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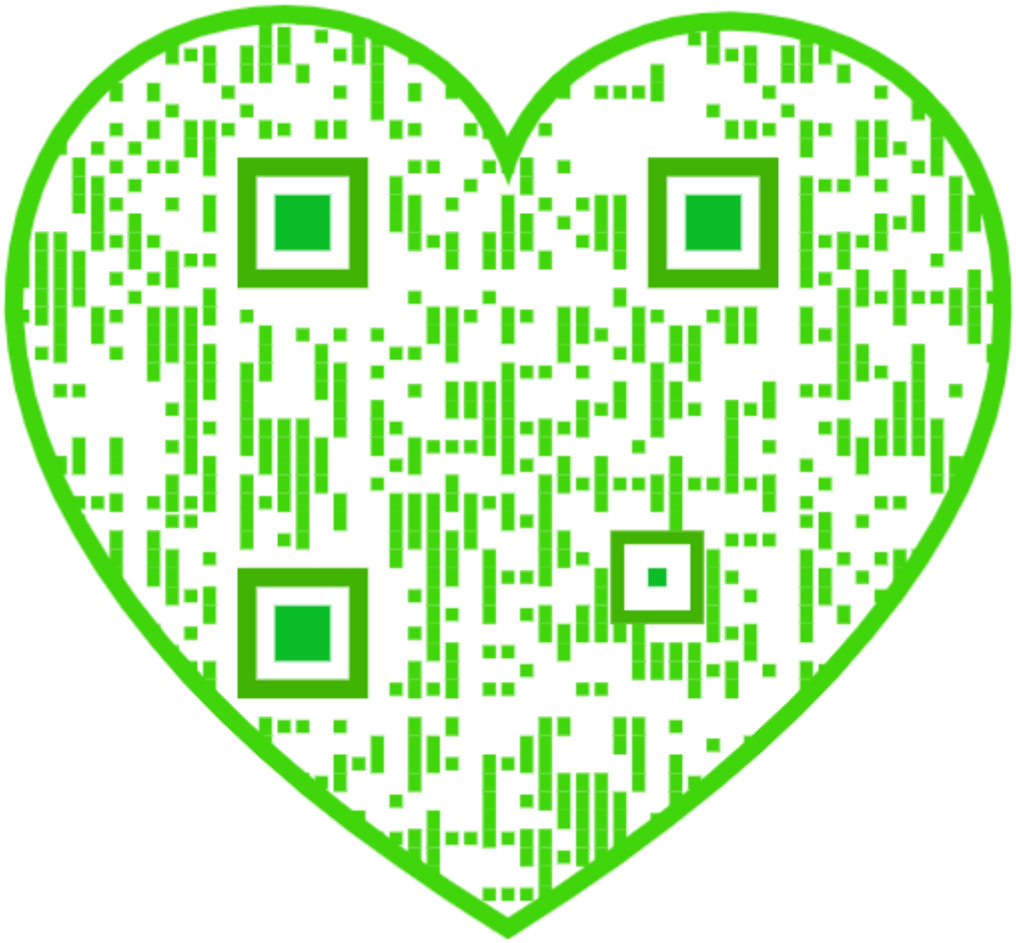

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more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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* Author of "Disturbance of Public Meetings," 14 Cyc. 539; "General Principles of the Law of Contract," "Evidence," etc. Joint author of "Estoppel," 16 Cyc. 671; "Factors and Brokers," 19 Cyc. 109.

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Policemen's Benefit Funds, see MUNICIPAL CORPORATIONS.
Religious Societies, see RELIGIOUS SOCIETIES.

I. CORPORATIONS AND ASSOCIATIONS.

A. Nature and Status — 1. GENERALLY. Mutual benefit insurance companies, whether incorporated or unincorporated, are those organizations which are formed, not for profit, but for the mutual protection, relief, or benefit of their members or their members' nominated beneficiaries. They are known by various names, usually as beneficial associations, or benevolent, friendly, or fraternal societies. They resemble mutual insurance companies doing business without capital on the assessment plan,[1] but differ from those companies in various respects. The main point of distinction lies in the purpose of their organization. They are usually formed, not as insurance companies, but as social or benevolent associations, insurance being an incident and not the main purpose of the organization,[2] and the insurance feature is adopted, not for the purpose of gain, but for the object of benevolence.[3] Another point of distinction frequently lies in their

1. See INSURANCE, 22 Cyc. 1410 *et seq.*
2. Block *v.* Valley Mut. Ins. Assoc., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166; State *v.* Brawner, 15 Mo. App. 597. And see *infra*, I, C, 1.
3. See Block *v.* Valley Mut. Ins. Assoc., 52

plan of government, which is usually representative in form; they are ordinarily governed by the lodge system,[4] and have a ritualistic form of work.[5] A third point of distinction lies in the fact that the benefits are usually confined to limited classes of persons: A person not a member of the society cannot as a rule obtain a certificate of insurance,[6] and the member's right to nominate the person to whom death benefits shall be paid is usually limited, either by statute, charter or articles, or constitution or by-law, to his relatives or dependents.[7] These points of distinction are recognized by statutes specially authorizing the formation of benevolent societies as distinguished from insurance companies;[8] or specially exempting such societies from the general insurance laws; or imposing special restrictions, duties, and liabilities upon them, or granting them special rights, privileges, or immunities.[9] While these organizations are thus distinct from insurance companies, yet where they agree with their members, in consideration of the payment of dues and assessments, to indemnify them or their nominees against loss from certain causes, such as accidental personal injury, sickness, or death, they conduct an insurance business, and the distinction is in so far without a difference. The certificate issued to the member stands in place of the ordinary insurance policy and is essentially a contract of insurance.[10] Upon this view, in many states, these societies are deemed insurance companies, and their rights and liabilities are governed accordingly,[11] and the statutory regulations

Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166; Marshall *v.* Grand Lodge A. O. U. W., 133 Cal. 686, 66 Pac. 25; Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; Littleton *v.* Wells, etc., Council No. 14 J. O. U. A. M., 98 Md. 453, 56 Atl. 798; International Fraternal Alliance *v.* State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071; *In re* St. Louis Christian Science Inst., 27 Mo. App. 633; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Com. *v.* Order of Vesta, 2 Pa. Dist. 254, 12 Pa. Co. Ct. 481; Vincent *v.* Gaudry, 9 Quebec Super. Ct. 415.

An association may be a mutual life insurance company, however, notwithstanding the organization is benevolent and not speculative in its purposes. Bolton *v.* Bolton, 73 Me. 299. And see Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566.

Compensation of officers.—The fact that an officer of an association who is at the same time a member is paid a compensation for his services does not constitute receiving money "as profit or otherwise" within the statute which exempts from the operation of certain insurance regulations beneficial associations whose members receive no money as profit or otherwise. Commercial League Assoc. *v.* People, 90 Ill. 166. Compensation of officers in general see *infra*, I, D, 1.

Beneficial or friendly society as creating charity see CHARITIES, 6 Cyc. 909.

4. See State *v.* National Assoc. *v.* Farmers', etc., Mut. Aid Assoc., 35 Kan. 51, 9 Pac. 956; International Fraternal Alliance *v.* State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; Rensenhouse *v.* Seeley, 72 Mich. 603, 40 N. W. 765; Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. N. S. 1114; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071; Com. *v.* Keystone Ben. Assoc., 171 Pa. St. 465, 32 Atl. 1027; Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278; Berry *v.* Knights Templars', etc., Life Indemnity Co., 46 Fed. 439 [*affirmed* in 50 Fed. 511, 1 C. C. A. 561]. And see *infra*, I, F.

5. Young *v.* Railway Mail Assoc., (Mo. App. 1907) 103 S. W. 557.

6. See Skelton *v.* Com., 92 S. W. 298, 28 Ky. L. Rep. 1351; Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. N. S. 1114; Reg. *v.* Stapleton, 21 Ont. 679. And see *infra*, II, C, 1.

7. See Golden Rule *v.* People, 118 Ill. 492, 9 N. E. 342; Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986; State *v.* Moore, 38 Ohio St. 7; Kelsall *v.* Tyler, 11 Exch. 513, 25 L. J. Exch. 153. And see *infra*, IV, A.

8. See *infra*, I, C, 1.

9. See *infra*, I, B.

10. See *infra*, II, B.

11. *Colorado.*— Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595; Chartrand *v.* Brace, 16 Colo. 19, 26 Pac. 152, 25 Am. St. Rep. 235, 12 L. R. A. 209.

Illinois.— Supreme Sitting O. I. H. *v.* Grigsby, 178 Ill. 57, 52 N. E. 956 [*affirming* 78 Ill. App. 300].

Indiana.— Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317; Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

Iowa.— State *v.* Miller, 66 Iowa 26, 23 N. W. 241. See, however, Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73.

Kansas.— Endowment, etc., Assoc. *v.* State, 35 Kan. 253, 10 Pac. 872.

prescribed for insurance companies apply to them,[12] in the absence of statutes specially regulating benevolent or friendly societies with insurance features.[13] The question whether an association is a benevolent or friendly society is ordi-

Maine.— Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394.

Michigan.— Rensenhouse *v.* Seeley, 73 Mich. 603, 40 N. W. 765.

Oklahoma.— Home Forum Ben. Order *v.* Jones, 5 Okla. 598, 50 Pac. 165.

Pennsylvania.— Meyer-Burns *v.* Peninsylvania Mut. L. Ins. Co., 189 Pa. St. 579, 42 Atl. 297.

Tennessee.— Knoxville Co-operative F. Ins. Order *v.* Lewis, 12 Lea 136.

Texas.— Supreme Council A. L. H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633.

Utah.— Daniher *v.* Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. 245.

See 6 Cent. Dig. tit. "Beneficial Associations," § 1; 28 Cent. Dig. tit. "Insurance," § 1824.

See, however, Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247; Swift *v.* San Francisco Stock, etc., Bd., 67 Cal. 567, 8 Pac. 94; Drum *v.* Benton, 13 App. Cas. (D. C.) 245; White *v.* National L. Ins. Co., 11 Ohio Dec. (Reprint) 857, 30 Cinc. L. Bul. 237; Penniston *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 830, 8 Am. L. Rec. 361, 4 Cinc. L. Bul. 935; Philadelphia Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

Compare Alden *v.* Supreme Tent K. M., 178 N. Y. 535, 71 N. E. 104 [*reversing* 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89]; Seidenspinner *v.* Metropolitan L. Ins. Co., 70 N. Y. App. Div. 476, 74 N. Y. Suppl. 1108.

12. *Iowa.*— Grimes *v.* Northwestern L. H., 97 Iowa 315, 64 N. W. 806, 66 N. W. 183; State *v.* Nichols, 78 Iowa 747, 41 N. W. 4.

Kansas.— State *v.* National Assoc. Farmers', etc., Mut. Aid. Assoc., 35 Kan. 51, 9 Pac. 956.

Kentucky.— Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Sims *v.* Com., 114 Ky. 827, 71 S. W. 929, 24 Ky. L. Rep. 1591; Supreme Commandery U. O. G. C. W. *v.* Hughes, 114 Ky. 175, 70 S. W. 405, 24 Ky. L. Rep. 984; Sherman *v.* Com., 82 Ky. 102; Sherman *v.* Com., 5 Ky. L. Rep. 874.

Maryland.— International Fraternal Alliance *v.* State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; Order of International Fraternal Alliance *v.* State, 77 Md. 547, 26 Atl. 1040.

Massachusetts.— Com. *v.* Wetherbee, 105 Mass. 149.

Michigan.— Citizens' Ins. Co. *v.* Insurance Com'rs, 128 Mich. 85, 87 N. W. 126.

Missouri.— State *v.* Merchants' Exch. Mut. Benev. Soc., 72 Mo. 146; Williams *v.* St. Louis L. Ins. Co., 97 Mo. App. 449, 71 S. W. 376; Toomey *v.* Supreme Lodge K. P. W., 74 Mo. App. 507; State *v.* Brawner, 15 Mo. App. 597; State *v.* Citizens' Ben. Assoc, 6 Mo. App. 163. See, however, Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. N. S. 1114; Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429.

Nebraska.— Modern Woodmen of America *v.* Colman, 68 Nebr. 660, 94 N. W. 814, 96 N. W. 154; State *v.* Farmers, etc., Mut. Benev. Assoc., 18 Nebr. 276, 25 N. W. 81.

Texas.— Farmer *v.* State, 69 Tex. 561, 7 S. W. 220.

Virginia.— Cosmopolitan L. Ins. Co. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

Wisconsin.— State *v.* Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271.

United States.— Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278; National Union *v.* Marlow, 74 Fed. 775, 21 C. C. A. 89.

England.— Kelsall *v.* Tyler, 11 Exch. 513, 25 L. J. Exch. 153. *Quære* Brown *v.* Freeman, 4 De G. & Sm. 444, 64 Eng. Reprint 906.

Canada.— Swift *v.* Provincial Provident Inst., 17 Ont. App. 66 [*overruling Re* O'Heron, 11 Ont. Pr. 422]; Reg. *v.* Stapleton, 21 Ont. 679. See, however, Wintemute *v.* Brotherhood of Railroad Trainmen, 27 Ont. App. 524; Cerri *v.* Ancient Order of Foresters, 25 Ont. App. 22 [*reversing* 28 Ont. 111].

See, however, Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; State *v.* Mutual Protection Assoc., 26 Ohio St. 19; Knudson *v.* Grand Council N. L. of H., 7 S. D. 214, 63 N. W. 911.

In Pennsylvania the rule is otherwise. Lithgow *v.* Supreme Tent K. M. W., 165 Pa. St. 292, 30 Atl. 830; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854; Dickinson *v.* Grand Lodge A. O. U. W., 159 Pa. St. 258, 28 Atl. 293; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Com. *v.* Equitable Ben. Assoc., 137 Pa. St. 412, 18 Atl. 1112; National Mut. Aid Soc. *v.* Lupold, 101 Pa. St. 111; Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481; Donlevy *v.* Supreme Lodge S. H., 1 Pa. Dist. 213, 11 Pa. Co. Ct. 477; Espy *v.* Legion of Honor, 7 Kulp 134; Easton *v.* Temperance Mut. Ben. Assoc., 5 Lanc. L. Rev. 349; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70. See, however, Lane *v.* American Relief Assoc., 25 Pa. Co. Ct. 129.

What constitutes life insurance within exemption laws see EXEMPTIONS, 14 Cyc. 1437.

13. State *v.* Iowa Mut. Aid Assoc., 59 Iowa 125, 12 N. W. 782; State *v.* Benton, 35 Nebr. 463, 53 N. W. 567; State *v.* Taylor, 56 N. J. L. 49, 27 Atl. 797 [*affirmed* in 56 N. J. L. 715, 31 Atl. 771]; Supreme Council O. C. F. *v.* Fairman, 10 Abb. N. Cas. (N. Y.) 162, 62 How. Pr. 386. See *infra*, I, B.

narily determined by its object as expressed in its charter or articles and by-laws;[14] but the fact that it adopts a name indicative of social or benevolent objects or that

14. Pare *v.* Clegg, 29 Beav. 589, 7 Jur. N. S. 1136, 30 L. J. Ch. 742, 4 L. T. Rep. N. S. 669, 9 Wkly. Rep. 795, 54 Eng. Reprint 756; Hodges *v.* Wale, 2 Wkly. Rep. 65.

Society held to be a beneficial, fraternal, or secret organization see Marshall *v.* Grand Lodge A. O. U. W., 135 Cal. 686, 66 Pac. 25; Ancient Order of United Workmen *v.* Shober, 16 S. D. 513, 94 N. W. 405 (both referring to the Ancient Order of United Workmen); Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815 (Order of Iron Hall); Commercial League Assoc. of America *v.* People, 90 Ill. 166; Rensenhouse *v.* Seeley, 72 Mich. 603, 40 N. W. 765; Gilligan *v.* Supreme Council R. A., 26 Ohio Cir. Ct. 42 (Royal Arcanum); Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481; Supreme Council A. L. H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633 (American Legion of Honor); Newbold Friendly Soc. *v.* Barlow, [1893] 2 Q. B. 128, 57 J. P. 565, 62 L. J. M. C. 124, 68 L. T. Rep. N. S. 798, 5 Reports 435, 41 Wkly. Rep. 543.

Society held not to be a beneficial, fraternal, or secret organization see People *v.* Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865 (Benevolent and Protective Order of Elks); State *v.* Trubey, 37 Minn. 97, 33 N. W. 554; Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071 (Modern Woodmen); *In re* St. Louis Christian Science Inst., 27 Mo. App. 633; Peltz *v.* Supreme Chamber O. F. U., (N. J. Ch. 1890) 19 Atl. 668 (an association whose success depended on the lapsing of a large proportion of its membership); People *v.* Nelson, 46 N. Y. 477 [*reversing* 11 Abb. Pr. N. S. 106 (*reversing* 3 Lans. 394)]; State *v.* Moore, 38 Ohio St. 7; *In re* National Indemnity, etc., Co., 142 Pa. St. 450, 21 Atl. 879 (where the scheme was not for the benefit of all members alike); Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 561 [*affirming* 46 Fed. 439] (holding that an assessment "life indemnity company" having no lodges, or social, charitable, benevolent, or literary features, and neither paying sick dues nor giving other attention to members in distress or poverty, is a life insurance company, and is subject to the regulations imposed by the insurance laws, as distinguished from the laws relating to coöperative benevolent societies, although its insurance is confined in practice, but not by its charter, to members of the masonic fraternity).

A social corporation is not "a mutual benefit association" within a statute dispensing with the signing and acknowledging of articles of incorporation in the case of "mutual benefit associations." People *v.* Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865.

Labor unions.—A mutual society which, in addition to rules for the *bona fide* relief of sick members, and for other ordinary purposes of a friendly society, includes also rules for the encouragement, relief, or maintenance of men on strike is not a friendly society. Farrer *v.* Close, L. R. 4 Q. B. 602, 10 B. & S. 533, 38 L. J. M. C. 132, 20 L. T. Rep. N. S. 802, 17 Wkly. Rep. 1129; Hornby *v.* Close, L. R. 2 Q. B. 153, 8 B. & S. 175, 10 Cox C. C. 393, 36 L. J. M. C. 43, 15 L. T. Rep. N. S. 563, 15 Wkly. Rep. 336. See, generally, LABOR UNIONS.

Loan societies.—A society established for raising shares at stated periods by the subscriptions of its members, and enabling such members to receive the value of their shares in advance on payment of a bonus and entering into security for the payment of the subscriptions, fines, forfeitures, and interest, the privilege of receiving such advances being put up at auction and sold to the highest bidder, is not a friendly society within 10 Geo. IV, c. 56, and 4 & 5 Wm. IV, c. 40. Reg. *v.* Shortridge, 1 D. & L. 855, 1 New Sess. Cas. 56; Reg. *v.* Scott, 8 Jur. 473, 13 L. J. M. C. 70. And see Burbidge *v.* Cotton, 5 De G. & Sm. 17, 15 Jur. 1070, 21 L. J. Ch. 201, 64 Eng. Reprint 998. See, generally, BUILDING AND LOAN SOCIETIES.

Marriage benefit society.—A single men's association whose purpose is to endow each member or the wife of each member, on his marriage, with a sum of money equal to as many dollars as there are members of the association, to be raised by assessment on them, is not a benevolent society or beneficial association. State *v.* Critchett, 37 Minn. 13, 32 N. W. 787; *In re* Quaker City Marriage Ben. Assoc., 10 Wkly. Notes Cas. (Pa.) 467. And see MARRIAGE INSURANCE, 26 Cyc. 926.

Railroad employees' relief association.—An association organized by a railroad company for the benefit of the members, in case of injury to them, or of the beneficiaries named in the membership certificate, in case of their death, the relief fund of which is raised from monthly payments by the members, who are employees of the road only, any deficiency being made up by the company, is not an "insurance company," but a beneficial society. Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492; Beck *v.* Pennsylvania R. Co., 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. Rep. 211; State *v.* Pittsburg, etc., R. Co., 68 Ohio St. 9, 67 N. E. 93, 96 Am. St. Rep. 635, 64 L. R. A. 405. And see Gearen *v.* Baltimore, etc., R. Co., 10 Ohio Dec. (Reprint) 234, 19 Cinc. L. Bul. 293. See, generally, MASTER AND SERVANT, 26 Cyc. 1049.

Substantial objects.—A society is a friendly society under the Friendly Societies Act of 1875, § 8, although it may not include in its objects all the objects there stated, provided its objects are substantially the same as those in the act. Knowles *v.* Booth, 32 Wkly. Rep. 432.

it is described in its charter or articles as a benevolent or friendly society does not render it such if in fact its main object is that of the ordinary insurance company.[15]

2. As Partnerships.[16] Benevolent or friendly societies, unincorporated, are generally held to be associations and not partnerships.[17]

B. Statutory Regulation — 1. Domestic Companies. It has been seen that beneficial or fraternal organizations, in so far as they do an insurance business, are essentially insurance companies, and subject to the general insurance laws.[18] In many states, however, these organizations, although they do a limited insurance business, are either expressly or by clear implication exempted by the legislature from the operation of statutes regulating insurance companies generally,[19] and special provisions are enacted for their regulation.[20] In some states beneficial or

What law governs.— Where the statutes of a state wherein an insurance society was organized are different from those of the forum, the statutes of the state of the association's domicile govern for the purpose of determining the character of the association. Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

15. *Kentucky.*— Sherman *v.* Com., 82 Ky. 102, 5 Ky. L. Rep. 874.

Missouri.— Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986; State *v.* Citizens' Ben. Assoc., 6 Mo. App. 163.

New Jersey.— Peltz *v.* Supreme Chamber O. F. U., (Ch. 1890) 19 Atl. 668.

New York.— People *v.* Nelson, 46 N. Y. 477 [*reversing* 11 Abb. Pr. N. S. 106 (*reversing* 3 Lans. 394)].

United States.— National Union *v.* Marlow, 74 Fed. 775, 21 C. C. A. 89.

See 28 Cent. Dig. tit. "Insurance," § 1826.

16. See, generally, Partnership.

17. *Alabama.*— Burke *v.* Roper, 79 Ala. 138. *Compare* Boyd *v.* State, 53 Ala. 601.

Michigan.— Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

Minnesota.— Ehrmanntraut *v.* Robinson, 52 Minn. 333, 54 N. W. 188.

Missouri.— Kuhl *v.* Meyer, 35 Mo. App. 206.

New York.— Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41], holding that where an unincorporated beneficial association organized for moral, benevolent, and social purposes only, accumulated a sum of money from subrentals of its meeting hall and other rooms which it was obliged to rent in order to procure suitable accommodations, such transactions, although outside its primary objects, are merely incidental, and the result of accident and good business management, and will not therefore authorize a conclusion that a copartnership was thereby created.

Pennsylvania.— Jones *v.* Thistle Lodge, 10 Kulp 52. And see Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818. *Contra*, Babb *v.* Reed, 5 Rawle 151, 28 Am. Dec. 650; Protchett *v.* Schaefer, 11 Phila. 166, 2 Wkly. Notes Cas. 317; Kurz *v.* Eggert, 9 Wkly. Notes Cas. 126.

Tennessee.— Atnip *v.* Tennessee Mfg. Co., (Ch. App. 1898) 52 S. W. 1093.

See 6 Cent. Dig. tit. "Beneficial Associations," § 1; 28 Cent. Dig. tit. "Insurance," § 1824.

Contra.— Gorman *v.* Russell, 14 Cal. 531.

18. See *supra*, I, A.

19. *California.*— Marshall *v.* Grand Lodge A. O. U. W., 133 Cal. 686, 66 Pac. 25.

Illinois.— Commercial League Assoc. of America *v.* People, 90 Ill. 166.

Iowa.— Knapp *v.* Brother of American Yeoman, 128 Iowa 566, 105 N. W. 63; Smith *v.* Supreme Lodge K. & L. G. P., 123 Iowa 676, 99 N. W. 553. And see Beeman *v.* Farmers' Pioneer Mut. Ins. Assoc., 104 Iowa 83, 73 N. W. 597, 65 Am. St. Rep. 424.

Michigan.— Rensenhouse *v.* Seeley, 72 Mich. 603, 40 N. W. 765.

Missouri.— See Hanford *v.* Massachusetts Ben. Assoc., 122 Mo. 50, 26 S. W. 680.

New Jersey.— State *v.* Taylor, 56 N. J. L. 49, 27 Atl. 797 [*affirmed* in 56 N. J. L. 715, 31 Atl. 771], holding that an association incorporated under the Benevolent Association Act does not come within the prohibition of the insurance laws, so long as it confines its agreements to the payment of sick benefits and burial expenses.

Ohio.— State *v.* Mutual Protection Assoc., 26 Ohio St. 19; Gilligan *v.* Supreme Council R. A., 26 Ohio Cir. Ct. 42.

Pennsylvania.— Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481.

Texas.— Sovereign Camp W. W. *v.* Carrington, (Civ. App. 1905) 90 S. W. 921.

Wisconsin.— State *v.* Whitmore, 75 Wis. 332, 43 N. W. 1133, where certain societies are exempted by name.

England.— Peat *v.* Fowler, 55 L. J. Q. B. 271, 34 Wkly. Rep. 366.

See 28 Cent. Dig. tit. "Insurance," § 1825.

In Kansas secret societies alone are exempt. State *v.* National Assoc. F. & M. Mut. Aid Assoc., 35 Kan. 51, 9 Pac. 956.

Change in nature of society.—If the society so changes its articles or by-laws, or so conducts its affairs, that it does not answer to the definition of a beneficial society, it is not exempt as such. International Fraternal Alliance *v.* State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187.

If the association does an insurance business, it is not exempt. Cosmopolitan L. Ins. Assoc. *v.* Koegel, 104 Va. 619, 52 S. E. 166; National Union *v.* Marlow, 74 Fed. 775, 21 C. C. A. 89.

20. See the statutes of the different states;

fraternal societies are required to obtain a license before doing business;[21] in other states they are expressly exempted from so doing.[22]

2. **Foreign Companies.**[23] The rights of foreign beneficial or fraternal societies are in many states governed by statute specially relating to them.[24] They are

and *supra*, I, A. And see Brotherhood Acc. Co. *v.* Linehan, 71 N. H. 7, 51 Atl. 266; Supreme Lodge U. B. A. *v.* Johnson, 98 Tex. 1, 81 S. W. 18 [*reversing* (Civ. App. 1903) 77 S. W. 661].

21. See the statutes of the different states.

Powers and duties of state officer as to issuing license.— The state auditor is clothed with a broad discretion in determining whether a fraternal beneficiary society has complied with the law, and is so entitled to a license to do business, but this is a legal and not an arbitrary discretion. Accordingly, under Cobbey Annot. St. Nebr. (1903) § 6503, providing that the moneys collected by any fraternal beneficiary society for the payment of death or disability claims shall be kept separate and apart from other funds and used only in the payment of such claims, the auditor may require such funds to be kept separate before granting a license to such organization to continue business. Where, however, the society had failed to keep the funds separate for a number of years, but the auditor had nevertheless issued a license authorizing it to do business during such years, he should not refuse a new license on the ground of such irregularities, but should call the attention of the society to them so as to allow it to comply with the statute, and upon such compliance should issue the license. State *v.* Searle, (Nebr. 1905) 105 N. W. 284. Under N. H. Laws (1901), c. 86, § 2, prohibiting fraternal beneficiary societies from writing insurance in the state unless the "commissioner is satisfied that the associations are reliable," the commissioner may refuse to issue a license to an insurance company authorized to do business by Laws (1895), c. 86, upon a compliance with the conditions therein prescribed, on the ground that the company is not reliable. Brotherhood Acc. Co. *v.* Linehan, 71 N. H. 7, 51 Atl. 266.

Operation of statute.— N. Y. Laws (1881), c. 256, § 4, requiring a beneficial association to obtain a certificate from the state insurance department before commencing business, does not apply to an association which had been doing business in the state before the passage of the act. Supreme Council O. C. F. *v.* Fairman, 10 Abb. N. Cas. (N. Y.) 162, 62 How. Pr. 386.

If the association does an insurance business, it is required, in some states, to obtain a license (Sherman *v.* Com., 5 Ky. L. Rep. 874; State *v.* Farmers, etc., Mut. Benev. Assoc., 18 Nebr. 276, 25 N. W. 81; Reg. *v.* Stapleton, 21 Ont. 679); otherwise not (Easton *v.* Temperance Mut. Ben. Assoc., 5 Lanc. L. Rev. (Pa.) 349; Ancient Order of United Workmen *v.* Shober, 16 S. D. 513, 94 N. W. 405).

Municipal license-tax see Montgomery *v.* Shaddox, 138 Ala. 263, 36 So. 369.

22. Montgomery *v.* Shaddox, 138 Ala. 263, 36 So. 369 (where certain mutual aid associations are exempted); Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815.

An exempt association cannot compel the issuance of a license.— Brotherhood Acc. Co. *v.* Linehan, 71 N. H. 7, 51 Atl. 266.

23. **Alteration of rules** by foreign association see *infra*, note 58.

Foreign insurance corporations see Foreign Corporations, 19 Cyc. 1206, 1231, 1260, 1277, 1293, 1296, 1302, 1309; Insurance, 22 Cyc. 1391.

Interstate commerce clause of federal constitution as precluding exclusion or regulation of foreign insurance companies see Commerce, 7 Cyc. 418; Insurance, 22 Cyc. 1386.

24. See the statutes of the different states. And see People's Mut. Ben. Soc. *v.* Lester, 105 Mich. 716, 63 N. W. 977; McDermott *v.* Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833 (holding that a foreign fraternal association which has complied with the Missouri laws relating to domestic fraternal, beneficiary associations is entitled to all the immunities and is subject to the burdens pertaining to domestic societies of that character); Brassfield *v.* Knights of Maccabees, 92 Mo. App. 102; Brasfield *v.* Modern Woodmen of America, 88 Mo. App. 208; Southwell *v.* Gray, 35 Misc. (N. Y.) 740, 72 N. Y. Suppl. 342 (holding that a foreign benefit association lawfully doing business in the state is subject to N. Y. Laws (1892), c. 690, § 233, governing similar corporations in the state); Granite State Mut. Aid Assoc. *v.* Porter, 58 Vt. 581, 3 Atl. 545; State *v.* Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271 (holding that a foreign insurance company was doing business on the "assessment plan," within Wis. Laws (1891), c. 418, regulating mutual beneficiary associations, and was hence entitled to a license to do business in the state).

Validity of statute.— Wash. Laws (1901), c. 174, § 12, requiring subsequently formed fraternal insurance associations to adopt mortuary assessment rates not lower than those indicated as necessary in the fraternal congress mortality table, although it does not apply to previously formed foreign associations and does apply to subsequently formed domestic associations, does not violate Wash. Const. art. 12, § 7, providing that no foreign corporation shall be allowed to transact business on more favorable conditions than similar domestic corporations. State *v.* Fraternal Knights, etc., 35 Wash. 338, 77 Pac. 500.

generally exempted, either expressly or by implication, from the operation of the general insurance laws, the same as domestic associations of that character.[25]

3. Injunction Against Doing Business in Violation of Statute. If a beneficial or fraternal association fails to comply with the statutes regulating such associations, or exceeds its powers or carries on business fraudulently, it may, in some jurisdictions, at the suit of the state, be enjoined from transacting business until it performs the neglected duty or corrects the violation of law and pays the costs of suit.[26]

If a foreign association does an insurance business, it is subject to the law relating to foreign insurance companies (State *v.* Miller, 66 Iowa 26, 23 N. W. 241; Skelton *v.* Com., 92 S. W. 298, 28 Ky. L. Rep. 1351; Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986); otherwise not (Rensenhouse *v.* Seeley, 72 Mich. 603, 40 N. W. 765; Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481). A company of another state, organized for "insuring lives on the plan of assessments upon surviving members" without limitation, is not within the class provided for in Ohio Rev. St. § 3630, which includes only companies insuring for the benefit of the families and heirs of members; nor does Ohio Act, April 12, 1880, embrace such a company, which may do business in Ohio on the terms applicable to insurance companies generally. State *v.* Moore, 38 Ohio St. 7.

25. Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. N. S. 1114; Kern *v.* Supreme Council A. L. H., 167 Mo. 471, 67 S. W. 252; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Hudnall *v.* Modern Woodmen of America, 103 Mo App. 356, 77 S. W. 84; Shotliff *v.* Modern Woodmen of America, 100 Mo. App. 138, 73 S. W. 326; State *v.* State Mut. Protection Assoc., 26 Ohio St. 19; Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481. *Compare* Sims *v.* Com., 114 Ky. 827, 71 S. W. 929, 24 Ky. L. Rep. 1591.

Conditions precedent to exemption.— The statutes of Missouri requiring fraternal beneficial associations organized prior to the passage of Rev. St. (1889) §§ 2823, 2824, to amend their constitutions in accordance therewith in order to claim the exemption from insurance control must be complied with by foreign corporations. Toomey *v.* Supreme Lodge K. P. W., 74 Mo. App. 507.

If a foreign association does an insurance business, it is not within the statutory exemption (Toomey *v.* Supreme Lodge K. P. W., 74 Mo. App. 507); otherwise it is exempt (Supreme Council A. L. H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633).

Application of general insurance laws in general see *supra*, I, A, 1.

26. State *v.* Bankers' Union of World, 71 Nebr. 622. 99 N. W. 531.

Duties of state officers.—Where a fraternal benefit association refuses to report to the auditor as required by law, or exceeds its powers, or conducts its business fraudulently, or fails to comply with the provisions of the statute, it is the duty of the auditor to notify the attorney-general, under Nebr. Laws (1897), p. 270, c. 47, § 16, and for the attorney-general immediately to commence an action against such society to enjoin it from carrying on any business. State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531.

Exclusiveness of statutory remedy.— Members of a benefit society may enjoin it and its officers from changing the location of its principal business office in violation of the articles of association and fundamental laws, notwithstanding Ill. Laws (1893), p. 130, § 12, provides that in case any society organized thereunder exceeds its powers or fails to comply with the provisions of the act, the attorney-general, on notice from the auditor of public accounts, shall enjoin it from carrying on business, and that no injunction shall be granted except on such application. Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378]. So Md. Acts (1894), c. 295, § 143o, directing the insurance commissioner to sue to enjoin a beneficial association from carrying on any business where it has failed to comply with certain sections of the act, and providing that no injunction shall be granted by any court except on the commissioner's application, does not affect the right conferred on stock-holders and creditors by Code, art. 23, § 264, as amended by Acts (1894), c. 263, to sue for the appointment of a receiver and the dissolution of an insolvent corporation. Barton *v.* International Fraternal Alliance, 85 Md. 14, 36 Atl. 658.

Grounds for injunction.— Where a fraternal benefit association has elected directors or other officers in violation of the statute, and these officers have had charge of the affairs of the society and have dealt with themselves in making contracts in their own personal interest, and in some instances in conflict with the interest of the society, the society will be enjoined from transacting further business until this error is corrected. So it will be enjoined for failing to report annually to the state auditor all death losses and the details of its business, or for failing to keep books and records showing the true condition of its business, including its benefit assessments and liabilities. It will likewise be enjoined for having taken members above the age limit or without medical examination, whether directly or indirectly by purchasing the business and risks of another society and consolidating the latter with itself. State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531.

Reinstatement of association.— Where a

C. Organization — 1. Voluntary Association and Incorporation. Beneficial or fraternal societies may be formed by voluntary association,[27] but statutes expressly authorizing the incorporation of such societies are not uncommon.[28] If

fraternal benefit association has been enjoined from carrying on business for neglecting to make a report provided by statute, or for violation of the statute, and such report is made, the violation corrected, and costs paid, the auditor must reinstate the association, which will then be authorized to continue its business. State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531.

27. Burke *v.* Roper, 79 Ala. 138; Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430; Kuhl *v.* Meyer, 35 Mo. App. 206; Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41]; *In re* St. John Baptist Ben. Soc., 13 Montg. Co. Rep. (Pa.) 95.

It is not necessary that a railroad employees' relief association should be incorporated in order that a judgment may be entered against it. L'Association de Secours *v.* Roberge, 7 Quebec Q. B. 500.

28. See the statutes of the different states. And see Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378]; Golden Rule *v.* People, 118 Ill. 492, 9 N. E. 342; Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645; Com. *v.* Order of Vesta, 2 Pa. Dist. 254, 12 Pa. Co. Ct. 481; Gilman *v.* Druse, 111 Wis. 400, 87 N. W. 557.

Society held not to be a benevolent or fraternal association entitled to incorporate as such see Golden Rule *v.* People, 118 Ill. 492, 9 N. E. 342; State *v.* Trubey, 37 Minn. 97, 33 N. W. 554; State *v.* Critchett, 37 Minn. 13, 32 N. W. 787; *In re* St. Louis Christian Science Inst., 27 Mo. App. 633; Peltz *v.* Supreme Chamber O. F. U., (N. J. Ch. 1890) 19 Atl. 668; People *v.* Nelson, 46 N. Y. 477 [*reversing* 11 Abb. Pr. N. S. 106 (*reversing* 3 Lans. 394)]; Com. *v.* Keystone Ben. Assoc., 171 Pa. St. 465, 32 Atl. 1027; *In re* National Indemnity, etc., Co., 142 Pa. St. 450, 21 Atl. 879; *In re* Quaker City Marriage Ben. Assoc., 10 Wkly. Notes Cas. (Pa.) 467. And see *supra*, I, A, 1.

Right to charter.—An application for a charter for a benevolent association having no capital stock and depending solely on contributions ought not to be granted, for its purposes can be accomplished as well without a charter. *In re* St. John Baptist Ben. Soc., 13 Montg. Co. Rep. (Pa.) 95.

Application for charter.— The application for a charter must be made at the place where the office of the association is to be located, and notice of the application must be published in two papers of general circulation, it being insufficient if one of the papers is merely a legal publication. *In re* Enterprise Mut. Ben. Assoc., 32 Leg. Int. (Pa.) 82. The application must be subscribed (*In re* Schmitt, 10 N. Y. Suppl. 583; *In re* Red Men's Mut. Relief Assoc., 31 Leg. Int. (Pa.) 254) or acknowledged (*In re* Red Men's Mut. Relief Assoc., *supra*) as required by statute, and should state the names of its members or of its directors chosen for the first year (*In re* Red Men's Mut. Relief Assoc., *supra*), and should show that the subscribers are citizens of the commonwealth (*In re* Enterprise Mut. Ben. Assoc., *supra*). An application for a charter will be denied where it is partly in a foreign language, and does not provide that there shall be any directors, and the purpose of the organization is given as the encouragment of social and brotherly feeling, but in what manner it is to be accomplished is not stated, and it is not shown how new members are to be admitted, or by what body by-laws are to be instituted, and there is no clause prohibiting the furnishing of intoxicating liquor by or to its members in any form. *In re* Societa Italiana di Mutui Socoerso de Benefieinza, 24 Pa. Co. Ct. 84. However, an application for a charter for a fraternal society, under Pa. Act, April 6, 1893, which declares the purposes of the proposed society in the formal statements required by the act is sufficiently explicit; and the omission of a specific declaration of how membership in the society is to be obtained, continued, or lost is not a fatal defect, nor is the omission to submit for the approval of tne judge the whole fundamental compact or constitution of the society. *In re* Continental Mut. Ben. Soc., 7 Pa. Dist. 167, 42 Wkly. Notes Cas. 183.

Approval of state officers as prerequisite.— Under N. Y. Laws (1848), c. 319, § 1, providing that a benevolent society desiring to incorporate may file a certificate in the office of the secretary of state on receiving the written consent of one of the justices of the supreme court, the consent of a justice is but one of the conditions precedent to the right to file the certificate, and is conclusive neither upon the public nor upon the secretary of state, who is not required to file a certificate unauthorized by the act. People *v.* Nelson, 46 N. Y. 477 [*reversing* 11 Abb. Pr. N. S. 106 (*reversing* 3 Lans. 394)].

Notice of intention to incorporate need not be published. Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645.

Adoption of charter.—A mutual benefit association passed a resolution according to its constitution and by-laws, to become incorporated. Articles were presented to the court, and ordered to be filed and published, and afterward a decree of incorporation was made. The charter was handed to the president of the society, and the bill of the attorney was approved and paid. For a year and a half the charter remained in the hands of the president and his successors, with the other papers of the society, and was manifestly accepted and recognized as the charter of the organization. It was held that the charter was sufficiently adopted, and that no

a proposed charter contains invalid provisions[29] or omits provisions which by law it is required to contain,[30] it will not be approved. A person joining a beneficial association must take notice that its charter is liable to be amended by the legislature, and he cannot prevent the acceptance of such amendments by the society.[31] An incorporated beneficiary association when sued by mandamus to compel the restoration of a member wrongfully expelled is estopped to deny its corporate existence on the ground that it had failed to comply with the statutes enacted

objection could be made that the minutes of the society did not show any vote adopting it. Hochreiter's Appeal, 93 Pa. St. 479.

Signing and acknowledging articles of incorporation.— Cal. Civ. Code, § 603, and St. (1873–1874) p. 745, dispensing with the signing and acknowledging of articles of incorporation on the organization of religious societies and mutual benefit associations, are not applicable to the formation of social corporations. People *v.* Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865.

Name.— The word "mutual" need not appear in the title adopted by the corporation. Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645. Name: Of association see ASSOCIATIONS, 4 Cyc. 304. Of corporation see CORPORATIONS, 10 Cyc. 150 *et seq.*

What constitutes charter.— The certificate of association together with the insurance superintendent's certificate of organization constitute the charter of a fraternal benefit society. Fraternal Tribunes *v.* Steele, 114 Ill. App. 194 [*affirmed* in 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 166].

29. See cases cited *infra*, this note. And see *In re* Red Men's Mut. Relief Assoc., 31 Leg. Int. (Pa.) 254, where a charter containing a provision giving the association the right to amend its charter was disapproved.

Provisions as to membership.—A clause in the charter of a beneficial society authorizing persons who have declared their intention to become citizens of the United States to become members is illegal (*In re* Alsatian Ben. Assoc., 35 Pa. St. 79), and the same is true of a provision that membership is to be forfeited upon enlistment in the army or navy (*In re* Rev. David Mulholland Benev. Soc., 10 Phila. (Pa.) 19). And the court will not approve a charter for the incorporation of a beneficial association, where the articles contain an indefinite statement of the offenses that may result in expulsion, as that any member may be expelled who commits any misdemeanor or any other act that may prove injurious to his character or standing (*In re* Butchers' Ben. Assoc. No. 1, 38 Pa. St. 298), or who is "guilty of an offence against the law" (*In re* Brotherly Unity Ben. Assoc., 38 Pa. St. 299), or who is "guilty of actions which may injure the association" (*In re* Butchers' Ben. Assoc., 35 Pa. St. 151), or who is "guilty of any practice injurious to himself, his family, or society" (*In re* Sarsfield Ben. Soc., 6 Phila. (Pa.) 64).

Provisions as to dissolution.—A provision of the charter of a beneficial association declaring that the society shall not be dissolved so long as a prescribed number of members remain is unlawful and void, since it is repugnant to the general rule of law allowing a majority of the members of such an association to dissolve it where there are no creditors to object. *In re* United Daughters of Cornish, 35 Pa. St. 80; *In re* German Gen. Ben. Assoc., 30 Pa. St. 155.

30. *In re* German Gen. Ben. Assoc., 30 Pa. St. 155, provision restricting the application of its fund to the object declared to be the purpose of the association. And see *In re* Societa Italiana di Mutui Socoerso de Benefieinza, 24 Pa. Co. Ct. 84, provisions for directors, and prohibiting the furnishing of intoxicating liquors by or to members.

Provisions as to objects and powers.— The charter should define the objects and powers of the association with certainty (*In re* Supreme Temple O. P., 17 Phila. (Pa.) 401. See, however, *In re* Continental Mut. Ben. Soc., 7 Pa. Dist. 167, 42 Wkly. Notes Cas. 183), and also set forth the means by which those objects are to be accomplished (*In re* Right Worthy Grand Court of Ladies' Protestant Assoc., 8 Pa. Dist. 127. And see *In re* Societa Italiana di Mutui Socoerso de Benefieinza, 24 Pa. Co. Ct. 84).

Provisions as to by-laws.—A clause in the charter of a beneficial society giving it the power to make by-laws must provide that they shall not be repugnant to the constitution and laws of the United States, to the constitution and laws of the commonwealth (*In re* Butchers' Ben. Assoc., 35 Pa. St. 151; *In re* German Gen. Ben. Assoc., 30 Pa. St. 155), or to the charter itself (*In re* German Gen. Ben. Assoc., *supra*); and it should state by what body the by-laws are to be instituted (*In re* Societa Italiana di Mutui Socoerso de Benefieinza, 24 Pa. Co. Ct. 84).

Provisions as to membership.— The charter should contain provisions as to the creation, continuance, and loss of membership (*In re* Right Worthy Grand Court of Ladies' Protestant Assoc., 8 Pa. Dist. 127; *In re* Societa Italiana di Mutui Socoerso de Benefieinza, 24 Pa. Co. Ct. 84. See, however, *In re* Continental Mut. Ben. Soc., 7 Pa. Dist. 167, 42 Wkly. Notes Cas. 183); and it must restrict membership to citizens of the state (*In re* David Mulholland Benev. Soc., 10 Phila. (Pa.) 19. And see *In re* Alsatian Ben. Assoc., 35 Pa. St. 79; *In re* Enterprise Mut. Ben. Assoc., 10 Phila. (Pa.) 380), and contain a limitation as to the ages of applicants for membership (Fraternal Tribunes *v.* Steele, 114 Ill. App. 194 [*affirmed* in 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160]).

31. Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932.

subsequent to its incorporation relating to beneficiary associations and providing that all existing corporations not conforming thereto should be dissolved; since such non-compliance simply renders it liable to dissolution in an action in behalf of the state.[32]

2. Constitution and By-Laws — a. In General. A beneficial or fraternal society, whether a voluntary association or a corporation, has power to adopt a constitution and by-laws.[33] This power the association cannot delegate,[34] but it may delegate the power to fix the time when the by-laws shall go into effect.[35] By-laws should be adopted in the mode prescribed by the society's constitution;[36] but the governing body of the society, when not limited by the charter, may enact a by-law by a majority vote in disregard of the procedure contained in a previous by-law.[37] In the absence of provisions to the contrary, the approval by the governing body of the action of the secretary in compiling, revising, and printing by-laws is a sufficient adoption of them.[38] Where by-laws are to become effective when the board of directors deem it expedient to put them in force, they go into effect when they are accepted and put in operation by the board, although no formal declaration to that effect is made.[39] Certain statutory formalities must be observed in some jurisdictions before the rules of the society become effective.[40] The mere fact that a by-law is in the form of a resolution does not render it any

Validity of provision giving company power to amend charter see *supra*, note 29.

32. Meurer *v.* Detroit Musicians' Benev., etc., Assoc., 95 Mich. 451, 54 N. W. 954.

33. Blasingame *v.* Royal Circle, 111 Ill. App. 202; State *v.* Grand Lodge A. O. U. W., 78 Mo. App. 546; Protected Home Circle *v.* Tisch, 24 Ohio Cir. Ct. 489; St. Mary's Ben. Soc. *v.* Burford, 70 Pa. St. 321.

What officers may enact by-laws.— The first trustees of a beneficial association may adopt by-laws for their own government in the management of the business of the association. The Chevaliers *v.* Shearer, 27 Ohio Cir. Ct. 509. But a provision in the constitution of a benevolent association with a life insurance department that its board of control shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may provide, confers executive and not legislative powers. Supreme Lodge K. P. *v.* Stein, 75 Miss. 107, 21 So. 559, 65 Am. St. Rep. 589, 37 L. R. A. 775; Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838. By statute in some states the law-making power may be exercised only by a representative body of the society. Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224.

Power to amend or repeal rules and to adopt additional rules see *infra*, I, C, 2, c.

34. Supreme Lodge K. P. *v.* Trebbe, 74 Ill. App. 545; Supreme Lodge K. P. W. *v.* Kutscher, 72 Ill. App. 462; Supreme Lodge K. P. *v.* Stein, 75 Miss. 107, 21 So. 559, 65 Am. St. Rep. 589, 37 L. R. A. 775; Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838, all holding that the supreme lodge of a mutual benefit society in which the charter vests the sole power to legislate with respect to the endowment rank of such society cannot legally delegate to a board of control the power to pass a general law against suicide affecting the entire endowment rank. And see Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611.

35. Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611.

36. Supreme Lodge K. P. *v.* Trebbe, 74 Ill. App. 545, holding that the concurrence of the supreme lodge in the report of the board of control of a subordinate lodge embodying a by-law enacted by the board does not constitute the enactment of a valid by-law by the supreme lodge under a constitution requiring that all by-laws be read on three different days and passed by a yea and nay affirmative vote of a majority of all the members.

Right to assert irregularities.— Where the statute provides that all rules duly certified by the barrister shall be considered as binding on all persons, the barrister's certificate precludes an attack on the rules as having been irregularly enacted. Dewhurst *v.* Clarkson, 2 C. L. R. 1143, 3 E. & B. 194, 18 Jur. 693, 23 L. J. Q. B. 247, 2 Wkly. Rep. 199, 77 E. C. L. 194.

37. Dornes *v.* Supreme Lodge K. P., 75 Miss. 466, 23 So. 191; Toomey *v.* Supreme Lodge K. P. W., 74 Mo. App. 507.

38. Lehman *v.* Clark, 71 Ill. App. 366.

39. Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611.

40. See the statutes of the different states.

In Ontario the constitution and by-laws must be annexed to the declaration of the name and objects of the society required to be filed as a prerequisite to incorporation, whereupon they become a part of its organic law. *In re* Ontario Ins. Act, 31 Ont. 154.

Enrolment of rules and signing thereof by clerk of court see Reg. *v.* Godolphin, 7 L. J. M. C. 104, 3 N. & P. 488, 8 A. & E. 338, 2 Jur. 613, 1 W. W. & H. 451, 35 E. C. L. 620; Rex *v.* Somersetshire, 4 B. & Ad. 549,

the less a by-law.[41] The constitution and by-laws should be liberally construed in order to effectuate the benevolent purpose of the organization[42] and the manifest intention of the parties.[43] That construction must be put on the laws of the order, taken as a whole, which is most favorable to the insured and most protects the beneficiaries;[44] and the court is not bound by the construction adopted by the society.[45] Members of the society are chargeable with notice of its constitution and by-laws,[46] and are bound thereby,[47] if legally enacted.[48]

b. Validity. If the constitution or by-laws of a beneficial or fraternal society are unreasonable in their requirements or operation they are void and inoperative.[49]

2 L. J. M. C. 40, 1 N. & M. 252, 24 E. C. L. 242; Rex *v.* Wade, 1 B. & Ad. 861, 9 L. J. M. C. O. S. 113, 20 E. C. L. 721; Rex *v.* Gilkes, 8 B. & C. 439, 15 E. C. L. 219, 3 C. & P. 52, 14 E. C. L. 446, 6 L. J. M. C. O. S. 118, 2 M. & R. 454.

41. Dornes *v.* Supreme Lodge K. P., 75 Miss. 466, 23 So. 191.

42. Berkeley *v.* Harper, 3 App. Cas. (D. C.) 308; Supreme Lodge K. P. W. *v.* Schmidt, 98 Ind. 374; Ballou *v.* Gile, 50 Wis. 614, 7 N. W. 561.

43. Woodmen of the World *v.* Gilliland, 11 Okla. 384, 67 Pac. 485.

44. Supreme Lodge O. M. P. *v.* Meister, 105 Ill. App. 471 [*affirmed* in 204 Ill. 527, 68 N. E. 454].

45. Morey *v.* Monk, 142 Ala. 175, 38 So. 265; Wiggin *v.* Knights of Pythias, 31 Fed. 122, holding that if the language be plain, unambiguous, and well understood to have a fixed meaning, either generally or as a technical term of the law, the latter meaning will be given to the words used, as in other cases for the interpretation of contracts.

46. Home Forum Ben. Order *v.* Jones, 5 Okla. 598, 50 Pac. 165. And see *infra*, II, D, 3, a.

47. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430 (holding that the articles of agreement of such an association, whether called a constitution, a charter, by-laws, or other name, constitute a contract between the members which the courts will enforce, if not immoral or contrary to public policy or the law of the land); Home Forum Ben. Order *v.* Jones, 5 Okla. 598, 50 Pac. 165.

The members are bound as by contract.— Kuhl *v.* Meyer, 42 Mo. App. 474. The constitution and by-laws are of no legal effect except as contracts, and are binding only on members who are shown to have personally assented to them. Hence the constitution of a grand lodge is not binding on the members of an unincorporated subordinate lodge who are not shown to have subscribed it, unless it is adopted by the constitution of the subordinate lodge which such members have subscribed. Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665.

Constitution and rules as part of contract between society and member see *infra*, II, D, 3.

48. Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224, holding that an attack on a by-law as having been enacted by an unauthorized body of officers is not an attack on the society's right to do business, such as can be made only by the state in a quo warranto proceeding. And see cases cited *supra*, this section.

49. Allnutt *v.* Subsidiary High Court, 62 Mich. 110, 28 N. W. 802; Brown *v.* Supreme Court I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806] (holding that a by-law whereunder members who pay their dues and assessments precisely as provided by the by-laws are deprived of their rights of membership, including a forfeiture of their insurance, if the officers of the company ordered to receive such dues fail to pay over the moneys, is unreasonable, and does not affect the status of members in good standing); Thomas *v.* Mutual Protective Union, 47 Hun (N. Y.) 171, 2 N. Y. Suppl. 175 [*reversed* on other grounds in 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175] (holding that by-laws which provide that it shall be the duty of every member to refuse to perform in any orchestra in which are any persons not members in good standing, and that it shall be deemed a breach of good faith between members to employ a suspended or non-member or to assist in a public performance given wholly or in part by amateurs, and a by-law which imposes a penalty for the violation of the foregoing provisions, are void because they are arbitrary).

Right of members to assert unreasonableness.— It has been held, however, that the members of a voluntary unincorporated society are bound by their own duly adopted by-laws and regulations, and cannot disregard them on the ground that they are unreasonable. Cuniff *v.* Jamour, 31 Misc. (N. Y.) 729, 65 N. Y. Suppl. 317; Elsas *v.* Alford, 1 N. Y. City Ct. 123. And see Myers *v.* Alta Friendly Soc., 29 Pa. Super. Ct. 492. See also *infra*, this section, text and note 53, as to estoppel to attack by-law.

By-laws held not to be void for unreasonableness see Fraternal Union of America *v.* Zeigler, 145 Ala. 287, 39 So. 751 (by-law that in case of death of a member by suicide the association should pay only one third of the amount of the insurance); Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653 (by-law providing that a beneficiary must be a member of a member's family or related to him by blood or dependent on him); Robinson *v.* Templar Lodge No. 17 I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193 (by-law which requires an ap-

So the constitution and by-laws must be in conformity with the law else

plication for sick benefits to be made within five weeks after they accrue); Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340 (by-laws providing that relief should be furnished to sick members, but not where the sickness was the result of drunkenness or debauchery, or was unaccompanied by a physician's certificate); Hussey *v.* Gallagher, 61 Ga. 86 (by-laws which prescribe a trial of the members for any delinquencies before a select number of members appointed by the president and presided over by him, without the right of appeal, and confine the evidence to such as may be brought by members only, and prescribe that members shall be dropped without trial if fines imposed by the by-laws are not paid); Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373 (provision in the constitution of a fraternal organization that no claim for benefits shall be paid a member until the rules of the order have been fully complied with, and the requisite proof of the justness of the claim has been made in accordance with the general laws of the order); Mazurkiewicz *v.* St. Adelbertus Aid Soc., 127 Mich. 145, 86 N. W. 543, 54 L. R. A. 727 (by-law that no member shall join any society not approved by the Roman Catholic church); Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000 (by-law that no member should join a similar society); Courtney *v.* Fidelity Mut. Aid Assoc., 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098 (by-law that where disability was the result of sickness, indemnity should not be paid for a greater period than ten weeks); Cowan *v.* New York Caledonian Club, 46 N. Y. App. Div. 288, 61 N. Y. Suppl. 714 (by-law that members indebted to the society for one year shall be held to be in arrears and not entitled to benefits); Falcone *v.* Societa Sarti Italiani di Mutuo Soccorso, 30 Misc. (N. Y.) 106, 61 N. Y. Suppl. 873 (by-law of a mutual benefit association requiring a member entitled to a per diem sick benefit to notify the secretary within twenty-four hours after his illness began, whereupon the latter would then send the association physician to visit him, and certify as to his illness, and further providing that the doctor's certificate should alone be proof thereof); St. Mary's Ben. Soc. *v.* Burford, 70 Pa. St. 321 (by-law that the widow of a member who dies from intemperance shall not receive benefits, and restraining the steward from paying the same); Del Ponte *v.* Societa Italiana Di M. S. Gugliemo Marconi, 27 R. I. 1, 60 Atl. 237, 114 Am. St. Rep. 17, 70 L. R. A. 188 (by-law providing for the expulsion of members for defaming the members of the directing council or any member whatsoever for reasons connected with the society, or causing dissensions and disorders in the association); Clement *v.* Clement, 113 Tenn. 40, 81 S. W. 1249 (by-law of a beneficiary association providing that in case of suicide only a part of the insurance, in the proportion of the time elapsing from the date of the insurance to the life expectancy at that date, shall be paid); Matkin *v.* Supreme Lodge K. H., 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886 (by-law requiring an applicant for membership to be initiated in addition to paying his proposition fee and being elected, before acquiring any rights as a member); L'Union St. Joseph *v.* Cabana, 10 Quebec Q. B. 324 (by-law providing for the expulsion of members who sue the society instead of submitting to a board of arbitration established by the charter).

By-law depriving member of benefits after payment of arrears.— It has been held that a by-law depriving a member who has been in default of the right to benefits for a certain period after he has paid all arrears is not unreasonable. United Brotherhood Carpenters and Joiners of America *v.* Dinkle, 32 Ind. App. 273, 69 N. E. 707; Littleton *v.* Wells, etc., Council No. 14 J. O. U. A. M., 98 Md. 453, 56 Atl. 798; Rubino *v.* Fraterna Assoc., 29 Misc. (N. Y.) 339, 60 N. Y. Suppl. 461; Jennings *v.* Chelsea Div. Ben. Fund Soc., 28 Misc. (N. Y.) 556, 59 N. Y. Suppl. 862; Alters *v.* Journeyman Bricklayers' Protective Assoc., 43 Wkly. Notes Cas. (Pa.) 336. And see Hart *v.* Adams Cylinder, etc., Assoc., 69 N. Y. App. Div. 578, 75 N. Y. Suppl. 110, holding that where the laws of a society provide that a new member shall not be entitled to benefits for six months, a law that a suspended member shall not be entitled to benefits for six months after reinstatement is not unreasonable. Other cases take a contrary view and hold the by-law under discussion to be invalid. Burns *v.* Manhattan Brass Mut. Aid Soc., 102 N. Y. App. Div. 467, 92 N. Y. Suppl. 846; Kennedy *v.* Local Union 726 U. B. C. & J. A., 75 N. Y. App. Div. 243, 78 N. Y. Suppl. 85; Cartan *v.* Father Matthew United Benev. Soc., 3 Daly (N. Y.) 20 [*doubted* but *followed* in Skelly *v.* Private Coachmen's Benev., etc., Soc., 13 Daly 2]; Brady *v.* Coachman's Benev. Assoc., 14 N. Y. Suppl. 272; Nelligan *v.* New York Typographical Union No. 6, 2 N. Y. City Ct. 261; Buecking *v.* Robert Blum Lodge of Odd Fellows, 1 N. Y. City Ct. 51; Phœnix Council No. 85 J. O. U. A. M. *v.* Bennett, 26 Ohio Cir. Ct. 110.

Regulations as to change of beneficiaries.— A by-law providing that "any member may change the beneficiary designated . . upon application in writing . . . stating to whom he desires such benefits paid, the surrender of his old certificate, and the payment of a fee of one dollar," is a reasonable regulation of the right of the member to exercise the power of appointment of the beneficiary whenever and so often as he pleases. Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519. So a constitutional provision authorizing the society to withhold its consent to the member's desig-

they are invalid and of no effect.[50] A by-law which is in conflict with the society's constitution is invalid;[51] and in the case of an incorporated society, if the constitution or by-laws are violative of its charter, they are nugatory.[52]

nation of one not a relative as a substituted beneficiary until the member gives good reasons for the substitution is not unreasonable as enabling the association to make an arbitrary denial of a member's rights. Murphy *v.* Metropolitan St. R. Assoc., 25 Misc. (N. Y.) 751, 55 N. Y. Suppl. 620. And by-laws requiring a member desiring to change the beneficiary to surrender his certificate, pay a fee, and receive a new one, and providing that no change could be made by will, and that in case of death of the beneficiary before insured and failure of the latter to secure new certificate, the benefit should go to his heirs, are valid regulations. Bollman *v.* Supreme Lodge K. H., (Tex. Civ. App. 1899) 53 S.W.722.

50. *Kansas.*—Ancient Order of Pyramids *v.* Drake, 66 Kan. 538, 72 Pac. 239, holding that where the by-laws require a member in order to retain the benefits of a certificate to pay stated assessments to a local secretary, a provision declaring the local secretary the agent of the member, and denying him the benefit of a payment so made unless the secretary forwards the amount, is invalid.

Missouri.— Cline *v.* Sovereign Camp W. W., 111 Mo. App. 601, 86 S. W. 501, holding that a by-law attempting to disable the organization from waiving compliance with the by-laws is nugatory.

New Jersey.— Berkhout *v.* Supreme Council R. A., 62 N. J. L. 103, 43 Atl. 1.

New York.— Cunniff *v.* Jamour, 31 Misc. 729, 65 N. Y. Suppl. 317; Buecking *v.* Robert Blum Lodge of Odd Fellows, 1 N. Y. City Ct. 51.

Pennsylvania.— Sweeney *v.* Rev. Hugh McLaughlin Ben. Soc., 14 Wkly. Notes Cas. 466, 486, holding that the by-laws of a beneficial association cannot make an appeal to the courts of a matter in dispute between it and a member a cause for expelling such member.

See 6 Cent. Dig. tit. "Beneficial Association," § 5; 28 Cent. Dig. tit. "Insurance," § 1833.

By-laws held to be valid see Supreme Lodge K. P. *v.* Clarke, 88 Ill. App. 600 (by-law against suicide, sane or insane); Lee *v.* Louisville Pilot Benev., etc., Assoc., 2 Bush (Ky.) 254 (by-laws providing that pilots only should be members of the association, that a majority of the company might fix a tariff of wages, and further providing for widows and orphans and funeral expenses of members, imposing an assessment of five per cent on wages, and requiring each member to pay into the treasury fifty cents per month as dues); Mazurkiewicz *v.* St. Adelbertus Aid Soc., 127 Mich. 145, 86 N. W. 543, 54 L. R. A. 727 (by-law prohibiting the members from belonging to any society not approved of by the Roman Catholic church); Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000 (by-law that members shall not join a similar society); Lavin *v.* Grand Lodge A. O. U. W., 104 Mo. App. 1, 78 S. W. 325 (by-laws providing for the payment of an assessment according to a specified rate on or before a certain day of each month, and declaring that a failure to pay any assessment on the day when due should *ipso facto*, and without any action on the part of the lodge or any officer thereof, work a suspension and forfeiture of all rights under the beneficiary certificate); Cunniff *v.* Jamour, 31 Misc. (N. Y.) 729, 65 N. Y. Suppl. 317; Tisch *v.* Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188 (by-law providing that a certificate issued to a member shall be void and all benefits thereunder forfeited if he shall die by suicide, felonious or otherwise, sane or insane); Del Ponte *v.* Societa Italiana Di M. S. Gugliemo Marconi, 27 R. I. 1, 60 Atl. 237, 113 Am. St. Rep. 17, 70 L. R. A. 188; Matkin *v.* Supreme Lodge K. H., 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886; Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904 (constitutional provision that no will should control the appointment or distribution of, or the right of any person to, any benefit payable by the order); Swaine *v.* Wilson, 24 Q. B. D. 252, 54 J. P. 484, 59 L. J. Q. B. 76, 62 L. T. Rep. N. S. 309, 38 Wkly. Rep. 261 (holding that rules made for the *bona fide* purpose of protecting the funds of the society from claims are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose); L'Union St. Joseph *v.* Cabana, 10 Quebec Q. B. 324 (by-law providing for the expulsion of a member who sues the society before a civil tribunal instead of submitting to a tribunal of arbitration established by the laws of the society).

Provisions restricting membership to those of a certain church and authorizing the expulsion of members who do not observe the duties prescribed by the church are constitutional and valid. Franta *v.* Bohemian Roman Catholic Cent. Union, 164 Mo. 304, 63 S. W. 1100, 86 Am. St. Rep. 611, 54 L. R. A. 723; Barry *v.* Order of Catholic Knights, 119 Wis. 362, 96 N. W. 797. And see Mazurkiewicz *v.* St. Adelbertus Aid Soc., 127 Mich. 145, 86 N. W. 543, 54 L. R. A. 727; Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000.

Validity of amendments as such and provision authorizing amendments see *infra*, I, C, 2, c.

51. Sherry *v.* Plasterers' Union, 139 Pa. St. 470, 20 Atl. 1062.

52. Raub *v.* Masonic Mut. Relief Assoc., 3 Mackey (D. C.) 68 (holding that where a beneficial association is chartered by act of congress, a by-law contrary to the charter provision is in effect a by-law in violation of a statute); Caudell *v.* Woodward, 15 Ky. L. Rep. 63; Thomas *v.* Mutual Protective Union, 49 Hun (N. Y.) 171, 2 N. Y. Suppl. 195 [*re-*

However, a member may be estopped by his conduct from asserting the invalidity of a by-law.[53] A by-law invalid in part may be enforced as to the valid provisions;[54] and the fact that some of the rules are illegal does not necessarily render the society an illegal one or affect the validity of the other rules.[55]

c. Alteration by Amendment or Repeal of Original Rules, or by Enactment of Additional Rules.[56] An unincorporated society has power to alter its articles of association, and a society, whether incorporated or unincorporated, may alter its constitution or by-laws, by an amendment or repeal of existing rules or the enactment of additional rules,[57] subject to such restrictions on the mode of adopting alterations as the legislature or the society may see fit to impose.[58] It has

versed on other grounds in 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175]; Di Messiah *v.* Gern, 10 Misc. (N. Y.) 30, 30 N. Y. Suppl. 824; Nelligan *v.* New York Typographical Union No. 6, 2 N. Y. City Ct. 261; Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

Powers of society generally see *infra*, I, G, 1, a.

53. Falcone *v.* Societa Sarti Italiani di Mutuo Soccorso, 30 Misc. (N. Y.) 106, 61 N. Y. Suppl. 873 (holding that one who, as a charter member of an association, either participated in the adoption of a by-law or assented to it when he joined the society, and who thereafter recognized it by acting thereon, is estopped to question its reasonableness); Toll *v.* Crimean, 13 Montg. Co. Rep. (Pa.) 33 (holding that where a member takes part in enacting a by-law, and other members have been misled to their injury by his acts, he cannot object to the by-law as illegal when an attempt is made to enforce it against him). And see *supra*, note 49, as to right to assert unreasonableness of by-law.

54. Berkhout *v.* Supreme Council R. A., 62 N. J. L. 103, 43 Atl. 1, holding that a by-law which provides for the expulsion of a member without affording him an opportunity of defending himself against the charges upon which his expulsion is based is not altogether null and void, but only so to the extent that it deprives such member of a hearing from which he might possibly derive a benefit, and where it appears that no such result has followed its enforcement, the existence of such a provision in it will not be held to invalidate the proceedings taken under it.

55. Swaine *v.* Wilson, 24 Q. B. D. 252, 59 L. J. Q. B. 76, 54 J. P. 484, 62 L. T. Rep. N. S. 309, 38 Wkly. Rep. 261.

56. Operation and effect of alterations as to existing members see *infra*, II, D, 3, b.

57. Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409 (holding that the constitution of the society is not a charter which it has no right to alter); Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 79 Am. St. Rep. 412, 47 L. R. A. 136. See, however, Souter *v.* Davies, 15 Reports 261, holding that unless power to alter the original rules is conferred by statute or some provision of the rules themselves, they cannot be altered without the consent of all the members.

Power as conferred by statute or charter.—The power of amendment is given by statute in some states to societies incorporating thereunder (Miller *v.* National Council K. & L. S., 69 Kan. 234, 76 Pac. 830; Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154); and it is frequently conferred by the charter of incorporation (Protected Home Circle *v.* Tisch, 24 Ohio Cir. Ct. 489; Sovereign Camp W. W. *v.* Fraley, (Tex. Civ. App. 1900) 59 S. W. 905).

Validity of constitutional restriction on right to adopt by-laws.—A provision in the constitution of an incorporated society which attempts to take away the inherent power of the society to adopt such other by-laws as its charter permits is invalid. Blasingame *v.* Royal Circle, 111 Ill. App. 202.

58. Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045; Deuble *v.* Grand Lodge A. O. U. W., 172 N. Y. 665, 65 N. E. 1116 [*affirming* 66 N. Y. App. Div. 323, 72 N. Y. Suppl. 755]; Cowan *v.* New York Caledonian Club, 46 N. Y. App. Div. 288, 61 N. Y. Suppl. 714.

What body may adopt amendments.—Where the articles of incorporation of an association authorized the directors to adopt such by-laws as might be necessary, the same not to conflict with the fundamental laws of the association, and a fundamental law of the association provided that the articles of incorporation or fundamental law might be amended by the supreme lodge, the board of directors were not authorized to amend a fundamental law. Van Atten *v.* Modern Brotherhood of America, 131 Iowa 232, 108 N. W. 313.

Necessity of prescribing mode of making alterations.—Where a statute provides that any society organized thereunder may change its articles of association in the manner prescribed by its rules, it seems that the mode of making alterations in the articles must be prescribed by the society before it can make changes therein. Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378].

A petition to amend the constitution of an incorporated beneficial society by inserting a clause allowing another association or corporation referred to as the "Supreme Lodge" to participate in making rules, by-laws, and regulations for the government of the corporation first named must set up the charac-

been held that the by-laws cannot be amended by simple motion or resolution.[59]

ter of the supreme lodge, and state where it is located and whether it is incorporated. *In re* Grand Lodge A. O. U. W., 110 Pa. St. 613, 1 Atl. 582.

Notice of a proposed alteration need not be given (McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149), unless the laws of the society require it (Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538 [*affirming* 37 Ill. App. 170]; Northwestern L. Assur. Co. *v.* Erlenkoetter, 90 Ill. App. 99; National Grand Lodge L. K. A. *v.* Watkins, 175 Pa. St. 241, 34 Atl. 602. See, however, Talbot *v.* Tipperary Men Nat., etc., Assoc., 23 Misc. (N. Y.) 486, 52 N. Y. Suppl. 633, holding that under a constitution requiring at least two weeks' previous notice in writing to be given at a meeting of the corporation, it is not necessary to give a member personal notice).

Examination and report by law committee. — Where the constitution of a benefit society provides that all proposed amendments to the constitution must be referred to the committee on laws, who shall report thereon, and that the committee "shall examine and report upon all proposed amendments to the constitution and laws of the supreme council presented at the supreme council," it is a sufficient compliance therewith if a committee is appointed at one session to revise and codify the constitution and laws of the order, and at the next session offers a report which is referred to the committee on laws, who report favorably thereon to the supreme council, and the supreme council thereupon repeals the old laws and accepts the revision in their stead. Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380.

Regularity of meeting.—Alterations in the laws of the society are invalid where restrictions as to the character (Torrey *v.* Baker, 1 Allen (Mass.) 120; Mutual Aid, etc., Soc. *v.* Monti, 59 N. J. L. 341, 36 Atl. 666) and the place (Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378]; Reg. *v.* Pratt, 6 B. & S. 672, 118 E. C. L. 672) of the meeting at which alterations may be made are not complied with. A meeting is not invalid, however, because held on Sunday (McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149); and authority to hold meetings outside of the state of incorporation may be gathered by implication (Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898 [*affirming* (Civ. App. 1900) 59 S. W. 905]).

Number of affirmative votes.— It is sometimes required that a certain proportion of votes greater than a bare majority must be cast in favor of the alteration. Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378]; Torrey *v.* Baker, 1 Allen (Mass.) 120 (holding that a proposed alteration in the articles which is voted for by less than the number required to make a change is ineffectual, although after the meeting enough other members to make up the requisite number request in writing to be allowed to record their votes for the alteration); Hochreiter's Appeal, 93 Pa. St. 479. See Cowan *v.* New York Caledonian Club, 46 N. Y. App. Div. 288, 61 N. Y. Suppl. 714.

Publication.— Where the by-laws of a mutual benefit insurance association provide that publication in the official organ of any notice required to be given the members shall be sufficient notice, and make it the duty of a certain official "to compile and arrange for publication . . . all amendments to the by-laws," it is not necessary that an amendment, after adoption, should be published in the official organ. Eversberg *v.* Supreme Tent K. M. W., 33 Tex. Civ. App. 549, 77 S. W. 246.

Reasonableness of by-law prescribing mode of amendment.— By-laws authorizing amendments only on a two-thirds vote of the members present at a regular meeting, after the amendment has been proposed in writing and presented to the association at least one month prior to being voted on, are reasonable and valid. Cowan *v.* New York Caledonian Club, 46 N. Y. App. Div. 288, 61 N. Y. Suppl. 714.

Right to object to alteration.— The members of a subordinate lodge liable to be affected by the proposed changes in the constitution of the grand lodge of their order are entitled to be heard in court in relation to the proposed amendment, and to except to the decision of the court approving the same. *In re* Grand Lodge A. O. U. W., 110 Pa. St. 613, 1 Atl. 582. But the trustees of a burial society who by its constitution are not and cannot be members are not persons interested, so as to enable them of their own accord to institute proceedings against the society for the purpose of controlling them in the proposed alteration of their rules. Hull *v.* McFarlane, 2 C. B. N. S. 796, 3 Jur. N. S. 1262, 27 L. J. C. P. 41, 89 E. C. L. 796. The acknowledgment, by the register of friendly societies, of the registry of an amendment is conclusive as to its validity. Butler *v.* Springmount Co-operative, etc., Soc., [1906] 2 Ir. 193.

Foreign association.— Nebr. Comp. St. (1901) c. 43, § 112, providing that before any amendment or alteration in the constitution or by-laws of a fraternal beneficiary association shall take effect, a copy of the amendment or alteration, duly certified, must be filed with the auditor of public accounts, applies to foreign associations. Knights of Maccabees of World *v.* Nitsch, 69 Nebr. 372, 95 N. W. 626.

The incorporation of an unincorporated benefit association is an amendment of its constitution, and is not binding on the subordinate lodges unless the provisions of its constitution in regard to amendments thereof are followed. National Grand Lodge L. K. A. *v.* Watkins, 175 Pa. St. 241, 34 Atl. 602.

59. Red Jacket Tribe No. 28 *v.* Gibson, 70

Where a benevolent society adopts a new constitution, all provisions in former constitutions not contained therein are repealed;[60] and the passage of a by-law by the supreme lodge of an association in a mode not prohibited by its charter or by the general law of the land is a repeal of any other mode previously prescribed by the same lodge.[61] The rules of a friendly society made under a certain statute do not cease to exist when that act is repealed,[62] and the adoption of new rules which are neither made nor confirmed as prescribed by statute does not operate as an abandonment of the old rules.[63] Where an incorporated benefit society has by its fundamental law fixed its principal office at the place designated in its articles of association, that place cannot be changed without the amendment of both its fundamental law and its articles of association.[64]

3. Reorganization, Reincorporation, Merger, and Consolidation. Beneficial or fraternal corporations may reincorporate under a statute enacted subsequent to that under which they were originally incorporated;[65] but unless the statute requires reincorporation thereunder the society may claim the benefits of the act

Cal. 128, 12 Pac. 127. And see Flaherty *v.* Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58, holding that where a benevolent society by a by-law provides that resolutions adopted at any meeting of the society shall be as binding as if embodied in its by-laws, such resolutions have the effect of by-laws only when they are not inconsistent with the by-laws, and do not have the effect of amending or repealing them.

60. Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

However, a by-law providing for a separate assessment in separate jurisdictions, but making no division of territory into separate jurisdictions, is not annulled by a later by-law making a division of territory creating separate jurisdictions, although the latter is a complete set of laws in itself; and hence they will be considered together in the construction of a contract made prior to the enactment of both. Brower *v.* Supreme Lodge Nat. Reserve Assoc., 74 Mo. App. 490.

61. Dornes *v.* Supreme Lodge K. P., 75 Miss. 466, 23 So. 191. And see Toomey *v.* Supreme Lodge K. P. W., 74 Mo. App. 507.

62. Smith *v.* Galloway, [1898] 1 Q. B. 71, 67 L. J. Q. B. 15, 77 L. T. Rep. N. S. 469, 46 Wkly. Rep. 204.

63. Reg. *v.* Cotton, 15 Q. B. 569, 14 Jur. 788, 19 L. J. M. C. 233, 4 New Sess. Cas. 291, 69 E. C. L. 569.

64. Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378].

65. People *v.* Payn, 161 N. Y. 229, 55 N. E. 849 [*affirming* 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1146 (*affirming* 28 Misc. 275, 59 N. Y. Suppl. 851)], holding also that under the New York Insurance Law (Laws (1892), c. 690, § 231), authorizing a mutual benefit fraternity to reincorporate by filing a declaration with the superintendent, and requiring him to file the declaration, and refer it to the attorney-general for certificate of conformity and approval, and on return thereof to record it, with the attorney-general's certificate, in his office, and deliver certified copies to the fraternity with his license to carry on the work of a fraternal society as proposed in the declaration, the duties of the superintendent are ministerial, and may be enforced by mandamus.

Effect of reincorporation.—A mutual benefit association organized in Illinois under Laws (1883), p. 104, and afterward reorganized under Laws (1893), p. 130, which more strictly limited the classes of persons who might be made beneficiaries, and provided that societies coming within the description of the act, then doing business in the state, should be considered duly organized, etc., should be regarded as an association existing and doing business under the latter act. Pauley *v.* Modern Woodmen of America, 113 Mo. App. 473, 87 S. W. 990. However, the act of reincorporating an insurance association in conformity with New York Insurance Law, § 52 (Laws (1892), p. 1955, c. 690, as amended by Laws (1901), p. 1779, c. 722), authorizing such reincorporation, did not operate to create a new corporation, although a different name was assumed, and a new policy of insurance adopted (Polk *v.* Mutual Reserve Fund Life Assoc., 137 Fed. 273); and if a majority of the members of the society, on being wrongfully expelled from its meeting rooms, organize in another place for similar objects, although under a new name, they represent the old society (Court Mount Royal No. 5694 *v.* Boulton, 1 Quebec Consol. Dig. 199).

Corporate name.—Under New York General Corporation Law, § 6 (Laws (1892), c. 687), providing that a corporation formed by reincorporation may have the same name as the corporation to whose franchise it has succeeded, an incorporated mutual benefit fraternity has the right to the use of its original name on reincorporation under Insurance Law, art. 7, § 231 (Laws (1892), c. 690), providing that any mutual benefit fraternity incorporated under the laws of the state may reincorporate. People *v.* Payn, 161 N. Y. 229, 55 N. E. 849 [*affirming* 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1146 (*affirming* 28 Misc. 275, 59 N. Y. Suppl. 851)].

without reincorporating.[66] A transfer of property from an unincorporated beneficial association to a corporation composed of the same members may be worked by legislative enactment, accepted and given effect to by the parties between whom the transfer is made.[67] In the absence of statutory authority incorporated mutual benefit societies cannot consolidate.[68] Where a benefit association transfers its risks and assets to another association, the agreement of the latter to reinsure is a contract with only the consenting members of the former company.[69]

D. Officers[70] **— 1. In General.** General statutes regulating beneficial or fraternal societies, and the society's charter of incorporation or articles of association, and its constitution and by-laws must be examined in order to determine by what officers the society is to be governed,[71] the persons by whom officers are to be elected,[72] eligibility to office,[73] the appointment[74] or election[75] of officers, the

66. Supreme Council L. H. *v.* Neidlet, 81 Mo. App. 598, holding that under Laws (1897), p. 132, making the continuance of a fraternal order and its authority to do business to depend on its making annual reports to the insurance commissioners, but not expressly requiring existing orders to reincorporate under its provisions, existing orders are entitled to the benefits of the act without reincorporation.

67. Ladies' Benev. Soc. No. 2 *v.* Edgefield Benev. Soc. No. 2, 2 Tenn. Ch. 77. See, however, Davies *v.* Griffiths, 1 Wkly. Rep. 402, holding that where the committee of an unregistered benefit club advanced club money on the security of a deposit of a lease, and afterward the surviving members of the club formed a new society under a different name, which succeeded to the funds of the old club, and which was duly registered, the equitable mortgage could not vest in the public officer of the new society without a legal transfer.

68. Bankers' Union of World *v.* Crawford, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465. See Jones *v.* Slee, 32 Ch. D. 585, 51 J. P. 83, 55 L. J. Ch. 908, 55 L. T. Rep. N. S. 129, 34 Wkly. Rep. 692.

Estoppel.— Where a mutual benefit society by which plaintiff's wife was insured for plaintiff's benefit made an ineffectual attempt to consolidate with defendant association, and the latter attempted to take over all the assets and certificates of the former, but received nothing of value belonging to plaintiff or his wife, and made no promise or agreement with them based on any consideration, plaintiff could not receover from defendant on his wife's certificate, after her death, on the ground of equitable estoppel. Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259. So where two benefit associations entered into an *ultra vires* contract of merger, one assuming all the risks and debts of the other, which was to turn over all its assets, it was held, in an action against non-assenting members holding such assets to compel specific performance, that they were not estopped, because the contract was fully performed by plaintiff, to set up that it was *ultra vires*, where their rights were not fully protected under the contract. Home Friendly Soc. *v.* Tyler, 9 Pa. Co. Ct. 617.

69. Insurance Com'rs *v.* Provident Aid Soc., 89 Me. 413, 36 Atl. 627; Adams *v.* Northwestern Endowment, etc., Assoc., 63 Minn. 184, 65 N. W. 360. And see Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259.

70. **Appeal to courts in contest for office** see *infra*, V.

Subordinate lodge and officers thereof as agents of supreme lodge see *infra*, I, F, 2, b.

Unauthorized or wrongful acts of officers as ground for dissolution see *infra*, I, I, 4, b.

71. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; Sharp *v.* Warren, 6 Price 131, holding that where the articles of association empowered the society to appoint a treasurer, it might appoint two persons as treasurers.

72. Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224; State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531, both holding that under a statute providing that the association shall have a representative form of government, the directors and other officers who have general charge of the property and business of the society must be chosen by the members.

73. State *v.* Boucher, (R. I. 1895) 31 Atl. 1058 (holding that a person is eligible to the office of physician for the society, although he is not a member thereof, none of its by-laws requiring that he should be); *In re* West of England, etc., Dist. Bank, 11 Ch. D. 768, 48 L. J. Ch. 577, 40 L. T. Rep. N. S. 551, 27 Wkly. Rep. 596 (holding that an incorporated banking company cannot be the treasurer of a friendly society under the Friendly Societies Act of 1875); Dewhurst *v.* Clarkson, 2 C. L. R. 1143, 3 E. & B. 194, 18 Jur. 693, 23 L. J. Q. B. 247, 2 Wkly. Rep. 199, 77 E. C. L. 194.

74. Roberts *v.* Price, 4 C. B. 231, 11 Jur. 352, 16 L. J. C. P. 169, 56 E. C. L. 231; Sharp *v.* Warren, 6 Price 131; Beckett *v.* Willetts, 5 Wkly. Rep. 622.

75. See cases cited *infra*, this note.

Voting by proxy.— Where the charter authorizes the society to elect its "directors or managers at such time and place, in such manner as may be specified in its by-laws," and gives power to make by-laws not inconsistent with the constitution and laws of the state or of the United States, a by-law authorizing its members to vote at all elec-

tenure of their office,[76] and their compensation.[77] As a rule official books belong to the society and not to the officer charged with their keeping.[78]

2. Suspension, Removal, and Reinstatement.[79] The power to appoint officers of a beneficial or fraternal society ordinarily includes the power of removing them,[80] subject to the provisions of the society's charter of incorporation or articles of association, constitution, and by-laws, or of statutes governing such organizations.[81] An officer is bound by a valid amendment of the laws of the society

tions either in person or by proxy is valid. People *v.* Crossley, 69 Ill. 195. However, to limit and perpetuate the administration of the society in the hands of the manager and secretary by means of a system of blank proxies unadvisedly signed by applicants for membership is a violation of the statute requiring the affairs of mutual benefit societies to be managed by not less than five trustees. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

Failure to elect an officer on the day fixed in the charter does not exhaust or destroy the power of election, so as to invalidate an election held subsequently. State *v.* Batt, 38 La. Ann. 955.

Estoppel to deny election.— The society and members thereof may be equitably estopped from setting up irregularities in the election of an officer. McDermott *v.* St. Wilhelmina Benev. Aid Soc., 24 R. I. 527, 54 Atl. 58.

76. State *v.* Batt, 38 La. Ann. 955 (holding that where the charter required a chief engineer to be elected "annually" by the board of delegates, also elected annually, and a board elected one for a term of five years, his tenure terminated on the election of another by the succeeding board); People *v.* Twaddell, 18 Hun (N. Y.) 427 (holding that under 2 N. Y. Rev. St. p. 624, § 2, providing for the incorporation of benevolent societies, the trustees do not, in the absence of any special provision therefor in the constitution or by-laws, hold over their year until their successors are elected, and hence where there is no provision for holding over, and the corporation has for several years failed to elect trustees, the corporators may, without any new legislative aid, meet at the time designated in the constitution and elect a new board of trustees); Brendon *v.* Worley, 8 Misc. (N. Y.) 253, 28 N. Y. Suppl. 557 (holding that a by-law which provides for the election of a physician to remain in office "during the pleasure of" the association authorizes a dismissal of such physician at a regular meeting of the association, there being no provision in the constitution or by-laws requiring a dismissal to be made at a special meeting).

77. *Maine.*— Flaherty *v.* Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58, holding that where a by-law of a benevolent corporation provides that its funds shall be appropriated for no other purposes than that necessarily incurred for the maintenance of wages, burying the dead, and other incidental expenses, the payment of a salary to a physician is forbidden, although another by-law provides for payment of sick benefits.

Nebraska.— Burdick *v.* Sons and Daughters of Protection, (1906) 106 N. W. 466, holding that a society whose power as to salaries to be allowed the officers of the order is vested in an executive committee is not bound by the acts of the members of the society; nor can a proposition made to the delegates as a convention of the order by a candidate as to his fees, if elected, be regarded as a contract in the event of his election, in the absence of any agreement with the governing body after such election.

New York.— Georgeson *v.* Caffrey, 71 Hun 472, 24 N. Y. Suppl. 971.

Ohio.— State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579, holding that trustees of mutual associations as such are entitled to compensation only for services in going to and from meetings and at such meetings, and cannot vote themselves compensation for services rendered which were peculiar to the duties of secretary, treasurer, and general and special agents; or vote themselves back pay for services rendered in former years.

Rhode Island.— See McDermott *v.* St. Wilhelmina Benev. Aid Soc., 23 R. I. 527, 54 Atl. 58.

England.— Garner *v.* Shelley, 5 Bing. 577, 7 L. J. C. P. O. S. 194, 3 M. & P. 98, 15 E. C. L. 680.

See 6 Cent. Dig. tit. "Beneficial Associations," §§ 27–31; 28 Cent. Dig. tit. "Insurance," § 1836.

The officer has a lien for compensation on the books of the society in his possession. People *v.* Scheel, 8 Abb. N. Cas. (N. Y.) 342, *semble*.

78. Ellwood *v.* Liverpool Victoria Legal Friendly Soc., 44 J. P. 508, 42 L. T. Rep. N. S. 694.

The society has a right to inspect the books, although the officer in possession of them has a lien thereon for compensation. People *v.* Scheel, 8 Abb. N. Cas. (N. Y.) 342.

79. Appeal by officer to courts in regard to suspension or removal see *infra*, V.

Right to dismiss officer elected during pleasure of society see *supra*, note 76.

80. Hodges *v.* Wale, 2 Wkly. Rep. 65.

81. Lowry *v.* Stotzer, 7 Phila. (Pa.) 397, holding that the grand chancellor of a society cannot suspend an officer of a subordinate lodge without trial by the lodge, the by-laws providing that an officer under charges shall officiate till they are settled, and "shall have a fair trial of the charge brought against him."

vesting the power of removal in a committee.[82] The ruler of a society has no authority to remove or suspend inferior officers unless it is conferred on him by the laws of the society.[83]

3. Authority.[84] The scope of authority of the officers of a beneficial society depends on the provisions of its charter of incorporation or articles of association, and its constitution and by-laws.[85] Officers of the society cannot as a rule bind it by acts done by them beyond the scope of their authority.[86]

4. Duties and Liabilities.[87] The duties and liabilities of officers of beneficial or

Notice.— Where the constitution of a beneficial or fraternal society gives one of the officers power to remove other officers for cause on notice, an attempt to remove officers without notice is void. Caine *v.* Benevolent and Protective Order of Elks, 88 Hun (N. Y.) 154, 34 N. Y. Suppl. 528. So the removal of an officer by the majority of a committee, one of whose members was not notified of the meeting, is ineffectual; and the fact of the committeeman not having attended the meetings of the committee or taken any part in the business of the society for a twelve-month did not amount on his part to a waiver of notice; nor did the fact of the officer being present at such meeting and demanding a poll on the question whether he should be removed amount to a recognition on his part of the validity of the meeting. Roberts *v.* Price, 4 C. B. 231, 11 Jur. 352, 16 L. J. C. P. 169, 56 E. C. L. 231.

82. Butler *v.* Springmount Coöperative Dairy Soc., [1906] 2 Ir. 193.

83. Caine *v.* Benevolent and Protective Order of Elks, 88 Hun (N. Y.) 154, 34 N. Y. Suppl. 528 (holding that the ruler cannot remove a committee appointed by a grand lodge to determine the time and place of its annual meetings, although the committeemen are also trustees of the grand lodge and the ruler has power to remove officers of the grand lodge); Lowry *v.* Stotzer, 7 Phila. (Pa.) 397 (holding that a grand chancellor has no authority to suspend an officer of a grand or a subordinate lodge without trial and judgment by the lodge).

84. Authority as affecting estoppel and waiver as to avoidance of contract and forfeiture of benefits see *infra*, IV, J, 3.

Authority of officers and agents respecting contract of insurance see *infra*, II, C, 3.

Authority of subordinate or affiliated body see *infra*, I, F, 2.

Authority to enact by-laws see *supra*, note 33.

Authority to remove other officers see *supra*, note 83.

Subordinate or affiliated body and officers thereof as agents of society see *infra*, I, F, 2, b.

85. *California.*— Red Jacket Tribe No. 28 *v.* Gibson, 70 Cal. 128, 12 Pac. 127, holding that an order of the society instructing its trustees "to try and invest the money in the bank" does not authorize an investment of money otherwise than "in stocks, bonds, mortgages, or other securities, approved by two thirds of the members thereof present as a regular council," according to the by-laws.

Indiana.— Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, holding that the directors have no power to direct the secretary to cancel a policy in a different manner than that provided by the by-laws.

Maine.— Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394, holding that the treasurer cannot admit a person ineligible to membership and thereby make a contract of insurance, nor can he ratify a contract so made.

Maryland.— Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045, holding that the committee of a railroad employees' relief association had no power to release the railroad company from its obligation to pay the associations' operating expenses.

New York.— Caine *v.* Benevolent and Protective Order of Elks, 88 Hun 154, 34 N. Y. Suppl. 528, holding that the ruler of a society could not interfere with the action of a committee appointed by the grand lodge in appointing the time and place of annual meetings of the grand lodge.

England.— Tyrrell *v.* Woolley, 10 L. J. C. P. 5, 1 M. & G. 809, 2 Scott N. R. 171, 39 E. C. L. 1039, holding that a committee was not authorized, in making a contract with a sick member who had met with an accident which disabled him from working at his trade, to allow him a fixed weekly sum for life, with permission to attend to any business that he might be able to transact, in consideration of his giving up all further claim upon the society during his life and at his decease. See Wybergh *v.* Ainley, McClell. 669.

See 6 Cent. Dig. tit. "Beneficial Associations," § 28; 28 Cent. Dig. tit. "Insurance," § 1836.

86. Grand Fountain U. O. T. R. *v.* Murray, 88 Md. 422, 41 Atl. 896; Hiatt *v.* Fraternal Home, 99 Mo. App. 105, 72 S. W. 463 (holding that where a deputy organizer of an association had no authority either under his appointment or by contract with the supreme lodge or under his appointment by a local lodge to deliver certificates of insurance or to collect dues and assessments, an arrangement made by him with the secretary of a local lodge whereby he was to perform these duties was not binding on either the supreme or local lodge); Burdick *v.* Sons and Daughters of Protection, (Nebr. 1906) 106 N. W. 466.

87. Criminal liability see Embezzlement;

fraternal societies are governed by the same rules that apply to officers of associations or corporations in general, according to whether or not the society in question is incorporated, subject of course to the provisions of statutes specially governing the matter, and to the provisions of the society's charter of incorporation or articles of association and its constitution and by-laws.[88] In England the

FALSE PRETENSES; FORGERY; INSURANCE, 22 Cyc. 1396; LARCENY.

Right of society to prefer indictment against officer see INDICTMENTS AND INFORMATIONS.

88. See cases cited *infra*, this note. And see, generally, ASSOCIATIONS, 4 Cyc. 309; CORPORATIONS, 10 Cyc. 736 *et seq.*

Duty to keep accounts.— It is a breach of duty for the officers of mutual benefit society to fail to keep correct and intelligible books of account, whether such failure results from design, carelessness, or want of skill. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

Duty to transfer funds, etc., to successor.— It is the duty of an officer, on ceasing to hold office, to transfer to his successor such funds and property of the society as he may hold. Matter of Friendly Soc., 1 Sim. & St. 82, 1 Eng. Ch. 82, 57 Eng. Reprint 33 (where one of two trustees absconded and the other was ordered to transfer funds into his own name and that of another appointed); Hodges *v.* Wale, 2 Wkly. Rep. 65. So members of a voluntary beneficial association, after a proper vote to change the name thereof, may maintain a bill in equity to compel a recusant trustee to join the other trustees in assigning to their successors deposits of the society in a savings bank. Birmingham *v.* Gallagher, 112 Mass. 190. And see Court Mount Royal No. 5694 *v.* Boulton, 1 Quebec Consol. Dig. 199. However, the treasurer is bound to pay over moneys to his successor only upon receipt of a proper order as required by the rules of the society. Smith *v.* Pinney, 86 Mich. 484, 49 N. W. 305.

Liability for debts of society.— Ordinarily the trustees are not liable for debts contracted by them for the society. Strobridge *v.* Winchell, 6 Ohio Dec. (Reprint) 761, 7 Am. L. Rec. 743. But the contrary is sometimes declared by statute. Wallbrecht *v.* Pucketat, 8 Ohio Dec. (Reprint) 774, 9 Cinc. L. Bul. 335 (holding, however, that the statutory individual liability of trustees of an incorporated benevolent association for debts contracted by them is secondary, and is to be resorted to by the creditors only when the debt cannot be made against the corporation itself); Beckett *v.* Willetts, 5 Wkly. Rep. 622.

Liability as to benefits.— The officers are not personally liable to the members for the benefits contracted for. Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; Kurz *v.* Eggert, 9 Wkly. Notes Cas. (Pa.) 126. *Compare* Fisher *v.* Andrews, 37 Hun (N. Y.) 176; Brown *v.* Orr, 112 Pa. St. 233, 3 Atl. 817.

Liability for failure to collect.— If it is the duty of the treasurer to collect certain money from the secretary, and he allows the latter to retain it without warrant, and it is misappropriated, the treasurer is liable therefor. Hudson *v.* Baker, 185 Mass. 122, 70 N. E. 419.

Liability for diverting funds.— If, on the disbanding of a local lodge, the officers thereof pay over its funds to another society in violation of the laws of the grand lodge, they are liable therefor to the latter. Grand Lodge K. P. *v.* Germania Lodge No. 50, 56 N. J. Eq. 63, 38 Atl. 341.

Liability for withholding funds.—A person to whom all the members of a local assembly of the Knights of Labor in good standing have executed an assignment of their right, title, and interest can maintain an action to recover money paid in by members of the assembly on the formation of a preliminary organization, with the intention that the money so contributed should be used as initiation fees in the assembly to be formed as a successor to the first association, when defendants, who were the treasurer and one of the trustees of the first association, refuse to give it up. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430. However, a foreign mutual benefit society which has failed to comply with the laws of the state, and is therefore forbidden under penalty to do business in the state, cannot sue to recover money assessed against its members in the state and which was voluntarily paid by such members to defendant, its agent, for the use of the company, as the claim "arose out of" forbidden acts within the statute. People's Mut. Ben. Soc. *v.* Lester, 105 Mich. 716, 63 N. W. 977.

Liability for effecting consolidation of society with another.— The directors of a mutual benefit corporation are liable to a member who holds a policy for wrongfully dissolving it by consolidating it with another corporation which refuses to issue a policy to him; and the application for insurance to the company with which the defunct corporation was consolidated does not amount to a ratification of the act of consolidation, so as to bar the member's action for damages. Grayson *v.* Willoughby, 78 Iowa 83, 42 N. W. 591, 4 L. R. A. 365.

Liability to members for moneys paid to society before its insolvency.— The agents and directors of a coöperative life insurance society chosen by the members of the society to conduct its affairs cannot, in the absence of fraud, be held responsible by a member after the insolvency of the society for dues and assessments collected and paid by them to the society and paid out by it under its articles and rules. Perkins *v.* Fish, 121 Cal. 317, 53 Pac. 901. So where members pay dues to the secretary in anticipation of dues

duties and liabilities of the officers of friendly societies are affected by statutory enactments more generally than in the United States.[89]

to accrue in the future, it is his duty to pay such sums into the treasury, and if he does so he incurs no liability to the members in case the society subsequently but before the dues mature becomes insolvent. Garrett *v.* Guarantee Trust, etc., Co., 29 Wkly. Notes Cas. (Pa.) 33.

Liability to society for moneys returned to its members.—An officer of a mutual benefit association who without authority returns to members money lawfully collected by him as dues and assessments is liable to the association or its assignees for the amount returned. Benevolent Order of Active Workers *v.* Smith, 1 Pa. Super. Ct. 1, 37 Wkly. Notes Cas. 247.

Liability for moneys lost through robbery. —The treasurer of a friendly society is liable only as bailee in respect of the loss of money through robbery immediately after its receipt. Walker *v.* British Guarantee Assoc., 18 Q. B. 277, 21 L. J. Q. B. 257, 83 E. C. L. 277.

The act of the officers in surrendering control of the association and transferring their offices to others for a money consideration is a breach of trust, which renders them liable to account to the association for the money so received; but a subsequent creditor of the association is not entitled to recover such money from the delinquent officers. Heineman *v.* Marshall, 117 Mo. App. 546, 92 S. W. 1131.

Liability for contempt.—An injunction was granted against trustees of a friendly society by name, restraining them from dividing part of the society's funds among its members. These trustees afterward retired and other members were appointed in their place. A fresh resolution was then passed by the society for dividing the money, and this was carried out by the new trustees. One of the former trustees was present when the resolution was passed and assisted in distributing the money. All received their shares of the money, but had repaid them. On motion to commit all the trustees, old and new, for contempt, it was held that the new trustees had notice of the order, and that they and the old trustees who actively assisted in dividing the money must be committed to prison. Avery *v.* Andrews, 51 L. J. Ch. 414, 46 L. T. Rep. N. S. 279, 30 Wkly. Rep. 564.

Liability of physician for breach of duty.—A member of a beneficial association cannot maintain an action against a physician appointed by it for wilfully, maliciously, and wrongfully refusing to certify another physician's bill for attendance during the member's illness, as required by the association's by-laws, to enable the member to receive sick benefits, since his remedy is against the association, which cannot refuse to pay the benefits because of its agent's wrongful act. Gleavy *v.* Walker, 22 R. I. 70, 46 Atl. 180.

Officers are liable for funds converted to their own use.—Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566; Kuhl *v.* Meyer, 35 Mo. App. 206; Marrs *v.* Thompson, 86 L. T. Rep. N. S. 759; Sharp *v.* Warren, 6 Price 131. Money received by the trustees from an assessment imposed on members to pay benefits to the widow of a deceased member belongs to the association and not to the widow; and hence an action against the trustees to recover for their conversion of the money cannot be brought by the widow. Fisher *v.* Andrews, 37 Hun (N. Y.) 176.

Officers will be charged with improper expenses incurred by them and paid out of the society's funds. Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045; St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98.

89. Duties and liabilities under English friendly societies acts see Farrer *v.* Close, L. R. 4 Q. B. 602, 10 B. & S. 533, 38 L. J. M. C. 132, 20 L. T. Rep. N. S. 802, 17 Wkly. Rep. 1129; Hornby *v.* Close, L. R. 2 Q. B. 153, 8 B. & S. 175, 10 Cox C. C. 393, 36 L. J. M. C. 43, 15 L. T. Rep. N. S. 563, 15 Wkly. Rep. 336; Reg. *v.* Bannatyne, 17 Q. B. 524, 15 Jur. 1035, 20 L. J. Q. B. 210, 79 E. C. L. 524; Hammond *v.* Bendyshe, 13 Q. B. 869, 14 Jur. 62, 18 L. J. M. C. 219, 3 New Sess. Cas. 619, 66 E. C. L. 869; Barrett *v.* Markham, L. R. 7 C. P. 405, 41 L. J. M. C. 118, 27 L. T. Rep. N. S. 313; Rex *v.* Wade, 1 B. & Ad. 861, 9 L. J. M. C. O. S. 113, 20 E. C. L. 721; Rex *v.* Gilkes, 8 B. & C. 439, 15 E. C. L. 219, 3 C. & P. 52, 14 E. C. L. 446, 6 L. J. M. C. O. S. 118, 2 M. & R. 454; Matter of Heanor Friendly Soc., 1 Beav. 508, 17 Eng. Ch. 508, 48 Eng. Reprint 1037; *Ex p.* Norrish, Jacob 162, 4 Eng. Ch. 162, 37 Eng. Reprint 811; Avery *v.* Andrews, 51 L. J. Ch. 414, 46 L. T. Rep. N. S. 279, 30 Wkly. Rep. 564; Reg. *v.* Bennett, 63 L. J. M. C. 181, 10 Reports 456; Marrs *v.* Thompson, 86 L. T. Rep. N. S. 759; Sharp *v.* Warren, 6 Price 131; Matter of Friendly Soc., 1 Sim. & St. 82, 1 Eng. Ch. 82, 57 Eng. Reprint 33; Patrick *v.* Gilbert, 18 Wkly. Rep. 315; Beckett *v.* Willetts, 5 Wkly. Rep. 622; Reg. *v.* Aldham, 2 Wkly. Rep. 456; Hodges *v.* Wale, 2 Wkly. Rep. 65; *Re* Briton Friendly Soc., 1 Wkly. Rep. 50.

Statutory preference of society on bankruptcy or insolvency of officer under English statutes see *In re* Miller, [1893] 1 Q. B. 327, 57 J. P. 469, 62 L. J. Q. B. 324, 68 L. T. Rep. N. S. 367, 10 Morr. Bankr. Cas. 21, 4 Reports 256, 41 Wkly. Rep. 243; *Ex p.* O'Donnell, L. R. 1 Q. B. 274, 35 L. J. M. C. 99, 14 Wkly. Rep. 83; Absolom *v.* Gething, 32 Beav. 322, 9 Jur. N. S. 1263, 32 L. J. Ch. 786, 8 L. T. Rep. N. S. 132, 11 Wkly. Rep. 332, 55 Eng. Reprint 126; *Ex p.* Buckland, Buck. 214; *Ex p.* Ray, 3 Deac. 537, Mont. & C. 50; *Ex p.* Harris, 1 De Gex 162, 14 L. J. Bankr. 25; *Ex p.* Orford, 1 De G. M. & G. 483, 16 Jur. 851, 21 L. J. Bankr. 31, 50

5. Liability on Official Bonds. The rights and liabilities of sureties on a bond given by the officer of a beneficial or fraternal society to secure the performance of his duties are ordinarily governed by the law applicable to sureties in general.[90]

E. Members — 1. Eligibility and Admission. The eligibility and admission of members of a beneficial or fraternal society are governed by the society's charter of incorporation or articles of association, and its constitution and by-laws,[91] and in some states the matter is regulated by statute.[92] Membership is restricted sometimes to citizens of the state in which the society is formed,[93] and frequently to persons of a certain religious faith,[94] and generally to persons between certain

Eng. Ch. 370, 42 Eng. Reprint 639; *Ex p.* Burge, 10 L. J. Bankr. 30, 1 Mont. D. & De G. 540; *In re* Atkins, 51 L. J. Ch. 406, 46 L. T. Rep. N. S. 240, 30 Wkly. Rep. 432; *In re* Welch, 63 L. J. Q. B. 524, 70 L. T. Rep. N. S. 691, 1 Manson 62, 10 Reports 140, 42 Wkly. Rep. 320; Anonymous, 6 Madd. 98, 56 Eng. Reprint 1029; *Ex p.* Whipham, 3 Mont. D. & De G. 564; *Ex p.* Stamford Friendly Soc., 15 Ves. Jr. 280, 33 Eng. Reprint 760; *Ex p.* Ross, 6 Ves. Jr. 802, 31 Eng. Reprint 1316; *Ex p.* Corser, 6 Ves. Jr. 441, 31 Eng. Reprint 1134; *Ex p.* Amicable Soc., 6 Ves. Jr. 98, 31 Eng. Reprint 957.

90. See Principal and Surety.

Failure to turn over funds on resignation. — The sureties on the bond of the treasurer of a beneficial association are not relieved from liability for a defalcation because the association accepted the treasurer's resignation, where a new treasurer was immediately elected and installed, and a demand made on the former one for the funds. Hence where the bond of the treasurer is conditioned that he shall faithfully account for all moneys received by him, and shall, on his ceasing to be such treasurer from any cause whatsoever, deliver up to his successor all moneys owing by him, the sureties are liable for his refusal to deliver moneys to his successor after he had resigned. Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535.

Defaults of officer before execution of bond.— In an action against the sureties on the bond of the master of the exchequer of a beneficial association for moneys which came into his hands as such officer before he executed the bond, the court must assume that the association had the power to alter or amend the constitution so as to allow officers to act, although they might not execute the bond before they entered on their duties as required by the constitution. In any event, where a person was elected master of the exchequer in 1879, and annually thereafter till 1885, and notwithstanding the constitutional requirement that he must give bond before entering on his duties no bond was given till 1884, when one was executed, conditioned to account for all property that should come or had already come into his hands, he was at least a *de facto* officer prior to the time he executed bond, and hence the sureties could not rely on his failure to execute a bond as a defense to their liability for moneys that came into his hands during that time. And where, during the current year following the execution of the bond, the officer paid into the treasury more than the amount of his previous defalcation, but was still short in his accounts at the end of the year, when an action was brought on his bond, no application having been made of the payments during the year, the court had the right to apply them to the past indebtedness and charge the deficiency to the sureties on the bond for the current year. Wilson *v.* Wright, 8 Ky. L. Rep. 963. Money owed to the society by an officer at the time the bond was executed but which he had previously invested in enterprises of his own is "in his hands," within the meaning of the bond. Wilson *v.* Wright, *supra*. It has been held, however, that the sureties of a treasurer are not liable for society funds borrowed by him before the bond was executed, and retained during the term of the bond, but finally unaccounted for. Rowe *v.* Davenport, 8 Kulp (Pa.) 81. And see Supreme Council C. K. *v.* Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

What constitutes misappropriation of funds.— Obligations of a beneficial association which should have been paid by the treasurer during his former term but which were carried forward by him into his new term and paid out of current receipts were not discharged when assessments were made sufficient to meet them but continued until paid; and hence their payment out of funds of the association did not amount to embezzlement or larceny by the treasurer, committed during the new term, and the surety on his new bond was not liable for the misappropriation. Supreme Council C. K. *v.* Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

Additional bond.— Where the surety of a treasurer joined in an additional bond because the amount in the treasurer's hands exceeded the amount allowed to remain there by the by-laws, he could not defeat his liability because the by-laws required the treasurer to have in his possession a sum not exceeding a certain amount and a bond for that amount had been given. Court Vesper No. 69 F. A. *v.* Fries, 22 Pa. Super. Ct. 250.

91. See *supra*, I, C, 2.

92. See the statutes of the different states.

93. *In re* Butchers' Ben. Assoc., 35 Pa. St. 151, holding that membership is confined by statute to citizens of the state and cannot be extended to citizens of the United States. And see *supra*, I, C, 1.

94. See *supra*, note 50.

ages,[95] and of certain occupations.[96] And initiation as a member and prepayment of prescribed fees, dues, and assessments,[97] and the issuance, delivery, and acceptance of a certificate of membership,[98] are also often prescribed as conditions precedent to membership in the society.

2. Liabilities.[99] Members of an unincorporated beneficial or fraternal society are liable for the acts of their associates, when liable at all, on the ground of agency, not of partnership.[1] They are not individually liable for the payment of benefits,[2] for the salary of officers of the society,[3] or for loans effected by such officers in the society's behalf.[4] The members of an incorporated society, although it is not a corporation *de jure*, are not individually liable for benefits.[5]

3. Abandonment and Withdrawal of Membership — a. In General. Membership in a voluntary beneficial or fraternal society may be abandoned,[6] and a member may sever his connection with the society by withdrawing therefrom without its

95. Fraternal Tribunes *v.* Steele, 114 Ill. App. 194 [*affirmed* in 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160] (holding that where the charter of a society limits the ages of those to be admitted to membership to fifty-one years of age, the admission of a person over fifty-one years of age is an act *ultra vires*, and no recovery can be had on a certificate issued to such person); State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531. And see *infra*, II, E, 2.

Minors may become members of the society (Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549), in the absence of statute to the contrary (Chicago Mut. Life Indemnity Assoc. *v.* Hunt, *supra*). See, however, *In re* Globe Mut. Ben. Assoc., 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547 [*affirming* 63 Hun 263, 17 N. Y. Suppl. 852] (holding that under Laws (1883), c. 175, providing for the incorporation of coöperative or assessment life and casualty insurance associations, and declaring each policy-holder a member of the association, with a voice in the management of its affairs, only adult persons were contemplated as entitled to membership, as membership is founded on mutual contract between the members); Com. *v.* People's Mut. Life, etc., Assoc., 6 Pa. Dist. 561 (holding that a beneficial association having authority, under Act, May 23, 1891, to issue limited policies of insurance only to its members, has no authority to issue policies of insurance to minors, membership being founded on contract).

96. See *infra*, II, E, 2; IV, I, 2, e.

A director of a corporation engaged in manufacturing and selling malt liquors is eligible to membership in a fraternal order under a by-law providing that no person who is engaged as "principal, agent, or servant" in the manufacture or sale of malt liquors shall become a member, as a director is in no sense such a principal, agent, or servant in the transaction of the business of his corporation. People *v.* Supreme Tent M. W., 35 Misc. (N. Y.) 424, 71 N. Y. Suppl. 960.

Membership may be restricted to the employees of a certain corporation. See Master and Servant, 26 Cyc. 1049.

97. See *infra*, II, C, 1.

Medical examination as a prerequisite see *infra*, II, C, 1.

98. See *infra*, II, C, 2.

99. Liabilities on insolvency or dissolution see *infra*, I, F, 4; I, I, 5.

1. Ehrmanntraut *v.* Robinson, 52 Minn. 333, 54 N. W. 188. And see *supra*, I, A, 2.

In California and Pennsylvania the members of a beneficial society are deemed partners (see *supra*, I, A, 2), but in the latter state they are not individually liable for the debts of the society (Pain *v.* Sample, 158 Pa. St. 428, 27 Atl. 1107; Sparks *v.* Husted, 5 Pa. Dist. 189; Kurz *v.* Eggert, 9 Wkly. Notes Cas. 126).

2. Cochran *v.* Boleman, 162 Ind. 659, 71 N. E. 47, 65 L. R. A. 516; Payne *v.* Snow, 12 Cush. (Mass.) 443, 59 Am. Dec. 203; Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613.

It is otherwise in some jurisdictions (Protchett *v.* Schaefer, 11 Phila. (Pa.) 166, 2 Wkly. Notes Cas. 317; Vincent *v.* Gaudry, 9 Quebec Super. Ct. 415), in the absence of statute to the contrary (Pain *v.* Sample, 158 Pa. St. 428, 27 Atl. 1107).

3. Georgeson *v.* Caffrey, 71 Hun (N. Y.) 472, 24 N. Y. Suppl. 971, holding that the members of a mutual aid association with a fluctuating membership, the officers of which are not authorized to pledge the individual credit of the members, and the expenses of which are, under the by-laws, to be paid out of a particular fund raised by setting apart a certain percentage of the monthly dues, are not liable for the salary of the manager.

4. Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818, holding that members of a lodge organized for beneficial and social purposes are not liable for money borrowed on a certificate signed by the officers of the lodge to build a temple for the society, unless the members ratified the acts of the officers by advising or voting for the erection of the temple.

5. Foster *v.* Moulton, 35 Minn. 458, 29 N. W. 155.

6. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 82 Ill. App. 214; Lavin *v.* Grand Lodge A. O. U. W., 112 Mo. App. 1, 86 S. W. 600. See, however, Hyatt *v.* Legal Protective Assoc., 106 Mo. App. 610, 81 S. W. 470.

consent[7] or the consent of his beneficiary.[8] If, however, the rules of the society impose conditions on the right or mode of withdrawal, these must be observed in order to render the withdrawal effective.[9] A member does not lose his membership by joining another order formed by a group of members who have withdrawn from the society,[10] and a group of members do not, by rebelling and refusing to comply with the laws of the society, *ipso facto* lose their membership therein, in the absence of a provision in its laws to that effect.[11] If a member is entitled, on account of mental incapacity, to avoid a surrender of his certificate of membership, the beneficiary on his death may avoid it on the same conditions.[12]

b. Effect on Property Rights. Those members of a lodge who secede therefrom lose their rights in the funds and property of the lodge,[13] although they constitute a majority of the members.[14]

7. Chaloupka *v.* Bohemian Roman Catholic First Cent. Union, 111 Ill. App. 585; Borgraefe *v.* Supreme Lodge K. & L. H., 26 Mo. App. 218; French *v.* New York Mercantile Exch., 80 N. Y. App. Div. 131, 80 N. Y. Suppl. 312.

Estoppel to deny withdrawal.— A benevolent association is not estopped from asserting that a member has withdrawn from membership, although it has denied his right to withdraw, unless in so doing it has led the member to believe to his prejudice that he is still a member. Borgraefe *v.* Supreme Lodge K. & L. H., 26 Mo. App. 218.

Withdrawal of subordinate lodge see *infra*, I, F, 4.

8. Chaloupka *v.* Bohemian Roman Catholic First Cent. Union, 111 Ill. App. 585; Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607 (where the constitution of the society provides that its members may surrender their certificates); Wendt *v.* Order Germania, 8 N. Y. St. 351.

If the beneficiary has a vested interest in the insurance contract, and has the certificate in his possession, the member cannot defeat his rights by resigning from the society without surrendering the certificate. Conselyea *v.* Supreme Council A. L. H., 3 N. Y. App. Div. 464, 38 N. Y. Suppl. 248.

What constitutes withdrawal.— The fact that a policy-holder in a beneficial order expresses dissatisfaction on account of assessments and an intention to quit the order and not pay any more cannot alone deprive the beneficiary of rights under the certificate. Crockett *v.* Order of Red Cross, 24 Ohio Cir. Ct. 421.

Right to substitute new beneficiary as against original beneficiary see infra, IV, C, 2, c.

9. Domestic Bldg. Assoc. *v.* Jourdain, 110 Ill. App. 197; *In re* Ontario Ins. Act, 31 Ont. 154.

The certificate of membership must be surrendered to effect a cancellation, according to the rules of some societies. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279; Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51.

Notice of withdrawal by a member subsequently dying bars an action for death benefits where the by-laws provide that a member may at any time withdraw by giving notice in writing of an intention to do so and paying all assessments and dues to date, although the company had not assented thereto or erased his name. Cramer *v.* Western New York Masonic Life Assoc., 9 N. Y. Suppl. 356.

Inconsistency of by-laws.— An old by-law of a company paying losses by assessments on its members, prohibiting the withdrawal of a member without the consent of the board of directors, and a new by-law prohibiting such withdrawal without a return of the policy for cancellation are not inconsistent, and both may be enforced. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279.

Waiver of conditions.— The society may waive compliance with conditions of withdrawal prescribed by a by-law. Wendt *v.* Order Germania, 8 N. Y. St. 351.

10. Oates *v.* Supreme Ct. I. O. F., 4 Ont. 535.

11. Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38, 23 Ky. L. Rep. 2276, *semble*.

12. Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

Conditions precedent.— In order to avoid the surrender the beneficiary must offer to pay all assessments due and refund the consideration received by the member on surrender. Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

13. Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627, so holding, although the majority had seceded as a lodge from the central organization, pursuant, however, to charter authority, and the minority had adhered to the central organization, procured a revocation of the charter of the lodge, and formed a separate lodge under the authority of the central organization. And see Kane *v.* Shields, 167 Mass. 392, 45 N. E. 758.

14. Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38, 23 Ky. L. Rep. 2276 (holding that when a schism has occurred in a benevolent association which has united with and assented to the control and supervision of a general organization, and thereafter acquired property by the investment of dues collected from its members while harmony obtained, that faction which has adhered to the laws and usages of the general

4. Suspension and Expulsion[15] — a. Generally. The charter of incorporation or articles of association of a beneficial or fraternal society, or its constitution or by-laws, generally confer power upon it to suspend or expel its members for infractions of its rules or other prescribed offenses. The members are bound by these provisions and cannot complain of a proper exercise of the power,[16] even though in consequence their incidental property rights are forfeited.[17] The power cannot be exercised arbitrarily, however, or without proper cause.[18] If the rules of the society prescribe a fine as a penalty for breach of a particular regulation, an offending member is not ordinarily liable to expulsion;[19] and if the rules provide that if an accused member fails to appear, no trial shall be had, but he may be expelled for contempt, an expulsion after trial of the charges against a non-appearing member is unauthorized.[20] Apart from the power thus expressly conferred, the society has inherent power to suspend or expel its members for limited classes of causes other than those mentioned in its laws.[21] The power of expulsion cannot be delegated to a committee or subordinate branch of the society unless such delegation is authorized by its laws.[22]

organization, although it be a minority of the entire membership, constitutes the true association, and is alone entitled to the use and enjoyment of the property, provided such minority embraces the minimum number necessary to continue the existence of the local organization); Altmann *v.* Benz, 27 N. J. Eq. 331 (holding that where the majority of the members of an unincorporated benevolent association which formed one lodge of a large number belonging to the same order withdrew from the jurisdiction of the grand lodge of the state, surrendered the charter received by the lodge from the grand lodge, and formed a new lodge under the same name, while the remaining members continued in allegiance, and the charter was duly delivered to them, as constituting the lodge, by the grand lodge, the body composed of the members who had not withdrawn was entitled to recover the property of the lodge from the possession of the body formed by the withdrawing members); Gorman *v.* O'Connor, 155 Pa. St. 239, 26 Atl. 379 (holding that where a local division of a benevolent society is, by virtue of its constitution and by-laws, a member of a national organization, a majority present at a meeting of the local division has no power, against the will of the minority present, to renounce allegiance to the national body, and at the same time carry with it the property of the local division; and the fact that the subsequent proceedings of the minority in continuing the organization may have been irregular and in violation of the constitution of the national body does not give the majority any rights in the property of the local division).

15. **Effect of suspension or expulsion of member:** As forfeiting right to benefits see *infra*, IV, I, 2, b. On liability for dues and assessments see *infra*, III, B.

Forfeiture of right to benefits see *infra*, society see *infra*, IV, I.

Suspension of right to benefits as distinguished from suspension of member from society see *infra*, IV, I.

Suspension of subordinate lodge: Generally see *infra*, I, F, 5. As forfeiting member's right to benefits see *infra*, IV, I, 2, a.

16. Peyre *v.* French Zouaves Mut. Relief Soc., 90 Cal. 240, 27 Pac. 191; State *v.* Stevedores', etc., Benev. Assoc., 43 La. Ann. 1098, 10 So. 169.

17. Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400 (holding that the interest of a member in the property of the order accumulated by the payment of annual dues by the members, and his right to participate in its disposition and to be assisted therefrom in case of need or distress, is merely incidental to his membership, and will cease on his ceasing to be a member, and does not constitute any such interest in property as will prevent his expulsion, if he has forfeited his right of membership by reason of his conduct); Moore *v.* National Council K. & L. S., 65 Kan. 452, 70 Pac. 352 (holding that due proceedings, based on proper by-laws of a benevolent society in disciplining its members, constitute due process of law, although they may result in the expulsion of the member and the forfeiting of property rights).

18. Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626. And see Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika *v.* Ross, 117 Ill. App. 247; State *v.* Fraternal Mystic Circle, 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385.

19. Otto *v.* Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

20. Slater *v.* Supreme Lodge K. & L. H., 76 Mo. App. 387.

21. State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125 (offense against duty of member as such); Monette *v.* La Société St. Jean Baptiste, 30 L. C. Jur. 150 [*affirming* 13 Rev. Leg. 454] (insulting or compromising the honor of the society). And see Associations, 4 Cyc. 303; Exchanges, 17 Cyc. 859 note 64.

22. Women's Catholic Order of Foresters *v.* Haley, 86 Ill. App. 330; People *v.* Alpha Lodge No. 1 K. S. F. & I., 13 Misc. (N. Y.)

b. Grounds.[23] The causes for which a member may be suspended or expelled include not only the common-law grounds, but a variety of other acts or omissions on the part of the member which, in the opinion of the society, as expressed in its charter of incorporation or articles of association, and constitution or by-laws, operate directly or indirectly to the injury of the society or its good name.[24]

677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147]; State *v.* Fraternal Mystic Circle, 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385, holding also that to justify a committee or a subordinate branch in exercising the power, it must be expressly and clearly conferred.

23. Estoppel and waiver as to asserting grounds of suspension or expulsion see *infra*, I, E, 4, e.

Validity of by-laws prescribing grounds for suspension or expulsion see *supra*, I, C, 2, b.

24. *New Jersey.*— Radice *v.* Italian-American Christopher Columbus Soc., 67 N. J. L. 196, 50 Atl. 691, holding, however, that the facts did not justify an expulsion under a constitution prescribing that penalty against members who impugn the honor or the name of the society, either in word or deed, or who talk against the society, thus staining its good name and honor.

New York.— Gleiforst *v.* Workingmen's Sick, etc., Ben. Fund, 37 Misc. 221, 75 N. Y. Suppl. 44 (holding, however, that a member of a society who, just before an election therein, distributed circulars criticizing the officers of the society and proposing an opposite ticket cannot be expelled therefor, where the constitution of the society authorizes no such action; and that a pledge in the ritual of the society that a member will not bring charges against the society, its officers and members, in any public manner, before exhausting the means of redress given by the constitution of the society, is not violated by a distribution among the members, just before an election, of circulars criticizing the officers); People *v.* Alpha Lodge No. 1 K. S. F. & I., 13 Misc. 677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147] (where it is said that slandering the society is cause for expulsion).

Ohio.— State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125, holding that where membership is limited to those who have complied with their duties as catholics, a member may be expelled on charges that he is an idler, a drunkard, that he uses blasphemous language in the presence of his wife and children, and that he has been convicted of abusing his family.

Pennsylvania.— Franklin Ben. Assoc. *v.* Com., 10 Pa. St. 357 (holding, however, that a by-law providing that "no soldier of a standing army, seaman, or mariner, shall be capable of admission, and any member who shall voluntarily enlist as a soldier, or enter on board of any vessel as a seaman or mariner, shall thenceforth lose his membership," if valid (see *supra*, page 15, note 29), does not authorize the expulsion of a member who joined a volunteer corps raised in another state, which corps tendered their services to the United States under the act of 1846, and were accepted and mustered into the service, such member continuing in such service in Mexico until the expiration of his term); Crow *v.* Capital City Council, 26 Pa. Super. Ct. 411 (holding that where the by-laws of a beneficial association provide that any member "who shall publicly attack or scandalize the national council," etc., may "be expelled from the order," a member may be expelled where he has refused to obey the supreme law of the order, urged secession of members, attempted to bring discredit on the order and to bring the national council into disrepute, attempted nullification of the authority of the national council, and encouraged insubordination and rebellion among members).

Texas.— Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Civ. App. 1905) 91 S. W. 834, holding that a provision of the constitution of an association of locomotive engineers authorizing the expulsion of members for unbecoming conduct is of itself proper, but cannot lawfully be so construed as to sanction the expulsion of a member on the ground that he has gone on the witness' stand and testified as an expert against a railroad company.

Canada.— Monette *v.* La Société St. Jean Baptiste, 30 L. C. Jur. 150 [*affirming* 13 Rev. Lég. 454] (holding that a benefit society may expel one of its members where, by his scandalous conduct, he has insulted or compromised its honor); Durantaye *v.* La Société St. Ignace, 13 L. C. Jur. 1 (holding that expulsion is justified where the member obtained admission by a fraudulent misrepresentation as to his age).

See 6 Cent. Dig. tit. "Beneficial Associations," § 13.

Bringing suit against society.— Under a constitution providing that members who "knowingly" violate the rules of the order shall be expelled, one who has unwittingly brought a suit against the association while an appeal on his case is pending in a superior lodge is not liable to expulsion for violation of a rule that no member shall bring a civil action against it until all remedies provided by the association have been exhausted. Glover *v.* Lodge, 1 Del. Co. (Pa.) 317. And a member cannot be expelled for proceeding at law against the society, where he has been denied redress by it. Worrilow's Appeal, 3 Walk. (Pa.) 161 [*affirming* 1 Del. Co. 409].

Crime.— A member may be expelled who has been convicted of crime. *In re* Butchers' Ben. Assoc., 35 Pa. St. 151. And see State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125. So a member may

Beneficial or fraternal societies may, and commonly do, make the failure of a member to pay legal dues, fines, and assessments in due season a ground of suspension or expulsion.[25] Where an article of the by-laws of a benefit society imposes a general penalty for all infractions of the by-laws, and in another subsequent article a special penalty is imposed for a special infraction, the only penalty that can be applied in the case of the special infraction is the special penalty.[26] If a member was sane when he became such, the fact that he was insane when he committed the acts for which he was expelled does not invalidate the sentence.[27]

c. Proceedure — (I) *IN GENERAL.*[28] In suspending or expelling a member the procedure prescribed by the society's charter of incorporation or articles of asso-

be expelled for embezzling the society's moneys under a provision in its constitution authorizing expulsion of members guilty of "vicious and indecent practices injurious to civil society." Com. *v.* Kensington German Ben. Soc., 17 Phila. (Pa.) 277. However, a by-law authorizing the suspension of a member on conviction for felony does not authorize an expulsion merely because he is engaged in a business declared a felony by statute. Glardon *v.* Supreme Lodge K. P. W., 50 Mo. App. 45.

Drunkenness.—A member may be expelled for drunkenness. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597; State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125. However, drunkenness on a single occasion will not justify expulsion under a by-law imposing that penalty for "unfaithful, immoral, or unworthy behavior generally." Com. *v.* Young Men's Benev. Assoc., 1 Montg. Co. Rep. (Pa.) 101.

False accusations againt co-member, and libel and slander.—A provision in the constitution of a benefit society that if a member make "to the chief ranger, or to the public, an accusation against a sister that shall be false or malicious, she shall be suspended or expelled," is not void as having nothing to do with the transaction of the business of a fraternal insurance society (People *v.* Women's Catholic O. F., 162 Ill. 78, 44 N. E. 401); but a constitutional provision that a member may be expelled for "immoral conduct," or for making to the "lodge or to its dictator, any accusation against a member which shall prove to be false and malicious," does not authorize expulsion for uttering false and malicious accusations against a member, where such accusations are not made to the lodge or to its dictator (Mulroy *v.* Supreme Lodge K. H., 28 Mo. App. 463). It has been held that a member of a mutual benefit society cannot be expelled for slandering a fellow member. People *v.* Alpha Lodge, No. 1 K. S. F. & I., 13 Misc. (N. Y.) 677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147]. In any event the discipline to which a member is liable for the offense of libeling another member can be exerted only in cases where the libel is without any reasonable cause. Allnutt *v.* Subsidiary High Court, 62 Mich. 110, 28 N. W. 802.

Fraudulently obtaining benefits.—A member who feigns illness and fraudulently obtains sick benefits may be expelled. Slater *v.* Supreme Lodge K. & L. H., 88 Mo. App. 177; Society for Visitation of Sick, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139. So where the articles authorize the expulsion of a member for scandalous or improper proceedings which might injure the reputation of the society, it is a good cause of expulsion that a member claiming relief from the society altered the amount of a physician's bill from four dollars to forty, and presented the bill to the president as the basis of his claim. Com. *v.* Philantbropic Soc., 5 Binn. (Pa.) 486.

Liquor dealing.— The society may purge itself of members who engage in the liquor business (Noel *v.* Modern Woodmen of America, 61 Ill. App. 597); but members who entered the business when the by-laws permitted them to do so must be given a reasonable time in which to abandon the occupation and withdraw their investments therefrom (Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340). The applying for a license as a dram-shop keeper is a petitioning for the establishment of a saloon for the sale of intoxicants, within such terms as used in a certificate of membership to a temperance benefit society. State *v.* Temperance Benev. Assoc., 42 Mo. App. 485.

25. Simek *v.* Bohemian Slavonian Benev. Soc. Lodge No. 86, 118 Mich. 81, 76 N. W. 124.

Non-payment of an illegal fine affords no ground for suspension. Erd *v.* Bavarian Nat. Aid, etc., Assoc., 67 Mich. 233, 34 N. W. 555.

Necessity of notice: Of dues and assessments see *infra*, III, C. Of arrears for dues and assessments see *infra*, I, E, 4, c, (II), (B).

Non-payment, independent of formal suspension or expulsion, as forfeiting right to benefits see *infra*, IV, I, 2, d.

26. Desmarais *v.* La Société de Bienfaisance, etc., 12 Rev. Lég. 198.

27. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597.

Right to proceed against insane member see *infra*, I, E, 4, c, (I).

28. **Estoppel or waiver as to asserting validity of suspension or expulsion** see *infra*, I, E, 4, e.

Necessity of affirmative action by society to effect suspension or expulsion so as to forfeit right to benefits see *infra*, IV, I, 3, a.

Power to suspend or expel members see *supra*, I, E, 4, a.

Validity of action taken on Sunday see SUNDAY.

ciation or its constitution and by-laws must be strictly followed.[29] If the constitution of the society requires the manner of suspension to be detailed in the by-laws of its local lodges, the enactment of such a by-law is a prerequisite to the exercise of the power of suspension by a lodge.[30] If no mode of procedure is prescribed by the laws of the society, the tribunal having original jurisdiction to suspend or expel members may adopt such mode of trial as it pleases, subject only to the implied limitation that it must be fair.[31] Such tribunal may accordingly order a trial before a special committee appointed to take the evidence and report the same to it with their findings and recommendations.[32] Ordinarily a member is entitled to a trial of the charges against him.[33] The suspension or expulsion must be based on evidence produced before the trial tribunal,[34] and the decision is usually to be determined by ballot.[35] The charges must be stated definitely

29. Women's Catholic O. F. *v.* Haley, 86 Ill. App. 330; District Grand Lodge No. 4 O. K. S. B. *v.* Menken, 67 Ill. App. 576; People *v.* Alpha Lodge No. 1 K. S. F. & I., 13 Misc. (N. Y.) 677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147]; Foxhever *v.* Order of Red Cross, 24 Ohio Cir. Ct. 56; Woodmen of World *v.* Gilliland, 11 Okla. 384, 67 Pac. 485.

30. District Grand Lodge No. 4 *v.* Cohn, 20 Ill. App. 335, holding that a mere custom of procedure could not take the place of adoption of a by-law therefor.

31. Spilman *v.* Supreme Council H. C., 157 Mass. 128, 31 N. E. 776.

32. Spilman *v.* Supreme Council H. C., 157 Mass. 128, 31 N. E. 776.

Eligibility of committeemen.— In a proceeding to expel a member of a mutual benefit society, a brother of the person who preferred the charges cannot sit on the trial committee. People *v.* Alpha Lodge No. 1 K. S. F. & I., 13 Misc. (N. Y.) 677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147].

Action of society on report of committee.— A provision of the constitution as to the order in which votes shall be taken on questions arising from the report and as to what question shall be voted on must be complied with. And where the report was not accompanied by a recommendation, by the journal of the committee's proceedings, or by the testimony received, as required by the constitution of the association, and a motion to suspend the member was made without reference to any recommendation by the committee, and was postponed without action, there was no valid suspension. Supreme Lodge K. P. W. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609. However, a provision of the constitution of a society that a ballot shall not be reconsidered does not apply to a ballot which has been declared void by a court. Doljanin *v.* Austrian Benev. Soc., 137 Cal. 165, 69 Pac. 908.

Delegation of power of suspension or expulsion see *supra*, I, E, 4, a.

33. Slater *v.* Supreme Lodge K. & L. H., 76 Mo. App. 387; Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538.

In the case of suspension or expulsion for non-payment of dues or assessments, the member is entitled to a trial before sentence (Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. (Pa.) 141), unless the society has adopted rules for immediate forfeiture of membership in case of non-payment (Supreme Conclave K. D. *v.* Warwick, 110 Ga. 388, 35 S. E. 645, holding that where the by-laws authorize the commander to declare a member suspended for non-payment of assessments, there need be no trial by the lodge; all that is necessary is a report to the order of the member's delinquency, a vote of suspension by the lodge, and an announcement thereof by the presiding officer. And see Drum *v.* Benton, 13 App. Cas. (D. C.) 245). Self-executing provisions of laws of society for suspension or expulsion as ground for forfeiture of right to benefits see *infra*, IV, I, 3, a.

Right to opportunity for defense see *infra*, I, E, 4, c, (II).

34. Modern Woodmen of America *v.* Deters, 65 Ill. App. 368; Zangen *v.* Krakauer Young Men's Assoc. No. 1, 26 Misc. (N. Y.) 332, 56 N. Y. Suppl. 1052, holding that evidence of statements of witnesses who were not brought before the committee as a body but who talked with them as individuals is insufficient as a basis for expulsion. And see Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789, [*affirming* 30 Ill. App. 98].

35. Hoeffner *v.* Grand Lodge G. O. H., 41 Mo. App. 359 (holding that where the rules provided that a vote for the expulsion of a member should be taken by written ballots, a judgment of expulsion entered in pursuance of a vote taken by casting white or black balls was void); Grand Lodge A. O. U. W. *v.* Brand, 29 Nebr. 644, 46 N. W. 95; Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. (Pa.) 141; Supreme Lodge K. H. *v.* Wickser, 72 Tex. 257, 12 S. W. 175 (holding that where the laws of the association require the payment of all assessments within thirty days after the date of the notice thereof on penalty of suspension, the time of which is to be fixed by vote of the association, an order of an officer of the association suspending a member for non-payment of an assessment but without the required vote is inoperative).

Vote on report of trial committee see *supra*, note 32.

and specifically,[36] and it is frequently provided that the accused member shall be served with a copy of them.[37] So the findings must definitely and specifically show the commission of the offense charged.[38] The action of an officer in suspending a member for non-payment of dues should be made a matter of record.[39] Proceedings for expulsion are quasi-judicial, and where the local body which under the by-laws of the association constitutes the court acquires jurisdiction, a judgment pronounced by it in good faith is binding.[40] A judgment of suspension or expulsion may as a rule be rendered against a member who fails to appear;[41] and proceedings for forfeiture of membership may be taken against insane as well as sane members.[42] The accused member is generally given the right of appeal from a judgment of suspension or expulsion,[43] and a reversal of the judgment operates as a reinstatement of the member.[44]

(II) *Notice and Opportunity For Defense*[45] — (A) *In General.* Ordinarily before a member can be suspended or expelled he must be given an oppor-

36. Allnutt *v.* Subsidiary High Court, 62 Mich. 110, 28 N. W. 802 (holding that a complaint charging a member with defamation, without naming the injured person or giving details of the alleged defamation, is insufficient); Zangen *v.* Krakauer Young Men's Assoc. No. 1, 26 Misc. (N. Y.) 332, 56 N. Y. Suppl. 1052 (holding that a charge that a member, when elected, had been affected with a chronic disease, was not sufficiently definite); Com. *v.* German Mut. Support, etc., Soc., 15 Pa. St. 251 (holding that a charge that a member "had assisted, as president of the society, in defrauding the society out of the sum of fifty cents," and had been guilty of "defaming and injuring the same in public taverns," is not sufficiently definite). See, however, Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626 (holding that where a member has actual notice of the particular charge for which it is sought to expel him, such charge need not be formally stated); Kelly *v.* Grand Circle W. W., 40 Wash. 691, 82 Pac. 1007 (holding that where the charges in the report of an investigating committee appointed to report on the conduct of a member accused of slandering others and of making threats to use the funds of the lodge illegally were general that the accused was making threats to use the funds of the lodge regardless of the right so to do, and of slandering several members of the lodge and the grand officers of the order, the lodge was authorized to put accused on trial pursuant to the by-laws).

37. Erd *v.* Bavarian Nat. Aid, etc., Assoc., 67 Mich. 233, 34 N. W. 555; Supreme Lodge K. P. W. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609; Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425; Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626.

If the rules do not require a copy of the charges to be served, failure to do so is not fatal to the proceedings. State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125.

38. Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36; Schweiger *v.* Voightlander Ben. Assoc. No. 1, 13 Phila. (Pa.) 113, holding that the commission of an offense cannot rest on inference alone.

39. Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71 (holding that where the by-laws of a beneficial association require that a record of the suspension of a member shall be made on the books of the order, such record must state jurisdictional and other facts in accordance with the rules of the order on which the suspension was made in order to forfeit the member's rights to benefits); Seehorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949 (holding that the action should be evidenced in some other way than by the officer's mere oral declaration).

40. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597.

41. Pfeiffer *v.* Weishaupt, 13 Daly (N. Y.) 161; Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626, holding that a member who defaults on a hearing may be expelled on evidence tending to establish his guilt. See, however, Slater *v.* Supreme Lodge K. & L. H., 76 Mo. App. 387.

42. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597; Pfeiffer *v.* Weishaupt, 13 Daly (N. Y.) 161. See, however, Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789 [*affirming* 30 Ill. App. 98]; Hoeffner *v.* Grand Lodge G. O. H., 41 Mo. App. 359; Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832.

Insanity as excusing misconduct see *supra*, I, E, 4, b.

43. Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36, holding that a grand lodge had power to entertain an appeal from a vote of suspension, although not prosecuted as prescribed by the constitution.

Notice of hearing on appeal see *infra*, I, E, 4, c, (II).

44. Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36. And see Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428; Marck *v.* Supreme Lodge K. H., 29 Fed. 896.

45. **Validity of by-law authorizing suspension or expulsion without notice and opportunity for defense** see *supra*, I, C, 2, b.

tunity to present a defense.[46] Consequently the member must be given notice of the proceeding for suspension or expulsion, the charges against him, and the time and place of hearing,[47] even though the rules of the society do not provide for

46. *Illinois.*—Supreme Lodge A. O. U. W. *v.* Zuhlke, 30 Ill. App. 98 [*affirmed* in 129 Ill. 298, 21 N. E. 789].

Michigan.—Erd *v.* Bavarian Nat. Aid, etc., Assoc., 67 Mich. 233, 34 N. W. 555.

Missouri.— State *v.* Temperance Benev. Assoc., 42 Mo. App. 485; Ludowiski *v.* Polish Roman Catholic St. Stanislaus Kostka Benev. Soc., 29 Mo. App. 337.

New York.— Wachtel *v.* Noah Widows', etc., Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478 [*affirming* 60 How. Pr. 424 (*affirming* 9 Daly 476)]; Downing *v.* St. Columba's R. C. T. A. B. Soc., 10 Daly 262; Simmons *v.* Syracuse, etc., Benev. Soc., 10 N. Y. Suppl. 293; Fritz *v.* Muck, 62 How. Pr. 69.

Pennsylvania.— Com. *v.* German Mut. Support, etc., Soc., 15 Pa. St. 251.

Rhode Island.— Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626.

Canada.— Gravel *v.* L'Union St. Thomas, 24 Ont. 1; Beland *v.* L'Union St. Thomas, 19 Ont. 747.

See 6 Cent. Dig. tit. "Beneficial Associations," §§ 14, 15.

47. *Illinois.*— Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789 [*affirming* 30 Ill. App. 98]; Women's Catholic O. F. *v.* Haley, 86 Ill. App. 330; Modern Woodmen of America *v.* Deters, 65 Ill. App. 368.

Massachusetts.— See Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

Missouri.— Sechorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949; Slater *v.* Supreme Lodge K. & L. H., 76 Mo. App. 387; Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538; State *v.* Temperance Benev. Assoc., 42 Mo. App. 485; Ludowiski *v.* Polish Roman Catholic St. Stanislaus Kostka Benev. Soc., 29 Mo. App. 337.

New Jersey.— Supreme Lodge K. P. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609.

New York.— Wachtel *v.* Noah Widows', etc., Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478 [*affirming* 60 How. Pr. 424 (*affirming* 9 Daly 476)]; Downing *v.* St. Columba's R. C. T. A. B. Soc., 10 Daly 262; Fay *v.* Supreme Tent K. M., 38 Misc. 427, 77 N. Y. Suppl. 994; Zangen *v.* Krakauer Young Men's Assoc., 26 Misc. 332, 56 N. Y. Suppl. 1052; People *v.* Independent Order Ahavas Israel, 13 Misc. 426, 34 N. Y. Suppl. 675; Simmons *v.* Syracuse, etc., Benev. Soc., 10 N. Y. Suppl. 293.

Pennsylvania.— Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425; Com. *v.* German Mut. Support, etc., Soc., 15 Pa. St. 251.

Rhode Island.— Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626.

Canada.— Beland *v.* L'Union St. Thomas, 19 Ont. 747, holding that notice to an intemperate member directing him to amend his conduct or be subject to expulsion did not dispense with notice of an intention to move for his expulsion for intemperance.

See 6 Cent. Dig. tit. "Beneficial Associations," § 14.

Effect of failure of member to notify society of change of residence.—Although an article of a beneficial association provides that a member changing his residence shall give notice thereof to the secretary, and that on failure so to do he shall be liable to a fine, such failure does not relieve the society from the duty of notifying the member before expulsion. Wachtel *v.* Noah Widows', etc., Ben. Soc., 84 N. Y. 28, 38 Am. Rep. 478 [*affirming* 60 How. Pr. 424 (*affirming* 9 Daly 476)]; Zangen *v.* Krakauer Young Men's Assoc., 26 Misc. (N. Y.) 332, 56 N. Y. Suppl. 1052.

Effect of prior expulsion from subordinate lodge.— Under the constitution of the superior body of a beneficial association guaranteeing a member against whom charges have been preferred notice and a fair hearing before expulsion, except when such member has been expelled from the subordinate lodge of which he was a member, a member expelled from a subordinate lodge may be expelled from the supreme body without notice. Pfeiffer *v.* Weishaupt, 13 Daly (N. Y.) 161.

In the case of suspension or expulsion for non-payment of dues and assessments, the member is entitled to notice (Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. (Pa.) 141), unless the society has adopted rules providing for immediate forfeiture of membership for non-payment (Supreme Conclave K. D. *v.* Warwick, 110 Ga. 388, 35 S. E. 645, holding that where the by-laws authorize the commander to declare a member suspended for non-payment of assessments, all that is required is a report to the order of his delinquency and affirmative action thereon by the lodge), in which case, if the member has been given prior notice of arrears (see *infra*, I, E, 4, c, (II), (B)), he may be dropped from membership without further notice (Drum *v.* Benton, 13 App. Cas. (D. C.) 245. And see L'Union St. Joseph *v.* Lapierre, 4 Can. Sup. Ct. 164). Self-executing rules for suspension or expulsion on nonpayment of dues and assessments so as to forfeit right to benefits see *infra*, IV, I, 3, a.

Notice to insane member.— Where the laws of a benefit society do not clearly authorize jurisdiction to try an insane member on a notice which has been merely addressed and deposited in the post-office, his expulsion on such notice is ineffectual. Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832.

notice.[48] And by the rules of some societies additional notices are required to be given.[49] The notice should specify the time when[50] and the place where[51] the action is proposed to be taken, and state that the suspension or expulsion is one of the objects of the meeting so specified.[52]

(B) *Notice of Arrearage of Assessments or Dues.*[53] The laws of the society frequently require that before a member can be suspended or expelled for non-payment of dues and assessments he must be notified that he is in arrears.[54]

48. Supreme Lodge A. O. U. W. *v.* Zuhlke, 30 Ill. App. 98 [*affirmed* in 129 Ill. 298, 21 N. E. 789]; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. (Pa.) 141; Gravel *v.* L'Union St. Thomas, 24 Ont. 1. See, however, State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125.

49. See cases cited *infra*, this note.

Notice of intention to appoint trial committee.— The suspension of a member is without jurisdiction where he was not served, as required by the constitution of the association, with a notice that the matter would be taken up at the next session of the lodge, when a committee to investigate the charges would be appointed, a notice commanding him to appear before a committee which had already been appointed and answer the charge being insufficient. Supreme Lodge K. P. W. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609.

Notice of action on report of committee.— Under the constitution of a society providing for notice to a member only of the preference of a charge and of the verdict of the committee, and declaring that in the absence of exceptions thereto in two weeks the society shall ballot on the penalty, he not to be present during the ballot, no further notice to him is necessary, in the absence of exceptions by him. Doljanin *v.* Austrian Benev. Soc., 137 Cal. 165, 69 Pac. 908.

Additional notice on member's failure to appear.—A provision of the constitution of a beneficial society that if defendant fails to appear after written notice of proceedings for expulsion, he shall be notified personally by messenger, however unreasonable, must be complied with in the case of a member who is out of the county. Zangen *v.* Krakauer Young Men's Assoc. No. 1, 26 Misc. (N. Y.) 332, 56 N. Y. Suppl. 1052.

Notice of expulsion.— Where the constitution of a beneficial order directs that the secretary shall serve a written notice on all expelled members, either in a registered letter or personally, notifying them of their expulsion and the reasons therefor, the expulsion is ineffectual in the absence of notice thereof. Wanek *v.* Supreme Lodge Bohemian Slavonic Benev. Soc., 84 Mo. App. 185. Although the by-laws require notice of expulsion to be sent by registered letter and it is sent by unregistered letter, yet it is sufficient if received and acted upon. Simek *v.* Lodge No. 86 Bohemian Slavonian Benev. Soc., 118 Mich. 81, 76 N. W. 124. Where proceedings for the expulsion of a member were taken without notice to her to appear and defend, as required by the by-laws, she could not be required to take an appeal from the expulsion order until notice of conviction and subsequent expulsion had been received; and a notice of expulsion and a tender of assessments, dues, etc., to the member's sister, who was not shown to have been authorized to act in her behalf, was inoperative to terminate the member's rights in the association. Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

Notice of hearing on appeal.— Under by-laws of a beneficial order which provide that a member accused of having become intemperate after joining the order shall, before the suspension, have full opportunity for defense, and may be represented by counsel, a suspension amounting to an expulsion is illegal where it was made without notice to the member of the hearing, and where his appeals to the higher courts of the order were determined by them without any notice to him of the hearings. Fay *v.* Supreme Tent K. M., 38 Misc. (N. Y.) 427, 77 N. Y. Suppl. 994.

50. Seehorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949; Supreme Lodge K. P. W. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609, holding that a notice which erroneously states the time at which a report of the committee investigating charges against him will be made is insufficient. And see cases cited *supra*, note 46 *et seq.*

51. Seehorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949. And see cases cited *supra*, note 46 *et seq.*

52. People *v.* Alpha Lodge No. 1 K. S. F. & I., 13 Misc. (N. Y.) 677, 35 N. Y. Suppl. 214 [*affirmed* in 8 N. Y. App. Div. 591, 40 N. Y. Suppl. 1147].

53. **Notice of assessment** see *infra*, III, C, 2.

Notice of intended suspension or expulsion for non-payment of dues and assessments see *supra*, note 47.

Self-executing provisions for suspension or expulsion on non-payment of dues and assessment so as to forfeit right to benefits see *infra*, IV, I, 3, a.

54. Murphy *v.* Independent Order S. & D. J. A., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111; Wachtel *v.* Noah Widows', etc., Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478 [*affirming* 60 How. Pr. 424 (*affirming* 9 Daly 476)]; Weinberg *v.* Independent Order Ahoras Israel, 36 Misc. (N. Y.) 205, 73 N. Y. Suppl. 150; Odd Fellows' Protective Assoc. *v.* Hook, 9 Ohio Dec. (Reprint) 89, 10 Cinc. L. Bul. 391.

It has been held, however, that a member

d. Reinstatement.[55] A member who has been illegally suspended or expelled is entitled to reinstatement, and may appeal to the courts to obtain that relief.[56] If, however, the suspension or expulsion is not illegal, the society may refuse to reinstate him,[57] or impose such lawful conditions on his reinstatement and prescribe such formalities therefor as it sees fit, in which case he is not entitled to be restored to membership until those conditions and formalities are complied with and observed.[58] A reinstatement obtained by the member through fraudulent

who admits that he is in arrear for six months' contributions is not entitled to prior notice before he can be expelled for non-payment of dues. L'Union St. Joseph *v.* Lapierre, 4 Can. Sup. Ct. 164.

Sufficiency of notice.— The mere fact that but thirteen days intervene between the giving of the first and the second notice of an assessment by a benefit association, instead of fifteen days, as provided for by the articles of association, does not invalidate the member's suspension for non-payment after the expiration of the full period allowed by the articles for the payment of assessments. Wolf *v.* Michigan Masonic Mut. Ben. Assoc., 108 Mich. 665, 66 N. W. 576. Notice may be given by mail. Bettenhasser *v.* Templars of Liberty of America, 58 N. Y. App. Div. 61, 68 N. Y. Suppl. 505. See, however, Wachtel *v.* Noah Widows', etc., Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478 [*affirming* 60 How. Pr. 424 (*affirming* 9 Daly 476)]; Weinberg *v.* Independent Order Ahoras Israel, 36 Misc. (N. Y.) 205, 73 N. Y. Suppl. 150.

55. **Reinstatement after forfeiture not resulting from formal suspension or expulsion** see *infra*, IV, I, 4.

Reinstatement by superior officers on appeal by suspended or expelled member see *supra*, I, E, 4, c, (I).

Reinstatement of deceased member as entitling beneficiary to benefits see *infra*, IV, I, 4, a.

Reversal of judgment of suspension or expulsion as reinstatement see *supra*, I, E, 4, c, (I).

56. See *infra*, V, B, 1.

57. Saerwein *v.* Jamour, 32 Misc. (N. Y.) 701, 65 N. Y. Suppl. 501.

58. *Colorado.*— Brun *v.* Supreme Council A. L. H., 15 Colo. App. 538, 63 Pac. 796.

Illinois.— Sherret *v.* Royal Clan O. S. C., 37 Ill. App. 446, holding that under a provision that a member may be reinstated after suspension for non-payment of dues on passing a medical examination showing him to be sound in body and paying all arrears of dues, a tender of dues by a person on his sick bed, on the day of his death, is ineffectual for any purpose.

Massachusetts.— McLaughlin *v.* Supreme Council C. K. A., 184 Mass. 298, 68 N. E. 344, rule requiring a member, as a condition of reinstatement, to furnish an examiner's certificate, as prescribed for the original application, which must be made on a certain form, and transmitted by the local examiner, sealed, to the supreme medical examiner.

New York.— Saerwein *v.* Jamour, 32 Misc. 701, 65 N. Y. Suppl. 501.

Texas.— Sovereign Camp W. W. *v.* Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553, holding that where the laws of a mutual benefit order provide that a suspended member can be reinstated only on paying "all arrearages of every kind," and that the failure to receive a notice of assessment shall not relieve a member from forfeiture for non-payment thereof, a member who has been regularly suspended for non-payment of one month's assessment is not entitled to reinstatement after another assessment has become due, without paying the latter, although he had not received notice that it was due; and that a member cannot claim reinstatement without paying assessments levied while he was suspended, although during such time he was not entitled to the benefits of the order.

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 80 Pac. 375, 1110, holding that a rule providing that a member who has been suspended for more than six months must apply for membership on the same terms and conditions as any person who has not been a member, except that he shall not be required to be again formally introduced in the ritual, does not exempt such member from taking an obligation, required by the order as a condition precedent to membership, agreeing to pay all dues and assessments, and that he is in sound health.

Canada.— Société 'Bienveillante St. Roch *v.* Moisan, 7 Quebec Q. B. 128 [*reversing* 12 Quebec Super. Ct. 189].

See 6 Cent. Dig. tit. "Beneficial Associations," §§ 18, 19.

Compliance with the conditions restores membership (Van Houten *v.* Pine, 38 N. J. Eq. 72, holding that where the by-laws provide that a member who has been dropped for non-payment of an assessment may be reinstated on presenting a sufficient excuse, he cannot, if the excuse presented is sufficient, be denied reinstatement because he is in precarious health), although subsequently and before formal reinstatement the member becomes sick (Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369, holding that where the by-laws provide that any member suspended for non-payment of dues may be reinstated by the supreme secretary, if in good health, by payment of all arrearages within sixty days from the date of suspension, it is the duty of the officer to reinstate a member who makes payment within such time while in good health, although when thereafter called on for a health certificate he is sick and unable to furnish

misrepresentations is not binding on the society,[59] but in the absence of fraud the society may be bound by the action of its clerk in reinstating a member who is not entitled to that relief.[60]

e. Estoppel and Waiver.[61] The right to suspend or expel a delinquent or offending member,[62] and the right to deny the regularity and validity of the reinstatement of a member who has been suspended or expelled,[63] may be lost to the society by estoppel or waiver. So a member who has been suspended or expelled may, by estoppel or waiver, lose the right to assert that the society had no power

it), or dies (Sovereign Camp W. W. *v.* Grandon, 64 Nebr. 39, 89 N. W. 448, where the constitution provided for suspension of a member, and for his reinstatement, if in good health, on payment of arrears, and that if the delinquent did not appear in person, he should send a certificate of good health, waiving his rights of reinstatement if such certificate should be untrue, and it was held that where a suspended member signed the required certificate and mailed it, he complied with the requirements, although it did not reach the clerk until after his death. And see Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428).

59. Grand Lodge A. O. U. W. *v.* Cressey, 47 Ill. App. 616.

60. Frame *v.* Sovereign Camp W. W., 67 Mo. App. 127, where a by-law of a benefit society provided a severe penalty against its clerk, who was authorized to receive arrearages from delinquent members and reinstate them, if he should do so where the member's health was impaired or he was known by him to use intoxicants, and it was held that if the clerk, with knowledge of the condition of a suspended member, received his arrearages and reinstated him, his action was binding on the society.

61. Estoppel by judgment see JUDGMENTS.

Estoppel to assert forfeiture based on suspension or expulsion see *infra*, IV, J.

Waiver of forfeiture based on suspension or expulsion see *infra*, IV, J.

62. People *v.* Sciacca Assoc., 56 N. Y. App. Div. 341, 67 N. Y. Suppl. 751, holding that where a beneficial society, after the imposition on a member of a fine, accepts membership dues from him, it waives its right to suspend him for refusal to pay such fine.

However, the fact that a beneficial society, with knowledge of the fact that a member was engaged in a business prohibited by a by-law of the order, continued to assess him for death losses, does not estop the order from expelling him for a violation of such by-law. State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456. And where a member made false statements as to his age in his application for membership, and has never stated his true age, the fact that pending an investigation of the matter by the society, which investigation is carried on with reasonable diligence and results in his expulsion, assessments are levied against and paid by him, does not constitute a waiver of the right to expel him for his false statements, where, up to the time of his expulsion, the society has no legal proof that his age was falsely stated. Preuster *v.* Supreme Council O. C. F., 135 N. Y. 417, 32 N. E. 135 [*affirming* 60 Hun 324, 15 N. Y. Suppl. 41]. Nor does the collection of dues by a local secretary of a benefit society, after knowledge of breach of a condition avoiding the certificate, constitute a waiver of the breach, unless the secretary had power to waive a breach. State *v.* Temperance Benev. Assoc., 42 Mo. App. 485.

63. Gaige *v.* Grand Lodge A. O. U. W., 48 Hun (N. Y.) 137 (holding that a provision of a charter that a member who has been suspended because of failure to pay dues may, by application in writing, be restored to membership by a majority vote of the subordinate lodge, may be waived by the lodge as to the written or preliminary application, and that a resolution of the lodge that two members suspended be restored on payment of dues and assessments charged against them is a waiver of such provision); Hoffman *v.* Supreme Council A. L. H., 35 Fed. 252 (where the society, after a member had been suspended for delinquency in his assessments, continued to make calls on him for subsequent dues, and to receive the amounts called for, and the local council, on full hearing of his application for reinstatement, although not acting in all respects in conformity with the rules of the institution, granted such application, and it was held that the society was estopped to deny that the member was in good standing).

Acceptance of arrearages by the society does not waive compliance with other conditions or formalities prescribed by the by-laws for reinstatement or estop the society to assert non-compliance therewith (Rice *v.* Grand Lodge A. O. U. W., 92 Iowa 417, 60 N. W. 726), especially where at the time of such acceptance the society calls the member's attention to the necessity of complying with such formalities and conditions (Marshall *v.* Grand Lodge A. O. U. W., 133 Cal. 686, 66 Pac. 25; Rice *v.* Grand Lodge A. O. U. W., 103 Iowa 643, 72 N. W. 770; Adams *v.* Grand Lodge A. O. U. W., 66 Nebr. 389, 92 N. W. 588) and subsequently tenders back the amount so received (Marshall *v.* Grand Lodge A. O. U. W., *supra*).

Facts held not to amount to estoppel or waiver see Grand Lodge A. O. U. W. *v.* King, 10 Ind. App. 639, 38 N. E. 352; McLaughlin *v.* Supreme Council C. K. A., 184 Mass. 298, 68 N. E. 344; Supreme Lodge K. H. *v.* Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084.

to suspend or expel him,[64] that the suspension or expulsion is invalid,[65] or that the procedure and formalities prescribed therefor were not observed.[66]

5. Wrongful Exclusion From Membership.[67] If the society wrongfully refuses to acknowledge a member as such, and excludes him from the rights and privileges to which members are entitled, the member has a right of action therefor.[68] But exclusion from membership is not wrongful where the member has failed to pay his dues in accordance with the laws of the society;[69] nor where a member who has been expelled by the society but who has been reinstated by decree of court fails to present the decree in a regular manner to the officers of the society and demand reinstatement.[70]

F. Superior, Inferior, and Affiliated Bodies — 1. In General. Beneficial or fraternal societies, whether incorporated or voluntary, commonly consist of a central superior body[71] and numerous subordinate local bodies organized pursuant

Power of subordinate lodge to waive formalities and conditions of reinstatement see *infra*, IV, J, 3, b.

64. Sassenscheidt *v.* Frescoe Painters' Benev., etc., Union, 1 N. Y. City Ct. 8, as where the accused member appears before the society, and submits to its jurisdiction by taking part in the trial.

65. See cases cited *infra*, this note.

Acquiescence in the suspension or expulsion defeats the member's right to attack it. Grand Lodge A. O. U. W. *v.* Scott, 3 Nebr. (Unoff.) 845, 851, 97 N. W. 637, 93 N. W. 190. And see Bachmann *v.* New Yorker Deutcher Arbiter Bund, 64 How. Pr. (N. Y.) 442; Foxhever *v.* Order of Red Cross, 24 Ohio Cir. Ct. 56. It has been held that the mere failure to apply for reinstatement does not constitute acquiescence (Grand Lodge A. O. U. W. *v.* Scott, *supra*); but if, in addition to this omission, the member fails to tender arrearages (Glardon *v.* Supreme Lodge K. P. W., 50 Mo. App. 45) or dues subsequently accruing (Lavin *v.* Grand Lodge A. O. U. W., 112 Mo. App. 1, 86 S. W. 600; Glardon *v.* Supreme Lodge K. P. W., *supra*), or if, having paid arrearages, the society returns the sum on the ground of his suspension and he accepts it (Hand *v.* Supreme Council R. A., 44 N. Y. App. Div. 484, 60 N. Y. Suppl. 808 [*affirmed* in 167 N. Y. 600, 60 N. E. 1112]), he cannot afterward assert the invalidity of the suspension or expulsion.

66. Moore *v.* National Council K. & L. S., 65 Kan. 452, 70 Pac. 352; Miller *v.* U. S. Grand Lodge O. B., 72 Mo. App. 499 (holding that a member who had full notice of his intended suspension and assented thereto in unmistakable terms thereby waived any informality in the notice); Murray *v.* Supreme Hive L. M. W., 112 Tenn. 664, 80 S. W. 827 (holding that a member, by requesting a rehearing in the matter of his expulsion, waives any previous irregularities). And see State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125.

However, a mere statement by a member that he was unable to keep up the assessments, and would be compelled to drop the insurance, does not estop him from denying his suspension from the order, if such suspension is a formal proceeding prescribed in detail in the constitution of the order. Petherick *v.* General Assembly O. A., 114 Mich. 420, 72 N. W. 262. And where a member was illegally expelled when insane, there could be no waiver on his part of the society's rules of procedure, observance of which was necessary to the validity of the expulsion. Hoeffner *v.* Grand Lodge G. O. H., 41 Mo. App. 359.

Estoppel and waiver as to notice and specification of charges. — A member does not waive his right to notice of the charges against him by attending a meeting of the society, and entering on his defense. Downing *v.* St. Columba's R. C. T. A. B. Soc., 10 Daly (N. Y.) 262. See, however, State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125. The sufficiency of the specification of charges is waived, however, where the only objection to the proceeding is based on jurisdictional grounds. Moore *v.* National Council K. & L. S., 65 Kan. 452, 70 Pac. 352; Kelly *v.* Grand Circle W. W., 40 Wash. 691, 82 Pac. 1007.

67. Repudiation of contract of insurance see *infra*, II, G.

68. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607.

69. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607.

Election of remedies see *infra*, VI, A, 1.

70. McLafferty *v.* Sweeney, 6 Pa. Cas. 264, 9 Atl. 277 [*affirming* 19 Wkly. Notes Cas. 396], holding that he cannot assert his status by simply appearing at a meeting without informing the officers in a regular manner of the action of the court.

71. Authority to incorporate central body. — Pennsylvania Corporation Act of 1874, providing for the incorporation of societies for beneficial or protective purposes to its members from funds collected therein, does not authorize the organization of a central corporation which undertakes to levy assessments on and assess benefits to beneficiary members of subordinate lodges who are excluded from membership in the national lodge. Com. *v.* Order of Vesta, 2 Pa. Dist. 254, 12 Pa. Co. Ct. 481.

The central body is often composed of representatives of the local bodies. See Park *v.* Modern Woodmen of America, 181 Ill. 214.

to charters issued by the central organization.[72] The superior body is generally invested with legislative and executive powers, so far as matters affecting the society at large are concerned,[73] and it exercises a supervisory jurisdiction over the various subordinate bodies.[74] The question whether the central or a branch body is liable for the payment of benefits depends upon the laws of the society and the form of the benefit certificate.[75] Where a subordinate body wrongfully expels one

54 N. E. 932. Number of representatives to which local body is entitled see Supreme Lodge O. G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720.

72. See National Council J. O. A. M. *v.* State Council J. O. U. A. M., 104 Va. 197, 51 S. E. 166.

Regularity of organization.— The grand lodge of a mutual benefit association, by accepting and retaining the dues of an applicant for a beneficiary certificate with knowledge of the facts, waives all irregularities in the organization of the subordinate lodge. Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022, 51 Minn. 224, 53 N. W. 367.

73. Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932; Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898.

Estoppel to deny authority.—A subordinate lodge's implied or express assent to the grand lodge's exercise of an authority not within the scope of the charter does not confer such authority, or estop the subordinate lodge from denying it. Grand Lodge A. O. U. W. *v.* Stepp, 3 Pennyp. (Pa.) 45.

74. State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456, where the charter of a beneficial order made it the duty of the grand master to interpret the laws and render decisions on all matters of law referred to him by subordinate lodges, and provided that such decisions and interpretations should have binding force, subject to the approval of the grand lodge, and it was held that where the grand master, at the request of a subordinate lodge, interprets the law of the order as to the expulsion of members, his interpretation, upon approval by the grand lodge, establishes a precedent for the guidance of subordinate lodges.

If, however, the central body is a foreign corporation which has not complied with the state laws concerning such, the local body is not bound to obey its mandates. State *v.* Miller, 66 Iowa 26, 23 N. W. 241.

Appeals to superior body.— Where the supreme lodge of a beneficial association to which appeals might be taken by members consisted of five hundred and forty members, and much of the work was necessarily done by committees, claimant could not object that her claim was determined by a committee instead of by the entire body of the lodge, in the absence of a request before the hearing that the case should be presented to the entire body. Derry *v.* Great Hive L. M. M., 135 Mich. 494, 98 N. W. 23. A rule of a beneficial association providing for appeals from the action of the executive committee to a supreme tribunal, giving that body "the power to take additional proofs," implies that it may consider proofs taken before the executive committee. Barker *v.* Great Hive L. M. M., 135 Mich. 499, 98 N. W. 24. Where the society's constitution provided that if a member should be suspended from his lodge his membership in the endowment rank should cease from the time of such suspension, but that if the action of the lodge should be reversed by higher authority, the standing of the member should be the same as if no action was had, the action of the grand lodge reversing a vote of suspension restored the member to membership in the rank, although the grand lodge had no direct authority over the endowment rank, and although the member had died prior to such reversal. Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36. Necessity of appealing to supreme tribunal before resorting to courts see *infra*, V, D.

75. Liability of superior body.— Certain subordinate lodges organized a grand lodge, composed of their representatives. The laws of the grand lodge provided for the payment of a certain sum as a death benefit by the grand lodge to designated relatives of the deceased members, and that all subordinate lodges were jointly bound to pay the fund. The grand lodge was to make the assessments against the subordinate lodges and pay the fund to the beneficiaries, but it had nothing to do with the individual members of the subordinate lodges. It was held that the grand lodge was not liable to a beneficiary for the payment of a death benefit. Weyrich *v.* Grand Lodge I. O. T. L., 47 Mo. App. 391.

Liability of inferior body.— The constitution and laws of the supreme lodge of a foreign corporation provided that in certain events the subordinate divisions known as grand lodges might be set apart from the supreme lodge and thereafter collect and disburse their own beneficiary funds. A member of the grand local lodge received a benefit certificate under the seal of the supreme lodge. Afterward the grand lodge was set apart, and a proper proportion of the beneficiary fund turned over to it. Later the grand lodge was incorporated under the local laws and assumed and promised to pay "all the obligations and liabilities of, and beneficiary and other claims against, said association, whether already accrued or hereafter payable." After this change the member paid his assessments to the new corporation, and was recognized as a member in good standing until his death. It was held that this effected a complete novation of the contract, and the new corporation was liable

of its members, the superior body is ordinarily not liable to the member in damages.[76]

2. Authority of Inferior Bodies — a. In General. The powers and authority of the subordinate or branch bodies of a beneficial society are governed by their charters of incorporation or articles of association, and their constitutions and by-laws, subject to such limitations as may be contained in the laws of the central superior body.[77]

b. As Agents of Superior Body.[78] The questions whether the acts or omissions of a subordinate branch of a beneficial society are binding on the order depends primarily on the provisions of the society's charter of incorporation or articles of association and its constitution and by-laws.[79] Although the cases are not in accord as to whether the subordinate bodies are the agents of the society in dealing with their members, yet by the weight of authority the local bodies are held to represent the central organization, and as between the members and the society the latter is bound by acts of the local bodies done within the scope of their authority;[80] and

on the certificate. Burns *v.* Grand Lodge A. O. U. W., 153 Mass. 173, 26 N. E. 443. Where the grand lodge has failed to assess and collect a death benefit, because the subordinate lodge has wrongfully refused to furnish a certificate that the deceased was one of its members in good standing, the beneficiary may sue the subordinate lodge for the full amount of the death benefit. Woelfer *v.* Heyneman, 2 N. Y. City Ct. 15.

76. Grand Fountain U. O. T. R. *v.* Murray, 88 Md. 422, 41 Atl. 896.

77. See cases cited *infra*, this note.

Power to pay benefits.—A constitutional provision of a local society of a mutual benefit association authorizing the local society to aid the widows and orphans of deceased members entitled to benefits does not justify the local society in paying a benefit certificate issued by the association. Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746.

Power to impose conditions of forfeiture.—A funeral benefit association, which was made up of local councils, paid a funeral benefit of two hundred and fifty dollars on the death of a member in good standing, and required the local lodge to adopt a by-law requiring payment of the full amount received from the association on a member's death, less the cost of the claim and all charges legally due the council, to the beneficiaries. It was held that a local by-law providing that if a member was in arrears in paying his assessments for thirteen weeks his rights to a benefit should be forfeited is void, since the local council has no right to impose conditions in addition to those required by the general association. Taylor *v.* Pettee, 70 N. H. 38, 47 Atl. 733. So where the constitution of a beneficial association provided for weekly benefits for sickness, and granted authority to local divisions to limit the benefits of any member to a specified sum, and each division was authorized to make such by-laws for its government as did not conflict with the constitution, a local division had no authority to enact a by-law providing that any member receiving sick benefits found absent from his home after eight P. M. should be deprived of his benefits. Loftus *v.* Division No. 7 A. O. H., (N. J. Sup. 1905) 60 Atl. 1119.

Power to reject claim for benefits.—The laws of a relief fund association provided that on notice of the disability of a member a board of physicians should examine him, and report to the supreme council; that all proofs for death or disability benefits should be approved by the subordinate council; and that, upon approval of satisfactory proofs of a member's disability, he should be entitled to benefit. It was held that the subordinate council could not finally reject a claim. Albert *v.* Supreme Council O. C. F., 34 Fed. 721.

Subordinate lodges have power to bind themselves by acts done within the scope of their authority. Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429.

Estoppel to deny power.—Where a subordinate lodge of a secret beneficial society through which its members are compelled to deal with the grand lodge is created by the grand lodge under the power conferred by Pa. Act, April 6, 1893 (Pamphl. Laws 7), the grand lodge is estopped to deny the quasi-corporate character of the subordinate lodge or its power to sue for the protection of the rights of its members and beneficiaries. Washington Camp *v.* Funeral Ben. Assoc., 8 Pa. Dist. 198.

78. **Agency with respect to:** Estoppel and waiver as to forfeiture of benefits see *infra*, IV, J, 3, b. Waiver of conditions of reinstatement see *infra*, IV, I, 4, b.

79. O'Connell *v.* Supreme Conclave K. D., 102 Ga. 143, 28 S. E. 282, 66 Am. St. Rep. 159.

80. Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429; Johanson *v.* Grand Lodge A. O. U. W., (Utah 1906) 86 Pac. 494.

Agency as to accepting transfer card of member.—A local lodge is the agent of the superior body in regard to accepting the cards of members transferred from other local lodges, and if it wrongfully neglects or refuses to accept a member so transferred the superior body cannot refuse to pay benefits on the ground that he has ceased to be

if the facts are such that the local body is as a matter of law the agent of the main body, the society is bound by the acts or omissions of the former, even though it is stipulated in the society's laws or in the benefit certificate that the local body is to be deemed the agent of its members.[81]

a member (Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709) or that he has failed to pay dues to the agent lodge (Schlosser *v.* Grand Lodge B. R. T., 94 Md. 362, 50 Atl. 1048). *Compare* Oates *v.* Supreme Court I. O. F., 4 Ont. 535.

Agency as to ceremony of initiation.— In Mitchell *v.* Leech, 69 S. C. 413, 48 S. E. 290, 104 Am. St. Rep. 811, 66 L. R. A. 723, the local camp was held to be the agent of the parent camp so as to render the latter liable for injuries inflicted on a member of a local camp in initiating him by means of a mechanical goat, although such contrivance was not authorized by the parent camp. But in Jumper *v.* Sovereign Camp W. W., 127 Fed. 635, 62 C. C. A. 361, agency in this respect did not appear, and the parent camp was held not liable.

Agency as to collection and remission of dues and assessments.— The local lodges are generally deemed to be the agents of the central body as respects the collection and remission of dues and assessments, and their acts and omissions in regard thereto are chargeable to the central body. Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595; Parliament of Prudent Patricians of Pompeii *v.* Marr, 20 App. Cas. (D. C.) 363; Reed *v.* Ancient Order of Red Cross, 8 Ida. 409, 69 Pac. 127; Supreme Lodge O. M. P. *v.* Meister, 204 Ill. 527, 68 N. E. 454 [*affirming* 105 Ill. App. 471]; Brotherhood of Railroad Brakemen *v.* Knowles, 39 Ill. App. 47; Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262; Fraternal Aid Assoc. *v.* Powers, 67 Kan. 420, 73 Pac. 65; Schlosser *v.* Grand Lodge B. R. T., 94 Md. 362, 50 Atl. 1048; Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903; Murphy *v.* Independent Order S. & D. J., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111; Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710; Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369; Harris *v.* Wilson, 86 Mo. App. 406, 413, 416; Soehner *v.* Grand Lodge O. S. H., (Nebr. 1905) 104 N. W. 871; Brown *v.* Supreme Court I. O. F., 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 [*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397]; Bragaw *v.* Supreme Lodge K. & L. H., 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; Johanson *v.* Grand Lodge A. O. U. W., (Utah 1906) 86 Pac. 494; Schunck *v.* Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369; Supreme Lodge K. P. *v.* Withers, 177 U. S. 260, 20 S. Ct. 611, 44 L. ed. 762 [*affirming* 89 Fed. 160, 32 C. C. A. 182]; Modern Woodmen of America *v.* Tevis, 111 Fed. 113, 49 C. C. A. 256, 117 Fed. 369, 54 C. C. A. 293; Whiteside *v.* Supreme Conclave I. O. H., 82 Fed. 275. Agency with respect to estoppel and waiver as to forfeiture of benefits see *infra*, IV, J, 3, b. Waiver of conditions of reinstatement see *infra*, IV, I, 4, b.

Agency as to setting aside suspension of members. — A subordinate lodge of the knights of honor, or a grand officer thereof, cannot, three months after a member has died suspended, impose a liability on the supreme lodge by setting aside the order of suspension passed prior to the member's death. Whipple *v.* Supreme Lodge K. H., 7 Ky. L. Rep. 301.

81. *Colorado.*— Knights of Honor *v.* Davis, 26 Colo. 252, 58 Pac. 595.

District of Columbia.— Parliament of Prudent Patricians of Pompeii *v.* Marr, 20 App. Cas. 363, holding that where a by-law imposes on the officers of local councils the duty of receiving and transmitting to the central governing body all the dues, assessments, etc., of the members, a provision in such by-law that the officers of each local council shall be deemed the agents solely of such council and its members is inconsistent with the duty and agency imposed on them by the central governing body, and cannot be used to defeat a claim on a certificate of insurance issued by the association.

Idaho.— Reed *v.* Ancient Order of Red Cross, 8 Ida. 409, 69 Pac. 127.

Indiana.— Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Kansas.— Ancient Order of Pyramids *v.* Drake, 66 Kan. 538, 72 Pac. 239.

Maryland.— Schlosser *v.* Grand Lodge B. R. T., 94 Md. 362, 50 Atl. 1048.

Michigan.— Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903. See, however, Peet *v.* Great Camp K. M., 83 Mich. 92, 99, 47 N. W. 119.

Mississippi.—Murphy *v.* Independent Order S. & D. J., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111.

Missouri. — McMahon *v.* Supreme Tent K. M. W., 151 Mo. 522, 52 S. W. 384; Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 719; Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369; Harris *v.* Wilson, 86 Mo. App. 406, 413, 416. See, however, Lavin *v.* Grand Lodge A. O. U. W., 104 Mo. App. 1, 78 S. W. 325.

New York.— Brown *v.* Supreme Court I. O. F., 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 [*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397].

North Carolina. — Bragaw *v.* Supreme Lodge K. & L. H., 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602.

Wisconsin.—Schunck *v.* Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369.

United States.— Supreme Lodge K. P. *v.* Withers, 177 U. S. 260, 20 S. Ct. 611, 44 L. ed. 762 [*affirming* 89 Fed. 160, 32 C. C. A. 182]; Modern Woodmen of America *v.* Tevis,

3. Rights Inter Se as to Funds.[82] The right and title to particular funds and the power of control thereover, as between the central organization and the subordinate bodies by whom the funds were raised, depend upon the laws of the society.[83] If the supreme body is entitled to a fund, it may recover the same from the local lodge, although the latter has paid it out for other purposes.[84] In an action by the supreme body to recover a fund from a local branch the latter cannot question the validity of the incorporation of the supreme body;[85] but if the society is a foreign corporation, and it has failed to comply with the local statutes governing such, it cannot recover.[86]

4. Voluntary Dissolution, Withdrawal, and Surrender of Charter by Inferior Body.[87] The right of a local lodge to secede or withdraw from the central organ-

111 Fed. 113, 49 C. C. A. 256, 117 Fed. 369, 54 C. C. A. 293; Whiteside *v.* Supreme Conclave I. O. H., 82 Fed. 275.

See 28 Cent. Dig. tit. "Insurance," § 1838.

The actual legal relation of parties to each other, their acts and transactions, prevail over previous written stipulations which were subsequently disregarded, and condition their rights. Thus where a beneficiary association empowers the clerk of a local camp to collect, receipt for, remit, and report on its benefit assessments, and the clerk acts under this authority with the knowledge and consent of all parties, the relation of principal and agent for this purpose exists, and conditions the rights of the parties, notwithstanding the fact that the by-laws and certificates of membership contain a uniformly disregarded stipulation that the clerk of the local camp shall not be the agent of the association, but shall be the agent of the local camp, which has no interest in the benefit assessments, and that the acts or omissions of the clerk shall not affect the liability or waive any of the rights of the association. Modern Woodmen of America *v.* Tevis, 111 Fed. 113, 49 C. C. A. 256.

Validity of stipulation as to agency see *supra*, I, C, 2, b.

82. Application of funds see *infra*, I, H, 2.

Power to levy dues and assessments as between superior and inferior bodies see *infra*, III, A.

Right of local lodge to benefits and forfeiture thereof see *infra*, IV, I.

Right to funds on insolvency and involuntary dissolution of society see *infra*, I, I, 7.

Right to funds on voluntary dissolution, withdrawal, and surrender of charter by inferior body see *infra*, I, F, 4.

83. Title in inferior body.— Where the laws of an order provide that the revenues of the supreme commandery shall be derived from charter fees, *per capita* taxes, and the sale of supplies, the supreme commandery has no right to the sick benefit fund of a subordinate lodge, although the latter transfers it to a different order. Detroit Sav. Bank *v.* Haines, 128 Mich. 38, 87 N. W. 66. Where a fraternal society is composed of local councils formed from individual members, state councils composed of delegates from the local councils, and a national council composed of delegates from the state councils, these relationships all being purely voluntary, and the members having a right to withdraw at any time, and the state and national councils are supported by taxes on the individual members, but neither has any power to enforce the tax, the tax levied by the national council being collected by the state councils, with the tax levied for their own support, money collected by a state council by a tax levied on the members within its jurisdiction is not impressed with a trust in favor of the national council unless it was called and collected for the very purpose of meeting the demands of such national council. National Council Jr. O. U. A. M. *v.* State Council Jr. O. U. A. M., 66 N. J. Eq. 429, 57 Atl. 1132 [*affirming* 64 N. J. Eq. 470, 53 Atl. 1082].

Title in superior body.— The legal title to the twenty per cent of assessment received by local branches of the Order of Iron Hall, which they are allowed to retain as a reserve fund, and which by the law of the order is declared to be the property of the supreme sitting and subject to its control at all times, and which is to be called for in its annual instalments after the period of six years and six months, is, like the other eighty per cent which is paid over immediately, in the supreme sitting, although the possession is for the time retained by the branches. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739. And see Yeates *v.* Roberts, 7 De G. M. & G. 227, 3 Wkly. Rep. 461, 56 Eng. Ch. 175, 44 Eng. Reprint 89 [*affirming* 3 Drew. 170, 1 Jur. N. S. 319, 61 Eng. Reprint 868].

Right of superior body to funds of inferior body.— The superior body cannot recover, in a suit on a bond executed by the treasurer of a subordinate court, money which belongs exclusively to such subordinate court, and raised to be expended solely for the benefit of its members. Independent Order of Foresters *v.* Donahue, 91 Ill. App. 585.

84. National Council Jr. O. U. A. M. *v.* State Council Jr. O. U. A. M., 66 N. J. Eq. 429, 57 Atl. 1132 [*affirming* 64 N. J. Eq. 470, 53 Atl. 1082].

85. Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739.

86. Supreme Sitting O. I. H. *v.* Grigsby, 178 Ill. 57, 52 N. E. 956 [*affirming* 78 Ill. App. 300].

87. Withdrawal of members as such see *supra*, I, E, 3.

ization without its consent,[88] and the property rights of the respective bodies in case of withdrawal,[89] depend primarily on the laws of the society and the local body's charter of incorporation or articles of association. And the same is true as to the power of a majority of the members of the local body to bind the minority by a vote to secede as a body from the society.[90] On voluntary dissolution of a local body its assets generally become the property of the central organization.[91] Hence if the local lodge, on dissolving, divides among its members funds to which the supreme lodge is entitled, the latter may recover each portion from the member receiving it;[92] and where the members of a subordinate lodge disband and turn over the funds of the lodge to another society in violation of the laws of the grand lodge, those assisting in the actual disposition of the funds are jointly and severally liable to the grand lodge for the whole fund.[93]

5. Suspension, Expulsion, Dissolution, and Forfeiture of Charter of Inferior by Superior Body.[94] The power of the central organization of a beneficial society

88. Power to withdraw held to exist see Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627.

Power to withdraw held not to exist see Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746, holding that where the constitution of the association provided for the issuance and payment of benefit certificates by it, funds for payment to be provided by assessment of all the members of local societies forming the association, and that if any local society failed to pay an assessment it should be dropped from the association, and that when any society retired from the association it should thereby give up all claim to the property, a local society had no power to sever its connection with the association by resolution and assume the payment of the benefit certificates of its members, since such action would impair the obligations of contracts.

Procedure for withdrawal see *In re* Sheffield O. D. S., 66 J. P. 613. The conclusion of members of a lodge to withdraw from an association, reached at an informal meeting, where they acted individually and not as a lodge, is inoperative, Circus *v.* Independent Order Ahawas Israel, 55 N. Y. App. Div. 534, 67 N. Y. Suppl. 342.

89. See Koerner Lodge No. 6 K. P. *v.* Grand Lodge K. P., 146 Ind. 639, 45 N. E. 1103; *In re* Sheffield Order of Druids Soc., 66 J. P. 613.

Seceding body held entitled to retain its property see Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627. *Contra*, see Ahlendorf *v.* Barkous, 20 Ind. App. 656, 50 N. E. 887.

90. Majority held to have power to bind minority see Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627.

Majority held to have no power to bind minority see Koerner Lodge No. 6 K. P. *v.* Grand Lodge K. P., 146 Ind. 639, 45 N. E. 1103; Gorman *v.* O'Connor, 155 Pa. St. 239, 26 Atl. 379. And see Altmann *v.* Benz, 27 N. J. Eq. 331; *In re* Sheffield Order of Druids Soc., 66 J. P. 613.

Failure of minority to dissent.— Where a resolution of a benefit society that it was no longer a member of the grand lodge was passed without dissent, thereafter a minority of the society cannot claim to be the society, and entitled to its property, because the majority will not accept regulations of the grand lodge afterward presented to them. Union Benev. Soc. No. 8 *v.* Martin, 76 S. W. 1098, 25 Ky. L. Rep. 1039.

Right to funds and property as between majority and minority on withdrawal or secession. see *supra*, I, E, 3, b.

91. Koerner Lodge No. 6 K. P. *v.* Grand Lodge K. P., 146 Ind. 639, 45 N. E. 1103; Schubert Lodge No. 118 K. P. *v.* Schubert Kranken Untersturzen Verein, 56 N. J. Eq. 78, 38 Atl. 347 (holding that the fact that a supreme lodge has broken its contract with members of a subordinate lodge by refusing to allow them to use the German language for their ritual and records is no justification for the diversion by those members of the funds of the lodge held in trust for the purposes of the order); Grand Lodge K. P. *v.* Germania Lodge No. 50, 56 N. J. Eq. 63, 38 Atl. 341; State Council O. U. A. M. *v.* Sharp, 38 N. J. Eq. 24 (holding that where a subordinate lodge of a beneficial association organized for the mutual relief of its members in case of sickness or distress under the laws of the general council of the order, one of which provided that on the dissolution of a subordinate lodge its charitable funds should be paid to the general council and be held and distributed by it for the benefit of the widows and orphans of members of the subordinate lodge in accordance with its by-laws, such subordinate lodge, on dissolving, has no right to divide its assets among its members, although it is incorporated and the superior lodge is insolvent). See, however, Grand Lodge I. O. O. F. *v.* Barker, 139 Mich. 701, 103 N. W. 193, where the grand lodge was held not entitled to recover as against a *bona fide* purchaser of lodge property.

92. State Council O. U. A. M. *v.* Sharp, 38 N. J. Eq. 24.

93. Grand Lodge K. P. *v.* Germania Lodge No. 50, 56 N. J. Eq. 63, 38 Atl. 341.

94. As affecting inferior body's right to benefits see *infra*, IV, I.

As affecting right of members of inferior body or their beneficiaries to benefits see *infra*, IV, I, 2, a.

to suspend or expel a local branch body, or to forfeit its charter, or to dissolve it, depends primarily on the society's charter of incorporation or articles of association and its constitution and by-laws;[95] and the grounds of suspension, etc.,[96] and the procedure to be taken to that end[97] are likewise determined. If a subordinate lodge is incorporated, its legal existence is not affected by the fact that the supreme authority suspends it or declares its charter forfeited, and in such case it is entitled to retain its funds and property as against the supreme body.[98] An agreement whereby members of a beneficial association undertake to confer judicial powers

95. Who may suspend.—Where, by a beneficial association's constitution, general power to suspend a lodge is given to the grand lodge, with authority to the executive committee to suspend, until the next meeting of the grand lodge, the charter of a lodge refusing to obey the rules, and no such power is otherwise conferred on any officer thereof, a lodge cannot be suspended by the action of the association secretary, although it may be in default in the payment of its dues. Circus *v.* Independent Order Ahawas Israel, 55 N. Y. App. Div. 534, 67 N. Y. Suppl. 342. And see Hall *v.* Supreme Lodge K. H., 24 Fed. 450.

96. Grand Grove U. A. O. D. *v.* Garibaldi Grove No. 71, 130 Cal. 116, 62 Pac. 486, 80 Am. St. Rep. 80 (holding that the fact that a subordinate lodge has violated its charter and refused to obey the directions of the grand lodge does not justify a forfeiture of its charter); State *v.* Miller, 66 Iowa 26, 23 N. W. 241 (holding that a state lodge cannot be suspended for failure to obey the mandates of the supreme lodge where the latter is a foreign corporation and has not complied with the state laws governing such); Holomany *v.* National Slavonic Soc., 39 N. Y. App. Div. 573, 57 N. Y. Suppl. 720 (holding that where the by-laws of a society provide that an accused member shall be tried before a jury chosen from the members of the local assembly, but give no power either to the grand jury or supreme assembly to direct a local assembly to expel one of its members, the grand jury or supreme assembly cannot expel a local assembly for refusing to expel one of its members); Grand Lodge A. O. U. W. *v.* Stepp, 3 Pennyp. (Pa.) 45 (holding that a subordinate lodge cannot be suspended for its failure to pay an invalid assessment).

97. Notice.— Under the rules of most societies a subordinate body cannot be suspended, etc., without notice. Reed *v.* Ancient Order of Red Cross, 8 Ida. 409, 69 Pac. 127 (holding that where the constitution of a mutual benefit association provides that on failure of a subordinate lodge to make a monthly report and remit assessments, the secretary of the supreme lodge shall give notice in writing and mail it to the president, secretary, and treasurer of the subordinate lodge, the failure to make such report and remittance does not, in absence of notice, work a suspension of the subordinate lodge); Supreme Sitting O. I. H. *v.* Moore, 47 Ill. App. 251; St. Patrick's Alliance of America *v.* Byrne, 59 N. J. Eq. 26, 44 Atl. 716; Doggett *v.* United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26. And see Hall *v.* Supreme Lodge K. H., 24 Fed. 450. And notice has been held to be necessary even where the laws of the society are silent on the subject. Grand Grove U. A. O. D. *v.* Garibaldi Grove No. 71, 130 Cal. 116, 62 Pac. 486, 80 Am. St. Rep. 80, service of notice on former officers being held insufficient. And a provision of the by-laws of a benefit society authorizing its general president to suspend any local union for any violation of the constitution or laws of the general society, by consent of a majority of the general executive board, thereby forfeiting the charter and affecting the property rights of the union, without providing for notice to the offending order, is unreasonable and void. Swaine *v.* Miller, 72 Mo. App. 446.

Hearing.—Subordinate lodges are generally entitled to a hearing or an opportunity to be heard before suspension, etc. Grand Grove U. A. O. D. *v.* Garibaldi Grove No. 71, U. A. O. D., 105 Cal. 219, 38 Pac. 947 (holding that where the constitution of a benevolent association provides for the suspension of a subordinate grove by the grand grove by hearing on notice, and for suspension by a certain officer during a recess of the grand grove, a hearing on written charges is necessary to suspension by such officer); Supreme Sitting O. I. H. *v.* Moore, 47 Ill. App. 251; St. Patrick's Alliance of America *v.* Byrne, 59 N. J. Eq. 26, 44 Atl. 716.

Record of dissolution.— The entry, by an officer of the supreme body, of a record of the dissolution of a defaulting lodge may be made a condition precedent to its dissolution. Doggett *v.* United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26.

Prematurity of cancellation of charter.— Where the constitution of a mutual benefit association requires that, in case of failure of a subordinate body to pay over assessments collected from members to the governing body, a certain district official shall institute an inquiry, taking testimony on notice to the defaulting subordinate lodge, and render a judgment and report it to the governing body, and that until such steps are taken a subordinate lodge shall not be declared dormant, and that a state of dormancy shall exist three months before the charter of the subordinate lodge shall be canceled, a notice canceling such charter, made twelve days after a notice suspending all of the members of the lodge, and without other proceedings, is void. Gray *v.* Chapter-General of America K. St. J. & M., 70 N. Y. App. Div. 155, 75 N. Y. Suppl. 267.

98. Merrill Lodge No. 299 I. O. G. T. *v.* Ellsworth, 78 Cal. 166, 20 Pac. 399, 400, 2

on a body of its members selected from time to time from the society at large, and known as the grand lodge, with authority to forfeit the charters, property, and rights of subordinate lodges for violation of rules of the association is void, and courts will not aid in the enforcement of the decrees of such tribunal, except in a submission of specific matters to arbitration.[99]

G. Powers and Liabilities in General — 1. Powers — a. In General. The powers of beneficial or fraternal societies depend primarily upon the statutes under which they are organized,[1] and secondarily upon their charters of incorporation or articles of association.[2] Although their benevolent objects are in a large measure attained through the medium of insurance against sickness or death, and they are in so far insurance companies,[3] yet they have no power to carry on a general life insurance business,[4] or as a rule to issue endowment policies,[5]

L. R. A. 841; District Grand Lodge No. 5 I. O. B. B. *v.* Jedidjah Lodge No. 7 I. O. B. B., 65 Md. 236, 3 Atl. 104.

99. Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665.

1. Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268 (holding that benefit societies are creations of the statute, incapable of exercising any power not therein expressed or clearly implied); La Métropolitaine Société Mutuelle de Bienfaisance *v.* Dugre, 11 Rev. Lég. 344 (holding that benefit societies organized under a certain statute must restrain their operations to those provided by the statute).

2. See cases cited *infra*, note 4, *et seq.*

Validity of by-laws violative of charter see *infra*, I, C, 2, b.

3. See *supra*, I, A, 1.

4. Kelsall *v.* Tyler, 11 Exch. 513, 25 L. J. Exch. 153, *semble*.

Powers as to payment of benefits.—Where the charter of a benefit society provides that one of its objects is to afford relief, comfort, and protection to members, and empowers it to make by-laws to carry out such objects, it has power to adopt a by-law for the payment of benefits to defray the funeral expenses of members and of their wives. Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538. A certificate of membership in a benevolent society providing that the benefit due on the member's death shall be used to defray his burial expenses and in improving his burial lot is valid, under a charter provision declaring one of the objects of the society to be "to promote benevolence and charity," and another providing that the benefit shall be paid to the family of the member, "or as he or she may have directed." Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627. An association incorporated to promote the cause of temperance, discountenance drunkenness and guard against the consequences thereof, and provide for the widows and orphans of any member who may die, has power under its charter to provide for weekly payments to sick members. McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149. So, it seems, a corporation whose general purpose is declared to be the welfare of its members, and particularly their relief in times of sickness and distress, may extend its benefits to the families of its members, and make provision for the widows of deceased members. Gundlach *v.* Germania Mechanics' Assoc., 4 Hun (N. Y.) 339, 49 How. Pr. 190. And a benefit society is liable on its contract to pay to the child of a deceased member a monthly stipend until she arrives at twelve years of age, although its charter, which enumerates as an object of the society the aiding of the families of deceased members, also provides that the powers granted shall not be used "for insurance purposes," since aiding families of deceased members is not carrying on an insurance business in the usual acceptation of that term in the commercial world. Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429. Where, however, the objects of the corporation are declared by the charter to be "to form a benefit society . . . and by means of the revenue derived from the property of the society, and of the monthly contributions, to form a fund for providing aid and assistance to its members in case of accident or illness, and in the event of death, to their widows and children or fathers and mothers," a by-law providing that on the decease of the wife of any member an assessment should be levied on each member, to be paid to the widower, is *ultra vires*. Harvard *v.* L'Union St. Joseph, 4 Quebec Super. Ct. 352.

Who may be beneficiary see *infra*, IV, A.

5. Rockhold *v.* Canton Masonic Mut. Benev. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420 (holding, however, that a certificate containing an unauthorized agreement for endowment insurance will be valid in so far as it is payable to the beneficiaries on the death of the member); Calkins *v.* Bump, 120 Mich. 335, 79 N. W. 491; Walker *v.* Giddings, 103 Mich. 344, 61 N. W. 512 (from which case it appears that Mich. Pub. Acts (1893), No. 119, defines fraternal beneficiary associations, and provides who may be beneficiaries, and how such association may be organized, and section 3 provides that all such associations organized under the laws of and now doing business in the state shall be considered duly organized, and "may continue such business," provided they comply with the requirements of the act as to annual reports, etc., and it was held that such act does not authorize a fraternal beneficiary association

and they cannot assume payment of the losses of another society.[6] The society cannot operate for the pecuniary profit of its officers;[7] and if the act incorporating the society renders it a purely benevolent one, it cannot pass by-laws having the effect of interfering with the demand and price of labor.[8] Beneficial societies are generally, although not always,[9] authorized to transact business beyond the state in which they are organized, and in this event sessions of the general governing body are commonly authorized to be held outside of the state.[10] The method of

organized under Laws (1869), Act No. 104, which has been unlawfully conducting the business of endowment insurance, to continue to do business by complying with the requirements as to reports, etc.); State *v.* Orear, 144 Mo. 157, 45 S. W. 1081. And see Boyd *v.* Southern Mut. Aid Assoc., 145 Ala. 167, 41 So. 164 (holding that a mutual aid association authorized by its charter to pay sick and death benefits from funds accumulated by assessments on members has no authority to issue policies under which assessments are to be returned at the expiration of a certain time, less benefits paid, such policies being *ultra vires* and destructive of mutuality of obligation); Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549 (holding that a promise to members to refund to them, at the expiration of a certain period, all the reserve fund to which they would be equitably entitled, is a violation of the statutory prohibition against the receipt by members of mutual benefit societies of any money as profit); Golden Rule *v.* People, 118 Ill. 492, 9 N. E. 342 (holding that where, by the constitution and by-laws of a society organized under Ill. Act, April 18, 1872 (Rev. St. (1874) p. 290), a fund voluntarily contributed by its members is set apart from which a certain sum is, upon the death of a member, paid to the beneficiary designated by him, and a certain other sum to the living members of the society holding numbers just above and just below the number of the deceased member, this constitutes the exercise of insurance functions in violation of the act, section 1 of which allows companies to organize under it "for any lawful purpose, except . . . insurance," and section 31 of which provides that societies intended to benefit widows, orphans, heirs, and devisees of deceased members, and members who have received a certain permanent disability, shall not be deemed insurance companies).

What constitutes endowment insurance.— Where the constitution of a fraternal association provided that it might issue endowment or life certificates, not exceeding two hundred and fifty dollars each, payable in one hundred months or on total disability or death, and that when there was a sufficient sum in the maturity fund, the lowest serial number of the endowment certificates might be retired, the sum provided by such certificates to be paid was an endowment fund. Walker *v.* Giddings, 103 Mich. 344, 61 N. W. 512. So it constitutes endowment insurance where a society issues certificates which provide for the payment of benefits, regardless of disability, to all members who shall attain to seventy years, from which time their certificates shall become paid up. State *v.* Orear, 144 Mo. 157, 45 S. W. 1081.

6. Twiss *v.* Guaranty Life Assoc., 87 Iowa 733, 55 N. W. 8, 43 Am. St. Rep. 418; Bankers' Union of World *v.* Crawford, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259.

7. Com. *v.* Order of Vesta, 2 Pa. Dist. 254, 12 Pa. Co. Ct. 481, holding that a corporation chartered "for benevolent or protective purposes to its members from funds collected therein" cannot extend its operations by means of agents or so-called "subordinate lodges" for the pecuniary advantage of the officers and managers of the concern, assessing members of subordinate lodges who are excluded from membership in the central corporation, business conducted in such way being contrary to law and equity, against public policy, and in violation of its charter.

8. Paradise *v.* La Société des Ouvriers de Bord, 13 Quebec 101. And see Crumpton *v.* Pittsburgh Council No. 117 J. O. U. A. M., 1 Pa. Super. Ct. 613, 38 Wkly. Notes Cas. 335, holding that where the charter of a benevolent association stated that its object was "to maintain and promote the interests of American mechanics, by assisting them in obtaining employment and encouraging them in business, and the establishing of a sick and funeral fund by contributions made to said fund by members of this corporation," a by-law assessing each member for a contribution to an association whose object was to secure legislation for the prevention of immigration was *ultra vires*.

9. Com. *v.* Order of Vesta, 2 Pa. Dist. 254, 12 Pa. Co. Ct. 481.

10. Head Camp Pacific Jurisdiction W. W. *v.* Woods, 34 Colo. 1, 81 Pac. 261 (holding that sessions of a beneficial association held in states other than that in which it was incorporated and where its head office was maintained are legal, the association having been incorporated to do business in such states); Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898 [*affirming* (Civ. App. 1900) 59 S. W. 905] (holding that a beneficial society organized with power to organize subordinate bodies in the United States and Canada may hold meetings of its supreme legislative department outside of the state of its incorporation, since, as the interests of members require that meetings of the legislative department be held as near to the membership as possible, the place of meeting must be

raising funds to carry out one of the purposes for which the association was established and the amount to be so raised are ordinarily matters of policy which the association has power to determine.[11] A society organized under a charter which does not confer power to issue notes has no implied power to do so when such authority is unnecessary to enable the association to exercise the powers expressly given or to accomplish the purpose of its creation.[12] An incorporated benevolent society has no power to act as trustee.[13]

b. Estoppel to Deny Power. The cases are not in accord as to whether a beneficial society may estop itself to deny liability on a certificate of insurance on the ground that the contract as entered into was beyond its powers. It has been held that an estoppel may arise in favor of the beneficiary,[14] but not in favor of the contracting member;[15] that where the society has received a transfer of all of the members and property of another association, and collected assessments from them as its members under a contract whereby it was to perform the former association's obligations, and whereby the mortuary fund contributed by the members who

frequently changed to such place as may be best adapted to the purpose of its creation).

However, in the absence of statute to the contrary, a corporation has no power to perform strictly corporate acts outside of the state of its creation (Bastian *v.* Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090 [*reversing* 68 Ill. App. 378]. And see Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898 [*affirming* (Civ. App. 1900) 59 S. W. 905]); and a benefit society organized under any law of Illinois which has applied for permission to continue business under Ill. Laws (1893), p. 130, is prohibited by section 10 of that act from changing the location of its principal office at a meeting held in another state (Bastian *v.* Woodmen of America, *supra*). Laws have been enacted in Illinois validating all business theretofore transacted by the governing body of such a society without the state in all respects as if it had been transacted within the state. Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932. See in this connection Bastian *v.* Modern Woodmen of America, *supra*.

11. Reno Lodge No. 99 I. O. O. F. *v.* Grand Lodge I. O. O. F., 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98; Pain *v.* Sample, 158 Pa. St. 428, 27 Atl. 1107, where funds were raised by a theatrical performance.

12. Scott *v.* Bankers' Union of World, 73 Kan. 575, 85 Pac. 604, the society being incorporated.

It is within the power of a voluntary benefit association to give a promissory note or bill of exchange for the purpose of compromising a suit pending against it. Court Harmony A. O. F. *v.* Court Abraham Lincoln A. O. F., 70 Conn. 634, 40 Atl. 606.

13. Hart *v.* Hamburger, 1 N. Y. St. 293, holding that where a member directed that the society keep a fund to which his children would be entitled on his death "until they were twenty-one years of age," the trust attempted to be created is absolutely void.

14. Bloomington Mut. Ben. Assoc. *v.* Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558 [*affirming* 24 Ill. App. 518] (holding that a mutual benefit association organized under Ill. Act, June 18, 1883, § 1, authorizing such associations for the purpose of furnishing indemnity to named classes of persons, cannot defeat a recovery on a policy issued to a member for the benefit of a person not of the classes described in the statute on the ground that the contract was *ultra vires*); Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441 (holding that where the member fulfilled the contract while he lived, the society could not defeat a recovery because the contract provided for a lower rate of assessments than was fixed in the charter); Wuerfler *v.* Grand Grove W. O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940 (holding that a certificate issued by a benefit society to a member, and on which he has in good faith relied and paid dues, cannot be avoided by it on the ground of *ultra vires* because the amendment in its constitution, under which it was issued, was not made in the particular method provided by the constitution). To the contrary see Steele *v.* Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160 [*affirming* 114 Ill. App. 194] (holding that a benefit society whose by-laws and certificate of organization prohibit the taking in of a member over fifty-one years of age cannot be bound by a certificate of membership issued to a person over that age); Fitzgerald *v.* Burden Benev. Assoc., 69 Hun (N. Y.) 532, 23 N. Y. Suppl. 647.

15. Rockhold *v.* Canton Masonic Mut. Benev. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420 [*affirming* 26 Ill. App. 141], holding that the plea of *ultra vires* is maintainable by such a corporation as a defense to an action for endowment insurance, brought by a member charged with knowledge of the want of power to make such contract, and whose payment of assessments to the corporation had not been retained by it to increase its property, but had been paid to those entitled thereto. To the contrary see Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190, holding that a beneficial association is estopped to assert that it has no power to make a contract for payment of a sum certain in case of perma-

should thereafter join the consolidated association should inure to all the members, it is estopped to refuse to levy an assessment on members joining after the consolidation to pay beneficiaries of a member of the former association on the ground that the contract was *ultra vires*;[16] that where the society executes a mortgage without first obtaining an order of court as required by statute, and the mortgage is usurious, the society may attack it as being *ultra vires*;[17] that a member of one of two societies which unlawfully attempt to consolidate is not estopped to attack the consolidation, where his rights are not protected by the contract between the two societies;[18] and that in no event can an estoppel arise unless either the member or his beneficiary changed his position to his detriment in reliance on the representations or conduct of the society out of which the estoppel is claimed to arise.[19]

2. **Liabilities.** An incorporated society is civilly responsible for illegal acts done by its members pursuant to by-laws which are beyond the powers conferred by its charter;[20] but a member of a voluntary relief association cannot maintain an action against it for the negligence of its employees in treating him in its hospital, being as much responsible for the acts of such employees as the other members; nor will an action lie by his legal representative where such negligence results in his death.[21] The society is liable for moneys borrowed and applied for its benefit;[22] but cannot be held upon a contract of its promoters where the society itself would have no power to enter into such a contract.[23]

H. Funds and Property[24] — **1. In General.** A beneficial society may dispose of its property for proper purposes,[25] but in some states such a society is prohibited by statute from selling or encumbering its real property without first obtaining an order of court for that purpose.[26] Purchases and sales between the

nent total disability, where the contract purports to set out verbatim an article of its character, and as set out it authorizes such provision.

16. Cathcart *v.* Equitable Mut. L. Ins. Assoc., 111 Iowa 471, 82 N. W. 964.

17. Portneuf Lodge No. 20 I. O. O. F. *v.* Western Loan, etc., Co., 6 Ida 673, 59 Pac. 362.

18. Home Friendly Soc. *v.* Tyler, 9 Pa. Co. Ct. 617.

19. Twiss *v.* Guaranty Life Assoc., 87 Iowa 733, 55 N. W. 8, 43 Am. St. Rep. 418; Bankers' Union of World *v.* Crawford, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259, in all of which cases it was held that the society was not estopped to deny its power to assume the death losses of another society. See, however, cases cited *supra*, notes 17, 18.

20. Paradis *v.* La Société des Ouvriers de Bord, 13 Quebec 101.

21. Martin *v.* Northern Pac. Ben. Assoc., 68 Minn. 521, 71 N. W. 701.

22. Pare *v.* Clegg, 29 Beav. 589, 7 Jur. N. S. 1136, 30 L. J. Ch. 742, 4 L. T. Rep. N. S. 669, 9 Wkly. Rep. 795, 54 Eng. Reprint 756, so holding, although the object of the society is visionary and unattainable, and although the formalities required by its rules have not been followed.

23. Marshalltown First Nat. Bank *v.* Church Federation of America, 129 Iowa 268, 105 N. W. 578, holding that an association organized under a statute providing that such associations shall not employ paid agents except in building up subordinate bodies has no power to ratify the contract of a promoter agreeing to pay an agent a commission for obtaining contracts of insurance before the association was organized, so as to render it liable for commissions on insurance obtained before the society was incorporated.

24. **Duties and liabilities of officers with respect to funds and property** see *supra*, I, D, 4.

Right to funds and property: On insolvency and dissolution see *infra*, I, 1, 7. On reorganization, reincorporation, merger, and consolidation see *supra*, I, C, 3.

Right to funds as between superior and inferior bodies: Generally see *supra*, I, F, 3. On voluntary dissolution, withdrawal, and surrender of charter by inferior body see *supra*, I, F, 4.

Withdrawal from membership and secession as affecting right to funds and property as between members see *supra*, I, E, 3, b.

25. Com. *v.* Suffolk Trust Co., 161 Mass. 550, 37 N. E. 757 (holding that a society may assign a deposit in bank to secure a loan); Blais *v.* Brazeau, 25 R. I. 417, 56 Atl. 186 (holding that provision in the regulations of an incorporated society prohibiting a dissolution of the society and a disposal of its funds so long as it has fourteen members does not prevent it from selling its property for payment of its debts while it has more than that number of members).

26. See the statutes of the different states. And see Podneuf Lodge No. 20 I. O. O. F. *v.* Western Loan, etc., Co., 6 Ida. 673, 59 Pac. 362; Dudley *v.* Congregation Third Order of St. Francis, 138 N. Y. 451, 34 N. E. 281 [*affirming* 65 Hun 21, 19 N. Y. Suppl. 605].

society and its officers are valid if free from fraud;[27] but a sale of property of an incorporated society to a syndicate representing the majority of the members, authorized by themselves, is fraudulent as against the minority.[28] Where the charter of a beneficial association does not authorize it to loan money, a promissory note made to it in consideration of a loan is void.[29] Dues and assessments paid by the members into the treasury in accordance with the by-laws ordinarily become the money of the society, and no member can recover the sums so paid by him or assign the same.[30]

2. APPLICATION OF FUNDS.[31] The application of the funds of a beneficial society is controlled by its charter of incorporation or articles of association and its constitution and by-laws,[32] and the association, its subordinate branches, or the members thereof, have no power to divert the funds from the purposes to which, under the laws of the order, they have been dedicated.[33] Special funds are sometimes

27. Hodson *v.* Deans, [1903] 2 Ch. 647, 72 L. J. Ch. 751, 89 L. T. Rep. N. S. 92, 52 Wkly. Rep. 122 [*following* Martinson *v.* Clowes, 21 Ch. D. 857, 51 L. J. Ch. 594, 46 L. T. Rep. N. S. 884, 30 Wkly. Rep. 795 (*affirmed* in 52 L. T. Rep. N. S. 706, 33 Wkly. Rep. 555)]. And see Hagerstown Mfg., etc., Co. *v.* Keedy, 91 Md. 430, 46 Atl. 965.

Burden of proof and presumption as to fraud see *infra*, VI, G, 1, a.

28. Blais *v.* Brazeau, 25 R. I. 417, 56 Atl. 186.

29. Grand Lodge *v.* Waddill, 36 Ala. 313.

30. Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394.

Control of funds vested in members.— If, however, by the laws of the society, the control of its funds is vested in the members in good standing, the latter may join in assigning a fund; and in such a case suspended members, although they have a right to be reinstated and hence have a contingent interest in the funds of the association, are not necessary parties to the assignment. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

31. Application cy pres see CHARITIES.

Distribution of funds on insolvency and dissolution see *infra*, I, I, 7.

Equity jurisdiction over funds see *infra*, VI, A, 1, c.

32. Arthur *v.* Odd Fellows' Ben. Assoc., 29 Ohio St. 557.

33. Koerner Lodge No. 6 K. P. *v.* Grand Lodge K. P., 146 Ind. 639, 45 N. E. 1103; Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149 [*affirming* 60 N. Y. App. Div. 11, 69 N. Y. Suppl. 764].

Illustrations of improper application of funds.— The donation by trustees of an incorporated benevolent association to each member, in pursuance of a unanimous vote of the members present at a meeting when the vote was taken, of a certain sum for past services, when no services had been rendered other than such as the parties were bound to render as members, is a misappropriation of corporate funds, the restoration of which may be compelled by a member who was not a party to the transaction. Ashton *v.* Dashaway Assoc., 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809. An association that has created an endowment fund cannot, on being refused a license by the state in which it was incorporated and thus compelled to cease business, organize a new company, and, against the protest of parties insured, use such fund to obtain reinsurance of the old members in the new company. Stamm *v.* Northwestern Mut. Ben. Assoc., 65 Mich. 317, 32 N. W. 710. The directors of a mutual benefit association have no authority to pay its special security funds to a surety company as collateral security against liability as surety on a bond given by the president of the association on appeal from a judgment against him for costs of a suit for malfeasance. Milbank *v.* American Surety, Co., 14 N. Y. App. Div. 250, 43 N. Y. Suppl. 474. A benevolent society formed for the promotion of the interests of the theatrical profession, the constitution of which provides rules applicable to the admission of actors in any part of the world as members, will be enjoined *pendente lite* from expending money to be used in defraying the expenses of a committee to present to congress a memorial recommending that the contract labor law be so amended as to prevent the importation of foreign actors under contract for a term of service in the United States, the purpose of the expenditure being foreign to the objects of the order. Flockton *v.* Aldrich, 4 N. Y. Suppl. 7. The funds of a society organized principally to assist its sick and needy members, and whose rules provide that "the funds of the society shall be expended only for the purposes of the society," cannot be applied to religious purposes. Podesta *v.* Societa Di Unione, 10 Ohio Cir. Ct. 19, 6 Ohio Cir. Dec. 210. Where the funds of subordinate lodges of a beneficial association are contributed for the exclusive benefit of their own members as prescribed by their rules and by-laws, they are held in trust for such purposes, and equity will restrain an appropriation thereof for the uses of an endowment fund created in a district grand lodge of the order for the purpose of paying a specific endowment at death to each member of all the lodges within the district. Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589.

Illustrations of proper application of funds. — It is proper, independently of any statutory provision, to pay the expenses of management of a fraternal benefit society out of

created by the laws of the society, out of which, in case the fund raised by regular assessment is insufficient, benefits are payable as preferred claims.[34] Where the rules of a society whose funds were furnished partly by the members and partly by non-members provide that only the interest of the funds shall be applied toward its purposes, and no provision is made for the ultimate distribution of the capital, a sole surviving member of the society is not entitled to have the capital paid to him.[35]

I. Insolvency, Dissolution, and Forfeiture of Charter[36] — **1. Voluntary Assignments.** A beneficial or friendly society may assign for the benefit of its creditors,[37] but where an association is simply unable, because of the general impracticability of its scheme, to carry out its plan, it is not properly an "insolvent," and an assignment for the benefit of its creditors is not the proper procedure to wind up its affairs.[38]

assessments collected from the members, and the governing body may set aside a certain percentage of the assessments for that purpose. Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321. A society authorized to raise and expend money for sick benefits has implied power to furnish a physician to sick members. Flaherty *v.* Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58, in the absence of a by-law to the contrary. A subordinate lodge of an order whose aim is "to unite fraternally all acceptable persons" may appropriate, for the support of a lodge to be organized under the same jurisdiction, part of a fund raised among its members by contribution out of which its general expenses and sick benefits are payable, if such appropriation is not prohibited by its by-laws or the general laws of the order. Lady Lincoln Lodge *v.* Faist, 52 N. J. Eq. 510, 28 Atl. 555. Salary of officers see *supra*, I, D, 1.

Discretion of society as to distribution of fund.— Where a number of persons belonging to a benevolent society were killed and injured by a cyclone, and a call was made on the different branches of the society for financial aid for the sufferers, the money sent to the society in response to the call was given it in trust to be distributed among the sufferers in proportion to their necessities, and the society had no discretion as to how much should be distributed, but was bound to distribute the whole sum. Supreme Lodge K. & L. H. *v.* Owens, 94 Ky. 327, 22 S. W. 326, 15 Ky. L. Rep. 134, 20 L. R. A. 347. Discretion as to allowance of benefits see *infra*, IV, D, 3, c.

Powers of superior lodge over inferior lodge funds.— Since the accumulated funds of the several subordinate lodges of a benevolent association contributed for the exclusive benefit of their own members under the ordinances and by-laws are held in trust for the designated purposes, the appropriation of any part of these funds by a superior lodge for a different use is a breach of trust which may be restrained in a court of equity. Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589.

Powers of subordinate lodge over society funds.— A local division of a voluntary association, in the absence of anything in the constitution or by-laws of the order permitting such action, cannot, by a majority vote of its members voting, authorize its officers to pay to certain members who are allowed to secede and set up another organization their *pro rata* share of the association's property. Kane *v.* Shields, 167 Mass. 392, 45 N. E. 758.

34. Wilber *v.* Torgerson, 24 Ill. App. 119, holding that under Starr & C. Annot. St. Ill. c. 73, § 129, the reserve fund of a mutual benefit association is a trust fund to be used only for mortuary benefits or otherwise applied as directed by the by-laws, and when the association is not in a condition to pay the holders of death claims by a regular assessment, they have the right to be paid out of such reserve before a payment to the directors of an advance made by them in good faith to the association.

Where, however, the constitution and by-laws of a mutual aid society provided for the payment of losses out of a reserve fund raised by assessments and replenished by another assessment whenever a death claim was paid, and if the fund was insufficient to pay all claims they were paid out of the assessment, and if there were claims still unpaid they could not be paid until the next assessment, and each claim was for a definite amount, and each assessment notice contained the names of deceased members entitled to participate in the fund, the proceeds of an assessment made on the death of a member do not inure to the special benefit of the member named in the notice, and therefore his beneficiary has no preferred claim to such assessment. People *v.* Grand Lodge E. O. M. A., 156 N. Y. 533, 51 N. E. 299.

35. Spiller *v.* Maude, 10 Jur. N. S. 1089, 11 L. T. Rep. N. S. 329, 13 Wkly. Rep. 69.

36. **Dissolution and forfeiture of charter of inferior lodge by act of supreme lodge** see *supra*, I, F, 5.

37. See Gibson *v.* Megrew, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362; Order of Solon *v.* Folsom, 161 Pa. St. 225, 28 Atl. 1078; Garrett *v.* Guarantee Trust, etc., Co., 29 Wkly. Notes Cas. (Pa.) 33; *In re* Wisconsin Odd Fellows' Mut. L. Ins. Co., 101 Wis. 1, 76 N. W. 775, 42 L. R. A. 300.

38. *In re* Youths' Temple of Honor, 73 Minn. 319, 76 N. W. 59.

2. RECEIVERSHIPS — **a. In General.** A receiver may be appointed for a beneficial society in both insolvency proceedings[39] and proceedings for dissolution of the society;[40] and where a receiver has been appointed in one state an ancillary receiver may be appointed in another state in which the society has assets.[41] The appointment of a receiver for a beneficial association by a court of the state in which it was incorporated does not defeat attachments of its property in another state by its creditors there residing,[42] nor does it defeat an attachment of property in another state made before such appointment by a citizen of the state in which the appointment was made.[43]

b. Grounds of Appointment of Receivers. Maladministration by the officers of the society is ground for the appointment of a receiver;[44] but unauthorized acts by the officers do not warrant the appointment of a receiver on the application of a creditor, in the absence of a showing that his rights are prejudiced thereby;[45] and a member is not entitled to have a receiver appointed and to have the officers enjoined from administering the society's affairs either because the object of the organization is illegal and unauthorized[46] or because the whole scheme of the order is impracticable and certain to end in disaster.[47] The fact that the society, in anticipation of dissolution, transfers its entire assets to be applied, first, to its liabilities, and, second, to the benefit of a new society to be formed in its stead by its members, is not necessarily ground for appointing a receiver to recover its assets and wind up its affairs.[48]

39. See cases cited *passim*, I, I, 2, 5–7.

40. See cases cited *passim*, I, I, 2, 4–7.

41. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739; National Park Bank *v.* Clark, 38 Misc. (N. Y.) 558, 77 N. Y. Suppl. 1089.

42. Solis *v.* Blank, 199 Pa. St. 600, 49 Atl. 302.

43. Solis *v.* Blank, 199 Pa. St. 600, 49 Atl. 302.

44. Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210, holding that an injunction would be an inadequate remedy, where the officers of the society, who are non-residents, are charged with gross maladministration and with depositing its money for their own benefit without proper security in an insolvent bank in another state, and are daily receiving large sums which they might squander or convert to the extent of many thousands of dollars before they could be displaced by the process provided by the laws of the corporation.

Bona fide misapplication of funds.— The fact that officers of an association in good faith used for satisfying in part the demands of pressing creditors, including complainant, a *per capita* tax collected for transmission to the parent association, and the further fact that they, without authority but in good faith and for the benefit of the association, executed a mortgage on its property in order to pay pressing creditors, including in part that of complainant, will not justify the appointment of a receiver under La. Acts (1898), No. 159, § 1, authorizing a court to appoint a receiver where the officers of the corporation are jeopardizing rights of stockholders or creditors, it appearing that the appointment would do good to no one and might prove disastrous to all. Steudell *v.* Longshoremen's Protective Union Benev. Assoc., 116 La. 974, 41 So. 228.

The payment of extravagant salaries to the officers does not warrant the appointment of a receiver. Baker *v.* Fraternal Mystic Circle, 1 Ohio S. & C. Pl. Dec. 579, 32 Cinc. L. Bul. 84.

45. Baker *v.* Fraternal Mystic Circle, 1 Ohio S. & C. Pl. Dec. 579, 32 Cinc. L. Bul. 84.

46. Crombie *v.* Order of Solon, 157 Pa. St. 588, 27 Atl. 710.

47. Crombie *v.* Order of Solon, 157 Pa. St. 588, 27 Atl. 710.

48. Baltimore, etc., R. Co. *v.* Cannon, 72 Md. 493, 20 Atl. 123, in which case it appeared that an incorporated relief association which was formed by the employees of a railroad company and whose obligations were guaranteed by the company was dissolved by the legislature, but that before the taking effect of the act of dissolution the association transferred all its assets to the company, and the latter covenanted to apply them to the liabilities of the association and thereafter to the benefit of a new association that was to take the place of the old, and also to pay to the members of the old association not desiring to become members of the new the value of their respective interests; and it was held that, conceding that the transfer of the assets to the company and the agreement between it and the old association were void, yet as ninety-five per cent of the members of the old association, who had joined the new, depended on the latter for the continuance of their life insurance and sick benefits, and as the company was able and willing to perform its covenants, equity would not appoint a receiver of the old association to take possession of its assets, wind up its affairs, and in effect destroy the new association, at the instance of a member of the old who had

c. Powers and Duties of Receivers. On the appointment of a receiver the title to the assets of the society vests in him,[49] and it is his right and duty to recover them.[50] Where by the rules of the society and the contract of membership the members are personally liable for assessments,[51] the receiver may enforce payment of assessments made by the society before his appointment;[52] and he may levy assessments to pay benefits[53] under order of the court,[54] and enforce payment thereof by suit.[55]

refused to join the new, and whose interests were amply protected by the covenant of the company to pay all such members the value of their respective interests.

49. Clark *v.* Lehman, 65 Ill. App. 238; Schroder *v.* Supreme Sitting O. I. H., 1 Ohio S. & C. Pl. Dec. 408, 7 Ohio N. P. 243, holding that where local branches of an association have funds which under the constitution and laws of the association are kept as a reserve fund to be subject to the order of the society's official head, and the association is insolvent and its affairs are in the hands of a receiver, such local branches have no right to appropriate so much of such reserve fund as was paid in by them, but it belongs to the receiver.

Estoppel to deny receiver's title.— The title of the receiver of a mutual benefit association, duly appointed in a proceeding to procure its dissolution, to the assets of the company, including the liability of a member to make good the association's losses by the payment of proper assessments, cannot be questioned by such member in a suit by the receiver to enforce such member's liability for an assessment for such purposes levied by the receiver. McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87.

50. Fisher *v.* Andrews, 37 Hun (N. Y.) 176 (holding that a beneficiary cannot, without leave of court, sue the trustees of the society for conversion of the proceeds of an assessment levied for his benefit, where the society is in the hands of a receiver, and he has not been requested to sue); Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259.

Recovery of trust funds.— A trustee who has acted as a mere conduit through which money has passed to those entitled to it under the scheme of the organization, and this while the corporation is a going concern, cannot be charged with the fund which has passed through his hands. Calkins *v.* Beekman, 127 Mich. 249, 86 N. W. 836. Where, however, certificate holders contributed to a common fund which was invested in securities, which the association assigned to a trustee for the benefit of certain holders whose certificates had matured, a decree setting aside the assignment and ordering the transfer of the securities to a receiver for distribution among all the members is proper, since the fund was a trust fund in which every member who contributed was beneficially interested *pro rata* to the amount of his contribution. Calkins *v.* Bump, 120 Mich. 335, 79 N. W. 491.

51. See *infra*, III, B.

52. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692; Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739.

If the contract of insurance is unilateral, and the member does not promise to pay assessments, the receiver cannot collect an assessment by suit. Lehman *v.* Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648 [*reversing* 71 Ill. App. 366]; Clark *v.* Schromeyer, 23 Ind. App. 565, 55 N. E. 785.

53. Clark *v.* Lehman, 65 Ill. App. 238; Calkins *v.* Angell, 123 Mich. 77, 81 N. W. 977; McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87.

By statute in Michigan it is the receiver's duty to continue the business of the association and levy assessments to pay death claims accruing before his appointment. Taft *v.* Kent Cir. Judge, 129 Mich. 312, 88 N. W. 887.

54. Clark *v.* Lehman, 65 Ill. App. 238 (holding that the court has full power to give him the authority possessed in the first instance by the secretary of notifying the members of their liability to pay assessments for death losses); Richards *v.* Swaim, 9 Ohio S. & C. Pl. Dec. 70, 7 Ohio N. P. 68.

Where, however, on a bill to dissolve a benefit association, no holders of death claims apply to have an assessment ordered by the court, and an attempt to raise the money to pay them by an assessment would be futile, no assessment should be ordered. Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

Right to move to vacate order.—A member of a mutual benefit association, acting for himself alone, cannot apply to vacate an order authorizing the receiver of the association to levy assessments and to enforce payment, as such order is not an adjudication against him. People *v.* U. S. Mutual Acc. Assoc., 10 N. Y. App. Div. 319, 41 N. Y. Suppl. 756.

55. Clark *v.* Lehman, 65 Ill. App. 238; Calkins *v.* Angell, 123 Mich. 77, 81 N. W. 977; McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87, holding that the receiver may bring separate actions against each member to recover the assessments so made.

Estoppel to deny liability.—Although Ohio Rev. St. § 3690, provides that a person may become a member of a mutual insurance company by signing its constitution, a person who takes out and holds a policy issued by such an association but who does not sign the constitution is estopped in equity from denying his liability for assessments, made under order of court in proceedings to dissolve the association, for the purpose of pay-

3. Dissolution by Act of Parties and by Operation of Society's Laws. In the absence of statute to the contrary[56] a benevolent association may be dissolved by consent of the members,[57] subject to such restrictions as are contained in its laws.[58] Although a by-law provides that in a certain event the society shall be disbanded, yet the happening of the event does not *ipso facto* effect a dissolution.[59]

4. Judicial Dissolution and Forfeiture of Charter[60] — a. In General. Members of a friendly society who have given notice of withdrawal of deposits are not in the same position as outside creditors, and are not entitled *ex debito justitiæ* to obtain an order for winding-up.[61] Where the constitution of a beneficial association provides that it shall not be dissolved so long as five members favor its continuance, such provision is controlling in an action to dissolve it, and if five members oppose a dissolution no decree to that effect can be rendered.[62] A judgment, in an action between members of a benefit association to determine who are its representatives, ordering the funds of the association to be preserved *in*

ing debts or losses accruing during the continuance of his policy. Richards *v.* Swaim, 9 Ohio S. & C. Pl. Dec. 70, 7 Ohio N. P. 68.

56. See the statutes of the different states.

Dissolution by officers on petition to court is provided for by statute in some states. Calkins *v.* Bump, 120 Mich. 335, 79 N. W. 491 (holding that a beneficial association, duly incorporated, cannot be dissolved by the voluntary acts of its officers, since 2 Howell Annot. St. Mich. c. 281, provides that corporations can be dissolved by the officers only by petition to a court having equity jurisdiction); Matter of American Dramatic Fund Assoc., 3 N. Y. Suppl. 793, 22 Abb. N. Cas. 231 (holding that Code Civ. Proc. §§ 2419, 2431, as amended by Laws (1884), applies to an incorporated beneficial society; that the fact that all the details required by the statute to be complied with in the distribution by a receiver cannot be carried out in the case of the association does not render it inapplicable, where those requirements are not pertinent, in view of the situation of the property and the character of the corporation, but the by-laws of the association relating thereto will be followed; and that it is no objection to the dissolution of the association that cemetery lots owned by it cannot be sold and the proceeds distributed, as the members may voluntarily surrender that property and create a fund for the maintenance of the burial place).

57. See cases cited *infra*, this note, and note 58.

Meeting for dissolution.— The dissolution of an association is not effected by a vote in favor thereof at a special meeting called by a deposed president, whom the society no longer recognized as president, and of whose claim to the office it had no knowledge. Industrial Trust Co. *v.* Greene, 17 R. I. 586, 23 Atl. 914, 17 L. R. A. 202. And a notice of a special meeting which does not state the business to be transacted does not authorize a vote to dissolve the association and dispose of its property. St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98. Necessity of calling meeting under English statute see Matter of Eclipse Mut. Ben. Assoc., 2 Eq. Rep. 221, Kay appendix 30, 23 L. J. Ch. 279, 2 Wkly. Rep. 113, 69 Eng. Reprint 328.

Time when resolution takes effect.—Where an unincorporated society resolved that its officers be directed to withdraw its money from the banks, and that the president be directed to distribute the same, and that the society be dissolved, the society was not dissolved till the funds were divided, and hence the president could sue to recover undistributed funds. Strebe *v.* Albert, 2 N. Y. City Ct. 40.

58. Rudd *v.* James, [1896] 2 Ch. 554, 60 J. P. 628, 65 L. J. Ch. 781, 74 L. T. Rep. N. S. 714, where, under the laws of the society, the consent of the managing committee was a prerequisite to dissolution.

Number of members required to effect dissolution.— By the laws of some societies there can be no dissolution so long as a specified number of members are willing to continue the society. St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98; Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87. But it has been held that the court will not enjoin a society from dissolving where a great majority of its members agree to such dissolution, notwithstanding a rule that if "three agree to hold the society, it shall not be dissolved." Waterhouse *v.* Murgatroyd, 9 L. J. Ch. O. S. 272.

59. Atnip *v.* Tennessee Mfg. Co., (Tenn. Ch. App. 1898) 52 S. W. 1093, where a by-law of an unincorporated beneficial association provided that, if the dues of its members should fall below one hundred dollars per month for three successive months, it should be disbanded, and its funds be held for the benefit of members then in good standing.

60. Equity jurisdiction see *infra*, VI, A, 1, c.

Procedure in suit for dissolution see *infra*, VI.

Receivers in dissolution proceedings see *supra*, I, I, 2.

61. *In re* Independent Protestant Loan Fund Soc., [1895] 1 Ir. 1, holding, however, that where the circumstances make it just and equitable so to do, the court will order such a society to be wound up.

62. Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87. And see State *v.* Société Républicaine, etc., 9 Mo. App. 114.

statu quo until the election of officers by the supreme lodge of the association, does not prevent the attorney-general from bringing quo warranto proceedings to oust the association from its franchise.[63]

b. Grounds. A beneficial or fraternal society may be judicially dissolved and its charter forfeited upon various grounds, as where it usurps powers which it had no authority to exercise,[64] where it fails to exercise its franchise and abandons operation,[65] where it misuses its franchise and powers,[66] or where it becomes

63. Com. *v.* Order of Solon, 166 Pa. St. 33, 30 Atl. 930.

64. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549 (where the society created a special fund to be disposed of in a manner contrary to statute); Fogg *v.* Supreme Lodge U. O. G. L., 156 Mass. 431, 31 N. E. 289 (where the society employed paid agents); Peltz *v.* Supreme Chamber O. F. U., (N. J. Ch. 1890) 19 Atl. 668 (where a so-called benevolent association was formed for a purpose not contemplated by the statute under which it claims to exist).

Accumulation of profits.—A voluntary association was formed for moral improvement and for relief in case of sickness or death. The constitution and by-laws provided for redress of grievances, and for punishment of parties offending; also for appeal to a higher tribunal. In an action by certain members to dissolve the association because of its having taken a lease of more room than it required for its meetings and sublet a portion, thereby accumulating a fund, it was held that there was no such departure from the objects of the association as called for a dissolution. Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41].

Admission of minors as members.— Minors are not, merely because of their minority, disqualified from becoming members of mutual benefit societies, in the absence of any statute on the subject; and their admission is not such a violation of the policy of the law as will subject such a society to dissolution. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

Engaging in insurance business.— The charter of a benevolent association will not be forfeited because it does an insurance business in violation of the statutes, thereby entailing loss on its numerous members; but it will be permitted to wind up its insurance business and to continue as a beneficial order, or it will be allowed to amend its charter so as to bring itself within the insurance laws of the state. Order of International Fraternal Alliance *v.* State, 77 Md. 547, 26 Atl. 1040.

Violation of charter provisions as to who may be a beneficiary.— A mutual benefit association which is in good financial condition, pays its losses promptly, and is well managed, will not be ousted from its franchise because it violates its charter by granting certificates payable to others than the family of the insured. State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579.

65. Burke *v.* Roper, 79 Ala. 138, holding that when the operations of the association have been discontinued, its object and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the several contributors in proportion to the amount contributed or paid by them respectively. See, however, Roper *v.* Burke, 83 Ala. 193, 3 So. 439; State *v.* Societe Republicaine, etc., 9 Mo. App. 114.

Term of non-user.— The franchise of a benevolent corporation will not be forfeited because of a failure to hold meetings and collect dues for a short time. State *v.* Société Républicaine, etc., 9 Mo. App. 114. But where the constitution of an unincorporated benevolent society provided that meetings should be held monthly, and dues be paid monthly, and that whoever should remain in arrears for six months should be stricken from the lists without further resolution of the society, a failure to hold meetings for eleven months and to carry out the purposes of the organization would amount in law to an abandonment thereof. Kuhl *v.* Meyer, 42 Mo. App. 474.

66. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549 (where the officers sought to perpetuate themselves in office by obtaining proxies from applicants for membership; where the society's books of account were confused; and where the annual statement filed with the state auditor contained falsifications and suppressions of the truth); Pelz *v.* Supreme Chamber O. F. U., (N. J. Ch. 1890) 19 Atl. 668 (where the officers were guilty of illegal conduct). See, however, State *v.* Société Républicaine, etc., 9 Mo. App. 114, holding that mere mistakes or acts of misuser do not warrant a judgment of ouster.

Fraud upon the members of the society constitutes ground for dissolution. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549 (where the officers issued certificates of membership numbered higher than the total number of certificates issued up to that date); Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799. See, however, Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815, holding that where a corporation issues certificates providing that the holder shall be entitled to receive from its benefit fund a sum not exceeding one thousand dollars in accordance with its laws, which provide that members may participate in its benefit fund to an amount not to exceed one thousand dollars, to be paid at the end of seven years on payment

insolvent[67] or its scheme of operation is wholly impracticable and certain to result in disaster to the society.[68] On a bill in equity for the distribution of the funds of a relief association among the members, a decree of distribution will not be granted unless it clearly appears that the operations of the association have entirely ceased, and its objects been abandoned.[69] Dissensions among the members of the society do not afford ground for dissolution.[70]

5. Rights and Liabilities of Members.[71] A member not otherwise entitled to assign his certificate may do so after the society has been enjoined from further operation[72] or dissolved.[73] A certificate holder in an insolvent society cannot

of two dollars and a half on each assessment, but does not make provision as to the number of assessments that shall be made, it cannot be said as a matter of law to be guilty of fraud in offering more than its assessments justify, although it uses a seal with the figures "$1,000" and the words "in seven years."

Misapplication of funds.— The use of advance mortuary assessments to pay current expenses is such a violation of law as will warrant the dissolution of a mutual benefit society, where the statute provides that no part of the funds collected for the payment of death benefits shall be applied for any other purpose. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549. So where a mutual benefit association which has created an endowment fund, on being refused a license by the state of its corporation and thus compelled to cease business, organizes a new company, and against the protest of the parties insured uses such endowment fund to obtain reinsurance of the old members in the new company, the parties insured may proceed in a court of equity to wind up the affairs of the old company and compel the distribution of the fund among those for whose benefit it was created. Stamm *v.* Northwestern Mut. Ben. Assoc., 65 Mich. 317, 32 N. W. 710. However, the fact that the trustees wrongfully vote profits to the payment of excessive salaries to themselves is no ground for forfeiting the society's franchise. State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579.

It is no ground for dissolution that a member has been wrongfully expelled (Burke *v.* Roper, 79 Ala. 138. *Contra,* Gorman *v.* Russell, 14 Cal. 531); and the arbitrary and illegal deposition of the president of a voluntary benevolent association cannot be relied upon by him several months afterward as a ground for dissolving the association, if at the time he submitted to the action without any attempt to enforce his rights either under the constitution of the association or in the courts of law (Industrial Trust Co. *v.* Green, 17 R. I. 586, 23 Atl. 914, 17 L. R. A. 202). Where a fraternal benefit association is not shown to be insolvent, but has been operating in violation of Nebr. Laws (1897), c. 47, regulating such associations, a receiver will not be appointed to wind up the affairs of the society, but to secure a correction of the abuses and irregularities it will be enjoined from transacting business until the law is complied with (State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531); and where the incorporators of a mutual aid society, in violation of their charter, adopt by-laws giving themselves the right to fill all vacancies in offices and to fix their own salaries, but, upon suggestion filed by the attorney-general, they correct their errors, it is proper not to wind up the corporation if the interests of a large membership would thereby suffer (Com. *v.* United Brethren Mut. Aid Soc., 16 Pa. Co. Ct. 145).

67. *In re* Lead Co.'s Workmen's Fund Soc., [1904] 2 Ch. 196, 73 L. J. Ch. 628, 91 L. T. Rep. N. S. 433, 20 T. L. R. 504, 52 Wkly. Rep. 571.

What constitutes insolvency.— The fact that by reason of attacks on its credit a society has not been able to earn sufficient money to pay its policies as they fall due does not constitute insolvency. Barton *v.* International Fraternal Alliance, 85 Md. 14, 36 Atl. 658. Nor is a society insolvent simply because it is unable, because of the general impracticability of its scheme, to carry out its plan. *In re* Youths' Temple of Honor, 73 Minn. 319, 76 N. W. 59. And the assets of a fraternal benefit association do not consist in cash and tangible securities alone, but if its plan of business is feasible it may rely on the good faith and solvency of its members, and cannot be said to be insolvent when it is reasonably probable that by its authorized assessments it can meet its just liabilities. State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531.

68. *In re* Lead Co.'s Workmen's Fund Soc., [1904] 2 Ch. 196, 73 L. J. Ch. 628, 91 L. T. Rep. N. S. 433, 20 T. L. R. 504, 52 Wkly. Rep. 571; Reeve *v.* Parkins, 2 Jac. & W. 389, 17 Eng. Ch. 677.

69. Roper *v.* Burke, 83 Ala. 193, 3 So. 439. And see Blake *v.* Smither, 22 T. L. R. 698.

70. Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41]. And see Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627.

71. Liability for assessments see *supra,* I, I, 2, c.

Rights of members on distribution of funds see *infra,* I, I, 7.

72. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692, subject, however, to rights of set-off and other equities against him.

73. Com. *v.* Order of Solon, 193 Pa. St. 240, 44 Atl. 327 (holding that a provision in a certificate of membership in a beneficial

enforce his rights against another society which has made an ineffectual attempt to consolidate with the insolvent society and take over its assets and certificates.[74] If a member pays dues in advance and the society goes into insolvency before the dues are earned, the member may recover them.[75] However, the fact that the society conducted an unauthorized business does not entitle the members to recover moneys paid by them by way of initiation fees and assessments as moneys had and received.[76] Members who have received unlawful payments out of a trust fund are liable therefor to a receiver subsequently appointed.[77]

6. Rights of Beneficiaries.[78] The beneficiary is, on the death of a member, a creditor of the association, so as to have the right to attachment.[79] Where beneficiaries have, prior to the appointment of a receiver, *prima facie* established their claims in the regular way, they need not again present their proofs to the court.[80]

7. Distribution of Funds and Property. The assets of a beneficial society in the hands of an assignee or receiver should be applied: (1) To the payment of the expenses of administration;[81] (2) to the debts of the society not arising out of contracts of membership or insurance;[82] and (3) to the members of the society,[83]

society that the member shall not assign or transfer it, and that any such assignment shall render it void, does not prevent assignment after dissolution of the society); Com. *v.* Order of Solon, 192 Pa. St. 498, 43 Atl. 1086.

74. Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259, holding that his rights must be enforced by the receiver of the insolvent society.

75. Garrett *v.* Guarantee Trust, etc., Co., 29 Wkly. Notes Cas. (Pa.) 33.

Right to have overpayments refunded see *infra*, note 83.

76. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692.

77. Calkins *v.* Beekman, 127 Mich. 249, 86 N. W. 836. See, however, Calkins *v.* Green, 130 Mich. 57, 89 N. W. 587, hoding that where defendant took out one of the certificates issued by a benefit association, payable six years after date, according to the terms of which the society agreed to pay him one thousand two hundred dollars on his payment of assessments amounting to four hundred and thirty-two dollars in seventy-two monthly payments, and the contract was fulfilled, and defendant paid, a receiver appointed on the insolvency of the association could not recover the payment or any portion thereof for the benefit of others whose certificates remained unpaid; there being nothing morally wrong with the scheme, although it was impracticable, the funds paid in did not become a trust fund to be held for all the members.

78. Rights of beneficiaries on distribution of funds see *infra*, I, I, 7.

79. Lackmann *v.* Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583; Solis *v.* Blank, 199 Pa. St. 600, 49 Atl. 302.

80. Clark *v.* Lehman, 65 Ill. App. 238.

81. Insurance Com'r *v.* Provident Aid Soc., 89 Me. 413, 36 Atl. 627; *In re* Youths' Temple of Honor, 73 Minn. 319, 76 N. W. 59.

Liability for attorney's fees.—Where, after the dissolution of a beneficial society and the appointment of a receiver in proceedings by the attorney-general, claims against the society were rejected at the instance of the attorney for holders of assigned certificates of membership, his fees for services should be paid by his clients and not out of the general fund. Com. *v.* Order of Solon, 193 Pa. St. 240, 44 Atl. 327.

Expenses incurred by society.—A provision in the certificates that on a division of the fund the association should retain reasonable charges for its management does not cover the general expenses of the association, except so far as properly chargeable to the management of the fund. Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

82. *In re* Youths' Temple of Honor, 73 Minn. 319, 76 N. W. 59; McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87; Sheeler's Appeal, 159 Pa. St. 594, 28 Atl. 482; Smith *v.* Taggart, 87 Fed. 94, 30 C. C. A. 563.

Foreign attachment see *infra*, this section.

83. Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18.

A voluntary beneficial association not being a partnership (see *supra*, I, A, 2), its funds are not distributable as partnership funds (Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41]).

As between the holders of matured and unmatured certificates.—The fact that a certificate had matured before the institution of insolvency or dissolution proceedings does not entitle its holder to a preference over the holders of certificates which had not matured at that time. *In re* Youths' Temple of Honor, 73 Minn. 319, 76 N. W. 59; Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145; Tonti's Assigned Estate, 173 Pa. St. 464, 487, 34 Atl. 440, 441; Sheeler's Appeal, 159 Pa. St. 594, 28 Atl. 482. *Contra*, Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311.

or, in the case of such of the members of the society as may have died, to their legal

As between the members of the society generally, a special fund is to be distributed among them in proportion to the amount contributed to it by each. Insurance Com'r *v.* Provident Aid Soc., 89 Me. 413, 36 Atl. 627; Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692 [*followed* in Williams *v.* United Reserve Fund Associates, 166 Mass. 450, 44 N. E. 342]; Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966; Lindquist *v.* Glines, 3 Misc. (N. Y.) 214, 23 N. Y. Suppl. 272; Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145; Tonti's Assigned Estate, 173 Pa. St. 464, 487, 34 Atl. 440, 441; Fraternal Guardian's Assigned Estate, 159 Pa. St. 594, 28 Atl. 482; Smith *v.* Taggart, 87 Fed. 94, 30 C. C. A. 563; *In re* Lead Co.'s Workmen's Fund Soc., [1904] 2 Ch. 196, 73 L. J. Ch. 628, 91 L. T. Rep. N. S. 433, 52 Wkly. Rep. 571, 20 T. L. R. 504, holding, however, that no interest is to be allowed on contributions. To accomplish exact equity the last assessment paid by each member should be returned to him, if the funds are sufficient, and if not, the ratable share, based on the amount of each assessment; and the balance, if any, should be applied to the next preceding assessment in the same ratio, and so continued until the fund is exhausted. Insurance Com'r *v.* Provident Aid Soc., *supra*.

As between certificate holders and incorporators.— The contention that the incorporators of a beneficiary assessment insurance association, incorporated under statutes authorizing the formation of such companies for the private gain and profit of a particular class of members, are entitled to the rights and property of the corporation, and that the certificate holders have no other interest than as holders of contracts of insurance, is unfounded, where no such provision is made in the certificate of incorporation, or in the original or any subsequent by-laws, and all rights given to the first board of officers, who were chosen from the incorporators, were given to them as officers and not as incorporators. Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566.

Deduction of benefits received.— In proceedings to wind up the affairs of an insolvent fraternal insurance order, payments made to a certificate holder on account of sick or disability claims are to be deducted from the money paid in by him, and only the balance is provable (Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692. *Contra*, *In re* Lead Co.'s Workmen's Fund Soc., [1904] 2 Ch. 196, 73 L. J. Ch. 628, 91 L. T. Rep. N. S. 433, 20 T. L. R. 504, 52 Wkly. Rep. 571); but no computation of interest should be made on sums paid for sick or disability benefits (Fogg *v.* Supreme Lodge U. O. G. L., *supra*).

Deduction of unpaid assessments.— Unpaid assessments which were due when dissolution proceedings were commenced should be deducted from the dividends due the defaulting members. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692; Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145.

Refunding overpayments of assessments. — If an assessment levied by the society and paid to a receiver subsequently appointed is greater than is needed, the payers are entitled to have the excess refunded. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692. Right to recover unearned dues paid in advance see *supra*, I, I, 5.

Sick and disability benefits.— It has been held that where the constitution and by-laws of a railroad employees' relief association provided for the payment of a specific sum to each member in case of sickness or disability caused by accident, on distribution of the assets of such association the claims of members for benefits in cases of sickness beginning or accident occurring before dissolution of the association were preferred claims, and the right to receive benefits did not terminate with such dissolution. Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045. On the other hand it has been held that members who received checks in payment of sick or disability benefits, or otherwise, and failed to collect them before the corporation was enjoined from continning business in a proceeding to wind up its affairs, are not entitled to have the checks paid in full; that they may prove the same against the fund derived from assessments levied to create reserve and benefit funds, but not against the general or expense fund. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692. And where a certificate provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the association, there should be paid to the member, at the option of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the association and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one half of the amount of the insurance, and under this provision a claim for total disability was made after an order for the winding-up of the society, the effect of the order was to destroy the functions of the directors and officers and practically to determine the contract; and as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings, but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy. *Re* Massachusetts Ben. Life Assoc., 30 Ont. 309.

The question of who are members and entitled to a distributive share in the benefit and reserve fund of the society should be determined by the society's constitution and by-

representatives[84] or their beneficiaries.[85] If the board of government of a voluntary association votes a fund to another society in anticipation of disso-

laws. Garham *v.* Mutual Aid Soc., 161 Mass. 357, 37 N. E. 447.

As between members and beneficiaries see *infra*, note 85.

Rights of members generally see *supra*, I, I, 5.

84. Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045; Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146 (holding that the legal representatives of certificate holders who died without having incurred any forfeiture, and who had not had any benefit from an assessment, are to share equally with other holders of certificates in force); Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18; Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145.

85. See cases cited *infra*, this note.

Right to preferential payment.— In an action for the dissolution of a mutual aid society and a distribution of its assets, the rights of a beneficiary who claims a preference out of the assets are to be determined as they existed at the date of the commencement of the action; and they are governed, not by the general rules of equity, but by the constitution and by-laws and certificate of membership of the society. People *v.* Grand Lodge E. O. M. A., 156 N. Y. 533, 51 N. E. 299. Death claims held entitled to preference see Baltimore, etc., R. Co. *v.* Baltimore, etc., Employés' Relief Assoc., 77 Md. 566, 26 Atl. 1045; Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18. Death claims held not entitled to preference see People *v.* Grand Lodge E. O. M. A., *supra* (holding that where an assessment collected in pursuance of a notice containing information of the death of a member is paid out to the beneficiaries of other members whose deaths had occurred previously, and no portion of such assessment reaches the hands of a receiver of the association afterward appointed, the beneficiary of such member has no preferred claim on the funds which are in the receiver's hands); Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145; *In re* Wisconsin Odd Fellows' Mut. L. Ins. Co., 101 Wis. 1, 76 N. W. 775, 42 L. R. A. 300 (holding that where a beneficial association had no capital stock and no funds for the payment of losses except such as it secured by assessment of its members, and its funds were divided into a "policy fund" and a "reserve fund," but the latter was not set apart for any special purpose, and the directors were authorized to transfer it to the former fund when they deemed it expedient, the members had no vested right in the reserve fund; and hence where a member died after the assignment of the association for the benefit of its creditors, his beneficiary was not entitled to be paid by the assignee out of that fund as a creditor).

Right to share in safety funds.— Certificates provided for payment of death benefits not exceeding one thousand dollars by assessments, and for payments to a "safety fund" for the benefit of members of five years' standing by having the income of it, after five years or after it had amounted to one hundred thousand dollars, applied to the payment of future dues. If after that time the association should fail to pay the indemnity provided in the certificates the fund was to be divided among all the holders of certificates then in force, but the fund was not to be liable for any purpose "except as above mentioned." The association failed before the five years and while the fund was only nineteen thousand dollars. It was held that the fund should be divided equally among all the holders of certificates in force at the time a bill to dissolve the association was filed, and could not be taken by attachment or otherwise by the holders of death claims, notwithstanding general expressions on the back of the certificates asserting that the association provided substantial protection for the families and dependents of deceased members by means of the safety fund. Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

A widow entitled to a monthly payment "during widowhood" loses her right to further payments by remarrying pending dissolution proceedings, although she again becomes a widow before distribution. Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18.

Liquidation of life benefits.— It has been held that the legislature may authorize an insolvent benefit society to compel a beneficiary to receive a lump sum once for all in lieu of a life rent payable weekly as provided by the certificate of membership. Belisle *v.* L'Union St. Jacques, 20 L. C. Jur. 29 [*reversing* 15 L. C. Jur. 212]. The rules of a benevolent association provided that the widow of any member in good standing at the time of his death should be entitled to fifteen dollars per month during widowhood. The certificate of incorporation authorized dissolution and the appointment of commissioners to wind up the affairs of the association. It was duly dissolved, and commissioners were appointed who took charge of the assets and continued to pay some of the widows fifteen dollars per month. After dissolution other members died leaving widows, and certain of the widows who were such at the time of dissolution remarried. It was held that the widows who were such at the time of the dissolution and who have not remarried were entitled to have the value of their annuities of fifteen dollars per month reckoned according to the probable length of their lives, without considering the possi-

lution, and the members do not object, the fund will be distributed accordingly.[86] If surplus funds have accumulated in the hands of commissioners appointed in dissolution proceedings, they are to be distributed with reference to the amount of the respective shares of the persons entitled to participate in the assets in existence when the society was dissolved.[87] Where a society transferred its risks and assets to another company, but only a part of the members assented and took certificates in the latter company, the latter is not, on the appointment of a receiver for the society, entitled to the entire mortuary fund in the hands of the receiver, but is entitled only to that proportion of the fund to which the reinsured members would otherwise be entitled.[88] On dissolution of a relief association formed by the employees of a corporation, the contributing members and the corporation, which also has contributed to the fund, are entitled to share in the fund in proportion to the amount contributed by each.[89] The members of a local lodge of a beneficial society cannot, on dissolution of the lodge, distribute among themselves a fund accumulated by the lodge for the charities of the organization.[90] A member does not ordinarily forfeit his right to share in the assets by failing to pay an assessment levied by the society, where dissolution or receivership proceedings are instituted before the time expires within which payment may be made.[91] The funds of a beneficial association having branches in different states are generally to be distributed among the members and their beneficiaries without reference to their place of residence;[92] and it has been held that in case a receiver has been appointed for a foreign society in the state of its domicile, the local courts may in the exercise of comity direct a local receiver, after paying his charges and expenses and the costs of the suit, to pay over the balance to the

bility of their remarrying, which sum should be paid to them, less the amount they had received from the commissioners in monthly payments; that every such widow who had never, since the dissolution, received her monthly allowance was entitled to the present value of her annuity; and that in the case of the widows who had been paid fifteen dollars per month the profit on their annuities should be calculated at the average net per cent for the whole time, less such net per cent on the monthly payments from the time of such payments. Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18.

Foreign attachment see *infra*, this section.

Rights of beneficiaries generally see *supra*, I, I, 6.

86. Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966.

87. Collier *v.* Steamboat Captains' Benev. Assoc., 7 Ohio Dec. (Reprint) 10, 1 Cinc. L. Bul. 18.

88. Insurance Com'r *v.* Provident Aid Soc., 89 Me. 413, 36 Atl. 627.

89. Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966.

90. Nichols *v.* Bardwell Lodge No. 179 I. O. O. F., 105 Ky. 168, 48 S. W. 426 (where most of the contributors to the fund had ceased to be connected with the lodge prior to its dissolution); Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

91. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692 (the society having been enjoined from doing business before the expiration of such time); Matter of Home Mut. Aid Assoc., 4 Ohio S. & C. Pl. Dec. 272, 3 Ohio N. P. 145.

Exceptions and qualifications.— The filing of a bill for a receiver and an injunction on the last day on which payment of an assessment might be made does not excuse the failure to pay on that day, where no attempt was made to pay, and the officers of the society did not refuse payment. Fogg *v.* Supreme Lodge U. O. G. L., 159 Mass. 9, 33 N. E. 692. And the holders of certificates which, at the time the bill for dissolution was filed, had not been in force for a year, within which time they were to make their first payment to the fund, are not to share in the fund unless the payment has been made since that date within the year. Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

Dissolution of local lodge as authorizing payment of assessments to supreme lodge see *infra*, IV, I, 2, d, (III), (B).

Dissolution or proceedings therefor as excusing non-payment of dues and assessments see *infra*, IV, I, 2, d, (IV).

92. See cases cited *infra*, this note, and note 93.

Rights of foreign members.— Where a mutual benefit association with branches in several states becomes insolvent, and a receiver is appointed in Massachusetts, the benefit and reserve funds should be proportionally distributed among the certificate holders regardless of their residence, to which end certificate holders who have attached property of the association will be excluded from any share in such funds unless they release such attachments or account for the property in their possession. Garham *v.* Mutual Aid Soc., 161 Mass. 357, 37 N. E. 447.

foreign receiver for distribution in accordance with rules laid down by the local courts.[93]

II. THE CONTRACT OF INSURANCE.

A. In General. The contract of insurance entered into between a beneficial or fraternal society and its members is generally evidenced by a certificate of insurance, so-called, which takes the place of the ordinary policy;[94] but some societies issue no certificates, and in this event the contract of insurance is to be ascertained by reference to the society's charter of incorporation or articles of association and its constitution and by-laws.[95] If the contract in itself is not impossible of performance, the rights of the member thereunder are not destroyed by the fact that the scheme adopted by the society to perform the contract is impracticable and incapable of execution.[96]

B. Nature. While there is a difference between beneficial or fraternal societies and ordinary insurance companies,[97] still the contract whereby a beneficial society agrees with its members, in consideration of the payment of dues and assessments, to indemnify them or their nominees against loss from certain causes,

93. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846 (holding that a receiver of the property in Massachusetts of a benefit society incorporated in Indiana may be ordered to pay over the balance to a receiver in Indiana, where the courts of both states have adopted the same principles governing the distribution of the fund, and it appears by the decree of the Indiana court that it will admit the proof of claims against the funds made in the Massachusetts court when it regularly certifies them, subject to such revision in Indiana as justice may seem to the court to require, and will distribute the fund so that benefit certificate members in Massachusetts will receive the same proportionate dividend as members in Indiana and other states); Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739 (holding that local branches of an insolvent foreign benefit society cannot refuse to turn over assessments in their hands to an ancillary receiver appointed to aid the foreign receiver in collecting the assets, to be by him transmitted to the foreign receiver for distribution in the discretion of the court, if such disposition appears to be proper and consistent with affording due protection to the citizens of the state); National Park Bank *v.* Clark, 38 Misc. (N. Y.) 558, 77 N. Y. Suppl. 1089 (holding that where a foreign benefit order becomes insolvent, and a receiver is appointed in a foreign state and also in New York, the court may protect domestic creditors to the extent of directing a relief fund on deposit in New York to be paid to the New York receivers, they to pay over any balance, after paying the expenses of the receivership, to the foreign receiver, he giving a bond to distribute it according to the principles laid down by the courts of New York for the distribution of the fund); Smith *v.* Taggart, 87 Fed. 94, 30 C. C. A. 563.

This rule is not followed in all jurisdictions, however. Lackmann *v.* Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583; Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815; Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311; Lindquist *v.* Glines, 3 Misc. (N. Y.) 214, 23 N. Y. Suppl. 272; Frowert *v.* Blank, 205 Pa. St. 299, 54 Atl. 1000. And see Solis *v.* Blank, 199 Pa. St. 600, 49 Atl. 302.

Failure to pay over funds as forfeiting right to dividends.— On the insolvency of a mutual benefit association and the appointment of a receiver in an Indiana court an order was issued by such court requiring all branches and all local receivers in the different states to forward to the Indiana receiver all funds in their hands. An Ohio court refused to order the transfer of such funds to the Indiana receiver, but directed its receiver to distribute the same among the members of the local branches, which was done. Meanwhile the Indiana court directed that all receivers account to the principal receiver and pay over to him the funds in their hands by a certain date or be thereafter barred from receiving any distribution on the claims represented by them until all others who should have so accounted had been first fully paid. It was held, in an action against the principal receiver in Indiana by certain Ohio certificate holders who were unable on account of the action of the Ohio court to comply with said order, that they were entitled to be paid their claims, less what they had received on account thereof in Ohio or elsewhere, and any assessments not paid by them which had been paid by other certificate holders, and any unnecessary expenses incurred in the administration of the funds in Ohio. Cowen *v.* Failey, 149 Ind. 382, 49 N. E. 270.

94. See *infra*, II, C, 2.

95. Mills *v.* Rebstock, 29 Minn. 380, 13 N. W. 162; Badesch *v.* Congregation Brothers of Willna, 23 Misc. (N. Y.) 160, 50 N. Y. Suppl. 958.

Constitution and by-laws as part of contract evidenced by certificate see *infra*, II, D, 3.

96. Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311.

97. See *supra*, I, A, 1.

such as accidental personal injury, sickness, or death, is essentially a contract of insurance, and the rights and liabilities of the parties thereto are governed accordingly.[98] The contract is classed as personal property,[99] being a chose in action.[1]

C. Formation — 1. In General. The contract of insurance is commonly formed by the making of an application therefor[2] and an acceptance thereof by the society,[3] and the issuance, delivery, and acceptance of a certificate of insurance.[4] The application is generally required to be accompanied by a medical examination of the applicant,[5] and in case of his acceptance he is commonly

98. *Alabama.*— Supreme Commandery K. G. R. *v.* Ainsworth, 71 Ala. 436, 36 Am. Rep. 332.

California.— Bornstein *v.* District Grand Lodge No. 4 I. O. B. B., 2 Cal. App. 624, 84 Pac. 271. See, however, Swift *v.* San Francisco Stock, etc., Bd., 67 Cal. 567, 8 Pac. 94.

District of Columbia.— Drum *v.* Benton, 13 App. Cas. 245.

Indiana.— Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317; Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 98 Ind. 149.

Iowa.— Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411.

Kansas.— Endowment, etc., Assoc. *v.* State, 35 Kan. 253, 10 Pac. 872; State *v.* Vigilant Ins. Co., 30 Kan. 585, 2 Pac. 840.

Maine.— Bolton *v.* Bolton, 73 Me. 299.

Maryland.— Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627.

Massachusetts.— Com. *v.* Wetherbee, 105 Mass. 149.

Nebraska.— Soehner *v.* Grand Lodge O. S. H., (1905) 104 N. W. 871.

New Hampshire.— Barton *v.* Provident Mut. Relief Assoc., 63 N. H. 535, 3 Atl. 627; Smith *v.* Bullard, 61 N. H. 381; Mellows *v.* Mellows, 61 N. H. 137.

New Jersey.— Supreme Assembly R. S. G. F. *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061; Golden Star Fraternity *v.* Martin, 59 N. J. L. 207, 35 Atl. 908.

Ohio.— Odd Fellows' Protective Assoc. *v.* Hook, 9 Ohio Dec. (Reprint) 89, 10 Cinc. L. Bul. 391.

Texas.— Supreme Council A. L. H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633; Coleman *v.* Anderson, (Civ. App. 1904) 82 S. W. 1057 [*affirmed* in (1905) 86 S. W. 730].

Utah.— Daniher *v.* Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. 245.

Virginia.— Cosmopolitan L. Ins. Co. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

See 28 Cent. Dig. tit. "Insurance," § 1848; and *supra*, I, A, 1.

See, however, Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Com. *v.* Equitable Ben. Assoc., 137 Pa. St. 412, 18 Atl. 1112.

A certificate of membership in a mutual benefit society is not a "life policy," within the meaning of that phrase in the statutes relative to life insurance. Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620. And see Drum *v.* Benton, 13 App. Cas. (D. C.) 245.

Construction of contract as a will see *infra*, IV, G, 3, b.

99. Rowell *v.* Covenant Mut. Life Assoc., 84 Ill. App. 304.

1. Rowell *v.* Covenant Mut. Life Assoc., 84 Ill. App. 304; Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. 1057 [*affirmed* in (1905) 86 S. W. 730], holding that it is such even before the death of the member.

2. Pfeifer *v.* Supreme Lodge B. B. S. Soc., 37 Misc. (N. Y.) 71, 74 N. Y. Suppl. 720 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138].

If the rules of the society require the application to be signed, and this is not done, there is no contract of insurance. Supreme Lodge of Protection K. & L. H. *v.* Grace, 60 Tex. 569. But where an application is signed in good faith by a third person in the applicant's name, and the applicant afterward approves it, the contract of insurance is not therefore invalid. Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105 (where an application was made in good faith under the insured's authorization by his brother, who was familiar with his physical condition, the insured afterward submitting to a medical examination and ratifying his brother's action); Somers *v.* Kansas Protective Union, 42 Kan. 619, 22 Pac. 702 (where an application was made by a husband for the wife at her direction, and was signed by him with the consent of the agent of the company, and the action of the husband was afterward approved by the wife).

If the society issues a certificate without formal application, it cannot avoid liability thereon because no application was presented. Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903.

3. Rogers *v.* Equitable Mut. Life, etc., Assoc., 103 Iowa 337, 72 N. W. 538.

4. See *infra*, II, C, 2.

5. State *v.* Bankers' Union of World, 71 Nebr. 622, 99 N. W. 531; Asselto *v.* Supreme Tent K. M., 192 Pa. St. 5, 43 Atl. 400.

Authority to make examination.— Where an applicant for membership in a fraternal order is examined by a physician having authority from the state deputy to examine his own applicants for membership and have physicians of his own selection sign the reports, and such examination is signed by an approved examiner of the order, it is suf-

required to prepay certain fees, dues, or assessments.[6] To entitle a person to a certificate of insurance it is necessary that he should be a social member of the organization or of one of its lodges.[7]

2. Certificate of Insurance. To complete the contract of insurance it is generally necessary, under the constitution and by-laws of a beneficial or fraternal society, that a certificate of insurance or membership be issued,[8] duly approved,

ficient, although the laws of the order declare that no examination shall be legal unless made by an examiner approved by the supreme medical director. Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844.

6. Blue Grass Ins. Co. *v.* Cobb, 72 S. W. 1099, 24 Ky. L. Rep. 2132; Loyal Mystic Legion of America *v.* Richardson, (Nebr. 1906) 107 N. W. 795; National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122; Modern Woodman Acc. Assoc. *v.* Kline, 50 Nebr. 345, 69 N. W. 943; Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110. And see Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819. *Compare* Bushaw *v.* Woman's Mut. Ins., etc., Co., 3 Silv. Sup. (N. Y.) 591, 8 N. Y. Suppl. 423.

Where, however, the constitution of a benefit society provided that each and every member, on becoming a member of the beneficiary fund, should pay to the financial secretary of the subordinate council the amount of one assessment, and that members who failed to pay any assessment to the beneficiary fund should be suspended, and further that if any council permitted a member liable to suspension to remain in good standing it must pay his assessment out of its general funds, payment of the assessment on application to become a beneficiary member was not a condition precedent to membership. Baldwin *v.* Golden Star Fraternity, 47 N. J. L. 111. And where in the application assured agreed to pay "one assessment" within thirty days from its date, when made as provided in the by-laws, and the by-laws provided that a member failing to pay his assesment within thirty days from its date should stand suspended, the payment of at least one assessment was not a condition precedent to recovery. Stanley *v.* Northwestern Life Assoc., 36 Fed. 75.

Sufficiency of tender.— Where the rules of a beneficial association required the officer who collected assessments to give official receipts for all moneys received, and keep stubs of each receipt given by him, and to attest benefit certificates and other official documents, and further required certificates to be signed by another officer before delivery to the member, and the collecting officer kept an office known to the members, where he transacted the business of the order, a tender of dues and assessments and a demand of a certificate made to the collector on a public street after business hours was insufficient to fix the rights as a member of the person making the tender. Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

7. See cases cited *infra*, this note. *Compare* Emmons *v.* Hope Lodge No. 21 I. O. O. F., 1 Marv. (Del.) 187, 40 Atl. 956.

Initiation is generally a condition precedent to membership. Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580 (so holding, although the certificate bears a previous date); Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Hiatt *v.* Fraternal Home, 99 Mo. App. 105, 72 S. W. 463 (holding that Rev. St. (1890) § 1408, by requiring fraternal beneficiary associations to have a lodge system, intends that no person shall become a member of such an association until he has been initiated into one of its lodges); Loyal Mystic Legion of America *v.* Richardson, (Nebr. 1906) 107 N. W. 795; Devins *v.* Royal Templars of Temperance, 20 Ont. App. 259. *Compare* Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603. Mere election to membership without initiation is not sufficient. Matkin *v.* Supreme Lodge K. H., 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886. But see Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875], where the contrary was held under the workings of the society.

8. National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122; May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66; Pfeifer *v.* Supreme Lodge B. B. S. Soc., 37 Misc. (N. Y.) 71, 74 N. Y. Suppl. 720 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138], holding that where the constitution of a benevolent society requires one desiring to be entitled to a death benefit to apply for it and procure a certificate from the supreme lodge showing that he is so entitled, a member who has not complied with these requirements bars his heirs from the death benefit, although after his death the subordinate lodge notifies the supreme lodge that he is so entitled. See, however, Bishop *v.* Grand Lodge E. O. M. A., 112 N. Y. 627, 20 N. E. 562 [*reversing* 43 Hun 472], where a fund was provided for, to be paid over to the families, heirs, or legal representatives of deceased members, or to such persons as deceased members might while living have directed, and it was further provided that each member should be entitled to a certificate setting forth his name and good standing, the amount of the benefit to be paid at his death, and to whom payable, and it was held that where a member had complied with all other rules of the society, the fact that he had not taken out a certificate or designated a beneficiary did not preclude a recovery against the society, but that his

signed, and sealed,[9] and delivered to the applicant[10] and accepted by him.[11] The certificate of insurance is to be regarded as a written contract, and, so far as it goes, is the measure of the rights of all parties.[12] Conditions on the back of the certificate do not became a part of the contract, unless referred to therein.[13]

family would be entitled to the benefit. And see *supra*, II, A.

9. Triple Tie Ben. Assoc. *v.* Wood, 73 Kan. 124, 84 Pac. 565 (where the constitution required certificates to be executed by the supreme president and supreme secretary); Home Forum Ben. Order *v.* Jones, 5 Okla. 598, 50 Pac. 165 (holding that where the constitution and laws provide that no certificate shall be binding until it has been approved by the grand medical examiner and signed by the president and secretary of the order, such approval and signature are essential to create an obligation on the certificate, and delay by the local lodge in forwarding the application will not create a contract without them).

Counter-signature by local officers.— The certificate need not be countersigned by local officers (Triple Tie Ben. Assoc. *v.* Wood, 73 Kan. 124, 84 Pac. 565; Dickert *v.* Farmers' Mut. Ins. Assoc., 52 S. C. 412, 29 S. E. 786. And see Fisk *v.* Equitable Aid Union, 7 Pa. Cas. 567, 11 Atl. 84), in the absence of some by-law to the contrary (Hiatt *v.* Fraternal Home, 99 Mo. App. 105, 72 S. W. 463; Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110. See, however, Supreme Lodge K. H. *v.* Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160).

10. *Kentucky.*— Blue Grass Ins. Co. *v.* Cobb, 72 S. W. 1099, 24 Ky. L. Rep. 2132.

New York.—Roblee *v.* Masonic Life Assoc., 38 Misc. 481, 77 N. Y. Suppl. 1098; Pfeifer *v.* Supreme Lodge B. B. S. Soc., 37 Misc. 71, 74 N. Y. Suppl. 720 [*affirmed* in 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138]. And see Bushaw *v.* Woman's Mut. Ins., etc., Co., 3 Silv. Sup. 591, 8 N. Y. Suppl. 423.

Tennessee.— McLendon *v.* Woodmen of World, 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444.

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

Washington.— Logsdon *v.* Supreme Lodge F. W. A., 34 Wash. 666, 76 Pac. 292.

See 28 Cent. Dig. tit. "Insurance," § 1856.

Although the certificate bears a date prior to its delivery, yet the member becomes such only when the certificate is delivered. Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580.

Delivery is not essential, however, to the validity of the insurance, unless it is made so by some by-law or stipulation in the application for insurance. Baldwin *v.* Golden Star Fraternity, 47 N. J. L. 111. Nor is the insurance defeated by a wrongful refusal of the society to deliver the certificate (Pledger *v.* Sovereign Camp W. W., 17 Tex. Civ. App. 18, 42 S. W. 653); nor by the failure of a subordinate lodge to deliver a certificate issued to it by the central organization, where such failure was due to the loss by the member of another certificate in lieu of which the one in question was issued (Supreme Lodge K. H. *v.* Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160).

Delivery to officer or agent of society or to subordinate lodge.— Delivery to an officer (Supreme Court O. P. *v.* Davis, 129 Mich. 318, 88 N. W. 874, he having been asked to act as custodian for assured, and having done so in a personal and individual capacity) or agent (Supreme Lodge K. H. *v.* Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160) of the society, or to a subordinate lodge (Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903. And see Tracy *v.* Supreme Court of Honor, 4 Nebr. (Unoff.) 189, 93 N. W. 702), for delivery to the applicant may be a sufficient delivery, although the applicant never receives it.

Involuntary delivery pursuant to judicial process is not a sufficient delivery. National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122.

11. May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66. See, however, Tuttle *v.* Iowa State Traveling Men's Assoc., 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. N. S. 223; Tracy *v.* Supreme Court of Honor, 4 Nebr. (Unoff.) 189, 93 N. W. 702.

A written acceptance is not necessary (Sovereign Camp W. W. *v.* Brown, (Tex. Civ. App. 1905) 88 S. W. 372. And see Tracy *v.* Supreme Court of Honor, 4 Nebr. (Unoff.) 189, 93 N. W. 702), unless required by the terms of the application or laws of the society (Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110. And see Triple Tie Ben. Assoc. *v.* Wood, 73 Kan. 124, 84 Pac. 565).

By accepting a certificate whose terms differ from those stated in the application the member must be held to approve its terms. Thomas *v.* Leake, 67 Tex. 469, 3 S. W. 703.

Acceptance as fixing place of contract see *infra*, II, D, 4.

12. Block *v.* Valley Mut. Ins. Assoc., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166; Chartrand *v.* Brace, 16 Colo. 19, 26 Pac. 152, 25 Am. St. Rep. 235, 12 L. R. A. 209.

Conflict between terms of application and certificate see *infra*, II, D, 2.

Conflict between terms of constitution or by-laws and certificate see *infra*, II, D, 3, a.

13. Page *v.* Knights and Ladies of America, (Tenn. Ch. App. 1900) 61 S. W. 1068, holding that an acceptance on the face of a benefit insurance certificate of "all the conditions therein named" did not carry a reference to matters on the back of the certificate and make them a part thereof.

3. Powers of Agents. The powers of the agents of a beneficial or fraternal society are, generally speaking, governed by the general rules of agency, more particularly as applied to ordinary insurance agents.[14]

D. Construction and Operation[15] in General — 1. General Rules of Construction. The contract entered into by a beneficial society with its members being, in so far as it relates to benefits, essentially a contract of insurance,[16] it follows, it has been said, that the predominant intention of the parties is indemnity,[17] and this intention is to be kept in view in construing the terms of the contract.[18] The courts lean to that construction which will effectuate the purpose of the contract;[19] but in insurance contracts, as well as in other contracts, it is for the courts

If referred to in the certificate, conditions on the back thereof become a part of the contract. Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645; Pearson *v.* Knight Templars, etc., Indemnity Co., 114 Mo. App. 283, 89 S. W. 588.

Canadian statutory provisions.— It has been held that a statute requiring all the terms and conditions of a written contract of insurance made or renewed after the passage of the act to be set out in full either on the face or on the back of the instrument does not apply to mutual benefit certificates (Wintemute *v.* Brotherhood of Railroad Trainmen, 27 Ont. App. 524); also that even if the act does apply, a certificate not containing an absolute contract to pay any sum, but stating merely that on compliance with the conditions and payment of the assessments directed by the constitution the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the statute, and that the conditions of the constitution must be read into it in determining its validity (Wintemute *v.* Brotherhood of Railroad Trainmen, *supra*); and that it is not a renewal of a contract of insurance within the act, but a continuance of the original contract, where, after default in payment of assessments and consequent suspension of rights, a member of a benevolent society, pursuant to the rules of the society, pays the assessments as of right and becomes thereby *ipso facto* reinstated (Long *v.* Ancient Order of United Workmen, 25 Ont. App. 147).

14. See, for example, Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603 (holding that an agent having general authority to solicit applications for certificates in a mutual benefit association connected with a particular secret society has authority to take applications for certificates from persons not members of the society, to become binding when the applicants shall become members); Baltimore, etc., Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44 (holding that a railroad paymaster to whom is intrusted merely the ministerial duty of paying to employees the amounts appearing to be due them by the pay-rolls furnished him is not an agent of the railroad company, much less of a relief association composed of the company's employees).

Limitations on authority.— A beneficial association may limit the authority of its agents by a provision in its certificates or by its by-laws; and an agent whose powers are thus limited cannot bind the association beyond the limits of his authority to those who know the extent of its powers. And the insured and the beneficiaries under a contract of a beneficial association are charged with knowledge of the limitations on the powers of the association's agents which are found in the certificate or in by-laws which are made a part of the contract. Modern Woodmen of America *v.* Tevis, 117 Fed. 369, 54 C. C. A. 293. And see May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66. However, a condition in a certificate of membership of a mutual benefit society denying agents the power to make, alter, or discharge contracts has no application to the general manager or secretary of the association. Bankers', etc., Mut. Ben. Assoc. *v.* Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772.

Authority to make medical examination see *supra*, note 5.

Estoppel and waiver as affected by authority of officers and agents see *infra*, IV, J, 3, a.

Insurance agents in general see Insurance, 22 Cyc. 1427 *et seq.*

Principal and agent generally see Principal and Agent.

15. **Construction as to:** Avoidance of contract for fraud, misrepresentation, and breach of warranty or condition precedent see *infra*, II, E, 1. Forfeiture of benefits for breach of promissory warranty or condition subsequent and other causes see *infra*, IV, I, 1.

Construction of constitution and by-laws see *supra*, I, C, 2, a.

Construction of incontestability clause see *infra*, IV, J, 6.

Nature of contract see *supra*, II, B.

16. See *supra*, II, B.

17. Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478]; Supreme Lodge O. M. P. *v.* Meister, 105 Ill. App. 471 [*affirmed* in 204 Ill. 527, 68 N. E. 454].

18. Supreme Lodge O. M. P. *v.* Meister, 105 Ill. App. 471 [*affirmed* in 204 Ill. 527, 68 N. E. 454].

19. Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478].

to interpret the contract made by the parties themselves, and not to make a contract for them.[20] The rule that all the provisions of the contract of insurance will be liberally construed in favor of the assured and strongly against the insurer is applicable to the contracts of insurance between a benefit society and its members.[21] Accordingly if the terms of the contract are obscure or ambiguous, the court will adopt that meaning which is most favorable to the member or his beneficiary.[22] Where the only contract existing between a mutual benefit corporation and an insured is that embodied in the by-laws, they must be considered in their entirety as essential to the proper construction of any part.[23]

2. APPLICATION AS PART OF CONTRACT. The answers contained in an application for membership or insurance and the terms of the application may be incorporated into the ensuing contract of insurance in various ways. Thus the application may be made a part of the contract by the terms of the constitution and by-laws of the society,[24] by the terms of the certificate of membership or insurance,[25] or by the terms of the application itself.[26] Apart from this the rule that

20. Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478].

21. O'Connor *v.* Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688; Knights Templars', etc., Life Indemnity Co. *v.* Vail, 206 Ill. 404, 68 N. E. 1103 [*affirming* 105 Ill. App. 331]; Supreme Lodge O. C. K. *v.* McLaughlin, 108 Ill. App. 85; Supreme Lodge O. M. P. *v.* Meister, 105 Ill. App. 471 [*affirmed* in 204 Ill. 527, 68 N. E. 454]; Matthes *v.* Imperial Acc. Assoc., 110 Iowa 222, 81 N. W. 484.

Conditions limiting or avoiding liability are strictly construed against the insurer and liberally in favor of the insured. Soehner *v.* Grand Lodge O. S. H., (Nebr. 1905) 104 N. W. 871. Construction in regard to: Avoidance of contract for fraud, misrepresentation, and breach of warranty or condition precedent see *infra*, II, E, 1. Forfeiture of benefits for breach of promissory warranty or condition subsequent and other causes see *infra*, IV, I, 1.

Construction of incontestability clause see *infra*, IV, J, 6.

22. *Illinois.*— Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478]; National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43.

Iowa.— Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190; Peterson *v.* Modern Brotherhood of America, 125 Iowa 562, 101 N. W. 289, 67 L. R. A. 631.

New Jersey.— Anders *v.* Supreme Lodge K. H., 51 N. J. L. 175, 17 Atl. 119.

New York.— Gyllenhammer *v.* Home Ben. Soc., 24 N. Y. Suppl. 930, holding, however, that the rule was not applicable to the certificate in question, since there was no ambiguity in its provisions.

North Dakota.— Clemens *v.* Royal Neighbors of America, 14 N. D. 116, 103 N. W. 402.

See 28 Cent. Dig. tit. "Insurance," § 1870.

23. Badesch *v.* Congregation Brothers of Wilna, 23 Misc. (N. Y.) 160, 50 N. Y. Suppl. 958.

Construction of constitution and by-laws see *supra*, I, C, 2, a.

24. Supreme Lodge S. & D. P. *v.* Underwood, 3 Nebr. (Unoff.) 798, 92 N. W. 1051. See, however, Supreme Lodge A. O. U. W. *v.* Hutchinson, 6 Ind. App. 399, 33 N. E. 816.

25. *Georgia.*— Home Friendly Soc. *v.* Berry, 94 Ga. 606, 21 S. E. 583.

Illinois.— Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309; Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79.

Missouri.— State *v.* Temperance Benev. Assoc., 42 Mo. App. 485, holding that a certificate of membership in a benefit society reciting that it is issued "in consideration of the representations made in the application" makes such application and the promise therein as to the applicant's future conduct a part of the contract.

Nebraska.— Supreme Lodge S. & D. P. *v.* Underwood, 3 Nebr. (Unoff.) 798, 92 N. W. 1051.

New Jersey.— Lippincott *v.* Supreme Council R. A., 64 N. J. L. 309, 45 Atl. 774.

New York.— Foley *v.* Royal Arcanum, 151 N. Y. 196, 45 N. E. 456, 56 Am. St. Rep. 621, holding that where a certificate in a beneficiary society provides that it is issued on condition that the statements in the application for membership be made a part of the contract, the word "statements" includes a warranty in the application as to representations therein, and a waiver of all provisions of law preventing the applicant's physician from disclosing communications relative to his patient's physical condition.

South Dakota.— Knudson *v.* Grand Council N. L. H., 7 S. D. 214, 63 N. W. 911.

Wisconsin.— Boyle *v.* Northwestern Mut. Relief Assoc., 95 Wis. 312, 70 N. W. 351; Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713.

See 28 Cent. Dig. tit. "Insurance," §§ 1853, 1871.

The medical examination may likewise be made a part of the contract. Knudson *v.* Grand Council N. L. H., 7 S. D. 214, 63 N. W. 911.

26. Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Supreme

all papers *in pari materia* are to be read together applies in these cases, so that in determining the terms of the contract of insurance the application is to be considered, although it is not incorporated into the contract in any of the ways just mentioned.[27] In some states, however, by force of statute, the application does not become a part of the contract unless it or a copy of it is attached to the certificate of insurance;[28] and a stipulation inserted in the application without authority of the society does not become a part of the contract.[29] In case of conflict between the terms of the application and the certificate,[30] or between the terms of the certificate and the resolution accepting the application,[31] the certificate prevails.

3. Statutes, Charter or Articles, and Constitution and By-Laws as Part of Contract[32] — **a. Existing Provisions.** The statutes under which a beneficial society is formed and operates,[33] its charter of incorporation[34] or articles of asso-

Lodge S. & D. P. *v.* Underwood, 3 Nebr. (Unoff.) 798, 92 N. W. 1051; United Brethren Mut. Aid Soc. *v.* White, 100 Pa. St. 12. See, however, Alden *v.* Supreme Tent K. M., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

27. Grand Lodge A. O. U. W. *v.* Jesse, 50 Ill. App. 101; Northwestern Benev., etc., Assoc. *v.* Hand, 29 Ill. App. 73; Northwestern Benev., etc., Assoc. *v.* Bloom, 21 Ill. App. 159 (the last two cases holding that an application which excepts death by suicide from the risk, and the certificate of membership issued thereon, will be construed together as one instrument, although the application was not expressly referred to in the certificate); Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Ebert *v.* Mutual Reserve Fund Life Assoc., 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Supreme Lodge S. & D. P. *v.* Underwood, 3 Nebr. (Unoff.) 798, 92 N. W. 1051 (*semble*). And see People *v.* Grand Lodge A. O. U. W., 32 Misc. (N. Y.) 528, 67 N. Y. Suppl. 330.

The medical examination is likewise to be considered. Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Numrich *v.* Supreme Lodge K. & L. H., 3 N. Y. Suppl. 552, holding that where the constitution of a society requires each member to procure a certificate from the subordinate medical examiner after examination by the latter, and provides that if the medical examination is approved by the supreme medical examiner the applicant shall be entitled to the relief fund, otherwise not, and the certificate requires the insured to comply with all the rules and requirements of the society, the representations by the insured in his medical examination are made the basis of the contract, although the certificate does not refer to them. And see Grossman *v.* Supreme Lodge K. & L. H., 13 N. Y. St. 592. However, the answers of an examining physician to interrogatories directed to him and indorsed on the application constitute no part of the application and no representation on the part of the insured. United Brethren Mut. Aid Soc. *v.* Kinter, 12 Wkly. Notes Cas. (Pa.) 76.

Whether statements in the application are representations or warranties see *infra*, II, E.

28. Grimes *v.* Northwestern Legion of Honor, 97 Iowa 315, 64 N. W. 806, 66 N. W. 183; Supreme Commandery U. O. G. C. W. *v.* Hughes, 114 Ky. 175, 70 S. W. 405, 24 Ky. L. Rep. 984; Grand Lodge A. O. U. W. *v.* Edwards, 85 S. W. 701, 27 Ky. L. Rep. 469.

Failure to attach the application to the certificate does not invalidate the latter. McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188.

In Pennsylvania a similar statute applying to ordinary insurance policies is held not to apply to benefit certificates. Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854; Donlevy *v.* Supreme Lodge S. H., 1 Pa. Dist. 213; Espy *v.* American Legion of Honor, 7 Kulp 134.

29. Supreme Lodge K. P. *v.* Stein, 75 Miss. 107, 21 So. 559, 65 Am. St. Rep. 589, 37 L. R. A. 775.

30. Thomas *v.* Leake, 67 Tex. 469, 3 S. W. 703.

31. Palmer *v.* Commercial Travelers' Mut. Acc. Assoc., 53 Hun (N. Y.) 601, 6 N. Y. Suppl. 870 [*affirmed* in 127 N. Y. 678, 28 N. E. 256].

32. Construction of constitution and by-laws see *supra*, I, C, 2, a.

33. Kirkpatrick *v.* Modern Woodmen of America, 103 Ill. App. 468; Nelson *v.* Gibson, 92 Ill. App. 595 [*affirmed* in 191 Ill. 365, 61 N. E. 127, 85 Am. St. Rep. 263, 54 L. R. A. 836]; Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935; Ebert *v.* Mutual Reserve Fund Life Assoc., 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457.

What law governs see *infra*, II, D, 4.

34. Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Maginnis *v.* New Orleans Cotton Exch. Mut. Aid Assoc., 43 La. Ann. 1136, 10 So. 180; Supreme Lodge K. P. *v.* Stein, 75 Miss. 107, 21 So. 559, 65 Am. St. Rep. 589, 37 L. R. A. 775; Matter of Globe Mut. Ben. Assoc., 63 Hun (N. Y.) 263, 17 N. Y. Suppl. 852; People *v.* Grand Lodge A. O. U. W., 32 Misc. (N. Y.) 528, 67 N. Y. Suppl. 330. See, however, Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441; Evans

ciation, and its constitution and by-laws,[35] enter into and form a part of the contract of insurance evidenced by the certificate of membership, and accordingly they must be looked to in determining the rights and liabilities of the parties.

v. Southern Tier Masonic Relief Assoc., 182 N. Y. 453, 75 N. E. 317 [*reversing* 94 N. Y. App. Div. 541, 88 N. Y. Suppl. 162], where the certificate of incorporation was held not to be part of the contract.

Construction as to which of several charters governs see Martinez *v.* Supreme Lodge K. H., 81 Mo. App. 590.

35. *California.*— Conway *v.* Supreme Council C. K. A., 131 Cal. 437, 63 Pac. 727; Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; Hass *v.* Petaluma Mut. Relief Assoc., 118 Cal. 6, 49 Pac. 1056.

District of Columbia.— Clark *v.* Mutual Reserve Fund Life Assoc., 14 App. Cas. 154.

Illinois.— Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168; Domestic Bldg. Assoc. *v.* Jourdain, 110 Ill. App. 197; Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Kirkpatrick *v.* Modern Woodmen of America, 103 Ill. App. 468; Grand Lodge A. O. U. W. *v.* Jesse, 50 Ill. App. 101.

Indiana.— Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571.

Iowa.— Shuman *v.* Ancient Order United Workmen, 110 Iowa 642, 82 N. W. 331; Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470.

Kansas.— Triple Tie Ben. Assoc. *v.* Wood, 73 Kan. 124, 84 Pac. 565.

Maryland.— Royal Arcanum *v.* Brashears, 89 Md. 624, 43 Atl. 866.

Michigan.— Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Pokrefky *v.* Detroit Firemen's Fund Assoc., 121 Mich. 456, 80 N. W. 240; Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519.

Minnesota.— Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Bost *v.* Supreme Council R. A., 87 Minn. 417, 92 N. W. 337; Ebert *v.* Mutual Reserve Fund Life Assoc., 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 79 Am. St. Rep. 412, 47 L. R. A. 136.

Missouri.— Brower *v.* Supreme Lodge National Reserve Assoc., 74 Mo. App. 490; Grand Lodge O. H. *v.* Elsner, 26 Mo. App. 108.

New York.— Butler *v.* Supreme Council A. L. H., 105 N. Y. App. Div. 164, 93 N. Y. Suppl. 1012; O'Brien *v.* Supreme Council C. B. L., 81 N. Y. App. Div. 1, 80 N. Y. Suppl. 775 [*affirmed* in 176 N. Y. 597, 68 N. E. 1120]; Matter of Globe Mut. Ben. Assoc., 63 Hun 263, 17 N. Y. Suppl. 852.

Ohio.— Supreme Court I. O. F. *v.* Herlinger, 27 Ohio Cir. Ct. 151; Steuve *v.* Grand Lodge, 5 Ohio Cir. Ct. 471, 3 Ohio Cir. Dec. 231.

Pennsylvania.— Myers *v.* Alta Friendly Soc., 29 Pa. Super. Ct. 492.

Rhode Island.— Newton *v.* Northern Mut. Relief Assoc., 21 R. I. 476, 44 Atl. 690.

Tennessee.— Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

Texas.— United Moderns *v.* Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032.

United States.— Polk *v.* Mutual Reserve Fund Life Assoc., 137 Fed. 273; Wiggin *v.* Knights of Pythias, 31 Fed. 122.

Canada.— Wells *v.* Supreme Court I. O. F., 17 Ont. 317.

See 28 Cent. Dig. tit. "Insurance," §§ 1854, 1872.

This is especially true where the certificate is so incomplete as to make reference to the by-laws necessary in order to understand the exact obligation and duties of the parties. Miller *v.* National Council K. & L. S., 69 Kan. 234, 76 Pac. 830. And see Wintemute *v.* Brotherhood of Railroad Trainmen, 27 Ont. App. 524.

The constitution is not binding on an applicant for membership. Members alone are bound thereby. Supreme Lodge A. O. U. W. *v.* Hutchinson, 6 Ind. App. 399, 33 N. E. 816.

Stipulations excluding by-laws from contract.— The by-laws are not a part of the contract of insurance where the certificate expressly provides that it and the application shall constitute the complete and only contract (Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309), or where the application provides that it and the certificate shall form the basis of the contract (Purdy *v.* Bankers' Life Assoc., 101 Mo. App. 91, 74 S. W. 486).

Constitutions of superior and inferior bodies.— The constitutions of the general association and of the constituent local societies of a mutual benefit association, as well as the benefit certificates, form parts of the insurance contracts with the members. Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746. The constitution of a local branch of a benefit society forms a part of a member's contract of insurance, and where there is no requirement that the constitution and by-laws of the subordinate societies must strictly conform to those of the association, which has no transactions with the members directly, the former governs in case of conflict. Polish Roman Catholic Union *v.* Warczak, 182 Ill. 27, 55 N. E. 64 [*affirming* 82 Ill. App. 351].

Laws of reinsuring society.—A provision in the certificate making the society's laws a part of the contract does not require the member to comply with the laws of a society that subsequently assumes the risks of the society that issued the certificate. Young *v.* Railway Mail Assoc., (Mo. App. 1907) 103 S. W. 557.

This is especially true where the certificate [36] or the application [37] contains a reference to the laws of the society or expressly makes them a part of the contract. On the same principle a member who, after the amendment of the by-laws in force at the time he joined, surrenders his original certificate and accepts a new one thereby submits to the amended by-laws then in force.[38] To incorporate the charter, constitution, and by-laws into the contract it is not necessary that copies thereof should be attached to the certificate,[39] or that they should be set out in the certificate [40] or be referred to therein;[41] and the members are bound by the terms of the charter, constitution, and by-laws, although they have no actual notice thereof.[42] If the certificate is one which the society has power to issue, and

36. *California.*— O'Connor *v.* Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688.

Connecticut.— Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223.

District of Columbia.— Drum *v.* Benton, 13 App. Cas. 245.

Indiana.— Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833.

Iowa.— Fee *v.* National Masonic Acc. Assoc., 110 Iowa 271, 81 N. W. 483; Fitzgerald *v.* Metropolitan Acc. Assoc., 106 Iowa 457, 76 N. W. 809.

Michigan.— Sabin *v.* Senate of National Union, 90 Mich. 177, 51 N. W. 202.

Missouri.— Pearson *v.* Knight Templars, etc., Indemnity Co., 114 Mo. App. 283, 89 S. W. 588; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530.

New Jersey.— Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142.

New York.— French *v.* Select Guardians Soc., 23 Misc. 86, 51 N. Y. Suppl. 675.

Ohio.— See Pete *v.* Woodmen of World, 26 Ohio Cir. Ct. 653.

Texas.— United Moderns *v.* Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032.

Wisconsin.— Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904.

Canada.— Hargrove *v.* Royal Templars of Temperance, 2 Ont. L. Rep. 79.

See 28 Cent. Dig. tit. "Insurance," §§ 1854, 1872.

37. Hutchinson *v.* Supreme Tent K. M. W., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801; Nielison *v.* Jewelers', etc., Co., 30 Misc. (N. Y.) 197, 61 N. Y. Suppl. 1125. And see Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000; Ashby *v.* Costin, 21 Q. B. D. 401, 53 J. P. 69, 57 L. J. Q. B. 491, 59 L. T. Rep. N. S. 224, 37 Wkly. Rep. 140. See, however, Fitzgerald *v.* Equitable Reserve Fund Life Assoc., 3 N. Y. Suppl. 214 [*affirmed* in 15 Daly 229, 5 N. Y. Suppl. 837].

38. Breslow *v.* Southern Tier Masonic Relief Assoc., 107 N. Y. App. Div. 123, 94 N. Y. Suppl. 787; Clement *v.* Clement, 113 Tenn. 40, 81 S. W. 1249; Supreme Council A. L. H. *v.* Lyon, (Tex. Civ. App. 1905) 88 S. W. 435. And see Supreme Council A. L. H. *v.* Garrett, (Tex. Civ. App. 1905) 85 S. W. 27.

39. See cases cited *infra*, this note.

Statutory provisions.— The Pennsylvania statute requiring copies of the constitution and by-laws of an insurance company to be attached to the policy in order to make them part of the contract does not apply to mutual benefit certificates. Lithgow *v.* Supreme Tent K. M. W., 165 Pa. St. 292, 30 Atl. 830; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854; Dickinson *v.* Ancient Order United Workmen, 159 Pa. St. 258, 28 Atl. 293; Donlevy *v.* Supreme Lodge S. H., 1 Pa. Dist. 213, 11 Pa. Co. Ct. 477; Espy *v.* American Legion of Honor, 7 Kulp (Pa.) 134. But a different rule prevails in Kentucky. Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Supreme Commandery U. O. G. C. W. *v.* Hughes, 114 Ky. 175, 70 S. W. 405, 24 Ky. L. Rep. 984.

40. Hargrove *v.* Royal Templars of Temperance, 2 Ont. L. Rep. 79.

However, a certificate providing that it shall be void if the member dies by his own hand unless he is insane, although made on an application stating that it is subject to all the provisions of the constitution, is not controlled by a constitutional provision that there shall be a condition in every certificate making it void if the member die by his own hand "whether sane or insane," since this is not a general provision of the constitution or by-laws making all certificates void if the insured shall commit suicide, but specifically relates to those certificates of which that condition shall be made a part, or, if it is a general provision, it will not apply as against one who was misled by the failure of the officers to insert the condition in his contract. Sovereign Camp W. W. *v.* Fraley, (Tex. Civ. App. 1900) 59 S. W. 905.

41. Hass *v.* Mutual Relief Assoc., 118 Cal. 6, 49 Pac. 1056; Clark *v.* Mutual Reserve Fund Life Assoc., 14 App. Cas. (D. C.) 154, 43 L. R. A. 390; Monahan *v.* Supreme Lodge O. C. K., 88 Minn. 224, 92 N. W. 972.

42. *Delaware.*— Emmons *v.* Hope Lodge No. 21 I. O. O. F., 1 Marv. 187, 40 Atl. 956.

District of Columbia.— Clark *v.* Mutual Reserve Fund Life Assoc., 14 App. Cas. 154, 43 L. R. A. 390.

Indiana.— Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571.

New York.— May *v.* New York Safety Reserve Fund Soc., 14 Daly 389, 13 N. Y. St. 66; People *v.* Grand Lodge A. O. U. W., 32 Misc. 528, 67 N. Y. Suppl. 330.

the constitution and by-laws are not attached thereto or set out therein, the certificate governs the rights of the parties in case of conflict between its provisions and the provisions of the constitution and by-laws.[43] Although a member of a benefit society is induced to join by an erroneous publication of its by-laws in

Ohio.— Supreme Court I. O. F. *v.* Herlinger, 27 Ohio Cir. Ct. 151.

Texas.— United Moderns *v.* Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032. See, however, Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898 [*affirming* (Civ. App. 1900) 59 S. W. 905].

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

See 28 Cent. Dig. tit. "Insurance," §§ 1854, 1872.

Presumption of knowledge.— The members are said to be conclusively presumed to have knowledge of the terms of the constitution and by-laws. See cases cited *supra*, this note. But some cases seem to regard this presumption as rebuttable. Syuchar *v.* Workingmen's Co-operative Assoc., 14 Misc. (N. Y.) 10, 35 N. Y. Suppl. 124. And see cases cited *infra*, this note.

If the constitution and by-laws are made a part of the contract or referred to therein, it is immaterial that the member had no actual knowledge of their terms. Fitzgerald *v.* Metropolitan Acc. Assoc., 106 Iowa 457, 76 N. W. 809; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530. And see Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000; Sabin *v.* Senate of National Union, 90 Mich. 177, 51 N. W. 202; Pete *v.* Woodmen of World, 26 Ohio Cir. Ct. 653. See, however, Sovereign Camp W. W. *v.* Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898 [*affirming* (Civ. App. 1900) 59 S. W. 905], holding that where notice of a constitutional condition was intended to be given by inserting it in the certificate, which was not done, the insured is not chargeable with knowledge on the ground that it was a by-law of the insurer, although his application was made subject to the constitution and by-laws, since the insurer had assumed the duty of notifying the insured of the existence of such provision.

If the constitution and by-laws were accessible to the member, he is bound by them, although he had no actual knowledge of their provisions. Syuchar *v.* Workingmen's Co-operative Assoc., 14 Misc. (N. Y.) 10, 35 N. Y. Suppl. 124 (so holding, although the laws were not printed); The Chevaliers *v.* Shearer, 27 Ohio Cir. Ct. 509 (so holding where plaintiff was a charter member of a beneficial association, and the manuscript copy of its constitution and by-laws was on file in its office before the certificate was delivered to him). And see Pete *v.* Woodmen of World, 26 Ohio Cir. Ct. 653.

Failure to post by-laws.— Where a certificate was issued subject to the insurer's by-laws, such laws were binding on the insured, although they were not posted in the company's principal place of business as required by Iowa Code (1873), § 1076. Fee *v.* National Masonic Acc. Assoc., 110 Iowa 271, 81 N. W. 483.

Effect of want of notice in case of conflict between certificate and by-laws see *infra*, note 43.

43. Davidson *v.* Old People's Mut. Ben. Soc., 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482; Laker *v.* Royal Fraternal Union, 95 Mo. App. 353, 74 S. W. 705 (both cases holding that the society is deemed to have waived the provisions of the by-law); McCoy *v.* Northwestern Mut. Relief Assoc., 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 [*citing* Morrison *v.* Wisconsin Odd Fellows' Mut L. Ins. Co., 59 Wis. 162, 18 N. W. 13]. And see Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441; Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311; Courtney *v.* Fidelity Mut. Aid Assoc., 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098, holding that under Rev. St. (1899) § 7903, declaring that every certificate shall specify the exact sum of money which it promises to pay upon the contingency insured against, and that the corporation shall be obligated to the beneficiary for such payment at the time and to the amount specified in the policy or certificate, a provision of the by-laws of an insurance organization as to the amount of benefit to be paid is controlled by a conflicting recital in the policy. To the contrary see Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369.

But when the laws of the order are referred to by apt words in the certificate, and made a part of the contract of insurance, the certificate and the laws together make out the contract of insurance and the whole are to be construed together in an endeavor to ascertain the intention of the parties. Laker *v.* Royal Fraternal Union, 95 Mo. App. 353, 74 S. W. 705.

By-laws which qualify the terms of the certificate of insurance in an ambiguous manner are to be construed most favorably to the insured. Laker *v.* Royal Fraternal Union, 95 Mo. App. 353, 74 S. W. 705.

A provision in the certificate violative of the society's charter of incorporation is void. Richardson *v.* Kentucky Grangers' Mut. Ben. Soc., 4 Ky. L. Rep. 735.

If the member has no knowledge of the provision of the constitution or by-laws in question, the certificate governs (Fitzgerald *v.* Equitable Reserve Fund Life Assoc., 3 N. Y. Suppl. 214 [*affirmed* in 15 Daly 229, 5 N. Y. Suppl. 837]. And see Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441), although the application makes the by-laws a part of the contract (Fitzgerald *v.* Equitable Reserve Fund Life Assoc.,

relation to the benefits to be paid by it, he is not entitled by estoppel to benefits in accordance with the by-laws as published, but is limited to his rights under the by-laws as they actually are;[44] and a beneficiary cannot, while seeking to enforce payment of benefits, assert that a certain condition of the contract is not authorized by the society's constitution.[45]

b. Subsequent Provisions[46]—(i) *GENERAL RULES AS TO OPERATION AND EFFECT.* The rule that statutes will be construed as operating prospectively unless it is clear that the legislature intended them to operate retrospectively[47] applies to statutes relating to beneficial associations;[48] and apart from this they cannot be given a retrospective operation if, thus operating, they would interfere with vested rights or impair the obligation of preëxisting contracts.[49] A like rule applies to alterations made in the constitution and by-laws of a society, whether by amendment or repeal of existing provisions or by the enactment of new provisions. Accordingly such alterations will be given a prospective operation unless it clearly appears that they were intended to operate retrospectively;[50] and even where a retrospective operation was intended, the alterations do not govern the

supra. And see Beach *v.* Supreme Tent K. M. W., 177 N. Y. 100, 69 N. E. 281 [*affirming* 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770]).

Estoppel of society to deny power to issue certificate see *supra*, I, G, 1, b.

44. Hirsch *v.* U. S. Grand Lodge O. B. A., 56 Mo. App. 101.

45. Palmer *v.* Commercial Travelers' Mut. Acc. Assoc., 53 Hun (N. Y.) 601, 6 N. Y. Suppl. 870 [*affirmed* in 127 N. Y. 678, 28 N. E. 256], holding that he cannot thus accept one part of the contract and reject another.

46. **Constitution and by-laws as amended as part of new certificate** see *supra*, II, D, 3, a.

47. See STATUTES.

48. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93]; Clayton *v.* Owen, 31 Beav. 285, 8 Jur. N. S. 1117, 31 L. J. Ch. 825, 6 L. T. Rep. N. S. 802, 10 Wkly. Rep. 770, 54 Eng. Reprint 1148.

However, a statute requiring by-laws to be attached to the certificate in order to render them a part of the contract applies to certificates issued before its enactment in so far as to require a by-law adopted after the enactment of the statute to be attached to such certificates. Hunziker *v.* Supreme Lodge K. P., 117 Ky. 418, 78 S. W. 201, 25 Ky. L. Rep. 1510.

Retrospective operation of statute as to eligibility of beneficiary see *infra*, IV, A, 2.

49. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Moore *v.* Chicago Guaranty Fund Life Soc., 76 Ill. App. 433; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93], *semble*.

However, a statutory provision that before any alteration in the constitution or by-laws of an association shall take effect a certified copy of the alteration must be filed with the auditor of public accounts is not unconstitutional as impairing the obligation of contract, when applied to a benefit certificate issued prior to the statute and expressly subject to all future changes in the by-laws. Knights of Maccabees of World *v.* Nitsch, 69 Nebr. 372, 95 N. W. 626. So Mo. Laws (1897), p. 132, exempting beneficiary associations from the provisions of the general insurance laws, did not, as to the beneficiary in a certificate issued prior to the statute, violate Const. art. 2, § 15, prohibiting the enactment of any law impairing the obligation of contract or retrospective in its operation, as the beneficiary had no vested right in the certificate. Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. N. S. 1114. And where a certificate was issued subject to a statute providing that suicide should be no defense to an action thereon, and the statute was afterward repealed, a subsequent act restoring the suicide statute was not unconstitutional as applied to the certificate, the member being alive when the later act was passed. Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93].

Retrospective operation of statute as to eligibility of beneficiary see *infra*, IV, A, 2.

50. *California.*— Berlin *v.* Eureka Lodge No. 9 K. P., 132 Cal. 294, 64 Pac. 254.

Colorado.— Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193.

Georgia.— Sovereign Camp W. W. *v.* Thornton, 115 Ga. 798, 42 S. E. 236.

Illinois.— Benton *v.* Brotherhood of Railroad Brakemen, 146 Ill. 570, 34 N. E. 939 [*reversing* 45 Ill. App. 112]; Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340.

Iowa.— Carnes *v.* Iowa Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306, holding that where the constitution authorized the association to amend it so as to bind a member to any change in his contract without his assent, and the amended articles did not purport to change existing contracts, the liability of the association on a certificate issued before the

rights and liabilities of preëxisting members and their beneficiaries if vested rights would thereby be defeated or the obligation of contracts be impaired.[51] So long, however, as they do not impair preëxisting contracts of insurance or interfere with vested rights, alterations in the constitution and by-laws, if intended to

amendment is to be determined according to the constitution as it existed when the certificate was issued.

Kansas.— Taylor *v.* Modern Woodmen of America, 72 Kan. 443, 83 Pac. 1099, 5 L. R. A. N. S. 283; Grand Lodge A. O. U. W. *v.* Haddock, 72 Kan. 35, 82 Pac. 583, 1 L. R. A. N. S. 1064.

New Jersey.—Roxbury Lodge No. 184 I. O. O. F. *v.* Hocking, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. Rep. 596; Locomotive Engineers' Mut. L., etc., Ins. Assoc. *v.* Winterstein, 58 N. J. Eq. 189, 44 Atl. 199.

New York.— Spencer *v.* Grand Lodge A. O. U. W., 22 Misc. 147, 48 N. Y. Suppl. 590 [*affirmed* in 53 N. Y. App. Div. 627, 65 N. Y. Suppl. 1146].

Texas.— Grand Lodge A. O. U. W. *v.* Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840.

Utah.— Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030.

United States.— Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93 [*affirmed* in 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139].

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Even though the laws of the society expressly authorize alterations therein, subsequent changes will not be given a retrospective operation unless it appears that they were intended so to operate. Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; National Council K. & L. S. *v.* Dillon, 108 Ill. App. 183; Grossmeyer *v.* District No. 1 I. O. B. B., 34 Misc. (N. Y.) 577, 70 N. Y. Suppl. 393 [*affirmed* in 70 N. Y. App. Div. 90, 74 N. Y. Suppl. 1057 (*affirmed* in 174 N. Y. 550, 67 N. E. 1083)].

Even though the member agrees to be bound by future changes, an alteration made subsequent to the issuance of the certificate will be given a prospective operation, in the absence of a clear intent that it shall operate retrospectively. Emmons *v.* Supreme Conclave I. O. H., (Del. 1906) 63 Atl. 871; Ancient Order United Workmen *v.* Brown, 112 Ga. 545, 37 S. E. 890; Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340; Bottjer *v.* Supreme Council A. L. H., 78 N. Y. App. Div. 546, 79 N. Y. Suppl. 684 [*affirming* 37 Misc. 406, 75 N. Y. Suppl. 805]; Roberts *v.* Cohen, 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57 [*reversing* 33 Misc. 536, 68 N. Y. Suppl. 949, and *affirmed* in 173 N. Y. 580, 65 N. E. 1122]; Wist *v.* Grand Lodge A. O. U. W., 22 Oreg. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Hodley *v.* Queen City Camp No. 27 W. W., 1 Tenn. Ch. App. 413 (where neither the member nor the beneficiary had actual notice of the amendment, and the certificate was never changed to conform thereto); Fawcett *v.* Fawcett, 26 Ont. App. 335. And see Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93]. See, however, Gilmore *v.* Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594].

Amendment held to operate retrospectively see Pain *v.* Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Lavigueur *v.* L'Union Mutuelle de Bienfiasance, 16 Quebec Super. Ct. 588.

51. *California.*— Benjamin *v.* Mutual Reserve Fund Life Assoc., 146 Cal. 34, 79 Pac. 517; Bornstein *v.* District Grand Lodge No. 4 I. O. B. N., 2 Cal. App. 624, 84 Pac. 271.

Colorado.— Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193.

Illinois.— Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309; Northwestern Benev., etc., Aid Assoc. *v.* Wanner, 24 Ill. App. 357.

Indiana.— Brotherhood of Painters, etc., *v.* Moore, 36 Ind. App. 580, 76 N. E. 262.

Iowa.—.Sieverts *v.* National Benev. Assoc., 95 Iowa 710, 64 N. W. 671; Courtney *v.* U. S. Masonic Ben. Assoc., (1892) 53 N. W. 238; Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

Michigan.— Pokrefky *v.* Detroit Firemen's Fund Assoc., 121 Mich. 456, 80 N. W. 240; Wheeler *v.* Supreme Sitting O. I. H., 110 Mich. 437, 68 N. W. 229; People *v.* Detroit Fire Dept., 31 Mich. 458.

Missouri.— Young *v.* Railway Mail Assoc., (App. 1907) 103 S. W. 557; Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627.

New York.— Weber *v.* Supreme Tent K. M. W., 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753 [*affirming* 61 N. Y. App. Div. 613, 70 N. Y. Suppl. 1150]; Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Fargo *v.* Supreme Tent K. M. W., 96 N. Y. App. Div. 491, 89 N. Y. Suppl. 65; Deuble *v.* Grand Lodge A. O. U. W., 66 N. Y. App. Div. 323, 72 N. Y. Suppl. 755 [*affirmed* in 172 N. Y. 665, 65 N. E. 1116]; Coyle *v.* Father Matthew Total Abstinence Benev. Soc., 17 N. Y. Wkly. Dig. 17.

Ohio.— Court Forest City No. 10 F. A. *v.* Rennie, 25 Ohio Cir. Ct. 790.

Pennsylvania.— Marshall *v.* Pilots' Assoc., 206 Pa. St. 182, 55 Atl. 916; Becker *v.* Berlin Ben. Soc., 144 Pa. St. 232, 22 Atl. 699, 27 Am. St. Rep. 624.

Texas.— Supreme Council A. L. H. *v.*

operate retrospectively, enter into and become a part of those contracts, and are binding on the society and its members and their beneficiaries,[52] where the original constitution or by-laws reserve to the society the right to make alterations therein,[53] and the contract as made expressly subjects the member to the constitution and

Batte, 34 Tex. Civ. App. 456, 79 S. W. 629; International Order of Twelve K. & D. T. *v.* Boswell, (Civ. App. 1899) 48 S. W. 1108.

United States.— Supreme Council A. L. H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153 [*affirming* 109 Fed. 261].

Canada.— Fawcett *v.* Fawcett, 26 Ont. App. 335 [*distinguishing* Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88].

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872. And see *infra*, this section, text and notes.

The society cannot change the objects of the association, or add entirely different and independent objects to those embraced in the original articles. Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38, 23 Ky. L. Rep. 2276. And see *infra*, note 56.

52. *California.*—Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400.

Illinois.— Supreme Council C. K. A. *v.* Franke, 137 Ill. 118, 27 N. E. 86 [*affirming* 34 Ill. App. 651].

Kentucky.— Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38, 23 Ky. L. Rep. 2276, holding that the society may bind members by mere internal regulations, such as those having for their purpose the more definite identification of members in traveling, and the acquirement by members of greater proficiency in the knowledge of the teachings of the institution.

Massachusetts.— Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154.

Michigan.— Peet *v.* Great Camp K. M., 83 Mich. 92, 47 N. W. 119.

Nebraska.— Shepperd *v.* Bankers' Union of World, (1906) 108 N. W. 188.

New York.— Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149 [*affirming* 60 N. Y. App. Div. 11, 69 N. Y. Suppl. 764]; O'Brien *v.* Supreme Council C. B. L., 81 N. Y. App. Div. 1, 80 N. Y. Suppl. 775 [*affirmed* in 176 N. Y. 597, 68 N. E. 1120]; Durian *v.* Central Verein of Hermann's Soehnne, 7 Daly 168; Mitterwallner *v.* Supreme Lodge K. & L. G. S., 86 N. Y. Suppl. 786. And see Sanger *v.* Rothschild, 123 N. Y. 577, 26 N. E. 3 [*affirming* 50 Hun 157, 2 N. Y. Suppl. 794].

Ohio.— Thesing *v.* Supreme Lodge K. A., 11 Ohio Dec. (Reprint) 88, 24 Cinc. L. Bul. 401.

Pennsylvania.— St. Patrick's Mut. Ben. Soc. *v.* McVey, 92 Pa. St. 510.

Wisconsin.— Langnecker *v.* Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185.

Canada.— *Re* Supreme Legion S. K. C., 29 Ont. 708; Lavigneur *v.* L'Union Mutuelle de Bienfaisance, 16 Quebec Super. Ct. 588.

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Alterations effected by new charter.— Where a beneficial association first incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, and for many years, with the knowledge and recognition of the subordinate lodges and of deceased, continued to act under the later charter, the Missouri charter and the constitution and by-laws enacted thereunder controlled in determining the rights under deceased's certificate, although he had joined before the new charter was obtained. Bollman *v.* Supreme Lodge K. H., (Tex. Civ. App. 1899) 53 S. W. 722.

Distinction based on subject-matter of amendment.—A distinction is to be taken between amendments directly affecting the promise to the certificate holder as an insured person and amendments affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers. The former are inoperative to impair the member's rights unless he has agreed to be bound thereby. The latter do not impair the obligation of his contract, and are binding on him. See Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154; and *infra*, note 56.

A member is entitled to the advantage of changes in the laws as well as bound to submit to the burdens thereby imposed. Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4; Lavigueur *v.* L'Union Mutuelle de Bienfaisance, 16 Quebec Super. Ct. 588.

53. *California.*— Hass *v.* Petaluma Mut. Relief Assoc., 118 Cal. 6, 49 Pac. 1056; Robinson *v.* Templar Lodge No. 17 I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; Stohr *v.* San Francisco Musical Fund Soc., 82 Cal. 557, 22 Pac. 1125.

Massachusetts.— Pain *v.* Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Torrey *v.* Baker, 1 Allen 120.

Missouri.— Ellerbe *v.* Faust, 119 Mo. 563, 25 S. W. 390, 25 L. R. A. 149.

New York.—Poultney *v.* Bachman, 31 Hun 49 [*reversing* 10 Abb. N. Cas. 252, 62 How. Pr. 466]; McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun 149; May *v.* New York Safety Reserve Fund Soc., 14 Daly 389, 13 N. Y. St. 66; Kehlenbeck *v.* Logeman, 10 Daly 447.

Pennsylvania.— Stark *v.* Byers, 24 Pa. Co. Ct. 517.

Tennessee.— Catholic Knights *v.* Kuhn, 91 Tenn. 214, 18 S. W. 385.

Texas.— Byrne *v.* Casey, 70 Tex. 247, 8 S. W. 38.

by-laws,[54] or where the member expressly agrees to be bound, not only by the existing laws, but also by such as may be afterward enacted.[55] However, a gen-

Vermont.—Fugure *v.* St. Joseph Mut. Soc., 46 Vt. 362.

England.— Smith *v.* Galloway, [1898] 1 Q. B. 71, 67 L. J. Q. B. 15, 77 L. T. Rep. N. S. 469, 46 Wkly. Rep. 204.

Canada.— *In re* Ontario Ins. Act, 31 Ont. 154; Baker *v.* Forest City Lodge I. O. O. F., 28 Ont. 238 [*affirmed* in 24 Ont. App. 585, and *followed* in *Re* Supreme Legion S. K. C., 29 Ont. 708].

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

54. Bowie *v.* Grand Lodge L. W., 99 Cal. 392, 34 Pac. 103.

If the contract expressly subjects the member to the constitution and by-laws he is bound by subsequent amendments thereto. Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Messer *v.* Grand Lodge A. O. U. W., 180 Mass. 321, 62 N. E. 252; Beach *v.* Supreme Tent K. M. W., 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770 [*affirmed* in 177 N. Y. 130, 69 N. E. 281]; Hutchinson *v.* Supreme Tent K. M. W., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801; Supreme Council C. K. A. *v.* Morrison, 16 R. I. 468, 17 Atl. 57; Leadley *v.* McGregor, 11 Manitoba 9.

55. *Alabama.*— Fraternal Union of America *v.* Zeigler, 145 Ala. 287, 39 So. 751; Supreme Commandery K. G. R. *v.* Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

California.— Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653.

Connecticut.— Gilmore *v.* Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17; Masonic Mut. Ben. Assoc. *v.* Severson, 71 Conn. 719, 43 Atl. 192.

Georgia.— Union Fraternal League *v.* Johnston, 124 Ga. 902, 53 S. E. 241.

Illinois.—Moerschbaecher *v.* Supreme Council R. L., 188 Ill. 9, 59 N. E. 17, 52 L. R. A. 281; Baldwin *v.* Begley, 185 Ill. 180, 56 N. E. 1065 [*reversing* 84 Ill. App. 674]; Fullenwider *v.* Supreme Council R. L., 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239 [*affirming* 73 Ill. App. 321]; Theorell *v.* Supreme Court of Honor, 115 Ill. App. 313; Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340; Supreme Tent K. M. W. *v.* Stensland, 105 Ill. App. 267; Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 399; Supreme Tent K. M. *v.* Hammers, 81 Ill. App. 560.

Indiana.—Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Iowa.— Ross *v.* Modern Brotherhood of America, 120 Iowa 692, 95 N. W. 207.

Kansas.— Miller *v.* National Council K. & L. S., 69 Kan. 234, 76 Pac. 830.

Louisiana.— Daughtry *v.* Knights of Pythias, 48 La. Ann. 1203, 20 So. 712, 55 Am. St. Rep. 310.

Massachusetts.— Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154; Sargent *v.* Supreme Lodge K. H., 158 Mass. 557, 33 N. E. 650.

Michigan.— Brinen *v.* Supreme Council C. M. B. A., 140 Mich. 220, 103 N. W. 603.

Mississippi.— Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4; Dornes *v.* Supreme Lodge K. P., 75 Miss. 466, 23 So. 191.

Missouri.— Richmond *v.* Supreme Lodge O. M. P., 100 Mo. App. 8, 71 S. W. 736; Morton *v.* Royal Tribe of Joseph, 93 Mo. App. 78; State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456; Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463.

Nebraska.— Lange *v.* Royal Highlanders, (1905) 106 N. W. 224; Hall *v.* Western Travelers' Acc. Assoc., 69 Nebr. 601, 96 N. W. 170.

New Hampshire.— Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380.

New Jersey.— Strang *v.* Camden Lodge A. O. U. W., 73 N. J. L. 500, 64 Atl. 93; O'Neill *v.* Supreme Council A. L. H., 70 N. J. L. 410, 57 Atl. 463.

New York.— Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594]; McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347; French *v.* New York Mercantile Exch., 80 N. Y. App. Div. 131, 80 N. Y. Suppl. 312; Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611; People *v.* Grand Lodge A. O. U. W., 32 Misc. 528, 67 N. Y. Suppl. 330.

Ohio.— Tisch *v.* Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188 [*affirming* 24 Ohio Cir. Ct. 489]; Steune *v.* Grand Lodge, 5 Ohio Cir. Ct. 471, 3 Ohio Cir. Dec. 231.

Pennsylvania.— Chambers *v.* Supreme Tent K. M. W., 200 Pa. St. 244, 49 Atl. 784, 86 Am. St. Rep. 716; Reynolds *v.* Supreme Conclave I. O. H., 24 Pa. Co. Ct. 638, 18 Lanc. L. Rev. 125.

Tennessee.— Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

Texas.— Eversberg *v.* Supreme Tent K. M. W., 33 Tex. Civ. App. 549, 77 S. W. 246; Bollman *v.* Supreme Lodge K. H., (Civ. App. 1899) 53 S. W. 722; Duer *v.* Supreme Council O. C. F., 21 Tex. Civ. App. 493, 52 S. W. 109.

Wisconsin.— Loeffler *v.* Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012; Hughes *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 98 Wis. 292, 73 N. W. 1015; Schmidt *v.* Supreme Tent K. M. W., 97 Wis. 528, 73 N. W. 22.

United States.— Lloyd *v.* Supreme Lodge K. P., 98 Fed. 66, 38 C. C. A. 654.

Canada.— Doidge *v.* Dominion Council R. T. T., 4 Ont. L. Rep. 423.

See 6 Cent. Dig. tit. "Beneficial Associ-

eral reservation of the right to alter the constitution and by-laws is subject to the implied condition that the changes, as applied to existing members, shall be reasonable, and not destructive of vested rights or the obligation of existing contracts.[56]

ations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Alterations by society's successor.—An agreement to be bound by laws subsequently enacted by the society does not subject the member to by-laws adopted by a new corporation which has, without the member's knowledge, succeeded to the society's assets and assumed its liabilities. Richter *v.* Supreme Lodge K. P., 137 Cal. 8, 69 Pac. 483. See, however, Bollman *v.* Supreme Lodge K. H., (Tex. Civ. App. 1899) 53 S. W. 722.

Alterations effected through new charter.—A beneficial society first became incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, under which it continued to act for many years with the knowledge and recognition of the subordinate lodges and the deceased. It was held that, conceding that the Kentucky charter and the laws enacted thereunder should control, the second charter would be in the nature of an amendment to the first, and as the first provided for amendment, and deceased in his application agreed to comply with future regulations, a change in the rule for determining beneficiaries was binding on him and on the beneficiaries. Bollman *v.* Supreme Lodge K. P., (Tex. Civ. App. 1899) 53 S. W. 722. See, however, Richter *v.* Supreme Lodge K. P., 137 Cal. 8, 69 Pac. 483.

If the agreement to be bound by alterations relates only to alterations in certain respects, the member is not bound by alterations in other respects which impair the obligation of the contract or interfere with vested rights. Newhall *v.* Supreme Council A. L. H., 181 Mass. 111, 63 N. E. 1; Cohen *v.* Supreme Sitting O. I. H., 105 Mich. 283, 63 N. W. 304.

56. *Alabama.*— Fraternal Union of America *v.* Zeigler, 145 Ala. 287, 39 So. 751.

California.— Caldwell *v.* Grand Lodge W. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653; Bornstein *v.* District Grand Lodge No. 4 I. O. B. B., 2 Cal. App. 624, 84 Pac. 271.

Georgia.— Supreme Council A. L. H. *v.* Jordan, 117 Ga. 808, 45 S. E. 33.

Illinois.— Peterson *v.* Gibson, 191 Ill. 365, 61 N. E. 127, 85 Am. St. Rep. 263, 54 L. R. A. 836 [*affirming* 92 Ill. App. 595]; Theorell *v.* Supreme Court of Honor, 115 Ill. App. 313; Modern Woodmen *v.* Weiland, 109 Ill. App. 340; Covenant Mut. Ben. Assoc. *v.* Baldwin, 49 Ill. App. 203.

Iowa.— Van Atten *v.* Modern Brotherhood of America, 131 Iowa 232, 108 N. W. 313; Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

Kansas.— Miller *v.* Tuttle, (1903) 73 Pac. 88.

Louisiana.— Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469.

Massachusetts.— Porter *v.* Supreme Lodge A. L. H., 183 Mass. 326, 67 N. E. 238.

Michigan.— Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Starling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709.

Minnesota.— Tebo *v.* Supreme Council R. A., 89 Minn. 3, 93 N. W. 513; Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 79 Am. St. Rep. 412, 47 L. R. A. 136, holding that by-laws in operation when a member enters an association may be reasonable and valid as to him on the ground of his having assented thereto when accepting membership, and yet be unreasonable and invalid as to present members when adopted as amendments to existing by-laws, such members not having assented thereto in any manner.

Missouri.— Pearson *v.* Knight Templars', etc., Indemnity Co., 114 Mo. App. 283, 89 S. W. 588; Sisson *v.* Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Campbell *v.* American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342; Morton *v.* Supreme Council R. L., 100 Mo. App. 76, 73 S. W. 259; Smith *v.* Supreme Lodge K. P., 83 Mo. App. 512.

Nebraska.— Lange *v.* Royal Highlanders, (1905) 106 N. W. 224; Hall *v.* Western Travelers' Acc. Assoc., 69 Nebr. 601, 96 N. W. 170.

New Hampshire.—Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380.

New Jersey.— Sautter *v.* Supreme Conclave I. O. H., 72 N. J. L. 325, 62 Atl. 529; O'Neill *v.* Supreme Council A. L. H., 70 N. J. L. 410, 57 Atl. 463.

New York.— Evans *v.* Southern Tier Masonic Relief Assoc., 182 N. Y. 453, 75 N. E. 317 [*reversing* 94 N. Y. App. Div. 541, 88 N. Y. Suppl. 162]; Beach *v.* Supreme Tent K. M., 177 N. Y. 100, 69 N. E. 281 [*affirming* 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770]; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594]; Langan *v.* Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932 [*reversing* 69 N. Y. App. Div. 616, 75 N. Y. Suppl. 1127 (*affirming* 34 Misc. 629, 70 N. Y. Suppl. 663)]; McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347; Butler *v.* Supreme Council A. L. H., 105 N. Y. App. Div. 164, 93 N. Y. Suppl. 1012; Smith *v.* Supreme Council A. L. H., 94 N. Y. App. Div. 357, 88 N. Y. Suppl. 44; Williams *v.* Supreme Council A. L. H., 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713; Bottjer *v.* Supreme Council A. L. H., 78 N. Y. App. Div. 546, 75 N. Y. Suppl. 805, 79 N. Y. Suppl. 684 [*affirming* 37 Misc. 406, 75 N. Y. Suppl.

The right to make changes in the constitution and by-laws which would otherwise interfere with vested rights or impair the obligation of contracts rests on contract, and if a member has not agreed to be bound by future changes they are inoperative as to him,[57] unless he ratifies the changes or acquiesces therein, or otherwise

805]; Grossmayer *v.* District No. 1 I. O. B. B., 70 N. Y. App. Div. 90, 74 N. Y. Suppl. 1057 [*affirming* 34 Misc. 577, 70 N. Y. Suppl. 393, and *affirmed* in 174 N. Y. 550, 67 N. E. 1083]; Roberts *v.* Cohen, 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57 [*reversing* 33 Misc. 536, 68 N. Y. Suppl. 949, and *affirmed* in 173 N. Y. 580, 65 N. E. 1122]; Wright *v.* Knights of Maccabees of World, 48 Misc. 558, 95 N. Y. Suppl. 996; Graftstrom *v.* Frost Council No. 21 O. C. F., 19 Misc. 180, 43 N. Y. Suppl. 266; Coyle *v.* Father Matthew Total Abstinence Benev. Soc., 17 N. Y. Wkly. Dig. 17.

North Carolina.— Bragaw *v.* Supreme Lodge K. & L. H., 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; Strauss *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605, 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 699, 54 L. R. A. 605.

Ohio.— Pellazzino *v.* German Catholic St. Joseph's Soc., 9 Ohio Dec. (Reprint) 635, 16 Cinc. L. Bul. 27.

Pennsylvania.— Hale *v.* Equitable Aid Union, 168 Pa. St. 377, 31 Atl. 1066.

Tennessee.— Gaut *v.* American Legion of Honor, 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465.

Wisconsin.— Wuerfler *v.* Grand Grove O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

United States.— Supreme Council A. L. H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153 [*affirming* 109 Fed. 261]; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93 [*affirmed* in 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139]; Lloyd *v.* Supreme Lodge K. P., 98 Fed. 66, 38 C. C. A. 654.

Canada.— See Fawcett *v.* Fawcett, 26 Ont. App. 335; Yelland *v.* Yelland, 25 Ont. App. 91.

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Changes authorized by general reservation. —A general reservation of power to make changes in the laws refers to changes relating to the organization generally (Supreme Council A. L. H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153 [*affirming* 109 Fed. 261]), the conduct of its affairs (Campbell *v.* American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342), and its internal management (Bornstein *v.* District Grand Lodge No. 4 I. O. B. B., 2 Cal. App. 624, 84 Pac. 271), and the duties of members as such as distinguished from their rights and liabilities as holders of certificates of insurance (Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154; Sisson *v.* Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Campbell *v.* American Ben. Club Fraternity, *supra*; Morton *v.* Supreme Council R. L., 100 Mo. App. 76, 73 S. W. 259); and the changes, to be binding, must be in harmony with the objects of the society (Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340; Bottjer *v.* Supreme Council A. L. H., 78 N. Y. App. Div. 546, 79 N. Y. Suppl. 684 [*affirming* 37 Misc. 406, 75 N. Y. Suppl. 805]. And see Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38, 23 Ky. L. Rep. 2276), and not violative of its fundamental laws (Van Atten *v.* Modern Brotherhood of America, 131 Iowa 232, 108 N. W. 313; Kern *v.* Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Smith *v.* Supreme Lodge K. P., 83 Mo. App. 512).

57. *Illinois.*— Peterson *v.* Gibson, 191 Ill. 365, 61 N. E. 127, 85 Am. St. Rep. 263, 54 L. R. A. 836 [*affirming* 92 Ill. App. 595]; National Council K. & L. S. *v.* Dillon, 108 Ill. App. 183.

Iowa.— Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

Kansas.— Miller *v.* Tuttle, (1903) 73 Pac. 88.

Louisiana.— Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469.

Michigan.— Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709.

Missouri.— Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463; Grand Lodge A. O. U. W. *v.* Sater, 44 Mo. App. 445.

New York.— Wiedynska *v.* Pulaski Polish Benev. Soc., 110 N. Y. App. Div. 732, 97 N. Y. Suppl. 413; Butler *v.* Supreme Council A. L. H., 105 N. Y. App. Div. 164, 93 N. Y. Suppl. 1012; Zinna *v.* Saveria Friscia Soc., 88 N. Y. Suppl. 404.

North Carolina.— Johnson *v.* Grand Fountain U. O. T. R., 135 N. C. 385, 47 S. E. 463; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649; Hill *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 977, 36 S. E. 1023, 128 N. C. 463, 39 S. E. 56.

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Consent by participating in meeting.— Where a member sent his proxy to a meeting of the association held in another state, it will be presumed, in the absence of evidence to the contrary, that such proxy was intended for the ordinary purposes of meetings; and hence a resolution passed thereat depriving the member of vested rights under his insurance contract will not be binding on him by reason of his proxy. Hill *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 977, 36 S. E. 1023, 128 N. C. 463, 39 S. E.

waives his rights or estops himself from attacking them.[58] The rule that the members of a society are bound to take notice of its laws applies to alterations therein; and accordingly the fact that a member was ignorant of changes does not exempt him from their operation if they are otherwise binding on him.[59] By statute in some states, however, a new by-law must be attached to the certificate or be brought to the member's notice, else it does not affect his contract.[60] The rights of the beneficiary become vested on the member's death, and consequently the society cannot thereafter alter its laws to the beneficiary's detriment.[61] Before the member's death, however, the rights of the beneficiary are by the weight of authority merely contingent,[62] and hence he cannot, in the lifetime of the member, question the right of the society to alter its laws.[63] To be binding on the members, it is of course necessary that the alterations in the constitution and by-laws should be such as the society has power to make,[64] and not contrary to

56. And see Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 37 Ill. App. 170 [*affirmed* in 137 Ill. 417, 27 N. E. 538]; Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

Consent by representation.— Consent to alterations impairing the contract of insurance cannot be implied from the fact that the body making the changes is composed of representatives elected by the subordinate lodges, of one of which insured was a member. Fargo *v.* Supreme Tent K. M. W., 96 N. Y. App. Div. 491, 89 N. Y. Suppl. 65; Supreme Council A. L. H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153 [*affirming* 109 Fed. 261]. And see Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299.

58. *Iowa.*— Courtney *v.* U. S. Masonic Ben. Assoc., (1892) 53 N. W. 238.

Massachusetts.—Sargent *v.* Supreme Lodge K. H., 158 Mass. 557, 33 N. E. 650.

Michigan.— Pokrefky *v.* Detroit Firemen's Fund Assoc., 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057.

New Jersey.— O'Neill *v.* Supreme Council A. L. H., 70 N. J. L. 410, 57 Atl. 463.

New York.— McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347; Berg *v.* Badenser Unterstuetzungs Verein Von Rochester, 90 N. Y. App. Div. 474, 86 N. Y. Suppl. 429; Evans *v* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611; Penachio *v.* Saati Soc., 33 Misc. 751, 67 N. Y. Suppl. 140.

Pennsylvania.— Margut *v.* United Brethren Mut. Aid Soc., 148 Pa. St. 185, 23 Atl. 896.

United States.— Clymer *v.* Supreme Council A. L. H., 138 Fed. 470; Supreme Council A. L. H. *v.* McAlarney, 135 Fed. 72, 67 C. C. A. 546 [*reversing* 131 Fed. 538]; Supreme Council A. L. H. *v.* Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803 [*reversing* 130 Fed. 483].

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Facts held not to create an estoppel see Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469; Williams *v.* Supreme Council A. L. H., 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649; Supreme Council A. L. H. *v.* Daix, 130 Fed. 101, 64 C. C. A. 435 [*affirming* 127 Fed. 374]; Supreme Council A. L. H. *v.* Champe, 127 Fed. 541, 63 C. C. A. 282. And see Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629; Henderson *v.* Supreme Council A. L. H., 120 Fed. 585.

Effect of surrendering certificate and taking out new one see *supra*, II, D, 3, a.

59. Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611 (*semble*); People *v.* Grand Lodge A. O. U. W., 32 Misc. (N. Y.) 528, 67 N. Y. Suppl. 330. See, however, Hunziker *v.* Supreme Lodge K. P., 117 Ky. 418, 78 S. W. 201, 25 Ky. L. Rep. 1510; Tebo *v.* Supreme Council R. A., 89 Minn. 3, 93 N. W. 513; Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 79 Am. St. Rep. 412, 47 L. R. A. 136; Wiedynska *v.* Pulaski Polish Benev. Soc., 110 N. Y. App. Div. 732, 97 N. Y. Suppl. 413; Hadley *v.* Queen City Camp No. 27 W. W., 1 Tenn. Ch. App. 413.

If the original laws provide for notice of amendments, an amendment of which a member has not been notified is not binding on him. Northwestern Life Assur. Co. *v.* Erlenkoetter, 90 Ill. App. 99; Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 37 Ill. App. 170 [*affirmed* in 137 Ill. 417, 27 N. E. 538].

60. Hunziker *v.* Supreme Lodge K. P., 117 Ky. 418, 78 S. W. 201, 25 Ky. L. Rep. 1510.

61. Gundlach *v.* Germania Mechanics' Assoc., 4 Hun (N. Y.) 339, 49 How. Pr. 190.

62. See *infra*, IV, C, 2, c.

63. Pollak *v.* Supreme Council R. A., 40 Misc. (N. Y.) 274, 81 N. Y. Suppl. 942.

64. Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653; Lawson *v.* Hewel, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224; Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380; Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977 [*affirming* 60 N. Y. App. Div. 11, 69 N. Y. Suppl. 764].

Power of amendment see *supra*, I, C, 2, c.

law;[65] and that they should have been duly enacted[66] by the body having authority to enact them.[67]

(II) *ILLUSTRATIONS.* The rules announced in the preceding section apply to alterations in the constitution and by-laws of the society with reference to assessments;[68] alterations with reference to conditions concerning the habits of members[69] and their occupation;[70] alterations with reference to conditions concerning

65. Fraternal Union of America *v.* Zeigler, 145 Ala. 287, 39 So. 751; Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653.

Validity of by-laws see *supra*, I, C, 2, b.

66. *Illinois.*— Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538 [*affirming* 37 Ill. App. 170]. And see Northwestern L. Assur. Co. *v.* Erlenkoetter, 90 Ill. App. 99.

Massachusetts.— Torrey *v.* Baker, 1 Allen 120.

Nebraska.— Lange *v.* Royal Highlanders, (1905) 106 N. W. 224; Knights of Maccabees of World v. Nitsch, 69 Nebr. 372, 95 N. W. 626.

New Jersey.— Mutual Aid, etc., Soc. *v.* Monti, 59 N. J. L. 341, 36 Atl. 666.

Texas.— Sovereign Camp W. W. *v.* Fraley, (Civ. App. 1900) 59 S. W. 905 [*affirmed* in 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898].

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

Mode of enactment see *supra*, I, C, 2, a, c.

67. Supreme Lodge K. P. W. *v.* Kutscher, 72 Ill. App. 462; Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224.

Authority to enact by-laws see *supra*, I, C, 2, a.

68. See cases cited *infra*, this note.

Alterations as to notice of assessments.— If by the original rules a member is entitled to actual notice of assessments, an amendment authorizing notice by mail as a condition precedent to forfeiture of benefits for non-payment of assessments is not binding on the member, unless he acquiesces therein. Courtney *v.* U. S. Masonic Ben. Assoc., (Iowa 1892) 53 N. W. 238. And the same is true where the original rules provide for written or printed notice of assessments, and a subsequent amendment authorizes notice by publication, and provides that the failure to give or to receive notice shall not relieve the member from the consequences of an omission to pay the assessments, even though the member has agreed to be bound by rules subsequently enacted. Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 79 Am. St. Rep. 412, 47 L. R. A. 136.

Alterations increasing assessments.—Where the parties contract with reference to future changes in the by-laws, an alteration resulting in an increase in assessments is binding on the member, if made for the general good of the order. Fullenwider *v.* Supreme Council R. L., 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239 [*affirming* 73 Ill. App. 321]; Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Miller *v.* National Council K. & L. S., 69 Kan. 234, 76 Pac. 830; Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154; Messer *v.* Grand Lodge A. O. U. W., 180 Mass. 321, 62 N. E. 252; Steuve *v.* Grand Lodge A. O. U. W., 5 Ohio Cir. Ct. 471, 3 Ohio Cir. Dec. 231. *Contra*, Benjamin *v.* Mutual Reserve Fund Life Assoc., 146 Cal. 34, 79 Pac. 517; Pearson *v.* Knights Templars', etc., Indemnity Co., 114 Mo. App. 283, 89 S. W. 588; Wright *v.* Knights of Maccabees of World, 48 Misc. (N. Y.) 558, 95 N. Y. Suppl. 996; Strauss *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605, 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 703, 54 L. R. A. 609. But such an alteration is not binding on the member in the absence of an agreement to be bound by future changes. Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309; Covenant Mut. Ben. Assoc. *v.* Baldwin, 49 Ill. App. 203. See, however, Shepperd *v.* Bankers' Union of World, (Nebr. 1906) 108 N. W. 188 (holding that the monthly assessments required from members of a beneficial society may be increased when necessary to meet the needs of the business); Gaines *v.* Supreme Council R. A., 140 Fed. 978 (holding that the action of a fraternal beneficiary association organized under the laws of Massachusetts, where it has its domicile and chief office, in so amending its by-laws as to change its system of assessments, by which the rate of assessment on its older members is increased, is not so clearly in violation of the contract rights of such members under the laws of Massachusetts as to authorize a court of another state to interfere by injunction). By paying the increased assessments without protest the member waives the right to object to the amendment. Pokrefky *v.* Detroit Firemen's Fund Assoc., 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057.

69. Taylor *v.* Modern Woodmen of America, 72 Kan. 443, 83 Pac. 1099, 5 L. R. A. N. S. 283, holding that a by-law providing that if any member shall become intemperate in the use of drugs, his certificate shall by such acts become void and all payments thereon shall be forfeited does not apply to a member who before the enactment of such by-laws had become intemperate and continued so thereafter.

70. See cases cited *infra*, this note.

If the parties contract with reference to alterations, a member is bound by an amendment prohibiting members from engaging in the liquor business (State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456; Loeffler *v.* Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012), and providing for a for-

suicide;[71] alterations with reference to suspension and forfeiture of bene-

feiture of benefits in case they do so (Strang *v.* Camden Lodge A. O. U. W., 73 N. J. L. 500, 64 Atl. 93); and where the constitution of the association at the time the insured became a member provided that no person engaged in the retail liquor business should be admitted to membership, he was bound by a subsequent amendment that the certificate of any member who should thereafter engage in such business should be null and void. (People *v.* Grand Lodge A. O. U. W., 32 Misc. (N. Y.) 528, 67 N. Y. Suppl. 330). So the member is bound by an amendment adding to the list of extrahazardous occupations (Gilmore *v.* Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17); but he is not bound by an amendment forfeiting benefits in case he engages in a certain occupation in which he previously had a right to engage, where he had no notice thereof (Tebo *v.* Supreme Council R. A., 89 Minn. 3, 93 N. W. 513).

If the parties do not contract with reference to alterations, a member who was engaged in selling liquor when he became such and continued therein, as he had a right to do under the laws of the order, and who paid all dues and assessments for six years, acquired rights of which neither he nor his beneficiary could arbitrarily be deprived by an amendment declaring the certificates of all members engaged in such business void. Deuble *v.* Grand Lodge A. O. U. W., 66 N. Y. App. Div. 323, 72 N. Y. Suppl. 755 [*affirmed* in 172 N. Y. 665, 65 N. E. 1116]. So a member is not bound by an amendment adding to the list of extrahazardous occupations (Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299), where it was enacted after he was injured while engaged in an occupation so added (Brotherhood of Painters, etc. *v.* Moore, 36 Ind. App. 580, 76 N. E. 262).

Construction of alteration as to retrospectiveness.—A by-law of a fraternal order providing that any member who shall after its adoption enter into the business of selling intoxicating liquors shall stand suspended from his right to participate in the beneficiary fund, and that his certificate shall become void from the date of his so engaging in such occupation, does not apply to a member who prior to that time was engaged in such business and who remains in it continuously thereafter. Grand Lodge A. O. U. W. *v.* Haddock, 72 Kan. 35, 82 Pac. 583, 1 L. R. A. N. S. 1064; Deuble *v.* Grand Lodge A. O. U. W., 66 N. Y. App. Div. 323, 72 N. Y. Suppl. 755 [*affirmed* in 172 N. Y. 665, 65 N. E. 1116]. *Contra*, Ellerbe *v.* Faust, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149. And see Gilmore *v.* Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17. However, a by-law that any member who shall engage in the business of selling intoxicating liquors after a certain date shall be expelled applies to all members of the order not engaged in the prohibited business at the time mentioned therein; and there is no exception in favor of one who was engaged in such business at the time he united with the order but who retired therefrom and reëngaged in the business subsequent to the date specified in the order. Langnecker *v.* Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185.

71. Sovereign Camp W. W. *v.* Thornton, 115 Ga. 798, 42 S. E. 236 (holding that an amendment in regard to suicide as working a forfeiture will not be given a retrospective operation in the absence of a clearly expressed intention to that effect); Northwestern Benev., etc., Aid Assoc. *v.* Wanner, 24 Ill. App. 357 (holding that an amendment making suicide a ground of forfeiture does not affect existing members unless they agreed to be bound by alterations).

If the parties contract with reference to alterations, the member and his beneficiary are bound by an amendment declaring the certificate void if the member commits suicide (Supreme Commandery K. G. R. *v.* Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Daughtry *v.* Knights of Pythias, 48 La. Ann. 1203, 20 So. 712, 55 Am. St. Rep. 310; Dornes *v.* Supreme Lodge K. P., 75 Miss. 466, 23 So. 191; Morton *v.* Royal Tribe of Joseph, 93 Mo. App. 78; Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224; Tisch *v.* Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188 [*affirming* 24 Ohio Cir. Ct. 489]; Supreme Lodge K. P. *v.* La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; Hughes *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 98 Wis. 292, 73 N. W. 1015. *Contra*, Santter *v.* Supreme Conclave I. O. H., 72 N. J. L. 325, 62 Atl. 529), or reducing the amount payable in case of suicide (Eversberg *v.* Supreme Tent K. M. W., 33 Tex. Civ. App. 549, 77 S. W. 246. *Contra*, Smith *v.* Supreme Lodge K. P., 83 Mo. App. 512). And even where the original contract and laws provide that suicide shall work a forfeiture only when committed within a certain period after issuance of the certificate, the member and his beneficiary are bound by an amendment extending that period (Chambers *v.* Supreme Tent K. M., 200 Pa. St. 244, 49 Atl. 784, 86 Am. St. Rep. 716), or providing for a forfeiture if the member commits suicide at any time (Eversberg *v.* Supreme Tent K. M. W., *supra*. *Contra*, Morton *v.* Supreme Council R. L., 100 Mo. App. 76, 73 S. W. 259).

In New York an amendment making suicide of the member, sane or insane, a ground of forfeiture in whole or in part, is valid as applied to preëxisting members who subsequently commit suicide while sane (Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594]; Mitterwallner *v.* Supreme Lodge K. &

fits[72] and reinstatement;[73] alterations with reference to the contingencies on which benefits become payable;[74] alterations with reference to the right to desig-

L. G. S., 86 N. Y. Suppl. 786), but not as to those who take their lives while insane (Shipman *v.* Protected Home Circle, *supra*. And see Bottjer *v.* Supreme Council A. L. H., 78 N. Y. App. Div. 546, 79 N. Y. Suppl. 684 [*affirming* 37 Misc. 406, 75 N. Y. Suppl. 805]); and where the original contract and laws provide for a forfeiture only when the member commits suicide within a certain period after issuance of the certificate, an amendment extending that time (Weber *v.* Supreme Tent K. M. W., 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753), or providing that suicide at any time thereafter shall work a forfeiture (Fargo *v.* Supreme Tent K. M. W., 96 N. Y. App. Div. 491, 89 N. Y. Suppl. 65), is likewise void as to members subsequently committing suicide while insane. This distinction does not seem to be taken in other states. See cases cited *supra*, this note.

72. See cases cited *infra*, this note.

Alterations as to proceedings for suspension and forfeiture.— If a member agrees to be bound by future by-laws, an alteration dispensing with notice or proceedings as a prerequisite to forfeiture for breach of a condition subsequent is binding on him. Moerschbaecher *v.* Supreme Council R. L., 188 Ill. 9, 59 N. E. 17, 52 L. R. A. 281 [*affirming* 88 Ill. App. 89]; Schmidt *v.* Supreme Tent K. M. W., 97 Wis. 528, 73 N. W. 22. And where the original laws require no notice of the suspension of a subordinate lodge to be given to its members in order that the suspension should operate to suspend them also, the adoption of a subsequent resolution by the great camp providing that it should not be liable for the default of a subordinate camp in serving notices of suspensions imposes no additional burden and no new forfeitures on the member, and is binding on him. Peet *v.* Great Camp K. M., 83 Mich. 92, 47 N. W. 119.

Alterations making a member's past acts or omissions ground of forfeiture are inoperative as to him (People *v.* Detroit Fire Dept., 31 Mich. 458; Coyle *v.* Father Matthew Total Abstinence Benev. Soc., 17 N. Y. Wkly. Dig. 17), although he has agreed to be bound by alterations (Graftstrom *v.* Frost Council No. 21, 19 Misc. (N. Y.) 180, 43 N. Y. Suppl. 266; Lloyd *v.* Supreme Lodge K. P., 98 Fed. 66, 38 C. C. A. 654).

Construction of alterations.— Even where changes in the constitution and by-laws are intended to operate retrospectively and are binding on the members, yet if they are calculated to work a forfeiture of the members' rights they will be strictly construed against the society. Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299; Lange *v.* Royal Highlanders, (Nebr. 1905) 106 N. W. 224; Pfeifer *v.* Supreme Lodge B. S. Benev. Soc., 173 N. Y. 418, 66 N. E. 108 [*reversing* 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138]; Deuble *v.* Grand Lodge A. O. U. W., 66 N. Y. App. Div. 323, 72 N. Y. Suppl. 755 [*affirmed* in 172 N. Y. 665, 65 N. E. 1116].

The beneficiary cannot object to an alteration in this respect in the lifetime of the member. Pollak *v.* Supreme Council R. A., 40 Misc. (N. Y.) 274, 81 N. Y. Suppl. 942.

73. Sieverts *v.* National Benev. Assoc., 95 Iowa 710, 64 N. W. 671, holding that where a policy provides that insured may, within fifteen days after his assessment becomes due and unpaid, be reinstated by the payment of the assessment and a fine, the insurer cannot alter the contract by the subsequent adoption of a by-law providing for such reinstatement on condition that insured is then in good health.

74. *Iowa.*— Ross *v.* Modern Brotherhood of America, 120 Iowa 692, 95 N. W. 207 (holding that where a member contracts with reference to future changes, and the original by-laws do not define the breaking of a leg, the member is bound by a subsequent by-law defining that injury as the breaking of the shaft of the thigh-bone between the hip and the knee joints, or the breaking of the shafts of both bones between the knee and ankle joints); Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306 (holding that an amendment limiting the contingencies on which benefits are payable does not apply to pre-existing members, where the laws of the society do not authorize it to bind a member by amendments, and the amendment does not purport to affect existing contracts).

Michigan.— Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709, holding that if a certificate defines what shall be deemed a total disability, and declares the member to be entitled to a sum specified on the suffering by him of such disability, the society cannot, without the member's consent, afterward reduce the classes of total disability.

Mississippi.— Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4, holding that where, in his application for membership, the member, who had not been vaccinated, agreed, as was required at the time by the laws of the society, to waive all claims under his benefit certificate should he die from smallpox, and before his death the laws of the society were so changed as to require members who had not been vaccinated to agree that until they were successfully vaccinated they would waive all claim under their certificates in case they died from smallpox, the amendment operated in favor of the member, and hence it is no defense to a suit on the certificate that he died with that disease, he having been successfully vaccinated after the amendment was made.

Missouri.— Sisson *v.* Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297, holding that a member is not bound by an

nate beneficiaries, the persons who may be designated, the mode of designation, change of beneficiaries, and the method of determining beneficiaries;[75] alterations

amendment, passed after he received his certificate, limiting his right to recover in case of injury, unless he expressly consented thereto, although his certificate stipulates that it is issued on condition that he comply with the constitution then in force or thereafter to be enacted, such stipulation relating only to his duties as a member of the association.

Nebraska.— Hall *v.* Western Travelers' Acc. Assoc., 69 Nebr. 601, 96 N. W. 170, holding that where insured became a member under an agreement providing for amendments to the constitution, an amendment exempting the company from liability for injuries caused by vertigo is binding on him.

New York.— Beach *v.* Supreme Tent K. M., 177 N. Y. 100, 69 N. E. 281 [*affirming* 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770]; Bottjer *v.* Supreme Council A. L. H., 78 N. Y. App. Div. 546, 79 N. Y. Suppl. 684 [*affirming* 37 Misc. 406, 75 N. Y. Suppl. 805], holding that even though the parties contract with reference to alterations, the member is not bound by an amendment excepting death from alcoholism or by legal execution for crime from the risks insured against.

Pennsylvania.— Hale *v.* Equitable Aid Union, 168 Pa. St. 377, 31 Atl. 1066.

Utah.— Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030, holding that a by-law providing that a member receiving bodily injuries which alone cause the total and permanent loss of one or both eyes shall receive the whole amount of his policy does not include an injury causing the loss of a member's eyesight prior to its passage.

United States.— Lloyd *v.* Supreme Lodge K. P., 98 Fed. 66, 38 C. C. A. 654, holding that where, after the issuance of a life policy, its conditions were changed, as therein provided might be done, by a by-law reducing the amount recoverable in case the death of insured should be caused or superinduced by the use of intoxicating liquors, the question whether the amount recoverable on the subsequent death of the insured, admitted to have been superinduced by the use of intoxicating liquors, is affected by such by-law, becomes one of fact, depending on whether the disease causing his death became seated in fatal and incurable form before or after the by-law took effect.

See 6 Cent. Dig. tit. "Beneficial Associations," § 6; 28 Cent. Dig. tit. "Insurance," §§ 1833, 1855, 1872.

75. Grossmayer *v.* District No. 1 I. O. B. B., 70 N. Y. App. Div. 90, 74 N. Y. Suppl. 1057 [*affirming* 34 Misc. 577, 70 N. Y. Suppl. 393, and *affirmed* in 174 N. Y. 550, 67 N. E. 1083] (holding that an alteration changing the manner of designating beneficiaries, and requiring, contrary to the former rule, that unless a member who left no wife or child designated a beneficiary in a certain manner no benefit should accrue, did not change the status of a member who was incapacitated by insanity from compliance therewith, and remained so until his death); Wist *v.* Grand Lodge A. O. U. W., 22 Oreg. 271, 29 Pac. 610, 29 Am. St. Rep. 603 (holding that an amendment to the effect that each member shall designate the person to whom the fund due at his death should be paid, who shall in every instance be a member of his family, a blood relation, or a person dependent on him, even if retroactive, did not apply to a member who had no family, blood relation, or person dependent on him, and his previously designated beneficiary was entitled to the fund).

If the parties contract with reference to future alterations the member and his beneficiary are bound thereby. This rule applies to alterations in the mode of determining beneficiaries (Masonic Mut. Ben. Assoc. *v.* Severson, 71 Conn. 719, 43 Atl. 192; Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380; Bollman *v.* Supreme Lodge K. H., (Tex. Civ. App. 1899) 53 S. W. 722), alterations as to who may be a beneficiary (Baldwin *v.* Begley, 185 Ill. 180, 56 N. E. 1065 [*reversing* 84 Ill. App. 674]; Sargent *v.* Supreme Lodge K. H., 158 Mass. 557, 33 N. E. 650; Brinen *v.* Supreme Council C. M. B. A., 140 Mich. 220, 103 N. W. 603. And see Leadley *v.* McGregor, 11 Manitoba 9. *Contra*, Roberts *v.* Cohen, 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57 [*reversing* 33 Misc. 536, 68 N. Y. Suppl. 949, and *affirmed* in 173 N. Y. 580, 65 N. E. 1122]. And see Fawcett *v.* Fawcett, 26 Ont. App. 335 [*distinguishing* Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88]), and alterations as to changing beneficiaries (Supreme Council C. K. A. *v.* Morrison, 16 R. I. 468, 17 Atl. 57; Catholic Knights of America *v.* Kuhn, 91 Tenn. 214, 18 S. W. 385; Byrne *v.* Casey, 70 Tex. 247, 8 S. W. 38).

If the parties do not contract with reference to future alterations neither the member nor his beneficiary is bound thereby. This rule applies to alterations as to changing beneficiaries (Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; Peterson *v.* Gibson, 191 Ill. 365, 61 N. E. 127, 85 Am. St. Rep. 263, 54 L. R. A. 836 [*affirming* 92 Ill. App. 595]. See, however, Supreme Council C. K. A. *v.* Franke, 137 Ill. 118, 27 N. E. 86 [*affirming* 34 Ill. App. 651]; Thesing *v.* Supreme Lodge K. A., 11 Ohio Dec. (Reprint) 88, 24 Cinc. L. Bul. 401, both holding that the original beneficiary was bound by the alterations); alterations as to the eligibility of beneficiaries (Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627; Fawcett *v.* Fawcett, 26 Ont. App. 335 [*distinguishing* Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88]. See, however, Durian *v.* Central Verein

with reference to the classification of members for insurance purposes;[76] alterations with reference to the abolition, suspension, or reduction of benefits,[77] and

H. S., 7 Daly (N. Y.) 168, holding that the original beneficiary cannot object to an alteration enlarging the classes of beneficiaries, under which the member appointed a new beneficiary), and alterations as to the mode of determining beneficiaries (Fawcett *v.* Fawcett, *supra*. *Contra*, O'Brien *v.* Supreme Council C. B. L., 81 N. Y. App. Div. 1, 80 N. Y. Suppl. 775 [*affirmed* in 176 N. Y. 597, 68 N. E. 1120]).

Construction of alterations as to retrospectiveness.—Alterations as to beneficiaries operate retrospectively unless a clear intent to the contrary appears. This rule applies to alterations as to who may be a beneficiary (Emmons *v.* Supreme Conclave I. O. H., (Del. 1906) 63 Atl. 871; Roberts *v.* Cohen, 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57 [*reversing* 33 Misc. 536, 68 N. Y. Suppl. 949, and *affirmed* in 173 N. Y. 580, 65 N. E. 1122]; Spencer *v.* Grand Lodge A. O. U. W., 22 Misc. (N. Y.) 147, 48 N. Y. Suppl. 590 [*affirmed* in 53 N. Y. App. Div. 627, 65 N. Y. Suppl. 1146]; Wist *v.* Grand Lodge A. O. U. W., 22 Oreg. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Hadley *v.* Queen City Camp No. 27 W. W., 1 Tenn. Ch. App. 413; Grand Lodge A. O. U. W. *v.* Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840; Fawcett *v.* Fawcett, 26 Ont. App. 335; Yelland *v.* Yelland, 25 Ont. App. 91. See, however, Leadley *v.* McGregor, 11 Manitoba 9), alterations as to changing beneficiaries (Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; Locomotive Engineers' Mut. L., etc., Ins. Assoc. *v.* Winterstein, 58 N. J. Eq. 189, 44 Atl. 199), and to an alteration declaring that where marriage is contracted after issuance of the policy, and the policy becomes payable through death, it shall be paid to the widow, or, in event of her death, to their joint issue, if any, unless otherwise ordered (Benton *v.* Brotherhood of Railroad Brakemen, 146 Ill. 570, 34 N. E. 939 [*reversing* 45 Ill. App. 112]).

Retrospective operation of statute as to eligibility of beneficiary see *infra*, IV, A, 2, a.

76. Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409 (holding that a change by a benevolent order, in good faith, under a reserved power of amendment, of its system of insurance, whereby the number of persons in a certain class is reduced by the creation of another class giving insurance upon more favorable terms to persons under a certain age, and permitting certificate holders to become members of the new class, thus cutting down the amount which will be realized by a beneficiary by an assessment upon the members of the old class, is not such a wrongful act or breach of contract as renders the association liable to the beneficiary beyond the amount which will be so realized; and that even if the depletion of the class mentioned constituted a breach of contract, the damages are too remote and conjectural to form the basis of a recovery); French *v.* New York Mercantile Exch., 80 N. Y. App. Div. 131, 80 N. Y. Suppl. 312 (holding that where members were divided into two classes, one participating in benefits and one non-participating, a participating member who agreed to be bound by future by-laws was bound by an amendment, enacted for the good of the order, authorizing participating members to change to the non-participating class on paying all assessments due); Margut *v.* Mutual Aid Soc., 148 Pa. St. 185, 23 Atl. 896 (holding that where a member continues to pay his assessments for more than three years after receiving notice that the classification of his membership has been changed, he is deemed to have assented to the change, and cannot rescind the contract on account of it).

Increase in assessments resulting from change see *supra*, note 68.

77. See cases cited *infra*, this note.

Abolition of disability benefits.— It has been held that where the sections of the constitution and rules which provide for payment of a benefit to a member on total disability are repealed, he loses his right to such benefit. *Re* Supreme Legion S. K. C., 29 Ont. 708.

Reduction of death benefits.—An amendment reducing death benefits is binding on the beneficiary if the certificate expressly provides that his rights shall be determined by the laws of the society in force at the time when benefits are payable (Richmond *v.* Supreme Lodge O. M. P., 100 Mo. App. 8, 71 S. W. 736. See, however, Evans *v.* Southern Tier Masonic Relief Assoc., 182 N. Y. 453, 75 N. E. 317 [*reversing* 94 N. Y. App. Div. 541, 88 N. Y. Suppl. 162]); but the mere fact that the laws of the society authorize amendments thereto does not subject the beneficiary to an amendment reducing death benefits (Pokrefky *v.* Detroit Firemen's Fund Assoc., 121 Mich. 456, 80 N. W. 240. *Contra*, Fugure *v.* St. Joseph Mut. Soc., 46 Vt. 362); nor does the fact that the parties contract with reference to alterations in general (Bornstein *v.* District Grand Lodge No. 4 I. O. B. B., 2 Cal. App. 624, 84 Pac. 271; Supreme Council A. L. H. *v.* Jordan, 117 Ga. 808, 45 S. E. 33; Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469; Porter *v.* Supreme Council A. L. H., 183 Mass. 326, 67 N. E. 238; Langan *v.* Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932 [*reversing* 69 N. Y. App. Div. 616, 75 N. Y. Suppl. 1127 (*affirming* 34 Misc. 629, 70 N. Y. Suppl. 663)]; Smith *v.* Supreme Council A. L. H., 94 N. Y. App. Div. 357, 88 N. Y. Suppl. 44; Williams *v.* Supreme Council A. L. H., 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713; Gaut *v.* American Legion of Honor, 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465; Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456,

alterations with reference to an increase of the amount payable by the society as

79 S. W. 629 [*citing* Supreme Council A. L. H. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. 901]; Wuerfler *v.* Grand Grove O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940; Supreme Council A. L. H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153 [*affirming* 109 Fed. 26]; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93 [*affirmed* in 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139]. And see Newhall *v.* Supreme Council A. L. H., 181 Mass. 111, 63 N. E. 1. *Contra*, Duer *v.* Supreme Council O. C. F., 21 Tex. Civ. App. 493, 52 S. W. 109. And see McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347), although the society's promise is only to pay an indefinite sum not exceeding the amount named in the certificate (Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649). And an amendment made after the death of the member whereby the amount of benefits is reduced is not binding on the beneficiary. Gundlach *v.* Germania Mechanics' Assoc., 4 Hun (N. Y.) 339, 49 How. Pr. 190.

Reduction of disability benefits.— It has been held that an amendment reducing the benefits payable on total disability is not binding on a preëxisting member subsequently becoming disabled, although the laws of the society authorize amendments (Zinna *v.* Saveria Friscia Soc., 88 N. Y. Suppl. 404), and although the certificate is taken subject generally to the laws, existing and subsequently adopted (Beach *v.* Supreme Tent K. M. W., 177 N. Y. 100, 69 N. E. 281 [*affirming* 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770]).

Reduction of endowment.—It has been held that where a certificate provides for its payment "in an amount to be computed according to the laws" of the society, and these latter provide that their provisions in regard to the payment of such certificates may be changed at any time (Bowie *v.* Grand Lodge L. W., 99 Cal. 392, 34 Pac. 103), or where in the contract of insurance the society reserves the power to alter its rules in respect to the fund out of which the certificate is payable (Doidge *v.* Dominion Council R. T. T., 4 Ont. L. Rep. 423), the member is bound by an amendment reducing the amount of the endowment to which he may become entitled; but that a member is not thus bound because his certificate was taken subject generally to the society's laws, existing and subsequently adopted (Hale *v.* Equitable Aid Union, 168 Pa. St. 377, 31 Atl. 1066).

Reduction of sick benefits.— It has been held that an amendment reducing sick benefits, adopted pending a member's sickness, is not binding on him if he has not agreed to be bound thereby (Wiedynska *v.* Pulaski Polish Benev. Soc., 110 N. Y. App. Div. 732, 97 N. Y. Suppl. 413; Becker *v.* Berlin Ben. Soc., 144 Pa. St. 232, 22 Atl. 699, 27 Am. St. Rep. 624. *Contra*, Berg *v.* Badenser Understuetzungs Verein Von Rochester, 90 N. Y. App. Div. 474, 86 N. Y. Suppl. 429), unless the laws of the society authorize amendments, in which case he is bound (Stohr *v.* San Francisco Musical Fund Soc., 82 Cal. 557, 22 Pac. 1125; Pain *v.* Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Poultney *v.* Bachman, 31 Hun (N. Y.) 49 [*reversing* 10 Abb. N. Cas. 252, 62 How. Pr. 466]. *Contra*, Court Forest City *v.* Rennie, 25 Ohio Cir. Ct. 790; Pellazzino *v.* German Catholic St. Joseph's Soc., 9 Ohio Dec. (Reprint) 635, 16 Cinc. L. Bul. 27).

Suspension of payment of benefits.— It seems that an amendment suspending payment of death benefits till the fund applicable thereto shall accumulate to a certain amount is not binding on a preëxisting member (International Order T. K. & D. T. *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108); but it has been held that a similar amendment suspending payment of sick benefits is binding on members subsequently taken sick (McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149; St. Patrick's Male Ben. Soc. *v.* McVey, 92 Pa. St. 510).

Retrospectiveness of alterations.—An alteration in the laws reducing benefits will not be given a retroactive operation unless an intent to that effect clearly appears. Berlin *v.* Eureka Lodge No. 9 K. P., 132 Cal. 294, 64 Pac. 254; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93 [*affirmed* in 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139]. Amendment held to be retroactive see Pain *v.* Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287.

Estoppel and waiver.— Where the amendment as to benefits is accompanied by a corresponding change in the amount of dues and assessments, a member who pays the changed dues and assessments without protest waives his right to object to the amendment. Pokrefky *v.* Detroit Firemen's Fund Assoc., 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057; McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347; Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611. And see Berg *v.* Badenser Understuetzungs Verein Von Rochester, 90 N. Y. App. Div. 474, 86 N. Y. Suppl. 429. But such payment does not amount to a waiver where the member objects to the amendment and pays under protest (Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469; Williams *v.* Supreme Council A. L. H., 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649; Supreme Council A. L. H. *v.* Champe, 127 Fed. 541, 63 C. C. A. 282. See, however, Clymer *v.* Supreme Council A. L. H., 138 Fed. 470; Supreme Council A. L. H. *v.* Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803 [*reversing* 130 Fed. 483]),

benefits;[78] alterations with reference to the assignment of the certificate;[79] alterations with reference to the adjustment of claims[80] and the time for suit;[81] and alterations with reference to the distribution of the funds of the society.[82]

where he makes the payment with the expectation that the amendment will be repealed (Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629), or where the society refuses to accept any other than the changed assessment (Supreme Council A. L. H. *v.* Champe, *supra*). The member is estopped to question the validity of the amendment if he fails to take action within a reasonable time to the prejudice of the society and its members and their beneficiaries. Clymer *v.* Supreme Council A. L. H., *supra*; Supreme Council A. L. H. *v.* McAlarney, 135 Fed. 72, 67 C. C. A. 546 [*reversing* 131 Fed. 538]; Supreme Council A. L. H. *v.* Lippincott, *supra*. See, however, Supreme Council A. L. H. *v.* Daix, 130 Fed. 101, 64 C. C. A. 435 [*affirming* 127 Fed. 374]. So where an amendment to the by-laws of a society confines sick benefits to members residing in a certain city, and a member subsequently signs the amended by-laws, and declares his submission thereto, he cannot recover benefits for an illness which occurs while he is living in another city. Penachio *v.* Saati Soc., 33 Misc. (N. Y.) 751, 67 N. Y. Suppl. 140. And where, after the passage of a by-law scaling all five-thousand-dollar certificates to two thousand dollars, the holder of a certificate for five thousand dollars returned the same, with a request that a new certificate for two thousand dollars be issued, he was not entitled to recover the premiums paid on the five-thousand-dollar certificate. Supreme Council A. L. H. *v.* Lyon, (Tex. Civ. App. 1905) 88 S. W. 435. The fact that a member of a fraternal insurance association, on learning that it had, without legal right, reduced the amount payable on his certificate below that called for by the contract, stopped payment of a check sent in payment of a previous assessment, does not preclude him from maintaining an action against it for breach of the contract. Henderson *v.* Supreme Council A. L. H., 120 Fed. 585.

Alteration as breach of contract see *infra*, II, G.

Alterations diminishing benefits: In case of death superinduced by the use of intoxicants see *supra*, note 69. In case of death by suicide see *supra*, note 71.

78. Lavigueur *v.* L'Union Mutuelle de Bienfaisance, 16 Quebec Super. Ct. 588, holding that a by-law increasing the amount payable at the death of members applies to those who were members at the time of its passage, as well as to those subsequently becoming such, especially where it is not accompanied by any change in the scale of weekly payments by either prior or subsequent members.

79. Wheeler *v.* Supreme Sitting O. I. H., 110 Mich. 437, 68 N. W. 229, holding that a by-law forbidding transfers of membership certificates does not affect the rights of holders of certificates issued before it was passed.

80. Union Fraternal League *v.* Johnston, 124 Ga. 902, 53 S. E. 241, holding that where a member agrees to comply with laws afterward adopted, he is bound by a subsequent by-law requiring a reference of claims to a committee.

81. See cases cited *infra*, this note.

Alterations affecting prematurity of suit.—An amendment giving the society ninety days after maturity of the certificate in which to pay benefits is not binding on preëxisting members unless assented to. Wheeler *v.* Supreme Sitting O. I. H., 110 Mich. 437, 68 N. W. 229. In any event where the articles of association provided that benefits should be paid at such times as might be provided by the laws governing such payment or in the certificate of membership, and after the issuance of a certificate which provided that if the member to whom it was issued should for seven years pay his assessments punctually and maintain himself in good standing in the order, he should be entitled to a sum not exceeding the principal amount named in the certificate, less the amount which he might have already received as benefits, a by-law was adopted providing that final benefits should, when found correct, be adjusted within ninety days from the date of the expiration of the certificate, the by-law applied only to such certificates as by their terms made the benefit payable at the time fixed by the by-law, and hence it did not affect the time for bringing suit on the certificate. Cohen *v.* Supreme Sitting O. I. H., 105 Mich. 283, 63 N. W. 304.

Alterations fixing a short period of limitation.—Although the application for membership contains an agreement of the applicant to conform to the laws then in force or which might thereafter be adopted, and the certificate of insurance promises to pay the amount thereof in consideration of a full compliance with the by-laws existing or thereafter to be enacted, a subsequent by-law limiting the time for bringing suit on the certificate to a shorter period than allowed by the statute, in the absence of a contractual limitation, is not binding on the member's beneficiaries. Butler *v.* Supreme Council A. L. H., 105 N. Y. App. Div. 164, 93 N. Y. Suppl. 1012. To the contrary see McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347.

82. Messer *v.* Grand Lodge A. O. U. W., 180 Mass. 321, 62 N. E. 252 (holding that under a statute authorizing fraternal beneficiary associations to make payment of money to the supreme lodge for the purpose of contributing to the death benefits of members of lodges in other states, a fraternal beneficiary association whose laws as origin-

4. What Law Governs.[83] It is competent for the parties to stipulate that the contract shall be deemed to have been made in a certain state and be governed by its laws.[84] In the absence of such a stipulation the rights and liabilities of the parties are governed by the law of the state where the contract was made,[85] or the law of the state where the contract is to be performed.[86] However, the statutes of the state in which the society is domiciled are regarded as entering into contracts made by the society in other states, and will be given effect by the courts of the latter.[87]

E. Fraud, Misrepresentation, and Breach of Warranty or Condition Precedent[88] **— 1. General Rules.** Fraud exercised in procuring the contract of insurance vitiates it.[89] So the fraudulent concealment of material facts by the applicant avoids liability on the certificate.[90] If statements made by an applicant

ally published contemplated such payments to the supreme lodge may adopt by-laws providing for such payments without violating any of the rights of its members, although such payments prior to the enactment of the statute might have been *ultra vires*); Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149 [*affirming* 60 N. Y. App. Div. 11, 69 N. Y. Suppl. 764] (holding that where a gratuity fund, by assessments and other appropriations of money, had accumulated for the benefit of beneficiaries designated in the charter, a subsequent by-law authorizing distribution of the fund among the living members was void).

83. What law governs as to eligibility of beneficiary see *infra*, IV, A, 2, a.

84. Burns *v.* Burns, 109 N. Y. App. Div. 98, 95 N. Y. Suppl. 797; Polk *v.* Mutual Reserve Fund Life Assoc., 137 Fed. 273.

85. See cases cited *infra*, this note. And see Burns *v.* Burns, 109 N. Y. App. Div. 98, 95 N. Y. Suppl. 797.

Place of contract held to be the state where the certificate was issued and mailed see Tuttle *v.* Iowa State Traveling Men's Assoc., (Iowa 1905) 104 N. W. 1131. Place of contract held to be the state where the certificate was countersigned by the local agent and delivered see Mason *v.* Massachusetts Ben. Life Assoc., 30 Ont. 716. Place of contract held to be the state where the certificate was accepted by the member see Coverdale *v.* Royal Arcanum, 193 Ill. 91, 61 N. E. 915 [*reversing* 93 Ill. App. 373]; Expressman's Mut. Ben. Assoc. *v.* Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; Meyer *v.* Supreme Lodge K. P., 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839 [*affirming* 82 N. Y. App. Div. 359, 81 N. Y. Suppl. 813].

86. Expressman's Mut. Ben. Assoc. *v.* Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470, holding also that where a resident of Maryland became a member of a beneficial association of New York, which association had an agent in Maryland who received dues and assessments and paid claims of beneficiaries in such state, the contract of insurance was to be performed in Maryland. And see Burns *v.* Burns, 109 N. Y. App. Div. 98, 95 N. Y. Suppl. 797.

87. Royal Arcanum *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Matter of Globe Mut. Ben. Assoc., 63 Hun (N. Y.) 263, 17 N. Y. Suppl. 852; Gaines *v.* Supreme Council R. A., 140 Fed. 978. And see Martinez *v.* Supreme Lodge K. H., 81 Mo. App. 590.

88. Estoppel or waiver as to fraud, misrepresentation, and breach of warranty or condition precedent see *infra*, IV, J.

Fraud, misrepresentation, and breach of warranty or condition precedent as nullifying reinstatement see *infra*, IV, I, 4.

89. Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Koerts *v.* Grand Lodge O. H. S., 119 Wis. 520, 97 N. W. 163.

Fraud in procuring new certificate.—Where the constitution of a society provides that if the certificate of a member be lost or beyond his control he may obtain a new certificate payable to the same or another beneficiary, the fact that a member who has given a certificate to his wife, to whom it is payable, on desiring to obtain another payable to a different beneficiary states that it is lost does not invalidate a certificate subsequently issued, such certificate being properly issuable on the ground that the old certificate was beyond the member's control. Spengler *v.* Spengler, 65 N. J. Eq. 176, 55 Atl. 285.

Where one insures his life with intent to commit suicide, and so provide for his family and creditors, and, while sane, carries out that intent, the policy is void, although it does not stipulate for its avoidance by the insured's suicide. Smith *v.* National Ben. Soc., 51 Hun (N. Y.) 575, 4 N. Y. Suppl. 521 [*affirmed* in 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616].

Damages.—A member of a benevolent society, induced to become such by false representations of an agent, can recover from it only the amount of money paid out by reason of such false representations, and not the sum he would have received had the representations been true. May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66.

90. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Callies *v.* Modern Woodmen of America, 98 Mo. App. 521, 72 S. W. 713; Robinson *v.* Supreme Commandery O. G. C., 77 N. Y. App. Div. 215, 79

for insurance are incorporated into the contract and their truth is warranted so that it constitutes a condition precedent to the validity of the contract, the falsity of the statements avoids the contract,[91] even though the applicant made the misstatement in good faith and without fraudulent intent,[92] and even though the subject of the statement is not actually material to the risk,[93] and did not cause insured's death.[94] If, however, statements made by the applicant are not incorporated into the contract of insurance but are collateral thereto, and they are made merely as an inducement to the proposed contract, they constitute representations as distinguished from warranties or conditions precedent, and their falsity does not avoid the contract,[95] unless they relate to a matter which is material to the risk,[96]

N. Y. Suppl. 13 [*affirmed* in 177 N. Y. 564, 69 N. E. 1130].

91. Supreme Lodge O. C. K. *v.* McLaughlin, 108 Ill. App. 85; O'Shaughnessy *v.* Working Woman's Co-operative Assoc., 8 Misc. (N. Y.) 491, 28 N. Y. Suppl. 761; Alta Friendly Soc. *v.* Brown, 8 Pa. Super. Ct. 267; Knudson *v.* Grand Council N. L. H., 7 S. D. 214, 63 N. W. 911.

Where there are several separate warranties, the breach of any of them will defeat a recovery on the certificate. Knapp *v.* Brotherhood of American Yeomen, 128 Iowa 566, 105 N. W. 63.

Statements made in the application are mere representations and not warranties, where the application is not made a part of the policy by reference or otherwise. Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Supreme Lodge O. C. K. *v.* McLaughlin, 108 Ill. App. 85; Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317; Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367; Alden *v.* Supreme Tent K. M., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005. And see Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

92. *Illinois.*— Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79.

Massachusetts.— Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666.

New Jersey.— Johnson *v.* Order of Chosen Friends, 10 N. J. L. J. 346.

New York.— Jennings *v.* Supreme Council R. A. B. A., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005; Mayer *v.* Equitable Reserve Fund Life Assoc., 49 Hun 336, 2 N. Y. Suppl. 79; Kemp *v.* Good Templars' Mut. Ben. Assoc., 19 N. Y. Suppl. 435 [*affirmed* in 135 N. Y. 658, 32 N. E. 648].

Pennsylvania.—Dinan *v.* Supreme Council C. M. B. A., 201 Pa. St. 363, 50 Atl. 999.

Wisconsin.— Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713.

See 28 Cent. Dig. tit. "Insurance," § 1860.

93. *Illinois.*— Supreme Lodge O. C. K. *v.* McLaughlin, 108 Ill. App. 85.

Massachusetts.— Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666.

New Jersey.— Hoagland *v.* Supreme Council R. A., 70 N. J Eq. 607, 61 Atl. 982.

New York.— Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

Washington.— Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

See 28 Cent. Dig. tit. "Insurance," § 1859.

Stipulation as to materiality.— Under a policy making statements in the application a part of the policy and the only basis thereof, and stipulating that such statements are true and strict warranties, but containing an agreement by assured that in the event of his having concealed or misrepresented any facts "found to be essential in considering the risk" the policy shall be void, a misrepresentation does not avoid the policy unless it is essential to the risk. Offineer *v.* Brotherhood of American Yeomen, 109 Mo. App. 72, 83 S. W. 67.

94. Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713.

95. Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603. And see cases cited *infra*, notes 96, 97.

A representation need not be literally true, but is fulfilled if substantially true. Supreme Lodge O. C. K. *v.* McLaughlin, 108 Ill. App. 85; Northwestern Benev., etc., Aid Assoc. *v.* Cain, 21 Ill. App. 471. And see Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

96. *Illinois.*— Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Fraternal Tribunes *v.* Hanes, 100 Ill. App. 1.

Massachusetts.— Kidder *v.* Supreme Commandery W. O. G. C., 192 Mass. 326, 78 N. E. 469; Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367.

Nebraska.— Royal Neighbors of America *v.* Wallace, 73 Nebr. 409, 102 N. W. 1020.

New Jersey.— Hoagland *v.* Supreme Council R. A., 70 N. J. Eq. 607, 61 Atl. 982.

New York.—Alden *v.* Supreme Tent K. M., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

Pennsylvania.— United Brethren Mut. Aid Soc. *v.* White, 100 Pa. St. 12, holding that

or unless they were made in bad faith.[97] In some states it is provided by statute that no misstatement shall be a defense to an action on the certificate unless made fraudulently[98] or with reference to a matter which was material to the risk[99] and which contributed to the death of insured,[1] and unless the premiums paid by insured are deposited in court.[2] Except so far as the return of premiums is concerned, these statutes are declaratory of the common-law rule as to simple misrepresentations, and change the common-law rule only as to warranties.[3] Statements will not be held to be warranties or conditions precedent unless a clear intention to that effect appears;[4] and answers in the application are construed favorably to

a false statement that the applicant is a widower is material.

See 28 Cent. Dig. tit. "Insurance," § 1859.

Test of materiality.— The test in determining whether questions contained in an application for insurance are material is, Would the knowledge or ignorance of the facts sought to be elicited thereby materially influence the action of the insurer? Mattson *v.* Modern Samaritans, 91 Minn. 434, 98 N. W. 330. So a fact stated in an application is material to the risk when, if known to the insurer, it would have caused him to reject the application or to demand a higher premium. McCaffrey *v.* Knights and Ladies of Columbia, 213 Pa. St. 609, 63 Atl. 189.

97. *Illinois.*— Supreme Council C. K. & L. A. *v.* Beggs, 110 Ill. App. 139; Northwestern Benev., etc., Aid Assoc. *v.* Cain, 21 Ill. App. 471.

Massachusetts.— Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367.

Nebraska.— Royal Neighbors of America *v.* Wallace, 73 Nebr. 409, 102 N. W. 1020.

New Jersey.— Hoagland *v.* Supreme Council R. A., 70 N. J. Eq. 607, 61 Atl. 982.

New York.— Alden *v.* Supreme Tent K. M., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

Washington.— See Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

See 28 Cent. Dig. tit. "Insurance," § 1859.

98. Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244 (applying Massachusetts statute); Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

99. Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244 (applying Massachusetts statute); Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

The Ohio statute does not apply to fraternal beneficiary orders. Grand Lodge A. O. U. W. *v.* Bunkers, 23 Ohio Cir. Ct. 487.

1. Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986. See, however, Hanford *v.* Massachusetts Ben. Assoc., 122 Mo. 50, 26 S. W. 680.

The general insurance law of Missouri relating to the defense of misrepresentation does not apply to foreign fraternal societies. Kern *v.* Supreme Council A. L. H., 167 Mo. 471, 67 S. W. 252.

2. Herzberg *v.* Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986.

3. Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

4. *California.*— O'Connor *v.* Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688, holding that where the medical examination made the answers of the applicant warranties, and the constitution of the society provided that the certificate should be void if the applicant should wilfully make any erroneous statement or intentionally conceal any material fact, the provisions of the contract were conflicting, leaving it in doubt whether it was intended that the answers should be literally true, or only that they should not be wilfully erroneous, and as the doubt was created by the society, the assured was relieved from the obligation of a strict warranty.

Illinois.— Northwestern Benev., etc., Aid Assoc. *v.* Cain, 21 Ill. App. 471, holding that a provision that "this certificate is issued upon the condition . . . that the statements in the application for this certificate are true" does not make such statements warranties.

Indiana.— Supreme Lodge K. P. W. *v.* Edwards, 15 Ind. App. 524, 41 N. E. 850, holding that where an application for insurance referred to certain statements therein made as "warranties," and the certificate recited that it was issued "in consideration of the representations and declarations" made in the application, such statements should be considered as representations only.

Maryland.— Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244, holding that statements made by an applicant which by the terms of the policy are made a part of the contract but are not therein stipulated to be warranties are to be regarded not as warranties but as representations.

New Jersey.— Anders *v.* Supreme Lodge K. H., 51 N. J. L. 175, 17 Atl. 119, holding that where, in an application for insurance, the applicant, after answering numerous questions, used these words: "I certify that the answers made by me," etc., "are true, in which there are no misrepresentations or suppression of known facts," agreeing that such statements should be a warranty, the language, being ambiguous, was to be taken most strongly against the insurer,

the insured and against the insurer.[5] A breach of warranty cannot be predicated on mere concealment independent of any affirmative misstatement;[6] and if a statement is expressly made on knowledge, information, and belief, its falsity does not avoid the policy unless it is made fraudulently with knowledge or information of its untruth and not in the belief that it is true.[7] If the contract is voidable for fraud, misrepresentation, or breach of warranty or condition precedent, it does become valid because the members of the society form a new organization which assumes the liabilities of the original society.[8]

2. Illustrations. The principles announced in the next preceding section apply to misstatements concerning the age of the applicant for insurance,[9] his

and the insured warranted the statements to be true only to the best of his knowledge.

New York.— Jennings *v.* Supreme Council R. A. B. A., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90.

See 28 Cent. Dig. tit. "Insurance," § 1860.

Statements held to be warranties see Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79; Foley *v.* Royal Arcanum, 78 Hun (N. Y.) 222, 28 N. Y. Suppl. 952 [*affirmed* in 151 N. Y. 196, 45 N. E. 456, 56 Am. St. Rep. 621]; Alta Friendly Soc. *v.* Brown, 8 Pa. Super. Ct. 267; Brock *v.* United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340.

5. Modern Woodmen of America *v.* Wilson, (Nebr. 1906) 107 N. W. 568; American Order of Protection *v.* Stanley, 5 Nebr. (Unoff.) 132, 97 N. W. 467 (holding that a health certificate provided by the insurer and signed by the insured will be construed most strongly against the insurer, when, if judged by the common meaning of the terms employed, the certificate is true, unless the construction contended for was known by insured at the time of making the certificate; and that references to the original application of assured made in the health certificate are not equivalent to a reassertion of the statements contained in the application as true of insured at the time of making the health certificate); Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005 (holding that where the questions and answers were made ambiguous and uncertain by the action of the society itself, it cannot defeat a recovery because of the apparent discrepancy made by the insured in stating the facts). And see Robinson *v.* Supreme Commandery O. G. C., 77 N. Y. App. Div. 215, 79 N. Y. Suppl. 13 [*affirmed* in 177 N. Y. 564, 69 N. E. 1130].

6. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Callies *v.* Modern Woodmen of America, 98 Mo. App. 521, 72 S. W. 713; Robinson *v.* Supreme Commandery U. O. G. C., 77 N. Y. App. Div. 215, 79 N. Y. Suppl. 13 [*affirmed* in 177 N. Y. 564, 69 N. E. 1130].

7. Jennings *v.* Supreme Council R. A. B. A., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005; Egan *v.* Supreme Council C. B. L., 32 N. Y. App. Div. 245, 52 N. Y. Suppl. 978 [*affirmed* in 161 N. Y. 650, 57 N. E. 1109]; Thompson *v.* Family Protective Union, 66 S. C. 459, 45 S. E. 19. See, however, Mayer *v.* Equitable Reserve Fund Life Assoc., 49 Hun (N. Y.) 336, 2 N. Y. Suppl. 79; Kemp *v.* Good Templars' Mut. Ben. Assoc., 19 N. Y. Suppl. 435 [*affirmed* in 135 N. Y. 658, 32 N. E. 648], in both of which cases it was held that the statement was absolutely warranted to be true and not merely true to the best of the applicant's knowledge, information, and belief.

Statement of opinion.—An incorrect or untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy, if made in good faith and without intention to deceive. Royal Neighbors of America *v.* Wallace, 73 Nebr. 409, 102 N. W. 1020; Home Circle Soc. No. 2 *v.* Shelton, (Tex. Civ. App. 1905) 85 S. W. 320; Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844.

8. Marcoux *v.* St. John Baptist Beneficence Soc., 91 Me. 250, 39 Atl. 1027; Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394.

9. See cases cited *infra*, this note.

If an applicant is ineligible because of age to become a member of the society, an understatement of his age vitiates the contract of insurance (Marcoux *v.* St. John Baptist Beneficence Soc., 91 Me. 250, 39 Atl. 1027; Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394; Taylor *v.* Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. N. S. 114; Pirrung *v.* Supreme Council C. M. B. A., 104 N. Y. App. Div. 571, 93 N. Y. Suppl. 575; Cerri *v.* Ancient Order of Foresters, 25 Ont. App. 22 [*reversing* 28 Ont. 111]), especially where the statement is warranted to be true (Dinan *v.* Supreme Council C. M. B. A., 201 Pa. St. 363, 50 Atl. 999).

Even though the applicant is eligible to membership, yet an understatement of his age is material and avoids the contract of insurance (United Brethren Mut Aid Soc. *v.* White, 100 Pa. St. 12. See, however, Hargrove *v.* Royal Templars of Temperance, 2 Ont. L. Rep. 79), especially where the statement is made a warranty or condition precedent (United Brethren Mut. Aid Soc. *v.* White, *supra*; Alta Friendly Soc. *v.* Brown, 8 Pa. Super. Ct. 267). The misstatement does not avoid the policy, however, where it was expressly made merely on information and belief, and the applicant answered in good faith. Egan *v.* Supreme Council C. B.

health and physical condition,[10] his family history,[11] and his habits[12] and his occu-

L., 32 N. Y. App. Div. 245, 52 N. Y. Suppl. 978 [*affirmed* in 161 N. Y. 650, 57 N. E. 1109].

10. Smith *v.* Supreme Lodge K. & L. G. P., 123 Iowa 676, 99 N. W. 553; Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469 (holding that, when considering answers involving insured's physical history in an application for life insurance, insured will be presumed to have been cognizant of his physical history within the period to which the inquiries were confined, as well as whether he had consulted or been treated by a physician); Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4 (holding that a stipulation requiring the applicant, if not vaccinated, to waive all claim for death from smallpox until he shall have been "successfully vaccinated" means only vaccination which produces the usual symptoms of vaccination, which is deemed effective, and does not mean such as would render the subject absolutely immune from smallpox); Jennings *v.* Supreme Council R. A. B. A., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90 (holding that answers contained in the medical examination accompanying the application for the certificate will be deemed representations unless the intention of both parties to make them warranties appears by clear, comprehensive, and unqualified language).

Present condition.—False warranties of the applicant's good health and freedom from disease avoid the insurance (Lippincott *v.* Supreme Council R. A., 64 N. J. L. 309, 45 Atl. 774; Boyle *v.* Northwestern Mut. Relief Assoc., 95 Wis. 312, 70 N. W. 351; Smith *v.* Grand Orange Lodge, 6 Ont. L. Rep. 588. And see Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713. See, however, McDermott *v.* Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833); and a mere misrepresentation will likewise avoid the contract if it relates to a material matter (Durantaye *v.* La Société St. Ignace, 13 L. C. Jur. 1. See, however, Endowment Rank K. P. *v.* Rosenfeld, 92 Tenn. 508, 22 S. W. 204).

Prior ailments.—The falsity of a warranty that the applicant has not suffered from certain ailments defeats the insurance (Smith *v.* Supreme Lodge K. & L. G. P., 123 Iowa 676, 99 N. W. 553; Lippincott *v.* Supreme Council R. A., 64 N. J. L. 309, 45 Atl. 774; Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713; Smith *v.* Grand Orange Lodge, 6 Ont. L. Rep. 588. See, however, Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844); but every temporary trifling ailment need not be mentioned in answer to a question calling for the names of prior ailments (Modern Woodmen of America *v.* Wilson, (Nebr. 1906) 107 N. W. 568. And see McDermott *v.* Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833).

Prior consultations with physicians.—A false answer that applicant has not consulted a physician within a certain period, or an understatement of the number of consultations within that period, or a false answer as to when the last consultation occurred, avoids the insurance, whether the answer be a warranty (McDermott *v.* Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833; Numrich *v.* Supreme Lodge K. & L. H., 3 N. Y. Suppl. 552; Wall *v.* Royal Society of Good Fellows, 179 Pa. St. 355, 36 Atl. 748; Brock *v.* United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340; Smith *v.* Grand Orange Lodge, 6 Ont. L. Rep. 588) or a mere representation (Numrich *v.* Supreme Lodge K. & L. H., *supra*), and without regard to the character of the ailment for which the physician was consulted (McDermott *v.* Modern Woodmen of America, *supra*; Wall *v.* Royal Society of Good Fellows, *supra*. And see Brock *v.* United Moderns, *supra*. But see Modern Woodmen of America *v.* Wilson, (Nebr. 1906) 107 N. W. 568).

If statements merely express the applicant's opinion, their falsity does not avoid the contract unless made with knowledge or means of acquiring knowledge of their falsity, or recklessly and in bad faith. Endowment Rank K. P. *v.* Rosenfeld, 92 Tenn. 508, 22 S. W. 204; Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844. See, however, Boyle *v.* Northwestern Mut. Relief Assoc., 95 Wis. 312, 70 N. W. 351; Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713.

11. See cases cited *infra*, this note.

Cause of death of parent.— A false statement as to the cause of the death of a parent of the applicant avoids the contract. Fraternal Tribunes *v.* Hanes, 100 Ill. App. 1; Hoagland *v.* Supreme Council R. A., 70 N. J. Eq. 607, 61 Atl. 982, where the applicant was notified that he was ineligible if either of his parents had died of consumption, after which he made a false answer as to the cause of the death of his mother, who had in fact died of that disease.

12. Knapp *v.* Brotherhood of American Yeomen, 128 Iowa 566, 105 N. W. 63; McVey *v.* Grand Lodge A. O. U. W., 53 N. J. L. 17, 20 Atl. 873, holding that where a benefit certificate is issued to an applicant on the faith of his wilfully false representation that he is not addicted to the use of intoxicating liquors, the contract is avoided by the fraud, although the representation is not a warranty.

Construction of questions and answers.— A question as to what extent an applicant uses alcoholic stimulants refers to a habit or custom of using them and not to an occasional use. Grand Lodge A. O. U. W. *v.* Belcham, 145 Ill. 308, 33 N. E. 886 [*affirming* 48 Ill. App. 346]. And see Sovereign Camp W. W. *v.* Burgess, (Miss. 1902) 31 So. 809; Endowment Rank Supreme Lodge K. P. *v.* Townsend, 36 Tex. Civ. App. 651, 83 S. W. 220. And where, in answer to a question as to the use of tobacco, the ap-

pation;[13] misstatements as to whether he has other existing insurance[14] and as to whether he has ever been rejected as a risk;[15] and misstatements concerning the beneficiary.[16]

plicant states that his use is moderate, it may be implied that a habit of using tobacco has been formed. Grand Lodge A. O. U. W. *v.* Belcham, 48 Ill. App. 346 [*affirmed* in 145 Ill. 308, 33 N. E. 886]. In the construction of representations, made as warranties, that the applicant had always been temperate in the use of liquors, and that his use was moderate, the words "temperate" and "moderate" should be given their ordinary signification; and the fact that the order issuing the certificate afterward created a board of control with power to cancel the certificate of any member who became addicted to any vice which, in the opinion of the board, shortened his expectancy of life and rendered the risk more hazardous, does not affect the construction to be placed on the words in the application. Knights of Pythias of World *v.* Bridges, 15 Tex. Civ. App. 196, 39 S. W. 333.

13. High Court I. O. F. *v.* Schweitzer, 70 Ill. App. 139 (holding that a warranty that applicant was "managing a restaurant, etc.," was not broken by the fact that he also regularly tended bar in the restaurant); United Brethren Mut Aid Soc. *v.* White, 100 Pa. St. 12 (holding that where insured answered that he was a laborer, and he had been for many years without occupation, the policy was avoided; but that it seems that if he had only temporarily suspended labor this result would not have followed).

Effect of false statements.— Where the truth of the facts stated in an application for life insurance which is made part of the policy is warranted by the applicant, a false statement as to applicant's business will avoid the policy, although the nature of his business had nothing to do with his death. Levell *v.* Royal Arcanum, 9 Misc. (N. Y.) 257, 30 N. Y. Suppl. 205. And a false representation that applicant is not a bartender but has a different occupation avoids the contract, where the laws of the association exclude bartenders from membership. Holland *v.* Supreme Council O. C. F., 54 N. J. L. 490, 25 Atl. 367. However, although the by-laws provide that any incorrect statement of any fact shall avoid the policy, yet where they also provide that if any member receives an injury in a position or employment classed as more hazardous than that stated in his application the beneficiary shall receive no greater amount than is provided in the classification for the employment in which he was actually engaged, a certificate of insurance is not void because the actual occupation of the insured is more hazardous than the occupation named by him in his application, since, if the occupation as classed is more hazardous, the beneficiary is restricted to the recovery of the lesser benefit provided for the more hazardous occupation. National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43.

14. See cases cited *infra*, this note.

False representations of the non-existence of other insurance ordinarily avoid the certificate. Home Friendly Soc. *v.* Berry, 94 Ga. 606, 21 S. E. 583; Bretzlaff *v.* Evangelical Lutheran St. John's Sick Ben. Soc., 125 Mich. 39, 83 N. W. 1000. However, the fact that the applicant disclosed only a part of his other insurance does not defeat the contract where, pursuant to a stipulation in the application, he dropped all his other insurance, including that undisclosed (Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299); and in any event mere non-disclosure of all other insurance, while it may avoid the contract for fraud, does not constitute a breach of warranty (Robinson *v.* Supreme Commandery O. G. C., 77 N. Y. App. Div. 215, 79 N. Y. Suppl. 13 [*affirmed* in 177 N. Y. 564, 69 N. E. 1130]).

15. See cases cited *infra*, this note.

A false statement that the applicant has not been rejected by any other society or company avoids the contract of insurance where it is a warranty (Clemans *v.* Supreme Assembly R. S. G. F., 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33 [*reversing* 16 N. Y. Suppl. 378]. And see Fraternal Tribunes *v.* Hanes, 100 Ill. App. 1; Semm *v.* Supreme Lodge K. H., 29 Fed. 895), and even where it is a mere representation (American Mut. Aid Soc. *v.* Bronger, 11 Ky. L. Rep. 902, 12 Ky. L. Rep. 284. And see Semm *v.* Supreme Lodge K. H., *supra*. *Contra*, Fraternal Tribunes *v.* Hanes, *supra*).

A beneficial or fraternal society is not a "company" within the meaning of a question whether the applicant has been rejected by any "company." Lyons *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247. And see LIFE INSURANCE, 25 Cyc. 819 note 36, 820 note 39. *Contra*, Alden *v.* Supreme Tent K. M. W., 178 N. Y. 535, 71 N. E. 104 [*reversing* 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89].

16. See cases cited *infra*, this note.

A false warranty that the proposed beneficiary is the spouse or a relative of the applicant or is dependent on him avoids the contract. Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653 (holding that where a by-law of the association required a beneficiary to be a member of the member's family, related by blood, or dependent on the member, a statement of a member that the beneficiary named by him was dependent on him amounted to a warranty); Smith *v.* Baltimore, etc., R. Co., 81 Md. 412, 32 Atl. 181; Supreme Council A. L. H. *v.* Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527. Statements as to beneficiaries held not to be warranties see Supreme Lodge A. O. U. W. *v.* Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Vivar *v.* Supreme Lodge K. P. 52 N. J. L. 455, 20 Atl. 36.

F. Cancellation and Rescission.[17] In the absence of fraud [18] a beneficial or fraternal society cannot cancel or rescind contracts of insurance entered into by it,[19] unless that power is reserved.[20] However, the issuance of a new certificate in lieu of the original operates as a cancellation of the latter.[21]

G. Repudiation of Contract by Society.[22] It has been held that if the society repudiates the contract of insurance in the lifetime of the member, the latter may at his option treat the contract as broken and at once sue for damages.[23]

In the absence of a warranty that the proposed beneficiary is a member of a certain class, a false statement that he is such does not avoid the contract. Supreme Lodge A. O. U. W. *v.* Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36; Story *v.* Williamsburgh Masonic Mut. Ben. Assoc., 95 N. Y. 474; Bogart *v.* Thompson, 24 Misc. (N. Y.) 581, 53 N. Y. Suppl. 622, where neither the constitution and by-laws of the association, nor the laws under which it was incorporated, restrict the designation of beneficiaries. However, where a member of a mutual benefit insurance association, whose rules provide for the issuance of death benefit certificates to a certain class, procures the issuance of a certificate to a woman on the false representation that she is a member of the class, such certificate may be avoided on the ground of fraud. Koerts *v.* Grand Lodge O. H. S., 119 Wis. 520, 97 N. W. 163.

17. **Expulsion of members:** Generally see *supra*, I, E, 4. As forfeiting benefits see *infra*, IV, I, 2, h.

Forfeiture of benefits see *infra*, IV, I.

Surrender of certificate: As mode of withdrawal see *supra*, I, E, 3, a. For purpose of changing beneficiaries see *infra*, IV, C.

Withdrawal of members see *supra*, I, E, 3.

18. Sons of Scotland Benev. Assoc. *v.* Faulkner, 26 Ont. App. 253.

19. Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. Rep. 701, 41 Nebr. 561, 59 N. W. 751 (holding that where liabilities have already accrued against a benefit insurance company, the tender back of an assessment paid does not discharge the company); Hollings *v.* Bankers' Union of World, 63 S. C. 192, 41 S. E. 90; Home Forum Ben. Order *v.* Varnado, (Tex. Civ. App. 1900) 55 S. W. 364 (the last two cases holding that the association cannot revoke a binding contract of insurance, after the death of the insured, by tendering to the beneficiary the amounts paid therefor).

Right of beneficiary to sue for wrongful cancellation.— Where a certificate is issued to a man for the benefit of his wife, with the privilege on his part of changing the beneficiary at will, the wife has no right of action against the company for improperly canceling the certificate, since her interest is too hypothetical to authorize a present recovery of damages. Knights Templar, etc., Life Indemnity Co. *v.* Gravett, 49 Ill. App. 252.

Damages for wrongful cancellation.— The measure of damages for wrongful cancellation is not the amount of premiums paid, but the damage resulting at the date of cancellation, allowance having been made for insurance already had. Ebert *v.* Mutual Reserve Fund Life Assoc., 81 Minn. 116, 83 N. W. 506, 84 N. W. 457.

20. Travelers' Protective Assoc. *v.* Dewey, 34 Tex. Civ. App. 419, 78 S. W. 1087, holding that where the constitution of a beneficial association organized under the laws of Missouri authorized directors to cancel any membership if deemed advisable by them, and there were other provisions of the constitution of the order as well as of the laws of Missouri which authorized expulsion of a member for the commission of any felonious offense, habitual drunkenness, or violation of any agreement of his membership, the directors had authority to cancel a membership owing to insured having lost an eye, which rendered him a more hazardous risk, the provision authorizing the directors to cancel a membership as deemed advisable not being in conflict with the other provisions relative to expulsion.

Return of dues and assessments (Supreme Council O. C. F. *v.* Bailey, 55 S. W. 888, 21 Ky. L. Rep. 1627), or a tender thereof (Supreme Lodge K. P. W. *v.* Taylor, (Ala. 1897) 24 So. 247), is a condition precedent to cancellation of the certificate.

Notice of the annulment proceeding must be given to the member. Supreme Lodge K. P. W. *v.* Taylor, (Ala. 1897) 24 So. 247.

21. Dexter *v.* Supreme Council R. T. T., 97 N. Y. App. Div. 545, 90 N. Y. Suppl. 292; Klee *v.* Klee, 47 Misc. (N. Y.) 101, 93 N. Y. Suppl. 588. And see Supreme Council A. L. H. *v.* Garrett, (Tex. Civ. App. 1905) 85 S. W. 27.

Consideration for new certificate.— Where a member surrendered his certificate and was granted a certificate for a less amount, and thereafter and up to the time of his death assessments were paid thereon which were much less than the assessment he would have been compelled to pay on his original certificate, such reduction of assessments on his part and the reduction of the association's liability constituted a sufficient consideration for the exchange. Supreme Council A. L. H. *v.* Garrett, (Tex. Civ. App. 1905) 85 S. W. 27.

22. **Wrongful exclusion from membership** see *supra*, I, E, 5.

23. O'Neill *v.* Supreme Council A. L. H., 70 N. J. L. 410, 57 Atl. 463, holding that where a beneficial organization issues a certificate entitling the beneficiaries to a stated sum on the death of the member on

H. Assignment[24] — **1. In General.** At common law a certificate of insurance, being a chose in action, is not assignable;[25] but the assignment is generally recognized in equity.[26] In many states the common-law rule has been changed by statute and the equitable rule is given effect,[27] but in some states assignment of mutual benefit certificates is prohibited.[28] If no third person is named as beneficiary, the member may by assignment create rights superior to those of his per-

payment of stipulated periodical assessments during life and complying with the by-laws of the association, the member has such an interest in the enforcement of the certificate as entitles him to sue to recover damages for its repudiation; and that where a certificate is repudiated during the life of the member, he need not continue payment of assessments to entitle himself to sue for damages.

The unauthorized enactment of a by-law modifying the contract to the detriment of the member has been held to constitute a breach of contract entitling him to sue for damages. Supreme Council A. L. H. *v.* Jordan, 117 Ga. 808, 45 S. E. 33; O'Neill *v.* Supreme Council A. L. H., 70 N. J. L. 410, 57 Atl. 463; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649; Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629; Supreme Council A. L. H. *v.* Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803 [*reversing* 130 Fed. 483]; McAlarney *v.* Supreme Council A. L. H., 131 Fed. 538 [*reversed* on another ground in 135 Fed. 72, 67 C. C. A. 546]; Supreme Council A. L. H. *v.* Daix, 130 Fed. 101, 64 C. C. A. 435 [*affirming* 127 Fed. 374]; Supreme Council A. L. H. *v.* Black, 123 Fed. 650, 59 C. C. A. 414 [*affirming* 120 Fed. 580]; Henderson *v.* Supreme Council A. L. H., 120 Fed. 585. And see Strauss *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605, 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 703, 54 L. R. A. 609. *Contra*, Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 489, 3 L. R. A. 409; Porter *v.* Supreme Council A. L. H., 183 Mass. 326, 67 N. E. 238; Langan *v.* Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932 [*reversing* 69 N. Y. App. Div. 616, 75 N. Y. Suppl. 1127 (*affirming* 34 Misc. 629, 70 N. Y. Suppl. 663)], holding that such an amendment and the subsequent refusal of the association to receive dues and assessments on the original basis and to recognize the original contract as binding on it do not constitute such a breach of the contract of insurance as to entitle the certificate holder to maintain an action for the recovery of damages therefor, since the amendment is wholly ineffectual to deprive him of any rights which had become vested, and his refusal to acquiesce in the amendment and the tender of payment of his assessment on the original contract preserves the contract of insurance as it was; the proper remedy is to resort to a court of equity and ask its intervention in a decree which would compel the association to live up to its contract and which would restrain it from proceeding under its void by-law. Waiver and estoppel as to right to treat enactment of by-law as breach of contract see *supra*, II, D, 3, b.

Moneys paid as dues and assessments as measure of damages see *infra*, III, E.

24. Assignment after dissolution see *supra*, I, I, 5.

Assignment as fraudulent conveyance see Fraudulent Conveyances.

Whether certificate passes by assignment for benefit of creditors see Assignments For the Benefit of Creditors, 4 Cyc. 212 note 26.

25. Jarvis *v.* Binkley, 206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59]; McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76]; Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202]. And see Jackson *v.* Anderson, 4 S. W. 326, 9 Ky. L. Rep. 165.

Estoppel to attack assignment.— Where a certificate in terms confers the right to assign the benefit, and the member assigns it in exchange for land, the assignee, after retaining it for ten years, cannot sue to set aside the contract on the ground that there was no right to assign and recover the land, especially where he has not tendered the certificate back to the member, but has allowed it to lapse by failing to pay the premiums. Jackson *v.* Anderson, 4 S. W. 326, 9 Ky. L. Rep. 165.

26. Jarvis *v.* Binkley, 206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59]; McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76]; Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202]; Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768; Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639 [*distinguishing* Independent Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 204, 78 Am. St. Rep. 785]. And see Anthony *v.* Massachusetts Ben. Assoc., 158 Mass. 322, 33 N. E. 577.

27. Souder *v.* Home Friendly Soc., 72 Md. 511, 20 Atl. 137; Rittler *v.* Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. 1057 [*affirmed* in 98 Tex. 570, 86 S. W. 730]. And see Assignments, 4 Cyc. 9; Life Insurance, 25 Cyc. 765.

28. Belknap *v.* Johnston, 114 Iowa 265, 86 N. W. 267 (holding, however, that the statute does not apply where a member of a mutual benefit society surrendered his policy therein, and obtained in its stead a new one in favor of a creditor); Crocker *v.* Hogin, 103 Iowa 243, 72 N. W. 411 (holding that

sonal representative.[29] If a beneficiary is named, but he has no vested interest in the insurance, the member may assign the certificate without his consent;[30] otherwise, as where the member has no power to change the beneficiary, his consent must be obtained.[31] The beneficiary may assign the certificate if he has a vested interest in it.[32] Hence he may assign it after the member's death.[33] Assignments are invalid as against the society where its laws forbid them,[34] or where its laws provide that they shall not be made except with the society's consent, and that consent is not obtained.[35] The certificate being a non-negotiable instrument, the assignee is not entitled to protection as a *bona fide* holder.[36]

2. Form and Requisites, and Validity in General. The rules of the society sometimes prescribe certain requisites for an assignment of a certificate.[37] Apart

the assignment is void as between the assignee and the beneficiary, who joined therein with the member, although it was made before the statute was enacted; and that where the society was operating under the statute, although not fully complying with its conditions, the assignee could not recover from the society, and hence could not recover from a trustee to whom the society voluntarily paid the money to be held by him until the rights of the beneficiary and the assignee should be determined). And see Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655; Fisher *v.* Fisher, 25 Ont. App. 108 [*reversing* 28 Ont. 459].

29. Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768; *In re* Griffin, [1902] 1 Ch. 135, 71 L. J. Ch. 112, 86 L. T. Rep. N. S. 38, 50 Wkly. Rep. 250 [*overruling* Caddick *v.* Highton, [1901] 2 Ch. 476 note, 68 L. J. Q. B. 281; *In re* Redman, [1901] 2 Ch. 471, 70 L. J. Ch. 669, 65 J. P. 536, 85 L. T. Rep. N. S. 13, 50 Wkly. Rep. 19].

30. Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Anthony *v.* Massachusetts Ben. Assoc., 158 Mass. 322, 33 N. E. 577; Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

31. Block *v.* Valley Mut. Ins. Assoc., 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166 (holding further that a provision in the insurance certificate that the certificate may be assigned with the consent of the association does not authorize an assignment by the insured, but by the beneficiary only); Kentucky Grangers' Mut. Ben. Soc. *v.* Howe, 9 Ky. L. Rep. 198; Richardson *v.* Kentucky Grangers' Mut. Ben. Soc., 4 Ky. L. Rep. 735. And see Fisher *v.* Fisher, 25 Ont. App. 108 [*reversing* 28 Ont. 459].

32. See Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; and cases cited *infra*, this note.

Where assured has power to change the beneficiary, a beneficiary named in the certificate has no vested interest therein, enabling him to assign it during assured's life. Carpenter *v.* Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128. And see Michigan Mut. Ben. Assoc. *v.* Rolfe, 76 Mich. 146, 42 N. W. 1094. *Contra*, Lawler *v.* Hartford Nat. Life Assoc., 83 Hun (N. Y.) 393, 31 N. Y. Suppl. 875.

Operation of assignment as contract.— Although the beneficiary may have no assignable vested interest, yet an assignment from both assured and beneficiary operates as an enforceable agreement, when the contingent interest of the beneficiary has become vested by the death of assured. Dexter *v.* Supreme Council R. T. T., 97 N. Y. App. Div. 545, 90 N. Y. Suppl. 292. And see Coleman *v.* Anderson, 98 Tex. 570, 86 S. W. 730 [*affirming* (Civ. App. 1904) 82 S. W. 1057].

33. Gary *v.* Northwestern Masonic Aid Assoc., (Iowa 1891) 50 N. W. 27; Michigan Mut. Ben. Assoc. *v.* Rolfe, 76 Mich. 146, 42 N. W. 1094.

Order for payment.— After the death of a member his widow may, for a valuable consideration, by an order to the association directing payment of a certain sum due her as beneficiary to a third person, transfer the right to collect such amount to such third person. Briggs *v.* Earl, 139 Mass. 473, 1 N. E. 847.

34. Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; Supreme Conclave I. O. H. *v.* Dailey, 61 N. J. Eq. 145, 47 Atl. 277. And see Kentucky Grangers' Mut. Ben. Soc. *v.* Howe, 9 Ky. L. Rep. 198; Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655; Hotel-Men's Mut. Ben. Assoc. *v.* Brown, 33 Fed. 11.

Estoppel and waiver as to restrictions.— If a by-law providing that not more than one half of the sums for which a beneficiary is insured may be assigned is not based on statutory or charter limitations, the society may waive it; and in case the society does so, a beneficiary who has violated the by-law cannot take advantage of it. Swedish Christian Mission Soc. *v.* Lawrence, 79 Minn. 124, 81 N. W. 756.

35. National Mut. Aid Soc. *v.* Lupold, 101 Pa. St. 111; Harman *v.* Lewis, 24 Fed. 97, 530.

However, the assent of the association to the assignment is sufficiently manifested by the signing of the treasurer's name by a clerk who in so doing acts under the general authority of the treasurer. Anthony *v.* Massachusetts Ben. Assoc., 158 Mass. 322, 33 N. E. 577.

36. Dexter *v.* Supreme Council R. T. T., 97 N. Y. App. Div. 545, 90 N. Y. Suppl. 292.

37. National Mut. Aid Soc. *v.* Lupold, 101

from this no particular form is necessary,[38] and the assignment may be made by parol.[39] It does not constitute an assignment, however, where the holder of a certificate indorses thereon directions that the proceeds shall be distributed among certain beneficiaries;[40] nor can a defective application for a change of beneficiary be regarded as an assignment of the certificate to the proposed beneficiary;[41] and an agreement by a beneficiary reciting that she is such and is desirous of seeing certain children of her deceased husband, the insured, receive a portion of the insurance money, and that she agrees to divide the same, when received, among such children, is not an assignment, either legal on equitable, but merely an executory contract to assign.[42] If in writing, an agreement relating to an assignment must be properly executed;[43] but the consent by a married woman to the assignment of a certificate in which she is the beneficiary need not be privily acknowledged as required by the laws of the state in case of a conveyance of her real estate.[44] In the absence of fraud,[45] mere want of consideration does not vitiate an assignment, since it may be sustained as a gift.[46] Where the father of an illegitimate child takes out a certificate of insurance and assigns it to the mother for the child's support, the transaction is not illegal.[47]

Pa. St. 111; North Western Masonic Aid Assoc. *v.* Marshall, 10 Pa. Co. Ct. 270; Harman *v.* Lewis, 24 Fed. 97, 530.

However, a by-law providing that no transfer by a member of a benefit certificate should be binding on the corporation unless made upon an application in the manner determined by the directors, and accompanied by the fee and the certificate is limited to the legal right of proceeding against the corporation, and does not affect the right to create an equitable interest in the fund to be collected. Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297. And it is immaterial that the by-laws were not observed where the beneficiary in a policy on the life of her son assigned her interest to him, and subsequently, with her approval, he made a will disposing of the policy by making certain specific devises, and directing certain persons to employ the residue in caring for his mother during her life, any residue after her death to become the property of those so caring for her, and after the death of insured the mother was cared for as provided for in the will, since, irrespective of whether the beneficiary assigned the policy as required by the by-laws, there was a contract binding on her and her representatives, and hence those claiming under the will were entitled to the policy as provided in the will. Kendall *v.* Morrison, 33 Tex. Civ. App. 345, 77 S. W. 31.

Estoppel and waiver as to restrictions.— Restrictions as to the mode of assignment may be waived by the society (Anthony *v.* Massachusetts Ben. Assoc., 158 Mass. 322, 33 N. E. 577; Kimball *v.* Lester, 43 N. Y. App. Div. 27, 59 N. Y. Suppl. 545 [*affirmed* in 167 N. Y. 570, 60 N. E. 1113]), and in case it does so a beneficiary who has joined in the assignment cannot take advantage of them (Kimball *v.* Lester, *supra*. See, however, Harman *v.* Lewis, 24 Fed. 97, 530, holding that where an assignment by a member does not comply with the by-laws, his heirs, who otherwise would be entitled to the benefits, may attack it on that ground).

Consent of society as prerequisite see *supra*, II, H, 1.

38. Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768.

39. Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768.

The by-laws may require a writing. Haigh *v.* Mentor Council No. 907 L. H., 17 Phila. (Pa.) 71.

40. St. Clair County Benev. Soc. *v.* Fietsam, 97 Ill. 474.

41. Flowers *v.* Sovereign Camp W. W., (Tex. Civ. App. 1905) 90 S. W. 526, where there was no delivery or written transfer of the certificate to the proposed beneficiary, and where the power of disposition by the member was through a change of beneficiary in the method prescribed by the constitution of the society.

42. Banholzer *v.* Grand Lodge A. O. U. W., 119 Mo. App. 177, 95 S. W. 953.

43. Banholzer *v.* Grand Lodge A. O. U. W., 119 Mo. App. 177, 95 S. W. 953, holding that a contract between the beneficiary and certain children of her deceased husband for the division of the proceeds of the certificate is not binding, when executed by only part of the parties.

44. Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

45. Gary *v.* Northwestern Masonic Aid Assoc., (Iowa 1891) 50 N. W. 27.

What constitutes fraud.— Where a member who was sick and without money negotiated a sale of a certificate whose face was two thousand dollars to another in payment of an existing debt of four hundred dollars and, in consideration of present and future advances of five hundred dollars, the assignee also to pay future assessments, there was nothing unreasonable or unconscionable in the transaction. Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140.

46. Gary *v.* Northwestern Masonic Aid Assoc., (Iowa 1891) 50 N. W. 27.

47. Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768.

3. As Affected by Interest and Status of Assignee — a. Necessity of Insurable Interest[48] — (i) *In General.* The authorities are not in accord as to whether a certificate of insurance valid in its inception may be assigned to a person having no insurable interest in the life of the member.[49] By the weight of authority, however, such assignment is valid when not used as a cloak for a wagering or speculative transaction.[50] However, the invalidity of an assignment does not vitiate the certificate ;[51] and hence the person to whom it is payable may recover the benefits from the society,[52] or, in case they have been collected by the assignee, he may recover them from the latter,[53] less the consideration paid by the assignee for the assignment,[54] and such amount as he may have paid to keep the certificate alive[55] and to make proof of death.[56]

(ii) *Assignment as Collateral Security.* In the absence of anything to the contrary in the statutes or the laws of the society[57] the certificate may be assigned or pledged as security for a debt either by the member[58] or by the bene-

48. What constitutes insurable interest see *infra*, IV, A, 3, b.

49. See Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429; Quinn *v.* Supreme Council C. K., 99 Tenn. 80, 41 S. W. 343. And see Life Insurance, 25 Cyc. 709.

50. Moore *v.* Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882 [*affirming* 76 Ill. App. 433] (statute); Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95 (holding that where a person procures insurance on his own life and pays the premiums, he may assign the certificate to one having no interest in his life); Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429 (holding that where the assignee of a policy of two thousand dollars pays the insured three hundred dollars, and agrees to pay the dues and the assessments thereon, in consideration of the assignment, the assignment is not invalid as a gambling transaction, in the absence of proof of the age or expectancy of life of the insured); McFarland *v.* Creath, 35 Mo. App. 112. *Contra*, Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; Basye *v.* Adams, 81 Ky. 368, 5 Ky. L. Rep. 91; Hotopp *v.* Hotopp, 9 Ky. L. Rep. 649; Schonfield *v.* Firner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; Price *v.* Supreme Lodge K. H., 68 Tex. 361, 4 S. W. 633. And see Lexington Nat. Exch. Bank *v.* Bright, 36 S. W. 10, 38 S. W. 135, 18 Ky. L. Rep. 588.

If the assignment is taken for the purpose of speculation it is invalid. Gilbert *v.* Moose, 104 Pa. St. 74, 49 Am. Rep. 570; Quinn *v.* Supreme Council C. K. A., 99 Tenn. 80, 41 S. W. 343. And see cases cited *supra*, this note.

A by-law providing that no certificate shall issue unless the beneficiary has an insurable interest in the life of the member does not alter the rule stated in the text. McFarland *v.* Creath, 35 Mo. App. 112. See, however, Michigan Mut. Ben. Assoc. *v.* Rolfe, 76 Mich. 146, 42 N. W. 1094.

Assignment by beneficiary.—A beneficiary having an insurable interest in the life of the member may assign the certificate to one who has no such insurable interest. Souder *v.* Home Friendly Soc., 72 Md. 511, 20 Atl. 137. The rule is otherwise in Pennsylvania (Wegman *v.* Smith, 16 Wkly. Notes Cas. (Pa.) 186), with stronger reason where the beneficiary had no insurable interest in the member's life (Gilbert *v.* Moose, 104 Pa. St. 74, 49 Am. Rep. 570; Meily *v.* Hershberger, 16 Wkly. Notes Cas. (Pa.) 186).

Right to attack assignment.—Although a sale of a certificate to a person without insurable interest be against public policy, that, as a matter of contract right, is a question between the society and the purchaser; and where the society recognizes its validity by issuing a new certificate in which the purchaser is named as beneficiary, and on the death of the assured pays the money due under the certificate to such purchaser, no stranger or volunteer can assail the validity of the payment. Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140. See, however, Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

51. See cases cited *infra*, notes 52, 53.

52. Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; Price *v.* Supreme Lodge K. H., 68 Tex. 361, 4 S. W. 633.

53. Basye *v.* Adams, 81 Ky. 368, 5 Ky. L. Rep. 91; Wegman *v.* Smith, 16 Wkly. Notes Cas. (Pa.) 186, so holding, although the assignment was made by the beneficiary. And see Gilbert *v.* Moose, 104 Pa. St. 74, 49 Am. Rep. 570; Meily *v.* Hershberger, 16 Wkly. Notes Cas. (Pa.) 186.

54. Quinn *v.* Supreme Council C. K. A., 99 Tenn. 80, 41 S. W. 343; Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

55. Basye *v.* Adams, 81 Ky. 368, 5 Ky. L. Rep. 91; Kentucky Grangers' Mut. Ben. Soc. *v.* Howe, 9 Ky. L. Rep. 198; Wegman *v.* Smith, 16 Wkly. Notes Cas. (Pa.) 186; Quinn *v.* Supreme Council C. K. A., 99 Tenn. 80, 41 S. W. 343; Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

56. Kentucky Grangers' Mut. Ben. Soc. *v.* Howe, 9 Ky. L. Rep. 198.

57. Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655.

58. Jarvis *v.* Binkley, 206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59]; McGrew *v.*

ficiary;[59] but the assignment is valid and available only to the extent of the assignee's pecuniary interest,[60] the person to whom the certificate is payable being entitled to the residue.[61] However, it has been held that the society itself has no power to take an assignment of one of its certificates as security for money loaned to the member.[62]

b. Eligibility of Assignee as Beneficiary. If the statutes governing a beneficial society or its charter or laws limit the payment of benefits to certain classes of persons, an assignment of a certificate of insurance to a person not embraced in one of those classes is ineffectual.[63] Nevertheless the assignee should in such a

McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76]; Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202]; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Throckmorton *v.* National Mut. Ben. Assoc., 4 Ky. L. Rep. 61; Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639; *In re* Burns, 27 Pittsb. Leg. J. N. S. (Pa.) 47.

Right to attack assignment.—A by-law inhibiting a member from assigning the certificate to secure a debt can be taken advantage of only by the society. Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; Coleman *v.* Anderson, (Tex. 1905) 86 S. W. 730 [*affirming* (Civ. App. 1904) 82 S. W. 1057].

59. Klinckhamer Brewing Co. *v.* Cassman, 21 Ohio Cir. Ct. 465, 12 Ohio Cir. Dec. 141; Coleman *v.* Anderson, (Tex. 1905) 86 S. W. 730 [*affirming* (Civ. App. 1904) 82 S. W. 1057], holding that where a member of a mutual benefit society delivered his certificate to the beneficiary without any agreement as to which should pay the assessments, and the beneficiary, considering it his duty to pay them, agreed with defendant that if the latter would pay such assessments he should be reimbursed out of the proceeds of the certificate, which was then delivered to him, defendant had a lien for the amounts so paid on the beneficiary's expectancy, although he had no insurable interest in the life of the member, who was entitled to change his beneficiary at will; and that the fact that, on a dispute arising between defendant and the beneficiary, who objected to further payments, no further payments were made, was no defense to defendant's right to reimbursement for the money actually expended. See, however, Supreme Conclave I. O. H. *v.* Dailey, 61 N. J. Eq. 145, 47 Atl. 277, holding that the contingent interest of a wife in a certificate issued to the husband, payable to her on his death, is not assignable as security for the husband's debt, where the contract as evidenced by the certificate and the constitution and by-laws of the order prohibits assignments to secure debts owing by members, and declares any assignment of the certificate void; and such assignment cannot be enforced in equity as an agreement by the wife to pay the assignee when she comes into possession of the insurance money.

Right to attack assignment.—A beneficiary who has formally joined in a written assignment of a benefit certificate to secure an obligation of the assured is estopped from denying the sufficiency of the transfer. Conway *v.* Supreme Council C. K. A., 131 Cal. 437, 63 Pac. 727; Kimball *v.* Lester, 43 N. Y. App. Div. 27, 59 N. Y. Suppl. 540 [*affirmed* in 167 N. Y. 570, 60 N. E. 1113]. And see Jarvis *v.* Binkley, 206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59].

60. Spies *v.* Spikes, 112 Ala. 584, 20 So. 959; Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; Jarvis *v.* Binkley, 206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59]; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Throckmorton *v.* National Mut. Ben. Assoc., 4 Ky. L. Rep. 61. *Contra*, Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639, where the transaction is not a mere cloak for a wagering transaction.

Lien of assignee.— One to whom a certificate is assigned as security has, to the extent of the debt, a lien thereon to secure the payment of the indebtedness, especially for premiums or dues paid at the request of the assignor to keep the certificate alive. Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. 1057 [*affirmed* in (1905) 86 S. W. 730].

61. *In re* Burns, 27 Pittsb. Leg. J. N. S. (Pa.) 47. And see cases cited *supra*, note 60.

62. Dietrich *v.* Madison Relief Assoc., 45 Wis. 79.

63. *Kentucky.*—Van Bibber *v.* Van Bibber, 82 Ky. 347; Basye *v.* Adams, 81 Ky. 368, 5 Ky. L. Rep. 91; Richardson *v.* Kentucky Grangers' Mut. Ben. Soc., 4 Ky. L. Rep. 735. And see Kentucky Grangers' Mut. Ben. Soc. *v.* Howe, 9 Ky. L. Rep. 198.

Maryland.— Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655.

Massachusetts.— Briggs *v.* Earl, 139 Mass. 473, 1 N. E. 847.

Michigan.— Michigan Mut. Ben. Assoc. *v.* Rolfe, 76 Mich. 146, 42 N. W. 1094.

Mississippi.— Rose *v.* Wilkins, 78 Miss. 401, 29 So. 397.

New York.— Kult *v.* Nelson, 24 Misc. 20, 53 N. Y. Suppl. 95.

Ohio.— Odd Fellows' Ben. Assoc. *v.* Diebert, 2 Ohio Cir. Ct. 462, 1 Ohio Cir. Dec. 589.

Pennsylvania.— Maneely *v.* Knights of Birmingham, 2 Pa. Co. Ct. 339.

Texas.— Williams *v.* Fletcher, 26 Tex. Civ. App. 85, 62 S. W. 1082.

See 28 Cent. Dig. tit. "Insurance," §§ 1875, 1931, 1978.

Contra, in equity, see Jarvis *v.* Binkley,

case receive out of the proceeds of the certificate the amount paid by him in keeping it alive.[64]

III. FINES, DUES, AND ASSESSMENTS.[65]

A. Power and Duty to Levy. The power to levy fines, dues, and assessments depends on the provisions of the society's charter of incorporation or articles of association, and its constitution and by-laws.[66] Where the by-laws of the society provide that assessments for death losses shall be levied by the board of directors, the board cannot delegate such power to the president.[67] A lodge incorporated under the laws of one state cannot subject itself or its members to the jurisdiction of a supreme lodge incorporated in a sister state and not subject to the local courts,

206 Ill. 541, 69 N. E. 582 [*affirming* 102 Ill. App. 59], where an assignment by the beneficiary was upheld in equity.

Right to attack assignment.— No one but the society has ordinarily any right to complain of the assignment as violating its laws in this respect. Binkley *v.* Jarvis, 102 Ill. App. 59 [*affirmed* in 206 Ill. 541, 69 N. E. 582]; McFarland *v.* Creath, 35 Mo. App. 112; Dexter *v.* Supreme Council R. T. T., 97 N. Y. App. Div. 545, 90 N. Y. Suppl. 292. And even the society cannot attack the transfer where the beneficiary confirms it after the member's death. Aiken *v.* Massachusetts Ben. Assoc., 13 N. Y. Suppl. 579.

Eligibility of beneficiary see *infra*, IV, A.

64. Odd Fellows' Ben. Assoc. *v.* Diebert, 2 Ohio Cir. Ct. 462, 1 Ohio Cir. Dec. 589.

65. Non-payment of fines, dues, and assessments: As ground of forfeiture of benefits see *infra*, IV, I, 2, d. As ground of suspension or expulsion generally see *supra*, I, E, 4, b; I, E, 4, c, (II), (B).

66. Harvard *v.* L'Union St. Sauveur, 4 Quebec Super. Ct. 352.

What officers may levy.— Where the articles of a society provided that the directors should control its affairs, and empowered them to enact by-laws and rules, and to appoint from their number an executive committee who should supervise the business of the society and audit accounts, and provided for assessments, but was silent as to who should make them, the directors had authority, through a by-law, to empower the executive committee to make assessments. Fee *v.* National Masonic Acc. Assoc., 110 Iowa 271, 81 N. W. 483. Where the constitution of an association provides that on certain fixed dates, or at such other dates as the board of directors may determine, an assessment shall be made on the entire membership for such sums as the executive committee may deem sufficient to meet the existing claims by death, action by the board of directors is not required except in fixing the time for making an assessment, where it was to be made at a date other than one of the dates fixed by the constitution; and where the time had been so fixed the executive committee had power to make the assessment. Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159.

Amount of funds on hand as affecting power to levy assessment.— Mass. St. (1880) c. 196, § 3, providing that beneficiary associations, etc., "shall have the right to hold at any one time, as a death fund belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment," does not require that losses as they occur shall be paid from this fund, but the officers at their discretion may levy an assessment to pay such losses. Crossman *v.* Massachusetts Ben. Assoc., 143 Mass. 435, 9 N. E. 753. Moneys in the hands of the treasurer of a benefit society, if already legally drawn on so as to reduce them to a less sum than an amount which fixes the limit of the right to make an assessment, are not "in" the fund, so as to prohibit the calling of an assessment. Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

Proofs of death are a condition precedent to assessment according to the laws of some societies. Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604. See, however, Passenger Conductors' L. Ins. Co. *v.* Birnbaum, 116 Pa. St. 565, 11 Atl. 378.

Where the by-laws authorize assessments if necessity requires, an assessment is invalid unless necessary. Supreme Council A. L. H. *v.* Haas, 116 Ill. App. 587.

The fact that a claim has been paid out of a fund on hand does not invalidate an assessment made to replenish such fund. McGowan *v.* Supreme Council C. M. B. A., 76 Hun (N. Y.) 534, 28 N. Y. Suppl. 177; Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819.

Dues and assessments levied before loss.— In some societies an assessment may be levied and collected in advance of any loss. State *v.* Ohio F. Ins. Assoc., 27 Ohio Cir. Ct. 838. So a fraternal benefit society has a right to make assessments for a reserve fund if the governing power of the society determines that it is good policy to do so. Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321. And where the by-laws of a mutual benefit society require each member to pay a fee of one dollar, after having been a member one year, for the beneficiaries of the next member who shall die, and make a similar payment at each death, such fee is due from a member one year after he joins, although no member may have died during such year. Menard *v.* St. Jean Baptiste Soc., 63 Conn. 172, 27 Atl. 1115.

67. Garretson *v.* Equitable Mut. Life, etc., Assoc., 93 Iowa 402, 61 N. W. 952.

so as to render an assessment made by the supreme lodge enforceable in the local courts.[68] Before a member of an incorporated benevolent society can be fined for infraction of its rules, there must be a law adopted by the association defining the offense and imposing the penalty.[69] Generally by the contract of insurance the society is in duty bound to levy an assessment to pay the promised benefits.[70]

B. Liability of Members. The contract of insurance commonly entered into by and between a beneficial society and its members does not impose a personal obligation on the members to pay assessments, and the society's only remedy against a defaulting member is to declare a forfeiture of the right to benefits.[71] By the terms of some contracts, however, the member promises, either expressly or by implication, to pay all fines, dues, and assessments; and in this event the society may recover the same in an action at law.[72] A member is not liable for

68. Lamphere *v.* Grand Lodge A. O. U. W., 47 Mich. 429, 11 N. W. 268. And see Grand Lodge A. O. U. W. *v.* Stepp, 3 Pennyp. (Pa.) 45.

Where, however, a national council of a beneficial association, having the supreme governing power of the order with authority to raise a revenue, provides that such revenue shall be derived from a *per capita* tax on every member of the order, which shall be paid to the national secretary by the state council secretaries and the secretaries of councils under the national council's jurisdiction, it may proceed against the subordinate councils and the individual members for the collection of the *per capita* tax on refusal of the state council to collect it, since such refusal cannot deprive the national council of its revenues, or of its authority to collect them from the members directly or from the local councils to which they belong. Derry Council No. 40 O. U. A. M. *v.* State Council, 197 Pa. St. 413, 47 Atl. 208, 80 Am. St. Rep. 838.

69. Erd *v.* Bavarian Nat. Aid, etc., Assoc., 67 Mich. 233, 34 N. W. 555.

70. Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; Schiff *v.* Supreme Lodge O. M. P., 64 Ill. App. 341.

Compelling assessment.— The designated beneficiary of a member of a mutual benefit association has, on the death of the member, an interest fixed and certain in the bounty of his donor, and he may compel the corporation to levy an assessment for its payment. Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519. Remedies against society for failure to levy and collect assessment see *infra*, VI, A, 1.

Discretion as to levying assessment.— Where the constitution of a mutual benefit society provided that mortuary assessments should be made only by authority of the board of directors, and the by-laws made it the duty of the secretary, in case of a member's death, to submit the proofs of death to the board, and declared that with their indorsement and the approval of the president an assessment should be made, these provisions did not leave the making of an assessment, in case proper proofs of death were presented, to the mere discretion of the board. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168. Discretion as to allowance of benefits see *infra*, IV, D, 3, c.

71. *Illinois.*— Lehman *v.* Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648 [*reversing* 71 Ill. App. 366 (*following* Clark *v.* Lehman, 65 Ill. App. 238)]; Vick *v.* Clark, 77 Ill. App. 599.

Indiana.— Gibson *v.* Mcgrew, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362; Clark *v.* Schromeyer, 23 Ind. App. 565, 55 N. E. 785.

Pennsylvania.— New Era Life Assoc. *v.* Dare, 6 Pa. Co. Ct. 526.

Rhode Island.— L'Union St. Jean Baptiste de Pawtucket *v.* Ostiguy, 25 R. I. 478, 56 Atl. 681, 105 Am. St. Rep. 899, 64 L. R. A. 158.

Canada.— *In re* Ontario Ins. Act, 31 Ont. 154.

See 6 Cent. Dig. tit. "Beneficial Associations," § 23; 28 Cent. Dig. tit. "Insurance," § 1881.

The same rule applies to lodge dues. *In re* Ontario Ins. Act, 31 Ont. 154. See, however, Lehman *v.* Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648 [*reversing* 71 Ill. App. 366 (*following* Clark *v.* Lehman, 65 Ill. App. 238)].

A note given for an initiation fee and an assessment is not enforceable as between the parties, where the member was not personally liable for such fee and assessment. Nash *v.* Russell, 5 Barb. (N. Y.) 556.

72. *Michigan.*— Calkins *v.* Angell, 123 Mich. 77, 81 N. W. 977.

Missouri.— Ellerbe *v.* Barney, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435.

New Hampshire.— Provident Mut. Relief Assoc. *v.* Pelissier, 69 N. H. 606, 45 Atl. 562.

New York.— McDonald *v.* Ross-Lewin, 29 Hun 87 (holding that where the by-laws provide that on the death of any member each member shall have notice to pay the amount required by the association's rules, and an applicant for membership agrees to accept and pay for a certificate subject to all the conditions of the by-laws, the issuance and acceptance of the certificate furnish a sufficient consideration for the member's agreement to pay assessments; and that a member who fails to pay his assessments should be charged with interest on the amount of the assessments from the time when by the terms of the by-laws they became

dues accruing,[73] for assessments levied,[74] or for losses occurring,[75] before he joined the society; nor is he liable to assessment for benefits accruing after his membership has terminated.[76] Where an association received the membership of another association under an agreement that the mortuary fund contributed by the members who should thereafter join the consolidated association should inure to the benefit of members of both associations, the beneficiaries of a member of the latter association are not entitled to compel an assessment on all the members of the consolidated association to pay the death benefit of their insured.[77] Where a member disappeared and remained unheard of for nearly two years, and the

due); Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416].

Wisconsin.— Fulton *v.* Stevens, 99 Wis. 307, 74 N. W. 803, holding also that under the laws of the society in question the member's liability to pay was fixed by making the assessment and giving notice thereof to replenish the policy fund, and not by the death of the member to pay whose loss the assessment was levied.

See 6 Cent. Dig. tit. "Beneficial Associations," § 23; 28 Cent. Dig. tit. "Insurance," § 1881.

The same rule applies to lodge dues. Provident Mut. Relief Assoc. *v.* Pelissier, 69 N. H. 606, 45 Atl. 562; Smith *v.* Bown, 75 Hun (N. Y.) 231, 27 N. Y. Suppl. 11.

Election of remedies.— If the society expels a defaulting member (L'Union St. Jean Baptiste de Pawtucket *v.* Ostiguy, 25 R. I. 478, 56 Atl. 681, 105 Am. St. Rep. 899, 64 L. R. A. 158) or declares his rights forfeited (McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87; Johnston *v.* Anderson, 23 Pa. Super. Ct. 152. *Contra*, Ellerbe *v.* Barney, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435) for non-payment of dues or assessments, it cannot collect the same from him by suit.

73. Logsdon *v.* Supreme Lodge F. U. A., 34 Wash. 666, 76 Pac. 292, holding that where a clause in the constitution of a beneficial society provides that a member shall be liable for the month in which his certificate is "issued or dated," but another clause provides that there shall be no liability on the part of the society until the degree of fraternity is conferred, one assessment paid, and the certificate is delivered and "accepted in writing," a certificate is not "issued" when signed and dated, nor until it is delivered and accepted; and hence under a certificate dated and signed August 12, but not delivered until September 2, at which time the first assessment was paid and the degree conferred, there is no liability for dues for the month of August.

74. Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27.

75. Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27; Rowswell *v.* Equitable Aid Union, 13 Fed. 840.

However, a rule charging with assessments all members who take the final degree "on and prior to" a certain date makes them liable to contribute to all deaths occurring during that calendar day. Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

76. Fulton *v.* Stevens, 99 Wis. 307, 74 N. W. 803.

Assessments made after a member's suspension but before his membership is finally terminated are recoverable if he is otherwise personally liable. Provident Mut. Relief Assoc. *v.* Pelissier, 69 N. H. 606, 45 Atl. 562; Palmetto Lodge No. 5 I. O. O. F. *v.* Hubbell, 2 Strobh. (S. C.) 457, 49 Am. Dec. 604; Sovereign Camp W. W. *v.* Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553; *In re* Ontario Ins. Act, 31 Ont. 154. However, under a constitution providing that should the action of a subordinate lodge suspending a member be reversed, he will be required to pay all assessments made during such suspension, a member who has been suspended is not required to pay such assessments until the order of reversal is actually made. Vivar *v.* Supreme Lodge K. P., 52 N. J. L. 455, 20 Atl. 36.

Withdrawal of member.—A member does not avoid liability for subsequent assessments by an attempted withdrawal from the society, where he does not comply with the conditions prescribed for withdrawal by the rules of the society. Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416] (holding that where the by-laws provided that the "member shall be held liable to the association for all dues and assessments until such time as he shall have given notice of his desire to withdraw," and also that in case of neglect to pay any dues and assessments as required "such membership shall cease and determine at once, without notice, and all claims be forfeited to the association," it was optional with the association to terminate or treat as terminated the relation as member of one who was in default, or to continue him in the relation of membership and charge him with liability to pay dues and assessments until he gave notice of his purpose to withdraw therefrom); Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51; *In re* Ontario Ins. Act, 31 Ont. 154. Mode of withdrawal see *supra*, I, E, 3, a.

Subsequent assessments for prior losses.— A former member is liable for assessments levied after termination of membership to pay losses occurring before that event. Provident Mut. Relief Assoc. *v.* Pelissier, 69 N. H. 606, 45 Atl. 562; McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87.

77. Cathcart *v.* Equitable Mut. Life Assoc., 111 Iowa 471, 82 N. W. 964, since such agreement inferentially excluded those who

directors by resolution ordered an assessment on account of his death but did not fix the time of his death, such assessment should be levied on those who were members at the date of the resolution, and not on the members at the time of the disappearance of the assured.[78]

C. Procedure — 1. In General. The mode of levying fines and assessments is generally prescribed by the constitution and by-laws of the society.[79] A *per*

became members of the association before the consolidation.

78. Miller *v.* Georgia Masonic Mut. L. Ins. Co., 57 Ga. 221.

79. *Illinois.*— Grand Lodge A. O. U. W. *v.* Bagley, 164 Ill. 340, 45 N. E. 538 [*affirming* 60 Ill. App. 589] (holding that provisions of the constitution and by-laws that on the death of a member the grand recorder shall be notified by the lodge to which he belonged, and shall in turn notify each subordinate lodge, and that "each subordinate lodge shall then make an assessment of one dollar upon each member holding a certificate," to be paid by a certain time, under penalty of forfeiture of the member's rights, are not complied with by simply reading in the subordinate lodge the notice from the grand recorder and entering it on the lodge "minute book" with the statement, "Assessments No. 102 and 103, on death 458 and 466, was called March 1," without any further action by way of making the assessment); Bagley *v.* Grand Lodge A. O. U. W., 46 Ill. App. 411 (holding that a custom of the recorder of a subordinate lodge to read at lodge meetings official notice to make assessments for the death of members sent out by the grand lodge, and for the presiding officer then to state that "members will pay the assessments," is not equivalent to the making of an assessment by vote of the lodge).

Indiana.— Grand Lodge A. O. U. W. *v.* Marshall, 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. Rep. 273, holding that under a constitution of a beneficial association requiring the grand recorder to call on subordinate lodges for the beneficiary funds in their respective treasuries when needed, and directing that the issuing of such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, the recorder in making such call is required to give a list of only such deaths occurring since the last call as have been officially reported to him by the subordinate lodges; and that where the constitution requires the call on the subordinate lodges for the beneficiary fund and notice of the assessment to be made by the grand recorder with the approval of the finance committee, and directs that the issuance of the call shall constitute the making of the assessment, which shall be published and a copy sent to each lodge and member, the notice of assessment and call on the beneficiary fund are sufficiently approved when signed and approved as one instrument.

Minnesota.— Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74, holding that where the articles of association and by-laws provided that assessments should be made by resolution of the board of trustees, and should be made only on the first secular days of certain months, the fact that the resolution ordering an assessment was passed prior to the date so fixed, the intervening time being occupied in preparing the notices, which were mailed on the day before the first, does not render the assessment invalid.

Nebraska.— Chapple *v.* Sovereign Camp W. W., 64 Nebr. 55, 89 N. W. 423 [*followed* in Sovereign Camp W. W. *v.* Ogden, (1906) 107 N. W. 860], holding that substantial compliance with a by-law empowering two officers of the society to make an assessment on a certain day in each month, and requiring the clerk of the superior branch of the order to give notice to clerks of inferior associations, is sufficient to uphold the assessment.

New York.— Leahy *v.* Mooney, 39 Misc. 829, 81 N. Y. Suppl. 360, holding that by-laws providing that "all the members are required to go to their duties in a body twice a year, viz.: at Easter and Christmas. For not complying with this order a fine of one dollar will be imposed for each offense," require affirmative action on the part of the society or its managing committee to make the fine payable; mere entry of the amount of the fine in the books of the financial secretary is insufficient.

Pennsylvania.— Derry Council No. 40 O. U. A. M. *v.* State Council, 197 Pa. St. 413, 47 Atl. 208, 80 Am. St. Rep. 838, holding that where the laws of a beneficial association direct that a *per capita* tax shall be in an amount to be "enacted" from year to year, an objection in a proceeding to collect such tax that the tax was not enacted by a statute of the order is frivolous, where the financial committee recommended the amount of the tax, and the national council approved the recommendation by resolution.

See 6 Cent. Dig. tit. "Beneficial Associations," § 24; 28 Cent. Dig. tit. "Insurance," § 1883.

Assessment by directors.— Where, by the articles of association, members are assessed according to their ages on the death of a member, a vote of the directors instructing the secretary to levy an assessment on account of certain named deceased members, and to pay their beneficiaries, constitutes an assessment by the board of directors. Van Frank *v.* U. S. Masonic Benev. Assoc., 158 Ill. 560, 41 N. E. 1005. So where the fact of a member's death was before the board of directors but the proofs of death had not come in, an assessment ordered by the board to pay the death benefits, subject to the approval of the proofs of death by the chairman of the board as required by the by-laws,

capita tax may be imposed by the society at a meeting held outside of the state in which the society was organized.[80] Where a member of a benevolent society is expelled for not paying a fine imposed by the president for violating its by-laws, the imposition of the fine need not be ratified, if the expulsion be ratified by the lodge.[81]

2. Notice. Notice of an assessment must be duly given a member in order to render him liable therefor,[82] and to justify the society in suspending him[83] or declaring his right to benefits forfeited[84] because of his failure to pay the same.

D. Amount.[85] The amount of any particular assessment is frequently left to the discretion of the officers having power to impose assessments;[86] but an assessment is invalid which is levied to pay a claim in excess of the amount which the society is authorized to pay;[87] and double assessments to pay one claim are not generally allowable.[88] The members of the society may properly be classified

was not invalid as having been made not by the board but by the chairman. Passenger Conductors' L. Ins. Co. *v.* Birnbaum, 116 Pa. St. 565, 11 Atl. 378. Where the board of trustees of a mutual benefit association, when less than a quorum was present, after official notice of the death of members, ordered assessments, the irregularity, if any, was cured by the approval of the minutes of such meeting at a subsequent meeting when a quorum was present. Wolf *v.* Michigan Masonic Mut. Ben. Assoc., 108 Mich. 665, 66 N. W. 576.

80. Derry Council No. 40 O. U. A. M. *v.* State Council, 197 Pa. St. 413, 47 Atl. 208, 80 Am. St. Rep. 838, since such corporation is not such a one as is subject to the restriction that strict corporate acts must be performed within the limits of the sovereignty from which it springs.

81. Simek *v.* Lodge No. 86 B. S. B. S., 118 Mich. 81, 76 N. W. 124.

82. *In re* Ontario Ins. Act, 31 Ont. 154, holding also that notice to members of an assessment is not sufficiently proved by the fact that the official paper of the society was distributed by a distributing agency, without proof of delivery by the latter to the individual members. See, however, Smith *v.* Bown, 75 Hun (N. Y.) 231, 27 N. Y. Suppl. 11, holding that where a certificate requires the periodical payment of a certain sum by the member, such payment is not an assessment, within N. Y. Laws (1883), c. 175, requiring that "each notice of assessment. . . shall truly state the cause and purpose of such assessment," and shall also "state the amount paid on the last death claim paid, the name of the deceased member, and the maximum face value of the certificate or policy, and if not paid in full, the reason therefor."

83. People *v.* Theatrical Mechanical Assoc., 8 N. Y. Suppl. 675 [*affirmed* in 126 N. Y. 622, 27 N. E. 409], holding that where the articles of a benefit society provide that "any member who shall refuse or neglect to pay all fines, dues, or contributions quarterly, and who, having been notified by the financial secretary of his indebtedness, shall still neglect or refuse, for sixty days after receiving said notice, to cancel his indebtedness, shall be dropped from the roll of membership," it has no right to drop a delinquent member from the rolls unless he has received notice of his delinquency.

Notice of arrears as prerequisite to suspension for non-payment see *supra*, I, E, 4, c, (II), (B).

84. See *infra*, IV, I, 2, d, (II).

85. **Increase of rate of assessment by change in constitution** or by-laws see *supra*, II, D, 3, b, (II).

86. Barbot *v.* Mutual Reserve Fund Life Assoc., 100 Ga. 681, 28 S. E. 498 (holding that a resolution passed at a convention of members which simply gives to the board of directors power to pay death claims from current receipts, which, under the constitution and by-laws, are applicable to another fund, leaves the exercise of such power in the discretion of the board; and an assessment made by the board is not invalid because larger than it would have been if current receipts were so applied); Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159 (holding that where the constitution of a benefit association provided that on certain fixed dates, or at such other dates as the board of directors might determine, an assessment should be made on the entire membership for such sums as the executive committee might deem sufficient to meet the existing claims by death, the power of the committee was not limited to making such an assessment as was in fact necessary to satisfy the claims, but was a broad discretionary power to make an assessment for such sum as was necessary in their judgment to provide for such claims).

Discretion as to allowance of benefits see *infra*, IV, D, 3, c.

87. Pearson *v.* Knight Templars, etc., Indemnity Co., 114 Mo. App. 283, 89 S. W. 588; Moeller *v.* Machine Printers' Ben. Assoc., 27 R. I. 22, 60 Atl. 591.

Amount of benefits see *infra*, IV, E.

88. People *v.* Masonic Guild, etc., Assoc., 126 N. Y. 615, 27 N. E. 1037 [*reversing* 58 Hun 395, 12 N. Y. Suppl. 171] (holding that where the by-laws of a mutual benefit association provide that its members shall be subject to but one assessment for each death loss, and one assessment is made from which only part of the amount due on a certificate

according to age for the purpose of fixing the different rates of assessment;[89] and a call on a member for payment of a greater assessment rate than that required of others is not on that account void, where the amount required to be paid by each is in accordance with the by-laws in force at the time of the issuance of his certificate.[90] It is competent for the legislature to determine rates of assessment,[91] and to prohibit rebating of premiums.[92]

E. Recovery of Moneys Paid as Dues or Assessments. If the society repudiates the contract of insurance the member is entitled to recover such amounts as he has paid as dues or assessments.[93] If a member is suspended or

is paid, mandamus will not lie to compel the levy of another assessment in order to pay the balance, whether or not the first assessment was sufficient to have paid the claim in full); Newton *v.* Northern Mut. Relief Assoc., 21 R. I. 476, 44 Atl. 690 (where a law of a beneficial association provided that if the amount received from the last assessment paid prior to the death of a member should be less than the sum for which his certificate was issued, the beneficiary should be entitled only to the amount of said assessment, and another law provided that where the amount of one assessment was not sufficient to pay all the claims, a double assessment might be made, and it was held not to authorize a double assessment for one death).

89. Reynolds *v.* Supreme Council R. A., 192 Mass. 150, 78 N. E. 129, 7 L. R. A. N. S. 1154.

Construction of contract.— Where a certificate of membership in a mutual benefit association has indorsed thereon an assessment rate table showing by amounts the proportion of assessments to be made at ages from fifteen to sixty-five years on each one thousand dollars insured, and the constitution and by-laws provide that at stated intervals assessments shall be made by the governing authorities on the entire membership for such sums as may be deemed sufficient to meet existing death claims, which shall be apportioned among the members according to age, the table attached to the certificate will be construed only to fix the ratio of payment by each member on the basis of age, and not as a limitation on the amount of the gross assessment. Barbot *v.* Mutual Reserve Fund Life Assoc., 100 Ga. 681, 28 S. E. 498. The constitution and by-laws of an assessment insurance association, which were made a part of the contract, provided for a death-benefit assessment at such rates, "according to the age of each member," as the directors might establish, and that such assessment should be apportioned among the members "as per the rates named in the certificate of membership," and a table of rates was annexed to such certificate. It was held that an assessment against a member whose age at entry was forty-three years, at the rate of his attained age, fifty-five years, was within the promise of the contract. Crosby *v.* Mutual Reserve Fund Life Assoc., 38 Misc. (N. Y.) 708, 78 N. Y. Suppl. 237.

90. Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819.

91. State *v.* Fraternal Knights & Ladies, 35 Wash. 338, 77 Pac. 500, holding that the question is not necessarily one of evidence to be weighed by the courts; also that a statute requiring subsequently formed fraternal insurance associations to adopt mortuary assessment rates not lower than those indicated as necessary in the fraternal congress mortality table incorporates the table into the act, so that its terms constitute a part thereof; and that the fact that such table was originally prepared by a body of men bearing no official relation to the legislature did not prevent the legislature from adopting the table and incorporating it into law.

92. Citizens' L. Ins. Co. *v.* Insurance Com'r, 128 Mich. 85, 87 N. W. 126, holding that Mich. Comp. Laws (1897), § 7219, prohibiting on penalty any life insurance company from rebating the premium on any policy as an inducement to insure, is applicable to a benevolent association organized under Laws (1887), Act No. 187.

93. Supreme Council A. L. H. *v.* Jordan, 117 Ga. 808, 45 S. E. 33; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649 (holding that the holder of a mutual benefit insurance certificate which the association has illegally reduced in amount is not compelled to remain quiet during his life and leave the enforcement of the original contract to his beneficiary; nor is he relegated to a suit in equity to compel receipt of the full premium and other recognition of his rights thereunder; but he may maintain an action for damages for that proportion of the premiums paid by him which represents the canceled insurance); Strauss *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605, 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 703, 54 L. R. A. 609 (holding that mandamus to compel reinstatement need not be resorted to); Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629; Supreme Council A. L. H. *v.* Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803 [*reversing* 130 Fed. 483]; McAlarney *v.* Supreme Council, 131 Fed. 538 [*reversed* on another ground in 135 Fed. 72, 67 C. C. A. 546]; Supreme Council A. L. H. *v.* Daix, 130 Fed. 101, 64 C. C. A. 435 [*affirming* 127 Fed. 374]; Supreme Council A. L. H. *v.* Black, 123 Fed. 650, 59 C. C. A. 414 [*affirming* 120 Fed. 580]. See, however, Porter *v.* Supreme Council A. L. H., 183 Mass. 326, 67 N. E. 238; Supreme

expelled his previous payments of dues or assessments cannot be recovered back,[94] unless the suspension or expulsion is unlawful, in which case such payments are recoverable.[95] Although a beneficiary certificate contains an unauthorized agreement for endowment insurance, yet where the member has not seasonably rescinded the contract and the benefits of the beneficiaries thereunder have intervened, he cannot recover from the corporation assessments paid by him, none of which was levied for endowment insurance;[96] and although a member continues his insurance only on condition that he might designate as beneficiary a person ineligible under the charter, yet he cannot recover dues and assessments subsequently paid on that understanding.[97] A plaintiff in an action against an assessment insurance company to recover the amount of illegal assessments cannot recover the amount of illegal assessments paid with full knowledge of all the facts.[98] A beneficiary[99] who is ineligible as such cannot recover from the association dues and assessments paid by him where the society did not know that he and not the member was making the payments;[1] and a beneficiary who, with knowledge that beneficiaries may be changed, pays dues and assessments, cannot recover such payments on the designation of a new beneficiary.[2]

F. Estoppel and Waiver. A member of a beneficial society is not estopped to object to an assessment by the fact that the assessment was made by the society, acting as trustee for the policy-holders;[3] and the fact that it was customary to make the assessment in a way not provided by the constitution does not affect the right to recover an assessment so made unless the member had knowledge thereof.[4] However, a member may estop himself to deny the validity of an assessment,[5] as where he pays the same.[6] And one who was induced to become a member by

Council A. L. H. *v.* Lyon, (Tex. Civ. App. 1905) 88 S. W. 435.

Interest on the payments is recoverable from the date of each payment. Supreme Council A. L. H. *v.* Jordan, 117 Ga. 808, 45 S. E. 33; Makely *v.* Supreme Council A. L. H., 133 N. C. 367, 45 S. E. 649; Strauss *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 971, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605, 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 703, 54 L. R. A. 609.

Waiver and estoppel as to asserting repudiation by amendment of constitution and by-laws see *supra*, II, D, 3, b, (I).

94. Robinson *v.* Yates City Lodge No. 448 A. F. & A. M., 86 Ill. 598; McLaughlin *v.* Supreme Council C. K. A., 184 Mass. 298, 68 N. E. 344, holding that where a member is suspended from a beneficial order for failure to pay assessments, and dies prior to his reinstatement, his beneficiary cannot recover the sums paid before the suspension.

95. Dickey *v.* Covenant Mut. Life Assoc., 82 Mo App. 372 (holding that where a mutual benefit society wrongfully refused to reinstate plaintiff, and declared his policy forfeited, plaintiff was entitled to abandon the contract of insurance and bring an action to recover his premiums, with interest, and was not obliged to bring mandamus proceedings to compel reinstatement); Supreme Council C. K. A. *v.* Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114 (holding that the mere fact that the expulsion of a member was void for want of notice and trial, as required by the association's laws, was no defense to an action by him to recover premiums paid; and that the association is not entitled to a credit for the value of the insurance during the time it was in force; but that where the association was composed of a supreme council and subordinate councils, and a member was expelled by a subordinate council without notice or trial as required by the association's laws, but was informed by one of the supreme officers that the act was void, and the supreme secretary wrote the local council to that effect, there was no expulsion in fact, and the member could not recover premiums paid).

96. Rockhold *v.* Canton Masonic Mut. Benev. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420.

Power to issue endowment policies see *supra*, I, G, 1, a.

97. Presbyterian Mut. Assur. Fund *v.* Lotz, 10 Ky. L. Rep. 155, there being no failure of consideration as the society was liable to him for sick benefits, and to the person entitled under the charter for the amount of insurance.

98. Howard *v.* Mutual Reserve Fund Life Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853.

99. Right of beneficiary to reimbursement out of proceeds of insurance see *infra*, IV, G, 6.

1. Knights and Ladies of Honor *v.* Burke, (Tex. App. 1890) 15 S. W. 45.

2. Spengler *v.* Spengler, 65 N. J. Eq. 176, 55 Atl. 285.

3. Rowell *v.* Covenant Mut. Life Assoc., 84 Ill. App. 304.

4. Underwood *v.* Iowa Legion of Honor, 66 Iowa 134, 23 N. W. 300.

5. See cases cited *infra*, note 6 *et seq.*

6. Steuve *v.* Grand Lodge A. O. U. W., 5 Ohio Cir. Ct. 471, 3 Ohio Cir. Dec. 231, hold-

fraud of the society may become estopped to refuse to pay assessments on that ground.[7]

IV. BENEFITS AND BENEFICIARIES.

A. Eligibility of Beneficiary[8] — **1. IN GENERAL.** In the absence of any restriction imposed by statute or by the charter or laws of the society,[9] a member who takes out a certificate of insurance may designate as beneficiary any person whom he sees fit,[10] save in those jurisdictions where the beneficiary is required to have an insurable interest in the member's life in order to entitle him to receive the benefits.[11] And even where by statute, by the common law, or by the charter or laws of the society restrictions are placed on the right to designate beneficiaries, it is generally held that no one but the society can question the eligibility of the person designated,[12] and that its right to object may be lost by estoppel or

ing that where a member of a benefit association pays assessments made by the grand lodge, under orders of the supreme lodge, on a different basis from that contemplated by the certificate issued to the member, he thereby waives any right which he may have had to object to the changed basis of assessment, and admits that such change was not inconsistent with his certificate of membership.

Conditional acceptance.— The payment of an assessment on a certificate in a benefit association does not estop the assured to question the validity of the assessment where the payment is accepted conditionally. Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475.

Offer to pay.— Where an offer to pay an assessment by a mutual benefit insurance company is not accepted by the company, such offer is withdrawn by the bringing of a suit on the certificate, and cannot be regarded as a waiver of any objection to the validity of the assessment. Langdon *v.* Massachusetts Ben. Assoc., 166 Mass. 316, 44 N. E. 226.

Payment of a previous illegal assessment does not estop the member or his beneficiary from asserting the invalidity of a subsequent unpaid assessment which is similarly illegal. Benjamin *v.* Mutual Reserve Fund Life Assoc., 146 Cal. 34, 79 Pac. 517; Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; Duggans *v.* Covenant Mut. Life Assoc., 87 Ill. App. 415; Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309; Langdon *v.* Massachusetts Ben. Assoc., 166 Mass. 316, 44 N. E. 226 [*following* Margesson *v.* Massachusetts Ben. Assoc., 165 Mass. 262, 42 N. E. 1132]. So payments of assessments after forfeiture of membership, but in ignorance of that fact, do not estop the member from denying his liability to pay subsequent assessments on the ground that he is not a member. Ellerbe *v.* Faust, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149.

7. State Mut. F. Ins. Co. *v.* Smith, 1 Pa. Super. Ct. 470 (holding that where a person is induced by false representations to become a member of a mutual benefit association, and after knowledge of the fraud makes no attempt to cancel the policy, he is liable, during the life of his policy, for assessments levied because of a large increase of members, and of moneys lost); Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51 (holding that the fraud of officers of a society in inducing defendant to become a member is not a good defense to an action for assessments, where the rights of innocent third persons have intervened).

8. **Assignment of certificate to ineligible person** see *supra*, II, H, 3.

Disqualification of beneficiary by murder of member see *infra*, IV, D, 2, d.

Disqualification of wife as beneficiary by adultery see *infra*, IV, G, 3, a.

9. See *infra*, IV, A, 2.

10. Walter *v.* Hensel, 42 Minn. 204, 44 N. W. 57; Eckert *v.* Rochester Mut. Relief Soc., 2 N. Y. Suppl. 612; Maneely *v.* Knights of Birmingham, 115 Pa. St. 305, 9 Atl. 41 [*reversing* 2 Pa. Co. Ct. 339, 18 Wkly. Notes Cas. 282, and *followed* in Wolpert *v.* Grand Lodge K. B., 2 Pa. Super. Ct. 564, 39 Wkly. Notes Cas. 264; Jacobs *v.* Most Excellent Assembly A. O. M. P., 9 Pa. Dist. 54].

11. See *infra*, IV, A, 3.

12. *Arkansas.*—Johnson *v.* Supreme Lodge K. H., 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732, holding that the widow cannot object that the certificate was improperly made payable to the heirs.

Illinois.— Johnson *v.* Van Epps, 110 Ill. 551 [*affirming* 14 Ill. App. 201] (holding that the heirs cannot object that the certificate was issued in favor of one not a relative); Munhall *v.* Daly, 37 Ill. App. 628 (holding that heirs having no title to the fund cannot object to its payment to an ineligible beneficiary).

Kentucky.— Peek *v.* Peek, 101 Ky. 423, 41 S. W. 434, 19 Ky. L. Rep. 654, holding that one who has been named as beneficiary under an agreement that the fund shall be distributed in a certain way cannot repudiate the trust because persons will thereby become beneficiaries for whom the member could not directly provide, the order having consented to the conditions on which she was named as beneficiary.

Minnesota.— Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384 (holding that the widow cannot object to the designation of a lodge as beneficiary); Bacon *v.* Brotherhood of Railroad Brakemen, 46 Minn. 303, 48 N. W. 1127 (holding that a parent

waiver.[13] Where a person's eligibility as a beneficiary depends upon his sustain-

of the member cannot object to the designation of a lodge as beneficiary).

New Hampshire.— Aurora Lodge No. 708 K. H. *v.* Watson, 64 N. H. 517, 15 Atl. 125, holding that one of several co-beneficiaries of specified proportions of the fund cannot question the eligibility of a co-beneficiary.

New Jersey.— Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449 [*reversing* 59 N. J. Eq. 321, 45 Atl. 111], holding that according to the decisions of the supreme court of Massachusetts, if a society issues a beneficial certificate in favor of persons who are included in the statutory classes of beneficiaries, but are not included in the classes covered by the constitution and by-laws of the society, a rival claimant of the benefit cannot set up lack of authority in the society to make such persons beneficiaries.

New York.— Coulson *v.* Flynn, 181 N. Y. 62, 73 N. E. 507 (holding that the member's brothers and sisters cannot question the beneficiary's eligibility); Markey *v.* Supreme Council C. B. L., 70 N. Y. App. Div. 4, 74 N. Y. Suppl. 1069 (holding that the member's administratrix cannot question the eligibility of the member's brother as beneficiary); Maguire *v.* Maguire, 59 N. Y. App. Div. 143, 69 N. Y. Suppl. 61 (holding that the widow and children of the member cannot question the eligibility of his niece as beneficiary).

Ohio.— Starr *v.* Knights of Maccabees, 27 Ohio Cir. Ct. 475, holding that the widow cannot question the eligibility of an unlawful wife of the member as beneficiary.

Pennsylvania.— Schoales *v.* Order of Sparta, 206 Pa. St. 11, 55 Atl. 766 (holding that an heir at law of the holder of a benefit certificate, who is a member of a class from which the insured might have selected a beneficiary, is without standing to question the validity of the designation of a beneficiary by the insured); Death Ben. Fund K. G. E. *v.* Liberty Castle No. 39 K. G. E., 5 Pa. Dist. 385 (holding that member's heirs cannot question the beneficiary's eligibility). And see Bomberger *v.* United Brethren Mut. Aid Soc., 3 Pa. Cas. 293, 6 Atl. 41 (holding that where the amount of a mutual benefit certificate has been paid by the company to a beneficiary without insurable interest after written notice that the fund was claimed by the widow and heirs, but no claim was made by the widow in her capacity as executrix, she cannot, as executrix recover such proceeds from the company); Hummer *v.* Roseville Council No. 680 Jr. O. U. A. M., 7 Pa. Dist. 258 (holding that where a local council, upon the death of any of its members, received from a beneficial association a certain sum, which sum was by the constitution of the council payable to the member's wife if at the time of his death his dues had been paid and he was "beneficial," otherwise the fund to be kept by the council, the widow of a member who was not "beneficial" at the time of his death could not recover the money from the council because it had no insurable interest in the member's life).

United States.— Taylor *v.* Hair, 112 Fed. 913 (holding that the member's heirs cannot question the eligibility of the beneficiary); Supreme Lodge O. G. C. *v.* Terrell, 99 Fed. 330 (holding that the persons who, in the absence of a valid designation, would receive the benefits cannot question the eligibility of the beneficiary).

See 28 Cent. Dig. tit. "Insurance," §§ 1933, 1935.

Contra.— Supreme Lodge O. M. P. *v.* Dewey, 142 Mich. 666, 106 N. W. 140, 113 Am. St. Rep. 596, 3 L. R. A. N. S. 334, holding that the person entitled to the benefits in case of an invalid designation may question the eligibility of the beneficiary.

Right of original beneficiary to question eligibility of substituted beneficiary see *infra*, IV, C, 2, e, (I).

13. Alfsen *v.* Crouch, 115 Tenn. 352, 89 S. W. 329; Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 88 N. W. 607, holding that where a certificate was made payable to the member's friend whom he might designate in his will, a by-law requiring the designation of a different beneficiary was waived.

By accepting dues and assessments until the death of the member (Bloomington Mut. Ben. Assoc. *v.* Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558 [*affirming* 24 Ill. App. 518]; Tramblay *v.* Supreme Council C. B. L., 90 N. Y. App. Div. 39, 85 N. Y. Suppl. 613), with knowledge of the facts (Coulson *v.* Flynn, 41 Misc. (N. Y.) 186, 83 N. Y. Suppl. 944 [*affirmed* in 90 N. Y. App. Div. 613, 86 N. Y. Suppl. 1133]), the society estops itself to question the beneficiary's eligibility. Where, however, a member holds a certificate payable to his order, and by-laws subsequently passed require him to surrender the certificate and receive a new one payable to such beneficiary as he may designate from certain specified classes, the receiving of the premiums on the unsurrendered policy afterward is not a waiver of anything more than the return of the certificate and a designation of the beneficiary. West *v.* Grand Lodge A. O. U. W., 14 Tex. Civ. App. 471, 37 S. W. 966.

By requiring rival claimants to interplead and paying the money into court the association waives the ineligibility of the beneficiary designated by the member. Aurora Lodge No. 708 K. H. *v.* Watson, 64 N. H. 517, 15 Atl. 125; Supreme Council O. C. F. *v.* Bennett, 47 N. J. Eq. 39, 19 Atl. 785 [*reversed* on other grounds in 47 N. J. Eq. 563, 22 Atl. 1055, 24 Am. St. Rep. 416, 14 L. R. A. 342]; Taylor *v.* Hair, 112 Fed. 913.

Estoppel by act of agent.— Where a certificate provides that "no agent or member or other party than the president or secretary of the said order" shall have the right

ing a particular relation to the member, his eligibility is generally determinable as of the time of the member's death.[14]

2. As Affected by Statute, Charter of Incorporation or Articles of Association, and Constitution and By-Laws — a. General Rules.[15] By statute in many

to change the conditions of the contract or to agree to any modification thereof, the fact that other agents of the society than those mentioned knew that the person named as a beneficiary in a certificate did not belong to the class from which the member was authorized to make a selection would not estop the society from calling in question that person's right to the fund provided for in the certificate. Union Fraternal League *v.* Walton, 112 Ga. 315, 37 S. E. 389.

Special contract for payment of benefits to person ineligible as beneficiary see *infra*, IV, A, 2, a.

14. *Illinois.*— Supreme Lodge K. & L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508].

Kentucky.— Williams *v.* Williams, 10 Ky. L. Rep. 37, holding that where the charter authorizes the designation of legal heirs as beneficiaries a member may designate in his application any person who may be his heir when he dies, and may therefore designate collateral kindred.

New York.— Kemp *v.* New York Produce Exch., 34 N. Y. App. Div. 175, 54 N. Y. Suppl. 678, holding that a by-law providing that in the absence of widow and children a gratuity fund shall be paid to the next of kin of the deceased member within the limit of representation prescribed by the statutes contemplates payment to persons who shall be next of kin as prescribed by the statutes in existence at the time of the member's decease, although they were not under the statutes in existence at the time of the enactment of the by-law.

Pennsylvania.— See De Grote *v.* De Grote, 175 Pa. St. 50, 34 Atl. 312.

Wisconsin.— Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904, holding that where a certificate was payable to the member's "legal heirs," the persons entitled to take should be determined by the laws of the state of the member's residence at the time of his death.

See, however, Elsey *v.* Odd Fellows' Mut. Relief Assoc., 142 Mass. 224, 7 N. E. 844 (holding that the heirs who are authorized to be designated are the legal heirs or distributees of the member at the time of the application or designation); *In re* Farley, 9 Ont. L. Rep. 517; Mearns *v.* Ancient Order of United Workmen, 22 Ont. 34; and other cases contrary to the text cited *infra*, this note.

Change of status after issuance of certificate rendering beneficiary ineligible.— If insured designates as beneficiary a member of his family as such, a subsequent breaking off of the family relation before insured's death defeats the beneficiary's right to the fund. Knights of Columbus *v.* Rowe, 70 Conn. 545, 40 Atl. 451; Larkin *v.* Knights of Columbus, 188 Mass. 22, 73 N. E. 850; Supreme Lodge O. M. P. *v.* Dewey, 142 Mich. 666, 106 N. W. 140, 113 Am. St. Rep. 596, 3 L. R. A. N. S. 334; Lister *v.* Lister, 73 Mo. App. 99; Davin *v.* Davin, 114 N. Y. App. Div. 396, 99 N. Y. Suppl. 1012. So if a wife is named as beneficiary her right to the benefit is ordinarily defeated by an absolute divorce. Kirkpatrick *v.* Modern Woodmen of America, 103 Ill. App. 468; Tyler *v.* Odd Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360; Order of Railway Conductors *v.* Koster, 55 Mo. App. 186; Williams' Appeal, 92 Pa. St. 69; Heyman *v.* Meyerhoff, 16 Wkly. Notes Cas. (Pa.) 212; Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189. And see Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 52 N. E. 41 [*affirming* 73 Ill. App. 287]. *Compare* Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486. *Contra*, Courtois *v.* Grand Lodge A. O. U. W., 135 Cal. 552, 67 Pac. 970, 87 Am. St. Rep. 137 (where the wife was designated by name, and the member made no attempt to substitute a beneficiary, although the society laws required the designation of a member of insured's family, a blood relative, or a dependent); White *v.* Brotherhood of American Yeomen, 124 Iowa 293, 99 N. W. 1071, 104 Am. St. Rep. 323, 66 L. R. A. 164 (where the certificate is made payable to the wife by name, and the statutes permit certificates to be issued in favor of the member's wife or legatee, and no attempt is made to change the beneficiary after the divorce); Brown *v.* Grand Lodge A. O. U. W., 208 Pa. St. 101, 57 Atl. 176. See Overhiser *v.* Overhiser, 14 Colo. App. 1, 59 Pac. 75. However, a divorce *a mensa et thoro* does not defeat the wife's right to the benefits. Supreme Council A. L. of H. *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770. If a member nominates his fiancée as beneficiary, the breaking off of the engagement before his death defeats her right to the benefit. Grand Lodge A. O. U. W. *v.* Child, 70 Mich. 163, 38 N. W. 1. And see Jacobs *v.* Most Excellent Assembly A. O. of M. P., 9 Pa. Dist. 54. On the contrary it has been held that a designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated in the contract. Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653.

Disqualification of beneficiary by murder of member see *infra*, IV, D, 2, d.

Disqualification of wife as beneficiary by adultery see *infra*, IV, G, 3, a.

15. **As of what time eligibility of beneficiary is determined** see *supra*, IV, A, 1.

jurisdictions, and by the charter or laws of most societies, the liberal rule allowing a member to designate whom he pleases as beneficiary is abrogated, and in nominating a beneficiary the member is restricted to certain classes of persons, such as wife and children, relatives, and dependents.[16] Where the classes of persons to whom benefits may be paid are prescribed by statute or by the society's charter of incorporation, neither the society, nor a member, nor the two combined, can divert the fund from the classes prescribed;[17] the society has no power to issue a

Waiver and estoppel as to eligibility of beneficiary see *supra*, IV, A, 1.

Who may question eligibility of beneficiary see *supra*, IV, A, 1.

16. Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424; Caudell *v.* Woodward, 15 Ky. L. Rep. 63, 96 Ky. 646, 29 S. W. 614, 16 Ky. L. Rep. 742 (where the charter of a benefit association stated that one of its objects was to establish a benefit fund to be paid on the death of a member "to his or her family, or to be disposed of as he or she may direct," and a general law of the association provided that the applicant should enter on the examiner's blank "the names of the members of their family, or those dependent upon them, to whom they desire their benefit paid," and a circular issued by the order stated that on the death of a member a certain sum should be paid "to the beneficiaries (members of his or her family)," and it was held that the beneficiary must be dependent on the insured or be a member of his family); Grand Lodge O. S. H. *v.* Iselt, (Tex. Civ. App. 1896) 37 S. W. 377 (where the charter of a mutual benefit association stated its object to be "to insure pecuniary relief to the widow, orphans, or legatees of the deceased members," and further provided that on the death of a member a certain sum should be paid to the person designated as beneficiary in the application for membership, and it was held that the charter must be construed as restricting the choice of a beneficiary to one of the three classes named). And see Swift *v.* Provincial Provident Inst., 17 Ont. App. 66 [*overruling Re* O'Heron, 11 Ont. Pr. 422], holding that the act to secure to wives and children the benefit of life insurance applies to insurance in societies incorporated under the Benevolent Societies Act. See also cases cited *infra*, note 17 *et seq.*

Construction of provisions.— In determining whether the beneficiary designated by a member of a beneficial association is capable of taking the fund under the charter of the association, the courts will give as broad and comprehensive a meaning as possible to the terms of the charter, in which the general object of the association and the class of persons to be benefited are set forth. Sheehan *v.* Journeymen Butchers' Protective, etc., Assoc., 142 Cal. 489, 76 Pac. 238; Love *v.* Clune, 24 Colo. 237, 50 Pac. 34; Walter *v.* Hensel, 42 Minn. 204, 44 N. W. 57; Compton's Estate, 25 Pa. Super. Ct. 28; Ballou *v.* Gile, 50 Wis. 614, 7 N. W. 561. Thus where the statutes provide for the formation of beneficial associations to pay a sum to the "nominee" of any deceased member, and require the associations to file a certificate stating their general objects, the statement in its articles of incorporation and the preamble of its constitution that the object of an association is to "relieve the distress of widows and orphans" does not render it beyond its power to contract to pay the death benefit to the mother of a member under a provision in the body of its constitution for payment to a person designated by the member who is related to him by blood. Sheehan *v.* Journeymen Butchers' Protective, etc., Assoc., *supra*. And see Maneely *v.* Knights of Birmingham, 115 Pa. St. 305, 9 Atl. 41 [*reversing* 2 Pa. Co. Ct. 339, 18 Wkly. Notes Cas. 282]. So under the constitution of a society declaring its object to be "to aid and benefit the families of deceased members," and providing that the widows, children, or next of kin of deceased members should be entitled to benefit, and that "any member may, however, designate to whom such payment shall be made," a member is not restricted to the designation of his widow, children, or next of kin. Brown *v.* Brown, 6 Misc. (N. Y.) 433, 27 N. Y. Suppl. 129. And where the charter declares that one of the objects of the association is to provide benefits for the "widow, orphans, dependents or other beneficiary," and the constitution states one of the objects to be the payment of benefits "to the member, or his wife, or his affianced wife, or his children, or his blood relations, or to persons dependent upon the member," a brother of the member may be designated as beneficiary to the exclusion of widow, orphans, and dependents. Donithen *v.* Independent Order of Foresters, 209 Pa. St. 170, 58 Atl. 142 [*reversing* 23 Pa. Super. Ct. 442]. And an appointment of the member's administrator as beneficiary in a certificate of membership is not inconsistent with the declared object of an association "to secure to dependent and loved ones assistance and relief at the death of a member." Eastman *v.* Provident Mut. Relief Assoc., 65 N. H. 176, 18 Atl. 745, 23 Am. St. Rep. 29, 5 L. R. A. 712.

Payment of assessments on a benefit certificate by a beneficiary who is ineligible will not entitle him to recover on the certificate. Clarke *v.* Schwarzenberg, 164 Mass. 347, 41 N. E. 655.

17. Kentucky Masonic Mut. L. Ins. Co. *v.* Miller, 13 Bush (Ky.) 489; Wagner *v.* St. Francis Xavier Ben. Soc., 70 Mo. App. 161; Britton *v.* Supreme Council R. A., 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376 [*affirmed* in 47 N. J. Eq. 325, 21 Atl. 754]; Supreme Council A. L. H. *v.* Smith, 45

certificate payable to a person not belonging to one of those classes;[18] and the designation of a person thus ineligible as beneficiary is nugatory.[19] While the society may, through appropriate legislation, restrict the classes of persons to whom, by statute or charter, benefits may be paid,[20] it cannot enlarge them.[21] Ordinarily the society has power to prescribe what classes of persons shall be eligible as beneficiaries,[22] and in case it exercises that power the designation of a person not belonging to one of those classes is ordinarily ineffectual.[23] However, it has been held that the society may by special contract recognize as valid the designation of a person ineligible under the terms of its constitution and by-laws.[24]

N. J. Eq. 466, 17 Atl. 770; Lints *v.* Lints, 2 Comm. L. Rep. (Can.) 469, 6 Ont. L. Rep. 100.

18. Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Supreme Council C. B. L. *v.* McGinness, 59 Ohio St. 531, 53 N. E. 54; National Mut. Aid Assoc. *v.* Gonser, 43 Ohio St. 1, 1 N. E. 11; State *v.* People's Mut. Ben. Assoc., 42 Ohio St. 579; Groth *v.* Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 95 Wis. 140, 70 N. W. 80.

19. *Georgia.*— Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424.

Illinois.— Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 52 N. E. 41 [*affirming* 73 Ill. App. 287].

Kansas.— Gillam *v.* Dale, 69 Kan. 362, 76 Pac. 861.

Kentucky.— Gibbs *v.* Anderson, 16 Ky. L. Rep. 397.

Missouri.— Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967.

Pennsylvania.— Stark *v.* Byers, 24 Pa. Co. Ct. 517.

South Dakota.— Foss *v.* Petterson, (1905) 104 N. W. 915.

See 28 Cent. Dig. tit. "Insurance," §§ 1933, 1935.

20. Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 52 N. E. 41 [*affirming* 73 Ill. App. 287]; Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 45 Atl. 111 [*reversed* on other grounds in 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449]; Halle *v.* District Grand Lodge No. 2 I. O. B. B., 24 Ohio Cir. Ct. 717. *Contra,* Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424; Wallace *v.* Madden, 168 Ill. 356, 48 N. E. 181 [*affirming* 67 Ill. App. 524].

21. *Georgia.*— Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424.

Illinois.— Wallace *v.* Madden, 168 Ill. 356, 48 N. E. 181 [*affirming* 67 Ill. App. 524]; Kirkpatrick *v.* Modern Woodmen of America, 103 Ill. App. 468.

Massachusetts.—Supreme Council *v.* Perry, 140 Mass. 580, 5 N. E. 634.

New Jersey.— Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 45 Atl. 111 [*reversed* on other grounds in 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449].

New York.— Di Messiah *v.* Gern, 10 Misc. 30, 30 N. Y. Suppl. 824.

Ohio.— State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399; Halle *v.* District Grand Lodge No. 2 I. O. B. B., 24 Ohio Cir. Ct. 717.

See 28 Cent. Dig. tit. "Insurance," §§ 1933, 1935.

22. Brinen *v.* Supreme Council Catholic Mut. Ben. Assoc., 140 Mich. 220, 103 N. W. 603; St. Mary's Ben. Soc. *v.* Burford, 70 Pa. St. 321 (where the charter of a beneficial society stated its object to be to afford relief to its members and their families, and to defray the expenses of their funerals or such other cases of distress as should be defined by the by-laws, and authorized the society to enact by-laws necessary for its government, and generally to do the matters lawful for its well-being, and it was held that a by-law providing that at the death of a member "entitled to benefits" sixty dollars should be paid to his widow or legal representatives was within the power of legislating for the well-being of the society); Morgan *v.* Hunt, 26 Ont. 568.

Reasonableness of by-laws restricting designation of beneficiaries see *supra,* I, C, 2, b.

23. *Colorado.*— Love *v.* Clune, 24 Colo. 237, 50 Pac. 34.

Illinois.— Kirkpatrick *v.* Modern Woodmen of America, 103 Ill. App. 468.

Kentucky.—Weisert *v.* Muehl, 5 Ky. L. Rep. 285.

Michigan.— Brinen *v.* Supreme Council Catholic Mut. Ben. Assoc., 140 Mich. 220, 103 N. W. 603.

Missouri.— Grand Lodge O. H. *v.* Elsner, 26 Mo. App. 108; Shamrock Benev. Soc. *v.* Drum, 1 Mo. App. 320.

New York.—Wertheimer *v.* Independent Order Free Sons of Judah, 28 N. Y. App. Div. 64, 50 N. Y. Suppl. 842.

Ohio.— Odd Fellows' Ben. Assoc. *v.* Diebert, 2 Ohio Cir. Ct. 462, 1 Ohio Cir. Dec. 589.

Pennsylvania.— Heyman *v.* Meyerhoff, 16 Wkly. Notes Cas. 212.

Texas.— See Williams *v.* Fletcher, 26 Tex. Civ. App. 85, 62 S. W. 1082.

Canada.— Leadley *v.* McGregor, 11 Manitoba 9 [*following In re* Phillips, 23 Ch. D. 235, 52 L. J. Ch. 441, 48 L. T. Rep. N. S. 81, 31 Wkly. Rep. 511]; Morgan *v.* Hunt, 26 Ont. 568.

See 28 Cent. Dig. tit. "Insurance," § 1935.

24. *Minnesota.*— Gruber *v.* Grand Lodge A. O. U. W., 79 Minn. 59, 81 N. W. 743, holding that articles of association providing that in case of the death of a member the

A restriction as to beneficiaries cannot be evaded by procuring a certificate in favor of an eligible person who secretly agrees with the member to take the fund as trustee for an ineligible person.[25] Where a society is organized under a statute limiting the classes of beneficiaries, and subsequently the legislature enlarges those classes, certificates thereafter issued by the society are governed by the later act, although the society has not formally accepted it,[26] and although the society has not amended its laws so as to accord with the statute,[27] unless the statute requires such amendment;[28] but the designation of an ineligible person as beneficiary is not validated by a subsequent enactment enlarging the classes of beneficiaries so as to include the class to which the person designated belongs.[29] If the society accepts a new statute limiting the classes of beneficiaries, its power as to payment of benefits is thereafter restricted to the classes so prescribed;[30] but legislative

moneys due on his certificate should be paid to the person named in the certificate, when related to deceased or a member of his family or dependent on him, and in case such person was not living at the time to certain classes of relatives in a certain definite order, and not otherwise, were not a limitation of the power of the association, so as to prevent it from recognizing a person not belonging to one of the prescribed classes as a properly designated beneficiary in the absence of fraud, there being no question of public policy involved.

Missouri.— See Grand Lodge O. H. *v.* Elsner, 26 Mo. App. 108.

New Jersey.— See Supreme Council A. L. H. *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770.

New York.—Story *v.* Williamsburg Masonic Mut. Ben. Assoc., 95 N. Y. 474; Schnook *v.* Independent Order Sons of Benjamin, 53 N. Y. Super. Ct. 181, where, however, the society's assent to the designation of an ineligible beneficiary was held not to appear.

Pennsylvania.— Folmer's Appeal, 87 Pa. St. 133; Menovsky *v.* Menovsky, 19 Pa. Super. Ct. 427 (holding that unless the words of the charter are clearly prohibitive or restrictive, the contract must be carried out as it was made); Jacobs *v.* Most Excellent Assembly A. O. M. P., 9 Pa. Dist. 54.

See 28 Cent. Dig. tit. "Insurance," § 1935.

Waiver and estoppel as to eligibility of beneficiary see *supra*, IV, A, 1.

Who may question eligibility of beneficiary see *supra*, IV, A, 1.

25. Gillam *v.* Dale, 69 Kan. 362, 76 Pac. 861.

However, the trustee cannot raise this objection. See *supra*, IV, A, 1.

26. Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; Massachusetts Catholic Order of Foresters *v.* Callahan, 146 Mass. 391, 16 N. E. 14.

27. Morey *v.* Monk, 145 Ala. 301, 40 So. 411.

28. Grimme *v.* Grimme, 198 Ill. 265, 64 N. E. 1088 [*affirming* 101 Ill. App. 389], holding that if a statute enlarging the classes of beneficiaries of fraternal associations authorizes existing societies to continue business by observing the provisions of the act concerning annual reports, but provides that societies may avail themselves of the provisions of the act by amendments to their constitution, a society already existing may continue its business by observing the provisions as to annual reports, but cannot avail itself of the provisions of the act enlarging the class of beneficiaries without amending its charter to conform to the statute.

29. Clarke *v.* Schwarzenberg, 164 Mass. 347, 41 N. E. 655 (holding that where one who became a member of a beneficial association before the enactment of St. (1885) c. 183, under which a creditor may be named as beneficiary failed, after such enactment, to pay assessments seasonably, and on his application was reinstated after each failure, but no new certificate of membership was issued, a creditor who is the beneficiary named in the certificate cannot recover thereon after the member's death, if the reinstatements were by way of a waiver of the forfeiture and not by way of new contracts); Skillings *v.* Massachusetts Ben. Assoc., 146 Mass. 217, 15 N. E. 566 (it not distinctly appearing that the society had availed itself of the privileges of the new act, or that it had done anything to make the promise to pay valid); Supreme Council A. L. H. *v.* Perry, 140 Mass. 580, 5 N. E. 634 (holding that a by-law including in the class of recipients persons not entitled under the statute is void, and no claim can be maintained under it, although a subsequent statute broadens the powers of the association so as to include the class named in the by-law). *Compare In re* Harton, 213 Pa. St. 499, 62 Atl. 1058 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059].

Incorporation of society as enlarging classes of beneficiaries.— Where a voluntary association whose laws restrict the payment of benefits to certain classes of persons is compelled by statute to become incorporated, the fact that in its articles of association it sets forth its purpose in the language of the statute, which permits insurance for the benefit of such persons as the member may direct in such manner as may be provided in the by-laws, does not enlarge the classes of beneficiaries if its old by-laws are readopted and its form of certificate conforming thereto remains the same. Love *v.* Clune, 24 Colo. 237, 50 Pac. 34.

30. Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530 (holding that

restrictions on the right to designate beneficiaries do not affect the rights of the parties under certificates previously issued.[31] The eligibility of a beneficiary is to be determined by reference to the laws of the state wherein the society was organized.[32]

b. Illustrations of Who May or May Not Be Designated. As has been said in the preceding section, the eligibility of a person as a beneficiary depends largely on the statutes under which the society operates, its charter of incorporation or articles of association, and its constitution and by-laws.[33] By these

the society cannot thereafter issue certificates payable to persons not within the statutory classes); Grand Lodge A. O. U. W. *v.* McKinstry, 67 Mo. App. 82 (holding that a person not within the statutory classes cannot be substituted as beneficiary even though the certificate was issued before the statute was enacted).

31. *Delaware.*— Emmons *v.* Supreme Conclave I. O. H., (1906) 63 Atl. 871.

Illinois.— Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543.

Iowa.—Belknap *v.* Johnston, 114 Iowa 265, 86 N. W. 267; Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29, holding also that where a benefit certificate issued before the passage of the new act in favor of a beneficiary not included in the classes prescribed therein was forfeited for non-payment of assessments, a reinstatement after the act took effect did not bring the certificate within its scope.

Michigan.— Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935.

Missouri.—See Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627.

New York.— Roberts *v.* Grand Lodge A. O. U. W., 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57 [*reversing* 33 Misc. 536, 68 N. Y. Suppl. 949, and *affirmed* in 173 N. Y. 580, 65 N. E. 1122]. *Compare* Kemp *v.* New York Produce Exch., 34 N. Y. App. Div. 175, 54 N. Y. Suppl. 678.

Pennsylvania.—Schoales *v.* Order of Sparta, 206 Pa. St. 11, 55 Atl. 766; Thomeuf *v.* Grand Lodge K. B., 12 Pa. Super. Ct. 195; Wolpert *v.* Grand Lodge K. B., 2 Pa. Super. Ct. 564, 29 Wkly. Notes Cas. 264.

See 28 Cent. Dig. tit. "Insurance," § 1933.

Retroactive operation of by-laws affecting eligibility of beneficiary see *supra*, II, D, 3, b, (II).

32. Grimme *v.* Grimme, 101 Ill. App. 389 [*affirmed* in 198 Ill. 265, 64 N. E. 1088]; Belknap *v.* Johnston, 114 Iowa 265, 86 N. W. 267; Gibson *v.* Imperial Council O. U. F., 168 Mass. 391, 47 N. E. 101; United Order of Golden Cross *v.* Merrick, 165 Mass. 421, 43 N. E. 127.

In Missouri the rule seems to be otherwise. There it has been held that where a beneficial society depends for its power to do business on the statutes of two states, one where it is organized and the other where it is permitted to do business as a foreign corporation, the statute of the latter state controls as to who may be beneficiaries in cases originating in such latter state. Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967; Pauley *v.* Modern Woodmen of America, 113 Mo. App. 473, 87 S. W. 990; Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530. *Contra*, Hoffmeyer *v.* Muench, 59 Mo. App. 20; Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627.

33. See *supra*, IV, A, 2, a; and cases cited *infra*, this note *et seq.*

Member as beneficiary.— Under Mass. St. (1885) c. 183, a beneficiary association may insure a member for his own benefit, in which case the proceeds of the certificate after his death will go to his executor or administrator as a part of his estate. Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; Harding *v.* Littlehale, 150 Mass. 100, 22 N. E. 703. A different rule prevails in some societies. Kentucky Grangers' Mut. Ben. Assoc. *v.* McGregor, 7 Ky. L. Rep. 750.

Member's "estate" as beneficiary.—A member cannot as a rule designate his "estate" as his beneficiary. Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166; Matter of Smith, 42 Misc. (N. Y.) 639, 87 N. Y. Suppl. 725.

"Survivors" as beneficiaries.— Where a law of a mutual benefit insurance association provides that its purpose is to pay a sum to "survivors" of a member at his death, the term "survivors" does not include a person who is neither a relative, nor a member of the household of, nor connected by marriage with, the member of the association. Grand Lodge O. H. S. *v.* Lemke, 124 Wis. 483, 102 N. W. 911; Koerts *v.* Grand Lodge O. H. S., 119 Wis. 520, 97 N. W. 163.

Creditor as beneficiary.— Creditors are commonly made ineligible as beneficiaries either by statute or by the laws of the society. Van Bibber *v.* Van Bibber, 82 Ky. 347; Kentucky Grangers' Mut. Ben. Assoc. *v.* McGregor, 7 Ky. L. Rep. 750; Clarke *v.* Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Boasberg *v.* Cronan, 9 N. Y. Suppl. 664 [*reversing* 7 N. Y. Suppl. 5]; Morgan *v.* Hunt, 26 Ont. 568. However, a contract of insurance payable to a trustee for the benefit of an estate which was in part unlawfully converted by the insured is not void as *ultra vires* by reason of statutory provisions protecting beneficial insurance from the claims of creditors. Bloodgood *v.* Massachusetts Ben. Life Assoc., 19 Misc. (N. Y.) 460, 44 N. Y. Suppl. 563.

A subordinate lodge, although unincorporated, may be designated as beneficiary. Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384 (where the by-laws so pro-

commonly a member of the society is in terms allowed on the one hand to designate as beneficiary, and is on the other hand in designating a beneficiary restricted to, his surviving spouse,[34] his children,[35] and the members of his family generally;[36]

vide); Bacon *v.* Brotherhood of Railroad Brakeman, 46 Minn. 303, 48 N. W. 1127.

As of what time eligibility is determined see *supra*, IV, A, 1.

34. Wagner *v.* St. Francis Xavier Ben. Soc., 70 Mo. App. 161; Shamrock Benev. Soc. *v.* Drum, 1 Mo. App. 320; Wertheimer *v.* Independent Order Free Sons of Judah, 28 N. Y. App. Div. 64, 50 N. Y. Suppl. 842.

Unlawful spouse.— Where two persons are married and live as husband and wife till his death, both mistakenly supposing that she was divorced from her former husband, she, being designated as his wife and beneficiary in his certificate in a mutual benefit association, is entitled to the insurance, although its by-laws provide that no certificate shall be made payable to one not a wife, husband, child, dependent, etc., of the member. Supreme Tent K. M. W. *v.* McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382. And see Story *v.* Williamsburgh Masonic Mut. Ben. Assoc., 95 N. Y. 474; Overbeck *v.* Overbeck, 155 Pa. St. 5, 25 Atl. 646; Bodnarik *v.* National Slavonic Soc., 6 Pa. Dist. 449. *Contra*, as against the lawful widow. Grand Lodge O. H. S. *v.* Elsner, 26 Mo. App. 108. However, the proceeds of a mutual benefit certificate payable to "the widow or other heir" of the member may not be devised by him to one to whom he was in form married while he still had a legal wife living and undivorced, this not being permitted by a by-law of the order that the money should go to the "widow, heirs, or other legal representatives" of the member, another by-law giving the form of the policy, which required payment to the "widow or heirs." Tutt *v.* Jackson, 87 Miss. 207, 39 So. 420. And if the laws of the society restrict the payment of benefits to the member's husband, certain relatives, and dependents, one with whom the member lives as her husband, although designated by her in the certificate as her husband, cannot take the benefits. Kult *v.* Nelson, 24 Misc. (N. Y.) 20, 53 N. Y. Suppl. 95. Although, under a by-law providing that in case of the death of a member his widow or heirs shall receive the amount agreed on by the constitution, the certificate may be made payable to a person living with the member as his wife but not legally such, if assented to by the association, yet merely living with the member as his wife does not sufficiently establish that she has been accepted by the association as beneficiary in order to entitle her to recover on the contract to the exclusion of the lawful wife, who was living at the time of the member's death. Schnook *v.* Independent Order Sons of Benjamin, 53 N. Y. Super. Ct. 181. Misdescription of beneficiary as wife see *infra*, IV, B, 2. Unlawful wife or concubine as dependent on member see *infra*, note 40.

Divorce as defeating rights of wife as beneficiary see *supra*, note 14.

35. See cases cited *infra*, this note.

Adults are not "children" within a by-law prescribing the classes of beneficiaries. Hammerstein *v.* Parsons, 29 Mo. App. 509.

An adopted child may take the benefit under a by-law in favor of widow and children, or, in the absence of widow or children, in favor of next of kin, where the member left no widow or natural children or remote issue, and no next of kin other than the adopted child. Kemp *v.* New York Produce Exch., 34 N. Y. App. Div. 175, 54 N. Y. Suppl. 678, holding also that the fact that the member adopted the child for the purpose of having it share in such fund was no fraud on the society.

An illegitimate child is not a "child" within a statute prescribing the classes of beneficiaries. Lavigne *v.* Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L. R. A. 814.

"Orphans," as used in a by-law prescribing the classes of beneficiaries, means children, and is not used in its strict legal sense. Fischer *v.* Malchow, 93 Minn. 396, 101 N. W. 602. Where the charter of a benevolent corporation provides that its purpose is to assist and give pecuniary aid to the widows and "orphans" of deceased members, and its constitution provides that a member may designate to whom benefits shall be paid in case of his death, a member may designate as his beneficiary a daughter of his wife by a former husband. Renner *v.* Supreme Lodge B. S. B. Soc., 89 Wis. 401, 62 N. W. 80.

Guardian as beneficiary.— The legislative intention that fraternal insurance shall not be made the subject of speculation by strangers on the life of insured is not violated by making a certificate payable to a stranger as guardian of certain named grandchildren of insured. Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229.

36. See cases cited *infra*, this note.

Meaning of "family."—The word "family" may be of narrow or broad meaning as the intention of the parties or of the legislature or law-making body of the society may appear. Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268. The family consists of such persons as habitually reside under one roof and form one domestic circle, or such as are dependent on each other for support (Hofman *v.* Grand Lodge B. L. F., 73 Mo. App. 47), or among whom there is a legal and equitable obligation to provide support (Hofman *v.* Grand Lodge B. L. F., *supra*; Grand Lodge A. O. U. W. *v.* McKinstry, 67 Mo. App. 82).

Parent and adult child living apart.—An adult son who leaves the father's family permanently becomes an independent entity and is no longer a member of the father's family; and the father cannot be the bene-

and he is generally in terms allowed to designate, or restricted in his designation

ficiary of a certificate taken by a son in a benefit society. Knights of Columbus *v.* Rowe, 70 Conn. 545, 40 Atl. 451; Brower *v.* Supreme Lodge Nat. Reserve Assoc., 87 Mo. App. 614; Davin *v.* Davin, 114 N. Y. App. Div. 396, 99 N. Y. Suppl. 1012. And see O'Neal *v.* O'Neal, 109 Ky. 113, 58 S. W. 529, 22 Ky. L. Rep. 616. So a mother is not a member of the family of an adult son who marries and establishes a home separate from her, she not being dependent on him. Elsey *v.* Odd Fellows' Mut. Relief Assoc., 142 Mass. 224, 7 N. E. 844; Lister *v.* Lister, 73 Mo. App. 99; Hanna *v.* Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820. *Contra,* Manley *v.* Manley, 107 Tenn. 191, 64 S. W. 8. And adult children who are not dependent on the member or living in his household cannot be made beneficiaries as against the widow and infant children. Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486. *Contra,* see Klotz *v.* Klotz, 14 Ky. L. Rep. 80, 22 S. W. 551, 15 Ky. L. Rep. 183. It has been held, however, that a daughter of a member belongs to his "immediate family," although she is married and lives apart from him. Danielson *v.* Wilson, 73 Ill. App. 287 [*affirmed* in 176 Ill. 94, 52 N. E. 41].

Parent and adult child living together.—Where a son and his wife lived with his father, being dependent on him for their support during the son's final illness, the father was a member of the family. Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268. So a mother with whom an adult child lives is a member of his family. Klee *v.* Klee, 47 Misc. (N. Y.) 101, 93 N. Y. Suppl. 588.

Stepchildren who have been brought up in the member's household are members of his family. Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449 [*reversing* 59 N. J. Eq. 321, 45 Atl. 111].

Strangers in blood living together as parent and child may constitute a "family." Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 16 N. W. 871. So an infant delivered to a stranger on his promise to adopt, educate, and rear him as a child, and who is taken into his household, and thus educated and reared, but not formally adopted, is a member of the family of such stranger. Grand Lodge A. O. U. W. *v.* McKinstry, 67 Mo. App. 82.

Brothers and sisters living apart.—A sister who does not live with her brother and is not dependent on him for support is not a member of his family. Smith *v.* Boston, etc., Railway Relief Assoc., 168 Mass. 213, 46 N. E. 626.

Brothers and sisters living together.—Where a husband separated from his wife without a divorce, and thereafter until his death lived with his sister, paying no board, and was nursed and cared for by her as a member of the family, a policy on his life issued in favor of the sister by a company organized under an act authorizing the insured to name the beneficiary, who might be one of the "family" or an heir, was valid, although the wife of the deceased survived him. Hosmer *v.* Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504. So a brother residing with the member is one of his "immediate family." Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 52 N. E. 41 [*affirming* 73 Ill. App. 287].

An old friend who has lived with the member for years and is physically disabled is not a member of his family, so as to be able to take the benefits of a benevolent insurance policy, payable only to a member of the family. Supreme Lodge K. H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826.

However, a member is not bound to designate a member of his family where the statute or the laws of the society provide for payment of benefits to members, their families or assigns (Sulz *v.* Mutual Reserve Fund Life Assoc., 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379 [*reversing* 83 Hun 139, 31 N. Y. Suppl. 1133 (*affirming* 7 Misc. 593, 28 N. Y. Suppl. 263)]; Massey *v.* Mutual Relief Soc., 102 N. Y. 523, 7 N. E. 619 [*affirming* 34 Hun 254]), their families or heirs (Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935; Young Men's Mut. Life Assoc. *v.* Harrison, 10 Ohio Dec. (Reprint) 786, 23 Cinc. L. Bul. 360), their widows, orphans, and heirs or devisees (Lamont *v.* Grand Lodge I. L. H., 31 Fed. 177), or their families or as they may direct (Mitchell *v.* Grand Lodge I. K. H., 70 Iowa 360, 30 N. W. 865; Independent Order S. & D. J. *v.* Allen, 76 Miss. 326, 24 So. 702, 71 Am. St. Rep. 532; Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151; Supreme Lodge K. H. *v.* Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160. *Contra,* Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486). So the fact that the articles of association declare the association's plan to be to pay benefits to the members' "representatives" (Walter *v.* Hensel, 42 Minn. 204, 44 N. W. 57), or the fact that the certificate is made payable to the member's "legal representative" (Sulz *v.* Mutual Reserve Fund Life Assoc., *supra*), does not limit the payment of benefits to those of the member's family, where the right of designation is unrestricted. And where the declared object of an unincorporated fraternal insurance association is to secure a provision for the families of deceased members, but the rules adopted for its government contain no restriction on the right to designate as beneficiary one who is not included in the particular class of persons for whose benefit the association is formed, the designation of a son-in-law of a member as a beneficiary, who thereafter pays all assessments levied against such membership, is valid. Derrington *v.* Conrad, 3 Kan. App. 725, 45 Pac. 458.

to, his relatives,[37] his heirs[38] and next of kin,[39] and persons dependent on him.[40]

37. See cases cited *infra*, this note.

"Blood relationship" is a term of very comprehensive meaning. It includes those persons who are of the same family, stock, or descended from a common ancestor. Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429. Grandchildren are blood relatives of the grandfather. Grand Lodge A. O. U. W. *v.* Fisk, 126 Mich. 356, 85 N. W. 875.

An illegitimate child is not a "relative" of the member within the meaning of a statute prescribing the classes of beneficiaries. Lavigne *v.* Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L. R. A. 814.

Relatives by marriage are included in the term "relatives" as it is used in some statutes and in the laws of some societies. Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449 [*reversing* 59 N. J. Eq. 321, 45 Atl. 111]. Accordingly a man's stepchildren are deemed his relatives (Tepper *v.* Supreme Council R. A., *supra*), even after the mother's death (Simcoke *v.* Grand Lodge A. O. U. W., 84 Iowa 383, 51 N. W. 8, 15 L. R. A. 114. *Contra*, Morey *v.* Monk, 145 Ala. 301, 40 So. 411). And see Faxon *v.* Grand Lodge B. L. F., 87 Ill. App. 262, holding that under a statute providing that payment of death benefits shall be made only to the families, heirs, blood relations, affianced husband or wife, or to persons dependent on the member, and under the constitution of a society providing for relief to members and their families in the event of death or total disability, the stepmother of assured, being related by affinity in the same degree as a natural mother is by consanguinity, may be named as a beneficiary. So the wife of a grandnephew of the member has been held to be a relative (Bennett *v.* Van Riper, 47 N. J. Eq. 563, 22 Atl. 1055, 24 Am. St. Rep. 416, 14 L. R. A. 342 [*reversing* 47 N. J. Eq. 39, 19 Atl. 785]); but on the contrary it has been held that a niece of a deceased member's father's first wife, deceased being a son of the second wife, is not a relative of deceased either by consanguinity or affinity (Smith *v.* Supreme Tent K. M. W., 127 Iowa 115, 102 N. W. 830, 69 L. R. A. 174), and that the niece of a member's deceased wife is not a blood relation (Baldwin *v.* Begley, 185 Ill. 180, 56 N. E. 1065 [*reversing* 84 Ill. App. 674]). Relationship by affinity includes the relationship of betrothal. Jacobs *v.* Most Excellent Assembly A. O. M. P., 9 Pa. Dist. 54.

38. Williams *v.* Williams, 10 Ky. L. Rep. 37; Weisert *v.* Muehl, 5 Ky. L. Rep. 285; Griffith *v.* Howes, 2 Comm. L. Rep. (Can.) 15, 5 Ont. L. Rep. 439; Plante *v.* La Société des Artisans Canadiens Français, 20 Rev. Lég. 320.

The term "heirs" is not to be taken in its restricted sense, but includes any one to whom the estate of the deceased might pass by operation of law (Hanna *v.* Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820; Lamont *v.* Grand Lodge I. L. H., 31 Fed. 177), and thus would, in many cases, include persons who were but distantly related by blood to the deceased member, who had never been members of his family, and with whom he had no personal acquaintance (Lamont *v.* Grand Lodge I. L. H., *supra*), and who have no insurable interest in his life (Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935). A mother is not eligible as an heir where the member's widow and children are living. Hanna *v.* Hanna, *supra*. See *infra*, IV, B, 2.

39. Kemp *v.* New York Produce Exch., 34 N. Y. App. Div. 175, 54 N. Y. Suppl. 678 (holding that under a statute which confers on adopted children the right of inheritance, an adopted child, under the by-laws of a corporation providing that in the absence of widow and children a gratuity fund shall be paid to the next of kin of the deceased member within the limit of representation prescribed by the statutes, even if not child within the by-laws, is entitled to the fund as next of kin); Yelland *v.* Yelland, 25 Ont. App. 91 (holding that a certificate issued by a benevolent society providing for payment of the endowment to the member's "next of kin," and expressed to be subject to the constitution and by-laws then in force and also to such amendments and alterations as might thereafter be regularly adopted, is not affected by an alteration omitting "next of kin" by that name from the classes of persons to whom certificates may be made payable).

40. Supreme Council C. B. L. *v.* McGinness, 59 Ohio St. 531, 53 N. E. 54, holding that a benefit society chartered to afford aid to "its members and their dependents" by paying a sum on the member's death to his "family or dependents" cannot issue a valid certificate providing for payment to one not dependent on the member. See, however, Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; Earley *v.* Earley, 23 Ohio Cir. Ct. 618; Supreme Assembly R. S. G. F. *v.* Adams, 107 Fed. 335, in all which cases dependents were held to be but one of several classes of persons who might be designated as beneficiaries.

Meaning of "dependent."—The words "persons dependent upon the member," as used in a statute pertaining to beneficiaries, do not mean dependence for favor, companionship, or affection, nor do they refer to occasional gifts, nor to complete dependence for support; but a person who is partially and regularly dependent on such member for support comes within the statute. Martin *v.* Modern Woodmen of America, 111 Ill. App. 99. And see Grand Lodge O. H. *v.* Elsner, 26 Mo. App. 108.

A creditor of the member is not necessarily a dependent. Skillings *v.* Massachusetts Ben.

3. As Affected by Want of Insurable Interest[41] **— a. General Rules.** In the absence of anything to the contrary in the enactments of the legislature or in the charter or laws of the society,[42] it is held by the weight of authority that the bene-

Assoc., 146 Mass. 217, 15 N. E. 566; Fisher *v.* Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383; Fodell *v.* Royal Arcanum, 44 Wkly. Notes Cas. (Pa.) 498 [*affirmed* in 193 Pa. St. 570, 44 Atl. 919].

A divorced wife of a member of a benefit society, in whose favor a certificate was issued prior to the divorce, is entitled to the proceeds of the certificate where, after the divorce, she remains a person dependent on the member. Martin *v.* Modern Woodmen of America, 111 Ill. App. 99. And see White *v.* Brotherhood of American Yeomen, 124 Iowa 293, 99 N. W. 1071, 104 Am. St. Rep. 323, 66 L. R. A. 164. Divorce as defeating right of wife as beneficiary see *supra*, note 14.

A member's mistress is not a dependent who may be named as beneficiary (Grand Lodge A. O. U. W. *v.* Hanses, 81 Mo. App. 545; West *v.* Grand Lodge A. O. U. W., 14 Tex. Civ. App. 471, 37 S. W. 966), even though he supported her, and she depended on him for support (Keener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543).

A stranger whom the member has promised to support is not therefore a dependent. Caldwell *v.* Grand Lodge U. W., 148 Cal. 195, 82 Pac. 781, 113 Am. St. Rep. 219, 2 L. R. A. N. S. 653 (where insured told a woman that if she would marry a certain man insured would take care of her while he lived, and she did so, and he furnished a house for her, gave her money, and paid her bills, but her husband when he worked earned two dollars a day); Ownby *v.* Supreme Lodge K. H., 101 Tenn. 16, 46 S. W. 758 (holding that a child who lived with her parents and whom a member promised to clothe, educate, and support, where he only paid for some music lessons, and presented her with a dress, a pair of shoes, and a watch, is not dependent on him).

Adult relatives who are financially independent of each other are not "dependents" who may be beneficiaries. Morey *v.* Monk, 145 Ala. 301, 40 So. 411; Brower *v.* Supreme Lodge N. R. A., 87 Mo. App. 614, although they may be temporarily boarding at the same place. And see Supreme Council A. L. H. *v.* Perry, 140 Mass. 580, 5 N. E. 634. Claimant was dependent on deceased, however, where she and her two sisters lived together, and prior to the marriage of one of them to deceased it was arranged that after the marriage the four should continue to "run the house," whereupon the wife and one sister, who was in ill health, kept the house, and claimant continued to work for wages, which she contributed to the common fund, and after the death of the wife the home was continued as before, whereupon deceased took out a benefit certificate, naming claimant as beneficiary, in order to assist her to support herself and her invalid sister after his death. Wilber *v.* Supreme Lodge N. E. O. P., 192 Mass. 477, 78 N. E. 445.

An affianced wife of a member is not therefore a dependent. Alexander *v.* Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187 [*reversing* 42 Ill. App. 455] (where the affianced wife was, during the entire period of her engagement, working for her own living, earning during part of that time more than her intended husband, and receiving nothing from him except occasional presents of clothing and money); Palmer *v.* Welch, 132 Ill. 141, 23 N. E. 412 [*affirming* 33 Ill. App. 188]; Supreme Council A. L. H. *v.* Perry, 140 Mass. 580, 5 N. E. 634. But she may be a dependent in fact, and hence eligible as a beneficiary. McCarthy *v.* Supreme Lodge N. E. O. P., 153 Mass. 314, 26 N. E. 866, 25 Am. St. Rep. 637, 11 L. R. A. 144, as when she is supported partly by her own labor and partly by money paid her by the member, although he is under no legal obligation to make such payments.

An illegitimate child of a member is not a person dependent on him within a statute specifying who may be beneficiaries, he being under no legal obligation to support her, and having never contributed to her support other than that he had boarded with her mother and like other boarders paid his own board. Lavigne *v.* Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L. R. A. 814. To the contrary see Hanley *v.* Supreme Tent K. M., 38 Misc. (N. Y.) 161, 77 N. Y. Suppl. 246.

An unlawful wife who is innocent of wrong-doing is a dependent who may be named as beneficiary. Senge *v.* Senge, 106 Ill. App. 140; Supreme Lodge A. O. U. W. *v.* Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Starr *v.* Knights of Maccabees of World, 27 Ohio Cir. Ct. 475; James *v.* Supreme Council R. A., 130 Fed. 1014; Crosby *v.* Ball, 4 Ont. L. Rep. 496.

The fact that a person profits through business relations with a member does not render such person a dependent on the member. Faxon *v.* Grand Lodge B. L. F., 87 Ill. App. 262 (woman with whom the member boarded); Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142 (servant of the member).

41. As of what time eligibility is determined see *supra*, IV, A, 1.

Waiver and estoppel as to eligibility of beneficiary see *supra*, IV, A, 1.

Who may question eligibility of beneficiary see *supra*, IV, A, 1.

42. Union Fraternal League *v.* Walton, 112 Ga. 315, 37 S. E. 389; Gillam *v.* Dale, 69 Kan. 362, 76 Pac. 861.

Whether 14 Geo. III, c. 48, prohibiting insurances by persons having no interest, applies to benefit insurance societies constituted under the Friendly Societies Act,

ficiary in a certificate taken out by the member is competent to take the benefits on the member's death even though he had no insurable interest in the member's life; and that it is only when the transaction between the parties is employed as a cloak or cover for a wagering transaction that the designation of a stranger in interest as beneficiary is void.[43] In many states certain classes of persons having no insurable interest in the life are expressly authorized by statute to be named as beneficiaries;[44] and in some states, by implied authority of statute, any person may be designated as beneficiary, regardless of insurable interest.[45] Where a

quœre. Brown *v.* Freeman, 4 De G. & Sm. 444, 64 Eng. Reprint 906.

43. *Georgia.*— Lodge No. 7 A. O. U. W. *v.* Brown, 112 Ga. 545, 37 S. E. 890; Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424.

Illinois.— Johnson *v.* Van Epps, 110 Ill. 551 [*affirming* 14 Ill. App. 201]; Kinney *v.* Dodd, 41 Ill. App. 49. And see Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

Indiana.— Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

Missouri.— Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25.

New York.— Freeman *v.* National Ben. Soc., 42 Hun 252.

Pennsylvania.— Zinn's Estate, 2 Pa. Dist. 801.

United States.— Ingersoll *v.* Knights of Golden Rule, 47 Fed. 272; Lamont *v.* Grand Lodge I. L. H., 31 Fed. 177.

See 28 Cent. Dig. tit. "Insurance," § 1929.

Contra.— Caudell *v.* Woodward, 96 Ky. 646, 29 S. W. 614, 16 Ky. L. Rep. 742; Van Bibber *v.* Van Bibber, 82 Ky. 347; Metropolitan L. Ins. Co. *v.* O'Brien, 92 Mich. 584, 52 N. W. 1012; Smith *v.* Pinch, 80 Mich. 332, 45 N. W. 183; Mutual Ben. Assoc. *v.* Hoyt, 46 Mich. 473, 9 N. W. 497. *Compare* Walter *v.* Hensel, 42 Minn. 204, 44 N. W. 57.

This is especially true where the laws of the society expressly authorize any person to be named as beneficiary (Berkeley *v.* Harper, 3 App. Cas. (D. C.) 308; Lamont *v.* Hotel Men's Mut. Ben. Assoc., 30 Fed. 817), or where the member acted for himself in taking out the certificate, at his own expense, and in good faith, to promote the interest of the beneficiary (Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424; Bloomington Mut. Ben. Assoc. *v.* Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558 [*affirming* 24 Ill. App. 518]; Overbeck *v.* Overbeck, 155 Pa. St. 5, 25 Atl. 646; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810, holding also that a certificate which provides that the devisees, or, in case of no will, the heirs, of the member on his death are to receive a designated sum, is not a wagering contract). However, under the provisions of Mass. St. (1894) c. 367, § 8, that where the wife, children, father, mother, brothers, and sisters of a member of a beneficiary corporation have all died, his certificate may be transferred to "any other person," the member may designate a stranger as the beneficiary, and such designation will not be rendered void by the fact that it was made on an agreement that the beneficiary should pay the dues and assessments of the member, the provision of the section that "no contract under this section shall be valid or legal which shall be conditional upon an agreement or understanding that the beneficiary shall pay the dues and assessments, or either of them" applying only to the original making of the contract, and not to the subsequent designation of a new beneficiary. Hill *v.* Supreme Council A. L. H., 178 Mass. 145, 59 N. E. 652.

If the insurance is not effected by the member himself the rule is different. One who has no insurable interest in the life of another cannot take out a certificate on that other's life, naming himself as beneficiary (Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424; Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 98 Ind. 149; Basye *v.* Adams, 5 Ky. L. Rep. 91. And see Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620); nor can he indirectly effect the insurance by inducing such other to take out a certificate of which he is the beneficiary, and then furnish the member the money with which to make the necessary payments (Whitmore *v.* Supreme Lodge K. & L. H., 100 Mo. 36, 13 S. W. 495). If, however, he has an insurable interest in the member's life he may take out a policy in his own favor. Martin *v.* Stubbings, *supra*; Rittler *v.* Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.

The rules applicable to ordinary life insurance policies with reference to insurable interest apply, it is said, to mutual benefit certificates. Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 98 Ind. 149. See, however, Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424.

44. See the statutes of the different states. And see Derrington *v.* Conrad, 3 Kan. App. 725, 45 Pac. 458; Lane *v.* Lane, 99 Tenn. 639, 42 S. W. 1058.

45. See the statutes of the different states. And see Moore *v.* Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882 [*affirming* 76 Ill. App. 433]; Sabin *v.* Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681 [*affirming* 8 N. Y. Suppl. 185]; Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151.

member may, under the statutes or the charter or by-laws of the society, bequeath the benefits to a stranger in interest, he may take out a certificate payable to a stranger in the first instance.[46]

b. What Constitutes Insurable Interest. It is not easy to define with precision what will in all cases constitute an insurable interest. It may be stated generally, however, to be such an interest arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.[47]

B. Designation of Beneficiary[48] — **1. Mode, Sufficiency, and Validity** — **a. In General.** According to the practice of some societies no certificate of insur-

46. Moore *v.* Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882 [*affirming* 76 Ill. App. 433]; Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Bloomington Mut. Ben. Assoc. *v.* Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558 [*affirming* 24 Ill. App. 518]; Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25 (*semble*); Lamont *v.* Grand Lodge I. L. H., 31 Fed. 177.

47. Ingersoll *v.* Knights of Golden Rule, 47 Fed. 272 [*quoting* Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924].

A pecuniary interest is not necessarily an element of insurable interest. Ingersoll *v.* Knights of Golden Rule, 47 Fed. 202 [*citing* Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924].

Everyone has an insurable interest in his own life. Union Fraternal League *v.* Walton, 109 Ga. 1, 34 S. E. 317, 77 Am. St. Rep. 350, 46 L. R. A. 424; Milner *v.* Bowman, 119 Ind. 79, 21 N. E. 1094, 5 L. R. A. 95; Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

An unlawful wife of a member has an insurable interest in his life where she in good faith lives with him until his death. Supreme Tent K. M. *v.* McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382; Mueller's Estate, 15 Pittsb. Leg. J. N. S. (Pa.) 326. *Compare* Overbeck *v.* Overbeck, 155 Pa. St. 5, 25 Atl. 646.

Children who, under the by-laws of the society, are entitled to be named as beneficiaries in a policy on the lives of their parents, are entitled to recover on the policy without otherwise showing insurable interests. Voorheis *v.* People's Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109.

Brother and sister.— The relationship existing between a member and his sister constitutes in law a good and valid consideration for his designation of her as beneficiary. Supreme Assembly R. S. G. F. *v.* Adams, 107 Fed. 335.

A cousin of the member has not therefore an insurable interest in his life. Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639, *semble*.

A relative by marriage has no insurable interest in the member's life. Hotopp *v.* Hotopp, 9 Ky. L. Rep. 649 (sister-in-law); United Brethren Mut. Aid Soc. *v.* McDonald, 122 Pa. St. 324, 15 Atl. 439, 9 Am. St. Rep. 111, 1 L. R. A. 238 (stepson); Stoner *v.* Line, 16 Wkly. Notes Cas. (Pa.) 187 (son-in-law).

Creditors.—It has been held that a creditor has an insurable interest in the life of the debtor. Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Van Bibber *v.* Van Bibber, 82 Ky. 347; Rittler *v.* Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844 (holding that a creditor who, in pursuance of a *bona fide* effort to secure payment of his debt, insures the life of his debtor and takes a policy in his own name, or for his own benefit, which he is obliged to keep alive by paying premiums, is entitled to hold all he can recover on the policy, if there is not such a gross disproportion between the debt and the amount of the policy as to make the transaction a speculation or wager); Keystone Mut. Assoc. *v.* Beaverson, 16 Wkly. Notes Cas. (Pa.) 188. *Contra*, Lexington Nat. Exch. Bank *v.* Bright, 36 S. W. 10, 38 S. W. 135, 18 Ky. L. Rep. 588. *Compare* Spies *v.* Stikes, 112 Ala. 584, 20 So. 959. However, a person holding notes executed for gambling debts by insured is not entitled to be a beneficiary. Weigelman *v.* Bronger, 96 Ky. 132, 28 S. W. 334, 16 Ky. L. Rep. 401. Rights of creditors in proceeds see *infra*, IV, G, 5.

A mere friend has no insurable interest in the life of a member. Caudell *v.* Woodward, 96 Ky. 646, 29 S. W. 614, 16 Ky. L. Rep. 742.

As of what time eligibility of beneficiary is determined see *supra*, IV, A, 1.

48. **Designation by assignment of certificate payable to member himself** see *supra*, II, H, 1.

Right to proceeds of certificate: Where, at member's death, there are no persons in existence who belong to the classes of beneficiaries prescribed by statute, or charter or laws of society, or certificate of insurance see *infra*, IV, G. Where designated beneficiary predeceases member see *infra*, IV, G, 3, b. Where designation of beneficiary is invalid or otherwise ineffectual see *infra*, IV, G, 3. Where member fails to designate beneficiary see *infra*, IV, 1. Where member marries

ance is issued;[49] and in this event the member does not designate a beneficiary, but the right to benefits is determined by the statute under which the society operates, or its charter or laws.[50] According to the practice of other societies, although a certificate is issued, the member does not designate a beneficiary, but the benefits are payable to certain classes of persons prescribed either in the certificate or by statute or the charter or laws of the society.[51] Generally speaking, however, it is contemplated that the member shall designate a beneficiary; and if he fails to do so,[52] or if for any reason his designation proves to be invalid or ineffectual,[53] the fund will be disposed of in a manner prescribed by the rules of the society. In designating a beneficiary the member must comply with the rules prescribed by the society.[54] It is not always necessary, however, that the designation should be made in the certificate itself;[55] and it has been held that a beneficiary may be designated by parol.[56] The designation may be made after the certificate has been issued,[57] and the beneficiary's name may be inserted in the certificate even after the member's death.[58] The certificate need not be delivered to the beneficiary in order to constitute a valid designation.[59] It has been held that the designation of a beneficiary by a minor is ineffectual where he dies before majority.[60] So the designation is ineffectual where it is made by the society without the member's consent.[61] And the designation of a deceased person as beneficiary is a nullity.[62] As a rule no one but the society may question the validity

after designating a beneficiary see *infra*, IV, C, 1, b.

49. See *supra*, II, A.

50. See *infra*, IV, B, 1, c.

51. See *infra*, IV, B, 1, c.

52. See *infra*, IV, G, 1.

53. See *infra*, IV, G, 3.

Effect of marriage of member after designation see *infra*, IV, C, 1, b.

Subsequent disqualification of beneficiary see *infra*, IV, G, 3.

54. Sheehan *v.* Journeymen Butchers' Protective, etc., Assoc., 142 Cal. 489, 76 Pac. 238 (holding that St. (1873–1874) c. 510, § 3, providing that on the death of a member of a beneficial association it may levy an assessment on the living members to be paid to the "nominee" of deceased, is a limitation on the power of the association to dispose of the fund, so that the widow is not entitled to recover it unless she has been nominated by deceased in the manner prescribed by the constitution and by-laws of the association); Eastman *v.* Provident Mut. Relief Assoc., 62 N. H. 555. See, however, Hofman *v.* Grand Lodge B. L. F., 73 Mo. App. 47.

Directory provisions of the society's laws need not be complied with in order to effect a valid designation in equity. St. Louis Police Relief Assoc. *v.* Tierney, 116 Mo. App. 447, 91 S. W. 968, such as a provision that a beneficiary should be designated on the third day after the member's admission to the society.

Signature of designation.— If a by-law requires a member to sign his designation of the beneficiaries, his writing their names in the prepared blank, without signing, is not a sufficient designation. Elliott *v.* Whedbee, 94 N. C. 115.

The fact that no person's name is recorded in the books of the society, as required by its rules, does not invalidate the designation of a beneficiary in the member's will, where the certificate of insurance is payable "as provided in my will." Brooklyn Trust Co. *v.* Seventh Regiment Veteran, etc., League, 113 N. Y. App. Div. 717, 99 N. Y. Suppl. 248.

55. Kinney *v.* Dodd, 41 Ill. App. 49, where designation in the certificate stub was held to be valid. See Loewenthal *v.* District Grand Lodge No. 2, 19 Ind. App. 377, 49 N. E. 610, where designation in a book was contemplated.

56. Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091; Clausen *v.* Jones, 18 Tex. Civ. App. 376, 45 S. W. 183.

Where, however, a sum is made payable by a relief association on the death of a member to an appointee named in the member's certificate or in the books of the association, and no person is so named, there is no one to whom the association is liable, and evidence as to whom the member intended to appoint is inadmissible. Eastman *v.* Provident Mut. Relief Assoc., 62 N. H. 555.

Parol trust as to fund see *infra*, note 85.

57. Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091.

58. Scott *v.* Provident Mut. Relief Assoc., 63 N. H. 556, 4 Atl. 792 (where both the member and the officers of the association understood, when he made his application, that the proposed name should be entered on the record without further direction); International Order of Twelve K. D. T. *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108.

59. Leftwich *v.* Wells, 101 Va. 255, 43 S. E. 364, 99 Am. St. Rep. 865.

60. Burst *v.* Weisenborn, 1 Pa. Super. Ct. 276.

61. Order of Mutual Companions *v.* Griest, 76 Cal. 494, 18 Pac. 652. And see Eckler *v.* Terry, 95 Mich. 123, 54 N. W. 704.

62. Order of Mut. Companions *v.* Griest, 76 Cal. 494, 18 Pac. 652.

of the designation of a beneficiary because of the member's failure to comply with the society's rules in regard to the mode of designation.[63]

b. Designation by Will.[64] The laws of beneficial societies are sometimes so framed as to preclude a designation of beneficiaries by will of the member.[65] A member may, however, make a valid designation by will where the certificate is made payable "to his will,"[66] or to his heirs[67] or legatees,[68] or to the member himself[69] or his estate.[70] And if the member is authorized to dispose of the benefits on the death of the original beneficiary he may, in case the original beneficiary predeceases him, designate a new beneficiary by will.[71] To operate effectually, however, the will must contain a specific bequest of the insurance fund, where he has other property on which the will can operate,[72] and the legatees must be

63. Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; Order of Mutual Companions *v.* Griest, 76 Cal. 494, 18 Pac. 652; Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091; Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449 [*reversing* 59 N. J. Eq. 321, 45 Atl. 111].

Right to question eligibility of beneficiary: Generally see *supra*, IV, A, 1. Right of original beneficiary to question eligibility of substituted beneficiary see *infra*, IV, C, 2, c, (I).

Right to question sufficiency of designation of substituted beneficiary see *infra*, IV, C, 3, d.

64. **Change of beneficiary by will** see *infra*, IV, C, 3, c.

Designation of ineligible beneficiary by will see *supra*, IV, A, 2, 3.

Right to designate beneficiary otherwise than by will where statute or laws of society authorize designation of legatee as beneficiary see *supra*, IV, A, 3, a.

Waiver and estoppel as to designation by will see *infra*, IV, B, 1, e.

65. *California.*— Griest's Estate, 76 Cal. 497, 18 Pac. 654, where the member was required by the rules to designate a beneficiary in writing.

New York.— Hellenberg *v.* District No. 1 I. O. B. B., 94 N. Y. 580 (where a formal designation in a book, signed by the member, was required, and the will in question was not brought to the society's notice till after the member's death); Kunkel *v.* Workmen's Sick, etc., Ben. Fund, 68 N. Y. App. Div. 385, 75 N. Y. Suppl. 188 (where a special form of "testamentary disposition" was required to be used and signed by the member).

Pennsylvania.— Hunter *v.* Firemen's Relief, etc., Assoc., 20 Pa. Super. Ct. 605, where the designation was required to be in writing and filed with the society's secretary.

Wisconsin.— Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904, where the society's constitution provided that no will should be permitted to control the appointment or distribution of, or the rights of any person to, any benefit payable by the order.

Canada.—Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88, where the rules of the society required the beneficiary to be named in the certificate.

See 28 Cent. Dig. tit. "Insurance," § 1941.

See, however, Grand Lodge U. S. I. O. F. S. I. *v.* Ohnstein, 85 Ill. App. 355.

A will is not such an order as is required to make a death benefit payable to one other than the person to whom the certificate is payable by the laws of the society "unless otherwise ordered in writing." Mellows *v.* Mellows, 61 N. H. 137. To the contrary see Vance *v.* Park, 7 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 138.

66. Hoffmeyer *v.* Muench, 59 Mo. App. 20.

67. Hannigan *v.* Ingraham, 55 Hun (N. Y.) 257, 8 N. Y. Suppl. 232. See, however, *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058, 4 L. R. A. N. S. 939 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059].

68. People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652]. And see Grand Lodge U. S. I. O. F. S. I. *v.* Ohnstein, 85 Ill. App. 355, holding that under a by-law providing that every lodge shall keep a book in which every member shall declare in writing, on a blank form provided, to whom the amount of his benefit shall be paid after his death, and requiring that the names of such beneficiaries be written in full, a designation, "Payable to such parties as provided for in my will," is sufficient, and the object of the by-law is substantially attained.

69. Harding *v.* Littlehale, 150 Mass. 100, 22 N. E. 703, where the certificate may be made payable to the member.

70. Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166, where the certificate may be made payable to the member's estate. *Contra*, where the certificate cannot be made payable to the member's estate. Matter of Smith, 42 Misc. (N. Y.) 639, 87 N. Y. Suppl. 725.

71. High Court C. O. F. *v.* Malloy, 169 Ill. 58, 48 N. E. 392 [*affirming* 67 Ill. App. 665]; Kepler *v.* Supreme Lodge K. of H., 45 Hun (N. Y.) 274.

It is otherwise under some statutes. Olmstead *v.* Masonic Mut. Ben. Soc., 37 Kan. 93, 14 Pac. 449.

72. *District of Columbia.*— Moss *v.* Littleton, 6 App. Cas. 201.

Kentucky.— Duvall *v.* Goodson, 79 Ky. 224.

Maryland.— Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

New York.— Greeno *v.* Greeno, 23 Hun

specifically named.[73] And the rules sometimes require the society's approval of the designation in order to render it effective.[74] An informal will, although inoperative as a bequest, may constitute a sufficient designation of beneficiaries.[75]

c. Designation by Statute or Charter or Laws of Society.[76] In some societies the members do not designate beneficiaries, and the benefits are payable to certain classes of persons designated as beneficiaries by statute or by the charter or laws of the society.[77] And these enactments not infrequently provide that certain persons of a class or classes shall be co-beneficiaries and share in the fund in prescribed proportions, in which event the insured cannot, by designating but one member of the preferred class or classes, defeat the rights of the other members thereof.[78]

d. New Designation.[79] It is not necessary, in order to entitle the original beneficiary to the fund, that he should be redesignated as such in a substituted certificate issued on reorganization of the society;[80] but where the society's charter provided that the widows and children of the members should be equal beneficiaries of the funds, and an amendment authorized the creation of a second class of members entitled to designate any of the charter beneficiaries as a sole

478. See, however, Brooklyn Trust Co. *v.* Seventh Regiment Veteran, etc., League, 113 N. Y. App. Div. 717, 99 N. Y. Suppl. 248.

Ohio.— Arthur *v.* Odd Fellows Ben. Assoc., 29 Ohio St. 557. *Compare* Vance *v.* Park, 7 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 138.

Wisconsin.— Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

See 28 Cent. Dig. tit. "Insurance," § 1941.

Contra.— Weil *v.* Trafford, 3 Tenn. Ch. 108.

If the member has no other property on which the will can operate, the benefits pass by a general bequest. Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52 (*semble*); Kepler *v.* Supreme Lodge K. H., 45 Hun (N. Y.) 274.

Sufficiency of bequest.— Where an endowment in a mutual benefit order could by its terms be disposed of by will, and a member's will provided, "I give the remainder of my personal estate, including anything that may come to my estate by reason of any insurance in the order . . . to my sister," the fact that the testator possibly regarded the endowment as a part of his estate did not defeat his evident intent that his sister should receive the endowment. High Court C. O. F. *v.* Malloy, 169 Ill. 58, 48 N. E. 392 [*affirming* 67 Ill. App. 665]. So where the beneficiary as designated by the assured is "such parties as provided for in my will," a will leaving to a certain person "the balance of my estate, being real, personal, and such amount as be derived from life insurance," is a sufficient designation. Grand Lodge U. S. I. O. F. S. I. *v.* Ohnstein, 85 Ill. App. 355. And a will bequeathing forty thousand dollars to be derived from testator's life insurance passes a benefit certificate issued to him payable "as directed by the will," where less than that amount of insurance, even including such certificate, was collected. Jacob *v.* Jacob, 89 S. W. 246, 28 Ky. L. Rep. 327.

73. House *v.* Northwestern L. Assur. Co., 10 Pa. Dist. 41.

74. *In re* Phillips, 23 Ch. D. 235, 52 L. J. Ch. 441, 48 L. T. Rep. N. S. 81, 31 Wkly. Rep. 511.

75. Dennett *v.* Kirk, 59 N. H. 10; Thomeuf *v.* Knights of Birmingham, 12 Pa. Super. Ct. 195.

76. **Designation by statute or charter or laws of society:** Where, at member's death, there are no persons in existence who belong to the classes of beneficiaries prescribed by statute, or charter or laws of society, or certificate of insurance see *infra*, IV, G. Where designated beneficiary predeceases member see *infra*, IV, G, 3, b. Where designation of beneficiary is invalid or otherwise ineffectual see *infra*, IV, G, 3. Where member fails to designate beneficiary see *infra*, IV, G, 1. Where member marries after designating a beneficiary see *infra*, IV, C, 1, b.

Necessity of new designation on amendment of charter so as to allow designation of any one of charter beneficiaries as sole beneficiary see *infra*, IV, B, 1, d.

77. See for example Pleimann *v.* Hartung, 84 Mo. App. 283; Janda *v.* Bohemian Roman Catholic First Cent. Union, 71 N. Y. App. Div. 150, 75 N. Y. Suppl. 654 [*affirmed* in 173 N. Y. 617, 66 N. E. 1110]; Dielmann *v.* Berka, 49 Misc. (N. Y.) 486, 97 N. Y. Suppl. 1027; Winsor *v.* Odd Fellows' Ben. Assoc., 13 R. I. 149.

Rights of creditors of member where beneficiaries are designated solely by statute or charter or laws of society see *infra*, IV, G, 5.

Rights of personal representative of member where beneficiaries are designated solely by statute or charter or laws of society see *infra*, IV, G, 4.

78. Nuckols *v.* Kentucky Mut. Ben. Soc., 16 Ky. L. Rep. 270.

79. **Necessity of new designation:** On death of beneficiary before member see *infra*, IV, G, 3, b. On marriage of member after designation see *infra*, IV, C, 1, b.

80. Derrington *v.* Conrad, 3 Kan. App. 725, 45 Pac. 458, it being apparent that the member intended the original beneficiary to take the fund.

beneficiary, a member who, by his certificate issued under the original charter, had made an ineffectual designation of one of them as a sole beneficiary, could not give effect to the designation merely by returning his certificate for the purpose of having it made definite as to amount and becoming a member of the second class.[81]

e. Waiver and Estoppel. The society may, by waiver or estoppel, lose its right to question the validity of the designation of a beneficiary.[82] So it has been held that the rights of the beneficiary are not affected by the fact that the designation does not comply with the rules of the society where such non-compliance was due to the neglect of the society's officers or agents.[83]

2. Persons Within Terms of Designation.[84] As a general rule, when a benefit certificate issues from a benefit society, the designation on the face of the certificate as to who shall be the beneficiary is conclusive on that subject.[85] Misnomer of the person named as beneficiary does not defeat his designation if the intent to nominate him is clear;[86] and a statement of the relation that the beneficiary bears to the member is regarded as *descriptio personæ*, so that its falsity does not invalidate the designation if the beneficiary is eligible as such.[87] Where a certifi-

81. Nuckols *v.* Kentucky Mut. Ben. Soc., 16 Ky. L. Rep. 270.

82. *Alabama.*— Stoelker *v.* Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140.

Minnesota.— Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091.

New Jersey.— Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449 [*reversing* 59 N. J. Eq. 321, 45 Atl. 111].

New York.—Brooklyn Trust Co. *v.* Seventh Regiment Veteran, etc., League, 113 N. Y. App. Div. 717, 99 N. Y. Suppl. 248; Allison *v.* Stevenson, 51 N. Y. App. Div. 626, 64 N. Y. Suppl. 481; Kepler *v.* Supreme Lodge K. H., 45 Hun 274.

Wisconsin.— Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 88 N. W. 607.

Waiver and estoppel as to eligibility of beneficiary see *supra*, IV, A, 1.

Who may question validity of designation see *supra*, IV, B, 1, a.

83. International Order of Twelve of Knights & Daughters of Labor *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108. See however, Loewenthal *v.* District Grand Lodge No. 2, 19 Ind. App. 377, 49 N. E. 610.

84. As of what time beneficiaries are determined see *supra*, IV, A, 1.

85. Thomas *v.* Leake, 67 Tex. 469, 3 S. W. 703.

Conflict between application and certificate. — If the certificate does not conform to the application in regard to the persons to whom the benefits shall be paid, but the member nevertheless accepts and retains the certificate without objection, the designation in the certificate is bindng on the beneficiaries named in the application. Thomas *v.* Leake, 67 Tex. 469, 3 S. W. 703. *Contra*, Eckler *v.* Terry, 95 Mich. 123, 54 N. W. 704, where the certificate made the application a part of the contract.

Parol trust.— It may be shown by parol that the beneficiary named in the certificate was designated as a trustee to take the proceeds for persons not named therein. Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229; Hirsh *v.* Auer, 146 N. Y. 13, 40 N. E. 397 [*affirming* 79 Hun 493, 29 N. Y. Suppl. 917]; Vance *v.* Park, 7 Ohio S. & C. Pl. Dec. 564, 7 Ohio N. P. 138; Donithen *v.* Independent Order of Foresters, 209 Pa. St. 170, 58 Atl. 142; Clausen *v.* Jones, 18 Tex. Civ. App. 376, 45 S. W. 183.

Parol designation of beneficiary see *supra*, IV, B, 1, a.

86. Russ *v.* Supreme Council A. L. H., 110 La. 588, 34 So. 697, 98 Am. St. Rep. 469, holding that where the beneficiary is designated by name, and also as the wife of the person to whom the certificate is issued, and this person has but one wife, there is no uncertainty, although the beneficiary is called "Georgie" instead of "Georgiana." And see Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136 [*reversing* 63 Ill. App. 385].

87. Berkeley *v.* Harper, 3 App. Cas. (D. C.) 308. And see cases cited *infra*, this note.

A fiancée described as a wife may take the benefits where fiancées are eligible as beneficiaries. Bachmann *v.* Supreme Lodge K. & L. H., 44 Ill. App. 188. Eligibility of fiancée as beneficiary see *supra*, IV, A.

Divorced wife.—A description of the beneficiary as the member's wife does not restrict payment of benefits to his widow. Hence the fact that the wife is divorced after issuance of the certificate does not defeat her right to benefits. White *v.* Brotherhood of American Yeomen, 124 Iowa 293, 99 N. W. 1071, 104 Am. St. Rep. 323, 66 L. R. A. 164. See, however, *supra*, note 14.

Illegitimate children described as adopted children may take the benefits if otherwise eligible as beneficiaries. Hanley *v.* Supreme Tent K. M. W., 38 Misc. (N. Y.) 161, 77 N. Y. Suppl. 246. Eligibility of illegitimate children see *supra*, IV, A.

Unlawful wife.— The fact that a woman with whom the member lives as his wife but who is not legally such is described as his wife does not defeat her right to the benefits if she is otherwise eligible as a

cate of insurance was made payable to a person "as guardian of" the member's grandchildren, and such person individually was not eligible as a beneficiary, the intention of insured that the grandchildren should have the sole benefit of the insurance was sufficiently shown, although the person named as guardian was not then or subsequently appointed their guardian.[88] In determining the meaning and scope of the words "children"[89] and "issue,"[90] "heirs"[91] and

beneficiary. Durian *v.* Central Verein H. S., 7 Daly (N. Y.) 168; Overbeck *v.* Overbeck, 155 Pa. St. 5, 25 Atl. 646; Bodnarik *v.* National Slavonic Soc., 6 Pa. Dist. 449; James *v.* Supreme Council R. A., 130 Fed. 1014; Crosby *v.* Ball, 4 Ont. L. Rep. 496. Eligibility of unlawful wife or concubine as beneficiary see *supra*, IV, A.

88. Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229.

89. See cases cited *infra*, this note.

"Children" includes after-born children by a subsequent wife where the children of the first marriage were not specifically named in the certificate. Thomas *v.* Leake, 67 Tex. 469, 3 S. W. 703, it appearing that one of the main objects of the association was to provide a fund for the benefit of the entire family of a member, and not to restrict it to a portion, and that the charter contained no provision allowing an applicant to designate the beneficiary. It is otherwise where the children of the first marriage were designated by name. Spry *v.* Williams, 82 Iowa 61, 47 N. W. 890, 31 Am. St. Rep. 460, 10 L. R. A. 863, so holding, although the object of the society is to afford aid to the "widows, orphans, and heirs, or devisees," of a deceased member, since the member has a right to designate the beneficiaries within the prescribed classes.

"Children" includes grandchildren. Duvall *v.* Goodson, 79 Ky. 224; Nuckols *v.* Kentucky Mut. Ben. Soc., 16 Ky. L. Rep. 270. *Contra*, Winsor *v.* Odd Fellows' Ben. Assoc., 13 R. I. 149.

Eligibility of children as beneficiaries see *supra*, IV, A.

Misdescription of children as beneficiaries see *supra*, note 87.

90. Hemenway *v.* Draper, 91 Minn. 235, 97 N. W. 874, holding that a provision in a certificate directing payment to insured's brothers and sisters, "or their living issue, according to the right of representation," means the living lineal descendants of deceased brothers and sisters.

91. Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935 (holding that Laws (1887), Act No. 187, which prohibits the issuance of a certificate "upon any life in which the beneficiary named has not an insurable interest," but which provides that in case of a violation of said prohibition the insurance shall be payable to the heirs of the member, embraces heirs who have not an insurable interest in the member's life); Hellenberg *v.* District No. 1, I. O. B. B., 94 N. Y. 580 (where the society's by-laws provided that on the death of a member the benefit should be paid to his widow, if living, and, if dead, to his children, and, if there should be none, then to such person as he might have formally designated; and a member having no wife or children designated his mother as beneficiary, the designation describing the payment directed as "the $1,000 my heirs are to receive," and the mother died before the member, and no other designation was made, and it was held that the reference to "heirs" in the designation did not make them the beneficiaries, but was only matter of description); Supreme Council R. A. *v.* Kacer, 96 Mo. App. 93, 69 S. W. 671 (holding that a by-law providing that no benefit shall be made payable to any foreign resident relates only to the designation of a beneficiary, and does not prevent such a person taking under a by-law making the benefit payable to insured's relatives in case of the beneficiary dying before him).

"Heirs," as that term is used to describe beneficiaries, means those persons who are entitled under the statute of distribution to take the personal property of an intestate. Johnson *v.* Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; Mullen *v.* Reed, 64 Conn. 240, 29 Atl. 478, 42 Am. St. Rep. 174, 24 L. R. A. 664; Alexander *v.* Northwestern Masonic Aid Assoc., 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161 [*affirming* 27 Ill. App. 29]; Lawwill *v.* Lawwill, 29 Ill. App. 643; Britton *v.* Supreme Council R. A., 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376 [*affirmed* in 47 N. J. Eq. 325, 21 Atl. 754]; Bishop *v.* Grand Lodge E. O. M. A., 112 N. Y. 627, 20 N. E. 562 [*reversing* 43 Hun 472]; Walsh *v.* Walsh, 66 Hun (N. Y.) 297, 20 N. Y. Suppl. 933 [*affirmed* in 143 N. Y. 662, 39 N. E. 21]; Dielmann *v.* Berka, 49 Misc. (N. Y.) 486, 97 N. Y. Suppl. 1027; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Hodge's Appeal, 8 Wkly. Notes Cas. (Pa.) 209; Hanna *v.* Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820; Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904; Mearns *v.* Ancient Order of United Workmen, 22 Ont. 34. Accordingly the term may include the member's widow. Mullen *v.* Reed, *supra*; Alexander *v.* Northwestern Masonic Aid Assoc., *supra*; Lawwill *v.* Lawwill, *supra*; Addison *v.* New England Commercial Travellers' Assoc., 144 Mass. 591, 12 N. E. 407 (where by the charter of an association the persons whom the insured could designate as beneficiaries were limited to his widow, his orphan children, and other persons dependent on him, and the by-laws provided that if the insured made no designation the amount should be paid to his widow, or, if he left no widow, to a guardian or trustee of his minor children;

"devisees,"[92] and "legal representatives"[93] and "estate,"[94] as those terms are used in the member's designation of beneficiaries, or in statutes or the charter or laws of the society for the purpose of designating beneficiaries, the courts adopt a

and the insured at the time of making his designation had a wife and two daughters, and in his application, in answer to the question, "To whom will you have your death loss paid?" answered, "To my heirs," and in a reply to a request to state the relationship to any of the persons to whom payable answered, "Wife or daughters," and it was held that on the death of the insured, the money was to be paid to the widow); Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091; Burns *v.* Burns, 109 N. Y. App. Div. 98, 95 N. Y. Suppl. 797; Walsh *v.* Walsh, *supra* (holding that where a member at his death left him surviving a wife and brothers and sisters but no children or parents, the wife is not excluded from participation in the fund by a by-law providing that "in case of a failure of or imperfect designation, then the amount shall be paid to the legal heirs of the deceased members"); Kaiser *v.* Kaiser, 13 Daly (N. Y.) 522 (holding that where a member designated his legal heirs as his beneficiaries, and he left a wife but no children, and his heir at law and next of kin was a brother in a foreign country, with whom he had had little to do, his wife was entitled to the fund); Jamieson *v.* Knights Templar, etc., Aid Assoc., 9 Ohio Dec. (Reprint) 388, 12 Cinc. L. Bul. 272. See, however, Johnson *v.* Knights of Honor, *supra*, holding that under Mansfield Dig. Ark. § 2592, which provides that "if a husband die, leaving a widow and no children, such widow shall be endowed of one-half the real estate of which such husband died seized and one-half of the personal estate, absolutely and in her own right," the widow takes by way of dower and not as a distributee; and this section does not bring the widow under the description "heirs" in a certificate payable to the heirs of insured. So the term may include the member's children (*In re* Farley, 9 Ont. L. Rep. 517; Mearns *v.* Ancient Order of United Workmen, *supra*), or both widow and children (Pleimann *v.* Hartung, 84 Mo. App. 283; Janda *v.* Bohemian Roman Catholic First Cent. Union, 71 N. Y. App. Div. 150, 75 N. Y. Suppl. 654 [*affirmed* in 173 N. Y. 617, 66 N. E. 1110]; Hannigan *v.* Ingraham, 55 Hun (N. Y.) 257, 8 N. Y. Suppl. 232; Hanna *v.* Hanna, *supra*).

A legatee of a member is not therefore his heir. Hill *v.* Supreme Council A. L. H., 178 Mass. 145, 59 N. E. 652; National Mut. Aid Assoc. *v.* Gonser, 43 Ohio St. 1, 1 N. E. 11.

What law governs.—Where a mutual benefit certificate is payable to the member's legal heirs, resort may be had to the intestate laws of the state under which the descent was cast for the purpose of determining who are the heirs (Burke *v.* Modern Woodmen of America, 2 Cal. App. 611, 84 Pac. 275; Mullen *v.* Reed, 64 Conn. 240, 29 Atl. 478, 42 Am. St. Rep. 174, 24 L. R. A. 664; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Thomas *v.* Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. N. S. 904), but not for the purpose of determining the proportion of the fund which each heir shall take (Burke *v.* Modern Woodmen of America, *supra*. *Contra*, Mullen *v.* Reed, *supra*).

Eligibility of heirs as beneficiaries see *supra*, IV, A.

92. Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810, holding that an executor, not being of the class of beneficiaries named in a certificate which recites that at the member's death his devisees, or, if no will, his heirs at law, are to receive the fund named in the certificate, is not made a devisee by reason of his duty to collect the assets of an estate to pay its debts, since the certificate, being for the benefit of the class named, places the fund beyond the reach of creditors.

Eligibility of devisees as beneficiaries see *supra*, IV, A.

93. *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059] (holding that "legal representatives" means heirs where, under the society's charter, the member's family and heirs are the only eligible beneficiaries); Hodge's Appeal, 8 Wkly. Notes Cas. (Pa.) 209 (holding that "legal representatives" means next of kin).

"Legal representatives" means those to whom benefits may be made payable under the charter or laws of the society. Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey (D. C.) 70; Murray *v.* Strang, 28 Ill. App. 608. And see *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059]. Where the by-laws of a mutual benefit society state its object to be to promote the welfare of all its members, and to furnish substantial aid to their families "or assigns," the right of the insured to choose his beneficiary is unrestricted, and therefore a policy payable to the insured's "legal representatives" is not merely for the benefit of insured's immediate family, so as to be entirely payable to his widow in case he leaves no children, as against distant relatives. Sulz *v.* Mutual Reserve Fund Life Assoc., 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379 [*reversing* 7 Misc. 593, 28 N. Y. Suppl. 263].

94. Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655 (holding that where the certificate is payable to the "estate" of the member, and he dies intestate, the fund goes to his widow and children); Matter of Smith, 42 Misc. (N. Y.) 639, 87 N. Y. Suppl. 725 (holding that where the certificate is payable to the member's estate, the proceeds go to the person who is entitled to take his personalty under the statute of distribution).

liberal rule of construction, so as to effectuate the intent of the parties and the benevolent objects of the society.[95]

C. Revocation and Change of Designation of Beneficiary — 1. Revocation of Designation[96] — a. In General. The person designated as beneficiary in a mutual benefit certificate has as a rule no such interest in the insurance as will preclude the member from revoking the designation and substituting another person as beneficiary in his place;[97] and his right to the benefits ceases if the member revokes the designation,[98] although no attempt to name a new beneficiary is made.[99] It has been held that if the original certificate is surrendered and a new one is issued to a new beneficiary, the original beneficiary likewise loses his rights, although the new beneficiary is ineligible as such;[1] but if the original certificate is not surrendered, the rights of the beneficiary named therein are not affected by an attempted substitution of beneficiaries which for any reason is invalid or ineffective.[2] So if a revocation or change of designation is procured by fraud,[3] or if at the time thereof the member is mentally incapacitated,[4] the original designation stands, and the original beneficiary is entitled to the insurance money.

b. By Subsequent Marriage of Member.[5] The fact that a member, after having designated a beneficiary, marries a third person does not operate to revoke the designation;[6] but this rule has been altered, either expressly or by implication,

95. See cases cited *supra*, note 89 *et seq.*

96. **Revocation by assignment of certificate** see *supra*, II, H.

Revocation by death of beneficiary before death of member see *infra*, IV, G, 3, b.

97. See *infra*, IV, C, 2, c, (1).

98. **Revocation by substitution of new beneficiary** see *infra*, IV, C, 2.

99. Cullen *v.* Supreme Tent K. M. W., 77 Hun (N. Y.) 6, 28 N. Y. Suppl. 276.

Persons entitled to proceeds where original designation is revoked and no new beneficiary is named see *infra*, IV, G, 3, a.

1. Carson *v.* Vicksburg Bank, 75 Miss. 167, 22 So. 1, 65 Am. St. Rep. 596, 37 L. R. A. 559; Luhrs *v.* Supreme Lodge K. & L. H., 3 Silv. Sup. (N. Y.) 572, 7 N. Y. Suppl. 487; Alfson *v.* Crouch, 115 Tenn. 352, 89 S. W. 329 [*overruling* by implication Offill *v.* Supreme Lodge K. H., (Tenn. 1898) 46 S. W. 758]. *Contra*, Smith *v.* Boston, etc., R. Relief Assoc., 168 Mass. 213, 46 N. E. 626; Supreme Council C. B. L. *v.* McGinness, 59 Ohio St. 531, 53 N. E. 54; Groth *v.* Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 94 Wis. 140, 70 N. W. 80.

Persons entitled to proceeds where new beneficiary is ineligible see *infra*, IV, G, 3, a.

Right of original beneficiary to attack revocation and change of designation because of new beneficiary's ineligibility see *infra*, IV, C, 2, c, (1).

2. Coyne *v.* Bowe, 23 N. Y. App. Div. 261, 48 N. Y. Suppl. 937 [*affirmed* in 161 N. Y. 633, 57 N. E. 1107], holding that a tentative and ineffective designation of one beneficiary does not revoke a prior designation.

If the newly designated beneficiary is ineligible as such the original beneficiary is entitled to the benefits. Elsey *v.* Odd Fellows' Mut. Relief Assoc., 142 Mass. 224, 7 N. E. 844; Di Messiah *v.* Gern, 10 Misc. (N. Y.) 30, 30 N. Y. Suppl. 824; Foss *v.* Petterson, (S. D. 1905) 104 N. W. 915; Leadlay *v.* McGregor, 11 Manitoba 9.

Right of original beneficiary to set up invalidity of revocation and change of designation see *infra*, IV, C, 2, c, (1).

3. Goodrich *v.* Bohan, (Tenn. Ch. App. 1898) 52 S. W. 1105, where the new beneficiary induced the member to make the change by fraud and undue influence. And see Supreme Council C. B. L. *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497.

Fraud on original beneficiary see *infra*, IV, C, 2, c, (1).

Right of original beneficiary to attack revocation and change of designation for fraud see *infra*, IV, C, 2, c, (1).

4. Grand Lodge A. O. U. W. *v.* McGrath, 133 Mich. 626, 95 N. W. 739; Grand Lodge A. O. U. W. *v.* Frank, 133 Mich. 232, 94 N. W. 731; Sovereign Camp W. W. *v.* Broadwell, 114 Mo. App. 471, 89 S. W. 891; Offill *v.* Supreme Lodge K. H., (Tenn. 1898) 46 S. W. 758. And see Supreme Council C. B. L. *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497.

Right of original beneficiary to attack revocation and change of designation because of member's incapacity see *infra*, IV, C, 2, c, (1).

5. **Marriage of member after death of original beneficiary** see *infra*, IV, G, 3, b.

Marriage of member as changing status of original beneficiary as one of member's family see *supra*, page 107, note 14.

6. *California.*— Sheehan *v.* Journeymen Butchers' Protective, etc., Assoc., 142 Cal. 489, 76 Pac. 238. And see Courtois *v.* Grand Lodge A. O. U. W., 135 Cal. 552, 67 Pac. 970, 87 Am. St. Rep. 137; McLaughlin *v.* McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83.

Georgia.— See Polhill *v.* Battle, 124 Ga. 111, 52 S. E. 87.

Illinois.— See Highland *v.* Highland, 109 Ill. 366 [*affirming* 13 Ill. App. 510].

Kentucky.— See Wright *v.* Wright, 15 Ky. L. Rep. 573.

Massachusetts.— Massachusetts Catholic Order of Foresters *v.* Callahan, 146 Mass.

by the charter or laws of some societies by which the previous disposition becomes ineffectual.[7]

2. Change of Beneficiaries[8] **— a. In General.** In order to effect a valid substitution of beneficiaries it is generally essential that the statutes and the charter or laws of the society, if any, prescribing the mode of substitution should be substantially complied with,[9] and that the new beneficiary should be eligible as such.[10] Otherwise the person attempted to be substituted as beneficiary is not entitled to the benefits,[11] and the rights of the original beneficiary remain unaffected unless his designation as such is otherwise revoked.[12] In case, however, a new beneficiary who is eligible as such is substituted for the original beneficiary in the manner prescribed by statute or the charter or laws of the society, the rights of the original beneficiary thereupon cease,[13] provided he has no vested interest in the insurance fund.[14]

b. Right to Make Change as Against Society. Either by statute or the charter or laws of the society the members of a beneficial society are commonly given the right to substitute other persons as beneficiaries in the place of those originally designated.[15] This right, however, is frequently hedged about with certain restrictions, such as that the society's consent to the substitution shall be first obtained, or that the substitution shall be made in a prescribed manner;[16] and in some instances the substitution of beneficiaries is absolutely prohibited.[17]

c. Right to Make Change as Against Original Beneficiary[18] **— (i)** *General Rules.* The cases as to the right of a member of a beneficial society, as against the person originally designated by him, to substitute another beneficiary in place of that person are not in accord. By the weight of authority, however, if there is nothing to the contrary in the statutes, or in the society's charter or laws, or in the

391, 16 N. E. 14, under a statute to assist widows and orphans of deceased members.

New York.— Day *v.* Case, 43 Hun 179. And see Thomas *v.* Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582 [*affirming* 60 Hun 382, 15 N. Y. Suppl. 15]; Thomas *v.* Thomas, 15 N. Y. Suppl. 16.

Pennsylvania.— Stock *v.* Stock, 18 Pa. Super. Ct. 421. And see Brown *v.* Ancient Order of United Workmen, 208 Pa. St. 101, 107, 57 Atl. 176, 1134.

Canada.— See Simmons *v.* Simmons, 24 Ont. 662; Mearns *v.* Ancient Order of United Workmen, 22 Ont. 34; Mingeaud *v.* Packer, 21 Ont. 267 [*appeal dismissed* in 19 Ont. App. 290].

See 28 Cent. Dig. tit. "Insurance," § 1940.

7. Sanger *v.* Rothschild, 123 N. Y. 577, 26 N. E. 3 [*affirming* 50 Hun 157, 2 N. Y. Suppl. 794].

Necessity of new designation after marriage.—A mutual benefit association amended its constitution by providing that where marriage was contracted by the member after the issuance of the policy, and the policy became payable through death, it should be paid to the widow, unless otherwise ordered. It was held that where a member had, before the adoption of such amendment, designated his mother as beneficiary, she was entitled to the proceeds, although he left a widow whom he had married after issuance of the policy, since the amendment did not require the designation of another beneficiary than the widow to be made after its adoption. Benton *v.* Brotherhood of Railroad Brakemen, 146 Ill. 570, 34 N. E. 939 [*reversing* 45 Ill. App. 112].

8. **Change of beneficiaries by assignment of certificate** see *supra*, II, H.

Fraud as defeating revocation and change of designation see *supra*, IV, C, 1, a.

Mental incapacity as defeating revocation and change of designation see *supra*, IV, C, 1, a.

New designation: On death of beneficiary see *infra*, IV, G, 3, b. On marriage of member after designation of beneficiary see *supra*, note 7.

Time when change of beneficiaries takes effect see *infra*, IV, C, 3, a–d.

9. See *infra*, IV, C, 3, a.

10. See *supra*, IV, A.

11. See cases cited *passim*, IV, A, C.

12. See *supra*, IV, C, 1, a; and cases cited *passim*, IV, C.

13. See cases cited *passim*, IV, C.

14. See *infra*, IV, C, 2, c.

15. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Lockett *v.* Lockett, 80 S. W. 1152, 26 Ky. L. Rep. 300; Scholl *v.* Sadoury, 25 Pittsb. Leg. J. N. S. (Pa.) 43.

16. See *infra*, IV, C, 3, a.

17. Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317, where charter provided to whom benefit should be paid.

Retrospectiveness of restriction.—The right of a member of a benefit society to change at will the beneficiary in his certificate cannot be taken away by a subsequent statute or by-law, where such right existed when his insurance contract was made. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543.

18. **Right of original beneficiary to question sufficiency of substitution** see *infra*, IV, C, 3, d.

certificate of insurance, the beneficiary originally designated has no vested interest in the contract, and hence the member may at his pleasure designate a new beneficiary and thus defeat the original beneficiary's contingent right to benefits.[19] In any event this is so where the statutes, the charter or laws of the society, or the certificate of insurance expressly or impliedly authorize a change of beneficiaries.[20]

19. *California.*— Hoeft *v.* Supreme Lodge K. H., 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.

Illinois.— McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76] (*semble*); Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130] (*semble*); Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620 (*semble*).

Indiana.— Masonic Mut. Ben. Soc. *v.* Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449 (*semble*); Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317 (*semble*); Bunyan *v.* Reed, 34 Ind. App. 295, 70 N. E. 1002 (*semble*).

Iowa.— Carpenter *v.* Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128.

Missouri.— Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25; Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68 (*semble*); St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091 (*semble*).

New York.— Deady *v.* Bank Clerks' Mut. Ben. Assoc., 49 N. Y. Super. Ct. 246.

Pennsylvania.— Brown *v.* Ancient Order of United Workmen, 208 Pa. St. 101, 107, 57 Atl. 176, 1134, *semble*. *Contra*, Waltz *v.* Mutual Aid Soc., 5 Pa. Co. Ct. 208.

Tennessee.— Alfsen *v.* Crouch, 115 Tenn. 352, 89 S. W. 329.

Washington.— Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882, *semble*.

United States.— Ingersoll *v.* Knights of Golden Rule, 47 Fed. 272, *semble*.

See 28 Cent. Dig. tit. "Insurance," §§ 1948, 1949.

Contra.— Johnson *v.* Hall, 55 Ark. 210, 17 S. W. 874; Block *v.* Valley Mut. Ins. Assoc., 52 Ark. 201, 12 S. W. 447, 20 Am. St. Rep. 166; Hill *v.* Groesbeck, 29 Colo. 161, 67 Pac. 167; Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; Love *v.* Clune, 24 Colo. 237, 50 Pac. 34; Van Bibber *v.* Van Bibber, 82 Ky. 347 (*semble*); Weisert *v.* Muehl, 81 Ky. 336; Locomotive Engineers' Mut. L., etc., Assoc. *v.* Winterstein, 58 N. J. Eq. 189, 44 Atl. 199.

20. *California.*—Bowman *v.* Moore, 87 Cal. 306, 25 Pac. 409.

Connecticut.— Masonic Mut. Ben. Assoc. *v.* Tolles, 70 Conn. 537, 40 Atl. 448.

Illinois.— Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Supreme Council C. K. A. *v.* Franke, 137 Ill. 118, 27 N. E. 86 [*affirming* 34 Ill. App. 651]; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Gordon *v.* Gordon, 117 Ill. App. 91.

Indiana.— Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Masonic Mut. Ben. Soc. *v.* Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449.

Iowa.— Wandell *v.* Mystic Toilers, 130 Iowa 639, 105 N. W. 448; Brown *v.* Grand Lodge A. O. U. W., 80 Iowa 287, 45 N. W. 884, 20 Am. St. Rep. 420.

Kansas.— Titsworth *v.* Titsworth, 40 Kan. 511, 20 Pac. 213.

Kentucky.— Hopkins *v.* Hopkins, 92 Ky. 324, 17 S. W. 864, 13 Ky. L. Rep. 707 (holding that the general insurance law under which, when a married woman is entitled to the proceeds of insurance it is her separate estate and not liable for the debts of her husband or of the person through whom it was obtained, does not prevent a condition in the contract giving insured the power to defeat her right by changing the beneficiary; nor does a provision in the charter of an insurance company that a policy issued for the benefit of the insured's wife shall be held by her "free from all existing debts, contracts and engagements" of insured; and that if the right to change the beneficiary is reserved in the certificate, it is not affected by the fact that such reservation is not contained in the application also); Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486; Lockett *v.* Lockett, 80 S. W. 1152, 26 Ky. L. Rep. 300.

Massachusetts.— Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382.

Michigan.— Grand Lodge A. O. U. W. *v.* McGrath, 133 Mich. 626, 95 N. W. 739; Metropolitan L. Ins. Co. *v.* O'Brien, 92 Mich. 584, 52 N. W. 1012; Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519.

Minnesota.— Schoenau *v.* Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384.

Missouri.— Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68.

Montana.— Knights of Maccabees *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532.

Nebraska.—Woodmen Acc. Assoc. *v.* Hamilton, 70 Nebr. 24, 96 N. W. 989, 70 Nebr. 30, 97 N. W. 1017.

New Hampshire.— Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380 (*semble*); Aurora Lodge No. 708 K. H. *v.* Watson, 64 N. H. 517, 15 Atl. 125; Barton *v.* Provident Mut. Relief Assoc., 63 N. H. 535, 3 Atl. 627.

New Jersey.— Spengler *v.* Spengler, 65 N. J. Eq. 176, 55 Atl. 285; Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 45 Atl. 111 [*reversed* on other grounds in 61

And it has been held that the original beneficiary cannot attack the designation of a new beneficiary because of the latter's ineligibility as such,[21] because of the member's mental incompetency at the time he made the substitution,[22] or because of fraud in the new designation.[23]

(II) *EXCEPTIONS AND LIMITATIONS.* The right of a member of a beneficial society to substitute a new beneficiary without the consent of the one originally designated is limited by statute in some jurisdictions,[24] and by the charter or laws

N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449], *semble.*

New York.— Fink *v.* Delaware, etc., Mut. Aid Soc., 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80 [*reversed* on other grounds in 171 N. Y. 616, 64 N. E. 506]; Armstrong *v.* Warren, 83 Hun 217, 31 N. Y. Suppl. 665; Luhrs *v.* Supreme Lodge K. & L. H., 3 Silv. Sup. 572, 7 N. Y. Suppl. 487; Pollak *v.* Supreme Council R. A., 40 Misc. 274, 81 N. Y. Suppl. 942; Fleeman *v.* Fleeman, 15 N. Y. Suppl. 838; Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681 [*affirming* 8 N. Y. Suppl. 185].

Ohio.— Thesing *v.* Supreme Lodge K. A., 11 Ohio Dec. (Reprint) 88, 24 Cinc. L. Bul. 401.

Pennsylvania.— Hamilton *v.* Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186; Mulderick *v.* Grand Lodge A. O. U. W., 155 Pa. St. 505, 26 Atl. 663; Beatty *v.* Supreme Commandery U. O. G. C., 154 Pa. St. 484, 25 Atl. 644; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861; Fisk *v.* Equitable Aid Union, 1 Pa. Cas. 567, 11 Atl. 84.

Rhode Island.— Supreme Council C. K. A. *v.* Morrison, 16 R. I. 468, 17 Atl. 57.

Tennessee.— Lane *v.* Lane, 99 Tenn. 639, 42 S. W. 1058; Fischer *v.* Fischer, 99 Tenn. 629, 42 S. W. 448; Sofge *v.* Supreme Lodge K. H., 98 Tenn. 446, 39 S. W. 853 (holding that the respective rights of persons claiming to be beneficiaries, where a substituted beneficiary has been named, must be determined by a consideration of the power reserved to assured, under the rules and by-laws of the order, to deal with the certificate, although the order admits its liability on the certificate); Catholic Knights of America *v.* Kuhn, 91 Tenn. 214, 18 S. W. 385; Tennessee Lodge No. 20 K. H. *v.* Ladd, 5 Lea 716.

Texas.— Byrne *v.* Casey, 70 Tex. 247, 8 S. W. 38; Splawn *v.* Chew, 60 Tex. 532.

Washington.— Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603; Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

Wisconsin.— Preusser *v.* Supreme Hive L. M. W., 123 Wis. 164, 101 N. W. 358.

United States.— Ingersoll *v.* Knights of Golden Rule, 47 Fed. 272; Lamont *v.* Grand Lodge I. L. H., 31 Fed. 177; Lamont *v.* Hotel Men's Mut. Ben. Assoc., 30 Fed. 817; Gentry *v.* Supreme Lodge K. H., 23 Fed. 718.

See 28 Cent. Dig. tit. "Insurance," §§ 1948, 1949.

A creditor of the original beneficiary stands in his shoes, and cannot object to a change of beneficiaries where the society's charter authorizes it. Schillinger *v.* Boes, 3 S. W. 427, 9 Ky. L. Rep. 18.

Retrospectiveness of amendments to laws of society authorizing change of beneficiaries see *supra*, II, D, 3, b, (II).

21. Alfsen *v.* Crouch, 115 Tenn. 352, 89 S. W. 329 [*overruling* by implication Offill *v.* Supreme Lodge K. H., (Tenn. 1898) 46 S. W. 758]. And see Maguire *v.* Maguire, 59 N. Y. App. Div. 143, 69 N. Y. Suppl. 61. *Contra*, Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486; Groth *v.* Central Verein G. U. G. G., 95 Wis. 140, 70 N. W. 80.

22. Alfsen *v.* Crouch, 115 Tenn. 352, 89 S. W. 329 [*overruling* by implication Offill *v.* Supreme Lodge K. H., (Tenn. 1898) 46 S. W. 758], *semble. Contra*, Grand Lodge A. O. U. W. *v.* McGrath, 133 Mich. 626, 95 N. W. 739; Grand Lodge A. O. U. W. *v.* Frank, 133 Mich. 232, 94 N. W. 731; Sovereign Camp W. W. *v.* Broadwell, 114 Mo. 471, 89 S. W. 891.

23. See cases cited *infra*, this note.

Fraud on beneficiary.— The beneficiary in a certificate having no vested interest therein, fraud cannot be perpetrated on him by changing the beneficiary. Moan *v.* Normile, 37 N. Y. App. Div. 614, 56 N. Y. Suppl. 339; Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603.

Fraud on member.— The original beneficiary cannot attack the new designation because it was induced by the fraud of the new beneficiary. Hoeft *v.* Supreme Lodge K. H., 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; Alfsen *v.* Crouch, 115 Tenn. 352, 89 S. W. 329. *Contra*, see Moan *v.* Normile, 37 N. Y. App. Div. 614, 56 N. Y. Suppl. 339.

24. See the statutes of the different states. And see Titsworth *v.* Titsworth, 40 Kan. 571, 20 Pac. 213.

In Ontario the statute creates preferred classes of beneficiaries, and where a member of any one of the preferred classes is designated by the insured as his beneficiary, a trust in favor of that person arises, and the member cannot, except in certain cases authorized by statute (Racher *v.* Pew, 30 Ont. 483; Vidcan *v.* Westover, 29 Ont. 1), revoke the designation and substitute a new beneficiary (Lints *v.* Lints, 2 Comm. L. Rep. (Can.) 469, 6 Ont. L. Rep. 100; Cartwright *v.* Cartwright, 12 Ont. L. Rep. 272; *Re* Harrison, 31 Ont. 314; Simmons *v.* Simmons, 24 Ont. 662; *Re* Cameron, 21 Ont. 634; Mingeaud *v.* Packer, 21 Ont. 267 [*appeal dismissed* in 19 Ont. App. 290]; Scott *v.* Scott, 20 Ont. 313. See, however, *In re* Farley, 9 Ont. L.

of some societies.[25] Apart from this, equities may exist in favor of the original beneficiary which will preclude the member from substituting a new beneficiary[26] who has no equity superior to that of the person originally designated,[27] as where his status is that of a mere volunteer and not that of a *bona fide* purchaser;[28] and a person may by his dealings with the beneficiary estop himself to claim the fund under a subsequent designation as substituted beneficiary.[29] An equity in favor of the original beneficiary precluding the substitution of another in his place may rest on a contract between him and the member, based on a sufficient consideration, by which he is to receive the benefits.[30] Thus if a member designates a beneficiary, or, having designated a beneficiary, delivers the certificate to him, on an agreement that he shall receive the benefits, in consideration of past advances made by him,[31] or present or future advances,[32] or in consideration of his promise

Rep. 517), anything to the contrary in the by-laws or the certificate notwithstanding (Lints *v.* Lints, *supra*; *Re* Harrison, *supra*; Mingeaud *v.* Packer, *supra*). And the statute has been held to be retrospective as to current policies issued before it came into force. Simmons *v.* Simmons, *supra*.

25. Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317 (holding that where the charter provides that the fund shall be paid "as may be designated in the application" for membership; "this being changed by death, or otherwise impossible, it shall go" to certain persons in a certain order, the member cannot, even with the consent of the society, change the original designation); Mason *v.* Mason, (Ind. App. 1902) 63 N. E. 578 (where, among the objects of the association stated in its charter, was the payment of a specified sum to the relatives or beneficiary specified in the application of a member, and the regulations provided that benefits were payable only to the beneficiary designated in his application, if living at his death). And see Carter *v.* Carter, 35 Ind. App. 73, 72 N. E. 187; Supreme Council C. B. L. *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497, in both of which cases the member was entitled to change beneficiaries only when the certificate was lost or beyond his control.

However, a provision on the back of the certificate that "in case of assignment of the within certificate, the beneficiary must consent thereto, and said assignment must be approved by the secretary . . . ; otherwise the assignment shall be void," does not limit the power of assured to change his beneficiary. Carpenter *v.* Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128.

26. Jory *v.* Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733; *In re* Krause, 28 Pittsb. Leg. J. N. S. (Pa.) 29, holding that a member of a beneficial association may, for a valuable consideration, estop himself from changing his designation of a beneficiary, although such change is authorized by a by-law. And see *infra*, this section, text and notes. See, however, Schardt *v.* Schardt, 100 Tenn. 276, 45 S. W. 340.

27. See *infra*, this section, text and notes.

No special equity exists in favor of the beneficiary in the first certificate as against that in the second, the former being the wife of insured and the latter his parents. Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603.

28. Jory *v.* Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733; McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76]; Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202].

29. Webster *v.* Welch, 57 N. Y. App. Div. 558, 68 N. Y. Suppl. 55; Goodrich *v.* Bohan, (Tenn. Ch. App. 1898) 52 S. W. 1105.

30. Carter *v.* Carter, 35 Ind. App. 73, 72 N. E. 187; Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486; Smith *v.* National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 [*affirming* 51 Hun 575, 4 N. Y. Suppl. 521] (holding that Laws (1883), c. 175, § 18, which declare that membership in the society gives the member the right to make a change in his beneficiary without the latter's consent, applies simply when the original designation is in the nature of an inchoate or an unexecuted gift; and that it does not prevent a contract between the member and the beneficiary by which a vested right passes to the latter). See, however, Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151, holding that such a contract does not prevent the substitution of a new beneficiary; that the substitution merely amounts to a breach of the contract, for which the remedy of the original beneficiary is an action against the member.

31. McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76] (so holding notwithstanding the by-laws provide that certificates "cannot be made payable to a creditor, nor be held, wholly or in part, nor assigned, to secure a debt" of the member); Smith *v.* National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 [*affirming* on other grounds 51 Hun 575, 4 N. Y. Suppl. 521]; Book *v.* Book, 1 Ont. L. Rep. 86 [*reversing* 32 Ont. 206].

32. McGrew *v.* McGrew, 190 Ill. 604, 60 N. E. 861 [*affirming* 93 Ill. App. 76]; Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202]; Supreme Council C. B. L. *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497, where the beneficiary procured the reinstatement of a lapsed policy.

to pay dues and assessments, which promise is fulfilled,[33] the member cannot thereafter substitute a different person as beneficiary. However, the fact that the person originally designated incurs expenses with reference to the transaction on the faith of the designation,[34] as by paying dues and assessments to keep the certificate alive,[35] does not prevent the substitution of a new beneficiary in his place, in the absence of a contract that he is to receive the benefits; nor does the fact that the member delivers the certificate to the beneficiary as a gift preclude him from subsequently substituting a new beneficiary.[36] In order to divest the rights of the original beneficiary the substitution of a new beneficiary must ordinarily be completed in the lifetime of the member, since on his death the beneficiary's rights become vested.[37] It has been held that where a certificate creates a vested inter-

33. Sovereign Camp W. W. *v.* Broadwell, 114 Mo. App. 471, 89 S. W. 891; Supreme Council C. B. L. *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497; Maynard *v.* Vanderwerker, 24 N. Y. Suppl. 932, 30 Abb. N. Cas. 134 [*reversed* on other grounds in 76 Hun 25, 27 N. Y. Suppl. 714]; Benard *v.* Grand Lodge A. O. U. W., 13 S. D. 132, 82 N. W. 404. And see Supreme Council R. A. *v.* Tracy, 169 Ill. 123, 48 N. E. 401 [*affirming* 67 Ill. App. 202]; Leaf *v.* Leaf, 92 Ky. 166, 17 S. W. 354, 854, 13 Ky. L. Rep. 486; Webster *v.* Welch, 57 N. Y. App. Div. 558, 68 N. Y. Suppl. 55; Book *v.* Book, 1 Ont. L. Rep. 86 [*reversing* 32 Ont. 206].

If the original beneficiary does not fulfil the agreement by continuously paying all dues and assessments, the member may change the designation. Masonic Mut. Ben. Assoc. *v.* Tolles, 70 Conn. 537, 40 Atl. 448.

Statutory provisions.— Mo. Rev. St. (1899) § 1417, providing that no contract between a member of a fraternal beneficiary association and his beneficiary that the beneficiary or any person for him shall pay the member's assessments and dues shall give the beneficiary a vested right in the certificate or in the benefit derived therefrom, or deprive the member of the right to change the name of the beneficiary or revoke the certificate on written notice to the association in the manner provided by its by-laws, has no retrospective operation. Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68.

34. Fischer *v.* Fischer, 99 Tenn. 629, 42 S. W. 448.

35. *California.*— Jory *v.* Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733.

Connecticut.— Masonic Mut. Ben. Assoc. *v.* Tolles, 70 Conn. 537, 40 Atl. 448.

Missouri.— Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68.

Pennsylvania.— Fisk *v.* Equitable Aid Union, 7 Pa. Cas. 567, 11 Atl. 84.

Tennessee.— Fischer *v.* Fischer, 99 Tenn. 629, 42 S. W. 448.

Washington.— Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603.

Wisconsin.— Preusser *v.* Supreme Hive L. M. W., 123 Wis. 164, 101 N. W. 358.

See 28 Cent. Dig. tit. "Insurance," §§ 1948, 1949.

[9]

See, however, Tudor *v.* Tudor, 11 Ohio Dec. (Reprint) 422, 26 Cinc. L. Bul. 368, holding that where a member stops paying dues and assessments, separates from his family, and is divorced, and his wife pays the dues on behalf of their children, the beneficiaries, he cannot afterward change the beneficiaries.

The fact that the original beneficiary has possession of the certificate does not alter the rule. Grand Lodge A. O. U. W. *v.* McGrath, 133 Mich. 626, 95 N. W. 739; Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25; Spengler *v.* Spengler, 65 N. J. Eq. 176, 55 Atl. 285.

The society is not estopped to deny liability to the original beneficiary because he paid dues and assessments accruing after the substitution of a new beneficiary, where it did not know that the money so paid was his. Fanning *v.* Supreme Council Catholic Mut. Ben. Assoc., 84 N. Y. App. Div. 205, 82 N. Y. Suppl. 733 [*affirmed* in 178 N. Y. 629, 71 N. E. 1130].

Right of original beneficiary to reimbursement on account of payments for dues and assessments see *infra*, IV, G, 6.

36. Spengler *v.* Spengler, 65 N. J. Eq. 176, 55 Atl. 285; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861; Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603. And see Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151. *Contra*, see Tennessee Lodge No. 20, K. H. *v.* Ladd, 5 Lea (Tenn.) 716.

37. *Illinois.*— Gordon *v.* Gordon, 117 Ill. App. 91.

Iowa.—Shuman *v.* Ancient Order of United Workmen, 110 Iowa 642, 82 N. W. 331.

Montana.— Knights of Maccabees of World *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532.

New York.— Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80].

Oregon.— Stringham *v.* Dillon, 42 Oreg. 63, 69 Pac. 1020; Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

Pennsylvania.— Hamilton *v.* Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186.

Texas.— Flowers *v.* Sovereign Camp W. W., (Civ. App. 1905) 90 S. W. 526.

Exceptions to rule see *infra*, IV, C, 3, a–d.

Time when change of beneficiaries becomes effective see *infra*, IV, C, 3, a–d.

est in the beneficiary, and the insured surrenders the old certificate and takes out a new one, the extent of the vested interest of the beneficiary in the old certificate is its value at the time of the change.[38]

3. Mode of Revocation and Change of Designation[39] — **a. General Rule.** In the absence of any regulations in the statutes or the charter or laws of the society concerning the mode of changing beneficiaries, a change may be made in any way the member may choose, so long as he expresses a clear intent to make the change.[40] However, the society has power to prescribe the mode in which a change of beneficiaries shall be made,[41] and if a mode of change is prescribed either in its laws or in its certificates of membership, that mode must as a rule be followed by the members in order to effect a substitution of beneficiaries.[42]

Waiver by society after death of member of conditions as to change of beneficiaries see *infra*, IV, C, 3, e.

38. Locomotive Engineers' Mut. L., etc., Ins. Assoc. *v.* Winterstein, 58 N. J. Eq. 189, 44 Atl. 199, holding also that the value of the surrendered certificate is the difference between the amount payable on the death of the member, and the amount of payments, with interest, which will be required to keep the certificate alive during the probable period of the member's life.

39. Assignment of certificate as effecting change of beneficiaries see *supra*, II, H.

Irregular substitution of beneficiary as assignment of certificate see *supra*, II, H, 2.

40. Schoenau *v.* Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384; Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25; Collins *v.* Collins, 30 N. Y. App. Div. 341, 51 N. Y. Suppl. 922.

41. Coleman *v.* Supreme Lodge K. H., 18 Mo. App. 189.

Validity of regulations as to change of beneficiaries see *supra*, I, C, 2, b.

42. *Colorado.*— Rollins *v.* McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260, where the change was required to be entered on the society's records.

Illinois.— Gordon *v.* Gordon, 117 Ill. App. 91.

Iowa.— Shuman *v.* Ancient Order of United Workmen, 110 Iowa 642, 82 N. W. 331 (holding that equity will not treat an attempted change as having been legally made, where no reason is shown why the change might not have been made in the precise manner required by the terms of the contract); Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470; Stephenson *v.* Stephenson, 64 Iowa 534, 21 N. W. 19.

Massachusetts.— Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787.

Missouri.— St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091; Head *v.* Supreme Council C. K. A., 64 Mo. App. 212; Coleman *v.* Supreme Lodge K. H., 18 Mo. App. 189.

Montana.—Knights of Maccabees of World *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532.

New York.— Wilson *v.* Bryce, 43 N. Y. App. Div. 491, 60 N. Y. Suppl. 132; Ireland *v.* Ireland, 42 Hun 212; Renk *v.* Herman Lodge, 2 Dem. Surr. 409.

Ohio.— Earley *v.* Earley, 23 Ohio Cir. Ct. 618.

Oregon.— Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785, holding that the ignorance of the officers of a local lodge as to their duties in making a change in the beneficiary, and the failure of the order to furnish a blank form of application for such change, will not excuse the assured from a compliance with the rules of the order.

Pennsylvania.— Masonic Mut. Assoc. *v.* Jones, 154 Pa. St. 107, 26 Atl. 255; Vollman's Appeal, 92 Pa. St. 50; Stark *v.* Byers, 24 Pa. Co. Ct. 517.

Texas.— Flowers *v.* Sovereign Camp W. W., (Civ. App. 1905) 90 S. W. 526, holding that where the constitution required a member applying for a change to waive for himself and beneficiary all rights under the certificate, a change of beneficiary could not be made on an application of the member which failed to waive the rights of the original beneficiary.

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110, holding that it is immaterial what motive induced the member to disregard the prescribed mode of change, or that he failed to comply therewith because he failed to understand his contract with the society.

Wisconsin.— McGowan *v.* Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603.

United States.— Hotel-Men's Mut. Ben. Assoc. *v.* Brown, 33 Fed. 11.

England.—Bennett *v.* Slater, [1899] 1 Q. B. 45, 68 L. J. Q. B. 45, 79 L. T. Rep. N. S. 324, 47 Wkly. Rep. 82.

See 28 Cent. Dig. tit. "Insurance," § 1951.

Substantial compliance with the provisions of the society's laws or certificates is necessary on the one hand (Conway *v.* Supreme Council C. K. A., 131 Cal. 437, 63 Pac. 727; Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68; Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785; Flowers *v.* Sovereign Camp W. W., (Tex. Civ. App. 1905) 90 S. W. 526), and on the other hand is sufficient (Schoenau *v.* Grand

Thus it is frequently required in order to effect a change that the certificate shall be surrendered to the society,[43] or that a new certificate naming the new beneficiary shall be issued;[44] or that the member shall file a written petition for the change,[45]

Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68; Earley *v.* Earley, 23 Ohio Cir. Ct. 618; McGowan *v.* Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603. And see text and notes *passim*, IV, C, 3, a.

Exclusiveness of prescribed method.—If the laws of the society prescribe a method of changing beneficiaries, that method is exclusive of all others. McCarthy *v.* Supreme Lodge N. E. O. P., 153 Mass. 314, 26 N. E. 866, 25 Am. St. Rep. 637, 11 L. R. A. 144; Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80]; Brown *v.* Ancient Order of United Workmen, 208 Pa. St. 101, 57 Atl. 176; Flowers *v.* Sovereign Camp W. W., (Tex. Civ. App. 1905) 90 S. W. 526. And see text and notes *passim*, IV, C, 3, a, c.

If regulations as to the mode of changing beneficiaries are ambiguous, that construction will be given to them which is most favorable to the rights of the member. Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384.

43. *California.*— McLaughlin *v.* McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83.

Indiana.— Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116.

Iowa.— Modern Woodmen of America *v.* Little, 114 Iowa 109, 86 N. W. 216; Stephenson *v.* Stephenson, 64 Iowa 534, 21 N. W. 19.

Michigan.—Supreme Lodge K. H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826.

New Jersey.— Supreme Council A. L. H. *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770.

North Carolina.— Smith *v.* Supreme Council R. A., 127 N. C. 138, 37 S. E. 159.

Ohio.— Charch *v.* Charch, 57 Ohio St. 561, 49 N. E. 408.

Oregon.— Stringham *v.* Dillon, 42 Oreg. 63, 69 Pac. 1020.

Pennsylvania.— *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058, 4 L. R. A. N. S. 939 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059]; Hamilton *v.* Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186.

See 25 Cent. Dig. tit. "Insurance," § 1951.

However, under a by-law providing that a new certificate marked "duplicate" or "renewal" should be issued on request of a member and on the payment of twenty-five cents, a member's written request therefor, with payment of the required fee, gives him an absolute right to a new certificate without the surrender of the old one. Fink *v.* Delaware, etc., Mut. Aid Soc., 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80 [*reversed* on other grounds in 171 N. Y. 616, 64 N. E. 506].

The fact that it was customary to require a surrender of the original certificate when a change of beneficiary was desired does not invalidate an otherwise valid change of beneficiary, if the member had no notice of the custom. Hirschl *v.* Clark, 81 Iowa 200, 47 N. W. 78, 9 L. R. A. 841.

44. *Illinois.*— Gordon *v.* Gordon, 117 Ill. App. 91.

Kansas.— Kemper *v.* Modern Woodmen of America, 70 Kan. 119, 78 Pac. 452.

Michigan.—Supreme Lodge K. H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826.

Nebraska.—Counsman *v.* Modern Woodmen of America, 69 Nebr. 710, 96 N. W. 672, 98 N. W. 414, holding that a change of beneficiaries which does not reach the head office till after the death of the member, and is refused because not in accordance with the by-laws as to a part of the fund, has no effect even as to the part of the fund in reference to which it is in proper form, where the association has a by-law declaring the old certificate to be in effect till the new one is delivered.

New York.—Eagan *v.* Eagan, 58 N. Y. App. Div. 253, 68 N. Y. Suppl. 777; Coyne *v.* Bowe, 23 N. Y. App. Div. 261, 48 N. Y. Suppl. 937 [*affirmed* in 161 N. Y. 633, 57 N. E. 1107].

Oregon.— Stringham *v.* Dillon, 42 Oreg. 63, 69 Pac. 1020.

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

See 28 Cent. Dig. tit. "Insurance," § 1951.

Indorsement of change on original certificate.— An indorsement of a change of beneficiaries on the original certificate, whether made by an officer of the society (National Exch. Bank *v.* Bright, 36 S. W. 10, 38 S. W. 135, 18 Ky. L. Rep. 588) or by the member himself (Thomas *v.* Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582 [*affirming* 60 Hun 382, 15 N. Y. Suppl. 15]; Thomas *v.* Thomas, 60 Hun (N. Y.) 582, 15 N. Y. Suppl. 16; Jinks *v.* Banner Lodge No. 484 L. K. H., 139 Pa. St. 414, 21 Atl. 4), is ineffectual where the laws require the issuance of a new certificate in order to effect a substitution of beneficiaries.

Execution of new certificate.— A new benefit certificate issued by a mutual benefit association or union to change the beneficiary, on application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, cannot be held to be invalid because not signed and sealed by the officers of the subordinate union. Fisk *v.* Equitable Aid Union, 7 Pa. Cas. 567, 11 Atl. 84.

45. Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785, holding that an informal note addressed to the society is insufficient. And see Stephenson *v.* Stephenson,

or make the substitution in writing,[46] as by indorsement on the certificate;[47] and that the application for a change or the indorsement of the change shall be attested,[48] and a fee be paid by the member.[49] And the approval of the substitution by the society is sometimes made a condition precedent to a valid substitution.[50] The fact that an application or direction for a change of beneficiary is inclosed in a sealed envelope addressed to the proper officer of the society is not a compliance with a law requiring it to be forwarded to such officer, where it is not mailed;[51] and even if it is mailed the member runs the risk of its not being delivered in seasonable time.[52] It has been held, however, that notice to the society is not essential to a valid substitution of beneficiaries unless required by the certificate or the laws of the society.[53] An unexecuted

64 Iowa 534, 21 N. W. 19; Hamilton *v.* Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186.

46. Pennsylvania R. Co. *v.* Warren, 69 N. J. Eq. 706, 60 Atl. 1122.

No particular form of writing is required under a provision in a certificate empowering the member to change the beneficiary by "writing filed with the association," his intent being clear. Bowman *v.* Moore, 87 Cal. 306, 25 Pac. 409.

47. *Iowa.*— Hainer *v.* Iowa Legion of Honor, 78 Iowa 245, 43 N. W. 185.

Michigan.—Supreme Lodge K. H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826.

Minnesota.— Hall *v.* Northwestern Endowment, etc., Assoc., 47 Minn. 85, 49 N. W. 524.

Missouri.— Grand Lodge A. O. U. W. *v.* Ross, 89 Mo. App. 621.

New Jersey.— Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142.

See 28 Cent. Dig. tit. "Insurance," § 1952.

Indorsement of change by agent of member.— The member may authorize an officer of the society to indorse the change on the certificate, and thus effect a substitution of beneficiaries. Bowman *v.* Moore, 87 Cal. 306, 25 Pac. 409; Schmidt *v.* Iowa Knights of Pythias Ins. Assoc., 82 Iowa 304, 47 N. W. 1032, 11 L. R. A. 205. And see Hall *v.* Allen, 75 Miss. 175, 22 So. 4, 65 Am. St. Rep. 601.

48. Hainer *v.* Iowa Legion of Honor, 78 Iowa 245, 43 N. W. 185; Abbott *v.* Supreme Colony U. O. P. F., 190 Mass. 67, 76 N. E. 234; Supreme Lodge K. H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826; Gladding *v.* Gladding, 8 N. Y. Suppl. 880.

Actual witnessing of the member's signature by an officer of the lodge is not required by a law requiring the officer to attest the application or order for a change of beneficiary. Simcoke *v.* Grand Lodge A. O. U. W., 84 Iowa 383, 51 N. W. 8, 15 L. R. A. 114; Donnelly *v.* Burnham, 86 N. Y. App. Div. 226, 83 N. Y. Suppl. 659 [*affirmed* in 177 N. Y. 546, 69 N. E. 1122].

49. Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80]; Stringham *v.* Dillon, 42 Oreg. 63, 69 Pac. 1020.

Authority to receive fee.— The fee must be paid to a person having authority to receive it in the society's behalf. Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80].

50. Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Council A. L. H. *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770; Armstrong *v.* Warren, 83 Hun (N. Y.) 217, 31 N. Y. Suppl. 665; Murphy *v.* Metropolitan St. R. Assoc., 25 Misc. (N. Y.) 751, 55 N. Y. Suppl. 620; Gladding *v.* Gladding, 8 N. Y. Suppl. 880; Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785. See, however, Finch *v.* Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384, holding that a by-law providing that a member may change beneficiaries, and on "proper evidence of such change to the satisfaction and approval of the" society, the benefit will be paid to the new beneficiary, does not require the society's approval of a change of beneficiary.

A formal vote of approval is not necessary under a by-law requiring a change in the beneficiary to be approved by the board of managers. Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091.

If the member has a right to make the change without the society's consent, the society cannot defeat the change by withholding its consent. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Scholl *v.* Sadoury, 25 Pittsb. Leg. J. N. S. (Pa.) 43. And see Fink *v.* Delaware, etc., Mut. Aid Soc., 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80 [*reversed* on other grounds in 171 N. Y. 616, 64 N. E. 506].

51. Hamilton *v.* Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186.

52. Knights of Maccabees of World *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532; Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80], where there is no provision in the by-laws for sending it by mail, and there has been no correspondence with the association on the subject, since if nothing has been done by either party to call for a letter from the other, the agent selected to deliver is the agent of the sender, not of the receiver, and the relation is not changed by selecting the United States mail as the agency to make the delivery, any more than if an express company or a personal messenger had been chosen for that purpose.

53. Hirschl *v.* Clark, 81 Iowa 200, 47 N. W. 78, 9 L. R. A. 841, in which case the substitution was sustained, although the society did not receive notice until after the member's death.

intent to substitute a new beneficiary is not equivalent to an actual substitution,[54] even though the certificate is delivered to the person attempted to be substituted;[55] nor does an unexecuted agreement to substitute a person as beneficiary entitle him to the benefits,[56] even though he pays subsequent dues and assessments in reliance thereon.[57] To give effect to a change of beneficiary the new beneficiary must of course be definitely identified.[58] If no beneficiary is designated by name in the certificate when it is issued, although it provides that in case no designation is made the benefit shall be paid to the member's heirs or legatees, the subsequent designation of a beneficiary by name is an original designation, which need not be made in the manner prescribed for changing beneficiaries.[59] A statute relating to the method of changing beneficiaries does not apply to the subsequent change of a beneficiary in a certificate issued before it was enacted.[60]

b. Exceptions to Rule. The rule that the parties must comply with the laws of the society in order to effect a change of beneficiary[61] is subject to three exceptions, namely: (1) Where the society has waived compliance with its regulations or estopped itself to assert non-compliance therewith.[62] (2) Where it is beyond the power of the member to comply literally with the regulations,[63] as

54. McLaughlin *v.* McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; Highland *v.* Highland, 109 Ill. 366 [*affirming* 13 Ill. App. 510]; Simmons *v.* Simmons, 24 Ont. 662.

55. Rollins *v.* McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260; Gordon *v.* Gordon, 117 Ill. App. 91; Eagan *v.* Eagan, 58 N. Y. App. Div. 253, 68 N. Y. Suppl. 777; Smith *v.* Supreme Council R. A., 127 N. C. 138, 37 S. E. 159. See, however, Lockett *v.* Lockett, 80 S. W. 1152, 26 Ky. L. Rep. 300. *Compare* Simmons *v.* Simmons, 24 Ont. 662.

56. Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787. *Contra*, Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247; Broadrick *v.* Broadrick, 25 Pa. Super. Ct. (Pa.) 225. And see Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639.

57. Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787; Eagan *v.* Eagan, 58 N. Y. App. Div. 253, 68 N. Y. Suppl. 777. *Compare* Simmons *v.* Simmons, 24 Ont. 662.

58. Mason *v.* Mason, 160 Ind. 191, 65 N. E. 585 (holding that where the regulations provided that an applicant might, in his application or subsequently, designate a beneficiary other than a relative, and that benefits should be payable only to the beneficiary designated in the application, if living, there was no change of beneficiary, where a supplementary application provided for none, and the new certificate issued on surrender of the old one did not specify a beneficiary, although the member at the time declared another his beneficiary, and delivered the new certificate to her); Grace *v.* Northwestern Mut. Relief Assoc., 87 Wis. 562, 58 N. W. 1041, 41 Am. St. Rep. 62 (where a member applied for change of beneficiary, stating that the former certificate was thereby returned and surrendered for the purpose of the application, and that the association should forward a new certificate payable to such persons as he might name in his will, and the certificate was issued accordingly, but no beneficiaries were ever designated by will or otherwise). And see, generally, *supra*, IV, B, 2.

However, where a member requested the society to substitute his executors as beneficiaries, the fact that the executors were not named in the request does not render the substitution invalid, as they can be identified by the will to which the member referred in his request for the change. Bowman *v.* Moore, 87 Cal. 306, 25 Pac. 409.

59. Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091; Shryock *v.* Shryock, 50 Nebr. 886, 70 N. W. 515, where the certificate provided, "It is my will that the benefit fund named in this certificate be paid to —— legal heirs."

60. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543 [*affirming* 61 Ill. App. 42]; Moan *v.* Normile, 37 N. Y. App. Div. 614, 56 N. Y. Suppl. 339.

61. See *supra*, IV, C, 3, a.

62. See *infra*, IV, C, 3, e.

63. *Illinois.*— Gordon *v.* Gordon, 117 Ill. App. 91.

Missouri.— St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091.

New York.— See Wilson *v.* Bryce, 43 N. Y. App. Div. 491, 60 N. Y. Suppl. 132.

Oregon.— Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

United States.— Supreme Conclave R. A. *v.* Cappella, 41 Fed. 1.

See 28 Cent. Dig. tit. "Insurance," § 1951.

Failure to indorse a change of beneficiaries on the certificate is excused where the certificate has been lost (Grand Lodge A. O. U. W. *v.* Noll, 90 Mich. 37, 51 N. W. 268, 30 Am. St. Rep. 419, 15 L. R. A. 350; Grand Lodge A. O. U. W. *v.* Child, 70 Mich. 163, 38 N. W. 1), where the original beneficiary has possession of it and will not give it up (Grand Lodge A. O. U. W. *v.* Kohler, 106 Mich. 121, 63 N. W. 897), or where it is in possession of the society (Hall *v.* Allen, 75 Miss. 175, 22 So. 4, 65 Am. St. Rep. 601).

Failure to have the change attested by two witnesses is not excused by the fact that

where the rules require a surrender of the original certificate and it is impossible for the member to surrender it.[64] And (3) where the member has done all that he is required to do, and only formal ministerial acts on the part of the society remain to be done in order to complete the change, and the member dies before performance thereof.[65]

e. Revocation and Change by Will. The cases are not in accord as to whether a change of beneficiary may be effected by will of the member. In some cases it is held that the beneficiary may be thus changed,[66] unless a different mode of substitution is prescribed by the laws of the society,[67] in which case a substitution by

the member was sick in a hospital whose rules allowed a patient to have but one visitor a day. Abbott *v.* Supreme Colony U. O. P. F., 190 Mass. 67, 76 N. E. 234.

64. Isgrigg *v.* Schooley, 125 Ind. 94, 25 N. E. 151 (as where the certificate has been wrongfully taken from the member); Hirschl *v.* Clark, 81 Iowa 200, 47 N. W. 78, 9 L. R. A. 841 (*semble*); Lahey *v.* Lahey, 174 N. Y. 146, 66 N. E. 670, 95 Am. St. Rep. 554, 61 L. R. A. 791.

If the original beneficiary refuses to surrender the certificate the member is excused from doing so. Jory *v.* Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733; Leaf *v.* Leaf, 12 Ky. L. Rep. 47; Lahey *v.* Lahey, 174 N. Y. 146, 66 N. E. 670, 95 Am. St. Rep. 554, 61 L. R. A. 791. Estoppel of original beneficiary to object to non-surrender of certificate see *infra*, IV, C, 3, e.

This excuse for non-surrender is recognized by the rules of some societies (Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68), which, however, sometimes provide that in case of the loss of the certificate the member desiring a change of beneficiary must furnish the sovereign clerk satisfactory proof under oath of such loss (Flowers *v.* Sovereign Camp W. W., (Tex. Civ. App. 1905) 90 S. W. 526).

65. *District of Columbia.*— Berkeley *v.* Harper, 3 App. Cas. 308.

Illinois.— Gordon *v.* Gordon, 117 Ill. App. 91.

Kansas.— Heydorf *v.* Conrack, 7 Kan. App. 202, 52 Pac. 700.

Massachusetts.— See Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382.

Mississippi.— Hall *v.* Allen, 75 Miss. 175, 23 So. 4, 65 Am. St. Rep. 601.

Missouri.— St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091; National American Assoc. *v.* Kirgin, 28 Mo. App. 80.

New Hampshire.— Sanborn *v.* Black, 67 N. H. 537, 35 Atl. 942.

New York.— Donnelly *v.* Burnham, 177 N. Y. 546, 69 N. E. 1122 [*affirming* 86 N. Y. App. Div. 226, 83 N. Y. Suppl. 659]; Luhrs *v.* Luhrs, 123 N. Y. 367, 25 N. E. 388, 20 Am. St. Rep. 754, 9 L. R. A. 534 [*reversing* 6 N. Y. Suppl. 51]. And see Fink *v.* Delaware, etc., Mut. Aid Soc., 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80 [*reversed* on other grounds in 171 N. Y. 616, 64 N. E. 506].

Oregon.— Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

Wisconsin.—Waldum *v.* Homstad, 119 Wis. 312, 96 N. W. 806; McGowan *v.* Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603.

United States.— Supreme Lodge O. G. C. *v.* Terrell, 99 Fed. 330; Supreme Conclave R. A. *v.* Cappella, 41 Fed. 1.

See 28 Cent. Dig. tit. "Insurance," § 1951.

Consent of society as prerequisite to substitution of beneficiary see *supra*, IV, C, 3, a.

66. Supreme Council Catholic Mut. Ben. Assoc. *v.* Priest, 46 Mich. 429, 9 N. W. 481; Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25.

Sufficiency of bequest.—The will of a member of a mutual benefit association directing all policies of insurance on his life to be invested and used by his wife for the benefit of herself and their children is not such an execution of the power of appointment of a beneficiary as will control the fund under a policy payable to his mother, where the member had other policies of insurance, it not appearing from the will that there was an intention again to exercise the power of appointment by naming another beneficiary. Young Men's Mut. Life Assoc. *v.* Harrison, 10 Ohio Dec. (Reprint) 786, 23 Cinc. L. Bul. 360. So there can be no inference of intent to change the already designated beneficiaries by a mere residuary clause in the member's will. Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689. And a will is insufficient to effect a change of beneficiary where it makes no reference to the certificate or to the moneys payable thereunder, as is required by statute. *Re* Snyder, 4 Ont. L. Rep. 320.

Validity of will.— An attempt by insured to change the beneficiary named in the policy by an instrument purporting to be a will but which has no witnesses is ineffectual for that purpose. Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470.

Sufficiency of identification of beneficiary by will see *supra*, IV, C, 3, a.

67. Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25.

However, regulations which provide that on the death of a member his share of the beneficiary fund shall be paid to the persons named by him on the will book, and that if he names no one it shall be divided equally among his family do not prevent a member from changing by will a previous designation made on the will book. Supreme

will is invalid.[68] Other cases, on the contrary, hold that a will is ineffectual to change the designation,[69] unless the laws of the society authorize a substitution to be made in that manner,[70] in which case a substitution by will is valid.[71]

d. Who May Question Sufficiency of Revocation and Change. It is generally held that the regulations concerning the method of changing beneficiaries are prescribed for the protection of the society, and that if the society has by waiver or estoppel lost its right to object to a change of beneficiary[72] no one else may raise that objection.[73] Accordingly if a change of beneficiaries has actually been consummated and acted on by the society in the member's lifetime, the original beneficiary has no standing to attack the change because it was not made in compliance with the regulations of the society.[74]

Council Catholic Mut. Ben. Assoc. *v.* Priest, 46 Mich. 429, 9 N. W. 481.

68. *Indiana.*— Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116.

Iowa.— Hainer *v.* Iowa Legion of Honor, 78 Iowa 245, 43 N. W. 185; Stephenson *v.* Stephenson, 64 Iowa 534, 21 N. W. 19.

Massachusetts.— McCarthy *v.* Supreme Lodge N. E. O. P., 153 Mass. 314, 26 N. E. 866, 25 Am. St. Rep. 637, 11 L. R. A. 144; Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166.

New York.— Fink *v.* Fink, 171 N. Y. 616, 64 N. E. 506 [*reversing* 57 N. Y. App. Div. 507, 68 N. Y. Suppl. 80].

Pennsylvania.— *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058, 4 L. R. A. N. S. 939 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059]; Vollman's Appeal, 92 Pa. St. 50.

England.— Bennett *v.* Slater, [1899] 1 Q. B. 45, 68 L. J. Q. B. 45, 79 L. T. Rep. N. S. 324, 47 Wkly. Rep. 82.

See 28 Cent. Dig. tit. "Insurance," § 1953.

69. De Silva *v.* Supreme Council P. U., 109 Cal. 373, 42 Pac. 32; Burke *v.* Modern Woodmen of America, 2 Cal. App. 611, 84 Pac. 275; *In re* Harton, 213 Pa. St. 499, 62 Atl. 1058, 4 L. R. A. N. S. 939 [*followed* in *In re* Harton, 213 Pa. St. 505, 62 Atl. 1059]. See, however, Bowman *v.* Moore, 87 Cal. 306, 25 Pac. 409, holding that the substitution of the executors of the member as his beneficiaries, and the insertion in his will of a direction to them to apply the proceeds in payment of his debts, is not an attempt to devise by will the policy or its proceeds.

70. See cases cited *supra*, note 69.

71. Raub *v.* Masonic Mut. Relief Assoc., 3 Mackey (D. C.) 68; Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543 [*affirming* 61 Ill. App. 42].

72. See *infra*, IV, C, 3, e.

73. Munhall *v.* Daly, 37 Ill. App. 628 (holding that persons who would not in any event be entitled to the fund cannot object to the change of designation); Schomaker *v.* Schwebel, 204 Pa. St. 470, 54 Atl. 337 (holding that, although no formal change of beneficiary is made, yet where the original beneficiary has paid over the fund to another person pursuant to an ante-mortem direction of the member, the original beneficiary's assignee in bankruptcy cannot recover the fund from such person); Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247.

74. *Illinois.*— Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620 [*affirming* 27 Ill. App. 121]; Gordon *v.* Gordon, 117 Ill. App. 91.

Iowa.— Wandell *v.* Mystic Toilers, 130 Iowa 639, 105 N. W. 448; Depee *v.* Grand Lodge A. O. U. W., 106 Iowa 747, 76 N. W. 798; Schmidt *v.* Iowa Knights of Pythias Ins. Assoc., 82 Iowa 304, 47 N. W. 1032, 11 L. R. A. 205.

Kansas.— Titsworth *v.* Titsworth, 40 Kan. 571, 20 Pac. 213.

Kentucky.— Manning *v.* Ancient Order of United Workmen, 86 Ky. 136, 5 S. W. 385, 9 Ky. L. Rep. 428, 9 Am. St. Rep. 270.

Michigan.— Supreme Court O. P. *v.* Davis, 129 Mich. 318, 88 N. W. 874.

Minnesota.— Fischer *v.* Malchow, 93 Minn. 396, 101 N. W. 602; Schoenau *v.* Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999.

New York.— Stronge *v.* Supreme Lodge K. P., 111 N. Y. App. Div. 87, 97 N. Y. Suppl. 661; Fanning *v.* Supreme Council Catholic Mut. Ben. Assoc., 84 N. Y. App. Div. 205, 82 N. Y. Suppl. 733 [*affirmed* in 178 N. Y. 629, 71 N. E. 1130]; Klee *v.* Klee, 47 Misc. 101, 93 N. Y. Suppl. 588.

Ohio.— Earley *v.* Earley, 23 Ohio Cir. Ct. 618.

Pennsylvania.— Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247.

Tennessee.— Schardt *v.* Schardt, 100 Tenn. 276, 45 S. W. 340.

Washington.— Cade *v.* Head Camp Pacific Jurisdiction W. W., 27 Wash. 218, 67 Pac. 603.

United States.— Supreme Conclave R. A. *v.* Cappella, 41 Fed. 1.

See 28 Cent. Dig. tit. "Insurance," § 1951.

If no change is actually made in the member's lifetime the original beneficiary may object to its validity. Gordon *v.* Gordon, 117 Ill. App. 91; Pennsylvania R. Co. *v.* Warren, 69 N. J. Eq. 706, 60 Atl. 1122; Grand Lodge A. O. U. W. *v.* Connolly, 58 N. J. Eq. 180, 43 Atl. 286; Brown *v.* Grand Lodge A. O. U. W., 208 Pa. St. 101, 107, 57 Atl. 176, 1134. Consummation of change after death of member see *supra*, IV, C, 2, c, (II).

If the society does not assent to an irregular change of beneficiaries in the mem-

e. Estoppel and Waiver.[75] The society may, in the lifetime of the member,[76] waive provisions in its laws or in the certificate governing the method of changing beneficiaries,[77] or estop itself from insisting thereon,[78] and when it has done so no

ber's lifetime, the original beneficiary may attack the change. Holland *v.* Taylor, 111 Ind. 121, 12 N. E. 116; Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470; Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785; Hotel-Men's Mut. Ben. Assoc. *v.* Brown, 33 Fed. 11. Authority to assent to irregular change of beneficiaries see *infra*, IV, C, 3, e. Waiver of objections after death of member see *infra*, IV, C, 3, e.

Estoppel of original beneficiary to object to mode of changing beneficiary see *infra*, IV, C, 3, e.

75. **Estoppel of insured to change beneficiary** see *supra*, IV, C, 2, c, (II).

Estoppel of new beneficiary to claim as such see *supra*, IV, C, 2, c, (II).

76. See cases cited *infra*, this note.

As against the original beneficiary, the society cannot, by any act or omission occurring after the member's death, waive compliance with provisions governing the mode of changing beneficiaries, since immediately on the member's death the original beneficiary's rights become vested. McLaughlin *v.* McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; Gordon *v.* Gordon, 117 Ill. App. 91; Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470; Knights of Maccabees *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532.

77. *California.*— Adams *v.* Grand Lodge A. O. U. W., 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45.

Illinois.— Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130]; Gordon *v.* Gordon, 117 Ill. App. 91.

Kansas.— Titsworth *v.* Titsworth, 40 Kan. 571, 20 Pac. 213.

Kentucky.— Manning *v.* Ancient Order of United Workmen, 86 Ky. 136, 5 S. W. 385, 9 Ky. L. Rep. 428, 9 Am. St. Rep. 270.

Massachusetts.— Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382.

Michigan.—Allgemeiner Arbeiter Bund *v.* Adamson, 132 Mich. 86, 92 N. W. 786.

Minnesota.— Fischer *v.* Malchow, 93 Minn. 396, 101 N. W. 602; Schoenau *v.* Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999.

Mississippi.— Hall *v.* Allen, 75 Miss. 175, 22 So. 4, 65 Am. St. Rep. 601.

Missouri.— St. Louis Police Relief Assoc. *v.* Strode, 103 Mo. App. 694, 77 S. W. 1091.

Montana.—Knights of Maccabees *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532.

New York.— Stronge *v.* Supreme Lodge K. P., 111 N. Y. App. Div. 87, 97 N. Y. Suppl. 661; Fanning *v.* Supreme Council Catholic Mut. Ben. Assoc., 84 N. Y. App. Div. 205, 82 N. Y. Suppl. 733 [*affirmed* in 178 N. Y. 629, 71 N. E. 1130]; Moan *v.* Normile, 37 N. Y. App. Div. 614, 56 N. Y. Suppl. 339; Kepler *v.* Supreme Lodge K. H., 45 Hun 274 (holding that the delivery of a will changing the beneficiary to an officer of the lodge, and the statement to the reporter of its contents and of the understanding of insured that it conveyed his insurance to the new beneficiary, and the retention of the will by the lodge, waive any irregularity in the designation of the new beneficiary); Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901. And see Wilson *v.* Bryce, 43 N. Y. App. Div. 491, 60 N. Y. Suppl. 132; Klee *v.* Klee, 47 Misc. 101, 93 N. Y. Suppl. 588.

Oregon.— Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061. And see Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785, holding, however, that the failure of a local court of a beneficial association to meet at a regular meeting time prior to an insured's death and after he had applied to the secretary for a change of a beneficiary is not a waiver by the association of a rule that a petition for such a change should be filed with the local court, where insured filed no petition prior to his death.

Pennsylvania.— Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247.

Texas.— Splawn *v.* Chew, 60 Tex. 532.

United States.— Supreme Conclave R. A. *v.* Cappella, 41 Fed. 1. And see Lamont *v.* Hotel Men's Mut. Ben. Assoc., 30 Fed. 817.

See 28 Cent. Dig. tit. "Insurance," § 1954.

By depositing the money in court or with a stakeholder the society loses its right to object to the mode by which the beneficiary was changed. Titsworth *v.* Titsworth, 40 Kan. 571, 20 Pac. 213; Hall *v.* Allen, 75 Miss. 175, 22 So. 4, 65 Am. St. Rep. 601; Knights of Maccabees *v.* Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532; Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061; Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247.

By issuing a new certificate payable to a new beneficiary the society waives irregularities in regard to the change of beneficiary. Adams *v.* Grand Lodge A. O. U. W., 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; Fanning *v.* Supreme Council Catholic Mut. Ben. Assoc., 84 N. Y. App. Div. 205, 82 N. Y. Suppl. 733 [*affirmed* in 178 N. Y. 629, 71 N. E. 1130].

Authority to waive.— No act or omission of any officer or agent of the society will amount to a waiver unless he has authority in that regard. Wendt *v.* Iowa Legion of Honor, 72 Iowa 682, 34 N. W. 470; Independent Order of Foresters *v.* Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

78. Wandell *v.* Mystic Toilers, 130 Iowa 639, 105 N. W. 448. See, however, Clark *v.*

one else can as a rule take advantage of non-compliance with such provisions.[79] So the original beneficiary, even where he might otherwise object to the method in which a new beneficiary was substituted,[80] may by his conduct estop himself from raising such objections.[81] Where a suspended member designates a new beneficiary in his application for reinstatement, the fact that on reinstatement he receives and countersigns a clearance card referring to him as the holder of his old certificate, which by its terms had become null and void, does not preclude him from demanding a new certificate designating the new beneficiary in accordance with the rules of the society.[82]

D. Contingency on Which Benefits Are Payable[83]— **1. In General.** Benefits are generally payable on the death of the member,[84] on his becoming sick or otherwise disabled,[85] or on his attaining a specified age.[86] However, the certificates or laws of some societies provide that no benefits shall be recoverable on account of sickness, disability, or death occurring within a certain period after issuance of the certificate;[87] and it is frequently provided that benefits shall not be paid on account of sickness, disability, or death resulting from the use of intoxicants,[88] or

Supreme Council R. A., 176 Mass. 468, 57 N. E. 787.

79. See *supra*, IV, C, 3, d.

80. See *supra*, IV, C, 3, d.

81. *Illinois.*— Delaney *v.* Delaney, 175 Ill. 187, 51 N. E. 961 [*affirming* 70 Ill. App. 130], where the original beneficiary refused to give up the certificate, and thus prevented the member from complying with a rule requiring him to surrender it on changing the beneficiary. And see *supra*, IV, C, 3, b.

Iowa.— Hainer *v.* Iowa Legion of Honor, 78 Iowa 245, 43 N. W. 185, where a member made a change of beneficiaries by will, a method not in compliance with the contract of insurance, but the original beneficiary induced him to rely on her acquiescence in the provisions of the will, and accepted benefits under it after his decease.

Kentucky.— See Lockett *v.* Lockett, 80 S. W. 1152, 26 Ky. L. Rep. 300.

Massachusetts.—Marsh *v.* Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382, where a member delivered his certificate and a petition for substitution to the subordinate secretary, who, acting in collusion with the original beneficiary, delivered the certificate to her, and forwarded the petition without sealing or attesting it as required by the rules. See, however, Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787, where the contention was between the widow and children of a former wife.

United States.— Supreme Conclave R. A. *v.* Cappella, 41 Fed. 1, where a member made a written request for a change in his certificate in favor of his father in the form prescribed by the by-laws, stating that the original certificate was in the hands of his aunt, the original beneficiary, and that he could not make an actual surrender of such certificate, and before the certificate was made out he died, and the aunt had agreed to see that the change was made, but subsequently refused to do so.

See 28 Cent. Dig. tit. "Insurance," § 1954.

82. Davidson *v.* Supreme Lodge K. P., 22 Mo. App. 263.

83. Retrospective operation of laws of society as to contingency on which benefits are payable see *supra*, II, D, 3, b, (II).

84. See *infra*, IV, D, 2.

85. See *infra*, IV, D, 3.

86. See *infra*, IV, D, 4.

87. Willison *v.* Jewelers, etc., Co., 30 Misc. (N. Y.) 197, 61 N. Y. Suppl. 1125. See, however, Irish Catholic Ben. Soc. *v.* Gooley, 31 L. C. Jur. 56.

If a sickness begins within the prescribed period, no benefits are recoverable, although it continues after the expiration of that period. Dabura *v.* Sociedad de la Union, (Tex. Civ. App. 1900) 59 S. W. 835. See McDonald *v.* Dominion Coal Co.'s Relief Fund, 36 Nova Scotia 15. See, however, Baronowski *v.* Baltimore Mut. Aid Soc., 39 Wkly. Notes Cas. (Pa.) 533, holding that where the certificate stipulated that no benefits should be paid within twenty weeks of its date of issue, and that in case of sickness or death within that period the society should return the premiums and cancel the certificate, if the society fails to cancel its liability and refund the premiums paid on a sickness occurring within the period specified, it will be liable for sick benefits for illness occurring after the expiration of the twenty weeks.

88. *California.*— Hogins *v.* Supreme Council C. R. C., 76 Cal. 109, 18 Pac. 125, 9 Am. St. Rep. 173.

Maine.— Marcoux *v.* St. John Baptist Beneficence Soc., 91 Me. 250, 39 Atl. 1027.

Missouri.— Beller *v.* Supreme Lodge K. P., 66 Mo. App. 449, holding that where a certificate provides that it shall be void if the death of insured was caused by use of intoxicating liquors, the beneficiary cannot recover if the death was caused even by the moderate use of intoxicants.

Pennsylvania.— See Orth *v.* Carsten, 1 Wkly. Notes Cas. 199.

Texas.— Kempe *v.* Woodmen of World, (Civ. App. 1898) 44 S. W. 688, holding that where a certificate provided that it should become void if the holder became so far intemperate as permanently to impair his health, and he could then be expelled from the fraternity, and deceased was expelled he-

from the members engaging in certain prohibited occupations considered extrahazardous in their nature.[89]

2. Death[90] — a. In General. Mutual benefit societies are generally bound by the terms of their certificates, or their charters of incorporation or articles of association and their constitution and by-laws, to pay, on the death of a member, a prescribed amount, known as a death benefit, to a person designated by him as beneficiary or otherwise as the certificate and laws of the society in question may prescribe;[91] and such societies frequently bind themselves to pay funeral benefits on the death of a member.[92]

cause of his excessive drinking, and that habit ultimately caused his death, there could be no recovery, although deceased was insane at the time of his expulsion.

See 28 Cent. Dig. tit. "Insurance," § 1955.

If the lodge issuing a certificate has no power to require a pledge of abstinence, a provision exempting the society from liability in case of death due to the use of intoxicants is of no effect. Grand Lodge A. O. U. W. *v.* Haynes, 16 Ky. L. Rep. 399.

In the absence of any provision exempting the society from liability if illness is caused by the indiscretion of a member, it will be liable, although the condition of the member has been brought on by indulgence in unnatural and vicious habits. Wuerthner *v.* Workingmen's Benev. Soc., 121 Mich. 90, 79 N. W. 921, 80 Am. St. Rep. 484. See, however, Orth *v.* Carsten, 1 Wkly. Notes Cas. (Pa.) 199.

Intemperance not causing sickness or death as breach of promissory warranty or condition subsequent see *infra*, IV, I, 2, e.

Validity of by-law exempting society from liability for benefits in case of intemperance see *supra*, I, C, 2, h.

89. Abell *v.* Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65, 906, holding, however, that the certificate remains in full force and effect except as to the hazards of such occupation.

Engaging in prohibited occupation not causing sickness or death as breach of promissory warranty or condition subsequent see *infra*, IV, I, 2, e.

90. **Exemption of liability for death due to intemperance or engaging in prohibited occupation** see *supra*, IV, D, 1, a.

Stipulation as to time when certificate goes into effect see *supra*, IV, D, 1, a.

91. Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168 (holding that the fact that a membership certificate contains no promise to pay mortuary benefits does not relieve the society from paying the same where provisions to that effect are found in the constitution and by-laws, since they are considered as part of the certificate); Peet *v.* Great Camp K. M., 83 Mich. 92, 47 N. W. 119 (holding that where the constitution of a society provides that on "the death, or on reaching 70 years of age, or total and permanent disability of a member," a sum "shall be paid to the member," or to specified relatives, "as he may direct, and as the endowment laws provide"; and the endowment laws provide that no certificate shall be made payable to any other person than the wife, children, and other specified relatives of the member, and that if a member dies without having made direction as to payment the same shall be made to his legal heirs, a certificate issued to a member himself as beneficiary matures at his death, as well as on his being totally disabled or reaching seventy years of age).

Accident insurance.— Where a certificate in a benefit association provides that there shall be no liability in case of death from disease, the fact that apoplexy intervenes will not relieve the association if death is caused by bodily injury. Indianapolis Nat. Ben. Assoc. *v.* Granman, 107 Ind. 288, 7 N. E. 233. And where an insured, by reason of an insane impulse, does an act causing his death, the death is "through and by external, violent and accidental means," within the provisions of an accident certificate. Tuttle *v.* Iowa State Traveling Men's Assoc., 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. N. S. 223. However, under an accident certificate providing that there shall be no liability for a disability happening directly or indirectly, wholly or in part, because of any disease or bodily infirmity, there can be no recovery where the diseased condition of insured's arteries at the time of accident contributed to the disability. Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190.

Exception of death from pregnancy.—A provision in a certificate that it should be void in case the holder should be attended at confinement or miscarriage by any one not a regularly licensed physician is superseded by a special contract by which insured waives all benefits in case her death should result from pregnancy; and death from puerperal septicæmia results from pregnancy within the meaning of the waiver. Knights, etc., of Columbia Ins. Order *v.* Shoaf, 166 Ind. 367, 77 N. E. 738.

92. Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627; Thomas *v.* Societa Italiana di Mutuo Soccorso, 10 Misc. (N. Y.) 746, 31 N. Y. Suppl. 815, where the by-laws of a society stated its objects to be (1) to give its members financial relief in time of sickness, (2) legal protection in case of wrong, and (3) funeral in case of death; and they also provided for a tax for funerals; and it was held that the provision in regard to funerals required the society to pay the expenses, and did not mean merely that the members of the society should be called on to attend a member's burial.

b. Death in Violation of Law. Death of the member while he is engaged in a violation of the law is often excepted from the risks insured against by the terms of the certificate.[93]

c. Suicide.[94] The cases are not in accord as to the effect of suicide on the liability for death benefits in the absence of any stipulations on the subject in the constitution or by-laws or the contract of insurance. In some cases it is held that if the certificate is payable to a person other than the member or his personal representative, the society is liable thereon even though at the time of taking his life the member was sane.[95] Other courts, on the contrary, hold that in such case the society is relieved from liability,[96] and that benefits cannot be recovered unless at the time of suicide the member was insane.[97] However this

Power to provide for funeral benefits see *supra*, I, G, 1, a.

93. Davis *v.* Modern Woodmen of America, 98 Mo. App. 713, 73 S. W. 923, where it appeared that deceased, seeing a neighbor with whom he had long been on bad terms, passing in the highway, armed himself, and, going out, had a wordy altercation with the neighbor, and, after the latter had passed on, stationed himself near the road, and waited fifteen or twenty minutes for the neighbor to return; and that when he did so, both parties fired and deceased was killed; and it was held that in awaiting the neighbor's return deceased was guilty of an unlawful act avoiding a certificate conditioned that it should be void if he was killed in consequence of a violation of law.

However, death received while retreating from a personal difficulty, not for the purpose of gaining vantage ground to renew it, where the encounter is begun by an assault by deceased on his slayer with a weapon capable of inflicting great bodily harm or death, according to its use, is not a death "in violation or attempted violation of any criminal law." Supreme Lodge K. P. *v.* Bradley, 73 Ark. 274, 83 S. W. 1055, 108 Am. St. Rep. 38, 67 L. R. A. 770. And a member did not die while violating the law where he entered the office of the state treasurer, obtained by a show of arms a sum of money, and was shot and killed while making his escape, but before he had reached the outer door of the capitol. Griffin *v.* Western Mut. Assoc., 20 Nebr. 620, 31 N. W. 122, 57 Am. Rep. 848.

Death in a duel.— In a certificate providing that it should be void if assured should be killed in a duel, the word "duel" signified a combat resulting from prearrangement, and hence the fact that assured was killed in combat did not avoid the certificate, in the absence of prearrangement. Davis *v.* Modern Woodmen of America, 98 Mo. App. 713, 73 S. W. 923.

Suicide.— In New York, although suicide is not a crime, yet it constitutes an illegal act within a provision exempting the society from liability in case the member dies by any illegal act of his own. Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 68 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594, and *overruling* Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 (*affirming* 42 Hun 245, which was *followed* in Freeman *v.* National Ben. Soc., 42 Hun 252, 5 N. Y. St. 82)]. In Illinois, however, suicide does not render the certificate void under a provision of the constitution of the society making a certificate void if insured dies on account of violating any criminal law of the state (Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439]); and this was formerly the rule in New York (Darrow *v.* Family Fund Soc., *supra*; Freeman *v.* National Ben. Soc., *supra*).

94. **Estoppel and waiver as to suicide** see *infra*, IV, J.

Incontestability clause as defeating defense of suicide see *infra*, IV, J, 6.

Procuring insurance with intent to commit suicide as fraud see *supra*, II, E, 1.

Retrospective operation of society laws as to effect of suicide see *supra*, II, D, 3, b, (II).

Suicide as death in violation of law see *supra*, note 93.

Suicide as involving loss of standing of member see *infra*, IV, I, 2, c.

Suicide through insane impulse as accident see *supra*, note 91.

95. Grand Legion S. K. A. *v.* Beaty, 117 Ill. App. 657 [*affirmed* in 224 Ill. 346, 79 N. E. 565, 8 L. R. A. N. S. 1124]; Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Mills *v.* Rebstock, 29 Minn. 380, 13 N. W. 162; Supreme Lodge S. & D. P. *v.* Underwood, 3 Nebr. (Unoff.) 798, 92 N. W. 1051. And see Morton *v.* Supreme Council R. L., 100 Mo. App. 76, 73 S. W. 259.

Funeral benefits are due by a beneficial society on the death of a member by suicide. Penn Lodge No. 105 K. P. *v.* Chalfant, 1 Chest. Co. Rep. (Pa.) 133.

96. Hunziker *v.* Supreme Lodge K. P., 117 Ky. 418, 78 S. W. 201, 25 Ky. L. Rep. 1510 (*semble*); Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594]; Reynolds *v.* Supreme Conclave I. O. H., 24 Pa. Co. Ct. 638, 18 Lanc. L. Rev. 125.

97. Hunziker *v.* Supreme Lodge K. P., 117 Ky. 418, 78 S. W. 201, 25 Ky. L. Rep. 1510;

may be, the society may on the one hand contract to pay benefits even in case the member takes his life;[98] and on the other hand the society may stipulate for a limited or conditional liability in case the member commits suicide;[99] and it is competent for the society to adopt laws totally exempting it from liability in case a member commits suicide,[1] or otherwise to incorporate a stipulation to that effect in the contract of insurance,[2] in which case the suicide of a member when sane constitutes a valid defense to an action on the certificate issued to him.[3] A stipulation against liability in case of suicide generally does not constitute a defense if at the time of suicide the member was insane;[4] but the society may lawfully stipulate against liability in case the member commits suicide, sane or insane,[5]

Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594], *semble*.

98. Morton *v.* Supreme Council R. L., 100 Mo. App. 76, 73 S. W. 259, where an association had so interpreted its contracts as to render itself liable thereunder, although the certificate holder committed suicide while sane by providing that it should not be liable if insured committed suicide within two years after the issuance of the certificate, and by thereafter passing by-laws that if insured committed suicide his beneficiary should be entitled to only one half of the face of the certificate.

99. Post *v.* Supreme Court I. O. F., 146 Mich. 666, 103 N. W. 841, holding that where the by-laws of a society precluded a recovery of benefits in case insured committed suicide, except in case the society's executive council or supreme court was satisfied that deceased, at the time of the suicide, was of unsound mind, and prior thereto he was known and reported to the supreme secretary as such, there can be no recovery in case of suicide, in the absence of any evidence that deceased was ever reported to the supreme secretary as insane, or that any such claim was made in the case or in the tribunals of the order.

Suicide in delirium resulting from illness. — The word "illness" in a certificate providing that the insurer will pay benefits of members who commit suicide in delirium resulting from "illness" does not refer only to such a sickness as confines one in bed. Supreme Lodge K. H. *v.* Lapp, 74 S. W. 656, 25 Ky. L. Rep. 74.

Time of suicide. — Where a society fixes a period in its certificate within which, if insured commits suicide, the certificate shall be avoided, death of insured by suicide after the expiration of such period does not constitute a defense to an action on the certificate. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299. Incontestability clause see *infra*, IV, J, 6.

1. Theobald *v.* Supreme Lodge K. P., 59 Mo. App. 87.

Power to enact regulations as to suicide as between supreme lodge and board of control see *supra*, I, C, 2, a.

Validity of condition against suicide in constitution or by-laws see *supra*, I, C, 2, b.

2. Blasingame *v.* Royal Circle, 111 Ill. App. 202; McCoy *v.* Northwestern Mut. Relief Assoc., 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681, both holding that the society may provide against liability in the event of suicide, notwithstanding such provision is not directly authorized by the constitution and by-laws of the organization.

3. Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381.

Funeral benefits are not recoverable in case of suicide where the certificate provides that "no benefits will be paid for self-inflicted injuries." Weber *v.* Home Benev. Soc., 21 Ind. App. 345, 52 N. E. 462.

4. Supreme Council R. A. *v.* Pels, 209 Ill. 33, 70 N. E. 697 [*affirming* 110 Ill. App. 409] (holding also that a suicide clause in a by-law exonerating the society from liability in case of suicide unless the beneficiary shall prove affirmatively that the member had been judicially declared insane, or was under treatment for insanity, or was in the delirium of other illness, merely relieves the beneficiary from proving the degree of insanity in case he proves any of the facts specified, but does not necessarily require proof of any of such facts to warrant a recovery); Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478]; Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Hammers *v.* Supreme Tent M. W., 78 Ill. App. 162; Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Mauch *v.* Supreme Tribe of Ben Hur, 100 N. Y. App. Div. 49, 91 N. Y. Suppl. 367 [*affirmed* in 184 N. Y. 527, 76 N. E. 1100]; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

5. Supreme Court of Honor *v.* Buxton, 111 Ill. App. 187; Seitzinger *v.* Modern Woodmen of America, 106 Ill. App. 449 [*affirmed* in 204 Ill. 58, 68 N. E. 478]; Supreme Lodge K. P. *v.* Clarke, 88 Ill. App. 600; Robson *v.* United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Mauch *v.* Supreme Tribe of Ben Hur, 100 N. Y. App. Div. 49, 91 N. Y. Suppl. 367 [*affirmed* in 184 N. Y. 527, 76 N. E. 1100]; United Moderns *v.* Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032. And see Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632, where exception is made if the act was committed in delirium resulting from sickness.

Validity of provision of constitution or by-laws against liability in case of suicide when insane see *supra*, I, C, 2, b.

and in this event the fact that the member was insane when he took his life does not render the society liable on his certificate.[6] To avoid the defense of suicide in cases where suicide when insane is not provided against, it is sufficient that the member at the time of taking his life was without sufficient reason to know what he was doing[7] or to recognize the consequences of his acts,[8] or was without sufficient will power, because of an insane impulse, to govern his actions,[9] or was unable to distinguish right from wrong;[10] and it is not essential in order to avoid the defense that the member's insanity should have been permanent in form.[11] To constitute suicide the member must have purposely destroyed his life.[12] Consequently, in order to relieve the society from liability under a provision against suicide when insane, insured must have been conscious of the physical nature and natural consequences of his act;[13] but the defense of suicide under such provision is not avoided because insured was unconscious of the moral character of his act;[14] nor because he was driven to suicide by an uncontrollable insane impulse.[15] In some states the defense of suicide is the subject of statutory regulation.[16] A beneficiary in a certificate issued by a mutual benefit association

6. *Illinois.*— Seitzinger *v.* Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478 [*affirming* 106 Ill. App. 449]; Supreme Court K. M. W. *v.* Marshall, 111 Ill. App. 312; Blasingame *v.* Royal Circle, 111 Ill. App. 202; Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630; Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632.

Michigan.— Sabin *v.* Senate of National Union, 90 Mich. 177, 51 N. W. 202; Streeter *v.* Western Union Mut. Life, etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882.

North Dakota.— Clemens *v.* Royal Neighbors of America, 14 N. D. 116, 103 N. W. 402.

Texas.— Brown *v.* United Moderns, (Civ. App. 1905) 87 S. W. 357.

United States.— Zimmerman *v.* Masonic Aid Assoc., 75 Fed. 236, holding that where the application provided that in case of death by suicide the contract should be "null and void," but the by-laws of the association, which were made a part of the contract, declared that in case of suicide, "sane or insane," the certificate should be void, except that the beneficiary should be entitled to the amount paid in, but that the board of directors might at their option waive this provision and pay in full, no recovery could be had on the policy if insured intentionally killed himself.

See 28 Cent. Dig. tit. "Insurance," § 1956.

7. Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787.

8. Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

9. Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

10. Supreme Council R. A. *v.* Pels, 110 Ill. App. 409 [*affirmed* in 209 Ill. 33, 70 N. E. 697]; Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787.

11. Hammers *v.* Supreme Tent M. W., 78 Ill. App. 162.

12. Grand Legion S. K. A. O. U. W. *v.* Korneman, (Kan. App. 1901) 63 Pac. 292, holding that death of a member by accidental drowning, although resulting directly from his acts, does not relieve the society from liability under a provision against death of the member by his own hand.

Suicide as accident see *supra*, note 91.

13. Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630 (*semble*); Sabin *v.* Senate of National Union, 90 Mich. 177, 51 N. W. 202 (*semble*); Streeter *v.* Western Union Mut. L., etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882 (*semble*); Brown *v.* United Moderns, (Tex. Civ. App. 1905) 87 S. W. 357 (*semble*). *Contra*, Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632.

14. Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630; Sabin *v.* Senate of National Union, 90 Mich. 177, 51 N. W. 202; Streeter *v.* Western Union Mut. L., etc., Co., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882.

15. Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632.

16. See the statutes of the different states.

In Missouri, Rev. St. (1899) § 7896, provides that in all suits on life policies issued by any company doing business in the state to a citizen thereof it shall be no defense that the insured committed suicide unless it appears that he contemplated suicide at the time that he made application for the policy, and any stipulation in the policy to the contrary shall be void. By section 1408 fraternal beneficiary societies as defined therein are exempt from the operation of section 7896. Morton *v.* Royal Tribe of Joseph, 93 Mo. App. 78; Theobald *v.* Supreme Lodge K. P., 59 Mo. App. 87. However, the latter section is not confined to insurance on the old line life plan, but is broad enough to cover any life insurance not withdrawn from

takes his rights through the insured, and subject to the terms of the contract entered into by him, and not in the same manner as the beneficiary in an ordinary life insurance policy, and hence he cannot recover on the certificate in case the insured commits suicide in violation of the express or implied conditions of the contract.[17]

d. Death Caused by Beneficiary. If the beneficiary intentionally causes the member's death, he cannot recover benefits.[18]

3. Sickness or Disability[19]—a. In General. The contract entered into by a beneficial society and its members generally provides for the payment of benefits to the member in case he is taken sick[20] or is otherwise disabled.[21]

its application by some other statute (Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967); and hence a foreign association which does not conform to the Missouri statute concerning fraternal beneficiary societies is not exempt under section 1408 from the operation of section 7896 (Dennis *v.* Modern Brotherhood of America, *supra*; Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071; Brassfield *v.* Knights of the Maccabees, 92 Mo. App. 102; Brasfield *v.* Modern Woodmen of America, 88 Mo. App. 208).

Estoppel of beneficiary to rely on statute. — If a foreign society, because of its failure to conform to Mo. Rev. St. (1899) § 1408, is not exempt under that section from the operation of section 7896, which abrogates the defense of suicide, the beneficiary in a certificate issued by the society to a citizen of Missouri is not estopped to rely on the latter section because the member entered into the contract with the association as such at reduced rates, on easy terms, and enjoyed its privileges as such member. Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967.

17. Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594]. And see cases cited *supra*, this section.

18. Supreme Lodge K. & L. H. *v.* Menkhausen, 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508 [*affirming* 106 Ill. App. 665]; Schreiner *v.* High Court I. C. O. F., 35 Ill. App. 576; Schmidt *v.* Northern Life Assoc., 112 Iowa 41, 83 N. W. 800, 84 Am. St. Rep. 323, 51 L. R. A. 141.

Intention.— The rule is otherwise where the death, not intentional, was caused by the carelessness or unlawful act of the beneficiary. Schreiner *v.* High Court I. C. O. F., 35 Ill. App. 576.

Insanity.— The killing of insured by an insane beneficiary under circumstances which would constitute murder if such beneficiary were sane does not work a forfeiture of the certificate. Holdom *v.* Grand Lodge A. O. U. W., 159 Ill. 619, 43 N. E. 772, 50 Am. St. Rep. 183, 31 L. R. A. 67 [*reversing* 51 Ill. App. 200].

Persons entitled to proceeds where beneficiary causes member's death see *infra*, IV, G, **3, a.**

19. **Exemption from liability in case sickness or disability is due to intemperance or engaging in prohibited occupation** see *supra*, IV, D, 1, a.

Stipulation as to time when certificate goes into effect see *supra*, IV, D, 1, a.

20. McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149. And see cases cited *passim*, IV, D, 3.

Conditions of liability.— The society may make its liability for sick benefits conditional on the residence of the member in a certain city (Penachio *v.* Saati Soc., 33 Misc. (N. Y.) 751, 67 N. Y. Suppl. 140); or provide that the member shall not be entitled to benefits while an inmate of a workhouse or lunatic asylum (Caistor Union *v.* Cleaver, 56 J. P. 503); and a member who follows no occupation, as where he is a retired merchant, may be barred from benefits (Bone *v.* Columbia Lodge No. 2 I. O. O. F., 1 Brit. Col. pt. ii, 349).

A resolution to suspend sick benefits for eight months when the treasury is exhausted is not a by-law in conflict with the constitution, which fixes sick benefits at not less than a certain sum per week. Toll *v.* Crimean, 13 Montg. Co. Rep. (Pa.) 33.

21. Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Peet *v.* Great Camp K. M. W., 83 Mich. 92, 47 N. W. 119; Monahan *v.* Supreme Lodge O. C. K., 88 Minn. 224, 92 N. W. 972.

Accident insurance.— Where the arm of a member of a beneficial association was shattered by a pistol shot received in a fight not caused by his fault, he is suffering from an accidental disability, within the meaning of the laws of the order providing for the payment of benefits to members "disabled by accident." Supreme Council O. C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298. So a shock to the nerves of an employee, caused by fright sustained in the discharge of his duty, which incapacitated him from employment, is an "accident" within the meaning of a certificate issued by a railroad company to such employee, under which a weekly allowance is to be paid by the company in case of such employee "being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service." Pugh *v.* London, etc., R. Co., [1896] 2 Q. B. 248, 65 L. J. Q. B. 521, 74 L. T. Rep. N. S. 724, 44 Wkly. Rep. 627. The word "immediately" in the constitution and laws of an order providing for

b. Nature and Extent. In so far as the liability of the society to pay benefits on account of the sickness or disability of a member depends on the nature or extent of the sickness or disability, resort must be had to the terms of the contract of insurance in the particular case as embodied in the certificate of membership and the constitution and by-laws of the society.[22]

benefits if a member shall sustain accidental injury which shall, independently of all other causes, immediately, wholly, and continuously disable him, refers to time, not cause; and hence in order to render the society liable the disability must follow within a very short time after the injury. Pepper *v.* Order of United Commercial Travelers of America, 113 Ky. 918, 69 S. W. 956, 24 Ky. L. Rep. 723.

22. See cases cited *infra*, this note. And see Peterson *v.* Modern Brotherhood of America, 125 Iowa 562, 101 N. W. 289, 67 L. R. A. 631, holding that a certificate entitling the insured to a certain benefit in case of the breaking of a leg, and defining the breaking of a leg as "the breaking of the shaft of the thigh between the hip and knee, or the shafts of both bones between the knee and ankle," does not cover what is known to the medical profession as a "Pott's fracture," which is defined as the breaking of one bone between the knee and ankle joints, and the dislocation of the other, or, as technically defined, the breaking of the fibula one and one half to two inches above the joint, and of the malleolus process.

"Sickness or other disability" includes insanity, so as to entitle a member who becomes insane to benefits. McCullough *v.* Expressman's Mut. Ben. Assoc., 133 Pa. St. 142, 19 Atl. 355, 7 L. R. A. 210; Robillard *v.* Societe St. Jean Baptiste de Centreville, 21 R. I. 348, 43 Atl. 635, 45 L. R. A. 559; Burton *v.* Eyden, L. R. 8 Q. B. 295, 42 L. J. M. C. 115, 28 L. T. Rep. N. S. 408, 21 Wkly. Rep. 593. A certificate insuring against sickness, and not extending to surgical treatment not necessitated by injury, does not exempt the association from liability for benefits accruing after a surgical operation which was necessitated as a means of curing the illness and which did not cause any sickness distinct from the sickness previous thereto (Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876); and a provision that the benefits shall not cover disabilities resulting from paralysis does not relieve the association from paying benefits to a beneficiary suffering from inflammation of the spinal cord, where his paralytic condition is but a sequence of such disease after it has reached a certain stage in its development, since the association is absolved from liability only when the disability is the direct result of paralysis (Yarbrough *v.* National Benev. Soc., 88 Mo. App. 465). However, the term "sickness" does not extend to a case of a permanent bodily injury which does not affect the general health of the person injured (Kelly *v.* Ancient Order of Hibernians, 9 Daly (N. Y.) 289); nor does it extend to the natural decay attendant on old age (Dunkley *v.* Harrison, 51 J. P. 788, 56 L. T. Rep. N. S. 660).

Total or permanent disability.— Under a by-law providing, "If a member lose both feet, both hands or both eyes, thereby becoming totally disabled," etc., a member need not have actually had both feet or legs severed from his body in order to recover, but it is enough if they be so badly injured that they cannot perform their functions. Theorell *v.* Supreme Court of Honor, 115 Ill. App. 313. So where a certificate provides that if a member loses a hand he shall receive a certain sum, the member may recover such sum if his hand is so injured as to be practically useless to him, although it is not entirely amputated. Sisson *v.* Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297. And where a member loses a leg it constitutes a permanent disability, in view of the association's constitution specifically stating that the loss of a leg shall constitute permanent disability. Brotherhood of Painters, etc., of America *v.* Moore, 36 Ind. App. 580, 76 N. E. 262. However, a by-law providing that any member receiving bodily injuries which alone should "cause amputation of a limb (whole hand or foot)" shall receive the full amount of his policy, does not cover an injury which resulted in the amputation of a part of the right foot. Fuller *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 122 Mich. 548, 81 N. W. 326, 80 Am. St. Rep. 598, 48 L. R. A. 86.

Inability to work or to do accustomed work.— A member who becomes totally blind because of an accidental injury is entitled to benefits under a by-law providing for the payment of benefits to "a member who shall find himself incapable of working, by reason of sickness or accident." Mogé *v.* Société de Bienfaisance St. Jean Baptiste, 167 Mass. 298, 45 N. E. 749, 35 L. R. A. 736. So where the by-laws provide for the payment of sick benefits where a member is sick and unable to work, benefits are payable where a member has not been restored to full health and is substantially unable to do such work as he was accustomed to do prior to his sickness. Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika *v.* Ross, 117 Ill. App. 247; Genest *v.* L'Union St. Joseph, 141 Mass. 417, 6 N. E. 380, so holding, although by unreasonable, excessive, and harmful effort and exertion he succeeds in doing light work for two consecutive days, by reason thereof suffering a relapse; and the fact that he receives wages for those two days is immaterial. And see Grand Lodge B. L. F. *v.* Orrell, 206 Ill. 208, 69 N. E. 68 [*affirming* 97 Ill. App. 246] (holding that total incapacity, as the term is used in a certificate

c. Discretion of Society as to Allowance of Benefits. If it is optional with a society whether benefits on account of sickness or disability shall be allowed,[23] the society is not liable therefor unless it has elected to allow the same.[24]

4. Arrival at Specified Age. In some societies an endowment is payable to the member on his reaching a specified age, regardless of sickness or disability.[25]

E. Amount of Benefits.[26] The amount of benefits which the society is liable to pay in a given case depends on its charter of incorporation or articles of asso-

payable in case insured should become "totally incapacitated from performing manual labor," means inability to perform sustained manual labor, so as to enable one to earn or assist in earning a livelihood); Chicago, etc., R. Co. *v.* Olsen, 70 Nebr. 559, 97 N. W. 831, 99 N. W. 847. And frequently a member is entitled to benefits by the terms of the certificate or the society's laws where he is unable to follow his usual occupation. Beach *v.* Supreme Tent K. M., 177 N. Y. 100, 69 N. E. 281 [*affirming* 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770]; Hutchinson *v.* Supreme Tent K. M. W., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801. Ordinarily, however, a member is not entitled to benefits if he is able to follow some other occupation (Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44; Albert *v.* Order of Chosen Friends, 34 Fed. 721), provided that he can obtain it (L'Association de Secours D'Assurance *v.* Roberge, 7 Quebec Q. B. 500), and that it calls for substantially the same physical and mental ability as his former occupation (Neill *v.* Order of United Friends, 149 N. Y. 430, 44 N. E. 145, 52 Am. St. Rep. 738 [*affirming* 78 Hun 255, 28 N. Y. Suppl. 928]) and is substantially as remunerative (Monahan *v.* Supreme Lodge O. C. K., 88 Minn. 224, 92 N. W. 972). If the certificate gives insured sick benefits when he is "wholly incapacitated from transacting any and every kind of work or business pertaining to his occupation, and as a result thereof be entirely confined to the house or bed," he is not entitled to the benefits after he gets out of the house and to his store, and there sits a couple of hours a day superintending his business (Shirts *v.* Phœnix Acc., etc., Assoc., 135 Mich. 439, 97 N. W. 966); but where a member is entitled to a benefit in case he is totally and permanently disabled from following any occupation whereby he might obtain a livelihood, the fact that a member suffering from hernia might pursue an occupation by wearing a truss will not make such disability the less a total one, or affect his right to benefits, when the use of the truss would subject him to intolerable discomfort and endanger his life (McMahon *v.* Supreme Council O. C. F., 54 Mo. App. 468). Where a certificate provided for the payment of a certain indemnity if the beneficiary became totally disabled so as to be unable to "direct or perform" the kind of business or labor which he had always followed, a beneficiary who customarily performed physical labor was entitled to the indemnity on being disabled from performing such labor, although he was still able to direct it, the provision as to "directing" having reference only to those whose customary business consisted in giving direction. Beach *v.* Supreme Tent K. M. W., 74 N. Y. App. Div. 527, 77 N. Y. Suppl. 770 [*affirmed* in 177 N. Y. 100, 69 N. E. 281]. Where an association contracted to furnish relief to a member "totally and permanently disabled from following his or her usual occupation," and such disability was defined by its by-laws as "such a permanent and disabling sickness as shall render the member helpless to the extent of permanently preventing [him] . . . from following any occupation whereby he or she can obtain a livelihood," both the member's mental and physical capacities for labor should be considered in determining whether such a disability exists in any given case. McMahon *v.* Supreme Council O. C. F., *supra*.

Injury to sight.—Where an association provided for the payment of benefits to members having less than fifteen two-hundredths vision in each eye, it was no defense to a claim for such benefits that by use of lenses claimant's eyes could be brought to a higher range of vision than fifteen two-hundredths. Benson *v.* Grand Lodge B. L. F., (Tenn. Ch. App. 1899) 54 S. W. 132. And a by-law providing that a member receiving bodily injuries causing "total and permanent loss of eyesight" should receive the full amount of his certificate applies to the total and permanent loss of the sight of one eye, disabling insured from following his occupation, the by-law being afterward amended plainly to express this. Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 16 Utah 145, 51 Pac. 259, 67 Am. St. Rep. 602.

23. Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

24. Knowlton *v.* Bay State Beneficiary Assoc., 171 Mass. 455, 50 N. E. 929; Boyd *v.* Gernant, 82 N. Y. App. Div. 456, 81 N. Y. Suppl. 835; Worthen *v.* Massachusetts Ben. Life Assoc., 24 Misc. (N. Y.) 437, 53 N. Y. Suppl. 685; Dabura *v.* Sociedad de la Union, (Tex. Civ. App. 1900) 59 S. W. 835.

25. *In re* Educational Endowment Assoc., 56 Minn. 171, 57 N. W. 463, in which case the certificates do not mature until the beneficiaries reach that age, although, before then, all dues and assessments that can be required of the holders have been paid. And see Peet *v.* Great Camp K. M. W., 83 Mich. 92, 47 N. W. 119; Hargrove *v.* Royal Templars of Temperance, 2 Ont. L. Rep. 79.

26. **Amount of recovery** see *infra*, VI, I, 2. **Retrospective operation of laws of society as to amount of benefits** see *supra*, II, D, 3, b, (II).

ciation, its constitution and by-laws, and the terms of the certificate of insurance.[27] By its constitution and by-laws the society may obligate itself to pay a sum certain

27. See cases cited *infra*, this note.

A contract to pay a certain endowment is not invalid as being unconscionable because of the fact that the member was required to pay only a much smaller sum by way of assessments. Robyn *v.* Supreme Sitting O. I. H., 55 Mo. App. 198.

A contract to pay an endowment not exceeding a certain sum is an absolute contract to pay that sum, and not a contract merely to return such amount as the member may have paid as assessments up to the maturity of the contract, where there is no other provision in the contract or the laws of the society for determining the amount of the endowment. Robyn *v.* Supreme Sitting O. I. H., 55 Mo. App. 198.

A disabled member is entitled to relief only from the date of his application for such relief, and not from the commencement of the disability, under the rules of some societies. Breneman *v.* Franklin Ben. Assoc., 3 Watts & S. (Pa.) 218.

Consolidation of societies.— The provision of an agreement by which one society became merged in another that members of the former should be accepted "in the same standing" as they had in their own organization, without payment of any initiation fee, and should be allowed the same benefits as in their own organization, does not entitle the beneficiary of a member of the society thus merged to benefits in a greater amount than was authorized by the laws of his own organization, although a greater amount is payable under the laws of the other society. Pfingsten *v.* Perkins, 82 N. Y. Suppl. 399.

Deduction of sick benefits from death benefits.— A contract in effect for the payment of a specified sum of money to one's heirs, less whatever he may have received in his lifetime as sick or disability benefits, entitles the heirs to recover the whole specified sum, where deceased had received nothing, although he had become entitled to receive a certain sum in his lifetime. Bomash *v.* Supreme Sitting O. I. H., 42 Minn. 241, 44 N. W. 12.

Limitation of amount based on member's dying in arrears.— A provision of the constitution and by-laws of a society that when a member at his death owes six months' dues his representatives shall be entitled to only a portion of the amount for which he was insured governs the amount payable on the death of a member thus in arrears, although another by-law provides that the financial secretary shall give each member in arrears a written notice of the amount due, and no notice had been given the member. Hanf *v.* Herrlich, 24 Misc. (N. Y.) 698, 53 N. Y. Suppl. 776.

Limitation of amount with reference to occupation or means of injury.— The amount of benefits may be limited with reference to the occupation in which the member is engaged at the time of his injury or death (Railway Officials, etc., Acc. Assoc. *v.* Bradley, 97 Ill. App. 355), or with reference to the means of injury (Doody *v.* National Masonic Acc. Assoc., 66 Nebr. 493, 92 N. W. 613, 60 L. R. A. 424, holding that the member was "handling" firearms, within the meaning of such a limitation, where he was removing a gun from one room to another, and was injured by its accidental discharge).

Recovery for nurse hire paid by sick member.— Where the society's rules provide for detailing members to watch the sick, and that a certain officer of the society may, when a sick member needs persons to watch with him, employ a nurse for that purpose, no claim can be made for nurse hire paid by a sick member if he made no demand on the lodge to furnish a nurse. Matoon *v.* Wentworth, 7 Ohio Dec. (Reprint) 639, 4 Cinc. L. Bul. 512.

Reduction of benefits.— A reduction of the amount of benefits made pursuant to the by-laws of a beneficial association does not take effect until the member has been notified of the reduction; and if an association wishes to take advantage of a by-law authorizing it to reduce its sick benefits where a member has been drawing them for a period of six months, it must take some action indicating such intention; and, if the benefits have remained unpaid, it may not relieve itself from liability by tendering full benefits for the six months, and reduced benefits thereafter, but must pay full benefits up to the date of tender. Worrilow's Appeal, 3 Walk. (Pa.) 161 [*affirming* 2 Del. Co. 66]. An amendment to the by-laws of a beneficial association provided that on a certain date every member should be charged with one-half the amount of his certificate and be credited with assessments paid; that members might within a certain time thereafter exercise the option of returning to membership under the plan previously in force; and that all members not so electing should continue as members under the new plan. It was held that where a member died before the time to elect had expired without having made the election, the unpaid balance of the charge made under the new plan should be deducted from his benefits. Brundin *v.* Supreme Council O. C. F., 13 N. Y. App. Div. 147, 42 N. Y. Suppl. 1043. Retrospective operation of by-laws reducing benefits see *supra*, II, D, 3, b, (II).

Reformation of certificate as to amount.— Where certificate has been issued by mistake of the parties for a larger sum than that contracted for, and only assessments necessary to keep alive a certificate for the amount intended to be stated have been paid, the beneficiary cannot, by offering to allow the additional assessments to be deducted, recover the amount erroneously inserted, over a demand by the insurer for a reformation of the certificate. Gray *v.* Supreme Lodge K.

specified in the certificate,[28] or to pay the proceeds of an assessment[29] or a certain percentage thereof;[30] or on the other hand the amount of benefits may be made to depend on the number of members in the society,[31] or in a particular class

H., 118 Ind. 293, 20 N. E. 833. And see, generally, REFORMATION OF INSTRUMENTS.

Right to elect between gross indemnity and weekly payments.— A holder of a certificate stipulating for weekly benefits for loss of time resulting from injuries through violent means leaving external marks, or a specified sum in lieu of weekly benefits for the loss of a hand or foot, who sustained injuries through violent means leaving external marks causing a loss of time, and who also sustained the loss of a hand, is entitled to elect to take the weekly benefits instead of the specified sum for the loss of a hand. Fricke *v.* U. S. Indemnity Soc., 78 Conn. 188, 61 Atl. 431. Discretion of society as to allowance of benefits see *supra*, IV, D, 3, c.

Sick benefits may be limited to a specified number of weekly payments.— Courtney *v.* Fidelity Mut. Aid Assoc., 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098. And a by-law of an association allowing a member a sick benent of five dollars "per week during thirteen weeks only of the same year" refers to a period of a year from the time the payments begin, and not to a calendar year. Thibeault *v.* St. Jean Baptist Assoc., 21 R. I. 157, 42 Atl. 518. Where, however, the constitution provides that the benefit to sick members shall be five dollars for each week for thirteen weeks "during any twelve months," in case a single illness of a member extends from one year into another he is entitled to sick benefits to the extent of thirteen weeks during each year, if sick so long during each of the years. Leahy *v.* Ancient Order of Hibernians, 54 Ill. App. 108.

Conflict between charter and constitution or by-laws as to amount of benefits see *supra*, I, C, 2, b.

Retrospective operation of alterations in laws of society as to amount of benefits see *supra*, II, D, 3, b, (II).

Validity of provisions of constitution and by-laws as to amount of benefits see *supra*, I, C, 2, b.

28. Prudential Mut. Aid Soc. *v.* Cromleigh, 3 Walk. (Pa.) 332, holding that the amount recoverable was the amount specified in the certificate, and not merely the amount collected by assessment.

The words "face value" in a by-law providing that two thousand dollars shall be the highest amount paid on a certificate, provided the amount paid shall not exceed the amount of a full assessment on each of the members, and provided "that the face value of the benefit certificate shall be paid, so long as the emergency fund . . . has not been exhausted," means the amount stated in the body of the certificate, so that where the emergency fund is not exhausted at the death of a member whose certificate, issued before the passage of the by-law, provides for payment of five thousand dollars, all of it is payable. Supreme Council A. L. H. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. 901.

29. Matthes *v.* Imperial Acc. Assoc., 110 Iowa 222, 81 N. W. 484 (holding that where an association issues a policy with a weekly indemnity of a certain sum for a limited period, without qualification in the first instance, but with a subsequent provision that if the reserve fund is exhausted when the policy becomes a claim the amount shall be dependent on the amount collected from the assessment to meet such claim, but the association is nowhere given any authority to make an assessment for paying losses, a member who is entitled to recover a weekly indemnity is entitled to an absolute judgment for the amount thereof); Frame *v.* Sovereign Camp W. W., 67 Mo. App. 127 (holding that a certificate declaring that the member is entitled to participate in the beneficiary fund to the amount of two thousand dollars, payable at his death to his wife, etc., but declaring that in case of death the beneficiary shall receive such sum as may be collected from an assessment of all members, is an agreement to pay on the death of a member the sum specified, if that amount is raised by the assessment of members); York County Mut. Aid Assoc. *v.* Myers, 11 Wkly. Notes Cas. (Pa.) 541.

The amount actually collected and not the number of assessable members determines the amount of the benefit, where the laws of the society provide that to make up the amount due to the nominee of a deceased member each member shall pay a dollar, and that the nominee is entitled to receive the amount collected (*In re* La Solidarite Mut. Ben. Assoc., 68 Cal. 392, 9 Pac. 453), or that the funds to pay the beneficiary of a deceased member shall be raised by contributions by the members of such dues as the by-laws provide, "said sum in no case to exceed the total sum of such dues remaining [received] in the treasury of said society" (Lake *v.* Minnesota Masonic Relief Assoc., 61 Minn. 96, 63 N. W. 261, 52 Am. St. Rep. 538).

30. Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645; French *v.* Select Guardians Soc., 23 Misc. (N. Y.) 86, 51 N. Y. Suppl. 675.

31. Theunen *v.* Iowa Mut. Ben. Assoc., 101 Iowa 558, 70 N. W. 712, 37 L. R. A. 587; Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631 (both holding that the amount of the benefit was not a sum certain specified in the certificate, but an amount to be fixed according to the number of members in the society); Neskern *v.* Northwestern Endowment, etc., Assoc., 30 Minn. 406, 15 N. W. 683; Freeman *v.* National Ben. Soc., 42 Hun (N. Y.) 252, 5 N. Y. St. 82 (the last two cases holding that the amount of the benefit was to be determined by the number of mem-

thereof,[32] at the time of insured's death; or they may even be made to depend on the amount of a specified sum on hand at that time.[33] In case of ambignity or inconsistency in the laws of the society or the certificate of insurance as to the amount of the benefit, that construction will be adopted which is the more favorable to insured and his beneficiary.[34] If the benefits are payable only out of a particular

bers in the society, regardless of whether all such members paid their assessments).

32. Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409 (holding that where a certificate contains an agreement to pay the beneficiary two thousand dollars, with a proviso that if there shall be less than two thousand members in the class to which the assured belongs then only a sum equal to one dollar for each member shall be paid, the amount recoverable by the beneficiary is contingent on the number of members in the class, and is confined to the specific fund); Supreme Lodge K. P. *v.* Andrews, 39 Ind. App. 1, 77 N. E. 361, 78 N. E. 433; Sourwine *v.* Supreme Lodge K. P. W., 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532.

The number of members in the class and not the amount actually collected from them by the society held to fix the amount of benefits see Georgia Masonic Mut. L. Ins. Co. *v.* Whitman, 52 Ga. 419; Supreme Commandery K. G. R. *v.* Barrett, 12 Ky. L. Rep. 94.

Wrongful rejection of member from class. — Where assured was entitled to transfer from one class of risks to another if in good health at the time of his application, the motives of the medical examiner which induced him wrongfully to reject such application were immaterial; and the member was not bound to institute mandamus proceedings to compel such transfer in order to preserve his rights, which he effectually did by paying sufficient funds to the society's financial officer, to whom assessments were payable, to meet assessments against him on the basis of the class to which he was entitled to transfer, and directing that the moneys be applied to the payment of such assessments. Supreme Lodge K. P. *v.* Andrews, 39 Ind. App. 1, 77 N. E. 361, 78 N. E. 433. And see Sourwine *v.* Supreme Lodge K. P. W., 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532. Where, however, a member of one class did not for nine years exercise his right to appeal to the supreme lodge or to the civil courts from an action rejecting, for apparent cause, his application to be transferred to another class or division, but continued to pay the assessments levied on the class which he originally joined, the order was justified in assuming that he acquiesced in the rejection. Supreme Lodge K. P. *v.* Andrews, 31 Ind. App. 422, 67 N. E. 1009.

Abolition of class. — Where the assessment on the members of a class of a benefit society, made before the society discontinued the class, constituted the fund for the payment of a certificate on the death of a member of that class subsequent to its discontinuance, the discontinuance did not affect the beneficiary under the certificate, nor entitle him to more than the proceeds of the assessment on the members made before the discontinuance of the class. Kennedy *v.* Iowa Legion of Honor, 124 Iowa 66, 99 N. W. 137. And where a society issued a certificate to a member entitling her beneficiary on her death to participate in the society's benefit fund to the extent of one assessment on the members then in good standing of the special class to which this member belonged, not exceeding one thousand dollars, and subsequently the society discontinued this special class and provided for the transfer of the members thereof to the general class, and the member died the month following the change without having become a member of the general class, the beneficiary was entitled only to the sum received from an assessment on the members of the special class in good standing at the time of the death. Kennedy *v.* Iowa Legion of Honor, *supra*.

33. Hass *v.* Mutual Relief Assoc., 118 Cal. 6, 49 Pac. 1056 (holding that where certain payments by a beneficial association are contingent on the existence of an excess in the reserve fund, and no reserve fund is created or defined by the rules or by-laws, it will be deemed to consist of moneys not specially devoted to other purposes); L'Union St.-Joseph *v.* Gagnon, 8 Quebec Q. B. 334 (holding that where a rule of a mutual benefit association provides that the widows of members shall have a right to a specified sum when the funds reach a certain larger amount, the widows of all members are entitled thereto when the funds reach the amount stated, and, when such funds fall below such amount, to a smaller sum).

34. Supreme Lodge National Reserve Assoc. *v.* Mondrowski, 20 Tex. Civ. App. 322, 49 S. W. 919, where a by-law limited the amount recoverable on a death claim to the sum realized from one assessment on the members, less a stated portion thereof, and another by-law adopted at the same time provided that if a stated number of assessments levied in any one year was insufficient to pay death claims, the reserve fund should be drawn on, and it was held that, to pay a death claim, more than one assessment on the members had to be made, and the reserve fund had to be drawn on, because, the two by-laws being inconsistent, the one most favorable to insured would control. See, however, Gyllenhammer *v.* Home Ben. Soc., 24 N. Y. Suppl. 930, where a certificate provided that the society would "pay the sum of $5,000 from the mortuary fund, as hereinafter provided," and that all claims on the mortuary fund arising between stated inter-

fund, which proves insufficient to pay all matured claims in full, the different claimants will each be entitled only to his proportionate share.[35]

F. Notice and Proof of Loss, and Adjustment Thereof[36] — **1. Notice and Proof — a. In General.** In the absence of any stipulation on the subject in the laws of the society or the contract of insurance, notice or proof of loss is not a condition precedent to the right to recover benefits;[37] and the beneficiary need not furnish proofs of death where the duty to report the cause of death is devolved by the by-laws of the society on its officers or on a subordinate lodge or its officers;[38] nor are the rights of the beneficiary prejudiced by the failure of the lodge or its officers to do their duty in regard to notice and proofs of death.[39] The society may, however, prescribe conditions as to the necessity, form, and requisites of notice or proofs of loss,[40] and if these conditions are not complied

vals of assessment should be paid *pro rata* out of the next succeeding mortuary call, "but not to exceed the face of each certificate," and it was held that there was no ambiguity, so as to render applicable the rule that a policy should be construed most strongly against the insurer, and thereby impose an absolute liability on the society for five thousand dollars, but it was liable only for the *pro rata* part of the mortuary fund where the reserve fund was not available.

Where a certificate contains a promise to pay a specified sum, and this is followed by obscure clauses, difficult to be understood or requiring expert knowledge for their comprehension, they will not be construed as intended to impair the promise, but should receive the construction the insurer had reason to suppose was put upon them by the insured. To effect an impairment of the original obligation, the language of the subsequent clauses must be clear and unambiguous. Wadsworth *v.* Jewelers, etc., Co., 132 N. Y. 540, 29 N. E. 1104 [*affirming* 58 N. Y. Super. Ct. 88, 9 N. Y. Suppl. 711]. And see Laker *v.* Royal Fraternal Union, 95 Mo. App. 353, 75 S. W. 705.

35. *California.*— Perpoli *v.* Grand Lodge L. W., 102 Cal. 592, 36 Pac. 936, holding that where a society issues to each of its members of a certain class special endowment coupons entitling him, at the maturity of a coupon, to the whole amount of one assessment from every member of that class, the number of such assessments being regulated annually by the grand lodge of the society and paid into a special fund, a member whose coupon falls due with others at a time when there is not enough in said fund to pay them all in full can recover only his *pro rata* share of the fund.

Kansas.— See Reeves *v.* Supreme Lodge P. A., (1902) 70 Pac. 357, holding that where the constitution and by-laws of a beneficial association declare that assessments are made to accumulate and replenish a fund for the payment of death losses, and not to pay particular losses as they may occur, and the certificates issued to members stipulate that the member "is entitled to participate in the benefit fund to the full amount of one assessment," the representatives of a member are sharers in a fund, and not the owners of any specific portion of it levied for their exclusive use.

New York.— See Gyllenhammer *v.* Home Ben. Soc., 24 N. Y. Suppl. 930.

Pennsylvania.—See Fahey *v.* Empire L. Ins. Co., 5 Lack. Leg. N. 377.

Canada.— L'Union St.-Joseph *v.* Gagnon, 8 Quebec Q. B. 334, holding that in the absence of any express rule, the widows of all members are on the same footing, and no preference exists in favor of one whose husband first died.

See 28 Cent. Dig. tit. "Insurance," § 1961.

36. Retrospective operation of laws of society as to notice and proof of loss and adjustment thereof see *supra*, II, D, 3, b, (II).

37. Pennsylvania Mut. Aid Soc. *v.* Corley, 2 Pennyp. (Pa.) 398. See, however, National Union *v.* Thomas, 10 App. Cas. (D. C.) 277.

38. National Union *v.* Thomas, 10 App. Cas. (D. C.) 277 (holding that in such case there is no implied obligation on the part of a beneficiary to do more than give notice of death, and possibly to make a particular statement of the time, place, and circumstances of death, if demanded); Supreme Council A. L. H. *v.* Landers, 23 Tex. Civ. App. 625, 57 S. W. 307.

39. Supreme Council C. B. L. *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105; Murphy *v.* Independent Order S. & D. J. A., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111; Doggett *v.* United Order Golden Cross, 126 N. C. 477, 36 S. E. 26; Supreme Lodge K. H. *v.* Wickser, 72 Tex. 257, 12 S. W. 175.

Default of officers as ground of estoppel see *infra*, IV, F, 1, d.

Liability of subordinate lodge for benefits where claim against society is defeated through lodge's default see *supra*, I, F, 2.

40. Kelly *v.* Supreme Council Catholic Mut. Ben. Assoc., 46 N. Y. App. Div. 79, 61 N. Y. Suppl. 394, holding that a provision in a certificate that no time of absence or disappearance on the part of a member, without proof of actual death, shall entitle his beneficiary to recover, is not invalid as repugnant to law or against public policy, although setting aside the rule of evidence as to presumption of death from absence for seven years.

Validity of provisions of constitution and by-laws as to notice and proofs of loss see *supra*, I, C, 2, b.

with there can as a rule be no recovery of benefits.[41] And conditions as to the time within which notice or proofs of loss must be served must likewise be com-

41. Lucas *v.* Thompson, 146 Pa. St. 315, 23 Atl. 321, holding that a sick member who is visited by the relief committee, and declines to be reported as sick, and further declares he is not entitled to benefits, cannot, years afterward, without any change in his condition, recover arrearages of weekly benefits for all that time; and much less, when he has made no such claim, can his representatives do so after his death.

A physician's certificate duly authenticated (Mutual Aid, etc., Soc. *v.* Monti, 59 N. J. L. 341, 36 Atl. 666, holding, however, that a certificate signed by a doctor and the mayor of a foreign city, with the testimony of plaintiff that he saw them sign it, is a sufficient compliance with articles requiring a medical certificate signed or authenticated by the legal authorities) and approved (McVoy *v.* Keller, 36 Misc. (N. Y.) 803, 74 N. Y. Suppl. 842, holding that where the by-laws provided that the certificate of the attending physician stating the nature of the member's illness should be approved by the association's physician before sick benefits would be paid, benefits were properly rejected on a certificate not so approved, the refusal to approve the same not being unreasonable) is commonly required to be furnished; and in the case of a sick member claiming benefits weekly certificates are sometimes required (Dolan *v.* Court Good Samaritan No. 5,910 A. O. O. F., 128 Mass. 437; Myers *v.* Alta Friendly Soc., 29 Pa. Super. Ct. 492). Substantial compliance with these requirements is sufficient. Dolan *v.* Court Good Samaritan No. 5,910 A. O. O. F., *supra*. Where a certificate provides for payment in sixty days after "satisfactory proof of death," and another clause requires that "satisfactory proof of death" should be furnished by sworn certificates of the attending physician and others, the insurance could not require a certificate by a physician who had not attended the insured for several years before his death. Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716. For liability of physician for refusing to give certificate see *supra*, page 27, note 88.

Certificate of member as to sickness.— A provision of the by-laws that a member demanding sick benefits shall first present his own certificate setting forth the date, character, and cause of the sickness must be complied with; but if he is in a feeble condition he need not make out and sign the certificate personally, it being sufficient if this is done for him by his physician, nurse, or a member of his family. Myers *v.* Alta Friendly Soc., 29 Pa. Super. Ct. 492.

"Satisfactory" proofs of loss.— Where a policy provides for proofs of injury satisfactory to the board of directors, the decision of the directors that the proofs are not satisfactory is not conclusive, the holder being required to furnish proofs satisfactory to them, only when acting reasonably. Noyes *v.* Commercial Travellers' Eastern Acc. Assoc., 190 Mass. 171, 76 N. E. 665. And see Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716. A stipulation in a certificate that the claimant shall make satisfactory proof of death of the insured does not mean that such proof shall be made as shall in all cases satisfy the insurer of the cause of death, but the insurer is entitled only to reasonable proof of the fact of death and to reasonable proof of the cause of death. Knights Templar, etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]. A requirement that the insurer shall be furnished with "satisfactory proof of the death" of the assured does not entitle it to demand information as to the cause of his death. Buffalo Loan, etc., Co. v. Knights Templar, etc., Mut. Aid Assoc., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839 [*affirming* 56 Hun 303, 9 N. Y. Suppl. 346]. A certificate requiring "satisfactory proof of the death of the member, and of the identity and right of claimant and of the validity of the claim," cannot be reasonably construed as requiring a showing as to the validity of the certificate, or such a showing as reasonably to satisfy the society's officers that it has no good defense against the claim on the ground of misrepresentation; but proof of death and proof of claimant's right to such benefit as is stipulated by the certificate are the only requisites. Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247.

Negativing defenses.— The holder of an accident policy need not, in his proofs of injury, negative his exposure of himself to unnecessary danger, which, under the contract, would be a defense to the association's liability, the burden being on the association to prove such defense. Noyes *v.* Commercial Travellers' Eastern Acc. Assoc., 190 Mass. 171, 76 N. E. 665. Indeed the fact that the proofs show facts of which the association might avail itself as a defense to an action on the certificate does not derogate from the sufficiency of the proofs or bar the bringing of an action. Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247.

Absent or traveling members claiming sick benefits.— Under the provisions of the by-laws of a beneficial society that no sick benefits shall be granted to "resident brothers" for more than a week prior to application therefor, and that an "absent brother" claiming benefits must send a statement of his case attested by the sachem of a tribe near the place where he may be, one out of the jurisdiction of the tribe or lodge to which he belongs is an "absent brother" without regard to the place of his legal residence. Walsh *v.* Cosumnes Tribe No. 14 I. O. R. M., 108 Cal. 496, 41 Pac. 418. And a member who failed to comply with a by-law providing that a member leaving his usual place of residence

plied with.[42] If the proofs of loss are insufficient the beneficiary may, it seems, furnish further proofs;[43] and on the other hand the society may require him to do so.[44]

b. Excuses For Non-Compliance With Provisions as to Notice and Proof.[45] It has been suggested that the failure to comply with provisions of the contract of insurance or of the laws of the society with reference to notice and proofs of loss is excused where compliance therewith is impossible;[46] but there are cases apparently to the contrary.[47]

c. Conclusiveness of Statements in Proofs of Loss. Statements made in the

shall be entitled to sick benefits, provided he procures a traveling card and presents it to the branch lodge where he may be sojourning, and requests such lodge officially to notify the association of his illness, cannot maintain an action for sick benefits. Markowitz *v.* Joseph Eckert Lodge No. 82 I. O. B. A., 30 Misc. (N. Y.) 764, 61 N. Y. Suppl. 874.

Notice of death given to a de facto officer of the society is notice to the society. Supreme Lodge B. S. K. & L. *v.* Matejowsky, 190 Ill. 142, 60 N. E. 101 [*affirming* 92 Ill. App. 385].

42. United Benev. Soc. *v.* Freeman, 111 Ga. 355, 36 S. E. 764.

However, a provision in a certificate that payment of the benefit will be made within ninety days after satisfactory proof of death does not mean that a failure to make proof within ninety days after death will operate as a forfeiture of the benefit. Fraternal Aid Assoc. *v.* Powers, 67 Kan. 420, 73 Pac. 65. And a provision that all claims shall be made within six months after insured's death was sufficiently complied with by furnishing, within thirty days after death, proof of death, to which the insurer made no objection, together with a statement that the guardian of the beneficiaries was authorized to receive the full amount of the insurance. Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648].

When time commences to run.— The conditions attached to a certificate provided that notice should be given to the society within ten days from the beginning of the illness on account of which benefits are claimed. The insured was taken ill twelve days before he gave notice, and on the day he became incapacitated to attend to his usual occupation he served notice on the society which stated that the illness began on the twelfth day prior thereto, which notice was received within ten days of its date. It was held that the notice was sufficient, since the beginning of the illness within the terms of the certificate was the time when the insured became incapacitated, and the notice was not void for the reason that it named an earlier date. Grant *v.* North American Casualty Co., 88 Minn. 397, 93 N. W. 312.

Validity of regulations as to time of serving notice or proofs of claim see *supra*, I, C, 2, b.

43. National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43; Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190.

44. Tessmann *v.* Supreme Commandery U. F., 103 Mich. 185, 61 N. W. 261, holding, however, that where the laws of a society provide that "further proof may be required if deemed necessary by the supreme commander," the society cannot demand further proof of loss, after the usual proof has been made, unless the supreme commander personally "deems" it necessary.

45. **Failure of society to furnish blanks as waiver or estoppel** see *infra*, IV, F, 1, d.

Refusal of subordinate lodge to furnish certificate of membership as rendering it liable for benefits see *supra*, I, F, 2.

46. United Benev. Soc. *v.* Freeman, 111 Ga. 355, 36 S. E. 764; Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190. And see Ramell *v.* Duffy, 82 N. Y. App. Div. 496, 81 N. Y. Suppl. 600.

Physical incapacity.— Failure of a member of a benefit association to comply with by-laws requiring him to notify the secretary of his illness is not excused by showing that he was incapacitated from so doing by sudden illness, where, long before he recovered from the illness for which he seeks to recover a *per diem* benefit, he was able to, but did not, notify the secretary. Falcone *v.* Societa Sarti Italiana Di Mutuo Soccorso, 30 Misc. (N. Y.) 106, 61 N. Y. Suppl. 873.

47. See cases cited *infra*, this note. And see Woelfer *v.* Heyneman, 2 N. Y. City Ct. 15.

Mental incapacity.— Compliance with the requirement of a by-law that a member claiming sick benefits must furnish a statement of his case is not excused by his insanity. Walsh *v.* Cosumnes Tribe No. 14 I. O. R. M., 108 Cal. 496, 41 Pac. 418.

Refusal of physician to furnish certificate. — Where a by-law of a beneficial association provided that no sick member should receive benefits without producing a sworn certificate of a physician, the fact that the physician who attended plaintiff's intestate in his last sickness refused to give a sworn statement because he had conscientious scruples against making an oath did not excuse plaintiff from complying with the by-law, and hence an action to recover benefits before securing the certificate was premature. Audette *v.* L'Union St.-Joseph, 178 Mass. 113, 59 N. E. 668. See, however, Ramell *v.* Duffy, 82 N. Y. App. Div. 496, 81 N. Y. Suppl. 600. Liability of physician for refusing to give certificate see *supra*, p. 27, note 88.

proofs of death as to the cause of death are not conclusive on the beneficiary in the trial of the case,[48] in the absence of any facts creating an estoppel.[49]

d. Estoppel and Waiver.[50] The society may by its conduct estop itself from objecting to the non-compliance with conditions as to notice and proofs of loss.[51] So the society may waive compliance with such conditions,[52] and it does so where it denies liability on the certificate on other grounds,[53] or where it accepts and

48. Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; Supreme Tent K. M. W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267]; Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 439]; Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

Infant beneficiaries.— Where the contract of insurance does not require the claimant to furnish proof of the cause of death, an infant beneficiary is not bound by the admission of his guardian, who, in furnishing the proofs of death, voluntarily included the attending physician's certificate of the cause of death, which showed that the insured died from one of the excepted causes. Buffalo Loan, etc., Co. *v.* Knights Templar, etc., Mut. Aid Assoc., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839 [*affirming* 56 Hun 303, 9 N. Y. Suppl. 346].

49. Supreme Tent K. M. W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267] (holding that negligence of the widow of insured in not reading the proofs of loss before signing them is not ground for estopping her from assigning a different cause of death than that stated in the proofs); Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

If the society has not changed its position to its detriment in reliance on statements in the proofs of loss, the beneficiary is not estopped to dispute them. Supreme Tent K. M. W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267]; Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 439].

Statements of opinion.— The fact that a widow, in signing proofs of loss, knew that they stated that insured met his death by suicide from strangulation, does not estop her from assigning a different cause of death at the trial, since such statements in the proofs were merely matters of opinion. Supreme Tent K. M. W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267].

50. Estoppel of beneficiary to dispute statements in proofs of death see *supra*, IV, F, 1, c.

51. Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626. And see Fillmore *v.* Great Camp K. M., 109 Mich. 13, 66 N. W. 675.

52. See cases cited *infra*, this note *et seq.* And see United Benev. Soc. *v.* Freeman, 111 Ga. 355, 36 S. E. 764; Grand Lodge B. L. F. *v.* Orrell, 206 Ill. 208, 69 N. E. 68 [*affirming* 97 Ill. App. 246]; Fillmore *v.* Great Camp K. M., 109 Mich. 13, 66 N. W. 675.

Authority to waive compliance.— The financial secretary of a fraternal association, charged with the duty of receiving proofs of death, *prima facie* has the power to waive the presentation of such proofs by refusing to recognize any liability on the part of his principal. United Brotherhood C. & J. A. *v.* Fortin, 107 Ill. App. 306. So where the finance committee of a mutual benefit association had authority to pass on proofs of death, but did so only when the proofs were submitted to it with the signature of the grand master and grand recorder, the grand recorder had authority to waive proofs of death. Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508. And where the secretary of a section in a society is the representative of the society concerning payment of premiums and delivering blanks of proofs of death, a waiver by him of proofs is valid. Winter *v.* Supreme Lodge K. P. W., 96 Mo. App. 1, 69 S. W. 662.

53. *California.*— Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864.

Colorado.— Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595.

Illinois.— Supreme Lodge O. M. P. *v.* Meister, 204 Ill. 527, 68 N. E. 454 [*affirming* 105 Ill. App. 471]; Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538; Covenant Mut. Ben. Assoc. *v.* Spies, 114 Ill. 463, 2 N. E. 482; Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630.

Iowa.— Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580; Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190; Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508.

Kansas.—Kansas Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607.

Maine.— See St. Clement *v.* L'Institut Jacques Cartier, 95 Me. 493, 50 Atl. 376.

Minnesota.— See Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626.

Missouri.—Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

New York.— Hutchinson *v.* Supreme Tent K. M. W., 68 Hun 355, 22 N. Y. Suppl. 801; Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416]; Payn *v.* Mutual Relief Soc., 6 N. Y. St. 365, 2 How. Pr. N. S. 220.

Pennsylvania.— Brubaker *v.* Denlinger, 17 Lanc. L. Rep. 212; McVey *v.* St. Patrick's Ben. Soc., 36 Leg. Int. 157, holding that where a beneficial society by a resolution suspends payments of benefits for a certain time and denies the right of members to ap-

retains the notice or proofs without making objection to the sufficiency thereof.[54] If the failure to comply with conditions as to notice or proofs of loss is due to the neglect or wrongful act of the society's officers,[55] as where they wrongfully refuse to furnish the necessary blanks to the member or his beneficiary,[56] the society cannot take advantage thereof.

2. Adjustment of Loss.[57] Provision is sometimes made for an adjustment of claims for benefits in a tribunal established by the laws of the society,[58] in which

ply for the same, it thereby waives the necessity of giving notice of claims for benefits, even though the resolution be invalid.

Utah.—Daniher *v.* Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. 245.

United States.—Unsell *v.* Hartford L., etc., Ins. Co., 32 Fed. 443; Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

See 28 Cent. Dig. tit. "Insurance," § 1965.

54. National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43; Grand Lodge I. O. M. A. *v.* Besterfield, 37 Ill. App. 522. And see Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626; Stambler *v.* Order of Pente, 159 Pa. St. 492, 28 Atl. 301.

55. Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74; Young *v.* Grand Council A. O. A., 63 Minn. 506, 65 N. W. 933; Gleavy *v.* Walker, 22 R. I. 70, 46 Atl. 180 [*citing* Supreme Sitting O. I. H. *v.* Stein, 120 Ind. 270, 22 N. E. 136].

Effect of failure of local lodge to furnish proofs of death see *supra*, IV, F, 1, a.

Liability of local lodge for benefits where it has refused to furnish certificate of membership see *supra*, I, F, 2.

Liability of physician for refusal to furnish certificate see *supra*, page 27, note 88.

56. *Illinois.*— National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43; Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74; Supreme Lodge, etc., K. H. *v.* Goldberger, 72 Ill. App. 320, holding that where the supreme lodge of a beneficiary association declines to furnish the necessary blanks for proofs of death to the representatives of a deceased member, it casts on its subordinate lodge the burden of supplying the required proofs, and in effect relieves such representatives from all obligation in that behalf.

Kansas.— Ancient Order of Pyramids *v.* Drake, 66 Kan. 538, 72 Pac. 239.

Minnesota.— Gellatly *v.* Odd Fellows' Mut. Ben. Soc., 27 Minn. 215, 6 N. W. 627, where one of the by-laws of a mutual benefit society provided that "proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or of the nearest lodge to the deceased," and it was held that on refusal of the society to furnish blanks, proof of death might be made without them, and without the seal of the society.

Missouri.—Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662.

New York.—See Ramell *v.* Duffy, 82 N. Y. App. Div. 496, 81 N. Y. Suppl. 600; Hutchinson *v.* Supreme Tent K. M. W., 68 Hun 355, 22 N. Y. Suppl. 801; Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416]; Payn *v.* Mutual Relief Soc., 6 N. Y. St. 365, 2 How. Pr. N. S. 220.

See 28 Cent. Dig. tit. "Insurance," § 1965.

57. Compromise and settlement of claim see *infra*, IV, H.

58. See cases cited *infra*, this note. And see Grand Lodge B. L. F. *v.* Orrell, 206 Ill. 208, 69 N. E. 68 [*affirming* 97 Ill. App. 246]; Fillmore *v.* Great Camp K. M., 109 Mich. 13, 66 N. W. 675.

Admissibility of evidence.—It is necessarily implied from the submission of a claim to a tribunal of the association consisting of several hundred lay delegates that the only rule for the admission and exclusion of testimony is that of common fairness; and the fact that proof adduced before the tribunal consisted of *ex parte* affidavits is no ground for its disallowance at the instance of a beneficiary who himself used similar affidavits in presenting his evidence. Barker *v.* Great Hive L. M. M., 135 Mich. 499, 98 N. W. 24.

Production and cross-examination of witnesses.— An objection to the consideration of a physician's certificate by a tribunal of a beneficial association on the ground that the beneficiary had a right to cross-examine the writer thereof was not well taken where the beneficiary's proofs were taken without affording the association the same right. Barker *v.* Great Hive L. M. M., 135 Mich. 499, 98 N. W. 24. So where proceedings were had before a tribunal of members of a benefit association to determine a claim against it, and evidence was produced by affidavit only, neither party requesting that the witnesses be produced and sworn and examined orally, plaintiff could not object to an adverse finding on the ground that the witnesses were not so produced and examined. Derry *v.* Great Hive L. M. M., 135 Mich. 494, 98 N. W. 23.

Failure of tribunal to have affidavits read. — A beneficiary was not deprived of the hearing to which he was entitled before the supreme tribunal of the association because such tribunal did not have the affidavits and other proofs in reference to the claim read to it, but contented itself with listening to counsel's statement, for it was his counsel's duty properly to present the case, and counsel's ignorance of the fact that the affidavits were accessible was not chargeable to the association. Barker *v.* Great Hive L. M. M., 135 Mich. 499, 97 N. W. 24.

Absence of counsel from trial.—The validity of the decision of the tribunal of a beneficial

case resort cannot ordinarily be had to the courts by an action on the certificate until the tribunal has passed on the claim.[59]

G. Persons Entitled to Proceeds[60] — **1. Where No Beneficiary Is Designated by Member.** In case a member of a beneficial society fails to designate a beneficiary, the benefits are to be distributed in the manner prescribed by the laws of the society or the certificate of membership.[61] In the absence of any provision for

association on a claim presented to it by the beneficiary, after giving him a legal and fair hearing, cannot be affected by such irregularities as the absence of the beneficiary's counsel at the time of the final determination of the claim. Barker *v.* Great Hive L. M. M., 135 Mich. 499, 98 N. W. 24.

Error cured.— Where, on a hearing of a claim against a beneficial association before the association tribunal, its physician in argument referred to hearsay statements of third persons, but the association's attorney promptly told the members of the tribunal that they could not consider such statements, claimant was not prejudiced thereby. Derry *v.* Great Hive L. M. M., 135 Mich. 494, 98 N. W. 23.

Right of appeal.— A constitutional provision that "from the proceedings of a lodge in all matters of form required by the constitution and laws of the order, the minority or an accused member shall have the right of appeal to the district grand committee," does not allow an appeal from an order of the lodge to pay sick and funeral benefits. Matoon *v.* Wentworth, 7 Ohio Dec. (Reprint) 639, 4 Cinc. L. Bul. 512.

Interest of members of tribunal.— Under section 267 of the Insurance Law, providing that every policy-holder of a coöperative insurance company shall, on sustaining a loss, immediately notify the president or secretary thereof, and the officers of the corporation shall at once adjust such loss in the manner provided by the charter and by-laws, a stipulation in the policy requiring the submission of such loss to the adjusters, and on appeal to the executive committee, is not void as against public policy because the members of such board and committee are themselves liable to an assessment for such loss. Spink *v.* Co-operative Fire Ins. Co., 25 N. Y. App. Div. 484, 49 N. Y. Suppl. 730.

Waiver of fraud.—Where a beneficiary submits her proofs to the trustees of the society and appeals from the rejection of her claim, she waives any fraud prior to the submission. Hoag *v.* Supreme Lodge I. C., 134 Mich. 87, 95 N. W. 996.

59. See *infra*, V, D, 3, a.

60. Recovery of payments made to person not entitled to proceeds see *infra*, IV, H.

Rights of assignee of member or beneficiary see *supra*, II, H.

61. *Illinois.*— Covenant Mut. Ben. Assoc. *v.* Sears, 114 Ill. 108, 29 N. E. 480 (holding that a certificate by which the association agrees, on the member's death, to levy an assessment and to pay the money thereby collected "to his devisees . . . or, in the event of their prior death, to the legal heir or devisees of the certificate-holder," obliges the association, in case the member dies intestate, to levy an assessment and pay the proceeds to his heirs); Supreme Lodge K. & L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508].

Michigan.— Peet *v.* Great Camp K. M. W., 83 Mich. 92, 47 N. W. 119.

Minnesota.— Jewell *v.* Grand Lodge A. O. U. W., 41 Minn. 405, 43 N. W. 88, where the constitution of a benevolent society provided that on the death of a member the moneys payable under the certificate should be distributed in the following order: "First. To the person designated by the deceased brother, provided such person is designated by name and is a person other than the deceased, having an insurable interest in the life of the deceased. Second. Where no such person is named, and in cases where the certificate is payable to the deceased," then to certaain relatives; and it was held that the relatives named in the second division took the fund whenever no beneficiary was designated, although the certificate was not payable to the deceased.

New York.— Bishop *v.* Grand Lodge E. O. M. A., 112 N. Y. 627, 20 N. E. 562 [*reversing* 43 Hun 472] (where one object of the society was to assist and support members or their families in case of sickness, want, or death, and a beneficiary fund was provided for, to be paid over to the families, heirs, or legal representatives of deceased members, or to such person as such deceased member might while living have directed, and it was further provided that each member should be entitled to a certificate setting forth his name and good standing, the amount of the benefit to be paid at his death, and to whom payable; and it was held that, where a member had complied with all other rules of the society, the fact that he had not designated a beneficiary did not preclude a recovery against the society, but that his family was entitled to the benefit); Cullin *v.* Supreme Tent K. M. W., 77 Hun 6, 28 N. Y. Suppl. 276.

Ohio.— Arthur *v.* Odd Fellows Ben. Assoc., 29 Ohio St. 557; Halle *v.* Grand Lodge No. 2 I. O. B. B., 24 Ohio Cir. Ct. 717.

Rhode Island.— Munroe *v.* Providence Permanent Fireman's Relief Assoc., 19 R. I. 491, 34 Atl. 997, holding that under a by-law providing that on the death of a member the society will pay one thousand dollars to his "widow, child or children, parent or parents," etc., in whole or in part, in such proportions to each, as the same shall have been assigned and made payable by the member by

such a case, the society is liable to no one.[62] It amounts to a failure to designate a beneficiary within these rules where the certificate as issued is payable to the member's devisees[63] or as he may direct by will, and he dies intestate;[64] or where a member revokes a previous designation without making another.[65]

2. Where Member Designates Beneficiary — a. Rights of Beneficiary in General. Where a mutual benefit certificate is made payable to a person named, he is entitled to the proceeds thereof as against all other persons, provided there are no peculiar equities between the different claimants,[66] and that there is nothing to the contrary in any independent agreement between the member and the beneficiary.[67] The fact that the beneficiary did not pay future assessments as provided by the agreement under which he was designated does not defeat his right to the

written notice filed with the secretary prior to his decease, the association is liable, in the absence of any assignment filed by such member, to pay to the persons designated in the order named the whole sums specified in the by-law.

Virginia.— Whitehurst *v.* Whitehurst, 83 Va. 153, 1 S. E. 801, where the charter of an association provided that on the decease of any member, "the fund to which his family is entitled shall be paid as may be designated in the application for membership. This being rendered impossible, it shall go, first to the widow and infant children," and afterward in the order named; and a member directed that the benefit should be paid as he might designate in his will, and he died intestate, leaving a widow but no infant children; and it was held that the widow was entitled to the fund.

United States.— Smith *v.* Covenant Mut. Ben. Assoc., 24 Fed. 685.

See 28 Cent. Dig. tit. "Insurance," § 1945.

Reversion of fund to society.— In the absence of anything to the contrary in the society's charter (Wolf *v.* District Grand Lodge No. 6 I. O. B. B., 102 Mich. 23, 60 N. W. 445), it is competent for the society to enact by-laws providing that if the member fails to designate a beneficiary, and there are no persons living to whom the benefits are otherwise payable, the fund shall revert to the society (Halle *v.* District Grand Lodge No. 2 I. O. B. B., 24 Ohio Cir. Ct. 717; Grand Lodge A. O. U. W. *v.* Cleghorn, (Tex. Civ. App. 1897) 42 S. W. 1043, where the laws of a society provided that each member might designate the person to whom his mortuary fund should be paid; that should such person die before the member, the fund should be paid to the member's surviving widow and children; and that if there should be no one living, entitled to the fund, it should revert to the society; and it was held that, where a member had never designated any beneficiary, his mortuary fund reverted to the society, even though he left a widow; West *v.* Grand Lodge A. O. U. W., (Tex. Civ. App. 1896) 37 S. W. 966).

Persons within designation made by statute or charter or laws of society in case member fails to make designation see *supra*, IV, B, 2.

Rights of creditors of member where certificate is payable to member or his estate, or where no beneficiary is designated, or where no certificate is issued and society laws designate beneficiaries see *supra*, IV, G, 5.

Rights of personal representative of member where certificate is payable to member or his estate, where no beneficiary is designated, or where no certificate is issued and society laws designate beneficiaries see *infra*, IV, G, 4.

62. Order of Mutual Companions *v.* Griest, 76 Cal. 494, 18 Pac. 652; Eastman *v.* Provident Mut. Relief Assoc., 62 N. H. 555. See, however, Supreme Lodge K. & L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 66 L. R. A. 508].

Construction of by-laws and certificates as to liability of society where no beneficiary is designated see *supra*, note 61.

63. Covenant Mut. Ben. Assoc. *v.* Sears, 114 Ill. 108, 29 N. E. 480; Smith *v.* Covenant Mut. Ben. Assoc., 24 Fed. 685.

64. Whitehurst *v.* Whitehurst, 83 Va. 153, 1 S. E. 801.

65. Cullin *v.* Supreme Tent K. M. W., 77 Hun (N. Y.) 6, 28 N. Y. Suppl. 276.

66. Klotz *v.* Klotz, 14 Ky. L. Rep. 80.

Payment of assessments by third person.— In the absence of contract, payments by a third person on a certificate of insurance of another are gratuitous, creating no equities in his favor. Leftwich *v.* Wells, 101 Va. 255, 43 S. E. 364, 99 Am. St. Rep. 865.

Prior agreement to designate another.— A contract made on sufficient consideration by a member to designate one as his beneficiary does not confer any property right or interest in the fund, or in the undertaking of the association to pay, which enables the one in whose favor the contract is made to charge as a trustee in his behalf one who was subsequently appointed in violation of the agreement. Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. St. 151.

67. Peek *v.* Peek, 101 Ky. 423, 41 S. W. 434, 19 Ky. L. Rep. 654, holding that a sister who has been named as beneficiary in her brother's benefit certificate under a written agreement executed by her at the time that the fund shall, upon her receipt therefor, be paid over by the order to the executor of the member's will, to be distributed thereunder, cannot herself, nor can her executor after her death, repudiate that agreement, although the law of the order provides that the fund

benefits where the member waived that provision of the contract.[68] If a person is designated as beneficiary subject to a parol trust, and he is unable to perform the trust, a capable trustee should be appointed for that purpose with bond.[69] Even though by the terms of a certificate it is payable only on surrender thereof, yet the beneficiary may recover without a surrender if the certificate is in the hands of a third person, who refuses to give it up;[70] and a provision in a certificate that it shall be payable only on its surrender is waived where the society refuses to pay solely on the grounds of non-payment of assessments, and that another beneficiary had been substituted.[71]

b. Rights of Personal Representatives and Next of Kin of Beneficiary.[72] The rights of the beneficiary become vested on the member's death, so that on the subsequent death of the beneficiary the right to the fund passes to his personal representatives or next of kin.[73]

c. Rights of Co-Beneficiaries Inter Se.[74] A member naming several beneficiaries may as a rule specify the proportion of the fund which each shall take.[75] If he fails to do so, the fund, according to different authorities, should be divided among the co-beneficiaries in equal shares,[76] or according to the equities in the

shall constitute no part of the member's estate, and that he shall have no control thereof except to designate the beneficiaries, the agreement reciting as the consideration therefor a bequest made to the beneficiary in the member's will. See, however, Felix *v.* Ancient Order United Workmen, 31 Kan. 81, 1 Pac. 281, 47 Am. Rep. 479, holding that a grand lodge, bound by the terms of a contract with a member to pay a fund on his death to his wife and children, can take no notice of secret arrangements made by the member with one of his children, which, if recognized, would deprive such child of its share.

68. Belknap *v.* Johnston, 114 Iowa 265, 86 N. W. 267.

69. Superior Lodge D. H. *v.* Satchwell, 112 Mo. App. 280, 87 S. W. 58.

70. Smith *v.* Supreme Council R. A., 127 N. C. 138, 37 S. E. 159.

71. Himmelein *v.* Supreme Council A. L. H., (Cal. 1893) 33 Pac. 1130.

72. Right to proceeds as between surviving beneficiary and representatives of co-beneficiary dying after insured see *infra*, IV, G, 2, c.

Right to proceeds on death of beneficiary before member see *infra*, IV, G, 3, b.

73. Chartrand *v.* Brace, 16 Colo. 19, 26 Pac. 152, 25 Am. St. Rep. 235, 12 L. R. A. 209; Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; Kottmann *v.* Gazett, 66 Minn. 88, 68 N. W. 732, holding that where a beneficial association by its certificate agreed to pay within sixty days after notice and proof of death, to the member's wife if living, if not living then to the member's heirs or assigns, a sum ascertainable, the words "if living" and "if not living" referred to the date of the member's death; hence the widow's right as beneficiary became vested on the husband's death, and on her subsequent death her heirs were entitled to the fund.

74. Rights of co-beneficiaries where one is ineligible as such see *infra*, IV, G, 3, a.

75. Roberts *v.* Roberts, 64 N. C. 695, where a by-law provided that the proceeds of certificates should be paid "to the widow . . . for the benefit of herself and the dependent children of the deceased," with a permission to the party insured to appoint an executor to disburse such proceeds, and a prohibition against any disposal "by will or otherwise, so as to deprive his widow or his dependent children of its benefits"; and a widow owned two thousand dollars' worth of other property, and it was held that a bequest by one insured of a policy of four thousand dollars, giving to his widow one thousand dollars and the remainder to an only child, there being no other property owned by him, was not an unreasonable exercise of the discretion vested in him.

76. *California.*— Burke *v.* Modern Woodmen of America, 2 Cal. App. 611, 84 Pac. 275, holding that where a certificate was payable to a member's legal heirs, and he died leaving ten heirs, consisting of his widow, brothers, sisters, nephews, and nieces, they were each entitled to one tenth of the proceeds.

Kansas.— Felix *v.* Ancient Order of United Workmen, 31 Kan. 81, 1 Pac. 281, 47 Am. Rep. 479, holding that under a certificate payable to the "wife and children" of the insured, the beneficiaries take equally *per capita*.

Kentucky.— Hallan *v.* Gardner, 5 Ky. L. Rep. 857, holding that where the charter of a society does not specify in what proportions the beneficiaries are to take, they must take equal shares, the widow sharing equally with the children.

Massachusetts.— Jackman *v.* Nelson, 147 Mass. 300, 17 N. E. 529, where a certificate in a society which paid death benefits to the widows and orphans of members, and other persons shown to be dependent on members, was payable to the member's widow "for the benefit of herself and the children of said member," and they had one child, and the member also had two children by a former marriage, one of whom was married, and did not live at home at the member's death; and it was held that the widow and each child

particular case,[77] or in accordance with the rule prescribed by statute for the distribution of personalty.[78] In case a co-beneficiary dies after the death of the member and before payment of the benefit, his share goes to his personal representative, not to the surviving beneficiary.[79] In construing a certificate in a beneficial association, the intention of the member is the controlling element in respect to the rights of co-beneficiaries.[80]

3. Where Designation of Beneficiary Is Invalid or Ineffective — a. In General. In case the designation of a beneficiary proves for any reason to be invalid or ineffectual, the fund does not as a rule revert to the society;[81] but it goes to such person or persons as are eligible to take the benefits in the manner prescribed by statute or by the laws of the society or the certificate of insurance.[82] This rule applies where the designation is invalid because of the member's minority;[83] or where the person designated as beneficiary was at the time of his designation ineligible as such,[84] or, being then eligible, since became ineligible or disqualified and

were severally entitled to one fourth of the amount each.

Pennsylvania.— See U. B. Mut. Aid Soc. *v.* Miller, 107 Pa. St. 162.

Wisconsin.— See Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249.

See 28 Cent. Dig. tit. "Insurance," § 1970.

77. Fletcher *v.* Collier, 61 Ga. 653 (where the certificate was issued for the use of the member's wife and her dependent children, and it was held that, in view of the objects and purposes of the insurance, the shares of the widow and children might be equal or unequal according to circumstances, such as the comparative ages, health, and strength of the children, equality not being necessarily the rule); Wolf *v.* Pearce, 45 S. W. 865, 20 Ky. L. Rep. 296 (where the fund was payable to defendants, and it appeared that the member had recognized the dependence of a sister and was in the habit of extending aid to certain nieces, the daughters of a deceased sister, and it was held that one half of the fund should be paid to the sister and the other half to the nieces).

78. McLin *v.* Calvert, 78 Ky. 472; Burns *v.* Burns, 109 N. Y. App. Div. 98, 95 N. Y. Suppl. 797; Dielmann *v.* Berka, 49 Misc. (N. Y.) 486, 97 N. Y. Suppl. 1027.

79. Union Mut. Assoc. *v.* Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519, so holding, although the certificate provided that "in case of death of either [beneficiary] full amount to go to the survivor . . if living; if not living, to the heirs of said member."

Right to proceeds as between surviving beneficiary and representatives of co-beneficiary dying before insured see *infra*, IV, G, 3, b.

80. Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967.

81. Supreme Lodge K. & L. H. *v.* Menkhausen, 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508 [*affirming* 106 Ill. App. 665]; Caudell *v.* Woodward, 15 Ky. L. Rep. 63; Clarke *v.* Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; Sargent *v.* Supreme Lodge K. H., 158 Mass. 557, 33 N. E. 650; Burns *v.* Grand Lodge A. O. U. W., 153 Mass. 173, 26 N. E. 443; Britton *v.* Supreme Council R. A., 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376 [*affirmed* in 47 N. J. Eq. 325, 21 Atl. 754]. And see cases cited *infra*, note 83 *et seq.* See, however, Hellenberg *v.* District No. 1 I. O. B. B., 94 N. Y. 580; Taylor *v.* Hair, 112 Fed. 913.

The substitution of a new certificate in which an ineligible beneficiary is named may be effectual as between the member and the society, so as to permit of a recovery thereon by the persons who are eligible as beneficiaries. Doherty *v.* Ancient Order Hibernians Widows', etc., Fund, 176 Mass. 285, 57 N. E. 463.

Right to avoid certificate for fraud in designating ineligible beneficiary see *supra*, II, E, 1.

82. See cases cited *infra*, note 83 *et seq.*

Persons within designation made by statute or charter or laws of society in case designation by member is invalid or ineffective see *supra*, IV, B, 2.

Right to reimbursement for moneys paid by beneficiary to keep certificate alive where designation is invalid or ineffective see *infra*, IV, G, 6.

Rights of personal representative of member where designation of beneficiary is invalid or ineffective see *infra*, IV, G, 4.

83. Burst *v.* Weisenborn, 1 Pa. Super. Ct. 276, holding that on the death of a member while still a minor, the case must be treated as if no designation had been made.

Validity of designation by minor see *supra*, IV, B, 1, a.

84. *Illinois.*— Baldwin *v.* Begley, 185 Ill. 180, 56 N. E. 1065 [*reversing* 84 Ill. App. 674]; Palmer *v.* Welch, 132 Ill. 141, 23 N. E. 412; Supreme Lodge K. & L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508]; Danielson *v.* Wilson, 73 Ill. App. 287 [*affirmed* in 176 Ill. 94, 52 N. E. 41].

Kentucky.— Gibbs *v.* Anderson, 16 Ky. L. Rep. 397; Gibson *v.* Kentucky Grangers' Mut. Ben. Soc., 8 Ky. L. Rep. 520; Kentucky

so not entitled to take the benefit at the time of the member's death;[85] or where the designation is invalid for non-compliance with the rules of the society prescribing the mode of designation.[86]

b. Death of Beneficiary Before Death of Member.[87] By the weight of authority, in the absence of any provision on the subject in the laws of the society or in the certificate of insurance, the beneficiary in a mutual benefit certificate has no vested right therein during the lifetime of the member, and his contingent interest therein expires on his death; hence if he predeceases the member neither his personal representatives nor next of kin nor his legatees become entitled to benefits on the

Grangers' Mut. Ben. Soc. *v.* McGregor, 7 Ky. L. Rep. 750.

Maryland.— Dale *v.* Brumbly, 96 Md. 674, 54 Atl. 655.

Massachusetts.— See cases cited *supra*, note 81.

Mississippi.— Carson *v.* Vicksburg Bank, 75 Miss. 167, 22 So. 1, 65 Am. St. Rep. 596, 37 L. R. A. 559.

Missouri.—Hofman *v.* Grand Lodge B. L. F., 73 Mo. App. 47; Koener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543.

New Jersey.— See cases cited *supra*, note 81.

New York.— Matter of Smith, 42 Misc. 639, 87 N. Y. Suppl. 725; Roberts *v.* Grand Lodge A. O. U. W., 33 Misc. 536, 68 N. Y. Suppl. 949 [*reversed* on another ground in 60 N. Y. App. Div. 259, 70 N. Y. Suppl. 57].

Pennsylvania.— Fodell *v.* Miller, 193 Pa. St. 570, 44 Atl. 919 [*affirming* 44 Wkly. Notes Cas. 498].

See 28 Cent. Dig. tit. "Insurance," § 1944.

Retrospectiveness of statute.— Mich. Laws (1887), Act No. 187, § 16, providing that any contracts of insurance on lives of more than sixty-five years issued by coöperative and mutual benefit associations, "organized, existing, or doing business in this State under or by virtue of" its provisions, "shall be void as to the beneficiary therein named, but the amount thereof shall . . be payable to the heirs of the member," does not apply to a policy issued prior to its passage, and the heirs of the assured have no claim upon money voluntarily paid to the beneficiary. Smith *v.* Pinch, 80 Mich. 332, 45 N. W. 183.

If one of two beneficiaries is ineligible, the other takes the entire fund. Beard *v.* Sharp, 100 Ky. 606, 38 S. W. 1057, 18 Ky. L. Rep. 1029; Caudell *v.* Woodward, 96 Ky. 646, 29 S. W. 614, 16 Ky. L. Rep. 742. But see Superior Lodge D. H. *v.* Satchwell, 112 Mo. App. 280, 87 S. W. 58, holding that where a member designates two beneficiaries, each to receive a special part of the fund, and one is ineligible, his part of the fund should be distributed as if no designation had been made as to it. If the member bequeaths the fund to a competent beneficiary subject to the payment of his debts, and creditors are ineligible as beneficiaries, the competent beneficiary takes the fund. Morgan *v.* Hunt, 26 Ont. 568.

Eligibility of beneficiary see *supra*, IV, A.

85. Supreme Lodge K. & L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508].

If a beneficiary designated as a member of insured's family subsequently loses his status as such, and so forfeits his right as beneficiary (see *supra*, IV, A, 1), the fund goes to those who constitute the family at the time of insured's death. Knights of Columbus *v.* Rowe, 70 Conn. 545, 40 Atl. 451; Lister *v.* Lister, 73 Mo. App. 99.

If a beneficiary designated as the member's wife is subsequently divorced, and so loses her rights as beneficiary (see *supra*, IV, A, 1), the fund goes to the member's children, where the benefits are payable to the widow or children. Williams' Appeal, 92 Pa. St. 69; Heyman *v.* Meyerhoff, 16 Wkly. Notes Cas. (Pa.) 212.

If the beneficiary murders the member, and so loses his rights as such (see *supra*, IV, D, 2, d), the fund may be recovered by such other persons as would take had no beneficiary been designated. Supreme Lodge K. & L. H. *v.* Menkhausen, 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508 [*affirming* 106 Ill. App. 665]; Schmidt *v.* Northern Life Assoc., 112 Iowa 41, 83 N. W. 800, 84 Am. St. Rep. 323, 51 L. R. A. 141.

Adultery does not disqualify a widow to take as beneficiary. Shamrock Benev. Soc. *v.* Drum, 1 Mo. App. 320.

Breaking off of marriage engagement as defeating right of fiancé see *supra*, IV, A, 1.

Marriage of member as defeating rights of beneficiary previously named see *supra*, IV, C, 1, b.

Time as of which beneficiary is determined see *supra*, IV, A, 1.

86. *District of Columbia.*— Moss *v.* Littleton, 6 App. Cas. 201.

Maryland.— Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Michigan.— Grand Lodge A. O. U. W. *v.* Fisk, 126 Mich. 356, 85 N. W. 875.

New Jersey.— Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142.

Pennsylvania.— House *v.* Northwestern L. Assur. Co., 10 Pa. Dist. 41.

Canada.— Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88; *Re* Snyder, 4 Ont. L. Rep. 320.

See 28 Cent. Dig. tit. "Insurance," § 1944.

Mode of designation of beneficiary see *supra*, IV, B, 1.

87. Rights of personal representative and next of kin of beneficiary dying after member see *supra*, IV, G, 2, b.

member's subsequent decease.[88] This rule, however, does not prevail in all jurisdictions,[89] and in some it has been abrogated or modified by statute;[90] and by the constitutions and by-laws of some societies it is likewise abrogated or modified.[91]

88. *Illinois.*— Munhall *v.* Daly, 37 Ill. App. 628.

Indiana.— Bunyan *v.* Reed, 34 Ind. App. 295, 70 N. E. 1002.

Kansas.— Brew *v.* Clement, 48 Kan. 386, 29 Pac. 704, *semble.*

Massachusetts.— Haskins *v.* Kendall, 158 Mass. 224, 33 N. E. 495, 35 Am. St. Rep. 490, holding also that the beneficiary does not have a vested interest which will pass to his next of kin on his death before the member, although the by-laws provide that the member cannot transfer the certificate without the beneficiary's consent.

Michigan.— Michigan Mut. Ben. Assoc. *v.* Rolfe, 76 Mich. 146, 42 N. W. 1094.

Minnesota.— Gutterson *v.* Gutterson, 50 Minn. 278, 52 N. W. 530; Richmond *v.* Johnson, 28 Minn. 447, 10 N. W. 596.

Missouri.— Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967; Supreme Council R. A. *v.* Bevis, 106 Mo. App. 429, 80 S. W. 739 (so holding in the absence of any agreement between the member and the beneficiary by which the certificate was pledged to the latter); Expressmen's Aid Soc. *v.* Lewis, 9 Mo. App. 412.

New Hampshire.— Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380.

New Jersey.— Golden Star Fraternity *v.* Martin, 59 N. J. L. 207, 35 Atl. 908.

New York.— Simon *v.* O'Brien, 87 Hun 160, 33 N. Y. Suppl. 815; Brooklyn Masonic Relief Assoc. *v.* Hanson, 53 Hun 149, 6 N. Y. Suppl. 161; Southwell *v.* Gray, 35 Misc. 740, 72 N. Y. Suppl. 342.

Ohio.— Tafel *v.* Supreme Commandery K. G. R., 9 Ohio Dec. (Reprint) 279, 12 Cinc. L. Bul. 35.

Pennsylvania.— Arthars *v.* Baird, 8 Pa. Co. Ct. 67, 20 Phila. 287 [*followed* in Arthars *v.* Baird, 8 Pa. Co. Ct. 71, 20 Phila. 291]. *Contra,* Clark *v.* Equitable Aid Union, 6 Pa. Co. Ct. 321.

Tennessee.— Handwerker *v.* Diermeyer, 96 Tenn. 619, 36 S. W. 869.

Texas.— Screwmen's Benev. Assoc. *v.* Whitridge, 95 Tex. 539, 68 S. W. 501.

Wisconsin.— Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249; Riley *v.* Riley, 75 Wis. 464, 44 N. W. 112.

Canada.— *Re* Phillips, 12 Ont. L. Rep. 48.

See 28 Cent. Dig. tit. "Insurance," § 1943.

If the member and the beneficiary die simultaneously the representatives of the latter take nothing. Paden *v.* Briscoe, 81 Tex. 563, 17 S. W. 42.

If the nominal beneficiary is a mere trustee for others, the rights of the latter as the real beneficiaries are not defeated by his death in the lifetime of the member. Adams *v.* Grand Lodge A. O. U. W., 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45, where a certificate made payable to a member of a firm to which insured was indebted was intended by all parties to be for the benefit of the firm.

Foreign societies.— The rights of beneficiaries under a certificate in a foreign beneficial association which is in point of fact a fraternal association under the laws of the state where organized, and whose organization, mode of payment of benefits, and mode of raising funds therefor was in such respects in keeping with the law of Missouri relating to such associations, even though all its classes of beneficiaries are not identical with those named in the Missouri statute, are the rights recognized by the law applicable to such certificates, and hence the interest of one of such beneficiaries ceased at her death. Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967.

89. Johnson *v.* Hall, 55 Ark. 210, 17 S. W. 874; Caddick *v.* Highton, 68 L. J. Q. B. 281, 80 L. T. Rep. N. S. 527, 47 Wkly. Rep. 668.

If the member fails to designate another beneficiary after the death of the original beneficiary in his lifetime, the fund goes to the latter's representatives. Expressmen's Mut. Ben. Assoc. *v.* Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; Thomas *v.* Cochran, 89 Md. 390, 43 Atl. 792, 46 L. R. A. 160.

If a certificate taken out by a husband in favor of his wife is to be considered a vested property interest of the wife, it is a mere chose in action which, on her death before that of her husband, becomes the absolute property of the latter. Handwerker *v.* Diermeyer, 96 Tenn. 619, 34 S. W. 869.

90. Supreme Council C. K. A. *v.* Densford, 56 S. W. 172, 21 Ky. L. Rep. 1574, 49 L. R. A. 776, holding that a certificate issued by a benefit society to a member, payable on his death to beneficiaries named therein, is to be construed as a will, and therefore St. § 4841, providing that if a legatee dies before the testator, his issue, if any, shall take the estate bequeathed, applies to such a certificate.

91. Anderson *v.* Supreme Council C. B. L., 69 N. J. Eq. 176, 60 Atl. 759; O'Brien *v.* Supreme Council C. B. L., 81 N. Y. App. Div. 1, 80 N. Y. Suppl. 775 [*affirmed* in 176 N. Y. 597, 68 N. E. 1120]. See, however, Simon *v.* O'Brien, 87 Hun (N. Y.) 160, 33 N. Y. Suppl. 815 (where the constitution and by-laws of a mutual benefit association provided for the payment of a certain sum on a member's death "to his family or dependents, as such member may have directed"; that a member might at any time change his designation of a beneficiary; and that "in the event of the death of a beneficiary of a member, and no change of beneficiary shall have been made as hereinbefore provided, the share of such deceased bene-

In case the beneficiary predeceases the member, the latter may as a rule designate a new beneficiary, who will on the member's subsequent death become entitled to the benefits.[92] If, on the death of the beneficiary in the lifetime of the member, the latter fails to designate a new beneficiary, the fund becoming payable on the member's subsequent death reverts to the society, in the absence of anything to the contrary in the rules of the society or the contract of insurance.[93] However, the laws of the society commonly provide that in case the beneficiary predeceases the member and the latter fails to designate a new beneficiary the fund shall go, not to the society on the one hand, nor on the other hand to the representatives of the deceased beneficiary, but that it shall be paid in a certain order to certain persons related to or dependent on the member, and in distributing the fund in such a case these provisions will govern.[94] Where several persons are designated

ficiary shall be paid to his or her legal representative"; and it was held that the provisions in regard to payment to the representative of a deceased beneficiary merely designated the person to whom the association might make payment in discharging its liability; and where a beneficiary died before the member of the association, and no new designation was made, the next of kin of the beneficiary are not entitled to the insurance, but it will go to the family or dependents of the member, as provided by the constitution); Mattison *v.* Sovereign Camp U. W., 25 Tex. Civ. App. 214, 60 S. W. 897 (where the constitution of a mutual benefit society provided that on the death of a member his certificate should be paid to his beneficiary, which should be his wife, children, adopted children, parents, brothers, sisters, or other relatives, and that if the relative named should be deceased at the time of the member's death, and no change of beneficiary had been made, the benefit should be paid to the "next living relative," in the order named; and a member took a certificate in favor of his mother, and subsequently married, and on the death of his mother made no change in the designation of his beneficiary; and it was held that the wife was entitled to the benefits in preference to his brothers, since the words "next living relative" meant the one next in relationship to the deceased member, and not to the dead beneficiary).

Validity of by-law abrogating rule see *supra*, I, C, 2, b.

92. Van Bibber *v.* Van Bibber, 82 Ky. 347, 6 Ky. L. Rep. 393; Scboales *v.* Order of Sparta, 206 Pa. St. 11, 55 Atl. 766; *In re* Farley, 9 Ont. L. Rep. 517.

Sufficiency of designation of new beneficiary.— Where a certificate was made payable to the member's wife, and on her death an attempted change in the beneficiary was ineffective, the proceeds are payable to the children of the deceased member, under a regulation of the order that the benefit shall he paid, where the beneficiary dies during the lifetime of the widow, first to his widow, if living, and, if not, then to his children. Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142. So where the constitution of a mutual benefit society required certain formalities in changing the beneficiary designated, and insured designated his wife, who subsequently died, and a few days later he executed a will bequeathing the insurance to claimants, but, although he lived eight months thereafter, he failed to make the change as required by the constitution, the fund belongs to his heirs, under a provision in the constitution of the society that if the beneficiary shall die during the lifetime of the insured, the benefit shall be paid to his heirs. Grand Lodge A. O. U. W. *v.* Fisk, 126 Mich. 356, 85 N. W. 875. It has been held, however, that the designation of a new beneficiary in place of one deceased, by a member of a benefit society instituted for the purpose of personal benefit to members and their families, although ineffectual under the laws of the society, may be an expression of his will, which, on his death, may entitle the beneficiary, who is a member of his family, to the benefit, to the exclusion of his heirs, who are not members of his family. Hofman *v.* Grand Lodge B. L. F., 73 Mo. App. 47. Sufficiency of designation of new beneficiary after death of original beneficiary see *supra*, IV, B. Mode of changing beneficiaries where original beneficiary predeceases member see *supra*, IV, C, 3. Eligibility of beneficiary designated in place of deceased beneficiary see *supra*, IV, A.

93. Munhall *v.* Daly, 37 Ill. App. 628; Hellenberg *v.* District No. 1 I. O. B. B., 94 N. Y. 580; Screwmen's Benev. Assoc. *v.* Whitridge, 95 Tex. 539, 68 S. W. 501. See, however, Supreme Lodge K. L. H. *v.* Menkhausen, 106 Ill. App. 665 [*affirmed* in 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, 65 L. R. A. 508].

The member's personal representatives are not entitled to the fund in such a case. Home Circle Soc. *v.* Hanley, (Tex. Civ. App. 1905) 86 S. W. 641. *Contra*, Boyden *v.* Massachusetts Masonic Life Assoc., 167 Mass. 242, 45 N. E. 735; Haskins *v.* Kendall, 158 Mass. 224, 33 N. E. 495, 35 Am. St. Rep. 490.

94. *District of Columbia.*— Moss *v.* Littleton, 6 App. Cas. 201; Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey 70.

Kentucky.— O'Neal *v.* O'Neal, 109 Ky. 113, 58 S. W. 529, 22 Ky. L. Rep. 616, holding that the member's personal representatives were not entitled to the fund as against his

as co-beneficiaries of the entire proceeds of one certificate, they become joint tenants as to the fund, and if one predeceases the member those who survive him take the entire fund.[95]

widow, where the charter secured the fund to the member's family, and provided that it should not be subject to his debts.

Massachusetts.— Pease *v.* Supreme Assembly R. S. G. F., 176 Mass. 506, 57 N. E. 1003, holding that a by-law directing that if, on the death of a beneficiary selected by a member before his demise, such member makes no further disposition thereof, the benefit shall be paid to his family, and, if none, to his next of kin, is consistent with a charter providing that on a member's death there may be paid a certain sum to his family, or as he may direct.

Michigan.— Grand Lodge A. O. U. W. *v.* Fisk, 126 Mich. 356, 85 N. W. 875.

Missouri.— Supreme Council R. A. *v.* Bevis, 106 Mo. App. 429, 80 S. W. 739; Supreme Council R. A. *v.* Kacer, 96 Mo. App. 93, 69 S. W. 671.

New Hampshire.— Supreme Council A. L. H. *v.* Adams, 68 N. H. 236, 44 Atl. 380.

New Jersey.— Grand Lodge A. O. U. W. *v.* Gandy, 63 N. J. Eq. 692, 53 Atl. 142.

New York.— Matter of Rock, 49 Misc. 286, 99 N. Y. Suppl. 157; Southwell *v.* Gray, 35 Misc. 740, 72 N. Y. Suppl. 342.

Ohio.— Matter of Beyer, Ohio Prob. 241.

Pennsylvania.—Fischer *v.* American Legion of Honor, 168 Pa. St. 279, 31 Atl. 1089; Arthars *v.* Baird, 8 Pa. Co. Ct. 67, 20 Phila. 287 [*followed* in Arthars *v.* Baird, 8 Pa. Co. Ct. 71, 20 Phila. 291] (holding that where the laws of a benefit society provide that care must be taken to see that the person or persons of a member's family legally dependent on him are the ones to be named as his beneficiaries, and that a married man must name his wife, or wife and children, and a member, after naming his mother, marries, and, after the death of his mother, dies, leaving a widow but no children and without having altered the appointment of his beneficiary, the widow, and not the administrator of the member is entitled to the fund); Espy *v.* American Legion of Honor, 7 Kulp 134.

Tennessee.— Deacon *v.* Clarke, 112 Tenn. 289, 79 S. W. 383.

Texas.— Paden *v.* Briscoe, 81 Tex. 563, 17 S. W. 42; Bollman *v.* Supreme Lodge K. H., (Civ. App. 1899) 53 S. W. 722.

Wisconsin.— Ballou *v.* Gile, 50 Wis. 614, 7 N. W. 561.

Canada.—*In re* Roddick, 27 Ont. 537, holding that the member's personal representative was not entitled to the fund.

See 28 Cent. Dig. tit. "Insurance," § 1943.

Persons within designation made by statute or charter or laws of society in case beneficiary designated by member predeceases him see *supra*, IV, B, 2.

Divorce as equivalent to death.— The fact that a wife designated as beneficiary obtains a divorce from the member is not equivalent to her death, so as to require the fund to be distributed as in case of her death before him. Overhiser *v.* Overhiser, 14 Colo. App. 1, 59 Pac. 75.

Ineligibility as equivalent to death.— The fact that the person named as beneficiary is ineligible as such is not equivalent to his death so as to require a distribution of the fund as in cases where the beneficiary predeceases the member. Knights of Honor *v.* Watson, 64 N. H. 517, 15 Atl. 125; Starr *v.* Knights of Maccabees of World, 27 Ohio Cir. Ct. 475.

95. Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249; *Re* Phillips, 12 Ont. L. Rep. 48.

This rule is incorporated into the laws of some societies.—Polhill *v.* Battle, 124 Ga. 111, 52 S. E. 87; Bunyan *v.* Reed, 34 Ind. App. 295, 70 N. E. 1002; Wright *v.* Wright, 15 Ky. L. Rep. 573. However, a certificate issued by a benefit society to a member, payable on his death to beneficiaries named therein, is to be construed as a will, and therefore Ky. St. § 4841, providing that, if a devisee or legatee dies before the testator, his issue, if any, shall take the estate devised or bequeathed, applies to such a certificate; so that, where one of several beneficiaries named dies before the member, leaving issue, which survive the member, such issue take his share, notwithstanding a by-law of the society providing that on the death of one of the beneficiaries selected by the member the benefit shall be paid in full to the surviving beneficiaries, as such a by-law, in view of the statute, must be construed as applying only where the deceased beneficiary leaves no issue. Supreme Council C. K. A. *v.* Densford, 56 S. W. 172, 21 Ky. L. Rep. 1574, 49 L. R. A. 776.

Although the member apportions the fund between co-beneficiaries, yet, it has been held, the rule is the same. Thus where a certificate was issued in accordance with an application wherein the member named as his beneficiaries one of his daughters for a certain amount and another daughter for a certain amount, the amount of the benefit applied for being the total of such sums, it was held that the words of appointment used in the certificate were to be regarded as the same as if the fund was payable to the member's children, naming them, and the survivor of such children was entitled to the entire fund. Dennis *v.* Modern Brotherhood of America, 119 Mo. App. 210, 95 S. W. 967.

So where a member designates his "family" as the beneficiary, and his family consists at that time of himself and his wife and daughter, the wife and daughter are the beneficiaries; and if the daughter dies before her father, and the wife is the only member

4. Rights of Personal Representative of Member.[96] Except in cases where the certificate is made payable to the member himself or to his estate,[97] benefits payable on the death of a member of a beneficial or fraternal society are not assets of his estate, subject to administration; and hence his personal representative is not entitled thereto, and cannot recover the same.[98] This rule applies, not only where the member has in due form designated an eligible beneficiary who is alive and capable of taking the benefit at the time of the member's death,[99] but also where the member has failed to designate a beneficiary,[1] or where the designation

of his family who survives him, she takes the whole fund, and the daughter's children take nothing. Brooklyn Masonic Relief Assoc. *v.* Hanson, 53 Hun (N. Y.) 149, 6 N. Y. Suppl. 161.

96. Right of personal representative to funeral benefits see *infra*, IV, G, 7.

97. Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166 (holding that in such case the executor must administer the fund in accordance with the will); Compton's Estate, 25 Pa. Super. Ct. 28; Quinn *v.* Supreme Council C. K., 99 Tenn. 80, 41 S. W. 343 (holding also that if the certificate has been assigned to one who is not entitled to take the benefits, and the fund has been paid to the assignee, the personal representative of the original holder may recover from him such amount, less that actually paid by him for the assignment).

98. *Illinois.*— People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652], holding that where the contract is to pay the benefits to the member's "devisees, as provided in his last will," and by such will the fund is bequeathed to a named person "in trust for my legal heirs," the person so named takes the proceeds as trustee, although he is named as executor and qualifies as such, the fund not being assets in his hands as executor.

Maryland. — Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Mississippi.— Bishop *v.* Curphey, 60 Miss. 22.

New York.— Bishop *v.* Grand Lodge E. O. M. A., 112 N. Y. 627, 20 N. E. 562 [*reversing* 43 Hun 472]; Bown *v.* Supreme Council C. M. B. A., 33 Hun 263; Matter of Brooks, 5 Dem. Surr. 326. And see Matter of Palmer, 3 Dem. Surr. 129.

Pennsylvania.— McNeil *v.* United Order of Golden Cross, 131 Pa. St. 339, 18 Atl. 899; Williams' Appeal, 92 Pa. St. 69; Oertlett's Estate, 7 Pa. Dist. 678, 21 Pa. Co. Ct. 616 (holding that the proceeds of certificates which by their express terms are payable to relatives of a deceased member as therein specified do not become assets of the estate, although included in the inventory by the executor); Morrell's Estate, 8 Wkly. Notes Cas. 183.

Texas.—White *v.* White, 11 Tex. Civ. App. 113, 32 S. W. 48, holding that where money is collected on an insurance certificate by the member's executrix, who is named as beneficiary therein, it is not subject to administration.

United States. — Iowa State Traveling Men's Assoc. *v.* Moore, 73 Fed. 750, 19 C. C. A. 662, holding that where an application for membership in a mutual benefit association names a certain person as beneficiary, and the constitution of such association provides for the payment of the benefits secured in case of death to the persons named as beneficiaries by the members in their application, or, in default of such appointment to the heirs or legal representatives of the members, the obligation of such association arising upon the issue of a certificate of membership is to the person so named as beneficiary alone, and such person cannot recover in an action brought as administrator of the member.

England.— See Bennett *v.* Slater, [1899] 1 Q. B. 45, 68 L. J. Q. B. 45, 79 L. T. Rep. N. S. 324, 47 Wkly. Rep. 82, holding that where a member of a friendly society has nominated a sum of £100, but the total amount payable by the society at the death of such member exceeds £100, the society is bound to pay the sum nominated to the nominee, without administration, and the general law will apply with regard to the amount over and above the sum of £100.

Canada.— See *In re* Roddick, 27 Ont. 537.

See 28 Cent. Dig. tit. "Insurance," § 1973.

99. See cases cited *supra*, note 98.

1. *Maryland.*— Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Missouri.— Fenn *v.* Lewis, 81 Mo. 259 [*affirming* 10 Mo. App. 478].

Nebraska.— Warner *v.* Modern Woodmen of America, 67 Nebr. 233, 93 N. W. 397, 108 Am. St. Rep. 634, 61 L. R. A. 603.

New Hampshire.— Eastman *v.* Provident Mut. Relief Assoc., 62 N. H. 555.

Pennsylvania.— Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Hodge's Appeal, 8 Wkly. Notes Cas. 209.

United States.—Worley *v.* Northwestern Masonic Aid Assoc., 28 Int. Rev. Rec. 50.

England.— Ashby *v.* Costin, 21 Q. B. D. 401, 53 J. P. 69, 57 L. J. Q. B. 491, 59 L. T. Rep. N. S. 224, 37 Wkly. Rep. 140.

Canada.— Babe *v.* Toronto Bd. of Trade, 30 Ont. 69.

See 28 Cent. Dig. tit. "Insurance," § 1973.

However, where the by-laws of a beneficial association provided that a benefit should be paid "to his direction, as entered upon his

of a beneficiary is invalid or ineffective,[2] as where the person designated was at the time thereof ineligible as a beneficiary;[3] or where there are no persons in existence who are competent to take the benefits at the time of the member's death,[4] as where the person designated predeceased the member and no new designation was made.[5] In some states, however, it has been held that the personal representative of the member may in such cases recover the proceeds of the certificate, not as assets, but for the benefit of those entitled to the fund.[6] In case the benefits are paid to the member's personal representative by the society, he holds it not as assets, but for the benefit of those legally entitled to it.[7]

5. Rights of Creditors.[8] The fund created by a beneficial or fraternal society for the payment of benefits is generally exempt, under the charter and laws of the society, from the claims of creditors of the members;[9] and as a rule a member

certificate," and, if such beneficiaries were dead, the benefit should become a part of the member's estate, and might be disposed of by will, and assured's certificate directed that the benefit should be paid to a third person as his interest should appear, and the balance according to the provisions of his will, such balance was payable to assured's executor, where not specifically disposed of by will. Shepard *v.* Provident Mut. Relief Assoc., 68 N. H. 611, 44 Atl. 530. And the amount of a certificate payable "to those dependent" on the insured having been voluntarily paid by the order to the administrator of the insured, he holds the fund for distribution as other assets, where the payment of the certificate by the order, no beneficiary being named, could not have been coerced under the laws of the order. Wolf *v.* Pearce, 45 S. W. 865, 20 Ky. L. Rep. 296.

2. See cases cited *infra*, note 3 *et seq.*

3. Walter *v.* Hensel, 42 Minn. 204, 44 N. W. 57; McFarland *v.* Creath, 35 Mo. App. 112.

4. Warner *v.* Modern Woodmen of America, 67 Nebr. 233, 93 N. W. 397, 108 Am. St. Rep. 634, 61 L. R. A. 603; Gould *v.* United Traction Employés' Mut. Aid Assoc., 26 R. I. 142, 58 Atl. 624.

5. See *supra*, IV, G, 3, b.

6. Schmidt *v.* Northern Life Assoc., 112 Iowa 41, 83 N. W. 800, 84 Am. St. Rep. 323, 51 L. R. A. 141 (holding that where the beneficiary murders the member the latter's representative may recover of the society); Doherty *v.* Ancient Order Hibernians Widows', etc., Fund, 176 Mass. 285, 57 N. E. 463; Clarke *v.* Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; Burns *v.* Grand Lodge A. O. U. W., 153 Mass. 173, 26 N. E. 443 (the last four cases holding that where the beneficiary designated by the member is ineligible, the member's representative may recover of the society); Munroe *v.* Providence Permanent Firemen's Relief Assoc., 19 R. I. 363, 34 Atl. 149 (holding that in the absence of any statutory provisions regulating the procedure, the benefit may be recovered in an action of assumpsit brought either by the personal representative of the deceased member because the deceased was the person from whom the consideration moved and to whom the promise was made, or by the beneficiary for whose benefit the contract was made).

If the money has been paid to an ineligible beneficiary, the member's representative may recover it from him. Kohr *v.* Wolf, 16 Wkly. Notes Cas. (Pa.) 189.

If the money has been paid to an assignee who is not entitled thereto, the member's representative may recover it from him. Gilbert *v.* Moose, 104 Pa. St. 74, 49 Am. Rep. 570; Stoner *v.* Line, 16 Wkly. Notes Cas. (Pa.) 187; Meily *v.* Hershberger, 16 Wkly. Notes Cas. (Pa.) 186.

7. Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Council A. L. H. *v.* Perry, 140 Mass. 580, 5 N. E. 634. And see cases cited *supra*, note 6. See, however, Wolf *v.* Pearce, 45 S. W. 865, 20 Ky. L. Rep. 296.

Release by person entitled to fund.—Although the amount derived from the certificate of a member of a beneficiary association forms no part of his estate, yet if his estate is very small, and the person whose right to the benefit is controverted knowingly receives from the executor, by the consent of the next of kin, a portion of the money derived from the certificate, which portion is much larger than the estate, and, without being induced by fraud, releases his claim to the "estate," he thereby gives up all claim to the amount received from the certificate. Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166.

8. Eligibility of creditor as beneficiary see *supra*, IV, A, 2, 3.

9. *Michigan.*— Supreme Council Catholic Mut. Ben. Assoc. *v.* Priest, 46 Mich. 429, 9 N. W. 481.

Mississippi.— Bishop *v.* Curphey, 60 Miss. 22.

Nebraska.—Warner *v.* Modern Woodmen of America, 67 Nebr. 233, 93 N. W. 397, 108 Am. St. Rep. 634, 61 L. R. A. 603 (holding that where the certificate is payable to the legal heirs of a member, and he dies without any heirs, and without designating any other beneficiary, and there is no one in existence who could, under the by-laws of the association and the statutes of the state under which it is organized, legally become such beneficiary, no equitable rights accrue to the creditors of the member, and the fund re-

cannot impress a trust on the fund in favor of his creditors since he has no present or future right to or interest therein.[10]

6. Reimbursement of Persons Not Entitled to Benefits.[11] Where a person who was designated as beneficiary by the member but who is ineligible to take as such has paid dues and assessments to keep the certificate alive, he is entitled to reimbursement therefor out of the proceeds of the certificate.[12] So one whom the member ineffectually attempted to substitute in place of the beneficiary originally designated is likewise entitled to reimbursement for dues and assessments paid by him.[13] And the original beneficiary is entitled to reimbursement for dues and assessments paid by him where a new beneficiary is subsequently substituted in his place.[14] However, a stranger who pays the member's dues and assessments is not entitled to reimbursement.[15]

7. Persons Entitled to Funeral Benefits. Funeral benefits are frequently provided for by the laws of the society, the liability of the society and the person entitled to receive the benefit depending on the terms of those laws.[16]

verts to the society); Fisher *v.* Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383.

New York.— Bishop *v.* Grand Lodge E. O. M. A., 112 N. Y. 627, 20 N. E. 562 [*reversing* 43 Hun 472]; Beeckel *v.* Imperial Council O. U. F., 58 Hun 7, 11 N. Y. Suppl 321 [*affirmed* in 124 N. Y. 661, 27 N. E. 413]; Matter of Palmer, 3 Dem. Surr. 129.

North Carolina.— Brenizer *v.* Supreme Council R. A., 141 N. C. 409, 53 S. E. 835, 6 L. R. A. N. S. 235.

Ohio.— Matter of Beyer, Ohio Prob. 241.

Pennsylvania.—Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 26 Atl. 263, 35 Am. St. Rep. 810; Algeo *v.* Fries, 27 Pa. Super. Ct. 157, holding that where the by-laws of a beneficial association provide a particular way by which the name of beneficiaries may be changed, and expressly exclude creditors, a judgment entered on a judgment bond signed by a member and his wife, who is the beneficiary, cannot after the death of the member be made the basis for an attachment execution against the association to attach the death benefit represented by the certificate in the wife's name.

Canada.—Johnston *v.* Catholic Mut. Benev. Assoc., 24 Ont. App. 88.

See 28 Cent. Dig. tit. "Insurance," § 1976. And see *supra*, IV, G, 4.

Right of creditor to reimbursement on account of moneys expended see *infra*, IV, G, 6.

Rights of creditor as assignee of certificate see *supra*, II, H, 3, a.

Statutory exemption of fund see Exemptions, 18 Cyc. 1436.

10. Fisher *v.* Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383; Bown *v.* Supreme Council Catholic Mut. Ben. Assoc., 33 Hun (N. Y.) 263; Boasberg *v.* Cronan, 9 N. Y. Suppl. 664 [*reversing* 7 N. Y. Suppl. 5]. *Contra*, Woodruff *v.* Tilman, 112 Mich. 188, 70 N. W. 420; *In re* Copeland, 37 Misc. (N. Y.) 569, 75 N. Y. Suppl. 1042.

In any event one who loans money to a member is not entitled to repayment out of the insurance fund in the absence of evidence that the money so loaned went into the fund. Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787.

11. Reimbursement of assignee of certificate where assignment is void see *supra*, II, H, 3.

12. Gibson *v.* Kentucky Grangers' Mut. Ben. Soc., 8 Ky. L. Rep. 520; Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 45 Atl. 111 [*reversed* on other grounds in 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449]; Jewelers' League *v.* Hepke, 28 Misc. (N. Y.) 716, 60 N. Y. Suppl. 224 [*affirmed* in 63 N. Y. Suppl. 1110]; Fodell *v.* Miller, 193 Pa. St. 570, 44 Atl. 919 [*affirming* 44 Wkly. Notes Cas. 498].

The person thus ineligible as beneficiary is entitled also to be reimbursed the amount expended by him in making proof of loss. Gibson *v.* Kentucky Grangers' Mut. Ben. Soc., 8 Ky. L. Rep. 520.

Where creditors of the member are ineligible as beneficiaries a creditor who is designated as such is entitled to be repaid advances made by him to the member in consideration of his being designated as beneficiary. Jewelers' League *v.* Hepke, 28 Misc. (N. Y.) 716, 60 N. Y. Suppl. 224 [*affirmed* in 63 N. Y. Suppl. 1110].

However, an ineligible beneficiary is not entitled to reimbursement on account of expenses incurred by him in caring for insured in his last illness and in burying him pursuant to an agreement made when the insurance was procured. Voelker *v.* Grand Lodge B. L. F., 103 Mo. App. 637, 77 S. W. 999.

13. Weisert *v.* Muehl, 81 Ky. 336.

14. Leaf *v.* Leaf, 12 Ky. L. Rep. 47; Grand Lodge A. O. U. W. *v.* O'Malley, 114 Mo. App. 191, 89 S. W. 68. And see Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901, holding that the original beneficiary is entitled to repayment of assessments paid by her in ignorance of the fact that a new beneficiary has been designated.

15. Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787; Grand Lodge A. O. U. W. *v.* Cleghorn, (Tex. Civ. App. 1897) 42 S. W. 1043.

16. Radient Temple No. 2 O. U. A. *v.* Piper, 62 N. J. Eq. 565, 50 Atl. 177 (where a beneficial association's constitution pro-

H. Payment, Accord and Satisfaction, Compromise and Settlement, Release, and Discharge.[17] Payment of the benefits to a person not entitled to

vided that on the death of a member in good standing a funeral benefit of not less than thirty dollars should be paid as specified in the by-laws, and, should the member leave no relative, an officer of the association should receive the funeral benefit and attend to the burial; and the by-laws prescribed that a death benefit of one hundred and fifty dollars should be paid on the death of a member in good standing, and authorized an officer of the association, on the death of a member, to immediately pay twenty-five dollars to the family, or person bearing the expenses of the burial; and it was held that a husband of a deceased member of the society, who was the sole survivor of deceased, and who had paid the funeral expenses, was entitled to the benefit fund, and not the executor of deceased's estate); Hughes *v.* Journeymen Horseshoers' Protective Union, 29 Misc. (N. Y.) 327, 60 N. Y. Suppl. 526 (holding that under by-laws providing that on the death of a member in good standing a certain sum shall be appropriated for funeral expenses, to be paid to the proper parties, the widow of a deceased member is not entitled to recover that amount, where it does not appear that such member, at the time of his death, was in good standing, or by whom the funeral expenses were defrayed); Talbot *v.* Tipperary Men Nat., etc., Assoc., 23 Misc. (N. Y.) 486, 52 N. Y. Suppl. 633 (holding that a provision in the constitution of a corporation for benevolent purposes that a stated amount shall be paid toward the funeral expenses of a member's wife applies to the funeral of a member's second wife, although the corporation paid the stated amount toward the funeral expenses of his first wife; that under a provision in the constitution that a stated amount should be paid to the "next of kindred" toward the burial expenses of a member's wife, the amount is payable to the husband; and that under a constitution which provided for the payment of a certain sum toward the burial expenses of a member's wife, and reserved to the society the right to expend the money, a member cannot recover the amount where the corporation had no knowledge of the death of his wife until after the funeral); Fanton *v.* Coachmen's Benev. Union, 13 Misc. (N. Y.) 245, 34 N. Y. Suppl. 162 (where the constitution of a benefit society provided that "in case of the death of a member entitled to benefits, the sum of $150 shall be allowed as a funeral benefit. In the absence of competent friends, the association shall appoint a committee to take charge of the deceased brother"; and it was held that the funeral benefit was payable to the person who had charge of the funeral, and the wife of a deceased member, who had lived apart from him and was not his administratrix, was not entitled thereto); Battersby *v.* Schuylkill Tribe No. 202 I. O. R., 29 Pa. Super. Ct. 288 (holding that where the by-laws of a beneficial association provide that funeral benefits shall be paid to the widow, unless the officers are satisfied that such benefits would be diverted from their legitimate purpose, in which case they may see to their payment, an undertaker who is a mere volunteer without contract with the association cannot recover from the latter the expenses of the funeral of a member merely because he notified the association that the widow intended to divert the fund, and the widow in fact did divert the fund, when it was paid to her); Miller *v.* Wolf, 18 Lanc. L. Rev. (Pa.) 105 (holding that the nearest competent relatives of a deceased member of an unincorporated beneficial society, to whom the constitution provides that his funeral benefit shall be paid "to aid in defraying the expense of his burial," are not entitled to recover the same where they have not contracted for or paid said expenses); Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307 (holding that an administrator of a deceased member of a beneficial association may recover an allowance for funeral expenses provided for by the laws of the association but which are not declared payable to any particular person).

A wife who has separated from or deserted her husband is not, it seems, entitled to funeral benefits on his death. Berlin Ben. Soc. *v.* March, 82 Pa. St. 166; Smith *v.* Theatrical Mechanical Ben. Assoc., 5 Pa. Dist. 326. And see Fanton *v.* Coachmen's Benev. Union, 13 Misc. (N. Y.) 245, 34 N. Y. Suppl. 162, where the benefits were held to be payable to the person in charge of funeral.

Application of benefits.— Where a decedent left no personal estate except a certificate in a society to which he belonged, by which forty dollars was appropriated to pay the burial expenses of a member, that fund having been paid to the widow, she was not entitled to retain it as part of her distributive share, but was properly required to pay it on burial expenses. Redmond *v.* Redmond, 112 Ky. 760, 66 S. W. 745, 23 Ky. L. Rep. 2161. So money paid by a beneficial society to the widow of a deceased member for the purpose of defraying funeral expenses must be used for that purpose, and not diverted to the benefit of the widow or of creditors. Haas' Estate, 3 Pa. Co. Ct. 345. And where the constitution of a beneficial society provided that benefits should be paid to the widow of a member to defray funeral expenses, such benefits in her hands are impressed with a trust for that purpose, in so far as necessary, and the husband's estate is entitled to be reimbursed therefrom for amounts paid for that purpose. Martin's Estate, 2 Chest. Co. Rep. (Pa.) 47. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 206, 267 *et seq.*

17. **Adjustment of claim in society tribunal** see *supra*, IV, F, 2.

receive them does not discharge the society's liability to the person legally entitled thereto although it may not know of such person's existence ;[18] and the society may in such case recover back the money from the person who thus came into its possession.[19] The liability of the society may be discharged by accord and satisfaction,[20]

Damages for refusal of payment see *infra*, VI, I, 2.

Liability for interest see *infra*, VI, I, 2.

18. Dielmann *v.* Berka, 49 Misc. (N. Y.) 486, 97 N. Y. Suppl. 1027 (holding that where, under the laws of the society, the widow of a married member is entitled to the death benefit, and the society pays the money to a deceased member's father before the expiration of the time for presenting claims for benefits, it is no discharge as against the widow, although the society did not know that the member was married); Grand Fountain U. O. T. R. *v.* Wilson, 96 Va. 594, 32 S. E. 48 (holding that as against the beneficiary named in a certificate, payment by the association to one named as executrix in an instrument inoperative as a will, executed by the insured, with the approbation of the father of the beneficiary, who was a minor, is not a discharge; nor is the fact that the proceeds thereof had been applied to the support of the beneficiary).

Payment to the person designated in the certificate as beneficiary does not discharge the society's liability if that person is ineligible to take the benefits. Gaines *v.* Kentucky Grangers' Mut. Ben. Soc., 11 Ky. L. Rep. 580; Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360. *Contra*, see Supplee *v.* Knights of Birmingham, 18 Wkly. Notes Cas. (Pa.) 280, holding that the innocent payment by the society to the person whom the deceased member in his lifetime designated and falsely represented to be his wife is a bar to the claim of the real widow.

Payment to officers of society.— The constitution of a benevolent society provided that on the death of any member his heirs should receive one thousand dollars from the order. The supreme lodge was composed of delegates elected from the general membership, and was authorized to call on the subordinate lodges to contribute toward the death benefit; they to pay the assessment to a trustee appointed by the subordinate lodges of the society, and he to pay the gross sum to those entitled to benefit. It was held that the supreme lodge did not discharge itself of liability to the heirs of a member by paying his death benefit to such trustee, he being the agent of the subordinate lodge, and not the agent of the heirs. Pfeifer *v.* Supreme Lodge Bohemian Slavonian Benev. Soc., 173 N. Y. 418, 66 N. E. 108 [*reversing* 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138 (*affirming* 37 Misc. 71, 74 N. Y. Suppl. 720)]. So where the members of a lodge are entitled to receive benefits from the relief fund of an order of which the lodge is a subordinate part, and the chief officer of the lodge receives from the relief fund a sum of money which is to be paid as a benefit to the widow of a deceased member of the lodge, and the officer absconds with the money, the lodge is bound to make good the benefit to the person entitled to receive it, although the officer had no authority to receive the money. Fisher *v.* Olive Branch Lodge No. 33 K. P., 152 Pa. St. 449, 25 Atl. 869.

Payment to foreign court.—Upon the death of a native of Austro-Hungary, and subsequent removal of his widow and minor children to that country, the payment of benefits from a certain society due the children upon his death, to the courts having jurisdiction, through the consul of Austro-Hungary, rather than to the children's guardian is proper, there being no creditors, legatees, or heirs in the state. Ameison *v.* National Slavonic Soc., 8 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 54 [*affirming* 20 Pa. Co. Ct. 59].

19. Gaines *v.* Kentucky Grangers' Mut. Ben. Soc., 11 Ky. L. Rep. 580 (holding that where officers of a mutual benefit society have paid the whole of a benefit to certain beneficiaries, having been led into the mistaken belief that no other beneficiary with a superior right was in existence, and the latter beneficiary recovers from the company the part due him, the company may recover back such amount from the former beneficiary); Gibson *v.* Kentucky Grangers' Mut. Ben. Soc., 8 Ky. L. Rep. 520 (holding that where money has been paid by a mutual benefit association to a person incapable of receiving it, under the charter of the society, by reason of mistake of fact, the society may, in an action against it by the widow and children of the member, recover such payment of the person to whom it had been made, on a cross petition, such person being entitled to retain the payment actually made by him to keep the certificate in force).

20. Simons *v.* Supreme Council A. L. H., 178 N. Y. 263, 70 N. E. 776 [*reversing* 82 N. Y. App. Div. 617, 81 N. Y. Suppl. 1014], where beneficiaries in a certificate issued by a fraternal benefit society disagreed with it as to the amount due under the certificate, the society insisting that the amount named in the policy was reduced to a certain sum by amendment of the by-laws passed after the issuance of the certificate, and refused to pay that sum until the beneficiaries signed a certificate acknowledging payment of the policy and surrendered it for cancellation; and it was held that the acceptance by the beneficiaries of a draft for the amount tendered by the society, and the signing and delivery of the certificate required, were evidence of a settlement by the beneficiaries with full knowledge of all the facts, and sufficient to establish an accord and satisfaction.

compromise and settlement,[21] and by release.[22] If, after the division of an order into rival bodies, a member who was such before the division makes a new con-

21. See Sears *v.* Grand Lodge A. O. U. W., 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204 [*reversing* 24 N. Y. App. Div. 410, 48 N. Y. Suppl. 559], where one insured for two thousand dollars in a beneficiary society disappeared, and was not heard of for ten years thereafter, and nine years after his departure his widow, believing him to be dead, sued on the policy, and to dispose of the suit it was agreed between plaintiff and defendant that the action should be dismissed, defendant to pay six hundred and sixty-six dollars of the insurance, which was in no event to be returned to it, and to pay the remaining one thousand three hundred and thirty-four dollars in sixteen months thereafter, if insured did not turn up in the meantime; and it was held that, although it was discovered that insured was alive before the six hundred and sixty-six dollars were paid, defendant was bound to pay the same.

22. See cases cited *infra*, this note.

Consideration for release.—A life policy provided that the insurer would pay to the beneficiaries five thousand dollars if the insured died from any cause other than suicide, and also the assessments that the insured had paid under the policy. On the death of the insured the guardian of the beneficiaries furnished proofs of death. The insurer, claiming that the insured committed suicide, paid to the guardian the amount of the assessments which were payable, although the insured committed suicide. It was held that the guardian's release of further liability on receiving the amount of the assessments paid was without consideration, and did not prevent a collection of the face of the policy if the assured did not commit suicide. Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]. And see Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360. So a receipt or release in full, given on payment by a beneficial association of two thousand dollars of the five thousand dollars which a certificate provided should be paid, is without consideration as to the three thousand dollars, liability for the two thousand dollars not being denied but conceded. Supreme Council A. L. H. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. 901.

Fraud.—Where the widow and beneficiary of a member of a beneficial order, on the payment to her of five hundred dollars, releases the order from the payment of her claim of three thousand dollars, because the officers of such order falsely represented that deceased was not in good standing at the time of his death, and she has no claim whatever against it, a court of equity will set such release aside, and the fact that she had the benefit of the advice of competent counsel does not deprive her of the right to have such release set aside, if he also was misinformed by such officers. Henry *v.* Imperial Council O. U. F., 52 N. J. Eq. 770, 29 Atl. 508. A certificate in a benefit association provided for a compliance by the insured with any by-laws of the association thereafter adopted. A by-law was thereafter passed reducing insured's certificate in case of death from five thousand dollars to two thousand dollars and at the same time the assessments upon insured were reduced *pro rata*. The insured continued to pay the assessments for some seventeen months. On his death the beneficiaries executed a release of the association on the payment by it to them of two thousand dollars. At the time nothing was said to them as to the existence of any amended by-law, or that any amended by-law it had adopted was valid, or in any way affected the rights of the beneficiaries. It was held that the fact that at the time of such release nothing was said by the officers as to a decision of the court holding the by-laws scaling the society's outstanding certificates void was no ground for setting aside the release on a claim of fraud. McCloskey *v.* Supreme Council A. L. H, 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347. But a settlement of a five-thousand-dollar claim on a mutual benefit insurance certificate, for one thousand nine hundred dollars, induced by the company's representation that it had enacted a by-law reducing the insurance in that proportion, when the company knew that the by-law had been held void by the supreme court, will be set aside as fraudulent. Simon *v.* Supreme Council A. L. H., 91 N. Y. App. Div. 390, 86 N. Y. Suppl. 866 [*affirmed* in 181 N. Y. 578, 74 N. E. 1125]. Complainant's husband was a member of a fraternal order which insured its members against death by accident. At the time of his death, which resulted from an accident, complainant was too ill to attend his funeral, and she remained in an enfeebled and nervous condition for several weeks. A member of the same local body in the order, in whom she had full confidence, was appointed administrator of his estate, and he assured complainant that the insurance due from the order would be paid soon, and in full. While so believing, she was called on at her home by the administrator and three other members of the order, two of whom were officers of the governing body, who told complainant she had no claim against the order, but offered to pay her one thousand dollars in settlement, and pressed her for an immediate decision. The administrator, when she talked with him apart, said he knew little about the matter, but that the other men probably understood the situation. Being required to decide at once, she accepted the offer, signed a release, and received a draft for one thousand dollars which, however, she never cashed. It appeared that she knew nothing of the constitution of the order, nor of the

tract of insurance with one of the bodies, but retains his membership in the other body, payment by the latter of benefits on his death does not discharge the other body of liability on the new contract of insurance;[23] but this is not so where the member does not make a new contract of insurance after the division of the order.[24]

I. Forfeiture of Right to Benefits[25] — **1. GENERALLY.** The law does not favor forfeitures of benefits accruing to members of a beneficial or fraternal society or their beneficiaries,[26] and by-laws providing therefor will be construed so as to avoid a forfeiture, if the language employed therein, considered in connection with the other by-laws, will admit of such construction.[27] In the absence of express authority to do so, the society cannot delegate the power of forfeiture to a subordinate body.[28]

2. GROUNDS — a. Dissolution or Suspension of Subordinate Body. The dissolution of a subordinate lodge of a beneficial or fraternal society does not of itself forfeit the right to benefits under a certificate issued by the society to a member of the lodge.[29] Nor does the suspension of a subordinate lodge of itself ordinarily

truth of the facts stated by its representatives as grounds for their statement that she had no claim, nor was she ever advised before that its validity was questioned. She in fact had a valid legal claim against the order for six thousand three hundred dollars. It was held that the settlement so obtained by taking complainant by surprise, and by requiring her to act at once without an opportunity to take legal advice or to ascertain the facts, would not be sustained by a court of equity, but the release would be set aside. Order of United Commercial Travelers *v.* McAdam, 125 Fed. 358, 61 C. C. A. 22. However, the beneficiary of a life insurance certificate who settles for less than its face, understanding that he is to receive nothing more, cannot rescind the settlement for fraud, and maintain an action on the claim, without first repaying the money received. Moore *v.* Massachusetts Ben. Assoc., 165 Mass. 517, 43 N. E. 298.

Estoppel to avoid release.— The son of a member of a mutual relief association being in fact entitled to the whole of the fund payable on his father's death, his guardian, on making claim therefor, was informed by the president that only a part of the fund was due to the son, and that the balance belonged to another person, who had been named as a beneficiary. The guardian, in good faith, without disputing this, accepted the smaller sum, and signed a receipt in full. It was held that a suit might still be maintained by the son for the balance of the fund, and that the guardian's passive assent to the payment of the balance to the wrong person did not amount to an estoppel. Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360.

Release by assignee.— Where a mutual benefit certificate has been assigned as collateral security for a loan, and after the death of the assured the association pays such loan, and receives from the lender a release of all his rights under the certificate, which is surrendered by him, this release does not discharge the association from payment of the balance of the certificate over and above the loan. Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428.

23. Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069.

24. Bock *v.* Ancient Order of United Workmen, 75 Iowa 462, 39 N. W. 709. *Compare* L'Union St. Jean Baptiste de Pawtucket *v.* Couture, 24 R. I. 304, 53 Atl. 42.

25. **Forfeiture of membership** as distinguished from forfeiture of right to benefits see *supra*, I, E, 4.

26. *Arkansas.*— United Brothers of Friendship *v.* Haymon, 67 Ark. 506, 55 S. W. 948.

California.— Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

Illinois.— Knights Templars', etc., Life Indemnity Co. *v.* Vail, 206 Ill. 404, 68 N. E. 1103 [*affirming* 105 Ill. App. 331]; Supreme Council A. L. H. *v.* Haas, 116 Ill. 587; Royal Circle *v.* Achterrath, 106 Ill. App. 439 [*affirmed* in 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452]; Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74.

Kansas.— Elliot *v.* Grand Lodge A. O. U. W., 2 Kan. App. 430, 42 Pac. 1009.

Missouri.— Lewis *v.* Western Funeral Ben. Assoc., 77 Mo. App. 586; Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

Nebraska.— Soehner *v.* Grand Lodge O. S. H., (1905) 104 N. W. 871.

New York.— Morris *v.* Krakauer Young Men's Assoc., 16 Misc. 35, 37 N. Y. Suppl. 948; Payn *v.* Rochester Mut. Relief Soc., 6 N. Y. St. 365, 2 How. Pr. N. S. 228.

Washington.— Logsdon *v.* Supreme Lodge, F. W. A., 34 Wash. 666, 76 Pac. 292.

Canada.— Maille *v.* L'Union des Ouvriers Boulangers, 12 Quebec Super. Ct. 526.

See 28 Cent. Dig. tit. "Insurance," § 1889.

27. Connelly *v.* Shamrock Benev. Soc., 43 Mo. App. 283.

28. State *v.* Fraternal Mystic Circle, 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385.

Delegation of power of suspension or expulsion see *supra*, I, E, 4, a.

Construction of amendments in laws relating to forfeiture, etc., see *supra*, page 81, note 72.

29. Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709 (where he had paid all dues to the supreme council); Kehrbaum *v.* Kegal, 17

work a forfeiture of the rights of members thereof who have complied with the laws of the society up to the time when the benefits accrue.[30] The constitution and by-laws of the society sometimes provide, however, that suspension of a subordinate lodge *ipso facto* works a suspension of its members;[31] and that to entitle them to benefits subsequently accruing they must apply to the society for reinstatement[32] or transfer to another subordinate lodge.[33] These provisions are binding on the members, and unless the prescribed conditions are complied with their right to benefits will be forfeited,[34] although the suspension of the subordinate lodge occurred without fault on their part,[35] and although the society has given them no notice of the suspension of the subordinate lodge.[36]

b. Suspension or Expulsion of Member.[37] If, before the happening of the event on which benefits become payable, a member of a beneficial or fraternal society is duly suspended, the right to claim benefits on the happening of that event is thereby forfeited.[38] With stronger reason the expulsion of a member works a forfeiture of the right to claim subsequent benefits.[39] Where, however, the constitution of a beneficial association authorizes punishment of members only by fine or expulsion, the society has no right to suspend a member, and thereby deprive him of its benefits while leaving him subject to the payment of dues;[40] and a benevolent society, in the absence of any provision in the constitution or by-laws to that effect, cannot affect a member's right to sick benefits which have already accrued by expelling him on the theory that his claim is fraudulent.[41]

Misc. (N. Y.) 635, 40 N. Y. Suppl. 589 (where non-payment of dues was held to have been excused by the dissolution).

30. United Brothers of Friendship *v.* Haymon, 67 Ark. 506, 55 S. W. 948; Supreme Lodge N. R. A. *v.* Turner, 19 Tex. Civ. App. 346, 47 S. W. 44.

31. See cases cited *infra*, note 32 *et seq.*

If the lodge is not suspended in strict accordance with the laws of the society, its members' rights are not forfeited. Young *v.* Grand Lodge S. P., 173 Pa. St. 302, 33 Atl. 1038 [*affirming* 3 Pa. Dist. 209, 34 Wkly. Notes Cas. 100].

32. Necessity of reinstatement.—Where the by-laws provide that the failure of a subordinate lodge to remit assessments to the supreme lodge within a certain time shall suspend the subordinate lodge, and that in such case the supreme president may deprive the members of the subordinate lodge of all benefits from the death benefit fund, the suspension of the lodge does not suspend its members so as to require an application by them for reinstatement, but its only effect is to deprive the members of the death benefit fund during the period of suspension, especially where other sections provide explicitly as to suspension and reinstatement of members for failure to pay assessments. Supreme Lodge N. R. A. *v.* Turner, 19 Tex. Civ. App. 346, 47 S. W. 44.

Conditions of reinstatement.—A provision requiring a certificate of good health as a prerequisite to reinstatement of a member of a suspended lodge is unreasonable as applied to a member who was in good standing at the time of the suspension but whose health had failed prior to that time. Brown *v.* Supreme Court I. O. F., 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 [*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397].

33. See cases cited *infra*, note 29 *et seq.*

Failure to affiliate with another subordinate lodge is no ground of forfeiture when application was prevented by the supreme lodge. Oates *v.* Supreme Court I. O. F., 4 Ont. 535.

34. Sovereign Camp W. W. *v.* Hicks, (Tex. Civ. App. 1904) 84 S. W. 425.

35. Peet *v.* Great Camp K. M. W., 83 Mich. 92, 47 N. W. 119.

36. Peet *v.* Great Camp K. M. W., 83 Mich. 92, 47 N. W. 119.

37. Non-payment of dues, fines, and assessments as working suspension *ipso facto* and consequent forfeiture of right to benefits see *infra*, IV, I, 2, d.

Suspension and expulsion of members generally see *supra*, I, E, 4.

Suspension as affecting "good standing" of member see *infra*, IV, I, 2, c.

38. Supreme Conclave K. D. *v.* Warwick, 110 Ga. 388, 35 S. E. 645; Supreme Council C. K. A. *v.* Winter, 108 Ky. 141, 55 S. W. 908, 21 Ky. L. Rep. 1583 (so holding, although there was no express provision for a forfeiture of benefits in the rules of the society); Winter *v.* Independent Order A. I., 88 N. Y. Suppl. 354.

The suspension must be legal in order to work a forfeiture. Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369; Lewis *v.* Western Funeral Ben. Assoc., 77 Mo. App. 586; Supreme Lodge K. H. *v.* Wickser, 72 Tex. 257, 12 S. W. 175.

39. Biskupski *v.* Pospisil, 7 Misc. (N. Y.) 434, 27 N. Y. Suppl. 1018; Foxhever *v.* Order of Red Cross, 24 Ohio Cir. Ct. 56.

40. Schassberger *v.* Staendel, 9 Wkly. Notes Cas. (Pa.) 379.

41. Wuerthner *v.* Workingmen's Benev. Soc., 121 Mich. 90, 79 N. W. 921, 80 Am. St. Rep. 484.

e. Loss of Standing. The rules of the society frequently provide that benefits are payable to only such members as are in good standing, in which case loss of standing forfeits the right to benefits.[42] Good standing may be lost, and the right to benefits consequently forfeited, by the pendency of charges against the member,[43] by his suspension[44] or withdrawal,[45] or otherwise by the termination of his membership.[46]

d. Non-Payment of Dues, Fines, or Assessments[47] — (i) *In General.* The rules of beneficial or fraternal organizations commonly provide that the failure of a member to pay dues, fines, or assessments within the time and in the manner fixed by the by-laws forfeits the right to benefits subsequently accruing;[48] and

42. Hughes *v.* Journeymen Horseshoers' Protective Union, 29 Misc. (N. Y.) 327, 60 N. Y. Suppl. 526.

Determination of fact of good standing.— Where the association has been accustomed in all cases to refer the question whether its members continued to be masons in good standing to the masonic officers, it will, in the absence of any other provision for determining that question, be regarded as having made its contract with a member in view of that usage, and the contract is to be construed as though it provided in terms that the question should be so determined. Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

Loss of standing after accrual of claim.— Where only members in good standing are entitled to benefits in case of disability, it is only necessary that the member should have been in good standing at the time he became disabled. He is not required to be in good standing at the time of making his claim or of bringing suit after the claim has been rejected. McMahon *v.* Supreme Council O. C. F., 54 Mo. App. 468.

Loss of standing as to particular benefits.— The rules of the society may be such that a member may have lost his standing so as not to have been entitled to sick benefits at the time of his death and yet have been in good standing at that time so as to authorize a recovery of death benefits (Emmons *v.* Hope Lodge No. 21 I. O. O. F., 1 Marv. (Del.) 187, 40 Atl. 956) or funeral benefits (Mullen *v.* Court Queen City O. F., 70 N. H. 327, 47 Atl. 257).

43. See Emmons *v.* Hope Lodge No. 21 I. O. O. F., 1 Marv. (Del.) 187, 40 Atl. 956. *Compare* Mullen *v.* Court Queen City O. F., 70 N. H. 327, 47 Atl. 257.

44. Karcher *v.* Supreme Lodge K. H., 137 Mass. 368; Supreme Council C. K. A. *v.* Conema, 3 Ohio Cir. Ct. 130, 2 Ohio Cir. Dec. 74; Supreme Lodge K. P. *v.* Wilson, 66 Fed. 785, 14 C. C. A. 264.

Where, however, one rule provides that the endowment should be paid "upon the death of any member . . . in good standing at the time of his demise," and that a member shall "be deemed in good standing for the purpose of claiming endowment who at the time of his death was not indebted to his council," and another rule provides that "members four months in arrears for dues shall be *ipso facto* suspended," and that "members legally suspended shall not be entitled to any of the privileges of membership whatever, until re-instated according to law," the right of the beneficiary of a deceased member to recover the endowment depended on the question whether the member at the time of his death was indebted to his council, and not on the question whether he had been suspended and not reinstated. O'Grady *v.* Knights of Columbus, 62 Conn. 223, 25 Atl. 111.

45. Meyer *v.* American Star Order, 2 N. Y. Suppl. 492, where the member obtained a withdrawal card from his lodge, and thereby ceased to exercise any voice or influence in it.

46. Ellerbe *v.* Faust, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149, holding that the termination of membership in a lodge, which is in substance and effect an expulsion, although not so in form, forfeits the right to benefits.

47. Non-payment of dues, fines, or assessments: As affecting good standing of defaulting member see *supra*, IV, I, 2, c. As ground for suspension or expulsion of defaulting member see *supra*, I, E, 4, b.

Powers of subordinate bodies with reference to forfeiture for non-payment of dues, fines, or assessments see *supra*, I, F, 2.

Strict construction of provisions for forfeiture see *supra*, IV, I, 1.

Validity of provisions for forfeiture for non-payment of dues, fines, or assessments see *supra*, I, C, 2, b.

48. *Illinois.*— Sherret *v.* Royal Clan O. S. C., 37 Ill. App. 446.

Indiana.— Grand Lodge A. O. U. W. *v.* Marshall, 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. Rep. 273.

Minnesota.— Bost *v.* Supreme Council R. A., 87 Minn. 417, 92 N. W. 337.

Missouri.— Scheele *v.* State Home Lodge F. M. P. M., 63 Mo. App. 277.

Texas.— Supreme Lodge K. H. *v.* Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084.

United States.— Stanley *v.* Northwestern Life Assoc., 36 Fed. 75 (*semble*); McMurry *v.* Supreme Lodge K. H., 20 Fed. 107; Madeira *v.* Merchants' Exch. Mut. Ben. Soc., 16 Fed. 749, 5 McCrary 258.

England.— Taylor *v.* Collins, 46 L. T. Rep. N. S. 168.

See 6 Cent. Dig. tit. "Beneficial Associations," § 44; 28 Cent. Dig. tit. "Insurance," § 1895.

provisions for suspension and forfeiture for this cause are frequently self-executing, so as to require no action on the part of the society against the defaulting member in order to bar the right to benefits.[49] However, the failure of a member to pay dues or assessments which are invalid or for which he is not legally liable does not work a forfeiture;[50] and a default in paying dues or assessments

Failure to pay assessment made by old society as forfeiting certificate issued by new society.—Defendant was organized for the express purpose of succeeding a mutual aid society. By a resolution adopted by defendant, members of the old society, on surrender of their old certificates, were to receive certificates issued by defendant, and the resolution further provided that "all assessments made by the old society on its members, not due at the time of transfer of the member from the old to the new organization, should become due and payable to the latter," etc. The certificates issued by defendant in lieu of the old certificates provided that a failure to pay "any assessments made by the society within the prescribed time shall work a forfeiture of this certificate." It was held that the forfeiture thus provided for was not incurred by a failure to pay assessments made upon the member by the old society, but by a failure to pay assessments made by defendant. Abe Lincoln Mut. Life, etc., Soc. *v.* Miller, 23 Ill. App. 341.

Failure to pay other assessments than those mentioned in certificate.—A benefit certificate stipulated that liability should attach only on compliance by assured with all the by-laws of the order, and on payment by him of all assessments to the benefit fund within the time and in the manner required by the by-laws. A by-law provided that the certificate should be void if assured failed to pay within a specified time all assessments called by the executive committee. It was held that the fact that the certificate required a payment of the assessment due the benefit fund did not relieve assured from the duty of paying other legal assessments and of complying with the by-law providing therefor; and, if he failed to do so, the certificate was avoided. Supreme Council A. L. H. *v.* Landers, 31 Tex. Civ. App. 338, 72 S. W. 880.

Failure to pay per capita tax.— Where monthly assessments were required to be paid by the member, and a semiannual *per capita* tax, and the by-laws provided a forfeiture for a failure to pay the tax at maturity, as well as for failure to pay assessments, the association was entitled to enforce a forfeiture for failure to pay the tax as well as for failure to pay assessments. Boyce *v.* Royal Circle, 99 Mo. App. 349, 73 S. W. 300.

Extent of default.— Under a provision of the constitution of a mutual benefit association that any member failing to pay "his monthly dues and other dues" for a certain time shall forfeit his membership, a forfeiture does not result unless the default is as to both monthly dues and other dues. Masi *v.* Congrega San Donato di Mutuo Soccorso, 17 Misc. (N. Y.) 609, 40 N. Y. Suppl. 667. And where the constitution of a society provides that a member shall be entitled to funeral benefits if he is "not more than three months' dues in arrears at the time of his death," a member whose dues are in arrears for three months and who dies the day before the dues for the following month are payable is entitled to funeral benefits. Sherry *v.* Operative Plasterers' Mut. Union, 139 Pa. St. 470, 20 Atl. 1062.

What benefits are forfeited.— The constitution of a benefit society provided that "members who fail to pay their dues within two meetings after general meeting shall be excluded from all benefits until all their dues are paid at the next last pay night. Before this time such members have no claim on the society. Members in arrears, and their families, are entitled only to burial ground, i. e., grave, no other expenses. Members in arrears for six months shall be stricken from the rolls." It was held that on the death of a member in arrears for dues but not in arrears for a period of six months, his widow as beneficiary was not entitled to recover the death fund provided by such constitution. Morris *v.* Krakauer Young Men's Assoc., 16 Misc. (N. Y.) 35, 37 N. Y. Suppl. 948. The right to funeral benefits may be dependent on the right to sick benefits, so that if the latter right is forfeited the former also is defeated (Frey *v.* Fidelity Lodge No. 123 K. P., 6 Pa. Co. Ct. 435); but where, in the by-laws of a beneficial order, the provisions relative to funeral benefits and sick benefits are given in separate sections, and it is provided that six months' arrearage in the payment of dues shall disentitle a member to funeral benefits, and that three months' arrearage shall disentitle him to sick benefits, the representative of a member who at the time of his death was in arrears for nearly four months' dues was entitled to funeral benefits (Owens *v.* Tamana Council, 1 Lack. Leg. N. (Pa.) 163).

49. See *infra*, IV, I, 3, a.

50. *California.*— Benjamin *v.* Mutual Reserve Fund Life Assoc., 146 Cal. 34, 79 Pac. 517, holding that a certificate holder of whom an illegal assessment is demanded need not pay the assessment or tender a sum equivalent to a legal assessment in order to preserve his rights under his contract; nor need he, on demand of the association, furnish it with his reasons for not paying the assessment.

Illinois.— Chicago Guaranty Fund Life Soc. *v.* Wilson, 91 Ill. App. 667; Rowell *v.* Covenant Mut. Life Assoc., 84 Ill. App. 304 (where the assessment was excessive); Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71 (where the assessment was not made in accordance with the by-laws).

accruing after the liability of the society for benefits has become fixed does not bar the right to such benefits.[51]

(II) *NOTICE*[52] *AND DEMAND*—(A) *Necessity.* If the constitution or by-laws of a beneficial or fraternal society provide that members shall be notified of dues and assessments, the failure of a member to pay dues or assessments of which he has not been notified cannot serve as a basis for the forfeiture of the right to benefits, but the giving of notice in such a case is a condition precedent to an exercise by the society of the right of forfeiture,[53] and the same has been held even where the rules of the society are silent on the question of notice.[54] If, however, by the laws of the society, dues and assessments accrue at stated intervals or fixed dates, the members are bound to take notice of that fact, and other

Kentucky.— American Mut. Aid Soc. *v.* Helburn, 85 Ky. 1, 2 S. W. 495, 8 Ky. L. Rep. 627, 7 Am. St. Rep. 571; Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604.

Massachusetts.— Langdon *v.* Massachusetts Ben. Assoc., 166 Mass. 316, 44 N. E. 226; Margesson *v.* Massachusetts Ben. Assoc., 165 Mass. 262, 42 N. E. 1132, in both of which cases the assessment was excessive.

Pennsylvania.— Birnbaum *v.* Passenger Conductors' L. Ins. Co., 2 Pa. Co. Ct. 179.

United States.— Rowswell *v.* Equitable Aid Union, 13 Fed. 840.

See 6 Cent. Dig. tit. "Beneficial Associations," § 44; 28 Cent. Dig. tit. "Insurance," § 1895.

Validity of dues and assessments in general see *supra*, III.

51. Albrecht *v.* People's Life, etc., Assoc., 129 Mich. 444, 89 N. W. 44 (where a certificate of membership provided for the payment of a certain sum monthly in case of total disability, and the by-laws provided that a member failing to pay his dues within the month in which they fell due should stand suspended from all benefits of the association, and it was held that a member becoming totally disabled while in good standing, so that the association became indebted to him for sick benefits, did not forfeit his membership by failing to pay dues during sickness; and that the fact that dues for a certain month became delinquent before his disability had existed a month, so as to entitle him to one month's payment of sick benefits, did not work a suspension); Burkheiser *v.* Northwest Mut. Acc. Assoc., 61 Fed. 816, 10 C. C. A. 94, 26 L. R. A. 112 (where a mutual benefit association insured its members "against personal bodily injuries effected during the continuance of membership in this insurance through external violent and accidental means," and against death resulting from such injuries within ninety days after the accident, and it was held that where a member died within ninety days after an accident, the fact that before his death he ceased to be a member because of default in paying an assessment falling due after the accident did not relieve the association from liability, as its liability was fixed by the accident).

52. Waiver of notice see *infra*, IV, J, 1, b.

53. *Illinois.*—Supreme Lodge K. H. *v.* Dalberg, 138 Ill. 508, 28 N. E. 785 [*affirming* 37 Ill. App. 145]; Catholic Order of Foresters *v.* Fitzpatrick, 58 Ill. App. 376.

Kentucky.— Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604; Grand Lodge A. O. U. W. *v.* Haynes, 16 Ky. L. Rep. 399.

Minnesota.—Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 57 N. W. 1063; Scheufler *v.* Grand Lodge A. O. U. W., 45 Minn. 256, 47 N. W. 799.

Mississippi.— Murphy *v.* Independent Order S. D. J. A., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111.

Missouri.— Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

New York.— Ellis *v.* National Provident Union, 50 N. Y. App. Div. 255, 63 N. Y. Suppl. 1012; Farrie *v.* Supreme Council C. B. L., 47 Hun 639. And see Sullivan *v.* Industrial Ben. Assoc., 73 Hun 319, 26 N. Y. Suppl. 186.

North Carolina.— Doggett *v.* United Order G. C., 126 N. C. 477, 36 S. E. 26.

Pennsylvania.— Reynolds *v.* Fidelis Lodge, 14 Pa. Super. Ct. 515.

See 28 Cent. Dig. tit. "Insurance," § 1897.

However, the rules may require members to keep themselves advised as to whether they are in arrears, in which case the right to benefits may be forfeited, although individual notice was not given. Chapple *v.* Sovereign Camp W. W., 64 Nebr. 55, 89 N. W. 423; Rhule *v.* Diamond Colliery Acc. Fund, 13 Pa. Super. Ct. 416 [*affirming* 5 Lack. Leg. N. 101].

Knowledge of assessment as dispensing with notice.— Where a benefit certificate is by its terms subject to forfeiture for non-payment of an assessment after notice of the assessment has been given, the certificate is not forfeited by non-payment of an assessment if notice is not given, although the member knows that the assessment has been made. Hannum *v.* Waddill, 135 Mo. 153, 36 S. W. 616. *Compare* Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

Notice of assessment generally see *supra*, III, C, 2.

54. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Loomis, 43 Ill. App. 599. And see Supreme Council A. L. H. *v.* Orcutt, 119 Fed. 682, 56 C. C. A. 294; *Re* Supreme Legion S. K. C., 29 Ont. 708, decided under a statute requiring notice. *Con-*

notice is not necessary.[55] Apart from notice of dues and assessments, the society may be required either by its rules[56] or by statute[57] to notify a member of the fact that he is in arrears before a forfeiture for non-payment can be claimed.[58] Ordinarily no one is entitled to notice of dues and assessments or arrearages but the members, but this rule may be altered by the laws of the society[59] or by agreement between it and a third person.[60] Where the primary purpose of a society is to promote fraternal association and afford mutual assistance irrespective of money benefits, and its by-laws make dues of every nature payable by the member in person and only at monthly meetings, a demand by the society on the member for payment of accrued dues is not a condition precedent to forfeiture for non-payment thereof.[61]

(B) *Form, Mode, and Sufficiency.* The notice of dues and assessments must be given in the manner prescribed by the rules of the society.[62] It must be given to the member himself[63] by the officer on whom the rules devolve that duty.[64]

tra, Bopple *v.* Supreme Tent K. M. W., 18 N. Y. App. Div. 488, 45 N. Y. Suppl. 1096.

55. Feiber *v.* Supreme Council A. L. H., 112 La. 960, 36 So. 818; Riddick *v.* Farmers' Life Assoc., 132 N. C. 118, 43 S. E. 544. And see Catholic Order of Foresters *v.* Fitzpatrick, 58 Ill. App. 376; *Re* Supreme Legion S. K. C., 29 Ont. 708, decided under a statute dispensing with notice in such a case, but holding that the assessments in question were not payable at fixed dates.

Agreement for notice.— Where the losses of a beneficial association were paid from assessments, and the certificate provided that annual dues should amount to a certain sum and should be paid on a certain day, and an agent soliciting for the association told insured that he would have twenty days' notice "of anything to be paid under the policy," such statement did not cover annual dues, but referred merely to such things as were uncertain, such as assessments for losses. Riddick *v.* Farmers' Life Assoc., 132 N. C. 118, 43 S. E. 544.

If the rules provide for further notice, it must be given. Covenant Mut. Ben. Assoc. *v.* Spies, 114 Ill. 463, 2 N. E. 482; Garretson *v.* Equitable Mut. Life, etc., Assoc., 93 Iowa 402, 61 N. W. 952; Garbutt *v.* Citizens' Life, etc., Assoc., 84 Iowa 293, 51 N. W. 148; Robbins *v.* American Mut. Aid Soc., 11 Ky. L. Rep. 580; Mutual Reserve Fund Life Assoc. *v.* Hamlin, 139 U. S. 297, 11 S. Ct. 614, 35 L. ed. 167.

56. United Brotherhood C. J. A. *v.* Fortin, 107 Ill. App. 306; Shafer *v.* United Brotherhood of Carpenters, 22 Misc. (N. Y.) 363, 49 N. Y. Suppl. 151; Masi *v.* Congrega San Donato di Mutuo Succorso, 17 Misc. (N. Y.) 609, 40 N. Y. Suppl. 667.

57. See Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738 [*affirming* 18 N. Y. Suppl. 305]; Elmer *v.* Mutual Ben. Life Assoc., 64 Hun (N. Y.) 639, 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512].

58. Notice of proceeding for forfeiture see *infra*, IV, I, 3, b.

59. Woodmen of the World *v.* Gilliland, 11 Okla. 384, 67 Pac. 485, holding that where the constitution of a society provides that on insanity of a member notice shall be given his guardian or conservator and his beneficiary of the fact of his insanity, and the amount of assessments and dues unpaid by him, within a certain time, such notice and time are conditions precedent to the right of the society to cancel the certificate for non-payment of assessments.

60. Keeler *v.* New York State Mut. Ben. Assoc., 20 N. Y. Suppl. 935 (holding that where a society, knowing the interest of a third person in a policy, agreed to give him notice of assessments in time to enable him to pay and prevent a lapse, it could not ignore the agreement and lapse the policy in violation thereof); Buchannan *v.* Supreme Conclave I. O. H., 178 Pa. St. 465, 35 Atl. 873, 56 Am. St. Rep. 774, 34 L. R. A. 436 (holding that where a person holding a benefit certificate in a fraternal society becomes insane, and his daughter, to whom the certificate is payable on his death, requests the proper officer of the society to notify her of any assessments, non-payment of an assessment will not work a suspension of the certificate, in the absence of the requested notification).

61. Anthony *v.* Carl, 28 Misc. (N. Y.) 200, 58 N. Y. Suppl. 1084, so holding, although the rules secured benefits to any member who has paid all dues, etc., "that may legally be demanded of him by the lodge."

62. Farmers' Federation *v.* Croney, 106 Ill. App. 423 (where notice in the precise manner specified in the rules was required); Supreme Lodge K. H. *v.* Dalberg, 37 Ill. App. 145 [*affirmed* in 138 Ill. 508, 28 N. E. 785] (where notice was required to be given substantially in the manner prescribed by the rules).

63. Garbutt *v.* Citizens' Life, etc., Assoc., 84 Iowa 293, 51 N. W. 148 (where notice to the member's husband, who also was a member, was held insufficient); Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604 (where it was held that notice to the society's local agent was not notice to the local members).

64. Bates *v.* Detroit Mut. Ben. Assoc., 51 Mich. 587, 17 N. W. 67 (notice by the managers of the society being insufficient

Rules prescribing the time at which the notice shall be sent have been held to be merely directory;[65] and the fact that the notice is mailed before its date does not invalidate the assessment.[66] If the notice is such as to advise the member of the amount due and the time for payment, it is sufficient, in the absence of statute or by-law prescribing further requirements as to its form and contents.[67] If the notice demands a greater sum than is due,[68] or requires payment to be made at an earlier day than the by-laws prescribe,[69] it is invalid. According to the requirements of the rules of the society, the notice must be actual[70] and personal,[71] or

where the rules direct the secretary to give notice); Payn *v.* Rochester Mut. Relief Soc., 2 How. Pr. N. S. (N. Y.) 220, 6 N. Y. St. 365 (notice by the local secretary being insufficient where the general secretary is required by the rules to give notice).

65. Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371, holding that the failure to give notice on or before the day of the month specified by the rules does not release a member from liability to pay the assessment, or relieve him from the forfeiture of his rights as a member if he fails to pay it.

Time of giving notice as fixing time of payment of dues and assessments see *infra*, IV, I, 2, d, (III), (A).

Validity of notice demanding payment before time fixed by rules see *infra*, this subsection.

66. Van Frank *v.* U. S. Masonic Benev. Assoc., 158 Ill. 560, 41 N. E. 1005.

67. Hansen *v.* Supreme Lodge K. H., 140 Ill. 301, 29 N. E. 1121 [*affirming* 40 Ill. App. 216] (holding that a notice specifying the number of the assessment, and bearing the seal of the association, received by a member, inclosed in an envelope addressed to him at his residence, is sufficient, although neither signed by the officer whose duty it is to give the same nor addressed to such member on the notice itself); Thibert *v.* Supreme Lodge K. H., 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136 (holding that where the reporter of a lodge notified decedent in person of three assessments due, and decedent promised to make payment, such personal notice was sufficient to put decedent in default, although the by-laws provided for written or printed notice). See, however, Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 57 N. W. 1063, holding that where a certificate of insurance provided that one month should be allowed for paying assessments after notice thereof, and on the envelope containing the certificate was indorsed: "First premium payable Feb. 1," failure to pay, before February 1, an assessment made January 1, of which the member had no other notice, did not forfeit his certificate.

List of deaths and amount due.— Where a notice to a member of a mutual benefit association does not contain a list of the deaths since the last assessment, and notify the member of the amount due to the benefit fund, as required by the by-laws of the association, a forfeiture of a policy cannot be sustained for failure to pay the assessment. Miner *v.* Michigan Mut. Ben. Assoc., 63 Mich. 338, 29 N. W. 852. However, a notice stating that it is a mortuary call for payment of death claims according to an annexed list showing the number and amount of each policy, the name and residence of deceased, and the name of, and the amount and date of payment to, each beneficiary, is sufficient. Smith *v.* Covenant Mut. Ben. Assoc., (Tex. Civ. App. 1897) 43 S. W. 819.

Notice of impending forfeiture.—Although the holder of a mutual benefit certificate before his death failed to pay an assessment which he was notified to pay, the certificate is not forfeited if the notice did not state, as required by N. Y. Laws (1876), c. 341, as amended by N. Y. Laws (1877), c. 321, that unless it was paid the certificate would be forfeited. Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512].

68. U. S. Mutual Acc. Assoc. *v.* Mueller, 151 Ill. 254, 37 N. E. 882; Dowling *v.* Knights Templars, etc., Life Indemnity Co., 116 Mich. 471, 74 N. W. 725. See, however, Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96, holding that where a benefit certificate provides that insured shall pay three dollars per annum for expenses on the first day of the month after issue and at every anniversary thereafter, "or by monthly or other *pro rata* installments of the same in advance for periods of less than a year," and during seven years the company sent notices to insured at the proper time, containing an item for three months' dues in advance, and he paid the same without objection or dissent, a notice of an assessment and also of three months' dues in a separate item afterward sent to him was not defective, although he was entitled to his choice as to whether he would pay one or three months' dues in advance.

69. U. S. Mutual Acc. Assoc. *v.* Mueller, 151 Ill. 254, 37 N. E. 882 [*affirming* 51 Ill. App. 40]; Illinois Commercial Men's Assoc. *v.* Wahl, 68 Ill. App. 411; Haskins *v.* Kentucky Grangers' Mut. Ben. Soc., 7 Ky. L. Rep. 371; Bridges *v.* National Union, 73 Minn. 486, 76 N. W. 270, 77 N. W. 411; *Re* Supreme Legion S. K. C., 29 Ont. 708. See, however, Grand Lodge A. O. U. W. *v.* Moore, 1 Ky. L. Rep. 93.

Time for payments see *infra*, IV, I, 2, d, (III), (A).

70. Courtney *v.* U. S. Masonic Ben. Assoc., (Iowa 1892) 53 N. W. 238; American Mut. Aid Soc. *v.* Quire, 7 Ky. L. Rep. 671.

Necessity of actual receipt of notice by mail see *infra*, note 73.

71. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Loomis, 43 Ill. App. 599.

it may be given by posting the same in the lodge rooms,[72] or by depositing it in the mail.[73]

(III) *PAYMENT AND TENDER*—(A) *Time For Payment.*[74] The time when dues and assessments must be paid in order to avoid a forfeiture depends upon the constitution and by-laws of the society,[75] which commonly provide that payment

72. Rhule *v.* Diamond Colliery Acc. Fund, 5 Lack. Leg. N. (Pa.) 101 [*affirmed* in 13 Pa. Super. Ct. 416].

73. Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371.

Notice of default before forfeiture of an insurance certificate is well served if sent by post addressed to assured at his last known place of abode. Morgan *v.* McClure, [1899] 2 Ir. 209. *Compare* Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738 [*affirming* 18 N. Y. Suppl. 305].

What constitutes mailing.— In order to render notice through the mails sufficient, the notice must be placed in the post-office, properly directed, and stamped. Haskins *v.* Kentucky Grangers' Mut. Ben. Soc., 7 Ky. L. Rep. 371. And placing a notice, properly addressed and stamped, on a desk from which the mail carrier, whenever he delivered mail, took letters so left to deposit them in the mail, is not a mailing of the notice. Molloy *v.* Supreme Council Catholic Mut. Ben. Assoc., 93 Iowa 504, 61 N. W. 928.

Address.— The notice by mail must be sent directed to the proper address. Haskins *v.* Kentucky Grangers' Mut. Ben. Soc., 7 Ky. L. Rep. 371. If it is misdirected and the member does not receive it, it is insufficient to put him in default. Supreme Lodge K. H. *v.* Dalberg, 37 Ill. App. 145 [*affirmed* in 138 Ill. 508, 28 N. E. 785]; Molloy *v.* Supreme Council Catholic Mut. Ben. Assoc., 93 Iowa 504, 61 N. W. 928; Waterworth *v.* American Order of Druids, 164 Mass. 574, 42 N. E. 106.

Effect of non-receipt or delay in receipt.— A member of an association, subject to all the requirements thereof and entitled to all the benefits as provided in the by-laws, is bound by a by-law that the secretary shall give notice of assessments and dues by sending all such notices by mail to the last given post-office address of each member, which shall be considered a legal notice, and is in default if he fails to respond to such a notice, whether he ever received it or not. Union Mut. Acc. Assoc. *v.* Miller, 26 Ill. App. 230; Weakly *v.* Northwestern Benev., etc., Assoc., 19 Ill. App. 327; Forse *v.* Supreme Lodge K. H., 41 Mo. App. 106. It has been held, however, that a member is not in default if he never receives the notice (Robbins *v.* American Mut. Aid Soc., 11 Ky. L. Rep. 580; Crockett *v.* Order of Red Cross, 24 Ohio Cir. Ct. 421. And see Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371), or if he does not receive it until after the time for payment has expired (Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738 [*affirming* 18 N. Y. Suppl. 305]).

Effect of sickness or insanity of member.— The fact that assured is insane at the time the notice is mailed or at the time he receives it does not render the notice ineffective. Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96. *Contra*, see Courtney *v.* U. S. Masonic Ben. Assoc., (Iowa 1892) 53 N. W. 238, where at the time of receiving the notice assured was ill, and unable to understand or transact any business, and so remained until his death, before which time the envelope containing the notice was not opened. Sickness or insanity as excuse for non-payment of dues and assessments see *infra*, IV, D, 2, d, (IV).

Burden of proof and presumption as to receipt of notice see *infra*, VI, G, 1, a.

74. **Failure to pay within prescribed time as working forfeiture** see *supra*, IV, I, 2, d, (I).

75. United Brotherhood C. J. A. *v.* Dinkle, 32 Ind. App. 273, 69 N. E. 707 (holding that where the dues of a society were fifty cents each month, and each local union collected an assessment monthly and the constitution provided that monthly dues should be charged on the books on the first of each month, and that the secretary should not receive dues in the interim between meetings, except that after the last meeting in the month he should receive dues up to and including the last day of the month, the monthly dues and assessments were entered and became due on the first of the month, but the members had all of that month in which to pay without becoming delinquent); Strasser *v.* Staats, 59 Hun (N. Y.) 143, 13 N. Y. Suppl. 167 (where, by the constitution and by-laws of defendant's lodge, members' dues accrued weekly, and a forfeiture by the member of all lodge benefits was prescribed in case he should be in arrears for dues over the amount of thirteen weeks, and the dues were uniformly charged and collected quarterly, and the deceased member, through whom plaintiff claimed a funeral benefit, died within a month after having regularly paid his last quarterly dues; and it was held that the phrase "accrued" weekly did not mean "payable" weekly, but that the dues were payable quarterly, and that deceased was not in arrears at the time of his death); Davis *v.* Atkinson, 33 Misc. (N. Y.) 483, 67 N. Y. Suppl. 851 (holding that where the by-laws of a beneficial association provide that any member whose dues remain unpaid for thirteen weeks shall be allowed until the next meeting to pay the same, but shall not be entitled to any benefits if such dues are not paid by that time, the right of the wife of a member thereof to recover a death benefit is not

may and must be made within a prescribed period after the giving of notice.[76] The fact that the member dies after receiving notice and without having paid

defeated by showing that the husband had not paid his dues for more than thirteen weeks, but it must also be shown that the association had a meeting subsequent thereto, since the member was entitled to benefits until such meeting); Weiss *v.* Tennant, 2 Misc. (N. Y.) 213, 21 N. Y. Suppl. 252 (holding that where there is nothing in the by-laws of an association requiring the monthly dues to be paid in advance, they may be paid at any time during the month, and a member who dies before the end of a month without paying that month's dues is not in arrears); Bukofzer *v.* U. S. Grand Lodge I. O. S. B., 15 N. Y. Suppl. 922 [*affirmed* in 139 N. Y. 612, 35 N. E. 204] (holding that where the constitution of a mutual benefit association provides that a member shall forfeit all right to the endowment fund "when he is in arrears with his dues and assessment for a period of six months," such forfeiture does not occur as soon as he owes six months' dues, they being payable at the end of each quarter; for he is not six months in arrears until six months after the day when his payments are due); Wiggin *v.* Knights of Pythias, 31 Fed. 122 (where, according to an article of the constitution of the endowment rank of a society, a benefit certificate was not forfeited for the non-payment of the local lodge dues until the member was more than six months "in arrears" for the dues, and it was held therefore that under the by-laws of a local lodge regulating the payment of dues to that lodge, they were not demandable in advance at the beginning of the term for which they were leviable, but at the end of that term, and did not become "in arrears" until after that time, although they might be paid, and in practice generally were paid, before that date).

76. *Kentucky.*—Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., (1887) 2 S. W. 676.

Louisiana.— Wetmore *v.* Mutual Aid, etc., Assoc., 23 La. Ann. 770, holding that where assured agreed to pay a certain sum on the death of any member, within thirty days after date of death, being notified thereof by publication in a daily newspaper for five consecutive days, he was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication.

Michigan.— Shelden *v.* National Masonic Acc. Assoc., 122 Mich. 403, 81 N. W. 266, holding that where there is a question as to the time after notice within which assessments levied by a mutual benefit association must be paid to prevent a forfeiture, its articles of association will govern, instead of by-laws adopted by the board of directors.

New York.— Knight *v.* Supreme Council O. C. F., 2 Silv. Sup. 453, 6 N. Y. Suppl. 427, holding that where the constitution of a mutual benefit association provides that when an assessment is made the secretary shall at once notify the members, and each member shall pay the same within thirty days from the date of the notice under penalty of forfeiture, the omission to pay an assessment levied thirty-four days before the member's death is no cause for forfeiture when the notice was not given until thirteen days after levy of the assessment.

United States.— Stanley *v.* Northwestern Life Assoc., 36 Fed. 75, holding that where by-laws require notice of each assessment to be sent to the member at his last known post-office, sending the notice is an essential part of the "notice" or "assessment," and unless done within a reasonable time after its date, the thirty days allowed for payment do not run from such date.

See 28 Cent. Dig. tit. "Insurance," § 1903.

If the rules provide for payment within a specified period after notice, the member is not in default for failing to pay within a less time than prescribed by the notice. Illinois Commercial Men's Assoc. *v.* Wahl, 68 Ill. App. 411; Haskins *v.* Kentucky Grangers' Mut. Ben. Soc., 7 Ky. L. Rep. 371; *Re* Supreme Legion S. K. C., 29 Ont. 708. And see cases cited *infra*, note 77. See, however, Grand Lodge A. O. U. W. *v.* Moore, 1 Ky. L. Rep. 93 (holding that, where ample notice is given, it is not necessary that the full time allowed by the charter shall intervene between the date of the notice and the suspension of a benefit certificate); Stanley *v.* Northwestern Life Assoc., 36 Fed. 75. Validity of notice requiring payment before time prescribed by rules see *supra*, IV, I, 2, d, (II), (B).

The time for payment is to be computed from the time when the notice is received (Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159; U. S. Mutual Acc. Assoc. *v.* Mueller, 151 Ill. 254, 37 N. E. 882 [*affirming* 51 Ill. App. 40]; Grand Lodge I. I. O. M. A. *v.* Besterfield, 37 Ill. App. 522; Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., (Ky. 1887) 2 S. W. 676; American Mut. Aid Soc. *v.* Quire, 7 Ky. L. Rep. 671; Shelden *v.* National Masonic Acc. Assoc., 122 Mich. 403, 81 N. W. 266. And see Bridges *v.* National Union, 73 Minn. 486, 76 N. W. 270, 77 N. W. 411; Williams *v.* Young Men's Mut. Life Assoc., 6 Ohio Dec. (Reprint) 1168, 11 Am. L. Rec. 48) or would be received in the ordinary course of mail (U. S. Mut. Acc. Assoc. *v.* Mueller, *supra*; National Mut. Ben. Assoc. *v.* Miller, 85 Ky. 88, 2 S. W. 900, 8 Ky. L. Rep. 731; Shelden *v.* National Masonic Acc. Assoc., *supra*), and not from the date appearing on the notice (Great Western Mut. Aid Assoc. *v.* Colmar, *supra*; Grand Lodge I. I. O. M. A. *v.* Besterfield, *supra*; National Mut. Ben. Assoc. *v.* Miller, *supra*; Bridges *v.* National Union, *supra*; Williams *v.* Young Men's Mut. Life Assoc., *supra*), or the day on which it was mailed (Great Western Mut. Aid Assoc. *v.* Colmar, *supra*; Grand Lodge I. I. O. M. A. *v.* Bester-

dues and assessments does not forfeit the right to benefits, if at the time of his death the period fixed for payment has not expired.[77] The society may either expressly or by implication extend the time of payment as fixed by its rules.[78]

(B) *Sufficiency of Payment.* Dues and assessments may be paid by the member's beneficiary,[79] or by an officer of the lodge under an agreement with a third person to reimburse him.[80] Payments may be made to an assistant of the collecting officer;[81] and a member of a disbanded lodge whose transfer card has been refused by the only other local lodge may send his assessments to the supreme council.[82] Payment may be made by order or check,[83] but in case it is

field, *supra*; National Mut. Ben. Assoc. *v.* Miller, *supra*. But see Bridges *v.* National Union, *supra*; Williams *v.* Young Men's Mut. Life Assoc., *supra*).

77. *Illinois.*— Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88; Grand Legion S. K. A. *v.* Beaty, 117 Ill. App. 657 [*affirmed* in 224 Ill. 346, 79 N. E. 565, 8 L. R. A. N. S. 1124]; Grand Lodge I. I. O. M. A. *v.* Besterfield, 37 Ill. App. 522.

Indiana.— Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Iowa.— McGowan *v.* Northwestern Legion of Honor, 98 Iowa 118, 67 N. W. 89; Moore *v.* Order of Railway Conductors of America, 90 Iowa 721, 57 N. W. 623.

Kansas.— See Kansas Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607.

Missouri.— Harris *v.* Wilson, 86 Mo. App. 406.

New York.— Elmer *v.* Mutual Ben. Life Assoc. of America, 64 Hun 639, 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512]; Knight *v.* Supreme Council O. C. F., 2 Silv. Sup. 453, 6 N. Y. Suppl. 427.

See 28 Cent. Dig. tit. "Insurance," § 1903.

Death on last day of period.— Under a certificate giving insured until a given day in the month to pay an assessment, there can be no forfeiture for non-payment where insured dies on such given day. Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262. *Contra*, Reichenbach *v.* Ellerbe, 115 Mo. 588, 22 S. W. 573.

78. Flicek *v.* High Court C. O. F., 90 Ill. App. 344; Kansas Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607.

Extension by sending notice of later assessments.—The by-laws provided that each member should pay the amount due on the notice of the collector within thirty days from the date of notice, and on failure to pay should stand suspended. A member failed to pay an assessment within thirty days, but after the expiration of that time notices of other assessments were sent to him, requesting him to pay the therein-mentioned assessments due from him to maintain his standing in the order, and reciting that "to avoid suspension, this assessment must be paid on or before" a certain date, and that "the sending of this notice shall not be held to waive forfeiture or lapse of membership by non-payment of previous assessments." Within thirty days after the date of the last notice, the member died, and tender of the amount due on such assessments was made within that time. It was held, in an action on the certificate of membership, that the sending of said notices extended the time of payment of the overdue assessments. McGowan *v.* Northwestern Legion of Honor, 98 Iowa 118, 67 N. W. 89.

79. O'Grady *v.* Knights of Columbus, 62 Conn. 223, 25 Atl. 111, in the absence of any rule to the contrary.

80. Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165, holding also that where dues and assessments were regularly paid for insured to the lodge by the financier of the local lodge on an agreement of a third person to reimburse him, the insurance was not forfeited, although the third person did not in fact reimburse the financier until after the death of insured.

81. Anderson *v.* Supreme Council O. C. F., 135 N. Y. 107, 31 N. E. 1092, where the constitution of a subordinate council of a society with a relief fund feature provided that the secretary of the subordinate council should receive assessments of members entitled to relief benefits; that he should be under bonds; and that the subordinate council might permit him to select an assistant, for whose acts he should be responsible; and it was held that, it being the uniform practice of the members to make payments to the wife of the secretary, who had no office, at his house, in his absence, and her authority not having been questioned, she would be treated as his assistant, so that a payment to her would prevent forfeiture.

82. Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709, holding that the member is not bound to transfer his membership to a foreign lodge.

83. National Ben. Assoc. *v.* Jackson, 114 Ill. 533, 2 N. E. 414, holding that where the amount due is paid by an order on the member's employer, the association receiving the order in lieu of cash, the fact that the employer erroneously states that he owed the member nothing does not relieve the association from liability for the benefit, the member not having been notified of the non-payment of the order.

Where, however, a member mails a check for the sum due to the secretary of the association, but before the check is used telegraphs to the secretary to hold it until he is heard from, and nothing further is heard from him, he may be legally dropped from

mailed it operates only from its receipt by the society.[84] The failure of the collecting officer to turn the money over to the lodge,[85] or the failure of the lodge to send the money to the society,[86] does not invalidate the payment or defeat the member's rights; nor does the refusal of the society to give him credit for a payment.[87]

(c) *Application of Payments and Credits.* It is a general rule, subject, however, to some exceptions,[88] that where the society has in its possession sufficient funds of the member to pay dues and assessments at the time they accrue, it must apply the funds in payment thereof, and hence cannot declare a forfeiture for failure of the member to pay them;[89] nor can the society apply payments

membership after the lapse of the period for payment prescribed by the by-laws, as in such case the secretary is the agent of the member and holds the check subject to his order and not in payment of dues. Drum *v.* Benton, 13 App. Cas. (D. C.) 245.

84. Rice *v.* Grand Lodge A. O. U. W., 103 Iowa 643, 72 N. W. 770, 92 Iowa 417, 60 N. W. 726.

85. Weiss *v.* Tennant, 2 Misc. (N. Y.) 213, 21 N. Y. Suppl. 252.

86. See *supra*, I, F, 2, b.

87. Supreme Lodge K. H. *v.* Wickser, 72 Tex. 257, 12 S. W. 175.

88. Hansen *v.* Supreme Lodge K. H., 40 Ill. App. 216; Ancient Order United Workmen *v.* Moore, 1 Ky. L. Rep. 93 (holding that where an assessment by a supreme lodge has not been paid, the benefit certificate of the member may be suspended, although there is more than sufficient due him from the subordinate lodge to pay such assessment); Petrie *v.* Mutual Ben. L. Ins. Co., 92 Minn. 489, 100 N. W. 236.

Application of salary of member as employee of society.— The fact that at the time of the death of a member the society was indebted to him for salary as an officer in an amount greater than the amount of the assessments due from him did not require the society to apply the amount due to the payment of the assessments so as to avoid a forfeiture of the certificate. Leffingwell *v.* Grand Lodge A. O. U. W., 86 Iowa 279, 53 N. W. 243; Pister *v.* Keystone Mut. Ben. Assoc., 3 Pa. Super. Ct. 50.

89. Supreme Lodge O. M. P. *v.* Meister, 105 Ill. App. 471 [*affirmed* in 204 Ill. 527, 68 N. E. 454]; Knights Templars, etc., Life Indemnity Co. *v.* Vail, 105 Ill. App. 331 [*affirmed* in 206 Ill. 404, 68 N. E. 1103]; Logsdon *v.* Supreme Lodge F. U. A., 34 Wash. 666, 76 Pac. 292. *Compare* Hollister *v.* Quincy Mut. F. Ins. Co., 118 Mass. 478.

Advance payments.— If the member deposits money to meet anticipated dues and assessments, it must be applied thereto by the society (Demings *v.* Supreme Lodge K. P., 20 N. Y. App. Div. 622, 48 N. Y. Suppl. 649; Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27; Logsdon *v.* Supreme Lodge F. U. A., 34 Wash. 666, 76 Pac. 292. And see U. S. Mutual Acc. Assoc. *v.* Mueller, 151 Ill. 254, 37 N. E. 882; Dowling *v.* Knights Templars, etc., Life Indemnity Co., 116 Mich. 471, 74 N. W. 725), although the duties of the collecting officer do not require him to receive money in advance (Grand Lodge A. O. U. W. *v.* Scott, 3 Nebr. (Unoff.) 851, 97 N. W. 637, 3 Nebr. (Unoff.) 845, 93 N. W. 190).

Overpayments made by a member should be applied by the society to dues and assessments subsequently accruing. Supreme Lodge O. M. P. *v.* Meister, 204 Ill. 527, 68 N. E. 454 [*affirming* 105 Ill. App. 471]; Supreme Lodge P. A. *v.* Welsch, (Kan. 1899) 57 Pac. 115; Knight *v.* Supreme Council O. C. F., 2 Silv. Sup. (N. Y.) 453, 6 N. Y. Suppl. 427; Reynolds *v.* Fidelis Lodge, 14 Pa. Super. Ct. 515; Crumpton *v.* Pittsburg Council No. 117 J. O. U. A. M., 1 Pa. Super. Ct. 613, 38 Wkly. Notes Cas. 335.

Share in surplus.—An assessment life association had in its hands a sum, evidenced by a bond issued to insured representing his proportion of a surplus or guaranty fund of the association, which sum it was by its constitution required to apply in payment of his assessments without notice to or request from him or surrender of the bond, although the bond provided to the contrary. Its constitution provided that failure to pay an assessment when due should *ipso facto* work a forfeiture and termination of membership. The member had notice of an assessment, but, not having paid it when due, his policy was canceled on the books of the company. At the time of his death his share of the surplus named in the bond would have paid all assessments levied prior to his death. It was held that the company was liable on the policy, although insured had not complied with the conditions of the bond. Knights Templars,' etc., Life Indemnity Co. *v.* Vail, 206 Ill. 404, 68 N. E. 1103 [*affirming* 105 Ill. App. 331]. The by-laws of an association provided for a distribution of the surplus according to the directions of the directors. The company issued a policy to a husband for the benefit of his wife, the premium to be paid on the eighteenth of March of each year. Insured died in August, 1901, and by the terms of the policy it had lapsed March 18, 1901, for default in premium. On Jan. 21, 1901, the directors adopted a resolution declaring a provisional dividend on the payment of the annual premiums. There was available as a dividend at that time to the policy in suit a sum which, if applied to reduce the indebtedness, would extend the policy beyond

made by the member or funds belonging to him to dues or assessments for which he is not liable, and thus put him in arrears for dues or assessments for which he is liable;[90] or apply payments to dues which are not due at the time of the payment, and thus put him in default for dues which are due at that time.[91]

(D) *Tender.*[92] If a member tenders his dues or assessments to the proper officer of the society, and the tender is refused, there can be no forfeiture of his rights for non-payment of dues and assessments;[93] and the tender of an assessment made by a subordinate lodge to the supreme body, although refused, preserves the rights of the lodge and its members.[94]

(IV) *EXCUSES FOR NON-PAYMENT.*[95] A member is excused from paying or tendering subsequently accruing dues and assessments where he has been wrongfully expelled from the society,[96] and a tender of previously accruing dues and assessments has been refused;[97] or where the society has denied the fact of his

the date of the death of insured. It was held that that portion of the provisional dividend apportioned to the policy did not become applicable as a credit to reduce the indebtedness of insured and extend the insurance, because of the valid condition attached requiring payment of the annual premium, so that the policy lapsed on March 18, 1901. Petrie *v.* Mutual Ben. L. Ins. Co., 92 Minn. 489, 100 N. W. 236.

Sick benefits.— Under a by-law of a benevolent association providing for payment of benefits in case of sickness to "every member in good standing on the books," a member cannot be deprived of such benefits because in arrear for dues, where the amount of the dues in arrear is less than the previously accrued benefits. Brady *v.* Coachman's Benev. Assoc., 14 N. Y. Suppl. 272. And see Murray *v.* Iron Hall, 9 Pa. Super. Ct. 89, 43 Wkly. Notes Cas. 357. The constitution of a mutual benefit association, after requiring the payment of dues to the local lodge, provided that if any member who was a beneficiary and receiving sick benefits should be unable to pay dues, a sum should be applied from the amount of his benefits sufficient to prevent his becoming in arrears. A section of the by-laws, governing reinstatement after suspension for non-payment of dues, fines, or assessments, provided that the application must be accompanied with the full amount the member was in arrears for dues and fines, the assessment on which he was suspended, and the first assessment due after the date of reinstatement. It was held that a member who was in receipt of sick benefits was not entitled to have a sum applied out of such benefits to the payment of an assessment on his certificate, so as to prevent its forfeiture. Hansen *v.* Supreme Lodge K. H., 40 Ill. App. 216. Default of society in paying benefits as excusing non-payment of assessments see *infra*, IV, I, 2, d, (IV). Sickness as excusing non-payment of dues and assessments see *infra*, IV, I, 2, d, (IV).

90. Supreme Lodge P. A. *v.* Welsch, (Kan. 1899) 57 Pac. 115; Elliott *v.* Grand Lodge A. O. U. W., 2 Kan. App. 430, 42 Pac. 1009; Knight *v.* Supreme Court O. C. F., 2 Silv. Sup. (N. Y.) 453, 6 N. Y. Suppl. 427; Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27; Reynolds *v.* Fidelis Lodge, 14 Pa. Super. Ct. 515; Crumpton *v.* Pittsburg Council No. 117 J. O. U. A. M., 1 Pa. Super. Ct. 613, 38 Wkly. Notes Cas. 335; Logsdon *v.* Supreme Lodge F. U. A., 34 Wash. 666, 76 Pac. 292.

91. Harris *v.* Wilson, 86 Mo. App. 406.

92. See, generally, TENDER.

Refusal of tender of dues or assessment as excusing tender of subsequent dues or assessments see *infra*, IV, I, 2, d, (IV).

93. Foresters of America *v.* Hollis, 70 Kan. 71, 78 Pac. 160; Sullivan *v.* Industrial Ben. Assoc., 73 Hun (N. Y.) 319, 26 N. Y. Suppl. 186, both so holding, although the officer refused to accept payment because he doubted his authority to do so.

Tender of an assessment to one not authorized to receive it, and who refuses to accept it, informing the person who tenders the same that it must be paid to the financial secretary of the company, does not bind the company, although the person to whom the tender was made had been in the habit of receiving assessments from different members, receipting therefor, and paying them over to the proper officer. Toelle *v.* Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 97 Wis. 322, 72 N. W. 630.

Necessity of repeating tender.—A tender once made and refused does not have to be repeated; the debtor is only required to keep in readiness to meet a demand when made. Hall *v.* Supreme Lodge K. H., 24 Fed. 450.

Where no specific amount of money is tendered, but the member merely expresses his willingness to pay the assessment if he knew its amount, the tender is insufficient. Supreme Conclave K. D. *v.* Warwick, 110 Ga. 388, 35 S. E. 645.

94. Hall *v.* Supreme Lodge K. H., 24 Fed. 450.

95. Dissolution of society or subordinate body as excusing non-payment of subsequent dues and assessments see *supra*, I, I, 5.

96. Plattdeutsche Grot Gilde *v.* Ross, 117 Ill. App. 247.

97. Grand Lodge A. O. U. W. *v.* Scott, 3 Nebr. (Unoff.) 851, 97 N. W. 637, 3 Nebr. (Unoff.) 845, 93 N. W. 190 (holding that the failure thereafter to tender dues cannot

membership,[98] or repudiated the contract of insurance,[99] or notified the member that no further payments would be accepted from him,[1] and refused a tender of an assessment made previously to that in question;[2] and generally the refusal of a tender of an assessment dispenses with the necessity of tendering a subsequent assessment.[3] So the default of the society in paying benefits in instalments as agreed excuses the member from paying subsequent assessments;[4] and if the member is absent during the time allowed for payment and has no knowledge of the assessment,[5] or if the collecting officer is absent and his whereabouts are unknown during that time,[6] non-payment of the assessment within the prescribed period may be excused. Sickness or insanity of the member is no excuse for non-payment of dues and assessments as they accrue,[7] unless the by-laws contain provisions to the contrary.[8] Nor is a member excused from paying dues and

be made the basis of a forfeiture until notice of a readiness to receive them has been brought home to the suspended member); Simmons *v.* Syracuse, etc., R. Benev. Soc., 10 N. Y. Suppl. 293.

98. Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595. And see *infra*, IV, J, 5, b, (I), as to waiver by conduct inducing forfeiture.

99. Sullivan *v.* Industrial Ben. Assoc., 73 Hun (N. Y.) 319, 26 N. Y. Suppl. 186. And see *infra*, IV, J, 5, b, (I), as to waiver by conduct inducing forfeiture.

1. Supreme Council O. C. F. *v.* Bailey, 55 S. W. 888, 21 Ky. L. Rep. 1627.

Wrongful conditions of acceptance.—If the society notifies the member that it will not accept further payments unless he complies with certain conditions which it wrongfully imposes, non-payment of subsequent dues and assessments is excused. Boyce *v.* Royal Circle, 104 Mo. App. 528, 79 S. W. 495.

2. See cases cited *supra*, notes 98, 99, 1.

3. Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903.

4. Murray *v.* Iron Hall, 9 Pa. Super. Ct., 89, 43 Wkly. Notes Cas. 357. And see Brady *v.* Coachman's Benev. Assoc., 14 N. Y. Suppl. 272.

Duty of society to apply sick benefits to payment of dues and assessments see *supra*, note 89.

5. Druids Mut. Relief Soc. *v.* Billau, 5 Ohio Dec. (Reprint) 217, 3 Am. L. Rec. 546.

6. Sovereign Camp W. W. *v.* Hicks, (Tex. Civ. App. 1904) 84 S. W. 425.

7. *District of Columbia.*— McElhone *v.* Massachusetts Ben. Assoc., 2 App. Cas. 397.

Illinois.— Grand Lodge A. O. U. W. *v.* Jesse, 50 Ill. App. 101.

Iowa.— See Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100.

Maryland.— Yoe *v.* Benjamin C. Howard Masonic Mut. Benev. Assoc., 63 Md. 86.

Minnesota.— See Bost *v.* Supreme Council R. A., 87 Minn. 417, 92 N. W. 337.

Missouri.— Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862. And see Curtin *v.* Grand Lodge A. O. U. W., 65 Mo. App. 294.

Nebraska.— See Field *v.* National Council K. & L. S., 64 Nebr. 226, 89 N. W. 773.

Utah.— See Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

United States.— Hawkshaw *v.* Supreme Lodge K. H., 29 Fed. 770.

See 28 Cent. Dig. tit. "Insurance," § 1906.

Contra.— Dennis *v.* Massachusetts Ben. Assoc., 120 N. Y. 496, 24 N. E. 843, 17 Am. St. Rep. 660, 9 L. R. A. 189 [*affirming* 47 Hun 338]. See, however, Ingram *v.* Supreme Council A. L. H., 14 N. Y. St. 600.

Duty of society to apply sick benefits to payment of dues and assessments see *supra*, note 89.

Sickness or insanity as invalidating notice of dues and assessments see *supra*, IV, I, 2, d, (II), (B).

8. Grand Lodge A. O. U. W. *v.* Brand, 29 Nebr. 644, 46 N. W. 95. See, however, Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100 (holding that where a benefit certificate provides that members of one year's standing shall not be subject to forfeiture of membership for failure to pay assessments during sickness, if unable to do so, such exemption does not apply to a member who had not been such for one year at the time of default in payment); Curtin *v.* Grand Lodge A. O. U. W., 65 Mo. App. 294 (holding that by-laws providing that a member shall not become suspended on dues or assessments during the time he shall stand reported as sick or disabled relate to sick benefits only, and do not prevent a forfeiture of death benefits for failure to pay assessments during sickness); Field *v.* National Council K. & L. S., 64 Nebr. 226, 89 N. W. 773 (holding that in order to obtain sick benefits, as provided by the by-laws of a mutual benefit association, a member must bring himself within their terms; and where a sick member is unable to keep up his assessments, and the by-laws so provide, in such case he must appear before the council and make a statement that owing to such sickness of either himself or of the family he is unable to pay his assessments).

Notice of sickness.— To excuse a sick member from paying his dues and assessments, he must, by the terms of some by-laws, notify the society of his sickness. Bost *v.* Supreme Council R. A., 87 Minn. 417, 92 N. W. 337; Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

assessments within the prescribed time by the default of his agent,[9] or the failure of the society's collector to call for the dues as required by the rules;[10] and payment is not excused by the fact that the society has engaged in business beyond its powers, unless he is injured thereby,[11] or has made an unauthorized attempt to change his contract of insurance to his detriment,[12] or by the fact that prior assessments have been misappropriated by the society.[13]

e. Breach of Condition Subsequent or Promissory Warranty.[14] The contract of insurance between a beneficial society and a member, and the by-laws which enter into the contract, prescribe the conditions subsequent on which benefits are payable, and if the member violates any of these conditions the right to benefits is generally forfeited provided they are not illegal or against public policy.[15]

9. Graveson *v.* Cincinnati Life Assoc., 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327 [*affirming* 11 Ohio Dec. (Reprint) 369, 26 Cinc. L. Bul. 183]. And see United Moderns *v.* Pike, (Tex. Civ. App. 1903) 76 S. W. 774.

10. Taylor *v.* Collins, 46 L. T. Rep. N. S. 168. And see *infra*, IV, J, 5, b, (I), as to waiver by conduct inducing forfeiture.

11. Haydel *v.* Mutual Reserve Fund Life Assoc., 98 Fed. 200.

12. National Council K. & L. S. *v.* Dillon, 212 Ill. 320, 72 N. E. 367 [*reversing* 108 Ill. App. 183].

13. Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

14. **Breach of condition causing sickness or death** see *supra*, IV, D, 2, 3.

Indulgence in vicious and unnatural habits as defeating right to benefits see *supra*, IV, D, 2, 3.

Non-payment of dues and assessments as defeating right to benefits see *supra*, IV, I, 2, d.

Suicide as defeating right to benefits see *supra*, IV, D, 2, c.

15. Cunniff *v.* Jamour, 31 Misc. (N. Y.) 729, 65 N. Y. Suppl. 317. And see cases cited *infra*, this note.

Change of residence; notice to agent.—A condition requiring the member to keep the society's secretary informed of his residence is satisfied by giving notice of a change of residence to the agent of the society through whom the member obtained his policy and received notices of assessment and to whom he had paid assessments. United Brethren Mut. Aid Soc. *v.* McDermond, 12 Wkly. Notes Cas. (Pa.) 73.

Conditions as to religion.— Where a society is incorporated for the benefit of the sick of a certain congregation, and the membership is limited to communicants, a member of the church loses his membership in the society by withdrawing from the church and joining another, although no formal charges are preferred against him. State *v.* Society for Support of Sick, 5 Cinc. L. Bul. (Ohio) 124, 6 Ohio Dec. (Reprint) 899, 8 Am. L. Rec. 627. So if the member does any act which *ipso facto* operates to excommunicate him the right to subsequent benefits is forfeited. Barry *v.* Order of Catholic Knights, 119 Wis. 362, 96 N. W. 797. Before the courts will deny a widow and children the benefit of a life insurance fully paid for by the husband and father, however, on the ground that he forfeited the insurance by the failure to perform a mere religious duty required by the contract, they will scrutinize with considerable care the evidence of such forfeiture. Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799.

Regulations as to wages of members; validity.—A provision in the constitution of an unincorporated trade association organized for the purpose of advancing the general welfare of its members that a member thereof who sustained an injury by accident while actually employed at the trade should receive certain accident benefits, provided he was working on the job where the injury was received at the wages prescribed by the organization, is valid and enforceable. Cunniff *v.* Jamour, 31 Misc. (N. Y.) 729, 65 N. Y. Suppl. 317.

Sick benefits; conditions as to leaving house.—A policy provided that if a member should become wholly disabled from prosecuting any kind of business by reason of sickness, he should receive a weekly indemnity "during the time he was confined to the house and under a physician's care." It was held that a member who was wholly disabled from prosecuting his business on account of sickness did not violate the conditions on which he was to receive indemnity by going out of the house, under the advice and directions of a competent physician, for the purpose of taking exercise and receiving medical treatment at the physician's office. Columbian Relief Fund Assoc. *v.* Gross, 25 Ind. App. 215, 57 N. E. 145. A by-law forbidding a sick member to go out of the house after certain hours, the intent of the by-law being to guard against fraud in feigning sickness, has no application where, on the occasions of the alleged violation, the member attended meetings of the lodge. Gleavy *v.* Court Love, etc., 23 R. I. 85, 49 Atl. 387. A beneficial association is not justified in stopping payment of benefits to a member merely because he was seen on the street in inclement weather, which was not forbidden by the by-laws. Brubaker *v.* Denlinger, 17 Lanc. L. Rev. (Pa.) 212. And where a by-law provides that a member receiving sick benefits shall forfeit the same if found absent from his home after eight P. M., a member cannot be deprived of his benefits until he has been asked for his reasons for his absence

Thus no benefits are recoverable if he engages in an occupation prohibited by the conditions of the contract.[16]

3. Proceedings For Forfeiture[17] — a. Necessity of Affirmative Action by Society. The laws of beneficial or fraternal societies in regard to the forfeiture of the right to benefits are commonly couched in such terms as to render them self-executing; and in this case the society need not take affirmative action against the delinquent or offending member to declare a forfeiture, but the right to benefits is lost immediately upon the occurrence of the act or default which by the rules of the society constitutes ground of forfeiture.[18] Thus it is usually pro-

and been unable to give an explanation. Loftus *v.* Ancient Order of Hibernians, (N. J. Sup. 1905) 60 Atl. 1119.

Violation of temperance pledge.—An application for membership provided that if the applicant violated his pledge of total abstinence or should be suspended or expelled, his claim on the beneficiary fund should be forfeited, and the certificate issued thereon was on the condition that the applicant should faithfully maintain his pledge of total abstinence and comply with all the rules of the society, and provided for the payment of mortuary benefits in case he should be in good standing at the time of his decease. It was held that violation of his pledge of total abstinence forfeited his right to mortuary benefits, although he had not been expelled or suspended from the society. Supreme Council R. T. *v.* Curd, 111 Ill. 284. Right to benefits for sickness or death due to intemperance see *supra*, IV, D, 2, 3.

16. Pauley *v.* Modern Woodmen of America, 113 Mo. App. 473, 87 S. W. 990 (holding that where a benefit certificate provided that it should be void if assured engaged in liquor selling, engaging in the prohibited business avoided the certificate, although the prohibited act in no way contributed to his death); Snow *v.* Modern Woodmen of America, 24 Ohio Cir. Ct. 142 (holding that, although a man is called a "district yard brakeman" and is employed only within a limited territory, he is a "railway freight brakeman" within a provision in the application for an insurance policy declaring such policy void should insured be killed while engaged as a "railway freight brakeman"). *Contra*, Hobbs *v.* Iowa Mut. Ben. Assoc., 82 Iowa 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299, holding that the fact that a member who, when he joined, was not engaged in an extrahazardous occupation subsequently engaged in such does not forfeit subsequent benefits.

What constitutes condition.— Where an applicant whom the society knew to be a brakeman stated his occupation to be that of a machinist and railroader, the fact that he agreed to strike out the work "railroader" is not equivalent to an agreement not to act as a brakeman. National Mut. Ben. Assoc. *v.* Hickman, 5 S. W. 565, 9 Ky. L. Rep. 525.

Whether provisions for forfeiture are self-executing depends on a construction of the entire body of the society's rules. In some cases engaging in a prohibited occupation *ipso facto* works a forfeiture and no proceedings to that end on the part of the society are necessary. Moerschbaecher *v.* Supreme Council R. L., 188 Ill. 9, 59 N. E. 17, 52 L. R. A. 281 [*affirming* 88 Ill. App. 89]; Langnecker *v.* Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185. In other cases there is no forfeiture until the society takes affirmative action to that end. Steinert *v.* United Brotherhood C. & J. A., 91 Minn. 189, 97 N. W. 668.

Extent of forfeiture.— Where a benefit certificate provides that if the member shall engage in any occupation prohibited by the by-laws the certificate shall become void as to any claim on account of the death of a member traceable to such occupation, the insurer is exempted from all liability for death by accident or disease directly traceable to such prohibited occupation, but the certificate remains in full force except as to the hazard of such occupation. Abell *v.* Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65, 906.

Right to benefits for sickness or death due to engaging in prohibited occupation see *supra*, IV, D, 2, 3.

17. Reversal of order of suspension as restoration to membership see *infra*, IV, I, 4.

18. Moerschbaecher *v.* Supreme Council R. L., 188 Ill. 9, 59 N. E. 17, 52 L. R. A. 281 [*affirming* 88 Ill. App. 89], forfeiture for liquor dealing. But see Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439] (where a by-law required corporate action by the society to deprive the member of his good standing); Wheeler *v.* Accidental Fund, 5 Lack. Leg. N. (Pa.) 97 (holding that where the by-laws of a beneficial association provide that a member shall be expelled or suspended, or that he shall be dropped from membership under certain circumstances, the forfeiture must be declared by legal and affirmative action on part of the association; otherwise, the beneficiary is entitled to recover).

Provisions for forfeiture for indulgence in intoxicants held to be self-executing see Hogins *v.* Supreme Council C. R. C., 76 Cal. 109, 18 Pac. 125, 9 Am. St. Rep. 173; Smith *v.* Knights of Father Mathew, 36 Mo. App. 184, where, however, the society did not know of the breach until after the member died. Provisions held not to be self-executing see Supreme Council R. T. T. *v.* Stewart, 11 Ky.

vided, either expressly or by implication, that the failure to pay dues and assessments within the prescribed time operates to suspend the member and forfeit the right to benefits, so that the society need take no affirmative action against the member in order to relieve it of liability.[19]

b. Notice.[20] If the laws of the society require it to take affirmative action against a delinquent or offending member in order to forfeit the right to benefits, the member is ordinarily entitled to notice of the proceedings for suspension or forfeiture.[21]

L. Rep. 484, holding that even where the member had become intemperate before his death, his beneficiary was entitled to recover, as he had not been suspended or expelled, although his intemperate habits had not been brought to the society's notice.

19. *California.*— Marshall *v.* Grand Lodge A. O. U. W., 133 Cal. 686, 66 Pac. 25.

Connecticut.— Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96.

Illinois.— Lehman *v.* Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648 [*reversing* 71 Ill. App. 366]; Royal Circle *v.* Achterrath, 106 Ill. App. 439 [*affirmed* in 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452]; National Union *v.* Hunter, 99 Ill. App. 146 [*affirmed* in 197 Ill. 478, 64 N. E. 356]; National Union *v.* Shipley, 92 Ill. App. 355; Parker *v.* Bankers' Life Assoc., 86 Ill. App. 315.

Iowa.— See Bosworth *v.* Western Mut. Aid Soc., 75 Iowa 582, 39 N. W. 903, holding that a provision that upon failure to pay an assessment within thirty days from notice the certificate shall be void cannot, in the absence of any qualifying expressions, be construed to render the policy only voidable at the option of the association.

Kentucky.—American Mut. Aid Soc. *v.* Kilburn, 7 Ky. L. Rep. 750.

Louisiana.— Feiber *v.* Supreme Council A. L. H., 112 La. 960, 36 So. 818; Maginnis *v.* New Orleans Cotton Exch. Mut. Aid Assoc., 43 La. Ann. 1136, 10 So. 180.

Missouri.— Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862; Borgraefe *v.* Supreme Lodge K. & L. H., 22 Mo. App. 127.

Nebraska.— Chapple *v.* Sovereign Camp W. W., 64 Nebr. 55, 89 N. W. 423.

New York.— McDonald *v.* Ross-Lewin, 29 Hun 87; Paster *v.* Nagelsmith, 30 Misc. 791, 63 N. Y. Suppl. 154.

Pennsylvania.— Beeman *v.* Supreme Lodge S. H., 29 Pa. Super. Ct. 387.

Texas.— Sovereign Camp W. W. *v.* Hicks, (Civ. App. 1904) 84 S. W. 425; Supreme Lodge K. H. *v.* Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084.

Wisconsin.— Freckmann *v.* Supreme Council R. A., 96 Wis. 133, 70 N. W. 1113.

Canada.— Wells *v.* Supreme Court I. O. F., 17 Ont. 317.

See 28 Cent. Dig. tit. "Insurance," § 1917.

Effect of provisions for suspension, dropping from membership, or striking name from rolls.— If the rules provide that a member shall be suspended or dropped from membership, or that his name shall be stricken from the rolls, in case of default in the payment of dues or assessments, it is generally held that the default does not of itself work a forfeiture of the right to benefits, but that the society must take affirmative action to suspend or drop the member or strike his name from the rolls (High Court I. O. F. *v.* Edelstein, 70 Ill. App. 95; Rogers *v.* Union Benev. Soc. No. 2, 111 Ky. 598, 64 S. W. 444, 23 Ky. L. Rep. 928, 55 L. R. A. 605; Dale *v.* Weston Lodge, 24 Ont. App. 351); and this has been held even where the rules also provide that the default shall forfeit the right to benefits (Northwestern Traveling Men's Assoc. *v.* Schauss, 148 Ill. 304, 35 N. E. 747 [*affirming* 51 Ill. App. 78]; Petherick *v.* General Assembly O. A., 114 Mich. 420, 72 N. W. 262; Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454; Scheufler *v.* Grand Lodge A. O. U. W., 45 Minn. 256, 47 N. W. 799; Kuhl *v.* Meyer, 42 Mo. App. 474. And see Lewis *v.* Western Funeral Ben. Assoc., 77 Mo. App. 586. *Contra*, Phillips *v.* U. S. Grand Lodge I. O. S. B., 39 Misc. (N. Y.) 296, 79 N. Y. Suppl. 540 [*reversing* 37 Misc. 869, 76 N. Y. Suppl. 1000]; Rood *v.* Railway Pass., etc., Ben. Assoc., 31 Fed. 62). So where the laws make suspension for non-payment of dues a forfeiture of benefits, and provide a formal method for suspension, non-payment of dues will not *ipso facto* work a forfeiture, although the assured was secretary of the society, and formal proceedings for suspension have not been had because he failed, as required, to report his own delinquency. Osterman *v.* District Grand Lodge No. 4 I. O. B. B., (Cal. 1896) 43 Pac. 412.

Provisions held not to be self-executing see Northwestern Traveling Men's Assoc. *v.* Schauss, 148 Ill. 304, 35 N. E. 747 [*affirming* 51 Ill. App. 78]; Plattdeutsche Grot Gilde *v.* Ross, 117 Ill. App. 247; Independent Order of Foresters *v.* Haggerty, 86 Ill. App. 31; Jelly *v.* Muscatine City, etc., Aid Soc., 120 Iowa 689, 95 N. W. 197, 98 Am. St. Rep. 378; American Mut. Aid Soc. *v.* Quire, 7 Ky. L. Rep. 671; Murphy *v.* Independent Order S. & D. J. A., 77 Miss. 830, 27 So. 624, 50 L. R. A. 111; Harris *v.* Wilson, 86 Mo. App. 406.

20. **Notice of dues and assessments or arrearages** see *supra*, IV, I, 2, d, (II), (A).

21. Supreme Lodge K. P. W. *v.* Taylor, (Ala. 1897) 24 So. 247; Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454; Scheufler *v.* Grand Lodge A. O. U. W., 45 Minn. 256, 47 N. W. 799. *Compare* People *v.* Detroit Fire Dept., 31 Mich. 458.

4. Reinstatement.[22] If a member of a beneficial or fraternal society has been suspended or expelled or has otherwise forfeited the right to benefits, the society is under no obligation to reinstate him[23] unless its rules require it to do so.[24] Hence in conferring the right to reinstatement the society may impose such conditions as it sees fit, and unless they are complied with it is not liable for benefits accruing after the forfeiture.[25] The rules of the society may require the approval of certain officers[26] or a vote of the lodge[27] in order to effect a reinstatement; and it is generally required that at the time of reinstatement the member shall be in good health;[28] but the fact that at the time of the application for reinstate-

Sufficiency of notice.— Where the by-laws of a mutual benefit society require written notice of forfeiture of a policy, any other notice is insufficient. Dial *v.* Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

Waiver of notice see *infra*, IV, J, 1, b.

22. Reinstatement of members of suspended subordinate lodge see *supra*, IV, I, 2, a.

23. Harrington *v.* Keystone Mut. Ben. Assoc., 190 Pa. St. 77, 42 Atl. 523, holding that a by-law empowering the executive committee to reinstate a delinquent member, at any time within a year, upon satisfactory evidence of good health, and upon payment of all delinquent premiums, does not bind the committee to reinstate.

24. Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369.

25. Brun *v.* Supreme Council A. L. H., 15 Colo. App. 538, 63 Pac. 706; McLaughlin *v.* Supreme Council C. K. A., 184 Mass. 298, 68 N. E. 344.

If, however, by the terms of the policy a member who has forfeited his certificate has a right to be restored on certain conditions, a reinstatement on compliance with these conditions constitutes no consideration for a stipulation exacted by the society from the beneficiary that it shall be liable to pay him only a part of the amount to which he would be entitled under the terms of the policy. Davidson *v.* Old People's Mut. Ben. Soc., 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482.

26. U. S. Indemnity Soc. *v.* Griggs, 118 Ill. App. 577; Lane *v.* Fidelity Mut. L. Ins. Co., 142 N. C. 55, 54 S. E. 854, 115 Am. St. Rep. 729; Graveson *v.* Cincinnati Life Assoc., 11 Ohio Dec. (Reprint) 369, 26 Cinc. L. Bul. 183. See, however, Dickey *v.* Covenant Mut. Life Assoc., 82 Mo. App. 372; Ingram *v.* Supreme Council A. L. H., 14 N. Y. St. 600, in both of which cases specified officers were held to have no power to pass on the application for reinstatement.

27. Butler *v.* Grand Lodge A. O. U. W., 146 Cal. 172, 79 Pac. 861. And see Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428; Lyon *v.* Supreme Assembly R. S. G. F., 153 Mass. 83, 26 N. E. 236. See, however, McDonald *v.* Supreme Council O. C. F., 78 Cal. 49, 20 Pac. 41, holding that a reëlection to membership was not necessary where the member had not been declared suspended.

28. Gross-Loge des Deutschen Ordens der Harugari des Staates Illinois *v.* Laercher, 41 Ill. App. 462; Garbutt *v.* Citizens' Life, etc., Assoc., 84 Iowa 293, 51 N. W. 148; Duffy *v.* Alta Friendly Soc., 17 Pa. Super. Ct., 531. And see U. S. Indemnity Soc. *v.* Griggs, 118 Ill. App. 577.

A certificate of good health is commonly required as a condition of reinstatement (Supreme Council C. K. *v.* Connema, 3 Ohio Cir. Ct. 130, 2 Ohio Cir. Dec. 74. And see Lyon *v.* Supreme Assembly R. S. G. F., 153 Mass. 83, 26 N. E. 236); but this is not always so (McDonald *v.* Supreme Council O. C. F., 78 Cal. 49, 20 Pac. 41, where no suspension had been declared by the society. And see Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580). The society has no right to reject an application for reinstatement on the ground that it does not consider the certificate of health sufficient, but the right to reinstatement depends on its sufficiency in fact. Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733. Where a member who had in a number of previous cases been reinstated on giving a health certificate gave money to her son to have herself reinstated, the son had authority to sign the health certificate. Anderson *v.* Alta Friendly Soc., 26 Pa. Super. Ct. 630.

Concealment or non-disclosure of ill health. — Where a wife took steps to have her husband reinstated to membership in a mutual insurance company under his lapsed certificate at a time when he was sick with the disease from which he subsequently died, the concealment of that fact avoided whatever was done toward a reinstatement. Marshall *v.* Women's Mut. Ins., etc., Co., 58 N. Y. Super. Ct. 406, 11 N. Y. Suppl. 700. But where a member was reinstated on the payment of defaulted premiums while suffering from the disease which eventuated in his death, without inquiry by the society as to his condition of health, his failure to disclose his condition did not avoid his membership. Spitz *v.* Mutual Ben. Life Assoc., 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469.

False statement and warranties as to health.—Where a society erroneously requires a member to furnish a health certificate as a condition to reinstatement when a certificate is in fact unnecessary, its falsity does not defeat the claims of the beneficiaries. Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580. But where a certificate is necessary, and the member states in his application that he is in good health, and that there is nothing in his habits or condition which is likely to impair his health or

ment a delinquent member is beyond the insurable age does not necessarily defeat the application.[29] In the case of a member who has lost his rights by failing to pay dues and assessments, payment of arrears is a condition precedent to reinstatement;[30] and payment of arrears may of itself operate to reinstate the member,[31] or entitle him to benefits,[32] without any affirmative action being taken to that end. The time within which a member may be reinstated is generally prescribed by the rules of the society.[33] As a rule the death of a member precludes reinstatement.[34] Accordingly, if a member dies while in default, the beneficiary is not entitled to pay arrearages and recover benefits, even though the time allowed for reinstatement, were the member alive, has not expired.[35] The issuance of a

shorten his life, and that if "this statement be found to be in any respect untrue, the policy shall be treated in the same manner as if the assessment had not been accepted," there can be no recovery on the policy if the statement is untrue in fact, although it was honestly made. Richards *v.* Maine Ben. Assoc., 85 Me. 99, 26 Atl. 1050. Where, however, the member warranted the statements made by him in a certificate of good health to be true, but no by-law was shown declaring that false warranties in an application for reinstatement should operate as a forfeiture of the insurance contract, nor was there such a provision in the certificate of membership, the application therefor, or the application for reinstatement, the forfeiture, if any, for a claimed breach of warranties in the application was not self-executing. Traders' Mut. L. Ins. Co. *v.* Johnson, 200 Ill. 359, 65 N. E. 634 [*affirming* 101 Ill. App. 559].

What constitutes good health.—After a member had forfeited her membership by failure to pay an assessment within the time required by the certificate, the assessment was paid, and a receipt given therefor which recited that the payment was made and received and the receipt given by the association and received by the member on condition that such member "is now in good health, and free from all diseases, infirmities, or weaknesses"; that the member's health had begun to be affected about a year before the forfeiture by the natural decline of age, which resulted in her death soon after the receipt was given, but she was subject to no disease, and her only infirmities were those natural to old age. It was held that the society was liable for benefits. Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71.

Effect of death of member before reinstatement see *infra*, this subsection.

29. Lovick *v.* Providence Life Assoc., 110 N. C. 93, 14 S. E. 506.

30. Butler *v.* Grand Lodge A. O. U. W., 146 Cal. 172, 79 Pac. 861.

31. McDonald *v.* Supreme Council O. C. F., 78 Cal. 49, 20 Pac. 41 (so holding where no suspension had been declared by the society); Manson *v.* Grand Lodge A. O. U. W., 30 Minn. 509, 16 N. W. 395.

By the rules of some societies, however, mere payment and acceptance of arrears does not of itself effect a reinstatement. Butler *v.* Grand Lodge A. O. U. W., 146 Cal. 172, 79 Pac. 861; O'Grady *v.* Knights of Columbus, 62 Conn. 223, 25 Atl. 111; Lyon *v.* Supreme Assembly R. S. G. F., 153 Mass. 83, 26 N. E. 236; Duffy *v.* Alta Friendly Soc., 17 Pa. Super. Ct. 531. And see cases cited *passim*, this subsection, as to conditions and requisites of reinstatement.

32. O'Grady *v.* Knights of Columbus, 62 Conn. 223, 25 Atl. 111; Roeding *v.* Sons of Moses, 16 Daly (N. Y.) 417, 11 N. Y. Suppl. 712; Maillé *v.* L'Union des Ouvriers Boulangers, 12 Quebec Super. Ct. 526.

33. Supreme Council A. L. H. *v.* Gootee, 89 Fed. 941, 32 C. C. A. 436, holding that where a member is given the right to reinstatement "within 60 days from the date of suspension," that day is to be included in computing the sixty days.

In the absence of specific regulations in respect to the time within which an application for reinstatement of a member whose policy has been forfeited for non-payment of dues should be made, the member has a reasonable time to do so, but he must be diligent. Lovick *v.* Providence Life Assoc., 110 N. C. 93, 14 S. E. 506.

34. Butler *v.* Grand Lodge A. O. U. W., 146 Cal. 172, 79 Pac. 861 (where the member died after payment of arrearages but before a vote of reinstatement); Campbell *v.* Supreme Lodge K. P. W., 168 Mass. 397, 47 N. E. 109 (where the member died after arrearages were sent but before they were received). See, however, Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733, holding that the death of the member after arrearages and an application for reinstatement were sent but before they were received was no ground for rejecting the application.

35. Carlson *v.* Supreme Council A. L. H., 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643; Modern Woodmen of America *v.* Jameson, (Kan. 1892) 29 Pac. 473, 48 Kan. 718, 30 Pac. 460, 49 Kan. 677, 31 Pac. 733; Harvey *v.* Grand Lodge A. O. U. W., 50 Mo. App. 472 [*approved* in Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862]; Delaney *v.* Kelly, 103 N. Y. App. Div. 409, 92 N. Y. Suppl. 1021 [*reversing* 45 Misc. 286, 92 N. Y. Suppl. 265].

It is otherwise under the rules of some societies. Dennis *v.* Massachusetts Ben. Assoc., 120 N. Y. 496, 24 N. E. 843, 17 Am. St. Rep. 660, 9 L. R. A. 189 [*affirming* 47 Hun 338].

Tender after expiration of time for reinstatement.—*A fortiori* a tender of the assess-

certificate of reinstatement[36] or the restoration of the member's name to the rolls[37] is not prerequisite to reinstatement if all material conditions have been complied with. Reinstatement does not give rise to a new contract of insurance; it operates merely to revive and continue the original contract.[38] Nor does reinstatement entitle the member to benefits which accrued while he was in default;[39] and if by the rules of the society a member is not entitled to benefits for a specified time after payment of arrearages, a reinstatement by such payment does not entitle the member to benefits accruing before the expiration of the prescribed time.[40]

J. Estoppel and Waiver, and Stipulations as to Avoidance of Contract or Forfeiture of Benefits[41] **— 1. In General — a. Doctrine Applied Against Society.** It has been seen that a beneficial or fraternal society which has issued a certificate of insurance may avoid the same for fraud, material misrepresentation, or breach of warranty or condition precedent;[42] and that it may declare a forfeiture of benefits for breach of promissory warranty or condition subsequent.[43] The society may, however, whether incorporated or not,[44] estop itself from asserting these grounds of avoidance or forfeiture; and independent of any technical estoppel the society may waive the right to avoid the certificate for fraud, misrepresentation, or breach of warranty or condition precedent, or waive performance of a promissory warranty or condition subsequent.[45] The society may so

ment by the beneficiary after the expiration of the time limited for payment of the assessment cannot avail to reinstate the decedent as of the time of his death or aid the claim of the beneficiary in any manner. Drum *v.* Benton, 13 App. Cas. (D. C.) 245. And see cases cited *supra*, IV, I, 2, d, (III), (A).

36. Knights Templars', etc., Life Indemnity Co. *v.* Jacobus, 80 Fed. 202, 25 C. C. A. 378.

37. Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

38. Lovick *v.* Providence Life Assoc., 110 N. C. 93, 14 S. E. 506 (thus distinguishing reinsurance); Long *v.* Ancient Order of United Workers, 25 Ont. App. 147 (thus distinguishing the renewal of the contract of insurance). And see Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29. See, however, O'Brien *v.* Brotherhood of Union, 76 Conn. 52, 55 Atl. 577.

39. Fee *v.* National Masonic Acc. Assoc., 110 Iowa 271, 81 N. W. 483; Coyne *v.* New York Longshoremen's Protective Assoc. No. 3, 13 Daly (N. Y.) 1.

40. Burns *v.* Manhattan Brass Mut. Aid Soc., 102 N. Y. App. Div. 467, 92 N. Y. Suppl. 846; Hart *v.* Adams Cylinder, etc., Printers' Assoc., 69 N. Y. App. Div. 578, 75 N. Y. Suppl. 110; Hess *v.* Johnson, 41 N. Y. App. Div. 465, 58 N. Y. Suppl. 983; Frey *v.* Fidelity Lodge No. 123 K. P., 6 Pa. Co. Ct. 435. And see O'Brien *v.* Brotherhood of Union, 76 Conn. 52, 55 Atl. 577.

41. **Waiver and estoppel as to reinstatement** see *supra*, IV, I, 4.

42. See *supra*, II, E.

43. See *supra*, IV, I, 2, e.

44. Railway Passenger, etc., Conductors' Mut. Aid, etc., Assoc. *v.* Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286 [*reversing* 54 Ill. App. 445].

45. *California.*— Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

Illinois.—Wood *v.* Supreme Ruling F. M. C., 212 Ill. 532, 72 N. E. 783 [*reversing* 114 Ill. App. 431]; Coverdale *v.* Royal Arcanum, 193 Ill. 91, 61 N. E. 915.

Indiana.— Sweetser *v.* Odd Fellows Mut. Aid Assoc., 117 Ind. 97, 19 N. E. 722.

Iowa.— Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441.

Kentucky.— National Mut. Ben. Assoc. *v.* Jones, 84 Ky. 110.

Minnesota.— Wiberg *v.* Minnesota Scandinavian Relief Assoc., 73 Minn. 297, 76 N. W. 37; Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74.

Missouri.— Lavin *v.* Grand Lodge A. O. U. W., 104 Mo. App. 1, 78 S. W. 325; Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463.

Nebraska.— Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

New York.— Kenyon *v.* Knights Templar, etc., Mut. Aid Assoc, 122 N. Y. 247, 25 N. E. 299; Baker *v.* New York State Mut. Ben. Assoc., 45 Hun 588, 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416]; Wendt *v.* Order Germania, 8 N. Y. St. 351.

South Carolina.— Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391.

Texas.— Bankers', etc., Mut. Ben. Assoc. *v.* Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772; Home Circle Soc. No. 1 *v.* Shelton, (Civ. App. 1904) 81 S. W. 84.

See 28 Cent. Dig. tit. "Insurance," §§ 1866, 1907.

No new agreement is needed to constitute an effectual waiver. Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74; Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

No new consideration is needed to constitute an effectual waiver. Baker *v.* New York State Mut. Ben. Assoc., 45 Hun (N. Y.) 588,

conduct itself, even after a member's death, as to preclude it, on the ground of estoppel or waiver, from avoiding the contract or declaring a forfeiture because of acts or omissions of the member in his lifetime.[46]

b. Doctrine Applied Against Member or Beneficiary.[47] The member[48] or his beneficiary[49] may by acquiescing in a suspension and consequent forfeiture of benefits be estopped to deny the suspension.

2. As Affected by Ignorance or Knowledge of Facts.[50] If the society is ignorant of the facts giving it the right to avoid the contract or to declare a forfeiture, no action or inaction on its part can operate against it by way of estoppel or waiver.[51] Where, however, it appears that the society has actual or

9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416].

A mistake of the society in accepting delinquent dues and assessments does not prevent a waiver where the money is retained. Tobin *v.* Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770. And see Supreme Lodge K. P. *v.* Kalinski, 163 U. S. 289, 16 S. Ct. 1047, 41 L. ed. 163.

A secret intention not to waive a forfeiture cannot defeat the legal effect of unequivocal and deliberate acts of the association. Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74; Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

Stipulations against waiver.—A stipulation in the by-laws that certain acts constituting a waiver in law shall not operate as such is ineffectual. Supreme Tent K. M. W. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203. *Compare* Fee *v.* National Masonic Acc. Assoc., 110 Iowa 271, 81 N. W. 483; Griesa *v.* Massachusetts Ben. Assoc., 60 Hun (N. Y.) 581, 15 N. Y. Suppl. 71 [*affirmed* in 133 N. Y. 619, 30 N. E. 1146]; People *v.* Mutual Reserve Fund Life Assoc., 15 Misc. (N. Y.) 333, 37 N. Y. Suppl. 617.

Enlarging contract by estoppel or waiver. — While the right to forfeit benefits contracted for may be lost by estoppel or waiver, the doctrine cannot be successfully invoked to create a liability for benefits not contracted for at all. McCoy *v.* Northwestern Mut. Relief Assoc., 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681.

Estoppel and waiver as to statutory requirements and ultra vires acts see *supra*, I, G, 1, b.

46. *Indiana.*— Masonic Mut. Ben. Assoc. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295; Supreme Tent K. M. W. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203; Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Kansas.— Modern Woodmen of America *v.* Jameson, 48 Kan. 718, 30 Pac. 460.

Michigan.— Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443.

New York.— Beil *v.* Supreme Lodge K. H., 80 N. Y. App. Div. 609, 80 N. Y. Suppl. 751; Lamb *v.* Prudential Ins. Co. of America, 22 N. Y. App. Div. 552, 48 N. Y. Suppl. 123; Shay *v.* National Ben. Soc., 54 Hun 109, 7 N. Y. Suppl. 287.

Texas.— Illinois Home Forum Ben. Order *v.* Jones, (Civ. App. 1898) 48 S. W. 219.

Wisconsin.— Seibel *v.* Northwestern Mut. Relief Assoc., 94 Wis. 253, 68 N. W. 1009; Erdmann *v.* Mutual Ins. Co. O. H. S., 44 Wis. 376.

See 28 Cent. Dig. tit. "Insurance," § 1910.

Condition precedent.— It has been held, however, that the doctrines of estoppel and waiver do not apply where, because of an applicant's death before delivery of the certificate, no contract was ever consummated. Roblee *v.* Masonic Life Assoc., 38 Misc. (N. Y.) 481, 77 N. Y. Suppl. 1098 [*affirmed* in 95 N. Y. App. Div. 620, 88 N. Y. Suppl. 1115], holding, however, that the subsequent acceptance of an assessment from the beneficiary with full knowledge of the facts might create a binding contract to pay him the death benefit. See, however, Illinois Home Forum Ben. Order *v.* Jones, (Tex. Civ. App. 1898) 48 S. W. 219.

Acceptance of dues and assessments on condition that member is alive see *infra*, IV, J, 5, d, (III).

Authority to waive constitutional provision against reinstatement after death see *infra*, IV, J, 3, a.

Ignorance of death as precluding estoppel or waiver see *infra*, IV, J, 2.

Reinstatement after death of member see *supra*, IV, I, 4.

47. **Estoppel to deny knowledge of contents of application** see *infra*, IV, J, 4.

Estoppel to object to classification of member see *supra*, II, D, 3, b, (II).

48. Lavin *v.* Grand Lodge A. O. U. W., 112 Mo. App. 1, 86 S. W. 600; Hand *v.* Supreme Council R. A., 44 N. Y. App. Div. 484, 60 N. Y. Suppl. 808 [*affirmed* in 167 N. Y. 600, 60 N. E. 1112], where a member who had been suspended for non-payment of assessments, and had subsequently sent the money to the society, accepted a return of the money and took no action toward reinstatement.

49. McDonald *v.* Grand Lodge A. O. U. W., 53 S. W. 282, 21 Ky. L. Rep. 883.

50. **Effect of ignorance of custom or course of dealing of officers or agents** see *infra*, IV, J, 5, b, (II).

Estoppel of member to deny knowledge of contents of application see *infra*, IV, J, 4.

51. *Illinois.*—Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340.

Maine.— Marcoux *v.* St. John Baptist Ben. Soc., 91 Me. 250, 39 Atl. 1027.

implied[52] knowledge of the invalidating facts, an estoppel or waiver may be based on its conduct in treating the insurance as in full force and effect;[53] and knowledge of officers and agents having authority to act in the matter in question is generally imputed to the society.[54]

Missouri.— Callies *v.* Modern Woodmen of America, 98 Mo. App. 521, 72 S. W. 713.

New Hampshire.— Dunn *v.* Merrimack County Odd Fellows' Mut. Relief Assoc., 68 N. H. 365, 44 Atl. 484.

New York.— Preuster *v.* Supreme Council O. C. F., 135 N. Y. 417, 32 N. E. 135 [*affirming* 60 Hun 324, 15 N. Y. Suppl. 41]; Desmond *v.* Supreme Council C. B. L., 51 N. Y. App. Div. 91, 64 N. Y. Suppl. 406.

Pennsylvania.— Kimbrough *v.* Hoffman, 6 Pa. Super. Ct. 60, 41 Wkly. Notes Cas. 275.

See 28 Cent. Dig. tit. "Insurance," § 1907.

Ignorance of death.— Forfeiture for nonpayment of an assessment is not waived by accepting the assessment (Bagley *v.* Grand Lodge A. O. U. W., 31 Ill. App. 618), or by demanding an assessment (Parker *v.* Bankers' Life Assoc., 86 Ill. App. 315) in ignorance of the delinquent member's death. Nor is the society estopped to deny the existence of a contract by accepting money on account of a deceased applicant for insurance where it had no knowledge of his death. Hiatt *v.* Fraternal Home, 99 Mo. App. 105, 72 S. W. 463; Roblee *v.* Masonic Life Assoc., 38 Misc. (N. Y.) 481, 77 N. Y. Suppl. 1098 [*affirmed* in 95 N. Y. App. Div. 620, 88 N. Y. Suppl. 1115].

Ignorance of law.— Where a representative of a mutual benefit insurance company, within the scope of his authority, accepts a surrender of a benefit certificate and a fee for the issuance of a new one with knowledge that the holder of the certificate is in arrears for dues or assessments, the effect of his so doing is not avoided by evidence that he acted in ignorance of the legal consequences. Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

52. Wood *v.* Supreme Ruling F. M. C., 212 Ill. 532, 72 N. E. 783 [*reversing* 114 Ill. App. 431] (where the application misstated the applicant's age, but contained the true date of his birth, and it was held that the society should have inquired into the inconsistency); Loyal Americans *v.* Edwards, 106 Ill. App. 399 (where the directors were in possession of information which would have led them on proper inquiry to a knowledge of the invalidating facts, and it was held that the society was estopped).

Notice by record.— The society is bound to know the contents of its own records. Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943. See, however, Desmond *v.* Supreme Council C. B. L., 51 N. Y. App. Div. 91, 64 N. Y. Suppl. 406, holding that knowledge of the contents of the records of a medical examiner is not imputable to the society, although the examiner is required to keep a record.

The fact that a member has been accused of making a false representation is not necessarily knowledge of the fact of falsity, such as to found an estoppel or waiver on an acceptance of assessments pending an inquiry into the truth of the accusation. Preuster *v.* Supreme Council O. C. F., 135 N. Y. 417, 32 N. E. 135 [*affirming* 60 Hun 324, 15 N. Y. Suppl. 41].

A statute providing that in an action on a life policy, where defendant seeks to avoid liability on the ground of the intemperate habits of assured, it is a sufficient defense that the habits of assured were generally known in the community where defendant's agent resided, if thereafter defendant continued to receive the premiums, has no application to an action on a certificate issued by a fraternal beneficiary association. Knapp *v.* Brotherhood of American Yeomen, 128 Iowa 566, 105 N. W. 63; Knudson *v.* Grand Council N. L. H., 7 S. D. 214, 63 N. W. 911.

53. See cases cited *passim*, IV, J, 5.

54. Plattdeutsche Grot Gilde *v.* Ross, 117 Ill. App. 247 (where knowledge of its officers was imputed to the society); Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105 (where knowledge of the agent issuing the certificate was imputed to the society); Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603 (where knowledge of the agent taking the application was imputed to the society); Pringle *v.* Modern Woodmen of America, (Nebr. 1906) 107 N. W. 756; Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943 (where the society was affected by the knowledge of its head clerk). And see Somers *v.* Kansas Protective Union, 42 Kan. 619, 22 Pac. 702; and *infra*, IV, J, 4.

In order to bind the society, however, the officer or agent must be one who is charged with some duty or who has some authority in the matter in question (Supreme Council A. L. H. *v.* Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527; Desmond *v.* Supreme Council C. B. L., 51 N. Y. App. Div. 91, 64 N. Y. Suppl. 406. And see Whigham *v.* Independent Foresters, 44 Oreg. 543, 75 Pac. 1067); and the knowledge must have come to the officer or agent while acting in the discharge of his official duty (Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394. And see Whigham *v.* Independent Foresters, *supra*.

Knowledge of a subordinate lodge or its officers or agents has been imputed to the society in some cases (Coverdale *v.* Royal Arcanum, 193 Ill. 91, 61 N. E. 915 [*reversing* 93 Ill. App. 373]; High Court I. O. F. *v.* Schweitzer, 171 Ill. 325, 49 N. E. 506 [*affirming* 70 Ill. App. 139]; Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508); in others not (Levell *v.* Royal Arcanum, 9 Misc. (N. Y.) 257, 30 N. Y. Suppl. 205. And see Dunn *v.* Merrimack

3. As Affected by Authority of Officers and Agents — a. In General. The society may be estopped from relying on provisions of the contract or by-laws forming a part of the contract by the acts or omissions of officers[55] or agents[56] having authority to act in regard to the subject-matter thereof; and those provisions may likewise be waived.[57] Officers or agents of the society have no power, however, to waive the requirements of its constitution.[58] The society may, by stipulation in its constitution or by-laws or in the contract of membership, limit the power of its officers and agents with reference to estoppel and waiver.[59] In this event the member and the beneficiary are charged with knowledge of the limitation and are bound thereby so that neither may rely on acts of officers or agents which might otherwise create an estoppel or amount to a waiver.[60]

County Odd Fellows' Mut. Relief Assoc., 68 N. H. 365, 44 Atl. 484). *Compare* Whigham *v.* Independent Foresters, 44 Oreg. 543, 75 Pac. 1067.

Where the applicant and the agent conspire to defraud the society, it is not chargeable with the agent's knowledge. See *infra*, IV, J, 4.

55. Traders' Mut. L. Ins. Co. *v.* Johnson, 200 Ill. 359, 65 N. E. 634 [*affirming* 101 Ill. App. 559] (waiver by president); Jones *v.* National Mut. Ben. Assoc., 2 S. W. 447, 8 Ky. L. Rep. 599 (waiver by secretary); Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391; Supreme Lodge Nat. Reserve Assoc. *v.* Turner, 19 Tex. Civ. App. 346, 47 S. W. 44.

It has been held, however, that the officers of a beneficial society have no authority to waive by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity. McCoy *v.* Roman Catholic Mut. Ins. Co., 152 Mass. 272, 25 N. E. 289; Kocher *v.* Supreme Council C. B. L., 65 N. J. L. 649, 48 Atl. 544, 86 Am. St. Rep. 687, 52 L. R. A. 861. And see Lyon *v.* Supreme Assembly R. S. G. F., 153 Mass. 83, 26 N. E. 236.

Officers of local lodge see *infra*, IV, J, 3, b.

56. See cases cited *infra*, this note.

Soliciting agents.— Agents employed by benevolent insurance societies to solicit insurance have power to waive stipulations in the benefit certificate which do not relate to the by-laws (Supreme Council C. B. L. *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105); and an agent having general authority to solicit applications for certificates in a mutual benefit association connected with a particular secret society has authority to take applications for certificates from persons not members of the society, to become binding when the applicants shall become members (Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603). See, however, Home Friendly Soc. *v.* Berry, 94 Ga. 606, 21 S. E. 583.

Agents of local lodge see *infra*, IV, J, 3, b.

57. See cases cited *supra*, notes 55, 56.

58. Bagley *v.* Grand Lodge A. O. U. W., 31 Ill. App. 618; Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394; Pirrung *v.* Supreme Council Catholic Mut. Ben. Assoc., 104 N. Y. App. Div. 571, 93 N. Y. Suppl. 575 (certainly not in the absence of fraud or misrepresentation on the part of the officer or agent); Grand Lodge A. O. U. W. *v.* Bunkers, 23 Ohio Cir. Ct. 487. And see Lyon *v.* Supreme Assembly R. S. G. F., 153 Mass. 83, 26 N. E. 236; McCoy *v.* Roman Catholic Mut. Ins. Co., 152 Mass. 272, 25 N. E. 289; Kocher *v.* Supreme Council C. B. L., 65 N. J. L. 649, 48 Atl. 544, 86 Am. St. Rep. 687, 52 L. R. A. 861. *Contra*, Sovereign Camp W. W. *v.* Carrington, (Tex. Civ. App. 1905) 90 S. W. 921.

59. Modern Woodmen of America *v.* Tevis, 117 Fed. 369, 54 C. C. A. 293.

60. *Connecticut.*— Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223.

Michigan.— Lord *v.* National Protective Soc., 134 Mich. 357, 96 N. W. 443.

Missouri.— Loyd *v.* Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530.

New York.— Schoeller *v.* Grand Lodge A. O. U. W., 110 N. Y. App. Div. 456, 96 N. Y. Suppl. 1088; Jackson *v.* Royal Ben. Soc., 15 Misc. 481, 37 N. Y. Suppl. 28.

Utah.— Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

Wisconsin.— Loeffler *v.* Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012.

United States.— Modern Woodmen of America *v.* Tevis, 117 Fed. 369, 54 C. C. A. 293.

See 28 Cent. Dig. tit. "Insurance," § 1908.

See, however, Pringle *v.* Modern Woodmen of America, (Nebr. 1906) 107 N. W. 756; Modern Woodmen of America *v.* Coleman, 64 Nebr. 162, 89 N. W. 641.

Construction of limitation.—A provision that no officer may waive any laws which relate to the substance of the contract for the payment of benefits refers to a completed contract of insurance, and not to the preparing and acceptance of applications (Shotliff *v.* Modern Woodmen of America, 100 Mo. App. 138, 73 S. W. 326); and it refers to a waiver of valid laws, so that it does not preclude an agent from issuing a certificate inconsistent with a void law (Sovereign Camp W. W. *v.* Fraley, (Tex. Civ. App. 1900) 59 S. W. 905 [*affirmed* in 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898]). A condition in a certificate of membership denying agents the power to waive forfeiture has no application to the general manager or secretary of the association. Bankers', etc., Ben. Assoc. *v.*

b. Authority of Subordinate Lodge or Officers or Agents Thereof to Bind Society.[61] Inferior lodges and their officers and agents are generally held to be the agents of the society,[62] and hence they may, by acts or omissions founding an estoppel or waiver, preclude the society from relying on grounds of avoidance or forfeiture.[63] To create an estoppel or waiver as against the society, however, they must have acted as its agent,[64] and within the scope of their authority as such.[65]

4. As Affected by Mistake, Negligence, or Fraud of Agent. If false answers

Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772.

Effect of misrepresentations as to authority.— Where a certificate of membership in a benevolent insurance society provides that agents have no authority to waive forfeitures, a member is bound to take notice of the terms of his contract as stated in the certificate, and, having received and retained it without objection, is bound by its terms, regardless of representations of the agent inconsistent therewith. May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66.

The society may waive the limitation by ratifying an agent's unauthorized waiver of the conditions of the contract, and thus become bound. Dial *v.* Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

61. **Estoppel or waiver by custom or course of dealing** of subordinate lodge or officers or agents thereof see *infra*, IV, J, 5, b, (II).

Knowledge of subordinate lodge or officers or agent thereof as affecting society see *supra*, IV, J, 2.

62. See *supra*, I, F, 2, b.

63. *Illinois.*— Grand Lodge A. O. U. W. *v.* Lachmann, 199 Ill. 140, 64 N. E. 1022 [*affirming* 101 Ill. App. 213]; Coverdale *v.* Royal Arcanum, 193 Ill. 91, 61 N. E. 915 [*reversing* 93 Ill. App. 373]; High Court I. O. F. *v.* Schweitzer, 171 Ill. 325, 49 N. E. 506 [*affirming* 70 Ill. App. 139].

Indiana.— Brotherhood of Painters, etc. *v.* Moore, 36 Ind. App. 580, 76 N. E. 262; Supreme Court of Honor *v.* Sullivan, 26 Ind. App. 60, 59 N. E. 37; Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Iowa.—Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508.

Mississippi.— Sovereign Camp W. W. *v.* Dismukes, (1905) 38 So. 351.

South Carolina.— Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391.

Texas.— Sovereign Camp W. W. *v.* Carrington, (Civ. App. 1905) 90 S. W. 921; Order of Columbus *v.* Fuqua, (Civ. App. 1901) 60 S. W. 1020; Knights of Pythias of World *v.* Bridges, 15 Tex. Civ. App. 196, 39 S. W. 333.

Utah.— Johanson *v.* Grand Lodge A. O. U. W., 31 Utah 45, 86 Pac. 494.

See 28 Cent. Dig. tit. "Insurance," § 1911.

See, however, Dunn *v.* Merrimack County Odd Fellows' Mut. Relief Assoc., 68 N. H. 365, 44 Atl. 484; Levell *v.* Royal Arcanum, 9 Misc. (N. Y.) 257, 30 N. Y. Suppl. 205; Whigham *v.* Independent Foresters, 44 Oreg. 543, 75 Pac. 1067.

It has been held, however, that officers of subordinate lodges of benevolent societies have no authority to waive any provisions of the rules of the order which form a part of the contract of membership. Royal Highlanders *v.* Scoville, 66 Nebr. 213, 92 N. W. 206, 4 L. R. A. N. S. 421; United Moderns *v.* Pikes, (Tex. Civ. App. 1903) 76 S. W. 774.

64. Voelkel *v.* Supreme Tent K. M. W., 116 Wis. 202, 92 N. W. 1104, 1135, where the rules of a benefit insurance company provided that the local tent was the agent of its members in collecting dues and assessments, and that the supreme tent should not be liable for any negligence or be bound by any illegal action or irregularity of the local tent.

65. Illinois Masons' Benev. Soc. *v.* Baldwin, 86 Ill. 479 (where a local agent accepted overdue payments in violation of express instructions); Modern Woodmen of America *v.* Hicks, 109 Ill. App. 27 (holding that no action of a local lodge officer can amount to a waiver of some action required by the laws of the society to be taken by its board of directors); Adams *v.* Grand Lodge A. O. U. W., 66 Nebr. 389, 92 N. W. 588 (holding that where no authority over the payment of death benefits in the subordinate lodge or its officers is shown, their dealings with the beneficiaries after the assured's death can establish no liability on the part of the grand lodge); Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4, 259*a* (holding that where the receipt of an assessment after maturity is expressly forbidden by the by-laws, a receipt of an officer of a local lodge is not binding on the society).

Express limitation on powers as to estoppel and waiver see *supra*, IV, J, 3, a.

Local collecting agents have no power to waive conditions of the contract. Home Friendly Soc. *v.* Berry, 94 Ga. 606, 21 S. E. 583; Brown *v.* Grand Council N. L. H., 81 Iowa 400, 46 N. W. 1086; Elder *v.* Grand Lodge A. O. U. W., 79 Minn. 468, 82 N. W. 987. So the minor son of the collector of a lodge has no authority to bind the society by a promise to receive a past-due assessment. Supreme Conclave K. D. *v.* Warwick, 110 Ga. 388, 35 S. E. 645.

Local secretaries have no power to accept overdue assessments except as authorized. Boyce *v.* Royal Circle, 99 Mo. App. 349, 73 S. W. 300; Pete *v.* Woodmen of World, 26 Ohio Cir. Ct. 653.

by an applicant for membership are induced by an agent of the society,[66] or if the agent assumes to answer the questions from his own personal knowledge and answers falsely,[67] the society is estopped to assert the falsity as ground for avoiding liability. And if the applicant omits to disclose material facts on the agent's representation that they are immaterial, the society is likewise estopped.[68] So, if the applicant makes truthful answers to the agent, and the agent, in preparing the application, omits to insert the answers,[69] or inserts false answers,[70] the society is estopped to assert the falsity as ground for avoiding liability.

5. Illustrations of Estoppel and Waiver — a. By Issuing Certificate. By issuing a certificate of insurance the society waives or estops itself from asserting any defense based on facts of which it had knowledge at the time of issuance.[71]

66. Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603; Shotliff *v.* Modern Woodmen of America, 100 Mo. App. 138, 73 S. W. 326. And see Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477.

67. Pudritzky *v.* Supreme Lodge K. H., 76 Mich. 428, 43 N. W. 373.

68. Kansas Protective Union *v.* Gardner, 41 Kan. 397, 21 Pac. 233.

69. Whitney *v.* National Masonic Acc. Assoc., 57 Minn. 472, 59 N. W. 943.

70. Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. 247; Kansas Protective Union *v.* Gardner, 41 Kan. 397, 21 Pac. 233; Kenyon *v.* Knights Templars, etc., Aid Assoc., 48 Hun (N. Y.) 278 [*affirmed* in 122 N. Y. 247, 25 N. E. 299].

It has been held, however, that in the absence of fraud or misrepresentation, the assured cannot be protected by claims of ignorance of the contents of the application, since it is his duty to inform himself of its contents before signing. Herndon *v.* Triple Alliance, 45 Mo. App. 426.

If the applicant is illiterate the rule stated in the text applies with especial force. O'Brien *v.* Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954 [*affirming* 51 Hun 495, 4 N. Y. Suppl. 275]; Home Circle Soc. No. 2 *v.* Shelton, (Tex. Civ. App. 1905) 85 S. W. 320.

If the agent and applicant conspire to defraud the society by inserting false answers, however, the society is not thus estopped. Mattson *v.* Modern Samaritans, 91 Minn. 434, 98 N. W. 330; Hanf *v.* Northwestern Masonic Aid Assoc., 76 Wis. 450, 45 N. W. 315.

71. *District of Columbia.*— Parliament of Prudent Patricians of Pompeii *v.* Marr, 20 App. Cas. 363, holding that where a certificate of insurance is issued to a member of a local council of a fraternal beneficial association after the time when by the laws of the association the council has forfeited its right to affiliate with the association and the officers thereof have ceased to be the agents of the central governing body, without notice to the insured of the default, the issuance amounts to a waiver by the association of the default of the local council, and estops the association to deny the continued membership of the council and the agency of its officers.

Illinois.— Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299, holding that where a question in an application for life insurance is not fully answered, but the company issues its policy on the application, it waives any further answer.

Iowa.— Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105 (holding that the agent of a mutual benefit association who issues a certificate on an application which he knows is made and signed by the insured's brother thereby waives a provision of the by-laws requiring applications to be signed by the applicants personally); Delaney *v.* Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603 (holding that where, under the articles of a fraternal association, no person is eligible to membership who is not at the time of receiving his certificate a member in another association, and an agent, with knowledge that the applicant was not then a member, accepts an application with the understanding that the applicant would become a member in the other association, and after the condition is complied with, the certificate of membership is delivered, the association cannot claim that the certificate was invalid because the member was not eligible when the application was made); Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 11 Am. St. Rep. 196, 1 L. R. A. 659 (holding that by issuing a certificate to a person known to be a drunkard, the society waives a condition that the certificate shall be void if applicant uses intoxicants so as to injure his health).

Missouri.—Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650 (where a formal application for insurance was thus waived); Herndon *v.* Triple Alliance, 45 Mo. App. 426 (holding that, notwithstanding the application falsely states matter material to the risk, if the insurer or its agent had knowledge of the facts at the time when the contract was entered into, the certificate will not be thereby avoided).

Texas.— Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844, where initiation into membership was thus waived.

United States.— Rowswell *v.* Equitable Aid Union, 13 Fed. 840, where payment of the first assessment was thus waived.

See 28 Cent. Dig. tit. "Insurance," § 1907 *et seq.*

b. By Conduct Inducing Forfeiture[72] — (I) *IN GENERAL.* If the society so acts as to induce a member to commit a breach of a promissory warranty or condition subsequent, it is precluded, on the ground of estoppel or waiver, from asserting the breach as a defense.[73]

(II) *CUSTOM AND COURSE OF DEALING.*[74] If, however, the society, by its course of dealing with a particular member,[75] or by a custom or usage in dealing

Ineligibility of the beneficiary may be thus waived. Coulson *v.* Flynn, 181 N. Y. 62, 73 N. E. 507 [*affirming* 90 N. Y. App. Div. 613, 86 N. Y. Suppl. 1133]; Massey *v.* Mutual Relief Soc., 34 Hun (N. Y.) 254 [*affirmed* in 102 N. Y. 523, 7 N. E. 619].

The medical examination may be thus waived. Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441; Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

Effect of ignorance of facts see *supra*, IV, J, 2.

72. Inducing false answers or non-disclosure by applicant see *supra*, IV, J, 4.

73. *Illinois.*— Grand Lodge A. O. U. W. *v.* Lachmann, 101 Ill. App. 213 [*affirmed* in 199 Ill. 140, 64 N. E. 1022].

Iowa.— Moore *v.* Order of Railway Conductors, 90 Iowa 721, 57 N. W. 623; Loughridge *v.* Iowa Life, etc., Assoc., 84 Iowa 141, 50 N. W. 568.

New York.— Kenyon *v.* Knights Templar, etc., Mut. Aid Assoc., 122 N. Y. 247, 25 N. E. 299 [*affirming* 48 Hun 278].

Utah.— Johanson *v.* Grand Lodge A. O. U. W., 31 Utah 45, 86 Pac. 494, holding that where a subordinate lodge having power to waive strict compliance with the society's by-laws respecting payment of assessments notified a member that the society would loan him the amount of four assessments for four specified months, it thereby waived payment of assessments during such period.

United States.— Supreme Lodge K. P. *v.* Kalinski, 163 U. S. 289, 16 S. Ct. 1047, 41 L. ed. 163 [*affirming* 57 Fed. 348, 6 C. C. A. 373], where a prior decision of the society in another case in regard to forfeiture for non-payment of dues was held to prevent a forfeiture in a subsequent case on the ground that it was a public and solemn declaration of the order, which would lead a member honestly to believe that he was complying with all the requirements necessary to keep his certificate good, thus operating by way of estoppel against the order.

See 28 Cent. Dig. tit. "Insurance," § 1907 *et seq.*

See, however, Eichel *v.* Supreme Lodge K. P., 15 Ind. App. 268, 43 N. E. 1014 (holding that if an agent of a fraternal insurance association may change by parol agreement the time fixed by the by-laws for monthly payments and waive a forfeiture which would otherwise result from the failure to make such payments at the time so fixed, a forfeiture was not waived by the mere promise of a branch president that he would send notice when payments became due, where it did not appear that the president, in making such promise, assumed to act on behalf of the association, or that the parties in interest were misled thereby); McCoy *v.* Northwestern Mut. Relief Assoc., 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681.

Failure to call or draw for assessments.— Where a friend of a member who had undertaken to keep up the insurance directed the collector to call on the member's mother for payment, and if she failed to pay to come back to him, the collector's failure to call on the friend after the mother's refusal to pay was not a waiver of a subsequent default for non-payment. United Moderns *v.* Rathbun, 104 Va. 736, 52 S. E. 552. And see *supra*, IV, I, 2, d, (IV), as to failure of collector to call as excusing default. If, however, the manager of the society promises to draw on a member for assessments, and fails to do so, and the member, being misled by the fact that drafts have twice been drawn on him, fails to pay the assessment, and is suspended, and cannot be reinstated because his health has become impaired, the society is estopped to insist on the forfeiture. McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149, 8 S. W. 516.

Repudiation of contract.— Seasonable payment of assessments on a benefit certificate are waived where the society, before expiration of time for their payment, declares the certificate void, and continues this attitude till the time has expired. Wuerfier *v.* Grand Grove W. O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940. And see *supra*, IV, I, 2, d, (IV), as to denial of membership or repudiation of contract as excusing subsequent default.

Refusal of tender of dues and assessments as excusing subsequent tender see *supra*, IV, I, 2, d, (IV).

Wrongful expulsion as excusing tender of subsequent dues and assessments see *supra*, IV, I, 2, d, (IV).

However, the fact that the conduct of the society in its dealing with a member was such as to induce a belief on his part that in the event of death by suicide that fact would not be insisted on as a defense, notwithstanding the provisions of the contract against suicide, does not preclude the society from asserting that defense. McCoy *v.* Northwestern Mut. Relief Assoc., 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681.

74. Waiver of conditions of reinstatement by custom or course of dealing see *supra*, IV, I, 4.

75. *Illinois.*— Railway Pass., etc., Conductors' Mut. Aid Assoc. *v.* Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286, receipt of assessment after proper time.

with members generally,[76] known to the member in question[77] and relied on by

Indiana.— Sweetser *v.* Odd Fellows Mut. Aid Assoc., 117 Ind. 97, 19 N. E. 722.

Iowa.— Moore *v.* Order of Railway Conductors, 90 Iowa 721, 57 N. W. 623; Loughridge *v.* Iowa Life, etc., Assoc., 84 Iowa 141, 50 N. W. 568.

Kentucky.— Supreme Council C. K. A. *v.* Winter, 108 Ky. 141, 55 S. W. 908, 21 Ky. L. Rep. 1583; National Mut. Ben. Assoc. *v.* Jones, 84 Ky. 110, 7 Ky. L. Rep. 751, 8 Ky. L. Rep. 621.

Michigan.— Wallace *v.* Fraternal Mystic Circle, 121 Mich. 263, 80 N. W. 6, 127 Mich. 387, 86 N. W. 853.

Missouri.— Cline *v.* Sovereign Camp W. W., 111 Mo. App. 601, 86 S. W. 501. See, however, Reichenbach *v.* Ellerbe, 115 Mo. 588, 22 S. W. 573.

New York.— Kenyon *v.* Knights Templar, etc., Mut. Aid Assoc., 122 N. Y. 247, 25 N. E. 299 [*affirming* 48 Hun 278]; McGowan *v.* Supreme Council Catholic Mut. Ben. Assoc., 76 Hun 534, 28 N. Y. Suppl. 177.

Texas.— See McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149, 8 S. W. 516.

See 28 Cent. Dig. tit. "Insurance," § 1914.

In the absence of notice of an intention to enforce strict compliance with the conditions of the contract in the future, the society is estopped by its previous course of dealing. Van Bokkelen *v.* Massachusetts Ben. Assoc., 90 Hun (N. Y.) 330, 35 N. Y. Suppl. 865, holding that an association which has habitually and without objection allowed calls to be paid by checks mailed by a member on the last days named therein cannot declare a forfeiture of his membership for a failure to comply with a recent condition printed in fine type in its form of mortuary notice, requiring remittances to reach the home office on or before the limitation named therein, where the member did not see it. And see *infra*, note 76, as to notice of discontinuance of custom.

Prior reinstatements according to the by-laws on payment of arrears do not waive a forfeiture for non-payment of subsequent dues and assessments, since the only thing such conduct could lead the member to expect is that on lapse of the certificate for non-payment of dues and assessments he would be reinstated in accordance with the by-laws. Rice *v.* Grand Lodge A. O. U. W., 103 Iowa 643, 72 N. W. 770; Crossman *v.* Massachusetts Ben. Assoc., 143 Mass. 435, 9 N. E. 753; Anderson *v.* Alta Friendly Soc., 26 Pa. Super. Ct. 630. And see *infra*, note 76, as to custom of reinstating delinquent members. See, however, Cline *v.* Sovereign Camp W. W., 111 Mo. App. 601, 86 S. W. 501. Waiver of conditions of reinstatement see *supra*, IV, I, 4.

76. *Illinois.*— Grand Lodge A. O. U. W. *v.* Lachmann, 101 Ill. App. 213 [*affirmed* in 199 Ill. 140, 64 N. E. 1022]; National Gross Loge U. O. T. *v.* Jung, 65 Ill. App. 313.

Indiana.— See Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Kansas.— Foresters of America *v.* Hollis, 70 Kan. 71, 78 Pac. 160.

Michigan.— Wallace *v.* Fraternal Mystic Circle, 121 Mich. 263, 80 N. W. 6, 127 Mich. 387, 86 N. W. 853, *semble*.

Minnesota.— Mueller *v.* Grand Grove U. A. O. D., 69 Minn. 236, 72 N. W. 48.

Missouri.— Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710; Courtney *v.* St. Louis Police Relief Assoc., 101 Mo. App. 261, 73 S. W. 878; Seehorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949.

United States.—Modern Woodmen of America *v.* Tevis, 111 Fed. 113, 49 C. C. A. 256.

See 28 Cent. Dig. tit. "Insurance," § 1914.

However, the custom of the financier of a local lodge of a benevolent insurance association of sending reports to the supreme lodge later than directed by the by-laws, and their acceptance without protest, does not estop the supreme lodge from claiming a forfeiture for delay in payment of dues, since the promptness of the reports in no way affects the rights of members. United Moderns *v.* Pike, (Tex. Civ. App. 1903) 76 S. W. 774.

A custom of accepting overdue payments from members in good health does not waive a subsequent default by a sick member. National Mut. Ben. Assoc. *v.* Miller, 85 Ky. 88, 2 S. W. 900, 8 Ky. L. Rep. 731; Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862; Schmidt *v.* Modern Woodmen of America, 84 Wis. 101, 54 N. W. 264. See, however, Moore *v.* Order of Railway Conductors, 90 Iowa 721, 57 N. W. 623; Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710. Waiver of conditions of reinstatement see *supra*, IV, I, 4.

A custom of reinstating delinquent members in pursuance of the by-laws does not constitute a waiver of the prompt payment of future assessments. Elder *v.* Grand Lodge A. O. U. W., 79 Minn. 468, 82 N. W. 987. And see *supra*, note 75, as to prior reinstatements of particular member. See, however, Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710. Waiver of conditions of reinstatement see *supra*, IV, I, 4.

Discontinuance of custom.— The custom of a fraternal insurance company to allow its members to become delinquent is not irrevocable, and may be changed by the association to insure a more strict compliance with the by-laws, in which case the members cannot claim the benefit of the previous course of the association to justify further neglect as to payments (Bost *v.* Supreme Council R. A., 87 Minn. 417, 92 N. W. 337), provided that they have been given notice of the change (Modern Woodmen of America *v.* Tevis, 111 Fed. 113, 49 C. C. A. 256. And see *supra*, note 75, as to notice of intention to discontinue course of dealing).

77. Jones *v.* National Mut. Ben. Assoc., (Ky. 1887) 2 S. W. 447; McGowan *v.* Su-

him,[78] misleads the member into believing that the strict terms of the contract or of the by-laws in regard to the payment of dues and assessments and forfeiture for default therein will not be insisted upon, it is precluded, on the ground of estoppel or waiver, from asserting a forfeiture for failure of the member strictly to comply with those terms. The society is likewise bound by the acts of officers and agents[79] or subordinate lodges,[80] where they have authority to act in the matter; but if they are not originally authorized to bind the society in this regard, it is not precluded from asserting the forfeiture,[81] unless it had knowledge of their custom or usage or course of dealing and acquiesced therein.[82]

c. By Recognizing Continuing Existence of Contract. If the society, with knowledge of facts giving it the right to avoid the contract or to declare a forfeiture, recognizes the contract as continuing in full force and effect, it is thereby precluded, on the ground of estoppel or waiver, from afterward asserting those facts to avoid liability.[83]

preme Council Catholic Mut. Ben. Assoc., 76 Hun (N. Y.) 534, 28 N. Y. Suppl. 177, both holding that a custom or usage of the society cannot form an estoppel or waiver in favor of a member who was not aware of it. And see Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710.

78. See cases cited *supra*, notes 75, 76.

However, the fact that the member believed that the society could not forfeit the certificate for delinquency does not show that he did not rely on its custom of not requiring payment within the time fixed by the rules. Wallace *v.* Fraternal Mystic Circle, 127 Mich. 387, 86 N. W. 853.

79. Moore *v.* Order of Railway Conductors, 90 Iowa 721, 57 N. W. 623; Loughridge *v.* Iowa Life, etc., Assoc., 84 Iowa 141, 50 N. W. 568. And see cases cited *passim*, IV, J, 5, b, (II).

80. Mueller *v.* Grand Grove U. A. O. D., 69 Minn. 236, 72 N. W. 48; Andre *v.* Modern Woodmen of America, 102 Mo. App. 377, 76 S. W. 710 (so holding, although the by-laws stipulate to the contrary); Seehorn *v.* Supreme Council C. K. A., 95 Mo. App. 233, 68 S. W. 949. And see cases cited *passim*, IV, J, 5, b, (II).

81. Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463.

82. Roeding *v.* Sons of Moses, 16 Daly (N. Y.) 417, 11 N. Y. Suppl. 712; Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

In the absence of knowledge of the unauthorized custom or course of dealing, the society is not estopped thereby. Elder *v.* Grand Lodge A. O. U. W., 79 Minn. 468, 82 N. W. 987; Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463; United Moderns *v.* Pike, (Tex. Civ. App. 1903) 76 S. W. 774; Fraternal Union of America *v.* Hurlock, 33 Tex. Civ. App. 78, 75 S. W. 539; Supreme Lodge K. H. *v.* Oeters, 95 Va. 610, 29 S. E. 322; Supreme Council R. A. *v.* Taylor, 121 Fed. 66, 57 C. C. A. 406; Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

Ignorance or knowledge as affecting estoppel or waiver generally see *supra*, IV, J, 2.

83. *California.*— Hoeft *v.* Supreme Lodge K. H., 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174, holding that in an action against a benefit association to which stepchildren of plaintiff, as contestants, are joined as defendants, an admission by the association that the certificate was in fact issued, and payment of the amount thereof into court by it, operate as a waiver by all the defendants of any irregularities in the certificate.

Indiana.— Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477, holding that by failing to offer to rescind the contract for a long lapse of time after discovering the falsity of statements in the application, the society estops itself from avoiding the contract because of such falsity.

Minnesota.— See Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74.

Missouri.— Callies *v.* Modern Woodmen of America, 98 Mo. App. 521, 72 S. W. 713, where the holder of a certificate was cited for trial before the local lodge on the charge of violating the terms of the certificate by frequently becoming intoxicated, and while the charge was shown to be true, no sentence of expulsion was passed, but all action was deferred until he should be released from an asylum in which he then was, and it was held to constitute a waiver of a forfeiture on account of the use of intoxicants after the certificate was issued.

Nebraska.— Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943; Grand Lodge A. O. U. W. *v.* Brand, 29 Nebr. 644, 46 N. W. 95, holding that the fact that a member was addicted to the use of intoxicating liquors contrary to the rules of the order cannot be set up after his death in defense to an action on the certificate issued to him and conditioned to be void unless he complied with all the rules of the order, where no objection was made and no forfeiture declared on this account in his lifetime, although the members of the association knew his habits. See, however, Chapple *v.* Sovereign Camp W. W., 64 Nebr. 55, 89 N. W. 423, holding that where the by-laws declare that default in payment shall work a forfeiture of membership, such forfeiture is not waived by the fact that a member was present at all the meetings and social proceedings of the camp up to the time of his death,

d. By Demanding, Accepting, or Retaining Dues or Assessments[84] — (I) *In General.* It generally constitutes a waiver of the right to avoid the contract of insurance so to declare a forfeiture, where the society, with knowledge of the existence of grounds of avoidance or forfeiture, unconditionally accepts dues or assessments from the member in question,[85] at least where the society retains the

which occurred shortly after he became delinquent.

See 28 Cent. Dig. tit. "Insurance," § 1907 *et seq.*

See, however, Kempe *v.* Woodmen of the World, (Tex. Civ. App. 1898) 44 S. W. 688, holding that the knowledge of a fraternal life insurance company of a member's excessive drinking long prior to the time he was expelled therefor does not estop the company from setting up the expulsion, where the terms of the certificate provided that it should become void if the holder drank to excess, so as to permanently injure his health.

84. Estoppel or waiver after death of member see *supra*, IV, J, 1, a.

85. Watts *v.* Equitable Mut. Life Assoc., 111 Iowa 90, 82 N. W. 441; Pringle *v.* Modern Woodmen of America, (Nebr. 1906) 107 N. W. 756 (where the right to forfeit the policy because of the member's conviction of felony was thus waived); Baranowski *v.* Baltimore Mut. Aid Soc., 3 Pa. Super. Ct. 367 (holding that where a benefit certificate provides for return of premiums and cancellation of certificate in event of sickness within twenty weeks from its date, an acceptance of weekly instalments after proof of sickness works a waiver of such right of cancellation, and justifies recovery of sick benefits after the expiration of twenty weeks); Order of Columbus *v.* Fuqua, (Tex. Civ. App. 1901) 60 S. W. 1020 (where breach of promissory warranty as to habits was thus waived). And see Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799, where it is said that a certificate cannot be treated as valid for the purpose of assessing the member, and invalid for the purpose of avoiding payment to his beneficiaries.

Waiver of false statements in application.— The right to avoid the contract for false statements in the application may be thus waived. Masonic Mut. Ben. Assoc. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295; Ball *v.* Granite State Mut. Aid Assoc., 64 N. H. 291, 9 Atl. 103 (false statement as to health); Grimaldi *v.* Associazione Fraterna Italiani, 31 Misc. (N. Y.) 745, 64 N. Y. Suppl. 25 (false statement as to physical condition); Order of Columbus *v.* Fuqua, (Tex. Civ. App. 1901) 60 S. W. 1020 (false statement as to habits); Hoffman *v.* Supreme Council A. L. H., 35 Fed. 252. And see cases cited *infra*, this note.

Waiver of provisions as to admission of members.— The right to avoid the contract for irregularities in the admission of the member may be thus waived. Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069 (holding that where the officers of a new lodge received dues and assessments from a person with notice that he had not severed his connection with an old one, as required by resolutions of the new lodge, the latter is estopped from insisting on his failure to do so as a ground of avoidance); Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022, 51 Minn. 224, 53 N. W. 367; Burlington Voluntary Relief Dep't *v.* White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. Rep. 701, 41 Nebr. 561, 59 N. W. 751 (where a formal application and medical examination and issuance of a certificate were thus waived); Supreme Ruling F. M. C. *v.* Crawford, (Tex. Civ. App. 1903) 75 S. W. 844 (where initiation of the member was thus waived).

Waiver of provisions as to age.— The right to avoid the contract for ineligibility of the member on account of age may be thus waived. Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595; Wiberg *v.* Minnesota Scandinavian Relief Assoc., 73 Minn. 297, 76 N. W. 37, where the applicant falsely stated his age. And see Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477, where the applicant falsely stated his age. In any event a waiver occurs where, at the time of issuing the certificate, the society knows the applicant's age. Gray *v.* National Ben. Assoc., *supra*. See, however, Fraternal Tribunes *v.* Steele, 114 Ill. App. 194 [*affirmed* in 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160], and *supra*, I, G, 1, b, as to estoppel and waiver where the society has no power to admit members under or above certain ages.

Waiver of provisions as to occupation.— The society may thus waive misrepresentations of the applicant as to his occupation; in any event a waiver occurs where, at the time of issuing the certificate, the society is aware of the true facts. Coverdale *v.* Royal Arcanum, 193 Ill. 91, 61 N. E. 915 [*reversing* 93 Ill. App. 373]; High Court I. O. F. *v.* Schweitzer, 171 Ill. 325, 49 N. E. 506 [*affirming* 70 Ill. App. 139]. And breach of promissory warranty as to occupation also may be thus waived. Brotherhood of Painters, etc. *v.* Moore, 36 Ind. App. 580, 76 N. E. 262; Supreme Court of Honor *v.* Sullivan, 26 Ind. App. 60, 59 N. E. 37; Supreme Tent K. M. W. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203; Modern Woodmen of America *v.* Colman, 64 Nebr. 162, 89 N. W. 641. See however, Abell *v.* Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65, 906; Modern Woodmen of America *v.* Talbot, (Nebr. 1906) 107 N. W. 790, both holding that where a certificate provides that if a member engages in an occupation prohibited by the by-laws it shall become void as to any claim on account of injuries or death traceable to such occupation, the society is not estopped from insisting on its exemption from liability for

money thus paid even though it was received and retained after the death of the assured.[86]

(II) *WAIVER OF FORFEITURE FOR NON-PAYMENT OF DUES OR ASSESSMENTS.* The right to avoid liability for non-payment of dues or assessments within the prescribed time is waived where the society accepts payment of the same unconditionally after that time,[87] and especially is this true where it retains the

the death of a member due to his engaging in such occupation by accepting dues and assessments with knowledge of such fact. And see State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456.

Waiver of provisions as to eligibility of beneficiary.—A by-law limiting beneficiaries to persons of a certain class is waived by issuing a certificate payable to a person known to be not in that class and collecting assessments thereunder. Coulson *v.* Flynn, 181 N. Y. 62, 73 N. E. 507 [*affirming* 90 N. Y. App. Div. 613, 86 N. Y. Suppl. 1133]. Waiver where society has no power to issue certificates payable to persons outside of a certain class see *supra*, I, G, 1, b. So false statements as to the relationship of the beneficiary to the member may be waived by collecting assessments with knowledge of the falsity. Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508; Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29; Seibel *v.* Northwestern Mut. Relief Assoc., 94 Wis. 253, 68 N. W. 1009.

Stipulation against waiver see *supra*, IV, J, 1, a.

86. Supreme Tent K. M. W. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203; Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. Rep. 701, 41 Nebr. 561, 59 N. W. 751; Seibel *v.* Northwestern Mut. Relief Assoc., 94 Wis. 253, 68 N. W. 1009. And see Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477.

Retention of payments does not constitute a waiver, however, where the society denies liability and offers to return the money (Taylor *v.* Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. N. S. 114; Hiatt *v.* Fraternal Home, 99 Mo. App. 105, 72 S. W. 463), or where the member has died and there is no person competent to accept a return of the money (Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799; Hiatt *v.* Fraternal Home, *supra*), or where the money is not retained for an unreasonable time after ascertaining the facts (Matt *v.* Roman Catholic Mut. Protective Soc., *supra*).

87. *California.*— McDonald *v.* Supreme Council O. C. F., 78 Cal. 49, 20 Pac. 41.

Colorado.— Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Illinois.— Independent Order of Foresters *v.* Haggerty, 86 Ill. App. 31; Bartling *v.* Edwards, 84 Ill. App. 471.

Indiana.— Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Iowa.— Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770.

Kansas.— Modern Woodmen of America *v.* Jameson, 48 Kan. 718, 30 Pac. 460.

Massachusetts.— Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475.

Michigan.— Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443.

Missouri.—Piquenard *v.* Libby, 7 Mo. App. 565.

New Hampshire.— La Marsh *v.* L'Union St. Jean Baptiste Soc., 68 N. H. 229, 38 Atl. 1045.

New York.—Rewitzer *v.* Switchmen's Union of North America, 112 N. Y. App. Div. 708, 98 N. Y. Suppl. 974; Beil *v.* Supreme Lodge K. H., 80 N. Y. App. Div. 609, 80 N. Y. Suppl. 751; Sieburg *v.* Massachusetts Ben. Assoc., 87 Hun 199, 33 N. Y. Suppl. 1064 [*affirmed* in 156 N. Y. 669, 50 N. E. 1122]; Shay *v.* National Ben. Soc., 54 Hun 109, 7 N. Y. Suppl. 287.

Texas.— Home Forum Ben. Order *v.* Jones, 20 Tex. Civ. App. 68, 48 S. W. 219.

Utah.— Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307; Daniher *v.* Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. 245.

Wisconsin.— Erdmann *v.* Mutual Ins. Co. O. H. S., 44 Wis. 376.

United States.— Supreme Lodge K. P. *v.* Kalinski, 163 U. S. 289, 16 S. Ct. 1047, 41 L. ed. 163.

Canada.— Horton *v.* Provincial Provident Inst., 17 Ont. 361; La Société Bienveillante St. Roch *v.* Moisan, 7 Quebec Q. B. 128 [*reversing* 12 Quebec Super. Ct. 189].

See 28 Cent. Dig. tit. "Insurance," § 1909.

See, however, Adams *v.* Grand Lodge A. O. U. W., 66 Nebr. 389, 92 N. W. 588.

Acceptance of overdue assessments against local lodge.— If the society accepts payment of overdue assessments against a local lodge, it waives the default of the lodge as against a member thereof. Gray *v.* Chapter-Gen. of America K. S. & M., 70 N. Y. App. Div. 155, 75 N. Y. Suppl. 267.

Acceptance of part payment of the amount overdue does not waive the default (Supreme Lodge K. H. *v.* Oeters, 95 Va. 610, 29 S. E. 322. And see Modern Woodman Acc. Assoc. *v.* Kline, 50 Nebr. 345, 69 N. W. 943), unless the society retains the money without objection or demand for the balance (Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159).

Payment of arrears as effecting reinstatement see *supra*, IV, I, 4.

Waiver of provisions limiting benefits to

money.[88] So if the society, while a member is in default, unconditionally accepts from him dues or assessments subsequently accruing and retains them, the default is thereby waived.[89] Neither a demand of payment of an overdue assessment, nonpayment of which has *ipso facto* resulted in a forfeiture of the member's rights,[90] nor an offer to reinstate a member whose rights have been forfeited,[91] constitutes an estoppel or waiver unless followed by payment or a tender of payment within a reasonable time;[92] but a waiver occurs where, after a member has defaulted, the society imposes other assessments on him and demands payment thereof, even though he fails to pay or tender them.[93]

members on payment of arrearages see *supra*, IV, I, 4.

Waiver of right to refuse to reinstate because of ill health see *supra*, IV, I, 4.

88. *Illinois.*— Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74.

Iowa.— Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770.

Kansas.— Modern Woodmen of America *v.* Jameson, 48 Kan. 718, 30 Pac. 460.

Michigan.— Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443.

New York.— Beil *v.* Supreme Lodge K. H., 80 N. Y. App. Div. 609, 80 N. Y. Suppl. 751; Sieburg *v.* Massachusetts Ben. Assoc., 87 Hun 199, 33 N. Y. Suppl. 1064 [*affirmed* in 156 N. Y. 669, 50 N. E. 1122].

Wisconsin.— Erdmann *v.* Order of Herman's Sons Mut. Ins. Co., 44 Wis. 376.

See 28 Cent. Dig. tit. "Insurance," § 1909.

An offer to return a part of the money thus received does not preclude a waiver. Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443.

Time of offer to return.—An offer to return assessment is not in time, where the society has retained the money for thirty days after the member's death. Rewitzer *v.* Switchmen's Union, 112 N. Y. App. Div. 708, 98 N. Y. Suppl. 974.

Retention of overdue notes.— Where an association takes notes from a member in settlement of assessments, and they are not paid at maturity, the fact that the association retains them does not prevent the forfeiture of the policy for such non-payment. Parker *v.* Bankers' Life Assoc., 86 Ill. App. 315.

Retention of money accepted by mistake as waiver see *supra*, note 86.

Retention of part payment as waiver see *supra*, note 87.

89. *California.*— Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133; Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864.

Colorado.— Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Connecticut.— Menard *v.* St. Jean Baptiste Soc., 63 Conn. 172, 27 Atl. 1115.

Illinois.— Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538 [*affirming* 37 Ill. App. 170].

Iowa.— Tobin *v.* Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663.

Massachusetts.—Rice *v.* New England Mut. Aid Soc., 146 Mass. 248, 15 N. E. 624.

Michigan.— Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443.

Nebraska.— Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

New York.— Beil *v.* Supreme Lodge K. H., 80 N. Y. App. Div. 609, 80 N. Y. Suppl. 751; Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512]; Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71 [*affirmed* in 133 N. Y. 619, 30 N. E. 1146].

Ohio.— See Phœnix Council No. 85 J. O. U. A. M. *v.* Bennett, 26 Ohio Cir. Ct. 110; Springmeier *v.* Widows', etc., Benev. Assoc., 8 Ohio Dec. (Reprint) 89, 5 Cinc. L. Bul. 516.

Pennsylvania.—Wheeler *v.* Accidental Fund, 5 Lack. Leg. N. 97.

Utah.—Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307.

Wisconsin.— Stylow *v.* Wisconsin Odd-Fellows' Mut. L. Ins. Co., 69 Wis. 224, 34 N. W. 151, 2 Am. St. Rep. 738.

See 28 Cent. Dig. tit. "Insurance," § 1909.

If the society accepts assessments from a local lodge which is in default as to a prior assessment, it constitutes a waiver of the default as against a member of the lodge. Gray *v.* Chapter-Gen. K. St. J. & M., 70 N. Y. App. Div. 155, 75 N. Y. Suppl. 267.

If the society tenders back the subsequent assessment on learning that the member was indebted to his lodge when the money was accepted from him, there is no waiver (Springmeier *v.* Widows', etc., Benev. Assoc., 8 Ohio Dec. (Reprint) 89, 5 Cinc. L. Bul. 516); but a tender back of only a part of the amount received does not prevent a waiver (Lord *v.* National Protective Soc., 129 Mich. 335, 88 N. W. 876, 134 Mich. 357, 96 N. W. 443).

90. Scheele *v.* State Home Lodge F. M. P., 63 Mo. App. 277; Schmidt *v.* Modern Woodmen of America, 84 Wis. 101, 54 N. W. 264.

91. Sovereign Camp W. W. *v.* Hicks, (Tex. Civ. App. 1904) 84 S. W. 425.

92. Murray *v.* Home Ben. L. Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133; Shay *v.* National Ben. Soc., 54 Hun (N. Y.) 109, 7 N. Y. Suppl. 287. See, however, Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416].

93. *California.*— Murray *v.* Home Ben. L. Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

(III) *CONDITIONAL ACCEPTANCE.*[94] The right to avoid the contract or to take advantage of a forfeiture is not waived by the acceptance of dues or assessments where the society accepts them on a condition which is not fulfilled,[95] unless the

Illinois.— Modern Woodmen of America *v.* Anderson, 71 Ill. App. 351; Railway Pass. Conductors' Mut. Aid, etc., Assoc. *v.* Swartz, 54 Ill. App. 445.

Kentucky.—American Mut. Aid Soc. *v.* Quire, 7 Ky. L. Rep. 671.

New York.— See Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416].

United States.—Rowswell *v.* Equitable Aid Union, 13 Fed. 840.

See 28 Cent. Dig. tit. "Insurance," § 1909.

Contra.—Bowlin *v.* Sovereign Camp W. W., 82 Minn. 411, 85 N. W. 160; Schmidt *v.* Modern Woodmen of America, 84 Wis. 101, 54 N. W. 264, both holding that a forfeiture resulting from non-payment of an assessment is not waived by sending the member notice of a subsequent assessment.

Levy before right to declare forfeiture accrues.— The fact that an association sends a delinquent member notice of an assessment is not a waiver of the right of forfeiture for non-payment of a previous assessment, where such notice is sent before the right to declare a forfeiture accrues. Graveson *v.* Cincinnati Life Assoc., 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327.

Levy within time allowed for reinstatement.—Where non-payment of an assessment results in a forfeiture of benefits, and the rules entitle delinquent members to reinstatement within a certain time on payment of arrears and assessments subsequently accruing, the levy of an assessment on a delinquent member before the expiration of the prescribed time does not waive the default. Carlson *v.* Supreme Council A. L. H., 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643; Leffingwell *v.* Grand Lodge A. O. U. W., 86 Iowa 279, 53 N. W. 243; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159; Toelle *v.* Central Verein, etc., 97 Wis. 522, 72 N. W. 630.

If the member declines to pay assessments and asks to have his certificate canceled, the fact that assessments are levied on him while he is in default does not create an estoppel. Scheele *v.* State Home Lodge F. M. P., 63 Mo. App. 277.

The sending of an official call by a sovereign camp to a subordinate camp is not a waiver or abrogation of the law with respect to delinquencies, as recognizing the standing of a delinquent member of the subordinate camp by calling on him to pay an assessment subsequent to that with respect to which he is delinquent, where such call was simply a call on the clerk to collect from those who were entitled to pay, including delinquents who might be still in good health and present themselves in good health or furnish the prescribed certificate. Pete *v.* Woodmen of World, 26 Ohio Cir. Ct. 653.

94. Conditions of reinstatement and waiver thereof see *supra,* IV, I, 4.

95. Modern Woodman Acc. Assoc. *v.* Kline, 50 Nebr. 345, 69 N. W. 943, holding that the receipt by the association, subsequent to the injury sued for, of the sum necessary to constitute plaintiff a member from that date, he being then informed that the certificate does not cover the injury, is not a waiver of payment in full as a condition to the taking effect of the certificate.

Acceptance on condition that the member is in good health does not constitute a waiver where he is not in good health. Garhutt *v.* Citizens' Life, etc., Assoc., 84 Iowa 293, 51 N. W. 148; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159. Where, however, the rules permit the readmission of a member on satisfactory evidence of good health, the acceptance of a delinquent assessment from the secretary of the section to which the member belongs on the statement that he is a healthy man waives the right to forfeiture for the non-payment of such dues. Supreme Lodge K. P. *v.* Hammerl, 94 Ill. App. 164. And where a duplicate notice of an overdue assessment was sent, across the face of which was stamped: "Certificate forfeited for non-payment. May be renewed by immediate payment, if the risk is approved by the Association, upon receipt of said payment at the home office," and thereupon the member paid the assessment, and a receipt therefor was delivered to him, stating that the payment was received on the condition that he was in good health, the association waived its right to a forfeiture of the policy. Sieburg *v.* Massachusetts Ben. Assoc., 87 Hun (N. Y.) 199, 33 N. Y. Suppl. 1064 [*affirmed* in 156 N. Y. 669, 50 N. E. 1122]. So where payment of an assessment was accepted by the company after the time limited in the certificate for making it had expired, and the receipt stamped on the notice recited, "Accepted on condition that the member is in good health," but nothing was said by the member, and no inquiries were made relative thereto at that time, the subsequent levy and unconditional acceptance by the company of six assessments on the member waived the forfeiture, although the member was at the time of the conditional acceptance in ill health. Rice *v.* New England Mut. Aid Soc., 146 Mass. 248, 15 N. E. 624.

Acceptance on condition that the member shall undergo a medical examination and furnish a certificate of good health does not constitute a waiver unless the member is examined and furnishes the certificate. Bowlin *v.* Sovereign Camp W. W., 82 Minn. 411, 85 N. W. 160; May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66. And see Leffingwell *v.* Grand Lodge A. O. U. W., 86 Iowa 279, 53 N. W. 243; Adams *v.* Grand Lodge A. O. U. W., 66 Nebr. 389, 92 N. W. 588, invitation to lay case before finance committee.

society subsequently waives the condition.[96] However, a waiver will be treated as unconditional unless it clearly appears that it was otherwise understood by the parties.[97]

e. By Asserting but One of Several Known Grounds of Avoidance or Forfeiture. If the society, with knowledge of several grounds of avoidance or forfeiture, asserts but one of them when called on to pay benefits, it constitutes an estoppel or waiver precluding it from asserting the other grounds when sued on the certificate.[98]

f. By Negotiating For Settlement or Requiring Proofs of Claim. The society does not waive its right to avoid the contract or to take advantage of a forfeiture merely by inviting negotiations in regard to a disputed claim for benefits;[99] but if the society recognizes the continuing existence of the contract by requiring proofs of claim, which are furnished by the member or his beneficiary at some trouble and expense, the right to defend on account of previously known grounds of avoidance or forfeiture is lost.[1]

g. By Accepting or Collecting Money to Pay Claim. By accepting from a collateral organization a fund to be paid to the beneficiary of a member who has died in default, the society waives the default.[2] So, it has been held, the right to avoid the contract or to take advantage of a forfeiture is waived where the society, with knowledge of the facts, collects or levies an assessment for the purpose of creating a fund to pay benefits pursuant to the terms of the contract.[3]

h. By Recitals in Certificate. The society is estopped as against the beneficiary from denying the truth of recitals in the policy as to the initiation of the member,[4] and as to the payment of preliminary dues and assessments.[5]

6. Stipulations as to Contestability. The certificate of insurance not infrequently contains a clause that after being in force a specified time it shall not be

Acceptance subject to reinstatement does not constitute a waiver where the member is not reinstated. Bowlin *v.* Sovereign Camp W. W., 82 Minn. 411, 85 N. W. 160; McGowan *v.* Supreme Council Catholic Mut. Ben. Assoc., 76 Hun (N. Y.) 534, 28 N. Y. Suppl. 177; People *v.* Mutual Reserve Fund Life Assoc., 15 Misc. (N. Y.) 333, 37 N. Y. Suppl. 617.

96. Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71 [*affirmed* in 133 N. Y. 619, 30 N. E. 1146].

97. Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

98. Taylor *v.* Supreme Lodge C. L., 135 Mich. 231, 97 N. W. 680, 106 Am. St. Rep. 392; Wolf *v.* District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23, 60 N. W. 445. *Contra*, see Pauley *v.* Modern Woodmen of America, 113 Mo. App. 473, 87 S. W. 990.

99. Taylor *v.* Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. N. S. 114 (holding that where a benefit society learned that the certificate issued to the insured was void because of misstatements as to his age, it was not estopped to claim such invalidity by its request that the beneficiary name someone with whom it could negotiate as to the claim); Adams *v.* Grand Lodge A. O. U. W., 66 Nebr. 389, 92 N. W. 588 (holding that after liability has been denied by the grand lodge, and payment made for the purpose of reinstatement tendered back, the fact that a member of the grand lodge finance committee invited plaintiff's attorney to lay his case before the whole committee was not a binding admission of liability, although it involved some expense to plaintiff to do so); Hughes *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 98 Wis. 292, 73 N. W. 1015.

1. Traders' Mut. L. Ins. Co. *v.* Johnson, 200 Ill. 359, 65 N. E. 634 [*affirming* 101 Ill. App. 559]; Chicago Guaranty Fund Life Soc. *v.* Wilson, 91 Ill. App. 667; Supreme Tent K. M. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203. And see Beil *v.* Supreme Lodge K. H., 80 N. Y. App. Div. 609, 80 N. Y. Suppl. 751.

There is no waiver, however, where the society, on forwarding blank proofs at the request of the beneficiary, informs him that no rights are thereby waived (Tuttle *v.* Iowa State Traveling Men's Assoc., (Iowa 1905) 104 N. W. 1131); or where proofs are accepted pending an attempt to compromise the claim (Hughes *v.* Wisconsin Odd Fellows' Mut. L. Assoc., 98 Wis. 292, 73 N. W. 1015).

2. Littleton *v.* Wells, etc., Council No. 14 J. O. U. A. M., 98 Md. 453, 56 Atl. 798.

3. Pfeifer *v.* Supreme Lodge B. S. B. S., 173 N. Y. 418, 66 N. E. 108 [*reversing* 77 N. Y. Suppl. 1138]. And see Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069. *Contra*, Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394. And see Hughes *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 98 Wis. 292, 73 N. W. 1015.

4. Shackelford *v.* Supreme Conclave K. D., 98 Ga. 295, 26 S. E. 746.

5. Kline *v.* National Ben. Assoc., 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703.

disputed or shall be incontestable, in which case the society is estopped to assert any defense within the terms of the clause if the member survived the prescribed period.[6]

V. RIGHT TO RESORT TO COURTS.

A. In General.[1] If the society confines itself to the powers vested in it and acts in good faith under by-laws not violating the laws of the land or any inalienable right of the member, the general rule is that the courts have no authority to interfere with the society by directing or controlling it as to questions of internal policy, nor to decide questions relating to the discipline of its members, but will leave the society free to carry out any lawful purpose in accordance with its rules and regulations.[2] This rule applies whether the society is incorporated or unin-

6. Kline *v.* National Ben. Assoc., 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703, holding that where both the policy of insurance, which provides that it is incontestable except for fraud, and the application state, the one by express words and the other by clear implication, that the consideration has been paid, the insurer is estopped to deny payment as against the beneficiary, and the policy is enforceable by the latter, notwithstanding part of the premium was not in fact paid, but instead orders were given therefor by the assured on his employer, who at his request refused to pay them, and although the orders stipulated that if they were not paid the assured's rights were thereby fortified.

Validity of clause.—A clause in a benefit certificate making the certificate incontestable after the lapse of a reasonable time for fraud in procuring it (Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439]; Wright *v.* Mutual Ben. Life Assoc., 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L. R. A. 731), or because the beneficiary had no insurable interest in the member's life (Wright *v.* Mutual Ben. Life Assoc., *supra*), is valid as creating a short statute of limitations.

Construction of clause.—A clause in a fraternal certificate of life insurance that it is to be incontestable after a certain date from the issuance of the policy is to be liberally construed in favor of the insured. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439].

The defense of fraud is thus precluded. Wright *v.* Mutual Ben. Life Assoc., 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L. R. A. 731 [*affirming* 43 Hun 61], holding that a provision in a certificate that "no question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership and during the life of the member therein named," embraces the defense of fraud of the insured and beneficiary in obtaining the certificate. See, however, Holland *v.* Supreme Council O. C. F., 54 N. J. L. 490, 25 Atl. 367.

The defense of suicide is thus precluded. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439]; Supreme Court of Honor *v.* Updegraf, 68 Kan. 474, 75 Pac. 477.

1. See also ASSOCIATIONS, 4 Cyc. 302–305; CLUNS, 7 Cyc. 263.

Arbitration as condition precedent to actions see ARBITRATION AND AWARD, 3 Cyc. 595.

2. *Illinois.*—Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598; Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321.

Kansas.— Moore *v.* National Council K. L. S., 65 Kan. 452, 70 Pac. 352; Reno Lodge No. 99 I. O. O. F. *v.* Grand Lodge I. O. O. F., 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98.

Missouri.— State *v.* Grand Lodge A. O. U. W., 78 Mo. App. 546.

New York.— Levy *v.* U. S. Grand Lodge O. S. B., 9 Misc. 633, 30 N. Y. Suppl. 885.

Ohio.— Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589.

Pennsylvania.— See Picar *v.* Bovolak, 7 Kulp 241.

Texas.— Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Civ. App. 1905) 91 S. W. 834.

Canada.— Baker *v.* Forest City Lodge I. O. O. F., 28 Ont. 238 [*affirmed* in 24 Ont. App. 585].

See 6 Cent. Dig. tit. "Beneficial Associations," §§ 21, 45; 28 Cent. Dig. tit. "Insurance," § 1987.

The constitution and by-laws will not be interpreted by the courts to ascertain how the latter conform to the former, and specifically to restrain its officers and agents in the performance of the duties devolved upon them as such, because such action would be an administration of its internal affairs. Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589.

Protection of rights of subordinate lodge.—A subordinate lodge of a beneficial association cannot appeal to the courts from the action of the grand lodge, except where some civil or property right is invaded, the association being the sole judge in questions of doctrine and policy. Grand Lodge K. P. *v.* People, 60 Ill. App. 550. A subordinate lodge cannot resort to the courts to enjoin the supreme lodge from considering certain charges against it where the proceedings are

corporated.[3] For instance, the method of raising funds to carry out one of the benevolent purposes of the order and the amount to be so raised is ordinarily a matter of policy with which the courts will not interfere.[4] But while courts will not undertake to direct or control such societies in the matter of discipline or internal policy, they are nevertheless subject to the laws of the state and the jurisdiction of the courts in proper cases; and the courts will not hesitate where property rights are involved to entertain jurisdiction and afford relief.[5]

in pursuance of the regular course of the supreme lodge when charges are preferred against subordinate lodges. Grand Commandery U. O. G. C. *v.* Stewart, 177 Mass. 235, 58 N. E. 689.

Suspension of officer.— The courts will not interfere to prevent the suspension of an officer of a beneficial order by a superior officer where no property rights are involved. Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

The merits of questions within the scope of the powers of the society, and which are still in process of adjustment by it, in accordance with the form set forth in its by-laws, will not be considered by the court. Brubaker *v.* Denlinger, 17 Lanc. L. Rev. (Pa.) 212.

Compelling declaration of adoption of amendment.— Officers of a society will not be compelled to declare the adoption of a certain amendment proposed to the constitution, where the question involves the construction of that constitution as to the requisite vote to carry an amendment, and petitioner has no pecuniary interest in the settlement of the question. People *v.* Masonic Benev. Assoc., 98 Ill. 635.

The secret password to the grand lodge will not be compelled to be given to a delegate of a subordinate lodge, nor will it be compelled to permit him to participate in the deliberations where no property right is in danger. Wellenvoss *v.* Grand Lodge K. P., 103 Ky. 415, 45 S. W. 360, 20 Ky. L. Rep. 113, 40 L. R. A. 488.

Compelling grand lodge to notify local lodges.— Mandamus does not lie to compel officers of the grand lodge of the society to perform acts such as notifying subordinate lodges of sessions of the grand lodge and directing them to elect representatives thereto, where such acts necessarily rest in the discretion of such officers. Laflin *v.* State, 49 Nebr. 614, 68 N. W. 1022.

3. People *v.* Grand Lodge K. P., 166 Ill. 71, 46 N. E. 768 [*affirming* 60 Ill. App. 550]; Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

4. Reno Lodge No. 99 I. O. O. F. *v.* Grand Lodge I. O. O. F., 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98.

What is reasonable rate of assessment will not be determined by the courts as against the honest judgment of the governing body of the society. Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321.

5. Modern Woodmen of America *v.* Deters, 65 Ill. App. 368; Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373; Reno Lodge No. 99 I. O. O. F. *v.* Grand Lodge I. O. O. F., 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98; Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834. See also Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383; Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

Unincorporated associations.— Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character. Otto *v.* Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156. But see MANDAMUS, 26 Cyc. 385.

When property right is involved.— Where a member alleges that the management of the association has been wasteful and has violated its laws so as to endanger the endowment, and that the officers threaten to deprive plaintiff of his seat in the supreme body, a cause of action is stated for the protection of plaintiff's rights to participate in the meetings of the governing body as a member thereof for the protection of his property interests. So where an officer acting in violation of the provisions of the constitution assumes to cancel the warrant of a subordinate lodge on an alleged failure to pay an assessment and to suspend all members of such lodge from the benefits of the endowment department, the members themselves not being in default, equity will interpose to protect the rights of a member of such subordinate lodge. Gray *v.* Chapter-Gen. K. St. J. & M., 70 N. Y. App. Div. 155, 75 N. Y. Suppl. 267. Where the laws of the order provide for the payment of benefits to defray the funeral expenses of its members and their family, the members have property rights in the society. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383; Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538. A member of a benevolent society has an interest in its funds, and is entitled to the protection of the by-laws in regard thereto, and may maintain a bill to enjoin a violation thereof. Flaherty *v.* Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58.

When property right is not involved.— Where the only right claimed to have been violated was the social right of a member to represent his subordinate lodge in the grand body, no property right is involved so as to warrant an injunction, although it is

B. Suspension or Expulsion of Member and Reinstatement — 1. In General.[6] The decisions of the order in admitting members, and in disciplining, suspending, or expelling them, are of a quasi-judicial nature with which the courts will not ordinarily interfere,[7] except, in connection with property rights, to ascer-

alleged that great and irreparable injury will be done both to him and to the subordinate lodge if he is not received as a delegate. Wellenvoss *v.* Grand Lodge K. P., 103 Ky. 415, 45 S. W. 360, 20 Ky. L. Rep. 113, 40 L. R. A. 488. The right to a seat in the national organization of the Women's Relief Corps is not a right of property, and a member who is entitled to a seat in that body cannot compel the officers of that society, by mandatory injunction, to permit her to take her seat. Clark *v.* Wallace, 45 S. W. 504, 20 Ky. L. Rep. 154. A judgment of the grand tribunal of a benefit society suspending a subordinate lodge until it obeys an order of the supreme lodge requiring the exclusive use of an English ritual does not so affect property rights, either of the subordinate lodge or its members, as to justify interference by the courts. People *v.* Grand Lodge K. P., 166 Ill. 71, 46 N. E. 768 [*affirming* 60 Ill. App. 550]. Where the interest of the member in the property of the order is merely incidental to his membership and will cease upon his ceasing to be a member, such interest in the order will not prevent his expulsion if he has forfeited his right of membership by reason of his conduct or give to courts the right to prevent an investigation of the charge or themselves to determine its sufficiency. Josich *v.* Austrian Benev. Soc., 119 Cal. 74, 51 Pac. 18; Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400.

6. See also Associations, 4 Cyc. 303; Clubs, 7 Cyc. 263.

7. *California.*— Peyre *v.* Mutual Relief Soc. of French Zouaves, 90 Cal. 240, 27 Pac. 191; Otto *v.* Journeymen Tailors' Protective, etc., Benev. Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

Connecticut.— Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

Michigan.— Burton *v.* St. George's Soc., 28 Mich. 261; People *v.* St. George's Soc. 28 Mich. 261, unless a clear case of injustice is shown.

Missouri.— Slater *v.* Supreme Lodge K. & L. H., 88 Mo. App. 177.

Ohio.— State *v.* Algemeiner Verein, 7 Ohio Dec. (Reprint) 449, 3 Cinc. L. Bul. 295.

Pennsylvania.— Society for Visitation of Sick, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139; Com. *v.* German Soc. for Mut. Support, etc., 15 Pa. St. 251; Com. *v.* Pike Ben. Soc., 8 Watts & S. 247; Bauer *v.* Seegar, 2 Wkly. Notes Cas. 242.

Washington.—Kelly *v.* Grand Circle W. W., 40 Wash. 691, 82 Pac. 1007, proceeding must not be contrary to law.

Canada.— Monette *v.* Société St. Jean-Baptiste, 30 L. C. Jur. 150 [*affirming* 13 Rev. Lég. 454].

See 6 Cent. Dig. tit. "Beneficial Associations," § 45.

Decisions as to good standing.— The determinations of societies as to the good standing of members therein are conclusive in courts of justice where they have proceeded to determine the question in accordance with the rules of the order. High Court I. O. F. *v.* Zak, 35 Ill. App. 613 [*affirmed* in 136 Ill. 185, 26 N. E. 593]. But where good standing is based merely upon the payment of dues and it appears that such dues have been paid, the court will not hesitate to take cognizance of the matter. Parliament of Prudent Patricians of Pompeii *v.* Marr, 20 App. Cas. (D. C.) 363.

Mere informality in the proceedings for removal of a member will not justify interference by mandamus when it is evident that there are just grounds for expulsion, and that the accused has been acting in hostility to the organization. Crow *v.* Capital City Council, 26 Pa. Super. Ct. 411.

Admission of member.— An injunction will not be granted to prevent the initiation of a member where it does not appear that plaintiff will be deprived of any pecuniary benefit because thereof. Thompson *v.* Tammany Soc., 17 Hun (N. Y.) 305.

Like award of arbitrators.— An expulsion by the sentence of a tribunal of its own choice has been likened to an award of arbitrators. Com. *v.* Pike Ben. Soc., 8 Watts & S. (Pa.) 247; Black & White Smiths' Soc. *v.* Vandyke, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

Decisions as compared with judgments.— Decisions of tribunals of an order involving the expulsion of a member are no more subject to collateral attack for mere error than are the judgments of a court of law. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

Res judicata.— Where a member has been expelled from a beneficial association in accordance with its laws, and in a proceeding fairly conducted, and the validity of such expulsion has been once determined in a legal controversy between the parties, in which the question was distinctly raised, equity will not reopen the matter, or decree a reinstatement of such member. Bachmann *v.* New Yorker Deutscher Arbeiter Bund, 12 Abb. N. Cas. (N. Y.) 54, 64 How. Pr. 442. See also Judgments.

The right of a member to recover sick benefits for a period during which he had been unlawfully expelled from the order will not be considered by a court of law in an action to compel his reinstatement, since his right to such benefits under the laws of the order are dependent upon numerous conditions which must be determined in the first in-

tain whether the proceeding was pursuant to the rules and laws of the order,[8] and in good faith,[9] and whether there was anything in the proceeding in violation of the laws of the land.[10] Especially is this so where the question is sought to be raised collaterally in an action for the recovery of benefits.[11] So where it is provided that one who has forfeited his membership by the non-payment of dues may be reinstated on furnishing to an officer certain proofs to his satisfaction, the decision of such officer, when exercised in good faith, is ordinarily conclusive.[12] But where the right to reinstate depends upon the performance of certain acts, restoration to membership may be enforced by the courts where such acts have been performed.[13] And where the expulsion was illegal and property rights are involved, a resort may be had to the courts, who will grant relief.[14] So where

stance by the order. Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69.

8. Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428; Modern Woodmen of America *v.* Deters, 65 Ill. App. 368.

Where the rules provide for hearing evidence, and action is taken without evidence, the proceeding cannot be sustained. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353; Modern Woodmen of America *v.* Deters, 65 Ill. App. 368.

The mere fact that an expulsion is not in pursuance of the laws of the association is not enough in itself to authorize a court of equity to interfere, but it must further appear that some property or civil right is involved in the controversy. Froelich *v.* Musicians' Mut. Ben. Assoc., 93 Mo. App. 383.

9. Otto *v.* Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428; Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

10. Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

11. *California.*— Josich *v.* Austrian Ben. Soc., 119 Cal. 74, 51 Pac. 18.

Connecticut.— Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

Illinois.— Croak *v.* High Court I. O. F., 162 Ill. 298, 44 N. E. 525 [*affirming* 62 Ill. App. 47]; Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika *v.* Ross, 117 Ill. App. 247.

Kentucky.— Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156, 8 Ky. L. Rep. 655; Jones *v.* National Mut. Ben. Assoc., 2 S. W. 447, 8 Ky. L. Rep. 599.

New York.— Sassenscheidt *v.* Fresco Painters' Ben., etc., Union, 1 N. Y. City Ct. 8.

Pennsylvania.— Black & White Smiths' Soc. *v.* Vandyke, 2 Whart. 309, 30 Am. Dec. 263; Dodd *v.* Armstrong, 18 Phila. 399.

United States.— See Hawkshaw *v.* Supreme Lodge K. H., 29 Fed. 770, holding that the member was bound by records of the society. But see Dillingham *v.* New York Cotton Exch., 49 Fed. 719.

See 6 Cent. Dig. tit. "Beneficial Associations," § 45; 28 Cent. Dig. tit. "Insurance," § 1987.

All questions which might have been raised by a plea on the merits are concluded by a trial before the society expelling a member therefrom. Dodd *v.* Armstrong, 2 Pa. Co. Ct. 352.

Mode of determining membership.— Where an association which prescribes membership in good standing in some masonic lodge as a condition to membership in it adopts the usage of referring the question of membership on the part of applicants to the proper masonic officers, such usage, in the absence of any express agreement between it and an applicant as to how such question shall be determined, will constitute a part of the contract between them, and a decision of such officers on the question of an applicant's membership at a given time, either before or after his acceptance by the association, will be conclusive on it. Connelly *v.* Masonic Mut Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

12. Graveson *v.* Cincinnati Life Assoc., 11 Ohio Dec. (Reprint) 369, 26 Cinc. L. Bul. 183 [*affirmed* in 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327].

Unavoidable accident or mistake see Graveson *v.* Cincinnati Life Assoc., 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327 [*affirming* 11 Ohio Dec. (Reprint) 369, 26 Cinc. L. Bul. 183].

13. Graveson *v.* Cincinnati Life Assoc., 11 Ohio Dec. (Reprint) 369, 26 Cinc. L. Bul. 183 [*affirmed* in 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327].

14. Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika *v.* Ross, 117 Ill. App. 247; People *v.* Mechanics' Aid Soc., 22 Mich. 86; Worrilow's Appeal, 3 Walk. (Pa.) 161.

For example, relief will not be denied by the courts where a member has been expelled but upon an appeal to a higher tribunal within the order the order of expulsion has been reversed and the subordinate lodge has been ordered to restore the member to the privileges of the order but the latter has refused so to do. Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156, 8 Ky. L. Rep. 655.

Courts of equity have jurisdiction. Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69 (holding that where the expulsion of a member from

the provisions of the order authorizing the expulsion of members are unreasonable, the courts may interfere.[15]

2. Action to Recover Damages. Where a mutual benefit society illegally expels a member, the expelled member may sue to recover damages for the illegal expulsion,[16] without first exhausting his remedy within the order.[17]

C. Action For Benefits. In the absence of any provision in the constitution or by-laws, or any agreement between the parties as to the adjustment of controversies as to benefits, an action may be maintained in the courts to recover benefits due.[18] And a requirement that those claiming benefits submit their claims to designated officers of the society for investigation and allowance before the claims are made the subject of litigation does not abridge the right of members to resort to the courts where their claims have been submitted to and finally rejected by such officers and tribunals.[19]

an unincorporated beneficial society is invalid, a suit in equity is the proper remedy to secure restoration); Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; Worrilow's Appeal, 2 Del. Co. (Pa.) 66; Glover *v.* Farmers', etc., Lodge, 1 Del. Co. (Pa.) 317. Equity may perpetually enjoin a benevolent association from expelling a member on account of specific acts of his, alleged by the association to be in violation of its constitution. Society of Italian Union & Brotherhood *v.* Montedonico, 5 Ky. L. Rep. 586. Where the grand chancellor of the Knights of Pythias, an unincorporated society, was suspended by the supreme chancellor of the order, before trial, equity may enjoin his suspension, at the suit of other members and officers of the order who were injured by such suspension, even though the grand chancellor assented to the suspension. Lowry *v.* Read, 3 Brewst. (Pa.) 452. The only question is whether on the evidence, the weight and competency of which it had a right to judge, the laws of the society were enforced fairly and without oppression. Murray *v.* Supreme Hive L. M. W., 112 Tenn. 664, 80 S. W. 827. Mandamus: Where the order is incorporated see Mandamus, 26 Cyc. 343. Where the order is unincorporated see Mandamus, 26 Cyc. 385, 386.

15. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

Provisions not unreasonable.— A provision of the constitution authorizing subordinate lodges to expel members for unbecoming conduct is not unreasonable. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

16. Ludowiski *v.* Polish Roman Catholic St. Stanislaus Kostka Benev. Soc., 29 Mo. App. 337; Schmidt *v.* Social Turn Verein, 6 N. J. L. J. 57 (holding that a member of a fraternal association, who is expelled without notice to answer the charges against him, although the constitution of the society requires it, has a cause of action against the society for damages for his unlawful expulsion, although the expulsion is set aside on an appeal); Winter *v.* Hamm, 5 N. Y. Civ. Proc. 194; Strebe *v.* Albert, 1 N. Y. City Ct. 376; Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834; Benson *v.* Screwmen's Benev. Assoc., 2 Tex. Civ. App. 66, 21 S. W. 562. See also American Legion of Honor *v.* Geisberg, 17 Tex. Civ. App. 2, 42 S. W. 785, holding that a refusal to reinstate, on compliance with the rules of the order, was not shown so as to authorize a suit for damages. *Contra*, Peyre *v.* Mutual Relief Soc. F. Z., 90 Cal. 240, 27 Pac. 191; Lavalle *v.* Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392.

The reason for denying the right to sue for damages has been held to be that mandamus lies to compel reinstatement, and by waiving such remedy and suing for damages the expulsion is recognized as legal, and because the elements of damages are too uncertain, and ordinarily such society has no funds except such as are held in trust for the benefit of the members, which cannot be applied to other purposes. Lavalle *v.* Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392.

Malice.— In order to make the conduct of a fraternal association in maliciously expelling a member actionable, it is not necessary that malice in the sense of hatred or ill-will by the association toward the member be shown, but it is sufficient if it is shown that the association acted knowingly and wilfully in violation of the rights of the member and to his injury. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

17. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834; Benson *v.* Screwmen's Benev. Assoc., 2 Tex. Civ. App. 66, 21 S. W. 562. *Contra*, Blumenfeldt *v.* Korschuck, 43 Ill. App. 434; Godin *v.* L'Ordre Indépendant des Forestiers, 14 Quebec Super. Ct. 12.

18. Magee *v.* Clayton Lodge No. 4 K. P., 5 Houst. (Del.) 453; Kentucky Lodge No. 39 I. O. O. F. *v.* White, 5 Ky. L. Rep. 418; Dolan *v.* Court Good Samaritan No. 5910 A. O. F., 128 Mass. 437; Smith *v.* Society, 12 Phila. (Pa.) 380. See also *infra*, VI, A, 1, b.

19. See *infra*, V, E.

D. Resort to Remedies Within Order as Condition Precedent — 1. In General. Unless there is some good excuse for not doing so,[20] if the constitution and by-laws provide a tribunal to hear and determine grievances, with or without a remedy by appeal to a higher tribunal of the society, such remedies must be exhausted before relief is asked of the civil courts.[21] For instance a member cannot sue to have fines imposed upon him by a committee declared void because imposed without a trial, until he has exhausted his remedy by appeal in the society itself.[22] Especially is this so where it is expressly provided that resort must first be had to the tribunals of the order.[23] This rule applies not only to members but also where a subordinate lodge complains of the action of the grand lodge.[24] But where the laws of the order make no provision by which the grievances may be determined, a member aggrieved may seek legal redress without first applying to the order for relief.[25] So where the by-law of the supreme order under which property rights of a subordinate order are affected is absolutely void, redress may

20. Delaware Lodge No. 1 I. O. O. F. *v.* Allmon, 1 Pennew. (Del.) 160, 39 Atl. 1098. See Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227, holding that the fact that an appeal within the order cannot reinstate plaintiff in office, because his term of office would expire before the appeal could be heard, is immaterial.

21. *California.*— Schou *v.* Sotoyome Tribe No. 12 I. O. R., 140 Cal. 254, 73 Pac. 996.

Illinois.— Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598.

Indiana.— Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571.

Kansas.— Reno Lodge No. 99 I. O. O. F. *v.* Grand Lodge I. O. O. F., 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98.

Kentucky.— Kentucky Lodge No. 39 I. O. O. F. *v.* White, 5 Ky. L. Rep. 418.

New Jersey.— Grand Lodge A. O. U. W. *v.* Gaddis, 65 N. J. Eq. 1, 55 Atl. 465; Grand Castle G. E. *v.* Bridgeton Castle No. 13 K. G. E., (Ch. 1898) 40 Atl. 849.

New York.— Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* 1 Abb. N. Cas. 318, 52 How. Pr. 41].

Pennsylvania.— Miller *v.* Wolf, 18 Lanc. L. Rev. 105; Toll *v.* Crimean, 13 Montg. Co. Rep. 33.

Rhode Island.— Wood *v.* What Cheer Lodge No. 298 S. St. G., (1896) 35 Atl. 1045.

Wisconsin.— Loeffler *v.* Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012.

See 6 Cent. Dig. tit. "Beneficial Associations," §§ 19, 21, 45; 28 Cent. Dig. tit. "Insurance," § 1987.

On suspension of officer.— Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

On removal of officers.— Whitty *v.* McCarthy, 20 R. I. 792, 36 Atl. 129.

Enjoining allowance and payment of bill.— Coss *v.* Mansfield Lodge No. 56 B. & P. O. E., 24 Ohio Cir. Ct. 36.

Assent to rules of order.— Courts of law will not enforce the constitution and by-laws of a beneficial association as binding on its members unless the obligations and disabilities growing out of such laws are proved to have been assented to by them in such a manner as would establish a valid contract between persons not members of the association, but not one which is against public policy. Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665.

22. Burns *v.* Brick-Layers' Benev., etc., Union, 14 N. Y. Suppl. 361, 27 Abb. N. Cas. 20 [*affirming* 10 N. Y. Suppl. 916, 24 Abb. N. Cas. 150].

23. Ocean Castle K. G. E. *v.* Smith, 58 N. J. L. 545, 33 Atl. 849 [*affirmed* in 59 N. J. L. 198, 35 Atl. 917]; Levy *v.* U. S. Grand Lodge I. O. S. B., 9 Misc. (N. Y.) 633, 30 N. Y. Suppl. 885.

Exception to rule.— Where the constitution provides that no member shall proceed in the courts against the supreme court of the order until he has exhausted all remedies given by the constitution of the order, it does not apply where the question at issue is strictly one of law, and capable of final decision by courts of law. Brown *v.* Supreme Court I. O. F., 34 Misc. (N. Y.) 556, 70 N. Y. Suppl. 397 [*affirmed* in 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806].

24. Grand Lodge K. P. *v.* People, 60 Ill. App. 550; Reno Lodge No. 99 I. O. O. F. 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98. See also Oliver *v.* Hopkins, 144 Mass. 175, 10 N. E. 776. But see Hall *v.* Supreme Lodge K. H., 24 Fed. 450, holding that where the suspension of a subordinate lodge is absolutely void, no appeal from such order is necessary to authorize a resort to the courts.

25. Gray *v.* Chapter-Gen. A. K. St. J. & M., 70 N. Y. App. Div. 155, 75 N. Y. Suppl. 267. See also Moeller *v.* Machine Printers' Ben. Assoc., 27 R. I. 22, 60 Atl. 591; Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832, holding that where, under the laws of a benefit society, the only recourse of the beneficiary of a policy issued thereby from an expulsion of the member whose life was insured while insane was to submit the matter to arbitration, which the beneficiary offered to do and the society declined to grant, the beneficiary's only recourse left was through the courts.

Where the by-laws do not provide for an appeal, as a matter of right, from the decision of the tribunal intrusted in the first instance with the trial of members for offenses against the society, but only for an appeal dependent on the favor of another, a party aggrieved may resort to the courts,

be had in the courts without first resorting to the remedy provided within the order itself.[26]

2. On Suspension or Expulsion of Member.[27] This general rule is very strictly applied in cases of suspension or expulsion, and the courts will not interfere until the means of relief within the order, including appeals, afforded by the rules of the society, have been exhausted.[28] Such recourse is not necessary, however, where there is a good excuse for not so doing,[29] as where an appeal would be useless,[30] or where the remedies are inapplicable,[31] or unreasonable or inadequate.[32] So it is generally held that the rule does not apply where the expulsion is void.[33]

without exhausting the appellate remedies found in the by-laws. Holomany *v.* National Slavonic Soc., 39 N. Y. App. Div. 573, 57 N. Y. Suppl. 720.

26. Swaine *v.* Miller, 72 Mo. App. 446.

27. As condition to action to recover damages see *supra*, V, B, 2.

28. *Illinois.*— People *v.* Grand Lodge K. P., 166 Ill. 71, 46 N. E. 768 [*affirming* 60 Ill. App. 550]; People *v.* Women's Catholic Order of Foresters, 162 Ill. 78, 44 N. E. 401; Blumenfeldt *v.* Korschuck, 43 Ill. App. 434.

Iowa.— Finnerty *v.* Supreme Counsel C. K. A., 115 Iowa 398, 88 N. W. 834.

Kansas.— Modern Woodmen of America *v.* Taylor, 67 Kan. 368, 71 Pac. 806.

Maine.—Jeane *v.* Grand Lodge A. O. U. W., 86 Me. 434, 30 Atl. 70.

New Jersey.— Zeliff *v.* Grand Lodge N. J. K. P., 53 N. J. L. 536, 22 Atl. 63.

New York.— Johansen *v.* Blume, 53 N. Y. App. Div. 526, 65 N. Y. Suppl. 987. But see Kohler *v.* Klein, 39 Misc. 353, 79 N. Y. Suppl. 866, holding that a provision in the constitution of the order providing for an appeal by a member deeming himself aggrieved by a "decision" of the order does not apply to an expulsion without notice and hearing, since this does not constitute a "decision" within the meaning of the provision. *Compare* Ramell *v.* Duffy, 82 N. Y. App. Div. 496, 81 N. Y. Suppl. 600, holding that where the full penalty for bringing suit had been inflicted upon the member before beginning the action, he could not be precluded from bringing suit for failure to exhaust all means of appeal within the order.

Ohio.— State *v.* Knights of Golden Rule, 9 Ohio Dec. (Reprint) 1, 10 Cinc. L. Bul. 2.

Oregon.— Montour *v.* Grand Lodge A. O. U. W., 38 Oreg. 47, 62 Pac. 524.

Pennsylvania.— Beeman *v.* Supreme Lodge S. H., 29 Pa. Super. Ct. 387; Crow *v.* Capital City Council, 26 Pa. Super. Ct. 411; Bauer's Appeal, 5 Wkly. Notes Cas. 485 [*affirming* 2 Wkly. Notes Cas. 242].

Texas.— Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379.

Canada.— Essery *v.* Court Pride of Dominion, 2 Ont. 596.

See 6 Cent. Dig. tit. "Beneficial Associations," § 19; 28 Cent. Dig. tit. "Insurance," § 1987.

See also Associations, 4 Cyc. 304; Mandamus, 26 Cyc. 345 note 33.

Rule as applied to beneficiary.— The fact that a beneficiary, not being a member, has no right to resort to the tribunal of the association, because she had no vested interest in the certificate until the death of the holder, when she took only what was left, does not exempt her from the rule that the action of the order in suspending a member will not be reviewed by the courts where no appeal was taken. Finnerty *v.* Supreme Council C. K. A., 115 Iowa 398, 88 N. W. 834: Canfield *v.* Great Camp K. M., 87 Mich. 626, 49 N. W. 875, 24 Am. St. Rep. 186, 13 L. R. A. 625.

29. Finerty *v.* Supreme Council C. K. A., (Iowa 1901) 84 N. W. 990, where notice of suspension was not given in time to take an appeal.

30. State *v.* Grand Lodge A. O. U. W., 70 Mo. App. 456; Brown *v.* Supreme Court I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806].

31. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273.

32. Brown *v.* Supreme Court I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806] (holding that where the obstacles to the prosecution of an appeal in a benevolent association are so great as to amount almost to a denial of justice, and where, if prosecuted, no relief would result therefrom, such by-laws are not a bar to an action by a suspended member who is denied reinstatement, although they also provide that no member shall be entitled to bring any legal proceedings until he shall have exhausted all his remedies by such appeal, since the association has no power to deprive such member of the right to resort to the civil courts for redress, or to compel him to seek his remedies by appeal to the various judicatories erected within the order); People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129.

33. People *v.* Women's Catholic Order of Foresters, 162 Ill. 78, 44 N. E. 401 (holding, however, that there is a distinction between the question of the validity of the expulsion when it is set up as a defense to an action upon a benefit certificate or other contract and the question of the validity of the expulsion when restoration to the privileges of the society is sought to be secured through writ of mandamus or other procedure. In the former case it is sufficient for the beneficiary to show that the judgment of expulsion was invalid without showing the exhaustion of all remedies within the order or

3. Recovery of Benefits — a. In General. Likewise this rule as to exhausting internal remedies is applied where a recovery of benefits from the society is sought.[34]

society for the purpose of having the judgment vacated. In the latter case it must appear that the remedy provided by the rules of the society for the review of the judgment complained of was resorted to); Modern Woodmen of America *v.* Deters, 65 Ill. App. 368; Slater *v.* Supreme Lodge K. & L. H., 76 Mo. App. 387; Swaine *v.* Miller, 72 Mo. App. 446; Glardon *v.* Supreme Lodge K. P. W., 50 Mo. App. 45; Hoeffner *v.* Grand Lodge G. O. H. M., 41 Mo. App. 359; Supreme Lodge K. P. W. *v.* Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609 (failure to give notice); Langnecker *v.* Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185. But see McGuinness *v.* Court Elm City No. 1 F. A., 78 Conn. 43, 60 Atl. 1023. *Contra*, Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379; Supreme Council C. K. A. *v.* Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114.

When void.— An expulsion made by a subordinate lodge when it has no jurisdiction for want of notice to the member expelled or for want of authority to entertain the charge brought against him is void. People *v.* Women's Catholic Order of Foresters, 162 Ill. 78, 44 N. E. 401.

34. *California.*— Schou *v.* Sotoyome Tribe No. 12 I. O. R. C., 140 Cal. 254, 73 Pac. 996; Robinson *v.* Templar Lodge No. 17 I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; Robinson *v.* Irish-American Benev. Soc., 67 Cal. 135, 7 Pac. 435.

Connecticut.— McGuinness *v.* Court Elm City No. 1 F. A., 78 Conn. 43, 60 Atl. 1023.

Delaware.— Delaware Lodge No. 1 I. O. O. F. *v.* Allmon, 1 Pennew. 160, 39 Atl. 1098.

Georgia.—Union Fraternal League *v.* Johnston, 124 Ga. 902, 53 S. E. 241.

Indiana.— Supreme Council O. C. F. *v.* Forsinger, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571. *Compare*, as *contra*, Supreme Council O. C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

Maryland.— Weigand *v.* Fraternities Acc. Order, 97 Md. 443, 55 Atl. 530.

Michigan.— Hoag *v.* Supreme Lodge of International Congress, 134 Mich. 87, 95 N. W. 996. See also Russell *v.* North American Ben. Assoc., 116 Mich. 699, 75 N. W. 137.

Minnesota.— See Carey *v.* Switchmen's Union of North America, 98 Minn. 28, 107 N. W. 129.

Missouri.— Colley *v.* Wilson, 86 Mo. App. 396; McMahon *v.* Supreme Council O. C. F., 54 Mo. App. 468.

New Hampshire.— Levy *v.* Order of Iron Hall, 67 N. H. 593, 38 Atl. 18. See Mullen *v.* Court Queen City O. F., 70 N. H. 327, 47 Atl. 257.

New Jersey.— Smith *v.* Ocean Castle No. 11, 59 N. J. L. 198, 35 Atl. 917.

New York.— Shirtcliffe *v.* Wall, 68 N. Y. App. Div. 375, 74 N. Y. Suppl. 189; Poultney *v.* Bachman, 31 Hun 49. *Compare* Anderson *v.* Supreme Council O. C. F., 135 N. Y. 107, 31 N. E. 1092.

Ohio.— Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613 (holding that where it was determined in a proceeding in a lodge, in substantial accordance with its laws, that plaintiff, a member, was not entitled to sick benefits, and plaintiff appealed to the next higher tribunal in the order, the lodge furnishing him a proper transcript of the proceedings, but plaintiff thereafter failed to secure a hearing of his appeal by reason of circumstances not attributable to the lodge, such facts did not entitle him to sue the lodge for such benefits in the civil courts); Schryver *v.* Columbia Lodge No. 32 I. O. O. F., 3 Ohio Cir. Ct. 422, 2 Ohio Cir. Dec. 238; Cincinnati Lodge No. 3 I. O. O. F. *v.* Littlebury, 8 Ohio Dec. (Reprint) 194, 6 Cinc. L. Bul. 237.

Pennsylvania.— McAlees *v.* Supreme Sitting O. I. H., 10 Pa. Cas. 188, 13 Atl. 755; Wick *v.* Fraternities Acc. Order, 21 Pa. Super. Ct. 507. See also Coffee *v.* Southwark Ben. Soc., 2 Wkly. Notes Cas. 600; Pritchett *v.* Schafer, 2 Wkly. Notes Cas. 317.

Rhode Island.—Wood *v.* What Cheer Lodge, 20 R. I. 795, 38 Atl. 895.

Canada.— Dale *v.* Weston Lodge, 24 Ont. App. 351.

See 6 Cent. Dig. tit. "Beneficial Associations," § 47; 28 Cent. Dig. tit. "Insurance," § 1987.

Contra.— See Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307.

In Illinois, however, the trend of authorities is to the contrary. It is held that provisions requiring claims for benefits to be first determined by a tribunal of the order or for an appeal from one tribunal to another as condition precedent to seeking redress in the courts are to be strictly construed (Grand Lodge B. R. T. *v.* Randolph, 84 Ill. App. 220 [*affirmed* in 186 Ill. 89, 57 N. E. 882]; Brotherhood of Railroad Trainmen *v.* Newton, 79 Ill. App. 500; Grand Central Lodge No. 297 A. O. U. W. *v.* Grogan, 44 Ill. App. 111), and a strained interpretation will be resorted to if necessary to avoid such result (Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598). And the courts have even gone so far as to hold that an express stipulation requiring a submission to the tribunals of the order will not render compliance therewith a condition precedent to an action for benefits. Supreme Lodge O. M. P. *v.* Meister, 204 Ill. 527, 68 N. E. 454 [*affirming* 105 Ill. App. 471]; Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630. But see Grant *v.* Langstaff, 52 Ill. App. 128; Grand Central Lodge No. 297 A. O. U. W. *v.* Grogan, 44 Ill. App. 111.

However, if some valid excuse for non-compliance is shown,[35] as where the requirement is unreasonable,[36] or the by-law authorizing the forfeiture is invalid,[37] or where the by-laws do not secure any adequate method of redress within the society,[38] a resort to such tribunals is not a condition precedent. Furthermore, and in this respect the right to resort to the courts to recover benefits is to be distinguished from a right to resort to the courts where the suspension or expulsion of the member is concerned, a provision in the rules giving a right to appeal is merely permissive and does not take away the right to resort to the courts without first taking such an appeal.[39] It follows that a party who asserts that the right to resort to the courts in the first instance has been curtailed must show a clear and express provision abridging or surrendering the right.[40] Furthermore, provisions relating to procedure for settlement in the society, in cases of disputes between "members" and the society, have been held not to affect the right of a "beneficiary" to sue without first exhausting the remedies within the society;[41] and some cases are apparently based upon the theory that such provisions are in their very nature applicable only to the members of the society,[42] although there are numerous decisions where the failure of the beneficiary himself to exhaust the remedies within the order has been held fatal to his right to sue.[43] So a provision relating to "members and their beneficiaries" has been held not to apply where an action is brought by a trustee of a beneficiary who sues upon a contract made with himself.[44] Likewise a provision that members shall exhaust their remedy within the order before resorting to a court has been held not to relate to controversies with the order itself but to controversies of members with one another within the order.[45]

35. Colley *v.* Wilson, 86 Mo. App. 396.

36. Kane *v.* Supreme Tent K. M. W., 113 Mo. App. 104, 87 S. W. 547 (holding that where the by-laws provided for two appeals to tribunals within the order in case a benefit claim should be rejected, before claimant was permitted to sue in the courts, and one of such tribunals did not convene oftener than once in two or three years, making it possible to keep a claim pending in the association for two or more years before the claimant could resort to the courts, such by-laws were unreasonable and invalid, as a partial ouster of the jurisdiction of the courts to try the claim); Colley *v.* Wilson, 86 Mo. App. 396.

37. Loftus *v.* Division No. 7 A. O. H., (N. J. Sup. 1905) 60 Atl. 1119.

38. Harris *v.* Wilson, 86 Mo. App. 406.

39. Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598; Grand Lodge B. R. T. *v.* Randolph, 84 Ill. App. 220 [*affirmed* in 186 Ill. 89, 57 N. E. 882]; Grand Central Lodge No. 297 A. O. U. W. *v.* Grogan, 44 Ill. App. 111; Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571; Supreme Lodge K. P. *v.* Andrews, 31 Ind. App. 422, 67 N. E. 1009; Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477; Supreme Lodge O. S. F. *v.* Dey, 58 Kan. 283, 49 Pac. 74; Dobson *v.* Hall, 11 Pa. Co. Ct. 532. See also Kumle *v.* Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Pen Lodge No. 105 K. P. *v.* Chalfant, 1 Chest. Co. Rep. (Pa.) 133; Benson *v.* Grand Lodge B. L. F., (Tenn. Ch. App. 1899) 54 S. W. 132. *Contra*, Supreme Court I. O. F. *v.* Herlinger, 27 Ohio Cir. Ct. 151. But see Kentucky Lodge No. 39 I. O. O. F. *v.* Limeback, 9 Ky. L. Rep. 320; Dale *v.* Weston Lodge, 24 Ont. App. 351.

40. Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571. See also Supreme Council O. C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Roxbury Lodge No. 184 I. O. O. F. *v.* Hocking, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. Rep. 596.

41. Kumle *v.* Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Wells & McComas Council No. 14 J. O. U. A. M. *v.* Littleton, 100 Md. 416, 60 Atl. 22; Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. Rep. 701, 41 Nebr. 561, 59 N. W. 751; Dobson *v.* Hall, 11 Pa. Co. Ct. 532. See also Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630.

42. Maxwell *v.* Family Protective Union, 115 Ga. 475, 41 S. E. 552; Strasser *v.* Staats, 59 Hun (N. Y.) 143, 13 N. Y. Suppl. 167; Dobson *v.* Hall, 11 Pa. Co. Ct. 532.

43. Weigand *v.* Fraternities Acc. Order, 97 Md. 443, 55 Atl. 530; Hoag *v.* Supreme Lodge I. C., 134 Mich. 87, 95 N. W. 996; Fillmore *v.* Great Camp K. M., 109 Mich. 13, 66 N. W. 675; Colley *v.* Wilson, 86 Mo. App. 396; Cotter *v.* Grand Lodge A. O. U. W., 23 Mont. 82, 57 Pac. 650. See also Modern Woodmen of America *v.* Taylor, 67 Kan. 368, 71 Pac. 806, holding that the failure of the member to appeal as provided by the laws of the order, before his death, precludes the right of the beneficiary to sue where the latter has not appealed.

44. Schiff *v.* Supreme Lodge O. M. P., 64 Ill. App. 341.

45. Bukofzer *v.* U. S. Grand Lodge I. O. S. B., 15 N. Y. Suppl. 922 [*affirmed* in 139 N. Y. 612, 35 N. E. 204].

b. Waiver. An absolute denial of liability by the order,[46] or a denial of the remedy by appeal provided for by the order,[47] or a refusal of the order to hear the appeal,[48] is a waiver of the requirement for submission to the tribunals of the order. So there is a waiver when a member is denied a hearing contrary to the rules;[49] where he is prevented from exhausting such remedies by the wilful refusal of the proper officer to certify to his sickness, from which refusal no appeal is given by the laws of the society;[50] or where the order expresses a willingness to contest the matter in the courts.[51] Where the subordinate board defers action until it is too late to take an appeal to the grand lodge and commence suit in the courts within the time allowed by the by-laws, the appeal will be considered as waived,[52] and also where there is an unauthorized dismissal of the appeal by the order on the death of the member.[53] So where no action is taken on appeals to the higher tribunals, the member may then apply to the courts for relief.[54] And where the supreme council, on motion of one of its members, reviews and affirms the decision of the lower tribunal, a further appeal by the member must be considered as waived.[55] So the failure of an executive committee to render a decision so that an appeal might be taken to a biennial general council while it was in session has been held to excuse the insured from a further prosecution of the matter within the order.[56] So where the order violates its own laws in not giving any notice or opportunity to produce testimony, the claimant is excused from further proceeding within the order.[57] So where a by-law merely renders a submission a condition of invoking judicial remedies to enforce a right, compliance therewith is waived by a failure of the society to file appropriate proceedings complaining of the non-compliance.[58] On the other hand, a statement to the member by the officers of the grand council that he might appeal, but that it would do him no good, has been held not to relieve him from the necessity of resorting to the tribunals of the order.[59]

E. Provisions as to Conclusive Effect of Decision by Order. Where the decision of a tribunal of the society is not declared by the by-laws or constitution to be final, resort to a court is not precluded.[60] And it is generally held that

46. Supreme Lodge O. M. P. *v.* Zerulla, 99 Ill. App. 630; Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. (N. Y.) 124, 46 N. Y. Suppl. 1016; Wuerfler *v.* Grand Grove O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

47. Rose *v.* Supreme Court O. P., 126 Mich. 577, 85 N. W. 1073.

48. Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613.

49. Haag *v.* Good, 7 Pa. Super. Ct. 425, 42 Wkly. Notes Cas. 530.

Extent of relief.— Where a member of a beneficial society who has been denied a hearing contrary to the constitution of the order applies to the courts, relief will be afforded only so far and from such date as compliance by the member with the rules of the organization establishes a legal standing to appeal to the courts on refusal by the society of an adequate hearing. Haag *v.* Good, 7 Pa. Super. Ct. 425, 42 Wkly. Notes Cas. 530.

50. Supreme Sitting O. I. H. *v.* Stein, 120 Ind. 270, 22 N. E. 136.

51. Gnau *v.* Masons' Fraternal Acc. Assoc., 109 Mich. 527, 67 N. W. 546.

52. Brotherhood of Railway Trainmen *v.* Newton, 79 Ill. App. 500.

53. Berlin *v.* Eureka Lodge No. 9 K. P., 132 Cal. 294, 64 Pac. 254.

54. Harman *v.* Raub, 25 Pa. Co. Ct. 97, 18 Lanc. L. Rev. 181.

55. McMahon *v.* Supreme Council O. C. F., 54 Mo. App. 468.

56. Colley *v.* Wilson, 86 Mo. App. 396.

57. Schou *v.* Sotoyome Tribe No. 12 I. O. R. C., 140 Cal. 254, 73 Pac. 996.

58. Wuerfler *v.* Grand Grove O. D., 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

59. Wick *v.* Fraternities Acc. Order, 21 Pa. Super. Ct. 507.

60. *Illinois.*— Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598.

Iowa.— Lillie *v.* Brotherhood of Railway Trainmen, 114 Iowa 252, 86 N. W. 279.

Kansas.— Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373.

Michigan.— Wuerthner *v.* Workingmen's Benev. Soc., 121 Mich. 90, 79 N. W. 921, 80 Am. St. Rep. 484.

Nebraska.— See Chicago, etc., R. Co. *v.* Olsen, 70 Nebr. 559, 570, 97 N. W. 831, 99 N. W. 847.

New York.— Quinlan *v.* St. Francis Xavier Mut. Ben. Soc., 2 N. Y. City Ct. 356.

Pennsylvania.— See Child *v.* Teachers' Annuity, etc., Assoc., 21 Pa. Super. Ct. 480.

See 6 Cent. Dig. tit. "Beneficial Associations," § 46; 28 Cent. Dig. tit. "Insurance," § 1988.

where the insured has first exhausted all his remedies within the order he cannot be deprived of recourse to the courts by a stipulation that the decision of the association's own tribunal shall be conclusive;[61] but there is considerable authority holding that such stipulations, in the absence of fraud, make the decisions of the order as to the insurance binding on the members and their beneficiaries.[62] However, the stipulation making the determination within the order conclusive

But see Robinson *v.* Templar Lodge No. 17 I. O. O. F., 97 Cal. 62, 31 Pac. 609; Toram *v.* Howard Ben. Assoc., 4 Pa. St. 519.

A provision that a member may be relieved from the effect of forfeiture for non-payment of an assessment on giving "valid" excuse to the officers of the order does not vest in the officers an exclusive right to determine the validity of the excuse but their determination is reviewable by the court. Dennis *v.* Massachusetts Ben. Assoc., 120 N. Y. 496, 24 N. E. 843, 17 Am. St. Rep. 660, 9 L. R. A. 189 [*affirming* 47 Hun 338].

61. *Illinois.*— Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168 [*affirming* 38 Ill. App. 111]; Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Loomis, 43 Ill. App. 599 [*reversed* on other grounds in 142 Ill. 560, 32 N. E. 424]. See also Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598. But see Grand Lodge B. L. F. *v.* Orrell, 97 Ill. App. 246.

Indiana.— Supreme Council O. C. F. *v.* Forsinger, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; Supreme Council O. C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571; Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Kansas.— Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373.

Minnesota.— See Whitney *v.* National Masonic Acc. Assoc., 52 Minn. 378, 54 N. W. 184.

Ohio.— Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; Baltimore, etc., R. Co. *v.* Stankard, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

Pennsylvania.— Sweeney *v.* Rev. Hugh McLaughlin Ben. Soc., 14 Wkly. Notes Cas. 486. But see Myers *v.* Fritchman, 6 Pa. Super. Ct. 580.

Rhode Island.— Pepin *v.* Société St. Jean Baptiste, 23 R. I. 81, 49 Atl. 387.

Utah.— Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307; Daniher *v.* Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. 245.

See 6 Cent. Dig. tit. "Beneficial Associations," § 46; 28 Cent. Dig. tit. "Insurance," § 1988.

Compare Parliament of Prudent Patricians *v.* Marr, 20 App. Cas. (D. C.) 363; Woolsey *v.* Independent Order of Odd Fellows, 61 Iowa 492, 16 N. W. 576; Kentucky Lodge No. 39 I. O. O. F. *v.* White, 5 Ky. L. Rep. 418.

Such contracts are in their nature only applicable to cases wherein it becomes necessary to fix some fact, leaving the question of law to be settled by the courts upon proper proceedings. The ultimate question to be determined — the liability or non-liability of the parties — must be left to the courts. The construction of a written contract is a question of law for the court, and a provision in a contract that the construction of such contract, or the meaning of rules or regulations, shall be finally determined by some designated person, is void, because the court cannot be robbed of its jurisdiction to finally determine such questions. Baltimore, etc., R. Co. *v.* Stankard, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

Agreements to submit a matter to arbitration are valid when made after the specified controversy has actually arisen and not when made in advance separately when the agreement provides that one of the interested parties shall be the sole arbitrator. Bauer *v.* Samson Lodge, 102 Ind. 262, 1 N. E. 571.

By-laws providing for arbitration of disputed claims, and that the award shall be final, but that no award shall be valid if not signed by all arbitrators, in which case either party shall have the right to a new arbitration, and providing that no suit or action shall be commenced or maintained by any member against the association, are valid and reasonable. Russell *v.* North American Ben. Assoc., 116 Mich. 699, 75 N. W. 137.

62. Osceola Tribe No. 11 I. O. R. M. *v.* Schmidt, 57 Md. 98; Anacosta Tribe No. 12 I. O. R. M. *v.* Murbach, 13 Md. 91, 71 Am. Dec. 625; Dick *v.* Supreme Body of International Congress, 138 Mich. 372, 101 N. W. 564; Barker *v.* Great Hive L. M. M., 135 Mich. 499, 98 N. W. 24; Derry *v.* Great Hive L. M. M. 135 Mich. 494, 98 N. W. 23; Fillmore *v.* Great Camp K. M., 103 Mich. 437, 61 N. W. 785; Hembeau *v.* Great Camp K. M., 101 Mich. 161, 59 N. W. 417, 45 Am. St. Rep. 400, 49 L. R. A. 592; Canfield *v.* Great Camp K. M., 87 Mich. 626, 49 N. W. 875, 24 Am. St. Rep. 186, 13 L. R. A. 625 (holding that provision is conclusive on beneficiary, although not a member of the society in the absence of a charge of fraud or violation of the rules or regulations of the property); Van Poucke *v.* Netherland St. Vincent de Paul Soc., 63 Mich. 378, 29 N. W. 863; Rood *v.* Railway Pass., etc., Conductors' Mut. Ben. Assoc., 31 Fed. 62. See also Robinson *v.* Templar Lodge No. 17 I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; Otto *v.* Journeymen Tailors' Protective, etc., Benev. Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156 (holding decision not final where made in bad faith and maliciously); Perry *v.* Cobb, 88 Me. 435, 34 Atl.

will not, in any event, be construed to have that effect unless it is clear and unambiguous.[63] Even in cases where the final decision of the courts of the order is otherwise considered as conclusive, such result will not follow where the claimant has been deprived of a fair hearing as prescribed by the rules of the order.[64]

VI. ACTIONS.[65]

A. Right of Action — 1. Nature and Form — a. In General. The remedies in favor of or against a mutual benefit insurance association or company are,

278, 49 L. R. A. 389; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69 (holding that where the rules of an unincorporated beneficial society provide in what cases benefits shall be paid, the determination of such society that a member is not entitled to benefits is conclusive).

Extent of rule.— And a provision in the by-laws of the association giving a committee power to pass on all death claims and making their decision final is not limited to cases where the beneficiary sees fit to submit the claim to the tribunals of the order but precludes a resort to the courts even in the first instance. Fillmore *v.* Great Camp K. M., 103 Mich. 437, 61 N. W. 785.

So an agreement to submit to arbitration and abide by the arbitrator's decisions precludes recourse to the court. Russell *v.* North American Ben. Assoc., 116 Mich. 699, 75 N. W. 137 (where it was held that there was no waiver of the by-laws as to arbitrators); Raymond *v.* Farmers' Mut. F. Ins. Co., 114 Mich. 386, 72 N. W. 254.

Decision as to what constitutes total disability.— Where it is stipulated that for certain injuries the insured shall receive the full amount of his certificate but that "other claims for total disability" shall be referred to certain officers of the order, "who shall decide as to whether or not the disability is of such a nature as to totally and permanently incapacitate the claimant from the performance of duty in any department of the train or yard service; and if the claim is approved by them, the claimant shall receive the full amount" of the certificate, a decision of such officers as to whether an injury sustained by a member totally disabled him is final so that where the decision is unfavorable no resort can be had to the courts. Eighmy *v.* Brotherhood of Railway Trainmen, 113 Iowa 681, 83 N. W. 1051; Sanderson *v.* Brotherhood of Railroad Trainmen, 204 Pa. St. 182, 53 Atl. 767. *Contra*, Brotherhood of Railway Trainmen *v.* Greaser, 108 Ill. App. 598. See also Pool *v.* Brotherhood of Railroad Trainmen, 143 Cal. 650, 77 Pac. 661, holding that where the constitution provides that all claims for disability not enumerated in a preceding section should be held to be addressed to the systematic benevolence of the order and should in no case be made the basis of a legal liability on its part, and that every such claim should be referred to a beneficiary board and if approved the claimant should be paid an amount equal to the amount of his certificate, and that the approval of the board should be required as a condition precedent to the right of any such claimant, and that the section might be pleaded in bar of any suit to enforce the payment of any such claim, such provisions prevented the attaching of any legal liability whatever for disabilities other than those enumerated in the preceding section.

63. Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373. See also Parliament of Prudent Patricians of Pompeii *v.* Marr, 20 App. Cas. (D. C.) 363; Albert *v.* Order of Chosen Friends, 34 Fed. 721.

For instance, a constitution providing for an auditing committee, and making it a part of the duty of such committee to examine all books, papers, etc., and see that the business was honestly conducted, did not constitute the committee a conclusive tribunal as to death claims arising against the order, by adding to their duties that of deciding "all points of dispute and questions of doubt that may arise," and providing that "their decision shall be final." Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168 [*affirming* 38 Ill. App. 111]. So it has even been held that a by-law providing a board to conclusively determine who are the real beneficiaries does not render conclusive the decision of such a board as to the claim of the beneficiary based on a contract with insured. Grimbley *v.* Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19 [*distinguishing* Robinson *v.* Templar Lodge No. 17 I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193]. A rule of a benevolent insurance association in connection with a railroad company, that any controversy arising between the parties in the department should be submitted to the superintendent for determination, does not apply to an action by the widow of insured to enforce the liability accruing to her. Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 561, 59 N. W. 747, 751, 43 Am. St. Rep. 701.

64. Dick *v.* Supreme Body of International Congress, 138 Mich. 372, 101 N. W. 564; Rose *v.* Supreme Court O. P., 126 Mich. 577, 85 N. W. 1073.

Forum in which conclusiveness may be questioned.—The conclusiveness of an adjudication of the supreme tribunal as to liability on a membership certificate may be questioned not only in a court of chancery but also in a court of law when set up as a defense to an action on the certificate. Dick *v.* Supreme Body I. C., 138 Mich. 372, 101 N. W. 564.

65. See also Life Insurance, 25 Cyc. 904 *et seq.*

where a resort to the courts is permissible, practically the same as in the case of other voluntary associations and corporations.[66]

b. Actions at Law. An action at law may be brought upon a certificate issued by a mutual benefit association;[67] and this is so even where the association has neglected or refused to make an assessment to pay the claim represented by the certificate,[68] it not being necessary to first bring mandamus to compel the making

66. See cases cited *infra*, this note.

Mandamus to compel inspection of books.— A benevolent association is entitled to a peremptory writ of mandamus for an inspection of its books, in the hands of one claiming a lien upon them for arrears of salary, the books to be returned to the claimant after the inspection. People *v.* Scheel, 8 Abb. N. Cas. (N. Y.) 342.

Contempt proceedings are not appropriate for the trial of issues involving the title to a fund raised by assessments upon the members of the benefit society, which is in the possession of the local branch from whose numbers it came, nor to determine the validity of a lien alleged to have been acquired by garnishment proceedings against it. Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739.

Personal liability of member.— Action as subject to objection of attempting to hold members personally liable for the debts of the association see Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307.

67. St. Clement *v.* L'Institut Jacques Cartier, 95 Me. 493, 50 Atl. 376; Doty *v.* New York State Mut. Ben. Assoc., 5 Silv. Sup. (N. Y.) 581, 9 N. Y. Suppl. 42 [*affirmed* in 132 N. Y. 596, 30 N. E. 1151].

But it has been held that where the association is unincorporated, an action at law cannot be maintained upon contracts of insurance, where the promise is joint and not several, because the assured cannot at the same time in the same action at law be both plaintiff and defendant, the only remedy being in equity. Perry *v.* Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389.

The statutes providing that a corporation organized for benevolent or charitable purposes is not subject to suit by any member for any benefit or sums due him does not apply to corporations organized for the purpose of mutual insurance. St. Clement *v.* L'Institute Jacques Cartier, 95 Me. 493, 50 Atl. 376.

Effect of provision in contract.— A provision in the certificate that no suit shall be brought upon the contract contained therein, except in equity, does not preclude an action at law to recover the benefits provided for in the certificate when at the time the action is brought the association has on hand as the proceeds of former excessive assessments a sum largely in excess of the certificate, since in such case a suit in equity to compel an assessment would be unnecessary. Covenant Mut. Ben. Assoc. *v.* Baldwin, 49 Ill. App. 203.

68. *Colorado.*— Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Connecticut.— Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113.

Idaho.— See Reed *v.* Ancient Order of Red Cross, 8 Ida. 409, 69 Pac. 127.

Illinois.— Covenant Mut. Life Assoc. *v.* Kentner, 89 Ill. App. 495 [*affirmed* in 188 Ill. 431, 58 N. E. 966]; Schiff *v.* Supreme Lodge O. M. P., 64 Ill. App. 341. *Compare* Covenant Mut. Ben. Assoc. *v.* Sears, 114 Ill. 108, 29 N. E. 480, holding that the obligation of a mutual benefit insurance company to levy an assessment on a member's death may be enforced by suit in equity for specific performance.

Indiana.— Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84.

Maryland.— Earnshaw *v.* Sun Mut. Aid Soc., 68 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460. See also Oriental Ins. Assoc. *v.* Glancey, 70 Md. 101, 16 Atl. 391.

Michigan.— Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935.

Minnesota.— Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

Missouri.— Herndon *v.* Triple Alliance, 45 Mo. App. 426.

New York.— O'Brien *v.* Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954 [*affirming* 51 Hun 495, 4 N. Y. Suppl. 275]; Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495.

Pennsylvania.— See Birnbaum *v.* Passenger Conductors' L. Ins. Co., 15 Wkly. Notes Cas. 518.

Wisconsin.— Jackson *v.* North-Western Mut. Relief Assoc., 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786.

See 28 Cent. Dig. tit. "Insurance," § 1986.

Compare Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

Contra.— Smith *v.* Covenant Mut. Ben. Assoc., 24 Fed. 685.

In Iowa a distinction is drawn between certificates agreeing that the member or beneficiary is to receive the amount of one assessment from each contributing member not to exceed a certain sum, and those where the agreement is to pay a fixed sum subject to the limitation that the liability shall not exceed the sum which is realized upon the assessment of a specified sum *per capita* from members at the date of the sickness, accident, or death as the case may be. In the latter case it is held that it is not necessary, in the first instance, to sue to compel the association to make an assessment, even though it shows that it has not in its possession funds with which to pay the amount due, but that an action at law may be maintained to obtain judgment for the amount

of an assessment.[69] Where the company wrongfully obtains possession of a policy, its act of retaining possession constitutes a conversion, and the beneficiaries may maintain trover against the company therefor and recover the sum unpaid thereon.[70]

c. Equity Jurisdiction.[71] The jurisdiction of equity over beneficial associations and their funds is based on the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies.[72] Equity has jurisdiction of an action to recover on a certificate where there is no remedy at law,[73] or where the remedy at law is inadequate.[74] But equity has no jurisdiction where there is an adequate remedy at law,[75] except where that defense is not

shown to be due. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508. See also Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105. But where the undertaking is to make an assessment on the members at the time of a death and to pay over the proceeds of such assessment to the beneficiary, and the order refuses to make the assessment, an action at law cannot be maintained for the recovery of such sum, but the remedy of the beneficiary, if any, is by a proceeding to compel the order to make the assessment. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100; Rainsbarger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770. See also Rambousek *v.* Supreme Council M. T., 119 Iowa 263, 93 N. W. 277 [*distinguishing* Hart *v.* National Masonic Acc. Assoc., *supra*]; Newman *v.* Covenant Mut. Ben. Assoc., 72 Iowa 242, 33 N. W. 662. Where a beneficiary in a mutual benefit certificate erroneously brought suit at law thereon, defendants did not waive such objection by failing to move to transfer the cause to the equity docket. Sleight *v.* Supreme Council M. T., *supra*.

69. *Colorado.*— Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Indiana.— Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84; Supreme Lodge K. H. *v.* Abbott, 82 Ind. 1.

Michigan.— Burland *v.* Northwestern Mut. Ben. Assoc., 47 Mich. 424, 11 N. W. 269.

New Jersey.— Johnson *v.* Order of Chosen Friends, 10 N. J. L. J. 346.

New York.— Doty *v.* New York State Mut. Ben. Assoc., 5 Silv. Sup. 581, 9 N. Y. Suppl. 42 [*affirmed* in 132 N. Y. 596, 30 N. E. 1151].

Pennsylvania.— Smith *v.* Society, 12 Phila. 380.

See 28 Cent Dig. tit. "Insurance," § 1986.

Mandamus does not lie to compel an assessment. Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84; Bates *v.* Detroit Mut. Ben. Assoc., 47 Mich. 646; Burland *v.* Northwestern Mut. Ben. Assoc., 47 Mich. 424, 11 N. W. 269. *Contra*, Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; Harl *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880; Rainsbarger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626; Perry *v.* Farmers' Mut. F. Ins. Co., 132 N. C. 283, 43 S. E. 837. See also MANDAMUS, 26 Cyc. 358. Mandamus will not lie to compel a second assessment for a death loss where the by-laws provide for only one assessment. People *v.* Masonic Guild, etc., Assoc., 126 N. Y. 615, 27 N. E. 1037 [*reversing* 58 Hun 395, 12 N. Y. Suppl. 171]. Mandamus to compel levy after judgment for benefits see *infra*, VI, I, 3.

70. Fraternal Army of America *v.* Evans, 114 Ill. App. 578 [*affirmed* in 215 Ill. 629, 74 N. E. 689].

71. See, generally, EQUITY.

72. Burke *v.* Roper, 79 Ala. 138. But see Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589, holding that money contributed by the members of a beneficial association to be used for the benefit of particular members when under a disability is not a charitable fund to be controlled by a court of equity.

Partnership.— Equity has no jurisdiction over the association and fund on the ground of partnership, since the members *inter se* are not partners. Burke *v.* Roper, 79 Ala. 138. And see *supra*, I, A, 2. But see Gorman *v.* Russell, 14 Cal. 531.

73. Britton *v.* Supreme Council R. A., 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376 [*affirmed* in 47 N. J. Eq. 325, 21 Atl. 754].

Where lodge not suable eo nomine.— A member or beneficiary cannot maintain assumpsit against an unincorporated lodge, to recover benefits alleged to be due, as the remedy is by a bill in equity, such a society not being suable at law *eo nomine*. Sharrow *v.* Yohoghany Lodge, 8 Pa. Dist. 616; Fletcher *v.* Gawanese Tribe No. 281 I. O. R. M., 9 Pa. Super. Ct. 393.

74. Blair *v.* Supreme Council A. L. H., 208 Pa. St. 262, 57 Atl. 564, 101 Am. St. Rep. 934. See also Covenant Mut. Ben. Assoc. *v.* Sears, 114 Ill. 108, 29 N. E. 480, holding that the obligation of a mutual benefit insurance company to levy an assessment on a member's death may be enforced by a suit in equity for specific performance.

The surrender of a certificate for cancellation, as required by a by-law, in order to obtain a sum less than its face value, where the society has scaled all certificates, does not preclude a bill in equity for restitution, discovery of the condition of the emergency fund, and payment of the face value. Blair *v.* Supreme Council A. L. H., 208 Pa. St. 262, 57 Atl. 564, 101 Am. St. Rep. 934.

75. Hoagland *v.* Supreme Council R. A., 70 N. J. Eq. 607, 61 Atl. 982.

urged.[76] A suit may be brought in equity to have the claim of a member declared to be a legal one and to make it a charge against moneys in the hands of a trustee of the funds of the order.[77] In a proper case an injunction may be granted against a society and its officers or members.[78] So generally equity has jurisdiction to dissolve the association or corporation.[79] Equity will not decide which of two sets of officers claiming to be the officers *de jure* of the society are entitled to the offices unless some other equitable matter is involved.[80]

d. Remedies For Forfeiture. One whose membership or certificate has been forfeited by the society has an election of remedies either: (1) To institute a proceeding to have his certificate adjudged in force;[81] (2) to tender the dues as they

76. Hoagland *v.* Supreme Council R. A., 70 N. J. Eq. 607, 61 Atl. 982.

77. Colley *v.* Wilson, 86 Mo. App. 396.

78. See Flockton *v.* Aldrich, 4 N. Y. Suppl. 7; Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589. See, generally, INJUNCTIONS, 22 Cyc. 871 *et seq.*

An injunction against the performance of the duties of the offices of a fraternal beneficial association, to which defendants claim to have been elected, sought on the ground that the election was invalid because persons entitled to vote were denied the right, is not the proper remedy, especially when it does not appear that this was done in bad faith. Supreme Lodge O. G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720.

Excluding representatives from right to vote.— A court of equity has power to enjoin the members of the supreme lodge of a fraternal beneficiary association from excluding any properly qualified state representatives from the right to vote. Supreme Lodge O. G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720.

A mandatory injunction to compel the secret password of the grand lodge of a benevolent society to be given to a delegate of a subordinate lodge, and to permit him to participate in the deliberations, is not within the province of a court of equity, where it is not shown that any right of property is endangered, although an irreparable injury may be done to the delegate and to his lodge by excluding him. Wellenvoss *v.* Grand Lodge K. P., 103 Ky. 415, 45 S. W. 360, 20 Ky. L. Rep. 113, 40 L. R. A. 488.

79. Gorman *v.* Russell, 14 Cal. 531; Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549 (statutory); State *v.* Knights of Aurora, 49 Minn. 165, 51 N. W. 909 (statutory); Peltz *v.* Supreme Chamber O. F. U., (N. J. Ch. 1890) 19 Atl. 668. See also Burke *v.* Roper, 79 Ala. 138, 83 Ala. 193, 3 So. 439. But see Mason *v.* Supreme Court E. L. B. C., 77 Md. 483, 27 Atl. 171, 39 Am. St. Rep. 433 (holding that a corporation cannot be dissolved by a court of equity unless the power to declare such dissolution has been conferred by statute); Goodman *v.* Jedidjah Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627 (holding that under a bill in equity filed by a majority of the members who had formed themselves into a different organization, for their share of the funds, the court would have no power to dissolve the corporation, to forfeit its charter, or to correct any missuse of its corporate powers). *Compare* Baltimore, etc., R. Co. *v.* Flaherty, 87 Md. 102, 39 Atl. 524, 1076.

When proper.— A court of equity will dissolve an unincorporated beneficial association organized for moral, benevolent, and social purposes in an action between its members, if at all, only when the organization has ceased to answer the ends of its existence, and no other mode of relief is possible. It should not be dissolved for dissensions among its members, where its government is fairly and honestly administered. Lafond *v.* Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344 [*reversing* on other grounds 1 Abb. N. Cas. 318, 52 How. Pr. 41]. No action for dissolution will be entertained on mere proof of differences of opinion, bad temper, or ordinary disputes common in such societies, nor for any infringement of the rights of a member by the society, unless no other remedy is open to him. Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87. A receiver will not be appointed to take charge of a beneficial corporation, and to administer its assets, where it is not alleged to be insolvent. Mason *v.* Supreme Court E. L. B. C., 77 Md. 483, 27 Atl. 171, 39 Am. St. Rep. 433. And see *supra*, I, I, 4.

80. St. Patrick's Alliance of America *v.* Byrne, 59 N. J. Eq. 26, 44 Atl. 716, holding also that the fact that one of the rival claimants holds funds which he refuses to pay over to one claiming to be his successor does not give a court of equity jurisdiction to determine their rights to the office.

81. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607; Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

Injunction and specific performance.— It has been held that in a proper case where the remedy at law is inadequate, a bill may be filed to prevent a forfeiture of the certificate for non-payment of assessments and to enforce a specific performance of the contract according to its terms. Rowell *v.* Covenant Mut. Life Assoc., 84 Ill. App. 304. A contract of insurance, being a chose in action, may properly be classified under the general head of personal property, to which the principles governing specific performance, relating generally to personal estate, will apply to prevent a forfeiture. Rowell *v.* Covenant Mut. Life Assoc., *supra*.

become payable and when benefits accrue to sue for the same;[82] (3) to sue at once for damages sustained by reason of the wrongful act,[83] or elect to consider the policy at an end and bring an action at once to recover the just value of the policy;[84] or, (4) if no benefits have been received, to treat the policy as rescinded and sue to recover back the money paid under it.[85]

2. CONDITIONS PRECEDENT.[86] The happening of the event on which the benefits become payable, as specified in the contract, gives a cause of action unless there is, by the terms of the contract, some condition precedent to be performed by the member or his beneficiary before he is entitled to maintain an action.[87] If the society agrees to pay a certain sum upon a specified condition, no recovery is permissible in the absence of proof of compliance with such condition.[88] Payment of a first assessment, as provided for by the contract, is not a condition precedent to a recovery on the certificate where there is no provision making it such a condition.[89] If a member seeks to rescind a settlement of a claim for benefits, he must first return the amount paid to him.[90] It is generally provided in the laws of employees' relief associations that the liability of an employer for the injury must be released before a benefit will be paid, and in such case no action for benefits can be brought except upon compliance therewith.[91] If a member wishes to sue officers of the society for misappropriation, and the society is in the hands of a receiver, a demand upon the receiver and his refusal, and an application to the court for leave to sue the officers and receiver, are conditions precedent.[92]

3. DEFENSES. The professedly benevolent and charitable character of fraternal insurance societies does not exempt them from the application of the rule that technical defenses to actions on policies are not regarded with favor by the courts.[93] Practically all the defenses to an action for benefits have already been fully considered.[94] Manual possession of the certificate, in case it is in force and is valid, is not necessary to an action thereon.[95] In an action by the association on a note, a plea that the taking of the note was *ultra vires* sets up no defense.[96] A society may by its acts estop itself from setting up a particular defense.[97]

82. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607; Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

83. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607. See also *supra*, V, B, 2.

84. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

85. Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607. See also American L. Ins. Co. *v.* McAden, 109 Pa. St. 399, 1 Atl. 256.

86. See also LIFE INSURANCE, 25 Cyc. 905.

Exhaustion of remedies within society as condition precedent see *supra*, V, D.

Pleading see *infra*, VI, F, 1, a, (v).

87. See, generally, ACTIONS, 1 Cyc. 692.

88. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100.

89. Stanley *v.* Northwestern Life Assoc., 36 Fed. 75.

90. Slater *v.* U. S. Health, etc., Ins. Co., 133 Mich. 347, 95 N. W. 89.

91. Fuller *v.* Baltimore, etc., Relief Assoc., 67 Md. 433, 10 Atl. 237, holding that where the mother is designated as beneficiary and upon the death of the member his wife and minor child did not release the employer but brought suit and recovered damages the mother had no right of action.

92. Fisher *v.* Andrews, 37 Hun (N. Y.) 176.

93. Trotter *v.* Grand Lodge L. H., 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. N. S. 569.

94. See *supra*, II; IV.

Deposit in court with plea of false representations.— The statute rendering a defense of misrepresentation invalid unless the insurer at the trial shall deposit in court premiums received on the policy is applicable to a foreign fraternal society. Kern *v.* Supreme Council A. L. H., 167 Mo. 471, 67 S. W. 252.

Settlement.— An allegation of settlement of all claims which a certificate holder in an accident association had or might have against the association, without reference to the claim of the beneficiary for the death of the insured from the same accident, refer only to the then accrued claims for disability, and not to the subsequent death of the insured, and state no defense to the death claim beyond the amount of the payment alleged. Woodmen Acc. Assoc. *v.* Hamilton, 70 Nebr. 24, 96 N. W. 989, 70 Nebr. 30, 97 N. W. 1017.

95. National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122.

96. Kripner *v.* Lincoln, 66 Ill. App. 532.

97. See Dexter *v.* Supreme Council R. T. T., 97 N. Y. App. Div. 545, 90 N. Y. Suppl. 292, holding that payment of a funeral benefit by a mutual benefit association to the holder of an original certificate, in lieu of which a duplicate certificate had been issued, did not estop the association from afterward denying the right of the holder of the original certifi-

B. Place of Bringing Suit — 1. Jurisdiction.[93] An action upon a certificate is transitory, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof located.[99] Where the certificate was payable to the friend of the insured whom he might designate in his will, the person so named stands as if his name was written into the certificate so that he takes thereunder instead of under the will, and cannot resort to the probate court to recover the insurance money.[1]

2. Venue.[2] In most jurisdictions an action to recover benefits may be brought in the county where the member resides or where he resided at the time of his death.[3]

C. Time of Bringing Suit — 1. When Action Premature. Provisions in the constitution, by-laws, or certificate that no action shall be brought to recover a benefit until a specified time after injury, sickness, or death are valid, and an action cannot be maintained until after the expiration of the time named.[4] Such

cate to recover thereon, the payment having been made under the belief that it was claimed under the duplicate certificate.

The admission of liability on a certificate on the part of the order is a waiver of the defense that a by-law was violated by naming as a beneficiary a person designated in a will instead of expressly naming him in the certificate. Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 88 N. W. 607.

98. See, generally, Courts. See also Life Insurance, 25 Cyc. 908.

99. Perrine *v.* Knights Templars, etc., Life Indemnity Co., 71 Nebr. 267, 98 N. W. 841, 101 N. W. 1017.

1. Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 88 N. W. 607.

2. See, generally, Venue. See also Life Insurance, 25 Cyc. 908.

3. Hildebrand *v.* United Artisans, 46 Oreg. 13, 79 Pac. 347, 114 Am. St. Rep. 852; Quinn *v.* Fidelity Ben. Soc., 12 Wkly. Notes Cas. (Pa.) 311. But see Price *v.* Temperance Mut. Ben. Assoc., 3 Dauph. Co. Rep. (Pa.) 128, holding that the act of April 8, 1868, permitting actions to be brought against life and accident insurance companies in any county where the property insured may be located, is not applicable to a mutual benefit association; and hence such association must be sued in the county of its legal residence.

In Illinois, Rev. St. (1901) p. 1337, § 3, providing that the courts in the county where complainant may reside shall have jurisdiction of all actions against any insurance company incorporated by any law of the state, applies to a fraternal insurance company issuing insurance for the members of the fraternity of Odd Fellows. Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875]. And under Rev. St. (1891) c. 110, § 3, the statutory rule was held to apply to mutual benefit societies and to suits in equity as well as actions at law. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168. But other cases hold that an assessment company is not an insurance company within the statutes as to bringing suit in the county of plaintiff's residence. Covenant Mut. Ben. Assoc. *v.* Baldwin, 49 Ill. App. 203; Union Mut. Acc. Assoc. *v.* Riel, 38 Ill. App. 414; Northwestern Life Assoc. *v.* Stout, 32 Ill. App. 21.

In Iowa an association which operated upon the assessment plan in paying benefits, and which designated its business as insurance, is an insurance company, within the meaning of Code, § 2584, providing that an insurance company may be sued in the county where the contract was made or where the loss occurred. Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601.

In Ohio, however, a mutual protective association is not an insurance company and therefore cannot be sued in a county where a loss has occurred, as authorized by Code Civ. Proc. § 48, but must be sued in a county where its principal office is located. Sargent *v.* Mutual L. Ins. Assoc., 7 Ohio Dec. (Reprint) 645, 4 Cinc. L. Bul. 659; Rude *v.* Ohio Mut. Relief Assoc., 4 Ohio Dec. (Reprint) 244, 1 Clev. L. Rep. 157.

Statute not limited to actions upon policies. — The act of April 29, 1857, which provided that suit against an insurance company should be brought "in any county where property insured may be located," as amended by the act of April 8, 1868, extending its provisions to life insurance companies, applies to an action against a mutual benefit association for money paid to defendant by reason of assessments which he asserts were illegally made upon a policy of life insurance existing at that time upon his life. Bennett *v.* Keystone Mut. Ben. Assoc., 16 Pa. Co. Ct. 596.

4. Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580; Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105; Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100. See also Cohen *v.* Supreme Sitting O. I. H., 105 Mich. 283, 63 N. W. 304; Societa di Mutuo Soccorso ed Istruzione Fra Gli Operai Italiani *v.* Cenni, 62 N. J. L. 652, 42 Atl. 743, holding that

a provision is waived, however, by an absolute denial of liability before the commencement of the suit.[5]

2. LIMITATION OF TIME TO SUE — a. In General. A cause of action on a certificate is not barred by laches short of the statute of limitations,[6] except where a less time is fixed by contract.[7] The statutes of limitations applicable thereto are generally those governing actions on simple contracts in general.[8]

b. Contract Limitations. The constitution, by-laws, or certificate generally provide that an action must be brought to recover benefits within a specified period shorter than that prescribed by the statute of limitations applicable to such an action, and such provisions are valid so as to bar an action not brought within such time.[9] The limitation has been held to be arrested by, and to begin to run

where, by the by-laws of a beneficial association, the mortuary tax assessed is to be remitted to that heir of a deceased member who is adjudged to have the greatest right thereto, an action by an heir to enforce payment to him is prematurely brought if instituted before the association decides who is entitled to the benefit. *Compare* Wheeler *v.* Supreme Sitting O. I. H., 110 Mich. 437, 68 N. W. 229, holding that where it did not appear that the failure to pay was for want of funds in the treasury, it could not be claimed that the action was premature on the ground that under the by-laws the treasurer could not pay the certificates until certain proceedings were had, and that if there was no money in the treasury to pay the certificates an assessment would have to be made.

In Ontario it is provided by statute that the claim becomes payable sixty days after proper proofs of loss; and any stipulation or rule to the contrary is void. Doidge *v.* Dominion Council R. T. T., 4 Ont. L. Rep. 423.

When cause of action accrues.— Cause of action does not accrue till after the furnishing of proof of death to the society, the beneficiary certificate requiring that on the death of the member satisfactory proof of his death shall be furnished on blanks authorized by it, and that no benefits shall become due or payable till sixty days after the furnishing thereof. Kelly *v.* Supreme Council Catholic Mut. Ben. Assoc., 46 N. Y. App. Div. 79, 61 N. Y. Suppl. 394. The liability to pay under a benefit certificate accrues, in the absence of a contrary provision in the contract of insurance, at the time of the death of the member. American Home Circle *v.* Schumm, 111 Ill. App. 316.

Accident certificate.— The provision of an accident certificate that no benefits shall be due till disability ceases or the right to benefits has terminated does not apply to a permanent total disability for which payment of a sum certain is provided, and action for such sum at the end of either sixty or ninety days after presentation of complete and satisfactory proofs is authorized, by implication at least, by the provisions that no benefits shall be due till ninety days after receipt of such proofs, and no suit shall be brought on any claim against the association before sixty days after the presentation of such proofs. Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190.

5. Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190. See also LIFE INSURANCE, 25 Cyc. 910 note 18.

6. Stewart *v.* Grand Lodge A. O. U. W., 100 Tenn. 267, 46 S. W. 579.

7. See *infra*, VI, C, 2, b.

8. See LIMITATIONS OF ACTIONS.

Five years.— A widow's cause of action for money payable to her by a benevolent society on proof of her husband's death is within the statutory limitation of five years. Kauz *v.* Great Council I. O. R. M., 13 Mo. App. 341.

When limitations begin to run.— Where a member of a beneficial association is wrongfully expelled, limitations begin to run against his action to recover premiums paid by him at the time of expulsion. Supreme Council C. K. A. *v.* Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114. As against a cause of action in favor of a widow for a benefit payable on her husband's death, the statutory limitation of five years begins to run on the day when the widow could make the demand payable by presenting proper proofs of her husband's death, that is, from the date of such death. Kauz *v.* Great Council I. O. R. M., 13 Mo. App. 341.

Unwritten contract.— Where parol evidence was necessary in order to prove that the widow was entitled to the benefit money, the contract was an unwritten one within the statute barring actions on unwritten contracts in five years. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Loomis, 142 Ill. 560, 32 N. E. 424 [*reversing* 43 Ill. App. 599].

9. Modern Woodmen of America *v.* Bauersfeld, 62 Kan. 340, 62 Pac. 1012, retroactive effect of by-law. *Contra*, Brower *v.* Supreme Lodge Nat. Reserve Assoc., 74 Mo. App. 490, holding that a provision requiring actions to be instituted within six months from the death of the insured member is rendered void by Rev. St. (1889) § 2394, providing that the time in which suit shall be begun shall not be limited by contract.

Construction of provision.— A provision limiting the time for suing on any cause or claim arising out of any membership certificate, which, from the context, is shown to relate solely to actions after the death of a member to recover on his certificate, does

anew from the date of, a part payment of the amount,[10] and to cease running upon the appointment of a receiver within the specified time.[11] So where the beneficiary is enjoined from receiving payment until the time to sue has expired, suit may be brought after the removal of the injunction at any time within the statute of limitations.[12] But a general statute extending the time for the commencement of an action where the person entitled to bring it dies has been held to apply only to limitations by law and not to contracts of insurance limiting the time within which the beneficiary may sue.[13] Conducting negotiations with the member or his beneficiary inducing him to believe a settlement would be effected without suit waives the contract limitation;[14] but where the order denies liability a considerable time before the expiration of the stipulated time to sue there is no waiver.[15]

D. Parties[16] **— 1. In General — a. Plaintiff.** While at common law a mere association could not sue in its own name, but suit was required to be brought in the name of its members,[17] the rule now generally is, by statute, that actions may be brought by the association in its own name,[18] or in the name of one or more of its officers.[19] So one or more of the members can generally sue for the benefit of all where there is a common interest.[20] And trustees of the association in whom, by its laws, its property is vested, or who are to enforce obligations incurred to the society, may sue to enforce property rights of the order.[21] An action against

not apply to an action by a member to enforce a rescission of his contract on account of an anticipatory breach thereof by the association. Supreme Council A. L. H. *v.* Daix, 130 Fed. 101, 64 C. C. A. 435 [*affirming* 127 Fed. 374].

When action commenced.— Where a certificate provided that an action thereon must be brought within a year from the death of the insured, a suit in which the petition was filed before, but the summons was not issued and served until after, the expiration of a year, could not be maintained under Kan. Civ. Code, §§ 20, 57, providing that an action may be commenced by filing a petition and issuing a summons thereon, and shall be deemed commenced at the date of service of such summons on defendant. Modern Woodmen of America *v.* Bauersfeld, 62 Kan. 340, 62 Pac. 1012.

When time begins to run.— Where the contract of insurance provides that action must be brought thereon within a certain period after the rejection of a claim thereunder, notice of rejection must be given by the society to the claimant before such period begins to run. Pioneer Reserve Assoc. *v.* Jones, 111 Ill. App. 156, holding also that notice of rejection given to the local secretary of a benefit society is not notice to the claimant, notwithstanding proofs of loss may have been forwarded through such secretary, since the subordinate lodge is the agent of the society as to receiving notice of rejection and not of the claimant.

10. Kentucky Mut. Security Fund Co. *v.* Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. L. Rep. 793.

11. Clark *v.* Lehman, 65 Ill. App. 238.

12. Earnshaw *v.* Sun Mut. Aid Soc., 68 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460.

13. Fey *v.* I. O. O. F. Mutual L. Ins. Soc., 120 Wis. 358, 98 N. W. 206.

14. Voorheis *v.* People's Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109.

15. Shackett *v.* People's Mut. Ben. Soc., 107 Mich. 65, 64 N. W. 875; Fey *v.* I. O. O. F. Mutual L. Ins. Soc., 120 Wis. 358, 98 N. W. 206. See also Life Insurance, 25 Cyc. 912.

16. See, generally, Parties.

17. See Associations, 4 Cyc. 312.

Right of members to sue.— The members of an unincorporated beneficial association have such an interest in the property of the association as to entitle them to sue on the bond of the treasurer of the association to recover the amount of a defalcation, although title to the property is in the association, regarded as a unit, or in officers thereof. Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535.

18. See Associations, 4 Cyc. 313.

19. Swaine *v.* Miller, 72 Mo. App. 446, holding that the president of a local union of an unincorporated benefit association may bring an action for conversion of the society's funds.

20. Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535, holding that under a general statute providing that when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, a few members of the association, the membership of which is over two hundred, may sue for themselves and all the other members, on the bond of an officer, to recover the amount of a defalcation.

An action against the grand lodge of a beneficial association, in the name of an unincorporated subordinate lodge, by one or more of its members, will not be dismissed on the ground that such suit should have been by one or more members on behalf of the persons constituting the society. Washington Camp *v.* Funeral Ben. Assoc., 8 Pa. Dist. 198.

21. Colley *v.* Wilson, 86 Mo. App. 396; Kuhl *v.* Meyer, 35 Mo. App. 206.

the association may be brought by an assignee.[22] One having an absolute title for life to a policy issued upon the life of a member may sue alone to have such member reinstated after his membership is forfeited for the non-payment of assessments.[23]

b. Defendant. An action may be brought against the association in its corporate name if it has been incorporated.[24] If it is not incorporated, except where it is otherwise provided by statute,[25] action should be brought against the individual members.[26] An unincorporated order may provide for trustees in whom their property may be vested and against whom all actions pertaining to the order may be prosecuted.[27] Where the action is to restrain the misapplication of funds by subordinate lodges, and the secretaries of such lodges directly and actively participated in the breach of trust complained of and incurred a personal liability, which was several, the action lies without bringing in the lodges themselves.[28] Where directors of an incorporated company have committed a wrong by misapplying money so as to defeat the claim of a beneficiary, the latter cannot sue the directors without joining the corporation as a party.[29]

2. Action to Recover Benefits — a. Plaintiff. The person for whose benefit the contract is made, that is the beneficiary, can generally sue to recover a benefit,[30]

An action on a note executed by a member of the association may be brought by trustees of the association. Pierce *v.* Robie, 39 Me. 205, 63 Am. Dec. 614.

Substitution of trustees.— Where a note given to the association is made payable to trustees thereof or their successors, such successors may, at the request of the association, maintain a suit upon it in the name of the former trustees; and such former trustees, as plaintiffs of record, have no power to dismiss the suit, but they may require protection from costs. Pierce *v.* Robie, 39 Me. 205, 63 Am. Dec. 614.

22. Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768.

Assignee of claims of all the members.— A person to whom all the members of a local assembly of the Knights of Labor in good standing have executed an assignment of their right, title, and interest can maintain an action to recover money paid in by members of the assembly on the formation of a preliminary organization, with the intention that the money so contributed should be used as initiation fees in the assembly, to be formed as a successor to the first association when defendants, who were the treasurer and one of the trustees of the first association, refuse to give it up. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

23. Van Bokkelen *v.* Massachusetts Ben. Life Assoc., 90 Hun (N. Y.) 330, 35 N. Y. Suppl. 865.

24. See the statutes of the several states. And see Corporations.

25. See the statutes of the several states.

In New York an action against an unincorporated beneficial association consisting of more than seven members may be brought against the president or treasurer as defendant; and it is not necessary that the other members should be made parties thereto. Fritz *v.* Muck, 62 How. Pr. 69 (action to compel reinstatement of member); Olery *v.* Brown, 51 How. Pr. 92. A local benefit insurance lodge, with the sole management and control of its benefit fund, which it raises, manages, and dispenses as its own property, may, although the supreme lodge is incorporated, be sued as an unincorporated association within such statutory provision. Boyd *v.* Gernant, 82 N. Y. App. Div. 456, 81 N. Y. Suppl. 835.

26. Paul *v.* Keystone Lodge, 3 Wkly. Notes Cas. (Pa.) 408. See also Associations, 4 Cyc. 313.

Effect of non-joinder of members.— In a suit in equity against an unincorporated beneficial association having numerous members, a bill which does not make all the members by name parties defendant is, on demurrer, good as to all the members who are named. Manning *v.* Klein, 1 Pa. Dist. 278, 11 Pa. Co. Ct. 525.

An action for slanderous words, spoken of plaintiff by a mutual aid association of which he was a member when the alleged tort was committed, will not lie against the association sued as a partnership; but the redress, if any, is against the wrong-doers in their individual or non-partnership capacity. Nor does it make any difference in this respect that, in consequence of this slander, plaintiff was suspended from the benefits of membership for a term of years and that the action was brought pending this term of suspension. Gilbert *v.* Crystal Fountain Lodge, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255.

27. Colley *v.* Wilson, 86 Mo. App. 396.

28. Stadler *v.* Bnai Brith, 5 Ohio Dec. (Reprint) 221, 3 Am. L. Rec. 589.

29. Brown *v.* Orr, 112 Pa. St. 233, 3 Atl. 817.

30. Dean *v.* American Legion of Honor, 156 Mass. 435, 31 N. E. 1 [*distinguishing* Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716]; York County Mut. Aid Assoc. *v.* Myers, 11 Wkly. Notes Cas. (Pa.) 541, action of covenant. *Contra*, Burns *v.* Grand Lodge A. O. U. W., 153 Mass. 173,

without joining the administrator of the insured.[31] Where the widow and children of a deceased member are entitled to a fund, the widow, as administratrix, may sue for the fund.[32] The administrator of the member may sue where the insurance is for the benefit of the heirs of the member,[33] although it has been held that where the heirs of the member are entitled to the insurance because of the death of his wife, the beneficiary, who bequeathed her property to the deceased member, they are entitled to sue.[34] As in other actions an assignee may now generally sue in his own name.[35]

b. Defendant. Where a certificate is issued in the name of an association which is a separate and independent entity distinct from the parent society, it is the proper party to be sued on a certificate issued by it.[36] An action may be brought against persons as officers and members of the order,[37] and statutory provisions exist in some states under which the association may be sued in the name of an officer.[38] If another association has taken over the assets of the order and specifically agreed to pay the certificate in suit, an action may be brought against it.[39]

26 N. E. 443; Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716.

The trustees of a subordinate lodge of a benevolent society may act as trustees for a beneficiary in one of its certificates, and as such they may sue the corporation to enforce the trust, their status not being different from that of ordinary members. Hysinger *v.* Supreme Lodge K. & L. H., 42 Mo. App. 627.

31. Baltimore City O. C. *v.* Fuqua, (Tex. Civ. App. 1901) 60 S. W. 1020.

Intervention.— A fraternal beneficiary corporation had the following by-law: "In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow and children of the member in equal shares; if none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the Benefit Fund." It was held that where a member died without widow, children, or heirs at law, and the corporation waived the claim of reversion to its benefit fund, the executor of the deceased member might be admitted as a party to a suit on the certificate, in order to enable him to raise the question whether there was a resulting trust. Hill *v.* Supreme Council A. L. H., 178 Mass. 145, 59 N. E. 652.

32. Janda *v.* Bohemian Roman Catholic First Cent. Union, 71 N. Y. App. Div. 150, 75 N. Y. Suppl. 654 [*affirmed* in 173 N. Y. 617, 66 N. E. 1110].

33. Rindge *v.* New England Mut. Aid Soc., 146 Mass. 286, 15 N. E. 628, holding that where the certificate designated a creditor of the member as beneficiary, in violation of the statute, which also provided that in case the insured survived the beneficiaries the insurance should be for the benefit of his heirs, the administrator of the insured could sue on the certificate, although his petition needlessly averred the action was for the benefit of the creditor.

Where a policy is payable to the member's "legal representatives," the administrator of the member, if one is appointed, alone can sue upon the policy. Sulz *v.* Mutual Reserve Fund Life Assoc., 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379 [*reversing* 7 Misc. 593, 28 N. Y. Suppl. 263].

As quasi-trustee for heirs.— Where, under the constitution, every member, in case of his death, is entitled "to a receipt by his heirs," of a certain sum, the administratrix of such a member may sue to recover the fund as a quasi-trustee for those represented by the word "heirs," which is not used in its technical sense, as persons entitled to inherit real estate, but as intending the next of kin entitled to the fund. Pfeifer *v.* Supreme Lodge B. S. B. S. Soc., 173 N. Y. 418, 66 N. E. 108 [*reversing* on other grounds 74 N. Y. App. Div. 630, 77 N. Y. Suppl. 1138 (*affirming* 37 Misc. 71, 74 N. Y. Suppl. 720)].

34. Wood *v.* Lenawee Cir. Judge, 84 Mich. 521, 47 N. W. 1103. See also Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935.

35. Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768.

Amount assigned by order of court.— Where a portion of the amount due on a certificate is assigned by order of court to one of the beneficiaries, the assignee may sue the association to recover the amount assigned to him. Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428.

36. Delaney *v.* Kelly, 45 Misc. (N. Y.) 286, 92 N. Y. Suppl. 265 [*reversed* on other grounds in 103 N. Y. App. Div. 409, 92 N. Y. Suppl. 1021].

37. Luders *v.* Volp, 8 Wkly. Notes Cas. (Pa.) 417. But see Payne *v.* Snow, 12 Cush. (Mass.) 443, 59 Am. Dec. 203.

38 Poultney *v.* Bachman, 10 Abb. N. Cas. (N. Y.) 252, 62 How. Pr. 466 [*reversed* on other grounds in 31 Hun 49], holding that action could be brought against the treasurer under Code Civ. Proc. § 1919.

39. Cosmopolitan L. Ins. Assoc. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

c. Joinder of Plaintiffs.[40] The surviving beneficiaries under a certificate may recover against the insured, although the administrator of the deceased beneficiary was not joined as plaintiff.[41] Where there is no joint demand in favor of different beneficiaries, as where different sums are payable to different persons, they cannot join as plaintiffs.[42] Where the defense is that plaintiff had no insurable interest, the wife and children are not necessary parties.[43] If the action is by an assignee of the beneficiary, the assignor is not a necessary party merely because the assignment was made to secure a loan from the assignee to the insured of a less sum than the amount of the policy.[44] Where the interest of each member in the fund is a several interest, the other members need not be joined as plaintiffs in an action by a member to recover his proportional part of the insurance money.[45]

d. Joinder of Defendants. Except where it is otherwise provided by statute,[46] all or a portion of the members of an unincorporated society should be named as defendants.[47] If the certificate entitles the beneficiary to the amount of an assessment, the secretary need not be made a party in an action thereon.[48] Where an officer is made the sole trustee and custodian of the funds for the payment of insurance claims against the association, he is the only necessary party to an action by a beneficiary to recover a claim against such fund.[49]

3. Actions For Dissolution. The question as to who are proper and necessary parties to actions to dissolve the society is governed by the rules relating to parties in general.[50]

E. Service of Process.[51] Service of process upon an incorporated associa-

40. Joinder of beneficiary and administrator see *supra*, VI, D, 2, a.

41. Supreme Lodge K. & L. H. *v.* Portingall, 167 Ill. 291, 47 N. E. 203, 59 Am. St. Rep. 296 [*affirming* 64 Ill. App. 283].

42. Conard *v.* Southern Tier Masonic Relief Assoc., 101 N. Y. App. Div. 611, 93 N. Y. Suppl. 626.

43. Kentucky Grangers' Mut. Ben. Soc. *v.* Evans, 13 Ky. L. Rep. 542.

44. Lawler *v.* National Life Assoc., 83 Hun (N. Y.) 393, 31 N. Y. Suppl. 875.

45. Emmeluth *v.* Home Ben. Assoc., 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704.

46. See the statutes of the several states.

47. Jones *v.* Thistle Lodge, 10 Kulp (Pa.) 52.

48. Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485.

49. Colley *v.* Wilson, 86 Mo. App. 396. See also Harris *v.* Wilson, 86 Mo. App. 406.

Members of an auditing committee, in no manner responsible for the funds over which they have no direct control, need not be joined as defendants. Colley *v.* Wilson, 86 Mo. App. 396.

50. See Parties.

Plaintiffs.— A proceeding to dissolve a mutual benefit society, or to remove its officers, for failure to make proper reports, or for improperly conducting its business, instituted under section 10 of the act of 1883, is not a criminal prosecution within the meaning of Ill. Const. art. 6, § 33, which requires a criminal prosecution to be carried on "in the name and by the authority of the People of the State of Illinois," but is a civil proceeding to protect property rights, and may be brought in equity, by the attorney-general in his own name. Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

Defendants.— Where a member of an unincorporated association filed a bill on behalf of himself and other members in good standing for its dissolution and an accounting of its funds, without joining any of its managing officers, or its advisory committee having control of the funds, or any of its contributory members, who might desire the continuance of the association, such bill was defective for want of necessary parties. Atnip *v.* Tennessee Mfg. Co., (Tenn. Ch. App. 1898) 52 S. W. 1093.

Intervention.—In an action by the people to dissolve, where there is a judgment providing for closing up the society's affairs through a receiver and the court, and appointing a referee to take proof of claims against the company, it is improper to allow an intervention by beneficiaries under a certificate of insurance claiming a certain fund in the hands of the receiver collected on the death of assured, and to appoint another referee to take proof of such claim. People *v.* Grand Lodge E. O. M. A., 70 Hun (N. Y.) 439, 24 N. Y. Suppl. 376.

Cross bill.— Upon the filing of a bill in equity to wind up the association and distribute its assets, the holder of a death claim against the association has an interest in the subject-matter of the proceeding, and may properly file a cross bill to prevent the misappropriation of a trust fund. Wilber *v.* Torgerson, 24 Ill. App. 119.

Manner of raising objections for want of necessary parties see Atnip *v.* Tennessee Mfg. Co., (Tenn. Ch. App. 1898) 52 S. W. 1093.

51. See, generally, Process. See also Life Insurance, 25 Cyc. 915.

tion may generally be made by serving an officer or agent as provided for by the statutes in the case of domestic corporations.[52] If unincorporated, and there is no statute providing therefor, it has been held that service cannot be made upon the secretary of the society,[53] nor on the master of a subordinate lodge where the action is against the grand lodge.[54] Where the statute provides that service may be made on one or more of any persons associated in any business under a common name, and a fraternal association has for one of its objects the insurance of its members within the state, but has no president or other officers therein, service may be made upon any one of the associates within the state at the time the action is brought.[55] If the society is a foreign corporation, service may generally be made, by statute, on any agent within the state.[56] Where the statute provides for

52. See, generally, PROCESS.

Any clerk or agent in county.—Under a statute providing that, where none of the officers of a corporation reside or have an office in the county, service of process shall be made on any clerk or agent found in the county, service on a fraternal benefit association may be made on the secretary of the local assembly, whose duty it is, among others, to notify the supreme secretary when the death of a member occurs, and to make reports of money and membership to the supreme assembly. Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852.

Chief officer in charge of principal office.—Under the statute relative to service of process on town mutual insurance companies, which provides that a certified copy of the petition and summons shall be served on the president or secretary or other chief officer in charge of the "principal office" of the company, a return showing service on the secretary in charge of the company's "usual business office" was insufficient. Thomasson *v.* Mercantile Town Mut. Ins. Co., (Mo. App. 1904) 81 S. W. 911.

Who is "managing agent."—The fact that a person collects premiums from a local branch, and transmits them to the central organization of a fraternal insurance company, does not constitute him a managing agent of the company, on whom service may be made, under the code. Moore *v.* Monumental Mut. L. Ins. Co., 77 N. Y. App. Div. 209, 78 N. Y. Suppl. 1009.

When a domestic corporation.—A fraternal beneficiary association having a grand lodge and principal place of business in this state and doing an insurance business therein is a domestic corporation, under Nebr. Comp. St. c. 43, § 91, on which service of summons should be made according to the provisions of Code, c. 2, relating to service of summons on corporations and insurance companies. Grand Lodge A. O. U. W. *v.* Bartes, 64 Nebr. 800, 90 N. W. 901.

Anywhere within state.—Under the Kentucky statutes it seems that service may be made upon the proper officers or agents anywhere within the state. Kentucky Mut. Security Fund Co. *v.* Logan, 90 Ky. 364, 14 S. W. 337, 12 Ky. L. Rep. 327.

Insurance on human life.—An action is based on a certificate of insurance on a human life within Ark. St. (1895) p. 188, providing that in such actions against any fraternal society service may be made upon the chief officer or, in his absence, on the secretary of any subordinate lodge in the state, notwithstanding the policy is an accident policy and also provides indemnity for certain injuries, where the action is brought upon the death of the insured which is caused by accidental means. Travelers' Protective Assoc. *v.* Gilbert, 101 Fed. 46, 41 C. C. A. 180.

An unauthorized service of summons on a person assumed to be the agent of a fraternal insurance company is not aided by the fact that there was available a representative of the company upon whom service could properly have been made. Moore *v.* Monumental Mut. L. Ins. Co., 77 N. Y. App. Div. 209, 78 N. Y. Suppl. 1009.

53. Jones *v.* Thistle Lodge, 10 Kulp (Pa.) 52, holding that service of summons must be made upon the members sued as individuals.

54. Grand Lodge B. L. F. *v.* Cramer, 53 Ill. App. 578.

55. Taylor *v.* Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684.

56. See the statutes of the several states.

Secretary of local division held an insurance "agent" within Wis. Rev. St. § 2637, subd. 9, and § 1977, declaring who shall be considered agents of a foreign insurance company for the purpose of receiving service of process see Dixon *v.* Order of Railway Conductors, 59 Fed. 910. Where a foreign company authorizes a person in Kansas, whom it designates as its local or branch secretary, to receive assessments from its members in said state, and countersign and deliver receipts therefor, and forward the money so received to the home office in another state, and the company has no other officer in the county where service is sought upon the company, upon whom service may be had, service on the local secretary is a valid service, under Gen. St. (1889) par. 4152. Southwestern Mut. Ben. Assoc. *v.* Swenson, 49 Kan. 449, 30 Pac. 405.

The president of a subordinate lodge organized under the authority of the supreme lodge, having the power to decide all questions of law and order, subject to the approval of the president of the supreme lodge, and to approve every claim before payment is made, and the members of the subordinate

service by the acting sheriff of the county in which the company may have its principal office, service by a deputy sheriff is sufficient.[57]

F. Pleading[58] — **1. Actions to Recover Benefits — a. Complaint** — (i) *General Requisites.* Where the certificate issued by the supreme authority is to pay a certain amount to a designated beneficiary upon the death of the member, the certificate is in legal effect a policy of life insurance governed by the rules of pleading applicable to ordinary actions on policies.[59] The complaint should contain the statement of the contract or certificate, the consideration, the performance of all the conditions precedent on the part of plaintiff and the insured, the sickness, accident, or death authorizing a recovery, and the failure of the society to pay the amount due.[60] There can be no recovery upon a certificate under a

lodge having the power to admit members in accordance with the laws of the association, is a local agent of the association, within the statute authorizing the service of citations on local agents of foreign corporations. Bankers' Union *v.* Nabors, 36 Tex. Civ. App. 38, 81 S. W. 91.

To what companies statute applicable.— A fraternal insurance company confining its membership to members of a certain order is within Burns Annot. St. Ind. (1901) § 4914*t*, relating to service of process on foreign mutual life and accident companies. Bruning *v.* Brotherhood Acc. Co., 191 Mass. 115, 77 N. E. 710.

57. Thomasson *v.* Mercantile Town Mut. Ins. Co., (Mo. App. 1904) 81 S. W. 911.

58. See, generally, Pleading. And see Life Insurance, 25 Cyc. 916 *et seq.*

59. Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 516.

60. See Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Osceola Tribe No. 11 I. O. R. M. *v.* Schmidt, 57 Md. 98, holding complaint in action to recover sick benefits insufficient where it failed to state the amount claimed or the length of time plaintiff was sick or from whom he was entitled to receive benefits.

Statutory provisions as to what shall be sufficient declaration in action on policy held applicable to a fraternal mutual benefit society see Cosmopolitan L. Ins. Assoc. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

Contract.—A petition which by intendment at least shows a contract between defendant and plaintiff, and a right of recovery thereon by the latter, is sufficient. Hirsch *v.* U. S. Grand Lodge O. B. A., 56 Mo. App. 101.

Showing liability of successor.— A petition alleging that defendant was the legal successor of another such association which had issued the certificate, having received all its assets and effects, and assumed to pay all its liabilities, and to fulfil all its obligations and engagements, including the demand sued on, sufficiently states that the first association no longer exists, and that defendant is its legal successor. Stanley *v.* Northwestern Life Assoc., 36 Fed. 75.

Showing individual liability of officers.— A certificate reciting a contract between the member and the State Insurance Fund A. O. H., and being signed by its officers, the personal liability of the latter is sufficiently shown by a complaint which alleges that they were jointly engaged in carrying on a life insurance business, and entered into the contract under the name of the State Insurance Fund A O. H. Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113.

Details of injury.— It is not necessary to state in the petition all the details of the injury, it being sufficient to state the substance of the material facts and their legal effect. Railway Officials, etc., Assoc. *v.* Beddow, 112 Ky. 184, 65 S. W. 362, 23 Ky. L. Rep. 1438.

Consideration.— The consideration moving from the plaintiff to the society, whereby it became liable to pay benefits, must be stated in an action to recover sick benefits. Osceola Tribe No. 11 I. O. R. M. *v.* Schmidt, 57 Md. 98. Where, by statute, all written instruments whereby the payment of money is promised import consideration, an allegation that the benefit certificate sued on was issued for a "valuable consideration" was sufficient. Johnson *v.* Sovereign Camp W. W., 119 Mo. App. 98, 95 S. W. 951.

Inconsistent allegations.— Allegations that a party had a vested interest in a life policy by virtue of an antenuptial agreement and by a gift *inter vivos* are not necessarily inconsistent. Hill *v.* Groesbeck, 29 Colo. 161, 5 Pac. 167.

Duplicity.— A complaint to recover moneys claimed from a benefit society by a member is bad for duplicity, where it attempts to unite in one count a claim founded on one set of regulations of the society with one founded on another and distinct set. Portage Lake Miners', etc., Benev. Soc. *v.* Phillips, 36 Mich. 22.

Requiring plaintiff to elect where action based on two certificates see Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

Complaints held sufficient see Himmelein *v.* Supreme Council A. L. H., (Cal. 1893) 33 Pac. 1130; Beckner *v.* Beckner, 104 Ga. 219, 30 S. E. 622; Grand Lodge A. O. U. W. *v.* Barwe, 38 Ind. App. 308, 75 N. E. 971; Faulkner *v.* Grand Legion Select Knights A. O. U. W., 63 Kan. 400, 65 Pac. 653; Silvers *v.* Michigan Mut. Ben. Assoc., 94 Mich. 39, 53 N. W. 935; Van Houten *v.* Pine, 36 N. J. Eq. 133; Cheek *v.* Supreme Lodge K. H., 129 N. C. 179, 39 S. E. 832; Cosmo-

declaration consisting only of the common counts.[61] Where the venue depends upon where the cause of action accrued the complaint must show the place where the cause arose.[62]

(II) *ANTICIPATING DEFENSES.* The complaint need not anticipate defenses,[63] such as the falsity of representations in the application,[64] or the defense that the assured was not in good standing at the time of his death.[65]

(III) *SETTING UP CERTIFICATE AND APPLICATION.* The certificate, with the conditions annexed, constitutes an entire contract, and, in declaring upon the contract, it, or a sufficient portion of it to show a right of recovery, must be set out, either in terms or in substance,[66] or by way of exhibit. But the complaint need not set out the application by the insured, although it is referred to in the certificate and made a part thereof.[67]

(IV) *RIGHT TO SUE AND INSURABLE INTEREST.* The complaint must show that plaintiff is the person entitled to sue to recover the benefits.[68] If the insur-

politan L. Ins. Co. *v.* Koegel, 104 Va. 619, 52 S. E. 166, sufficiency where obligation of society taken over by another company.

Complaints held insufficient see Rebut *v.* Legion of West, 96 Cal. 661, 31 Pac. 1118 (holding complaint defective where coupon was only a part of the contract, and the terms thereof are not set forth, and nothing is shown as to how much, if anything, in endowments had been paid plaintiff and that plaintiff was entitled to any portion of the fund on hand); Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110; Johns *v.* Northwestern Mut. Relief Assoc., 87 Wis. 111, 58 N. W. 76 (complaint held ambiguous and insufficient as asking for either a money judgment or equitable relief, and subject to motion to make more definite and certain). A complaint alleging that the amount demanded is "the sum paid by said society to the sick of said society," without stating how this obligation arises, what the regulations as to beneficiaries are, or that plaintiff has complied with the regulations, is fatally defective. Burlington Ben. Soc. *v.* White, 30 N. J. L. 313. A complaint is bad where it alleges only the legal conclusion that the society was indebted to the member, and does not aver the regulations, the member's performance of conditions, or the demand, etc., by which the society became liable. Portage Lake Miners', etc., Benev. Soc. *v.* Phillips, 36 Mich. 22. In a suit for sick benefits, an allegation that by a by-law "every member in good standing, when sick . . . is entitled" is insufficient, there being no allegation that such by-law was in force at the time of plaintiff's sickness. Irish Catholic Benev. Assoc. *v.* O'Shaughnessey, 76 Ind. 191.

Forms see Cosmopolitan L. Ins. Co. *v.* Koegel, 104 Va. 619, 621, 52 S. E. 166.

61. Supreme Lodge O. M. P. *v.* Meister, 78 Ill. App. 649.

62. Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852.

63. See, generally, PLEADING.

For instance, where a benefit certificate is made payable "under the provisions of the constitution and by-laws of this association," it is not necessary that the beneficiary suing thereon should, in order to make a *prima facie* case, show in the first instance that the insured did not violate any of the provisions of such constitution and by-laws, or that his death was not occasioned by any of the causes in respect to which such association was exempted from liability by the conditions or exceptions printed on the back of the certificate. These are all matters of defense, which, to be availed of, must be specially pleaded. Lloyd *v.* Travelers Protective Assoc., 115 Ill. App. 39.

64. Supreme Lodge K. & L. G. *v.* Albers, 106 Ill. App. 85.

65. Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877; Ellis *v.* National Provident Union, 50 N. Y. App. Div. 255, 63 N. Y. Suppl. 1012, holding that the complaint need not allege that assured was in good standing at his death, the annexed certificate being proof of good standing at the date of issuance, which would be presumed to have continued.

Surplusage.— In an action on a life insurance policy allegations in a complaint asserting generally that the insured was a member in good standing and had paid all dues and assessments are surplusage, and do not relieve defendant of the necessity of pleading, and the burden of proving a default in these respects. Kinney *v.* Brotherhood of American Yeomen, (N. D. 1905) 106 N. W. 44.

66. Supreme Lodge O. M. P. *v.* Meister, 78 Ill. App. 649.

Filing copy.— The membership certificate does not become a part of the declaration by merely filing a copy of it in the case, and does not make the certificate any more properly receivable in evidence under the common counts than if no copy had been filed. Supreme Lodge O. M. P. *v.* Meister, 78 Ill. App. 649.

67. Himmelein *v.* Supreme Council A. L. H., (Cal. 1893) 33 Pac. 1130; Supreme Lodge K. H. *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598.

68. Sleight *v.* Supreme Council M. T., 133 Iowa 379, 107 N. W. 183, 121 Iowa 724, 96 N. W. 1100 (holding that where a certificate provided for the payment of a funeral benefit to the member's next of kin, or the person having charge of the burial, such benefit

ance was procured by plaintiff upon the life of another, it must be alleged that plaintiff had an insurable interest in the life insured by stating the facts from which such interest may be inferred.[69] But the interest of the person insuring his own life need not be alleged, where the certificate shows the interest of plaintiff.[70] A petition in which plaintiff is described as a brother of the deceased member, without showing that he was in any way dependent on the deceased, as required by the charter of the society, does not state a cause of action.[71]

(v) *PERFORMANCE OF CONDITIONS PRECEDENT.* The performance of conditions precedent by the insured and the beneficiary must be alleged,[72] a mere allegation of performance by the beneficiary being insufficient.[73] It is ordinarily sufficient, however, to make such allegations in general terms as by stating due performance of all conditions on the part of plaintiff and the insured.[74]

was not recoverable in the absence of an allegation that plaintiffs were the member's nearest of kin, or had the burial in charge); Sherry *v.* Operative Plasterers' Union, 139 Pa. St. 470, 20 Atl. 1062 (holding that under a constitution which provides that funeral benefits shall be paid to the nearest relatives of the deceased, an allegation in the statement of claim that plaintiffs are the father and mother of deceased, "and his nearest relatives," is sufficient, without stating that deceased did not leave a widow, child, or children him surviving).

69. Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 98 Ind. 149, holding that a mere general averment of such an interest is a conclusion of law and insufficient.

70. Foresters of America *v.* Hollis, 70 Kan. 71, 78 Pac. 160; Masonic Benev. Assoc. *v.* Bunch, 109 Mo. 560, 19 S. W. 25, holding that where the charter does not require the beneficiary to have an insurable interest in the life of the member, and the member himself made the contract with the association, the beneficiary in an action on the certificate need not allege an insurable interest.

71. Supreme Council C. B. L. *v.* McGinness, 59 Ohio St. 531, 53 N. E. 54.

72. See cases cited *infra*, this note.

Offer to surrender certificate.— A declaration which fails to allege that an offer to surrender the certificate was made as required by the contract on payment, or any matter of excuse for not surrendering it, is demurrable. Independent Order of Mutual Aid *v.* Paine, 17 Ill. App. 572.

Proofs of death or disability.— A declaration which does not allege that proofs of death were furnished as required by the contract is demurrable. Independent Order of Mutual Aid *v.* Paine, 17 Ill. App. 572. But where an attempt is made to aver notice and proof of death as required by the certificate, it may be aided by an averment that the association is in default for not paying the benefit according to the terms of the certificate. National Ben. Assoc. *v.* Grauman, 107 Ind. 288, 7 N. E. 233. A complaint which sets out plaintiff's contract of membership, avers performance of the conditions on his part, and shows that he is totally disabled, and that he made proper proof of his disability, need not allege that his proof was such as satisfied the corporate officers. Supreme Council O. C. F. *v.* Forsinger, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501.

Admissions.— The validity of an assessment against a member was not admitted by an averment in a bill on such member's insurance certificate that, at a time which was subsequent to the levying of the assessment, the member sent what he owed the society to its treasurer, the proper officer to receive such payment. Stewart *v.* Grand Lodge A. O. U. W., 100 Tenn. 267, 46 S. W. 579.

Surrender of certificate.— In an action by a beneficiary on a certificate surrendered by the member for a valuable consideration, the beneficiary claiming that the member was insane at the time of the surrender, he not having been at the time under guardianship, the complaint must allege that plaintiff was willing to pay all assessments due, and to refund the consideration received by deceased. Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

Payment of dues.— An allegation in a petition on a certificate that the insured "at all times from and after his admission to membership to said defendant, until up to the time of his death, promptly and punctually paid all assessments, dues, charges, and demands levied, charged, and demanded of him by said defendant," is sufficient, on demurrer, as an allegation that such payments were made to the proper officer of defendant. Supreme Council A. L. H. *v.* Orcutt, 119 Fed. 682, 56 C. C. A. 294.

Performance of acts to secure reinstatement see Grand Lodge A. O. U. W. *v.* King, 10 Ind. App. 639, 38 N. E. 352.

Excusing failure to pay assessments see Wright *v.* Supreme Commandery G. R., 87 Ga. 426, 13 S. E. 564, 14 L. R. A. 283.

73. Grand Lodge A. O. U. W. *v.* Hall, 37 Ind. App. 371, 76 N. E. 1029.

74. National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316; Grand Lodge A. O. U. W. *v.* Hall, 31 Ind. App. 107, 67 N. E. 272; Forse *v.* Supreme Lodge K. H., 41 Mo. App. 106. See also Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Sufficiency of particular averment.— In an action on a certificate, an averment as follows: "That the deceased after the making and delivery of the certificate and while he

(vi) *NON-PAYMENT AND AMOUNT.* Where the promise is absolute to pay a certain sum upon the death of a member, it is only necessary to allege non-payment.[75] But where the agreement is to pay over the proceeds of certain assessments not to exceed a certain amount, the complaint must charge a failure or refusal to make the assessment, and that, if such assessment had been made, it would have resulted in the amount which plaintiff claims as damages,[76] although where a refusal to pay or to make an assessment is alleged the number of members liable to be assessed need not be also stated.[77] In at least one jurisdiction it is held that where a certificate entitles the beneficiary to the proceeds of an assessment, he must allege that the society had in its hands the money collected by assessment, which it was in duty bound to pay to plaintiff.[78] Where a certificate provided that the beneficiary should be paid out of a specified fund, it is not necessary to allege that there was such a fund out of which the claim could be paid,[79] nor *a fortiori* need it be alleged that there was sufficient in such fund to pay the claim.[80] So where the certificate does not by its terms bind the society to pay absolutely the sum specified therein, but only to pay out of its benefit fund an amount not to exceed such sum, the complaint need not allege that the condition of the benefit fund was such that when the loss occurred defendant was bound to pay the full sum named in the certificate.[81]

b. Answer — (i) *IN GENERAL.* The general requisites and sufficiency of an answer in an action to recover benefits is governed by the rules applicable to answers in civil actions in general.[82] Affirmative defenses, such as non-payment

was an active member of the association in good standing, to wit, on the 28th day of May, 1892, came to his death," etc., is equivalent to an averment that the deceased "has in all things observed, performed, and fulfilled all and singular the matters and things which were on his part to be observed, performed and fulfilled" and is sufficient. Lloyd *v.* Travelers Protective Assoc., 115 Ill. App. 39.

75. Ring *v.* U. S. Life, etc., Assoc., 33 Ill. App. 168.

76. Supreme Lodge O. M. P. *v.* Meister, 78 Ill. App. 649. See also Ring *v.* U. S. Life, etc., Assoc., 33 Ill. App. 168. But see Neskern *v.* Northwestern Endowment Assoc., 30 Minn. 406, 15 N. W. 683, holding that the complaint need not allege the actual receipt of money upon an assessment to meet the loss or neglect to make such assessment. *Compare* Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113, holding that an allegation that no assessment had ever been made was sufficient without alleging a promise to make such assessment, where the contract involved an implied agreement to make the assessment on the death of a member.

Refusal to make.— It is sufficient to allege that defendant refused to make the assessment which it had agreed to make, and, if such assessment had been made, defendant would have realized the agreed amount. Herndon *v.* Triple Alliance, 45 Mo. App. 426.

77. Elkhart Mut. Aid, etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514. See also Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

78. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100.

79. Ellis *v.* National Provident Union, 50 N. Y. App. Div. 255, 63 N. Y. Suppl. 1012.

80. Hollings *v.* Bankers' Union of World, 63 S. C. 192, 41 S. E. 90.

81. Supreme Council A. L. H. *v.* Anderson, 61 Tex. 296.

82. See PLEADING.

Conclusions of law.— A paragraph of an answer in an action on an accident certificate alleging that plaintiff was not injured while in the performance of the duties of his employment, as required by the rules of the association to entitle him to recover, but by unnecessarily exposing himself to danger while seeking his own pleasure, is demurrable as not stating facts. Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Admissions as to status of society.—Where the petition declares that defendant is, and was at the time of making the contract, a corporation engaged in the life insurance business in the state, and the answer was that "defendant admits being a corporation and doing business in the state, and admits the issuance of a beneficiary certificate to" the deceased, and does not set up what kind of a corporation it is, the status of defendant is thereby fixed, for the purposes of the case, as an ordinary life insurance company. Cauveren *v.* Ancient Order of Pyramids, 98 Mo. App. 433, 72 S. W. 141.

Premature action.—A defense that the suit was prematurely brought, because of an extension of the time of payment of the amount due, if based on the instrument in suit, is properly pleaded in bar; but, if based on a transaction extraneous of such instrument, it can only be availed of by plea in abatement. American Home Circle *v.* Schumm, 111 Ill. App. 316.

Limitations.— The defense that a certifi-

of dues or assessments, misrepresentation of material facts in the application, etc., must be specially pleaded.[83]

(11) *Failure to Pay Assessment.* Alleging failure to pay assessments which is declared by the laws of the society to work a forfeiture of the certificate, and showing the proceedings constituting a valid call for the delinquent assessment, states a good defense.[84] However, at least the substance of the laws of the order must be set up,[85] and it is not sufficient merely to allege failure to pay without alleging wherein there was any non-compliance with the provisions of the certificate.[86] The answer must state that the dues were assessed,[87] and the facts showing that notice of the assessment was given.[88] Alleging that the member failed to pay is sufficient without a further allegation that the assessment was not in fact paid, where no person other than the member was liable to pay it.[89] Alle-

cate required action for benefit to be begun within two years after the member's death, although somewhat inconsistent with one setting up a provision against recovery except on proof of actual death, is not on that account subject to demurrer. Kelly *v.* Supreme Council Catholic Mut. Ben. Assoc., 46 N. Y. App. Div. 79, 61 N. Y. Suppl. 394.

Certificate non-transferable.— An answer that the benefit certificate was not transferable to plaintiff, for the reason that he had no insurable interest in the life of the insured, is insufficient, failing to show an offer to return the assessments paid upon the certificate by plaintiff. Supreme Lodge K. H. *v.* Metcalf, 15 Ind. App. 135, 43 N. E. 893.

Setting out by-laws.— Where the defense is that the certificate was issued in violation of the rules and by-laws of the association, a copy of such rules and by-laws should be set out in the answer. It is not sufficient for the pleader to give his own conclusions as to their effect. Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477.

Residence of deceased in prohibited territory.— Where it appears that the certificate was void under the constitution, if the member came to his death while residing, without the consent of the association, outside of certain parallels of latitude, an affidavit of defense is sufficient which avers that the deceased member died while residing south of a parallel of latitude mentioned in the constitution, and that he resided there at that time without the consent of the society. Bateman *v.* Grand Fraternity, 18 Pa. Super. Ct. 385.

Cancellation by agreement.— In an action on two certificates to recover the whole amount of each certificate, an affidavit of defense is sufficient which avers that plaintiff had surrendered the first certificate, had received over three hundred dollars on account of it, and had accepted in lieu thereof a new certificate, and that on her own request the second certificate was canceled, and defendant agreed to return to her the amount to be paid in instalments on the certificate, and that a portion of this amount had been paid. Mitchell *v.* Monumental Mut. L. Ins. Co., 23 Pa. Super. Ct. 584.

Verified denial of execution.—A plea of misjoinder of defendants cannot be allowed where neither defendant has denied the execution of the certificate by plea verified by affidavit, where the action is against two defendants on a certificate declared on as the instrument in writing of both. Supreme Lodge A. O. U. W. *v.* Zuhlke, 30 Ill. App. 98 [*affirmed* in 129 Ill. 298, 21 N. E. 789]. But failure to deny the execution of the certificate under oath does not preclude defendant from showing a failure of consideration consisting of failure to pay an assessment. Johnson *v.* Sovereign Camp W.. W., 119 Mo. App. 98, 95 S. W. 951.

Time of death and cause of disablement see Leo *v.* Pennsylvania R. Co., 9 Pa. Super. Ct. 196, 43 Wkly. Notes Cas. 402.

Assent to by-law reducing amount of recovery see Getz *v.* Supreme Council A. L. H., 109 Fed. 261 [*affirmed* in 112 Fed. 119, 50 C. C. A. 153].

Amount of assessment.—Where the answer alleged that the amount was to be determined by the number of members subject to a specified assessment and that the amount collected from the assessment was less than the sum designated in the certificate, the answer was held insufficient for failure to show the exercise of all reasonable efforts to collect the assessment. Supreme Commandery K. G. R. *v.* Barrett, 12 Ky. L. Rep. 94.

83. See *infra*, VI, F, 1, e, (III).

84. Sovereign Camp W. W. *v.* Ogden, (Nebr. 1906) 107 N. W. 860.

85. Johnson *v.* Sovereign Camp W. W., 119 Mo. App. 98, 95 S. W. 951.

86. Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

87. Harlow *v.* Supreme Lodge K. H., 62 S. W. 1030, 23 Ky. L. Rep. 456.

Conclusions of law.—An allegation that assessments were duly made by defendant in accordance with its charter is a mere conclusion of law. American Mut. Aid Soc. *v.* Helburn, 85 Ky. 1, 2 S. W. 495, 8 Ky. L. Rep. 627, 7 Am. St. Rep. 571.

88. Harlow *v.* Supreme Lodge K. H., 62 S. W. 1030, 23 Ky. L. Rep. 456; Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604, holding that a mere allegation of failure to pay dues after "legal notice" is insufficient.

89. Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833.

gations of suspension for non-payment of assessments and also for non-payment of dues do not set up inconsistent defenses between which defendant must be compelled to elect.[90]

(III) *MISREPRESENTATIONS OF INSURED.* If the society relies upon the untruthfulness of representations made by the applicant as a defense it must plead the facts in regard thereto,[91] by setting forth the representations alleged to be false and stating wherein they were untrue.[92] It must also be alleged that they were relied on and formed an inducement to the making of the contract.[93] In some jurisdictions an offer to return the assessments paid upon the certificate must be alleged,[94] and in some, by statute, a copy of the application must be attached to the answer.[95]

(IV) *SUICIDE.* A plea that the deceased committed suicide, where that is a defense, is sufficient,[96] without alleging that the insured was sane at the time.[97]

c. Reply. Whether a reply is necessary is governed by the rules relating to pleadings in civil actions in general.[98] Ordinarily a reply may contain any allegations tending to avoid any new matter set up in the answer.[99] The reply, where a denial, must negative the material parts of the plea,[1] and, if setting up new matter, must not materially depart from the allegations in the complaint.[2] A

90. Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

91. Royal Arcanum *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367.

Warranties.— Where the answer sets out representations made by insured in the application, which shows that they are warranties, and alleges their falsity, and that insured knew that they were false, it is a sufficient allegation that the representations were warranties to make it error to refuse an instruction that the falsity of such representations, although made through mistake and in good faith, is sufficient to defeat a recovery on the policy. National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576.

92. Bateman *v.* Grand Fraternity, 18 Pa. Super. Ct. 385.

93. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Supreme Commandery U. O. G. C. *v.* Hughes, 114 Ky. 175, 70 S. W. 405, 24 Ky. L. Rep. 984; McCaffrey *v.* Knights & Ladies of Columbia, 213 Pa. St. 609, 63 Atl. 189.

94. Supreme Lodge K. H. *v.* Metcalf, 15 Ind. App. 135, 43 N. E. 893.

95. Supreme Lodge K. P. W. *v.* Edwards, 15 Ind. App. 524, 41 N. E. 850.

96. Northwestern Benev., etc., Assoc. *v.* Hand, 29 Ill. App. 73; Supreme Lodge K. H. *v.* Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523.

Power to enact rule.— In an action on a policy claimed by defendant to have been forfeited by the suicide of the insured, a special plea alleging that the insured had agreed to be bound by all the laws, rules, and regulations of the order governing the endowment rank thereafter enacted by the supreme lodge, and that the law under which the forfeiture is claimed was thereafter adopted by the board of control of said rank, having full power to enact laws for its government, is bad on demurrer. Supreme Lodge K. P. W. *v.* McLennan, 171 Ill. 417, 49 N. E. 530 [*affirming* 69 Ill. App. 599].

97. Supreme Commandery K. G. R. *v.* Ainsworth, 71 Ala. 436, 46 Am. Rep. 332. But see Supreme Court of Honor *v.* Barker, 96 Ill. App. 490, holding that where a beneficiary certificate stipulates against payment of benefits to members committing suicide, unless it is done in delirium resulting from illness or while the member is under treatment for insanity, a special plea founded on such provision, to state a defense to an action on the certificate, must show that the suicide was such as by the contract of insurance relieved the company from the payment of benefits.

98. See PLEADING.

In Texas, under Rev. St. (1895) art. 1193, declaring it unnecessary for plaintiff to deny any special matter of defense, but that it shall be regarded as denied unless expressly admitted, the allegation of the answer in an action for the death benefit that the member committed suicide, whereby the benefit certificate became void, is put in issue by the statute, notwithstanding a mere implied admission of the reply. Brown *v.* United Moderns, (Civ. App. 1905) 87 S. W. 357.

99. Carter *v.* Carter, 35 Ind. App. 73, 72 N. E. 187, holding that where, in an action to recover the proceeds of a benefit certificate, defendant set up a claim under a certificate subsequently issued, allegations of an antenuptial contract between plaintiff and insured, in which he agreed to transfer the insurance in question to her in consideration of marriage, etc., was proper matter in reply.

1. Suppiger *v.* Covenant Mut. Ben. Assoc., 20 Ill. App. 595; Fuller *v.* Baltimore, etc., Relief Assoc., 67 Md. 433, 10 Atl. 237.

2. Sweetser *v.* Odd Fellows' Mut. Aid Assoc., 117 Ind. 97, 19 N. E. 722; Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262; Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77

reply to a plea that the certificate was issued by mistake for a sum larger than dues were collected for, that the beneficiary had no knowledge of the laws of the society, and that after the death, in expectation of receiving the face value of the policy, she contracted debts and expended money she would not have done had she known of the alleged mistake, sets up no defense.[3]

d. Amendments. The complaint,[4] answer,[5] or other pleadings may be amended, by leave of court, subject to the rules relating to amendments of pleadings in civil actions in general.[6]

e. Issues, Proof, and Variance[7] — (i) *IN GENERAL.* The proof must be within the issues.[8] It must correspond with the allegations of the pleadings,[9] but an immaterial variance is not fatal.[10] In assumpsit, a contract under seal of the company is inadmissible because of the form of the action.[11] Where the defense is false representations, the fact of their falsity when the policy was delivered some time after the application was made is immaterial if the answer alleges that they were false when made.[12] It has been held that a notice under the plea of

S. W. 862; Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071.

3. Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833.

4. Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659.

5. Runge *v.* Esau, 6 Misc. (N. Y.) 147, 26 N. Y. Suppl. 33; Nova Scotia Mut. Relief Soc. *v.* Webster, 17 Can. Sup. Ct. 718; Oates *v.* Supreme Ct. I. O. F., 4 Ont. 535.

6. See PLEADING.

7. See, generally, PLEADING.

8. Croak *v.* High Court I. O. F., 162 Ill. 298, 44 N. E. 525, holding that evidence that at the time of a member's expulsion he was sick with a fatal disease was inadmissible in an action on the benefit certificate, where the case was not tried on the theory that the order expelled him because he was sick, and for the purpose of avoiding the payment of his certificate.

9. *Kansas.*— Taylor *v.* Modern Woodmen of America, 72 Kan. 443, 83 Pac. 1099, 5 L. R. A. N. S. 283, holding that where the answer sets up a ruling of the clerk of the local camp refusing an assessment on certain grounds, and that no appeal had been taken under the by-laws, and the evidence shows such refusal on the ground that the beneficiary had been suspended for a different reason, there is a fatal variance.

Maryland.— Wells, etc., Council No. 14 J. O. U. A. M. *v.* Littleton, 100 Md. 416, 60 Atl. 22.

New York.— Victors *v.* National Provident Union, 113 N. Y. App. Div. 715, 99 N. Y. Suppl. 299 (holding that where plaintiff alleged full performance on the part of insured, evidence to establish a waiver of full performance was inadmissible); Demings *v.* Supreme Lodge K. P. W., 20 N. Y. App. Div. 622, 48 N. Y. Suppl. 649 (holding that where the defense was an alleged forfeiture for failure to pay a certain assessment, evidence of non-payment of a subsequent assessment was inadmissible).

North Carolina.— Doggett *v.* United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26, holding that where the answer denied that the certificate was in force because of failure to pay an assessment, evidence that the certificate was not in force on the ground that the local lodge had been dissolved for non-payment of assessment is inadmissible.

Texas.— Supreme Council A. L. H. *v.* Anderson, 61 Tex. 296 (holding that where the petition described the certificate as one by which defendant bound itself to pay plaintiff a specified sum and the instrument offered in evidence certified an obligation to pay a sum not exceeding the sum alleged in the complaint subject to certain conditions named therein, the variance was fatal); Supreme Lodge K. H. *v.* Rampy, (Civ. App. 1898) 45 S. W. 422 (holding that there is no variance between an allegation that on a certain day the insured became a member of a named lodge of the insurer and that he was in good standing in the order when he died, and proof that insured was a member of another lodge when he died).

An allegation in a complaint that a beneficiary's certificate of membership was issued by the "supreme lodge, Knights of Pythias," is sufficiently supported by a certificate showing that it was issued by the "board of control of the endowment rank, Knights of Pythias." Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877.

10. Hyatt *v.* Loyal Protective Assoc., 106 Mo. App. 610, 81 S. W. 470 (holding that where the certificate offered in evidence was dated April 21, and the one described in the petition April 8, but the application of the member was dated April 8 and the application was made a part of the certificate, the variance did not warrant the exclusion of the certificate); Heffernan *v.* Supreme Council A. L. H., 40 Mo. App. 605 (holding that where the petition alleged an unconditional contract to pay the insurance, but the proof showed a contract to pay on the performance of certain conditions precedent, the variance was immaterial, where defendant had fully set out such conditions in its answer).

11. Pennsylvania Mut. Aid Soc. *v.* Corley, 2 Pennyp. (Pa.) 398.

12. Modern Woodmen of America *v.* Sutton, 38 Ill. App. 327.

the general issue that defendant will insist upon false representations and concealment is sufficient to let in evidence of a particular disease with which the insured was suffering.[13]

(II) *Matters to Be Proved.* Where the answer alleges that defendant is a fraternal beneficiary society, but there is no proof thereof, and the certificate sued on indicates that the organization is an insurance concern, it will be considered a life insurance company.[14] Where the only issue is whether the membership lapsed during the lifetime of the member, the beneficiary need not prove the demand on the society to make an assessment or that an assessment has been made.[15] So where plaintiff admitted all substantial facts necessary to authorize an assessment, the society need not prove that such assessment was authorized or levied in the manner prescribed by the rules of the order.[16] Likewise, an admission by the association that the certificate was in fact issued, and payment of the amount thereof into court by it, operates as a waiver not only on the part of the association but also as to contestants joined as defendants.[17] Where the insured admits that its mortuary fund contains more than the amount of the certificate, plaintiff is not required to prove that the fund contains that amount applicable to the payment of the certificate.[18] A statement in agreed facts that a call for an assessment was made in accordance with the provisions of the policy does not prevent the right to contest the legality of the assessment where the agreed facts nowhere state that the amount named in the call was justly due.[19]

(III) *Defenses Not Specially Pleaded.* Ordinarily new matter constituting a defense must be specially pleaded.[20] Non-payment of dues or assessments;[21] misrepresentation of material facts in the application;[22] the materiality of the misrepresentations;[23] the claim that the certificate is void as a wagering contract;[24] failure to sue within the time specified in the contract;[25] failure to furnish proof of death;[26] a by-law passed after issuance of the certificate, chang-

13. Briesenmeister *v.* Supreme Lodge K. P. W., 81 Mich. 525, 45 N. W. 977.

14. Brown *v.* Modern Woodmen of America, 115 Iowa 450, 88 N. W. 965.

15. Southwestern Mut. Ben. Assoc. *v.* Swenson, 49 Kan. 449, 30 Pac. 405.

16. Montour *v.* Grand Lodge A. O. U. W., 38 Oreg. 47, 62 Pac. 524.

17. Hoeft *v.* Supreme Lodge K. H., 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.

18. Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512].

19. Langdon *v.* Massachusetts Ben. Assoc., 166 Mass. 316, 44 N. E. 226.

20. See Pleading.

21. Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469; Chadwick *v.* Order of Triple Alliance, 56 Mo. App. 463; Van Alstyne *v.* Franklin Council No. 41 J. O. U. A. M., 69 N. J. L. 15, 54 Atl. 564 [*affirmed* in 69 N. J. L. 672, 58 Atl. 818]; Supreme Assembly Royal Soc. G. F. *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061; Kinney *v.* Brotherhood of American Yeomen, (N. D. 1905) 106 N. W. 44. *Contra*, see Bettenhasser *v.* Templars of Liberty of America, 58 N. Y. App. Div. 61, 68 N. Y. Suppl. 505, holding that where plaintiff, seeking to recover on an insurance policy, alleged full performance by the insured of all the terms and conditions of his certificate of membership, defendant, under a general denial, was entitled to prove non-payment of assessments by the member, although such fact was not specially pleaded.

22. Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512], holding that a plea of misrepresentation as to other matters is insufficient.

Under circuit court rule 104, requiring that if the insurer rely in whole or in part on plaintiff's failure to perform or make good any promise, representation, or warranty, not contained in the policy, but in another writing in the insurer's hands, the latter's notice under the general issue shall declare the same, and indicate the breach relied on, no question, after the proofs are closed, can be raised that the applicant did not state his true residence. Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365.

23. Zepp *v.* Grand Lodge A. O. U. W., 69 Mo. App. 487.

24. Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475.

25. Gaston *v.* Modern Woodmen of America, 116 Ill. App. 291.

26. Woodmen of World *v.* Grace, (Miss. 1900) 28 So. 832, holding that a plea of the general issue, with notice of proof of a breach of warranty, is not sufficient to allow a benevolent association to take advantage of the fact that the declaration does not allege proof of the death of a member, and delivery

ing the contract;[27] the suicide of the insured;[28] or the defense of *ultra vires*[29] cannot *inter alia* be relied upon unless specially pleaded by defendant. But it has been held that where the question of membership is in issue, evidence showing that deceased had given notice of withdrawal is admissible, although his withdrawal is not pleaded.[30] Where no issue is raised by the pleadings as to the submission of a claim to arbitrators, defendant cannot rely thereon as a defense.[31] Where the answer sets up a forfeiture for non-payment of assessments, a waiver cannot be urged if not pleaded.[32] Where the certificate is to be void for the non-performance of a certain condition, its performance need not be proved unless put in issue by special plea.[33] The execution of the certificate must be held confessed unless denied by a verified answer, and plaintiff is not required to offer such certificate in evidence, nor the application therefor, even though made a part of the contract.[34]

2. MISCELLANEOUS ACTIONS. Decisions as to pleadings arising in actions other than ones to recover benefits are set forth in the note below.[35]

of such proof to the association, before an action was brought to recover on a certificate of membership.

27. Supreme Council A. L. H. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. 901.

28. Latimer *v.* Sovereign Camp W. W., 62 S. C. 145, 40 S. E. 155.

29. Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

30. Cramer *v.* Masonic Life Assoc., 9 N. Y. Suppl. 356.

31. Knapp *v.* Brotherhood of American Yeomen, 128 Iowa 566, 105 N. W. 63.

32. Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799; Supreme Tent K. M. *v.* Hilliker, 29 Can. Sup. Ct. 397; Allen *v.* Merchants' Mar. Ins. Co., 15 Can. Sup. Ct. 488.

33. Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 439].

For instance, where the complaint alleges generally the performance of all the conditions of the certificate, a general denial does not raise the issue of the performance of the conditions precedent that insured should be in sound health when the certificate was delivered. Taylor *v.* Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867.

34. Thomas *v.* Guaranty Fund Life Assoc., 73 Mo. App. 371.

35. See cases cited *infra*, this note.

Suits to compel reinstatement.—A bill in equity to compel the reinstatement of plaintiff to membership in an association, and to recover sick benefits, is multifarious. Mesisco *v.* Giuliano, 190 Mass. 352, 76 N. E. 907. In a suit in equity for reinstatement, a bill which alleges that plaintiff has complied with the constitution and by-laws, and has never done anything to justify his expulsion, is good against a demurrer without further alleging that the expulsion was illegal. Manning *v.* Klein, 1 Pa. Dist. 278, 11 Pa. Co. Ct. 525. Sufficiency of petition for mandamus to prevent officers from expelling a subordinate lodge see Women's Catholic Order of Foresters *v.* Condon, 84 Ill. App. 564.

Forfeiture of charter of local lodge.—Where the constitution and by-laws provided that no charter of any local board should be forfeited until such board should have been notified, and afforded a hearing, the society cannot successfully defend an action by a member of a local branch on the ground that its charter had been forfeited, unless its pleadings allege that such forfeiture was entered after due notice and hearing. Supreme Sitting O. I. H. *v.* Moore, 47 Ill. App. 251.

Action for rescission of contract.—In an action by a member to enforce a rescission of his contract and recover payments made thereunder because of a renunciation of the contract by the association, an affidavit of defense stating generally that by reason of plaintiff's delay in electing to rescind the association has altered its position to its prejudice, without setting out in detail any facts to support such statement, and where the association has always denied, and still denies, plaintiff's right to rescind, is insufficient to state a defense. Daix *v.* Supreme Council A. L. H., 127 Fed. 374 [*affirmed* in 130 Fed. 101, 64 C. C. A. 435].

Allegation of corporate existence.—Plaintiff's allegation that it is a branch of the Grand Lodge of the Independent Order of Odd Fellows of Kentucky, and that, by virtue of the charter granted to the Grand Lodge, it is a corporation authorized to sue and be sued, is not a sufficient allegation of corporate existence to enable it to maintain an action to recover a fund alleged to have been assigned to it by the Grand Lodge, there being no allegation that the Grand Lodge is a corporation empowered by law to hold property, sue and be sued, or contract and be contracted with. Nichols *v.* Bardwell Lodge No. 179 I. O. O. F., 48 S. W. 1091, 20 Ky. L. Rep. 1236, 105 Ky. 168, 48 S. W. 426.

Actions by members to recover property of society.—Where several members of a voluntary beneficial association sue for themselves and the other members to recover property of the association, the complaint need not allege the authority of plaintiffs to sue.

G. Evidence — 1. Presumptions and Burden of Proof[36] — a. In General. The rules relating to presumptions and burden of proof considered herein, except those stated in the note below,[37] have arisen in connection with actions to recover benefits. Where it is the duty of the subordinate lodge to report a death to the supreme lodge, it will be presumed that the requisite proofs of death were furnished, especially where the refusal to pay is on the ground of fraud in the application.[38] In the absence of any stipulation for a communication by the society to a member through the mail, the society has the burden of showing that it was received by the member.[39]

Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535.

Actions against officers for wrongful acts. —A bill in equity by the receivers of a beneficial society against the officers and agents who have had the management of it, which charges them with wrongful and fraudulent appropriation of the property of the association to their own use, is sufficient as against a demurrer generally for want of equity. Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566.

Conclusions of law.—Alleging that the increase of annual dues is in violation of contract is insufficient because a mere conclusion of law. Sowles *v.* Mutual Reserve Fund Life Assoc., 71 Vt. 466, 45 Atl. 1045.

Objects of association.— Complaint held insufficient for failure to clearly state the objects of the association and also insufficient to render the articles of association admissible see Grand Chapter O. E. S. *v.* United Grand Chapter E. S., 93 Mo. App. 560, 67 S. W. 732.

36. See, generally, Evidence.

Cause of disability.— Where a health insurance policy provided that the insurer should not be liable for disability resulting from bronchitis, and it was shown that a disabled member suffered from senile bronchitis and a catarrhal condition of the stomach and duodenum, the insurer was not relieved from liability, without proof that the bronchitis and not the affection of the digestive tract caused the disability. Courtney *v.* Fidelity Mut. Aid Assoc., 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098.

37. See cases cited *infra*, this note.

Number of members.—A defense that the society does not in fact include seven members must be affirmatively established. Boyd *v.* Gernant, 82 N. Y. App. Div. 456, 81 N. Y. Suppl. 835.

Loans.— Where a company was not authorized to lend out anything on mortgage of real estate except its mortuary fund, and it seems to have had no other means except the fees for current expenses, the court must assume that the note and mortgage on real estate on which its assignee sues were given for money which was loaned from that fund. Allen *v.* Thompson, 108 Ky. 476, 56 S. W. 823, 22 Ky. L. Rep. 164.

Purposes for which foreign corporation created.— In the absence of proof to the contrary, it will be presumed that a foreign beneficial association doing business in Texas was created for the same purpose as that described by the statute defining a fraternal beneficial association, and authorizing similar associations organized under the laws of other states to do business in the state on complying with certain conditions. Whaley *v.* Bankers' Union of World, (Tex. Civ. App. 1905) 88 S. W. 259.

Assessment on local lodge.— In an action by a national council to recover from a state council of the order money collected by a *per capita* tax on its members, the burden is on the national council to establish that the tax was assessed and collected for its benefit. National Council J. O. U. A. M. *v.* State Council J. O. U. A. M., 66 N. J. Eq. 429, 57 Atl. 1132 [*affirming* 64 N. J. Eq. 470, 53 Atl. 1082].

Election of officers.— Where directors are elected by proxy, it will be presumed, in the absence of evidence that the persons executing the proxies were members of the society or that the proxies were properly executed, that the proxies were regular and proper. People *v.* Crossley, 69 Ill. 195. See, however, Cowan *v.* New York Caledonian Club, 46 N. Y. App. Div. 288, 61 N. Y. Suppl. 714, where the by-laws provided that they should not be amended unless three-fourths of the members present at the meeting when the proposed amendment was voted on voted in favor of it, and the records of the association showed that an amendment was voted on at a regular meeting, after due notice, and that forty-six voted for, and four against, the amendment, which was immediately declared adopted by the presiding officer, and the society thereafter acted on the amendment, and it was held that, in the absence of evidence to the contrary, it would be assumed that all the members present participated in the vote, and that it was adopted by the required majority.

Time when judicial proceedings commenced. —Where a beneficiary brought suit by attachment against the association on a matured benefit certificate on the same day on which a suit was brought in another state for the dissolution of the order, but there was no evidence as to which suit was begun first on that day, the dissolution proceedings will not deprive the member of his rights acquired by the attachment. Cohen *v.* Supreme Sitting O. I. H., 105 Mich. 283, 63 N. W. 304.

38. Lorscher *v.* Supreme Lodge K. H., 72 Mich. 316, 40 N. W. 545, 2 L. R. A. 206.

39. Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475.

b. Right to Sue. The burden is generally on plaintiff to show his title and interest authorizing him to sue. For instance an assignee of a certificate who sues thereon has the burden of showing a *prima facie* valid transfer of the benefit accruing from the certificate to himself in pursuance of the rules of the order.[40] The presumption is that a member has the power to change the beneficiary in a certificate of membership,[41] and one claiming the benefit through the beneficiary has the burden of proving that the latter survived the insured.[42] Where the society claims that the named beneficiary is not a legal one, it has the burden of proving such claim;[43] but where an action is brought by one other than the beneficiary, the burden is on him to show that the beneficiary named was not within any of the classes named in the rules of the order, so as to be entitled to the benefits.[44] Where a member designates certain persons as his beneficiaries, the approval thereof by the society will be presumed.[45]

c. Existence and Validity of Contract. While the burden is upon plaintiff to establish a by-law, rule, or custom rendering the society liable for benefits,[46] and also to prove his allegation of a change in the laws of the society after the issuance of the certificate,[47] yet where the society relies on a by-law it must prove that it was legally adopted,[48] and if it relies on an amendment of the laws it has the burden of showing that the amendment was according to the rules of the order.[49] So where the society relies upon a law of the order alleged to have been enacted after the issuance of the certificate, the burden of proving its enactment is upon the society.[50] And where the society cannot change its rules after its contract with a member, to his detriment, except by consent, the burden of showing such consent is on the society.[51] Under an allegation that an order issued its certificate in a specified rank, it will be presumed that a certificate purporting to be issued by that rank was in fact issued by the main order.[52]

d. Forfeiture and Compliance With Conditions Precedent — (i) *IN GENERAL.* No presumption will be indulged in favor of a forfeiture, and the burden of proof,

40. Henry *v.* Grand Lodge I. O. M. A., 15 Ill. App. 151.

41. Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

Presumption of validity of change.— From proof of deceased's signature to a letter written by his second wife, directing that she and their child be substituted as beneficiaries in his benefit certificate, arises a presumption that the letter was voluntarily and consciously signed, with knowledge of its contents, which is not affected by the fact that no witness was present. Walts *v.* Grand Lodge I. W., 118 Iowa 216, 91 N. W. 1062.

42. Supreme Council R. A. *v.* Kacer, 96 Mo. App. 93, 69 S. W. 671; Males *v.* Sovereign Camp W. W., 30 Tex. Civ. App. 184, 70 S. W. 108.

43. Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595.

44. Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429. See also Kittredge *v.* Boston Firemen's Mut. Relief Assoc., 191 Mass. 23, 77 N. E. 648.

45. Mee *v.* Fay, 190 Mass. 40, 76 N. E. 229; Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 60 N. W. 1091. See also Shryock *v.* Shryock, 50 Nebr. 886, 70 N. W. 515.

46. Mullally *v.* Irish-American Benev. Soc., (Cal. 1885) 6 Pac. 78.

47. United Moderns *v.* Rathbun, 104 Va. 736, 52 S. E. 552.

48. Alters *v.* Journeymen Bricklayers Protective Assoc., 19 Pa. Super. Ct. 272.

49. United Brotherhood C. & J. A. *v.* Fortin, 107 Ill. App. 306.

50. Herman *v.* Supreme Lodge K. P., 66 N. J. L. 77, 48 Atl. 1000.

51. Johnson *v.* Grand Fountain U. O. T. R., 135 N. C. 385, 47 S. E. 463.

Validity of call for meeting.— Where the by-laws in force when a member obtained his certificate are afterward amended at a meeting which he did not attend, such amendments are not binding on him unless it is affirmatively shown that the meeting was called in the manner provided by the constitution of the association. Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538 [*affirming* 37 Ill. App. 170].

Presumptions.— Where a member sent his proxy to a meeting of the association held in another state, it will be presumed, in the absence of evidence to the contrary, that such proxy was intended for the ordinary purposes of meetings; and hence a resolution passed thereat depriving the member of vested rights under his insurance contract will not be binding on him by reason of his proxy. Hill *v.* Mutual Reserve Fund Life Assoc., 126 N. C. 977, 36 S. E. 1023, 128 N. C. 463, 39 S. E. 56.

52. Supreme Lodge K. P. W. *v.* Edwards, 15 Ind. App. 524, 41 N. E. 850.

where the society seeks to escape liability on that ground, is upon the society.[53] An allegation in the complaint that all the conditions of the contract were fulfilled by the assured, even when denied by the answer, does not impose on plaintiff the burden of proving that each particular condition was fulfilled, but when the breach of any particular condition is relied on as a defense, the burden of proving it is upon the society.[54] If the membership has ceased, the burden is upon the society to prove it as a defense.[55] So if it is claimed that the member was not in good standing at the time the liability, if any, accrued, the burden is upon the society to prove such fact.[56] So the burden is upon the society to show by its records that its action in expelling a member was in accordance with the by-laws of the order.[57] Where the certificate provided that the insured should comply with the rules of the order, the burden of showing that he violated them is upon the society.[58] Where the defense is that deceased had not been a member for the prescribed length of time, the burden is on the society to prove it.[59] Where it is shown that a member was expelled by a unanimous vote of a certain number of votes, it will be presumed that it was carried by a unanimous vote of all the members present.[60]

(II) *NON-PAYMENT OF DUES AND ASSESSMENTS.* Ordinarily where the society pleads the failure to pay dues and assessments, the burden is on it to prove such failure,[61] and the fact of an assessment.[62] So the burden is upon the society to prove that the assessment was authorized by and made in accordance with the laws of the society,[63] and that the member had notice of the assessment in the

53. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Thompson, 91 Ill. App. 580; People *v.* Detroit Fire Dept., 31 Mich. 458; Phillips *v.* U. S. Grand Lodge I. O. S. B., 37 Misc. (N. Y.) 869, 76 N. Y. Suppl. 1000; Odd Fellows' Protective Assoc. *v.* Hook, 9 Ohio Dec. (Reprint) 89, 10 Cinc. L. Bul. 391.

54. Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512]. See also Osterman *v.* District Grand Lodge No. 4 I. O. B. B., (Cal. 1896) 43 Pac. 412.

55. Cornfield *v.* Order Brith Abraham, 64 Minn. 261, 66 N. W. 970; Langnecker *v.* Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185.

56. *Illinois.*— United Brotherhood C. & J. A. *v.* Fortin, 107 Ill. App. 306; Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71; High Court I. O. F. *v.* Edelstein, 70 Ill. App. 95.

Indiana.— Supreme Lodge K. H. W. *v.* Johnson, 78 Ind. 110.

Iowa.— Sleight *v.* Supreme Council M. T., 133 Iowa 379, 107 N. W. 183; Lillie *v.* Brotherhood of Railway Trainmen, 114 Iowa 252, 86 N. W. 279.

Minnesota.— Monahan *v.* Supreme Lodge O. C. K., 88 Minn. 224, 92 N. W. 972.

Missouri.— Mulroy *v.* Supreme Lodge K. H., 28 Mo. App. 463. *Contra*, Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

New York.— Demings *v.* Supreme Lodge K. P. W., 20 N. Y. App. Div. 622, 48 N. Y. Suppl. 649; Meagher *v.* Life Union, 65 Hun 354, 20 N. Y. Suppl. 247.

See 6 Cent. Dig. tit. "Beneficial Associations," § 54; 28 Cent. Dig. tit. "Insurance," §§ 1909–2001.

Presumption of continuance.— The certificate issued to a member of a benefit society is evidence of his good standing at the time of its issuance, and such good standing is presumed to continue until the contrary is shown. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439].

57. Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71.

58. Supreme Lodge B. S. K. & L. *v.* Matejowsky, 190 Ill. 142, 60 N. E. 101; Supreme Tent K. M. W. *v.* Stensland, 105 Ill. App. 267.

59. Weiss *v.* Tennant, 2 Misc. (N. Y.) 213, 21 N. Y. Suppl. 252.

60. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597.

61. *Illinois.*— Supreme Council C. K. & L. A. *v.* O'Neill, 108 Ill. App. 47; Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74.

Indiana.— Sovereign Camp W. W. *v.* Cox, (App. 1906) 76 N. E. 888.

Massachusetts.— Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

Michigan.— Petherick *v.* General Assembly O. A., 114 Mich. 420, 72 N. W. 262.

Minnesota.— Scheufler *v.* Grand Lodge A. O. U. W., 45 Minn. 256, 47 N. W. 799.

New Jersey.— Van Etten *v.* Grand Lodge A. O. U. W., 72 N. J. L. 61, 60 Atl. 210.

New York.— Elmer *v.* Mutual Ben. Life Assoc., 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512].

Pennsylvania.— Crumpton *v.* Pittsburg Council No. 117 J. O. U. A. M., 1 Pa. Super. Ct. 613, 38 Wkly. Notes Cas. 335.

See 28 Cent. Dig. tit. "Insurance," § 2001.

62. Earney *v.* Modern Woodmen of America, 79 Mo. App. 385.

63. Supreme Council A. L. H. *v.* Haas, 116 Ill. App. 587; Chicago Guaranty Fund Life

manner prescribed by the rules of the society.[64] The delivery of a policy raises a presumption of payment of the first dues on which its existence depends.[65] A refusal to pay assessments raises a presumption that the member intended to abandon his membership in the association.[66] Where a member claims that he is excused from paying assessments because the company is engaged in business which is *ultra vires*, the burden is on him to further show that his obligations have thereby been changed to his disadvantage.[67]

(III) *FRAUD OR MISREPRESENTATIONS OF MEMBERS.* Where the society alleges misrepresentations on the part of a member, the burden of proving such misrep-

Soc. *v.* Wilson, 91 Ill. App. 667; Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309; Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74; Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71; Shea *v.* Massachusetts Ben. Assoc., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159. But see Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51.

There is no presumption that the officers of the society have acted in a regular and valid manner in making an assessment. Coyle *v.* Kentucky Grangers' Mut. Ben. Soc., 2 S. W. 676, 8 Ky. L. Rep. 604. See also Order of Chosen Friends *v.* Austerlitz, 75 Ill. App. 74, holding that the fact that an assessment was made by the proper officer of the society is not *prima facie* evidence of the validity of the assessment.

Facts raising presumption of necessity and validity.— Where the secretary of the governing body is empowered by its laws to increase the number of monthly assessments whenever the condition of the general treasury demands more revenue in anticipation of death claims, where deaths have actually occurred, a notice by the secretary, requiring the payment of extra assessments, is presumptive evidence that such assessments are necessary to meet death claims. Bridges *v.* National Union, 73 Minn. 486, 76 N. W. 270, 409, 77 N. W. 411. The record of an assessment reciting that the resolution ordering the assessment "was unanimously adopted by the directors as a body, and by the executive committee," is *prima facie* evidence against the members. Anderson *v.* Mutual Reserve Fund Life Assoc., 171 Ill. 40, 49 N. E. 205 [*affirming* 71 Ill. App. 269]. Where the rules required the supreme secretary, when the benefit fund was insufficient, to notify the subordinate secretaries to collect a fixed assessment, the notice from the supreme secretary was presumptive proof that the assessment was necessary, since acts done by a corporation which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. Demings *v.* Supreme Lodge K. P. W., 131 N. Y. 522, 30 N. E. 572 [*reversing* 60 Hun 350, 14 N. Y. Suppl. 834].

64. *Illinois.*— Farmers' Federation *v.* Croney, 106 Ill. App. 423.

Kentucky.— Grand Lodge A. O. U. W. *v.* Haynes, 16 Ky. L. Rep. 399.

Missouri.— Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268, holding that the jury may or may not infer notice from the fact of knowledge.

New Jersey.— Supreme Assembly R. S. G. F. *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061.

New York.— Ellis *v.* National Provident Union, 50 N. Y. App. Div. 255, 63 N. Y. Suppl. 1012.

Texas.— McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149, 8 S. W. 516.

See 28 Cent. Dig. tit. "Insurance," § 2001.

Contra.— See Eaton *v.* Supreme Lodge K. H., 8 Fed. Cas. No. 4,259*a*.

Service of notice by mail.— Under by-laws providing that notice shall be given of assessment due before there shall be a forfeiture, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a forfeiture. McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149, 8 S. W. 516. There are cases, however, holding that proof that such notice was mailed is sufficient to show its receipt by a member, in the absence of proof to the contrary. Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371; Bettenhasser *v.* Templars of Liberty of America, 58 N. Y. App. Div. 61, 68 N. Y. Suppl. 505. But see King *v.* Masonic Life Assoc., 87 Hun (N. Y.) 591, 34 N. Y. Suppl. 563. But evidence that the delinquent was absent at the time the notice was mailed to his residence rebuts the presumption of its receipt by him which would ordinarily arise from the mailing of a notice to his place of residence. People *v.* Theatrical Mechanical Assoc., 8 N. Y. Suppl. 675. It is not sufficient to show merely a mailing without showing where it was sent and that it was received. Supreme Lodge K. H. *v.* Dalberg, 37 Ill. App. 145 [*affirmed* in 138 Ill. 508, 28 N. E. 785]. Where the constitution requires notice to be given by mailing to the member's last address as shown by the branch books, a notice mailed to a member at a different address is insufficient. Molloy *v.* Supreme Council Catholic Mut. Ben. Assoc., 93 Iowa 504, 61 N. W. 928.

65. Taylor *v.* Supreme Lodge C. L., 135 Mich. 231, 97 N. W. 680, 106 Am. St. Rep. 392. See also LIFE INSURANCE, 25 Cyc. 928, note 82.

66. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 82 Ill. App. 214.

67. Haydel *v.* Mutual Reserve Fund Life Assoc., 98 Fed. 200.

resentations is upon the society,[68] as is the burden of proving that the representations were fraudulent and made in bad faith.[69] Likewise the burden of proving the representations to be warranties is on the society.[70]

e. Death of Insured — (i) *In General.*[71] The beneficiary has the burden of proof to establish the fact of death.[72] But where a member disappears and the beneficiary tendered payment of assessments against him, the burden of proving his death at the time is on the society.[73] If the society claims that the death was caused by the use of narcotics or intoxicants within a clause avoiding the certificate in the case of death from such causes, the burden of proving such contention is upon the society.[74]

(ii) *Suicide.* Where a society defends on the ground that the insured committed suicide, within an exception in a certificate, the burden is on it to establish such fact,[75] notwithstanding the fact that the proofs of death furnished by plaintiff state the cause of death as suicide,[76] the presumption being against death by

68. *Colorado.*— Supreme Lodge K. H. *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598.

Illinois.— Modern Woodmen of America *v.* Sutton, 38 Ill. App. 327.

Indiana.— National Ben. Assoc. *v.* Grauman, 107 Ind. 288, 7 N. E. 233.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367.

Missouri.— Wolfe *v.* Supreme Lodge K. & L. H., 160 Mo. 675, 61 S. W. 637.

New Jersey.— Johnson *v.* Order of Chosen Friends, 10 N. J. L. J. 346.

New York.— Davis *v.* Supreme Lodge K. H., 35 N. Y. App. Div. 354, 54 N. Y. Suppl. 1023.

Washington.— Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

See 28 Cent. Dig. tit. "Insurance," § 1999.

The presumption is that the representations were true. Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449. But see Royal Neighbors of America *v.* Wallace, 73 Nebr. 409, 102 N. W. 1020, holding that if an applicant has knowledge of facts that furnish sufficient reason to believe that he is afflicted with a fatal disease when he makes his application, his statement in such application that he is in good health and free from disease will be presumed to be fraudulent.

Presumption of guilt from extraneous circumstances.—A member who, on being charged, in the presence of the lodge, by its presiding officer, with misrepresentation as to his age at the time he became a member, makes no attempt to deny the charge, but after using defiant and abusive language toward the lodge and its presiding officer leaves the lodge room, and never thereafter attends any meeting of such order, pays any dues, or communicates with it in any way, will be presumed to confess the truth of the charge. Foxhever *v.* Order of Red Cross, 24 Ohio Cir. Ct. 56.

69. Alden *v.* Supreme Tent K. M. W., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89.

70. Supreme Lodge K. H. *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598.

71. Presumption as to death and survivorship in general see Death, 13 Cyc. 295 *et seq.*

72. Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662.

Contract provisions.—A stipulation in a beneficiary certificate that no time of absence or disappearance on the part of the member without proof of actual death shall entitle his beneficiary to recover is not invalid, as repugnant to law or against public policy, although setting aside the rule of evidence as to presumption of death from absence for seven years. Kelly *v.* Supreme Council Catholic Mut. Ben. Assoc., 46 N. Y. App. Div. 79, 61 N. Y. Suppl. 394.

Presumption of death after disappearance. — Where a married man disappears, and is not heard from for seven years, and when last heard from was in good health, and showed no intention of returning, but assumed to be an unmarried man, there is no presumption of his death within two years of his disappearance, so as to render valid an insurance on his life, which expired two years after his disappearance because of nonpayment of assessments. Seeds *v.* Grand Lodge A. O. U. W., 93 Iowa 175, 61 N. W. 411.

73. Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

74. Woodmen of World *v.* Gilliland, 11 Okla. 384, 67 Pac. 485. See also Life Insurance, 25 Cyc. 930 note 92.

75. *Maryland.*— Royal Arcanum *v.* Brashear, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244.

Nebraska.— Hardinger *v.* Modern Brotherhood of America, 72 Nebr. 860, 101 N. W. 983, 103 N. W. 74.

New York.— Mitterwallner *v.* Supreme Lodge K. & L. G. S., 37 Misc. 860, 76 N. Y. Suppl. 1001.

Oregon.— Cox *v.* Royal Tribe of Joseph, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 752, 60 L. R. A. 620.

South Dakota.—Chambers *v.* Modern Woodmen of America, 18 S. D. 173, 99 N. W. 1107.

United States.— National Union *v.* Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

See 28 Cent. Dig. tit. "Insurance." § 1999.

76. Supreme Tent K. M. W. *v.* Stensland,

suicide.[77] But where death by suicide is shown and plaintiff claims that the insured was insane at the time of the act, the burden of proving insanity is on plaintiff, the presumption being that deceased was sane when he committed suicide.[78]

f. Payment and Amount of Recovery. On an issue of payment in an action on a certificate, the burden is upon the society not only to show that payment was in fact made,[79] but also that it was made to the proper beneficiary.[80] So where the society claims that plaintiff consented that the money due should be applied in paying a sum embezzled by the assured, and that it was so applied, the burden of proving such defense is upon the society.[81] Where a certificate is a promise to pay a certain sum, to be raised by assessments, the burden is on the society to show that the sum could not be so raised.[82] Where the society is required to make an assessment and keep on hand an emergency fund collected from annual dues and also a general reserve fund, the burden is not on plaintiff to show that the society has sufficient funds in its possession to pay his claim.[83] Where a statute provides for a penalty and reasonable attorney's fees, in addition to the amount of the certificate, if the society fails to pay the loss within the time specified therein, but excepts certain mutual relief associations, the burden is on the

206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267]. See also Knights Templar, etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; Supreme Lodge K. H. *v.* Jaggers, 62 N. J. L. 96, 40 Atl. 783 [*affirmed* in 62 N. J. L. 800, 45 Atl. 1092].

77. Tackman *v.* Brotherhood of American Yeomen, 132 Iowa 64, 106 N. W. 350, 8 L. R. A. N. S. 974; American Benev. Assoc. *v.* Stough, 83 S. W. 126, 26 Ky. L. Rep. 1093; Ingersoll *v.* Knights of Golden Rule, 47 Fed. 272.

78. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439]; Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632; Reynolds *v.* Supreme Conclave I. O. H., 24 Pa. Co. Ct. 638. See also LIFE INSURANCE, 25 Cyc. 931.

79. Mitterwallner *v.* Supreme Lodge K. & L. G. S., 37 Misc. (N. Y.) 860, 76 N. Y. Suppl. 1001.

80. Kittredge *v.* Boston Firemen's Mut. Relief Assoc., 191 Mass. 23, 77 N. E. 648.

81. Osterman *v.* District Grand Lodge No. 4 I. O. B. B., (Cal. 1896) 43 Pac. 412.

82. *Arkansas.*— Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

Illinois.— Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538.

Indiana.— People's Mut. Ben. Soc. *v.* McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

Iowa.— Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105; Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508.

Missouri.— Frame *v.* Sovereign Camp W. W., 67 Mo. App. 127.

New York.— See Kehrbaum *v.* Kegal, 17 Misc. 635, 40 N. Y. Suppl. 589; Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428. *Contra*, O'Brien *v.* Home Ben. Soc., 46 Hun 426, holding that where the agreement is to pay the amount realized from one assessment not exceeding a specified sum, the burden of showing what would have been realized upon an assessment is on plaintiff.

Ohio.— See Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

See 28 Cent. Dig. tit. "Insurance," § 2002.

Contra.— Deardorff *v.* Guaranty Mut. Acc. Assoc., 89 Cal. 599, 27 Pac. 158.

Number of members.— In an action against a mutual benefit association on a certificate of membership therein constituting an undertaking to pay, on the death of a member, a sum of money, the amount to be determined by the number of contributing members, the number of membership certificates issued is *prima facie* evidence of the number of members; and, if any of the persons to whom they were issued have ceased to be members by forfeiture, suspension, or otherwise, the burden is on defendant to show that fact. Neskern *v.* Northwestern Endowment Assoc., 30 Minn. 406, 15 N. W. 683.

Presumptions.— Where the certificate obligates the society to levy and collect an assessment on the member's death, it will be presumed, in an action on the certificate, that it had collected the full amount assessed, unless it avers that it made an effort to effect such collection and failed. Supreme Commandery K. G. R. *v.* Barrett, 12 Ky. L. Rep. 94. So where the society agrees to pay a certain per cent of the proceeds of one assessment, and it does not show the amount which such an assessment would realize, the presumption is in favor of the beneficiary that such an assessment would pay the full amount named in the certificate. Southwestern Mut. Ben. Assoc. *v.* Swenson, 49 Kan. 449, 30 Pac. 405.

83. Grindle *v.* York Mut. Aid Assoc., 87 Me. 177, 32 Atl. 868.

society which has rendered itself amenable to the penalty to show every fact necessary to bring it within the exception.[84]

2. Admissibility — a. In General. The rules relating to the admissibility of evidence in general in civil actions apply in actions on policies or certificates or other actions by or against the society.[85] Holdings that the courts should construe

84. Mutual Reserve Fund Life Assoc. *v.* Payne, (Tex. Civ. App. 1895) 32 S. W. 1063. See also Supreme Council A. L. H. *v.* Story, 97 Tex. 264, 78 S. W. 1 [*modifying* (Civ. App. 1903) 75 S. W. 901].

85. See Evidence.

Letters written by officers of the association commenting on the merits of plaintiff's claim, and discussing its validity, are inadmissible in evidence on behalf of defendant. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. 487. A letter containing no promise to pay, such as would constitute a waiver of a legal defense, and being ambiguous in its terms, and amounting only to an acknowledgment that defendant was endeavoring to arrange a settlement, is irrelevant. Emmons *v.* Hope Lodge No. 21 I. O. O. F., 1 Marv. (Del.) 187, 40 Atl. 956.

Mortality tables have no connection with a suit for weekly benefits and are not admissible in evidence. Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

Identity of name.—A corporation whose name is the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction" is sufficiently identified by the name of the "Grand Lodge of the State of Alabama," as given in a charter which it issued for the formation of a subordinate lodge, so as to authorize the admission of such charter in evidence. Burdine *v.* Grand Lodge, 37 Ala. 478.

Proofs of loss.— In an action on a policy, affidavits of other persons than the beneficiary, constituting the proofs of loss, were incompetent as substantive evidence either for or against the beneficiary, although they might have been used in the proper way for purposes of impeachment if any of the affiants had testified inconsistently with their affidavits. American Benev. Assoc. *v.* Stough, 83 S. W. 126, 26 Ky. L. Rep. 1093.

Opinions of insurance actuaries and reports of insurance commissioners of various states are not competent evidence in favor of the society in an action against an association of this state on a beneficiary certificate, to show inability to carry out the contract. Covenant Mut. Life Assoc. *v.* Tuttle, 87 Ill. App. 309.

In mandamus proceedings to compel reinstatement, the relator may give evidence that since his expulsion he has been in a condition which entitled him to the aid of the society, under its constitution and by-laws. Marion Ben. Soc. *v.* Com., 31 Pa. St. 82.

Actions to recover damages for illegal expulsion.— In an action against an association of railroad engineers for wrongfully expelling a member, evidence of the value of an insurance policy, of a traveling card good on railroads, and of sick benefits incident to membership in the association, was admissible. But evidence as to the amount of plaintiff's earnings while employed as an engineer was not relevant to the issue of damages, where plaintiff had not been so employed for nearly two years and it was not shown that he contemplated again seeking such employment. Where the issue was whether plaintiff was rightfully expelled for writing a certain letter, or whether he was wrongfully expelled for testifying against a railroad, it was error to exclude evidence that another member who joined with plaintiff in writing the letter promised not to testify against the railroad and was accordingly not expelled, and that another member was expelled upon refusing to promise not to testify against the railroad. Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834. Neither the minutes of the proceedings of the society nor oral testimony of the statements of the secretary to the society at the time of the expulsion is admissible in favor of the society. Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425.

Evidence as to accident or disability.— In an action on an accident policy, the evidence of the accident should not be limited to facts stated in the proofs furnished the association. Noyes *v.* Commercial Travellers' Eastern Acc. Assoc., 190 Mass. 171, 76 N. E. 665. Where the laws of the association required the examination of a disabled member applying for relief by a physician appointed by the order, and that the physician report as to the character and permanency of the disability, such report is not competent evidence against the applicant in a suit to recover the benefits after the association has rejected his claim. McMahon *v.* Supreme Council O. C. F., 54 Mo. App. 468. Where a member of a brotherhood, entitled to benefits for total incapacity for duty in any department of the train or yard service, sued to recover such benefits after his discharge from service for impaired eyesight, the rules of such railroad as to physical examinations, which were the rules applied to him, and evidence that many other railroads required such examination, were admissible to make out *a prima facie* case of disability. So evidence showing that plaintiff's eyesight was so impaired that he could not see signals at a reasonable distance, or distinguish colors, is admissible. Lillie *v.* Brotherhood of Railway Trainmen, 114 Iowa 252, 86 N. W. 279.

Amount payable.— Where the certificate provided that in case of accident the member should receive such sum as was authorized by the conditions of the rate-book, plaintiff must show the non-existence of a rate-

the rules and regulations of mutual benefit associations liberally to effect the benevolent objects of the organization have been held applicable generally to rulings on questions of evidence in actions upon policies or certificates of membership.[86]

b. Contract. The records of the association are evidence in its favor in respect to the rights of its members.[87] So either party may offer in evidence the constitution and by-laws of the society, to determine the rights of the parties, where they constitute a part of the contract of insurance.[88] An application for membership, where a part of the contract, is admissible,[89] but in some jurisdictions, by statute, it is not admissible unless attached to the policy or by-laws.[90] In some jurisdictions the certificate of membership is not admissible in evidence where not accompanied by the application and by-laws.[91] The printed rules of the society are admissible,[92] but the construction placed thereon by the order is not admissible.[93] Receipts for benefits as a former member are not admissible to show the

book before oral testimony is admissible as to the amount of indemnity agreed to be paid insured when the certificate was issued by the officers of the society. National Benev. Soc. *v.* Oldham, 70 Kan. 79, 78 Pac. 163.

Payment.— Where the certificate provided that its payment would be based on one assessment on the entire membership of the order, the full amount so paid not to exceed the amount of one assessment, evidence of the membership and financial condition of the order was admissible to show that one assessment was sufficient to raise the amount called for by the certificate. Sovereign Camp W. W. *v.* Carrington, (Tex. Civ. App. 1905) 90 S. W. 921.

Notice to member of resolution of grand lodge see Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069.

Admissions of insured as admissible against beneficiary in general see EVIDENCE, 16 Cyc. 1016, 1017.

86. Supreme Lodge K. P. W. *v.* Schmidt, 98 Ind. 374.

87. Van Frank *v.* U. S. Masonic Benev. Assoc., 158 Ill. 560, 41 N. E. 1005 [*affirming* 56 Ill. App. 203].

But a circular not identified as coming from the society, and not proved to have ever been seen or relied on by assured before becoming a member of the society, was inadmissible. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100.

88. Willison *v.* Jewelers', etc., Co., 30 Misc. (N. Y.) 197, 61 N. Y. Suppl. 1125; Syuchar *v.* Workingmen's Co-operative Assoc., 14 Misc. (N. Y.) 10, 35 N. Y. Suppl. 124, holding that in an action on a contract of insurance, on the issue of notice and proof of claim, its constitution is relevant and material, whether there is reference thereto in the contract or not.

Amended constitution.— When, at the time plaintiff joined a benevolent society, its constitution contained provisions for amendments thereto, the constitution, as amended, is admissible in evidence, in an action by plaintiff on a certificate. May *v.* New York Safety Reserve Fund Soc., 13 N. Y. St. 66.

89. Dickinson *v.* Ancient Order United Workmen, 159 Pa. St. 258, 28 Atl. 293. See also Bopple *v.* Supreme Tent K. M. W., 18 N. Y. App. Div. 488, 45 N. Y. Suppl. 1096, holding application admissible, although not referred to in the certificate and made part of the contract.

The application for membership, the benefit certificate to the original beneficiary, proof of its surrender after her death, the benefit certificate of defendant, the payment of assessments by the insured, and the proof of his death, were admissible as evidence relating to the history of the insurance contract and to defendant's right and title thereunder. Morey *v.* Monk, 142 Ala. 175, 38 So. 265.

90. See the statutes of the several states.

Statutory rule not applicable in action on benefit certificate see Dickinson *v.* Ancient Order United Workmen, 159 Pa. St. 258, 28 Atl. 293.

Applicability of statute.—An officer or incorporator of a mutual benefit society, sought to be held personally liable on a death claim, may put in evidence the conditions and statements contained in the application of membership, although the company itself could not avail itself of these conditions and statements because of its failure to attach a copy of the application to the by-laws, as required by Acts 18th Gen. Assembl. c. 211, § 2. Moore *v.* Union Fraternal Acc. Assoc., 103 Iowa 424, 72 N. W. 645.

91. Tackman *v.* Brotherhood of American Yeomen, 132 Iowa 64, 106 N. W. 350, 8 L. R. A. N. S. 974, holding, however, that where the only defense was under a clause in the certificate exempting defendant from liability in case of suicide the rule was not applicable.

92. Myers *v.* Lucas, 16 Ohio Cir. Ct. 545, 8 Ohio Cir. Dec. 431.

93. Davidson *v.* Supreme Lodge K. P., 22 Mo. App. 263 (holding that the opinion of an officer of a benevolent society as to the interpretation to be given its laws is not admissible in the absence of evidence that he was under the laws of the society a judicatory for making such interpretation); Myers *v.* Lucas, 16 Ohio Cir. Ct. 545, 8 Ohio Cir. Dec. 431.

rules and regulations of the association.[94] In order to charge a member with notice of a resolution passed by the grand lodge, evidence that at a meeting of a subordinate lodge at which he was not present a report of the resolution was made is not admissible.[95] On an issue whether an amendment to the constitution applied to a policy issued prior to its adoption, evidence that the members unanimously adopted it, and that the holder of the policy in question voted for it, is admissible.[96] The adoption of amendments to by-laws may be proved by officers, members, etc., who were present and testify that they were adopted at the time and in the manner prescribed therefor.[97] Alleged contemporaneous verbal agreements varying the terms of the contract as contained in the written application and policy are inadmissible.[98]

c. Persons Entitled to Benefits. On an issue as to whether plaintiff is a person entitled to be a beneficiary, or as to the right to the proceeds as between different beneficiaries or other persons, any legal evidence to show or disprove the right of any party to the proceeds is admissible.[99] A by-law is admissible in

94. Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

95. Warnebold *v.* Grand Lodge A. O. U. W., 83 Iowa 23, 48 N. W. 1069.

96. Koeth *v.* Knights Templars', etc., Life Indemnity Co., 37 N. Y. App. Div. 146, 55 N. Y. Suppl. 768.

97. Masonic Mut. Ben. Assoc. *v.* Severson, 71 Conn. 719, 43 Atl. 192.

98. National Mut. Ben. Assoc. *v.* Heckman, 86 Ky. 254, 5 S. W. 565, 9 Ky. L. Rep. 525.

99. See Grand Fountain U. O. T. R. *v.* Wilson, 96 Va. 594, 32 S. E. 48.

Where a latent ambiguity appears in a certificate as to the beneficiary intended, and an attempt is made to identify such beneficiary, the testimony of the person who drew the application for membership is admissible to show the circumstances under which the certificate was made; but testimony as to what the deceased member, after the making of the certificate, said as to his intentions is not. Hogan *v.* Wallace, 63 Ill. App. 385.

Good faith of transfer of certificate.— Where insured, in consideration of money paid, and dues, sold his certificate to plaintiff, the insured being at the time an old man and in poor health, the association should be allowed to prove, in an action on the certificate, the age of the insured at the time of the transfer, such fact tending to show whether the transfer was made in good faith, or whether it was speculative and in the nature of a wager. Supreme Lodge K. H. *v.* Metcalf, 15 Ind. App. 135, 43 N. E. 893.

Statements made by the creditor holding the certificate of a member are admissible to show the nature of his claim thereto. Dillingham *v.* New York Cotton Exch., 49 Fed. 719.

Change of beneficiaries.—A by-law authorizing a substitution of beneficiaries is not evidence of a right to substitute, in the absence of any showing that it was in force at the time of the attempted substitution. Hill *v.* Groesbeck, 29 Colo. 161, 67 Pac. 167. The evidence of a son of the insured that she had told him that she wanted plaintiff, her daughter, to have the insurance money, was properly received as tending to show that defendant, named as beneficiary, had no vested interest in the certificate. Nix *v.* Donovan, 18 N. Y. Suppl. 435. Evidence as to insured's reasons for substituting his sister in place of his wife as beneficiary was admissible to show mental competency, but not to prove a gift. Great Camp K. M. M. *v.* Deem, 143 Mich. 652, 107 N. W. 447. Evidence that one in directing a change in the beneficiaries wrote a letter, instead of filling out blanks thereon as directed, does not tend to show lack of mental capacity. Walts *v.* Grand Lodge I. W., 118 Iowa 216, 91 N. W. 1062. In an action between the appointees of a decedent as beneficiaries, a change as to such beneficiaries being made just prior to decedent's death, evidence as to the poor condition of plaintiff's health prior to his father's death, which was known to him, and the fact of his dependency for support on his labor, is admissible as showing the conditions when the certificate was transferred. And where plaintiff charges that the change was procured by fraud of persons who resided with decedent, evidence of decedent's wife that she had difficulty in seeing her husband, because of the hostility of those with whom he resided, is admissible on the issue of fraud. Shuman *v.* Supreme Lodge K. H., 110 Iowa 480, 81 N. W. 717.

Transfer by beneficiary.— Evidence that a testamentary writing on a certificate, by the beneficiary, disposing of the proceeds, was executed and acknowledged as a will is inadmissible to show title in the legatee named in said indorsement. Grand Fountain U. O. T. R. *v.* Wilson, 96 Va. 594, 32 S. E. 48.

Beneficiary as person within rules of order. — Evidence concerning the family relation and surroundings, the exercise of dominion and control by the insured over the household, the ownership of the house in which families of the insured and the beneficiary resided, is admissible to show that the beneficiary was a member of the family of the insured and that the insured was the head

behalf of the society to show that plaintiff was not one embraced in any of the classes therein mentioned as possible beneficiary.[1] Where the certificate was payable to one in trust for those dependent on the insured and the benefit was paid to the trustee, extrinsic evidence is admissible to show who were intended as beneficiaries.[2] But where a contract of membership provides that the benefit shall be paid to a specified relative, no evidence outside of the written contract is admissible to show that another person was intended.[3] A decree of court distributing the estate of the deceased to plaintiffs is not admissible as against the society to prove that they are his heirs.[4]

d. Membership and Good Standing — (I) *IN GENERAL.* In an action for benefits, evidence of the medical examiner of the society that plaintiff had never been examined by him is admissible as tending to show that plaintiff had not become a member.[5] But declarations of the insured that he regarded his policy canceled and that he had withdrawn from the company have been held immaterial.[6] Statements by the beneficiary have been held admissible to show that the member had abandoned the order.[7] Unsigned affidavits are not admissible.[8] Where the rules provide that upon due trial and conviction of unbecoming conduct a member shall be reprimanded, suspended, or expelled, the loss of good standing can be shown only by proof of some official action by the society, and oral evidence thereof is not admissible.[9] A report concerning the standing of insured when he died, made to the supreme lodge in the discharge of official duties, is admissible in behalf of the beneficiary.[10]

(II) *EXPULSION OR SUSPENSION.* The entry of an order upon the minutes suspending a member for non-payment, being only *prima facie* evidence of its legality, parol evidence is admissible to show that the suspension was by order of an officer alone.[11] An application for reinstatement made by a member is not admissible to prove the fact of his suspension,[12] nor is a statement made by the member that he was suspended for the non-payment of an assessment.[13] So a monthly report of a branch order, showing a list of the suspended members, is not admissible to show such suspension, as the proper way to show it is by the books and records of the branch to which the member belongs.[14] In the absence of any statute or by-law upon the subject, the service on a member of a notice of charges against him may be proved by oral testimony.[15]

(III) *PAYMENT OF DUES OR ASSESSMENTS.* The evidence admissible on the issue as to payment of dues or assessments is largely governed by the rules relating to the admissibility of evidence of payments in general.[15] On an issue as to

thereof. Morey *v.* Monk, 142 Ala. 175, 38 So. 265.

On issue whether beneficiary was dependent on insured for support see Alexander *v.* Parker, 42 Ill. App. 455.

1. Foss *v.* Petterson, (S. D. 1905) 104 N. W. 915.

2. Wolf *v.* Pearce, 45 S. W. 865, 20 Ky. L. Rep. 296.

3. Bolton *v.* Bolton, 73 Me. 299.

4. Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

5. Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

6. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279.

7. Lavin *v.* Grand Lodge A. O. U. W., 104 Mo. App. 1, 78 S. W. 325.

8. Rambousek *v.* Supreme Council M. T., 119 Iowa 263, 93 N. W. 277.

9. High Court I. O. F. *v.* Zak, 136 Ill. 185, 26 N. E. 593 [*affirming* 35 Ill. App. 613, and *distinguishing* Supreme Council R. T. T. *v.* Curd, 111 Ill. 284].

10. Supreme Lodge K. H. *v.* Rampy, (Tex. Civ. App. 1898) 45 S. W. 422, holding also that where a beneficiary introduces a report of insured's death made by certain officers of the order to show insured's standing in the order, the insurer cannot claim that a written statement of the physician who attended insured in his last sickness is admissible as a part of such report.

11. Supreme Lodge K. H. *v.* Wicksер, 72 Tex. 257, 12 S. W. 175.

12. Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

13. Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

14. Supreme Council C. K. & L. A. *v.* O'Neill, 108 Ill. App. 47.

15. Noel *v.* Modern Woodmen of America, 61 Ill. App. 597.

16. See PAYMENT. See also Henry *v.* Imperial Council O. U. F., 52 N. J. Eq. 770,

whether notice of the assessment was given, evidence of the secretary whose duty it was to make and mail notices, as to his methods in preparing and sending them, is admissible, although he has no distinct recollection of sending the particular notice in question.[17] So an affidavit as to the publication and mailing of the paper in which the call for the assessment was published is admissible.[18] But an application of the deceased for reinstatement is not admissible, as an admission by him that he had received notice of the assessment for the non-payment of which he was suspended.[19] Proof of the validity of an assessment can, in the first instance, be made by the introduction of the records of the society or by direct and affirmative testimony.[20] Where the by-laws do not require that an assessment be recorded in the minutes, the fact that it was made may be shown by parol.[21] The admissions of the deceased have been held not admissible as against the beneficiary to show that the policy has lapsed.[22] Evidence, or an offer of proof, that an assessment had in fact been levied which the insured was bound to pay must precede evidence of failure to pay an assessment.[23] Evidence tending to show that the right to declare a forfeiture for non-payment of dues and assessments has been waived by the society is admissible.[24] Proof of the custom and usage of the

29 Atl. 508; United Moderns *v.* Pistole, (Tex. Civ. App. 1905) 86 S. W. 377; Supreme Council A. L. H. *v.* Champe, 127 Fed. 541, 63 C. C. A. 282, holding evidence admissible to excuse failure of deceased to tender amounts in excess of the assessments required under a by-law attempting to arbitrarily reduce the amount payable on the death of a deceased member.

A monthly report of a branch of a society is not competent evidence of a non-payment of assessments, if any were made, as the failure to pay may be shown by the financial officer to whom payment should have been made. Supreme Council C. K. & L. A. *v.* O'Neill, 108 Ill. App. 47.

Statements of a member that he does not intend to pay assessments any longer may be shown in connection with proof of his failure to pay subsequent assessments. Van Frank *v.* U. S. Masonic Benev. Assoc., 158 Ill. 560, 41 N. E. 1005 [*affirming* 56 Ill. App. 203].

Receipts.— See United Moderns *v.* Pistole, (Tex. Civ. App. 1905) 86 S. W. 377. Purported receipts for assessments and dues, not identified, are inadmissible. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100. Receipts which it was claimed were given by the subordinate lodge for the assessments in question, but which clearly showed erasures and alterations in the name of the party to whom they were given, are inadmissible, in the absence of any evidence explaining the alterations. Rambousek *v.* Supreme Council M. T., 119 Iowa 263, 93 N. W. 277. Receipts showing the payment of assessments against plaintiff, who was also a member of the order to which deceased belonged, are immaterial as a whole, although part of them might have been material in rebuttal as tending to explain disputed receipts claimed to have been given to deceased. Rambousek *v.* Supreme Council M. T., *supra*.

Excuse for failure to pay.—A circular stating that a member cannot be suspended, when sick or disabled and not financially able to pay assessments, for failure to pay the same, which was not referred to or made a part of the certificate, which provided that such exemption from forfeiture should apply only to members of at least one year's standing, is inadmissible. Sleight *v.* Supreme Council M. T., 121 Iowa 724, 96 N. W. 1100.

17. National Union *v.* Shipley, 92 Ill. App. 355. See also Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

18. Rambousek *v.* Supreme Council M. T., 119 Iowa 263, 93 N. W. 277.

19. Hansen *v.* Supreme Lodge K. H., 40 Ill. App. 216.

20. Supreme Council A. L. H. *v.* Haas, 116 Ill. App. 587.

21. Supreme Council A. L. H. *v.* Landers, 23 Tex. Civ. App. 625, 57 S. W. 307.

22. Supreme Lodge K. P. *v.* Schmidt, 98 Ind. 374.

23. Kinney *v.* Brotherhood of American Yeomen, (N. D. 1905) 106 N. W. 44.

24. Salvail *v.* Catholic Order of Foresters, 70 N. H. 635, 50 Atl. 100, holding that evidence tending to show that the by-laws under which he was suspended had been habitually disregarded, and that deceased had been assured by defendant's officers, on paying his arrears, that such payment would restore him to membership, is admissible as tending to prove that the by-law had been waived or suspended, so that it was no part of the contract sued on. But see Heffernan *v.* Supreme Council A. L. H., 40 Mo. App. 605 (holding that evidence of a custom of the company to induce suspended members to apply for reinstatement is inadmissible); Dickinson *v.* Grand Lodge A. O. U. W., 159 Pa. St. 258, 28 Atl. 293 (holding that evidence is inadmissible that it was defendant's custom to reinstate members on payment of defaulted assessments, as a matter of course, if no other charges were preferred against them). *Compare* Sweetser *v.* Odd Fellows Mut. Aid. Assoc., 117 Ind. 97, 19 N. E. 722.

The record of a decision of the board of

society, and of decisions by its officers, that payments of arrears, to secure reinstatement, were to be made at a meeting of the society is not admissible either as a part of the contract or to aid in its interpretation.[25]

e. **Fraud and Misrepresentations.** On an issue whether the member misrepresented or concealed his physical condition or other facts as they existed before and at the time of making the application for insurance, any legal evidence bearing on the truth or falsity of the representations is admissible.[26] The condition of

control cannot be excluded on the ground that the decision was *res inter alios acta*, where the decision was a rule established by a competent authority, and was of equal validity with the original enactment which it construed or modified. Supreme Lodge K. P. *v.* Kalinski, 57 Fed. 348, 6 C. C. A. 373 [*affirmed* in 163 U. S. 289, 16 S. Ct. 1047, 41 L. ed. 163].

Admissions of officers of society see Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607.

25. Manson *v.* Grand Lodge A. O. U. W., 30 Minn. 509, 16 N. W. 395.

26. See cases cited *infra*, this note.

Evidence of rejection by another company.—A written application for insurance, with a pretended indorsement of rejection by the medical examiner of the insurance company, is incompetent evidence to prove the rejection, or that deceased had a certain disease, in an action on a policy written by another company. Pudritzky *v.* Supreme Lodge K. H., 76 Mich. 428, 43 N. W. 373.

Age of member.—A baptismal record of the church where the member was baptized is admissible on an issue as to his age. Meehan *v.* Supreme Council Catholic Benev. Legion, 95 N. Y. App. Div. 142, 88 N. Y. Suppl. 821. But it is improper to admit as evidence as to age a certificate of the board of health based upon nothing except the report of the undertaker, which in turn rested upon nothing more than statements to him by members of the family of the deceased. It is also improper to admit an engraved coffin plate, prepared by the undertaker, the inscription upon which was based upon the same source of information. Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999.

Bad faith of member.—On an issue whether insured's answer in his application to the effect that he had never been rejected, which was untrue, was made fraudulently and in bad faith, evidence was admissible to show that at the time he made it the agent knew about a prior rejection, but told insured to make the answer as he did, and that he would take the application with him, and explain the prior rejection to the company. Alden *v.* Supreme Tent K. M., 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89.

Expert evidence.—Where insured stated that he had not consulted or been advised by any physician regarding his health within five years prior to his application for insurance, and a physician whom he had consulted within that time with reference to granulated eyelids testified that such affection was a mere inflammatory condition of the eyelids, etc., evidence of another physician that granulated eyelids was not a condition of health, but a mere local inflammation, was admissible. Brock *v.* United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340.

Evidence of physicians.—It is competent to show by a physician that, when consulted by the insured and his father, he had told the father, who was one of the beneficiaries, that he could not recommend the insured for insurance, and this evidence was competent, although it did not appear that this information was communicated to the insured, or that any of the beneficiaries had any agency in procuring the insurance, or knew that they were to be the beneficiaries. Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79. An unsworn certificate of the doctor who attended the decedent in his last illness to the effect that decedent contracted the disease of which he died before he joined the society is inadmissible as evidence of that fact, even though the certificate was inclosed with or attached to the proofs of death served on the society. Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 35 N. E. 168 [*affirming* 38 Ill. App. 111].

Facts within personal knowledge of witnesses.—Witnesses may state from their personal knowledge that applicant was unable to speak above a whisper, was emaciated, and that her father stated that she had consumption. Home Circle Soc. No. 1 *v.* Shelton, (Tex. Civ. App. 1904) 81 S. W. 84.

Evidence to show member not bound by answers.—Evidence by the beneficiary that he was unable to read, that the agent failed to disclose certain statements in the application as to the applicant's health or the family physician, and that he did not ascertain the statements were in the application until after the applicant's death is admissible. Home Circle Soc. No. 1 *v.* Shelton, (Tex. Civ. App. 1904) 81 S. W. 84.

Application for membership.—The application for membership containing statements made by the member as to his occupation was admissible in evidence, although it was not referred to in the certificate, and made part of the contract. Bopple *v.* Supreme Tent K. M. W., 18 N. Y. App. Div. 488, 45 N. Y. Suppl. 1096.

A waiver of the requirement that the applicant must be in good health may be established by showing that it customarily and knowingly accepted persons not in good health. Home Circle Soc. No. 1 *v.* Shelton, (Tex. Civ. App. 1904) 81 S. W. 84.

Admissions.—Where defendant introduced a physician residing in a town in another state as a witness in its behalf, and such

the health of the insured at the time of making application cannot be shown by general reputation.[27] Declarations or admissions of the member before or after the application as to health or age have been held admissible to show the falsity of his answers in the application and his knowledge thereof,[28] although not where the declarations are too remote.[29] Evidence that insurance in other companies was effected on the life of the insured by or on behalf of the beneficiary is admissible to show that the object was to defraud defendant.[30]

f. Cause of Death. Unauthorized statements in a physician's certificate as to the cause of death are inadmissible where the cause of death is the vital issue.[31] So a report made by a committee of the society upon the cause and circumstances of the death is not admissible against the beneficiary.[32] But a death certificate purporting to show of what disease a particular person died is admissible to show the cause of death where produced from public records kept pursuant to statute.[33] Where the defense was death from intemperance, testimony of persons having an opportunity to observe insured's habits that they had seldom seen him drunk or under the influence of liquor is admissible to show that he was not a habitual drinker.[34] Neither a copy of the verdict, nor the evidence, at a coroner's inquest, is admissible to show the cause of death,[35] except, it seems, where delivered as a

witness testified that he had treated insured in the town in which witness resided some time before the date of the application, evidence by a member of the lodge to which insured belonged that insured had told him a short time previous to his death that he had formerly resided at the place where the physician testified to having treated him was admissible, the possibility that such evidence might prove to be a link in a chain whereby the untruthfulness of statements of insured in his application might be shown being too remote to justify its exclusion. Head Camp P. T. W. W. *v.* Loeher, 17 Colo. App. 247, 68 Pac. 136. Admissions of the officers of the insurance order as to the cause of death may be considered. Ranta *v.* Supreme Tent K. M. W., 97 Minn. 454, 107 N. W. 156.

Evidence to show estoppel to assert falsity of answer.— Where the application showed that the member had answered "no" to the question as to whether he had pleurisy, evidence was admissible that all the medical examiner asked the member at the time of his examination for membership as to disease was whether he had ever been sick, and that the member answered that he had had smallpox, typhoid fever, the "grippe," and a slight attack of pleurisy. Lyons *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247.

Materiality of representations.— Evidence that the order had the reputation of taking anybody, whether in good health or not, is admissible, in connection with evidence that plaintiff and the insured had been led to believe that the condition of the insured's health at the time of application for insurance was immaterial. Home Circle Soc. No. 2 *v.* Shelton, (Tex. Civ. App. 1905) 85 S. W. 320.

Illness after application.— Where plaintiff testifies to the last illness of the deceased, it is proper on cross-examination to inquire as to whether the deceased was ill immediately prior to his last illness, the claim of the society being that he had been ill from the time the application was made until his death. Modern Woodmen of America *v.* Von Wald, 6 Kan. App. 231, 49 Pac. 782.

27. Home Circle Soc. No. 1 *v.* Shelton, (Tex. Civ. App. 1904) 81 S. W. 84.

28. Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882; McGowan *v.* Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603. But see Supreme Lodge K. H. *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598 (holding that statements of insured, prior to his application for the insurance, in regard to his age, made in applications for membership to societies, such statements being immaterial to the application in which they were contained, are inadmissible against the beneficiary to prove the falsity of insured's representations as to his age); Terwilliger *v.* Supreme Council R. A., 49 Hun (N. Y.) 305, 2 N. Y. Suppl. 114 (holding that declarations of the insured before taking out the policy are not admissible to show a false representation in his application as to his physical condition, unless attended by some acts on his part or other circumstances showing such condition); Rawson *v.* Milwaukee Mut. L. Ins. Co., 115 Wis. 641, 92 N. W. 378. *Contra*, Tessmann *v.* Supreme Commandery U. F., 103 Mich. 185, 61 N. W. 261. See also EVIDENCE, 16 Cyc. 1016, 1017.

29. Grossman *v.* Supreme Lodge K. & L. H., 6 N. Y. Suppl. 821.

30. Whitmore *v.* Supreme Lodge K. & L. H., 100 Mo. 36, 13 S. W. 495.

31. Neudeck *v.* Grand Lodge A. O. U. W., 61 Mo. App. 97.

32. National Union *v.* Thomas, 10 App. Cas. (D. C.) 277.

33. National Council K. & L. S. *v.* O'Brien, 112 Ill. App. 40.

34. Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165.

35. Cox *v.* Royal Tribe of Joseph, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 752, 60

part of the proofs of death, so as to constitute an admission of the beneficiary.[36] *A fortiori* a mere document signed by the coroner stating what appeared to him to be the cause of the death is not admissible.[37] Where the defense is that the member committed suicide, any legal evidence is admissible which tends to throw light on the circumstances and causes of the death.[38]

3. WEIGHT AND SUFFICIENCY — a. In General. The weight and sufficiency of evidence in actions by or against the society is governed by the rules relating to the weight and sufficiency of evidence in civil actions in general.[39] Plaintiff

L. R. A. 620. But see Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 649], holding that the verdict of the coroner's jury in the inquest over the remains of assured is admissible, but the testimony of the witnesses at the inquest is inadmissible for any purpose other than contradiction. See also EVIDENCE, 16 Cyc. 1016, 1017; LIFE INSURANCE, 25 Cyc. 943.

36. Supreme Lodge K. H. *v.* Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523; Cox *v.* Royal Tribe of Joseph, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 752, 60 L. R. A. 620.

37. Kinney *v.* Brotherhood of American Yeomen, (N. D. 1905) 106 N. W. 44. See also Royal Arcanum *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244.

38. See cases cited *infra*, this note.

Time when intention arose.—Where defendant alleged that assured intended to commit suicide at the time he made application for membership, evidence to show that the suicidal purpose was due to a condition that arose after the date of the application was competent. Supreme Conclave I. O. H. *v.* Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528.

Evidence to show motive see Rumbold *v.* Supreme Council R. L., 206 Ill. 513, 69 N. E. 590 [*reversing* 103 Ill. App. 596]; National Union *v.* Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

Application as evidence in sur rebuttal see Casey *v.* National Union, 3 App. Cas. (D. C.) 510.

39. See EVIDENCE, 17 Cyc. 753 *et seq.*

Sufficiency of evidence to show particular facts see Walsh *v.* Cosumnes Tribe No. 14 I. O. R. M., 108 Cal. 496, 41 Pac. 418 (waiver of statement of member's case before tribunals of order); Supreme Lodge K. P. *v.* McLennan, 69 Ill. App. 599 (that certificate was contract made by defendant); Supreme Lodge K. P. W. *v.* Sourwine, 15 Ind. App. 489, 44 N. E. 315 (illegal rejection on account of applicant's age); Supreme Council O. C. F. *v.* Bailey, 55 S. W. 888, 21 Ky. L. Rep. 1627 (admission as insurance member as well as social member); United Order of Golden Cross *v.* Merrick, 165 Mass. 421, 43 N. E. 127 (certificate as conditional on understanding that beneficiary should pay the dues); Pokrefky *v.* Detroit Firemen's Fund Assoc., 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057 (waiver of right to object to amendments); Carey *v.* Switchmen's Union of North America, 98 Minn. 28, 107 N. W. 129 (disallowance of claim by order before action); Taylor *v.* Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. N. S. 114 (waiver of right to claim contract void *ab initio*); Mueller *v.* Grand Grove U. A. O. D., 69 Minn. 236, 72 N. W. 48 (service of notice of death); Grand Lodge A. O. U. W. *v.* Bartes, 69 Nebr. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. Rep. 577 (insured as within age limit); National Council J. O. U. A. M. *v.* State Council J. O. U. A. M., 66 N. J. Eq. 429, 57 Atl. 1132 [*affirming* 64 N. J. Eq. 470, 53 Atl. 1082] (collection of money by state council for national council); Allen *v.* Merrimack County Odd Fellows Mut. Relief Assoc., 72 N. H. 525, 57 Atl. 922 (consent to amendment of by-laws); McCloskey *v.* Supreme Council A. L. H., 109 N. Y. App. Div. 309, 96 N. Y. Suppl. 347 (false representations as to scaling certificate); Smith *v.* Supreme Council A. L. H., 94 N. Y. App. Div. 357, 88 N. Y. Suppl. 44 (consent to reduction of amount payable on policy); Sullivan *v.* Industrial Ben. Assoc., 73 Hun (N. Y.) 319, 26 N. Y. Suppl. 186 (whether application rejected by medical examiner); Stambler *v.* Order of Pente, 159 Pa. St. 492, 28 Atl. 301 (holding that the jury may find that by retaining, without objection, an application for sick benefits, accompanied by proofs of disability, the society has waived verification of the physician's certificate); Alters *v.* Journeymen Bricklayers Protective Assoc., 19 Pa. Super. Ct. 272 (adoption of by-law); Supreme Council C. K. A. *v.* Morrison, 16 R. I. 468, 17 Atl. 57 (holding that a gift of a mutual benefit certificate by husband to wife, she being the beneficiary named therein, is not sufficiently shown by the husband's declarations that he had given the insurance to her, and by her possession of it, he having afterward obtained it, and procured a change in the beneficiary); Benson *v.* Grand Lodge B. L. F., (Tenn. Ch. App. 1899) 54 S. W. 132 (disability from defective eyesight); Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629 (election to accept action of society in scaling certificate).

Persons entitled to proceeds.— Sufficiency of evidence as to change of beneficiary see Jacob *v.* Jacob, 89 S. W. 246, 28 Ky. L. Rep. 327; Coston *v.* Coston, 145 Mich. 390, 108 N. W. 736; Great Camp K. M. M. *v.* Deem, 143 Mich. 652, 107 N. W. 447 (purpose); Becker *v.* Kuhl, 62 Minn. 366, 64 N. W. 895; Stronge *v.* Supreme Lodge K. P., 111 N. Y. App. Div. 87, 97 N. Y. Suppl. 661; Gladding *v.* Gladding, 8 N. Y. Suppl.

makes a *prima facie* case on a benefit certificate when he has put in evidence the certificate and proofs of death, has showed who the beneficiaries are, and has proved that the assured died before suit was begun.[40] Where the member has the right to change the beneficiary at his option, the records of the society during the life of the member are *prima facie* evidence in respect to the rights of the beneficiary, who has no vested interest in the certificate.[41] While it is permitted to contradict the records of the society or to show that they do not fully disclose all the proceedings which ought to be recorded, such proof must be so convincing and satisfactory as to leave no doubt that the matter attempted to be interpolated into the records actually occurred.[42] In an action to collect assessments with which to pay death claims, the certificates of membership of deceased members need not be produced where the membership is shown by the records.[43]

b. Membership. The production of a benefit certificate at the trial makes out a *prima facie* case for plaintiff on the issue of the good standing of the assured at the date of its delivery to him,[44] and it is *prima facie* evidence that he was in good standing at his death.[45] So proof of recognition of a membership by the society up to within a short time of the member's death is sufficient evidence of the good standing of the member to maintain an action for death benefits.[46] The mere record of a sentence of suspension of the member, without any proceedings whatever to found it upon, and not according to the laws of the order, is not conclusive as to membership and standing.[47] Statements made by a creditor holding the certificate of a member as a pledgee are not conclusive as to decedent's title to the membership.[48]

c. Ground For Forfeiture — (I) *IN GENERAL.* Before a forfeiture will be permitted to become effectual, the facts necessary to its support must be clearly established by the most satisfactory proof.[49]

880; Mayer *v.* Equitable Reserve Fund Life Assoc., 49 Hun (N. Y.) 336, 2 N. Y. Suppl. 79; Schmitt *v.* New Braunfelser Unterstuetzungs Verein, 32 Tex. Civ. App. 11, 73 S. W. 568. Evidence as to who were parents of member see Voelker *v.* Grand Lodge B. L. F., 103 Mo. App. 637, 77 S. W. 999. Evidence as to who was intended as beneficiary see Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136. Sufficiency of evidence to show antenuptial agreement see Hill *v.* Groesbeck, 29 Colo. 161, 67 Pac. 167. Sufficiency of evidence to show beneficiary "dependent" on insured see Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829. Only slight evidence of dependence is necessary. Erickson *v.* Modern Woodmen of America, 43 Wash. 242, 86 Pac. 584.

40. Supreme Tent K. M. W. *v.* Stensland, 105 Ill. App. 267. See also Hirsch *v.* U. S. Grand Lodge O. B. A., 78 Mo. App. 358; Robinson *v.* Supreme Commandery O. G. C., 77 N. Y. App. Div. 215, 79 N. Y. Suppl. 13 [*affirmed* in 177 N. Y. 564, 69 N. E. 1130].

The certificate must be introduced in evidence by plaintiff to make out a *prima facie* case. Knights of Honor *v.* Fortson, 78 Tex. 475, 14 S. W. 922. But where it was forwarded to the subordinate lodge and retained on the ground of fraud in the application, the beneficiary may recover without producing it, no evidence of the fraud being given by the society. Lorscher *v.* Supreme Lodge K. H., 72 Mich. 316, 40 N. W. 545, 2 L. R. A. 206.

41. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. 487.

42. Hawkshaw *v.* Supreme Lodge K. H., 29 Fed. 770.

43. Lehman *v.* Clark, 71 Ill. App. 366.

44. Forse *v.* Supreme Lodge K. H., 41 Mo. App. 106.

45. Supreme Lodge K. H. *v.* Johnson, 78 Ind. 110.

46. Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

47. Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

48. Dillingham *v.* New York Cotton Exch., 49 Fed. 719.

49. Payn *v.* Mutual Relief Soc., 2 How. Pr. N. S. (N. Y.) 220. See also Phillips *v.* U. S. Grand Lodge I. O. S. B., 37 Misc. (N. Y.) 869, 76 N. Y. Suppl. 1000; Sons of Scotland Benev. Assoc. *v.* Faulkner, 26 Ont. App. 253.

Sufficiency of evidence to show false representations of insured see Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. N. S. 247; O'Connor *v.* Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688; Smith *v.* Supreme Lodge K. & L. G. P., 123 Iowa 676, 99 N. W. 553; Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29; Supreme Council R. A. *v.* Brashear, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4; Supreme Conclave K. D. *v.* Saylor, 79 Miss. 62, 29 So. 790 (age); Modern Woodmen of America *v.* Wilson, (Nebr. 1906) 107 N. W. 568; American Order of Protection *v.* Stanley, 5

(II) *NON-PAYMENT OF DUES AND ASSESSMENTS.* Non-payment of dues and assessments must be affirmatively proved by the society by clear and satisfactory evidence.[50] Mere proof of an expulsion for non-payment of an assessment is not sufficient to show that a valid assessment was levied.[51] Likewise evidence of service of notice of assessment on the member must be clearly shown.[52] The knowledge of a member of the levy of an assessment is a fact from which the jury, in a suit on the certificate, may, but are not bound to, infer that he was properly notified of the assessment.[53] The records of the society showing the suspension of a member before the expiration of the time for payment of an assessment is not sufficient evidence of the non-payment, nor of any default of the member.[54]

d. Death of Insured and Cause Thereof. The death of the insured need not be proved beyond a reasonable doubt,[55] but it must be established by a preponder-

Nebr. (Unoff.) 132, 97 N. W. 467; Jennings *v.* Supreme Council R. A. Ben. Assoc., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90; Muller *v.* Orden Germania, 61 N. Y. Super. Ct. 43, 18 N. Y. Suppl. 794 (proof of death); Supreme Council A. L. H. *v.* Larmour, 81 Tex. 71, 16 S. W. 633; Supreme Ruling F. M. C. *v.* Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844; Hoffman *v.* Supreme Council A. L. H., 35 Fed. 252.

Ignorance of society of falsity of statement see Brown *v.* Sovereign Camp W. W., 20 Tex. Civ. App. 373, 49 S. W. 893.

Sufficiency of evidence to prove notice of charges against member see Downing *v.* St. Columba's R. C. T. A. B. Soc., 10 Daly (N. Y.) 262.

Sufficiency of evidence to show acquiescence in suspension of member see Grand Lodge A. O. U. W. *v.* Scott, 3 Nebr. (Unoff.) 851, 97 N. W. 637, 3 Nebr. (Unoff.) 845, 93 N. W. 190.

Sufficiency of evidence as to grounds of forfeiture in general see Matt *v.* Roman Catholic Mut. Protective Soc., 70 Iowa 455, 30 N. W. 799, neglect to perform easter duties.

50. See cases *infra*, this note.

Sufficiency of evidence to show non-payment see Sovereign Camp W. W. *v.* Cox, (Ind. App. 1906) 76 N. E. 888, (Ind. App. 1905) 75 N. E. 290; Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580; Supreme Forest W. C. *v.* Stretton, 68 Kan. 403, 75 Pac. 472; Taylor *v.* Supreme Lodge C. L., 135 Mich. 231, 97 N. W. 680, 106 Am. St. Rep. 392 (sufficiency to overcome presumption of payment arising from delivery of policy); Mills *v.* Rebstock, 29 Minn. 380, 13 N. W. 162; Van Etten *v.* Grand Lodge A. O. U. W., 72 N. J. L. 61, 60 Atl. 210; Coyne *v.* New York Longshoremen's Protective Assoc. No. 3, 13 Daly (N. Y.) 1; Robertson *v.* Local Union No. 64 U. B. C. & J. A., 23 Misc. (N. Y.) 142, 50 N. Y. Suppl. 673; Stand *v.* Griessman, 91 N. Y. Suppl. 278; United Moderns *v.* Pistole, (Tex. Civ. App. 1905) 86 S. W. 377; Oeters *v.* Supreme Lodge K. H., 98 Va. 201, 35 S. E. 356.

Sufficiency of evidence to show tender see Sterling *v.* Head Camp Pacific Jurisdiction W. W., 28 Utah 505, 526, 80 Pac. 375, 1110.

Sufficiency of evidence to show waiver of time of payment see National Council K. & L. S. *v.* Dillon, 212 Ill. 320, 72 N. E. 367 [*reversing* 108 Ill. App. 183]; National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122; Teckemeyer *v.* Supreme Council R. T. T., 4 N. Y. App. Div. 537, 40 N. Y. Suppl. 23; Baker *v.* New York State Mut. Ben. Assoc., 45 Hun (N. Y.) 588, 9 N. Y. St. 653 [*affirmed* in 112 N. Y. 672, 20 N. E. 416]; Bankers', etc., Ben. Assoc. *v.* Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772. The receipt of prior delinquent payments without objection, without reinstatement, without ascertaining whether the insured is still in good health, and without any action by the secretary or board of directors exercising an option in regard to his reinstatement as provided by the by-laws of the society, tends to show that the society had waived the right to enforce the forfeiture. U. S. Indemnity Soc. *v.* Griggs, 118 Ill. App. 577.

51. Tourville *v.* Brotherhood of Locomotive Firemen, 54 Ill. App. 71.

52. *Illinois.*—Northwestern Traveling Men's Assoc. *v.* Schauss, 148 Ill. 304, 35 N. E. 747 [*affirming* 51 Ill. App. 78]; National Union *v.* Hunter, 99 Ill. App. 146 [*affirmed* in 197 Ill. 478, 64 N. E. 356], holding that testimony by the secretary that, while he had no recollection of putting a particular notice for an assessment into an envelope and addressing it to a particular member, he followed his usual custom of mailing a notice to each and every member, and that the one sent to each member showed him the amount of the assessment and was on the blanks of the secretary, is *prima facie* evidence of the service of the notice on the deceased member.

Michigan.— Wallace *v.* Fraternal Mystic Circle, 127 Mich. 387, 86 N. W. 853.

Missouri.— Hannum *v.* Waddill, 135 Mo. 153, 36 S. W. 616.

New York.— Payn *v.* Mutual Relief Soc., 2 How. Pr. N. S. 220.

Ohio.— Odd Fellows' Protective Assoc. *v.* Hook, 9 Ohio Dec. (Reprint) 89, 10 Cinc. L. Bul. 391.

53. Siebert *v.* Supreme Council O. C. F., 23 Mo. App. 268.

54. Lazensky *v.* Supreme Lodge K. H., 31 Fed. 592, 24 Blatchf. 533.

55. See LIFE INSURANCE, 25 Cyc. 945.

ance of the evidence.[56] Suicide of insured, as a defense, must also be established by a preponderance of the evidence.[57] Evidence of facts surrounding the death pointing unmistakably to the conclusion that the assured took his own life and excluding all reasonable probability of death by murder or accident is sufficient to overcome the presumption that a sane person would not destroy his own life, and establishes *prima facie* the defense of suicide.[58] If it is claimed that the insured was insane when he committed suicide, the insanity must be proved by a preponderance of the evidence.[59] Proofs of death and the verdict of a coroner's jury stating that insured died from alcoholic poisoning are insufficient of themselves to prove such facts.[60]

H. Trial[61] **— 1. In General.** The course and conduct of the trial, in an action relating to mutual benefit insurance, is governed by the rules applicable in civil actions in general.[62]

2. Questions For Jury[63] **— a. In General.** The general rule is that questions of law are for the court while questions of fact are for the jury, and that a question of fact will not be taken away from the jury so long as the evidence is conflicting as to some material part thereof.[64] If the contract is in writing, its terms

Sufficiency of evidence to prove fact of death see Supreme Council C. B. L. *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105.

56. Winter *v.* Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662.

57. Hardinger *v.* Modern Brotherhood of America, 72 Nebr. 860, 101 N. W. 983, 103 N. W. 74.

Sufficiency of evidence to show death by suicide see Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; American Benev. Assoc. *v.* Stough, 83 S. W. 126, 26 Ky. L. Rep. 1093; Fletcher *v.* Sovereign Camp W. W., 81 Miss. 249, 32 So. 923; Hunt *v.* Ancient Order of Pyramids, 105 Mo. App. 41, 78 S. W. 649; Shotliff *v.* Modern Woodmen of America, 100 Mo. App. 138, 73 S. W. 326; Sovereign Camp W. W. *v.* Hruby, 70 Nebr. 5, 96 N. W. 998; Supreme Lodge K. H. *v.* Jaggers, 62 N. J. L. 96, 40 Atl. 783 [*affirmed* in 62 N. J. L. 800, 45 Atl. 1092]; Feierstein *v.* Supreme Lodge K. H., 69 N. Y. App. Div. 53, 74 N. Y. Suppl. 558; Clement *v.* Clement, 113 Tenn. 40, 81 S. W. 1249; Cosmopolitan L. Ins. Co. *v.* Koegel, 104 Va. 619, 52 S. E. 166; Voelkel *v.* Supreme Tent K. M., 116 Wis. 202, 92 N. W. 1104.

58. Hardinger *v.* Modern Brotherhood of America, 72 Nebr. 860, 101 N. W. 983, 103 N. W. 74.

59. Supreme Court of Honor *v.* Peacock, 91 Ill. App. 632.

Sufficiency of evidence to show suicide resulting from insanity see Meacham *v.* New York State Mut. Ben. Assoc., 46 Hun (N. Y.) 363 [*affirmed* in 120 N. Y. 237, 24 N. E. 283].

60. Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165.

61. See, generally, Trial.

62. See Trial.

Demurrer to evidence.—A demurrer to the evidence in a suit on a life policy issued by a foreign fraternal society on the life of a married woman for the benefit of her husband does not raise the question of the right of the husband to be a beneficiary, where no such issue was raised in the pleadings or asserted at the trial. Kern *v.* Supreme Council A. L. H., 167 Mo. 471, 67 S. W. 252.

Admissions on trial.— In an action on a policy, an admission on the trial by defendant of the validity of plaintiff's demand, "except as to the amount plaintiff was entitled to receive," and a stipulation by defendant that it would confine its defense wholly to that question, concedes that plaintiff had an insurable interest in the life of deceased. People's Mut. Ben. Soc. *v.* McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

Trial of issues by jury.—A cause of action by a company to compel a policy-holder to pay his *pro rata* share of expenses, pursuant to the charter and the member's contract, and to foreclose a lien given therefor, is solely of equitable cognizance, so that defendant is not entitled as of right to have any issue tried by a jury. Farmers' Mut. Ins. Assoc. *v.* Berry, 53 S. C. 129, 31 S. E. 53.

Place of service of rule for reference see Charles *v.* Keystone Mut. Ben. Assoc., 2 Montg. Co. Rep. (Pa.) 143.

63. See, generally, Trial.

64. See, generally, Trial.

Whether a fiancée is dependent on the member is a question of fact. Alexander *v.* Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187 [*reversing* 42 Ill. App. 455].

Persons entitled to benefit.— Where a certificate provides that payment may be made, at the option of the society, to the beneficiary named, or to any relatives of the member by blood or connected by marriage, the question whether one named as a cousin of the insured, but in fact her common-law husband, was entitled to receive the benefits, is for the jury. Jackson *v.* Royal Ben. Soc., 15 Misc. (N. Y.) 481, 37 N. Y. Suppl. 28.

Disability.— Whether a person is totally disabled from following any vocation (Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709), or whether an injury constitutes a total loss

and construction is a question of law for the court.[65] So the questions whether of a hand (Beber *v.* Brotherhood of Railroad Trainmen, (Nebr. 1905) 106 N. W. 168), is a question for the jury, as is ordinarily the question whether the injury resulted from an accident or other cause (Binder *v.* National Masonic Acc. Assoc., 127 Iowa 25, 102 N. W. 190; Noyes *v.* Commercial Travellers' Eastern Acc. Assoc., 190 Mass. 171, 76 N. E. 665). So whether a holder of an accident policy negligently exposed himself to unnecessary danger is a question for the jury. Noyes *v.* Commercial Travellers' Eastern Acc. Assoc., *supra*.

Reinstatement.—Whether the time elapsing before applying for reinstatement is reasonable is generally a question for the jury. Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733. But where such a length of time has elapsed before the death of an expelled member that all reasonable men would agree that it was a reasonable length of time in which to apply for reinstatement, the question whether the time was reasonable then becomes a matter of law to be determined by the court. Dimmer *v.* Supreme Council C. K. A., 22 Ohio Cir. Ct. 366, 12 Ohio Cir. Dec. 413. Whether a sickness was a "valid reason" within a contract authorizing reinstatement on payment of back dues, for valid reasons, is a question for the jury. Dennis *v.* Massachusetts Ben. Assoc., 47 Hun (N. Y.) 338 [*affirmed* in 120 N. Y. 496, 24 N. E. 843, 17 Am. St. Rep. 660, 9 L. R. A. 189]. So where reinstatement is dependent upon good health on payment of arrearages, evidence that the member had a bad cold and quit work several days before he paid such arrearage and that he was taken sick some two weeks thereafter, raises a question for the jury as to whether he was in good health at the time the payment was made. Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369. Whether, by the acceptance of back dues, the society waives the requirement of a health certificate and vote of assured's lodge is a question for the jury. Rice *v.* Grand Lodge A. O. U. W., 92 Iowa 417, 60 N. W. 726. See also Cauveren *v.* Ancient Order of Pyramids, 98 Mo. App. 433, 72 S. W. 141.

Change of beneficiary.— Where there is no evidence that a change of beneficiaries was induced by fraud, except the inference that it was improbable that a father would have voluntarily changed the beneficiary from an infant daughter to his grown brother, it is proper to sustain a demurrer to the evidence. Broderick *v.* Broderick, 69 Kan. 679, 77 Pac. 534.

Age of member.— Where the evidence as to the age of the insured at the time of his admission to membership is conflicting the question is for the jury. Reis *v.* Arbeiter Unterstuetzung Verein No. 2, 111 Mich. 127, 71 N. W. 177; Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 210 Pa. St. 456, 60 Atl. 10. But where there is no conflict in the evidence which shows that the member was beyond the age limit when he joined, a verdict should be directed. Meehan *v.* Supreme Council C. B. L., 95 N. Y. App. Div. 142, 88 N. Y. Suppl. 821; Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 213 Pa. St. 489, 62 Atl. 1067.

Assent to change in by-laws.— Whether a member assented to a change in the by-laws and was bound thereby, where the evidence is that he paid increased dues thereunder without protest and also stated to a member that he was satisfied with the changes made, is a question for the jury. Pokrefky *v.* Detroit Firemen's Fund Assoc., 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057.

Payment of premiums as election to treat contract as in force.— Whether the payment of premiums by a member of a beneficial association, after notice of a by-law amounting to a repudiation of the contract on the part of the association, showed an election on the member's part to treat the contract as still in force is a question of fact. Supreme Council A. L. H. *v.* Batte, 34 Tex. Civ. App. 456, 79 S. W. 629.

Rejection of applicant.— It cannot, as a matter of law, be said that the chief medical examiner of a fraternal order acted arbitrarily in rejecting an applicant sixty-two years of age on the ground that his pulse rate (seventy-six when sitting, and eighty when standing) was excessive. Supreme Lodge K. P. *v.* Andrews, 31 Ind. App. 422, 67 N. E. 1009.

Intemperance as rendering certificate void.— Where a benefit certificate is to be void if assured becomes so far intemperate as to permanently impair his health, whether he indulged in the use of intoxicants to such extent is a question for the jury. Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 439].

Blame for failure to serve proofs of death in time.— Where there was evidence that plaintiff's failure to serve proofs of death within the time required by the by-laws was due either to her negligence or to the neglect of duty by defendant's secretary in failing to furnish blanks in time, as required by the by-laws, it was for the jury to determine where the fault rested. Shelden *v.* National Masonic Acc. Assoc., 122 Mich. 403, 81 N. W. 266.

Acquiescence in refusal to transfer from one class of risks to another as question for jury see Supreme Lodge K. P. *v.* Andrews, 39 Ind. App. 1, 77 N. E. 361, 78 N. E. 433.

Fraud in inducing release of claim of beneficiary as question for jury see Fraternal Army of America *v.* Evans, 215 Ill. 629, 74 N. E. 689 [*affirming* 114 Ill. App. 578].

In action for wrongful expulsion see Thompson *v.* Grand International Brotherhood of Locomotive Engineers, (Tex. Civ. App. 1905) 91 S. W. 834.

65. Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79; Kenyon *v.* Knights Templar, etc., Mut. Aid Assoc., 122 N. Y. 247,

the constitution of the society was in force at a certain date,[66] the interpretation of the provisions of the certificate,[67] whether a bill or note was given for a purpose foreign to and in violation of the laws of the society,[68] and the measure of damages when the sum is stipulated by the rules[69] are questions of law for the court. So the question whether a given state of admitted or proved facts works a forfeiture or lapse of a policy is a question of law.[70] But whether a member was "non-beneficial" at the time his claim for benefits arose has been held one of fact for the jury.[71] What constitutes forgery of a policy and the signature of what officers is requisite to its validity are questions for the court,[72] as is the question whether a member was entitled to all the rights and privileges of the society.[73]

b. Payment of Dues and Assessments. Generally the question whether an assessment was made,[74] whether notice thereof was properly given,[75] and whether it was paid in due time[76] are questions for the jury. But the question whether certain assessments were made in accordance with the constitution is one of law for the court.[77] Whether the non-payment of dues or assessments has been waived is generally for the jury.[78] The sufficiency of a notice required to be given by a member when he was sick and unable to pay assessments is a question of law for the court.[79]

c. False Representations. Ordinarily the question of the falsity of a representation in the application,[80] as well as whether it was intentionally made and in

25 N. E. 299; Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832, holding where the laws are introduced in evidence in an action on a policy defended on the ground that the policy was void by reason of the member's expulsion from the order before his death, it is for the court to determine whether they conferred jurisdiction on the order to try the accused under notice by mail addressed to the member, but received by his wife, plaintiff in the action, after the member was so far insane as to be unable to comprehend the notice.

66. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. 487 [*reversing* on other grounds 31 Ill. App. 618].

67. Baranowski *v.* Baltimore Mut. Aid Soc., 3 Pa. Super. Ct. 367.

68. Court Harmony A. O. F. *v.* Court Abraham Lincoln A. O. F., 70 Conn. 634, 40 Atl. 606.

69. Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

70. Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

71. Jacobs *v.* Baltimore Mut. Aid Soc., 9 Pa. Super. Ct. 99.

72. International Order of Twelve K. & D. T. *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108.

73. Grand Lodge A. O. U. W. *v.* Hall, 31 Ind. App. 107, 67 N. E. 272.

74. Hannum *v.* Waddill, 135 Mo. 153, 36 S. W. 616.

75. Stewart *v.* Supreme Council A. L. H., 36 Mo. App. 319; Keeler *v.* New York State Mut. Ben. Assoc., 20 N. Y. Suppl. 935; Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733.

76. Finerty *v.* Supreme Council C. K. A., (Iowa 1901) 84 N. W. 990; Logan Tribe I. O. R. M. *v.* Schwartz, 19 Md. 565; Lavin *v.* Grand Lodge A. O. U. W., 112 Mo. App. 1, 86 S. W. 600. See also Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819. But see Montour *v.* Grand Lodge A. O. U. W., 38 Oreg. 47, 62 Pac. 524.

77. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. 487.

78. Sweetser *v.* Odd Fellows Mut. Aid Assoc., 117 Ind. 97, 19 N. E. 722; Miller *v.* Head Camp, 45 Oreg. 192, 77 Pac. 83; United Brethren Mut. Aid. Soc. *v.* Schwartz, 10 Pa. Cas. 242, 13 Atl. 769; Hughes *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 98 Wis. 292, 73 N. W. 1015.

A delay of twenty-one days in tendering overdue assessments, after receipt of a demand for payment, is not, as a matter of law, unreasonable, so as to preclude the member from relying on the demand and tender as a waiver of his default. Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

79. Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862.

80. Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716; Woodmen of World *v.* Grace, (Miss. 1900) 28 So. 832; Kenyon *v.* Knights Templar, etc., Aid Assoc., 122 N. Y. 247, 25 N. E. 299 [*affirming* 48 Hun 278]; Meacham *v.* New York State Mut. Ben. Assoc., 120 N. Y. 237, 24 N. E. 283; Spitz *v.* Mutual Ben. Life Assoc., 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469. But see Supreme Conclave K. D. *v.* Saylor, (Miss. 1902) 32 So. 50; Puls *v.* Grand Lodge A. O. U. W., 13 N. D. 559, 102 N. W. 165 (holding that where insured stated that he had never drunk immoderately, evidence that he sometimes drank and on a few occasions appeared intoxicated, is insufficient to sustain

bad faith,[81] or whether the misrepresentation was material,[82] is one of fact for the jury. But where the materiality has been determined by the form of the contract,[83] or the facts are ascertained,[84] or the materiality is a matter of common knowledge,[85] the question of materiality is one of law for the court. So the questions whether the insured knew that his application contained statements different from his answers,[86] and whether the society knew, or by the exercise of reasonable diligence should have known, the contents of a first application containing different statements, when it issued the policy,[87] are for the jury. But whether certain acts of officers and agents constitute a waiver of its rules in regard to statements required in the application is a question of law and not of fact.[88]

d. Death and Cause Thereof. The time of death of a member is generally a question of fact for the jury;[89] but where the evidence establishes absence for seven years, on which plaintiff relies, and there is no proof in rebuttal of the presumption, the question of death is not for the jury.[90] The cause of death, where the evidence is conflicting,[91] including the question whether deceased committed suicide,[92] is generally for the jury, although where the evidence points unmistakably to the conclusion of suicide and nothing is shown by either party inconsistent with the proof of such facts, a verdict should be directed for the society.[93] So

an allegation that the representations were false so as to require the submission of that question to the jury); United Brethren Mut. Aid Soc. *v.* White, 12 Wkly. Notes Cas. (Pa.) 147 (holding that it is for the court to consider the meaning of answers and questions in the application).

81. Modern Woodmen of America *v.* Wilson, (Nebr. 1906) 107 N. W. 568 (holding that where questions in an application are so framed that the insured may have honestly mistaken their true import and have given answers which are in fact untrue, but true as he may have reasonably understood the question, it is for the jury to determine whether he made his answers honestly and in good faith); Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832.

82. Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469; Spitz *v.* Mutual Ben. Life Assoc., 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469; Grossman *v.* Supreme Lodge K. & L. H., 13 N. Y. St. 592. See Kidder *v.* Supreme Commandery U. O. G. C., 192 Mass. 326, 78 N. E. 469.

83. O'Connor *v.* Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688; Royal Neighbors of America *v.* Wallace, 66 Nebr. 543, 92 N. W. 897.

84. American Mut. Aid Soc. *v.* Bronger, 11 Ky. L. Rep. 902, 12 Ky. L. Rep. 284.

Where the contract is wholly in writing, the question whether the answers in the application are warranties and material is one of law for the court. Morgan *v.* Bloomington Mut. Life Ben. Assoc., 32 Ill. App. 79.

85. Royal Neighbors of America *v.* Wallace, 64 Nebr. 330, 89 N. W. 758.

86. Mattson *v.* Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

87. Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832.

88. Modern Woodmen of America *v.* Hoover, 56 Ill. App. 431.

89. Kendrick *v.* Grand Lodge A. O. U. W., 8 Ky. L. Rep. 149.

90. Biegler *v.* Supreme Council A. L. H., 57 Mo. App. 419.

91. Modern Woodmen of America *v.* Davis, 84 Ill. App. 439 [*affirmed* in 184 Ill. 236, 56 N. E. 300]; Maier *v.* Massachusetts Ben. Assoc., 107 Mich. 687, 65 N. W. 552; Supreme Lodge K. P. *v.* Lloyd, 107 Fed. 70, 46 C. C. A. 153.

92. *District of Columbia.*— Casey *v.* National Union, 3 App. Cas. 510.

Illinois.— Supreme Tent K. M. W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 [*affirming* 105 Ill. App. 267].

Iowa.— Tackman *v.* Brotherhood of American Yeomen, 132 Iowa 64, 106 N. W. 350, 8 L. R. A. N. S. 974.

Kentucky.— American Benev. Assoc. *v.* Stough, 83 S. W. 126, 26 Ky. L. Rep. 1093.

Maryland.— Supreme Conclave I. O. H. *v.* Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528.

Missouri.—Kane *v.* Supreme Tent K. M. W., 113 Mo. App. 104, 87 S. W. 547.

Nebraska.— Hardinger *v.* Modern Brotherhood of America, 72 Nebr. 860, 101 N. W. 983, 103 N. W. 74.

New York.— Meacham *v.* New York State Mut. Ben. Assoc., 120 N. Y. 237, 24 N. E. 283 [*affirming* 46 Hun 363]; Mitterwallner *v.* Supreme Lodge K. & L. G. S., 37 Misc. 860, 76 N. Y. Suppl. 1001.

Oregon.— Cox *v.* Royal Tribe of Joseph, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 752, 60 L. R. A. 620.

Pennsylvania.— Shank *v.* United Brethren Mut. Aid Soc., 84 Pa. St. 385; Slattery *v.* Great Camp K. M., 19 Pa. Super. Ct. 111.

United States.— National Union *v.* Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

See 28 Cent. Dig. tit. "Insurance," § 2009.

93. Hardinger *v.* Modern Brotherhood of America, 72 Nebr. 860, 101 N. W. 983, 103 N. W. 74; Clemens *v.* Royal Neighbors of America, 14 N. D. 116, 103 N. W. 402. See also Mason *v.* Supreme Court of Honor, 109 Ill. App. 10; Supreme Lodge K. H. *v.*

the question whether the deceased, when he committed suicide, was insane, is generally one for the jury.[94]

3. INSTRUCTIONS. The necessity for, and sufficiency of, instructions in actions relating to mutual benefit insurance are governed by the general rules applicable to instructions in civil actions in general.[95] For instance the instructions must not

Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523.

94. Mooney *v.* Grand Lodge A. O. U. W., 114 Ky. 950, 72 S. W. 288, 24 Ky. L. Rep. 1787; Supreme Lodge K. H. *v.* Lapp, 74 S. W. 656, 25 Ky. L. Rep. 74.

95. See TRIAL. See also Union Benev. Soc. No. 8 *v.* Martin, 76 S. W. 1098, 25 Ky. L. Rep. 1039.

Disability see Grand Lodge B. L. F. *v.* Orrell, 206 Ill. 208, 69 N. E. 68 [*affirming* 97 Ill. App. 246] (holding that defining "permanent" incapacity as such as would "exist through all time" could not be complained of by insurer); Supreme Tent K. M. W. *v.* Cox, 25 Tex. Civ. App. 366, 60 S. W. 971 (disability to perform "and" direct any or all kinds of labor or business). If the jury is instructed that to entitle plaintiff to recover he must be totally disabled from following any vocation, and that it is for the jury to draw from the evidence the inference of fact upon this subject, defendant cannot be regarded as prejudiced by the further statement on the part of the judge that the fact that a man may work for a few moments or perhaps for a few months is not necessarily conclusive evidence that he can follow some avocation. Startling *v.* Supreme Council R. T. T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709. Where the constitution provides that a certain indemnity shall be paid to members whose disabilities totally incapacitate them "from the performance of duty in any department of the train or yard service," an instruction which uses the words of the constitution in stating grounds for which recovery may be had is not insufficient, as failing to show whether plaintiff must be incapacitated from service in some one or in all departments of the service. Lillie *v.* Brotherhood of Railroad Trainmen, 114 Iowa 252, 86 N. W. 279.

Reinstatement.—An instruction that, if deceased was legally suspended a month before his death, plaintiffs, to recover, must show that he was reinstated before his death by compliance with the rules of the order, was properly amended by adding, "or that the defendant waived the suspension of the deceased and the forfeiture of his beneficiary certificate," there being evidence to show waiver. Grand Lodge A. O. U. W. *v.* Lachmann, 199 Ill. 140, 64 N. E. 1022 [*affirming* 101 Ill. App. 213].

Payment of dues and assessments see Globe Reserve Mut. L. Ins. Co. *v.* Duffy, 76 Md. 293, 25 Atl. 227, first assessment, necessity of payment before policy becomes effective. Where the defense was that the member was not in good health at the time of his reinstatement after suspension for non-payment of dues, an instruction that the words "good health" mean that the person is in a reasonably good state of health, and free from any disease or illness that tends seriously to weaken or impair the constitution, was a reasonable definition. Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557. It was not error to explain or qualify a requested instruction that "the receipt of an assessment after maturity by the collector of a subordinate lodge of a mutual benefit society is not binding upon the supreme lodge of the order unless the collector had authority, either express or implied, to receive it," by adding thereto the words, "That means unless the collector had a right to act as agent of the company." Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391.

Proofs of death.— Instructing that the jury must believe from the evidence that the society had received satisfactory evidence of the death before plaintiff can recover is properly refused. Policemen's Benev. Assoc. *v.* Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190.

Instructions as to false representations see Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022; Whitmore *v.* Supreme Lodge K. & L. H., 100 Mo. 36, 13 S. W. 495; Grossman *v.* Supreme Lodge K. & L. H., 13 N. Y. St. 592; Hoffman *v.* Supreme Council A. L. H., 35 Fed. 252, phrase "essentially untrue" upheld. Where plaintiff's right to recover depended on the truth of certain statements of the insured, and the court charged, in reference to each one of defendant's allegations impeaching such statements, that, if it be true, plaintiff cannot recover, defendant cannot object that such statements were called by the judge "representations" rather than "warranties." Roach *v.* Kentucky Mut. Security Fund Co., 28 S. C. 431, 6 S. E. 286. Where defendant alleges only that the answers of insured to three specified questions in his medical examination were false, it is not entitled to an instruction authorizing a verdict for it, if there were any misrepresentations in the examination. Wolfe *v.* Supreme Lodge K. & L. H., 160 Mo. 675, 61 S. W. 637. An instruction that if the application stated that the applicant was in good health, and the certificate was issued in reliance thereon, and the statement was false, plaintiff could not recover, was properly refused where it ignored the issue of waiver. Home Circle Soc. No. 2 *v.* Shelton, (Tex. Civ. App. 1905) 85 S. W. 320. Where the application, signed by both parties, provided that the answers to all questions should be considered material, it was error to refuse to charge that such answers were material.

be misleading,[96] nor single out particular evidence and give undue prominence to it,[97] and must be confined to the issues,[98] and applicable to the evidence.[99] So the instructions must not invade the province of the jury,[1] nor, on the other hand, submit questions of law to the jury.[2] So an instruction appealing to the sympathy of the jury is properly refused.[3] If covered by instructions already given, a request to charge is properly refused.[4]

4. VERDICT AND FINDINGS. The rules governing general and special verdicts[5] and findings by the court[6] are the same as those which apply to the verdicts of

Thomas *v.* Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

Instruction as to presumption of death from absence of insured see Policemen's Benev. Assoc. *v.* Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190.

Instructions as to cause of death see Rumbold *v.* Supreme Council R. L., 206 Ill. 513, 69 N. E. 590; American Benev. Assoc. *v.* Stough, 83 S. W. 126, 26 Ky. L. Rep. 1093; Payne *v.* Union Life Guards, 136 Mich. 416, 99 N. W. 376, 112 Am. St. Rep. 368, death while violating laws of land. Where defendant alleged suicide, a charge that suicide was a moral offense and also a crime, that these facts should be considered by the jury, because if deceased committed suicide, "it is a reflection upon his family," and that "suicide is too odious to be presumed," was not erroneous, but merely calculated to impress the jury with the gravity of the issue, and explain the burden of proof. Mitterwallner *v.* Supreme Lodge K. & L. G. S., 37 Misc. (N. Y.) 860, 76 N. Y. Suppl. 1001. Where the dead body of insured was found in the water, but no one saw her go in, and it did not appear from the evidence whether she went in of her own accord or by some other cause, the court was warranted, in an action on her benefit certificate, in charging that there was a presumption of a natural death. An instruction that, "when a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental," etc., was not objectionable because of the use of the word "unexplainable," although deceased was not found dead from unexplainable causes, it being manifest that the term was employed to define the presumption alluded to. A further instruction that the beneficiary was therefore entitled to recover, "unless the evidence introduced has overcome this presumption, and satisfied you that death was voluntary," was not objectionable because of the word "satisfied," where the court had previously charged that defendant was required to establish suicide to the satisfaction of the jury by a preponderance of the testimony. Cox *v.* Royal Tribe of Joseph, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 752, 60 L. R. A. 620. An instruction that a man's natural instinct is to preserve his life and not to destroy it, so that it was presumable that deceased did not commit suicide, was not erroneous for failure to limit the presumption to natural conditions, where there was no evidence that deceased's condition at the time of his death was not natural. Tackman *v.* Brotherhood of American Yeomen, 132 Iowa 64, 106 N. W. 350, 8 L. R. A. N. S. 974.

96. Wagner *v.* Supreme Lodge K. & L. H., 128 Mich. 660, 87 N. W. 903.

97. Policemen's Benev. Assoc. *v.* Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190; Rumbold *v.* Supreme Council R. L., 206 Ill. 513, 69 N. E. 590 [*reversing* on other grounds 103 Ill. App. 596]; Supreme Council R. A. *v.* Lund, 25 Ill. App. 492, holding that where defendant sets up misrepresentations and gives evidence tending to prove this defense, it is error to charge that the jury must find for plaintiff if they believe that she has made out her case as alleged in the declaration, without making any reference to the evidence in support of the defense.

98. McDermott *v.* St. Wilhelmina Benev. Aid Soc., 24 R. I. 527, 54 Atl. 58.

99. Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733.

1. Thompson *v.* Family Protective Union, 66 S. C. 459, 45 S. E. 19; Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391, instructions as to waiver.

2. See Osceola Tribe No. 11 I. O. R. M. *v.* Rost, 15 Md. 295.

3. National Council K. & L. S. *v.* O'Brien, 112 Ill. App. 41.

4. Hardister *v.* Supreme Order M. M. L. A., 118 Mo. App. 679, 96 S. W. 316.

5. See cases cited *infra*, this note.

Special findings as inconsistent with general verdict see Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430. See also TRIAL.

Construction of findings of jury as to amount payable on policy see People's Mut. Ben. Soc. *v.* McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

Where the jury find that the insured committed suicide, it is a determination that it was the intentional act of a sane man, under N. Y. Pen. Code, § 172, defining suicide as the intentional taking of one's own life. Shipman *v.* Protected Home Circle, 67 N. E. 83, 174 N. Y. 398, 63 L. R. A. 347 [*modifying* 66 N. Y. App. Div. 448, 73 N. Y. Suppl. 594].

6. See cases cited *infra*, this note.

Necessity.—Although payment of the membership fee was an ultimate fact which should have been found, in an action on an accident policy, where payment appeared from the record to have been treated as an admitted fact, it was unnecessary to make such finding. Northwestern Benev. Soc. *v.* Dudley, 27 Ind. App. 327, 61 N. E. 207.

Contradictory findings.— Findings that a

a jury and the findings by a court where the trial is without a jury in civil actions in general.[7]

I. Judgment — **1. General Rules.** The judgment must conform to the pleadings and evidence and be within the issues.[8] So it must conform to the verdict or findings.[9] While the relief granted is not confined to that specifically prayed for,[10] relief different from that prayed for in the complaint will not ordinarily be granted.[11] Judgment may be granted on the pleadings in a proper case;[12] and in other respects the judgment is governed by the rules applicable to judgments in civil actions in general.[13]

2. Amount of Recovery.[14] Generally the measure of damages for breach of a contract of insurance by the society is the amount of the certificate.[15] So the measure of damages, where there is no regular certificate, is not such amount as

benefit order had no notice that a member's statements in his application as to his use of intoxicants were not true, and that it had notice as to his drinking, are not contradictory, where the evidence shows that the applicant had been intemperate, which was generally known, and that previous to his application he had taken the liquor cure, which was generally believed to be effectual. Brown *v.* Sovereign Camp W. W., 20 Tex. Civ. App. 373, 49 S. W. 893.

Presumption in favor of findings.— A general finding in favor of a wife's claim as beneficiary under a certificate issued to her husband, and valid only as to a member of his family, is not erroneous because of a stipulation that she was "living separate and apart from him," since it will be presumed, in support of the finding, that the separation was without change of the legal relation. Smith *v.* Boston, etc., R. Relief Assoc., 168 Mass. 213, 46 N. E. 626.

Sufficiency of findings see Millard *v.* Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864 (sufficiency of finding that decedent was a member in good standing at the time a certain notice was given); Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279 (sufficiency of finding to show policies in force when loss sued for occurred); Pennsylvania R. Co. *v.* Wolfe, 203 Pa. St. 269, 52 Atl. 247 (finding that alleged contract for substitution of beneficiaries was made).

7. See Trial.

8. Sovereign Camp W. W. *v.* Dismukes, (Miss. 1905) 38 So. 351; Evans *v.* Southern Tier Masonic Relief Assoc., 94 N. Y. App. Div. 541, 88 N. Y. Suppl. 162 (holding that where plaintiff established her right to a portion of the amount of the certificate counted on in her complaint, a judgment, although for a less amount than the face of the certificate, was within the issues made by the pleadings); Evans *v.* Southern Tier Masonic Relief Assoc., 76 N. Y. App. Div. 151, 78 N. Y. Suppl. 611.

9. Endowment Rank Supreme Lodge K. P. *v.* Townsend, 36 Tex. Civ. App. 651, 83 S. W. 220, holding that where the court's conclusion of law disclosed that plaintiff was only entitled to judgment for one thousand dollars, with interest thereon from the date of the judgment, a judgment including previous interest was erroneous.

10. Sullivan *v.* Industrial Ben. Assoc., 73 Hun (N. Y.) 319, 26 N. Y. Suppl. 186.

11. See Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29.

12. See McFarland *v.* Creath, 35 Mo. App. 112. But see Riley *v.* Mutual Ben. Assoc., 2 Chest. Co. Rep. (Pa.) 305, holding that judgment for want of an affidavit of defense cannot be taken in a suit on a policy of life insurance.

13. See Judgments, 23 Cyc. 623.

Form.— Where it is stipulated that the beneficiary is to receive a definite sum and that the amount due is to be provided for by assessment, the beneficiary is entitled to a money judgment and not merely to a mandatory order to make and pay over the proceeds of an assessment. Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105.

Provisions as to assessments.— It is improper in a judgment in an action to recover benefits to provide for the mode of collection of assessments, in case of defaults by particular members, where the defaults may never occur. Lindsey *v.* Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29.

Provision for repayment of premiums.— Where an expelled member, before bringing suit to be restored, declined an offer of the premiums he had paid, the decree denying reinstatement need not provide for such repayment. Murray *v.* Supreme Hive L. M. W., 112 Tenn. 664, 80 S. W. 827.

14. Amount of benefits see *supra*, IV, E.

15. Royal Arcanum *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Fulmer *v.* Union Mut. Assoc., 12 N. Y. St. 347; Freeman *v.* National Ben. Soc., 5 N. Y. St. 82. See also Sovereign Camp W. W. *v.* Woodruff, 80 Miss. 546, 32 So. 4.

Breach by depletion or abolition of class of members.— No more than nominal damages could be recovered for the depletion of the class in a benefit society to which a person insured belonged, even if it constituted a breach of contract, where such depletion was occasioned by the formation of a new class, into which many members of the former entered, as the damages are too remote, conjectural, and speculative to form the basis of a legal recovery. Supreme Lodge K. P. *v.* Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409. The by-laws of a beneficial

the jurors' consciences may approve as just, but the amount provided for in such a case by the charter and by-laws of the association.[16] In an action for damages for breach of the contract for refusing to reinstate, plaintiff is entitled to recover the amount of the premiums and assessments paid by him.[17] Where there has been a breach of the express or implied contract to make an assessment, the measure of damages is the full amount of the certificate unless it is shown in defense that an assessment would not have produced that sum.[18] But where the

association divided the members into classes, and provided, with respect to one class, that the beneficiaries of the members thereof should be paid the sum named in the certificate or such part thereof as would be realized by one assessment of the members of that class. The amount of such assessment varied according to the ages of the members and the sums named in their certificates. Subsequently the by-laws were amended by abolishing the classes, and a uniform rate of assessment and dues was provided for all members, and the sum to be paid upon the death of any member was the same as that formerly paid upon the death of a member of the class in question. Later the by-laws were again amended so as to provide for a uniform rate of monthly assessment, and for the ascertainment of benefit funds on the basis of a *pro rata* division of the net proceeds of assessments made for a stipulated time. It was held that, whether the subsequent by-laws could rightly affect the original contract of a member of the class in question or not, yet, the classes having been abolished, and there being no way to ascertain how much the beneficiary would be entitled to under the original contract, the beneficiary could not recover more than the amount due under the amended by-laws. Breslow *v.* Southern Tier Masonic Relief Assoc., 107 N. Y. App. Div. 123, 94 N. Y. Suppl. 787.

Partial recovery.— Where a beneficial association defends a suit against it for sick benefits on the ground that the member had not furnished the association his own and a physician's certificate as required by the by-laws, and it appears that the member had furnished the certificates in time for one week's benefits, but not in time for the subsequent weeks for which he claimed, and it also appears that no tender of money for the one week was made to the member, plaintiff is entitled to recover for one week's benefits, and also for costs. Myers *v.* Alta Friendly Soc., 29 Pa. Super. Ct. 492.

Right of society to protect other members of class.—A mutual benefit society, being trustee for its members of a certain class of a special benefit fund, can assert their rights to a *pro rata* share therein against one of their number who seeks judgment for more than his share. Perpoli *v.* Grand Lodge L. W., 102 Cal. 592, 36 Pac. 936.

Recovery of costs see Wells *v.* Supreme Court I. O. F., 17 Ont. 317. Where, in a controversy between persons interpleaded for the proceeds of a death certificate, the court decided in favor of one of the interpleaders, the court properly assessed the defeated interpleader with the costs. Sovereign Camp W. W. *v.* Broodwell, 114 Mo. App. 471, 89 S. W. 891. In an action on a certificate, to which the administrator of the insured's estate was a party, claiming the insurance as part of the estate, and on which the association admitted its liability, plaintiff, being entitled to the money, is entitled to his taxable costs to be paid out of the estate to the insured. Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 88 N. W. 607.

16. Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

17. Lovick *v.* Providence Life Assoc., 110 N. C. 93, 14 S. E. 506.

18. *Arkansas.*— Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

Connecticut.— Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113.

Illinois.— Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538; Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383.

Indiana.— Elkhart Mut. Aid Benev., etc., Assoc. *v.* Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

Iowa.— Thornburg *v.* Farmers' Life Assoc., 122 Iowa 260, 98 N. W. 105; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508.

Minnesota.— Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

See 6 Cent. Dig. tit. "Beneficial Associations," § 48; 28 Cent. Dig. tit. "Insurance," § 2013.

Contra.— Ball *v.* Granite State Mut. Aid Assoc., 64 N. H. 291, 9 Atl. 103 (holding that where nothing is shown as to what the assessment would, or did, amount to, only nominal damages are recoverable); Cram *v.* Equitable Acc. Assoc., 58 Hun (N. Y.) 11, 11 N. Y. Suppl. 462; O'Brien *v.* Home Ben. Soc., 51 Hun (N. Y.) 495, 4 N. Y. Suppl. 275 [*affirmed* in 117 N. Y. 310, 22 N. E. 954].

Statutory provisions.— In an action on a certificate for three thousand dollars issued by a fraternal association, it cannot urge that said certificate limits the amount payable to the proceeds of an assessment of two dollars per member, and that there is a question whether thereby such sum could be realized, where Nebr. Comp. St. c. 43, § 110, under which it was organized, forbids it to

evidence shows that the amount that would be produced by such an assessment would be less than the face of the certificate, the judgment should be rendered only for the amount that would be produced by the assessment.[19] Where a claim for an injury was payable only from a specified fund, recovery is limited to the amount in that fund.[20] Interest is ordinarily recoverable,[21] but only from the time when the claim was due.[22] No recovery is permissive for benefits accruing after the commencement of the action;[23] and where the agreement is to pay a disabled member in annual instalments, only the sum of the annual instalments due at the

issue a certificate of over one thousand dollars if it has not a membership of two thousand. Modern Woodmen Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826.

19. Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 137 Ill. 417, 27 N. E. 538.

20. Hesinger *v.* Home Ben. Assoc., 41 Minn. 516, 43 N. W. 481.

21. Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648] (holding that a policy designating specifically the beneficiaries and the sums to be paid, and stipulating that the same shall be paid within sixty days after proof of death — the assessments paid by the assured to be repaid without interest — but containing no statement with reference to interest on the face of the policy, is a contract for the payment of money, within Hurd Rev. St. (1901) c. 74, § 2; and hence the insurer is liable for interest at the legal rate on the face of the policy from sixty days after proof of death); Grand Lodge B. L. F. *v.* Orrell, 206 Ill. 208, 69 N. E. 68 [*affirming* 97 Ill. App. 246] (holding that where a benefit certificate was for a specified sum, payable to the beneficiary if totally disabled, interest on such sum was properly allowed from the date of refusal to pay the claim on its presentation according to the by-laws of the society); Supreme Council C. K. A. *v.* Franke, 137 Ill. 118, 27 N. E. 86 [*affirming* 34 Ill. App. 651]; Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789; Supreme Lodge K. L. H. *v.* Rehg, 116 Ill. App. 59; Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499 (holding that where a mutual benefit association failed to levy an assessment for the payment of a death loss as provided in a policy, interest should be allowed from the time of the breach); Glaser *v.* New York Physicians Mut. Aid Assoc., 32 Misc. (N. Y.) 67, 66 N. Y. Suppl. 152 (holding that where a mutual aid association refuses payment of a sum of money to which the executor of a deceased member, after proof of death, is entitled, under the by-laws, interest, to begin to run thirty days from proof of death, will be allowed on the claim, the thirty days being a reasonable time allowed the association in which to collect assessments); Knights of Pythias *v.* Allen, 104 Tenn. 623, 58 S. W. 241. But see Railway Passenger, etc., Conductors' Mut. Aid, etc., Assoc. *v.* Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286 (holding that a contract of membership in a mutual benefit association, embodied in the certificate of membership, the constitution and by-laws, and such oral evidence as is necessary to connect them, is an unwritten contract, in an action on which interest is not recoverable); Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485 (holding that one entitled under a certificate to "the net proceeds of one full assessment at schedule rates, upon all the members in good standing, at the date of said death to an amount not exceeding $2,500," is not entitled to interest, although her claim is contested, there being no provision in the schedule for assessing for interest); Courtney *v.* U. S. Masonic Ben. Assoc., (Iowa 1892) 53 N. W. 238 (holding that in an action against a mutual benefit association on certificate of insurance to compel defendant to make assessments to pay the loss caused by the death of assured, plaintiff is not entitled to interest on the amount provided for by the certificates).

Where the beneficiary is named in the certificate, the sum recoverable is specified and certain, and proper preliminary proof or demand, as the case may require, has been made, and payment is refused, interest may be recovered on such certificate. Grand Lodge B. L. F. *v.* Orrell, 109 Ill. App. 422.

Impossibility of tender as affecting right to interest.— Where an insurer denied liability under a certificate, the beneficiary was entitled to legal interest on the amount of the certificate from ninety days after the insured's death, although the beneficiary was a non-resident of the state, so that no tender of the amount due could be made to her in the state. Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508.

22. Himmelein *v.* Supreme Council A. L. H., (Cal. 1893) 33 Pac. 1130.

Demand.— A beneficial association is not chargeable with interest on claims for sick benefits prior to the date demand was made therefor. Dary *v.* Providence Police Assoc., 27 R. I. 377, 62 Atl. 513. And see Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789, holding that a claim for insurance from a mutual benefit association bears interest from the time of giving the association written notice of the death of the insured, and a written demand for the insurance money, served on the proper officers of the association.

23. Robinson *v.* Exempt Fire Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715; Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

time of the trial is recoverable.[24] In some states, by statute, reasonable attorney's fees may be recovered where the society fails to settle a loss for which it is liable within a specified time.[25] Where the society is sought to be held liable because of false representations of an agent inducing plaintiff to become a member, the damages recoverable are the amount paid out by reason of such false representations, and not the sum he would have received if such representations had been true.[26]

3. ENFORCEMENT. After a judgment for benefits has been recovered and execution returned unsatisfied, it has been held that mandamus lies to compel the association to make an assessment to pay the judgment.[27] A judgment recovered against a foreign assessment society can be enforced only by final process against the funds of the society within the jurisdiction or by a suit on the judgment in the state of the society's domicile.[28] Where an action is brought on a judgment for benefits, matters of defense as to the mode of payment and the extent of the society's liability cannot be gone into, because merged in the judgment sued on.[29] It has been held that execution will be confined in the first instance to the amount collected from assessments, unless an attempt is made to defraud plaintiff or use the assessment as means of delay.[30] In some states, by statute, particular funds of the society are exempt from execution.[31]

J. Appeal and Error.[32] General rules relating to who may appeal;[33] the right to appeal;[34] that questions not urged in the lower court and not properly preserved for review will not be noticed on appeal;[35] that error must appear

24. Supreme Tent K. M. W. v. Cox, 25 Tex. Civ. App. 366, 60 S. W. 971.

25. Ancient Order United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890, holding that to render an insurance company liable for attorney's fees, under Civ. Code, § 2140, a demand and a refusal to pay, sixty days before suit is brought, must be plainly averred, and the truth of such averment must be established on the trial; and hence, where no such demand and refusal are averred and proved, the recovery of attorney's fees is not authorized.

In Texas, exempting from such provisions for attorney's fees mutual relief associations organized under the laws of another state, a foreign mutual relief association, although an insurance company, is within the exception and not liable for attorney's fees. Supreme Council A. L. H. v. Larmour, 81 Tex. 71, 16 S. W. 633. Rev. St. (1895) art. 3096, provides that the general insurance laws shall not apply to mutual relief associations which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members, provided that the principal officer shall make an annual statement to the insurance department, etc. Article 3071, applicable to life insurance companies, provides that, where a company shall fail to pay a loss within the time specified, it shall be liable for twelve per cent damages and reasonable attorney's fees. It was held that a fraternal beneficiary corporation created under the laws of a sister state, whose relief funds are created by assessments on its members, which has subordinate lodges to which application is made for membership, and which issues benefit certificates, the amount payable on which is under a by-law dependent on the sum collected by assessments, is within article 3096, and is not liable under article 3071, except in case of failure of its principal officer to make the required statement. Supreme Council A. L. H. v. Story, 97 Tex. 264, 78 S. W. 1 [*modifying* (Civ. App. 1903) 75 S. W. 901].

26. May v. New York Safety Reserve Fund Soc., 13 N. Y. St. 66.

27. People v. Masonic Guild, etc., Ben. Assoc., 58 Hun (N. Y.) 395, 12 N. Y. Suppl. 171 [*reversed* on other grounds in 126 N. Y. 615, 27 N. E. 1037]. *Contra*, Miner v. Michigan Mut. Ben. Assoc., 65 Mich. 84, 31 N. W. 763, holding that further proceedings, if any are proper, must be had in equity under Howell Annot. St. Mich. § 8153, providing that when a judgment shall be obtained against a corporation and an execution thereon be returned unsatisfied, the circuit court may sequestrate the corporate property.

28. Brenizer v. Supreme Council R. A., 141 N. C. 409, 53 S. E. 835, 6 L. R. A. N. S. 235.

29. People's Mut. Ben. Soc. v. Werner, 6 Ind. App. 614, 34 N. E. 105.

30. Seitzinger v. New Era Life Assoc., 15 Wkly. Notes Cas. (Pa.) 348.

31. See EXEMPTIONS, 18 Cyc. 1436.

32. See, generally, APPEAL AND ERROR.

33. Com. v. Order of Solon, 166 Pa. St. 33, 30 Atl. 930, holding that where the supreme lodge accepts as final the decree of ouster, and directs the officers of the order to take no appeal, and follows this action by omitting to elect any new officers and adjourning *sine die*, the minority party has no standing to appeal from the judgment of ouster.

34. See Fisher v. Fisher, 28 Can. Sup. Ct. 494, as to granting special leave to appeal in cases involving matters of public importance.

35. Supreme Tribe of Ben Hur v. Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262; L'Union St. Joseph v. Lapierre, 4 Can.

from the record;[36] that a verdict or findings based on conflicting evidence will not be disturbed;[37] and that error which is harmless is not ground for reversal[38] apply to appeals in mutual benefit cases. Special statutes, in some jurisdictions, limit the time to bring error to reverse a judgment against a benefit association,[39] as well as the time within which the society may appeal.[40] But a statute making it unlawful for an insurance company to do business in the state where it fails to pay a judgment or take an appeal and give a supersedeas bond within a specified time does not authorize a dismissal of the appeal for failure to give such bond.[41]

MUTUAL COMBAT. A combat in which both parties enter willingly. (Mutual Combat: Generally, see PRIZE-FIGHTING. As an Assault, see ASSAULT AND BATTERY. Resulting in Homicide, see HOMICIDE.)

MUTUAL CONSENT. See CONTRACTS.

MUTUAL COVENANT. A covenant where either party may recover damages from the other for the injury he may have received from a breach of the covenants in his favor.[2] (See, generally, CONTRACTS; COVENANTS.)

MUTUAL CREDITS. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

MUTUAL DEBTS. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

MUTUAL INSURANCE. See INSURANCE, and the Insurance Titles.

MUTUALITY. The state or quality of being mutual; reciprocity; interchange.[3] (Mutuality: Of Award, see ARBITRATION AND AWARD. Of Contract — Generally, see CONTRACTS; Insurance Contract, see INSURANCE, and the Insurance Titles; To Authorize Specific Performance, see SPECIFIC PERFORMANCE. Of Estoppel — Generally, see ESTOPPEL; Affecting Judgment, see JUDGMENTS. See also MUTUAL.)

MUTUAL MISTAKE. See MISTAKE.

MUTUAL POOL. A method of gambling on horse races.[4] (See FRENCH POOL; and, generally, GAMING.)

Sup. Ct. 164 [*reversing* on other grounds 21 L. C. Jur. 332, 1 Montreal Leg. N. 40].

36. Englert *v.* Roman Catholic Mut. Protection Soc., 82 Iowa 465, 48 N. W. 810.

37. Hunter *v.* National Union, 197 Ill. 478, 64 N. E. 356 [*affirming* 99 Ill. App. 146].

38. *Iowa.*— Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659.

Kansas.— Southwestern Mut. Ben. Assoc. *v.* Swenson, 49 Kan. 449, 30 Pac. 405.

Missouri.— Boward *v.* Bankers' Union of World, 94 Mo. App. 442, 68 S. W. 369.

Rhode Island.— McDermott *v.* St. Wilhelmina Benev. Aid Soc., 24 R. I. 527, 54 Atl. 58.

Texas.— Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819.

See 28 Cent. Dig. tit. "Insurance," § 2015.

The bringing of an action in the name of the administrator of a deceased member of a mutual benefit association, on a certificate of membership payable to the member's heirs, is harmless error, where the administrator is also the sole heir of such deceased member. Peet *v.* Great Camp K. M., 83 Mich. 92, 47 N. W. 119.

39. Modern Woodmen of America *v.* Heath, 91 Kan. 148, 79 Pac. 1091.

40. Sons & Daughters of Justice *v.* Swift, 73 Kan. 255, 84 Pac. 984.

41. Supreme Lodge K. H. *v.* Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523.

1. Aldrige *v.* State, 59 Miss. 250, 255.

"Mutual combat" is the mutual intent to fight, and does not necessarily imply mutual blows. If the intent exists, and but one blow be struck, a mutual combat exists, though the first blow kills or disables one of the parties. Tate *v.* State, 46 Ga. 148, 158.

2. Bailey *v.* White, 3 Ala. 330, 331.

Mutual conditions.— Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other. Huggins *v.* Daley, 99 Fed. 606, 609, 40 C. C. A. 12, 48 L. R. A. 320.

3. Century Dict.

4. James *v.* State, 63 Md. 242, 248, where the method of conducting the pool is described as follows: "A list of the horses in a certain race is placed on a black-board in the open view of the bidders, and to each horse, on the left of their names, is attached a number, and to the right of their names is left an open space to show the number of times the horse has been chosen. A person wishing to invest money on a certain horse, purchases of the person having charge of the pool, a card or receipt, commonly called a ticket, stating at the time the horse upon which he wishes to purchase the card or ticket, which ticket has on its face a number which corresponds with the number attached to the name on the blackboard. . . . When the purchase has been made, the pool indicates the whole number of cards, receipts or tickets sold or taken upon

MUTUAL PROMISES. See CONTRACTS.

MUTUAL WILLS. See WILLS.

MUTUARY. A receiver of property pledged under a form of contract called a *mutuum*.[5] (See MUTUUM.)

MUTUUM. A contract whereby property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical thing, or property of the same kind and value.[6] In the civil law, a loan for consumption; goods of like kind to be returned.[7] (See, generally, BAILMENTS.)

MY.[8] Belonging to me.[9]

MYELITIS. Chronic inflammation of the spine.[10]

MYOPIA. A term used to designate shortness of sight.[11]

MYSELF. An emphatic form of the first personal pronoun I or me.[12]

MYSTERY. A term sometimes applied to a person's trade, art or occupation.[13]

the said black-board, placed in the open view, and this is correctly marked from time to time as each ticket or card is purchased or taken. When the pool is closed, the total amount invested on the different horses is added together, and is seen on the black-board aforesaid, and is called the total, and the total constitutes that pool. The total, less the commission of five per cent to the person conducting the pool, is divided into equal sums and paid to the persons having selected, taken or purchased the cards or tickets on the winning horse."

5. Rahilly *v.* Wilson, 20 Fed. Cas. No. 11,532, 3 Dill. 420, 426.

6. Rahilly *v.* Wilson, 20 Fed. Cas. No. 11,532, 3 Dill. 420, 426.

7. Payne *v.* Gardiner, 29 N. Y. 146, 167; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297, 299.

An "irregular deposit" differed from a "mutuum" in this: that the latter has principally in view the benefit of the receiver; the former, the benefit of the bailor. In case of *mutuum* the party borrowing was not held to pay interest, but in cases of irregular deposit interest was due by the depositary, both *ex nudo pacto* and *ex mora*; but this distinction between the two classes of deposit, as to interest, is not recognized by the common law, the depositary being liable in each case for interest in the event of breach of duty. Payne *v.* Gardiner, 29 N. Y. 146, 167.

8. **Distinguished from "the"** in Cooke *v.* Cunliffe, 17 Q. B. 245, 254, 79 E. C. L. 245.

As used in connection with other words see the following phrases: "All the balance of my property" see Mitchell *v.* Mitchell, 23 N. C. 257, 258. "My books" see Lawrence *v.* Lindsay, 68 N. Y. 108, 110. "My certificates" see Edmonson *v.* Bloomshire, 11 Wall. (U. S.) 382, 388, 20 L. ed. 44. "My chambers" see Doe *v.* Parratt, 3 B. & Ad. 469, 471, 23 E. C. L. 211. "My wife and children" see Carroll *v.* Carroll, 20 Tex. 731, 745. "My lawful debts and funeral charges" see Forster *v.* Sierra, 4 Ves. Jr. 766, 31 Eng. Reprint 397. "My estate" see *In re* Mumford, Myr. Prob. (Cal.) 133, 134; Crew *v.* Dixon, 129 Ind. 85, 91, 27 N. E. 728; England *v.* Prince George's Parish, 53 Md. 466, 470; Lediger *v.* Canfield, 78 N. Y. App. Div. 596, 79 N. Y. Suppl. 758; *In re* Durfee, 14 R. I. 47, 52 [*citing* Jarman Wills]; Carlton *v.* Goebler, 94 Tex. 93, 98, 58 S. W. 829. "My estate and property of every description" see Emery *v.* Haven, 67 N. H. 503, 505, 35 Atl. 940. "My whole estate" see Smith *v.* Terry, 43 N. J. Eq. 659, 666, 12 Atl. 204. "My half part" see Bebb *v.* Penoyre, 11 East 160, 163. "My household goods" see Barton *v.* Cooke, 5 Ves. Jr. 461, 31 Eng. Reprint 682. "My lawful heirs" see *In re* Cowley, 120 Wis. 263, 265, 97 N. W. 930, 98 N. W. 28; Thompson *v.* Smith, 25 Ont. 652, 654. "My own right heirs" see Coatsworth *v.* Carson, 24 Ont. 185, 186. "My other land" see Watson *v.* Watson, 110 Mo. 164, 169, 19 S. W. 543. "My plantation" see Peyton *v.* Smith, 4 McCord (S. C.) 476, 478, 17 Am. Dec. 758. "My property" see Pearson *v.* Housel, 17 Johns. (N. Y.) 281, 283. "My real estate" see Eckford *v.* Eckford, (Iowa 1892) 53 N. W. 345, 349. "My whole remainder" see White *v.* White, 52 Conn. 518, 520; Mulvane *v.* Rude, 146 Ind. 476, 480, 45 N. E. 659. "My saw mill" see Burr *v.* Mills, 21 Wend. (N. Y.) 290, 294. "My stock" see Norris *v.* Thomson, 16 N. J. Eq. 218, 222. "'My' bonds and stocks" see Matter of Hadden, 9 N. Y. Suppl. 453, 454, 1 Connoly Surr. (N. Y.) 306. "My wife" see Pastene *v.* Bonini, 166 Mass. 85, 87, 44 N. E. 246.

9. Century Dict.

Construed as meaning "her" see Horton *v.* Cantwell, 108 N. Y. 255, 268, 15 N. E. 546.

10. Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270, 271, where it is said that among the causes producing it may be concussion of the spine.

11. Harrell *v.* Norvill, 50 N. C. 29, 31.

12. Century Dict. See also Jenkins *v.* Bass, 88 Ky. 397, 401, 11 S. W. 293, 10 Ky. L. Rep. 987, 21 Am. St. Rep. 344, to the effect that where a note signed by two makers is made payable "to the order of myself," the word "myself" is equally applicable to either of the makers.

13. State *v.* Bishop, 15 Me. 122, 124.

In a covenant to teach an apprentice the art and mystery of tanning, it means to make him a workman of as much skill as tanners generally possess who have regularly learned the trade. Barger *v.* Caldwell, 2 Dana (Ky.) 129, 131.

MYSTIC TESTAMENT. In the law of Louisiana a sealed testament.[14] (See, generally, WILLS.)

N. In conveyances, maps, charts, and other instruments, a letter commonly used as an abbreviation of the word "North."[15]

N. A. An abbreviation for "*non allocatur*," meaning "it is not allowed."[16]

NAKED. Completely without clothing;[17] mere; simple; plain.[18] (Naked: Confession, see CRIMINAL LAW; NAKED CONFESSION. Contract, see CONTRACTS. Deposit, see BAILMENTS. Power, see NAKED POWER. Trust, see TRUSTS.)

NAKED AUTHORITY. A NAKED POWER,[19] *q. v.* (See, generally, POWERS.)

NAKED CONFESSION. As insufficient to lay a basis for conviction, a confession which relates no circumstances proven to have existed.[20]

NAKED CONTRACT. See CONTRACTS.

NAKED DEPOSIT. See BAILMENTS.

NAKED LIE. As sufficient to support an action of fraud, saying a thing which is false, knowing, or not knowing, it to be so, and without any design to injure, cheat or deceive another person;[21] where there is no warranty intended, and where the party deceived may exercise his own judgment.[22] (See, generally, FALSEHOOD; FRAUD.)

NAKED POSSESSION. Actual possession or occupation of the estate; without any apparent right to hold and continue such possession;[23] the lowest and most imperfect degree of title.[24] (See, generally, ADVERSE POSSESSION; PROPERTY.)

NAKED POSSIBILITY OR EXPECTANCY. With reference to a potential future estate, words importing hope to succession, but not a certainty;[25] not founded upon a right, or coupled with an interest, and therefore not transferable at law in the absence of a statutory provision;[26] although, despite the conflict and

Household service in a city, town, or village may perhaps be said to be a sort of "trade or mystery," which may require apprenticeship. *Com. v.* Vanlear, 1 Serg. & R. (Pa.) 248, 252.

14. Black L. Dict.

15. Burr *v.* Broadway Ins. Co., 16 N. Y. 267, 271.

16. Black L. Dict.

17. *Com. v.* Dejardin, 126 Mass. 46, 47, 30 Am. Rep. 652, where it is said the term does not apply to those who are without clothing only to the waist.

18. Webster Int. Dict.

"Naked bailee" and "naked bailment" see Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 284, 19 Am. Rep. 181.

19. See Moores *v.* Moores, 41 N. J. L. 440, 445, where these terms are used alike.

Of a power to executors in regard to land. —"A naked authority is where a man devises that his executors shall sell his land, or orders that his land shall be sold by his executors, or appoints, constitutes and empowers A. and B., whom he makes his executors of his last will, to sell, let, or set to sale, his estate. In all these cases the executors have only a naked authority to sell; and after the death of the testator the freehold descends to the heir, who is entitled to the profits until the sale." Powell Devises [*quoted* in Moores *v.* Moores, 41 N. J. L. 440, 445].

20. State *v.* Long, 2 N. C. 455, 456, where it is said: "Where A. makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict a prisoner; but a naked confession, unattended with circumstances, is not sufficient."

For another definition see CRIMINAL LAW, 12 Cyc. 483.

21. Pasley *v.* Freeman, 3 T. R. 51, 56, 1 Rev. Rep. 634, where "bare, naked lie" is so defined by Buller, J.

22. See Harvey *v.* Young, Yelv. 21*a*, note (1) where the term "nude assertion" is so explained with the added illustration: "As where it is a mere matter of opinion . . . or where he, by common prudence, may ascertain the truth of the assertion."

23. 2 Blackstone Comm. 196 [*quoted* in English *v.* Doe, 7 Ga. 387, 391].

It is "prima facie evidence of legal title in the possessor; and it may, by length of time and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title" (2 Blackstone Comm. 196 [*quoted* in English *v.* Doe, 7 Ga. 387, 391]), and has been held "enough to hold off creditors where exemption is claimed" under the Homestead Law (Pendleton *v.* Hooper, 87 Ga. 108, 109, 13 S. E. 313, 27 Am. St. Rep. 227 [*quoted* in Birdwell *v.* Burleson, 31 Tex. Civ. App. 31, 35, 72 S. W. 446]).

24. 2 Blackstone Comm. 196 [*cited* in Pendleton *v.* Hooper, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227, and *quoted* in English *v.* Doe, 7 Ga. 387, 391].

25. McCall *v.* Hampton, 98 Ky. 166, 172, 32 S. W. 406, 17 Ky. L. Rep. 713, 56 Am. St. Rep. 335, 33 L. R. A. 266.

26. McCall *v.* Hampton, 98 Ky. 166, 168, 32 S. W. 406, 17 Ky. L. Rep. 713, 56 Am. St. Rep. 335, 33 L. R. A. 266, where it is said: "The question in this case is whether a naked possibility or contingency, not

weight of authority, an assignment or release, made under proper circumstances, of an heir apparent or presumptive, may be enforced in equity.[27]

NAKED POWER. A power simply collateral and without interest;[28] a right or authority disconnected from any interest of the donee in the subject-matter.[29] It exists when authority is given to a stranger to dispose of an interest in which he had not before nor has by the instrument creating the power any estate whatever.[30] (See, generally, POWERS.)

NAKED PROMISE. A promise without consideration whereon, therefore, no action can be founded.[31]

NAKED TRUST. See TRUSTS.

NAM DEBES MELIORIS CONDITIONIS ESSE QUAM ACTOR MEUS A QUO JUS IN ME TRANSIT. A maxim meaning "One should not be placed in better condition than the person to whose rights he succeeds."[32]

NAMELY. A term which imports interpretation, that is, indicates what is included in the previous term.[33]

founded upon a right or coupled wth an interest, can be assigned or sold. Under the common law this could not be done. There is no statute in this State changing the common law on this subject."

27. See ASSIGNMENTS, 4 Cyc. 15.

28. Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 15, 2 Am. Dec. 281 [*quoted* in Hunt *v.* Ennis, 12 Fed. Cas. No. 6,889, 2 Mason 244].

29. Clark *v.* Hornthal, 47 Miss. 434, 534.

30. Mansfield *v.* Mansfield, 6 Conn. 559, 562, 16 Am. Dec. 76 [*quoted* in Atwater *v.* Perkins, 51 Conn. 188, 198].

The same description is given in substantially identical terms in Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 15, 2 Am. Dec. 281 [*quoted* in Hunt *v.* Ennis, 12 Fed. Cas. No. 6889, 2 Mason 244].

31. See Doctor and Student, Dial. 2, c. 24 [*quoted* in Arend *v.* Smith, 151 N. Y. 502, 505, 45 N. E. 872], where the following definition is given: "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service, and nothing is assigned for the money or for the building, or for the service. These be called naked promises, because there is nothing assigned why they should be made, and no action lieth in these cases, though they be not performed." See also NUDUM PACTUM.

Need of consideration to clothe a promise with contractual quality see CONTRACTS, 9 Cyc. 309, 310.

32. Peloubet Leg. Max.

33. Jarman Wills (5th ed.) 1090; Stroud Jud. Dict. 493 [both *quoted* in Matter of Duncombe, 3 Ont. L. Rep. 510, 513, distinguishing the word "including"].

NAMES

By Archibald H. Throckmorton
Dean of College of Law, Central University of Kentucky *

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* Author of 'Levees,' 25 Cyc. 188.

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I. DEFINITION.

A name is a word or words, designation or appellation, used to distinguish a person or thing or class from others;[1] and more particularly one or more words used to distinguish a person.[2]

1. Griffith *v.* Bonawitz, (Nebr. 1905) 103 N. W. 327, 329.
Commercial name defined see 8 Cyc. 494.
Corporate name see 10 Cyc. 150.
"Names" and "signatures" used interchangeably see Griffith *v.* Bonawitz, (Nebr. 1905) 103 N. W. 327, 329.
2. *Missouri.*— State *v.* McGrath, 75 Mo. 424, 426.
New Hampshire.— Tibbets *v.* Kiah, 2 N. H. 557, 558.
New Mexico.— Pearce *v.* Albright, 12 N. M. 202, 208, 76 Pac. 286.
New York.— People *v.* Hamilton County, 75 N. Y. App. Div. 110, 114, 77 N. Y. Suppl. 620; Snook's Petition, 2 Hilt. 566, 568; Rich *v.* Mayer, 7 N. Y. Suppl. 69, 70; People *v.* Ferguson, 8 Cow. 102, 106.
North Carolina.— See Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43.
Ohio.—Uihlein *v.* Gladieux, 74 Ohio St. 232, 237, 78 N. E. 363.
South Carolina.— Miller *v.* George, 30 S. C. 526, 528, 9 S. E. 659.
West Virginia.— Slingluff *v.* Gainer, 49 W. Va. 7, 9, 37 S. E. 771.
United States.— Gordon *v.* Holiday, 10 Fed. Cas. No. 5,610, 1 Wash. 285, 289.
See 36 Cent. Dig. tit. "Names," § 1.
See also Anderson L. Dict. 694; 7 Bacon Abr. 5; Bouvier L. Dict. 463.
Other definitions are: "A discriminative appellation, or designation of an individual." People *v.* Ferguson, 8 Cow. (N. Y.) 102, 106.
"That by which we distinguish a particular individual." Rich *v.* Mayer, 7 N. Y. Suppl. 69, 70.
"The designation by which [a person] is known." People *v.* Leong Quong, 60 Cal. 107.
"The designation by which [one] is distinctively known in the community." Laflin, etc., Co. *v.* Steytler, 146 Pa. St. 434, 442, 23 Atl. 215, 14 L. R. A. 690.
"The mark or *indicia* by which [a person] is known." Snook's Petition, 2 Hilt. (N. Y.) 566, 568.
"Name" is a word of various meaning.— A man's name is the synonym of his power and personality. It is often put metaphorically for the man himself. Carpenter *v.* Carpenter, 12 R. I. 544, 548, 34 Am. Rep. 716. See also Hale *v.* Kerr, 3 N. D. 523, 58 N. W. 27.
Original and modern use contrasted.— "The names of persons at this day are only sounds for distinction's sake, although it is probable they originally imported something more; as some natural qualities, features, or relations; but now there is no other use of them but to mark out the individuals we speak of, and to distinguish them from all others: Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142, 149. Many names have no specific meaning, apart from indicating the persons who bear them, and as *designatio personæ* it makes no difference, should the word or name performing that office, as is frequently the case, be also a word for expressing something else. Snook's Petition, 2 Hilt. (N. Y.) 566, 567.
Indicating identity.— Names are merely used as one method of indicating identity of persons. Meyer *v.* Indiana Nat. Bank, 27 Ind. App. 354, 61 N. E. 596.
"Name" construed as meaning "family" or "right line" see Mortimer *v.* Hartley, 6 Exch. 47, 60.
"Name" distinguished from "blood" as used in the phrase "of my blood and of my name" see Leigh *v.* Leigh, 15 Ves. Jr. 92, 103, 10 Rev. Rep. 31, 33 Eng. Reprint 690.

II. WHAT CONSTITUTES A NAME.

A. Christian Name and Surname — 1. In General. By the common law, since the time of the Norman conquest, a legal name has consisted of one christian or given name, and of one surname, patronymic, or family name.[3]

2. Surname. The surname or family name of a person is that which is derived from the common name of his parents, or is borne by him in common with other members of his family.[4]

3. Christian Name. The christian name is that which is given one after his birth or at baptism, or is afterward assumed by him in addition to his family name.[5]

3. *Arkansas.*— State *v.* Webster, 30 Ark. 166.

Colorado.— Moynahan *v.* People, 3 Colo. 367.

Indiana.— Burton *v.* State, 75 Ind. 477; Schofield *v.* Jennings, 68 Ind. 232; State *v.* Kutter, 59 Ind. 572; Choen *v.* State, 52 Ind. 347, 21 Am. Rep. 179.

Kentucky.— Com. *v.* Kelcher, 3 Metc. 484; Milward *v.* Lair, 13 B. Mon. 207.

New Jersey.— Elberson *v.* Richards, 42 N. J. L. 69.

New York.— Frank *v.* Levie, 5 Roh. 599; Snook's Petition, 2 Hilt. 566.

West Virginia.— Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

See 36 Cent. Dig. tit. "Names," § 1.

4. State *v.* McGrath, 75 Mo. 424; Snook's Petition, 2 Hilt. (N. Y.) 566; Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771. See also Moynahan *v.* People, 3 Colo. 367.

History and origin.— "The surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. . . . The insufficiency of the christian name to distinguish the particular individual, where there were many hearing the same name, led necessarily to the giving of surnames; and a man was distinguished, in addition to his christian name, in the great majority of cases, by the name of his estate, or the place where he was horn, or where he dwelt, or from whence he had come, as in the name of Washington, originally Wessyngton, which, as its component parts indicate, means a person dwelling on the meadow land, where a creek runs in from the sea, or else from his calling, as John the smith, or William the tailor, in time abridged to John Smith and William Taylor. And as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the father by calling him John's-son, or William's-son, which, among the Welsh, was abridged to s, as Edwards, Johns, or Jones, or Peters, which, as familiar appellations, passed into surnames. The Normans added Fitz to the father's christian name, to distinguish the son, as Fitz-herbert or Fitz-gerald. And among the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname, to denote from what stock each family was descended, Mac was added to distinguish the son, and O to distinguish the grandson; and generally, where names were taken from a place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch Van or French De, or a termination added at the end, which additions were in time merged into and formed but one word, until, from these various prefixes and suffixes, numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual gave rise to the surname, such as his color, as black John, brown John, white John, afterwards transposed to John Brown, &c.; or it arose from his bulk, height, or strength, as Little, Long, Hardy, Strong; or his mental or moral attributes, as Good, Wiley, Gay, Moody, or Wise; or his qualities were poetically personified by applying to him the name of some animal, plant, or bird, as Fox or Wolf, Rose or Thorn, Martin or Swan." Snook's Petition, 2 Hilt. (N. Y.) 566, 569.

Custom gives one the family name of his father and such *præ nomina* as his parents choose to put before it. Laflin, etc., Co. *v.* Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690.

A recently emancipated slave is not presumed to have a surname. Boyd *v.* State, 7 Coldw. (Tenn.) 69.

At marriage the wife takes the husband's surname. Uihlein *v.* Gladieux, 74 Ohio St. 232, 247, 78 N. E. 363, where it is said: "To distinguish her from the husband [she] is called Mrs. or Mistress . . . but otherwise her name is not changed. This person's real and legal name therefore, was Mrs. Lucy Rogers, and not Mrs. Wm. Rogers."

In the case of illegitimates, they take the name or designation they have gained by reputation. Snook's Petition, 2 Hilt. (N. Y.) 566, 570; Rex *v.* Smith, 6 C. & P. 151, 1 Moody C. C. 402, 25 E. C. L. 368; Rex *v.* Clark, R. & R. 266.

5. *California.*— People *v.* Leong Quong, 60 Cal. 107, 108.

Missouri.— State *v.* McGrath, 75 Mo. 424, 426.

New York.— Frank *v.* Levie, 5 Rob. 599, 600; Snook's Petition, 2 Hilt. 566, 568.

West Virginia.— Slingluff *v.* Gainer, 49 W. Va. 7, 9, 37 S. E. 771.

Therefore, at common law,[6] an indictment[7] or affidavit[8] in a criminal prosecution was defective unless, in addition to the surname of defendant, it contained his christian name, or an allegation that he had no christian name, or that it was unknown. In a civil action, a person may sue[9] or be sued[10] by his surname alone.

B. Middle Name or Initial. Under the well-settled rule that the law recognizes only one christian name,[11] it has been repeatedly held that the insertion,[12] or

England.— Holman *v.* Walden, 1 Salk. 6, where Holt, C. J., said: One may "have a *nomen* or *cognomen* that never was baptized, and thousands in fact have."

Where a person's name is given as "Ben," it will be assumed that it is his full christian name. Burton *v.* State, 75 Ind. 477.

Formerly the christian name was the more important of the two. Indeed, anciently in England there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth they were not considered of controlling importance. Snook's Petition, 2 Hilt. (N. Y.) 566, 567; Button *v.* Wrightman, Poph. 56.

Essential part of name.— The first or christian name of a party is an essential part of his name. Gottlieb *v.* Alton Grain Co., 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413.

The proper name.— The christian or first name is in the law denominated the proper name. Snook's Petition, 2 Hilt. (N. Y.) 566, 567.

Name of corporation.— "Christian name" may be used in the sense of "given name" so as to include the name given to a corporation. Johnson *v.* Central R. Co., 74 Ga. 397.

6. The common-law rule has been very generally changed by statute, so that the omission of defendant's christian name does not render the indictment defective. State *v.* Webster, 30 Ark. 166; Com. *v.* Kelcher, 3 Metc. (Ky.) 484.

7. Burton *v.* State, 75 Ind. 477; Gardner *v.* State, 4 Ind. 632.

8. State *v.* Kutter, 59 Ind. 572.

9. Brashear *v.* Stothard, 4 Bibb (Ky.) 265. *Contra*, Seely *v.* Schenck, 2 N. J. L. 75.

10. Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340. *Contra*, as to attachments see Elberson *v.* Richards, 42 N. J. L. 69; Frank *v.* Levie, 5 Rob. (N. Y.) 599.

Where a wife's name in full appears in the body of a mortgage, in which also she joins with her husband, her signature by her christian name only is sufficient. Zann *v.* Haller, 71 Ind. 136, 36 Am. Rep. 193.

11. *Alabama.*—Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169.

Arkansas.— State *v.* Smith, 12 Ark. 622, 56 Am. Dec. 287.

Colorado.— Doane *v.* Glenn, 1 Colo. 495.

Florida.— Burroughs *v.* State, 17 Fla. 643.

Georgia.— Banks *v.* Lee, 73 Ga. 25.

Illinois.—Humphrey *v.* Phillips, 57 Ill. 132.

Indiana.— O'Connor *v.* State, 97 Ind. 104; Schofield *v.* Jennings, 68 Ind. 232.

Iowa.— Hendershott *v.* Thompson, Morr. 186. See also State *v.* Loser, (1905) 104 N. W. 337.

Kansas.— Dutton *v.* Hobson, 7 Kan. 196.

Minnesota.— Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98.

Missouri.— State *v.* Martin, 10 Mo. 391; State *v.* Black, 12 Mo. App. 531.

Nebraska.— Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939.

New Jersey.— Dilts *v.* Kinney, 15 N. J. L. 130.

New York.—Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428]; Clute *v.* Emmerich, 26 Hun 10; Van Voorhis *v.* Budd, 39 Barb. 479; Aylesworth *v.* Brown, 10 Barb. 167; Snook's Petition, 2 Hilt. 566; Milk *v.* Christie, 1 Hill 102; Roosevelt *v.* Gardinier, 2 Cow. 463; Franklin *v.* Talmadge, 5 Johns. 84.

North Dakota.— Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

Ohio.— Uihlein *v.* Gladieux, 74 Ohio St. 232, 78 N. E. 363; Hamilton *v.* Cunningham, Tapp. 257.

Pennsylvania.— Bratton *v.* Seymour, 4 Watts 329; Paul *v.* Johnson, 9 Phila. 32.

Texas.—McDonald *v.* Morgan, 27 Tex. 503; Stockton *v.* State, 25 Tex. 772; McKay *v.* Speak, 8 Tex. 376; Delphino *v.* State, 11 Tex. App. 30; Dixon *v.* State, 2 Tex. App. 530. See also Jones *v.* State, (Cr. App. 1906) 96 S. W. 29.

United States.— Keene *v.* Meade, 3 Pet. 1, 7 L. ed. 581.

England.— Rex *v.* Newman, 1 Ld. Raym. 562; Evans *v.* King, Willes 554.

See 36 Cent. Dig. tit. "Names," § 2.

For purposes of identification, the middle name may be very important, as where the question is which one of two men of the same name, except that they have different middle names, or only one has a middle name, did a certain act, or was injured or sued, or the like. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

12. *Alabama.*— Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169; McMahan *v.* Colclough, 2 Ala. 68.

Arkansas.— State *v.* Smith, 12 Ark. 622, 56 Am. Dec. 287.

Florida.— Burroughs *v.* State, 17 Fla. 643.

Georgia.— Banks *v.* Lee, 73 Ga. 25.

Illinois.— Gross *v.* Grossdale, 177 Ill. 248, 52 N. E. 372; Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Bletch *v.* Johnson, 40 Ill. 116; Thompson *v.* Lee, 21 Ill. 242.

Indiana.— Choen *v.* State, 52 Ind. 347, 21 Am. Rep. 179.

Iowa.— Hendershott *v.* Thompson, Morr. 186.

Kentucky.— See Taulbee *v.* Buckner, 91 S. W. 734, 28 Ky. L. Rep. 1246.

Minnesota.— Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98.

Mississippi.— Haywood *v.* State, 47 Miss. 1, name.

omission,[13] of, or mistake[14] in, a middle name or initial in a criminal[15] as well as in a civil proceeding[16] is therefore immaterial. But if he is sued or prosecuted

Missouri.— Phillips *v.* Evans, 64 Mo. 17.

New York.—Van Voorhis *v.* Budd, 39 Barb. 479; People *v.* Cook, 14 Barb. 259 [*affirmed* in 8 N. Y. 67, 59 Am. Dec. 451].

Ohio.— Hamilton *v.* Cunningham, Tapp. 257.

Vermont.— Walbridge *v.* Kibbee, 20 Vt. 543.

England.—Rex *v.* Newman, 1 Ld. Raym. 562.

See 36 Cent. Dig. tit. "Names," § 2.

13. *Alabama.*— Rooks *v.* State, 83 Ala. 79, 3 So. 720.

California.— People *v.* Ferris, 56 Cal. 442.

Illinois.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Humphrey *v.* Phillips, 57 Ill. 132.

Indiana.— O'Connor *v.* State, 97 Ind. 104; Miller *v.* State, 69 Ind. 284; Foltz *v.* State, 33 Ind. 215.

Iowa.— State *v.* Williams, 20 Iowa 98, name.

Kansas.— Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

Maryland.— White *v.* McClellan, 62 Md. 347.

Missouri.—Randolph *v.* Keiler, 21 Mo. 557; Smith *v.* Ross, 7 Mo. 463.

New Hampshire.— King *v.* Hutchins, 28 N. H. 561; Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey.— Dilts *v.* Kinney, 15 N. J. L. 130.

New York.— People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344 (name); Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428]; Clute *v.* Emmerich, 26 Hun 10; Aylesworth *v.* Brown, 10 Barb. 167; Roosevelt *v.* Gardinier, 2 Cow. 463; Franklin *v.* Talmadge, 5 Johns. 84.

Pennsylvania.— *In re* South Abington Tp. Road, 109 Pa. St. 118; Paul *v.* Johnson, 9 Phila. 32.

Rhode Island.— State *v.* Feeny, 13 R. I. 623.

Texas.— McDonald *v.* Morgan, 27 Tex. 503; Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580; Dodd *v.* State, 2 Tex. App. 58.

Vermont.— Allen *v.* Taylor, 26 Vt. 599; Alexander *v.* Wilmorth, 2 Aik. 413.

West Virginia.— Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

United States.— Games *v.* Dunn, 14 Pet. 322, 10 L. ed. 476.

See 36 Cent. Dig. tit. "Names," § 2.

Contra, except in civil cases where the person is otherwise identified. See Ryder *v.* Mansell, 66 Me. 167; Luce *v.* Dexter, 135 Mass. 23; Hubbard *v.* Smith, 4 Gray (Mass.) 72; Collins *v.* Douglass, 1 Gray (Mass.) 167.

14. *Alabama.*— Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513, name.

California.— People *v.* Lockwood, 6 Cal. 205.

Colorado.— Doane *v.* Glenn, 1 Colo. 495.

Georgia.— Cheshire *v.* Milburn Wagon Co., 89 Ga. 249, 15 S. E. 311; Hicks *v.* Riley, 83 Ga. 333, 9 S. E. 771.

Illinois.— Beattie *v.* National Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, 43 L. R. A. 654 [*affirming* 69 Ill. App. 632]; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Miller *v.* People, 39 Ill. 457.

Indiana.— Schofield *v.* Jennings, 68 Ind. 232; Morgan *v.* Woods, 33 Ind. 23.

Kansas.— Dutton *v.* Hobson, 7 Kan. 196.

Maine.— Emery *v.* Legro, 63 Me. 357.

Missouri.— Campbell *v.* Wolf, 33 Mo. 459; Randolph *v.* Keiler, 21 Mo. 557; Orme *v.* Shephard, 7 Mo. 606; State *v.* Black, 12 Mo. App. 531.

New York.— Geller *v.* Hoyt, 7 How. Pr. 265; Milk *v.* Christie, 1 Hill 102.

North Dakota.— Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

Pennsylvania.— Bratton *v.* Seymour, 4 Watts 329.

Texas.— Stockton *v.* State, 25 Tex. 772; State *v.* Manning, 14 Tex. 402; McKay *v.* Speak, 8 Tex. 376; Trimble *v.* Burroughs, (Civ. App. 1906) 95 S. W. 614; Delphino *v.* State, 11 Tex. App. 30; Dixon *v.* State, 2 Tex. App. 530.

Vermont.— Bogue *v.* Bigelow, 29 Vt. 179; Allen *v.* Taylor, 26 Vt. 599; Isaacs *v.* Wiley, 12 Vt. 674.

United States.— Keene *v.* Meade, 3 Pet. 1, 7 L. ed. 581.

See 36 Cent. Dig. tit. "Names," § 2.

Contra.— Ming *v.* Gwatkin, 6 Rand. (Va.) 551. But by statute in Virginia (Code (1904), §§ 3258, 3999) no plea in abatement for misnomer is now allowed in any action, either civil or criminal, and the declaration or indictment may, on motion, be amended by inserting the right name. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

15. *Arkansas.*— State *v.* Smith, 12 Ark. 622, 56 Am. Dec. 287.

California.— People *v.* Ferris, 56 Cal. 442.

Illinois.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Miller *v.* People, 39 Ill. 457.

Indiana.— O'Connor *v.* State, 97 Ind. 104.

New York.— People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344.

Rhode Island.— State *v.* Feeny, 13 R. I. 623.

Texas.— Stockton *v.* State, 25 Tex. 772; Delphino *v.* State, 11 Tex. App. 30; Dixon *v.* State, 2 Tex. App. 530.

See 36 Cent. Dig. tit. "Names," § 2.

Contra.—In Maine, Massachusetts and Tennessee in criminal cases. State *v.* Dresser, 54 Me. 569; State *v.* Homer, 40 Me. 438; Com. *v.* Buckley, 145 Mass. 181, 13 N. E. 368; Com. *v.* McAvoy, 16 Gray (Mass.) 235; Com. *v.* Shearman, 11 Cush. (Mass.) 546; Com. *v.* Hall, 3 Pick. (Mass.) 262; Com. *v.* Perkins, 1 Pick. (Mass.) 388; State *v.* Hughes, 1 Swan (Tenn.) 261.

16. See cases cited *supra*, notes 11–14.

by his middle name, omitting his christian name, the declaration or indictment is defective,[17] unless it be proved that he was also known by the name stated.[18]

C. Prefixes and Suffixes — **1. PREFIXES.** The prefixes "Mr." and "Mrs." appearing before names of persons are not themselves names or parts of names.[19] But certain well known and commonly used prefixes have come to be recognized as integral and essential parts of surnames.[20]

2. SUFFIXES. The addition of the abbreviations "Sr."[21] or "Jr."[22] or

As against subsequent purchasers and judgment creditors, the omission of, or mistake in, a middle initial in the debtor's name in the index to a judgment prevents such record from constituting legal notice. Crouse *v.* Murphy, 140 Pa. St. 335, 21 Atl. 358, 23 Am. St. Rep. 232, 12 L. R. A. 58 [*overruling* Jenny *v.* Zehnder, 101 Pa. St. 296]; Hutchinson's Appeal, 92 Pa. St. 186; Wood *v.* Reynolds, 7 Watts & S. (Pa.) 406; Stott *v.* Irwin, 2 Chest. Co. Rep. (Pa.) 137 (mechanic's lien); Davis *v.* Steeps, 87 Wis. 472, 58 N. W. 769, 41 Am. St. Rep. 51, 23 L. R. A. 818; Staunton *v.* Staunton, 15 Ir. Ch. 464. *Contra*, Clute *v.* Emmerich, 26 Hun (N. Y.) 10; Weber *v.* Fowler, 11 How. Pr. (N. Y.) 458.

Attachment was defective where there was a variance in the middle initial of defendant as stated in the attachment and the sheriff's return. Dutton *v.* Simmons, 65 Me. 583, 20 Am. Rep. 729.

Other variances held material.— If there is a variance in the middle initial between the summons and the account filed, the defect is fatal. Bowen *v.* Mulford, 10 N. J. L. 230. In a suit on a bill of exchange where the drawer's signature is alleged to be G. A. Cook, and the signature on the instrument produced at the trial is G. W. Cook, this is a material variance. King *v.* Clark, 7 Mo. 269.

17. Diggs *v.* State, 49 Ala. 311; Graves *v.* People, 11 Ill. 542; State *v.* Martin, 10 Mo. 391; Arbouin *v.* Willoughby, 1 Marsh. 477, 4 E. C. L. 472.

So there is a variance where the indictment charges stealing the property of John Peter Sinish, and the evidence is that it was the property of Peter Sinish. State *v.* English, 67 Mo. 136.

18. Diggs *v.* State, 49 Ala. 311; Graves *v.* People, 11 Ill. 542; Wolcott *v.* Meech, 22 Barb. (N. Y.) 321; N. Y. Code Civ. Proc. § 539. See also Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939.

19. *Illinois.*— Schmidt *v.* Thomas, 33 Ill. App. 109.

Indiana.— State *v.* Kutter, 59 Ind. 572.

Nebraska.— Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939.

New Jersey.— Elberson *v.* Richards, 42 N. J. L. 69.

North Carolina.— Labat *v.* Ellis, 1 N. C. 92, "monsieur."

Ohio.— Uihlein *v.* Gladieux, 74 Ohio St. 232, 78 N. E. 363.

See 36 Cent. Dig. tit. "Names," § 3.

"Mrs." distinguishes the person named as a married woman. Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939; Elberson *v.* Richards, 42 N. J. L. 69.

20. Moynahan *v.* People, 3 Colo. 367 ("Fitz"); Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465 ("O"); State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162 ("Mac"); Snook's Petition, 2 Hilt. (N. Y.) 566.

21. Lord *v.* Waterhouse, 1 Root (Conn.) 430; Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206; Neil *v.* Dillon, 3 Mo. 59.

22. *Alabama.*— Teague *v.* State, 144 Ala. 42, 40 So. 312.

California.— San Francisco *v.* Randall, 54 Cal. 408; Carleton *v.* Townsend, 28 Cal. 219.

Colorado.— Loveland *v.* Sears, 1 Colo. 433.

Connecticut.— Coit *v.* Starkweather, 8 Conn. 289.

Georgia.— Hayes *v.* State, 58 Ga. 35.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Headley *v.* Shaw, 39 Ill. 354.

Indiana.— Geraghty *v.* State, 110 Ind. 103, 11 N. E. 1; Allen *v.* State, 52 Ind. 486.

Iowa.— State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

Kentucky.— Johnson *v.* Ellison, 4 T. B. Mon. 526, 16 Am. Dec. 163.

Louisiana.— State *v.* Cafiero, 112 La. 453, 36 So. 492.

Maine.— State *v.* Grant, 22 Me. 171.

Maryland.— Weber *v.* Fickey, 52 Md. 500.

Massachusetts.—Simpson *v.* Dix, 131 Mass. 179; Cobb *v.* Parmenter, 101 Mass. 211; Boyden *v.* Hastings, 17 Pick. 200; Cobb *v.* Lucas, 15 Pick. 7; Com. *v.* Perkins, 1 Pick. 388; Kincaid *v.* Howe, 10 Mass. 203.

Minnesota.— Bidwell *v.* Coleman, 11 Minn. 78.

New Hampshire.—State *v.* Weare, 38 N. H. 314.

New York.— Farnham *v.* Hildreth, 32 Barb. 277; People *v.* Cook, 14 Barb. 259 [*affirmed* in 8 N. Y. 67, 59 Am. Dec. 451]; Fleet *v.* Young, 11 Wend. 522; People *v.* Collins, 7 Johns. 549; Padgett *v.* Lawrence, 10 Paige 170, 40 Am. Dec. 232; Goodhue *v.* Berrien, 2 Sandf. Ch. 630.

North Carolina.— State *v.* Best, 108 N. C. 747, 12 S. E. 907.

Texas.— Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668; Wesley *v.* State, 45 Tex. Cr. 64, 73 S. W. 960.

Vermont.— Prentiss *v.* Blake, 34 Vt. 460; Jameson *v.* Isaacs, 12 Vt. 611; Blake *v.* Tucker, 12 Vt. 39; Allen *v.* Ogden, 12 Vt. 9; Keith *v.* Ware, 6 Vt. 680; Brainard *v.* Stilphin, 6 Vt. 9, 27 Am. Dec. 532.

"2nd" [23] or words of similar import [24] to a name is no part of the name.[25] Such additions are used merely to distinguish between two or more persons bearing the same name,[26] especially when they live in the same community,[27] "Jr." and "2nd" being usually adopted to designate the son, when the father bears the same christian name as well as the same family name.[28] When father and son bear the same name, by the use of the name without addition, the father is *prima facie* intended,[29] and of two persons not father and son, the elder is presumed to be intended;[30] but slight evidence will be sufficient to rebut the presumption and identify the son, or the younger person.[31] Where the only difference between two names is in such an addition, they are presumed to refer to the same person [32] until the contrary is affirmatively alleged and proved.[33]

D. Abbreviations. A name may be represented by an abbreviation, con-

Virginia.—O'Bannon *v.* Saunders, 24 Gratt. 138.

Wisconsin.— Clark *v.* Gilbert, 1 Pinn. 354.

See 36 Cent. Dig. tit. "Names," § 3.

But upon a plea of nul tiel record in an action on a judgment against A B, a record of a judgment against A B Jr., will not support the issue. De Kentland *v.* Somers, 2 Root (Conn.) 437; Boyden *v.* Hastings, 17 Pick. (Mass.) 200.

23. Litchfield *v.* Farmington, 7 Conn. 100; Com. *v.* Parmenter, 101 Mass. 211; Cobb *v.* Lucas, 15 Pick. (Mass.) 7.

24. Teague *v.* State, 144 Ala. 42, 40 So. 312.

25. "Appropriate circumstances may require 'Sr.' or 'Jr.' as a further constituent part." Laflin, etc., Co. *v.* Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690. "Jr." and words of similar import are ordinarily mere matters of description. Teague *v.* State, 144 Ala. 42, 40 So. 312.

26. *Colorado.*— Loveland *v.* Sears, 1 Colo. 433.

Kentucky.— Johnson *v.* Ellison, 4 T. B. Mon. 526, 16 Am. Dec. 163.

Maine.— State *v.* Grant, 22 Me. 171.

Massachusetts.— Boyden *v.* Hastings, 17 Pick. 200; Cobb *v.* Lucas, 15 Pick. 7.

New Hampshire.— State *v.* Weare, 38 N. H. 314.

New York.— Padgett *v.* Lawrence, 10 Paige 170, 40 Am. Dec. 232.

See 36 Cent. Dig. tit. "Names," § 3.

27. Kincaid *v.* Howe, 10 Mass. 203; Lepiot *v.* Browne, 1 Salk. 7.

28. Loveland *v.* Sears, 1 Colo. 433; Boyden *v.* Hastings, 17 Pick. (Mass.) 200; Kincaid *v.* Howe, 10 Mass. 203; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Lepiot *v.* Browne, 1 Salk. 7.

29. *Delaware.*— Bate *v.* Burr, 4 Harr. 130.

Georgia.— Manry *v.* Shepperd, 57 Ga. 68.

Illinois.— Graves *v.* Colwell, 90 Ill. 612.

Indiana.— Brown *v.* Benight, 3 Blackf. 39, 23 Am. Dec. 373.

Massachusetts.— Kincaid *v.* Howe, 10 Mass. 203.

New Hampshire.—State *v.* Vittum, 9 N. H. 519.

New York.— Padgett *v.* Lawrence, 10 Paige 170, 40 Am. Dec. 232.

North Carolina.— Stevens *v.* West, 51 N. C. 49.

England.— Young *v.* Young, 1 Dowl. P. C. N. S. 865, 6 Jur. 916; Singleton *v.* Johnson, 1 Dowl. P. C. N. S. 356, 5 Jur. 114, 11 L. J. Exch. 88, 9 M. & W. 67; Lepiot *v.* Browne, 1 Salk. 7; Sweeting *v.* Fowler, 1 Stark. 106, 2 E. C. L. 49.

See 36 Cent. Dig. tit. "Names," §§ 3, 11.

30. Stevens *v.* West, 51 N. C. 49.

31. Bate *v.* Burr, 4 Harr. (Del.) 130; Kincaid *v.* Howe, 10 Mass. 203; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Rex *v.* Peace, 3 B. & Ald. 579, 5 E. C. L. 334; Sweeting *v.* Fowler, 1 Stark. 106, 2 E. C. L. 49; Jones *v.* Newman, W. Bl. 60.

If there is a devise to A B and the devisor did not know the son, or if one deals with the son, knowing nothing of his father, this is sufficient evidence that the son was intended. Lepiot *v.* Browne, 1 Salk. 7.

32. *Illinois.*— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

Kentucky.— Johnson *v.* Ellison, 4 T. B. Mon. 526, 16 Am. Dec. 163.

Louisiana.— State *v.* Cafiero, 112 La. 453, 36 So. 492.

New York.— People *v.* Collins, 7 Johns. 549.

England.— Lepiot *v.* Browne, 1 Salk. 7.

See 36 Cent. Dig. tit. "Names," § 3.

Exception to rule.— But where a trust deed describes the trustee as "L. T. Jr." and the certificate of acknowledgment begins "I, L. T. Jr." but is signed "L. T. N. P.," the inference is that the trustee and the notary are different persons. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

33. *Illinois.*— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Graves *v.* Colwell, 90 Ill. 612.

Kentucky.— Johnson *v.* Ellison, 4 T. B. Mon. 526, 16 Am. Dec. 163.

Louisiana.— State *v.* Cafiero, 112 La. 453, 36 So. 492.

Maine.— State *v.* Grant, 22 Me. 171.

New Hampshire.— State *v.* Weare, 38 N. H. 314.

New York.— People *v.* Collins, 7 Johns. 549.

Vermont.— Prentiss *v.* Blake, 34 Vt. 460.

England.— Lepiot *v.* Browne, 1 Salk. 7.

See 36 Cent. Dig. tit. "Names," § 3.

The question is for the jury.— Allen *v.* Ogden, 12 Vt. 9.

sisting of a letter[34] or letters, used for the name.[35] Judicial notice will be taken of the ordinary and commonly used abbreviations of christian names,[36] and in certain cases also of the abbreviations of surnames and parts of surnames.[37] In the case of less common abbreviations, the question is one for the jury.[38]

E. Initials. A christian name may consist simply of a letter or letters, whether vowel or consonant,[39] and where a surname is preceded by single letters there is no presumption that they are merely initials, rather than the full christian name of the person designated.[40] The use of initials, however, instead of a christian name, before a surname, is a common practice, and has come to be recognized as a sufficient statement of the person's name.[41]

III. DERIVATIVES AND CORRUPTIONS.

Where two names have the same original derivation, or where one of such names is a contraction or corruption of the other name, and in common usage

34. Claflin *v.* Chicago, 178 Ill. 549, 53 N. E. 339 ("J." for John); Lee *v.* Mendel, 40 Ill. 359; People *v.* Ferguson, 8 Cow. (N. Y.) 102 ("Geo." for George and "H." for Henry). *Contra*, Andrews *v.* Wynn, 4 S. D. 40, 54 N. W. 1047, "E." for Edward.

35. See cases cited *infra*, notes 36–38.

36. *Georgia.*— Goodell *v.* Hall, 112 Ga. 435, 37 S. E. 725 ("Eliza" for Elizabeth); Stephen *v.* State, 11 Ga. 225 ("Jas." for James); Studstill *v.* State, 7 Ga. 2 ("Thos." for Thomas).

Illinois.— Linn *v.* Buckingham, 2 Ill. 451 ("Wm." for William).

Indiana.— Trimble *v.* State, 4 Blackf. 435, "Susan" for Susanna.

Kansas.— Sparks *v.* Sparks, 51 Kan. 195 32 Pac. 892, "Dan" for Daniel.

Missouri.— Weaver *v.* McElhenon, 13 Mo. 89 ("Christ." or "Christy" for Christopher); Exendine *v.* Morris, 8 Mo. App. 383 ("Ellen" for Eleanor).

Montana.— Kemp *v.* McCormick, 1 Mont. 420, "Alex." for Alexander and "Jno." for John.

New York.— People *v.* Ferguson, 8 Cow. 102, "Hen." for Henry, and "Geo." for George. But "Nat. Locke" is not an abbreviation for James N. Locke, nor "James N. Locke" for Nat. Locke. People *v.* Hamilton County, 75 N. Y. App. Div. 110, 77 N. Y. Suppl. 620.

South Carolina.— State *v.* Dodson, 16 S. C. 453, "Rich." for Richard.

Vermont.— McGregor *v.* Balch, 17 Vt. 562, "Barney" for Barnabas.

See 36 Cent. Dig. tit. "Names," § 4.

37. State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162, "Mc" for the prefix "Mac."

38. Thursby *v.* Myers, 57 Ga. 155 ("Mord." for Mordecai); Curtiss *v.* Marrs, 29 Ill. 508 ("Bart." for Bartholomew); Com. *v.* O'Baldwin, 103 Mass. 210 ("Jo." for Joseph). And see Cutting *v.* Conklin, 28 Ill. 506, "Feb'y" for February.

39. *Connecticut.*— Tweedy *v.* Jarvis, 27 Conn. 42.

Michigan.— Hinkle *v.* Collins, 113 Mich. 105, 71 N. W. 481; Fewlass *v.* Abbott, 28 Mich. 270.

Pennsylvania.— *In re* Jones, 27 Pa. St. 336.

South Carolina.— Wilthaus *v.* Ludecus, 5 Rich. 326; Charleston *v.* King, 4 McCord 487.

Wyoming.— Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

England.— Reg. *v.* Dale, 17 Q. B. 64, 15 Jur. 657, 20 L. J. M. C. 240, 79 E. C. L. 64, 5 Eng. L. & Eq. 360.

See 36 Cent. Dig. tit. "Names," § 5.

"Christian and surname" may consist in the surname in full and the initials of the christian name. Stratton *v.* Foster, 11 Me. 467.

40. Taylor *v.* Insley 7 Colo. App. 175, 42 Pac. 1046; Hinkle *v.* Collins, 113 Mich. 105, 71 N. W. 481; Woodberry *v.* Dye, 10 Rich. (S. C.) 31; Wilthaus *v.* Ludecus, 5 Rich. (S. C.) 326; Charleston *v.* King, 4 McCord (S. C.) 487; Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

41. *Georgia.*— Minor *v.* State, 63 Ga. 318.

Kansas.— Ferguson *v.* Smith, 10 Kan. 396.

Maine.— State *v.* Taggart, 38 Me. 298.

Maryland.— Harryman *v.* Roberts, 52 Md. 64.

Massachusetts.— Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193; Com. *v.* Gleason, 110 Mass. 66; Webber *v.* Davis, 5 Allen 393.

New Mexico.— Pearce *v.* Albright, 12 N. M. 202, 76 Pac. 286.

New York.— Gottlieb *v.* Alton Grain Co., 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413 [*affirmed* in 181 N. Y. 563, 74 N. E. 1117]. See also Palmer *v.* Stephens, 1 Den. 471.

United States.— See Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. ed. 72.

England.— Reg. *v.* Avery, 18 Q. B. 576, 17 Jur. 194, 21 L. J. Q. B. 428, 83 E. C. L. 576. See also Phillimore *v.* Barry, 1 Campb. 513, 10 Rev. Rep. 742; Jacob *v.* Kirk, 2 M. & Rob. 221.

See 36 Cent. Dig. tit. "Names," § 5.

Words indicated by single letters are only less adapted to the purposes of names than words indicated by several letters. Griffith *v.* Bonawitz, (Nebr. 1905) 103 N. W. 327, 329.

they are considered one and the same, the use of one name for the other is entirely immaterial.[42]

IV. ASSUMED NAMES.

A. Fictitious Name. Without abandoning his real name, a person may adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued.[43] Such assumed or fictitious name may be either a purely artificial name or a name that is or may be applied to natural persons.[44]

Presumption.— A letter preceding a surname is presumed to be an initial and not an abbreviation of a title, unless proved to be the latter. Burford *v.* McCue, 53 Pa. St. 427.

"Full names" does not necessarily imply that the christian or given names must be spelled out in full in every case. Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Laflin, etc., Co. *v.* Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690. But Ind. Rev. St. § 338, requiring the title of a clause contained in the complaint to specify the names of the parties, meant the full names, and not merely the initials of the christian names. Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856.

Initials are not a name, and cannot be used for the christian names of parties to actions, except in cases where parties inscribed by initial letters in bills of exchange, promissory notes, or other written instruments. Elberson *v.* Richards, 42 N. J. L. 69, 70.

42. *Arkansas.*—Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555, 100 Am. St. Rep. 91.

California.— Galliano *v.* Kilfoy, 94 Cal. 86, 29 Pac. 416, "Rose" for Rosa.

Illinois.— Wilson *v.* Turner, 81 Ill. 402 ("Lizia" for Elizabeth); Rivard *v.* Gardner, 39 Ill. 125 ("Sinclair" for St. Clair).

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735 ("Jack" for John); Conaway *v.* Hays, 7 Blackf. 159 ("Conavay" for Conaway).

Iowa.— Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315.

Kansas.— State *v.* Watson, 30 Kan. 281, 1 Pac. 770, "Mollie" for Mary.

Kentucky.— Ellis *v.* Merriman, 5 B. Mon. 296 ("Isah" for Isaiah); Schooler *v.* Ashurst, 3 A. K. Marsh. 492 ("Josier" for Josiah).

Missouri.— Exendine *v.* Morris, 8 Mo. App. 383, "Ellen" for Elcanor.

New York.— Jackson *v.* Boneham, 15 Johns. 226, "Minner" for Miner.

Pennsylvania.— *In re* Jones, 27 Pa. St. 336.

Texas.— Alsup *v.* State, 36 Tex. Cr. 535, 38 S. W. 174, "Bob." for Robert.

Vermont.— McGregor *v.* Balch, 17 Vt. 562, "Barney" for Barnabas.

Virginia.— Burley *v.* Griffith, 8 Leigh 442, "Bill" for William.

United States.— Gordon *v.* Holiday, 10 Fed. Cas. No. 5,610, 1 Wash. 285.

See 36 Cent. Dig. tit. "Names," § 6.

However, it has been held that "Minnie" is not the same as "Wilhelmina" or "Mena" (Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555, 100 Am. St. Rep. 91); nor "Mary" as "May" (Kennedy *v.* Merriam, 70 Ill. 228); nor "Harry" as "Henry" (Garrison *v.* People, 21 Ill. 535; Gordon *v.* Holiday, 10 Fed. Cas. No. 5,610, 1 Wash. 285; Rex *v.* Roberts, Str. 1214); nor "Helen" as "Ellen" (Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315); nor "Emma" as "Emily" (Burge *v.* Burge, 94 Mo. App. 15, 67 S. W. 703).

43. *Alabama.*— Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115.

Connecticut.— Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225.

Illinois.— Graham *v.* Eiszner, 28 Ill. App. 269.

Louisiana.— *In re* Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427.

Missouri.— Sparks *v.* Despatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

New York.— England *v.* New York Pub. Co., 8 Daly 375; Snook's Petition, 2 Hilt. 566; Rich *v.* Mayer, 7 N. Y. Suppl. 69.

England.— Linch *v.* Hooke, 1 Salk. 7.

See 36 Cent. Dig. tit. "Names," § 7.

A divorced woman may assume her maiden name and maintain an action in that name. Rich *v.* Mayer, 7 N. Y. Suppl. 69, 70.

N. Y. Laws (1900), p. 452, c. 216, § 363b, forbidding the carrying on of business under an assumed name, does not prevent institution of an action by one who has assumed a trade name. Devlin *v.* Peek, 135 Fed. 167.

44. See cases cited *supra*, note 43.

There is no difference between assuming a purely artificial name, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person. Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225.

The term "fictitious name" does not include a firm-name showing only the surnames of the partners. McLean *v.* Crow, 88 Cal. 644, 647, 26 Pac. 596; Carlock *v.* Cagnacci, 88 Cal. 600, 601, 26 Pac. 597; Pendleton *v.* Cline, 85 Cal. 142, 145, 24 Pac. 659. "We have nowhere found a legal definition of what constitutes a 'fictitious or assumed name.' We apprehend that not every change in one or more of a person's Christian names, either in the spelling, the arrange-

B. Change of Name. It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth.[45]

V. RIGHT TO USE.

A person has no such exclusive right to the use of a surname,[46] or a name applied to house or land,[47] as will enable him to prevent its assumption by another. Nor will an injunction issue to restrain the unauthorized use of a person's name, as in a testimonial, even though such use is calculated to injure him in his profession, unless such use is shown to be injurious to plaintiff's reputation, or to his property.[48] Where an officer of a corporation consents to the use of his name as trustee in certain transactions of the corporation, he cannot, after he has ceased to hold office, enjoin the use of his name as trustee for the completion of such business.[49]

VI. NAMES IN COMMON USE.

It is sufficient in legal proceedings that a person is designated by a name by which he is commonly known and called, even though it is not his true name.[50]

ment, or even substituting one Christian name for another, makes the new name a 'fictitious or assumed name,' but that the fact must depend upon the substance and circumstances of the change, how long the new name has been used, and possibly the purpose of the change, and that, in general, whether the new name is really a fictitious or assumed name, is a question of fact." Pollard *v.* Fidelity F. Ins. Co., 1 S. D. 570, 574, 47 N. W. 1060.

45. *Kansas.*— Clark *v.* Clark, 19 Kan. 522.

Mississippi.— Haywood *v.* State, 47 Miss. 1.

New York.— Cooper *v.* Burr, 45 Barb. 9; England *v.* New York Pub. Co., 8 Daly 375; Snook's Petition, 2 Hilt. 566; Rich *v.* Mayer, 7 N. Y. Suppl. 69.

South Carolina.— Charleston *v.* King, 4 McCord 487.

United States.—Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894.

England.— Doe *v.* Yates, 5 B. & Ald. 544, 7 E. C. L. 298.

See 36 Cent. Dig. tit. "Names," §§ 7, 18.

Presumption is that baptismal name continues.— People *v.* Leong Quong, 60 Cal. 107, 108.

Effect of parliamentary permission to assume.— A person granted permission by act of parliament to take a new name does not lose his original name, the effect of the crown's license is not to impose the new name but only to give permission to use it. Such a person therefore may still take a devise under his original name. Leigh *v.* Leigh, 15 Ves. Jr. 92, 10 Rev. Rep. 31, 33 Eng. Reprint 690.

A legacy on condition of marriage with person of the name of A is not performed by marriage with person assuming that name. Barlow *v.* Bateman, 2 Bro. P. C. 272, 1 Eng. Reprint 939.

Where a married woman eloped with a man, and was commonly known in the community in which she lived after the elopement by the name of her paramour, with whom she lived as a wife, she can sue in such reputed name. Clark *v.* Clark, 19 Kan. 522.

In New York, while the common-law rule is still in effect, yet, in order that legal sanction may be obtained for the new name, it is provided by statute that a person may file a petition in court for leave to assume another name. Such petition should state the name, age, and residence of the person, the name he wishes to assume, and it seems also, whether he is married, and whether there are any judgments against him, or any suits pending against him, and whether there is any commercial paper outstanding in the old name. Code Civ. Proc. §§ 2410, 2412; Snook's Petition, 2 Hilt. 566; Matter of Hamilton, 10 Abb. N. Cas. 79.

46. Olin *v.* Bate, 98 Ill. 53, 38 Am. Rep. 78; Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430, 38 L. J. P. C. 35, 6 Moore P. C. N. S. 31, 17 Wkly. Rep. 594, 16 Eng. Reprint 638.

47. Day *v.* Brownrigg, 10 Ch. D. 294, 48 L. J. Ch. 173, 39 L. T. Rep. N. S. 553, 27 Wkly. Rep. 217.

48. Dockrell *v.* Dougall, 78 L. T. Rep. N. S. 840.

49. Tulleys *v.* Keller, 45 Nebr. 220, 63 N. W. 388.

50. *Alabama.*— Noble *v.* State, 139 Ala. 90, 36 So. 19; Ford *v.* State, 129 Ala. 16, 30 So. 27; Washington *v.* State, 68 Ala. 85.

Florida.— Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704.

Georgia.— Wilson *v.* State, 69 Ga. 224; Johnston *v.* Riley, 13 Ga. 97.

Illinois.— Lucas *v.* Farrington, 21 Ill. 31; Stevens *v.* Stebbins, 4 Ill. 25; Parmelee *v.* Raymond, 43 Ill. App. 609.

Indiana.— Conaway *v.* Hays, 7 Blackf. 159.

Maine.— State *v.* Dresser, 54 Me. 569; State *v.* Homer, 40 Me. 438; Frye *v.* Hinkley, 18 Me. 320.

Nor is it necessary that he shall be known as well by the name used as by his real name; it is enough that he is so commonly known.[51]

VII. DISTINGUISHING SEX.

Courts will take judicial notice that certain christian names in common use are the names of male persons,[52] and that others are the names of females.[53]

VIII. IDEM SONANS.

A. General Rules. The law does not regard the spelling of names so much as their sound. By the doctrine of *idem sonans*, if two names, although spelled differently, sound alike, they are to be regarded as the same.[54] Great latitude is

Massachusetts.— Lancy *v.* Snow, 180 Mass. 411, 62 N. E. 735; Com. *v.* Gormley, 133 Mass. 580; Com. *v.* O'Hearn, 132 Mass. 553; Com. *v.* Trainor, 123 Mass. 414.

Michigan.— Hommel *v.* Devinney, 39 Mich. 522; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241.

Minnesota.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602; Lyons *v.* Rafferty, 30 Minn. 526, 16 N. W. 420.

Mississippi.— McBeth *v.* State, 50 Miss. 31.

Missouri.— State *v.* Curran, 18 Mo. 320.

New Hampshire.— See Morey *v.* Brown, 42 N. H. 373.

New York.— Cooper *v.* Burr, 45 Barb. 9; Van Voorhis *v.* Budd, 39 Barb. 479; Eagleston *v.* Son, 5 Rob. 640; Franklin *v.* Talmadge, 5 Johns. 84; Gardiner *v.* People, 6 Park. Cr. 155.

Ohio.— Goodenow *v.* Tappan, 1 Ohio 60; Mack *v.* Schlotman, 4 Ohio Dec. (Reprint) 307, 3 Cinc. L. Bul. 737; Donaldson *v.* Donaldson, 31 Cinc. L. Bul. 102.

Pennsylvania.— *In re* Jones, 27 Pa. St. 336.

South Carolina.— Charleston *v.* King, 4 McCord 487. See also Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

Tennessee.— Timms *v.* State, 4 Coldw. 138; State *v.* France, 1 Overt. 434.

Texas.— Waters *v.* State, (Cr. App. 1895) 31 S. W. 642; Owen *v.* State, 7 Tex. App. 329.

Virginia.— Taylor *v.* Com., 20 Gratt. 825.

Wisconsin.— State *v.* Lincoln, 17 Wis. 579.

United States.—Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894.

England.— Bowen *v.* Shapcott, 1 East 542; *Ex p.* Richards, 6 Jur. 136, 2 Mont. D. & De G. 493.

See 36 Cent. Dig. tit. "Names," § 8.

It is a question for the jury whether he is known by one name as well as by the other. Noble *v.* State, 139 Ala. 90, 36 So. 19; Taylor *v.* Com., 20 Gratt. (Va.) 825; Adams *v.* Crowe, 26 Nova Scotia 510 [*reversed* on other grounds in 21 Can. Sup. Ct. 342]. A former indictment by the name used, to which defendant pleaded not guilty, is competent evidence on the issue. State *v.* Homer, 40 Me. 438. The question was not whether defendant was as well known by one name as by the other at the time of trial, but whether such was the case when the indictment was preferred. Noble *v.* State, *supra*.

An indictment against a person by his true name is proper, although he is commonly known by another name. Ehlert *v.* State, 93 Ind. 76.

One cannot be sued by his surname and title of courtesy, such as "monsieur," without his christian name, although he is commonly known by his title of courtesy. Labat *v.* Ellis, 1 N. C. 92.

51. Frye *v.* Hinkley, 18 Me. 320; Bell *v.* State, 25 Tex. 574.

52. Supernant *v.* People, 100 Ill. App. 121, "Joseph."

The court will not assume that "Lawrence" may not be the christian name of a woman. La Motte *v.* Archer, 4 E. D. Smith (N. Y.) 46.

53. Tillson *v.* State, 29 Kan. 452 ("Ruth"); Taylor *v.* Com., 20 Gratt. (Va.) 825 ("Ellen" and "Frances").

54. Names held *idem sonans*: Adamson and Adanson. James *v.* State, 7 Blackf. (Ind.) 325. Allen and Allain or Allaine. Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 48 [*following* Chiniquy *v.* Catholic Bishop, 41 Ill. 148]. Alwin and Alvin. Jockisch *v.* Hardtke, 50 Ill. App. 202. Adderson's Island and Anderson's Island. Van Pelt *v.* Pugh, 18 N. C. 210. Amel and Amiel. People *v.* Gosch, 82 Mich. 22, 46 N. W. 101. Anne and Anna. Kerr *v.* Swallow, 33 Ill. 379. Anne and Anny. State *v.* Upton, 12 N. C. 513. Armstead and Almstead or Olmstead. Armstead *v.* Jones, 71 Kan. 142, 80 Pac. 56. Arnall and Arnold. Arnall *v.* Newcomb, 29 Tex. Civ. App. 521, 69 S. W. 92. Asahel Savery and Asal Savary. Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794. Augustine and Augustina. Com. *v.* Desmarteau, 16 Gray (Mass.) 1. Bagwell and Bagswell. Case *v.* Bartholow, 21 Kan. 300. Barbra and Barbara. State *v.* Haist, 52 Kan. 35, 34 Pac. 453. Barnstein and Burnstein. Springer *v.* Hutchinson, 59 Ill. App. 80. Battels and Battles. Leath *v.* State, 132 Ala. 26, 31 So. 108. Beckwith and Beckworth. Stewart *v.* State, 4 Blackf. (Ind.) 171. Benhart, Banhart, Beanhart, and Bernhart. State *v.* Witt, 34 Kan. 488, 8 Pac. 769. Beniditto and Benedetto. Ahitbol *v.* Beniditto, 2 Taunt. 401. Bennaux and Beneux. Beneux *v.* State, 20 Ark. 97. Berry and Barry. Ratteree *v.* State, 53 Ga. 570. Bert and Burt. State

allowed in the spelling and pronunciation of proper names, and in all legal proceedings, whether civil or criminal, if two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial.

v. Johnson, 70 Kan. 861, 79 Pac. 732. Bert Samrud and Bernt Sannerud. State *v.* Sannerud, 38 Minn. 229, 36 N. W. 447. Beton and Belton. Belton *v.* Fisher, 44 Ill. 32. Bettie and Beattie. Gross *v.* Grossdale, 177 Ill. 248, 52 N. E. 372. Beulah and Berlah. Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4. Biddulph and Puthuff. Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427. Biggers and Bickers. Biggers *v.* State, 109 Ga. 105, 34 S. E. 210. Biglow and Bigelow. Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402. Blackenship and Blankenship. State *v.* Blankenship, 21 Mo. 504. Bland and De Bland. Leland *v.* Eckert, 81 Tex. 226, 16 S. W. 897. Bobb and Bubb. Myer *v.* Fegaly, 39 Pa. St. 429, 80 Am. Dec. 534, German. Boge and Bogue. Bogue *v.* Bigelow, 29 Vt. 179. Bolen and Bolden. Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867. Booth and Boothe. Jackson *v.* State, 74 Ala. 26. Bosse and Busse. Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798. Brady and Braddy. Dickerson *v.* Brady, 23 Ga. 161. Brearley and Brailey. People *v.* Gosch, 82 Mich. 22, 46 N. W. 101. Burdet and Boudet or Boredet. Aaron *v.* State, 37 Ala. 106, French, so held by jury. Calvert and Calvit. Day Land, etc., Co. *v.* New York, etc., Land Co., (Tex. Civ. App. 1894) 25 S. W. 1089. Canada and Kennedy. State *v.* White, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783. Celestia and Celeste. Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178, so held by jury. Celia and Selia. Galveston, etc., R. Co. *v.* Sanchez, (Tex. Civ. App. 1901) 65 S. W. 893. Chambles and Chambless. Ward *v.* State, 28 Ala. 53. Charleston and Charlestown. Alvord *v.* Moffatt, 10 Ind. 366. Chegawgoquay and Chegawgequay. Brown *v.* Quinland, 75 Mich. 289, 42 N. W. 940. Chicopee and Chickopee. Com. *v.* Desmarteau, 16 Gray (Mass.) 1. Clark and Clarke. Altschul *v.* Casey, 45 Oreg. 182, 76 Pac. 1083. Coburn and Colburn. Colburn *v.* Bancroft, 23 Pick. (Mass.) 57. Collin and Colin. Collin *v.* Farmers' Alliance Mut. F. Ins. Co., 18 Colo. App. 170, 70 Pac. 698. Colster and Colsten. Luna *v.* State, (Tex. Cr. App. 1902) 70 S. W. 89. Conaway and Conavay. Conaway *v.* Hays, 7 Blackf. (Ind.) 159. Conklin and Conklan. Cutting *v.* Conklin, 28 Ill. 506. Conn and Corn. Moore *v.* Anderson, 8 Ind. 18. Conolly and Conly. Fletcher *v.* Conly, 2 Greene (Iowa) 88. Coonrod and Conrad. Carpenter *v.* State, 8 Mo. 291. Corrigan and Corgan. Prince *v.* McLean, 17 U. C. Q. B. 463. Cox and Cocks. Waters *v.* State, (Tex. Cr. App. 1895) 31 S. W. 642. Crushes and Crusins. People *v.* James, 110 Cal. 155, 42 Pac. 479. Cuffy, Cuffee, and Cuff. State *v.* Farr, 12 Rich (S. C.) 24. Currier and Kiah. Tibbets *v.* Kiah, 2 N. H. 557, so held by jury. Danner and Dannaher. Gahan *v.* People, 58 Ill. 160. Deadema and Diadema. State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699. De Hust and De Hurst. Cotton's Case, Cro. Eliz. 258. Dickson and Dixon. Reading *v.* Waterman, 46 Mich. 107, 8 N. W. 691. Dierkes and Dierges or Doerges. Gorman *v.* Dierkes, 37 Mo. 576. Dillahunty and Dillahinty and Dillaunty. Dillahunty *v.* Davis, 74 Tex. 344, 12 S. W. 55. Domick and Domeck. Olive *v.* Com., 5 Bush (Ky.) 376. Donnelly and Donly. Donnelly *v.* State, 78 Ala. 453. Dooley and Doorley. New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030. Droun and Drown. Com. *v.* Woods, 10 Gray (Mass.) 477. Dugald McInnis and Dougal McGinnis. Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699. Dyer and Dyre. Niblo *v.* Dyer, (Tex. Civ. App. 1900) 56 S. W. 216. Edmindson and Edmundson. Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169. Eichman and Ichman. Eichman *v.* State, 22 Tex. App. 137, 2 S. W. 538. Elbertson and Elberson. Elberson *v.* Richards, 42 N. J. L. 69. Ellen and first two syllables of Eleanor. Exendine *v.* Morris, 8 Mo. App. 383. Ellett and Elliott. Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781. Emerly and Emley. Galveston, etc., R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955. Emonds and Emmens or Emmons. Lyon *v.* Kain, 36 Ill. 362. Erwin and Irvin. Williams *v.* Hitzie, 83 Ind. 303. Fain and Fanes. State *v.* Hare, 95 N. C. 682. Farelly and Farley. Leonard *v.* Wilson, 2 Cromp. & M. 589, 3 L. J. Exch. 171, 4 Tyrw. 415. "Fauls" and "false." Gaines *v.* Gaines, 109 Ill. App. 226. Fauntleroy and Fontleroy. Wilks *v.* State, 27 Tex. App. 381, 11 S. W. 415. Faust and Foust. Faust *v.* U. S., 163 U. S. 452, 16 S. Ct. 1112, 41 L. ed. 224. Fenn and Finn. Alexander *v.* State, (Tex. Cr. App. 1894) 25 S. W. 127. Finegan and Finnegan. People *v.* Mayworm, 5 Mich. 146. Flory and Fleurer. Imhoff *v.* Fleurer, 2 Phila. (Pa.) 35. Forest and Fourai. State *v.* Timmens, 4 Minn. 325, French. Forris and Farris. Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852. Forshee and Foshee. Taylor *v.* State, 72 Ark. 613, 82 S. W. 495. Foster and Faster. Foster *v.* State, 1 Tex. App. 531. Foster and Forster. Bedford *v.* Forster, Cro. Jac. 77. Francis and Frances. State *v.* Hammond, 77 Mo. 157. Garcia and Garzia. Rape *v.* State, 34 Tex. Cr. 615, 31 S. W. 652. Gardiner and Gardner. Rector *v.* Taylor, 12 Ark. 128. Geessler and Geissler. Cleaveland *v.* State, 20 Ind. 444. George and Georg. Hall *v.* State, 32 Tex. Cr. 594, 25 S. W. 292. Giboney and Gibney. Fleming *v.* Giboney, 81 Tex. 422, 17 S. W. 13. Giddings and Gidings or Gidines. State *v.* Lincoln, 17 Wis. 579. Gigger and Jiger or Jigr. Com. *v.* Jennings, 121 Mass. 47, 23 Am. Rep. 249, so held by jury. Girous and Geroux. Girous *v.* State, 29 Ind. 93. Gordon and Gorden. White *v.* State, 136 Ala. 58, 34 So. 177. Gottleib and Gottlieb. Gottlieb *v.* Alton Grain Co., 87 N. Y. App.

Even slight difference in their pronunciation is unimportant; if the attentive ear finds difficulty in distinguishing the two names when pronounced, they are *idem*

Div. 380, 84 N. Y. Suppl. 413. Gravier and Gravaier. Semon *v.* Hill, 7 Ark. 70. Guadalupe and Guadlupe. Reys *v.* State, 45 Tex. Cr. 463, 76 S. W. 457, 77 S. W. 213. Guadalupe and Guadalupu. Cabellero *v.* State, (Tex.) 80 S. W. 1014. Hackman and Heckman. Bergman's Appeal, 88 Pa. St. 120. Hanaford and Hanoford. Hanaford *v.* Morton, 22 Tex. Civ. App. 587, 55 S. W. 987. Hanley and Hanly. Irvin *v.* Sebastian, 6 Ark. 33. Harman and Herman. Kahn *v.* Herman, 3 Ga. 266. Harriman and Herriman. State *v.* Bean, 19 Vt. 530. Haverly and Havely. State *v.* Havely, 21 Mo. 498. Hearn and Hearne. Coster *v.* Thomason, 19 Ala. 717. Helmer and Hilmer. Cline *v.* State, 34 Tex. Cr. 415, 31 S. W. 175. Henning and Herring. Felker *v.* New Whatcom, 16 Wash. 178, 47 Pac. 505. Heptum and Hepburn. Hall *v.* Rice, 64 Cal. 443, 1 Pac. 891. Herring and Herron. Herron *v.* State, 93 Ga. 554, 19 S. E. 243. Hieronymus and Heronymus. Tevis *v.* Collier, 84 Tex. 638, 19 S. W. 801. Hinsdall and Hinsdale. Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362. Hix Nowels and Hicks Nowells. Spoonemore *v.* State, 25 Tex. App. 358, 8 S. W. 280. Horick and Horrick. Evans *v.* State, 150 Ind. 651, 50 N. E. 820. Hudson and Hutson. Chapman *v.* State, 18 Ga. 736; State *v.* Hutson, 15 Mo. 512; Cato *v.* Hutson, 7 Mo. 142. Hutchinson and Hutcheson. State *v.* Stedman, 7 Port. (Ala.) 495. Isah and Isaiah. Ellis *v.* Merriman, 5 B. Mon. (Ky.) 296. Israel and Isreal. Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775. Jacob and Jaacob. Ahoah's Case, 1 Mod. 107. Janes and James. Janes *v.* Whitbread, 11 C. B. 406, 15 Jur. 612, 20 L. J. C. P. 217, 73 E. C. L. 406. Janury and January. Hutto *v.* State, 7 Tex. App. 44. Japheth and Japhath. Morton *v.* McClure, 22 Ill. 257. Jefferds and Jeffards. Com. *v.* Brigham, 147 Mass. 414, 18 N. E. 167. Jeffers and Jeffries. Jeffries *v.* Bartlett, 75 Ga. 230. Johnson and Johnsen. Paul *v.* Johnson, 9 Phila. (Pa.) 32. Johnson and Johnston. Miltonvale State Bank *v.* Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; State *v.* Jones, 55 Minn. 329, 56 N. W. 1068; Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987. Josier and Josiah. Schooler *v.* Asherst, 1 Litt. (Ky.) 216, 13 Am. Dec. 232. Juli and Julee. Point *v.* State, 37 Ala. 148. Julia and July. Dicksor *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694. Kay and Key. Dickinson *v.* Kay, 16 East 110. Kealiher, Keoliher, Kelliher, Kellier, Keolhier and Kelhier. Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275. Keeland and Kneeland. Doe *v.* Roe, Dudley (Ga.) 177. Keen and Keene. Com. *v.* Riley, Thach. Cr. Cas. (Mass.) 67. Kennedy McCutchen and Canada McCutchen. State *v.* White, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783. Kimberling and Kamberling. Houston *v.* State, 4 Greene (Iowa) 437. Kinney and Kenney. Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. 708. Kreitz, Krietz, Kritz and Critz. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. Krower and Krowder. Alexis *v.* U. S., 129 Fed. 60, 63 C. C. A. 502. Kuhns and Coons. Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443. Kurkwiski and Kurkowski. State *v.* Johnson, 26 Minn. 316, 3 N. W. 982. Langford and Lankford. State *v.* Mahan, 12 Tex. 283. Larson and Larsen. Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006. Lawrence and Lawrance. Webb *v.* Lawrence, 1 Cromp. & M. 806, 2 Dowl. P. C. 681, 3 Tyrw. 906. Leola and Leolar. Miller *v.* State, 110 Ala. 69, 20 So. 392. Lincoln and Lington. Armstrong *v.* Colby, 47 Vt. 359. Lindsay, Lindsey, and Lindsy. Roberts *v.* State, 2 Tex. App. 4. Littelmore and Lidamore. Parker *v.* People, 97 Ill. 32. Lossene and Lawson. State *v.* Pullens, 81 Mo. 387. Louis and Lewis. Block *v.* State, 66 Ala. 493; Marr *v.* Wetzel, 3 Colo. 2. Lytle and Little. Lytle *v.* People, 47 Ill. 422. McDonald and McDonnell. McDonald *v.* People, 47 Ill. 533. McInnis and McGinnis. Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699. McKay and Macke. International, etc., R. Co. *v.* Kindred, 57 Tex. 491. McLaughlin and McGloflin. McLaughlin *v.* State, 52 Ind. 476. M'Nicoll and M'Nicole. Reg. *v.* Wilson, 2 C. & K. 527, 2 Cox C. C. 426, 1 Den. C. C. 284, 17 L. J. M. C. 82, 61 E. C. L. 527. Malay or Maley and Mealy. Com. *v.* Donovan, 13 Allen (Mass.) 571, so held by jury. Marietta and Mary Etta. Goode *v.* State, 2 Tex. App. 520. Marres and Mars. Com. *v.* Stone, 103 Mass. 421, so held by jury. Megilligan and McGilligan. Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264. Metz and Meetz. Metz *v.* McAvoy Brewing Co., 98 Ill. App. 584. Meyer, Meyers, and Mayer. Smurr *v.* State, 88 Ind. 504. Michal and Michaels. State *v.* Houser, 44 N. C. 410. Mikel and Mikil. Mikel *v.* State, 43 Tex. Cr. 615, 68 S. W. 512. Minner and Miner. Jackson *v.* Boneham, 15 Johns. (N. Y.) 226. Mitchell and Micheal. Chiniquy *v.* Catholic Bishop, 41 Ill. 148. Moss and Morse. Litchfield *v.* Farmington, 7 Conn. 100. Mousur, Mousuer and Mozer. Ruddell *v.* Mozer, 1 Ark. 503. Newton, Nuton and Newten. Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346. Noberto and Norberto. Salinas *v.* State, 39 Tex. Cr. 319, 45 S. W. 900. Nolen and Noland. Burks *v.* State, (Tex. Cr. App. 1896) 35 S. W. 173. Nowels and Nowells. Spoonemore *v.* State, 25 Tex. App. 358, 8 S. W. 280. Oglibee and Ogilshee. Hamilton *v.* Langley, 1 McMull. (S. C.) 498. O'Meara, O'Mara, and O'Mera. O'Meara *v.* North American Min. Co., 2 Nev. 123. Owen D. Haverly and Owens D. Havely. State *v.* Havely, 21 Mo. 498. Patterson and Petterson. Jackson *v.* Cody, 9 Cow. (N. Y.) 140. Penryn and Pennyrine. Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519. Peregran and

sonans.[55] The names will be presumed to be pronounced according to the ordinary rules of pronunciation of the English language, unless it is proved that they belong to another language and are pronounced differently in the language to which they belong, and also in the general usage of the community.[56] Usually the insertion or omission of a "t" before the ending "son" is held immaterial,[57] as is

Peregrine. Dunn *v.* Clements, 52 N. C. 58. Petrie and Petris. Petrie *v.* Woodworth, 3 Cai. (N. Y.) 219. Pettis and Pittis. Hutto *v.* State, 7 Tex. App. 44. Philip and Pilip. Taylor *v.* Rogers, Minor (Ala.) 197. Pillsby and Pillsbury. Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427. Preyer and Pryor or Prior. Page *v.* State, 61 Ala. 16. Read and Reed. Goethal *v.* Reed, 35 Tex. Civ. App. 461, 81 S. W. 592. "Rigby" and "Rigley." State *v.* Pointdexter, 117 La. 380, 41 So. 688. Robinson and Robison. People *v.* Cooke, 6 Park. Cr. (N. Y.) 31, so held by jury. Rosa and Rose. Galliano *v.* Kilfoy, 94 Cal. 86, 29 Pac. 416. Rooks and Rux. Rooks *v.* State, 83 Ala. 79, 3 So. 720. Ruty and Ruthe. Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344. Saffle and Saffell. Hoffman *v.* Bircher, 22 W. Va. 537. Samul and Samuel. Fenn *v.* Alston, 11 Mod. 284. Sarmine and Sarmin. Cull *v.* Sarmin, 3 Lev. 66. Schmidt and Schmitt. Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99. Seaver and Seavers. Seaver *v.* Fitzgerald, 23 Cal. 85. Segrave and Seagrave. Williams *v.* Ogle, Str. 889. Seibert and Sibert. Green *v.* Meyers, 98 Mo. App. 438, 72 S. W. 128. Shacraft and Shacroft. Denner *v.* Shacroft, Cro. Eliz. 258. Shaffer and Shafer. Rowe *v.* Palmer, 29 Kan. 337. Shuter and Shutter. State *v.* Johnson, 36 Wash. 294, 78 Pac. 903. Sinclair and St. Clair. Rivard *v.* Gardner, 39 Ill. 125. Steinburg and Steenburg. Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939. Steven Stebbins and Stevens Stebbins. Stevens *v.* Stebbins, 4 Ill. 25. Stier and Stirr. New Albany *v.* Stirr, 34 Ind. App. 615, 72 N. E. 275. Stores and Storrs. People *v.* Sutherland, 81 N. Y. 1. Stormer and Stermer. Sample *v.* Robb, 16 Pa. St. 305. Stramler and Strambler. Galveston, etc., R. Co. *v.* Stealey, 66 Tex. 468, 1 S. W. 186. Robert Rodger Strang and Robert Roger Strong. *In re* Smith, 10 C. B. N. S. 344, 100 E. C. L. 344. Symonds and Simons. Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632. Thompson and Thonpson. State *v.* Wheeler, 35 Vt. 261. Thweatt and Threet. Gooden *v.* State, 55 Ala. 178. Tidmarsh and Tidmarch. People *v.* Tidmarsh, 113 Ill. App. 153. Tougaw and Tugaw. Girous *v.* State, 29 Ind. 93. Townsen and Townsend. Townsend *v.* Ratcliff, 50 Tex. 148. Trobridge and Trowbridge. Buhl *v.* Trowbridge, 42 Mich. 44, 3 N. W. 245. Usrey and Usury. Gresham *v.* Walker, 10 Ala. 370. Van Nortrick and Van Nortwick. Mallory *v.* Riggs, 76 Iowa 748, 39 N. W. 886. Veike and Vieke. Selby *v.* State, 161 Ind. 667, 69 N. E. 463. Vester and Vister. Gaither *v.* Com., 91 S. W. 1124, 28 Ky. L. Rep. 1345. Wanser and Wanzer. Wanzer *v.* Barker, 4 How. (Miss.) 363. Watford and Wadford. Hayes *v.* State, 58 Ga. 35. Watkins and Wadkins. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947. Welsh and Welch. Donohoe-Kelly Banking Co. *v.* Southern Pac. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28. Westley and Wesley. Proudfoot *v.* Lount, 9 Grant Ch. (U. C.) 70. Weston and Wason. Symmers *v.* Wason, 1 B. & P. 105. Whatson and Watson. Toole *v.* Peterson, 31 N. C. 180, so held by jury. Whitman and Whiteman. Henry *v.* State, 7 Tex. App. 388. Whyneard and Winyard. Rex *v.* Foster, R. & R. 305. Wilkerson and Wilkinson. Wilkerson *v.* State, 13 Mo. 91, 53 Am. Dec. 137. Wille and Villee. Villee *v.* Com., 1 Mona. (Pa.) 445. William and Williams. Williams *v.* State, 5 Tex. App. 226. Witt and Wid. Veal *v.* State, 116 Ga. 589, 42 S. E. 705. Woolley and Wolley. Power *v.* Woolley, 21 Ark. 462. Wray and Rae. Vance *v.* Wray, 3 Can. L. J. 69. Wray and Ray. Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892. Yarbery and Yarbro. Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264. Zerelday and Serelda. Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105. Zimri and Zemeriah. Ames *v.* Snider, 55 Ill. 498.

55. *Alabama.*— Rooks *v.* State, 83 Ala. 79, 3 So. 720.

California.— Galliano *v.* Kilfoy, 94 Cal. 86, 29 Pac. 416.

Colorado.— Marr *v.* Wetzel, 3 Colo. 2.

Illinois.— Springer *v.* Hutchinson, 59 Ill. App. 80.

Massachusetts.— Com. *v.* Donovan, 13 Allen 571; Com. *v.* Mehan, 11 Gray 321.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

New Jersey.— Elberson *v.* Richards, 42 N. J. L. 69.

Washington.— State *v.* Johnson, 36 Wash. 294, 78 Pac. 903.

See 36 Cent. Dig. tit. "Names," § 12.

Differing in sound.— If two names having the same original derivation are both taken, according to common use, to be the same, although differing in sound, the use of one for the other is not a material misnomer. Wilkerson *v.* State, 13 Mo. 91, 53 Am. Dec. 137.

56. *Alabama.*— Rooks *v.* State, 83 Ala. 79, 3 So. 720; Sayres *v.* State, 30 Ala. 15.

Arkansas.— Beneux *v.* State, 20 Ark. 97, French.

Minnesota.— State *v.* Johnson, 26 Minn. 316, 3 N. W. 982 (Polish); State *v.* Timmens, 4 Minn. 325 (French).

Pennsylvania.— Myer *v.* Fegaly, 39 Pa. St. 429, 80 Am. Dec. 534, German.

Texas.— Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798 (German); Galveston, etc., R. Co. *v.* Sanchez, (Civ. App. 1901) 65 S. W. 893 (Spanish).

See 36 Cent. Dig. tit. "Names," § 12*ff*.

57. Miltonvale State Bank *v.* Kuhnle, 50

also the omission or addition of a final "e,"[58] the two names being considered *idem sonans*. But the addition or omission of a final "s" is usually held a fatal variance.[59] And many names sounding much alike have been declared by courts or juries not *idem sonans*.[60] As to the application of this principle it is impos-

Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; State *v.* Jones, 55 Minn. 329, 56 N. W. 1068; Elberson *v.* Richards, 42 N. J. L. 69; Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987.

58. Jackson *v.* State, 74 Ala. 26; Coster *v.* Thomason, 19 Ala. 717; Com. *v.* Riley, Thach. Cr. Cas. (Mass.) 67; Altschul *v.* Casey, 45 Oreg. 182, 76 Pac. 1083.

59. *Alabama.*— Jacobs *v.* State, 61 Ala. 448; Humphrey *v.* Whitten, 17 Ala. 30.

Arkansas.— Semon *v.* Hill, 7 Ark. 70.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537.

Texas.— Faver *v.* Robinson, 46 Tex. 206; Brown *v.* State, 28 Tex. App. 65, 11 S. W. 1022; Neiderluck *v.* State, 21 Tex. App. 320, 17 S. W. 467; Parchman *v.* State, 2 Tex. App. 228, 27 Am. Rep. 435. *Contra*, Williams *v.* State, 5 Tex. App. 226.

England.— McDonald *v.* Rodger, 9 Grant Ch. (U. C.) 75.

See 36 Cent. Dig. tit. "Names," § 12*ff*.

Contra.— Smurr *v.* State, 88 Ind. 504; State *v.* Havely, 21 Mo. 498.

60. Names held not *idem sonans*: Abie and Avie, or Ovie. Burgamy *v.* State, 4 Tex. App. 572. Appropriate and appriate. Jones *v.* State, 25 Tex. App. 621, 8 S. W. 801, 8 Am. St. Rep. 449. Asher and Ashley. Bates *v.* State Bank, 7 Ark. 394, 46 Am. Dec. 293. Barham and Barnham. Kirk *v.* Suttle, 6 Ala. 679. Battles and Bappels or Boppes. Leath *v.* State, 132 Ala. 26, 31 So. 108. Binford and Brimford. Entrekin *v.* Chambers, 11 Kan. 368. Brown and Brow. Brown *v.* Marqueze, 30 Tex. 77. Bryan and Bryant. Weidemeyer *v.* Bryan, 21 Tex. Civ. App. 428, 53 S. W. 353. Burglary and burgerally. Haney *v.* State, 2 Tex. App. 504. Carhart and Cawhart. Carhart *v.* Britt, 3 Tex. App. Civ. Cas. § 373. Chapelear and Chapelas. Leath *v.* State, 132 Ala. 26, 31 So. 108. Cobb and Cobbs. Jacobs *v.* State, 61 Ala. 448. Comyns and Cummins. Cruiksbank *v.* Comyns, 24 Ill. 602. Conrad and Coonrod. Shields *v.* Hunt, 45 Tex. 424. Cordeviolle and Cordoviatti. New Orleans *v.* Cordeviolle, 10 La. Ann. 727. Dallam and Dillon. Dallam *v.* Wilson, 4 T. B. Mon. (Ky.) 108. David and Davids. Davids *v.* People, 192 Ill. 176, 61 N. E. 537. Donnel and Donald. Donnel *v.* U. S., Morr. (Iowa) 141, 39 Am. Dec. 457. Ebling and Able. Weber *v.* Ebling, 2 Mo. App. 15. Edith and Edie. Waters *v.* State, (Tex. Cr. App. 1895) 31 S. W. 642, Elijah and Elisha. Mead *v.* State, 26 Ohio St. 505. Emma and Emily. Burge *v.* Burge, 94 Mo. App. 15, 67 S. W. 703. Ethelbert and Ethelwood. Halfman *v.* Ellison, 51 Ala. 543. Falk and Falleck. Calkins *v.* Falk, 39 Barb. (N. Y.) 620 [*affirmed* in 1 Abb. Dec. 291, 38 How. Pr. 62]. Faver and Favers. Faver *v.* Robinson, 46 Tex. 204. Ferdinand and Fernando. Cleveland, etc., R. Co. *v.* Peirce, 34 Ind. App. 188, 72 N. E. 604. Frank and Franks. Parchman *v.* State, 2 Tex. App. 228, 27 Am. Rep. 435. Furman and Freeman. Howe *v.* Thayer, 49 Iowa 154. Gerardus and Grantis or Quartus. Mann *v.* Carley, 4 Cow. (N. Y.) 148. Graton and Grafton. Graton *v.* Holliday-Klotz Land, etc., Co., 189 Mo. 322, 87 S. W. 37. Gratz and Grolts. State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. Griffin and Griffie. State *v.* Griffie, 118 Mo. 188, 23 S. W. 878. Griffin and Griffith. Henderson *v.* Cargill, 31 Miss. 367, 416. Grimalda and Grimanda. Hayney *v.* State, 5 Ark. 72. Henry Hall and Henry Wall. Henderson *v.* State, (Tex. Cr. App. 1897) 38 S. W. 618. Hesser and Hesse. Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122. Hilburn and Holburn and Holbein. Simpson *v.* Johnson, (Tex. Civ. App. 1898) 44 S. W. 1076. Hodnett and Hadnett. Nutt *v.* State, 63 Ala. 180. Humphrey and Humphreys. Humphrey *v.* Whitten, 17 Ala. 30. Hyde and Hite. State *v.* Williams, 68 Ark. 241, 57 S. W. 792, 82 Am. St. Rep. 288. Jeffery and Jeffries. Marshall *v.* Jeffries, 16 Fed. Cas. No. 9,128*a*, Hempst. 299. Joest and Yoest. Heil's Appeal, 40 Pa. St. 453, 80 Am. Dec. 590. Kladder and Kritler. Brotherline *v.* Hammond, 69 Pa. St. 128. Kraig and Krug. McClaskey *v.* Barr, 45 Fed. 151. Landis and Landers. Atwood *v.* Landis, 22 Minn. 558. Lane and Leane. Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489. Lindly and Lindsay, or Lindsey, or Lindsy. Roberts *v.* State, 2 Tex. App. 4. Lindsey and Lindsley. Selman *v.* Orr, 75 Tex. 528, 12 S. W. 697. Lynes and Lyons. Lynes *v.* State, 5 Port. (Ala.) 236, 30 Am. Dec. 557. McCann and McCarn. Rex *v.* Tannet, R. & R. 261. McCravey and McCarver. McCravey *v.* Cox, 24 Ark. 574. McDevro and McDero. McDevro *v.* State, 23 Tex. App. 429, 5 S. W. 133. McKee and McRee. McRee *v.* Brown, 45 Tex. 503. McMahan and McManus. McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665. Mathews and Mather. Robson *v.* Thomas, 55 Mo. 581. Maze and Moys. State *v.* Sullivan, 9 Mont. 490, 24 Pac. 23. Melvin and Melville. State *v.* Curran, 18 Mo. 320. Merlette and Mulette. Merlette *v.* State, 100 Ala. 42, 14 So. 562. Meyer and Meyers. Gonzalia *v.* Bartelsman, 143 Ill. 634, 32 N. E. 532. Millen and Miller. Chamberlain *v.* Blodgett, 96 Mo. 482, 10 S. W. 44. Minchen and Mincher. Adams *v.* State, 67 Ala. 89. Mohr and Moores. State *v.* Mohr, 55 Mo. App. 325. Munkers and Moncus. Munkers *v.* State, 87 Ala. 94, 6 So. 357. Raglin and Ragsley. Mindex *v.* State, (Tex. Cr. App. 1897) 38 S. W. 995.

sible to state more specific rules, and each case must be determined by the sound of the two names.[61]

B. Questions For Court or Jury. Although the question of *idem sonans* is essentially a question of fact, if it arises on demurrer, and the names are necessarily pronounced substantially alike, the court will take judicial notice of the fact, and hold as a matter of law that the two names are the same.[62] But if there is no generally received English pronunciation of the names as one and the same, the doctrine of *idem sonans* cannot be applied without the aid of extrinsic evidence, and the question whether the two names are the same should be submitted to the jury.[63] When the question of *idem sonans* arises on the evidence, if the two names are necessarily sounded alike, the question is decided by the court;[64] but in a case where there is reasonable doubt, the question is properly for the jury.[65] In at least one jurisdiction, where the question of *idem sonans* arises on

Rodger and Rodgers. McDonald *v.* Rodger, 9 Grant Ch. (U. C.) 75. Sandland and Sunderland. Sandland *v.* Adams, 2 How. Pr. (N. Y.) 98. Schoonhoven and Schoonover, Schoonhoven *v.* Gott, 20 Ill. 46, 71 Am. Dec. 247. Sensenderf and Sensenderter. Com. *v.* Bowers, 3 Brewst. (Pa.) 350. Shakespeare and Shakepear. Rex *v.* Shakespeare, 10 East 83. Semon and Semons. Semon *v.* Hill, 7 Ark. 70. Simonson and Siemson. Simonson *v.* Dolan, 114 Mo. 176, 21 S. W. 510. Spintz and Sprinz. U. S. *v.* Spintz, 18 Fed. 377. Stephens and Stephenson. Ellis *v.* State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660. Tabart and Tarbart. Bingham *v.* Dickie, 5 Taunt. 814, 1 E. C. L. 415. Tapley and Tarpley. Tarpley *v.* State, 79 Ala. 271. Taussig and Tanssing. Taussig *v.* Glenn, 51 Fed. 409, 2 C. C. A. 314. Wall and Hall. Henderson *v.* State, (Tex. Cr. App. 1897) 38 S. W. 618. Whelen and Wheler. Whelen *v.* Weaver, 93 Mo. 430, 6 S. W. 220. Wilkin and Wilkins. Brown *v.* State, 28 Tex. App. 65, 11 S. W. 1022. Willard G. Bracket and William G. Brackett. Lilly *v.* Somerville, 142 Ind. 298, 40 N. E. 1088. William and Wilhelm. Becker *v.* German Mut. F. Ins. Co., 68 Ill. 412. Willis and William. Thornily *v.* Prentice, 121 Iowa 89, 96 N. W. 728, 100 Am. St. Rep. 317. Williston and Willison. Bull *v.* Franklin, 2 Speers (S. C.) 46. Wood and Woods. Neiderluck *v.* State, 21 Tex. App. 320, 17 S. W. 467. Zachary and Zachariah. Lawrence *v.* State, 59 Ala. 61.

61. Names submitted to jury: Amadeasis and Amandesis. Lilly *v.* Somerville, 142 Ind. 298, 40 N. E. 1088; Boyce and Bice. Boyce *v.* Danz, 29 Mich. 146. Burdet and Boredet or Boudet. Aaron *v.* State, 37 Ala. 106. Celestia and Celeste. Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178. Cluin and Klune. Com. *v.* Gill, 14 Gray (Mass.) 400. Currier and Kiah. Tibbets *v.* Kiah, 2 N. H. 557. Darius and Tryus. Reg. *v.* Davis, 5 Cox C. C. 237, 2 Den. C. C. 231, 15 Jur. 546, 20 L. J. M. C. 207, T. & M. 557. Fooley and Foley. Underwood *v.* State, 72 Ala. 220. Freude and Fraude. Weitzel *v.* State, 28 Tex. App. 523, 13 S. W. 864, 19 Am. St. Rep. 855. Gigger and Jiger or Jigr. Com. *v.* Jennings, 121 Mass. 47, 23 Am. Rep. 249. Hemessey and Hennessey. Com. *v.* Mehan, 11 Gray (Mass.) 321. Kurkwiski and Kurkowski. State *v.* Johnson, 26 Minn. 316, 3 N. W. 982. Malay or Maley and Mealy. Com. *v.* Donovan, 13 Allen (Mass.) 571. Marres and Mars. Com. *v.* Stone, 103 Mass. 421. Noble and Nobles. Noble *v.* State, 139 Ala. 90, 36 So. 19. Robison and Robinson. People *v.* Cooke, 6 Park. Cr. (N. Y.) 31. Shay and Shea. White *v.* Springfield Sav. Inst., 134 Mass. 232. Sounderland and Soderlund, Saderlund, Sonderlund, Soederland. State *v.* Thompson, 10 Mont. 549, 27 Pac. 349, Swedish. Tonges and Toenges. Siebert *v.* State, 95 Ind. 471. Toy Fong and Choy Fong. People *v.* Fick, 89 Cal. 144, 26 Pac. 759.

62. *Alabama.*— Rooks *v.* State, 83 Ala. 79, 3 So. 720; Sayres *v.* State, 30 Ala 15.

Illinois.— Springer *v.* Hutchinson, 59 Ill. App. 80.

Georgia.— Veal *v.* State, 116 Ga. 589, 42 S. E. 705.

Massachusetts.— Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178.

Missouri.— State *v.* Havely, 21 Mo. 498.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

See 36 Cent. Dig. tit. "Names," § 12*ff*.

63. Munkers *v.* State, 87 Ala. 94, 6 So. 357.

64. Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178; Spoonemore *v.* State, 25 Tex. App. 358, 8 S. W. 280.

65. *Alabama.*— Noble *v.* State, 139 Ala. 90, 36 So. 19; Underwood *v.* State, 72 Ala. 220.

Georgia.— Veal *v.* State, 116 Ga. 589, 42 S. E. 705; Dickerson *v.* Brady, 23 Ga. 161.

Indiana.— Siebert *v.* State, 95 Ind. 471.

Massachusetts.— Com. *v.* Warren, 143 Mass. 568, 10 N. E. 178; Com. *v.* Donovan, 13 Allen 571; Com. *v.* Mehan, 11 Gray 321.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

Texas.— Weitzel *v.* State, 28 Tex. App. 523, 13 S. W. 864, 19 Am. St. Rep. 855.

See 36 Cent. Dig. tit. "Names," § 12*ff*.

the evidence, it is always submitted to the jury to be determined by them as a matter of fact.[66] In accordance with the general rules stated above, a large number of names have been declared by the courts *idem sonans* as has been elsewhere shown.[67]

C. Application of Doctrine — 1. To Records. The general principle of *idem sonans* applies to records, such as judgment dockets;[68] but it has been held not to extend to names which begin with a different letter, even though pronounced alike.[69]

2. Where Surname Divided. The doctrine of *idem sonans* does not apply where the surname is divided and the first part is written separately as a christian or middle name or initial, although the pronunciation may be the same.[70]

NAM EXEMPLO PERNICIOSUM EST UT EI SCRIPTURÆ CREDATUR QUA UNUS QUISQUAM SIBI ADNOTATIONE PROPRIA DEBITOREM CONSTITUIT. A maxim meaning "Care is to be taken that writings shall not have such credit that a person by his own memorandum can make out another person his debtor."[1]

NAM QUI HÆRET IN LITERA, HÆRET IN CORTICE. A maxim meaning "For he who confines himself to the letter, goes but half way."[2]

NAPHTHA. A refined coal or earth oil, not differing in nature from benzine or benzole and kerosene, but only in degree of inflammability.[3] (Naphtha: Keeping and Use, see Fire Insurance; Nuisances. Regulation of Manufacture and Use, see Explosives. See also Benzine; Kerosene.)

NARCOSIS. The aggregate of influence or effect from continuous use of narcotic substances.[4] (See, generally, Criminal Law.)

NARR. An abbreviation of the word Narratio,[5] *q. v.*

NARRATIO. One of the common law names for a plaintiff's count or declaration, as being a narrative of the facts on which he relies.[6] (See, generally, Pleading.)

NARROW. Of little breadth; not wide or broad.[7] (See Little.)

NARROWED. Made small as compared with something else.[8]

NATION. A body politic; a society of men united together for the purpose

66. Taylor *v.* Com., 20 Gratt. (Va.) 825, 829, where it is said: "The question is one for the jury, and not for the court, which cannot instruct the jury, as matter of law, that any two names are or are not of the same sound."

67. See cases cited *supra*, note 54 *et seq.*

68. Green *v.* Meyers, 98 Mo. App. 438, 72 S. W. 128; Bergman's Appeal, 88 Pa. St. 120; Myer *v.* Fegaly, 39 Pa. St. 429, 434, 80 Am. Dec. 534, in which case the court said: "Persons searching the judgment docket for liens, ought to know the different forms in which the same name may be spelt, and to make their searches accordingly; unless, indeed, where a spelling is so entirely unusual that persons cannot be expected to think of it."

69. Heil's Appeal, 40 Pa. St. 453, 80 Am. Dec. 590, "Yoest" and Joest. *Compare* Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43, "R. M. P." for M. R. P.

So where payment is made of a check, on which the name of the payee and that of the first indorser are spelled differently, but pronounced alike, the doctrine of *idem sonans* does not apply. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

70. Moynahan *v.* People, 3 Colo. 367 (Patrick Fitz Patrick for Patrick Fitzpatrick); Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465 ("John O. Shea" for John O'Shea).

1. Morgan Leg. Max.

2. 2 Blackstone Comm. 379 [*quoted* in Klohs' Estate, 2 Woodw. (Pa.) 225, 227].

3. Morse *v.* Buffalo F. & M. Ins. Co., 30 Wis. 534, 536, 11 Am. Rep. 587, kerosene being much less inflammable than either of the others.

4. Standard Dict.

5. Bouvier L. Dict.

6. Black L. Dict.

7. Webster Int. Dict.

Used in the definition of "galloon" the word "narrow" is a relative term of varying meanings. U. S. *v.* Graef, 127 Fed. 688, 689, 62 C. C. A. 414. See Galloon.

"Narrow-tired wagon" means a wagon having wheels with tires that are narrow. Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489, 491.

8. Universal Brush Co. *v.* Sonn, 146 Fed. 517, 520.

of promoting their mutual safety and advantage by the joint efforts of their combined strength.[9] (See, generally, INTERNATIONAL LAW.)

NATIONAL BANK. A private corporation organized under the general law of congress by individual stock-holders with their own capital, for private gain, and managed by officers, agents and employees of their own selection;[10] a quasi-public institution.[11] (See, generally, BANKS AND BANKING.)

NATIONAL BANK-BILLS. A term used to designate a kind or part of the national currency.[12] (See, generally, BANKS AND BANKING).

NATIONAL BANKING SYSTEM. A term used to designate a system of banks authorized by congress.[13] (See, generally, BANKS AND BANKING.)

NATIONAL BANK-NOTES. Notes of a national bank.[14] (See, generally, BANKS AND BANKING.)

NATIONAL BOARD OF HEALTH. See HEALTH.

NATIONAL BUILDING AND LOAN ASSOCIATION. Under the statutes of Minnesota, a building and loan association doing a general business.[15] (See, generally, BUILDING AND LOAN SOCIETIES.)

NATIONAL CORPORATIONS. See BANKS AND BANKING; CORPORATIONS; RAILROADS.

NATIONAL CURRENCY. That which is issued under the sanction of a nation;[16] notes or bills circulating by authority of the general government as money.[17] (See BANK-NOTE; CONFEDERATE MONEY; CURRENCY; MONEY; and, generally, PAYMENT.)

NATIONAL DOMAIN. See MINES AND MINERALS; PUBLIC LANDS.

NATIONAL DOMICILE. See DOMICILE.

NATIONAL ELECTION. See ELECTIONS.

NATIONAL FORCES. See ARMY AND NAVY.

NATIONAL GOVERNMENT. See UNITED STATES.

NATIONAL GUARD. See MILITIA.

9. Vattel L. Nat. [*quoted* in Keith *v.* Clark, 97 U. S. 454, 459, 24 L. ed. 1071].

By the law of nations a nation is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual applies with greater force to the actions of a nation. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306, 308.

The word may presuppose or imply an independence of any other sovereign power more or less absolutely, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. Montoya *v.* U. S., 180 U. S. 261, 265, 21 S. Ct. 358, 45 L. ed. 521.

When applied to Indians, the term means a people distinct from all others (Langford *v.* Monteith, 1 Ida. 612, 617); and tribes of North American Indians are not regarded as constituting nations, as that word is used by writers upon international law, although they are often so designated in treaties with them (Montoya *v.* U. S., 180 U. S. 261, 265, 21 S. Ct. 358, 45 L. ed. 521).

10. Branch *v.* U. S., 12 Ct. Cl. 281, 286, where it is said: "They constitute no part of any branch of the Government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute is of a general nature, arising from their business relations to the people through individual citizens, and not as direct representatives of the State as a body-politic in exercising its legal and constitutional functions." *Compare* Weber *v.* Spokane Nat. Bank, 64 Fed. 208, 209, 12 C. C. A. 93, where it is said that such a bank is "a body corporate, with power to make contracts, to sue and be sued, and to exercise all such incidental powers as shall be necessary to carry on the business of banking."

11. "While it is the property of the stockholders, and its profit inures to their benefit it is nevertheless intended by the law creating it that it should be for the public accommodation." Foll's Appeal, 91 Pa. St. 434, 437, 36 Am. Rep. 671 [*quoted* in Ryan *v.* McLane, 91 Md. 175, 187, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501].

12. *Ex p.* Prince, 27 Fla. 196, 203, 9 So. 659, 26 Am. St. Rep. 67.

13. *In re* Manufacturers' Nat. Bank, 16 Fed. Cas. No. 9,051, 5 Biss. 499.

14. They are not national notes of a bank. Hummel *v.* State, 17 Ohio St. 628, 632. Nor are they money in which a sufficient tender can be made. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688, 692.

15. Maudlin *v.* American Sav., etc., Assoc., 63 Minn. 358, 359, 69 N. W. 645, as distinguished from a local building and loan association.

16. State *v.* Gasting, 23 La. Ann. 609, 610.

17. Grant *v.* State, 55 Ala. 201, 209.

There are two kinds of United States currency, both of which may properly be called

NATIONALITY. A man's natural allegiance.[18] (See, generally, ALIENS; CITIZENS.)

NATIONAL USE. See EMINENT DOMAIN.

NATIVE. See ALIENS; CITIZENS.

NATIVE-BORN CITIZENS. See CITIZENS.

NATIVE LAND. In New Zealand law, land in a colony owned by natives under their custom or usage, but of which ownership has not been determined by the court.[19]

NATURA APPETIT PERFECTUM; ITA ET LEX. A maxim meaning "Nature desires perfection; so does the law."[20]

NATURÆ VIS MAXIMA; NATURA BIS MAXIMA. A maxim meaning "The force of nature is greatest, nature is doubly great."[21]

NATURA FIDE JUSSIONIS SIT STRICTISSIMI JURIS ET NON DURAT VEL EXTENDATUR DE RE AD REM, DE PERSONA AD PERSONAM, DE TEMPORE AD TEMPUS. A maxim meaning "The nature of the contract of suretyship is *strictissimi juris*, and cannot endure nor be extended from thing to thing; from person to person, or from time to time."[22]

NATURAL. Likely to happen and for that reason should be foreseen;[23] arising under the ordinary operation of physical laws;[24] resulting in ordinary course of things;[25] such as occurs in the ordinary state of things.[26] (Natural: Affection, see CONTRACTS. Allegiance, see ALIENS; CITIZENS; TREASON. Born,[27] see BASTARDS; CITIZENS. Boundary,[28] see BOUNDARIES. Capacity to Make Contract,[29] see CONTRACTS. Child, see BASTARDS. Day, see DAY. Death, see NATURAL DEATH. Domicile,[30] see DOMICILE. Flow, see NATURAL FLOW. Fool, see NATURAL FOOL. Fruits, see FRUCTUS NATURALES. Gas, see NATURAL GAS.

national currency of the United States, one of which consists of treasury notes, and the other of national bank-notes. Dull *v.* Com., 25 Gratt. (Va.) 965, 975.

18. U. S. *v.* Wong Kim Ark, 169 U. S. 649, 657, 18 S. Ct. 456, 42 L. ed. 890.

19. Barker *v.* Edger, [1898] A. C. 748, 749, 67 L. J. P. C. 115, 79 L. T. Rep. N. S. 151.

20. Peloubet Leg. Max.

21. Bouvier L. Dict.

22. Bouvier L. Dict.

23. Flynn *v.* Consolidated Traction Co., 67 N. J. L. 546, 547, 52 Atl. 369; Newark, etc., R. Co. *v.* McCann, 58 N. J. L. 642, 644, 34 Atl. 1052, 33 L. R. A. 127; Wiley *v.* West Jersey R. Co., 44 N. J. L. 247, 251; Carter *v.* Cape Fair Lumber Co., 129 N. C. 203, 210, 39 S. E. 828; Scott *v.* Allegheny Valley R. Co., 172 Pa. St. 646, 652, 33 Atl. 712 [*citing* South-Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390, 399, 11 Atl. 627, 2 Am. St. Rep. 672].

As used in connection with other words see the following phrases: "Natural butter and cheese" see State *v.* Capital City Dairy Co., 62 Ohio St. 350, 361, 57 N. E. 62, 57 L. R. A. 181. "Natural causes" see Slevin *v.* San Francisco Police Fund Com'rs, 123 Cal. 130, 131, 55 Pac. 785; Rowland *v.* Miller, 15 N. Y. Suppl. 701, 702. "Natural channel" see Larrabee *v.* Cloverdale, 131 Cal. 96, 99, 63 Pac. 143. "Natural consequence" see Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 170, 51 Am. Rep. 435; Kuhn *v.* Jewett, 32 N. J. Eq. 647, 649; Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653; Chicago, etc., R. Co. *v.* Elliott, 55 Fed. 949, 953, 5 C. C. A. 347, 20 L. R. A. 582. "Natural course of drainage" see Kansas City *v.* Swope, 79 Mo. 446, 448; Bayha *v.* Taylor, 36 Mo. App. 427, 435. "Natural life" see People *v.* Wright, 89 Mich. 70, 93, 50 N. W. 792. "Natural possession" see Sunol *v.* Hepburn, 1 Cal. 254, 263; Vicksburg, etc., R. Co. *v.* Le Rosen, 52 La. Ann. 192, 198, 26 So. 854. "Natural state of the stream" see Dorman *v.* Ames, 12 Minn. 451. "Natural want" see Lux *v.* Haggin, 69 Cal. 255, 305, 10 Pac. 674.

24. Dorman *v.* Ames, 12 Minn. 451.

25. Rowland *v.* Miller, 15 N. Y. Suppl. 701, 702.

26. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247, 251.

27. **"Natural born"** see New Hartford *v.* Canaan, 54 Conn. 39, 44, 5 Atl. 360; Marshall *v.* Wabash R. Co., 120 Mo. 275, 279, 25 S. W. 179 [*citing* Barns *v.* Allen, 25 Ind. 222]; *In re* Look Tin Sing, 21 Fed. 905, 909, 10 Sawy. 353 [*citing* Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583]; U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28, 40.

28. **"Natural boundary"** see Swamp-Land Reclamation Dist. *v.* Wilcox, (Cal. 1887) 14 Pac. 843, 845; Peuker *v.* Canter, 62 Kan. 363, 370, 63 Pac. 617; Boston *v.* Richardson, 13 Allen (Mass.) 146, 154; Eureka Min., etc., Co. *v.* Way, 11 Nev. 171, 177; Stapleford *v.* Brinson, 24 N. C. 311, 313.

29. **"Natural capacity to contract"** see Bestor *v.* Hickey, 71 Conn. 181, 185, 41 Atl. 555.

30. **"Natural or original domicile"** see Johnson *v.* Twenty-One Bales, 13 Fed. Cas. No. 7,417, 2 Paine 601, Van Ness' Prize Cas. 5, 3 Wheel. Cr. Cas. 433.

Guardian,[31] see GUARDIAN AND WARD. Heir,[32] see DESCENT AND DISTRIBUTION; HEIR. History, see EVIDENCE. Import, see NATURAL IMPORT. Increase, see NATURAL INCREASE. Justice, see NATURAL JUSTICE. Law, see LAW; LAW OF NATURE. Liberty, see LIBERTY. Object in the Mineral Act,[33] see MINES AND MINERALS. Person, see NATURAL PERSONS. Presumption, see NATURAL PRESUMPTION. Rights, see NATURAL RIGHTS. State, see NATURAL STATE. Stream, see NATURAL STREAM. Succession, see NATURAL SUCCESSION. Support, see EASEMENTS. Watercourse,[34] see WATERS. See also NATURALLY.)

NATURAL AFFECTION. See CONTRACTS.

NATURAL ALLEGIANCE. See ALIENS; CITIZENS; TREASON.

NATURAL-BORN. See BASTARDS; CITIZENS.

NATURAL BOUNDARY. See BOUNDARIES.

NATURAL CHILD. See BASTARDS.

NATURAL CHILDREN. Children born out of lawful wedlock;[35] illegitimate children who have been acknowledged by their father.[36] (See, generally, BASTARDS.)

NATURAL DAY. See DAY.

NATURAL DEATH. Death resulting from disease, or from natural forces, without the concurrence of man's agency, as distinguished from violent death;[37] or a death which occurs by the unassisted operation of natural causes as distinguished from a violent death, one caused or accelerated by the interference of human agency.[38] (See, generally, ACCIDENT INSURANCE; LIFE INSURANCE.)

NATURAL DOMICILE. See DOMICILE.

NATURALE EST QUIDLIBET DISSOLVI EO MODO QUO LIGATUR. A maxim meaning "It is natural for a thing to be unbound in the same way in which it was bound."[39]

NATURALE ET ÆQUIOR LEX NON EST ULLA QUAM NECIS ARTIFICIEM ARTE PERIRE SUA. A maxim meaning "There is no law more just than that he who contrives destruction for others, should perish by his own arts."[40]

NATURAL FLOW. Applied to a natural gas well, the entire volume of gas that will issue from the mouth of the well when retarded only by the atmospheric pressure.[41] Applied to a stream of water, the quantity of water ordinarily flowing in the stream at the times when its volume is not increased by unusual freshets or rains.[42] (See, generally, MINES AND MINERALS; WATERS.)

NATURAL FOOL. One who is such from his nativity.[43] (See, generally, INSANE PERSONS.)

31. "**Natural guardian**" see Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

32. "**Natural heir**" see Smith *v.* Pendell, 19 Conn. 107, 112, 48 Am. Dec. 146; Markover *v.* Krauss, 132 Ind. 294, 307, 31 N. E. 1047, 17 L. R. A. 806; Ludlum *v.* Otis, 15 Hun (N. Y.) 410, 414; Miller *v.* Churchill, 78 N. C. 372, 373.

33. "**Natural object**" see Jackson *v.* Dines, 13 Colo. 90, 94, 21 Pac. 918; Drummond *v.* Long, 9 Colo. 538, 540, 13 Pac. 543; Quimby *v.* Boyd, 8 Colo. 194, 202, 6 Pac. 462; Gamer *v.* Glenn, 8 Mont. 371, 379, 20 Pac. 654; Flavin *v.* Mattingly, 8 Mont. 242, 246, 19 Pac. 384; Baxter Mt. Gold Min. Co. *v.* Patterson, 3 N. M. 179, 181, 3 Pac. 741. Obligation, see NATURAL OBLIGATION.

34. "**Natural watercourse**" see Rice *v.* Evansville, 108 Ind. 7, 13, 9 N. E. 139, 58 Am. Rep. 22; Cleveland, etc., R. Co. *v.* Huddleston, 21 Ind. App. 621, 52 N. E. 1008, 1011, 69 Am. St. Rep. 385; Singleton *v.* Atchison, etc., R. Co., 67 Kan. 284, 287, 72 Pac. 786; McLaughlin *v.* Sandusky, 17 Nebr. 110, 113, 22 N. W. 241; Bloodgood *v.* Ayers, 37 Hun (N. Y.) 356, 359 [*citing* Barkley *v.* Wilcox, 86 N. Y. 140, 143, 40 Am. Rep. 519]; Porter *v.* Armstrong, 129 N. C. 101, 106, 39 S. E. 799. See also Hawley *v.* Sheldon, 64 Vt. 491, 493, 24 Atl. 717, 33 Am. St. Rep. 941.

35. Marshall *v.* Wabash R. Co., 46 Fed. 269, 273.

36. Vance's Succession, 110 La. 760, 764, 34 So. 767.

37. Black L. Dict. [*quoted* in Slevin *v.* San Francisco Police Fund Com'rs, 123 Cal. 130, 131, 55 Pac. 785, 44 L. R. A. 114].

38. Bouvier L. Dict. (Rawles' Rev.) [*quoted* in Slevin *v.* San Francisco Police Fund Com'rs, 123 Cal. 130, 131, 55 Pac. 785, 44 L. R. A. 114].

39. Bouvier L. Dict.

40. Morgan Leg. Max.

41. Richmond Natural Gas Co. *v.* Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N. E. 782, 783.

42. Nemasket Mills *v.* Taunton, 166 Mass. 540, 544, 44 N. E. 609.

43. *In re* Anderson, 132 N. C. 243, 246, 43 S. E. 649.

NATURAL FRUITS. See Fructus Naturales.

NATURAL GAS. A mineral;[44] a fluid mineral substance;[45] a fuel;[46] a substance which may be converted into heat by combustion with atmospheric air, but it is not heat itself.[47] (See, generally, Gas; Mines and Minerals.)

NATURAL GUARDIAN. See Guardian and Ward.

NATURAL HEIR. See Descent and Distribution; Heir.

NATURAL IMPORT. A phrase which when used in connection with words denotes a meaning which their utterance, promptly and uniformly, suggest to the mind — that which common use has affixed to them.[48] (See Construction; Interpretation.)

NATURAL INCREASE. Applied to stock, dividends.[49] (See, generally, Corporations; Joint-Stock Companies.)

NATURALIZATION. See Aliens.

NATURAL JUSTICE. That which is founded in equity, in honesty and right.[50] (See Justice.)

NATURAL LAW. See Law; Law of Nature.

NATURAL LIBERTY. See Liberty.

NATURALLY. In the usual course of things;[51] the equivalent of "legitimately," "normally."[52] (See Natural.)

NATURAL OBJECT. See Boundaries; Mines and Minerals.

NATURAL OBLIGATION. One which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice.[53]

NATURAL PERSONS. Distinguished from artificial persons; such persons as the God of nature formed us.[54] (See Artificial Persons; and, generally, Corporations.)

NATURAL PRESUMPTION. The presumption arising when a fact is proved, wherefrom by reason of the connection founded upon experience the existence of another fact is directly inferred.[55] (See, generally, Evidence.)

NATURAL RIGHTS. Such as appertain originally and essentially to man — such as are inherent in his nature, and which he enjoys as a man, independent of

44. See Mines and Minerals, 27 Cyc. 516.

45. Manufacturers' Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 468, 57 N. E. 912, 50 L. R. A. 768.

46. Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 338, 16 N. E. 624; Emerson *v.* Com., 108 Pa. St. 111, 126.

47. Emerson *v.* Com., 108 Pa. St. 111, 126.

48. People *v.* Hallett, 1 Colo. 352, 359; People *v.* May, 3 Mich. 598, 605.

49. Miller *v.* Guerrard, 67 Ga. 284, 291, 44 Am. Rep. 720.

50. Kempsey *v.* Maginnis, 2 Mich. N. P. 49, 55.

51. Parke *v.* Frank, 75 Cal. 364, 370, 17 Pac. 427; Mitchell *v.* Clarke, 71 Cal. 163, 164, 11 Pac. 882, 60 Am. Rep. 529. *Compare* Davis *v.* Rich, 180 Mass. 235, 237, 62 N. E. 375, in which case the court said that as used in an instruction in an action brought to recover for injuries caused by falling on an icy sidewalk, due to water from a defective pipe on defendant's premises, the word "naturally" imports that the result must be one which manifestly would come to pass, according to common experience, if the defect was allowed to remain.

52. Reese *v.* Bates, 94 Va. 321, 333, 26 S. E. 865.

Used in connection with the word "impotent" as being a ground for divorce see Griffeth *v.* Griffeth, 162 Ill. 368, 375, 44 N. E. 820; Jorden *v.* Jorden, 93 Ill. App. 633, 636.

53. La. Civ. Code (1900), art. 1757. See also Blair *v.* Williams, 4 Litt. (Ky.) 34, 39; Factors, etc., Ins. Co. *v.* New Orleans, 25 La. Ann. 454, 456.

Obligations are commonly both natural and civil.— There are some, however, which are merely civil and which the debtor may be judicially compelled to perform without being under any obligation to do so in point of conscience. Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 55; Blair *v.* Williams, 4 Litt. (Ky.) 34, 39.

54. Chapman *v.* Brewer, 43 Nebr. 890, 898, 62 N. W. 320, 47 Am. St. Rep. 779.

55. Gulick *v.* Loder, 13 N. J. L. 68, 72, 23 Am. Dec. 711, where it is said: "Presumptions are of two classes, natural and legal or artificial. . . The legal or artificial presumption is, where the existence of one fact is not direct evidence of the existence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other." See also Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 188, 34 Atl. 154, 49 Am. St. Rep. 600; Burr *v.* Sim, 4 Whart. (Pa.) 150, 172, 23 Am. Dec. 50.

any particular act on his side.[56] (See, generally, CIVIL RIGHTS; CONSTITUTIONAL LAW.)

NATURAL SLATE. A metamorphic clay rock.[57] (See, generally, MINES AND MINERALS.)

NATURAL STREAM. A river flowing from its source to the ocean, or an outlet between one interior sea or lake and another.[58] (See, generally, WATERS.)

NATURAL SUCCESSION. The succession taking place between natural persons.[59] (See, generally, DESCENT AND DISTRIBUTION; ESTATES; WILLS. See also NATURAL PERSONS.)

NATURAL USE AND ENJOYMENT. Applied to property, such customary and appropriate employment of the property itself as are needful for its complete utilization according to its inherent qualities or contents and its surroundings.[60]

NATURAL WEAR AND TEAR. Such decay or depreciation in value of the property as may rise from ordinary and reasonable use.[61] (See, generally, CONTRACTS; LANDLORD AND TENANT.)

NATURA NON FACIT SALTUM; ITA NEC LEX. A maxim meaning "Nature takes no leaps; nor does the law."[62]

NATURA NON FACIT VACUUM; NEC LEX SUPERVACUUM. A maxim meaning "Nature makes no vacuum; neither does the law make anything superfluous."[63]

NATURE. Sort, kind, character or species;[64] the sum of qualities and attributes which make a thing what it is, as distinct from others.[65]

NAUFRAGIUM COMMUNE OMNIBUS EST CONSOLATIO. A maxim meaning "A calamity which overtakes the whole community alike is a mitigation of its evils to each individual."[66]

NAUGHTY. A term which may or may not, according to the context, mean adulterous.[67]

56. Borden *v.* State, 11 Ark. 519, 527, 44 Am. Dec. 217.

57. Plastic Fireproof Constr. Co. *v.* San Francisco, 97 Fed. 620, 623, where it is said: "In the quarry and in masses it has cleavage planes, so that it can be readily divided into thin plates or slabs, which are very solid and fine grained, and which may be easily worked and smoothed; and it is therefore useful as a top covering, where such covering is required to be thin, smooth, and water-tight. It is especially valuable for roofing, and in the manufacturing of mantels, billiard tables, and other similar objects. Whet slate has a fine grain, and makes hones. A tough kind (hornblende slate) is used for flagging and sidewalks. A soft kind, containing carbon (drawing slate or graphic slate), is used for pencils. Polishing slate has a peculiarly fine grain, and is found in Bohemia. It is used in slips and in powder. . . . Slate is also made into tablets for use in schools, and wherever it is convenient for writings and drawings intended to be expunged."

58. Scott *v.* The Young America, 21 Fed. Cas. No. 12,549, Newb. Adm. 101, 106.

59. Thomas *v.* Dakin, 22 Wend. (N. Y.) 9, 100.

60. Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 214, 28 Atl. 702.

This does not include the bringing upon land, artificially, of substances not naturally found there. The complement of this rule is, that, as to anything beyond such natural use and enjoyment of his property, without negligence or malice, every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property. Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 214, 28 Atl. 702 [*citing* State *v.* Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305].

61. Green *v.* Kelly, 20 N. J. L. 544, 550. *Compare* Cook *v.* Champlain Transp. Co., 1 Den. (N. Y.) 91, 103.

62. Peloubet Leg. Max.

63. Morgan Leg. Max.

64. State *v.* Birchim, 9 Nev. 95, 100; Webster Dict. [*quoted* in State *v.* Murphy, 23 Nev. 390, 398, 48 Pac. 628].

65. State *v.* Dougherty, 4 Oreg. 200, 203; Ford *v.* Baker, (Tex. Civ. App. 1896) 33 S. W. 1036, 1037.

"Nature" of an obligation, means those qualities which inhere in and pertain to it — such as whether it is joint, or joint and several. Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470.

Used in connection with other words the term has frequently received judicial interpretation, for example: "Nature and character of the demand." Guerin *v.* Reese, 33 Cal. 292, 298. "Nature of the plaintiff's demand." Pipkin *v.* Kaufman, 62 Tex. 545, 547. "Nature of the case" see Truax *v.* Parvis, 7 Houst. (Del.) 330, 334, 32 Atl. 227.

66. Morgan Leg. Max.

67. Merivale *v.* Carson, 20 Q. B. D. 275, 279, 52 J. P. 261, 58 L. T. Rep. N. S. 331,

NAUTICAL ASSESSORS. Experienced shipmasters, or other persons having special knowledge of navigation and nautical affairs, who are called to the assistance of a court of admiralty, in difficult cases involving questions of negligence.[68]

NAVAL ACADEMY. See ARMY AND NAVY.

NAVAL CADET. See ARMY AND NAVY.

NAVAL COURT-MARTIAL. See ARMY AND NAVY.

NAVAL OFFICER. See ARMY AND NAVY.

36 Wkly. Rep. 231, where it was said that the words "naughty wife" as used in a certain play, did not necessarily mean an adulterous woman.

68. Black L. Dict. [*citing* The Empire, 19 Fed. 558, 559; The Clement, 5 Fed. Cas. No. 2,879, 2 Curt. 363, 369], where it is said that they "sit with the judge during the argument, and give their advice upon questions of seamanship or the weight of testimony."

NAVIGABLE WATERS

By Clark A. Nichols*

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* Author of "Hawkers and Peddlers," 21 Cyc. 364; also author of a Treatise on New York "Pleading and Practice"; and joint author of "Master and Servant," 26 Cyc. 941.

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CROSS-REFERENCES

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Grant of Public Land in General, see PUBLIC LANDS.
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Pilot, see PILOTS.
Powers and Duties of Municipal Corporation in General, see MUNICIPAL CORPORATIONS.
Regulation of Commerce, see COMMERCE.
Transportation of Freight and Passengers, see SHIPPING.

I. WHAT CONSTITUTES.

A. General Rules.[1] Water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes.[2] This rule is not only the one which

1. What are navigable waters "of the United States" see ADMIRALTY, 1 Cyc. 815–870.

2. *Alabama.*— Tuscaloosa County *v.* Foster, 132 Ala. 392, 31 So. 587; Bayzer *v.* McMillan Mill Co., 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133; Sullivan *v.* Spotswood, 82 Ala. 163, 2 So. 716; Lewis *v.* Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Walker *v.* Allen, 72 Ala. 456; State *v.* Bell, 5 Port. 365.

Arkansas.— St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559; Little Rock, etc., R. Co. *v.* Brooks, 39 Ark. 403, 43 Am. Rep. 277.

California.—American River Water Co. *v.* Amsden, 6 Cal. 443.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Georgia.— See also Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306.

Illinois.— Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783; Healy *v.* Joliet, etc., R. Co., 2 Ill. App. 435 [*reversed* on facts in 94 Ill. 416]. But see Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295

Indiana.— Neaderhouser *v.* State, 28 Ind. 257.

Iowa.— McManus *v.* Carmichael, 3 Iowa 1.

Michigan.— Baldwin *v.* Erie Shooting Club, 127 Mich. 659, 87 N. W. 59; Burroughs *v.* Whitwam, 59 Mich. 279, 26 N. W. 491; Tyler *v.* People, 8 Mich. 320; Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

Minnesota.— Castner *v.* The Dr. Franklin, 1 Minn. 73.

Missouri.— Benson *v.* Morrow, 61 Mo. 345.

New York.— Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58; Ten Eyck *v.* Warwick, 75 Hun 562, 27 N. Y. Suppl. 536; Munson *v.* Hungerford, 6 Barb. 265; Lowber *v.* Wells, 13 How. Pr. 454.

North Carolina.— State *v.* Twiford, 136 N. C. 603, 48 S. E. 586; State *v.* Baum, 128 N. C. 600, 38 S. E. 900; Farmers' Co-operative Mfg. Co. *v.* Albemarle, etc., R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700; Burke County *v.* Catawba Lumber Co., 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829; State *v.* Eason, 114 N. C. 787, 19 S. E. 88, 41 Am. St. Rep. 811, 23 L. R. A. 520; State *v.* Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633; Ingram *v.* Threadgill, 14 N. C. 59; Wilson *v.* Forbes, 13 N. C. 30.

Ohio.— Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

Oregon.— Nutter *v.* Gallagher, 19 Oreg. 375, 24 Pac. 250; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

prevails in nearly all of the states in this country but was also the rule under the civil

Pennsylvania.— Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566; Flanagan *v.* Philadelphia, 42 Pa. St. 219; Carson *v.* Blazer, 2 Binn. 475, 4 Am. Dec. 463; Hecksher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. 273.

South Carolina.—Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42; State *v.* Pacific Guano Co., 22 S. C. 50.

Tennessee.— Webster *v.* Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324; Sigler *v.* State, 7 Baxt. 493; Stuart *v.* Clark, 2 Swan 9, 58 Am. Dec. 49; Elder *v.* Burrus, 6 Humphr. 358; Allison *v.* Davidson, (Ch. App. 1896) 39 S. W. 905.

Vermont.— New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

West Virginia.— Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

Wisconsin.— Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974; Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

United States.— U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 [*reversing* on other grounds 9 N. M. 292, 51 Pac. 674]; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018; Packer *v.* Bird, 137 U. S. 661, 11 S. Ct. 210, 34 L. ed. 819; Miller *v.* New York, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971; U. S. *v.* The Montello, 11 Wall. 411, 20 L. ed. 191, 20 Wall. 430, 22 L. ed. 391; The Daniel Ball *v.* U. S., 10 Wall. 557, 19 L. ed. 999; Jones *v.* Soulard, 24 How. 41, 16 L. ed. 604; Toledo Liberal Shooting Co. *v.* Erie Shooting Club, 90 Fed. 680, 33 C. C. A. 233; Chisholm *v.* Caines, 67 Fed. 285.

Canada.— McDonald *v.* Lake Simcoe Ice, etc., Co., 26 Ont. App. 411; Dixon *v.* Snetsinger, 23 U. C. C. P. 235; Reg. *v.* Meyers, 3 U. C. C. P 305; Parker *v.* Elliott, 1 U. C. C. P. 470. See also Atty.-Gen. *v.* Scott, 34 Can. Sup. Ct. 603 [*affirming* 24 Quebec Super. Ct. 59]; Atty.-Gen. *v.* Harrison, 12 Grant Ch. (U. C.) 466.

See 37 Cent. Dig. tit. "Navigable Waters," § 5.

In Tennessee a river may be navigable in the ordinary acceptation of the term, and yet not navigable in a legal (common-law) sense; and such is a river or stream of sufficient depth naturally for valuable floatage, such as rafts, flatboats, and small vessels of lighter draft than ordinary. Irwin *v.* Brown, (1889) 12 S. W. 340; Stuart *v.* Clark, 2 Swan 9, 58 Am. Dec. 49.

In North Carolina the test is the capacity to afford a passage for sea vessels. State *v.* Eason, 114 N. C. 787, 19 S. E. 88, 41 Am. St. Rep. 811, 23 L. R. A. 520; Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242; Cornelius *v.* Glen, 52 N. C. 512; State *v.* Glen, 52 N. C. 321; Collins *v.* Benbury, 25 N. C. 277, 38 Am. Dec. 722; Wilson *v.* Forbes, 13 N. C. 30.

Lakes and bays.— Where a steamboat carrying visitors and pleasure parties was operated on a lake, and numerous small boats were used for rowing and fishing, and the lake had an average depth of sixteen feet, it was a navigable body of water. Kalez *v.* Spokane Valley Land, etc., Co., 42 Wash. 43, 84 Pac. 395. A bay is not rendered a "navigable" part of the river from the mere fact that certain vessels of light draught might get nearer the shore thereof before the construction of a railroad than at present. Kerr *v.* West Short R. Co., 127 N. Y. 269, 27 N. E. 833.

Charge for fishing.— That the former riparian owner charged people one fourth of the catch for fishing in a creek, and that some in their ignorance submitted to the exaction, is not proof of the non-navigability of the creek. State *v.* Twiford, 136 N. C. 603, 48 S. E. 586.

Navigability cannot be affected by conditions, such as there being a large town, with wharves, or whether one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access by land. State *v.* Twiford, 136 N. C. 603, 48 S. E. 586.

The fact that a stream has not been meandered and returned as navigable is not the test of its navigability. Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257; Lownsdale *v.* Gray's Harbor Boom Co., 21 Wash. 542, 58 Pac. 663.

Particular waters held to be navigable: Allegheny river. Wainwright *v.* McCullough, 63 Pa. St. 66. Connecticut river. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716. But see Scott *v.* Willson, 3 N. H. 321. Falia river. Ingram *v.* St. Tammany Parish Police Jury, 20 La. Ann. 226. Fox river. U. S. *v.* The Montello, 20 Wall. (U. S.) 430, 22 L. ed. 391. Hudson river. Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270. Maumee river. Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337. Mississippi river. People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339; Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa 106, 7 Am. Rep. 176; McManus *v.* Carmichael, 3 Iowa 1; Castner *v.* The Dr. Franklin, 1 Minn. 73. But see Houck *v.* Yates, 82 Ill. 179; Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295; The Magnolia *v.* Marshall, 39 Miss. 109. Missouri river. Benson *v.* Morrow, 61 Mo. 345. Mohawk river. People *v.* Canal Appraisers, 33 N. Y. 461; Crill *v.* Rome, 47 How. Pr. (N. Y.) 398. Monongahela river. Wainwright *v.* McCullough, 63 Pa. St. 66; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527. Niagara river. *In re* State Reservation Com'rs, 37 Hun (N. Y.) 537 [*affirming* 16 Abb. N. Cas. 159, and *affirmed* in 102 N. Y. 734, 7 N. E. 916]. Oconto river. Leigh *v.* Holt, 15 Fed. Cas. Co. 8,220, 5 Biss. 338. Ohio river. Wainwright *v.* McCul-

law.[3] In England, however, a different rule prevailed and only water in which the tide ebbed and flowed was considered navigable.[4] This limitation of navigable water to tide-water has been recognized in this country in only a few cases.[5] In so far as the public right of navigation is concerned, the distinction is immaterial inasmuch as the same rights exist in non-tidal waters navigable in fact as in tidal waters, even where only tidal waters are navigable in law.[6] In order to be navigable, water must be navigable in its natural state without artificial aid;[7] but it is immaterial that there is no current,[8] or that the stream or body of water is not navigable in its entirety,[9] if it is in fact navigable wholly or in part. It is elementary that the

lough, 63 Pa. St. 66. Pond branch. Witt *v.* Jefcoat, 10 Rich. (S. C.) 389. Rappahannock river. Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574. Rock river. State *v.* Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848; Cobb *v.* Smith, 16 Wis. 661; Newell *v.* Smith, 15 Wis. 101. Wabash river. Dawson *v.* James, 64 Ind. 162; State *v.* Wabash Paper Co., 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949. The channel between Quantac bay and East bay, portions of the Great South bay, in Long Island, is a part of the navigable waters of the United States. Whitehead *v.* Jessup, 53 Fed. 707.

Particular waters held not navigable: Healy slough. Joliet, etc., R. Co. *v.* Healy, 94 Ill. 416. Rio Grande river. U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 [*reversing* on other grounds 9 N. M. 292, 51 Pac. 674]. Bayou La Chute. Bendich *v.* Scobel, 107 La. 242, 31 So. 703.

3. Goodwill *v.* Bossier Parish Police Jury, 38 La. Ann. 752; Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Ten Eyck *v.* Warwick, 75 Hun (N. Y.) 562, 27 N. Y. Suppl. 536; Stuart *v.* Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

4. *Arkansas.*— St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559.

Connecticut.— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Illinois.— Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

Maine.— Veazie *v.* Dwinel, 50 Me. 479; Spring *v.* Russell, 7 Me. 273; Berry *v.* Carle, 3 Me. 269.

Massachusetts.— Com. *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386.

Michigan.— Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435.

Mississippi.— Morgan *v.* Reading, 3 Sm. & M. 366.

New York.— *Ex p.* Jennings, 6 Cow. 518, 16 Am. Dec. 447; Hooker *v.* Cummings, 20 Johns. 90, 11 Am. Dec. 249.

Tennessee.— Stuart *v.* Clark, 2 Swan 9, 58 Am. Dec. 49.

Utah.— Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

United States.— Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 15 S. Ct. 991, 40 L. ed. 85.

England.— Murphy *v.* Ryan, Ir. R. 2 C. L. 143, 16 Wkly. Rep. 678; Ilchester *v.* Raisleigh, 61 L. T. Rep. N. S. 477, 38 Wkly. Rep. 104. *Compare* Miles *v.* Rose, 1 Marsh. 313, 5 Taunt. 705, 1 E. C. L. 361, 15 Rev. Rep. 623.

See 37 Cent. Dig. tit. "Navigable Waters," § 8.

5. Veazie *v.* Dwinel, 50 Me. 479; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Com. *v.* Alger, 7 Cush. (Mass.) 53; Com. *v.* Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Cobb *v.* Davenport, 32 N. J. L. 369; People *v.* Canal Appraisers, 33 N. Y. 461; People *v.* Tibbetts, 19 N. Y. 523; Morgan *v.* King, 30 Barb. (N. Y.) 9 [*reversed* on other grounds in 35 N. Y. 454, 91 Am. Dec. 58]; Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404; *Ex p.* Jennings, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270. See Welles *v.* Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526.

6. Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435; People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228.

7. *Michigan.*—East Branch Sturgeon River Imp. Co. *v.* White, etc., Lumber Co., 69 Mich. 207, 37 N. W. 192; Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., 9 N. M. 292, 51 Pac. 674.

New York.— Ten Eyck *v.* Warwick, 75 Hun 562, 27 N. Y. Suppl. 536.

Ohio.— Jeremy *v.* Elwell, 5 Ohio Cir. Ct. 379, 3 Ohio Cir. Dec. 186.

Oregon.— Nutter *v.* Gallagher, 19 Oreg. 375, 24 Pac. 250.

Tennessee.— Webster *v.* Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

Washington.— East Hoquiam Boom, etc., Co. *v.* Neeson, 20 Wash. 142, 54 Pac. 1001.

See 37 Cent. Dig. tit. "Navigable Waters," § 5 *et seq.*

Compare Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803.

But an estuary which was not a natural harbor, but which has been made a harbor by the construction of government works, is a navigable body of water. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

8. Turner *v.* Holland, 65 Mich. 453, 33 N. W. 283.

9. Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783; Hempstead *v.* New York, 52 N. Y. App. Div. 182, 65 N. Y. Suppl. 14; Alston *v.* Limehouse, 60 S. C. 559, 39 S. E. 188; St. Anthony Falls Water-Power Co. *v.* St. Paul Water Com'rs, 168 U. S. 349, 18 S. Ct. 157, 42 L. ed. 497. See also Egan *v.* Hart, 165 U. S. 188, 17 S. Ct. 300, 41 L. ed. 680.

mere fact that a river is navigable does not of itself render all of its branches navigable.[10]

B. Water Navigable Periodically. To constitute a navigable stream, it need not be perennially so, but the seasons of navigability must occur regularly, and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse.[11]

C. Purposes For Which Water Used. It is not the use which has been made of the water but the use which may be made of it without a change of conditions that determines its navigability.[12] The stream must be navigable for some useful purpose, such as trade or agriculture, rather than for mere pleasure.[13] But the mode of using the stream, whether by boats or by rafts or floating of logs separately, is not a test;[14] and streams which are merely floatable and useful for logging purposes are also navigable streams so far as the right of the public to

10. Hull *v.* Scott, 24 Quebec Super. Ct. 59 [*affirmed* in 13 Quebec K. B. 164].

11. *Arkansas.*— Little Rock, etc., R. Co. *v.* Brooks, 39 Ark. 403, 43 Am. Rep. 277.

California.— Miller *v.* Enterprise Canal, etc., Co., 142 Cal. 208, 75 Pac. 770, 100 Am. St. Rep. 115.

Michigan.— Thunder Bay River Booming Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., 9 N. M. 292, 51 Pac. 674.

Tennessee.— Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Sigler *v.* State, 7 Baxt. 493.

Washington.— Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272.

United States.— Chisholm *v.* Caines, 67 Fed. 285.

See 37 Cent. Dig. tit. "Navigable Waters," § 7 *et seq.*

But see Bayzer *v.* McMillan Mill Co., 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133; Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33.

Extraordinary occasions.— Where marsh land bordering on navigable waters is subject only to temporary inundation in times of heavy gales, it does not constitute a part of the navigable waters. Niles *v.* Cedar Point Club, 85 Fed. 45, 29 C. C. A. 5 [*affirmed* in 175 U. S. 300, 41 L. ed. 171]. And, as a further illustration of the rule, water navigable only during extraordinary winds is not navigable in law. Ross *v.* Portsmouth, 17 U. C. C. P. 195.

12. Bucki *v.* Cone, 25 Fla. 1, 6 So. 160; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

13. *Connecticut.*— Groton *v.* Hurlburt, 22 Conn. 178; Wethersfield *v.* Humphrey, 20 Conn. 218.

Illinois.— Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783.

Louisiana.— Burns *v.* Crescent Gun, etc., Club, 116 La. 1038, 41 So. 249.

Michigan.— Baldwin *v.* Erie Shooting Club, 127 Mich. 659, 87 N. W. 59; Burroughs *v.* Whitwam, 59 Mich. 279, 26 N. W. 491.

Washington.—Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

United States.— Toledo Liberal Shooting Co. *v.* Erie Shooting Club, 90 Fed. 680, 33 C. C. A. 233.

See 37 Cent. Dig. tit. "Navigable Waters," § 7.

Contra.— Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; State *v.* Twiford, 136 N. C. 603, 48 S. E. 586. And see Atty.-Gen. *v.* Woods, 108 Mass. 436, 11 Am. Rep. 380.

Capacity to float a rowboat is not enough to make water navigable. Baldwin *v.* Erie Shooting Club, 127 Mich. 659, 87 N. W. 59. The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States which the federal statute makes it a misdemeanor to obstruct unless the channel is substantially useful to some purpose of interstate commerce. Leovy *v.* U. S., 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 [*reversing* 92 Fed. 344, 34 C. C. A. 392].

The water must connect with other waters or lead from one public place to another, in order to be useful for commerce so as to be navigable as a matter of law. Manigault *v.* Ward, 123 Fed. 707; Chisholm *v.* Caines, 67 Fed. 285. See also Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102; Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242. But see State *v.* Twiford, 136 N. C. 603, 48 S. E. 586.

14. *Florida.*— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Louisiana.— Goodwill *v.* Bossier Parish Police Jury, 38 La. Ann. 752.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

Minnesota.— Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

New York.—Ten Eyck *v.* Warwick, 75 Hun 562, 27 N. Y. Suppl. 536. See also Morgan *v.* King, 30 Barb. 9 [*reversed* on other grounds in 35 N. Y. 454, 91 Am. Dec. 58].

Wisconsin.—Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257.

United States.— U. S. *v.* The Montello, 20 Wall. 430, 22 L. ed. 391.

See 37 Cent. Dig. tit. "Navigable Waters," § 5 *et seq.*

use them therefor is concerned, as has already been considered elsewhere in connection with the law of logging.[15]

D. Effect of Obstructions. Navigable waters do not lose their character as such because interrupted by falls, if they can be used for purposes of commerce both above and below the falls,[16] nor because of the existence of other obstructions not preventing navigation.[17]

E. Tide-Water Not Necessarily Navigable. While all tide-water is *prima facie* navigable,[18] it is not necessarily so.[19]

F. Statutory Declarations of Navigability. In many jurisdictions certain streams are declared navigable by statute.[20] But such a statute cannot make a stream navigable which is in fact not navigable.[21] On the other hand a statutory declaration that a river is navigable is not necessary to make it so.[22]

G. Evidence and Questions For Jury. While the courts will take judicial notice of the navigability of all tide-water and particular rivers of the country on which navigation is conducted as a matter of common knowledge,[23] the question whether or not a stream is navigable is ordinarily a question of fact,[24] the burden

15. See LOGGING, 25 Cyc. 1566, 1567.

16. Matter of Niagara State Reservation Com'rs, 37 Hun (N. Y.) 537 [*affirming* 16 Abb. N. Cas. 159, and *affirmed* in 102 N. Y. 734, 7 N. E. 916]; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

17. Goodwill *v.* Bossier Parish Police Jury, 38 La. Ann. 752; Charlestown *v.* Middlesex County Com'rs, 3 Metc. (Mass.) 202; Chisholm *v.* Caines, 67 Fed. 285; Atty.-Gen. *v.* Harrison, 12 Grant Ch. (U. C.) 466. But see Useful Manufactures, etc., Soc. *v.* Morris Canal, etc., Co., 1 N. J. Eq. 157, 21 Am. Dec. 41; Cates *v.* Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699.

18. Sullivan *v.* Spotswood, 82 Ala. 163, 2 So. 716; Flanagan *v.* Philadelphia, 42 Pa. St. 219; Reg. *v.* Meyers, 3 U. C. C. P. 305. See Walsh *v.* Hopkins, 22 R. I. 418, 48 Atl. 390, holding that a stream in which the tide is perceptible is public waters, although not navigable. See also Dawson *v.* McMillan, 34 Wash. 269, 75 Pac. 807.

Water navigable only at high tides.— A river is navigable when it can be navigated in a practical and profitable manner with the assistance of the tide, notwithstanding it is impossible for vessels to enter the river at low tide on account of the shallowness of the waters at its mouth. Atty.-Gen. *v.* Fraser, 37 Can. Sup. Ct. 577 [*reversing* on other grounds 14 Quebec K. B. 115].

19. Wethersfield *v.* Humphrey, 20 Conn. 218; Burns *v.* Crescent Gun, etc., Club, 116 La. 1038, 41 So. 249; Rowe *v.* Granite Bridge Corp., 21 Pick. (Mass.) 344; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Glover *v.* Powell, 10 N. J. Eq. 211.

Tidal channels are navigable in law only when they are navigable in fact for trade and commerce by craft of some kind. State *v.* Pacific Guano Co., 22 S. C. 50.

20. *California.*— People *v.* Elk River Mill, etc., Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; Cardwell *v.* Sacramento County, 79 Cal. 347, 21 Pac. 763; American River Water Co. *v.* Amsden, 6 Cal. 443.

Maryland.— Binney's Case, 2 Bland 99.

Ohio.— Guthrie *v.* McConnel, 2 Ohio Dec. (Reprint) 157, 1 West. L. Month. 593.

Pennsylvania.— Baker *v.* Lewis, 33 Pa. St. 301, 75 Am. Dec. 598; Wiener *v.* Peoples, 17 Lanc. L. Rev. 289.

Wisconsin.— Wood *v.* Hustis, 17 Wis. 416.

United States.— U. S. *v.* Union Bridge Co., 143 Fed. 377.

See 37 Cent. Dig. tit. "Navigable Waters," § 6.

Streams not enumerated as non-navigable. — The effect of a series of statutes declaring what streams or portions of streams shall be navigable, which, after declaring a stream navigable between certain points, and repeatedly changing one of those points, omits the stream from the list of navigable waters entirely, is to declare by implication that the stream is non-navigable. Cardwell *v.* Sacramento County, 79 Cal. 347, 21 Pac. 763.

21. *California.*— People *v.* Elk River Mill, etc., Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125.

Kentucky.— Murray *v.* Preston, 106 Ky. 561, 50 S. W. 1095, 21 Ky. L. Rep. 72, 90 Am. St. Rep. 232.

Ohio.— Walker *v.* Bd. of Public Works, 16 Ohio 540.

Washington.—Watkins *v.* Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

Wisconsin.—Jones *v.* Pettibone, 2 Wis. 308.

United States.— Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 17 Fed. 419, 5 McCrary 382.

See 37 Cent. Dig. tit. "Navigable Waters," § 6.

22. Martin *v.* Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

Statutes relating to navigable streams have in some instances been held to refer merely to streams declared navigable by the legislature. Walker *v.* Bd. of Public Works, 16 Ohio 540.

23. See EVIDENCE, 16 Cyc. 862.

24. *Maine.*— Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298.

of establishing which rests upon the party affirming it.[25] The admission of evidence,[26] and the weight and sufficiency thereof,[27] is governed by the rules relating to evidence in civil actions in general.

II. FEDERAL AND STATE CONTROL.

A. Federal Control. "Navigable waters of the United States"[28] are under the control of congress which has power to legislate in regard thereto so far as commerce is concerned.[29] It has not only power to prohibit the creation of any obstruction,[30] but also has power to determine what shall constitute an obstruction to navigation,[31] and to require the removal of obstructions.[32] Likewise, on the other hand, it has power, in the interest of commerce, to authorize the obstruction, and even the closing, of the navigation of navigable waters of the United States.[33]

Mississippi.—Smith *v.* Fonda, 64 Miss. 551, 1 So. 757.

Missouri.— McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351.

New York.— See Morgan *v.* King, 18 Barb. 277 [*affirmed* in 30 Barb. 9 (*reversed* on other grounds in 35 N. Y. 454, 91 Am. Dec. 58)].

Ohio.— Jeremy *v.* Elwell, 5 Ohio Cir. Ct. 379, 3 Ohio Cir. Dec. 186.

Texas.—Jones *v.* Johnson, 6 Tex. Civ. App. 262, 25 S. W. 650.

Canada.— Reg. *v.* Meyers, 3 U. C. C. P. 305.

See 37 Cent. Dig. tit. "Navigable Waters," § 16.

In Alabama whether a stream is navigable is a question of law where the facts are ascertained, but is a question of fact where the facts on which the question depends are not determined. Walker *v.* Allen, 72 Ala. 456; Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439.

25. Burns *v.* Crescent Gun, etc., Club, 116 La. 1038, 41 So. 249; McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351; Leihy *v.* Ashland Lumber Co., 49 Wis. 165, 5 N. W. 471; Jones *v.* Pettibone, 2 Wis. 308.

Stream above tide-water.— The onus is on the party claiming it to be so to prove that a stream above tide-water is navigable, and therefore open to the public. Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439.

Presumption where stream not meandered. — The fact that a stream between two lakes was not meandered by the United States surveyors or their deputies raises the presumption that it is not navigable. Clute *v.* Briggs, 22 Wis. 607.

26. See, generally, EVIDENCE.

Opinion evidence.— On a question as to the floatability of a stream on which a dam has been built, it is not competent for a witness to give his opinion as to the possibility or expense of running logs at any particular time on the stream without using the water raised or kept back by the dam. Holden *v.* Robinson Mfg. Co., 65 Me. 215.

27. See, generally, EVIDENCE, 17 Cyc. 753.

28. **Definition** of phrase see ADMIRALTY, 1 Cyc. 817.

29. Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643 [*reversed* on other grounds in 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629]; Jolly *v.* Terre Haute Drawbridge Co., 17 Fed. Cas. No. 7,441, 6 McLean 237; Bedford *v.* U. S., 36 Ct. Cl. 474. And see COMMERCE, 7 Cyc. 453–467.

Hydraulic mining.— The act of congress of March 1, 1893, regulating hydraulic mining in California, to prevent the obstruction of navigable streams of the state, is constitutional. North Bloomfield Gravel Min. Co. *v.* U. S., 88 Fed. 664, 32 C. C. A. 84 [*affirming* 81 Fed. 243].

30. U. S. *v.* Wishkah Boom Co., 136 Fed. 42, 68 C. C. A. 592 (holding the act of congress of Sept. 19, 1890, prohibiting maintenance of obstructions to navigation not inconsistent with the act of congress of March 3, 1899, chapter 425, prohibiting the erection of such structures); U. S. *v.* Bellingham Bay Boom Co., 81 Fed. 658, 26 C. C. A. 547 (holding statute not retroactive).

Removal of obstruction.— The act of congress prohibiting the meddling with a navigable stream of the United States without first obtaining permission from the secretary of war was passed merely to prevent obstructions of navigation without such consent, and does not refer to a course of action which has for its object the removal of an obstruction to such navigation. People *v.* West Chicago St. R. Co., 115 Ill. App. 172 [*affirmed* in 214 Ill. 9, 73 N. E. 393].

Deposit of refuse.— The act of congress of June 29, 1888, as amended by the act of Aug. 18, 1894, regulating the deposit of refuse within the harbor of New York and other waters, is a valid exercise of police power. U. S. *v.* Romard, 89 Fed. 156.

31. U. S. *v.* Union Bridge Co., 143 Fed. 377; U. S. *v.* North Bloomfield Gravel-Min. Co., 81 Fed. 243 [*affirmed* in 88 Fed. 664, 32 C. C. A. 84].

32. U. S. *v.* Union Bridge Co., 143 Fed. 377.

Where congress has assumed jurisdiction over a navigable river, it has power to order obstructions to navigation removed even though their construction was authorized by the state. U. S. *v.* Moline, 82 Fed. 592.

33. Frost *v.* Washington County R. Co., 96 Me. 76, 51 Atl. 806.

The right to erect a structure in a navigable river of the United States wholly within the limits of a state depends upon the concurrent or joint consent of the state and federal governments.[34]

B. State Control — 1. In General. In so far as navigable waters are within the territorial limits of a state, without regard to whether they do or do not connect with waters outside such limits, it has exclusive jurisdiction, subject to the paramount right of congress to regulate commerce, to legislate concerning the use thereof.[35] But a state cannot, except under its power of eminent domain and upon making just compensation, interfere with its navigable streams except for

Construction of statute.— U. S. Rev. St. (1878) § 2339 [U. S. Comp. St. (1901) p. 1437], 19 U. S. St. at L. 377 [U. S. Comp. St. (1901) p. 1548], and 26 U. S. St. at L. 1101 [U. S. Comp. St. (1901) p. 1570], recognizing and assenting to the appropriation of water for mining and irrigation purposes, under laws of the states, in contravention of the common-law rule as to continuous flow, cannot be construed to confer upon any state the right to appropriate all the waters of streams tributary to a navigable watercourse, so as to destroy its navigability. U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 [*reversing* 9 N. M. 292, 51 Pac. 674].

Bridges.— Congress has authority to regulate or prohibit the construction of bridges across navigable waters of the United States (U. S. *v.* Milwaukee, etc., R. Co., 26 Fed. Cas. No. 15,778, 5 Biss. 410), and may delegate that authority to the head of a governmental department (U. S. *v.* Milwaukee, etc., R. Co., *supra*). As the act of congress of Sept. 19, 1890, which prohibits the erection of a bridge in navigable waters without permission of the secretary of war, excepts from its operation bridges the construction of which has been previously authorized by law, such consent is not necessary for a bridge authorized by the state legislature previous to such act of congress. Adams *v.* Ulmer, 91 Me. 47, 39 Atl. 347.

34. Montgomery *v.* Portland, 190 U. S. 89, 23 S. Ct. 735, 47 L. ed. 965 [*affirming* 38 Oreg. 215, 62 Pac. 755]; Calumet Grain, etc., Co. *v.* Chicago, 188 U. S. 431, 23 S. Ct. 477, 47 L. ed. 532; Cummings *v.* U. S., 188 U. S. 410, 23 S. Ct. 472, 47 L. ed. 525.

35. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Maine.— Parker *v.* Cutler Milldam Co., 20 Me. 353, 37 Am. Dec. 56.

Michigan.—People *v.* Silberwood, 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694; Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

New Jersey.— McCarter *v.* Hudson County Water Co., 70 N. J. Eq. 525, 61 Atl. 710.

New York.— Langdon *v.* New York, 93 N. Y. 129. *Compare* Morgan *v.* King, 18 Barb. 277 [*affirmed* in 30 Barb. 9 (*reversed* on other grounds in 35 N. Y. 454, 91 Am. Dec. 58)]. See also People *v.* Jessup, 160 N. Y. 249, 54 N. E. 682.

North Carolina.—State *v.* White Oak River Corp., 111 N. C. 661, 16 S. E. 331.

Rhode Island.— Rhode Island Motor Co. *v.* Providence, (1903) 55 Atl. 696.

United States.— Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946; Lake Shore, etc., R. Co. *v.* Ohio, 165 U. S. 365, 17 S. Ct. 357, 41 L. ed. 747; Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237; U. S. *v.* Beef Slough Mfg., etc., Co., 24 Fed. Cas. No. 14,559, 8 Biss. 421.

See 37 Cent. Dig. tit. "Navigable Waters," § 2. And see COMMERCE, 7 Cyc. 452.

The state is the owner of all navigable waters within its territorial limits. Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. St. Rep. 269; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Hecksher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. (Pa.) 273. Strictly speaking, however, the state does not own the waters, since navigable water is not the subject of ownership. Niagara County Irr., etc., Co. *v.* College Heights Land Co., 111 N. Y. App. Div. 770, 98 N. Y. Suppl. 4.

Power to authorize dam.— In the absence of legislation by congress, a state may authorize the erection of a dam across a navigable river which is wholly within the limits of the state (Brooks *v.* Cedar Brook, etc., Imp. Co., 82 Me. 17, 19 Atl. 87, 17 Am. St. Rep. 459, 7 L. R. A. 460; Glover *v.* Powell, 10 N. J. Eq. 211; Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257; Tewksbury *v.* Schulenberg, 41 Wis. 584; Stoughton *v.* State, 5 Wis. 291; Pound *v.* Turck, 95 U. S. 459, 24 L. ed. 525), although it may involve a partial obstruction or inconsiderable detention to navigation (State *v.* Sunapee Dam Co., 70 N. H. 458, 50 Atl. 108; Woodman *v.* Kilbourn Mfg. Co., 30 Fed. Cas. No. 17,978, 1 Abb. 158, 1 Biss. 546). So a dam may be authorized by the legislature for a public purpose other than the improvement of navigation (State *v.* Eau Claire, 40 Wis. 533). A constitutional provision that all navigable waters shall forever remain public highways does not prevent the legislature, in the exercise of its police power to subserve the drainage of lowlands, from authorizing the construction of a dam across a navigable stream. Manigault *v.* Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274 [*affirming* 123 Fed. 707]. But the power given to state officers to authorize the use of lands under water does not permit them to authorize the construction of a permanent dam in a navigable stream. People *v.* Page, 39

the purpose of regulating, preserving, and protecting the public easement of navigation therein.[36] The state has power to prohibit the obstruction of navigable streams,[37] and to provide that no one shall obstruct navigability with-

N. Y. App. Div. 110, 56 N. Y. Suppl. 834, 58 N. Y. Suppl. 239.

Booms.— The state has power to authorize the temporary obstruction of a stream by permitting the construction of a boom for facilitating the running of logs. J. S. Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295, holding that the grant is valid as against the public only and cannot authorize a trespass by the grantee upon land to which he has no title. A log boom constructed in a manner conformable to a state statute at a time when congress had not assumed jurisdiction over the waters in question is "affirmatively authorized by law," within the meaning of the River and Harbor Act prohibiting any obstruction "not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction." U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437 [*reversing* 81 Fed. 658, 26 C. C. A. 547].

Docks.— A state or the municipality or board to whom the power is delegated may regulate the use of a dock, and its regulations are binding upon all, providing they do not interfere with the right of the owners to receive and collect their wharfage. Hecker *v.* New York Balance Dock Co., 24 Barb. (N. Y.) 215.

When congress acts it is not concluded by anything that the state or individuals by its authority or acquiescence may have done, from assuming entire control of the matter, and abating any erections that have been made and preventing any others from being made except in conformity with such regulations as it may impose. Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629; U. S. *v.* Union Bridge Co., 143 Fed. 377. If congress declares a bridge or other structure over or on navigable waters to be an unlawful structure, the state legislature cannot make it lawful nor can a state court declare it to be lawful. So if congress declares the structure to be lawful, neither the state legislature nor a state court can, even upon the most plenary proof, declare it unlawful as interfering with navigation. Frost *v.* Washington County R. Co., 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68.

The state has no power to close any navigable waters of the United States, although located wholly within its limits. Leovy *v.* U. S., 92 Fed. 344, 34 C. C. A. 392 [*reversed* on facts in 177 U. S. 621, 20 S. Ct. 697, 44 L. ed. 914].

Removal or alteration of bridges.— The delegation to the secretary of war by the act of congress of Sept. 12, 1890, of authority to direct changes in existing bridges over any navigable waters of the United States, to prevent obstructions to navigation, showed no intention by congress to exercise exclusive control over navigable waters entirely within the jurisdiction of a state, and consequently does not deprive the state of power to compel the removal or alteration of bridges erected over such waters without authority. Lake Shore, etc., R. Co. *v.* State, 165 U. S. 365, 17 S. Ct. 357, 41 L. ed. 747.

Acts of congress making appropriations for the improvement of a river lying within a state do not operate as an inhibition against state legislation authorizing the construction of booms, dams, etc., so as to make unlawful such structures when erected under state authority. U. S. *v.* Bellingham Bay Boom Co., 81 Fed. 658, 26 C. C. A. 547 [*reversed* on other grounds in 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437].

Conflict with federal statutes.— The act of congress of March 3, 1899, chapter 425, section 19, relating to the removal of obstructions from navigable waters is paramount, and where state statutes or municipal ordinances conflict therewith they are invalid. Hagan *v.* Richmond, 104 Va. 723, 52 S. E. 385.

The mere establishment of a harbor line does not deprive the state of the right to control the navigable waters within the line; nor does a grant of lots to a city divest the state of its sovereign rights over the navigable highways on which the lots are bounded. People *v.* Williams, 64 Cal. 498, 2 Pac. 393.

Retroactive effect.— A statute authorizing a municipal corporation to divert waters on condition that it shall keep a certain depth of water in the stream at low water mark, and maintain such navigable depth at all times, is not retroactive. Hempstead *v.* New York, 52 N. Y. App. Div. 182, 65 N. Y. Suppl. 14.

Concurrent jurisdiction.— Construction of federal statutes providing that the states of Wisconsin and Minnesota shall have concurrent jurisdiction over the Mississippi river so far as it forms a boundary between such states see Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953; J. S. Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.

36. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

37. Cox *v.* State, 3 Blackf. (Ind.) 193; Wisconsin River Imp. Co. *v.* Lyons, 30 Wis. 61.

Construction of statutes.— Using the water of a navigable stream for "sluicing" a canal bed is not using it as a "motive power," within the meaning of N. C. Code, § 1123, making the obstruction of a navigable stream, except for purposes of utilizing the water as a "motive power," a misdemeanor. State *v.* Duplin Canal Co., 91 N. C. 637. The statute made it a misdemeanor to put any obstruction in any passage for water, whereby the

out first obtaining the permission of the legislature.[38] While no state can obstruct, or authorize the obstruction of, navigable waters of the United States over which congress has control,[39] a state has power to authorize the obstruction of navigable waters wholly within the state,[40] without compensation to riparian proprietors.[41] A state has the power to grant superior or even exclusive privileges in the use of its navigable rivers, either to persons or corporations.[42] But a state bordering on a navigable river has no authority to interfere with the opposite shores or common rights of navigation.[43] Provisions of the ordinance of 1787 for the government of the Northwest Territory, and similar provisions in the statutes admitting various states into the Union, that certain navigable rivers should be and remain highways, forever free, without any tax, impost, or duty thereon, have been generally held not to take away the power which the state could otherwise exercise over such waters;[44] since such provisions do not refer to physical obstructions but political regulations.[45]

2. **Bridges.**[46] In the absence of congressional legislation relating thereto,[47] or the assumption of control of a river by the United States,[48] a state has power to

natural flow of water is "lessened or retarded; or whereby the navigation is impeded." It was held that the word "or," between the words "retarded" and "whereby," should be read "and." State *v.* Pool, 74 N. C. 402.

The English statute to prevent nuisances in rivers was held to be in force in Massachusetts in 1813. Com. *v.* Ruggles, 10 Mass. 391.

38. Wisconsin River Imp. Co. *v.* Lyons, 30 Wis. 61.

39. Neaderhouser *v.* State, 28 Ind. 257; St. Joseph County *v.* Pidge, 5 Ind. 13; Guthrie *v.* McConnel, 2 Ohio Dec. (Reprint) 157, 1 West. L. Month. 593; Leovy *v.* U. S., 92 Fed. 344, 34 C. C. A. 392 [*reversed* on other grounds in 177 U. S. 621, 44 L. ed. 914]; Hatch *v.* Wallamet Bridge Co., 6 Fed. 780, 7 Sawy. 141; Columbus Ins. Co. *v.* Curtenius, 6 Fed. Cas. No. 3,045, 6 McLean 209; Columbus Ins. Co. *v.* Peoria Bridge Assoc., 6 Fed. Cas. No. 3,046, 6 McLean 70; Palmer *v.* Cuyahoga County, 18 Fed. Cas. No. 10,688, 3 McLean 226.

40. Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Butler *v.* State, 6 Ind. 165; Depew *v.* Wabash, etc., Canal, 5 Ind. 8. But see Cox *v.* State, 3 Blackf. (Ind.) 193.

41. Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

42. Mullen *v.* Penobscot Log-Driving Co., 90 Me. 555, 38 Atl. 557; St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184, holding that the legislature may grant, or authorize the granting, to any person having traffic with craft navigating the contiguous waters, the exclusive use of so much of a public levee as is reasonably necessary for his business with such craft, provided it does not unreasonably interfere with the use of the levee by the public.

43. Rutz *v.* St. Louis, 7 Fed. 438, 2 McCrary 344.

44. *Iowa.*— Ingraham *v.* Chicago, etc., R. Co., 34 Iowa 249.

Michigan.— La Plaisance Bay Harbor Co. *v.* Monroe, Walk. 155.

Minnesota.— See Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 83 Am. Dec. 59.

Mississippi.— Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126.

Ohio.—Hutchinson *v.* Thompson, 9 Ohio 52.

United States.— St. Anthony Falls Water-Power Co. *v.* Water Com'rs, 168 U. S. 349, 18 S. Ct. 157, 42 L. ed. 497; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629; Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959 [*affirming* 19 Fed. 562, 9 Sawy. 662]. See Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

See 37 Cent. Dig. tit. "Navigable Waters," § 2.

Streams to which statute or ordinance applicable.— Provisions in an act of congress admitting a state into the Union that the navigable rivers shall be open highways and free was not intended to apply to streams only capable of an imperfect navigation in times of floods and very high water. Boykin *v.* Shaffer, 13 La. Ann. 129.

45. Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421 [*following* Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629].

46. As obstructions to navigation see *infra*, V, B, 2.

47. Kansas City, etc., R. Co. *v.* Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578.

A provision in an act of congress commonly found in the acts admitting states into the Union, declaring that navigable waters within the state shall be highways and forever free, etc., does not prohibit a state from authorizing the construction of a bridge over such navigable streams. People *v.* Potrero, etc., R. Co., 67 Cal. 166, 7 Pac. 445; Hamilton *v.* Vicksburg, etc., R. Co., 119 U. S. 280, 7 S. Ct. 206, 30 L. ed. 393; Scheurer *v.* Columbia-Street Bridge Co., 27 Fed. 172.

48. Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 19 Fed. 347, 9 Sawy. 643], holding that by expending money in improving the Willamette river in Oregon, and making

authorize the construction of bridges over navigable waters within its borders,[49] whether or not an interstate stream,[50] provided they do not materially or unnecessarily obstruct navigation over waters subject to the control of the federal government.[51] Whether public convenience and necessity require such obstruction to navigation as necessarily results from the erection of a bridge is a question exclusively within the province of the legislature to determine.[52] So a state may delegate the power to authorize the construction of bridges.[53] But a state cannot give a right to use a bridge across a river beyond low-water mark, where such river constitutes the boundary line of the state.[54]

III. IMPROVEMENT OF WATERWAYS.[55]

A. Power to Make — 1. In General.[56] The United States has power to make improvements in the navigable streams of the United States.[57] So a state is possessed of the power,[58] except in so far as it is prohibited by federal

Portland a port of entry, congress did not assume police power over that stream so as to deprive the state of the power to authorize the erection of a bridge over that river without the consent of congress.

49. *Delaware.*— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. 389, 44 Am. Dec. 593.

Indiana.— St. Joseph County *v.* Pidge, 5 Ind. 13.

Massachusetts.— Com. *v.* Breed, 4 Pick. 460.

New Jersey.— Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247.

Pennsylvania.— Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

Tennessee.— Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

United States.—Columbus Ins. Co. *v.* Peoria Bridge Assoc., 6 Fed. Cas. No. 3,046, 6 McLean 70.

See 37 Cent. Dig. tit. "Navigable Waters," § 74.

Compare Green, etc., Nav. Co. *v.* Chesapeake, etc., R. Co., 88 Ky. 1, 10 S. W. 6, 10 Ky. L. Rep. 625, 2 L. R. A. 540, holding that a license to a railroad company to build bridges so as not to unreasonably obstruct navigation did not impair the rights of a navigation company under a lease from the state of a river line of navigation.

Withdrawal of authority.— The grant of power to build a bridge may be withdrawn pursuant to a reservation in the grant. Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143, holding that a judicial decision that the bridge would interfere with navigation was not first necessary to exercise the right to withdraw the assent. So where the legislature delegates the power to authorize the construction of bridges, it may withdraw such delegation of power. Philadelphia Port *v.* Philadelphia, 42 Pa. St. 209.

50. Kansas City, etc., R. Co. *v.* Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578; Rogers Sand Co. *v.* Pittsburgh, etc., R. Co., 139 Fed. 7, 71 C. C. A. 419.

51. *Indiana.*— St. Joseph County *v.* Pidge, 5 Ind. 13.

Massachusetts.— Com. *v.* Breed, 4 Pick. 460.

Pennsylvania.— Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527.

Wisconsin.— Sweeney *v.* Chicago, etc., R. Co., 60 Wis. 60, 18 N. W. 756.

United States.— Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643 [*reversed* on other grounds in 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629]; Columbus Ins. Co. *v.* Curtenius, 6 Fed. Cas. No. 3,045, 6 McLean 209; Columbus Ins. Co. *v.* Peoria Bridge Assoc., 6 Fed. Cas. No. 3,046, 6 McLean 70.

See 37 Cent. Dig. tit. "Navigable Waters," § 74.

52. Com. *v.* Breed, 4 Pick. (Mass.) 460.

53. See *In re* Smithfield Creek Bridge, 6 Whart. (Pa.) 363.

54. Evansville, etc., Traction Co. *v.* Henderson Bridge Co., 134 Fed. 973.

55. See also Levees, 25 Cyc. 188.

Construction of dams for improvement of navigation see *infra*, VI, B, 3.

Improvement of harbors see *infra*, IV, D.

Liability for cost of work and payment therefor.— King *v.* Mobile Harbor Bd., 57 Ala. 135; State *v.* Graham, 24 La. Ann. 429; *In re* Hampshire County Com'rs, 143 Mass. 424, 9 N. E. 756; Allen *v.* Sisson, 66 Hun (N. Y.) 140, 20 N. Y. Suppl. 971 [*affirmed* in 148 N. Y. 728, 42 N. E. 721].

56. As regulation of commerce see Commerce, 7 Cyc. 454.

Power to take riparian rights by right of eminent domain see Eminent Domain, 15 Cyc. 594.

57. Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; Bedford *v.* U. S., 36 Ct. Cl. 474, holding that it is not bound to delay river improvement until a continuation of natural causes shall diminish the injury. See also, generally, Commerce, 7 Cyc. 454.

Power to close part of channel.— Congress has power to close one of several channels in a navigable stream, if in its judgment the navigation of the river will be thereby improved. South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782.

58. *Indiana.*— St. Joseph County *v.* Pidge, 5 Ind. 13.

legislation.[59] So the power may be delegated to a city,[60] or board,[61] or private person or corporation.[62]

2. LIABILITY TO RIPARIAN OWNERS.[63] Where no property of the riparian owner is actually taken, whether upland or submerged, or directly invaded, no damages can be recovered for the injury incident to the lawful and proper exercise of the governmental power.[64] Compensation must be made, however, where land is

Mississippi.— Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126.

North Carolina.— See also Atty.-Gen. *v.* Cape Fear Nav. Co., 37 N. C. 444.

Ohio.— Guthrie *v.* McConnel, 2 Ohio Dec. (Reprint) 157, 1 West. L. Month. 593.

Pennsylvania.— McKeen *v.* Delaware Div. Canal Co., 49 Pa. St. 424.

United States.— Corrigan Transit Co. *v.* Chicago Sanitary Dist., 137 Fed. 851, 70 C. C. A. 381.

See 37 Cent. Dig. tit. "Navigable Waters," § 18. See also COMMERCE, 7 Cyc. 454.

Divestment of power.—A state, by granting to individuals lands bounded on the river or lands under water, does not divest itself of the power of improving the navigation of the river. Hollister *v.* Union Co., 9 Conn. 436, 25 Am. Dec. 36; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606 [*affirming* 10 N. Y. App. Div. 294, 41 N. Y. Suppl. 938]; Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

Constitutional prohibition.— The improvement of waterways is within the constitutional provision forbidding the making of internal improvements at the expense of the state. Ryerson *v.* Utley, 16 Mich. 269.

The right of access to the navigable waters possessed by riparian owners is subject to the power of the state to make such regulations for improvements as public interests may require for the purposes of navigation. Southern Pac. Co. *v.* Western Pac. R. Co., 144 Fed. 160.

Irrigation rights.—A canal forming a water connection between a navigable stream and the sea has been held a practical improvement of the navigation of the stream, to which a riparian owner's right to use the water for irrigation was subservient. Bigham *v.* Port Arthur Canal, etc., Co., (Tex. Civ. App. 1905) 91 S. W. 848.

Private ownership.— Improvements made by state as becoming the subject of private ownership see St. Anna's Asylum *v.* New Orleans, 104 La. 392, 29 So. 117.

59. La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155; Corrigan Transit Co. *v.* Chicago Sanitary Dist., 137 Fed. 851, 70 C. C. A. 381.

Except as authorized by the federal statutes, a state or municipality cannot improve navigable water of the United States, unless such change is approved by the secretary of war. Chicago *v.* Law, 144 Ill. 569, 33 N. E. 855.

Statutes and ordinances of congress merely providing for the free navigation of a river do not deprive the state or the United States of the power to improve the navigation of such river. Williams *v.* Beardsley, 2 Ind. 591; Withers *v.* Buckley, 20 How. (U. S.) 84, 15 L. ed. 816; Palmer *v.* Cuyahoga County, 21 Fed. Cas. No. 10,688, 3 McLean 226; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

60. Austin *v.* Hall, (Tex. Civ. App. 1900) 58 S. W. 479; West Chicago St. R. Co. *v.* People, 201 U. S. 506, 26 S. Ct. 518, 50 L. ed. 845 [*affirmed* 214 Ill. 9, 73 N. E. 393].

61. Lane *v.* New Haven Harbor Com'rs, 70 Conn. 685, 40 Atl. 1058.

62. Bigham *v.* Port Arthur Canal, etc., Co., (Tex. Civ. App. 1905) 91 S. W. 848; Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295, holding that a statute authorizing companies to make improvements legalizes, as against the state, works of the kind previously erected by such corporation. But see Sellers *v.* Union Lumbering Co., 39 Wis. 525, holding a statute void for want of a certain and definite grantee.

Construction by contract.—Where a statute authorizes certain compensation when three dams were erected, the erection of two dams was not such a compliance as entitled the constructor to compensation. Sauntry *v.* Laird-Norton Co., 100 Wis. 146, 75 N. W. 985.

63. See also *infra*, VII, A; VII, E.

64. *Connecticut.*— Lane *v.* New Haven Harbor Com'rs, 70 Conn. 685, 40 Atl. 1058 (holding that a portion of a harbor channel may be straightened, deepened, and widened by private parties at their own expense, under permits from, and supervision of, the proper state and United States agents, without compensation to an owner of upland whose right to cultivate oysters on the flats in front thereof is interfered with by the channel being cut through nearer to the shore than before); Hollister *v.* Union Co., 9 Conn. 436, 25 Am. Dec. 36; Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707.

Michigan.— Scranton *v.* Wheeler, 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484 [*affirmed* in 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126], holding that the United States has the right to make improvements upon submerged land, necessary for the aid of navigation, without compensation to the owner thereof, even where access to the open water is thereby cut off.

New York.— Slingerland *v.* International Contracting Co., 169 N. Y. 60, 61 N. E. 995 [*affirming* 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12]; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606 [*affirming* 10 N. Y. App. Div. 294, 41 N. Y. Suppl. 938]; Denton *v.* State, 72 N. Y. App. Div. 248, 76 N. Y. Suppl.

actually taken or the use of it destroyed,[65] as where land belonging to the riparian owner is permanently flooded thereby.[66]

B. Navigation Improvement Companies. Navigation improvement companies exist in many states in this country,[67] and their powers,[68] rights,[69] and

167; De Lancey *v.* Hawkins, 23 N. Y. App. Div. 8, 49 N. Y. Suppl. 469.

Pennsylvania.— McKeen *v.* Delaware Div. Canal Co., 40 Pa. St. 424. See also Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738; Susquehanna Canal Co. *v.* Wright, 9 Watts & S. 9, 42 Am. Dec. 312.

Texas.— See Austin *v.* Hall, (Civ. App. 1900) 58 S. W. 479.

Wisconsin.— Black River Imp. Co. *v.* La Crosse Booming, etc., Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66.

United States.— Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126 [*affirming* 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484]; Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; Mills *v.* U. S., 46 Fed. 738, 12 L. R. A. 673.

See 37 Cent. Dig. tit. "Navigable Waters," § 21.

But where a dock is injured in improving navigation, the owner thereof is entitled to damages providing the dock did not extend into the waters navigable in fact so as to obstruct navigation. Paine Lumber Co. *v.* U. S., 55 Fed. 854.

Spring covered by water.— Where a spring which rises below high water mark on the Susquehanna river, which an individual has been accustomed to use, has been covered by the improvement of the river, any damage suffered by him is *damnum absque injuria.* Com. *v.* Fisher, 1 Penr. & W. (Pa.) 462.

A board of commissioners, appointed by the legislature, with power to turn or straighten the channel of a river, in order to protect a populous portion of the state from threatened inundation, are not liable for damages caused by the work, resulting from mere errors of judgment, provided they keep within the scope of their powers, and exercise their judgment honestly, and do not act maliciously, oppressively, or arbitrarily. Green *v.* Swift, 47 Cal. 536.

Non-navigable streams cannot be made navigable except by the exercise of the power of eminent domain and the making of compensation for the easements acquired. Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423. See Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245.

Injury to one navigating river.— Where the use of hydraulic power in the improvement of a navigable stream becomes a serious obstruction to navigation, and an injury occurs to one navigating the river with ordinary care, the party creating such obstruction is liable for the injury, although he may be acting under a license from the state. Guthrie *v.* McConnel, 2 Ohio Dec. (Reprint) 157, 1 West. L. Month. 593.

When use not connected with navigation or commerce.— Where a city, the owner of tidelands, builds thereon a speedway from which is excluded all forms of commercial traffic, compensation must be made to riparian proprietors injured thereby. *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500.

65. See EMINENT DOMAIN, 15 Cyc. 648.

66. See EMINENT DOMAIN, 15 Cyc. 661.

67. State *v.* Orleans Nav. Co., 7 La. Ann. 679; East Branch Sturgeon River Imp. Co. *v.* White, etc., Lumber Co., 69 Mich. 207, 37 N. W. 192.

Improvement of navigable rivers only.— Howell Annot. St. Mich. c. 111, providing for the organization of river navigation improvement companies, refers to navigable streams only, and a corporation organized thereunder cannot control a dam previously erected without authority on a non-navigable stream. East Branch Sturgeon River Imp. Co. *v.* White, etc., Land Co., 69 Mich. 207, 37 N. W. 192.

Sufficiency of petition by company for leave to improve river see Clay *v.* Penoyer Creek Imp. Co., 34 Mich. 204.

68. Alabama Sipsey River Nav. Co. *v.* Georgia Pac. R. Co., 87 Ala. 154, 6 So. 73; Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28; Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542; Black River Imp. Co. *v.* La Crosse Booming, etc., Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66.

Place.—A legislative grant of authority to make improvements within a limited location for the purpose of facilitating the navigation of a public river does not by implication confer the power to affect injuriously property outside the location without making compensation therefor. Thompson *v.* Androscoggin River Imp. Co., 58 N. H. 108.

Right to interfere with riparian owners.— Where the charter of a corporation authorized it to improve a stream by removing obstructions, deepening it, and protecting the banks, so as to make it a "floating stream," but not to extend "the means of floating beyond the natural flow of the water of said creek," the powers of the corporation were confined within the channel of the stream, and it had no right to interfere with riparian owners. White Deer Creek Imp. Co. *v.* Sassaman, 67 Pa. St. 415.

69. Toothaker *v.* Winslow, 61 Me. 123; Ginn *v.* Hancock, 31 Me. 42.

Use of lands on shore without compensation.—A charter authorizing an improvement company to improve the navigation of a river by building dams, etc., should be construed literally so as to give the right to use said lands on the shores of the river without compensation therefor, either to the state, or to persons claiming under her grants subsequent to such use or appropriation by the improvement company. Black River Imp. Co. *v.* La

duties[70] are fixed by their charter and the statutes governing such companies. Where the company is obliged to keep the channel in navigable condition, it is liable for the damages sustained by reason of its negligence in failing to perform such duties.[71]

C. Compensation. The cost of improvements may in some jurisdictions be assessed upon the lands improved.[72] The state may exact a reasonable toll for the use of improvements made by it.[73] Where the work is performed by a private person or corporation, compensation is generally fixed by authorizing the collection of tolls[74] or the use of the water power thereby created,[75] and in some cases the statutes give a lien to the contractor on tide-lands filled in by the improvement.[76]

Crosse Booming, etc., Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66.

70. Lehigh Coal, etc., Co. *v.* Brown, 100 Pa. St. 338; Butler *v.* Mitchell, 15 Wis. 355.

71. Tompkins *v.* Kanawha Board, 21 W. Va. 224. See also Levy *v.* Carondelet Canal, etc., Co., 34 La. Ann. 180. But see James River, etc., Co. *v.* Early, 13 Gratt. (Va.) 541, holding that the company was not liable when the time for making the improvement had not expired and it had not commenced to charge tolls authorized by the charter.

72. McGee *v.* Hennepin County, 84 Minn. 472, 88 N. W. 6 (holding statute constitutional); Allen *v.* Sisson, 66 Hun (N. Y.) 140, 20 N. Y. Suppl. 971 [*affirmed* in 148 N. Y. 728, 42 N. E. 721]. See Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609.

73. Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487 [*affirming* 15 Fed. 292, 11 Biss. 559]; Spooner *v.* McConnell, 23 Fed. Cas. No. 13,245, 1 McLean 337.

A constitutional or statutory provision that a certain stream or streams shall be highways and free without any tax, impost, or duty therefor does not deprive the state of the right to charge, or to grant the right to charge, a toll after such a stream is improved. Lott *v.* Cox, 43 Ala. 697; Lott *v.* Mobile Trade Co., 43 Ala. 578; Atty.-Gen. *v.* Manistee River Imp. Co., 42 Mich. 628, 4 N. W. 483; Wisconsin River Imp. Co. *v.* Manson, 43 Wis. 255, 28 Am. Rep. 542; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

Power of state to authorize taking of tolls as conflicting with power of congress to regulate commerce see COMMERCE, 7 Cyc. 455.

Tolls on logs see LOGGING, 25 Cyc. 1572.

74. *Connecticut.*— Thames Bank *v.* Lovell, 18 Conn. 500, 46 Am. Dec. 332.

Louisiana.— Carondelet Canal, etc., Co. *v.* Parker, 29 La. Ann. 430, 29 Am. Rep. 339; State *v.* New Orleans Nav. Co., 11 Mart. 309.

Michigan.—Atty.-Gen. *v.* Manistee River Imp. Co., 42 Mich. 628, 4 N. W. 483.

North Carolina.— State *v.* Patrick, 14 N. C. 478.

Wisconsin.— Sauntry *v.* Laird-Norton Co., 100 Wis. 146, 75 N. W. 985; Black River Flooding Dam Assoc. *v.* Ketchum, 54 Wis. 313, 11 N. W. 551; Tewksbury *v.* Schulenberg, 41 Wis. 584.

See 37 Cent. Dig. tit. "Navigable Waters," § 30.

When improvements useless.—A company authorized by the legislature to construct locks and dams on a navigable stream, and charge tolls on boats and rafts passing through, cannot collect tolls on rafts using the stream during high water, when the locks and dams are rendered useless. Green, etc., Nav. Co. *v.* Palmer, 83 Ky. 646.

The condition upon which the right to charge tolls is granted must be definite to make such grant effectual. St. Louis Dalles Imp. Co. *v.* Nelson Lumber Co., 43 Minn. 130, 44 N. W. 1080.

Defenses to action for tolls.— Where tolls were not actually paid, but were charged to the boatmen under an agreement for periodical payments, the fact that the tolls were excessive was a good defense to a suit by a navigation company to recover the unpaid tolls. Monongahela Nav. Co. *v.* Wood, 30 Pittsb. Leg. J. N. S. (Pa.) 93.

Craft liable.— Where a statute authorizes the charging of toll of all craft, it is to be construed as allowing toll not only to those craft which could not previously have navigated the stream but also as to those whose improvements are merely facilitated by the improvement. Nelson *v.* Cheboygan Slack-Water Nav. Co., 44 Mich. 7, 5 N. W. 998, 38 Am. Rep. 222.

Such contract right cannot be annulled by the legislature without the consent of the corporation. Sinking Fund Com'rs *v.* Green, etc., River Nav. Co., 79 Ky. 73.

Tolls can be charged only where the right is given by the charter or statute.— Boykin *v.* Shaffer, 13 La. Ann. 129; Weatherby *v.* Meiklejohn, 56 Wis. 73, 13 N. W. 697.

Fixing of rates.— It has been held that the right of a board of control to fix the rates of toll to be charged by improvement companies cannot be reviewed by the courts. Manistee River Imp. Co. *v.* Lamport, 49 Mich. 442, 13 N. W. 810.

Remedies.— In order to recover compensation, the remedy provided by the statute must be followed. Witt *v.* Jefcoat, 10 Rich. (S. C.) 389. See also Swasey *v.* The Montgomery, 12 La. Ann. 800, holding that, in Louisiana, no privilege can be claimed on vessels.

75. See Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 19 S. Ct. 97, 43 L. ed. 364.

76. Hays *v.* Callvert, 36 Wash. 138, 78 Pac. 793; Mississippi Valley Trust Co. *v.* Hofius, 20 Wash. 272, 55 Pac. 54.

But no right to collect tolls exists except upon compliance with the conditions precedent imposed by statute.[77]

D. Injunction.[78] The state, or the United States, as the case may be, may enjoin injuries to the improvements;[79] but an injunction against the improvement will not be granted where the work is authorized and the means adopted are not improper.[80]

IV. HARBORS.[81]

A. Establishment of Harbor Lines.[82] The state has the power by legislation to prescribe the lines in a harbor beyond which piers, docks, wharves, and other structures — other than those erected under the authority of the general government — cannot be built by riparian owners in the waters of the harbor which are navigable in fact.[83] Generally the establishment of harbor lines is delegated to a board or committee.[84] Such establishment is not of itself an injury or taking of property.[85] New harbor lines may be established without further legislative authority and such establishment is a practical discontinuance of the old lines.[86] The fixing of a harbor line does not deprive a riparian owner of access to his land, but merely determines the line to which he may fill without encroaching upon public rights.[87]

B. Harbor Commissioners and Masters. Harbor commissioners and masters are appointed in many states with general and summary power over harbors and the vessels therein.[88] The enforcement of an order of the board, in a

77. Duke *v.* Cahawba Nav. Co., 16 Ala. 372; Kellogg *v.* Union Co., 12 Conn. 7; Carman *v.* Clarion River Nav. Co., 81 Pa. St. 412; Black River Flooding Dam Assoc. *v.* Ketchum, 54 Wis. 313, 11 N. W. 551; Tewksbury *v.* Schulenburg, 48 Wis. 577, 4 N. W. 757.

Keeping navigation open.—Where a navigation company was required to keep open a certain descending navigation on a river, and the dams forming said descending navigation between certain points were destroyed by a freshet and not rebuilt by the company, the company was not entitled to charge tolls for logs floated over this portion of the river. Lehigh Coal, etc., Co. *v.* Brown, 100 Pa. St. 338.

78. **Injunction** generally see INJUNCTIONS.

79. U. S. *v.* Mississippi, etc., Boom Co., 3 Fed. 548, 1 McCrary 601; U. S. *v.* Duluth, 25 Fed. Cas. No. 15,001, 1 Dill. 469.

80. Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481; Schuyler Steam Towboat Line *v.* Newton, 21 Fed. Cas. No. 12,496, 9 Reporter 233.

81. **Regulation of commerce** see COMMERCE, 7 Cyc. 462.

82. **As authorizing riparian owner to fill in or build out to line** see *infra*, VII, H, 5.

83. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

A constitutional provision relating to the establishment of harbor lines in front of cities does not authorize a statute providing for the disestablishment of harbor lines in front of "towns." Wilson *v.* State Land Com'rs, 13 Wash. 65, 42 Pac. 524.

Equal protection.—A harbor line is proper where it is so run as to protect the rights of all riparian owners in proportion to the frontage of their lands. Sherman *v.* Sherman, 18 R. I. 504, 30 Atl. 459.

Tide-lands may be included within the harbor lines. State *v.* Harbor Line Com'rs, 4 Wash. 816, 30 Pac. 734; Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550.

84. Farist Steel Co. *v.* Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590, holding that only the committee have power to establish the lines.

Acts before establishment of lines.— The committee need not establish a general harbor line before forbidding or removing any particular encroachments upon the waters of the harbor. State *v.* Sargent, 45 Conn. 358.

Who may interfere.— If the laying of harbor lines in navigable waters by a commission under Const. art. 15, is in violation of the acts of congress concerning navigation and harbor lines, the United States, by its proper officers, alone can interfere. State *v.* Harbor Line Com'rs, 4 Wash. 816, 30 Pac. 734; Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550.

85. Prosser *v.* Northern Pac. R. Co., 152 U. S. 59, 14 S. Ct. 528, 38 L. ed. 352.

Owner of wharf with no title to tide-lands. — Where a riparian proprietor has no title to the tide-lands, simply owning the wharf thereon, including such lands within the harbor lines is not such an interference with the ownership or possession of the wharf as will authorize a court to issue a writ of prohibition. State *v.* Harbor Line Com'rs, 4 Wash. 816, 30 Pac. 734; Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550.

86. Farist Steel Co. *v.* Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590.

87. Sherman *v.* Sherman, 18 R. I. 504, 30 Atl. 459.

88. Union Transp. Co. *v.* Bassett, 118 Cal. 604, 50 Pac. 754 (holding that equity will not interfere with the discretion of the board honestly exercised as to the stationing of

case where the facts and circumstances do not justify or authorize the order, may be restrained by injunction.[89]

C. Obstructions.[90] The removal of obstructions in harbors,[91] such as a sunken boat,[92] may be compelled. And, on the other hand, an injunction may be granted against the creation of an obstruction.[93] In some jurisdictions the statutes provide for the recovery of a penalty from the person causing the obstruction.[94]

D. Improvement. Congress has constitutional power to regulate and improve harbors of the United States, which power carries with it the right to deposit the material removed in making the improvements in any part of the harbor within its control.[95] Statutes as to harbor improvements[96] have been held to confer authority to direct a diversion of water from one channel into another, notwithstanding the constitutional fact that it promotes the commerce of one

vessels in a harbor, even though the conclusion of the board was erroneous and worked a hardship to an individual); Payne *v.* English, 79 Cal. 540, 21 Pac. 952; Atty.-Gen. *v.* Boston, etc., R. Co., 118 Mass. 345; Hecker *v.* New York Balance Dock Co., 24 Barb. (N. Y.) 215; Adams *v.* Farmer, 1 E. D. Smith (N. Y.) 588; Cole *v.* Mahoney, 67 How. Pr. (N. Y.) 226; State *v.* Harbor Line Com'rs, 4 Wash. 6, 29 Pac. 938.

Powers and jurisdiction.— The harbor-master acts quasi-judicially and has the power to decide whether a vessel is in good faith engaged in discharging its cargo, and whether circumstances require that it should be assigned to another berth. Cole *v.* Mahoney, 65 How. Pr. (N. Y.) 499 [*affirmed* in 12 Daly 405]. To justify the harbor-master in ordering the removal of vessels from berths occupied by them to make room for others, it is not sufficient that he knows of no other place for the landing of certain merchandise; but it must appear that the place is actually needed for some purpose connected with navigation or commerce. Hoeft *v.* Seaman, 38 N. Y. Super. Ct. 62. "Ships and vessels" under the control of the harbor-master includes any floating structure making use of a private dock, wharf, or slip in the city of New York. Adams *v.* Farmer, 1 E. D. Smith (N. Y.) 588. Vessels fastened to a wharf are in the "stream" within the statute and hence subject to the control of the harbor-master as fully as if lying in the center of the river. Adams *v.* Farmer, *supra*. Harbor regulations prohibiting vessels from anchoring within prescribed limits have been held not to apply to small sail-boats. Lambert *v.* Staten Island R. Co., 70 N. Y. 104. Harbor commissioners generally have no power to allow obstructions or permit encroachments in the harbor. Rhode Island Motor Co. *v.* Providence, (R. I. 1903) 55 Atl. 696.

Neglect of duty.— The California act of March 14, 1853, "to prevent extortion in office and enforce official duty," applies to a state harbor commissioner who neglects to perform the duties of his office. *In re* Marks, 45 Cal. 199.

Sufficiency of complaint.—A complaint which merely shows that defendant has refused to obey the orders of a harbor-master to remove his vessel from the unauthorized occupation of a private dock is not sufficient to justify a conviction; but it must show such conduct as is a violation of the rights of navigation, and aver such facts as would justify the orders and render disobedience wrongful. Horn *v.* People, 26 Mich. 221.

Place of anchorage.—A vessel is not liable for the penalty imposed for anchoring outside of anchorage ground, where it applied for the required permit on the day it went to the assistance of a wreck, and it was issued within twenty-four hours. The Monarch, 89 Fed. 875.

In some jurisdictions the state has no power to relinquish the control of a harbor. State *v.* Bridges, 22 Wash. 98, 60 Pac. 66, holding that a statute leaving it optional with the lessee of a harbor area to improve is void, as a relinquishment of control thereover for the term of the lease.

Powers in connection with erection of depot see Bateman *v.* Colgan, 111 Cal. 580, 44 Pac. 238.

Fees see Harbor Masters *v.* Morgan's Louisiana, etc., R., etc., Co., 40 La. Ann. 124, 3 So. 627; Shinn *v.* McKnight, 21 Fed. Cas. No. 12,789, 4 Cranch C. C. 134.

Constitutionality of statutes see Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349.

Implied repeal of statute see Bateman *v.* Colgan, 111 Cal. 580, 44 Pac. 238.

89. Hoeft *v.* Seaman, 38 N. Y. Super. Ct. 62.

90. See, generally, *infra*, V, B.

Dumping refuse in harbors and adjacent waters see *infra*, V, B, 1, b.

91. Garey *v.* Ellis, 1 Cush. (Mass.) 306; People *v.* Vanderbilt, 26 N. Y. 287, 25 How. Pr. 139.

92. Buffalo *v.* Yattan, Sheld. (N. Y.) 483; U. S. *v.* Hall, 63 Fed. 472, 11 C. C. A. 294.

93. Atty.-Gen. *v.* Woods, 108 Mass. 436, 11 Am. Rep. 380.

Injunction generally see INJUNCTIONS.

94. Wallace *v.* State, 46 Ga. 199.

Penalty generally see PENALTIES.

A notice to remove the obstruction may be, by statute, a condition precedent to an action for a penalty. Pilot Com'rs *v.* Vanderbilt, 31 N. Y. 265 [*affirming* 2 Rob. 367].

95. Southern Pac. Co. *v.* Western Pac. R. Co., 144 Fed. 160.

96. Talcott *v.* Blanding, 54 Cal. 289; Wilson *v.* Inloes, 11 Gill & J. (Md.) 351.

state to the prejudice of that of another.[97] So the federal government has authority to make a contract for the removal of rock from a harbor.[98]

V. NAVIGATION.[99]

A. Rights of Public — 1. In General. Where water is navigable, whether or not within the ebb and flow of the tide, the public have a common right to use it for navigation as a public highway,[1] without any legislative declaration that

97. South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782.

98. Benner *v.* Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220.

The validity of contracts made by a municipality for improvements is governed by the rules relating to municipal contracts in general. See MUNICIPAL CORPORATIONS. See also People *v.* Overyssel Tp. Bd., 11 Mich. 222; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238.

99. **Floatage of rafts or logs** see LOGGING, 25 Cyc. 1566 *et seq.*

1. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Bullock *v.* Wilson, 2 Port. 436.

California.— Gunter *v.* Geary, 1 Cal. 462.

Connecticut.— Pitkin *v.* Olmstead, 1 Root 217.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. 389, 44 Am. Dec. 593; Cummins *v.* Spruance, 4 Harr. 315.

Illinois.— Braxon *v.* Bressler, 64 Ill. 488.

Indiana.— Sherlock *v.* Bainbridge, 41 Ind. 35, 13 Am. Rep. 302.

Kentucky.— Warner *v.* Ford Lumber, etc., Co., 93 S. W. 650, 29 Ky. L. Rep. 527; Terrell *v.* Paducah, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289.

Maine.— Davis *v.* Winslow, 51 Me. 264, 81 Am. Dec. 573; Gerrish *v.* Brown, 51 Me. 256, 81 Am. Dec. 569; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Spring *v.* Russell, 7 Me. 273; Berry *v.* Carle, 3 Me. 269.

Massachusetts.— Kean *v.* Stetson, 5 Pick. 492; Com. *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386.

Michigan.— Thunder Bay River Booming Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184; Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435; La Plaisance Bay Harbor Co. *v.* Monroe, Walk. 155.

New Hampshire.— Thompson *v.* Androscoggin River Imp. Co., 54 N. H. 545.

New York.— Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58; Browne *v.* Scofield, 8 Barb. 239.

Pennsylvania.— Flanagan *v.* Philadelphia, 42 Pa. St. 219; Com. *v.* Fisher, 1 Penr. & W. 462; Hunt *v.* Graham, 15 Pa. Super. Ct. 42.

Rhode Island.— Chase *v.* American Steamboat Co., 10 R. I. 79.

Tennessee.— Stuart *v.* Clark, 2 Swan 9, 58 Am. Dec. 49.

Wisconsin.— Whisler *v.* Wilkinson, 22 Wis. 572. See also Sweeney *v.* Chicago, etc., R. Co., 60 Wis. 60, 18 N. W. 756.

United States.— Faust *v.* Cleveland, 121 Fed. 810, 58 C. C. A. 194; Leverich *v.* Mobile, 110 Fed. 170; Spokane Mill Co. *v.* Post, 50 Fed. 429; Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246; Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

England.— Brinckman *v.* Matley, [1904] 2 Ch. 313, 68 J. P. 161, 73 L. J. Ch. 160, 2 Loc. Gov. 258, 90 L. T. Rep. N. S. 199, 20 T. L. R. 180, 52 Wkly. Rep. 363; Gann *v.* Whitstable Free Fishers, 20 C. B. N. S. 1, 11 H. L. Cas. 192, 35 L. J. C. P. 29, 12 L. T. Rep. N. S. 150, 13 Wkly. Rep. 589, 11 Eng. Reprint 1305; Rex *v.* Hammond, 10 Mod. 382; Ball *v.* Herbert, 3 T. R. 253, 1 Rev. Rep. 695.

Canada.— Kennedy *v.* The Surrey, 10 Can. Exch. 29; Beatty *v.* Davis, 20 Ont. 373; Crandell *v.* Mooney, 23 U. C. C. P. 212; Gage *v.* Bates, 7 U. C. C. P. 116.

See 37 Cent. Dig. tit. "Navigable Waters," § 43.

The distinction between waters navigable in law, and those merely navigable in fact, where the tide does not ebb and flow, practically only affects questions of title to the soil, rights of fishery, and the like, and not the public rights of navigation. People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228.

Nature of right.— The right of navigation in a public river cannot be treated as real estate vested in the public or the state for the benefit of every individual who may have occasion to use it. It is sometimes called a public easement but does not come within the meaning of the word "easement" as used to designate an incorporeal hereditament as a right of way belonging to one person or estate over the lands of another. Barnard *v.* Hinkley, 10 Mich. 458.

Use for navigation insignificant.— The fact that the use of a navigable stream for commerce or navigation is insignificant does not destroy the state's proprietary rights, or authorize its appropriation for individual use. People *v.* Vanderbilt, 26 N. Y. 287; People *v.* Page, 39 N. Y. App. Div. 110, 56 N. Y. Suppl. 834, 58 N. Y. Suppl. 239.

A navigator may moor his vessel in the stream for the purpose of making repairs. Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582 [*reversing* 2 Ohio S. & C. Pl. Dec. 305]. The right to anchor is a necessary part of the right to navigate. Gann *v.* Whitstable Free Fishers, 20 C. B. N. S. 1, 11 H. L. Cas. 192, 35 L. J. C. P. 29, 12 L. T. Rep. N. S. 150, 13 Wkly. Rep. 589, 11 Eng. Reprint 1305.

Time for use.— A stream is not a public highway at those times when in its natural condition it cannot be used as such. Thunder-

it is a public highway.[2] This right of navigation extends not only to the main channel but also to the water between high and low water marks except where it will interfere with buildings erected thereon by the owner of such land.[3] The right of navigation is superior to the right of fishing,[4] the right to take water from the stream,[5] or the rights of the private owner of the lands under the water.[6] Navigators using the stream in a lawful manner are not liable to riparian owners for unavoidable injury caused thereby.[7]

2. Prescriptive Rights. Long continued and uninterrupted use of a stream by the public for purposes of navigation constitutes it a public highway,[8] although

Bay River Booming Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184.

Where a stream is navigable only by artificial means, the public have no right of navigation thereon. Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525.

Statutory discontinuance of waterway.— The intention to discontinue the right of way in a navigable stream will not be presumed (Connecticut River Lumber Co. *v.* Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826), and is not shown by a public grant of the land under and around the stream (Connecticut River Lumber Co. *v.* Olcott Falls Co., *supra*).

2. Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

3. Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; Montgomery *v.* Reed, 69 Me. 510; Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568; Deering *v.* Long Wharf, 25 Me. 51; Poor *v.* McClure, 77 Pa. St. 214; Wainwright *v.* McCullough, 63 Pa. St. 66; Lehigh Valley R. Co. *v.* Trone, 28 Pa. St. 206; Boston *v.* Lecraw, 17 How. (U. S.) 426, 15 L. ed. 118. See also Brinckman *v.* Matley, [1904] 2 Ch. 313, 68 J. P. 161, 73 L. J. Ch. 160, 2 Loc. Gov. 258, 90 L. T. Rep. N. S. 199, 20 T. L. R. 180, 52 Wkly. Rep. 363.

The right is not confined to the natural channel.— Porter *v.* Allen, 8 Ind. 1, 65 Am. Dec. 750. However, it extends only to the dock line so that any interference with property upon such docks by the bows, masts, or attachments of any vessel is a trespass. Dunham Towing, etc., Co. *v.* Daudelin, 41 Ill. App. 175 [*affirmed* in 143 Ill. 409, 32 N. E. 258].

Where a permanent dam causes the waters above it to be raised, the rights of navigation are enlarged accordingly. Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185.

4. See Fish and Game, 19 Cyc. 993.

5. Hunt *v.* Graham, 15 Pa. Super. Ct. 42.

6. *Illinois.*— Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783.

New York.— Canal Fund Com'rs *v.* Kempshall, 26 Wend. 404; Conal Com'rs *v.* People, 5 Wend. 423.

North Carolina.— Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242.

Ohio.—Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582.

Pennsylvania.— Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

Tennessee.— Webster *v.* Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

Wisconsin.—Boorman *v.* Sunnuchs, 42 Wis. 233; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386; Walker *v.* Shepardson, 4 Wis. 486, 65 Am. Dec. 324.

United States.— West Chicago St. R. Co. *v.* Illinois, 201 U. S. 506, 26 S. Ct. 518, 50 L. ed. 845 [*affirming* 214 Ill. 9, 73 N. E. 393].

See 37 Cent. Dig. tit. "Navigable Waters," § 43.

Grant of superior rights.— If the crown grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. Gann *v.* Whitstable Free Fishers, 20 C. B. N. S. 1, 11 H. L. Cas. 192, 35 L. J. C. P. 29, 12 L. T. Rep. N. S. 150, 13 Wkly. Rep. 589, 11 Eng. Reprint 1305.

7. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision so various are the subjects and occasions for it and so diversified the relations of parties therein interested. Kennedy *v.* The Surrey, 10 Can. Exch. 29. In determining the question of reasonable use of a navigable stream, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. Davis *v.* Winslow, 51 Me. 264, 81 Am. Dec. 573; Kennedy *v.* The Surrey, *supra*. See also Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

Liabilities.— Every person has the right to use navigable water for the legitimate purpose of travel and transportation and if in so doing, while in the exercise of ordinary care he necessarily impedes or obstructs another temporarily, he does not thereby become a wrong-doer so as to be liable therefor to other persons using the waters. Kennedy *v.* The Surrey, 10 Can. Exch. 29. A person navigating a river is liable for negligently injuring an employee walking on a bridge being constructed across the river, notwithstanding the bridge company had no statutory permission to bridge the stream. Stewart-Peck Sand Co. *v.* Reyber, 66 Kan. 156, 71 Pac. 242.

8. Brubaker *v.* Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111; Scott *v.* Willson, 3 N H.

acquiescence in a partial use of the stream will not confer any rights where it is in fact non-navigable.[9]

3. Exclusive Rights. Generally one person has as much right as another to navigate a navigable stream.[10] The right being a public one, the general rule is that no one has any exclusive right to the use of any part of the water further than is necessary to carry on his business in using it as a highway.[11] An exclusive right to navigate waters of a navigable stream can be acquired only by a grant from the public,[12] and can never be presumed by exclusive use for a length of time.[13] Exclusive rights of navigation may be granted by the state in consideration of improvements made in the stream,[14] but such right exists only where the statutory conditions precedent have been fully complied with.[15]

4. Injunction.[16] The improper use of a stream for navigation may be restrained by injunction,[17] and one granted an exclusive right of navigation may restrain the use of the stream by others.[18]

5. Use of Shores and Banks.[19] Ordinarily navigators have no right to use the banks of a stream where they are not riparian owners,[20] except by agree-

321; Shaw *v.* Crawford, 10 Johns. (N. Y.) 236; Stump *v.* McNairy, 5 Humphr. (Tenn.) 363, 42 Am. Dec. 437.

9. Jeremy *v.* Elwell, 5 Ohio Cir. Ct. 379, 3 Ohio Cir. Dec. 186.

10. Crandell *v.* Mooney, 23 U. C. C. P. 212.

11. Dalrymple *v.* Mead, 1 Grant (Pa.) 197.

12. Bird *v.* Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 483.

13. Bird *v.* Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 483.

14. Moor *v.* Veazie, 31 Me. 360; Ogden *v.* Gibbons, 4 Johns. Ch. (N. Y.) 150 [*affirmed* in 17 Johns. 488]. The last cited case is reversed, however, in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23, which holds the state statute unconstitutional as interfering with the power of congress to regulate commerce, so far as it prohibits vessels licensed according to the laws of the United States for carrying on the coasting trade from navigating the waters.

15. Alabama Sipsey River Nav. Co. *v.* Georgia Pac. R. Co., 87 Ala. 154, 6 So. 73.

16. Injunction generally see Injunctions.

17. Meyer *v.* Phillips, 97 N. Y. 485, 49 Am. Rep. 538; Curtis *v.* Keesler, 14 Barb. (N. Y.) 511. See also Matter of Vanderbilt, 4 Johns. Ch. (N. Y.) 57.

18. Ogden *v.* Gibbons, 4 Johns. Ch. (N. Y.) 150 [*affirmed* in 17 Johns. 488 (*reversed* on other grounds in 9 Wheat. (U. S.) 1, 6 L. ed. 23)].

19. By riparian owners see *infra*, VII, F.

For purposes not incident to navigation see *infra*, VI, E.

In connection with floating logs see Logging, 25 Cyc. 1568.

20. Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Dec. 644; Smith *v.* Atkins, 60 S. W. 930, 22 Ky. L. Rep. 1619, 53 L. R. A. 790; State *v.* Wilson, 42 Me. 9; Brinckman *v.* Matley, [1904] 2 Ch. 313, 68 J. P. 161, 73 L. J. Ch. 160, 2 Loc. Gov. 258, 90 L. T. Rep. N. S. 199, 20 T. L. R. 180, 52 Wkly. Rep. 363; Ball *v.* Herbert, 3 T. R. 253, 1 Rev. Rep. 695. *Contra*, see Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480 (holding that the title to shore of a tide-water stream resides in the state, and its use for the purpose of commerce by the public is permissible); Castner *v.* The Dr. Franklin, 1 Minn. 73 (holding that the right of persons navigating the Mississippi river to land freight and passengers extends to high water mark); O'Fallon *v.* Daggett, 4 Mo. 343, 29 Am. Dec. 640 (holding that, although the banks are owned by private individuals, navigators are entitled to a temporary use of them in landing, fastening, and repairing their vessels, and exposing their sales or merchandise, although the right has its reasonable qualifications and restrictions as to length of time during which the banks are used).

A line from vessels moored in the stream across the bank, against the objection of the riparian owner, and fastened upon the shore land, may be enjoined where the owner of the vessel insists upon the right to continue such act. Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582.

Right to make charge for use of shore.— The owner of the shore of a fresh-water river, capable of navigation, has the right to charge such sums as he sees proper to navigators for using the shore in lading and unlading their vessels, if he gives notice of his charge before such use is made of his property. The Magnolia *v.* Marshall, 39 Miss. 109.

Injury to fishing rights.— But it has been held that a boat on a navigable stream has a right to go to the bank when and where it is necessary to do so, and is not liable for damage done to seines drawn across the way, if such damage was done without malice or wantonness. Lewis *v.* Keeling, 46 N. C. 299, 62 Am. Dec. 168.

In Louisiana, however, under the civil law, the public have the right to use the banks of a stream for any purpose connected with the navigation thereof. Barrett's Syndic *v.* New Orleans, 13 La. Ann. 105; Lyons *v.* Hinckley, 12 La. Ann. 655; De Ben *v.* Gerard, 4 La. Ann. 30; Hanson *v.* Lafayette City Council, 18 La. 295; Henderson *v.* New Or-

ment,[21] prescription,[22] or grant.[23] However, it has been held that a navigator may temporarily use a bank or shore in cases of peril or emergency.[24] Likewise the right to use the bank or shore is sometimes granted by statute.[25]

B. Obstructions[26] — **1. In General — a. Right to Maintain.** Obstructions not materially injuring free navigation, which are temporary and reasonable, are not nuisances.[27] On the other hand, except where authorized by statute,[28] any "mate-

leans, 3 La. 563. See also Morgan *v.* Rapides Police Jury, 26 La. Ann. 281. Where the public have the right to use the banks of a river a building thereon which prevented the public from depositing their goods in the usual stage of high water is an obstruction of the use of the bank which may be removed. McKeen *v.* Kurfust, 10 La. Ann. 523. A lease of a bank cannot be annulled on the ground that the premises leased are public property not susceptible of being leased where the lessee has not been disturbed in the enjoyment of the property. Dennistoun *v.* Walton, 8 Rob. (La.) 211. So much of a quay as is necessary for loading and unloading vessels is public and not susceptible of private ownership, although the rest may be private property. De Armas *v.* New Orleans, 5 La. 132.

21. Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Smith *v.* Atkins, 60 S. W. 930, 22 Ky. L. Rep. 1619, 53 L. R. A. 790.

22. Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186; Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Coolidge *v.* Learned, 8 Pick. (Mass.) 504; State *v.* Randall, 1 Strobh. (S. C.) 110, 47 Am. Dec. 548, holding that a prescriptive right to a landing cannot be larger than the right of way by which it is reached. *Contra*, Talbott *v.* Grace, 30 Ind. 389, 95 Am. Dec. 704; State *v.* Wilson, 42 Me. 9.

23. Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476.

Public landings.— A landing, to be public, must be the terminus of a public road. State *v.* Randall, 1 Strobh. (S. C.) 110, 47 Am. Dec. 548. Where a highway running from place to place is laid along the shore of a navigable stream and in immediate contact with it for a considerable distance, there is no presumption that the shore along such point of contact was intended as a public landing. Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186. The right of mooring boats and other craft at the well-known landings in the stream is as well secured and protected by law as that of actual navigation. Baker *v.* Lewis, 33 Pa. St. 301, 75 Am. Dec. 598. The owners of the shore have the right to control the embarkation and landing, even at the terminus of a highway. Bird *v.* Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 383.

24. Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Dec. 644. See also Brinckman *v.* Matley, [1904] 2 Ch. 313, 68 J. P. 161, 73 L. J. Ch. 160, 2 Loc. Gov. 258, 90 L. T. Rep. N. S. 199, 20 T. L. R. 180, 52 Wkly. Rep. 363.

Liability for injury.— One who is navigating a river may, without incurring responsibility to the owner of the shore, cable his vessel to a tree or other permanent object to secure it against danger, or even for convenience do the same thing, being responsible for all injury that may arise from negligence or want of skill. Morrison *v.* Thurman, 17 B. Mon. (Ky.) 249, 66 Am. Dec. 153.

25. State *v.* Wilson, 42 Me. 9.

26. Power of congress and state to authorize or prohibit see *supra*, II.

In harbors see *supra*, IV, C.

27. People *v.* Horton, 64 N. Y. 610 [*affirming* 5 Hun 516]; Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163 [*affirmed* in 56 N. Y. 612].

Where the public has equal rights in a navigable river it must be shown, in order to maintain an action for the obstruction thereof, that defendant has exercised his rights in such a manner as to reasonably impede or delay plaintiff. Rolston *v.* Red River Bridge Co., 1 Manitoba 235.

The occasional grounding of a vessel is an obstruction incident to commerce, and not unlawful. Cummins *v.* Spruance, 4 Harr. (Del.) 315.

The construction of a canal by a sanitary district so as to create a current in a river and thereby obstruct and retard the passage of vessels is not an unreasonable or unauthorized use of the river. Corrigan Transp. Co. *v.* Sanitary Dist., 125 Fed. 611.

Obstruction of navigation as distinguished from use for navigation.— Where a river is navigable but the navigation at a certain point has long been abandoned and the stream at that place is filled with obstructions so that it is not navigable in fact, the erection of a building in the stream that may obstruct its navigation but which does not obstruct the use of the river for navigation, is not a nuisance, since a nuisance does not consist in obstructing navigable water but in obstructing the use thereof by the public for navigation. State *v.* Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848.

28. Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754, holding that grants to corporations to erect structures in navigable streams must be construed strictly, and not extended beyond what is reasonably necessary to carry out the provisions of the act.

A water-pipe laid across a river by authority of the legislature and in accordance with plans recommended by the chief of engineers and authorized by the secretary of war is not an unlawful obstruction of the river. Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953.

Where congress has passed acts for the survey and improvement of a navigable river, a federal court will not interfere with the

rial" obstruction to navigation is unlawful and a nuisance;[29] and this rule applies not only to obstructions by the public but also by riparian owners,[30] or by a

existing use of the stream, although such use obstructs navigation, unless it clearly appears that the acts complained of necessarily interfere with the operation of such legislation. U. S. *v.* Beef Slough Mfg., etc., Co., 24 Fed. Cas. No. 14,559, 8 Biss. 421.

One who claims authority to obstruct, under a legislative grant, must show such authority to be clear, either from the explicit terms of the grant or by necessary implication. Atty.-Gen. *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526.

29. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502.

Illinois.— People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

Indiana.— Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381.

Maine.— Gerrish *v.* Brown, 51 Me. 256, 81 Am. Dec. 569; Veazie *v.* Dwinel, 50 Me. 479.

New Jersey.— Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.

New York.— People *v.* Horton, 5 Hun 516 [*affirmed* in 64 N. Y. 610]; People *v.* Vanderbilt, 38 Barb. 282 [*affirmed* in 26 N. Y. 287, 25 How. Pr. 139].

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Pocono Spring Water Ice Co., 7 North. Co. Rep. 350.

Tennessee.— Stump *v.* McNairy, 5 Humphr. 363, 42 Am. Dec. 437.

Wisconsin.— Barnes *v.* Racine, 4 Wis. 454.

United States.— Woodman *v.* Kilbourn Mfg. Co., 30 Fed. Cas. No. 17,978, 1 Abb. 158, 1 Biss. 546.

England.— See Williams *v.* Wilcox, 8 A. & E. 314, 7 L. J. Q. B. 229, 3 N. & P. 606, 1 W. W. & H. 477, 35 E. C. L. 609.

Canada.— Kennedy *v.* The Surrey, 10 Can. Exch. 29.

See 37 Cent. Dig. tit. "Navigable Waters," §§ 61, 69.

Public and private nuisance.—An unreasonable and unnecessary obstruction of a navigable stream may be a public nuisance in its general effect upon the public, and at the same time a private nuisance as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury. Page *v.* Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608, 1119.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, although of very great public benefit and the obstruction of the slightest possible degree. Gold *v.* Carter, 9 Humphr. (Tenn.) 369, 49 Am. Dec. 712; Reg. *v.* Moss, 26 Can. Sup. Ct. 322.

A public way cannot be laid out across a navigable river without the consent of the legislature. Chapin *v.* Maine Cent. R. Co., 97 Me. 151, 53 Atl. 1105.

Obstruction by unfinished breakwater.— Where contractors with the United States for the construction of a breakwater were required to maintain a stake light on the structure while the work was in progress, they are liable for injury to a vessel stranded on the new construction by reason of the extinguishment by the wind of the stake light, where they had knowledge that it was liable to be extinguished, and had been a number of times previously. Harrison *v.* Hughes, 125 Fed. 860, 60 C. C. A. 442 [*affirming* 110 Fed. 545].

Federal statutes prohibit the erection of any structure in any navigable waters of the United States in such a manner as to obstruct or impair navigation, except by permission of the secretary of war. Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953; Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927 [*affirming* 17 Misc. 461, 40 N. Y. Suppl. 1088]; Northern Pac. R. Co. *v.* U. S., 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80. The obstructions to navigation prohibited by the act of congress of Sept. 19, 1890, section 10, are those obstructions which are permanent in their nature. U. S. *v.* Burns, 54 Fed. 351. Hydraulic mining, in so far as forbidden by congress except where authorized by a permit, will be enjoined without regard as to whether it is in fact detrimental to navigation. North Bloomfield Gravel Min. Co. *v.* U. S., 88 Fed. 664, 32 C. C. A. 84 [*affirming* 81 Fed. 243]. The clause of the federal statute prohibiting the creation of any obstruction not affirmatively authorized by congress does not mean that there must be some act of congress, general or special, which in terms or by construction authorizes the obstruction; but it is sufficient that the obstruction was built according to plans recommended by the chief of engineers and authorized by the secretary of war. Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953. The right to create an obstruction in a navigable stream caused by the settling of the track of the road and the forcing of earth into the bed of the river causing a bar is not to be implied from the fact that congress has authorized the construction of a railroad parallel to the course of the stream and some distance therefrom. Northern Pac. R. Co. *v.* U. S., 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80.

30. *California.*— Taylor *v.* Underhill, 40 Cal. 471.

Pennsylvania.— McGunnegle *v.* Pittsburg, etc., R. Co., 213 Pa. St. 383, 62 Atl. 988.

Rhode Island.— Walsh *v.* Hopkins, 22 R. I. 418, 48 Atl. 390.

Washington.— Dawson *v.* McMillan, 34 Wash. 269, 75 Pac. 807.

United States.— Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246.

England.—White *v.* Phillips, 15 C. B. N. S.

city.[31] It applies to waters navigable in fact as well as to tidal waters,[32] although it has been held that it does not apply to streams valuable only for floatage of logs.[33] Obstructions which have been held unlawful as interfering with navigation include bridges,[34] dams,[35] piers and wharves,[36] booms,[37] jetties,[38] nets,[39] pipes,[40] lines or ropes,[41] wire cable used as a ferry-boat guide,[42] telegraph cables,[43] vessels unlawfully obstructing passage of other vessels,[44] and rafts of lumber continuously moored in the stream.[45]

b. Deposits of Refuse.[46] Deposits of *débris* and refuse in harbors or other navigable waters, where not authorized by statute, are unlawful where tending to obstruct or impede navigation.[47] In addition, federal[48] and state[49] statutes have been enacted prohibiting, subject to certain regulations, the deposit of refuse in harbors or adjacent waters and also in navigable streams in general.

c. Ferries.[50] Freedom of navigation is not necessarily interfered with by the granting of a ferry franchise,[51] but such franchise cannot be exercised so as to

245, 10 Jur. N. S. 425, 33 L. J. C. P. 33, 9 L. T. Rep. N. S. 388, 12 Wkly. Rep. 85, 109 E. C. L. 245.

31. People *v.* West Chicago St. R. Co., 115 Ill. App. 172 [*affirmed* in 214 Ill. 9, 73 N. E. 393].

32. Wethersfield *v.* Humphrey, 20 Conn. 218; Veazie *v.* Dwinel, 50 Me. 479; Knox *v.* Chaloner, 42 Me. 150.

33. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462.

34. See *infra*, V, B, 2, b.

35. See *infra*, V, B, 3, b.

36. See *infra*, VII, H, 3.

37. See *infra*, V, B, 4.

38. Atty.-Gen. *v.* Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. 335, 20 L. T. Rep. N. S. 64, 17 Wkly. Rep. 219.

39. Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

40. Omslaer *v.* Philadelphia Co., 31 Fed. 354.

41. The Swan, 19 Fed. 455; McCord *v.* The Tiber, 15 Fed. Cas. No. 8,715, 6 Biss. 409.

42. Albina Ferry Co. *v.* The Imperial, 38 Fed. 614, 13 Sawy. 639, 3 L. R. A. 234; The Vancouver, 28 Fed. Cas. No. 16,838, 2 Sawy. 381.

43. Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510 [*reversing* on other grounds 67 Barb. 228, 3 Thomps. & C. 775]; The City of Richmond, 43 Fed. 85 [*affirmed* in 59 Fed. 365, 8 C. C. A. 152].

44. Smith *v.* The Alabama, 22 Fed. Cas. No. 12,998*a*.

45. Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211.

46. See also COMMERCE, 7 Cyc. 455.

47. Veazie *v.* Dwinel, 50 Me. 479; Easton, etc., R. Co. *v.* Central R. Co., 52 N. J. L. 267, 19 Atl. 722; Clark *v.* Peckham, 10 R. I. 35, 14 Am. Rep. 654; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

Hydraulic mining.— The dumping of *débris* by a mining company which interferes with navigation is a public nuisance. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

Implied authority.—A grant by the government of the right to erect a mill in connection with the sale of land situated upon a navigable stream does not warrant the grantee in casting refuse from the mill into the stream so as to impede navigation. Atty.-Gen. *v.* Harrison, 12 Grant Ch. (U. C.) 466.

48. Jaycox *v.* U. S., 107 Fed. 938, 47 C. C. A. 83 (holding statute not unconstitutional because it makes the master of a tugboat criminally liable for the forbidden acts of his associates in the course of their general undertaking, although he may be innocent of criminal intent); U. S. *v.* Romard, 89 Fed. 156; U. S. *v.* Burns, 54 Fed. 351; The G. L. Garlic, 45 Fed. 380; U. S. *v.* The Sadie, 41 Fed. 396.

Liability of steamship in rem.— A steamship from which ashes are dumped in an unlawful place by firemen presumably acting under orders from some superior officer is liable as having herself violated the law. U. S. *v.* The Bombay, 46 Fed. 665. But a single act, where there is no proof of orders by any one in authority, does not show that the steamship was used or employed in a violation of the law, so as to be liable *in rem* to the penalties therein prescribed. U. S. *v.* The Anjer Head, 46 Fed. 664. See also U. S. *v.* The Emperor, 49 Fed. 751.

49. Witham *v.* New Orleans, 49 La. Ann. 929, 22 So. 38 (holding that Act Ex. Sess. (1877) No. 14, prohibiting "all persons, firms or corporations acting under any parish or city ordinance or state law" to cast offal into the Mississippi river, does not apply to a municipal corporation); State *v.* Howard, 72 Me. 459 (holding that the throwing of "long sawdust" and "shingle shavings" was included within the statutory prohibition against the throwing of refuse, wood, or timber of any sort into a river); Pilot Com'rs *v.* Frost, 4 Daly (N. Y.) 353 (holding that in order to recover the penalty prescribed by a state statute for throwing ashes or cinders in the waters of the port of New York, no notice forbidding such deposits is required).

50. See, generally, FERRIES, 19 Cyc. 491.

51. Chiapella *v.* Brown, 14 La. Ann. 189; State *v.* New Orleans Nav. Co., 11 Mart. (La.) 309; Chapin *v.* Crusen, 31 Wis. 209.

obstruct or materially interfere with the right of the public to use the stream for navigation.[52]

d. Wrecks. If a vessel sinks, the owner may abandon it, in the absence of a statute requiring him to remove it, so as to be no longer responsible for it.[53] But if the owner attempts to save it, he is liable for any unnecessary and unreasonable obstruction of the stream therefrom.[54] The responsibility of the owner ceases when public authorities take possession of, and assume control over, the wreck as an obstruction to navigation.[55] So where the war department has taken charge of the removal, under authority of an act of congress, its jurisdiction in the matter is exclusive, and a city cannot be held negligent in failing to take action for the removal of the wreck.[56]

e. Diversion or Detention of Waters. While a diversion or detention of waters not affecting navigation is not unlawful,[57] except where a statute otherwise provides,[58] such diversion or detention is a nuisance where navigation is affected thereby.[59]

f. Prescriptive Right. There can be no prescriptive right to maintain or continue a material obstruction in a navigable stream.[60]

52. Babcock *v.* Herbert, 3 Ala. 392, 37 Am. Dec. 695; Mississippi River Bridge Co. *v.* Lonergan, 91 Ill. 508; The Globe *v.* Kurtz, 4 Greene (Iowa) 433; Lonergan *v.* Mississippi River Bridge Co., 5 Fed. 777, 2 McCrary 451.

53. Winpenny *v.* Philadelphia, 65 Pa. St. 135; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281.

54. Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281. And see Morrison *v.* Thurman, 17 B. Mon. (Ky.) 249, 66 Am. Dec. 153; Thurman *v.* Morrison, 14 B. Mon. (Ky.) 367; Boston, etc., Steamboat Co. *v.* Munson, 117 Mass. 34; Moran *v.* Merritt, etc., Derrick, etc., Co., 135 Fed. 863 [*affirmed* in 142 Fed. 1038, 71 C. C. A. 685]; Brown *v.* Mallett, 5 C. B. 599, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 599; White *v.* Crisp, 10 Exch. 312, 23 L. J. Exch. 317.

Failure to give warning signals.— The owner of a wreck obstructing the channel is liable for injuries received by another vessel running into such wreck, where proper danger signals were not put out. The Mary S. Lewis, 126 Fed. 848. It is immaterial that the neglect was that of an independent contractor employed by the owner of the vessel. The Snark, [1900] P. 105, 9 Aspin. 50, 69 L. J. P. 41, 82 L. T. Rep. N. S. 42, 48 Wkly. Rep. 279 [*affirming* [1899] P. 74, 8 Aspin. 483, 68 L. J. P. 22, 80 L. T. Rep. N. S. 25, 47 Wkly. Rep. 398].

A city, although charged by statute with the duty of keeping the channels of navigable streams within its limits free from obstructions, cannot be held liable for an injury caused by a sunken wreck, where the owner had in due time undertaken its removal through the agency of a reputable and experienced wrecking company, which was proceeding with apparent diligence and good faith and by customary methods. McCaulley *v.* Philadelphia, 119 Fed. 580, 56 C. C. A. 100 [*affirming* 116 Fed. 438, 103 Fed. 661].

55. Taylor *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 369 [*affirmed* in 37 N. Y. 275]. See also McCaulley *v.* Philadelphia, 119 Fed. 580, 56 C. C. A. 100.

56. McCaulley *v.* Philadelphia, 119 Fed. 580, 56 C. C. A. 100.

57. Connecticut River Lumber Co. *v.* Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826.

58. Hempstead *v.* New York, 52 N. Y. App. Div. 182, 65 N. Y. Suppl. 14; Cox *v.* New York, 26 Misc. (N. Y.) 177, 55 N. Y. Suppl. 74.

59. Yolo County *v.* Sacramento, 36 Cal. 193; Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. Rep. 146; Philadelphia *v.* Gilmartin, 71 Pa. St. 140; Philadelphia *v.* Collins, 68 Pa. St. 106. See also La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155; Green Bay, etc., Canal Co. *v.* Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 48 Am. St. Rep. 937, 28 L. R. A. 443.

60. *Alabama.*— Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33.

Louisiana.— Ingram *v.* St. Tammany Parish Police Jury, 20 La. Ann. 226.

Maine.— Knox *v.* Chaloner, 42 Me. 150. See also Brown *v.* Black, 43 Me. 443.

Massachusetts.— Boston Rolling Mills *v.* Cambridge, 117 Mass. 396.

New Hampshire.— Collins *v.* Howard, 65 N. H. 190, 18 Atl. 794.

New York.— Shaw *v.* Crawford, 10 Johns. 236.

West Virginia.—Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

See 37 Cent. Dig. tit. "Navigable Waters," § 61.

A right to maintain a bridge across a navigable stream cannot be acquired by prescription. Arundel *v.* McCulloch, 10 Mass. 70 (holding that a prescriptive right to maintain a bridge across a navigable stream is not shown by proof that it has been maintained in the same place more than fifty years); Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

Dams.— The right to maintain a dam can-

g. Duty to Remove. A municipality is ordinarily under no duty to remove obstructions from a river or to keep it safe for navigation.[61] So it is not liable for the damage resulting from the failure of its officers to enforce an ordinance as to the removal of vessels.[62] Where a railroad company is required to restore any watercourse intersected by its road to its former state, it cannot evade liability by showing that obstructions to navigation were placed there by its contractor.[63]

h. Liability For Injuries to Obstructions. Generally, one navigating a river in a proper manner is not liable for injuries caused to obstructions in the stream,[64] except where the injury was wilful or negligent.[65]

i. Question For Jury. Whether particular obstructions of navigable waters amount to a nuisance is a question for the jury.[66]

2. Bridges[67] — a. Authority to Construct or Maintain — (i) *In General.* A bridge across a navigable stream is an obstruction to navigation tolerated only because of necessity and the convenience of commerce on land, the right of navigation of the stream being paramount.[68] Unless authorized by congress or the state, or the officer or board to whom the federal or state power has been delegated, a person or corporation has no right to build a bridge across navigable waters.[69]

not be acquired by prescription (Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Dyer *v.* Curtis, 72 Me. 181; Crill *v.* Rome, 47 How. Pr. (N. Y.) 398), except as against upper riparian proprietors (Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743).

Filling up the channels and harbors of a navigable river by the deposit of refuse therein is a public nuisance which no length of time can legalize. Ogdensburgh *v.* Lovejoy, 58 N. Y. 662 [*affirming* 2 Thomps. & C. 83].

61. Seaman *v.* New York, 80 N. Y. 239, 36 Am. Rep. 612; Faust *v.* Cleveland, 121 Fed. 810, 58 C. C. A. 194.

62. Coonley *v.* Albany, 57 Hun (N. Y.) 327, 10 N. Y. Suppl. 512 [*affirmed* in 132 N. Y. 145, 30 N. E. 382].

63. Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686 [*affirmed* in 6 N. Y. Suppl. 958].

64. Milwaukee Gaslight Co. *v.* The Gamecock, 23 Wis. 144, 99 Am. Dec. 138; Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 8 C. C. A. 152; The City of Baltimore, 5 Fed. Cas. No. 2,744, 5 Ben. 474. See also Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

65. Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570; The Fred. Schlesinger, 71 Fed. 747; Fisher *v.* Pennsylvania R. Co., 66 Fed. 71, 13 C. C. A. 331.

66. Blanc *v.* Klumpke, 29 Cal. 156; Wetmore *v.* Atlantic White Lead Co., 37 Barb. (N. Y.) 70; Pilcher *v.* Hart, 1 Humphr. (Tenn.) 524; Reg. *v.* Meyers, 3 U. C. C. P. 305.

Bridges.— Whether a bridge is in reality an obstruction to navigation is a question of fact for the jury. Selman *v.* Wolfe, 27 Tex. 68. Whether the extent and duration of the obstruction of a navigable stream by a railroad company while building a bridge across it renders such obstruction unlawful is for the jury. Cantrell *v.* Knoxville, etc., R. Co., 90 Tenn. 638, 18 S. W. 271.

67. See also Bridges, 5 Cyc. 1049.

Interference with flow of water and liability to adjoining landowners see Bridges, 5 Cyc. 1098.

Power of federal or state government to authorize see *supra*, II, B, 2.

68. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289.

69. *Louisiana.*— Blanchard *v.* Abraham, 115 La. 989, 40 So. 379.

Maine.— Cape Elizabeth *v.* Cumberland County Com'rs, 64 Me. 456.

Massachusetts.— Com. *v.* Charlestown, 1 Pick. 180, 11 Am. Dec. 161; Arundel *v.* McCulloch, 10 Mass. 70.

New Jersey.—Allen *v.* Monmouth County, 13 N. J. Eq. 68.

New York.— Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228; People *v.* Gutchess, 48 Barb. 656.

See 37 Cent. Dig. tit. "Navigable Waters," § 76.

Consent of town.— But if the title to the land under the water where a bridge is constructed is in a town, the consent of the town to the construction of the bridge prevents it from constituting a purpresture. People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228.

In some states authority must be obtained from the board of county supervisors. Stoffet *v.* Estes, 104 Mich. 208, 62 N. W. 347 (holding that town authorities have no right to build a bridge over a stream without the sanction of the board of supervisors); Naegely *v.* Saginaw, 101 Mich. 532, 60 N. W. 46 (holding that a bayou at a point where there is less than two feet of water is not a stream navigable for boats and vessels of fifteen tons burden, within the meaning of the statute); Shepard *v.* Gates, 50 Mich. 495, 15 N. W. 878 (holding that the constitutional provision does not apply to streams which in their natural condition are not adapted to any valuable boat or vessel navigation); Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154 (holding that the constitutional provision refers only to such streams

And this rule applies equally well to a riparian owner.[70] Likewise, neither county commissioners nor supervisors,[71] nor town boards,[72] in the absence of a statute authorizing it, have power to construct a bridge over navigable waters; although there are cases holding that statutory power to lay out highways includes the power to construct bridges necessary for crossing navigable streams.[73]

(II) *Railroad Company.* A railroad company has no authority to construct a bridge over navigable waters unless the right is expressly or impliedly given by its charter or other statutes.[74] The mere incorporation of a railroad does not in itself confer on it the right to cross navigable waters of the state without the consent of the legislature.[75]

b. Bridge as Nuisance.[76] A bridge which obstructs the passage of boats is a public nuisance,[77] especially where constructed without legislative author-

as are wholly within the state). Where the river is navigable, county commissioners in Massachusetts have no power to authorize the erection of a bridge. Charlestown *v.* Middlessex County Com'rs, 3 Metc. (Mass.) 202.

The federal statutes requiring the consent of congress to the building of a bridge do not apply to the rebuilding of a bridge which was lawfully in existence when such statutes were passed. Rogers Sand Co. *v.* Pittsburgh, etc., R. Co., 139 Fed. 7, 71 C. C. A. 419.

70. People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228. But see Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407, holding that a person owning land on both sides of a river can maintain a bridge for his own use, although without authority of the legislature or even in defiance of legislative prohibition, providing he does not thereby interfere with the public easement; but he cannot, without legislative authority, maintain such bridge for public use.

71. State *v.* Anthoine, 40 Me. 435; Charlestown *v.* Middlesex County Com'rs, 3 Metc. (Mass.) 202; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Arundel *v.* McCulloch, 10 Mass. 70. See also Snyder *v.* Foster, 77 Iowa 638, 42 N. W. 506, holding that a statute authorizing county commissioners to provide for the erection of necessary bridges within their respective counties does not give them power to construct a bridge across a navigable lake the bed of which belongs to the state. And see Bridges, 5 Cyc. 1055.

72. Menasha *v.* The Portage, 26 Wis. 534. See also Bridges, 5 Cyc. 1056.

73. Bryan *v.* Branford, 50 Conn. 246; Brown *v.* Preston, 38 Conn. 219. *Contra*, Com. *v.* Breed, 4 Pick. (Mass.) 460; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Arundel *v.* McCulloch, 10 Mass. 70; Com. *v.* Coombs, 2 Mass. 489.

74. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716 (holding that the fact that a railroad company owns land on both sides of a river does not give it the right to build a bridge across for the passage of its trains); Northern Pac. R. Co. *v.* U. S., 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

Authority may be implied from a statute authorizing the company to exercise all powers necessary to carry into effect the purposes of the statute permitting the construction of the railroad and providing that the road is to be constructed "with al necessary draws . bridges, etc. . equal in all respects to railways of the first class;" and it is necessary to cross a river with such road in order to reach the terminus. Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313. Where a company is authorized to construct a railroad between two points "over" a navigable water, a right to construct a bridge over that water is implied as a necessary means of carrying into effect the power granted. Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

A general power to construct a road and bridges between given termini, the natural and convenient route of which road would pass several navigable streams, authorizes the corporation to construct bridges over such navigable streams in a manner that will not destroy the navigation of them. Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970, 44 Am. Rep. 451; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Miller *v.* Prairie du Chien, etc., R. Co., 34 Wis. 533. But see Little Rock, etc., R. Co. *v.* Brooks, 39 Ark. 403, 43 Am. Rep. 277.

Change of statutes.— **The right of a railroad company to maintain a bridge across a** navigable stream built in conformity to a statute containing no reservation of the right to alter or amend it was not affected by any subsequent acts relating to the same subject-matter or of which by their terms are prospective in their operation. U. S. *v.* Parkersburg Branch R. Co., 134 Fed. 969.

75. Dundalk, etc., R. Co. *v.* Smith, 97 Md. 177, 54 Atl. 628.

76. Nuisance generally see Nuisances.

77. Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306; South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 7.8; Selman *v.* Wolfe, 27 Tex. 68. See Snure *v.* Great Western R. Co., 13 U. C. Q. B. 376.

Artificial navigation.— A bridge is not an illegal obstruction where it does not interfere with navigation except as enlarged by an artificial channel which a riparian owner de-

ity.[78] But a bridge constructed under federal authority in the manner authorized thereby is not a nuisance,[79] although the mere fact of legislative authority does not prevent it being a nuisance where it does not conform to the requirements of the statute,[80] nor where it obstructs navigation more than is reasonably necessary.[81] Where authority is conferred, in general terms, to build bridges, without specifying their character, one which obstructs navigation is unlawful.[82] On the other hand, the fact that a bridge may occasion some slight inconvenience to persons navigating the stream does not necessarily make it such an obstruction as constitutes a nuisance,[83] as where it is constructed with a proper draw.[84] In determining whether a bridge illegally obstructs navigation, the navigation of which the water is capable and the extent of the use thereof are to be considered,[85] although a charter prohibition against the interruption of navigation has been held not limited to the kind and amount of trade on the stream at the time of enactment, but to extend to the increased business incident to the growth of the country and expansion of commerce.[86] The fact that a bridge is a nuisance to those navigating the stream does not make it a nuisance as to others not navigating it.[87] The bridge must be clearly shown to be a nuisance before it can be so decreed.[88]

c. Petition and Approval of Plans. A petition for leave to construct a bridge should be definite and certain both as to its location and plans.[89] The approval of the plan by an officer or board is often a requisite to the construction, even after authority granted by the legislature.[90] The approval of the plans by the secretary of war,[91] or the proper state official,[92] is generally final and conclusive. The

sires to build. Hedges *v.* West Shore R. Co., 150 N. Y. 150, 44 N. E. 691, 55 Am. St. Rep. 660 [*reversing* 80 Hun 310, 30 N. Y. Suppl. 92].

78. Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228. See also Whitehead *v.* Jessup, 53 Fed. 707.

Want of authority to build where no obstruction.— A bridge is an illegal obstruction where not authorized by law, although it does not as a matter of fact materially obstruct navigation. Snyder *v.* Foster, 77 Iowa 638, 42 N. W. 506.

79. Easton *v.* New York, etc., R. Co., 24 N. J. Eq. 49; People *v.* Kelly, 76 N. Y. 475; Miller *v.* New York, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971 [*affirming* 10 Fed. 513, 18 Blatchf. 212]; Texarkana, etc., R. Co. *v.* Parsons, 74 Fed. 408, 20 C. C. A. 481.

Delaying movement of tide.— Where the federal authorities have authorized the construction of a bridge over tide-water, the fact that it will delay the movement of high tide for some minutes is not of itself sufficient ground for enjoining its construction. Carvalho *v.* Brooklyn, etc., Turnpike Co., 76 N. Y. Suppl. 859.

80. Healy *v.* Joliet, etc., R. Co., 2 Ill. App. 435 [*reversed* on other grounds in 94 Ill. 416]; State *v.* Dibble, 49 N. C. 107; Texarkana, etc., R. Co. *v.* Parsons, 74 Fed. 408, 20 C. C. A. 481.

81. State *v.* Freeport, 43 Me. 198; Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

82. Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Selman *v.* Wolfe, 27 Tex. 68. See also Terre Haute Drawbridge Co. *v.* Halliday, 4 Ind. 36.

83. *Illinois.*— Illinois River Packet Co. *v.* Peoria Bridge Assoc., 38 Ill. 467.

Indiana.— Williams *v.* Beardsley, 2 Ind. 591.

New Jersey.—Atty.-Gen. *v.* Paterson River R. Co., 9 N. J. Eq. 526.

New York.— People *v.* Kelly, 76 N. Y. 475.

Pennsylvania.—Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

United States.— Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. ed. 311; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

See 37 Cent. Dig. tit. "Navigable Waters," §§ 84, 85.

84. Easton *v.* New York, etc., R. Co., 24 N. J. Eq. 49; Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

85. Wethersfield *v.* Humphrey, 20 Conn. 218; Bucki *v.* Cone, 25 Fla. 1, 6 So. 160 (holding that a bridge constructed by plaintiff across a navigable stream used for floating logs, which had an opening of over fifty feet for the passage of logs, with guide booms to direct the logs to the opening, did not improperly obstruct navigation); State *v.* Gilmanton, 14 N. H. 467.

86. Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464.

87. Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44.

88. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

89. Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639.

90. Muskingum County *v.* Bd. of Public Works, 39 Ohio St. 628.

91. U. S. *v.* Pittsburgh, etc., R. Co., 26 Fed. 113.

92. Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

notification of the approval by the secretary of war has been held sufficient, although made through one of his subordinates.[93]

d. Construction — (i) *In General.* The bridge, in its construction, must at least substantially conform to the limitations and conditions imposed by the statutes authorizing it.[94] Where the power to construct a bridge is limited by no express restriction, it includes the right to construct and maintain piers in the bed of the stream,[95] to drive piles in the bed of the river at a pier site,[96] and to fix the number and location of the piers.[97] But in any event it must be so constructed as to cause no unnecessary injury to the rights of navigation.[98] Authority to build bridges across a river has been held to leave to the officials to whom the power was granted the determination of the location of the bridges within the prescribed limits.[99]

(ii) *Liabilities Connected With Construction.* Generally a riparian proprietor is not entitled to compensation except for land owned by him which is actually taken.[1] Where a bridge is being built by virtue of legislative authority, the owners are not liable for temporary obstructions of the stream in the course of such work.[2] But the company or person constructing the bridge is liable for injuries resulting from its negligence where a vessel collides with a partly constructed bridge or with works used in the construction.[3] Of course the owner of

93. People *v.* Kelly, 76 N. Y. 475; Miller *v.* New York, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971 [*affirming* 10 Fed. 513, 18 Blatchf. 212].

94. *Missouri.*— Silver *v.* Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410.

New York.— Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686.

Ohio.— Jutte *v.* Cincinnati, etc., Bridge Co., 21 Ohio Cir. Ct. 422, 12 Ohio Cir. Dec. 136, holding that the bridge company was liable for damages caused by a collision on account of its negligence and failure to comply with the conditions of the secretary of war and orders of the United States officer in charge of the river.

Pennsylvania.— Flanagan *v.* Philadelphia, 42 Pa. St. 219.

United States.— Gildersleeve *v.* New York, etc., R. Co., 82 Fed. 763; St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755 (requiring piers to be built parallel to current); U. S. *v.* Milwaukee, etc., R. Co., 26 Fed. Cas. No. 15,779, 5 Biss. 420.

See 37 Cent. Dig. tit. "Navigable Waters," § 80.

Where a strict literal construction of a provision in the charter as to interference with navigation prevents the construction of any bridge and thus defeats the grant, the proviso should be reasonably construed in furtherance of the statute. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527.

A proviso in a charter that a bridge shall not be erected in such a manner as to interrupt the navigation is merely a limitation of the franchise and not a rule of liability to the injured navigators. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527.

A bridge franchise will not be forfeited because of the failure to comply with the franchise by constructing the bridge with certain openings between the arches for the convenience of navigation, if no private or public injury is shown to have resulted from such failure. Thompson *v.* People, 23 Wend. (N. Y.) 537.

95. Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

96. The Modoc, 26 Fed. 718.

97. Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

98. Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313.

99. Muskingum County *v.* Bd. of Public Works, 39 Ohio St. 628.

1. Pennsylvania R. Co. *v.* New York, etc., R. Co., 23 N. J. Eq. 157; Matter of Water Com'rs, 3 Edw. (N. Y.) 290 (holding that, in proceedings to condemn land for the construction of a bridge across the Harlem river, the owners are not entitled to damages for an obstruction of navigation that may result therefrom); Winifrede Coal Co. *v.* Central R., etc., Co., 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173.

2. Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970, 44 Am. Rep. 451; Baltimore, etc., R. Co. *v.* Wheeling, etc., Transp. Co., 32 Ohio St. 116; Cantrell *v.* Knoxville, etc., R. Co., 90 Tenn. 638, 18 S. W. 271. *Contra*, Memphis, etc., R. Co. *v.* Hicks, 5 Sneed (Tenn.) 427.

No recovery can be had for injuries resulting from construction work where performed as authorized by the federal statute (Covington Harbor Co. *v.* Phœnix Bridge Co., 10 Ohio Dec. (Reprint) 657, 23 Cinc. L. Bul. 34), and a person navigating a stream cannot recover for injuries to his vessel from striking against submerged timbering used in constructing a bridge where its existence was known to the master of the vessel and the injury was not due to the absence of marks or signals as to its location (Kelley Island Lime, etc., Co. *v.* Cleveland, 144 Fed. 207).

3. Jutte *v.* Keystone Bridge Co., 146 Pa. St. 400, 23 Atl. 235; Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582; Wilson *v.* Chicago, 42 Fed. 506 [*affirmed* in 63 Fed.

the bridge is not liable where the accident resulted solely from the negligence of the navigator.[4]

e. Injuries to Navigators — (I) *In General.*[5] The owners of a bridge are liable to persons navigating the river for damages resulting from the obstruction caused by the bridge,[6] but not where the obstructions were placed without fault of such owners.[7] If piers in the stream interfere to some extent with navigation, the owner is not liable where the charter powers have not been exceeded.[8] So mere unavoidable delays in passing a bridge do not of themselves constitute an obstruction for which the owner is liable in damages.[9]

(II) *Collision With Bridge.* Where a bridge is properly constructed pursuant to authority conferred by the legislature, the owner, in the absence of negligence on his part, is not liable for losses resulting from collision with the bridge, although it in some degree obstructs navigation.[10] But the bridge owner is liable to the owners of vessels injured by a collision with the bridge where it is improperly constructed,[11] provided the defect caused the injury.[12] If a vessel comes in contact with a bridge through no fault of the owners of the bridge, they are required to use only such care as ordinarily prudent men would use in removing the vessel.[13]

(III) *Obstruction During Repairs.*[14] A bridge owner is generally not liable to persons navigating the stream for temporary obstructions caused by the repairing of the bridge where carried on with due diligence and where the obstruction is not unreasonable.[15] This rule has in some states been recognized by statute.[16]

626, 11 C. C. A. 366]; The Modoc, 26 Fed. 718.

4. Hosford *v.* Wakefield, 117 Fed. 945.

5. Injuries connected with operation of drawbridge see *infra*, V, B, 2, f, (II).

6. St. Louis, etc., R. Co. *v.* Meese, 44 Ark. 414; Farmers' Co-operative Mfg. Co. *v.* Albermarle, etc., R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700; Rolston *v.* Red River Bridge Co., 1 Manitoba 235.

Defenses.— It is immaterial, in determining the liability of one who constructs a bridge across a navigable stream for special damage to a boat owner by reason of the obstruction, that plaintiff's boat was not licensed, or that it was doing business as a common carrier as well as for the manufacturer who owned it. Farmers' Co-operative Mfg. Co. *v.* Albermarle, etc., R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700.

Conformity to license.— The fact that the bridge is built in conformity to a license from the war department does not exonerate the owner from liability for damages for injuries received by a vessel passing through the draw caused by striking material deposited in the river in constructing the bridge, and which obstructed the channel between the piers. Maxon *v.* Chicago, etc., R. Co., 122 Fed. 555.

7. Pensacola, etc., R. Co. *v.* Hyer, 32 Fla. 539, 14 So. 381, 22 L. R. A. 368.

8. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527.

9. Illinois River Packet Co. *v.* Peoria Bridge Assoc., 38 Ill. 467.

10. Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

If the bridge when built was no obstruction, a change in the channel from artificial causes created by third parties could not render the bridge company liable for injuries sustained by collision with one of the piers; otherwise, if such change was the result of natural causes influenced in their operation by the piers. Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464.

11. Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 79 Mo. 478; Vessel Owners' Towing Co. *v.* Wilson, 63 Fed. 626, 11 C. C. A. 366; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281. See also Darrall *v.* Southern Pac. Co., 47 La. Ann. 1455, 17 So. 884.

12. Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281.

13. Mark *v.* Hudson River Bridge Co., 103 N. Y. 28, 8 N. E. 243.

14. Duty to repair see Bridges, 5 Cyc. 1078.

Right to repair see *infra*, V, B, 2, h.

15. Green, etc., Nav. Co. *v.* Chesapeake, etc., R. Co., 88 Ky. 1, 10 S. W. 6, 10 Ky. L. Rep. 625, 2 L. R. A. 540; Hamilton *v.* Vicksburg, etc., R. Co., 119 U. S. 280, 7 S. Ct. 206, 30 L. ed. 393; Rhea *v.* Newport, etc., R. Co., 50 Fed. 16; Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 566. But see Jones *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 106; Pharr *v.* Morgan's Louisiana, etc., R., etc., Co., 115 La. 138, 38 So. 943, holding that where by the breaking of the bridge steamboats were prevented from passing, although barges could pass, the additional expense of extra steamboats should be allowed as damages.

16. See the statutes of the several states. In New Jersey the statute which permits

f. Construction and Operation of Draws — (i) *In General.* Generally the charter or statute authorizing the construction of a bridge requires a drawbridge.[17] Local statutes regulating the rights and duties of a superintendent of a drawbridge as to those passing through the draw,[18] and the duties of a vessel on approaching a draw,[19] have been enacted in some states. Irrespective of statute, persons using the stream are only obliged to use ordinary skill and care in passing through the draw.[20] A bridge owner may enjoin the improper passage of vessels through the draw.[21]

(ii) *Duties and Liabilities.* A drawbridge must be so constructed that it may be readily opened to permit the passage of vessels, must be placed in charge of persons competent to operate it, and must be equipped with lights and signals giving warning of its position in opening and closing;[22] and timely warning

the obstruction to navigable waters to make necessary repairs on bridges between the first day of January and the first day of March does not include the terminal days. Delaware, etc., R. Co. *v.* Mehrhof Bros. Brick Mfg. Co., 53 N. J. L. 205, 23 Atl. 170. However, if the work can be done nearly as well with the draw open as with it closed, the owner of the bridge has no right to close it while making repairs. Lister *v.* Newark Plank Road Co., 36 N. J. Eq. 477.

17. See Hood *v.* Dighton Bridge, 3 Mass. 263; Davis *v.* Jerkins, 50 N. C. 290; State *v.* Dibble, 49 N. C. 107; New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S. 12, 5 S. Ct. 19, 28 L. ed. 619; Georgetown *v.* Porter, 1 Fed. Cas. No. 5,346, 1 Hawy. & H. 139. But see Com. *v.* Taunton, 7 Allen (Mass.) 309.

The "main channel" of a river, within the meaning of a statute requiring that the draw shall be over the main channel of the river, and at an accessible and navigable point, is that bed over which the principal volume of water flows. St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755.

Width of draw.—Where the legislature authorized defendant to build a bridge over a navigable stream with a draw not less than fifteen feet wide, he was not bound to make the draw wider than fifteen feet, although vessels of a greater breadth had been accustomed to sail in such water. Com. *v.* Breed, 4 Pick. (Mass.) 460.

Duty to provide for raising of draw.— Where the charter required "a draw of sufficient width for vessels to pass through . and the whole shall be kept in good and safe repair," the corporation was bound to provide requisite tackle for raising the draw, and to raise the same when parties wish their vessels to go through. Patterson *v.* East Bridge, 40 Me. 404.

Under an act of congress providing that if a bridge should be constructed as a pivot drawbridge with the draw over the main channel of the river it must have spans of not less than a specified number of feet in length in the clear and at the side of the pivot pier, and the piers must be parallel with the current of the river, it required a passageway for vessels between such piers of not less than the specified number of feet in width, measured by a line going directly across the channel and at right angles with the piers of the bridge, and if a bridge is built diagonally across the river, the measurement along the line of the bridge is not the proper measure. Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 8 S. Ct. 874, 31 L. ed. 731; St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281. See also Assante *v.* Charleston Bridge Co., 41 Fed. 365.

Where congress assumes control over a river, and a bridge has been built over it by the authority of the state which has reserved the right to require a draw in the bridge upon the happening of a certain contingency, congress may require the construction of such draw upon the happening of the contingency without providing for compensation to the bridge owners. U. S. *v.* Moline, 82 Fed. 592.

18. Com. *v.* Chase, 127 Mass. 7.

19. Ripley *v.* Essex, etc., Counties, 40 N. J. L. 45.

20. St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755.

21. Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 15 S. Ct. 228, 39 L. ed. 271 [*affirming* 45 Fed. 5]. See Texas, etc., R. Co. *v.* Interstate Transp. Co., 42 Fed. 261.

Injunction generally see INJUNCTIONS.

22. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289; Pennsylvania R. Co. *v.* Central R. Co., 59 Fed. 190 [*affirmed* in 59 Fed. 192, 8 C. C. A. 86].

Under the regulations of the lighthouse board, requiring the suspension of lights on drawbridges, so that three red lights will be seen up and down stream when the draw is closed, and three green lights when it is open, the failure of a city to maintain such lights on a drawbridge erected by it is such negligence as will render it liable for damages to a steamer resulting from such omission. Smith *v.* Shakopee, 103 Fed. 240, 44 C. C. A. 1.

The ordinance of the city of Chicago requiring the maintenance of vessel signals on all bridges over the Chicago river, etc., has been held to apply only to bridges owned by the city and does not affect the rights of vessels with respect to private bridges. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289.

must be given to approaching vessels if for any reason the draw cannot be opened.[23] Reasonable care must be used to avoid accidents and not only not to impede the safe navigation of passing vessels, but to obviate any unnecessary delay thereto.[24] A bridge owner is liable in damages to the owner of a vessel injured by reason of negligence in failure to promptly open,[25] or in operating,[26] the draw. So damages are recoverable for injuries received because of the

23. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289.

24. Central R. Co. *v.* Pennsylvania R. Co., 59 Fed. 192, 8 C. C. A. 86 [*affirming* 59 Fed. 190].

Liability of city.—A city is not, in the absence of statute, liable for injury to a vessel from its negligent maintenance of a draw in a bridge which it constructed and maintained in its public character, the general statute rendering municipalities liable for non-repair of highways having no application. Corning *v.* Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526.

25. *California.*— Minturn *v.* Lisle, 4 Cal. 180.

Louisiana.— Houston *v.* St. Martin Police Jury, 3 La. Ann. 566.

Massachusetts.— Jennings *v.* Fitchburg R. Co., 146 Mass. 621, 16 N. E. 468. *Compare* Hood *v.* Dighton Bridge, 3 Mass. 263, action to recover penalty.

New Jersey.— Mattlage *v.* Hudson County, 63 N. J. L. 583, 44 Atl. 756, question for jury.

United States.— New Haven Towing Co. *v.* New Haven, 126 Fed. 882; Hartley *v.* American Steel-Barge Co., 108 Fed. 97, 47 C. C. A. 229; Boland *v.* Combination Bridge Co., 94 Fed. 888; Piscataqua Nav. Co. *v.* New York, etc., R. Co., 89 Fed. 362; Central R. Co. *v.* Pennsylvania R. Co., 59 Fed. 192, 8 C. C. A. 86 [*affirming* 59 Fed. 190]; King *v.* Ohio, etc., R. Co., 25 Fed. 799.

See 37 Cent. Dig. tit. "Navigable Waters," § 96.

Where the draw falls through the negligence of the bridge owner and vessels are thereby detained, the owner is liable for the damages sustained. Piscataqua Nav. Co. *v.* New York, etc., R. Co., 89 Fed. 362.

Right to presume that draw will be opened.— Where a vessel has given the proper signal to open a bridge and is prudently proceeding under slow speed in the absence of proper warning to the contrary, it has the right to presume that the bridge will be opened in time for passage, and is not bound to stop until it has been opened. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289.

Persons liable.— Where a draw over a bridge is managed and controlled by a town and village so negligently that an injury results therefrom to one navigating the river, a right of action accrues against town and village, jointly and severally, both at common law and under a statute which renders liable every person who shall obstruct any navigable stream in any manner, so as to impair the free navigation thereof. Weisenberg *v.* Winneconne, 56 Wis. 667, 14 N. W. 871. The statute making the board of chosen freeholders of a county responsibe for damage received through the wrongful neglect of the board to erect a bridge, etc., applies to a case of a person whose vessel is damaged by running against a draw of a bridge spanning a navigable river. Mattlage *v.* Hudson County, 63 N. J. L. 583, 44 Atl. 756. The detention of vessels for several hours until repairs could be made to the draw, where laborers had been sent to repair the draw on complaint having been made that it was difficult to swing, and where their defective work caused the breakage, does not render the county liable. Pettit *v.* Camden County, 91 Fed. 998, 34 C. C. A. 159.

Defenses.— It is no defense that the vessel's master was without a pilot's license, where the master was not guilty of any negligence contributing to the loss. Greenwood *v.* Westport, 60 Fed. 560. It is immaterial that the party delayed does not notify the company every time he wishes to pass through, open the draw himself, or use vessels which can pass under the bridge. Gates *v.* Northern Pac. R. Co., 64 Wis. 64, 24 N. W. 494. The fact that states on either side of a navigable river have in force statutes prohibiting the doing of certain kinds of work on Sunday does not relieve the owner of a bridge spanning the river from the duty of opening the draw on Sunday to admit the passage of vessels engaged in commerce on the river. Boland *v.* Combination Bridge Co., 94 Fed. 888.

The burden rests on the owner of the bridge to excuse its failure to perform its duty to open the bridge. Clement *v.* Metropolitan West Side El. R. Co., 123 Fed. 271, 59 C. C. A. 289.

Questions for jury.— Where the evidence was conflicting as to whether a signal was given to open the draw and whether it could be heard in the storm then raging, the questions were for the jury. Louisville, etc., R. Co. *v.* McDonald, 79 Miss. 641, 31 So. 417, 418.

Measure of damages.— See Scott *v.* Chicago, 21 Fed. Cas. No. 12,526, 1 Biss. 510.

26. Chicago *v.* Mullen, 116 Fed. 292, 54 C. C. A. 94; Chicago *v.* Wisconsin Steamship Co., 97 Fed. 107, 38 C. C. A. 70. See also Ripley *v.* Essex, etc., Counties, 40 N. J. L. 45.

What constitutes negligence.— Failure to securely fasten the draw of a bridge when turned to permit vessels to pass through is negligence. Etheridge *v.* Philadelphia, 26 Fed. 43. Where the draw of a bridge maintained by a city over a navigable stream is provided with a lock at one end, sufficient to hold it in position when open, under ordinary

improper construction of the draw,[27] or for injuries inflicted by permitting the draw to improperly obstruct the channel.[28] The question of contributory negligence on the part of those in charge of the vessel[29] is generally one for the jury.[30] Where both the bridge owner and those in charge of the vessel are negligent, the practice in the federal courts is to divide the damages.[31]

g. Injuries to Bridges.[32] The owner of a bridge may recover damages for injuries thereto from improper or negligent navigation.[33]

h. Alterations, or Repairs. Legislative authority to construct and maintain a bridge includes the right to repair or to renew the superstructure when necessary to its safe use.[34] Congress may require the alteration of a bridge over any of the

circumstances, the city is not chargeable with negligence because such lock is not sufficiently strong to withstand the impact of a vessel striking against the side of the draw at the opposite end, or because the draw is not locked at both ends. Chicago *v.* Wisconsin Steamship Co., 97 Fed. 107, 38 C. C. A. 70.

Burden of proof.— In an action to recover for injuries sustained while attempting to go through a draw, the burden is on plaintiff to show that draw rests were not necessary or lawful parts of the bridge. Silver *v.* Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410.

Forfeiture of franchise.— It has been held that a bridge franchise will not be forfeited for unreasonably neglecting to raise the draw where the charter imposes no penalty for such neglect. Com. *v.* Breed, 4 Pick. (Mass.) 460.

27. Crouch *v.* Charleston, etc., R. Co., 21 S. C. 495; Boston *v.* Crowley, 38 Fed. 202.

Defenses.— It is no defense that plaintiff had knowledge that there were defects in the draw nor that the steamer failed to drop anchor and drag under the same, as required by statute. Crouch *v.* Charleston, etc., R. Co., 21 S. C. 495.

28. New York, etc., R. Co. *v.* Piscataqua Nav. Co., 108 Fed. 92, 47 C. C. A. 225.

Actionable injury.—A tug engaged in towing vessels to and from a channel to which they resort, which channel is negligently and improperly obstructed temporarily by the draw of a bridge, but which tug was accustomed to deliver and receive its tows below the bridge and had no occasion to pass it, suffers no actionable injury by reason of the obstruction merely because it loses the towage of vessels which, except for the obstruction, would have used the channel obstructed. New York, etc., R. Co. *v.* Piscataqua Nav. Co., 108 Fed. 92, 47 C. C. A. 225.

29. See Chicago *v.* Mullen, 116 Fed. 292, 54 C. C. A. 94, holding that a tug was not in fault for approaching and entering the opening bridge with her tow after the signal that it was open had been given her by the bridge tender, notwithstanding the fact that the draw had not then been fully opened and locked.

Error in judgment in acting to prevent collision.— Where the failure of a tender of a bridge across a navigable river to open the draw in time for the passage of a steamer approaching from up the stream imposed upon those in charge of the vessel the necessity of hasty action to prevent a collision with the bridge, an error of judgment on their part, committed in the haste and confusion incident to the situation, will not be imputed to the vessel as a fault. Boland *v.* Combination Bridge Co., 94 Fed. 888.

Admissibility of evidence.— On an issue as to whether a county was liable for injuries to a vessel caused by an alleged defective drawbridge, where the defense of contributory negligence was based on the contention that the captain of the vessel should have stopped his boat on seeing that the draw did not begin to move, as customary, when his vessel was within a certain distance, evidence concerning the usual distance of vessels from the bridge when the bridge tenders began to move the draw was admissible to show how quickly the draw might be opened, and how soon the captain of an approaching vessel ought to apprehend danger. Mattlage *v.* Hudson County, 63 N. J. L. 583, 44 Atl. 756.

30. Mattlage *v.* Hudson County, 63 N. J. L. 583, 44 Atl. 756.

31. Smith *v.* Shakopee, 103 Fed. 240, 44 C. C. A. 1.

32. See also BRIDGES, 5 Cyc. 1115.

33. Toll Bridge Co. *v.* Langrell, 47 Conn. 228; Bucki *v.* Cone, 25 Fla. 1, 6 So. 160; Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171.

Who may sue.— Where a bridge was built and had always been maintained by the town, an action for injury thereto was properly brought in the name of the town. Menasha *v.* The Portage, 26 Wis. 534.

Instructions.— It is not proper to instruct a jury that if a bridge over a navigable stream is a lawful structure, and a steamboat is run down against it, injuring one of the piers, the verdict shall be for the bridge company, since it excludes the possibility that the accident may have been purely fortuitous. St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755.

34. Kansas City, etc., R. Co. *v.* Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578; U. S. *v.* Parkersburg Branch R. Co., 143 Fed. 284, 74 C. C. A. 354 [*affirming* 134 Fed. 969]; U. S. *v.* Cincinnati, etc., R. Co., 134 Fed. 353, 67 C. C. A. 335.

The replacing of the wooden superstructure of a bridge which had become unsafe from decay and long use by a new superstructure of iron does not constitute the erection of a new bridge so as to bring it within the provisions of the federal statute regulating the method of building bridges. U. S. *v.* Cin-

navigable waters of the United States,[35] on a proper notice being given.[36] Where congress declares a bridge a lawful structure, and provides that such modification can be made in its position and elevation as the secretary of war may order in the interests of navigation, it will be regarded as a lawful structure until the secretary of war orders modifications which are not complied with.[37]

3. Dams[38] **— a. Right to Construct or Maintain** — (I) *In General.* Generally statutory permission is necessary to authorize the erection of a dam.[39] It is held, however, that if the character of the navigation is such that a dam will not materially interfere with it, the riparian owner has a right to place a dam in the stream without permission.[40] At any event, without regard to whether or not the right

cinnati, etc., R. Co., 134 Fed. 353, 67 C. C. A. 335.

Act Cong. March 3, 1899, § 10 (30 U. S. St. at L. 1151 [U. S. Comp. St. (1901) p. 3540]), which provides that "the creation of any obstruction not affirmatively authorized by congress, to the navigable capacity of any of the waters of the United States is hereby prohibited," is prospective purely, and not intended to take away from a railroad company, which, under a duly authorized grant from a state, has constructed a bridge over a navigable interstate river, the implied power to make all necessary repairs. Kansas City, etc., R. Co. *v.* Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578.

Building temporary structure in stream.— The right to maintain a railroad bridge across a navigable stream carries with it the right to build temporary structures in the stream such as may be necessary to prevent the interruption of the operation of the railroad, and to maintain the same for a reasonable length of time. Rogers Sand Co. *v.* Pittsburgh, etc., R. Co., 139 Fed. 7, 71 C. C. A. 419.

35. U. S. *v.* Union Bridge Co., 143 Fed. 377. But see U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178, holding that a bridge having been built and maintained in accordance with the requirements of an act of congress, the secretary of war cannot declare it an obstruction to navigation and require it to be changed, remodeled, or rebuilt.

Matters to be considered.— The right of the United States to require the removal or alteration of a bridge as an obstruction to navigation of an interstate waterway is not affected by the fact that it made no objection when the bridge was built, or that it was built under authority from the state, nor do such facts render the government liable to compensate the owner for his loss, where the consent of congress was not asked; the owner being chargeable with notice of its power over such waters and its right to exercise the same at any time. U. S. *v.* Union Bridge Co., 143 Fed. 377.

36. U. S. *v.* Rider, 50 Fed. 406 (holding that a notice did not give a reasonable time in which to provide a draw); U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178 (holding that a notice must particularly point out what alterations are required to be made); U. S. *v.* St. Louis, etc., R. Co., 43 Fed. 414 (holding that a fine cannot be recovered of receivers for failure to comply with the notice where they had not been served in their official capacity and that the corporation was not liable because of the fact that after it had been served a receiver had been appointed).

37. Frost *v.* Washington County R. Co., 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68.

38. As affecting logging in streams see Logging, 25 Cyc. 1568, 1569.

39. Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154 (holding that necessity of authority from the board of supervisors refers only to streams wholly within the state); Denton *v.* State, 72 N. Y. App. Div. 248, 76 N. Y. Suppl. 167 (holding that statute gave an implied right to erect dams); State *v.* Skagit County Super. Ct., 42 Wash. 491, 85 Pac. 264 (holding a slough not navigable to such an extent as to require the consent of the federal government for the construction of a dam at its mouth); Wisconsin River Imp. Co. *v.* Lyons, 30 Wis. 61.

Petition.— Where the statute requires a petition for leave to erect a dam, it must strictly comply with the statute. Powers *v.* Irish, 23 Mich. 429; Lamprey *v.* Nelson, 24 Minn. 304.

Presumption from grant of authority.— Where dams were built in a river, under a legislative grant of authority therefor, for the purpose of improving the navigability of the river, the presumption is that the dams so built were necessary and proper for the purpose authorized, and were erected in good faith. Moor *v.* Veazie, 31 Me. 360.

Effect of grant.— Authority from the legislature to erect a dam is a complete defense to a suit for an injunction to restrain the changing of water level of the lake, where it appeared that the water had at no time been drawn down to a point below that authorized by the statute. State *v.* Sunapee Dam Co., 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55.

Navigation companies are sometimes given the power to build dams with the same right to erect a dam in a river that a proprietor has to erect one on his own land. Lehigh River Bridge *v.* Lehigh Coal, etc., Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111.

40. Kretzschmar *v.* Meehan, 74 Minn. 211, 77 N. W. 41; Hallock *v.* Suitor, 37 Oreg. 9, 60 Pac. 384.

Riparian owners may alter the channel by constructing dams so far as such changes are possible without an infringement of the public right to such a free way as would be

to construct or maintain has been conferred by statute, the right to build is subject to the paramount right of navigation.[41]

(II) *Statutes.* Statutes permitting the erection of dams[42] are to be limited to the class of streams to which they apply;[43] and, in so far as they forbid the erection or maintenance of a dam so as to obstruct or impede the navigation, they are but declaratory of the common law.[44] Ordinarily the provision that a dam shall not obstruct or impede navigation is to be liberally construed, since a literal construction would destroy the grant.[45] An act authorizing a dam need not expressly declare that the improvement of navigation is the principal object.[46] The power to erect dams given by a statute has been held but a license to the riparian owner subject to be revoked whenever the interests of the public may require it.[47] A federal statute prohibiting the erection of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters of the United States, prohibits the construction of a dam in a river at a point where it is not navigable which so retards the flow of water as to affect the navigability of the river at a point where the river was before navigable.[48]

b. Obstruction of Navigation. A dam which materially obstructs navigation is unlawful and a nuisance,[49] especially where erected without authority,[50] or where it impedes navigation beyond what the statute authorizes.[51] The owner has also been held liable in damages to navigators injured thereby, although it was constructed pursuant to statutory authority and in compliance therewith.[52] On the other hand, where a dam has been built at a specified place and of a certain height, under express authority of an act of the legislature, the person building or maintaining it is not liable to an indictment for a public nuisance created by such dam.[53] Where one erects a dam in conformity with law, and the chute has been rendered unnavigable by flood or accident, he is not liable for damages occasioned thereby, before he had time to make repairs.[54] So a temporary obstruction

afforded by the stream in its natural condition. Connecticut River Lumber Co. *v.* Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826.

41. Elgin *v.* Elgin Hydraulic Co., 85 Ill. App. 182 [*affirmed* in 194 Ill. 476, 62 N. E. 929]; Cox *v.* State, 3 Blackf. (Ind.) 193; Knox *v.* Chaloner, 42 Me. 150; Roy *v.* Fraser, 36 N. Brunsw. 113.

42. Volk *v.* Eldred, 23 Wis. 410; Wood *v.* Hustis, 17 Wis. 416.

43. Brown *v.* Com., 3 Serg. & R. (Pa.) 273; Cobb *v.* Smith, 16 Wis. 661.

44. Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

45. Ensworth *v.* Com., 52 Pa. St. 320.

46. Tewksbury *v.* Schulenberg, 41 Wis. 584.

47. Elgin *v.* Elgin Hydraulic Co., 85 Ill. App. 182 [*affirmed* in 194 Ill. 476, 62 N. E. 929]; Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

48. U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136.

49. Dwinel *v.* Veazie, 44 Me. 167, 69 Am. Dec. 94; Hall *v.* Lacey, 3 Grant (Pa.) 264, holding that a dam in a stream which was not before navigable at the place where the dam is constructed cannot be said to be an impediment to navigation.

Prima facie a nuisance.— Where a dam is erected across a river, it is *prima facie* evidence of a nuisance. Hogg *v.* Zanesville Mfg. Co., Wright (Ohio) 139; Com. *v.* Church, 1 Pa. St. 105, 44 Am. Dec. 112. But see Criswell *v.* Clugh, 3 Watts (Pa.) 330.

In order to constitute a mill dam a nuisance, as erected upon tide-waters, it should appear to stand within the flow of common and ordinary tides. Simpson *v.* Seavey, 8 Me. 138, 22 Am. Dec. 228.

Maintenance.— A dam may be regarded as a nuisance if not kept in the condition required by statute. Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410.

50. Dyer *v.* Curtis, 72 Me. 181; State *v.* Godfrey, 12 Me. 361; Com. *v.* Church, 1 Pa. St. 105, 44 Am. Dec. 112.

51. Knox *v.* Chaloner, 42 Me. 150; State *v.* Godfrey, 12 Me. 361; Renwick *v.* Morris, 3 Hill (N. Y.) 621 [*affirmed* in 7 Hill 575]. See also Newbold *v.* Mead, 57 Pa. St. 487.

52. Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298; Boston, etc., Mill Corp. *v.* Gardner, 2 Pick. (Mass.) 33; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410; Bacon *v.* Arthur, 4 Watts (Pa.) 437. See also Plumer *v.* Alexander, 12 Pa. St. 81. But see Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674; Pound *v.* Turck, 95 U. S. 459, 24 L. ed. 525.

53. Stoughton *v.* State, 5 Wis. 291.

It seems, however, that the grant of such power is not necessarily a defense where the statute merely grants a general power to erect dams without specifying the place, height, or other requirements. Stoughton *v.* State, 5 Wis. 291; Luning *v.* State, 2 Pinn. (Wis.) 215, 52 Am. Dec. 153, 1 Chandl. 178.

54. Roush *v.* Walter, 10 Watts (Pa.) 86.

while remodeling a lock or dam where the first one has proved defective is not such an obstruction as constitutes a nuisance.[55]

c. Construction and Maintenance. A dam must be built as provided for by the statute,[56] including its height,[57] and the construction of a suitable slope or lock.[58] Where the erection of a dam would cause injury to mill property situated above in another state, an injunction will be granted.[59] The fact that plaintiff is himself obstructing a navigable stream by means of a dam is no defense to a suit to restrain the diversion of water above by means of a dam erected subsequently.[60]

d. Injuries From Construction and Actions Therefor. It is generally held that the proprietors of a dam are not liable to upper riparian owners or the owners of a bridge above the dam for injuries resulting from the backing up of the water because of the dam,[61] although in some instances they have been held liable.[62] A dam owner has been held liable for damages occasioned by sending masses of logs down the stream by means of a flood caused by opening the dams.[63]

e. Injuries to. Damages are recoverable for injuries to a dam by persons using the stream,[64] and an injunction will be granted to protect the owner from such injuries.[65] In some jurisdictions the injuries are punishable by criminal proceedings.[66]

f. Repairs. The owner of a dam is entitled to a reasonable time to repair it,[67] but permission to repair is to be construed as permission to repair and maintain as authorized by the original statute.[68]

4. Booms.[69] Generally a riparian proprietor has the right to construct a boom,[70] and in many states statutes expressly provide for the incorporation of boom companies with the right to collect tolls.[71] Generally the statute requires that navigation shall not be impeded thereby,[72] and if a boom does obstruct navi-

55. State *v.* Charleston Light, etc., Co., 68 S. C. 540, 47 S. E. 979.

56. Parker *v.* Cutler Milldam Co., 20 Me. 353, 37 Am. Dec. 56.

57. Arpin *v.* Bowman, 83 Wis. 54, 53 N. W. 151.

58. Neaderhouser *v.* State, 28 Ind. 257; State *v.* Cullum, 2 Speers (S. C.) 581.

In Michigan, under the constitution and statutes, it is not competent to require a water-power company damming a navigable river to place locks in the dam so as to admit of the passage of boats. Valentine *v.* Berrien Springs Water-Power Co., 128 Mich. 280, 87 N. W. 370.

59. Holyoke Water Power Co. *v.* Connecticut River Co., 52 Conn. 570.

60. Miller *v.* Enterprise Canal, etc., Co., 142 Cal. 208, 75 Pac. 770, 100 Am. St. Rep. 115.

61. Brooks *v.* Cedar Brook, etc., Imp. Co., 82 Me. 17, 19 Atl. 87, 17 Am. St. Rep. 459, 7 L. R. A. 460; New York Canal Appraisers *v.* People, 17 Wend. (N. Y.) 571; Zimmerman *v.* Union Canal Co., 1 Watts & S. (Pa.) 346; Lehigh River Bridge *v.* Lehigh Coal, etc., Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111.

Rights as against mill owner.— A company authorized by the legislature to construct dams in a navigable stream in aid of navigation is not liable to the owner of a mill operated by the water power of the river for injury caused by the intermittent increase and decrease in the flow of the water as a result of the use of the dam, although the mill owner was operating his mill under statutory authority prior in time. Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257.

62. Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105. See also Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379, 47 Am. Dec. 474, holding that a navigation company may be liable, although a riparian proprietor would not in a like case.

63. Dubois *v.* Glaub, 52 Pa. St. 238.

64. James *v.* Carter, 96 Ky. 378, 29 S. W. 19, 16 Ky. L. Rep. 515; Coe *v.* Hall, 41 Vt. 325.

65. Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004.

66. Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33, holding that statutory authority is no defense where it does not appear that the terms of the statute have been complied with.

67. Pratt *v.* Brown, 106 Mich. 628, 64 N. W. 583.

68. Arpin *v.* Bowman, 83 Wis. 54, 53 N. W. 151.

69. **Definition** see Logging, 25 Cyc. 1547.

70. See Logging, 25 Cyc. 1568.

Right subordinate to public use.—The right of a riparian proprietor to construct a boom in aid of navigation is subordinate to the public use and may be regulated or prohibited by law. Cohn *v.* Wausau Boom Co., 47 Wis. 314, 2 N. W. 546.

71. See Logging, 25 Cyc. 1569.

72. Plummer *v.* Penobscot Lumbering Assoc., 67 Me. 363; Powers' Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882; West

gation it is unlawful and a nuisance.[73] A boom company which has the right to use navigable waters to the line of ordinary high tide has no right to use shore lands above that line for private purposes.[74] If the land of upper riparian proprietors is overflowed because of the construction of a boom, it has been held that damages are recoverable, although it was constructed and maintained in accordance with its charter.[75]

5. Remedies[76] — a. In General. The ordinary remedies for the obstruction or diversion of navigable waters are by indictment,[77] injunction,[78] action to abate a nuisance,[79] or an action to recover damages.[80] Special statutory remedies, such as a writ of *ad quo damnum*,[81] or the compelling the restoration of the stream to its former condition,[82] are provided for in some states, and in some jurisdictions the statutory remedy has been held exclusive.[83] An action for the forfeiture of the franchise of an improvement company has been held proper where it improperly obstructs navigation,[84] and certiorari has been granted to quash the location of a highway on a beach.[85] Under some of the statutes a penalty is provided for obstructing navigable waters which may be recovered by action.[86] If water is diverted into a new channel, the public may use such new channel;[87] and if the new channel becomes obstructed, the public may effect a suitable passage over the former channel, if no unnecessary damage is occasioned thereby.[88]

b. Injunction[89] — (i) *Propriety of Remedy.* Where an unauthorized obstruction is about to be built, or has been erected, in or over a navigable stream, a court of equity will afford relief by injunction;[90] but injunctive relief will not be

Branch Boom Co. *v.* Dodge, 31 Pa. St. 285; Carl *v.* West Aberdeen Land, etc., Co., 13 Wash. 616, 43 Pac. 890; U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437 [*reversing* 81 Fed. 658, 26 C. C. A. 547].

73. Cincinnati Cooperage Co. *v.* Com., 11 Ky. L. Rep. 629; Union Mill Co. *v.* Shores, 66 Wis. 476, 29 N. W. 243; Leigh *v.* Holt, 15 Fed. Cas. No. 8,220, 5 Biss. 338; Kennedy *v.* The Surrey, 10 Can. Exch. 29.

Custom.— The right to maintain a boom so as to prevent the passage of vessels cannot be acquired by custom. Gifford *v.* McArthur, 55 Mich. 535, 22 N. W. 28.

74. Lownsdale *v.* Gray's Harbor Boom Co., 21 Wash. 542, 58 Pac. 663.

75. Doucette *v.* Little Falls Imp., etc., Co., 71 Minn. 206, 73 N. W. 847; McKenzie *v.* Mississippi, etc., Boom Co., 29 Minn. 288, 13 N. W. 123. See also Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819; Rogers *v.* Coal River Boom, etc., Co., 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008.

Burden of proof.— Where a riparian owner seeks to recover for injuries to his land from an overflow alleged to have been caused by a dam constructed by a booming company, the burden is on him to show that the waters which caused the injury were raised by the dam above ordinary high water mark, and out of the well-defined channels of the stream. Gniadek *v.* Northwestern Imp., etc., Co., 73 Minn. 87, 75 N. W. 894.

76. Jurisdiction of federal courts see Courts, 11 Cyc. 1159.

77. See *infra*, V, B, 5, e.

78. See *infra*, V, B, 5, b.

79. See *infra*, V, B, 5, c.

80. See *infra*, V, B, 5, d.

81. Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

82. Kerr *v.* West Shore R. Co., 127 N. Y. 269, 27 N. E. 833, holding that the statute was designed to protect public rights only.

83. Spigelmoyer *v.* Walter, 3 Watts & S. (Pa.) 540; Criswell *v.* Clugh, 3 Watts (Pa.) 330; Com. *v.* Plumer, 1 Am. L. Reg. (Pa.) 124.

84. Black River Imp. Co. *v.* La Crosse Booming, etc., Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66.

85. Marblehead *v.* Essex County Com'rs, 5 Gray (Mass.) 451.

86. Pilot Com'rs *v.* Pidgeon, 23 Hun (N. Y.) 346 (holding that intent must be shown where statute authorized recovery for "wilfully" dumping in New York harbor); Ogdensburg *v.* Lyon, 7 Lans. (N. Y.) 215 (holding that a state court has jurisdiction of an action for the recovery of a penalty prescribed by city ordinance for casting sawdust and other refuse into a navigable river); Bennet *v.* Hurd, 3 Johns. (N. Y.) 438 (holding that declaration need not negative proviso in statute).

87. Dwinel *v.* Veazie, 44 Me. 167, 69 Am. Dec. 94.

88. Dwinel *v.* Veazie, 44 Me. 167, 69 Am. Dec. 94.

89. Injunction generally see Injunctions.

90. *Georgia.*— Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306.

Michigan.— Stofflet *v.* Estes, 104 Mich. 208, 62 N. W. 347.

New Jersey.— Atty.-Gen. *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526.

New York.— People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, 26 N. Y. 287, 25 How. Pr. 139; Rochester *v.* Erickson, 46 Barb. 92.

North Carolina.— Reyburn *v.* Sawyer, 135

granted where it is not clearly shown that an obstruction to navigation exists which constitutes a nuisance.[91] So where there is an adequate remedy at law,[92] or by summary proceedings before public officials,[93] or where it does not clearly appear that the water obstructed is navigable,[94] an injunction will not be awarded. In a proper case, a preliminary injunction may be granted before a final determination of the rights of the parties.[95]

N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

Pennsylvania.— Pennsylvania Canal Co. *v.* Philadelphia, etc., R. Co., 2 Pearson 354.

Washington.— Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272.

Wisconsin.— Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

United States.— U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136; U. S. *v.* Lawrence, 53 Fed. 632; Hatch *v.* Wallamet Bridge Co., 6 Fed. 780, 7 Sawy. 141; Hatch *v.* Wallamet Iron Bridge Co., 6 Fed. 326, 7 Sawy. 127.

See 37 Cent. Dig. tit. "Navigable Waters," § 135.

Notice or demand to abate the obstruction is not necessary before suit may be brought to enjoin its continuance. Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306.

As substitute for indictment.— Although indictment is the proper remedy in case of the obstruction of a stream by a bridge, yet, where it is necessary, a court of chancery will, by injunction, interfere with the construction of the bridge until the slower process by indictment can be put in motion. Rowe *v.* Granite Bridge Corp., 21 Pick. (Mass.) 344.

Defenses.— The public benefit arising from the obstruction of a bridge over a navigable river is no defense. Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249. So it is no defense that the obstruction of navigation will be slight or immaterial. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400. And the fact that plaintiff permitted other persons to obstruct the stream to a far greater extent than would be done by defendant's construction is no defense. Rochester *v.* Erickson, 46 Barb. (N. Y.) 92.

Obstruction as penal offense.— The obstruction or injury of navigable waters is an injury to the property rights of the United States, and may be enjoined at the suit of the government, although the act is also made by law a penal offense. North Bloomfield Gravel Min. Co. *v.* U. S., 88 Fed. 664, 32 C. C. A. 84 [*affirming* 81 Fed. 243].

Estoppel.— That a lower riparian proprietor made no objection to the owner of riparian land above him clearing the bed of the stream of obstruction, but assisted therein, and subsequently, during a period of two years, used the water which the upper riparian proprietor stored by means of a dam for the floating of shingle bolts, did not estop such lower proprietor from subsequently objecting to the upper riparian proprietor's continued interruption of the natural flow of the water by the dam. Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272.

91. *Delaware.*— Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435.

Michigan.— Grand Rapids *v.* Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498.

New Jersey.— Gilbert *v.* Morris Canal, etc., Co., 8 N. J. Eq. 495.

New York.— Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927; Rochester *v.* Curtiss, Clarke 336.

Ohio.— Hutchinson *v.* Thompson, 9 Ohio 52.

United States.— U. S. *v.* North Bloomfield Gravel-Min. Co., 53 Fed. 625; Turner *v.* People's Ferry Co., 21 Fed. 90; St. Louis *v.* Knapp, 6 Fed. 221; Silliman *v.* Troy, etc., Bridge Co., 22 Fed. Cas. No. 12,853, 11 Blatchf. 274; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

See 37 Cent. Dig. tit. "Navigable Waters," § 135.

Obstruction of war vessels.— That a bridge obstructs the passage of war vessels up a river is not a ground on which a town may seek an injunction against its continuance. Dover *v.* Portsmouth Bridge, 17 N. H. 200.

Legislative authority.— A bridge constructed across a navigable stream, as authorized by act of congress and the local legislature, cannot be enjoined as a public nuisance. Winifrede Coal Co. *v.* Central R., etc., Co., 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173; Miller *v.* New York, 17 Fed. Cas. No. 9,585, 13 Blatchf. 469.

92. Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145.

Where the remedy at law is inadequate, the jurisdiction of equity is not excluded by code provisions for actions at law to recover damages for, and to abate as nuisances, obstructions in navigable streams. Carl *v.* West Aberdeen Land, etc., Co., 13 Wash. 616, 43 Pac. 890.

93. People *v.* Horton, 5 Hun (N. Y.) 516 [*affirmed* in 64 N. Y. 610].

94. Erkenbrecher *v.* Cincinnati, 2 Cinc. Super. Ct. (Ohio) 412; State *v.* Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848.

95. Atty.-Gen. *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526; People *v.* Gutchess, 48 Barb. (N. Y.) 656; Devoe *v.* Penrose Ferry-Bridge Co., 7 Fed. Cas. No. 3,845. See also Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384, holding that a temporary injunction was properly dissolved where an answer was filed denying categorically all the averments in the bill as to the navigability of the stream.

(II) *Jurisdiction.* Federal courts have jurisdiction where the obstruction is in a navigable stream of the United States.[96] A state court has no jurisdiction to restrain obstructions erected in another state.[97]

(III) *Parties.*[98] The rules applicable to injunction suits in general ordinarily cover the question of proper and necessary parties in a suit to enjoin obstructions.[99] A state, where it has a direct interest in the matter, may sue,[1] an action being properly brought by the attorney-general.[2] The federal government cannot sue except where it has power to regulate and prevent obstructions to the particular waters.[3] If a private person has sustained special injury different from that which the general public suffers, he may sue to enjoin the nuisance,[4] but if no special injury is sustained a private person cannot sue.[5]

(IV) *Pleading.*[6] The bill or complaint must allege and show *inter alia* the navigability of the stream,[7] the nature of the obstruction, and the special injury to complainants.[8]

Showing as to obstruction.— A preliminary injunction to restrain the erection of a bridge across a navigable river will not be allowed, where it is shown that such bridge will not be an obstruction necessarily amounting to a nuisance. Northern Pac. R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 172, 2 McCrary 224.

96. See Courts, 11 Cyc. 859.

97. People *v.* New Jersey Cent. R. Co., 42 N. Y. 283.

98. See, generally, Parties.

99. See Injunctions, 22 Cyc. 910 *et seq.*

A borough and the inhabitants thereof are proper parties to a bill to enjoin the unauthorized erection of a wharf extending into the channel of a creek therein and obstructing the navigation thereof. Frankford *v.* Lennig, 2 Phila. (Pa.) 403.

A board cannot obtain an injunction where its authority has been superseded by an act of the legislature specifically vesting its powers in other officials. Philadelphia Port *v.* Philadelphia, 42 Pa. St. 209.

1. Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249.

2. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; People *v.* Vanderbilt, 26 N. Y. 287, 25 How. Pr. 139.

3. Northern Pac. R. Co. *v.* U. S., 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80; U. S. *v.* Beef Slough Mfg., etc., Co., 24 Fed. Cas. No. 14,559, 8 Biss. 421.

4. *Alabama.*— Walker *v.* Allen, 72 Ala. 456.

California.— Crescent Mill, etc., Co. *v.* Hayes, (1885) 8 Pac. 692.

Connecticut.— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

Idaho.— Small *v.* Harrington, 10 Ida. 499, 79 Pac. 461, statute reiterates rule.

New York.— Jencks *v.* Miller, 17 Misc. 461, 40 N. Y. Suppl. 1088.

Ohio.— Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

Wisconsin.— Walker *v.* Shepardson, 2 Wis. 384, 60 Am. Dec. 423.

United States.— Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

See 37 Cent. Dig. tit. "Navigable Waters," § 140. See also Nuisances.

What constitutes special injury.— A person engaged in the business of fishing in a navigable stream is specially damaged by the placing of an obstruction in such stream which interferes with the carrying on of his business, and may sue on behalf of himself and others similarly situated to enjoin such obstruction. Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33. The proprietor of a wharf which is situated upon a navigable river, although he is not the owner of a licensed coasting vessel, a pilot, or a navigator, may file a bill to restrain the erection of a bridge over the stream by authority of the state within whose limits it wholly lies; he being likely to suffer consequential injury therefrom. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249.

5. *Connecticut.*— O'Brien *v.* Norwich, etc., R. Co., 17 Conn. 372.

Delaware.— Delaware, etc., R. Co. *v.* Stump, 8 Gill & J. 479, 29 Am. Dec. 561.

Florida.— Sullivan *v.* Moreno, 19 Fla. 200; Alden *v.* Pinney, 12 Fla. 348.

New Hampshire.— Dover *v.* Portsmouth Bridge, 17 N. H. 200.

New York.— Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Manhattan Gas Light Co. *v.* Barker, 7 Rob. 523, 36 How. Pr. 233.

Oregon.— Esson *v.* Wattier, 25 Oreg. 7, 34 Pac. 756.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

See 37 Cent. Dig. tit. "Navigable Waters," § 140.

6. See, generally, Pleading.

7. Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; Walker *v.* Allen, 72 Ala. 456; Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272; U. S. *v.* Wishkah Boom Co., 136 Fed. 42, 68 C. C. A. 592.

8. See U. S. *v.* Wishkah Boom Co., 136 Fed. 42, 68 C. C. A. 592; Spokane Mill Co. *v.* Post, 50 Fed. 429 (holding that one who seeks an injunction against an obstruction of a navigable stream must allege and show that the commerce for which he would utilize the stream is lawful); Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

Right to use water.— A complaint, in an

c. Abatement or Removal[9] — (i) *By Act of Person Injured.* Where there is an obstruction of navigation it may be abated by any person who is injured thereby in his rights,[10] where no breach of the peace is involved,[11] irrespective of how long the obstruction has been in existence.[12] It has been held, however, that the obstruction must be peculiarly injurious to the person abating it as distinguished from the injury resulting to the public.[13]

(ii) *Injunction Against Removal or Abatement.* Equity has jurisdiction to prevent the abatement of a structure as a nuisance, where it would produce great loss to the owner and great inconvenience to the public.[14]

(iii) *Actions to Abate or Compel Removal.*[15] Where an obstruction constitutes a nuisance, it may be abated by an action brought therefor.[16] But the structure will not be abated unless it is clearly shown to be an unauthorized obstruction constituting a nuisance,[17] defendant being entitled to the benefit of

action to enjoin the obstruction of a navigable stream, which alleges that plaintiff had been engaged in fishing therein for a year prior to the action, sufficiently shows that plaintiff was entitled to fish in such water, as against the objection made at the trial. Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33.

9. See, generally, Nuisances.

10. *California.*— Gunter *v.* Geary, 1 Cal. 462.

Illinois.— McLean *v.* Mathews, 7 Ill. App. 599.

Indiana.— Porter *v.* Allen, 8 Ind. 1, 65 Am. Dec. 750, holding that the obstruction must not be left by the person removing it at a place where it would be likely to endanger the property of others.

Kentucky.— Brubaker *v.* Paul, 7 Dana 428, 32 Am. Dec. 111.

Maine.— State *v.* Anthoine, 40 Me. 435.

New York.— Bedell *v.* Kirk, 17 N. Y. Suppl. 638.

North Carolina.— State *v.* Parrott, 71 N. C. 311, 17 Am. Rep. 5; State *v.* Dibble, 49 N. C. 107.

Pennsylvania.— Beach *v.* Schoff, 28 Pa. St. 195, 70 Am. Dec. 122; Philiber *v.* Matson, 14 Pa. St. 306.

South Carolina.— King *v.* Sanders, 2 Brev. 111.

Tennessee.—Stump *v.* McNairy, 5 Humphr. 363, 42 Am. Dec. 437.

Texas.— Selman *v.* Wolfe, 27 Tex. 68.

United States.— North American Dredging, etc., Co. *v.* The River Mersey, 48 Fed. 686.

Canada.— Kennedy *v.* The Surrey, 10 Can. Exch. 29.

See 37 Cent. Dig. tit. "Navigable Waters," § 145.

But see Black River Imp. Co. *v.* La Crosse Booming, etc., Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66, holding that where a corporation is authorized to improve the navigation of a stream, an abatement of the works constituting the improvement as a private nuisance and without action is not allowable, although such improvements obstruct, instead of improving, the navigation.

Contra.— Vallette *v.* Patten, 9 Rob. (La.) 367.

The owner of a towboat has no right, merely in the general interest of navigation, to break up and destroy the coal boat of another, which has been sunk, but only in case he is unable to pass the said boat without seriously endangering his own boat. The fact that the owner of a towboat would have suffered some expense and delay in taking his tow in sections past a sunken boat does not justify the destruction of the said boat. Gumbert *v.* Wood, 146 Pa. St. 370, 23 Atl. 404.

11. Day *v.* Day, 4 Md. 262.

12. Arundel *v.* McCulloch, 10 Mass. 70; Renwick *v.* Morris, 7 Hill (N. Y.) 575 [*affirming* 3 Hill 621].

13. Larson *v.* Furlong, 50 Wis. 681, 8 N. W. 1. *Contra*, Gunter *v.* Geary, 1 Cal. 462.

14. Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245. But see Moore *v.* Pilot Com'rs, 32 How. Pr. (N. Y.) 184, holding that an injunction does not lie against the commissioners of pilots to restrain their removing obstructions in navigable waters although they constitute a nuisance.

15. See, generally, Nuisances.

16. Com. *v.* Wright, Thach. Cr. Cas. (Mass.) 211; People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 49 How. Pr. 511]; People *v.* Vanderbilt, 26 N. Y. 287, 25 How. Pr. 139; Hubbard *v.* Toledo, 21 Ohio St. 379; Barnes *v.* Racine, 4 Wis. 454.

Plaintiff must allege and show that the commerce for which he would utilize the stream is lawful. Spokane Mill Co. *v.* Post, 50 Fed. 429.

Instead of abating the nuisance the court may order the structure to be so modified as to prevent it being an obstruction (White *v.* King, 5 Leigh (Va.) 726), or, where the mere presence is not of itself an obstruction of navigation, but it only becomes such when used in a particular manner, the court will simply forbid its use in such unlawful manner (People *v.* Horton, 5 Hun (N. Y.) 516 [*affirmed* in 64 N. Y. 610]).

17. Brown *v.* Kentfield, 50 Cal. 129; Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1; U. S. *v.* Bellingham Bay Boom Co., 72 Fed. 585 [*affirmed* in 81 Fed. 658, 26 C. C. A. 547 (*affirmed* in 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437)]; St. Louis *v.* Knapp, etc., Co., 6 Fed. 221; Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145.

every reasonable doubt.[18] Suit may be brought by the state,[19] or, in a proper case, by the United States.[20] A private individual may sue if he has sustained special injury not common to the entire community,[21] but not if he has sustained no injury different from that sustained by the general public who navigate such waters.[22] Separate riparian landowners may join in an action for abatement of an obstruction of the waters contiguous to their land.[23]

(iv) *Liability of Persons Removing or Abating.* A person who abates or removes an obstruction constituting a nuisance is not liable in damages to the owner of the obstruction if the act is not done wantonly or negligently.[24] Especially is this so where the removal is in pursuance of authority conferred by a jury or public officers.[25] Conversely, liability exists where the abatement is in total disregard of the rights of others and without giving the owner of the obstruction a reasonable chance to remove it as he was endeavoring to do.[26] Generally questions as to whether the removal was necessary,[27] or negligently done,[28] or accomplished with more force than necessary,[29] are for the jury.

d. Actions For Damages — (i) *In General.* Damages may be recovered by an action therefor where injuries have been received from the unlawful obstruction of navigable waters,[30] provided that plaintiff was not, at the time the

18. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

19. Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634.

20. U. S. *v.* Pittsburgh, etc., R. Co., 26 Fed. 113; U. S. *v.* Beef Slough Mfg., etc., Co., 24 Fed. Cas. No. 14,559, 8 Biss. 421. See also Courts, 11 Cyc. 879.

21. Blanc *v.* Klumpke, 29 Cal. 156; Dawson *v.* McMillan, 34 Wash. 269, 75 Pac. 807; Barnes *v.* Racine, 4 Wis. 454; E. A. Chatfield Co. *v.* New Haven, 110 Fed. 788; Spokane Mill Co. *v.* Post, 50 Fed. 429; Woodman *v.* Kilbourn Mfg. Co., 30 Fed. Cas. No. 17,978, 1 Abb. 158, 1 Biss. 546.

The fact that an obstruction is a matter of public concern does not prevent the maintenance of an action by a person whose private interests are affected thereby, to abate it. Carl *v.* West Aberdeen Land, etc., Co., 13 Wash. 616, 43 Pac. 890.

22. Jarvis *v.* Santa Clara Valley R. Co., 52 Cal. 438; Thomas *v.* Wade, 48 Fla. 311, 37 So. 743; Clark *v.* Chicago, etc., R. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187; Whitehead *v.* Jessup, 53 Fed. 707.

23. Palmer *v.* Waddell, 22 Kan. 352; Barnes *v.* Racine, 4 Wis. 454.

24. Beach *v.* Schoff, 28 Pa. St. 195, 70 Am. Dec. 122; Harrington *v.* Edwards, 17 Wis. 586, 86 Am. Dec. 768; The Swan, 19 Fed. 455.

25. Sicard *v.* Chitz, 13 La. 111; Grummond *v.* The Burlington, 73 Fed. 258.

26. Lallande *v.* The C. D. Jr., 14 Fed. Cas. No. 8,000, Newb. 501.

27. Gumbert *v.* Wood, 146 Pa. St. 370, 23 Atl. 404.

28. Bedell *v.* Kirk, 17 N. Y. Suppl. 638.

29. Larson *v.* Furlong, 63 Wis. 323, 23 N. W. 584.

30. *Indiana.*— Martin *v.* Bliss, 5 Blackf. 35, 32 Am. Dec. 52.

Maine.— Gerrish *v.* Brown, 51 Me. 256, 81 Am. Dec. 569; Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319.

New York.— Briggs *v.* New York Cent., etc., R. Co., 30 Hun 291; Shaw *v.* Crawford, 10 Johns. 236. See Taylor *v.* Atlantic Mut. Ins. Co., 2 Bosw. 106.

Pennsylvania.— Rhines *v.* Clark, 51 Pa. St. 96.

Wisconsin.— Sweeney *v.* Chicago, etc., R. Co., 60 Wis. 60, 18 N. W. 756.

United States.— Inland, etc., Coasting Co. *v.* The Commodore, 40 Fed. 258; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281. *Compare* The Maud Webster, 16 Fed. Cas. No. 9,302, 8 Ben. 547.

See 37 Cent. Dig. tit. "Navigable Waters," § 153.

Compare Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Tompkins *v.* Kanawha Bd., 19 W. Va. 257.

Notice to abate.— The doctrine that a person cannot be held liable for continuing a pre-existing nuisance, without notice to abate it, does not apply to an illegal obstruction maintained in a river to the injury of persons using such river as a highway. Arpin *v.* Bowman, 83 Wis. 54, 53 N. W. 151 [*distinguishing* Slight *v.* Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476]; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281.

Necessity that loss be sustained.— Where a city, by authority of an act of the legislature, builds a dike extending into a navigable river, owners of land on the opposite shore and in another state, who suffer no loss thereby, cannot maintain actions against such city for damages. Rutz *v.* St. Louis, 10 Fed. 338, 3 McCrary 261.

Accidents.— Where a chute in connection with a dam has become unnavigable by accident, the owner of the dam is not liable to a navigator whose boat was injured, notwithstanding the owner's advice to the navigator that there was no danger and that he could run it. Roush *v.* Walter, 10 Watts (Pa.) 86.

Liability as between lessor and lessee see Seaman *v.* New York, 80 N. Y. 239, 36 Am.

injuries were received, guilty of acts of omission or commission constituting contributory negligence.[31]

(II) *WHO MAY SUE.* Where a private individual has sustained any particular and special injury over and above that sustained by the public generally, as a direct result of an obstruction, he may maintain an action to recover damages therefor;[32] but if he has received no special damage an action cannot be brought by him.[33] The state alone has power to redress a wrong resulting from the improper location of a bridge,[34] or of a pier of a bridge;[35] and a private individual cannot sue on the ground that the legislature exceeded its powers in granting the privilege of constructing the alleged obstruction.[36]

(III) *DEFENSES.* A state statute authorizing an erection is no defense where it is a material obstruction to navigation.[37] *A fortiori* a statute authorizing

Rep. 612. A lessor who has let a wharf and slip and delivered exclusive possession to the lessee who covenants to repair is not liable for damages that occur through obstructions that arise subsequently, of which the lessor has no notice. Moore *v.* Oceanic Steam Nav. Co., 24 Fed. 237.

31. Sullivan *v.* Jernigan, 21 Fla. 264; Porter *v.* Allen, 8 Ind. 1, 65 Am. Dec. 750; Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510; Mark *v.* Hudson River Bridge Co., 56 How. Pr. (N. Y.) 108; Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582; Dunbar-Sullivan Dredging Co. *v.* Troy, etc., Bridge Co., 145 Fed. 428; Omslaer *v.* Philadelphia Co., 31 Fed. 354; Columbus Ins. Co. *v.* Peoria Bridge Assoc., 6 Fed. Cas. No. 3,046, 6 McLean 70; Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

32. *Connecticut.*— Burrows *v.* Pixley, 1 Root 362, 1 Am. Dec. 56.

Maine.— Dudley *v.* Kennedy, 63 Me. 465.

Massachusetts.— Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470; Benson *v.* Malden, etc., Gaslight Co., 6 Allen 149; Blood *v.* Nashua, etc., R. Corp., 2 Gray 137, 61 Am. Dec. 444.

Minnesota.— Viebahn *v.* Crow Wing County, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. N. S. 1126; Page *v.* Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608, 1119.

New Jersey.— Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12.

Pennsylvania.— Hughes *v.* Heiser, 1 Binn. 463, 2 Am. Dec. 459.

Wisconsin.— Enos *v.* Hamilton, 27 Wis. 256.

Canada.— Watson *v.* Toronto Gas-Light, etc., Co., 4 U. C. Q. B. 158.

See 37 Cent. Dig. tit. "Navigable Waters," § 154.

What constitutes special or peculiar injury sufficient to sustain such an action is not always easy of determination. No general rule for determining it has been laid down which can readily be applied to every case. Where to draw the line between cases where the injury is more general or more equally distributed and cases where it is not, where by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is a ground for special damage, and the more remote obstruction or interference which is not. Viebahn *v.* Crow Wing County, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. 1126.

A steamboat owner whose boat is stopped by a bridge is specially injured so as to authorize an action. Little Rock, etc., R. Co. *v.* Brooks, 39 Ark. 403, 43 Am. Rep. 277; South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778. *Contra*, Jones *v.* St. Paul, etc., R. Co., 16 Wash. 25, 47 Pac. 226.

33. *Connecticut.*— Seeley *v.* Bishop, 19 Conn. 128.

Iowa.— Innis *v.* Cedar Rapids, etc., R. Co., 76 Iowa 165, 40 N. W. 701, 2 L. R. A. 282.

Maine.— Low *v.* Knowlton, 26 Me. 128, 45 Am. Dec. 100.

Massachusetts.— Breed *v.* Lynn, 126 Mass. 367; Blackwell *v.* Old Colony R. Co., 122 Mass. 1; Brightman *v.* Fairhaven, 7 Gray 271.

Michigan.— Potter *v.* Indiana, etc., R. Co., 95 Mich. 389, 54 N. W. 956.

New York.— Lansing *v.* Smith, 8 Cow. 146 [*affirmed* in 4 Wend. 9, 21 Am. Dec. 80].

West Virginia.— Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491.

Wisconsin.— Clark *v.* Chicago, etc., R. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187.

Canada.— Small *v.* Grand Trunk R. Co., 15 U. C. Q. B. 283.

See 37 Cent. Dig. tit. "Navigable Waters," § 154.

34. Stephens, etc., Transp. Co. *v.* Central R. Co., 34 N. J. L. 280.

35. Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147.

36. J. S. Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.

37. Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Guthrie *v.* McConnel, 2 Ohio Dec. (Reprint) 157, 1 West. L. Month. 593; Jolly *v.*

defendant to construct a similar erection is no defense to a claim for damages accruing before the enactment of such statute.[38] It is no defense that plaintiff might have avoided injury by the exercise of the utmost care and caution,[39] or that the craft injured could not have navigated the river before the alleged obstruction was built.[40]

(iv) *Pleading.*[41] The complaint must show *inter alia* that the water obstructed was navigable,[42] plaintiff's right or title,[43] the manner in which navigation was obstructed,[44] and the ownership of the obstruction;[45] although it has been held that it is not necessary to state the place where the obstruction is located.[46] If the obstruction was erected pursuant to legislative authority, the complaint must show the failure to comply with the statute, if that is relied on.[47] If an action is by a private individual, the complaint must allege some special injury which he has sustained of a different character from the general injury to the public.[48] Matters of defense need not be negatived in the complaint.[49] A plea of legislative authority must go further and deny that the construction was a material obstruction of navigation.[50] The general rule that the proof must correspond with, and not materially vary from, the pleadings,[51] is applicable.[52] Evidence as to special damages is not admissible where such damages are not pleaded.[53] Under a plea of the general issue, a statute authorizing the alleged obstruction is admissible,[54] but not evidence of a prescriptive right.[55]

(v) *Evidence.* The admissibility of evidence[56] is governed by the rules relating to the admissibility of evidence in civil actions in general.[57] The burden of showing that an obstruction is not unlawful is on defendant,[58] although if plaintiff relies on the failure to comply with statutory requirements, he must show that the deviation caused the injury.[59]

Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

State authority conflicting with federal legislation.— An individual suffering special damages by an obstruction of a navigable river may have a civil redress by a suit, although the obstruction be authorized by a state, if it be contrary to, or conflict with, an act of congress. U. S. *v.* New Bedford Bridge Co., 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401.

38. Smith *v.* Louisville, etc., R. Co., 62 Miss. 510.

39. Newbold *v.* Mead, 57 Pa. St. 487.

40. Volk *v.* Eldred, 23 Wis. 410.

41. See, generally, Pleading.

42. Tyrrell *v.* Lockhart, 3 Blackf. (Ind.) 136.

43. Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418.

44. Hall *v.* Kitson, 3 Pinn. (Wis.) 296, 4 Chandl. 20. But see Illinois River Packet Co. *v.* Peoria Bridge Assoc., 38 Ill. 467, holding proper to allege that the bridge materially obstructed the navigation.

45. Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629.

46. Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12.

47. Stephens, etc., Transp. Co. *v.* Central R. Co., 34 N. J. L. 280; Oregon City Transp. Co. *v.* Columbia St. Bridge Co., 53 Fed. 549. *Contra*, Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129.

48. Alabama, etc., Nav. Co. *v.* Georgia Pac. R. Co., 87 Ala. 154, 6 So. 73; Swanson *v.* Mississippi, etc., Boom Co., 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673; Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418; Hall *v.* Kitson, 3 Pinn. (Wis.) 296, 4 Chandl. 20.

49. Sweeney *v.* Chicago, etc., R. Co., 60 Wis. 60, 18 N. W. 756; Enos *v.* Hamilton, 27 Wis. 256. See also Farwell *v.* Smith, 16 N. J. L. 133.

50. Columbus Ins. Co. *v.* Curtenius, 6 Fed. Cas. No. 3,045, 6 McLean 209.

51. See Pleading.

52. Harold *v.* Jones, 98 Ala. 348, 11 So. 747, 97 Ala. 637, 639, 11 So. 747, 748; Harrison *v.* Sterett, 4 Harr. & M. (Md.) 540; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410.

53. Powers *v.* Irish, 23 Mich. 429.

54. Illinois River Packet Co. *v.* Peoria Bridge Assoc., 38 Ill. 467.

55. Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

56. Clark *v.* Lake, 2 Ill. 229 (evidence of other obstructions maintained by other persons is inadmissible); Powers *v.* Irish, 23 Mich. 429 (record held not admissible to prove dam was lawfully built); Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510 (presumptive evidence that cable unlawfully obstructed navigation); Newbold *v.* Mead, 57 Pa. St. 487 (evidence comparing old dam with new one not admissible unless similarity in their construction or dimensions is very decided). See Glick *v.* Weatherwax, 14 Wash. 560, 45 Pac. 156, admissions held to warrant the exclusion of evidence.

57. See Evidence.

58. Doxsey *v.* Long Island R. Co., 35 Hun (N. Y.) 362; Cantrell *v.* Knoxville, etc., R. Co., 90 Tenn. 638, 18 S. W. 271; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129. But see Silver *v.* Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410.

59. Oregon City Transp. Co. *v.* Columbia St. Bridge Co., 53 Fed. 549.

(VI) *DAMAGES.*[60] The damages recoverable are those which are peculiar to plaintiff and the natural and proximate consequence of the nuisance.[61] Probable earnings of a boat during the time it was delayed have been held recoverable,[62] but not purely speculative, damages.[63] In the federal courts, where both parties are in fault, the damages are usually divided.[64]

(VII) *INSTRUCTIONS AND QUESTIONS FOR JURY.*[65] The general rules relating to instructions in civil actions,[66] such as that they must not be misleading,[67] apply to instructions in actions to recover damages for obstructions.[68] The navigability of the stream,[69] the reasonableness of the use of the stream by defendant,[70] the existence of special damages to plaintiff,[71] what was a reasonable time for the removal of an obstruction,[72] and whether a bridge was constructed as required by the statute,[73] have been held to be questions for the jury.

e. Prosecutions[74] — (I) *IN GENERAL.* The obstruction of a navigable stream is indictable,[75] both at common law,[76] and by express statutory provisions in most of the states.[77] But the obstruction of navigable waters is not punishable as a crime in the federal courts unless contrary to some clause in the federal constitution or a treaty or an act of congress.[78] Generally a lessor is not liable for acts of his lessee,[79] and *vice versa.*[80] Where an act is a misdemeanor, all joining therein

60. See, generally, DAMAGES.

61. Powers *v.* Irish, 23 Mich. 429.

The increase in the expense of the work may be recovered as damages in an action for the obstruction where because thereof plaintiff was compelled to do a portion of his work on the river at increased expense in the ensuing season of low water. Gates *v.* Northern Pac. R. Co., 64 Wis. 64, 24 N. W. 494.

Where seed was being transported by boat and because of an obstruction by a bridge plaintiff was compelled to unload the seed but instead of procuring another conveyance left it exposed whereby it was injured, the measure of damages was the value of the boat for the time it was delayed, including reasonable wages paid to the crew, but no recovery was permissible for injury to the seed from exposure or for the cost of unloading. Farmers' Co-operative Mfg. Co. *v.* Albermarle, etc., R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700.

62. Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

63. Potter *v.* Indiana, etc., R. Co., 95 Mich. 389, 54 N. W. 956.

64. Atlee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619.

65. See, generally, TRIAL.

66. See TRIAL.

67. Edwards *v.* Wausau Boom Co., 67 Wis. 463, 30 N. W. 716.

68. See Martin *v.* Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; Texarkana, etc., R. Co. *v.* Parsons, 74 Fed. 408, 20 C. C. A. 481 (instruction held more favorable to objecting party than he was entitled to); Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281 (sufficiency of charge as to unskilfulness or neglect of plaintiff in handling his boat, contributing to the injury, as contributory negligence).

69. Southern R. Co. *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

70. Davis *v.* Winslow, 51 Me. 264, 81 Am. Dec. 573.

71. Harrison *v.* Sterett, 4 Harr. & M. (Md.) 540.

72. Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

73. Silver *v.* Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410.

74. Criminal law generally see CRIMINAL LAW.

75. Com. *v.* Gloucester, 110 Mass. 491; State *v.* Elk Island Boom Co., 41 W. Va. 796, 24 S. E. 590. See also Atty.-Gen. *v.* Harrison, 12 Grant Ch. (U. C.) 466.

76. State *v.* Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; State *v.* Thompson, 2 Strobh. (S. C.) 12, 47 Am. Dec. 588.

77. Ensworth *v.* Com., 52 Pa. St. 320; State *v.* Gainer, 3 Humphr. (Tenn.) 39. And see the statutes of the several states.

It is within the power of the state to make indictable any acts which would amount to an obstruction of a navigable stream. State *v.* White Oak River Corp., 111 N. C. 661, 16 S. E. 331.

Obstruction by mill dam. — An indictment cannot be sustained for obstructing a stream by erecting a mill dam across it, unless the stream was used at the time and place of the obstruction for purposes of navigation by boats, or flats, or rafts of lumber or timber. State *v.* Hickson, 5 Rich. (S. C.) 447.

78. U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401.

The River and Harbor Act of 1890 expressly provides for the punishment by fine or imprisonment of persons obstructing navigable waters of the United States without the consent of the federal government. Leovy *v.* U. S., 92 Fed. 344, 34 C. C. A. 392 [*reversed* on other grounds in 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914]. So the unlawful dumping of refuse in harbors is an indictable offense under the federal statutes. The Scow No. 36, 144 Fed. 932, 75 C. C. A. 572; U. S. *v.* Moran, 113 Fed. 172.

79. State *v.* Coe, 72 Me. 456.

80. State *v.* Emerson, 72 Me. 455.

are principals and may be prosecuted together.[81] Preliminary proceedings required by the statute must first be complied with.[82]

(II) *Defenses.* Statutory authority is an affirmative defense if compliance with the statute is shown.[83] It is a defense that the obstruction was for the purpose of promoting the health of the community.[84] A former indictment and conviction and compliance with the order as to alterations of the obstruction is a defense,[85] as is inability to comply with an order of the secretary of war directing municipal officers to alter a bridge.[86]

(III) *Indictment.*[87] The indictment must state *inter alia* the name of the stream, that the part obstructed is navigable, and specify the place where the obstruction is situated.[88] If the alleged obstruction is built pursuant to statutory authority the indictment must show wherein its construction failed to comply with the statute.[89] It has been held that preliminary proceedings required by the statute need not be set out in the indictment.[90] An indictment must negative exceptions in the statute,[91] and not charge two or more distinct offenses so as to be objectionable because of duplicity.[92] An indictment which is insufficient under the statute may be sustained as charging the common-law offense of obstructing navigable water.[93]

(IV) *Procedure.* Where the evidence is conflicting as to whether the stream is a navigable one,[94] or whether the injury was caused by an unavoidable accident,[95] the question is one for the jury. The instructions must be applicable to the issues,[96] and clearly state the law governing the case.[97] A special finding by the jury not clearly showing that the acts complained of were obstructions to navigation is insufficient to warrant the conviction of defendant.[98]

VI. PUBLIC USES OTHER THAN NAVIGATION.

A. In General. In addition to the right of the public to the free and unobstructed use of navigable waters for navigation,[99] the public has the right of fish-

81. Jaycox *v.* U. S., 107 Fed. 938, 47 C. C. A. 83.

82. Com. *v.* Plumer, 1 Am. L. Reg. (Pa.) 124. See U. S. *v.* Burns, 54 Fed. 351, holding that a prosecution under the federal statutes may be maintained, although neither the officers and agents of the United States in charge of works for the improvement of said waters, nor the collectors of customs or other revenue officers, have given information to the district attorney as provided for in the statute.

83. State *v.* Duplin Canal Co., 91 N. C. 637; Com. *v.* Church, 1 Pa. St. 105, 44 Am. Dec. 112. See also Clark *v.* Syracuse, 13 Barb. (N. Y.) 32.

84. Leovy *v.* U. S., 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914.

85. Ensworth *v.* Com., 52 Pa. St. 320.

86. Rider *v.* U. S., 178 U. S. 251, 20 S. Ct. 838, 44 L. ed. 1057 [*reversing* 50 Fed. 406].

87. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

88. Cox *v.* State, 3 Blackf. (Ind.) 193.

Allegations as to right to build and maintain structure.— An allegation in an indictment that a drawbridge over a navigable stream was "duly erected and legally maintained," by a certain railroad corporation, is a sufficient allegation that the corporation had a right to build across the river and to maintain a drawbridge over it. Com. *v.* Chase, 127 Mass. 7.

Charging the "obstructing and impeding" of navigation is insufficient where persons erecting the obstruction have a right by statute to obstruct so long as they do not prevent navigation. State *v.* Portland, etc., R. Co., 57 Me. 402.

89. See State *v.* Dundee Water Power, etc., Co., 71 N. J. L. 419, 58 Atl. 1094.

90. Com. *v.* Plumer, 1 Am. L. Reg. (Pa.) 124.

91. State *v.* Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; State *v.* Cullum, 2 Speers (S. C.) 581. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 344.

92. U. S. *v.* Burns, 54 Fed. 351.

93. State *v.* Baum, 128 N. C. 600, 38 S. E. 900.

94. State *v.* Twiford, 136 N. C. 603, 48 S. E. 586; Leovy *v.* U. S., 92 Fed. 344, 34 C. C. A. 392 [*reversed* on other grounds in 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914].

95. Randall *v.* U. S., 107 Fed. 935, 47 C. C. A. 80.

96. Leovy *v.* U. S., 92 Fed. 344, 34 C. C. A. 392 [*reversed* on other grounds in 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914].

97. State *v.* Baum, 128 N. C. 600, 38 S. E. 900; Randall *v.* U. S., 107 Fed. 935, 47 C. C. A. 80.

98. State *v.* Babcock, 30 N. J. L. 29.

99. See *supra*, V.

ing and hunting,[1] and the right to travel upon the ice,[2] and to cut ice formed upon navigable waters.[3]

B. Cutting Ice.[4] The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water and the riparian ownership of the bed of a stream carries with it the right to the ice forming upon the surface as far as the riparian right to the soil extends.[5] But, in the absence of a statute to the contrary,[6] where the state owns the bed of a stream, the right to cut ice thereon is a common right of the public, where there is no interference with any other person to a like enjoyment, subject only to such mere police regulations as the legislature may prescribe to preserve the common right.[7] Subject to such rules, one person has the same right to the ice formed upon public waters as has another until there has been an actual appropriation of such ice.[8]

1. See FISH AND GAME, 19 Cyc. 992.

2. State *v.* Wilson, 42 Me. 9; French *v.* Camp, 18 Me. 433, 36 Am. Dec. 728; Com. *v.* Christie, 13 Pa. Co. Ct. 149.

Nature of right.— The right to travel upon the ice is subordinate to the right to use the stream for navigation (Woodman *v.* Pitman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342), and no greater than the public right to cut ice (Woodman *v.* Pitman, *supra*. *Contra*, Com. *v.* Christie, 13 Pa. Co. Ct. 149), so that one using the ice as a highway cannot recover for injuries from the cutting of ice unless the persons cutting were negligent in guarding the places where the ice had been cut (Woodman *v.* Pitman, *supra*; Sickles *v.* New Jersey Ice Co., 153 N. Y. 83, 46 N. E. 1042 [*reversing* 80 Hun 213, 30 N. Y. Suppl. 10]). Where defendant cut holes in the ice of a navigable stream on or near the place where there had been a winterway for twenty years, he was liable for the loss of plaintiff's horse by drowning, plaintiff being lawfully traveling on the ice. French *v.* Camp, 18 Me. 433, 36 Am. Dec. 728.

3. See *infra*, VI, B.

4. On non-navigable waters see WATERS.

5. Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90; McFadden *v.* Haynes, etc., Ice Co., 86 Me. 319, 29 Atl. 1068; Hoag *v.* Place, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39.

Above the line of low water no right exists in the public where the riparian owner owns to the low water line. McFadden *v.* Haynes, etc., Ice Co., 86 Me. 319, 29 Atl. 1068.

6. American Ice Co. *v.* Catskill Cement Co., 99 N. Y. App. Div. 31, 90 N. Y. Suppl. 801 [*reversing* 43 Misc. 221, 88 N. Y. Suppl. 455] (holding that where, by statute, the right to the ice is given to the riparian owner without prejudice to the unrestricted use of other riparian lands for any lawful purpose, an ice company which is a riparian owner cannot enjoin a manufacturing plant located on the banks from operation during the freezing season, on the ground that dust, cinders, etc., are deposited upon the ice); Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12 (holding that an upland owner who has not erected icehouses, etc., and therefor has no existing ice privileges, is nevertheless entitled to damages for any impairment of the privilege of acquiring such right).

7. *Iowa.*— Brown *v.* Cunningham, 82 Iowa 512, 48 N. W. 1042, 12 L. R. A. 583.

Kansas.— Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330.

Maine.— McFadden *v.* Haynes, etc., Ice Co., 86 Me. 319, 29 Atl. 1068; Brastow *v.* Rockport Ice Co., 77 Me. 100.

Massachusetts.— People's Ice Co. *v.* Davenport, 149 Mass. 322, 21 N. E. 385, 14 Am. St. Rep. 425.

New Hampshire.— Concord Mfg. Co. *v.* Robertson, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679.

Wisconsin.— Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.

Canada.— See Lake Simcoe Ice, etc., Co. *v.* McDonald, 31 Can. S. Ct. 130 [*reversing* 26 Ont. App. 411 (*reversing* 29 Ont. 247)].

See 37 Cent. Dig. tit. "Navigable Waters," § 173.

Right to cut passage for ice.— An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their icehouses, and for that purpose may cut a channel through private water lots through which to float the ice. Lake Simcoe Ice, etc., Co. *v.* McDonald, 31 Can. Sup. Ct. 130 [*reversing* 26 Ont. App. 411 (*reversing* 29 Ont. 247)]. See also Cullerton *v.* Miller, 26 Ont. 36.

8. Becker *v.* Hall, 116 Iowa 589, 88 N. W. 324, 56 L. R. A. 573.

As to what will amount to an appropriation the authorities are not entirely harmonious but the true rule seems to be that there can be an appropriation only when the ice is fairly merchantable and when the appropriator has the present intention and ability to proceed at once to the harvest of the ice and does so proceed with reasonable diligence. Becker *v.* Hall, 116 Iowa 589, 88 N. W. 324, 56 L. R. A. 573. In Massachusetts and in Maine it is held that the mere marking or staking off of ice fields does not constitute such an appropriation as will vest the right to the ice. Barrett *v.* Rockport Ice Co., 84 Me. 155, 24 Atl. 802, 16 L. R. A. 774; People's Ice Co. *v.* Davenport, 149 Mass. 322, 21 N. E. 385, 14 Am. St. Rep. 425. See also Rowell *v.* Doyle, 131 Mass. 474.

Possession to support trespass.— One having surveyed, marked, and staked off ice unappropriated by another on a navigable river,

The state is not the owner of ice formed on public waters,[9] and has no right to sell it.[10] The limit of state authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so.[11] Persons navigating a stream are liable for injuries to ice harvesters resulting from breaking up the ice by running unnecessarily close to a boom protecting the ice.[12] An ice company has no right to deposit the snow scraped from its ice upon the flats of an adjoining owner without the latter's consent.[13]

C. Seaweed. So long as seaweed is floating, it belongs to anyone who can gain access to it and take possession thereof.[14] And while it is growing below low water mark it belongs to the public.[15] But when it is cast upon the beach, it belongs to the owner of the upland and shore,[16] except where the public right is reserved by a stipulation in the deed of the beach.[17] In some states, by statute, the public is given the right to gather seaweed on a public beach.[18] No right to take seaweed is acquired, by custom or prescription, merely because the inhabitants of a town have always been accustomed to take seaweed from the beach.[19]

D. Bathing. The right to bathe in a public stream is not an absolute right,[20] but is subject to the rights of the public and to the duties owed to the public.[21]

E. Use of Shores or Banks.[22] The general rule is that the public has no right to use the banks of navigable streams,[23] unless it has been acquired by express grant or prescription.[24] On the other hand, where the sea-shore belongs to the state, the public's right to use it for passage, navigation, and fishing extends to all lands below high water mark not used, built upon, or occupied so as to prevent the passage of boats and the natural ebb and flow of the tide.[25]

and having expended money to preserve it and make it valuable for use as a commercial commodity, has a possession sufficient to support an action of trespass by him against any person who enters thereon and takes and carries it away. Hickey *v.* Hazard, 3 Mo. App. 480.

Those persons who first take possession thereof are entitled to the ice without interference from others, such right being the subjects of qualified property by occupation. Woodman *v.* Pittman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342.

9. Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.

10. Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.

11. Barrows *v.* McDermott, 73 Me. 441.

12. People's Ice Co. *v.* The Excelsior, 44 Mich. 229, 6 N. W. 636, 38 Am. Rep. 246.

13. McFadden *v.* Haynes, etc., Ice Co., 86 Me. 319, 29 Atl. 1068.

14. Anthony *v.* Gifford, 2 Allen (Mass.) 549.

Drift.— Seawood, between high and low water mark, which during flood tide is moved by each rising and receding wave, is adrift, within the meaning of Mass. Gen. St. c. 83, § 20, although the bottom of the mass may touch the beach. Anthony *v.* Gifford, 2 Allen (Mass.) 549.

15. Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707.

16. See *infra*, VII, F, 3.

17. Parsons *v.* Miller, 15 Wend. (N. Y.) 561, holding, however, that the stipulation that the grantee shall allow all people to pass and repass to fish, etc., and to do any business they shall have to do on said beach, did not confer the right on the public to take seaweed from the beach. See Hill *v.* Lord, 48 Me. 83.

18. Church *v.* Meeker, 34 Conn. 421, holding that the statute requires the removal of seaweed from a public beach within twenty-four hours after it is heaped up on the beach.

19. Hill *v.* Lord, 48 Me. 83.

20. Hunt *v.* Graham, 15 Pa. Super. Ct. 42; Rex *v.* Crunden, 2 Campb. 89, 11 Rev. Rep. 671; Reg. *v.* Reed, 12 Cox C. C. 1.

In England there is no right at common law in the public to bathe in the sea from a foreshore belonging to a private owner. Brinckman *v.* Matley, [1904] 2 Ch. 313, 68 J. P. 161, 73 L. J. Ch. 160, 2 Loc. Gov. 258, 90 L. T. Rep. N. S. 199, 20 T. L. R. 180, 52 Wkly. Rep. 363.

21. Hunt *v.* Graham, 15 Pa. Super. Ct. 42.

22. **By riparian owners** see *infra*, VII, F.

In connection with navigation see *supra*, V, A, 5.

23. Reimold *v.* Moore, 2 Mich. N. P. 15; Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366. But see State *v.* Wilson, 42 Me. 9.

Trespass lies by a riparian owner against one who deposits wood, stones, etc., on the shore of the river in a manner not in the exercise of the public easement on such river as a highway. Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

24. Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102.

25. Rhode Island Motor Co. *v.* Providence, (R. I.) 55 Atl. 696.

VII. RIPARIAN AND LITTORAL RIGHTS.[26]

A. In General. The owner of land bounded upon navigable waters has certain rights therein other than those belonging to the public,[27] and such rights are termed "riparian rights." They do not depend upon ownership of the soil to the center of the stream,[28] and are the same in artificial as in natural waterways.[29] They constitute property of which he cannot be deprived, in general, without compensation.[30] In most jurisdictions these rights include *inter alia*: (1) The right of access to the water; (2) the right to build a pier out to navigable water; (3) the right to accretions; and (4) the right to a reasonable use of the water as it flows past the land.[31] In some states the littoral proprietor has also a preferred right to purchase tide-land subject to sale by the state.[32] The riparian owner must exercise his rights in such a manner as not to interfere with

26. Grants of riparian rights see *infra*, IX, A, 4; IX, C.

Rights and liabilities of municipalities in general see MUNICIPAL CORPORATIONS.

Right to construct dam see *supra*, V, B, 3, a.

Taxation see TAXATION.

27. Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618; North Hempstead *v.* Gregory, 66 N. Y. Suppl. 28.

Land acquired by condemnation.— A company which has acquired land abutting on navigable waters by condemnation acquires the riparian rights belonging thereto. Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722.

28. Bigham *v.* Port Arthur Canal, etc., Co., (Tex. Civ. App. 1905) 91 S. W. 848; Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126.

Tidal or non-tidal.— The rights of a riparian proprietor against adjoining or opposite riparian proprietors are no greater in a tidal than in a non-tidal river. Atty.-Gen. *v.* Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. 335, 20 L. T. Rep. N. S. 64, 17 Wkly. Rep. 219.

29. Beidler *v.* Sanitary Dist., 211 Ill. 628, 71 N. E. 1118, 67 L. R. A. 820.

Artificial channel.— Riparian rights are the same in an artificial channel, owing to a diversion of the course of the stream, as in the natural channel. Lathrop *v.* Racine, 119 Wis. 461, 97 N. W. 192.

30. Sutter *v.* Heckman, 1 Alaska 188; *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500; Sage *v.* Mayor, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606. See also Fuller *v.* Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146; Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649. And see EMINENT DOMAIN, 15 Cyc. 648 *et seq.*

Cutting off right of access see *infra*, VII, E.

Liability of state to riparian owner injured by improvement of waterway see *supra*, III, A, 2.

31. Ockerhausen *v.* Tyson, 71 Conn. 31, 40 Atl. 1041; Taylor *v.* Com., 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865. See also Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; and *infra*, VII, D, E, H, I.

Where the riparian owner is the state, the riparian rights incident to such ownership belong to the public. Pewaukee *v.* Savoy, 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L. R. A. 836.

Effect of failure to exercise.— The mere fact that an owner of riparian rights has never exercised the rights does not impair or abridge them as against an adjoining owner. Ockerhausen *v.* Tyson, 71 Conn. 31, 40 Atl. 1041.

Cove rights.— A riparian owner on a cove has no exclusive rights on the [illegible] stream but his rights are confined to the cove and to be exercised therein. Richards *v.* New York, etc., R. Co., 77 Conn. 501, 60 Atl. 295, 69 L. R. A. 929. On the other hand, the fact that a riparian owner has a water frontage on the river other than that of the cove does not lessen his rights in the waters of the cove and in the flats over which they flowed. Ockerhausen *v.* Tyson, 71 Conn. 31, 40 Atl. 1041.

Division of rights and actions.— Where lands bordering upon a navigable stream are partitioned, and by agreement of the owners the riparian rights belonging thereto are not divided, but remain their joint property, they can still maintain a joint action against a railroad company for damages to such rights caused by the company's wrongful construction of tracks and buildings. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96.

The rights of a city as a riparian owner are not divested by the fact that a railroad company occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of a city ordinance; but the city still has the right to exercise such riparian rights, subject to the terms of the ordinance. Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018.

A mere sluiceway is not a watercourse so as to confer riparian rights on abutting owners. Chamberlain *v.* Hemingway, 63 Conn. 1, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45.

32. See PUBLIC LANDS. And see *infra*, VIII, C.

the riparian rights of others,[33] or with the rights of the public.[34] He has no right to deflect the stream into a new channel by obstructions placed across the main current.[35]

B. What Law Governs. The nature and extent of the rights of riparian owners is to be determined by the courts of the state as a matter of local law subject to the right of congress to regulate public navigation and commerce.[36] But where an island in a navigable river had been surveyed prior to the admission of the state, riparian rights are to be determined by the rules of the common law and not by the law of the state, so long as it remains undisposed of by the United States.[37]

C. Who Are Riparian Owners. Ownership in fee is not necessary to entitle one to riparian rights.[38] Where land is described as lying in the vicinity of, and on the margin of, a bay, the grantee is a shore owner.[39] Strictly speaking, a grantee of land under water is not a riparian owner merely because of his ownership of such land.[40] An intervening public street or other public way between private owners and the exterior line of the water front prevents the acquisition of riparian rights by the owners of the opposite side of the street.[41]

D. Use of Water. The water of a stream is not the subject of ownership in the ordinary sense,[42] but the right of property is in the right to use its flow and not in the specific water.[43] A riparian owner has the right to have the water

33. Ockerhausen *v.* Tyson, 71 Conn. 31, 40 Atl. 1041.

34. Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606.

35. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162.

36. St. Anthony Falls Water-Power Co. *v.* Water Com'rs, 168 U. S. 349, 18 S. Ct. 157, 42 L. ed. 497; Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331.

Accretions.— Each state has the power to settle for itself the title to land formed by accretions within its boundaries. Frank *v.* Goddin, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493.

37. Widdicombe *v.* Rosemiller, 118 Fed. 295.

38. Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722; Lewis *v.* Johnson, 76 Fed. 476, holding that citizens of the United States claiming, in good faith, uplands in Alaska, and in actual possession thereof, take the same littoral rights as are incident to ownership in fee.

But one having a contract for the purchase of riparian land on conditions not yet fulfilled by him has been held to have no rights as a riparian owner. Smith *v.* Logan, 18 Nev. 149, 1 Pac. 678.

39. Morris Canal, etc., Co. *v.* Brown, 27 N. J. L. 13.

40. Turner *v.* People's Ferry Co., 21 Fed. 90.

41. Allen *v.* Munn, 55 Ill. 486; St. Louis Public Schools *v.* Risley, 10 Wall. (U. S.) 91, 19 L. ed. 850; Banks *v.* Ogden, 2 Wall. (U. S.) 57, 17 L. ed. 818; Turner *v.* People's Ferry Co., 21 Fed. 90. *Contra*, Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715.

Description.— Where a lot was originally granted, bounding on a street, although the grant describes this front as facing on the river, the grantee is not a riparian proprietor. Smith *v.* St. Louis Public Schools, 30 Mo. 290.

Grantor.— Where the ownership in fee of that half of the street next to the river remains in the grantor, he is the riparian proprietor. Brishine *v.* St. Paul, etc., R. Co., 23 Minn. 114.

Street not opened.— The fact that the portion of a street lying in front of certain property has never been actually opened by the city as a thoroughfare could not give the owner of such property title to the land and water on the river front opposite and across the space appropriated for the street. Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946.

Effect of statutes.— Where, after riparian owners had consented to the location of a street in front of their lots but under water on lands belonging to the state, a statute was enacted which gave such lot owners the right to extend the whole front of their lots as far as they should see fit into the river, it reinstated the owners with riparian rights interrupted by the location of such street. Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166.

42. Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582.

43. Lancey *v.* Clifford, 54 Me. 487, 92 Am. Dec. 561.

Usufructuary right.— The right of the adjacent proprietor to the water of the stream is a usufructuary right, appurtenant to the freehold and not an absolute property. Walker *v.* Bd. of Public Works, 16 Ohio 540.

Diversion for municipal water-supply.— The rights of riparian owners are subordinate to the right of a municipality to draw its water-supply therefrom without compensation to the riparian owners. Minneapolis Mill Co. *v.* St. Paul, 56 Minn. 485, 58 N. W. 33; Crill *v.* Rome, 47 How. Pr. (N. Y.) 398.

remain in place and to make such use of it as not to interfere with the rights of others.[44] This includes a qualified right to the use of the water free from pollution.[45] A riparian owner on a navigable river may use the water flowing past his land for any reasonable purpose so long as he does not obstruct navigation.[46] Of course he cannot use it so as to pollute it unreasonably.[47] Statutes oftentimes authorize the use of the water of navigable streams by mill owners,[48] or for

Contra, Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393, holding that the state has no right to divert the waters of the small lakes and streams of New York, which are navigable, but in which the tide does not ebb and flow, for any other purposes than those of navigation, except under its power of eminent domain, on making just compensation.

Diversion for canal.— Diversion by the state for the purposes of a canal gives no right of action to riparian owners. People *v.* Canal Appraisers, 33 N. Y. 461.

44. Barrett *v.* Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758; Holyoke Water Power Co. *v.* Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133.

A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage. Saunders *v.* William Richards Co., 2 N. Brunsw. Eq. 303.

The vested rights of a littoral owner upon a navigable lake, under a patent issued prior to the adoption of the state constitution, to the uninterrupted use of the water in its natural flow or condition, continues unimpaired by the constitution and cannot be divested except under the power of eminent domain upon the making of compensation. Madson *v.* Spokane Valley Land, etc., Co., 40 Wash. 414, 82 Pac. 718, 6 L. R. A. N. S. 257, where the diversion of the waters and the use of a dam by an irrigation company was enjoined. See also EMINENT DOMAIN, 15 Cyc. 648 *et seq.*

Stream divided by island.— Where the water of a navigable river is divided by an island, so that only one fourth of the stream descends on one side of the island, and the residue on the other, the owner of the shore where the largest quantity flows is entitled to the use of the whole water flowing there, and the owner of the other shore has no right to place obstructions at the head of the island, and cause one half of the stream to descend on his side of the river. Crooker *v.* Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555.

45. Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691. See, generally, NUISANCES; WATERS.

As dependent on title below high water mark.— Where the riparian owner has no title beyond high water mark, he is not entitled to an injunction on account of the pollution of the stream. Simmons *v.* Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L. R. A. 717.

46. *Illinois.*—Washington Ice Co. *v.* Shortall, 101 Ill. 46, 40 Am. Rep. 196.

Kentucky.— Thurman *v.* Morrison, 14 B. Mon. 296.

Minnesota.—State *v.* Minneapolis Mill Co., 26 Minn. 229, 2 N. W. 839; Morrill *v.* St. Anthony Falls Water-Power Co., 26 Minn. 222, 2 N. W. 842, 37 Am. Rep. 399.

New York.— Varick *v.* Smith, 9 Paige 547.

United States.—Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246.

See 37 Cent. Dig. tit. "Navigable Waters," § 245.

Compare Stokes *v.* Upper Appomatox Co., 3 Leigh (Va.) 318.

Nature of right.— A mere opportunity, on account of the situation of a mill, to use the tides as a motive power for it, is not an easement which can be so disturbed as to confer a right of action. Folsom *v.* Freeborn, 13 R. I. 200.

Irrigation.— But the taking of water from a stream for the purposes of irrigation is not an ordinary or natural use within the rule giving riparian owners the absolute right to such uses. Watkins Land Co. *v.* Clements, 98 Tex. 578, 86 S. W. 733, 107 Am. St. Rep. 653, 70 L. R. A. 964 [*reversing* 36 Tex. Civ. App. 339, 82 S. W. 665]; Bigham *v.* Port Arthur Canal, etc., Co., (Tex. Civ. App. 1905) 91 S. W. 848 [*reversed* on other grounds in (1906) 97 S. W. 686]; Barrett *v.* Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758.

Right not exclusive.— A riparian proprietor, even though he owns to the thread of the stream, has no right to the exclusive use of the water over such land, but his right is subordinate to the paramount easement of navigation by the public, which included the right to use such waters for navigation and commerce and such uses as may be reasonably incident thereto. Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582.

The state, if a riparian owner, is entitled to have the ordinary flow of water remain in the channel, and to have it come to its lands undiminished in quantity and unimpaired in quality by the act of any other of the owners thereof, subject to the use of the passing water, in a reasonable manner, for domestic and irrigation purposes. McCarter *v.* Hudson County Water Co., 70 N. J. Eq. 525, 61 Atl. 710; Doremus *v.* Paterson, 65 N. J. Eq. 711, 55 Atl. 304.

47. See NUISANCES; WATERS.

48. Rundle *v.* Delaware, etc., Canal Co., 21 Fed. Cas. No. 12,139, 1 Wall. Jr. 275 [*affirmed* in 14 How. 80, 14 L. ed. 335], holding that such a grant is a mere license revocable at pleasure.

irrigation purposes where such use will not destroy the navigability of the stream nor materially injure riparian owners.[49]

E. Access to Water. The owner of land bounded by navigable waters has a right to free communication between his premises and the navigable channel of the river.[50] This riparian right of access is strictly the right of access to the front of the property and does not include the right of access to the sides of piers.[51] The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability,[52] and is the same whether the land abuts on tidal or non-tidal water.[53] This right of access is property,[54] and while the right does not prevent the state from assuming jurisdiction and control over the bed and banks between high and low water marks,[55] yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought,[56] except where the right has been obtained by emi-

49. Kalez *v.* Spokane Valley Land, etc., Co., 42 Wash. 43, 84 Pac. 395, holding that the state has a right, as against riparian owners, to confer upon others irrigation rights in the waters of a navigable lake, where the irrigation operations do not cause the water to rise higher than high water mark or fall lower than low water mark. See also WATERS.

50. *Alaska.*— Juneau Ferry Co. *v.* Alaska Steamship Co., 1 Alaska 533; Sutter *v.* Heckman, 1 Alaska 81.

Iowa.— Park Com'rs *v.* Taylor, (1906) 108 N. W. 927.

Maryland.— Garitee *v.* Baltimore, 53 Md. 422.

Minnesota.— Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

New York.— Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618; People *v.* Woodruff, 30 N. Y. App. Div. 43, 51 N. Y. Suppl. 515; Hedges *v.* West Shore R. Co., 80 Hun 310, 30 N. Y. Suppl. 92 [*reversed* on other grounds in 150 N. Y. 150, 44 N. E. 691, 55 Am. St. Rep. 660]; Saunders *v.* New York Cent., etc., R. Co., 24 N. Y. Suppl. 659 [*affirming* 71 Hun 153, 23 N. Y. Suppl. 927, 30 Abb. N. Cas. 88].

Rhode Island.— Rhode Island Motor Co. *v.* Providence, (1903) 55 Atl. 696.

United States.— Lewis *v.* Johnson, 76 Fed. 476; Paine Lumber Co. *v.* U. S., 55 Fed. 854; Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684.

England.— Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, 46 L. J. Ch. 68, 35 L. T. Rep. N. S. 569, 25 Wkly. Rep. 165.

Canada.— Pion *v.* North Shore R. Co., 14 Can. Sup. Ct. 677; Byron *v.* Stimpson, 17 N. Brunsw. 697; Reg. *v.* Buffalo, etc., R. Co., 23 U. C. Q. B. 208.

See 37 Cent. Dig. tit. "Navigable Waters," § 243.

Different from public right.—A riparian proprietor has a right of access distinguished from his right as one of the general public to use navigable water. Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, 46 L. J. Ch. 68, 35 L. T. Rep. N. S. 569, 25 Wkly. Rep. 165; Atty.-Gen. *v.* Thames Conservators, 1 Hem. & M. 1, 8 Jur. N. S. 1203, 8 L. T. Rep. N. S. 9, 1 New Rep. 121, 11 Wkly. Rep. 163, 71 Eng. Reprint 1.

Must be riparian owner.— However, an owner of upland has no right to trespass on the land of another for the purpose of reaching the navigable waters beyond. Coudert *v.* Underhill, 107 N. Y. App. Div. 335, 95 N. Y. Suppl. 134; Brookhaven *v.* Smith, 98 N. Y. App. Div. 212, 90 N. Y. Suppl. 646.

Where different persons own portions of the upland shore line of a small semicircular bay, each party can have only an equitable portion of the approaches to deep water, and a court of equity will protect their several rights by injunction. Martin *v.* Heckman, 1 Alaska 165.

Right to have tide flow to property.— The right of access does not include the right to have the tide flow to the property if it is not accessible by navigation from the sea. Henry *v.* Newburyport, 149 Mass. 582, 22 N. E. 75, 5 L. R. A. 179.

51. Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927. And see *infra*, VII, H, 6.

52. San Francisco Sav. Union *v.* R. G. R. Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606; Taylor *v.* Com., 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984.

53. Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, 45 L. J. Ch. 68, 35 L. T. Rep. N. S. 569, 25 Wkly. Rep. 165.

54. Rhode Island Motor Co. *v.* Providence, (R. I. 1903) 55 Atl. 696.

55. Park Com'rs *v.* Taylor, (Iowa 1906) 108 N. W. 927.

56. *Maryland.*— Garitee *v.* Baltimore, 53 Md. 422, holding that the common-law right of a landowner to recover damages from one who obstructs his access to a river is not affected by the existence of statutes prescribing penalties for obstructing the navigation of the river.

New York.— Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618 [*overruling* Gould *v.* Hudson River R. Co., 6 N. Y. 522].

nent domain or the interference is the improvement of the navigation of the river by the state or regulation of commerce by congress.[57] Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction.[58]

F. Use of Shores and Banks[59] — **1. In General.** Generally a riparian owner has the right to the exclusive use of the banks of a stream,[60] subject to the rights of the public.[61] Where the water is tide water, even though the littoral proprietor does not own the shore, he has an easement in it and the right to appropriate it

Pennsylvania.— Briggs *v.* Pfeil, 25 Pittsb. Leg. J. N. S. 18.

Rhode Island.— Rhode Island Motor Co. *v.* Providence, (1903) 55 Atl. 696.

Wisconsin.— Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386.

England.— North Shore R. Co. *v.* Pion, 14 App. Cas. 612, 59 L. J. P. C. 25, 61 L. T. Rep. N. S. 525; Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, 46 L. J. Ch. 68, 35 L. T. Rep. N. S. 569, 25 Wkly. Rep. 165; Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1.

See 37 Cent. Dig. tit. "Navigable Waters," § 244.

Compare San Francisco Sav. Union *v.* R. G. R. Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242.

Contra.— Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. Rep. 269. See EMINENT DOMAIN, 15 Cyc. 650 note 84.

Liability of railroad company.—A riparian owner is entitled to such damages as he may have sustained as against a railroad company that constructs its road across his water front, and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. Rumsey *v.* New York, etc., R. Co., 136 N. Y. 543, 32 N. E. 979 (measure of damages); Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618 [*reversing* 15 N. Y. Suppl. 509]; Rumsey *v.* New York, etc., R. Co., 125 N. Y. 681, 25 N. E. 1080 [*reversing* 4 N. Y. Suppl. 293]; Ormerod *v.* New York, etc., R. Co., 13 Fed. 370, 21 Blatchf. 106. *Contra,* see Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa 106, 7 Am. Rep. 176; Gould *v.* Hudson River R. Co., 6 N. Y. 522 [*affirming* 12 Barb. 616]; Getty *v.* Hudson River R. Co., 21 Barb. (N. Y.) 617.

Statutes providing for assessments by harbor commissioners for the displacement of tide-water by structures have been held to apply only to structures voluntarily erected under some authority or license. Bradford *v.* Old Colony R. Co., 181 Mass. 33, 63 N. E. 6.

57. Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618. And see *supra,* III, A, 2.

58. Shirley *v.* Bishop, 67 Cal. 543, 8 Pac. 82.

59. By navigators see *supra,* V, A. 5.
By public in general see *supra,* VI, E.

60. Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; Williamsburg Boom Co. *v.* Smith, 84 Ky. 372, 1 S. W. 765, 8 Ky. L. Rep. 369; Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366 (rule limited to fresh water); Sisson *v.* Cummings, 35 Hun (N. Y.) 22 [*reversed* on other grounds in 106 N. Y. 56, 12 N. E. 345]. But see Com. *v.* Young Men's Christian Assoc., 169 Pa. St. 24, 32 Atl. 121, holding that a riparian owner cannot exclusively occupy land lying between high and low water marks by a permanent structure foreign to purposes of navigation, although there is no material appropriation of navigable water or of shore line.

The banks of a stream navigable only in times of freshets for floating logs belong absolutely to the riparian proprietor, in the absence of any claim of prescription or user. Hubbard *v.* Bell, 54 Ill. 110, 5 Am. Rep. 98.

The owner of land bordering on waters where the tide ebbs and flows, or on inland navigable waters where the tide does not ebb and flow, has a legal right to possess and occupy the land between high and low water mark, subject, however, to the right of the state to take the land for its own use, or to authorize it to be taken by a corporation for public use, and also subject to the right of the public to use it in aid of navigation. Sisson *v.* Cummings, 35 Hun (N. Y.) 22 [*reversed* on other grounds in 106 N. Y. 56, 12 N. E. 345].

Liability of navigators.— Where a navigator keeps his vessels for an unreasonable length of time between high and low water mark and makes a profit out of such use of the property, he is liable to a riparian owner in damages for such use. Wall *v.* Pittsburg Harbor Co., 152 Pa. St. 427, 25 Atl. 647, 34 Am. St. Rep. 667.

Construction of buildings.—Where the title of the riparian owner extends to low water mark, he may construct a building between high and low water mark. State *v.* Longfellow, 169 Mo. 109, 69 S. W. 374.

61. Zug *v.* Com., 70 Pa. St. 128 [*reversing* on other grounds 18 Pittsb. Leg. J. 92].

Even though the title extends to low water mark a riparian owner must use land between low and high water mark so as not to injure either the public or another such owner. Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206. See McKeesport Gas Co. *v.* Carnegie Steel Co., 189 Pa. St. 509, 42 Atl. 42.

Right as against boom company.— The title is limited in so far as such space is concerned and cannot prevail as against the right of a boom company, organized under the

to his exclusive use.[62] Under the civil law which prevails in Louisiana, however, the use of banks by riparian owners is subject to the right of the public to use them in connection with navigation.[63]

2. Protection of Banks. When a bank is being worn away by the water, the riparian owner,[64] or a third person with his consent,[65] may erect a structure to protect the bank so long as the rights of navigation are not thereby obstructed.

3. Stranded Property and Wrecks.[66] The right to seaweed stranded on a beach is a private right in the shore belonging to the owner of the land bordering on the beach,[67] and the right to take seaweed may be the subject of grant.[68] So the owner of the seashore has title to and possession of wreck thrown upon his shore and never reclaimed by the original proprietor.[69]

statutes, to raise the water in carrying on its business until it fills the intervening space. Gniadek *v.* Northwestern Imp., etc., Co., 73 Minn. 87, 75 N. W. 894.

Highways.— Where a highway extends to the edge of a river the ownership of shore lands and land under water is subject to the public right of passing thereon to the water's edge. Helfenstein *v.* Reichenbach, 23 Pa. Co. Ct. 66.

62. Stockham *v.* Browning, 18 N. J. Eq. 390. See also *infra*, VII, G.

But he cannot maintain an action for use and occupation where he has not reclaimed or improved the shore. Stewart *v.* Fitch, 31 N. J. L. 17. When a party, using land between high and low water mark for the purpose of securing rafts, pays to the shore owner a bill presented for the use thereof, as a compromise to avoid trouble, denying the right of the shore owner to demand such payment, it cannot be construed into an admission of the shore owner's right to demand and receive rent for the flats, nor does it raise an implied promise to pay for their future use and occupation. Stewart *v.* Fitch, *supra*.

The owner of a beach may restrain the building of a sea wall on an improper line where it will interfere with his use of the beach. Fisk *v.* Ley, 76 Conn. 295, 56 Atl. 559. The owner of flats has no power, as against adjoining owners, to prevent the erection of structures obstructing the tide, where not cutting off the right of access. Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91.

Use of tide-lands by city for speedway.— The title to tide-lands and land under water reserved to the city of New York does not extend to any public use not connected with navigation or commerce, and hence the city cannot build a speedway from which is excluded all forms of commercial traffic, without making compensation to the riparian proprietors. *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500.

In Washington, however, an occupant of tide-lands belonging to the state, although he may, under the provisions of the Tide-Land Act, possess a preference right of purchasing the same by virtue of improvements made thereon, cannot enjoin the occupation and use by another of the tide-lands lying in front of his improvements when his access to navigable water is not thereby materially interfered with. Morse *v.* O'Connell, 7 Wash. 117, 34 Pac. 426.

63. Hart *v.* Baton Rouge, 10 La. Ann. 171; Dennistoun *v.* Walton, 8 Rob. (La.) 211; Hanson *v.* Lafayette,, 18 La. 295. See also *supra*, V, A, 5.

Where a bulkhead is thrown forward, not for protection from inundation, but to establish a new landing line on the river front of a city, the land behind the bulkhead does not thereby become private property so as to attach to the ownership of the upland. St. Anna's Asylum *v.* New Orleans, 104 La. 392, 29 So. 117.

64. Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

To secure accretions.—An owner of land bounded by a navigable stream has the right to protect his soil against inroads of the water to secure accretions which form against his bank. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162.

Injury to opposite riparian owner.— But a riparian proprietor has no right to construct a jetty for the protection of his own soil or otherwise to the injury of an opposite riparian proprietor. Atty.-Gen. *v.* Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. 335, 20 L. T. Rep. N. S. 64, 17 Wkly. Rep. 219.

On land of state.—An owner of land on the Great Lakes has no common-law right as riparian owner to wharf out into the lake in order to protect the shore of his land from erosion, although he may erect structures on his own land for such purpose. Revell *v.* People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790.

65. Slater *v.* Fox, 5 Hun (N. Y.) 544.

66. **Logs stranded on shore** see Logging, 25 Cyc. 1577.

Obstruction to navigation see *supra*, V, B, 1, d.

Rights of public see *supra*, VI, F, 2.

67. Church *v.* Meeker, 34 Conn. 421; Hill *v.* Lord, 48 Me. 83; Emans *v.* Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427; Carr *v.* Carpeuter, 22 R. I. 528, 48 Atl. 805, 53 L. R. A. 333. *Contra*, Mather *v.* Chapman, 40 Conn. 382, 16 Am. Rep. 46, holding that while the littoral proprietor has the right to seaweed cast by extraordinary floods above ordinary high water mark, he has no exclusive right to seaweed cast on the shore between high and low water mark, where he does not own the shore.

68. See Cushing *v.* Worrick, 9 Gray (Mass.) 382.

69. Barker *v.* Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678. See also Salvage.

G. Reclamation and Improvement of Submerged Lands[70] — **1. Right to Reclaim or Improve.** In many of the states, by statute or custom, the private owner of lands to high water mark has the privilege of reclaiming the lands of the state lying under water in front of his land up to the line of navigability.[71] The establishment by legislative authority of a harbor or dock line in navigable waters is an implied grant to the owners of the adjacent upland of the right to build on or fill up the land under water up to such line.[72] The right to reclaim

70. **Wharves, piers, and docks** see *infra*, VII, H.

71. Goodsell *v.* Lawson, 42 Md. 348; Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 31 Am. Rep. 290; Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. St. Rep. 269; Simpson *v.* Moorehead, 65 N. J. Eq. 623, 56 Atl. 887; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018 [*affirming* 33 Fed. 730]; Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543 [*affirming* 16 Fed. 816]. See also Scully *v.* Com., 188 Mass. 178, 74 N. E. 342; Bradford *v.* Metcalf, 185 Mass. 205, 70 N. E. 40; People *v.* Central R. Co., 48 Barb. (N. Y.) 478, 33 How. Pr. 407 [*reversed* on other grounds in 42 N. Y. 283]; Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102; Furman *v.* New York, 5 Sandf. (N. Y.) 16; Van Dolsen *v.* New York, 17 Fed. 817, 21 Blatchf. 454. But see Musser *v.* Hershey, 42 Iowa 356; Saunders *v.* New York Cent., etc., R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L. R. A. 378; North Hempstead *v.* Gregory, 66 N. Y. Suppl. 28; McKeesport Gas Co. *v.* Carnegie Steel Co., 189 Pa. St. 509, 42 Atl. 42.

In Maryland, by statute, riparian proprietors are given the exclusive right to make improvements in the waters in front of their lands and such improvements, when made, belong to them as an incident to their estate. Horner *v.* Pleasants, 66 Md. 475, 7 Atl. 691; Garitee *v.* Baltimore, 53 Md. 422; Goodsell *v.* Lawson, 42 Md. 348; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Baltimore *v.* McKim, 3 Bland (Md.) 453. The bedding of oysters is not an "improvement" within the statute. Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673. The owner of a perpetual leasehold in lots is a proprietor within the statute. Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166, holding that the lessee may maintain ejectment for lots thus made by the lessee.

Right of third person to fill in.— Filling in the flats of an adjoining riparian owner is an act of disseizin. Ladies' Seaman's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658. Where a third person enters on a riparian lot and fills in front thereof without the consent of the riparian owner, the improvement belongs to the latter. Baltimore *v.* St. Agnes Hospital, 48 Md. 419. *Contra*, Austin *v.* Rutland R. Co., 45 Vt. 215.

Power of city.— Under a city charter giving the city power to establish landing places and to fix the rates of landing for all steamboats, etc., the city has authority to widen and improve a street along the banks of the river, by filling in and reclaiming the same, without the consent of the adjacent proprietor, and without making him compensation. Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224.

Effect of city ordinances.— Where an ordinance of a city relating to the granting of land under water provided that no such grant should authorize the grantor to make bulkheads without permission of the common council, even if a deed of land under water contained no restrictions, the grantee could not, without such consent, fill in the land. Duryea *v.* New York, 26 Hun (N. Y.) 120.

A condemnation by a railroad corporation of the upland abutting upon the water embraces also the incidental riparian right of improvement and occupancy of the submerged lands, although no specific mention is made of riparian rights. Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722.

Owner of inland block.— Where both land above and under water is platted and an inland block is conveyed with reference to such plat, the gradual encroachment of the water until it reaches the block so conveyed does not confer on its owner the riparian right to reclaim and use the submerged blocks and streets. Gilbert *v.* Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411.

A legislative grant to numerous individuals authorizing them to fill up in front of their lots to a fixed exterior line is a grant to each of the shore proprietors in severalty of such right to the extent of the land under water in front of his own shore. O'Donnell *v.* Kelsey, 4 Sandf. (N. Y.) 202.

As compensation to private individuals for extending the landing line farther out into deep water, a municipality which holds the property for public use may grant a temporary use of such extension and the batture just behind. St. Ann's Asylum *v.* New Orleans, 104 La. 392, 29 So. 117.

Liability to adjoining owner.— The owner of land adjoining tide-water, but not accessible by navigation from the sea, has no right to have the tide ebb and flow, for the drainage of his premises, across flats or the shore, between his land and low water mark, belonging to another, and such other owner by filling up his land will not become liable to such owner in an action for the interruption of such drainage. Henry *v.* Newburyport, 149 Mass. 582, 22 N. E. 75, 5 L. R. A. 179.

72. Miller *v.* Mendenhall, 43 Minn. 95, 44 N. W. 1141, 19 Am. St. Rep. 219, 8 L. R. A. 89; Rhode Island Motor Co. *v.* Providence, (R. I. 1903) 55 Atl. 696; Bailey *v.* Burges,

has been held a mere franchise,[73] or license,[74] which may be revoked by the legislature at any time before such reclamation actually takes place;[75] but when the license is executed, it becomes irrevocable.[76] In some states, however, the right of the riparian owner is a vested property right which cannot be taken away even by the state for a public use without compensation.[77]

2. POWER TO AUTHORIZE. The state has power to authorize the filling in of lands under water where navigation will not be affected thereby.[78]

3. OWNERSHIP AND RIGHTS OF RECLAIMANT. Where land under water is lawfully reclaimed, the reclaimed portions become integral parts of the owner's adjoining land,[79] and his title will extend at least to the new high water

11 R. I. 330. See also Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553.

Change of dock line.— The establishment of a dock line inside of some of the submerged blocks as laid out in a plat will not divest any property rights therein but merely regulate and limit their use so that where the dock line is changed to a point outside of the lands, it amounts to authority from the state to fill in and build out to the new line. Bradshow *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066.

Title by adverse possession.— The establishment of a harbor line permits the riparian owner to take and occupy the tide-flowed land by filling in, as well when his ownership is acquired by adverse possession as when it is acquired in any other manner. Aborn *v.* Smith, 12 R. I. 370.

The assent of harbor commissioners to fill out below high water mark, as to the territory it applies to, is as authoritative as the establishment of a harbor line is as to the more extensive territory it applies to, and both operate as an authoritative declaration that navigation will not be obstructed by any such filling out, and as a license or invitation to the riparian proprietor to fill out to that line. Dawson *v.* Broome, 24 R. I. 379, 53 Atl. 151.

73. Lockwood *v.* New York, etc., R. Co., 37 Conn. 387.

74. Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; State *v.* Jersey City, 25 N. J. L. 525. See also Rhode Island Motor Co. *v.* Providence, (R. I. 1903) 55 Atl. 696.

For instance, the right of a private individual to improve out into the river, until actually availed of, is subject to the right of the United States to use the soil under the water in aid of navigation without his consent and without compensation. Hawkins Point Light-House Case, 39 Fed. 77.

75. Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; State *v.* Jersey City, 25 N. J. L. 525. See also State *v.* Carragan, 37 N. J. L. 264.

76. New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133 [*affirmed* in 47 N. J. Eq. 598, 22 Atl. 1076].

77. Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066.

78. Eldridge *v.* Cowell, 4 Cal. 80 (holding that it is immaterial that such reclamation destroys the riparian character of another lot); People *v.* Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; Briggs *v.* Pfeil, 25 Pittsb. Leg. J. N. S. (Pa.) 18; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421.

Power of city.— It was within the authority of the city of Dubuque to authorize a slough of the Mississippi river at that place, which has been formerly used for purposes connected with navigation, to be filled up and railroad tracks built over or along the same. Ingraham *v.* Chicago, etc., R. Co., 34 Iowa 249.

79. *Connecticut.*— Lockwood *v.* New York, etc., R. Co., 37 Conn. 387; Nichols *v.* Lewis, 15 Conn. 137.

Maryland.— Baltimore, etc., R. Co. *v.* Chase, 43 Md. 23; Wilson *v.* Inloes, 11 Gill & J. 351.

New Jersey.— Bell *v.* Gough, 23 N. J. L. 624; Atty.-Gen. *v.* Central R. Co., 68 N. J. Eq. 198, 59 Atl. 348.

New York.— People *v.* Kelsey, 38 Barb. 269, 14 Abb. Pr. 372; Dickinson *v.* Codwise, 1 Sandf. Ch. 214.

United States.— U. S. *v.* Mission Rock Co., 189 U. S. 391, 23 S. Ct. 606, 47 L. ed. 865 [*affirming* 109 Fed. 763, 48 C. C. A. 641]; *In re* Edmondson Island, 42 Fed. 15.

See 37 Cent. Dig. tit. "Navigable Waters," § 233.

But see Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

Planting trees.— A riparian proprietor, having obtained either legal or equitable title to land filled in by the state adjacent to his premises, cannot be restrained from planting trees thereon, although they may injure his neighbor's view of the lake. Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102.

Ownership as between lessor and lessee.— Where the United States, holding an island under a lease for the use of the fish commission, adds land thereto, with the consent of the lessor, by building out into navigable water and filling up, and claims title to such addition as necessary for the protection of a lighthouse, the lessor is the owner of the addition, subject only to the easement in relation to the lighthouse, and may maintain ejectment for its occupancy by the United States for the use of the fish commission after the lease of the island proper has expired. *In re* Edmondson Island, 42 Fed. 15.

Reclamation by a railroad company has been held not to give an absolute fee in the lands reclaimed or any right of use, disposal, or control, except for a right of way and for

mark.[80] The title to reclaimed lands is not lost by the subsequent submergence thereof whether for a long or a short period.[81] The title is one derived from the state and not from the grantor of the person filling in.[82] Where the upland was, by dedication, to remain forever free from structures, the title to filled-in lands is subject to the same condition.[83] Where the land is so situated that improvements on one lot conflict with improvements made by a senior patentee on an adjoining lot, the franchise or right of the prior patentee is paramount.[84] Made land should be divided between adjoining owners as if it was natural alluvion.[85]

4. Public Rights in Reclaimed Lands. The title is not subject to any right in the public to use the made land.[86] However, it has been held that a highway may be located over flats lying between high and low water mark which have been filled up by the proprietor of the adjoining upland.[87] But a railroad company cannot construct its road over such made land without making compensation therefor.[88]

5. Entry and Grant. The state cannot grant the shore so recovered nor appropriate it to public use without making adequate compensation.[89]

6. Ejectment.[90] Ejectment lies for the recovery of reclaimed land,[91] but it has been held that ejectment will not lie by a riparian owner for a recovery of land made by a stranger by filling in in front of his land below low water mark.[92]

H. Wharves, Piers, and Docks[93] **— 1. Definitions.** The terms "dock," "wharf," and "pier" are commonly used interchangeably. Strictly speaking, however, a wharf is a structure alongside of which vessels can be conveniently brought to load or unload,[94] while a pier is the projection of the wharf out into the water,[95] and a dock is the opening in the wharf or pier, or between two piers, for the purpose of increasing the space available for wharfage purposes by adding to its length and at the same time furnishing a safer berth for vessels wishing to use the pier.[96]

2. Right to Construct and Maintain — a. In General. Subject to statutory regulations, the general rule is that a riparian or shore owner has a right to build a wharf and a pier out to the line of navigation so long as it does not obstruct navigation nor interfere with the rights of adjoining owners.[97] There are cases,

railroad purposes. Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018 [*affirming* 33 Fed. 730].

Preëxisting easements.— It is subject to the easement of an existing highway reaching to the high water mark before the reclamation. Atty.-Gen. *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 198, 59 Atl. 348.

80. Gough *v.* Bell, 22 N. J. L. 441.

81. Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

82. Bailey *v.* Burges, 11 R. I. 330.

83. Bliss *v.* Ward, 198 Ill. 104, 64 N. E. 705.

84. Baltimore, etc., R. Co. *v.* Chase, 43 Md. 23.

85. Watson *v.* Horne, 64 N. H. 416, 13 Atl. 789. And see BOUNDARIES, 5 Cyc. 888.

86. Wetmore *v.* Brooklyn Gaslight Co., 42 N. Y. 384.

87. Henshaw *v.* Hunting, 1 Gray (Mass.) 203; Clement *v.* Burns, 43 N. H. 609.

88. Davenport, etc., R. Co. *v.* Renwick, 102 U. S. 180, 26 L. ed. 51 [*affirming* 49 Iowa 664], holding that the fact that plaintiff was not authorized to construct a fill or embankment over which defendant railway company appropriated a right of way did not deprive him of his right to damages for the right of way so appropriated, under Acts (1874), c. 35, § 2, providing that no corporation shall construct its road between lots of land and the river, or on the shore or margin thereof, without first ascertaining and paying the damages to the riparian owner.

89. Bell *v.* Gough, 23 N. J. L. 624 [*affirming* 22 N. J. L. 441].

90. **Ejectment** generally see EJECTMENT.

91. Nichols *v.* Lewis, 15 Conn. 137.

92. Austin *v.* Rutland R. Co., 45 Vt. 215.

93. See, generally, WHARVES.

Erection by city see MUNICIPAL CORPORATIONS.

Grant of land under water as incident to grant of wharf see *infra*, VIII, C, 2.

Remedies where obstruction to navigation see *supra*, V, B, 5.

A wharf or pier is real property.— Bedlow *v.* Stillwell, 158 N. Y. 292, 53 N. E. 26 [*affirming* 91 Hun 384, 36 N. Y. Suppl. 129].

94. See WHARVES.

95. See Webster Int. Dict.; and PIER. And see People *v.* New York, etc., Ferry Co., 7 Hun (N. Y.) 105, 108; Stevens *v.* Rhinelander, 5 Rob. (N. Y.) 285, 301; The Haxby, 94 Fed. 1016.

96. Farnham Waters & Water Rights 560. See also DOCK.

97. *Alaska.*— Lewis *v.* Johnson, 1 Alaska 529; Martin *v.* Heckman, 1 Alaska 165.

however, holding that in so far as the wharf or pier is built on or over land beyond the line to which the riparian proprietor owns, it is unlawful.[98] The mere own-

Connecticut.— Prior *v.* Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L. R. A. 668; Ladies' Seaman's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658; Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

Illinois.— Chicago *v.* Van Ingen, 152 Ill. 624, 38 N. E. 894, 43 Am. St. Rep. 285; Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495.

Indiana.— Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Dec. 644.

Iowa.— Mills *v.* Evans, 100 Iowa 712, 69 N. W. 1043.

Kentucky.— Cincinnati Cooperage Co. *v.* Com., 11 Ky. L. Rep. 629.

Maine.— Deering *v.* Long Wharf, 25 Me. 51.

Massachusetts.— Com. *v.* Alger, 7 Cush. 53.

Minnesota.— Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18.

New York.— White *v.* Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169; Wetmore *v.* Brooklyn Gas Light Co., 42 N. Y. 384; People *v.* Woodruff, 30 N. Y. App. Div. 43, 51 N. Y. Suppl. 515 [*affirmed* in 159 N. Y. 536, 53 N. E. 1129]. See People *v.* New York, etc., Ferry Co., 68 N. Y. 71.

North Carolina.— Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281.

Oregon.— Parker *v.* Taylor, 7 Oreg. 435.

Wisconsin.— Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386.

United States.— Sullivan Timber Co. *v.* Mobile, 110 Fed. 186; Leverich *v.* Mobile, 110 Fed. 170; Paine Lumber Co. *v.* U. S., 55 Fed. 854; Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684; Tuck *v.* Olds, 29 Fed. 738. But see Atlee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619, holding that a pier erected in the navigable water of the Mississippi river for the sole use of the riparian owner, and not in aid of navigation, without license or authority of any kind except such as may arise from his ownership of the adjacent shore, is an unlawful structure.

See 37 Cent. Dig. tit. "Navigable Waters," § 257.

But see Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, holding that a statute providing for the lease of the right to build and maintain wharves precludes the authority of a riparian proprietor as such to extend wharves in front of his land into the sea below high water mark.

A riparian owner on the Great Lakes has the right to build out such convenient wharves as do not obstruct the public right of navigation. Rice *v.* Ruddiman, 10 Mich. 125; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018 [*affirming* 33 Fed. 730]; Dutton *v.* Strong, 1 Black (U. S.) 23, 17 L. ed. 29. *Contra*, Revell *v.* People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790.

Control of harbor commissioners.— The right of the owner of land lying on the harbor to build a wharf extending below high water line is subject to the control of the board of harbor commissioners. State *v.* Sargent, 45 Conn. 358.

Compelling removal of wharf.— Where a riparian owner, without a grant from the state, builds a pier in the shoal water adjoining his premises to reach the navigable portion of a stream, and such pier does not obstruct navigation or interfere with any public use, the state cannot, without showing a public necessity therefor, compel the removal of the structure. People *v.* Mould, 37 N. Y. App. Div. 35, 55 N. Y. Suppl. 453 [*reversing* 24 Misc. 287, 52 N. Y. Suppl. 1032]. *Contra*, where pier built in Lake Michigan. Revell *v.* People, 177 Ill. 468, 53 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790.

Interference with navy yard.—An owner of land under water adjacent to the United States navy yard may be enjoined from erecting a dock upon his land under water, where it would seriously interfere with the rights of the government as proprietors of the navy yard. U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,204, 5 Blatchf. 35.

A municipality, by virtue of its ownership of a street next to the water, has wharfage rights. Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 672, 3 S. Ct. 445, 4 S. Ct. 15, 27 L. ed. 1070. But see Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186.

Adverse possession.— The right to construct a wharf may be lost by adverse possession of the land by an adjacent riparian owner. Montgomery *v.* Shaver, 40 Oreg. 244, 66 Pac. 923.

98. Dana *v.* Jackson St. Wharf Co., 31 Cal. 118, 89 Am. Dec. 164; Cobb *v.* Lincoln Park, 202 Ill. 427, 67 N. E. 5, 95 Am. St. Rep. 258, 63 L. R. A. 264; Revell *v.* People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790; Naglee *v.* Ingersoll, 7 Pa. St. 185; Borough *v.* The Geneva, 3 Lanc. L. Rev. (Pa.) 134; Atty.-Gen. *v.* Curry, 15 U. C. C. P. 329. See also Shortall *v.* Fitzsimons, etc., Co., 93 Ill. App. 231 (holding that a contract to build a wall through the waters of Lake Michigan by driving piles into, and making a permanent structure upon lands under, said waters, the title to which is in the state of Illinois in trust for the public, is an illegal contract, and the wall, when built, is a purpresture, and liable to abatement at the instance of the state); Brookhaven *v.* Smith, 98 N. Y. App. Div. 212, 90 N. Y. Suppl. 646; People *v.* Mould, 24 Misc. (N. Y.) 287, 52 N. Y. Suppl. 1032 (holding that grant of land under water must first be obtained from the state); Frankford *v.* Lennig, 1 Am. L. Reg. (Pa.) 357.

Prescription.— The right to maintain a wharf on lands belonging to the state may be acquired by prescription. Bell *v.* New

ership of land under water, disconnected from ownership of the upland, does not of itself give the right to build a wharf, but it must be derived either from the express terms of the grant,[99] or from the clear and manifest intent of the grant as shown by the surrounding circumstances, such as prior use or the declared intention of the grant.[1] In many jurisdictions statutes especially authorize the erection of wharves by adjoining owners.[2] The person entitled to erect a wharf must be actually a riparian owner.[3] One other than the riparian or shore owner has no right to build a wharf,[4] in the absence of a statute authorizing it;[5] and when a wharf is so built it is a private nuisance as against the shore owner.[6]

b. Beyond Line of Navigability. As soon as the point of navigability is reached, the purpose of the pier is fulfilled and the right to construct it ceases at that point.[7] Statutes have been passed in many states fixing or providing for

York, 77 N. Y. App. Div. 437, 79 N. Y. Suppl. 347. See also Nichols *v.* Boston, 98 Mass. 39, 93 Am. Dec. 132; Bedlow *v.* New York Floating Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

Where the wharf will obstruct or deflect the flow of water, a riparian owner has no right to construct it in front of his lands on tide-lands owned by a city. Murphy *v.* Bullock, 20 R. I. 35, 37 Atl. 348.

By the law of England, every building or wharf erected without license below high water mark, where the soil belongs to the king, is a purprestnre, and may, at the suit of the king, either be demolished or be seized and rented for his benefit if it is not a nuisance to navigation. Atty.-Gen. *v.* Terrey, L. R. 9 Ch. 423, 30 L. T. Rep. N. S. 215, 22 Wkly. Rep. 395; Atty.-Gen. *v.* Richards, Anstr. 603, 3 Rev. Rep. 632; Blundell *v.* Catterall, 5 B. & Ald. 268, 24 Rev. Rep. 353, 7 E. C. L. 152; Atty.-Gen. *v.* Parmeter, 10 Price 378, 24 Rev. Rep. 723.

99. Turner *v.* People's Ferry Co., 21 Fed. 90.

1. Turner *v.* People's Ferry Co., 21 Fed. 90.

2. Hazlehurst *v.* Baltimore, 37 Md. 199; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419, holding that a mere license was conferred which could not be transferred to another.

Statue as defense where injury to land in another state.— Where, pursuant to a statute of Missouri, a dock was constructed by the city of St. Louis, which resulted in the washing away of a portion of plaintiff's land on the opposite side of the river in Illinois, such statute could not be pleaded as a defense to an action therefor. Rutz *v.* St. Louis, 7 Fed. 438, 2 McCrary 344.

3. Potomac Steamboat Co. *v.* Upper Steamboat Co., MacArthur & M. (D. C.) 285.

4. Brookhaven *v.* Smith, 98 N. Y. App. Div. 212, 90 N. Y. Suppl. 646; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,204, 5 Blatchf. 35.

Contracts.— Where a riparian owner permitted defendants to erect piers and drive piling in the water opposite his premises under a contract, after its termination he might maintain action against defendants to enjoin them from maintaining the structures. Reeves *v.* Backus-Brooks Co., 83 Minn. 339, 86 N. W. 337.

Ownership.—If one other than the riparian owner constructs a dock, it belongs to the riparian owner. Baltimore *v.* St. Agnes Hospital, 48 Md. 419.

5. See the statutes of the several states.

6. McCarthy *v.* Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 876.

7. Jencks *v.* Miller, 17 Misc. (N. Y.) 461, 40 N. Y. Suppl. 1088; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018. See also People *v.* New York, etc., Ferry Co., 7 Hun (N. Y.) 105, 49 How. Pr. 511.

The term "point of navigability," as used in cases defining the right of a riparian owner to extend landings, wharves, etc., from his land into a navigable river beyond low water mark, is to be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water for any kind of navigation for which the stream is used, and for which it is adapted, provided of course it does not obstruct the paramount rights of the public. Union Depot St. R., etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789. Where a decree adjudged that the right existed to maintain piers extending into a lake "to the point of practical navigability," the inquiry thereunder should be as to the line of practical navigability at the time of the adjudication rather than at the time of the commencement of the suit. People *v.* Illinois Cent. R. Co., 91 Fed. 955, 34 C. C. A. 138.

Railroad piers in Great Lakes.—Piers, docks, and wharves erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship cannot be said to extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on that lake, where such structures extend no further into the lake than is necessary to accommodate a great number of vessels of moderate capacity, and the average depth of water at the outer line of the structures is insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake. People *v.* Illinois Cent. R. Co., 184 U. S. 77, 22 S. Ct. 300, 46 L. ed. 440 [*affirming* 91 Fed. 955, 34 C. C. A. 138].

When pier obstructs navigation.— The extension of the upper of adjoining piers forty

the determination of a wharf line beyond which piers cannot be built,[8] but such statutes are not retroactive so as to affect wharves erected before their passage.[9]

3. Obstruction to Navigation. Piers and wharves, to some extent, obstruct navigation, but they are also substantial and material aids to it, for without piers and wharves, at which vessels might land, navigation would cease. The question as to the legality of such structures therefore is not whether they obstruct navigation to some extent, but whether they constitute a material obstruction.[10] Where a pier is an unlawful structure or not properly maintained, one injured by striking it while navigating the river may recover damages,[11] providing the injury was not caused by careless navigation.[12] But an action cannot be maintained against one erecting piers, for obstructing the flow of the water, where such obstruction does not cause any material damage to plaintiff.[13]

4. Injunction[14] Against Construction and Maintenance. A wharf is not *per se* a public nuisance, the erection of which will be enjoined.[15] But where a dock will interfere with navigation, it will be enjoined.[16] A floating dock erected on a public dock by private persons without authority is a public nuisance,[17] and where the owner of a near-by pier is specially injured thereby he is entitled to an injunction.[18] Where a pier is built on land under water belonging to the state, it will not be enjoined unless it is or will be a nuisance, or followed by some irreparable damage, or an appreciable hindrance to the execution of some legislative act relating to fishery, commerce, or navigation.[19] An injunction will not be granted at the instance of an adjoining owner unless it appears that he will be materially

feet into a shallow channel of a broad, navigable river does not "impair navigation, commerce, or anchorage," within the River and Harbor Act, where the channel does not extend above the upper pier, and is seldom traversed, and then by vessels of but small capacity, and principally by the pier owners, and the extension does not obstruct the vessels of the lower owner in reaching their pier, but destroys merely the facility with which they may be warped along and moored to its side. Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927.

8. Savannah *v.* State, 4 Ga. 26; Williams *v.* New York, 105 N. Y. 419, 11 N. E. 829; *In re* Port Wardens' Line, 13 Phila. (Pa.) 453, holding that objections to the establishment of wharf lines can be made only by riparian owners.

Effect.— Acts establishing lines in the harbor of Boston beyond which no wharf shall be extended take away the rights of proprietors of flats in the harbor beyond such lines to build wharves thereon, even when they would be no actual injury to navigation. Com. *v.* Alger, 7 Cush. (Mass.) 53.

9. Com. *v.* Alger, 7 Cush. (Mass.) 53.

10. *Massachusetts.*—Com. *v.* Wright, Thach. Cr. Cas. 211.

Minnesota.— Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18.

New York.— People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228; Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927.

North Carolina.— Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281.

Rhode Island.— Thornton *v.* Grant, 10 R. I. 477, 14 Am. Rep. 701.

Wisconsin.— Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386.

United States.— Dutton *v.* Strong, 1 Black 23, 17 L. ed. 29; Paine Lumber Co. *v.* U. S., 55 Fed. 854.

See 37 Cent. Dig. tit. "Navigable Waters," § 105.

A pier erected in the waters of the harbor of New York is a public nuisance unless the party erecting the same is authorized to build it at that place by some power competent to confer authority. People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, 26 N. Y. 287, 25 How. Pr. 139.

The channel cannot be changed by a city so as to give it the right to claim that wharves are thereby made an obstruction to navigation and are nuisances. Chicago *v.* Laflin, 49 Ill. 172.

11. Atlee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619.

12. The Henry Clark *v.* O'Brien, 65 Fed. 815.

13. Seeley *v.* Brush, 35 Conn. 419.

14. Injunction generally see Injunctions.

15. Laughlin *v.* Lamasco City, 6 Ind. 223.

16. Grand Trunk R. Co. *v.* Backus, 46 Fed. 211.

Other like structures.— The fact that a dock extends to a certain point in a river is no ground for refusing to enjoin the extension of an adjacent dock to that point, when such extension is unlawful. Grand Trunk R. Co. *v.* Backus, 46 Fed. 211.

17. Hecker *v.* New York Balance Dock Co., 13 How. Pr. (N. Y.) 549; Hart *v.* Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

18. Penniman *v.* New York Balance Co., 13 How. Pr. (N. Y.) 40.

19. People *v.* Davidson, 30 Cal. 379.

and substantially injured by such erection,[20] nor at the instance of the owner of the land under water where the pier was not intended to extend over such land.[21] Where a city conveyed land under water and the grantee covenanted to maintain wharves thereon and the city covenanted that he should have the right to all wharfage accruing therefrom, the city could not be enjoined from building wharves outside of those of the grantee, thereby preventing the use of the latter.[22]

5. Application For Leave to Build and Grant of Authority.[23] The state has power to regulate or forbid the erection of wharves,[24] and several states have expressly forbidden the erection of wharves by the riparian owner either absolutely or without obtaining the express consent of the authorities.[25] In many jurisdictions power to grant authority to build wharves is, by statute, vested in certain officers.[26] Where a wharf will obstruct navigation in navigable water of the United States, permission of the secretary of war must first be obtained.[27] In the absence of a statute to the contrary, it has been held that the state may grant the right to erect and keep a public wharf to a person other than the shore owner where the latter does not own the land under water.[28] In most of the states, however, a license can be granted only to the shore owner.[29] A license from the secretary of war does not authorize the erection of a wharf without the consent of

20. Thornton *v.* Grant, 10 R. I. 477, 14 Am. Rep. 701. See also Maine Wharf *v.* Custom House Wharf, 85 Me. 175, 27 Atl. 93; Taylor *v.* Brookman, 45 Barb. (N. Y.) 106, 1 Abb. Pr. N. S. 169.

Deprivation of right of access.— A person who is the owner and in possession of a private wharf is entitled to a perpetual injunction restraining the construction of another wharf in front of his, which will cut him off from the navigable waters of the bay, unless a lawful right, proceeding from competent authority, to erect the proposed wharf be shown. Cowell *v.* Martin, 43 Cal. 605.

Parallel piers.— A person who has built a wharf out into a navigable stream cannot, by injunction, prevent another from building a parallel one, and extending it further into the stream, provided the latter is not a practical hindrance to the navigation of the stream. Van der Brooks *v.* Currier, 2 Mich. N. P. 21.

21. Knickerbocker Ice Co. *v.* Shultz, 41 Hun (N. Y.) 458 [*affirmed* in 116 N. Y. 382, 22 N. E. 564].

22. Langdon *v.* New York, 6 Abb. N. Cas. (N. Y.) 314 [*affirmed* in 27 Hun 288].

23. Grant of right to build as conveyance of submerged land see *infra*, VIII, C, 2.

24. State *v.* Sargent, 45 Conn. 358.

Exclusive rights.— It is competent for the legislature, in aid of the navigation of the Ohio river, to confer on municipal corporations the exclusive right to construct wharves within their corporate limits between ordinary high water mark and low water mark, without compensation to the adjacent lot owner for the land so taken for that purpose. Ravenswood *v.* Flemings, 22 W. Va. 52, 46 Am. Rep. 485.

Depriving owner of property.— A statute requiring piers constructed on submerged land to have intervening water spaces of at least one hundred feet is a valid exercise of legislative control over such piers, and does not deprive the owner of his property. People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*reversing* on other grounds 7 Hun 105].

25. Stockton *v.* American Lucol Co., (N. J. Ch. 1897) 36 Atl. 572.

26. Giraud *v.* Hughes, 1 Gill & J. (Md.) 249; Philadelphia, etc., R. Co. *v.* Morris, 7 Phila. (Pa.) 286; Frankfort *v.* Lennig, 2 Phila. (Pa.) 403.

Compelling attendance and examination of witnesses.— On an application to the board of chosen freeholders for permission to erect a wharf, the board has no power to compel the attendance of parties or witnesses, nor power to swear and examine witnesses who attend voluntarily, even on the public questions submitted to them. Brown *v.* Morris Canal, etc., Co., 27 N. J. L. 648.

The county commissioners of a county have no power or authority to confer an exclusive right upon one of the citizens of the county to erect and maintain a wharf on land covered with navigable water. The state alone can issue a grant for that purpose, and even then can grant to a riparian proprietor only. Gregory *v.* Forbes, 96 N. C. 77, 1 S. E. 541.

Location.— A grant to a riparian proprietor of the right to erect a wharf in front of his land is not objectionable for want of exact location, since that would be supplied by the wharf when built. Roberts *v.* Brooks, 71 Fed. 914 [*affirmed* in 78 Fed. 411, 24 C. C. A. 158].

27. Jencks *v.* Miller, 17 Misc. (N. Y.) 461, 40 N. Y. Suppl. 1088.

28. Martin *v.* O'Brien, 34 Miss. 21.

29. Brown *v.* Morris Canal, etc., Co., 27 N. J. L. 648 (holding that the board of chosen freeholders have no power to examine into and decide upon the applicant's title to the land); Morris Canal, etc., Co. *v.* Brown, 27 N. J. L. 13; Gregory *v.* Forbes, 96 N. C. 77, 1 S. E. 541.

the state or its grantee which owns the land under water.[30] A license may be evidenced by express act or may be implied from acquiescence in and regulation of the use of the wharf.[31] Where the license has not been acted upon it may be modified,[32] but after it has been acted on and expenditures made in reliance thereon it has been held not revocable.[33] Where a license granted to a riparian owner is not exercised before a grant of the tide-land, the license is terminated by such grantor.[34] While a license to erect a pier is ordinarily revocable,[35] authority to extend and maintain a wharf may constitute a grant and not merely a revocable license,[36] and may preclude the right to compel compensation not provided for in the grant.[37]

6. Title to Wharves and Rights of Wharf Owners[38] — a. In General. A wharf lawfully erected is private property of which the owner cannot be deprived by the state without compensation.[39] Where a wharf is built by an adjoining owner on land under water belonging to the state, it does not pass by a subsequent grant by the state of the land under water.[40] Where a statute authorizes riparian owners to wharf out and extend their lots, such proprietors become owners of such extensions and improvements.[41] But a licensee does not acquire title to his wharf until he completes it according to the terms of the license.[42] The maintenance of wharves built under a license does not ordinarily give the owners any right of property in the soil or waters occupied, or of permanent occupancy, as against the United States.[43] He has no easement in the water in the front of adjoining property,[44] and cannot use the adjoining property of another as a dock.[45] However, he has a right to dig a channel in front of his wharf and along the end thereof beyond low water mark, connecting his wharf with navigable water, providing he does not interfere with navigation.[46] If the wharf is constructed without authority, below low water mark, it has been held that the state and not the riparian proprietor may maintain ejectment therefor.[47]

b. Rights as Between Adjoining and Opposite Owners. An upland owner cannot lawfully erect a wharf so as to conflict with the rights of other upland owners,[48]

30. Cobb *v.* Lincoln Park, 202 Ill. 427, 67 N. E. 5, 95 Am. St. Rep. 258, 63 L. R. A. 264.

31. Sullivan Timber Co. *v.* Mobile, 110 Fed. 186.

32. Lane *v.* Harbor Com'rs, 70 Conn. 685, 40 Atl. 1058.

33. Sullivan Timber Co. *v.* Mobile, 110 Fed. 186.

34. Hogg *v.* Davis, 22 Oreg. 428, 30 Pac. 160; Bowlby *v.* Shively, 22 Oreg. 410, 30 Pac. 154.

35. Thames Conservators *v.* South Eastern R. Co., 1 Aspin. 3, 24 L. T. Rep. N. S. 246.

36. Bradford *v.* McQuesten, 182 Mass. 80, 64 N. E. 688.

37. Bradford *v.* McQuesten, 182 Mass. 80, 64 N. E. 688.

38. Right to collect wharfage see Wharves.

39. Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154.

40. Brooklyn *v.* Mackay, 13 N. Y. App. Div. 105, 42 N. Y. Suppl. 1063.

41. Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261.

Leases.— One having a vested right to the possession of a pier may lease it as though he owned the fee. New York *v.* Hill, 13 How. Pr. (N. Y.) 280.

42. Giraud *v.* Hughes, 1 Gill & J. (Md.) 249; Stockton *v.* American Lucol Co., (N. J. Ch. 1897) 36 Atl. 572.

43. Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946.

In Canada, where the bed of a stream is vested in the government and the riparian owner builds a pier thereon, such erection does not give possession of the bed of the river between the pier and the shore to the riparian owner. Dixson *v.* Snetsinger, 23 U. C. C. P. 235.

44. U. S. *v.* Bain, 24 Fed. Cas. No. 14,496, 3 Hughes 593.

45. Gray *v.* Bartlett, 20 Pick. (Mass.) 186, 32 Am. Dec. 208; Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281; Engs *v.* Peckham, 11 R. I. 210; Clark *v.* Peckham, 10 R. I. 35, 14 Am. Rep. 654. See also Duverge *v.* Salter, 6 La. Ann. 450, dry dock.

46. Prior *v.* Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L. R. A. 668.

47. Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634.

48. Martin *v.* Heckman, 1 Alaska 165.

Municipal authority.— Hill Annot. Laws Oreg. § 4228, providing that the corporate authorities of a town wherein it is proposed to erect a wharf or wharves may prescribe the mode and extent to which the franchise may be exercised beyond the line of low water mark, does not empower a municipality to authorize a riparian owner to extend his wharf in front of the lands of an adjoin-

or of an opposite owner.[49] But a pier may be extended, although by so doing access to an adjoining wharf is shut off from one side.[50] The relative rights to wharf out, where the shore line is curved or the land is on a cove, is usually determined by drawing a line from the thread of the stream at right angles to the shore termini.[51]

7. Public Use. The public has no right to use private wharves without the consent of the owner.[52] This is so even though such wharves extend beyond the low water mark on to the land of the state and were erected without the consent of the state.[53] But it has been held that persons raising a wreck near a public pier are not liable to the owners of the pier for its use in the prosecution of their work,[54] nor for injuries done to the pier in the course of such work.[55] Statutes oftentimes fix the uses which may be made of city piers;[56] and such statutes

ing riparian owner. Montgomery *v.* Shaver, 40 Oreg. 244, 66 Pac. 923.

Where a pier is properly built so as to be a lawful structure, adjoining proprietors have no cause of action for injuries resulting therefrom. Hollister *v.* Union Co., 9 Conn. 436, 25 Am. Dec. 36; Lansing *v.* Smith, 8 Cow. (N. Y.) 146 [*affirmed* in 4 Wend. 9, 21 Am. Dec. 89].

49. Walker *v.* Shepardson, 4 Wis. 486, 65 Am. Dec. 324.

50. Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 511; Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281.

In the absence of legislation one must so build his pier with reference to his ownership of the upland as to secure himself from interference by the structures of adjacent proprietors, that is, the right of access to the pier is solely from the front and does not include the exclusive right to use the open space on the sides. Jenks *v.* Miller, 14 N. Y. App. Div. 474, 43 N. Y. Suppl. 927.

51. Montgomery *v.* Shaver, 40 Oreg. 244, 66 Pac. 923. See Martin *v.* Heckman, 1 Alaska 165; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,204, 5 Blatchf. 35.

Coves.— When the irregularities or curvature of the shore are such that lines cannot be drawn at right angles to the shore so as to authorize a direct course over intervening shallows to construct piers or other structures connecting the shore with the point of navigability, then the whole cove is to be treated as a unit of the shore line by drawing such vertical lines from its two boundary points or headlands to the line of navigability and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands and by drawing straight lines from the two termini of navigable water line to the respective termini of shore line pertaining to each owner. Thomas *v.* Ashland, etc., R. Co., 122 Wis. 519, 100 N. W. 993, 106 Am. St. Rep. 1000; Northern Pine Land Co. *v.* Bigelow, 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776. But the dominant rule is that each riparian owner must have his due proportion of the land bounding navigability and a direct course of access to it from the shore exclusive of every other owner, and all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result. Thomas *v.* Ashland, etc., R. Co., *supra*; Northern Pine Land Co. *v.* Bigelow, *supra*.

Extension of lateral boundaries.— Where the lateral boundaries in a conveyance of flats on a seashore below high water mark are definite, the incidental right to wharf to the channel must be confined to the area embraced within the extensions of the lateral boundaries, although these boundaries form an acute angle with the shore boundary. Ladies' Seamen's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658.

Statutory provisions see Classen *v.* Chesapeake Guano Co., 81 Md. 258, 31 Atl. 808.

52. Chicago *v.* Laflin, 49 Ill. 172; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495; O'Neill *v.* Annett, 27 N. J. L. 290, 72 Am. Dec. 364.

Dedication.— Where the owner of a wharf permits it to be used by others, he does not thereby dedicate it to the public or give the right to use it without his permission. O'Neill *v.* Annett, 27 N. J. L. 290, 72 Am. Dec. 364.

Grant to promote commerce.— A grant expressly providing that it is for the purpose of promoting commerce, of lands under water, upon which a riparian owner erects a dock, confers upon him no exclusive right to the use of the dock but appropriates it to the use of all engaged in promoting the purpose of the grant subject only to the owner's right to collect a reasonable compensation for the use. Thousand Island Steamboat Co. *v.* Visger, 179 N. Y. 206, 71 N. E. 764 [*affirming* 86 N. Y. App. Div. 126, 83 N. Y. Suppl. 325]; Harper *v.* Williams, 110 N. Y. 260, 18 N. E. 77.

53. Coney *v.* Brunswick, etc., Steamboat Co., 116 Ga. 222, 42 S. E. 498; Wetmore *v.* Brooklyn Gaslight Co., 42 N. Y. 384; Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 4 N. Y. St. 380. But see Wiener *v.* Peoples, 17 Lanc. L. Rev. (Pa.) 289.

54. Taylor *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 369 [*affirmed* in 37 N. Y. 275, 4 Transcr. App. 279, 34 How. Pr. 625 note].

55. Taylor *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 369 [*affirmed* in 37 N. Y. 275, 4 Transcr. App. 279, 34 How. Pr. 625 note].

56. Hill *v.* New York, 18 N. Y. Suppl. 399 [*affirming* 15 N. Y. Suppl. 393].

also oftentimes provide penalties for obstructing, encumbering, or interfering with a public pier or bulkhead.[57]

8. Injuries to and Obstructions of Wharves. An obstruction to the use of a wharf or dock is actionable,[58] and may be enjoined,[59] or authorize a recovery of damages,[60] provided there is a special injury.[61]

9. Abatement.[62] It has been held that an unauthorized encroachment on the shore by a wharf or pier, although not injurious or a public nuisance, may be enjoined or abated on the information of the attorney-general.[63] Where a pier is erected by a third person in front of the land of another, the latter may himself remove it as a private nuisance.[64]

I. Accretions[65]**—1. Definitions—a. Accretion.** Accretion is an imperceptible addition to riparian land made by water to which the land is contiguous.[66]

b. Alluvion. Accretion differs from alluvion in that the latter term is applied to the deposit itself, while accretion rather denotes the process by which it is deposited.[67] It is different from reliction,[68] although there is no alluvion without some kind of reliction.[69] In order to constitute alluvion, the accretion must take

57. Pilot Com'rs *v.* Erie R. Co., 5 Rob. (N. Y.) 366 [*affirmed* in 41 N. Y. 619], holding that sheds, buildings, gates, and fences erected on a bulkhead are obstructions encumbering and interfering with the free use thereof, within the statute providing a penalty for obstructing the bulkhead.

58. Haskell *v.* New Bedford, 108 Mass. 208; Harvard College *v.* Stearns, 15 Gray (Mass.) 1 (holding, however, that the owner of a wharf on public navigable waters cannot maintain a private action for illegally filling them up and thereby obstructing his access to his wharf); Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418.

A wharf boat, moored to the shore of a navigable river, is entitled to the same immunity from trespass or obstruction by vessels navigating the river as the land itself to which it is moored. Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Dec. 644.

59. Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274; Parker *v.* Taylor, 7 Oreg. 435.

60. Fry *v.* Campbell's Creek Coal Co., 37 W. Va. 604, 16 S. E. 796. *Compare* Hart *v.* Baton Rouge, 10 La. Ann. 171.

Where plaintiff's dock is itself a public nuisance damages cannot be recovered. Yates *v.* Judd, 18 Wis. 118.

61. Thayer *v.* New Bedford R. Co., 125 Mass. 253.

62. **As obstruction to navigation** see *supra*, V, B, 5, c.

63. Revell *v.* People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790. *Contra*, see People *v.* Davidson, 30 Cal. 379.

64. McCarthy *v.* Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 876.

65. **Conveyance of** see *infra*, IX, A, 4, b; IX, C, 3.

66. See St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 323, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559; Coulthard *v.* Stevens, 84 Iowa 241, 245, 50 N. W. 983, 35 Am. St. Rep. 304; Benne *v.* Miller, 149 Mo. 228, 238, 50 S. W. 824; Lammers *v.* Nissen, 4 Nebr. 245, 250; Steers *v.* Brooklyn, 101 N. Y. 51, 56, 4 N. E. 7; Mulry *v.* Norton, 100 N. Y. 424, 432, 3 N. E. 581, 53 Am. Rep. 206; Emans *v.* Turnbull, 2 Johns. (N. Y.) 313, 323, 3 Am. Dec. 427; Nebraska *v.* Iowa, 143 U. S. 359, 369, 12 S. Ct. 396, 36 L. ed. 186; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 186, 10 S. Ct. 518, 33 L. ed. 872; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 680, 9 L. ed. 573; Stockley *v.* Cissna, 119 Fed. 812, 822, 56 C. C. A. 324.

Submerged land.—Accretion does not include new land formed by the waters of a stream until such land emerges and becomes visible. Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

67. St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 323, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559. See also Warren *v.* Chambers, 25 Ark. 120, 122, 91 Am. Dec. 538, 4 Am. Rep. 23; Lovingston *v.* St. Clair County, 64 Ill. 56, 58, 16 Am. Rep. 516; Coulthard *v.* Stevens, 84 Iowa 241, 245, 50 N. W. 983, 35 Am. St. Rep. 304; Sapp *v.* Frazier, 51 La. Ann. 1718, 1723, 26 So. 378, 72 Am. St. Rep. 493; White *v.* Leovy, 49 La. Ann. 1660, 1688, 22 So. 931; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 124, 36 Am. Dec. 624; Adams *v.* Frothingham, 3 Mass. 352, 358, 3 Am. Dec. 151; Halsey *v.* McCormick, 18 N. Y. 147, 149; Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 539, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206; Hubbard *v.* Manwell, 60 Vt. 235, 245, 14 Atl. 693, 6 Am. St. Rep. 110; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 10 S. Ct. 518, 33 L. ed. 872; St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 53, 23 L. ed. 59; Saulet *v.* Shepherd, 4 Wall. (U. S.) 502, 504, 18 L. ed. 442; East Omaha Land Co. *v.* Jeffries, 40 Fed. 386; Kinzie *v.* Winston, 14 Fed. Cas. No. 7,835.

In Louisiana alluvion is sometimes called batture. Zeller *v.* Southern Yacht Club, 34 La. Ann. 837. See also Batture, 5 Cyc. 676; and *infra*, VII, I, 2, a.

68. St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 23 L. ed. 59.

69. Ocean City Assoc. *v.* Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425.

place by imperceptible degrees.[70] The test as to what is a gradual and imperceptible addition within the meaning of the rule is that, although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.[71] It is not necessary that the formation be indiscernible by comparison at two distinct points of time.[72] The length of time during which the formation takes place is not material, if the increment resulting is such as to be beyond the power of identification.[73]

c. Avulsion. Avulsion is the sudden and rapid change of the channel of a stream which is a boundary, whereby it abandons its old and seeks a new bed.[74]

d. Reliction. Reliction is the term applied to land made by the recession of the water by which it was previously covered.[75] The reliction must be from the waters in their usual state.[76]

2. Ownership — a. In General. In the absence of a statute to the contrary,[77] alluvion belongs to the riparian or shore owner to which the accretion is attached.[78] The right to such deposits extends also to future deposits so as to

70. Hahn *v.* Dawson, 134 Mo. 581, 36 S. W. 233; Halsey *v.* McCormick, 18 N. Y. 147; Mulry *v.* Norton, 29 Hun (N. Y.) 660 [*affirmed* in 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206]; Matter of Driveway, 46 Misc. (N. Y.) 157, 93 N. Y. Suppl. 1107; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 10 S. Ct. 518, 33 L. ed. 782 [*affirming* 40 Fed. 386].

Rapid formation.— Land is an accretion, in a legal sense, although it may have been rapidly formed, as where over one hundred and twenty-four acres were washed away from one side of a stream and joined on to the land on the other side within less than three years, perceived by no one while the process was going on. Nix *v.* Pfeifer, 73 Ark. 199, 83 S. W. 951.

The law of accretion applies to the Missouri river, notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers. De Long *v.* Olsen, 63 Nebr. 327, 88 N. W. 512.

71. St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 23 L. ed. 59.

72. Wallace *v.* Driver, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317.

73. Coulthard *v.* Stevens, 84 Iowa 241, 50 N. W. 983, 35 Am. St. Rep. 304.

74. Chicago *v.* Ward, 169 Ill. 392, 408, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849; Rees *v.* McDaniel, 115 Mo. 145, 152, 21 S. W. 913; Bouvier *v.* Stricklett, 40 Nebr. 792, 801, 59 N. W. 550; Nebraska *v.* Iowa, 143 U. S. 359, 361, 12 S. Ct. 396, 36 L. ed. 186.

Alluvion is distinguished from those large additions which are made to land when the sea suddenly recedes, or when it casts up by its immediate and manifest force large quantities of earth and sand. Linthicum *v.* Coan, 64 Md. 439, 2 Atl. 826, 54 Am. Rep. 775; St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 23 L. ed. 59.

75. Hammond *v.* Sheppard, 186 Ill. 235, 242, 57 N. E. 867, 78 Am. St. Rep. 274; Sapp *v.* Frazier, 51 La. Ann. 1718, 1723, 26 So. 378, 72 Am. St. Rep. 493.

76. Sapp *v.* Frazier, 51 La. Ann. 718, 26 So. 378, 72 Am. St. Rep. 493.

The mere temporary subsidence of the waters of a lake occasioned by the seasons does not constitute reliction in the sense of an addition to the contiguous land susceptible of private ownership. Sapp *v.* Frazier, 51 La. Ann. 1718, 26 So. 378, 72 Am. St. Rep. 493.

77. Briggs *v.* Pfeil, 25 Pittsb. Leg. J. N. S. (Pa.) 18, holding that a statute absolutely fixing the low water mark in a navigable river rendered all accretions beyond such line the property of the state.

78. *Arkansas.*— Nix *v.* Pfeifer 73 Ark. 199, 83 S. W. 951.

Iowa.— Berry *v.* Hoogendoorn, (1906) 108 N. W. 923; Sioux City *v.* Chicago, etc., R. Co., 129 Iowa 694, 106 N. W. 183; Coulthard *v.* Stevens, 84 Iowa 241, 50 N. W. 983, 35 Am. St. Rep. 304.

Kansas.— Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822.

Kentucky.— Miller *v.* Hepburn, 8 Bush 326; Berry *v.* Snyder, 3 Bush 266, 96 Am. Dec. 219.

Louisiana.— State *v.* Buck, 46 La. Ann. 656, 15 So. 531; Barrett *v.* New Orleans, 13 La. Ann. 105; Stephenson *v.* Goff, 10 Rob. 99, 43 Am. Dec. 171.

Maryland.— Patterson *v.* Gelston, 23 Md. 432; Giraud *v.* Hughes, 1 Gill & J. 249; Chapman *v.* Hoskins, 2 Md. Ch. 485.

Massachusetts.— Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

Missouri.— Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; St. Louis Public Schools *v.* Risley, 40 Mo. 356. See also Benecke *v.* Welch, 168 Mo. 267, 67 S. W. 604.

Nebraska.— Topping *v.* Cohn, 71 Nebr. 559, 99 N. W. 372; Lammers *v.* Nissen, 4 Nebr. 245.

New Hampshire.— Gerrish *v.* Clough, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165.

New Jersey.— Camden, etc., Land Co. *v.* Lippincott, 45 N. J. L. 405.

New York.— Saunders *v.* New York Cent., etc., R. Co., 71 Hun 153, 23 N. Y. Suppl. 927, 30 Abb. N. Cas. 88 [*modified* and *affirmed* in 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L. R. A. 378].

give a cause of action to the riparian owner against one who changes the current so as to result in preventing future deposits.[79] So any increase of the soil which may result from the gradual recession of the waters from the shore belongs to the riparian owner.[80] This rule also applies to one who enters upon government land

Pennsylvania.— Morgan *v.* Scott, 26 Pa. St. 51.

Tennessee.— Posey *v.* James, 7 Lea 98.

Utah.— Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

Vermont.— Newton *v.* Eddy, 23 Vt. 319.

Wisconsin.— Boorman *v.* Sunnuchs, 42 Wis. 233.

United States.— Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 10 S. Ct. 518, 33 L. ed. 872 (holding that rule applies to the Missouri river); Saulet *v.* Shepherd, 4 Wall. 502, 18 L. ed. 442; Widdicombe *v.* Rosemiller, 118 Fed. 295; Roberts *v.* Brooks, 78 Fed. 411, 24 C. C. A. 158; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

See 37 Cent. Dig. tit. "Navigable Waters," § 270.

The reasons usually given for the rule that a riparian owner is entitled to accretions are either that it falls within the maxim, "*De minimis lex non curat*," or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But the rule may be said to rest upon a broader principle, that is, to preserve the fundamental riparian right on which all others depend and which often constitute the principal value of the land — of access to the water. Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

Waters to which rule applies.— The rule as to the right of a riparian owner to accretions applies to navigable as well as non-navigable waters. Lovingston *v.* St. Clair County, 64 Ill. 56, 16 Am. Rep. 516; Denny *v.* Cotton, 3 Tex. Civ. App. 634, 22 S. W. 122. In Louisiana, however, the rule does not apply to lakes. Zeller *v.* Southern Yacht Club, 34 La. Ann. 837.

Removal of deposits as affecting rule.— The fact that deposits had not been allowed to accumulate and become a visible portion of the land of the riparian owner, but had been a valuable sediment on the shores between high and low water marks, cannot affect the rule that the accretions belong to the owner of the land. Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206.

The title acquired by adverse possession extends also to accretions (Chicago, etc., R. Co. *v.* Groh, 85 Wis. 641, 55 N. W. 714), and the adverse possession of one claiming accretions to land begins at the time it began as to the mainland (Campbell *v.* Laclede Gas Light Co., 84 Mo. 352).

Separation of part of accretions by creek. — Where accretions form to the mainland, and a creek then cuts through them, the part thus separated from the mainland still belongs to it. De Lassus *v.* Faherty, 164 Mo. 361, 64 S. W. 183, 58 L. R. A. 193.

Abandonment.— The mere omission to figure on the plan of partition of an estate, the alluvion that may have existed in front of it, and to divide it among the heirs, cannot be construed as an abandonment of the ownership thereof in favor of the public. Delord *v.* New Orleans, 11 La. Ann. 699.

The right is a vested one and inherent in the property itself. Kennedy *v.* Municipality No. 2, 10 La. Ann. 54.

Batture.— In Louisiana the term "batture" is often used as wholly or in part the equivalent of accretions. See BATTURE, 5 Cyc. 676. The title to the batture is in the riparian owner (Donovan *v.* New Orleans, 35 La. Ann. 461; Pulley *v.* Municipality No. 2, 18 La. 278; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Morgan *v.* Livingston, 6 Mart. (La.) 19), providing he actually owns the soil situated at the edge of the water (Winter *v.* New Orleans, 26 La. Ann. 310), and he may lease the batture lying between a public road and the river (Dennistoun *v.* Walton, 8 Rob. (La.) 211). On the other hand, where batture is formed within the limits of incorporated towns and cities, the riparian ownership is subject to the right of the municipality to reserve and use a sufficient portion thereof as may be necessary for navigation, commerce, public highway, and streets, although there is no public servitude over such batture in favor of railroads. Minor *v.* New Orleans, 115 La. 301, 38 So. 909. And see Sweeney *v.* Shakspeare, 42 La. Ann. 614, 7 So. 729, 21 Am. St. Rep. 400; Sarpy *v.* New Orleans, 13 La. Ann. 349; Yeatman *v.* New Orleans, 13 La. Ann. 154; Pulley *v.* Municipality No. 2, *supra*; Municipality No. 2 *v.* Orleans Cotton Press, *supra*; Remy *v.* Municipality No. 2, 12 La. Ann. 500; Packwood *v.* Walden, 7 Mart. N. S. (La.) 81. Batture property not necessary for public uses may be reduced to the private occupancy and absolute ownership of the riparian proprietor. Donovan *v.* New Orleans, *supra*. And the right is expressly conferred by statute upon the riparian owner to recover such portion as is not necessary for public use. Minor *v.* New Orleans, 115 La. 301, 38 So. 999.

79. Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206.

80. *Alabama.*—Hagan *v.* Campbell, 8 Port. 9, 33 Am. Dec. 267.

Arkansas.— Warren *v.* Chambers, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23.

Connecticut.— Welles *v.* Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48.

Maryland.— Giraud *v.* Hughes, 1 Gill & J. 249; Chapman *v.* Hoskins, 2 Md. Ch. 435.

Missouri.— Buse *v.* Russell, 86 Mo. 209.

on a navigable river.[81] So a municipal corporation which owns shore land has the right to alluvion deposited thereon the same as a private owner,[82] but it is necessary that the municipality be the actual riparian proprietor.[83]

b. Artificial Accretions. The right to alluvion does not depend upon whether the additions to the soil resulted from natural or artificial causes.[84] On the other hand the doctrine of accretion does not apply to land reclaimed by man through filling in land once under water and making it dry.[85]

c. Necessity of Title to Water Line. To entitle a proprietor to alluvion, his land must adjoin the line of ordinary high water.[86] For instance, if the land is bounded by a road or street along the stream, the owner is not entitled to alluvion formed upon the opposite side of the road or street.[87]

d. Point Where Accretions Commence. To entitle the riparian owner to the alluvion the accretion must begin from his land and not from some other point so as to finally reach his land.[88]

Nebraska.— Topping *v.* Cohn, 71 Nebr. 559, 99 N. W. 372.

North Carolina.— Murry *v.* Sermon, 8 N. C. 56.

Wisconsin.— Boorman *v.* Sunnuchs, 42 Wis. 233.

See 37 Cent. Dig. tit. "Navigable Waters," § 281.

81. Minto *v.* Delaney, 7 Oreg. 337; Granger *v.* Swart, 10 Fed. Cas. No. 5,685, 1 Woolw. 88.

82. Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Jones *v.* Soulard, 24 How. (U. S.) 41, 16 L. ed. 604; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573.

83. Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624. But see Cochran *v.* Fort, 7 Mart. N. S. (La.) 622.

84. Lovingston *v.* St. Clair County, 64 Ill. 56, 16 Am. Rep. 516; Park Com'rs *v.* Taylor, (Iowa 1906) 108 N. W. 927; Whyte *v.* St. Louis, 153 Mo. 80, 54 S. W. 478; St. Clair County *v.* Lovingston, 23 Wall. (U. S.) 46, 23 L. ed. 59. But see Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286, holding that a railroad company lawfully constructing its road upon the bed of a navigable stream thereby precludes riparian owners from acquiring title by accretion to land so formed, and lying between the land appropriated by the railroad and the new high water mark of the river.

85. Park Com'rs *v.* Taylor, (Iowa 1906) 108 N. W. 927; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606 [*affirming* 10 N. Y. App. Div. 294, 41 N. Y. Suppl. 939]; Matter of Driveway, 46 Misc. (N. Y.) 157, 93 N. Y. Suppl. 1107.

It seems that accretions made by a purpresture or encroachment by the erection of a wharf in a public harbor do not belong to the owner of the lot on which the wharf is built. Dana *v.* Jackson St. Wharf Co., 31 Cal. 118, 89 Am. Dec. 164.

86. *Louisiana.*— Buras *v.* O'Brien, 42 La. Ann. 527, 7 So. 632; Winter *v.* New Orleans, 26 La. Ann. 310.

New Jersey.— Ocean City Assoc. *v.* Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425; Fitzgerald *v.* Faunce, 46 N. J. L. 536.

New York.— *In re* State Reservation Com'rs, 37 Hun 537; Hensler *v.* Hartman, 16 Abb. N. Cas. 176 note.

Texas.— Fulton *v.* Fraudolig, 63 Tex. 330.

United States.— Saulet *v.* Shepherd, 4 Wall. 502, 17 L. ed. 442.

See 37 Cent. Dig. tit. "Navigable Waters," § 270.

Owner of water lot.— The owner of a lot on a water front, as established by statute, below low water mark, has been held not a riparian proprietor within the rule as to rights to accretions. Dana *v.* Jackson St. Wharf Co., 31 Cal. 118, 89 Am. Dec. 164.

Whether an owner is a riparian proprietor so as to be entitled to accretions is to be determined as of the time of the date of the deed to him. Ocean City Assoc. *v.* Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425. The right of the vendee cannot be carried back to the date of a title bond previously assigned to him under which he procured the deed. Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117.

87. Ellinger *v.* Missouri Pac. R. Co., 112 Mo. 525, 20 S. W. 800; Smith *v.* St. Louis Public Schools, 30 Mo. 290; Lebeaume *v.* Poctlington, 21 Mo. 35; Magraw *v.* Hailman, 33 Leg. Int. (Pa.) 192; Banks *v.* Ogdon, 2 Wall. (U. S.) 57, 17 L. ed. 818. *Contra*, Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

88. Mallory *v.* Brademyer, 76 Ark. 538, 89 S. W. 551; Wallace *v.* Driver, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317; Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; Perkins *v.* Adams, 132 Mo. 131, 33 S. W. 778; Dixson *v.* Snetsinger, 23 U. C. C. P. 235. See also Chinn *v.* Naylor, 182 Mo. 583, 81 S. W. 1109.

A bar, not above ordinary high water mark, although of gradual formation, is not an accretion. St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559.

Islands.— Where an island springs up in the midst of a stream, it is an accretion to the soil in the bed of the river, and not to

e. Owner of Island. The owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the shore of the mainland.[89] If the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island;[90] but if accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.[91]

f. Easements to Which Subject. Where there is a right of way to and from the water, such right continues over all accessions to the soil between high and low water mark, whether the line of high water mark is changed by natural or artificial causes.[92]

3. Reappearance of Land After Submergence. Where, after submergence, the water disappears from the land, either by gradual retirement or elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation or boundary lines, the proprietorship returns to the original owner.[93] In such a case the doctrine of reappearance of land after submergence controls, and while the principles governing the acquisition of land by accretion or reliction have a bearing upon the case, they are not strictly determinative of the controversy.[94] It has been held, however, that if part of the

the land of the riparian owner, although it afterward becomes united with the mainland. East Omaha Land Co. *v.* Hanson, 117 Iowa 96, 90 N. W. 705; Hahn *v.* Dawson, 134 Mo. 581, 36 S. W. 233; Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

89. *California.*— Fillmore *v.* Jennings, 78 Cal. 634, 21 Pac. 536.

Kansas.— Fowler *v.* Wood, 93 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162.

Michigan.— People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

New York.— Morris *v.* Brooke, 25 Alb. L. J. 90.

Pennsylvania.— Houseman *v.* International Nav. Co., 214 Pa. St. 552, 64 Atl. 379.

See 37 Cent. Dig. tit. "Navigable Waters," § 270.

Compare Widdicombe *v.* Rosemiller, 118 Fed. 295.

90. Glassell *v.* Hansen, 135 Cal. 547, 67 Pac. 964; Moore *v.* Farmer, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504; Naylor *v.* Cox, 114 Mo. 232, 21 S. W. 589.

However, it has been held that a riparian owner acquires with his patent to the shore land a contingent interest in and to an island in the channel based upon the possibility that at some future time, either by the action of or a recession of the waters, the island will become connected with the mainland, regardless of other rights subsequently acquired; so that where accretions established a sand bar between the island and the property of the shore owner, the riparian rights of the first patentee of the shore land were superior to those of a patentee of the island, and the first patentee obtained title to the island and the land between it and his shore land. Webber *v.* Axtell, 94 Minn. 375, 102 N. W. 915, 6 L. R. A. N. S. 194.

91. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; Hahn *v.* Dawson, 134 Mo. 581, 36 S. W. 233; Buse *v.* Russell, 86 Mo. 209.

If the channel is filled up by accretion to or dereliction from either side, the boundary is the center of the channel as it was before the water left it. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162.

92. Lockwood *v.* New York, etc., R. Co., 37 Conn. 387.

93. Hughes *v.* Birney, 107 La. 664, 32 So. 30; Mulroy *v.* Norton, 100 N. Y. 426, 3 N. E. 581, 53 Am. Rep. 206; Murphy *v.* Norton, 61 How. Pr. (N. Y.) 197; Widdicombe *v.* Rosemiller, 118 Fed. 295.

Rights of non-riparian owner.—It has been held that where a plat is made of upland and of land beneath the water and land is sold, with reference to the plat, the fact that the water gradually encroaches upon one of the shore lots so as to entirely submerge it does not vest the title thereto in the owner of the adjacent inland block. Gilbert *v.* Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411. The weight of authority, however, holds that where a particular tract is entirely cut off from a river by an intervening tract, and the latter was gradually washed away until the former was reached by the river, it becomes riparian as much as if it had been originally such, so that if afterward the water recedes and gradually restores what it had taken not only from the remoter lot but also from the intervening lot, the entire land belongs to the remoter lot which had become riparian. Welles *v.* Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; Peuker *v.* Canter, 62 Kan. 363, 63 Pac. 617; Widdecomb *v.* Chiles, 173 Mo. 195, 73 S. W. 444, 96 Am. St. Rep. 507. On the same theory, it is held that where one of the boundaries in a conveyance of a strip of a part of the upland owned by the grantor is high water mark and by encroachment of the waters the land was submerged and lost, the grantee cannot claim a strip bounded by the new high water mark. Nixon *v.* Walter, 41 N. J. Eq. 103, 3 Atl. 385.

94. Hughes *v.* Birney, 107 La. 664, 32 So. 30.

mainland is gradually washed away and such land reforms in the stream, but not beginning at the water's edge, it does not belong to the riparian proprietor, although within the boundaries of the original survey.[95]

4. Avulsion.[96] Avulsion, as already defined,[97] does not divest the title to lands covered by water,[98] nor confer title to lands uncovered or deposited by the water.[99] If the land afterward reappears the riparian owner retains his title thereto,[1] provided the identity of the land can be established.[2]

5. Apportionment. Ordinarily accretions must be immediately in front of the land to which it is attached so that the owner cannot follow them up or down the stream.[3] The rule usually adopted for the apportionment of accretions among contiguous riparian owners is to divide the new shore line among the proprietors in proportion to their respective rights in the old shore line and to draw lines from the points of division thus made in the new shore line to the points at which the old shore line is intersected by the boundaries separating the proprietors.[4] Of course the circumstances of the particular case may vary the general rule.[5]

6. Remedies and Procedure. To protect the right to accretions, the riparian owner has the same remedies as belong to him with reference to the other shore

95. Frank *v.* Goddin, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493; Cox *v.* Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Naylor *v.* Cox, 114 Mo. 232, 21 S. W. 589.

96. As changing boundary line between states see States.

97. See *supra*, VII, I, 1, c.

98. Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783; Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; Nix *v.* Dickerson, 81 Miss. 632, 33 So. 490; Spigener *v.* Cooner, 8 Rich. (S. C.) 301, 64 Am. Dec. 755. See also York County *v.* Rolls, 27 Ont. App. 72.

Abandonment of bed.— Where a stream which forms a boundary line of lands from any cause suddenly abandons its old, and seeks a new, bed, or suddenly and perceptibly washes away its banks, such change of channel or banks, if its limits can be determined, works no change of boundary. Wallace *v.* Driver, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317. In the case of a sudden and extraordinary recession of the waters of a navigable stream exposing its bed as a consequence of the adoption of a new channel, such land belongs to the government which owned the bed. Murry *v.* Sermon, 8 N. C. 56 (lake); Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

99. Vogelsmeier *v.* Prendergast, 137 Mo. 271, 39 S. W. 83; Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300 [*affirming* 52 Mo. App. 229]; Rees *v.* McDaniel, 115 Mo. 145, 21 S. W. 913; Rodriguez *v.* Hernandez, 35 Tex. Civ. App. 78, 79 S. W. 343. See also Noyes *v.* Collins, 92 Iowa 566, 61 N. W. 250, 54 Am. St. Rep. 571, 26 L. R. A. 609.

1. Chicago *v.* Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849; Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162; Wiggenhorn *v.* Kountz, 23 Nebr. 690, 37 N. W. 603, 8 Am. St. Rep. 150; Mulry *v.* Norton, 29 Hun (N. Y.) 660 [*affirmed* in 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206].

2. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162.

3. Widdicombe *v.* Rosemiller, 118 Fed. 295.

4. Nauman *v.* Burch, 91 Ill. App. 48; Berry *v.* Hoogendoorn, (Iowa 1906) 108 N. W. 923; Deerfield *v.* Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117; Jones *v.* Johnston, 18 How. (U. S.) 150, 15 L. ed. 320; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324. See also Delord *v.* New Orleans, 11 La. Ann. 699; Michon *v.* Gravier, 11 La. Ann. 596, effect of agreement. And see Boundaries, 5 Cyc. 888.

In **Kentucky**, however, it has been held that the rights of riparian owners of lots originally fronting on the Ohio river to land added thereto by accretion are to be ascertained by extending the original river frontage of the respective lots as nearly as practicable at right angles with the course of the river to the thread of the stream. Miller *v.* Hepburn, 8 Bush 326.

Where plaintiff and his grantors were riparian owners, plaintiff was entitled to such portion of the accretions as would give to him his corresponding frontage on the new river bank, and could not be limited to so much of the accretions in front of his property as was necessary to make it rectangular in form. Berry *v.* Hoogendoorn, (Iowa 1906) 108 N. W. 923.

5. Batchelder *v.* Keniston, 51 N. H. 496, 12 Am. Rep. 143; Thornton *v.* Grant, 10 R. I. 477, 14 Am. Rep. 701.

The owner of a fractional section whose corner is established in the range line on the shore of a navigable river according to a United States survey is entitled to all the accretions formed by an extension of the shore line and not simply to so much thereof as is included within a promulgation of the usual section lines to what would have been the section corner had the made land been there when the United States survey was made. Frederitzie *v.* Boeker, 193 Mo. 228, 92 S. W. 227.

land.[6] Of course a party cannot be protected by injunction as to accretions which are not in existence and which may or may not exist in the future.[7] The burden of proving that land was an accretion so as to belong to the party claiming it is on the party having the affirmative of the issue.[8]

J. Islands and Sand-Bars — 1. What Constitutes. To constitute an island in the river, it must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sand-bar subject to overflow by a rise in the river and connected with the land when the water is low.[9]

2. Ownership. The ownership of an island generally follows the ownership of the bed of the water, so that if the state owns the land under water it belongs to the state,[10] while if the riparian owner has title to the bed the island belongs to him up to the line of his ownership of the bed.[11] Where islands are formed and surveyed by the United States before the admission of the state into the Union, they are subject to disposition by the federal government the same as other public lands, but if formed after the admission of the state the question whether they

6. See Griffin *v.* Kirk, 47 Ill. App. 258; Leonard *v.* Baton Rouge, 39 La. Ann. 275, 4 So. 241; Morris *v.* Brooke, 25 Alb. L. J. (N. Y.) 90.

Decree.— In a suit to quiet title where the evidence was convicting as to whose land the alluvion first attached, the court properly divided the land in controversy between the respective claimants on equitable principles and quieted the title of each riparian owner to the parcel allotted to him. Pearcy *v.* Bybee, 20 Oreg. 385, 26 Pac. 233.

7. Taylor *v.* Underhill, 40 Cal. 471.

8. Bissell *v.* Fletcher, 27 Nebr. 582, 43 N. W. 350, holding also that where land claimed as an accretion had been surveyed by the United States and sold to defendants, the burden of proof was on plaintiff to also show that the survey and sale by the United States was without authority and in violation of plaintiff's rights.

9. McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822. See also Islands, 23 Cyc. 357.

In determining whether a formation in a river is an island or a part of the shore land by accretion, account should be taken of the size and stability of the formation and the permanence of the channels around it. McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822. So the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel must likewise be taken into account. Shoemaker *v.* Hatch, 13 Nev. 261.

A mussel bed, over which the water ebbs and flows at every tide, and between which and the shore no water flows at low tide, is not an island, but belongs to the owner of the adjacent shore. King *v.* Young, 76 Me. 76, 49 Am. Rep. 596.

10. Tracy *v.* Norwich, etc., R. Co., 39 Conn. 382; Middletown *v.* Sage, 8 Conn. 221; People *v.* Warner, 116 Mich. 228, 74 N. W. 705; Sherwood *v.* State Land Office, 113 Mich. 227, 71 N. W. 532; Moore *v.* Farmer, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504; Perkins *v.* Adams, 132 Mo. 131, 33 S. W. 778; Wainwright *v.* McCullough, 63 Pa. St. 66; Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566. But see Adams *v.* St. Louis, 32 Mo. 25.

In Missouri islands formed in navigable streams belong to the respective counties within which they appear. Frank *v.* Goddin, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493; Moore *v.* Farmer, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504.

Statutory provisions.— In California, by statute, islands and accumulations of land formed in the beds of navigable streams belong to the state if there is no title or prescription to the contrary. Glassell *v.* Hansen, 135 Cal. 547, 67 Pac. 964; Heckman *v.* Swett, 99 Cal. 303, 33 Pac. 1099.

11. Kaskaskia *v.* McClure, 167 Ill. 23, 47 N. E. 72; Berry *v.* Snyder, 3 Bush (Ky.) 266, 96 Am. Dec. 219; McBaine *v.* Johnson, 155 Mo. 191, 55 S. W. 1031; Sliter *v.* Carpenter, 123 Wis. 578, 102 N. W. 27; Franzini *v.* Layland, 120 Wis. 72, 97 N. W. 499. See also Asher Lumber Co. *v.* Lunsford, 30 S. W. 968, 17 Ky. L. Rep. 245.

The owner of land on both sides of a river above tide-water owns the islands therein to the extent of the length of his lands opposite to them. Granger *v.* Avery, 64 Me. 292.

Ownership as between riparian owners.— Islands are to be divided in severalty between the proprietors on both sides according to the original dividing line, or *filum aquæ*, as it would run if the islands were under water. McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715. The ownership of an island depends upon the location of the channel at the time of the execution of the deeds to the claimants and is not affected by the shifting of the stream to the channel on the other side of the island. Degman *v.* Elliott, 8 S. W. 10, 9 Ky. L. Rep. 982.

Under the law of France prevailing in the Illinois territory in 1743, islands formed between the thread of the stream and the shore became the property of the riparian proprietor. Kaskaskia *v.* McClure, 167 Ill. 23, 47 N. E. 72.

An owner of an island in the Great Lakes has title only to tide line. People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

belong to the riparian owner or are the property of the state is governed by local law.[12]

VIII. LAND UNDER WATER AND ISLANDS.[13]

A. Definitions.[14] The term "land under water," as used herein, refers to land below high water mark. The term "bank" is not strictly appropriate to the arms of the sea and other tidal waters, but is applicable to non-tidal, fresh water rivers.[15] The term "shore" technically means all the ground between ordinary high water and low water mark where the tide ebbs and flows.[16] The term "shore" is synonymous with "tide-lands,"[17] and "flats."[18]

B. Ownership[19] — **1. In England.** At common law the fee in all land covered by navigable water, that is, water in which the tide ebbed and flowed, was in the king.[20]

2. In United States — a. Federal Ownership. No title to the soil under navigable waters was conferred by the constitution upon the federal government, so far as the original states were concerned, but the title remained in the respective states.[21] But before a state is admitted and while it is a territory, the federal government is vested with the title to the lands under water.[22] This title, however, except as conveyed before the admission of the state, is relinquished to the state upon its admission into the Union.[23] In the acquisition of territory from another country the United States does not acquire title to lands under water which have been previously granted to other parties by the former government or which have been subjected to trusts that would require their disposition in

12. Widdicombe *v.* Murphy, 118 Fed. 295.

13. See, generally, Public Lands.

As subject to condemnation see Eminent Domain, 15 Cyc. 609.

Dedication of see Dedication, 13 Cyc. 449, 450.

Reclamation and improvement of submerged land see *supra*, VII, G.

14. Bank see 5 Cyc. 226.

Beach see 5 Cyc. 677.

Bed see 5 Cyc. 678.

Flat see 19 Cyc. 1078.

"High and low water mark" see Boundaries, 5 Cyc. 901.

"Thread of stream" see Boundaries, 5 Cyc. 902.

15. Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933.

Division line between bank and bed.— The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the bank by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. St. Louis, etc., R. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559; Howard *v.* Ingersoll, 13 How. (U. S.) 381, 14 L. ed. 189.

16. Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 472, 52 Atl. 933.

17. Andrus *v.* Knott, 12 Oreg. 501, 8 Pac. 763.

Land covered with water several months in the year is not tide-land. Sengstacken *v.* McCormac, 46 Oreg. 171, 79 Pac. 412; Andrus *v.* Knott, 12 Oreg. 501, 8 Pac. 763.

18. See Flat, 19 Cyc. 1078.

19. What law governs see Boundaries, 5 Cyc. 891.

20. Brookhaven *v.* Smith, 98 N. Y. App. Div. 212, 90 N. Y. Suppl. 646; Carroll *v.* Price, 81 Fed. 137; Atty.-Gen. *v.* Tomline, 14 Ch. D. 58, 44 J. P. 617, 49 L. J. Ch. 377, 42 L. T. Rep. N. S. 880, 28 Wkly. Rep. 870; Lowe *v.* Govett, 3 B. & Ad. 863, 1 L. J. K. B. 224, 23 E. C. L. 376.

21. Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

22. See *infra*, VIII, C, 1, b, (I).

Alaska.— Title to tide-lands in Alaska is in the United States. Sutter *v.* Heckman, 1 Alaska 81.

23. Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333]; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565; Mobile *v.* Sullivan Timber Co., 129 Fed. 298, 63 C. C. A. 412; Leverich *v.* Mobile, 110 Fed. 170; Mission Rock Co. *v.* U. S., 109 Fed. 763, 48 C. C. A. 641 [*affirmed* in 189 U. S. 391, 23 S. Ct. 606, 47 L. ed. 865]; Carroll *v.* Price, 81 Fed. 137; Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684. See also State *v.* Pinckney, 22 S. C. 484.

The secretary of war cannot grant rights to lands owned by the state, nor can he deprive plaintiff of his property and rights by authorizing a stranger to take them. San Francisco Sav. Union *v.* Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242.

The shores of navigable waters within the territory of a state vest in the state upon its admission to the Union. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756.

some other way;[24] but if there was no authority on the part of the representatives of the former government to make the grant, it will not be recognized.[25]

b. State Ownership. Except where grants have been made before or after the admission of a state into the Union, it owns the seashore,[26] the land under the Great Lakes,[27] and the land under a stream in so far as the tide ebbs and flows.[28] There is some conflict as to the ownership of the bed of navigable lakes other than the Great Lakes.[29] So where the river is one in which the tide does not ebb and flow but is navigable in fact, there is a great conflict of opinion as to the line dividing the ownership of the riparian proprietor and of the state, some courts holding the right of the riparian owner extends to the middle of the stream, while others limit his right to low water mark, and still others limit the right to high water mark.[30]

3. Statutory Provisions. A statutory declaration that a navigable stream is non-navigable will not transfer title to its bed to the riparian owner.[31] Conversely a statute declaring a non-navigable stream navigable will not deprive the riparian owner of his title to the bed previously acquired by grant from the commonwealth.[32] Statutory provisions declaring title to the beds of all navigable streams

24. Knight *v.* U. S. Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Mobile *v.* Hallett, 16 Pet. (U. S.) 261, 10 L. ed. 958; Coburn *v.* San Mateo County, 75 Fed. 520.

25. Walker *v.* Marks, 29 Fed. Cas. No. 17,078, 2 Sawy. 152 [*affirmed* in 17 Wall. 648, 20 L. ed. 744].

26. San Francisco Sav. Union *v.* Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242; Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887; Taylor *v.* Com., 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 815 (where statute held to be merely declaratory of the common law); Southern Pac. Co. *v.* Western Pac. R. Co., 144 Fed. 160; Carroll *v.* Price, 81 Fed. 137. See, generally, Boundaries, 5 Cyc. 893.

Lands submerged by advance of sea.— The state owns lands submerged by the gradual advance of the sea. Mulry *v.* Norton, 29 Hun (N. Y.) 660 [*affirmed* in 100 N. Y. 424, 53 Am. Rep. 206]; Wilson *v.* Shiveley, 11 Oreg. 215, 4 Pac. 324; *In re* Hull, etc., R. Co., 8 L. J. Exch. 260, 5 M. & W. 327.

In Massachusetts and Maine ordinances were passed at an early date giving the riparian owner title to low water mark on the sea-shore not to exceed one hundred rods below high water mark. See Boundaries, 5 Cyc. 893.

27. Revell *v.* People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790; People *v.* Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; Chicago Transit Co. *v.* Campbell, 110 Ill. App. 366. See also Boundaries, 5 Cyc. 893.

Property sunk.— The United States has no title to property sunk in the bottom of one of the Great Lakes, title to the bed belonging to the state. Murphy *v.* Dunham, 38 Fed. 503.

28. Muckle *v.* Good, 45 Oreg. 230, 77 Pac. 743; Webster *v.* Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324. See also Boundaries, 5 Cyc. 894.

In Pennsylvania all the property on the river front of the city of Philadelphia on the Delaware river below low water mark is held merely by license from the commonwealth, and subject to such laws as the legislature may see fit to enact. Simpson *v.* Neill, 89 Pa. St. 183.

29. See cases cited *infra*, this note.

Title held to belong to state.—Rood *v.* Wallace, 109 Iowa 5, 79 N. W. 449; Pewaukee *v.* Savoy, 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L. R. A. 836; Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185, holding that the title was not subject to taxation and hence a purchaser of land covered by a part of such lake at a tax-sale acquires no right to the bed thereof.

Title held to belong to shore owners see Boundaries, 5 Cyc. 893.

30. See Boundaries, 5 Cyc. 895–897.

At common law if the tide does not ebb and flow in a stream, the title to the property belongs to the riparian owners. Hindson *v.* Ashby, [1896] 2 Ch. 1, 60 J. P. 484, 65 L. J. Ch. 515, 74 L. T. Rep. N. S. 327, 45 Wkly. Rep. 252 [*reversing* on other grounds [1896] 1 Ch. 78, 60 J. P. 40, 65 L. J. Ch. 91, 73 L. T. Rep. N. S. 468, 44 Wkly. Rep. 184].

Diversion of water as extinguishing title. — The title of the state to the bed of a navigable stream is not extinguished by the wrongful diversion of the water. Wainwright *v.* McCullough, 63 Pa. St. 66.

Artificial raising of bed.— The title of state to the bed does not change by artificially filling so as to raise the bed above the level of the water. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

31. Wood *v.* Chicago, etc., R. Co., 60 Iowa 456, 15 N. W. 284; Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330. See also Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286; Steele *v.* Sanchez, 72 Iowa 65, 33 N. W. 366, 2 Am. St. Rep. 233.

32. Coovert *v.* O'Conner, 8 Watts (Pa.) 470; Allen *v.* Weber, 80 Wis. 531, 50 N. W. 514, 27 Am. St. Rep. 51, 14 L. R. A. 361.

to be in the state have been held not to apply to a stream navigable only for the purpose of floating logs.[33]

C. Public Grants[34]—**1. Power to Grant**—**a. In England and Canada.** In England,[35] and Canada,[36] land under water may be granted by the crown.

b. In United States—(i) *Power of United States.* Congress has power to grant land under water within a territory of the United States,[37] but after the admission of the state into the Union the federal government has no power to dispose of submerged lands therein.[38]

(ii) *Power of State*[39]—(a) *In General.* The general rule is that a state has the absolute power to grant its lands under water,[40] unless prohibited by stat-

33. Watkins *v.* Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

34. Grant as incidental to grant of riparian land see *infra*, IX, A, 2, a.

35. Atty.-Gen. *v.* Tomline, 14 Ch. D. 58, 44 J. P. 617, 49 L. J. Ch. 377, 42 L. T. Rep. N. S. 880, 28 Wkly. Rep. 870; Atty.-Gen. *v.* Burridge, 10 Price 350, 24 Rev. Rep. 705.

36. Reg. *v.* Moss, 26 Can. Sup. Ct. 322; Ross *v.* Portsmouth, 17 U. C. C. P. 195; Atty.-Gen. *v.* Perry, 15 U. C. C. P. 329; Parker *v.* Elliott, 1 U. C. C. P. 470.

37. Kneeland *v.* Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. 745; Mann *v.* Tacoma Land Co., 153 U. S. 273, 14 S. Ct. 820, 38 L. ed. 714; Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331 [*affirming* 22 Oreg. 410, 30 Pac. 154]; Carroll *v.* Price, 81 Fed. 137, holding that where the right of navigation is not impaired possessory right to tide-lands in Alaska will be determined by the rights governing similar rights to uplands. *Contra*, Kalez *v.* Spokane Valley Land, etc., Co., 42 Wash. 43, 84 Pac. 395 (land under lake); Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

38. Doe *v.* Greit, 8 Ala. 930; Doe *v.* Bebee, 8 Ala. 909; Doe *v.* Files, 3 Ala. 47; Goodtitle *v.* Kibbe, 9 How. (U. S.) 471, 13 L. ed. 220; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565. See also Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

This rule includes the shore.—Kemp *v.* Thorp, 3 Ala. 291; Doe *v.* Files, 2 Ala. 47; Mobile *v.* Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325.

39. Sale of tide-lands by state see Public Lands.

40. *California.*—Ward *v.* Mulford, 32 Cal. 365.

Georgia.—Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Maryland.—Browne *v.* Kennedy, 5 Harr. & J. 195, 9 Am. Dec. 503; Chapman *v.* Hoskins, 2 Md. Ch. 485.

Michigan.—Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

New Jersey.—Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 2 Am. Rep. 269; Gough *v.* Bell, 21 N. J. L. 156.

New York.—Saunders *v.* New York Cent., etc., R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L. R. A. 378 [*modifying* 24 N. Y. Suppl. 659 (*affirming* 71 Hun 153, 23 N. Y. Suppl. 927)]; People *v.* New York, etc., Ferry Co., 68 N. Y. 71; People *v.* Tibbetts, 19 N. Y. 523.

Ohio.—Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

Oregon.—Bowlby *v.* Shively, 22 Oreg. 410, 30 Pac. 154; Parker *v.* Taylor, 7 Oreg. 435.

Texas.—Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

Washington.—Morse *v.* O'Connell, 7 Wash. 117, 34 Pac. 426; Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550; Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.

United States.—U. S. *v.* Mission Rock Co., 189 U. S. 391, 23 S. Ct. 606, 47 L. ed. 865 [*affirming* 109 Fed. 763, 48 C. C. A. 641]; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428; Manchester *v.* Massachusetts, 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421.

See 37 Cent. Dig. tit. "Navigable Waters," § 203.

But see Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242; Tatum *v.* Sawyer, 9 N. C. 226.

Contra.—Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430; Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574; Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904 (holding that the state cannot grant the title to submerged lands under navigable waters, with the right of draining such waters); Pewaukee *v.* Savoy, 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L. R. A. 836.

Under the general land laws, an individual cannot obtain the title to soil under the waters of navigable streams, and the exclusive privilege of taking from the bed of the stream sand, gravel, and other deposits found therein. Goodwin *v.* Thompson, 15 Lea (Tenn.) 209, 54 Am. Rep. 410.

Exclusive rights.—The state may grant an exclusive right to use lands under public waters for oyster planting. People *v.* Thompson, 30 Hun (N. Y.) 457.

Construction of statute.—Statutory authority given a railroad company to take and use any lands and streams belonging to the state does not include lands under one of

ute.[41] In a part of the states, however, it is held that the title of the state to lands under navigable water and the power of disposition is an incident and a part of its sovereignty that cannot be surrendered, alienated, or delegated except for some public purpose or some reasonable use which can fairly be said to be for the public benefit.[42]

(B) *Power as Limited to Grant to Adjacent Owner.* By statute, in some jurisdictions, the power to grant land under water is limited, or a preference is given, to adjacent owners of upland.[43]

the Great Lakes, the water not being a stream. Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408.

Forfeiture.— Where a patent reserved a yearly rent, a grantor can enforce forfeiture for non-payment. De Lancey *v.* Piepgras, 138 N. Y. 26, 33 N. E. 822, 34 N. E. 513 [*affirming* 63 Hun 169, 17 N. Y. Suppl. 681].

Cancellation or vacation of patent or grant.— Where a patent is unlawfully obtained it will be canceled. Smith *v.* State, 2 Harr. & M. (Md.) 244; People *v.* Colgate, 67 N. Y. 512. However, the state alone can raise the question of the forfeiture of a grant because of the grantee's failure to fill in such land. White *v.* Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169.

Leases.— The state cannot lease its lands below high water mark except for the purposes specified in the statute or constitutional provision authorizing the making of such lease. Curing and canning fish, maintaining a retail and wholesale fish market, and the storage of ice for packing and handling fish, are not conveniences of navigation and commerce, within section 1, and establishments of that character, and structures created for such purposes are not the "only structures" mentioned in section 2. State *v.* Bridges, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593.

Successive grants.— In the absence of an express grant of wharfage or of such manifest intention, the city or the state, as the case may be, may make successive grants of its lands under water, each in front of the former to different grantees, without any violation of the rights of either; and neither the first nor the last grantee will acquire any exclusive riparian privilege. Turner *v.* People's Ferry Co., 21 Fed. 90.

41. Day *v.* Day, 22 Md. 530.

Construction.— The clause in Md. Acts (1862), c. 129, § 3, prohibiting the issuance of any patent to land covered by navigable waters, should be so construed as to apply to all lands below high water mark. Day *v.* Day, 22 Md. 530.

42. Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408 (holding that the state has no power to alienate such lands except for the erection of structures in aid of commerce, and not impairing the public interest, and that it cannot dispose of the land by allowing a railroad company to build upon it for its private use); People *v.* Kirby, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; Fuller *v.* Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146 (holding that a grant cannot be made so as to deprive the riparian owners of their rights as such); Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; Rhode Island Motor Co. *v.* Providence, (R. I. 1903) 55 Atl. 696; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018 [*affirming* 33 Fed. 730]. See also Bliss *v.* Ward, 198 Ill. 104, 64 N. E. 705; People *v.* Kirby, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277, holding that submerged lands redeemed by the extension of a driveway upon Lake Michigan may be appropriated by the park board, under the authority of the legislature, to pay for the improvement, where the rights of navigation, commerce, and fishing are not interfered with.

Within this principle the state has power to grant lands under water to a municipal corporation for the promotion of its commercial prosperity (Langdon *v.* New York, 93 N. Y. 129); and may also make grants to railroads for rights of way and other facilities in the transaction of their business (Saunders *v.* New York Cent., etc., R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L. R. A. 378).

A grant of all the lands under the navigable waters of a state is not within the power of the legislature. Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018 [*affirming* 33 Fed. 730].

43. See the statutes of the several states.

In New York, by statute, land under water can be granted by the commissioners of the land-office only to the adjacent riparian owner (People *v.* Colgate, 67 N. Y. 512; People *v.* Schermerhorn, 19 Barb. 540; Benson *v.* McNamee, 12 N. Y. St. 503; Beach *v.* New York, 45 How. Pr. 357, holding that a grant to several vested in the grantees the title to lands under water so conveyed, although the grantees were not the owners of all the uplands jointly, but were at the time owners in severalty of all the uplands except one or two lots; People *v.* Mauran, 5 Den. 389), except that, by Laws (1850), §§ 25, 49, such land may be granted by them to a railroad company for the purposes of the road (Saunders *v.* New York Cent., etc., R. Co., 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L. R. A. 378 [*modifying* 24 N. Y. Suppl. 659 (*affirming* 71 Hun 153, 23 N. Y. Suppl. 927)]). A railroad company cannot, by virtue merely of the construction of its railroad under charter along a navigable river, on land partly below high water, conveyed to it for that purpose by owners of the adjacent uplands, be regarded as an adjacent owner within the statute allowing a grant of land

c. Grants to Towns and Cities. The state may grant in fee land under tidewater to a municipality in furtherance of the public interests, subject to the federal rights respecting navigation.[44] Such lands which have been granted to a

under water only to such an owner. Saunders *v.* New York Cent., etc., R. Co., 135 N. Y. 613, 32 N. E. 54; New York Cent., etc., R. Co. *v.* Aldridge, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516 [*affirming* 16 N. Y. Suppl. 674]; Rumsey *v.* New York, etc., R. Co., 125 N. Y. 681, 25 N. E. 1080; Rumsey *v.* New York, etc., R. Co., 114 N. Y. 423, 21 N. E. 1066. In such a case the grantor still remains the riparian owner so that a patent may issue to him as the owner of adjacent land, or the land lying next under the water. Saunders *v.* New York Cent., etc., R. Co., 135 N. Y. 613, 32 N. E. 54; New York Cent., etc., R. Co. *v.* Aldridge, *supra*. An adjacent owner is the owner of the upland bounded by a stream and not merely the owner of the contiguous land between the high and low water line. New York *v.* Hart, 16 Hun (N. Y.) 380 [*affirmed* in 95 N. Y. 443]. Where one without right fills up land under water he does not acquire a title thereto so as to become an adjacent owner entitled to purchase land under water. People *v.* Land Office Com'rs, 135 N. Y. 447, 32 N. E. 139. A reservation in a deed of lands down to high water mark of all the water rights and privileges in the river opposite is inoperative to prevent a grant of the land under water to the grantee. People *v.* Land Office Com'rs, 15 N. Y. Suppl. 644. The right to land under water acquired by the upland owner by grant from the state is not divested by subsequent statutes giving railroad corporations the right to construct their roads across, along, and upon any stream. Rumsey *v.* New York, etc., R. Co., 130 N. Y. 88, 28 N. E. 763 [*affirming* 15 N. Y. Suppl. 509]. The land which the state may grant to an upland owner, it seems, is that included in a perpendicular line drawn from the shore line at right angles with the thread of the stream. People *v.* Schermerhorn, *supra*; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,204, 5 Blatchf. 35. Where a patent of lands under water makes the rights acquired by the grantee subject to all claims which the people of the state have therein, the state reserves the right to make other grants to riparian owners for the purpose of promoting the commerce of the state and for the beneficial enjoyment of the adjacent owners. But a marine railway built by an individual, for the purpose of hauling out vessels from the water, used only as a private enterprise, does not entitle the owners thereof to certain privileges granted to him by a second grant if the land on which said railway was constructed should be applied to the use of commerce. De Lancey *v.* Hawkins, 23 N. Y. App. Div. 8, 49 N. Y. Suppl. 469.

In New Jersey, under Gen. St. p. 2791, § 30, no grant can be made to one other than the riparian proprietor until six months after notification and a failure of the riparian proprietor to apply and pay for such land within said time. Shamberg *v.* Riparian Com'rs, 72 N. J. L. 132, 60 Atl. 43; Bradley *v.* McPherson, (N. J. Ch. 1904) 58 Atl. 105. See also Polhemus *v.* Bateman, 60 N. J. L. 163, 37 Atl. 1015; Fitzgerald *v.* Faunce, 46 N. J. L. 536. Formerly it was held that a riparian owner who had not reclaimed the land under water in front of his upland had no rights in the land under water which prevented the state from granting it to another without making provision for compensation. Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409. The right to a riparian grant must be exercised by keeping within side lines at right angles with the high water line, if that is straight, and, if curved or irregular, then within side lines which divide the fore shore proportionately along the littoral owners. Bradley *v.* McPherson, *supra*.

In Florida, where a preference in granting the right to work deposits in navigable water is required to be given to riparian owners, such right to a preference is not assignable. State *v.* Phosphate Com'rs, 31 Fla. 558, 12 So. 913.

Preferences in sale of tide lands in Oregon and Washington see PUBLIC LANDS.

44. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

An extension of the corporate limits of a city a mile from the shore land does not vest title in the city to lands under water belonging to the state. Bliss *v.* Ward, 198 Ill. 104, 64 N. E. 705.

Colonial grants to a town of lands under tidal water are still in force in New York and other states. Coudert *v.* Underhill, 107 N. Y. App. Div. 335, 95 N. Y. Suppl. 134; Brookhaven *v.* Smith, 98 N. Y. App. Div. 212, 90 N. Y. Suppl. 646; People *v.* Jessup, 28 N. Y. App. Div. 524, 51 N. Y. Suppl. 228; Huntington *v.* Lowndes, 40 Fed. 625 [*affirmed* in 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615]. See also Southampton *v.* Betts, 163 N. Y. 454, 57 N. E. 762 [*affirming* 21 N. Y. App. Div. 435, 47 N. Y. Suppl. 697]; New York, etc., R. Co. *v.* Horgan, 25 R. I. 408, 56 Atl. 179.

The city of New York, by the Dongan and Montgomerie charters, acquired an absolute title in fee to all the land between high and low water mark around the island of Manhattan. *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500; Jarvis *v.* Lynch, 157 N. Y. 445, 52 N. E. 657 [*affirming* 13 N. Y. Suppl. 703]; Matter of New York Speedway, 60 N. Y. App. Div. 122, 69 N. Y. Suppl. 994; Sage *v.* New York, 10 N. Y. App. Div. 294, 41 N. Y. Suppl. 938; Green *v.* Heruz, 14 Misc. 474, 35 N. Y. Suppl. 843 [*affirmed* in 2 N. Y. App. Div. 255, 37 N. Y. Suppl. 887]; New York *v.* Law, 6 N. Y. Suppl. 628

municipality in fee may be granted by it to private owners.[45] But where rights can be granted on certain specified conditions, the granting of such rights except upon compliance with the conditions is by necessary implication forbidden.[46]

2. GRANT AS INCIDENT TO GRANT OF WHARVES. A grant of the right to erect and maintain a wharf on land under water belonging to the state conveys a fee in the land under the wharf,[47] and flats fronting such wharf.[48]

3. PRESUMPTION OF GRANT. A grant from the state of the beds of navigable streams cannot be presumed,[49] at least without evidence of long exclusive possession and use.[50]

4. APPLICATION FOR GRANT AND SUBSEQUENT PROCEDURE. The procedure to obtain a grant of land under water belonging to the state or other municipality, and the right to a grant, are largely governed by local statutes.[51] A grant should be refused where it will not confer substantial rights but will be likely to cause litigation or interfere with the public right of fishery and navigation.[52] Ordinarily a preliminary notice required, by statute, to be given by the applicant, is absolutely necessary to confer jurisdiction on the land commissioners.[53] Generally an appeal may be taken from the decision of the board of land commissioners.[54] And

[*affirmed* in 125 N. Y. 380, 26 N. E. 471]; Beach *v.* New York, 45 How. Pr. 357. See also Nott *v.* Thayer, 2 Bosw. 10.

45. Williams *v.* New York, 105 N. Y. 419, 11 N. E. 829; Furman *v.* New York, 10 N. Y. 567 (holding, however, that a grant by the city to a certain point falling short of the four hundred feet belonging to the corporation, without covenants to the contrary, will not prevent the city from selling the residue to others for the purpose of building wharves or otherwise improving the flats); New York *v.* Hart, 16 Hun (N. Y.) 380 [*affirmed* in 95 N. Y. 443]; Dry Dock, etc., R. Co. *v.* New York, etc., R. Co., 30 How. Pr. (N. Y.) 39 [*reversed* on other grounds in 54 Barb. 388]. See also Dodge *v.* Gallatin, 130 N. Y. 117, 29 N. E. 107 [*affirming* 52 Hun 158, 5 N. Y. Suppl. 126]. *Contra*, Mobile *v.* Sullivan Timber Co., 129 Fed. 298, 63 C. C. A. 412, construing Ala. Act, Jan. 31, 1867, granting land under Mobile river to city of Mobile.

Part of street.— A city cannot convey the land under a pier which is a part of a city street. Knickerbocker Ice Co. *v.* Forty-Second St., etc., R. Co., 39 Misc. (N. Y.) 27, 78 N. Y. Suppl. 838.

The custom whereby riparian proprietors have used land under water for the erection of wharves, etc., does not show that the ownership thereof by the city has been divested. Mobile *v.* Sullivan Timber Co., 129 Fed. 298, 63 C. C. A. 412.

After-acquired rights do not pass by a deed from a city of land under water. Van Zandt *v.* New York, 8 Bosw. (N. Y.) 375; Matter of Riverside Park Extension, 27 Misc. (N. Y.) 373, 58 N. Y. Suppl. 963.

Leases.— A town which is the owner of land under water may lease it (Robins *v.* Ackerly, 91 N. Y. 98), and a lease by a town may be authorized by a special act of the legislature (U. S. *v.* Bain, 24 Fed. Cas. No. 14,496, 3 Hughes 593).

46. Bedlow *v.* New York Floating Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

47. Wetmore *v.* Atlantic White Lead Co., 37 Barb. (N. Y.) 70; Roberts *v.* Brooks, 71 Fed. 914 [*affirmed* in 78 Fed. 411, 24 C. C. A. 158]. But see People *v.* Broadway Wharf Co., 31 Cal. 33.

48. Ashby *v.* Eastern R. Co., 5 Metc. (Mass.) 368, 38 Am. Dec. 426; Doane *v.* Broad St. Assoc., 6 Mass. 332.

49. State *v.* Pacific Guano Co., 22 S. C. 50; Rosborough *v.* Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033. See also Boston *v.* Richardson, 105 Mass. 351.

50. Palmer *v.* Hicks, 6 Johns. (N. Y.) 133.

51. See the statutes of the several states.

In New York the statutes giving the commissioners of the land-office power to grant land under water to the owners of the adjacent upland confer an absolute discretion on the commissioners whether to make the grant. People *v.* Woodruff, 57 N. Y. App. Div. 273, 68 N. Y. Suppl. 10 [*affirmed* in 166 N. Y. 453, 60 N. E. 28]; People *v.* Woodruff, 54 N. Y. App. Div. 1, 66 N. Y. Suppl. 209 [*affirmed* in 166 N. Y. 597, 59 N. E. 1129]; People *v.* Woodruff, 39 N. Y. App. Div. 123, 56 N. Y. Suppl. 681 [*affirmed* in 159 N. Y. 536, 53 N. E. 1129]. Such discretion cannot be controlled. People *v.* Woodruff, 54 N. Y. App. Div. 1, 66 N. Y. Suppl. 209.

52. Chapman *v.* Hoskins, 2 Md. Ch. 485.

53. People *v.* Schermerhorn, 19 Barb. (N. Y.) 540. But see People *v.* Mauran, 5 Den. (N. Y.) 389, holding that it is not necessary for one making title to lands under the waters of navigable rivers by patent to show that notice of the application for the land was given as required by statute.

54. Patterson *v.* Gelston, 23 Md. 432; People *v.* Jones, 110 N. Y. 509, 18 N. E. 432 (holding that the commissioners may appeal to the court of appeals, but that the successful party who has not been made a party to the certiorari proceedings before the supreme court cannot appeal to the court of appeals, but such court may permit its counsel to be heard on the appeal of the commissioners).

too it has been held that, in a proper case, the issuance of a patent may be restrained by injunction.[55]

5. Form, Requisites, and Validity of Grant. A certificate of purchase has been held void for failure to properly classify the lands,[56] but a patent is not void because of a failure to contain a reservation of gold and silver mines.[57] A patent may be issued under the seal of the state, or the land commissioners may grant such lands under their own hands and seals.[58] A grant cannot be collaterally attacked in an action between individuals.[59] Where there is a breach of condition subsequent, the state alone can take advantage thereof.[60] Curative statutes, in some jurisdictions, ratify and confirm prior sales of tide-lands.[61]

6. Construction and Operation of Grants. Reservations and exceptions in the grant are to be construed as in other conveyances.[62] A grant of tide-lands by the state extinguishes any highway rights acquired by the public.[63] Where a water privilege in lands is described as "commencing at high water mark" the conveyance is to be construed as referring to high water mark at the time of the conveyance.[64] Where land under water is granted by the state for a purpose not connected with commerce, the grant must be strictly construed against the grantee.[65]

7. Title and Rights of Grantee — a. In General. Provided the grant is absolute,[66] a grant to an individual of the title to land under water ordinarily conveys

55. Taylor *v.* Underhill, 40 Cal. 471, holding, however, that a court of equity will not interfere to restrain the issuance of a patent for lands under water, which patent would not be a cloud on plaintiff's title and does not include any portion of his land, although the patent, when issued, would be invalid and would require evidence *dehors* to show its nullity.

56. Taylor *v.* Underhill, 40 Cal. 471, holding that a certificate of purchase of lands on the Sacramento river below high water mark, and over which the tide ebbs and flows, as swamp and overflowed lands, is void.

57. People *v.* Mauran, 5 Den. (N. Y.) 389.

58. People *v.* Mauran, 5 Den. (N. Y.) 389.

Presumptions.— A grant of lands under water by patent, under the seal of the state, is *prima facie* evidence that it was regularly issued, and that all things preliminary had been performed and complied with. People *v.* Mauran, 5 Den. (N. Y.) 389.

59. E. G. Blackslee Mfg. Co. *v.* E. G. Blackslee's Sons Iron-Works, 129 N. Y. 155, 29 N. E. 2 [*affirming* 59 Hun 209, 13 N. Y. Suppl. 493] (holding that a patent cannot be collaterally attacked on the ground that the patentee's land had been erroneously assumed to be upland, or that the land granted him was not in fact in front of the same); Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686; People *v.* Mauran, 5 Den. (N. Y.) 389 (holding that a patent cannot be collaterally attacked on the ground that it was granted for other purposes than to promote the commerce of the state). See also Elizabeth *v.* New Jersey Cent. R. Co., 53 N. J. L. 491, 22 Atl. 47.

60. Easton, etc., R. Co. *v.* New Jersey Cent. R. Co., 52 N. J. L. 267, 19 Atl. 722.

61. Upham *v.* Hosking, 62 Cal. 250; Walker *v.* Marks, 29 Fed. Cas. No. 17,078, 2 Sawy. 152 [*affirmed* in 17 Wall. 648, 21 L. ed. 744], holding that Cal. Act, May 14, 1861, affirming sales of tide-lands meant lands covered and uncovered by the tide and did not include lands lying below low tide-mark.

62. See Whitman *v.* New York, 39 Misc. (N. Y.) 43, 78 N. Y. Suppl. 820; Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 39 Misc. (N. Y.) 27, 78 N. Y. Suppl. 838, holding that where a city granted certain water lots, with a provision for the extension of a city street thereupon, it might lawfully construct a bulkhead across the water lots, where the result would be practically the same as if such street had been built and filled in.

63. Morris, etc., R. Co. *v.* Jersey City, 63 N. J. Eq. 45, 51 Atl. 387.

64. Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166.

65. De Lancey *v.* Hawkins, 23 N. Y. App. Div. 8, 49 N. Y. Suppl. 469 [*affirmed* in 163 N. Y. 587, 57 N. E. 1108].

66. See cases cited *infra*, this note.

When grant not absolute.— A grant giving the grantee the right to fill in and otherwise improve land under water and appropriate it to his own exclusive use does not confer an exclusive right to the land until reclaimed, except as in so far as necessary to enable the grantee to make reclamation. Polhemus *v.* Bateman, 60 N. J. L. 163, 37 Atl. 1015. So a grant to an abutting owner of land in a harbor between high and low water mark under a statute providing for the grant of such property to such owners "for the purpose of making wharves" does not necessarily pass title to the bed of the harbor or convey anything more than an easement to erect wharves, etc. Shepard's Point Land Co. *v.* Atlantic Hotel, 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937. And the right to take phosphate from the beds of navigable waters below high water mark for the purposes of sale has been held not included in a statute

the fee to him,[67] subject to prior legally established encumbrances,[68] and subject to the rights of navigation.[69] And prior grants of land under water cannot be divested by subsequent grants or legislation.[70] The grantee can exclude any other person from the permanent occupancy of the land granted,[71] but the state does not divest itself of the right to regulate the use of the granted premises in the interest of the public and for the protection of commerce and navigation.[72]

b. Conditions, Exceptions, and Reservations. Conditions, exceptions, or reservations in a grant of land under water may limit the rights of the grantee.[73]

D. Possession, Occupancy, and Use — 1. In General. The owner of land covered by navigable waters has the absolute right to use and enjoy the same, so long as he does not obstruct the public easement of navigation, pollute the stream, or diminish the supply.[74] But where land under water is owned by a private person, his interest is subject to the paramount right of the public to use the stream

giving riparian proprietors the title to submerged lands above the edge of the channel and authorizing them to fill up such lands. State *v.* Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 21 L. R. A. 189.

A statute giving all "riparian rights" vested in the state, between high water line and the river, to a municipality, does not constitute a grant of the soil below high water line. Allegheny City *v.* Moorehead, 80 Pa. St. 118.

The owner of a street, whether a city or its grantee, is not a riparian proprietor within the statute vesting title to submerged lands in front of any tract of land in the riparian proprietor. Geiger *v.* Filor, 8 Fla. 325.

67. People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 7 Hun 105]; Nolan *v.* Rockaway Park Imp. Co., 76 Hun (N. Y.) 458, 28 N. Y. Suppl. 102. See Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658.

When title passes.— A statute whereby the state grants to a city in fee simple certain land under water and requires certain payments, etc., as consideration, passes the title without acceptance on the part of the city, and no subsequent act or neglect of the city can defeat the title. Jersey City *v.* American Dock, etc., Co., 54 N. J. L. 215, 23 Atl. 682.

Grant of minerals.— A patent entitling the patentee to the minerals under the bed of a river from one shore to the opposite shore does not give him the right to mine minerals under an island within the boundaries of the grant, which, under prior existing laws, was subject to application and sale. Pennsylvania Coal Co. *v.* Winchester, 109 Pa. St. 572, 58 Am. Rep. 740.

68. Baltimore *v.* McKim, 3 Bland (Md.) 453.

69. Baltimore *v.* McKim, 3 Bland (Md.) 453; People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 7 Hun 105]; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107, holding, however, that the grantee does not take subject to any right of the public to use it as a road-bed for other traffic.

70. Hammond *v.* Inloes, 4 Md. 138.

Subsequent grant of right to erect dock.— Where a state has granted in fee a strip of land under water, it cannot thereafter give another the right to erect a public dock thereon. De Lancey *v.* Wellbrock, 113 Fed. 103.

When grants inconsistent.— An upland owner who receives a patent for land under water in front of his premises takes it subject to the right of the land commissioners to grant to adjoining upland owners the land under water in front of their premises. People *v.* Woodruff, 30 N. Y. App. Div. 43, 51 N. Y. Suppl. 515 [*affirmed* in 159 N. Y. 536, 53 N. E. 1129]. A grant by the state of land under water to a railroad company and a later grant of the same land to the upland owner are not necessarily inconsistent. Rumsey *v.* New York, etc., R. Co., 125 N. Y. 681, 25 N. E. 1080, holding that the upland owner acquired a good title subject only to the rights of the railroad company to the extent and within the limits of the purposes of its charter.

71. People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 7 Hun 105]; Nolan *v.* Rockaway Park Imp. Co., 76 Hun (N. Y.) 458, 28 N. Y. Suppl. 102.

72. People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 7 Hun 105].

73. New York *v.* Law, 6 N. Y. Suppl. 628.

Illustrations.— Where the grant is on condition that the flats be filled in within a certain time, the public right of user for purposes of navigation is not extinguished until they are filled. Boston, etc., Steamboat Co. *v.* Munson, 117 Mass. 34. So where land under water has been conveyed by a city reserving a portion thereof for streets, etc., the grantee takes no substantial right to the part reserved. Jordan *v.* Metropolitan Gas-Light Co., 65 How. Pr. (N. Y.) 255, holding also that the grantee cannot, by erecting piers near the street line, restrict the rights of the city.

Where the state reserves the right of reentry until the land is appropriated to commerce by the erection of a dock thereon, a subsequent patent to a railroad company for the land, on which the former patentee had not erected a dock, amounts to a reëntry by the state and divests his title. Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686.

74. Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783.

for navigation and of the government to erect necessary aids to navigation.[75] Of course in no event can the riparian owner occupy below high water mark to the prejudice of navigation,[76] except as authorized by state or federal authority. Even if the riparian owner has title only to low water mark, it has been held that he may erect structures extending below such line where they do not obstruct navigation,[77] such a structure not being a nuisance.[78] Statutes sometimes confer upon riparian owners the right to build upon submerged lands;[79] but statutes will not ordinarily be construed to authorize structures on or under the land of the state under water, except where the intent so to do is clearly evident.[80]

2. RAILROADS. A railroad company may be authorized by its charter to build a portion of its road below high water mark.[81] But the state may impose the condition that it compensate riparian owners for damages sustained by them from such construction.[82]

3. HIGHWAYS AND STREETS. While towns have authority to lay out a way or a road between high water mark and the channel of a navigable river,[83] yet a highway cannot be laid out on a beach so as to interfere with navigation during high tides.[84] A street cannot be extended into a river so as to divert the natural course thereof and destroy the rights of other riparian owners.[85] A right to the use of the bed of a stream as a ford cannot be acquired against the state by prescription, although there may be a so long continued use of the channel for a roadway

75. Wainwright *v.* McCullough, 63 Pa. St. 66; Hawkins Point Light-House Case, 39 Fed. 77.

Regulating use of water.— The grantee of land under water takes subject to the paramount right of congress to regulate the use of the water flowing over the land. Jencks *v.* Miller, 17 Misc. (N. Y.) 461, 40 N. Y. Suppl. 1088.

Lighthouse.— The ownership is subject to the right of the United States to build lighthouses for commercial purposes and the owner of the adjacent land is entitled to no compensation for damages resulting from the erection of such structures. Hill *v.* U. S., 39 Fed. 172 [*reversed* on other grounds in 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862]; Hawkins Point Light-House Case, 39 Fed. 77.

76. Natchitoches *v.* Coe, 3 Mart. N. S. (La.) 432; Wainwright *v.* McCullough, 63 Pa. St. 66.

77. Williamsburg Boom Co. *v.* Smith, 84 Ky. 372, 1 S. W. 765, 8 Ky. L. Rep. 369; Thurman *v.* Morrison, 14 B. Mon. (Ky.) 296. *Contra*, State *v.* Longfellow, 169 Mo. 109, 69 S. W. 374.

78. Wetmore *v.* Atlantic White Lead Co., 37 Barb. (N. Y.) 70.

79. Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489, holding that a statute authorizing riparian owners to erect wharves on submerged lands did not apply in the case of a public park. See also *supra*, VII, G, H.

80. Haskell *v.* New Bedford, 108 Mass. 208 (holding a city, authorized by statute to lay out sewers "through any streets or private lots," has no right to extend such a sewer by a structure on flats below low water mark, owned by an individual under special grant from the legislature); Atty.-Gen. *v.* Huston Tunnel R. Co., 27 N. J. Eq. 176 (holding that the act of March 21, 1874, extending the time for the completion by defendant, a company organized under the general railroad law, of its proposed tunnel, did not confer upon it the right to construct its tunnel in the land of the state under the waters of the Hudson river without first obtaining consent of the board of riparian commissioners).

Boom statutes.—A statute containing a provision which authorizes the incorporation of a booming company is a waiver of a right to complain of a reasonable appropriation of the bed of a stream. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462.

81. Schofield *v.* Pennsylvania, etc., R. Co., 2 Pa. Dist. 57, 12 Pa. Co. Ct. 122. See also Stevens *v.* Paterson, etc., R. Co., 20 N. J. Eq. 126; Saunders *v.* New York Cent., etc., R. Co., 135 N. Y. 613, 32 N. E. 54 [*affirming* 18 N. Y. Suppl. 942]; New York Cent., etc., R. Co. *v.* Aldridge, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516.

Construction.— A statute giving a railroad company the right to lay its road along a river and to acquire the rights of the shore owners will not be construed to give by implication the right to take land of the state lying below high water mark. Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 3 Am. Rep. 269.

82. Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664.

83. Kean *v.* Stetson, 5 Pick. (Mass.) 492; Balliet *v.* Com., 17 Pa. St. 509, 55 Am. Dec. 581. See also Hunt *v.* Com., 183 Mass. 307, 67 N. E. 966, holding that a town has jurisdiction to lay out a highway over land that is above mean high water mark, although it is covered by the sea during the high courses of tides.

84. Marblehead *v.* Essex County Com'rs, 5 Gray (Mass.) 451.

85. St. Louis *v.* Meyers, 113 U. S. 566, 5 S. Ct. 640, 28 L. ed. 1131.

as to warrant the presumption of a grant from the state of the right to a ford across it.[86]

4. Laying Pipes. The owner of the bed of a stream may prevent the laying or maintenance of a pipe line under the soil or upon the river bed,[87] but it is otherwise as to a riparian owner whose title does not extend to the ownership of the bed.[88]

E. Trespass on Submerged Lands and Actions Therefor. Where the title to the bed of a non-tidal river is in the riparian owner, he may maintain trespass [89] or replevin [90] against one taking gravel or sand therefrom. So the owner of land underneath tidal waters, whether by grant or otherwise, may maintain trespass against one using the water bed [91] or removing soil therefrom;[92] but the mere right to remove seaweed from a beach does not amount to such a possession as to warrant an action for trespass on such beach.[93] Where the title to the soil underneath the water is not in the riparian owner, he cannot maintain trespass for the invasion thereof.[94] A trespass or other encroachment on land under water may be enjoined in a suit by the owner thereof.[95]

F. Proceedings to Recover or Determine Rights.[96] Ejectment lies to recover lands under water or below high water mark,[97] provided plaintiff has title to the land which he seeks to recover.[98] So a writ of entry has been held a proper

86. Austin *v.* Hall, (Tex. Civ. App. 1900) 58 S. W. 1038.

87. Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107.

88. United New Jersey R., etc., Co. *v.* Standard Oil Co., 33 N. J. Eq. 123.

89. June *v.* Purcell, 36 Ohio St. 396. See also Ware *v.* Houk, 10 Ohio Dec. (Reprint) 724, 23 Cinc. L. Bul. 205.

Trespass generally see Trespass.

A charter right to take gravel above low water mark for perfecting a turnpike does not warrant the taking of it for repairing the road and the owner of the soil may maintain trespass therefor. Whitenack *v.* Tunison, 16 N. J. L. 77.

90. Braxon *v.* Bressler, 64 Ill. 488.

Replevin generally see Replevin.

91. Whittaker *v.* Burhans, 62 Barb. (N. Y.) 237.

92. Moore *v.* Griffin, 22 Me. 350; Clement *v.* Burns, 43 N. H. 609.

93. Parsons *v.* Smith, 5 Allen (Mass.) 578. See also Tappan *v.* Burnham, 8 Allen (Mass.) 65.

94. McManus *v.* Carmichael, 3 Iowa 1; Parsons *v.* Clark, 76 Me. 476.

95. State *v.* Black River Phosphate Co., 27 Fla. 276, 9 So. 205 (holding that a bill in equity not directly averring that the state was the owner of the bed of a stream did not allege title with such certainty as to warrant the granting of an injunction); Rumsey v. New York, etc., R. Co., 130 N. Y. 88, 28 N. E. 763 [*affirming* 15 N. Y. Suppl. 509] (holding that an individual cannot complain that the state had no authority as against the United States to grant land under water to the riparian proprietor); Com. *v.* Young Men's Christian Assoc., 169 Pa. St. 24, 32 Atl. 121.

96. Reclaimed land see *supra*, VII, G, 6.

97. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333; Ladies' Seamen's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658; Gibson *v.* Kelly, 15 Mont. 417, 30 Pac. 517.

Ejectment generally see Ejectment.

Questions for jury.— In ejectment for land under water, it is proper for the court to let the jury find whether the land in controversy is within the tract surveyed and granted. Bates *v.* Illinois Cent. R. Co., 1 Black (U. S.) 204, 17 L. ed. 158.

Instructions.—A charge limiting plaintiff's right to recover on the ground that the description takes the line far inland is properly refused, where the complaint described the shore line as extending along the high water mark; and it is also properly refused as limiting the recovery to the present tide-water line which might be different from what it was when the grant was made or the suit commenced. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

98. *Maryland.*— Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658.

Oregon.— Parker *v.* West Coast Packing Co., 17 Oreg. 510, 21 Pac. 822, 5 L. R. A. 61.

Washington.— Pierce *v.* Kennedy, 2 Wash. 324, 26 Pac. 554, 28 Pac. 35.

Wisconsin.— Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

United States.— Bates *v.* Illinois Cent. R. Co., 1 Black 204, 17 L. ed. 158.

Compare United Land Assoc. *v.* Knight, 85 Cal. 448, 24 Pac. 818.

See 37 Cent. Dig. tit. "Navigable Waters," § 199.

The mere ownership of the shore to the water's edge does not authorize the owner to maintain ejectment to obtain possession of land beyond the water's edge. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

Sufficiency of title.— It has been held that the legal right of the riparian owner on a navigable water to possess and occupy the

remedy,[99] as has unlawful entry and detainer.[1] In some jurisdictions the state may proceed by information in the name of the commonwealth.[2]

G. Division Between Adjoining Owners.[3] A riparian proprietor is entitled to have the extent of his enjoyment upon the line of navigability of the watercourse determined and marked, and his proper share of the flats or land under the water set apart, and its boundaries defined.[4] A division made by the parties themselves will prevail over that which would be effected by following the rules of law,[5] especially where acquiesced in for a long time.[6] And an agreement, where followed by actual occupation thereunder, may be presumed from a long continued series of acts.[7] So the judicial settlement of the divisional line between high and low water mark is at least *prima facie* settlement of the relative rights beyond low water mark.[8] So acquiescence in an incorrect apportionment and the

land between high and low water mark is a sufficient title to enable him to maintain ejectment against an intruder on lands lying partly above and partly below high water mark, where the lands above and below are embraced in the same action and recovered in the same judgment. Sisson *v.* Cummings, 35 Hun (N. Y.) 22 [*reversed* on other grounds in 106 N. Y. 56, 12 N. E. 345].

Burden of proof.— Under a statute authorizing the United States to bring an action, making defendants the persons asserting any claim or right to or in the land or water, and providing that such persons cited must appear and maintain any right or title they have in the premises, the burden is on defendant to maintain by evidence the titles or claims set up in their answers. U. S. *v.* Morris, 6 Mackey (D. C.) 90.

Deed as evidence.—A deed under the great seal of the state, purporting to convey the state's title to land under water, in pursuance of a statute, is of itself competent evidence in ejectment for the land, without proof that the previous steps necessary to the vesting of the title had been taken when the deed was made. American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409.

Construction of deed.— Where the state conveys land below high water mark of the sea, with the right to exclude the tide water from so much of the land as lies under water by filling in or otherwise improving it, and to appropriate the land under water to exclusive private uses, the grantee may maintain ejectment against one who occupies a pier erected upon the land under water. Burkhard *v.* H. I. Heinz Co., 71 N. J. L. 562, 60 Atl. 191 [*distinguishing* Polhemus *v.* Bateman, 60 N. J. L. 163, 37 Atl. 1015].

99. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95, holding that a mere possessory title is not sufficient where both parties claim under common ancestry or predecessors.

Writ of entry generally see ENTRY, WRIT OF.

1. Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430.

Unlawful entry or detainer see FORCIBLE ENTRY AND DETAINER.

2. Com. *v.* Roxbury, 9 Gray (Mass.) 451.

Information generally see INDICTMENTS AND INFORMATIONS.

Pleading and defenses.— The information sufficiently describes the title of the commonwealth by averring that it is the "owner in fee of all said channels, lands and flats." It is no defense that defendant has acquired a right of drainage through the lands. Cutting grass annually on flats covered for a part of the time by the tide does not amount to such a disseizin of the commonwealth as to prevent it from maintaining the information. Com. *v.* Roxbury, 9 Gray (Mass.) 451.

3. **Rules governing determination of boundary lines** see BOUNDARIES, 5 Cyc. 888.

4. Groner *v.* Foster, 94 Va. 650, 27 S. E. 493. And see BOUNDARIES, 5 Cyc. 951.

Procedure.— See Breed *v.* Breed, 110 Mass. 532. Upon proceedings under Mass. St. (1864) c. 306, for the division of flats, any question of title by disseizin of any portion of the flats to be divided should be determined before the appointment of commissioners; and the commissioners have no authority to pass upon such a question. Wonson *v.* Wonson, 14 Allen (Mass.) 71. A petition for partition of land described as bounded on the sea, or on a bay of the sea, is to be taken as a petition for a division of the flats, as well as the upland; and it is the duty of the commissioners on such petition to divide the flats. Partridge *v.* Luce, 36 Me. 16. The costs of commissioners appointed under Mass. St. (1871) c. 338, to make a division of flats, are to be apportioned among the several owners thereof, according to the market value of their respective shares or interests, and not according to the area of the flats. *In re* King, 129 Mass. 413.

5. Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521.

An unauthorized agreement by the lessees of one riparian owner with the adjoining riparian owner as to the division line between the holdings in the shallow waters of a navigable bay is void. Northern Pine Land Co. *v.* Bigelow, 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776.

6. Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521.

7. Treat *v.* Shipman, 35 Me. 34; Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553.

8. Maine Wharf *v.* Custom House Wharf, 85 Me. 175, 27 Atl. 93.

erection of structures in reliance thereon may preclude the right to a new partition,[9] and if the riparian owner takes possession pursnant to an apportionment among other owners, he will be presumed to have acquiesced therein.[10]

H. Appropriation. Land lying between high and low water mark is not subject to private appropriation under statutes authorizing the entry and grant of land held by the state.[11] But in some jurisdictions, by statute, a railroad company may appropriate lands of the state between high and low water mark for the construction of its road-bed.[12]

I. Adverse Possession.[13] Where a state has power to grant lands under water, title may be acquired as against the state by adverse possession.[14] On the other hand, if the state cannot convey such land, no title can be obtained by adverse possession.[15] So title may be acquired by adverse possession against a private owner of land below high water mark.[16] If title to the upland is divested by adverse possession the interests below the line of high water mark which are incident thereto, pass with it.[17]

J. Islands.[18] Individuals cannot obtain a right to the exclusive possession of islands in the sea by virtue of discovery,[19] but are entitled to the possession of property taken therefrom after the expenditnre of labor and money.[20] Title to islands in a navigable stream cannot be acquired by actual settlement and improvement except where the statutes so provide.[21] Title may be acquired by adverse possession.[22]

IX. Conveyances and Contracts.[23]

A. Transfer of Riparian Land — 1. In General. The rules governing conveyances of land in general apply to conveyances of land next to navigable waters.[24] Generally, riparian land owned by a municipality may be

9 O'Donnell *v.* Kelsey, 10 N. Y. 412, 2 Edm. Sel. Cas. 361.

10. O'Donnell *v.* Kelsey, 10 N. Y. 412, 2 Edm. Sel. Cas. 361.

11. Holley *v.* Smith, 132 N. C. 36, 43 S. E. 501; Ward *v.* Willis, 51 N. C. 183, 72 Am. Dec. 570; Poor *v.* McClure, 77 Pa. St. 214. See also Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281.

Attorney to locate on unoccupied and unappropriated land will not include the right to locate on mud flats subject to the flow of the tide within a harbor. Baer *v.* Moran Bros. Co., 2 Wash. 608, 27 Pac. 470.

12. Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286. See also Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664.

13. **Necessity for actual possession and what constitutes** see Adverse Possession, 1 Cyc. 995.

14. Church *v.* Meeker, 34 Conn. 421. See also Mayville *v.* Wilcox, 61 Hun (N. Y.) 223, 16 N. Y. Suppl. 15.

15. Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94; Knickerbocker Ice Co. *v.* Shultz, 116 N. Y. 382, 22 N. E. 564; Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

Licenses.— Where the bed of a stream is owned by the state, riparian owners cannot claim rights in such bed as licensees of the state on the ground that they are in possession, under color of title, when such possession was taken contrary to express statutory provisions and against the declared policy of the state. Richardson *v.* U. S., 100 Fed. 714.

16. Clancey *v.* Houdlette, 39 Me. 451; Wheeler *v.* Stone, 1 Cush. (Mass.) 313.

17. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

18. **Island** defined see *supra*, VII, J, 1.
Accretions see *supra*, VII, I, 2, e.
Title of riparian owners see *supra*, VII, J.

19. American Guano Co. *v.* U. S. Guano Co., 44 Barb. (N. Y.) 23, holding that islands discovered by citizens of the United States belong to the federal government.

Statutes.— One who, acting on information obtained from another of the existence of a guano island discovered by the latter, takes the first actual possession thereof, cannot claim an exclusive title as discoverer under the act of congress of 1856, even as against third persons. American Guano Co. *v.* U. S. Guano Co., 44 Barb. (N. Y.) 23.

20. American Guano Co. *v.* U. S. Guano Co., 44 Barb. (N. Y.) 23.

21. Johns *v.* Davidson, 16 Pa. St. 512.

22. See Tracy *v.* Norwich, etc., R. Co., 39 Conn. 382.

23. **Public grants of land under water** see *supra*, VIII, C.

24. See Deeds; Vendor and Purchaser.

Cliff as boundary.— Where a shore owner conveys part of his land bounded on the shore side by a cliff, and there is, at the time, a strip of land between the cliff and high water mark, the strip is not embraced in the conveyance. East Hampton *v.* Kirk, 84 N. Y. 215, 38 Am. Rep. 505.

The words "front to the river" *prima facie* convey a riparian estate. Morgan *v.*

alienated;[25] but where riparian land is reserved from sale for public use, the owners of lands abutting thereon acquire such an interest therein that they may enjoin an absolute conveyance of the property for private purposes.[26]

2. AS CONVEYING LAND UNDER WATER — a. Public Grants. Grants by congress of portions of the public lands within a territory do not of themselves convey title below high water mark.[27] So where a federal patent is granted after the admission of a state into the Union, it does not of itself pass title to land below high water mark inasmuch as the United States has no title thereto;[28] although the patentee may have title below high water mark where, by the law of the state, it attaches as an incident to the ownership of riparian lands.[29] Such grants are to be construed as to their effect, according to the law of the state in which the land lies.[30] The same rule applies to a patent from the crown.[31] Subject to the general rules relating to boundaries,[32] state grants have been construed as passing title only to high water mark,[33] while other grants of lands bounded on a river have been held to convey to the thread of the stream where there was no limitation in the terms of the grant itself.[34] Where a non-tidal river forms an international boundary it has been held that a state grant passes title only to the shore.[35]

Livingston, 6 Mart. (La.) 19. But where land sold does not run up to the navigable water, the words "front to the river" are merely descriptive of the position of the land sold, and no land passes beyond the expressed limits. Cambre *v.* Kohn, 8 Mart. N. S. (La.) 572.

25. New Orleans *v.* Hopkins, 13 La. 326.

26. Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649.

A reservation from sale of riparian land, to remain forever for public use, does not prevent a conveyance thereof to a railroad company for such purpose. Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649.

27. Astoria Exch. Co. *v.* Shively, 27 Oreg. 104, 39 Pac. 398, 40 Pac. 92; Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331 [*affirming* 22 Oreg. 410, 30 Pac. 154].

A grant from the sovereign of lands bounded by the sea or by any navigable tidewater does not pass any title below high water mark unless either the language of the grant or long usage under it clearly indicates that such was the intention. U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865; Somerset *v.* Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, 11 E. C. L. 719; Smith *v.* Stair, 6 Bell App. Cas. 487.

28. Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323; Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Niles *v.* Cedar Point Club, 85 Fed. 45, 29 C. C. A. 5 [*affirmed* in 175 U. S. 300, 20 S. Ct. 124, 44 L. ed. 171]; Scranton *v.* Wheeler, 57 Fed. 803, 6 C. C. A. 585.

29. Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300 [*affirming* 52 Mo. App. 229]; Chandos *v.* Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207; Scranton *v.* Wheeler, 57 Fed. 803, 6 C. C. A. 585.

30. Haight *v.* Keokuk, 4 Iowa 199; Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428.

31. De Lancey *v.* Piepgras, 138 N. Y. 26, 33 N. E. 822 [*affirming* 63 Hun 169, 17 N. Y. Suppl. 681].

32. See BOUNDARIES, 5 Cyc. 861.

33. *Connecticut.*— Church *v.* Meeker, 34 Conn. 421; Middletown *v.* Sage, 8 Conn. 221; East Haven *v.* Hemingway, 7 Conn. 186.

Iowa.— Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

Maine.— Knox *v.* Pickering, 7 Me. 106.

Massachusetts.— Com. *v.* Roxbury, 9 Gray 451; Lufkin *v.* Haskell, 3 Pick. 356.

New York.— East Hampton *v.* Vail, 71 Hun 94, 24 N. Y. Suppl. 583 [*affirmed* in 151 N. Y. 463, 45 N. E. 1030]. See also People *v.* Page, 39 N. Y. App. Div. 110, 56 N. Y. Suppl. 834, 58 N. Y. Suppl. 239.

South Carolina.— State *v.* Pacific Guano Co., 22 S. C. 50.

Texas.— Galveston *v.* Menard, 23 Tex. 349; Rosborough *v.* Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033.

See 37 Cent. Dig. tit. "Navigable Waters," § 212.

Islands.—The grants by the state of islands in the Niagara river describing them as islands do not convey title to the bed of the river, but only to the boundary of the islands. Matter of Niagara State Reservation, 16 Abb. N. Cas. (N. Y.) 159 [*affirmed* in 37 Hun 537].

A purchaser of upland from a city which owns four hundred feet below the low water mark cannot claim the soil under the river as a riparian owner. Furman *v.* New York, 5 Sandf. (N. Y.) 16.

34. State *v.* Gilmanton, 9 N. H. 461; Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631; Orendorff *v.* Steele, 2 Barb. (N. Y.) 126; Van Buren *v.* Baker, 12 N. Y. St. 209; Varick *v.* Smith, 9 Paige (N. Y.) 547; Coovert *v.* O'Conner, 8 Watts (Pa.) 470.

35. Kingman *v.* Sparrow, 12 Barb. (N. Y.) 201 [*reversed* on other grounds in 1 N. Y.

b. Transfers by Individuals — (i) *As Passing Title to Low Water Mark.* In the absence of provisions in the deed showing a contrary intent, a deed of land abutting on tidal or non-tidal waters passes whatever title the grantor has to the bank or shore.[36] Where the boundary is the water or shore, and the grantor owns to low water line, the grantee usually takes at least to low water mark;[37] but

242]; Matter of Niagara State Reservation, 16 Abb. N. Cas. (N. Y.) 191 [*affirmed* in 37 Hun 537]; Hensler *v.* Hartman, 16 Abb. N. Cas. (N. Y.) 176 note.

36. *Alabama.*— Hess *v.* Cheney, 83 Ala. 251, 3 So. 791.

Maine.— Whitmore *v.* Brown, 100 Me. 410, 61 Atl. 985; Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Erskine *v.* Moulton, 84 Me. 243, 24 Atl. 841; Snow *v.* Mt. Desert Island Real Estate Co., 84 Me. 14, 24 Atl. 429, 30 Am. St. Rep. 331, 17 L. R. A. 280; Babson *v.* Tainter, 79 Me. 368, 10 Atl. 63; King *v.* Young, 76 Me. 76, 49 Am. Rep. 596; Dillingham *v.* Roberts, 75 Me. 469, 46 Am. Rep. 419; Pike *v.* Monroe, 36 Me. 309, 58 Am. Dec. 751; Partridge *v.* Luce, 36 Me. 16; Winslow *v.* Patten, 34 Me. 25; Low *v.* Knowlton, 26 Me. 128, 45 Am. Dec. 100; Moore *v.* Griffin, 22 Me. 350; Lapish *v.* Bangor Bank, 8 Me. 85.

Massachusetts.— Litchfield *v.* Scituate, 136 Mass. 39; Hathaway *v.* Wilson, 123 Mass. 359; Cook *v.* Farrington, 10 Gray 70; Com. *v.* Roxbury, 9 Gray 451; Porter *v.* Sullivan, 7 Gray 441; Harlow *v.* Rogers, 12 Cush. 291; Green *v.* Chelsea, 24 Pick 71; Barker *v.* Bates, 13 Pick. 255, 23 Am. Dec. 678; Com. *v.* Charlestown, 1 Pick. 180, 11 Am. Dec. 161; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Austin *v.* Carter, 1 Mass. 231. See also Adams *v.* Boston Wharf Co., 10 Gray 521.

New York.— Oakes *v.* De Lancey, 71 Hun 49, 24 N. Y. Suppl. 539 [*affirmed* in 143 N. Y. 673, 39 N. E. 21]; New York *v.* Hart, 16 Hun 380 [*affirmed* in 95 N. Y. 443].

Pennsylvania.— Jones *v.* Janney, 8 Watts & S. 436, 42 Am. Dec. 309; Risdon *v.* Philadelphia, 18 Wkly. Notes Cas. 73.

United States.— Boston *v.* Lecraw, 17 How. 426, 15 L. ed. 118; McDonald *v.* Whitehurst, 47 Fed. 757 [*affirmed* in 52 Fed. 633, 3 C. C. A. 214]; Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170. See also St. Paul, etc., R. Co. *v.* Schurmeier, 7 Wall. 272, 19 L. ed. 74.

See 37 Cent. Dig. tit. "Navigable Waters," §§ 213, 215.

This rule applies to islands as well as to the mainland. Hill *v.* Lord, 48 Me. 83.

Line on bank as boundary.—A riparian owner on a navigable stream takes title to ordinary low water mark, even though the description calls for a corner on the bank above low water mark, where it is not shown that a line was run and marked on the bank as the true boundary. Martin *v.* Nance, 3 Head (Tenn.) 649.

Proof of possession.— Where a lost deed of upland is presumed from long-continued possession, it will carry the flats as appurtenant without proof of actual possession, unless there is evidence showing a separation of the title to the two. Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

Subsequently acquired title.— The transfer of the shore land after application by the owner to purchase tide-lands does not convey the subsequently acquired title to the latter, except in so far as included in the grant. Parker *v.* Taylor, 7 Oreg. 435.

A grant of lands described by metes and bounds carries with it lands under water within the bounds (Coudert *v.* Underhill, 107 N. Y. App. Div. 335, 95 N. Y. Suppl. 134; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493), but not any land outside of the boundaries (Rivas *v.* Solary, 18 Fla. 122; Lansing *v.* Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89).

37. *Alabama.*—Hess *v.* Cheney, 83 Ala. 251, 3 So. 791.

Maine.— Snow *v.* Mt. Desert Island Real Estate Co., 84 Me. 14, 24 Atl. 429, 30 Am. St. Rep. 331, 17 L. R. A. 280; Babson *v.* Tainter, 79 Me. 368, 10 Atl. 63; King *v.* Young, 76 Me. 76, 49 Am. Rep. 596. See also Erskine *v.* Moulton, 84 Me. 243, 24 Atl. 841.

Massachusetts.— Boston *v.* Richardson, 105 Mass. 351; Saltonstall *v.* Boston Pier, 7 Cush. 195; Jackson *v.* Boston, etc., R. Corp., 1 Cush. 575; Green *v.* Chelsea, 24 Pick. 71; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155.

Minnesota.— Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59 [*affirmed* in 7 Wall. 272, 19 L. ed. 74].

Mississippi.— The Magnolia *v.* Marshall, 39 Miss. 109.

New York.— Oakes *v.* De Lancey, 71 Hun 49, 24 N. Y. Suppl. 539 [*affirmed* in 143 N. Y. 673, 39 N. E. 21]; Child *v.* Starr, 4 Hill 369. See Oakes *v.* De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628 [*affirming* 59 N. Y. Super. Ct. 497, 15 N. Y. Suppl. 561]. But see Jarvis *v.* Lynch, 91 Hun 349, 36 N. Y. Suppl. 220, holding that a description of a tract of land naming the Harlem river as one of its boundaries does not necessarily include land lying between high and low water mark on said river.

Ohio.— Lamb *v.* Rickets, 11 Ohio 311.

Pennsylvania.— Wood *v.* Appal, 63 Pa. St. 210.

West Virginia.— Brown Oil Co. *v.* Caldwell, 35 W. Va. 95, 13 S. E. 42, 29 Am. St. Rep. 793.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

See 37 Cent. Dig. tit. "Navigable Waters," § 213.

Compare Galveston City Surf Bathing Co. *v.* Heidenheimer, 63 Tex. 559, holding that under a grant to a city of land described as

if the "beach" is the boundary he takes only to high water mark.[38] The flats are not included where the language of the deed shows a contrary intent,[39] as where the deed bounds the land conveyed by high water mark,[40] or by fixed lines excluding the adjoining flats,[41] or by a fixed monument on the bank.[42] So a conveyance of land "to" the shore or water does not include flats.[43]

(II) *As Passing Title to Center of Stream.* If the grantor owns to the thread of the stream, a grant of riparian land includes the title to the bed up to the thread of the stream unless the deed or other conveyance clearly shows a contrary intention.[44] So if the lines of a grant of land include a navigable river, soil covered by the river and owned by the grantor will pass to the grantee.[45] Of

extending to the seashore, and bounded by it, the shore is not included, and the city cannot interfere with bath houses erected on the shore, unless they constitute a nuisance.

Privileges to low water mark.— Where a deed bounded the premises on one side by the seashore at high water mark, "including all the privilege of the shore to low water mark," the grantee took the fee in the land between high and low water mark. Dillingham *v.* Roberts, 75 Me. 469, 46 Am. Rep. 419.

"Sea or beach."—A deed of land bounded on one side "by the sea or beach" includes the land lying between high and low water mark. Doane *v.* Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

Boundary "on the bank."— The grantees hold to low water mark, notwithstanding they are bounded "by stakes and stones on the bank of the river." Hart *v.* Hill, 1 Whart. (Pa.) 124.

Harbor as boundary.— Where the land is described as bounded by a harbor, the flats in front of the harbor pass by the deed. Mayhew *v.* Norton, 17 Pick. (Mass.) 357, 28 Am. Dec. 300.

38. Litchfield *v.* Scituate, 136 Mass. 39; Niles *v.* Patch, 13 Gray (Mass.) 254; Benson *v.* Townesend, 4 N. Y. Suppl. 860. See also Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; People *v.* Jones, 112 N. Y. 597, 20 N. E. 577.

39. Montgomery *v.* Reed, 69 Me. 510; Nickerson *v.* Crawford, 16 Me. 245; Lapish *v.* Bangor Bank, 8 Me. 85; Chapman *v.* Edmands, 3 Allen (Mass.) 512.

40. Clancey *v.* Houdlette, 39 Me. 451; Lapish *v.* Bangor Bank, 8 Me. 85; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

41. Simons *v.* French, 25 Conn. 346; Whitmore *v.* Brown, 100 Me. 410, 61 Atl. 985, holding that the flats do not pass as appurtenant to the upland when they are outside of the express boundaries in the grant, even if the grant contains the words, "together with all the privileges and appurtenances thereto belonging."

42. Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

43. Brown *v.* Heard, 85 Me. 294, 27 Atl. 182; Montgomery *v.* Reed, 69 Me. 510; Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155; Parker *v.* Elliott, 1 U. C. C. P. 470.

The fact that a deed conveying land "to high water mark" on the bank of a river also granted "all the privileges of water and landing to the same belonging" does not operate to extend the bounds of the land conveyed beyond high water mark. Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

44. *Illinois.*— Chicago *v.* Van Ingen, 152 Ill. 624, 38 N. E. 894, 43 Am. St. Rep. 285.

Kentucky.— Williamsburg Boom Co. *v.* Smith, 84 Ky. 372, 1 S. W. 765, 8 Ky. L. Rep. 369; Berry *v.* Snyder, 3 Bush 266, 96 Am. Dec. 219.

Maine.— Granger *v.* Avery, 64 Me. 292.

Massachusetts.— McDonald *v.* Morrill, 154 Mass. 270, 28 N. E. 259; Lunt *v.* Holland, 14 Mass. 149, holding that land granted as bounded by a river extends to the thread of the river, although trees standing by the side of a river are named as the points for beginning and ending.

Michigan.— Fletcher *v.* Thunder Bay River Boom Co., 51 Mich. 277, 16 N. W. 645; Cole *v.* Wells, 49 Mich. 450, 13 N. W. 813.

New Hampshire.— Sleeper *v.* Laconia, 60 N. H. 201, 49 Am. Rep. 311.

New Jersey.— Kanouse *v.* Slockbower, 48 N. J. Eq. 42, 21 Atl. 197.

New York.— Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567; Demeyer *v.* Legg, 18 Barb. 14; Walton *v.* Tifft, 14 Barb. 216; Child *v.* Starr, 4 Hill 369; Luce *v.* Carley, 24 Wend. 451, 35 Am. Dec. 637; Canal Com'rs *v.* People, 5 Wend. 423.

Ohio.— Lake Shore, etc., R. Co. *v.* Platt, 53 Ohio St. 254, 41 N. E. 243, 29 L. R. A. 52; Day *v.* Pittsburg, etc., R. Co., 44 Ohio St. 406, 7 N. E. 528.

Tennessee.— Martin *v.* Nance, 3 Head 649.

Wisconsin.— Jones *v.* Pettibone, 2 Wis. 308. See also Arnold *v.* Elmore, 16 Wis. 509.

United States.— St. Louis *v.* Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. ed. 941 [*affirming* 35 Fed. 188].

See 37 Cent. Dig. tit. "Navigable Waters," § 214.

Effect of platting.— The fact that the grantor, before conveying, platted the lands into lots and blocks, with distinct lines and distances marking the boundaries of each lot, and with the water boundary of the river lots indicated by a line representing the shore line, and conveyed by such plat, will not limit the grant to such shore line, or operate to reserve to him proprietary rights in front of the lots conveyed. Watson *v.* Peters, 26 Mich. 508.

45. Browne *v.* Kennedy, 5 Harr. & J.

course if the deed expressly makes the shore line the boundary, the grantee does not take title to the center of the stream.[46]

3. As Conveying Islands. A grant of riparian land includes islands up to the line of the grantor's ownership of the bed of the stream, unless they are expressly reserved.[47] So where the government conveys land on the bank of a navigable stream without reservation, it has been held that all unsurveyed islands between the middle line of the stream and the bank pass by the grant and the riparian owner cannot be divested by a subsequent survey and grant of the islands.[48] But where an island is surveyed and platted as such, a patent to land on the bank does not include the island.[49] So where the mainland and an island have been separately surveyed and purchased by different parties as distinct tracts, the grantees of the mainland cannot claim the island as included in their grant.[50]

4. As Conveying Riparian Rights — a. In General. A transfer of upland bordering on navigable waters passes the riparian rights of the grantor unless specially reserved or excepted.[51] But where the grant does not extend to high water mark, no riparian rights pass to the grantee.[52] Except where limited by statute or municipal ordinance,[53] a conveyance of land next to navigable waters passes the right possessed by the grantor to reclaim and improve submerged land.[54]

b. Accretions. Accretions pass to a purchaser of the riparian land,[55] or patentee,[56] although not described in the deed or other instrument of conveyance. It is immaterial that the boundary is described in the conveyance as the water line,[57] or that the land is conveyed by its section number,[58] or by the number of acres.[59]

(Md.) 195, 9 Am. Dec. 503; People *v.* Schermerhorn, 19 Barb. (N. Y.) 540.

46. Freeman *v.* Bellegarde, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76; Babcock *v.* Utter, 1 Abb. Dec. (N. Y.) 27, 1 Keyes 115, 397, 32 How. Pr. 439.

47. Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423; Miller *v.* Mann, 55 Vt. 475 (holding, however, that a deed conveying a hotel "and the lands adjoining it, being two or three acres more or less," does not convey an island on the opposite side of the main channel of a river flowing past the hotel grounds); Sliter *v.* Carpenter, 123 Wis. 578, 102 N. W. 27. But see Jackson *v.* Halstead, 5 Cow. (N. Y.) 216.

48. Fuller *v.* Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; St. Paul, etc., R. Co. *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 31, 49 N. W. 303; Franzini *v.* Layland, 120 Wis. 72, 97 N. W. 499; Chandos *v.* Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207. But see Packer *v.* Bird, 71 Cal. 134, 11 Pac. 873; Orendorff *v.* Steele, 2 Barb. (N. Y.) 126.

49. James *v.* Howell, 41 Ohio St. 696.

50. Wiggenhorn *v.* Kountz, 23 Nebr. 690, 37 N. W. 603, 8 Am. St. Rep. 150.

51. Richardson *v.* Prentiss, 48 Mich. 88, 11 N. W. 819; Head *v.* Chesbrough, 6 Ohio S. & C. Pl. Dec. 494, 4 Ohio N. P. 73.

Wharfage rights reserved by the grantor in a previous conveyance of part of the riparian land pass to his grantee of the residue of the tract as appurtenances. Perry *v.* Pennsylvania R. Co., 55 N. J. L. 178, 26 Atl. 829.

52. Bailey *v.* Burges, 11 R. I. 330.

53. Duryea *v.* New York, 26 Hun (N. Y.) 120.

54. Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261; Williams *v.* Baker, 41 Md. 523, holding that a lease of a lot lying on a navigable river, and "the improvements, . . . appurtenances, and advantages to the same belonging," passes to the lessee the right to reclaim and improve.

55. Crill *v.* Hudson, 71 Ark. 390, 74 S. W. 299; Meyers *v.* Mathis, 42 La. Ann. 471, 7 So. 605, 21 Am. St. Rep. 385; Rolland *v.* McCarty, 19 La. 77; Topping *v.* Cohn, 71 Nebr. 559, 99 N. W. 372. *Contra*, see Ferrière *v.* New Orleans, 35 La. Ann. 209; Barre *v.* New Orleans, 22 La. Ann. 612; Cire *v.* Rightor, 11 La. 140; Cochran *v.* Fort, 7 Mart. N. S. (La.) 622.

Reservation in deed.— See Minneapolis Trust Co. *v.* Eastman, 47 Minn. 301, 50 N. W. 82, 930.

56. Boglino *v.* Giorgetta, 20 Colo. App. 338, 78 Pac. 612. But see Sage *v.* New York, 10 N. Y. App. Div. 294, 41 N. Y. Suppl. 938.

57. Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415 (holding that it is immaterial that the description of a deed refers to a recorded plat); Lovingston *v.* St. Clair County, 64 Ill. 56, 16 Am. Rep. 516; Berry *v.* Snyder, 3 Bush (Ky.) 266, 96 Am. Dec. 219; Bowman *v.* Duling, 39 W. Va. 619, 20 S. E. 567; East Omaha Land Co. *v.* Jeffries, 40 Fed. 386 [*affirmed* in 134 U. S. 178, 10 S. Ct. 518, 33 L. ed. 872].

58. Tappendorff *v.* Downing, 76 Cal. 169, 18 Pac. 247.

59. Bartlett *v.* Corliss, 63 Me. 287, holding that a deed of a part of one lot with enough off another lot "to make fifty acres, exclu-

So too it is immaterial that the land is conveyed by metes and bounds,[60] or by the meander line.[61]

5. As Conveying Reclaimed Land. Where land bordering on navigable waters is conveyed it generally includes the reclaimed land unless the contrary clearly appears from the conveyance.[62]

B. Transfer of Land Under Water.[63] A conveyance of land below high water mark passes no title to any upland,[64] and extends to low water mark of tidal waters where there is nothing to indicate a contrary intention.[65] Where a deed expressly includes flats, such flats only will pass as belong to the upland conveyed, unless there is a clear provision to the contrary.[66] Where there is a grant of land under water, with the right to build a wharf, the grantee has, as a necessary incident, the right of access to the wharf for vessels over adjoining submerged land belonging to the grantor.[67] Where a sale is made of land by the acre, at a fixed price per acre, bounded on a navigable stream, the purchase-price does not ordinarily cover the acreage between ordinary low water mark and the center of the stream and actually covered by the water.[68] An instrument, the object of which is to establish an open dock between two wharves, will not pass any title to the soil under it by conveying a small strip of flats at the head of it to be filled in for wharf purposes.[69] Of course a riparian owner who does not own the bed of the stream cannot convey it.[70]

C. Transfer of Riparian Rights — 1. In General. Riparian rights generally pass as appurtenant to the riparian land,[71] although they may be separated from the ownership of the upland and conveyed separately.[72] Whether a deed conveys riparian rights of the grantor depends upon the intention of the parties as shown thereby.[73] Where a deed conveys water privileges of certain lands commencing at high water mark, it refers to high water mark at the date of the deed.[74]

sive of water," excluded from the computation but not from the conveyance, certain land of the latter lot covered with water so that when the water receded the land thus uncovered became the grantee's.

60. Frank *v.* Goddin, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493.

61. Knudsen *v.* Omanson, 10 Utah 124, 37 Pac. 250.

Boundary of public grants.— It has been held, however, that the meander line, if it can be found, constitutes the true boundary and that the grantee cannot claim the water as his boundary. Fulton *v.* Frandolig, 63 Tex. 330.

62. Castle *v.* Elder, 57 Minn. 289, 59 N. W. 197; Hannon *v.* Delaware, etc., R. Co., 37 N. J. L. 276, holding that if the description of the measurements of property does not coincide with the position of the monuments referred to the latter must prevail; and therefore, where the description carries the property to a navigable river, and thence along the river, it will include the reclaimed land to actual high water mark as it exists, although not embraced within the measured distance.

63. **Power of United States, state, or other municipality to grant** see *supra*, VIII, C.

When passes with grant of upland see *supra*, IX, A, 2.

64. Church *v.* Meeker, 34 Conn. 421, conveyance of "sedge-flat."

65. Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

66. Treat *v.* Strickland, 23 Me. 234; Adams *v.* Boston Wharf Co., 10 Gray (Mass.) 521.

67. Bedlow *v.* New York Floating Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

68. Holbert *v.* Edens, 5 Lea (Tenn.) 204, 40 Am. Rep. 26. But see Shands *v.* Triplet, 5 Rich. Eq. (S. C.) 76.

69. Central Wharf, etc., Corp. *v.* India Wharf, 123 Mass. 561.

70. Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489; Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679; Roberts *v.* Baumgarten, 110 N. Y. 380, 18 N. E. 96 [*affirming* 51 N. Y. Super. Ct. 482].

71. See *supra*, IX, A, 4.

72. See *infra*, IX, E.

73. Simons *v.* French, 25 Conn. 346.

A grant of a right to take seaweed from a beach extends to whatever land may constitute the beach, although the lines have changed since the right was granted. Phillips *v.* Rhodes, 7 Metc. (Mass.) 322. Taking seaweed from a beach pursuant to a license from the owner of the beach is lawful only where the conditions of the license are fully complied with. Gifford *v.* Brownell, 2 Allen (Mass.) 535.

Where a right of way to a harbor is granted, it includes, it seems, a way over lands afterward reclaimed in front of the harbor. Lockwood *v.* New York, etc., R. Co., 37 Conn. 387.

74. Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261.

A grant of the right to erect and maintain an embankment in front of riparian land operates as a surrender of all riparian rights.[75] Where a grantor conveys a right of wharfage at a wharf adjoining land under water belonging to him, it carries as a necessary incident the right of way to the wharf for vessels over the grantor's adjacent land under water.[76] A grant by a city of authority to erect wharves is not a conveyance of the land to low water mark but a privilege or franchise which will pass in a conveyance of such land under the term "appurtenances."[77]

2. Right to Reclaim.[78] Where the grant does not extend to high water mark, but the grantee retains a strip above such mark, the right to fill out is in the grantor and not in the grantee.[79] But where a portion of flats not including a portion lying between the part conveyed and low water mark is transferred and access to the part reserved is possible only over the part conveyed, the right to reclaim and use the outside portion passes by the grant.[80]

3. Accretions.[81] Of course accretions pass by a deed conveying the mainland where particularly described in the deed.[82] In a conveyance of riparian land the quantity is properly described by including the accretions.[83]

D. Exceptions, Reservations, and Restrictions. As in any other conveyance of land, the grantor may reserve certain rights,[84] such as the right to all future accretions.[85] But where a riparian owner conveys his land he cannot reserve any right to the adjacent land under water belonging to the state and of which he has received no grant from the state,[86] nor can he charge such lands below high water mark with restrictions as to their use, so as to be enforceable against a subsequent grant by the state of the land beyond high water mark.[87]

E. Separation of Upland. A riparian owner or littoral proprietor may separate his ownership of the upland and of the land below high water mark and convey them separately.[88] Where he has title to the bed of the stream he may

75. Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828].

76. Matter of North River Water Front, 113 N. Y. App. Div. 84, 98 N. Y. Suppl. 1063.

77. Wiswall *v.* Hall, 3 Paige (N. Y.) 313.

78. As incident to transfer of riparian land see *supra*, IX, A, 4, a.

79. Bailey *v.* Burges, 11 R. I. 330.

80. New Haven Steamboat Co. *v.* Sargent, 50 Conn. 199, 47 Am. Rep. 632.

81. As incident to transfer of riparian land see *supra*, IX, A, 4, b.

82. Chinn *v.* Naylor, 182 Mo. 583, 81 S. W. 1109.

83. Morgan *v.* Scott, 26 Pa. St. 51.

84. Turner *v.* Holland, 65 Mich. 453, 33 N. W. 283.

Construction.—A reservation of the right to pile seaweed on the shore has been construed to include the adjoining upland. Mather *v.* Chapman, 40 Conn. 382, 16 Am. Rep. 46. The reservation to a town of "the privilege of the shores" includes the right to take sand and gravel to repair its highways where the beach will not be materially affected thereby. Ripley *v.* Knight, 123 Mass. 515. Where the grantor reserves all privileges around a lot bounded by tide-water, it includes the right of wharfage. Parker *v.* Rogers, 8 Oreg. 183.

A reservation of a street in the upland does not include a street in the flats conveyed by the same deed. Winslow *v.* Patten, 34 Me. 25.

85. Minor *v.* New Orleans, 115 La. 301, 38 So. 999.

86. Blakslee Mfg. Co. *v.* Blackslee's Sons Iron Works, 59 Hun (N. Y.) 209, 13 N. Y. Suppl. 493 [*affirmed* in 129 N. Y. 155, 29 N. E. 2].

87. Evans *v.* New Auditorium Pier Co., 67 N. J. Eq. 315, 58 Atl. 191; Atlantic City *v.* New Auditorium Pier Co., 63 N. J. Eq. 644, 53 Atl. 99.

88. Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Porter *v.* Sullivan, 7 Gray (Mass.) 441; Norcross *v.* Griffiths, 65 Wis. 599, 27 N. W. 606, 56 Am. Rep. 642; Smith *v.* Ford, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462.

Question for jury.— Where the intention of the grantor is doubtful, the question whether he intended to convey the flats is one for the jury. Risdon *v.* Philadelphia, 18 Wkly. Notes Cas. (Pa.) 73.

Reservation of land under water.— If the private owner of land, a part of which has been submerged, conveys merely the upland, the purchaser has no title to the submerged portion upon its reappearance unless it has been added by accretion or reliction. Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162. Where the private owner of land under water and upland conveys the upland to the water's edge, the grantee acquires no right, as against the grantor, to cut ice. Allen *v.* Weber, 80 Wis. 531, 50

separately convey that portion below low water mark.[89] So riparian rights depending primarily upon ownership of the soil may be separately conveyed,[90] and a conveyance of riparian land may reserve riparian rights.[91] For instance, the right to reclaim and improve submerged lands may be separated from the riparian estate and transferred to persons having no interest in the original riparian estate.[92] It has been held, however, that where the title of a riparian owner is bounded by ordinary high water mark, the rights which he has in the land between high and low water mark are not the subject of transfer or sale independently of a conveyance of the land to which such rights are appurtenant.[93] The land under water may be reserved by the reservation of a strip along the shore so as to prevent the passing of title to the water's edge,[94] or by conveying by metes and bounds,[95] or by platting the land under the water and conveying upland according to the plat.[96] So where riparian land is platted into blocks and streets and shore blocks are conveyed to one and water blocks to another, the former acquires no appurtenant riparian rights as against the latter.[97]

F. Leases. Leases of riparian land and land under water are governed by the general rules relating to leases of real property in general.[98] Where land

N. W. 514, 27 Am. St. Rep. 51, 14 L. R. A. 361.

89. Rivas *v.* Solary, 18 Fla. 122.

90. Prior *v.* Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 333, 18 L. R. A. 668; Ladies' Seamen's Friend Soc. *v.* Halstead, 58 Conn. 144, 19 Atl. 658; Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722 [*overruling* Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679].

91. Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066.

92. Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066; Gilbert *v.* Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411; Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722. *Contra*, Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679.

Construction of conveyance of water privileges.— Where a riparian proprietor, vested with the title to land made by filling and extending his lots into a river, conveyed the entire water privileges below high water mark, the grantee took an irrevocable license to fill and extend the lot from high water line, but did not take title to extensions made prior to his conveyance. Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261.

93. Steele *v.* Sanchez, 72 Iowa 65, 33 N. W. 366, 2 Am. St. Rep. 233; Musser *v.* Hershey, 42 Iowa 356; Phillips *v.* Rhodes, 7 Metc. (Mass.) 322; Zimmerman *v.* Robinson, 114 N. C. 39, 19 S. E. 102; Simpson *v.* Neill, 89 Pa. St. 183. See also Shepard's Point Land Co. *v.* Atlantic Hotel, 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937.

94. Richardson *v.* Prentiss, 48 Mich. 88, 11 N. W. 819.

95. Rivas *v.* Solary, 18 Fla. 122.

96. Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066.

97. Northern Pac. R. Co. *v.* Scott, etc., Lumber Co., 73 Minn. 25, 75 N. W. 737; Gilbert *v.* Emerson, 55 Minn. 254, 56 N. W. 818, 43 Am. St. Rep. 502; Dawson *v.* Broome, 24 R. I. 359, 53 Atl. 151.

Waiver.— Where an improvement company owning land along the shore of a navigable bay plats the same, and also the shoal waters extending to the dock line established by legislative authority, with a view to filling up and making dry land of the latter, it may waive all riparian rights therein in conveyances of the uplands, incident to the remaining uplands, and a grantee of the uplands with notice of such conveyances, and of the general plan of the improvements, recited in his deed, will be bound by such waiver. Miller *v.* Mendenhall, 43 Minn. 95, 44 N. W. 1141, 19 Am. St. Rep. 219, 8 L. R. A. 89.

98. See LANDLORD AND TENANT, 24 Cyc. 845. See also Williams *v.* Glover, 66 Ala. 189 (rent at so much an acre held to include land between high and low water mark); Carrollton R. Co. *v.* Winthrop, 5 La. Ann. 36.

At the end of the term, it has been held, under particular provisions in a lease, that the title to an erection made by the lessee did not vest in the lessor. Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634 (holding that a provision that the lessees shall surrender the demised premises, where the lease is of a tract extending to low water mark, does not compel the lessees to surrender a wharf below low water mark constructed during the term and attached to a wharf on the demised premises); Friedman *v.* Macy, 17 Cal. 226.

Short lands as appurtenant.— Where a riparian lot is leased, tide and shore lands, extending therefrom to deep water over which a wharf is built which also covers the lot, will pass as an appurtenance thereto. Brown *v.* Carkeek, 14 Wash. 443, 44 Pac. 887.

A lease of water front and booming facilities does not carry with it a lease of the bed of the stream. Sullivan *v.* Spotswood, 82 Ala. 163, 2 So. 716.

Lessees of tide-lands have no such property in the flats as will entitle them to compensation because of the building of a bridge on the flats by authority of the state. Ger-

fronting on a navigable water is leased and accretions are afterward added to the property, the lessee is entitled to hold them as part of the property.[99] Leases by the state of its land below high water mark are permitted in many states.[1]

NAVIGATE. To steer, direct, or manage a vessel;[1a] to pass by water.[2] (See NAVIGATION.)

NAVIGATION.[3] The science or art of conducting a ship from one place to another, and the science or art of ascertaining the position and directing the course of vessels, especially at sea, by astronomical operations or calculations; a nautical science or art; shipping.[4] (Navigation: In General, see COLLISION; NAVIGABLE WATERS; SHIPPING. Contract in Violation of Laws of Navigation, see CONTRACTS. Insurance, see MARINE INSURANCE. Lien, see MARITIME LIENS. Persons Employed in, see PILOTS; SEAMEN; SHIPPING. Regulation of Commerce, see COMMERCE. Rights of, see NAVIGABLE WATERS. Rules For Preventing Collision, see COLLISION. Services Rendered in, see SALVAGE; TOWAGE; WHARVES.)

NAVY. See ARMY AND NAVY.

NAVY DEPARTMENT. See UNITED STATES.

NAVY OFFICER. See ARMY AND NAVY.

hard *v.* Seekonk River Bridge Com'rs, 15 R. I. 334, 5 Atl. 199.

99. Cobb *v.* Lavalle, 89 Ill. 331, 21 Am. Rep. 91; Williams *v.* Baker, 41 Md. 523.

1. See the statutes of the several states.

As limited to adjacent owner.— Where the grantor reserved a strip along the shore above which ordinary high water did not come, on a sale by him, his right as against his grantee, to a lease was not lost by the ordinary high water line rising above such strip. Grey *v.* Morris, etc., Dredging Co., 64 N. J. Eq. 555, 55 Atl. 59 [*affirmed* in 69 N. J. Eq. 829, 63 Atl. 985]. If the lease is conditioned to be void if the lessee is not the owner of the shore front, it may be avoided where the lessee is not such owner, although by his deed of the shore front he had reserved the water rights. Grey *v.* Morris, etc., Dredging Co., *supra*. A lease from the state cannot be avoided because another afterward acquired title by adverse possession to the shore. Grey *v.* Morris, etc., Dredging Co., *supra*.

To third person.— Where the state owns the bed below high water mark, a riparian owner cannot object to a lease of it by the state to a third person where not arbitrarily interfering with any of the rights of the riparian proprietor. Taylor *v.* Com., 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

Enjoining cancellation.— Where an appeal may be taken from an order canceling a lease the lessee cannot sue to enjoin the enforcement of the order. Seattle Wharf Co. *v.* Callvert, 42 Wash. 390, 85 Pac. 16.

1a. Webster Dict. [*quoted* in Ryan *v.* Hook, 34 Hun (N. Y.) 185, 191].

2. Queddy River Driving Boom Co. *v.* Davidson, 3 Cartwr. Cas. (Can.) 243, 262.

A vessel is navigating when she is able to proceed by her own power. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 367, 8 C. C. A. 152.

3. **"Accidents of navigation"** see The G. R. Booth, 171 U. S. 450, 461, 19 S. Ct. 9, 43 L. ed. 234; The Miletus, 17 Fed. Cas. No. 9,545, 5 Blatchf. 335.

"Actual and necessary purposes of canal navigation" see Morris Canal, etc., Co. *v.* Betts, 24 N. J. L. 555, 556.

"Easement of navigation" see Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 668, 47 N. E. 582.

"Free navigation" see Benjamin *v.* Manistee River Imp. Co., 42 Mich. 628, 634, 4 N. W. 483; Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 496, 26 L. ed. 1143.

"Inland navigation" see American Transp. Co. *v.* Moore, 5 Mich. 368, 400; Woodhouse *v.* Cain, 95 N. C. 113, 114; Moore *v.* American Transp. Co., 24 How. (U. S.) 38, 16 L. ed. 674; The Garden City, 26 Fed. 766, 773; The War Eagle, 29 Fed. Cas. No. 17,173, 6 Biss. 364.

4. Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 668, 47 N. E. 582.

What term includes.— It includes the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas. The Silvia, 171 U. S. 462, 466, 19 S. Ct. 7, 43 L. ed. 241. And for some purpose it includes a period when a ship is not in motion, as for instance when she is at anchor. Hayn *v.* Culliford, 3 C. P. D. 410, 417. But it does not apply to a dismantled steamboat which has been fitted up as a saloon and hotel. The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419. Nor does it include moving a vessel from one place to another in an unfinished state for the purpose of completing such vessel, but it would include any moving of a vessel which was for the purpose of profit. The Joshua Leviness, 13 Fed. Cas. No. 7,549, 9 Ben. 339, 345. Nor does it mean the running of sawlogs down a stream. Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 17 Fed. 419, 424, 5 McCrary 382.

NAVY YARD. By this term is meant not merely the land on which the government does work connected with the ships of the navy, but the waters contiguous, necessary to float vessels of the navy while at the navy yard.[5] (See, generally, ARMY AND NAVY.)

N. B. An abbreviation for *nota bene*, mark well, observe; and also for *nulla bona*, no goods.[6]

N. D. An abbreviation for "no date,"[7] and also for "northern district."[8]

N. E. An abbreviation for the word "northeast."[9]

NE AD CONSILIUM ANTEQUAM VOCERIS. A maxim meaning "Go not to the council chamber before you are summoned."[10]

NEAP TIDES. Those tides which happen between the full and the change of the moon twice in every twenty-four hours.[11] (See, generally, NAVIGABLE WATERS.)

NEAR.[12] Synonymous with AT,[13] *q. v.*, and means close or at no great distance;[14] close to;[15] not distant from;[16] not distant nor remote, but of reasonably easy and convenient access.[17] (See CLOSE; NEAREST; NEARLY.)

NEAREST. Immediately adjacent to; in close proximity.[18] (See NEAR; NEARLY.)

As applied to waters which are used as highways, it denotes the transportation of ships or material from one place to another under intelligent guidance, and not the use of such waters as a mere receptacle of filth, or as a place for the deposit of worthless materials. Gerrish *v.* Brown, 51 Me. 256, 262, 81 Am. Dec. 569.

As used with regard to the navigation of canals it means "the passage of boats along and upon their waters." Rexford *v.* State, 105 N. Y. 229, 233, 11 N. E. 514.

5. *Ex p.* Tatem, 23 Fed. Cas. No. 13,759, 1 Hughes 588, 589.

6. Black L. Dict.

7. Webster Int. Dict.

8. Black L. Dict.

9. Sexton *v.* Appleyard, 34 Wis. 235, 240.

10. Morgan Leg. Max.

11. Teschemacher *v.* Thompson, 18 Cal. 11, 21, 79 Am. Dec. 151.

12. **This word is of relative meaning** and its precise import can only be determined by surrounding facts and circumstances. Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121, 125; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221, 227; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340, 367; Barrett *v.* Schuyler County Ct., 44 Mo. 197, 202; American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409, 435; Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157, 168; Griffen *v.* House, 18 Johns. (N. Y.) 397, 398; Holcomb *v.* Danby, 51 Vt. 428, 434; Kirkbride *v.* Lafayette County, 108 U. S. 208, 211, 2 S. Ct. 501, 27 L. ed. 705.

13. Minter *v.* State, 104 Ga. 743, 754, 30 S. E. 989; Harris *v.* State, 72 Miss. 960, 964, 18 So. 387, 33 L. R. A. 85; Proctor *v.* Andover, 42 N. H. 348, 353; Bartlett *v.* Jenkins, 22 N. H. 53, 63.

Used in connection with other words see the following phrases: "As near as may be." Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 600, 50 N. E. 1089, 64 Am. St. Rep. 137; Potter *v.* Robinson, 40 N. J. L. 114, 117; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 205, 13 S. Ct. 859, 37 L. ed. 699; Phelps *v.* Oaks, 117 U. S. 236, 239, 6 S. Ct. 714, 29 L. ed. 888; Phenix Ins. Co. *v.* Charleston Bridge Co., 65 Fed. 628, 632, 13 C. C. A. 58; *In re* Rugheimer, 36 Fed. 369, 378; Beardsley *v.* Littell, 2 Fed. Cas. No. 1,185, 2 Ban. & A. 501, 14 Blatchf. 102. "As near as practicable." Sonnek *v.* Minnesota Lake, 50 Minn. 558, 559, 52 N. W. 961; *In re* Brooklyn El. R. Co., 11 N. Y. Suppl. 161. "At or near." McDonald *v.* Wilson, 59 Ind. 54, 55; Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 154, 75 S. W. 275, 25 Ky. L. Rep. 342; Griscom *v.* Gilmore, 16 N. J. L. 105, 106; People *v.* Collins, 19 Wend. (N. Y.) 56, 58; Parke's Appeal, 64 Pa. St. 137, 141; Warren *v.* State, 3 Heisk. (Tenn.) 269, 271; State *v.* Powell, 3 Lea (Tenn.) 164, 166; Bishop *v.* Com., 13 Gratt. (Va.) 785, 787. "In or near." Warner *v.* Callender, 20 Ohio St. 190, 196. "Near the creek." Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 538, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206. "Near open port." Tenet *v.* Phœnix Ins. Co., 7 Johns. (N. Y.) 363, 372. "Near the sea shore." Keyser *v.* Coe, 14 Fed. Cas. No. 7,750, 9 Blatchf. 32, 35. "Near to." Ward *v.* Wilmington, etc., R. Co., 109 N. C. 358, 362, 13 S. E. 926.

14. Ward *v.* Wilmington, etc., R. Co., 109 N. C. 358, 363, 13 S. E. 926.

15. The Fulham, [1898] P. 206, 211, 67 L. J. P. D. & Adm. 78, 79 L. T. Rep. N. S. 127, 47 Wkly. Rep. 62.

16. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221, 227.

17. Manis *v.* State, 3 Heisk. (Tenn.) 315, 316.

"Near relatives" has been held to mean next of kin. Cox *v.* Wills, 49 N. J. Eq. 130, 135, 22 Atl. 794. And it has also been construed to mean those who would take under the statute of distributions, and a devise should be distributed in a manner provided by such statute. Handley *v.* Wrightson, 60 Md. 198, 206.

18. Wells *v.* Cleveland, etc., R. Co., 17 Ohio Cir. Ct. 201, 205, 9 Ohio Cir. Dec. 527.

NEARLY.[19] Almost, within a little.[20] (See NEAR; NEAREST.)

NEAT CATTLE. Animals of the genus *bos*;[21] a term commonly applied in the United States to describe a beast of the bovine genus.[22] (See, generally, ANIMALS.)

NEAT PROFITS. Profits after all charges and expenses have been deducted.[23] (See NET PROFITS.)

NEC BENEFICIUM PERTINET AD EUM QUI NON DEBET GENERE OFFICIUM. A maxim meaning "No benefit belongs to him who was not obliged to perform a certain act."[24]

NEC CUM SACCO ÆDIRE DEBET. A maxim meaning "A debtor is not obliged to carry a money bag with him wherever he goes."[25]

NEC CURIA DEFICERET IN JUSTITIA EXHIBENDA. A maxim meaning "Nor should the court be deficient in showing justice."[26]

NECESSARIES. Such things as are useful and suitable to the party's estate and condition in life, and not merely such as are requisite for bare subsistence;[27] whatever is convenient, usual, or adapted to the proper end or customary under similar circumstances.[28] (Necessaries: Contract — Of Infant For, see INFANTS; Of Insane Person For, see INSANE PERSONS. Discharge of Insolvent From Debts For, see INSOLVENCY. Disposition of Property to Secure, as Ground For Attachment, see ATTACHMENT. Exemptions Against Debts For, see EXEMPTIONS; HOMESTEADS. For Support — Of Insane Person, see INSANE PERSONS; Of Pauper, see PAUPERS. Furnished to Vessel, see MARITIME LIENS. Liability — Of Husband and Wife For, see HUSBAND AND WIFE; Of Parent and Child For,

As used in connection with other words see the following phrases: "Nearest and lawful heirs." Reinders *v.* Koppelman, 94 Mo. 338, 341, 7 S. W. 288. "Nearest and next of kin." Brandon *v.* Brandon, 3 Swanst. 312, 318, 36 Eng. Reprint 876, 2 Wils. Ch. 14, 37 Eng. Reprint 209. "Nearest buildings." Gates *v.* Madison County Mut. Ins. Co., 2 N. Y. 43, 46; Kennedy *v.* St. Lawrence County Mut. Ins. Co., 10 Barb. (N. Y.) 285, 288. "Nearest court house." Shaw *v.* Cade, 54 Tex. 307, 311. "Nearest entrance." Matter of Veeder, 31 Misc. (N. Y.) 569, 570, 65 N. Y. Suppl. 517. "Nearest for all practicable purposes." Williams *v.* Planters', etc., Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. 617, 619. "Nearest heirs." Ryan *v.* Allen, 120 Ill. 648, 653, 12 N. E. 65. "Nearest in blood." Codman *v.* Brooks, 167 Mass. 499, 502, 46 N. E. 102. "Nearest male heirs." Jones *v.* Jones, 201 Pa. St. 548, 550, 51 Atl. 362. "Nearest notary." Oswalt *v.* Hartford F. Ins. Co., 175 Pa. St. 427, 430, 34 Atl. 735. "Nearest of kin." Leonard *v.* Haworth, 171 Mass. 496, 497, 51 N. E. 7; Keniston *v.* Mayhew, 169 Mass. 166, 169, 47 N. E. 612; Slosson *v.* Lynch, 43 Barb. (N. Y.) 147, 149; Elmsley *v.* Young, 4 L. J. Ch. 200, 201, 2 Myl. & K. 780, 7 Eng. Ch. 780, 39 Eng. Reprint 1142. "Nearest relations." Locke *v.* Locke, 45 N. J. Eq. 97, 98, 16 Atl. 49. "Nearest the place of fire." German-American Ins. Co. *v.* Etherton, 25 Nebr. 505, 510, 41 N. W. 406; Paltrovitch *v.* Phœnix Ins. Co., 143 N. Y. 73, 75, 37 N. E. 639, 25 L. R. A. 198. "Nearest towns." Wyman *v.* Lexington, etc., R. Co., 13 Metc. (Mass.) 316, 323.

19. Used in connection with other words see the following phrases: "As nearly as may be." People *v.* Monroe County, 135 N. Y. 473, 501, 31 N. E. 921, 16 L. R. A. 836; People *v.* Rice, 65 Hun (N. Y.) 236, 247, 20 N. Y. Suppl. 293; People *v.* Monroe County, 19 N. Y. Suppl. 978, 985. "As nearly as possible." Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 599, 25 Pac. 765; Green *v.* McCrane, 55 N. J. Eq. 436, 442, 37 Atl. 318. "As nearly as the same can be conveniently done." Goodrich *v.* Lunenburg, 9 Gray (Mass.) 38, 39. "As nearly uniform as practicable." State *v.* Milwaukee County Sup'rs, 25 Wis. 339, 344. "Nearly end on" see 27 Cyc. 467 note 23.

20. Webster Dict. See also Cogswell *v.* Bull, 39 Cal. 320, 325, where it is said that the word is purely relative in its meaning.

21. State *v.* Hoffman, 53 Kan. 700, 702, 37 Pac. 138.

22. Territory *v.* Christman, 9 N. M. 582, 587, 58 Pac. 343.

What term includes.— The term is more appropriate in this connection than the mere word "cattle" (Mathews *v.* State, 39 Tex. Cr. 553, 556, 47 S. W. 647, 48 S. W. 189), and includes only cattle of the bovine species such as a "cow" (Wilburn *v.* Territory, 10 N. M. 402, 404, 62 Pac. 968), or a steer (State *v.* Bowers, (Mo. 1886) 1 S. W. 288; State *v.* Lawn, 80 Mo. 241, 242).

Distinguished from horses, sheep and goats. State *v.* Hoffman, 53 Kan. 700, 705, 37 Pac. 138.

23. Owston *v.* Ogle, 13 East 538, 543, 12 Rev. Rep. 426.

24. Peloubet Leg. Max.

25. Morgan Leg. Max.

26. Black L. Dict.

27. 2 Greenleaf Ev. § 365 [*quoted* in Turner *v.* Gaither, 83 N. C. 357, 361, 35 Am. Rep. 574].

28. Sargent *v.* La Plata County, 21 Colo. 158, 171, 40 Pac. 366.

For similar definitions see Sulter *v.* Mustin, 50 Ga. 242, 244; Clark *v.* Cox, 32 Mich. 204, 211; La Rue *v.* Gilkyson, 4 Pa. St. 375, 376,

see INFANTS; PARENT AND CHILD. Responsibility For, Furnished to Ward by Third Person, see GUARDIAN AND WARD.)

NECESSARILY. In a necessary manner; by necessity; unavoidably; indispensably.[29] (See NECESSARY.)

NECESSARIUM EST QUOD NON POTEST ALITER SE HABERE. A maxim meaning "That is necessary which cannot be otherwise."[30]

NECESSARY. Indispensable, requisite;[31] indispensably requisite, useful, requisite, INCIDENTAL, *q. v.*, or conducive;[32] ESSENTIAL, *q. v.*, indispensable, requisite;[33] unavoidable; such as must be; impossible to be otherwise; not to be avoided; inevitable;[34] indispensable, unavoidable, or which must be;[35] such as must be; impossible to be otherwise; not to be avoided; inevitable;[36] indispensable to the accomplishment of a purpose;[37] without which another thing must fail, yield, or cease to be;[38] NEEDFUL,[39] *q. v.*, CONVENIENT (*q. v.*) or useful or ESSENTIAL,[40] *q. v.*; reasonably convenient;[41] expedient, APPROPRIATE,[42] *q. v.* (Necessary: Parties, see PARTIES. Repairs on Vessels, see MARITIME LIENS.)

45 Am. Dec. 706; Crafts *v.* Carr, 24 R. I. 397, 402, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128; Middlebury College *v.* Chandler, 16 Vt. 683, 685, 42 Am. Dec. 537; Leavitt *v.* Metcalf, 2 Vt. 342, 343, 19 Am. Dec. 718; Jolly *v.* Rees, 15 C. B. N. S. 628, 642, 10 Jur. N. S. 319, 33 L. J. C. P. 177, 10 L. T. Rep. N. S. 298, 12 Wkly. Rep. 473, 109 E. C. L. 628; Peters *v.* Fleming, 9 L. J. Exch. 81, 82, 6 M. & W. 42.

A contract for subsistence, clothing, and education is a contract for "necessaries." Stone *v.* Dennison, 13 Pick. (Mass.) 1, 6, 23 Am. Dec. 654.

It is a question of fact what the term includes. Eskridge *v.* Ditmars, 51 Ala. 245, 253.

29. Summers *v.* Tarney, 123 Ind. 560, 564, 24 N. E. 678.

As used in connection with other words see the following phrases: "Necessarily expended." People *v.* New York, 32 N. Y. 473, 475. "Necessarily incurred." Sargent *v.* La Plata County, 21 Colo. 158, 170, 40 Pac. 366; People *v.* Cayuga County, 22 Misc. (N. Y.) 616, 622, 50 N. Y. Suppl. 16; Reg. *v.* Warwick, 8 Q. B. 926, 929, 10 Jur. 962, 15 L. J. Q. B. 306, 55 E. C. L. 962. "'Necessarily' on the calendar." Sipperly *v.* Warner, 9 How. Pr. (N. Y.) 332, 333. "Necessarily preliminary to its organization." McCormick *v.* Market Nat. Bank, 162 Ill. 100, 107, 44 N. E. 381. "Necessarily traveled." Marion County *v.* Pressley, 81 Ind. 361, 362; Hitch *v.* U. S., 66 Fed. 937, 942. "Necessarily used." Lewis *v.* Galveston, etc., R. Co., 73 Tex. 504, 507, 11 S. W. 528; Chicago, etc., R. Co. *v.* Bayfield County, 87 Wis. 188, 194, 58 N. W. 245; Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271, 277; Milwaukee, etc., R. Co. *v.* Crawford County, 29 Wis. 116, 122.

Not synonymous with "unnecessarily," although these terms are sometimes used interchangeably. Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, 155, 9 S. W. 871.

30. Black L. Dict.

31. Wolf *v.* Pleasant Valley Independent School-Dist., 51 Iowa 432, 434, 1 N. W. 695.

The word is an adjective possessing degrees, a thing or purpose may be necessary, more necessary, or indispensably necessary. Cotten *v.* Leon County Com'rs, 6 Fla. 610, 629; Moale *v.* Cutting, 59 Md. 510, 522; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 414, 4 L. ed. 579.

32. Chambers *v.* St. Louis, 29 Mo. 543, 576.

33. Webster Dict. [*quoted* in Stephens *v.* Hobbs, 14 Tex. Civ. App. 148, 149, 36 S. W. 287; Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271, 277].

34. Webster Dict. [*quoted* in Stevenson *v.* State, 17 Tex. App. 618, 634].

35. Old Town *v.* Dooley, 81 Ill. 255, 259.

36. Lockwood *v.* Mildeberger, 159 N. Y. 181, 186, 53 N. E. 803.

37. St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303, 307.

38. Com. *v.* Morrison, 2 A. K. Marsh. (Ky.) 75, 81.

39. Johnson Dict. [*quoted* in Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 438].

40. Union Bank *v.* Jacobs, 6 Humphr. (Tenn.) 515, 522.

41. Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86, 88.

42. Getchell, etc., Lumber, etc., Co. *v.* Des Moines Union R. Co., 115 Iowa 734, 737, 87 N. W. 676.

This word is nearly synonymous with expedient but it has been held not to be synonymous with the word "convenient," nor to be convertible with the terms "useful," "expedient," "suitable," "eligible," "agreeable," "desirable." Com. *v.* Morrison, 2 A. K. Marsh. (Ky.) 75, 84. It is a word susceptible of various meanings and may import absolute physical necessity, or that which is only convenient or useful or essential. Baltimore *v.* Chesapeake, etc., Tel. Co., 92 Md. 692, 48 Atl. 465. And it is not limited to such things as are absolutely indispensable, but includes all such things as are proper, useful, and suitable for the purpose. Garfield County *v.* Isenberg, 10 Okla. 378, 382, 61 Pac. 1067. Nor does it always import an absolute physical necessity so strong, that one thing to which another may be termed necessary cannot exist without that other. Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311, 328; New Jersey R., etc., Co. *v.* Hancock, 35 N. J. L. 537, 546. And in exemptions from taxation to railroad corporations of property neces-

NECESSARY IMPLICATION. A term which means not natural necessity but so strong a probability of intention that an intention contrary to that which is

sary to the conduct of their business the word does not mean indispensable, but embraces all things suitable and proper for carrying into execution the granted powers. Newark *v.* Verona Tp., 59 N. J. L. 94, 34 Atl. 1060.

When not construed to mean "actual" and "indispensable."— Almgren *v.* Dutilh, 5 N. Y. 28, 32.

Used in connection with other words.— "Absolutely necessary" see Moale *v.* Cutting, 59 Md. 510, 515; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 314, 316, 4 L. ed. 579. See also 1 Cyc. 210 note 24. "Actual and necessary purposes of canal navigation." Morris Canal, etc., Co. *v.* Betts, 24 N. J. L. 555, 556. "If necessary." New London Tp. *v.* Miner, 26 Ohio St. 452, 457. "Necessary absence." Page *v.* Hardin, 8 B. Mon. (Ky.) 648, 664. "Necessary acts." Tracy *v.* Guthrie County Agricultural Soc., 47 Iowa 27, 29. "Necessary additional depot grounds." Jager *v.* Dey, 80 Iowa 23, 25, 45 N. W. 391. "Necessary amount." State *v.* Omaha, 39 Nebr. 745, 748, 58 N. W. 442. "Necessary and incidental" business. Nicollet Nat. Bank *v.* Frisk-Turner Co., 71 Minn. 413, 417, 74 N. W. 160, 70 Am. St. Rep. 334. "Necessary and proper." Thayer *v.* Hedges, 23 Ind. 141, 143; Griswold *v.* Hepburn, 2 Duv. (Ky.) 20, 25; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; U. S. *v.* Pusey, 27 Fed. Cas. No. 16,098. "Necessary" apparatus (Patteson *v.* Garret, 7 J. J. Marsh. (Ky.) 112, 113); appendages (Creager *v.* School-Dist. No. 9, 62 Mich. 101, 108, 28 N. W. 704; Gibson *v.* School Dist. No. 5, 36 Mich. 404, 407); changes (Western Bldg., etc., Assoc. *v.* Fitzmaurice, 7 Mo. App. 283, 293); charges (Bussey *v.* Gilmore, 3 Me. 191, 196; Waters *v* Bonvouloir, 172 Mass. 286, 288, 52 N. E. 500; Minot *v.* West Roxbury, 112 Mass. 1, 3, 17 Am. Rep. 52; Friend *v.* Gilbert, 108 Mass. 408, 411; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71, 76; Willard *v.* Newburyport, 12 Pick. (Mass.) 227, 230); comforts of life (Binzel *v.* Grogan, 67 Wis. 147, 151, 29 N. W. 895); current expenses of a city (Webb City, etc., Waterworks Co. *v.* Carterville, 142 Mo. 101, 112, 43 S. W. 625); damages (Browning *v.* Wabash Western R. Co., (Mo. 1893) 24 S. W. 731, 736); diligence (Sanderson *v.* Brown, 57 Me. 308, 312; Garahy *v.* Bayley, 25 Tex. Suppl. 294, 302); disbursements (Mark *v.* Buffalo, 87 N. Y. 184, 189; Kohn *v.* Manhattan R. Co., 8 Misc. (N. Y.) 421, 28 N. Y. Suppl. 663; Putney *v.* McDow, 54 S. C. 172, 173, 32 S. E. 67; Wolf *v.* McGavock, 24 Wis. 54, 55); expenses (Sweeney *v.* Muldoon, 139 Mass. 304, 307, 31 N. E. 720, 52 Am. Rep. 708; Babbitt *v.* Savoy, 3 Cush. (Mass.) 530, 533; Scofield *v.* Moore, 11 N. Y. Suppl. 303; Herring *v.* Dixon, 122 N. C. 420, 422, 29 S. E. 368; Mayo *v.* Washington, 122 N. C. 5, 7, 29 S. E. 343, 40 L. R. A. 163; Charlotte *v.* Shepard, 120 N. C. 411, 415, 27 S. E. 109; Knowles *v.* Beaty, 14 Fed. Cas. No. 7,896, 1 McLean 41); food (Farrell *v.* Higley, Lalor (N. Y.) 87, 88; Cowan *v.* Main, 24 Wis. 569, 570); ford (Old Town *v.* Dooley, 81 Ill. 255, 259); furniture (Hitchcock *v.* Holmes, 43 Conn. 528, 529; Weed *v.* Dayton, 40 Conn. 293, 297; Montague *v.* Richardson, 24 Conn. 338, 346, 63 Am. Dec. 173; Davlin *v.* Stone, 4 Cush. (Mass.) 359, 360; Clark *v.* Averill, 31 Vt. 512, 514, 76 Am. Dec. 131; Hart *v.* Hyde, 5 Vt. 328, 332; Crocker *v.* Spencer, 2 D. Chipm. (Vt.) 68, 70, 15 Am. Dec. 652); grounds (Ramsey County *v.* Macalaster College, 51 Minn. 437, 443, 53 N. W. 704, 18 L. R. A. 278); help (State *v.* Hobart, 13 Nev. 419, 420); highway (Hazard *v.* Middletown, 12 R. I. 227, 232; Hunter *v.* Newport, 5 R. I. 325, 331); improvements (Reed *v.* Jones, 8 Wis. 421, 464); injury (Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 559, 44 S. W. 778; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, 169, 36 Am. Rep. 459; Marshall *v.* Consolidated Jack Mines Co., 119 Mo. App. 270, 273, 95 S. W. 972; Goss *v.* Missouri Pac. R. Co., 50 Mo. App. 614, 629); licenses (*In re* Erie Licenses, 4 Pa. Dist. 167, 168); means (New Jersey, R., etc., Co. *v.* Hancock, 35 N. J. L. 537, 546); oaths (Wheat *v.* Ragsdale, 27 Ind. 191, 198); police ordinances (Wice *v.* Chicago, etc., R. Co., 193 Ill. 351, 353, 61 N. E. 1084, 56 L. R. A. 268); powers (National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 156, 33 Atl. 860; Maxwell *v.* Planters' Bank, 10 Humphr. (Tenn.) 507, 508); provisions (Mulligan *v.* Newton, 16 Gray (Mass.) 211, 212); purposes (Forde *v.* Exempt Fire Co., 50 Cal. 299, 302; Cotten *v.* Leon County Com'rs, 6 Fla. 610, 629; Gregory *v.* Jersey City, 36 N. J. L. 166, 168); repairs (Clark *v.* Smith, 1 N. J. Eq. 121, 139; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228, 233; Webster *v.* Seekamp, 4 B. & Ald. 352, 355, 23 Rev. Rep. 307, 6 E. C. L. 515); risks (Vaughn *v.* Glens Falls Portland Cement Co., 105 N. Y. App. Div. 136, 139, 93 N. Y. Suppl. 979); road or highway (Cushing *v.* Gay, 23 Me. 9, 16); self-defense (People *v.* Dollor, 89 Cal. 513, 515, 26 Pac. 1086); supplies (Farrar *v.* Rowley, 3 La. Ann. 276, 277; The Medora, 16 Fed. Cas. No. 9,391, 1 Sprague 138); team (Wheeler *v.* Cropsey, 5 How. Pr. (N. Y.) 288, 291); tools (*In re* Mitchell, 102 Cal. 534, 536, 36 Pac. 840; *In re* Robb, 99 Cal. 202, 203, 33 Pac. 890, 37 Am. St. Rep. 48; Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; Howard *v.* Williams, 2 Pick. (Mass.) 80, 83; Buckingham *v.* Billings, 13 Mass. 82, 85; McDowell *v.* Shotwell, 2 Whart. (Pa.) 26, 31); town charges (Stetson *v.* Kempton, 13 Mass. 272, 279, 7 Am. Dec. 145); vegetables (Carpenter *v.* Herrington, 25 Wend. (N. Y.) 370, 371, 37 Am. Dec. 239); violence (Bull *v.* Com., 14 Gratt. (Va.) 613, 624); way or passway (Vice *v.* Eden, 113 Ky. 255, 261, 68 S. W. 125, 24 Ky. L. Rep. 132); wearing apparel (Towns *v.* Pratt, 33 N. H. 345, 349, 66 Am. Dec. 726; Frazier *v.* Barnum, 19 N. J. Eq. 316, 318, 97 Am. Dec. 666; Bowne *v.* Witt, 19 Wend. (N. Y.) 475, 476; Stewart *v.* McClung, 12 Oreg. 431, 433, 8 Pac. 447, 53 Am. Rep. 374;

imputed to the testator cannot be supposed.[43] (See CONSTRUCTION; INTERPRETATION.)

NECESSITAS EST LEX TEMPORIS ET LOCI. A maxim meaning "Necessity is the law of time and place."[44]

NECESSITAS EXCUSAT AUT EXTENUAT DELICTUM IN CAPITALIBUS, QUOD NON OPERATUR IDEM IN CIVILIBUS. A maxim meaning "Necessity excuses or extenuates delinquency in capital cases, which would not operate the same in civil cases."[45]

NECESSITAS FACIT LICITUM QUOD ALIAS NON EST LICITUM. A maxim meaning "Necessity makes that lawful which otherwise is not lawful."[46]

NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURA PRIVATA. A maxim meaning "With respect to private rights, necessity privileges a person acting under its influence."[47]

NECESSITAS NON HABET LEGEM. A maxim meaning "Necessity shall be a good excuse in our law, and in every other law."[48]

NECESSITAS PUBLICA MAJOR EST QUAM PRIVATA. A maxim meaning "Public necessity is greater than private,"[49]

NECESSITAS QUOD COGIT DEFENDIT. A maxim meaning "Necessity defends what it compels."[50]

NECESSITAS SUB LEGE NON CONTINETUR; QUIA QUOD ALIAS NON EST LICITUM NECESSITAS FACIT LICITUM. A maxim meaning "Necessity is not restrained by law; since what otherwise is not lawful necessity makes lawful."[51]

NECESSITAS VINCIT LEGEM. A maxim meaning "Necessity controls the law."[52]

NECESSITAS VINCIT LEGEM; LEGUM VINCULA IRRIDET. A maxim meaning "Necessity overcomes law; it derides the fetters of laws."[53]

NECESSITATE PRECEPTI; SED NON NECESSITATE MEDII. A maxim meaning "Consent is necessary in the case of a contract executory, as an act of obedience to the law; but not essential to the validity of an executed contract."[54]

NECESSITOUS. NARROW, *q. v.*, destitute, pinching, pinched.[55]

NECESSITY.[56] Irresistible force; inevitable consequence; being necessary;

Brown *v.* Edmonds, 8 S. D. 271, 273, 66 N. W. 310, 59 Am. St. Rep. 762; *In re* Turnbull, 106 Fed. 667, 669); work (Filbert *v.* Philadelphia, 181 Pa. St. 530, 544, 37 Atl. 545). "Necessary for schools, religious and charitable purposes." Northwestern University *v.* People, 80 Ill. 333, 334, 22 Am. Rep. 187. "Necessary for the support." Cushing *v.* Quigley, 11 Mont. 577, 583, 29 Pac. 337. "Necessary to the drainage." Updike *v.* Wright, 81 Ill. 49, 52. "Reasonably necessary." Berry *v.* Turner, 77 Ga. 58, 60, as applied to expenditures.

43. Galloway *v.* Durham, 118 Ky. 544, 81 S. W. 659, 660, 26 Ky. L. Rep. 445, 111 Am. St. Rep. 300. See also Weed *v.* Scofield, 73 Conn. 670, 675, 49 Atl. 22; Gilbert *v.* Craddock, 67 Kan. 346, 353, 72 Pac. 869; Atty.-Gen. *v.* Sands, 68 N. H. 54, 57, 44 Atl. 83; People *v.* Draper, 15 N. Y. 532, 558; Whitfield *v.* Garris, 134 N. C. 24, 27, 45 S. E. 904; Boisseau *v.* Aldridges, 5 Leigh (Va.) 222, 233, 27 Am. Dec. 590.

44. Bouvier L. Dict.

45. Peloubet Leg. Max.

46. Morgan Leg. Max.

Applied in Egbert *v.* McGuire, 36 Misc. (N. Y.) 245, 246, 73 N. Y. Suppl. 302.

47. Broom Leg. Max.

Applied in: American Print Works *v.* Lawrence, 1 Code Rep. (N. Y.) 14; Reg. *v.* Dudley, 14 Q. B. D. 273, 285, 15 Cox C. C. 624, 49 J. P. 69, 54 L. J. M. C. 32, 52 L. T. Rep. N. S. 107, 33 Wkly. Rep. 347.

48. Black L. Dict.

Applied in *In re* Briggs, 135 N. C. 118, 126, 47 S. E. 403.

49. Bouvier L. Dict.

Applied in Durham *v.* Eno Cotton Mills, 141 N. C. 615, 645, 54 S. E. 453, 7 L. R. A. N. S. 321.

50. Peloubet Leg. Max.

51. Morgan Leg. Max.

52. Bouvier L. Dict.

53. Black L. Dict.

54. Morgan Leg. Max.

55. Webster Dict.

"**Necessitous circumstances**" has been held to be a relative term, dependent on the fortune of the deceased and the condition in which the claimant to a dowry lived during the marriage. Dupuy *v.* Dupuy, 52 La. Ann. 869, 871, 27 So. 287; Smith *v.* Smith, 43 La. Ann. 1140, 1151, 10 So. 248.

"**Necessitous men** are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the creditor may impose upon them." Collins *v.* Denny Clay Co., 41 Wash. 136, 82 Pac. 1012, 1015 [*quoting* Vernon *v.* Bethel, 2 Eden 110, 114, 28 Eng. Reprint 838].

56. **Used in connection with other words** see the following phrases: "Immediate and urgent necessity." Rumford Chemical Works

something that is necessary;[57] that which is essentially requisite;[58] the occasion, or that which gives rise to something else;[59] great or urgent public convenience.[60] (Necessity: Homicide by, see HOMICIDE. Public, see EMINENT DOMAIN. Way or Easement of, see EASEMENTS. Work of, see SUNDAY. See also COMPULSION.)

NECKLACE.[61] See JEWELRY.

NEC REGIBUS INFINITA AUT LIBERA POTESTAS. A maxim meaning "The power which is given to kings is neither unbounded nor at will."[62]

NECROSCOPY. The examination of a body after death; post-mortem examination; AUTOPSY,[63] *q. v.* (Necroscopy: In General, see CORONERS. Civil Liability For Illegal Autopsy, see DEAD BODIES. Criminal Responsibility For Unlawful Autopsy, see DEAD BODIES.)

NEC TEMPUS NEC LOCUS OCCURRIT REGI. A maxim meaning 'Neither time nor place bars the king."[64]

NE CURIA DEFICERET IN JUSTITIA EXHIBENDA. A maxim meaning "Nor should the court be deficient in showing justice."[65]

NEC VENIAM EFFUSO SANGUINE CASUS HABET. A maxim meaning "Where blood is spilled, the case is unpardonable."[66]

NEC VENIAM LÆSO NOMINE CASUS HABET. A maxim meaning "Where the Divinity is insulted the case is unpardonable."[67]

NEED. A word that has been held equivalent to DESIRE,[68] *q. v.*; or request.[69]

NEEDFUL. Necessary for supply or relief, requisite.[70]

NEEDLESSLY. Without necessity; unnecessarily;[71] wantonly and cruelly.[72]

v. Ray, 19 R. I. 456, 459, 34 Atl. 814. "Imperious necessity." Chester Traction Co. *v.* Philadelphia, etc., R. Co., 188 Pa. St. 105, 112, 41 Atl. 449, 44 L. R. A. 269. "Moral necessity." The Yarkana, 117 Fed. 336, 341. "Other great necessity." Spring Valley Water Works *v.* San Francisco, 52 Cal. 111, 112. "Physical necessity." The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228, 248. "Public necessity." *In re* Shelton St. R. Co., 69 Conn. 626, 629, 38 Atl. 362; Lewis *v.* Shreveport, 15 Fed. Cas. No. 8,331, 3 Woods 205, 210. See also, generally, EMINENT DOMAIN.

Both shelter and occupation may be included in the term "necessities. Taylor's Appeal, 7 Pa. Cas. 466, 474, 11 Atl. 307.

57. Carver *v.* State, 69 Ind. 61, 64, 35 Am. Rep. 205.

58. Corey *v.* Swagger, 74 Ind. 211, 213.

When the word does not mean that which is absolutely requisite see Todd *v.* Flournoy, 56 Ala. 99, 113, 28 Am. Rep. 758; Wardsboro *v.* Jamaica, 59 Vt. 514, 516, 9 Atl. 11; Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 600, 73 Pac. 670); or indispensable (see Bryan *v.* Branford, 50 Conn. 246, 253).

Necessity must be actual, and not merely apprehended, or one which on a balancing of chances may turn out absolute and real, or only threatening and imaginary. The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465, where it is said the term "is not of itself of any very distinct or definite signification."

59. Worcester Dict. [*quoted* in Carver *v.* State, 69 Ind. 61, 64, 35 Am. Rep. 205].

Used in relation to the necessity of using the dying declarations as evidence in a prosecution for murder which makes them admissible does not mean the exigency of a particular case, but a public necessity which civilized society feels the pressure of for the protection of human life on the punishment of manslayers. Com. *v.* Roddy, 184 Pa. St. 274, 289, 39 Atl. 211.

Used with regard to the forfeiture of a homestead for temporary absence, the term may embrace considerations of health, or travel, or public official engagements, or even a private business emergency of an exceptional and temporary character. Thompson *v.* Tillotson, 56 Miss. 36, 40.

60. Com. *v.* Gilligan, 195 Pa. St. 504, 510, 46 Atl. 124, when used with reference to public matters.

61. "Pearl necklace" see Atty.-Gen. *v.* Harley, 7 L. J. Ch. O. S. 31, 35, 5 Russ. 173, 5 Eng. Ch. 173, 38 Eng. Reprint 992.

62. Morgan Leg. Max.

63. Century Dict.

64. Bouvier L. Dict.

65. Peloubet Leg. Max.

66. Bouvier L. Dict.

67. Morgan Leg. Max.

68. Gillen *v.* Kimball, 34 Ohio St. 352, 363.

69. Cooper *v.* Olcott, 1 App. Cas. (D. C.) 123, 131. See also Conant *v.* Stratton, 107 Mass. 474, 481.

Needing aid as used in a will see Fay *v.* Howe, 136 Cal. 599, 602, 69 Pac. 423.

70. Webster Dict.

Used in connection with other words see the following places: "Needful buildings." Newcomb *v.* Rockport, 183 Mass. 74, 77, 66 N. E. 587; Bannon *v.* Burnes, 39 Fed. 892, 899. "Needful rules." Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 319, 5 Pac. 606. "Needful rules and regulations." State *v.* Fond Du Lac Bd. of Education, 63 Wis. 234, 237, 23 N. W. 102, 53 Am. Rep. 282; Higbee *v.* Higbee, 4 Utah 19, 26, 5 Pac. 693.

71. Webster Dict.

72. Grise *v.* State, 37 Ark. 456, 461. See also Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933.

Used in a statute with reference to mutilating or killing an animal, the term has been construed to mean without any useful motive.[73]

NEEDY.[74] By want of means of living; very poor; INDIGENT, *q. v.*; NECESSITOUS,[75] *q. v.*

When not construed to mean "recklessly" see Wabash R. Co. *v.* Speer, 156 Ill. 244, 252, 40 N. E. 835.

73. Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933. See also Hodge *v.* State, 11 Lea (Tenn.) 528, 532, 47 Am. Rep. 307.

74. "Most needy" see Fontaine *v.* Thompson, 80 Va. 229, 232, 56 Am. Rep. 588.

75. Webster Dict. [*quoted* in Juneau County *v.* Wood County, 109 Wis. 330, 333, 85 N. W. 387].

The term may be used to characterize minor children who do not own property in their own name, although they earn their own living. Woods *v.* Perkins, 43 La. Ann. 347, 9 So. 48.

NE EXEAT

By Benjamin J. Shipman *

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CROSS-REFERENCES

For Matters Relating to:
Arrest Generally, see ARREST.
Bail Generally, see BAIL.
Review of Proceedings, see APPEAL AND ERROR.

I. DEFINITIONS.

A. Ne Exeat Regno. In English practice ne exeat regno is a writ which issues to restrain a person from leaving the kingdom.[1]

B. Ne Exeat Republica. In American practice ne exeat republica is a writ similar to that of ne exeat regno available to plaintiff in a civil suit, under some circumstances, when defendant is about to leave the state.[2] It is an ordinary or mesne process of equity,[3] and may be correctly described as a process issuing from a court of equitable jurisdiction upon the impending departure of a person from the jurisdiction with intent to evade it, to restrain such person until he has given equitable bail or security to abide the decree.[4]

1. Black L. Dict.

Under the early English practice, this writ, known as the writ of ne exeat regno, was a high prerogative writ, limited to affairs of state. Anonymous, 1 Atk. 521, 26 Eng. Reprint 329; Hunter *v.* Maccray, Cas. t. Talb. 196, 25 Eng. Reprint 734; Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128; Dick *v.* Swinton, 1 Ves. & B. 371, 35 Eng. Reprint 145; Jackson *v.* Petrie, 10 Ves. Jr. 164, 7 Rev. Rep. 368, 32 Eng. Reprint 807; De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 7 Rev. Rep. 340, 32 Eng. Reprint 762. It was afterward applied to private rights. See Whitehouse *v.* Partridge, 3 Swanst. 365, 19 Rev. Rep. 216, 36 Eng. Reprint 896. The adoption of the Judicature Acts did not extend the application of the writ to mere legal debts. Drover *v.* Beyer, 13 Ch. D. 242, 49 L. J. Ch. 37, 41 L. T. Rep. N. S. 393, 28 Wkly. Rep. 110. It can only issue when the case is within the exceptions of the Debtors Act (1869), 32 & 33 Vict. c. 62, § 6. Drover *v.* Beyer, *supra*; Hands *v.* Hands, 43 L. T. Rep. N. S. 750.

It was formerly used for political purposes, but is now only resorted to in equity when defendant is about to leave the kingdom; it is only in cases where the intention of the party to leave can be shown that the writ is granted. Black L. Dict.

2. Black L. Dict.

3. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557; Gleason *v.* Bisby, Clarke (N. Y.) 551.

4. See Cable *v.* Alvord, 27 Ohio St. 654; Adams *v.* Whitcomb, 46 Vt. 708; Gleason *v.* Bisby, Clarke (N. Y.) 551.

"The Ne Exeat, as now understood and practised upon, is a proceeding in Equity to obtain bail, in a case where there is a debt due in Equity, though not at Law; for, if it be a legal debt, then you may take bail at Law, and Equity will not entertain you, except in cases of account, and perhaps a few other cases of concurrent jurisdiction." Rhodes *v.* Cousins, 6 Rand. (Va.) 188, 192, 18 Am. Dec. 715 [*quoted* in Cable *v.* Alvord, 27 Ohio St. 654, 664].

II. NATURE AND PURPOSE.

A. In General. The writ of ne exeat is in the nature of equitable bail,[5] and its essential object is to insure compliance, by defendant, with the order or decree to be made,[6] or with a decree already rendered,[7] by compelling him to give security for the performance of any duty necessarily imposed.[8] A ne exeat may be issued in aid of other equitable processes, such as an injunction,[9] or a ne exeat and an injunction may be issued together.[10] When available, it is in the nature of a writ of right;[11] but, as it is a remedy of great severity, it is applied to private rights with caution,[12] and will not ordinarily be granted when the equity is doubtful,[13] nor as a means of improper restraint.[14]

B. Constitutional and Statutory Provisions — 1. In General. The issuance of a writ of ne exeat is expressly authorized by the statutes of the United States, and by those of many of the states,[15] although in some states it has been

5. *Arkansas.*— Gresham *v.* Peterson, 25 Ark. 377.
Indiana.— Hunter *v.* Nelson, 5 Blackf. 263.
Massachusetts.— Rice *v.* Hale, 5 Cush. 238.
New York.— Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669.
Ohio.— Cable *v.* Alvord, 27 Ohio St. 654.
Wisconsin.— Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 198.
England.— Whitehouse *v.* Partridge, 3 Swanst. 365, 19 Rev. Rep. 216, 36 Eng. Reprint 896; Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128; Dick *v.* Swinton, 1 Ves. & B. 371, 35 Eng. Reprint 145; Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544; Stewart *v.* Graham, 19 Ves. Jr. 313, 34 Eng. Reprint 533; Haffey *v.* Haffey, 14 Ves. Jr. 261, 33 Eng. Reprint 521; Jackson *v.* Petrie, 10 Ves. Jr. 164, 7 Rev. Rep. 368, 32 Eng. Reprint 807; Dawson *v.* Dawson, 7 Ves. Jr. 173, 32 Eng. Reprint 71.

6. *Arkansas.*— Gresham *v.* Peterson, 25 Ark. 377.
Georgia.— McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.
Maryland.— Johnson *v.* Clendenin, 5 Gill & J. 463.
New Jersey.— Yule *v.* Yule, 10 N. J. Eq. 138.
New York.— Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669.
Ohio.— Cable *v.* Alvord, 27 Ohio St. 654.
See 37 Cent. Dig. tit. "Ne Exeat," § 1.

7. Dunham *v.* Jackson, 1 Paige (N. Y.) 629; Haffey *v.* Haffey, 14 Ves. Jr. 261, 33 Eng. Reprint 521; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171, 32 Eng. Reprint 70; Coglar *v.* Coglar, 1 Ves. Jr. 94, 30 Eng. Reprint 246.

8. Rice *v.* Hale, 5 Cush. (Mass.) 238.

9. Hayes *v.* Willio, 11 Abb. Pr. N. S. (N. Y.) 167 [*reversed* on other grounds in 4 Daly 259].

10. Bryson *v.* Petty, 1 Bland (Md.) 182 note.

11. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169; Gleason *v.* Bisby, Clarke (N. Y.) 551.

12. Gresham *v.* Peterson, 25 Ark. 377; Pratt *v.* Wells, 1 Barb. (N. Y.) 425; Whitehouse *v.* Partridge, 3 Swanst. 365, 19 Rev. Rep. 216, 36 Eng. Reprint 896; Tomlinson *v.* Harrison, 8 Ves. Jr. 32, 32 Eng. Reprint 262.

13. De Rivafinoli *v.* Corsetti, 4 Paige (N. Y.) 264, 25 Am. Dec. 532; Jenkins *v.* Parkinson, Coop. t. Brough. 179, 47 Eng. Reprint 64, 3 L. J. Ch. 36, 2 Myl. & K. 5, 7 Eng. Ch. 5, 39 Eng. Reprint 846.
Where the equity is clear, but the facts are in dispute, the writ may be granted. Hampton *v.* Pool, 28 Ga. 514.

14. Shainwald *v.* Lewis, 46 Fed. 839 [*modified* as to another point in 48 Fed. 492].
The writ was not intended to operate as a lifelong restraint, and should not be granted in a suit to revive a judgment, where none was granted in the action in which the judgment was rendered, but one was granted in a creditor's bill brought on such judgment, under which defendant was held under bond for more than seven years, especially where the allegation that defendant intends to depart is denied by answer, and is not supported by proof. Shainwald *v.* Lewis, 46 Fed. 839 [*modified* as to another point in 48 Fed. 492]. See Amsinck *v.* Barklay, 8 Ves. Jr. 594, 32 Eng. Reprint 486.

15. See U. S. Rev. St. (1878) §§ 716, 717 [U. S. Comp. St. (1901) p. 580]; and the statutes of the several states. See also King *v.* Huntley, 2 Hawaii 457; Samuel *v.* Wiley, 50 N. H. 353.
In Colorado, under Gen. St. § 1604, the writ was issued under the jurisdiction conferred upon the district courts to make all orders necessary to compel a guardian to account, to detain a guardian — whose sureties were insolvent — and his wife, having property of the ward, and being about to leave the United States with the intention of defrauding her out of her inheritance. People *v.* Barton, 16 Colo. 75, 26 Pac. 149.
In Tennessee the writ is authorized by Civ. Code, § 4434, but the right to issue the writ under Const. (1870) art. 1, § 18, was considered doubtful. Smith *v.* Koontz, 4 Hayw. 189.
Under the Bankruptcy Act of 1898, 30 U. S. St. at L. 544, c. 541, § 2, subd. 15 [U. S. Comp. St. (1901) p. 3420], which confers general powers on courts of bankruptcy to issue such process as may be

abolished,[16] and where no exclusive remedy has been substituted it is undoubtedly available, as an ordinary process of equity, under the equitable jurisdiction of the courts of the several states,[17] notwithstanding the general adoption of the single form of action.[18]

2. Extension of Remedy. In some states the scope of the writ has been extended by statutes which modify or dispense with the rules as to equitable demand and maturity of debt.[19]

3. Inhibition of Imprisonment For Debt. The arrest of a defendant under a ne exeat, either as an equitable remedy or as extended by statute, is not "imprisonment for debt," unless clearly within the scope and meaning of the constitutional or statutory prohibition applicable.[20]

necessary for the enforcement of the act, such courts may issue writs in the nature of ne exeat within their respective districts, upon a proper showing of necessity therefor. *In re* Cohen, 136 Fed. 999.

16. As in Arkansas, California, Kentucky, New York, Ohio, Oklahoma, and Oregon.

Under Cal. Code Civ. Proc. § 478, which prescribes process and proceedings by which a defendant may be arrested in a civil action, the writ of ne exeat, not being mentioned, is not available. *Ex p.* Harker, 49 Cal. 465.

In New York the writ was abolished by Code Civ. Proc. § 548, which provided a substitute by an order of arrest and bail, which is available only in the cases specifically enumerated. Collins *v.* Collins, 80 N. Y. 24; Fuller *v.* Emeric, 2 Sandf. 626, 2 Code Rep. 58; Boucicault *v.* Boucicault, 59 How. Pr. 131. It had been previously held that the writ was not abolished under the old code. Haberstro *v.* Bedford, 43 Hun 201 [*affirmed* in 118 N. Y. 187, 23 N. E. 459]; Collins *v.* Collins, 17 Hun 598 [*affirmed* in 80 N. Y. 1]; Viadero *v.* Viadero, 7 Hun 313; Brownell *v.* Akin, 6 Hun 378; Beckwith *v.* Smith, 4 Lans. 182; Breck *v.* Smith, 54 Barb. 212; Forrest *v.* Forrest, 10 Barb. 46, 5 How. Pr. 125, 3 Code Rep. 141, 2 Edm. Sel. Cas. 171 [*affirming* 3 Code Rep. 121]; Neville *v.* Neville, 22 How. Pr. 500; Bushnell *v.* Bushnell, 7 How. Pr. 389 [*affirmed* in 15 Barb. 399]; Brown *v.* Haff, 5 Paige 235, 28 Am. Dec. 425. *Contra*, Johnston *v.* Johnston, 1 Rob. 642, 16 Abb. Pr. 43, 25 How. Pr. 181; Fuller *v.* Emeric, 2 Sandf. 626, 2 Code Rep. 58.

In Ohio the writ is abolished as to all civil actions under the code. Cable *v.* Alvord, 27 Ohio St. 654.

17. Carter *v.* Porter, 71 Me. 167; Rice *v.* Hale, 5 Cush. (Mass.) 238.

18. Bonesteel *v.* Bonesteel, 28 Wis. 245.

19. See the statutes of the several states.

In Alabama the writ may issue, on equitable debts and demands, whenever an attachment at law may issue. Civ. Code, § 762.

In Georgia the writ is authorized: (1) In favor of coöbligors or promisors, against persons equally or partly responsible for the performance of any duty; (2) against persons illegally removing property of decedents, orphans, or married women, at the instance of any person interested, or of a next friend; (3) at the instance of remainder-men or reversioners, interested in personal property, against any person attempting to remove property in which a vested or contingent interest exists; (4) at the instance of a mortgagee, against the holder of the equity of redemption; and (5) at the instance of any person interested, legally or equitably, in property about to be removed, where no adequate remedy exists at law. Civ. Code, § 4886; Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201.

In Illinois the writ may issue upon legal or equitable demands, and whether actually due or not, if fairly and *bona fide* in expectancy at the time of filing the application. Rev. St. (1874) c. 97, § 1.

In Indiana the writ was available, under the former practice, for both legal and equitable demands. Hunter *v.* Nelson, 5 Blackf. (Ind.) 263.

20. Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119 (where it was held that alimony, or maintenance, is not a debt, within the meaning of the constitutional prohibition against imprisonment for debt); Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 198. *Compare* Scoggin *v.* Taylor, 13 Ark. 380 (where it was held that the act of 1843 repealed, by implication, an earlier statute conferring power on the master in chancery to issue the writ); Cable *v.* Alvord, 27 Ohio St. 654.

Where cases of tort, or cases based upon fraud, are excepted in the inhibition against imprisonment for debt, any act raising at least a strong presumption of fraud would be sufficient to authorize the issuance of the writ, such as the attempted removal of the property of a ward, by a guardian, with intent to deprive the ward of her inheritance (People *v.* Barton, 16 Colo. 75, 26 Pac. 149), or the removal of unexempt property with the intent to leave no assets within the jurisdiction (Malcolm *v.* Andrews, 68 Ill. 100; Garden City Sand Co. *v.* Gettins, 102 Ill. App. 201. See West *v.* Walker, 6 Blackf. (Ind.) 420, where no fraud was shown). Where the exception is that of a defendant "about to depart from and establish his residence beyond the limits of the state," a showing that he is "about to change his residence and abscond beyond the limits of the state" will not take the case out of the statute. Mason *v.* Hutchings, 20 Me. 77. See also Gleason

III. NATURE OF DEMAND.

A. In General. The debt or demand relied upon to support a writ of ne exeat must, unless otherwise authorized by statute, be an equitable one[21] which is enforceable against the person of defendant,[22] is of a pecuniary nature[23] and presently payable.[24] The demand must also be certain, although not necessarily so in amount,[25] and the writ will not issue for demands which are uncertain,

v. Bisby, Clarke (N. Y.) 551, where the writ was refused on a bill to enforce payment of a note.

21. *Alabama.*— Baker *v.* Rowan, 2 Stew. & P. 361; Lucas *v.* Hickman, 2 Stew. 111, 19 Am. Dec. 44.

Arkansas.— Gresham *v.* Peterson, 25 Ark. 377; *Ex p.* Royster, 6 Ark. 29.

Hawaii. — King *v.* Huntley, 2 Hawaii 457.

Indiana.— Hunter *v.* Nelson, 5 Blackf. 263.

Maryland.— Cox *v.* Scott, 5 Harr. & J. 384.

New Jersey.— McDonough *v.* Gaynor, 18 N. J. Eq. 249.

New York.— Brownell *v.* Akin, 6 Hun 378; Allen *v.* Hyde, 2 Abb. N. Cas. 197; Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669; Smedberg *v.* Mark, 6 Johns. Ch. 138; Seymour *v.* Hazard, 1 Johns. Ch. 1; Gleason *v.* Bisby, Clarke 551; Palmer *v.* Van Doren, 2 Edw. 425.

Ohio.— Cable *v.* Alvord, 27 Ohio St. 654.

Virginia.— Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

Wisconsin.— Bonesteel *v.* Bonesteel, 28 Wis. 245.

United States.— Graham *v.* Stucken, 10 Fed. Cas. No. 5,677, 4 Blatchf. 50.

England.— Drover *v.* Beyer, 13 Ch. D. 242, 49 L. J. Ch. 37, 41 L. T. Rep. N. S. 393, 28 Wkly. Rep. 110; Pearne *v.* Lisle, Ambl. 75, 27 Eng. Reprint 47; Baker *v.* Dumaresque, 2 Atk. 66, 26 Eng. Reprint 438; Anonymous, 1 Atk. 521, 26 Eng. Reprint 329; Jenkins *v.* Parkinson, Coop. t. Brough. 179, 47 Eng. Reprint 64, 3 L. J. Ch. 36, 2 Myl. & K. 5, 7 Eng. Ch. 5, 39 Eng. Reprint 846; Crosley *v.* Marriot, Dick. 609, 21 Eng. Reprint 408; *Ex p.* Duncombe, Dick. 503, 21 Eng. Reprint 365; Greames *v.* Stritho, Dick. 469, 21 Eng. Reprint 352; Brocker *v.* Hamilton, Dick. 154, 21 Eng. Reprint 228; Mackintosh *v.* Ogilvie, Dick. 119, 21 Eng. Reprint 213; King *v.* Smith, Dick. 82, 21 Eng. Reprint 199; Howkins *v.* Howkins, 1 Dr. & Sm. 75, 6 Jur. N. S. 490, 2 L. T. Rep. N. S. 274, 8 Wkly. Rep. 428, 62 Eng. Reprint 306; Leake *v.* Leake, 1 Jac. & W. 605, 37 Eng. Reprint 498; Done's Case, 1 P. Wms. 263, 2 Salk. 102, 24 Eng. Reprint 380; Waller *v.* Fowler, Sau. & Sc. 274; Whitehouse *v.* Partridge, 3 Swanst. 365, 19 Rev. Rep. 216, 36 Eng. Reprint 896; Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128; Dick *v.* Swinton, 1 Ves. & B. 371, 35 Eng. Reprint 145; Howden *v.* Rogers, 1 Ves. & B. 129, 35 Eng. Reprint 51; Bernal *v.* Donegal, 11 Ves. Jr. 43, 32 Eng. Reprint 1004; Jackson *v.* Petrie, 10 Ves. Jr. 164, 7 Rev. Rep. 368, 32 Eng. Reprint 807; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171, 32 Eng. Reprint 70; Cock *v.* Ravie, 6 Ves. Jr. 283, 31 Eng. Reprint 1053.

See 37 Cent. Dig. tit. "Ne Exeat," § 3.

An allegation of non-residence alone will not be sufficient to enable a court of equity to assume jurisdiction, where the remedy is exclusively legal. McGinley *v.* Brooks, 1 B. Mon. (Ky.) 129.

A legal demand may become equitable, where a judgment and execution creditor seeks, by a bill in equity, to reach equitable assets and choses in action and subject them to the payment of his judgment. Ellingwood *v.* Stevenson, 4 Sandf. Ch. (N. Y.) 366.

22. Gleason *v.* Bisby, Clarke (N. Y.) 551; Adams *v.* Whitcomb, 46 Vt. 708.

Where the procedure allowed is directed toward property the writ will be refused. Burnsides *v.* Blythe, 11 B. Mon. (Ky.) 6.

23. Cowdin *v.* Cram, 3 Edw. (N. Y.) 231; Edwards *v.* Massey, 8 N. C. 359; Blaydes *v.* Calvert, 2 Jac. & W. 211, 37 Eng. Reprint 608.

24. *Maryland.*— Cox *v.* Scott, 5 Harr. & J. 384.

New Jersey.— Williams *v.* Williams, 3 N. J. Eq. 130.

New York.— Seymour *v.* Hazard, 1 Johns. Ch. 1; Gleason *v.* Bisby, Clarke 551.

Virginia.—Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

England.—Colverson *v.* Bloomfield, 29 Ch. D. 341, 54 L. J. Ch. 817, 52 L. T. Rep. N. S. 478, 33 Wkly. Rep. 889; Rico *v.* Gualtier, 3 Atk. 501, 26 Eng. Reprint 1088; Anonymous, 1 Atk. 521, 26 Eng. Reprint 329; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169; Cock *v.* Ravie, 6 Ves. Jr. 283, 31 Eng. Reprint 1053.

See 37 Cent. Dig. tit. "Ne Exeat," § 3.

The relation of a garnishee to defendant is not that of a "debtor" within the meaning of the rules governing the issuance of the writ. Patterson *v.* Bowie, 18 Fed. Cas. No. 10,825, 1 Cranch C. C. 425.

25. *Arkansas.*— Gresham *v.* Peterson, 25 Ark. 377.

New Jersey.— Williams *v.* Williams, 3 N. J. Eq. 130.

New York.— Brown *v.* Haff, 5 Paige 235, 28 Am. Dec. 425; De Rivafinoli *v.* Corsetti, 4 Paige 264, 25 Am. Dec. 532; Gleason *v.* Bisby, Clarke 551.

North Carolina.— Edwards *v.* Massey, 8 N. C. 359.

United States.— Graham *v.* Stucken, 10 Fed. Cas. No. 5,677, 4 Blatchf. 50; McKenzie

unliquidated, or contingent,[26] as for example, a claim for unliquidated damages.

B. Alimony. The writ will be granted, on application of the wife, to prevent a threatened departure of the husband with intent to evade an order or decree for the payment of alimony.[27]

C. Accounting. The writ is also available to prevent the departure of a defendant who admits a balance due on account, where plaintiff claims a greater sum,[28] and it has been allowed between co-defendants.[29]

D. Specific Performance. The writ may issue in an action for the specific performance of a contract at the instance of the vendor, if it is clear that the contract should be performed.[30]

IV. NECESSITY OF INTENDED DEPARTURE.

To sustain an application for the writ there must be a probable or threatened

v. Cowing, 16 Fed. Cas. No. 8,856, 4 Cranch C. C. 479.

England.— Colverson *v.* Bloomfield, 29 Ch. D. 341, 54 L. J. Ch. 817, 52 L. T. Rep. N. S. 478, 33 Wkly. Rep. 889; Storey *v.* Higgins, 3 Bro. Ch. 476, 29 Eng. Reprint 652; Alder *v.* Ward, 5 Ir. Eq. 367; Thompson *v.* Smith, 11 Jur. N. S. 276, 34 L. J. Ch. 412, 12 L. T. Rep. N. S. 9, 13 Wkly. Rep. 422; Grant *v.* Grant, 3 Russ. 598, 27 Rev. Rep. 135, 3 Eng. Ch. 598, 38 Eng. Reprint 699, 3 Sim. 340, 30 Rev. Rep. 170, 6 Eng. Ch. 340, 57 Eng. Reprint 1025; Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169; Cock *v.* Ravie, 6 Ves. Jr. 283, 31 Eng. Reprint 1053.

See 37 Cent. Dig. tit. "Ne Exeat," § 3.

26. Gresham *v.* Peterson, 25 Ark. 377; Rice *v.* Hale, 5 Cush. (Mass.) 238; Rico *v.* Gualtier, 3 Atk. 501, 26 Eng. Reprint 1088; Anonymous, 1 Atk. 521, 26 Eng. Reprint 329; Anonymous, 5 New Rep. 358; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169; Cock *v.* Ravie, 6 Ves. Jr. 283, 31 Eng. Reprint 1053.

A surety cannot obtain the writ in order to hold his principal to bail, and thereby compel the payment of a penalty of forfeiture under the laws of a foreign state, before it is legally ascertained that either principal or surety will be compelled to pay such penalty. Gibbs *v.* Mennard, 6 Paige (N. Y.) 258. But see Sealy *v.* Laird, 3 Swanst. 380, 36 Eng. Reprint 902, holding that a surety can obtain the writ, although he has not been called upon to pay the debt.

27. Yule *v.* Yule, 10 N. J. Eq. 138; Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 364; Prather *v.* Prather, 4 Desauss. Eq. (S. C.) 33; Anonymous, 2 Atk. 210, 26 Eng. Reprint 530; Dawson *v.* Dawson, 7 Ves. Jr. 173, 32 Eng. Reprint 71; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171, 32 Eng. Reprint 70.

The writ was granted pending the hearing in contempt proceedings, in Connecticut, for refusal to comply with a decree awarding alimony, upon proof that defendant was about to leave the state. Lyon *v.* Lyon, 21 Conn. 185.

The writ may issue in a statutory suit for maintenance, before the rendition of a decree fixing the amount. Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119.

Pending application.— A writ of ne exeat may be granted at the instance of a wife against her husband pending an application for alimony, and prior to a decree therefor, under Civ. Code (1895), § 2467, providing that in divorce proceedings the court shall enforce its orders in the same manner as in a court of equity. Lamar *v.* Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169.

In England the writ of ne exeat regno is in the case of alimony marked only for the arrears actually due. Haffey *v.* Haffey, 14 Ves. Jr. 261, 33 Eng. Reprint 521. See also Street *v.* Street, Turn. & R. 322, 12 Eng. Ch. 322, 37 Eng. Reprint 1124.

28. McGehee *v.* Polk, 24 Ga. 406; MacDonough *v.* Gaynor, 18 N. J. Eq. 249; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169; Howden *v.* Rogers, 1 Ves. & B. 129, 35 Eng. Reprint 51; Jones *v.* Alephsin, 16 Ves. Jr. 470, 33 Eng. Reprint 1063; Hannay *v.* McEntire, 11 Ves. Jr. 54, 32 Eng. Reprint 1008; Jones *v.* Sampson, 8 Ves. Jr. 593, 32 Eng. Reprint 485.

A settlement of partnership accounts may also be obtained by the use of this remedy, where it appears, by satisfactory evidence, that a partner has converted all his property into money, or notes, and intends to leave the state. Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 198.

29. Sobey *v.* Sobey, L. R. 15 Eq. 200, 42 L. J. Ch. 271, 27 L. T. Rep. N. S. 808, 21 Wkly. Rep. 309; Done's Case, 1 P. Wms. 263, 2 Salk. 702, 24 Eng. Reprint 380.

30. Morris *v.* McNeil, 2 Russ. 604, 3 Eng. Ch. 604, 38 Eng. Reprint 462.

A mere apprehension that a person about to leave the state does not intend to return in time to perform his agreement will not justify the issuance of the writ prior to the time for performance. De Rivafinoli *v.* Corsetti, 4 Paige (N. Y.) 264, 25 Am. Dec. 532.

On a contract for the sale of land plaintiff must show a clear and unencumbered title to the land at the time of commencing his action. Brown *v.* Haff, 5 Paige (N. Y.) 235, 28 Am. Dec. 425.

departure of defendant from the state or the United States generally, with intent to evade jurisdiction.[31]

V. FOR WHOM ISSUED.

A. In General. The remedy is available on behalf of any person having a clear right to relief, either in equity or under statutory provisions,[32] where he has a legal right or title to sue,[33] and a present vested interest may support such right, even if capable of being divested.[34]

B. Married Women. The writ will be issued on the application of a married woman, where the husband intends to defeat her rights by removing from the jurisdiction.[35]

C. Non-Residents. The writ will be granted in behalf of a non-resident,

31. *Alabama.*— Baker *v.* Rowan, 2 Stew. & P. 361; Lucas *v.* Hickman, 2 Stew. 111, 19 Am. Dec. 44.

Georgia.—Orme *v.* McPherson, 36 Ga. 571; Moore *v.* Gleaton, 23 Ga. 142.

New Jersey.— Yule *v.* Yule, 10 N. J. Eq. 138.

New York.— Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669; Mattocks *v.* Tremain, 3 Johns. Ch. 75.

Wisconsin.— Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 198.

United States.— Graham *v.* Stucken, 10 Fed. Cas. No. 5,677, 4 Blatchf. 50; Loewenstein *v.* Biernbaum, 15 Fed. Cas. No. 8,461*a*; Patterson *v.* McLaughlin, 18 Fed. Cas. No. 10,828, 1 Cranch C. C. 352.

See 37 Cent. Dig. tit. "Ne Exeat," § 3.

Under U. S. Rev. St. (1878) § 717 [U. S. Comp. St. (1901) p. 580] the writ will only be granted where defendant designs to depart quickly from the United States. Shainwald *v.* Lewis, (1889) 46 Fed. 839 [*affirmed* in 48 Fed. 492]; Loewenstein *v.* Biernbaum, 15 Fed. Cas. No. 8,461*a*.

Departure in ordinary course of business. —The rule was established in England, at an early date, that a departure in the ordinary course of business, and without any apparent intent to defraud, would justify issuance of the writ, if plaintiff's claim might be thereby endangered or lost. Dick *v.* Swinton, 1 Ves. & B. 371, 35 Eng. Reprint 145; Stewart *v.* Graham, 19 Ves. Jr. 313, 34 Eng. Reprint 533; Tomlinson *v.* Harrison, 8 Ves. Jr. 32, 32 Eng. Reprint 262; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169. And it has been applied in this country, where contractors had completed their contract in one state, and were about to leave for the state where they resided. MacDonough *v.* Gaynor, 18 N. J. Eq. 249.

Under statutes providing for an equivalent remedy, it has been held that a debtor may be held to bail, when about to depart, even for a short period, provided he leaves no property. Roberts *v.* Page, 13 La. 452; Henshaw *v.* Ladd, 8 La. 512. But the possibility that he may leave the state, under conditions as yet uncertain, does not warrant the inference that a present intention exists. Gardner *v.* O'Connell, 5 La. Ann. 353.

Under the Kentucky code the intention must be for a permanent residence. Myall *v.* Wright, 2 Bush 130.

Analogy to capias in equity practice.— The practice of courts of equity, whereby a capias may issue, in vacation, to arrest a person intending to leave the state in order to evade a decree, or to attach his property to secure the enforcement of an anticipated final decree, is analogous, in principle, to the writ of ne exeat regno as recognized and administered by the English law. Samuel *v.* Wiley, 50 N. H. 353.

32. See *supra*, II, B; III.

33. Redd *v.* Wood, Ga. Dec., Pt. II, 174; Swift *v* Swift, 1 Ball & B. 326; Howkins *v.* Howkins, 1 Dr. & Sm. 75, 6 Jur. N. S. 490, 2 L. T. Rep. N. S. 274, 8 Wkly. Rep. 428, 62 Eng. Reprint 306.

34. Howkins *v.* Howkins, 1 Dr. & Sm. 75, 6 Jur. N. S. 490, 2 L. T. Rep. N. S. 274, 8 Wkly. Rep. 428, 62 Eng. Reprint 306.

35. *Florida.*— Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. Dec. 119.

Georgia.— Lamar *v.* Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169.

Maryland.— Bayly *v.* Bayly, 2 Md. Ch. 326.

New Jersey.— Yule *v.* Yule, 10 N. J. Eq. 138.

New York.—Bushnell *v.* Bushnell, 15 Barb. 399; Forrest *v.* Forrest, 10 Barb. 46, 5 How. Pr. 125, 3 Code Rep. 141, 2 Edm. Sel. Cas. 171, 9 N. Y. Leg. Obs. 89; Denton *v.* Denton, 1 Johns. Ch. 441.

Pennsylvania.—Dransfield *v.* Dransfield, 6 Phila. 143.

South Carolina.— Devall *v.* Devall, 4 Desauss. Eq. 79; Prather *v.* Prather, 4 Desauss. Eq. 33.

England.— Anonymous, 2 Atk. 210, 26 Eng. Reprint 530; Read *v.* Read, 1 Ch. Cas. 115, 22 Eng. Reprint 720; Street *v.* Street, Turn. & R. 322, 12 Eng. Ch. 322, 37 Eng. Reprint 1124; Haffey *v.* Haffey, 14 Ves. Jr. 261, 33 Eng. Reprint 521; Dawson *v.* Dawson, 7 Ves. Jr. 173, 32 Eng. Reprint 71; Shaftoe *v.* Shaftoe, 7 Ves. Jr. 171, 32 Eng. Reprint 70; Coglar *v.* Coglar, 1 Ves. Jr. 94, 30 Eng. Reprint 246.

See 37 Cent. Dig. tit. "Ne Exeat," § 6.

Capacity of married woman to sue and be sued in general see HUSBAND AND WIFE, 21 Cyc. 1512 *et seq.*

upon a demand arising in the United States,[36] and it seems also where the demand arose abroad.[37]

D. Representative Parties. The writ may issue at the instance of persons standing in a position of trust, such as executors or administrators.[38]

VI. AGAINST WHOM ISSUED.

A. Non-Residents. Under the early English practice, the use of the writ was confined to persons domiciled within the jurisdiction;[39] but the modern rule permits its use, upon a proper showing, against any debtor within the jurisdiction, whether resident or not, and against a non-resident even when temporarily within the jurisdiction,[40] unless the person is for some reason privileged from arrest,[41] and upon demands arising abroad.[42] Nor is it essential that a defendant be actually within the jurisdiction when the writ is applied for.[43] All parties jointly liable or interested need not be joined in an application under a statute authorizing the issuance of the writ as between joint obligors or promisors, or persons jointly interested.[44]

B. Married Women. A ne exeat may issue against a married woman, where a proper foundation is laid for an equitable action against her,[45] but not in an action founded on contract.[46]

C. Representative Parties. The writ is available against persons standing in a representative or fiduciary character, as executors and administrators, guardians, or trustees.[47]

36. Flack *v.* Holm, 1 Jac. & W. 405, 21 Rev. Rep. 202, 37 Eng. Reprint 430. See Story Eq. Pl. (10th ed.) §§ 851-855.

37. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669, in which plaintiff was a resident of Havana, and defendant resided at Carthagena, in the state of Colombia, and the demand arose abroad. The point has never been directly adjudicated. See De Carriere *v.* De Calonne, 4 Ves. Jr. 577, 31 Eng. Reprint 297.

38. Baker *v.* Rowan, 2 Stew. & P. (Ala.) 361; Cox *v.* Scott, 5 Harr. & J. (Md.) 384; Brownell *v.* Akin, 6 Hun (N. Y.) 378.

The writ was refused by Lord Thurlow, in the English chancery, on the affidavit of a *feme covert* administratrix, where the husband had obtained possession of the assets of the estate, and intended to depart from England, on the ground that the wife's evidence could not be received against the husband. Sedgwick *v.* Watkins, 1 Ves. Jr. 49, 30 Eng. Reprint 224.

39. Smith *v.* Nethersole, 2 Russ. & M. 450, 39 Eng. Reprint 465; Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544.

40. MacDonough *v.* Gaynor, 18 N. J. Eq. 249; Parker *v.* Parker, 12 N. J. Eq. 105.

41. Dixon *v.* Ely, 4 Edw. (N. Y.) 557, holding that a witness, although not under subpœna, coming into the jurisdiction for the sole purpose of testifying in an action, cannot be arrested on a ne exeat while waiting to testify. The writ was refused on the ground of parliamentary privilege in Bernal *v.* Donegal, 11 Ves. Jr. 43, 32 Eng. Reprint 1004.

Exemption from arrest see ARREST, 3 Cyc. 917.

42. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557; Woodward *v.* Schatzell, 3 Johns. Ch. (N. Y.) 412; Atkinson *v.* Leonard, 3 Bro. Ch. 218, 29 Eng. Reprint 499; Mackintosh *v.* Ogilvie, Dick. 119, 21 Eng. Reprint 213; Flack *v.* Holm, 1 Jac. & W. 405, 21 Rev. Rep. 202, 37 Eng. Reprint 430; Howden *v.* Rogers, 1 Ves. & B. 129, 35 Eng. Reprint 51; De Carriere *v.* De Calonne, 4 Ves. Jr. 577, 31 Eng. Reprint 297.

The writ will not be issued against a non-resident, temporarily within the jurisdiction, although he has been served with process, where the demand has been due, and has been enforceable in the courts of his own country for eighteen months, and when the decree, if rendered, would be respected and enforceable there. Harrison *v.* Graham, 110 Fed. 896.

43. Parker *v.* Parker, 12 N. J. Eq. 105.

44. Fitzgerald *v.* Gray, 59 Ind. 254.

45. Neville *v.* Neville, 22 How. Pr. (N. Y.) 500.

Capacity of married woman to sue and be sued in general see HUSBAND AND WIFE, 21 Cyc. 1512 *et seq.*

46. Moore *v.* Valda, 151 Mass. 363, 23 N. E. 1102, 7 L. R. A. 396; Adams *v.* Whitcomb, 46 Vt. 708.

In England, at an early date, the writ was refused against a feme covert administratrix, on the ground that she could not act separately from her husband. —— *v.* Taylor, 1 L. J. Ch. O. S. 139, Turn. & R. 96, 12 Eng. Ch. 96, 37 Eng. Reprint 1031. This decision has been cited in comparatively recent authorities, but the reason has ceased to exist, at least in the United States.

47. Ruddell *v.* Childress, 31 Ark. 511; People *v.* Barton, 16 Colo. 75, 26 Pac. 149;

VII. JURISDICTION TO ISSUE.[48]

The writ can only be issued by the court or a judge,[49] except where a subordinate officer, such as a court commissioner,[50] or master in chancery,[51] is expressly authorized by statute.

VIII. DEFENSES.[52]

A. In General. A mere denial of plaintiff's allegations will ordinarily be insufficient, as the court acts upon evidence of intent, without regard to denial,[53] but a previous arrest and bail at law,[54] or a statutory discharge in insolvency[55] or under a non-imprisonment act,[56] will be sufficient.

B. Existence and Adequacy of Remedy at Law. A ne exeat will ordinarily be denied, where plaintiff has an existing and adequate remedy by arrest and bail in a proceeding at law;[57] but where courts of chancery and common law

Patterson *v.* McLaughlin, 18 Fed. Cas. No. 10,828, 1 Cranch C. C. 352; Taylor *v.* Leitch, Dick. 380, 21 Eng. Reprint 317; Moore *v.* Meynell, Dick. 30, 21 Eng. Reprint 178; Moore *v.* Hudson, 6 Madd. 218, 56 Eng. Reprint 1075. See Graves *v.* Griffith, 1 Jac. & W. 646, 37 Eng. Reprint 514, where the ground relied on was collusion between the executor and a debtor of the estate, and the writ was refused.

48. Jurisdiction generally see COURTS.

49. Bailey *v.* Cadwell, 51 Mich. 217, 16 N. W. 381.

"The authority to issue this writ is properly regarded as an exercise of very high judicial discretion which cannot be vested except in those who exercise the ordinary judicial power of courts." Bailey *v.* Cadwell, 51 Mich. 217, 221, 16 N. W. 381.

In the federal courts direct authority is derived by the supreme and circuit courts, from U. S. Rev. St. (1878) § 716 [U. S. Comp. St. (1901) p. 580], and by section 717, authority is extended to the judges of either court in cases where the court could issue the writ; but until 1889 no judicial construction had been given as to the power of the federal district court, although in Gernon *v.* Boecaline, 10 Fed. Cas. No. 5,367, 2 Wash. 130, the authority of a judge was denied, and in Loewenstein *v.* Biernbaum, 15 Fed. Cas. No. 8,461*a*, the court was in doubt as to whether a district judge, sitting as a judge of the circuit court, would not be within the statute. In Lewis *v.* Shainwald, 48 Fed. 492, the court held that the district court may issue the writ, as a necessary incident to the exercise of its jurisdiction.

In Hawaii circuit judges have jurisdiction to issue writs of ne exeat. Aldrich *v.* Judge First Cir. Ct., 9 Hawaii 470.

Justice of the peace cannot issue the writ see JUSTICE OF THE PEACE, 24 Cyc. 477.

50. Bailey *v.* Cadwell, 51 Mich. 217, 16 N. W. 381.

51. Bassett *v.* Bratton, 86 Ill. 152.

52. Vacating and discharge see *infra*, XIV.

53. Whitehouse *v.* Partridge, 3 Swanst. 365, 19 Rev. Rep. 216, 36 Eng. Reprint 896.

A denial may be sufficient, as where a defendant denied that he has any property whatever, and there was no proof to the contrary. Palmer *v.* Van Doren, 2 Edw. (N. Y.) 425.

54. Pratt *v.* Wells, 1 Barb. (N. Y.) 425; Raynes *v.* Wyse, 2 Meriv. 472, 35 Eng. Reprint 1021.

55. O'Connor *v.* Debraine, 3 Edw. (N. Y.) 230; James *v.* North, 5 Jur. N. S. 84, 28 L. J. Ch. 374, 7 Wkly. Rep. 150.

56. Ashworth *v.* Wrigley, 1 Paige (N. Y.) 301, even though a writ of certiorari to review such discharge is pending, where no facts are shown as grounds for reversal of the discharge upon which the court can pass, and none as to whether it was erroneous.

In South Carolina a discharge under the Prison Bounds Act did not relieve the debtor from liability to arrest on a ne exeat. Ancrum *v.* Dawson, McMull. Eq. 405.

57. *Georgia.*— Orme *v.* McPherson, 36 Ga. 571; Hawthorn *v.* Kelly, 30 Ga. 965; Ross *v.* Hawkins, 29 Ga. 261; Hannahan *v.* Nichols, 17 Ga. 77.

Illinois.— Victor Scale Co. *v.* Shurtleff, 81 Ill. 313.

Massachusetts.—Moore *v.* Valda, 151 Mass. 363, 23 N. E. 1102, 7 L. R. A. 396.

New York.— Smedberg *v.* Mark, 6 Johns. Ch. 138; Porter *v.* Spencer, 2 Johns. Ch. 169.

South Carolina.— Nixon *v.* Richardson, 4 Desauss. Eq. 108.

Vermont.— Adams *v.* Whitcomb, 46 Vt. 708.

England.—Blaydes *v.* Calvert, 2 Jac. & W. 211, 37 Eng. Reprint 608; Gardner *v.* ——, 15 Ves. Jr. 444, 33 Eng. Reprint 822; Dawson *v.* Dawson, 7 Ves. Jr. 173, 32 Eng. Reprint 71; Russell *v.* Ashby, 5 Ves. Jr. 96, 31 Eng. Reprint 490. See also Walker *v.* Christian, 7 Sim. 367, 8 Eng. Ch. 367, 58 Eng. Reprint 878.

Where a statute requires it as a condition, it must be shown affirmatively. Conyers *v.* Gray, 67 Ga. 329.

Where an action has been commenced at law a court of equity has no power to impound the property which is the subject-matter of such action, for the purpose of satisfying the judgment which may be obtained and to prevent the removal of such property from the state, pending the action

exercise concurrent jurisdiction the writ may issue, although defendant can be held to bail at law;[58] and, it seems, in any case where justice might be otherwise defeated.[59] In such cases it is, in the absence of a statutory method, the only remedy, as the writ of injunction is not available.[60]

IX. PROCEEDINGS TO PROCURE.

A. In General.[61] An application for a writ of ne exeat is properly made by motion,[62] or upon an original complaint or bill in equity.[63] But as the proceeding is necessarily *ex parte*, an order to show cause is improper.[64] If made by complaint, bill, or petition, the allegations should be as sufficient and positive as is required in case of affidavits upon a motion,[65] based upon more than mere suspicion or apprehension,[66] as the whole burden of proof is on plaintiff.[67] The pleading should be verified by the complainant or some person having knowledge of the facts,[68] but it need not pray for the issuance of the writ unless the facts are

at law. Union Bank *v.* Newman, 4 Humphr. (Tenn.) 330.

Election of remedies.— Where a judgment debtor had been sued and held to bail in the circuit court of the United States, and a bill was also filed in a state court to obtain payment of the same judgment, and a writ of ne exeat issued against the debtor thereon, the complainant was required to elect to release defendant from the arrest and bail in the federal court, the alternative being a discharge of the ne exeat. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669.

58. Lucas *v.* Hickman, 2 Stew. (Ala.) 111, 19 Am. Dec. 44; Jones *v.* Alephsin, 16 Ves. Jr. 470, 33 Eng. Reprint 1063; Hannay *v.* McEntire, 11 Ves. Jr. 55, 32 Eng. Reprint 1008; Atkinson *v.* Leonard, 3 Bro. Ch. 218, 29 Eng. Reprint 499.

59. Lucas *v.* Hickman, 2 Stew. (Ala.) 111, 19 Am. Dec. 44; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169.

Exceptions to the rule as to adequate remedy can only be allowed, in the discretion of the court, where they are founded upon some difficulty in the use of the legal remedy. Pratt *v.* Wells, 1 Barb. (N. Y.) 425.

That sureties for a debt or demand are solvent will not alone defeat an application for the writ, where other sufficient grounds are shown. Fitzgerald *v.* Gray, 59 Ind. 254, 61 Ind. 109. *Compare* Sheppard *v.* Blue, 26 Ga. 117.

60. Bleyer *v.* Blum, 70 Ga. 558; Ramsay *v.* Joyce, McMull. Eq. (S. C.) 236, 37 Am. Dec. 550.

61. **Venue.**— The Georgia act of 1830, authorizing writs of ne exeat at the instance of persons claiming personal property in reversion or remainder, contemplated that the bill should be filed, and the security given, in the county where the person resides who had possession or control of the property, and jurisdiction cannot be transferred, except for cause. That different portions of the property claimed were held in different counties is not sufficient. Jackson *v.* Waters, 10 Ga. 546.

62. See Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557; 2 Daniell Ch. Pr. (6th Am. ed.) § 1706.

63. See Anderson *v.* Stamp, 2 Hem. & M. 576, 11 Jur. N. S. 169, 34 L. J. Ch. 230, 12 L. T. Rep. N. S. 113, 71 Eng. Reprint 587. And see cases cited *infra*, notes 65-70.

64. Bleyer *v.* Blum, 70 Ga. 558.

65. Thorne *v.* Halsey, 7 Johns. Ch. (N. Y.) 189; Anderson *v.* Stamp, 2 Hem. & M. 576, 11 Jur. N. S. 169, 34 L. J. Ch. 230, 12 L. T. Rep. N. S. 113, 71 Eng. Reprint 587. See *infra*, IX, C.

In Georgia a petition by a remainder-man or reversioner is insufficient under Ga. Civ. Code, § 4886, if it fails to allege that defendant is removing or about to remove out of the state, either himself or his property, or the specific property in which plaintiff claims an interest. Reed *v.* Barber, 110 Ga. 524, 35 S. E. 650.

A bill or petition may be amended, in a proper case. Bassett *v.* Bratton, 86 Ill. 152; Fisher *v.* Stone, 4 Ill. 68. And an amendment which does not really change the cause of action will not prevent the issuance of the writ. Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557.

66. Anshutz *v.* Anshutz, 16 N. J. Eq. 162; Forrest *v.* Forrest, 10 Barb. (N. Y.) 46, 5 How. Pr. 125, 3 Code Rep. 141, 2 Edm. Sel. Cas. 171, 9 N. Y. Leg. Obs. 89; Woodward *v.* Schatzell, 3 Johns. Ch. (N. Y.) 412; Lehman *v.* Logan, 42 N. C. 296; Shermam *v.* Shermam, 3 Bro. Ch. 370, 29 Eng. Reprint 589; Darley *v.* Nicholson, 1 Dr. & War. 66.

67. Garden City Sand Co. *v.* Gettins, 102 Ill. App. 261.

68. Orme *v.* McPherson, 36 Ga. 571; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.

A bill properly verified becomes part of a supporting affidavit, and its charges may be considered in determining whether the affidavit is positive or not. Orme *v.* McPherson, 36 Ga. 571.

A verification upon information and belief only is insufficient. Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201; Holliday *v.* Riodan, 25 Ga. 629; Bryan *v.* Ponder, 23 Ga. 480; Wallace *v.* Duncan, 13 Ga. 41.

That one has reason to believe and does verily believe a thing to be true is equiva-

known and it is the intention of plaintiff to apply for the writ at the time of filing the bill[69] or unless so required by statute.[70]

B. Time of Application. A writ of ne exeat may be applied for at any stage of a pending action,[71] but not until after a bill has been filed,[72] unless in consequence of statutory provisions.[73]

C. Affidavits — 1. In General. An affidavit to support an application for a writ of ne exeat must be as positive as one required to hold to bail at law.[74] When made under a statute it should come within the provisions of such statute.[75] It may refer to and adopt the allegations of a verified bill alleging jurisdictional facts;[76] and, where the showing is defective, may be aided by an official confirmation,[77] by the admissions of an answer,[78] or by competent extrinsic evidence.[79]

2. Statement of Demand. Affidavits for a ne exeat must clearly show a demand or debt, certain in its nature, presently payable, and enforceable in equity, or under

lent to swearing that it is true. Simpkins *v.* Malatt, 9 Ind. 543.

69. Elliott *v.* Sinclair, Jac. 545, 4 Eng. Ch. 545, 37 Eng. Reprint 956; Barned *v.* Laing, 6 Jur. 1050, 7 Jur. 383, 12 L. J. Ch. 377, 13 Sim. 255, 36 Eng. Ch. 255, 60 Eng. Reprint 99; Moore *v.* Hudson, 6 Madd. 218, 56 Eng. Reprint 1075; Collinson *v.* ——, 18 Ves. Jr. 353, 11 Rev. Rep. 212, 34 Eng. Reprint 351; Howkins *v.* Howkins, 8 Wkly. Rep. 403.

Danger of loss will be presumed, where the bill prays for the writ, upon an allegation that defendant is a non-resident. McGehee *v.* Polk, 24 Ga. 406.

70. Jackson *v.* Waters, 10 Ga. 546.

71. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Dunham *v.* Jackson, 1 Paige (N. Y.) 629; Mattocks *v.* Tremain, 3 Johns. Ch. (N. Y.) 75; Sobey *v.* Sobey, L. R. 15 Eq. 200, 42 L. J. Ch. 271, 27 L. T. Rep. N. S. 808, 21 Wkly. Rep. 309; Hughes *v.* Ryan, Beatty 327; Waller *v.* Fowler, Sau. & Sc. 274; Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128.

72. Mattocks *v.* Tremain, 3 Johns. Ch. (N. Y.) 75; Anonymous, 6 Madd. 276, 56 Eng. Reprint 1096; *Ex p.* Brunker, 3 P. Wms. 312, 24 Eng. Reprint 1079.

Where a writ was issued without a complaint filed, under the Indiana statute authorizing an arrest upon a complaint, affidavit, and bond, and the jury found that defendants did not intend to leave the state within the meaning of the statute, and that the note sued on was not due at the issuance of the order of arrest, but was before verdict, and defendants did not move to quash the order, it was held that the order should have been set aside, and defendants discharged, on the return of the verdict, leaving the case as if a complaint had been filed and no process issued, to be continued for process. Ramsey *v.* Foy, 10 Ind. 493.

In a case of extreme necessity, the writ was allowed, to prevent a solicitor, who had been overpaid, from leaving the realm. Loyd *v.* Cardy, Prec. Ch. 171, 24 Eng. Reprint 82. See Stewart *v.* Stewart, 1 Ball & B. 73.

73. MacDonough *v.* Gaynor, 18 N. J. Eq. 249.

The writ is granted before suit, in New Jersey, under a statute which permits a conviction for perjury on wilfully swearing falsely in an affidavit made for any lawful purpose, or necessary or proper to be used in any of the courts of the state, the common-law rule being that the false swearing must be in some judicial proceeding in order to constitute the offense. Clark *v.* Clark, 51 N. J. Eq. 404, 26 Atl. 1012.

74. *Georgia.*— Orme *v.* McPherson, 36 Ga. 571.

New York.— Gibert *v.* Colt, Hopk. 496, 14 Am. Dec. 557; Mattocks *v.* Tremain, 3 Johns. Ch. 75.

Virginia.—Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

United States.— Gernon *v.* Boecaline, 10 Fed. Cas. No. 5,367, 2 Wash. 130.

England.— Hughes *v.* Ryan, Beatty 327; Shermam *v.* Shermam, 3 Bro. Ch. 370, 29 Eng. Reprint 589; Flack *v.* Holm, 1 Jac. & W. 405, 21 Rev. Rep. 202, 37 Eng. Reprint 430; Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544; Jackson *v.* Petrie, 10 Ves. Jr. 164, 7 Rev. Rep. 368, 32 Eng. Reprint 807; De Carriere *v.* De Calonne, 4 Ves. Jr. 577, 31 Eng. Reprint 297.

See 37 Cent. Dig. tit. "Ne Exeat," § 9.

The affidavit of the wife alone would support the writ, in a suit for alimony, under the former practice in New York (Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 441), and will now in New Jersey (Yule *v.* Yule, 10 N. J. Eq. 138), but where the information is derived almost entirely from third parties, her affidavit should be supported by the affidavits of such parties (McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407).

75. Reed *v.* Barber, 110 Ga. 524, 35 S. E. 650; Jones *v.* Kennicott, 83 Ill. 484; Malcolm *v.* Andrews, 68 Ill. 100.

76. Clayton *v.* Mitchell, 1 Del. Ch. 32; Orme *v.* McPherson, 36 Ga. 571.

77. Yule *v.* Yule, 10 N. J. Eq. 138; Collinson *v.* ——, 18 Ves. Jr. 353, 11 Rev. Rep. 212, 34 Eng. Reprint 351.

78. Roddam *v.* Hetherington, 5 Ves. Jr. 91, 31 Eng. Reprint 487.

79. Rice *v.* Hale, 5 Cush. (Mass.) 238.

statutory provisions, by positive allegations, except as to a balance of account.[80] General allegations are not sufficient.[81]

3. Departure of Defendant — a. In General. The intended departure of defendant must be shown, either by positive allegations, or by allegation of facts, or threats and declarations evidencing such intention.[82]

b. Endangerment of Debt. The affidavits must show that the debt or demand will be lost or the recovery thereof greatly endangered by defendant's departure,[83] and in such case it is not essential to allege an intent to avoid jurisdiction.[84]

4. Amendment. An affidavit for a writ of ne exeat may be amended in a proper case.[85]

D. Bond or Undertaking[86] — 1. In General. According to established practice, the writ should not issue until a satisfactory bond has been filed, running to defendant, and conditioned for the payment of costs, and of any damage defendant may sustain from the issuance of the writ,[87] although the failure to file such a

80. *Delaware.*— Clowes *v.* Judge, 1 Del. Ch. 295.

Louisiana.—Graham *v.* Noble, 19 La. Ann. 512.

New Jersey.— MacDonough *v.* Gaynor, 18 N. J. Eq. 249.

New York.— Gibert *v.* Colt, Hopk. 496, 14 Am. Dec. 557.

United States.— Gernon *v.* Boecaline, 10 Fed. Cas. No. 5,367, 2 Wash. 130; McKenzie *v.* Cowing, 16 Fed. Cas. No. 8,856, 4 Cranch C. C. 479.

England.— Rico *v.* Gualtier, 3 Atk. 501, 26 Eng. Reprint 1088; Hughes *v.* Ryan, Beatty 327; Alder *v.* Wood, 5 Ir. Eq. 367; Hill *v.* O'Hanlon, 2 Ir. Eq. 463; Vanzeller *v.* Vanzeller, 15 Jur. 115; Thompson *v.* Smith, 11 Jur. N. S. 276, 34 L. J. Ch. 412, 12 L. T. Rep. N. S. 9, 13 Wkly. Rep. 422; Waller *v.* Fowler, Sau. & Sc. 274; Anonymous, 2 Ves. 489, 28 Eng. Reprint 313; Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544; Jackson *v.* Petrie, 10 Ves. Jr. 164, 7 Rev. Rep. 368, 32 Eng. Reprint 807; Amsinck *v.* Barklay, 8 Ves. Jr. 594, 32 Eng. Reprint 486.

See 37 Cent. Dig. tit. "Ne Exeat," § 9.

A statement that a certain sum is due, when the demand is actually an unliquidated one, although in terms a statement of fact amounts to no more than a strong declaration of a confident expectation or belief. Rice *v.* Hale, 5 Cush. (Mass.) 238.

81. Mattocks *v.* Tremain, 3 Johns. Ch. (N. Y.) 75.

82. *Georgia.*— Conyers *v.* Gray, 67 Ga. 329; Orme *v.* McPherson, 36 Ga. 571; Wood *v.* Symmes, 25 Ga. 69.

Louisiana.—Graham *v.* Noble, 19 La. Ann. 512. See Florance *v.* Camp, 5 La. 280.

New Jersey.— Yule *v.* Yule, 10 N. J. Eq. 138.

New York.—Mattocks *v.* Tremain, 3 Johns. Ch. 75.

Rhode Island.— Robinson *v.* Robinson, 21 R. I. 81, 41 Atl. 1009.

Tennessee.— See Smith *v.* Koontz, 4 Hayw. 189.

England.— Anonymous, 4 De G. & Sm. 547, 64 Eng. Reprint 951; Sichel *v.* Raphael, 4 L. T. Rep. N. S. 114; Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544; Stewart *v.* Graham, 19 Ves. Jr. 313, 34 Eng. Reprint 533; Jones *v.* Alephsin, 16 Ves. Jr. 470, 33 Eng. Reprint 1063; Hannay *v.* McEntire, 11 Ves. Jr. 54, 32 Eng. Reprint 1008; Amsinck *v.* Barklay, 8 Ves. Jr. 594, 32 Eng. Reprint 486; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169; Oldham *v.* Oldham, 7 Ves. Jr. 410, 32 Eng. Reprint 166; Perry *v.* Dorset, 19 Wkly. Rep. 1048.

See 37 Cent. Dig. tit. "Ne Exeat," § 9.

To establish a uniform method of procedure, it was required in Rhode Island, in 1898, that all applications be accompanied by a positive affidavit establishing the probability of defendants' departure and the consequent danger of loss to plaintiff. Robinson *v.* Robinson, 21 R. I. 81, 41 Atl. 1009.

83. Mattocks *v.* Tremain, 3 Johns. Ch. (N. Y.) 75; Vanzeller *v.* Vanzeller, 15 Jur. 115; McGauran *v.* Furnell, Sau. & Sc. 263; Tomlinson *v.* Harrison, 8 Ves. Jr. 32, 32 Eng. Reprint 262; Etches *v.* Lance, 7 Ves. Jr. 417, 32 Eng. Reprint 169.

84. Yule *v.* Yule, 10 N. J. Eq. 138.

An affidavit may be sufficient, if positive as to the intention, although upon information and belief as to preparations and threats. Moore *v.* Gleaton, 23 Ga. 142.

Under a statutory provision prohibiting imprisonment for debt, except when defendant is "about to depart and establish his residence beyond the limits of this state," an affidavit that he is "about to change his residence and abscond beyond the limits of the State" is not sufficient. Mason *v.* Hutchings, 20 Me. 77.

Where a complainant, who had derived her information from third parties, swore that the facts stated were true so far as they concerned herself, and so far as they concerned the acts and deeds of others she believed them to be true, and the bill alleged that defendant had threatened to leave the state, the writ was issued. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.

85. Gernon *v.* Boecaline, 10 Fed. Cas. No. 5,367, 2 Wash. 130.

86. **Form of bond** see Cox *v.* Scott, 5 Harr. & J. (Md.) 384.

87. Graham *v.* Noble, 19 La. Ann. 512. See also Ramsey *v.* Foy, 10 Ind. 493.

bond is not fatal,[88] unless the writ issues under statutory procedure absolutely requiring it.[8]

2. AMENDMENT. In a proper case the bond may be amended.[90]

E. Order or Decree.[91] The writ may be granted by an interlocutory order,[92] or it may be provided for in the final decree.[93] In either case, it seems, a basis for the indorsement of the writ should be given.[94] In no case should the court impose conditions more onerous than the law would otherwise require,[95] or deny the writ upon such conditions.[96]

X. ISSUANCE, FORM, AND REQUISITES.

A. In General. The writ should be issued in accordance with rules governing the issuance of process, and if these are substantially complied with irregularities may be corrected by amendment.[97] The writ is essentially a command to the sheriff to cause defendant to give bail according to its terms and the indorsement, or in default thereof to commit him to prison until he does so.[98] The writ should contain a recital of the grounds upon which it is issued,[99] and, as it is "process," it should be properly signed and attested and under the seal of the court.[1]

B. Indorsement. The writ must be marked, or indorsed, by the officer issuing it, or under proper direction, with the amount in which defendant is to be held to bail.[2] This amount is fixed by the court, in the exercise of its discretion, and is conclusive upon the officer executing the writ,[3] and, if excessive, the court will reduce it rather than quash the writ.[4]

XI. SERVICE AND CUSTODY OF PRISONER.

A. Service.[5] The writ is served by the sheriff and, where its issuance is an original proceeding, no subpœna is necessary.[6]

Approval of bond.— In Kentucky, since the enactment of the act of 1827, it is the duty of the clerk of the circuit court to approve the sureties upon the complainant's bond. Burnsides *v.* Blythe, 11 B. Mon. (Ky.) 6.

The undertaking required by the Indiana statute is sufficient, although made payable to defendant, if taken by the officer in the discharge of the duties of his office. Fitzgerald *v.* Gray, 59 Ind. 254.

88. Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119.

89. Straughan *v.* Inge, 5 Ind. 157.

90. Fitzgerald *v.* Gray, 59 Ind. 254.

91. **Form of order** see 3 Daniell Ch. Pr. (6th Am. ed.) 2328.

92. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407.

93. Lewis *v.* Shainwald, 48 Fed. 492.

94. See *infra*, X, B.

95. Bleyer *v.* Blum, 70 Ga. 558.

96. Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201.

97. Viadero *v.* Viadero, 7 Hun (N. Y.) 313.

98. Adams *v.* Whitcomb, 46 Vt. 708.

Form of writ see Rice *v.* Hale, 5 Cush. (Mass.) 238, 242; 3 Daniell Ch. Pr. (6th Am. ed.) 2328; 1 Seton Decrees (1st Am. ed.) p. 172.

Alternative form.— In Georgia, under the act of 1830, the writ was authorized in the alternative form, that defendant should not go beyond seas, or that he give bond for the eventual condemnation money. McGehee *v.* Polk, 24 Ga. 406, 409.

99. Hyde *v.* Whitfield, 19 Ves. Jr. 342, 13 Rev. Rep. 215, 34 Eng. Reprint 544.

1. A writ issued by a judge at chambers, and signed by him, but not attested by the clerk, or under the seal of the court, is void, and affords no protection to any person acting under it. Bonesteel *v.* Bonesteel, 28 Wis. 245.

2. Viadero *v.* Viadero, 7 Hun (N. Y.) 313; Gleason *v.* Bisby, Clarke (N. Y.) 551; —— *v.* Taylor, 1 L. J. Ch. O. S. 139, Turn. & R. 96, 12 Eng. Ch. 96, 37 Eng. Reprint 1031.

3. Denton *v.* Denton, 1 Johns. Ch. (N. Y.) 441.

Determination of amount.— On issuance of a writ of ne exeat in divorce proceedings, pending an application for alimony, in determining the amount of the bond, the court should consider the rank of the parties and the property of the husband. Lamar *v.* Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169.

4. —— *v.* Taylor, 1 L. J. Ch. O. S. 139, Turn. & R. 96, 12 Eng. Ch. 96, 37 Eng. Reprint 1031.

5. **A service of the writ on Sunday is void,** and the bond given on issuing it should be given up and canceled. Jewett *v.* Bowman, 27 N. J. Eq. 275.

6. MacDonough *v.* Gaynor, 18 N. J. Eq. 249, holding that the party cannot be discharged on affidavit but must answer.

B. Acceptance of Bail. The sheriff must obtain bail from defendant to the amount required by the writ,[7] and is responsible for default or omission to do so;[8] but, in case of a disagreement between himself and defendant, it may be referred to the court for adjustment.[9]

XII. RETURN OF WRIT.

The sheriff must make his return, after service, as in cases of other process.[10]

XIII. EQUITABLE BAIL.

A. In General. The equitable bail or security given by defendant must be at least equal to the sum indorsed upon the writ,[11] although that does not equal the actual amount of plaintiff's demand,[12] or be in accordance with existing statutory provisions.[13]

B. Liability of Sureties. The liability of sureties for equitable bail is analogous to the duties and responsibilities of bail at law.[14] They are bound to the extent of the final decree,[15] and a judgment against defendant is conclusive upon them;[16] but if defendant remains within the jurisdiction,[17] or is in custody for disobedience of a final decree,[18] their liability terminates.

Defendant cannot evade jurisdiction where the writ has been actually served, and, where a subpœna was taken out with the writ, but neither could be served owing to the absence of defendant, and a new writ was sent to the county where defendant then was, and, immediately after its service upon him, a new subpœna was issued and sent to the same county, which defendant evaded by leaving the state, the arrest by the service of the writ was regular. Georgia Lumber Co. *v.* Bissell, 9 Paige (N. Y.) 225.

A writ of assistance was ordered in England, where the ne exeat remained unexecuted, and defendant appeared to be evading it. Cazet de la Borde *v.* Othon, 23 Wkly. Rep. 110.

7. Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557. See *supra*, X, B.

8. Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128.

9. Brayton *v.* Smith, 6 Paige (N. Y.) 489.

10. Crocker *v.* Dunkin, 6 Blackf. (Ind.) 535.

In Indiana, under the use of an equivalent remedy by order of arrest, the taking of a recognizance and entering it on the order of arrest is no necessary part of the issue, service, or return, of such order. Fitzgerald *v.* Gray, 61 Ind. 109.

Return of process generally see PROCESS.

11. Gibert *v.* Colt, Hopk. (N. Y.) 496, 14 Am. Dec. 557. See *supra*, X, B.

12. Baker *v.* Jefferies, 2 Cox Ch. 226, 30 Eng. Reprint 105.

13. Bleyer *v.* Blum, 70 Ga. 558; McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; Burnsides *v.* Blythe, 11 B. Mon. (Ky.) 6; Basket *v.* Scott, 5 Litt. (Ky.) 208.

A bond substantially at variance with the facts is void, as one given to "appear at the Court of Common Pleas . . . at Union court-house . . . on the fourth Monday in June next," when no court was to sit, "to answer to . . . in a bill of equity," over which subject the court had no control. Darby *v.* Hunt, 2 Treadw. (S. C.) 740.

14. Johnson *v.* Clendenin, 5 Gill & J. (Md.) 463; Union Dist. Equity Com'rs *v.* Phillips, 2 Hill (S. C.) 631.

A reasonable time may be allowed, where a defendant departs after giving bail, to produce him, or the amount required. Brayton *v.* Smith, 6 Paige (N. Y.) 489.

15. Zantzinger *v.* Weightman, 30 Fed. Cas. No. 18,202, 2 Cranch C. C. 478.

16. Blue *v.* Sheppard, 28 Ga. 566.

17. Zantzinger *v.* Weightman, 30 Fed. Cas. No. 18,202, 2 Cranch C. C. 478.

Leave of absence may, by agreement of parties, be allowed a defendant who has given bail, without prejudice to the bail. Dupont *v.* Goffe, 1 Desauss. Eq. (S. C.) 143.

18. Johnson *v.* Clendenin, 5 Gill & J. (Md.) 463; Debazin *v.* Debazin, Dick. 95, 21 Eng. Reprint 204. In Stapylton *v.* Peill, 19 Ves. Jr. 615, 34 Eng. Reprint 644, and Le Clea *v.* Trot, Prec. Ch. 230, 24 Eng. Reprint 112, the imprisonment was before the decree, and the application of the sureties was refused.

The liability of sureties cannot be increased, by a substituted bond, beyond what they originally agreed to assume and the order for the writ requires, and which imposes upon them conditions which cannot be enforced against them so long as defendant does not break the condition for his appearance. Wauters *v.* Van Vorst, 28 N. J. Eq. 103.

A surety will not be discharged, before final decree, under a bond conditioned that defendant "will abide and perform the orders and decrees of the court in the cause," given by defendant by agreement with plaintiff and upon which he was discharged, upon defendant placing himself within the jurisdiction of the court. *In re* Griswold, 13 R. I. 125.

While sureties could not surrender their bail at common law, the New York act of May 13, 1827, gave them the right, and was applicable to cases where the breach of a ne exeat bond occurred before the act was

C. Enforcement of Liability. A court of equity may retain proceedings upon a ne exeat bail-bond, and enforce the liability of the sureties;[19] but it will ordinarily permit them an opportunity to contest it,[20] although it may order payment of the amount into court,[21] or that a suit be brought upon the bond,[22] if defendant omits a defense, or departs from the state.

XIV. VACATING AND DISCHARGE.

A. In General. A writ of ne exeat will be vacated, on application of defendant, upon a proper showing that it should not have been granted,[23] or that facts have arisen since its issuance obviating its continuance;[24] but the showing must be more than a bare denial of plaintiff's allegations.[25] The writ will ordinarily be vacated as of course, when bail has been furnished in accordance with its requirements;[26] and the court may, although constrained to vacate it, still require security.[27]

B. Application. Defendant may apply for a discharge of the writ before answering,[28] or at any stage of the action,[29] even before he is arrested,[30] or before the expiration of time allowed for exceptions to his answer,[31] provided the time is reasonable under the circumstances.[32] The application may be upon the bill and answer,[33]

passed. Matter of Wolfe, 3 N. Y. Leg. Obs. 383.

19. Elliott *v.* Elliott, (N. J. Ch. 1897) 36 Atl. 951.

In an early case, in England, it was held that the court had nothing to do with the enforcement of the bond. Collinridge *v.* Mount, Dick. 688, 21 Eng. Reprint 439.

20. Stapler *v.* Hurt, 16 Ala. 799.

21. Utten *v.* Utten, 1 Meriv. 51, 35 Eng. Reprint 596; Musgrave *v.* Medex, 1 Meriv. 49, 35 Eng. Reprint 595.

22. Harris *v.* Hardy, 3 Hill (N. Y.) 393.

23. Dithmar *v.* Dithmar, 68 N. J. Eq. 533, 59 Atl. 644; Sichel *v.* Raphael, 4 L. T. Rep. N. S. 114; Leo *v.* Lambert, 3 Russ. 417, 3 Eng. Ch. 417, 38 Eng. Reprint 632. See *supra*, III.

24. James *v.* North, 5 Jur. N. S. 84, 28 L. J. Ch. 374, 7 Wkly. Rep. 150, holding that the writ cannot be continued against one who has secured protection by taking advantage of the Insolvent Debtors Act.

The court will not inquire into the validity of a discharge in insolvency, where it is made the ground of an application to vacate. O'Connor *v.* Debraine, 3 Edw. (N. Y.) 230.

25. Houseworth *v.* Hendrickson, 27 N. J. Eq. 60; Myer *v.* Myer, 25 N. J. Eq. 28; Glenton *v.* Clover, 10 Abb. Pr. (N. Y.) 422; Hammond *v.* Hammond, Clarke (N. Y.) 151; McGauran *v.* Furnell, Sau. & Sc. 263.

26. McGee *v.* McGee, 8 Ga. 295, 52 Am. Dec. 407; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Gleason *v.* Bisby, Clarke (N. Y.) 551; Boon *v.* Collingwood, Dick. 115, 21 Eng. Reprint 212; Evans *v.* Evans, 1 Ves. Jr. 96, 30 Eng. Reprint 247. See Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. ed. 678.

A defendant cannot be discharged under a writ of habeas corpus on the ground that the sheriff has taken what he deems a sufficient amount of his property to pay the debt, as this does not amount to a satisfaction of the debt, or to such a final determination of the matter as the law requires. *Ex p.* Royster, 6 Ark. 29.

27. MacDonough *v.* Gaynor, 18 N. J. Eq. 249.

On an application by a remainder-man or reversioner under the Georgia statute, defendant may, by answering, controvert the title of the complainant, and, if the verdict of the jury be against its validity, he will be released from his obligation for the forthcoming of the property; otherwise the security will continue. Jackson *v.* Waters, 10 Ga. 546.

28. Dithmar *v.* Dithmar, 68 N. J. Eq. 533, 59 Atl. 644; Cary *v.* Cary, 39 N. J. Eq. 3; Harris *v.* Hardy, 3 Hill (N. Y.) 393.

A defendant in custody for contempt will not be heard on a motion to vacate a ne exeat, until he has purged himself of the contempt. Evans *v.* Van Hall, Clarke (N. Y.) 22.

29. Flack *v.* Holm, 1 Jac. & W. 405, 21 Rev. Rep. 202, 37 Eng. Reprint 430; Grant *v.* Grant, 3 Russ. 598, 27 Rev. Rep. 135, 3 Eng. Ch. 598, 38 Eng. Reprint 699, 3 Sim. 340, 30 Rev. Rep. 170, 6 Eng. Ch. 340, 57 Eng. Reprint 1025.

Unless it appears that the duty of defendant in the premises is already clear the court will not discharge the writ immediately upon the coming in of the answer. Atkinson *v.* Bedel, Dick. 98, 21 Eng. Reprint 205.

30. Lewis *v.* Lewis, 68 L. T. Rep. N. S. 198, 3 Reports 346.

31. Thorne *v.* Halsey, 7 Johns. Ch. (N. Y.) 189.

32. Miller *v.* Miller, 1 N. J. Eq. 386.

33. Fitch *v.* Richardson, Morr. (Iowa) 245; Jesup *v.* Hill, 7 Paige (N. Y.) 95.

The giving of the usual security does not ordinarily preclude defendant from applying

or by petition or motion,[34] and may be supported and opposed by affidavits,[35] and the notice of motion should ordinarily cover grounds disposing of the whole matter.[36]

C. Conditions of Discharge. The court may, although the writ has not been complied with, grant a discharge upon reasonable conditions,[37] by requiring the delivery of property,[38] or additional security for the performance of the decree,[39] or it may continue the decree until its object has been accomplished.[40]

XV. LIABILITIES ON ORIGINAL BONDS.

Upon a bond conditioned that plaintiff will prosecute his bill or petition to effect, or shall reimburse defendant for such damages and costs as he shall sustain from the wrongful suing out of the writ, defendant is entitled to recover at least nominal damages if the original suit is not prosecuted with effect,[41] if the right to damages has not been waived;[42] but only actual damages will be recoverable unless the writ was sued out maliciously.[43] Where the bond is conditioned to impose liability only in case the issuance of the writ is procured without cause, it is a good defense to show that plaintiffs acted with good cause.[44]

to vacate the writ, and for the cancellation of the bond, upon the bill only, or upon the coming in of the answer. But the execution of a bond to abide the event of the final decree, under a voluntary agreement with plaintiff for the discharge of the writ, without reserving a right of application to have the bond canceled, in case the court shall decide that the writ was improperly issued, is a waiver of the right to question the propriety of issuing the writ. Jesup *v.* Hill, 7 Paige (N. Y.) 95. See Lees *v.* Patterson, 7 Ch. D. 866, 47 L. J. Ch. 616, 38 L. T. Rep. N. S. 451, 26 Wkly. Rep. 399.

34. Fitch *v.* Richardson, Morr. (Iowa) 245; 2 Daniell Ch. Pr. (6th Am. ed.) 1706.

Where the motion papers do not show that defendant has given bail, the motion will not be denied on the ground that, by giving bail, he has waived his right to object to the writ. Allen *v.* Hyde, 2 Abb. N. Cas. (N. Y.) 197.

Harmless error.— Where defendant moves to vacate the writ, not on the ground that he is in custody under it, but because he has been discharged from custody on giving bail or security to the sheriff, it is not erroneous for the court to deny the motion, as the writ can do him no harm if he does not intend to leave the jurisdiction. Breck *v.* Smith, 54 Barb. (N. Y.) 212.

35. Flack *v.* Holm, 1 Jac. & W. 405, 21 Rev. Rep. 202, 37 Eng. Reprint 430.

A defendant arrested on a ne exeat will be refused a discharge when it appears that he has boasted that his property is out of his hands, but that he still controls it, and will leave the state before anything can be done with him. Cary *v.* Cary, 39 N. J. Eq. 20.

36. Forms.— Notice, and orders for discharge see 3 Daniell Ch. Pr. (6th Am. ed.) pp. 2329, 2330; 1 Seton Decrees (1st Am. ed.), p. 172.

37. MacDonough *v.* Gaynor, 18 N. J. Eq. 249; Parker *v.* Parker, 12 N. J. Eq. 105; *In re* Griswold, 13 R. I. 125.

38. Glenton *v.* Clover, 10 Abb. Pr. (N. Y.) 422.

Assessment of damages.— Where the order of discharge is for a wrongful issuance of the writ, under plaintiff's bond, it may direct an inquest as to damages. Sichel *v.* Raphael, 4 L. T. Rep. N. S. 114.

39. *In re* Griswold, 13 R. I. 125.

An additional bond for the performance of the final decree does not supersede equitable bail conditioned that defendant will render himself amenable to such proceedings as may be taken to compel him to perform such decree. Elliott *v.* Elliott, (N. J. Ch. 1897) 36 Atl. 951.

40. Devall *v.* Devall, 4 Desauss. Eq. (S. C.) 79.

The writ is not discharged by the entry of judgment, but continues until security is given, or the judgment is satisfied. McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Lewis *v.* Shainwald, 48 Fed. 492.

A writ was suspended, in South Carolina, on defendant's executing a power of attorney to a citizen, authorizing him to convey the land involved in the suit. Read *v.* Prince, 1 Desauss. Eq. 145.

41. Burnap *v.* Wight, 14 Ill. 301.

What constitutes prosecution to effect.— Where defendant was discharged from custody under the writ upon his delivering up to complainant certain property in his possession, there was not such a failure to prosecute the writ to effect as would entitle defendant to maintain an action on the bond for damages. Spivey *v.* McGehee, 24 Ala. 476.

Jurisdiction to enforce.— The bond given for the issuance of the writ, conditioned for its due prosecution and for the payment of damages and costs sustained by a wrongful issuance, is, in its nature, a contract, and enforceable in another state than that where it is executed. Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

42. Lees *v.* Patterson, 7 Ch. D. 866, 47 L. J. Ch. 616, 38 L. T. Rep. N. S. 451, 26 Wkly. Rep. 399.

43. Spivey *v.* McGehee, 24 Ala. 476.

44. Coombs *v.* Newlon, 4 Blackf. (Ind.) 120.

NE EXEAT REGNO. See Ne Exeat.

NE EXEAT REPUBLICA. See Ne Exeat.

NEFARIUM EST PER FORMULAS LEGIS LAQUEOS INNECTERE INNOCENTIBUS. A maxim meaning "It is infamous to lay snares for the innocent through forms of law."[1]

NE FICTIO PLUS VALEAT IN CASU FICTIO QUAM VERITAS IN CASU VERO. A maxim meaning "A fiction is of no more value in a fictitious case than truth in a real case."[2]

NEGATIO CONCLUSIONIS EST ERROR IN LEGE. A maxim meaning "The negative of a conclusion is error in law."[3]

NEGATIO DESTRUIT NEGATIONEM, ET AMBÆ FACIUNT AFFIRMATIONEM. A maxim meaning "A negative destroys a negative, and both make an affirmative."[4]

NEGATIO DUPLEX EST AFFIRMATIO. A maxim meaning "A double negative is an affirmative."[5]

NEGATIO NON POTEST PROBARI. A maxim meaning "Denial cannot be proved."[6]

NEGATIVE. As an adjective, a word implying denial, negation, or difference.[7] As a noun, a term used in photography to designate the original plate, made sensitive by chemicals, which is printed under the sunlight by the camera.[8] (Negative: Averment in Pleading, see Pleading. Condition in — Contract, see Contract; Deed, see Deeds. Covenant, see Covenants. Easement, see Easements. Evidence, see Evidence. Pregnant, see Pleading.)

NEGATIVE AVERMENT. See, generally, Pleading.

NEGATIVE CONDITION. A condition by which it is stipulated that a certain thing shall not happen.[9] (Negative Condition: In Contract, see Contracts. In Deed, see Deeds.)

NEGATIVE COVENANT. See Covenants.

NEGATIVE EASEMENT. See Easements.

NEGATIVE EVIDENCE. See Criminal Law; Evidence.

NEGATIVE PREGNANT. See Pleading.

NEGATIVING EXCEPTIONS. See Indictments and Informations. See also Pleading.

NEGLECT. As a noun,[10] a failure to do what is required;[11] omission, forbearance to do anything that can be done or that requires to be done;[12] the omission to do or perform some work, duty, or act;[13] the omission or disregard of some duty;[14] the omission from carelessness to do something that can be done and that ought to be done;[15] a want of such attention to the probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concern;[16] the omission or forbearance to do a thing that can be done or that is required to be done;[17] negligence; the omission of care or diligence; the omission of that degree of care which a man of common prudence takes of his own

1. Peloubet Leg. Max.
2. Peloubet Leg. Max.
3. Morgan Leg. Max.
4. Black L. Dict.
5. Peloubet Leg. Max.
6. Morgan Leg. Max.
7. Webster Dict.
8. Udderzook *v.* Com., 76 Pa. St. 340, 352.
9. Black L. Dict.
10. "Design or neglect" see The Strathdon, 89 Fed. 374, 378.
11. State *v.* Assmann, 46 S. C. 554, 562, 24 S. E. 673.

As applied to a public officer means a failure on his part to do and perform some of the duties of his office (Atty.-Gen. *v.* Jochiam, 99 Mich. 358, 377, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699); or to perform any duty required of him by law (State *v.* Norris, 111 N. C. 652, 656, 16 S. E. 2).

12. Malone *v.* U. S., 5 Ct. Cl. 486, 489.
13. Rosenplaenter *v.* Roessle, 54 N. Y. 262, 268.
14. People *v.* Perkins, 85 Cal. 509, 511, 26 Pac. 245.

Some omission of duty is implied. Northern Pac. R. Co. *v.* Adams, 192 U. S. 440, 450, 24 S. Ct. 408, 48 L. ed. 513.

15. Watson *v.* Hall, 46 Conn. 204, 206.
16. People *v.* Herlihy, 35 Misc. (N. Y.) 711, 716, 72 N. Y. Suppl. 389.
17. Anderson L. Dict. [*quoted* in Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5].

concerns.[18] As a verb,[19] to fail or to omit;[20] to omit to do a thing, not to do it;[21] to omit by carelessness or design;[22] not to do, perform, improve, promote, or to attend to as one ought, to leave out.[23] (Neglect: In General, see NEGLIGENCE. Ground For Divorce, see DIVORCE.)

18. Burrill L. Dict. [*quoted* in People *v.* Grant, 13 N. Y. Civ. Proc. 209, 213].

19. **"Neglected to act"** see Willoughby *v.* Willoughby, 9 Q. B. 923, 934, 11 Jur. 992, 16 L. J. Q. B. 251, 58 E. C. L. 923.

"Neglected and refused" see Rankin *v.* Sisters of Mercy, 82 Cal. 88, 90, 22 Pac. 1134; Kimball *v.* Rowland, 6 Gray (Mass.) 224, 225; Gallemore *v.* Gallemore, 115 Mo. App. 179, 189, 91 S. W. 406; Robertson *v.* Northern R. Co., 63 N. H. 544, 549, 3 Atl. 621; Cherry *v.* Heming, 1 Code Rep. (N. Y.) 31.

20. Warren *v.* U. S., 58 Fed. 559, 562, 7 C. C. A. 368.

21. Rankin *v.* Sisters of Mercy, 82 Cal. 88, 89, 22 Pac. 1134.

22. Webster Dict. [*quoted* in New York Guaranty, etc., Co. *v.* Gleason, 53 How. Pr. (N. Y.) 122, 125]; Worcester Dict. [*quoted* in Direct Cable Co. *v.* Dominion Tel. Co., 28 Grant Ch. (U. C.) 648, 670].

If the word imports something more than the word "omit" it must be because it imports that the party had opportunity to do the thing which he omitted to do. Johnson *v.* Huntington, 13 Conn. 47, 50.

23. Worcester Dict. [*quoted* in Direct Cable Co. *v.* Dominion Tel. Co., 28 Grant Ch. (U. C.) 648, 670].

NEGLIGENCE

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Dry Dock, see WHARVES.
Electricity, see ELECTRICITY.
Employment, see MASTER AND SERVANT.
Explosive, see EXPLOSIVES.
Fence, see FENCES.
Ferry, see FERRIES.
Fire, see FIRES; RAILROADS; SHIPPING.
Firearms, see WEAPONS.
Flume, see WATERS.
Food, see ADULTERATION; FOOD.
Gas, see GAS.
Highway, see STREETS AND HIGHWAYS.
Hotel, see INNKEEPERS.
Inn, see INNKEEPERS.
Jail, see PRISONS.
Leased Property, see FERRIES; LANDLORD AND TENANT; MINES AND MINERALS; RAILROADS; STREET RAILROADS.
Levee, see LEVEES.
Livery-Stable Keeper, see LIVERY-STABLE KEEPERS.
Logs, see LOGGING.
Mine, see MINES AND MINERALS.
Party-Wall, see PARTY-WALLS.
Pier, see WHARVES.
Poorhouse, see PAUPERS.
Prison, see PRISONS.
Private Road, see PRIVATE ROADS.
Railroad, see RAILROADS; STREET RAILROADS.
School-House, see SCHOOLS AND SCHOOL-DISTRICTS.
Sewer, see MUNICIPAL CORPORATIONS.
Station, see CARRIERS; RAILROADS; SHIPPING; STREET RAILROADS.
Steam, see STEAM.
Street, see STREETS AND HIGHWAYS.
Street Railroad, see STREET RAILROADS.
Telegraph, see TELEGRAPHS AND TELEPHONES.

For Matters Relating to — (*continued*)
Negligence, With Respect to Use, Etc.— (*continued*)
Telephone, see TELEGRAPHS AND TELEPHONES.
Theater, see THEATERS AND SHOWS.
Toll Road, see TOLL ROADS.
Town Building, see TOWNS.
Turnpike, see TOLL ROADS.
Vessel, see CANALS; NAVIGABLE WATERS; PILOT; SHIPPING; TOWAGE; WHARVES.
Warehouse, see WAREHOUSEMEN.
Waterworks, see WATERS.
Weapon, see WEAPONS.
Wharf, see WHARVES.
Negligent:
Escape, see EXECUTIONS; PRISONS; SHERIFFS AND CONSTABLES.
Homicide, see HOMICIDE.
Tort in General, see TORTS, and Cross-References Thereunder.

I. DEFINITION AND NATURE.

The definitions of negligence, by courts and text-writers, are perhaps more numerous than of any other title in the scope of the law, and are not altogether harmonious. The definition given by Judge Cooley in his work on torts and quoted with approval in many decisions is perhaps the most comprehensive and accurate of any. He defines it as "the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."[1]

1. *Arkansas.*— St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 413, 30 S. W. 765, 1135; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, 366.

California.— Barrett *v.* Southern Pac. Co., 91 Cal. 296, 302, 27 Pac. 666, 25 Am. St. Rep. 186.

Delaware.— Queen Anne's R. Co. *v.* Reed, (1905) 59 Atl. 860, 862; Diamond State Iron Co. *v.* Giles, 7 Houst. 557, 564, 11 Atl. 189.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100, 105.

Missouri.— Wencker *v.* Missouri, etc., R. Co., 169 Mo. 592, 598, 70 S. W. 145.

Nebraska.— Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 650, 58 N. W. 1120.

North Carolina— Fisher *v.* New Bern, 140 N. C. 506, 512, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. 542; Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 521, 27 S. E. 991.

Utah.— Downey *v.* Gemini Min. Co., 24 Utah 431, 441, 68 Pac. 414, 91 Am. St. Rep. 798.

Virginia.— Black *v.* Virginia Portland Cement Co., 104 Va. 450, 452, 51 S. E. 831.

And see Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175, 184; Brown *v.* Congress, etc., R. Co., 49 Mich. 153, 156, 13 N. W. 494.

See 37 Cent. Dig. tit. "Negligence," § 1.

Other definitions are: "The want of ordinary care." Bacon *v.* Kearney Vineyard Syndicate, 1 Cal. App. 275, 277, 82 Pac. 84; Boudwin *v.* Wilmington City R. Co., 4 Pennew. (Del.) 381, 384, 60 Atl. 865; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 512, 513, 52 Atl. 264; Knopf *v.* Philadelphia, etc., R. Co., 2 Pennew. (Del.) 392, 395, 46 Atl. 747; Murphy *v.* Hughes, 1 Pennew. (Del.) 250, 258, 40 Atl. 187; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 597, 23 S. E. 207; Hanley *v.* Ft. Dodge Light, etc., Co., (Iowa 1906) 107 N. W. 593, 594; Hill *v.* Glenwood, 124 Iowa 479, 481, 100 N. W. 522; Mills *v.* Louisville, etc., R. Co., 116 Ky. 309, 315, 76 S. W. 29, 25 Ky. L. Rep. 488; Simonton *v.* Loring, 68 Me. 164, 166, 28 Am. Rep. 29; Montgomery *v.* Muskegon Booming Co., 88 Mich. 633, 641, 50 N. W. 729, 26 Am. St. Rep. 308; Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 182, 48 S. W. 659, 51 S. W. 81; Casper *v.* Dry Dock, etc., R. Co., 23 N. Y. App. Div. 451, 454, 48 N. Y. Suppl. 352; Johnson *v.* State, 66 Ohio St. 59, 67, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24, 31; San Antonio, etc., R. Co. *v.* Manning, 20 Tex. Civ. App. 504, 506, 50 S. W. 177; Decker *v.* McSorley, 116 Wis. 643, 646, 93 N. W. 808. And see Fiske *v.* Forsyth Dyeing, etc., Co., 57 Conn. 118, 119, 17 Atl. 356; Struble *v.* Burlington, etc., R. Co., 128 Iowa 158, 103 N. W. 142, 144; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239, 241, 31 Atl. 566; Tower *v.* Providence, etc., R. Co., 2 R. I. 404, 409; Parks *v.* San Antonio Traction Co., (Tex. 1906) 94 S. W. 331, 332; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 515, 23 S. E. 582; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 68, 5 McCrary 300.

As shown in the preceding note, some of the definitions are so brief that they

"Want of due care." Matulys *v.* Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70, 50 Atl. 823.

"Want of due diligence." Bouvier L. Dict. [*quoted* in Union Pac. R. Co. *v.* Rollins, 5 Kan. 167, 178].

"The want of due and proper care." Parker *v.* South Carolina, etc., R. Co., 48 S. C. 364, 370, 26 S. E. 669.

"The absence of proper care under the circumstances." Turton *v.* Powelton Electric Co., 185 Pa. St. 406, 410, 39 Atl. 1053; Holmes *v.* Allegheny Traction Co., 153 Pa. St. 152, 154, 25 Atl. 640.

"Want of due care, or the failure to do that which under the law and circumstances is required." Weir *v.* Herbert, 6 Kan. App. 596, 51 Pac. 582.

"The failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." Kendrick *v.* Towle, 60 Mich. 363, 367, 27 N. W. 567, 1 Am. St. Rep. 526; Brown *v.* Congress, etc., R. Co., 49 Mich. 153, 156, 13 N. W. 494; Flint, etc., R. Co. *v.* Stark, 38 Mich. 714, 717.

"A failure of duty." Schoonmaker *v.* Albertson, etc., Mach. Co., 51 Conn. 387, 392; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 572, 51 N. W. 645; Holmes *v.* Irwin, 18 Nebr. 313, 317, 25 N. W. 334; Emry *v.* Roanoke Nav., etc., Co., 111 N. C. 94, 95, 16 S. E. 18, 17 L. R. A. 699; Ledig *v.* Germania Brewing Co., 153 Pa. St. 298, 25 Atl. 870; Galveston, etc., R. Co. *v.* Brown, 95 Tex. 2, 4, 63 S. W. 305; The St. Georg, 104 Fed. 898, 901, 44 C. C. A. 246. And see Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 433, 18 S. W. 543, 29 Am. St. Rep. 48, 15 L. R. A. 434; Bill *v.* Smith, 39 Conn. 206, 210; Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. E. 573, 575; Bowden *v.* Derby, 97 Me. 536, 539, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223; Minor *v.* Sharon, 112 Mass. 477, 487, 17 Am. Rep. 122; Cook *v.* Potter, 2 Mich. N. P. 146, 148; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 266, 49 Am. Dec. 239; Woodward *v.* Griffith, 2 Tex. App. Civ. Cas. §§ 360, 362; Mann *v.* Central Vermont R. Co., 55 Vt. 484, 485, 45 Am. Rep. 628; Garnett *v.* Phœnix Bridge Co., 98 Fed. 192, 194; McDonald *v.* Union Pac. R. Co., 42 Fed. 579, 581.

"An omission of duty." Jacksonville Southeastern R. Co. *v.* Southworth, 135 Ill. 250, 255, 25 N. E. 1093; Chicago, etc., R. Co. *v.* Fenn, 3 Ind. App. 250, 29 N. E. 790, 791; Thiele *v.* McManus, 3 Ind. App. 132, 28 N. E. 327; Union Pac. R. Co. *v.* Rollins, 5 Kan. 167, 182; Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, 190, 31 N. W. 904, 8 Am. St. Rep. 876; Swineford *v.* Franklin County, 73 Mo. 279, 283; Callan *v.* Pugh, 54 N. Y. App. Div. 545, 547, 66 N. Y. Suppl. 1118; Sherman *v.* Western Transp. Co., 62 Barb. (N. Y.) 150, 156; Com. *v.* Cook, 8 Pa. Co. Ct. 486, 487; Godley *v.* Carson, 2 Phila. (Pa.) 138, 140; Brehmer *v.* Lyman, 71 Vt. 98, 103, 42 Atl. 613. And see Donovan *v.* Ferris, 128 Cal. 48, 54, 60 Pac. 519, 79 Am. St. Rep. 25.

"Any omission to perform a duty imposed by law for the protection of one's own person or property or the person or property of another." Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 399, 43 S. W. 877, 66 Am. St. Rep. 894; Fordyce *v.* Culver, 2 Tex. Civ. App. 569, 571, 22 S. W. 237.

"The want or absence of diligence." Robinson *v.* Simpson, 8 Houst. (Del.) 398, 405, 32 Atl. 287. And see Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 179, 45 N. W. 739.

"The want of care required by the circumstances." McCloskey *v.* Chautauqua Lake Ice Co., 174 Pa. St. 34, 36, 34 Atl. 287. And see White *v.* Roydhouse, 211 Pa. St. 13, 15, 60 Atl. 316; Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414, 417, 3 Atl. 874; Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 11, 52 Am. Rep. 468.

"Such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces in an ordinary and legal sequence, a damage to another." Wharton Negl. § 3 [*quoted* in Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, 39 N. E. 672, 677, 40 N. E. 822; Salmon *v.* Delaware, etc., R. Co., 38 N. J. L. 5, 11, 20 Am. Rep. 356].

"A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Farrell *v.* Waterbury Horse R. Co., 60 Conn. 239, 246, 21 Atl. 675, 22 Atl. 544.

"The omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do." Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 175, 24 S. W. 106; Smith *v.* Whittier, 95 Cal. 279, 291, 30 Pac. 529; Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593, 596; Richardson *v.* Kier, 34 Cal. 63, 75, 91 Am. Dec. 681; Wolff Mfg. Co. *v.* Wilson, 152 Ill. 9, 15, 38 N. E. 694, 26 L. R. A. 229; Lauritsen *v.* American Bridge Co., 87 Minn. 518, 522, 92 N. W. 475; Geist *v.* Missouri Pac. R. Co., 62 Nebr. 309, 323, 87 N. W. 43; McGraw *v.* Chicago, etc., R. Co., 59 Nebr. 397, 81 N. W. 306; Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 404, 63 N. W. 941; Roberts *v.* Boston, etc., R. Co., 69 N. H. 354, 355, 45 Atl. 94; Sandoval *v.* Territory, 8 N. M. 573, 581, 45 Pac. 1125; Elze *v.* Baumann, 2 Misc. (N. Y.) 72, 74, 21 N. Y. Suppl. 782; International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 590, 50 S. W. 732; Texas, etc., R. Co. *v.* Curlin, 13 Tex. Civ. App. 505, 506, 36 S. W. 1003; Texas Cent. R. Co. *v.* Brock, (Tex. Civ. App. 1895) 30 S. W. 274, 277; Woodward *v.* Griffith, 2 Tex. App. Civ. Cas. §§ 360, 363; Parrott *v.* Wells, 15 Wall. (U. S.) 524, 536, 21 L. ed. 206; Rosen *v.* Chicago Great Western

hardly suffice to give an adequate idea of its meaning. Negligence is a relative

R. Co., 83 Fed. 300, 304, 27 C. C. A. 534; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 78, 11 Biss. 516; Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. 212, 4 Wkly. Rep. 294. And see Wardlaw *v.* California R. Co., (Cal. 1895) 42 Pac. 1075, 1076; Mississippi Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 130, 12 So. 156; Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 741, 36 S. E. 181; Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426, 427; Eichel *v.* Sawyer, 44 Fed. 845, 847.

"The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 441, 24 L. ed. 506 [*quoted* in Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 405, 63 N. W. 941].

"The want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances." Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 566, 36 N. E. 646; Western Maryland R. Co. *v.* Stanley, 61 Md. 266, 273, 48 Am. Rep. 96; Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93, 101, 13 S. W. 893; Galveston, etc., R. Co. *v.* Simon, (Tex. Civ. App. 1899) 54 S. W. 309, 310; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 437, 49 S. W. 526. And see Little Rock, etc., R. Co. *v.* Atkins, 46 Ark. 423, 430; Robinson *v.* Simpson, 8 Houst. (Del.) 398, 405, 32 Atl. 287; Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149, 150; German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361, 363; Jerolman *v.* Chicago Great Western R. Co., 108 Iowa 177, 179, 78 N. W. 855; Young *v.* Detroit, etc., R. Co., 56 Mich. 430, 437, 23 N. W. 67; Dean *v.* Kansas City, etc., R. Co., 199 Mo. 386, 395, 97 S. W. 910; Gratiot *v.* Missouri Pac. R. Co., (Mo. 1891) 19 S. W. 31, 34; Jones *v.* American Warehouse Co., 138 N. C. 546, 549, 51 S. E. 106; Galveston, etc., R. Co. *v.* Waldo, (Tex. Civ. App. 1895) 32 S. W. 783, 784; Morris *v.* State, 35 Tex. Cr. 313, 316, 33 S. W. 539; Johnson *v.* Chicago, etc., R. Co., 49 Wis. 529, 532, 5 N. W. 886; King *v.* Cleveland, 28 Fed. 835, 837; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875, 878.

"The want of that care and prudence which a man of ordinary intelligence would exercise under all the circumstances of the given case." Vass *v.* Waukesha, 90 Wis. 337, 341, 63 N. W. 280; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 592, 4 McCrary 454. And see Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 713, 3 McCrary 352; Ross *v.* Chicago, etc., R. Co., 8 Fed. 544, 2 McCrary 235.

"The failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case." Cleghorn *v.* Thompson, 62 Kan. 727, 731, 64 Pac. 605, 54 L. R. A. 402.

"The absence of proper care, caution and diligence; of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised." Kibele *v.* Philadelphia, 105 Pa. St. 41, 44; Fritsch *v.* Allegheny, 91 Pa. St. 226, 228.

"Negligence consists in doing something or omitting to do something which a person of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances." Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047, 1049; Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 690, 50 S. W. 417.

"The doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect." Ahern *v.* Oregon Tel., etc., Co., 24 Oreg. 276, 294, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635.

"The want of that care which men of common sense and common prudence ordinarily exercise in like employments." O'Brien *v.* Philadelphia, etc., R. Co., 3 Phila. (Pa.) 76, 78.

"Omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do." Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168, 171; McCaull *v.* Bruner, 91 Iowa 214, 217, 59 N. W. 37; Drake *v.* Mount, 33 N. J. L. 441, 444. And see State *v.* Manchester, etc., R. Co., 52 N. H. 528; Sebrell *v.* Barrows, 36 W. Va. 212, 215, 14 S. E. 996; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 196.

For other cases in which negligence has been defined see the following: Hoard *v.* State, 80 Ark. 87, 92, 95 S. W. 1002; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, 366; Bailey *v.* Hartford, etc., R. Co., 56 Conn. 444, 459, 16 Atl. 234; Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 471, 4 Atl. 106; Schoonmaker *v.* Albertson, etc., Mach. Co., 51 Conn. 387, 392; Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 522; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448, 455; Huntington County *v.* Bonebrake, 146 Ind. 311, 317, 45 N. E. 470; Evansville, etc., R. Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608, 612; Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464, 466; Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251, 253; Citizens' St. R. Co. *v.* Hoffhauer, 23 Ind. App. 614, 56 N. E. 54, 59; Jerolman *v.* Chicago Great Western R. Co., 108 Iowa 177, 179, 78 N. W. 855; Larsh *v.* Des Moines, 74 Iowa 512, 514, 38 N. W. 384; U. S. Express Co. *v.* Everest, 72 Kan. 517, 522, 83 Pac. 817; Stephenson *v.* Corder, 71 Kan. 475, 479, 80 Pac. 938, 69 L. R. A. 246; Missouri, etc., R. Co. *v.* Fowler, 61 Kan. 320, 326, 59 Pac. 648; Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199, 45 Pac. 956, 961; Passamaneck *v.* Louisville R. Co., 98 Ky. 195, 203, 32 S. W. 620, 17 Ky. L. Rep. 763; Cohankus Mfg. Co. *v.* Rogers, 96

term[2] and depends upon the circumstances of each particular case.[3] What might be negligence under some circumstances at some time or place may not be negli-

S. W. 437, 439, 29 Ky. L. Rep. 747; Cornelius *v.* South Covington, etc., R. Co., 93 S. W. 643, 644, 29 Ky. L. Rep. 505; Illinois Cent. R. Co. *v.* Coleman, 59 S. W. 13, 14, 22 Ky. L. Rep. 878; New Orleans, etc., R. Co. *v.* McEwen, 49 La. Ann. 1184, 1196, 22 So. 675, 38 L. R. A. 134; Raymond *v.* Portland R. Co., 100 Me. 529, 535, 62 Atl. 602, 3 L. R. A. N. S. 94; Bacon *v.* Casco Bay Steamboat Co., 90 Me. 46, 50, 37 Atl. 328; Pennsylvania R. Co. *v.* State, 61 Md. 108, 117; Frohlich *v.* Pennsylvania Co., 138 Mich. 116, 122 note, 101 N. W. 223, 110 Am. St. Rep. 310; Dean *v.* Kansas City, etc., R. Co., 199 Mo. 386, 406, 97 S. W. 910; Helfenstein *v.* Medart, 136 Mo. 595, 608, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 244, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Lincoln Gas, etc., Co. *v.* Thomas, (Nebr.) 104 N. W. 153; O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 362, 86 N. W. 1098; Geist *v.* Missouri Pac. R. Co., 62 Nebr. 309, 323, 87 N. W. 43; Roberts *v.* Boston, etc., R. Co., 69 N. H. 354, 355, 45 Atl. 94; Drake *v.* Mount, 33 N. J. L. 441, 444; Morris *v.* Brown, 111 N. Y. 318, 326, 18 N. E. 722, 7 Am. St. Rep. 751; Willis *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 340, 342, 78 N. Y. Suppl. 478; Magar *v.* Hammond, 54 N. Y. App. Div. 532, 535, 67 N. Y. Suppl. 63; Taylor *v.* Constable, 57 Hun (N. Y.) 371, 374, 10 N. Y. Suppl. 607; Elze *v.* Baumann, 2 Misc. (N. Y.) 72, 74, 21 N. Y. Suppl. 782; Gardner *v.* Heartt, 3 Den. (N. Y.) 232, 237; Foot *v.* Seaboard Air Line R. Co., 142 N. C. 52, 53, 54 S. E. 843; Fuller *v.* Atlantic Coast Line R. Co., 140 N. C. 480, 483, 53 S. E. 297; Jones *v.* American Warehouse Co., 137 N. C. 337, 342, 49 S. E. 355; Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 596, 16 S. E. 323; Heckman *v.* Evenson, 7 N. D. 173, 178, 73 N. W. 427; Mason *v.* Moore, 73 Ohio St. 275, 294, 76 N. E. 932, 4 L. R. A. N. S. 597; Gawlack *v.* Michigan Cent. R. Co., 11 Ohio Cir. Ct. 59, 64, 5 Ohio Cir. Dec. 313; Foster *v.* Union Traction Co., 199 Pa. St. 498, 49 Atl. 270; Jones *v.* Harris, 186 Pa. St. 469, 471, 40 Atl. 791; Nugent *v.* Philadelphia Traction Co., 181 Pa. St. 160, 163, 37 Atl. 206; Holmes *v.* Allegheny Traction Co., 153 Pa. St. 152, 154, 25 Atl. 640; Collins *v.* Chartiers Valley Gas Co., 131 Pa. St. 143, 160, 18 Atl. 1012, 17 Am. St. Rep. 791, 6 L. R. A. 280; Lehigh, etc., Coal Co. *v.* Lear, 6 Pa. Cas. 272, 275, 9 Atl. 267; Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135, 139; Missouri, etc., R. Co. *v.* Parrott, (Tex. 1906) 92 S. W. 795; Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 119, 26 S. W. 1052; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587, 592; International, etc., R. Co. *v.* Trump, (Tex. Civ. App. 1906) 94 S. W. 903, 906; St. Louis Southwestern R. Co. *v.* Dixon, (Tex. Civ. App. 1906) 91 S. W. 626, 627; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 289, 59 S. W. 607; Meadows *v.* Truesdell, (Tex. Civ. App. 1900) 56 S. W. 932; San Antonio, etc., R. Co. *v.* Green, (Tex. Civ. App. 1898) 49 S. W. 672, 673; Gulf, etc., R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 64, 36 S. W. 793; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 201, 23 S. W. 745; Texas, etc., R. Co. *v.* Gorman, 2 Tex. Civ. App. 144, 146, 21 S. W. 158; Hale *v.* Grand Trunk R. Co., 60 Vt. 605, 612, 15 Atl. 300, 1 L. R. A. 187; Chesapeake, etc., R. Co. *v.* Farrow, 106 Va. 137, 140, 55 S. E. 569; Mason *v.* Post, 105 Va. 494, 501, 54 S. E. 311; Trout *v.* Virginia, etc., R. Co., 23 Gratt. (Va.) 619, 630; Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 206, 35 Am. Rep. 748; Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 340, 84 N. W. 446, 81 Am. St. Rep. 911; Patry *v.* Chicago, etc., R. Co., 82 Wis. 408, 415, 52 N. W. 312; Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 348, 18 S. Ct. 68, 42 L. ed. 491; International Mercantile Mar. Co. *v.* Smith, 145 Fed. 891, 893, 76 C. C. A. 423; Neininger *v.* Cowan, 101 Fed. 787, 791, 42 C. C. A. 20; The Columbia, 61 Fed. 220, 9 C. C. A. 455; Zopfi *v.* Postal Tel. Cable Co., 60 Fed. 987, 988, 9 C. C. A. 308; McDonald *v.* Union Pac. R. Co., 42 Fed. 579, 581; Hodgson *v.* Dexter, 12 Fed. Cas. No. 6,565, 1 Cranch C. C. 109.

2. *Arizona.*— Stanfield *v.* Anderson, (1896) 43 Pac. 221.

Arkansas.— St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135.

Delaware.— Diamond State Iron Co. *v.* Giles, 7 Houst. 557, 11 Atl. 189.

Illinois.— Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512.

Maryland.— Sheridan *v.* Baltimore, etc., R. Co., 101 Md. 50, 60 Atl. 280.

Michigan.— Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876.

New Jersey.— New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

New York.— McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668.

United States.— Carter *v.* Kansas City Cable R. Co., 42 Fed. 37; Lusby *v.* Atchison, etc., R. Co., 41 Fed. 181; King *v.* Cleveland, 28 Fed. 835.

3. *Arizona.*— Stanfield *v.* Anderson, (1896) 43 Pac. 221.

Arkansas.— Bizzell *v.* Booker, 16 Ark. 308.

California.— Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409.

Kansas.— Union Pac. R. Co. *v.* Rollins, 5 Kan. 167.

Missouri.— Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476.

Ohio.— Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274.

Pennsylvania.— Ledig *v.* Germania Brewing Co., 153 Pa. St. 298, 25 Atl. 870.

gence under other circumstances at another time and place.[4] All the surrounding or attendant circumstances must be taken into account if the question involved is one of negligence,[5] such as the opportunity for deliberation, degree of danger, and many other considerations of like nature, affecting the standard of care which may be reasonably required in the particular case.[6]

II. NEGLIGENCE DISTINGUISHED FROM OTHER TERMS.

While it has been said that the term "negligence" is synonymous with "carelessness"[7] or "laches,"[8] it is readily distinguishable from and must not be confounded with such terms as "incompetence,"[9] "malice,"[10] "intent,"[11] "fraud,"[12] "malfeasance,"[13] "contributory negligence,"[14] or "prudence."[15]

III. ELEMENTS OF NEGLIGENCE.

A. In General. In every case involving negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of defendant to protect plaintiff from the injury;[16] (2) failure of defendant to per-

West Virginia.— Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

Wisconsin.— Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667.

United States.— King *v.* Cleveland, 28 Fed. 835.

4. Cooke *v.* Baltimore Traction Co., 80 Md. 551, 31 Atl. 327; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; King *v.* Cleveland, 28 Fed. 835.

5. Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 11 Atl. 189.

6. Pennsylvania R. Co. *v.* Coon, 111 Pa. St. 430, 3 Atl. 234.

7. Southern R. Co. *v.* Horine, 121 Ga. 386, 49 S. E. 285; Bindbeutal *v.* Street R. Co., 43 Mo. App. 463; State *v.* Boston, etc., R. Co., 58 N. H. 408. *Compare* St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755, 756, in which it was said: "In common speech, the word 'negligence' is used as synonymous with 'carelessness,' but it has a much broader meaning in legal parlance."

8. U. S. *v.* Winona, etc., R. Co., 67 Fed. 969, 15 C. C. A. 117.

9. Baltimore *v.* War, 77 Md. 593, 27 Atl. 85 (in which it was said that there was a difference between inability to perform work and negligence in performing it); Texas Cent. R. Co. *v.* Rowland, 3 Tex. Civ. App. 158, 22 S. W. 134 (in which it was said that a competent man may be negligent at times); Olsen *v.* North Pac. Lumber Co., 100 Fed. 384, 40 C. C. A. 427.

10. People *v.* Camp, 66 Hun (N. Y.) 531, 21 N. Y. Suppl. 741 [*citing* Wharton Cr. L. 126], in which it was said that negligence is distinguished from malice in that it arises from a failure of purpose, while malice arises from an evil purpose.

11. White *v.* Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437 [*citing* Com. *v.* Pease, 137 Mass. 576], in which it was said that the difference between intent and negligence, in a legal sense, is ordinarily nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act.

12. Gardner *v.* Heartt, 3 Den. (N. Y.) 232, in which it was said that fraud is a deceitful practice or wilful device resorted to to deprive another of his right, or in some manner to do him an injury. It is always positive; the mind concurs with the act; what is done is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty.

13. Gardner *v.* Heartt, 3 Den. (N. Y.) 232, in which it was said that negligence is strictly nonfeasance, and not malfeasance.

14. Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781, in which it was said that a clear distinction exists between negligence and contributory negligence. Negligence is contributory when, and only when, it directly and proximately induces the injury in whole or in part.

15. Galveston, etc., R. Co. *v.* Ryon, 70 Tex. 56, 7 S. W. 687, in which it was said that negligence is the opposite of prudence.

16. *Georgia.*— Atlanta, etc., R. Co. *v.* West, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701; Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607.

Illinois.—Chicago, etc., R. Co. *v.* Gardanier, 116 Ill. App. 619; Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416, 424; Chicago, etc., R. Co. *v.* Urbaniac, 106 Ill. App. 325; Putney *v.* Keith, 98 Ill. App. 285; Gross *v.* South Chicago R. Co., 73 Ill. App. 217; Angus *v.* Lee, 40 Ill. App. 304.

Indiana.— Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875; Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783; Lary *v.* Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572; Salem-Bedford Stone Co. *v.* O'Brien, 12 Ind. App. 217, 40 N. E. 430; Morrow *v.* Sweeney, 10 Ind. App. 626, 38 N. E. 187.

Massachusetts.— Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368, 87 Am. Dec. 644.

form that duty;[17] and (3) injury to plaintiff from such failure of defendant.[18] When these elements are brought together they unitedly constitute actionable negligence, and the absence of any one of these elements renders the complaint bad or the evidence insufficient.[19]

Minnesota.— Wickenburg *v.* Minneapolis, etc., R. Co., 94 Minn. 276, 102 N. W. 713.

Missouri.—Boettger *v.* Scherpe, etc., Architectural Iron Co., 124 Mo. 87, 27 S. W. 466; Bindbeutal *v.* Street R. Co., 43 Mo. App. 463.

New Hampshire.— Pittsfield Cottonwear, etc., Co. *v.* Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Buch *v.* Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163.

New Jersey.— Kahl *v.* Love, 37 N. J. L. 5.

New York.— Albany *v.* Cunliff, 2 N. Y. 165; Burke *v.* De Castro, 11 Hun 354; Bogatcka *v.* Walker, 1 N. Y. City Ct. 447.

North Dakota.— O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

Ohio.— Baltimore, etc., R. Co. *v.* Cox, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; Harriman *v.* Pittsburg, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburg, etc., R. Co. *v.* Bingham, 29 Ohio St. 364.

Pennsylvania.— McCauley *v.* Logan, 152 Pa. St. 202, 25 Atl. 499; Christian *v.* Commercial Ice Co., 3 Pa. Super. Ct. 320; Com. *v.* Cook, 8 Pa. Co. Ct. 486; Varnau *v.* Penn Tel. Co., 5 Lanc. L. Rev. 97; Dunn *v.* Pennsylvania R. Co., 20 Phila. 258.

Vermont.— Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613.

West Virginia.— Uthermohlen *v.* Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

Wisconsin.— Gorr *v.* Mittlestaedt, 96 Wis. 296, 71 N. W. 656.

United States.— Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300.

England.— Lane *v.* Cox, [1897] 1 Q. B. 415, 66 L. J. Q. B. 193, 76 L. T. Rep. N. S. 135, 45 Wkly. Rep. 261. See Gilbert *v.* Trinity House, 17 Q. B. D. 795, 56 L. J. Q. B. 85, 35 Wkly. Rep. 30.

Canada.— Agricultural Inv. Co. *v.* Federal Bank, 45 U. C. Q. B. 214 [*affirmed* in 6 Ont. App. 192].

See 37 Cent. Dig. tit. "Negligence," § 1.

The ideas of negligence and duty are strictly co-relative and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which we are bound by law to exercise toward somebody. Daniels *v.* Noxon, 17 Ont. App. 206 [*quoting* Thomas *v.* Quartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555].

Negligence is the violation of the obligation which requires care and caution in what we do. Cook *v.* Potter, 2 Mich. N. P. 146; Swan *v.* Jackson, 55 Hun (N. Y.) 194, 7 N. Y. Suppl. 821; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

Knowledge of duty.— It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what was his duty in a given case. Sherman *v.* Western Transp. Co., 62 Barb. (N. Y.) 150.

Knowledge of facts making foresight possible.— An essential element of negligence is a knowledge of facts which render foresight possible, and the circumstances necessary to be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger. Hope *v.* Fall Brook Coal Co., 3 N. Y. App. Div. 70, 38 N. Y. Suppl. 1040.

17. Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875; Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Morrow *v.* Sweeney, 10 Ind. App. 626, 38 N. E. 187; Bindbeutal *v.* Street R. Co., 43 Mo. App. 463; Varnau *v.* Pennsylvania Tel. Co., 5 Lanc. L. Rev. (Pa.) 97; Harriman *v.* Pittsburg, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. And see Holland House Co. *v.* Baird, 169 N. Y. 136, 62 N. E. 149.

18. *Illinois.*—Putney *v.* Keith, 98 Ill. App. 285; Craven *v.* Braun, 73 Ill. App. 189.

Indiana.— Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875; Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Morrow *v.* Sweeney, 10 Ind. App. 626, 38 N. E. 187.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., (1893) 24 S. W. 57.

New York.— McCaffrey *v.* Twenty-third St. R. Co., 47 Hun 404.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Pennsylvania.— Varnau *v.* Penn Tel. Co., 5 Lanc. L. Rev. 97.

West Virginia.— Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

United States.— Stout *v.* Sioux City, etc., R. Co., 23 Fed. Cas. No. 13,503.

See 37 Cent. Dig. tit. "Negligence," § 1.

This applies to breach of duty prescribed by statute or ordinance as to other negligent acts. Bluedorn *v.* Missouri Pac. R. Co., (Mo. 1893) 24 S. W. 57.

Violent language and threats against the property of a third person, addressed to plaintiff by defendant, do not constitute a negligent act toward plaintiff, such as is naturally calculated to cause injury. Craven *v.* Braun, 73 Ill. App. 189. And see *infra*, VI.

19. Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875; Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261.

B. Omission or Commission. It is said that strictly speaking negligence is a nonfeasance not a malfeasance, an act of omission rather than commission.[20] A negative and not a positive term.[21] But in ordinary usage the essence of the fault may be either in omission or commission.[22] Or it may result from both combined.[23]

C. Intent. Intent is not an essential element of negligence.[24] Neither intention to injure plaintiff nor an intention to do the act which caused the injury is necessary. It is sufficient if defendant does an act from which plaintiff suffers an immediate injury.[25] Intoxication will not excuse an injury which is the result

20. Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

21. Giblin *v.* McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, 21 L. T. Rep. N. S. 214, 5 Moore P. C. N. S. 434, 17 Wkly. Rep. 445, 16 Eng. Reprint 578.

22. *Alabama.*— Grant *v.* Moseley, 29 Ala. 302.

Indiana.— Louisville, etc., R. Co. *v.* Carmon, (App. 1898) 48 N. E. 1047.

Maine.— Fidelity, etc., Co. *v.* Cutts, 95 Me. 162, 49 Atl. 673.

Mississippi.— Mississippi Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 130, 12 So. 156.

Nebraska.— Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722.

New York.— Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721; Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63.

Ohio.— Johnson *v.* State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277; Harriman *v.* Pittsburg, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

Pennsylvania.— Kibele *v.* Philadelphia, 105 Pa. St. 41.

South Carolina.— Renneker *v.* South Carolina R. Co., 20 S. C. 219; Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Texas.— Texas Cent. R. Co. *v.* Brock, (Civ. App. 1895) 30 S. W. 274.

Vermont.— Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

Wisconsin.— Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

United States.— Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506; Eichel *v.* Sawyer, 44 Fed. 845.

There are two classes of negligence—active and passive.— A person is equally liable for doing a negligent act which would be active negligence, or in omitting to do an act which was passive, where by such omission injury would follow. Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047.

In its secondary sense negligence may be said to include every omission to perform a duty imposed by law for the avoidance of injury to person or property. Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185. And see Louisiana, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1899) 52 S. W. 649.

There is a clear distinction between active and passive negligence — between negligence of commission and negligence of omission. Callan *v.* Pugh, 54 N. Y. App. Div. 545, 66 N. Y. Suppl. 1118.

23. Dunn *v.* Pennsylvania R. Co., 20 Phila. (Pa.) 258.

24. Bindbeutal *v.* Street R. Co., 43 Mo. App. 463; Griffin *v.* Toledo, etc., R. Co., 21 Ohio Cir. Ct. 547, 11 Ohio Cir. Dec. 749; Kelly *v.* Dow, 9 N. Brunsw. 435. And see Belt R. Co. *v.* Banicki, 102 Ill. App. 642. "Negligence . . . necessarily excludes a condition of mind which is capable either of designing an injury to another or of agreeing that an injury should be received from another. To contributory negligence, therefore, the maxim, *Volenti non fit injuria*, does not apply, because a negligent person exercises no will at all. The moment he wills to do the injury, or to combine in doing the injury, then he ceases to be negligent, and the case becomes one of malice or fraud." Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 507, 57 S. W. 268 [*quoting* Wharton Negl. § 132].

Views of text-writers.— "The books on negligence are generally agreed that 'intent' is not included in the essentials of negligence. Wharton, Neg., sec. 11; Deering Neg., sec. 2; Shear. & Redf. Neg., sec. 2. It is too clear for argument that the two terms 'carelessness' and 'wilfulness' are not equivalents, the one of the other, in any legal sense; they are repugnant and inconsistent in their signification and meaning. There is a manifest distinction between cases which count upon negligence as a ground for action, and those which are founded upon acts of aggressive wrong or wilfulness." Bindbeutal *v.* Street R. Co., 43 Mo. App. 463, 471.

Negligence is used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305.

25. Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Tally *v.* Ayres, 3 Sneed (Tenn.) 677. The test of liability is not whether the injury was accidentally inflicted but whether defendant was free from blame. Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96.

Applications of rule.— Where an injury is inflicted by the negligent discharge of a toy cannon pointed toward pedestrians in a city, the party discharging it will not be relieved from liability because he didn't intend to shoot the person injured. Combs *v.* Thompson,

thereof.[26] When an intention to commit the injury exists, whether that intention be actual or constructive, only the wrongful act ceases to be a merely negligent injury and becomes one of violence or aggression.[27]

IV. DEGREES OF NEGLIGENCE.

A. In General. In the civil law there are three degrees of fault or neglect: *Lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect.[28] In some jurisdictions the civil law division of degrees of negligence is recognized,[29] but in the great majority of jurisdictions it is not.[30] In his great work on negligence Judge Thompson says: "I confess myself careless, ignorant and indifferent upon this whole subject of the degrees of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. . . . The sound view is that the classification of negligence as gross, ordinary and slight, indicates only that, under special circumstances, great care and caution are required, or only ordinary care, or only slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown." [31]

B. Slight Negligence. Slight negligence in jurisdictions where this degree of care is recognized is considered to be the want of great care and diligence;[32]

68 Kan. 277, 74 Pac. 1127. If one wilfully, carelessly, or negligently sets out fire, and it escapes into and consumes another's property, he is liable for the damages resulting from his act. It is not necessary, in order to fix his liability, that the act should have been done with intent to injure. Jacobs *v.* Andrews, 4 Iowa 506. One guilty of imprudence or neglect or a want of due regard for the rights or feelings of another will be responsible to the latter for whatever damage his conduct, although not malicious, has caused. Smith *v.* Berwick, 12 Rob. (La.) 20; Vallette *v.* Patten, 9 Rob. (La.) 367; Civ. Code, arts. 1928, 2294, 2295. And see *infra*, VI, E.

26. Sullivan *v.* Murphy, 2 Miles (Pa.) 298.

27. Belt R. Co. *v.* Banicki, 102 Ill. App. 642; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

28. Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368; Story Bailm. § 18.

29. Belt R. Co. *v.* Banicki, 102 Ill. App. 642; Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1; Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763; Lockwood *v.* Belle City St. R. Co., 92 Wis. 97, 65 N. W. 866; Ward *v.* Milwaukee, etc., R. Co., 29 Wis. 144; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

30. *Alabama.*— Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 13 So. 75; Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Colorado.— Denver, etc., R. Co. *v.* Peterson, 30 Colo. 77, 69 Pac. 578, 97 Am. St. Rep. 76.

Indiana.—Louisville, etc., R. Co. *v.* Shanks, 94 Ind. 598.

Maine.— Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94.

Missouri.— Magrane *v.* St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158; Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

Nebraska.— Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853.

New York.— Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 281. The rule was formerly otherwise in this state. Brand *v.* Schenectady, etc., R. Co., 8 Barb. 368.

North Carolina.—McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

United States.— Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; The New World *v.* King, 16 How. 469, 14 L. ed. 1019; Kelly *v.* Malott, 135 Fed. 74, 67 C. C. A. 548; Purple *v.* Union Pac. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

See 37 Cent. Dig. tit. "Negligence," § 15.

And see Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 11 Atl. 189.

The words "gross" and "reckless," when applied to negligence *per se*, have no legal significance which imports other than simple negligence or the want of due care. Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 13 So. 75.

Gross negligence is merely negligence with a vituperative epithet. Willson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113; Fitzgerald *v.* Grand Trunk R. Co., 4 Ont. App. 601.

31. 1 Thompson Negl. § 18.

32. Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1; Hodgson *v.* Dexter, 12 Fed. Cas. No. 6,565, 1 Cranch C. C. 109.

and, as has been declared, is consistent with the exercise of due[33] or ordinary care.[34]

C. Ordinary Negligence. Ordinary negligence is the want of ordinary care and diligence,[35] the want of such care as persons of ordinary prudence observe, or as the mass of mankind observes.[36]

D. Gross Negligence. Gross negligence is defined as the want of slight care and diligence,[37] or as the failure to take such care as a person of common sense and reasonable skill in like business but of careless habits would observe in avoiding injury to his own person or life under circumstances of equal or similar danger.[38] It is very great negligence[39] or gross failure to exercise the proper care.[40] In some states it is used in the sense of indifference or reckless disregard of consequences[41] not ordinarily involving wilfulness or intent,[42] although it has been carried to that extent.[43] When used in this sense it does not include ordinary negligence.[44] There are no degrees of gross negligence.[45]

"Slight negligence" does not mean slight want of ordinary care, but the absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use and will not defeat an action for negligence. Krueger *v.* Bronson, 45 Wis. 198; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Griffin *v.* Willow, 43 Wis. 509; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

33. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381.

34. Chicago, etc., R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142; Chicago City R. Co. *v.* Dinsmore, 162 Ill. 658, 44 N. E. 887; Lake Shore, etc., R. Co. *v.* Hessions, 150 Ill. 546, 37 N. E. 905; Malott *v.* Schlosser, 119 Ill. App. 259; Harvey, etc., R. Co. *v.* Chicago, etc., R. Co., 116 Ill. App. 507.

35. Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; 1 Shearman & R. Negl. § 49.

36. Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

37. Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512; Chicago, etc., R. Co. *v.* Chapman, 30 Ill. App. 504; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1; Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69; Newport News, etc., Co. *v.* Dentzel, 91 Ky. 42, 14 S. W. 958, 12 Ky. L. Rep. 626; Maysville, etc., R. Co. *v.* Herrick, 13 Bush (Ky.) 122; Louisville, etc., R. Co. *v.* Walden, 74 S. W. 694, 25 Ky. L. Rep. 1; Chesapeake, etc., R. Co. *v.* Dodge, 66 S. W. 606, 23 Ky. L. Rep. 1959; Texas, etc., R. Co. *v.* Burnes, 2 Tex. Unrep. Cas. 239; 1 Shearman & R. Negl. § 49.

Failure to use ordinary care is not gross negligence. Stratton *v.* Central City Horse R. Co., 95 Ill. 25.

More than want of ordinary care is meant by gross negligence. Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501.

38. Macon *v.* Paducah St. R. Co., 110 Ky. 680, 62 S. W. 496, 23 Ky. L. Rep. 46; Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 22 S. W. 747, 15 Ky. L. Rep. 199; Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Chesapeake, etc., R. Co. *v.* Board, 77 S. W. 189, 25 Ky. L. Rep. 1118 (in which the court doubted whether there is any appreciable practical difference between this definition and one that gross negligence is the want of slight care); Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637. And see White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

39. Kingston *v.* Drennan, 27 Can. Sup. Ct. 46 [*affirming* 23 Ont. App. 406].

40. Dolphin *v.* Worcester Consol. St. R. Co., 189 Mass. 270, 75 N. E. 635.

41. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Neal *v.* Gillett, 23 Conn. 437; Missouri Pac. R. Co. *v.* Lawler, 3 Tex. App. Civ. Cas. § 19.

As ground for exemplary damages see Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587.

42. Neal *v.* Gillett, 23 Conn. 437; Jacksonville South Eastern R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093; Pittsburgh, etc., R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439; Louisville, etc., R. Co. *v.* Shanks, 94 Ind. 598. And see Macon *v.* Paducah St. R. Co., 110 Ky. 680, 62 S. W. 496, 23 Ky. L. Rep. 46.

43. The term "gross negligence" signifies wilfulness and involves intent, actual or constructive, which is a characteristic of criminal liability. Rideout *v.* Winnebago Tract. Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601. Gross negligence as used in cases holding an owner liable to a trespasser for an injury caused by owner's gross negligence means something more than mere omission of duty; it means reckless and aggressive conduct. Lary *v.* Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572.

44. Rideout *v.* Winnebago Tract. Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601.

45. Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512; Illinois Cent. R. Co. *v.* Hetherington, 83 Ill. 510; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576.

E. Wilful Negligence. Strictly speaking the terms "negligence" and "wilfulness" are incompatible. To say that an injury resulted from the negligent and wilful conduct of another is to affirm that the same act is the result of two opposite mental conditions, heedlessness and purpose or design.[46] In some jurisdictions, however, the term is used to signify a higher degree of neglect than gross neglect.[47] It is a creature of statute and is the only degree of neglect to which the plea of contributory negligence may not be relied on as a defense.[48] To constitute wilful negligence the act done or omitted must be the result of intention.[49] The term properly applies only to actions for loss of life involving punitive damages.[50] When used in connection with damage to property it will be construed to mean gross neglect.[51]

F. Criminal Negligence. As used in a statute, criminal negligence means gross negligence, such as amounts to reckless disregard of one's own safety, and a wilful indifference to the consequences liable to follow.[52]

V. CARE REQUIRED AND LIABILITY IN GENERAL.[53]

A. Duty to Use Care — 1. CREATION OF DUTY. The duty, violation of which constitutes negligence, may arise in several ways. It may be created by statute or ordinance,[54] by contract,[55] or from the relation of the parties as in case of master and servant, bailor and bailee, carrier and passenger or consignee.[56] This duty is

46. Brooks *v.* Pittsburgh, etc., R. Co., 158 Ind. 62, 62 N. E. 694; Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Parker *v.* Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51, 7 N. E. 807; Pittsburgh, etc., R. Co. *v.* Ferrell, (Ind. App. 1906) 78 N. E. 988; Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571, 52 N. E. 1013; Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Rideout *v.* Winnebago Tract. Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601; Lockwood *v.* Belle City St. R. Co., 92 Wis. 97, 65 N. W. 866; The Strathdon, 89 Fed. 374; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 12 C. C. A. 618.

"By willful negligence is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of the will in a particular direction, there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligent in any proper sense, and the term 'willful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer." Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 241, 57 S. W. 770, 50 L. R. A. 850 [*quoting* Beach Contr. Negl. § 62].

47. Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 16 Ky. L. Rep. 296.

48. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 16 Ky. L. Rep. 296.

49. Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263.

Other definitions are: "Intentional neglect or such recklessness as evidenced a purpose to injure." Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 866, 16 Ky. L. Rep. 296.

"An intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury." Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119, 128; Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403, 413.

"An intentional wrong, or such a reckless disregard of security and right as to imply bad faith." Louisville, etc., R. Co. *v.* Filbern, 6 Bush (Ky.) 574, 580, 99 Am. Dec. 690.

50. Chesapeake, etc., R. Co. *v.* Yost, 29 S. W. 326, 16 Ky. L. Rep. 834.

51. Chesapeake, etc., R. Co. *v.* Yost, 29 S. W. 326, 16 Ky. L. Rep. 834.

As to what constitutes wilful or wanton acts as affecting defense of contributory negligence see *infra*, VII, A, 1, d, (IV), (B).

52. Union Pac. R. Co. *v.* Roeser, 69 Nebr. 62, 95 N. W. 68; Chicago, etc., R. Co. *v.* Hyatt, 48 Nebr. 161, 167, 67 N. W. 8; Chicago, etc., R. Co. *v.* Hague, 48 Nebr. 97, 66 N. W. 1000; Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913; Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976; Omaha, etc., R. Co. *v.* Chollette, 33 Nebr. 143, 49 N. W. 1114.

53. Condition and use of land, building, and other structures see *infra*, V, F, 5, 6, 7, 8.

Contributory negligence see *infra*, VII.

Dangerous substances and instrumentalities see *infra*, V, F, 1, 3.

54. See *infra*, V, D, 6, a.

55. Gill *v.* Middleton, 105 Mass. 477, 7 Am. Rep. 548, although there was no consideration for the promise.

56. See, generally, BAILMENT; CARRIERS; MASTER AND SERVANT.

usually implied by law,[57] the rule being that the law imposes on a person engaged in the prosecution of any work an obligation to perform it in such a manner as not to endanger the lives or persons of others,[58] and the law imposes on every person in the enjoyment of his property the duty of so using his own as not to injure his neighbor.[59] This duty may also arise out of circumstances;[60] and this is especially true where a person is using or dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury to bystanders,[61] where an owner has reason to apprehend danger owing to the peculiar situation of his property and its openness to accident,[62] or where it was apparent that if a person did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to another. In such case a duty arises to use such care and skill.[63]

2. Necessity of Privity. It has been broadly stated that where there was no privity there was no duty. This is not strictly true, the proper rule being that where the cause of action arose out of a breach of duty created by contract there must be some privity of contract between defendant and the person injured,[64] unless the law imposes duties additional to those specified in the contract or inde-

57. Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Myers *v.* Snyder, Brightly (Pa.) 489.

Legal obligation to perform act omitted.— To make a person guilty of negligence by act of omission, it is not necessary that he should be obliged by law to do the act he failed to do. It is sufficient that it would be prudent to do it. Jess *v.* Quebec, etc., Ferry Co., 25 Quebec Super. Ct. 224.

58. Wittenberg *v.* Seitz, 8 N. Y. App. Div. 439, 40 N. Y. Suppl. 899; Mandeville *v.* Cookenderfer, 16 Fed. Cas. No. 9,009, 3 Cranch C. C. 257.

When a person undertakes an employment which requires care and skill, whether for reward or not, a failure to exert the measure of care and skill appropriate to the measure of such employment is negligence for which action will lie. Siegrist *v.* Arnot, 10 Mo. App. 197; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

59. Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

60. Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628, holding that that which in one case would be an ordinary and proper use of one's rights may by change of circumstances become negligence and want of care.

One through whose negligence an unrecorded deed belonging to another has been lost is liable in damages. People's Bldg., etc., Assoc. *v.* Pickrell, 55 S. W. 194, 21 Ky. L. Rep. 1386.

61. Parry *v.* Smith, 4 C. P. D. 325, 48 L. J. C. P. 731, 41 L. T. Rep. N. S. 93, 27 Wkly. Rep. 801.

62. Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332. And see *infra*, V, E, 2, b.

63. Wittenberg *v.* Seitz, 8 N. Y. App. Div. 439, 40 N. Y. Suppl. 899; Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357 [*reversing* 9 Q. B. D. 302, 51 L. J. Q. B. 465, 30 Wkly. Rep. 749].

64. *Michigan.*—Necker *v.* Harvey, 49 Mich. 517, 14 N. W. 503.

Missouri.— Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821; Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Gordon *v.* Livingston, 12 Mo. App. 267.

New Jersey.— Marvin Safe Co. *v.* Ward, 46 N. J. L. 19; Kahl *v.* Love, 37 N. J. L. 5.

New York.— Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638; Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 513; Swan *v.* Jackson, 55 Hun 194, 7 N. Y. Suppl. 821; Burke *v.* De Castro, 11 Hun 354.

Pennsylvania.— Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322.

United States.— National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

England.— Loader *v.* London, etc., Docks Joint Committee, 56 J. P. 165, 65 L. T. Rep. N. S. 674 (holding the usual performance of an operation by defendant's servants was no evidence of a contractual duty to perform it and imposed no liability for non-performance); Winterbottom *v.* Wright, 11 L. J. Exch. 415, 10 M. & W. 109; Love *v.* Mack, 93 L. T. Rep. N. S. 352.

Canada.— Smith *v.* Onderdonk, 25 Ont. App. 171.

Applications of rule.— A party to a contract with an electric light company to furnish him power, who is injured by reason of the failure of such company to comply with the contract, cannot recover damages against a third person whose negligence rendered performance by the electric light company impossible. Byrd *v.* English, 117 Ga. 191, 43 S. E. 419, 64 L. R. A. 94. And where an injury to plaintiff arises from failure of defendant to perform a contract with a third person defendant, in the absence of a positive duty apart from that connected with the contract, is not liable to plaintiff, where the duty of a third person intervenes between the neglect of defendant

pendent of it,[65] as where the thing is inherently dangerous,[66] the rule being that where there is no contract duty, liability for negligence rests on the principle that if a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence.[67] Where a breach of duty has been committed, protection cannot be had by setting up a contract respecting the same matter with another person.[68] Privity of contract is not necessary where there is no contract relation.[69]

3. REQUISITES. The duty must be owing to the person injured,[70] and must be in respect of the very matter or act charged as negligence.[71]

B. Degree of Care — 1. IN GENERAL. In the absence of the existence of a contract relation between the person guilty of negligence and the person injured, such as that of carriers or bailment, the degree of care required is ordinary care.[72]

and the injury to plaintiff. Styles *v.* F. R. Long Co., 70 N. J. L. 301, 57 Atl. 448.

65. Bickford *v.* Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224; Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821; Cox *v.* Mason, 89 N. Y. App. Div. 219, 85 N. Y. Suppl. 973, holding that an omission to perform a contract obligation is never a tort unless that omission is also the omission of a legal duty.

66. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; Burke *v.* De Castro, 11 Hun (N. Y.) 354; Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428. And see *infra*, V, F, 3.

67. Wharton Negl. § 437; Fowles *v.* Briggs, 116 Mich. 425, 74 N. W. 1046, 72 Am. St. Rep. 537, 40 L. R. A. 528.

68. Smith *v.* Onderdonk, 25 Ont. App. 171.

69. *Massachusetts.*—Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298; Stewart *v.* Harvard College, 12 Allen 58, any man who is in a place where he has right to be can maintain an action against a stranger who does him an injury carelessly.

Michigan.— Ella *v.* Boyce, 112 Mich. 552, 70 N. W. 1106.

Minnesota.— Schubert *v.* J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818. And see Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194.

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493.

United States.— Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

England.— Corby *v.* Hill, 4 C. B. N. S. 554, 4 Jur. N. S. 512, 27 L. J. C. P. 318, 6 Wkly. Rep. 575, 93 E. C. L. 556. And see Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357.

Illustrations.— "A traveller on a street, for example, can maintain an action against the proprietor of a lot adjoining the street, who injures him by carelessly permitting a stick of timber to fall upon him. Every man must so manage his business as not to injure another, though the other be a stranger to him." Stewart *v.* Harvard College, 12 Allen (Mass.) 58, 67. And one who negligently places obstructions in the hall of a building is liable to an employee of a tenant of the building who is injured thereby, since such obstruction constitutes a breach of the duty of the owner to keep such hallway open to the use of the tenants. Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

70. *Indiana.*— Indianapolis *v.* Emmelman, 108 Ind. 530, 9 N. E. 155; Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783; Pittsburgh, etc., R. Co. *v.* Simons, (App. 1906) 76 N. E. 883; Thiele *v.* McManus, 3 Ind. App. 132, 28 N. E. 327.

Maryland.— Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Massachusetts.— Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368, 87 Am. Dec. 644.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

North Carolina.— Bottoms *v.* Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784; Emory *v.* Roanoke Nav., etc., Co., 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699.

United States.— Newark Electric Light, etc., Co. *v.* Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725.

As to duty of care in regard to specific classes of persons or property see *infra*, V, E.

71. Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116. And see Davis *v.* Boston, etc., R. Co., 70 N. H. 519, 49 Atl. 108; Morrison *v.* Burgess Sulphite Fibre Co., 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634; McGill *v.* Maine, etc., Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618.

72. Williams *v.* Clinton, 28 Conn. 264; Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94; German-American Ins. Co. *v.* Standard Gas Light Co., 174 N. Y. 508, 66 N. E. 1109; Straus *v.* Buchman, 96 N. Y. App. Div. 270, 89 N. Y. Suppl. 226.

2. Ordinary Care — a. Definition. As in the case of the term "negligence" definitions of ordinary care are numerous and varying. The following seems most apt. Ordinary care is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances.[73] The expressions "due care," "ordinary care," and "reasonable care" are convertible terms.[74]

Instructions.— It is error to instruct that if plaintiff was injured by the negligence of defendant, without plaintiff's fault, in order to exonerate defendant it must appear that the accident was inevitable, and utterly without fault of defendant. Joseph Schlitz Brewing Co. *v.* Duncan, 6 Kan. App. 178, 51 Pac. 310. An instruction that "reasonable ordinary care . . . means such reasonable ordinary care as a person of ordinary care and prudence would have exercised under similar circumstances" is erroneous, there being no such degree known to the law. Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107, 46 S. W. 113.

73. *Georgia.*— Western, etc., R. Co. *v.* Vaughan, 113 Ga. 354, 38 S. E. 851; Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 622, 37 S. E. 873; Harris *v.* Central R. Co., 78 Ga. 525, 536, 3 S. E. 355.

Kentucky.— Needham *v.* Louisville, etc., R. Co., 85 Ky. 423, 434, 3 S. W. 797, 11 S. W. 306, 8 Ky. L. Rep. 869. And see Louisville, etc., R. Co. *v.* Logsdon, 114 Ky. 746, 71 S. W. 905.

Missouri.— Ford *v.* Kansas City, 181 Mo. 137, 150, 79 S. W. 923; Moore *v.* Lindall R. Co., 176 Mo. 528, 538, 75 S. W. 672; Murray *v.* St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611; Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 415, 61 S. W. 874.

Texas.— Galveston, etc., R. Co. *v.* Simon, (Civ. App. 1899) 54 S. W. 309, 311; Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107, 108, 46 S. W. 113; Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 626, 43 S. W. 1028; Paris, etc., R. Co. *v.* Nesbitt, (Civ. App. 1896) 38 S. W. 243, 244; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 7, 34 S. W. 809, 46 S. W. 863. And see Houston, etc., R. Co. *v.* Kimball, (Civ. App.) 43 S. W. 1049.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579, 583.

Wisconsin.— Schrunk *v.* St. Joseph, 120 Wis. 223, 226, 97 N. W. 946; Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 223, 95 N. W. 100. And see Iago *v.* Walsh, 98 Wis. 348, 74 N. W. 212.

See 37 Cent. Dig. tit. "Negligence," § 6.

And see L. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381; Graham *v.* Oxford, 105 Iowa 705, 75 N. W. 473.

Other definitions are: "That degree of care which prudent men, skilled in the particular business, would be likely to exercise under the circumstances." Kelley *v.* Cable Co., 7 Mont. 70, 77, 14 Pac. 633; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 590, 13 Pac. 367.

"That degree of care which a majority of men of prudent and careful habits would exercise under the same or like circumstances." Olwell *v.* Milwaukee St. R. Co., 92 Wis. 330, 334, 66 N. W. 362; Dreher *v.* Fitchburg, 22 Wis. 675, 678, 99 Am. Dec. 91. And see Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403, 409.

"Such diligence as men of common prudence usually exercise about their own affairs; . . . as to property, such care as every prudent man takes of his goods." Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132, 143; Putney *v.* Keith, 98 Ill. App. 285, 289.

"The care which may be reasonably expected of a man in the given circumstances." Nesbit *v.* Crosby, 74 Conn. 554, 560, 51 Atl. 550; Neal *v.* Gillett, 23 Conn. 437. And see Durant *v.* Palmer, 29 N. J. L. 544, 546.

"Such as an ordinarily prudent person exercises upon any and all occasions, not such as such a person usually exercises." Chicago City R. Co. *v.* Schuler, 111 Ill. App. 470, 472.

"That degree of care and prudence which a discreet and cautious person would use in his own affairs were the whole loss or risk to be his own." Porter County *v.* Dombke, 94 Ind. 72, 75; Salem-Bedford Stone Co. *v.* O'Brien, 12 Ind. App. 217, 40 N. E. 430, 432.

"Such a degree of care and attention as experience has found reasonable and necessary to prevent injury to others in like cases." Philadelphia, etc., R. Co. *v.* Kerr, 25 Md. 521, 530.

"The care reasonable and prudent men use under like circumstances." Cayzer *v.* Taylor, 10 Gray (Mass.) 274, 280, 69 Am. Dec. 317; Swanson *v.* Sedalia, 89 Mo. App. 121, 125.

"Such as a prudent man would exercise under similar circumstances." Bizzell *v.* Booker, 16 Ark. 308, 312; Sanders *v.* Georgia Cent. R. Co., 123 Ga. 763, 764, 51 S. E. 728; Ramsbottom *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 41, 50 S. E. 448; Texas, etc., R. Co. *v.* Gorman, 2 Tex. Civ. App. 144, 146, 21 S. W. 158.

"Such care as reasonably prudent and cautious persons exercise under like circumstances." Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 578, 82 S. W. 245; Chicago City R. Co. *v.* Dinsmore, 162 Ill. 658, 660, 44 N. E. 887; Chicago, etc., R. Co. *v.* Ryan, 62 Ill. App. 264, 270.

"Ordinary care is such care as persons of average prudence would exercise under the same circumstances." Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 551, 39 Atl. 336, 68 Am. St. Rep. 700; Coates *v.* Canaan, 51 Vt. 131, 138.

74. Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550; Neal *v.* Gillett, 23 Conn. 437; Baltimore, etc., R. Co. *v.* Faith, 175 Ill. 58, 51 N. E. 807; Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94; Durant *v.* Palmer, 29 N. J. L. 544.

b. Dependent on Circumstances. Ordinary care and negligence are relative terms and depend on the circumstances[75] or exigencies of the occasion.[76] That is, the same act under one set of circumstances might be considered due care, and under different conditions a want of due care or negligence. Therefore the duty intended by the use of the phrase "ordinary care" is always referable to the circumstances and conditions under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable. The same rule is now generally held to apply to employment in the most perilous places and in the manipulation and use of the most dangerous agencies.[77] The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect.[78] The greater the risk or danger the greater must be the care.[79] What is ordinary care in a case of

The idea of all negligence however slight is not excluded by ordinary care. Calumet Iron, etc., Co. *v.* Martin, 115 Ill. 358, 3 N. E. 456.

Reasonable care is such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances. Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94.

75. *Alabama.*— The Farmer *v.* McCraw, 26 Ala. 189, 72 Am. Dec. 718.

Maine.— Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94.

Maryland.— Philadelphia, etc., R. Co. *v.* Kerr, 25 Md. 521.

Massachusetts.— Cunningham *v.* Hall, 4 Allen 268.

Montana.— Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

New Jersey.— New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

South Carolina.— Simms *v.* South Carolina R. Co., 27 S. C. 268, 3 S. E. 301.

Texas.— Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579.

See 37 Cent. Dig. tit. "Negligence," § 6.

Negligence is not absolute or intrinsic but always relative to some circumstance of time, place, or person. Broom Leg. Max. 329; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Union Pac. R. Co. *v.* Rollins, 5 Kan. 167; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. 212, 4 Wkly. Rep. 294; Beaton *v.* Springer, 24 Ont. App. 297.

76. Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722 [*quoting* Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506]; Houston, etc., R. Co. *v.* Milam, (Tex. Civ. App. 1900) 58 S. W. 735; Texas Cent. R. Co. *v.* Brock, (Tex. Civ. App.) 30 S. W. 274.

77. Raymond *v.* Portland R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. N. S. 94. Ordinary care under one set of circumstances might be positive negligence under other circumstances. Illinois Cent. R. Co. *v.* Keegan, 112 Ill. App. 28 [*affirmed* in 210 Ill. 150, 71 N. E. 321].

78. *Connecticut.*— Dexter *v.* McCready, 54 Conn. 171, 5 Atl. 855.

Indiana.— Porter County *v.* Dombke, 94 Ind. 72; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034.

Maryland.— Baltimore *v.* Holmes, 39 Md. 243.

Mississippi.— Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 12 So. 156.

Missouri.— King *v.* National Oil Co., 81 Mo. App. 155; Doan *v.* St. Louis, etc., R. Co., 38 Mo. App. 408.

New York.— Robinson *v.* Manhattan R. Co., 5 Misc. 209, 25 N. Y. Suppl. 91.

Pennsylvania.— Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

Texas.— Citizens' R. Co. *v.* Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041; Irvin *v.* Gulf, etc., R. Co., (Civ. App. 1897) 42 S. W. 661.

Where the work done is not obviously dangerous to others, the standard of care to be observed is such reasonable care as a prudent man would ordinarily take in doing such work. Heffernan *v.* Arnold, 48 N. Y. App. Div. 419, 63 N. Y. Suppl. 261.

Ordinary care has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which it is to be exerted. Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

79. Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367; Robinson *v.* Toronto R. Co., 2 Ont. L. Rep. 18.

Ordinary care must be measured by the character and risks and exposures of the business; and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases. Cayzer *v.* Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317.

extraordinary danger would be extraordinary care in a case of ordinary danger.[80] And a person engaging in an act which the circumstances indicate may be dangerous must take all the care which prudence would suggest to avoid injury.[81]

c. Dependent on Capacity of Person Injured[82] — (i) *In General.* Negligence is a relative term and depends on the circumstances and the obligation which rests on the party injured to care for his personal safety.[83] Greater care is required to prevent injuries to others in case of those mentally or physically incapacitated to discover danger.[84] It is said that in case of dangerous machinery the test of liability to one lawfully on the premises is the insufficient capacity of the injured party to appreciate danger.[85] So greater care is required as to one with defective eyesight,[86] or to an idiot.[87] Intoxication does not relieve others from exercising care toward the intoxicated person.[88]

(ii) *Children.* While the law requires the same degree of care to be exercised toward adults and children, yet conduct which is prudent in reference to an adult may be otherwise in respect to an infant under like circumstances[89]

Commensurate with known dangers.— Degree of care must be commensurate with the known dangers. Armbright *v.* Zion, 108 Iowa 338, 79 N. W. 72. But see Flinn *v.* World's Dispensary Medical Assoc., 54 N. Y. App. Div. 564, 67 N. Y. Suppl. 1.

80. Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602; Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; McGrew *v.* Stone, 53 Pa. St. 436; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875.

81. McGrew *v.* Stone, 53 Pa. St. 436. In all cases in which if not done with care and skill will be highly dangerous to the persons or lives of one or more persons known or unknown the law *ipso facto* imposes a public duty to exercise such care and skill, so as to be liable for negligence in the performance of a contract. Schutte *v.* United Electric Co., 68 N. J. L. 435, 53 Atl. 204; Van Winkle *v.* American Steam-Boiler Co., 52 N. J. L. 240, 19 Atl. 472.

82. **Carrier's liability for injuries to infirm passenger** see CARRIERS.

In operation of railroads see RAILROADS.

83. New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722. While ordinary care in its general sense is such care commonly exercised by persons of ordinarily prudent habits placed under similar circumstances, yet the nature of the subject of required care whether animate or inanimate, capable of a high, low, or ordinary degree of self-preservation or merely under the control of the person charged with the care and the dangers to which it is exposed are the main considerations in its determination. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

84. Where a person who had been struck by a railroad train was taken up apparently dead, and without notice to his family or to any person who would have taken an interest in him, and without sending for a physician, was taken into the warehouse of the company and locked up all night, and the next morning it was found that the person had during the night revived and had moved some paces, and had apparently died from hemorrhage, it was held that it was competent for the jury to conclude that there was negligence, and that the railroad company was liable for such acts of its servants in the treatment of the deceased subsequent to the collision. Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

85. San Antonio Waterworks Co. *v.* White, (Tex. Civ. App.) 44 S. W. 181, and not to insufficient experience.

86. McCrum *v.* Weil, 125 Mich. 297, 84 N. W. 282. A storekeeper who knew that a customer, a stranger in the store whom he directed to the rear of the store, had defective eyesight, and appeared to be intoxicated, and not in the possession of ordinary faculties, did not perform his full duty, although not knowing he was deaf, in merely saying to him in an ordinary tone of voice that the trap-door was open, without telling him where it was, it being in the middle of the floor space provided for the use of customers. Brown *v.* Stevens, 136 Mich. 311, 99 N. W. 12.

87. Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67, *dictum*.

88. Williams *v.* Mudgett, 2 Tex. Unrep. Cas. 254. And see Clarke *v.* Philadelphia, etc., Coal, etc., Co., 92 Minn. 418, 100 N. W. 231.

89. *Connecticut.*— Rohloff *v.* Fair Haven, etc., R. Co., 76 Conn. 689, 58 Atl. 5; Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106.

Kentucky.— Bransom *v.* Labrot, 81 Ky. 638, 50 Am. Rep. 193. And see Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

Minnesota.—Mattson *v.* Minnesota, etc., R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503.

New York.— Geibel *v.* Elwell, 19 N. Y. App. Div. 285, 46 N. Y. Suppl. 76.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

Applications of rule.— Plaintiff, a boy of eight, came upon defendant's land, where the latter was mowing hay, and defendant permitted him to get upon the mowing machine alone, and to drive the horses. By reason of one of the wheels striking into a furrow, plaintiff was thrown out of his seat, and,

and may constitute gross negligence.[90] The care required to be exercised in case of children is measured by the maturity and capacity of the child.[91] And it is said that responsibility is broader when the injury results from acts of commission than from omission leading up to unexpected consequences.[92]

C. Knowledge of Defect or Danger[93] — **1. In General.** As negligence is the violation or disregard of some duty, a knowledge of the facts out of which the duty springs is an essential element in determining whether there has been any negligence and especially so in determining the care to be exercised.[94] It may be said as a general proposition that there is no negligence where there is no knowledge of the danger on the part of the person charged with the negligence[95] or of

falling on the knives of the machine, was injured. It was held that defendant was liable for want of reasonable care. Carroll *v.* Freeman, 23 Ont. 283. In an action for personal injuries, where it appeared that plaintiff, a child of eight years, was invited by one of defendants in the presence of the other, to ride on a narrow pole drawn by a horse to propel machinery, it was not error to charge that if the jury should find that the sweep was a dangerous place for plaintiff to ride, and that defendants, having reason to know that it was dangerous, permitted her to ride upon it in dangerous proximity to the machinery, and that because of her tender years and immature judgment she was incapable of comprehending and guarding against the danger, and under such circumstances was injured, it would be evidence of negligence. Rosenberg *v.* Durfee, 87 Cal. 545, 26 Pac. 793.

What does not amount to negligence.— The daughter of the owner of a home, occupied together by him and her, invited a child to spend the day with her, when she and her father were both at home, and when she had full charge and control thereof, and, when doing her work about the house, she placed a large vessel of hot water on the floor of the kitchen, into which the child inadvertently fell and was fatally injured. It was held that the daughter was not liable for such injury, not being guilty of negligence. Putney *v.* Keith, 98 Ill. App. 285.

Childish instincts to be considered.— Children, wherever they go, must be expected to act upon childish instincts and impulses, and those who are chargeable with a duty of care and caution toward them must calculate upon this and take precaution accordingly. Ficker *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 804, 7 Ohio N. P. 600. But see Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318.

90. Lowry *v.* Lynch, 57 Ill. App. 323; Mattson *v.* Minnesota, etc., R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503; Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

91. Mattson *v.* Minnesota, etc., R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503; Sioux City, etc., R. Co. *v.* Stout, 17 Wall. (U. S.) 657, 21 L. ed. 745.

92. Lopes *v.* Sahuque, 114 La. 1004, 38 So. 810.

93. **Knowledge of danger** as affecting proximate cause see *infra*, VII, A, 4, g, (II).

Knowledge of presence of children see *infra*, V, E, 2, b, (II), (B).

Knowledge of presence of trespasser see *infra*, V, E, 1, a, (II).

Liability of manufacturers see *infra*, V, H, 4.

94. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529. And see Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 26 L. ed. 235.

Nuisance through wrongful acts of strangers.— Where property abutting on a highway becomes, through the wrongful act of strangers, a nuisance to the public lawfully using the highway, the owner of such property has a duty cast upon him from the moment he becomes aware of the danger to take steps to prevent his property becoming a source of injury to the public. Silverton *v.* Marriott, 52 J. P. 677, 59 L. T. Rep. N. S. 61.

95. St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357; Neylon *v.* Phillips, 179 Mass. 334, 60 N. E. 616; Hudson *v.* Northern Pac. R. Co., 107 Wis. 620, 83 N. W. 769; Pearson *v.* Plucknett, 20 L. T. Rep. N. S. 662.

Applications of rule.— Plaintiff had dug a tunnel from his cellar, under the pavement, to connect with a sewer, when a city employee searching for a leakage of gas in front of plaintiff's house lighted a paper, moved it along the surface of the sidewalk, ignited a jet of escaping gas, and then covered it with dirt to extinguish the flame. Five minutes afterward an explosion occurred in plaintiff's cellar. The city employee did not know that the tunnel was there, and his method of discovering the leak was the usual one. It was held that he was not negligent. Littman *v.* New York, 36 N. Y. App. Div. 189, 55 N. Y. Suppl. 383. So where one, as he had reason to suppose, entirely extinguished a fire on his own land, he is not liable for the destruction of timber on adjoining land, where the evidence showed that if his fire was communicated to such adjoining land it must have been done by passing underground, there being no evidence that he knew, or was guilty of negligence in not knowing, the combustible nature of the soil. Case *v.* Hobart, 25 Wis. 651. And a railroad company was not liable for loss of property by fire due to the cutting by an engine of hose stretched across its track in the absence of knowledge of its

defect in the instrumentality[96] or property causing the injury.[97] This rule, however, does not apply in determining the liability for defective or dangerous condition of buildings or place where an absolute duty rests on the owner to keep it in a safe condition,[98] or where the defect or danger grows out of the original act of the owner.[99] An owner will not be liable for unknown defects in a building where he has done all in his power to erect a safe structure,[1] as by the employment of a competent architect or builder.[2] Knowledge of defect or danger on part of the owner is sufficient to render him liable.[3]

2. Implied Notice or Knowledge. Actual notice of defects or danger is not

presence. Mott *v.* Hudson River R. Co., 1 Rob. (N. Y.) 585. And see Daegling *v.* Gilmore, 49 Ill. 248.

96. McGregor *v.* Grand Trunk Elevator Co., 129 Mich. 469, 89 N. W. 332.

97. *California.*— Baddeley *v.* Shea, 114 Cal. 1, 45 Pac. 990, 55 Am. St. Rep. 56, 33 L. R. A. 747.

Illinois.— Chapin *v.* Walsh, 37 Ill. App. 526.

Missouri.— Witte *v.* Stifel, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668.

New York.— Congreve *v.* Morgan, 4 Duer 439 (holding that in absence of facts showing the duty of erecting and maintaining the structure in all events and at his peril, there was no liability for its defective condition in the absence of notice of it); McCabe *v.* Kastens, 10 Misc. 42, 30 N. Y. Suppl. 832 [*affirmed* in 11 Misc. 272, 32 N. Y. Suppl. 249].

England.— Gwinnell *v.* Eamer, L. R. 10 C. P. 658, 32 L. T. Rep. N. S. 835; Smith *v.* London, etc., Docks Co., L. R. 3 C. P. 326, 37 L. J. C. P. 217, 18 L. T. Rep. N. S. 403, 16 Wkly. Rep. 728.

Canada.— Legault *v.* St. Paul Corp., 12 Quebec Super. Ct. 479. And see Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 26 L. ed. 235; Skelton *v.* Thompson, 3 Ont. 11.

Applications of rule.— A private lot owner is not liable to a person whom he has invited or induced to use a road leading over such lot for business purposes, for damages resulting from an excavation by the side of the road, unless it appears that the owner was aware of its dangerous condition. Eisenberg *v.* Missouri Pac. R. Co., 33 Mo. App. 85. The owner of a building is not liable for injuries to a pedestrian caused by falling into a coal hole in the sidewalk while the cover was removed, where the cover was so constructed that it could be removed only by design, and where such owner did not know, nor ought she to have known, of the removal of the cover, by a coal dealer delivering coal to a tenant, until after the accident. Brady *v.* Shepard, 42 N. Y. App. Div. 24, 58 N. Y. Suppl. 674.

98. Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; North Manchester Tri-County Agricultural Assoc. *v.* Wilcox, 4 Ind. App. 141, 30 N. E. 202; Tucker *v.* Illinois Cent. R. Co., 42 La. Ann. 114, 7 So. 124; Barnes *v.* Beirne, 38 La. Ann. 280; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. Rep. N. S. 406, 21 Wkly. Rep. 577. And see Washington Market Co. *v.* Clagett, 19 App. Cas. (D. C.) 12; Dunn *v.* Durant, 9 Daly (N. Y.) 389.

Applications of rule.— The owner of a building or structure designed for public exhibitions and entertainments, to which an admission fee is charged, is responsible for defects in the original construction of the building or structure, although he had no actual knowledge of the defect, and although he employed a contractor for the construction, and a competent architect to oversee it. Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]. Where a person is injured by the falling of a defective smokestack, erected on a building in pursuance of a contract with the owner, the owner's liability in no way depends upon a notice to him of the insecurity of said stack. Boyce *v.* Tallerman, 83 Ill. App. 575 [*affirmed* in 183 Ill. 115, 55 N. E. 703].

99. Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82 (where the original act of negligence in permitting an opening in a floor to remain open out of repair rendered it impossible for defendant or his agents who were not present to be aware of plaintiff's peril in time to avoid the injury, ordinary care requisite to avoid the injury must have been exercised by defendant with reference to the original and continuing act of negligence); Crowhurst *v.* Amersham Parish Burial Bd., 4 Ex. D. 5, 48 L. J. Exch. 109, 39 L. T. Rep. N. S. 355, 27 Wkly. Rep. 95.

1. Walden *v.* Finch, 70 Pa. St. 460. The owner of a building veneered with brick, the brick portion of the wall of which fell, through the failure of the builder to anchor the same to the sheathing of the wall, as was proper and customary, was not liable for injuries occasioned by the fall, in the absence of evidence that by his exercising ordinary care before the wall fell he might have discovered the defect therein. Ryder *v.* Kinsey, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557.

2. Searle *v.* Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. Rep. N. S. 89, 22 Wkly. Rep. 367.

3. Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216; Brooks *v.* London, etc., R. Co., 33 Wkly. Rep. 167. And see Alston *v.* Stewart, 2 Mona. (Pa.) 51.

Illustration.— A finding that the proprietor of a creamery was negligent in not adopting appropriate means to protect customers, in its building by its invitation, from injury in case of the breaking of a

necessary; proof of facts from which notice may be implied is sufficient,[4] negligently remaining ignorant being equivalent to actual knowledge.[5] Actual notice is not necessary where the defect or danger could have been discovered by the exercise of due care,[6] and where the condition has existed a sufficient time to have enabled the owner to discover it.[7] What constitutes sufficient time must depend on the circumstances of each case.[8] Where a similar act has produced like results the person will be presumed to know the danger.[9] So giving warning is sufficient recognition of danger to others.[10] While the rule that a person is liable for those injuries only which he ought reasonably to have foreseen and anticipated is usually enunciated in connection with the doctrine of proximate cause,[11] yet it is not limited to that phase of the question of negligence.[12] It is a general rule that negligence cannot be predicated on an act or omission which would not lead an ordinarily prudent man to apprehend danger from it,[13] or unless it might reasonably be foreseen that injury would naturally or probably follow.[14] So failure to prevent an injury is not negligence where it results from a wholly unexpected

rapidly moving belt near where customers were wont to go, is justified by evidence that it had knowledge that belts so used were quite liable to break or separate, and that the belt in question had parted some time before. True *v.* Meredith Creamery, 72 N. H. 154, 55 Atl. 893.

4. Woods *v.* Trinity Parish, 21 D. C. 540.

5. Washington Market Co. *v.* Clagett, 19 App. Cas. (D. C.) 12.

6. Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700; Mohr *v.* Wetherill, 33 Misc. (N. Y.) 791, 67 N. Y. Suppl. 590; Patterson *v.* Jos. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336. And see Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; Roberts *v.* Mitchell, 21 Ont. App. 433.

Illustration.— In an action for injuries caused by the falling of a cornice from a building, due to the maintenance by an electric light company of a heavy wire from one of its posts to the cornice, that the building had been built twenty-two years, that it was veneered, that the front was cracked, and that it was otherwise in bad condition, charged defendant with notice of the danger. Swanson *v.* Menominee Electric Light, etc., Co., 113 Mich. 603, 71 N. W. 1098.

Where the owner did not know and ought not reasonably to have known of the existence of a ridge of ice on walk, he is not liable for injuries caused thereby. Skelton *v.* Thompson, 3 Ont. 11.

7. McCabe *v.* Kastens, 10 Misc. (N. Y.) 42, 30 N. Y. Suppl. 832 [*affirmed* in 11 Misc. 272, 32 N. Y. Suppl. 249].

8. Travers *v.* Murray, 87 N. Y. App. Div. 552, 84 N. Y. Suppl. 558; Butcher *v.* Hyde, 10 Misc. (N. Y.) 275, 30 N. Y. Suppl. 1075 [*reversed* on other grounds in 152 N. Y. 142, 46 N. E. 305] (holding that twenty-four hours is sufficient time to charge the owner of a theater with notice of a patent defect in the stairs); Western Union Tel. Co. *v.* Engler, 75 Fed. 102, 21 C. C. A. 246 (holding that where plaintiff was injured in an accident caused by a telegraph wire which had been allowed by the company owning it to remain for more than two months sagging across, and within two feet of the surface of, the highway he was not precluded from recovering damages because neither he nor any one else had notified the telegraph company of the condition of the wire).

9. Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729. In this case it appeared that deceased was struck on the head by a rock when near his dwelling situated some two hundred yards from a cut on the railroad's right of way, where defendants were engaged in blasting rock. Rock had previously been thrown in the same vicinity by blasting. It was held that defendants or their employees, in the exercise of ordinary care, ought to have known of such facts, and the danger to which deceased was exposed. And see The European, 10 P. D. 99, 5 Aspin. 417, 54 L. J. P. D. & Adm. 61, 52 L. T. Rep. N. S. 868, 33 Wkly. Rep. 937.

10. Barnum, etc., Mfg. Co. *v.* Wagner, 64 Ill. App. 375.

11. See *infra*, VI, E.

12. Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640.

13. Cowett *v.* American Woolen Co., 100 Me. 65, 60 Atl. 703.

14. *Illinois.*— Cleveland, etc., R. Co. *v.* Lindsay, 109 Ill. App. 533.

Indiana.— Young *v.* Harvey, 16 Ind. 314.

Kansas.— Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Cleghorn *v.* Thompson, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402.

Louisiana.— New Orleans, etc., R. Co. *v.* McEwen, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

New York.— Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130. Negligence must be established as a matter of fact, and mere constructive negligence is not sufficient to subject either the owner or occupant of a building to liability in a case where the injury occurs through an accident that could not be foreseen by a commonly prudent person, no matter whether the obligation to repair arose out of covenant, or out of the duty which the occupant of real

act of the person injured.[15] Nor is a person bound to foresee and provide against casualties never before known and not reasonably to be expected,[16] or which would not have arisen save under circumstances which are exceptional.[17] But if the consequence might reasonably have been foreseen the fact that a similar accident has never before happened does not necessarily repel the charge of negligence.[18] So the failure to anticipate and take precautions against the criminal acts of third persons is not negligence.[19] The liability for a lawful act depends not on the particular consequence that has resulted from it,[20] nor is the duty of the person doing the act to be estimated by what, after the accident, then first appears to be a proper precaution.[21] To relieve a person from liability for an injury it is not enough that it was unlikely to occur where it was one the owner knew might occur.[22] Under this rule a landowner is under no obligation to render his premises safe for any purpose for which he cannot reasonably anticipate that they will be used,[23] or for persons whose presence he cannot anticipate,[24] unless the relations of the parties are such that he should have foreseen their

estate owes the public. Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408 [*reversing* 50 N. Y. Super. Ct. 119].

North Carolina.— Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890, holding that an act done by a teacher in the exercise of his authority and not prompted by malice is not actionable, although it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act.

Pennsylvania.— Fox *v.* Borkey, 126 Pa. St. 164, 17 Atl. 604.

England.— Pearson *v.* Cox, 2 C. P. D. 369, 36 L. T. Rep. N. S. 495.

An individual is not presumed to contemplate the coincidence of events having no probable or natural connection in the mind, and which cannot by ordinary thoughtfulness be foreseen as likely to happen in consequence of the act in which he is engaged. Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231.

15. Chester *v.* Porter, 47 Ill. 66; Heffernan *v.* Arnold, 48 N. Y. App. Div. 419, 63 N. Y. Suppl. 261.

Illustration.—Plaintiff was injured in consequence of defendant's pulling down a dumb waiter. The waiter had been pulled up to plaintiff's apartments, and while she was placing articles on a shelf therein she put her head inside of it, and as it was pulled down she was injured. She knew that there was a safety clutch, but did not use it. The servant could not see plaintiff, and he had no reason to anticipate that, in placing the articles on the shelf, she would put her head so far into the waiter that his act in pulling it down would injure her. He did not wait for a signal. It was held, as a matter of law, that the servant was not negligent. Smith *v.* Borden's Condensed Milk Co., 48 Misc. (N. Y.) 648, 95 N. Y. Suppl. 900.

16. Dwyer *v.* Hills Bros. Co., 79 N. Y. App. Div. 45, 79 N. Y. Suppl. 785; Cleary *v.* Brooklyn Factory, etc., Co., 79 N. Y. App. Div. 35, 79 N. Y. Suppl. 1041; Wood *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 308, 34 N. Y. Suppl. 698.

17. Quill *v.* Empire State Tel. Co., 92 Hun (N. Y.) 539, 34 N. Y. Suppl. 470, 37 N. Y. Suppl. 1149.

18. Quill *v.* Empire State Tel. Co., 92 Hun (N. Y.) 439, 34 N. Y. Suppl. 470, 37 N. Y. Suppl. 1149.

19. Greenebaum *v.* Bornhofen, 167 Ill. 640, 47 N. E. 857; Unger *v.* Forty-Second St., etc., Ferry R. Co., 6 Rob. (N. Y.) 237 [*affirmed* in 51 N. Y. 497]; Pennsylvania L. Ins., etc., Co. *v.* Franklin F. Ins. Co., 181 Pa. St. 40, 37 Atl. 191, 37 L. R. A. 780; Imperial Bank *v.* Hamilton Bank, 31 Can. Sup. Ct. 344.

20. Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890.

21. Dwyer *v.* Hills Bros. Co., 79 N. Y. App. Div. 45, 79 N. Y. Suppl. 785.

22. Fallis *v.* Gartshore, etc., Pipe, etc., Co., 4 Ont. L. Rep. 176.

23. Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585; Guilmartin *v.* Philadelphia, 201 Pa. St. 518, 51 Atl. 312.

24. Angus *v.* Lee, 40 Ill. App. 304; Dooley *v.* Degnon-McLean Contracting Co., 45 Misc. (N. Y.) 593, 91 N. Y. Suppl. 30 (defendant not required to anticipate the presence of a licensee in one place where another has been provided for him); Spengeman *v.* Alter, 7 Misc. (N. Y.) 61, 27 N. Y. Suppl. 406; Dawson *v.* St. Louis Expanded Metal Fireproofing Co., 94 Tex. 424, 59 S. W. 847, 61 S. W. 118. And see Tolhausen *v.* Davies, 58 L. J. Q. B. 98 [*affirming* 52 J. P. 804, 57 L. J. Q. B. 392, 59 L. T. Rep. N. S. 436]. See *infra* V, E.

Illustration.— A salt company operating a tramway over its premises could not be held liable for injuries on the ground that it was negligent in failing to use lines with which to drive mules by which the cars were drawn, so that the cars could be driven off the track in case of danger to one on the track. A party who is using his own property in a lawful way is not guilty of a breach of duty to anyone whose presence he could not anticipate.

presence.[25] So the owner of a building is not required to build it strong enough to withstand extraordinary emergencies,[26] or the unanticipated acts of third persons.[27]

D. Particular Acts or Omissions — 1. In General. Where a person does a lawful act which he is authorized to do he is not liable for injuries resulting therefrom in the absence of negligence;[28] and where a lawful act is not injurious *per se* negligence must be proved.[29] But one who inflicts an injury by reason of negligence is liable, although the act was lawful.[30]

2. Acts in Emergencies.[31] Persons suddenly placed in a position of peril and impending danger do things which ordinarily would be acts of negligence, but acts done in such extreme circumstances are not to be judged by ordinary rules. And if an act has to be performed in a brief period with no time in which to determine the best course negligence cannot be predicated of it.[32]

3. Acts in Good Faith or With Good Motive. The mere fact that an act was

Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

25. St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450, holding that a subcontractor engaged in putting in cement floors in a building who, after replacing a cracked panel, removed the support, without giving it sufficient time to harden and become safe, should have foreseen that persons going on it would receive injury. But see Dooley *v.* Degnon-McLean Contracting Co., 45 Misc. (N. Y.) 593, 91 N. Y. Suppl. 30.

26. Woodruff *v.* Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198. But where braces were placed against a wall for the very purpose of guarding against high winds, but not a hurricane, defendant's contention that the removal of the braces was not a negligent act, because the accident that occurred could not be reasonably anticipated, was without merit. Pasquini *v.* Lowery, 18 N. Y. Suppl. 284.

27. Mahoney *v.* Libbey, 123 Mass. 20, 25 Am. Rep. 6.

28. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

Mississippi.—Thomasson *v.* Agnew, 24 Miss. 93.

Missouri.— Boyd *v.* Graham, 5 Mo. App. 403.

New Jersey.— Ulshowski *v.* Hill, 61 N. J. L. 375, 39 Atl. 904, holding that where ropes were attached to a building that was being torn down, and it was attempted to pull the building in a certain direction, although it fell in a different direction, and thereby injured a child, there was no such negligence as to permit a recovery against the owner for personal injuries.

United States.—Nugent *v.* Wann, 3 Fed. 79, 1 McCrary 438, holding that where a party acquires the right to make an excavation on a private way, he is not liable in damages for personal injuries resulting from a person falling into the excavation.

Canada.— Langstaff *v.* McRae, 22 Ont. 78.

If an act is lawful and participated in by another and an injury unintentionally results to such other no liability arises; thus where two persons voluntarily and mutually engage in a friendly scuffle and one of them by mere accident injures the other no action for the injuries received will lie. Gibeline *v.* Smith, 106 Mo. App. 545, 80 S. W. 961.

29. Peters *v.* Devinney, 6 U. C. C. P. 389.

30. *Indiana.*— Howe *v.* Young, 16 Ind. 312, holding that if a party does a wrongful act or rightful one in a negligent, wrongful manner whereby injury happens to another, such act being the proximate cause, the party committing the act may be liable for the injury.

Maryland.— Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

New York.— Seabrook *v.* Hecker, 4 Rob. 344.

Tennessee.— Tally *v.* Ayres, 3 Sneed 677.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

31. Acts in emergencies by servant see Master and Servant, 26 Cyc. 1245, 1275 *et seq.*

Operation of railroad trains or locomotives see Railroads.

Operation of street railways see Street Railways.

32. Donahue *v.* Kelly, 181 Pa. St. 93, 37 Atl. 186, 59 Am. St. Rep. 632 (holding that where an employee in a restaurant picked up a gasoline lamp which had become improperly ignited, to carry it outside, and while proceeding to the door he was severely burned, and threw the lamp causing it to explode, his employer was not liable, as for culpable negligence, to a third person injured by such explosion); Floyd *v.* Philadelphia, etc., R. Co., 162 Pa. St. 29, 29 Atl. 396; Manzoni *v.* Douglas, 6 Q. B. D. 145, 45 J. P. 391, 50 L. J. Q. B. 289, 29 Wkly. Rep. 425; Holmes *v.* Mather, L. R. 10 Exch. 261, 44 L. J. Exch. 176, 33 L. T. Rep. N. S. 361, 23 Wkly. Rep. 364; Rainnie *v.* St. John City R. Co., 31 N. Brunsw. 582.

Limitation of rule.— Where an elevator containing a number of passengers becomes caught between the second and third floors of a building, so that it cannot be moved in either direction by the ordinary appliances, and is in no danger of falling so long as it is left in that condition, there is no such emergency as would relieve the owner from the duty of exercising the "highest degree of care

done in good faith,[33] that defendant thought it was proper,[34] or that defendant believed it to be safe,[35] is not material. Or so doing an act which endangers public safety from a patriotic motive will not excuse negligence.[36] Nor is the fact that a person's judgment approved the act sufficient to relieve him from a charge of negligence.[37]

4. Wilful or Wanton Acts.[38] Any person who commits a wilful or wanton act under circumstances involving unavoidable injury to persons and property is responsible to the person injured thereby.[39]

5. Customary Methods and Acts.[40] While in some jurisdictions the ordinary usage or custom of the business or occupation is made the test of negligence,[41] the weight of authority is that as negligence is the doing or failure to do what ordinarily prudent men would do, the test of ordinary usage is too low and hence proof of custom would not tend to show absence of negligence,[42] especially where the custom is clearly a careless or a dangerous one.[43] In other jurisdictions it is

and skill." Savage *v.* Joseph H. Bauland Co., 42 N. Y. App. Div. 285, 58 N. Y. Suppl. 1014.

33. Western, etc., R. Co. *v.* Vaughan, 113 Ga. 354, 38 S. E. 851. One may act in good faith and still be guilty of gross negligence. Lincoln *v.* Buckmaster, 32 Vt. 652.

34. Western, etc., R. Co. *v.* Vaughan, 113 Ga. 354, 38 S. E. 851.

35. Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; Krippner *v.* Biebl, 28 Minn. 139, 9 N. W. 671.

36. Durfield *v.* New York, 101 N. Y. App. Div. 581, 92 N. Y. Suppl. 204.

37. Even an expert may be guilty of negligence in doing what, at the time, his judgment approves. Oceanic Steam Nav. Co. *v.* Aitken, 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610 [*affirming* 124 Fed. 1, 59 C. C. A. 521]. But see Piehl *v.* Albany R. Co., 19 N. Y. App. Div. 471, 46 N. Y. Suppl. 257, holding that where a person had exercised his best judgment and his acts had been approved by competent experts he was, as a matter of law, not guilty of negligence, although other experts differed.

38. As to what constitutes wilful and wanton conduct see *infra*, VII, A, 1, d, (IV), (B).

39. Munger *v.* Baker, 1 Thomps. & C. (N. Y.) 122, holding that where defendant, with the intention of injuring the property of a railway company, uncoupled a loaded train, and plaintiff, an employee of the company, without his own fault or that of those in charge of the train, was injured in consequence of defendant's act, defendant was liable for such injury. And see Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542.

40. As affecting liability: For defects in highways see HIGHWAYS; STREETS. Of carriers see CARRIERS. Of master for injuries to servant see MASTER AND SERVANT. Of railroads for injuries to persons other than employees or passengers see RAILROADS.

For injuries by water or to water rights see WATERS.

Usages of navigation see COLLISION.

41. Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35; Beck *v.* Hood, 185 Pa. St. 32, 39 Atl. 842; Ford *v.* Anderson, 139 Pa. St. 261, 21 Atl. 18; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Stout *v.* Sioux City, etc., R. Co., 23 Fed. Cas. No. 13,503 [*affirmed* in 17 Wall. 657, 21 L. ed. 745]; McLelland *v.* Johnstone, 4 F. (Ct. Sess.) 459.

Where a party is pursuing the usual and proper course of business, and there are no circumstances calling for special care, there is no negligence, and any unusual occurrence is a mere accident. Young *v.* Missouri Pac. R. Co., 93 Mo. App. 267.

42. Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077; Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3; Jenkins *v.* Hooper Irr. Co., 13 Utah 100, 44 Pac. 829.

Rule applied to customary method of construction.— Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]; O'Connor *v.* Curtis, (Tex. 1892) 18 S. W. 953; O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628 (bracing fire walls); Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565 (bracing cistern walls). And see Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209].

Rule applied to customary precautions against injury.— *Illinois.*— Calumet Gas Co. *v.* Creutz, 80 Ill. App. 96, signals at open ditches.

Michigan.— Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Missouri.— Kelley *v.* Parker-Washington Co., 107 Mo. App. 490, 81 S. W. 631, guarding machinery.

South Carolina.— Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24.

Washington.— Ilwaco R., etc., Co. *v.* Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169, fastening turn-table.

Rule applied to custom as to precautions against spread of fire.— Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224; Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986.

Rule applied to customary method of piling lumber.— Earl *v.* Cronck, 131 N. Y. 613, 30 N. E. 864 [*affirming* 16 N. Y. Suppl. 770]; Wright *v.* Boller, 42 Hun (N. Y.) 77; Wright *v.* Boller, 3 N. Y. Suppl. 742.

43. George *v.* Mobile, etc., R. Co., 109 Ala.

held that custom may be considered, but is not conclusive.[44] Evidence to show defendant's own custom in answer to a charge of negligence is incompetent.[45]

6. Violation of Statute or Ordinance[46] — a. In General. As a general rule it may be said that negligence may consist in the neglect of some duty imposed by statute as well as by the careless or negligent performance of some obligation imposed by law or contract.[47] Liability for damages because of the violation of a statute or ordinance imposing some duty on a person is not affected by the fact that it is made a misdemeanor,[48] and the fact that the statute imposes a penalty for its violation will not prevent an action for damages.[49]

b. As Negligence Per Se. In many decisions it is held that a violation of a statute[50] or ordinance specifically imposed under the police power of the state[51]

245, 19 So. 784; Hill *v.* Winsor, 118 Mass. 251; Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223; Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60; Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 18 S. Ct. 35, 42 L. ed. 411. And see Ilwaco R., etc., Co. *v.* Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169.

A custom obtaining in the sale of petroleum products for the seller not to make any representations of the character of the gasoline sold, nor to give instructions as to handling or storing it, cannot relieve the seller from liability for failure to notify purchasers of eighty-seven degree gasoline of its dangerous qualities. Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

44. Cass *v.* Boston, etc., R. Co., 14 Allen (Mass.) 448; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133. That an act is ordinarily performed in a certain way is *prima facie* proof that this is not a negligent way. Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

45. Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481; Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700; Jenkins *v.* Hooper Irr. Co., 13 Utah 100, 44 Pac. 829.

46. As affecting liability: For collisions of vessels see Collision. For injuries to mining property see Mines and Minerals. For injuries to trespassing animals see Animals. Of carriers see Carriers. Of innkeeper see Innkeepers. Of master for injuries to servant see Master and Servant. Of railroad see Railroads.

As affecting rights and liabilities of adjoining landowners see Adjoining Landowners.

47. Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328; Jones *v.* American Warehouse Co., 138 N. C. 546, 51 S. E. 106; Woodward *v.* Griffith, 2 Tex. App. Civ. Cas. § 360.

48. Nugent *v.* Vanderveer, 38 Hun (N. Y.) 487, 39 Hun 322; Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82.

49. Parker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450; Love *v.* New Fairview Corp., 10 Brit. Col. 330. And see Groves *v.* Wimborne, [1898] 2 Q. B. 402, 67 L. J. Q. B. 862, 79 L. T. Rep. N. S. 284, 47 Wkly. Rep. 87.

50. *Colorado.*— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Georgia.— Central R., etc., Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397.

Iowa.— Osborne *v.* Van Dyke, 113 Iowa 557, 85 N. W. 784, 54 L. R. A. 367.

Massachusetts.—Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

New York.— Weiss *v.* Jenkins, 39 N. Y. App. Div. 567, 57 N. Y. Suppl. 708; McRickard *v.* Flint, 13 Daly 541 [*affirmed* in 114 N. Y. 222, 21 N. E. 153].

Wisconsin.— Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563.

United States.— Texarkana, etc., R. Co. *v.* Parsons, 74 Fed. 408, 20 C. C. A. 481.

England.— Nitro-Phosphate, etc., Chemical Manure Co. *v.* London, etc., Docks Co., 9 Ch. D. 503, 39 L. T. Rep. N. S. 433, 27 Wkly. Rep. 267.

Employment of boy under age fixed by statute has been held to be negligence *per se.* Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82. But see Fahey *v.* Jephcott, 1 Ont. L. Rep. 18; Roberts *v.* Taylor, 31 Ont. 10.

Failure to label poison in bottle as required by statute is negligence *per se.* Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377; Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

Failure to guard wheel hole.— Under Gen. St. (1894) § 2250, requiring wheel holes in warerooms, etc., to be inclosed, the owner of a warehouse who fails to adequately guard a wheel hole in his building is liable to an employee of a lessee for an injury resulting from such negligence. Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062. *Contra*, Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703.

Sale of ball cartridges for use in toy pistol contrary to statute is negligence *per se.* Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

A rail of a street railroad protruding above the level of a street contrary to statute is a nuisance and renders the company liable for injury caused thereby. Halifax St. R. Co. *v.* Joyce, 22 Can. Sup. Ct. 258.

51. *Illinois.*— Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203.

is negligence *per se*, or as matter of law,[52] if the other elements of actionable negligence exist.[53]

c. As Prima Facie Negligence. In some cases, however, it is held that while the violation of a statute or ordinance is not negligence *per se*,[54] it is competent evidence,[55] and sufficient to justify the jury in finding as a fact that its violation was negligence.[55] If, however, it is apparent that such violation could have had no influence in causing the injury, then the jury have no right to consider it.[57] In one jurisdiction the violation of an ordinance, while not in itself evidence of negligence, may yet be considered with other facts in ascertaining the existence of negligence.[58]

Indiana.— Louisville, etc., R. Co. *v.* Davis, 7 Ind. App. 222, 33 N. E. 451.

Missouri.—Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509, 10 S. W. 66; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Schoenlau *v.* Friese, 14 Mo. App. 436.

New York.— Jetter *v.* New York, etc., R. Co., 2 Abb. Dec. 458, 2 Keyes 154.

Texas.— Texas, etc., R. Co. *v.* Brown, 11 Tex. Civ. App. 503, 33 S. W. 146.

And see Patterson *v.* Fanning, 2 Ont. L. Rep. 462.

One who fails to fill or to inclose, by fence or wall, a dangerous excavation on his property in a city, as required by ordinance, is liable for injuries to a stranger resulting from such failure. Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504.

52. Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Necessity of providing fire-escapes see Willy *v.* Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Love *v.* New Fairview Corp., 10 Brit. Col. 330.

Failure to comply with building laws.—An owner of a building who fails to comply with Laws (1894), c. 481, § 21, providing that openings for elevators, not otherwise closed, shall be protected with substantial guards, is negligent. Weiss *v.* Jenkins, 39 N. Y. App. Div. 567, 57 N. Y. Suppl. 708. And see Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Starting fires.— Under Laws (1862), c. 53, one who starts a fire on his own land between September 1 and May 1 following is absolutely liable for damages caused by its escape on to the premises of another, regardless of the question of diligence. Conn *v.* May, 36 Iowa 241.

53. This rule is limited to cases where ordinance relates to the alleged negligent act. Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849.

54. *Maine.*— Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am Rep. 400; Gilmore *v.* Ross, 72 Me. 194; Larrabee *v.* Sewall, 66 Me 376; Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274.

Massachusetts.— Lane *v.* Atlantic Works, 111 Mass. 136.

Minnesota.— Oddie *v.* Mendenhall, 84 Minn. 58, 86 N. W. 881.

New York.— McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153; Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488 [*reversing* 23 Hun 159]; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524; McGrath *v.* New York, etc., R. Co., 63 N. Y. 522.

Ohio.— Bell *v.* Pistorius, 18 Ohio Cir. Ct. 73, 9 Ohio Cir. Dec. 869.

Pennsylvania.— Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849.

55. Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; Lane *v.* Atlantic Works, 111 Mass. 136; Oddie *v.* Mendenhall, 84 Minn. 58, 86 N. W. 881; McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153; Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; Briggs *v.* New York Cent., etc., R. Co., 72 N. Y. 26; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524; McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522; Jetter *v.* New York, etc., R. Co., 2 Abb. Dec. (N. Y.) 458, 2 Keyes 154; McCambley *v.* Staten Island Midland R. Co., 32 N. Y. App. Div. 346, 52 N. Y. Suppl. 849; Koster *v.* Noonan, 8 Daly (N. Y.) 231; Devlin *v.* Gallagher, 6 Daly (N. Y.) 494; Beisegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. (N. Y.) 29.

Prima facie evidence of negligence.— Giles *v.* Diamond State Iron Co., 7 Houst. (Del.) 453, 8 Atl. 368; True Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369 [*affirming* 104 Ill. App. 15]; U. S. Brewing Co. *v.* Stoltenberg, 113 Ill. App. 435; Maxwell *v.* Durkin, 86 Ill. App. 257 [*affirmed* in 185 Ill. 546, 57 N. E. 433]; Acton *v.* Reed, 104 N. Y. App. Div. 507, 93 N. Y. Suppl. 911.

56. McCambley *v.* Staten Island Midland R. Co., 31 N. Y. App. Div. 346, 52 N. Y. Suppl. 849; Devlin *v.* Gallagher, 6 Daly (N. Y.) 494; Dwyer *v.* McLaughlin, 31 Misc. (N. Y.) 510, 64 N. Y. Suppl. 380 [*reversing* 27 Misc. 187, 57 N. Y. Suppl. 220].

Question of negligence in failing to comply with ordinance for jury.— Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; Dallemand *v.* Saalfeldt, 73 Ill. App. 151.

57. Briggs *v.* New York Cent., etc., R. Co., 72 N. Y. 26.

58. Riegert *v.* Thackery, 212 Pa. St. 86, 61 Atl. 614; Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849; Herron *v.* Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Foote *v.* American Product Co., 195 Pa.

d. As Limited to Persons or Consequences Contemplated. It is necessary, however, that the duty imposed be for the benefit of the person injured,[59] or of his property; and where the duty is plainly for the benefit of the public at large the individual acquires no new rights by virtue of its enactment.[60] Whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined and the benefits to be derived from its performance.[61] So the violation of a statute or ordinance designed to protect persons entitled to be on premises will not constitute negligence as to mere licensees or trespassers to whom no duty was owed independently of the statute.[62] In order to render the violation of a statute or ordinance actionable negligence the consequences which resulted from such negligence must have been those contemplated by the provision,[63]

St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764; Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644.

59. *Illinois.*—Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, 26 N. E. 661, 25 Am. St. Rep. 397, 11 L. R. A. 352.

Indiana.—Zimmerman *v.* Baur, 11 Ind. App. 607, 39 N. E. 299.

Kansas.— Clark *v.* Missouri Pac. R. Co., 35 Kan. 350, 11 Pac. 134; Missouri Pac. R. Co. *v.* Pierce, 33 Kan. 61, 5 Pac. 378.

Minnesota.— Hamilton *v.* Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Rosse *v.* St. Paul, etc., R. Co., 68 Minn. 216, 71 N. W. 20, 64 Am. St. Rep. 472, 37 L. R. A. 591.

New York.— Acton *v.* Reed, 104 N. Y. App. Div. 507, 93 N. Y. Suppl. 911.

60. Frontier Steam Laundry Co. *v.* Connolly, 72 Nebr. 767, 101 N. W. 995, 68 L. R. A. 425.

61. Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703; Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457; Frontier Steam Laundry Co. *v.* Connolly, 72 Nebr. 767, 101 N. W. 995, 68 L. R. A. 425; Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. ed. 410.

Liability of public character.—A city ordinance requiring the building of fireproof shutters on the windows of brick buildings within a city imposed a duty for the purpose of giving public protection against fire, which the common law did not provide, and does not render the owner liable to a third person whose property was destroyed by reason of failure to have such shutters. Frontier Steam Laundry Co. *v.* Connolly, 72 Nebr. 767, 101 N. W. 995, 68 L. R. A. 425. A city ordinance making it unlawful to build or keep any unsafe buildings within the city, and requiring the owners to make such buildings safe within twelve hours after notice from the chief fire engineer, and under which any building likely to fall or take fire is deemed "unsafe," within the meaning of the ordinance, is designed to protect citizens and persons on business from the danger of falling buildings, and the city from that of fire, and does not regard the safety of firemen working at the fire. Woodruff *v.* Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198. The mere fact that a stationary engine which set fire to plaintiff's property was unlicensed will not entitle him to recover damage. But he must prove negligence by reason of which the fire was communicated to defendant's buildings and from there to plaintiff's property. Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400.

62. Thus a statute or charter requiring elevator shafts to be guarded will not render the owner liable for failure to erect such guard to a licensee or trespassers (Flanagan *v.* Sanders, 138 Mich. 253, 101 N. W. 581; Flannigan *v.* American Glucose Co., 11 N. Y. Suppl. 688; Beehler *v.* Daniels, 19 R. I. 49, 31 Atl. 582), such as a fireman (Kelly *v.* Henry Muhs Co., 71 N. J. L. 358, 59 Atl. 23).

Guarding machinery for protection of employees.—A city ordinance which requires machinery that is so located as to endanger the lives and limbs of those employed in the building to be so covered or guarded to insure against injury to such employees gives no right of action to an injured person who is not an employee. Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588.

Guarding shafts.—A city ordinance requiring that "every opening in a shaft or hoist well within two and a half feet above the floor shall be protected by a rail, gate, door, or drop-door" is intended for the benefit of any person who might suffer by its violation, and is not restricted to firemen, policemen, or special classes of persons. Sheyer *v.* Lowell, 134 Cal. 357, 359, 66 Pac. 307.

63. *Kansas.*— Maltby *v.* Dihel, 5 Kan. 430, where it was held that no liability existed for the death of a horse caused by falling into an excavation on defendant's premises, the horse having entered the field through a defective fence, although the statute provided that where a person failed to maintain a lawful fence he should be liable for injuries inflicted on trespassing stock.

Massachusetts.— Gay *v.* Essex Electric St. R. Co., 159 Mass. 238, 34 N. E. 186, 38 Am. St. Rep. 415, 21 L. R. A. 448, holding that a street car company that leaves its cars standing in the public street, with unfastened brakes, contrary to a city ordinance, knowing that the cars would be likely to attract chil-

and it is further necessary that the statutes must apply to the act complained of.[64]

e. As Affected by Failure of Officers to Act. Where the statute or ordinance requires some act to be done under the direction or approval of some officer defendant is not relieved from liability for failure to perform such duty by reason of the inaction of such officer.[65] And where a certificate of approval is required absence of such certificate throws the burden on defendant to show a compliance with the statute,[66] the rule being that where the standard of care is fixed by law its omission is negligence.[67]

f. Excuse For Violation. Violation of a statute in relation to the construction of a building is not excused by approval of the plans by the building department,[68] or by the fact that it was committed during the absence of the person responsible.[69] Authority conferred by charter to erect a steam mill will not relieve defendant from compliance with statutory provisions relative to the use of a stationary engine.[70] It has been held, however, that the violation of an ordinance will not render defendant liable unless it is shown that he had the means and opportunity to perform the duty imposed in time to avert the injury;[71] and failure to comply with the statute will not render defendant liable where the precaution taken was substantially equivalent to that required by the statute.[72]

g. As Cause of Injury.[73] Although the violation of a statute is held to be negligence *per se* there must be a causal relation between such act and the injury to render defendant liable,[74] and such violation must be the proximate cause of

dren, is not liable for injuries caused by the flying back of a brake, to a ten-year-old boy who goes upon the cars to play.

Missouri.—Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504.

Nebraska.— Frontier Steam Laundry Co. *v.* Connolly, 72 Nebr. 767, 101 N. W. 995, 68 L. R. A. 425.

Rhode Island.—Waterman *v.* Shepard, 21 R. I. 257, 43 Atl. 66.

England.— Lloyd *v.* Ogleby, 5 C. B. N. S. 667, 94 E. C. L. 66, holding that the mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action brought against him for running over a person who was crossing the road on foot.

Canada.— Smith *v.* Hayes, 29 Ont. 283.

64. Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501; Brugher *v.* Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Bretsch *v.* Plate, 82 N. Y. App. Div. 399, 81 N. Y. Suppl. 868; Morrison *v.* Cornelius, 63 N. C. 346; Phillips *v.* Wisconsin State Agricultural Soc., 60 Wis. 401, 19 N. W. 377. And see Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849.

65. Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163 (holding that the duty imposed upon the owner of a building, under Rev. St. c. 26, § 26, as amended by Pub. Laws (1891), c. 89, to provide fire-escapes, does not depend on the action of the municipal officers or fire engineers, or upon their failure to take action); McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153.

66. Lincoln Traction Co. *v.* Heller, 72 Nebr. 127, 100 N. W. 197, 102 N. W. 262; Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531; Sewell *v.* Moore, 166 Pa. St. 570, 31 Atl. 370.

67. Tucker *v.* Illinois Cent. R. Co., 42 La. Ann. 114, 7 So. 124; Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30.

68. Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156.

69. Straus *v.* Buchman, 96 N. Y. App. Div. 270, 89 N. Y. Suppl. 226, holding that where architects who were employed to supervise the completion of a partially constructed building permitted certain beams therein to rest on stud partitions, in violation of the express provisions of Laws (1892), p. 547, c. 275, § 476, they are not absolved from liability for negligence by proof that the beams were placed on the partition intermediate a morning and afternoon inspection of the same day, and so covered with flooring as to prevent defendants from seeing how the work had been done.

70. Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400.

71. Weise *v.* Tate, 45 Ill. App. 626. And see Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849.

72. Malloy *v.* New York Real Estate Assoc., 156 N. Y. 205, 50 N. E. 853, 41 L. R. A. 487.

73. As to what constitutes proximate cause see *infra*, VI, B.

74. *Delaware.*— Kyne *v.* Wilmington, etc., R. Co., 8 Houst. 185, 14 Atl. 922.

Illinois.— Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Browne *v.* Siegel, 90 Ill. App. 49 [*affirmed* in 191 Ill. 226, 60 N. E. 815].

Indiana.— Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117.

Louisiana.— Seibert *v.* McManus, 104 La. 404, 29 So. 108.

the injury.[75] And in this respect it must appear that compliance with the ordinance would have prevented the injury.[76]

7. Accidents. No liability attaches where the injury results from what is termed pure or inevitable accident.[77] Negligence can never be consistently predicated of a purely accidental occurrence.[78] But merely calling the act which resulted in an injury an accident will not avoid liability for the result of negligence.[79] The fact that at the very moment of the accident the injury could not have been prevented will not relieve defendant from liability if it was brought about by his negligence.[80] An accident within the rule is that which happens without the fault of any one,[81] and without one's foresight or expectation.[82] And it has been held that where both parties exercise ordinary care an injury

New York.— Kuhnen *v.* White, 102 N. Y. App. Div. 36, 92 N. Y. Suppl. 104; Weinberger *v.* Kratzenstein, 35 Misc. 74, 71 N. Y. Suppl. 244.

Pennsylvania.—Sewell *v.* Moore, 166 Pa. St. 570, 31 Atl. 370; Fahey *v.* Jephcott, 1 Ont. L. Rep. 18 [*distinguishing* Groves *v.* Wimborne, [1898] 2 Q. B. 402, 67 L. J. Q. B. 862, 79 L. T. Rep. N. S. 284, 47 Wkly. Rep. 87].

Illustration.— Gen. Laws (1896), c. 108, § 15, requiring automatic warning signals to be attached to elevators not so protected as to be inaccessible from without while moving, is inapplicable in an action for injuries, where the injury was caused by the pushing of the trap-door which guarded the elevator. Gallowshaw *v.* Lonsdale Co., 25 R. I. 383, 55 Atl. 932.

75. Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885; Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943; Mathiason *v.* Mayer, 90 Mo. 585, 2 S. W. 834; Lincoln Traction Co. *v.* Heller, 72 Nebr. 127, 100 N. W. 197, 102 N. W. 262; Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531.

Injury proximate result of negligence.— Failure to perform a statutory duty is negligence *per se*, and if the injury is the proximate result or consequence of the negligent act there is liability. It was so held in respect of a failure to label poison in a bottle. Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548. And see Patterson *v.* Fanning, 2 Ont. L. Rep. 462.

76. Weinberger *v.* Kratzenstein, 35 Misc. (N. Y.) 74, 71 N. Y. Suppl. 244.

Illustration.— Where horses hired by plaintiff to defendant ice company became frightened and unmanageable while on the ice and ran on to thin ice, and were drowned, it was held that defendant's failure to place a fence of a single board, nailed on two by four inch posts three and a half feet from the surface on which the posts stand, in accordance with Sanborn & B. Annot. St. § 4395, was not such negligence as would warrant a recovery for the horses, since such a fence would have been totally inadequate to prevent the accident. Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091.

77. *Arkansas.*— Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

Delaware.— MacFeat *v.* Philadelphia, etc., R. Co., (1904) 62 Atl. 898; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264.

Georgia.— Seaboard, etc., R. Co. *v.* Spencer, 111 Ga. 868, 36 S. E. 921.

Illinois.— Illinois Cent. R. Co. *v.* Smiesni, 104 Ill. App. 194.

Maine.— Fidelity, etc., Co. *v.* Cutts, 95 Me. 162, 49 Atl. 673. And see Conway *v.* Lewiston, etc., Horse R. Co., 90 Me. 199, 38 Atl. 110; Conley *v.* American Express Co., 87 Me. 352, 32 Atl. 965.

New Jersey.— McGuire *v.* Central R. Co., 68 N. J. L. 608, 53 Atl. 696.

New York.— McCaffrey *v.* Twenty-Third St. R. Co., 47 Hun 404; Harvey *v.* Dunlop, Lalor 193.

Texas.— Rea *v.* St. Louis Southwestern R. Co., (Civ. App. 1903) 73 S. W. 555.

Vermont.— Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

Wisconsin.— Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55.

United States.— Hodgson *v.* Dexter, 12 Fed. Cas. No. 6,565, 1 Cranch C. C. 109 [*affirmed* in 1 Cranch 345, 2 L. ed. 130].

England.— Davis *v.* Saunders, 2 Chit. 639, 18 E. C. L. 825.

See 37 Cent. Dig. tit. "Negligence," § 80.

Inevitable accident illustrated.— It is an inevitable accident, for which there can be no recovery, where an employee of defendants stumbled over a roll of matting, and, with a roll of oilcloth, fell on plaintiff, who was in defendants' store to make a purchase. Wall *v.* Lit, 195 Pa. St. 375, 46 Atl. 4.

78. 1 Shearman & R. Negl. § 15; Sutton *v.* Bonnett, 114 Ind. 243, 16 N. E. 180. In this case plaintiff was injured by the accidental discharge of a pistol held by defendant, who, as the jury found, did not see plaintiff, or point the pistol at him. It was held that defendant was not liable. But see Grant *v.* Moseley, 29 Ala. 302.

79. McGrew *v.* Stone, 53 Pa. St. 436; Beach *v.* Parmeter, 23 Pa. St. 196.

80. Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734.

81. Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185; Nelson *v.* Richardson, 108 Ill. App. 121; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205.

82. Nelson *v.* Narragansett Electric Light-

resulting to one of them is relatively to them the result of an accident.[83] So if an injury occurs from some unaccountable reason it may be attributed to accident.[84]

8. Act of God.[85] An injury caused by the act of God or a superior agency without the fault of defendant will not impose any liability on him.[86] An act of God is defined as inevitable accident without the intervention of man and the public enemy.[87] To constitute an act of God in such sense as to relieve defendant from liability for injury it must have been so far outside the range of ordinary human experience that the duty of exercising ordinary care did not require it to be anticipated or provided against.[88] Thus it has been decided that winds of unusual and extraordinary violence,[89] extraordinary rain-storms,[90] floods,[91]

ing Co., 26 R. I. 258, 58 Atl. 802, 106 Am. St. Rep. 711, 67 L. R. A. 116 (holding that the slipping the trolley from an electric wire was not an accident); Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

83. *Delaware.*— Ford *v.* Whiteman, 2 Penew. 355, 45 Atl. 543, holding that an injury caused by a frightened horse which becomes frightened and unmanageable without fault of the driver is, so far as the driver is concerned, the result of an accident.

Georgia.—Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

New Hampshire.— Brown *v.* Collins, 53 N. H. 442, 16 Am. Rep. 372.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

England.— Manzoni *v.* Douglas, 6 Q. B. D. 145, 45 J. P. 391, 50 L. J. Q. B. 289, 29 Wkly. Rep. 425.

84. Green *v.* Urban Contracting, etc., Co., 106 N. Y. App. Div. 460, 94 N. Y. Suppl. 743; Guinea *v.* Campbell, 22 Quebec Super. Ct. 257.

85. Act of God as proximate cause see *infra*, VI, I, 3.

86. Gault *v.* Humes, 20 Md. 297; Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. 212, 4 Wkly. Rep. 294.

87. Henry Sonneborn, etc., Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

88. *Delaware.*—Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Indiana.— Woodruff *v.* Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198.

Massachusetts.— Gray *v.* Harris, 107 Mass. 492, 9 Am. Rep. 61, holding that a person maintaining a dam in a stream subject to extraordinary freshets is bound to construct it so as to resist them, although they come only once in several years.

Ohio.— Pittsburgh, etc., R. Co. *v.* Brigham, 29 Ohio St. 374, 23 Am. Rep. 751.

Texas.— Gulf, etc., R. Co. *v.* Boyce, (Civ. App. 1905) 87 S. W. 395.

What is not an act of God illustrated.— Where one sustained damage to his property, resulting from the freezing upon his premises of water which flowed thereon from the tank of a railroad company, the damage being sustained in consequence of the freezing and detention thereby of water which otherwise would have flowed down and off the premises without injury, it was held that the company was liable, as the injury was one which might reasonably and naturally have been expected to result. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

89. *Delaware.*—Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Louisiana.— New Orleans, etc., R. Co. *v.* McEwen, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

New York.— Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244; Norling *v.* Allee, 13 N. Y. Suppl. 791 [*affirming* 10 N. Y. Suppl. 97, and *affirmed* in 131 N. Y. 622, 30 N. E. 865].

Ohio.— Pittsburgh, etc., R. Co. *v.* Brigham, 29 Ohio St. 374, 23 Am. Rep. 751.

England.— River Wear Com'rs *v.* Adamson, 2 App. Cas. 743, 47 L. J. Q. B. 193, 37 L. T. Rep. N. S. 543, 26 Wkly. Rep. 217.

Application of rule.— While a towboat belonging to one of defendants was towing, across a navigable lake, a large raft of saw logs belonging to the other defendant, the raft was broken up, and the logs scattered in many directions, by an unexpected storm. Many of the logs were afterward recovered, and reasonable efforts made to recover the others, which were still floating on the lake about six months afterward, when a storm of unprecedented severity and fury arose, and some of the logs were driven against plaintiff's breakwater. It was held that defendants were not negligent. New Orleans, etc., R. Co. *v.* McEwen, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

90. Couts *v.* Neer, 70 Tex. 468, 9 S. W. 40; Gulf, etc., R. Co. *v.* Boyce, (Tex. Civ. App. 1905) 87 S. W. 395.

91. Gregg *v.* Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238 (holding that the fact that corn in a warehouse is damaged by a flood of unprecedented and extraordinary extent and rapidity of rise does not show that the person who stored it there was guilty of want of ordinary and reasonable care); Nichols *v.* Marsland, 2 Ex. D. 1, 46 L. J. Exch. 174, 35 L. T. Rep. N. S. 725, 25 Wkly. Rep. 173.

What is an extraordinary flood.— To give a stream or body of water the character of an extraordinary flood it is not necessary that it should be the greatest flood within memory. Its character in this respect is to be tested by comparison with the usual volume of floods ordinarily occurring. Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

fires,[92] and frosts[93] are classed as acts of God within the rule exempting defendant from liability.

E. Particular Classes of Persons or Property Injured — 1. Trespassers in General — a. Duty and Liability — (1) *In General.* The general rule is that no duty exists toward trespassers except that of refraining from wantonly or wilfully injuring them. The principle that owners of property are bound to see that persons lawfully on such premises are not injured does not extend to those who are on the premises without right or without permission.[94] So the owner of land is under no obligation or duty as to a mere trespassser to keep his premises in a suitable condition.[95] The mere maintenance of a dangerous nuisance on one's inclosed premises gives no right of action to one who without necessity and without the owner's invitation express or implied enters on such premises and is injured thereby.[96] And hence as to such trespassers the owner of the premises is not required to guard elevator shafts,[97] trap-doors or holes,[98] excavations,[99]

92. Kitchen *v.* Carter, 47 Nebr. 776, 66 N. W. 855.

93. Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. 212. 4 Wkly. Rep. 294.

94. *Delaware.*— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95.

Illinois.— Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588.

Indiana.— Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719.

Massachusetts.—Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368, 87 Am. Dec. 644.

New York.— Magar *v.* Hammond, 95 N. Y. App. Div. 249, 88 N. Y. Suppl. 796; Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63; Baker *v.* Byrne, 58 Barb. 438; Terry *v.* New York Cent. R. Co., 22 Barb. 574.

Pennsylvania.— Keegan *v.* Luzerne County, 8 Kulp 160.

England.— Petrie *v.* Rostrevor, [1898] 2 Ir. 556.

Application of rule.— One who places an elevator in the building of another on condition that the elevator is to be operated by the latter on trial, but under the supervision of the vendor, and not to be accepted until in complete running order, will not be liable to an employee of his vendee for an injury sustained by reason of a defect in the elevator while on trial. Zieman *v.* Kieckhefer Elevator Mfg. Co., 90 Wis. 497, 63 N. W. 1021.

95. *Georgia.*—Chattanooga Southern R. Co. *v.* Wheeler, 123 Ga. 41, 50 S. E. 987.

Illinois.— Union Stock Yards, etc., Co. *v.* Rourke, 10 Ill. App. 474.

Indiana.— St. Joseph Ice Co. *v.* Bertch, 33 Ind. App. 491, 71 N. E. 56.

Kentucky.— Illinois Cent. R. Co. *v.* Waldrop, 72 S. W. 1116, 24 Ky. L. Rep. 2127.

Missouri.— Straub *v.* Soderer, 53 Mo. 38.

North Dakota.—O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

West Virginia.— Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148.

United States.— Berlin Mills Co. *v.* Croteau, 88 Fed. 860, 32 C. C. A. 126.

England.— Jewson *v.* Gatti, Cab. & E. 564.

Applications of rule.— No recovery can be had by plaintiff who, while a trespasser, entered an abandoned and decaying freight house, and was injured by a piece of the building being blown against him in a sudden storm. Lary *v.* Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572. No liability existed for the death of plaintiff's husband who was killed by being thrown from a horse against a barbed wire fence built entirely on defendant's land and not along a public road. Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520. Where plaintiff's intestate while a trespasser fell into a pool of water, over which a crust had so formed that it resembled dry land, and was drowned, defendant was not liable. Union Stock Yards, etc., Co. *v.* Rourke, 10 Ill. App. 474. The owner of a private way opening on a public street, who fails to erect a sign that the way is not public, is not liable for injuries resulting from defects therein to strangers venturing thereon without permission. Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459.

96. Hutson *v.* King, 95 Ga. 271, 22 S. E. 615.

97. South Bend Iron Works *v.* Larger, 11 Ind. App. 367, 39 N. E. 209; Flanagan *v.* Sanders, 138 Mich. 253, 101 N. W. 581; Trask *v.* Shotwell, 41 Minn. 66, 42 N. W. 699.

98. Lackat *v.* Lutz, 94 Ky. 287, 22 S. W. 218, 15 Ky. L. Rep. 75; Zoebisch *v.* Tarbell, 10 Allen (Mass.) 385, 87 Am. Dec. 660.

99. Kohn *v.* Lovett, 44 Ga. 251; Fredenburg *v.* Bear, 89 Minn. 241, 94 N. W. 683; McNeven *v.* Arnott, 4 N. Y. App. Div. 133, 38 N. Y. Suppl. 759; Gramlick *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684.

Illustrations.— Plaintiff having voluntarily left the street and walked across a vacant lot, from which he fell into a chute leading to defendant's cellar, defendant is not liable, plaintiff being a trespasser. Reeves *v.* French, 45 S. W. 771, 46 S. W. 217, 20 Ky. L. Rep. 220. Where a stranger in a city stepped, at night, into the doorway of a dilapidated building, without any invitation, and fell into a cellar opening at the doorway, and received injuries, the owner was not liable. Hutson *v.* King, 95 Ga. 271, 22 S. E. 615.

falling walls,[1] dangerous passage,[2] or stairways;[3] but it has been held that a trespasser may recover if the negligence was so gross as to imply a disregard of consequences or willingness to inflict the injury,[4] or if the injury was wantonly, wilfully, or intentionally inflicted.[5] The general rule as stated is not universally adopted, some cases holding that the mere fact that plaintiff was a trespasser will not defeat recovery.[6]

(II) *Knowledge of Presence of Trespasser.* A person cannot escape liability for negligence merely because the person injured was a trespasser, where before the commission of the negligent act the presence of the trespasser was known to him,[7] or ought to have been known,[8] and by use of ordinary care defendant might have avoided the injury.[9] Nor will one trespass justify another trespass.[10]

(III) *Ownership of Premises.* To relieve one from liability on the ground that the injured person is a trespasser, the premises must belong to the person whose negligence is complained of.[11]

(IV) *Technical Trespassers.*[12] So a trespass that is purely technical has been held not to prevent recovery by reason of defendant's negligence.[13] The general rule of non-liability to trespassers is subject to the exception that where an unguarded excavation on private property is so near a highway as to render use of it unsafe, one who while using the highway falls into it and is injured may recover, although technically a trespasser by falling into the hole.[14] So where in

1. Baltimore *v.* Brannon, 14 Md. 227; Haack *v.* Brooklyn Labor Lyceum Assoc., 44 Misc. (N. Y.) 273, 89 N. Y. Suppl. 888.

2. Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613.

3. Blatt *v.* McBarron, 161 Mass. 21, 36 N. E. 468, 42 Am. St. Rep. 385.

4. Chicago Terminal Transfer R. Co. *v.* Gruss, 200 Ill. 195, 65 N. E. 693; Chicago Terminal Transfer R. Co. *v.* Kotoski, 199 Ill. 383, 65 N. E. 350; Lafayette, etc., R. Co. *v.* Adams, 26 Ind. 76.

Illustration.—Where plaintiff who had been fishing after night in the private pond of one of the defendants was shot, as he was starting away, by the watchman, who was in the habit of firing a gun after nightfall to frighten away trespassers, an instruction that if the watchman wantonly and recklessly fired in the direction of human beings defendants were liable was proper. Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63.

5. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Hector Min. Co. *v.* Robertson, 22 Colo. 491, 45 Pac. 406; Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

6. Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Lovett *v.* Salem, etc., R. Co., 9 Allen (Mass.) 557; Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

7. Rome Furnace Co. *v.* Patterson, 120 Ga. 521, 48 S. E. 166; Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333. And see Hector Min. Co. *v.* Robertson, 22 Colo. 491, 45 Pac. 406.

Illustration.— The mere fact that plaintiff was a trespasser in defendant's circus tent will not prevent his recovery for an injury by reason of defendant's negligence in exploding a giant firecracker, a part of which struck plaintiff's eye, when it was done after defendant knew of plaintiff's presence in the tent. Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

Where no notice to defendant of the presence of trespassing animals was shown there could be no recovery. Christy *v.* Hughes, 24 Mo. App. 275.

8. O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677. And see Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63.

9. Norwood *v.* Raleigh, etc., R. Co., 111 N. C. 236, 16 S. E. 4.

10. Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768, holding that a defendant by whose negligence the property of another has been injured cannot excuse his negligence by showing that plaintiff's property was placed where it received the injury by an act of trespass on the part of plaintiff.

11. Cameron *v.* Vandegriff, 53 Ark. 381, 13 S. W. 1092. And see Commonwealth Electric Co. *v.* Melville, 210 Ill. 70, 70 N. E. 1052.

12. As to excavations dangerous to persons on highway see *infra*, V, F, 5, b.

As to trespass by children see *infra* V, E, 2.

13. Mullaney *v.* Spence, 15 Abb. Pr. N. S. (N. Y.) 319; Lowe *v.* Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. Rep. 708, holding that if a person who has been injured through the negligence of defendant while committing a trespass shows that he did not know he was trespassing or that the trespass was purely technical, and only such as he might reasonably suppose defendant would permit, recovery will not be prevented by reason of such trespass.

14. Hadley *v.* Taylor, L. R. 1 C. P. 53, 11 Jur. N. S. 979, 13 L. T. Rep. N. S. 368, 14 Wkly. Rep. 59; Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L. 392, 2 C. & K. 661, 61 E. C. L.

attempting to pass an obstruction on a sidewalk caused by defendant in excavating steps on defendant's land one falls into the excavation defendant is liable.[15]

(v) *Spring Guns.* Another exception to the rule of non-liability is that a trespasser injured by a spring gun of which no notice was given may recover.[16] And this rule applies to other things of like nature.[17]

(vi) *Trespassing Animals.* The same rule applies to trespassing animals as to persons.[18] And no liability exists where a trespassing animal falls into an excavation [19] or well on defendant's uninclosed premises in the absence of gross negligence,[20] and an owner of land is not liable for the death of trespassing animals resulting from drinking poisonous substances,[21] or articles of food which did not agree with them.[22] But where animals were lawfully running at large recovery may be had unless the owner was guilty of actual negligence.[23] If the right to pasture stock upon common lands is permissive or negative merely and no obligation to fence against them exists no recovery can be had.[24] And merely permitting a well to remain unguarded where animals are not expected to be at large is not gross negligence.[25]

b. Who Are Trespassers — (i) *In General.* A person going upon the premises of another is a trespasser if he does so out of curiosity,[26] for his own purposes,[27] or convenience,[28] and voluntarily without invitation express or implied,[29]

661, 14 Jur. 334, 19 L. J. C. P. 195; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Exch. 139, 7 Wkly. Rep. 326. And see Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680; Gramlick *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684. The occupant of land is liable for negligently leaving unguarded an excavation so near a highway that one using the road, with ordinary care to keep within its limits, falls therein, although he inadvertently trespasses on private property before reaching the excavation. Sanders *v.* Reister, 1 Dak. 151, 6 N. W. 680, 684.

"In the case of Hadley *v.* Taylor, L. R. 1 C. P. 53, the plaintiff, in passing along a highway at night, fell into a 'hoist hole,' which was within fourteen inches of the public way, and unfenced. It was held that the hole was near enough the highway to constitute a nuisance." Sanders *v.* Reister, *supra.*

15. Vale *v.* Bliss, 50 Barb. (N. Y.) 358.

16. Hooker *v.* Miller, 37 Iowa 613, 18 Am. Rep. 18; Grant *v.* Hass, (Tex. Civ. App. 1903) 75 S. W. 342; Bird *v.* Holbrook, 4 Bing. 628, 6 L. J. C. P. O. S. 146, 1 M. & P. 607, 29 Rev. Rep. 657, 13 E. C. L. 667.

If the trespasser has notice that spring guns are laid upon defendant's premises, he is not entitled to recover. Ilott *v.* Wilkes, 3 B. & Ald. 304, 22 Rev. Rep. 400, 5 E. C. L. 181.

17. Palmer *v.* Gordon, 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302.

18. McNeer *v.* Boone, 52 Ill. App. 181; Christy *v.* Hughes, 24 Mo. App. 275; Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384.

19. Turner *v.* Thomas, 71 Mo. 596; Hughes *v.* Hannibal, etc., R. Co., 66 Mo. 325.

20. Caulkins *v.* Mathews, 5 Kan. 191; Knight *v.* Abert, 6 Pa. St. 472, 47 Am. Dec. 478; McCutchen *v.* Gorsline, (Tex. Civ. App. 1905) 86 S. W. 1044.

21. Morrison *v.* Cornelius, 63 N. C. 346 (poisonous liquid used in manufacturing saltpeter); Ferguson *v.* Miami Powder Co., 9 Ohio Cir. Ct. 445, 6 Ohio Cir. Dec. 408 (nitrate of soda).

22. Bush *v.* Brainard, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513 (maple syrup).

23. Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78; Haughey *v.* Hart, 62 Iowa 96, 17 N. W. 189, 49 Am. Rep. 138; Kerwaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Rep. 246. And see Little Rock R. Co. *v.* Finley, 37 Ark. 562.

Illustration.— One who digs a pit near a highway on his own uninclosed land, into which his neighbor's cow, properly at large, without signal of warning or protection, and where cotton seed and corn were scattered around falls, is liable. Jones *v.* Nichols, 46 Ark. 207, 55 Am. Rep. 575.

24. Herold *v.* Meyers, 20 Iowa 378, where an ox was killed by eating corn while trespassing on land not inclosed by lawful fence.

25. McCutchen *v.* Gorsline, (Tex. Civ. App. 1905) 86 S. W. 1044.

26. McNeven *v.* Arnott, 4 N. Y. App. Div. 133, 38 N. Y. Suppl. 759; Wetzlar *v.* Richelieu, etc., Nav. Co., 13 Quebec Super. Ct. 336.

27. Elliott *v.* Carlson, 54 Ill. App. 470; Kentucky Distilleries, etc., Co. *v.* Leonard, 79 S. W. 281, 25 Ky. L. Rep. 2046; Haack *v.* Brooklyn Labor Lyceum Assoc., 44 Misc. (N. Y.) 273, 89 N. Y. Suppl. 888; McMullin *v.* Archibald, 22 Nova Scotia 146.

28. Union Stock Yards, etc., Co. *v.* Rourke, 10 Ill. App. 474; Anderson *v.* Northern Pac. R. Co., 19 Wash. 340, 53 Pac. 345; Zieman *v.* Kieckhefer Elevator Mfg. Co., 90 Wis. 497, 63 N. W. 1021.

29. Hutson *v.* King, 95 Ga. 271, 22 S. E. 615; Reeves *v.* French, 45 S. W. 771, 46 S. W. 217, 20 Ky. L. Rep. 220; Bennett *v.* Butterfield, 112 Mich. 96, 70 N. W. 410; Brady *v.* Prettyman, 193 Pa. St. 628, 44 Atl.

and not in the performance of a duty to defendant,[30] and without any enticement, allurement, inducement, or express or implied assurance of safety,[31] or any business there,[32] even though he is there by mistake.[33] But one going on premises to get property left by him in charge of defendant is not a trespasser.[34] And merely touching defendant's electric wire by accident did not render a boy a trespasser when he was rightfully at such place.[35] One employed about the premises is not a trespasser.[36]

(II) *Termination of License.* The termination of a license to use property renders the licensee a trespasser as to any use thereafter.[37] The revocation of a license to the public to use or cross one's property where notice of such revocation is given renders persons afterward crossing such premises trespassers.[38] So, when people were in the habit of crossing land, but the owner turned them back whenever he saw them, he was not liable for damages sustained while crossing.[39] And where the license has been revoked by putting up obstructions, the owner is not required to maintain such obstruction in safe condition beyond a reasonable time.[40]

2. Children as Trespassers — a. In General. A child of tender years may be a trespasser and subject to the consequences of his trespass.[41] The tender age of a child cannot have the effect of raising a duty where none otherwise existed, and the general rule is that the mere fact that a trespasser is a child will not create or

919; Schilling *v.* Abernethy, 112 Pa. St. 437, 3 Atl. 792, 56 Am. Rep. 320.

Storing property on another's premises.— A railroad company is not, as to one going to its station at the instance of a third person to look after private property stored without the company's permission in an abandoned warehouse, under any duty to keep the building and its approaches in a safe condition. Chattanooga Southern R. Co. *v.* Wheeler, 123 Ga. 41, 50 S. E. 987.

30. Lackat *v.* Lutz, 94 Ky. 287, 22 S. W. 218, 15 Ky. L. Rep. 75. Defendant turned over to another company for use a cross-arm on its telephone pole, and it took possession and strung wires thereon. A city employee, having no connection with either company, went on the pole to make an alteration in the position of the wires, and in doing so a wire caught on an insulator on such cross-arm, which had not been placed thereon by defendant, precipitating it to the ground, and resulting in plaintiff's injury. It was held that defendant was not liable. Quill *v.* Empire State Tel., etc., Co., 159 N. Y. 1, 53 N. E. 679 [*reversing* 92 Hun 539, 34 N. Y. Suppl. 435, 37 N. Y. Suppl. 1149].

31. Straub *v.* Soderer, 53 Mo. 38; Mauer *v.* Ferguson, 17 N. Y. Suppl. 349; O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677; Berlin Mills Co. *v.* Crotean, 88 Fed. 860, 32 C. C. A. 126.

32. Baltimore *v.* Brannon, 14 Md. 227.

Illustration.— Where buildings on defendant's property were destroyed by fire and plaintiff came on the premises, and was picking up some sort of tickets out of the ruins, and one of the walls fell on him, defendant was not liable. Haack *v.* Brooklyn Labor Lyceum Assoc., 44 Misc. (N. Y.) 273, 89 N. Y. Suppl. 888.

33. Blatt *v.* McBarron, 161 Mass. 21, 36 N. E. 468, 42 Am. St. Rep. 385, holding that a constable having a civil writ to serve, and entering by a doorless opening, a tenement-house, wherein he wrongly supposes that the person to be served resides or is, is a mere trespasser, and cannot recover for injuries received by falling down a dark stairway.

34. Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117.

An invitation given by employers without authority did not render plaintiffs licensees instead of trespassers. Curtis *v.* Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955.

35. Commonwealth Electric Co. *v.* Melville, 210 Ill. 70, 70 N. E. 1052.

36. Ferris *v.* Aldrich, 12 N. Y. Suppl. 482; St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450; Graham *v.* Smith, 12 Quebec Super. Ct. 240.

37. Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613.

38. Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698.

Sufficiency of notice of revocation.— Where obstructions erected by a railroad company across its right of way, which had been used by the public as a road, had remained in place for four months, and three months more elapsed when plaintiff was injured in attempting to ride over the former road, sufficient time had elapsed to constitute notice to the public of the revocation of the license to use the road, and so preclude a recovery. Illinois Cent. R. Co. *v.* Waldrop, 72 S. W. 1116, 24 Ky. L. Rep. 2127.

39. Stone *v.* Jackson, 16 C. B. 199, 81 E. C. L. 199.

40. Illinois Cent. R. Co. *v.* Waldrop, 72 S. W. 1116, 24 Ky. L. Rep. 2127.

41. Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967; Holbrook *v.* Aldrich, 168 Mass. 15, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493; Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365 [*distinguishing* Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332]; Feehan *v.* Dobson, 10 Pa. Super. Ct. 6. *Compare* Kansas City Suburban Belt

impose on the owner of property any duty to keep his premises safe,[42] especially where there is nothing about the premises attractive to children,[43] and the only duty owing a trespassing child is that of avoiding wilful or wanton injury to him.[44]

R. Co. *v.* Herman, (Kan. App. 1900) 62 Pac. 543 (four-year-old child not a trespasser); Missouri Pac. R. Co. *v.* Prewitt, 7 Kan. App. 556, 51 Pac. 923 (two-year-old child not a trespasser).

42. *Connecticut.*— Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106, such as fencing a railroad right of way.

Illinois.— Wabash R. Co. *v.* Jones, 163 Ill. 167, 45 N. E. 50; Norman *v.* Bartholomew, 104 Ill. App. 667; Conlon *v.* Bailey, 58 Ill. App. 261.

Iowa.— Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967.

Kentucky.—Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258.

Massachusetts.— Holbrook *v.* Aldrich, 168 Mass. 15, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493; Grindley *v.* McKechnie, 163 Mass. 494, 40 N. E. 764; McGuiness *v.* Butler, 159 Mass. 233, 34 N. E. 259, 38 Am. St. Rep. 412; Morrissey *v.* Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686.

Michigan.— Hargreaves *v.* Deacon, 25 Mich. 1.

New Hampshire.— Hughes *v.* Boston, etc., R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518; Frost *v.* Eastern R. Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396.

New Jersey.— Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831.

Pennsylvania.— Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Feehan *v.* Dobson, 10 Pa. Super. Ct. 6, 44 Wkly. Notes Cas. 65; Marnock *v.* Simpson, 10 Del. Co. 119; Keegan *v.* Luzerne County, 8 Kulp 160. And see Weatherbee *v.* Philadelphia, etc., R. Co., 214 Pa. St. 12, 63 Atl. 367.

Texas.— Missouri, etc., R. Co. *v.* Dobbins, (Civ. App. 1896) 40 S. W. 861 [*affirmed* in 91 Tex. 60, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573].

West Virginia.— Uthermohlen *v.* Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911.

Canada.— McShane *v.* Toronto, etc., R. Co., 31 Ont. 185.

And see Etheredge *v.* Georgia Cent. R. Co., 122 Ga. 853, 50 S. E. 1003.

See 37 Cent. Dig. tit. "Negligence," § 25.

Applications of rule.— Detendant's factory was among open lots, a block away from the nearest house. It was built on three sides of a square yard, in which was a box of scrap lead. A boy of twelve, while in said yard for the sole purpose of stealing lead to sell, was scalded by steam and water which the engineer happened at that moment to blow off through a discharge pipe near the box. It was held that defendant was not liable. Mergenthaler *v.* Kirby, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371. Where a child of tender years goes into a mill without any right to be there, and is killed while attempting to ride on an apparatus used for hoisting materials, which apparatus had recently been in use, and after being stopped and put out of reach had in some unexplained way got into motion again, no cause of action lies therefor against the mill-owners. Rodgers *v.* Lees, 140 Pa. St. 475, 21 Atl. 399, 23 Am. St. Rep. 250, 12 L. R. A. 216. Where a child six years of age, while trespassing on private property, was drowned while attempting to cross a stream by means of a bridge which had been partly removed, the landowner is not responsible in the absence of wantonness or gross negligence. Marnock *v.* Simpson, 10 Del. Co. (Pa.) 119. A child nine years old found a railroad torpedo beside defendant's track, a quarter of a mile from its station, at a point where defendant had permitted people to pass without objection, and the child struck the torpedo with a rock and was injured by the explosion. The torpedo was of a kind used by railroads only, and defendant's rules required its trainmen to be supplied with them. Defendant knew the use that was being made of the track by people, including children, who were constantly passing. It was held that a nonsuit was properly ordered, as such child was injured by its own intermeddling with defendant's machinery at a place it had no right to be, and the fact that such child was an infant did not create a duty where none existed. Hughes *v.* Boston, etc., R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518.

43. American Advertising, etc., Co. *v.* Flannigan, 100 Ill. App. 452; Feehan *v.* Dohson, 10 Pa. Super. Ct. 6, 44 Wkly. Notes Cas. 65; Curtis *v.* Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955; Smith *v.* Hayes, 29 Ont. 283.

Illustration.— Where defendant, a corporation engaged in distilling, discharged the waste steam and water from the distillery boilers on unfenced ground belonging to it, and lying on the further side of a road which ran past the distillery, and plaintiff's child, three years of age, fell into a hole made by the escaping steam and water, and was scalded so that she died, defendant is not liable, in the absence of evidence that the place where the child lost her life was attractive to children by reason of the discharge of steam and boiling water, or that children were in the habit of resorting there to play, or to witness the escape of the water and steam from the pipe. Schmidt *v.* Kansas City Distilling Co., 90 Mo. 284, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16.

44. Williamson *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 279; Uthermohlen *v.* Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911; Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148.

b. Attractive Machinery or Places — (I) *In General.* A well-established exception to the rule as to non-liability to trespassers exists in some jurisdictions in the case of machinery or places attractive to children, even though they be technical trespassers,[45] it being held that one cannot arrange even on his own property that which he knows, or in the exercise of common judgment and prudence ought to know, will naturally attract others into unsuspected danger or great bodily harm.[46] The duty rests on the owner of a dangerous machine to use care to protect children from injury;[47] but even in such case there is no liability unless the owner has failed to exercise such care as might reasonably be expected of a person of ordinary prudence under the circumstances.[48] The exception is not recognized in a number of jurisdictions where it is held that there is no distinction between adults and children.[49]

(II) *Reasons For Rule* — (A) *Attractiveness to Children.* One of the grounds on which liability is placed is that the place or thing, although potently dangerous to those of ordinary intelligence and prudence, is so enticing to others excusably lacking in intelligence and caution as to induce them to venture to do

45. McAllister *v.* Jung, 112 Ill. App. 138; American Advertising, etc., Co. *v.* Flannigan, 100 Ill. App. 452; Biggs *v.* Consolidated Barb-Wire Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655; Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52; Porter *v.* Anheuser-Busch Brewing Assoc., 24 Mo. App. 1. And see cases cited in notes following in this section; and *infra*, V, F, 5.

One who maintains on his own premises a dangerous instrumentality not in itself attractive, but placed in such immediate proximity to an attractive situation on the premises of another as to form with it a dangerous whole, notwithstanding the attractive situation on the other premises may not be of itself dangerous is liable for injuries to others who are excusably lacking in intelligence or caution. Consolidated Electric Light, etc., Co. *v.* Healy, 65 Kan. 798, 70 Pac. 884.

46. Alabama Great Southern R. Co. *v.* Crocker, 131 Ala. 584, 31 So. 561; Consolidated Electric Light, etc., Co. *v.* Healy, 65 Kan. 798, 70 Pac. 884.

"It is the apparent probability of danger rather than rights of property, that determines the duty and measure of care required of the author of such a contrivance, for ordinarily the duty of avoiding known danger to others may under some circumstances operate to require care for persons who may be at the place of danger without right." Alabama Great Southern R. Co. *v.* Crocker, 131 Ala. 584, 590, 31 So. 561.

47. Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385; Keffe *v.* Milwaukee, etc., R. Co., 21 Minn. 207, 18 Am. Rep. 393; Jonasch *v.* Standard Gas Co., 56 N. Y. Super. Ct. 447, 4 N. Y. Suppl. 542; Schmidt *v.* Cook, 4 Misc. (N. Y.) 85, 23 N. Y. Suppl. 799, 30 Abb. N. Cas. 285 [*reversing* 1 Misc. 227, 20 N. Y. Suppl. 889]; Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Gulf, etc., R. Co. *v.* Evansich, 63 Tex. 54; Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3.

48. Ball *v.* Middlesborough Town, etc., Co., 68 S. W. 6, 24 Ky. L. Rep. 114; Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, 19 N. W. 655; Missouri, etc., R. Co. *v.* Edwards, (Tex. Civ. App. 1895) 32 S. W. 815.

49. *Massachusetts.*— McEachern *v.* Boston, etc., R. Co., 150 Mass. 515, 23 N. E. 231.

Michigan.— Ryan *v.* Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Hargreaves *v.* Deacon, 25 Mich. 1.

New Jersey.— Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831.

Rhode Island.— Paolino *v.* McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133.

England.— Mangan *v.* Atterton, L. R. 1 Exch. 239, 35 L. J. Exch. 161, 4 H. & C. 388, 14 L. T. Rep. N. S. 411, 14 Wkly. Rep. 771; Cummings *v.* Darngavil Coal Co., 5 F. (Ct. Sess.) 513.

Illustrations.—A boy aged eight years, ignorant of English, was taken, without authority, by his brother, an employee in a mill, to learn his work. Other boys had taken their brothers into the mill for the same purpose, but it was not shown that the employer knew this, and on this occasion he ordered the boy to leave, but it was doubtful whether the boy understood him. It was held that it was not error to direct a verdict for defendant, as the boy was a trespasser. Buch *v.* Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163. One who, in the operation of his coal mines on his own land, uses a cable running on pulleys to haul coal cars from his mine, is not liable for injury to a child trespassing on the premises, and receiving the injury from such cable and pulleys. Uthermohlen *v.* Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911. A corporation owned an unused pump-house, containing a small overshot water wheel. Children were in the habit of crossing the company's land near the pump-house without objection. Plaintiff, a child, was injured in rescuing her sister, who was caught between the water wheel and the wheel pit while playing on the wheel with other children. It was held that, although the water

it or use it,[50] and that the attractiveness of the thing amounts to an implied invitation.[51] It is laid down by some courts that, to render a person liable under this rule, the machinery or thing must be peculiarly or unusually attractive,[52] or so obviously dangerous to children that where the use of it by children is discovered it is negligent not to guard it;[53] and hence does not apply where the machinery was not dangerous in itself.[54] This implied invitation does not exist where the child entered the premises on the invitation of an older person who went thereon for unlawful purposes,[55] or where the child did not enter the premises by reason of the inducement of the attractive machinery.[56] But where the child went on the premises by reason of the attractiveness, it does not matter that it was in pursuance of an invitation by another child.[57] And it has been held that where an invitation is inferable from the unusual attractiveness of the machine, it does not matter where the child was when she accepted the implied invitation.[58] Such danger must be commonly incident to the premises, and the owner is not required to use affirmative care in guarding the child from dangers from extraneous causes.[59]

(B) *Owner's Knowledge of Attractiveness to Children.* In such jurisdictions as concede liability for leaving an attractive machine or place unguarded, one of the grounds for liability is that the owner knew or should have known that children were accustomed to go or would be likely to be attracted thereto,[60] and that

wheel may have been attractive and accessible to children, plaintiff was a trespasser, to whom the company owed no duty of warning or protection. Ryan *v.* Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310.

50. Consolidated Electric Light, etc., Co. *v.* Healy, 65 Kan. 798, 70 Pac. 884.

51. Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599; Chicago, etc., R. Co. *v.* Fox, 38 Ind. App. 268, 70 N. E. 81. And see Simonton *v.* Citizens' Electric Light, etc., Co., 28 Tex. Civ. App. 374, 67 S. W. 530, in which it is said that in certain classes of cases an invitation by the owner to enter upon his property will be implied by estoppel in favor of children from facts that would raise no such implication as to adult persons.

Where the owner has used due care in keeping his premises fenced he cannot be said to have impliedly invited the children to go thereon. O'Connor *v.* Illinois Cent. R. Co., 44 La. Ann. 339, 10 So. 678.

52. San Antonio, etc., R. Co. *v.* Morgan, 92 Tex. 98, 46 S. W. 28; Missouri, etc., R. Co. *v.* Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825.

53. Missouri, etc., R. Co. *v.* Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825.

54. Fitzgerald *v.* Rodgers, 58 N. Y. App. Div. 298, 68 N. Y. Suppl. 946.

Illustration.— Thus no liability existed for the death of a child, who playing on a ladder at the lower end of a fire-escape fell and received the injury, it not being a dangerous machine. Kelly *v.* Smith, 29 N. Y. App. Div. 346, 51 N. Y. Suppl. 413.

55. Union Stock Yard, etc., Co. *v.* Butler, 92 Ill. App. 166.

56. O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

57. Barrett *v.* Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186.

58. San Antonio, etc., R. Co. *v.* Skidmore, 27 Tex. Civ. App. 329, 65 S. W. 215.

59. *In re* Demarest, 86 Fed. 803. A property-owner securely inclosing its land from the street is not liable for injuries to a child coming upon its land across the land of another, and falling into an adjoining, unprotected excavation on the land of a third person. Magner *v.* Frankford Baptist Church, 174 Pa. St. 84, 34 Atl. 456.

60. *Arkansas.*—Brinkley Car Co. *v.* Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216.

Connecticut.— Fitzmaurice *v.* Connecticut R., etc., Co., 78 Conn. 406, 62 Atl. 620, 112 Am. St. Rep. 159, 3 L. R. A. N. S. 149.

Indiana.— Chicago, etc., R. Co. *v.* Fox, 38 Ind. App. 268, 70 N. E. 81; Cincinnati, etc., Spring Co. *v.* Brown, 32 Ind. App. 58, 69 N. E. 197.

Kansas.—Biggs *v.* Consolidated Barb-Wire Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655; Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, 36 Pac. 322.

Missouri.— Witte *v.* Stifel, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668.

Nebraska.— Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920.

New York.— Marcantonio *v.* Murray, 63 N. Y. App. Div. 119, 71 N. Y. Suppl. 418.

Ohio.— Wheeling, etc., R. Co. *v.* Harvey, 27 Ohio Cir. Ct. 672.

Tennessee.— Cooper *v.* Overton, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591.

Texas.— Ft. Worth, etc., R. Co. *v.* Robertson, (1891) 16 S. W. 1093, 14 L. R. A. 781; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586; Ollis *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 601, 73 S. W. 30; Dublin Cotton Oil Co. *v.* Jarrard, (Civ. App. 1897) 40 S. W. 531; Missouri, etc., R. Co. *v.* Edwards, (Civ. App. 1895) 32 S. W. 815.

Washington.— Ilwaco R., etc., Co. *v.* Hed-

from the peculiar nature and open and exposed condition of the thing or place he ought reasonably to have anticipated such an injury as actually happened.[61]

(III) *Knowledge of Danger.* To render a person liable for injuries to children it must appear that he knew of the danger, and where there was nothing to indicate any probability of danger he will not be liable for failure to use safeguards.[62]

(IV) *To What Children Rule Applicable.* The exception in favor of children who are trespassers applies only to such as lack the discretion of adults,[63] but applies whether the children are of sufficient age to have some degree of discretion or not.[64] A defendant will not be liable, however, where the danger is obvious and known and the child has sufficient intelligence to appreciate it even though put on notice that children are accustomed to come there.[65]

3. Licensees — a. Duty to Use Care. The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises,[66]

rick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169.

United States.— Sioux City, etc., R. Co. *v.* Stout, 17 Wall. 657, 21 L. ed. 745 [*affirming* 23 Fed. Cas. No. 13,504].

61. *Alabama.*—Alabama Great Southern R. Co. *v.* Crocker, 131 Ala. 584, 31 So. 561.

Arkansas.— Brinkley Car Co. *v.* Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216.

Georgia.— Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102.

Illinois.— Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599; Coppner *v.* Pennsylvania Co., 12 Ill. App. 600.

Iowa.— Edgington *v.* Burlington, etc., R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561.

Minnesota.— Keffe *v.* Milwaukee, etc., R. Co., 21 Minn. 207, 18 Am. Rep. 393.

Missouri.—Porter *v.* Anheuser-Busch Brewing Assoc., 24 Mo. App. 1.

New York.— Mullaney *v.* Spence, 15 Abb. Pr. N. S. 319.

Tennessee.— East Tennessee, etc., R. Co. *v.* Cargille, 105 Tenn. 628, 59 S. W. 141.

Texas.— Ft. Worth, etc., R. Co. *v.* Robertson, (1891) 16 S. W. 1093, 14 L. R. A. 781; Missouri, etc., R. Co. *v.* Edwards, (Civ. App. 1895) 32 S. W. 815.

Canada.— See Smith *v.* Hayes, 29 Ont. 283.

Where a turn-table is situated in an isolated place, it is not negligence to leave it unlocked. St. Louis, etc., R. Co. *v.* Bell, 81 Ill. 76, 25 Am. Rep. 269.

62. Ball *v.* Middlesborough Town, etc., Co., 68 S. W. 6, 24 Ky. L. Rep. 114.

Illustrations.—A landowner was not responsible for injuries to a child, owing to a fall of a pile of stones on the land, the pile having been knocked down by children at play, and they not having been invited on the premises, where there was nothing in the appearance of the pile to indicate that it was likely to prove dangerous. Kane *v.* Erie R. Co., 110 N. Y. App. Div. 7, 96 N. Y. Suppl. 810. So where the owner of an inclosed tract of land, within a city, which had been graded to a level, leaving a bank on one side of the premises, to which premises adults were suffered to resort to play base-ball, and the amusement attracted to the grounds boys to witness the games, he is not liable for injury to a boy, caused by caving in of the top of the embankment, where its condition did not indicate a reasonable probability of such result. Ann Arbor R. Co. *v.* Kinz, 68 Ohio St. 210, 67 N. E. 479.

63. Heimann *v.* Kinnare, 73 Ill. App. 184. And see Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206.

64. Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385.

65. Brinkley Car Works, etc., Co. *v.* Cooper, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724. And see *infra*, VII, B, 2.

66. *Delaware.*— Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 43 Atl. 156.

Illinois.— Gibson *v.* Leonard, 143 Ill. 182, 35 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Bentley *v.* Loverock, 102 Ill. App. 166; Elliott *v.* Carlson, 54 Ill. App. 470; Gibson *v.* Sziepienski, 37 Ill. App. 601.

Indiana.— Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; St. Joseph Ice Co. *v.* Bertch, 33 Ind. App. 491, 71 N. E. 56; South Bend Iron Works *v.* Larger, 11 Ind. App. 367, 39 N. E. 209.

Kentucky.— Kentucky Distilleries, etc., Co. *v.* Leonard, 79 S. W. 281, 25 Ky. L. Rep. 2046.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761; Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503.

Maryland.— Benson *v.* Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, 39 Am. St. Rep. 436, 20 L. R. A. 714.

Massachusetts.— Moffat *v.* Kenny, 174 Mass. 311, 54 N. E. 850; Plummer *v.* Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Severy *v.* Nickerson, 120 Mass. 306, 21 Am. Rep. 514.

Missouri.— Barry *v.* Calvary Cemetery Assoc., 106 Mo. App. 358, 80 S. W. 709.

New Jersey.— Taylor *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 102, 46 Atl. 707; Fitzpatrick *v.* Cumberland Glass Mfg. Co., 61 N. J. L. 378, 39 Atl. 675; Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478; Mathews *v.* Bensel, 51 N. J. L. 30, 16 Atl. 195.

New York.— Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep.

unless imposed by statute,[67] save that he should not knowingly let him run upon a hidden peril,[68] or wantonly or wilfully cause him harm.[69] The licensee enters upon the premises at his own risk and enjoys the license subject to its concomitant perils.[70] There is a class of cases, however, which stand on a ground

718; Victory *v.* Baker, 67 N. Y. 366; Oats *v.* New York Dock Co., 109 N. Y. App. Div. 841, 96 N. Y. Suppl. 813; Converse *v.* Walker, 30 Hun 596.

Ohio.—Kelly *v.* Columbus, 41 Ohio St. 263; Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

Rhode Island.— Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512.

West Virginia.— Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

United States.— Smith *v.* Hopkins, 120 Fed. 921, 57 C. C. A. 193.

England.— Ivay *v.* Hedges, 9 Q. B. D. 80; Gantret *v.* Egerton, L. R. 2 C. P. 371, 36 L. J. C. P. 191, 16 L. T. Rep. N. S. 17, 15 Wkly. Rep. 638; Hounsell *v.* Smyth, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 29 L. J. C. P. 203, 1 L. T. Rep. N. S. 440, 8 Wkly. Rep. 277, 97 E. C. L. 731.

See 37 Cent. Dig. tit. "Negligence," § 42.

Obstructions and pitfalls.— The owner of the premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them for their own convenience or pleasure, even where this is done with his permission. Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 245; Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644. *Compare* Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75; Converse *v.* Walker, 30 Hun (N. Y.) 596. But see Lauritsen *v.* American Bridge Co., 87 Minn. 518, 92 N. W. 475; Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

67. Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512.

68. Vanderbeck *v.* Hendry, 34 N. J. L. 467; Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512; Burchell *v.* Hickisson, 50 L. J. Q. B. 101.

Unusual danger unknown to licensee.— Graham *v.* Queen Victoria Niagara Falls Park, 28 Ont. 1.

Licensee takes risk of obvious and patent dangers see the following cases:

Massachusetts.—Reardon *v.* Thompson, 149 Mass. 267, 21 N. E. 369.

Minnesota.— Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75.

Missouri.— Eisenberg *v.* Missouri Pac. R. Co., 33 Mo. App. 85.

New York.— Albert *v.* New York, 75 N. Y. App. Div. 553, 78 N. Y. Suppl. 355.

England.— Giles *v.* London County Council, 68 J. P. 10, 2 Loc. Gov. 326.

69. *Delaware.*— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 43 Atl. 156.

Illinois.— Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761.

Massachusetts.— Blackstone *v.* Chelmsford Foundry Co., 170 Mass. 321, 49 N. E. 635; Shea *v.* Gurney, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446.

Minnesota.— Schreiner *v.* Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75.

Nebraska.— Chesley *v.* Rocheford, 4 Nebr. (Unoff.) 768, 96 N. W. 241.

New Jersey.— Land *v.* Fitzgerald, 68 N. J. L. 28, 52 Atl. 229; Taylor *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 102, 46 Atl. 707; Phillips *v.* Burlington Library Company, 55 N. J. L. 307, 27 Atl. 478; Vanderbeck *v.* Hendry, 34 N. J. L. 467.

New York.— Albert *v.* New York, 75 N. Y. App. Div. 553, 78 N. Y. Suppl. 355; Forbrick *v.* General Electric Co., 45 Misc. 452, 92 N. Y. Suppl. 36; McCann *v.* Thilemann, 36 Misc. 145, 72 N. Y. Suppl. 1076.

Pennsylvania.— Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

Rhode Island.— Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512.

West Virginia.— Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

Wisconsin.— Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800.

See 37 Cent. Dig. tit. "Negligence," § 42.

70. *Alabama.*— Louisville, etc., R. Co. *v.* Sides, 129 Ala. 399, 29 So. 798.

Georgia.— Seward *v.* Draper, 112 Ga. 673, 37 S. E. 978.

Illinois.— Gibson *v.* Sziepienski, 37 Ill. 601; Bentley *v.* Loverock, 102 Ill. App. 166.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761.

Massachusetts.— Mallock *v.* Derby, 190 Mass. 208, 76 N. E. 721; Moffatt *v.* Kenny, 174 Mass. 311, 54 N. E. 850; Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459.

Michigan.— Kinney *v.* Onsted, 113 Mich. 96, 71 N. W. 482, 67 Am. St. Rep. 455, 38 L. R. A. 665.

Missouri.— Barry *v.* Calvary Cemetery Assoc., 106 Mo. 358, 80 S. W. 709.

New Jersey.— Mathews *v.* Bensel, 51 N. J. L. 30, 16 Atl. 195; Vanderbeck *v.* Hendry, 34 N. J. L. 467.

New York.— Sterger *v.* Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 28 Am. St. Rep. 594, 16 L. R. A. 640 [*affirming* 7 N. Y. Suppl. 805]; Victory *v.* Baker, 67 N. Y. 366 (vat of boiling liquid in saltpeter factory); Crofoot

peculiar to themselves. They are where defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The liability in such a case is coextensive with the implied invitation.[71]

b. Who Are Licensees — (i) *In General.* A licensee is a person who is neither a passenger, servant, nor trespasser and not standing in any contractual relation with the owner of the premises, and is permitted to come upon the premises for his own interest, convenience, or gratification.[72] Thus one who enters on premises as a visitor,[73] or to transact business with defendant's employees in which defendant has no interest,[74] or to view machinery,[75] or to seek employment,[76] is a bare licensee. So also where one enters on land with notice that it is a private way,[77] or not open to the public.[78] A license may be created by acquiescence in the use of property for the purpose in question without objection.[79] Another

v. Syracuse, etc., R. Co., 75 N. Y. App. Div. 157, 77 N. Y. Suppl. 389; Castoriano *v.* Miller, 15 Misc. 254, 36 N. Y. Suppl. 419; Flannigan *v.* American Glucose Co., 11 N. Y. Suppl. 688.

Ohio.— Kelley *v.* Columbus, 41 Ohio St. 263; Pittsburg, etc., R. Co. *v.* Bingham, 29 Ohio St. 364.

Pennsylvania.— Brady *v.* Prettyman, 193 Pa. St. 628, 44 Atl. 919.

Wisconsin.— Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800.

United States.— Smith *v.* Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108 [*reversing* 86 Fed. 62].

England.— Batchelor *v.* Fortescue, 11 Q. B. D. 474, 49 L. T. Rep. N. S. 644; Ivay *v.* Hedges, 9 Q. B. D. 80; Hounsell *v.* Smyth, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 29 L. J. C. P. 203, 1 L. T. Rep. N. S. 440, 8 Wkly. Rep. 277, 97 E. C. L. 731; Devlin *v.* Jeffray, 5 F. (Ct. Sess.) 130; Wilkinson *v.* Fairrie, 1 H. & C. 633, 9 Jur. N. S. 280, 32 L. J. Exch. 73, 7 L. T. Rep. N. S. 599; Castle *v.* Parker, 18 L. T. Rep. N. S. 367.

Canada.— Rogers *v.* Toronto Public School Bd., 27 Can. Sup. Ct. 448; McMullin *v.* Archibald, 22 Nova Scotia 146.

See 37 Cent. Dig. tit. "Negligence," § 42.

A licensee is only relieved from being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on. Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478; Vanderbeck *v.* Hendry, 34 N. J. L. 467.

71. Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724; Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Beck *v.* Carter, 68 N. Y. 283, 23 Am. Rep. 175; Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999; De Boer *v.* Brooklyn Wharf, etc., Co., 51 N. Y. App. Div. 289, 64 N. Y. Suppl. 925. See also Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718.

72. Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599.

Illustrations.— One who takes refuge in a hotel to escape a thunder storm and is injured by a defective balcony is a licensee. Converse *v.* Walker, 30 Hun (N. Y.) 596. Where a lot is left unfenced, a person who goes upon it by bare permission, because there is no obstruction to keep him off, goes at his own risk. Kelley *v.* Columbus, 41 Ohio St. 263. A person who enters a building containing offices, to inquire about a servant of the occupier of one of the offices, who keeps no servant's registry and who has no connection with such business, the building not being used or designed in any part for such purposes, is a mere licensee therein. Plummer *v.* Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. If grown men choose to play a game on ground where they are permitted to do so, but where there is a danger openly and obviously before them, the owner of the ground is not liable for injuries caused by such danger to one of the players. Giles *v.* London County Council, 68 J. P. 10, 2 Loc. Gov. 326. Plaintiff while on premises adjoining her own seeking her children who are accustomed to play there is a mere licensee. Sterger *v.* Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 28 Am. St. Rep. 594, 16 L. R. A. 640.

73. Shea *v.* Gurney, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271; Southcote *v.* Stanley, 1 H. & N. 247, 25 L. J. Exch. 339.

74. Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761; Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800.

75. Benson *v.* Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, 39 Am. St. Rep. 436, 20 L. R. A. 714.

76. Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718. And see Hinds *v.* E. P. Breckenridge Co., 16 Ohio Cir. Ct. 12, 8 Ohio Cir. Dec. 231.

77. Moffatt *v.* Kenny, 174 Mass. 311, 54 N. E. 850.

78. Victory *v.* Baker, 67 N. Y. 366; Albert *v.* New York, 75 N. Y. App. Div. 553, 78 N. Y. Suppl. 355.

79. Wheeler *v.* St. Joseph Stock-Yards, etc., Co., 66 Mo. App. 260; McCann *v.* Thilemann, 36 Misc. (N. Y.) 145, 72 N. Y. Suppl. 1076. And see Henderson *v.* St. John, 14 N. Brunsw.

class of licensees comprehends those cases in which the law gives permission to enter a man's premises.[80]

(II) *Going Beyond Invitation.* Where a person has entered on the premises of another under invitation express or implied he is bound by that invitation and becomes a bare licensee if he goes to some other part of the premises for purposes of his own,[81] uses the premises for other purposes than that for which they were intended,[82] or remains on the premises beyond a reasonable time after permission has expired.[83]

(III) *Members of Fire Department.* In the absence of any statutory provision to the contrary a member of a public fire department who enters a building in the exercise of his duties is a mere licensee under a permission to enter given by the law, and the owner or occupant of the building owes him no duty to keep it in a reasonably safe condition.[84] The fact that the license has its origin

72; Gautret *v.* Egerton, L. R. 2 C. P. 371, 36 L. J. C. P. 191, 16 L. T. Rep. N. S. 17, 15 Wkly. Rep. 638.

80. Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512. See also Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588 [*affirming* 37 Ill. App. 344].

81. *Alabama.*— Louisville, etc., R. Co. *v.* Sides, 129 Ala. 399, 29 So. 798.

Georgia.— Etheredge *v.* Georgia Cent. R. Co., 122 Ga. 853, 50 S. E. 1003.

Massachusetts.— Blackstone *v.* Chelmsford Foundry Co., 170 Mass. 321, 49 N. E. 635.

Michigan.— Hutchinson *v.* Cleveland-Cliffs Iron Co., 141 Mich. 346, 104 N. W. 698; Pelton *v.* Schmidt, 97 Mich. 231, 56 N. W. 689; Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585.

Minnesota.— Trask *v.* Shotwell, 41 Minn. 66, 42 N. W. 699.

Missouri.— Barry *v.* Calvary Cemetery Assoc., 106 Mo. App. 358, 80 S. W. 709.

Nebraska.— Chesley *v.* Rocheford, 4 Nebr. (Unoff.) 777, 98 N. W. 429.

New Jersey.— Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478.

New York.— Flanagan *v.* Atlantic Alcatraz Asphalt Co., 37 N. Y. App. Div. 476, 56 N. Y. Suppl. 18; Castoriano *v.* Miller, 15 Misc. 254, 36 N. Y. Suppl. 419; Flannigan *v.* American Glucose Co., 11 N. Y. Suppl. 688.

North Carolina.— Quantz *v.* Southern R. Co., 137 N. C. 136, 49 S. E. 79.

Texas.— Slough *v.* W. G. Ragley Lumber Co., (Civ. App. 1903) 76 S. W. 779.

Vermont.— Pierce *v.* Whitcomb, 48 Vt. 127, 21 Am. Rep. 120.

Wisconsin.— Peake *v.* Buell, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946.

Applications of rule.— Where plaintiff, while on business in defendant's factory, was accidentally locked in the attic, so that he could not go down the stairway, and he requested one of defendant's workmen to take him down in the elevator, not knowing that it was out of order, he was not entitled to damages for injuries received by its fall. Leavitt *v.* Mudge Shoe Co., 69 N. H. 597, 45 Atl. 558. Where a butcher asked plaintiff, who owned a cat, to deliver it to him on his premises, and, when she did so, on her stating that it would run away unless it was put in a closet, opened a door sufficiently wide to allow the cat to be put in, and plaintiff, thinking it was a closet, walked in and fell down the cellar stairs, she could not recover for the injuries received, her invitation to enter on the premises extending only to the use of the premises sufficiently to put the cat through the open door. Ryerson *v.* Bathgate, 67 N. J. L. 337, 51 Atl. 708, 57 L. R. A. 307. Plaintiff having come to defendant's office at his invitation, on business, while waiting for him to be at leisure, requested and obtained permission to go to the toilet, in the basement, and was given the key thereto, it being locked. The way was blocked with boxes, of which defendant did not know, and, in going around them, in the poorly lighted basement, plaintiff fell into an elevator pit. It was held that plaintiff was a licensee, so that defendant was not liable for negligence at common law. Glaser *v.* Rothschild, 106 Mo. App. 418, 80 S. W. 332.

82. New York, etc., Tel. Co. *v.* Speicher, 59 N. J. L. 23, 39 Atl. 661.

Application of rule.— Where a person going to an elevator passes on to an elevated platform used as a passageway to the office, and on his way over the platform stops to talk with men in the street, and leans against a railing of the platform, and it gives way, and he is injured, as he was not using the platform for the purpose intended he cannot recover for the injuries received. Kinney *v.* Onsted, 113 Mich. 96, 71 N. W. 482, 67 Am. St. Rep. 455, 38 L. R. A. 665.

83. Clarkin *v.* Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020; Currier *v.* Dartmouth College, 117 Fed. 44, 54 C. C. A. 430.

84. *Illinois.*— Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588 [*affirming* 37 Ill. App. 344].

Indiana.— Woodruff *v.* Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198.

Minnesota.— Hamilton *v.* Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 99 Am. St. Rep. 350.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Anderson, (1905) 102 N. W. 89.

New Jersey.— Kelly *v.* Henry Muhs Co., 71 N. J. L. 358, 59 Atl. 23.

in a source other than the owner does not detract from the applicability of the rule that a mere naked license to enter premises does not impose an obligation on the owner to provide against the dangers of accident.[85]

4. Persons Invited — a. Duty to Use Care. The owner or occupant of premises who induces others to come upon it by invitation express or implied owes to them the duty of using reasonable or ordinary care to keep the premises in a safe and suitable condition,[86] so that they will not be unnecessarily or unreasonably exposed to danger.[87] And hence such persons may recover for injuries received

New York.— Eckes *v.* Stetler, 98 N. Y. App. Div. 76, 90 N. Y. Suppl. 473; Baker *v.* Otis Elevator Co., 78 N. Y. App. Div. 513, 79 N. Y. Suppl. 663, in this case it did not appear that he entered by any way which it was reasonable to anticipate he would take, or that the men who had preceded him had not themselves removed the guard-rail and moved the elevator.

Rhode Island.— Beehler *v.* Daniels, 19 R. I. 49, 31 Atl. 582; Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512.

85. Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588.

86. *Alabama.*— O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158.

Connecticut.— Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88.

Georgia.— Etheredge *v.* Georgia Cent. R. Co., 122 Ga. 853, 50 S. E. 1003.

Illinois.— Buckingham *v.* Fisher, 70 Ill. 121; John Spry Lumber Co. *v.* Duggan, 80 Ill. App. 394.

Indiana.— Fairmount Union Joint Stock Agricultural Assoc. *v.* Downey, 146 Ind. 503, 45 N. E. 696.

Kentucky.— Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761; Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Maryland.— Kann *v.* Meyer, 88 Md. 541, 41 Atl. 1065.

Massachusetts.— Wright *v.* Perry, 188 Mass. 268, 74 N. E. 328.

Minnesota.— Lauritsen *v.* American Bridge Co., 87 Minn. 518, 92 N. W. 475; Mastad *v.* Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 85 Am. St. Rep. 446, 53 L. R. A. 803; Corrigan *v.* Elsinger, 81 Minn. 42, 83 N. W. 492; Emery *v.* Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Trask *v.* Shotwell, 41 Minn. 66, 42 N. W. 699; Nash *v.* Minneapolis Mill Co., 24 Minn. 501, 31 Am. Rep. 349.

Missouri.— Meyers *v.* Chicago, etc., R. Co., 103 Mo. App. 268, 77 S. W. 149, holding that wagon-way leading to stock-yards need not be kept absolutely safe.

Nebraska.— Tucker *v.* Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321.

New Jersey.— Smith *v.* Jackson, 70 N. J. L. 183, 56 Atl. 118; Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505; Sebeck *v.* Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 46 Atl. 631, 81 Am. St. Rep. 512, 50 L. R. A. 199.

New York.— Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; Hart *v.* Grennell, 122 N. Y. 371, 25 N. E. 354; Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Ackert *v.* Lansing, 59 N. Y. 646; Schnizer *v.* Phillips, 108 N. Y. App. Div. 17, 95 N. Y. Suppl. 478; Withers *v.* Brooklyn Real Estate Exch., 106 N. Y. App. Div. 255, 94 N. Y. Suppl. 328; Dutton *v.* Greenwood Cemetery Co., 80 N. Y. App. Div. 352, 80 N. Y. Suppl. 780; Huebner *v.* Hammond, 80 N. Y. App. Div. 122, 80 N. Y. Suppl. 295 [*affirmed* in 177 N. Y. 537, 69 N. E. 1124]; Grifhahn *v.* Kreizer, 62 N. Y. App. Div. 413, 70 N. Y. Suppl. 973; Flanagan *v.* Atlantic Alcatraz Asphalt Co., 37 N. Y. App. Div. 476, 56 N. Y. Suppl. 18; Miller *v.* Brewster, 32 N. Y. App. Div. 559, 53 N. Y. Suppl. 1; Dinnihan *v.* Lake Ontario Beach Imp. Co., 8 N. Y. App. Div. 509, 40 N. Y. Suppl. 764; Baker *v.* Byrne, 58 Barb. 438.

Rhode Island.—Beehler *v.* Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512.

Texas.— Fry *v.* Hillan, (Civ. App. 1896) 37 S. W. 359.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169.

Virginia.— Richmond, etc., R. Co. *v.* Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

West Virginia.— Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

Wisconsin.— Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

England.— Marney *v.* Scott, [1899] 1 Q. B. 986, 68 L. J. Q. B. 736, 47 Wkly. Rep. 666; Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357; Smith *v.* London, etc., Docks Co., L. R. 3 C. P. 326, 37 L. J. C. P. 217, 18 L. T. Rep. N. S. 403, 16 Wkly. Rep. 728; The Moorcock, 14 P. D. 64, 6 Aspin. 373, 58 L. J. P. D. & Adm. 73, 60 L. T. Rep. N. S. 654, 37 Wkly. Rep. 439 [*followed* in Butler *v.* McAlpine, [1904] 2 Ir. 445]; Thomson *v.* North Eastern R. Co., 2 B. & S. 119, 8 Jur. N. S. 991, 31 L. J. Q. B. 194, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 404, 110 E. C. L. 119; The Ville de St. Nazaire, 52 Wkly. Rep. 68.

See 37 Cent. Dig. tit. "Negligence," § 42.

87. Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; Phillips *v.* Burlington

owing to the dangerous condition of the premises known to him and not to them.[88] But a defendant is not bound to keep his premises absolutely safe.[89]

b. What Constitutes Invitation — (i) *In General.* An implied invitation creating the obligation to use reasonable care arises from the conduct of the parties, and its essence is that the owner knew or ought to have known that something he was doing or permitting to be done might give rise to a natural belief that he intended that to be done which his conduct had led plaintiff to believe he had intended.[90] It is not enough that the user believed that the use was intended, he must bring his belief home to the owner by pointing out some act or conduct of his that afforded a reasonable basis for such a belief.[91] Invitation has been implied where the space adjoining a highway has been paved and its use as a sidewalk permitted.[92] But merely paving a private way is not a sufficient inducement to the public to enter for their own convenience.[93] One, however, who holds out a way as a public street is liable.[94]

(ii) *Invitation From Benefit* — (a) *In General.* An invitation to enter upon the premises exists where some benefit accrues or is supposed to accrue to the one who extends the invitation.[95] Ordinarily an invitation will not be implied unless

Library Co., 55 N. J. L. 307, 27 Atl. 478; Hart *v.* Grennell, 122 N. Y. 371, 25 N. E. 354; Larkin *v.* O'Neill, 119 N. Y. 221, 23 N. E. 563; Wilson *v.* Olano, 28 N. Y. App. Div. 448, 51 N. Y. Suppl. 109; Sunderlin *v.* Hollister, 4 N. Y. App. Div. 478, 38 N. Y. Suppl. 682; Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 26 L. ed. 235.

88. Chapin *v.* Walsh, 37 Ill. App. 526; Davis *v.* Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368; Carleton *v.* Franconia Iron, etc., Co., 99 Mass. 216; Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 26 L. ed. 235; Indermaur *v.* Dames, L. R. 2 C. P. 311, 36 L. J. C. P. 181, 16 L. T. Rep. N. S. 293, 15 Wkly. Rep. 434; Paddock *v.* North Eastern R. Co., 18 L. T. Rep. N. S. 60.

89. Wilson *v.* Kelly, 52 Ill. App. 124; Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822; Meyers *v.* Chicago, etc., R. Co., 103 Mo. App. 268, 77 S. W. 149; McKeon *v.* Louis Weber Bldg. Co., 84 N. Y. Suppl. 913.

90. Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505; York *v.* Canada Atlantic Steamship Co., 22 Can. Sup. Ct. 167.

Application and limits of rule.— A porter took plaintiff through a dark, narrow passage and said they would take the elevator, and from the action of the porter in taking hold of a rope plaintiff thought the elevator was about to start and stepped to go on to it, but as it was on the next floor above, he fell to the basement. It was held that defendant was liable. Sheyer *v.* Lowell, 134 Cal. 357, 66 Pac. 307. Where one constructs a walk on his property leading from the street to his opera house, and beyond that to another street and permits the public to use it, he is bound to keep it reasonably safe for travel; and to leave an open area in it, guarded only by a railing nineteen inches high, is negligence. Brezee *v.* Powers, 80 Mich. 172, 45 N. W. 130. The facts that the houses are near together, and that the only approach to a rear house from the front is over such strip, do not constitute an invitation to pass over an eight-foot strip between two houses, in the absence of evidence that there is no lawful passage from the rear house to a street, so as to render the owner of a portion of the strip liable for an injury caused by plaintiff's falling into an excavation thereon. Reardon *v.* Thompson, 149 Mass. 267, 21 N. E. 369.

91. Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505.

92. Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; Sears *v.* Merrick, 175 Mass. 25, 55 N. E. 476; Beck *v.* Carter, 68 N. Y. 283, 23 Am. Rep. 175; Rachmel *v.* Clark, 205 Pa. St. 314, 54 Atl. 1027, 62 L. R. A. 959.

93. Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459 [*distinguishing* Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22].

94. Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Marsh *v.* Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630, holding that where a city graded a street across private property without acquiring title thereto, and the owner constructed a sidewalk connecting a building on his premises with the street, and held it out as a thoroughfare, and plaintiff was injured by defects therein, he had a right of action against such owner. "The inducement, or implied invitation, in these cases, is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be coextensive with the inducement or implied invitation." Plummer *v.* Dill, 156 Mass. 426, 430, 31 N. E. 128, 32 Am. St. Rep. 463.

95. Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599.

the property is designed or used by the owner for public purposes and the person entering on the premises is carrying out a purpose which is to the common interest or advantage of the owner and himself,[96] as in the case of one going on property on the business of the owner.[97] It is not necessary that the benefit to the owner should be a financial one.[98] It is enough that defendant in giving the invitation is actuated only by motives of friendship or charity.[99] To come under an implied invitation as distinguished from a mere license the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.[1]

(B) *Customers and Persons at Public Resorts.* This invitation arises in the case of customers who for the purpose of trade or other business enter a store,[2] or other place of business,[3] and in the case of persons attending public places of amusement,[4] or other places where persons have paid for the privilege of being or placing their property.[5] So the invitation is applied in the case of

96. Plummer *v.* Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Trask *v.* Shotwell, 41 Minn. 66, 42 N. W. 699; Galveston Oil Co. *v.* Morton, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611; Simonton *v.* Citizens' Electric Light, etc., Co., 28 Tex. Civ. App. 374, 67 S. W. 530; Holmes *v.* North Eastern R. Co., L. R. 6 Exch. 123, 40 L. J. Exch. 121, 24 L. T. Rep. N. S. 69.

97. Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761.

98. Davis *v.* Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368.

99. Davis *v.* Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368, holding that if a religious society gives notice of a meeting to be held at its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee.

1. Plummer *v.* Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

2. *Alabama.*— O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158.

Maine.— Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Massachusetts.— Larue *v.* Farren Hotel Co., 116 Mass. 67.

Minnesota.—Corrigan *v.* Elsinger, 81 Minn. 42, 83 N. W. 492.

New York.— Hart *v.* Grennell, 122 N. Y. 371, 25 N. E. 354; Graham *v.* Joseph H. Bauland Co., 97 N. Y. App. Div. 141, 89 N. Y. Suppl. 595.

South Carolina.—Freer *v.* Cameron, 4 Rich. 228, 55 Am. Dec. 663.

Texas.— Northern Texas Constr. Co. *v.* Crawford, (Civ. App. 1905) 87 S. W. 223, holding that plaintiff who went to a cotton gin at the request of a customer to get a bale of cotton which had been baled for such customer was there by invitation.

See 37 Cent. Dig. tit. "Negligence," § 42.

3. Saloon.— Drennan *v.* Grady, 167 Mass. 415, 45 N. E. 741.

Hotel.— Texas Loan Agency *v.* Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63; Hasson *v.* Wood, 22 Ont. 66.

Restaurant or places where meals were served.— Schnizer *v.* Phillips, 108 N. Y. App. Div. 17, 95 N. Y. Suppl. 478.

Custom sawmill.—Ackert *v.* Lansing, 59 N. Y. 646.

Cotton ginnery.—Horton *v.* Harvey, 119 Ga. 219, 46 S. E. 70.

Warehouse.—Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Holmes *v.* North Eastern R. Co., L. R. 6 Exch. 123, 40 L. J. Exch. 121, 24 L. T. Rep. N. S. 69 [*affirming* L. R. 4 Exch. 254, 38 L. J. Exch. 161, 20 L. T. Rep. N. S. 616, 17 Wkly. Rep. 800].

4. Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282 (holding that a party in letting his hall for a public purpose holds out to the public that it is safe); Brazier *v.* Polytechnic Inst., 1 F. & F. 507.

Public toboggan slide.— Barrett *v.* Lake Ontario Beach Imp Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829.

Merry-go-round.— Flynn *v.* Toronto Industrial Exhibition Assoc., 9 Ont. L. Rep. 582.

Fair.— Latham *v.* Roach, 72 Ill. 179; Francis *v.* Cockrell, L. R. 5 Q. B. 501, 10 B. & S. 850, 39 L. J. Q. B. 291, 23 L. T. Rep. N. S. 466, 18 Wkly. Rep. 1205.

Park maintained by railway company.— Bass *v.* Reitdorf, 25 Ind. App. 650, 58 N. E. 95; Richmond, etc., R. Co. *v.* Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

5. Dutton *v.* Greenwood Cemetery Co., 80 N. Y. App. Div. 352, 80 N. Y. Suppl. 780; Marshall *v.* Toronto Industrial Exhibition Assoc., 1 Ont. L. Rep. 319 [*affirmed* in 2 Ont. L. Rep. 62].

Illustration.—Owners of a steamer, desiring to make repairs on her, contracted with the owners of the marine railway to take the steamer out of the water for repairs, the owners of the steamer to use the railway, and employ their own men on the repairs and furnish their own material, paying a certain sum per day for the use of the railway. It was held that the relation of the parties was that of licensor and licensee. Moore *v.* Stetson, 96 Me. 197, 52 Atl. 767.

prospective tenants,[6] and prospective purchasers,[7] or one accompanying the prospective purchaser who is interested in the purchase,[8] and those who come on business with tenants.[9] There is no implied invitation to those coming on premises on business with employees.[10] And a person coming into a store on his own business is a licensee merely.[11]

(III) *Invitation From Employment.* An employee entering on premises to perform work there, although not employed directly by the owner,[12] or in the employment of another in joint occupancy of the premises,[13] and one who goes to deliver goods to the owners or occupants of the premises[14] is there by implied invitation. So one is on premises by implied invitation where he is learning an occupation there by leave of the owner's agent, with the expectation that if he became competent he would be taken into the owner's employment.[15] And so is a person seeking employment on invitation of the owner,[16] or his agent, in accordance with a recognized custom.[17]

6. Wright *v.* Lefever, 51 Wkly. Rep. 149. And see Withers *v.* Brooklyn Real Estate Exch., 106 N. Y. App. Div. 255, 94 N. Y. Suppl. 328; Fogarty *v.* Bogart, 59 N. Y. App. Div. 114, 69 N. Y. Suppl. 47. But see McMullin *v.* Archibald, 22 Nova Scotia 146.

Illustration.—In the absence of direction to apply elsewhere, a notice, in the window of an apartment house, "Flat to Let," constituted an implied invitation to persons desiring such apartments to apply there for information concerning the flat offered. Fogarty *v.* Bogart, 43 N. Y. App. Div. 430, 60 N. Y. Suppl. 81.

7. Smith *v.* Jackson, 70 N. J. L. 183, 56 Atl. 118.

8. Davis *v.* Ferris, 29 N. Y. App. Div. 623, 53 N. Y. Suppl. 571, wife of prospective purchaser.

9. Miller *v.* Hancock, [1893] 2 Q. B. 177, 57 J. P. 758, 69 L. T. Rep. N. S. 214, 4 Reports 478, 41 Wkly. Rep. 578.

10. Galveston Oil Co. *v.* Morton, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611.

11. Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261.

12. *Georgia.*—Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

Illinois.— John Spry Lumber Co. *v.* Duggan, 182 Ill. 218, 54 N. E. 1002 [*affirming* 80 Ill. App. 394].

Kansas.— Iola Portland Cement Co. *v.* Moore, 65 Kan. 762, 70 Pac. 864.

Missouri.— Young *v.* Waters-Pierce Oil Co., 185 Mo. 634, 84 S. W. 929.

New Jersey.— Dettmering *v.* English, 64 N. J. L. 16, 44 Atl. 855, 48 L. R. A. 106.

New York.— Huebner *v.* Hammond, 177 N. Y. 537, 69 N. E. 1124 [*affirming* 80 N. Y. App. Div. 122, 80 N. Y. Suppl. 295]; McGovern *v.* Standard Oil Co., 11 N. Y. App. Div. 558, 42 N. Y. Suppl. 595; Ferris *v.* Aldrich, 12 N. Y. Suppl. 482.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169.

West Virginia.— Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

England.— Indermaur *v.* Dames, L. R. 2 C. P. 311, 36 L. J. C. P. 181, 16 L. T. Rep. N. S. 293, 15 Wkly. Rep. 434.

Applications of rule.— Where plaintiff was employed by a contractor in erecting a building for defendant near defendant's private railroad track, defendant owed plaintiff the duty to exercise ordinary care to avoid injuring him with cars passing on the track. Sack *v.* St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79. A coal company into whose yard a railway track is built so as to permit of the unloading of coal cars in the yard is bound in piling the coal beside the track to use such care as an ordinarily prudent person would have exercised to avoid injury to employees of the railway company running cars into the yard. Fry *v.* Hillan, (Tex. Civ. App. 1896) 37 S. W. 359. The owners of property adjoining a railroad, who construct a side-track, so as to have cars set in to and removed from their premises, cannot construct anything thereon, for their own convenience, which may injure the employees of the company, using ordinary care, while setting in or removing cars. Smith *v.* Newark Ice, etc., Co., 8 Ohio S. & C. Pl. Dec. 283.

13. Gile *v.* J. W. Bishop Co., 184 Mass. 413, 68 N. E. 837, holding that where a construction company is engaged in altering a building of a manufacturing company, which at the same time continues its business, so that the construction company is not in the exclusive occupation of the grounds, but the employees of the manufacturing company are expected to use them so far as necessary, such an employee is not a mere licensee, as against the construction company, and the latter is bound to use reasonable care to prevent his injury.

14. Wright *v.* Perry, 188 Mass. 268, 74 N. E. 328; Grifhahn *v.* Kreizer, 62 N. Y. App. Div. 413, 70 N. Y. Suppl. 973; Miller *v.* Brewster, 32 N. Y. App. Div. 559, 53 N. Y. Suppl. 1; Wilson *v.* Olano, 28 N. Y. App. Div. 448, 51 N. Y. Suppl. 109.

15. Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630.

16. Warner *v.* Mier Carriage Co., 26 Ind. App. 350, 58 N. E. 554, 59 N. E. 873.

17. McDonough *v.* James Reilly Repair, etc., Co., 45 Misc. (N. Y.) 334, 90 N. Y. Suppl. 358; St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450.

(iv) *Invitation From Duty.* It is generally held that one who is on premises in the performance of a duty is there by implied invitation.[18] This rule has been applied to employees of government,[19] or municipality,[20] but not to members of a public fire department who enter to protect the property from fire.[21]

(v) *Invitation From Acquiescence.* While invitation is not shown by mere toleration of a trespass,[22] or passive acquiescence in permitting people upon the premises,[23] or mere permission for them to be there,[24] or by use without the owner's knowledge,[25] yet, where the use has been so long continued as to lead the public to think the owner invited such use, a liability has been held to arise as from an implied invitation.[26] Thus, where there had been a custom for persons to enter on premises for certain purposes, with the acquiescence of the owner, an invitation will be implied.[27] But occasional use in disregard of defendant's apparent intentions is not sufficient.[28]

(vi) *Extent of Invitation.* The implied invitation to a customer extends to ways of ingress and egress,[29] and it has been held that this is so even though

18. Iola Portland Cement Co. *v.* Moore, 65 Kan. 762, 70 Pac. 864; Young *v.* Waters-Pierce Oil Co., 185 Mo. 634, 84 S. W. 929; Smith *v.* Newark Ice, etc., Co., 8 Ohio S. & C. Pl. Dec. 283; Kitchen *v.* Riter-Conley Mfg. Co., 207 Pa. St. 558, 56 Atl. 1083.

19. Young *v.* People's Gas, etc., Co., 128 Iowa 290, 103 N. W. 788.

Illustration.— A United States revenue storekeeper on duty at a private distillery, and required to daily inspect all parts of it, is present at the implied invitation of the distiller, and is not a mere licensee. Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

20. Toomey *v.* Sanborn, 146 Mass. 28, 14 N. E. 921. A policeman who, in the discharge of his duty, enters in the night-time a building the doors of which he finds open, and falls down an elevator well, left unguarded by the railing required by the statute, may maintain an action against the owner of the building. Parker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450.

21. See *supra*, V, E, 3, b, (III).

22. Reardon *v.* Thompson, 149 Mass. 267, 21 N. E. 369; Ryan *v.* Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 25 L. R. A. 724 [*reversing* 78 Hun 1, 28 N. Y. Suppl. 1097]; McCann *v.* Thilemann, 36 Misc. (N. Y.) 145, 72 N. Y. Suppl. 1076; Breckenridge *v.* Bennett, 7 Kulp (Pa.) 95.

Where one merely suffers others to cross his land, without express or implied permission, he is not bound to keep the premises free from pitfalls or obstructions. Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783.

23. Formall *v.* Standard Oil Co., 127 Mich. 496, 86 N. W. 946; Furey *v.* New York Cent., etc., R. Co., 67 N. J. L. 270, 51 Atl. 505.

Merely abstaining from driving children off a lot is not an invitation which would impose any duty or responsibility for its condition. Galligan *v.* Metacomet Mfg. Co., 143 Mass. 527, 10 N. E. 171.

24. Gibson *v.* Sziepienski, 37 Ill. App. 601; McCoy *v.* Walsh, 186 Mass. 369, 71 N. E. 792; Forbick *v.* General Electric Co., 45 Misc. (N. Y.) 452, 92 N. Y. Suppl. 36; Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

25. Fleming *v.* Texas Loan Agency, 24 Tex. Civ. App. 203, 58 S. W. 971.

26. Morrow *v.* Sweeney, 10 Ind. App. 626, 38 N. E. 187; De Tarr *v.* Ferd-Heim Brewing Co., 62 Kan. 188, 61 Pac. 689; Lawson *v.* Shreveport Waterworks Co., 111 La. 73, 35 So. 390; Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. And see *infra*, V, F, 6, c.

Case not within rule.— Defendant's railroad on each side of a creek in a city was built on a dump. A bridge had been constructed over the creek, with stone abutments thirty-nine feet high, similar to those constructed by railroads generally, so laid as to form steps leading from the base of the dump to the railroad track on each side. Across defendant's railroad at that point was a beaten track, used by the public, connecting with the stone stairway; but there was no obstruction on the precipice side of the abutment to prevent a person from falling over the same, and defendant's right-of-way fence did not extend across the abutment. It was held that such facts were insufficient to show an invitation or permission to the public to use the abutment as a passageway. Williamson *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 279.

27. Huebner *v.* Hammond, 80 N. Y. App. Div. 122, 80 N. Y. Suppl. 295 [*affirmed* in 177 N. Y. 537, 69 N. E. 1124]; McDonough *v.* James Reilly Repair, etc., Co., 45 Misc. (N. Y.) 334, 90 N. Y. Suppl. 358.

28. Dooley *v.* Degnon-McLean Contracting Co., 45 Misc. (N. Y.) 593, 91 N. Y. Suppl. 30.

29. Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Lepnick *v.* Gaddis, 72 Miss. 200, 16 So. 213, 48 Am. St. Rep. 547, 26 L. R. A. 686; Chapman *v.* Rothwell, E. B. & E. 168, 4 Jur. N. S. 1180, 27 L. J. Q. B. 315, 96 E. C. L. 168. And see Doherty *v.* McLean, 171 Mass. 399, 50 N. E. 938; Foster *v.* Portland Gold Min. Co., 114 Fed. 613, 52 C. C. A. 393.

not the proper ways, if the owner of the premises has permitted customers to enter by such ways without taking any precautions to prevent their use.[30] So it has been held that one owes to his customer the duty of protecting him from the unsafe condition of his store room, although the customer enters by a way which customers are not expressly or impliedly invited to use.[31] But the fact that a person enters a place of business as a customer does not give him a right to expect that every part of the premises shall be so arranged and kept that he may be in safety. It is only those parts where the customer is expected to be that the owner must keep in a safe condition,[32] or at such times as he may be expected.[33] But a storekeeper is under obligation to use proper care and diligence to keep reasonably safe such parts of the premises as customers may visit by invitation,[34] or to which they are allowed to go.[35] And evidence of custom as to parts of premises into which persons were admitted for the purpose of the invitation is competent to show the extent of the implied invitation.[36] An implied invitation to enter premises will not apply beyond the necessary lines of travel,[37] or parts intended for the public.[38]

30. Weinhold *v.* Acker, 49 N. Y. Super. Ct. 182.

31. Burk *v.* Walsh, 118 Iowa 397, 92 N. W. 65.

32. Cowen *v.* Kirby, 180 Mass. 504, 62 N. E. 968; League *v.* Stradley, 68 S. C. 515, 47 S. E. 975. And see Schmidt *v.* Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580.

Illustration.— It is not negligence to permit a properly constructed stairway to exist in the back end of the store room, where customers have no occasion to go; and the owner is not liable for injuries to a child caused by its falling down the stairway, although there are no barriers to prevent such an accident. Donnelly *v.* Kelly, 2 N. Y. City Ct. 11 note.

33. Cowen *v.* Kirby, 180 Mass. 504, 62 N. E. 968, holding that one who after putting his team in a livery stable, and receiving a check therefor, returned, and in attempting to put packages into the wagon is injured, is at best, in the absence of custom of business, or special invitation to do as he did, a licensee, to whom the owner owes no duty to keep the premises safe.

34. O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158 (back part of store); Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Reid *v.* Linck, 206 Pa. St. 109, 55 Atl. 849; League *v.* Stradley, 68 S. C. 515, 47 S. E. 975; Freer *v.* Cameron, 4 Rich. (S. C.) 228, 55 Am. Rep. 663 (behind counter).

Illustration.— Where a department store maintained a reception room for female patrons who were accompanied by their children, it was bound to keep such room in such a condition as would be reasonably free from danger to such children. Miller *v.* Geo. B. Peck Dry Goods Co., 104 Mo. App. 609, 78 S. W. 682.

35. True *v.* Meredith Creamery, 72 N. H. 154, 55 Atl. 893.

Illustration.— Defendant, a distilling company, sold its slop to parties who drove their wagons under the slop vat and filled them therefrom. Defendant had an employee to stir the slop, but customers who wished to do so were allowed to stir it for themselves. Plaintiff's intestate was repeatedly allowed to go upon the platform around the vat and stir the slop, and once, while doing so, the vat burst and he was scalded to death. It was held that deceased, being where he was with defendant's permission, and on business for their mutual benefit, was not a mere licensee, and defendant owed him the duty of ordinary care to see that the vat was kept in safe condition. Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

36. Wilsey *v.* Jewett Bros., etc., Co., 122 Iowa 315, 98 N. W. 114; Union Warehouse Co. *v.* Prewitt, 50 S. W. 964, 21 Ky. L. Rep. 61; Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478.

Illustration.— Evidence that people were in the habit of waiting about the trap-door through which plaintiff fell, for their mail, the store being used as a post-office building, was admissible, as tending to show that more care was required. Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

37. Walker *v.* Winstanley, 155 Mass. 301, 29 N. E. 518. An owner allowing the public to use a path across his land is not bound to keep his entire premises in safe condition for pedestrians, and, where a person leaves the path and wanders into a ditch partly concealed from view, the owner is not liable. Etheredge *v.* Georgia Cent. R. Co., 122 Ga. 853, 50 S. E. 1003.

38. Smith *v.* Hopkins, 120 Fed. 921, 57 C. C. A. 193. Where, in an action for injuries sustained by falling into an excavation in a walk over defendant's premises, it appeared that a considerable portion of the flagging had been removed and building operations were in progress on the premises, it was error to instruct that the jury might find that defendant had invited the public and plaintiff to use its grounds as a way, as an owner of premises whose business requires him to keep a pathway over them, and who permits, without objection, the public to use such pathway solely for the purpose of passing, with no connection with him or his business, cannot be said to invite such use. Bucbtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

5. Persons on Adjoining Premises.[39] One who uses his premises so negligently as to injure a person on adjoining premises is liable for the injuries sustained.[40] This rule has been applied in the case of unguarded excavations,[41] failure to repair standing walls,[42] and the construction of buildings in such manner that ice and snow must inevitably slide from the roof on to the adjoining premises.[43] And the rule has been held to apply, although the person injured is on the adjoining premises merely as a guest,[44] or as a trespasser.[45] But one is not required to erect barriers to prevent persons on adjoining buildings from falling on to his premises.[46]

F. Particular Instrumentalities and Places[47] — **1. Injurious Substances or Articles.** One who for his own purposes brings on his own lands and collects and keeps anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural result of its escape.[48] No liability, however, arises where the substance is not generally injurious,[49] or the injurious substances are such as grow naturally on the land.[50] So one who negligently places stock having a contagious disease near plaintiff's pasture, by reason of which his cattle are infected, is liable for the resulting damage;[51] and one who places his children who have a contagious disease in a boarding house, by reason of which the keeper of the house sustains pecuniary injury, is liable in damages.[52]

2. Defective and Dangerous Machinery. A person owning or controlling power operating machinery is bound to use reasonable care to make it safe for persons working near it and is liable for injuries resulting from failure to do so.[53] So one furnishing defective machinery is liable for injuries caused thereby.[54] But one

39. For injuries to property see Adjoining Landowners, 1 Cyc. 767 *et seq.*

40. Wilson *v.* American Bridge Co., 74 N. Y. App. Div. 596, 77 N. Y. Suppl. 820; Defiance Water Co. *v.* Olinger, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736.

41. Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793, holding that one who negligently makes an excavation on his own land that deprives the adjoining owner's lot of its lateral support, and thereby creates a pit into which a child of the occupant of such adjoining premises falls, is liable in damages to the father of such child, provided the father and child are free from contributory negligence.

42. Kinney *v.* Morley, 2 U. C. C. P. 226.

43. Ferris *v.* Detroit Bd. of Education, 122 Mich. 315, 81 N. W. 98.

44. Defiance Water Co. *v.* Olinger, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736.

45. Wilson *v.* American Bridge Co., 74 N. Y. App. Div. 596, 77 N. Y. Suppl. 820.

46. Woods *v.* Miller, 30 N. Y. App. Div. 232, 52 N. Y. Suppl. 217, holding that an owner of premises partly covered with buildings and bounded by party-walls is under no obligation to fence the top of the party-walls so as to protect persons who may be on the roof of adjoining buildings from falling over into his yard and there is no exception from this principle in favor of firemen.

47. See Electricity; Explosives; Gas; Steam.

48. Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244 (caustic soda); Laugabough *v.* Anderson, 22 Ohio Cir. Ct. 178, 12 Ohio Cir. Dec. 341 (crude oil stored in large quantities); Firth *v.* Bowling Iron Co., 3 C. P. D. 254, 47 L. J. C. P. 358, 38 L. T. Rep. N. S. 568, 26 Wkly. Rep. 558 (rusting and disintegration of wire fences); Crowhurst *v.* Amersham Parish Burial Bd., 4 Ex. D. 5, 48 L. J. Exch. 109, 39 L. T. Rep. N. S. 355, 27 Wkly. Rep. 95 (poisonous trees whose branches extend over adjoining lands); Fletcher *v.* Rylands, L. R. 1 Exch. 265, 12 Jur. 603, 35 L. J. Exch. 154, 13 L. T. Rep. N. S. 524, 14 Wkly. Rep. 799. And see Sprankle *v.* Bart, 25 Ind. App. 681, 58 N. E. 862.

Trespassing cattle.— There is no liability for injuries to trespassing cattle resulting from keeping dangerous substances on the premises. Morrison *v.* Cornelius, 63 N. C. 346; Ferguson *v.* Miami Powder Co., 9 Ohio Cir. Ct. 445, 6 Ohio Cir. Dec. 408.

49. Fennell *v.* Seguin St. R. Co., 70 Tex. 670, 8 S. W. 486, holding that the owner of a lot on which green millet is growing, who carelessly leaves his fence down, is not liable for the value of a cow killed by eating the millet, the court having found as a fact that it is not generally injurious to stock.

50. Brown *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1902) 69 S. W. 178.

51. Rouse *v.* Youard, 1 Kan. App. 270, 41 Pac. 426.

52. Smith *v.* Baker, 20 Fed. 709.

53. Kentucky Stove Co. *v.* Bryan, 84 S. W. 537, 27 Ky. L. Rep. 136. This is held to be so regardless of whether the person injured was an employee of the person so liable, or was working under a boss or independent contractor.

54. Cowley *v.* Sunderland, 6 H. & N. 565, 30 L. J. Exch. 127, 4 L. T. Rep. N. S. 720, 9 Wkly. Rep. 668.

who is in the regular discharge of his duty, and has taken the ordinary precautions to prevent accidents, is not liable for damage resulting from the breaking of a sledge hammer or other tool being used by him, causing injury to another.[55] Nor is one liable to his neighbor for damages to his property through defective machinery if he was not negligent.[56] The owner of a machine is not liable for injuries caused by its operation where the danger is one incident to the ordinary operation of the machine and all proper precautions have been taken,[57] where the injury resulted from following the instructions of the manufacturer,[58] where the appliance was of the best quality and no visible defects existed.[59]

3. Dangerous Instrumentalities or Operations. Persons using dangerous agencies are required to use the utmost care to prevent injuries and to adopt every known safeguard.[60] And one who places in the hands of or authorizes the use of by another person of a dangerous instrument or article under such circumstances that he has reason to know it is likely to produce injury is liable for natural consequences.[61]

4. Fires[62] — a. In General. In general it may be said that a person is not liable for damages caused by fire in the absence of negligence in its use.[63] One may lawfully kindle a fire on his own premises for purposes of husbandry, and he is not liable for injury caused by it to the property of another in the absence of negligence in its management.[64] Ordinary care and caution is all that is required;[65] that is, the fire should be kindled at a proper time, under ordinarily

55. Boyd *v.* Graham, 5 Mo. App. 403.

56. Davis *v.* Charleston, etc., R. Co., 72 S. C. 112, 51 S. E. 552.

Illustration.— Where one places a steam boiler upon his premises and operates it with such skill that it is no nuisance, he is not liable to his neighbor for damages caused by an explosion, in the absence of negligence on his part. Veith *v.* Hope Salt, etc., Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

57. Rector *v.* Syracuse Rapid Transit R. Co., 66 N. Y. App. Div. 395, 72 N. Y. Suppl. 745.

58. Kirby *v.* Delaware, etc., Canal Co., 48 N. Y. App. Div. 636, 62 N. Y. Suppl. 1110.

59. Witte *v.* Dieffenbach, 54 N. Y. Super. Ct. 508; Larose *v.* Laforest, 17 Quebec Super. Ct. 331.

60. Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Citizens' Light, etc., Co. *v.* Lepitre, 29 Can. Sup. Ct. 1; Montreal *v.* Gosney, 13 Quebec K. B. 214. And see Electricity; Explosives; Gas.

Loaded revolver.— It is actionable negligence for one, while adjusting the hammer of a loaded revolver, to hold it so that an accidental discharge would injure another. Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96.

61. Palm *v.* Ivorson, 117 Ill. App. 535; Chaddock *v.* Plummer, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 283, 14 L. R. A. 675, holding that a toy air-gun was not such an obviously dangerous weapon that it was negligence *per se for* defendant to put it in the hands of a small boy.

62. Liability of: Railroads see Railroads. Vessels see Shipping. Warehousemen see Warehousemen.

Wilful burning see Fires.

63. Dolby *v.* Hearn, 1 Marv. (Del.) 153, 37 Atl. 45 (holding that a person burning slabs on his own premises is not liable for the damage by the escape of the fire unless such escape was caused by his negligence); Read *v.* Pennsylvania R. Co., 44 N. J. L. 280; Lansing *v.* Stone, 37 Barb. (N. Y.) 15, 14 Abb. Pr. 199.

64. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Culver, 60 Ind. 469; Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215.

Iowa.— Hanlon *v.* Ingram, 3 Iowa 81.

Kansas.— Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

Missouri.— Miller *v.* Martin, 16 Mo. 508, 57 Am. Dec. 242.

Nebraska.—Vansyoc *v.* Freewater Cemetery Assoc., 63 Nebr. 143, 88 N. W. 162; Bock *v.* Grooms, 2 Nebr. (Unoff.) 803, 92 N. W. 603.

New York.— Hays *v.* Miller, 6 Hun 320 [*affirmed* in 70 N. Y. 112]; Calkins *v.* Barger, 44 Barb. 424; Lansing *v.* Stone, 37 Barb. 15, 14 Abb. Pr. 199 (in which it was held that St. 6 Anne, c. 3, reënacted by 14 Geo. III, providing that no action shall be had against any person in whose building or on whose estate any fire shall accidentally begin, is part of the common law of this state); Clark *v.* Foot, 8 Johns. 421.

North Carolina.— Averitt *v.* Murrell, 49 N. C. 323.

South Carolina.— Gregory *v.* Layton, 36 S. C. 93, 15 S. E. 352, 31 Am. St. Rep. 857.

Wisconsin.— Fahn *v.* Reichart, 8 Wis. 255, 76 Am. Dec. 237.

Canada.—Chaz *v.* Les Cistercians Reformes, 12 Manitoba 330 [*following* Owens *v.* Burgess, 11 Manitoba 75; Buchanan *v.* Young, 23 U. C. C. P. 101].

See 37 Cent. Dig. tit. "Negligence," § 28.

65. *Iowa.*— Hanlon *v.* Ingram, 3 Iowa 81; De France *v.* Spencer, 2 Greene 462, 52 Am. Dec. 533.

New York.— Hitchcock *v.* Riley, 44 Misc. 260, 89 N. Y. Suppl. 890.

favorable circumstances and in a reasonably prudent manner.[66] The owner will of course be liable for injuries from negligence in starting fires or in not using proper precautions to prevent their spread.[67] He is not at liberty to kindle fires, when on account of the time, manner, or circumstances it appears probable that damage to others will result,[68] such as setting it in a dry time,[69] or without guarding it sufficiently to prevent its spreading.[70] Nor should he set it near the property of another in matter through which it is likely to spread to such property from inflammable matter.[71] It is immaterial whether the negligence consisted in the time or manner of kindling or the means used to prevent its spread,[72] and where a fire is negligently kept it is immaterial in what manner it spreads to the premises of another.[73] If the fire would after escaping have certainly in any event have destroyed plaintiff's property an effort by defendant to protect the property is immaterial. It then becomes simply a question whether defendant was careful or negligent in setting out the fire and attempting to control it.[74] Failure to provide means for extinguishing fires is sometimes held to be negligence even though the fire originated without his fault.[75] Such failure will not render him liable if it would not have extinguished the fire.[76] One who kindles a fire on his own land is not bound to anticipate and guard against a whirlwind or any extraordinary high winds that may ensue, if before setting it he took such precautions as a man of ordinary caution would exercise to confine it to his own premises and exercised the same care and watchfulness to prevent its escape while burning.[77]

Pennsylvania.— McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584.

Texas.— Meadows *v.* Truesdell, (Civ. App. 1900) 56 S. W. 932.

Wisconsin.— Nass *v.* Schulz, 105 Wis. 146, 81 N. W. 133.

See 37 Cent. Dig. tit. "Negligence," § 28.

66. Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215; Dewey *v.* Leonard, 14 Minn. 153.

67. Hanlon *v.* Ingram, 1 Iowa 108; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Whether the owner was guilty of gross negligence or merely want of ordinary care see Barnard *v.* Poor, 21 Pick. (Mass.) 378.

68. Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215; Bolton *v.* Calkins, 102 Mich. 69, 60 N. W. 297; Needham *v.* King, 95 Mich. 303, 54 N. W. 891; Dewey *v.* Leonard, 14 Minn. 153.

69. Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215; Garrett *v.* Freeman, 50 N. C. 78. See also Beaton *v.* Springer, 24 Ont. App. 297. But see Stuart *v.* Hawley, 22 Barb. (N. Y.) 619, holding it not negligence to burn rubbish at the usual time for doing so, although it is a dry time.

70. Harris *v.* Savage, 70 Kan. 561, 79 Pac. 113; Hewey *v.* Nourse, 54 Me. 256; Bachelder *v.* Heagan, 18 Me. 32; Bolton *v.* Calkins, 102 Mich. 69, 60 N. W. 297; Jesperson *v.* Phillips, 46 Minn. 147, 48 N. W. 770.

71. Cleland *v.* Thornton, 43 Cal. 437; McCornack *v.* Sornberger, 56 Ill. App. 496; Garrett *v.* Freeman, 50 N. C. 78.

Illustration.— Setting fire to a field of high wheat stubble in which are standing stacks of wheat of another, where there is nothing reasonably calculated to prevent the fire from destroying the stacks, is, if the stacks are destroyed, actionable negligence, although the person has the right to burn the stubble and had no intent to burn the stacks. Harris *v.* Savage, 70 Kan. 561, 79 Pac. 113.

72. Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215; Hewey *v.* Nourse, 54 Me. 256.

73. Ayer *v.* Starkey, 30 Conn. 304; Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63.

74. Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

75. Cowley *v.* Colwell, 91 Mich. 537, 52 N. W. 73; McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494.

Circumstances on which negligence depends. — Whether the owner of a building is guilty of negligence in failing to provide means to extinguish fires which will render him liable for an injury to property of another therein by fire which originated without his fault or negligence depends upon the character of the building and its contents and the purpose for which they are used. World's Columbian Exposition Co. *v.* Republic of France, 91 Fed. 64, 33 C. C. A. 333.

76. Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305.

77. *Indiana.*— Pennsylvania Co. *v.* Whitlock, 99 Ind. 16, 50 Am. Rep. 71.

Kansas.— Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

Michigan.— Bolton *v.* Calkins, 102 Mich. 69, 60 N. W. 297; Needham *v.* King, 95 Mich. 303, 54 N. W. 891. But if the fire was negligently set defendant will not be released from liability from the consequences of its spreading and setting fire to the premises of another, although a wind renders the damage greater than ordinary. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

Missouri.— Miller *v.* Martin, 16 Mo. 508, 57 Am. Dec. 242.

Nebraska.— Bock *v.* Grooms, 2 Nebr. (Unoff.) 803, 92 N. W. 603.

b. Chimneys, Flues, Furnaces, and Engines. Persons in the lawful use of fire for manufacturing, mechanical, or propelling purposes are held to the exercise of ordinary care to prevent it from injuring others;[78] and if, notwithstanding the use of such a degree of care, adjoining property is destroyed, no liability is incurred. Negligence or misconduct on the part of defendant must be shown in order to render him liable to one whose property has been destroyed.[79] What constitutes ordinary care and prudence depends upon the circumstances of the particular case.[80] The greater the danger of communicating fire to the property of others, the more precautions and the greater vigilance will be necessary in order to measure up to the requirements of ordinary care.[81] Thus, by reason of the location of a manufacturing plant, a high degree of care and skill may be required, both in the construction and in the use of a furnace and chimney.[82] Where a manufacturing plant is situated in the center of a populous city, the owner is bound to use such appliances, adapted to the chimneys thereof, as will most efficiently arrest the escape of sparks,[83] whether such apparatus has been previously used on that kind of a chimney or not,[84] particularly where he has notice of the danger from such sparks.[85] He is not, however, an insurer against

New York.— Calkins *v.* Barger, 44 Barb. 424; Stuart *v.* Hawley, 22 Barb. 619, the fact that defendant did nothing to prevent the fire from spreading did not render him liable for injury caused thereby.

North Carolina.— Averitt *v.* Murrell, 49 N. C. 323.

See 37 Cent. Dig. tit. "Negligence," § 28.

Illustration.—A farmer, in the middle of April, after heavy rains, set fire to stumps on plowed lands, and at the end of the month a sudden gale of wind swept the fire from the stumps to an adjoining lot of another which contained much dry material. The farmer and others were unable to extinguish the fire, and by revival of the gale it blew on to a second lot, belonging to a third person, and burned up his woodpile. It was held that there was no evidence of negligence sufficient to render the farmer liable. Hitchcock *v.* Riley, 44 Misc. (N. Y.) 260, 89 N. Y. Suppl. 890.

78. *Arkansas.*— Planters' Warehouse, etc., Co. *v.* Taylor, 64 Ark. 307, 42 S. W. 279.

Maine.— York *v.* Cleaves, 97 Me. 413, 54 Atl. 915.

Michigan.— Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580.

New York.— Briggs *v.* New York Cent., etc., R. Co., Sheld. 402 [*affirmed* in Sheld. 433].

Wisconsin.— Rylander *v.* Laursen, 124 Wis. 2, 102 N. W. 341.

See 37 Cent. Dig. tit. "Negligence," § 29.

79. *Indiana.*— Gagg *v.* Vetter, 41 Ind. 259; Gagg *v.* Vetter, 41 Ind. 228, 13 Am. Rep. 322.

Minnesota.— Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513.

New Hampshire.— Gerrish *v.* Whitfield, 72 N. H. 222, 55 Atl. 551.

New York.—Briggs *v.* New York Cent., etc., R Co., Sheld. 402 [*affirmed* in Sheld. 433]; Loeber *v.* Roberts, 60 N. Y. Super. Ct. 202, 17 N. Y. Suppl. 378.

Canada.—Brewer *v.* Humble, 26 N. Brunsw. 495.

But see Lawton *v.* Giles, 90 N. C. 374.

80. **The degree of care required in regard to steam threshers** is the same as that of railroad locomotives. Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. N. S. 530.

Leaving a stove red hot with an oil can upon it and inflammable material around it is negligence. Read *v.* Pennsylvania R. Co., 44 N. J. L. 280.

81. Gagg *v.* Vetter, 41 Ind. 228, 13 Am. Rep. 322; Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513; Collins *v.* George, 102 Va. 509, 46 S. E. 684.

A furnace requiring a great degree of heat in its operation is dangerous to adjoining properties and requires a degree of care in its management proportionate to the danger. Hauch *v.* Hernandez, 41 La. Ann. 992, 6 So. 783.

82. Gagg *v.* Vetter, 41 Ind. 228, 13 Am. Rep. 322.

83. Gagg *v.* Vetter, 41 Ind. 228, 13 Am. Rep. 322 (holding that one is bound to avail himself of all the discoveries which science and experience have put within his reach); Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580; Hoyt *v.* Jeffers, 30 Mich. 181; Biggs *v.* New York Cent., etc., Co., 72 N. Y. 26; Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. N. S. 530. See also Holman *v.* Boston Land, etc., Co., 20 Colo. 7, 36 Pac. 797, holding that the law requires at the hands of one engaged in a hazardous business only the exercise of reasonable efforts to furnish good and well constructed machinery adapted to the work, combining the greatest safety with practical use.

Failure to have a spark arrester upon a stationary engine is not *per se* negligence (Collins *v.* George, 102 Va. 509, 46 S. E. 684; Peers *v.* Elliott, 21 Can. Sup. Ct. 19); but where wood is used for fuel by a steam mill in a city, the failure to employ a spark arrester may be deemed negligence (Lawton *v.* Giles, 90 N. C. 374).

84. Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580; Hoyt *v.* Jeffers, 30 Mich. 181.

85. John Mouat Lumber Co. *v.* Wilmore,

accident,[86] nor is he bound to provide such safe machinery that by the exercise of ordinary care absolute security will be afforded.[87] Merely providing proper appliances to arrest sparks will not relieve from liability if the engine is negligently operated.[88]

c. Statutory Provisions. Statutes limiting liability for damages from fire to those where the fire is due to negligence is only an affirmance of the common law.[89] But where setting of fire on land at certain times is forbidden violation of the statute has been held negligence *per se*.[90] Under a statute rendering a person liable for setting fire on certain land he cannot be held liable where the fire was set on other land but spread to the forbidden land.[91] But where the statute forbids setting fire to stubble defendant will be liable if he sets fire to anything likely to set such stubble on fire.[92]

5. Machinery or Places Attractive to Children — a. Turn-Tables. The rule as to liability for injuries to children from attractive machinery and places had its development largely from injuries on railroad turn-tables as an attractive thing to play with, the danger of which they could not appreciate, and in many cases it is held that leaving a turn-table unguarded and unlocked in a place accessible to children is negligence rendering the railroad company liable for resulting injuries to them.[93] And while the tendency is to limit the rule it applies to cases where the turn-table was located in a public place where children were accustomed to congregate and play to the knowledge of the company.[94] According to other decisions children who are attracted to railroad premises and injured by unguarded and unlocked turn-tables cannot recover for such injuries,[95] the view being taken by

15 Colo. 136, 25 Pac. 556; Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580; Hoyt *v.* Jeffers, 30 Mich. 181; Teall *v.* Barton, 40 Barb. (N. Y.) 137.

86. Holman *v.* Boston Land, etc., Co., 20 Colo. 7, 36 Pac. 797; York *v.* Cleaves, 97 Me. 413, 54 Atl. 915.

87. Holman *v.* Boston Land, etc., Co., 20 Colo. 7, 36 Pac. 797.

88. Hinds *v.* Barton, 25 N. Y. 544; Martin *v.* Bishop, 59 Wis. 417, 18 N. W. 337.

89. Hewey *v.* Nourse, 54 Me. 256.

The statute, 14 Geo. III, c. 78, § 86, which is an extension of 6 Anne, c. 31, §§ 6, 7, protecting from liability for accidental fire, is in force in the province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 Geo. III, c. 31, but has no application to protect a party from legal liability as a consequence of negligence. Canada Southern R. Co. *v.* Phelps, 14 Can. Sup. Ct. 132.

90. Burton *v.* McClellan, 3 Ill. 434; Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579.

91. Grannis *v.* Cummings, 25 Conn. 165.

Illustration.— Under Code, § 3890, making the person setting fire to prairie land, and allowing it to escape beyond control, liable for resulting injuries, one will not be liable where a fire was started for a lawful purpose, and not in the prairie grass, and escaped without negligence, setting fire to prairie land. Ellsworth *v.* Ellingson, 96 Iowa 154, 64 N. W. 774.

92. Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579.

93. Kansas Cent. R. Co. *v.* Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161; Sioux City, etc., R. Co. *v.* Stout, 17 Wall. (U. S.) 657, 21 L. ed. 745.

94. *Alabama.*—Alabama Great Southern R. Co. *v.* Crocker, 131 Ala. 584, 31 So. 561.

California.— Barrett *v.* Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186.

Georgia.— Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102.

Minnesota.— Keffe *v.* Milwaukee, etc., R. Co., 21 Minn. 207, 18 Am. Rep. 393.

Ohio.— Wheeling, etc., R. Co. *v.* Harvey, 27 Ohio Cir. Ct. 672.

Tennessee.— East Tennessee, etc., R. Co. *v.* Cargille, 105 Tenn. 628, 59 S. W. 141.

Texas.— Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586. And see Gulf, etc., R. Co. *v.* Evansich, 63 Tex. 54; Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3.

See 37 Cent. Dig. tit. "Negligence," § 34.

The maintenance of railroad turn-tables is not negligence per se, although the manner of maintaining them may be negligence. Thomason *v.* Southern R. Co., 113 Fed. 80, 51 C. C. A. 67.

95. *Massachusetts.*— Daniels *v.* New York, etc., R. Co., 154 Mass. 349, 28 N. E. 283, 26 Am. St. Rep. 253, 13 L. R. A. 248.

New Hampshire.— Frost *v.* Eastern R. Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396.

New Jersey.— Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 46 Atl. 682, 68 Am. St. Rep. 729, 41 L. R. A. 831; Turess *v.* New York, etc., R. Co., 61 N. J. L. 314, 40 Atl. 614.

New York.—Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724 [*reversing* 78 Hun 1, 28 N. Y. Suppl. 1097].

some of these decisions that the company is under no obligation to mere trespassers even though they are infants to keep the premises in a safe condition.[96]

b. Excavations; Embankments. Although there is some authority to the contrary,[97] the weight of authority is to the effect that no duty rests on the owner of land to protect children from danger from excavations thereon.[98] It does not follow that because a thing is or may be attractive to children, the owner must guard and protect it against their trespasses upon and unlawful dealings with it.[99]

c. Ponds, Reservoirs, or Streams. As to ponds or reservoirs the weight of authority is that they are not to be classed with turn-tables and that the owner of premises on which a pond or reservoir is situated is under no obligation to keep the premises guarded against the trespasses of children.[1] So it has been held that a properly constructed drain, made for the purpose of carrying off surface water, is not such a contrivance as would be so inviting to a child that the owner would be liable for his death by drowning, due to his playing in the drain during or just after a very heavy rain.[2]

d. Other Machinery, Appliances, Structures, or Instrumentalities. Persons who leave unguarded dangerous machinery, appliances, or instrumentalities to which children are likely to be attracted for sport or pastime are held to be guilty of such negligence as will create liability for injuries inflicted on them by such machinery, instrumentalities, and appliances.[3] Cogwheels,[4] shafting,[5]

Texas.— San Antonio, etc., R. Co. *v.* Morgan, 92 Tex. 98, 46 S. W. 28 [*reversing* (Civ. App. 1898) 45 S. W. 169].

See 37 Cent. Dig. tit. "Negligence," § 34.

96. Turess *v.* New York, etc., R. Co., 61 N. J. L. 314, 40 Atl. 614; Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724.

97. Fink *v.* Missouri Furnace Co., 10 Mo. App. 61. And see Ann Arbor R. Co. *v.* Kinz, 22 Ohio Cir. Ct. 227, 12 Ohio Cir. Dec. 379, holding that where a railroad company, in removing earth from its grounds, left on one side of the excavation a steep embankment, the face of which was concave and overhanging the excavation, creating a place where, to the knowledge of the railway company, they were allowed for more than a year to play, such company is liable for injuries caused by the falling of the bank, whether the persons injured are regarded as trespassers or licensees.

98. Loftus *v.* Dehail, 133 Cal. 214, 65 Pac. 379; Savannah, etc., R. Co. *v.* Beavers, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314; Ratte *v.* Dawson, 50 Minn. 450, 52 N. W. 965; Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

99. Loftus *v.* Dehail, 133 Cal. 214, 65 Pac. 379.

1. *California.*— Peters *v.* Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106.

Illinois.— Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 [*affirming* 53 Ill. App. 189, and *distinguishing* St. Louis, etc., R. Co. *v.* Bell, 81 Ill. 76, 25 Am. Rep. 269].

Minnesota.— Stendal *v.* Boyd, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 288, distinguishing from turn-table cases on the ground that a turn-table may be rendered absolutely safe while there is no way to prevent access by boys to a pond.

Missouri.— Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; Smith *v.* Jacob Dold Packing Co., 82 Mo. App. 9.

Nebraska.— Richards *v.* Connell, 45 Nebr. 467, 63 N. W. 915.

Pennsylvania.— Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

Texas.— Dobbins *v.* Missouri, etc., R. Co., 91 Tex. 60, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573; Missouri, etc., R. Co. *v.* Dobbins, (Civ. App. 1896) 40 S. W. 861.

Wisconsin.— Klix *v.* Nieman, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854.

United States.— See McCabe *v.* American Woolen Co., 132 Fed. 1006, 65 C. C. A. 59.

Contra.— Price *v.* Atchison Water Co., 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625.

Applications of rule.—Although a city water reservoir was so constructed that its top was twenty-five feet above the street, with a sloping, surrounding surface, and there was a hole under the fence so that children could and did enter, there could be no recovery for the death of a child drowned therein. Peninsular Trust Co. *v.* Grand Rapids, 131 Mich. 571, 92 N. W. 38. The owner of a vacant unfenced lot, on which children are accustomed to play, is not liable for the death of a child six years old, who was drowned in a cesspool on the lot. Greene *v.* Linton, 7 Misc. (N. Y.) 272, 27 N. Y. Suppl. 891.

2. Rome *v.* Cheney, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221.

3. Porter *v.* Anheuser-Busch Brewing Assoc., 24 Mo. App. 1; Dublin Cotton Oil Co. *v.* Jarrard, (Tex. Civ. App. 1897) 40 S. W. 531. See also Biggs *v.* Consolidated Barb-Wire Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655.

4. Jensen *v.* Wetherell, 79 Ill. App. 33; Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

5. Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

elevators,[6] tubing,[7] wheel scrapers,[8] heavy iron rollers,[9] tugboats,[10] and piles of lumber or material,[11] have been held within this rule. The rule has been held not to apply to fires,[12] electric light poles,[13] revolving doors,[14] wagons,[15] railroad bridges,[16] railroad cars,[17] stone coping,[18] or stock pens.[19]

6. Lands or Buildings[20] — a. In General. The rule in regard to the condition and use of lands and buildings is that so long as the owner violates no duty which he owes to others, he cannot be called in question for the manner in which he uses or manages them.[21] And no stricter liability exists for the negligent use or management of real property than for a similar use of personal property.[22] Where, however, an owner has reason to apprehend danger from the peculiar situation of his property, and its openness to accident, the question of duty then becomes one for the jury.[23] In cases where a duty exists the owner of property is in general required to exercise ordinary care to keep it in a safe condition;[24] but as to trespassers, no duty rests on the owner of private grounds to keep them safe.[25] Where one knowingly leaves open his property under circumstances calculated to lead others to think they are entitled to use it he assumes an obligation to keep it in a reasonably safe condition.[26] So too where a person is engaged in business in a public place he will be liable for injuries caused by a machine so defective as to be imminently dangerous to life.[27]

6. Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112.

7. Kopplekom *v.* Colorado Cement Pipe Co., 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284.

8. Kelley *v.* Parker-Washington Co., 107 Mo. App. 490, 81 S. W. 631.

9. Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

10. Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

11. Kansas City, etc., R. Co. *v.* Matson, 68 Kan. 815, 75 Pac. 503; Branson *v.* Labrot, 81 Ky. 638, 50 Am. Rep. 193; Harper *v.* Kopp, 73 S. W. 1127, 24 Ky. L. Rep. 2342 (even though it was not negligently piled where it was left unguarded); Earl *v.* Cronck, 131 N. Y. 613, 30 N. E. 864 [*affirming* 16 N. Y. Suppl. 770]. But see Powers *v.* Owego Bridge Co., 97 N. Y. App. Div. 477, 89 N. Y. Suppl. 1030; Missouri, etc., R. Co. *v.* Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825, where the children had repeatedly been driven away.

12. Erickson *v.* Great Northern R. Co., 82 Minn. 60, 84 N. W. 462, 83 Am. St. Rep. 410, 51 L. R. A. 645; Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Coleman *v.* Robert Graves Co., 39 Misc. (N. Y.) 85, 78 N. Y. Suppl. 893; Paolino *v.* McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133.

13. Simonton *v.* Citizens' Electric Light, etc., Co., 28 Tex. Civ. App. 374, 67 S. W. 530.

14. Harris *v.* Cowles, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847.

15. Conlon *v.* Bailey, 58 Ill. App. 261; Groarke *v.* Laemmle, 56 N. Y. App. Div. 61, 67 N. Y. Suppl. 409.

16. Williamson *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 279. And see Fredericks *v.* Illinois Cent. R. Co., 46 La. Ann. 1180, 15 So. 413, holding that a bridge did not constitute a trap so as to render the company liable for injuries to a child falling against the sharp edge of a cross tie.

17. Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; Robinson *v.* Oregon Short Line, etc., R. Co., 7 Utah 493, 27 Pac. 689, 13 L. R. A. 765. And see McEachern *v.* Boston, etc., R. Co., 150 Mass. 515, 23 N. E. 231.

18. Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

19. Gulf, etc., R. Co. *v.* Cunningham, 7 Tex. Civ. App. 65, 26 S. W. 474. And see Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, 36 Pac. 322.

20. **Dangerous substances, machinery, and other instrumentalities** see *supra*, V, F, 1, 2, 3, 4, 5.

21. Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Victory *v.* Baker, 67 N. Y. 366; Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332; Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170.

22. McCafferty *v.* Spuyten Duyvil, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 184 (unless the act amounts to a nuisance); Dugal *v.* Peoples Bank, 34 N. Brunsw. 581.

23. Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332.

If the probability of injury is so strong as to make it the duty of the owner of premises, as a member of the community, to guard that community from the danger to which the condition of his premises exposes its members, such owner is liable to an action for loss accruing through his neglect to perform that duty. Young *v.* Harvey, 16 Ind. 314.

24. Marsh *v.* Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630; Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408; Jeble *v.* Ellicott Square Co., 31 N. Y. App. Div. 336, 52 N. Y. Suppl. 366; McKeon *v.* Louis Weber Bldg. Co., 84 N. Y. Suppl. 913; Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

25. See *supra*, V, E, 1, a, (I).

26. See *supra*, V, E, 4, b, (V).

27. Fitzpatrick *v.* Garrison, etc., Ferry Co., 49 Hun (N. Y.) 288, 1 N. Y. Suppl. 794.

b. Private Ways. Persons using a private way with the consent or permission of the owner are entitled to the same degree of protection from danger,[28] and are bound to the same degree of care in respect to other persons lawfully using it,[29] as they would be on a public highway. Where the public has been accustomed to use a private way it is negligence for the owner to make an unguarded excavation therein,[30] or otherwise dangerously obstruct it,[31] or to conduct his business in a manner dangerous to those passing,[32] or to fail to keep it in repair.[33] But no liability exists where a person leaves the way and falls into an excavation.[34]

c. Public Resorts.[35] One maintaining a public resort is required to keep it in a reasonably safe condition for those frequenting it.[36] Upon this principle liability exists for injury caused by falling structures;[37] by failure to remove obstructions in bathing places,[38] or to have persons supervise bathers and rescue drowning persons;[39] by failure to erect barriers to prevent access to dangerous places;[40] by failure to protect visitors from intoxicated persons;[41] and by the negligent management of fireworks.[42]

d. Places Abutting on Highway[43] — (i) *In General.* The owner of property abutting on or adjacent to a highway owes a duty to the public to exercise reasonable care to prevent injury to passers-by from its defective or dangerous

28. Haack *v.* Brooklyn Labor Lyceum Assoc., 93 N. Y. App. Div. 491, 87 N. Y. Suppl. 814.

29. Danforth *v.* Durell, 8 Allen (Mass.) 242.

30. *Connecticut.*— Rooney *v.* Woolworth, 78 Conn. 167, 61 Atl. 366.

Indiana.— Graves *v.* Thomas, 95 Ind. 361, 48 Am. Rep. 727; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205.

Kansas.— De Tarr *v.* Ferd. Heim Brewing Co., 62 Kan. 188, 61 Pac. 689.

Mississippi.— Lepnick *v.* Gaddis, 72 Miss. 200, 16 So. 213, 48 Am. St. Rep. 547, 26 L. R. A. 686.

New Jersey.— Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478.

Pennsylvania.— Bush *v.* Johnston, 23 Pa. St. 209.

Canada.— Vachon *v.* Durand, 13 Quebec K. B. 372.

31. Morrow *v.* Sweeney, 10 Ind. App. 626, 38 N. E. 187; Williams *v.* Mudgett, 2 Tex. Unrep. Cas. 254; Allison *v.* Haney, (Tex. Civ. App. 1901) 62 S. W. 933. And see Galveston Land, etc., Co. *v.* Levy, 10 Tex. Civ. App. 104, 30 S. W. 504. But see Cahill *v.* Layton, 57 Wis. 600, 16 N. W. 1, 46 Am. Rep. 46, where the owner had done nothing to make the roadway more dangerous than it had been for years.

32. Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517; Gallagher *v.* Humphrey, 6 L. T. Rep. N. S. 684, 10 Wkly. Rep. 664, holding that an owner of a private way passing by his warehouses is liable for an injury to persons lawfully using the way if caused by his servants negligently lowering goods from the warehouses.

33. Campbell *v.* Boyd, 88 N. C. 129, 43 Am. Rep. 740.

34. Etheredge *v.* Georgia Cent. R. Co., 122 Ga. 853, 50 S. E. 1003.

35. Questions for jury see *infra*, VIII, D, 2, b, (III), (A), (1).

36. Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; Dinnihan *v.* Lake Ontario Beach Imp. Co., 8 N. Y. App. Div. 509, 40 N. Y. Suppl. 764, holding that one cannot escape liability merely by showing that he did nothing to render the premises unsafe.

37. Latham *v.* Roach, 72 Ill. 179; Francis *v.* Cockrell, L. R. 5 Q. B. 501, 10 B. & S. 850, 39 L. J. Q. B. 291, 23 L. T. Rep. N. S. 466, 18 Wkly. Rep. 1205.

38. Bass *v.* Reitdorf, 25 Ind. App. 650, 58 N. E. 95, holding, however, that plaintiff had been guilty of contributory negligence which barred his recovery.

39. Brotherton *v.* Manhattan Beach Imp. Co., 50 Nebr. 214, 69 N. W. 757; Larkin *v.* Saltair Beach Co., 30 Utah 86, 83 Pac. 686, 3 L. R. A. N. S. 982.

The mere presence of a pond in a park used by a traction company for picnic purposes does not impose upon the proprietor the obligation to inform all comers, by notice, that they shall not bathe therein, nor to post a guard to enforce an observance of such conduct. The absence of such guard or notice, and the existence of the pond, is not negligence, and it is not to be considered a pitfall. Le Grand *v.* Wilkes Barre, etc., Traction Co., 10 Pa. Super. Ct. 12.

40. Peckett *v.* Bergen Beach Co., 44 N. Y. App. Div. 559, 60 N. Y. Suppl. 966.

41. Mastad *v.* Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803.

42. Sebeck *v.* Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199 (holding further that the owner of the premises is not relieved from liability by reason of the fact that the exhibition is given, not by himself, but by an independent contractor); Crowley *v.* Rochester Fireworks Co., 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. N. S. 330.

43. Defects in highways see STREETS AND HIGHWAYS.

Defects in sidewalks or streets see STREETS AND HIGHWAYS.

condition.[44] He is not, however, an insurer of the safe condition of his premises or building,[45] and need not provide against the acts of third persons.[46]

(II) *Excavations*—(A) *Liability in General.* If the owner of land makes an excavation thereon adjacent to a highway, or so near as to make the use of the highway unsafe or dangerous, he will be liable to a traveler who, while using ordinary care, falls into it and is injured.[47] But when the excavation is made at such a distance from the street or highway that a person falling into it would be a trespasser before he reached it, no liability exists.[48] The rule applies equally to all classes of persons lawfully using the highway, whether walking or driving.[49] Liability has been held to extend to cases where, although the excavation was some feet from the highway, the line of the street was indefinite by reason of the intervening space being paved,[50] and where one in attempting to pass an obstacle placed on the sidewalk passes on to defendant's land and falls into the excavation.[51] But where the injured one is not attempting to follow the highway,[52] or reaches the excavation by crossing other premises,[53] the owner will not be liable, although the excavation is so near the highway as to render him liable to persons injured while lawfully using it.

(B) *Test of Liability.* There is some diversity of opinion as to the test of duty and consequent liability in cases of this kind. In England and Massachusetts

44. Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721. And see cases cited *infra*, V, F, 6, d, (II), (III), (IV), (V).

45. Connolly *v.* Des Moines Inv. Co., 130 Iowa 633, 105 N. W. 400.

46. Grogan *v.* Pennsylvania R. Co., 213 Pa. St. 340, 62 Atl. 924, holding that a railroad company owning real estate abutting on a street is not required to construct a fence sufficiently strong to provide against the contingency of a crowd of trespassers coming on the inclosed property and pushing the fence over on a person walking on the street, although some of the trespassers were the servants of the company.

47. *California.*— Malloy *v.* Hibernia Sav., etc., Soc., (1889) 21 Pac. 525.

Dakota.— Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

Georgia.— Hutson *v.* King, 95 Ga. 271, 22 S. E. 615.

Iowa.— Earl *v.* Cedar Rapids, 126 Iowa 361, 102 N. W. 140, 106 Am. St. Rep. 361.

Maine.— Stratton *v.* Staples, 59 Me. 94.

New Jersey.— Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721.

New York.— Beck *v.* Carter, 68 N. Y. 283, 23 Am. Rep. 175; Healy *v.* Vorndran, 65 N. Y. App. Div. 353, 72 N. Y. Suppl. 877; Dwyer *v.* McLaughlin, 31 Misc. 510, 64 N. Y. Suppl. 380.

England.— Hadley *v.* Taylor, L. R. 1 C. P. 53, 11 Jur. N. S. 979, 13 L. T. Rep. N. S. 368, 14 Wkly. Rep. 59; Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L. 392, 2 C. & K. 661, 61 E. C. L. 661, 14 Jur. 334, 19 L. J. C. P. 195; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Exch. 139, 7 Wkly. Rep. 326.

Canada.— Mallet *v.* Martineau, 13 Quebec Super. Ct. 510.

Wells.— Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Post holes.— Wright *v.* Saunders, 36 How. Pr. (N. Y.) 136.

In England the principle of the decisions is that such an excavation constitutes a public nuisance. Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L. 392, 2 C. & K. 661, 61 E. C. L. 661, 14 Jur. 334, 19 L. J. C. P. 195; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Exch. 139, 7 Wkly. Rep. 326. See also Hounsell *v.* Smyth, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 29 L. J. C. P. 203, 1 L. T. Rep. N. S. 440, 8 Wkly. Rep. 277, 97 E. C. L. 731.

48. Howland *v.* Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Gorr *v.* Mittelstaedt, 96 Wis. 296, 71 N. W. 656; Hounsell *v.* Smyth, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 29 L. J. C. P. 203, 1 L. T. Rep. N. S. 440, 8 Wkly. Rep. 277, 97 E. C. L. 731; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Exch. 139, 7 Wkly. Rep. 326.

49. Davis *v.* Commercial Bank, 32 Nova Scotia 366.

50. Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88 (on the ground of invitation); Sears *v.* Merrick, 175 Mass. 25, 55 N. E. 476. But see Lorenzo *v.* Wirth, 170 Mass. 596, 49 N. E. 1010, 40 L. R. A. 347 (where piles of coal on the sidewalk near the holes gave notice of danger); Binks *v.* South Yorkshire R. Co., 3 B. & S. 244, 32 L. J. Q. B. 26, 7 L. T. Rep. N. S. 350, 11 Wkly. Rep. 66, 113 E. C. L. 244.

51. Vale *v.* Bliss, 50 Barb. (N. Y.) 358, dirt and stones left on sidewalk.

52. Dobbins *v.* Missouri, etc., R. Co., 91 Tex. 60, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573; Jewson *v.* Gatti, Cab. & E. 564, holding that the owner of a cellar abutting on a public road owed a duty to keep the opening safe for passers-by but not to one leaning over a bar to see what was being done inside.

53. Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557.

the test is whether the excavation substantially adjoins the public way, so that a traveler, by a misstep, might be endangered;[54] while in Connecticut the duty and liability in regard to such an unguarded excavation depends on the dangerous condition in which it is left rather than on its distance from the street.[55]

(III) *Falling Structures or Substances.* The owner of a building or other structure abutting on a street or highway is under a legal obligation to take reasonable care that it shall not fall into the street or highway and injure persons lawfully there.[56] He is not liable, however, for injuries caused by a falling building in the absence of evidence that by his exercising ordinary care before the wall fell he might have discovered the defect therein.[57] The owner is liable for injury caused by the falling of materials or substances from such building by reason of its defective condition,[58] or the manner of its construction.[59] So persons engaged with tools and materials directly over a thoroughfare where people are constantly passing are in duty bound to exercise the greatest care to prevent injury to travelers.[60] And the same is true in regard to throwing substances into the street.[61]

(IV) *Dangerous Obstructions.* Where a person permits dangerous obstructions to be on his land so near the highway that they result in injury to persons passing along the highway he is liable.[62] But it has been held that the maintenance of a dangerous fence along the highway is not negligence.[63] But one who

54. Howland *v.* Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Binks *v.* South Yorkshire R. Co., 3 B. & S. 244, 32 L. J. Q. B. 26, 7 L. T. Rep. N. S. 350, 11 Wkly. Rep. 66, 113 E. C. L. 244; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Exch. 139, 7 Wkly. Rep. 326.

55. Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; Norwich *v.* Breed, 30 Conn. 535.

56. Mullen *v.* St. John, 57 N. Y. 567, 15 Am. Rep. 530.

An abutting owner, erecting a fence around an excavation, must make it sufficiently strong to withstand any wind that a reasonably prudent person would anticipate. Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721.

57. Ryder *v.* Kinsey, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557.

58. *Maryland.*— Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367.

Missouri.— Butts *v.* National Exch. Bank, 99 Mo. App. 168, 72 S. W. 1083.

New York.— Reynolds *v.* Van Buren, 51 N. Y. App. Div. 632, 64 N. Y. Suppl. 724.

England.— Tarry *v.* Ashton, 1 Q. B. D. 314, 45 L. J. Q. B. 260, 34 L. T. Rep. N. S. 97, 24 Wkly. Rep. 581.

Canada.— Ferrier *v.* Trepannier, 24 Can. Sup. Ct. 86.

59. Shepherd *v.* Creamer, 160 Mass. 496, 36 N. E. 475; Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695 (although the building is of no unusual construction); Shipley *v.* Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Hannem *v.* Pence, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717 (holding that it is no defense that the owner exercised all the diligence and care he could to remove the snow from the roof). *Contra,* see Lazarus *v.* Toronto, 19 U. C. Q. B. 9.

Falling snow and ice.— It is negligence to maintain a building so near the street and so constructed that in the ordinary course of things snow and ice is liable to fall from the roof upon travelers on the adjoining highway.

60. Knott *v.* McGilvray, 124 Cal. 128, 56 Pac. 789; Hunt *v.* Hoyt, 20 Ill. 544; Jager *v.* Adams, 123 Mass. 26, 25 Am. Rep. 7.

A person who undertakes to hoist a heavy safe from a street, through which people are accustomed to pass back and forth, into an upper story of the building, is bound to use such care as the nature of the employment, and the situation and the circumstances surrounding the same require of a prudent person, experienced and skilled in such or similar work, and is liable for injuries occasioned by the falling of the safe on account of the lack of such care and skill. Spokane Truck, etc., Co. *v.* Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

61. **It is negligence in the highest degree to throw snow and ice from a roof** into a thoroughfare of a crowded city without using some precaution against accidents. Althorf *v.* Wolfe, 22 N. Y. 355 [*affirming* 2 Hilt. 344].

62. **Placing a post so near the highway** as to cause injury to a person lawfully using the highway is an actionable wrong, and it is no defense that it was placed there to protect the public from an insecure sewer. Gunther *v.* Dranbauer, 86 Md. 1, 38 Atl. 33.

63. **Maintenance of a barbed wire fence on one's premises along a highway,** although in a city, if not prohibited by ordinance, is not negligence *per se,* and, in the absence of other evidence showing it a nuisance, its owner will not be liable for injury to stock occasioned thereby. Robertson *v.* Wooley, 5 Tex. Civ. App. 237, 23 S. W. 828. And see Kelly *v.* Bennett, 132 Pa. St. 218, 19 Atl. 69, 19 Am. St. Rep. 594, 7 L. R. A. 120.

piles lumber on or near a sidewalk so carelessly that a child attempting to climb on it will cause it to fall is liable for injury caused thereby.[64]

(v) *Frightening Horses on Street.* The owner of land adjoining a street is also liable for injuries sustained if he maintains any structure or other thing on his land likely to frighten horses;[65] this rule has been applied in case of piles of material,[66] machinery,[67] or caving embankments,[68] and steam whistles, unnecessarily powerful and alarming.[69] But it has been held that no liability attaches for injuries caused by a horse becoming frightened at a falling structure maintained by the owner at a considerable distance from the street.[70]

e. Buildings.[71] The duty which the law imposes on owners to maintain their premises in a reasonably safe condition for the use of those who may be lawfully there renders the owner liable for injuries caused by defective floors;[72] defective,[73] obstructed,[74] or unguarded stairways;[75] unguarded elevator shafts,[76]

64. Earl *v.* Cronch, 16 N. Y. Suppl. 770 [*affirmed* in 131 N. Y. 613, 30 N. E. 864]; Kreiner *v.* Straubmüller, 30 Pa. Super. Ct. 609; Addis *v.* Hass, 29 Pa. Super. Ct. 505.

65. Peterson *v.* Adams Express Co., 111 Iowa 572, 82 N. W. 963. And see cases cited in the following notes.

66. Island Coal Co. *v.* Clemmitt, 19 Ind. App. 21, 49 N. E. 38; Valley *v.* Concord, etc., R. Co., 68 N. H. 546, 38 Atl. 383.

67. Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014; Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517.

Sawmill.— It is not negligence *per se* to erect and operate a sawmill along a public highway. Goodin *v.* Fuson, 60 S. W. 293, 22 Ky. L. Rep. 873.

68. See Scott *v.* Hough, 14 N. Y. St. 401.

69. Knight *v.* Goodyear's India Rubber Glove Mfg. Co., 38 Conn. 438, 9 Am. Rep. 406; Albee *v.* Chappaqua Shoe Mfg. Co., 62 Hun (N. Y.) 223, 16 N. Y. Suppl. 687. In an action for personal injuries caused by a fall from a cart, resulting from plaintiff's horse being frightened by a steam whistle in defendant's railroad shops, an instruction that there is a distinction between the nature of a locomotive whistle and a stationary whistle for the purpose of notice only, the former being necessary for the purpose of frightening animals off the track, etc., so that its usefulness depends on the alarming and frightening character of the noise it makes, while with respect to the latter there is no necessity for constructing or operating them so as to alarm an animal of ordinary gentleness, so that any unnecessary alarming or frightening use of them is wrongful, was proper. Powell *v.* Nevada, etc., R. Co., 28 Nev. 305, 82 Pac. 96, 28 Nev. 40, 78 Pac. 978.

70. O'Sullivan *v.* Knox, 178 N. Y. 565, 70 N. E. 1104 [*affirming* 81 N. Y. App. Div. 438, 80 N. Y. Suppl. 848], sign blowing down.

71. **City buildings** see Municipal Corporations, 28 Cyc. 1307.

County buildings see Counties, 11 Cyc. 497.

Duty owed to trespassers and licensees see *supra*, V, E, 1, 2, 3.

Inns see Innkeepers, 22 Cyc. 1081.

Liability as between landlord and tenant see Landlord and Tenant.

Livery stables see Livery-Stable Keepers.

Master's liability for injuries to servant see Master and Servant.

Party-walls see Party-Walls.

Railroad stations and freight houses see Carriers; Railroads; Street Railroads.

School-houses see Schools and School-Districts.

Structures over railroad tracks see Railroads.

Theaters see Theaters and Shows.

Warehouses see Warehousemen.

Wharves see Wharves.

72. Polenske *v.* Lit, 18 Pa. Super. Ct. 474; Axford *v.* Prior, 14 Wkly. Rep. 611.

Floors at different levels.— The construction of the floor of a room in an office building four and seven-eighths inches above the floor of the hallway is not of itself defective or negligent, so as to render the owner of the building liable for the injury of a licensee, sustained thereby. Ware *v.* Boston Evangelical Baptist Benev., etc., Soc., 181 Mass. 285, 63 N. E. 885.

73. Spicer *v.* Boice, 66 N. J. L. 434, 49 Atl. 441; Wright *v.* Lefever, 51 Wkly. Rep. 149.

74. **Leaving a feather duster upon a stairway** upon which a customer slips and falls is negligence. Graham *v.* Joseph H. Bauland Co., 97 N. Y. App. Div. 141, 89 N. Y. Suppl. 595.

The placing of a slippery skid in the middle of a stairway, over which customers were invited to ascend and descend, in such a way as not to be likely to attract the attention of shoppers familiar with the stairway, and without any means being adopted to warn such customers, is negligence. Quirk *v.* Siegel-Cooper Co., 43 N. Y. App. Div. 464, 60 N. Y. Suppl. 228 [*affirming* 26 Misc. 244, 56 N. Y. Suppl. 49].

A stair step so worn that a nail projects three sixteenths of an inch is not a defect rendering defendant liable for injuries sustained by plaintiff by catching his heel on the nail and falling. Jennings *v.* Tompkins, 180 Mass. 302, 62 N. E. 265.

75. Toland *v.* Paine Furniture Co., 179 Mass. 501, 61 N. E. 52. But see Burchell *v.* Hickisson, 50 L. J. Q. B. 101, holding owner not liable where the defective condition was obvious.

76. South Bend Iron Works *v.* Larger, 11

or trap-doors;[77] and unguarded or defective platforms or passageways.[78] To create a liability, however, the opening or passageway must have been in the nature of a trap or pitfall;[79] as that it was insufficiently lighted,[80] or surrounded by obstructions,[81] or concealed,[82] or otherwise difficult to see or anticipate.[83] Where the place is well lighted recovery is usually refused.[84] An owner may escape liability for injuries caused by premises inherently defective and dangerous by showing that he employed a competent architect and builder.[85]

7. Elevators.[86] The degree of care necessary in the operation of freight elevators is less than that required in the case of passenger elevators. The weight of authority is that the operator of such an elevator is bound to use only reasonable and ordinary care and diligence to keep it safe,[87] and is liable for injury to any person lawfully using it, who is himself guilty of no contributory negligence, occasioned by the want of such care and diligence.[88]

8. Traps and Pitfalls. One who maintains a trap, pitfall, or other harmful device on his premises is generally held liable for injuries which are occasioned thereby whether the person injured was there rightfully or not.[89] This liability has been held to arise in the case of spring guns where no notice of their presence is given,[90] unguarded openings,[91] piles of live coals covered with ashes on vacant land frequented by children,[92] tilted gratings over holes,[93] exhaust steam barrel set in

Ind. App. 367, 39 N. E. 209; Indermaur *v.* Dames, L. R. 2 C. P. 311, 36 L. J. C. P. 181, 16 L. T. Rep. N. S. 293, 15 Wkly. Rep. 434.

77. Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Moore *v.* Korte, 77 Mo. App. 500; Wilson *v.* Olano, 28 N. Y. App. Div. 448, 51 N. Y. Suppl. 109; Binney *v.* Carney, 20 N. Y. App. Div. 621, 46 N. Y. Suppl. 307; League *v.* Stradley, 68 S. C. 515, 47 S. E. 975. And see Hasson *v.* Wood, 22 Ont. 66; Denny *v.* Montreal Tel. Co., 42 U. C. Q. B. 577.

78. Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698; Texas Loan Agency *v.* Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63.

79. Wilsey *v.* Jewett, 122 Iowa 315, 98 N. W. 114.

Two entrances — one dangerous.—The maintenance of an unfastened door and unguarded entrance to the cellar in close proximity to the main entrance to the building, without any sign to distinguish the one from the other, renders the conditions connected with the approach to the main entrance misleading and dangerous. Foren *v.* Rodick, 90 Me. 276, 38 Atl. 175; Clopp *v.* Mear, 134 Pa. St. 203, 19 Atl. 504.

80. Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942; Freer *v.* Cameron, 4 Rich. (S. C.) 228, 55 Am. Dec. 663; Barowski *v.* Schulz, 112 Wis. 415, 88 N. W. 236. But see Wilkinson *v.* Fairrie, 1 H. & C. 633, 9 Jur. N. S. 280, 32 L. J. Exch. 73, 7 L. T. Rep. N. S. 599, holding that the owner of a building is not liable to one who, in going along a dark passage, falls down a staircase, which would have been perfectly safe in daylight.

81. Smith *v.* Parkersburg Co-operative Assoc., 48 W. Va. 232, 37 S. E. 645.

82. Buckingham *v.* Fisher, 70 Ill. 121.

83. Drennan *v.* Grady, 167 Mass. 415, 45 N. E. 741.

84. State *v.* Green, 95 Md. 217, 52 Atl. 673; Accousi *v.* G. A. Stowers Furniture Co., (Tex. Civ. App. 1905) 87 S. W. 861; Dunn *v.* Kemp, 36 Wash. 183, 78 Pac. 782.

85. Burke *v.* Ireland, 47 N. Y. App. Div. 428, 62 N. Y. Suppl. 453; Valiquette *v.* Fraser, 9 Ont. L. Rep. 57. See also Brazier *v.* Polytechnic Inst., 1 F. & F. 507.

Where the owner of land employs a competent architect to design a building, he must show affirmatively that he fairly committed the subject-matter to the architect, and that the defects in the design were not caused by his interference or direction, in order to relieve himself from liability for injuries to an employee of the contractor caused by inherent defects in the plans. Burke *v.* Ireland, 47 N. Y. App. Div. 428, 62 N. Y. Suppl. 453; Fox *v.* Ireland, 46 N. Y. App. Div. 541, 61 N. Y. Suppl. 1061.

86. For injuries to: Servant see Master and Servant. Passengers on elevators see Carriers.

87. Springer *v.* Ford, 88 Ill. App. 529; Kentucky Distilleries, etc., Co. *v.* Leonard, 79 S. W. 281, 25 Ky. L. Rep. 2046.

88. Ford *v.* Crigler, 74 S. W. 661, 25 Ky. L. Rep. 56; Grifhahn *v.* Kreizer, 171 N. Y. 661, 64 N. E. 1121 [*affirming* 62 N. Y. App. Div. 413, 70 N. Y. Suppl. 973]; Ferris *v.* Aldrich, 12 N. Y. Suppl. 482.

89. Harris *v.* Perry, [1903] 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. Rep. N. S. 174.

90. Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599; Hooker *v.* Miller, 37 Iowa 613, 18 Am. Rep. 18. And see Grant *v.* Hass, 31 Tex. Civ. App. 688, 75 S. W. 342.

91. See *supra*, V, F, 6, e.

92. Penso *v.* McCormick, 125 Ind. 116, 25 N. E. 156, 21 Am. St. Rep. 211, 9 L. R. A. 313. *Contra*, American Advertising, etc., Co. *v.* Flannigan, 100 Ill. App. 452; Feehan *v.* Dobson, 10 Pa. Super. Ct. 6, 44 Wkly. Notes Cas. 65.

93. Finnigan *v.* Biehl, 30 Misc. (N. Y.)

ground,[94] guy wires to telephone poles,[95] and falling of bales of goods;[96] but not to swinging doors in a store,[97] ponds at public resort,[98] or visible barriers across paths.[99]

G. Precautions Against Injury[1] — **1. Guarding or Protecting Dangerous Places**[2] — **a. Necessity** — (i) *In General.* Failure to guard or protect dangerous places or instrumentalities for the safety of those rightfully there is negligence;[3] especially where a statute requires it.[4] Nor will the party on whom the duty devolves be excused from taking the necessary precautions because of the interference of third persons,[5] nor by contracting with others to take the necessary precautionary measures.[6] But failure to adopt a particular precaution will not render a person liable where it does not appear that such precaution would have prevented the injury.[7]

(ii) *Obvious or Known Dangers.* No precautions are necessary where the danger is obvious and unconcealed,[8] or known to the person injured,[9] or where it was the duty of the person injured to do the thing, failure to do which caused the injury.[10]

b. Sufficiency — (i) *In General.* To relieve one from liability the precaution taken must be sufficient under ordinary circumstances to prevent accidents and injuries.[11] No particular kind of a precaution is necessary so long as it is effectual,[12] but the mere failure of the device adopted is not of itself sufficient to

735, 63 N. Y. Suppl. 147 [*reversing* 61 N. Y. Suppl. 1116].

94. Kinchlow *v.* Midland Elevator Co., 57 Kan. 374, 46 Pac. 703.

95. Wilson *v.* Great Southern Tel., etc., Co., 41 La. Ann. 1041, 6 So. 781.

96. White *v.* France, 2 C. P. D. 308, 46 L. J. C. P. 823, 25 Wkly. Rep. 878.

97. Pardington *v.* Abraham, 93 N. Y. App. Div. 359, 87 N. Y. Suppl. 670.

98. Le Grand *v.* Wilkes Barre, etc., Traction Co., 10 Pa. Super. Ct. 12.

99. McCandless *v.* Phreaner, 24 Pa. Super. Ct. 383.

1. **By persons injured** see *infra,* VII, A, 3, b.

Duty to take precautions in general see *supra,* V, A.

2. **Master's liability for injuries to servant** see Master and Servant.

3. Philadelphia, etc., R. Co. *v.* Kerr, 25 Md. 521; Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Hawken *v.* Shearer, 56 L. J. Q. B. 284; Citizens' Light, etc., Co. *v.* Lepitre, 29 Can. Sup. Ct. 1; Fallis *v.* Gartshore, etc., Pipe, etc., Co., 4 Ont. L. Rep. 176.

4. See *supra,* V, D, 6.

5. Mayer *v.* Thompson-Hutchison Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433.

6. Ainsworth *v.* Lakin, 180 Mass. 397, 62 N. E. 746, 91 Am. St. Rep. 314, 57 L. R. A. 132; Lauer *v.* Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; Marney *v.* Scott, [1899] 1 Q. B. 986, 68 L. J. Q. B. 736, 47 Wkly. Rep. 666.

7. Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755 (holding that where plaintiff's intestate was killed by the bursting of a fly wheel attached to an engine in defendant's power house, used for generating electricity, the absence of an electrical engineer is no evidence of negligence, where there is no evidence to show that his presence would have prevented the accident); Sowles *v.* Moore, 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723.

8. Hunnewell *v.* Haskell, 174 Mass. 557, 55 N. E. 320; Hart *v.* Gremnell, 122 N. Y. 371, 25 N. E. 354; Gray *v.* Siegel-Cooper Co., 78 N. Y. App. Div. 118, 79 N. Y. Suppl. 813; Accousi *v.* G. A. Stowers Furniture Co., (Tex. Civ. App. 1905) 87 S. W. 861; Burchell *v.* Hickisson, 50 L. J. Q. B. 101.

9. Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

10. Read *v.* Warwick Mills, 25 R. I. 476, 56 Atl. 679; Manchester, etc., R. Co. *v.* Woodcock, 25 L. T. Rep. N. S. 335.

11. Myers *v.* Snyder, Brightly (Pa.) 489; Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086. And see Brezee *v.* Powers, 80 Mich. 172, 45 N. W. 130; Cox *v.* Nova Scotia Tel. Co., 35 Nova Scotia 148.

It is not necessary to put up two guards unless the person injured has been led to expect it. Kent *v.* Todd, 144 Mass. 478, 11 N. E. 734.

Stationing person as guard. — The reasonable care which the law requires the occupant of a building containing a hatchway to observe, especially where persons are not accustomed to pass and repass, does not impose upon his conduct of his ordinary private business such a burden as to keep an additional force, for a guard, stationed there to prevent persons from falling into it. Murray *v.* McLean, 57 Ill. 378. See also Le Grand *v.* Wilkes-Barre, etc., Traction Co., 10 Pa. Super. Ct. 12. Failure to comply with a permit authorizing a trench across a sidewalk, in not having a watchman present, is negligence. Shannahan *v.* Ryan, 8 Can. L. T. Occ. Notes 379, 20 Nova Scotia 142.

12. Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517; Burk *v.* Walsh, 118 Iowa 397, 92 N. W. 65.

establish negligence.[13] The authorities are conflicting as to whether the use of a customary precaution is sufficient, and while some courts hold that common usage is all that is required,[14] the weight of authority is that custom and usage cannot be considered.[15]

(II) *Machinery or Places Attractive to Children.* In determining the precautions necessary to be taken the relation such precautions bear to the beneficial use of the premises and the probability of injury must be considered.[16] Thus a turn-table need not be so fastened or secured that the fastenings cannot be displaced or set in motion by children,[17] but merely latching or fastening a turn-table in such a manner that it could easily be unfastened by children is not sufficient,[18] even though the children had always been warned away when observed playing there.[19] A railway company, maintaining what is known as a "gravity" yard or side-track, has performed its duty as to a trespassing child of tender years strictly *non sui juris* when it securely fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track.[20] Nor does ordinary care require a constant lookout to guard passing children from injuries from dangerous machinery,[21] or to prevent them from trespassing.[22] The only requirement is that when their presence is discovered due diligence must be used to prevent injury to them.[23]

2. Inspection and Repair — a. Necessity. The owner of premises who invites others to enter owes them the duty of inspecting it to see that it is in a reasonably safe condition.[24] Failure to make certain tests is not negligence where it does not appear that such tests were common or prudent,[25] or where the owner had no reason to think an inspection was necessary.[26] The fact that third persons were in possession for the purpose of repair[27] or the interference of third persons will not relieve the

Precautions required by statute.— Where a statute requires elevator shafts to be protected by "a substantial guard or gate," the use of an iron chain is a sufficient compliance therewith. Malloy *v.* New York Real Estate Assoc., 156 N. Y. 205, 50 N. E. 853, 41 L. R. A. 487; Weinberger *v.* Kratzenstein, 35 Misc. (N. Y.) 74, 71 N. Y. Suppl. 244.

13. Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517.

14. Kilbride *v.* Carbon Dioxide, etc., Co., 201 Pa. St. 552, 51 Atl. 347, 88 Am. St. Rep. 829.

The test is general use.— It is not enough that some persons regard it as a valuable safeguard. Delaware River Iron Ship-Bldg. Co. *v.* Nuttall, 119 Pa. St. 149, 13 Atl. 65. The true test is the use of such precautions as are ordinarily used by men of ordinary care and prudence, or by men generally engaged in the same or similar business under the same or similar circumstances. Rylander *v.* Laursen, 124 Wis. 2, 102 N. W. 341; Nass *v.* Schulz, 105 Wis. 146, 81 N. W. 133. See also Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517.

15. McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494; Koons *v.* St. Louis, etc., R. Co., 65 Mo. 592; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24.

16. Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920. And see Chicago, etc., R. Co. *v.* Fox, (Ind. App. 1904) 70 N. E. 81; Kayser *v.* Lindell, 73 Minn. 123, 75 N. W. 1038, owner of land is not required to fence every retaining wall tree, shed, etc., so that children of his tenants would not fall off.

17. Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, 19 N. W. 655. "The contrary of this would impose upon the defendant more than the ordinary care required of persons who have upon their own premises dangerous machines, attractive to and open to the access of children of tender years; would, in effect, make it an insurer of the safety of such persons." Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, 134, 19 N. W. 655.

18. Ilwaco R., etc., Co. *v.* Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169.

19. Callahan *v.* Eel River, etc., R. Co., 92 Cal. 89, 28 Pac. 104 [*following* Barrett *v.* Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186].

20. Haesley *v.* Winona, etc., R. Co., 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220.

21. Driscoll *v.* Clark, 32 Mont. 172, 80 Pac. 1, 373.

22. Chambers *v.* Milner Coal, etc., Co., 143 Ala. 255, 39 So. 170; Haesley *v.* Winona, etc., R. Co., 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220; Emerson *v.* Peteler, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337.

23. Emerson *v.* Peteler, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337.

24. McIntyre *v.* Detroit Safe Co., 129 Mich. 385, 89 N. W. 39.

25. Hall *v.* Murdock, 119 Mich. 389, 78 N. W. 329.

26. Baddeley *v.* Shea, 114 Cal. 1, 45 Pac. 990, 55 Am. St. Rep. 56, 33 L. R. A. 747; Sellers *v.* Dempsey, 26 N. Y. App. Div. 22, 49 N. Y. Suppl. 765; Akers *v.* Overbeck, 18 Misc. (N. Y.) 198, 41 N. Y. Suppl. 382.

27. Steppe *v.* Alter, 48 La. Ann. 363, 19

owner from the necessity of repairing a dangerous wall.[28] Where the owner of property is aware of its dangerous condition and the use to which it is put it is his duty to repair it,[29] but the owner has no duty of inspection as to one who has assumed such duty himself.[30]

b. Time to Inspect and Repair. The owner is held only to reasonable care in inspection from time to time, and is not liable for a defect not discovered in time to repair it before the accident occurs.[31] And the owner of property is entitled to a reasonable time to remedy the defect after notice of it.[32] But where the defect has existed for a long time to the knowledge of the owner he will be liable for injuries caused thereby.[33] No liability, however, is incurred by failure to work on Sunday,[34] unless the danger was so obvious that a reasonable and prudent person would have taken immediate measures on that day to have taken the necessary precautions.[35]

c. Sufficiency. The inspections must be sufficiently frequent to insure a reasonably safe condition,[36] and thorough enough to determine the condition;[37] and where an inspection complying with these requirements is made no liability exists for injuries.[38] Thus if the owner of a wall in a burned building has it inspected by a competent mechanic who reports it safe no liability exists,[39] although it has been held that this duty cannot be discharged by merely contracting with competent persons to do the work for him.[40] Mere general instruction to mechanics to

So. 147, 55 Am. St. Rep. 281, holding that an owner of a building partly burned was not excused from liability for injuries received by a passer-by because of the falling of the building through the owner's neglect to repair it, by the fact that an insurance company carrying a policy on the building had elected after the fire to repair the same.

28. Lauer *v.* Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67.

29. Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698.

30. Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

31. Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139, 55 Pac. 772 (holding that a lot owner is not responsible for injuries occasioned by an opening over an excavation under a sidewalk in front of his premises, where the opening was made without his knowledge by persons not in his employ, and only a few minutes before the accident); Connolly *v.* Des Moines Inv. Co., 130 Iowa 633, 105 N. W. 400.

32. Ainsworth *v.* Lakin, 180 Mass. 397, 62 N. E. 746, 91 Am. St. Rep. 314, 57 L. R. A. 132; Lauer *v.* Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; Dugal *v.* Peoples Bank, 34 N. Brunsw. 581; Howden *v.* Lake Simcoe Ice Co., 21 Ont. App. 414; Landreville *v.* Gouin, 6 Ont. 455.

Illustration.— The owner of an apartment house is not liable for injuries caused by an uneven deposit of ice and snow on steps, where it appears that there was no weather permitting removal, and that the unevenness was caused by ashes put on to render the steps more safe. Laufers-Weiler *v.* Borchardt, 88 N. Y. Suppl. 985.

Facts showing negligence.— In an action by a customer for injuries sustained in falling down an open stairway in defendant's shop, that the fall was due to the unguarded condition of the stairway and to the bad condition of the mats near the stairway, which condition had existed for some time prior to the accident, is sufficient to sustain a finding of negligence of defendant. Toland *v.* Paine Furniture Co., 179 Mass. 501, 61 N. E. 52.

33. Spaine *v.* Stiner, 51 N. Y. App. Div. 481, 64 N. Y. Suppl. 655 [*affirmed* in 168 N. Y. 666, 61 N. E. 1135].

34. Oleson *v.* Plattsmouth, 35 Nebr. 153, 52 N. W. 848.

35. Schwartz *v.* Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Dixon *v.* Wachenheimer, 9 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 380.

36. Washington Market Co. *v.* Clagett, 19 App. Cas. (D. C.) 12; Boyce *v.* Union Pac. R. Co., 8 Utah 353, 31 Pac. 450, 18 L. R. A. 509.

Illustration.— Where a threshing engine was equipped with a double netting in order to prevent the escape of sparks, its operators were guilty of negligence in failing to make at least a daily inspection thereof. Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. N. S. 530.

37. Springer *v.* Ford, 88 Ill. App. 529; McIntyre *v.* Pfaudler Vacuum Fermentation Co., 133 Mich. 552, 95 N. W. 527; Willcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761. See also Mills *v.* Evans, 100 Iowa 712, 69 N. W. 1043; Rigdon *v.* Temple Water Works Co., 11 Tex. Civ. App. 542, 32 S. W. 828.

38. McMullen *v.* New York, 104 N. Y. App. Div. 337, 93 N. Y. Suppl. 772; Bell *v.* Caledonian R. Co., 4 F. (Ct. Sess.) 431.

39. Schell *v.* St. Paul Second Nat. Bank, 14 Minn. 43; Olsen *v.* Meyer, 46 Nebr. 240, 64 N. W. 954; Freeman *v.* Carter, 28 Tex. Civ. App. 571, 67 S. W. 527.

40. Marney *v.* Scott, [1899] 1 Q. B. 986, 68 L. J. Q. B. 736, 47 Wkly. Rep. 666. And see Hamilton *v.* Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350.

repair is not sufficient, where the defect has existed for sufficient time for a prudent man to discover it.[41]

3. Notice or Warning[42] — a. Necessity — (i) *In General.* Where one is performing some act which is likely to be dangerous to persons in the vicinity it is his duty to warn such persons of the danger.[43] And a person furnishing another a defective article owes him the duty of notifying him of such defect, especially where the dangerous quality is not common to such articles.[44] So if the owner of land knows that its condition is unsafe he should give timely warning to persons rightfully there.[45] A person engaged in a dangerous occupation is not excused from giving warning because someone else has been accustomed to give such warning and failed to do so at the time of the injury.[46] Failure to give a warning creates no liability for injuries where it would have been of no avail.[47] It has been held in a jurisdiction where no distinction is made betweeen infant and adult trespassers that no warning to an infant trespasser attracted by dangerous machinery is necessary.[48]

(ii) *Obvious or Known Dangers.* Notice or warning is not necessary where the danger is obvious,[49] or where no danger is to be anticipated,[50] or if such other

41. Stevens *v.* Walpole, 76 Mo. App. 213.

42. Master's liability for injuries to servant see Master and Servant.

43. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269 (throwing heavy bales into passageway); Mahan *v.* Everett, 50 La. Ann. 1162, 23 So. 883 (holding that throwing heavy articles on to the sidewalk without looking to see if any one was near and without giving any warning was negligence); Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403; Dehring *v.* Comstock, 78 Mich. 153, 43 N. W. 1049; Burkhardt *v.* Schott, 101 Mo. App. 465, 74 S. W. 430 (felling tree without warning to one near by that it was about to fall).

Blasting.—Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Gates *v.* Latta, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729; Stephens *v.* Martins, (Pa. 1889) 17 Atl. 242; O'Gorman *v.* O'Gorman, [1903] 2 Ir. 573; Collier *v.* Michigan Cent. R. Co., 27 Ont. App. 630.

44. King *v.* National Oil Co., 81 Mo. App. 155, holding that where a wagon-maker conducting an independent business undertakes under contract to repair the wagons of an oil company, he is an independent contractor, and the relation of master and servant does not exist; and the oil company owes him the duty to exercise ordinary care in regard to the condition of the wagons offered for repair, and to notify him of such defects therein as are likely to result in injury during the process of repairing.

45. *Connecticut.*— Fox *v.* Kinney, 72 Conn. 404, 44 Atl. 745.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761.

Massachusetts.— Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350; Carleton *v.* Franconia Iron, etc., Co., 99 Mass. 216. But see Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459, holding failure to erect a sign that the way was not public would not render the owner liable to strangers entering without permission.

Michigan.— Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150 (by the fact that he himself was riding on the elevator at the same time, and exercised the same care for plaintiff's safety); Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

Missouri.— Wheeler *v.* St. Joseph Stock-Yards, etc., Co., 66 Mo. App. 260, defective bridge on private way.

New Hampshire.— True *v.* Meredith Creamery, 72 N. H. 154, 55 Atl. 893.

New York.— Scott *v.* Hough, 14 N. Y. St. 401, holding that a person excavating in a bank overhanging a highway is bound to use care, skill, and vigilance to prevent injury to persons passing, and to warn them of dangers to which they may be exposed by the caving in of such bank.

Oregon.— Massey *v.* Seller, 45 Oreg. 267, 77 Pac. 397, holding that where the owner of premises on which there is an unguarded elevator shaft invites a person to enter such premises, it is his duty to warn the other of the danger or apprise him of the unguarded shaft.

Pennsylvania.— Myers *v.* Snyder, Brightly 489.

United States.— Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 26 L. ed. 235.

See 37 Cent. Dig. tit. "Negligence," § 38.

46. Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092.

47. Miller *v.* Rochester Vulcanite Paving Co., 21 N. Y. Suppl. 651.

48. Buch *v.* Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163.

49. Hunnewell *v.* Haskell, 174 Mass. 557, 55 N. E. 320; O'Neil *v.* Everest, 7 Aspin. 163, 56 J. P. 612, 61 L. J. Q. B. 453, 66 L. T. Rep. N. S. 396; Burns *v.* Henderson, 7 F. (Ct. Sess.) 697; Fonseca *v.* Lake of the Woods Milling Co., 15 Manitoba 413.

50. Favro *v.* Troy, etc., Bridge Co., 4 N. Y. App. Div. 241, 38 N. Y. Suppl. 433.

person had actual knowledge of the intended act.[51] Nor need a specific warning of the dangerous character of an article be given when the article is not new or unknown.[52]

b. Sufficiency of Notice or Warning. A notice must be sufficient to apprise the person notified of the danger.[53] But any notice which accomplishes such object is sufficient.[54] A warning or notice is effective to exempt from liability for injuries only in respect of those dangers which it would lead the party warned or notified to expect and avoid.[55] The exemption from liability for injuries resulting from notice may be waived, where the party giving it acquiesces in the disregard thereof by persons for whom it was intended.[56] Notice of the dangerous condition of premises when necessary must be given to each one liable to be injured.[57] But it need only be given to those likely to be injured,[58] and the warning must purport to come from the person liable.[59]

c. Effect of Notice or Warning. The general rule is that where proper notice or warning is given defendant is relieved from liability for injuries received by those who do not heed it.[60] The same is usually held to be true in regard to children trespassers on dangerous premises.[61] And if the child had been warned to go away the owner of a machine will not be liable for a sudden and unanticipated injury to the child.[62]

H. Persons Liable[63] **— 1. In General.** As a general rule any person who by his negligent personal conduct produces an injury to another is liable therefor.

Illustration.— Persons engaged in the lawful business of excavating sand from the bottom of a public stream are not bound, in the exercise of ordinary care, to anticipate and provide against the act of a boy of fifteen who, knowing he could not swim, and that holes made by defendant's dredge were in the near neighborhood, walked over a river bottom, which he could not see, and into a hole made by defendant, and are not negligent in leaving the cuts unmarked. Hunt *v.* Graham, 15 Pa. Super. Ct. 42.

51. Montgomery *v.* Augusta Masonic Hall, 70 Ga. 38. Defendants were not negligent in failing to give everyone who resided or worked within a radius of five hundred feet notice of an intended blast, especially after the blasting had been going on, to the knowledge of such person, for several weeks. Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1098, 64 Am. St. Rep. 329, 34 L. R. A. 182.

52. Gibson *v.* Torbert, 115 Iowa 163, 88 N. W. 443, 56 L. R. A. 98, no warning as to character of phosphorus is required.

53. Jackson *v.* Schmidt, 14 La. Ann. 806; Coxhead *v.* Johnson, 20 N. Y. App. Div. 605, 47 N. Y. Suppl. 389 [*affirmed* in 162 N. Y. 640, 57 N. E. 1107].

54. Downes *v.* Elmira Bridge Co., 41 N. Y. App. Div. 339, 58 N. Y. Suppl. 628, holding that where a private dock used by the public as mere licensees is being repaired, such fact is sufficient notice of the dangerous condition of the premises, and no duty rests on the person in charge of the work to give affirmative notice to one on the premises by mere sufferance.

Waiver of written notice.— In an action on the case, under Rev. Code, c. 16, § 2, for an injury to adjoining land by defendant's setting fire to his own woods without the notice in writing required by the code, proof of the waiver of a written notice was a sufficient defense. Roberson *v.* Kirby, 52 N. C. 477.

55. Clarke *v.* Rhode Island Electric Lighting Co., 16 R. I. 463, 17 Atl. 59.

56. Kentucky Distilleries, etc., Co. *v.* Leonard, 79 S. W. 281, 25 Ky. L. Rep. 2046; Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

For facts held not to show waiver see Ball *v.* Hauser, 129 Mich. 397, 89 N. W. 49.

57. Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677; Lechman *v.* Hooper, 52 N. J. L. 253, 19 Atl. 215.

58. Saussy *v.* South Florida R. Co., 22 Fla. 327.

59. Dublin Cotton Oil Co. *v.* Jarrard, 91 Tex. 289, 42 S. W. 959.

60. Harobine *v.* Abbott, 177 Mass. 59, 58 N. E. 284; Graetz *v.* McKenzie, 9 Wash. 696, 35 Pac. 377; Ellis *v.* Great Western R. Co., L. R. 9 C. P. 551, 43 L. J. C. P. 304, 30 L. T. Rep. N. S. 874; Anderson *v.* Coutts, 58 J. P. 369; Brown *v.* Heather, 8 Can. L. J. N. S. 86; Prud'homme *v.* Vincent, 11 Quebec Super. Ct. 27.

61. Powers *v.* Owego Bridge Co., 97 N. Y. App. Div. 477, 89 N. Y. Suppl. 1030; Missouri, etc., R. Co. *v.* Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825 [*reversing* (Civ. App. 1895) 32 S. W. 815]. But see Barrett *v.* Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186.

62. J. I. Case Threshing Mach. Co. *v.* Burns, (Tex. Civ. App. 1905) 86 S. W. 65.

63. Comparative negligence see *infra*, VII, D.

Concurrent negligence of third person as proximate cause of injury see *infra*, VI, G.

Condition of land, buildings, and other structures see *supra*, V, F.

2. Person in Possession or Control. The general rule is that one who is in control of a place or instrumentality, and through whose negligence another sustains injury is liable, although he is not the owner.[64] And the occupant of premises, although a mere licensee, is liable for injuries inflicted by reason of his neglect or failure to keep the premises in a safe condition.[65] Although a person has a right to go upon the premises of another he will be liable to such person for injuries caused by his negligent acts thereon.[66]

3. Owner — a. In General. To render the owner of premises liable for injuries caused by their defective or dangerous condition, it is not necessary for plaintiff to show actual negligence on the part of the owner himself. It is enough to show that he permitted another to place the premises in such a condition as to cause an injury.[67] Thus the owner is liable, although the premises were in the

Contributory negligence as proximate cause see *infra*, VII, A, 4.

Injuries from defects in bridges see Bridges.

Intervening negligence of third person as proximate cause of injury see *infra*, VI, H, 1.

Master's liability for injuries to servant see Master and Servant.

Master's liability to third persons see Master and Servant.

Of injuries: As affecting parents' right of recovery see Parent and Child. By tortious acts see Torts. By trespassing animals see Animals. From defective or dangerous condition of wharves or docks see Wharves. From defects from obstructions in highways see Streets and Highways. From defects in streets and public places in cities see Streets and Highways. From defects in turnpike see Turnpikes; Toll-Roads. From negligence of physicians and surgeons see Physicians and Surgeons. From negligence of sheriffs or constables see Sheriffs and Constables. From poison see Poisons. Incident to construction and maintenance of railroads see Railroads; Street Railroads. Incident to construction, maintenance, and operation of telegraphs and telephones see Telegraphs and Telephones. Incident to floating logs see Logs and Logging. Incident to keeping or hiring horses at livery stables see Livery-Stable Keepers. Incident to navigation of vessels see Collisions; Pilots; Shipping; Towage. Incident to operation of mines and mineral wells see Mines and Minerals. Incident to operation of railroads see Railroads; Street Railroads. Incident to use of flowage of water see Waters; Watercourses. Incident to use of steam see Steam. Received from violating Sunday laws see Sunday. To adjacent premises by negligence of adjoining landowner see Adjoining Landowners. To adjoining lands see Adjoining Landowners. To goods in hands of carrier see Carriers. To passengers see Carriers; Shipping. To servant from negligence of master see Master and Servant. Trustees see Trusts.

64. *Indiana.*— Growcock *v.* Hull, 82 Ind. 202.

Kansas.— Kansas City, etc., R. Co. *v.* Matson, 68 Kan. 815, 75 Pac. 503; Rouse *v.* Youard, 1 Kan. App. 270, 41 Pac. 426.

Louisiana.— Henderson *v.* Sun Mut. Ins. Co., 48 La. Ann. 1031, 20 So. 164, 55 Am. St. Rep. 292.

Massachusetts.— Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350.

Missouri.— Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Lottman *v.* Barnett, 62 Mo. 159.

Pennsylvania.— Grier *v.* Sampson, 27 Pa. St. 183.

Vermont.— Palmer *v.* St. Albans, 56 Vt. 519.

England.— Steel *v.* Lester, 3 C. P. D. 121, 47 L. J. C. P. 43, 37 L. T. Rep. N. S. 642, 26 Wkly. Rep. 212.

Canada.— Ferrier *v.* Trepannier, 24 Can. Sup. Ct. 86.

See 37 Cent. Dig. tit. "Negligence," § 39.

Trustee.— Where a trustee in possession of the trust property by himself, or by tenants under him, is guilty of negligence in care of the premises, by which a tenant is injured, the liability is personal, and the trust estate cannot be made to bear the loss. Weingartner *v.* Pomp, 10 North. Co. Rep. (Pa.) 146.

Owner of vehicle.— Where an owner of a vehicle accompanied by a guest, both being on a pleasure trip, permits the guest to drive at the latter's request, and is in a position to take control of the reins at any moment, the owner will be liable for any injury caused by the negligent act of the guest in driving the vehicle. McMahen *v.* White, 30 Pa. Super. Ct. 169.

65. Commonwealth Electric Co. *v.* Melville, 110 Ill. App. 242 [*affirmed* in 210 Ill. 70, 70 N. E. 1052]; Alston *v.* Stewart, 2 Mona. (Pa.) 51.

66. Kellar *v.* Shippee, 45 Ill. App. 377 (unguarded excavation on plaintiff's land); Sprankle *v.* Bart, 25 Ind. App. 681, 58 N. E. 862 (leaving poisonous substances on land of another).

67. Gardner *v.* Heartt, 2 Barb. (N. Y.) 165 [*reversed* on other grounds in 1 N. Y. 528].

Acts of employees within scope of employment.— Where plaintiff was injured by a box thrown from the door of defendant's mill to a truck on a sidewalk, defendant's liability is not affected by the fact that he had nothing to do with the transportation of goods from its mill door. Kelly *v.* Cohoes Knitting Co., 8 N. Y. App. Div. 156, 40 N. Y. Suppl. 477.

possession of a licensee,[68] a contractor,[69] or a tenant,[70] provided, however, in the latter case, that he is under obligation to make repairs.[71] One who is not owner or in control is not liable,[72] unless he has invited another to use the property.[73] After execution of a deed and delivery of possession of defective premises to the grantee, the grantor is not liable thereafter for injuries to one of the public because of the defect.[74] If there be nobody in possession of premises, the owner of the legal title is liable.[75]

b. Acts of Third Persons.[76] Where the injury is the result solely of the negligent act of a third person who does not stand in such a relation to defendant as to render the doctrine of *respondeat superior* applicable, no liability attaches to defendant.[77] The fact that the negligent act which caused the injury was done on a person's land or property will not render him liable where he had no control over the persons committing such act,[78] and the act was not committed on his

68. Conradt *v.* Clauve, 93 Ind. 476, 47 Am. Rep. 388 (holding that where the proprietors of a fair ground, charging an admission, had allotted a portion of the grounds for target shooting, which was operated under a license from the proprietor, but gave no notice thereof, and plaintiff's horse, hitched where others were hitched, was shot, the proprietors were liable); Flynn *v.* Toronto Industrial Exhibition Assoc., 9 Ont. L. Rep. 582.

69. Steppe *v.* Alter, 48 La. Ann. 363, 19 So. 147, 55 Am. St. Rep. 281; Knoop *v.* Alter, 47 La. Ann. 570, 17 So. 139 (holding that the owner of a defective wall is liable for injuries caused by its falling, although it was at the time in possession of another for the purpose of repair); Sebeck *v.* Platt-deutsche Volkfest Verein, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199.

70. House *v.* Metcalf, 27 Conn. 631.

If an owner lets land with a nuisance upon it, he is liable for an injury caused thereby. Gandy *v.* Jubber, 5 B. & S. 78, 10 Jur. N. S. 652, 33 L. J. Q. B. 151, 9 L. T. Rep. N. S. 800, 12 Wkly. Rep. 526, 117 E. C. L. 78; Todd *v.* Flight, 9 C. B. N. S. 377, 7 Jur. N. S. 291, 30 L. J. C. P. 21, 3 L. T. Rep. N. S. 325, 9 Wkly. Rep. 145, 99 E. C. L. 377.

71. St. Louis, etc., R. Co. *v.* Dooley, 70 Ark. 389, 67 S. W. 1012; Lake Erie, etc., R. Co. *v.* Maus, 22 Ind. App. 36, 51 N. E. 735. See also Bayley *v.* Wolverhampton Waterworks Co., 6 H. & N. 241, 30 L. J. Exch. 57.

Executors to whom the legal title to testator's real estate is devised are not liable for injuries caused by the defective condition of the premises, where the use thereof was given to another, and the executors were not authorized by the will to make repairs. Butler *v.* Townsend, 84 Hun (N. Y.) 100, 31 N. Y. Suppl. 1094.

72. **Liability of part-owner.**— In the construction of a building where plaintiff was injured, defendant city, desiring a hall for its use, entered into an arrangement with the owners of the land whereby the city, with others, was to complete the upper story of the building, keep the same in repair, and was then to be a part-owner of such upper story. The city had no interest in the land on which the building stood, or in the lower story, or any control over the building of the basement where the injury happened, and it was held that no liability attached to the city on the ground of ownership. El Paso *v.* Causey, 1 Ill. App. 531.

73. McIntyre *v.* Pfaudler Vacuum Fermentation Co., 133 Mich. 552, 95 N. W. 527.

74. Palmore *v.* Morris, 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693.

75. Grier *v.* Sampson, 27 Pa. St. 183.

76. **Acts of third persons as proximate cause** see *infra*, VI, H, I.

77. *Michigan.*— Chaddock *v.* Plummer, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 283, 14 L. R. A. 675.

New Mexico.— Abrahams *v.* California Powder Works, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

New York.— Wiley *v.* Bondy, 23 Misc. 658, 52 N. Y. Suppl. 68.

North Carolina.— Thorp *v.* Minor, 109 N. C. 152, 13 S. E. 702.

England.— Goodman *v.* Taylor, 5 C. & P. 410, 24 E. C. L. 630.

Canada.— McGregor *v.* Harwich Tp., 29 Can. Sup. Ct. 443; Holland *v.* Canadian Pac. R. Co., 33 N. Brunsw. 78.

See 37 Cent. Dig. tit. "Negligence," § 40.

Illustrations.— Where the negligent driving of a horse and carriage by a borrower thereof causes injury to a third person the owner is not liable if they were not at the time being used in his business. Herlihy *v.* Smith, 116 Mass. 265. Where a third person creates a dangerous state of affairs on the property of another, of which by using ordinary care he could not know, he will not be responsible to a person injured thereby, although the latter is rightfully on the premises. Clapp *v.* La Grill, 103 Tenn. 164, 52 S. W. 134.

78. *Massachusetts.*—Patnoude *v.* New York, etc., R. Co., 180 Mass. 119, 61 N. E. 813; Earle *v.* Hall, 2 Metc. 353.

Michigan.— Wright *v.* Big Rapids Door, etc., Mfg. Co., 124 Mich. 91, 82 N. W. 829, 50 L. R. A. 495; Knottnerus *v.* North Park St. R. Co., 93 Mich. 348, 53 N. W. 529, 17 L. R. A. 726.

Ohio.— Burdick *v.* Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767.

Pennsylvania.— Herbstritt *v.* Lackawanna Lumber Co., 212 Pa. St. 495, 61 Atl. 1101.

account,[79] nor where the third person whose negligence caused the injury assumes control of the owner's property without authority.[80] An owner or occupant of premises not in a defective or dangerous condition is not liable for injuries caused by acts of third persons which were unauthorized,[81] or which he had no reason to anticipate,[82] and of which he had no knowledge.[83] The owner is liable, however, where he gave permission to the third person to do the act causing the injury.[84]

4. Makers, Vendors, and Lenders — a. Basis of Liability. The liability of a vendor or manufacturer for negligence, except as regulated by contract, must arise from breach of a duty which he owes to the public.[85]

b. General Rule. Although it has been said that the duty which he owes to the public, for breach of which one injured may recover, is limited to instruments and articles in their nature calculated to do injury, such as are essentially elements of danger, and to acts that are ordinarily dangerous to life and property; and that if the wrongful act be not imminently dangerous to life and property, the negligent vendor is liable only to the party with whom he contracted,[86] it will appear on the contrary that the vendor or manufacturer may be held liable to persons with whom he has no contractual relation, for injury caused by mere negligence in the manufacture of an article harmless in kind, but made dangerous by defect, and knowingly putting such article upon the market in the ordinary course of business without notice of such defect.[87] A more explicit statement of the law exonerates the vendor or manufacturer from liability for negligence to persons with whom he has no contractual relation, as a general rule, with three exceptions, as follows: (1) Where the negligent act is imminently dangerous and is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life; (2) where the act is that of an owner, combined with an invitation to the

England.— Murphey *v.* Caralli, 3 H. & C. 462, 10 Jur. N. S. 1206, 34 L. J. Exch. 14, 13 Wkly. Rep. 165.

See 37 Cent. Dig. tit. "Negligence," § 40.

Illustration.— Where oil was allowed to flow into a public sewer, under the direction of the chief of the city's fire department, for the purpose of suppressing a fire at an oil company's works, the oil company is not liable for damages caused by an explosion thereof, it appearing that neither the fire nor the flow of oil was due to its negligence. Fuchs *v.* St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118.

79. Earle *v.* Hall, 2 Metc. (Mass.) 353.

80. Edwards *v.* Jones, 12 Daly (N. Y.) 415.

81. *Illinois.*— Illinois Cent. R. Co. *v.* Carraher, 47 Ill. 333.

Maryland.— Maenner *v.* Carroll, 46 Md. 193.

Massachusetts.— McIntire *v.* Roberts, 149 Mass. 450, 22 N. E. 13, 14 Am. St. Rep. 432, 4 L. R. A. 519.

New York.— Pardington *v.* Abraham, 93 N. Y. App. Div. 359, 87 N. Y. Suppl. 670; Meeker *v.* Smith, 84 N. Y. App. Div. 111, 81 N. Y. Suppl. 1067; Robbins *v.* Mount, 4 Rob. 553, 33 How. Pr. 24; Scullin *v.* Dolan, 4 Daly 163.

Rhode Island.— Dolan *v.* Callender, etc., Co., 26 R. I. 198, 58 Atl. 655.

82. Mahoney *v.* Libbey, 123 Mass. 20, 25 Am. Rep. 6.

83. Holt *v.* Spokane, etc., R. Co., 4 Ida. 443, 40 Pac. 56; Illinois Cent. R. Co. *v.* Carraher, 47 Ill. 333; Meeker *v.* Smith, 84 N. Y. App. Div. 111, 81 N. Y. Suppl. 1067.

84. Corby *v.* Hill, 4 C. B. N. S. 556, 4 Jur. N. S. 512, 27 L. J. C. P. 318, 6 Wkly. Rep. 575, 93 E. C. L. 556. And see Ella *v.* Boyce, 112 Mich. 552, 70 N. W. 1106.

85. Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 612, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821 (where the court quoted Whitaker Smith Negl., as follows: "The true question always is, has the defendant committed a breach of duty, apart from the contract? If he has only committed a breach of contract he is liable to those only with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person," and continued, "The difficulty in the practical administration of the law is to fix upon the dividing line between those cases where the duty begins and ends with the contract, and where the law imposes a duty to third persons notwithstanding the contract"); Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 401, 11 C. C. A. 253, 27 L. R. A. 583 (where it is said: "Negligence, to be actionable, must occur in breach of a legal duty, arising out of contract or otherwise, owing to the person sustaining the loss").

86. Standard Oil Co. *v.* Murray, 119 Fed. 572, 57 C. C. A. 1.

87. See Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220; Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Schubert *v.* J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St.

party thereby injured, to use the defective appliance on such owner's premises; (3) where the act consists in the sale and delivery of an article, with knowledge of undisclosed danger and without notice of its qualities whereby any person is injured in a way that might reasonably have been expected.[88]

c. Duty to the Public — (I) *In General.* The duty, to the public, of persons who furnish articles or structures for the use of others may be divided as follows: (1) That which one owes in dealing with a thing imminently dangerous in kind;[89] (2) that which is due from one who deals with a thing not imminently dangerous in kind, but rendered dangerous by defect.[90]

(II) *As to Articles Dangerous in Kind.* The manufacturer or vendor who deals with an article imminently dangerous in kind owes to the public a positive and active duty of employing care, skill, and diligence to limit that danger.[91] In such case the liability does not rest upon the ground of warranty,[92] although a warranty may afford an element of the tort, by putting the party injured off his guard and so rendering the negligence effective.[93] Nor does it depend on privity of contract;[94] but arises from a duty not to expose the public

Rep. 559, 15 L. R. A. 818; Riggs *v.* Standard Oil Co., 130 Fed. 199; Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; Bragdon *v.* Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; Georgs *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118.

88. Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, per Sanborn, C. J.

89. See *infra*, V, H, 4, c, (II).

90. See *infra*, V, H, 4, c, (III).

91. "A manufacturer and dealer in dangerous articles intended for use . . . may become liable to the purchaser at least, and possibly to third persons in some cases, for damages resulting from defective materials or from want of proper care and skill in the manufacture." Wyllie *v.* Palmer, 137 N. Y. 248, 255, 33 N. E. 381, 19 L. R. A. 285. "One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby." Weiser *v.* Holzman, 33 Wash. 87, 90, 73 Pac. 797, 99 Am. St. Rep. 932.

"This duty of course exists in a higher degree with respect to latent dangers which are hidden from the eye of the non-expert and without the knowledge of the uninformed." Smith *v.* Clarke Hardware Co., 100 Ga. 163, 167, 28 S. E. 73, 39 L. R. A. 607.

Duty to give notice of the dangerous qualities of an article dangerous in kind is incumbent on the maker or vendor (Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453); as also on one who delivers such article for carriage (Farrant *v.* Barnes, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553; Brass *v.* Maitland, 6 E. & B. 470, 2 Jur. N. S. 710, 26 L. J. Q. B. 49, 4 Wkly. Rep. 647, 88 E. C. L. 470. See also Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589).

92. Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788.

93. False and fraudulent warranty of a gun, bought, to the knowledge of the vendor, for the use of the purchaser and his sons, renders the vendor liable in tort to one of the sons for injury suffered by him through defect contrary to such warranty. Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337]. Here the action was on the case; fraud was alleged, as well as negligence, and fraud was treated, in the opinion, as the cause of action. But it is obvious on the facts that fraud, as a cause of action, could only have been supplementary to the negligence, for it was not fraud that caused the gun to burst. *Compare* Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 1053, 4 Jur. N. S. 657, 27 L. J. Q. B. 167, 92 E. C. L. 1035 [*quoted* in Carter *v.* Harden, 78 Me. 528, 531, 7 Atl. 392], where Coleridge, J., said: "It has always been considered that Levy *v.* Langridge was a case not to be extended in its application."

Implied warranty of provisions for domestic use as an element of tort.— French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440; Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 129.

94. Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Weiser *v.* Holzman, 33 Wash. 87, 90, 73 Pac. 797, 99 Am. St. Rep. 932 (where it was said: "The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful acts"); Georgs *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. C. P. 233, 16 Wkly. Rep. 1170 (holding that where a person who manufactures an article of ingredients known only to himself represents it to be fit for the purpose for which he supplies it, when he has by negligence or lack of skill made it unfit, there need be no contractual relation to sustain an action against him on behalf of a person injured thereby).

to danger.[95] Articles of the kind under consideration are dangerous chemicals,[96] explosives,[97] poisons, or dangerous drugs.[98] But where the proper care has been

95. Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 416, 73 N. Y. Suppl. 788, where it is said: "This is . . . because the vendor owes to the public a duty not to expose human life to danger by negligently and carelessly putting upon the market an article as harmless which is in fact dangerous."

96. Farran *v.* Barnes, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553, where a person who delivered a carboy of nitric acid to a carrier, without notice of its contents, was held liable to a second carrier to whom it was delivered by the first, for injury due to such negligence. See also Brass *v.* Maitland, 6 E. & B. 470, 2 Jur. N. S. 710, 26 L. J. Q. B. 49, 4 Wkly. Rep. 647, 88 E. C. L. 470.

97. *Georgia.*— Smith *v.* Clarke Hardware Co., 100 Ga. 163, 167, 28 S. E. 73, 39 L. R. A. 607, where it is said that one who holds himself up to the public as dealing in dangerous explosives "at least owes to purchasers the duty of exercising ordinary care in the matter of placing into their hands the kind and character of goods for which they contract."

Massachusetts.— Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64, 67, where it was said, in regard to a sale of naphtha under the name of "oil": "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault."

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493, 503, where it was alleged that the defendant, a manufacturer of oil, had wilfully sold an explosive fluid as fit for illuminating purposes, and thereby caused a death, and held that "if the identity of the oil and the guilty knowledge were made clear" the fact that the oil had passed through the hands of a number of vendors before it reached the person injured would be no bar to recovery; but the case was not proved. The court remarked that a manufacturer who sells his product as an illuminating oil bearing a high and safe fire test, when in fact he knows the fire test is much lower "and that this is a most explosive and unsafe oil for domestic use, can plead nothing in defence of this wilful, terrible wrong done to a confiding community. He bears within him a heart regardless of social duty, evidencing malice in its legal sense in a high degree."

United States.— Riggs *v.* Standard Oil Co., 130 Fed. 199.

England.— Parry *v.* Smith, 4 C. P. D. 325, 48 L. J. C. P. 731, 41 L. T. Rep. N. S. 93, 27 Wkly. Rep. 801, holding that there was no need of privity of contract to sustain an action against a gas-fitter for injuries caused by explosion due to deficient apparatus, since defendant was dealing with a highly dangerous thing.

Compare Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824, holding that to mark an explosive with the name of another explosive of equal qualities which is frequently substituted for it in trade and which name is frequently used to describe it, does not charge the vendor with liability.

For civil liability for negligence in dealing with explosives see, generally, EXPLOSIVES, 19 Cyc. 4–19.

98. *Georgia.*— Blood Balm Co. *v.* Cooper, 83 Ga. 457, 462, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612, where the owner of a proprietary medicine which was sold to, and resold by, a druggist, was held liable to the consumer for injury caused by a poisonous ingredient, the court saying: "A medicine which is known to the public as being dangerous and poisonous if taken in large quantities, may be sold by the proprietor to druggists and others, and if any person, without more, should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. But if the contents of a medicine are concealed from the public generally, and the medicine is prepared by one who knows its contents, and he sells the same, recommending it for certain diseases and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, the proprietor would be liable for the damage thus sustained."

Indiana.— Howes *v.* Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

Kentucky.— Fleet *v.* Hollenkemp, 13 B. Mon. 219, 228, 56 Am. Dec. 563, where it was said: "As applicable to the owners of drug stores, or persons engaged in vending drugs and medicines by retail, the legal maxim should be reversed. Instead of *caveat emptor*, it should be *caveat vendor*. . . . It is absurd to speak of degrees of diligence and of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground."

Louisiana.— Walton *v.* Booth, 34 La. Ann. 913.

Massachusetts.— Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298.

New York.— Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

Ohio.— Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. Rep. 548.

West Virginia.— "The greatest care is demanded of one who sells dangerous drugs. So also is high skill, certainly ample skill." Peters *v.* Johnson, 50 W. Va. 644, 652, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

used no liability attaches,[99] nor where the injury occurs through a use of the article other than that for which it was furnished.[1]

(III) *As to Articles Dangerous Through Defect*—(A) *General Rule.* The duty of the maker or vendor of a thing harmless in kind, but dangerous through defect, is in general a negative duty—not knowingly so to dispose of the article that it may become a trap to the innocent.[2]

(B) *Liability Based on Knowledge of Defect.* One who, with knowledge of the dangerous defect, so deals with a defective thing that it is likely to injure persons who are innocent of negligence in the matter is liable for damage caused thereby, independently of contract.[3] A like rule applies to one who lends,

Canada.— Stretton *v.* Holmes, 19 Ont. 286. And see, generally, Druggists, 14 Cyc. 1084–1087.

Vendor charged with knowledge at his peril.— This rule relating to provisions for domestic use applies to the case of drugs. Fleet *v.* Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

A druggist is not required to inform a purchaser of the generally well-known properties of a common drug, and the fact that the purchaser applies for it in an extremely illiterate letter does not impose such duty on the vendor or charge him with reason to believe that the applicant is ignorant of the use and qualities of the article. Gibson *v.* Torbert, 115 Iowa 163, 88 N. W. 443, 56 L. R. A. 98.

99. Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788 (holding that the bare bursting of a gun does not make the manufacturer liable. Proof that due care was used in the purchase of the materials and due care and skill in the manufacture exonerates him from liability in an action, based on his duty to the public, for damage caused by such explosion); Talley *v.* Beever, 33 Tex. Civ. App. 675, 78 S. W. 23; Guinea *v.* Campbell, 22 Quebec Super. Ct. 257 (holding that a manufacturer of soda water is not liable to a customer whose child was injured by the explosion of one of the bottles when the refrigerator containing them was opened, where the bottle was tested by the manufacturer before being used, and the explosion was either due to the sudden explosure of the bottle to a current of warm air or to unavoidable accident). *Compare* Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, 271, 13 S. Ct. 837, 37 L. ed. 728, where it was said in regard to a railroad company sued for negligence by an employee injured through the bursting of the boiler of an engine purchased from another company: "It may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency."

1. Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788.

2. See the cases cited in the note next following.

3. *California.*— Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220.

Minnesota.— Teal *v.* American Min. Co., 84 Minn. 320, 87 N. W. 837; Schubert *v.* J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818.

New York.— Kahner *v.* Otis Elevator Co., 96 N. Y. App. Div. 169, 89 N. Y. Suppl. 185; Cox *v.* Mason, 89 N. Y. App. Div. 219, 85 N. Y. Suppl. 973.

United States.—Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

England.— Heaven *v.* Pender, 11 Q. B. D. 503, 509, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357 [*disapproved* in Bragdon *v.* Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924] (where the rule that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger," was said to include all cases of liability for pure negligence, and held to impose such liability, without the aid of fraud, intent or privity of contract, upon one who negligently furnishes for the use of others dangerously defective apparatus to the injury of one using it properly for the purpose for which it was furnished); George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118. But *compare* Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170.

But *compare* Davidson *v.* Nichols, 11 Allen (Mass.) 514.

One who sells diseased animals, with knowledge and without giving notice of the disease, is liable for damages necessarily and naturally caused by such act. Jeffrey *v.* Bige-

although gratuitously,[4] and to one who has undertaken to repair an article which afterward causes injury by defect due to his negligence.[5] To such liability knowledge of the defect is requisite.[6]

low, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476, where the vendor of sheep with scab, a highly contagious disease, was held liable for all loss caused thereby to the vendee, including injury to his other sheep by contagion. *Contra*, Hill *v.* Balls, 2 H. & N. 298, 3 Jur. N. S. 592, 27 L. J. Exch. 45, 5 Wkly. Rep. 740, holding, as to the sale of a horse with glanders, resulting in the death of another and valuable horse, that mere knowledge on the part of the vendor without suppression of the marks of the disease or other falsity or concealment, did not amount to fraud or a cause of action for resulting damage. *Compare* State *v.* Fox, 79 Md. 514, 527, 29 Atl. 601, 47 Am. St. Rep. 424, 24 L. R. A. 679, holding that "if a vendor sells any property, which he knows to be imminently dangerous to human beings and likely to cause them injury, to an innocent vendee who is not aware of the danger and to whom false representations have been made as an inducement to the sale, he may, under proper allegation and proof, be held responsible not only to the vendee, but to such person or persons as the vendee may in the ordinary course of events call upon to take charge of the property for him;" and that a declaration alleging that defendants by means of false representations sold a mare with "a contagious and infectious disease called 'glanders' . . . which may easily be communicated to human beings," that defendants made the sale "knowing that the mare was suffering from said disease, the dangerous character of the disease, and that it was dangerous to human life," with the result that the vendee caught the disease and died, was insufficient, because the "declaration should allege not only that the disease was imminently dangerous, or something to that effect, but that the natural or probable consequences of human beings coming into contact was that they would contract it."

4. MacCarthy *v.* Young, 6 H. & N. 329, 336, 30 L. J. Exch. 227, 3 L. T. Rep. N. S. 785, 9 Wkly. Rep. 439 (where it is said: "By the necessarily implied purpose of the loan, a duty is contracted towards the horrower not to conceal from him those defects, known to the lender, which may make the loan perilous or unprofitable to him"); Blakemore *v.* Bristol, etc., R. Co., 8 E. & B. 1035, 1051, 4 Jur. N. S. 657, 27 L. J. Q. B. 167, 6 Wkly. Rep. 336, 92 E. C. L. 1035 (holding that "as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the horrower is injured," but the lender is not liable for injuries caused by defects of which he is unaware.

One who lends an article gratuitously is bound to abstain from such interference with it as may render it dangerous to the borrower, or to give warning to the borrower of such interference. Lauritsen *v.* American Bridge Co., 87 Minn. 518, 92 N. W. 475.

5. Kahner *v.* Otis Elevator Co., 96 N. Y. App. Div. 169, 89 N. Y. Suppl. 185. But *compare* Earl *v.* Lubbock, [1905] 1 K. B. 253, 74 L. J. K. B. 121, 91 L. T. Rep. N. S. 830, 21 T. L. R. 71, 53 Wkly. Rep. 145; Winterbottom *v.* Wright, 11 L. J. Exch. 415, 10 M. & W. 109.

6. *Illinois.*— Field *v.* French, 80 Ill. App. 78, holding that one who makes, furnishes, and sets up an elevator for another is not responsible to third persons for injury caused by defects without his knowledge.

Michigan.— O'Neill *v.* James, 138 Mich. 567, 101 N. W. 828, 110 Am. St. Rep. 321, 68 L. R. A. 342.

Missouri.— Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821.

New York.— See Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 127, 15 Am. Rep. 387, where it is said: "A tradesman who sells an article which he at the time believes, and warrants, to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness." *Compare* Ferris *v.* Aldrich, 12 N. Y. Suppl. 482, where knowledge and consent of defendant to the use of his defective elevator was regarded as charging him with liability.

Rhode Island.— Slattery *v.* Colgate, 25 R. I. 220, 55 Atl. 639, holding that the excess of a necessary ingredient in articles manufactured for sale does not render the manufacturer liable to members of the public for injury caused thereby unless he knows of the excess, for otherwise there is no deceit in exposing it for sale.

Wisconsin.— Zieman *v.* Kieckhefer Elevator Mfg. Co., 90 Wis. 497, 63 N. W. 1021.

United States.— Marquardt *v.* Ball Engine Co., 122 Fed. 374, 58 C. C. A. 462, where a manufacturer of steam engines was held not liable to the representative of an employee of the purchaser for the death of such employee due to defect in a valve, because it did not appear that defendant knew, or ought to have known, that the use of a valve of that kind was immediately or imminently dangerous to human life or safety.

England.— Longmeid *v.* Holliday, 6 Exch. 761, 20 L. J. Exch. 430.

Allegations that defendant "knew, or could have known" with ordinary care, held insufficient, as the mere lack of knowledge absolved him from liability apart from contract. Simons *v.* Gregory, 120 Ky. 116, 85 S. W. 751, 27 Ky. L. Rep. 509; King *v.* Creekmore, 117 Ky. 172, 77 S. W. 689, 25 Ky. L. Rep. 1292. But *compare* Schubert *v.* J. R. Clark Co., 49 Minn. 331, 339, 51 N. W. 1103,

(c) *Doctrines Inconsistent With Strict Liability Based on Knowledge of Defect.* The rule imposing upon one who places upon the market an article knowing that it has a concealed defect, a liability for injury caused by such defect to third persons,[7] has suffered, in application, through two doctrines which can hardly be reconciled with it:[8] namely, (1) That unless the defective thing which has caused injury is imminently dangerous in kind, the person who supplies it is not liable to one with whom he has no contractual relation;[9] (2) that delivery

32 Am. St. Rep. 559, 15 L. R. A. 818, where a complaint which alleged that defendant "knew, or ought to have known" of the alleged concealed defect, was held sufficient. The effect of the alternative "or ought to have known" was not discussed, but in regard to the appearance of a lack of knowledge on the part of defendant at the time when it delivered the article, the court said: "It seems from the complaint that at some time prior to the ordering and delivery of the article defendant in the course of its business of manufacturing such goods had negligently constructed this ladder for sale, but not . . . with any specific intention or anticipation as to who might purchase or use it; but only intending that it should go into its stock of goods of that kind, to be sold in the usual course of business, and thus at length come to the hands of some one who would purchase it for actual use. Defendant is to be deemed to have known the fact alleged,— that the dangerous defects were concealed by the application of oil, paint, and varnish,— although we do not understand that this was applied for the purpose of concealing such defects. . . . When defendant manufactured and put the dangerously faulty article in its stock for sale, he is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered."

7. See cases cited *supra*, V, H, 4, c, (III), (B).

8. See cases cited in the three following notes in this section.

9. Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 513 (where a fly wheel already made and on hand, defective, sold by the manufacturer to one who bought it for his own use, and from whom after five years it was leased by the decedent whose death was caused by the defect, was held not to be a dangerous instrument such as to charge the manufacturer with liability to a third person for injury caused by its bursting, the court said that this was not a necessary result or the expected consequence of its use); Kuelling *v.* Roderick Lean Mfg. Co., 88 N. Y. App. Div. 309, 84 N. Y. Suppl. 622 (where a defendant, engaged in the manufacture of farming implements, who made and sold to a dealer a land-roller with a deliberately concealed defect which resulted in injury to one who purchased it from the dealer to whom defendant had sold it, was held not liable to the second purchaser for such injury, on the ground that there was no privity of contract between the two, and that a land-roller is not intrinsically dangerous to human life, although the particular machine was rendered so by the intentionally hidden defect); Swan *v.* Jackson, 55 Hun (N. Y.) 194, 197, 7 N. Y. Suppl. 821 (where it was said: "The scaffold in question was six feet from the floor and constructed and intended to sustain the weight of a man while he was filling the ice-box, and we do not think it can be assumed that misfortune or injury to third persons, not parties to the contract, would be a natural and necessary consequence of the imperfect construction of the box or the scaffold, within the meaning of the decisions invoked in aid of this action); Burke *v.* De Castro, etc., Sugar Refining Co., 11 Hun (N. Y.) 354 (holding that the act of furnishing apparatus consisting in a simple arrangement of rope, derrick, blocks, drum and engine, for hoisting cargo, is not an act imminently dangerous to life, and therefore does not charge the person furnishing it with liability to an employee of the person to whom it is furnished, for injury caused by the breaking of a weak rope); Bailey *v.* Northwestern Ohio Natural Gas Co., 4 Ohio Cir. Ct. 471, 2 Ohio Cir. Dec. 656; McCaffrey *v.* Mossberg, etc., Mfg. Co., 23 R. I. 381, 387, 50 Atl. 651, 91 Am. St. Rep. 637, 55 L. R. A. 822 (where, after an extensive review of authorities, it was said: "We think that the result of the cases on this subject clearly establishes the weight of authority in favor of the rule that where the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment, or implied invitation; and where plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained," and held that the manufacturer of a drop press was not liable to an employee of the purchaser for an injury due to the defective manufacture); Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 402, 11 C. C. A. 253, 27 L. R. A. 583 (where it appeared that the flowing of crude petroleum, shipped by defendant to another, and due, in part at least, to defendant's failure to provide a valve, caused the loss by fire of the property of plaintiff, a third person, but it was held that, since no duty was owing from defendant to plaintiff upon contract, the liability, if any, must rest upon a public duty, that, if there was a public duty to provide a valve, it must be because the shipment was "such and so dangerous that defendant owed the duty to all who might in any way be brought in contact with it, to so protect and guard it that harm therefrom should come to no one,"

to and acceptance by the party with whom he contracts relieves the maker or vendor from liability to others for negligence in regard to the thing accepted.[10] A less stringent application of a like doctrine is found in the rule that one who performs work for another in strict accordance with the terms of their contract is not liable to third persons for injury resulting from defect in such work.[11] Acceptance, however, does not relieve one who after such acceptance is in possession and control, as for test or repair, by the thing furnished by him, from liability to third persons for injury due to its defective condition.[12]

(D) *Liability Based on Knowledge That the Thing Supplied, if Defective, Will Be Dangerous.* One who supplies a thing for such use by others that it is obvious that any defect will be likely to result in injury to those so using it is liable to any person who, using it properly for the purpose for which it is supplied, is injured by its defective condition.[13] The doctrine of invitation has been

and, since there was no duty of the kind as to crude petroleum, defendant was not liable).

10. Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638 (an action for injury due to the explosion of a boiler made by defendants, and sold by them to a person who had exclusive use and control of it thereafter. Although the evidence tended to show that the boiler was constructed improperly of poor material, that defendants knew, at the time of the sale, that it was to be used where, in case of explosion while in use, it would be likely to destroy life and property, and that the explosion which took place was due to defendant's negligence in manufacture, it was held that defendants were relieved from responsibility by the sale and were not liable to third persons); Bragdon *v.* Perkins-Campbell Co., 87 Fed. 109, 110, 30 C. C. A. 567, 66 L. R. A. 924 (a case in which the maker of a defective side-saddle, sold by him to plaintiff's husband, was held not liable to plaintiff for injury caused to her thereby. The court said: "Ordinarily, where a vendee accepts the purchased article, the vendor becomes, by reason of such acceptance, relieved from liability to third parties with respect to it. The vendee assumes, and the vendor stands discharged of, responsibility to them. But, where the vendor is chargeable with deceit, where he has induced the vendee's acceptance by false and fraudulent misrepresentations, the latter cannot be said to have consciously taken upon himself any duty of care; and that duty, therefore, if existent, is not shifted from the vendor, and he consequently remains liable," and in the absence of deceit the vendor was exonerated).

Applied in favor of contractors, building defective structures.—Fitzmaurice *v.* Fabian, 147 Pa. St. 199, 23 Atl. 444 (where the principle that a contractor whose work has been accepted and who has abandoned possession and control of the matter to the person who employed him is not liable to a third person for damage due to his negligence in its performance was applied to the case of one who, in doing work upon real estate, left loose boards lying upon a roof in plain sight and to the knowledge of the tenant, whose daughter, the injured party, was held to have no action); Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322 [*followed* in First Presb. Cong. *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504, as one ground of decision].

11. Marvin Safe Co. *v.* Ward, 46 N. J. L. 19 (holding that one who built a bridge under contract with municipal authorities and strictly in accordance with that contract had assumed no duty to the public such as would render him liable to a third person whose property was injured by the breaking of the structure); First Presb. Cong. *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504.

12. Empire Laundry Mach. Co. *v.* Brady, 164 Ill. 58, 45 N. E. 486 [*affirming* 60 Ill. App. 379, and *distinguishing* First Presb. Cong. *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504; Fitzmaurice *v.* Fabian, 147 Pa. St. 199, 23 Atl. 444; Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322]; Necker *v.* Harvey, 49 Mich. 517, 14 N. W. 503.

"When a manufacturer is in possession of and is testing his own machinery he owes to every one who may be in danger from it the duty of proper care; and if he exposes any one to danger from his carelessness, whether the carelessness be in handling or in construction — he must answer for the consequences. The duty of care under such circumstances is not a contract duty, but a duty imposed by the common law; and the contract is only important as it evidences the degree of care which the defendant was bound to observe." Necker *v.* Harvey, 49 Mich. 517, 520, 14 N. W. 503.

13. Hayes *v.* Philadelphia, etc., Coal, etc., Co., 150 Mass. 457, 23 N. E. 225 (where defendant having furnished tackle for the use of a customer, in unloading coal, was held liable to a servant of such customer, for injury received by him through the breaking of such tackle through defect, while so used and while he was employed near it in unloading the coal); Devlin *v.* Smith, 89 N. Y. 470, 42 Am. Rep. 311; Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Connors *v.* Great Northern Elevator Co., 90 N. Y. App. Div. 311, 313, 85 N. Y. Suppl. 644 (where it was said of defendant, which

invoked as a ground of liability in such cases, proceeding upon the theory that he had furnished a steam-shovel and appliances for the purpose of unloading grain, "It undertook to furnish appliances for a particular work, the negligent performance of which duty it knew imperilled the lives of many men. Having for an adequate consideration undertaken to furnish this tackle with full knowledge of its use, it assumed a responsibility to those who were injured while it was being operated precisely as intended); Bright *v.* Barnett, etc., Co., 88 Wis. 299, 307, 60 N. W. 418, 26 L. R. A. 524 (holding that the liability of one who negligently supplies a defective appliance for use by persons other than the one to whom he supplies it, "may rest upon the duty which the law imposes on every one to avoid acts imminently dangerous to the lives of others. This liability to third parties is held to exist when the defect is such as to render the construction in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use"). *Compare* Carter *v.* Harden, 78 Me. 528, 7 Atl. 392 (holding that a woman injured by the running away of a horse sold to her husband, without knowledge on the part of the vendor that the horse was purchased for the wife or for her use, or expectation on his part that she would rely on any representations of his has no action against the vendor); Davidson *v.* Nichols, 11 Allen (Mass.) 514 (where it appeared that defendants, chemists, and druggists, sold to other druggists, by mistake, one substance under the name of another. That a third person bought the substance of the vendee, both supposing it to be the other substance. That the final purchaser plaintiff, so misled, mixed the substance, harmless by itself, in a combination which it rendered explosive, whereby he was injured, and it was held that defendants were not liable as they were under no duty toward plaintiff); Swan *v.* Jackson, 55 Hun (N. Y.) 194, 7 N. Y. Suppl. 821 (holding that an article for the use of others than the purchaser must, in order to render the maker liable for injury to a third person through its defect, be such that it can be assumed that misfortune or injury to third persons, not parties to the contract, would be a natural and necessary consequence of its imperfect construction); Sweeney *v.* Rozell, 31 Misc. (N. Y.) 640, 641, 64 N. Y. Suppl. 721 (holding that the duty of a person who furnishes hoisting appliances is not "that of an insurer of the safety of every person" using them, when he does not undertake absolutely for the safety and sufficiency of the apparatus. In order to charge him with liability to one with whom he has no contractual relation for injury due to defect, it must appear that he "knew, or should have known, of its defective condition, or that he had omitted to use reasonable care to discover its condition, for his personal negligence is the very gist of the action"); Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170 (where a declaration alleging that defendant negligently and improperly hung a chandelier in a public house, knowing that plaintiff and others were likely to come under it and be injured by its fall, and without warning plaintiff of the danger, whereby the chandelier fell upon and injured plaintiff while he was unconscious of the danger, was held bad upon demurrer as showing no contract invitation or other source of duty from defendant to plaintiff. Willes, J., drew a distinction between the actual averment that the chandelier was hung "in a careless and negligent manner," and an averment which was not made, that it was so hung "as to be dangerous to persons frequenting the house," saying of the latter: "If that averment had been made and proved, the case might fall within the class to which Sullivan *v.* Waters, 14 Ir. C. L. 460, belongs, — as a trap to persons using or likely to use the way, whether public or not").

Vehicle.— It has been held that persons who let vehicles for private use are subject to the same liability toward those for whose use such vehicles are let. Hadley *v.* Cross, 34 Vt. 586, 80 Am. Dec. 699. So a coal dealer, the owner of a wagon, was held liable to the servant of one to whom he had shipped coal, for injury sustained through a defect in defendant's wagon while plaintiff was unloading it. Elliott *v.* Hall, 15 Q. B. D. 315, 54 L. J. Q. B. 518, 34 Wkly. Rep. 16. But see Earl *v.* Lubbock, [1905] 1 K. B. 253, 74 L. J. K. B. 121, 91 L. T. Rep. N. S. 830, 21 T. L. R. 71, 53 Wkly. Rep. 145 (holding that an employee of the owner of a van has no action against a wheelwright who has agreed with the owner to keep the van in repair and has failed to do so, for injury due to such failure, since there is no delivery of a dangerous article, such as would charge the person delivering it with duty to a third person, and no privity of contract between plaintiff and defendant); Winterbottom *v.* Wright, 11 L. J. Exch. 415, 10 M. & W. 109 (where a contractor who supplied a mail coach for the purpose of carrying mail-bags, and agreed with the postmaster-general to keep it in a fit, proper, secure, and safe condition for that purpose, was held not liable to one of the public for a personal injury occasioned by latent defects in such coach, for such a contract does not impose upon him any duty to the public).

Injury to property.— Persons who undertook to construct for plaintiffs a boiler for a full and adequate consideration knowing how it was to be situated and used were held liable to plaintiffs for damage to their property by its explosion. Erie City Iron Works *v.* Barber, 102 Pa. St. 156. One who undertakes to repair a number of fire sprinklers, which act automatically by bursting when the temperature is raised by a fire, is liable for damage to property from the bursting of a sprinkler without any apparent cause, occurring as the immediate result of his

who furnishes a thing for a certain use by others invites others to use it, and is therefore bound to make it safe for such purpose.[14]

(IV) *As to Unwholesome Food.* As to the principle upon which those who deal in unwholesome food are liable to persons injured thereby, the authorities do not seem to be altogether harmonious.[15]

inferior and imperfect workmanship. Canada Jute Co. *v.* Robert Mitchell Co., 16 Quebec Super. Ct. 211.

14. See the cases cited in the following note.

Doctrine of invitation.— Where defendant has supplied, for a certain use by others, a thing obviously likely to cause injury in such use if defective, and persons innocently about it in the course of such use have been injured by its defective condition, it has been said: "It was enough, we think, if the plaintiff proved that the tackle and appliances . . . were actually intended by the defendant to be used by its customers in delivering coal, and were furnished by the defendant for this purpose, and if Knight [plaintiff's employer, whose invitation was implied] was invited by the defendant to use them in unloading his coal" (Hayes *v.* Philadelphia, etc., Coal, etc., Co., 150 Mass. 457, 460, 23 N. E. 225); "When the defendant turned over the steam shovel and its appliances to the Lake Carriers' Association to be used in unloading grain, it knew that the grain was to be taken out by a large number of scoopers. It impliedly invited these men to go into the hold of the freighter with the assurance that it had furnished appliances which rendered the performance of the work reasonably safe so far as such tackle was concerned" (Connors *v.* Great Northern Elevator Co., 90 N. Y. App. Div. 311, 313, 85 N. Y. Suppl. 644); "The defendant, in furnishing this staging for the use of the employees of the fire extinguisher company, on which they might stand or walk in doing their work, had in effect invited and induced the deceased to walk on it while doing his work, and was liable to him if he suffered injury from its defective condition"); Bright *v.* Barnett, etc., Co., 88 Wis. 299, 306, 60 N. W. 418, 26 L. R. A. 524.

15. See the cases cited in the following note. And see, generally, Food, 19 Cyc. 1096.

The liability of vendors of unwholesome food has been treated as subject to the rule applicable to the case of a thing not intrinsically dangerous. Salmon *v.* Libby, 114 Ill. App. 258 (where it was held that "a different rule applies as to articles of food" from that concerning dangerous drugs and medicines; that a complaint alleging that plaintiff's testator came to his death by eating mince meat manufactured by defendant, there being no allegation of "fraud, concealment or implied invitation" to the deceased or of "any contract relation" between him and defendant, stated no cause of action. This was on the ground that mince meat is not "in its nature 'imminently dangerous'"); Craft *v.* Parker, 96 Mich. 245, 248, 55 N. W. 812, 21 L. R. A. 139 (where negligence, coupled with implied warranty, was held to charge the dealer with liability for injury due to bad food, "if he knew it to be dangerous, or, by proper care on his part, could have known its condition"). On the other hand a stricter doctrine, analogous to that which prevails in case of an article dangerous in kind, has been applied. Bishop *v.* Weber, 139 Mass. 411, 417, 1 N. E. 154, 52 Am. Rep. 715, where it was said: "If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such, by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment, and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties." See also Van Bracklin *v.* Fonda, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339, where, although the decision was based on deceit in not disclosing the condition of the food, the court said: "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril."

Food for animals.—A defendant sold part of a lot of hay on which he knew white lead had been spilled, knowing also that it was for the purpose of being fed to a cow. The cow died and he was held liable for her loss. "It is perfectly well settled that there is an implied warranty, in regard to manufactured articles purchased for a particular use, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased." French *v.* Vining, 102 Mass. 132, 135, 3 Am. Rep. 440.

Bottling.— "When a manufacturer makes, bottles and sells to the retail trade, to be

5. Joint and Several Liability. All persons jointly concerned in the negligence which caused the injury are liable therefor,[16] although but one of them is guilty of the negligent act causing the injury.[17] An agreement whereby one defendant, after the suit has been begun, buys out the interest of the other defendant, and assumes his liabilities in the business in the prosecution of which plaintiff's injury occurred, will not relieve the latter from liability.[18]

6. Concurrent Acts of Two or More Persons Causing Injury. If the concurrent negligence of two or more persons combined together results in an injury to a third person he may recover from either or all.[19] And in determining the

again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious." The duty not negligently to injure is due, in a case of that particular character, "not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended." Watson *v.* Augusta Brewing Co., 124 Ga. 121, 123, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L. R. A. N. S. 1178.

16. Hambleton *v.* McGee, 19 Md. 43; Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553.

In an action against two for negligently driving a wagon, if the two defendants hired it jointly and were jointly in the possession of it, both are liable for the accident. Bishop *v.* Ely, 9 Johns. (N. Y.) 294; Davey *v.* Chamberlain, 4 Esp. 229.

The several owners of three adjacent lots, upon which stand three brick buildings, with a common front wall, to which the partition walls attach, are jointly liable for the wrongful death of a person killed in the street by the falling of this front wall, which, after the rest of the buildings were destroyed by fire, was allowed to remain standing for a month after the fire, although dangerously insecure all that time. Simmons *v.* Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676.

In an action against an owner of land for damages from a fire set by himself and his lessee, and which was allowed to escape to plaintiff's land, the liability of defendant is not dependent upon the character of the rental agreement between him and his lessee, but rather upon the question whether in setting out the fire defendant and his tenant were acting together in the prosecution of a joint enterprise, and for their mutual benefit. Meadows *v.* Truesdell, (Tex. Civ. App. 1900) 56 S. W. 932.

One who superintends, although gratuitously, work done on the land of another, is liable, jointly with the owner of the land, for damage caused by the negligence of both. Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137.

17. Newman *v.* Stuckey, 10 N. Y. Suppl. 760.

Case lies against three proprietors of a stage coach for an injury caused by the negligent management thereof by one of them. Trespass also lies against the one who drove the coach. Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553.

One merely riding with another is not liable for injuries caused by such other's negligence. Davey *v.* Chamberlain, 4 Esp. 229.

18. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113.

19. *California.*— Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

Illinois.— McGregor *v.* Reid, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332; Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; Siegel *v.* Trcka, 115 Ill. App. 56 [*affirmed* in 218 Ill. 559, 75 N. E. 1053, 109 Am. St. Rep. 302, 2 L. R. A. N. S. 647]; Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385; Chicago Tel. Co. *v.* Hiller, 106 Ill. App. 306 [*affirmed* in 203 Ill. 518, 68 N. E. 72]; Boyle *v.* Illinois Cent. R. Co., 88 Ill. App. 255; Fisher *v.* Cook, 23 Ill. App. 621 [*affirmed* in 125 Ill. 280, 17 N. E. 763].

Indiana.— South Bend Mfg. Co. *v.* Liphart, 12 Ind. App. 185, 39 N. E. 908.

Kentucky.— Whiteman-McNamara Tobacco Co. *v.* Warren, 66 S. W. 609, 23 Ky. L. Rep. 2120.

Massachusetts.— Oulighan *v.* Butler, 189 Mass. 287, 75 N. E. 726; Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137.

Michigan.—Richard *v.* Detroit, etc., R. Co., 129 Mich. 458, 89 N. W. 52.

Minnesota.— King *v.* Chicago, etc., R. Co., 77 Minn. 104, 79 N. W. 611; McClellan *v.* St. Paul, etc., R. Co., 58 Minn. 104, 59 N. W. 978.

Missouri.— Rancy *v.* Lachance, 96 Mo. App. 479, 70 S. W. 376; Waller *v.* Missouri, etc., R. Co., 59 Mo. App. 410.

New York.— Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Schiverea *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 340, 85 N. Y. Suppl. 902; Colegrove *v.* New York, etc., R. Co. 6 Duer 382; Quill *v.* New York Cent., etc., R. Co., 16 Daly 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410]; Mooney *v.* Third Ave. R. Co., 2 N. Y. City Ct. 366.

Ohio.— Covington Transfer Co. *v.* Kelly, 36 Ohio St. 86.

Pennsylvania.— Lockhart *v.* Lichtenthaler, 46 Pa. St. 151; Rahenkamp *v.* United Traction Co., 14 Pa. Super. Ct. 635.

Rhode Island.— Venbuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770.

Wisconsin.— Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777.

liability of either of two persons whose concurrent negligence results in injury, the comparative degrees of negligence are not to be considered,[20] each being liable for the whole even though the other was equally culpable,[21] or contributed in a greater degree to the injury,[22] or the proportion in which the negligence of each contributed to the injury,[23] or the degrees of care used,[24] is not to be considered. And where the negligent conduct of several at the same time and place combined in causing an injury, they acting in concert, all are liable, although they did not conduct themselves negligently by preconcert.[25] So where the injury is the result of the neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them, they may be sued jointly.[26] Nevertheless in order to create a joint liability for an injury the negligent acts of the parties sought to be charged must have concurred in producing it.[27]

VI. PROXIMATE CAUSE.[28]

A. In General. Although a defendant may be negligent in the performance of some duty owed to the person injured no liability attaches unless such negligent act was the proximate cause of the injury.[29] The same rules are to be

United States.— Graves *v.* City, etc., Tel. Assoc., 132 Fed. 387.

Illustrations.— Where one deposits some sand on a vacant lot, which sand he then sells to another, who deposits more thereon, and the pressure of the whole pile injures an adjoining wall, the first person is liable for the whole damage, although his act alone might not have caused the injury, it being a contributing cause. Barnes *v.* Masterson, 38 N. Y. App. Div. 612, 56 N. Y. Suppl. 939. Where the negligence of the owner and independent contractor both contributed to the injury they are jointly liable. Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696 [*affirming* 26 Ill. App. 466]. It is gross negligence for a company owning a telegraph pole to allow it to become so rotten as to threaten danger to the passers-by, and it is equally gross negligence for a company which, in preparing to remove such pole, makes an excavation alongside of it, and so leaves it; and hence such companies are liable *in solido* to a passer-by on the public street on whom the pole falls. Joseph *v.* Edison Electric Co., 104 La. 634, 29 So. 223.

20. Schneider *v.* Second Ave. R. Co., 59 N. Y. Super. Ct. 536, 15 N. Y. Suppl. 556.

21. McClellan *v.* St. Paul, etc., R. Co., 58 Minn. 104, 59 N. W. 978; Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 267; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516.

22. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381.

23. Slater *v.* Mersereau, 64 N. Y. 138; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110].

Difficulty in determining in what proportion each contributed to the injury does not affect the liability of either. Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]. And see Slater *v.* Mersereau, 64 N. Y. 138 [*affirming* 5 Daly 445].

24. Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309 [*affirmed* in 174 N. Y. 512, 66 N. E. 1117].

25. Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

26. Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

27. Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; Yeazel *v.* Alexander, 58 Ill. 254; Mooney *v.* Third Ave. R. Co., 2 N. Y. City Ct. 366; Goodman *v.* Coal Tp., 206 Pa. St. 621, 56 Atl. 65; Rowland *v.* Philadelphia, 202 Pa. St. 50, 51 Atl. 589; Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Dutton *v.* Lansdowne, 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469; Howard *v.* Union Traction Co., 9 Pa. Dist. 99, 23 Pa. Co. Ct. 295.

28. **Contributory negligence as proximate cause of injury** see *infra*, VII, A, 4.

29. *Alabama.*— Louisville, etc., R. Co. *v.* Pearce, 142 Ala. 680, 39 So. 72; Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646; Alabama Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Florida.— Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558.

Georgia.— Perry *v.* Central R. Co., 66 Ga. 746.

Illinois.— The breach of duty on which an action for an injury can be maintained must be the proximate cause of the damages to plaintiff. Sullivan *v.* Morrice, 109 Ill. App. 650; Cleveland, etc., R. Co. *v.* Lindsay, 109 Ill. App. 533.

Indiana.— Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Massachusetts.—Tutein *v.* Hurley, 98 Mass. 211, 93 Am. Dec. 154.

Missouri.— Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80.

Nebraska.—Brotherton *v.* Manhattan Beach

applied in determining the question whether an act is the proximate cause, whether such act is in violation of a statute or of some duty under general principles of law.[30] It has been held, however, that the doctrine of proximate cause does not apply where the negligence which caused the injury was operating at the instant of the accident.[31]

B. Efficient Cause. In order to establish proximate cause it is necessary in the first place that there be a causal connection between the negligent act and the injury.[32] The act must have been such that without it the injury would not have happened.[33] It must have been the cause which produced the injury, the *causa causans*.[34] And hence where the act did not contribute to the injury it can-

Imp. Co., 48 Nebr. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598.

New York.— Cleveland *v.* New Jersey Steamboat Co., 5 Hun 523 [*reversed* on other grounds in 68 N. Y. 306].

North Carolina.— Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. 851.

Pennsylvania.— Marsh *v.* Giles, 211 Pa. St. 17, 60 Atl. 315.

South Carolina.— Anderson *v.* Southern R. Co., 70 S. C. 490, 50 S. E. 202; Farley *v.* Charleston Basket, etc., Co., 50 S. C. 222, 28 S. E. 193, 401.

Vermont.— Sowles *v.* Moore, 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723.

West Virginia.— Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

Wisconsin.— Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791.

Canada.— Agricultural Inv. Co. *v.* Federal Bank, 45 U. C. Q. B. 214 [*affirmed* in 6 Ont. App. 192]; Morgan *v.* Bell Tel. Co., 11 Quebec Super. Ct. 103.

See 37 Cent. Dig. tit. "Negligence," § 69 *et seq.*

30. Missouri, etc., R. Co. *v.* Dobbins, (Tex. Civ. App. 1896) 40 S. W. 861.

31. Huber *v.* Jackson, etc., Co., 1 Marv. (Del.) 374, 41 Atl. 92.

32. *Illinois.*—Muench *v.* Standard Brewery, 113 Ill. App. 512.

Kansas.— Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Atchison, etc., R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83.

Michigan.— Fowler *v.* Briggs, 116 Mich. 425, 74 N. W. 1046, 72 Am. St. Rep. 537, 40 L. R. A. 528.

Missouri.—Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22.

New York.— Warshawsky *v.* Dry Dock, etc., R. Co., 86 N. Y. Suppl. 748.

North Carolina.— Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. 851.

Pennsylvania.— Dunn *v.* Pennsylvania R. Co., 20 Phila. 258.

England.— O'Neil *v.* Everest, 7 Aspin. 163, 56 J. P. 612, 61 L. J. Q. B. 453, 66 L. T. Rep. N. S. 396.

Canada.— Bell Tel. Co. *v.* Chatham, 31 Can. Sup. Ct. 61.

See 37 Cent. Dig. tit. "Negligence," § 69.

33. *Illinois.*— Strojny *v.* Griffin Wheel Co., 116 Ill. App. 550; Cleveland, etc., R. Co. *v.* Lindsay, 109 Ill. App. 533.

Kentucky.— Louisville Gas Co. *v.* Kaufman, 105 Ky. 131, 48 S. W. 434, 20 Ky. L. Rep. 1069.

Minnesota.— Hansen *v.* St. Paul Gaslight Co., 82 Minn. 84, 84 N. W. 727.

North Carolina.— Ramsbotton *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

Pennsylvania.— Cochran *v.* Philadelphia, etc., R. Co., 184 Pa. St. 565, 39 Atl. 296.

Rhode Island.— Waterman *v.* Shepard, 21 R. I. 257, 43 Atl. 66.

Tennessee.— Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.— Texas, etc., R. Co. *v.* McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237; Texas, etc., R. Co. *v.* Black, (Civ. App. 1898) 44 S. W. 673.

West Virginia.— Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

United States.— Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583.

Illustration.—The negligence of a tenant in removing certain pipes placed in the leased building for the purpose of extinguishing fires does not render him liable for the loss of the building by fire, in the absence of anything to show that, if the pipes had not been removed, the fire could have been extinguished; the negligence being too remote. Franke *v.* Head, 42 S. W. 913, 19 Ky. L. Rep. 1128.

34. *Indiana.*— Westfield Gas, etc., Co. *v.* Hinshaw, 22 Ind. App. 499, 53 N. E. 1069.

Missouri.— Hudson *v.* Wabash, etc., R. Co., 32 Mo. App. 667.

New Jersey.— Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

New York.— Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130 (cause in such connection being the thing which brought the thing to be); Macauley *v.* Schneider, 9 N. Y. App. Div. 279, 41 N. Y. Suppl. 519.

North Carolina.— Ramsbotton *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Brewster *v.* Elizabeth City, 137 N. C. 392, 49 S. E. 885; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

United States.—Berlin Mills Co. *v.* Croteau, 88 Fed. 860, 32 C. C. A. 126; White *v.* Colorado Cent. R. Co., 29 Fed. Cas. No. 17,543, 5 Dill. 428, 3 McCrary 559.

See 37 Cent. Dig. tit. "Negligence," § 69.

not be the proximate cause.[35] The mere fact that the negligence in point of time preceded the injury does not of itself establish the causal connection,[36] and although the negligent act may have been the cause of one injury it will not be considered the proximate cause of another injury resulting from the voluntary and independent action of the injured person, although the negligent act causing the first injury caused or may have caused conditions which contributed to the second injury, and but for whose existence the second injury might not have happened.[37] Where either one of two defects alone would not have caused the injury, the two defects together constitute the proximate cause.[38] So the fact that the act complained of constituted a trespass will not affect the question of proximate cause.[39]

C. Remote or Immediate Cause. Negligence which does not amount to more than a remote cause will not create a liability for injuries which follow,[40] yet it is not necessary that the cause of the injury should be the immediate,[41]

35. Cowley *v.* Colwell, 91 Mich. 537, 52 N. W. 73; McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494; Vykess *v.* Duncan Co., 88 N. Y. App. Div. 129, 84 N. Y. Suppl. 398.

36. Hudson *v.* Wabash, etc., R. Co., 32 Mo. App. 667.

37. Snow *v.* New York, etc., R. Co., 185 Mass. 321, 70 N. E. 205 (holding that a passenger injured in a railroad collision, and suffering thereafter from attacks of dizziness, cannot recover for a broken wrist resulting from a fall occasioned by such an attack while she was standing in a sink to examine a leak in a water-pipe); Wood *v.* Pennsylvania R. Co., 177 Pa. St. 306, 35 Atl. 699, 55 Am. St. Rep. 728, 35 L. R. A. 199 (holding that negligence in failing to give a signal at a railroad crossing, resulting in the killing of a person on the crossing, cannot be held the proximate cause of the injury resulting from the body being thrown against one standing on a depot platform, fifty feet from the crossing).

38. The proximate cause of an accident from the falling of an elevator where the cable pulled out and the "dogs" failed to work, neither of which alone would have caused the fall, is not the pulling out of the cable alone, but that and the condition of the "dogs." McGregor *v.* Reid, etc., Co., 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332 [*reversing* 76 Ill. App. 610].

39. Bellino *v.* Columbus Constr. Co., 188 Mass. 430, 74 N. E. 684; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130.

40. *Arkansas.*— Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314.

California.— Oakland Sav. Bank *v.* Murfey, 68 Cal. 455, 9 Pac. 843.

Delaware.— MacFeat *v.* Philadelphia, etc., R. Co., (1904) 62 Atl. 898.

Iowa.— Gates *v.* Burlington, etc., R. Co., 39 Iowa 45.

Mississippi.—Alabama, etc., R. Co. *v.* Rooks, 78 Miss. 91, 28 So. 821.

Missouri.— Kansas City Bank of Commerce *v.* Ginocchio, 27 Mo. App. 661.

New York.— Hinchy *v.* Manhattan R. Co., 49 N. Y. Super. Ct. 406.

North Carolina.— Crampton *v.* Ivie, 126 N. C. 894, 36 S. E. 351.

Pennsylvania.— Pennsylvania Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

Texas.— Broussard *v.* Sabine, etc., R. Co., 80 Tex. 329, 16 S. W. 30; Rigdon *v.* Temple Water Works Co., 11 Tex. Civ. App. 542, 32 S. W. 828.

United States.— St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 11 S. Ct. 554, 35 L. ed. 154.

See 37 Cent. Dig. tit. "Negligence," § 73. See also cases cited *infra*, note 41.

41. *Indiana.*— Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Kansas.— Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362.

Maine.— Bowden *v.* Derby, 99 Me. 208, 58 Atl. 993.

Massachusetts.— Lund *v.* Tyngsboro, 11 Cush. 563, 59 Am. Dec. 159.

Missouri.— Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518.

New Hampshire.— Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 269.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

New York.—Cleveland *v.* New Jersey Steamboat Co., 5 Hun 523 [*reversed* on other grounds in 68 N. Y. 306].

Pennsylvania.—Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Hey *v.* Philadelphia, 81 Pa. St. 44, 22 Am. Rep. 733.

Rhode Island.— Keeler *v.* Lederer Realty Corp., 26 R. I. 524, 59 Atl. 855.

Texas.— Ray *v.* Pecos, etc., R. Co., (Civ. App. 1905) 88 S. W. 466.

Wisconsin.— Yess *v.* Chicago Brass Co., 124 Wis. 406, 102 N. W. 932; Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6; Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735.

United States.— Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. 44, 19 L. ed. 65.

See 37 Cent. Dig. tit. "Negligence," § 73.

the last,[42] or the nearest cause in time or distance to the consummation of the injury.[43] It is sufficient if it be the efficient cause which set in motion the chain of circumstances leading up to the injury,[44] and which in natural, continuous sequence, unbroken by any new and independent cause, produced the injury.[45] The primary cause will be the proximate cause where it is so linked and bound to the succeeding events that all create or become a continuous whole, the one so operating on the others as to make the injury the result of the primary cause.[46] While what is proximate cause is said to be controlled by the succession of events rather than nearness in time or distance,[47] yet whether a cause which contributes to an injury is proximate or not is not to be determined with reference to the order in which the several contributory elements succeed one another but with reference to the efficiency of these elements;[48] and is the last negligent act contributory thereto without which the injury would not have resulted.[49] If the injurious result could have been avoided by the exercise of care, the original cause is not the proximate cause.[50] This is true where the

Defining "proximate cause" as meaning a moving cause, or as immediate or direct cause to the remote cause, and stating that the question is, was defendant guilty of negligence that was the proximate cause of plaintiff's injury, is error. Schneider *v.* Chicago, etc., R. Co., 99 Wis. 378, 75 N. W. 169.

42. Texas, etc., R. Co. *v.* Bigham, 90 Tex. 223, 38 S. W. 162; Ray *v.* Pecos, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. 466.

43. *Illinois.*—Siegel *v.* Treka, 115 Ill. App. 56.

Iowa.— Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483, 103 N. W. 481, holding that it means closeness of causal relation not nearness in time or distance.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 211, time or distance.

Pennsylvania.— Pennsylvania *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431; Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542.

South Carolina.— See Anderson *v.* Southern R. Co., 70 S. C. 490, 50 S. E. 202.

Texas.— Ray *v.* Pecos, etc., R. Co., (Civ. App. 1905) 88 S. W. 466; Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

Wisconsin.— Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 8 N. W. 862.

United States.— Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395.

England.—Gordon *v.* Rimmington, 1 Campb. 123.

See 37 Cent. Dig. tit. "Negligence," § 73.

44. Strojny *v.* Griffin Wheel Co., 116 Ill. App. 550; Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275, 71 N. E. 244; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Illustration.— While plaintiff and another were sitting on a log in a vacant lot, defendant negligently drove in, so that unless they moved he would pass over them. In their efforts to escape, one of them moved the log, which threw plaintiff under the team. It was held that defendant's negligence was the proximate cause of the accident, and not the movement of the log. Chambers *v.* Carroll, 199 Pa. St. 371, 49 Atl. 128.

45. *Alabama.*— Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

Illinois.— Cleveland, etc., R. Co. *v.* Lindsay, 109 Ill. App. 533; Peoria *v.* Adams, 72 Ill. App. 662.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Claypool *v.* Wigmore, 34 Ind. App. 35, 71 N. E. 509.

Minnesota.— Strobeck *v.* Bren, 93 Minn. 428, 101 N. W. 795.

Nebraska.— Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891.

Pennsylvania.—Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100.

Texas.—St. Louis Southwestern R. Co. *v.* Lowe, (Civ. App. 1905) 86 S. W. 1059; Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641.

46. St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887; Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891; Gudfelder *v.* Pittsburg, etc., R. Co., 207 Pa. St. 629, 57 Atl. 70; Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032; McFarlane *v.* Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71.

47. See *supra*, note 43.

48. Van Houten *v.* Fleischman, 1 Misc. (N. Y.) 130, 20 N. Y. Suppl. 643; Rainnie *v.* St. John City R. Co., 31 N. Brunsw. 582.

49. Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

50. Broussard *v.* Sabine, etc., R. Co., 80 Tex. 329, 16 S. W. 30.

Illustration.— Starting a horse suddenly while another occupant of the wagon had his face to the rear of the wagon is not such negligence as will render the driver liable, where it appears that the person thrown from the wagon heard the driver call to the horse to "get up," and it does not appear that such person might not have guarded himself against falling off, and that the falling off

injured person has discovered the dangerous condition in time to avoid injury.[51]

D. Natural and Probable Consequences. To constitute proximate cause creating liability for negligence the injury must have been the natural and probable consequence of the negligent act.[52] It is the cause which naturally produces a given result.[53] The negligence must be such that by the usual course of events it

was the probable or necessary result of starting the horse. Flannagan *v.* Holloway, 20 Ohio Cir. Ct. 700, 11 Ohio Cir. Dec. 373.

51. Butz *v.* Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; The Saratoga, 94 Fed. 221, 36 C. C. A. 208; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583.

Illustration.— The act of a butcher in selling to a retailer a beef carcass without notice that it was infected is not the proximate cause of the retailer's clerk getting blood poison through cutting it up, he having discovered that it was putrid before he did so. Williams *v.* Wiedman, 135 Mich. 444, 97 N. W. 966, 106 Am. St. Rep. 400.

52. *Georgia.*— Brown Stove Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839.

Illinois.— Hullinger *v.* Worrell, 83 Ill. 220; Bjornson *v.* Saccone, 88 Ill. App. 6; Craven *v.* Braun, 73 Ill. App. 189 [*affirmed* in 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199].

Indiana.— Young *v.* Harvey, 16 Ind. 314; Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215.

Iowa.— Poland *v.* Earhart, 70 Iowa 285, 30 N. W. 637, accidental shooting involving loss of services is not a natural consequence of selling a revolver to a fifteen-year-old boy.

Kansas.— Schwarzschild, etc., Co. *v.* Weaks, 72 Kan. 190, 83 Pac. 406, 4 L. R. A. N. S. 515; Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615; Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

Michigan.— Jakoboski *v.* Grand Rapids, etc., R. Co., 106 Mich. 440, 64 N. W. 461; Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812.

Minnesota.— Christianson *v.* Chicago, etc., R. Co., 69 Minn. 94, 69 N. W. 640.

Missouri.— Porter *v.* Anheuser-Busch Brewing Assoc., 24 Mo. App. 1.

New York.— Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408; Hartman *v.* Clarke, 104 N. Y. App. Div. 62, 93 N. Y. Suppl. 314; Mills *v.* Bunke, 59 N. Y. App. Div. 39, 69 N. Y. Suppl. 96; Unger *v.* Forty-second St., etc., Ferry R. Co., 6 Rob. 237; Wood *v.* Third Ave. R. Co., 13 Misc. 308, 34 N. Y. Suppl. 698; Spengeman *v.* Alter, 7 Misc. 61, 27 N. Y. Suppl. 406.

North Carolina.— Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323; Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423.

Pennsylvania.— Douglass *v.* New York Cent., etc., R. Co., 209 Pa. St. 128, 58 Atl. 160; McCauley *v.* Logan, 152 Pa. St. 202, 25 Atl. 499; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; McGrew *v.* Stone, 53 Pa. St. 436; Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231; Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425.

Texas.— Texas, etc., R. Co. *v.* Bigham, 90 Tex. 223, 38 S. W. 162; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

West Virginia.— Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428.

Wisconsin.— Meyer *v.* Milwaukee Electric R., etc., Co., 116 Wis. 336, 93 N. W. 6; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Sheridan *v.* Bigelow, 93 Wis. 426, 67 N. W. 732; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 8 N. W. 862.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Empire State Cattle Co. *v.* Atchison, etc., R. Co., 135 Fed. 135; Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366.

See 37 Cent. Dig. tit. "Negligence," § 71.

Where defendant's negligence greatly multiplied the chances of an accident to plaintiff, and was of a character naturally leading to its occurrence, the mere possibility that it might have happened without such negligence is not sufficient to relieve defendant from liability. Reynolds *v.* Texas, etc., R. Co., 37 La. Ann. 694.

53. *Arkansas.*— Little Rock Traction, etc., Co. *v.* McCaskill, 75 Ark. 133, 86 S. W. 997, 112 Am. St. Rep. 48, 70 L. R. A. 680.

Florida.—Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Kentucky.— Henderson *v.* O'Haloran, 114 Ky. 186, 70 S. W. 662, 24 Ky. L. Rep. 995, 59 L. R. A. 718.

Massachusetts.—Metallic Compression Casting Co. *v.* Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689.

New York.— Mott *v.* Hudson River R. Co., 1 Rob. 585.

Tennessee.— Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.— Texas, etc., R. Co. *v.* Bigham, 90 Tex. 223, 38 S. W. 162; Broussard *v.* Sabine, etc., R. Co., 80 Tex. 329, 16 S. W. 30.

Wisconsin.— Barton *v.* Pepin County Agricultural Soc., 83 Wis. 19, 52 N. W. 1129.

See 37 Cent. Dig. tit. "Negligence," § 71.

Natural result illustrated.— In an action brought to recover damages for the destruction of flowers in a greenhouse, caused by gas escaping from negligently constructed gas

would result in injury unless independent moral agencies intervene in the particular injury.[54] But when an event is followed in natural sequence by a result it is adapted to produce or aid in producing, the result is the consequence of the event.[55] It is not necessary, however, that the injury should be the usual,[56] necessary, or inevitable result of the negligence.[57]

E. Consequences That Should Have Been Foreseen — 1. In General. In addition to the requirement that the result should be the natural and probable consequence of the negligence it is commonly stated that the consequence should be one which in the light of attending circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his neg-

mains, the complaint set forth that the flowers not killed by the gas were rendered worthless, because there was no market for them as such, and that their only value consisted in the demand for the complete line, as existing before any of the stock was destroyed, and that plaintiff was damaged in the total value of the entire stock. It was held that the escaping gas was the proximate cause of the injury to the remaining stock. Hansen *v.* St. Paul Gaslight Co., 82 Minn. 84, 84 N. W. 727. A conflagration is the natural and proximate result of the fall of a building in which fires are used, and which is itself inflammable, and contains a large amount of inflammable material, and one by whose negligence the building falls is liable for damages caused by its burning. Hine *v.* Cushing, 53 Hun (N. Y.) 519, 6 N. Y. Suppl. 850; Judd *v.* Cushing, 50 Hun (N. Y.) 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358. The act of a railway ticket agent infected with smallpox in exposing himself to plaintiff who purchased tickets from him was the proximate cause of plaintiff's wife contracting the disease, where plaintiff contracted it and communicated it to her. Missouri, etc., R. Co. *v.* Raney, (Tex. Civ. App. 1906) 99 S. W. 589. The servants of an express company negligently put a long chute, used for sliding packages from one car to another, into a car crosswise, so that its ends projected from the opposite side doors thereof, instead of putting it in endwise, as they had been used to do, and should have done; and plaintiff, a railroad brakeman, whose duty it was to direct the placing of the car opposite another car, so that the transfer of packages might be made, was injured while standing in the door signaling the engineer to go ahead; the injury being caused by the opposite end of the chute striking a stationary object. It was held that the negligent placing of the chute, and not the signal given by the brakeman to go ahead, was the proximate cause of the injury. American Express Co. *v.* Risley, 77 Ill. App. 476. Where plaintiff's horse was frightened by the waving of flags and noises made by passengers on defendant's excursion train, and ran away, and injured plaintiff, the acts of the passengers were the proximate cause of the injury. Boatwright *v.* Chester, etc., Electric R. Co., 4 Pa. Super. Ct. 279, 40 Wkly. Notes Cas. 330.

54. Marietta, etc., R. Co. *v.* Picksley, 24 Ohio St. 654; Wharton Negl. § 324.

55. Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498. And see San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922; Lee *v.* Riley, 18 C. B. N. S. 722, 11 Jur. N. S. 822, 34 L. J. C. P. 212, 12 L. T. Rep. N. S. 388, 13 Wkly. Rep. 51, 114 E. C. L. 722.

Illustrations.— Where defendant piled lumber on a sidewalk in a public street in the vicinity of the homes of a number of children, with knowledge that the children were in the habit of congregating there and climbing on the lumber while at play, and plaintiff's intestate was killed by the falling of the lumber so piled, a verdict finding that defendant's negligence was the proximate cause of the injury was justified. True, etc., Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369. Plaintiff, a boy of four years, while passing along a highway, climbed on a fence situated on defendant's adjoining land and separating it from the highway, for the purpose of looking at other boys at play on the further side of the fence, and not for the purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell on plaintiff and injured him. It was held that as plaintiff in climbing on the fence was merely doing an act which defendant ought to have contemplated as likely to be done by children using the highway, defendant was not entitled to avail himself of the defense that the injury was caused by plaintiff's own act, and that plaintiff was entitled to recover. Harrold *v.* Watney, [1898] 2 Q. B. 320, 67 L. J. Q. B. 771, 78 L. T. Rep. N. S. 788, 46 Wkly. Rep. 642.

56. Brown Store Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839.

57. Brown Store Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839; Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377. Where defendant, having had a quarrel with a boy in the street in a city, took up a pickax and followed him into plaintiff's store, whither he fled, and, in endeavoring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted, it was held that defendant was liable to plaintiff for the damages, although not a necessary consequence of the wrong, but the wrong was such as might naturally result in injury to others. Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268.

ligence.[58] This rule is usually given in connection with the rule requiring that the injury should be the natural and probable consequence of the negligent act and

58. *Illinois.*— Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*quoting* 1 Thompson Negl. § 50]; Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339; Hullinger *v.* Worrell, 83 Ill. 220; Weick *v.* Lander, 75 Ill. 93; Terminal R. Assoc. *v.* Larkins, 112 Ill. App. 366.

Indiana.— Young *v.* Harvey, 16 Ind. 314; Brummit *v.* Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215.

Iowa.— Poland *v.* Earhart, 70 Iowa 285, 30 N. W. 637.

Kansas.— Schwarzchild, etc., Co. *v.* Weeks, 72 Kan. 190, 83 Pac. 406, 4 L. R. A. N. S. 515; Stephenson *v.* Corder, 71 Kan. 475, 80 Pac. 938, 114 Am. St. Rep. 500, 69 L. R. A. 246; Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615; Sweeney *v.* Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734.

Maine.— Currier *v.* McKee, 99 Me. 364, 59 Atl. 422.

Massachusetts.— Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

Michigan.— Jakoboski *v.* Grand Rapids, etc., R. Co., 106 Mich. 440, 64 N. W. 461; Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812.

Minnesota.— Hansen *v.* St. Paul Gaslight Co., 82 Minn. 84, 84 N. W. 727; Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

Missouri.—Christy *v.* Hughes, 24 Mo. App. 275; Porter *v.* Anheuser-Busch Brewing Assoc., 24 Mo. App. 1.

New York.— Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408; Hartman *v.* Clarke, 104 N. Y. App. Div. 62, 93 N. Y. Suppl. 314; Murphy *v.* New York, 89 N. Y. App. Div. 93, 85 N. Y. Suppl. 445; Unger *v.* Forty-second St., etc., Ferry R. Co., 6 Rob. 237 [*affirmed* in 51 N. Y. 497]; Wood *v.* Third Ave. R. Co., 13 Misc. 308, 34 N. Y. Suppl. 698; Spengeman *v.* Alter, 7 Misc. 61, 27 N. Y. Suppl. 406.

North Carolina.— Ramsbottom *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Brewster *v.* Elizabeth City, 137 N. C. 392, 49 S. E. 885; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

Ohio.— Puterbaugh *v.* Reasor, 9 Ohio St. 484.

Pennsylvania.— McCauley *v.* Logan, 152 Pa. St. 202, 25 Atl. 499; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231; Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425.

Texas.— St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450; Eads *v.* Marshall, (Civ. App. 1894) 29 S. W. 170; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

Virginia.— Richmond, etc., R. Co. *v.* Yeamans, 90 Va. 752, 19 S. E. 787.

Wisconsin.— Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Sheridan *v.* Bigelow, 93 Wis. 426, 67 N. W. 732; Huber *v.* La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583; Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Empire State Cattle Co. *v.* Atchison, etc., R. Co., 135 Fed. 135; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516.

See 37 Cent. Dig. tit. "Negligence," § 72.

Consequences which could not reasonably have been foreseen illustrated.— Defendant's domestic chicken having escaped into a public park, defendant's servant was directed to recapture the same, and was pursuing the fowl away from plaintiff's premises, when it suddenly turned in the opposite direction, and, notwithstanding the servant's efforts to prevent its further progress in that direction, the chicken took to flight and broke the window of plaintiff's store. It was held that such result was not reasonably to have been anticipated from the pursuit of the chicken, and that defendants were not liable. Maloney *v.* Bishop, (Iowa 1905) 105 N. W. 407. Where the unloading of coal from a wagon box which had been hoisted from the wheels caused it to fall on an iron cogwheel, break it, and cast off a part, which, flying through the air, struck a pedestrian on the street, the injury was not a reasonable and probable result which ought to have been foreseen in the exercise of due prudence, or for which there is any liability. McKenzie *v.* Waddell Coal Co., 89 N. Y. App. Div. 415, 85 N. Y. Suppl. 819.

Consequences which could have reasonably been foreseen illustrated.— Defendants contracted to furnish plaintiff a tug to leave P not later than April 7, 1903, to haul stones to protect an ocean bulkhead, which plaintiff was constructing, from tides and storms. Plaintiff alleged that on April 7 he had completed five hundred feet of the bulkhead, which he then desired to have protected by stone ballast, but that defendants wilfully delayed the departure of the tug, and then sent it with a scow in tow so that it did not reach plaintiff's property until April 10, and was unable to then tow enough stone to protect the bulkhead before April 12, when a violent storm occurred and wrecked all that part of the bulkhead constructed, except that which had been protected by stones towed on two days after the tug's arrival. It was held that defendant's negligence in failing to promptly and properly transmit the tug as

as explanatory of it.[59] If the injury could not have been reasonably anticipated as the probable result of an act of negligence such act is either remote cause or no cause of injury.[60] Where, however, defendant knows or has reasonable means of knowing that consequences not usually resulting from the act are likely to intervene so as to occasion damage he is liable, although it be not an ordinary and natural consequence of the negligence.[61] Nor is it requisite that the result "must" have been foreseen.[62] Where a person had no knowledge and is not chargeable with knowledge of the danger his act will not constitute the proximate cause.[63]

2. Particular Injury. Where an act is negligent it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or precise form of the injury,[64] or the particular manner in which it occurred,[65] if by the exercise of reasonable care it might have been foreseen or anticipated that some injury might result.[66]

agreed was the proximate cause of plaintiff's damage. Mott *v.* Chew, 137 Fed. 197.

59. McCauley *v.* Logan, 152 Pa. St. 202, 25 Atl. 499; McGrew *v.* Stone, 53 Pa. St. 436; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 4 McCrary 454. The term "natural" in the rule that damages chargeable to a wrongdoer must be shown to be the natural and proximate effect of his delinquency imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247; Kuhn *v.* Jewett, 32 N. J. Eq. 647.

60. Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416. And see Kelly *v.* Bennett, 132 Pa. St. 218, 19 Atl. 69, 19 Am. St. Rep. 594, 7 L. R. A. 120; Stewart *v.* Ripon, 38 Wis. 584.

61. See Stewart *v.* Ripon, 38 Wis. 584; Sharp *v.* Powell, L. R. 7 C. P. 253, 41 L. J. C. P. 95, 26 L. T. Rep. N. S. 436, 20 Wkly. Rep. 584.

62. Meyer *v.* Milwaukee Electric, R., etc., Co., 116 Wis. 336, 93 N. W. 6.

63. Sherman *v.* Vermillion Parish, 51 La. Ann. 880, 25 So. 538; Fitzwater *v.* Fassett, 199 Pa. St. 442, 49 Atl. 310. That defendants' servants, after using a door in a schoolhouse, failed to securely fasten it, so that an infant attending the school was precipitated into the cellar when he leaned against the door, does not show negligence, if they did not know of the possible consequence of not fastening the door securely. Cleary *v.* Blake, 14 N. Y. App. Div. 602, 43 N. Y. Suppl. 1115.

Knowledge of defect or danger as affecting liability see *supra*, V, H, 4, c, (III), (B).

64. *Indiana.*— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; White Sewing Mach. Co. *v.* Richter, 2 Ind. App. 331, 28 N. E. 446.

Maryland.—Annapolis, etc., R. Co. *v.* Baldwin, 60 Md. 88, 45 Am. Rep. 711.

Massachusetts.— Hill *v.* Winsor, 118 Mass. 251.

Minnesota.— Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640; Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

New Jersey.— Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

New York.— Hankins *v.* Watkins, 77 Hun 360, 28 N. Y. Suppl. 867.

Pennsylvania.— Hess *v.* Berwind-White Coal Min. Co., 178 Pa. St. 239, 35 Atl. 990; Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

Texas.—Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678.

Vermont.— Stevens *v.* Dudley, 56 Vt. 158.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

See 37 Cent. Dig. tit. "Negligence," § 72.

65. Dixon *v.* Scott, 181 Ill. 116, 54 N. E. 897. One who negligently sets and keeps a fire on his own land is liable for injury done by its spreading to his neighbor's land, whether he might reasonably have anticipated the particular manner and direction in which it was communicated, or not. Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63.

66. *Illinois.*— Chicago, etc., R. Co. *v.* Willard, 111 Ill. App. 225.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899.

Kansas.—Atchison, etc., R. Co. *v.* Parry, 67 Kan. 515, 73 Pac. 105.

North Carolina.— Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890.

Pennsylvania.— Potter *v.* Natural Gas Co., 183 Pa. St. 575, 39 Atl. 7.

Wisconsin.—Coolidge *v.* Hallauer, 126 Wis. 244, 105 N. W. 568.

United States.— Texas, etc., R. Co. *v.* Carlin, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462.

See 37 Cent. Dig. tit. "Negligence," § 72.

Illustration.— Defendant knowing himself to be a poor shot and to have impaired eyesight, unlawfully and maliciously shot at and wounded plaintiff's dog, lying peaceably and in close proximity to plaintiff's house, on the land of a third person, whereupon the dog rushed into plaintiff's house and ran against plaintiff, knocking her down and injuring her. It was held that defendant was liable, since his acts were the proximate cause of the injury, without an intervening force; and it is immaterial whether the injury was or could have been foreseen. Isham

F. Condition or Occasion Making Injury Possible. A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury.[67] If no danger existed in the condition except because of the independent cause such condition was not the proximate cause.[68] And if an independent negligent act or defective condition sets into operation the circumstances which, because of the prior defective condition results in injury, such subsequent act or condition is the proximate cause.[69] But where the condition was such that the injury might have been anticipated, it will be the proximate cause notwithstanding the intervening agency,[70] or where such condition rendered it impossible to avoid injury from another contributing cause.[71] So where the condition of the property injured is defective and by reason of such defective condition the damage was greater than it otherwise would have been, the proximate cause of the greater loss is the defective condition and not the negligent act.[72]

G. Concurrent Causes[73] — **1. In General.** As a general rule it may be said

v. Dow, 70 Vt. 588, 41 Atl. 585, 67 Am. St. Rep. 691, 45 L. R. A. 87.

67. *Georgia.*—O'Connor *v.* Brucker, 117 Ga. 451, 43 S. E. 731.

Indiana.— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

Kansas.— Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399.

Minnesota.— Strobeck *v.* Bren, 93 Minn. 428, 101 N. W. 795.

Missouri.— Kappes *v.* Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158.

New York.— Koch *v.* Fox, 71 N. Y. App. Div. 288, 75 N. Y. Suppl. 913.

Pennsylvania.— Dixon *v.* Butler's Tp., 4 Pa. Super. Ct. 333, 40 Wkly. Notes Cas. 209.

Applications of rule.— The permission granted by a mother to a child less than five years old to ride with the driver of a delivery wagon is not the proximate cause of an injury received by the child in a collision between the wagon and an electric car. Metcalfe *v.* Rochester R. Co., 12 N. Y. App. Div. 147, 42 N. Y. Suppl. 661. The negligence of the railway company in not preventing the pole from coming in contact with the electric light globe, and not the negligence of the electric lighting company, if any, in placing the light so near to the trolley wire that it might be broken under such circumstances, was the proximate and intervening cause of the accident. Nelson *v.* Narragansett Electric Lighting Co., 26 R. I. 258, 58 Atl. 802, 106 Am. St. Rep. 711, 67 L. R. A. 116.

68. *California.*— Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139.

Illinois.— Peoria *v.* Adams, 72 Ill. App. 662.

Maine.— Leavitt *v.* Bangor, etc., R. Co., 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382.

Massachusetts.— Carter *v.* J. H. Lockey Piano Case Co., 177 Mass. 91, 58 N. E. 476.

Michigan.— Seccombe *v.* Detroit Electric R. Co., 133 Mich. 170, 94 N. W. 747.

New York.— Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130.

Texas.— Missouri, etc., R. Co. *v.* Dobbins, (Civ. App. 1896) 40 S. W. 861.

69. Walters *v.* Denver Consol. Electric Light Co., 12 Colo. App. 145, 54 Pac. 960; Willis *v.* Armstrong County, 183 Pa. St. 184, 38 Atl. 621; Smith *v.* Texas, etc., R. Co., 24 Tex. Civ. App. 92, 58 S. W. 151.

Illustration.— In an action by a painter to recover for injuries received, where the evidence shows that he fell from a ladder and clutched at a live electric wire, and was shocked thereby, he is not entitled to recover from the electric light company, which left the wire uninsulated, the fall from the ladder being the proximate cause of the injury. Elliott *v.* Allegheny County Light Co., 204 Pa. St. 568, 54 Atl. 278.

70. Windeler *v.* Rush County Fair Assoc., 27 Ind. App. 92, 59 N. E. 209, 60 N. E. 954; Fishburn *v.* Burlington, etc., R. Co., (Iowa 1904) 98 N. W. 380; Martin *v.* North Star Iron Works, 31 Minn. 407, 18 N. W. 109; Labombarde *v.* Chatham Gas Co., 10 Ont. L. Rep. 446. A person is liable for injury to a customer who stumbles on a platform in his store, and falls into an unguarded elevator shaft, where the stumbling, although the cause of the fall, would have produced no injury alone. Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086.

71. Rock Falls *v.* Wells, 65 Ill. App. 557 (holding that the negligence of a city in allowing a car track to remain so far above the level of a narrow street as to prevent the crossing of vehicles without danger was the proximate cause of an injury to the driver of a sleigh who was unable, by reason of the obstruction, to get out of the way of a runaway horse, and, in her attempt to force him aside, was injured); Porcella *v.* Mutual Reserve Fund Life Assoc., 50 N. Y. App. Div. 158, 63 N. Y. Suppl. 599.

72. Mould *v.* The New York, 40 Fed. 900.

73. For joint and several liability of persons whose concurring acts produce injury see *supra*, V, H, 5.

that negligence to render a person liable need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury.[74] So that where two causes combine to produce injuries a person is not relieved from liability because he is responsible for only one of them.[75] Within the rule the causes concurring with one's negligence may be the negligent act of another,[76] if the act of such

74. *Alabama.*—Alabama Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79.

Iowa.— Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697.

Maine.— Neal *v.* Rendall, 100 Me. 574, 62 Atl. 706.

Texas.— San Antonio Gas, etc., Co. *v.* Speegle, (Civ. App. 1900) 60 S. W. 884; Eads *v.* Marshall, (Civ. App. 1894) 29 S. W. 170.

United States.— Camden, etc., R. Co. *v.* Brady, 1 Black 62, 17 L. ed. 84.

See 37 Cent. Dig. tit. "Negligence," § 74.

Restatement of rule.— The rule of law is well settled that the mere fact that some other cause coöperates with the negligence of defendant to produce the injury does not absolve defendant from liability. His original wrong, concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the other cause was one for which defendant was responsible or not. Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064.

75. *Illinois.*— Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Carterville *v.* Cook, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 248, 4 L. R. A. 721; West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547; North Chicago St. R. Co. *v.* Dudgeon, 83 Ill. App. 528 [*affirmed* in 184 Ill. 477, 56 N. E. 796]; Flora *v.* Pruett, 81 Ill. App. 161; Murdock *v.* Walker, 43 Ill. App. 590.

Indiana.— Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534; Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230 [*citing* Crawfordsville *v.* Smith, 79 Ind. 308, 41 Am. Rep. 612]; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

Iowa.— Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064; Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697.

Louisiana.—Kennedy *v.* Mason, 10 La. Ann. 519.

Massachusetts.— Horne *v.* Meakin, 115 Mass. 326; Sherman *v.* Fall River Iron Works Co., 5 Allen 213.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; McMahon *v.* Davidson, 12 Minn. 357.

New York.— Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65; Pollett *v.* Long, 56 N. Y. 200; Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Demarest *v.* Forty-Second St., etc., R. Co., 104 N. Y. App. Div. 503, 93 N. Y. Suppl. 663; Quill *v.* Empire State Tel. Co., 13 Misc. 435, 34 N. Y. Suppl. 470 [*affirmed* in 92 Hun 539, 37 N. Y. Suppl. 1149].

Ohio.— Ohio, etc., Torpedo Co. *v.* Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437.

Texas.— O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628.

West Virginia.— Sheff *v.* Huntington, 16 W. Va. 307.

England.— Lynch *v.* Nurdin, 1 Q. B. 29, 5 Jur. 797, 10 L. J. Q. B. 73, 4 P. & D. 672, 41 E. C. L. 422; Mathews *v.* London St. Tramways Co., 52 J. P. 774, 58 L. J. Q. B. 12, 60 L. T. Rep. N. S. 47.

See 37 Cent. Dig. tit. "Negligence," § 74.

76. *California.*—Pastene *v.* Adams, 49 Cal. 87.

Idaho.— McCarty *v.* Boise City Canal Co., 2 Ida. (Hasb.) 245, 10 Pac. 623.

Illinois.— American Express Co. *v.* Risley, 179 Ill. 295, 53 N. E. 558; Aurora *v.* Hillman, 90 Ill. 61; Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616 [*affirmed* in 207 Ill. 478, 69 N. E. 882]; St. Louis Nat. Stock Yards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90].

Indiana.— Logansport, etc., Natural Gas Co. *v.* Coate, 29 Ind. App. 299, 64 N. E. 638; South Bend Mfg. Co. *v.* Liphart, 12 Ind. App. 185, 39 N. E. 908.

Kentucky.— Whiteman-McNamara Tobacco Co. *v.* Warren, 66 S. W. 609, 23 Ky. L. Rep. 2120.

Massachusetts.— Townsend *v.* Boston, 187 Mass. 283, 72 N. E. 991.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348; Meade *v.* Chicago, etc., R. Co., 68 Mo. App. 92, holding that one who pours benzine on a bench on which a person is sleeping, with the intention of setting fire to it, and so frightening that person, is liable for injuries to the latter resulting from the firing of the benzine by another person.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

New York.— Webster *v.* Hudson River R. Co., 38 N. Y. 260; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]; Brehm *v.* Great Western R. Co., 34 Barb. 256; Quill *v.* Empire State Tel. Co., 13 Misc. 435, 34 N. Y. Suppl. 470 [*affirmed* in 92 Hun 539, 34 N. Y. Suppl. 470, 37 N. Y. Suppl. 1149]; Jung *v.* Starin, 12 Misc. 362, 33 N. Y. Suppl. 650.

Pennsylvania.—McKenna *v.* Citizens' Natural Gas Co., 198 Pa. St. 31, 47 Atl. 990; Burrell Tp. *v.* Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664.

Texas.— Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755.

other is not imputable to the person injured[77] or inevitable accident, act of God, or some inanimate cause.[78] A person is not excused from liability for failure to perform a duty because another person failed to perform his duty.[79] Where several causes producing an injury are concurrent, the injury may be attributed to all or any one of the causes.[80] It is sufficient if the negligence of the party sought to be charged is an efficient cause,[81] without which the injury would not have resulted,[82] and that such other cause is not attributable to the person injured.[83] But it must appear that such person was responsible for one of the causes which resulted in the injury.[84] The concurring negligence of another cannot transform the remote into the proximate cause of an injury or create or increase the liability of another.[85]

2. WHAT ARE CONCURRENT CAUSES. Concurrent causes within the rule are causes acting contemporaneously and which together cause the injury,[86] which injury would not have resulted in the absence of either.[87] But where the negligence of one consists in a condition merely which is rendered injurious by the subsequent negligence of a third person the acts of the two persons are not concurrent.[88] The mere fact that the concurrent cause was unforeseen will not relieve from liability for the act of negligence;[89] but where two distinct causes wholly unrelated, one extraordinary and unexpected, contribute to an injury, one is the proximate and the other the remote cause.[90]

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

United States.— Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Choctaw, etc., R. Co. *v.* Holloway, 114 Fed. 458, 52 C. C. A. 260; Chicago, etc., R. Co. *v.* Sutton, 63 Fed. 394, 11 C. C. A. 251.

See 37 Cent. Dig. tit. "Negligence," § 75.

77. Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984.

78. Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780; Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348; Brash *v.* St. Louis, 161 Mo. 433, 61 S. W. 808; Howe *v.* West Seattle Land, etc., Co., 21 Wash. 594, 59 Pac. 495.

Illustration.— If defendant places a log on the side of a hill in such an insecure way that it could be dislodged by a landslide, at a place where he has knowledge that such slides are apt to occur, and the log is dislodged as the immediate result of a land slide and falls, causing injury, the concurring act of defendant would render him liable for the injury caused. Howe *v.* West Seattle Land, etc., Co., 21 Wash. 594, 59 Pac. 495.

79. Harrison *v.* Great Northern R. Co., 3 H. & C. 231, 10 Jur. N. S. 992, 33 L. J. Exch. 266, 10 L. T. Rep. N. S. 621, 12 Wkly. Rep. 1081.

80. Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377.

81. Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062; McMahon *v.* Davidson, 12 Minn. 357; Pacific Express Co. *v.* Darnell, (Tex. 1887) 6 S. W. 765; Galveston, etc., R. Co. *v.* Vollrath, (Tex. Civ. App. 1905) 89 S. W. 279.

Illustration.—If there was a proximate and discoverable cause attributable to defendant's negligence, which the evidence warrants the jury in finding was sufficient to produce, and may have produced, the injury, it is no defense to show the existence of another cause adequate to that end, and for which defendant is not responsible. Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256.

82. *Illinois.*—Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616.

Iowa.— Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377.

Minnesota.— Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

New York.— Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495.

Texas.— Ray *v.* Pecos, etc., R. Co., (Civ. App. 1905) 88 S. W. 466.

See 37 Cent. Dig. tit. "Negligence," § 74.

83. Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105; Halstead *v.* Warsaw, 43 N. Y. App. Div. 39, 59 N. Y. Suppl. 518; Schermerhorn *v.* New York Cent., etc., R. Co., 33 N. Y. App. Div. 17, 53 N. Y. Suppl. 279.

84. Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; Cordelia *v.* Dwyer, 9 Misc. (N. Y.) 399, 29 N. Y. Suppl. 1073 [*affirmed* in 153 N. Y. 689, 48 N. E. 1105].

85. Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416.

86. North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796 [*affirming* 83 Ill. App. 528]; Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95 [*affirmed* in 200 Ill. 9, 65 N. E. 442]; Merchants', etc., Oil Co. *v.* Burns, (Tex. Civ. App. 1903) 72 S. W. 626.

87. Johnson *v.* Northwestern Tel. Exch. Co., 48 Minn. 433, 51 N. W. 225.

88. Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

89. McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256.

90. Missouri Pac. R. Co. *v.* Columbia, 65

H. Intervening Efficient Cause — 1. In General. The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable the liability continues.[91] But an intervening cause will be regarded as the proximate cause, and the first cause as too remote where the chain of events is so broken that they become independent and the result cannot be said to be the natural and probable consequence of the primary cause.[92] The law will not look back from the injurious consequences beyond the last efficient cause,[93] especially where an intelligent and responsible human being has intervened.[94] But an intervening cause will not relieve from liability where the prior negligence was the efficient cause of the injury.[95]

2. Requisites in General. An intervening efficient cause is a new and inde-

Kan. 390, 69 Pac. 338; McGrew *v.* Stone, 53 Pa. St. 436.

91. Willis *v.* Providence Telegram Pub. Co., 20 R. I. 285, 38 Atl. 947 [*quoting* McDonald *v.* Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768].

92. *Georgia.*— Southern R. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

Illinois.—Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Terminal R. Assoc. *v.* Larkins, 112 Ill. App. 366.

Nebraska.— St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887; Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891.

New Jersey.— Wiley *v.* West Jersey R. Co., 44 N. J. L. 247 (the term "proximate" indicates that there must be no other culpable and efficient agency intervening between defendant's negligence and the injury); Kuhn *v.* Jewett, 32 N. J. Eq. 647.

Pennsylvania.— Gudfelder *v.* Pittsburg, etc., R. Co., 207 Pa. St. 629, 57 Atl. 70; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100.

Texas.— Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

West Virginia.— Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

United States.— Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416.

See 37 Cent. Dig. tit. "Negligence," § 76.

93. Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

94. *Illinois.*— Malmberg *v.* Bartos, 83 Ill. App. 481.

Indiana.— Wickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Claypool *v.* Wigmore, 34 Ind. App. 35, 71 N. E. 509.

Iowa.— Mahoney *v.* Dankwart, 108 Iowa 321, 79 N. W. 134.

Massachusetts.—Glassey *v.* Worcester Consol. St. R. Co., 185 Mass. 315, 70 N. E. 199.

Michigan.— Moll *v.* Riverside Storage, etc., Co., 82 Mich. 389, 46 N. W. 777.

New York.— Beetz *v.* Brooklyn, 10 N. Y. App. Div. 382, 41 N. Y. Suppl. 1009.

Pennsylvania.— Marsh *v.* Giles, 211 Pa. St. 17, 60 Atl. 315; Wood *v.* Pennsylvania R. Co., 177 Pa. St. 306, 35 Atl. 699, 55 Am. St. Rep. 728, 35 L. R. A. 199.

Rhode Island.— Afflick *v.* Bates, 21 R. I. 281, 43 Atl. 539.

Virginia.— Winfree *v.* Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A. N. S. 201.

Wisconsin.— Kumba *v.* Gilham, 103 Wis. 312, 79 N. W. 325.

England.— Scholes *v.* North London R. Co., 21 L. T. Rep. N. S. 835.

Illustrations.—Where a farmer had hitched one horse of his team, which he had driven seventeen miles, in front of a store while unloading his wagon, and, while the team was standing, a boy struck the nose of the horse hitched with his foot, which frightened the team, and it ran away causing the damage, the striking of the horse by the boy was the proximate cause of the accident. Stephenson *v.* Corder, 71 Kan. 475, 80 Pac. 938, 114 Am. St. Rep. 500, 69 L. R. A. 246. Where two small boys turned the lever of an electric truck standing in a public street, with the power off and the brake on, while the operator was delivering goods, and the truck, uncontrolled, collided with a horse and wagon, the act of such boys was the proximate cause of the injury, exempting the owner of the truck from liability. Berman *v.* Schultz, 40 Misc. (N. Y.) 212, 81 N. Y. Suppl. 647. That a city has allowed a swing to be suspended in the street several feet from the curb does not render the city liable for injuries to one driving along the street, caused by a child throwing the loop of the swing over the top of his buggy. Shotwell *v.* Reading, 4 Ohio S. & C. Pl. Dec. 326, 5 Ohio N. P. 241.

95. Goe *v.* Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182; Jensen *v.* The Joseph B. Thomas, 81 Fed. 578; Clark *v.* Chambers, 3 Q. B. D. 327, 47 L. J. Q. B. 427, 38 L. T. Rep. N. S. 454, 26 Wkly. Rep. 613; Burrows *v.* March Gas, etc., Co., L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. Rep. N. S. 318, 20 Wkly. Rep. 493; Illidge *v.* Goodwin, 5 C. & P. 190, 24 E. C. L. 520.

pendent force which breaks the causal connection between the original wrong and the injury.[96] Such new force must be sufficient itself to stand as the cause of the injury,[97] and be one but for which the injury would not have occurred.[98] If the new cause merely accelerates an original cause which was sufficient to produce the injury, the first cause will still be the proximate cause.[99] Such intervening act must have superseded the original act or been itself responsible for the injury.[1] The intervening act need not have been wrongful,[2] nor need the cause be produced by a responsible agency.[3] If the intervening act is done without knowledge of the danger it is not sufficient to break the causal connection.[4]

3. Causes Set in Operation by Primary Cause. Where the intervening cause is set in operation by the original wrongful act which was the probable cause of the injury and would not have produced the result in the absence of such original cause, such intervening cause will not relieve defendant from liability.[5] Thus, where a third person attempts to prevent the injury which would naturally have resulted from the negligent act of defendant and is injured while doing so, the original act of defendant remains the proximate cause.[6] The act of a third person will not

96. Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

97. Peoria *v.* Adams, 72 Ill. App. 662.

98. Perry *v.* Central R. Co., 66 Ga. 746; Stiles *v.* Atlanta, etc., R. Co., 65 Ga. 370; Strobeck *v.* Bren, 93 Minn. 428, 101 N. W. 795; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231.

99. Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146.

1. White Sewing Mach. Co. *v.* Richter, 2 Ind. App. 331, 28 N. E. 446.

2. Georgia Southern, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118. But see Currier *v.* McKee, 99 Me. 364, 59 Atl. 442, under Civil Damage Act.

3. Loftus *v.* Dehail, 133 Cal. 214, 65 Pac. 379 (holding that where plaintiff was injured by being pushed into an unguarded cellar by her four-year-old brother, his act was the proximate cause of the injury, and not the owner's failure to fence, and hence the owner was not liable therefor); Otten *v.* Cohen, 1 N. Y. Suppl. 430; Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231. See also Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635. *Contra*, Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483, 103 N. W. 481, holding the act of a child *non sui juris* not sufficient to constitute an intervening efficient cause.

4. Barney *v.* Burstenbinder, 7 Lans. (N. Y.) 210 (holding that where defendant shipped nitroglycerin without giving plaintiff carrier notice of the nature of the shipment, and the package leaked and was taken to a warehouse by plaintiff for examination, and while being opened exploded, damaging the warehouse and freight stored there, defendant was liable for the damages, although the opening of the package was the direct cause of the explosion); Waters-Pierce Oil Co. *v.* Davis, (Tex. Civ. App. 1900) 60 S. W. 453. And see Sharp *v.* Powell, L. R. 7 C. P. 253, 41 L. J. C. P. 95, 26 L. T. Rep. N. S. 436, 20 Wkly. Rep. 584.

5. *District of Columbia.*— District of Columbia *v.* Dempsey, 13 App. Cas. 533.

Indiana.— Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

Iowa.— Osborne *v.* Van Dyke, 113 Iowa 557, 85 N. W. 784, in which case it appeared that plaintiff was holding a horse while defendant applied some medicine to its neck. The horse jumped, and defendant began beating it with a heavy stick with a nail drawn through it, and, by reason of defendant's foot slipping, he unintentionally hit plaintiff on the nose, causing injury. It was held that an instruction that defendant would not be liable if, in beating the horse, he exercised reasonable care to avoid striking plaintiff, and the blow which inflicted the injury was caused by an accidental slip, was erroneous, since the slipping of defendant's foot, being the consequence of his own wrongful act, was not an excuse for the injury.

Maryland.— Consolidated Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

Nebraska.— St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887; Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891.

New York.— Pollett *v.* Long, 56 N. Y. 200.

6. *Iowa.*— Glanz *v.* Chicago, etc., R. Co., 119 Iowa 611, 93 N. W. 575; Thoburn *v.* Campbell, 80 Iowa 338, 45 N. W. 769.

Michigan.— La Duke *v.* Exeter Tp., 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357.

New Jersey.— Tuttle *v.* Atlantic City R. Co., 66 N. J. L. 327, 49 Atl. 450, 88 Am. St. Rep. 491, 54 L. R. A. 582.

North Dakota.— Owen *v.* Cook, 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646.

Pennsylvania.— Stanton *v.* Scranton Traction Co., 11 Pa. Super. Ct. 180.

Rhode Island.— Willis *v.* Providence Telegram Pub. Co., 20 R. I. 285, 38 Atl. 947.

England.— Collins *v.* Middle Level Com'rs, L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. Rep. N. S. 442, 17 Wkly. Rep. 929.

Application of rule.— Where one without negligence on his own part, in an effort to save his own property, in danger of destruction by fire negligently set by another, is

amount to an intervening efficient cause when such person is merely performing a duty resting on the original wrong-doer.[7]

4. ANTICIPATION OF INTERVENING CAUSE OR INJURY. If the occurrence of the intervening cause might have been anticipated such intervening cause will not interrupt the connection between the original cause and the injury.[8] Thus one who fails in his duty to remedy a defective or dangerous condition is liable for injuries resulting therefrom, although the immediate cause of the injury is a wind[9] or rainstorm usual at the time of the injury,[10] or a snowstorm.[11] Where an injury might reasonably have been anticipated from the negligent act, notwithstanding the intervention of an independent agency, the causal connection is not broken and the original wrong-doer is liable for the injury sustained.[12] But where the intervening agency could not have been anticipated such agency becomes the proximate cause.[13] And a person is not bound to anticipate the criminal acts of

personally injured by the fire, the negligent setting of the fire is the proximate cause of the injury. McKenna *v.* Baessler, 86 Iowa 197, 53 N. W. 103, 17 L. R. A. 310; Berg *v.* Great Northern R. Co., 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524. Plaintiff was driving over a defective bridge, and without his fault the horse broke through the bridge and fell, and in his endeavors to extricate the horse plaintiff received a blow from the horse and was injured thereby. It was held that the defect in the bridge was the proximate cause of the injury, plaintiff being at the same time in the exercise of ordinary care, he being required to relieve himself of an injury to his horse. Page *v.* Bucksport, 64 Me. 51, 18 Am. Rep. 239.

7. Howe *v.* West Seattle Land, etc., Co., 21 Wash. 594, 59 Pac. 495.

8. *Colorado.*— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Indiana.— Cleveland, etc., R. Co. *v.* Patterson, 37 Ind. App. 617, 75 N. E. 857.

Iowa.— Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483, 103 N. W. 481; Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377; Edgington *v.* Burlington, etc., R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561.

Massachusetts.— Lane *v.* Atlantic Works, 111 Mass. 136.

Missouri.— Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418.

New Hampshire.— Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 72 N. H. 546, 58 Atl. 242.

New York.— Williams *v.* Koehler, 41 N. Y. App. Div. 426, 58 N. Y. Suppl. 863, holding that one leaving a team unattended and untied in a street of a populous city is liable for injuries to a child caused by a bystander's negligence in attempting to drive it to a place of safety after it had wandered into the middle of the street.

Texas.— O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628; Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; Seale *v.* Gulf, etc., R. Co., 65 Tex. 274, 57 Am. Rep. 602; Gulf, etc., R. Co. *v.* Evansich, 63 Tex. 54.

Washington.— Howe *v.* West Seattle Land, etc., Co., 21 Wash. 594, 59 Pac. 495.

England.— Great Western R. Co. *v.* Davies, 39 L. T. Rep. N. S. 475; Sullivan *v.* Creed, [1904] 2 Ir. 317. In this case it appeared that defendant left a gun loaded and at full cock standing inside a fence on his land, beside a gap from which a path led over defendant's land from the public road to his house. Defendant's son, aged between fifteen and sixteen, coming from the road through the gap on his way home, found the gun. He went back with it to the public road, and, not knowing that it was loaded, pointed it, in play, at plaintiff, who was on the road. The gun went off and plaintiff was injured. It was held that defendant was liable in respect of the injury.

9. *Illinois.*— Schwarz *v.* Adsit, 91 Ill. App. 576, blowing down of walls of building destroyed by fire by windstorm.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.— Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880.

New Jersey.— Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721, blowing down of fence insecurely built.

New York.—Meyer *v.* Haven, 37 N. Y. App. Div. 194, 55 N. Y. Suppl. 864.

10. Slater *v.* Mersereau, 5 Daly (N. Y.) 445 [*affirmed* in 64 N. Y. 138].

11. Big Goose, etc., Co. *v.* Morrow, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955, holding that where a landowner's stock, caused by a snowstorm to travel toward an unguarded washout in a ditch, which is maintained over the land by a ditch company, falls into the same, the failure of the company to guard such washout is the natural and proximate cause of the injury, and not the storm.

12. Southern R. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; Claypool *v.* Wigmore, 34 Ind. App. 35, 71 N. E. 509; O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628. One who places in the hands of a child an article of a dangerous character, likely to cause injury to the child or to others, commits an actionable wrong, and, where injury results, the fact that some agency intervenes between such wrong and the injury will not prevent a recovery, if the injury was the natural or probable consequence of the original wrong. Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

13. James *v.* James, 58 Ark. 157, 23 S. W.

others by which damage is inflicted and hence is not liable therefor.[14] The failure of another to guard against the negligence of defendant will not prevent it from being proximate.[15]

5. Failure to Interrupt Primary Cause. The mere omission of a third person to interrupt the result of defendant's act will not amount to an intervening efficient cause,[16] even though such third person is a fellow servant of the person injured, neither of whom were servants of defendant.[17] But where after the negligent act a duty devolves on another person in reference to such act or condition which such person fails to perform such failure is the proximate cause of the injury resulting from the act.[18]

I. Particular Agencies or Instrumentalities — 1. Fires.[19] As applied to the spread of fire there is a conflict of opinion in respect to the extent of the application of the rule that proximate cause does not depend on nearness as to time or distance. In a few states it is held that a jury should not be allowed to find that a cause is proximate beyond its first effect, and that liability does not extend to the burning of other distinct buildings beyond the one negligently set on fire;[20]

1099 (holding that failure of the owner of a cotton gin to gin cotton within the time he had contracted so to do is not the proximate cause of the subsequent destruction of the cotton by fire while at the gin, and he is not responsible for such destruction, unless he failed to use ordinary care for its preservation); Wolff Mfg. Co. *v.* Wilson, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229; Saverio-Cella *v.* Brooklyn Union El. R. Co., 55 N. Y. App. Div. 98, 66 N. Y. Suppl. 1021; McFarlane *v.* Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71.

Where the act of the third person could not have been foreseen or anticipated, the original act ceases to be the proximate cause. Leeds *v.* New York Tel. Co., 178 N. Y. 118, 70 N. E. 219; Winfree *v.* Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A. N. S. 201; McDowall *v.* Great Western R. Co., [1903] 2 K. B. 331, 72 L. J. K. B. 652, 88 L. T. Rep. N. S. 825 [*reversing* [1902] 1 K. B. 618, 71 L. J. K. B. 330, 86 L. T. Rep. N. S. 558].

14. Andrews *v.* Kinsel, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25; Greenebaum *v.* Bornhofen, 167 Ill. 640, 47 N. E. 857; Pennsylvania L. Ins., etc., Co. *v.* Franklin F. Ins. Co., 181 Pa. St. 40, 37 Atl. 191, 37 L. R. A. 780; Imperial Bank *v.* Hamilton Bank, 31 Can. Sup. Ct. 344.

15. Jones *v.* Finch, 128 Ala. 217, 29 So. 182, holding that where a person negligently causes a telephone wire to fall across a trolley, and remain, hanging down into the street, where such telephone wire, charged with electricity from the trolley, would come in contact with passing animals, such negligence is an efficient proximate cause, making him liable for the death of a mule coming in contact with the wire, notwithstanding the negligence of the owner of the trolley in not providing fenders against the wire was a conjunctive cause of the injury.

16. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247 (holding that where plaintiff's property was burned by fire communicated to it from a fire started by defendant, the mere fact that a third person failed to extinguish the fire before it communicated to plaintiff's property, although he might have done so, does not operate to break the causal connection between defendant's negligence and plaintiff's injury, so as to prevent plaintiff's recovery on the ground that the injury is not the proximate result of defendant's negligence); Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675.

An act of negligence whereby a fire was set, which spread to plaintiff's house, is not the less an act for which damages may be recovered because the city was negligent in putting out the fire after it once started. Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

17. Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675.

18. Missouri, etc., R. Co. *v.* Merrill, 65 Kan. 436, 70 Pac. 358, 93 Am. St. Rep. 287, 59 L. R. A. 711 (holding that, where a railroad company delivers a defective freight car to a connecting line, it is not liable in damages to an employee of the latter who is injured by reason of such defects after the car has been inspected by the company receiving it); Carter *v.* Towne, 103 Mass. 507; Griffin *v.* Jackson Light, etc., Co., 128 Mich. 653, 87 N. W. 888, 92 Am. St. Rep. 496, 55 L. R. A. 318; Fowles *v.* Briggs, 116 Mich. 425, 74 N. W. 1046, 72 Am. St. Rep. 537, 40 L. R. A. 528.

19. **Fires caused by railroads** see Railroads; Street Railroads.

Fires caused by vessels see Shipping.

Liability of carrier for injuries to goods see Carriers.

20. Read *v.* Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Judd *v.* Cushing, 50 Hun (N. Y.) 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358; Reiper *v.* Nichols, 31 Hun (N. Y.) 491; Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305; Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431.

Where two adjacent buildings have separate and distinct walls, they are separate buildings within the rule. Judd *v.* Cushing, 50 Hun (N. Y.) 181, 2 N. Y. Suppl. 836, 22

and the rule is not changed by the fact that the same person owns both buildings, so as to make him liable to the occupants of the second building.[21] The better rule, however, and the one sustained by the weight of authority, is that where one, by negligence, occasions a fire on his own premises or the premises of a third person, which spreads from thence to plaintiff's property, and there is no intervening and independent cause between the negligent conduct of defendant and the injury to plaintiff, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability;[22] causal connection ceasing only when an object is interposed which if due care had been taken would have prevented the damage.[23] Whether the spread of the fire is caused by the wind, the law of gravitation, combustible matter existing in a state of nature, or other means is immaterial.[24]

2. FRIGHTENED ANIMALS. It is usually held that, although an injury is caused by frightened animals, yet the negligent act of the person who caused them to be frightened is the proximate cause of the injury, the result being a natural consequence of the original act,[25] unless the negligence of the owner of the animals gave opportunity for the injury when frightened, as where horses were left

Abb. N. Cas. 358. See also Hine *v.* Cushing, 53 Hun (N. Y.) 519, 6 N. Y. Suppl. 850.

21. Judd *v.* Cushing, 50 Hun (N. Y.) 181, 2 N. Y. Suppl. 836, 22 Ab. N. Cas. 358.

The force of these cases is somewhat lessened by the decisions in Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389, and Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100.

22. *Illinois.*— Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13.

Iowa.— McKenna *v.* Baessler, 86 Iowa 197, 53 N. W. 103, 17 L. R. A. 310.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Kuhn *v.* Jewett, 32 N. J. Eq. 647.

Wisconsin.— Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

23. Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214 [*disapproving* Ryan *v.* New York Cent. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 1 Am. Rep. 431]; Kuhn *v.* Jewett, 32 N. J. Eq. 647; Blenkiron *v.* Great Cent. Gas Consumers Co., 3 L. T. Rep. N. S. 317.

Proximate cause question for jury.— The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances. Adams *v.* Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

The fact that the fire smoldered for some time on defendant's land, and then, reviving, caused the injury to plaintiff, will not relieve defendant from liability, although he may not have had reason to anticipate that it would so smolder and revive. Krippner *v.* Biebl, 28 Minn. 139, 9 N. W. 671. But see McGibbon *v.* Baxter, 51 Hun (N. Y.) 587, 4 N. Y. Suppl. 382.

24. Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Kuhn *v.* Jewett, 32 N. J. Eq. 647.

Where wind exists at the time the fire starts it cannot be considered an intervening cause, although the consequences of the fire are thereby made more serious. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381. If, however, the wind arises after the ignition of the fire, and carries it to distant property, it may be considered an intervening cause which will relieve defendant from liability. Fent *v.* Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Pennsylvania Co. *v.* Whitlock, 99 Ind. 16, 50 Am. Rep. 71.

25. *Colorado.*— Farmers' High Line Canal, etc., Co. *v.* Westlake, 23 Colo. 26, 46 Pac. 134.

Indiana.— Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230.

Massachusetts.—Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695; McDonald *v.* Snelling, 14 Allen 290, 92 Am. Dec. 768.

Minnesota.—Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

New York.— Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.

Pennsylvania.— Sturgis *v.* Kountz, 165 Pa. St. 358, 30 Atl. 976, 27 L. R. A. 390.

Texas.—Texas, etc., R. Co. *v.* Moseley, (Civ. App. 1900) 58 S. W. 48.

West Virginia.—Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896.

England.— Hill *v.* New River Co., 9 B. & S. 303, 18 L. T. Rep. N. S. 355; Burkin *v.* Bilezikdji, 53 J. P. 760.

See 37 Cent. Dig. tit. "Negligence," § 77.

Illustration.— Where defendant negligently ran a guy wire from a telegraph pole across the street and a stranger's horse, becoming frightened, ran into and broke the wire, causing it to strike and injure plaintiff, defendant's negligence was the proximate cause of the injury. Lundeen *v.* Livingston Electric Light Co., 17 Mont. 32, 41 Pac. 995.

unfastened at the time they were frightened by the blowing of a whistle.[26] But where an injury to a horse was the result of its being frightened and a bad habit of the horse, the injury cannot be laid to the thing causing the fright.[27]

3. ACCIDENT OR ACT OF GOD.[28] Where the proximate cause of the injury was the act of God defendant will not be liable, although he was negligent.[29] Where the *vis major* is of so overwhelming a character that it would have produced the injury independently of such negligence it will relieve defendant from liability.[30] Nevertheless the rule imposing liability on defendant, although another efficient cause concurs with defendant's negligence, applies where an accident or act of God is the concurring cause.[31] And the same is true where the primary cause was an accident for which defendant was not liable if the injury would not have resulted but for his negligence,[32] or where by the exercise of ordinary care the result might have been essentially mitigated.[33]

J. Extent of Injury. The liability of a person for a negligent act causing personal injury is not limited to the immediate injury but includes as well liability for resultant effects; thus where an injury, although not sufficient in itself to produce death, yet results in death as a natural consequence, defendant is liable for such death.[34] And where the illness caused by the negligence resulted in

26. McMahon *v.* Kelly, 9 N. Y. Suppl. 544.

27. Parker *v.* Union Woolen Co., 42 Conn. 399.

28. As affecting liability of carrier see CARRIERS; SHIPPING.

Collision of vessels see COLLISION.

Injuries caused by water see WATERS; WATERCOURSES.

Injuries incident to construction and operation of railroads see RAILROADS.

Master's liability for injuries to servants see MASTER AND SERVANT.

29. Texas, etc., R. Co. *v.* Anderson, (Tex. Civ. App. 1901) 61 S. W. 424.

In cases involving negligence of duty based on contract the question of proximate cause is immaterial, and while the law, in some cases, will permit one to set up as a defense that he was prevented by a *vis major* from doing what he contracted to do, where he has been negligent, he will not be permitted to take refuge in an inquiry whether his own negligence or a *vis major* has been the proximate cause of a resultant injury. Sharp *v.* Cincinnati, 26 Ohio Cir. Ct. 59.

30. Grand Valley Irr. Co. *v.* Pitzer, 14 Colo. App. 123, 59 Pac. 420; Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456; Thomas *v.* Birmingham Canal Co., 45 J. P. 21, 49 L. J. Q. B. 851, 43 L. T. Rep. N. S. 435.

31. *California.*— Chidester *v.* Consolidated Ditch Co., 59 Cal. 197, holding that no one is responsible for an act of God or inevitable accident, but when human agency is combined with it and neglect occurs in the employment of it liability for damage results.

Illinois.— Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780; Joliet *v.* Schufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 458, 18 L. R. A. 750; Lockport *v.* Richards, 81 Ill. App. 533; Champaign *v.* Jones, 32 Ill. App. 179.

Indiana.— Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012.

Massachusetts.—Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

New Hampshire.—Boynton *v.* Somersworth, 58 N. H. 321.

New York.— Bogart *v.* Delaware, etc., R. Co., 145 N. Y. 283, 40 N. E. 17 [*affirming* 72 Hun 412, 25 N. Y. Suppl. 175]; Greeley *v.* State, 94 N. Y. App. Div. 605, 88 N. Y. Suppl. 468; Vincett *v.* Cook, 4 Hun 318.

Pennsylvania.— Siegfried *v.* South Bethlehem Borough, 27 Pa. Super. Ct. 456.

England.— Nitro-Phosphate, etc., Co. *v.* London, etc., Docks Co., 9 Ch. D. 503, 39 L. T. Rep. N. S. 433, 27 Wkly. Rep. 267.

See 37 Cent. Dig. tit. "Negligence," § 80.

Illustrations.— Where a landowner in excavating his land negligently leaves the excavation exposed so that rain runs into it and causes the land of an adjoining proprietor to give way, to the injury of the buildings thereon, he is liable for such injuries, although the rain may have been an unusual and excessive one, if it would not have run into the excavation except for his negligently leaving it exposed. Ulrick *v.* Dakota L. & T. Co., 3 S. D. 44, 51 N. W. 1023, 2 S. D. 285, 49 N. W. 1054. Where a fire destroyed defendant's house, leaving one of the walls standing in a dangerous condition, and defendant, knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged plaintiff's house, it was held that defendant could not shield himself under the plea of *vis major*, and was liable for the damages caused. Nordheimer *v.* Alexander, 19 Can. Sup. Ct. 248.

32. Champaign *v.* Jones, 32 Ill. App. 179; Clay Center *v.* Jevons, 2 Kan. App. 568, 44 Pac. 745.

33. Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287.

34. Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Koch *v.* Fox, 71 N. Y. App. Div. 288, 75 N. Y. Suppl. 913 (where the injury produced insanity and by reason thereof such person took his own life unless too long a time elapsed or the connection between the injury and the death was

injury to the eyesight, defendant is liable therefor.[35] So where fright caused by negligence induced illness defendant was liable therefor.[36] And likewise where the movement of a frightened horse increased the damage caused by a collision.[37]

VII. CONTRIBUTORY NEGLIGENCE.[38]

A. In General — 1. Nature and Effect — a. Definition. Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or coöperating with the negligent act of defendant is the proximate cause or occasion of the injury complained of.[39]

involved in doubt and uncertainty); Ginna *v.* Second Ave. R. Co., 8 Hun (N. Y.) 494 [*affirmed* in 67 N. Y. 596] (where blood poisoning set in resulting in death). And see DAMAGES, 13 Cyc. 25, 30.

35. Stephen *v.* Woodruff, 18 N. Y. App. Div. 625, 45 N. Y. Suppl. 712.

36. Chicago, etc., R. Co. *v.* Hunerberg, 16 Ill. App. 387; Lehman *v.* Brooklyn City R. Co., 47 Hun (N. Y.) 355 (where the conditions were very unusual); Mitchell *v.* Rochester R. Co., 4 Misc. (N. Y.) 575, 25 N. Y. Suppl. 744, 30 Abb. N. Cas. 362.

37. Albert *v.* Bleecker St., etc., R. Co., 2 Daly (N. Y.) 389.

38. **Admissibility and sufficiency of evidence** see *infra*, VIII, B, 3, b, 4, b.

Instructions see *infra*, VIII, D, 3, d.

Pleading see *infra*, VIII, B, 1, j, 2, c.

Presumptions and burden of proof see *infra*, VIII, C, 1, d, 2, b.

Of adjoining landowners as to condition of property see ADJOINING LANDOWNERS.

Of decedent in action for death see DEATH.

Of depositor on payment in bank of deposit to wrong person see BANKS AND BANKING.

Of guests at inns see INNKEEPERS.

Of hirer of livery horse see LIVERY-STABLE KEEPERS.

Of injured animals see ANIMALS.

Of insured as affecting liability of insurance company for loss see INSURANCE.

Of licensees and trespassers on railroad property in general see RAILROADS.

Of owner of animals injured on track see RAILROADS; STREET RAILROADS.

Of owner of horse injured by negligence of livery-stable keeper see LIVERY-STABLE KEEPERS.

Of owner of property destroyed by fire see RAILROADS; SHIPPING; STREET RAILROADS.

Of parents suing for injuries to child see PARENT AND CHILD.

Of passengers as affecting liability of sleeping-car company for loss of baggage see CARRIERS.

Of passengers injured by negligence of carrier see CARRIERS.

Of patients injured by negligence of physicians and surgeons see PHYSICIANS AND SURGEONS.

Of payee or drawer of forged checks see BANKS AND BANKING.

Of persons injured: At a railroad crossing see RAILROADS. By accidents to trains see RAILROADS. By animals see ANIMALS. By construction or maintenance of railroad see RAILROADS; STREET RAILROADS. By defects in bridges see BRIDGES. By defects in fences see FENCES. By electricity see ELECTRICITY. By flowage or detention of water see WATERS; WATERCOURSES. By gas see GAS. By negligence in use of highways see STREETS AND HIGHWAYS. By negligence of officers see SHERIFFS AND CONSTABLES. By negligence of warehousemen see WAREHOUSEMEN. By negligent use of wharves see WHARVES. By obstructions of navigable waters see NAVIGABLE WATERS. By poison see POISONS. By sale of intoxicating liquor see INTOXICATING LIQUORS. In highways see STREETS AND HIGHWAYS. In leased premises see LANDLORD AND TENANT. In mining property see MINES AND MINERALS. In operation of canal see CANALS. In operation of ferry see FERRIES. In sewers, drains, and watercourses in cities see MUNICIPAL CORPORATIONS. In streets see STREETS AND HIGHWAYS. In turnpikes see TURNPIKES; TOLL-ROADS. On wharves or docks see WHARVES. While riding on sleeping cars see CARRIERS.

Of persons working about vessels see SHIPPING.

Of sender of telegram see TELEGRAPHS AND TELEPHONES.

Of servant injured by negligence of master see MASTER AND SERVANT.

Of shipper of goods see CARRIERS.

Of shipper of live stock see CARRIERS.

Of tenants and occupants of demised premises injured by defects therein see LANDLORD AND TENANT.

Of trespassers ejected from property of carrier see CARRIERS; RAILROADS; SHIPPING.

Of vessels injured by negligence of pilot see PILOTS.

39. Beech Contrib. Negl. § 7; Wastl *v.* Montana Union R. Co., 24 Mont. 159, 176, 61 Pac. 9; St. Louis Southwestern R. Co. *v.* Casseday, 92 Tex. 525, 527, 50 S. W. 125; Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 121, 26 S. W. 1052; International, etc., R. Co. *v.* Anchonda, 33 Tex. Civ. App. 24, 28, 75 S. W. 557; Richmond, etc., R. Co. *v.* Pickleseimer, 85 Va. 798, 801, 10 S. E. 44; Plant Inv. Co. *v.* Cook, 74 Fed. 503, 505, 20 C. C. A. 625.

Other definitions are: "Such negligence on the part of the plaintiff as contributes to the injury, that is, directly in part causes it." Riley *v.* West Virginia Cent., etc., R.

b. Negligence of Plaintiff. An essential requirement is that the act of the person injured must be a negligent act. It is not sufficient merely that the act contribute to the injury, as it is the contributory negligence and not the contributory act which defeats recovery.[40] And further, such negligent act must be in some sense the act of the person injured;[41] either his own or that of someone whose negligence is legally attributed to him.[42]

c. Negligence of Defendant. The law of contributory negligence forbids a recovery by one who, by his own fault, brings an injury upon himself.[43] Contributory negligence on the part of plaintiff necessarily assumes negligence on the part of defendant.[44] To bar a recovery by plaintiff it is not necessary that his negligence should have been the sole cause of the injury,[45] since contributory neg-

Co., 27 W. Va. 145, 164; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 214.

"That sort of negligence which, being a cause of the injury, is of such a character that the defendant could not avoid the effects of it." Forwood *v.* Toronto, 22 Ont. 351, 359 [*quoting* Smith Negl. p. 227].

"Any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." Woodell *v.* West Virginia Imp. Co., 38 W. Va. 23, 39, 17 S. E. 386 [*quoting* Black L. Dict.].

"The contributory negligence which bars a recovery for an injury is that which co-operates in causing the injury; some concurring act, or omission of the other party to produce the injury — not the loss merely, and without which the injury could not have happened." Du Bois *v.* Decker, 4 N. Y. Suppl. 768, 769 [*citing* Moak Underhill Torts 463].

The general definition of what constitutes contributory negligence is this: "It is the doing, or the omitting to do, that which under the circumstances a reasonable man would not have done, or would not have omitted to do, to avoid any injury resulting to himself from the negligence of the defendant." Hubbard *v.* New York, etc., R. Co., 72 Conn. 24, 27, 43 Atl. 550.

"Contributory negligence consists of negligence by the party inflicting the injury and negligence on the part of the injured person, when the negligence of each contributed proximately to the injury and when the injury would not have occurred, notwithstanding the negligence of the party inflicting the injury, if the injured person had not been negligent. Houston, etc., R. Co. *v.* Patterson, 20 Tex. Civ. App. 255, 258, 48 S. W. 747.

For other cases in which contributory negligence has been defined see Jones *v.* Carey, 9 Houst. (Del.) 214, 217, 31 Atl. 976; Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 316, 62 N. W. 365; McLamb *v.* Wilmington, etc., R. Co., 122 N. C. 862, 874, 29 S. E. 894; Duncan *v.* Greenville County, 73 S. C. 254, 256, 53 S. E. 367; Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 482, 39 S. E. 715; McLeod *v.* Spokane, 26 Wash. 346, 351, 67 Pac. 74; Illinois Cent. R. Co. *v.* Jones, 95 Fed. 370, 373, 37 C. C. A. 106; Southern Bell Tel., etc., Co. *v.* Watts, 66 Fed. 460, 466, 13 C. C. A. 579; Wakelin *v.* London, etc., R. Co., 12 App. Cas. 41, 51, 51 J. P. 404, 56 L. J. Q. B. 229, 55 L. T. Rep. N. S. 709, 35 Wkly. Rep. 141.

40. *California.*— Williams *v.* Southern Pac. R. Co., (1885) 9 Pac. 152; Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 7 Pac. 769.

Kansas.— Wyandotte *v.* White, 13 Kan. 191.

New York.— Guichard *v.* New, 84 Hun 54, 31 N. Y. Suppl. 1080; Schmedt *v.* Cook, 4 Misc. 85, 23 N. Y. Suppl. 799, 30 Abb. N. Cas. 285.

Texas.— Selman *v.* Gulf, etc., R. Co., (Civ. App.) 101 S. W. 1030.

West Virginia.— Barker *v.* Ohio River R. Co., 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 808.

See 37 Cent. Dig. tit. "Negligence," § 83.

41. New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; Brewster *v.* Elizabeth City, 137 N. C. 392, 49 S. E. 885.

42. Crampton *v.* Ivie, 126 N. C. 894, 36 S. E. 351.

43. Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; South Chicago City R. Co. *v.* Adamson, 69 Ill. App. 110; St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434; Quebec, etc., Ferry Co. *v.* Jess, 35 Can. Sup. Ct. 693. And see Fortier *v.* Lauzier, 14 Quebec Super. Ct. 359; Davignon *v.* Stanbridge Station, 14 Quebec Super. Ct. 116.

Where the injury is wholly caused by the injured person's own deliberate act, through an error in judgment, there can be no recovery. Atkins *v.* Lackawanna Transp. Co., 79 Ill. App. 19.

44. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29; Louisville, etc., R. Co. *v.* Sights, 89 S. W. 132, 28 Ky. L. Rep. 186; Scott *v.* Seaboard Air Line R. Co., 67 S. C. 136, 45 S. E. 129; Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758; Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486.

45. North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; Western R. Co. *v.* Sistrunk, 85 Ala. 352, 5 So. 79; Lafayette, etc., R. Co. *v.*

ligence exists if the injury be caused by the joint and concurring negligence of the person injured and defendant.[46]

d. Effect of Contributory Negligence — (i) *In General.* The universal rule is that if negligence on the part of the person injured contributed to the injury he is not entitled to recover therefor,[47] and the rule applies as well where the

Huffman, 28 Ind. 287, 92 Am. Dec. 318; Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348; Pim *v.* St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155; Hanheide *v.* St. Louis Transit Co., 104 Mo. App. 323, 78 S. W. 820.

46. North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; Newcomb *v.* New York, etc., R. Co., 169 Mo. 409, 69 S. W. 348; Hanheide *v.* St. Louis Transit Co., 104 Mo. App. 323, 78 S. W. 820; Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16.

47. *Alabama.*— Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

California.— Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Delaware.—Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

District of Columbia.—Greenwell *v.* Washington Market Co., 21 D. C. 298.

Illinois.— Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991; Chicago Title, etc., Co. *v.* Standard Fashion Co., 106 Ill. App. 135; Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131; Tri-City R. Co. *v.* Killeen, 92 Ill. App. 57; Potter *v.* Sjorgren, 91 Ill. App. 530.

Indiana.— Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Indianapolis St. R. Co. *v.* Zaring, 33 Ind. App. 297, 71 N. E. 270, 501.

Iowa.— Portman *v.* Decorah, 89 Iowa 336, 56 N. W. 512; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316.

Kansas.— Lawrence *v.* Atchison, etc., R. Co., 57 Kan. 585, 47 Pac. 510.

Louisiana.— Johnson *v.* Canal, etc., R. Co., 27 La. Ann. 53; Knight *v.* Pontchartrain R. Co., 23 La. Ann. 462; Fleytas *v.* Pontchartrain R. Co., 18 La. 339, 36 Am. Dec. 658; Lesseps *v.* Pontchartrain R. Co., 17 La. 361.

Maine.— Moulton *v.* Sanford, etc., R. Co., 99 Me. 508, 59 Atl. 1023.

Maryland.— Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504.

Massachusetts.— Smith *v.* Smith, 2 Pick. 621, 13 Am. Dec. 464.

Michigan.— Michigan Cent. R. Co. *v.* Leahey, 10 Mich. 193.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Carroll *v.* Minnesota Valley R. Co., 13 Minn. 30, 97 Am. Dec. 221; McMahon *v.* Davidson, 12 Minn. 357.

Missouri.— Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885; Neier *v.* Missouri Pac. R. Co., (1886) 1 S. W. 387; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Callahan *v.* Warne, 40 Mo. 131; Schoenlau *v.* Friese, 14 Mo. App. 436.

New Jersey.— Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180; Bonnell *v.* Delaware, etc., R. Co., 39 N. J. L. 189; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525; Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. 531; Drake *v.* Mount, 33 N. J. L. 441; Haslan *v.* Morris, etc., R. Co., 33 N. J. L. 147; Telfer *v.* Northern R. Co., 30 N. J. L. 188; Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180; Runyon *v.* Central R. Co., 25 N. J. L. 556.

New York.— Curran *v.* Warren Chemical, etc., Co., 36 N. Y. 153, 1 Transcr. App. 59, 3 Abb. Pr. N. S. 240, 34 How. Pr. 250; Haley *v.* Earle, 30 N. Y. 208; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384; Cox *v.* Westchester Turnpike Road, 33 Barb. 414; Spooner *v.* Brooklyn City R. Co., 31 Barb. 419; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. 221; Terry *v.* New York Cent. R. Co., 22 Barb. 574; Collins *v.* Albany, etc., R. Co., 12 Barb. 492; Morris *v.* Phelps, 2 Hilt. 38; Mentges *v.* New York, etc., R. Co., 1 Hilt. 425; Williamson *v.* Metropolitan St. R. Co., 29 Misc. 324, 60 N. Y. Suppl. 477; Tonawanda R. Co. *v.* Munger, 5 Den. 255, 49 Am. Dec. 239 [*affirmed* in 4 N. Y. 349, 53 Am. Dec. 384]; Cook *v.* Champlain Transp. Co., 1 Den. 91; Rathbun *v.* Payne, 19 Wend. 399.

North Carolina.— Manly *v.* Wilmington, etc., R. Co., 74 N. C. 655; Morrison *v.* Cornelius, 63 N. C. 346.

Pennsylvania.— Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 250; Heil *v.* Glanding, 42 Pa. St. 493, 82 Am. Dec. 537; McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713; Wynn *v.* Allard, 5 Watts & S. 524; Myers *v.* Snyder, Brightly 489.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715; Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16; Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754; Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Texas.— Walker *v.* Herron, 22 Tex. 55; Galveston, etc., R. Co. *v.* Holyfield, (Civ. App. 1902) 70 S. W. 221.

Vermont.— Bryant *v.* Central Vermont R. Co., 56 Vt. 710; Washburn *v.* Tracy, 2 D. Chipm. 128, 15 Am. Dec. 661.

Virginia.— Richmond, etc., R. Co. *v.* Yea-

injury is to plaintiff's property as where it is to his person,[48] and in cases of contract as well as those of tort.[49] The rule also applies, although the contributory negligence is of a negative character such as lack of vigilance.[50] Contributory negligence which will defeat an action against one of two defendants sued jointly and severally will prevent recovery against the other.[51] And this is true whether the action is brought for damages to the person injured or by another for the resultant damage to him.[52]

(II) *Violation of Statute or Ordinance.* Contributory negligence will defeat recovery even though the negligent act consisted in the violation of a statute or ordinance,[53] and though such violation is held to be negligence *per se*.[54]

(III) *Gross Negligence.* The general rule is that contributory negligence will defeat recovery; although the negligence of defendant is gross, it must be something more than negligence.[55] There are cases, however, which hold that if

mans, 86 Va. 860, 12 S. E. 946; Richmond, etc., R. Co. *v.* Pickleseimer, 85 Va. 798, 10 S. E. 44; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Dun *v.* Seaboard, etc., R. Co., 78 Va. 645, 49 Am. Rep. 388; Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

West Virginia.— Overhy *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

Wisconsin.— Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852.

United States.— Claus *v.* Northern Steamship Co., 89 Fed. 646, 32 C. C. A. 282; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

England.— Williams *v.* Holland, 10 Bing. 112, 25 E. C. L. 61, 6 C. & P. 23, 25 E. C. L. 302, 2 L. J. C. P. 190, 3 Moore & S. 540; Sayer *v.* Hatton, Cab. & E. 492; Tuff *v.* Warman, 5 C. B. N. S. 573, 5 Jur. N. S. 222, 27 L. J. C. P. 322, 6 Wkly. Rep. 693, 94 E. C. L. 573; Williams *v.* Richards, 3 C. & K. 81; Woolf *v.* Beard, 8 C. & P. 373, 34 E. C. L. 787; Hill *v.* Warren, 2 Stark. 377, 3 E. C. L. 453; Doyle *v.* Kinahan, 17 Wkly. Rep. 679.

Canada.— Quebec, etc., Ferry Co. *v.* Jess, 35 Can. Sup. Ct. 693; Hawley *v.* Wright, 32 Can. Sup. Ct. 40 [*affirming* 34 Nova Scotia 365]; Hunt *v.* Wilson, 15 Quebec Super. Ct. 355.

See 37 Cent. Dig. tit. "Negligence," § 84.

48. Louisville, etc., R. Co. *v.* Boland, 53 Ind. 398; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

49. Milton *v.* Hudson River Steam-Boat Co., 37 N. Y. 210.

50. Sanders *v.* Aiken Mfg. Co., 71 S. C. 58, 63, 50 S. E. 679 (in which it was said: "An attempt to make a line of separation between positive and negative negligence — between active negligence and lack of vigilance — would involve the courts in distinctions not only difficult and intricate, but highly artificial and unsound); Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938.

51. Fletcher *v.* Boston, etc., R. Co., 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414.

52. Winner *v.* Oakland Tp., 158 Pa. St. 405, 27 Atl. 1110, 1111 (holding that contributory negligence of wife will defeat action by husband for loss of her services); Chicago, etc., R. Co. *v.* Honey, 63 Fed. 39, 12 C. C. A. 190, 26 L. R. A. 42.

53. *Colorado.*— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Illinois.— Browne *v.* Siegel, 191 Ill. 226, 60 N. E. 815.

Indiana.— Gartin *v.* Meredith, 153 Ind. 16, 53 N. E. 936.

Louisiana.— Lopes *v.* Sahnque, 114 La. 1004, 38 So. 810.

New York.— Nugent *v.* Vanderveer, 38 Hun 487, 39 Hun 322.

Vermont.— Noyes *v.* Morristown, 1 Vt. 353.

Canada.— Deyo *v.* Kingston, etc., R. Co., 8 Ont. L. Rep. 588.

54. *Indiana.*— Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885.

New York.— Willy *v.* Mulledy, 78 N. Y. 310, 34 Am. Rep. 536.

Tennessee.— Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82.

Texas.— Galveston Land, etc., Co. *v.* Pracker, 3 Tex. Civ. App. 261, 22 S. W. 830.

55. *Alabama.*— Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, 6 So. 910.

Connecticut.— Rowen *v.* New York, etc., R. Co., 59 Conn. 364, 21 Atl. 1073; Neal *v.* Gillett, 23 Conn. 437.

Florida.—Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Illinois.— Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38.

Indiana.— Lary *v.* Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572.

Michigan.— Labarge *v.* Pere Marquette R. Co., 134 Mich. 139, 95 N. W. 1073, where plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of defendant.

New York.—Wilds *v.* Hudson River R. Co., 24 N. Y. 430 [*reversing* 33 Barb. 503]; Burckle *v.* New York Dry Dock Co., 2 Hall 151; Bush *v.* Brainard, 1 Cow. 78, 13 Am. Dec. 513.

the negligence was so gross as to imply a disregard of consequences or a willingness to inflict the injury contributory negligence will not bar recovery.[56] But it is probable that "gross" in that connection was used in the sense of "wanton and reckless."

(IV) *Wilful or Wanton Negligence*[57] — (A) *In General.* The doctrine that contributory negligence will defeat recovery has no application where the injury is the result of the wilful,[58] wanton,[59] reckless conduct of defendant.[60] In no case will the wilful neglect of a party be excused by the contributory negligence of the party injured unless his contributing fault is more than gross neglect and amounts to an intention of causing his own injury, which could not have been avoided by the exercise of proper care.[61]

(B) *What Constitutes.* To constitute a wilful injury the act must have been intentional,[62] or the act or omission which produced it must have been committed

Texas.— McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; International, etc., R. Co. *v.* Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322; Texas, etc., R. Co. *v.* Brown, 2 Tex. Civ. App. 281, 21 S. W. 424.

Wisconsin.— Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

See 37 Cent. Dig. tit. "Negligence," § 85.

56. Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467; Lafayette, etc., R. Co. *v.* Adams, 26 Ind. 76; Illinois Cent. R. Co. *v.* Dick, 91 Ky. 434, 15 S. W. 665, 12 Ky. L. Rep. 772. The statute making a defendant liable for injuries caused by gross neglect, notwithstanding the contributory negligence of the person injured, applies only to cases where death results from such gross neglect.

57. Injuries to: Animals on or near tracks see RAILROADS. Persons at railroad crossings see RAILROADS. Persons on or near railroad tracks see RAILROADS; STREET RAILROADS. Servants see MASTER AND SERVANT.

58. *Illinois.*— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; Spring Valley Coal Co. *v.* Rowatt, 96 Ill. App. 248 [*affirmed* in 196 Ill. 156, 63 N. E. 649]; Schaefer *v.* North Chicago St. R. Co., 82 Ill. App. 473; Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381; East St. Louis Connecting R. Co. *v.* Jenks, 54 Ill. App. 91.

Indiana.— Quinn *v.* Chicago, etc., R. Co., 162 Ind. 442, 70 N. E. 526; Brannen *v.* Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Salem *v.* Goller, 76 Ind. 291; De Lon *v.* Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847.

Kentucky.— Louisville, etc., R. Co. *v.* Conniff, 27 S. W. 865, 16 Ky. L. Rep. 296.

Michigan.— Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Carroll *v.* Minnesota Valley R. Co., 13 Minn. 30, 97 Am. Dec. 221; McMahon *v.* Davidson, 12 Minn. 357.

Missouri.— Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

New York.— Martin *v.* Wood, 1 Silv. Sup. 212, 5 N. Y. Suppl. 274.

North Carolina.— Brendle *v.* Spencer, 125 N. C. 474, 34 S. E. 634.

Wisconsin.— Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

See 37 Cent. Dig. tit. "Negligence," § 85.

59. Southern R. Co. *v.* Yancey, 141 Ala. 246, 37 So. 341; Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145.

60. *Alabama.*— Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130.

Georgia.— Central R., etc., Co. *v.* Newman, 94 Ga. 560, 21 S. E. 219.

Indiana.— Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221, 20 N. E. 775.

Kansas.— Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

Kentucky.—Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Thurman *v.* Louisville, etc., R. Co., 34 S. W. 893, 17 Ky. L. Rep. 1343.

Michigan.— Battishill *v.* Humphreys, 64 Mich. 514, 38 N. W. 581.

Minnesota.— Rawitzer *v.* St. Paul City R. Co., 93 Minn. 84, 100 N. W. 664.

Mississippi.— Christian *v.* Illinois Cent. R. Co., (1893) 12 So. 710.

North Carolina.— Brendle *v.* Spencer, 125 N. C. 474, 34 S. E. 634.

West Virginia.— Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

United States.— McGhee *v.* Campbell, 101 Fed. 936, 42 C. C. A. 94.

Canada.— Brett *v.* Isnor, 25 Nova Scotia 430; Turner *v.* Isnor, 25 Nova Scotia 428.

See 37 Cent. Dig. tit. "Negligence," § 85.

61. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

62. Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263; Hancock *v.* Lake Erie, etc., R. Co., 21 Ind. App. 10, 51 N. E. 369; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Banks *v.* Braman, 188 Mass. 367, 74 N. E. 594.

Unless there was a purpose to inflict the injury it cannot be said to have been inten-

under such circumstances as evinced reckless disregard of the safety of others,[63] as by failure after discovering the danger to exercise ordinary care to prevent impending injury.[64] In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.[65] In order to establish wantonness it is not necessary to show an entire want of care.[66] The violation of a statute does not constitute a wilful wrong.[67] A wilful injury will not be inferred when the result may be reasonably attributed to negligence or inattention.[68]

e. Mitigation of Damages. In some jurisdictions the negligence of a plaintiff, although not of the proximate character necessary to defeat his recovery, may yet be looked to in mitigation of damages.[69] In others this rule does not exist.[70]

f. Degree of Contributory Negligence. While it is necessary that the negligence of the person injured should contribute to the cause of the injury in order to defeat recovery;[71] and while some courts in speaking of contributory negligence

tionally done. Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231.

63. Birmingham R., etc., Co. *v.* Pinckard, 124 Ala. 373, 26 So. 880; Louisville, etc., R. Co. *v.* Ader, 110 Ind. 376, 11 N. E. 437; Belt R., etc., Co. *v.* Mann, 107 Ind. 89, 7 N. E. 893; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51, 7 N. E. 807; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338. And see Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416, 424; Wabash R. Co. *v.* Jones, 53 Ill. App. 125; Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445.

An act is wanton when it manifests a reckless indifference to the rights of others. Everett *v.* Richmond, etc., R. Co., 121 N. C. 519, 27 S. E. 991. And see Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

64. Alger, etc., Co. *v.* Duluth-Superior Traction Co., 93 Minn. 314, 101 N. W. 298; Brett *v.* Isnor, 25 Nova Scotia 430; Turner *v.* Isnor, 25 Nova Scotia 428.

65. Alabama Great Southern R. Co. *v.* Guest, 144 Ala. 373, 39 So. 654; Montgomery St. R. Co. *v.* Rice, 142 Ala. 674, 38 So. 857; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116; Birmingham R., etc., Co. *v.* Bowers, 110 Ala. 328, 20 So. 345; Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176. And see Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Tinsley *v.* Western Union Tel. Co., 72 S. C. 350, 51 S. E. 913.

66. Birmingham R., etc., Co. *v.* Pinckard, 124 Ala. 372, 26 So. 880.

67. Browne *v.* Siegel, 191 Ill. 226, 60 N. E. 815.

Illustration.— That defendant's act in selling ammunition to a minor was in violation of a statute does not render it a wilful wrong, relieving a third person injured thereby, from showing freedom from contributory negligence. Gartin *v.* Meredith, 153 Ind. 16, 53 N. E. 936.

68. Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

69. Southern R. Co. *v.* Pugh, 97 Tenn. 624, 37 S. W. 555; Dush *v.* Fitzhugh, 2 Lea (Tenn.) 307; Jess *v.* Quebec, etc., Ferry Co., 25 Quebec Super. Ct. 224.

70. Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791.

71. *Alabama.*—Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Georgia.— Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644.

Illinois.— St. Louis National Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90; Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131; Chicago City R. Co. *v.* Canevin, 72 Ill. App. 81; Pennsylvania Co. *v.* McCaffrey, 68 Ill. App. 635.

Missouri.— Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239.

Nebraska.— Omaha Horse R. Co. *v.* Doolittle, 7 Nebr. 481.

New York.— Haley *v.* Earle, 30 N. Y. 208.

Texas.— Eads *v.* Marshall, (Civ. App. 1894) 29 S. W. 170.

Virginia.— Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345, 43 S. E. 614.

Washington.— Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323.

Wisconsin.— Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

United States.— Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327; Southern Bell Tel., etc., Co. *v.* Watts, 66 Fed. 460, 13 C. C. A. 579.

Basis of rule.— The doctrine of contributory negligence rests in the view that defendant has been in part negligent, yet plaintiff by his own carelessness severed the causal connection between defendant's negligence and the accident, and defendant's negligence is not the proximate cause of the injury.

have held that he who by his own negligence has contributed in an essential degree to the injury sustained by him cannot maintain an action therefor,[72] yet the general rule is that if the negligence of the injured person contributed in any degree no recovery can be had.[73] This is true no matter how slight may be the negligence of the person injured provided it contributed to the injury.[74] The law will not attempt to measure the degree.[75] But unless such negligence amounts

Godwin *v.* Newcombe, 1 Ont. L. Rep. 525 [*quoting* Thomas *v.* Quartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555].

72. Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Baltimore, etc., R. Co. *v.* State, 29 Md. 252, 96 Am. Dec. 528; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. (N. Y.) 221; Thrings *v.* Central Park R. Co., 7 Rob. (N. Y.) 616; Conlin *v.* Charleston, 15 Rich. (S. C.) 201.

73. *California.*—Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409; Gay *v.* Winter, 34 Cal. 153.

Illinois.— U. S. Express Co. *v.* McCluskey, 77 Ill. App. 56; Heimann *v.* Kinnare, 73 Ill. App. 184; Cicero, etc., St. R. Co. *v.* Snider, 72 Ill. App. 300.

Indiana.— Quinn *v.* Chicago, etc., R. Co., 162 Ind. 442, 70 N. E. 526; Salem *v.* Goller, 76 Ind. 291; De Lon *v.* Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847.

Maine.— Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947.

Massachusetts.— Fletcher *v.* Boston, etc., R. Co., 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414.

Missouri.— Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

New Hampshire.— Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

New York.— Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58; Owen *v.* Hudson River R. Co., 35 N. Y. 516 [*affirming* 7 Bosw. 329]; Williams *v.* Syracuse Iron Works, 31 Hun 392; Bunn *v.* Delaware, etc., R. Co., 6 Hun 303; Keese *v.* New York, etc., R. Co., 67 Barb. 205; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. 339; Delafield *v.* Union Ferry Co., 10 Bosw. 216.

Pennsylvania.— Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449, 15 Atl. 865; Monongahela City *v.* Fischer, 111 Pa. St. 9, 2 Atl. 87, 56 Am. Rep. 241; O'Brien *v.* Philadelphia, etc., R. Co., 3 Phila. 76.

South Carolina.— Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16.

Texas.— Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Cunningham *v.* Lyness, 22 Wis. 245; Potter *v.* Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548; Rothe *v.* Milwaukee R. Co., 21 Wis. 256; Achtenhagen *v.* Watertown, 18 Wis. 331, 84 Am. Dec. 769; Spencer *v.* Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758.

England.— Hawkins *v.* Cooper, 8 C. & P. 473, 34 E. C. L. 842.

See 37 Cent. Dig. tit. "Negligence," § 93.

74. *Alabama.*— Birmingham R. Light, etc., Co. *v.* Bynum, 139 Ala. 389, 36 So. 736.

Illinois.— Lindberg *v.* Chicago City R. Co., 83 Ill. App. 433.

Indiana.— Louisville, etc., R. Co. *v.* Shanks, 94 Ind. 598.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348.

New York.— Wilds *v.* Hudson River R. Co., 24 N. Y. 430.

See 37 Cent. Dig. tit. "Negligence," § 93.

Materially.— The negligence need not contribute materially. Cicero, etc., R. Co. *v.* Snider, 72 Ill. App. 300; Chicago City R. Co. *v.* Canevin, 72 Ill. App. 81; Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277; Mattimore *v.* Erie, 144 Pa. St. 14, 22 Atl. 817; Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449, 15 Atl. 865; Monongahela City *v.* Fischer, 111 Pa. St. 9, 2 Atl. 87, 56 Am. Rep. 241; Boyce *v.* Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563. *Compare* Matthews *v.* Toledo, 21 Ohio Cir. Ct. 69, 11 Ohio Cir. Dec. 375.

Substantially.— The negligence need not contribute materially. Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277.

Appreciable extent.— An instruction that "if the acts or omissions of plaintiff 'contributed in any appreciable extent' to the result of which plaintiff complains, he can not recover," is properly refused. Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831.

The use of the word "equally," in an instruction "that the plaintiff will be entitled to recover . . . unless they should conclude from the evidence that she, by her own negligence, contributed equally with the defendant to her own injuries," is error. Gulf, etc., R. Co., *v.* Warlick, 1 Indian. Terr. 10, 35 S. W. 235.

Where there is mutual neglect of the same character and degree no action can be sustained. Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Briggs *v.* Guilford, 8 Vt. 264; Noyes *v.* Morristown, 1 Vt. 353.

75. Colbourn *v.* Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936; Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Anderson *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 104, 61 N. Y. Suppl. 899; Weaver *v.* Pennsylvania R. Co., 212 Pa. St. 632, 61 Atl. 1117; Long *v.* Milford Tp., 137 Pa. St. 122, 20 Atl. 425.

to a want of ordinary care it will not defeat recovery.[76] An act constituting contributory negligence need not be wilful in order to defeat recovery.[77]

2. Care Required[78] — a. Degree of Care. The law imposes on every person the duty of using ordinary care for his own protection against injury.[79] He is not required to exercise extraordinary care,[80] or to use the utmost possible caution;[81] and hence, where there is an exercise of ordinary and reasonable care there is no contributory negligence.[82] In determining the question of negligence the same rule should be applied to plaintiff as to defendant.[83]

b. Ordinary Care.[84] Ordinary care is such care as ordinarily prudent persons would have exercised under the same or similar circumstances to avoid danger.[85]

76. Harvey *v.* Chicago, etc., R. Co., 116 Ill. App. 507 [*affirmed* in 221 Ill. 242, 77 N. E. 569]; Otis *v.* Janesville, 47 Wis. 422, 2 N. W. 783.

77. Texas, etc., R. Co. *v.* Mitchell, (Tex. Civ. App. 1898) 45 S. W. 945.

78. Admissibility of evidence see *infra*, VIII, C, 3, b.

Instructions see *infra*, VIII, D, 3, d, (I), (C).

Questions for jury see *infra*, VIII, D, 2, d.

79. *Connecticut.*— Beers *v.* Housatonic R., Co., 19 Conn. 566.

Delaware.— Parvis *v.* Philadelphia, etc., R. Co., 8 Houst. 436, 17 Atl. 702.

Illinois.— Fitzgerald *v.* Hedstrom, 98 Ill. App. 109; Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131; Elwood *v.* Chicago City R. Co., 90 Ill. App. 397; U. S. Express Co. *v.* McCluskey, 77 Ill. App. 56; Campbell *v.* Mullen, 60 Ill. App. 497; Kammerer *v.* Gallagher, 58 Ill. App. 561; Peoria *v.* Walker, 47 Ill. App. 182; Chicago, etc., R. Co. *v.* Harmon, 17 Ill. App. 640.

Indiana.— Louisville, etc., R. Co. *v.* Schmidt, 81 Ind. 264; Jonesboro, etc., Turnpike Co. *v.* Baldwin, 57 Ind. 86.

Mississippi.— Dix *v.* Brown, 41 Misc. 131.

New York.— Eakin *v.* Brown, 1 E. D. Smith 36.

Pennsylvania.— Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293; Delaware, etc., R. Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450, 6 Am. St. Rep. 745.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538.

See 37 Cent. Dig. tit. "Negligence," § 92.

80. Tobin *v.* Omnibus Cable Co., (Cal. 1893) 34 Pac. 124; Drake *v.* Dartmouth, 25 Nova Scotia 177.

A mere want of a superior degree of care and diligence cannot be set up to bar plaintiff's right of action. Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

81. West Chicago St. R. Co. *v.* Nilson, 70 Ill. App. 171 (highest degree of vigilance and care for his own safety not required); Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053; Chicago, etc., R. Co. *v.* Bailey, 66 Kan. 115, 71 Pac. 246; Eakin *v.* Brown, 1 E. D. Smith (N. Y.) 36.

82. Heimann *v.* Kinnare, 73 Ill. App. 184.

83. Government St. R. Co. *v.* Hanlon, 53 Ala. 70 (negligence has the same significance whether applied to a defendant as creating a cause of action or to plaintiff in bar of an action for redress of injuries); Dexter *v.* McCready, 54 Conn. 171, 5 Atl. 855.

84. And see *supra*, V, B.

85. *California.*— Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 322, 7 Pac. 769.

Delaware.— Parvis *v.* Philadelphia, etc., R. Co., 8 Houst. 436, 445, 17 Atl. 702.

Illinois.— Chicago Union Traction Co. *v.* Chugren, 209 Ill. 429, 431, 70 N. E. 573; Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 273, 70 N. E. 294, 477; Belleville *v.* Hoffman, 74 Ill. App. 503, 508; Kammerer *v.* Callagher, 58 Ill. App. 561, 562.

Indiana.— Meredith *v.* Reed, 26 Ind. 334. 336; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185, 197; Ft. Wayne *v.* Mellinger, 22 Ind. App. 191, 53 N. E. 426.

Massachusetts.— Patrick *v.* Pote, 117 Mass. 297, 302.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

Missouri.— Meyers *v.* Chicago, etc., R. Co., 103 Mo. App. 268, 271, 77 S. W. 149.

New York.—Salter *v.* Utica, etc., R. Co., 88 N. Y. 42, 51; Stackus *v.* New York Cent., etc., R. Co., 79 N. Y. 464, 466; Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72, 76; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 212, 78 Am. Dec. 178; McDonnel *v.* Henry Elias Brewing Co., 16 N. Y. App. Div. 223, 225, 44 N. Y. Suppl. 652.

North Carolina.— Asbury *v.* Charlotte Electric R., etc., Co., 125 N. C. 568, 575, 34 S. E. 654.

North Dakota.— Heckman *v.* Evenson, 7 N. D. 173, 178, 73 N. W. 427.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 166, 30 S. W. 902, 28 L. R. A. 538; Accousi *v.* G. A. Stowers Furniture Co., (Civ. App. 1905) 87 S. W. 861, 862; San Antonio, etc., R. Co. *v.* Lester, (Civ. App. 1904) 84 S. W. 401, 404; Pecos, etc., R. Co. *v.* Reveley, 24 Tex. Civ. App. 293, 294, 58 S. W. 845; La Prelle *v.* Fordyce, 4 Tex. Civ. App. 391, 394, 23 S. W. 453, not that of a person of prudence.

Washington.— Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323.

West Virginia.— Normile *v.* Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

See 37 Cent. Dig. tit. "Negligence," § 92.

Other definitions.— In an action for an injury to plaintiff, resulting from the negligence of defendant, the care required of plaintiff is that degree of care which may

It is not the equivalent of due care.[86] What constitutes ordinary care depends on the circumstances of each particular case,[87] and the dangers reasonably to be apprehended.[88] And the age, sex, and physical condition of the person injured may be taken into consideration in determining whether plaintiff has used ordinary care.[89] But a person's habits of life as to care and prudence cannot be considered.[90]

c. Duty to Discover Danger. While a person is not required to use extraordinary care,[91] the law requires of him a reasonable exercise of his faculties to observe and discover danger.[92] Hence if the defect or danger is visible and obvious, the failure of a person to discover and avoid it amounts to contributory negligence,[93] and the same is true where the surrounding conditions are such as to

reasonably be expected from one in his situation. Beers *v.* Housatonuc R. Co., 19 Conn. 566. An instruction that deceased was bound to exercise ordinary care — such care as a person of average prudence would exercise under like circumstances; and if a person of average prudence, put exactly in the place he was, possessed of the same knowledge and means of knowledge of the danger and means of avoiding it, would or might have done as he did, he is without fault — is correct. Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

Contributory negligence consists in the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety and which had it been exercised would have enabled him to have avoided the injury or the doing of some act which he ought not to have done and but for which the calamity would not have occurred. Wakelin *v.* London, etc., R. Co., 12 App. Cas. 41, 51 J. P. 404, 56 L. J. Q. B. 229, 55 L. T. Rep. N. S. 709, 35 Wkly. Rep. 141.

Test of contributory negligence.— The test of whether one was guilty of contributory negligence is not what would be done by a prudent man generally, but what a man of ordinary prudence and care would do under similar circumstances to avoid injury. Missouri, etc., R. Co. *v.* Wylie, (Tex. Civ. App. 1894) 26 S. W. 85.

An instruction that makes plaintiff's best judgment the test instead of that of an ordinarily prudent and careful man is erroneous. Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890.

86. San Antonio *v.* Talerico, (Tex. Civ. App. 1903) 78 S. W. 28.

87. Beers *v.* Housatonuc R. Co., 19 Conn. 566; New Jersey Cent. R. Co. *v.* Moore, 24 N. J. L. 824.

88. Parvis *v.* Philadelphia, etc., R. Co., 8 Houst. (Del.) 436, 17 Atl. 702; Chicago, etc., R. Co. *v.* Willard, 111 Ill. App. 225; Spring Valley *v.* Gavin, 81 Ill. App. 456 (holding that in any case the care required is only ordinary care to avoid danger commensurate with the peril); Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

Care commensurate with peril.— Where a person is confronted with an obvious peril, he is required to exercise care and caution commensurate with the peril. This, however, is to be determined by the conduct of ordinarily prudent men confronted by such peril under like circumstances. Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

Where from the darkness a person is unable to see the obstructions in his way greater care and caution is required of him. Hart *v.* Delaware, etc., R. Co., 22 N. Y. Suppl. 3.

The degree of care required to constitute "ordinary care" of a horse depends upon the character and disposition of the animal. Meredith *v.* Reed, 26 Ind. 334.

89. Hickman *v.* Missouri Pac. R. Co., 91 Mo. 433, 4 S. W. 127; Asbury *v.* Charlotte Electric R., etc., Co., 125 N. C. 568, 34 S. E. 654.

90. Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697.

91. Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240.

92. Peoria *v.* Adams, 72 Ill. App. 662; Neylon *v.* Phillips, 179 Mass. 334, 60 N. E. 616; Ballou *v.* Collamore, 160 Mass. 246, 35 N. E. 463; Gaffney *v.* Brown, 150 Mass. 479, 23 N. E. 233; Patterson *v.* Hemenway, 148 Mass. 94, 19 N. E. 15, 12 Am. St. Rep. 523; Wright *v.* Boller, 3 N. Y. Suppl. 742. And see Cotton *v.* Wood, 8 C. B. N. S. 568, 7 Jur. N. S. 168, 29 L. J. C. P. 333, 98 E. C. L. 568.

Illustration.— One who walks along the sidewalk of a street bisected by a public alley is bound, before crossing the alley, to look both ways to avoid injury from vehicles. Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185.

93. *District of Columbia.*—Allis *v.* Columbian University, 19 D. C. 270, defective steps.

Illinois.— Culver Constr. Co. *v.* McCormack, 114 Ill. App. 655; Chicago, etc., R. Co. *v.* Weeks, 99 Ill. App. 518 [*affirmed* in 198 Ill. 551, 64 N. E. 1039]; Poznanski *v.* Szczech, 71 Ill. App. 670 (defective scaffold); Baker *v.* Deane, 69 Ill. App. 613; Madigan *v.* Flaherty, 50 Ill. App. 393.

Louisiana.— Tatje *v.* Frawley, 52 La. Ann. 884, 27 So. 339.

Massachusetts.— Ramsdell *v.* Jordan, 168 Mass. 505, 47 N. E. 244; Goddard *v.* McIntosh, 161 Mass. 253, 37 N. E. 169.

Michigan.— Ramsay *v.* Eddy, 123 Mich. 158, 82 N. W. 127 (lumber pile too close to railroad track); Bedell *v.* Berkey, 76 Mich. 435, 43 N. W. 308, 15 Am. St. Rep. 370; Hutchins *v.* Priestley Express Wagon, etc., Co., 61 Mich. 252, 28 N. W. 85.

Minnesota.— Johnson *v.* Ramberg, 49 Minn.

indicate the danger.[94] So where the injured person goes into a strange place in the dark without using ordinary care to discover danger he is guilty of contributory negligence.[95] Where the danger is not so obvious that a person should have seen it in the exercise of ordinary care, failure to discover it is not negligence.[96] And if the conditions are such as to mislead a person failure to discover danger is not negligence.[97] So negligence is not imputable to a person for failing to look for danger when under the surrounding circumstances he had no reason to apprehend any.[98]

341, 51 N. W. 1043, stairway in well-lighted room.

Missouri.— Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267.

New York.— Whalen *v.* Citizens' Gas Light Co., 151 N. Y. 70, 45 N. E. 363 [*reversing* 10 Misc. 281, 30 N. Y. Suppl. 1077]; Gray *v.* Siegel-Cooper Co., 78 N. Y. App. Div. 118, 79 N. Y. Suppl. 813 (open space by elevator); Barrett *v.* Lake Ontario Beach Imp. Co., 68 N. Y. App. Div. 601, 74 N. Y. Suppl. 301 (defective railing); Nolan *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 184, 72 N. Y. Suppl. 501 [*affirmed* in 173 N. Y. 604, 66 N. E. 1112]; Fuller *v.* Dederick, 35 N. Y. App. Div. 93, 54 N. Y. Suppl. 593; Collins *v.* Mooney, 25 N. Y. App. Div. 187, 49 N. Y. Suppl. 341; Sparks *v.* Siebrecht, 19 N. Y. App. Div. 117, 45 N. Y. Suppl. 993; O'Dwyer *v.* O'Brien, 13 N. Y. App. Div. 570, 43 N. Y. Suppl. 815; Brenstein *v.* Mattson, 10 Daly 336 (open elevator shaft); Bromberg *v.* Friend, 67 N. Y. Suppl. 698 [*affirmed* in 72 N. Y. App. Div. 633, 76 N. Y. Suppl. 1010]; Van Lien *v.* Scoville Mfg. Co., 14 Abb. Pr. N. S. 74 (chemicals of different color).

Ohio.— Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494, pile of sand in front of excavation.

Texas.— Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520 (barbed wire fence near private way); Proctor *v.* San Antonio St. R. Co., 26 Tex. Civ. App. 148, 62 S. W. 938, 939 (electric wire).

Virginia.— Osborne *v.* Pulaski Light, etc., Co., 95 Va. 16, 27 S. E. 812.

United States.— Klutt *v.* Philadelphia, etc., R. Co., 133 Fed. 1003.

England.— Coyle *v.* Great Northern R. Co., L. R. 20 Ir. 409; Burns *v.* Henderson, 7 F. (Ct. Sess.) 697.

See 37 Cent. Dig. tit. "Negligence," § 90.

To look when one is in such a situation that he cannot see is not enough. Baumann *v.* Metropolitan St. R. Co., 21 Misc. (N. Y.) 658, 47 N. Y. Suppl. 1094.

One who puts himself in such a position that he is unable to see a danger which may be present is guilty of contributory negligence. Where one, in leaving a ferryboat, puts himself in so dense a crowd that he cannot see to his footing, and gets his foot crushed, he is guilty of contributory negligence. Dwyer *v.* New York, etc., R. Co., 47 N. J. L. 9.

94. Cowen *v.* Kirby, 180 Mass. 504, 62 N. E. 968; Sickles *v.* New Jersey Ice Co., 153 N. Y. 83, 46 N. E. 1042; Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

95. *District of Columbia.*— Greenwell *v.* Washington Market Co., 21 D. C. 298.

Georgia.— Bridger *v.* Gresham, 111 Ga. 814, 35 S. E. 677.

Illinois.— Bentley *v.* Loverock, 102 Ill. App. 166.

Kentucky.— Lackat *v.* Lutz, 94 Ky. 287, 22 S. W. 218, 15 Ky. L. Rep. 75.

Massachusetts.— Daley *v.* Kinsman, 182 Mass. 306, 65 N. E. 385; Kiander *v.* Brookline Gaslight Co., 179 Mass. 341, 60 N. E. 796; Campbell *v.* Abbott, 176 Mass. 246, 57 N. E. 462.

New York.— Brugher *v.* Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Fogarty *v.* Bogart, 43 N. Y. App. Div. 430, 60 N. Y. Suppl. 81; Woods *v.* Miller, 30 N. Y. App. Div. 232, 52 N. Y. Suppl. 217.

Oregon.— Massey *v.* Seller, 45 Oreg. 267, 77 Pac. 397.

Pennsylvania.— Sweeny *v.* Barrett, 151 Pa. St. 600, 25 Atl. 148.

United States.— Claus *v.* Northern Steamship Co., 89 Fed. 646, 32 C. C. A. 282.

Canada.— Fonseca *v.* Lake of the Woods Milling Co., 15 Manitoba 413.

See 37 Cent. Dig. tit. "Negligence," § 90.

Illustration.— Plaintiff secured permission to go after dark into a public building which had been locked up for the night, and which he knew to be unfinished. He took no guide or light, and, while groping around in the dark, on the second floor, he stepped out of an outside door and fell to the street, and was injured; the stairway leading therefrom not yet having been built, and he having forgotten that there was another flight of stairs to descend. It was held that he was guilty of contributory negligence, and could not recover. De Graffenried *v.* Wallace, 2 Indian Terr. 657, 53 S. W. 452.

96. Mahnken *v.* Monmouth County, 62 N. J. L. 404, 41 Atl. 921; Donnelly *v.* Cowen, 20 Misc. (N. Y.) 100, 45 N. Y. Suppl. 71. And see Texas, etc., Tel. Co. *v.* Prince, 36 Tex. Civ. App. 462, 82 S. W. 327.

97. Humphreys *v.* Portsmouth Trust, etc., Co., 184 Mass. 422, 68 N. E. 836; McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153; Chamber of Commerce Bldg. Co. *v.* Klussman, 25 Ohio Cir. Ct. 728.

98. *Illinois.*— American Express Co. *v.* Risley, 179 Ill. 295, 53 N. E. 558; Pullman Palace Car Co. *v.* Connell, 74 Ill. App. 447.

Indiana.—Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942.

Kansas.— Missouri Pac. R. Co. *v.* Johnson, 69 Kan. 721, 77 Pac. 576.

Missouri.— Langan *v.* St. Louis, etc., R.

d. Duty to Avoid Danger — (i) *In General.* Where a danger is obvious or known a person is bound to use ordinary care to avoid it,[99] and recovery cannot be had where the person injured by the exercise of ordinary care could have avoided the injury even though defendant was negligent.[1] This duty to avoid the consequence of another's negligence does not arise until the negligence of such other is existing and is either apparent or the circumstances are such that an ordinarily prudent person would apprehend its existence.[2] It follows that where the defect or danger is unknown to the person injured he is not negligent as matter of law in failing to avoid it.[3] The fact that avoiding an impending danger neces-

Co., 72 Mo. 392; Glaser *v.* Rothschild, 106 Mo. App. 418, 80 S. W. 332.

New York.— Peterson *v.* Hubbell, 12 N. Y. App. Div. 372, 42 N. Y. Suppl. 554; Quirk *v.* Siegel-Cooper Co., 26 Misc. 244, 56 N. Y. Suppl. 49 [*affirmed* in 43 N. Y. App. Div. 464, 60 N. Y. Suppl. 228].

Ohio.— Smith *v.* Newark Ice Co., 8 Ohio S. & C. Pl. Dec. 332, 6 Ohio N. P. 528.

And see Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086; St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450.

Illustrations.— Where there were two entrances to a store, both of which were used, it was not contributory negligence on the part of deceased to enter by the smaller way, where there was no warning of any danger, although he was ordinarily in the habit of entering by the main door, at the other end of the house. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269. A railway brakeman is not bound to anticipate that a guy rope will be stretched across the track so low as to throw him off the top of a car, where he is engaged in the discharge of his duty. Iola Portland Cement Co. *v.* Moore, 65 Kan. 762, 70 Pac. 864. Plaintiff desired to go to the office of a physician on the second floor of a business block, in the evening. Being unacquainted with the building, and seeing the physician's sign beside a door opening on the sidewalk, she entered the door, which was not fastened, and was injured by falling into the cellar, above which the door opened directly without any landing. It was held that such facts did not show that plaintiff was not in the exercise of ordinary care. Foren *v.* Rodick, 90 Me. 276, 38 Atl. 175.

99. *Georgia.*—Mansfield *v.* Richardson, 118 Ga. 250, 45 S. E. 269.

Indiana.— Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793.

Minnesota.— Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165.

New York.— Dennis *v.* Harris, 19 N. Y. Suppl. 524.

Pennsylvania.— Fox *v.* Borkey, 126 Pa. St. 164, 17 Atl. 604.

See 37 Cent. Dig. tit. "Negligence," § 88.

1. *Colorado.*— Colorado Cent. R. Co. *v.* Martin, 7 Colo. 592, 4 Pac. 1118.

Georgia.— Nicholas *v.* Tanner, 117 Ga. 223, 43 S. E. 489; Abrams *v.* Waycross, 114 Ga. 712, 40 S. E. 699; Western, etc., R. Co. *v.* Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; Barber *v.* East, etc., R. Co., 111 Ga. 838, 36 S. E. 50; Macon, etc., R. Co. *v.* Holmes, 103 Ga. 655, 30 S. E. 563; Briscoe *v.* Southern R. Co., 103 Ga. 224, 28 S. E. 638.

Illinois.— Grogan *v.* Big Muddy Coal, etc., Co., 58 Ill. App. 154.

Indiana.— Newhouse *v.* Miller, 35 Ind. 463; Salem-Bedford Stone Co. *v.* O'Brien, 12 Ind. App. 217, 40 N. E. 430.

Iowa.— O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467; Reynolds *v.* Hindman, 32 Iowa 146; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kansas.— Central Branch Union Pac. R. Co. *v.* Hotham, 22 Kan. 41.

Massachusetts.— Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

New Jersey.— Runyon *v.* Central R. Co., 25 N. J. L. 556.

Virginia.—Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

Wisconsin.— Matteson *v.* Jackman, 32 Wis. 182.

Illustrations.— Where plaintiff's boat was placed in a position of danger by defendant's negligence, plaintiff could not recover for injury thereto occurring after it was possible for him to avert a continuance of the danger by removal of the boat. Mark *v.* Hudson River Bridge Co., 56 How. Pr. (N. Y.) 108. Where one saw a truck slowly approaching and had abundant opportunity to get out of the way, but instead stood still and was injured, he was guilty of contributory negligence. Luzzi *v.* Charles E. Haff Co., 96 N. Y. Suppl. 456.

Mere failure to make complaint or objection is not contributory negligence. Moomey *v.* Peak, 57 Mich. 259, 23 N. W. 804; Berg *v.* Parsons, 84 Hun (N. Y.) 60, 31 N. Y. Suppl. 1091. But see Fox *v.* Borkey, 126 Pa. St. 164, 17 Atl. 604; Martin *v.* Bishop, 59 Wis. 417, 18 N. W. 337.

2. Western, etc., R. Co. *v.* Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; Macon, etc., R. Co. *v.* Holmes, 103 Ga. 655, 30 S. E. 563; Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956. But see Quimby *v.* Filter, 62 N. J. L. 766, 42 Atl. 1051.

3. *Colorado.*— Holman *v.* Boston Land, etc., Co., 20 Colo. 7, 36 Pac. 797.

Georgia.— Mansfield *v.* Richardson, 118 Ga. 250, 45 S. E. 269.

Indiana.— Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480.

Iowa.— Wilsey *v.* Jewett, 122 Iowa 315, 98 N. W. 114; Peterson *v.* Adams Express Co., 111 Iowa 572, 82 N. W. 963.

Kentucky.— Henderson *v.* O'Haloran, 114

sitates the violation of an ordinance will not excuse failure to avoid it;[4] but a person is not required to commit a trespass for that purpose.[5] Failure to use one's senses to discover and avoid injury will not defeat recovery if their employment would not have prevented the injury.[6]

(II) *As Applied to Use of One's Own Property.* This rule is subject to the exception that as a person is entitled to use his own premises for any lawful purpose, his failure to protect it from the negligence of another will not be contributory negligence.[7] But a man has no right to invite peril, or run into danger, even on his own property.[8]

e. Reliance on Care of Defendant. The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty to such other person.[9] Hence failure to anticipate

Ky. 186, 70 S. W. 662, 24 Ky. L. Rep. 995, 102 Am. St. Rep. 279, 59 L. R. A. 718; Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

Michigan.— Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

New York.— Magar *v.* Hammond, 95 N. Y. App. Div. 249, 88 N. Y. Suppl. 796; Weiss *v.* Jenkins, 39 N. Y. App. Div. 567, 57 N. Y. Suppl. 708.

Pennsylvania.— Colvin *v.* Vensel, 194 Pa. St. 83, 44 Atl. 1072.

Texas.— Mallory *v.* Smith, 76 Tex. 262, 13 S. W. 199, 18 Am. St. Rep. 40; St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450.

Utah.— Larkin *v.* Saltair Beach Co., 30 Utah 86, 83 Pac. 686, 3 L. R. A. N. S. 982.

4. Dennison *v.* Miner, 1 Pa. Cas. 399, 2 Atl. 561.

5. Wolf *v.* St. Louis Independent Water Co., 15 Cal. 319.

6. Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Timmons *v.* Central Ohio R. Co., 6 Ohio St. 105.

7. *California.*— Yik Hon *v.* Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666.

Minnesota.— Martin *v.* North Star Iron Works, 31 Minn. 407, 18 N. W. 109.

Missouri.— Stone *v.* Hunt, 114 Mo. 66, 21 S. W. 454.

New York.— Cook *v.* Champlain Transp. Co., 1 Den. 91.

Texas.— Gulf, etc., R. Co. *v.* Johnson, (Civ. App. 1899) 51 S. W. 531; Waters-Pierce Oil Co. *v.* King, 6 Tex. Civ. App. 93, 24 S. W. 700.

England.— Crowhurst *v.* Amersham Parish Burial Bd., 4 Ex. D. 5, 48 L. J. Exch. 109, 39 L. T. Rep. N. S. 355, 27 Wkly. Rep. 95; Walters *v.* Pfeil, M. & M. 362, 22 E. C. L. 544.

But see Factor's, etc., Ins. Co. *v.* Werlein, 42 La. Ann. 1046, 8 So. 435, 11 L. R. A. 361, under statutory provision authorizing adjoining owner to take the necessary precautions for which he is to be reimbursed.

Encroaching on line of telegraph poles and wires.— A landowner cannot be guilty of negligence contributing to an injury caused by telegraph wires in front of his property because he encroached on the line of poles and wires with his building, so long as the building remained on his own land. Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

Erecting building near dangerous factory. — One is not guilty of contributory negligence for erecting buildings near a chimney on which is a defective spark arrester, and he need not provide the building with extra safeguards. Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

8. Schell *v.* St. Paul Second Nat. Bank, 14 Minn. 43.

9. *Connecticut.*— Knight *v.* Goodyear's India Rubber Glove Mfg. Co., 38 Conn. 438, 9 Am. Rep. 406.

Indiana.— Noblesville Gas, etc., Co. *v.* Teter, 1 Ind. App. 322, 27 N. E. 635.

Kansas.— Kansas City-Leavenworth R. Co. *v.* Langley, 70 Kan. 453, 78 Pac. 858.

Massachusetts.— Hyde Park *v.* Gay, 120 Mass. 589, violation of statute.

Missouri.— Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938.

New Jersey.—Smith *v.* Jackson, 70 N. J. L. 183, 56 Atl. 118, assuming that house which he went to look at with a view to purchasing was in safe condition.

New York.— Newson *v.* New York Cent. R. Co., 29 N. Y. 383; Smith *v.* Bailey, 14 N. Y. App. Div. 283, 43 N. Y. Suppl. 856, holding that it is not negligence *per se* for one sweeping a crossing to work with his back turned in the direction from which teams would come.

Pennsylvania.— Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768.

United States.—Parrott *v.* Barney, 18 Fed. Cas. No. 10,773, 2 Abb. 197, 1 Sawy. 423 [*affirmed* in 15 Wall. 524, 21 L. ed. 206]. *Compare* Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129, holding that one may be guilty of contributory negligence in failing to anticipate and act on the contingency of another's negligence.

See 37 Cent. Dig. tit. "Negligence," § 91.

Restatement of rule.— With respect to a seen danger, omission of prudent precautions

defendant's negligence does not amount to contributory negligence,[10] even though he places his property in an exposed or hazardous position.[11] This is especially true where a duty to keep his premises safe rests on defendant by reason of ownership,[12] or agreement,[13] or where defendant by his conduct has thrown the person injured off his guard so that the want of diligence was the consequence of defendant's conduct.[14] Where the person injured has a right to rely on the care of defendant he will not be negligent in failing to observe the danger.[15] A person who has assumed the duty of defendant in regard to the thing causing the injury cannot recover before defendant failed to perform it.[16]

3. Particular Acts or Omissions[17] — a. Customary Methods or Acts. In many cases evidence of customary methods and conduct is held admissible on the question of contributory negligence and as tending to show the exercise of due care.[18]

is contributory negligence; but with respect to unseen, and merely anticipated or contingent, dangers, plaintiff is not bound to refrain from his usual and lawful course (being otherwise a prudent one) in order to preserve his right of recovery for consequences of defendant's negligence, but has a right to assume that defendant will act prudently and lawfully. Snyder *v.* Pittsburg, etc., R. Co., 11 W. Va. 14.

10. Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698; District of Columbia *v.* Bolling, 4 App. Cas. (D. C.) 397; Mahan *v.* Everett, 50 La. Ann. 1162, 23 So. 883; Healey *v.* Ehret, 42 N. Y. App. Div. 27, 58 N. Y. Suppl. 917; Dohn *v.* Dawson, 90 Hun (N. Y.) 271, 35 N. Y. Suppl. 984, failure to anticipate falling of tools or materials from a scaffold.

11. Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246, in which it was said that he is entitled to reparation on the ground that although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by mere accident, he did not thereby discharge defendant from the duty of observing ordinary care, or in other words, voluntarily incur the risk of injury by defendant's negligence.

12. Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328]; Fairmount Union Joint Stock Agricultural Assoc. *v.* Downey, 146 Ind. 503, 45 N. E. 696 (holding that a contestant in a race on a race track under the management of an agricultural association may rely upon the association to see that the track is clear before the signal to start is given); Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942; Willy *v.* Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Bassett *v.* Fish, 75 N. Y. 303; Vandercar *v.* Universal Trust Co., 80 N. Y. App. Div. 274, 80 N. Y. Suppl. 290 (dumb waiter kept for use of tenants). And see Redmond *v.* Maitland, 23 N. Y. App. Div. 194, 49 N. Y. Suppl. 128.

13. Meyer *v.* Haven, 37 N. Y. App. Div. 194, 55 N. Y. Suppl. 864; Smith *v.* Pennsylvania Coal Co., 18 N. Y. Suppl. 637; Sesler *v.* Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640, 59 J. P. 804, 65 L. J. Q. B. 50, 73 L. T. Rep. N. S. 459, 14 Reports 767, 44 Wkly. Rep. 49.

14. *Indiana.*— Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205 (holding that one is not guilty of contributory negligence who acts on the direction of the servant of the owner of premises, and proceeds along a way which is maintained as an approach to the premises, unless he knows or has reason to believe that the way is unsafe); Fultz *v.* Wycoff, 25 Ind. 321.

Iowa.— Richardson *v.* Douglas, 100 Iowa 239, 69 N. W. 530, holding that the fact that defendant's engine which caused the fire was placed, in relation to the stacks of grain burned, in a position suggested by plaintiff, which was in fact a dangerous place, does not show that plaintiff was negligent, he having reason to think that the engine had an efficient spark arrester, and being assured by defendant's employees that there was no danger.

New York.—Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761.

Pennsylvania.— Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579.

United States.— Wrought-Iron Range Co. *v.* Graham, 80 Fed. 474, 25 C. C. A. 570.

England.— Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191.

Canada.—Fleming *v.* Canadian Pac. R. Co., 31 N. Brunsw. 318; MacDonald *v.* St. John, 24 N. Brunsw. 370.

See 37 Cent. Dig. tit. "Negligence," § 91.

15. Brown *v.* Stevens, 136 Mich. 311, 99 N. W. 12; Burkhardt *v.* Schott, 101 Mo. App. 465, 74 S. W. 430. A truckman's driver, sent to drive a horse on another man's hoist in a place of which he knew nothing, is not negligent in attempting, on the invitation of the person managing the hoist, to enter at a door under a pulley block by the falling of which he was injured. Murray *v.* Dwight, 15 N. Y. App. Div. 241, 44 N. Y. Suppl. 234.

16. Ortmayer *v.* Johnson, 45 Ill. 469.

17. Customary use of: Railroad tracks by public see Railroads. Street car tracks by public see Street Railroads.

18. *Illinois.*— Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272.

In others such evidence is held incompetent, as the custom of others furnishes no measure of diligence in the particular case.[19]

b. Exposure to Known Dangers — (1) *In General.* While knowledge of danger does not, as a matter of law, defeat a recovery for an injury received,[20] yet in all cases it is an important factor for the consideration of the jury,[21] and in many the character of the knowledge and the nature of the danger may be such as to constitute contributory negligence.[22] If the danger is so imminent and

Iowa.— McDonald *v.* Chicago, etc., R. Co., 29 Iowa 170. But see Iowa cases cited in following note.

Missouri.— Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292.

New York.— Brooks *v.* New York, etc., R. Co., 21 N. Y. Wkly. Dig. 464.

Pennsylvania.— O'Donnell *v.* Allegheny R. Co., 50 Pa. St. 490.

United States.— Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 5 C. C. A. 551.

See 37 Cent. Dig. tit. "Negligence," § 95.

19. Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816; Vermillion County *v.* Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228. And see Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

Illustrations.— In an action for injuries caused while crawling under a car that blocked a street, evidence of a custom of people to crawl under cars so blocking streets is incompetent. Rumpel *v.* Oregon Short Line, etc., R. Co., 4 Ida. 13, 35 Pac. 700, 22 L. R. A. 725. Evidence of the custom in a certain neighborhood to take precaution to prevent the spread of fire is inadmissible to show the want of contributory negligence. Glossen *v.* Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244; Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54.

20. *Illinois.*— Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331; Illinois Iron, etc., Co. *v.* Weber, 89 Ill. App. 368.

Indiana.— Citizens' St. R. Co. *v.* Sutton, 148 Ind. 169, 46 N. E. 462, 47 N. E. 462; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Murphy *v.* Indianapolis, 83 Ind. 76.

Iowa.—Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379.

Kansas.— Davis *v.* Holton, 59 Kan. 707, 54 Pac. 1050.

Louisiana.— Potts *v.* Shreveport Belt R. Co., 110 La. 1, 34 So. 103, 98 Am. St. Rep. 452.

Massachusetts.— Finnegan *v.* Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523.

Missouri.— Swanson *v.* Sedalia, 89 Mo. App. 121; Harriman *v.* Kansas City Star Co., 81 Mo. App. 124; Stevens *v.* Walpole, 76 Mo. App. 213.

New York.— Kaiser *v.* Washburn, 55 N. Y. App. Div. 159, 66 N. Y. Suppl. 764; Sullivan *v.* Dunham, 35 N. Y. App. Div. 342, 54 N. Y. Suppl. 962; Post *v.* Stockwell, 44 Hun 28.

Pennsylvania.— Potter *v.* Natural Gas Co., 183 Pa. St. 575, 39 Atl. 7.

Wisconsin.— Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322.

England.— Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439.

Canada.— Gordon *v.* Belleville, 15 Ont. 26.

See 37 Cent. Dig. tit. "Negligence," § 86.

21. *Indiana.*— Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Murphy *v.* Indianapolis, 83 Ind. 76.

Minnesota.— Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223.

Missouri.— Swanson *v.* Sedalia, 89 Mo. App. 121; Harriman *v.* Kansas City Star Co., 81 Mo. App. 124; Stevens *v.* Walpole, 76 Mo. App. 213.

Tennessee.— Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734.

Texas.—Boyd *v.* Burkett, (Civ. App. 1894) 27 S. W. 223.

See 37 Cent. Dig. tit. "Negligence," § 86.

22. *Arkansas.*— St. Louis, etc., R. Co. *v.* Forbes, 63 Ark. 427, 39 S. W. 63.

Illinois.— Chicago, etc., R. Co. *v.* Murphy, 17 Ill. App. 444.

Indiana.— Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783.

Minnesota.—Schell *v.* St. Paul Second Nat. Bank, 14 Minn. 43.

Missouri.— O'Donnell *v.* Patton, 117 Mo. 13, 22 S. W. 903; Matthews *v.* St. Louis Grain Elevator Co., 59 Mo. 474; Boyd *v.* Graham, 5 Mo. App. 403.

Nebraska.— Knapp *v.* Jones, 50 Nebr. 490, 70 N. W. 19.

New York.— Kennedy *v.* Friederich, 168 N. Y. 379, 61 N. E. 642; McGuire *v.* Board, 58 N. Y. App. Div. 388, 68 N. Y. Suppl. 1026 [*affirmed* in 171 N. Y. 672, 64 N. E. 1123]; Carr *v.* Sheehan, 81 Hun 291, 30 N. Y. Suppl. 753; Hinz *v.* Starin, 46 Hun 526, 3 N. Y. Suppl. 290, 10 N. Y. Suppl. 671 [*affirmed* in 124 N. Y. 639, 27 N. E. 411]; McCann *v.* Thilemann, 36 Misc. 145, 72 N. Y. Suppl. 1076; Curran *v.* New York Cent., etc., R. Co., 30 Misc. 787, 63 N. Y. Suppl. 209.

North Carolina.— Hallyburton *v.* Burke County Fair Assoc., 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156.

Ohio.— Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494.

Pennsylvania.— Cochran *v.* Philadelphia, etc., R. Co., 184 Pa. St. 565, 39 Atl. 296; Krum *v.* Anthony, 115 Pa. St. 431, 8 Atl. 598; Layton *v.* Rogers, 3 Lanc. L. Rev. 233.

Washington.— Anderson *v.* Northern Pac. R. Co., 19 Wash. 340, 53 Pac. 345.

Wisconsin.— Ray *v.* Stuckey, 113 Wis. 77, 88 N. W. 900, 90 Am. St. Rep. 844.

United States.—Klutt *v.* Philadelphia, etc.,

threatening that a prudent man, knowing of its existence, would not assume the hazard of encountering it, then it does constitute such contributory negligence as will defeat a recovery.[23] Thus one who voluntarily assumes a position of danger, the hazard of which he understands and appreciates, cannot recover for resulting injury,[24] unless there is some reason of necessity or propriety to justify him in so doing.[25] If by the exercise of care proportionate to the danger one might reasonably expect to avoid the danger,[26] or if reasonably prudent men might differ as to the propriety of encountering it,[27] or where the way used is the only way,[28] a recovery is not barred. So it has been held that temporary forgetfulness of a known danger does not as a matter of law constitute contributory negligence on the part of the person injured.[29] Nor will the fact that the attention of the person injured is suddenly called in another direction have this effect.[30]

(II) *Presumption of Knowledge.* Knowledge on the part of the person injured of the defect or danger will be presumed where it was his duty to know it,[31] where the defective thing was made or constructed by him,[32] or where the dan-

R. Co., 133 Fed. 1003; Riggs *v.* Standard Oil Co., 130 Fed. 199.

England.— McEvoy *v.* Waterford Steamship Co., L. R. 18 Ir. 159; Manchester, etc., R. Co. *v.* Woodcock, 25 L. T. Rep. N. S. 335.

See 37 Cent. Dig. tit. "Negligence," § 86.

23. Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; Swanson *v.* Sedalia, 89 Mo. App. 121; Harriman *v.* Kansas City Star Co., 81 Mo. App. 124; Stevens *v.* Walpole, 76 Mo. App. 213.

24. *Alabama.*— Frazer *v.* South Alabama, etc., R. Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145.

Illinois.— Brownback *v.* Thomas, 101 Ill. App. 81, voluntarily operating dump in grain elevator.

Michigan.—Wiethoff *v.* Shedden Carthage Co., 142 Mich. 264, 105 N. W. 748; Grandorf *v.* Detroit Citizens' St. R. Co., 113 Mich. 496, 71 N. W. 844; Allen *v.* Johnston, 76 Mich. 31, 42 N. W. 1075, 4 L. R. A. 734.

Minnesota.— Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223.

Missouri.— Harff *v.* Green, 168 Mo. 308, 67 S. W. 576; Atherton *v.* Kansas City Coal, etc., Co., 106 Mo. App. 591, 81 S. W. 223.

New York.— Magar *v.* Hammond, 171 N. Y. 377, 64 N. E. 150; Lanigan *v.* New York Gaslight Co., 71 N. Y. 29; Simpson *v.* Gerken, 19 N. Y. App. Div. 68, 45 N. Y. Suppl. 1100; Robinson *v.* Manhattan R. Co., 5 Misc. 209, 25 N. Y. Suppl. 91.

Pennsylvania.— Artz *v.* Lit, 198 Pa. St. 519, 48 Atl. 297.

United States.—Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Smith *v.* Day, 117 Fed. 956.

Canada.— Rolland *v.* Dawes, 13 Quebec Super. Ct. 52.

See 37 Cent. Dig. tit. "Negligence," § 86.

Illustration.—Where plaintiffs, in an effort to save a haystack from a prairie fire, made no effort to escape until the fire was in close proximity on three sides of them, a heavy growth of grass being on the fourth side, the court was justified in finding that they were guilty of contributory negligence in unreasonably exposing themselves to danger. Berg *v.* Great Northern R. Co., 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524.

In Georgia it is held that if one, with a clear chance to avoid the consequences of defendant's negligence or breach of duty, voluntarily assumes the risk occasioned thereby, such conduct is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover. Simmons *v.* Seaboard Air-Line R. Co., 120 Ga. 225, 47 S. E. 570.

25. Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Hickey *v.* Boston, etc., R. Co., 14 Allen (Mass.) 429; Todd *v.* Old Colony, etc., R. Co., 7 Allen (Mass.) 207, 83 Am. Dec. 679.

26. Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90; Gordon *v.* Cummings, 152 Mass. 513, 25 N. E. 978, 23 Am. St. Rep. 846, 9 L. R. A. 640; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366.

27. Fox *v.* Glastenbury, 29 Conn. 204; Charlottesville *v.* Stratton, 102 Va. 95, 45 S. E. 737; Newport News, etc., R., etc., Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900.

28. Marwedel *v.* Cook, 154 Mass. 235, 28 N. E. 140. But see Larkin *v.* O'Neill, 119 N. Y. 221, 23 N. E. 563 [*reversing* 48 Hun 591, 1 N. Y. Suppl. 232].

29. Bassett *v.* Fish, 75 N. Y. 303; Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043; Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734.

30. Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197; McGovern *v.* Standard Oil Co., 11 N. Y. App. Div. 588, 42 N. Y. Suppl. 595.

31. Davidson *v.* Stuart, 34 Can. Sup. Ct. 215; McKenzie *v.* Lewis, 31 Nova Scotia 408.

32. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113.

gerous character of the thing is generally known.[33] The fact that a person has had an opportunity to learn of the defect or danger is evidence of knowledge of it,[34] or where conditions were such as to put a person on guard.[35]

c. Unanticipated Dangers. To constitute contributory negligence the act or omission of the person injured must be one which he could reasonably anticipate would result in his injury.[36] But a reasonable belief of a party that he will not sustain injury in doing acts which but for such belief would be negligent does not exonerate him.[37]

d. Choice Between Alternatives Involving Risk.[38] If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way with knowledge of the danger constitutes contributory negligence.[39] Where the person injured did not know of the danger,[40] or that there was another and safer

33. Lanigan *v.* New York Gaslight Co., 71 N. Y. 29, explosive character of ordinary illuminating gas.

34. La Riviere *v.* Pemberton, 46 Minn. 5, 48 N. W. 406; Hinz *v.* Starin, 3 N. Y. Suppl. 290, 10 N. Y. Suppl. 671 [*affirmed* in 124 N. Y. 639, 27 N. E. 411]; Slattery *v.* Colgate, 25 R. I. 220, 55 Atl. 639; Hutton *v.* Windsor, 34 U. C. Q. B. 487. One who has supervised the placing of a telegraph pole four or five feet into the earth, and knew of a subsequent grading down, leaving it only a foot therein, was held to be guilty of such contributory negligence in climbing it with spikes to detach the wires that his widow could not recover for his being killed by its fall. Matthews *v.* St. Louis Grain Elevator Co., 59 Mo. 474.

35. Buchtel College *v.* Martin, 25 Ohio Cir. Ct. 494; Fraser *v.* New Glasgow, 24 Nova Scotia 422.

36. *Arkansas.*— Jones *v.* Nichols, 46 Ark. 207, 55 Am. Rep. 575, holding that turning out a cow on a commons at a long distance from a cotton gin did not constitute contributory negligence, where the cow fell into a pit dug for the gin.

Kansas.— Salina Mill, etc., Co. *v.* Hoyne, (App. 1900) 63 Pac. 660.

Maryland.— Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

New York.— Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Loughrain *v.* Autophone Co., 77 N. Y. App. Div. 542, 78 N. Y. Suppl. 919; Albert *v.* Bleecker St., etc., R. Co., 2 Daly 389. And see Schoonmaker *v.* McNally, 3 Hun 415, 6 Thomps. & C. 47.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

See 37 Cent. Dig. tit. "Negligence," § 97.

37. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462 (as where he had done a dangerous thing successfully several times); Lanigan *v.* New York Gaslight Co., 71 N. Y. 29.

38. In emergency see *infra*, VII, A, 3, e.

Servant injured by negligence of master see MASTER AND SERVANT.

39. *California.*— McGraw *v.* Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004, a person whose attention being momentarily distracted falls into the space between a shed and a bulkhead of which he knew is guilty of contributory negligence.

Illinois.— Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Siegel *v.* Becker, 83 Ill. App. 600; North American Provision Co. *v.* Hart, 66 Ill. App. 659. But see Mt. Sterling *v.* Crummy, 73 Ill. App. 572.

Iowa.— Hansen *v.* State Bank Bldg. Co., 100 Iowa 672, 69 N. W. 1020.

Kentucky.— Cain *v.* Ohio Valley Tel. Co., 47 S. W. 759, 20 Ky. L. Rep. 855.

Maine.—Woodman *v.* Pitman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342.

Michigan.—Amerine *v.* Porteous, 105 Mich. 347, 63 N. W. 300, using freight elevator instead of passenger elevator.

Missouri.— Meyers *v.* Chicago, etc., R. Co., 103 Mo. App. 268, 77 S. W. 149.

New Jersey.— Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478.

New York.— Downes *v.* Elmira Bridge Co., 41 N. Y. App. Div. 339, 58 N. Y. Suppl. 628; Hoes *v.* Edison General Electric Co., 23 N. Y. App. Div. 433, 48 N. Y. Suppl. 323; Sandman *v.* Baylies, 21 Misc. 523, 47 N. Y. Suppl. 783. But see Whalen *v.* Citizens' Gas Light Co., 151 N. Y. 70, 45 N. E. 363; Murphy *v.* Perlstein, 73 N. Y. App. Div. 256, 76 N. Y. Suppl. 657.

Pennsylvania.—Johnson *v.* Wilcox, 135 Pa. St. 217, 19 Atl. 939; Smith *v.* Lehigh Valley R. Co., 21 Pa. Co. Ct. 9 (holding that where one has a choice of ways across the property of a railway company, the one illuminated and safe, the other dark and dangerous, and chooses the latter, falls into a sewer opening, and is hurt, he is guilty of contributory negligence, and cannot recover); Mellor *v.* Bridgeport, 14 Montg. Co. Rep. 184 (where one chose a street in an unsafe condition when the safe way could have been taken without loss of time or convenience).

Texas.— Galveston Land, etc., Co. *v.* Levy, 10 Tex. Civ. App. 104, 30 S. W. 504.

England.— Bolch *v.* Smith, 7 H. & N. 736, 8 Jur. N. S. 197, 31 L. J. Exch. 201, 6 L. T. Rep. N. S. 158, 10 Wkly. Rep. 387; Callender *v.* Carlton Iron Co., 9 T. L. R. 646 [*affirmed* in 10 T. L. R. 366].

Canada.— Phillips *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 28.

See 37 Cent. Dig. tit. "Negligence," § 98.

40. Aurora *v.* Hillman, 90 Ill. 61; Doherty *v.* McLean, 171 Mass. 399, 50 N. E. 938; Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062.

way that he might have followed,[41] he is held not to have been guilty of contributory negligence.

e. Acts in Emergencies[42] — (i) *In General.* The rule is well established that when one is required to act suddenly and in the face of imminent danger he is not required to exercise the same degree of care as if he had time for deliberation and the full exercise of his judgment and reasoning faculties.[43] And this is especially true where the peril has been caused by the fault of another.[44] He will not be held guilty of contributory negligence merely because he failed to exercise the care a prudent person would have exercised,[45] or because he fails to exercise the best judgment,[46] or takes every precaution which he might have taken which from a careful review of the circumstances it appears he might have taken.[47] But if he in good faith acts as a person of ordinary prudence might under the circumstances, he will not be guilty of contributory negligence even by doing an act which is dangerous and from which injury results in attempting to escape danger;[48] or where by the negligence of another he is compelled to choose

41. Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062.

42. **Danger incurred:** By collision of vessels see COLLISION. By passengers see CARRIERS; SHIPPING. By person injured by negligence in navigation of vessels see SHIPPING. By person on or near railroad tracks see RAILROADS; STREET RAILROADS. By servant injured by negligence of master see MASTER AND SERVANT. To save life of another see VII, H, 3, g.

43. Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331; Galesburg Electric Motor, etc., Co. *v.* Barlow, 108 Ill. App. 509; Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500; Salter *v.* Utica, etc., R. Co., 88 N. Y. 42; Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585 [*affirming* 5 Lans. 67].

Place of security.— One in a perilous position is not to be held to the exercise of the same care and prudence as if he were in a place of security. Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553, 41 Am. Rep. 333.

44. Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331; Dunham Towing, etc., Co. *v.* Daudelin, 143 Ill. 409, 32 N. E. 258; Wesley City Coal Co. *v.* Healer, 84 Ill. 126.

45. *California.*— McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209.

Illinois.— Momence Stone Co. *v.* Groves, 100 Ill. App. 98 [*affirmed* in 197 Ill. 88, 64 N. E. 335].

Missouri.— Dutzi *v.* Geisel, 23 Mo. App. 676.

Ohio.— Pennsylvania R. Co. *v.* Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700.

Texas.— Saunders *v.* Missouri, etc., R. Co., 35 Tex. Civ. App. 383, 80 S. W. 387.

Virginia.— Richmond R., etc., Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736.

See 37 Cent. Dig. tit. "Negligence," § 99.

46. *Colorado.*— Silver Cord Combination Min. Co. *v.* McDonald, 14 Colo. 191, 23 Pac. 346.

Illinois.— Wesley City Coal Co. *v.* Healer, 84 Ill. 126; Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381; Joliet St. R. Co. *v.* Duggan, 45 Ill. App. 450; Dunham Towing, etc., Co. *v.* Daudelin, 41 Ill. App. 175.

Kansas.— Kansas City-Leavenworth R. Co. *v.* Langley, 70 Kan. 453, 78 Pac. 858.

Missouri.— Siegrist *v.* Arnot, 10 Mo. App. 197.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20.

New York.— Heffernan *v.* Barber, 36 N. Y. App. Div. 163, 55 N. Y. Suppl. 418; Heath *v.* Glens Falls, etc., R. Co., 90 Hun 560, 36 N. Y. Suppl. 22; Wright *v.* Boller, 3 N. Y. Suppl. 742 [*affirmed* in 123 N. Y. 630, 25 N. E. 952]; Hoyt *v.* New York, etc., R. Co., 6 N. Y. St. 7.

Pennsylvania.— Cannon *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 159, 44 Atl. 1089; Gibbons *v.* Wilkes-Barre, etc., R. Co., 155 Pa. St. 279, 26 Atl. 417; Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624; Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425; Shaughnessy *v.* Consolidated Traction Co., 17 Pa. Super. Ct. 588.

United States.—Collins *v.* Davidson, 19 Fed. 83.

England.— North Eastern R. Co. *v.* Wanless, L. R. 7 H. L. 12, 43 L. J. Q. B. 185, 30 L. T. Rep. N. S. 275, 22 Wkly. Rep. 561.

See 37 Cent. Dig. tit. "Negligence," § 99.

Illustration.—A pedestrian on a sidewalk who is placed in imminent peril by the falling of an iron post fastened in the walk is not, as a matter of law, guilty of contributory negligence in holding up his hands to catch it, instead of stepping aside, since this is a mere error of judgment. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381 [*affirmed* in 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229].

47. Karr *v.* Parks, 40 Cal. 188. Where the jury find defendants were in fault in not giving timely notice of the blast whereby decedent was killed, or in failing to construct a covering, it is immaterial whether or not deceased took refuge in a safe place, it being sufficient that he made an effort to protect himself. Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

48. *District of Columbia.*— Ward *v.* District of Columbia, 24 App. Cas. 524.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 216 Ill. 451, 75 N. E. 179 [*affirming* 96 Ill. App. 210, 117 Ill. App. 1]; Junc-

instantly between two hazards he will not be guilty of contributory negligence, although the one he selects results in injury and he might have escaped had he chosen the other,[49] or had he done nothing at all.[50] Especially where the nature of the emergency is such as is calculated to produce fright, excitement, or bewilderment and affect the judgment.[51]

(II) *Nature of Emergency.* In order to relieve a person from the consequences of his own acts on the ground that they were done suddenly and under impending danger, there must either be a real danger or the circumstances must be such as to create in his mind a reasonable apprehension of danger,[52] and the injured person must be placed in such a position that he has to choose on the instant in the face of the impending peril. If there is time for him by the exercise of reasonable care to withdraw to a place of safety he cannot recover if he does not do so.[53]

(III) *Person Causing Emergency.* The rule exempting a person injured from the charge of contributory negligence because of an act done in an emergency

tion Min. Co. *v.* Ench, 111 Ill. App. 346; Illinois Cent. R. Co. *v.* Haecker, 110 Ill. App. 102; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394.

Nebraska.— Ellick *v.* Wilson, 58 Nebr. 584, 79 N. W. 152; Lincoln Rapid Transit Co. *v.* Nichols, 37 Nebr. 332, 55 N. W. 872, 20 L. R. A. 853.

New York.— Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Suppl. 124 [*affirmed* in 113 N. Y. 669, 21 N. E. 1116].

Pennsylvania.— Kreider *v.* Lancaster, etc., Turnpike Co., 162 Pa. St. 537, 29 Atl. 721; Hess *v.* Baltimore, etc., R. Co., 28 Pa. Super. Ct. 220.

South Carolina.— Mitchell *v.* Charleston, etc., Power Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577.

See 37 Cent. Dig. tit. "Negligence," § 99.

Applications of rule.— Plaintiff's horses, while he was driving, took fright from an attack by defendant's dog, and plaintiff brought suit for injuries sustained from falling from the wagon. It was held that the fact that he rose to his feet when the horses started did not affect his right of recovery. Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412. On a collision at night between a tug with a car float alongside and a steamboat, the engineer of the steamboat jumped for the float but fell into the water, and was drowned. It was held, in a suit by his administratrix against the owners of both vessels, where it was insisted that the attempt to jump was contributory negligence, that, if such attempt was an error, it was, under the circumstances, analogous to an error *in extremis*, for which he was not to blame. The City of Norwalk, 55 Fed. 98.

49. *Illinois.*— Chicago, etc., R. Co. *v.* Corson, 101 Ill. App. 115 [*affirmed* in 198 Ill. 98, 64 N. E. 739].

New York.— Nicholsburg *v.* Second Ave. R. Co., 11 Misc. 432, 32 N. Y. Suppl. 130.

Ohio.— Pennsylvania R. Co. *v.* Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700.

West Virginia.— Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, 18 S. E. 748.

Wisconsin.—Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

United States.— Haff *v.* Minneapolis, etc., R. Co., 14 Fed. 558, 4 McCrary 622.

See 37 Cent. Dig. tit. "Negligence," § 99.

50. Dolson *v.* Dunham, 96 Minn. 227, 104 N. W. 964; Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956; Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82.

51. *Illinois.*— Junction Min. Co. *v.* Ench, 111 Ill. App. 346; Chicago, etc., R. Co. *v.* Corson, 101 Ill. App. 115 [*affirmed* in 198 Ill. 98, 64 N. E. 739].

Rhode Island.— Willis *v.* Providence Telegram Pub. Co., 20 R. I. 285, 38 Atl. 947.

Texas.— International, etc., R. Co. *v.* Bryant, (Civ. App. 1899) 54 S. W. 364.

Virginia.— Richmond R., etc., Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736.

United States.— Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

England.— Woolley *v.* Scovell, 7 L. J. K. B. O. S. 41, 3 M. & R. 105.

Illustrations.—If an automobile comes upon a boy under circumstances calculated to produce fright or terror, and such fright causes an error of judgment, by which he runs in front of the automobile, he is not guilty of contributory negligence. Thies *v.* Thomas, 77 N. Y. Suppl. 276. A mother's failure, on discovery of her child's fall into a ditch, to take the most prompt measures of rescue, will not be imputed as negligence, if she was so greatly excited as to be incapable of calm and deliberate judgment. Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378.

52. South Covington, etc., R. Co. *v.* Ware, 84 Ky. 267, 1 S. W. 493; Ford *v.* Robinson-Pettett Co., 65 S. W. 793, 23 Ky. L. Rep. 1654, holding that he has no right on the happening of some trivial occurrence or such as would not create fear or apprehension in the mind of an ordinarily careful and prudent person to bring injury on himself. And see Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956; Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858; Texas Midland R. Co. *v.* Booth, 35 Tex. Civ. App. 322, 80 S. W. 121; Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82.

53. Cowen *v.* Knickerbocker Ice Co., 6 N. Y. St. 250.

applies where the emergency is caused by the negligent act of another.[54] If such emergency is brought about by the person injured negligently placing himself in a position of peril he cannot recover.[55] While it is usually the negligence of defendant which brings about the position of peril, it may be brought about by the negligence of a third person contributing to that of defendant,[56] or that of a third person alone if the injury which followed the effort to escape was due to defendant's negligence;[57] but not where defendant was not negligent.[58]

f. Danger Incurred in Discharge of Duty.[59] If a person, in doing that which it is his right to do in the discharge of his duty, exercises ordinary care and prudence, he is not chargeable with contributory negligence as matter of law, although the result showed that he imperiled his life or personal safety in doing as he did.[60]

g. Danger Incurred to Save Life — (i) *In General.* The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, and one who attempts to rescue another from imminent danger is not guilty of contributory negligence, although he thereby imperils his own life,[61] whether he is

54. See *supra*, VII, A, 3, e, (I).

55. *Georgia.*— Briscoe *v.* Southern R. Co., 103 Ga. 224, 28 S. E. 638.

Illinois.— Atkins *v.* Lackawanna Transp. Co., 79 Ill. 19, in which case it appeared that plaintiff, being lawfully on board a ship lying at the dock, the gang-plank was suddenly taken in, and the ship started from the dock, whereupon plaintiff, not desiring to be carried out, and "believing at the time he might safely do so, jumped from the ship to the dock, and sustained injuries," and it was held that the shipowner was not liable.

New York.— Robinson *v.* Manhattan R. Co., 5 Misc. 209, 25 N. Y. Suppl. 91.

Tennessee.— Chattanooga Electric R. Co. *v.* Cooper, 109 Tenn. 308, 70 S. W. 72; Nashville, etc., R. Co. *v.* Smith, 9 Lea 470.

Texas.— Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858.

Wisconsin.— Dummer *v.* Milwaukee Electric R., etc., Co., 108 Wis. 589, 84 N. W. 853; Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890.

See 37 Cent. Dig. tit. "Negligence," § 99.

56. Akers *v.* New York, 14 Misc. (N. Y.) 524, 35 N. Y. Suppl. 1099.

57. Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858.

58. Chattanooga Electric R. Co. *v.* Cooper, 109 Tenn. 308, 70 S. W. 72; Trowbridge *v.* Danville St.-Car Co., (Va.) 19 S. E. 780.

59. Persons injured: By negligence in use of highway see STREETS AND HIGHWAYS. On street car tracks while engaged in repairing or cleaning streets see STREET RAILROADS.

Servant injured by negligence of master see MASTER AND SERVANT.

60. Carroll *v.* Minnesota Valley R. Co., 14 Minn. 57.

61. *Georgia.*— Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

Iowa.— Saylor *v.* Parsons, 122 Iowa 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542.

Kentucky.— Becker *v.* Louisville, etc., R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. L. Rep. 1893, 96 Am. St. Rep. 459, 53 L. R. A. 267.

Maryland.— Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Massachusetts.— Linneham *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692.

New York.— Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721 [*affirming* 57 Barb. 555]; Sann *v.* H. W. Johns Mfg. Co., 16 App. Div. 252, 44 N. Y. Suppl. 641.

Ohio.— Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553, 13 L. R. A. 190.

Pennsylvania.— Corbin *v.* Philadelphia, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715.

Tennessee.— Mobile, etc., R. Co. *v.* Ridley, 114 Tenn. 727, 86 S. W. 606, holding that one is justified in attempting to save human life when it is imperiled by great danger, and in a sudden emergency, and in such case he need not hesitate until it is too late to make a rescue; but it is sufficient if he acts with such care as a reasonably prudent person would use in such an emergency and under similar circumstances.

Wisconsin.— Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796.

United States.— Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426, going in good faith upon premises where a fire is raging.

See 37 Cent. Dig. tit. "Negligence," § 102.

Illustrations.—Plaintiff approached defendant, his employer, who had had a fight with another, and had got a pistol, which he had cocked, and said to him not to shoot, whereupon defendant told him not to crowd him, and waved his pistol in his face, and it was discharged, hitting him. It was held that he was not guilty of contributory negligence. Bitzer *v.* Caver, 74 S. W. 735, 25 Ky. L. Rep. 92. A railroad employee, on observing a boy standing on the track, with his back to a rapidly approaching train, which had failed to give the statutory signals, rushed on the track, and either pushed or warned the boy so that his life was saved, but slipped or stumbled himself, and, in consequence of his stumble, was struck by the train and killed. It was held that a finding that the employee acted with due care under the circumstances

aware of the danger or not,[62] where such attempt is made in good faith,[63] in the belief that he could save the life of the person in danger and avoid injury himself,[64] unless the attempt be made under circumstances amounting to rashness or recklessness in the judgment of a man of ordinary prudence.[65] Error in judgment at such a time will not defeat recovery.[66]

(II) *Prior Negligence of Rescuer.* The rule is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue.[67]

(III) *Negligence of Defendant.* Notwithstanding the fact that an attempt to rescue one from imminent danger may not amount to contributory negligence no liability rests on defendant unless it has been negligent in placing such person in peril,[68] or in failing to avoid injury after discovering the peril.[69]

h. Danger Incurred to Save Property. The general rule seems to be that it does not constitute contributory negligence *per se*, for one acting in good faith and with reasonable prudence, to expose himself to danger for the purpose of saving his own or another's property from injury or loss.[70] It is necessary, however, that the person injured should have acted with such care and caution as a reasonably prudent man would have exercised under the same circumstances, it being insufficient to show merely that he did not act recklessly.[71] A few cases take the contrary view and hold that a person who voluntarily places himself in a position of danger simply for the protection of property is negligent, so as to preclude recovery for an injury so received.[72]

was justified. Mobile, etc., R. Co. *v.* Ridley, 114 Tenn. 727, 86 S. W. 606.

62. Walters *v.* Denver Consol. Electric Light Co., 12 Colo. App. 145, 54 Pac. 960, holding that a mother who voluntarily takes hold of her child in an endeavor to remove him from contact with a live electric wire, and is thereby injured, is not negligent, whether she is aware of the danger or not. And see Liming *v.* Illinois Cent. R. Co., 81 Iowa 246, 47 N. W. 66.

63. Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426.

64. Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430.

65. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721.

66. Chicago, etc., R. Co. *v.* Eganolf, 112 Ill. App. 323.

67. Atlanta, etc., Air Line R. Co. *v.* Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47 (holding that where plaintiff's intestate went on a railroad trestle, accompanied by a small boy, and was killed by a collision with a train, owing to the fact that he failed to save himself in his efforts to prevent injury to the boy, he was guilty of such contributory negligence as prevented recovery by his representatives, and that he is to be considered as if he were alone, it being no excuse that he neglected his own safety to preserve the boy with the care of whom he had voluntarily encumbered himself); West Chicago St. R. Co. *v.* Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226, 52 L. R. A. 655 [*affirming* 87 Ill. App. 638]; De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329, 14 So. 61. *Contra*, Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594.

68. Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594; Hirschman *v.* Dry-Dock, etc., R. Co., 46 N. Y. App. Div. 621, 61 N. Y. Suppl. 304.

69. Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594. Plaintiff was walking with his father up a railroad track, down which a train was moving at the rate of about four miles an hour, in full sight. They crossed an unplanked bridge, but the train came upon them before the father had cleared the bridge. The son stepped back to help him off the bridge, and succeeded, but lost his own leg in the act. The engineer reversed his engine and took all means to avoid an injury. It was held that no case for a recovery of damages from the company was shown. Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102.

70. *Illinois.*— Lamparter *v.* Wallbaum, 45 Ill. 444, 92 Am. Dec. 225.

Iowa.— Liming *v.* Illinois Cent. R. Co., 81 Iowa 246, 47 N. W. 66.

Missouri.—Hall *v.* Huber, 61 Mo. App. 384.

New York.— Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Finnigan *v.* Biehl, 61 N. Y. Suppl. 1116.

South Carolina.— Ivy *v.* Wilson, Cheves 74.

United States.— Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426.

Canada.— Thorn *v.* James, 14 Manitoba 373; Connell *v.* Prescott, 20 Ont. App. 49 [*affirming* 22 Can Sup. Ct. 147, and *distinguishing* Anderson *v.* Northern R. Co., 25 U. C. C. P. 301]. And see Price *v.* Roy, 29 Can. Sup. Ct. 494.

See 37 Cent. Dig. tit. "Negligence," § 103.

71. Pegram *v.* Seaboard Air Line R. Co., 139 N. C. 303, 51 S. E. 975.

72. Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703; Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E.

i. Disregard of Warnings or Notices.[73] Recovery cannot be had where the injury was the result of the disobedience to warnings,[74] or notices;[75] but in order to have this effect the warning must be sufficiently definite to inform the person injured of the danger.[76] And the warning must have been given in time for the person to escape the danger.[77]

j. Violation of Statute or Ordinance — (I) *In General.* If the person injured was at the time of receiving the injury doing some act in violation of a statute,[78] or ordinance,[79] such person cannot recover if such violation contributed to the injury, the violation amounting to contributory negligence. An exception to this rule has been made where the act, although a misdemeanor, was not an act which persons of ordinary prudence or moral sense would feel to be careless or morally wrong or as involving a reasonable probability of injury,[80] and also where the thing causing the injury was in the nature of a trap.[81]

(II) *Relation of Statute or Ordinance to Injury.* As in the case of the violation of a statute or ordinance by a defendant it is necessary that the statute or ordinance be intended to prevent such an injury as is the ground for suit, and where it has no relation to the act causing the injury violation of it will not be contributory negligence.[82] In addition the violation of the statute or ordinance must be the proximate cause of the injury.[83]

579; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721. See also Pike *v.* Grand Trunk R. Co., 39 Fed. 255.

73. See also MASTER AND SERVANT, 26 Cyc. 1271.

74. *Alabama.*— O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158.

Minnesota.— Swanson *v.* Boutell, 95 Minn. 138, 103 N. W. 886.

United States.— Hastorf *v.* Hudson River Stone Supply Co., 110 Fed. 669.

England.— Caswell *v.* Worth, 5 E. & B. 849, 2 Jur. N. S. 116, 25 L. J. Q. B. 121, 4 Wkly. Rep. 231, 85 E. C. L. 849.

Canada.—Roberts *v.* Hawkins, 29 Can. Sup. Ct. 218; Grieve *v.* Ontario, etc., Steamboat Co., 4 U. C. C. P. 387; Fortier *v.* Lauzier, 14 Quebec Super. Ct. 359.

75. Bass *v.* Reitdorf, 25 Ind. App. 650, 58 N. E. 95. Where plaintiff, as a driver for certain lumber dealers, was directed to deliver a load to defendant, and did not go into the building by the ordinary entrance, but went in through a door at which goods were unloaded from cars, on which was a notice forbidding persons to enter, and fell through an unguarded open space in the floor, he could not recover against the owners of the building. Greis *v.* Hazard Mfg. Co., 209 Pa. St. 276, 58 Atl. 474.

76. Shilagi *v.* Degnon-McLean Contracting Co., 71 N. Y. App. Div. 152, 75 N. Y. Suppl. 540 [*affirmed* in 173 N. Y. 625, 66 N. E. 1116], holding that a person who, while walking along a sidewalk, stops opposite to the place where a gas pipe in the center of the street is being cut, is not guilty of contributory negligence merely because he fails to move when warned that he is in a dangerous place; the fact that it was dangerous not being apparent to him, and the reason why it was dangerous not being explained to him. And see T. A. Gillespie Co. *v.* Cumming, 62 N. J. L. 370, 41 Atl. 693, 868.

77. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269; Woolley *v.* Scovell, 7 L. J. K. B. O. S. 41, 3 M. & R. 105. And see Osborn *v.* Jenkinson, 100 Iowa 432, 69 N. W. 548.

78. Whitman *v.* W. & A. R. Co., 6 Can. L. T. Occ. Notes 457, 18 Nova Scotia 271; Devlin *v.* Bain, 11 U. C. C. P. 523. *Compare* Minerly *v.* Union Ferry Co., 56 Hun (N. Y.) 113, 9 N. Y. Suppl. 104, holding that violation of a statute by a person injured is not absolute proof of negligence but merely places on him the burden of proof of showing that such violation did not contribute to the injury.

79. Boschart *v.* Little, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Banks *v.* Highland St. R. Co., 136 Mass. 485; Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532 (violation of speed ordinance); Galveston Land, etc., Co. *v.* Pracker, 3 Tex. Civ. App. 261, 22 S. W. 830.

80. Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63.

81. Wilson *v.* Great Southern Tel., etc., Co., 41 La. Ann. 1041, 6 So. 781.

82. Pennsylvania Co. *v.* Frana, 112 Ill. 398; Sherman *v.* Fall River Iron Works Co., 5 Allen (Mass.) 213; Corey *v.* Bath, 35 N. H. 530; Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169, violation of Sunday law by working or traveling does not excuse negligence.

83. Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498 (leaving a horse standing unhitched in a street in violation of ordinance); Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Minerly *v.* Union Ferry Co., 56 Hun (N. Y.) 113, 9 N. Y. Suppl. 104; Clyde Nav. Co. *v.* Barclay, 1 App. Cas. 790, 36 L. T. Rep. N. S. 379. That a motorman was running his car at a higher rate of speed than allowed by law when a tree fell down on the car, injuring him, was not the proximate cause of the accident, in that, if he had been going at the legal rate, the tree would have fallen before he arrived

k. Trespass. The right of a trespasser to recover for injuries received while trespassing is usually denied on the ground that no duty rests on the owner as to him and not on the ground of contributory negligence.[84] But in order to defeat recovery the trespass or wrongful act must contribute to the injury.[85]

l. Condition of Property or Person Enhancing or Contributing to Injury[86] — (I) *Defects in Property.* Since a person is not required to anticipate the negligence of another he will not be guilty of contributory negligence because the injury results in part from the defective condition of his property,[87] or because its condition is such as to render the danger greater.[88]

(II) *Disease or Other Condition of Person.*[89] If the negligence of defendant causes an injury plaintiff will be entitled to recover even though by reason of previous diseased condition such injuries are more serious,[90] or where the person is more susceptible to injury,[91] or where death is quickened,[92] but not where the injury is caused solely by such condition.[93]

4. Proximate Cause[94] — **a. In General.** While it is held that the negligence of the person injured is sufficient to defeat recovery if it contributes in any degree to the injury yet to defeat a recovery plaintiff's contributory negligence must be the proximate cause thereof.[95] Whether plaintiff's negligence was in whole or

at the spot, and does not affect his right to recover. Berry *v.* Sugar Notch Borough, 191 Pa. St. 345, 43 Atl. 240.

84. See *supra*, V, E, 1, i. But see Flanagan *v.* Atlantic Alcatraz Asphalt Co., 37 N. Y. App. Div. 476, 56 N. Y. Suppl. 18.

85. Marble *v.* Ross, 124 Mass. 44; Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

86. As affecting liability of carrier for loss of or injury to goods see Carriers; Shipping.

As between adjoining landowners see Adjoining Landowners.

In property injured by a flowage of water see Waters; Watercourses.

In vehicles or horses contributing to injury from defects in bridges see Bridges.

In vehicles or horses contributing to injury to persons on or near railroad tracks see Railroads; Street Railroads.

On property injured by a fire from vessels see Shipping.

On property injured by fire on railroad property see Railroads.

87. Fraler *v.* Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562; Wadsworth *v.* Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588 (unsafe character of horse); Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412; Pitzner *v.* Shinnick, 41 Wis. 676.

88. Holman *v.* Boston Land, etc., Co., 8 Colo. App. 282, 45 Pac. 519; Tacoma Lumber, etc., Co. *v.* Tacoma, 1 Wash. 12, 23 Pac. 929.

Illustration. — In an action for negligently allowing a fire to extend into plaintiff's premises and consume his timber, the fact that he, after cutting such timber, left it lying on his land, among limbs, brush, and rubbish, where it was extremely likely to be consumed in case of fire, does not constitute contributory negligence. Box *v.* Kelso, 5 Wash. 360, 31 Pac. 973.

89. As affecting liability of physician for injuries to patients see Physicians and Surgeons.

Intoxication see *infra*, VII, B, 1, c.

Injury to servant see Master and Servant.

90. Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Green *v.* Houston Electric Co., (Tex. Civ. App. 1905) 89 S. W. 442.

91. Driess *v.* Frederich, 73 Tex. 460, 11 S. W. 493, holding that where plaintiff's leg was broken through the negligence of defendant, the fact that prior to such injury the leg of plaintiff had been fractured at about the place where it was broken, and rendered more susceptible to injury, could not affect the question of plaintiff's right to recover.

92. McClardy *v.* Chandler, 3 Ohio Dec. (Reprint) 1, 2 Wkly. L. Gaz. 1, holding that although a person may be suffering from a mortal disease, yet if through negligence a druggist in making up a physician's prescription uses a poisonous drug, by the administration of which the person's life is shortened, the druggist is liable in damages. Louisville, etc., R. Co. *v.* Northington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268 [*distinguishing* Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 25 Am. & Eng. R. Cas. 327].

93. Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654. And see Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

Illustration. — Plaintiff's intestate went to defendant's apartment house to visit a servant of one of the tenants and entered an elevator used for carrying freight and servants. In one side of the elevator was a slide, movable up and down, for the purpose of taking on baggage. While the elevator was ascending, intestate, either through faintness or loss of consciousness, sank to the floor, and fell through the slide, which was open. It was held that the accident was a misadventure for which defendant could not be held liable. Egan *v.* Berkshire Apartment Assoc., 16 Daly 218, 10 N. Y. Suppl. 116.

94. Comparative negligence see *infra*, VII, D. **Imputed negligence** see *infra*, VII, C.

95. *California.*—Williams *v.* Southern Pac.

in part the proximate cause,[96] or as otherwise expressed if the injury be the product of the mutual or concurring negligence,[97] no recovery can be had. The same tests must be applied to both parties in determining whether negligence is a proximate or remote cause.[98]

b. Efficient Cause. To constitute proximate cause the contributory negligence must have been a part of the efficient cause of the injury,[99] that is, there must be

R. Co., (1885) 9 Pac. 152; Fernandes *v.* Sacramento City R. Co., 52 Cal. 45; Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14, 6 Am. Rep. 695; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409; Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Connecticut.— Smithwick *v.* Hall, etc., Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A. 279; Williams *v.* Clinton, 28 Conn. 264; Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Delaware.— Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Indiana.— Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168; Newhouse *v.* Miller, 35 Ind. 463; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053.

Iowa.— Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336; Haley *v.* Chicago, etc., R. Co., 21 Iowa 15.

Kansas.— Chicago, etc., R. Co. *v.* Bailey, 66 Kan. 115, 71 Pac. 246.

Louisiana.— Factors, etc., Ins. Co. *v.* Werlein, 42 La. Ann. 1046, 8 So. 435, 11 L. R. A. 361.

Maine.— Cosgrove *v.* Kennebec Light, etc., Co., 98 Me. 473, 57 Atl. 841; Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947; Atwood *v.* Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67.

Maryland.—Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Mississippi.— Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

Missouri.— Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678; Neier *v.* Missouri Pac. R. Co., (1886) 1 S. W. 387; Straus *v.* Kansas City, etc., R. Co., 75 Mo. 185; Callahan *v.* Warne, 40 Mo. 131; Kuke *v.* St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55; Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322.

Nebraska.— Brady *v.* Chicago, etc., R. Co., 59 Nebr. 233, 80 N. W. 809; Guthrie *v.* Missouri Pac. R. Co., 51 Nebr. 746, 71 N. W. 722.

Nevada.— O'Connor *v.* North Truckee Ditch Co., 17 Nev. 245, 30 Pac. 882.

New Jersey.—Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180; Van Horn *v.* Central R. Co., 38 N. J. L. 133.

New York.— Brick *v.* Metropolitan St. R. Co., 35 Misc. 135, 71 N. Y. Suppl. 314.

North Carolina.— Brewster *v.* Elizabeth City, 137 N. C. 392, 49 S. E. 885; Russell *v.* Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823; Manly *v.* Wilmington, etc., R. Co., 74 N. C. 655.

Ohio.— Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89; Matthews *v.* Toledo, 21 Ohio Cir. Ct. 69, 11 Ohio Cir. Dec. 375.

Rhode Island.— Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092.

South Carolina.— Anderson *v.* Southern R. Co., 70 S. C. 490, 50 S. E. 202; Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715; Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430; Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Farley *v.* Charleston Basket, etc., Co., 50 S. C. 222, 28 S. E. 193; Conlin *v.* Charleston, 15 Rich. 201.

Tennessee.— Postal Tel.-Cable Co. *v.* Zopfi, 93 Tenn. 369, 24 S. W. 633; East Tennessee, etc., R. Co. *v.* Hull, 88 Tenn. 33, 12 S. W. 419.

Texas.— Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. 1052; St. Louis Southwestern R. Co. *v.* Parks, (Civ. App. 1905) 90 S. W. 343; Central Texas, etc., R. Co. *v.* Hoard, (Civ. App. 1898) 49 S. W. 142; Campbell *v.* McCoy, 3 Tex. Civ. App. 298, 23 S. W. 34.

Utah.— Houe *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381.

Vermont.— Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

West Virginia.— Tompkins *v.* Kanawha Board, 21 W. Va. 224; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Sheff *v.* Huntington, 16 W. Va. 307.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

United States.— Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516.

England.—Merchants of Staple of England *v.* Bank of England, 21 Q. B. D. 160, 52 J. P. 580, 57 L. J. Q. B. 418, 36 Wkly. Rep. 880.

Canada.— Brownstein *v.* Imperial Electric Light Co., 17 Quebec Super. Ct. 292; Davignon *v.* Stanbridge Station, 14 Quebec Super. Ct. 116.

See 37 Cent. Dig. tit. "Negligence," § 112.

96. Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

97. Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504; Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305.

98. Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Boyce *v.* Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

99. Brown *v.* Illius, 27 Conn. 84, 71 Am. Dec. 49, holding that, in the cases where the

a causal connection between plaintiff's negligence and the injury.[1] Thus one cannot recover for injuries sustained by reason of the negligence of another when he has himself been guilty of negligence but for which the injury would not have occurred.[2]

c. Immediate or Nearest Cause. Proximate cause is a cause occurring at the time of the injury,[3] and concurring with the negligent act or omission of defendant.[4] In order for contributory negligence to defeat recovery it need not have been the nearest cause in time or place to the effect it produces,[5] or as expressed in some decisions a more proximate cause than defendant's negligence.[6]

d. Natural and Probable Consequences. When the act and the injury are not known by common experience to be naturally and usually in sequence and the injury does not according to the ordinary course of events follow from the act they are not sufficiently connected to make the act a proximate cause.[7] And the same is true when the injury is due to some unlooked-for and unexpected event which could not reasonably have been anticipated or regarded as likely to occur.[8]

negligence of the complainant is a complete legal excuse for that of defendant, the injury is the product to some extent of the co-operation of causes set in motion by both parties and due in some degree to their combined negligence); Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249; Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381.

1. Brown *v.* Illius, 27 Conn. 84, 71 Am. Dec. 49; Ford *v.* Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25; Kansas City Southern R. Co. *v.* Prunty, 133 Fed. 13, 66 C. C. A. 163.

2. *Alabama.*— McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

Colorado.— Colorado Cent. R. Co. *v.* Holmes, 5 Colo. 197.

Indiana.— Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322; Jeffersonville R. Co. *v.* Swift, 26 Ind. 459; Toledo, etc., R. Co. *v.* Bevin, 26 Ind. 443; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Indianapolis, etc., R. Co. *v.* Wright, 22 Ind. 376; Toledo, etc., R. Co. *v.* Thomas, 18 Ind. 215.

Kansas.— St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434.

Kentucky.— South Covington, etc., R. Co. *v.* Nelson, 89 S. W. 200, 28 Ky. L. Rep. 287; Harper *v.* Kopp, 73 S. W. 1127, 24 Ky. L. Rep. 2342.

Louisiana.— Woods *v.* Jones, 34 La. Ann. 1086.

Maryland.— Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762; Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325.

Missouri.— Pim *v.* St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155.

New Hampshire.— Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

New Jersey.— New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Runyon *v.* Central R. Co., 25 N. J. L. 556; Central R. Co. *v.* Moore, 24 N. J. L. 824; Moore *v.* Central R. Co., 24 N. J. L. 268.

New York.— Button *v.* Hudson River R. Co., 18 N. Y. 248; Brooks *v.* Buffalo, etc., R. Co., 25 Barb. 600; Owen *v.* Hudson River R. Co., 2 Bosw. 374; Thomas *v.* Kenyon, 1 Daly 132; Clark *v.* Kirwan, 4 E. D. Smith 21.

Ohio.— Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Pennsylvania.— Lehigh Valley R. Co. *v.* Greiner, 113 Pa. St. 600, 6 Atl. 246.

Texas.— International, etc., R. Co. *v.* Ormond, 64 Tex. 485; Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295; Campbell *v.* McCoy, 3 Tex. Civ. App. 298, 23 S. W. 34.

United States.— Collins *v.* Davidson, 19 Fed. 83; Sunney *v.* Holt, 15 Fed. 880.

England.— The Vera Cruz, 5 Aspin. 254, 9 P. D. 88, 53 L. J. P. D. & Adm. 33, 51 L. T. Rep. N. S. 104, 32 Wkly. Rep. 783; Witherley *v.* Regent's Canal Co., 12 C. B. N. S. 2, 3 F. & F. 61, 2 L. J. C. P. 190, 6 L. T. Rep. N. S. 255, 104 E. C. L. 2; Tuff *v.* Warman, 5 C. B. N. S. 573, 5 Jur. N. S. 222, 27 L. J. C. P. 322, 6 Wkly. Rep. 693, 94 E. C. L. 573; Doyle *v.* Kinahan, 17 Wkly. Rep. 679.

See 37 Cent. Dig. tit. "Negligence," § 112.

3. Haley *v.* Chicago, etc., R. Co., 21 Iowa 15; Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

4. St. Louis Southwestern R. Co. *v.* Parks, (Tex. Civ. App. 1905) 90 S. W. 343.

5. Central Texas, etc., R. Co. *v.* Hoard, (Tex. Civ. App. 1898) 49 S. W. 142; Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. 921, 6 C. C. A. 641. And see Union Pac. R. Co. *v.* Callaghan, 56 Fed. 988, 6 C. C. A. 205 [*affirmed* in 161 U. S. 91, 16 S. Ct. 493, 40 L. ed. 628]; Clark *v.* Chambers, 3 Q. B. D. 327, 47 L. J. Q B. 427, 38 L. T. Rep. N. S. 454, 26 Wkly. Rep. 613.

6. Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27; Gilbert *v.* Chicago, etc., R. Co., 123 Fed. 832; Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190.

7. Kansas City Southern R. Co. *v.* Prunty, 133 Fed. 13, 66 C. C. A. 163.

8. East Tennessee, etc., R. Co. *v.* Hull, 88 Tenn. 33, 12 S. W. 419.

e. Intervening Efficient Cause. The negligence of the person injured will not defeat recovery if the injury is disconnected from his act by an independent cause, there being no legal contribution to the injury.[9]

f. Remote Cause or Condition. Where the negligence of defendant is the proximate cause and that of the person injured is the remote cause an action may be maintained, although plaintiff was not entirely free from fault.[10] Where the act or omission of the person injured amounts merely to an antecedent occasion or condition of the injury remote in the sense of causation it is not contributory negligence.[11] So if the negligence of the person injured did not occur at the time of the injury,[12] and preceded it in point of time and was independent of that of defendant, a recovery is not barred thereby.[13] But the negligence of a person injured is not remote, although its inception was prior to that of defendant where it continued up to the time of the accident.[14]

9. Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180; Van Horn *v.* New Jersey Cent. R. Co., 38 N. J. L. 133.

10. *California.*— Seigel *v.* Eisen, 41 Cal. 109.

Indiana.—Indianapolis, etc., R. Co. *v.* Caldwell, 9 Ind. 397.

Kansas.— Pacific R. Co. *v.* Houts, 12 Kan. 328; Sawyer *v.* Sauer, 10 Kan. 466.

Maine.— Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947.

Maryland.— Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Mississippi.— Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

Missouri.— Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Meyer *v.* People's R. Co., 43 Mo. 523; Morrissey *v.* Wiggins Ferry Co., 43 Mo. 380, 97 Am. Dec. 402; Frick *v.* St. Louis, etc., R. Co., 5 Mo. App. 435 [*affirmed* in 75 Mo. 542].

North Carolina.— Doggett *v.* Richmond, etc., R. Co., 78 N. C. 305.

South Carolina.— Conlin *v.* Charleston, 15 Rich. 201.

Texas.— Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295.

Vermont.— Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

West Virginia.— Tompkins *v.* Kanawha Board, 21 W. Va. 224.

Wisconsin.— Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202.

England.— Greenland *v.* Chaplin, 5 Exch. 243, 19 L. J. Exch. 293.

See 37 Cent. Dig. tit. "Negligence," § 113.

Illustrations.— Plaintiff, employed to clean street cars, was standing near a car on a spur track, while another car was passing, and was injured by a wagon driven by defendant's servant in such a way that when he was attempting to pass the car the rear wheels of the wagon slid along the tracks, and crushed plaintiff against the car. It was held that, although plaintiff was guilty of some negligence in standing on the street without looking about him, it would not prevent a recovery if defendant's servant did not exercise due care in attempting to pass the car. Ford *v.* Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39. The agent of defendant sewing machine company attempted to remove a machine from plaintiff's house. Plaintiff had removed the belt, so as to enable the agent to take the machine apart, and told the agent what she had done, and that if he tried to carry out the machine without taking off the top or replacing the belt, the top would be likely to fall. The agent did not heed this suggestion. The top did fall, and plaintiff was injured thereby. It was held that the fact that plaintiff had removed the belt did not defeat her right of recovery. White Sewing-Mach. Co. *v.* Richter, 2 Ind. App. 331, 28 N. E. 446.

11. *District of Columbia.*— District of Columbia *v.* Bolling, 4 App. Cas. 397.

Louisiana.— Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791.

New York.— McKeon *v.* Steinway R. Co., 20 N. Y. App. Div. 601, 47 N. Y. Suppl. 374, holding that plaintiff being thrown out of a wagon by a collision with a street car through his own negligence does not prevent him from recovering if he is rendered unconscious thereby, and, lying on the track, is run over thereafter by another car, the driver of which is not in the use of due care.

Washington.— Short *v.* Spokane, 41 Wash. 257, 83 Pac. 183.

United States.— Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738, holding that culpable negligence of a complainant in an action for injuries, properly so called, which contributed to the injury, must always defeat the action; but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it, but for the primary wrong, it is not in law to be charged to the complainant, but to the original wrong-doer.

12. Manly *v.* Wilmington, etc., R. Co., 74 N. C. 655; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

13. O'Brien *v.* McGlinchy, 68 Me. 552; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190. And see Cassady *v.* Magher, 85 Ind. 228.

14. Cunningham *v.* Lyness, 22 Wis. 245, holding that where a woman took a position on the edge of a dock, where she would be

g. Injury Avoidable Notwithstanding Contributory Negligence — (i) *In General.* While the negligent act or omission of the person injured ordinarily defeats recovery the rule is subject to the exception or qualification that, although such person has been guilty of negligence in exposing himself to danger, yet he may recover if defendant, after knowing of such danger, could have avoided the injury by the exercise of ordinary care and fails to do so,[15] as in such case the

likely to be forced into the river by teams passing on and off a ferryboat, it was held that her negligence was not rendered remote in causation by the fact that several minutes elapsed before she was pushed off by the striking of a heavy wagon against a dray near her.

15. *Alabama.*— Memphis, etc., R. Co. *v.* Martin, 131 Ala. 269, 30 So. 827; Grant *v.* Moseley, 29 Ala. 302; The Farmer, 26 Ala. 189, 62 Am. Dec. 718.

California.— Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68.

Colorado.— Denver, etc., R. Co., *v.* Buffehr, 30 Colo. 27, 69 Pac. 582; Hector Min. Co. *v.* Robertson, 22 Colo. 491, 45 Pac. 406; Denver, etc., Rapid Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106; Colorado Cent. R. Co. *v.* Holmes, 5 Colo. 197.

Connecticut.— Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425.

District of Columbia.— Hawley *v.* Columbia R. Co., 25 App. Cas. 1; Howes *v.* District of Columbia, 2 App. Cas. 188.

Illinois.— Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408.

Indiana.— Krenzer *v.* Pittsburgh, etc., R. Co., 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467; Indianapolis, etc., R. Co. *v.* Wright, 22 Ind. 376; Wright *v.* Brown, 4 Ind. 95, 58 Am. Dec. 622.

Indian Territory.— Chicago, etc., R. Co. *v.* Pounds, 1 Indian Terr. 51, 35 S. W. 249.

Iowa.— Keefe *v.* Chicago, etc., R. Co., 92 Iowa 182, 60 N. W. 503, 54 Am. St. Rep. 542; Romick *v.* Chicago, etc., R. Co., 62 Iowa 167, 17 N. W. 458; Albertson *v.* Keokuk, etc., R. Co., 48 Iowa 292; Morris *v.* Chicago, etc., R. Co., 45 Iowa 29; Cooper *v.* Central R. Co., 44 Iowa 134; Gates *v.* Burlington, etc., R. Co., 39 Iowa 45; Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55.

Louisiana.— McGuire *v.* Vicksburg, etc., R. Co., 46 La. Ann. 1543, 16 So. 457.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859; Baltimore Traction Co. *v.* Appel, 80 Md. 603, 31 Atl. 964; Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325; People's Pass. R. Co. *v.* Green, 56 Md. 84; Klepper *v.* Coffey, 44 Md. 117; Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, 17 Am. Rep. 521; Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Mississippi.— Christian *v.* Illinois Cent. R. Co., (1893) 12 So. 710.

Missouri.— Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911; Swigert *v.* Hannibal, etc., R. Co., 75 Mo. 475; Straus *v.* Kansas City, etc., R. Co., 75 Mo. 185; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Nelson *v.* Atlantic, etc., R. Co., 68 Mo. 593; Fletcher *v.* Atlantic etc., R. Co., 64 Mo. 484; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, 11 Am. Rep. 420; Morrissey *v.* Wiggins Ferry Co., 43 Mo. 380, 97 Am. Dec. 402; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159.

Nebraska.— Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Burnett *v.* Burlington, etc., R. Co., 16 Nebr. 332, 20 N. W. 280.

New Hampshire.—State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New York.— Mapes *v.* Union R. Co., 56 N. Y. App. Div. 508, 67 N. Y. Suppl. 358; Weitzman *v.* Nassau Electric R. Co., 33 N. Y. App. Div. 585, 53 N. Y. Suppl. 905; Green *v.* Erie R. Co., 11 Hun 333.

North Carolina.— Styles *v.* Richmond, etc., R. Co., 118 N. C. 1084, 1088, 24 S. E. 740 [*citing* Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749]; Baker *v.* Wilmington, etc., R. Co., 118 N. C. 1015, 24 S. E. 415; Pickett *v.* Wilmington. etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; Gunter *v.* Wicker, 85 N. C. 310.

Ohio.— Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Texas.— Northern Texas Traction Co. *v.* Yates, (Civ. App. 1905) 88 S. W. 283; El. Paso Electric R. Co. *v.* Kendall, (Civ. App. 1905) 85 S. W. 61; Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140; Texas, etc., R. Co. *v.* Lively, 14 Tex. Civ. App. 554, 38 S. W. 370; Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295.

Utah.— Shaw *v.* Salt Lake City R. Co., 21 Utah 76, 59 Pac. 552; Hall *v.* Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726.

Vermont.— Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Virginia.— Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310; Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812, 31 Am. Rep. 750.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

negligence of the person injured is not the proximate cause of the injury and the negligence of defendant becomes the proximate cause.[16] This rule has no application where the negligence of the person injured and of defendant are concurrent,[17] each of which at the very time when the accident occurs contributes to it.[18]

(II) *Knowledge by Defendant of Danger.* The rule stated in the preceding section is universally adopted where defendant knows, becomes aware of, or discovers the peril of the person injured in time to avoid the injury.[19] In some jurisdictions, however, the principle upon which the doctrine of discovered peril is based has no application in the absence of actual knowledge on the part of the person causing the injury of the peril of the person injured in time to prevent the injury by the use of the means within his reach.[20] While in others it is extended to cases where defendant might have discovered the peril by the exercise of reasonable care,[21] or has neglected the most ordinary precaution in failing

Wisconsin.— Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202. But see Owen *v.* Portage Tel. Co., 126 Wis. 412, 105 N. W. 924.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]; Turnbull *v.* New Orleans, etc., R. Co., 120 Fed. 783, 57 C. C. A. 151; Baltimore, etc., R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

England.— Radley *v.* London, etc., R. Co., 1 App. Cas. 754, 46 L. J. Exch. 573, 35 L. T. Rep. N. S. 637, 25 Wkly. Rep. 147; Davey *v.* London, etc., R. Co., 12 Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. N. S. 739; The Vera Cruz, 9 P. D. 88, 5 Aspin. 254, 53 L. J. P. D. & Adm. 33, 51 L. T. Rep. N. S. 104, 32 Wkly. Rep. 783.

Canada.— Halifax Electric Tramway Co. *v.* Inglis, 30 Can. Sup. Ct. 256 [*affirming* 32 Nova Scotia 117]; West *v.* Boutilier, 6 Can. L. T. Occ. Notes 441, 18 Nova Scotia 297; Jacquemin *v.* Montreal St. R. Co., 11 Quebec Super. Ct. 419.

See 37 Cent. Dig. tit. "Negligence," § 115.

16. *Arkansas.*— Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

Delaware.— Higgins *v.* Wilmington City R. Co., 1 Marv. 352, 41 Atl. 86; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Indiana.— Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478.

Kentucky.— Washington Mfg., etc., Co. *v.* Barnett, 42 S. W. 1120, 19 Ky. L. Rep. 958.

Maine.— Coombs *v.* Mason, 97 Me. 270, 54 Atl. 728; Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947; Atwood *v.* Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67.

Missouri.— Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Isabell *v.* Hannibal, etc., R. Co., 60 Mo. 475; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

Ohio.— Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

Texas.— St. Louis Southwestern R. Co. *v.* Jacobson, 28 Tex. Civ. App. 150, 66 S. W. 1111.

Utah.— Thompson *v.* Salt Lake Rapid-Transit Co., 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172.

See 37 Cent. Dig. tit. "Negligence," § 115.

17. *California.*— Tobin *v.* Omnibus Cable Co., (1893) 34 Pac. 124; Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

Kentucky.— Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82.

Maine.— Butler *v.* Rockland, etc., R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267 (holding that negligence of plaintiff and defendant practically simultaneous); O'Brien *v.* McGlinchy, 68 Me. 552.

Ohio.— Lake Shore, etc., R. Co. *v.* Callahan, 25 Ohio Cir. Ct. 115; Cleveland, etc., R. Co. *v.* Gahan, 24 Ohio Cir. Ct. 277.

United States.— Gilbert *v.* Erie R. Co., 97 Fed. 747, 38 C. C. A. 408.

18. Green *v.* Los Angeles Terminal R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W. 705.

19. See cases cited under preceding section.

20. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Cochran, 77 Ark. 398, 91 S. W. 747; Johnson *v.* Stewart, 62 Ark. 164, 34 S. W. 889.

Iowa.— O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467.

Nebraska.— Omaha St. R. Co. *v.* Martin, 48 Nebr. 65, 66 N. W. 1007; Chicago, etc., R. Co. *v.* Lilley, 4 Nebr. (Unoff.) 286, 93 N. W. 1012.

Texas.— Missouri, etc., R. Co. *v.* Haltom, 95 Tex. 112, 65 S. W. 625; Ft. Worth, etc., R. Co. *v.* Shetter, 94 Tex. 196, 59 S. W. 533; Texas, etc., R. Co. *v.* Staggs, 90 Tex. 458, 39 S. W. 295; Texas, etc., R. Co. *v.* Breadow, 90 Tex. 26, 36 S. W. 410; Cardwell *v.* Gulf, etc., R. Co., (Civ. App. 1905) 88 S. W. 422; Gulf, etc., R. Co. *v.* Townsend, (Civ. App. 1904) 82 S. W. 804.

Washington.— Dotta *v.* Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

21. *Colorado.*— Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582.

Missouri.— Guenther *v.* St. Louis, etc., R. Co., 108 Mo. 18, 18 S. W. 846; Dahlstrom *v.* St. Louis, etc., R. Co., 96 Mo. 99, 8 S. W.

to do so,[22] or where not knowing of the danger he has sufficient notice to put a prudent man on the alert.[23]

h. Concurrent Negligence of Third Person. Even though the negligence of a third person which cannot be imputed to the person injured contributes with that of defendant in causing the injury, yet, if the person injured is also guilty of negligence contributing to the injury, there can be no recovery.[24]

i. Subsequent Negligence Aggravating Injury. The general rule is that a person who is injured as the result of the negligence of another is bound to use ordinary care in the treatment of the injury and cannot recover enhanced damages growing out of his neglect to use such care or to procure medical treatment.[25] Such subsequent neglect only goes to the amount and will not defeat recovery for the original injury.[26] If, however, the ultimate result would have followed regardless of the want of care on the part of the person injured recovery for such result may be had.[27] Where too the person injured has employed a competent and skilful physician, a mistake or improper treatment on the part of such physician will not prevent recovery for the resultant effect.[28] And defendant is liable for the injury caused even though proper treatment might have lessened the injury.[29]

j. Injury Inevitable Notwithstanding Contributory Negligence.[30] Recovery will not be defeated, although the person injured was guilty of some negligence, if by the exercise of ordinary care he could not have avoided the consequences of defendant's negligence.[31]

777; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22.

North Carolina.— See Ray *v.* Aberdeen, etc., R. Co., 141 N. C. 84, 53 S. E. 622; Bogan *v.* Carolina Cent. R. Co., 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418.

Ohio.— See Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Lake Shore, etc., R. Co. *v.* Callahan, 25 Ohio Cir. Ct. 115.

Virginia.— Richmond Traction Co. *v.* Martin, 102 Va. 209, 45 S. E. 886.

England.— Springett *v.* Ball, 4 F. & F. 472.

22. Buxton *v.* Ainsworth, 138 Mich. 532, 101 N. W. 817.

23. Klockenbrink *v.* St. Louis, etc., R. Co., 81 Mo. App. 351, 409.

24. Brannen *v.* Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; Smith *v.* New York Cent., etc., R. Co., 38 Hun (N. Y.) 33.

As to act of third persons contributory to position of peril see *supra*, VII, A, 3, e, (I).

25. *Kentucky.*— Louisville, etc., R. Co. *v.* Mason, 72 S. W. 27, 24 Ky. L. Rep. 1623.

Nebraska.— Atkinson *v.* Fisher, 4 Nebr. (Unoff.) 21, 93 N. W. 211.

New Hampshire.—Boynton *v.* Somersworth, 58 N. H. 321, holding that a physician and surgeon, injured by a defect in a highway, is bound to the same degreee of care in the selection of a physician and surgeon to treat him that other persons are held to.

Texas.— Brown *v.* Bridges, 70 Tex. 661, 8 S. W. 502; Gulf, etc., R. Co. *v.* McMannewitz, 70 Tex. 73, 8 S. W. 66.

United States.— Osborne *v.* Detroit, 32 Fed. 36 [*reversed* on other grounds in 135 U. S. 422, 10 Sup. Ct. 192, 34 L. ed. 260].

Canada.— Vinet *v.* Rex, 9 Can. Exch. 352.

What amounts to proper care.— Plaintiff's injuries from defendant's negligence caused her a miscarriage the same day, and it appeared that she exposed herself to bad weather a few days afterward, to the aggravation of her condition. It was held that a charge that if she went out, not recklessly and carelessly, but because she "felt" well enough, she was justified in so doing, was proper. Hope *v.* Troy, etc., R. Co., 40 Hun (N. Y.) 438 [*affirmed* in 110 N. Y. 643, 17 N. E. 873].

26. Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092; Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. 128; Bradford City *v.* Downs, 126 Pa. St. 622, 17 Atl. 884; Texas, etc., R. Co. *v.* McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237.

27. Texas, etc., R. Co. *v.* Orr, 46 Ark. 182 (failure to follow the best remedies or directions of physicians); Smith *v.* Consumer's Ice Co., 52 N. Y. Super. Ct. 430. And see York *v.* Canada Atlantic Steamship Co., 22 Can. Sup. Ct. 167.

28. Chicago, etc., R. Co. *v.* Burridge, 107 Ill. App. 23; Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18.

29. Elliott *v.* Kansas City, 174 Mo. 554, 74 S. W. 617; Gulf, etc., R. Co. *v.* Coon, 69 Tex. 730, 7 S. W. 492.

30. **Comparative negligence** see *infra*, VII, D.

Injuries to children see *infra*, VII, B, 2.

Negligence of parent or custodian imputed to child see *infra*, VII, C, 8.

31. *Connecticut.*— Beers *v.* Housatonuc R. Co., 19 Conn. 566.

Georgia.— Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818.

Iowa.— Wright *v.* Illinois, etc., Tel. Co., 20 Iowa 195.

Missouri.— Smith *v.* Union R. Co., 61 Mo. 588.

B. Children and Others Under Disability[32] — **1. In General — a. Care Dependent on Capacity in General.** In order to render a person guilty of contributory negligence defeating a recovery the person injured must be one to whom negligence is imputable and therefore excludes those who by reason of their mental capacity do not possess sufficient discretion to appreciate and avoid danger and who are incapable of legal wrong.[33] The law only requires the exercise of a degree of care commensurate with the discretion of the injured person. This rule applies to children, idiots, and persons *non compos mentis*,[34] and to persons whose mental faculties are impaired by age.[35] In determining contributory negligence the age and sex of the injured person should be considered.[36]

b. Persons Under Physical Disability. As the standard of care required of one charged with contributory negligence is that of an ordinarily prudent person in possession of ordinary sense and capacities, one physically deficient is required to exercise caution and prudence in proportion to his defect.[37] Thus one who is deaf is required to be more careful in keeping a proper lookout,[38] and one

Nebraska.— Omaha Horse R. Co. *v.* Doolittle, 7 Nebr. 481.

Nevada.— O'Connor *v.* North Truckee Ditch Co., 17 Nev. 245, 30 Pac. 882.

New York.— Kuhn *v.* Delaware, etc., R. Co., 92 Hun 74, 36 N. Y. Suppl. 339 [*affirmed* in 153 N. Y. 683, 48 N. E. 1105].

North Carolina.— Manly *v.* Wilmington, etc., R. Co., 74 N. C. 655.

Ohio.— Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Tennessee.— Whirley *v.* Whiteman, 1 Head 610.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

England.— Davies *v.* Mann, 6 Jur. 954, 12 L. J. Exch. 10, 10 M. & W. 546.

See 37 Cent. Dig. tit. "Negligence," § 114.

Illustration.— A person who leaves on a public street a horse harnessed to a carriage, unhitched and uncared for, is liable for any damages caused by the horse if he runs away, and it does not matter if the person injured, who is riding in a carriage, was so injured while endeavoring on foot to avoid the runaway, if it appears that he would not have escaped even if he had remained in his wagon. Laflamme *v.* Staines, 18 Quebec Super. Ct. 105.

32. **Of passengers** see CARRIERS.

Of persons injured: By defects in highways see STREETS AND HIGHWAYS. By negligence in use of highway see STREETS AND HIGHWAYS. In defects in streets or public places in cities see MUNICIPAL CORPORATIONS.

Of persons on or near railroad tracks or property see RAILROADS; STREET RAILROADS.

Of servants injured by negligence of master see MASTER AND SERVANT.

33. Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407, holding that one whose mind is merely dull, and who is capable of earning his livelihood, there being no apparent necessity of putting him under the protection of a guardian, is chargeable with the same degree of care for his personal safety as are others of brighter intellect; but if he is so devoid of intelligence as to be unable to apprehend apparent danger, one through whose negligence he is injured, having notice of his mental incapacity, cannot escape liability on the ground of his contributory negligence); Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25.

34. Boland *v.* Missouri R. Co., 36 Mo. 484.

35. Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586.

The law requires no greater care of an aged person to avoid injury than it requires of a young person.— It requires of each the exercise of ordinary care. Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853.

36. While, in determining the question of negligence, all the circumstances are to be taken into account, and among others the age and sex of the person injured, it is error to instruct that the law requires a less degree of care in a woman than in a man. Hassenyer *v.* Michigan Cent. R. Co., 48 Mich. 205, 12 N. W. 155, 42 Am. Rep. 470.

37. Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774 (holding that it is contributory negligence for one subject to dizziness or vertigo to go upon a railroad track); Simms *v.* South Carolina R. Co., 27 S. C. 268, 3 S. E. 301; Renneker *v.* South Carolina R. Co., 20 S. C. 219.

38. Fenneman *v.* Holden, 75 Md. 1, 22 Atl. 1049; Thompson *v.* Salt Lake Rapid-Transit Co., 16 Utah 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172.

Crossing railroad track.— Deafness of a person crossing a line of railway is contributory negligence in him if by reason of that defect he is unable to hear a warning given to him by the company's servants in charge at the crossing. Skelton *v.* London, etc., R. Co., L. R. 2 C. P. 631, 36 L. J. C. P. 249, 16 L. T. Rep. N. S. 563, 15 Wkly. Rep. 925; Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13, 4 H. & C. 83, 11 Jur. N. S. 954, 35 L. J. Exch. 3, 13 L. T. Rep. N. S. 376, 14 Wkly. Rep. 133.

Crossing street.—Plaintiff, who was almost deaf, was walking across a street in a diagonal direction at a place where there was no crossing. Defendant's driver turned his horse round from where he had stopped, and proceeded to drive up the same street. He

whose eyesight is impaired must use a degree of care beyond the usual and ordinary proportioned to the degree of his impairment of vision.[39]

c. Intoxicated Persons. The condition produced by intoxication being voluntary does not relieve the person injured from the necessity of exercising the ordinary care to avoid injury required under like circumstances of a sober man.[40] Intoxication alone is not a bar to recovery,[41] unless by reason of such intoxication he fails to exercise the ordinary care of a sober man,[42] or is unable to take the proper precautions to avoid danger.[43] Yet intoxication in any degree is a circumstance to be considered in determining the question of contributory negligence.[44]

saw plaintiff for the first time a short distance off, and shouted a warning. Plaintiff not hearing, continued on his course, whereupon the driver began to pull up, and shouted again, but immediately after collided with plaintiff, who was thereby seriously injured. The jury having found a verdict for plaintiff, it was held that the verdict was not against the weight of evidence. Smith *v.* Browne, L. R. 28 Ir. 1.

39. Karl *v.* Juniata County, 206 Pa. St. 633, 56 Atl. 78. And see Drake *v.* Dartmouth, 25 Nova Scotia 177.

Blindness of plaintiff who was injured while attempting to cross a railroad is to be taken into consideration in determining the question whether he was negligent or not. Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406, 20 So. 558. One who crosses a river in a boat in the night-time, and is injured by coming into collision with a tug, is not as a matter of law guilty of contributory negligence by the fact that the person propelling the boat was blind, and the question is properly submitted to the jury. Harris *v.* Uebelhoer, 75 N. Y. 169.

40. *Alabama.*— Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39.

Colorado.— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Illinois.— Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408; Burke *v.* Chicago, etc., R. Co., 108 Ill. App. 565.

Pennsylvania.— Mooney *v.* Pennsylvania R. Co., 203 Pa. St. 222, 52 Atl. 191.

Rhode Island.—Vizacchero *v.* Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

See 37 Cent. Dig. tit. "Negligence," § 119.

41. *Colorado.*— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Illinois.— Wabash R. Co. *v.* Monegan, 94 Ill. App. 82.

Kentucky.— Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681.

Michigan.— Kingston *v.* Ft. Wayne, etc., R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131.

Missouri.—Buddenberg *v.* Charles P. Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970; Meyer *v.* Pacific R. Co., 40 Mo. 151.

New York.— Ditchett *v.* Spuyten Duyvil, etc., R. Co., 5 Hun 165 [*reversed* on other grounds in 67 N. Y. 425]; Healy *v.* New York, 3 Hun 708; O'Hagan *v.* Dillon, 42 N. Y. Super. Ct. 456.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541.

Oregon.— Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Wisconsin.— Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554 (holding that intoxication is not conclusive of contributory negligence); Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13 (jury would be warranted in finding contributory negligence from intoxication alone).

Canada.— Ridley *v.* Lamb, 10 U. C. Q. B. 354.

See 37 Cent. Dig. tit. "Negligence," § 119.

And see Williams *v.* Mudgett, 2 Tex. Unrep. Cas. 254.

Illustration.— A person under the influence of liquor, but not so intoxicated as to interfere with the exercise of ordinary care on his part in walking on a public sidewalk, is not deprived of the right of protection from the negligence of another who fails to properly guard an opening into which the pedestrian falls. Clarke *v.* Philadelphia, etc., Coal, etc., Co., 92 Minn. 418, 100 N. W. 231.

42. Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774; Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, 23 Ky. L. Rep. 681; Meyer *v.* Pacific R. Co., 40 Mo. 151; Bageard *v.* Consolidated Traction Co., 64 N. J. L. 316, 45 Atl. 620, 81 Am. St. Rep. 498, 49 L. R. A. 424. And see O'Hagan *v.* Dillon, 42 N. Y. Super. Ct. 456.

43. *Illinois.*— Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Johnson *v.* Illinois Cent. R. Co., 61 Ill. App. 522; Chicago City R. Co. *v.* Lewis, 5 Ill. App. 242.

Iowa.— Cramer *v.* Burlington, 42 Iowa 315, holding that it is not negligence as matter of law, but a fact to be taken into consideration.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541.

Pennsylvania.— Hershey *v.* Mill Creek Tp., 6 Pa. Cas. 459, 9 Atl. 452; Munley *v.* Hull, 3 Lack. Jur. 277.

United States.— Anderson *v.* The E. B. Ward, Jr., 38 Fed. 44.

See 37 Cent. Dig. tit. "Negligence," § 119.

44. *Illinois.*— Aurora *v.* Hillman, 90 Ill. 61; Wabash R. Co. *v.* Monegan, 94 Ill. App. 82.

Kentucky.— Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734.

Missouri.— Buddenberg *v.* Charles P. Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970, holding that it is a fact from which contributory negligence may be inferred.

Intoxication which did not contribute to the injury is not contributory negligence and does not bar a recovery therefor.[45]

2. Children[46] **— a. In General** — (I) *Applicability of Doctrine of Contributory Negligence.* Except where the child is so young as to be incapable of exercising judgment or discretion,[47] the law of contributory negligence applies where the person injured is an infant the same as where he is an adult.[48]

(II) *Care Dependent on Age and Capacity.*[49] Prudence on the part of a child might be negligence in an adult, and a child of immature years is not required to exercise the same degree of care and caution to avoid injury as is required of adults under similar circumstances.[50] The degree of care required has been variously stated as the care reasonably to be expected of a child of his age;[51]

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541.

Oregon.— Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Wisconsin.— Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554; Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13.

As to admissibility of evidence of intoxication of plaintiff see *infra*, VIII, C, 3, b, (II), (B).

45. *Arkansas.*— Texas, etc., R. Co. *v.* Orr, 46 Ark. 182.

Georgia.—Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 21 S. E. 66.

Iowa.— Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455.

New York.— Ditchett *v.* Spuyten Duyvil, etc., R. Co., 5 Hun 165 [*reversed* on other grounds in 67 N. Y. 425]; Healy *v.* New York, 3 Hun 708.

Texas.— Houston, etc., R. Co. *v.* Reason, 61 Tex. 613.

Wisconsin.— Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. 771.

46. As affecting parent's right to recover see Parent and Child.

As to passengers see Carriers.

Injuries from defects or obstructions in streets see Municipal Corporations.

Injuries from negligence in use of highway see Streets and Highways.

Master's liability for injuries to an inexperienced or youthful servant see Master and Servant.

On railroad tracks see Railroads; Street Railroads.

Trespassing on railroad cars or trains see Railroads; Street Railroads.

47. *Alabama.*— Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

Kentucky.— Harper *v.* Kopp, 73 S. W. 1127, 24 Ky. L. Rep. 2342.

Missouri.— Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

New York.— Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450.

Ohio.— Ludden *v.* Columbus, etc., Midland R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

Texas.— North Texas Constr. Co. *v.* Bostick, (Civ. App. 1904) 80 S. W. 109 [*reversed* on other grounds in 98 Tex. 239, 83 S. W. 12].

England.— Lynch *v.* Nurdin, 1 Q. B. 29, 5 Jur. 797, 10 L. J. Q. B. 73, 4 P. & D. 672, 41 E. C. L. 422.

See 37 Cent. Dig. tit. "Negligence," § 121.

48. Honegsberger *v.* Second Ave. R. Co., 2 Abb. Dec. (N. Y.) 378, 1 Keyes 570, 33 How. Pr. 193 [*reversing* 1 Daly 89]; Schmidt *v.* Cook, 1 Misc. (N. Y.) 227, 20 N. Y. Suppl. 889 [*reversed* on other grounds in 4 Misc. 85, 23 N. Y. Suppl. 799]; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

49. Infant servant see Master and Servant.

50. *Colorado.*— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279, child of seven.

Georgia.— Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580.

Louisiana.— Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472.

New York.— Costello *v.* Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897; Swift *v.* Staten Island Rapid Transit R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 1 Silv. Sup. 375, 5 N. Y. Suppl. 316]; Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Jones *v.* Utica, etc., R. Co., 36 Hun 115. *Contra,* Honegsberger *v.* Second Ave. R. Co., 2 Abb. Dec. 378, 1 Keyes 570, 33 How. Pr. 193; Burke *v.* Broadway, etc., R. Co., 49 Barb. 529.

Texas.— Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586; Denison, etc., R. Co. *v.* Carter, (Civ. App. 1904) 79 S. W. 320.

Wisconsin.—Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

See 37 Cent. Dig. tit. "Negligence," § 123.

51. *Delaware.*— Goldstein *v.* People's R. Co., 5 Pennew. 306, 60 Atl. 975; Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. 537, 47 Atl. 1019, 82 Am. St. Rep. 425; Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 43 Atl. 156.

Illinois.— Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617; Illinois Cent. R. Co. *v.* Bandy, 88 Ill. App. 629.

Iowa.— Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483, 103 N. W. 481.

age and discretion;[52] maturity and capacity;[53] youth and inexperience;[54] mental and physical capacity;[55] age and capacity;[56] age and intelligence or intellectual

Kansas.— Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

Massachusetts.— Elkins *v.* Boston, etc., R. Co., 115 Mass. 190; Munn *v.* Reed, 4 Allen 431.

Missouri.— Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Donoho *v.* Vulcan Iron-Works, 7 Mo. App. 447 [*affirmed* in 75 Mo. 401].

New York.— Lafferty *v.* Third Ave. R. Co., 176 N. Y. 594, 68 N. E. 1118 [*affirming* 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405]; Byrne *v.* New York Cent., etc., R. Co., 83 N. Y. 620; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248; Mowrey *v.* Central City R. Co., 51 N. Y. 666; O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61; Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 1 Transcr. App. 49, 34 How. Pr. 217; Murphy *v.* Perlstein, 73 N. Y. App. Div. 256, 76 N. Y. Suppl. 657; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

Ohio.— Cleveland Rolling-Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385.

Oregon.— Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693.

Utah.— Christensen *v.* Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

United States.— Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

See 37 Cent. Dig. tit. "Negligence," § 123.

But see Western, etc., Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320, in which it was said that "capacity" is the main thing; that "age" is of no significance except as a mark or sign of capacity.

52. *Alabama.*— Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

Connecticut.— Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261.

Illinois.— Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago, etc., R. Co. *v.* Murray, 71 Ill. 601; Kerr *v.* Forque, 54 Ill. 482, 5 Am. Rep. 146.

Iowa.— McMillan *v.* Burlington, etc., R. Co., 46 Iowa 231.

Kansas.— Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

Maryland.—Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534; Baltimore, etc., R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49; State *v.* Baltimore, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600.

Massachusetts.— O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352; Dowd *v.* Chicopee, 116 Mass. 93; Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188.

Nebraska.— Chicago, etc., R. Co. *v.* Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522; Huff *v.* Ames, 16 Nebr. 139, 19 N. W. 623, 49 Am. Rep. 716.

New York.— Dowling *v.* New York Cent., etc., R. Co., 90 N. Y. 670; Byrne *v.* New York Cent., etc., R. Co., 83 N. Y. 620; Thurber *v.* Harlem Bridge, etc., R. Co., 60 N. Y. 326; Brown *v.* Syracuse, 77 Hun 411, 28 N. Y. Suppl. 792; Weaver *v.* Bullis, 60 Hun 579, 14 N. Y. Suppl. 338 [*affirmed* in 128 N. Y. 634, 29 N. E. 147]; Haycroft *v.* Lake Shore, etc., R. Co., 2 Hun 489 [*affirmed* in 64 N. Y. 636]; Costello *v.* Syracuse, etc., R. Co., 65 Barb. 92; Casey *v.* New York Cent., etc., R. Co., 6 Abb. N. Cas. 104 [*affirmed* in 78 N. Y. 518].

Pennsylvania.— Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

Tennessee.— Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82.

Texas.— Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79.

Washington.— Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

Wisconsin.—Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

See 37 Cent. Dig. tit. "Negligence," § 123.

53. Baltimore, etc., R. Co. *v.* Cumberland, 12 App. Cas. (D. C.) 598; Denison, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1904) 79 S. W. 320.

54. Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250. And see Rohloff *v.* Fair Haven, etc., R. Co., 76 Conn. 689, 58 Atl. 5.

55. Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952; Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320.

56. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Webster, 6 App. Cas. 182.

Georgia.— Stewart *v.* Southern Bell Tel., etc., Co., 124 Ga. 224, 52 S. E. 331; Western, etc., R. Co. *v.* Rogers, 104 Ga. 224, 30 S. E. 804; Western, etc., R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197.

Illinois.— Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. 971 [*affirming* 59 Ill. App. 561]; Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034 [*affirming* 56 Ill. App. 196]; Economy Light, etc., Co. *v.* Hiller, 113 Ill. App. 103 [*affirmed* in 211 Ill. 568, 71 N. E. 1096], age, capacity, and experience.

Iowa.— Merryman *v.* Chicago, etc., R. Co., 85 Iowa 634, 52 N. W. 545.

Kentucky.—Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258.

Louisiana.— Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

capacity;[57] age, experience, and intelligence;[58] age, experience, and capacity;[59] capacity and discretion;[60] age, capacity, and intelligence;[61] age, experience, and discretion;[62] age and mental and physical development;[63] age, intelligence, experience, and ability to comprehend danger;[64] age, courage, intelligence, and ordinary prudence.[65] It is said that there is no inflexible rule by which to determine the capacity of children for observing and avoiding danger,[66] but a child is bound to use the reason he possesses and exercise the degree of care and caution of which he is capable.[67]

(III) *Age at Which Contributory Negligence Is Chargeable.* The general rule is that an infant of tender years is deemed in law not possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its safety.[68] And while it has been held that the law has prescribed no

Massachusetts.— Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645.

Michigan.— Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Wright *v.* Detroit, etc., R. Co., 77 Mich. 123, 43 N. W. 765.

Missouri.— Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642; Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290, 9 S. W. 577; Boland *v.* Missouri R. Co., 36 Mo. 484; Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960; Anderson *v.* Union Terminal R. Co., 81 Mo. App. 116.

Ohio.— Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757.

Pennsylvania.— Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670 [*quoted* in Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482].

Washington.— Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

See 37 Cent. Dig. tit. "Negligence," § 123.

57. *Illinois.*— Rothschild *v.* Levy, 118 Ill. App. 78.

Maine.— Brown *v.* European, etc., R. Co., 58 Me. 384.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Massachusetts.— Slattery *v.* Lawrence Ice Co., 190 Mass. 79, 76 N. E. 459.

New York.— Atchason *v.* United Traction Co., 90 N. Y. App. Div. 571, 86 N. Y. Suppl. 176.

Texas.— St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123; Missouri, etc., R. Co. *v.* Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196.

58. Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Fitzgerald *v.* Chicago, etc., R. Co., 114 Ill. App. 118; Pittsburgh, etc., R. Co. *v.* Moore, 110 Ill. App. 304; Houston, etc., R. Co. *v.* Bulger, (Tex. Civ. App.) 80 S. W. 557; Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563.

59. Chicago, etc., Coal Co. *v.* Moran, 110 Ill. App. 664 [*affirmed* in 210 Ill. 9, 71 N. E. 38; Chicago, etc., R. Co. *v.* Ohlsson, 70 Ill. App. 487. (child of six); Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985; Illinois Cent. R. Co. *v.* Wilson, 63 S. W. 608, 23 Ky. L. Rep. 684.

60. Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25.

61. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206; Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600 (child of seven); Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981; Citizens' Electric R. Light, etc., Co. *v.* Bell, 26 Ohio Cir. Ct. 691 [*affirmed* in 70 Ohio St. 482, 72 N. E. 1155]; Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374.

62. Kentucky Hotel Co. *v.* Camp, 97 Ky. 424, 30 S. W. 1010, 17 Ky. L. Rep. 297. And see Van Natta *v.* People's St. R., etc., Co., 133 Mo. 13, 34 S. W. 505.

63. Cincinnati Traction Co. *v.* Blackson, 27 Ohio Cir. Ct. 191.

64. Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008.

65. Robinson *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 158, 86 N. Y. Suppl. 442.

66. Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25. Although a child has reached an age of sufficient maturity to be allowed to use the public ways to go to and from school without negligence being imputed to her parents, she is nevertheless required to exercise such a degree of care as is reasonably to be expected of one of her years. Young *v.* Small, 188 Mass. 4, 73 N. E. 1019, 109 Am. St. Rep. 627.

67. Evans *v.* Josephine Mills, 119 Ga. 448, 46 S. E. 674; Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895; Buch *v.* Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; Mowrey *v.* Central City R. Co., 66 Barb. (N. Y.) 43 [*affirmed* in 51 N. Y. 666].

68. *Indiana.*— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728.

Mississippi.— Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587.

New York.— Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Lafferty *v.* Third Ave. R. Co., 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405 [*affirmed* in 176 N. Y. 594, 68 N. E. 1118]; Mullaney *v.* Spence, 15 Abb. Pr. N. S. 319. But see Atchason *v.* United Traction Co., 90 N. Y. App. Div. 571, 86 N. Y. Suppl. 176.

definite age at which a child must arrive before it can be charged with contributory negligence,[69] practically no cases are found which hold that a child under six years of age can be charged with negligence.[70] The decisions are conflicting as to

North Carolina.—Bottoms *v.* Seaboard, etc,. R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784.

Ohio.— Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451.

Pennsylvania.— North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Brown *v.* Schellenberg, 19 Pa. Super. Ct. 286; Mahoney *v.* North Pennsylvania R. Co., 6 Phila. 242.

West Virginia.— Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

England.— Gardner *v.* Grace, 1 F. & F. 359.

Canada.— Merritt *v.* Hepenstal, 25 Can. Sup. Ct. 150; Sangster *v.* T. Eaton Co., 25 Ont. 78 [*affirmed* in 21 Ont. App. 624 (*affirmed* in 24 Can. Sup. Ct. 708)].

See 37 Cent. Dig. tit. "Negligence," § 124.

What might be gross contributory negligence in an adult may be excusable in a person of tender years. Warner *v.* Railroad Co., 6 Phila. (Pa.) 537.

69. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104, 21 N. E. 712; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932.

70. Less than two years.— *Illinois.*— Chicago West Div. R. Co. *v.* Ryan, 131 Ill. 474, 23 N. E. 385.

New Hampshire.— Carney *v.* Concord St. R. Co., 72 N. H. 364, 57 Atl. 218.

New York.— Fisselmayer *v.* Third Ave. R. Co., 2 N. Y. St. 75.

North Carolina.— Bottoms *v.* Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784.

Pennsylvania.— Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

South Carolina.— Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913.

Texas.— Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745.

Wisconsin.— Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

See 37 Cent. Dig. tit. "Negligence," § 124.

Two to three years.— *Indiana.*— Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995.

Kansas.— Missouri Pac. R. Co. *v.* Prewitt, 7 Kan. App. 556, 51 Pac. 923.

Louisiana.— Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400.

Michigan.— Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405.

Missouri.— Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595.

New York.—Prendegast *v.* New York Cent., etc., R. Co., 58 N. Y. 652; Carr *v.* Merchants' Union Ice Co., 91 N. Y. App. Div. 162, 86 N. Y. Suppl. 368.

Ohio.— Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698.

Virginia.— Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455.

Wisconsin.— O'Brien *v.* Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424.

See 37 Cent. Dig. tit. "Negligence," § 124.

Three to four years.— *Illinois.*— True, etc., Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; North Kankakee St. R. Co. *v.* Blatchford, 81 Ill. App. 609.

Iowa.— Fink *v.* Des Moines, 115 Iowa 641, 89 N. W. 28.

Kentucky.— South Covington, etc., St. R. Co. *v.* Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750.

Louisiana.— Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791; Hamilton *v.* Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824, 8 So. 586.

New York.— Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Mangam *v.* Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66 [*affirming* 36 Barb. 230]; Schwier *v.* New York Cent., etc., R. Co., 15 Hun 572.

Tennessee.— Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

West Virginia.— Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

See 37 Cent. Dig. tit. "Negligence," § 124.

But see Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Four to five years.— *Georgia.*— Crawford *v.* Southern R. Co., 106 Ga. 870, 33 S. E. 826.

Illinois.— Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; U. S. Brewing Co. *v.* Stoltenberg, 113 Ill App. 435 [*affirmed* in 211 Ill. 531, 71 N. E. 1081]; Potter *v.* Leviton, 101 Ill. App. 544 [*affirmed* in 199 Ill. 93, 64 N. E. 1029].

Kansas.— Kansas City Suburban Belt R. Co. *v.* Herman, (App. 1900) 62 Pac. 543.

Kentucky.— Reliance Textile, etc., Works *v.* Mitchell, 71 S. W. 425, 24 Ky. L. Rep. 1286.

Massachusetts.— Brennan *v.* Standard Oil Co., 187 Mass. 376, 73 N. E. 472.

Mississippi.— Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587.

Missouri.— Fink *v.* Missouri Furnace Co., 10 Mo. App. 61.

New York.— Dehmann *v.* Beck, 61 N. Y. App. Div. 505, 70 N. Y. Suppl. 29.

Oregon.— Macdonald *v.* O'Reilly, 45 Oreg. 589, 78 Pac. 753.

Pennsylvania.— North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187.

whether children of six are chargeable with negligence or not, some holding that they are not,[71] others that they may be,[72] although not as a matter of law.[73] After the age of seven the rule is that the child may be chargeable with contributory negligence.[74] Children of fourteen years or over are presumptively chargeable with contributory negligence.[75] As regards children younger than fourteen there is considerable conflict of authority as to the presumptions which may be indulged

Washington.— Eskildsen *v.* Seattle, 29 Wash. 583, 70 Pac. 64.

West Virginia.— Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842, 37 W. Va. 421, 16 S. E. 628.

United States.— Morgan *v.* Illinois, etc., Bridge Co., 17 Fed. Cas. No. 9,802, 5 Dill. 96.

See 37 Cent. Dig. tit. "Negligence," § 124.

Five to six years.— Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Bay Shore R. Co. *v.* Harris, 67 Ala. 6; Chicago, etc., R. Co. *v.* Eganolf, 112 Ill. App. 323; Hebard *v.* Mabie, 98 Ill. App. 543; Schnur *v.* Citizens' Traction Co., 153 Pa. St. 29, 25 Atl. 650, 34 Am. St. Rep. 680. A child a little over five years of age cannot be held guilty of contributory negligence in running across the street and into a wagon. American Tobacco Co. *v.* Polisco, 104 Va. 777, 52 S. E. 563. *Contra*, Hayes *v.* Norcross, 162 Mass. 546, 39 N. E. 282.

71. *Alabama.*— Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

Illinois.— Illinois Cent. R. Co. *v.* Jernigan, 198 Ill. 297, 65 N. E. 88 [*affirming* 101 Ill. App. 1]; Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314]; Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69; Cleveland, etc., R. Co. *v.* Scott, 111 Ill. App. 234.

Texas.— Ollis *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 601, 73 S. W. 30.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. 246.

England.— Lynch *v.* Nurdin, 1 Q. B. 29, 5 Jur. 797, 10 L. J. Q. B. 73, 4 P. & D. 672, 41 E. C. L. 422.

Canada.— Ricketts *v.* Markdale, 31 Ont. 610.

See 37 Cent. Dig. tit. "Negligence," § 124.

72. *Illinois.*— Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76, (1890) 24 N. E. 419, 8 L. R. A. 494; Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617; Chicago, etc., R. Co. *v.* Ohlsson, 70 Ill. App. 487.

Iowa.— Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483, 103 N. W. 481.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Missouri.— Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848.

New York.— Thies *v.* Thomas, 77 N. Y. Suppl. 276.

Texas.— Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 46 Am. Rep. 265.

See 37 Cent. Dig. tit. "Negligence," § 124.

73. *Illinois.*—Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617.

Massachusetts.— Mattey *v.* Whittier Mach. Co., 140 Mass. 337, 4 N. E. 575.

Mississippi.— Mackey *v.* Vicksburg, 64 Miss. 777, 2 So. 178.

New York.— Kaplan *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 133, 90 N. Y. Suppl. 585.

Wisconsin.— McVoy *v.* Oakes, 91 Wis. 214, 64 N. W. 748; Johnson *v.* Chicago, etc., R. Co., 56 Wis. 274, 14 N. W. 181.

See 37 Cent. Dig. tit. "Negligence," § 124.

Presumption in absence of evidence.— Where a child seven years old is killed on a railroad track, there being no evidence as to his intelligence or capacity, the *prima facie* presumption is that he was incapable of personal negligence, and contributory negligence cannot be imputed to him, or to his parent or custodian, so as to prevent a recovery in an action by his administrator. Watson *v.* Southern R. Co., 66 S. C. 47, 44 S. E. 375.

74. **Child of seven.**— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206; Chicago City R. Co. *v.* Wilcox, (Ill. 1890) 24 N. E. 419, 8 L. R. A. 494; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Cleveland, etc., R. Co. *v.* Scott, 111 Ill. App. 234; Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600; Reed *v.* Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733. *Contra*, Texas, etc., R. Co. *v.* Fletcher, 6 Tex. Civ. App. 736, 26 S. W. 446.

Child of eight.—Rohloff *v.* Fair Haven, etc., R. Co., 76 Conn. 689, 58 Atl. 5. A boy of eight years, whose mother permits him to play upon the street, is presumably of sufficient intelligence to know the danger of attempting to jump upon the front of a moving locomotive, and is therefore capable of contributory negligence barring a recovery for his death. Miles *v.* Receivers, 17 Fed. Cas. No. 9,544, 4 Hughes 172.

Child of ten.— Chicago Union Traction Co. *v.* McGinnis, 112 Ill. App. 177.

Child of eleven.— Evans *v.* Josephine Mills, 119 Ga. 448, 46 S. E. 674; Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258.

Child of twelve.— Fitzgerald *v.* Chicago, etc., R. Co., 114 Ill. App. 118; Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472.

75. Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952; Rhodes *v.* Georgia R., etc., Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362; Frauenthal *v.* Laclede Gaslight Co., 67 Mo. App. 1; Murphy *v.* Perlstein, 73 N. Y. App. Div. 256, 76 N. Y. Suppl. 657; Zlotovsky *v.* Twenty-Third St. R. Co., 8 Misc. (N. Y.) 463, 28 N. Y. Suppl. 661; Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413.

in in respect of the capacity of a child for contributory negligence. Thus it has been variously held that there is no presumption that a child between seven and fourteen years of age has sufficient capacity to be guilty of contributory negligence;[76] that a child under fourteen is presumed incapable of contributory negligence;[77] that a child of ten[78] or twelve[79] is presumed capable of contributory negligence; and that there is no presumption that a child between ten and fourteen is not capable of contributory negligence.[80]

(iv) *Age at Which Infant Chargeable With Care of Adult.* No arbitrary age has been fixed at which a child is required to exercise the care demanded of an adult.[81] In a few states it is held that this question is not one of fact for the jury, but of law for the court,[82] and that an infant over the age of twelve years will be presumed to be *sui juris*, and chargeable with the same degree of care and caution as an adult, in the absence of proof of mental incapacity.[83] This doctrine is repudiated in many decisions which hold that, while a child of twelve or over may be guilty of contributory negligence,[84] it cannot be said, as matter of law, that he should be required to exercise the same degree of prudence and judgment as an adult,[85] and in every case the question of the

76. George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829; Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670 (thirteen years); Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Trumbo *v.* City Street-Car Co., 89 Va. 780, 17 S. E. 124.

"Where there is no demurrer and the case is submitted to the jury, there is no presumption one way or the other, and the jury must find from the evidence whether the child had sufficient capacity at the time of the accident to know the danger, and to observe due care for its own protection. If it has such capacity and voluntarily goes into danger or to a dangerous place, it cannot recover; otherwise it can." Central R., etc., Co. *v.* Rylee, 87 Ga. 491, 495, 13 S. E. 584, 13 L. R. A. 634.

77. Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 908.

Child of eight.— Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

Child of nine.— Dempsey *v.* Brooklyn Heights R. Co., 98 N. Y. App. Div. 182, 90 N. Y. Suppl. 639.

78. Chicago, etc., R. Co. *v.* Hoffman, 82 Ill. App. 453.

79. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670.

80. Central R., etc., Co. *v.* Golden, 93 Ga. 510, 21 S. E. 68.

81. Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981; Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103.

82. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670 [*reversing* 11 N. Y. Suppl. 692]; Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413.

83. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670 [*reversing* 11 N. Y. Suppl. 692]; McDonald *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 233, 80 N. Y. Suppl. 577; Charlton *v.* Forty-Second St., etc., R. Co., 79 N. Y. App. Div. 546, 80 N. Y. Suppl. 174; Noonan *v.* Obermeyer, etc., Brewing Co., 50 N. Y. App. Div. 377, 63 N. Y. Suppl. 1066; Hunt *v.* Graham, 15 Pa. Super. Ct. 42. See also Dolan *v.* Callender, etc., Co., 26 R. I. 198, 58 Atl. 655.

Where plaintiff must show want of contributory negligence.— When an infant is twelve years of age or over, the burden is upon plaintiff to show the mental capacity of the infant, and establish as a fact that such infant was not possessed of sufficient mental capacity to exercise the degree of care and caution which is chargeable upon an adult, and it then becomes a question for the jury to determine whether the degree of care exercised in the particular case was such as to exonerate the infant from the charge of contributory negligence, measured by its age and capacity. Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; McDonald *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 233, 80 N. Y. Suppl. 577.

A youth of eighteen years of age, of ordinary intelligence and experience, must show some incapacity, in addition to his minority, to warrant a court in instructing, as a matter of law, that he is not required to use the same care as an adult. Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981; Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753.

84. Killelea *v.* California Horseshoe Co., 140 Cal. 602, 74 Pac. 157; Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472; Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229.

85. Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580; Mitchell *v.* Illinois Cent. R. Co., 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472; Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693.

A minor must exercise only such care as children of his age, experience, and intelligence ordinarily use under similar circum-

intelligence of the child and the measure of his capacity is to be left to the determination of the jury.[86]

(v) *Knowledge of Danger.* Notwithstanding the immaturity of a minor if it appears that he knew of the danger he will be held guilty of contributory negligence.[87] Where, however, the child is not conscious of acting imprudently, he cannot be held guilty of contributory negligence.[88]

(vi) *Negligence of Defendant.* While a child may be so young as not to be chargeable with contributory negligence a person who injures it will not be liable unless he himself is guilty of negligence.[89] And if the conduct of the child was the proximate cause of the injury no recovery can be had if defendant could not have avoided the injury by the exercise of due and reasonable care.[90]

b. Particular Acts or Omissions — (i) *Disregard of Warnings.* It is the rule that where a child capable of exercising judgment and discretion has been warned of danger and is injured by acting in disregard of such warnings he is guilty of contributory negligence.[91] The rule, however, has no application where the warning related to a cause entirely different from that which resulted in the injury.[92]

(ii) *Acts in Emergencies.* The rule applicable to acts of adults in emergencies applies equally to children, and such acts will not be deemed negligent.[93]

(iii) *Danger Incurred to Save Life.* A child, voluntarily placing himself in danger to rescue a younger child from imminent peril, is not guilty of contributory negligence as matter of law.[94]

(iv) *Trespassers.* As heretofore stated a child of tender years may be a trespasser so as to preclude recovery,[95] and this is so, even though he is too young

stances. Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374.

When contributory negligence must be shown as defense.— In those states in which defendant must show as a defense that plaintiff has been guilty of contributory negligence it will be assumed until otherwise shown that the minor has exercised the care and circumspection to be expected of one of his years of discretion. Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693.

86. Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103.

87. Loftus *v.* Dehail, 133 Cal. 214, 65 Pac. 379 (holding that where plaintiff, who was a child seven years old, was injured by being pushed into a cellar, and testified that she knew it would hurt her if she jumped in, a finding that she was of such tender years as not to appreciate the danger was not supported by the evidence); Heimann *v.* Kinnare, 190 Ill. 156, 60 N. E. 215, 83 Am. St. Rep. 123, 52 L. R. A. 652 [*reversing* 92 Ill. App. 232]; Carson *v.* Chicago, etc., R. Co., 96 Iowa 583, 65 N. W. 831; Merryman *v.* Chicago, etc., R. Co., 85 Iowa 634, 52 N. W. 545; Hunt *v.* Graham, 15 Pa. Super. Ct. 42; Laylow *v.* Rogers, 3 Lanc. L. Rev. (Pa.) 233.

88. Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501; Delage *v.* Delisle, 10 Quebec Q. B. 481.

89. Lee *v.* Jones, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; Lowery *v.* New York Ice Co., 26 Misc. (N. Y.) 163, 55 N. Y. Suppl. 707 [*affirmed* in 44 N. Y. App. Div. 637, 60 N. Y. Suppl. 1142]; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Brown *v.* Schellenberg, 19 Pa. Super. Ct. 286.

90. Goldstein *v.* People's R. Co., (Del. 1905) 60 Atl. 975.

91. Lebanon Light, etc., Co. *v.* Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Twist *v.* Winona, etc., R. Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626 (warning of danger from turn-table to boy of ten and a half years); Albert *v.* New York, 75 N. Y. App. Div. 553, 78 N. Y. Suppl. 355 (to twelve-year-old boy); Guichard *v.* New, 9 N. Y. App. Div. 485, 41 N. Y. Suppl. 456 (to eight-year-old boy of danger of putting his head over elevator gate); Martin *v.* Cahill, 39 Hun (N. Y.) 445 (to child of nine of danger of scaffold).

92. Gray *v.* Scott, 66 Pa. St. 345, 5 Am. Rep. 371.

93. Geibel *v.* Elwell, 19 N. Y. App. Div. 285, 46 N. Y. Suppl. 76. And see Calumet Electric St. R. Co. *v.* Van Pelt, 68 Ill. App. 582.

The fall of a boy into a place of danger not before known to him, while he was running from threatened harm along the only path open, is not to be deemed the result of his negligence. Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434 [*affirming* 42 Fed. 579].

94. Manzella *v.* Rochester R. Co., 105 N. Y. App. Div. 12, 93 N. Y. Suppl. 457; Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558.

95. See *supra*, V, E, 2, a.

to be guilty of contributory negligence.[96] But the fact that a child was a trespasser and would not otherwise have received the injury is not conclusive evidence of contributory negligence.[97] A child going on premises of another to rescue another from peril is not a trespasser.[98]

C. Imputed Negligence[99] — **1. Doctrine in General.** In order that the concurrent negligence of a third person can be interposed to shield another, whose negligence has caused an injury to one who was without fault, the injured person and the one whose negligence contributed to the injury must have sustained such a relation to each other, in respect to the matter then in progress, that in contemplation of law the negligent act of the third person was, upon the principle of agency, or coöperation in a common or joint enterprise, the act of the person injured,[1] or the relation between the person injured and the one whose negligence contributed to the injury must have been such that the latter was bound to care for and protect the former.[2] Negligence in the conduct of another will not be imputed to the person injured, if he neither authorized such conduct nor participated therein nor had the right or power to control the conduct of such person.[3] The doctrine of imputed negligence is not recognized in Illinois,[4] and has been repudiated in Ohio,[5] and in Nebraska is restricted to the relations of partnership, principal and agent, and master and servant.[6]

2. Negligence of Defendant — a. Necessity. The doctrine of imputed negligence arises only when the negligence of the third person and defendant both contribute to the injury, and where such person was the only one negligent no recovery can be had whether such negligence can be imputed to plaintiff or not.[7]

96. Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 61 N. W. 967.

97. Tully *v.* Philadelphia, etc., R. Co., 2 Pennew. (Del.) 537, 47 Atl. 1019, 82 Am. St. Rep. 425, eight-year-old boy.

98. Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Manzella *v.* Rochester R. Co., 105 N. Y. App. Div. 12, 93 N. Y. Suppl. 457.

99. Admissibility of evidence see *infra*, VIII, C, 3, c.

Burden of proof see *infra*, VIII, C, 2, e.

Instructions see *infra*, VIII, D, 3, a, (III), (D), e.

Pleading see *infra*, VIII, B, 1, j, (III), 2, c, (III).

Questions for jury see *infra*, VIII, D, 2, e.

1. Carmi *v.* Ervin, 59 Ill. App. 555; Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Knightstown *v.* Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379; Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; Quill *v.* New York Cent., etc., R. Co., 16 Daly (N. Y.) 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410]; Jacobi *v.* Haynes, 14 Misc. (N. Y.) 15, 35 N. Y. Suppl. 120.

Applications of rule.— The negligence of an eleven-year-old boy, who while on a wagon into which his father is unloading lumber from a car sees a car approaching, cannot be imputed to the father in an action by the latter for injuries sustained by a collision. Watson *v.* Wabash, etc., R. Co., 66 Iowa 164, 23 N. W. 380. Where goods of a guest are lost at an inn, it is not imputable to him as negligence, so as to defeat his action against the innkeeper for the loss, that the goods were stolen by another guest of the inn, whom he did not bring there, even though, with his consent, he is placed to sleep in the same room with such other guest, but otherwise if he brought the guest there. Olson *v.* Crossman, 31 Minn. 222, 17 N. W. 375.

2. Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152.

3. *Connecticut.*— Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, 52 Am. Rep. 587, failure of intervening owner to extinguish fire cannot be imputed to plaintiff.

Illinois.— Chicago Union Traction Co. *v.* Leach, 117 Ill. App. 169.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437.

Minnesota.— Koplitz *v.* St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74.

New York.— Mott *v.* Hudson River R. Co., 8 Bosw. 345.

4. Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385.

5. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130; Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Toledo Real Estate, etc., Co. *v.* Putney, 20 Ohio Cir. Ct. 486, 10 Ohio Cir. Dec. 698; Norwood *v.* Hauk, 19 Ohio Cir. Ct. 656, 10 Ohio Cir. Dec. 826; Smith *v.* Newark Ice, etc., Co., 8 Ohio S. & C. Pl. Dec. 283.

6. Hajsek *v.* Chicago, etc., R. Co., 68 Nebr. 539, 94 N. W. 609, 5 Nebr. (Unoff.) 67, 97 N. W. 327.

7. Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119; Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Chicago, etc., R. Co. *v.* Schumilowsky, 8 Ill. App. 613; Shaw *v.*

b. Wilful or Gross Negligence of Defendant. Where defendant is guilty of gross negligence to which contributory negligence is not a defense, the contributory negligence of a third person cannot be imputed to the person injured.[8]

3. Common or Joint Enterprise. To constitute a common or joint purpose within the rule as to imputed negligence there should be a joint interest or community of interest in the object or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in its control and management.[9] Thus a master and servant cannot be said to be engaged in a joint enterprise.[10] Nor does the relation of husband and wife of itself create a common enterprise.[11] And the relation is not created by the mere fact that two persons are doing something together.[12]

4. Husband and Wife. The better rule seems to be that the negligence of the husband cannot be imputed to the wife to prevent recovery by her for injuries she has received,[13] although there are many decisions which maintain the contrary doctrine,[14] and contributory negligence on the part of the wife which

Craft, 37 Fed. 317; Sheffield *v.* Central Union Tel. Co., 36 Fed. 164.

8. Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400, 49 N. W. 670.

9. Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666; Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763; Kinmouth *v.* McDougall, 19 N. Y. Suppl. 771, holding that mischievous conduct of school children, during recess, without their teacher's knowledge or consent, in vexing a ram, which attacked and injured the teacher, cannot be imputed to her in an action by her for injuries.

Where two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority to act for all with respect to the conduct or the means employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all. Koplitz *v.* St. Paul, 86 Minn. 378, 90 N. W. 794, 58 L. R. A. 74.

10. Where a son was in the employ of his father the father's negligence cannot be imputed to him on the ground that they are engaged in a joint enterprise. Brush Electric Light, etc., Co. *v.* Lefevre, (Tex. Civ. App. 1900) 55 S. W. 396.

11. Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379, holding where a wife is injured in passing over a sidewalk by tripping on a loose board, which flew up as her husband stepped on it, that they were returning from church together did not make them engaged in a common enterprise, so that the husband's negligence will affect her right to recover.

12. Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984 (holding that negligence of plaintiff's companion, who was merely walking upon the sidewalk with him, in stepping upon a loose board, whereby plaintiff was thrown and injured, cannot be imputed to plaintiff so as to prevent a recovery from the city on account of its negligence in keeping the walk in repair); Schoenfeld *v.* Metropolitan St. R. Co., 40 Misc. (N. Y.) 201, 81 N. Y. Suppl. 644. And see Lane *v.* Atlantic Works, 111 Mass. 136.

13. *Illinois.*— Koehler *v.* Miller, 21 Ill. App. 557.

Indiana.— Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416.

Iowa.— Bailey *v.* Centerville, 115 Iowa 271, 88 N. W. 379.

Massachusetts.— Street *v.* Holyoke, 105 Mass. 82, 7 Am. Rep. 500.

Missouri.— Hedges *v.* Kansas City, 18 Mo. App. 62; Flori *v.* St. Louis, 3 Mo. App. 231.

New York.— Platz *v.* Cohoes, 24 Hun 101 [*affirmed* in 89 N. Y. 219, 42 Am. Rep. 286].

United States.— Shaw *v.* Craft, 37 Fed. 317; Sheffield *v.* Central Union Tel. Co., 36 Fed. 164.

See 37 Cent. Dig. tit. "Negligence," § 132; 1 Thompson Negl. § 504.

The contributory negligence of a husband in the purchase of a drug to be used by his wife is not to be imputed to her in an action by her administrator against the dealer for death resulting from the use of such drug, unless she constituted him her agent; and in simply making known to her husband her desire for the medicine, by reason of which he obtains it, the wife did not constitute him her agent, so that his contributory negligence in purchasing can be imputed to her. Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

14. *California.*— McFadden *v.* Santa Ana, etc., R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252.

Connecticut.— Peck *v.* New York, etc., R. Co., 50 Conn. 379.

Iowa.— See Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257.

New Jersey.— Pennsylvania R. Co. *v.* Goodenough, 55 N. J. L. 577, 28 Atl. 3, 22 L. R. A. 460.

Texas.— Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344.

would defeat an action by her will defeat an action by her husband for loss of her services.[15]

5. Co-Employees or Fellow Servants. It is the general rule that the negligence of one employee will not be imputed to another employee so as to defeat a recovery for injuries caused by the negligence of a third person other than their common employees, although they are engaged in a common work,[16] where the injured employee has no control over the acts of the other,[17] or is entitled to rely on the care of the other employee.[18] Where, however, the employee contributing

United States.— Huntoon *v.* Trumbull, 12 Fed. 844, 2 McCrary 314.

See 37 Cent. Dig. tit. "Negligence," § 132.

15. Winner *v.* Oakland Tp., 158 Pa. St. 405, 27 Atl. 1110, 1111; Chicago, etc., R. Co. *v.* Honey, 63 Fed. 39, 12 C. C. A. 190, 26 L. R. A. 42 [*reversing* 59 Fed. 423], although McClain Code Iowa, § 3396, provides that a husband shall not be responsible for civil injuries committed by his wife.

16. *Illinois.*— St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Chicago, etc., R. Co. *v.* Vipond, 112 Ill. App. 558 [*affirmed* in 212 Ill. 199, 72 N. E. 22]. But *contra*, see Chicago, etc., R. Co. *v.* McKittrick, 78 Ill. 619.

Indiana.— Abbitt *v.* Lake Erie, etc., R. Co., (1895) 40 N. E. 40; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550.

Massachusetts.— Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272.

New York.— McCormack *v.* Nassau Electric R. Co., 18 N. Y. App. Div. 333, 46 N. Y. Suppl. 230; Perry *v.* Lansing, 17 Hun 34, negligence of employees of tugboat not imputed to pilot.

Texas.— Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949; St. Louis Southwestern R. Co. *v.* Swinney, 34 Tex. Civ. App. 219, 78 S. W. 547.

United States.— Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327; Cincinnati, etc., R. Co. *v.* Clark, 57 Fed. 125, 6 C. C. A. 281. But see Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

See 37 Cent. Dig. tit. "Negligence," § 139.

Restatement of rule.— The doctrine of nonliability of a master for injury to a servant caused by the negligence of a fellow servant is based upon the implied contract of the servant to assume the risk of his fellow servant's negligence, and does not extend to a stranger to the relation, who, in conjunction with a servant, injures a fellow servant of the latter, but he is liable like any other joint tort-feasor. Kentucky, etc., Bridge, etc., Co. *v.* Sydnor, 119 Ky. 18, 82 S. W. 989, 26 Ky. L. Rep. 951, 68 L. R. A. 183.

17. *Alabama.*— Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618; Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666.

Arkansas.— St. Louis, etc., R. Co. *v.* McFall, 75 Ark. 30, 86 S. W. 824, 69 L. R. A. 217, negligence of engineer not imputable to conductor so situated that he could not control him by signals.

Michigan.— McKernan *v.* Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

Missouri.— Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70.

New York.— Seaman *v.* Koehler, 122 N. Y. 646, 25 N. E. 353; Geary *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 514, 82 N. Y. Suppl. 1016 [*affirmed* in 177 N. Y. 535, 69 N. E. 1123]; Bailey *v.* Jourdan, 18 N. Y. App. Div. 387, 46 N. Y. Suppl. 399; Galligan *v.* Metropolitan St. R. Co., 33 Misc. 87, 67 N. Y. Suppl. 180; Le Blanc *v.* Interurban St. R. Co., 88 N. Y. Suppl. 150. But see Krintzman *v.* Interurban St. R. Co., 84 N. Y. Suppl. 243, holding that the negligence of the driver of a wagon is chargeable to a fellow servant riding on the wagon with him.

Texas.— See Houston City St. R. Co. *v.* Richart, (Civ. App. 1894) 27 S. W. 918.

See 37 Cent. Dig. tit. "Negligence," § 134.

Illustrations.— Where it does not appear that plaintiff had any control or management of a wagon driven by his fellow servant, and in which he was riding when the accident occurred, the doctrine that the driver's negligence is to be imputed to him will not apply in an action for damages for injuries from a collision between the wagon and defendant's street car. Anderson *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 104, 61 N. Y. Suppl. 899 [*citing* Hoag *v.* New York, etc., R. Co., 111 N. Y. 199, 18 N. E. 648; Hobson *v.* New York Condensed Milk Co., 25 N. Y. App. Div. 111, 49 N. Y. Suppl. 209]. Where the driver of a furniture van and his helper, who is injured in a collision with a street car, are not engaged in a common enterprise or joint adventure, but are merely fellow servants in the employ of the same master, but with distinct duties, the driver's negligence is not imputable to the helper, so as to prevent his recovery. Waters *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1120. In an action by a conductor of a horse car against the owner of a truck, for injuries caused by a collision, the concurring negligence of the driver of the car, who alone had charge of stopping and starting the horses to avoid collisions, is not imputable to the conductor. Hobson *v.* New York Condensed Milk Co., 25 N. Y. App. Div. 111, 49 N. Y. Suppl. 209.

18. Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Harper *v.* Delaware, etc., R. Co., 22 N. Y. App. Div. 273, 47 N. Y. Suppl. 933, holding that the failure of a street car conductor to use due care at a railroad crossing in ascertaining whether the track was clear does not necessarily relieve the railroad company from liability for the death of a motorman, who relied upon the conductor's assurance that the track was clear. See also next preceding note.

to the injury is under the injured servant's direction and control, his negligence will be imputed to the latter.[19] So where by agreement between two employees it became the duty of one of them to look out for and give notice of danger to the other, the negligence of the former will be imputed to the latter,[20] and where they are engaged in a joint enterprise the negligence of one will be imputed to the other.[21]

6. Agent or Other Representative — a. Master and Servant — (I) *Servant to Master.* It is a universal rule that the negligence of a servant is imputable to the master to prevent recovery by him for injuries to which the servant's negligence contributes,[22] in other words the master assumes the risk of the negligence of the employee,[23] unless the negligent act of the servant was not committed while acting within the scope of his employment.[24] And this rule is carried to the extent that knowledge of danger on the part of the servant is also imputed to the master.[25] Unless the relation of master and servant exists between the parties the acts of one, although done in the interest of the other, will not be imputed to the other.[26]

(II) *Master to Servant.* The negligence of the master will not be imputed to a servant so as to prevent recovery by the latter for injuries sustained by a

19. Minster *v.* Citizens' R. Co., 53 Mo. App. 276; Seaman *v.* Koehler, 122 N. Y. 646, 25 N. E. 353.

20. Abbitt *v.* Lake Erie, etc., R. Co., 150 Ind. 498, 50 N. E. 729, the relation of principal and agent thus existing between them.

21. Two persons, with a wagon, engaged in moving furniture, are engaged in a joint venture, and the negligence of one in the management of the wagon will be imputable to the other. Schron *v.* Staten Island Electric R. Co., 16 N. Y. App. Div. 111, 45 N. Y. Suppl. 124.

22. *Georgia.*— Read *v.* City, etc., R. Co., 115 Ga. 366, 41 S. E. 629.

Indiana.— Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863.

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714.

Massachusetts.— Yarnold *v.* Bowers, 186 Mass. 396, 71 N. E. 799.

Minnesota.— La Riviere *v.* Pemberton, 46 Minn. 5, 48 N. W. 406.

Missouri.—Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.

New York.— Reed *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 87, 68 N. Y. Suppl. 539; Smith *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 493, 38 N. Y. Suppl. 666, 39 N. Y. Suppl. 1119; Van Lien *v.* Scoville Mfg. Co., 14 Abb. Pr. N. S. 74.

United States.— The Livingstone, 104 Fed. 918.

See 37 Cent. Dig. tit. "Negligence," § 139.

Negligence of servant driving imputed to master riding in vehicle. Smith *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 493, 38 N. Y. Suppl. 666, 39 N. Y. Suppl. 1119.

The negligence of a slave in going to sleep on a railroad track is imputable to his master. Sims *v.* Macon, etc., R. Co., 28 Ga. 93.

23. Page *v.* Hodge, 63 N. H. 60, 4 Atl. 805.

24. St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357; San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1898) 46 S. W. 374.

Illustration.— Where a servant, without authority of his master, takes the children of his master in a wagon in which he delivers his master's goods, and the children are killed by an accident at a railroad crossing through the negligence of the railroad company and the contributory negligence of the servant, such contributory negligence does not bar recovery by the master against the railroad company for such negligence. Faust *v.* Philadelphia, etc., R. Co., 191 Pa. St. 420, 43 Atl. 329.

25. Koslovki *v.* International Heater Co., 75 N. Y. App. Div. 60, 77 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 631, 71 N. E. 1132]. And see Olson *v.* Schultz, 67 Minn. 494, 70 N. W. 779, 64 Am. St. Rep. 437, 36 L. R. A. 790.

26. White Sewing Mach. Co. *v.* Richter, 2 Ind. App. 331, 28 N. E. 446; Consolidated Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603 (holding that negligence of a policeman called by a neighbor to discover a gas leak, in his hunt presenting a lighted candle at a cellar opening in vacant adjoining premises, thereby occasioning an explosion, is not imputable to the owner of the vacant house); Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178 (holding that a mason employed on a house is not so far the agent of the owner as to make the latter responsible if the mason negligently omits to shut a door where he is not at work, whereby sparks from an engine enter and fire the house, and bar the right of the owner to recover against the railroad company); Schermerhorn *v.* Metropolitan Gas Light Co., 5 Daly (N. Y.) 144 (negligence of plumber called in to ascertain leak in gas pipe not imputed to owner); Norwood *v.* Hauk, 19 Ohio Cir. Ct. 656, 10 Ohio Cir. Dec. 826 (holding that the liability of a village for damages for injuries due to a defective sidewalk cannot be defeated by the fact that the one injured was led upon the defective place in the walk by a friend whose guidance she had accepted).

third person.[27] Nor will knowledge on the part of the master be imputed to his servant.[28]

b. Custodian of Child to Parent. The rules applicable to the imputation of the negligence of a servant to his master apply to the negligence of the custodian of a child and such negligence will defeat recovery by the parent.[29] But it has been held that negligence of the custodian will be imputed to the parent only who intrusted the child to such custodian and not to the other.[30] And under statutory provisions it has been held that the wife does not, from the mere marital relation, occupy such a position in the care and custody of a minor child as will defeat recovery by the husband for its death caused by her contributory negligence in permitting it to go into a place of danger.[31]

c. Custodian of Infirm Person. Where one by reason of his infirmities places himself in the care of another the negligence of such other will be imputed to him.[32] But the fact that an infirm person at the time of the injury is in the company of persons not his servants or employees and who did not owe him any duty does make their negligence imputable to him.[33]

d. Vendor to Purchaser. The relation of vendor and purchaser is not such that negligence of the former will be imputed to the latter.[34] But where the loss results from the negligence of a consignor in preparing an article for shipment it will be imputed to the consignee in favor of the carrier.[35]

e. Bailee to Bailor. Where property which is in the possession of a bailee and is being used in accordance with the terms of the bailment is injured by a

27. Siegel *v.* Norton, 209 Ill. 201, 70 N. E. 636; Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186 (negligence of railroad company not imputed to a yardmaster in not keeping watchman at street car crossing); Brush Electric Light, etc., Co. *v.* Lefevre, (Tex. Civ. App. 1900) 55 S. W. 396 (negligence of father not imputed to a son employed by him); Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939 (holding that negligence of a railroad contractor in failing to send out a flagman cannot be imputed to one of his employees); Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631 (negligence of contractor not imputed to his servant).

28. Martin *v.* Algona, 40 Iowa 390 (knowledge by owner of team of spirited character of horses not imputed to driver injured thereby); St. Louis Expanded Metal Fireproofing Co. *v.* Dawson, 30 Tex. Civ. App. 261, 70 S. W. 450 (knowledge by building contractor of fact that concrete floor had not had time to harden not imputed to employee); Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631 (knowledge by railroad contractor of rules of railroad not imputed to his employee). But see Bowser *v.* Toledo, 12 Ohio Cir. Ct. 631, 5 Ohio Cir. Dec. 672.

29. Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278; Cauley *v.* East St. Louis Electric St. R. Co., 58 Ill. App. 151; Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654; Schlenks *v.* Central Pass. R. Co., 23 S. W. 589, 15 Ky. L. Rep. 409; Williams *v.* Gardiner, 58 Hun (N. Y.) 508, 12 N. Y. Suppl. 612; Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

30. Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553.

31. Macdonald *v.* O'Reilly, 45 Oreg. 589, 78 Pac. 753.

32. New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

Illustration.— Where a person was killed while in a wagon crossing a railroad track, negligence on the part of the driver of the wagon is imputable to deceased, who was blind, and unable to take care of himself, and who, of his own volition, confided himself to the care of such driver, his father. Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

What is negligence on part of custodian.— In an action for death of plaintiff's husband, who was insane, by his being struck by a street railway car while he was at large and unattended, the fact that he was so at large did not necessarily constitute contributory negligence on the part of the custodian. Simpson *v.* Rhode Island Co., 26 R. I. 200, 58 Atl. 658.

33. Glidden *v.* Reading, 38 Vt. 52, 88 Am. Dec. 639.

34. Mooney *v.* Beattie, 180 Mass. 451, 62 N. E. 725, 70 L. R. A. 831. A city is not relieved from liability for damage to property caused by the collapse of a sewer which it was the city's duty to maintain by showing that a former owner of the property alleged to have been damaged would be estopped to claim such damages, or was guilty of contributory negligence in causing the collapse of the culvert, in the absence of proof of a covenant in the chain of title making such estoppel or contributory negligence run with the land. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

35. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

third party, the negligence of the bailee contributing to the injury is imputable to the bailor;[36] and on this ground the negligence of a carrier of goods has been imputed to the shipper.[37]

7. Carrier to Passenger — a. Public Conveyances in General. The rule laid down by the leading English decision is that the negligence of a carrier will be imputed to a passenger injured by the negligence of a third person, to which the carrier contributed,[38] and this doctrine has been adopted by a few English and American decisions.[39] The decision has, however, been expressly overruled in England[40] and disapproved by the United States supreme court,[41] and the great weight of authority is to the effect that the negligence of a carrier will not be imputed to a passenger who is injured by the concurrent negligence of the carrier and another and who exercises and can exercise no control over such carrier.[42]

36. *Maine.*— Moore *v.* Stetson, 96 Me. 197, 52 Atl. 767.

Mississippi.— Illinois Cent. R. Co. *v.* Sims, 77 Miss. 325, 27 So. 527, 49 L. R. A. 322.

Ohio.— Puterbaugh *v.* Reasor, 9 Ohio St. 484.

Pennsylvania.— Forks Tp. *v.* King, 84 Pa. St. 230.

Texas.— Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57.

See 37 Cent. Dig. tit. "Negligence," § 140.

Illustration.— The owner of a horse who lends it to another who, becoming drunk, rides it for eight hundred feet upon a railroad track, and it is scared by an approaching train, and, running into a trestle, is killed, cannot recover, the borrower being the owner's agent, and it makes no difference that the company had no fences or cattle-guards at the point where the horse entered upon the track. Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55, 4 N. E. 410.

37. Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560; Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221.

38. Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, 65 E. C. L. 115.

The ground on which this decision was based was that deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner and his servants, that if any injury resulted from their negligence, he must be considered a party to it. Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, 65 E. C. L. 115.

39. Brown *v.* New York Cent. R. Co., 31 Barb. (N. Y.) 385 (the judgment in this case was affirmed on other grounds in 32 N. Y. 597, but the rule of the English cases is disapproved); Mooney *v.* Hudson River R. Co., 5 Rob. (N. Y.) 548; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91; Armstrong *v.* Lancashire, etc., R. Co., L. R. 10 Exch. 47, 44 L. J. Exch. 89, 33 L. T. Rep. N. S. 228, 23 Wkly. Rep. 295.

40. The Bernina, 12 P. D. 58, 56 L. J. P. D. & Adm. 17, 56 L. T. Rep. N. S. 258, 35 Wkly. Rep. 314.

41. Little *v.* Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652.

42. Louisville, etc., Packet Co. *v.* Mulligan, 77 S. W. 704, 25 Ky. L. Rep. 1287; New York, etc., R. Co. *v.* Cooper, 85 Va. 939, 9 S. E. 321. And see cases cited in subsequent notes in this section.

Reason for rule.— In Little *v.* Hackett, 116 U. S. 366, 375, 6 S. Ct. 391, 29 L. ed. 652, it is said: "The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." In Bennett *v.* New Jersey R., etc., Co., 36 N. J. L. 225, 227, 13 Am. Rep. 435, in speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, 65 E. C. L. 115, the court, by the chief justice, said: "Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver, or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so on the same ground each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes."

Under this rule the negligence of the driver of a public carriage, omnibus, or stage coach will not be imputed to a passenger.[43] The same rule is applied in case of injuries to passengers on vessels,[44] steam railroads,[45] or street cars.[46]

b. Hired Conveyances. Where a person hires a conveyance with a driver and merely gives directions as to destination, exercising no other control over the driver, the negligence of the driver will not be imputed to him so as to prevent recovery for injuries caused by the concurring negligence of the driver and another, such hiring not creating the relation of master and servant.[47] But no recovery can be had where the passenger was exercising control over the driver.[48]

c. Private Conveyances. While there are some decisions to the contrary,[49] the great weight of authority is that the negligence of the driver of a private

43. **Public carriage.**— Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; New York, etc., R. Co. *v.* Cooper, 85 Va. 939, 9 S. E. 321; Little *v.* Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652 [*disapproving* Thorogood *v.* Bryan, 8 C. B. 115, 18 L. J. C. P. 336, 65 E. C. L. 115]; Missouri Pac. R. Co. *v.* Texas Pac. R. Co., 41 Fed. 316. Plaintiff while riding as a passenger in a public carriage driven by the owner thereof was thrown from the carriage and injured. The accident was due to a defect in the highway. There was evidence that the driver of the carriage knew of the defect in the highway, and had not given notice of the defect to any officer of the town, as required by Rev. St. c. 18, § 80. There was no claim that plaintiff had any notice of the defective condition of the highway prior to the accident. It was held that, while plaintiff was chargeable with the driver's knowledge of the defect, she was not chargeable with his breach of duty in failing to give the statutory notice of the defect. Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844.

Stage coach.— Becke *v.* Missouri Pac. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157.

Omnibus.— Landon *v.* Chicago, etc., R. Co., 92 Ill. App. 216; Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309; Rigby *v.* Hewitt, 5 Exch. 240, 19 L. J. Exch. 291; Mathews *v.* London St. Tramways Co., 52 J. P. 774, 58 L. J. Q. B. 12, 60 L. T. Rep. N. S. 47.

44. Markham *v.* Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131; Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 20 C. C. A. 86.

45. *Arkansas.*— Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

Indiana.— Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186.

Kansas.— Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601, 44 Pac. 628.

Minnesota.— Flaherty *v.* Minneapolis, etc., R. Co., 39 Minn. 328, 40 N. W. 160, 12 Am. St. Rep. 654, 1 L. R. A. 680.

New York.— Webster *v.* Hudson River R. Co., 38 N. Y. 260; Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove *v.* New York, etc., R. Co., 6 Duer 382 [*affirmed* in 20 N. Y. 492, 75 Am. Dec. 418].

Pennsylvania.— Bunting *v.* Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

See 37 Cent. Dig. tit. "Negligence," § 145.

46. *Alabama.*— Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413.

Arkansas.— Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

District of Columbia.— Woodiey *v.* Baltimore, etc., R. Co., 19 D. C. 542.

Missouri.— Kuttner *v.* Lindell R. Co., 29 Mo. App. 502.

New Jersey.— Bennett *v.* New Jersey R., etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435.

New York.— McCallum *v.* Long Island R. Co., 38 Hun 569.

Ohio.— Covington Transfer Co. *v.* Kelly, 36 Ohio St. 86.

Texas.— Gulf, etc., R. Co. *v.* Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125.

United States.— Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

See 37 Cent. Dig. tit. "Negligence," § 146.

47. *District of Columbia.*— Baltimore, etc., R. Co. *v.* Adams, 10 App. Cas. 97.

Georgia.— East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281.

Illinois.— Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119.

Indiana.— Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309.

Iowa.— Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480.

Massachusetts.— Randolph *v.* O'Riordon, 155 Mass. 331, 29 N. E. 583.

Minnesota.— Koplitz *v.* St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74.

Missouri.— Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186.

New Hampshire.— Noyes *v.* Boscawen, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410.

New Jersey.— New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126.

New York.— Lewis *v.* Long Island R. Co., 162 N. Y. 52, 56 N. E. 548.

North Carolina.— Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

See 37 Cent. Dig. tit. "Negligence," § 143.

48. Dryden *v.* Pennsylvania R. Co., 211 Pa. St. 620, 61 Atl. 249. And see Callahan *v.* Sharp, 27 Hun (N. Y.) 85.

49. Mullen *v.* Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 693 [*following* Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274]; Whittaker *v.* Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621;

conveyance will not be imputed to a person riding with him but who has no authority or control over him,[50] such as that of master and servant.[51] To create the imputation of negligence the passenger must have assumed such control and direction of the vehicle as to be considered practically in the exclusive possession of it.[52] Merely making suggestions as to the route to be taken,[53] or warning the driver of the danger, does not amount to sufficient authority or control.[54] The negligence of the driver will not be imputed to persons on the vehicle at the invi-

Omaha, etc., R. Co. *v.* Talbot, 48 Nebr. 627, 67 N. W. 599; Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30; Ritger *v.* Milwaukee, 99 Wis. 190, 74 N. W. 815; Otis *v.* Janesville, 47 Wis. 422, 2 N. W. 783; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558. See also Slater *v.* Burlington, etc., R. Co., 71 Iowa 209, 32 N. W. 264; Payne *v.* Chicago, etc., R. Co., 39 Iowa 523; Evensen *v.* Lexington, etc., St. R. Co., 187 Mass. 77, 72 N. E. 355.

50. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Delaware.— Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543.

Georgia.— Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67.

Illinois.— West Chicago St. R. Co. *v.* Dougherty, 110 Ill. App. 204 [*affirmed* in 209 Ill. 241, 70 N. E. 586].

Indiana.— Michigan City *v.* Boeckling, 122 Ind. 39, 23 N. E. 518; Knightstown *v.* Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827.

Iowa.— Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152.

Kansas.— Leavenworth *v.* Hatch, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309.

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714.

Maine.— State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. 36.

Maryland.— Baltimore, etc., R. Co. *v.* State, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Dec. 159.

Minnesota.— Follman *v.* Mankato, 35 Minn. 522, 29 N. W. 317, 59 Am. Rep. 340.

New Hampshire.— Noyes *v.* Boscawen, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410.

New York.— Dyer *v.* Erie R. Co., 71 N. Y. 228; Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Kleiner *v.* Third Ave. R. Co., 36 N. Y. App. Div. 191, 55 N. Y. Suppl. 394; Strauss *v.* Newburgh Electric R. Co., 6 N. Y. App. Div. 264, 39 N. Y. Suppl. 998; Kessler *v.* Brooklyn Heights R. Co., 3 N. Y. App. Div. 426, 38 N. Y. Suppl. 799; Van Vranken *v.* Clifton Springs, 86 Hun 67, 33 N. Y. Suppl. 329; Penna. *v.* Interurban St. R. Co., 48 Misc. 647, 96 N. Y. Suppl. 208; Bennett *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 765; McCaffrey *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 495; Metcalf *v.* Baker, 11 Abb. Pr. N. S. 431; Knapp *v.* Dagg, 18 How. Pr. 165.

North Carolina.— Duval *v.* Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722, in which it was said that the ground for the doctrine of imputed negligence in any of its phases is the assumed identity of the passenger and driver arising out of an implied agency.

North Dakota.— Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

Ohio.— Wheeling, etc., R. Co. *v.* Suhrwiar, 22 Ohio Cir. Ct. 560, 12 Ohio Cir. Dec. 809; Pears *v.* Cleveland, 4 Ohio Dec. (Reprint) 329, 1 Clev. L. Rep. 328.

Pennsylvania.— Little *v.* Central Dist., etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848; Carlisle *v.* Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483. See Mann *v.* Weiand, 81* Pa. St. 243.

Tennessee.— Hydes Ferry Turnpike Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69.

Texas.— Missouri, etc., R. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Bryant *v.* International, etc., R. Co., 19 Tex. Civ. App. 88, 46 S. W. 82.

Washington.— Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

United States.— Union Pac. R. Co. *v.* Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800; Sheffield *v.* Central Union Tel. Co., 36 Fed. 164.

Illustration.— Negligence of a truck driver, for whom plaintiff was not responsible, and with whom he was riding when injured in a collision with a street car, could not be imputed to him, and would not defeat his recovery for negligence of the motorman. Robinson *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 158, 86 N. Y. Suppl. 442 [*affirmed* in 179 N. Y. 593, 72 N. E. 1150].

Unless at fault for the negligence of the driver of a private vehicle, his negligence is not imputable to one who is riding therein. Chicago City R. Co. *v.* Wall, 93 Ill. App. 411.

51. See *supra*, VII, C, 6, a, (I). And see Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; Buckler *v.* Newman, 116 Ill. App. 546.

Where the driver of a private conveyance is not employed by the person riding therein, the negligence of the driver cannot be imputed to such person. Little *v.* Central Dist., etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848.

52. Duvall *v.* Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722; Crampton *v.* Ivie, 126 N. C. 894, 36 S. E. 351. And see Flood *v.* London West, 23 Ont. App. 530.

53. Zimmermann *v.* Union R. Co., 28 N. Y. App. Div. 445, 51 N. Y. Suppl. 1.

54. Bergold *v.* Nassau Electric R. Co., 30 N. Y. App. Div. 438, 52 N. Y. Suppl. 11.

tation of the owner,[55] and riding gratuitously,[56] even though at his own request,[57] or to persons riding without the knowledge of the driver.[58] And in applying this rule it has been held that the fact that the relationship between the driver of the vehicle and the other occupant thereof is husband and wife will not render the negligence of the husband imputable to the wife;[59] so also the rule has been applied in cases where the relationship of the driver and other occupant of the vehicle was that of fellow-servants,[60] and where the relationship was that of parent and child whether the driver who was negligent was the parent[61] or the

55. *Illinois.*— Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Chicago City R. Co. *v.* Wall, 93 Ill. App. 411; West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547; Carmi *v.* Ervin, 59 Ill. App. 555.

Indiana.— Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812; Lake Shore, etc., R. Co. *v.* Boyts, (App. 1896) 43 N. E. 667.

Kentucky.— Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. Rep. 714; Bevis *v.* Vanceburg Tel. Co., 89 S. W. 126, 28 Ky. L. Rep. 142.

Maryland.— United R., etc., Co. *v.* Biedler, 98 Md. 564, 56 Atl. 813.

Michigan.— Hampel *v.* Detroit, etc., R. Co., 138 Mich. 1, 100 N. W. 1002, 110 Am. St. Rep. 275.

Minnesota.— Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767; Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763.

Mississippi.—Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, 13 So. 693, negligence of driver of vehicle who is the son of the owner cannot be imputed to a person riding therein on the owner's invitation.

Missouri.— Marsh *v.* Kansas City So. R. Co., 104 Mo. App. 577, 78 S. W. 284.

New York.—Dyer *v.* Erie R. Co., 71 N. Y. 228; Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Mack *v.* Shawangunk, 98 N. Y. App. Div. 577, 90 N. Y. Suppl. 760.

North Carolina.— Duval *v.* Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722.

Virginia.— Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

Canada.— Foley *v.* East Flamborough Tp., 26 Ont. App. 43 [*reversing* 29 Ont. 139].

See 37 Cent. Dig. tit. "Negligence," § 147.

56. Noonan *v.* Consolidated Traction Co., 64 N. J. L. 579, 46 Atl. 770; Fisher *v.* Mt. Vernon, 41 N. Y. App. Div. 293, 58 N. Y. Suppl. 499; Scarangello *v.* Interurban St. R. Co., 90 N. Y. Suppl. 430; Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190 [*affirming* 75 Fed. 644].

57. Morris *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 78, 71 N. Y. Suppl. 321 [*affirmed* in 170 N. Y. 592, 63 N. E. 1119]; Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676. And see Mann *v.* Weiand, 81* Pa. St. 243.

58. Cincinnati St. R. Co. *v.* Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340; Wright *v.* Cincinnati St. R. Co., 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159.

59. *Indiana.*— Indianapolis St. R. Co. *v.* Johnson, (1904) 72 N. E. 571; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

Kansas.— Reading Tp. *v.* Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355.

Minnesota.— Teal *v.* St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945; Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Finley *v.* Chicago, etc., R. Co., 71 Minn. 471, 74 N. W. 174.

Missouri.— Munger *v.* Sedalia, 66 Mo. App. 629.

New York.— Lewin *v.* Lehigh Valley R. Co., 41 N. Y. App. Div. 89, 58 N. Y. Suppl. 113; Platz *v.* Cohoes, 24 Hun 101; Platz *v.* Cohoes, 8 Abb. N. Cas. 392.

Texas.— Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327.

See 37 Cent. Dig. tit. "Negligence," § 149.

Contra.— Carlisle *v.* Sheldon, 38 Vt. 440; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22. And see Toledo, etc., R. Co. *v.* Crittenden, 42 Ill. App. 469, holding that where a man and his wife are at a railroad station with a team, and she is in the vehicle and he is not, negligence on his part contributing to an injury to the wife will be imputed to her.

60. See *supra*, VII, C, 5.

61. *Illinois.*— Buckler *v.* Newman, 116 Ill. App. 546.

New York.— Lewin *v.* Lehigh Valley R. Co., 52 N. Y. App. Div. 69, 65 N. Y. Suppl. 49; Hennessey *v.* Brooklyn City R. Co., 6 N. Y. App. Div. 206, 39 N. Y. Suppl. 805. *Contra*, Callahan *v.* Sharp, 27 N. Y. 85.

Ohio.— St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 1 N. E. 519.

Texas.— Central Texas, etc., R. Co. *v.* Gibson, (Civ. App. 1904) 83 S. W. 862; Houston City St. R. Co. *v.* Richart, (Civ. App. 1894) 27 S. W. 918.

United States.— Kowalski *v.* Chicago, etc., R. Co., 84 Fed. 586; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574. But see Delaware, etc., R. Co. *v.* Devore, 114 Fed. 155, 52 C. C. A. 77 (holding that negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely); Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

See 37 Cent. Dig. tit. "Negligence," § 150.

Contra.— Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Lockwood *v.*

child.[62] But the negligence of a driver to whose care the child has been intrusted has been held imputable to the child.[63]

d. Duty of Passenger. Notwithstanding the fact that the negligence of the driver will not be imputed to a passenger yet it is necessary that the passenger himself must exercise ordinary care.[64] And the rule denying the imputation of the negligence of the driver to the passenger has no application where such passenger has an opportunity to discover the danger, it being his duty in such case to discover and avoid it.[65] While the passenger is not required to exercise the same watchfulness as the driver,[66] he cannot rely implicitly on the care of the driver when in a position to see.[67] No recovery can be had where the passenger acquiesced or participated in the negligent acts of the driver,[68] or had knowledge of the danger and accepts the risk to be encountered.[69] It would seem that to

Belle City St. R. Co., 92 Wis. 97, 65 N. W. 866.

62. Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534 (holding that the fact that plaintiff's daughter was driving at the time of an accident does not relieve defendant of liability, unless the accident was due to the daughter's lack of skill, and this lack of skill was known to plaintiff); Johnson *v.* St. Joseph, 96 Mo. App. 663, 71 S. W. 106 (holding that contributory negligence of a son driving a vehicle in which his mother was riding will not be imputed to the mother, in the absence of a showing that he was in her employ, so as to defeat a recovery for injuries sustained by her from a defective street); Weldon *v.* Third Ave. R. Co., 3 N. Y. App. Div. 370, 38 N. Y. Suppl. 206; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

63. Metcalfe *v.* Rochester R. Co., 12 N. Y. App. Div. 147, 42 N. Y. Suppl. 661.

64. Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812; Flanagan *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225 [*affirmed* in 173 N. Y. 631, 66 N. E. 1108]. And see Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

Illustration.— The fact that a married woman is riding with her husband, who has entire control of the team while attempting to cross a railroad track, does not relieve her of the duty of exercising care for her own safety in avoiding danger from passing trains. New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

65. Brannen *v.* Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Vincennes *v.* Thuis, 28 Ind. App. 523, 63 N. E. 315; Meenagh *v.* Buckmaster, 26 N. Y. App. Div. 451, 50 N. Y. Suppl. 85; Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

Illustrations.— Plaintiff, who was injured at a railroad crossing, being on the seat with the driver, and having the same knowledge of the road, and opportunities of discovering danger, the rule that the driver's negligence may not be imputed to the traveler had no application. Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648 [*affirming* 12 N. Y. St. 450]. Where one person is driving with another for the mutual pleasure of both, with opportunity to see and equal ability to appreciate the danger, and is in fact looking out for herself, but makes no effort to avoid the danger, such person is chargeable with the want of care which results in injury. Bush *v.* Union Pac. R. Co., 62 Kan. 709, 64 Pac. 624.

66. Pyle *v.* Clark, 75 Fed. 644 [*affirmed* in 79 Fed. 744, 25 C. C. A. 190].

67. Holden *v.* Missouri R. Co., 177 Mo. 456, 76 S. W. 973, holding that a person seated by the driver of a wagon approaching a street railway crossing at a careless speed cannot rely implicitly on the care of the driver, and, if he makes no effort to have the speed diminished and his action contributes to a collision with a street car, he cannot recover for his injuries.

68. Colorado, etc., R. Co. *v.* Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681 (holding that where deceased was riding with T as his guest at the time both were killed by being struck by a train at a crossing, and deceased joined with T in attempting to drive the horse across in front of the train without stopping or exercising any care to avoid an accident, no recovery could be had for decedent's death against the railroad company, although the negligence of T was not imputable to him); Illinois Cent. R. Co. *v.* McLeod, 78 Miss. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954.

69. Lohman *v.* McManus, 9 Pa. Dist. 223.

Insufficiency of driver, horse, or carriage.— If a person is injured, in part by the negligence of another and in part by the insufficiency of the driver, horse, or carriage by which the person injured was being conveyed, which insufficiency was due to his own want of care in selecting them, no recovery could be had, not because the driver's negligence, or the defect in the horse, harness, or carriage, was imputable to the person injured but because his own fault in selecting them was the proximate cause of the injury. Hanson *v.* Manchester St. R. Co., 73 N. H. 395, 62 Atl. 595. But where plaintiff in an action for injuries resulting from a defective highway was riding with her son, who was driving the team, his contributory negligence cannot be imputed to her unless she had knowledge; the negligence charged being a

relieve one from imputation of negligence of a driver the invitation should have been accepted without knowledge of the incompetency of the driver.[70]

8. Parent or Custodian Imputable to Child[71] — a. In Action For Child's Benefit — (i) *View That Negligence Imputable to Child* — (A) *Statement of Rule.* A New York case decided in 1839 promulgated the rule that the negligence of the parents of a child of tender years would be imputed to the child and bar a recovery by him for injuries negligently inflicted.[72] In support of this rule it is said: "An infant is not *sui juris.* He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. . . . If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."[73] This doctrine is still recognized in the courts of New York[74] and has been adopted in a number of other states.[75]

(B) *Limitations of Rule.* Even in those jurisdictions where the doctrine of the New York case is adopted, its harshness is generally recognized and the tendency is to modify and limit it, so far as consistent with the adjudged cases.[76] Thus it is held that when at the time of the injury the child was exercising such care that it could not be charged with negligence had it reached years of discretion negligence in permitting it to be in a place of danger will not preclude recovery, its parents' negligence not being the proximate cause of the injury.[77] Nor

failure to provide a sufficient brake and harness and the driving of an unroadworthy colt. Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. (Pa.) 290.

70. Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; Knightstown *v.* Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; Lake Shore, etc., R. Co. *v.* Boyts, (Ind. App. 1896) 43 N. E. 667; Marsh *v.* Kansas City Southern R. Co., 104 Mo. App. 577, 78 S. W. 284.

Obvious incompetency of driver.— Imputation of negligence of driver of private vehicle to passenger might arise from known or obvious incompetency of the driver resulting from drunkenness or other cause. Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67.

Knowledge that driver was slightly paralyzed.— In an action by husband and wife for injuries to the wife, the fact that the wife knew that her husband, who was driving, was "slightly paralyzed," so as "to affect to some extent his left hand and arm, but not so that he could not use them," does not imply contributory negligence on her part, where the horse was an ordinary, gentle one, and the husband accustomed to his use. District of Columbia *v.* Bolling, 4 App. Cas. (D. C.) 397.

71. **Negligence of parent or child as affecting parent's right to recover for injuries to child** see Parent and Child.

72. Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, in applying the rule it was held that where a child of such tender age as not to possess sufficient discretion to avoid danger is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, neither trespass nor case lies against the traveler if there is no pretense that the injury was voluntary or arose from culpable negligence on his part.

73. Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 619, 34 Am. Dec. 273.

74. McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Ihl *v.* Forty-Second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Mangam *v.* Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66; Levine *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 426, 80 N. Y. Suppl. 48 [*affirmed* in 177 N. Y. 523, 69 N. E. 1125]; McLain *v.* Van Zandt, 39 N. Y. Super. Ct. 347.

75. *California.*— Meeks *v.* Southern Pac. R. Co., 52 Cal. 602.

Delaware.— Kyne *v.* Wilmington, etc., R. Co., 8 Houst. 185, 14 Atl. 922.

Maine.— Leslie *v.* Lewiston, 62 Me. 468.

Maryland.— McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Massachusetts.—Casey *v.* Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259; McGeary *v.* Eastern R. Co., 135 Mass. 363; O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352; Gibbons *v.* Williams, 135 Mass. 333; Wright *v.* Malden, etc., R. Co., 4 Allen 283; Holly *v.* Boston Gaslight Co., 8 Gray 123, 69 Am. Dec. 233.

76. See Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553. And see *infra*, cases cited in subsequent notes in this section.

77. Chicago City R. Co. *v.* Robinson, 27 Ill. App. 26 [*affirmed* in 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126]; Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am.

has the doctrine of implied negligence any application where the infant is of sufficient age and capacity to exercise discretion in his own behalf. In such case it is only his own contributory negligence which will bar a recovery for injuries sustained.[78] Another limitation of the rule is that, although a parent may be negligent in exposing a child to peril yet, if defendant could have avoided injury to it by the exercise of ordinary care, the child may nevertheless recover damages.[79] And the rule has received a further and very material modification by the courts refusing in some cases to hold, as matter of law, that parents were negligent in not keeping constant watch and restraint over their children, the question of negligence being left to the jury.[80]

(II) *View That Negligence Not Imputable to Child.* According to the great weight of authority, in an action brought for the benefit of a child who has sustained injuries through the negligence of another, negligence on the part of the parents or those standing *in loco parentis* will not be imputed to the child nor bar a recovery by him.[81] The rule announced in Hartfield v. Roper has

Rep. 510; Ihl *v.* Forty-Second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; McMahon *v.* New York, 33 N. Y. 642; Smith *v.* City Realty Co., 79 N. Y. App. Div. 441, 79 N. Y. Suppl. 1116; Lannen *v.* Albany Gas Light Co., 46 Barb. (N. Y.) 264; Huerzeler *v.* Central Crosstown R. Co., 1 Misc. (N. Y.) 136, 20 N. Y. Suppl. 676.

Illustration.—Although a child's mother was negligent in leaving her, with her sister, in an unfenced lot fronting a public street, she would be entitled to recover for an injury received when she went into the street, due to defendant's negligence, if she did nothing which would be deemed dangerous or careless if her movements had been directed by a reasonably prudent adult. McNeil *v.* Boston Ice Co., 173 Mass. 570, 54 N. E. 257. The fact that the parents of a child three and one half years old negligently allowed it to be in the street does not affect the right of recovery in an action by the child to recover against one whose teamster has negligently run over it while it was exercising for its safety the care which the law would require of persons generally. O'Brien *v.* McGlinchy, 68 Me. 552.

78. Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837; Lafferty *v.* Third Ave. R. Co., 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405 [*affirmed* in 176 N. Y. 594, 68 N. E. 1118].

79. Chicago West. Div. R. Co. *v.* Ryan, 131 Ill. 474, 23 N. E. 385; Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534; McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911; Cadmus *v.* St. Louis Bridge, etc., Co., 15 Mo. App. 86; Kenyon *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 479.

80. Fox *v.* Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Karr *v.* Parks, 40 Cal. 188; Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; Mangam *v.* Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66. And see Payne *v.* Humeston, etc., R. Co., 70 Iowa 584, 31 N. W. 886; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310.

Illustration.—A ruling that there could be no recovery for the killing of a child by a passing wagon while playing in a street of a city, because the child was permitted by his mother to go upon the street with a sister eight years old, and there was no evidence of the care exercised by the sister, was erroneous, since both children are presumed, in the absence of evidence, to have been *non sui juris*, and not chargeable with negligence. Kennedy *v.* Hills Bros. Co., 54 N. Y. App. Div. 29, 66 N. Y. Suppl. 280. Where a place was open to the public, although not a highway, the question of negligence of parents in allowing a boy of two there attended by a brother of nine was for the jury. O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352.

81. *Alabama.*— Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

Arkansas.— St. Louis, etc., R. Co. *v.* Rexroad, 59 Ark. 180, 26 S. W. 1037.

Connecticut.— Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413.

District of Columbia.— Moore *v.* Metropolitan R. Co., 2 Mackey 437.

Florida.— Jacksonville Electric Co. *v.* Adams, 50 Fla. 429, 39 So. 183.

Georgia.— Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102. And see Atlanta, etc., Air Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553.

Illinois.— Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314]; Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; Heldmaier *v.* Taman, 88 Ill. App. 209 [*affirmed* in 188 Ill. 283, 58 N. E. 960]; Louisville, etc., R. Co. *v.* Gobin, 52 Ill. App. 565; Murphysboro *v.* Woolsey, 47 Ill. App. 447; Jansen *v.* Siddal, 41 Ill. App. 279; Chicago City R. Co. *v.* Wilcox, 33 Ill. App. 450 [*affirmed* in 24 N. E. 419, 8 L. R. A. 494]; Chicago West Div. R. Co. *v.* Ryan, 31 Ill. App. 621.

Indiana.— Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728 [*overruling* Hath-

received severe condemnation in many of the courts repudiating it as authority,[82]

away *v.* Toledo, etc., R. Co., 46 Ind. 25; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318]; Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Jeffersonville *v.* McHenry, 22 Ind. App. 10, 53 N. E. 183; McNamara *v.* Beck, 21 Ind. App. 483, 52 N. E. 707; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837.

Iowa.— Fink *v.* Des Moines, 115 Iowa 641, 89 N. W. 28; Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545 [*distinguishing* Slater *v.* Burlington, etc., R. Co., 71 Iowa 209, 32 N. W. 264, and *overruling* by implication Payne *v.* Humeston, etc., R. Co., 70 Iowa 584, 31 N. W. 886].

Kansas.— Missouri, etc., R. Co. *v.* Shockman, (1898) 52 Pac. 446; Union Pac. R. Co. *v.* Young, 57 Kan. 168, 45 Pac. 580; Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, 36 Pac. 322.

Kentucky.— South Covington, etc., R. Co. *v.* Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750.

Louisiana.— Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

Michigan.— Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626; Mullen *v.* Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 693; Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584; Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894.

Minnesota.— Mattson *v.* Minnesota, etc., R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503 [*overruling* Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212].

Mississippi.— Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587.

Missouri.— Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536 [*distinguishing* Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671]; Boland *v.* Missouri R. Co., 36 Mo. 484; Profit *v.* Chicago Great Western R. Co., 91 Mo. App. 369. *Contra,* Cadmus *v.* St. Louis Bridge, etc., Co., 15 Mo. App. 86.

Nebraska.— Huff *v.* Ames, 16 Nebr. 139, 19 N. W. 623, 49 Am. Rep. 716.

New Hampshire.— Warren *v.* Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735; Bisaillon *v.* Blood, 64 N. H. 565, 15 Atl. 147.

New Jersey.— Markey *v.* Consol. Traction Co., 65 N. J. L. 82, 46 Atl. 573; Bergen County Traction Co. *v.* Heitman, 61 N. J. L. 682, 40 Atl. 651; Newman *v.* Phillipsburg Horse-Car R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842.

North Carolina.— Bottoms *v.* Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784.

Ohio.— St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 1 N. E. 519, 54 Am. Rep. 802; Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451; Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399, 98 Am. Dec. 175; Ludden *v.* Columbus, etc., Midland R. Co., 9 Ohio S. & C. Pl. Dec. 793, 7 Ohio N. P. 106.

Pennsylvania.— Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471; Pennsylvania Co. *v.* James, 81* Pa. St. 194; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582.

Tennessee.— Whirley *v.* Whiteman, 1 Head 610. And see Nashville R. Co. *v.* Howard, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

Texas.— Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 46 Am. Rep. 265; Northern Texas Traction Co. *v.* Roye, (Civ. App. 1905) 86 S. W. 621; Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535; St. Louis South Western R. Co. *v.* Byers, (Civ. App. 1902) 70 S. W. 558; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518; Gulf, etc., R. Co. *v.* Johnson, (Civ. App. 1899) 51 S. W. 531; Texas, etc., R. Co. *v.* Fletcher, 6 Tex. Civ. App. 736, 26 S. W. 446.

Vermont.— Ploof *v.* Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Virginia.— Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455.

Washington.— Eskildsen *v.* Seattle, 29 Wash. 583, 70 Pac. 64; Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

West Virginia.— Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

United States.— Chicago Great Western R. Co. *v.* Kowalski, 92 Fed. 310, 34 C. C. A. 1 [*affirming* 84 Fed. 586]; Berry *v.* Lake Erie, etc., R. Co., 70 Fed. 679; Stout *v.* Sioux City, etc., R. Co., 23 Fed. Cas. No. 13,503.

Illustration.— The knowledge of a father ordering coal oil, but receiving gasoline, that the wrong article was delivered, is not imputable to his minor daughter, who, in ignorance of the mistake, uses the gasoline to start a fire, so as to relieve the seller from liability to the daughter for the consequent injuries. Ives *v.* Welden, 114 Iowa 476, 87 N. W. 408, 89 Am. St. Rep. 379, 54 L. R. A. 854.

Negligence of custodian.— Louisville, etc., R. Co. *v.* Hirsch, 69 Miss. 126, 13 So. 244; Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536; Newman *v.* Phillipsburg Horse-Car R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399, 98 Am. Dec. 175; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187 [*affirming* 6 Phila. 242]; Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1900) 60 S. W. 442.

82. Government St. R. Co. *v.* Hanlon, 53 Ala. 70, 82 (where it is said: "It seems repulsive to our sense of justice, that because the parent is negligent of his child, others

and is very generally regarded as unsound by text-writers.[83] In his work on negligence Judge Thompson says: "That it should be adhered to in any enlightened jurisdiction with respect to children is a reproach to the judges who uphold it. An adult person, when he commits his person to the custody of another, does so at least voluntarily: an infant does not select his custodian — it is selected for him by the laws of nature, or by circumstances beyond his control. Certainly, there is no reason why the ordinary principle that where one is injured by the concurring negligence of two persons, he has an action against either or both, should not apply in the case of an injury to a child, unless the imputation is to be put upon the law of denying to feeble and helpless infancy the same measure of protection which it accords to adults. Such a conception is cruel, heartless, and wicked. It can only hold in jurisdictions where property is placed above humanity." [84]

b. In an Action For Benefit of Parent. While in most jurisdictions negligence of parents, or others *in loco parentis*, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit,[85] yet when the action is by the parent, in his own right,[86] or for his benefit, as when he sues as administrator, but is also the beneficial plaintiff or *cestui que trust* of the action as distributee of the child's estate,[87] the contributory negligence of the

may with impunity, be equally negligent of its helplessness, and equally indifferent to its necessities"); Wymore *v.* Mahaska County, 78 Iowa 396, 399, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545 (where it is said: "It appears to us to be unjust and contrary to reason to hold that the irresponsible child should be responsible for the wrongful acts of his parents or others who may have him in charge. He is incapable by himself of committing any act of negligence, and cannot authorize another to commit one; therefore it seems unreasonable to require him or his estate to suffer loss because of the neglect or unauthorized acts of his parents"); Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399, 98 Am. Dec. 175 (where it is said that the rule that an adult cannot recover for injuries caused by negligence, where he is chargeable with negligence contributing to the injury, is founded upon reasons which are wholly inapplicable to the case of an infant. These reasons are: (1) The mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for his own wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against him for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others); Whirley *v.* Whiteman, 1 Head (Tenn.) 610, 620 (where it is said: "This decision is no less opposed to the current of authority upon the point, than to every principle of reason and justice. It is, literally, to visit the transgression of the parent upon the child").

83. Beach Contrib. Negl. (2d ed.) § 116 *et seq.*; Bishop Non-Contr. Law, § 581 *et seq.*; 1 Thompson Negl. § 295; Wharton Negl. (2d ed.) §§ 313, 314.

84. 1 Thompson Negl. 294.

85. See *supra*, VII, C, 8, a.

86. *Illinois.*— Lake Erie, etc., R. Co. *v.* Pike, 31 Ill. App. 90.

Louisiana.— Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

Missouri.— Koons *v.* St. Louis, etc., R. Co., 65 Mo. 592.

New York.— Albert *v.* Albany R. Co., 5 N. Y. App. Div. 544, 39 N. Y. Suppl. 430.

Ohio.— Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

Pennsylvania.— Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172.

Texas.— Williams *v.* Texas, etc., R. Co., 60 Tex. 205 [*distinguishing* Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123, 126, 44 Am. Rep. 586].

87. *Connecticut.*— Murphy *v.* Derby St. R. Co., 73 Conn. 249, 47 Atl. 120. But see *dictum* in Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069.

Illinois.— Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.

Massachusetts.— Grant *v.* Fitchburg, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449.

Nebraska.— Tucker *v.* Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321.

New York.— Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; O'Shea *v.* Lehigh Valley R. Co., 79 N. Y. App. Div. 254, 79 N. Y. Suppl. 890; Newdoll *v.* Young, 80 Hun 364, 30 N. Y. Suppl. 84; Foley *v.* New York Cent., etc., R. Co., 78 Hun 248, 28 N. Y. Suppl. 816.

North Carolina.— Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

Ohio.— Cleveland, etc., R. Co. *v.* Workman,

parent may be shown in evidence in bar of the action, and this although the action is brought by one parent and the negligence was that of the other.[88]

c. As Affected by Presence of Parent at Time of Injury. Some decisions make a distinction between cases where the contributory negligence of the parent occurs while he has the child under his immediate control or in his presence and those cases which occur where the child is away from the parent. In the former cases some of the decisions hold that the negligence of the parent will be imputable to the child.[89] The better view, however, is that there is no sufficient foundation for such distinction, and that the negligence of the parent will not be imputed to the child, although the injury occurred at a time when the child was under the immediate control of, or in the presence of, the parent.[90]

d. Care Required of Parent or Custodian — (I) *In General.* Ordinary care is all that is required of a parent in watching and controlling a child,[91] which is said to be such care as a person of ordinary discretion would exercise in taking care of himself,[92] or such care as persons of ordinary prudence exercise and deem adequate in the care of children.[93] In determining this the age, intelligence, and experience of the child,[94] and the ability of the parent to exercise care,[95] should be considered.

(II) *As Affected by Financial Condition of Parents.* In determining whether a parent failed to exercise reasonable care of a child the same rule should not be applied to persons dependent on their labor for support as to those whose means enable them to give or employ a servant to give constant attention to the care of their children.[96] It is sufficient that parents have done all that can

66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602.

Tennessee.— Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

Vermont.— Ploof *v.* Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108.

See 37 Cent. Dig. tit. "Negligence," § 154.

Contra.—A few cases hold that contributory negligence of the parents is not a defense, although they are the beneficiaries of the action brought by the administrator. Moore *v.* Metropolitan R. Co., 2 Mackey (D. C.) 437; Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545; Carney *v.* Concord St. R. Co., 72 N. H. 364, 57 Atl. 218; Warren *v.* Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735; Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

88. Toner *v.* South Covington, etc., St. R. Co., 109 Ky. 41, 58 S. W. 439, 22 Ky. L. Rep. 564.

89. Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671. And see Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

90. Chicago, etc., R. Co. *v.* Wilcox, (Ill. 1890) 24 N. E. 419, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 [*affirming* 33 Ill. App. 450]; Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545; Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626. See also St. Louis, etc., R. Co. *v.* Rexroad, 59 Ark. 180, 26 S. W. 1037; St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 1 N. E. 519.

91. Louisville, etc., R. Co. *v.* Shanks, 132 Ind. 395, 31 N. E. 1111 (parents are not bound to guard their children against unknown dangers that ordinary diligence and prudence would not make it their duty to know); Mullaney *v.* Spence, 15 Abb. Pr. N. S. (N. Y.) 319; Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186, 99 Am. Dec. 158.

Parents are not necessarily negligent because they "thoughtlessly" permit a child to wander into a place of danger so as to be unable to recover except in case of intentional or wanton injury. Dan *v.* Citizens' St. R. Co., 99 Tenn. 88, 41 S. W. 339.

Entire failure to extend protection is negligence. Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172.

92. Mangam *v.* Brooklyn City R. Co., 36 Barb. (N. Y.) 230 [*affirmed* in 38 N. Y. 455, 98 Am. Dec. 66].

93. O'Flaherty *v.* Union R. Co., 45 Mo. 70, 100 Am. Dec. 343.

94. St. Louis, etc., R. Co. *v.* Colum, 72 Ark. 1, 77 S. W. 596 (holding that where the evidence shows that plaintiff's eight-year-old boy who was injured by defendant's train was incapable of appreciating the danger from trains, left him unattended at defendant's station, the father was guilty of contributory negligence and cannot himself recover for the boy's injuries); Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723.

95. Where a small child was injured by a street car in front of the premises where it lived, evidence that its mother was in poor health and its father dead was admissible on the question of the mother's contributory negligence in allowing the child on the street. Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116].

96. Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226. And see Weida *v.* Hanover Tp., 30 Pa. Super. Ct. 424; Addis *v.* Hess, 29 Pa. Super. Ct. 505.

reasonably be expected from persons in their condition of life.[97] But outside of this the wealth or poverty of the parent cannot be considered.[98]

e. Acts or Omissions Constituting Negligence on Part of Parent — (i) *In General.* Where the rule obtains that negligence of the parent will not be imputed to the child it matters not in what particulars such negligence consists.[99] Where, however, the other rule is adopted parents are guilty of contributory negligence if they permit a child to go unattended to places which they know to be dangerous,[1] to use a dangerous explosive,[2] to fail to inform its custodian of danger of which they knew,[3] to observe and avoid danger to the child,[4] or to permit him to go where he had no right to be.[5] But an act on the part of the parent will not defeat recovery if he had no knowledge of the danger.[6] And it has been held

97. *Illinois.*— Chicago *v.* Hessing, 83 Ill. 204, 25 Am. Rep. 328, holding that the law does not require laboring people constantly employed to keep a constant watch over their children nor can the want of such care be imputed to them as negligent conduct.

New York.— Mullaney *v.* Spence, 15 Abb. Pr. N. S. 319.

Oregon.— Hedin *v.* Suburban R. Co., 26 Oreg. 155, 37 Pac. 540.

Pennsylvania.— Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Addis *v.* Hess, 29 Pa. Super. Ct. 505; Karahuta *v.* Schuylkill Traction Co., 6 Pa. Super. Ct. 319.

West Virginia.— Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

Application of rule.— The parents of an injured child were working people; the father at his work, and the mother engaged in her household duties. The child, with the mother's consent, went out to play on the public sidewalk with his sister, nine years of age, and was injured by the falling of a pile of lumber. It was held that, considering the position in life of the parents and the consequent demand on them to provide for their family, the ages of the children, the necessity of their playing somewhere on the summer afternoon, and that they went to play on the public sidewalk so near to their home, they cannot be said to have failed to exercise ordinary care in permitting the younger child to go out to play, as he did, accompanied by his eldest sister. True, etc., Co. *v.* Woda, 104 Ill. App. 15. So a mother cannot be charged as a matter of law with contributory negligence in permitting a child of tender years to escape from her house and stray to a dangerous spot in the immediate vicinity of the house, where the mother was, at the time, engaged in her household duties. Weida *v.* Hanover Tp., 30 Pa. Super. Ct. 424.

98. Fox *v.* Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745.

99. Government St. R. Co. *v.* Hanlon, 53 Ala. 70 (holding that the right of a child of tender years to recover for injuries received in a crowded street by reason of the negligence of another is not affected by the negligence of the parents in allowing him to go into the street unattended by any one capable of protecting him); Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102 (holding that the negligence of a parent in allowing a child to go near a dangerous instrument, left in a public place by another, is not attributable to the child, in a suit by the latter for injuries caused by playing with the instrument).

Negligence causing aggravation of injury.— Parents' negligence in failing to procure medical aid after an injury which aggravated it cannot be imputed to a child of tender years in a suit by the child for its own benefit. Texas, etc., R. Co. *v.* Beckworth, (Tex. Civ. App. 1895) 32 S. W. 809.

1. Canavan *v.* Stuyvesant, 12 Misc. (N. Y.) 74, 33 N. Y. Suppl. 53. It is negligence on the part of parents to permit a child three years of age to wander on a dilapidated piazza or balcony, and such negligence will preclude such child from recovering for injuries received therefrom. Flynn *v.* Hatton, 43 How. Pr. (N. Y.) 332.

2. Carter *v.* Towne, 103 Mass. 507.

3. Schindler *v.* New York, etc., R. Co., 1 N. Y. St. 289.

4. Reed *v.* Minneapolis St. R. Co., 34 Minn. 557, 27 N. W. 77.

5. Donnelly *v.* Kelly, 2 N. Y. City Ct. 11 note (holding that the negligence of a mother in permitting her child to wander about a store in which she was trading will be imputed to the child, so as to bar it from recovery for injuries received in falling down a properly constructed stairway at the back end of the store); The Burgundia, 29 Fed. 464.

6. Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47 (holding that the act of a parent, who does not know that a street is in a defective or dangerous condition, in permitting his seven-year-old child to go alone on such street, is not such negligence as will prevent a recovery by the parent for the death of the child, resulting therefrom); East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503; Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347 (holding that a mother allowing her child to play around the steerage in her presence, she not knowing of any poison to be contained in the drinking cup, is not guilty of contributory negligence, although she sees the child take the cup and drink out of it); Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; Union Pac. R. Co. *v.*

that it is not negligence for a father to leave his children in the custody of the mother.[7]

(11) *Permitting Child to Go on Street.* As a general proposition it is not negligent, as a matter of law, for a parent or guardian to permit a child so young as to be *non sui juris* to go upon the street unattended.[8] Whether there is negligence in such case depends not only upon the age, but also upon the intelligence and physical ability of the child.[9] So too the question of negligence depends greatly upon the amount of travel in and use made of the street as affecting the danger to which one is exposed in being there.[10] If a street is dangerous,[11] or crowded,[12] or used by street cars,[13] the fact that a child is permitted to go thereon unattended may be negligence on the part of the parents, whereas if the street is practically unused it would be otherwise.[14] The fact that the child escapes into the street while temporarily left alone does not constitute negligence on the part of the parent.[15] Nor can it be said, as matter of law, that the parents of a child are negligent in permitting him to go upon the street in the care of another child of sufficient age to appreciate and avoid danger,[16] or other competent

McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434 (holding that a mother's consent to a visit by her son, twelve years of age, to a mine, in company of one presumably capable of caring for him, is not negligence contributing to an injury to him near the mine from a concealed danger unknown to both).

7. Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535.

8. *California.*— Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693.

Illinois.— Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553.

Louisiana.— Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

Massachusetts.— Slattery *v.* Lawrence Ice Co., 190 Mass. 79, 76 N. E. 459.

Missouri.— Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642; O'Flaherty *v.* Union R. Co., 45 Mo. 70, 100 Am. Dec. 343.

New York.— Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490, 34 N. E. 1101; Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 50; McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Hyland *v.* Burns, 10 N. Y. App. Div. 386, 41 N. Y. Suppl. 873; Mangam *v.* Brooklyn City R. Co., 36 Barb. 230 [*affirmed* in 38 N. Y. 455, 98 Am. Dec. 66]; Thies *v.* Thomas, 77 N. Y. Suppl. 276. But see Weil *v.* Dry Dock, etc., R. Co., 57 N. Y. Super. Ct. 188, 5 N. Y. Suppl. 833; Lowery *v.* New York Ice Co., 26 Misc. 163, 55 N. Y. Suppl. 707 [*affirmed* in 60 N. Y. Suppl. 1142]; Dudley *v.* Westcott Express Co., 18 N. Y. Suppl. 130 [*reversing* 15 N. Y. Suppl. 952]; Hartfield *v.* Roper, 21 Wend. 615, 34 Am. Dec. 273.

Pennsylvania.— Phillips *v.* Duquesne Traction Co., 8 Pa. Super. Ct. 210.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

Wisconsin.— Holdridge *v.* Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

See 37 Cent. Dig. tit. "Negligence," § 159.

9. Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693.

10. Karr *v.* Parks, 40 Cal. 188.

11. If a father permits his child to go into a dangerous place on the street, and the child is injured, the father is guilty of such contributory negligence as will bar recovery by the child for the injuries so received. McLain *v.* Van Zandt, 39 N. Y. Super. Ct. 347 [*affirming* 48 How. Pr. 80].

12. Cotter *v.* Lynn, etc., R. Co., 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267; Casey *v.* Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259; Finkelstein *v.* American Ice Co., 88 N. Y. Suppl. 942.

13. Albert *v.* Albany R. Co., 5 N. Y. App. Div. 544, 39 N. Y. Suppl. 430 [*affirmed* in 154 N. Y. 780, 49 N. E. 1093]; Sullenberger *v.* Traction Co., 10 Del. Co. (Pa.) 129. But see Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535, holding that the fact that a child four years old is permitted to go on a street in which street cars are operated is not such negligence on the part of the persons in charge of the child as will prevent a recovery for injuries received through the negligent operation of a car.

14. Karr *v.* Parks, 40 Cal. 188.

15. Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106; Marsland *v.* Murray, 148 Mass. 91, 18 N. E. 680, 12 Am. St. Rep. 520; Weissner *v.* St. Paul City R. Co., 47 Minn. 468, 50 N. W. 606; Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Mangam *v.* Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66 [*affirming* 36 Barb. 230]; Dehmann *v.* Beck, 61 N. Y. App. Div. 505, 70 N. Y. Suppl. 29; McKenna *v.* Buffalo Brass Bedstead Co., 12 Misc. (N. Y.) 485, 33 N. Y. Suppl. 684; Ehrman *v.* Brooklyn City R. Co., 14 N. Y. Suppl. 336.

16. Illinois Cent. R. Co. *v.* Bandy, 88 Ill. App. 629 (child of seven and one half years in charge of sister eleven years old); Chicago West Div. R. Co. *v.* Ryan, 31 Ill. App. 621 (child less than two in custody of brother fifteen years old not shown to be incompetent or untrustworthy); O'Brien *v.* Hudner, 182 Mass. 381, 65 N. E. 788 (child of eight in custody of older sister); Collins *v.* South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675 (child of four years in charge of eleven-year-old sister); Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y.

custodian. In such cases the question of negligence should be submitted to the jury.[17]

(III) *Permitting Child to Go On or Near Railroad Tracks.* It is held to be negligence to permit a small child to play near a railroad track.[18] But not to permit a child of discretion to cross the track where he was familiar with the place.[19] So where the father of a child two years of age was absent from home, and the mother had gone to a neighbor's, a short distance away, leaving the child, with older children, at play in the yard, where a neighbor was also at work, and the child escaped, unobserved, and went upon a railroad track some two hundred and fifty feet from the house, and was run over and killed by a passing train, it cannot be held, as a matter of law, that the parents were guilty of contributory negligence, but the question is one for the jury.[20]

f. Contribution to Injury. The negligence of a parent will not defeat recovery if it did not contribute to the injury.[21]

D. Comparative Negligence[22] — **1. In General.** The doctrine of comparative negligence is that plaintiff may recover, although the person injured was guilty of contributory negligence, if that negligence was slight and the negligence of defendant was gross in comparison.[23] The rule is not that where there

317, 7 Am. Rep. 450 (child of three years taken across street by sister nine and one-half years old); Levine *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 426, 80 N. Y. Suppl. 48 [*affirmed* in 177 N. Y. 523, 69 N. E. 1125] (child of six and one half years of age in custody of boy of twelve); Adams *v.* Metropolitan St. R. Co., 60 N. Y. App. Div. 188, 69 N. Y. Suppl. 1117 (child *non sui juris* in charge of brother nine years old); Kennedy *v.* Hills Bros. Co., 54 N. Y. App. Div. 29, 66 N. Y. Suppl. 280 (small child with sister eight years old); Ehrmann *v.* Nassau Electric R. Co., 23 N. Y. App. Div. 21, 48 N. Y. Suppl. 379 (child of five in custody of brother fifteen years of age); Dahl *v.* Milwaukee City R. Co., 62 Wis. 652, 22 N. W. 755.

17. **Nurse.**— Kroesen *v.* New Castle Electric St. R. Co., 198 Pa. St. 30, 47 Atl. 851.

Driver of delivery wagon.— Bahrenburgh *v.* Brooklyn City, etc., R. Co., 56 N. Y. 652; Metcalfe *v.* Rochester R. Co., 12 N. Y. App. Div. 147, 42 N. Y. Suppl. 661.

18. Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398, 40 Am. Rep. 664 [*following* Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 378, 84 Am. Dec. 457].

19. Daubert *v.* Delaware, etc., R. Co., 199 Pa. St. 345, 49 Atl. 72 (boy nine years old); Garner *v.* Trumbull, 94 Fed. 321, 36 C. C. A. 361.

20. Garner *v.* Trumbull, 94 Fed. 321, 36 C. C. A. 361. And see Green *v.* Chicago, etc., R. Co., 110 Mich. 648, 68 N. W. 988.

21. True, etc., Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369; Bahrenburgh *v.* Brooklyn City, etc., R. Co., 56 N. Y. 652.

22. **Collision of vessels** see Collision.

Contributory negligence as proximate cause of injury see *supra*, VII, A, 4.

Injuries to passengers see Carriers; Shipping. **Persons on or near railroad tracks** see Railroads; Street Railroads. **Servant** see Master and Servant.

Injury avoidable notwithstanding contributory negligence see *supra*, VII, A, 4, g.

23. Christian *v.* Irwin, 125 Ill. 619, 17 N. E. 707; Calumet Iron, etc., Co. *v.* Martin, 115 Ill. 358, 3 N. E. 456; Chicago *v.* Stearns, 105 Ill. 554; Stratton *v.* Central City Horse R. Co., 95 Ill. 25; Wabash R. Co. *v.* Henks, 91 Ill. 406; Indianapolis, etc., R. Co. *v.* Evans, 88 Ill. 63; Illinois Cent. R. Co. *v.* Hammer, 85 Ill. 526; Grayville *v.* Whitaker, 85 Ill. 439; Quinn *v.* Donovan, 85 Ill. 194; Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Illinois Cent. R. Co. *v.* Goddard, 72 Ill. 567; Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; Hund *v.* Geier, 72 Ill. 393; Grand Tower Mfg., etc., Co. *v.* Hawkins, 72 Ill. 386; Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Chicago, etc., R. Co. *v.* Mock, 72 Ill. 141; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388; Pittsburgh, etc., R. Co. *v.* Knutson, 69 Ill. 103; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576; Illinois Cent. R. Co. *v.* Maffit, 67 Ill. 431; Chicago, etc., R. Co. *v.* Elmore, 67 Ill. 176; Chicago, etc., R. Co. *v.* Sweeney, 52 Ill. 325; Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Chicago, etc., R. Co. *v.* Dewey, 26 Ill. 255, 79 Am. Dec. 374; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Chicago, etc., R. Co. *v.* Dillon, 17 Ill. App. 355; St. Louis, etc., R. Co. *v.* Andres, 16 Ill. App. 292; Union Stock Yards, etc., Co. *v.* Monaghan, 13 Ill. App. 148; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; Chicago, etc., R. Co. *v.* O'Connor, 13 Ill. App. 62; Peoria, etc., R. Co. *v.* Miller, 11 Ill. App. 375; Pittsburgh, etc., R. Co. *v.* Shannon, 11 Ill. App. 222; Winchester *v.* Case, 5 Ill. App. 486; Chicago, etc., R. Co. *v.* Langley, 2 Ill. App. 505; Ditberner *v.* Chicago, etc., R. Co., 47 Wis. 138, 2 N. W. 69.

is negligence on both sides the mere preponderance against defendant will render him liable but that, although plaintiff may have been guilty of some negligence, still if it is slight as compared with that of defendant he may recover. He cannot recover unless the negligence of defendant clearly and largely exceeds his own. If both parties are equally at fault or nearly so no recovery can be had.[24] The person injured must have observed ordinary care for his own safety with reference to the particular circumstances involved in order to render the doctrine of comparative negligence applicable.[25] The doctrine of comparative negligence does not apply where the person injured was so young as to be incapable of exercising care for his safety.[26] The doctrine will apply, however, where recovery is sought to be defeated by reason of the negligence of the parent of the child injured.[27]

2. Extent of Adoption of Doctrine. The doctrine of comparative negligence is now recognized under statutory provisions in Florida and Georgia.[28] Formerly it was in force in Illinois and had there its greatest development, but in that state it has now been repudiated.[29] In Kansas the doctrine seems to have been adopted in some of the decisions,[30] but has also been expressly repudiated.[31] The doctrine of comparative negligence is expressly repudiated in Tennessee.[32] None of the other states have recognized the doctrine and most of them have expressly repudiated it.[33]

24. Christian *v.* Irwin, 125 Ill. 619, 17 N. E. 707; Chicago, etc., R. Co. *v.* Dimick, 96 Ill. 42; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Chicago, etc., R. Co. *v.* Clark, 70 Ill. 276; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Chicago, etc., R. Co. *v.* Dunn, 61 Ill. 385; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528; Kerr *v.* Forgue, 54 Ill. 482, 5 Am. Rep. 146; Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235, 71 Am. Dec. 263; Parmelee *v.* Farro, 22 Ill. App. 467.

25. Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211 [*affirming* 52 Ill. App. 46]; Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036; Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846 [*affirming* 31 Ill. App. 563]; Fisher *v.* Cook, 125 Ill. 280, 17 N. E. 763; Calumet Iron, etc., Co. *v.* Martin, 115 Ill. 358, 3 N. E. 456; Chicago, etc., R. Co. *v.* Payne, 59 Ill. 534; Louisville, etc., R. Co. *v.* Johnson, 44 Ill. App. 56; Terre Haute, etc., R. Co. *v.* Voelker, 31 Ill. App. 314 [*affirmed* in 129 Ill. 540, 22 N. E. 20]; Quincy Horse R., etc., Co. *v.* Gruse, 26 Ill. App. 397 (applying the same rule to a child); Galesburg *v.* Benedict, 22 Ill. App. 111; Garfield Mfg. Co. *v.* McLean, 18 Ill. App. 447; Chicago, etc., R. Co. *v.* Rogers, 17 Ill. App. 638 [*affirmed* in 117 Ill. 115, 6 N. E. 889]; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; Chicago, etc., R. Co. *v.* Dougherty, 12 Ill. App. 181; Chicago, etc., R. Co. *v.* Thorson, 11 Ill. App. 631; Wabash R. Co. *v.* Jones, 5 Ill. App. 607.

26. Chicago, etc., R. Co. *v.* Welsh, 118 Ill. 572, 9 N. E. 197.

27. Chicago, etc., R. Co. *v.* Des Lauriers, 40 Ill. App. 654.

28. See *infra*, VII, D, 3.

29. Macon *v.* Holcomb, 205 Ill. 643, 69 N. E. 79; Cicero, etc., St. R. Co. *v.* Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938; Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892; Chicago, etc., R. Co. *v.* Kelly, 75 Ill. App. 490; Chicago, etc., R. Co. *v.* Johnson, 61 Ill. App. 464; Cleveland, etc., R. Co. *v.* Maxwell, 59 Ill. App. 673; Rock Falls *v.* Wells, 59 Ill. App. 155; Kinnare *v.* Chicago, etc., R. Co., 57 Ill. App. 153.

30. Wichita, etc., R. Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275; Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37; Pacific R. Co. *v.* Houts, 12 Kan. 328; Sawyer *v.* Sauer, 10 Kan. 466; Edgerton *v.* O'Neil, 4 Kan. App. 73, 46 Pac. 206.

31. Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576; Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, 1 Pac. 298; Union Pac. R. Co. *v.* Young, 19 Kan. 488.

32. East Tennessee, etc., R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1082; East Tennessee, etc., R. Co. *v.* Hull, 88 Tenn. 33, 12 S. W. 419; East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea (Tenn.) 46. It has been held, however, that the use in a charge of words implying a comparison of the negligence of the parties will not vitiate a verdict, if by the qualification that the "greater" or "grosser" negligence must have been the prime, principal, and proximate cause of the injury. East Tennessee, etc., R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1082; East Tennessee, etc., R. Co. *v.* Gurley, *supra*; East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 35.

33. *Alabama.*— Birmingham R., etc., Co. *v.* Bynum, 139 Ala. 389, 36 So. 736.

Arizona.— Prescott, etc., R. Co. *v.* Rees, 3 Ariz. 317, 28 Pac. 1134.

Colorado.— Denver, etc., R. Co. *v.* Maydole, 33 Colo. 150, 79 Pac. 1023.

Connecticut.—Neal *v.* Gillett, 23 Conn. 437.

Delaware.— Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605; Brown *v.* Wilmington City R. Co., 1 Pennew. 332, 40 Atl. 936.

Indiana.— Ivens *v.* Cincinnati, etc., R. Co., 103 Ind. 27, 2 N. E. 134.

Iowa.—Artz *v.* Chicago, etc., R. Co., 38 Iowa 293; Johnson *v.* Tillson, 36 Iowa 89; O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467.

3. Statutory Comparative Negligence. In Florida and Georgia the legislature has provided by statute that contributory negligence of plaintiff will not defeat recovery but will be considered in mitigation of damages.[34] The result of these provisions is that, if plaintiff and defendant were both negligent, the former can recover unless his negligence was equal to or greater than the negligence of the defendant,[35] or unless he could by the exercise of ordinary care have avoided the consequences of defendant's negligence;[36] and the damage shall in such cases be diminished by the jury in proportion to the amount of default attributable to him.[37] The provision is not applicable where full damages are claimed

Kentucky.— Sandy River Cannel Coal Co. *v.* Caudill, 60 S. W. 180, 22 Ky. L. Rep. 1175.

Massachusetts.— Marble *v.* Ross, 124 Mass. 44.

Michigan.— Borschall *v.* Detroit R. Co., 115 Mich. 473, 73 N. W. 551; Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768; Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50; Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853.

New Jersey.— Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

New York.— Wilds *v.* Hudson River R. Co., 24 N. Y. 430 [*reversing* 33 Barb. 503]; A. L. & J. J. Reynolds Co. *v.* Third Ave. R. Co., 8 Misc. 313, 28 N. Y. Suppl. 734.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Pennsylvania.— Catawissa R. Co. *v.* Armstrong, 49 Pa. St. 186.

Texas.— McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Galveston, etc., R. Co. *v.* Thornsberry, (1891) 17 S. W. 521; Texas Midland R. Co. *v.* Tidwell, (Civ. App. 1899) 49 S. W. 641; Texas, etc., R. Co. *v.* Curlin, 13 Tex. Civ. App. 505, 36 S. W. 1003; International, etc., R. Co. *v.* Eason, (Civ. App. 1896) 35 S. W. 208; Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834; Turner *v.* Ft. Worth, etc., R. Co., (Civ. App. 1895) 30 S. W. 253.

Virginia.— Richmond Traction Co. *v.* Martin, 102 Va. 209, 45 S. E. 886.

Washington.— Woolf *v.* Washington R., etc., Co., 37 Wash. 491, 79 Pac. 997; Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84; Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

Wisconsin.— Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618. And see Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, for the exhaustive discussion of the doctrine.

See 37 Cent. Dig. tit. "Negligence," § 162.

34. Florida.—Act June 7, 1887. See Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Georgia.— Civ. Code, § 2322, providing that, if the complainant and agents of the company are both at fault, plaintiff may recover, but his damages are diminished, is qualified by section 3830, providing that plaintiff cannot recover where, by the exercise of ordinary care, he could have avoided the results of defendant's negligence. Southern R. Co. *v.* Watson, 104 Ga. 243, 30 S. E. 818. These provisions change the common law in respect to liability for negligence only in the particular that when there is negligence by both parties, which is concurrent and contributes to the injury, plaintiff is not barred entirely, but may recover damages reduced below full compensation by an amount proportioned to the amount of the fault attributable to him. Alabama Great Southern R. Co. *v.* Coggins, 88 Fed. 455, 32 C. C. A. 1.

35. Christian *v.* Macon R., etc., Co., 120 Ga. 314, 47 S. E. 923; Brunswick, etc., R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; Willingham *v.* Macon, etc., R. Co., 113 Ga. 374, 38 S. E. 843; Southern R. Co. *v.* Watson, 104 Ga. 243, 30 S. E. 818; Central R., etc., Co. *v.* Newman, 94 Ga. 560, 21 S. E. 219.

36. Christian *v.* Macon R., etc., Co., 120 Ga. 314, 47 S. E. 923; Miller *v.* Smythe, 95 Ga. 288, 22 S. E. 532; Americus, etc., R. Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105; Pierce *v.* Atlanta Cotton Mills, 79 Ga. 782, 4 S. E. 381; Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 426; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. Western, etc., R. Co. *v.* Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802.

37. Southern R. Co. *v.* Watson, 104 Ga. 243, 30 S. E. 818; Miller *v.* Smythe, 95 Ga. 288, 22 S. E. 532; Georgia R., etc., Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Rule not applicable in case of gross negligence.— The rule of apportionment laid down in the code for cases of contributory negligence has no application where plaintiff is guilty of gross negligence. Central R., etc., Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397.

and no claim is made for damages in case plaintiff was guilty of contributory negligence.[38]

VIII. ACTIONS.[39]

A. Right of Action, Parties, and Preliminary Proceedings — 1. Nature and Form of Remedy.[40]

It is a general rule — but one of difficult application —

38. Code, § 2972; Pierce *v.* Atlanta Cotton Mills, 79 Ga. 782, 4 S. E. 381.

39. Actions against: Abstractors for negligence see Abstracts of Title. Bailees for negligence see Bailments. Banks for negligence see Banks and Banking. Brokers for negligence see Brokers. Carriers for negligence in respect to carriage of goods see Carriers; Shipping. Carriers for negligence in respect to carriage of live stock see Carriers; Shipping. Carriers for negligence in respect to carriage of passengers see Carriers of Passengers; Shipping. Counties for negligence see Counties. Depositaries for negligence see Depositaries. Depositors of escrow for negligence in delivery see Escrow. Druggist for negligence see Druggists. Executors and administrators for negligence see Executors and Administrators. Factors for negligence see Factors. Innkeepers for injuries to guests see Innkeepers. Inspection officers for negligence see Inspection. Justices of the peace for negligence see Justices of the Peace. Master for injuries to servant see Master and Servant. Master for negligence of servant or incompetent contractor see Master and Servant. Notaries public for negligence see Notaries. Officers in general for negligence see Officers. Physicians and surgeons for negligence and malpractice see Physicians and Surgeons. Receivers for negligence see Receivers. Registers of deeds for negligence see Registers of Deeds. Sheriffs and constables for negligence see Sheriffs and Constables. Telegraph and telephone company for negligence in construction and maintenance see Telegraphs and Telephones. Towns for negligence see Towns. Trustees for negligence see Trusts. Warehousemen see Warehousemen.

Action by: Life-tenants for injuries to estate see Life-Estates. Master against servant for negligence see Master and Servant. Parent for injury to, or loss of services of, child see Parent and Child.

Actions by or against: Corporations for negligence see Corporations. Husband or wife or both for negligence see Husband and Wife. Infants for negligence see Infants. Insane persons see Insane Persons. Livery-stable keepers see Livery-Stable Keepers.

Actions for: Accident to trains see Railroads; Street Railroads. Negligence by or against partnerships see Partnership. Torts see Torts. Waste see Waste. Wilful or criminal burning or setting fire see Fires. Wrongful death see Death.

Actions for injuries: At railroad crossings see Railroads. By fire set out by railroads see Railroads. From construction and maintenance of levees see Levees. From construction and maintenance of railroads see Railroads. From construction, maintenance, and operation of canals see Canals. From construction, maintenance, and operation of ferries see Ferries. From cutting and floating logs see Logs and Logging. From defects in adjoining property see Adjoining Landowners. From defects in bridges see Bridges. From defects in drains see Drains. From defects in highways see Highways. From defects in leased premises see Landlord and Tenant. From defects in streets and public places see Municipal Corporations. From defects in turnpikes see Turnpikes and Toll-Roads. From defects in wharves and docks see Wharves. From electricity see Electricity. From escape or explosion of gas see Gas. From explosives see Explosives. From flowage of water see Water and Watercourses. From negligence in conduct of theaters and shows see Theaters and Shows. From negligence in navigation of vessels see Canals; Collision; Navigable Waters; Pilots; Shipping; Towage. From negligence in use of streets and highways see Streets and Highways. From negligence in use of weapons see Weapons. From negligence of agents see Principal and Agent. From obstruction or encroachment of highway see Highways. From operation of railroad see Railroads. From poisons see Poisons. Incident to construction and maintenance of walls see Party-Walls. Incident to operation of mines see Mines and Minerals. Incident to use of easements see Easements. To animals on or near railroad tracks see Railroads; Street Railroads. To licensees or trespassers on railroad property see Railroads. To or by animals see Animals. To or by fences see Fences.

Actions on the case see Case.

Elements and assessments of damages caused by negligence see Damages.

Joinder of causes of action see Actions.

Jurisdiction and termination of matter in controversy as affecting admiralty see Admiralty.

Jurisdiction and termination of matter in controversy as affecting jurisdiction of justice of the peace see Justices of the Peace.

Jurisdiction and termination of matter in controversy as affecting jurisdiction of justice of the peace in action for negligence see Justices of the Peace.

Limitation of action for negligence see Actions.

Proceedings for assessment of damages see Damages.

Survival of cause of action see Abatement and Revival.

Venue and place of trial see Venue.

40. Waiver of tort and suit in assumpsit see Assumpsit.

that, where the injury received from the negligent act of defendant is immediate and direct, the action must be trespass; and where it is mediate and consequential, the action must be case.[41] In some cases either trespass or case may be maintained — as when there has been an immediate and also a consequential injury from the same act.[42] So also, by the weight of authority, if the injury is attributable to negligence, although it be immediate, the injured party has his election either to treat the negligence of defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and declare in trespass.[43] Some cases, however, deny the right of election in the latter case, and hold that, in all cases where the injury is immediate, the only proper action is trespass.[44]

2. Choice of Remedies. Where the facts as pleaded disclose negligence in maintaining a structure which constituted a nuisance as well, an action for negligence lies, although an action for nuisance might also be maintained.[45] And where the action is based on the negligent failure to perform a duty, the action is one for negligence rather than for maintaining a nuisance.[46] Although a statute imposes a penalty for failure to perform the acts required by it, yet an action for injuries sustained by reason of such failure on the ground of negligence may also be maintained.[47]

3. Grounds or Cause of Action. It is one of the elements of actionable negligence that the negligent act or omission must have resulted in injury and hence, where no injury has been sustained, no action can be maintained;[48] but direct pecuniary loss need not be proved to warrant a recovery.[49] In an action to recover

41. *Alabama.*— Rhodes *v.* Roberts, 1 Stew. 145.

Connecticut.— Gates *v.* Miles, 3 Conn. 64.

Maryland.— Scott *v.* Bay, 3 Md. 431.

Rhode Island.— Brennan *v.* Carpenter, 1 R. I. 474.

Virginia.— Jordan *v.* Wyatt, 4 Gratt. 151, 47 Am. Dec. 720; Taylor *v.* Rainbow, 2 Hen. & M. 423.

England.—Leame *v.* Bray, 3 East 593; Day *v.* Edwards, 5 T. R. 648; Scott *v.* Shepherd, W. Bl. 892.

See 37 Cent. Dig. tit. "Negligence," § 168.

The legality or illegality of the original act is not the test whether the remedy should be trespass or case, although the intent is a proper subject for the jury to consider in determining damages. Scott *v.* Bay, 3 Md. 431; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143; Scott *v.* Shepherd, W. Bl. 892.

An injury is considered immediate when the act complained of itself occasions it, and not merely a consequence of that act. Scott *v.* Bay, 3 Md. 431.

42. Johnson *v.* Castleman, 2 Dana (Ky.) 377; McAllister *v.* Hammond, 6 Cow. (N. Y.) 342.

43. *Kentucky.*— Johnson *v.* Castleman, 2 Dana 377.

New Hampshire.— Dalton *v.* Favour, 3 N. H. 465.

New York.— Percival *v.* Hickey, 18 Johns. 257, 9 Am. Dec. 210; Blin *v.* Campbell, 14 Johns. 432.

Rhode Island.— Brennan *v.* Carpenter, 1 R. I. 474.

Vermont.— Howard *v.* Tyler, 46 Vt. 683; Claflin *v.* Wilcox, 18 Vt. 605.

Virginia.— Jordan *v.* Wyatt, 4 Gratt. 151, 47 Am. Dec. 720.

England.— Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553; Williams *v.* Holland, 10 Bing. 112, 25 E. C. L. 61, 6 C. & P. 23, 25 E. C. L. 302, 2 L. J. C. P. 190, 3 Moore & S. 540; Turner *v.* Hawkins, 1 B. & P. 472; Rogers *v.* Imbleton, 2 B. & P. N. R. 117; Ogle *v.* Barnes, 8 T. R. 188.

See 37 Cent. Dig. tit. "Negligence," § 168.

44. Gates *v.* Miles, 3 Conn. 64; Case *v.* Mark, 2 Ohio 169; Taylor *v.* Rainbow, 2 Hen. & M. (Va.) 423; Lotan *v.* Cross, 2 Campb. 464; Covell *v.* Laming, 1 Camph. 497; Leame *v.* Bray, 3 East 593; Day *v.* Edwards, 5 T. R. 648.

45. O'Sullivan *v.* Knox, 81 N. Y. App. Div. 438, 80 N. Y. Suppl. 848 [*affirmed* in 178 N. Y. 565, 70 N. E. 1104]. And see Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695, holding that to an action for the negligence of one in erecting a building so near a street that the safety of travelers was endangered by ice and snow falling from the roof, it is no objection that the building also constitutes an encroachment upon the highway, and plaintiff's action should be for the maintenance of a nuisance or in trespass.

46. Cottrell *v.* Dimick, 1 N. Y. St. 304.

47. Parker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450. And see *supra*, V, D, 6.

48. Foster *v.* Lyon County, 68 Kan. 164, 74 Pac. 595; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Smith *v.* Thackerah, L. R. 1 C. P. 564, Harr. & R. 615, 12 Jur. N. S. 545, 35 L. J. C. P. 276, 14 L. T. Rep. N. S. 761, 14 Wkly. Rep. 832. And see *supra*, III, A, 1.

49. Hooghkirk *v.* Delaware, etc., Canal Co., 63 How. Pr. (N. Y.) 328.

damages for negligence the "cause of action" as used in pleading is not the injury inflicted but the fact or facts which justify the action or show a right to maintain it,[50] and where the same wrongful act results in injury to goods and to the person it gives rise to distinct causes of action.[51]

4. WHAT LAW GOVERNS.[52] The law of the state where the injury occurs governs the right of the injured party to redress.[53] The remedy is governed by the *lex fori*.[54]

5. CONDITIONS PRECEDENT.[55] In some jurisdictions the statutes require written notice of injury and claim for damages to be given before the commencement of the action.[56] Such notice will be sufficient if it appears from it that it was intended as the basis of a claim for damages,[57] and service as soon as the parties had knowledge of the facts giving him a right of action is in time.[58]

6. DEFENSES. As previously seen, an action for negligence may be defeated by showing that plaintiff's negligence contributed to the injury,[59] or that it was caused by plaintiff's own negligence.[60] And of course absence of negligence on the part of defendant is a good defense.[61] The fact that the property injured was used for an illegal purpose is no defense,[62] or that plaintiff had previously been a party to a contract, subsequent negligent performance of which resulted in injury;[63] and the fact that defendant did not believe his act would cause injury or that a statute would authorize the act will not relieve defendant from liability.[64]

7. PARTIES — a. Plaintiffs. As a general rule any person who has been injured by the negligence of another may maintain an action therefor,[65] unless the statute has conferred that right on another.[66] So one who has a special interest merely in property injured may maintain an action.[67] The legal owner of

50. Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 78 N. W. 694.

51. Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944.

52. Assessment of damages see DAMAGES.

53. Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535.

54. Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535; Anderson *v.* Milwaukee, etc., R. Co., 37 Wis. 321.

Rules of pleading.— Where a complaint for negligent injury occurring in another state to personal property is filed in the courts of Indiana it must negative contributory negligence of plaintiff, although such negation is not necessary at common law, and although it will be presumed that the common law is in force in the other state. Cincinnati, etc., Electric St. R. Co. *v.* Klump, 37 Ind. App. 660, 77 N. E. 869.

Rules of evidence.—Burns Annot. St. (1901) § 359*a*, providing that the burden of proof in personal injury actions to establish contributory negligence shall be on defendant relates to procedure, and hence is applicable where the cause of action arose in another state. Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990.

55. See, generally, ACTIONS.

56. Carroll *v.* New York, etc., R. Co., 182 Mass. 237, 65 N. E. 69; Troschansky *v.* Milwaukee Electric R., etc., Co., 110 Wis. 570, 86 N. W. 156.

When statute not applicable.— Where an abutting owner moved her building back from the street, and paved a sidewalk on her land, the notice provided by Pub. St. c. 52, § 19, in case of defective ways, need not be given by one injured by defects in the walk. Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22.

57. Carroll *v.* New York, etc., R. Co., 182 Mass. 237, 65 N. E. 69.

58. Montreal *v.* Gosney, 13 Quebec K. B. 214.

59. See *supra*, VII, A, 1, d.

60. Bethea *v.* Taylor, 3 Stew. (Ala.) 482.

61. Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244. And see Travers *v.* Murray, 87 N. Y. App. Div. 552, 84 N. Y. Suppl. 558.

Illustration.— Where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part. Burton *v.* Davis, 15 La. Ann. 448.

62. Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1894) 25 S. W. 1015, use for gambling purposes.

63. Gardner *v.* Heartt, 1 Den. (N. Y.) 466.

64. Grant *v.* Hess, 31 Tex. Civ. App. 688, 75 S. W. 342.

65. Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

66. Eckes *v.* Stetler, 98 N. Y. App. Div. 76, 90 N. Y. Suppl. 473.

67. Brown Store Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839 (owner of improvements on land); Lynds *v.* Clark, 14 Mo. App. 74; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Whittingham *v.* Bloxham, 4 C. & P. 597, 19 E. C. L. 667.

property injured is the only necessary party plaintiff in an action to recover for such injuries, although others may be interested in the profits to be derived from it.[68]

b. Defendants. Where the injury is the result of the concurring negligence of two or more parties they may be sued jointly or severally.[69] All may be sued jointly notwithstanding different degrees of care may be owed by the different defendants.[70] Where, however, there is no joint duty or concert of action between two or more negligent persons they cannot be joined;[71] but they may be joined where there is a joint duty, although without concert of action.[72]

B. Pleading — 1. Declaration, Complaint, or Petition[73] — a. In General. The general rules of pleading apply to actions for negligence. Reasonable certainty in the statement of essential facts is required to the end that defendant may be informed of what he is called upon to meet at the trial.[74] Facts showing a legal duty and the neglect thereof on the part of defendant, and a resulting injury to plaintiff, should be alleged,[75] but no great degree of particularity is required.[76] All the different acts of negligence on the part of defendant which caused the injury may be alleged in one paragraph.[77] But a common-law action for negligence cannot be joined in the same count with one for statutory negligence.[78]

Tenant.—An occupant of a house damaged by blasting may maintain an action for injury to his possession, whether he be the owner or merely a tenant. Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523.

A chattel mortgagee may intervene in an action to recover for the negligent destruction of the mortgaged chattel. Wohlwend *v.* J. I. Case Threshing Mach. Co., 42 Minn. 500, 44 N. W. 517.

68. Conner *v.* Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145.

69. Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81; Boyle *v.* Illinois Cent. R. Co., 88 Ill. App. 255; Fisher *v.* Cook, 23 Ill. App. 621 [*affirmed* in 125 Ill. 280, 17 N. E. 763].

Illustration.— An action lies against two persons jointly, who were jointly superintending work which was so negligently done that it caused injury to plaintiff; and it makes no difference that one rendered his services to the other gratuitously, or that the acts of the other were all done on his own land. Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137.

70. Where a passenger was killed in a collision between a street car and a brewery wagon, caused by the concurrent negligence of both, a joint action could be maintained against the street railroad company and the brewery company, notwithstanding the different degrees of care owed deceased by the two defendants. Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309 [*affirmed* in 174 N. Y. 512, 66 N. E. 1117].

71. Goodman *v.* Coal Tp., 206 Pa. St. 621, 56 Atl. 65; Rowland *v.* Philadelphia, 202 Pa. St. 50, 51 Atl. 589; Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Dutton *v.* Lansdowne, 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469; Howard *v.* Union Traction Co., 9 Pa. Dist. 99, 23 Pa. Co. Ct. 295; Cole *v.* Lippett, 22 R. I. 31, 46 Atl. 43.

72. Birch *v.* Charleston Light, etc., Co., 113 Ill. App. 229.

73. Aider by verdict or subsequent pleading see Pleading.

Amendment of pleading generally see Pleading.

Bill of particulars see Pleading.

Practice on demurrer see Pleading.

Separate counts or causes of action see Pleading.

74. Baylor *v.* Stevens, 16 Pa. Super. Ct. 365; Lee *v.* Reliance Mills Co., 21 R. I. 322, 43 Atl. 536.

Grammatical errors will not render the petition defective. Parsons *v.* Mayfield, 73 Mo. App. 309.

75. Davey *v.* Erie R. Co., 69 N. J. L. 50, 54 Atl. 233, holding further that the fact that the declaration was inartistically drafted will not render it defective if otherwise sufficient.

76. Archer *v.* Blalock, 97 Ga. 719, 25 S. E. 391; Princeton Coal, etc., Co. *v.* Roll, (Ind. 1903) 66 N. E. 169; Deller *v.* Hofferberth, 127 Ind. 414, 26 N. E. 889; Schmidt *v.* Parker, 1 N. Y. L. Reg. 16; Walsh *v.* Wolf, 43 Fed. 640.

77. *Indiana.*— New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

Iowa.— Hammer *v.* Chicago, etc., R. Co., 61 Iowa 56, 15 N. W. 597.

Kentucky.— Fagg *v.* Louisville, etc., R. Co., 111 Ky. 30, 63 S. W. 580, 23 Ky. L. Rep. 383, 54 L. R. A. 919.

Missouri.— Haley *v.* Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. Rep. 743.

South Carolina.— Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819, holding that under Acts (1898), p. 693, regulating the practice in actions *ex delicto*, and providing that a party in such suit shall not be required to state several acts of negligence separately, plaintiff may allege without separate statement and prove acts of negligence and of wilful conduct relied on, and recover on both.

78. Kendrick *v.* Chicago, etc., R. Co., 81 Mo. 521.

b. Right to Maintain Action. In an action for the negligent destruction of property an allegation of ownership is necessary.[79]

c. Ownership, Possession, or Control of Place, or Instrumentality Causing Injury.[80] To render a complaint for injuries caused by negligence in the condition or use of property sufficient it must show that such property was owned by or in possession or control of defendant;[81] but an express allegation is not necessary; it is sufficient if it can be inferred from the other facts alleged.[82] It is not necessary to allege that defendant derived any benefit from the thing causing the injury.[83] Nor as to the owner of a defective structure that he constructed it in the first instance.[84]

d. Duty to Use Care — (I) *In General* — (A) *Necessity of Allegation.* In order to maintain an action based on negligence the declaration or complaint must show the existence of some duty which defendant owed plaintiff,[85] and in addition must allege a breach of such duty.[86] Failure to specifically aver the duty

79. St. Louis, etc., R. Co. *v.* Heckt, 38 Ark. 357; Mackey *v.* Monahan, 13 Colo. App. 144, 56 Pac. 680.

80. Variance between allegations and proofs see *infra*, VIII, B, 5, b.

81. Hart *v.* Washington Park Club, 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492 [*affirming* 54 Ill. App. 480]; Chicago, etc., R. Co. *v.* Gardanier, 116 Ill. App. 619; Rushenberg *v.* St. Louis, etc., R. Co., 109 Mo. 112, 19 S. W. 216.

Complaints held insufficient.— In order to a recovery by an administratrix for the killing of her intestate through the falling of a building by negligence in the construction thereof, the declaration must show that the alleged superintendent had exclusive control in the furnishing the materials and erecting the building; and, an allegation that defendants "were possessed and had the supervision and control of a certain building," which was then "being erected" for a court-house, was insufficient in that regard. Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151. In an action for injuries received by plaintiff through falling down an unguarded elevator shaft, a complaint alleging that defendant was a tenant in possession of the second floor of the premises, but failing to aver that plaintiff met his accident on the second floor, did not state facts sufficient to constitute a cause of action. Detviller *v.* Rolled Plate Metal Co., 110 N. Y. App. Div. 773, 97 N. Y. Suppl. 419.

82. Gaston *v.* Bailey, 24 Ind. App. 24, 53 N. E. 1021.

Application of rule.— In an action for damages caused by defendant's carelessly and unskilfully digging down and excavating a precipitous hill, and negligently leaving the precipice so formed unfenced, the declaration is not demurrable for failing to state that defendant owned the hill or was in possession or control thereof, as the control may be inferred from the acts of possession, such as excavating, etc., charged in the declaration. Mackey *v.* Vicksburg, 64 Miss. 777, 2 So. 178.

83. Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240; Stevens *v.* Walpole, 76 Mo. App. 213.

84. Stevens *v.* Walpole, 76 Mo. App. 213 (defective grating in walk); Waterhouse *v.* Joseph Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157 (defective building).

85. *Alabama.*— Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

Idaho.— Holt *v.* Spokane & P. Ry. Co., 3 Ida. 783, 35 Pac. 39.

Illinois.— Chicago, etc., R. Co. *v.* Gardanier, 116 Ill. App. 619; Winheim *v.* Field, 107 Ill. App. 145; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Northern Milling Co. *v.* Mackey, 99 Ill. App. 57; Eilenberger *v.* Nelson, 64 Ill. App. 277; Ward *v.* Chicago, etc., R. Co., 61 Ill. App. 530; West Chicago St. R. Co. *v.* Coit, 50 Ill. App. 640; Funk *v.* Piper, 50 Ill. App. 163; Angus *v.* Lee, 40 Ill. App. 304.

Indiana.— Pittsburgh, etc., R. Co. *v.* Simons, (App. 1906) 76 N. E. 883; Thiele *v.* McManus, 3 Ind. App. 132, 28 N. E. 327, at the time and place of the injury.

Minnesota.— Berry *v.* Dole, 87 Minn. 471, 92 N. W. 334.

New Jersey.— Race *v.* Easton, etc., R. Co., 62 N. J. L. 536, 41 Atl. 710.

New York.— Coon *v.* Froment, 25 N. Y. App. Div. 250, 49 N. Y. Suppl. 305.

Rhode Island.— Bucci *v.* Waterman, 25 R. I. 125, 54 Atl. 1059; Parker *v.* Providence, etc., S. Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414.

Vermont.— Kennedy *v.* Morgan, 57 Vt. 46.

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19; Hortenstein *v.* Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

United States.— World's Columbian Exposition Co. *v.* Republic of France, 91 Fed. 64, 33 C. C. A. 333 [*reversing* 83 Fed. 109].

England.— Thompson *v.* Lucas, Ir. R. 3 C. L. 208, 17 Wkly. Rep. 520.

Canada.—Cowans *v.* Marshall, 28 Can. Sup. Ct. 161.

See 37 Cent. Dig. tit. "Negligence," § 177.

86. Winheim *v.* Field, 107 Ill. App. 145; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Maenner *v.* Carroll, 46 Md. 193; Race *v.* Easton, etc., R. Co., 62 N. J. L. 536, 41 Atl. 710. And see cases cited in preceding note.

of defendant and the breach should be taken advantage of by demurrer and the objection cannot be made for the first time in the appellate court.[87]

(B) *Sufficiency of Allegation.* The duty of defendant must be shown by a statement of facts from which the duty follows as a matter of law. A mere general allegation of the existence of a duty is insufficient and such general averment is a conclusion of law.[88] Nor will the characterization of an act as negligent supply an omission to allege facts showing omission of duty.[89] Allegations of facts from which the duty arises are sufficient without showing the details,[90] and the manner in which the duty was imposed need not be alleged.[91] An allegation showing invitation is sufficient to show defendant's duty to keep the premises reasonably safe.[92]

(II) *INVITATION*—(A) *Necessity of Allegation.* Where the injury happened on the premises of defendant, the complaint must show that the person or property injured was there by invitation, express or implied.[93]

(B) *Sufficiency of Allegation.* An allegation that plaintiff was on defendant's premises by invitation is sufficient without stating the facts constituting the

87. Ella *v.* Boyce, 112 Mich. 552, 70 N. W. 1106.

88. *Illinois.*— Ayers *v.* Chicago, 111 Ill. 406; Chicago, etc., R. Co. *v.* Gardanier, 116 Ill. App. 619; Ward *v.* Danzeizen, 111 Ill. App. 163; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Putney *v.* Keith, 98 Ill. App. 285; Jensen *v.* Wetherell, 79 Ill. App. 33; West Chicago St. R. Co. *v.* James, 69 Ill. App. 609; Hart *v.* Washington Park Club, 54 Ill. App. 480; West Chicago St. R. Co. *v.* Coit, 50 Ill. App. 640; Angus *v.* Lee, 40 Ill. App. 304.

Indiana.— Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660, holding that in an action for negligence, where the allegation of the immediate facts does not lead to the deduction that a duty on the part of defendant to exercise care toward plaintiff existed, plaintiff must allege further facts whereby the existence of the duty is manifested.

Texas.— San Antonio, etc., R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544.

Vermont.— Brothers *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19.

United States.— Whitten *v.* Nevada Power, etc., Co., 132 Fed. 782.

England.— Seymour *v.* Maddox, 16 Q. B. 326, 15 Jur. 723, 20 L. J. Q. B. 327, 71 E. C. L. 326; Brown *v.* Mallett, 5 C. B. 599, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 599; Metcalfe *v.* Hetherington, 11 Exch. 257, 24 L. J. Exch. 314.

See 37 Cent. Dig. tit. "Negligence," § 177.

Allegations held insufficient.—Where plaintiff's intestate was fatally injured by the falling upon him of some lumber from a car which defendant, who was in control thereof as consignee, was unloading, a petition alleging that, at the time defendant received and unloaded the lumber, "it was piled together in a high pile on said car, and was not tied, braced, fastened, or confined thereon," as defendant well knew, etc., does not charge negligence against defendant. Laforrest *v.* O'Driscoll, 26 R. I. 547, 59 Atl. 923.

Allegation by way of recital.— In an action founded on defendant's negligence the declaration must directly and positively allege, otherwise than by mere recital, what duty was owing by defendant to plaintiff, the failure to discharge which caused the injury complained of and its breach or aver such facts as will show the existence of the duty and its breach. Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19.

89. Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875.

Allegation of facts showing negligence in addition to allegation of negligence.— In an action against a railway company for an injury to a child, received on an unguarded turn-table, an allegation that defendant was negligent in failing to keep the turn-table locked pursuant to its rule requiring it to be locked is not demurrable as being an allegation of an assumed duty, and not by law incumbent on defendant, where, under all the facts alleged, it was negligence to leave the turn-table unlocked. San Antonio, etc., R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544.

90. Jones *v.* Darden, 90 Ala. 372, 7 So. 923; North Manchester Tri-County Agricultural Assoc. *v.* Wilcox, 4 Ind. App. 141, 30 N. E. 202; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123.

91. Griswold *v.* Gallup, 22 Conn. 208.

92. Schmidt *v.* Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Chapman *v.* Rothwell, E. B. & E. 168, 4 Jur. N. S. 1180, 27 L. J. Q. B. 315, 96 E. C. L. 168.

93. *Illinois.*— Hart *v.* Washington Park Club, 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492 [*affirming* 54 Ill. App. 480].

Indiana.— St. Joseph Ice Co. *v.* Bertch, 33 Ind. App. 491, 71 N. E. 56.

Maryland.— Maenner *v.* Carroll, 46 Md. 193.

Missouri.— Arnold *v.* St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291.

Montana.— Driscoll *v.* Clark, 32 Mont. 172, 80 Pac. 1, 373.

invitation;[94] and where the facts alleged show an invitation no express allegation of invitation is necessary.[95] A complaint alleging attractiveness of premises to children and knowledge of such fact on the part of defendant sufficiently alleges invitation.[96] But merely alleging that plaintiff was lawfully on the premises is not sufficient to show invitation but only that he was a licensee.[97]

(III) *Duty Imposed by Statute or Ordinance*—(A) *By Statute.* If the duty, the violation of which is complained of, is imposed by a general statute, the declaration or complaint need not specifically plead it.[98] Courts will not, however, take notice of private acts, and consequently such parts of them as may be material must be pleaded, but it is enough if the substance be stated.[99] Where the statute is but declaratory of the common law it need not be pleaded.[1]

(B) *By Ordinance.* Where an injury occurs through the neglect of a party to comply with a city ordinance, such ordinance must be pleaded,[2] although the violation thereof is not claimed as negligence *per se*,[3] and it must be further alleged that defendant had the means and opportunity to perform the duty in time to avert the injury.[4] It need not be set out *in haec verba*, but that part of the ordinance relied on, or all the substantial parts thereof, should be set out.[5] Moreover,

England.— Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170; McCabe *v.* Guinness, Ir. R. 10 C. L. 21.

94. Robinson *v.* Howard, 108 Mo. App. 368, 83 S. W. 1031 (alleging that the premises were a public resort and that deceased was there on defendant's invitation); Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920 (where a child was injured while playing on a railroad turntable, a petition alleging that the child was induced by other small children, with the knowledge and consent of defendant, its agents, and servants, and by the invitation of defendant hung to and about the turntable, sufficiently alleges an invitation to come upon the dangerous premises, although the facts constituting such invitation are not set forth); Mathews *v.* Bensel, 51 N. J. L. 30, 16 Atl. 195; McKee *v.* McCardell, 21 R. I. 363, 43 Atl. 847.

95. Rink *v.* Lowry, 38 Ind. App. 132, 77 N. E. 967; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509 [*following* Jones *v.* Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92]; Foster *v.* Portland Gold Min. Co., 114 Fed. 613, 52 C. C. A. 393.

96. Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123.

Petition held insufficient.— A petition for damages for the death of a child, which states that defendant made use of an escape pipe discharging boiling water "in the neighborhood and vicinity of several inhabited dwelling houses along said road," does not, even by inference, sufficiently state that defendant improperly permitted the escape of boiling water in a place and manner liable to attract children, so as to show a cause of action against defendant. Schmidt *v.* Kansas City Distilling Co., 90 Mo. 284, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16.

97. Land *v.* Fitzgerald, 68 N. J. L. 28, 52 Atl. 229; Mathews *v.* Bensel, 51 N. J. L. 30, 16 Atl. 195, although it shows he was not a trespasser. And see Thiele *v.* McManus, 3 Ind. App. 132, 28 N. E. 327.

98. *Colorado.*— Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6.

Connecticut.— Griswold *v.* Gallup, 22 Conn. 208.

Kentucky.— Illinois Cent. R. Co. *v.* Mizell, 100 Ky. 235, 38 S. W. 5, 18 Ky. L. Rep. 738.

Missouri.— Nutter *v.* Chicago, etc., R. Co., 22 Mo. App. 328.

United States.— Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867.

99. Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

Duties imposed by city charters.— In an action against a municipal corporation for injuries caused by the unsafe condition of a bridge, if the charter is pleaded by its title, the court will take judicial notice of a provision requiring the city to keep bridges in repair. Shartle *v.* Minneapolis, 17 Minn. 308. In some states it is held not to be necessary to recite in the declaration an act of the assembly binding a city to keep its streets in repair. Stier *v.* Oskaloosa, 41 Iowa 353; Erie City *v.* Schwingle, 22 Pa. St. 384, 60 Am. Dec. 87.

1. East Tennessee, etc., R. Co. *v.* Pratt, 85 Tenn. 9, 1 S. W. 618.

2. Rockford City R. Co. *v.* Matthews, 50 Ill. App. 267; Lake Erie, etc., R. Co. *v.* Mikesell, 23 Ind. App. 395, 55 N. E. 488; Jackson *v.* Castle, 82 Me. 579, 20 Atl. 237; Nutter *v.* Chicago, etc., R. Co., 22 Mo. App. 328.

Ordinance inadmissible unless pleaded.— Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49; Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768; Nutter *v.* Chicago, etc., R. Co., 22 Mo. App. 328.

3. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

4. Weise *v.* Tate, 45 Ill. App. 626.

5. Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949; Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Lake Erie, etc., R. Co. *v.* Hancock, 15 Ind. App. 104, 43 N. E. 659, holding that it is sufficient to state in the complaint the existence of the ordinance without setting out a copy thereof.

it should be directly averred that the ordinance was in force at the time the injury occurred.[6]

e. Allegations as to Injuries. Injury being one of the essential elements of actionable negligence a complaint must show that plaintiff was injured by such negligence in order to state a cause of action.[7] According to some decisions the nature of the injuries should be stated with as much reasonable certainty as their character and nature permit,[8] so as to advise the opposite party what character of proof to expect and what the extent of the injury and basis of damages were.[9] According to others general allegations of injury will be sufficient.[10] Where the complaint describes the injuries specifically evidence to show other injuries than those described is not admissible.[11] But it has been held that where a complaint alleges injuries in general terms and also enumerates specific injuries, such enumeration does not exclude evidence of injuries other than those enumerated.[12] It need not set out the items of the injury and the amount claimed for each.[13] Nor need it allege that the damages have not been paid.[14]

f. Acts or Omissions Constituting Negligence — (i) *Characterization of Acts or Omissions.* While it is customary to allege that an act was done negligently, yet where the pleader states facts from which the law will raise a duty, and shows an omission of the duty and resulting injury, an averment that the act was negligent is unnecessary.[15] Where the acts are not alleged to have been negligent, it must appear by direct averment that the acts causing the injury were *per se* the result of negligence, or negligence must appear from a statement of

Failure to state the correct date of the approval of an ordinance is immaterial when the ordinance is further described by title and number, together with the allegation that it was in full force and effect at the time of the violation complained of. Missouri Pac. R. Co. *v.* Chick, 6 Kan. App. 481, 50 Pac. 605.

Setting out the substance, general tenor, and legal effect of an ordinance, with a specific reference to the section, article, and chapter of the revised ordinances wherein the particular provision can be found is sufficient as against a general demurrer. Hirst *v.* Ringen Real Estate Co., 169 Mo. 194, 69 S. W. 368.

6. Southern R. Co. *v.* Jones, 33 Ind. App. 333, 71 N. E. 275; Lake Erie, etc., R. Co. *v.* Mikesell, 23 Ind. App. 395, 55 N. E. 488; Hazard Powder Co. *v.* Volger, 3 Wyo. 189, 18 Pac. 636.

7. San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

8. City Delivery Co. *v.* Henry, 139 Ala. 161, 34 So. 389; San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

Illustration.— A complaint for injuries from a disease contracted in washing clothing infected therewith, which had been negligently put in the laundry by defendant, should allege the name and nature of the disease, if known, and a motion to make the complaint more definite and certain should have been granted. Hattermann *v.* Siemann, 1 N. Y. App. Div. 486, 37 N. Y. Suppl. 405.

What is not evidence of distinct injury.— Where a petition alleged injury to plaintiff's chest, evidence of his spitting blood was not incompetent as being an injury not pleaded, it not being relied on as a distinct injury, but simply to show the condition of plaintiff's chest, and the testimony showing it might have resulted from the injuries to the chest. Ft. Worth, etc., R. Co. *v.* White, (Tex. Civ. App. 1899) 51 S. W. 855.

An allegation stating the value of an animal killed is sufficient allegation of injury. Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254.

9. San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

10. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Quirk *v.* Siegel-Cooper Co., 26 Misc. (N. Y.) 244, 56 N. Y. Suppl. 49.

11. Under an allegation that plaintiff was hurt, bruised, and wounded evidence of fractures of shoulder, arm, and hand, and a strain of the hip, producing temporary pain and permanent injury, is not admissible. Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158.

12. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Quirk *v.* Siegel-Cooper Co., 26 Misc. (N. Y.) 244, 56 N. Y. Suppl. 49.

13. Furbush, etc., Mach. Co. *v.* Buchsbaum, 34 Wkly. Notes Cas. (Pa.) 147. See also Chicago, etc., R. Co. *v.* Sullivan, (Ill. 1888) 17 N. E. 460; Quirk *v.* Siegel-Cooper Co., 26 Misc. (N. Y.) 244, 56 N. Y. Suppl. 49.

14. Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

15. *Illinois.*— Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Winheim *v.* Field, 107 Ill. App. 145.

Indiana.— Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885.

Michigan.—Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

Missouri.— Dyer *v.* Pacific R. Co., 34 Mo. 127; Quick *v.* Hannibal, etc., R. Co., 31 Mo. 399.

Nebraska.— Geneva *v.* Burnett, 65 Nebr. 464, 91 N. W. 275, 101 Am. St. Rep. 628, 58

such facts as certainly raise the presumption that the injury was the result of negligence.[16] The pleading will be tested by such facts, without aid from an allegation that the acts alleged were "negligently" done.[17] The characterization of each act in a course of conduct as negligent does not make such act a separate cause of action,[18] and each act need not be separately characterized as negligent.[19]

(II) *Facts to Be Alleged.* A complaint or petition in an action for negligence must show negligence on the part of defendant.[20] While there is not entire harmony in the adjudicated cases as to the proper method of pleading negligence, the rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded and not a mere conclusion of law, a declaration or complaint charging defendant with an act injurious to plaintiff, with a general allegation of negligence in the performance of the act, is sufficient,[21] at least as against a gen-

L. R. A. 287; Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556.

Texas.— San Antonio St. R. Co. *v.* Cailloutte, 79 Tex. 341, 15 S. W. 390.

See 37 Cent. Dig. tit. "Negligence," § 175.

16. Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

17. Scheiber *v.* United Tel. Co., 153 Ind. 609, 55 N. E. 742; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Baltimore, etc., R. Co. *v.* Kleespies, (Ind. App. 1906) 76 N. E. 1015, 78 N. E. 252.

Use of qualifying adjectives.— Where the complaint charges defendant with negligence, but uses the qualifying adjectives "gross," "wanton," and "wilful," these words are properly treated as surplusage, and a good cause of action is stated. Cleveland, etc., R. Co. *v.* Asbury, 120 Ind. 289, 22 N. E. 140; Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982.

18. Hill *v.* Fair Haven, etc., R. Co., 75 Conn. 177, 52 Atl. 725.

19. Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579.

20. Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Tubelowish *v.* Lathrop, 104 Ill. App. 82; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Ft. Wayne *v.* De Witt, 47 Ind. 391; Vansyoc *v.* Freewater Cemetery Assoc., 63 Nebr. 143, 88 N. W. 162.

21. *Alabama.*— Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457; Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116; Jones *v.* Darden, 90 Ala. 372, 7 So. 923; Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566; Gliddon *v.* McKinstry, 25 Ala. 246.

California.—Cunningham *v.* Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452; House *v.* Meyer, 100 Cal. 592, 35 Pac. 308.

Colorado.— McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367.

Connecticut.— Hill *v.* Fair Haven, etc., R. Co., 75 Conn. 177, 52 Atl. 725; Bunnell *v.* Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533.

Florida.— Louisville, etc., R. Co. *v.* Jones, 45 Fla. 407, 34 So. 246; Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Georgia.— Brown Store Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839.

Idaho.— See King *v.* Oregon Short-Line R. Co., 6 Ida. 306, 55 Pac. 665, 59 L. R. A. 209.

Indiana.— Senhenn *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Boyce *v.* Fitzpatrick, 80 Ind. 526; Duffy *v.* Howard, 77 Ind. 182; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Ft. Wayne *v.* De Witt, 47 Ind. 391; Indianapolis, etc., R. Co. *v.* Keely, 23 Ind. 133; Island Coal Co. *v.* Clemmitt, 19 Ind. App. 21, 49 N. E. 38; Louisville, etc., Consol. R. Co. *v.* Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432.

Iowa.— Scott *v.* Hogan, 72 Iowa 614, 34 N. W. 444.

Kentucky.—Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; Connell *v.* Chesapeake, etc., R. Co., 58 S. W. 374, 22 Ky. L. Rep. 501.

Massachusetts.— Dolan *v.* Alley, 153 Mass. 380, 26 N. E. 989.

Minnesota.— Rogers *v.* Truesdale, 57 Minn. 126, 58 N. W. 688.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Neier *v.* Missouri Pac. R. Co., (1886) 1 S. W. 387; Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Mack *v.* St. Louis, etc., R. Co., 77 Mo. 232; Schneider *v.* Missouri Pac. R. Co., 75 Mo. 295; Shuler *v.* Omaha, etc., R. Co., 87 Mo. App. 618; Senate *v.* Chicago, etc., R. Co., 57 Mo. App. 223; Ravenscraft *v.* Missouri Pac. R. Co., 27 Mo. App. 617; Dolan *v.* Moberly, 17 Mo. App. 436; Otto *v.* St. Louis, etc., R. Co., 12 Mo. App. 168.

Nebraska.— Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741.

New York.— McCarthy *v.* New York Cent., etc., R. Co., 6 N. Y. Suppl. 560.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130; Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

Oregon.— Chaperon *v.* Portland Electric

eral demurrer for want of sufficient facts,[22] without stating the details or particulars of the act causing the injury, unless the particular acts alleged are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint,[23] or the contrary appears from the facts pleaded;[24] and that, under such allegation, any evidence tending to show that the act was negligently done may be admitted.[25] But when a special

Co., 41 Oreg. 39, 67 Pac. 928; Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763. *Compare* McPherson *v.* Pacific Bridge Co., 20 Oreg. 486, 26 Pac. 560; Woodward *v.* Oregon R., etc., Co., 18 Oreg. 289, 22 Pac. 1076.

South Dakota.— Waterhouse *v.* Joseph Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157.

Texas.— Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658; San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

Contra.— Marquette, etc., R. Co. *v.* Marcott, 41 Mich. 433, 2 N. W. 795.

22. *Alabama.*— Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Alabama Great Southern R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917; Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620.

California.— Cunningham *v.* Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452.

Georgia.— Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974.

Idaho.— King *v.* Oregon Short-Line R. Co., 6 Ida. 306, 55 Pac. 665, 59 L. R. A. 209.

Illinois.— Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386.

Indiana.— Indianapolis *v.* Cauley, 164 Ind. 304, 73 N. E. 691; Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Chicago, etc., R. Co. *v.* Barnes, 164 Ind. 143, 73 N. E. 91; Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901; Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Louisville, etc., R. Co. *v.* Cauley, 119 Ind. 142, 21 N. E. 546; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Hammond *v.* Schweitzer, 112 Ind. 246, 13 N. E. 869; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554, 74 N. E. 636; Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Citizens' St. R. Co. *v.* Albright, 14 Ind. App. 433, 42 N. E. 238, 1028; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700; Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650; Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465; Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335, 32 N. E. 297.

Minnesota.— Stendal *v.* Boyd, 67 Minn. 279, 69 N. W. 899; Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637; Keating *v.* Brown, 30 Minn. 9, 13 N. W. 909; Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75.

Missouri.— Le May *v.* Missouri Pac. R. Co., 105 Mo. 361, 16 S. W. 1049.

Nebraska.— Chicago, etc., R. Co. *v.* O'Donnell, 72 Nebr. 900, 101 N. W. 1009; Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417; Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618, 47 Nebr. 886, 66 N. W. 842.

New Jersey.— Minnuci *v.* Philadelphia, etc., R. Co., 68 N. J. L. 432, 53 Atl. 229.

Texas.— Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 37 Cent. Dig. tit. "Negligence," § 182.

23. Lake Shore, etc., R. Co. *v.* Butts, 28 Ind. App. 289, 62 N. E. 647; Stendal *v.* Boyd, 67 Minn. 279, 69 N. W. 899; Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637.

24. Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Citizens' St. R. Co. *v.* Albright, 14 Ind. App. 433, 42 N. E. 238, 1028.

25. *Colorado.*—McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367.

Florida.— Louisville, etc., R. Co. *v.* Jones, 45 Fla. 407, 34 So. 246.

Illinois.— Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548.

Indiana.— Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Ft. Wayne *v.* De Witt, 47 Ind. 391; Pennsylvania Co. *v.* Krick, 47 Ind. 368; Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464.

Kentucky.— Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608, 47 S. W. 615, 20 Ky. L. Rep. 792, 50 S. W. 252, 20 Ky. L. Rep. 1883; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211.

Minnesota.— Stendal *v.* Boyd, 67 Minn. 279, 69 N. W. 899.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Boone *v.* Wabash, etc., R. Co., 20 Mo. App. 232.

Nebraska.— Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; Omaha, etc., R. Co. *v.* Wright, 49 Nebr. 456, 68 N. W. 618.

New York.— Barker *v.* Paulson, 116 N. Y. 660, 22 N. E. 959, 24 N. E. 1097; Nolton *v.*

demurrer,[26] or motion to make more definite and certain,[27] is filed, raising the objection that the allegations are too general, the particulars of the negligence must be set forth, unless the facts are within the knowledge of defendant, and are such that plaintiff cannot be expected to know them.[28] In every case, however, such a general averment must be predicated upon some act or omission characterized by negligence,[29] in order that defendant may be apprised of what he will be called upon to defend against;[30] and such negligent act must be set out in traversable form.[31] Where the injuries are indirect,[32] or the acts complained of are innocent in themselves and injurious only in consequence of particular circumstances,[33] such circumstances must be alleged.

g. Connection Between Negligence Charged and Injury. In consequence of the rule that negligence to render a defendant liable must be the proximate cause

Western R. Corp., 15 N. Y. 444, 69 Am. Dec. 623.

South Dakota.— Walker *v.* McCaull, 13 S. D. 512, 83 N. W. 578.

Texas.— Texas, etc., R. Co. *v.* Meeks, (Civ. App. 1903) 74 S. W. 329.

Washington.— Collett *v.* Northern Pac. R. Co., 23 Wash. 600, 63 Pac. 225.

See 37 Cent. Dig. tit. "Negligence," § 182.

Gross negligence may be proved under a general averment of negligence. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211.

26. Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Russell *v.* Georgia Cent. R. Co., 119 Ga. 705, 46 S. E. 858; King *v.* Oregon Short-Line R. Co., 6 Ida. 306, 55 Pac. 665, 59 L. R. A. 209; Missouri Pac. R. Co. *v.* Johnson, 3 Tex. App. Civ. Cas. § 275.

27. *Georgia.*— Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974.

Indiana.— Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3; Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Hammond *v.* Schweitzer, 112 Ind. 246, 13 N. E. 869; Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160; Hawley *v.* Williams, 90 Ind. 160; Boyce *v.* Fitzpatrick, 80 Ind. 526; Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432.

Nebraska.— Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. E. 1066, 69 Am. St. Rep. 741; Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417.

New Jersey.— Minnuci *v.* Philadelphia, etc., R. Co., 68 N. J. L. 432, 53 Atl. 229.

Texas.— Gulf, etc., R. Co. *v.* Anson, (Civ. App. 1904) 82 S. W. 785.

See 37 Cent. Dig. tit. "Negligence," § 182.

In New York a bill of particulars is the proper means to compel a plaintiff to state the particular acts of negligence he intends to prove at the trial. Jackman *v.* Lord, 56 Hun 192, 9 N. Y. Suppl. 200.

28. Eldridge *v.* Long Island R. Co., 1 Sandf. (N. Y.) 89; Cederson *v.* Oregon R., etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763; Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608; San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Texas, etc., R. Co. *v.* Easton, 2 Tex. Civ. App. 378, 21 S. W. 575. *Contra,* Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974, where the exception announced in the foregoing cases is repudiated, the court holding that a specification of the particulars of the negligence relied on cannot be avoided by an allegation that plaintiff has been unable to ascertain the particular acts of negligence causing the injury, and that, on account of the manner in which the injury was inflicted, they were matters more peculiarly within the knowledge of defendant.

29. *Illinois.*— Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425.

Indiana.— Lake Erie, etc., R. Co. *v.* McFall, 165 Ind. 574, 76 N. E. 400; Hawley *v.* Williams, 90 Ind. 160; Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297; Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240.

New York.— Taite *v.* Boorum, etc., Co., 37 Misc. 162, 74 N. Y. Suppl. 874.

Oregon.— Cederson *v.* Oregon, etc., R. Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763.

Rhode Island.— Laporte *v.* Cook, 20 R. I. 261, 38 Atl. 700.

South Carolina.— Madden *v.* Port Royal, etc., R. Co., 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855.

Texas.— Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608.

Wyoming.— Hazard Powder Co. *v.* Volger, 3 Wyo. 189, 18 Pac. 636.

30. Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Dieter *v.* Zbaren, 81 Mo. App. 612; Benham *v.* Taylor, 66 Mo. App. 308; Wills *v.* Cape Girardeau Southwestern R. Co., 44 Mo. App. 51.

31. Brothers *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

32. Race *v.* Easton, etc., R. Co., 62 N. J. L. 536, 41 Atl. 710.

33. Keeley Brewing Co. *v.* Parnin, 13 Ind. App. 588, 41 N. E. 471; Hess *v.* Lupton, 7 Ohio 216.

of the injury, connection between the act or omission and the resultant injury must be shown,[34] and a complaint is insufficient if it fails to show such connection,[35] or where the contrary appears from the other allegations.[36] So where, as a matter of law, the specific negligence alleged is not the proximate cause of the injury, the pleading is not helped, as against a general demurrer by a general allegation that defendant ought to have foreseen the danger and averted it, or that the negligence was such proximate cause.[37] No particular form of allegation is necessary, and where the negligent act causing the injury is set out with an allegation that by reason of,[38] by,[39] through,[40] or in consequence of such negligence[41] it is a sufficient as well as a direct allegation that defendant's negligence caused the injury,[42] or that it was wholly caused thereby.[43]

h. Negligence of Third Persons. Where the negligence charged is that of a

34. McGanahan *v.* East St. Louis, etc., R. Co., 72 Ill. 557; Strain *v.* Strain, 14 Ill. 368; Paige Iron Works *v.* Hutter, 107 Ill. App. 673; Pittsburgh, etc., R. Co. *v.* Conn, 104 Ind. 64, 3 N. E. 636; Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 36 Am. Rep. 188; Island Coal Co. *v.* Clemmitt, 19 Ind. App. 21, 49 N. E. 38; Cowans *v.* Marshall, 28 Can. Sup. Ct. 161.

35. *Indiana.*— Louisville, etc., R. Co. *v.* Ehlert, 87 Ind. 339; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Pittsburgh, etc., R. Co. *v.* Culver, 60 Ind. 469; Cincinnati, etc., R. Co. *v.* Voght, 26 Ind. App. 665, 60 N. E. 797.

Iowa.— McCaull *v.* Bruner, 91 Iowa 214, 59 N. W. 37.

Nebraska.— Chicago, etc., R. Co. *v.* Clinebell, 5 Nebr. (Unoff.) 603, 99 N. W. 839.

New Jersey.— Minnuci *v.* Philadelphia, etc., R. Co., 68 N. J. L. 432, 53 Atl. 229.

Texas.— Miller *v.* Itasca Cotton Seed Oil Co., (Civ. App. 1897) 41 S. W. 366.

England.— Wilson *v.* Newberry, L. R. 7 Q. B. 31, 41 L. J. Q. B. 31, 25 L. T. Rep. N. S. 695, 20 Wkly. Rep. 111.

See 37 Cent. Dig. tit. "Negligence," § 183½.

Illustration.— A complaint in an action brought to recover for property destroyed by a fire started on defendant's premises and communicated to plaintiff's property, which fails to state defendant's negligence in suffering the fire to be so communicated, is defective. Indiana, etc., R. Co. *v.* McBroom, 91 Ind. 111. A complaint which alleged that a dumbwaiter in a tenement house was defective through defendant's negligence, and that plaintiff, a tenant, was injured by its falling on him, was insufficient, since it did not allege that the fall of the dumbwaiter or the injuries suffered, "resulted" from defendant's negligence. Allinger *v.* McKeown, 30 Misc. (N. Y.) 275, 63 N. Y. Suppl. 221 [*affirmed* in 50 N. Y. App. Div. 628, 64 N. Y. Suppl. 1131].

36. Kistner *v.* Indianapolis, 100 Ind. 210; Mathiason *v.* Mayer, 90 Mo. 585, 2 S. W. 834; Edwards *v.* Brayton, 25 R. I. 597, 57 Atl. 784.

37. Prokop *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 520, 79 S. W. 101.

38. Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293; Island Coal Co. *v.* Clemmitt, 19 Ind. App. 21, 49 N. E. 38; King *v.* Great Western R. Co., 24 L. T. Rep. N. S. 583.

39. Louisville, etc., R. Co. *v.* Shearer, 119 Ky. 648, 59 S. W. 330, 22 Ky. L. Rep. 929 (holding that a petition alleging that defendant committed certain acts, and that "by said carelessness and negligence and misconduct of defendant and its employes" plaintiff was injured, sufficiently alleges negligence); Shepherd *v.* Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260.

40. Wabash, etc., R. Co. *v.* Johnson, 96 Ind. 44.

41. Schultz *v.* Moon, 33 Mo. App. 329.

42. Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270.

Petition held sufficient.— A petition in an action against a railway company for negligently causing the death of a traveler at a highway crossing, which enumerates several alleged acts of negligence, and then alleges "that said acts of negligence were the direct and proximate cause of the death" of decedent, "and that all of said acts contributed thereto" is not open to the objection that it fails to allege that the negligent acts enumerated produced the injury complained of. International, etc., R. Co. *v.* Glover, (Tex. Civ. App. 1905) 88 S. W. 515.

43. Louisville, etc., R. Co. *v.* Hanmann, 87 Ind. 422; Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334. And see Brinkman *v.* Bender, 92 Ind. 234; Pzepka *v.* American Glucose Co., 11 Misc. (N. Y.) 131, 31 N. Y. Suppl. 1019.

Complaint held sufficient.— The complaint alleged that the county board negligently failed to place any guards at the sides of the bridge, and that, while plaintiff was driving over it in a buggy, her horse, without her fault, became frightened at a hog under the bridge, and backed at the side, where there was no railing or protection; that the horse, by reason of defendant's negligence, backed off the bridge, severely injuring plaintiff; and that such injuries were caused "wholly by the said negligent conduct of the defendant," without fault on plaintiff's part. It was held on demurrer that the complaint was not objectionable as not alleging that the injury was caused by the defects in the bridge. Boone County *v.* Mutchler, 137 Ind. 140, 36 N. E. 534.

third person, defendant's liability for such acts must be shown.[44] In a declaration charging negligence against a single defendant, an allegation to the effect that a constituent portion of the negligent conduct so charged against defendant resulted from the negligence of another than such defendant will be rejected as surplusage.[45]

i. Wilful or Wanton Injury.[46] In order to charge defendant with a wilful or wanton injury it is necessary to allege that such injury was intentionally and wittingly done. An allegation that an act was wilfully done is sufficient without setting out the facts showing the wilfulness.[47] A direct allegation of wilfulness is necessary if the facts alleged show wilfulness.[48] Where the facts alleged do not show that it was the intention of defendant to inflict an injury, the characterization of the act as wilful will not make the complaint good as charging wilful negligence.[49] It has been generally held that wilful injury is not charged by allegations that the act was committed recklessly,[50] wantonly,[51] purposely,[52] wrongfully,

44. Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

45. Owens *v.* Lehigh Valley Coal Co., 115 Ill. App. 142.

46. **Negativing contributory negligence** see *infra*, VIII, B, 1, j, (I), (C).

Plea or answer see *infra*, VIII, B, 2, c.

47. Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116 [*following* Birmingham Mineral R. Co. *v.* Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830]; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Chicago, etc., R. Co. *v.* Nash, (Ind. 1890) 24 N. E. 884; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218; Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564; Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406. And see Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231.

48. Levin *v.* Memphis, etc., R. Co., 109 Ala. 332, 19 So. 395 (holding that a complaint charging that defendant knowing of plaintiff's peril recklessly pursued a course of action calculated to inflict personal injuries on him and which did inflict the injuries is an averment of wantonness and wilfulness); Bolin *v.* Southern R. Co., 65 S. C. 222, 43 S. E. 665.

49. Southern R. Co. *v.* Prather, 119 Ala. 588, 24 So. 836, 72 Am. St. Rep. 949; Western Brewery Co. *v.* Meredith, 166 Ill. 306, 46 N. E. 720; Sherfey *v.* Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Cleveland, etc., R. Co. *v.* Asbury, 120 Ind. 289, 22 N. E. 140; Louisville, etc., R. Co. *v.* Ader, 110 Ind. 376, 11 N. E. 437; Belt R., etc., Co. *v.* Mann, 107 Ind. 89, 7 N. E. 893; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51, 7 N. E. 807; Louisville, etc., R. Co. *v.* Schmidt, 106 Ind. 73, 5 N. E. 684; Ivens *v.* Cincinnati, etc., R. Co., 103 Ind. 27, 2 N. E. 134; Louisville, etc., R. Co. *v.* Davis, 7 Ind. App. 222, 33 N. E. 451; Rountree *v.* Stephens, 8 Ky. L. Rep. 433; Taylor *v.* Holman, 45 Mo. 371. And see Williams *v.* North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589.

Complaints insufficient to show wilful injury.— A complaint in an action for personal injuries which alleges the mere intentional omission to perform a duty, or the intentional doing of an act contrary to such duty, although culpable and resulting in injury, without further averment, does not state that the injury was intentional or wantonly inflicted. Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231. A count in a complaint which charges that the death of plaintiff's intestate resulted by reason of a wilful running of said train at a high rate of speed, but does not aver that the intention in running the train was to inflict the injury, or aver facts which show that defendant knew that the probable result of such conduct would be to inflict injury, is defective as a complaint for injury wilfully inflicted. Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116. In actions against a railroad company, to recover damages for killing a person, when the pleading, notwithstanding the frequent use of the words "purposely" and "wilfully" does not charge that defendant purposely or wilfully killed the intestate, or purposely or wilfully ran the train upon him, or caused it so to be run upon him, the allegations amount to no more than a charge of killing through negligence. Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801.

50. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116; Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Cincinnati, etc., R. Co. *v.* Eaton, 53 Ind. 307; Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 239; Greathouse *v.* Croan, 4 Indian Terr. 668, 76 S. W. 273. But see Georgia Pac. R. Co. *v.* Ross, 100 Ala. 490, 14 So. 282.

51. Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Lexington *v.* Lewis, 10 Bush (Ky.) 677; Kelly *v.* Stewart, 93 Mo. App. 47. But see Georgia Pac. R. Co. *v.* Ross, 100 Ala. 490, 14 So. 282.

52. Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338.

or unlawfully;[53] and so an allegation that defendant was grossly negligent is held not equivalent to an allegation of a wilful act.[54]

j. Negativing Contributory Negligence or Other Fault — (i) *In General* — (A) *Necessity in General.* The rule adopted in nearly all jurisdictions is that contributory negligence is a defense and need not be negatived by plaintiff,[55]

53. Jacobs *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 263.

54. *Colorado.*— Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582.

Illinois.— Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

Indiana.— Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

Kansas.— Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982.

Missouri.— Taylor *v.* Scherpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581.

See 37 Cent. Dig. tit. "Negligence," § 185.

"Gross" a mere expletive.— Where a complaint alleges that plaintiff was injured by the gross negligence of defendant's servants, without alleging that the injury was inflicted wilfully, wantonly, or through malice, the word "gross" must be treated as a mere expletive. McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

55. *Alabama.*— Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606, 37 So. 635; Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735; Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566; Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672; Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Holt *v.* Whatley, 51 Ala. 569.

Arizona.— Lopez *v.* Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748.

California.— Matthews *v.* Bull, (1897) 47 Pac. 773; House *v.* Meyer, 100 Cal. 592, 35 Pac. 308; Boyd *v.* Oddous, 97 Cal. 510, 32 Pac. 569; Magee *v.* North Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; Yik Hon *v.* Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666.

District of Columbia.— Atchison *v.* Wills, 21 App. Cas. 548.

Florida.— Orlando *v.* Heard, 29 Fla. 581, 11 So. 182, in which it was said that the declaration need not aver that plaintiff was exercising reasonable care, and the injury happened without his fault, since this is implied in the averment that the injury was occasioned by defendant's negligence.

Georgia.— Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580; Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020.

Kansas.— Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

Kentucky.— Frankfort *v.* Chinn, 89 S. W. 188, 28 Ky. L. Rep. 257; Lancaster *v.* Walter, 80 S. W. 189, 25 Ky. L. Rep. 2189; Depp *v.* Louisville, etc., R. Co., 14 S. W. 363, 12 Ky. L. Rep. 366.

Louisiana.— Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334, in which it is said that the contrary doctrine is overruled in so far as recognized in the jurisprudence of Louisiana.

Minnesota.— Thompson *v.* Great Northern R. Co., 70 Minn. 219, 72 N. W. 962; Lydecker *v.* St. Paul City R. Co., 61 Minn. 414, 63 N. W. 1027; Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637; Ekman *v.* Minneapolis St. R. Co., 34 Minn. 24, 24 N. W. 291; Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75.

Mississippi.— Hickman *v.* Kansas City, etc., R. Co., 66 Miss. 154, 5 So. 225; Mackey *v.* Vicksburg, 64 Miss. 777, 2 So. 178.

Missouri.— Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364; Thorpe *v.* Missouri Pac. R. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Dolan *v.* Moberly, 17 Mo. App. 436; Clark *v.* Famous Shoe, etc., Co., 16 Mo. App. 463.

Montana.— Pryor *v.* Walkerville, 31 Mont. 618, 79 Pac. 240; Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

Nebraska.— Chicago, etc., R. Co. *v.* Putnam, 45 Nebr. 440, 63 N. W. 826.

New Hampshire.— Valley *v.* Concord, etc., R. Co. 68 N. H. 546, 38 Atl. 383; Smith *v.* Eastern R. Co., 35 N. H. 356.

New York.— Lee *v.* Troy Citizens' Gaslight Co., 98 N. Y. 115; Mele *v.* Delaware, etc., Canal Co., 59 N. Y. Super. Ct. 367, 14 N. Y. Suppl. 630.

North Dakota.— Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972.

Ohio.— Voss *v.* Young, 9 Ohio Dec. (Reprint) 48, 10 Cinc. L. Bul. 292; Cincinnati St. R. Co. *v.* Fullbright, 8 Ohio Dec. (Reprint) 361, 7 Cinc. L. Bul. 187.

Oregon.—Johnston *v.* Oregon Short Line R. Co., 23 Oreg. 94, 31 Pac. 283 [*criticizing* Coughtry *v.* Willamette St. R. Co., 21 Oreg. 245, 27 Pac. 1081]; Grant *v.* Baker, 12 Oreg. 329, 7 Pac. 318.

South Carolina.— Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; Crouch *v.* Charleston, etc., R. Co., 21 S. C. 495.

Tennessee.— Illinois Cent. R. Co. *v.* Davis, 104 Tenn. 442, 58 S. W. 296.

Texas.— San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319; Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293; Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

Vermont.— Benedict *v.* Union Agricultural Soc., 74 Vt. 91, 52 Atl. 110; Brothers *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 230, 13 S. E. 475; South West Imp. Co. *v.* Andrew, 86 Va. 270, 9 S. E. 1015; Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

unless the other averments necessary to state a cause of action suggest the inference that plaintiff may have been guilty of contributory negligence.[56] It is enough if the declaration does not show affirmatively the existence of contributory negligence on the part of plaintiff.[57] In a few jurisdictions, however, it is necessary for plaintiff to plead absence of contributory negligence,[58] and in Indiana the complaint must negative contributory negligence[59] in all cases except actions for personal injuries or death.[60] This exception to the long-settled rule is

Washington.— Johnson *v.* Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Sheff *v.* Huntington, 16 W. Va. 307; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wisconsin.— Shepherd *v.* Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260; Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; Potter *v.* Chicago, etc., R. Co., 20 Wis. 533, 91 Am. Dec. 444.

United States.— Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. ed. 78; Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239. In actions for personal injuries, brought in the federal courts, plaintiff is not required to plead or prove freedom from contributory negligence. Berry *v.* Lake Erie, etc., R. Co., 70 Fed. 193.

See 37 Cent. Dig. tit. "Negligence," § 186.

56. Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Street R. Co. *v.* Nolthenius, 40 Ohio St. 376; Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

57. Purcell *v.* Paterson, etc., Gas, etc., Co., (N. J. Sup. 1902) 53 Atl. 235; Warshawsky *v.* Raritan Traction Co., 68 N. J. L. 241, 52 Atl. 296; Falk *v.* New York, etc., R. Co., 56 N. J. L. 380, 29 Atl. 157; Galveston, etc., R. Co. *v.* Bohan, (Tex. Civ. App. 1898) 47 S. W. 1050.

If from the facts alleged an inference of contributory negligence arises such inference must be negatived. Indianapolis Traction, etc., Co. *v.* Pressell, (Ind. App. 1906) 77 N. E. 357; Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 853; Chicago, etc., R. Co. *v.* Putnam, 45 Nebr. 440, 63 N. W. 826. And see Chicago, etc., R. Co. *v.* Putnam, 45 Nebr. 440, 63 N. W. 826.

58. *Iowa.*— Brown *v.* Illinois Cent. R. Co., 123 Iowa 239, 98 N. W. 625; Decatur *v.* Simpson, 115 Iowa 348, 88 N. W. 839; Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458; Gregory *v.* Woodworth, 93 Iowa 246, 61 N. W. 962.

Massachusetts.— See Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Raymond *v.* Lowell, 6 Cush. 524, 53 Am. Dec. 57.

Michigan.— Thompson *v.* Flint, etc., R. Co., 57 Mich. 300, 23 N. W. 820. And see Milliken *v.* St. Clair, 136 Mich. 250, 99 N. W. 7. *Compare* Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837, in which it was held not customary in cases for injuries by animals to allege want of contributory negligence.

Oklahoma.— Guthrie *v.* Nix, 3 Okla. 136, 41 Pac. 343.

Rhode Island.— See Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

59. Cleveland, etc., R. Co. *v.* Wisehart, 161 Ind. 208, 67 N. E. 993; Gartin *v.* Meredith, 153 Ind. 16, 53 N. E. 936; Plymouth *v.* Fields, 125 Ind. 323, 25 N. E. 346; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Stevens *v.* Lafayette, etc., Gravel Road Co., 99 Ind. 392; Eberhart *v.* Reister, 96 Ind. 478; Wabash, etc., R. Co. *v.* Johnson, 96 Ind. 44; Wabash, etc., R. Co. *v.* Johnson, 96 Ind. 40; Louisville, etc., R. Co. *v.* Lockridge, 93 Ind. 191; Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168; Pennsylvania Co. *v.* Gallentine, 77 Ind. 322; Williams *v.* Moray, 74 Ind. 25, 39 Am. Rep. 76; Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26; Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477; Louisville, etc., R. Co. *v.* Boland, 53 Ind. 398; Cincinnati, etc., R. Co. *v.* Eaton, 53 Ind. 307; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154; Toledo, etc., R. Co. *v.* Harris, 49 Ind. 119; Jackson *v.* Indianapolis, etc., R. Co., 47 Ind. 454; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Maxfield *v.* Cincinnati, etc., R. Co., 41 Ind. 269; Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 545; Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229; Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380; Toledo, etc., R. Co. *v.* Bevin, 26 Ind. 443; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Indianapolis, etc., R. Co. *v.* Keely, 23 Ind. 133; Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; Mt. Vernon *v.* Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Cincinnati, etc., Electric St. R. Co. *v.* Klump, 37 Ind. App. 660, 77 N. E. 869; Indiana Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. App. 1904) 72 N. E. 183; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485; Lake Erie, etc., R. Co. *v.* Hancock, 15 Ind. App. 104, 43 N. E. 659; Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458; Keeley Brewing Co. *v.* Parnin, 13 Ind. App. 588, 41 N. E. 471; Richmond Gas Co. *v.* Baker, (Ind. App. 1895) 39 N. E. 552; Terre Haute St. R. Co. *v.* Tappenbeck, 9 Ind. App. 422, 36 N. E. 915; Cincinnati, etc., R. Co. *v.* Stanley, 4 Ind. App. 364, 30 N. E. 1103; Cincinnati, etc., R. Co. *v.* Stanley, (Ind. App. 1891) 27 N. E. 316.

60. Union Traction Co. *v.* Sullivan, 38 Ind. App. 513, 76 N. E. 116; Southern Indiana R.

made by a recent statute.[61] In Illinois the question is not well settled. A great number of decisions in this state hold that the burden of proof is on plaintiff to show the absence of contributory negligence,[62] and in a number of cases it is either held or said that absence of negligence on plaintiff's part must be alleged.[63] In others it is held that any defect in failing to attribute want of contributory negligence is cured by verdict.[64] There are, however, other decisions which hold that it is not necessary to negative contributory negligence.[65] Even in jurisdictions where contributory negligence must be negatived it is not necessary to expressly allege want of contributory negligence where the facts and circumstances exclude any fair inference of such negligence.[66] Failure to plead freedom from contributory negligence may be taken advantage of by motion in arrest of judgment.[67]

(B) *Knowledge of Defect or Danger.* In those jurisdictions in which contributory negligence need not be negatived plaintiff need not aver want of knowledge of the defect or danger, this being a matter of defense.[68] And in jurisdictions where it must be negatived, if the complaint alleges that plaintiff was without fault no allegation of ignorance of defect or danger is necessary.[69]

Co. *v.* Corps, 37 Ind. App. 586, 76 N. E. 902; Pittsburgh, etc., R. Co. *v.* Browning, 34 Ind. App. 90, 71 N. E. 227; Cleveland, etc., R. Co. *v.* Goddard, 33 Ind. App. 321, 71 N. E. 514; Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95, 69 N. E. 270; Baltimore, etc., R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923; Parkhurst *v.* Swift, 31 Ind. App. 521, 68 N. E. 620; Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309; Evansville *v.* Christy, 29 Ind. App. 44, 63 N. E. 867.

61. Burns Rev. St. Ind. § 359*a*.

62. See *infra*, VIII, C, 2, b, (I).

63. See Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358; Junction Min. Co. *v.* Ench, 111 Ill. App. 346 (holding, however, that if the count is based upon allegations of contributory negligence, averments of proof of ordinary care is not essential); Burke *v.* Chicago, etc., R. Co., 108 Ill. App. 565 (holding, however, that where the declaration avers that when defendant's servants deposited plaintiff upon their platform he was wholly incapable of exercising in his own behalf any care whatever, and that this was well known to defendant's servants, and that plaintiff was injured because they failed to perform the duty they owed him, it states a cause of action without alleging due care on the part of plaintiff).

64. Gerke *v.* Fancher, 158 Ill. 375, 41 N. E. 982; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373.

65. Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57, 24 N. E. 627; Chicago, etc., R. Co. *v.* Cass, 73 Ill. 394; Cox *v.* Brackett, 41 Ill. 222; Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242; Chicago, etc., R. Co. *v.* Hines, 33 Ill. App. 271 [*affirmed* in 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515]. And see Franklin Printing, etc., Co. *v.* Behrens, 80 Ill. App. 313.

66. Brockett *v.* Fair Haven, etc., R. Co., 73 Conn. 428, 47 Atl. 763; Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551; Gormley *v.* Ohio, etc., R. Co., 72 Ind. 31; Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26; Louisville, etc., R. Co. *v.* Boland, 53 Ind. 398; Maxfield *v.* Cincinnati, etc., R. Co., 41 Ind. 269; Michigan Southern, etc., R. Co. *v.* Lantz, 29 Ind. 528; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485; Pennsylvania Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425; Cincinnati, etc., R. Co. *v.* Stanley, (Ind. App. 1891) 27 N. E. 316.

Illustration.— The complaint alleging that an explosion and all the injuries and damages to plaintiff and to a well were caused solely and entirely by the negligence of defendants in "shooting" the well, shows, as a necessary inference, plaintiff's freedom from contributory negligence, and is therefore sufficient in that respect. Indiana Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. 1905) 75 N. E. 649 [*reversing* (App. 1904) 72 N. E. 183].

67. Brown *v.* Illinois Cent. R. Co., 123 Iowa 239, 98 N. W. 625; Decatur *v.* Simpson, 115 Iowa 348, 88 N. W. 839, by answering over defendant waived the error, but this does not constitute an adjudication.

68. Chicago, etc., R. Co. *v.* Hines, 33 Ill. App. 271 [*affirmed* in 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515]; Indiana Natural Gas, etc., Co. *v.* O'Brien, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; Union Stockyards Co. *v.* Conoyer, 38 Nebr. 488, 56 N. W. 1081, 41 Am. St. Rep. 738. And see Wells *v.* Burlington, etc., R. Co., 56 Iowa 520, 9 N. W. 364; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356.

69. Ohio, etc., R. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20; Chicago, etc., R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Wilson *v.* Trafalgar, etc., Gravel Road Co., 83 Ind. 326; Bloomington *v.* Rogers, 83 Ind. 261; Murphy *v.* Indianapolis, 83 Ind. 76; James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361. A complaint stating that the owner permitted a building to collapse, and in so doing, to instantly and without notice kill deceased, while he was rightfully and without negli-

(c) *As Against Wilful or Wanton Negligence.* An exception to the rule requiring plaintiff to negative contributory negligence occurs where the basis of the action is wilful or wanton negligence, because in such case contributory negligence is no defense.[70]

(d) *Sufficiency of Allegation.* To show freedom from contributory negligence, a general averment that plaintiff was without fault or negligence,[71] or that he was in the exercise of due care,[72] is sufficient unless the facts specially pleaded clearly show contributory negligence on the part of plaintiff.[73] Mere knowledge of

gence therein, alleges deceased's want of knowledge of its dangerous condition. Patterson *v.* Jos. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336.

70. Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159; Gartin *v.* Meredith, 153 Ind. 16, 53 N. E. 936; Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445; Belt R., etc., Co. *v.* Mann, 107 Ind. 89, 7 N. E. 893; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51, 7 N. E. 807; Ivens *v.* Cincinnati, etc., R. Co., 103 Ind. 27, 2 N. E. 134; Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46; Indianapolis, etc., R. Co. *v.* Petty, 30 Ind. 261; Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298, 27 N. E. 564; Continental Ins. Co. *v.* Clark, 126 Iowa 274, 100 N. W. 524. And see Louisville, etc., R. Co. *v.* Ader, 110 Ind. 376, 11 N. E. 437.

71. Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020; Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45 (holding that the precautions taken to avoid injury need not be set out); Ft. Wayne, etc., R. Co. *v.* Gruff, 132 Ind. 13, 31 N. E. 460; Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Louisville, etc., R. Co. *v.* Sandford, 117 Ind. 265, 19 N. E. 770; Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, 10 N. E. 575; Anderson *v.* Hervey, 67 Ind. 420 (especially when first attacked by motion in arrest of judgment); Wabash R. Co. *v.* Schultz, 30 Ind. App. 495, 64 N. E. 481; Citizens St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Cleveland, etc., R. Co. *v.* Griffin, 26 Ind. App. 368, 58 N. E. 503; Sprankle *v.* Bart, 25 Ind. App. 681, 58 N. E. 862; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Keeley Brewing Co. *v.* Parnin, 13 Ind. App. 588, 41 N. E. 471; New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Lake Erie, etc., R. Co. *v.* Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465; Evansville, etc., R. Co. *v.* Weikle, 6 Ind. App. 340, 33 N. E. 639; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328; Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Gregory *v.* Woodworth, 93 Iowa 246, 61 N. W. 962; Chicago, etc., R. Co. *v.* Lagerkrans, 65 Nebr. 566, 91 N. W. 358, 95 N. W. 9.

Where plaintiff avers that he was without fault any legitimate proof by which its truth can be established is admissible. Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 182.

72. Brennan *v.* Berlin Iron Bridge Co., 72 Conn. 386, 44 Atl. 727; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Keeley Brewing Co. *v.* Parnin, 13 Ind. App. 588, 41 N. E. 471.

73. D. H. Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229; Citizens' St. R. Co. *v.* Sutton, 148 Ind. 169, 46 N. E. 462, 47 N. E. 462; Richmond Gas Co. *v.* Baker, (Ind. 1895) 39 N. E. 552; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647, 36 N. E. 901; Phenix Ins. Co. *v.* Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 30 N. E. 27; Louisville, etc., Consol. R. Co. *v.* Summers, 131 Ind. 241, 30 N. E. 873; Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Hammond *v.* Schweitzer, 112 Ind. 246, 13 N. E. 869; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Howard County *v.* Legg, 93 Ind. 523, 47 Am. Rep. 390; Gheens *v.* Golden, 90 Ind. 427; Murphy *v.* Indianapolis, 83 Ind. 76; Mitchell *v.* Robinson, 80 Ind. 281, 41 Am. Rep. 812; Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 182; Ft. Wayne *v.* De Witt, 47 Ind. 391; Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Huntingburgh *v.* First, 15 Ind. App. 552, 43 N. E. 17; Lake Erie, etc., R. Co. *v.* Hancock, 15 Ind. App. 104, 43 N. E. 659; Citizens' St. R. Co. *v.* Albright, 14 Ind. App. 433, 42 N. E. 238, 1028; Eureka Block Coal Co. *v.* Bridgewater, 13 Ind. App. 333, 40 N. E. 1101; Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650; New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609; Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255, 34 N. E. 646; Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241; Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338; Ohio, etc., R. Co. *v.* Hawkins, 1 Ind. App. 213, 27 N. E. 331.

A general averment of plaintiff's freedom from negligence is controlled by a statement of the specific facts and circumstances on which the averment is based. Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485. An allegation in the complaint that decedent was attempting to cross a bridge with an engine, boiler, and wagon does not show such gross

the defect or danger is not sufficient to overcome such allegation.[74] Merely alleging an attempt to use due care is not sufficient.[75] The allegation of due care must be broad enough to cover the entire transaction,[76] and an allegation that plaintiff had no knowledge of the defect or danger is sufficient.[77] An allegation at the conclusion of several counts is sufficient in the absence of demurrer,[78] and if the facts alleged show freedom from contributory negligence it is sufficient.[79]

(E) *Effect of Inference of Contributory Negligence From Allegations.* Where the facts alleged show that plaintiff was guilty of contributory negligence, the complaint is bad;[80] but to render a complaint demurrable by reason of an inference of negligence from the facts alleged, the contributory negligence must be necessarily inferred as matter of law.[81]

(II) *Children.* Where freedom from contributory negligence must be alleged, the rule applies to an infant,[82] unless it is *non sui juris*,[83] and although the allegation of facts would show contributory negligence in an adult, yet such negligence is negatived by allegations that the person injured was a child of immature experience and judgment.[84] The fact that a child is *non sui juris* cannot be proved unless averred.[85]

(III) *Imputed Negligence.* The decisions are not in accord as to the necessity of pleading freedom from imputed negligence. Some cases hold that in a complaint for injury to one to whom the negligence of another may be imputed an averment of want of negligence on the part of such other is necessary.[86] But if the relationship is such that the negligence of such other will not be imputed to plaintiff no allegation that the other is free from negligence is necessary.[87] Others hold that an averment that plaintiff who was injured was free

negligence *per se* as to overcome an allegation that he was without fault. Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735.

74. Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450. The fact that the complaint showed that plaintiff's intestate knew of a dangerous place in the highway, into which he fell and was killed, was held not sufficient to overcome or make nugatory the explicit averment that he exercised reasonable care and prudence. Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490.

75. Thompson *v.* Flint, etc., R. Co., 57 Mich. 300, 23 N. W. 820.

76. Ward *v.* Danzeizen, 111 Ill. App. 163.

Application of rule.— An allegation that plaintiff "has been," in all things, free from negligence, renders the complaint demurrable, as it does not necessarily allege freedom from negligence at the particular time of the injury. Richmond Gas Co. *v.* Baker, (Ind. 1895) 39 N. E. 552.

77. Barman *v.* Spencer, (Ind. 1898) 49 N. E. 9; Cleveland, etc., R. Co. *v.* Goddard, 33 Ind. App. 321, 71 N. E. 514.

78. U. S. Brewing Co. *v.* Stoltenberg, 113 Ill. App. 435 [*affirmed* in 211 Ill. 531, 71 N. E. 1081].

79. Cincinnati, etc., Electric St. R. Co. *v.* Klump, 37 Ind. App. 660, 77 N. E. 869.

80. Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Lafayette *v.* Fitch, 32 Ind. App. 134, 69 N. E. 414; Stillwell *v.* South Louisville Land Co., 58 S. W. 696, 22 Ky. L. Rep. 785, 52 L. R. A. 325; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

81. Union Tp. *v.* Hester, 8 Kan. App. 725, 54 Pac. 923; Birmingham *v.* Duluth, etc., R. Co., 70 Minn. 474, 73 N. W. 409; Lydecker *v.* St. Paul City R. Co., 61 Minn. 414, 63 N. W. 1027; Ekman *v.* Minneapolis St. R. Co., 34 Minn. 24, 24 N. W. 291. A petition alleging that at three A. M. defendant's negligently constructed water tower fell, and that the water therefrom rushed upon deceased's house, and caused a burning lamp to be thrown upon deceased, resulting in his death, does not show contributory negligence. Rigdon *v.* Temple Water Works Co., 11 Tex. Civ. App. 542, 32 S. W. 828.

82. Higgins *v.* Jeffersonville, etc., R. Co., 52 Ind. 110.

83. Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Cleveland, etc., R. Co. *v.* Klee, 154 Ind. 430, 56 N. E. 234; Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535; Elwood *v.* Addison, 26 Ind. App. 28, 59 N. E. 47.

84. Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757.

85. Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895.

86. Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269.

Child sui juris.— The negligence of his custodians not being imputed to a child having capacity to exercise discretion in his own behalf, due care on the part of such custodians need not be alleged. Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, 37 N. E. 406.

87. Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609.

from contributory negligence is sufficient to cover freedom from imputed negligence.[88]

k. Power of Defendant to Avoid Injury. The complaint need not allege that, although plaintiff was negligent, yet defendant might have avoided the injury by the exercise of reasonable care in order to justify the admission of evidence of such fact.[89]

2. Plea or Answer[90] — a. In General. The plea or answer should deny all the material allegations of the complaint,[91] and of each count.[92]

b. Special Defenses. Special defenses must be specially pleaded. This applies to a defense that the injury would have happened notwithstanding the act of defendant[93] or that it was the result of an act of God[94] or inevitable accident;[95] and such plea must state the facts which constitute such inevitable accident.[96] The fact that a co-defendant was an independent contractor need not be specially set up,[97] nor that the injuries were due to the negligence of a third person unknown to defendant.[98]

c. Contributory Negligence — (i) *In General* — (A) *Necessity of Pleading.* While it is held in a number of jurisdictions that contributory negligence is available as a defense under the general issues or general denial,[99] it is held in the majority of jurisdictions where the question has been raised that to be available as a

88. Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837; Elenz *v.* Conrad, 115 Iowa 183, 88 N. W. 337.

89. Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 664, 20 N. W. 467, 22 N. W. 918, in which the court said, "We know of no rule of pleading which requires the plaintiff in actions of this character to confess negligence on his part, and avoid it by alleging that the defendant might have averted the injury by using proper care after the discovery of plaintiff's peril." It is a phase of the rights and obligations of the parties which arises upon the proofs rather than by pleading." But see Hawkins *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 633, 83 S. W. 52, holding that to entitle plaintiff to have the question of discovered peril submitted to the jury, the issue must be raised by the pleadings.

90. Form and sufficiency in general see Pleading.

Practice as to demurrer see Pleading.

Release of causes of action see Release.

91. South Covington, etc., R. Co. *v.* Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750 (holding that an answer denying that any injury was inflicted through the carelessness or negligence or by the fault of defendant does not deny the damage or the injury); McIntyre *v.* Buchanan, 14 U. C. Q. B. 581 (holding that a plea that deceased fell into an unguarded cellar by his own fault or negligence is had as not denying an allegation of youth and inexperience).

Failure to deny ownership of property admits it. St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357.

92. A plea to a whole declaration containing counts as to simple and gross negligence is defective in failing to answer a charge of gross negligence. Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260.

93. Thoburn *v.* Campbell, 80 Iowa 338, 45 N. W. 769. Where the owner of land contracts for the erection of a building thereon, in accordance with plans and specifications furnished by him, *prima facie* he is responsible for injuries resulting from the fact that the building thus erected is inherently defective and dangerous, and, if he can escape such liability by the fact that he employed a competent architect and acted upon his advice, it is incumbent upon him to affirmatively show those facts. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

94. Orient Ins. Co. *v.* Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036; Chicago, etc., R. Co. *v.* Shaw, 63 Nebr. 380, 88 N. W. 508.

95. Cotterill *v.* Starkey, 8 C. & P. 691, 34 E. C. L. 965; Burns *v.* Cork, etc., R. Co., 13 Ir. C. L. 543.

96. Burns *v.* Cork, etc., R. Co., 13 Ir. C. L. 543.

97. Overhouser *v.* American Cereal Co., 128 Iowa 580, 105 N. W. 113.

98. Levy *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 220, 68 N. Y. Suppl. 944 [*affirmed* in 34 Misc. 518, 69 N. Y. Suppl. 973].

99. *Indiana.*— Plymouth *v.* Fields, 125 Ind. 323, 25 N. E. 346; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; New York Cent., etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895; New Castle Bridge Co. *v.* Doty, 37 Ind. App. 84, 76 N. E. 557.

Minnesota.— O'Malley *v.* St. Paul, etc., R. Co., 43 Minn. 289, 45 N. W. 440; St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277.

New York.— Levy *v.* Metropolitan St. R. Co., 34 Misc. 220, 68 N. Y. Suppl. 944 [*affirmed* in 34 Misc. 518, 69 N. Y. Suppl. 973]; MacDonell *v.* Buffum, 31 How. Pr. 154.

defense contributory negligence must be specially pleaded,[1] and it has been held that the rule applies, although the complaint alleges that plaintiff was free from fault.[2] It is held, however, that contributory negligence may be availed of without special plea where it appears from plaintiff's pleading[3] or evidence;[4] and it

Wisconsin.— Cunningham *v.* Lyness, 22 Wis. 245.

Canada.— Doan *v.* Michigan Cent. R. Co., 17 Ont. App. 481; Kinney *v.* Morley, 2 U. C. C. P. 226.

See 37 Cent. Dig. tit. "Negligence," § 207.

Special plea bad as amounting to general issue.— In an action for running against plaintiff's carriage, a plea that the damage was the result of the negligence of both parties is bad in substance as well as form, for it amounts to the general issue. Woolf *v.* Beard, 8 C. & P. 373, 34 E. C. L. 787; Armitage *v.* Grand Junction R. Co., 6 Dowl. P. C. 340, 1 H. & H. 26, 3 M. & W. 244. And see Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

1. *Alabama.*— Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194; Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160; Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955; Tennessee Coal, etc., Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262. And see Brawley *v.* Birmingham R., etc., Co., (1905) 39 So. 919.

Florida.— Louisville, etc., R. Co. *v.* Yniestra, 21 Fla. 700.

Iowa.— Willis *v.* Perry, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124.

Kansas.— Western Union Tel. Co. *v.* Morris, 10 Kan. App. 61, 61 Pac. 972.

Louisiana.— Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334.

Mississippi.— Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587.

Missouri.— Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509, 10 S. W. 66; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Brown *v.* Hannibal, etc., R. Co., 31 Mo. App. 661; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76; Keitel *v.* St. Louis Cable, etc., R. Co., 28 Mo. App. 657.

Montana.— Orient Ins. Co. *v.* Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036; Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871; Meisner *v.* Dillon, 29 Mont. 116, 74 Pac. 130; Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 852.

North Carolina.— Smith *v.* Southern R. Co., 129 N. C. 374, 40 S. E. 86; De Berry *v.* Carolina Cent. R. Co., 100 N. C. 310, 6 S. E. 723.

South Carolina.— Scott *v.* Seaboard Air Line R. Co., 67 S. C. 136, 45 S. E. 129; Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303 [*following* Wilson *v.* Charleston, etc. R. Co., 51 S. C. 79, 28 S. E. 91].

Texas.— Dublin Cotton Oil Co. *v.* Jarrard, 91 Tex. 289, 42 S. W. 959; Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Missouri, etc., R. Co. *v.* Jamison, 12 Tex. Civ. App. 689, 34 S. W. 674; Western Union Tel. Co. *v.* Apple, (Civ. App. 1894) 28 S. W. 1022. *Contra*, Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas. § 481; Rogers *v.* Watson, 1 Tex. App. Civ. Cas. § 382.

Utah.— Holland *v.* Oregon Short Line R. Co., 26 Utah 209, 72 Pac. 940.

United States.— Clark *v.* Canadian Pac. R. Co., 69 Fed. 543, in federal courts. And see Evans *v.* Lake Erie, etc., R. Co., 78 Fed. 782, holding that such plea is proper. *Contra*, Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 20 C. C. A. 447.

See 37 Cent. Dig. tit. "Negligence," § 195.

The plea of contributory negligence is one in confession and avoidance and implies negligence on the part of defendant. McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317; Newport, etc., Turnpike Co. *v.* Pirmann, 82 S. W. 976, 26 Ky. L. Rep. 933; Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334; Mackey *v.* Vicksburg, 64 Miss. 777, 2 So. 178; Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

2. Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15 [*disapproving dictum* in Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476]. But see Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239, holding that where such fact is alleged in the complaint and denied in the answer it is in issue.

3. Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731.

4. *Minnesota.*— Blakeley *v.* Le Duc, 19 Minn. 187.

Mississippi.—McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

Missouri.— Engleking *v.* Kansas City, etc., R. Co., 187 Mo. 158, 86 S. W. 89; Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15; Kappes *v.* Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159; Brown *v.* Hannibal, etc., R. Co., 31 Mo. App. 661; Keitel *v.* St. Louis Cable, etc., R. Co., 28 Mo. App. 657; Evans, etc., Fire Brick Co. *v.* St. Louis, etc., R. Co., 21 Mo. App. 648.

Texas.— Gulf, etc., R. Co. *v.* Allbright, 7 Tex. Civ. App. 21, 26 S. W. 250.

Utah.— Holland *v.* Oregon Short Line R. Co., 26 Utah 209, 72 Pac. 940; Clark *v.* Oregon Short Line R. Co., 20 Utah 401, 59 Pac. 92; Bunnell *v.* Rio Grande Western R. Co., 13 Utah 314, 44 Pac. 927, although generally a matter of defense.

Washington.— Brown *v.* Oregon R., etc., Co., 41 Wash. 688, 84 Pac. 400.

See 37 Cent. Dig. tit. "Negligence," § 185.

Contra.— Strickland *v.* Capitol City Mills, 70 S. C. 211, 49 S. E. 478.

has also been held that evidence of contributory negligence introduced without objection under a general denial of a complaint which alleges want of contributory negligence will be treated on appeal as properly admitted; that while such denial is objectionable it must be held sufficient objection is made in the trial court.[5]

(B) *Plea of Contributory Negligence With General Denial.* A general denial and plea of contributory negligence do not constitute inconsistent defenses and may be pleaded together,[6] and negligence on the part of defendant is not admitted by a plea of contributory negligence following a general denial.[7] Such pleas are distinct and should be set out in different paragraphs.[8]

(C) *Sufficiency of Allegation.* There is a conflict of authority as to the method of pleading contributory negligence, decisions even in the same jurisdiction not being always uniform. According to some decisions a general averment of contributory negligence without specifying the acts constituting it is sufficient.[9] The weight of authority, however, is that the facts constituting the contributory negligence must be set out, a mere general statement that the injury resulted from the contributory negligence not being sufficient.[10] Nevertheless even where this view prevails a general averment will not be held sufficient unless objected to at the proper time,[11] or in the proper manner,[12] and a defective averment may be aided by reply.[13] A plea alleging that plaintiff was injured by his own negligence,[14] or by his own negligence and not by any negligence of defendant,[15] is

5. Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

6. Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365 [*reversing* 9 Kan. App. 301, 61 Pac. 327]; Weingartner *v.* Louisville, etc., R. Co., 42 S. W. 839, 19 Ky. L. Rep. 1023; Jackson *v.* Natchez, etc., R. Co., 114 La. 981, 38 So. 701, 108 Am. St. Rep. 366, 70 L. R. A. 294; Pugh *v.* Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689.

7. Louisville, etc., R. Co. *v.* Pearce, 142 Ala. 680, 39 So. 72; McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Fowler *v.* Brooks, (Kan. 1902) 70 Pac. 600; Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365 [*reversing* 9 Kan. App. 301, 61 Pac. 327]; Hasie *v.* Alabama, etc., R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632.

8. Weingartner *v.* Louisville, etc., R. Co., 42 S. W. 839, 19 Ky. L. Rep. 1023.

9. Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 104, 39 S. W. 832, 18 Ky. L. Rep. 1079; Neier *v.* Missouri Pac. R. Co., (Mo. 1886) 1 S. W. 387; Stewart *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 370, 78 S. W. 979.

10. *Alabama.*— Forbes *v.* Davidson, 41 So. 312; Southern R. Co. *v.* Branyon, 145 Ala. 662, 39 So. 675; Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194; Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Tennessee Coal, etc., Co. *v.* Herndon, 100 Ala. 451, 14 So. 287.

Indiana.— Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Wood *v.* Mears, 12 Ind. 515, 74 Am. Dec. 222.

Missouri.— Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318. And see Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359.

North Carolina.— Watson *v.* Farmer, 141 N. C. 452, 54 S. E. 419.

Washington.— See Brown *v.* Seattle City R. Co., 16 Wash. 465, 47 Pac. 890.

Canada.— Montreal, etc., Light, etc., Co. *v.* Stillwell, 5 Quebec Pr. 148.

Plea held sufficient.— In an action for falling into an open waterway defendant interposed a plea alleging that decedent knew of the location of the waterway, that it contained hot water, and that it was at times uncovered; that he attempted to cross it while it was uncovered and when steam arising therefrom obstructed the view; and that he did not use due care to ascertain whether it was covered. It was held to state facts sufficient to show contributory negligence. Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687.

11. Although a defense of contributory negligence was defectively pleaded, where no objection was taken thereto before the trial, a general charge of negligence was a sufficient basis for the introduction of proof. Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478.

12. **Motion to make more definite and certain.**— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359; Wall *v.* Buffalo Water Works Co., 18 N. Y. 119.

13. **Order by reply.**— The complaint having negatived contributory negligence, an allegation in the answer that plaintiff's injuries were caused by her "carelessness, fault and want of care," if denied by plaintiff in her reply, is a good plea of contributory negligence. Brown *v.* Seattle City R. Co., 16 Wash. 465, 47 Pac. 890.

14. Newport, etc., Turnpike Co. *v.* Pirmann, 82 S. W. 976, 26 Ky. L. Rep. 933.

15. Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618, 130 N. C. 313, 41 S. E. 541; Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

not a sufficient plea of contributory negligence. Indeed it is not a plea of contributory negligence at all, for the law where contributory negligence exists presupposes the negligence of defendant, and a plea of this nature denies it.[16]

(II) *Children.* In pleading contributory negligence on the part of a child of tender years the plea will be bad unless it rebuts the presumption that it was incapable of exercising caution.[17]

(III) *Imputed Negligence.* A plea of contributory negligence on the part of plaintiff has been held under the liberal construction of pleadings to charge contributory negligence on the part of a father, although he was suing as administrator.[18]

3. Replication or Reply[19] — a. Necessity. As a general rule the plea of contributory negligence is admitted unless denied by reply,[20] even though the complaint has negatived contributory negligence.[21] An answer amounting to no more than a denial of defendant's negligence and that it was wholly caused by the negligence of plaintiff does not require a reply.[22]

b. Sufficiency. A denial of contributory negligence generally without a denial of the particular facts alleged in the answer is good.[23] Wilful negligence of defendant, which, notwithstanding the negligence of plaintiff's intestate, resulted in injury, must be pleaded by the reply, to be available to overcome a defense of contributory negligence, and is not inferentially pleaded by a general denial of contributory negligence, without such affirmative allegations.[24] The general replication prescribed by the Florida statute is properly pleaded to the plea of not guilty, special pleas denying specific allegations of the declaration, and a plea alleging that plaintiff's alleged injuries were caused by his own negligence, and not otherwise, in actions for damages alleged to have been caused by defendant's negligence.[25]

4. Issues Raised By and Evidence Admissible Under Pleading — a. Under Allegations of Complaint — (I) *In General.* As in other actions the evidence offered must be limited to the issues made by the pleadings, that is, the proofs must correspond to the pleadings, and a different cause of the injury than the one alleged cannot be proved.[26]

16. Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618.

17. Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587. Demurrers to pleas setting up contributory negligence in a child in an action by an administratrix for the death of the child, on the ground that they do not aver that "plaintiff" had sufficient discretion, etc., are properly overruled. Plaintiff is the administratrix and there is no necessity of any such averments as to her. Chambers *v.* Milner Coal, etc., Co., 143 Ala. 255, 39 So. 170.

18. Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

19. Form and sufficiency in general see Pleading.

20. Wabash, etc., Canal Co. *v.* Mayer, 10 Ind. 400; Brooks *v.* Louisville, etc., R. Co., 71 S. W. 507, 24 Ky. L. Rep. 1318. *Contra*, Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42, under Code Civ. Proc. § 720, requiring a reply only when the answer contains a counterclaim, failure to reply in a personal injury case does not admit allegations of contributory negligence.

21. Louisville, etc., R. Co. *v.* Copas, 95 Ky. 460, 26 S. W. 179, 16 Ky. L. Rep. 14 (holding, however, that such failure is waived by failure to move for judgment on pleadings and merely moving for nonsuit or binding instructions); Louisville, etc., R. Co. *v.* Paynter, 82 S. W. 412, 26 Ky. L. Rep. 761 (also holding that the fact that the allegation that deceased was exercising ordinary care when killed was repeated in an amended petition filed after the answer, and that the pleading was controverted of record, did not operate as a denial of the allegation of contributory negligence or take the place of a reply).

22. Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

23. Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82.

24. Ford *v.* Chicago, etc., R. Co., 106 Iowa 85, 75 N. W. 650.

25. Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

26. Healy *v.* Patterson, 123 Iowa 73, 98 N. W. 576 (holding that, in an action for negligent injuries, an allegation that a dump gave way by reason of the negligent manner in which it was kept and handled did not involve or raise the issue of improper construction or want of repair of the dump); Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Welever *v.* Williams, 26 Ohio

(II) *Allegations of Particular Acts.* Where the specific acts constituting the negligence are alleged evidence of other acts of negligence is not admissible.[27] But under allegations of the particular acts constituting the negligence proof of all incidental facts and circumstances that fairly tend to establish the negligence of the primary acts charged is admissible.[28]

(III) *Specific and General Allegations.* According to some decisions, where a general averment of negligence is followed by an enumeration and aver-

Cir. Ct. 624; Lieuallen *v.* Mosgrove, 33 Oreg. 282, 54 Pac. 200, 664.

27. *California.*— Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

Delaware.— Barker *v.* Collins, (1906) 63 Atl. 686.

Florida.— Louisville, etc., R. Co. *v.* Wade, 46 Fla. 197, 35 So. 863.

Georgia.— Augusta R., etc., Co. *v.* Weekly, 124 Ga. 384, 52 S. E. 444; Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974; Tucker *v.* Georgia Cent. R. Co., 122 Ga. 387, 50 S. E. 128; Georgia Brewing Assoc. *v.* Henderson, 117 Ga. 480, 43 S. E. 698.

Illinois.— Chicago City R. Co. *v.* Bruley, 215 Ill. 464, 74 N. E. 441; Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921; Ebsary *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017; Chicago, etc., R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. 357 [*reversing* 57 Ill. App. 365]; Chicago, etc., R. Co. *v.* Rayburn, 153 Ill. 290, 38 N. E. 558 [*reversing* 52 Ill. App. 277]; Chicago, etc., R. Co. *v.* Urbaniac, 106 Ill. App. 325; Cohen *v.* Chicago, etc., R. Co., 104 Ill. App. 314; Brink's Chicago City Express Co. *v.* Herron, 104 Ill. App. 269; Chicago, etc., R. Co. *v.* Vipond, 101 Ill. App. 607; La Salle County Carbon Coal Co. *v.* Eastman, 99 Ill. App. 495; Straight *v.* Odell, 13 Ill. App. 232.

Kansas.— Brown *v.* Chicago, etc., R. Co., 59 Kan. 70, 52 Pac. 65; Southern Kansas R. Co. *v.* Griffith, 54 Kan. 428, 38 Pac. 478; Telle *v.* Leavenworth Rapid Transit R. Co., 50 Kan. 455, 31 Pac. 1076; Atchison, etc., R. Co. *v.* Owens, 6 Kan. App. 515, 50 Pac. 962.

Kentucky.— Louisville, etc., R. Co. *v.* McGary, 104 Ky. 509, 47 S. W. 440, 20 Ky. L. Rep. 691.

Michigan.— Wager *v.* Lamont, 135 Mich. 521, 98 N. W. 1; Whitcomb *v.* Detroit Electric R. Co., 125 Mich. 572, 84 N. W. 1072; Cowley *v.* Colwell, 91 Mich. 537, 52 N. W. 73; McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494; Marquette, etc., R. Co. *v.* Marcott, 41 Mich. 433, 2 N. W. 795.

Missouri.— Hirst *v.* Ringen Real Estate Co., 169 Mo. 194, 69 S. W. 368; McCarty *v.* Rood Hotel Co., 144 Mo. 397, 46 S. W. 172; Aston *v.* St. Louis Transit Co., 105 Mo. App. 226, 79 S. W. 999; Haines *v.* Pearson, 100 Mo. App. 551, 75 S. W. 194; J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 534; Ellis *v.* Wabash, etc., R. Co., 17 Mo. App. 126.

Nebraska.— Elliott *v.* Carter White-Lead Co., 53 Nebr. 458, 73 N. W. 948.

New York.— Stenger *v.* Buffalo Union Furnace Co., 109 N. Y. App. Div. 183, 95 N. Y. Suppl. 793; Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755.

Ohio.— Baltimore, etc., R. Co. *v.* Lockwood, 72 Ohio St. 586, 74 N. E. 1071.

Oregon.— Lieuallen *v.* Mosgrove, 33 Oreg. 282, 54 Pac. 200, 664.

Tennessee.— East Tennessee Coal Co. *v.* Daniel, 100 Tenn. 65, 42 S. W. 1062.

Texas.— San Antonio Gas, etc., Co. *v.* Speegle, (Civ. App. 1900) 60 S. W. 884.

Utah.— Davis *v.* Utah Southern R. Co., 3 Utah 218, 2 Pac. 521.

West Virginia.— Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

Wisconsin.— See Busse *v.* Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183.

See 37 Cent. Dig. tit. "Negligence," § 208.

Illustration.— In an action to recover for personal injuries suffered by reason of the car in which plaintiff was riding being thrown from the track, defendant's negligence having been pleaded as consisting in permitting the presence of a defective wheel and defective ties, and in retaining unskilled service, evidence cannot be introduced to show that the accident was caused by running the train at too high a rate of speed. Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613. In an action for injuries caused by excavation for a cellar adjoining plaintiff's lot, evidence that it was usual, under such circumstances, to excavate and to wall up the cellar in sections, is inadmissible where there was no such charge of negligence in the petition. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

28. *Illinois.*— Cohen *v.* Chicago, etc., R. Co., 104 Ill. App. 314.

Ohio.— Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Toledo, etc., R. Co. *v.* Janeski, 12 Ohio Cir. Ct. 685, 4 Ohio Cir. Dec. 218.

Oregon.— Woodward *v.* Oregon R., etc., Co., 18 Oreg. 289, 22 Pac. 1076.

South Dakota.— Patterson *v.* Jos. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336.

West Virginia.— Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

Illustration.— Where the negligence is stated to consist in "placing, keeping, upholding and managing" a certain gangway "upon and against the door, opening or entrance to said warehouse," evidence that there were no fastenings to retain the gangway in an upright position is admissible; the cause of action being the falling of such gangway, causing plaintiff's injury. Morton *v.* O'Connor, 85 Ill. App. 273. In an action

ment of specific acts of negligence, plaintiff's evidence will be confined to the acts of negligence specifically assigned;[29] when such general averment is made in connection with specific averments of negligence it will be treated as explanatory only.[30] According to other decisions plaintiff is not limited to the specific acts of negligence alleged, where general averments of negligence are contained in the complaint.[31]

(iv) *Degrees of Negligence.* An allegation of negligence raises no issue as to a wilful infliction of the injuries complained of.[32]

b. Under Plea or Answer — (i) *In General.* Only the allegations of the complaint which are denied are put in issue.[33] And where defendant has admitted possession and occupation of premises evidence that it was in the possession of a lessee is inadmissible.[34]

(ii) *General Issue or General Denial.* The general issue or general denial puts in issue all the facts constituting negligence,[35] and hence defendant may show the absence of negligence on his part,[36] what care he exercised,[37] that

for the negligent destruction of plaintiff's buildings by fires lighted by defendant, or not properly cared for by him, plaintiff can give evidence of the presence of combustible material on defendant's premises, even though the fact is not counted on in the declaration. Lucas *v.* Wattles, 49 Mich. 380, 13 N. W. 782.

29. Chicago, etc., R. Co. *v.* Wheeler, 70 Kan. 755, 79 Pac. 673; McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; Watson *v.* Mound City St. R. Co., 133 Mo. 246, 34 S. W. 573; Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 514; Politowitz *v.* Citizens' Tel. Co., 115 Mo. App. 57, 90 S. W. 1031; San Antonio Gas, etc., Co. *v.* Speegle, (Tex. Civ. App. 1900) 60 S. W. 884; Wallace *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 865; Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. 167; Galveston, etc., R. Co. *v.* Herring, (Tex. Civ. App. 1896) 36 S. W. 129. And see Busse *v.* Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183.

30. Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 514.

31. May *v.* Berlin Iron Bridge Co., 43 N. Y. App. Div. 569, 60 N. Y. Suppl. 550; Edgerton *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 389 [*affirmed* in 39 N. Y. 227]; Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 7 Pac. 795; Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284, holding that this is so unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts.

What constitutes general averment of negligence.— A complaint alleging that while plaintiff was a passenger on defendant's street car, and after it had come to a stop and when she was about to alight, the servants in charge negligently and violently started the car without warning, throwing plaintiff off, does not by the further allegation, after a description of plaintiff's injuries, that said injuries were caused through the negligence of defendant, and not through any act of plaintiff, make a general allegation of negligence, authorizing evidence of other negligence than the starting of the car after it had been brought to a stop. Albin *v.* Seattle Electric Co., 40 Wash. 51, 82 Pac. 145.

32. Pennsylvania Co. *v.* Smith, 98 Ind. 42; Taylor *v.* Sharpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581; Hankins *v.* Watkins, 77 Hun (N. Y.) 360, 28 N. Y. Suppl. 867; Moore *v.* Drayton, 16 N. Y. Suppl. 723; Wolhaupter *v.* Foley, 9 N. Brunsw. 90. *Contra*, Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

In jurisdictions where degrees of negligence are recognized, a general averment of negligence will authorize the admission of evidence of any degree of negligence. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Lake Street Elevated R. Co. *v.* Shaw, 103 Ill. App. 662; Belt R. Co. *v.* Benicki, 102 Ill. App. 642; Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

33. Jorgensen *v.* Squires, 21 N. Y. Suppl. 383 [*affirmed* in 144 N. Y. 280, 39 N. E. 373]. In an action for personal injuries caused by the fall of a building, where the complaint merely alleged that plaintiff was lawfully in front of the building, and the answer denied this, it was held that there was no issue as to plaintiff's precise position at the time of the accident. Waterhouse *v.* Jos. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587.

34. Christopher *v.* William T. Keogh Amusement Co., 51 Misc. (N. Y.) 33, 99 N. Y. Suppl. 840.

35. Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Collett *v.* Northern Pac. R. Co., 23 Wash. 600, 63 Pac. 225.

The general issue in actions for injury to the person is not guilty. Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181, under Code (1896), § 3295.

36. Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552; Stevens *v.* Lafayette, etc., Gravel Road Co., 99 Ind. 392; St. Louis Southwestern R. Co. *v.* Fenlaw, (Tex. Civ. App. 1896) 36 S. W. 295. And see Schaus *v.* Manhattan Gas Light Co., 14 Abb. Pr. N. S. (N. Y.) 371; Kinney *v.* Morley, 2 U. C. C. P. 226.

37. Kendig *v.* Overhulser, 58 Iowa 195, 12 N. W. 264.

the injury was caused by the negligence of one for whom he was not responsible,[38] a special contract limiting his liability,[39] that the property causing the injury did not belong to defendant,[40] or that the injury was the result of an act of God.[41] The general issue does not put in issue any right which defendant may have to do the act which resulted in the injury.[42]

(III) *Plea of Contributory Negligence.* Where the particular facts constituting contributory negligence are pleaded the defense is limited to proof of such facts,[43] and it has been held that this is so, even though there is a general allegation of contributory negligence as well.[44] Where contributory negligence is in issue, intoxication of the injured person,[45] or knowledge of the defect, may be shown.[46] A plea of contributory negligence raises the issue whether defendant could have avoided the injury notwithstanding the contributory negligence,[47] or whether the act of the person injured was one done in an emergency.[48]

5. Matters to Be Proved and Variance[49] — a. In General. Immaterial allegations or surplusage in a complaint need not be proved.[50]

b. Ownership of Premises. Ownership, control, or responsibility for the use of the premises, or instrumentality causing the injury, must be shown to be in defendant,[51] but failure to prove ownership of the premises as alleged in the complaint is not a misleading variance where the answer admitted that defendant occupied the premises.[52]

c. Circumstances of the Injury. That the evidence shows that the injury occurred on a different day from that alleged is immaterial;[53] but when the evi-

38. Overhouser *v.* American Cereal Co., 123 Iowa 580, 105 N. W. 113; Osborn *v.* Woodford, 31 Kan. 290, 1 Pac. 548 (independent contractor); Bragg *v.* Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527; Cousins *v.* Hannibal, etc., R. Co., 66 Mo. 572 (servant acting without authority); Roemer *v.* Striker, 142 N. Y. 134, 36 N. E. 808; Levy *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 220, 68 N. Y. Suppl. 944 [*affirmed* in 34 Misc. 518, 69 N. Y. Suppl. 973] (negligence of third person unknown to defendant); Clare *v.* National City Bank, 35 N. Y. Super. Ct. 261, 14 Abb. Pr. N. S. 326. And see Kinney *v.* Morley, 2 U. C. C. P. 226.

Illustration.—Where the owners of an omnibus are sued for an injury caused by the driver, they may, under the general issue, prove that the omnibus was leased to a third person at the time the injury occurred. It cannot be objected that such evidence is inconsistent with the denial of ownership in the general issue. Hart *v.* New Orleans, etc., R. Co., 4 La. Ann. 261.

39. Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607. But see Ruttan *v.* Shea, 5 U. C. Q. B. 210, special contract for services not admissible.

40. Van Natter *v.* Buffalo, etc., R. Co., 27 U. C. Q. B. 581.

41. Gault *v.* Humes, 20 Md. 297.

42. Mitchell *v.* Harper, 4 U. C. C. P. 147.

43. Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194; Atchison, etc., R. Co. *v.* Dickey, 1 Kan. App. 770, 41 Pac. 1070; Texas, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 34 S. W. 186; Montreal, etc., Light, etc., Co. *v.* Stillwell, 5 Quebec Pr. 148.

44. Texas, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 34 S. W. 186.

45. Fernbach *v.* Waterloo, 76 Iowa 598, 41 N. W. 370.

46. Indiana Natural Gas, etc., Co. *v.* O'Brien, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; Fernbach *v.* Waterloo, (Iowa 1887) 34 N. W. 610; Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102.

47. Nathan *v.* Charlotte St. R. Co., 118 N. C. 1066, 24 S. E. 511.

48. San Antonio, etc., R. Co. *v.* Peterson, 20 Tex. Civ. App. 495, 49 S. W. 924.

49. As to burden of proof see *infra*, VIII, C, 2.

50. *Iowa.*— Russell *v.* Holder, 116 Iowa 188, 89 N. W. 195.

Michigan.— Smith *v.* Holmes, 54 Mich. 104, 19 N. W. 767, allegations of fraud.

Missouri.—Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, negativing anticipated defense.

Nebraska.— Van Nortwick *v.* Holbine, 62 Nebr. 147, 86 N. W. 1057, fitness of machines for the use to which they are to be put.

Texas.— Green *v.* Houston Electric Co., (Civ. App. 1905) 89 S. W. 442, holding that, although plaintiff, in an action for personal injury negligently inflicted, alleged in her petition that she was, prior to the injury, sound and healthy, she was not required, in order to recover for the injury sustained, to prove the allegation.

And see Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397; Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

51. Brecher *v.* Ehlen, 94 Ill. App. 369; Dooley *v.* Healey, 95 N. Y. App. Div. 271, 88 N. Y. Suppl. 965.

52. James *v.* Ford, 16 Daly (N. Y.) 126, 9 N. Y. Suppl. 504.

53. Toledo, etc., R. Co. *v.* McClannon, 41 Ill. 238 (if within the statute of limita-

dence shows that the accident happened at a different place than that alleged the variance is fatal.[54] The fact that the injury did not happen in the precise manner alleged,[55] or that there was a slight variance between the pleading and proof in respect of the circumstances attending the injury,[56] will not be fatal to a recovery.

d. Acts or Omissions Constituting Negligence. The specific acts of negligence charged must be proved,[57] except such as are immaterial.[58] If the negligence alleged consisted of several acts of negligence plaintiff need not prove every act alleged if the injury resulted from those proved,[59] except that where it was alleged that the negligence consisted of several concurring acts all the acts must be proved.[60] If negligence charged is the joint negligence of two defendants it must be proved as charged.[61] Substantial conformance of the negligence proved to that alleged is sufficient to authorize a recovery.[62] Proof that the negligent act was performed by a servant supports an averment that it was the fault of defendant.[63]

e. Cause of Injury. Not only must the negligence of defendant be proved but it must be shown that such negligence was the cause of the injury.[64] If the

tions); Louisville *v.* Walter, 76 S. W. 516, 25 Ky. L. Rep. 893.

54. Reilly *v.* Vought, 87 N. Y. Suppl. 492.

55. Lancaster *v.* Connecticut Mut. L. Ins. Co., 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739. In this case it appeared that defendant inserted a girder in a party-wall, causing it and another wall to fall. Plaintiff alleged that the other wall fell on the party-wall and crushed it. An instruction required a finding for plaintiff to be based on proof that defendant's wall fell before the party-wall. It was held that if the party-wall yielded to the weight and caused both walls to fall, it was immaterial that the party-wall came to the ground first.

56. Folsom *v.* Lewis, 85 Ga. 146, 11 S. E. 606; Cook *v.* Standard Oil Co., 9 N. Y. App. Div. 105, 41 N. Y. Suppl. 152; Drinkwater *v.* Quaker City Cooperage Co., 208 Pa. St. 649, 57 Atl. 1107.

57. Tucker *v.* Georgia Cent. R. Co., 122 Ga. 387, 50 S. E. 128; Van Horn *v.* St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326; McGrath *v.* St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872.

58. Thayer *v.* Flint, etc., R. Co., 93 Mich. 150, 53 N. W. 216 (immaterial acts of negligence, although alleged, need not be proved); Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995.

59. *Georgia.*— Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

Illinois.— Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Chicago, etc., R. Co. *v.* Rains, 106 Ill. App. 539; East St. Louis Connecting R. Co. *v.* Shannon, 52 Ill. App. 420.

Indiana.— Chicago, etc., R. Co. *v.* Barnes, (1903) 68 N. E. 166.

Massachusetts.— O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352.

Texas.— San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

When two or more proximate causes contribute to produce an injury, each is sufficient within itself to support a cause of action for the recovery of the entire damage resulting, and a plaintiff pleading in his petition all of such claimed acts of negligence is entitled to recover upon proof of any one of them. Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915.

60. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453. And see Western R. Co. *v.* McPherson, 146 Ala. 427, 40 So. 934.

61. St. Louis, etc., Co. *v.* Hopkins, 100 Ill. App. 567; Sturzebecker *v.* Inland Traction Co., 211 Pa. St. 156, 60 Atl. 583. And see Woods *v.* Wentworth, 6 U. C. C. P. 101.

A finding of negligence on the part of one defendant constitutes a fatal variance where the complaint charged concurrent negligence on the part of two defendants. Cleveland, etc., R. Co. *v.* Eggmann, 71 Ill. App. 42.

62. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Olson *v.* Great Northern R. Co., 68 Minn. 155, 71 N. W. 5 (holding that allegation in a complaint to the effect that defendant negligently ran certain cars against a tender with such force as to injure plaintiff is sustained by proof that it negligently omitted to do an act from which such result followed); Reynolds *v.* Van Beuren, 51 N. Y. App. Div. 632, 64 N. Y. Suppl. 724. And see Leslie *v.* Wabash, etc., R. Co., 88 Mo. 50 (holding that it is not necessarily a fatal variance, where the cause of action stated is defendant's negligence in not stopping its train long enough for plaintiff to get off, while that proved is that the train was stopped at and started again from a place opposite the platform, but not the usual stopping place); Cook *v.* Champlain Transp. Co., 1 Den. (N. Y.) 91.

63. Brucker *v.* Fromont, 6 T. R. 659, 3 Rev. Rep. 303.

64. *Illinois.*— Harrigan *v.* Chicago, etc., R. Co., 53 Ill. App. 344.

Iowa.— Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432.

Maryland.— Baltimore, etc., R. Co. *v.* State, 101 Md. 359, 61 Atl. 189.

evidence shows that the injury resulted from an entirely different cause from that alleged the variance is fatal;[65] but if the cause of the injury as shown by the evidence is included in the general charge of negligence,[66] or if the cause alleged was only one of two concurring causes, the variance is immaterial.[67] So where there was evidence of another cause than that alleged as well as that alleged such fact will not defeat recovery.[68]

f. Degrees of Negligence. The weight of authority is that, when the negligence is alleged to be wilful, it must be proved as alleged and recovery cannot be had on proof of simple negligence.[69] Proof of ordinary negligence will authorize a recovery where the negligence alleged does not amount to a wilful act.[70] But if an injury from ordinary negligence is alleged, there can be no recovery for a wilful injury;[71] and under an allegation of simple negligence intent need not be proved.[72]

New York.— White *v.* Daniels, 39 N. Y. App. Div. 668, 57 N. Y. Suppl. 305; Kelsey *v.* Jewett, 28 Hun 51.

Ohio.— Kramer *v.* Fay, 6 Ohio S. & C. Pl. Dec. 335, 4 Ohio N. P. 233.

Pennsylvania.—Bube *v.* Weatherly Borough, 25 Pa. Super. Ct. 88.

United States.— Haff *v.* Minneapolis, etc., R. Co., 14 Fed. 558, 4 McCrary 662.

Canada.— Canadian Coloured Cotton Mills Co. *v.* Kervin, 29 Can. Sup. Ct. 478.

65. East St. Louis Electric St. R. Co. *v.* Steger, 65 Ill. App. 312; Canavan *v.* Stuyvesant, 7 Misc. (N. Y.) 113, 27 N. Y. Suppl. 413; Newnom *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1898) 47 S. W. 669.

Application of rule.— In an action for personal injuries, where plaintiff alleges that the injuries for which he seeks to recover were caused by a defective pile-driver, he cannot recover for injuries received on account of an unmanageable team of horses used in operating it. Santa Fe, etc., R. Co. *v.* Hurley, 172 U. S. 645, 19 S. Ct. 879, 43 L. ed. 1183 [*affirming* 4 Ariz. 258, 36 Pac. 216].

66. Bunnell *v.* Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533; Bell *v.* Boyd, 66 Mo. App. 137.

An allegation that an injury was caused by negligently digging an excavation is sustained by evidence that the injury was caused by the inadequate strength of a retaining wall of the excavation. U. S. *v.* Peachy, 36 Fed. 160.

67. Where the petition in an action for injuries caused by derailment of an engine alleged that the wreck was caused by the defective condition of the track, proof that it was caused by such condition, coupled with a collision of the engine with a calf, is not a variance. New York, etc., R. Co. *v.* Green, 90 Tex. 257, 38 S. W. 31 [*affirming* (Civ. App. 1896) 36 S. W. 812].

68. Washington Ice Co. *v.* Bradley, 171 Ill. 255, 49 N. E. 519.

69. Levin *v.* Memphis, etc., R. Co., 109 Ala. 332, 19 So. 395; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Highland Ave., etc., R. Co. *v.* Winn, 93 Ala. 306, 9 So. 509; Birmingham Mineral R. Co. *v.* Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830; Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253, 20 N. E. 147; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801; Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46; Turtenwald *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 65, 98 N. W. 948; Wilson *v.* Chippewa Valley Electric R. Co., 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912. *Contra*, Forkner *v.* Kean, 32 S. W. 265, 17 Ky. L. Rep. 654; Griffin *v.* Toledo, etc., R. Co., 21 Ohio Cir. Ct. 547, 11 Ohio Cir. Dec. 749. And *compare* Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616 [*affirmed* in 207 Ill. 478, 69 N. E. 882].

70. *Alabama.*— Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86.

District of Columbia.— Atchison *v.* Wills, 21 App. Cas. 548.

Kentucky.—Cincinnati, etc., R. Co. *v.* Cook, 113 Ky. 161, 67 S. W. 383, 23 Ky. L. Rep. 2410; Pendley *v.* Illinois Cent. R. Co., 92 S. W. 1, 28 Ky. L. Rep. 1324.

Michigan.— Keating *v.* Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575; Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

South Carolina.— Thomas *v.* Charlotte, etc., R. Co., 38 S. C. 485, 17 S. E. 226.

Texas.— Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; Texas, etc., R. Co. *v.* Magrill, 15 Tex. Civ. App. 353, 40 S. W. 188.

See 37 Cent. Dig. tit. "Negligence," § 209.

Charge not implying wilfulness.— Under a complaint in an action to recover for injuries caused by negligence, which charges defendant with acting "negligently, carelessly, and recklessly," plaintiff is not obliged to make out such a case that his own contributory negligence would not stand in the way of his right to a recovery, a charge in general terms of "recklessness," not implying wilfulness. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

71. Greathouse *v.* Croan, 4 Indian Terr. 668, 76 S. W. 273; O'Brien *v.* Loomis, 43 Mo. App. 29; Moore *v.* Drayton, 16 N. Y. Suppl. 723. And see Hankins *v.* Watkins, 77 Hun (N. Y.) 360, 28 N. Y. Suppl. 867; Wolhaupter *v.* Foley, 9 N. Brunsw. 90. *Contra*, Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

72. Kelly *v.* Dow, 9 N. Brunsw. 435.

g. Nature of Injury. A variance between the pleadings and proof as to the nature of the injury if not substantial will not prevent a recovery.[73]

h. Care Exercised by Person Injured. Freedom from contributory negligence is a defense and need not be proved by plaintiff,[74] except in those states requiring an allegation in the complaint of want of contributory negligence,[75] and even then under a charge of wanton and wilful negligence due care need not be proved.[76] Proof that another person than the one alleged had charge of property when injured is fatal.[77]

i. Invitation to Person Injured to Come on Premises. Proof that plaintiff was on premises merely as a licensee or trespasser does not support an allegation of presence by invitation.[78]

C. Evidence[79] **— 1. Presumptions**[80] **— a. In General.** As a general rule it may be stated that negligence is a fact which must always be proved and will never be presumed.[81] The mere fact that an accident has happened does not

73. Rock Island *v.* Cuinely, 26 Ill. App. 173 [*affirmed* in 126 Ill. 408, 18 N. E. 753] (holding that there is no variance such as will prevent recovery between an allegation that the right wrist was dislocated and broken by the negligence of defendant, and proof that the radius was fractured within half an inch of its lower end); Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936.

74. Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Dolan *v.* Moberly, 17 Mo. App. 436; Clark *v.* Famous Shoe, etc., Co., 16 Mo. App. 463; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

75. Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356; Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458, and in the absence of such proof no recovery can be had, although defendant was negligent.

76. Illinois Cent. R. Co. *v.* King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; Baltimore, etc., R. Co. *v.* Keek, 84 Ill. App. 159 [*affirmed* in 185 Ill. 400, 57 N. E. 197]; Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445.

77. Where, in an action for injuries caused to a buggy by being driven against some rubbish in a street, the declaration alleges that one C was driving, and the proof shows that another person was driver, and there is no allegation that such person exercised due care, there is a material variance between the pleadings and proofs. Cowan *v.* Muskegon R. Co., 84 Mich. 583, 48 N. W. 166.

78. Collier *v.* Coggins, 103 Ala. 281, 15 So. 578; Lepnick v. Gaddis, (Miss. 1895) 18 So. 319; Currier *v.* Dartmouth College, 117 Fed. 44, 54 C. C. A. 430.

79. Admissions, declarations, and hearsay see Evidence.

Applicability of instructions to evidence see *infra*, VIII, D, 3, a, (III).

Best and secondary evidence see Evidence.

Evidence as to damages see Damages.

Matters to be proved and evidence admissible under pleadings see *supra*, VIII, B, 4, 5.

Opinion and expert evidence see Evidence.

Parol and testamentary evidence see Evidence.

Relevancy, materiality, and competency in general see Evidence.

80. Instructions see *infra*, VIII, D, 3.

Matters to be proved under pleading see *supra*, VII, B, 5.

Questions for jury see *infra*, VIII, D, 2.

81. *Delaware.*— Garrett *v.* People's R. Co., (1906) 64 Atl. 254; Wood *v.* Wilmington City R. Co., 5 Pennew. 369, 64 Atl. 246; Graboski *v.* New Castle Leather Co., (1906) 64 Atl. 74; Robinson *v.* Huber, (1906) 63 Atl. 873; Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264; Neal *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 467, 53 Atl. 338.

Illinois.— Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; Great Western R. Co. *v.* Haworth, 39 Ill. 346; Libby *v.* Banks, 110 Ill. App. 330.

Indiana.— Indianapolis St. R. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

Louisiana.— Culbertson *v.* Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902.

Maryland.— State *v.* Philadelphia, etc., R. Co., 60 Md. 555.

Michigan.— Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514.

Nebraska.— Swift *v.* Holonbek, 60 Nebr. 784, 84 N. W. 249, 62 Nebr. 31, 86 N. W. 900.

New York.— Divver *v.* Hall, 21 Misc. 452, 47 N. Y. Suppl. 630 [*reversing* 20 Misc. 677, 46 N. Y. Suppl. 533].

Pennsylvania.— East End Oil Co. *v.* Pennsylvania Torpedo Co., 190 Pa. St. 350, 42 Atl. 707.

Vermont.— Lyndsay *v.* Connecticut, etc., R. Co., 27 Vt. 643.

Virginia.— Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

United States.— Mentzer *v.* Armour, 18 Fed. 373, 5 McCrary 617.

See 37 Cent. Dig. tit. "Negligence," § 217.

authorize the inference of negligence on defendant's part,[82] although it may be taken into consideration with other facts and circumstances of the case.[83] Instead the presumption is that defendant used due care;[84] but the absence of negligence cannot be inferred from the general disposition of men to avoid danger irrespective of the facts proved,[85] or that the thing causing the injury had been used for some time without accident.[86] Causal connection between a negligent act and the injury cannot be presumed,[87] and the cause of the injury cannot be presumed in the absence of evidence.[88] The jury has the right, however, to take into consideration all the presumptions which according to the common experience of mankind arise out of the facts proved.[89]

b. Res Ipsa Loquitur[90]—(i) *In General.* While as already shown negligence is never presumed and cannot be inferred from the injury alone,[91] it may be inferred from evidence of the injury in connection with the facts and circumstances under which it occurred.[92] In many cases it is laid down that negligence

82. *Delaware.*— Garrett *v.* People's R. Co., (1906) 64 Atl. 254.

District of Columbia.—Metropolitan R. Co. *v.* Snashall, 3 App. Cas. 420.

Illinois.— Chicago, etc., R. Co. *v.* Schumilowsky, 8 Ill. App. 613.

Kentucky.— Cincinnati, etc., R. Co. *v.* Cook, 73 S. W. 765, 24 Ky. L. Rep. 2152, 75 S. W. 218, 25 Ky. L. Rep. 356.

Maryland.— Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338, except in case of carriers of passengers.

Michigan.— Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368; Whitcomb *v.* Detroit Electric R. Co., 125 Mich. 572, 84 N. W. 1072.

Minnesota.— Johnson *v.* Walsh, 83 Minn. 74, 85 N. W. 910.

New Jersey.— Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.

New York.— Gottwald *v.* Bernheimer, 6 Daly 212.

North Carolina.— Isley *v.* Virginia Bridge, etc., Co., 141 N. C. 220, 53 S. E. 841.

Pennsylvania.— McGeeghan *v.* Hughes, 15 Pa. Dist. 249.

Rhode Island.— Venbuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770.

England.— Hammack *v.* White, 11 C. B. N. S. 588, 8 Jur. N. S. 796, 31 L. J. C. P. 129, 6 L. T. Rep. N. S. 676, 10 Wkly. Rep. 230, 103 E. C. L. 588. And see Manzoni *v.* Douglas, 6 Q. B. D. 145, 45 J. P. 391, 50 L. J. Q. B. 289, 29 Wkly. Rep. 405.

Canada.— Falconer *v.* European, etc., R. Co., 14 N. Brunsw. 179.

See 37 Cent. Dig. tit. "Negligence," § 218.

Illustration.— Where plaintiff, standing in a crowd watching fireworks, was struck by a falling rocket stick, and, although a number of rockets were fired, all the other sticks struck at other places, where they would do no harm, the mere happening of the accident was not proof of negligence. Crowley *v.* Rochester Fireworks Co., 95 N. Y. App. Div. 13, 88 N. Y. Suppl. 483.

83. La Fernier *v.* Soo River Lighter, etc., Co., 129 Mich. 596, 89 N. W. 353; Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; Isley *v.* Virginia Bridge, etc., Co., 141 N. C. 220, 53 S. E. 841.

84. Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516. Negligence will not be presumed in the absence of facts and circumstances from which its existence may reasonably be inferred. The presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by evidence. Swift *v.* Holoubek, 60 Nebr. 784, 84 N. W. 249, 62 Nebr. 31, 86 N. W. 900.

85. Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504.

86. Grifhahn *v.* Kreizer, 62 N. Y. App. Div. 413, 70 N. Y. Suppl. 973 [*affirmed* in 171 N. Y. 661, 64 N. E. 1121], where there was proof from which the jury might have found that a freight elevator was not properly constructed.

87. Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Texas, etc., R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049.

88. Dame *v.* Laconia Car Co. Works, 71 N. H. 407, 52 Atl. 864, holding that the mere fact that the intestate was found lying dead in proximity to a ladder does not create a presumption that the ladder caused his death by blowing down on him, in the absence of any evidence of physical injury or the condition of his health.

89. Neal *v.* Gillett, 23 Conn. 437 (holding that, where defendants were thirteen and sixteen years old, they will be presumed to be old enough to be required to exercise ordinary care, and hence their age is not material); Fogarty *v.* Bogart, 43 N. Y. App. Div. 430, 60 N. Y. Suppl. 81 (holding that where plaintiff saw a notice, "Flat to Let," in an apartment house, and went to the basement and rang the bell, and in turning fell down a cellar way, in the absence of contrary proof, the presumption is that the house was in the possession of the owner, and the notice was displayed by him or his agents); Gunn *v.* Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

90. Application of doctrine in case of injuries to passengers see Carriers, 6 Cyc. 628.

91. See preceding section.

92. Libby *v.* Banks, 110 Ill. App. 330 [*affirmed* in 209 Ill. 109, 70 N. E. 599].

may be presumed where the injury is caused by an act which in the ordinary course of things would not have resulted in injury if due care had been used in its performance.[93] Perhaps a more accurate statement is that where defendant owes to plaintiff a duty to use care, and the thing causing the accident is shown to be under the management of defendant or his servants, and the accident is such that in the ordinary course of things does not occur if those who have the management or control use proper care, the happening of the accident in the absence of evidence to the contrary is evidence that it arose from the lack of requisite care.[94] Even under these circumstances the happening of the accident is merely *prima facie* evidence and not conclusive proof of negligence.[95] The maxim *res ipsa loquitur* was originally limited to cases of absolute duty or an obligation practically amounting to that of insurer under a contractual relation,[96] but has

93. *District of Columbia.*—Kight *v.* Metropolitan R. Co., 21 App. Cas. 494.

Illinois.— North Chicago St. R. Co. *v.* Cotton, 140 Ill. 480, 29 N. E. 899; Cook *v.* Piper, 79 Ill. App. 291.

Massachusetts.— Pinney *v.* Hall, 156 Mass. 225, 30 N. E. 1016, holding that what is meant by *res ipsa loquitur* is that the jury are warranted in finding from their knowledge as men of the world that such accidents do not happen except through defendant's fault unless otherwise explained.

Missouri.— Shuler *v.* Omaha, etc., R. Co., 87 Mo. App. 618.

North Carolina.— Moore *v.* Parker, 91 N. C. 275; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

Ohio.— Cleveland, etc., R. Co. *v.* Walrath, 6 Ohio Dec. (Reprint) 718, 7 Am. L. Rec. 555.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

United States.— Jensen *v.* The Joseph B. Thomas, 81 Fed. 578.

See 37 Cent. Dig. tit. "Negligence," § 218.

Illustration.— While plaintiff was sitting on the step of a building to rest, defendant's servant was carrying a cake of ice in tongs down the steps. The ice fell from the tongs, striking plaintiff's hand. It was held that the accident, being such as would not, in the ordinary course of things, have happened, had the servant been in the exercise of proper care, and there being no evidence that the ice broke while being carried with ordinary care, a verdict for plaintiff would not be disturbed. Kaples v. Orth, 61 Wis. 531, 21 N. W. 633.

94. *California.*— Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

Illinois.— Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624; Chicago City R. Co. *v.* Eick, 111 Ill. App. 452; Armour *v.* Golkowska, 95 Ill. App. 492.

Minnesota.— Isherwood *v.* H. L. Jenkins Lumber Co., 84 Minn. 423, 87 N. W. 931; Johnson *v.* Walsh, 83 Minn. 74, 85 N. W. 910.

Missouri.— Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19.

New Jersey.— Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.

New York.—Stallman *v.* New York Steam Co., 17 N. Y. App. Div. 397, 45 N. Y. Suppl. 161.

Ohio.— Citizens' Electric R., etc., Co. *v.* Bell, 26 Ohio Cir. Ct. 691 [*affirmed* in 70 Ohio St. 482, 72 N. E. 1155].

Pennsylvania.— Fisher *v.* Ruch, 12 Pa. Super. Ct. 240.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 20 Atl. 380.

West Virginia.— Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

Wisconsin.— Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

United States.— Jensen *v.* The Joseph B. Thomas, 81 Fed. 578; Rintoul *v.* New York Cent., etc., R. Co., 17 Fed. 905, 21 Blatchf. 439.

England.— Scott *v.* London, etc., Docks Co., 3 H. & C. 596, 11 Jur. N. S. 204, 34 L. J. Exch. 220, 13 L. T. Rep. N. S. 148, 13 Wkly. Rep. 410; Byrne *v.* Boadle, 2 H. & C. 722, 33 L. J. Exch. 13, 9 L. T. Rep. N. S. 450, 12 Wkly. Rep. 279.

Basis of doctrine.— "The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant it is within his power to produce evidence of the actual cause that produced the accident which the plaintiff is unable to present." Kahn *v.* Burette, 42 Misc. (N. Y.) 541, 543, 85 N. Y. Suppl. 1047 [*quoting* Griffen *v.* Manice, 166 N. Y. 188, 193, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922].

95. Dixon *v.* Pluns, (Cal. 1893) 31 Pac. 931; Clay *v.* Chicago, etc., R. Co., 17 Mo. App. 629. And see Bird *v.* Great Northern R. Co., 28 L. J. Exch. 3.

96. Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; East End Oil Co. *v.* Pennsylvania Torpedo Co., 190 Pa. St. 350, 42 Atl. 707; Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842; Stallman *v.* New York Steam Co., 17 N. Y. App. Div.

been extended to actions sounding in tort where no contractual relation existed.[97] So that when the physical facts of an accident themselves create a reasonable probability that it resulted from negligence the physical facts are themselves evidential and furnish what the law terms "evidence of negligence" in conformity with the maxim *res ipsa loquitur*;[98] and where the injury arises from some condition or event that is in its nature so obviously destructive of the safety of persons or property and is so tortious in this quality as in the first instance at least to permit no inference save that of negligence on the part of the person in control of the dangerous agency the happening of the accident raises a presumption of negligence.[99] To render the maxim applicable the thing causing the injury must be shown to have been in the exclusive control of defendant;[1] and the rule has no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care.[2] Nor does it apply where the cause of the accident is known,[3] or where the injury was the result of two or more concurring causes.[4]

397, 45 N. Y. Suppl. 161. And see Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334.

97. Stallman *v.* New York Steam Co., 17 N. Y. App. Div. 397, 45 N. Y. Suppl. 161, injury from excavation in street.

98. *Arkansas.*— Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059.

Georgia.— Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

Iowa.— Tuttle *v.* Chicago, etc., R. Co., 48 Iowa 236.

New York.— Breen *v.* New York Cent., etc., R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Griffen *v.* Manice, 47 N. Y. App. Div. 70, 62 N. Y. Suppl. 364; Axlebrood *v.* Rosen, 21 Misc. 352, 47 N. Y. Suppl. 164.

North Carolina.— Ellis *v.* Portsmouth, etc., R. Co., 24 N. C. 138.

Pennsylvania.— Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

Virginia.—Richmond R., etc., Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736.

Wisconsin.— Kaples *v.* Orth, 61 Wis. 531, 21 N. W. 633.

United States.— Cincinnati, etc., R. Co. *v.* South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. N. S. 533.

Canada.— Cataraqui Bridge Co. *v.* Holcomb, 21 U. C. Q. B. 273.

Illustration.— Evidence that defendant's steam roller, used on the street in front of plaintiffs' residence, was run over their fence and lawn and against their house is sufficient to sustain a finding by the jury that the injury was occasioned by the negligence of defendant. Harlow *v.* Standard Imp. Co., 145 Cal. 477, 78 Pac. 1045.

It is not the injury, but the manner and circumstances of the injury, that justify the inference of negligence and the application of the maxim of *res ipsa loquitur*. Kohner *v.* Capital Traction Co., 22 App. Cas. (D. C.) 181, 62 L. R. A. 875.

Absence of contractual relations.— Where plaintiff sued to recover for injuries caused by the negligence of defendant or his servants, and there was no contractual relation between the parties, the rule of *res ipsa loquitur* applied only where facts were shown which compelled the jury to draw an inference of negligence, or circumstances making legitimate inference. Duhme *v.* Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615 [*reversing* 107 N. Y. App. Div. 237, 94 N. Y. Suppl. 1102].

99. Wood *v.* Wilmington City R. Co., 5 Pennew. (Del.) 369, 64 Atl. 246; Strasburger *v.* Vogel, 103 Md. 85, 63 Atl. 202; Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; McGrath *v.* St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872.

1. *Illinois.*— Bjornson *v.* Saccone, 88 Ill. App. 6.

Indiana.— National Biscuit Co. *v.* Wilson, (App. 1906) 78 N. E. 251.

Massachusetts.— Obertoni *v.* Boston, etc., R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

Missouri.— Raney *v.* Lachance, 96 Mo. App. 479, 70 S. W. 376.

New York.— Allen *v.* Banks, 7 N. Y. App. Div. 405, 39 N. Y. Suppl. 1016.

Rhode Island.— Laforrest *v.* O'Driscoll, 26 R. I. 547, 59 Atl. 923.

England.— Higgs *v.* Maynard, 1 Harr. & R. 581, 12 Jur. N. S. 705, 14 L. T. Rep. N. S. 332, 14 Wkly. Rep. 610; Crisp *v.* Thomas, 55 J. P. 261, 63 L. T. Rep. N. S. 756.

2. Sauer *v.* Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

3. Illinois Steel Co. *v.* Zolnowski, 118 Ill. App. 209 (holding that where plaintiff, engaged in repairing a furnace for defendant, was injured by a volume of gas being suddenly turned into the furnace by the voluntary and intentional act of someone in opening the valves the doctrine of *res ipsa loquitur* was not applicable, as the act which caused the injury was the voluntary and intentional act of such person in opening the valves); North Chicago St. R. Co. *v.* O'Donnell, 115 Ill. App. 110; Parsons *v.* Hecla Iron Works, 186 Mass. 221, 71 N. E. 572.

4. Harrison *v.* Sutter St. R. Co., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608; McGrath *v.* St. Louis Transit Co., 197 Mo. 97, 94

(II) *Application to Particular Accidents*—(A) *Falling Materials or Structures.* The doctrine under consideration has been applied in cases of materials or articles falling from buildings or other structures on to passers-by on a public street,[5] and the unexplained falling of a building or other structure creates a presumption of negligence.[6] But in order for the doctrine to apply the

S. W. 872; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84; Hanson *v.* Lancashire, etc., R. Co., 20 Wkly. Rep. 297.

5. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189.

California.— Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

Delaware.— Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Illinois.— Armour *v.* Golkowska, 95 Ill. App. 492.

Kansas.— Atchison *v.* Plunkett, 8 Kan. App. 308, 55 Pac. 677.

Massachusetts.— Lowner *v.* New York, etc., R. Co., 175 Mass. 166, 55 N. E. 805.

Missouri.— Gallagher *v.* Edison Illuminating Co., 72 Mo. App. 576.

New York.— Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 (iron bar falling from elevated railway); Connor *v.* Koch, 89 N. Y. App. Div. 33, 85 N. Y. Suppl. 93; Loughrain *v.* Autophone Co., 77 N. Y. App. Div. 542, 78 N. Y. Suppl. 919; Wolf *v.* American Tract. Soc., 25 N. Y. App. Div. 98, 49 N. Y. Suppl. 236; Morris *v.* Strobel, etc., Co., 81 Hun 1, 30 N. Y. Suppl. 571; Vincett *v.* Cook, 4 Hun 318, 6 Thomps. & C. 562; Clare *v.* National City Bank, 1 Sweeny 539; Papazian *v.* Baumgartner, 49 Misc. 244, 97 N. Y. Suppl. 399; Mentz *v.* Schieren, 36 Misc. 813, 74 N. Y. Suppl. 889.

Pennsylvania.— Ahern *v.* Melvin, 21 Pa. Super. Ct. 462.

Tennessee.— Hydes Ferry Turnpike Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69.

England.— Kearney *v.* London, etc., R. Co., L. R. 6 Q. B. 759, 40 L. J. Q. B. 285, 24 L. T. Rep. N. S. 913, 20 Wkly. Rep. 24; Briggs *v.* Oliver, 4 H. & C. 403, 35 L. J. Exch. 163, 14 L. T. Rep. N. S. 412, 14 Wkly. Rep. 658; Scott *v.* London, etc., Docks Co., 3 H. & C. 596, 11 Jur. N. S. 204, 34 L. J. Exch. 220, 13 L. T. Rep. N. S. 148, 13 Wkly. Rep. 410. But see Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500, holding that injury from glass falling from a window above a street was not of itself proof of negligence.

Illustrations.—Where a man, walking along a public street, without negligence on his part, was killed by the falling of an iron column which defendants were attempting to place in position, and the method and manner in which the work was done were laid before the jury, the rule of *res ipsa loquitur* obtains, and defendants were required to show absence of negligence. Scheider *v.* American Bridge Co., 78 N. Y. App. Div. 163, 79 N. Y. Suppl. 634. The fact that boxes, being lowered from an upper story of a factory to an express wagon below, were so insecurely fastened that they fell, causing a runaway, and injuring the expressman, was sufficient evidence of negligence to make a case for the jury. Loughrain *v.* Autophone Co., 77 N. Y. App. Div. 542, 78 N. Y. Suppl. 919. Where a person, lawfully on a sidewalk, is injured by materials falling from a building in the course of erection, and it appears that the sidewalk was not covered or in any way guarded, it is sufficient to raise a presumption that the builder was negligent. Dohn *v.* Dawson, 84 Hun (N. Y.) 110, 32 N. Y. Suppl. 59. The mere falling of a signboard from the roof of a building into the street is *prima facie* evidence of negligence on the part of the person who maintained the signboard, although the wind at the time was high, but not unusually high for that locality. Reynolds *v.* Van Beuren, 10 Misc. (N. Y.) 703, 31 N. Y. Suppl. 827. Where plaintiff was injured by the falling of a door which had been taken from its hinges and placed standing against the wall on the platform of defendant's store, and plaintiff testified that she went on the platform, after having transacted her business at the store, to await the arrival of her vehicle, and that the door fell on her without her touching it, such facts were sufficient to establish a *prima facie* case of negligence on the part of the owner of the store under the doctrine of *res ipsa loquitur*. Klitzke *v.* Webb, 120 Wis. 254, 97 N. W. 901.

6. *Delaware.*— Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Georgia.— Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

Illinois.— Martin *v.* Dufalla, 50 Ill. App. 371.

Iowa.— Connolly *v.* Des Moines Inv. Co., 130 Iowa 633, 105 N. W. 400.

Minnesota.— Ryder *v.* Kinsey, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557; Bast *v.* Leonard, 15 Minn. 304.

Missouri.— Scharff *v.* Southern Illinois Constr. Co., 115 Mo. App. 157, 92 S. W. 126.

New York.— Mullen *v.* St. John, 57 N. Y. 567, 15 Am. Rep. 530; Wittenberg *v.* Seitz, 8 N. Y. App. Div. 439, 40 N. Y. Suppl. 899; Judd *v.* Cushing, 50 Hun 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358; Lubelsky *v.* Silverman, 49 Misc. 133, 96 N. Y. Suppl. 1056. *Compare* May *v.* Berlin Iron Bridge Co., 43 N. Y. App. Div. 569, 60 N. Y. Suppl. 550.

South Dakota.— Patterson *v.* Jos. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336.

United States.— Hastorf *v.* Hudson River Stone Supply Co., 110 Fed. 669.

Contra.— Wilmot *v.* Jarvis, 12 U. C. Q. B. 641.

person injured must be on a public highway,[7] or in a place where he had a right to be.[8]

(B) *Condition of Premises.* It is generally held that the mere fact that an injury has occurred on the premises of defendant creates no presumption of negligence on his part,[9] in the absence of evidence of some defect.[10] Where, however, defendant owed to the injured person the duty of making the premises safe the doctrine *res ipsa loquitur* applies.[11]

(C) *Defective or Dangerous Machinery, Instrumentalities, or Operations.* By the weight of authority mere proof of an explosion does not create a *prima facie* case of negligence.[12] So it has been held that the escape of gas from a

Illustrations.— Where cellar stairs in a house fell while plaintiff who was contemplating a purchase was going from the cellar to the first floor, the falling of the stairs raised a *prima facie* presumption of lack of ordinary care on the part of defendant, the owner. Smith *v.* Jackson, 70 N. J. L. 183, 56 Atl. 118. The fact that a cistern wall, while being built, falls from its own weight, or from the pressure of earth placed behind it, raises a presumption of negligence. Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565. Where a window and catch of defendant were in perfect condition, and the window could not fail if the catch were properly set, the fall of the window upon plaintiff's hand, he being rightfully there, must have resulted from the failure of defendant's servant to set the catch, and a presumption of negligence arises from the happening of the accident itself. Carroll *v.* Chicago, etc., R. Co., 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872.

7. Johnson *v.* Yellow Pine Co., 67 N. Y. App. Div. 528, 73 N. Y. Suppl. 1020; Gernau *v.* Oceanic Steam Nav. Co., 21 N. Y. Suppl. 371, 70 Hun (N. Y.) 598, 23 N. Y. Suppl. 1143 [*affirmed* in 141 N. Y. 588, 36 N. E. 739]; Huey *v.* Gahlenbeck, 121 Pa. St. 238, 15 Atl. 520, 6 Am. St. Rep. 790.

8. Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484, holding that where one engaged in laying a sewer in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brick work it will be presumed that it occurred from want of reasonable care on his part, and he is liable for injuries received. But see Van Orden *v.* Acken, 28 N. Y. App. Div. 160, 50 N. Y. Suppl. 843.

9. Louth *v.* Thompson, 1 Pennew. (Del.) 149, 39 Atl. 1100; Bond *v.* Smith, 113 N. Y. 378, 21 N. E. 128; Curran *v.* Warren Chemical, etc., Co., 36 N. Y. 153, 1 Transcr. App. 59, 34 How. Pr. 250, 3 Abb. Pr. N. S. 240; Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684. And see Bube *v.* Weatherly Borough, 25 Pa. Super. Ct. 88.

10. Pinney *v.* Hall, 156 Mass. 225, 30 N. E. 1016; Boyd *v.* U. S. Mortgage, etc., Co., 94 N. Y. App. Div. 413, 88 N. Y. Suppl. 289.

11. Schnizer *v.* Phillips, 108 N. Y. App. Div. 17, 95 N. Y. Suppl. 478; Graham *v.* Joseph H. Bauland Co., 97 N. Y. App. Div. 141, 89 N. Y. Suppl. 595; Simon-Reigel Cigar Co. *v.* Gordon-Burnham Battery Co., 20 Misc. (N. Y.) 598, 46 N. Y. Suppl. 416; Greco *v.* Bernheimer, 17 Misc. (N. Y.) 592, 40 N. Y. Suppl. 677.

Evidence merely that plaintiff was hurt by slipping on ice on defendant's premises does not show negligence on the part of defendant, it not appearing how long the ice had been there. Vassin *v.* Butler, 94 N. Y. Suppl. 14.

12. **Injuries caused by explosions of steam boilers.**— Bishop *v.* Brown, 14 Colo. App. 535, 61 Pac. 50; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Veith *v.* Hope Salt, etc., Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410. And see Baran *v.* Reading Iron Co., 202 Pa. St. 274, 51 Atl. 979, holding that even if the maxim *res ipsa loquitur* applies in such a case, no burden rests on defendant, when plaintiff's evidence not only failed to show negligence but affirmatively showed that ordinary care had been exercised. *Contra*, Rose *v.* Stephens, etc., Transp. Co., 11 Fed. 438, 20 Blatchf. 411; Posey *v.* Scoville, 10 Fed. 140; The Reliance, 2 Fed. 249, 4 Woods 420.

The reasonable rule has been said to be that from the mere fact of an explosion it is competent for the jury to infer as a proposition of fact that there was some negligence. Young *v.* Bransford, 12 Lea (Tenn.) 232; Rose *v.* Stephens, etc., Transp. Co., 11 Fed. 438, 20 Blatchf. 411. It ought not to have the weight of a conclusive presumption, either of law or fact, so as to compel defendant, in order to avoid liability, to prove affirmatively that he was guilty of no negligence, and that the accident was unavoidable. At most the question of negligence should be left to the jury to determine upon the evidence actually introduced. Young *v.* Bransford, 12 Lea (Tenn.) 232.

Explosion of oil in refinery.— Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475 [*reversing* 55 N. Y. Super. Ct. 384].

Explosion of escaping gas from broken pipe while defendant's employee was locating the leak. Littman *v.* New York, 36 N. Y. App. Div. 189, 55 N. Y. Suppl. 383.

Explosion of hot water heating apparatus. — Kirby *v.* Delaware, etc., Canal Co., 48 N. Y. App. Div. 636, 62 N. Y. Suppl. 1110. See also Reiss *v.* New York Steam Co., 128 N. Y. 103, 28 N. E. 24.

Explosion of the heating apparatus in a hotel is not sufficient to charge the owner with negligence as against one not in contractual relations with him. Kirby *v.* Dela-

broken pipe,[13] and the frightening of a horse by a whistle,[14] create no presumption of negligence. No presumption of negligence arises in cases of injuries from defective machinery or other appliances, where the thing is not inherently dangerous,[15] or where the cause of the accident is a matter of conjecture.[16] The general rule seems to be that negligence will be presumed from the sagging or breaking of electric wires.[17]

(D) *Fires.* The general rule is that the destruction of property by fire does not raise a presumption of negligence, either in the kindling or the management at the fire.[18] The case of fires caused by sparks emitted from locomotive engines is an exception to this rule.[19] As to whether this exception also applies to fires set by steam threshing machine engines there is a conflict of authority.[20]

(E) *Frightened Animals.* The decisions are generally to the effect that the running away of horses where no driver is present creates a *prima facie* case of negligence on the part of the owner.[21] Where, however, a horse runs away with

ware, etc., Canal Co., 20 N. Y. App. Div. 473, 46 N. Y. Suppl. 777.

Explosion of gasoline pear burner.— Talley *v.* Beever, 33 Tex. Civ. App. 675, 78 S. W. 23.

Explosion of dynamite.—The explosion of dynamite (Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718) and an injury from a blast have been held to create a presumption of negligence (Ulrich *v.* McCabe, 1 Hilt. (N. Y.) 251; Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621).

13. People's Gaslight, etc., Co. *v.* Porter, 102 Ill. App. 461, although the escaping gas causes the injury to a sleeping occupant of a room by asphyxiation. But see Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759, holding that the escape of gas in the absence of any explanation is some evidence of neglect.

14. Roe *v.* Lucknow, 21 Ont. App. 1.

15. Early *v.* Lake Shore, etc., R. Co., 66 Mich. 349, 33 N. W. 813; McDonough *v.* James Reilly Repair, etc., Co., 45 Misc. (N. Y.) 334, 90 N. Y. Suppl. 358.

Fall of elevator.— The fact that a servant was killed by the fall, without any apparent cause, of a freight elevator in which he was riding, does not render the master liable under the doctrine of *res ipsa loquitur*. Starer *v.* Stern, 100 N. Y. App. Div. 893, 91 N. Y. Suppl. 821. See also Griffen *v.* Manice, 36 Misc. (N. Y.) 364, 73 N. Y. Suppl. 559.

The bursting of a fly wheel purchased from the manufacturers and used on an engine generating electrical power is not *prima facie* evidence of negligence. Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755 [*affirmed* in 162 N. Y. 617, 57 N. E. 1122].

16. Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

17. Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059; Jones *v.* Union R. Co., 18 N. Y. App. Div. 267, 46 N. Y. Suppl. 321. *Contra*, Kepner *v.* Harrisburg Traction Co., 183 Pa. St. 24, 38 Atl. 416, where no contractual relation exists between the parties.

18. *California.*— Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

Maine.— Bachelder *v.* Heagan, 18 Me. 32.

Minnesota.— Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513.

Missouri.— Catron *v.* Nichols, 81 Mo. 80, 51 Am. Rep. 222.

New York.— Stooks *v.* Foote, 20 N. Y. App. Div. 622, 46 N. Y. Suppl. 718; Loeber *v.* Roberts, 60 N. Y. Super. Ct. 202, 17 N. Y. Suppl. 378 [*affirmed* in 138 N. Y. 606, 33 N. E. 1082].

United States.— Hawes *v.* Warren, 119 Fed. 978.

See 37 Cent. Dig. tit. "Negligence," § 219.

But see Shafer *v.* Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254, where it was shown that defendant's servant, a tinner, was in possession of the place where the fire caught and was using a fire-pot.

19. See Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; Lawton *v.* Giles, 90 N. C. 374; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321; and RAILROADS. *Contra*, see Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Fournier *v.* Canadian Pac. R. Co., 33 N. Brunsw. 565.

20. The presumption of negligence which applies to fires set by railway engines does not apply to fires set by traction engines for threshing grain. Coffman *v.* McCauslin, 70 Mo. App. 34. *Contra*, Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. N. S. 530.

21. *Louisiana.*— Maus *v.* Broderick, 51 La. Ann. 1153, 25 So. 977, holding that where the driver is not produced as a witness, or his absence accounted for, it warrants a presumption that no satisfactory explanation could have been given.

New York.— Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497. *Contra*, Gottwald *v.* Bernheimer, 6 Daly 212.

Tennessee.— Thane *v.* Douglass, 102 Tenn. 307, 52 S. W. 155.

Wisconsin.— Strup *v.* Edens, 22 Wis. 432.

England.— Snee *v.* Durkie, 6 F. (Ct. Sess.) 42.

his driver, it has been held that there is nothing in that fact itself to show negligence on the part of the driver.[22]

(F) *Violation of Statute or Ordinance.* The question of the presumption of negligence arising from a violation of statutes or ordinances is treated under the question whether such violation constitutes negligence or not.[23]

c. Knowledge of Defect or Danger. Where knowledge on the part of defendant of a defect or danger is shown negligence may be inferred,[24] as where defendant's servants had been warned as to plaintiff's situation.[25] So where the evidence shows the existence of a defective condition knowledge of a defect may be inferred,[26] but not where the defect was not shown to have existed previous to the accident.[27]

d. Contributory Negligence — (I) *In General.* Every adult is presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence,[28] and the courts generally hold that the presumption is that the person injured was in the exercise of due care,[29] basing this presumption on the natural instinct of preservation, which may be taken into consideration in determining the question of contributory negligence.[30] This presumption of due care arises where there is no evidence as to the circumstances surrounding the accident,[31] and does not obtain where there is such evidence.[32] It is not overcome by the mere fact of

Canada.— Crawford *v.* Upper, 16 Ont. App. 440.

22. Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; Button *v.* Frink, 51 Conn. 342, 50 Am. Rep. 24; Swafford *v.* Rosenbloom, 102 Ill. App. 578.

23. See *supra*, V, D, 6, b, c.

24. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; Tucker *v.* Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321; May *v.* Berlin Iron Bridge Co., 43 N. Y. App. Div. 569, 60 N. Y. Suppl. 550.

25. Rink *v.* Lowry, 38 Ind. App. 132, 77 N. E. 967; Allis-Chalmers Co. *v.* Reilley, 143 Fed. 298, 74 C. C. A. 436.

26. Holzmann *v.* Monell, 19 N. Y. App. Div. 238, 46 N. Y. Suppl. 129; Ferris *v.* Aldrich, 12 N. Y. Suppl. 482; Walton *v.* Ensign, 27 Ohio Cir. Ct. 505; Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759; Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

27. Toland *v.* Paine Furniture Co., 175 Mass. 476, 56 N. E. 608.

28. Artman *v.* Kansas Cent. R. Co., 22 Kan. 296.

29. *Arkansas.*— Choctaw, etc., R. Co. *v.* Doughty, 77 Ark. 1, 91 S. W. 768; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245.

Missouri.— Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503.

New Jersey.— Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Johnson *v.* Hudson River R. Co., 5 Duer 21.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

Pennsylvania.— Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

United States.— Ward *v.* Dampskibselskabet Kjoebenhaven, 136 Fed. 502; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738.

30. *California.*— Gay *v.* Winter, 34 Cal. 153.

Colorado.— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

District of Columbia.— See Atchison *v.* Wills, 21 App. Cas. 548.

Kansas.— Atchison, etc., R. Co. *v.* Hill, 57 Kan. 139, 45 Pac. 581; Dewald *v.* Kansas City, etc., R. Co., 44 Kan. 586, 24 Pac. 1101.

New York.— Morrison *v.* New York Cent., etc., R. Co., 63 N. Y. 643. But see O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572, in which it was said that the inference of freedom from contributory negligence cannot be drawn from the presumption that one will exercise care and prudence in regard to his own safety and life.

Pennsylvania.— Scranton *v.* Dean, 33 Leg. Int. 281.

Virginia.— Newport News Pub. Co. *v.* Beaumeister, 102 Va. 677, 47 S. E. 821.

See 37 Cent. Dig. tit. "Negligence," § 222.

31. Atchison *v.* Wills, 21 App. Cas. (D. C.) 548 (holding that where a declaration alleges that plaintiff was in the exercise of due care, the natural instinct of preservation will stand in the place of positive evidence to support the allegation until defendant's evidence or plaintiff's own evidence overcomes this presumption); Newport News Pub. Co. *v.* Beaumeister, 102 Va. 677, 47 S. E. 821.

32. *Indiana.*— The presumption that one suing for injuries alleged to be due to defendant's negligence was free from contributory negligence is overcome by specific averments of facts showing that plaintiff knew, or might have known, of the danger, and knowing, did not use commensurate care. Lafayette *v.* Fitch, 32 Ind. App. 134, 69 N. E. 414.

Iowa.— Ames *v.* Waterloo, etc., Rapid Transit Co., 120 Iowa 640, 95 N. W. 161; Burk *v.*

the accident,[33] but slight circumstances, in the absence of direct evidence, may be sufficient for this purpose.[34] In jurisdictions which require plaintiff to show freedom from contributory negligence, such want of negligence may be established from inferences which may be properly drawn from the surrounding facts and circumstances;[35] but this presumption is not allowed to take the place of affirmative evidence of want of negligence;[36] and it has been held erroneous to instruct that the presumption will prevail unless overcome by evidence that the injured person was negligent,[37] since this would be equivalent to throwing the burden on defendant to show contributory negligence. Where the burden is held to be on defendant plaintiff may recover if contributory negligence is a matter of conjecture or inference merely.[38] Contributory negligence may be inferred from knowledge of the defect causing the injury[39] or its obviousness.[40]

(II) *Children.* The presumptions as to the age at which children are chargeable with contributory negligence and as to their capacity and discretion are treated under the head of contributory negligence of children.[41]

2. Burden of Proof — a. Negligence — (I) *In General.* The burden of proof rests on plaintiff to show negligence on the part of defendant.[42] And it rests

Walsh, 118 Iowa 397, 92 N. W. 65; Salyers *v.* Monroe, 104 Iowa 74, 73 N. W. 606.

Maryland.— Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504.

Missouri.— Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Myers *v.* Kansas, 108 Mo. 480, 18 S. W. 914; Rapp *v.* St. Joseph, etc., R. Co., 106 Mo. 423, 17 S. W. 487; Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183, 11 S. W. 569; Lee *v.* Knapp, 55 Mo. App. 390.

New York.— Connor *v.* Koch, 63 N. Y. App. Div. 257, 71 N. Y. Suppl. 836.

Where the evidence is conflicting as to whether a person injured contributed to his own injury, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves. Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

33. Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503.

34. Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503, holding that the habits and character of the person injured, his mental and physical condition when last seen before the injury, the location and character of the object or instrumentality causing the injury, are all to be taken into consideration by the jury in determining whether he was free from fault when injured.

35. Riordan *v.* Ocean Steamship Co., 124 N. Y. 655, 26 N. E. 1027; Wiwirowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023.

Circumstances must be relevant.— While the law does not require the production of direct evidence of contributory negligence, the facts proved, and from which the inference is drawn that plaintiff was or was not negligent, must be such as are relevant to the question of contributory negligence. Wood *v.* Danbury, 72 Conn. 69, 43 Atl. 554; Ryan *v.* Bristol, 63 Conn. 23, 27 Atl. 309.

36. *Illinois.*— Rothschild *v.* Levy, 118 Ill. App. 78.

Indiana.— McQueen *v.* Elkhart, 14 Ind. App. 671, 43 N. E. 460; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

Iowa.— Reynolds *v.* Keokuk, 72 Iowa 371, 34 N. W. 167; Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104; Dunlavy *v.* Chicago, etc., R. Co., 66 Iowa 435, 23 N. W. 911.

Maine.— McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487 (where it is said: While freedom from contributory negligence can sometimes be inferred from the circumstances shown, the inference must be from circumstances shown by the evidence to have actually existed and cannot be made from circumstances merely conjectured or even probable); Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

Massachusetts.— Moore *v.* Boston, etc., R. Co., 159 Mass. 399, 34 N. E. 366.

New York.— Riordan *v.* Ocean Steamship Co., 124 N. Y. 655, 26 N. E. 1027; Wiworowski *v.* Lake Shore, etc., R. Co., 124 N. Y. 420, 26 N. E. 1023.

37. Bell *v.* Clarion, 113 Iowa 126, 84 N. W. 962.

38. Shannon *v.* Delwer, 68 Minn. 138, 71 N. W. 14; Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

39. Koslovki *v.* International Heater Co., 75 N. Y. App. Div. 60, 77 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 631, 71 N. E. 1132].

40. McClain *v.* Caribou Nat. Bank, 100 Me. 437, 62 Atl. 144; Lofsten *v.* Brooklyn Heights R. Co., 184 N. Y. 148, 76 N. E. 1035; Paige *v.* New York Cent., etc., R. Co., 111 N. Y. App. Div. 828, 98 N. Y. Suppl. 183.

41. See *supra*, VII, B, 2, a, (II), (III), (IV).

42. *Alabama.*— Alabama Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827; Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003; Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30;

on plaintiff throughout the trial, proof of the accident not being direct proof of

Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886.

California.— Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 7 Pac. 769.

Delaware.— Garrett *v.* People's R. Co., (1906) 64 Atl. 254; Wood *v.* Wilmington City R. Co., 5 Pennew. 369, 64 Atl. 246; Graboski *v.* New Castle Leather Co., (1906) 64 Atl. 74; Robinson *v.* Huber, (1906) 63 Atl. 873; Goldstein *v.* People's R. Co., 5 Pennew. 306, 60 Atl. 975; Colbourn *v.* Wilmington, 4 Pennew. 443, 56 Atl. 605; Neal *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 467, 53 Atl. 338; Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945; Dolby *v.* Hearn, 1 Marv. 153, 37 Atl. 45; Kyne *v.* Wilmington, etc., R. Co., 8 Houst. 185, 14 Atl. 922.

Idaho.— Holt *v.* Spokane, etc., R. Co., 4 Ida. 443, 40 Pac. 56.

Illinois.— Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011; Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; North Chicago St. R. Co. *v.* O'Donnell, 115 Ill. App. 110; Tubelowish *v.* Lathrop, 104 Ill. App. 82; Baltimore, etc., R. Co. *v.* Greer, 103 Ill. App. 448; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Hunting *v.* Baldwin, 6 Ill. App. 547.

Indiana.— Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Fletcher *v.* Kelly, 37 Ind. App. 254, 76 N. E. 813; Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812; O'Kane *v.* Miller, 3 Ind. App. 136, 29 N. E. 439.

Iowa.— Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362.

Kentucky.— Louisville, etc., R. Co. *v.* McGary, 104 Ky. 509, 47 S. W. 440, 20 Ky. L. Rep. 691.

Louisiana.— Harris *v.* Tremont Lumber Co., 115 La. 973, 40 So. 374; McDonnell *v.* New Orleans Cypress Co., 115 La. 67, 38 So. 896.

Maine.— Butler *v.* Rockland, etc., R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; Lesan *v.* Maine Cent. R. Co., 77 Me. 85; Beaulieu *v.* Portland Co., 48 Me. 291; Bachelder *v.* Heagan, 18 Me. 32.

Maryland.—Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Massachusetts.— Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Holly *v.* Boston Gaslight Co., 8 Gray 123, 69 Am. Dec. 233; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92; Tourtellot *v.* Rosebrook, 11 Metc. 460.

Michigan.— Allen *v.* Bainbridge, 145 Mich. 366, 108 N. W. 732; Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368; Bradley *v.* Ft. Wayne, etc., R. Co., 94 Mich. 35, 53 N. W. 915; Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Kelly *v.* Hendrie, 26 Mich. 255; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Minnesota.— Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 53 N. W. 243, 23 L. R. A. 513.

Missouri.— Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Randle *v.* Pacific R. Co., 65 Mo. 325; Coffman *v.* McCauslin, 70 Mo. App. 34.

Nebraska.— Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68.

New Jersey.— In an action for negligence the burden is on plaintiff to prove either some negligent act or circumstances from which defendant's want of due care is a legitimate inference. Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593.

New York.— Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Field *v.* New York Cent. R. Co., 32 N. Y. 339; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Holbrook *v.* Mica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Thompson *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 10, 85 N. Y. Suppl. 181; McConnell *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 545, 71 N. Y. Suppl. 616; Groarke *v.* Laemmle, 56 N. Y. App. Div. 61, 67 N. Y. Suppl. 409; Littman *v.* New York, 36 N. Y. App. Div. 189, 55 N. Y. Suppl. 383; Burk *v.* Edison Gen. Electric Co., 89 Hun 498, 35 N. Y. Suppl. 313; Murphy *v.* Hays, 68 Hun 450, 23 N. Y. Suppl. 70; Kelsey *v.* Jewett, 28 Hun 51; Loeber *v.* Roberts, 60 N. Y. Super. Ct. 202, 17 N. Y. Suppl. 378 [*affirmed* in 138 N. Y. 606, 33 N. E. 1082]; Newcomb *v.* Metropolitan St. R. Co., 34 Misc. 203, 68 N. Y. Suppl. 780; Diver *v.* Hall, 21 Misc. 452, 47 N. Y. Suppl. 630; Friedman *v.* Dry Dock, etc., R. Co., 3 N. Y. St. 557; Robbins *v.* Mount, 33 How. Pr. 24.

Ohio.— Murphy *v.* Dayton, 8 Ohio S. & C. Pl. Dec. 354, 7 Ohio N. P. 227.

Pennsylvania.— Drinkwater *v.* Quaker City Cooperage Co., 208 Pa. St. 649, 57 Atl. 1107; Davidson *v.* Humes, 188 Pa. St. 335, 41 Atl. 649; McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Texas.— Beaty *v.* El Paso Electric R. Co., (Civ. App. 1906) 91 S. W. 365; Robertson *v.* Trammell, (Civ. App. 1904) 83 S. W. 258 [*affirmed* in 98 Tex. 364, 83 S. W. 1098];

negligence,[43] and the giving of evidence sufficient to establish a *prima facie* case does not shift the burden.[44] Neither does the fact that the doctrine *res ipsa loquitur* is applicable to the facts of the case relieve plaintiff of the burden of the issue.[45] So it is held that where defendant had admitted the averments of the complaint by default the burden of disproving the negligence was on him.[46] Where, however, plaintiff's evidence establishes a *prima facie* case of negligence the burden rests on defendant to overcome or rebut the presumption of negligence so established,[47] and the burden of disproving negligence is on him where the negli-

Lambert *v.* Western Union Tel. Co., (Civ. App. 1898) 45 S. W. 1034; Ft. Worth, etc., R. Co. *v.* Tomlinson, (App. 1890) 16 S. W. 866.

Virginia.— Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64, 48 S. E. 508; Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296; Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946; Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

United States.— Hawes *v.* Warren, 119 Fed. 978; Morris *v.* Chicago, etc., R. Co., 26 Fed. 22; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Mentzer *v.* Armour, 18 Fed. 373, 5 McCrary 617; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516; Fuller *v.* Galion Citizens' Nat. Bank, 15 Fed. 875; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103; Haff *v.* Minneapolis, etc., R. Co., 14 Fed. 558, 4 McCrary 622.

England.— Davey *v.* London, etc., R. Co., 12 Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. N. S. 739; Cotton *v.* Wood, 8 C. B. N. S. 568, 7 Jur. N. S. 168, 29 L. J. C. P. 333, 98 E. C. L. 568; Smith *v.* Midland R. Co., 52 J. P. 262, 57 L. T. Rep. N. S. 813.

Canada.— Cowans *v.* Marshall, 28 Can. Sup. Ct. 161; Witman *v.* W. & A. R. Co., 6 Can. L. T. Occ. Notes 451, 18 Nova Scotia 271; Ramie *v.* Walker, 6 Can. L. T. Occ. Notes 448, 18 Nova Scotia 175; Young *v.* Owen Sound Dredge Co., 27 Ont. App. 649; Morrow *v.* Canadian Pac. R. Co., 21 Ont. App. 149.

See 37 Cent. Dig. tit. "Negligence," § 224.

43. Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598; Lincoln Traction Co. *v.* Shephard, (Nebr. 1906) 107 N. W. 764; Omaha St. R. Co. *v.* Boesen, (Nebr. 1905) 105 N. W. 303; Rupp *v.* Sarpy County, (Nebr. 1905) 102 N. W. 242; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751; Casper *v.* Dry Dock, etc., R. Co., 56 N. Y. App. Div. 372, 67 N. Y. Suppl. 805; Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264.

44. Fourtellot *v.* Rosebrook, 11 Metc. (Mass.) 460; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751; Heinemann *v.* Heard, 62 N. Y. 448; Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

45. Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688; Dean *v.* Tarrytown, etc., R. Co., 113 N. Y. App. Div. 437, 99 N. Y. Suppl. 250; Adams *v.* Union R. Co., 80 N. Y. App. Div. 136, 80 N. Y. Suppl. 264; Wiley *v.* Bondy, 23 Misc. (N. Y.) 658, 52 N. Y. Suppl. 68; Lyles *v.* Brannon Carbonating Co., 140 N. C. 25, 52 S. E. 233; Stewart *v.* Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562. The doctrine of *res ipsa loquitur* does not relieve plaintiff of the burden of the issue, or raise a presumption in plaintiff's favor, but merely carries the case to the jury, permitting it to infer negligence and find on all the evidence whether plaintiff has sustained his burden of proof. Ross *v.* Double Shoals Cotton Mills, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. N. S. 298.

46. Elwood *v.* Connecticut R., etc., Co., 77 Conn. 145, 58 Atl. 751. And see Georgia R., etc., Co. *v.* Willis, 28 Ga. 317, holding that where defendant offered to pay for an injury arising from his negligence, but plaintiff declined the offer as being too small, and brought suit, the burden of disproving negligence was on defendant.

47. *Alabama.*— Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827.

Arkansas.— Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059.

Delaware.— Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Georgia.— Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644.

Iowa.— Tuttle *v.* Chicago, etc., R. Co., 48 Iowa 236; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Minnesota.— Ryder *v.* Kinsey, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557.

New York.— Breen *v.* New York Cent., etc., R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Mullen *v.* St. John, 57 N. Y. 567, 15 Am. Rep. 530; Adams *v.* Union R. Co., 80 N. Y. App. Div. 136, 80 N. Y. Suppl. 264, 12 N. Y. Annot. Cas. 386 (holding that it is incumbent on defendant to rebut the presumption, but the burden still rests on plaintiff); Griffen *v.* Manice, 47 N. Y. App. Div. 70, 62 N. Y. Suppl. 364.

North Carolina.— Moore *v.* Parker, 91 N. C. 275; Lawton *v.* Giles, 90 N. C. 374; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321; Ellis *v.* Portsmouth, etc., R. Co., 24 N. C. 138.

Tennessee.— Mitchell *v.* Nashville, etc., R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451, 19 Am. Rep. 618.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

West Virginia.— Carrico *v.* West Virginia

gence consisted of the violation of a statute or ordinance.[48] Where plaintiff proceeds to show the circumstances of the accident which shows the absence of negligence the burden is not on defendant to rebut the presumption of negligence arising from the accident;[49] and where an accident resulting in death occurs, in the absence of witnesses, plaintiff suing therefor is not relieved of the burden of proving defendant's negligence merely because it is presumed that the decedent exercised due care.[50]

(II) *Particular Elements of Liability*— (A) *In General.* This burden extends to all the elements which are necessary to be proved to render defendant liable. Thus plaintiff must show invitation, if a part of his case,[51] the duty to exercise care on the part of defendant,[52] defendant's knowledge of the defect causing the injury,[53] or the ability to discover and avoid danger by the exercise of reasonable care;[54] and an opportunity on the part of defendant to perform his duty.[55]

(B) *Proximate Cause.* The burden rests on plaintiff not only to prove that defendant was negligent, but also that such negligence was the proximate cause of the injury.[56]

Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

Wisconsin.— Kaples *v.* Orth, 61 Wis. 531, 21 N. W. 633. And see Strup *v.* Edens, 22 Wis. 432.

United States.— Hastorf *v.* Hudson River Stone Supply Co., 110 Fed. 669.

Canada.—Lloyds Plate Glass Co. *v.* Powell, 16 Quebec Super. Ct. 432; Joint *v.* Webster, 15 Quebec Super. Ct. 220.

Showing use of due care.— The burden thus cast on defendant is not that of satisfactorily accounting for the accident but of showing that he used due care. Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842.

48. Larimer County Ditch Co. *v.* Zimmerman, 4 Colo. App. 78, 34 Pac. 1111; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416; Burton *v.* McClellan, 3 Ill. 434; Sewall *v.* Moore, 166 Pa. St. 570, 31 Atl. 370.

Applications of rule.— When a municipality, under legislative authority, has designated the place in a sidewalk where a water company may maintain a hydrant, the burden is on the company to show that it maintains the hydrant in the particular place designated, where a person was injured by falling over it. Bean *v.* Maine Water Co., 92 Me. 469, 43 Atl. 22; Murphy *v.* Labbe, 27 Can. Sup. Ct. 126 [*affirming* 5 Quebec Q. B. 88].

49. Even if proof of the explosion of defendant's boiler, injuring a person not connected with its works, makes out a *prima facie* case of negligence, calling for explanation by defendant, showing that it used due care, defendant is not required to show anything where plaintiff proves all the circumstances of an explosion, and the facts connected with the operation and management of the boiler, which not only fail to show negligence, but do show that ordinary care had been exercised. Baran *v.* Reading Iron Co., 202 Pa. St. 274, 51 Atl. 979.

50. Powers *v.* Pere Marquette R. Co., 143 Mich. 379, 106 N. W. 1117.

51. Sloss Iron, etc., Co. *v.* Tilson, 141 Ala. 152, 37 So. 427; Oyshterbank *v.* Gardner, 49 N. Y. Super. Ct. 263.

52. Hamilton *v.* Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350.

53. Welfare *v.* London, etc., R. Co., L. R. 4 Q. B. 693, 38 L. J. Q. B. 241, 20 L. T. Rep. N. S. 743, 17 Wkly. Rep. 1065.

54. Necker *v.* Frank, 43 Misc. (N. Y.) 159, 88 N. Y. Suppl. 250.

55. South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210.

56. *Colorado.*— Pueblo Light, etc., Co. *v.* McGinley, 5 Colo. App. 238, 38 Pac. 425, negligent burning of building.

Delaware.— Hannigan *v.* Wright, 5 Pennew. 537, 63 Atl. 234.

Georgia.— Central R. Co. *v.* Freeman, 75 Ga. 331.

Idaho.— Hopkins *v.* Utah Northern R. Co., 2 Ida. (Hasb.) 300, 13 Pac. 343.

Illinois.—Lake Shore, etc., R. Co. *v.* Peterson, 86 Ill. App. 375; Boske *v.* Collopy, 86 Ill. App. 268; Bertalot *v.* Kinnare, 72 Ill. App. 52; Harrigan *v.* Chicago, etc., R. Co., 53 Ill. App. 344.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097.

Maine.— Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Maryland.— Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504.

Missouri.— Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67; Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New York.—Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Nellis *v.* Laughlin, 79 N. Y. App. Div. 470, 80 N. Y. Suppl. 30; Lehman *v.* Brooklyn, 29 Barb. 234; Schoen *v.* Dry Dock, etc., R. Co., 58 N. Y. Super. Ct. 149, 9 N. Y. Suppl. 709.

North Carolina.— Brewster *v.* Elizabeth, 142 N. C. 9, 54 S. E. 784; Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. 851; Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

(c) *Injury and Damages Sustained.* The burden of proof is on plaintiff to show the injury alleged,[57] and the damages which he claims were sustained.[58]

b. Contributory Negligence[59] — (i) *In General.* The burden of proving contributory negligence rests on defendant in those jurisdictions in which it is held to be a defense,[60] unless contributory negligence is shown by plaintiff's

North Dakota.— Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305, cause of fire.

Pennsylvania.—Drinkwater *v.* Quaker City Cooperage Co., 208 Pa. St. 649, 57 Atl. 1107.

Virginia.— Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

United States.— Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 4 McCrary 454.

England.— Wakelin *v.* London, etc., R. Co., 12 App. Cas. 41, 51 J. P. 404, 56 L. J. Q. B. 229, 55 L. T. Rep. N. S. 709, 35 Wkly. Rep. 141; Doyle *v.* Wragg, 7 F. & F. 1.

Canada.— Kervin *v.* Canadian Coloured Cotton Mills Co., 29 Can. Sup. Ct. 478 [*reversing* 25 Ont. App. 36]; Cowans *v.* Marshall, 28 Can. Sup. Ct. 161; Keenan *v.* Leinster St. Baptist Church, 21 N. Brunsw. 211; Young *v.* Owen Sound Dredge Co., 27 Ont. App. 649.

See 37 Cent. Dig. tit. "Negligence," § 229.

And see Fox *v.* Glastenbury, 29 Conn. 204; Park *v.* O'Brien, 23 Conn. 339.

57. Hopkins *v.* Utah Northern R. Co., 2 Ida. (Hash.) 300, 13 Pac. 343.

58. Coley *v.* Statesville, 121 N. C. 301, 28 S. E. 482.

59. Presumption see *supra*, VIII, C, 1, d.

60. *Alabama.*— Alabama Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827; McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47; Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735; O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158; Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566; Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672.

Arizona.— Southern Pac. Co. *v.* Tomlinson, 4 Ariz. 126, 33 Pac. 710 [*following* Lopez *v.* Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748].

Arkansas.— Little Rock, etc., R. Co. *v.* Atkins, 46 Ark. 423; Texas, etc., R. Co. *v.* Orr, 46 Ark. 182.

California.— MacDougall *v.* Central R. Co., 63 Cal. 431; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320.

Colorado.— Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; White *v.* Trinidad, 10 Colo. App. 327, 52 Pac. 214.

Dakota.— Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

Delaware.— Boyd *v.* Blumenthal, 3 Penew. 564, 52 Atl. 330; Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

District of Columbia.— Harmon *v.* Washington, etc., R. Co., 7 Mackey 255; Tolson *v.* Inland, etc., Coasting Co., 6 Mackey 39.

Florida.— Orlando *v.* Heard, 29 Fla. 581, 11 So. 182.

Georgia.— Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; Augusta *v.* Hudson, 88 Ga. 599, 15 S. E. 678.

Idaho.— Hopkins *v.* Utah Northern R. Co., 2 Ida. (Hasb.) 300, 13 Pac. 343.

Indiana.— In this state, by express statutory provision, the burden of proving contributory negligence is placed on defendant in personal injury cases, and in cases where such injuries result in death. Diamond Block Coal Co. *v.* Cuthbertson, 166 Ind. 290, 76 N. E. 1060, (1905) 73 N. E. 818; Stephens *v.* American Car, etc., Co., 38 Ind. App. 414, 78 N. E. 335; Indianapolis *v.* Mullally, 38 Ind. App. 125, 77 N. E. 1132; Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895; Fletcher *v.* Kelly, 37 Ind. App. 254, 76 N. E. 813; Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053; Harris *v.* Pittsburgh, etc., R. Co., 32 Ind. App. 600, 70 N. E. 407; Wortman *v.* Minich, 28 Ind. App. 31, 62 N. E. 85. But as subsequently shown in all other cases plaintiff must affirmatively establish the absence of contributory negligence. See *infra*, note 64.

Indian Territory.— Chicago, etc., R. Co. *v.* Pounds, 1 Indian Terr. 51, 35 S. W. 249.

Kansas.—St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Louisiana.— Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334. Formerly the rule was otherwise. Deikman *v.* Morgan's Louisiana, etc., R., etc., Co., 40 La. Ann. 787, 5 So. 76.

Massachusetts.—Merrill *v.* Eastern R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705.

Minnesota.— Lammers *v.* Great Northern R. Co., 82 Minn. 120, 84 N. W. 728; Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333; Hocum *v.* Weitherick, 22 Minn. 152.

Mississippi.— Mississippi Cent. R. Co. *v.* Hardy, 88 Miss. 732, 41 So. 505; Hickman *v.* Kansas City, etc., R. Co., 66 Miss. 154, 5 So. 225.

Missouri.— Card *v.* Eddy, (1894) 28 S. W. 753; Bluedorn *v.* Missouri Pac. R. Co., (1893) 24 S. W. 57; Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818; Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152, 19 S. W. 820; Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Stepp *v.* Chicago,

pleadings or evidence.[61] And this burden rests on defendant throughout the

etc., R. Co., 85 Mo. 229; Stephens *v.* Macon, 83 Mo. 345; Swigert *v.* Hannibal, etc., R. Co., 75 Mo. 475; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; McNown *v.* Wabash R. Co., 55 Mo. App. 585; Dolan *v.* Moberly, 17 Mo. App. 436.

Montana.— Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650; Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905.

Nebraska.— Omaha *v.* Ayer, 32 Nebr. 375, 49 N. W. 445.

New Jersey.— Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Durant *v.* Palmer, 29 N. J. L. 544.

North Carolina.— Haltom *v.* Southern R. Co., 127 N. C. 255, 37 S. E. 262; Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848; Sims *v.* Lindsay, 122 N. C. 678, 30 S. E. 19; Wood *v.* Bartholomew, 122 N. C. 177, 29 S. E. 959; White *v.* Suffolk, etc., R. Co., 121 N. C. 484, 27 S. E. 1002; Jordan *v.* Asheville, 112 N. C. 743, 16 S. E. 760.

Ohio.— Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89; Pittsburgh, etc., R. Co. *v.* Hart, 10 Ohio Cir. Ct. 411, 6 Ohio Cir. Dec. 731.

Oregon.— Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693; Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33; Grant *v.* Baker, 12 Oreg. 329, 7 Pac. 318.

Pennsylvania.— Baker *v.* Westmoreland, etc., Natural Gas Co., 157 Pa. St. 593, 27 Atl. 789, (1893) 27 Atl. 792; Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 20 Atl. 1046; Bush *v.* Johnston, 23 Pa. St. 209; Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514; Powel *v.* Pennsylvania R. Co., 30 Leg. Int. 47. But see Heiss *v.* Lancaster, 203 Pa. St. 260, 52 Atl. 201, holding that plaintiff being bound to make out a case clear of contributory negligence it is not error to speak of this in a charge as a burden resting on him, it being a burden, although a negative one.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307; Bouknight *v.* Charlotte, etc., R. Co., 41 S. C. 415, 19 S. E. 915; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515; Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

Tennessee.— Burke *v.* Citizens' St. R. Co., 102 Tenn. 409, 52 S. W. 170.

Texas.— Lee *v.* International, etc., R. Co., 89 Tex. 583, 36 S. W. 63; Gulf, etc., R. Co. *v.* Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125; Gulf, etc., R. Co. *v.* Hudson, 77 Tex. 494, 14 S. W. 158; Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293; Chicago, etc., R. Co. *v.* Buie, 31 Tex. Civ. App. 654, 73 S. W. 853; Galveston, etc., R. Co. *v.* Jackson, 31 Tex. Civ. App. 342, 71 S. W. 991; Galveston, etc., R. Co. *v.* Dehnisch, (Civ. App. 1900) 57 S. W. 64; Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942; Lambert *v.* Western Union Tel. Co., (Civ. App. 1898) 45 S. W. 1034; Houston, etc., R. Co. *v.* O'Neal, (Civ. App. 1898) 45 S. W. 921; Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 34 S. W. 133.

Utah.— Hickey *v.* Rio Grande Western R. Co., 29 Utah 392, 82 Pac. 29; Holland *v.* Oregon Short Line R. Co., 26 Utah 209, 72 Pac. 940; Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

Washington.— Currans *v.* Seattle, etc., R., etc., Co., 34 Wash. 512, 76 Pac. 87; Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Sheff *v.* Huntington, 16 W. Va. 307.

Wisconsin.— Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1136; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554; Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714 [*overruling* Dressler *v.* Davis, 7 Wis. 527; Chamberlain *v.* Milwaukee, etc., R. Co., 7 Wis. 425].

United States.— Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. ed. 270; Armour *v.* Carlas, 142 Fed. 721, 74 C. C. A. 53; Ward *v.* Dampskibselskabet Kjoebenhaven, 136 Fed. 502; Jefferson Hotel Co. *v.* Warren, 128 Fed. 565, 63 C. C. A. 193; Hemingway *v.* Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477; Watertown *v.* Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 738. This requirement is not changed by the fact that a different rule prevails in the courts of the state where the cause of action arose. Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

Canada.—Shannahan *v.* Ryan, 8 Can. L. T. Occ. Notes 379, 20 Nova Scotia 142; Morrow *v.* Canadian Pac. R. Co., 21 Ont. App. 149. But see Davey *v.* London, etc., R. Co., 12 Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. N. S. 739.

See 37 Cent. Dig. tit. "Negligence," § 229.

61. *Alabama.*— Pullman Palace-Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

Arizona.— Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545.

Arkansas.— Choctaw, etc., R. Co. *v.* Doughty, 77 Ark. 1, 91 S. W. 768; Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

California.— MacDougall *v.* Central R. Co., 63 Cal. 431; Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Colorado.— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Kansas.— Chicago, etc., R. Co. *v.* Lee, 66 Kan. 806, 72 Pac. 266; Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244.

trial.[62] No question of contributory negligence can arise, however, until it is shown *prima facie* that defendant was negligent.[63] In those states requiring plaintiff to negative contributory negligence the burden is on plaintiff to prove the absence of such negligence.[64] This rule, however, does not require plaintiff to show that

Mississippi.— Simms *v.* Forbes, 86 Miss. 412, 38 So. 546.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 147 Mo. 140, 48 S. W. 838.

Montana.— Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; Wall *v.* Helena St. R. Co., 12 Mont. 44, 29 Pac. 721; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

Nebraska.— Omaha St. R. Co. *v.* Martin, 48 Nebr. 65, 66 N. W. 1007; Union Stock Yards Co. *v.* Conoyer, 41 Nebr. 617, 59 N. W. 950; Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840; Omaha *v.* Ayer, 32 Nebr. 375, 49 N. W. 445; Lincoln *v.* Walker, 18 Nebr. 244, 20 N. W. 113, 18 Nebr. 250, 25 N. W. 66.

Pennsylvania.— Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Sopherstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1000; Baker *v.* Westmoreland, etc., Natural Gas Co., 157 Pa. St. 593, 27 Atl. 789; Varnau *v.* Pennsylvania Tel. Co., 5 Lanc. L. Rev. 97.

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 [*affirming* (Civ. App. 1894) 26 S. W. 509]; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297; Gulf, etc., R. Co. *v.* Melville, (Civ. App. 1905) 87 S. W. 863; Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 73 S. W. 857; Missouri, etc., R. Co. *v.* White, 22 Tex. Civ. App. 424, 55 S. W. 593; Missouri, etc., R. Co. *v.* Lyons, (Civ. App. 1899) 53 S. W. 96; San Antonio, etc., R. Co. *v.* Belt, (Civ. App. 1898) 46 S. W. 374; Hillsboro *v.* Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010; Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 34 S. W. 133.

Utah.— Corbett *v.* Oregon Short Line R. Co., 25 Utah 449, 71 Pac. 1065.

Virginia.— Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

Wisconsin.— Gill *v.* Homrighausen, 79 Wis. 634, 48 N. W. 862; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714.

See 37 Cent. Dig. tit. "Negligence," § 229.

62. Harris *v.* Pittsburgh, etc., R. Co., 32 Ind. App. 600, 70 N. E. 407. Proof of plaintiff's intoxication does not shift to plaintiff the burden of proving contributory negligence, but the question should be submitted to the jury under proper instructions. Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554.

63. Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486; Beaty *v.* El Paso Electric R. Co., (Tex. Civ. App. 1905) 91 S. W. 365.

64. *Connecticut.*— Fox *v.* Glastenbury, 29 Conn. 204; Park *v.* O'Brien, 23 Conn. 339; Beers *v.* Housatonuc R. Co., 19 Conn. 566.

Illinois.— West Chicago St. R. Co. *v.* Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226, 52 L. R. A. 655; Chicago, etc., R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. 357 [*reversing* 57 Ill. App. 365]; North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451; Rogers *v.* Chicago, etc., R. Co., 117 Ill. 115, 6 N. E. 889 [*affirming* 17 Ill. App. 638]; Indianapolis, etc., R. Co. *v.* Evans, 88 Ill. 63; Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74; Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Dyer *v.* Talcott, 16 Ill. 300; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; Hewes *v.* Chicago, etc., R. Co., 119 Ill. App. 393 [*affirmed* in 217 Ill. 500, 75 N. E. 515]; Baltimore, etc., R. Co. *v.* Ayers, 119 Ill. App. 108; Wilson *v.* Illinois Cent. R. Co., 109 Ill. App. 542 [*affirmed* in 210 Ill. 603, 71 N. E. 398]; Jones *v.* Illinois Cent. R. Co., 106 Ill. App. 597; Wabash R. Co. *v.* Jensen, 99 Ill. App. 312; Potter *v.* Sjorgren, 91 Ill. App. 530; Mutual Wheel Co. *v.* Mosher, 85 Ill. App. 240; Chicago, etc., R. Co. *v.* Gunderson, 74 Ill. App. 356; Heimann *v.* Kinnare, 73 Ill. App. 184; Cleveland, etc., R. Co. *v.* Butler, 55 Ill. App. 594; Lauster *v.* Chicago, etc., R. Co., 43 Ill. App. 534.

Indiana.— Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Conner *v.* Citizens' St. R. Co., 146 Ind. 430, 45 N. E. 662; Plymouth *v.* Fields, 125 Ind. 323, 25 N. E. 346; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138; Pennsylvania Co. *v.* Gallentine, 77 Ind. 322; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90; Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640, 45 N. E. 812; Huntingburgh *v.* First, 15 Ind. App. 552, 43 N. E. 17; Hartzell *v.* Louisville, etc., R. Co., 15 Ind. App. 417, 44 N. E. 315; Lake Shore, etc., R. Co. *v.* Boyts, (App. 1896) 43 N. E. 667; McQueen *v.* Elkhart, 14 Ind. App. 671, 43 N. E. 460; Wahl *v.* Shoulder, 14 Ind. App. 665, 43 N. E. 458; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

Iowa.—Buchholtz *v.* Radcliffe, 129 Iowa 27, 105 N. W. 336; Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458; Gregory *v.* Woodworth, 93 Iowa 246, 61 N. W. 962; Gwynn *v.* Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286; Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; Patterson *v.* Burlington, etc., R. Co., 38 Iowa 279.

the injury has not been aggravated by any subsequent act or neglect on his part, the burden as to such negligence being on defendant.[65] If the evidence shows that plaintiff was guilty of contributory negligence, the burden is on him to show that some distinct and later negligence of defendant was the proximate cause of the injury.[66]

(II) *As Affected by the Pleadings.* Where the facts alleged by plaintiff raise a presumption of contributory negligence it devolves on plaintiff to explain away such presumption;[67] but in jurisdictions where contributory negligence is a defense the fact that plaintiff has negatived it does not throw the burden on him of maintaining such allegation,[68] and in jurisdictions where the burden is held to

Louisiana.— Deikman *v.* Morgan's Louisiana, etc., R., etc., Co., 40 La. Ann. 787, 5 So. 76.

Maine.— Ward *v.* Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; Benson *v.* Titcomb, 72 Me. 31; Dickey *v.* Maine Tel. Co., 43 Me. 492; Waldron *v.* Portland, etc., R. Co., 35 Me. 422; Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 589; Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts.— Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. 418; Planz *v.* Boston, etc., R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835; Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Gahagan *v.* Boston, etc., R. Co., 1 Allen 187, 79 Am. Dec. 724; Holly *v.* Boston Gaslight Co., 8 Gray 123, 69 Am. Dec. 233; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92; Lucas *v.* New Bedford, etc., R. Co., 6 Gray 64, 66 Am. Dec. 406; Carsley *v.* White, 21 Pick. 254, 32 Am. Dec. 259; Adams *v.* Carlisle, 21 Pick. 146; Lane *v.* Crombie, 12 Pick. 177.

Michigan.— Mynning *v.* Detroit, etc., R. Co., 67 Mich. 677, 35 N. W. 811; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, 26 N. W. 514; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Kelly *v.* Hendrie, 26 Mich. 255; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

New York.—Whalen *v.* Citizens' Gas Light Co., 151 N. Y. 70, 45 N. E. 363; Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182, 42 N. E. 579; Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; Lee *v.* Troy Citizens' Gas-Light Co., 98 N. Y. 115; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56; Hale *v.* Smith, 78 N. Y. 480; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248; Warner *v.* New York Cent. R. Co., 44 N. Y. 465; Axelrod *v.* New York City R. Co., 109 N. Y. App. Div. 87, 95 N. Y. Suppl. 1072; Scialo *v.* Steffens, 105 N. Y. App. Div. 592, 94 N. Y. Suppl. 305; Lowry *v.* Anderson Co., 96 N. Y. App. Div. 465, 89 N. Y. Suppl. 107; Thompson *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 10, 85 N. Y. Suppl. 181; Frounfelker *v.* Delaware, etc., R. Co., 74 N. Y. App. Div. 224, 77 N. Y. Suppl. 470; Bruce *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 242, 74 N. Y. Suppl. 324; Sparks *v.* Siebrecht, 19 N. Y. App. Div. 117, 45 N. Y. Suppl. 993; McDonnel *v.* Henry Elias Brewing Co., 16 N. Y. App. Div. 223, 45 N. Y. Suppl. 652; Dorr *v.* McCullough, 8 N. Y. App. Div. 327, 40 N. Y. Suppl. 806; Burk *v.* Edison Gen. Electric Co., 89 Hun 498, 35 N. Y. Suppl. 313; Von Atzinger *v.* New York Cent., etc., R. Co., 83 Hun 120, 31 N. Y. Suppl. 632; Minerly *v.* Union Ferry Co., 56 Hun 113, 9 N. Y. Suppl. 104; McDermott *v.* Third Ave. R. Co., 44 Hun 107 [*affirmed* in 115 N. Y. 670, 22 N. E. 1126]; Lehman *v.* Brooklyn, 29 Barb. 234; McLain *v.* Van Zandt, 39 N. Y. Super. Ct. 347; Brenstein *v.* Mattson, 10 Daly 336; Geoghegan *v.* Atlas Steamship Co., 3 Misc. 224, 22 N. Y. Suppl. 749, 6 Misc. 127, 25 N. Y. Suppl. 1116 [*affirmed* in 146 N. Y. 369, 40 N. E. 507]; Byrnes *v.* Interurban St. R. Co., 84 N. Y. Suppl. 193; Thies *v.* Thomas, 77 N. Y. Suppl. 276; Schindler *v.* New York, etc., R. Co., 1 N. Y. St. 289. *Contra*, Johnson *v.* Hudson River R. Co., 5 Duer 21.

Vermont.— Bovee *v.* Danville, 53 Vt. 183; Walker *v.* Westfield, 39 Vt. 246; Hyde *v.* Jamaica, 27 Vt. 443. *Contra*, Lester *v.* Pittsford, 7 Vt. 158, contributory negligence being a defense only necessary to be put in when a *prima facie* case is made out.

Wisconsin.— Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

See 37 Cent. Dig. tit. "Negligence," § 229.

65. Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Wissler *v.* Atlantic, 123 Iowa 11, 98 N. W. 131. *Contra*, Morrison *v.* Long Island R. Co., 3 N. Y. App. Div. 205, 38 N. Y. Suppl. 393, holding that in an action for the loss of an eye caused by plaintiff being struck by a cinder from defendant's train the burden rested on plaintiff to show that his own neglect in not calling a physician sooner had not contributed to the injury.

66. Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

67. Gillum *v.* New York, etc., Steamship Co., (Tex. Civ. App. 1903) 76 S. W. 232; Louisiana Western Extension R. Co. *v.* McDonald, (Tex. Civ. App. 1899) 52 S. W. 649. And see *supra*, note 66.

68. Pennsylvania Co. *v.* Fertig, 33 Ind. App. 459, 70 N. E. 834 (so holding in personal injury case. This class of cases, and personal injuries resulting in death, are by

be on plaintiff it is not shifted to defendant by an unnecessary allegation of contributory negligence in the answer.[69]

(III) *As Affected by the Evidence.* Where the testimony on the part of plaintiff discloses contributory negligence as a matter of law defendant is relieved from the burden of showing such negligence and plaintiff cannot recover,[70] although defendant introduces no evidence of it.[71] Where plaintiff's own evidence raises a presumption of contributory negligence, the burden of proof is on him to explain away or rebut the presumption which he has himself created;[72] but such evidence while available to defendant in defense does not shift the burden of proof.[73] To place such burden on plaintiff his evidence must do more than merely tend to show contributory negligence.[74] The burden of proof on

statute excepted from the rule which obtains in this state of requiring plaintiff to negative contributory negligence); Missouri Pac. R. Co. *v.* Preston, (Kan. 1901) 63 Pac. 444. And see Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075; Hudson *v.* Wabash, etc., R. Co., 32 Mo. App. 667; Fitchburg R. Co. *v.* Nichols, 85 Fed. 945, 29 C. C. A. 500. *Contra*, see Padgett *v.* Atchison, etc., R. Co., 7 Kan. App. 736, 52 Pac. 578; Benedict *v.* Union Agricultural Soc., 74 Vt. 91, 52 Atl. 110.

69. Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909; Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717.

70. Silcock *v.* Rio Grande Western R. Co., 22 Utah 179, 61 Pac. 565; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813. And see Durrell *v.* Johnson, 31 Nebr. 796, 48 N. W. 890.

71. *Alabama.*— McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

California.— Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 7 Pac. 769.

Indiana.— Cleveland, etc., R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890; Evansville *v.* Christy, 29 Ind. App. 44, 63 N. E. 867.

Kansas.— Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819.

Minnesota.— Hocum *v.* Weitherick, 22 Minn. 152.

Missouri.— Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503.

Montana.— Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140; Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905.

New Jersey.— New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722 [*affirming* 32 N. J. L. 166]; Harper *v.* Erie R. Co., 32 N. J. L. 88; Durant *v.* Palmer, 29 N. J. L. 544.

Ohio.— Robison *v.* Gary, 28 Ohio St. 241.

Pennsylvania.— Cleveland, etc., R. Co. *v.* Rowan, 66 Pa. St. 393; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Waters *v.* Wing, 59 Pa. St. 211.

Utah.— Silcock *v.* Rio Grande Western R. Co., 22 Utah 179, 61 Pac. 565; Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737.

Virginia.— Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

West Virginia.— Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813.

Wisconsin.— Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 247, 1137; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

United States.— Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; Hemingway *v.* Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477; Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346.

72. *Louisiana.*— Ryan *v.* Louisville, etc., R. Co., 44 La. Ann. 806, 11 So. 30.

Montana.— Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 852; Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140; Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905.

Nebraska.— Chicago, etc., R. Co. *v.* Featherly, 64 Nebr. 323, 89 N. W. 792.

Ohio.— Meek *v.* Pennsylvania Co., 38 Ohio St. 632; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627; Robison *v.* Gary, 28 Ohio St. 241; Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366 (in which it was further held that the rule is not different where person is deceased; then it must be shown by the person seeking recovery for the death); New York, etc., R. Co. *v.* Woods, 9 Ohio Cir. Ct. 322, 6 Ohio Cir. Dec. 350.

Texas.— Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058; Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Missouri Pac. R. Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; Texas Portland Cement, etc., Co. *v.* Ross, 35 Tex. Civ. App. 597, 81 S. W. 94; Gilum *v.* New York, etc., Steamship Co., (Civ. App. 1903) 76 S. W. 232; Gulf, etc., R. Co. *v.* Robinson, (Civ. App. 1903) 72 S. W. 70; International, etc., R. Co. *v.* Lewis, (Civ. App. 1901) 63 S. W. 1091; Louisiana Western Extension R. Co. *v.* McDonald, (Civ. App. 1899) 52 S. W. 649; Gulf, etc., R. Co. *v.* Scott, (Civ. App.) 27 S. W. 827.

Wisconsin.— Achtenhagen *v.* Watertown, 18 Wis. 331, 84 Am. Dec. 769.

73. Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

74. *Alabama.*— Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886.

Dakota.— Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5.

Nebraska.— Rapp *v.* Sarpy County, 71 Nebr. 382, 98 N. W. 1042, 102 N. W. 242.

Texas.— Gulf, etc., R. Co. *v.* Shieder, 88

defendant is not discharged by any tendency of the evidence which falls short of reasonably satisfying the jury of the facts involved in such tendency.[75] Where there is no evidence on the question of contributory negligence absence of such negligence may be assumed.[76] Where defendant's evidence shows contributory negligence plaintiff must then show exercise of due care.[77]

c. Imputed Negligence. The same rules apply to the question of the burden of proof of the negligence of a parent or custodian, the burden being on defendant,[78] except in jurisdictions where the burden is on plaintiff to show absence of contributory negligence,[79] or where the evidence on the part of plaintiff shows such negligence.[80]

3. Admissibility[81] — a. In Relation to Negligence — (i) *In General.* The admissibility of evidence in negligence cases is governed by the rules applicable in civil cases generally.[82]

Tex. 152, 30 S. W. 902, 28 L. R. A. 538, holding that the fact that a "suspicion" of negligence may attach to plaintiff does not relieve defendant from proving contributory negligence. And see Galveston, etc., R. Co. *v.* Gordon, (Civ. App. 1899) 54 S. W. 635, holding that where the evidence of plaintiff would not warrant the court in instructing a verdict on the ground of contributory negligence it was correct to instruct that the burden of proof on this issue was on defendant.

Wisconsin.— Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

75. Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886.

76. Gay *v.* Winter, 34 Cal. 153; Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717. And see *supra*, VIII, C, 1, d.

77. Thompson *v.* Duncan, 76 Ala. 334; Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13, holding that where intoxication is proved it imposes on plaintiff the onus of showing that deceased was in the exercise of ordinary care and prudence.

78. Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693; Morgan *v.* Illinois, etc., Bridge Co., 17 Fed. Cas. No. 9,802, 5 Dill. 96.

In an action for the death of a child where contributory negligence must be negatived, freedom of parent or custodian from negligence must be proved. Brennan *v.* Standard Oil Co., 187 Mass. 376, 73 N. E. 472; Wright *v.* Malden, etc., R. Co., 4 Allen (Mass.) 283. And see Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26.

79. Holt *v.* Spokane, etc., R. Co., 4 Ida. 443, 40 Pac. 56; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

80. Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693.

81. Questions for jury see *infra*, VIII, D, 2.

82. See, generally, Evidence; and the following cases:

California.— Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059; Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; McGraw *v.* Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004.

Delaware.— Price *v.* Charles Warner Co., 1 Pennew. 462, 42 Atl. 699.

District of Columbia.— Atchison *v.* Wills, 21 App. Cas. 548; Jackson *v.* Emmons, 19 App. Cas. 250.

Georgia.— Curd *v.* Wing, 115 Ga. 371, 41 S. E. 580.

Illinois.— Brinks Chicago City Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446; Consolidated Coal Co. *v.* Shepherd, 112 Ill. App. 458; Illinois Cent. R. Co. *v.* Aland, 94 Ill. App. 428; Cleveland, etc. R. Co. *v.* Hall, 70 Ill. App. 429; Gillingham *v.* Christen, 55 Ill. App. 17.

Iowa.— Beard *v.* Guild, 107 Iowa 476, 78 N. W. 201; Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

Kansas.— Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232.

Kentucky.— Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822; Chesapeake, etc., R. Co. *v.* Wilder, 72 S. W. 353, 24 Ky. L. Rep. 1821.

Michigan.— Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339; Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006.

Minnesota.— Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062.

Mississippi.— Advance Gin, etc., Co. *v.* Thomas, 81 Miss. 486, 32 So. 316.

Missouri.— Rose *v.* St. Louis, 152 Mo. 602, 54 S. W. 440; Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557.

Nebraska.— Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920; Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

New Hampshire.— Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Monroe *v.* Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019.

New York.— Iaquinto *v.* Bauer, 104 N. Y. App. Div. 56, 93 N. Y. Suppl. 388; Ward *v.* St. Vincent's Hospital, 78 N. Y. App. Div. 317, 79 N. Y. Suppl. 1004; Sturmwald *v.* Schreiber, 69 N. Y. App. Div. 476, 74 N. Y. Suppl. 995; Campion *v.* Rollwagen, 43 N. Y. App. Div. 117, 59 N. Y. Suppl. 308; Gardner *v.* Frederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077; Fischer *v.* Franke, 21 N. Y.

(II) *Due Care on Part of Defendant.* In an action based on negligence on the part of defendant testimony showing that a prudent man would have acted in the same manner is admissible,[83] but not of what a particular person would have done.[84] Evidence of the intoxication of defendants at the time of the injury is admissible,[85] but the verdict of a coroner's jury,[86] or the decision of a magistrate on a criminal charge arising out of the act,[87] is not admissible to show negligence.

(III) *Ownership or Control of Property Causing Injury.* Evidence is admissible of any facts tending to show the ownership by defendant of the property, the defective condition of which,[88] or the negligent use of which, caused the injury;[89] and so is evidence of the relation between the owner and the person in control of the property.[90]

(IV) *Knowledge of Defect or Danger.* Any facts tending to show knowledge or notice of defect or danger on the part of defendant are admissible.[91] Thus it is competent to show complaint[92] or warning[93] to defendant of the dangerous character of the premises or instrumentality by which the injuries were sustained. Advice to defendant as to how the appliance which caused the injury should be used is also admissible.[94] So in order to show defendant's

App. Div. 635, 47 N. Y. Suppl. 161; Bradford *v.* Self, 21 N. Y. App. Div. 151, 47 N. Y. Suppl. 508; Luria *v.* Cusick, 47 Misc. 126, 93 N. Y. Suppl. 507.

Ohio.— Bowe *v.* Bowe, 26 Ohio Cir. Ct. 409.

Pennsylvania.— Ubelmann *v.* American Ice Co., 209 Pa. St. 398, 58 Atl. 849; Heiss *v.* Lancaster, 203 Pa. St. 260, 52 Atl. 201; Potter *v.* Natural Gas Co., 183 Pa. St. 575, 39 Atl. 7; Stewart *v.* Chester, etc., Road Co., 3 Pa. Super. Ct. 86.

South Dakota.—Waterhouse *v.* Jos. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587.

Texas.— Northern Texas Traction Co. *v.* Yates, (Civ. App. 1905) 88 S. W. 283; Denison, etc., R. Co. *v.* Harlan, (Civ. App. 1905) 87 S. W. 732.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

Wisconsin.— Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777.

See 37 Cent. Dig. tit. "Negligence," § 235.

83. Burkett *v.* Bond, 12 Ill. 87; Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272.

84. Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

85. Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734; Wynn *v.* Allard, 5 Watts & S. (Pa.) 524.

86. Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

87. Price *v.* Charles Warner Co., 1 Pennew. (Del.) 462, 42 Atl. 699.

88. Grier *v.* Sampson, 27 Pa. St. 183, demanding and receiving insurance money.

89. Aitken *v.* Bernheimer, 33 Misc. (N. Y.) 745, 67 N. Y. Suppl. 156 (name on wagon causing injury); Beamon *v.* Ellice, 4 C. & P. 585, 19 E. C. L. 661 (address of owner of carriage given by person driving it).

90. Krueger *v.* Thiemann, 35 Ill. App. 620. In an action for damages sustained by plaintiff in falling into a coal hole in front of defendant's premises, evidence in behalf of the latter to show that an independent contractor was at the time of the accident engaged in putting coal into the building, through the hole, is competent to show the situation at the time of the injury, but not to relieve defendant of his duty to keep the hole protected, and in a safe condition. Campion *v.* Rollwagen, 43 N. Y. App. Div. 117, 59 N. Y. Suppl. 308.

91. Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148. And see cases cited in subsequent notes in this section.

92. Bast *v.* Leonard, 15 Minn. 304.

93. *Georgia.*— Curd *v.* Wing, 115 Ga. 371, 41 S. E. 580, holding that in an action for injuries caused by the falling of a wall left standing after a fire, a letter written by the chief engineer to the mayor, and by him given to the owner of the property on which the wall stood, that it was dangerous and should be pulled down, is admissible to show notice of the injurious character of the wall.

Indiana.— Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Michigan.— Warren *v.* Porter, 144 Mich. 690, 108 N. W. 435.

Tennessee.— Williams *v.* Gobble, 106 Tenn. 367, 61 S. W. 51.

Texas.— Dunn *v.* Newberry, (Civ. App. 1905) 86 S. W. 626.

Washington.— Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84, holding that in an action for injuries occasioned by falling into a cellar in defendant's store, evidence that the trap-door had been open many times before to the knowledge of defendant, and that witness and others had been warned by defendant to look out for the door, is admissible as descriptive of the condition and as showing notice.

United States.— New York Electric Equipment Co. *v.* Blair, 79 Fed. 896, 25 C. C. A. 216.

See 37 Cent. Dig. tit. "Negligence," § 246.

That notice must relate to the matter charged as negligence see McCraw *v.* Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004.

94. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

knowledge of defects or dangers, evidence is admissible of the abandonment by railroads generally of appliances of the character causing the injury,[95] records of suits brought for other injuries caused by the same appliances,[96] and the condition of such appliance for a long time previous.[97] So too knowledge of the situation of the injured party and the probable damage to him is relevant on the question whether defendant exercised due care.[98] Evidence of warnings is not admissible where the question of knowledge is not involved.[99]

(v) *Precautions Against Injury.* Where it is the duty of defendant to take precautions against injury, evidence that such precautions were not taken is admissible;[1] but where such failure is shown it may also be shown that the precaution was not necessary.[2] Rules of defendant relative to the care to be taken are usually held admissible.[3] So on the part of defendant evidence of steps taken before the happening of the injury to render safe the condition of the appliances causing the injury[4] and the cost of taking such precautions[5] is admissible.

(vi) *Occurrence and Circumstances of Injury.* Inasmuch as negligence is dependent on the facts and circumstances of each particular case the manner in which and the circumstances under which the injury was received and all the circumstances surrounding the transaction which in any way tend to show the degree of care of either party or the manner in which in the particular case it should have been exercised are relevant;[6] but in order that such evidence may

95. Crane *v.* Missouri Pac. R. Co., 87 Mo. 588.

96. Ft. Worth, etc., R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124.

97. See *infra*, VIII, C, 3, a, (XIII).

98. Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920; Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116.

99. Potter *v.* Cave, 123 Iowa 98, 98 N. W. 569.

1. Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793.

2. Seals *v.* Edmondson, 71 Ala. 509; Gillingham *v.* Christen, 55 Ill. App. 17; Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755 [*affirmed* in 162 N. Y. 617, 57 N. E. 1122].

3. Stevens *v.* Boston El. R. Co., 184 Mass. 476, 69 N. E. 338 (holding that in an action for injuries by an elevated railroad, evidence that defendant had adopted a rule requiring the sounding of the gong, in connection with other testimony that defendant's motorman disobeyed the rule, and that such disobedience was one of the causes of the accident, was admissible); Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920. But see Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341, holding that in an action for personal injuries plaintiff cannot introduce the private rules of defendant, intended only for employees, as being admissions by defendant of the precautions requisite in the exercise of reasonable care.

4. Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513.

5. Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062.

6. *Illinois.*— Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583.

Iowa.— Snyder *v.* Witwer, 82 Iowa 652, 48 N. W. 1046.

Massachusetts.— Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272.

Michigan.— Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339, map of surroundings.

Missouri.— Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557.

New York.—Bretsch *v.* Plate, 82 N. Y. App. Div. 399, 81 N. Y. Suppl. 868; Ward *v.* St. Vincent's Hospital, 78 N. Y. App. Div. 317, 79 N. Y. Suppl. 1004; Sturmwald *v.* Schreiber, 69 N. Y. App. Div. 476, 74 N. Y. Suppl. 995; Cebrelli *v.* Church Constr. Co., 84 N. Y. Suppl. 919.

Ohio.— Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

England.— Wordsworth *v.* Willan, 5 Esp. 273.

Illustrations.— In an action for injuries to a child by being bitten by a bear owned by defendant, evidence was properly admitted to show how the grounds where the bear was kept were occupied, as bearing on the questions of defendant's negligence and the publicity of the place as determining the degree of care required. Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006. Evidence as to the weather at the time of setting the fire is competent to show the degree of care that should have been exercised. Needham *v.* King, 95 Mich. 303, 54 N. W. 891. The habit of plaintiff of getting off a street car in the middle of the block is admissible to show why the motorman did not stop the car for plaintiff at the crossing, where there was a conflict as to whether plaintiff was injured by getting off by failure of the motorman to

be admissible it must have a direct bearing on the act which is charged to be negligent.[7]

(VII) *CAUSE OF INJURY.* Evidence tending to show that the injury was caused by the acts of third persons[8] or an act of God is admissible;[9] and independent negligent acts of each of several defendants may be shown where the combined and concurrent effect of them all caused the injury.[10]

(VIII) *CUSTOM AND USAGE.* As a general rule custom and usage of well-appointed and well-managed concerns in the business under investigation is competent evidence on the question of the care and diligence required in the proper conduct of the business.[11] This rule is, however, subject to exceptions, among which is the exception that it cannot be allowed to contradict matters of common knowledge,[12] or to prove a custom which is so obviously unreasonable or dangerous as to be at once recognized as such by all intelligent persons.[13] To be admissible proof of custom must be limited to the vicinity of the accident, and to property similarly situated or under similar circumstances.[14] Nor can a general custom be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions.[15]

obey the signal to stop. McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

7. Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433 (holding that in an action for an injury from negligent construction, evidence that one of the workmen was paid by the thousand of brick, instead of by the day, is too remote to be considered as showing negligent construction); Seals *v.* Edmondson, 71 Ala. 509; Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3; Advance Gin, etc., Co. *v.* Thomas, 81 Miss. 486, 32 So. 316; Piehl *v.* Albany R. Co., 162 N. Y. 617, 57 N. E. 1122 [*affirming* 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755].

Harmless error.— Where it was admitted that the room in which plaintiff was injured was dark at the time of the accident, the admission of immaterial evidence as to light at other times of the day was without prejudice to defendant. Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

8. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469 (evidence tending to show that the horse's death was caused by the hallooing of persons on the street should have been admitted on the question of proximate cause); Otten *v.* Cohen, 1 N. Y. Suppl. 430 (although such third person was an infant under the age of discretion).

9. Olsen *v.* Meyer, 46 Nebr. 240, 64 N. W. 954.

10. Monroe *v.* Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019.

11. *Alabama.*— Maxwell *v.* Eason, 1 Stew. 514.

Illinois.— St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90; Chicago City R. Co. *v.* Sugar, 117 Ill. App. 578.

Kentucky.— Berberich *v.* Louisville Bridge Co., 46 S. W. 691, 20 Ky. L. Rep. 467; East Tennessee Tel. Co. *v.* Simms, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761.

New York.— Rich *v.* Pelham Hod Elevating Co., 23 N. Y. App. Div. 246, 48 N. Y. Suppl. 1067.

Tennessee.— Standard Oil Co. *v.* Swan, (1890) 14 S. W. 928.

Wisconsin.— Boyce *v.* Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563; Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Jochem *v.* Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178. But see Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408.

See 37 Cent. Dig. tit. "Negligence," § 238.

The custom of the witness may be shown, if it be conformable to the general custom. Maxwell *v.* Eason, 1 Stew. (Ala.) 514.

Testimony concerning a usage at remote periods is inadmissible to establish a custom at the time of the accident. Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Evidence of the usual and customary manner of construction is not admissible when negligent construction is alleged as the basis of an action. Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787; Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921. *Contra*, National Biscuit Co. *v.* Wilson, (Ind. App. 1906) 78 N. E. 251.

12. Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895.

13. *Iowa.*— Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224; Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 33 N. W. 633.

Maine.— Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986; Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601.

Massachusetts.—Miller *v.* Pendleton, 8 Gray 547.

Missouri.— Kelley *v.* Parker-Washington Co., 107 Mo. App. 490, 81 S. W. 631.

New York.— Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077.

See 37 Cent. Dig. tit. "Negligence," § 238.

14. Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831; Calumet Gas Co. *v.* Creutz, 80 Ill. App. 96.

15. Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986.

Evidence of what another would have done under the same circumstances is inadmissible.[16]

(IX) *Habits and Reputation of Defendant.* To show that defendant was negligent on a particular occasion, plaintiff may show defendant's usual conduct with respect to the particular act complained of,[17] but not to show that defendant was not negligent.[18] Evidence of defendant's reputation for carefulness and prudence is not admissible to show the absence of negligence.[19] Where evidence of the negligent habits of defendant is admitted to show negligence it must be limited to such habits at or about the time of the injury,[20] and to such habits as have a bearing on the negligence charged.[21]

(X) *Habits and Reputation of Defendant's Employees.*[22] Evidence of previous negligent acts of defendant's servant,[23] or of his habits and reputation for competency and carefulness,[24] is not admissible on the question of his negli-

16. Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

17. *Connecticut.*— Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

Illinois.— Ohio, etc., R. Co. *v.* Simms, 43 Ill. App. 260.

Iowa.— Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

Kansas.— St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165.

Massachusetts.— Floytrup *v.* Boston, etc., R. Co., 163 Mass. 152, 39 N. E. 797; Coffee *v.* New York, etc., R. Co., 155 Mass. 21, 28 N. E. 1128. *Contra*, Gahagan *v.* Boston, etc., R. Co., 1 Allen 187, 79 Am. Dec. 724.

Minnesota.— Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575.

Missouri.— Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953.

New Hampshire.— Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; Parkinson *v.* Nashua, etc., R. Co., 61 N. H. 416; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New York.— Saffer *v.* Dry-Dock, etc., R. Co., 2 Silv. Sup. 343, 5 N. Y. Suppl. 700. *Contra*, Whitbeck *v.* Atlantic Ave. R. Co., 4 N. Y. Suppl. 100.

Texas.— Gulf, etc., R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96; Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Virginia.—Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

Wisconsin.— Mayer *v.* Milwaukee St. R. Co., 90 Wis. 522, 63 N. W. 1048; Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 21 N. W. 536.

See 37 Cent. Dig. tit. "Negligence," § 239.

Contra.—Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

18. *Georgia.*— Atlanta, etc., R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751; Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706.

Iowa.— Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217, care of druggist in handling medicine.

Maryland.— Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251, holding that evidence of the usage of defendant in regard to preventing fire is inadmissible to disprove negligence.

Massachusetts.— Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

New York.— Buck *v.* Manhattan R. Co., 15 Daly 550, 10 N. Y. Suppl. 107.

Vermont.— Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695.

United States.— Maury *v.* Talmadge, 16 Fed. Cas. No. 9,315, 2 McLean 157.

See 37 Cent. Dig. tit. "Negligence," § 239.

Contra.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772, holding that the customary habits of defendant as to taking precautions to prevent the spread of fire is admissible to show that a fire which destroyed plaintiff's property did not result from defendant's negligence.

19. Slade *v.* State, 2 Ind. 33; Scott *v.* Hale, 16 Me. 326; Tenney *v.* Tuttle, 1 Allen (Mass.) 185; Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445.

20. Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324.

21. Pigott *v.* Lilly, 55 Mich. 150, 20 N. W. 879; Pennsylvania R. Co. *v.* Page, 9 Pa. Cas. 445, 12 Atl. 662.

22. **Habits and reputation of fellow servant as affecting master's liability for injuries to other servants** see MASTER AND SERVANT.

23. Maguire *v.* Middlesex R. Co., 115 Mass. 239; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

24. *Alabama.*— Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667. But see Cook *v.* Parham, 24 Ala. 21.

Colorado.— T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Maine.— Dunham *v.* Rackliff, 71 Me. 345.

Michigan.— Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55.

New York.— Wooster *v.* Broadway, etc., R. Co., 72 Hun 197, 25 N. Y. Suppl. 378; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84. But see Flynn *v.*

gence on the occasion complained of, unless plaintiff has first introduced proof of unskilfulness on his part.[25]

(XI) *OTHER DEFECTS, INJURIES, OR ACCIDENTS*[26] — (A) *In General.* Evidence of other defects in property, of other accidents or injuries from the same or similar cause, or of other similar acts of negligence on the part of defendant, is not admissible to show negligence in a particular case.[27] Nor is evidence that defendant paid another person for an injury similar to that suffered by plaintiff admissible to show negligence.[28]

(B) *To Show Existence of Defect or Cause of Injury.* By the weight of authority, evidence of other accidents or injuries occurring from the same cause is admissible to show that a defect in the property existed,[29] and the possibility or

Manhattan R. Co., 1 Misc. 188, 20 N. Y. Suppl. 652.

Vermont.— Bryant *v.* Central Vermont R. Co., 56 Vt. 710.

See 37 Cent. Dig. tit. "Negligence," § 240.

Contra.— Louisville, etc., R. Co. *v.* McEwan, 31 S. W. 465, 17 Ky. L. Rep. 406; Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 243; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

25. Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

26. **In fences along railroad right of way** see RAILROADS.

In highways see STREETS AND HIGHWAYS.

In railroad tracks see CARRIERS; MASTER AND SERVANT; RAILROADS.

In wharves or docks see WHARVES.

27. *Georgia.*— Augusta *v.* Lombard, 93 Ga. 284, 20 S. E. 312.

Illinois.— Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55; Chicago, etc., R. Co. *v.* Hodge, 55 Ill. App. 166.

Indiana.— Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644; Ramsey *v.* Rushville, etc., Gravel Road Co., 81 Ind. 394.

Iowa.— Potter *v.* Cave, 123 Iowa 98, 98 N. W. 569; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

Kentucky.— Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. 580; Louisville, etc., R. Co. *v.* Fox, 11 Bush 495.

Maine.— Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262.

Maryland.— Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Massachusetts.— Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214.

Michigan.— Early *v.* Lake Shore, etc., R. Co., 66 Mich. 349, 33 N. W. 813.

Mississippi.— Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899; Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45.

New York.— Cohn *v.* New York Cent. R. Co., 6 N. Y. App. Div. 196, 39 N. Y. Suppl. 986.

Ohio.— Findlay Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686; Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94.

Oregon.— Davis *v.* Oregon, etc., R. Co., 8 Oreg. 172.

Texas.— Gulf, etc., R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96; Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810; Missouri, etc., R. Co. *v.* Stafford, (Civ. App. 1895) 31 S. W. 319; Ware *v.* Shafer, (Civ. App. 1894) 27 S. W. 764. But see Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194.

Virginia.— Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

Wisconsin.— Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053; Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114.

See 37 Cent. Dig. tit. "Negligence," § 241.

Contra.— Hoover *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 480 [*overruling* Lester *v.* Kansas City, etc., R. Co., 60 Mo. 265]; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Harrell *v.* Albemarle, etc., R. Co., 110 N. C. 215, 14 S. E. 687.

Continuing acts.— In an action for negligence, evidence of specific acts of negligence in relation to similar transactions is not admissible unless such acts were in their nature continuing. Wentworth *v.* Smith, 44 N. H. 419, 82 Am. Dec. 228.

28. Georgia R. etc., Co. *v.* Walker, 87 Ga. 204, 13 S. E. 511; Louisville, etc., R. Co. *v.* Roberts, 13 Ind. App. 692, 42 N. E. 247; Stone *v.* State, 138 N. Y. 124, 33 N. E. 733.

29. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Connecticut.— Bailey *v.* Trumbull, 31 Conn. 581.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Mfg. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Gilmer *v.* Atlanta, 77 Ga. 688; Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

Illinois.— Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300. It is the policy of the law to exclude evidence of similar accidents when the prudence of every person who had met with a like accident would be involved; but when evidence of similar accidents is given simply to illustrate a physical fact, before or after the occurrence being investigated and the conditions of the same, such evidence is admissible. Aurora *v.* Brown, 12 Ill. App. 122 [*affirmed* in 109 Ill. 165].

Indiana.— Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312;

probability that the injury complained of resulted therefrom.[30] Such evidence is also admissible to show that defendant has not adopted proper precautions to prevent injury from the defective or dangerous condition of his property.[31] The evidence of other accidents or injuries from the same act of negligence, happening at a time remote from the occurrence of the injury complained of,[32] or under different circumstances,[33] is not admissible.

(c) *To Show Knowledge or Notice.* For the purpose of showing notice or knowledge on the part of defendant of the existence of the defective or dangerous condition causing the injury evidence of other accidents from the same cause or similar defect is admissible;[34] and evidence of the existence of other defects near

Louisville, etc., R. Co. *v.* Lange, 13 Ind. App. 337, 41 N. E. 609.

Iowa.— Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

Kansas.— Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Kentucky.— Georgetown, etc., Turnpike Road Co. *v.* Cannon, 7 Ky. L. Rep. 379.

Massachusetts.— Shea *v.* Glendale Elastic Fabrics Co., 162 Mass. 463, 38 N. E. 1123; Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254. *Contra*, Collins *v.* Dorchester, 6 Cush. 396.

Michigan.— Bowen *v.* Flint, etc., R. Co., 110 Mich. 445, 68 N. W. 230; Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

Minnesota.— Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Missouri.— Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 56 Am. Rep. 446.

New Hampshire.— Haseltine *v.* Concord R. Co., 64 N. H. 545, 15 Atl. 143; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55. *Contra*, Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520.

New York.— McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Sherman *v.* Oneonta, 21 N. Y. Suppl. 137 [*affirmed* in 142 N. Y. 637, 37 N. E. 566].

Ohio.— Findlay Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686; Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94.

Rhode Island.— Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

South Dakota.— Smith *v.* Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717.

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163. But see Ware *v.* Shafer, (Civ. App. 1894) 27 S. W. 764.

Vermont.— Kent *v.* Lincoln, 32 Vt. 591.

Virginia.— Brighthope R. Co. *v.* Rogers, 76 Va. 443.

Washington.—Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

United States.— District of Columbia *v.* Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. ed. 618.

See 37 Cent. Dig. tit. "Negligence," § 242.

Contra.— Bremner *v.* Newcastle, 83 Me. 415, 22 Atl. 382, 23 Am. St. Rep. 782; Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114.

30. *California.*— Butcher *v.* Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174.

Connecticut.— House *v.* Metcalf, 27 Conn. 631.

Illinois.— Cooper *v.* Randall, 59 Ill. 317.

Missouri.— Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175.

New Hampshire.— Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

New York.— Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 615.

North Carolina.— Harrell *v.* Albemarle, etc., R. Co., 110 N. C. 215, 14 S. E. 687.

Rhode Island.— Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22.

Vermont.— Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

United States.— Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

See 37 Cent. Dig. tit. "Negligence," § 242.

31. *Illinois.*— Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355.

Kansas.— St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165.

Maryland.— Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115.

Texas.— Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163.

See 37 Cent. Dig. tit. "Negligence," § 242.

32. Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357; Galveston, etc., R. Co. *v.* Rheiner, (Tex. Civ. App. 1894) 25 S. W. 971; Dillingham *v.* Whitaker, (Tex. Civ. App. 1894) 25 S. W. 723; Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

33. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Wise *v.* Ackerman, 76 Md. 375, 25 Atl. 424; Martin *v.* Cook, 14 N. Y. Suppl. 329.

34. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

Illinois.— Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Schlesinger *v.* Scheunemann, 114 Ill. App. 459.

Indiana.— Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836,

the place where plaintiff was injured prior to the accident is admissible on the question of defendant's knowledge of a general defective condition;[35] but general notoriety of the dangerous condition of a structure is not admissible to prove the existence of the defect itself.[36] Evidence of accidents happening after the injury to plaintiff is not admissible.[37]

54 Am. Rep. 312; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Toledo, etc., R. Co. *v.* Milligan, 2 Ind. App. 578, 28 N. E. 1019.

Iowa.— Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434; Robinson *v.* Chicago, etc., R. Co., 79 Iowa 495, 44 N. W. 718; Moore *v.* Burlington, 49 Iowa 136.

Kentucky.— Murray *v.* Young, 12 Bush 337; Crigler *v.* Ford, 82 S. W. 599, 26 Ky. L. Rep. 784.

Michigan.— Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627; Smith *v.* Sherwood Tp., 62 Mich. 159, 28 N. W. 806.

Minnesota.— Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745.

Missouri.— Short *v.* Bohle, 64 Mo. App. 242.

New Hampshire.— Presby *v.* Grand Trunk R. Co., 66 N. H. 615, 22 Atl. 554; Willey *v.* Portsmouth, 35 N. H. 303.

New York.— Withers *v.* Brooklyn Real Estate Exch., 106 N. Y. App. Div. 255, 94 N. Y. Suppl. 328; Larkin *v.* O'Neill, 48 Hun 591, 1 N. Y. Suppl. 232 [*reversed* on other grounds in 119 N. Y. 221, 22 N. E. 563]; Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun 544 [*affirmed* in 120 N. Y. 627, 24 N. E. 1096]; Stebbins *v.* Oneida, 1 Silv. Sup. 240, 5 N. Y. Suppl. 483; Brady *v.* Manhattan R. Co., 15 Daly 272, 6 N. Y. Suppl. 533 [*reversed* on other grounds in 127 N. Y. 46, 27 N. E. 368].

Ohio.— Findlay Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686.

Pennsylvania.— Carson *v.* Godley, 26 Pa. St. 111, 67 Am. Dec. 404.

South Dakota.—Waterhouse *v.* Jos. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587.

Texas.— Ft. Worth, etc., R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124; Northern Texas Constr. Co. *v.* Crawford, (Civ. App. 1905) 87 S. W. 223; Ware *v.* Shafer, (Civ. App. 1894) 27 S. W. 764.

Virginia.— Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

See 37 Cent. Dig. tit. "Negligence," § 247.

But see Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

35. *Illinois.*— Shelbyville *v.* Brant, 61 Ill. App. 153.

Iowa.— Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319; Aryman *v.* Marshalltown, 90 Iowa 350, 57 N. W. 867; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180. But see Goodson *v.* Des Moines, 66 Iowa 255, 23 N. W. 655; Conklin *v.* Marshalltown, 66 Iowa 122, 23 N. W. 294.

Michigan.—Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454; Tice *v.* Bay City, 84 Mich. 461, 47 N. W. 1062; O'Neil *v.* West Branch, 81 Mich. 544, 45 N. W. 1023; Grand Rapids *v.* Wyman, 46 Mich. 516, 9 N. W. 833.

Minnesota.— Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359; Gude *v.* Mankato, 30 Minn. 256, 15 N. W. 175.

Missouri.—Smallwood *v.* Tipton, 63 Mo. App. 234.

New York.— Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; McGuire *v.* Ogdensburgh, etc., R. Co., 18 N. Y. Suppl. 313.

North Dakota.— Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932.

Pennsylvania.— North Manheim Tp. *v.* Arnold, 119 Pa. St. 380, 13 Atl. 444, 4 Am. St. Rep. 650.

Tennessee.— Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308; Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.— Belton *v.* Turner, (Civ. App. 1894) 27 S. W. 831.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271; Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555.

See 37 Cent. Dig. tit. "Negligence," § 247.

36. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

37. *California.*— Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375.

Georgia.— Augusta *v.* Lombard, 93 Ga. 284, 20 S. E. 312.

Illinois.— Schlesinger *v.* Scheunemann, 114 Ill. App. 459.

Michigan.— McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

New York.— Johnson *v.* Manhattan R. Co., 52 Hun 111, 4 N. Y. Suppl. 848.

Rhode Island.— Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22.

Texas.— Missouri, etc., R. Co. *v.* Stafford, (Civ. App. 1895) 31 S. W. 319; Sills *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 28 S. W. 908.

Contra.— See Grahlman *v.* Chicago, etc.,

(xii) *Absence of Other Defects, Injuries, or Accidents.* Evidence of the absence of previous accidents or injuries from the same cause is not admissible on the question of defendant's negligence.[38]

(xiii) *Condition of Place of Appliance Before Injury.* Evidence of the condition of the place where plaintiff was injured a reasonable time before the accident is admissible for the purpose of showing the condition at the time,[39] when it is shown that the condition had not changed.[40] The limitation on the admission of such evidence is that it must be such, in character and point of time, as to justify the inference that the place was in a bad condition at the time of the accident.[41] The court may, however, in its discretion, reject evidence of previous condition even if, under special circumstances, it would be warranted in admitting it.[42]

(xiv) *Condition of Place of Appliance After Injury.* Evidence of the condition of the place where plaintiff was injured within a reasonable time after the accident[43] is admissible for the purpose of showing its condition at the

R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813.

38. *Colorado.*— T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Illinois.— Hodges *v.* Bearse, 129 Ill. 87, 21 N. E. 613; Joliet St. R. Co. *v.* Call, 42 Ill. App. 41.

Indiana.— Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432.

Maine.— Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810.

Massachusetts.— Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Kidder *v.* Dunstable, 11 Gray 342; Aldrich *v.* Pelham, 1 Gray 510.

New York.— Weiler *v.* Manhattan R. Co., 53 Hun 372, 6 N. Y. Suppl. 320 [*affirmed* in (1891) 28 N. E. 255]. *Compare* Lane *v.* Hancock, 67 Hun 623, 22 N. Y. Suppl. 470, holding that the fact that no accident had occurred there before is not conclusive that the road, where the accident happened, was safe.

Vermont.— Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

See 37 Cent. Dig. tit. "Negligence," § 244.

Contra.— Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194; Field *v.* Davis, 27 Kan. 400; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 15 Am. Rep. 362.

But to be admissible the use and experience of others relied upon must have been a test and use similar to that of plaintiff. Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; Taylor *v.* Monroe, 43 Conn. 36.

39. *Illinois.*— Jacksonville South Eastern R. Co. *v.* Southworth, 32 Ill. App. 307. See also Elgin *v.* Nofs, 96 Ill. App. 291.

Massachusetts.— Upham *v.* Salem, 162 Mass. 483, 39 N. E. 178; Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308.

Michigan.— Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572.

New York.— Woolsey *v.* Ellenville, 84 Hun 236, 32 N. Y. Suppl. 543.

Pennsylvania.— Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624.

Tennessee.— Williams *v.* Gobble, 106 Tenn. 367, 61 S. W. 51.

Texas.— Belton *v.* Turner, (Civ. App. 1894) 27 S. W. 831; Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

See 37 Cent. Dig. tit. "Negligence," § 248.

40. Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560; Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938 (holding that where it is shown that in the meantime repairs had been made, evidence of the condition of defendant's property six months before the injury to plaintiff, from alleged defects therein, is not admissible); Cheney *v.* Ryegate, 55 Vt. 499; Coates *v.* Canaan, 51 Vt. 131.

41. Newcomb *v.* New York Cent., etc., R. Co., 169 Mo. 409, 69 S. W. 348 (five months before too remote); Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69 [*affirmed* in 180 N. Y. 523, 72 N. E. 1146] (six weeks before too remote).

Illustration.— The question, in an action for injury from stepping into an elevator shaft, being whether the hall was lighted on the day and at the time plaintiff called to take the elevator, evidence as to its being lighted on other days of the same month, at such time of day, is immaterial and inadmissible. Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

42. Elvey *v.* Powers, 191 Mass. 588, 77 N. E. 1152; Woodcock *v.* Worcester, 138 Mass. 268.

43. *Arkansas.*— Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245, twenty-one months after too remote.

Illinois.— Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068, two weeks after not unreasonable time.

Indiana.— Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864, sixteen months after too remote.

Minnesota.— Johnson *v.* St. Paul, 52 Minn.

time of the injury,[44] in the absence of evidence of a change in the meantime.[45] Such evidence, however, is usually not admissible, where considerable time has elapsed,[46] unless accompanied by evidence that the condition has not changed.[47]

(xv) *Acts of Defendant After Injury* — (a) *In General.* Acts of defendant after an accident alleged to have resulted from his negligence are not admissible to show antecedent negligence.[48] The words and manner of defendant immediately after the accident are, however, admissible as part of the *res gestæ*,[49] and to show the defective condition of defendant's property plaintiff may show manifestations of such property, capable of producing injury, occurring after the injury complained of.[50]

364, 54 N. W. 735, four weeks after not unreasonable time.

Missouri.— Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389, three years after too remote.

New York.— Perkins *v.* Poughkeepsie, 83 Hun 76, 31 N. Y. Suppl. 368, eight months after too remote.

See 37 Cent. Dig. tit. "Negligence," § 251.

44. *Colorado.*— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Illinois.— Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068; Henderson *v.* Chicago, etc., R. Co., 73 Ill. App. 57. But see Chicago *v.* Early, 104 Ill. App. 398.

Indiana.— Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480.

Iowa.— Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028.

Kansas.— Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121.

Maryland.— Treusch *v.* Kamke, 63 Md. 278.

Minnesota.— Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735.

Missouri.— Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943; Weldon *v.* Omaha, etc., R. Co., 93 Mo. App. 668, 67 S. W. 698.

Nebraska.—Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920.

New York.— Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Suppl. 821; Forde *v.* Nichols, 12 N. Y. Suppl. 922.

Pennsylvania.— Mixter *v.* Imperial Coal Co., 152 Pa. St. 395, 25 Atl. 587.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Austin, etc., R. Co. *v.* Flannagan, (Civ. App. 1897) 40 S. W. 1043.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 160, 78 Am. Dec. 699.

See 37 Cent. Dig. tit. "Negligence," § 251.

45. *Illinois.*—Wabash *v.* Kime, 42 Ill. App. 272.

Iowa.— Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723.

Michigan.— Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584.

Minnesota.— Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

Tennessee.— Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086.

See 37 Cent. Dig. tit. "Negligence," § 251.

46. Jacksonville, etc., R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093 (one year); Indianapolis *v.* Scott, 72 Ind. 185 (one year); Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74 (fourteen months).

47. *Alabama.*— Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Illinois.— Merchants Loan, etc., Co. *v.* Boucher, 115 Ill. App. 101.

Indiana.— New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

Iowa.— Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63; Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615.

Massachusetts.—Tremblay *v.* Harnden, 162 Mass. 383, 38 N. E. 972.

Michigan.— Langworthy *v.* Greene Tp., 88 Mich. 270, 50 N. W. 130; Wolscheid *v.* Thome, 76 Mich. 265, 43 N. W. 12.

Missouri.— Smith *v.* Missouri, etc., Tel. Co., 113 Mo. App. 429, 87 S. W. 71.

New York.— Sullivan *v.* Syracuse, 77 Hun 440, 29 N. Y. Suppl. 105; Byrne *v.* Brooklyn City, etc., R. Co., 6 Misc. 260, 26 N. Y. Suppl. 760 [*affirmed* in 145 N. Y. 619, 40 N. E. 163].

Pennsylvania.— Lohr *v.* Philipsburg, 165 Pa. St. 109, 30 Atl. 822.

Texas.— Houston, etc., R. Co. *v.* Waller, 56 Tex. 331; Galveston, etc., R. Co. *v.* McAdams, (Civ. App. 1905) 84 S. W. 1076; Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

Vermont.—Whitney *v.* Londonderry, 54 Vt. 41.

Wisconsin.— Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117; Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

United States.— Crawley *v.* The Edwin, 87 Fed. 540.

See 37 Cent. Dig. tit. "Negligence," § 251.

48. Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345, holding that the fact that the employees of a railroad assisted in extinguishing a fire is not admissible to show the origin of the fire. But see Caveny *v.* Neely, 43 S. C. 70, 20 S. E. 806, holding that evidence that defendant deserted his vehicle after a collision is admissible as tending to show that such collision was the result of his negligence.

49. Joslin *v.* Grand Rapids Ice, etc., Co., 53 Mich. 322, 19 N. W. 17.

50. Lake Erie, etc., R. Co. *v.* Kirts, 29 Ill App. 175.

(B) *Changes, Repairs, or Precautions After Injury*—(1) IN GENERAL. While some courts hold to the contrary[51] the great weight of authority is that evidence of changes or repairs made subsequently to the injury, or as to precautions taken subsequently to prevent recurrence of injury, is not admissible as showing negligence or as amounting to an admission of negligence.[52] The reason

51. Olathe *v.* Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308 (but holding evidence immaterial in view of other proof of negligence); Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893; Consolidated Kansas City Smelting, etc., Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889; Jenkins *v.* Hooper Irr. Co., 13 Utah 100, 44 Pac. 829.

52. *Alabama.*—Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784; Davis *v.* Kornman, 141 Ala. 479, 37 So. 789; Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

Arkansas.—Ft. Smith Light, etc., Co. *v.* Soard, 79 Ark. 388, 96 S. W. 121; St. Louis Southwestern R. Co. *v.* Plumlee, 78 Ark. 147, 95 S. W. 442; Prescott, etc., R. Co. *v.* Smith, 70 Ark. 179, 67 S. W. 865, holding that it is harmless where other evidence exclusively shows defendant's negligence.

California.—Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710; Limberg *v.* Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119; Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590. But see Butcher *v.* Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174, 5 Pac. 359.

Colorado.—Anson *v.* Evans, 19 Colo. 274, 35 Pac. 47; Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345. *Contra*, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Connecticut.—Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47.

Georgia.—Georgia Southern, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118 [*overruling* Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Central R. Co. *v.* Gleason, 69 Ga. 200; Augusta, etc., R. Co. *v.* Renz, 55 Ga. 166].

Idaho.—Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Illinois.—Howe *v.* Medaris, 183 Ill. 288, 55 N. E. 724; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Warren *v.* Wright, 103 Ill. 298; Merchants Loan, etc., Co. *v.* Boucher, 115 Ill. App. 101; Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323; Mt. Morris *v.* Kanode, 98 Ill. App. 373; Howe *v.* Medaris, 82 Ill. App. 515; Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577; Streator *v.* Hamilton, 49 Ill. App. 449; Wabash R. Co. *v.* Kime, 42 Ill. App. 272; Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530; But see Vandalia *v.* Ropp, 39 Ill. App. 344; Marder, etc., Co. *v.* Leary, 35 Ill. App. 420.

Indiana.—Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Wabash County *v.* Pearson, 129 Ind. 456, 28 N. E. 1120; Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; Lafayette *v.* Weaver, 92 Ind. 477; Jeffersonville *v.* McHenry, 22 Ind. App. 10, 53 N. E. 183; Chicago, etc., R. Co. *v.* Lee, 17 Ind. App. 215, 46 N. E. 543.

Iowa.—Beard *v.* Guild, 107 Iowa 476, 78 N. W. 201; Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Cramer *v.* Burlington, 45 Iowa 627.

Kansas.—Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100.

Kentucky.—Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677; Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099.

Maryland.—Ziehm *v.* United Electric Light, etc., Co., 104 Md. 48, 62 Atl. 61; Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571.

Massachusetts.—Stevens *v.* Boston El. R. Co., 184 Mass. 476, 69 N. E. 338; Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. 1072; Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. 418; Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682; Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654; Shinners *v.* Merrimack River Locks, etc., 154 Mass. 168, 28 N. E. 10, 26 Am. St. Rep. 226, 12 L. R. A. 554; Murphy *v.* Stanley, 136 Mass. 133.

Michigan.—Wager *v.* Lamont, 135 Mich. 521, 98 N. W. 1; Zibbell *v.* Grand Rapids, 129 Mich. 659, 89 N. W. 563; Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126; Thompson *v.* Toledo, etc., R. Co., 91 Mich. 255, 51 N. W. 995; Polzen *v.* Morse, 91 Mich. 208, 51 N. W. 940; Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947; Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Fulton Iron, etc., Works *v.* Kimball Tp., 52 Mich. 146, 17 N. W. 733. *Contra*, Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

Minnesota.—Lally *v.* Crookston Lumber Co., 82 Minn. 407, 85 N. W. 157; Hammargren *v.* St. Paul, 67 Minn. 6, 69 N. W. 470; Day *v.* H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513; Morse *v.* Minnesota, etc., R. Co., 30 Minn. 465, 16 N. W. 358 [*overruling* Shafer *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575; Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588; O'Leary *v.* Mankato, 21 Minn. 65].

Missouri.—Bailey *v.* Kansas City, 189 Mo.

for the rule is that the effect of declaring such evidence competent would be to inform a defendant that, if he makes changes or repairs, he does it under a penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been

503, 87 S. W. 1182; Mahaney *v.* St. Louis, etc., R. Co., 108 Mo. 191, 18 S. W. 895; Alcorn *v.* Chicago, etc., R. Co., (1890) 14 S. W. 943 [*affirmed* in (1891) 16 S. W. 229]; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Hipsley *v.* Kansas City, etc., R. Co., 88 Mo. 348; Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34; Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535; Bowles *v.* Kansas City, 51 Mo. App. 416; O'Donnell *v.* Baum, 38 Mo. App. 245; Mitchell *v.* Plattsburg, 33 Mo. App. 555.

New Hampshire.— Aldrich *v.* Concord, etc., R. Co., 67 N. H. 250, 29 Atl. 408 [*overruling* Martin *v.* Towle, 59 N. H. 31].

New York.— Getty *v.* Hamlin, 127 N. Y. 636, 27 N. E. 399 [*reversing* 8 N. Y. Suppl. 190]; Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309; Port Jervis *v.* First Nat. Bank, 96 N. Y. 550; Sewell *v.* Cohoes, 75 N. Y. 45, 31 Am. Rep. 418; Dale *v.* Delaware, etc., R. Co., 73 N. Y. 468; Dougan *v.* Champlain Transp. Co., 56 N. Y. 1; Russell *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 151, 89 N. Y. Suppl. 429; Sherman *v.* Oneonta, 59 Hun 294, 12 N. Y. Suppl. 950; Morrell *v.* Peck, 24 Hun 37 [*reversed* on other grounds in 88 N. Y. 398]; Payne *v.* Troy, etc., R. Co., 9 Hun 526; Wilkes *v.* Gallagher, 51 Misc. 654, 99 N. Y. Suppl. 866; Markowitz *v.* Dry Dock, etc., Co., 12 Misc. 412, 33 N. Y. Suppl. 702; Timpson *v.* Manhattan R. Co., 1 N. Y. Suppl. 673; Brennan *v.* Lachat, 5 N. Y. St. 882 [*affirmed* in 14 Daly 197, 6 N. Y. St. 278]; Schmitt *v.* Dry Dock, etc., R. Co., 3 N. Y. St. 257, 2 N. Y. City Ct. 359.

North Carolina.— Lowe *v.* Elliott, 109 N. C. 581, 14 S. E. 51.

Ohio.— Toledo, etc., R. Co. *v.* Beard, 20 Ohio Cir. Ct. 681, 11 Ohio Cir. Dec. 406; Root *v.* Monroeville, 16 Ohio Cir. Ct. 617, 4 Ohio Cir. Dec. 53; Cleveland Provision Co. *v.* Limmermaier, 8 Ohio Cir. Ct. 701, 4 Ohio Cir. Dec. 240.

Pennsylvania.— Elias *v.* Lancaster, 203 Pa. St. 638, 53 Atl. 507; Baran *v.* Reading Iron Co., 202 Pa. St. 274, 51 Atl. 979 [*overruling* in effect Link *v.* Philadelphia, etc., R. Co., 165 Pa. St. 75, 30 Atl. 820, 822; Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624; McKee *v.* Bidwell, 74 Pa. St. 218; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315]; Fisher *v.* Paxson, 182 Pa. St. 457, 38 Atl. 407; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231.

Rhode Island.— McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122; Morancy *v.* Hennessey, 24 R. I. 205, 52 Atl. 1021.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401, where two judges held evidence of subsequent precautions inadmissible under any circumstances, and two held its admission rendered harmless by introduction of similar evidence by defendant.

Tennessee.— Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308, 78 Am. St. Rep. 926.

Texas.— Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684; St. Louis, etc., R. Co. *v.* Jones, (1890) 14 S. W. 309; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Missouri Pac. R. Co. *v.* Hennessy, 75 Tex. 155, 12 S. W. 608; Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; St. Louis Southwestern R. Co. *v.* Arnold, (Civ. App. 1905) 87 S. W. 173; San Antonio, etc., R. Co. *v.* Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252; Missouri, etc., R. Co. *v.* Wylie, (Tex. Civ. App. 1894) 26 S. W. 85; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546; Galveston, etc., R. Co. *v.* Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

Vermont.— Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496.

Washington.— Carter *v.* Seattle, 21 Wash. 585, 59 Pac. 500; Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405. But see Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25 [*reversed* on other grounds in 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405].

Wisconsin.— Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117; Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926; Lang *v.* Sanger, 76 Wis. 71, 44 N. W. 1095; Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

United States.— Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405 [*reversing* 3 Wash. Terr. 353, 19 Pac. 25]; Davidson Steamship Co. *v.* U. S., 142 Fed. 315, 73 C. C. A. 425; Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Barber Asphalt Paving Co. *v.* Odasz, 60 Fed. 71, 8 C. C. A. 471; Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220; Isaacs *v.* Southern Pac. Co., 49 Fed. 797; Carter *v.* Kansas City Cable R. Co., 42 Fed. 37.

England.— Hart *v.* Lancashire, etc., R. Co., 21 L. T. Rep. N. S. 261.

Canada.— Cole *v.* Canadian Pac. R. Co., 19 Ont. Pr. 104.

See 37 Cent. Dig. tit. "Negligence," § 255.

wrong-doers. A rule which so operates as to deter men from profiting from experience and availing themselves of new information has nothing to commend it, for it is neither expedient nor just.[53] No one should be placed in the embarrassing attitude of being compelled to choose between the risk of another accident by maintaining the *status quo*, and the equally uninviting alternative of taking proper steps to remove the danger and thereby "making evidence against himself which would act prejudicially to his defense in the minds of the jury."[54]

(2) In Showing Condition Prior to Repair. An exception to the rule excluding evidence of changes, repairs made, or precautions taken after the injury exists where the fact that the repair or change has been made is brought out in showing the condition existing at the time of the accident.[55]

(3) As Showing Duty to Repair or Ownership.[56] Another exception to the rule is that evidence that after the accident defendant made repairs at the place of the accident or of the defective appliance is admissible to show the ownership or control of the place,[57] and the duty to make repairs.[58]

(4) As Showing Cause of Injury.[59] Evidence of changes made after the injury has also been held admissible as tending to show that the condition complained of caused the injury.[60]

53. Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588.

54. Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308, 78 Am. St. Rep. 926.

55. *Illinois.*—Cbicago, etc., R. Co. *v.* Lewis, 48 Ill. App. 274; Marder *v.* Leary, 35 Ill. App. 420.

Indiana.— Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

Iowa.— Kuhns *v.* Wisconsin, etc., R. Co., 76 Iowa 67, 40 N. W. 92.

Kansas.— Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

Kentucky.— Louisville, etc., R. Co. *v.* Woodward, 15 Ky. L. Rep. 445. *Contra,* Louisville, etc., R. Co. *v.* Morton, 89 S. W. 243, 28 Ky. L. Rep. 355.

New York.— Stone *v.* Poland, 81 Hun 132, 30 N. Y. Suppl. 748; Sherman *v.* Oneonta, 59 Hun 294, 12 N. Y. Suppl. 950; Westfall *v.* Erie R. Co., 5 Hun 75; Brennan *v.* Lachat, 14 Daly 197, 6 N. Y. St. 278 [*affirming* 5 N. Y. St. 882].

Ohio.— North Amherst Home Tel. Co. *v.* Jackson, 26 Ohio Cir. Ct. 89.

Texas.— St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

Wisconsin.— Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

United States.— Choctaw, etc., R. Co. *v.* McDade, 112 Fed. 888, 50 C. C. A. 591; Norris *v.* Atlas Steamship Co., 37 Fed. 426; Osborne *v.* Detroit, 32 Fed. 36 [*reversed* on other grounds in 135 U. S. 492, 10 S. Ct. 1112, 3 L. R. A. 260].

Illustration.— In an action for injury to a workman due to the insufficient lighting of the scene of his labor, evidence of the condition or placement of lights after the accident brought out in rebuttal and by contradictions among the witnesses merely to fix the time of the accident and the conditions then existing, is properly admitted. Devaney *v.* Degnon-McLean Constr. Co., 79 N. Y. App. Div. 62, 79 N. Y. Suppl. 1050 [*affirmed* in 178 N. Y. 620, 70 N. E. 1098]. Erection of gates at crossing since accident where jury had viewed the crossing to show that gates were not there at time of injury is admissible. Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644.

56. As showing duty to repair highways see Streets and Highways.

57. Lafayette *v.* Weaver, 92 Ind. 477; Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405; Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Morrell *v.* Peck, 88 N. Y. 398; Bateman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 429; Skottowe *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593.

58. Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500.

59. See, generally, Evidence.

As to negligence in prosecutions for libel and slander see Libel and Slander.

60. Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323; Brennan *v.* Lachat, 5 N. Y. St. 882 [*affirmed* in 14 Daly 197, 6 N. Y. St. 278] (holding that the fact that a landlord immediately after an injury on his hall stairway had repaired the stairs is admissible in evidence on the question of the cause of the injury); Texas, etc., R. Co. *v.* Anderson, (Tex. Civ. App. 1901) 61 S. W. 424 (in which it was said that the admission of such testimony for the purpose designated was not in contravention of the rule that proof of subsequent repairs is not admissible for the purpose of proving prior negligence. But see McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

(5) In Rebuttal of Defendant's Evidence. Evidence of changes, alterations, or repairs is admissible to rebut testimony on the part of defendant that the condition existing at the time of the accident could not have been improved,[61] or that such condition was a necessary one.[62] So it is admissible to contradict evidence on the part of defendant that no change had been made,[63] or to show the incorrectness of diagrams of the place of the accident put in evidence by defendant,[64] or that an examination immediately after the accident showed the non-existence of defects.[65]

b. Contributory Negligence — (i) *In General.* Any legal evidence bearing on the question of contributory negligence is admissible.[66]

(ii) *Habits and Reputation* — (a) *In General.* By the weight of authority evidence of plaintiff's habits and usual conduct as to a particular act,[67] or of his character for prudence or recklessness,[68] is not admissible on the question of contributory negligence. Where such evidence is held admissible, it is competent for plaintiff to rebut this evidence by showing his care and skilfulness.[69]

61. Quinn *v.* New York, etc., R. Co., 56 Conn. 44, 12 Atl. 97, 7 Am. St. Rep. 284; St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Young *v.* Hahn, (Tex. Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950]; Cincinnati, etc., R. Co. *v.* Van Horne, 69 Fed. 139, 16 C. C. A. 182.

62. Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548; Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446.

63. Fordyce *v.* Moore, (Tex. Civ. App. 1893) 22 S. W. 235; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766. Where a railroad drawbridge tender claimed an accident was caused by the breaking of a defective wrench, and a witness for the company testified that the wrench was sound, and used afterward, he may be asked on cross-examination how long it was used before the company got a new one. Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583, 65 S. W. 657.

64. McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153 [*affirming* 13 Daly 541, 1 N. Y. St. 608]. And see Choctaw, etc., R. Co. *v.* McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. ed. 96 [*affirming* 112 Fed. 888, 50 C. C. A. 591], holding that the admission of testimony, in an action for damages for the death of a brakeman, alleged to be the result of a collision with an overhanging waterspout, that such spout was so reconstructed after the accident as to be farther removed from passing trains, is not error, where the jury are told that such change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the waterspout did not constitute danger to brakemen on passing trains.

65. Bond Hill *v.* Atkinson, 16 Ohio Cir. Ct. 470, 9 Ohio Cir. Dec. 185; Walker *v.* Westfield, 39 Vt. 246.

66. *Connecticut.* — Dore *v.* Babcock, 72 Conn. 408, 44 Atl. 736.

Missouri. — Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451.

New Hampshire. — Chamberlin *v.* Ossipee, 60 N. H. 212.

New York. — Mount *v.* Brooklyn Union Gas Co., 72 N. Y. App. Div. 440, 76 N. Y. Suppl. 533.

Ohio. — Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

67. *Alabama.* — Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. 215. But see McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

Kentucky. — Louisville, etc., R. Co. *v.* Berry, 88 Ky. 222, 10 S. W. 472, 10 Ky. L. Rep. 791, 21 Am. St. Rep. 329.

Maine. — Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

Maryland. — Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590.

Massachusetts. — Aiken *v.* Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238. But see Fitzpatrick *v.* Fitchburg R. Co., 128 Mass. 13.

Michigan. — Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161.

New York. — Eppendorf *v.* Brooklyn City, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171.

United States. — Louisville, etc., R. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60.

See 37 Cent. Dig. tit. "Negligence," § 259.

But see Craven *v.* Central Pac. R. Co., 72 Cal. 345, 13 Pac. 878.

Rule in Illinois. — In actions for negligence, evidence as to the general habits of plaintiff as to care is admissible only when no witness was present, and the exact manner in which the accident happened is not shown. Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Quincy Gas, etc., Co. *v.* Clark, 109 Ill. App. 20; Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15; Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55; Chicago, etc., R. Co. *v.* Anderson, 47 Ill. App. 91.

68. Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Pennsylvania Co. *v.* Trainer, 12 Ohio Cir. Ct. 66, 5 Ohio Cir. Dec. 519; Propson *v.* Leatham, 80 Wis. 608, 50 N. W. 586.

69. Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174.

(B) *Intoxication.* Evidence of the intoxication of plaintiff at the time of the injury complained of is admissible.[70] But evidence that plaintiff was in the habit of becoming intoxicated or addicted to the use of liquor is not admissible.[71] So evidence of habits of sobriety is not admissible to contradict direct evidence of intoxication at the time of the injury.[72]

(III) *Occurrence and Circumstances of Injury.* The circumstances attending the injury may be given in evidence as showing whether plaintiff did or did not exercise ordinary care.[73]

(IV) *Similar Matters and Transactions.* There is a conflict of authority as to whether avoidance by others of injury from the same defect or act of negligence is admissible on the question of contributory negligence. In some jurisdictions its admissibility is denied,[74] while in others it is affirmed.[75] So in one of the latter jurisdictions it is held competent to show that plaintiff passed the place of injury at other times and was not hurt,[76] and also that others were injured at the place where plaintiff was hurt.[77]

(V) *Defects in Property Contributory to Injury.* On the question of contributory negligence, defendant is entitled to offer any evidence tending to show a defect contributing to the accident,[78] if accompanied by further proof connecting such defect with the accident.[79]

(VI) *Right of Entry on Premises.* Evidence that plaintiff was at the place when he was injured, either in the performance of a duty or in the exercise of a right, is admissible on the question of contributory negligence.[80]

(VII) *Contributory Negligence of Children.* Where an issue of contributory negligence is raised in an action by an infant plaintiff, the brightness and intelligence of such infant are an important consideration, and evidence thereof is admissible;[81] but a witness should not be allowed to state that the child was

70. *Arkansas.*— Texas, etc., R. Co. *v.* Orr, 46 Ark. 182.

Illinois.—Aurora *v.* Hillman, 90 Ill. 61.

Indiana.— Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227.

Iowa.— Fernbach *v.* Waterloo, 76 Iowa 598, 41 N. W. 370, (1887) 34 N. W. 610.

Michigan.— Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

See 37 Cent. Dig. tit. "Negligence," § 260.

71. Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772; Kingston *v.* Ft. Wayne, etc., R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130; Hill *v.* Snyder, 44 Mich. 318, 6 N. W. 674; Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128; Shelly *v.* Brunswick Traction Co., 65 N. J. L. 639, 48 Atl. 562.

72. Carr *v.* West End St. R. Co., 163 Mass. 360, 40 N. E. 185; Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102.

73. *Delaware.*— Price *v.* Charles Warner Co., 1 Pennew. 462, 42 Atl. 699.

New York.— Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Suppl. 124 [*affirmed* in 113 N. Y. 669, 21 N. E. 1116].

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

United States.— Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. ed. 78.

Illustration.— In an action for the loss of service of plaintiff's son, caused by an injury received through the negligence of defendant's servant, in determining whether or not the negligence of the son concurred in causing the injury, the jury may consider all the circumstances affecting his conduct at the time, including the acts of third persons and of servants of defendant other than the one to whose negligence the injury is attributed in the complaint, although such acts cannot be made a ground of recovery. Gilligan *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 453.

74. Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576; Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115. And see Varnau *v.* Pennsylvania Tel. Co., 5 Lanc. L. Rev. (Pa.) 97.

75. Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194; Fairbury *v.* Rogers, 2 Ill. App. 96; Bennett *v.* Missouri, etc., R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

76. Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Smith *v.* Gilman, 38 Ill. App. 393.

77. Aurora *v.* Brown, 12 Ill. App. 122 [*affirmed* in 109 Ill. 165].

78. Hoyt *v.* New York, etc., R. Co., 118 N. Y. 399, 23 N. E. 565.

79. Holman *v.* Boston Land, etc., Co., 8 Colo. App. 282, 45 Pac. 519.

80. Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675; Fogarty *v.* Bogart, 43 N. Y. App. Div. 430, 60 N. Y. Suppl. 81.

81. Atchison, etc., R. Co. *v.* Potter, 60 Kan. 808, 58 Pac. 471, 72 Am. St. Rep. 385.

old enough to appreciate and avoid danger.[82] If the child is *non sui juris*, any legal evidence directed to relieving the parents of the child from the imputation of negligence on their part is admissible.[83] To establish an implied invitation on the part of defendant, it is competent for plaintiff to show the custom of children to use a turn-table for amusement.[84]

c. Imputed Negligence — (I) *In General.* Where the negligence of another is sought to be imputed to the person injured evidence of the habits and reputation of such person for carelessness,[85] or that such person had been guilty of negligence at other times, is not admissible;[86] but the habits of a driver may be shown to show the care the passenger should have exercised.[87]

(II) *Parent to Child.* Where the question of imputed negligence is raised the care exercised by the custodian at the time of the injury may be shown.[88] But it is not permissible to show want of care at times other than that at which the injury occurred;[89] as bearing on the care exercised by the parents all the surrounding circumstances,[90] including their financial condition, may be shown.[91]

4. Weight and Sufficiency — a. Negligence — (I) *Amount of Proof Required.* In order to sustain the burden of proof of negligence it must be shown by a preponderance of the evidence,[92] but proof beyond a reasonable

82. Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; San Antonio, etc., R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544.

83. Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116], holding that evidence that the child's father was dead and his mother in a poor condition of health is admissible.

84. San Antonio, etc., R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544.

85. Baldwin *v.* Western R. Corp., 4 Gray (Mass.) 333, holding that it was competent to show that he was in fact unskilful or careless in the management of the horse but it cannot be proved by reputation.

86. Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

87. Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059.

88. Livingston *v.* Wabash R. Co., 170 Mo. 452, 71 S. W. 136 (holding that the fact that a child run over by a train was at the depot unattended is a circumstance which may be considered in connection with the other evidence in determining whether its mother permitted it to be there unattended, although there was no express evidence that she permitted it to be there); San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 26 S. W. 745.

89. Woeckner *v.* Erie Electric Motor Co., 182 Pa. St. 182, 37 Atl. 936.

90. Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729 [*affirming* 47 Ill. App. 232] (holding that where plaintiff, a child of five years, was injured while returning from school in company with her elder sister, and counsel on both sides assume that the negligence of plaintiff's parents might be imputed to her, it is proper, to show absence of negligence on their part, to introduce evidence that plaintiff's father worked all night and slept all day, that the mother was advanced seven months in pregnancy, and that they had no servant, and no older child except the one who accompanied plaintiff); Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116].

91. Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116]; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745. *Contra*, Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793.

92. *Arkansas.*— Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092.

Delaware.— Tully *v.* Philadelphia, etc., R. Co., 3 Pennew. 455, 50 Atl. 95; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Illinois.— Lake Shore, etc., R. Co. *v.* Petersen, 86 Ill. App. 375.

Indiana.— Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Baltimore, etc., R. Co. *v.* Young, 153 Ind. 163, 54 N. E. 791; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246.

Massachusetts.— Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

New York.— Serra *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 159, 88 N. Y. Suppl. 500.

North Carolina.— Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131; Ramsbottom *v.* Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

Texas.—Robertson *v.* Trammell, (Civ. App. 1904) 83 S. W. 258.

Virginia.— Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64, 48 S. E. 508; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

Wisconsin.— Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464; Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164; Whitney *v.* Clifford, 57 Wis. 156, 14 N. W. 927; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

United States.— Chicago Great Western R.

doubt is not required.[93] Where the evidence is equally as consistent with the exercise of due care as negligence, or evenly balanced as to whether a cause for which defendant was responsible or another produced the injury, no recovery can be had.[94] Evidence sufficient to carry the case to the jury is sufficient to support a recovery.[95]

(II) *Direct or Circumstantial Evidence* — (A) *In General.* The law does not require direct and positive evidence of negligence, but it may be inferred from circumstances adduced in evidence so as to authorize the finding of negligence;[96] but the evidence must be such that negligence can reasonably be

Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 4 McCrary 454.

Canada.— Falconer *v.* European, etc., R. Co., 14 N. Brunsw. 179.

See 37 Cent. Dig. tit. "Negligence," § 267.

Where there was no evidence of negligence no recovery could be had. Deitz *v.* Lensinger, 77 Ark. 274, 91 S. W. 755; Ulseth *v.* Crookston Lumber Co., 97 Minn. 178, 106 N. W. 307; Weatherbee *v.* Philadelphia, etc., R. Co., 214 Pa. St. 12, 63 Atl. 367.

93. *Alabama.*— Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646; Drennen *v.* Smith, 115 Ala. 396, 22 So. 442 (although the jury have some doubt as to whose negligence caused the injury, it is enough that they are reasonably satisfied); Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146.

Arkansas.— Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092.

Illinois.— Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577.

Iowa.— Kendig *v.* Overhulser, 58 Iowa 195, 12 N. W. 264.

Massachusetts.— Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218.

New York.— Serra *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 159, 88 N. Y. Suppl. 500; Tholen *v.* Brooklyn City R. Co., 10 Misc. 283, 30 N. Y. Suppl. 1081 [*affirmed* in 151 N. Y. 627, 45 N. E. 1134].

North Carolina.—Asbury *v.* Charlotte Electric R., etc., Co., 125 N. C. 568, 34 S. E. 654.

Virginia.— Wood *v.* Southern R. Co., 104 Va. 650, 52 S. E. 371.

Wisconsin.— Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

United States.— Southern Bell Tel., etc., Co. *v.* Watts, 66 Fed. 460, 13 C. C. A. 579.

Canada.— Rainnie *v.* St. John City R. Co., 31 N. Brunsw. 582. But see Brewer *v.* Humble, 26 N. Brunsw. 495.

See 37 Cent. Dig. tit. "Negligence," § 267.

94. *Illinois.*— Field *v.* French, 80 Ill. App. 78.

Kentucky.— Louisville, etc., R. Co. *v.* McGary, 104 Ky. 509, 47 S. W. 440, 20 Ky. L. Rep. 691.

New York.— Ruppert *v.* Brooklyn Heights R. Co., 154 N. Y. 90, 47 N. E. 971; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; French *v.* Buffalo, etc., R. Co., 2 Abb. Dec. 196, 4 Keyes 108; McCaffrey *v.* Twenty-Third St. R. Co., 47 Hun 404; McDonough *v.* James Reilly Repair, etc., Co., 47 Misc. 109, 93 N. Y. Suppl. 491; Newcomb *v.* Metropolitan St. R. Co., 34 Misc. 203, 68 N. Y. Suppl. 780; McFadden *v.* Campbell, 13 Misc. 158, 34 N. Y. Suppl. 136.

Utah.—Wells *v.* Utah Constr. Co., 27 Utah 524, 76 Pac. 560.

England.— Doyle *v.* Wragg, 1 F. & F. 7.

Canada.— Jackson *v.* Hyde, 28 U. C. Q. B. 294. See also Storey *v.* Veach, 22 U. C. C. P. 164; Deverill *v.* Grand Trunk R. Co., 25 U. C. Q. B. 517.

95. Vanderwald *v.* Olsen, 1 N. Y. St. 506.

96. *Connecticut.*— Bunnell *v.* Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land Transp., etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

Illinois.— Boyce *v.* Tallerman, 183 Ill. 115, 55 N. E. 703; Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; U. S. Brewing Co. *v.* Stoltenberg, 113 Ill. App. 435 [*affirmed* in 211 Ill. 531, 71 N. E. 1081].

Indiana.— Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Fletcher *v.* Kelly, 37 Ind. App. 254, 76 N. E. 813; Southern Indiana R. Co. *v.* Messick, 35 Ind. App. 676, 74 N. E. 1097; Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

Iowa.— Garrett *v.* Chicago, etc., R. Co., 36 Iowa 121; Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420, 6 Am. Rep. 682.

Kansas.— Atchison, etc., R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814.

Maryland.— Western Maryland R. Co. *v.* Shivers, 101 Md. 391, 61 Atl. 618.

Michigan.— Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; Carver *v.* Detroit, etc., Plank-Road Co., 69 Mich. 616, 25 N. W. 183.

New York.— Reeves *v.* Fourteenth St. Store, 110 N. Y. App. Div. 735, 96 N. Y. Suppl. 448; Scheider *v.* American Bridge Co., 78 N. Y. App. Div. 163, 79 N. Y. Suppl. 634; Anderson *v.* Rothschild, 69 N. Y. App. Div. 19, 74 N. Y. Suppl. 523; Coxhead *v.* Johnson, 20 N. Y. App. Div. 605, 47 N. Y. Suppl. 389 [*affirmed* in 162 N. Y. 640, 57

presumed from the facts shown,[97] or such as satisfies reasonable minds thereof.[98] No recovery can be had where the evidence merely raises a conjecture as to defendant's negligence.[99] There must be more than a mere probability that defendant was negligent.[1] Evidence that previous accidents had not occurred from the defect is not conclusive evidence on the question of negligence,[2] and evidence that the appliance causing the injury could have been made stronger and had been changed thereafter does not show negligence.[3] Evidence that a building had stood for some years does not rebut allegation of the use of improper materials.[4]

(B) *Res Ipsa Loquitur.* The mere happening of an accident under ordinary circumstances is not sufficient evidence to charge defendant with negligence,[5] but such fact may be considered in connection with other evidence.[6] Where the doctrine of *res ipsa loquitur* applies the fact of the accident in the absence of evidence as to the cause thereof is presumptive evidence of negligence,[7] but such

N. E. 1107]; Lyons *v.* Rosenthal, 11 Hun 46; Luria *v.* Cusick, 47 Misc. 126, 93 N. Y. Suppl. 507.

Utah.— Black *v.* Rocky Mountain Bell Tel. Co., 26 Utah 451, 73 Pac. 514.

Virginia.— Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

United States.— Texas, etc., R. Co. *v.* Carlin, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462.

England.— Wakeman *v.* Robinson, 1 Bing. 213, 8 Moore C. C. 63, 8 E. C. L. 478; North *v.* Smith, 10 C. B. N. S. 572, 4 L. T. Rep. N. S. 407, 100 E. C. L. 572.

Canada.— Belyea *v.* Provincial Chemical Fertilizer Co., 37 Can. L. J. N. S. 247.

See 37 Cent. Dig. tit. "Negligence," § 272.

Negligence may be inferred from failure to take precautions against injury. Kuehn *v.* Dix, 42 Wash. 532, 85 Pac. 43.

97. *California.*— Rosenberg *v.* Durfee, 87 Cal. 545, 26 Pac. 793.

Illinois.— Gerke *v.* Fancher, 158 Ill. 375, 41 N. E. 982.

Massachusetts.— Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249; Eldred *v.* Mackie, 178 Mass. 1, 59 N. E. 673.

Michigan.— Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

New York.— Hartman *v.* Clarke, 104 N. Y. App. Div. 62, 93 N. Y. Suppl. 314; Moran *v.* Carlson, 95 N. Y. App. Div. 116, 88 N. Y. Suppl. 520; Barrett *v.* Lake Ontario Beach Imp. Co., 68 N. Y. App. Div. 601, 74 N. Y. Suppl. 301; Stallman *v.* New York Steam Co., 17 N. Y. App. Div. 397, 45 N. Y. Suppl. 161; Wright *v.* Boller, 3 N. Y. Suppl. 742.

Ohio.— Cleveland, etc., R. Co. *v.* Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142.

South Carolina.—Davis *v.* Charleston, etc., R. Co., 72 S. C. 112, 51 S. E. 552.

98. Dolby *v.* Hearn, 1 Marv. (Del.) 153, 37 Atl. 45.

99. Gilmore *v.* Meeker, 115 La. 849, 40 So. 244; State *v.* Philadelphia, etc., R. Co., 60 Md. 555; Murphy *v.* Hays, 68 Hun (N. Y.) 450, 23 N. Y. Suppl. 70; Singleton *v.* Eastern Counties R. Co., 7 C. B. N. S. 287, 97 E. C. L. 287.

1. *Indiana.*— Cauble *v.* Hudson, 26 Ind. App. 622, 59 N. E. 866.

Michigan.— Godkin *v.* Obenauer, 113 Mich. 93, 71 N. W. 456.

Ohio.— Cleveland, etc., R. Co. *v.* Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142; Welever *v.* Williams, 26 Ohio Cir. Ct. 624.

Pennsylvania.— King *v.* McDermott, 2 Phila. 175.

Virginia.— Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

Wisconsin.— Jerdells *v.* Stollenwerk, 78 Wis. 339, 47 N. W. 431.

England.— Abbott *v.* Freeman, 35 L. T. Rep. N. S. 783.

2. Wood *v.* Third Ave. R. Co., 91 Hun 276, 36 N. Y. Suppl. 253 [*affirmed* in 157 N. Y. 696, 51 N. E. 1094]; Quill *v.* New York Cent., etc., R. Co., 16 Daly (N. Y.) 313, 11 N. Y. Suppl. 80 [*affirmed* in 126 N. Y. 629, 27 N. E. 410].

Evidence that other horses had previously been frightened at the object causing the injury for which plaintiff seeks to recover is not conclusive evidence of negligence. Texas, etc., R. Co. *v.* Hill, 71 Tex. 451, 9 S. W. 351.

3. Talley *v.* Beever, 33 Tex. Civ. App. 675, 78 S. W. 23.

4. Waterhouse *v.* Joseph Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157.

5. Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647; Bond *v.* Smith, 113 N. Y. 378, 21 N. E. 128; Huneke *v.* West Brighton Amusement Co., 80 N. Y. App. Div. 268, 80 N. Y. Suppl. 261; Patterson *v.* Hochster, 38 N. Y. App. Div. 398, 56 N. Y. Suppl. 467; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234; Pendril *v.* Second Ave. R. Co., 34 N. Y. Super. Ct. 481; Pieschel *v.* Miner, 30 Misc. (N. Y.) 301, 63 N. Y. Suppl. 508; Freidman *v.* Dry Dock, etc., R. Co., 3 N. Y. St. 557; Cresey *v.* Railroad Co., 1 Leg. Gaz. (Pa.) 15; Wells *v.* Utah Constr. Co., 27 Utah 524, 76 Pac. 560.

6. May *v.* Berlin Iron Bridge Co., 43 N. Y. App. Div. 569, 60 N. Y. Suppl. 550.

7. *Arkansas.*— Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059.

Delaware.— Wood *v.* Wilmington City R. Co., 5 Pennew. 369, 64 Atl. 246.

presumption is not conclusive,[8] and is rebutted by proof of freedom from negligence;[9] by proof that the property causing the injury was in a safe condition;[10] or that the accident was due to the act of another, for whose negligence defendant is not responsible.[11] The maxim *res ipsa loquitur* relates merely to negligence *prima facie* and is available without excluding all other possibilities,[12] but it does not apply where there is direct evidence as to the cause,[13] or where the facts are such that an inference that the accident was due to a cause other than defendant's negligence could be drawn as reasonably as that it was due to his negligence.[14] Nor will the doctrine afford a presumption of negligence where several are shown to be in control of the instrumentality causing the injury.[15]

(c) *Relation of Defendant to Cause of Injury.* Ownership or control is usually held to be sufficiently shown by facts from which the fact of ownership[16] or control may be inferred,[17] and the same is true of participation in negligent act.[18]

(d) *Cause of Injury.* Cause of the injury may be sufficiently established by inferences from circumstances shown.[19] Thus the origin of a fire may be inferred

Kentucky.— Louisville R. Co. *v.* Esselman, 93 S. W. 50, 29 Ky. L. Rep. 333.

New York.— Connor *v.* General Fire Extinguisher Co., 73 N. Y. App. Div. 624, 77 N. Y. Suppl. 339; Clare *v.* New York Nat. City Bank, 1 Sweeny 539; Cahalin *v.* Cochran, 1 N. Y. St. 583.

Wisconsin.— Kaples *v.* Orth, 61 Wis. 531, 21 N. W. 633.

England.— See Carpue *v.* London, etc., R. Co., 5 Q. B. 747, Dav. & M. 608, 8 Jur. 464, 13 L. J. Q. B. 133, 3 R. & Can. Cas. 692, 48 E. C. L. 747; Briggs *v.* Oliver, 4 H. & C. 403, 35 L. J. Exch. 163, 14 L. T. Rep. N. S. 412, 14 Wkly. Rep. 658.

8. Dixon *v.* Pluns, (Cal. 1893) 31 Pac. 931; Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014; Clay *v.* Chicago, etc., R. Co., 17 Mo. App. 629. And see Bird *v.* Great Northern R. Co., 28 L. J. Exch. 3.

Evidence held insufficient to rebut presumption.—Roche *v.* Redington, 125 Cal. 174, 57 Pac. 890; Mentz *v.* Schieren, 36 Misc. (N. Y.) 813, 74 N. Y. Suppl. 889.

9. *Georgia.*— Georgia Cent. R. Co. *v.* Waxelbaum, 111 Ga. 812, 35 S. E. 645.

Maryland.— State *v.* Green, 95 Md. 217, 52 Atl. 673.

New York.— Green *v.* Urban Contracting, etc., Co., 106 N. Y. App. Div. 460, 94 N. Y. Suppl. 743; Duerr *v.* New York Consol. Gas Co., 86 N. Y. App. Div. 14, 83 N. Y. Suppl. 714; Van Orden *v.* Acken, 28 N. Y. App. Div. 160, 50 N. Y. Suppl. 843.

Pennsylvania.— Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842.

Wisconsin.— Klitzke *v.* Webb, 120 Wis. 254, 97 N. W. 901.

10. Nigro *v.* Willson, 50 Misc. (N. Y.) 656, 99 N. Y. Suppl. 344; Papazian *v.* Baumgartner, 49 Misc. (N. Y.) 244, 97 N. Y. Suppl. 399.

11. Wiley *v.* Bondy, 23 Misc. (N. Y.) 658, 52 N. Y. Suppl. 68.

12. Clarke *v.* Nassau Electric R. Co., 9 N. Y. App. Div. 51, 41 N. Y. Suppl. 78.

13. Geelan *v.* Cooke, 23 Misc. (N. Y.) 460, 51 N. Y. Suppl. 361.

14. McGrath *v.* St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872.

15. Harrison *v.* Sutter St. R. Co., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608; Wolf *v.* American Tract Soc., 164 N. Y. 30, 58 N. E. 31, 79 Am. St. Rep. 643, 51 L. R. A. 241; Jack *v.* McCabe, 56 N. Y. App. Div. 378, 67 N. Y. Suppl. 810; Hanson *v.* Lancashire, etc., R. Co., 20 Wkly. Rep. 297.

16. **Name of defendant on wagon.**— Seaman *v.* Koehler, 122 N. Y. 646, 25 N. E. 353; Hodgson *v.* Conklin, 50 N. Y. App. Div. 604, 64 N. Y. Suppl. 76; Stables *v.* Eley, 1 C. & P. 614, 12 E. C. L. 348.

Claiming property.— Courternier *v.* Secombe, 8 Minn. 299; Forman *v.* New York Transp. Co., 48 Misc. (N. Y.) 621, 95 N. Y. Suppl. 581; Fanning *v.* Lent, 3 E. D. Smith (N. Y.) 206. But see Brecher *v.* Ehlen, 94 Ill. App. 369.

17. **Contract relative to conduct of business.**— Sullivan *v.* Boston Electric Light Co., 181 Mass. 294, 63 N. E. 904; Smith *v.* Paul Boynton Co., 176 Mass. 217, 57 N. E. 367. But see Wodroczka *v.* Consolidated Gas Co., 29 Misc. (N. Y.) 637, 61 N. Y. Suppl. 186.

Exercising care over.—Humphreys *v.* Portsmouth Trust, etc., Co., 184 Mass. 422, 68 N. E. 836.

Attempt to conceal name.— Adams *v.* Swift, 172 Mass. 521, 52 N. E. 1068.

Giving orders concerning work.— Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523.

Only contractor engaged in construction of building.— Guldseth *v.* Carlin, 19 N. Y. App. Div. 588, 46 N. Y. Suppl. 357; Dohn *v.* Dawson, 90 Hun 271, 35 N. Y. Suppl. 984 [*affirmed* in 157 N. Y. 686, 51 N. E. 1090].

Superintending work.— Strauhal *v.* Asiatic Steamship Co., (Oreg. 1906) 85 Pac. 230; Makins *v.* Piggott, 29 Can. Sup. Ct. 188.

18. **Presence when admission as to negligent act was made.**— Hambleton *v.* McGee, 19 Md. 43.

Presence when first act was done.— Hamilton *v.* Fulton, 28 Mo. 359.

Proof of ownership of vehicle is sufficient without proof that person in charge is a servant. Walton *v.* Ensign, 27 Ohio Cir. Ct. 505.

19. *Indiana.*— Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480.

from surrounding facts.[20] The proximate cause of the injury may also be inferred from the nature of the injury and its subsequent effect,[21] and proof that servants of two defendants were in charge at the time of the accident sufficiently shows concurrent negligence.[22] The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury,[23] and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.[24] Plaintiff, however, is not bound to exclude the possibility that the accident might have

Missouri.— Leeright *v.* Ahrens, 60 Mo. App. 118, holding that in the absence of positive proof as to the manner in which a child was drowned in a cistern on defendant's lot where the evidence showed that the box around the cistern was decayed and insecure, an inference that the child leaned against it and thereby fell in justified a verdict for plaintiff.

New York.— Hart *v.* Hudson River Bridge Co., 80 N. Y. 622; Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11, 63 N. Y. Suppl. 286; Reilly *v.* Atlas Iron Constr. Co., 83 Hun 196, 31 N. Y. Suppl. 618; Cosulich *v.* Standard Oil Co., 55 N. Y. Super. Ct. 384, 14 N. Y. St. 713; Pasquini *v.* Lowery, 18 N. Y. Suppl. 284.

Pennsylvania.— Irvine *v.* Smith, 204 Pa. St. 58, 53 Atl. 510; Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

England.— Sneesby *v.* Lancashire, etc., R. Co., 1 Q. B. D. 42, 45 L. J. Q. B. 1, 33 L. T. Rep. N. S. 372, 24 Wkly. Rep. 99.

Canada.— Wilson *v.* Boulter, 26 Ont. App. 184.

20. *Colorado.*—John Mouat Lumber Co. *v.* Wilmore, 15 Colo. 136, 25 Pac. 556.

Indiana.— Over *v.* Debne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

Michigan.— Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; Hoyt *v.* Jeffers, 30 Mich. 181.

Minnesota.— Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60.

Missouri.— Coffman *v.* McCauslin, 70 Mo. App. 34.

21. Guckavan *v.* Lehigh Traction Co., 203 Pa. St. 521, 53 Atl. 351; Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 8 N. W. 862.

22. Strauhal *v.* Asiatic Steamship Co., (Oreg. 1906) 85 Pac. 230.

23. *Colorado.*— Pueblo Light, etc., Co. *v.* McGinley, 5 Colo. App. 238, 38 Pac 425.

Maine.— Boston *v.* Buffum, 97 Me. 230, 54 Atl. 392 (holding that in an action for personal injuries caused in the operation of a machine, a proposition, advanced by plaintiff, which, if not mechanically impossible, is exceedingly improbable, should not be permitted to serve as a basis of a verdict in his favor); Bean *v.* Maine Water Co., 92 Me. 469, 43 Atl. 222.

Maryland.— Strasburger *v.* Vogel, 103 Md. 85, 63 Atl. 202.

Minnesota.— Swenson *v.* Erlandson, 86 Minn. 263, 90 N. W. 534, holding that circumstantial evidence is competent and proper, but as such evidence consists in reasoning from facts which are known and proved to establish such as are conjectured to exist the process is fatally defective if the circumstances also depend on conjecture.

New York.— Morhard *v.* Richmond Light, etc., Co., 111 N. Y. App. Div. 353, 98 N. Y. Suppl. 124; Koch *v.* Fox, 71 N. Y. App. Div. 288, 75 N. Y. Suppl. 913; Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755 [*affirmed* in 162 N. Y. 617, 57 N. E. 1122]; Groarke *v.* Laemmle, 56 N. Y. App. Div. 61, 67 N. Y. Suppl. 409; Hinz *v.* Starin, 46 Hun 526; Hanson *v.* Aikman, 2 Silv. Sup. 528, 6 N. Y. Suppl. 366; Schoen *v.* Dry Dock, etc., R. Co., 58 N. Y. Super. Ct. 149, 9 N. Y. Suppl. 709.

North Carolina.— Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. 851.

Canada.— Canada Paint Co. *v.* Trainor, 28 Can. S. Ct. 352; Montreal Rolling Mills Co. *v.* Corcoran, 26 Can. Sup. Ct. 595.

24. *Idaho.*— Minty *v.* Union Pac. R. Co., 2 Ida. (Hasb.) 471, 21 Pac. 660, 4 L. R. A. 409.

Indiana.— McBroom *v.* Putney, 28 Ind. 353.

Kentucky.— Louisville, etc., R. Co. *v.* Jolly, 90 S. W. 977, 28 Ky. L. Rep. 989, holding that where, on plaintiff's own evidence, it is as probable that the injury sued for was not due to defendant's negligence as that it was due to such negligence, plaintiff cannot recover.

Missouri.— Caudle *v.* Kirkbride, 117 Mo. App. 412, 93 S. W. 868 (where the injury of which complaint is made may have resulted from either of several causes, for only one of which the party sued is liable, it is for the complainant to show with reasonable certainty that the cause for which the party is liable produced the result); Smart *v.* Kansas City, 91 Mo. App. 586 (especially where witnesses who appear know the facts, are accessible, and uncalled).

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Gillon *v.* Boschen, 44 N. Y. App. Div. 638, 60 N. Y. Suppl. 659; Yaggle *v.* Allen, 24 N. Y. App. Div. 594, 48 N. Y. Suppl. 827; Pieschel *v.* Miner, 30 Misc. 301, 63 N. Y. Suppl. 508.

North Carolina.— Kearns *v.* Southern R. Co., 139 N. C. 470, 52 S. E. 131; Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. 851.

Pennsylvania.— Bannon *v.* Pennsylvania R. Co., 29 Pa. Super. Ct. 231; Ahern *v.* Melvin, 21 Pa. Super. Ct. 462.

happened in some other way than alleged, but is required only to satisfy the jury by a fair preponderance of the evidence that it occurred in the manner alleged.[25]

b. Contributory Negligence—(i) *In General.* A preponderance of the evidence is necessary to sustain or disprove contributory negligence.[26] It is not necessary, however, that contributory negligence or the absence of it should be conclusively shown.[27] And very slight evidence is sufficient to show freedom from contributory negligence when it appeared that plaintiff was in a position of danger likely to produce mental confusion.[28]

(ii) *Direct or Circumstantial Evidence.* Where the burden of showing freedom from contributory negligence rests on plaintiff it is sufficient if such fact is shown by circumstantial evidence from which it may be reasonably inferred.[29]

Virginia.— Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64, 48 S. E. 508.

United States.— Standard Oil Co. *v.* Murray, 119 Fed. 572, 57 C. C. A. 1.

Canada.— Dominion Cartridge Co. *v.* Cairns, 28 Can. Sup. Ct. 361; Canada Paint Co. *v.* Trainor, 28 Can. Sup. Ct. 352; Jones *v.* Grand Trunk R. Co., 45 U. C. Q. B. 193.

25. Woodall *v.* Boston Elevated R. Co., 192 Mass. 308, 78 N. E. 446.

26. *Dakota.*— Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

District of Columbia.— Harmon *v.* Washington, etc., R. Co., 7 Mackey 255.

Illinois.— Chicago, etc., R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. 357; North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451; Mutual Wheel Co. *v.* Mosher, 85 Ill. App. 240.

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; New Castle Bridge Co. *v.* Doty, 37 Ind. App. 84, 76 N. E. 557; Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246.

New York.— Button *v.* Hudson River R. Co., 18 N. Y. 248; Baxter *v.* Second Ave. R. Co., 30 How. Pr. 219.

Ohio.— Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515, satisfaction of jury.

Texas.— Houston, etc., R. Co. *v.* Anglin, (1905) 89 S. W. 966; Walker *v.* Herron, 22 Tex. 55; El Paso Electric R. Co. *v.* Kitt, (Civ. App. 1905) 90 S. W. 678; Missouri, etc., R. Co. *v.* Greenwood, (Civ. App. 1905) 89 S. W. 810; Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

United States.— Jefferson Hotel Co. *v.* Warren, 128 Fed. 565, 63 C. C. A. 193; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; Eddy *v.* Wallace, 49 Fed. 801, 1 C. C. A. 435; Harris *v.* Union Pac. R. Co., 13 Fed. 591, 4 McCrary 454.

See 37 Cent. Dig. tit. "Negligence," § 274.

Where the testimony in regard to plaintiff's negligence is equally balanced, he cannot recover. Cowen *v.* Knickerbocker Ice Co., 6 N. Y. St. 250. And see Dorr *v.* McCullough, 8 N. Y. App. Div. 327, 40 N. Y. Suppl. 806.

Corroboration by disinterested witness.— Where the evidence of defendant as to negligence of plaintiff is supported by that of a disinterested witness, it will be sufficient to support a verdict. Locke *v.* Waldron, 75 N. Y. App. Div. 152, 77 N. Y. Suppl. 405.

27. Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82. And see Sanders *v.* Aiken Mfg. Co., 71 S. C. 58, 50 S. E. 679.

28. Schafer *v.* New York, 154 N. Y. 466, 48 N. E. 749.

29. *Illinois.*— Elgin, etc., R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151 [*affirming* 122 Ill. App. 165]; Cleveland, etc., R. Co. *v.* Keenan, 190 Ill. 217, 60 N. E. 107; Indiana, etc., R. Co. *v.* Otstot, 113 Ill. App. 37 [*affirmed* in 212 Ill. 429, 72 N. E. 387]; Upper Alton *v.* Green, 112 Ill. App. 439; Chicago *v.* Early, 104 Ill. App. 398; Metzger *v.* Chicago, 103 Ill. App. 605; Chicago City R. Co. *v.* Fennimore, 99 Ill. App. 174 [*affirmed* in 199 Ill. 9, 64 N. E. 985]; Chicago, etc., R. Co. *v.* Huston, 95 Ill. App. 350.

Indiana.— Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514; Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458.

Iowa.— Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; Nelson *v.* Chicago, etc., R. Co., 38 Iowa 564; Rusch *v.* Davenport, 6 Iowa 443.

Massachusetts.— Slattery *v.* Lawrence Ice Co., 190 Mass. 79, 76 N. E. 459; Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Mayo *v.* Boston, etc., R. Co., 104 Mass. 137.

Michigan.— Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722.

Missouri.— Sack *v.* St. Louis Car Co., 112 Mo. App. 476, 87 S. W. 79.

New York.— Boyce *v.* Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304; Hancock *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 161, 91 N. Y. Suppl. 601; Lorickio *v.* Brooklyn Heights R. Co., 44 N. Y. App. Div. 628, 60 N. Y. Suppl. 247; Dillon *v.* Forty-Second St., etc., R. Co., 28 N. Y. App. Div. 404, 51 N. Y. Suppl. 145; Harper *v.* Delaware, etc., R. Co., 22 N. Y. App. Div. 273, 47 N. Y. Suppl. 933; Sickles *v.* New Jersey Ice Co., 80 Hun 213, 30 N. Y. Suppl. 10 [*reversed* on other grounds in 153 N. Y. 83, 46 N. E. 1042]; James *v.* Ford, 16 Daly 126, 9 N. Y. Suppl. 504; Van Lien *v.* Scoville Mfg. Co., 14 Abb. Pr. N. S. 74.

England.— Radley *v.* London, etc., R. Co.,

c. Comparative Negligence. The burden of establishing the relative degrees of negligence between plaintiff and defendant is on plaintiff.[30]

D. Trial, Judgment, and Review — 1. Nonsuit and Direction of Verdict — a. Nonsuit — (I) *When Negligence Not Shown.* In an action for personal injuries, where the evidence fails to show any negligence on the part of defendant, nonsuit is proper.[31]

(II) *When Contributory Negligence Shown.* Where it is incumbent upon plaintiff to show, by affirmative evidence, that he was in the use of due care, and he offers no such evidence, but, on the contrary, the whole evidence on which his case rests shows that his own negligence contributed to his injury, it is proper to grant a nonsuit.[32] But a nonsuit is only proper where, on plaintiff's own showing, it clearly appears that he contributed to his injury. If the evidence is open to fair debate, and leaves the mind in a state of doubt on the subject, the case should not be withdrawn from the jury.[33] Even where contributory negligence is a matter of defense, where the same appears from plaintiff's own evidence, it has been held that a nonsuit should be granted,[34] but there are decisions to the contrary.[35]

b. Direction of Verdict. It has also been held that the court may direct a verdict for defendant on the ground that plaintiff was guilty of contributory negligence.[36]

2. Province of Court and Jury — a. In General — (I) *Sufficiency of Evidence to Raise Question For Jury* — (A) *As to Negligence* — (1) In General. The better rule is that if, at the close of plaintiff's case, there is evidence upon which the jury might find for plaintiff, the question as to defendant's negligence should be submitted to the jury.[37] Some cases, however, hold that if there is any

1 App. Cas. 754, 46 L. J. Exch. 573, 36 L. T. Rep. N. S. 637, 25 Wkly. Rep. 147.

See 37 Cent. Dig. tit. "Negligence," § 275.

30. Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425; Indianapolis, etc., R. Co. *v.* Evans, 88 Ill. 63.

31. *Georgia.*— Whatley *v.* Block, 95 Ga. 15, 21 S. E. 985.

Illinois.— Thomas *v.* Star, etc., Milling Co., 104 Ill. App. 110.

Iowa.— Sikes *v.* Sheldon, 58 Iowa 744, 13 N. W. 53.

Maryland.—Northern Cent. R. Co. *v.* State, 54 Md. 113.

Michigan.— Bradley *v.* Ft. Wayne, etc., R. Co., 94 Mich. 35, 53 N. W. 915.

Missouri.— Boland *v.* Missouri R. Co., 36 Mo. 484.

New Jersey.— Kelly *v.* Central R. Co., 70 N. J. L. 190, 56 Atl. 145; McGuire *v.* Central R. Co., 68 N. J. L. 608, 53 Atl. 696.

New York.— McLain *v.* Van Zant, 39 N. Y. Super. Ct. 347; Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on other grounds in 32 Barb. 165, 19 How. Pr. 199].

Pennsylvania.— Hoffman *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 87, 63 Atl. 409; New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

West Virginia.— Hoge *v.* Ohio River R. Co., 35 W. Va. 562, 14 S. E. 152.

Wisconsin.—Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

See 37 Cent. Dig. tit. "Negligence," § 283.

32. Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722. But see Walton *v.* Ackerman, 49 N. J. L. 234, 10 Atl. 709.

33. See *infra*, VIII, D, 2, a, (I), (B), (1).

34. Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219.

35. Bolden *v.* Southern R. Co., 123 N. C. 614, 31 S. E. 851; Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848; Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745; Bouknight *v.* Charlotte, etc., R. Co., 41 S. C. 415, 19 S. E. 915; Carter *v.* Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 7 S. E. 515.

36. Greenwell *v.* Washington Market Co., 21 D. C. 298. But see Walton *v.* Ackerman, 49 N. J. L. 234, 10 Atl. 709.

After evidence for both sides adduced.— On a prayer to instruct the jury to find for defendant on the ground of contributory negligence, after the evidence for both sides has been adduced, the whole evidence must be considered, and not that adduced by plaintiff only. State *v.* Baltimore, etc., R. Co., 69 Md. 339, 14 Atl. 685, 688.

37. *Illinois.*— Chicago City R. Co. *v.* Maloney, 99 Ill. App. 623.

Maine.— Beaulieu *v.* Portland Co., 48 Me. 291.

Michigan.— Powers *v.* Pere Marquette R. Co., 143 Mich. 379, 106 N. W. 1117.

New Hampshire.— Hewett *v.* Woman's Hospital Aid Assoc., 73 N. H. 556, 64 Atl. 190, 7 L. R. A. N. S. 496.

New Jersey.—Walton *v.* Ackerman, 49 N. J. L. 234, 10 Atl. 709.

New York.— Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Nelson

evidence,[38] more than a mere scintilla,[39] tending to prove negligence, plaintiff is entitled to go to the jury.

(2) Occurrence of Accident. Where an accident is one that would not ordinarily have happened if due care and caution had been used, the mere fact of the injury is sufficient to carry the case to the jury on the question of defendant's negligence.[40]

(B) *As to Contributory Negligence* — (1) In General. Unless the evidence offered by plaintiff shows such contributory negligence as prevents his recovery as a matter of law,[41] he is entitled to go to the jury.[42]

(2) Occurrence of Accident. Although there were no eye-witnesses of the accident, and its precise cause and manner of occurrence are unknown, absence of contributory negligence may be established sufficiently to make it a question of

v. Lehigh Valley R. Co., 25 N. Y. App. Div. 535, 50 N. Y. Suppl. 63; Hope *v.* Fall Brook Coal Co., 3 N. Y. App. Div. 70, 38 N. Y. Suppl. 1040; Powers *v.* New York Cent., etc., R. Co., 60 Hun 19, 14 N. Y. Suppl. 408 [*affirmed* in 128 N. Y. 659, 29 N. E. 148]; Clark *v.* Eighth Ave. R. Co., 32 Barb. 657 [*affirmed* in 36 N. Y. 135, 93 Am. Dec. 495].

South Carolina.— Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

See 37 Cent. Dig. tit. "Negligence," § 282.

Preliminary question for court.— While the existence of negligence is a question for the jury, it is the province of the trial justice, in the first instance, to determine whether there is sufficient evidence to justify a submission of the case to the jury. Powers *v.* New York Cent., etc., R. Co., 128 N. Y. 659, 29 N. E. 148 [*affirming* 60 Hun 19, 14 N. Y. Suppl. 408]; Cope *v.* Hampton County, 42 S. C. 17, 19 S. E. 1018; Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486.

Where the testimony offered by plaintiff makes out a prima facie case, the question of negligence is for the jury, notwithstanding the great preponderance of testimony is with defendant. Rauch *v.* Smedley, 208 Pa. St. 175, 57 Atl. 359.

38. *District of Columbia.*— Moore *v.* Metropolitan R. Co., 2 Mackey 437.

Iowa.— Sikes *v.* Sheldon, 58 Iowa 744, 13 N. W. 53.

Kentucky.— Connell *v.* Chesapeake, etc., R. Co., 58 S. W. 374, 22 Ky. L. Rep. 501.

Mississippi.—Illinois Cent. R. Co. *v.* Boehms, 70 Miss. 11, 12 So. 23.

South Carolina.— Rutherford *v.* Southern R. Co., 56 S. C. 446, 35 S. E. 136.

Texas.— Lindsey *v.* Storrie, (Civ. App. 1900) 55 S. W. 370.

West Virginia.— Hoge *v.* Ohio River R. Co., 35 W. Va. 562, 14 S. E. 152.

See 37 Cent. Dig. tit. "Negligence," § 282.

39. Bolden *v.* Southern R. Co., 123 N. C. 614, 31 S. E. 851; Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848; Drinkwater *v.* Quaker City Cooperage Co., 208 Pa. St. 649, 57 Atl. 1107; Pennsylvania R. Co. *v.* Horst, 110 Pa. St. 226, 1 Atl. 217.

A mere scintilla of evidence will not, however, justify the court in submitting the case to the jury. Philadelphia, etc., R. Co. *v.* Schertle, 97 Pa. St. 450; Reinhardt *v.* South Easton, 2 Pa. Cas. 90, 4 Atl. 532.

40. Cahalin *v.* Cochran, 1 N. Y. St. 583. But see Cresey *v.* Railroad Co., 1 Leg. Gaz. (Pa.) 15, 26 Leg. Int. 301.

41. *California.*—Williams *v.* Southern Pac. R. Co., (1885) 9 Pac. 152.

Colorado.— Colorado Cent. R. Co. *v.* Martin, 7 Colo. 592, 4 Pac. 1118.

Kentucky.— Standard Oil Co. *v.* Eiler, 110 Ky. 209, 61 S. W. 8, 22 Ky. L. Rep. 1641.

Missouri.— Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 14 S. W. 15.

New Jersey.— McLean *v.* Erie R. Co., 70 N. J. L. 337, 57 Atl. 1132; Pennsylvania R. Co. *v.* Middleton, 57 N. J. L. 154, 31 Atl. 616, 51 Am. St. Rep. 597; Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180.

New York.— Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Thrings *v.* Central Park R. Co., 30 N. Y. Super. Ct. 616; Bernhardt *v.* Rensselaer, etc., R. Co., 18 How. Pr. 427 [*reversed* on other grounds in 32 Barb. 16, 19 How. Pr. 199].

Pennsylvania.— Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Born *v.* Allegheny, etc., Plank Road Co., 101 Pa. St. 334.

Wisconsin.— Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714; Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

United States.— Western Union Tel. Co. *v.* Baker, 140 Fed. 315, 72 C. C. A. 87; Christensen *v.* Metropolitan St. R. Co., 137 Fed. 708, 70 C. C. A. 657.

See 37 Cent. Dig. tit. "Negligence," § 286.

42. *California.*—Williams *v.* Southern Pac. R. Co., (1885) 9 Pac. 152.

Kentucky.— Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. 493, 23 Ky. L. Rep. 43.

Missouri.— Drain *v.* St. Louis, etc., R. Co., 86 Mo. 574; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75.

New Jersey.— Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180.

New York.—Bell *v.* New York Cent., etc., R. Co., 29 Hun 560; Pendril *v.* Second Ave. R. Co., 34 N. Y. Super. Ct. 481; Williams *v.* O'Keefe, 9 Bosw. 536, 24 How. Pr. 16.

Wisconsin.—Leavitt *v.* Chicago, etc., R. Co., 64 Wis. 228, 25 N. W. 4; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714.

United States.— Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284.

See 37 Cent. Dig. tit. "Negligence," § 286.

fact for the jury, by proof of such facts and surroundings as reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of plaintiff.[43] But if the facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion therefor which is consistent with proper care and prudence, the inference of negligence is the only one to be drawn, and defendant is entitled to a nonsuit.[44]

(II) *When Facts Not Controverted* — (A) *As to Negligence.* When the facts are undisputed,[45] and only one inference can be drawn from them,[46] it is the

43. Maguire *v.* Fitchburg R. Co., 146 Mass. 379, 15 N. E. 904; Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675; Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649.

44. Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Bond *v.* Smith, 113 N. Y. 378, 21 N. E. 128; Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Gleeson *v.* Brummer, 87 Hun (N. Y.) 465, 34 N. Y. Suppl. 375 [*affirmed* in 152 N. Y. 653, 47 N. E. 1107].

45. *California.*—Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Indiana.— Pittsburgh, etc., R. Co. *v.* Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; Faris *v.* Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Evansville *v.* Christy, 29 Ind. App. 44, 63 N. E. 867; Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90.

Kansas.— Union Pac. R. Co. *v.* Lipprand, 5 Kan. App. 484, 47 Pac. 625.

Kentucky.— Henderson Trust Co. *v.* Stuart, 108 Ky. 167, 55 S. W. 1082, 21 Ky. L. Rep. 1664, 48 L. R. A. 49.

Missouri.— Fletcher *v.* Atlantic, etc., R. Co., 64 Mo. 484.

Nebraska.— Bradey *v.* Chicago, etc., R. Co., 59 Nebr. 233, 80 N. W. 809.

New Jersey.— Hammill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

New York.— Piper *v.* New York Cent., etc., R. Co., 56 N. Y. 630 [*affirming* 1 Thomps. & C. 290]; Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. 221.

Pennsylvania.— Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425; Baker *v.* Hagey, 11 Montg. Co. Rep. 205.

Utah.— Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326.

West Virginia.— Thomas *v.* Wheeling Electric Co., 54 W. Va. 395, 46 S. E. 217.

United States.— Southern Pac. Co. *v.* Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485.

See 37 Cent. Dig. tit. "Negligence," § 290.

Under Oreg. Const. art. 1, § 17, providing that the right of trial by jury in all civil cases shall remain inviolate, a defendant whose negligence is to be determined in an action for personal injuries is entitled to the verdict of a jury, although there may be no conflict in the testimony. Shobert *v.* May, 40 Oreg. 68, 66 Pac. 466, 91 Am. St. Rep. 453, 55 L. R. A. 810.

46. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

California.— Studer *v.* Southern Pac. R. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39; Wardlaw *v.* California R. Co., (1895) 42 Pac. 1075.

District of Columbia.— Ward *v.* District of Columbia, 24 App. Cas. 524; U. S. Electric Lighting Co. *v.* Sullivan, 22 App. Cas. 115.

Illinois.— Central Union Bldg. Co. *v.* Kolander, 212 Ill. 27, 72 N. E. 50 [*affirming* 113 Ill. App. 305]; West Chicago St. R. Co. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586 [*affirming* 110 Ill. App. 204]; Merchant *v.* South Chicago City R. Co., 104 Ill. App. 122; Browne *v.* Siegel, etc., Co., 90 Ill. App. 49 [*affirmed* in 191 Ill. 226, 60 N. E. 815].

Indiana.— Indianapolis, etc., R. Co. *v.* Watson, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578.

Kansas.— Union Pac. R. Co. *v.* Brown, 73 Kan. 233, 84 Pac. 1026; Metropolitan St. R. Co. *v.* Hanson, 67 Kan. 256, 72 Pac. 773; Chanute *v.* Higgins, 65 Kan. 680, 70 Pac. 638.

Kentucky.— Exchange Bank *v.* Trimble, 108 Ky. 230, 56 S. W. 156, 21 Ky. L. Rep. 1681.

Maine.— Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953; Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255, 54 Atl. 747.

Maryland.— Knight *v.* Baltimore, 97 Md. 647, 55 Atl. 388.

Minnesota.— Steindorff *v.* St. Paul Gaslight Co., 92 Minn. 496, 100 N. W. 221.

North Carolina.— Brown *v.* Durham, 141 N. C. 249, 53 S. E. 513; Isley *v.* Virginia Bridge, etc., Co., 141 N. C. 220, 53 S. E. 841.

North Dakota.— Heckman *v.* Evenson, 7 N. D. 173, 73 N. W. 427.

Texas.— International, etc., R. Co. *v.* Wray, (Civ. App. 1906) 96 S. W. 74.

Utah.— Burgess *v.* Salt Lake City R. Co., 17 Utah 406, 53 Pac. 1013.

West Virginia.—Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802; Klinkler *v.* Wheeling Steel, etc., Co., 43 W. Va. 219, 27 S. E. 237; Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

Wisconsin.— Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.

United States.— District of Columbia *v.* Moulton, 182 U. S. 576, 21 S. Ct. 840, 45 L. ed. 1237 [*reversing* 15 App. Cas. (D. C.) 363]; Christensen *v.* Metropolitan St. R. Co., 137 Fed. 708, 70 C. C. A. 657; St. Louis, etc.,

duty of the court to decide, as matter of law, whether there was negligence. Where the facts, although undisputed, are such that different minds might come to different conclusions as to the reasonableness and care of the party's conduct, the question is properly left to the jury.[47]

(B) *As to Contributory Negligence.* Contributory negligence is a question of law for the court, where there can be no substantial controversy as to the facts, from which but one reasonable conclusion can be drawn.[48]

(C) *As to Proximate Cause.* Where the facts are undisputed, it is the province of the court to determine the question of proximate cause.[49]

(III) *When Inferences From Evidence Uncertain*— (A) *As to Negligence* — (1) In General. Where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference is for the jury.[50] Thus, whenever it is

R. Co. *v.* Leftwich, 117 Fed. 127, 54 C. C. A. 1; McGhee *v.* Campbell, 101 Fed. 936, 42 C. C. A. 94; Nelson *v.* New Orleans, etc., R. Co., 100 Fed. 731, 40 C. C. A. 673; Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287.

See 37 Cent. Dig. tit. "Negligence," § 290.

47. *Connecticut.*— Beers *v.* Housatonuc R. Co., 19 Conn. 566.

Indiana.— Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Kansas.— Central Branch Union Pac. R. Co. *v.* Hotham, 22 Kan. 41; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Maine.— Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367; Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Minnesota.— Bennett *v.* Syndicate Ins. Co., 39 Minn. 254, 39 N. W. 488.

Missouri.— Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81.

Pennsylvania.— Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30.

Utah.— Davis *v.* Utah Southern R. Co., 3 Utah 218, 2 Pac. 521.

Vermont.— Vinton *v.* Schwab, 32 Vt. 612.

See 37 Cent. Dig. tit. "Negligence," § 290.

48. *Alabama.*— Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90.

District of Columbia.— Howes *v.* District of Columbia, 2 App. Cas. 188.

Maine.— Grows *v.* Maine Cent. R. Co., 67 Me. 100.

Maryland.— State *v.* Baltimore, etc., R. Co., 58 Md. 482; Baltimore, etc., R. Co. *v.* State, 54 Md. 648.

Michigan.— Apsey *v.* Detroit, etc., R. Co., 83 Mich. 440, 47 N. W. 513; Underhill *v.* Chicago, etc., R. Co., 81 Mich. 43, 45 N. W. 508.

Minnesota.— Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Donaldson *v.* Milwaukee, etc., R. Co., 21 Minn. 293.

New York.— Haring *v.* New York, etc., R. Co., 13 Barb. 9; Halpin *v.* Third Ave. R. Co., 40 N. Y. Super. Ct. 175; McLain *v.* Van Zandt, 39 N. Y. Super. Ct. 347.

North Carolina.— Neal *v.* Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684.

Ohio.— Pennsylvania Co. *v.* Alburn, 23 Ohio Cir. Ct. 130.

Rhode Island.— Nicholas *v.* Peck, 21 R. I. 404, 43 Atl. 1038; Chaffee *v.* Old Colony R. Co., 17 R. I. 658, 24 Atl. 141.

Utah.— Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381.

Wisconsin.— Seefeld *v.* Chicago, etc., R. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168.

United States.— Riggs *v.* Standard Oil Co., 130 Fed. 199; Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Hemingway *v.* Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477; Clark *v.* Zarniko, 106 Fed. 607, 45 C. C. A. 494; Pyle *v.* Clark, 79 Fed. 744, 25 C. C. A. 190.

See 37 Cent. Dig. tit. "Negligence," § 291.

49. *New York.*—Fanizzi *v.* New York, etc., R. Co., 113 N. Y. App. Div. 440, 99 N. Y. Suppl. 281; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 74 N. Y. Suppl. 130.

North Carolina.—Russell *v.* Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512.

Ohio.— Lake Shore, etc., R. Co. *v.* Liidtke, 69 Ohio St. 384, 69 N. E. 653.

Pennsylvania.—Douglass *v.* New York, etc., R. Co., 209 Pa. St. 128, 58 Atl. 160.

West Virginia.— Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

United States.— Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Louisville, etc., R. Co. *v.* Johnson, 81 Fed. 679, 27 C. C. A. 367; Pike *v.* Grand Trunk R. Co., 39 Fed. 255.

50. *Alabama.*— Holmes *v.* Birmingham Southern R. Co., 140 Ala. 208, 37 So. 338.

Illinois.— Chicago City R. Co. *v.* Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126; Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263; Tiernev *v.* Chicago Junction R. Co., 92 Ill. App. 631.

Indiana.— Indianapolis St. R. Co. *v.* Marschke, 166 Ind. 490, 77 N. E. 945; Evansville St. R. Co. *v.* Meadows, 13 Ind. App. 145, 41 N. E. 398.

Kansas.— Kansas Pac. R. Co. *v.* Richardson, 25 Kan. 391.

Massachusetts.— Foster *v.* New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331.

Missouri.— Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

Nebraska.— Chicago, etc., R. Co. *v.* Wilgus, 40 Nebr. 660, 58 N. W. 1125; Chicago,

necessary to determine what a man of ordinary care and prudence would be likely to do in the emergency proven, involving as it generally does more or less of conjecture, it can only be settled by a jury.[51]

(2) MATTER OF CONJECTURE. Where, under the testimony, the cause of an accident resulting in a personal injury is conjectural merely, the case should not go to the jury.[52]

(B) *As to Contributory Negligence* — (1) IN GENERAL. Where the evidence is such that different minds may reasonably draw different conclusions as to contributory negligence the question is for the jury.[53] But where the court can say from the evidence that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that plaintiff was acting as an ordinarily prudent person would have acted under the circumstances, the question of plaintiff's contributory negligence is for the court.[54]

etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120; Omaha St. R. Co. *v.* Lochneisen, 40 Nebr. 37, 58 N. W. 535; Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976.

New Hampshire.—Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740.

New Jersey.— Newark Pass. R. Co. *v.* Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374.

New York.— Hays *v.* Miller, 70 N. Y. 112 [*affirming* 6 Hun 320]; Thurber *v.* Harlem Bridge, etc., Co., 60 N. Y. 326; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077 [*affirmed* in 163 N. Y. 568, 57 N. E. 1110]; Siebrecht *v.* Pennsylvania R. Co., 21 Misc. 615, 48 N. Y. Suppl. 3; Vanderwald *v.* Olsen, 1 N. Y. St. 506.

North Carolina.— Russell *v.* Carolina R. Co., 118 N. C. 1098, 24 S. E. 512; Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

Utah.— Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934; Lowe *v.* Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708.

United States.— Grand Trunk R. Co. *v.* Tennant, 66 Fed. 922, 14 C. C. A. 190; Miller *v.* Union Pac. R. Co., 12 Fed. 600, 4 McCrary 115.

See 37 Cent. Dig. tit. "Negligence," § 293.

51. Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451; Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. Dec. (N. Y.) 131, 23 How. Pr. 166 [*affirming* 32 Barb. 165, 19 How. Pr. 199].

52. State *v.* Philadelphia, etc., R. Co., 60 Md. 555; Powers *v.* Pere Marquette R. Co., 143 Mich. 379, 106 N. W. 1117; Waters-Pierce Oil Co. *v.* Van Elderen, 137 Fed. 557, 70 C. C. A. 255; Riggs *v.* Standard Oil Co., 130 Fed. 199. See also Cawfield *v.* Asheville St. R. Co., 11 N. C. 597, 16 S. E. 703, contributory negligence.

53. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990.

Colorado.— Florence *v.* Snook, 20 Colo. App. 356, 78 Pac. 994.

Illinois.— Maxwell *v.* Durkin, 86 Ill. App. 257.

Indiana.— Indianapolis, etc., R. Co. *v.* Marschke, 166 Ind. 490, 77 N. E. 945; Greenawaldt *v.* Lake Shore, etc., R. Co., 165 Ind. 219, 73 N. E. 910, 74 N. E. 1081; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308.

Iowa.— Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Arenschield *v.* Chicago, etc., R. Co., 128 Iowa 677, 105 N. W. 200; Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861.

Michigan.— Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82.

Missouri.— Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213; Mathew *v.* Wabash R. Co., (App. 1903) 78 S. W. 271; Linn *v.* Massillon Bridge Co., 78 Mo. App. 111.

Nebraska.—O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 86 N. W. 1098.

New Jersey.— Clark Thread Co. *v.* Bennett, 58 N. J. L. 404, 33 Atl. 404.

New York.— Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451; Hackford *v.* New York Cent., etc., R. Co., 53 N. Y. 654.

North Carolina.— Russell *v.* Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512.

Ohio.— Marietta, etc., R. Co. *v.* Picksley, 24 Ohio St. 654; Baltimore, etc., R. Co. *v.* Stoltz, 18 Ohio Cir. Ct. 93, 9 Ohio Cir. Dec. 638.

Pennsylvania.— Fetterman *v.* Rush Tp., 28 Pa. Super. Ct. 77; Breunniger *v.* Pennsylvania R. Co., 9 Pa. Super. Ct. 461.

Washington.— Thomson *v.* Issaquah Shingle Co., 43 Wash. 253, 86 Pac. 588; Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323.

Wisconsin.— Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852; Dougherty *v.* West Superior Iron, etc., Co., 88 Wis. 343, 60 N. W. 274.

United States.—Wabash R. Co. *v.* Mathew, 199 U. S. 605, 26 S. Ct. 752, 50 L. ed. 329.

See 37 Cent. Dig. tit. "Negligence," § 296.

Credibility of witnesses.— When the facts claimed to constitute contributory negligence depend upon the credibility of witnesses, in respect of which honest men might differ, the question is for the jury. Brooks *v.* Somerville, 106 Mass. 271; Swoboda *v.* Ward, 40 Mich. 420; Hackford *v.* New York Cent., etc., R. Co., 53 N. Y. 654.

54. *District of Columbia.*—Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. 135.

(2) Although Facts Undisputed. The question of contributory negligence, although dependent on disputed facts, is properly submitted to the jury, when fair-minded persons may reasonably arrive at different conclusions thereon.[55]

(c) *As to Proximate Cause.* Where the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a proper question for the consideration of the jury.[56]

(iv) *When Evidence Conflicting or Facts Disputed* — (a) *As to Negligence.* Where the testimony is conflicting, or for any cause there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them, negligence is a question for the jury.[57] This rule will not be affected by the fact that plain-

Illinois.— Hewes *v.* Chicago, etc., R. Co., 217 Ill. 500, 75 N. E. 515 [*affirming* 119 Ill. App. 393]; Chicago City R. Co. *v.* Nelson, 215 Ill. 436, 74 N. E. 458; North Chicago St. R. Co. *v.* Canfield, 118 Ill. App. 353; Pittsburgh, etc., R. Co. *v.* O'Donnell, 118 Ill. App. 335; O'Donnell *v.* Chicago, etc., R. Co., 106 Ill. App. 287.

Iowa.— Mabbott *v.* Illinois Cent. R. Co., 116 Iowa 490, 89 N. W. 1076.

Kansas.— Cummings *v.* Wichita R., etc., Co., 68 Kan. 218, 74 Pac. 1104.

Maryland.— Topp *v.* United R., etc., Co., 99 Md. 630, 59 Atl. 52; Jenkins *v.* Baltimore, etc., R. Co., 56 Md. 402, 56 Atl. 966.

Mississippi.— Bridges *v.* Jackson Electric R., etc., Co., 86 Miss. 584, 38 So. 788.

Missouri.— Hecker *v.* Chicago, etc., R. Co., 110 Mo. App. 162, 84 S. W. 126; Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630; McNown *v.* Wabash R. Co., 55 Mo. App. 585.

New York.— Lofsten *v.* Brooklyn Heights R. Co., 184 N. Y. 148, 76 N. E. 1035 [*reversing* 97 N. Y. App. Div. 395, 89 N. Y. Suppl. 1042].

Ohio.— Jones *v.* Roberts, 1 Ohio S. & C. Pl. Dec. 572, 32 Cinc. L. Bul. 118.

Pennsylvania.— Fetterman *v.* Rush Tp., 28 Pa. Super. Ct. 77.

Rhode Island.— Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092.

Utah.— Johnson *v.* Rio Grande, etc., R. Co., 19 Utah 77, 57 Pac. 17.

Washington.— Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323.

United States.— Cary *v.* Morrison, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659; Dunworth *v.* Grand Trunk Western R. Co., 127 Fed. 307, 62 C. C. A. 225.

See 37 Cent. Dig. tit. "Negligence," § 296.

55. *California.*— Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651; Fernandes *v.* Sacramento City R. Co., 52 Cal. 45.

Kansas.— Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Kentucky.— Dolfinger *v.* Fishback, 12 Bush 474.

Maine.— Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

Minnesota.— Leonard *v.* Minneapolis, etc., R. Co., 63 Minn. 489, 65 N. W. 1084.

Missouri.— Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306; Atkinson *v.* Illinois Milk Co., 44 Mo. App. 153.

Nebraska.— Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976.

New York.— Sharp *v.* Erie R. Co., 184 N. Y. 100, 76 N. E. 923 [*reversing* 90 N. Y. App. Div. 502, 85 N. Y. Suppl. 553].

Vermont.— Vinton *v.* Schwab, 32 Vt. 612.

Washington.— Burian *v.* Seattle Electric Co., 26 Wash. 606, 67 Pac. 214.

Wisconsin.— Hoye *v.* Chicago, etc., R. Co., 62 Wis. 666, 23 N. W. 14; Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

United States.— Hemingway *v.* Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477.

See 37 Cent. Dig. tit. "Negligence," § 295.

The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort, and, in negligence cases, the rule applies only to facts when undisputed and the conclusion to be drawn from the facts is so far undisputable that men cannot reasonably differ in their interpretation of them. Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367.

56. Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188; Lincoln Traction Co. *v.* Heller, 72 Nebr. 127, 100 N. W. 197, 102 N. W. 262; Hart *v.* Hudson River Bridge Co., 80 N. Y. 622.

57. *Arkansas.*— Price *v.* St. Louis, etc., R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79.

District of Columbia.— U. S. Electric Lighting Co. *v.* Sullivan, 22 App. Cas. 115.

Illinois.— West Chicago St. R. Co. *v.* Schulz, 217 Ill. 322, 75 N. E. 495.

Indiana.— Stroble *v.* New Albany, 144 Ind. 695, 42 N. E. 806; Columbian Enameling, etc., Co. *v.* Burke, 37 Ind. App. 518, 77 N. E. 409, 117 Am. St. Rep. 337.

Iowa.— Hobbs *v.* Marion, 123 Iowa 726, 99 N. W. 577; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Union Pac. R. Co. *v.* Brown, 73 Kan. 233, 84 Pac. 1026.

Kentucky.— Central Pass. R. Co. *v.* Chatterson, 29 S. W. 18, 17 Ky. L. Rep. 5.

Maryland.— Pennsylvania R. Co. *v.* State, 61 Md. 108.

Michigan.— McIntyre *v.* Detroit Safe Co., 129 Mich. 385, 89 N. W. 39.

Minnesota.— Bennett *v.* Syndicate Ins. Co., 39 Minn. 254, 39 N. W. 488; Erd *v.* St. Paul, 22 Minn. 443.

Missouri.— Lamb *v.* Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; Taylor *v.* Scherpe, etc., Architectural Iron

tiff was the only witness in his behalf.[58] If, rejecting the conflicting evidence, negligence is still fully established by the evidence, the question need not be submitted to the jury.[59]

(B) *As to Contributory Negligence.* The question of contributory negligence is one of fact for the jury when the evidence in regard thereto is in dispute or is conflicting or uncertain.[60]

(C) *As to Proximate Cause.* Where the evidence is conflicting, the question of proximate cause is for the jury.[61]

Co., 133 Mo. 349, 34 S. W. 581; Lee *v.* Knapp, 55 Mo. App. 390.

Nebraska.— Omaha *v.* Houlihan, 72 Nebr. 326, 100 N. W. 415; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767; American Water-Works Co. *v.* Dougherty, 37 Nebr. 373, 55 N. W. 1051.

New York.— Swift *v.* Staten Island R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 1 Silv. Sup. 375, 5 N. Y. Suppl. 316]; Cook *v.* New York Cent. R. Co., 1 Abb. Dec. 432; Dise *v.* Metropolitan St. R. Co., 22 Misc. 97, 48 N. Y. Suppl. 551; Weckmann *v.* Arm Ende, 57 N. Y. Super. Ct. 595, 5 N. Y. Suppl. 567; Seabrook *v.* Hecker, 4 Rob. 344.

North Carolina.— Short *v.* Gill, 126 N. C. 803, 36 S. E. 336; Ward *v.* Odell Mfg. Co., 123 N. C. 248, 31 S. E. 495; Russell *v.* Carolina, etc., R. Co., 118 N. C. 1098, 24 S. E. 512; Knight *v.* Albemarle, etc., R. Co., 110 N. C. 58, 14 S. E. 650.

Ohio.— Cincinnati St. R. Co. *v.* Meyer, 9 Ohio Dec. (Reprint) 256, 11 Cinc. L. Bul. 321.

Pennsylvania.— Howett *v.* Philadelphia, etc., R. Co., 166 Pa. St. 607, 31 Atl. 336; Gray *v.* Floersheim, 164 Pa. St. 508, 30 Atl. 397; Gates *v.* Pennsylvania R. Co., 154 Pa. St. 566, 26 Atl. 598; Pennsylvania R. Co. *v.* Peters, 116 Pa. St. 206, 9 Atl. 317; Pennsylvania R. Co. *v.* White, 88 Pa. St. 327.

Texas.— Gulf, etc., R. Co. *v.* Matthews, (1905) 89 S. W. 983; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674.

Utah.— Ewell *v.* Joe Bowers Min. Co., 23 Utah 192, 64 Pac. 367; Linden *v.* Anchor Min. Co., 20 Utah 134, 58 Pac. 355.

West Virginia.—Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217.

Wisconsin.— Welch *v.* Abbott, 72 Wis. 512, 40 N. W. 223; Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.

United States.— Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 18 S. Ct. 68, 42 L. ed. 491.

See 37 Cent. Dig. tit. "Negligence," § 298.

58. Scholl *v.* Broadway R. Co., 137 N. Y. 566, 33 N. E. 339 [*affirming* 17 N. Y. Suppl. 755, 28 Abb. N. Cas. 205].

59. Dun *v.* Seaboard, etc., N. Co., 78 Va. 645, 49 Am. Rep. 388.

60. *Arkansas.*— Price *v.* St. Louis, etc., R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79.

Indiana.— Stroble *v.* New Albany, 144 Ind. 695, 42 N. E. 806; Eichel *v.* Senhenn, 2 Ind. App. 208, 28 N. E. 193.

Iowa.— Earl *v.* Cedar Rapids, 126 Iowa 361, 102 N. W. 140, 106 Am. St. Rep. 361; Orr *v.* Cedar Rapids, etc., R. Co., 94 Iowa 423, 62 N. W. 851; Nelson *v.* Chicago, etc., R. Co., 73 Iowa 576, 35 N. W. 611.

Kansas.— Davis *v.* Holton, 59 Kan. 707, 54 Pac. 1050.

Massachusetts.— Brooks *v.* Somerville, 106 Mass. 271.

Michigan.— Foster *v.* East Jordan Lumber Co., 141 Mich. 316, 104 N. W. 617; Becker *v.* Detroit Citizens' St. R. Co., 120 Mich. 580, 80 N. W. 581.

Minnesota.— Leonard *v.* Minneapolis, etc., R. Co., 63 Minn. 489, 65 N. W. 1084; Erd *v.* St. Paul, 22 Minn. 443.

Mississippi.— Fulmer *v.* Illinois Cent. R. Co., 68 Miss. 355, 8 So. 517.

Missouri.— Dougherty *v.* Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

Nebraska.— Omaha *v.* Houlihan, 72 Nebr. 326, 100 N. W. 415; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

New Jersey.— New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166 [*affirmed* in 33 N. J. L. 434, 97 Am. Dec. 722].

New York.— Swift *v.* Staten Island R. Co., 123 N. Y. 645, 25 N. E. 378 [*affirming* 1 Silv. Sup. 375, 5 N. Y. Suppl. 316]; Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451.

North Carolina.— House *v.* Seaboard Air Line R. Co., 131 N. C. 103, 42 S. E. 553; Russell *v.* Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512.

North Dakota.— Pyke *v.* Jamestown, 15 N. D. 157, 107 N. W. 359.

Ohio.— Cincinnati St. R. Co. *v.* Meyer, 9 Ohio Dec. (Reprint) 256, 11 Cinc. L. Bul. 321.

Oklahoma.— Oklahoma Gas, etc., Co. *v.* Lukert, 16 Okla. 397, 84 Pac. 1076; Choctaw, etc., R. Co. *v.* Wilker, 16 Okla. 384, 84 Pac. 1086, 3 L. R. A. N. S. 595.

Pennsylvania.—Gray *v.* Floersheim, 164 Pa. St. 508, 30 Atl. 397; Riland *v.* Hirshler, 7 Pa. Super. Ct. 384; Unger *v.* Philadelphia, etc., R. Co., 15 Pa. Dist. 257.

West Virginia.— Foley *v.* Huntington, 51 W. Va. 396, 41 S. E. 113.

Wisconsin.— Seefeld *v.* Chicago, etc., R. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168.

United States.— Western Union Tel. Co. *v.* Baker, 140 Fed. 315, 72 C. C. A. 87; National Metal Edge Box Co. *v.* Maroni, 123 Fed. 410, 59 C. C. A. 518.

See 37 Cent. Dig. tit. "Negligence," § 299.

61. *Alabama.*—Mayer *v.* Thompson-Hutchison Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433.

Illinois.— Chicago *v.* Bush, 111 Ill. App. 638.

Nebraska.— Omaha *v.* Houlihan, 72 Nebr.

(v) *When Facts Found Specially.* Where the facts are fully found by the court, and the necessary inference therefrom of defendant's alleged negligence is plain and certain, it is not error for the court to state such negligence as a conclusion of law.[62] So when the jury return a special verdict and but one reasonable inference can be drawn from the facts therein found, the question whether they constitute negligence or contributory negligence is for the court;[63] but whenever there may reasonably be differences of opinion as to the inference which may fairly be drawn from such facts, such question is then one of fact to be determined by the jury.[64]

(vi) *Rebuttal of Presumption of Negligence.* In an action for personal injuries from negligence, in which the occurrence of the accident raises a presumption of negligence, the question whether defendant's explanatory evidence sufficiently rebuts the presumption is one of fact for the jury.[65] So also, while contributory negligence may be shown by the evidence of plaintiff, whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury.[66]

b. Negligence — (i) *In General* — (a) *What Constitutes.* Negligence is a mixed question of law and fact.[67] The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury, and not

326, 100 N. W. 415; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

North Carolina.— Short *v.* Gill, 126 N. C. 803, 36 S. E. 336.

Ohio.— Kelly *v.* Howell, 41 Ohio St. 438.

Pennsylvania.— Holmes *v.* Watson, 29 Pa. St. 457.

See 37 Cent. Dig. tit. "Negligence," § 300.

62. Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102.

63. Young *v.* Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; Hadley *v.* Lake Erie, etc., R. Co., (Ind. App. 1897) 46 N. E. 935; Cincinnati, etc., R. Co. *v.* Grames, 136 Ind. 39, 34 N. E. 714; Conner *v.* Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109; Shirk *v.* Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656; Keller *v.* Gaskill, 9 Ind. App. 670, 36 N. E. 303; Louisville, etc., R. Co. *v.* Costello, 9 Ind. App. 462, 36 N. E. 299; Pittsburg, etc., R. Co. *v.* Evans, 53 Pa. St. 250.

64. Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837; Keller *v.* Gaskill, 9 Ind. App. 670, 36 N. E. 303; Louisville, etc., R. Co. *v.* Costello, 9 Ind. App. 462, 36 N. E. 299.

65. *California.*— Lauder *v.* Currier, 3 Cal. App. 28, 84 Pac. 217.

Georgia.— Jones *v.* Tift, 63 Ga. 488.

Illinois.— Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624 [*affirming* 111 Ill. App. 452].

Missouri.— Kenney *v.* Hannibal, etc., R. Co., 80 Mo. 573.

New York.— Kennedy *v.* McAllaster, 31 N. Y. App. Div. 453, 52 N. Y. Suppl. 714.

Pennsylvania.— Dormer *v.* Alcatraz Paving Co., 16 Pa. Super. Ct. 407.

66. Bolden *v.* Southern R. Co., 123 N. C. 614, 31 S. E. 851; Cox *v.* Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848.

67. *Connecticut.*— Derwort *v.* Loomer, 21 Conn. 245.

Kentucky.— Dolfinger *v.* Fishback, 12 Bush 474.

Mississippi.— McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

North Carolina.— Jones *v.* American Warehouse Co., 138 N. C. 546, 51 S. E. 106.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 340; Jenkins *v.* Little Miami R. Co., 2 Disn. 49.

Pennsylvania.— West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311.

South Carolina.— Couch *v.* Charlotte, etc., R. Co., 22 S. C. 557.

Tennessee.— Whirley *v.* Whiteman, 1 Head 610.

Vermont.— Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

West Virginia.— Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

United States.— King *v.* Cleveland, 28 Fed. 835; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875.

See 37 Cent. Dig. tit. "Negligence," § 280.

Duty to use care.— In an action for injuries caused by the alleged negligence of defendant, the question whether defendant owed any duty to plaintiff is one of law for the court. Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; Schoonmaker *v.* Albertson, etc., Mach. Co., 51 Conn. 387; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Gibson *v.* Leonard, 37 Ill. App. 344; Cumberland, etc., R. Co. *v.* State, 37 Md. 156; Hunnewell *v.* Haskell, 174 Mass. 557, 55 N. E. 320; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875. Whether the requisite conduct has been observed by defendant is a question for the jury. Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; Cumberland, etc., R. Co. *v.* State, *supra*; Knight *v.* Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21; Fuller *v.* Citizens' Nat. Bank, *supra*.

for the court.[68] When the standard of duty is not fixed, but variable, and shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with.[69] But when the standard is fixed, when the measure of duty is defined by the law and is the same under all circumstances, its omission is negligence, and may be so declared by the court.[70] And so, when there is such an obvious disregard of duty and safety

68. *California.*— Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351.

Colorado.—Williams *v.* Sleepy Hollow Min. Co., 37 Colo. 62, 86 Pac. 337, 7 L. R. A. N. S. 1170; Allen *v.* Florence, etc., R. Co., 15 Colo. App. 213, 61 Pac. 491.

Connecticut.—Fiske *v.* Forsyth Dyeing, etc., Co., 57 Conn. 118, 17 Atl. 356; Park *v.* O'Brien, 23 Conn. 339.

Delaware.— Burton *v.* Philadelphia, etc., R. Co., 4 Harr. 252. See also Goldstein *v.* People's R. Co., 5 Pennew. 306, 60 Atl. 975; Neal *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 467, 53 Atl. 338.

Georgia.— Rome *v.* Sudduth, 121 Ga. 420, 49 S. E. 300; Robert Portner Brewing Co. *v.* Cooper, 116 Ga. 171, 42 S. E. 408; Woolfolk *v.* Macon, etc., R. Co., 56 Ga. 457; Wright *v.* Georgia R., etc., Co., 34 Ga. 330.

Illinois.— Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Great Western R. Co. *v.* Haworth, 39 Ill. 346; Alton R., etc., Co. *v.* Webb, 119 Ill. App. 75 [*affirmed* in 219 Ill. 563, 76 N. E. 687]; Chicago Union Traction Co. *v.* Jacobson, 118 Ill. App. 383 [*affirmed* in 217 Ill. 404, 75 N. E. 508]; Pittsburgh, etc., R. Co. *v.* Moore, 110 Ill. App. 304; Swift *v.* Griffin, 109 Ill. App. 414; Chicago, etc., R. Co. *v.* Gore, 105 Ill. App. 16 [*affirmed* in 202 Ill. 188, 66 N. E. 188, 95 Am. St. Rep. 224]; Illinois Cent. R. Co. *v.* Behrens, 101 Ill. App. 33; Chicago Great Western R. Co. *v.* Mohan, 88 Ill. App. 151 [*affirmed* in 187 Ill. 281, 58 N. E. 395]; West Chicago St. R. Co. *v.* Luka, 72 Ill. App. 60.

Indiana.— Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Iowa.—Allender *v.* Chicago, etc., R. Co., 37 Iowa 264.

Kansas.—Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199, 45 Pac. 956.

Kentucky.— Illinois Cent. R. Co. *v.* Proctor, 89 S. W. 714, 28 Ky. L. Rep. 598.

Massachusetts.—Woods *v.* Boston, 121 Mass. 337.

Michigan.— Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Nebraska.— Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Seyfer *v.* Otoe County, 66 Nebr. 566, 92 N. W. 756; Chicago, etc., R. Co. *v.* Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920; Union Pac. R. Co. *v.* Mertes, 39 Nebr. 448, 58 N. W. 105; Mathieson *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 747, 97 N. W. 243.

New Hampshire.— Paine *v.* Grand Trunk R. Co., 63 N. H. 623, 3 Atl. 634.

New Jersey.— Bliss *v.* Bergen County Traction Co., 64 N. J. L. 601, 46 Atl. 624; Moore *v.* Central R. Co., 24 N. J. L. 268.

New York.— Curtiss *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258 [*affirming* 20 Barb. 282].

North Carolina.— Jones *v.* American Warehouse Co., 138 N. C. 546, 51 S. E. 106. *Contra*, Pleasants *v.* Raleigh, etc., Air Line R. Co., 95 N. C. 195; Biles *v.* Holmes, 33 N. C. 16.

North Dakota.—Pyke *v.* Jamestown, (1906) 107 N. W. 359.

Pennsylvania.— West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

Rhode Island.— Bucci *v.* Waterman, 25 R. I. 125, 54 Atl. 1059.

Texas.— Citizens' R. Co. *v.* Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041; Galveston, etc., R. Co. *v.* Waldo, (Civ. App. 1895) 32 S. W. 783.

Wisconsin.— Kutchera *v.* Goodwillie, 93 Wis. 448, 67 N. W. 729; Kaples *v.* Orth, 61 Wis. 531, 21 N. W. 633; Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629; Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55.

United States.— Tacoma R., etc., Co. *v.* Hays, 110 Fed. 496, 49 C. C. A. 115.

See 37 Cent. Dig. tit. "Negligence," §§ 289, 303.

69. O'Neil *v.* East Windsor, 63 Conn. 150, 27 Atl. 237; Baker *v.* Westmoreland, etc., Natural Gas Co., 157 Pa. St. 593, 27 Atl. 789; Holmes *v.* Allegheny Traction Co., 153 Pa. St. 152, 25 Atl. 640; Delaware, etc., R. Co. *v.* Jones, 128 Pa. St. 308, 18 Atl. 330; Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311.

70. Augusta R., etc., Co. *v.* Smith, 121 Ga. 29, 48 S. E. 681; Robert Portner Brewing Co. *v.* Cooper, 116 Ga. 171, 42 S. E. 408; Savannah, etc., R. Co. *v.* Evans, 115 Ga. 315, 41 S. E. 631, 90 Am. St. Rep. 116; Western, etc., R. Co. *v.* Vaughan, 113 Ga. 354, 38 S. E. 851; Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563 [*citing* Arnold *v.* Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. Rep. 542]; Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Empire Transp. Co. *v.* Wamsutta Refining, etc., Co., 63 Pa. St. 14, 3 Am. Rep. 515; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172; Pittsburgh, etc., Pass. R. Co. *v.* Kane, 4 Pa. Cas. 188, 6 Atl. 845; Bensing *v.* Peoples Electric St. R. Co., 9 Pa. Super. Ct. 142; Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

as amounts to misconduct, the court may declare it to be negligence as matter of law.[71]

(B) *Ordinary Care.* The terms "ordinary care," "reasonable prudence," "due diligence," and such like, have a relative significance and cannot be arbitrarily defined. What constitutes "ordinary care" is a question of fact to be determined by the jury in each particular case from all the facts and circumstances in evidence.[72]

(C) *Wilful and Wanton Acts and Gross Negligence.* If negligence exists, its degree, whether slight, ordinary, or gross, depends upon the evidence, and is ordinarily a question for the jury.[73] So what evidence would or would not evince a willingness to inflict the injury complained of must be left solely to the jury in each individual case.[74]

(II) *Dangerous Substances, Machinery, and Other Instrumentalities* — (A) *Particular Acts or Omissions* — (1) Setting Fires. In an action for injuries caused by fire escaping from defendant's premises, whether, under all the circumstances of the case, defendant was justified in starting a fire upon his land is ordinarily a question for the jury.[75] Whether he exercised reasonable care and diligence to extinguish the fire,[76] or took other reasonable precautions to prevent it from spreading to adjacent property,[77] is also a question of fact. So also it is a question for the jury whether defendant was negligent in the operation of a steam thresher,[78] or in permitting sparks to escape from the smoke-stack of his mill.[79]

(2) Blasting and Other Dangerous Operations. Whether or not there has been negligence in the use and conduct by defendant of dangerous instrumentalities and operations whereby plaintiff has suffered injury is a question of fact for the jury.[80]

71. Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311.

72. *Georgia.*— Augusta, etc., R. Co. *v.* Kilian, 79 Ga. 234, 4 S. E. 165.

Illinois.— Wabash R. Co. *v.* Elliott, 98 Ill. 481; McLeansboro *v.* Trammel, 109 Ill. App. 524; Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600 [*affirmed* in 203 Ill. 295, 67 N. E. 807]; Toledo, etc., R. Co. *v.* Cline, 31 Ill. App. 563.

Maine.— Littlefield *v.* Biddeford, 29 Me. 310.

Maryland.— Cumberland, etc., R. Co. *v.* State, 37 Md. 156. But see Regester *v.* Regester, 104 Md. 1, 64 Atl. 286; Ewalt *v.* Harding, 16 Md. 160.

Tennessee.— Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485 [*affirming* 35 Fed. 176]; Haff *v.* Minneapolis, etc., R. Co., 14 Fed. 558, 4 McCrary 622; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.

See 37 Cent. Dig. tit. "Negligence," § 305.

73. Wabash R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273 [*affirming* 51 Ill. App. 656]; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211; Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; Texas, etc., R. Co. *v.* Hill, 71 Tex. 451, 9 S. W. 351.

74. Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Needham *v.* Louisville, etc., R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; Johnson *v.* Castleman, 2 Dana (Ky.) 377.

75. Needham *v.* King, 95 Mich. 303, 54 N. W. 891; Hays *v.* Miller, 70 N. Y. 112 [*affirming* 6 Hun 320].

The fact that immediately after starting a fire it got beyond control is enough to require that the jury pass on the question of negligence in setting the fire. Richards *v.* Schleusener, 41 Minn. 49, 42 N. W. 599.

Consequences of fire.— It is a question for the jury whether the consequences of the negligent act of one setting a fire ought to have been foreseen by him. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

76. Lieuallen *v.* Mosgrove, 37 Oreg. 446, 61 Pac. 1022; Grow *v.* Pottsville, 197 Pa. St. 337, 47 Atl. 195; McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584; Baylor *v.* Stevens, 16 Pa. Super. Ct. 365.

77. Lieuallen *v.* Mosgrove, 37 Oreg. 446, 61 Pac. 1022; Warden *v.* Miller, 112 Wis. 67, 87 N. W. 828.

78. McClelland *v.* Scroggin, 48 Nebr. 141, 66 N. W. 1123.

79. Carpenter *v.* Laswell, 63 S. W. 609, 23 Ky. L. Rep. 686; Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580.

80. **Blasting.**— Whether or not defendant exercised reasonable care in the operation of blasting at the time and under the circumstances disclosed by the testimony is a question for the jury to determine (Koster *v.* Noonan, 8 Daly (N. Y.) 231; Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; Smith *v.* Day, 128 Fed. 561, 63 C. C. A. 189), provided the locality in which the blasting is carried on is not such as to

(3) Selling Injurious Articles. In an action against one for selling articles of food unfit for consumption, the question of defendant's negligence in such sale is for the jury.[81]

(4) Leaving Machinery Unprotected. Whether machinery is dangerous and known to be such, because it was attractive to, and known to be frequented by, children, and whether defendant was guilty of negligence in leaving it uncovered and unprotected, are questions for the jury.[82]

(B) *Knowledge by Owner of Defect or Danger.* Where inspection warrants the conclusion that an appliance had long been defective, the owner's knowledge thereof is a question for the jury.[83] Proof that defects existed, and that defendant knew of them in time to have averted the accident, makes the question of defendant's negligence one of law for the court.[84]

(C) *Notices and Warnings.* It is the duty of persons engaged in dangerous operations to give notice to all persons about passing within the limits of possible danger; and the question of negligence in omitting to do so, if persons passing are injured, is for the jury.[85] So where the evidence is conflicting as to whether the warning given was sufficient, it is for the jury to determine on all the circumstances.[86]

(III) *Condition and Use of Land, Buildings, and Other Structures* — (A) *Particular Illustrations* — (1) Places Open to Public — (a) In General. The proprietor of a store,[87] public park,[88] or other place open to the pub-

render the blasting a nuisance and unlawful (Klepsch *v.* Donald, *supra*).

Tunneling.— It is a question for the jury whether injuries to plaintiff's property were the unavoidable consequence of the non-negligent use of a usual and lawful method of tunneling or were caused by an omission to take the precautions in the use of that method that in the circumstances ordinary prudence would dictate. Fisher *v.* Ruch, 12 Pa. Super. Ct. 240.

Operation of engine.— Whether defendant was guilty of negligence in the operation of a gasoline engine with a noisy exhaust near a traveled highway is a question for the jury. Wolf *v.* Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517.

Discharging hot water into gutter.— The question of defendant's negligence in discharging hot water into a gutter whereby plaintiff was injured is properly submitted to the jury. Whiteman-McNamara Tobacco Co *v.* Warren, 66 S. W. 609, 23 Ky. L. Rep. 2120.

Explosion of boiler.— In an action for injuries caused by the explosion of a boiler on defendant's premises, evidence that it was old, rusty, and cracked is sufficient to take the case to the jury, on the question of negligence. Davis *v.* Charleston, etc., R. Co., 72 S. C. 112, 51 S. E. 552.

81. Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139.

82. Biggs *v.* Consolidated Barb Wire Co., 62 Kan. 492, 63 Pac. 740.

Turn-tables.— Alabama Great Southern R. Co. *v.* Crocker, 131 Ala. 584, 31 So. 561; Walsh *v.* Fitchburg R. Co., 67 Hun (N. Y.) 604, 22 N. Y. Suppl. 441; Jonasch *v.* Standard Gas Co., 56 N. Y. Super. Ct. 447, 4 N. Y. Suppl. 542 [*affirmed* in 117 N. Y. 641, 22 N. E. 1131]; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103; San Antonio, etc., R. Co. *v.* Skidmore, 27 Tex. Civ. App. 329, 65 S. W. 215.

Sufficiency of fastening for jury.— Where it is shown that the turn-table was unfastened by the child injured, the question of the sufficiency of the fastening used is one of fact for the jury. Edgington *v.* Burlington, etc., R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561.

83. Walton *v.* Ensign, 27 Ohio Cir. Ct. 505.

84. Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293.

85. Heinmiller *v.* Winston, 131 Iowa 32, 107 N. W. 1102, 117 Am. St. Rep. 405, 6 L. R. A. N. S. 150; Driscoll *v.* Newark, etc., Lime, etc., Co., 37 N. Y. 637, 97 Am. Dec. 761.

86. Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Healy *v.* Vorndran, 65 N. Y. App. Div. 353,

85. Heinmiller *v.* Winston, 131 Iowa 32, S. C. 593, 10 S. E. 1076.

87. Burns *v.* Dunham, etc., Co., 148 Cal. 208, 82 Pac. 959; Dent *v.* Grimm, 65 N. Y. App. Div. 81, 72 N. Y. Suppl. 471; Clopp *v.* Mear, 134 Pa. St. 203, 19 Atl. 504; Accousi *v.* G. A. Stowers Furniture Co., (Tex. Civ. App. 1905) 87 S. W. 861.

Splinter from floor entering foot.— The fact that a customer in defendant's store is injured by a splinter from the floor entering his foot is sufficient to authorize the submission to the jury of the question of defendant's negligence in permitting the floor to be in a dangerous condition. Russell *v.* Stewart Dry Goods Co., 56 S. W. 707, 22 Ky. L. Rep. 121.

88. Crowley *v.* Rochester Fireworks Co., 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. N. S. 330; Selinas *v.* Vermont State Agricultural

lic [89] is bound to keep it in a reasonably safe condition for all persons who may lawfully be there, and whether or not the required care has been exercised is generally a question of fact for the jury.

(b) Who Are Trespassers. Whether plaintiff was expressly or impliedly invited to go upon defendant's premises where he was injured by the defective condition thereof, or whether he acted as a trespasser or mere licensee in so doing, is a question for the jury.[90]

(2) Places Abutting On or Near Highways. How far from the margin of a highway the adjoining owner may make an excavation without being liable to persons who may fall into it is to be determined by the jury in each case, having regard to the knowledge of the traveler, the width of the highway, its surroundings and modes of use.[91] Whether an owner is negligent in failing to erect a barrier to guard an excavation or obstruction,[92] and whether that erected is sufficient for the purpose,[93] are also questions for the jury.

(3) Places Attractive to Children. Whether or not premises are sufficiently attractive to entice children into danger, and to suggest to defendant the probability of accident, is a matter to be determined by the jury.[94]

(4) Buildings and Other Structures. Whether the construction or maintenance of a building or other structure in the manner in which it was constructed or maintained constitutes negligence on the part of defendant is ordinarily a question for the jury under proper instructions.[95] In the erection of buildings facing streets, care must be exercised for the safety of those who have a right to use the pavements, and whether proper care was exercised in a particular case is ordinarily a question for the jury.[96]

(5) Elevators, Hoistways, and Shafts. In an action for personal injuries sustained by falling down an unguarded elevator shaft, the question of defendant's negligence is ordinarily for the jury.[97] So also whether defendant was negligent

Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; Camden Interstate R. Co. *v.* Williams, 140 Fed. 985, 72 C. C. A. 680 [*affirming* 138 Fed. 571].

89. **Fitness of structure for public use.**— Whether a structure to be put to a particular public use is reasonably fit or safe for that use is a question for the jury. Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829 [*reversing* 68 N. Y. App. Div. 601, 74 N. Y. Suppl. 301].

90. Mallock *v.* Derby, 190 Mass. 208, 76 N. E. 721; Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22; Phillips *v.* Burlington Library Co., 55 N. J. L. 307, 27 Atl. 478.

91. Beck *v.* Carter, 6 Hun (N. Y.) 604 [*affirmed* in 68 N. Y. 283, 23 Am. Rep. 175]. See also Dwyer *v.* McLaughlin, 31 Misc. (N. Y.) 510, 64 N. Y. Suppl. 380 [*reversing* 27 Misc. 187, 57 N. Y. Suppl. 220]; Duffy *v.* Sable Iron Works, 210 Pa. St. 326, 59 Atl. 1100.

92. Moynihan *v.* Whidden, 143 Mass. 287, 9 N. E. 645.

93. Mauerman *v.* Siemerts, 71 Mo. 101; Sutphen *v.* Hedden, 67 N. J. L. 324, 51 Atl. 721.

94. Brinkley Car Co. *v.* Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216; Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385. See also Kansas City, etc., R. Co. *v.* Matson, 68 Kan. 815, 75 Pac. 503.

95. Fishburn *v.* Burlington, etc., R. Co., (Iowa 1904) 98 N. W. 380; Miller *v.* Geo. B. Peck Dry Goods Co., 104 Mo. App. 609, 78 S. W. 682; Butts *v.* National Exchange Bank, 99 Mo. App. 168, 72 S. W. 1083; Anderson *v.* Northern Pac. R. Co., 34 Mont. 181, 85 Pac. 884; Kaiser *v.* Washburn, 55 N. Y. App. Div. 159, 66 N. Y. Suppl. 764; Schachne *v.* Barnett, 58 N. Y. Super. Ct. 145, 9 N. Y. Suppl. 717.

96. Decola *v.* Cowan, 102 Md. 551, 62 Atl. 1026; Dettmering *v.* English, 64 N. J. L. 16, 44 Atl. 855, 48 L. R. A. 106; Riegert *v.* Thackery, 212 Pa. St. 86, 61 Atl. 614. See also Leach *v.* Durkin, 98 Ill. App. 415.

97. *Alabama.*— O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158.

Illinois.— Fisher *v.* Cook, 23 Ill. App. 621 [*affirmed* in 125 Ill. 280, 17 N. E. 763].

Maryland.— Baltimore People's Bank *v.* Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403.

Massachusetts.—Wright *v.* Perry, 188 Mass. 268, 74 N. E. 328; Gordon *v.* Cummings, 152 Mass. 513, 25 N. E. 978, 23 Am. St. Rep. 846, 9 L. R. A. 640. See also Sullivan *v.* Marin, 175 Mass. 422, 56 N. E. 600.

Minnesota.— Birnberg *v.* Schwab, 55 Minn. 495, 56 N. W. 341.

New York.— Morrison *v.* Metropolitan Tel., etc., Co., 69 Hun 100, 23 N. Y. Suppl. 257, 30 Abb. N. Cas. 143; Dawson *v.* Sloan, 49 N. Y. Super. Ct. 304 [*affirmed* in 100 N. Y. 620]; Mullaney *v.* Spence, 15 Abb. Pr. N. S. 319. See also Pelzel *v.* Schepp, 83 N. Y. App. Div. 444, 82 N. Y. Suppl. 423.

See 37 Cent. Dig. tit. "Negligence," § 325.

in the operation of an elevator,[98] or movable scaffold,[99] or maintained it in a defective condition,[1] is properly submitted to the jury.

(B) *Knowledge of Owner or Occupant of Defect or Danger.* Where the owner of premises has knowledge of a defect therein and makes no effort to remedy it, the question of his negligence is properly submitted to the jury.[2] How far defendant knew or ought to have known the true condition of things is also a question for the jury.[3]

c. Proximate Cause — (I) *In General.* The question of the proximate cause of an injury is ordinarily one of fact for the jury;[4] but where the question is presented by demurrer to the declaration it is one of law for the court.[5] Whether or not the evidence tends to prove that negligence was the proximate cause of the injury is a question for the court.[6]

(II) *Consequences That Should Have Been Foreseen.* In an action for injuries caused by defendant's negligence, whether or not the injurious consequences that resulted from such negligence are such as ought reasonably to have been foreseen is for the jury.[7]

(III) *Remote Consequences.* Where fire set out by defendant is communicated to plaintiff's property through an intervening building, the question of remote and proximate cause is for the jury.[8] So also where a passenger is wrongfully put off a train and is killed by another train, the question whether his death

98. Belvedere Bldg. Co. *v.* Bryan, 103 Md. 514, 64 Atl. 44.

99. Lauritsen *v.* American Bridge Co., 87 Minn. 518, 92 N. W. 475.

1. **Whether an automatic gate three feet high is sufficient,** under N. Y. Laws (1892), c. 275, § 28, which requires elevator shafts to be protected by a substantial guard or gate, is a question for the jury, where it appears that the space between the elevator and the gate was only two and one-half inches, and that very little projection of a person's head into the elevator shaft would be dangerous. Guichard *v.* New, 84 Hun (N. Y.) 54, 31 N. Y. Suppl. 1080.

2. Spaine *v.* Stiner, 51 N. Y. App. Div. 481, 64 N. Y. Suppl. 655 [*affirmed* in 168 N. Y. 666, 61 N. E. 1135]; Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809.

3. Pitcher *v.* Lennon, 16 Misc. (N. Y.) 609, 38 N. Y. Suppl. 1007 [*affirmed* in 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156]; Ferris *v.* Aldrich, 12 N. Y. Suppl. 482.

4. *Illinois.*—Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501 [*reversing* 90 Ill. App. 134]; West Chicago St. R. Co. *v.* Feldstein, 169 Ill. 139, 48 N. E. 193 [*affirming* 69 Ill. App. 36]; East St. Louis R. Co. *v.* Hessling, 116 Ill. App. 125; Southern R. Co. *v.* Drake, 107 Ill. App. 12; True, etc., Co. *v.* Woda, 104 Ill. App. 15; Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; Norris *v.* Illinois Cent. R. Co., 88 Ill. App. 614.

Indiana.—Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478.

Kansas.— Atchison, etc., R. Co. *v.* Parry, 67 Kan. 515, 73 Pac. 105.

Maine.— Bowden *v.* Derby, 99 Me. 208, 58 Atl. 993.

Minnesota.— O'Malley *v.* St. Paul, etc., R. Co., 43 Minn. 289, 45 N. W. 440.

Nebraska.— Kitchen *v.* Carter, 47 Nebr. 776, 66 N. W. 855.

South Carolina.— Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802.

Texas.— Gulf, etc., R. Co. *v.* Boyce, (Civ. App. 1905) 87 S. W. 395.

Wisconsin.— Deisenrieter *v.* Kraus-Merkel Malting Co., 96 Wis. 279, 72 N. W. 735; Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

United States.— Southern R. Co. *v.* Carson, 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907 [*affirming* 68 S. C. 55, 46 S. E. 525]; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256 [*affirming* 14 Fed. Cas. No. 7,664]; Cole *v.* German Sav., etc., Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Missouri, etc., R. Co. *v.* Byrne, 100 Fed. 359, 40 C. C. A. 402.

See 37 Cent. Dig. tit. "Negligence," § 327.

5. Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. 325.

6. Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508.

7. *Colorado.*— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Michigan.— Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

Minnesota.— Martin *v.* North Star Iron Works, 31 Minn. 407, 18 N. W. 109.

New Hampshire.— Gilman *v.* Noyes, 57 N. H. 627.

Vermont.— Saxton *v.* Bacon, 31 Vt. 540.

See 37 Cent. Dig. tit. "Negligence," § 328.

8. Gram *v.* Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972; Adams *v.* Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Kellogg *v.* Milwaukee, etc., R. Co., 14 Fed.

was traceable directly to his removal from the train should be submitted to the jury.[9] If, however, the court is able to say that the injury is the remote and not the proximate result of defendant's acts, it is proper to so direct the jury.[10]

(IV) *Concurrent Causes.* Where the negligence of two parties has contributed to an injury, it is a question for the jury to say whether it was the negligence of the one or of the other that was the proximate cause of the injury.[11]

(V) *Inevitable Accident.* Where the evidence is conflicting as to whether the injury was the result of negligence or inevitable accident the question is properly left to the jury.[12]

d. Contributory Negligence — (I) *In General* — (A) *What Constitutes.* The want of ordinary care constituting contributory negligence must be determined from the facts disclosed in each particular case and is generally a question of fact for the jury,[13] except where the exact standard of duty is fixed,[14] or the negligence is gross and inexcusable.[15]

(B) *Knowledge of Danger* — (1) In General. The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as matter of law, but the question should be submitted to the jury.[16]

Cas. No. 7,664, 5 Dill. 537 [*affirmed* in 94 U. S. 469, 24 L. ed. 256].

9. Guy *v.* New York, etc., R. Co., 30 Hun (N. Y.) 399.

10. Stone *v.* Boston, etc., R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

11. Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616 [*affirmed* in 207 Ill. 478, 69 N. E. 882]; Van Houten *v.* Fleischman, 1 Misc. (N. Y.) 130, 20 N. Y. Suppl. 643 [*affirmed* in 142 N. Y. 624, 37 N. E. 565]; Venbuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770. *Compare* Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 69 Pac. 338.

12. Montgomery *v.* Wilmington, etc., R. Co., 51 N. C. 464.

13. *Alabama.*— Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566.

Georgia.— Cleveland *v.* Central R. Co., 73 Ga. 793.

Illinois.— Siegel *v.* Norton, 209 Ill. 201, 70 N. E. 636; Chicago, etc., R. Co. *v.* Blaul, 175 Ill. 183, 51 N. E. 895 [*affirming* 70 Ill. App. 518]; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444 [*affirmed* in 212 Ill. 268, 72 N. E. 423]; Chicago, etc., R. Co. *v.* Willard, 111 Ill. App. 225; Chicago, etc., R. Co. *v.* Burridge, 107 Ill. App. 23 [*reversed* on other grounds in 211 Ill. 9, 71 N. E. 836]; Toledo, etc., R. Co. *v.* Deliplane, 106 Ill. App. 634; Chicago City R. Co. *v.* Leach, 104 Ill. App. 30 [*reversed* on other grounds in 208 Ill. 198, 70 N. E. 222, 106 Am. St. Rep. 216]; Elgin, etc., R. Co. *v.* Duffy. 93 Ill. App. 463 [*affirmed* in 191 Ill. 489, 61 N. E. 432]; Dixon *v.* Scott, 74 Ill. App. 277; West Chicago St. R. Co. *v.* Walz, 62 Ill. App. 443.

Indiana.—Ramsey *v.* Rushville, etc., Gravel Road Co., 81 Ind. 394.

Iowa.— Allender *v.* Chicago, etc., R. Co., 37 Iowa 264.

Kansas.— Christ *v.* Wichita Gas, etc., Co., (1905) 83 Pac. 199; Kansas City, etc., R. Co. *v.* Owen, 25 Kan. 419.

Kentucky.— Ford *v.* Robinson-Pettett Co., 65 S. W. 793, 23 Ky. L. Rep. 1654.

Maine.— Coombs *v.* Mason, 97 Me. 270, 54 Atl. 728.

Maryland.— Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 5 Atl. 329.

Massachusetts.— Stewart *v.* Harvard College, 12 Allen 58.

Minnesota.— Erd *v.* St. Paul, 22 Minn. 443.

Mississippi.— Illinois Cent. R. Co. *v.* Sims, 77 Miss. 325, 27 So. 527, 49 L. R. A. 322.

Missouri.— Deland *v.* Cameron, 112 Mo. App. 704, 87 S. W. 597.

Nebraska.— Mathiesen *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 747, 97 N. W. 243.

New Jersey.—Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Pendril *v.* Second Ave. R. Co., 43 How. Pr. 399; Hackford *v.* New York Cent., etc., R. Co., 43 How. Pr. 222 [*affirmed* in 53 N. Y. 654].

North Dakota.— Pyke *v.* Jamestown, 15 N. D. 157, 107 N. W. 359.

South Carolina.— Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

Tennessee.— Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734; Mitchell *v.* Nashville, etc., R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426.

Texas.— International, etc., R. Co. *v.* Ormond, 64 Tex. 485; Western Union Tel. Co. *v.* Salter, (Civ. App. 1906) 95 S. W. 549; Martin *v.* Missouri Pac. R. Co., 3 Tex Civ. App. 133, 22 S. W. 195.

Utah.— Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381; Smith *v.* Rio Grande Western R. Co., 9 Utah 141, 33 Pac. 626.

Vermont.— Fassett *v.* Roxbury, 55 Vt. 552.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516.

See 37 Cent. Dig. tit. "Negligence," § 333.

14. Union Traction Co. *v.* Sullivan, 38 Ind. App. 513, 76 N. E. 116.

15. Popp *v.* New York Cent., etc., R. Co., 4 Silv. Sup. (N. Y.) 243, 7 N. Y. Suppl. 249.

16. *Michigan.*— Brezee *v.* Powers, 80 Mich. 172, 45 N. W. 130.

Missouri.—Young *v.* Waters-Pierce Oil Co., 185 Mo. 634, 84 S. W. 929.

(2) Precautions Against Known Danger. The question as to whether a party injured is chargeable with contributory negligence in not avoiding a known danger is usually a question for the jury.[17]

(c) *Duty to Observe Danger.* Whether an injured person was guilty of contributory negligence in failing to observe the danger is usually for the jury to determine under the particular facts of the case.[18]

(d) *Acts in Emergencies* — (1) In General. Failure to exercise the greatest prudence or the most exact judgment in a sudden emergency does not charge one with contributory negligence as matter of law. The question is one of fact for the jury.[19]

(2) Danger Incurred to Save Life. Whether a person is guilty of contributory negligence in rushing into a place of danger to save the life of another is a question for the jury.[20]

(e) *Subsequent Negligence Aggravating Injury.* Whether plaintiff, after being injured, used due diligence in determining whether medical aid was required, and acted as a prudent man should under the circumstances, is usually a question for the jury.[21]

(f) *Injury Avoidable Notwithstanding Contributory Negligence.* The question whether defendant could not, notwithstanding the imprudence or neglect of the person injured, have avoided doing injury by the exercise of reasonable care and diligence is for the jury.[22]

(g) *As Proximate Cause of Injury.* It is for the jury to determine whether, conceding contributory negligence, it in whole or in part proximately occasioned the injury,[23] unless the evidence introduced by plaintiff in attempting to prove his case shows that his own negligence was the proximate cause of the injury, in which case the question is one of law for the court.[24]

New York.— Morrissey *v.* Smith, 67 N. Y. App. Div. 189, 73 N. Y. Suppl. 673.

Washington.—Smith *v.* Dow, 43 Wash. 407, 86 Pac. 555.

United States.— Smith *v.* Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108 [*reversing* 86 Fed. 62].

See 37 Cent. Dig. tit. "Negligence," § 335.

17. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768; Foley *v.* Riverside Storage, etc., Co., 85 Mich. 7, 48 N. W. 154; Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043; Brown *v.* Brooks, 85 Wis. 290, 55 N. W. 395, 21 L. R. A. 255.

While previous knowledge of a dangerous situation or impending danger from which a person of ordinary intelligence might reasonably apprehend injury generally imposes upon one greater care and caution in approaching it, the degree of care required is a question for the jury. Palmer *v.* Dearing, 93 N. Y. 7.

18. *California.*— Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

Colorado.— Colorado Mortgage, etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Illinois.— Fisher *v.* Cook, 23 Ill. App. 621 [*affirmed* in 125 Ill. 280, 17 N. E. 763].

Massachusetts.— Hendricken *v.* Meadows, 154 Mass. 599, 28 N. E. 1054.

Michigan.— McCrum *v.* Weil, 125 Mich. 297, 84 N. W. 282; Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

New York.— Jones *v.* Charles H. Sagar Co., 14 N. Y. Suppl. 57.

See 37 Cent. Dig. tit. "Negligence," § 337.

19. Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692; Wright *v.* Boller, 3 N. Y. Suppl. 742 [*affirmed* in 123 N. Y. 630, 25 N, E. 952]; Stoughton *v.* Manufacturers' Natural Gas Co., 159 Pa. St. 64, 28 Atl. 227.

20. Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721; Manzella *v.* Rochester R. Co., 105 N. Y. App. Div. 12, 93 N. Y. Suppl. 457.

21. Toledo, etc., R. Co. *v.* Eddy, 72 Ill. 138; Morrison *v.* Long Island R. Co., 3 N. Y. App. Div. 205, 38 N. Y. Suppl. 393. See also Gulf, etc., R. Co. *v.* McMannewitz, 70 Tex. 73, 8 S. W. 66.

22. Memphis, etc., R. Co. *v.* Martin, 131 Ala. 269, 30 So. 827; Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 426; O'Flaherty *v.* Union R. Co., 45 Mo. 70, 100 Am. Dec. 343; Wheeler *v.* Gibbon, 126 N. C. 811, 36 S. E. 277.

23. *California.*— Smith *v.* Occidental, etc., R. Co., 99 Cal. 462, 34 Pac. 84.

Pennsylvania.— McCully *v.* Clarke, 40 Pa. St. 399, 80 Am. Dec. 584.

Tennessee.— Knoxville *v.* Cox, 103 Tenn. 368, 53 S. W. 734.

Utah.— Hall *v.* Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726.

Vermont.—Walker *v.* Westfield, 39 Vt. 246.

United States.— Ormsby *v.* Union Pac. R. Co., 4 Fed. 706, 2 McCrary 48.

See 37 Cent. Dig. tit. "Negligence," § 345.

24. See Silcock *v.* Rio Grande, etc., R. Co., 22 Utah 179, 61 Pac. 565.

(II) *Children and Others Under Disability*—(A) *In General.* Whether a child has sufficient capacity to understand the danger involved in a certain act, so as to charge him with contributory negligence, is ordinarily a question for the jury.[25] It is also a question for the jury to determine under all the facts whether a child exercised such care and discretion as might reasonably be expected of one of his age, capacity, and experience, situated as he was.[26]

(B) *Intoxicated Persons.* While plaintiff's intoxication is not conclusive on the question of his contributory negligence, it is a question for the jury whether, under all the circumstances of the case, such intoxication contributed to produce the injury.[27]

e. Imputed Negligence—(I) *Husband and Wife.* Whether an injury to a wife was caused by the negligence of her husband in leaving her in a place of

25. *Georgia.*— Savannah, etc., R. Co. *v.* Smith, 93 Ga. 742, 21 S. E. 157; Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Central R., etc., Co. *v.* Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634.

Illinois.— Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25; Atchison, etc., R. Co. *v.* Roemer, 59 Ill. App. 93.

Iowa.— Edgington *v.* Burlington, etc., R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561.

Kansas.— Biggs *v.* Consolidated Barb Wire Co., 62 Kan. 492, 63 Pac. 740.

Kentucky.— Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

Missouri.—Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

Ohio.— Ludtke *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120.

South Carolina.— Morrow *v.* Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24.

Texas.— St. Louis, etc., R. Co. *v.* Shiflet, (1900) 58 S. W. 945; Avey *v.* Galveston, etc., R. Co., (1891) 17 S. W. 31; Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103.

Wisconsin.— Holdridge *v.* Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

See 37 Cent. Dig. tit. "Ngeligence," §§ 347, 347½, 348.

Whether child sui juris.— It is a question for the jury to determine whether a child is *sui juris* unless the child is of so very tender years that the court can safely decide the fact. Denver City Tramway Co. *v.* Nicholas, 35 Colo. 462, 84 Pac. 813; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, 38 N. E. 837; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104, 21 N. E. 712 [*reversing* 46 Hun 184]; Gerber *v.* Boorstein, 113 N. Y. App. Div. 808, 99 N. Y. Suppl. 1091; Hill *v.* Baltimore, etc., R. Co., 75 N. Y. App. Div. 325, 78 N. Y. Suppl. 134; Penny *v.* Rochester R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Suppl. 172 [*affirmed* in 154 N. Y. 770, 49 N. E. 1101]; Kitchell *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 99, 39 N. Y. Suppl. 741; Bennett *v.* Brooklyn Heights R. Co., 1 N. Y. App. Div. 205, 37 N. Y. Suppl. 447.

The fact that a child of five is unusually intelligent does not render it proper to regard it as *sui juris.* Ryder *v.* New York, 50 N. Y. Super. Ct. 220.

Dependent on intelligence and character of danger.— A child's responsibility for contributory negligence depends upon his knowledge and experience, and upon the character of the danger to which he is exposed, and the question is generally one for the jury. Dynes *v.* Bromley, 208 Pa. St. 633, 57 Atl. 1123; Parker *v.* Washington Electric St. R. Co., 207 Pa. St. 438, 56 Atl. 1001; Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482.

26. *Kentucky.*— Owensboro *v.* York, 117 Ky. 294, 77 S. W. 1130, 25 Ky. L. Rep. 1397, 1439.

Maryland.—McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Missouri.—Spillane *v.* Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Gass *v.* Missouri Pac. R. Co., 57 Mo. App. 574.

New Jersey.— Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.—Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52; Guichard *v.* New, 84 Hun 54, 31 N. Y. Suppl. 1080; Moebus *v.* Hermann, 38 Hun 370 [*affirmed* in 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440]; Jones *v.* Utica, etc., R. Co., 36 Hun 115; Haycroft *v.* Lake Shore, etc., R. Co., 2 Hun 489 [*affirmed* in 64 N. Y. 636].

North Carolina.— Rolin *v.* R. J. Reynolds Tobacco Co., 141 N. C. 300, 53 S. E. 891, twelve years.

United States.— Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

See 37 Cent. Dig. tit. "Negligence," §§ 347, 347½, 348.

Children up to the age of seven years are, as matter of law, incapable of being guilty of contributory negligence; after that age they are capable of being guilty of contributory negligence, but whether in any particular case they have been so guilty is a question of fact to be determined by the jury. Cleveland, etc., R. Co. *v.* Scott, 111 Ill. App. 234.

27. Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Rhyner *v.* Menasha, 107 Wis. 201, 83 N. W. 303; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554.

danger,[28] or in failing to warn her of impending danger of which he was aware,[29] is a question for the jury.

(II) *Owner or Driver of Vehicle and Occupant.* The question as to whether plaintiff and the driver of a private vehicle who were at the time upon an errand together were engaged in a common enterprise which would render each responsible for the other's negligence is for the jury.[30]

(III) *Parent or Custodian and Child.* In an action by an infant for injuries, the question as to negligence on the part of the parents or custodian of the child is generally for the jury.[31]

f. Comparative Negligence. In an action for personal injuries, the question of comparative negligence is generally for the jury.[32]

3. Instructions — a. In General — (I) *Presumptions and Burden of Proof* — (A) *Presumptions.* An instruction which tells a jury that, upon a certain showing, a presumption of negligence exists is misleading, where it does not likewise instruct the jury that such presumption is rebuttable.[33] An instruction that negligence is not to be inferred from the happening of the accident is likewise misleading,[34] when the accident was of such a nature as to raise, in connection with the other evidence, an inference of negligence.[35]

28. Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35.

29. Nanticoke *v.* Warne, 106 Pa. St. 373.

30. Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152.

It cannot be said, as matter of law, that negligence of the driver of an insurance patrol wagon in colliding with a street car is not imputable to an employee of the insurance patrol, riding to a fire, on the wagon, on a seat with the driver and ringing the bell. Adler *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 877.

31. *California.*—Higgins *v.* Deeney, 78 Cal. 578, 21 Pac. 428.

Georgia.— Ferguson *v.* Columbus, etc., R. Co., 75 Ga. 637.

Illinois.— True, etc., Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369; McNulta *v.* Jenkins, 91 Ill. App. 309.

Iowa.— Payne *v.* Humeston, etc., R. Co., 70 Iowa 584, 31 N. W. 886.

Maine.— O'Brien *v.* McGlinchy, 68 Me. 552.

Massachusetts.— Mellen *v.* Old Colony St. R. Co., 184 Mass. 399, 68 N. E. 679; Walsh *v.* Loorem, 180 Mass. 18, 61 N. E. 222, 91 Am. St. Rep. 263; Butler *v.* New York, etc., R. Co., 177 Mass. 191, 58 N. E. 592; McNeil *v.* Boston Ice Co., 173 Mass. 570, 54 N. E. 257; Collins *v.* South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; Mulligan *v.* Curtis, 100 Mass. 512, 97 Am. Dec. 121; Lovett *v.* Salem, etc., R. Co., 9 Allen 557.

Michigan.— Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 504.

Missouri.— Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588.

New York.— Weil *v.* Dry-Dock, etc., R. Co., 119 N. Y. 147, 23 N. E. 487; Chrystal *v.* Troy, etc., R. Co., 105 N. Y. 164, 11 N. E. 380; Fallon *v.* Central Park, etc., R. Co., 64 N. Y. 13 [*affirming* 6 Daly 8]; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Mangam *v.* Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66 [*affirming* 36 Barb. 230]; Jetter *v.* New York, etc., R. Co., 2 Abb. Dec. 458; Burke *v.* Borden's Condensed Milk Co., 98 N. Y. App. Div. 219, 90 N. Y. Suppl. 527; Kennedy *v.* Hill Bros. Co., 54 N. Y. App. Div. 29, 66 N. Y. Suppl. 280; Kitchell *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 99, 39 N. Y. Suppl. 741; Ames *v.* Broadway, etc., R. Co., 56 N. Y. Super. Ct. 3, 4 N. Y. Suppl. 803 [*affirmed* in 122 N. Y. 643, 25 N. E. 956]; Ryder *v.* New York, 50 N. Y. Super. Ct. 220; Thies *v.* Thomas, 77 N. Y. Suppl. 276; Barry *v.* Second-Ave. R. Co., 16 N. Y. Suppl. 518, 520 [*affirmed* in 136 N. Y. 669, 33 N. E. 336]; Fisselmayer *v.* Third Ave. R. Co., 2 N. Y. St. 75.

Pennsylvania.—Duffy *v.* Sable Iron Works, 210 Pa. St. 326, 59 Atl. 1100; Jones *v.* United Traction Co., 201 Pa. St. 346, 50 Atl. 827; Muhlhause *v.* Monongahela Street R. Co., 201 Pa. St. 244, 50 Atl. 940; Corpies *v.* Sand Co., 31 Pa. Super. Ct. 107; Flaherty *v.* Scranton Gas, etc., Co., 30 Pa. Super. Ct. 446.

Vermont.— Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513.

West Virginia.— Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240.

Wisconsin.— O'Brien *v.* Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424; Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

See 37 Cent. Dig. tit. "Negligence," § 352.

32. North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186; St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409; Pittsburgh, etc., R. Co. *v.* Callaghan, 50 Ill. App. 676.

33. Chicago, etc., R. Co. *v.* Crose, 113 Ill. App. 547 [*affirmed* in 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135]; Chicago, etc., R. Co. *v.* Jamieson, 112 Ill. App. 69.

34. West Chicago St. R. Co. *v.* Petters, 196 Ill. 298, 63 N. E. 662 [*affirming* 95 Ill. App. 479].

35. Olson *v.* Great Northern R. Co., 68 Minn. 155, 71 N. W. 5.

(B) *Burden of Proof*— (1) As to Negligence. In an action for personal injuries the jury should be fully instructed as to the duty of plaintiff to make out affirmatively every element essential to recovery,[36] and it is error to refuse such a charge.[37] The court should instruct that the charge of negligence must be proved by plaintiff by a preponderance of the evidence, and that negligence cannot be presumed.[38] Such an instruction is not in conflict with a charge that the happening of an accident is *prima facie* evidence of negligence.[39] An erroneous instruction on the burden of proof is not neutralized and rendered harmless by a subsequent instruction stating the rule correctly.[40]

(2) As to Contributory Negligence. Where plaintiff is bound to make out a case clear of contributory negligence, it is not error to speak of this in a charge as a burden resting on him.[41] In such jurisdictions as require defendant to show contributory negligence on the part of plaintiff, an instruction to this effect should be given,[42] and a charge in effect instructing the jury that the burden is on plaintiff to prove want of contributory negligence is erroneous,[43] and properly refused.[44] When, however, the issue of contributory negligence is raised by plaintiff's own evidence, it is error to instruct that the burden of proving contributory negligence is on defendant,[45] where such instruction is calculated to induce the jury to believe that contributory negligence could only be proven by defendant's own witnesses, instead of by the whole evidence.[46] If the effect of the instruction is not to withdraw from defendant the benefit of plaintiff's evidence on such issue,[47] or if the court expressly adds that the fact of contributory negli-

36. Cooley *v.* Philadelphia Tract. Co., 189 Pa. St. 563, 42 Atl. 288; Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493, holding that an instruction that the burden is on plaintiff to make out his case by a preponderance of the evidence is not objectionable as imposing on plaintiff the burden of proving that he was not guilty of contributory negligence.

37. Reaney *v.* Standard Oil Co., 10 N. Y. App. Div. 326, 41 N. Y. Suppl. 768.

38. Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855.

Refusal of an instruction that negligence is never presumed is not error, where the jury are told that the burden is on plaintiff to establish negligence by a preponderance of the evidence. Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

In an action against several defendants an instruction that the burden of proof was on plaintiff to show by a preponderance of the testimony that defendants, or one of them, was guilty of negligence which resulted directly in decedent's death, is erroneous, as authorizing a recovery against all of defendants on proof of the negligence of one of them. Standard Light, etc., Co. *v.* Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931.

Shifting of burden of proof.— It is error to charge a jury that when evidence raising a presumption of negligence has been given by plaintiff, the burden of proof shifts to defendant. Jones *v.* Union R. Co., 18 N. Y. App. Div. 267, 46 N. Y. Suppl. 321.

39. Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

40. Linden *v.* Anchor Min. Co., 20 Utah 134, 58 Pac. 355.

41. Heiss *v.* Lancaster, 203 Pa. St. 260, 52 Atl. 201.

42. Forrester *v.* Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401; Houston, etc., R. Co. *v.* Bulger, 35 Tex. Civ. App. 478, 80 S. W. 557; Mobile, etc., R. Co. *v.* Wilson, 76 Fed. 127, 22 C. C. A. 101.

An instruction requiring defendant to "satisfy" the jury that plaintiff had been guilty of contributory negligence is erroneous, since a preponderance of the evidence is sufficient. Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

43. O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158; Quill *v.* Southern Pac. Co., 140 Cal. 268, 73 Pac. 991 (holding that in an action for negligent killing an instruction that in order to hold defendant liable it must appear that the deceased was without fault is not erroneous as shifting the burden of proof, and telling the jury plaintiff must affirmatively show lack of contributory negligence); Nichols *v.* Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

44. Reiter-Connolly Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 So. 280.

45. North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; Durrell *v.* Johnson, 31 Nebr. 796, 48 N. W. 890; Missouri, etc., R. Co. *v.* Jolly, 31 Tex. Civ. App. 512, 72 S. W. 871.

46. Indianapolis *v.* Cauley, 164 Ind. 304, 73 N. E. 691; Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; Cook *v.* Missouri Pac. R. Co., 94 Mo. App. 417, 68 S. W. 230; Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863; Gulf, etc., R. Co. *v.* Robinson, (Tex. Civ. App. 1903) 72 S. W. 70; Denison, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1902) 70 S. W. 322, (Civ. App. 1903) 71 S. W. 292.

47. *Indiana.*— Winamac *v.* Stout, 165 Ind. 365, 75 N. E. 158, 651.

gence need not be established by defendant's evidence, but that it is sufficient if it is made to appear by a preponderance of all the evidence in the case,[48] such an instruction may properly be given.

(II) *Invasion of Province of Jury*—(A) *Acts or Omissions Constituting Negligence.*[49] The existence of negligence should be passed upon by the jury as any other fact, and it is improper to instruct that a certain fact or group of facts amounts to negligence *per se*,[50] unless such acts are declared by law to be negligence *per se*,[51] or are such as to induce an inference of negligence in all reasonable minds.[52] At most the jury should be instructed that such facts, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence.[53]

(B) *Acts or Omissions Constituting Contributory Negligence.*[54] Subject to the same exceptions stated in the preceding section,[55] an instruction which states as a rule of law what facts would constitute contributory negligence is erroneous and properly refused.[56]

Missouri.— Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601.

Texas.— Gulf, etc., R. Co. *v.* Elmore, 35 Tex. Civ. App. 56, 79 S. W. 891.

Washington.— Prior *v.* Eggert, 39 Wash. 481, 81 Pac. 929.

Wisconsin.— Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322.

United States.— Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. ed. 296.

See 37 Cent. Dig. tit. "Negligence," § 355.

48. Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985; Evansville, etc., R. Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608; Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 73 S. W. 857.

49. **Negligence as question of fact for jury** see *supra*, VIII, D, 2, a, b.

50. *Connecticut.*— Williams *v.* Clinton, 28 Conn. 264.

Georgia.— Central R. Co. *v.* Hamilton, 71 Ga. 461.

Illinois.— Pittsburg, etc., R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499 [*affirming* 107 Ill. App. 254]; New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; St. Louis, etc., Co. *v.* Hopkins, 100 Ill. App. 567; East St. Louis Connecting R. Co. *v.* Eggmann, 71 Ill. App. 32; Pennsylvania Co. *v.* McCaffrey, 68 Ill. App. 635; Virginia *v.* Plummer, 65 Ill. App. 419; East St. Louis, etc., Electric St. R. Co. *v.* Wachtel, 63 Ill. App. 181; Chicago, etc., R. Co. *v.* Bouck, 33 Ill. App. 123.

Kansas.—Atchison, etc., R. Co. *v.* Dorsett, 6 Kan. App. 922, 50 Pac. 64.

Missouri.— Huelsenkamp *v.* Citizens' R. Co., 34 Mo. 45. But see Casey *v.* Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330; Ravenscraft *v.* Missouri Pac. R. Co., 27 Mo. App. 617.

Nebraska.— Omaha, etc., R., etc., Co. *v.* Levinston, 49 Nebr. 17, 67 N. W. 887; Chicago, etc., R. Co. *v.* Oleson, 40 Nebr. 889, 59 N. W. 354; Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913.

New York.— Locke *v.* Waldron, 75 N. Y. App. Div. 152, 77 N. Y. Suppl. 405.

Pennsylvania.— Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114. But see Catawissa R. Co. *v.* Armstrong, 52 Pa. St. 282.

South Carolina.— Jones *v.* Charleston, etc., R. Co., 61 S. C. 556, 39 S. E. 758; Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567; Garrick *v.* Florida Cent., etc., R. Co., 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874.

Texas.— Denham *v.* Trinity County Lumber Co., 73 Tex. 78, 11 S. W. 151; Galveston, etc., R. Co. *v.* Davidson, 61 Tex. 204; Walker *v.* Herron, 22 Tex. 55; Galveston, etc., R. Co. *v.* Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389; Galveston, etc., R. Co. *v.* Harris, (Civ. App. 1896) 36 S. W. 776; Sabine, etc., R. Co. *v.* Hanks, 2 Tex. Civ. App. 306, 21 S. W. 947.

See 37 Cent. Dig. tit. "Negligence," § 358.

A charge that it is the duty of a party to do certain things is equivalent to declaring that failure to do so is negligence, and is properly refused. Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538.

51. Atlanta, etc., R. Co. *v.* Hudson, 123 Ga. 108, 51 S. E. 29; Georgia Cent. R. Co. *v.* McKinney, 118 Ga. 535, 45 S. E. 430; Milledgeville *v.* Wood, 114 Ga. 370, 40 S. E. 239.

52. Hibler *v.* McCartney, 31 Ala. 501; Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20 [*affirming* 31 Ill. App. 314]; Omaha, etc., R., etc., Co. *v.* Levinston, 49 Nebr. 17, 67 N. W. 887.

53. East St. Louis Connecting R. Co. *v.* Eggmann, 71 Ill. App. 32; Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913.

54. **Contributory negligence as question of fact for jury** see *supra*, VIII, D, 2, a, (I), (B), (II), (B), (III), (B).

55. See *supra*, VIII, D, 3, a, (II), (A).

56. *Georgia.*— Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020.

Illinois.— Peoria *v.* Gerber, 168 Ill. 318, 48 N. E. 152 [*affirming* 68 Ill. App. 255]; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406 [*affirming* 38 Ill. App. 33]; Chicago, etc., R. Co. *v.* Truitt, 68 Ill. App. 76; Rock Falls *v.* Wells, 59 Ill. App. 155.

Indiana.— Parke County *v.* Sappenfield, 6 Ind. App. 577, 33 N. E. 1012.

(III) *Applicability to Pleadings and Evidence* — (A) *Negligence* — (1) In General. Where the petition alleges that the injury was the result of negligence and then sets up the specific acts of negligence relied on, the court should confine its instructions to those acts,[57] and it is error to charge the jury to find for plaintiff if defendant was guilty of negligence in any respect.[58] So also it is error to refuse to instruct that no recovery can be had for negligent acts not covered by the pleadings.[59] A charge to a jury on a phase of the case not warranted by the evidence is error.[60] Conversely an instruction ignoring testimony tending to show negligence,[61] or eliminating particular evidence of negligence from the considera-

Iowa.— Garrett *v.* Chicago, etc., R. Co., 36 Iowa 121.

Missouri.— Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

Pennsylvania.— Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226; Chautauqua Lake Ice Co. *v.* McLuckey, 8 Pa. Cas. 464, 11 Atl. 616.

Texas.— Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375; Texas, etc., R. Co. *v.* Wright, 62 Tex. 515; Hillsboro *v.* Jackson, (Civ. App. 1898) 44 S. W. 1010.

Wisconsin.—Jung *v.* Stevens Point, 74 Wis. 547, 43 N. W. 513.

United States.— See Langbein *v.* Swift, 121 Fed. 416 [*affirmed* in 127 Fed. 111, 62 C. C. A. 111].

See 37 Cent. Dig. tit. "Negligence," § 359.

Instruction taking question from jury.— An instruction, the effect of which would be to take the question of contributory negligence from the jury, is properly refused. Weinhold *v.* Acker, 49 N. Y. Super. Ct. 182; Carter *v.* Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754.

57. *Georgia.*— See Central R., etc., Co. *v.* Nash, 81 Ga. 580, 7 S. E. 808.

Illinois.— American Express Co. *v.* Risley, 179 Ill. 295, 53 N. E. 558; Chicago, etc., R. Co. *v.* Mock, 72 Ill. 141; Northern Milling Co. *v.* Mackey, 99 Ill. App. 57.

Indiana.—Chicago, etc., R. Co. *v.* Thrasher, 35 Ind. App. 58, 73 N. E. 829.

Iowa.— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 529, 93 N. W. 489; Beard *v.* Guild, 107 Iowa 476, 78 N. W. 201.

Kentucky.— Davis *v.* Paducah R., etc., Co., 68 S. W. 140, 24 Ky. L. Rep. 135; Sandy River Cannel Coal Co. *v.* Caudill, 60 S. W. 180, 22 Ky. L. Rep. 1175.

Michigan.— Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182.

Missouri.— Marr *v.* Bunker, 92 Mo. App. 651; Pryor *v.* Metropolitan St. R. Co., 85 Mo. App. 367.

New York.— Donohue *v.* Syracuse, etc., R. Co., 11 N. Y. App. Div. 525, 42 N. Y. Suppl. 808; Lee *v.* Vacuum Oil Co., 54 Hun 156, 7 N. Y. Suppl. 426.

Texas.— Freeman *v.* Carter, (Civ. App. 1904) 81 S. W. 81; Galveston, etc., R. Co. *v.* Karrer, (Civ. App. 1902) 70 S. W. 328; International, etc., R. Co. *v.* Eason, (Civ. App. 1896) 35 S. W. 208; Gulf, etc., R. Co. *v.* Younger, 10 Tex. Civ. App. 141, 29 S. W. 948; Gulf, etc., R. Co. *v.* Scott, (Civ. App. 1894) 27 S. W. 827.

See 37 Cent. Dig. tit. "Negligence," § 361.

Where plaintiff alleges negligence generally, and his evidence tends to show specific acts of negligence, a general charge, as broad as the petition, is erroneous. Mulderig *v.* St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

Defendant may request an instruction to that effect, although he does not object to evidence of other negligent acts, where they are not the subject of direct proof, but rather an inference deduced from other facts. East Tennessee Coal Co. *v.* Daniel, 100 Tenn. 65, 42 S. W. 1062.

58. Dallas, etc., R. Co. *v.* Harvey, (Tex. Civ. App. 1894) 27 S. W. 423.

Where no evidence of other negligence.— Where there is no evidence that defendant was negligent in any manner other than that charged in the declaration, a charge to find for plaintiff if they found defendant negligent is not error, although it does not limit the negligence to that alleged in the declaration. West Chicago St. R. Co. *v.* Musa, 180 Ill. 130, 54 N. E. 168.

59. Louisville, etc., R. Co. *v.* Wade, 46 Fla. 197, 35 So. 863.

60. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189.

Missouri.— Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82; Fairgrieve *v.* Moberly, 39 Mo. App. 31.

Nebraska.— Kilpatrick *v.* Richardson, 37 Nebr. 731, 56 N. W. 481.

New York.— Pollock *v.* Brooklyn, etc., R. Co., 15 N. Y. Suppl. 189 [*affirmed* in 133 N. Y. 624, 30 N. E. 1150].

Texas.— International, etc., R. Co. *v.* Eason, (Civ. App. 1896) 35 S. W. 208.

See 37 Cent. Dig. tit. "Negligence," § 361.

61. Burton *v.* Quincy, etc., R. Co., 111 Mo. App. 617, 86 S. W. 503; Gulf, etc., R. Co. *v.* Lankford, 9 Tex. Civ. App. 593, 29 S. W. 933.

An instruction singling out a circumstance going to prove negligence, and leaving the jury to determine it from that circumstance alone, disregarding other circumstances bearing on the question, is error. White *v.* Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 382; Bliss *v.* F. & M. Schaeffer Brewing Co., 67 N. J. L. 29, 50 Atl. 351; Dallas, etc., R. Co. *v.* Harvey, (Tex. Civ. App. 1894) 27 S. W. 423.

It is error to refuse an instruction as to an issue of negligence raised. Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24.

tion of the jury,[62] is error. A party need not, however, embrace in each requested instruction all the grounds of negligence averred in the different counts of the declaration.[63]

(2) Wilful, Wanton, or Reckless Acts. In an action for personal injuries, where there is no allegation or proof of wilful intent to injure, an instruction as to wilful injuries is erroneous.[64] Where, however, there is evidence tending to show wilful and wanton negligence on the part of defendant, it is proper to instruct thereon.[65] Where both negligence and wanton or intentional injury are charged in separate counts, a charge that plaintiff cannot recover unless wantonness or wilfulness are shown is erroneous, unless confined to the count alleging wantonness.[66]

(3) Gross Negligence. Where there is no proof of gross negligence and the declaration does not charge it, it is improper for the court to instruct the jury as to what damages they may assess in case they find defendant guilty of gross negligence.[67] Where there is evidence of gross negligence in a particular respect which has little or no relation to the casualty, an instruction as to gross negligence, if given, ought to be limited to the particular matter to which it is pertinent.[68]

(4) Inevitable Accident. Where there is evidence that the injury complained of was the result of an accident, defendant is entitled to a charge adjusted to this theory, even without a special request therefor.[69]

(B) *Proximate Cause.* An instruction as to proximate cause, not warranted by the evidence, is properly refused.[70] Although there is some evidence that plaintiff was injured entirely through the negligence of a third person, an instruction to find for plaintiff if defendant's negligence was the proximate cause of the injury is sufficient, in the absence of a request for a more definite charge.[71] Where there is no evidence that the alleged negligence of defendant was the proximate cause of the injury, omission to instruct that if defendant's negligence was not the proximate cause of the injury plaintiff could not recover is error.[72]

(C) *Contributory Negligence* — (1) In General. Where defendant pleads contributory negligence on the part of plaintiff, and there is evidence tending to show it, he is entitled to a charge submitting the question to the jury, and an instruction ignoring it is erroneous.[73] When, however, the issue of contributory negligence is not raised either by the pleadings or the evidence, it is proper for

62. Rylander *v.* Laursen, 124 Wis. 2, 102 N. W. 341.

63. Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396.

64. Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142; Denman *v.* Johnston, 85 Mich. 387, 48 N. W. 565.

Where the evidence tends to show negligence merely, an instruction submitting the question of wilful negligence is erroneous. Coal Run Coal Co. *v.* Coughlin, 19 Ill. App. 412.

Malicious negligence.— It is error, in a personal injury suit, to instruct as to malicious negligence in the absence of evidence of such negligence. Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222, 42 Pac. 699.

In Kentucky the statute creating wilful negligence has been repealed, and no instruction on that subject should now be given. Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646.

65. Baltimore, etc., R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197.

66. Birmingham R., etc., Co. *v.* Pinkard, 124 Ala. 372, 26 So. 880.

67. Chicago, etc., R. Co. *v.* Smith, 81 Ill. App. 364; Louisiana Western Extension R. Co. *v.* Carstens, (Tex. Civ. App. 1898) 47 S. W. 36.

In a case in which defendant is bound to use ordinary diligence, it is error for the court to charge that defendant is liable for gross negligence only. Brown Store Co. *v.* Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839.

68. Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576.

69. Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204.

70. Brush Electric Light, etc., Co. *v.* Lefevre, (Tex. Civ. App. 1900) 55 S. W. 396.

71. International, etc., R. Co. *v.* Bryant, (Tex. Civ. App. 1899) 54 S. W. 364.

72. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469.

73. *Colorado.*— Denver Tramway Co. *v.* Lassasso, 22 Colo. 444, 45 Pac. 409.

Illinois.— Moody *v.* Peterson, 11 Ill. App. 180.

Iowa.— Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909; Walker *v.* Decatur County, 67 Iowa 307, 25 N. W. 256.

Missouri.— Guenther *v.* St. Louis, etc., R. Co., 95 Mo. 286, 8 S. W. 371.

Texas.— St. Louis Southwestern R. Co. *v.*

the court to refuse to instruct the jury on the subject.[74] The court, in submitting the issue of contributory negligence, should confine the charge strictly to the specific acts pleaded and relied upon as evidence,[75] and should not enumerate certain acts which might have contributed to the injury, and omit the mention of other acts equally well established and equally likely to have had that effect.[76]

(2) Children and Others Under Disability — (a) Children. Where an infant plaintiff is not shown to have been of such exceptional capacity as to remove him from the class of infants presumptively held incapable of exercising discretion, an instruction on contributory negligence is unwarranted.[77] So where there is nothing in the case tending to show that negligence was not imputable to plaintiff by reason of his incapacity to exercise care, such question should not be submitted, by instruction, to the jury.[78] Where plaintiff is only a child, but no question is made, either in the pleading or the proof, as to his discretion, it is error to charge that less care is required of him than of an adult.[79] An instruc-

Everett, (Civ. App. 1905) 89 S. W. 457; Freeman *v.* Carter, (Civ. App. 1904) 81 S. W. 81; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099.

Vermont.— Eastman *v.* Curtis, 67 Vt. 432, 32 Atl. 232.

See 37 Cent. Dig. tit. "Negligence," § 365.

New trial should be awarded.— Where the evidence fairly presents the question of contributory negligence, and such defense is wholly ignored by the court in its charge, a new trial should be awarded. Chicago, etc., R. Co. *v.* Housh, 12 Ill. App. 88.

It is error to refuse a requested instruction on the subject of contributory negligence when that issue is raised by the pleadings or evidence. Missouri Pac. R. Co. *v.* Cassity, 44 Kan. 207, 24 Pac. 88.

When plaintiff's own evidence shows that he was guilty of contributory negligence, an instruction thereon should be given, although such negligence is not pleaded. Pim *v.* St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155.

74. *Colorado.*—White *v.* Trinidad, 10 Colo. App. 327, 52 Pac. 214.

Connecticut.— Churchill *v.* Rosebeck, 15 Conn. 359.

Georgia.— Bain *v.* Athens Foundry, etc., Works, 75 Ga. 718.

Iowa.— Lanning *v.* Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478.

Kentucky.— South Covington, etc., St. R. Co. *v.* Nelson, 89 S. W. 200, 28 Ky. L. Rep. 287.

Michigan.— Brower *v.* Edson, 47 Mich. 91, 10 N. W. 121.

Missouri.— Kelly *v.* Stewart, 93 Mo. App. 47; Brown *v.* Hannibal, etc., R. Co., 31 Mo. App. 661.

Ohio.— Pittsburgh, etc., R. Co. *v.* Fleming, 30 Ohio St. 480.

Texas.— Western Union Tel. Co. *v.* Bruner, (1892) 19 S. W. 149; Hirsch *v.* Ashe, 35 Tex. Civ. App. 495, 80 S. W. 650; Missouri, etc., R. Co. *v.* Tonahill, 16 Tex. Civ. App. 625, 41 S. W. 875; Gulf, etc., R. Co. *v.* Highy, (Tex. Civ. App. 1894) 26 S. W. 737.

See 37 Cent. Dig. tit. "Negligence," § 365.

When lack of contributory negligence admitted.— When it is admitted that plaintiff was without fault, it is error to give an instruction on the question of contributory negligence. Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

When there is no evidence that plaintiff had reason to apprehend disaster till the instant he was struck, an instruction as to the degree of care necessary on the part of one who has reason to apprehend disaster is properly refused as being inapplicable. West Chicago St. R. Co. *v.* McNulty, 166 Ill. 203, 46 N. E. 784.

An instruction assuming a want of due care and caution on the part of plaintiff is bad. Elwood *v.* Chicago City R. Co., 90 Ill. App. 397; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

75. Birmingham, etc., R. Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955; International, etc., R. Co. *v.* Wray, (Tex. Civ. App. 1900) 96 S. W. 74; Edwards *v.* Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761; Dallas, etc., El. R. Co. *v.* Harvey, (Tex. Civ. App. 1894) 27 S. W. 423.

76. Deep Min., etc., Co. *v.* Fitzgerald, 21 Colo. 533, 43 Pac. 210; Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096; Mobile, etc., R. Co. *v.* Wilson, 76 Fed. 127, 22 C. C. A. 101.

Making question dependent on one fact.— An instruction making the question of contributory negligence turn upon one isolated fact is erroneous. Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

Requested instruction ignoring facts in issue.— A requested instruction as to contributory negligence based on an incomplete statement of the facts in issue and bearing on the question is properly refused. New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562. See also Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

77. Vicksburg *v.* McLain, 67 Miss. 4, 6 So. 774.

78. Chicago, etc., R. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Lebanon Light, etc., Co. *v.* Griffin, 139 Ind. 476, 39 N. E. 62.

79. San Antonio, etc., R. Co. *v.* Jazo, (Tex. Civ. App. 1894) 25 S. W. 712.

tion as to the *quantum* of care expected from a child, which stated the age of the child to be other than that which the evidence showed it to be, is prejudicial error.[80]

(b) Others Under Disability. Where there is evidence that plaintiff was intoxicated at the time of his injury, it is error to refuse to instruct as to the effect of such intoxication upon his right to recover.[81]

(3) As Proximate Cause of Injury. It is misleading and erroneous for the court to instruct the jury that negligence on the part of plaintiff remotely contributing to the injury is not material, when in fact, if there was any negligence at all, it was clearly direct and proximate and not remote nor far removed from the injury.[82]

(4) Presumption of Exercise of Ordinary Care. Where, in an action for personal injuries, the evidence tends to show contributory negligence on the part of plaintiff, it is error to instruct that the law presumes plaintiff to have been in the exercise of ordinary care.[83]

(d) *Imputed Negligence.* Where there is no evidence of a joint undertaking or enterprise on the part of the driver of a vehicle and the occupant, a charge on the theory of imputed negligence is properly refused.[84]

b. Negligence — (i) *Nature and Definition.* In the absence of a request for such an instruction, it is usually held unnecessary for the court to give an abstract definition of the term "negligence,"[85] when the jury are correctly instructed upon the specific negligence under consideration.[86] If such an instruction be given, it is sufficient if it is so substantially correct as not to be misleading.[87]

80. Mester *v.* Wuest, 57 Ill. App. 122.

81. Bradley *v.* Second Ave. R. Co., 8 Daly (N. Y.) 289.

82. Chicago, etc., R. Co. *v.* Prouty, 55 Kan. 503, 40 Pac. 909; Atchison, etc., R. Co. *v.* Plunkett, 25 Kan. 188.

83. Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Myers *v.* Kansas City, 108 Mo. 480, 18 S. W. 914; Rapp *v.* St. Joseph, etc., R. Co., 106 Mo. 423, 17 S. W. 487; Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183, 11 S. W. 569.

84. Gulf, etc., R. Co. *v.* Slater, 22 Tex. Civ. App. 583, 56 S. W. 216.

85. Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Edelmann *v.* St. Louis Transfer Co., 3 Mo. App. 503; Galveston, etc., R. Co. *v.* Holyfield, (Tex. Civ. App. 1902) 70 S. W. 221; May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416; Western Union Tel. Co. *v.* Engler, 75 Fed. 102, 21 C. C. A. 246. But see Covington Saw Mill, etc., Co. *v.* Drexilius, 120 Ky. 493, 87 S. W. 266, 27 Ky. L. Rep. 903, 117 Am. St. Rep. 593; South Covington, etc., St. R. Co. *v.* Nelson, 89 S. W. 200, 28 Ky. L. Rep. 287.

An instruction defining negligence in the abstract is sufficient in conjunction with other instructions informing the jury as to the care required of plaintiff and defendant respectively. Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Rapid Transit R. Co. *v.* Miller, (Tex. Civ. App. 1905) 85 S. W. 439.

86. Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

87. Ready *v.* Peavy Elevator Co., 89 Minn. 154, 94 N. W. 442; Gulf, etc., R. Co. *v.* Hays, (Tex. Civ. App. 1905) 89 S. W. 29; Missouri, etc., R. Co. *v.* Hannig, (Tex. Civ. App. 1897) 41 S. W. 196; Texas Cent. R. Co. *v.* Brock, (Tex. Civ. App. 1895) 30 S. W. 274; Texas, etc., R. Co. *v.* Gorman, 2 Tex. Civ. App. 144, 21 S. W. 158.

Definitions held erroneous.— A definition of negligence leaving it to the jury to say what degree of care was required by the circumstances without furnishing any standard by which such care could be measured is erroneous. Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1904) 81 S. W. 1187. An instruction that a failure to exercise such care as an ordinarily prudent man would have exercised under like circumstances would "ordinarily" constitute negligence is error. Such failure would invariably constitute negligence. Palfrey *v.* Texas Cent. R. Co., 31 Tex. Civ. App. 552, 73 S. W. 411.

Definitions held not erroneous.— An instruction that negligence means the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances is not erroneous for failure to use the word "usually" before "exercise." Kentucky, etc., Bridge, etc., Co. *v.* Shrader, 80 S. W. 1094, 26 Ky. L. Rep. 206. The use of the words "reasonable and prudent" instead of "reasonably prudent" is not error. Galveston, etc., R. Co. *v.* Serafina, (Tex. Civ. App. 1898) 45 S. W. 614. The use of the words "any reasonably prudent man" in place of "a reasonably prudent man" is not error. Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1900) 60 S. W. 442. "Like prudence" is equivalent to "ordinary prudence." St. Louis Southwestern R. Co. *v.* Dixon, (Tex. Civ. App. 1906) 91 S. W. 626.

A definition lacking either the element of commission or omission is insufficient.[88]

(II) *Ordinary Care.* Where, in an action for negligence, defendant does not request an instruction defining "ordinary care" the court's failure to define such term is not reversible error.[89] If the term is defined it should be by some phrasing that will convey the idea of the ordinary conduct of the ordinarily prudent man,[90] under the same or similar circumstances;[91] and, where the charge of the court tends to create the impression in the mind of the jury that they may establish for themselves a particular standard of diligence, there is error.[92] An instruction imposing upon defendant a higher degree of care than is required by law is erroneous,[93] and is properly refused.[94]

(III) *Wilful, Wanton, or Reckless Acts.* Where the questions of wilful

"Negligence" in sense of "carelessness."— It is not error for the court to state to the jury that he uses the word "negligence" in the sense of "carelessness." Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

The word "wrong" is equivalent to "negligent" and is not misleading. Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1; Wells *v.* Sibley, 9 N. Y. Suppl. 343.

Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions, as they tend to obscure and confuse what should be stated in plain and concise language. Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853; Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209. See also Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

88. Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117. See also German Ins. Co. *v.* Chicago, etc., R. Co., 128 Iowa 386, 104 N. W. 361; Struble *v.* Burlington, etc., R. Co., 128 Iowa 158, 103 N. W. 142.

89. Denison, etc., R. Co. *v.* Barry, (Tex. Civ. App. 1904) 80 S. W. 634. *Compare* South Covington, etc., St. R. Co. *v.* Nilson, 89 S. W. 200, 28 Ky. L. Rep. 287.

Where no instruction is given as to the care required of defendant, it is error for the court to charge the jury to determine whether defendant had been guilty of a want of "care required by law." Pittsburgh, etc., R. Co. *v.* Wise, 36 Ind. App. 59, 74 N. E. 1107.

90. **Ordinary care equivalent to common prudence.**— Ordinary care may be described as synonymous with, or equivalent to, common prudence. Richmond, etc., R. Co. *v.* Howard, 79 Ga. 44, 3 S. E. 426.

An instruction using the term "proper care," without explaining the meaning thereof, is erroneous. Ft. Worth, etc., R. Co. *v.* Enos, (Tex. Civ. App. 1898) 50 S. W. 595.

The use of the word "prudent" without qualification is equivalent to "ordinarily prudent," at least where it is also charged that ordinary care is all that is required. Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580. See also Texas, etc., R. Co. *v.* Black, (Tex. Civ. App. 1898) 44 S. W. 673.

Omission of "ordinarily" before "exercise."— The use of the words "the care which the great majority of men would have used" instead of "the care which the great majority of men ordinarily exercise," while open to criticism, is not error. Coppins *v.* Jefferson, 126 Wis. 578, 105 N. W. 1078; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777. See also St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

The giving of two definitions of ordinary care substantially the same is not error. Chicago, etc., R. Co. *v.* Kelly, 80 Ill. App. 675.

Use of term "ordinary man," error.— In a charge as to negligence it is error to define the requisite degree of care as that exercised by an "ordinary" man, as a man may be "ordinary" in various senses and yet be either reckless or extraordinarily prudent. Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 13 S. W. 972; Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858.

Illustration of ordinary care.— Explaining to a jury that by the expression "care of a man of ordinary prudence" is meant "just such care as one of you similarly employed would have exercised under such circumstances" is erroneous. Louisville, etc., R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

High degree of care.— Even if it is erroneous to instruct the jury that it was defendant's duty to exercise "a high degree of care," the jury cannot be misled where they are afterward told what amount of care was required. Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19.

91. Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243.

"Same or similar circumstances" is equivalent to "same or like circumstances." Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028.

92. Springman *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 1.

93. Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. 520; Honey Grove *v.* Lamaster, (Tex. Civ. App. 1899) 50 S. W. 1053.

An instruction making defendant an absolute insurer of plaintiff's safety is reversible error. Anderson, etc., Distilleries Co. *v.* Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. L. Rep. 1822.

94. Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700.

ness, wantonness, and recklessness are submitted to the jury, those terms should be defined,[95] and distinguished from simple negligence.[96]

(IV) *Gross Negligence.* Where the liability of a defendant depends upon showing gross negligence, the term should be defined,[97] and the jury instructed that such negligence is materially different in kind from ordinary negligence.[98]

(V) *Acts or Omissions Through Agents or Employees.* It is improper, in an instruction relating to the negligent acts of agents or employees, merely to refer to the principal or master, without mentioning the agents or servants whose acts are complained of.[99]

(VI) *Knowledge by Defendant of Defect or Danger.* An instruction in a negligence case omitting any hypothesis of defendant's knowledge of the defect or danger causing the injury is erroneous.[1]

(VII) *Precautions Against Injury.* An instruction attempting to indicate the particular precautions defendant should have taken to prevent injury to others, and precluding the idea that he might have used other precautions as effective, is erroneous.[2]

c. **Proximate Cause**—(I) *In General.* Failure to instruct that, in order for negligence to create liability, it must be the proximate cause of the injury is reversible error.[3] It has been held unnecessary to define the term "proximate cause,"[4] but if a definition is given it must embrace the idea of "natural and probable result."[5] While this idea may be expressed in other language, it is better that the approved definition be substantially or literally followed.[6]

95. Buxton *v.* Ainsworth, 138 Mich. 532, 101 N. W. 817.

In Kentucky in an action for personal injuries not resulting in death, it is error to instruct the jury as to wilful negligence, as the statute relating thereto applies only when death results from the injuries sued for. Louisville, etc., R. Co. *v.* Survant, 16 Ky. L. Rep. 349.

96. Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176.

97. Wiser *v.* Chesley, 53 Mo. 547. But see Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554.

Kentucky—When the court directs a special verdict, failure to instruct the jury as to what is gross negligence is not error, because, when the facts are found by the jury, this is a question of law. Witty *v.* Chesapeake, etc., R. Co., 83 Ky. 21.

Definitions held sufficient see Todd *v.* Cochell, 17 Cal. 97; Illinois Cent. R. Co. *v.* Walters, 56 S. W. 706, 22 Ky. L. Rep. 137; Sullivan *v.* Boston Electric Light Co., 181 Mass. 294, 63 N. E. 904; Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 41 S. E. 468.

Definitions held insufficient.—Where the court gives an instruction authorizing punitive damages for gross negligence, it is prejudicial error to instruct the jury that gross negligence is the want of ordinary care. Chesapeake, etc., R. Co. *v.* Judd, 106 Ky. 364, 50 S. W. 539, 20 Ky. L. Rep. 1978. A definition of gross negligence by comparison with ordinary negligence is not a satisfactory one. Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587. Gross neglect, as defined by the Georgia code, "is the want of that care which every man of common sense, how inattentive soever he may be, takes of his own property." In undertaking to give this definition to the jury, the court should not omit the words "how inattentive soever he may be." Seaboard, etc., R. Co. *v.* Cauthen, 115 Ga. 422, 423, 41 S. E. 653.

98. Banks *v.* Braman, 188 Mass. 367, 74 N. E. 594.

99. Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

1. Edwards *v.* Metropolitan St. R. Co., 112 Mo. App. 656, 87 S. W. 587.

2. Burk *v.* Walsh, 118 Iowa 397, 92 N. W. 65; Vanderpool *v.* Husson, 28 Barb. (N. Y.) 196; Finseth *v.* Suburban R. Co., 32 Oreg. 1, 51 Pac. 84, 39 L. R. A. 517. See also Woods *v.* Trinity Parish, 21 D. C. 540.

3. Chicago, etc., R. Co. *v.* Carroll, 12 Ill. App. 643; Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568; Gulf, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1897) 39 S. W. 967; Houston, etc., R. Co. *v.* Malone, (Tex. Civ. App. 1896) 37 S. W. 640.

Remote cause.—An instruction laying down the doctrine that remote as well as proximate causes are sufficient to sustain an action is erroneous. See Baker *v.* Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979, 12 L. R. A. 698.

4. Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352. See also Houston, etc., R. Co. *v.* Oram, (Tex. Civ. App. 1906) 92 S. W. 1029, holding that where the jury are told that the negligence of defendant must be the direct cause of plaintiff's injury, it is not reversible error to fail to define proximate cause.

5. Gulf, etc., R. Co. *v.* Turner, (Tex. Civ. App. 1906) 93 S. W. 195; Feldschneider *v.* Chicago, etc., R. Co., 122 Wis. 423, 99 N. W. 1034.

6. Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777; Feldschneider *v.* Chicago, etc., R. Co., 122 Wis. 423, 99 N. W. 1034.

(II) *Concurrent Causes.* Where a case is tried upon the theory that the injury was the result of two concurring or proximate causes, it is the right of each party to have the jury correctly instructed respecting each of the claimed acts of negligence the same as if the right of recovery rested upon it alone, and if there is material error in the instructions given or refused respecting either charge of negligence, the verdict cannot stand.[7] A charge instructing the jury that if they are in doubt as to which of two or more causes produced the injury complained of they should find for defendant is properly refused.[8]

(III) *Inevitable Accident.* An instruction to find for defendant if the injury to plaintiff was the result of accident is bad unless it is explained that by the term "accident" is meant an event causing damage, happening unexpectedly and without fault.[9] Such an instruction is proper, however, where the word "accident" is qualified by "inevitable" or "unavoidable," and it has been held that "merely" also renders the instruction unobjectionable.[10]

d. Contributory Negligence — (I) *In General* — (A) *Necessity of Presenting Issue.* In an action for negligence, where there is a question as to whether plaintiff was guilty of contributory negligence or not, an instruction which authorizes a recovery without taking into consideration such negligence by plaintiff is erroneous.[11] And it is error to refuse to charge that if, by the exercise of ordinary care, plaintiff could have avoided the consequences caused by defendant's negligence, he cannot recover.[12] It is not, however, error to omit to instruct the jury as to the law of contributory negligence in an instruction given for plaintiff, when the court, in giving defendant's instructions, charges the jury fully and fairly on that point.[13] Where defendant pleads contributory negligence in general terms and introduces evidence under such plea, he is entitled to a special charge on such negligence, in which the facts are grouped and the law applied thereto.[14]

Direct and natural cause.— While an instruction that the proximate cause of an injury is the direct and natural cause is improper, such an instruction is not prejudicial in connection with an instruction limiting what is direct and natural to such things as the person responsible ought in the exercise of ordinary care to have apprehended. Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

Particular injury.— An instruction requiring defendant to foresee not only that injury would result, but that the particular injury would be the probable consequence of his act, is erroneous. Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

Many fortuitous circumstances.— It is proper to refuse to charge upon the effect of "many fortuitous circumstances" in relation to the cause of an event. Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

Instruction held erroneous.—An instruction that the proximate cause of an injury is that from which the result follows as a natural and probable consequence — probable from the standpoint of the person who is charged with the lack of ordinary care — is erroneous, in making the degree of caution dependent on the person required to exercise care, instead of the exercise of ordinary care. Hudson *v.* Northern Pac. R. Co., 107 Wis. 620, 83 N. W. 769.

7. Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

8. Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646.

9. Kellar *v.* Shippee, 45 Ill. App. 377.

10. Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214. See also Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

11. Chicago, etc., R. Co. *v.* Mock, 72 Ill. 141; Lake Shore, etc., R. Co. *v.* Pauly, 37 Ill. App. 203; Indianapolis, etc., R. Co. *v.* Willisch, 8 Ill. App. 242; McCormick *v.* Chicago, etc., R. Co., 47 Iowa 345; Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539; Ribble *v.* Starrat, 83 Mich. 140, 47 N. W. 244; Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226. While an instruction that on a certain state of facts defendant would be liable for negligence is erroneous if it fails to state the effect of contributory negligence which is a defense in the case, a failure to refer to such defense will not vitiate an instruction which is limited to definition. Ohio, etc., R. Co. *v.* Kleinsmith, 38 Ill. App. 45.

12. Georgia R. Co. *v.* Thomas, 68 Ga. 744; Hackford *v.* New York Cent. R. Co., 6 Lans. (N. Y.) 381, 13 Abb. Pr. N. S. 18 [*affirmed* in 53 N. Y. 654]; Southern R. Co. *v.* Smith, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746.

13. Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152; Normile *v.* Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.

14. Gulf, etc., R. Co. *v.* Mangham, 95 Tex. 413, 67 S. W. 765; Texas, etc., R. Co. *v.*

(B) *Form and Sufficiency.* An instruction submitting the issue of contributory negligence is sufficient if it clearly informs the jury that if plaintiff was guilty of contributory negligence he cannot recover.[15] It is not essential that contributory negligence be defined unless specially requested;[16] nor is it necessary that the term "contributory negligence" should be mentioned in the instructions, so long as that phrase of the case is fully presented.[17] An instruction on contributory negligence, given in connection with a charge relating to proximate cause, is not thereby rendered erroneous.[18] A charge that one may, under certain circumstances, recover, although by his own negligence he contributed to produce the injury, is erroneous and misleading, where the circumstances under which he may recover are not explained.[19] If plaintiff is a woman it is not error for the court to call the jury's attention to the possible bearing of her sex upon the question of contributory negligence.[20]

(C) *Care Required* — (1) IN GENERAL. In a personal injury case the court should instruct the jury that plaintiff was bound to exercise such care as ordinarily prudent persons would use under like circumstances,[21] and an instruction imposing

Cotts, (Tex. Civ. App. 1906) 95 S. W. 602; Texas Loan, etc., Co. *v.* Angel, (Tex. Civ. App. 1905) 86 S. W. 1056; Houston, etc., R. Co. *v.* Carruth, (Tex. Civ. App. 1899) 50 S. W. 1036; Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152. See also Philadelphia, etc., R. Co. *v.* State, 66 Md. 501, 8 Atl. 272.

15. Instructions held sufficient.— An instruction in a personal injury case that plaintiff, if guilty of any negligence which caused or contributed to his injury, could not recover, sufficiently charges on the issue of contributory negligence, where negligence and ordinary care are elsewhere defined. Galveston, etc., R. Co. *v.* Burns, (Tex. Civ. App. 1906) 91 S. W. 618. An instruction requiring the jury to find that plaintiff was injured while using ordinary care for his own safety does not authorize a recovery without regard to his contributory negligence. Kean *v.* Schoening, 103 Mo. App. 77, 77 S. W. 335. An instruction authorizing a verdict for plaintiff on condition that she was injured because of defendant's negligence, "without negligence or fault on her part" is equivalent to requiring ordinary care on her part. North Chicago St. R. Co. *v.* Fitzgibbons, 180 Ill. 466, 54 N. E. 483. Where negligence has been defined as failure to use ordinary care, an instruction is not erroneous because it states that plaintiff cannot recover if the proximate cause of his injury was his failure to use ordinary care. Galveston, etc., R. Co. *v.* Henning, (Tex. Civ. App. 1897) 39 S. W. 302. A charge requiring the use of ordinary care and diligence by plaintiff sufficiently presents the issue of contributory negligence. Omaha St. R. Co. *v.* Clair, 39 Nebr. 454, 58 N. W. 98. An instruction that plaintiff is entitled to recover for injuries sustained by him, if caused solely by defendant's negligence and want of reasonable care, sufficiently implies that plaintiff must be free from contributory negligence. Omaha Hotel Assoc *v.* Walter, 23 Nebr. 280, 36 N. W. 561. For other instructions held sufficient see Chicago, etc., R. Co. *v.* Hutchinson, 120 Ill. 587, 11 N. E. 855; Texas, etc., R. Co. *v.* Brown, 14 Tex. Civ. App. 697, 39 S. W. 140; Taul *v.* Shanklin, 1 Tex. App. Civ. Cas. § 1135.

Instructions held insufficient.— A charge on the subject of contributory negligence calculated to lead the jury to believe that negligence on the part of plaintiff would not exculpate defendant, unless ordinary care was exercised on his part, is misleading and reversible error. Baltimore, etc., R. Co. *v.* Whittaker, 24 Ohio St. 642. For other instructions held insufficient see Gamble *v.* Mullin, 74 Iowa 99, 36 N. W. 909.

16. Galveston, etc., R. Co. *v.* Holyfield, (Tex. Civ. App. 1902) 70 S. W. 221. But see McCracken *v.* Smathers, 119 N. C. 617, 26 S. E. 157.

Definitions held sufficient.—Illinois Cent. R. R. Co. *v.* Wilson, 63 S. W. 608, 23 Ky. L. Rep. 684; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74.

17. Louisville, etc., R. Co. *v.* Bowlds, 64 S. W. 957, 23 Ky. L. Rep. 1202.

18. Sherman, etc., R. Co. *v.* Eaves, 26 Tex. Civ. App. 409, 61 S. W. 550.

19. Richmond, etc., R. Co. *v.* Pickleseimer, 85 Va. 798, 10 S. E. 44.

20. Denver, etc., R. Co. *v.* Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

21. Hart *v.* Delaware, etc., R. Co., 22 N. Y. Suppl. 3; Pittsburgh, etc., R. Co. *v.* Wernsing, 7 Ohio Dec. (Reprint) 520, 3 Cinc. L. Bul. 592; Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884.

Where the court uses the words "ordinary care and prudence," it is error to refuse a specific explanation of the expression. Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152.

Omission of "ordinary" before "prudence" is error. La Prelle *v.* Fordyce, 4 Tex. Civ. App. 391, 23 S. W. 453.

"A reasonably prudent person" is equivalent to "a reasonable and prudent person." Missouri, etc., R. Co. *v.* Warren, 90 Tex. 566, 40 S. W. 6 [*affirming* (Civ. App. 1897) 39 S. W. 652].

"What a prudent person would ordinarily do" is equivalent to "what an ordinarily

a higher or lower degree of care is bad.[22] An instruction given for a plaintiff or a defendant properly defining only the duty of the opposite party toward him, and not stating the duty the law imposed on him under the same circumstances, is not necessarily objectionable because it does not state the whole law of the subject.[23]

(2) Time of Exercise. An instruction requiring ordinary care on the part of plaintiff "at the time of the injury" is not objectionable as restricting the exercise of ordinary care to the moment of the injury.[24] So also the phrase "while he was in the exercise of ordinary care for his own safety" as used in an instruction is sufficiently comprehensive as to time, the word "while" meaning during that time, and necessarily implies some degree of continuance, and refers to the whole series of circumstances involved in the transaction.[25]

(3) Persons in Imminent Danger. An instruction on the degree of care required of a person in imminent danger need not be qualified by the proviso that he acted in the emergency as an ordinarily prudent man would have been likely to act under the same circumstances,[26] or by a proviso on the contributory negligence of such person in bringing about the dangerous situation, where there is no evidence that he did bring it about.[27] A charge making the liability of defendant depend, not on his negligence, but on plaintiff's fright, without reference to the inquiry whether the fright was justified, is erroneous.[28]

(D) *Degree and Extent.* Since the degree of negligence exhibited by plaintiff has much to do with his right to recover, an instruction, leaving the degree wholly out of the case, is error.[29] Thus it is error to charge that the slightest want of care on the part of plaintiff will preclude a recovery.[30] So too an instruction requiring the jury to return a verdict for plaintiff unless he contributed equally with defendant to his injuries is error.[31]

(E) *As Proximate Cause of Injury.* A charge on contributory negligence failing to express the idea of proximate contribution is erroneous,[32] unless the evi-

prudent person would do." El Paso Electric R. Co. *v.* Kitt, (Tex. Civ. App. 1906) 91 S. W. 598.

"Reasonable" instead of "ordinary" care. — An instruction that plaintiff could not recover unless he was in the exercise of "reasonable" instead of "ordinary" care is properly refused. Peoria *v.* Gerber, 168 Ill. 318, 48 N. E. 152 [*affirming* 68 Ill. App. 255].

"Reasonably prudent person" is equivalent to "ordinarily prudent person." St. Louis Southwestern R. Co. *v.* Brown, (Tex. Civ. App. 1902) 69 S. W. 1010.

Where the person injured is a woman, a definition of "ordinary care" as such as an ordinarily prudent "man" would have used is not erroneous, since no greater degree of care is required of a woman than of a man. Asbury *v.* Charlotte Electric R., etc., Co., 125 N. C. 568, 34 S. E. 654.

Error of judgment.— An instruction that mere error of judgment on the part of plaintiff would not be negligence is erroneous in not limiting it to the judgment of a man of ordinary and common prudence. Hoyt *v.* New York, etc., R. Co., 118 N. Y. 399, 23 N. E. 565.

22. West Chicago St. R. Co. *v.* Nilson, 70 Ill. App. 171; Strader *v.* Marietta, etc., R. Co., 2 Cinc. Super. Ct. (Ohio) 268; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

23. Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

24. Lake Shore, etc., R. Co. *v.* Ouska, 151 Ill. 232, 37 N. E. 897; Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510; West Chicago St. R. Co. *v.* Egan, 74 Ill. App. 442. *Compare* Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 116.

25. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90 [*affirming* 101 Ill. App. 40]; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406; Chicago Union Tract. Co. *v.* Lawrence, 113 Ill. App. 269 [*affirmed* in 211 Ill. 373, 71 N. E. 1024]; Calumet Electric St. R. Co. *v.* Van Pelt, 68 Ill. App. 582.

26. McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209. But see Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858.

27. McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209.

28. Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 11 S. W. 858.

29. Chicago, etc., R. Co. *v.* Goss, 17 Wis. 428, 84 Am. Dec. 755.

30. Craig *v.* Benedictine Sisters Hospital Assoc., 88 Minn. 535, 93 N. W. 669.

31. Gulf, etc., R. Co. *v.* Warlick, 1 Indian Terr. 10, 35 S. W. 235; Gulf, etc., R. Co. *v.* Buford, 2 Tex. Civ. App. 115, 21 S. W. 272.

32. *Alabama.*— Thompson *v.* Duncan, 76 Ala. 334, holding that it is error to charge that if plaintiff's negligence "contributed in any way to the happening of the injury," the jury must find for defendant.

dence shows that plaintiff's conduct necessarily proximately contributed to his injury.[33] So it is error to give an instruction implying that contributory negligence, to defeat recovery, must be the sole proximate cause of the injury.[34] An instruction is also erroneous which fails to distinguish between negligence which may have caused the injury and negligence which may have contributed to it.[35]

(F) *Injury Avoidable Notwithstanding Contributory Negligence.* An instruction that, notwithstanding plaintiff had been guilty of negligence which contributed to the injury, yet, if defendant could, by the exercise of ordinary care, have avoided the accident, he would be liable, is proper.[36] It is error, however, to instruct that defendant would be liable if he might have avoided the injury in any way, since this imposes too high a degree of care upon him.[37]

(II) *Children and Others Under Disability* — (A) *In General.* In an action for personal injuries to a child, it is the duty of the court, without being requested, to instruct the jury that a different rule should be applied in considering the question of contributory negligence from that applicable in the case of an adult,[38]

Missouri.—Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987.

New York.— Ericius *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 353, 71 N. Y. Suppl. 596.

Ohio.— Holmes *v.* Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

South Carolina.— Nelson *v.* Georgia, etc., R. Co., 68 S. C. 462, 47 S. E. 722.

Texas.— Gulf, etc., R. Co. *v.* Mangham, 29 Tex. Civ. App. 486, 69 S. W. 80; St. Louis Southwestern R. Co. *v.* Crabb, (Civ. App. 1904) 80 S. W. 408.

Wisconsin.— Lynch *v.* Waldwick, 123 Wis. 351, 101 N. W. 925.

United States.— Plant Inv. Co. *v.* Cook, 74 Fed. 503, 20 C. C. A. 625.

See 37 Cent. Dig. tit. "Negligence," § 391.

The use of the word "directly" in such an instruction is not error. Missouri, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1899) 53 S. W. 96.

An instruction that "if the plaintiff was guilty of negligence which directly contributed to cause the accident" is equivalent to one "that he was guilty of negligence but for which the injury would have been avoided." Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192.

Degree of contribution immaterial.— It is error to instruct the jury that plaintiff's negligence must contribute to his injury in a material degree to preclude a recovery, since defendant is not liable if plaintiff's negligence contributed to it in any degree. Banning *v.* Chicago, etc., R. Co., 89 Iowa 74, 56 N. W. 277; Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449, 15 Atl. 865; Monongahela City *v.* Fischer, 111 Pa. St. 9, 2 Atl. 87, 56 Am. Rep. 241; La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526; Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. ed. 270.

33. Culpepper *v.* International, etc., R. Co., 90 Tex. 627, 40 S. W. 386; Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756; Ratteree *v.* Galveston, etc., R. Co., 36 Tex. Civ. App. 197, 81 S. W. 566; Baca *v.* San Antonio, etc., R. Co., 32 Tex. Civ. App. 210, 73 S. W. 1073; Galveston, etc., R. Co. *v.* Hubbard, (Tex. Civ. App. 1902) 70 S. W. 112. See also Button *v.* Hudson River R. Co., 18 N. Y. 248.

Where plaintiff's negligence, if any, must have contributed directly to his injury, it is error to charge that plaintiff, although guilty of negligence, can recover, "unless . this negligence was, in whole or in part, the cause of the injury." Memphis, etc., R. Co. *v.* Jobe, 69 Miss. 452, 10 So. 672.

34. Louisville, etc., R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323, 20 Ky. L. Rep. 1375; Avery *v.* Meek, 14 Ky. L. Rep. 814; Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, 31 S. W. 885; Citizens' R. Co. *v.* Creasy, (Tex. Civ. App. 1894) 27 S. W. 945, holding that an instruction to find for defendant if plaintiff's negligence contributed to and was the proximate cause of the injury does not require plaintiff's negligence to be the sole cause of the injury to preclude defendant's liability, and is not erroneous.

35. McKeller *v.* Monitor Tp., 78 Mich. 485, 44 N. W. 412.

36. Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310.

37. Kuchenmeister *v.* O'Conner, 8 Ohio Dec. (Reprint) 502, 8 Cinc. L. Bul. 257. See also Pendleton St. R. Co. *v.* Stallman, 22 Ohio St. 1.

38. Wright *v.* Detroit, etc., R. Co., 77 Mich. 123, 43 N. W. 765; Bennett *v.* New York Cent., etc., R. Co., 133 N. Y. 563, 30 N. E. 1149 [*affirming* 16 N. Y. Suppl. 765]; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121.

What constitutes negligence in a child.— In an action by a child, an instruction that plaintiff cannot recover if he was negligent, without stating what constitutes negligence in a child, is erroneous. Allen *v.* Texas, etc., R. Co., (Tex. Civ. App. 1894) 27 S. W. 943.

An instruction permitting the jury to fix the standard of care required is error. Wills *v.* Ashland Light, etc., Co., 108 Wis. 255, 84 N. W. 998.

and such instructions should be full and explicit.[39] An instruction upon the degree of care required of a child, which is correct so far as it goes, but which omits certain elements, is improper,[40] but may be supplemented and cured by other instructions which supply the omitted elements.[41] When, from the age of a child, it is doubtful whether he can be chargeable with contributory negligence, it is error for the court in its charge to assume that he was of such tender years that contributory negligence could not be charged to him,[42] or that he was *sui juris* and chargeable with such negligence.[43] The court should instruct that the child should have used the care and caution which under the circumstances might reasonably be expected of one of his age and capacity,[44] and it is error to refuse to instruct that if the child could have avoided the injury by the exercise of the care he was capable of, but did not exercise such care, he could not recover.[45]

(B) *Intoxicated Persons.* In an action for injuries from negligence, if the person injured was, at the time of the injury, intoxicated in any degree, that fact is proper to be considered by the jury in determining the question of contributory negligence, and it is error to charge the jury that the fact of intoxication is no defense unless plaintiff was so intoxicated as to be unable to exercise ordinary care.[46] So also where there is evidence that plaintiff was intoxicated at the time of the injury, it is error to state the rule of ordinary care.[47]

e. Imputed Negligence. The negligence of the parents of an infant plaintiff will not defeat a recovery unless such negligence contributed to the injury, and an instruction to this effect is proper.[48] Where, under the evidence, if the child had been an adult he would have been guilty of contributory negligence as a matter of law, an instruction that, if the child exercised the degree of care required of a person of his discretion, then the negligence of his parents is immaterial is erroneous as not applicable to the facts of the case.[49]

f. Comparative Negligence — (I) *Duty to Submit Issue.* In such jurisdic-

An instruction fixing the wrong standard of care for a child is rendered harmless by a charge stating the correct degree and measure of care required. Stewart *v.* Southern Bell Tel., etc., Co., 124 Ga. 224, 52 S. E. 331.

An instruction which subdivides the class of ordinarily prudent children, and makes the action of one division of the class the test of ordinary care, is erroneous. Collins *v.* Janesville, 107 Wis. 436, 83 N. W. 695.

39. Quill *v.* Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

40. Economy Light, etc., Co. *v.* Hiller, 113 Ill. App. 103 [*affirmed* in 211 Ill. 568, 71 N. E. 1096].

Intelligence, capacity, and experience.—An instruction permitting a recovery by an infant plaintiff if he was injured while in the exercise of ordinary care for a boy of his age is error, since the boy's intelligence, capacity, and experience should also be taken into account. Illinois Iron, etc., Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008 [*reversing* 89 Ill. App. 368]; Economy Light, etc., Co. *v.* Hiller, 113 Ill. App. 103 [*affirmed* in 211 Ill. 568, 71 N. E. 1096].

An instruction omitting any reference to the age of the child for the injury of whom a recovery is sought is misleading, and properly refused. Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72. See also Edwards *v.* Metropolitan St. R. Co., 112 Mo. App. 656, 87 S. W. 587.

41. Economy Light, etc., Co. *v.* Hiller, 113 Ill. App. 103 [*affirmed* in 211 Ill. 568, 71 N. E. 1096].

42. Georgia, etc., R. Co. *v.* Watkins, 97 Ga. 381, 24 S. E. 34 (charge held not erroneous as treating plaintiff as child of tender years); Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642; Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290, 9 S. W. 577; Cincinnati Traction Co. *v.* Blackson, 27 Ohio Cir. Ct. 191; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932.

Where the infant is over the age of twelve, it is error to charge that infancy *per se* exempts him from the measure of care which would devolve upon an adult. McDonald *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 233, 80 N. Y. Suppl. 577.

43. Garoni *v.* Compagnie Nationale de Navigation, 14 N. Y. Suppl. 797.

44. Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642; Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

45. Buscher *v.* New York Transp. Co., 114 N. Y. App. Div. 85, 99 N. Y. Suppl. 673.

46. Buddenberg *v.* Charles P. Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970; Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13.

47. Buesching *v.* St. Louis Gas-Light Co., 6 Mo. App. 85 [*affirmed* in 73 Mo. 219, 39 Am. Rep. 503].

48. True, etc., Co. *v.* Woda, 201 Ill. 315, 66 N. E. 369.

49. Carr *v.* Merchants' Union Ice Co., 91 N. Y. App. Div. 162, 86 N. Y. Suppl. 368.

tions as recognize the doctrine of comparative negligence, an instruction ignoring such doctrine is erroneous.[50] Where, however, the doctrine has been repudiated, an instruction submitting such issue is improper;[51] but is not reversible error where it could not have had an injurious effect.[52] An instruction relating merely to the measure of damages, in case plaintiff should recover, is not erroneous in omitting to state the rule of comparative negligence.[53]

(11) *Form and Sufficiency.* Where a jury is instructed on the doctrine of comparative negligence, both of the elements of the proposition, namely, the slight negligence of plaintiff and the gross negligence or wilful acts of defendant, must be embraced in the instruction;[54] and the law is not correctly stated in an instruction leaving the jury at liberty to find for plaintiff, even if he was guilty of great negligence, provided defendant was guilty of greater negligence.[55] So too the element of comparison of the negligence of plaintiff with that of defendant,[56] and the qualification that plaintiff must have been in the exercise of ordinary care,[57] are of the very essence of the rule, and should be referred to in instructions upon that question.

4. Verdict and Findings — a. In General. A special verdict in a negligence case must find and state all the facts essential to a recovery by the party who has the burden of proof,[58] and should not embody statements of conclusions of law or

50. Ohio, etc., R. Co. *v.* Porter, 92 Ill. 437. This doctrine is no longer recognized in Illinois. See *supra*, VII, D, 2.

51. St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176, 43 Pac. 434; East Tennessee, etc., R. Co. *v.* Hull, 88 Tenn. 33, 12 S. W. 419; Missouri, etc., R. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243 [*reversing* (Civ. App. 1896) 35 S. W. 412]; Gulf, etc., R. Co. *v.* Buford, 2 Tex. Civ. App. 115, 21 S. W. 272.

52. Brooks *v.* Hannibal, etc., R. Co., 35 Mo. App. 571; Gulf, etc., R. Co. *v.* Buford, 2 Tex. Civ. App. 115, 21 S. W. 272.

53. Pennsylvania Co. *v.* Marshall, 119 Ill. 399, 10 N. E. 220; Chicago, etc., R. Co. *v.* Dowd, 115 Ill. 659, 4 N. E. 368.

54. Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425; Union R., etc., Co. *v.* Kallaher, 12 Ill. App. 400; Chicago, etc., R. Co. *v.* Avery, 8 Ill. App. 133. The doctrine of comparative negligence has been repudiated in Illinois. See *supra*, VII, D, 2.

The term "want of ordinary care" used in such an instruction is not equivalent to the term "gross negligence." Chicago, etc., R. Co. *v.* Avery, 8 Ill. App. 133.

"Some" negligence instead of "slight" negligence.— While the word "some" is not as good as the word "slight," its use is not erroneous. Willard *v.* Swanson, 22 Ill. App. 424.

Where defendant guilty of ordinary negligence.—An instruction permitting plaintiff, although guilty of slight negligence, to recover, if defendant is shown to be guilty of only ordinary negligence, is erroneous. Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72.

Instructions held sufficient see Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Instructions held erroneous.—Even if plaintiff was guilty of negligence, this fact will not prevent recovery, if defendant's negligence was so much greater than plaintiff's as to clearly preponderate and outweigh it. Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35. Plaintiff may recover unless his negligence, contributing to the injury, was equal to or greater than that of defendant. Indianapolis, etc., R. Co. *v.* Evans, 88 Ill. 63.

55. Illinois Cent. R. Co. *v.* Maffit, 67 Ill. 431; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510.

56. Chicago, etc., R. Co. *v.* Murray, 62 Ill. 326; Chicago, etc., R. Co. *v.* Mason, 27 Ill. App. 450; Union Stock Yards, etc., Co. *v.* Monaghan, 13 Ill. App. 148; Moody *v.* Peterson, 11 Ill. App. 180.

57. Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846; Willard *v.* Swansen, 126 Ill. 381, 18 N. E. 548; Chicago, etc., R. Co. *v.* Warner, 123 Ill. 38, 14 N. E. 206 [*affirming* 22 Ill. App. 462]; Illinois Cent. R. Co. *v.* Ashline, 56 Ill. App. 475; Union Stock Yards, etc., Co. *v.* Monaghan, 13 Ill. App. 148.

In the absence of evidence of the exercise of ordinary care on the part of plaintiff, the issue of comparative negligence should not be submitted to the jury. Chicago, etc., R. Co. *v.* White, 26 Ill. App. 586.

An instruction assuming that plaintiff exercised ordinary care is erroneous. Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 25 N. E. 846. The refusal to instruct the jury that if both parties were guilty of gross negligence plaintiff could not recover is not prejudicial error, where the duty of plaintiff to use ordinary care is fully stated in the instruction given. Chicago, etc., R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

58. Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047 (holding that a special verdict failing to show what, if anything, plaintiff did to prevent the injury, is defective, and will not support a judgment); Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663.

Failure of the jury to find on a special interrogatory submitted by one of the parties

fact.[59] Thus where the facts found by a jury in a special verdict warrant the conclusion by the court that defendant was negligent, that such negligence contributed to plaintiff's injury, and that plaintiff was free from negligence, sufficient foundation for judgment against defendant is furnished.[60] If a special verdict is so vague and uncertain as to render it impossible to determine what the jury intended,[61] or is contradictory and inconsistent with itself,[62] it will not support a judgment for either party. Where a cause is tried without a jury, the judge should file separate findings of his conclusions of law and of fact.[63] General findings of law, making an improper application of the law to the special facts found, are erroneous.[64]

b. Consistency Between Verdict and Findings. The court is bound to consider all the findings of the jury, and their relation to, and bearing upon, each other, and if, upon such considerations, they do not appear to be in irreconcilable conflict with the general verdict, such verdict will stand.[65]

c. Responsiveness to Issues. A special verdict must be responsive to the issues as made by the pleadings.[66]

5. Appeal and Error — a. In General. In an action for negligence, the defense of contributory negligence cannot be first raised on appeal.[67] So also as a general

is error, which is not cured by a general verdict. Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791.

Findings considered as a whole.— The findings of a special verdict should be considered in their entirety, and not in fragmentary parts. Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293.

59. Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981.

The statement in a special verdict that an act or omission was negligent, without stating facts from which a conclusion of negligence can be drawn, will not support a judgment. Huntington County *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470; Hadley *v.* Lake Erie, etc., R. Co., 21 Ind. App. 675, 51 N. E. 337; Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047; Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663; Luhr *v.* Michigan Cent. R. Co., 16 Ind. App. 562, 45 N. E. 796.

60. Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109; Louisville, etc., R. Co. *v.* Carmon, (Ind. App. 1898) 48 N. E. 1047; Wabash R. Co. *v.* Miller, 18 Ind. App. 549, 48 N. E. 663.

A finding that plaintiff, while walking rapidly, was proceeding carefully, is equivalent to a finding that he was without fault or negligence. Gaston *v.* Bailey, 24 Ind. App. 24, 53 N. E. 1021.

A finding that a certain thing was "the most probable cause of the accident" is equivalent to a finding that it was the cause. Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670.

Where the negligence of defendant is clearly established, the court should give plaintiff judgment, although the special verdict contains no valid finding of negligence. Winchell *v.* Abbot, 77 Wis. 371, 46 N. W. 665.

61. Krueger *v.* Bronson, 45 Wis. 198.

62. Innes *v.* Milwaukee, 96 Wis. 170, 70 N. W. 1064, holding that a special verdict finding defendant both free from and guilty of actionable negligence will not support a judgment.

63. Edwards *v.* Chisholm, (Tex. 1887) 6 S. W. 558, holding a finding, as a conclusion of law, that defendant was negligent, is erroneous, where it has not been first found, as a matter of fact, that defendant was negligent.

64. Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. N. S. 530.

65. Salina Mill, etc., Co. *v.* Hoyne, (Kan. App. 1900) 63 Pac. 660.

Findings held inconsistent with verdict.— Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430.

Findings held consistent with verdict.— Barnes *v.* Rembarz, 150 Ill. 192, 37 N. E. 239; Windeler *v.* Rush County Fair Assoc., 27 Ind. App. 92, 59 N. E. 209, 60 N. E. 954; Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554; Salina *v.* Trosper, 27 Kan. 544; Smith *v.* Newark Ice Co., 8 Ohio S. & C. Pl. Dec. 332, 6 Ohio N. P. 528.

66. Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445 (holding that a finding that a certain injury was the result of negligence cannot support a charge that such injury was wilfully inflicted); Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, 24 N. E. 981 (holding that a special verdict which shows defendant to have been guilty of different acts of negligence from those charged in the complaint will not support a judgment); McAdoo *v.* Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316 (holding that where a complaint alleges that plaintiff was injured by the gross negligence of defendant, without alleging that the injury was inflicted wilfully, wantonly, or through malice, the word "gross" must be treated as an expletive; and a finding that plaintiff was injured "as alleged" will be regarded as an affirmative response to an issue whether defendant failed to exercise ordinary care.

67. Hackett *v.* Edwards, 25 Misc. (N. Y.) 778, 55 N. Y. Suppl. 624.

rule, in the absence of a plea of contributory negligence, rulings of the trial court in respect of contributory negligence will not be reviewed.[68] Where, however, the parties try the case to its conclusion under a plea of not guilty, as if issue had been joined in a plea of contributory negligence, the appellate court will review the rulings as if such issue had been specially pleaded.[69] The fact that a co-defendant has been acquitted of negligence in the court below is a matter of which an appellant cannot complain on appeal.[70] If it appears by plaintiff's own evidence, when he rests his case, that it is the duty of the court to nonsuit him, a refusal to nonsuit may be corrected by a writ of error.[71]

b. Review of Questions of Fact. Questions of fact are for the trier, and the findings will not be reviewed on appeal, where there is some evidence to sustain it,[72] or the evidence on the question is conflicting.[73] Where, however, the error is very palpable,[74] or some rule of law has been violated,[75] the finding will be set aside.

c. Harmless Error — (I) *Admission of Evidence.* The erroneous admission of evidence over objection is harmless where it could not have possibly worked any injury to the complaining party.[76]

(II) *Giving or Refusing Instructions.* Error in giving or refusing instructions is harmless where the complaining party could not have been prejudiced.[77]

68. Tennessee Coal, etc., Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

69. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86.

70. Chicago City R. Co. *v.* Lace, 62 Ill. App. 535.

71. New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

72. *California.*—Algier *v.* The Maria, 14 Cal. 167.

Illinois.— Mt. Carmel *v.* Howell, 137 Ill. 91, 27 N. E. 77; Toledo, etc., R. Co. *v.* Spencer, 66 Ill. 528; Wight Fire Proofing Co. *v.* Roczekai, 30 Ill. App. 266; Hodges *v.* Bearse, 30 Ill. App. 235.

Indiana.— Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729.

Maine.— Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260.

New York.— McLaughlin *v.* Armfield, 58 Hun 376, 12 N. Y. Suppl. 164; Murray *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 876.

Texas.—Texas Cent. R. Co. *v.* Frazier, (Civ. App. 1896) 34 S. W. 664.

Wisconsin.— Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085.

See 37 Cent. Dig. tit. "Negligence," § 405.

73. New York, etc., Min. Syndicate *v.* Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; Fisher *v.* Cook, 23 Ill. App. 621 [*affirmed* in 125 Ill. 280, 17 N. E. 763]; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. (N. Y.) 339; James *v.* Ford, 16 Daly (N. Y.) 126, 9 N. Y. Suppl. 504; Dennis *v.* Harris, 19 N. Y. Suppl. 524; Weaver *v.* Bullis, 14 N. Y. Suppl. 338 [*affirmed* in 128 N. Y. 634, 29 N. E. 147]; Reiss *v.* North German Lloyd, 11 Fed. 844. Even where it is apparent from the evidence that the injury was not caused by the negligence of defendant, yet, if the evidence is conflicting on the question whether the injury was not augmented by his negligence, a verdict for plaintiff should not be set aside. Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. Dec. (N. Y.) 131 [*affirming* 32 Barb. 165, 19 How. Pr. 199].

74. Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260; Kitchen *v.* Carter, 47 Nebr. 776, 66 N. W. 855; Morris *v.* Third Ave. R. Co., 23 How. Pr. (N. Y.) 345.

Whenever the record presents all the facts found by the trial court, and the conclusion is plainly erroneous, it is a question of law so far as the jurisdiction of the court on appeal is concerned, and is reviewable. Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305.

75. Andrews *v.* New York, etc., R. Co., 60 Conn. 293, 22 Atl. 566.

76. Marder *v.* Leary, 137 Ill. 319, 26 N. E. 1093; Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848; Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141. Error in permitting plaintiff to introduce evidence of former acts of negligence on the part of defendant may be rendered harmless by the introduction of similar evidence by defendant on the question of want of due care on the part of plaintiff. Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 1039.

77. *Florida.*— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187.

Illinois.— Chicago, etc., R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. 357 [*reversing* 57 Ill. App. 365]; Chicago, etc., R. Co. *v.* Matthews, 153 Ill. 268, 38 N. E. 559 [*affirming* 48 Ill. App. 361]; Cleveland, etc., R. Co. *v.* Baddeley, 150 Ill. 328, 36 N. E. 965 [*affirming* 52 Ill. App. 94]; Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; Dixon *v.* Scott, 81 Ill. App. 368; Lake Erie, etc., R. Co. *v.* Merain, 36 Ill. App. 632 [*affirmed* in 140 Ill. 117, 29 N. E. 869].

NEGLIGENT. Careless, heedless, liability to omit what ought to be done, want of attention;[1] habitually omitting, careless, heedless, neglectful, incompetent, thoughtless, or regardless.[2] (See NEGLECT; and, generally, NEGLIGENCE.)

NEGLIGENTIA SEMPER HABET INFORTUNIUM COMITEM. A maxim meaning "Negligence always has misfortune for a companion."[3]

NEGLIGENTLY. Without exercising that degree of care which a person of ordinary sense and prudence, under like circumstances, and in the performance of a like act, would have exercised.[4] (See NEGLIGENT; and, generally, NEGLIGENCE.)

NEGOTIABLE.[5] Capable of being transferred by assignment, sale, indorsement, or delivery;[6] capable of being passed by assignment or endorsement.[7] (Negotiable: Instrument—Generally, see COMMERCIAL PAPER; Best and Secondary Evidence, see EVIDENCE; Bill of Exchange, see COMMERCIAL PAPER; Bill of Lading, see CARRIERS; SHIPPING; Bond in General, see BONDS; Bond of County, see COUNTIES; Bond of Municipality, see MUNICIPAL CORPORATIONS; Bond of Private Corporation, see CORPORATIONS; Bond of Railroad Company, see RAILROADS; Bond of School-District, see SCHOOLS AND SCHOOL-DISTRICTS; Bond of Town or Township, see TOWNS; Check, see COMMERCIAL PAPER; City Certificate, see MUNICIPAL CORPORATIONS; City Warrant, see MUNICIPAL CORPORATIONS; Coupon, see COUPON BONDS; COUPON NOTE; COUPONS; Due-Bill, see COMMERCIAL PAPER; Guaranty, see GUARANTY; Letter of Credit, see BANKS AND BANKING; COMMERCIAL PAPER; LETTER OF CREDIT; Lost, see LOST INSTRUMENTS; Municipal Security, see MUNICIPAL CORPORATIONS; Parol Evidence Affecting, see EVIDENCE; Promissory Note, see COMMERCIAL PAPER; Recovery as For Money

Iowa.— Barnes *v.* Marcus, 96 Iowa 675, 65 N. W. 984.

Minnesota.— McLean *v.* Burbank, 11 Minn. 277.

Missouri.—Brooks *v.* Hannibal, etc., R. Co., 35 Mo. App. 571.

New York.— Lee *v.* Vacuum Oil Co., 54 Hun 156, 7 N. Y. Suppl. 426.

Texas.— Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215; Paris, etc., R. Co. *v.* Nesbitt, (Civ. App. 1896) 38 S. W. 243.

Washington.— Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

Wisconsin.— Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

United States.— Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231.

See 37 Cent. Dig. tit. "Negligence," § 407.

1. Standard Dict. [*quoted* in Kliefoth *v.* Northwestern Iron Co., 98 Wis. 495, 499, 74 N. W. 356].

2. Webster Dict. [*quoted* in Kliefoth *v.* Northwestern Iron Co., 98 Wis. 495, 500, 74 N. W. 356]. *Compare* Corry *v.* Pennsylvania R. Co., 10 Pa. Super. Ct. 232, 239, where it was held that the use of this word as applied to the conduct of defendant in a statement of claim for breach of contract does not convert the action in one *ex delicto*.

Used in pleading as equivalent to "wrongful" see Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 449, 41 S. E. 400, 90 Am. St. Rep. 819.

Used in connection with other words see the following phrases: "Negligent act" (Texas, etc., R. Co. *v.* McCraw, (Tex. Civ. App. 1906) 95 S. W. 82, 84); "construction" (Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 79, 39 S. E. 730); "escape" (Tillman *v.* Lansing, 4 Johns. (N. Y.) 45, 47; Adams *v.* Turrentine, 30 N. C. 147, 151); "homicide" (Anderson *v.* State, 27 Tex. App. 177, 182, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644); "supervision" (Brown *v.* Burr, 160 Pa. St. 458, 459, 28 Atl. 828).

3. Black L. Dict.

4. Flesh *v.* Lindsay, 115 Mo. 1, 12, 21 S. W. 907, 37 Am. St. Rep. 374.

"Negligently" guilty when equivalent to not guilty see State *v.* Wolfrum, 88 Wis. 481, 483, 60 N. W. 799.

Used in a complaint against a railway company for injuries, alleging that a car was negligently loaded, the term should be construed as an allegation of the fact, and not as a conclusion. Rogers *v.* Truesdale, 57 Minn. 126, 128, 58 N. W. 688.

5. **"Negotiability"** is a technical term, derived from the usage of merchants and bankers in transferring, primarily, bills of exchange, and afterward promissory notes. Shaw *v.* Merchants Nat. Bank, 101 U. S. 557, 562, 25 L. ed. 892.

6. Walker *v.* Ocean Bank, 19 Ind. 247, 250.

7. Bouvier L. Dict. [*quoted* in U. S. *v.* Fay, 9 Port. (Ala.) 465, 469].

The term is one of classification and does not of necessity imply anything more than that the paper possesses the negotiable quality. Robinson *v.* Wilkinson, 38 Mich. 299, 301.

In its enlarged signification it applies to any written security which may be transferred by indorsement or delivery so as to invest in the indorsee the legal title, so as to enable him to maintain a suit thereon in his own name. Odell *v.* Gray, 15 Mo. 337, 342, 55 Am. Dec. 147.

Applied to contracts it means primarily

Had and Received, see MONEY RECEIVED; Stock Certificate, see CORPORATIONS; Subject to Lis Pendens, see LIS PENDENS; Warehouse Certificate, see WAREHOUSEMEN; Warehouse Receipt, see WAREHOUSEMEN.)

NEGOTIABLE INSTRUMENT. See NEGOTIABLE, and Cross-References Thereunder.

NEGOTIATE.[8] To effect something;[9] to conclude by bargain, treaty or agreement;[10] to sell, to pass, to transfer for a valuable consideration;[11] to transfer for a valuable consideration;[12] to transfer, to sell, to pass, to procure by mutual intercourse an agreement with another;[13] to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management.[14] (To Negotiate: Bill or Note, see COMMERCIAL PAPER. Contract, see CONTRACTS. See also NEGOTIABLE, and Cross-References Thereunder.)

NEGRO. A black man descended from the black race of South Africa.[15] (Negro: Admission to Bar, see ATTORNEY AND CLIENT. As Citizen, see CITIZENS. As Juror, see GRAND JURIES; JURIES. Civil Rights of, see CIVIL RIGHTS. Discrimination Against, see CITIZENS; CIVIL RIGHTS; CONSTITUTIONAL LAW; GRAND JURIES; JURIES. Imputation of Being, see LIBEL AND SLANDER. In Public School, see CIVIL RIGHTS; SCHOOLS AND SCHOOL-DISTRICTS. Marriage of, see MARRIAGE; MISCEGENATION. Right to Vote, see ELECTIONS. See also COLORED PERSONS; MULATTO.)

N. E. I. An abbreviation for NON EST INVENTUS,[16] *q. v.* (See, generally, ATTACHMENT; ARREST; EXECUTIONS; PROCESS.)

NEIGHBORHOOD.[17] Adjoining or surrounding district;[18] a place near; vicin-

the capability of being transferred by indorsement and delivery, so as to give the indorser a right to sue thereon in his own name. Anderson *v.* Portland Flouring Mills Co., 37 Oreg. 483, 60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235.

8. **"Negotiating"** is a general word coming from the Latin, and signifying to carry on negotiations concerning, and so to conduct business, to conclude a contract, or to transfer or arrange. Newport Nat. Bank *v.* Newport Bd. of Education, 114 Ky. 87, 70 S. W. 186, 24 Ky. L. Rep. 876. Used in its ordinary and transitive sense the word means transferring. Rochester First Nat. Bank *v.* Pierson. 24 Minn. 140, 141, 31 Am. Rep. 341.

"Negotiation" is the act of putting in circulation (Walker *v.* Ocean Bank, 19 Ind. 247, 250; Odell *v.* Clyde, 38 N. Y. App. Div. 333, 57 N. Y. Suppl. 126); a mercantile business transaction (Shaw *v.* Merchants Nat. Bank, 101 U. S. 557, 562, 25 L. ed. 892).

Preliminary negotiations: Merger in subsequent contract see EVIDENCE, 17 Cyc. 595 *et seq.* Affecting construction of contract see CONTRACTS, 9 Cyc. 579 *et seq.*

"Negotium" in Roman law means to transact business, or to treat concerning purchases. Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413, 416, used in describing the relation of agency.

9. Attrill *v.* Patterson, 58 Md. 226, 245.

10. Palmer *v.* Ferry, 6 Gray (Mass.) 420, 423.

"Negotiated for" as used in a contract means to converse in arranging the terms of a contract, and does not include a promise to negotiate at a future time. Smith *v.* Coe, 55 N. Y. 678, 679.

11. Blakiston *v.* Dudley, 5 Duer (N. Y.) 373, 377; Webster Dict. [*quoted* in Gloversville Nat. Bank *v.* Wells, 15 Hun (N. Y.) 51, 63].

12. Foster *v.* Bowes, 2 Ont. Pr. 256, 258.

13. Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 569.

14. Yerkes *v.* Port Jervis Nat. Bank, 69 N. Y. 382, 386, 25 Am. Rep. 208.

The power to negotiate a bill or note is the power to indorse and deliver to another, so that the right of action thereon shall pass to the indorsee or holder (Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 592, 20 Am. Rep. 95), and means more than indorsement merely, and includes delivery (Lowrie *v.* Zunkel, 49 Mo. App. 153, 156). A note may be said to be negotiated when it is delivered by the maker for consideration or for circulation. Odell *v.* Clyde, 23 Misc. (N. Y.) 734, 735, 53 N. Y. Suppl. 61.

15. Felix *v.* State, 18 Ala. 720, 726.

The term includes a person of color within the third degree (State *v.* Melton, 44 N. C. 49, 51); a person having one fourth or more of African blood (Gentry *v.* McMinnis, 3 Dana (Ky.) 382, 385; Jones *v.* Com., 80 Va. 538, 542); and a slave (*Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462).

The term does not include a person with less than one fourth of African blood. McPherson *v.* Com., 28 Gratt. (Va.) 939, 940.

Not synonymous with the term "black person" see People *v.* Hall, 4 Cal. 399, 403.

Used interchangeably with "mulatto" see Linton *v.* State, 88 Ala. 216, 219, 7 So. 261.

16. Black L. Dict.

17. **"Farming neighborhood"** see 19 Cyc. 458.

"Immediate neighborhood" see 21 Cyc. 1729 note 5.

18. Black L. Dict. [*quoted* in State *v.* Jungling, 116 Mo. 162, 166, 22 S. W. 688].

ity; adjoining district;[19] the place which is nigh, that is, nigh to one's habitation;[20] a district or locality, especially when considered with relation to its inhabitants or their interests;[21] the quality or condition of being a neighbor, or dwelling near; a place near; vicinity; adjoining district; a region the inhabitants of which may be counted as neighbors; the inhabitants who live in the vicinity of each other;[22] dwelling near; a place near; adjoining district; inhabitants who live in the vicinity of each other.[23] (Neighborhood: Disturbing Peace of, see BREACH OF THE PEACE. Jury From, see JURIES. Nuisance Affecting, see NUISANCES. Prejudice of Neighbors, see JURIES. Reputation in Neighborhood — Of Accused, see CRIMINAL LAW; Of Parties to Civil Action, see EVIDENCE; Of Witness, see WITNESSES.)

NEIGHBORING. Situated or residing near by; being in the vicinity; adjacent.[24] (See NEIGHBORHOOD.)

NE IN CRASTINUM QUOD POSSIS HODIE. A maxim meaning "Put not off until to-morrow what can be done to-day."[25]

NE LICITATOREM VENDITOR APPONAT. A maxim meaning "The seller should not appoint a bidder."[26]

NEMINEM CUM ALTERIUS DETRIMENTO ET INJURIA FIERI LOCUPLETIORUM. A maxim meaning "No one can be made richer to the damage and wrong of another."[27]

NEMINEM LÆDIT QUI JURE SUO UTITUR. A maxim meaning "He who stands in his own rights injures no one."[28]

NEMINEM OPORTET ESSE SAPIENTIOREM LEGIBUS. A maxim meaning "No man need be wiser than the laws."[29]

NEMINI HORA EST BONA UT NON ALICUI SIT MALA. A maxim meaning "No hour is favorable for one man but that is bad for another."[30]

NEMINI IN ALIUM PLUS LICET QUAM CONCESSUM EST LEGIBUS. A maxim

All property injured directly or without intervening cause, by the force of an explosion is legally within the neighborhood or vicinity of the scene of the explosion. St. Marys' Woolen Mfg. Co. *v.* Bradford Glycerine Co., 14 Ohio Cir. Ct. 522, 527, 7 Ohio Cir. Dec. 582. And likewise in the case of an operating nuisance, every part is in the "neighborhood" which is affected by it. State *v.* Luce, 9 Houst. (Del.) 396, 399, 32 Atl. 1076.

Used with the word "farming," it forms a phrase indefinite in its meaning. Aliso Water Co. *v.* Baker, 95 Cal. 268, 270, 30 Pac. 537.

19. Webster Dict. [*quoted* in Coyle *v.* Chicago, etc., R. Co., 27 Mo. App. 584, 593].

The word signifies nearness as opposed to remoteness. Wilson *v.* Ford, 190 Ill. 614, 625, 60 N. E. 876; Territory *v.* Lannon, 9 Mont. 1, 4, 22 Pac. 495; Langley *v.* Barnstead, 63 N. H. 246, 247; State *v.* Meek, 26 Wash. 405, 407, 67 Pac. 76.

No definite idea of distance is expressed in this word. Schmidt *v.* Kansas City Distilling Co., 90 Mo. 284, 296, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16; Rice *v.* Sims, 3 Hill (S. C.) 5, 7. But it is a relative and indefinite term. Woods *v.* Cochrane, 38 Iowa 484, 485.

20. Crabb Syn. [*quoted* in Madison *v.* Morristown Gaslight Co., 63 N. J. Eq. 120, 122, 58 Atl. 158].

21. Century Dict. [*quoted* in Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676, 680, 32 Pac. 802].

The requirement that jurors be of the "visne or neighborhood" means the county where the act is committed. People *v.* Powell, 87 Cal. 348, 358, 25 Pac. 481, 11 L. R. A. 75.

Used in reference to the general usages of merchants to charge interest, means the same town or place where such person carried on business and not a different town or place. Esterly *v.* Cole, 3 N. Y. 502, 505.

Within a meaning of the rule that evidence of character must come from the neighborhood of the person whose character is called in question, the word is not necessarily confined to the particular locality in which he resides, but is coextensive to the extent of territory occupied by those with whom he associates and frequently comes in contact. Peters *v.* Bourneau, 22 Ill. App. 177, 179. And in this connection see also State *v.* Henderson, 29 W. Va. 147, 166, 1 S. E. 225.

22. Webster Dict. [*quoted* in State *v.* Hughes, 82 Mo. 86, 89].

23. Webster Dict. [*quoted* in Madison *v.* Morristown Gaslight Co., 65 N. J. Eq. 356, 358, 54 Atl. 439].

24. Standard Dict.

"Neighboring freeholders" see Rice *v.* Sims, 3 Hill (S. C.) 5, 7.

"Neighboring inhabitants" see Brouwer *v.* Jones, 23 Barb. (N. Y.) 153, 164; Barrow *v.* Richard, 8 Paige (N. Y.) 351, 360, 35 Am. Dec. 713 note.

25. Morgan Leg. Max.

26. Pelouhet Leg. Max.

27. Morgan Leg. Max.

28. Bouvier L. Dict.

29. Bouvier L. Dict.

Applied in Church *v.* Leavenworth, 4 Day (Conn.) 274, 280.

30. Morgan Leg. Max.

meaning "More is allowed to no one against another, than is conceded by the laws." [31]

NEMO AD LITTUS MARIS ACCEDERE PROHIBETUR. A maxim meaning "No one is prohibited from approaching the sea shore." [32]

NEMO ADMITTENDUS EST INHABILITARE SEIPSUM. A maxim meaning "No man is to be admitted to incapacitate himself." [33]

NEMO AGIT IN SEIPSUM. A maxim meaning "No man acts against himself." [34]

NEMO ALIENÆ REI, SINE SATISDATIONE, DEFENSOR IDONEUS INTELLIGITUR. A maxim meaning "No man is considered a competent defender of another's property, without security." [35]

NEMO ALIENO NOMINE LEGE AGERE POTEST. A maxim meaning "No one may sue at law in the name of another." [36]

NEMO ALIQUAM PARTEM RECTE INTELLIGERE POTEST ANTEQUAM TOTUM, ITERUM ATQUE ITERUM PERLEGIT. A maxim meaning "No one can rightly understand part of a thing till he has read through the whole again and again." [37]

NEMO ALLEGANS SUAM TURPITUDINEM EST AUDIENDUS. A maxim meaning "No one alleging his own baseness is to be heard." [38]

NEMO BIS DEBET VEXARI PRO UNA ET EADEM CAUSA. See *post*, p. 664, note 52.

NEMO BIS IN PERICULUM VENIET PRO EODEM DELICTO. A maxim meaning "No one should come twice into danger for the same crime." [39]

NEMO BIS PUNITUR PRO EODEM DELICTO. A maxim meaning "No man is punished twice for the same offence." [40]

NEMO COGI POTEST PRÆCISE AD FACTUM, SED IN ID TANTUM QUOD INTERESSE. A maxim meaning "No person can be compelled precisely to the act, but to so much only as interests him." [41]

NEMO COGITATIONIS PŒNAM PATITUR. A maxim meaning "No one suffers punishment on account of his thoughts." [42]

NEMO COGITUR REM SUAM VENDERE, ETIAM JUSTO PRETIO. A maxim meaning "No man is compelled to sell his own property, even for a just price." [43]

NEMO CONDEMNARI DEBET INAUDITUS NEC SUMMONITUS. A maxim meaning "No one should be condemned unheard, or unsummoned." [44]

31. Peloubet Leg. Max.
32. Morgan Leg. Max.
33. Black L. Dict.
34. Black L. Dict.
35. Bouvier L. Dict.
36. Peloubet Leg. Max.
37. Peloubet Leg. Max.

Applied in: Crofts *v.* Middleton, 8 De G. M. & G. 192, 214, 2 Jur. N. S. 528, 25 L. J. Ch. 513, 4 Wkly. Rep. 439, 57 Eng. Ch. 150, 44 Eng. Reprint 364.

38. Morgan Leg. Max.

Applied in: Townsend *v.* Bush, 1 Conn. 260, 270; Bredin *v.* Dorsey, 2 Ky. L. Rep. 20, 22; Ackerman *v.* Larner, 116 La. 101, 114, 40 So. 581; Wearse *v.* Peirce, 24 Pick. (Mass.) 141, 146; Van Schaack *v.* Stafford, 12 Pick. (Mass.) 565, 567; Orr *v.* Lacey, 2 Dougl. (Mich.) 230, 247; Hamilton *v.* Scull, 25 Mo. 165, 166, 69 Am. Dec. 460; Utica Bank *v.* Hillard, 5 Cow. (N. Y.) 153, 160; Powell *v.* Waters, 17 Johns. (N. Y.) 176, 180; Peters *v.* Grim, 149 Pa. St. 163, 166, 24 Atl. 192, 34 Am. St. Rep. 599; Bredin's Appeal, 92 Pa. St. 241, 245, 37 Am. Rep. 677; Townsend *v.* Kerns, 2 Watts (Pa.) 180, 183; Lazarus *v.* Bryson, 3 Binn. (Pa.) 54, 61; Gates' Case, 1 Pa. Co. Ct. 236, 241; *In re* Gates, 3 Kulp (Pa.) 422, 432; Harris *v.* Harris, 23 Gratt. (Va.) 737, 754; Taylor *v.* Beck, 3 Rand. (Va.) 316, 318; Davis *v.* Brown, 94 U. S. 423, 426, 24 L. ed. 204; U. S. *v.* Leffler, 11 Pet. (U. S.) 86, 94, 9 L. ed. 642; *Ex p.* Ball, 10 Ch. D. 667, 672, 14 Cox C. C. 237, 48 L. J. Bankr. 57, 40 L. T. Rep. N. S. 141, 27 Wkly. Rep. 563; Stone *v.* Marsh, 6 B. & C. 551, 564, 8 D. & R. 71, 5 L. J. K. B. O. S. 201, R. & M. 364, 30 Rev. Rep. 420, 13 E. C. L. 252; Skaife *v.* Jackson, 3 B. & C. 421, 423, 5 D. & R. 290, 10 E. C. L. 196; *Ex p.* Jones, 3 Deac. & C. 525, 538, 2 Mont. & A. 193; Walton *v.* Shelley, 1 T. R. 296, 300; Livingstone *v.* Massey, 23 U. C. Q. B. 156, 161; Doe *v.* Hopkins, 5 U. C. Q. B. O. S. 579, 584.

39. Peloubet Leg. Max.
40. Black L. Dict.

Applied in the following cases: Pilot Grove *v.* McCormick, 56 Mo. App. 530, 534; Mitchell *v.* State, 42 Ohio St. 383, 391; State *v.* Crotean, 23 Vt. 14, 72, 54 Am. Dec. 90; Middleton *v.* Crofts, Ridg. t. Hardw. 109, 131, 27 Eng. Reprint 774; Shadford *v.* Houstoun, Str. 317, 339.

41. Peloubet Leg. Max.
42. Bouvier L. Dict.
43. Black L. Dict.
44. Peloubet Leg. Max.

NEMO CONTRA FACTUM SUUM VENIRE POTEST. A maxim meaning "Nobody can come in against his own deed." [45]

NEMO DAMNUM FACIT, NISI QUI ID FECIT QUOD FACERE JUS NON HABET. A maxim meaning "No one does damage, unless he is doing what he has no right to do." [46]

NEMO DARE POTEST QUOD NON HABET. A maxim meaning "No man can give that which he has not." [47]

NEMO DAT QUID NON HABET. A maxim meaning "No one can give who does not possess." [48]

NEMO DEBET ALIENA JACTURA LOCUPLETARI. A maxim meaning "No one ought to gain by another's loss." [49]

NEMO DEBET BIS PUNIRE PRO UNO DELICTO: ET DEUS, NON AGIT BIS IN IPSUM. A maxim meaning "No one should be punished twice for the same fault, and God punishes not twice against himself." [50]

NEMO DEBET BIS PUNIRI PRO UNO DELICTO. A maxim meaning "No man ought to be punished twice for one offense." [51]

NEMO DEBET BIS VEXARI PRO EADEM CAUSA. See note 52.

NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA. A maxim meaning "No one ought to be twice vexed for one and the same cause." [52]

45. Morgan Leg. Max.

46. Peloubet Leg. Max.

47. Black L. Dict.

48. Bouvier L. Dict.

Applied in: Emerson *v.* European, etc., R. Co., 67 Me. 387, 391, 24 Am. Rep. 39; Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18, 24, 97 Am. Dec. 70, 1 Am. Rep. 71; Thompson *v.* Foerstel, 10 Mo. App. 290, 299; Ullman *v.* Biddle, 53 W. Va. 415, 417, 44 S. E. 280; Cross *v.* Currie, 5 Ont. App. 31, 62.

49. Bouvier L. Dict.

50. Peloubet Leg. Max.

51. Black L. Dict.

Applied in: Fry *v.* Bennett, 4 Duer (N. Y.) 247, 265, 1 Abb. Pr. 289; State *v.* Warren, 92 N. C. 825, 827; Reg. *v.* Port Perry, etc., R. Co., 38 U. C. Q. B. 431, 435.

52. Bouvier L. Dict.

Applied in: Burritt *v.* Belfy, 47 Conn. 323, 329, 36 Am. Rep. 79; State *v.* Reed, 26 Conn. 202, 208; Beach *v.* Norton, 8 Conn. 71, 76; Sheldon *v.* Kibbe, 3 Conn. 214, 220, 8 Am. Dec. 176; Fowler *v.* Wood, 73 Kan. 511, 533, 85 Pac. 763, 6 L. R. A. N. S. 162; Sweet *v.* Brackley, 53 Me. 346; Durham *v.* Giles, 52 Me. 206, 208; State *v.* Shoemaker, 20 N. J. L. 153, 156; Skillman *v.* Baker, 18 N. J. L. 134, 137; Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 584, 8 Atl. 811; Putnam *v.* Clark, 34 N. J. Eq. 532, 533; People *v.* Tweed, 63 N. Y. 194, 205; Lorillard F. Ins. Co. *v.* Meshural, 7 Rob. (N. Y.) 308, 312; Edwards *v.* Baker, 99 N. C. 258, 262, 6 S. E. 255.

Other forms of the maxim are: *Nemo debet bis vexari pro eadem causa.* Applied in: State *v.* Lee, 65 Conn. 265, 272, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; Hall *v.* Forman, 6 Ky. L. Rep. 473, 475; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423, 427; French *v.* Neal, 24 Pick. (Mass.) 55, 61; Donnell *v.* Wright, 147 Mo. 639, 646, 49 S. W. 874; Offutt *v.* John, 8 Mo. 120, 124, 40 Am. Dec. 125; Baldwin *v.* Fries, 46 Mo. App. 288, 294; Fay *v.* Parker, 53 N. H. 342, 387, 16 Am. Rep. 270; Steers *v.* Shaw, 53 N. J. L. 358, 360, 21 Atl. 940; Kuckler *v.* People, 5 Park. Cr. (N. Y.) 212, 216; Garvin *v.* Dawson, 13 Serg. & R. (Pa.) 246, 247; Kennedy *v.* McNickle, 7 Phila. (Pa.) 217; Rahter *v.* Newtown F. Ins. Co., 1 Wkly. Notes Cas. (Pa.) 328; Perkins *v.* Walker, 19 Vt. 144, 150; Price *v.* Com., 33 Gratt. (Va.) 819, 834, 36 Am. Rep. 797; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505, 511; Lawrence *v.* Vernon, 15 Fed. Cas. No. 8,146, 3 Sumn. 20, 22; Cambefort *v.* Chapman, 19 Q. B. D. 229, 232, 51 J. P. 455, 56 L. J. Q. B. 639, 57 L. T. Rep. N. S. 625, 35 Wkly. Rep. 838; Brunsden *v.* Humphrey, 14 Q. B. D. 141, 151, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944; *In re* May, 25 Ch. D. 231, 234, 49 L. T. Rep. N. S. 770, 32 Wkly. Rep. 337; *In re* Metropolitan Bank, 15 Ch. D. 139, 142, 49 L. J. Ch. 651, 43 L. T. Rep. N. S. 299; Reg. *v.* Morris, L. R. 1 C. C. 90, 92, 10 Cox C. C. 480, 36 L. J. M. C. 84, 16 L. T. Rep. N. S. 636, 15 Wkly. Rep. 990; Reg. *v.* Bird, 5 Cox C. C. 20, 90, 15 Jur. 193, 20 L. J. M. C. 70, 2 Eng. L. & Eq. 448; Gadderer *v.* Sheppard, 4 Dowl. P. C. 577, 578; Anonymous, 1 Dowl. P. C. 59, 60; Wadsworth *v.* Bentley, 17 Jur. 1077, 1078, 23 L. J. Q. B. 3, L. & M. 203, 2 Wkly. Rep. 56, 22 Eng. L. & Eq. 176; Masters *v.* Johnson, 21 L. J. Exch. 253, 255, 12 Eng. L. & Eq. 572; Reg. *v.* St. Louis, 5 Can. Exch. 330, 354; Naylor *v.* Bell, 14 Nova Scotia 444, 454; Erdman *v.* Walkerton, 20 Ont. App. 444, 452; Hughes *v.* Rees, 10 Ont. Pr. 301, 303; Sloan *v.* Creasor, 22 U. C. Q. B. 127, 131.

Nemo bis debet vexari pro una et eadem causa. Applied in: Com. *v.* Green, 17 Mass. 515, 534; Kent *v.* Kent, 2 Mass. 338, 355; Moran *v.* Plankinton, 64 Mo. 337, 338; Skeen *v.* Springfield Engine, etc., Co., 42 Mo. App. 158, 164; Bell *v.* McCulloch, 31 Ohio St. 397, 405; Marsh *v.* Pier, 4 Rawle (Pa.) 273, 287, 26 Am. Dec. 131; Archer *v.* Ward, 9 Gratt. (Va.) 622, 625; Younger *v.* State, 2 W. Va. 579, 585, 98 Am. Dec. 791; U. S. *v.* Throckmorton, 98 U. S. 61, 65, 25 L. ed. 93; Mellin *v.* Evans, 1 Cromp. & J. 82, 83; *In re* Parker,

NEMO DEBET BIS VEXARI, SI CONSTET CURIÆ QUOD SIT PRO UNA ET EADEM CAUSA. A maxim meaning "No man should be twice punished, if it appear to the court that it is for one and the same cause." [53]

NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA. A maxim meaning "No man ought to be a judge in his own cause." [54]

NEMO DEBET ESSE TESTIS IN SUA PROPRIA CAUSA. A maxim meaning "No one ought to be a witness in his own cause." [55]

NEMO DEBET EX ALIENO DAMNO LUCRARI. A maxim meaning "No one should be enriched out of the loss sustained by another." [56]

NEMO DEBET IMMISCERE SE REI AD SE NIHIL PERTINENTI. A maxim meaning "No one should intermeddle with a thing that in no respect concerns him." [57]

NEMO DEBET IN COMMUNIONE INVITUS TENERI. A maxim meaning "No one should be retained in a partnership against his will." [58]

NEMO DEBET LOCUPLETARI ALIENA JACTURA. A maxim meaning "No one ought to be enriched by another's loss." [59]

NEMO DEBET LOCUPLETARI EX ALTERIUS INCOMMODO. A maxim meaning "No one ought to be enriched at the expense of another." [60]

NEMO DEBET REM SUAM SINE FACTU AUT DEFECTU SUO AMITTERE. A maxim meaning "No one should lose his property without his own act or negligence." [61]

NEMO DE DOMO SUA EXTRAHI POTEST. A maxim meaning "No one may be dragged from his own house." [62]

NEMO DUOBUS UTATUR OFFICIIS. A maxim meaning "No one should hold two offices" [63]

NEMO EJUSDEM TENEMENTI SIMUL POTEST ESSE HÆRES ET DOMINUS. A maxim meaning "No one can be at the same time heir and lord of the same fief." [64]

NEMO ENIM ALIQUAM PARTEM RECTI INTELLIGERE POSSIT ANTEQUAM TOTUM ITERUM ATQUE ITERUM PERLEGERIT. A maxim meaning "No one can understand the significance of a part of a writing until he has read the whole again and again." [65]

NEMO EST COGENDUS QUIS AD SUBSTITUENDUM. A maxim meaning "No one is compelled to substitute another in his own place." [66]

NEMO EST HÆRES VIVENTIS. A maxim meaning "No one is an heir to the living." [67]

10 Can. L. T. Occ. Notes 373, 375; Reg. *v.* Morton, 19 U. C. C. P. 9, 23.

53. Peloubet Leg. Max. See also Black L. Dict. [*citing* Broom Leg. Max. 327, 348].

Applied in: Sturtevant *v.* Randall, 53 Me. 149, 153; Cole *v.* Butler, 43 Me. 401, 405; Burlen *v.* Shannon, 99 Mass. 200, 203, 96 Am. Dec. 733; Darlington *v.* Gray, 5 Whart. (Pa.) 487, 489; Marsh *v.* Pier, 4 Rawle (Pa.) 273, 288, 26 Am. Dec. 131; Wadleigh *v.* Veazie, 28 Fed. Cas. No. 17,031, 3 Sumn. 165, 167.

54. Black L. Dict.

Applied in: Winters *v.* Coons, 162 Ind. 26, 31, 69 N. E. 458; Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 17, 14 N. E. 733, 3 Am. St. Rep 616; Stoll *v.* Walpack Tp., 38 N. J L. 200, 202; Piland *v.* Taylor, 113 N C. 1, 3, 18 S. E. 70; Kelly *v.* Lynchburg, etc., R. Co., 110 N. C. 431, 432, 15 S. E. 200, 16 L. R A. 514; Reg. *v.* Steele, 2 Can Cr. Cas. 433, 435.

55. **Applied in:** Stocksdale *v* Cullison, 35 Md. 322, 325; *Ex p.* Palmer, 1 Deac. & C. 371, 379.

56. Morgan Leg. Max.

57. Black L. Dict.

58. Bouvier L. Dict.

Applied in Selden *v.* Vermilya, 2 Sandf. (N. Y.) 568, 593.

59. Black L. Dict.

Applied in Green *v.* Biddle, 8 Wheat. (U. S.) 1, 83, 5 L. ed. 547.

60. Morgan Leg. Max.

Applied in: Chaffe *v.* Oliver, 39 Ark. 531, 539; Griswold *v.* Bragg, 48 Conn. 577, 580; Gavin *v.* Carling, 55 Md. 530, 538; Union Hall Assoc. *v.* Morrison, 39 Md. 281, 294; American Dock, etc., Co. *v.* Public Schools, 39 N. J. Eq. 409, 450; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 494.

61. Bouvier L. Dict.

62. Peloubet Leg. Max.

63. Black L. Dict.

64. Peloubet Leg. Max.

65. Morgan Leg. Max.

66. Peloubet Leg. Max.

67. Bouvier L. Dict See also Black L. Dict. [*citing* Broom Leg. Max. 522, 523].

Applied in: Gerard *v.* Ives, 78 Conn. 485, 491, 62 Atl. 607; Noble *v.* Andrews, 37 Conn. 346, 347; Gold *v.* Judson, 21 Conn. 616, 624;

NEMO EST SUPRA LEGES. A maxim meaning "No one is above the laws."[68]

NEMO EX ALTERIUS DETRIMENTO FIERI DEBET LOCUPLETARI. A maxim meaning "No one ought to be made rich out of another person's injury."[69]

NEMO EX ALTERIUS FACTO PRÆGRAVARI DEBET. A maxim meaning "No man ought to be burdened in consequence of another's act."[70]

NEMO EX CONSILIO OBLIGATUR. A maxim meaning "No man is bound for the advice he gives."[71]

NEMO EX DOLO SUO PROPRIO RELEVETUR, AUT AUXILIUM CAPIAT. A maxim meaning "Let no one be relieved or gain an advantage by his own fraud."[72]

NEMO EX HIS QUI NEGANT SE DEBERE PROHIBITUR ETIAM ALI DEFENSIONE UTI NISI LEX IMPEDIT. A maxim meaning "No one, denying that he is indebted, is prohibited from using any other lawful defense."[73]

NEMO EX PROPRIO DOLO CONSEQUITUR ACTIONEM. A maxim meaning "No one acquires a right of action from his own wrong."[74]

NEMO EX SUO DELICTO MELIOREM SUAM CONDITIONEM FACERE POTEST. A maxim meaning "No one can improve his condition by his own wrong."[75]

NEMO FACTUM A SE ALIENUM TENETUR SCIRE. A maxim meaning "No one is bound to know the private act or deed of another, unless it is done with himself."[76]

NEMO FORESTAM HABET NISI REX. A maxim meaning "Forests belong to no one but the king."[77]

NEMO HABETUR AGERE DOLOSE QUI JURE SE UTITUR. A maxim meaning "No one is held to act fraudulently who acts in exercise of his rights."[78]

NEMO IN ALTERIUS FACTO PRÆGRAVARI DEBET. A maxim meaning "No one should be burdened by the act of another."[79]

NEMO INAUDITUS CONDEMNARI DEBET SI NON SIT CONTUMAX. A maxim meaning "No man ought to be condemned without being heard unless he be contumacious."[80]

Lockwood *v.* Jesup, 9 Conn. 272, 274; Dart *v.* Dart, 7 Conn. 250, 256; Throop *v.* Williams, 5 Conn. 98, 100; Hundley *v.* State, 47 Fla. 172, 174, 36 So. 362; Crawley *v.* Kendrick, 122 Ga. 183, 186, 50 S. E. 41; Morin *v.* Holliday, (Ind. App. 1906) 77 N. E. 861, 862; Doyle *v.* Andis, 127 Iowa 36, 102 N. W. 177, 189, 69 L. R. A. 953; Sellman *v.* Sellman, 63 Md. 520, 522; Houghton *v.* Kendall, 7 Allen (Mass.) 72, 75; Lewis *v.* Nelson, 4 Mich. 630, 639; *In re* Bartles, 33 N. J. Eq. 46, 47; Cushman *v.* Horton, 59 N. Y. 149, 151; Moore *v.* Littel, 41 N. Y. 66, 69; Umfreville *v.* Keeler, 1 Thomps. & C. (N. Y.) 486, 487; Bowers *v.* Arnoux, 33 N. Y. Super. Ct. 530, 548; Campbell *v.* Everhart, 139 N. C. 503, 508, 52 S. E. 201; Youngs *v.* Heffner, 36 Ohio St. 232, 238; Pollock *v.* Speidel, 27 Ohio St. 86, 94; Miller's Estate, 145 Pa. St. 561, 566, 22 Atl. 1044; Harris *v.* Potts, 3 Yeates (Pa.) 141, 144; *In re* Philadelphia Trust Co., 13 Phila. (Pa.) 44, 46; Phillips' Appeal, 8 Wkly. Notes Cas. (Pa.) 350, 352; Leightner *v.* Leightner, 6 Wkly. Notes Cas. (Pa.) 37, 39; *In re* Parsons, 45 Ch. D. 51, 62, 59 L. J. Ch. 666, 62 L. T. Rep. N. S. 929, 38 Wkly. Rep. 712; Right *v.* Creber, 5 B. & C. 866, 873, 8 D. & R. 718, 4 L. J. K. B. O. S. 324, 29 Rev. Rep. 444, 11 E. C. L. 715; Doe *v.* Perratt, 5 B. & C. 48, 78, 11 E. C. L. 363; Doe *v.* Perratt, 10 Bing. 198, 207, 25 E. C. L. 99; Hayter *v.* Rod, 1 P. Wms. 360, 366, 24 Eng. Reprint 426; Bayley *v.* Morris, 4 Ves. Jr. 788, 790, 31 Eng. Reprint 408; Frogmorton *v.* Wharrey, W. Bl. 728, 731, 3 Wils. C. P. 125; Gourley *r.* Gilbert, 12 N. Brunsw. 80, 87.

68. Morgan Leg. Max.

69. Peloubet Leg. Max.

Applied in Com. *v.* Shelby, 13 Serg. & R. (Pa.) 348, 353.

70. Black L. Dict.

Applied in Bellingham *v.* Freer, 1 Moore P. C. 333, 349, 12 Eng. Reprint 841.

71. Bouvier L. Dict.

72. Black L. Dict.

Applied in: Stone *v.* Marsh, 6 B. & C. 551, 8 D. & R. 71, 5 L. J. K. B. O. S. 201, 207, R. & M. 364, 30 Rev. Rep. 420, 13 E. C. L. 252.

73. Morgan Leg. Max.

74. Bouvier L. Dict.

Applied in: Housel *v.* Cremer, 13 Nebr. 298, 301, 14 N. W. 398; Pillsbury *v.* Kingon, 31 N. J. Eq. 619, 620; Gilbert *v.* Hoffman, 2 Watts (Pa.) 66, 68, 26 Am. Dec. 103; Fisher *v.* Saylor, 2 Wkly. Notes Cas. (Pa.) 162, 164.

75. Peloubet Leg. Max.

Applied in: Gilman *v.* European, etc., R. Co., 60 Me. 235, 245; State *v.* Union Tp., 8 Ohio St. 394, 402; Lundy *v.* Lundy, 24 Can. Sup. Ct. 650, 654; McKinnon *v.* Lundy, 21 Ont. App. 560, 564; James *v.* Grand Trunk R. Co., 1 Ont. L. Rep. 127, 135.

76. Morgan Leg. Max.

77. Morgan Leg. Max.

78. Peloubet Leg. Max.

79. Morgan Leg. Max.

80. Black L. Dict.

NEMO IN PROPRIA CAUSA TESTIS ESSE DEBET. A maxim meaning "No one ought to be a witness in his own cause." [81]

NEMO INVITUS COMPELLITUR AD COMMUNIONEM. A maxim meaning "No one can be compelled into copartnership against his will." [82]

NEMO JUS SIBI DICERE POTEST. A maxim meaning "No one can declare the law for himself." (No one is entitled to take the law into his own hands.) [83]

NEMO MILITANS DEO IMPLICET SE NEGOTIIS SECULARIBUS. A maxim meaning "No one whose duty is with things divine should be allowed to deal with things secular." [84]

NEMO MORI POTEST PRO PARTE TESTATUS PRO PARTE INTESTATUS. A maxim meaning "No one can die partly testate and partly intestate." [85]

NEMO MORITURUS PRÆSUMITUR MENTIRI. A maxim meaning "No one at the point of death is presumed to lie." [86]

NEMO NASCITUR ARTIFEX. A maxim meaning "No one is born an artificer." [87]

NEMO PATRIAM IN QUA NATUS EST EXUERE NEC LIGEANTIÆ DEBITUM EJURARE POSSIT. A maxim meaning "A man cannot abjure his native country nor the allegiance which he owes to his sovereign." [88]

NEMO PLUS COMMODI HEREDI SUO RELINQUIT QUAM IPSE HABUIT. A maxim meaning "No one leaves a greater benefit to his heir than he had himself." [89]

NEMO PLUS JURIS AD ALIENUM TRANSFERRE POTEST, QUAM IPSE HABET. A maxim meaning "No one can transfer to another a greater right than he has himself." [90]

NEMO POTEST CONTRA RECORDUM VERIFICARE PER PATRIAM. A maxim meaning "No one can verify by jury against a record." [91]

NEMO POTEST EPISCOPO MANDARE PRÆTER REGEM. A maxim meaning "No one can give a mandate to a bishop except the king." [92]

NEMO POTEST ESSE DOMINUS ET HÆRES. A maxim meaning "No one can be both owner and heir." [93]

NEMO POTEST ESSE SIMUL ACTOR ET JUDEX. A maxim meaning "No one can be at once suitor and judge." [94]

NEMO POTEST ESSE TENENS ET DOMINUS. A maxim meaning "No man can be at the same time tenant and lord." [95]

NEMO POTEST FACERE PER ALIUM, QUOD PER SE NON POTEST. A maxim meaning "No one can do by another what he cannot do by himself." [96]

NEMO POTEST FACERE PER OBLIQUUM QUOD NON POTEST FACERE PER DIRECTUM. A maxim meaning "No man can do that indirectly which he cannot do directly." [97]

81. Black L. Dict.
Applied in: Witherell *v.* Swan, 32 Me. 247, 249; Bertles *v.* Nunan, 12 Abb. N Cas. (N. Y.) 283, 292.
82. Peloubet Leg. Max.
83. Bouvier L. Dict. [*citing* Trayner Max. 366].
84. Morgan Leg. Max.
85. Peloubet Leg. Max.
86. Peloubet Leg. Max.
87. Bouvier L. Dict.
88. Broom Leg. Max.
89. Black L. Dict.
90. Peloubet Leg. Max.
Applied in: Geisreiter *v.* Sevier, 33 Ark. 522, 535; Bradeen *v.* Brooks, 22 Me. 463, 474; Levi *v.* Booth, 58 Md. 305, 311, 42 Am. Rep. 332; Sargent *v.* Usher, 55 N. H. 287, 289, 20 Am. Rep. 208; Newton *v.* Porter, 5 Lans. (N. Y.) 416, 431; Rawls *v.* Deshler, Sheld. (N. Y.) 48, 52; Holbrook *v.* Vose, 6 Bosw. (N. Y.) 76, 107; Cook *v* Beal, 1 Bosw. (N. Y.) 497, 500; Roberts *v.* Dillon, 3 Daly (N. Y.) 50, 52; Cheriot *v.* Foussat, 3 Binn. (Pa.) 220, 246; Wasserman *v.* Metzger, 105 Va. 744, 752, 54 S. E. 893, 7 L. R. A. N. S. 1019; Dunfee *v.* Childs, 59 W. Va. 225, 243, 53 S. E. 209; Wiesner *v.* Zaun, 39 Wis. 188, 214; Long *v.* Buckeridge, Str. 196, 111; Venner *v.* Sun L. Ins. Co., 17 Can. Sup. Ct. 394, 399; Sweeny *v.* Montreal Bank, 12 Can. Sup. Ct. 661, 704; Harrington *v.* Reynolds, 10 Nova Scotia 134, 141; Cross *v.* Currie, 5 Ont. App. 31, 47; Doe *v.* Bell, 5 U. C. Q. B. O. S. 344, 418.
91. Morgan Leg. Max.
92. Peloubet Leg. Max.
93. Bouvier L. Dict.
94. Black L. Dict.
95. Morgan Leg. Max.
Applied in Corr *v.* Porter, 33 Gratt. (Va.) 278, 286.
96. Peloubet Leg. Max.
97. Black L. Dict.

NEMO POTEST GLADII POTESTAM SIBI VEL CUJUS ALTERIUS COERCITIONIS AD ALIUM TRANSFERRE. A maxim meaning "No one to whom is delegated a power of coercion can himself transfer it to another." [98]

NEMO POTEST HABERE DUAS MILITIAS NEC DUAS DIGNITATES. A maxim meaning "No man can fill two offices, or two dignities." [99]

NEMO POTEST IMMITTERE IN ALIENUM. A maxim meaning "No one can send anything into another's field." [1]

NEMO POTEST MUTARE CONSILIUM SUUM IN ALTERIUS INJURIAM. A maxim meaning "No one is allowed to change his own mind to the injury of another." [2]

NEMO POTEST NISI QUOD DE JURE POTEST. A maxim meaning "No man can do anything except what he can do lawfully." [3]

NEMO POTEST RENUNCIARE JURI PUBLICO. A maxim meaning "No one can renounce a public right." [4]

NEMO POTEST SIBI DEBERE. A maxim meaning "No one can owe to himself." [5]

NEMO POTEST SIBI MUTARE CAUSAM POSSESSIONIS. A maxim meaning "No one can change for himself the cause of his possession." [6]

NEMO PRÆDO EST QUI PRETIUM NUMERAVIT. A maxim meaning "No one is a pirate who has counted out the price." [7]

NEMO PRÆSENS NISI INTELLIGAT. A maxim meaning "One is not present unless he understands." [8]

NEMO PRÆSUMITUR ALIENAM POSTERITATEM SUÆ PRÆTULISSE. A maxim meaning "No man is presumed to have preferred another man's posterity to his own." [9]

NEMO PRÆSUMITUR DONARE. A maxim meaning "No one is presumed to give." [10]

NEMO PRÆSUMITUR DONARE VEL SUUM PERDERE. A maxim meaning "Nobody is presumed to give a donation or to lose what is his own." [11]

NEMO PRÆSUMITUR ESSE IMMEMOR SUÆ ÆTERNÆ SALUTIS, ET MAXIME IN ARTICULO MORTIS. A maxim meaning "No one is presumed to be forgetful of his own eternal welfare, and particularly at the point of death." [12]

NEMO PRÆSUMITUR LUDERE IN EXTREMIS. A maxim meaning "No one is presumed to trifle at the point of death." [13]

NEMO PRÆSUMITUR MALUS. A maxim meaning "No one is presumed bad." [14]

NEMO PROHIBETUR PLURES NEGOTIATIONES SIVE ARTES EXERCERE. A maxim meaning "No one is prohibited from exercising several kinds of business or arts." [15]

NEMO PROHIBETUR PLURIBUS DEFENSIONIBUS UTI. A maxim meaning "No one is prohibited from making use of several defenses." [16]

NEMO PRUDENS PUNIT UT PRÆTERITA REVOCENTUR, SED UT FUTURA PRÆVENIANTUR. A maxim meaning "No wise man punishes that things done may be revoked, but that future wrongs may be prevented." [17]

NEMO PUNITUR PRO ALIENO DELICTO. A maxim meaning "No one is to be punished for the crime of another." [18]

98. Peloubet Leg. Max.
99. Peloubet Leg. Max.
1. Morgan Leg. Max.
2. Morgan Leg. Max.
Applied in Eakin *v.* Raub, 12 Serg. & R. (Pa.) 330, 362.
3. Morgan Leg. Max.
4. Peloubet Leg. Max.
5. Bouvier L. Dict.
6. Morgan Leg. Max.
7. Peloubet Leg. Max.
8. Black L. Dict.
9. Black L. Dict.
10. Black L. Dict.
Applied in: Morris *v.* Pratt, 114 La. 103, 38 So. 72; Haven *v.* Foster, 9 Pick. (Mass.) 112, 128, 19 Am. Dec. 353; Grey *v.* Grey, 47 N. Y. 552, 555; Dickeschied *v.* Exchange Bank, 28 W. Va. 340, 361.
11. Morgan Leg. Max.
12. Black L. Dict.
13. Bouvier L. Dict.
14. Morgan Leg. Max.
15. Peloubet Leg. Max.
16. Morgan Leg. Max.
17. Bouvier L. Dict.
18. Peloubet Leg. Max. See also Black L. Dict. [*citing* Wingfield Max. 336].

NEMO PUNITUR SINE INJURIA, FACTO, SEU DEFALTO. A maxim meaning "No one is punished except for some injury, deed, or default." [19]

NEMO QUI CONDEMNARE POTEST ABSOLVERE NON POTEST. A maxim meaning "He who is able to condemn is also able to acquit." [20]

NEMO REDDITUM INVITO DOMINO PERCIPERE ET POSSIDERE POTEST. A maxim meaning "No one can take, and enjoy the rent without consent of the owner." [21]

NEMO REM SUUM AMITTIT, NISI EX FACTO AUT DELICTO SUO, AUT NEGLECTU. A maxim meaning "No one can lose his own property, except by his own deed, transgression, or negleet." [22]

NEMO REPENTE TURPISSIMUS. A maxim meaning "No one becomes bad in an instant." [23]

NEMO SIBI ESSE JUDEX VEL SUIS JUS DICERE DEBET. A maxim meaning "No one ought to be his own judge, or the tribunal in his own affairs." [24]

NEMO SINE ACTIONE EXPERITUR, ET HOC NON SINE BREVE SIVE LIBELLO CONVENTIONALI. A maxim meaning "No one goes to law without an action, and no one can bring an action without a writ or bill." [25]

NEMO TENETUR AD IMPOSSIBILE. A maxim meaning "No one is bound to an impossibility." [26]

NEMO TENETUR ARMARE ADVERSARIUM CONTRA SE. A maxim meaning "No one is bound to arm his adversary against himself." [27]

NEMO TENETUR DIVINARE. A maxim meaning "No one is bound to know a thing before it happens." [28]

NEMO TENETUR EDERE INSTRUMENTA CONTRA SE. A maxim meaning "No man is bound to produce writings against himself." [29]

NEMO TENETUR INFORMARE QUI NESCIT SED QUISQUIS SCIRE QUOD INFORMAT. A maxim meaning "No one who is ignorant of a thing is bound to give information of it, but every one is bound to know that which he gives information of." [30]

NEMO TENETUR JURARE IN SUAM TURPITUDINEM. A maxim meaning "No one is bound to testify to his own baseness." [31]

NEMO TENETUR SEIPSUM ACCUSARE. A maxim meaning "No man can be compelled to criminate himself." [32]

NEMO TENETUR SEIPSUM INFORTUNIIS ET PERICULIS EXPONERE. A maxim meaning "No one is bound to expose himself to misfortunes and dangers." [33]

NEMO TENETUR SEIPSUM PRODERE. A maxim meaning "No one is bound to betray himself." [34]

19. Morgan Leg. Max.
20. Morgan Leg. Max.
21. Peloubet Leg. Max.
22. Morgan Leg. Max.
23. Peloubet Leg. Max.
24. Black L. Dict.

Applied in: Wildes *v.* Russell, L. R. 1 C. P. 722, 733, 12 Jur. N. S. 645, 35 L. J. M. C. 241, 16 L. T. Rep. N. S. 478, 14 Wkly. Rep. 796.

25. Bouvier L. Dict.
26. Black L. Dict.

Applied in *In re* Ritchie, 11 Nova Scotia 450, 471.

27. Bouvier L. Dict.
28. Morgan Leg. Max.
29. Black L. Dict.
30. Bouvier L. Dict.
31. Peloubet Leg. Max.
32. Broom Leg. Max.

Applied in: Wilson *v.* State, 110 Ala. 1, 5, 20 So. 415, 55 Am. St. Rep. 17; Grannis *v.* Branden, 5 Day (Conn.) 260, 273, 5 Am. Dec. 143; State *v.* Height, 117 Iowa 650, 653, 91 N. W. 935, 94 Am. St. Rep. 323, 59 L. R. A. 437; *In re* Emery, 107 Mass. 172, 181, 9 Am. Rep. 22; Bertles *v.* Nunan, 12 Abb. N. Cas. (N. Y.) 283, 292; Respublica *v.* Gibbs, 3 Yeates (Pa.) 429, 439; Brown *v.* Walker, 161 U. S. 591, 596, 16 S. Ct. 644, 40 L. ed. 819; Reg. *v.* Erdheim, [1896] 2 Q. B. 260, 266, 65 L. J. M. C. 176, 74 L. T. Rep. N. S. 734, 3 Manson 142, 44 Wkly. Rep. 607; Reg. *v.* Coote, L. R. 4 P. C. 599, 607, 12 Cox C. C. 557, 42 L. J. P. C. 45, 29 L. T. Rep. N. S. 111, 9 Moore P. C. N. S. 463, 21 Wkly. Rep. 553, 12 Eng. Reprint 587; Rex *v.* Ratcliffe, W. Bl. 3, 5; *In re* Connolly, 4 Can. L. T. Occ. Notes 301, 302; Reg. *v.* Hammond, 29 Ont. 211, 214; Reg. *v.* Williams, 28 Ont. 583, 585; Reg. *v.* Fee, 13 Ont. 590, 596.

33. Morgan Leg. Max.
34. Bouvier L. Dict.

Applied in: Reg. *v.* Baldry, 5 Cox C. C. 523, 525, 2 Den. C. C. 430, 16 Jur. 599, 21 L. J. M. C. 134, 12 Eng. L. & Eq. 590; Boyle *v.* Wiseman, 1 Jur. N. S. 115, 116, 24 L. J. Exch. 160, 3 Wkly. Rep. 206, 29 Eng. L. & Eq.

NEMO UNQUAM JUDICET IN SE. A maxim meaning "No one can ever be a judge in his own cause."[35]

NEMO UNQUAM VIR MAGNUS FUIT, SINE ALIQUO DIVINO AFFLATU. A maxim meaning "No one was ever a great man without some divine inspiration."[36]

NEMO VIDETUR FRAUDARE EOS QUI SCIUNT ET CONSENTIUNT. A maxim meaning "No one is considered as defrauding those who know and consent."[37]

NEPHEW. A son of one's brother or sister.[38] (Nephew: Construction of Term as Used in Will, see WILLS. Right of Inheritance, see DESCENT AND DISTRIBUTION. Right Under Will, see WILLS. See also HEIR.)

NE QUÆRE LITEM CUM LICET FUGERE. A maxim meaning "Seek not a lawsuit when you can escape it."[39]

NEQUE LEGES NEQUE SENATUS CONSULTA ITA SCRIBI POSSUNT UT OMNIS CASUS QUI QUANDOQUE IN SEDIRIUNT COMPREHENDANTUR; SED SUFFICIT EA QUÆ PLÆRUMQUE ACCIDUNT CONTINERI. A maxim meaning "Neither laws nor acts of a parliament can be so written as to include all actual or possible cases; it is sufficient if they provide for those things which frequently or ordinarily may happen."[40]

NE QUID IN LOCO PUBLICO VEL ITINERE FIAT. A maxim meaning "That nothing shall be done (put or erected) in a public place or way."[41]

NEROLI. The essential oil obtained from the flowers of the bitter orange.[42]

NERVOUS SYSTEM. A part of the physical organization.[43]

NESCIS TU QUAM METICULOSA RES SIT IRE AD JUDICEM. A maxim meaning "You know little if you do not know that it is a ticklish thing to go to law."[44]

NE SE IPSUM PRÆCIPITES IN DISCRIMINEM. A maxim meaning "Judge not too hastily."[45]

NET. Clear of all charges and deductions;[46] clear of anything extraneous, with all deductions;[47] clear of all tare, tret, and other deductions;[48] the opposite of GROSS,[49] *q. v.*

473; Rex *v.* Gilham, 2 Moody C. C. 186, 204; Reg. *v.* Fee, 13 Ont. 590, 598.

35. Black L. Dict.

36. Black L. Dict.

37. Peloubet Leg. Max.

38. *In re* Root, 187 Pa. St. 118, 121, 40 Atl. 818; Johnson Dict. [*quoted* in Grieves *v.* Rawley, 10 Hare 63, 64, 22 L. J. Ch. 625, 44 Eng. Ch. 63, 68 Eng. Reprint 840].

May include grand nephew.— Shepard *v.* Shepard, 57 Conn. 24, 39, 17 Atl. 173; Benton *v.* Benton, 66 N. H. 169, 170, 20 Atl. 365; Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214, 226; Matter of Woodward, 53 Hun (N. Y.) 466, 470, 6 N. Y. Suppl. 186 [*affirmed* in 117 N. Y. 522, 23 N. E. 120, 7 L. R. A. 367]; *In re* Root, 187 Pa. St. 118, 121, 40 Atl. 818.

Means legitimate nephews.— Lyon *v.* Lyon, 88 Me. 395, 400, 34 Atl. 180; Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214, 226.

Nephews and nieces as used in wills see Goddard *v.* Amory, 147 Mass. 71, 74, 16 N. E. 725; *In re* Woodward, 117 N. Y. 522, 526, 23 N. E. 120, 7 L. R. A. 367 [*affirming* 53 Hun 466, 6 N. Y. Suppl. 186]; *In re* Crawford, 113 N. Y. 366, 376, 21 N. E. 142; Green's Appeal, 42 Pa. St. 25, 30; Lewis *v.* Fisher, 2 Yeates (Pa.) 196, 200; Weiss' Estate, 1 Montg. Co. Rep. (Pa.) 209, 211; James *v.* Smith, 8 Jur. 594, 595, 13 L. J. Ch. 376, 14 Sim. 214, 60 Eng. Reprint 339.

39. Peloubet Leg. Max.

40. Morgan Leg. Max.

41. Black L. Dict.

42. Dodge *v.* Hedden, 42 Fed. 446.

43. North German Lloyd Steamship Co. *v.* Wood, 18 Pa. Super. Ct. 488, 494.

44. Morgan Leg. Max.

45. Morgan Leg. Max.

46. Scott *v.* Hartley, 126 Ind. 239, 246, 25 N. E. 826; Turnley *v.* Micheal, (Tex. App. 1891) 15 S. W. 912; St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136, 148, 22 L. ed. 743.

Used among merchants to designate the quantity, amount, or value of an article or commodity after all tare and charges are deducted. Andrews *v.* Boyd, 5 Me. 199, 201.

47. Century Dict. [*quoted* in Gibbs *v.* People's Nat. Bank, 198 Ill. 307, 311, 64 N. E. 1060].

48. Worcester Dict. [*quoted* in Scott *v.* Hartley, 126 Ind. 239, 246, 25 N. E. 826].

49. Scott *v.* Hartley, 126 Ind. 239, 246, 25 N. E. 826.

Used in connection with other words see the following phrases: "Net additional yield." Herring *v.* Armwood, 130 N. C. 177, 181, 41 S. E. 96, 57 L. R. A. 958. "Net balance." Evans *v.* Waln, 71 Pa. St. 69, 74. "Net cash." Love *v.* Scatcherd, 146 Fed. 1, 8, 77 C. C. A. 1. "Net cash rule." Marshall *v.* Williams, 16 Fed. Cas. No. 9,136, 2 Biss. 255, 256. "Net estate." Phillips *v.* Phillips, 91 Mich. 433, 434, 51 N. W. 1071. "Net loss." Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 262, 46 Atl. 328, 1063. "Net moneys." Court *v.* Buckland, 1 Ch. D. 605, 610. "Net recovery." Camden *v.* McCoy, 48 W. Va. 377, 379, 37 S. E. 637. "Net rent."

NET EARNINGS.[50] Of a business, the excess of receipts over expenditures;[51] what is left after paying the legitimate cost and expense of making earnings by the use of property.[52] Of a corporation, the gross receipts less the expenses of operating the corporate property to earn such receipts.[53] Of a railroad,[54] the excess of the gross earnings over the expenses in producing the same;[55] the gross receipts less the expenses of operating the road to earn such receipts;[56] the surplus of the transportation earnings above operating expenses.[57] (Net Earnings: Of Corporation to Determine Taxes, see INTERNAL REVENUE; TAXATION. See also EARNINGS; and, generally, RAILROADS.)

NET GAIN. The excess of receipts over expenditures.[58] (See GAIN.)

NET INCOME. Of a business or corporation, the products of a business deducting the expenses only.[59] Of estate, rents, profits or income;[60] the income derived from the whole property less the necessary expenses incurred in its management and disbursements incurred on account thereof.[61] Of real estate, that portion

Bennett *v.* Womack, 7 B. & C. 627, 629, 14 E. C. L. 283, 3 C. & P. 96, 14 E. C. L. 468, 6 L. J. K. B. O. S. 175, 1 M. & R. 644, 31 Rev. Rep. 270. "Net rents and profits." Barker *v.* Greenwood, 4 M. & W. 421, 430. "Net sales." Williamson *v.* Baltimore, 19 Md. 413, 417. "Net value." Babcock *v.* Middlesex Sav. Bank, etc., Assoc., 28 Conn. 302, 307; Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161, 164. "Net weight." State *v.* Great Northern R. Co., 43 Wash. 658, 663, 86 Pac. 1056, 1057.

50. Compared with other terms.—The term is equivalent to "profits" signifying an excess of the value of return over the value of advances. People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498. And may mean "net income" or "net profits." Phillips *v.* Eastern R. Co., 138 Mass. 122, 129. "Net earnings" is not the equivalent of "surplus" or "net profits," although the term may be and often is used as such equivalent. Cotting *v.* New York, etc., R. Co., 54 Conn. 156, 168, 5 Atl. 851.

51. Connolly *v.* Davidson, 15 Minn. 519, 530, 2 Am. Rep. 154.

52. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500, 587.

53. St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136, 148, 22 L. ed. 743.

54. "Net earnings of the road" see St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136, 148, 22 L. ed. 743.

55. State *v.* Bd. of Assessors, 48 La. Ann. 1156, 1159, 20 So. 670.

56. Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 418, 10 Atl. 328, 1 Am. St. Rep. 330; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, 452, 1 Atl. 362, where it is said: "These would be the gross receipts less the expenses of operating the road, and less also interest on such of the company's indebtedness as it is prudent and proper to keep in a proper form, and less also any floating or temporary liabilities which good judgment would require to be presently paid, and less also an annual contribution to a sinking fund for the payment of debts, whenever expedient and proper to provide such a fund." St. John *v.* Erie R. Co., 21 Fed. Cas. No. 12,226, 10 Blatchf. 271, 279. See also Schmidt *v.* Louisville, etc., R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 15 Ky. L. Rep. 785.

57. State *v.* Bd. of Assessors, 48 La. Ann. 1156, 1159, 20 So. 670.

A similar definition is "the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves." Com. *v.* Philadelphia, etc., R. Co., 164 Pa. St. 252, 260, 30 Atl. 145; Union Pac. R. Co. *v.* U. S., 99 U. S. 402, 420, 25 L. ed. 274; St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136, 148, 22 L. ed. 743; Barry *v.* Missouri, etc., R. Co., 27 Fed. 1, 5.

58. Connolly *v.* Davidson, 15 Minn. 519, 530, 2 Am. Rep. 154.

Used in a contract for purchase of logs see McIlquhan *v.* Barber, 83 Wis. 500, 505, 53 N. W. 902.

59. People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498. See also American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. 101, 102, construing "net income" of a railroad as meaning all over and above operating expenses.

Cannot be understood to mean gross profits.— Bromley *v.* Elliot, 38 N. H. 287, 304, 75 Am. Dec. 182, where the question involved was one of partnership liability.

"Net annual income" of corporation stock means "all dividends and bonuses distributed among the stockholders which are derived from and represent the surplus earnings of the corporation; but cannot rightfully claim to hold any portion of the capital stock of the corporation which has been purchased by the corporation on credit, and distributed among its stockholders, although such stock, when distributed, is charged to the profit and loss account of the corporation." Gilkey *v.* Paine, 80 Me. 319, 14 Atl. 205.

60. People *v.* San Francisco Sav. Union, 72 Cal. 199, 13 Pac. 498.

61. Matter of Young, 15 N. Y. App. Div. 285, 286, 44 N. Y. Suppl. 585.

As used in a will, the terms have been held to mean the income after the payment of taxes, commissions, and a reasonable allowance for the disbursement of the trustee in the execution of his trust. New York L. Ins., etc., Co. *v.* Sands, 24 Misc. (N. Y.) 102, 106, 53 N. Y. Suppl. 320. See also Matter of Young, 15 N. Y. App. Div. 285, 286, 44 N. Y. Suppl. 585.

which remains after payment of taxes, repairs, and commissions;[62] the gross rents of the real estate less only the taxes, assessments, and interest.[63] (See INCOME.)

NET PREMIUM. In life insurance parlance, that part of the premium which is intended to meet the cost of the insurance, both current and future.[64] (See, generally, LIFE INSURANCE.)

NET PROCEEDS. The sum actually received after making all deductions;[65] what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted;[66] of a sale of land, what remains of the gross proceeds after paying the expenses of the sale.[67]

NET PROFITS.[68] The gain that accrues on an investment after deducting the loss and expenses of the business;[69] the gain which accrues on an investment after deducting expenses and losses;[70] the money received from the sale of goods after deducting the cost and expenses;[71] the surplus left after deducting for all losses;[72] what is left after deducting from the selling price the actual cost price, together with all expenses incidental to the procurement of the property;[73] what shall remain as the clear gain of any business venture after deducting capital invested, the expense incurred and the loss sustained.[74] Of a partnership, everything remaining after the payment of all debts due from the firm.[75]

NET RECEIPTS. The receipts of the business after deducting the current expenses.[76]

NET TONNAGE. Of a vessel, the difference between the entire cubic contents of the interior of the vessel numbered in tons and the space occupied by the crew and by propelling machinery.[77] (See, generally, SHIPPING.)

NET VALUE. Of corporate shares, the fair market value of the shares as sold in the usual method of selling such property.[78] Of an insurance policy, the amount

62. Hemphill's Estate, 180 Pa. St. 95, 96, 36 Atl. 409.

63. Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 555, 1 N. Y. Suppl. 436.

"Net income of real estate" usually means the balance of the rent left after deducting therefrom all necessary expenses of every kind and nature connected with the preservation and management of the land. Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 554, 1 N. Y. Suppl. 436.

"Net income of one-third part of his homestead" see Andrews *v.* Boyd, 5 Me. 199, 201.

64. Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 664, 41 Atl. 4.

65. McMurphy *v.* Garland, 47 N. H. 316, 320.

As used in marine insurance see Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 518, 5 Am. Rep. 162. See also MARINE INSURANCE.

"Net proceeds" of a cargo see Caine *v.* Horsfall, 1 Exch. 519, 524, 17 L. J. Exch. 25.

"Residue or net proceeds" see *In re* Jones, 103 N. Y. 621, 624, 9 N. E. 493, 57 Am. Rep. 775.

66. Maloney *v.* Love, 11 Colo. App. 288, 52 Pac. 1029, 1030; Mercur Gold Min., etc., Co. *v.* Spry, 16 Utah 222, 234, 52 Pac. 382. See also Dunlap *v.* O'Dena, 1 Rich. Eq. (S. C.) 272, 274.

67. Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 207. 66 S. W. 294.

68. "Net profits" and "probable value" are convertible terms as applied to a business. Poposkey *v.* Munkwitz, 68 Wis. 322, 335, 32 N. W. 35, 60 Am. Rep. 858.

"Net profits" of land see Earl *v.* Rowe, 35 Me. 414, 420, 58 Am. Dec. 714.

69. Tutt *v.* Land, 50 Ga. 339, 350. See also Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850.

70. McCulsky *v.* Klosterman, 20 Oreg. 108, 113, 25 Pac. 366, 10 L. R. A. 785.

Method of ascertainment.— "In ascertaining the net profits of a business, if we take the capital invested, the expenses of running it, and the losses incurred in its prosecution, which last element necessarily includes such accounts as are to be treated as bad and uncollectible, and deduct from the account of stock and the outstanding accounts now freed from bad accounts and treated as outstanding accounts and collectible, the difference will be the net profits." McCulsky *v.* Klosterman, 20 Oreg. 108, 113, 25 Pac. 366, 10 L. R. A. 785.

71. Wallace *v.* Beebe, 12 Allen (Mass.) 354, 357; Foster *v.* Goddard, 9 Fed. Cas. No. 4,970, 1 Cliff. 158, 176.

72. Welsh *v.* Canfield, 60 Md. 469, 475.

73. Cooke *v.* Cain, 35 Wash. 353, 359, 77 Pac. 682.

74. Hunter *v.* Roberts, 83 Mich. 63, 72, 47 N. W. 131; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114, 121, 3 Atl. 162.

75. Matter of Marx, 49 Misc. (N. Y.) 280, 282, 99 N. Y. Suppl. 334; Gorse *v.* Lynch, 36 Misc. (N. Y.) 150, 153, 72 N. Y. Suppl. 1054. See also Fuller *v.* Miller, 105 Mass. 103, 105; Stewart *v.* Stebbins, 30 Miss. 66, 83.

76. People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498; German Alliance Ins. Co. *v.* Van Cleave, 191 Ill. 410, 414, 61 N. E. 94.

77. The Thomas Melville, 62 Fed. 749, 751, 10 C. C. A. 619.

78. Babcock *v.* Middlesex Sav. Bank, etc., Assoc., 28 Conn. 302, where it is said that it implies neither a sale forced at a time of

of the payments which have been made by the holder in excess of the yearly cost of insurance.[79] (See, generally, CORPORATIONS; LIFE INSURANCE.)

NEUROSIS. A change in the nervous system of the individual that produces symptoms, but in which on examination of the nerve organs after death, at an autopsy for instance, no physical symptoms could be found.[80]

unusual depression in the market, nor deferred in expectation of an unusual rise.

79. Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161, 165, where it is said: "The aggregate net values which furnish the basis of this tax represent approximately the amount of money of citizens of this Commonwealth, which the company has in its hands, and which it is investing and managing by virtue of its franchise."

80. Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 576, 95 S. W. 917, 920.

NEUTRALITY LAWS

Edited by THOMAS HODGINS
Judge of the Admiralty Court, Canada

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I. NATURE AND SOURCES.

A. Definition. Neutrality, strictly speaking, consists in abstinence from any participation in a public, private, or civil war, and impartiality of conduct toward both parties.[1] That which is neutrality may be explained in a few words. The nation which, while preserving its natural liberty and its independence, remains at peace, while other nations are at war, and which continues to maintain with the two belligerent nations the friendly relations of commerce, or only of sociality, or of humanity, existing before the outbreak of hostilities, may call itself neutral. This quality imposes upon it the obligations which may be summed up in two principles, and which embrace all the others: Abstaining from all acts of hostility direct or indirect; and perfect impartiality between the two nations at war respecting all matters affecting the war. These obligations place a limit on the natural independence of the neutral nation; they restrict their primitive rights but only on this point; all the others affecting their independence and these rights they retain entire and complete. One may therefore say that neutrality gives birth to a duty for the nation which acknowledges it, that it imposes one restriction on their rights, but that it does not confer upon them any new rights.[2]

B. History and Source. The term "war" may be defined as the state or condition of nations which seek to enforce their contention of right by force. The rudimentary propositions of early international law contemplated no other relations than those of war and peace, in which the doctrines of neutrality had no existence. If hostilities broke out between two states, every other state was an ally or an enemy. Little by little a third attitude became possible, and was recognized as legitimate; and its maintenance has gradually been transformed into a duty by the jealousy of the actual belligerents whose anxiety to deprive their enemy of all assistance or advantages which the preference of other states might give him has been aided by the equal anxiety of such other states to remain neutral so as to continue their commercial relations of trade and inter course. A code of rules has grown up affecting neutral states in their new relations; partly as the accidental result of the collision of interests of varying strength, and partly as the conflicting deductions from principles lying deep in the body of international law, which have now become so established as to be themselves independent forces. But as they are deductions from the contradictory states of peace and war, international facts of recent growth are obliged to pay a divided allegiance and to seek to accommodate themselves to certain principles which cannot be codified into a harmonious system of rules, the usages which govern the conduct of neutrals and belligerents are often inconsistent, yet

1. The Three Friends, 166 U S 1, 52, 17 S Ct 495, 41 L. ed. 897, in which it was said further that the maintenance unbroken of peaceful relations between two powers, when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used, when the disturbance has acquired such head as to have demanded the recognition of belligerency. Where a civil war between a sovereign government and its colonies exists, a neutral government allows to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed a belligerent nation, having the sovereign rights of war and entitled to be respected in the exercise of those rights, and it cannot interfere to the prejudice of either without making itself a party to the contest, and departing from the posture of neutrality The Santissima Trinidad, 7 Wheat. (U S.) 283, 5 L. ed. 454, per Story, J.

2. Hautefeuille Droits et des Devoirs des Nations Neutres, tom. 1, p. 165.

they are defensible theoretically on certain broad fundamental principles with which the doctrines of neutrality are bound to conform.[3]

C Origin. The doctrines governing the neutrality of nations in time of war, like other doctrines of the *jus gentium*, may be said to derive their authority and force from self-protection; for a nation associating itself with the great family of nations thereby at once submits itself to the law, or body of moral rules, common to them all and by which its international life is to be regulated and safeguarded. It cannot violate the *jus gentium* without exposing itself to the hazard of suspending or endangering its own international life, and of incurring the hostility of other nations which may coalesce to punish it, or even to terminate its existence as an independent state. And therefore the motive which induces each particular nation to observe the doctrines of neutrality is founded upon reciprocity, or mutuality, and its persuasion that other nations will observe toward it the same doctrine when engaged on belligerent warfare.[4]

D. Nature and Scope. Neutrality relates solely to a state of war between two belligerent nations, and includes two articles: (1) To give no assistance to either when there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or any other thing of direct use in war; for it would be absurd if a state should at one and the same time assist two nations at war with each other, and besides it would be impossible to do it with equality. (2) In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties, on account of the present war, what she grants to the other. This does not deprive her of the liberty to make the advantage of the state serve as her rule of conduct in her negotiations, her friendly connections, and her commerce, and for this reason she may give preference in things that are at her free disposal as of right, and is not chargeable with partiality.[5] The legal doctrines affecting the reciprocal rights and obligations of belligerent and neutral nations in relation to each other may be classified under the following heads: (1) The duty of neutrality, natural and voluntary, or conventional and obligatory, entire or partial; (2) the general obligations of the belligerent powers toward neutrals; (3) the rights and obligations of neutral powers in their own territory in relation to the belligerents, and in the territories of the belligerents, or on the high seas, in relation to commerce; (4) the conveyance of merchandise and goods by neutrals to either belligerent, or warlike stores or other contraband of war; and (5) the rights and obligations of belligerents and neutrals in maritime commerce; visitation and search of neutral merchant vessels on the high seas; procedure relative to maritime prizes and contraband of war; competent judicial tribunals in prize and contraband causes and efficiency of blockade, and commerce with blockaded ports.[6]

II. POWER TO PUNISH AND RESTRAIN HOSTILE ACTS AGAINST FOREIGN NATIONS.

A. In General. The participation by the citizens of a neutral state in an attack by one belligerent power upon another is an offense against the law of nations, and may be punished as such by such neutral state.[7] And as a mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty while good faith toward

3. Hall Int. Law (3d ed.) 75.
Rights of belligerent and neutral powers see WAR.
4. Vattel Law of Nations, bk 2, p. 160.
5. Vattel Law of Nations, bk. 3, p. 332. See, generally, WAR.
6. Reddie Int. Law 216. See, generally, WAR.
7. Henfield's Case, 11 Fed. Cas No. 6,360.
The duties of impartiality, kindness, and peaceful treatment of other nations, being plainly incumbent on the government of the United States, it is its duty to see that all those subject to its authority do nothing in contravention of these duties. What it may not do in these particulars, it may not permit to be done; and, for its own peace and welfare, it cannot suffer individuals, by min-

friendly nations requires their prevention.[8] The evidence tending to show that the general opinion among southern European nations toward the end of the eighteenth century looked upon the outfit and manning of cruisers, or privateers, by private persons as compromising the neutrality of their government, mainly consists in the neutrality edicts shortly after that time on the outbreak of war between England and France. Venice, Genoa, Tuscany, the Papal States and the Two Sicilies subjected any person owning vessels of war, or privateers, in their ports to a fine; and the States-General of the United Provinces issued a notice that subjects of that state equipping and placing on the sea armed vessels under a belligerent flag was contrary to the law of nations, and to the duties binding on the subjects of a neutral power.[9]

B. Neutrality Acts of the United States — 1. In General. The United States was early among civilized nations to compel, by positive law, its citizens, individually, to observe the law of nations toward friendly powers;[10] and statutes for this purpose, first enacted shortly after the adoption of the constitution, have been retained in effect, with various slight modifications, until the present day.[11] The principal object of the neutrality act is to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers;[12] but the act is nevertheless an act "to punish certain offences

gling themselves in the belligerent operations of other nations, or by making war on their own authority, to run the hazard of counteracting the policy, or embroiling the relations of their own government. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630. Since a government is justly held responsible for the acts of its citizens, if such government be unable or unwilling to restrain its citizens from acts of hostility, against a friendly power, such power may hold it answerable and declare war against it. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1.

8. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

9. Hall Int. Law (3d ed.) 591.

10. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974, 9 N. Y. Leg. Obs. 257.

11. U. S. *v.* O'Brien, 75 Fed. 900.

"The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of International Law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton; and passed the Senate by the casting vote of Vice President Adams. . . . Its enactment grew out of the proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared . . . to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers." The Three Friends, 166 U. S. 1, 52, 17 S. Ct. 495, 41 L. ed. 897.

The act of 1794 remained in force until the act of 1818, by which all the provisions respecting our neutral relations were embraced, and all former laws on the subject were repealed. The Estrella, 4 Wheat. (U. S.) 298, 4 L. ed. 574.

In U. S. Rev. St. (1874) § 5281 [U. S. Comp. St. (1901) p. 3599] the provisions of the act of 1818 were incorporated, such provisions being substantially those of the original act of 1794. U. S. *v.* O'Brien, 75 Fed. 900.

12. The Three Friends, 166 U. S. 1, 52, 17 S. Ct. 495, 41 L. ed. 897; 13 Op. Atty.-Gen. 177, 178.

Principle upon which neutrality laws rest. — The neutrality law of March 5, 1794, and the subsequent legislation upon the same subject, rest upon the principle that, until our country has made war, we are at peace with all by the law of nations, without any treaty to that effect, and that for the citizens of the United States to combine to kill and rob those with whom they are at peace, and on whom they have no right to make any aggression, is as essentially criminal as to combine to murder and rob our own citizens. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269, 2 Curt. 630. While it is not the purpose of our neutrality laws in any manner to check or interfere with the commercial activities of citizens of the United States, or of others residing therein and interested in commercial transactions, nor to render unlawful mere commercial ventures in contraband of war, they were designed to prohibit acts and preparations on the soil or waters of the United States, not originating from a due regard for commercial interests, but of a nature distinctly hostile in a material sense to a friendly power, engaged in hostilities, and calculated or tending to involve this country in war, whether an incidental or indirect commercial profit does or does not result from them. The Laurada, 85 Fed. 760 [*affirmed* in 98 Fed. 983, 39 C. C. A. 374]. The object of these laws was

against the United States by fines, imprisonment and forfeitures"[13] which offenses are defined by the act.

2. CONSTRUCTION. The Neutrality Act is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used.[14] It is a criminal and penal statute, and is not to be enlarged beyond what the language clearly expresses as being intended.[15]

III. NATURE AND ELEMENTS OF OFFENSES.

A. Accepting Foreign Commission. The acceptance and exercise of a commission to serve a foreign power against any other power with whom the United States is at peace is, by statute, made specifically punishable as a high misdemeanor.[16] The commission may be conferred by any district or country, or association of people, whose right to confer it shall be recognized by the person appointed.[17] And it is immaterial whether the commission has been conferred by the popular voice, or by the representatives of such district, or association of people.[18] Some overt act, under the commission, must be done, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act, which shows an exercise of the authority which the commission is supposed to confer.[19]

B. Enlisting in Foreign Service. By another section of the statute[20] a prohibition is enacted against any person enlisting in this country as a soldier of any foreign power.[21] This section also prohibits any person from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting.[22] But it does not prohibit persons within the jurisdiction of the United States, whether citizens or not, from going as individuals to foreign states, and enlisting

to prevent complications between this government and other nations. It was intended to do this by making criminal such acts as are calculated to embroil us. U. S. *v.* O'Brien, 75 Fed. 900; 3 Op. Atty.-Gen. 741, 748.

Not confined to warlike enterprises against belligerents.— The law of 1818 is not a neutrality law merely which applies only during a state of war, in order to prevent our citizens from interfering as against one of the belligerents. On the contrary, it applies to all hostile expeditions or purposes designed to violate the peace and rights of people at peace with the United States, whether they be at war with any other nation or not. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974; U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975, 9 N. Y. Leg. Obs. 257; 21 Op. Atty.-Gen. 267, 270.

13. The Three Friends, 166 U. S. 1, 52, 17 S. Ct. 495, 41 L. ed. 897; 13 Op. Atty.-Gen. 177, 178.

14. Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289.

The act being clear and unambiguous on its face, the court will not look, for the purpose of interpreting it, to any arguments drawn from the history of neutrality legislation in the United States, the condition of foreign relations, the political correspondence of the public authorities, or to the discussion in congress preliminary to its passage. The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760].

Construction of statutes generally see STATUTES.

15. The Three Friends, 78 Fed. 175. Mariners are said to be citizens of the world, and it is usual for them of all countries to serve on board of any merchant vessel that will take them into pay. A citizen of a neutral nation has a right to render his personal service, as a sailor, on board of any vessel whatever engaged in mere commerce, although such vessel may be owned by either of the belligerent powers, or the subjects or citizens of either, and nothing hostile can be attributed to such conduct. 7 Moore Dig. Int. Law 881.

16. See *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1. And see U. S. Rev. St. (1878) § 5281 [U. S. Comp. St. (1901) p. 3599]. The United States statute creates two offenses: (1) The setting on foot within the United States a military expedition to be carried on against any power with whom the United States are at peace; and (2) providing the means for such an expedition. U. S. *v.* Hart, 78 Fed. 868.

17. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1.

18. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1.

19. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1.

20. U. S. Rev. St. (1878) § 5282 [U. S. Comp. St. (1901) p. 3599].

21. U. S. *v.* O'Brien, 75 Fed. 900; 4 Op. Atty.-Gen. 336.

22. U. S. *v.* O'Brien, 75 Fed. 900; U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7.

A distinct hiring or retaining by defendant must be shown. It may be done through

in their armies;[23] nor is it an offense to transport persons out of the United States and land them in foreign countries, when such persons intend to enlist in foreign armies.[24]

C. Arming and Fitting Out Vessels. The arming or fitting out of a vessel to be employed in the service of a foreign power against another power with whom the United States is at peace is an offense against the United States.[25] The crime necessary to be shown in order to secure the conviction of an offender,[26] or the forfeiture of a vessel,[27] under this section, consists of an act done within

agents, but these agents must be shown to be agents for this purpose and acting under defendant. U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7.

When hiring or retaining complete.— If a person, within the jurisdiction of the United States, engages another to go beyond the limits of the United States with intent to enlist in the service of any foreign prince or state, and there be an intent on both sides that, after these acts have been performed, a consideration shall be paid to the party so engaging to enlist, the hiring or retaining denounced by this section is complete. U. S. *v.* Hertz, 26 Fed. Cas. No. 15,357.

Solemn contract of hiring unnecessary.— A party may be retained by verbal promise, or by invitation. If the statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under the name of board, passage money, or expenses, or the like, it would be idle to pass acts of congress for the punishment of this or any other offense. 7 Op. Atty.-Gen. 367.

Consideration.— It is not necessary that the consideration of the hiring shall be money. U. S. *v.* Hertz, 26 Fed. Cas. No. 15,357.

The intent of the person accused may be inferred both from his own act and declarations, and the acts and declarations of the person or persons whom he is alleged to have hired or engaged for the purpose specified. U. S. *v.* Hertz, 26 Fed. Cas. No. 15,357.

23. See *infra*, note 37.

24. The Laurada, 85 Fed. 760 [*affirmed* in 98 Fed. 983, 39 C. C. A. 374] (holding that, to bring an American vessel within section 5283 of the Revised Statutes of the United States, it must be shown that her employment in the prohibited service was pursuant to an intention formed within the territorial limits of the United States; and the formation of such an intention on the high seas after she had left such limits cannot be construed as being within the statute); U. S. *v.* Wiborg, 73 Fed. 159; U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7.

25. U. S. Rev. St. (1878) § 5283 [U. S. Comp. St. (1901) p. 3599].

Either "fitting out" or "arming" will constitute the offense. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458.

The terms "furnishing" and "fitting out" have no legal or technical meaning requiring a construction different from the ordinary acceptation in maritime and commercial parlance. The City of Mexico, 28 Fed. 148. By "furnishing and fitting" is intended something different from "arming." U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; The City of Mexico, *supra*. The conversion of a merchant ship into a vessel of war, with intent to commit hostilities against a friendly nation, is an original fitting out of a vessel with such intent, within the meaning of this act. U. S. *v.* Guinet, 26 Fed. Cas. No. 15,270, 2 Dall. (Pa.) 321, 1 L. ed. 398. An American built vessel having been fitted out and commissioned at Charleston as a French privateer went to sea, but returned to the United States and was dismantled by the United States government; she then sailed from thence unarmed as a foreign vessel, but was equipped and commissioned at Hayti by the French authorities; she then went again to sea, and captured a British ship which she brought into Charleston in 1795, and it was held that under the circumstances the fitting out by the aid of which the capture was made was not in contravention of law. Williamson *v.* The Betsy, 30 Fed. Cas. No. 17,750, Bee 67. Per *contra*, if the fitting out was in violation of the neutrality of the United States, for such violation infects captures subsequently made. British Consul *v.* Nancy, 4 Fed. Cas. No. 1,898, Bee 73. If a ship of war is built and fitted out in the United States, and then *bona fide* sold, purely as a commercial speculation to a belligerent, there would be no intent that she should cruise against friendly commerce; and thus no breach of neutrality would be committed. Ships of war, and arms, are articles of commerce, and neutrals are entitled to continue their ordinary commerce with belligerents, subject to the risk of their goods being captured, if they are contraband. Wharton Int. L. § 439*e*.

26. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458.

27. See The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760]. See also cases cited in following notes.

A capture made by citizens of the United States of property belonging to the subjects of a nation in amity with the United States is unlawful wheresoever the capturing vessel may have been equipped or by whomsoever commissioned; and the captured property if brought within the limits of the United State in violation of its neutrality will be decreed to be restored to the original owners. The Fanny, 9 Wheat. (U. S.) 658, 6 L. ed. 184.

the limits of the United States,[28] with the intent that the vessel in connection with which the act is done shall be employed in the service of some foreign prince, or state, or colony, district, or people, as a cruiser or committer of hostilities against the subjects, citizens, or property, of some foreign prince or state, or colony, district, or people, with whom the United States is at peace.[29] The offense consists principally in the intention with which the preparations are made,[30] and which is the material point on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or warlike character.[31] This intention must be formed before the vessel leaves the United

28 The Conserva, 38 Fed. 431; U. S. *v.* Owners of Unicorn, 27 Fed. Cas. No. 15,979*a*.

Furnishing and arming need not be completed in United States.— It is not necessary to a forfeiture of a vessel under this section that the furnishing, fitting out, or arming of her for the prohibited purpose should be completed within the limits of the United States. It is sufficient that, by prearrangement within the limits of the United States, the vessel having been procured here, the furnishing, fitting out, or arming is to be effected or completed after she has gone beyond these limits. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; The Laurada, 85 Fed. 760 [*affirmed* in 98 Fed. 983, 39 C. C. A. 374]; The Carondelet, 37 Fed. 799; The City of Mexico, 28 Fed. 148; U. S. *v.* Two Hundred and Fourteen Boxes of Arms, etc., 20 Fed. 50; U. S. *v.* The Mary N. Hogan, 18 Fed. 529; The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760]; U. S. *v.* Skinner, 27 Fed. Cas. No. 16,309, Brunn. Col. Cas. 446.

29. See cases cited *infra*, this note.

Classification of offenses.— "The offences set out in the section must have been committed within the limits of the United States, and are properly classified thus: First. The fitting out and arming by any person of any vessel, with the intent on the part of such person, that she shall be employed in the service of any foreign state, or of any people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any people, with whom the United States is at peace. Second. The attempting by any person to fit out and arm any vessel with the like intent. Third. The procuring by any person to be fitted out and armed, any vessel with the like intent. Fourth. The being knowingly concerned by any person in the furnishing of any vessel with the like intent. Fifth. The being knowingly concerned by any person in the fitting out of any vessel with the like intent. Sixth. The being knowingly concerned by any person in the arming of any vessel with the like intent. Seventh. The issuing or delivering by any person of a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid. If any one of these offences has been committed, the vessel in respect to which it is committed is, . . . to be forfeited." The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760].

What nations included.— The earlier cases hold that this section refers to a body politic which has been recognized by our government at least as a belligerent; and does not apply to the case of a vessel fitted out and armed to be employed in the service of insurgents or persons never recognized as a political body by our government. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 141]; U. S. *v.* The Itata, 56 Fed. 505, 5 C. C. A. 608; U. S. *v.* Trumbull, 48 Fed. 99; The Conserva, 38 Fed. 431; The Carondelet, 37 Fed. 799; The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760]; U. S. *v.* Guinet, 26 Fed. Cas. No. 15,270, 2 Dall. (Pa.) 321, 1 L. ed. 398. A late case in the United States supreme court holds, however, that the words "colony, district, or people" include any insurgent or insurrectionary body of people acting together and conducting hostilities, although their belligerency has not been recognized. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897 [*reversing* 78 Fed. 175]. The word "people" is merely descriptive of the power in whose service the vessel is intended to be employed, and it is one of the denominations applied by the act of congress to a foreign power. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458.

Release on bond.— U. S. Rev. St. (1878) § 5283 [U. S. Comp. St. (1901) p. 3599] is designed to prevent hostile expeditions altogether, by the seizure and forfeiture of a vessel engaged in them, and not to set a price, by releasing the vessel on bond, upon the violation of international obligations; no interpretation of the admiralty rules shall be permitted which would admit of that result. The Mary N. Hogan, 17 Fed. 813.

30. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; The Conserva, 38 Fed. 431; U. S. *v.* The Meteor, 26 Fed. Cas. No. 15,760; U. S. *v.* Owners of Unicorn, 27 Fed. Cas. No. 15,979*a*.

31. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458.

Commercial ventures not prohibited.— The neutrality laws are not designed to interfere with commerce, even in contraband of war, but merely to prevent the strictly hostile acts, as against a friendly power, which tend to involve this country in war. The Laurada, 85 Fed. 760 [*affirmed* in 98 Fed. 983, 39 C. C. A. 374]; U. S. *v.* The Itata, 56 Fed. 505, 5 C. C. A. 608 [*affirming* 49 Fed. 646]; U. S. *v.* Trumbull, 48 Fed. 99; U. S. *v.* The

States,[32] and must be a fixed intention; not conditional or contingent, depending upon some future arrangements.[33] Its existence is a question belonging exclusively to the jury to decide.[34]

D. Augmenting Force of War Vessels. It is an offense to increase or augment, within the territory or jurisdiction of the United States the force of any war vessel belonging to a foreign power, which was armed at the time of her arrival in the United States, by adding to the number or size of her guns prepared for use, or by the addition to her force, of any equipment solely applicable to war.[35]

E. Military Expeditions — 1. In General. It is an offense against the United States for any person within the jurisdiction of the United States to set on foot or provide the means for any military expedition against a foreign power with whom the United States is at peace.[36] It is no offense for individuals, singly of in company, and in any way they choose, to go abroad for the mere purpose or

Robert and Minnie, 47 Fed. 84; The Conserva, 38 Fed 431; The Carondelet, 37 Fed. 799; The City of Mexico, 24 Fed. 33; The Florida, 9 Fed Cas. No 4,887, 4 Ben. 452; 13 Op. Atty.-Gen. 541. Where persons other than diplomatic agents in the service of a belligerent, were found on board a neutral vessel which had not been permitted to take cargo, and that the belligerent government had paid for the passage of their men on board such vessel who were then in the armed service of that government, the vessel was confiscated. The Friendship, 6 C. Rob. 422 The trade of neutral nations with belligerent nations divides itself into two heads. It consists either in the purchase or sale of goods, or in the carrying them for hire from one place to another. The purchase of goods by a neutral from a belligerent is the subject of no belligerent restriction. The general principle that a neutral has a right to trade with his belligerent friend necessarily covers a commerce by which the war can in no case be directly affected It is when such goods or certain classes of goods are being carried from or to the neutral or belligerent that the doctrines of belligerency, or neutrality, have to do. By existing custom, the belligerent has the right to hinder that branch of neutral commerce which includes the carrying of goods which are noxious to him either because such commerce supplies his enemy with articles of direct use in war, because it diminishes the stress he puts upon his enemy, or because the carried goods become tainted by association with the property of his enemy. See Hall Int. L. (3d ed.) 634; Vattel Law of Nations, bk. 3. § 111.

Failure of negotiations for sale to foreign powers.— The mere carrying on of negotiations by the owners of a vessel, in this country, with the agents of a foreign people, with knowledge that, if the sale be effected, the vessel will be employed against a nation with which the United States is at peace, is not a breach of the neutrality laws, where the negotiations fail and are abandoned. U S. *v.* Meteor, 26 Fed. Cas. No. 15,760 [*reversing* 17 Fed. Cas. 9,498].

No conviction necessary to warrant forfeiture.—Under this section no prior personal conviction of an offender is necessary to warrant a decree of forfeiture *in rem* against the vessel. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760].

32. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; The Laurada, 98 Fed. 983, 39 C. C. A. 374 [*affirming* 85 Fed. 760].

33. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458. But see 5 Op. Atty.-Gen. 92, where it is said that no distinction is made between a proximate or immediate intent and any other intent. Any intent, direct or contingent, to cruise and commit hostilities with the vessel fitted out, against a nation with which the nation fitting her out is then at war, is within the act.

Intention need not be executed.— It is not necessary that the intention should be carried into execution in order to constitute the offense of fitting out or arming a vessel with intent that the same shall be employed against people at peace with the United States. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; U. S. *v.* Skinner, 27 Fed. Cas. No. 16,309, Brunn. Col. Cas. 446.

34. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458.

35. See U. S. Rev. St. (1878) § 5285 [U. S. Comp. St. (1901) p. 3600]. And see U. S. *v.* Grassin, 26 Fed. Cas. No. 15,248, 3 Wash. 65; 4 Op. Atty.-Gen. 336.

Raising or lowering gun-carriages on a vessel of war, or replacing rotten with sound timbers, is an offense within this section. U. S. *v.* Grassin, 26 Fed. Cas. No. 15,248, 3 Wash. 65.

Alteration of ports.— Additional equipment for war in a neutral port does not take place merely by alteration of two ports in repairing the waist of a vessel previously armed. Moodie *v.* The Brothers, 17 Fed. Cas. No. 9,743, Bee 76.

The repair of the bottom of a war vessel does not constitute any increase or augmentation of force within the meaning of the act. 4 Op. Atty.-Gen. 336, 338.

36. See U. S. Rev. St. (1878) § 5286 [U. S. Comp. St. (1901) p. 3601]. And see cases cited *infra*, this and following sections.

The purpose of this section is to prevent the use of the soil or waters of the United States as a base from which military ex-

enlisting in a foreign army, provided they do not enlist in, or set on foot here, or prepare, any military expedition or enterprise.[37] Indications of a military operation or of a military expedition are concert and unity of action, an organization of men to act together, the presence of weapons, and some form of command or leadership.[38] To constitute an offense there must be a hostile intention connected with the act of beginning or setting on foot the expedition, or providing

peditions or enterprises shall be carried on against foreign powers with whom the United States is at peace. U. S. *v.* Murphy, 84 Fed. 609.

There are four acts which the statute declares unlawful, any one of which completes the crime, namely: (1) To "begin" an expedition; (2) to "set on foot" an expedition; (3) to "provide the means" for an expedition; and (4) to "procure" those means. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975. See also U. S. *v.* Hart, 78 Fed. 868 [*affirmed* in 84 Fed. 799, 28 C. C. A. 612].

Definition of terms used.— The word "expedition" is used to signify a march or voyage with martial or hostile intentions. The term "enterprise" means an undertaking or hazard, an arduous attempt. U. S. *v.* O'Sullivan, 26 Fed. Cas. No. 15,975. See also *infra*, note 38. "To begin" is to do the first act — to enter upon. "To set on foot" is to arrange, to place in order, to set forward, to put in the way of being ready. "To provide" is to furnish or supply. "To procure the means" is to obtain, bring together, put on board, to collect. U. S. *v.* O'Sullivan, *supra*. See also cases cited *infra*, notes 43–47.

Knowledge or approbation of president no justification.— The president of the United States has no authority to set on foot a military expedition against a nation with which the United States is at peace, and it is no justification to a private individual who sets on foot such an expedition that he acted with the knowledge and approbation of the president. U. S. *v.* Smith, 27 Fed. Cas. No. 16,342.

37. U. S. *v.* Murphy, 84 Fed. 609 (holding that an American vessel may at any time transport a military enterprise, and a cargo of arms and munitions of war, and while the transportation of the latter is lawful the transportation of the former is unlawful); U. S. *v.* Nunez, 82 Fed. 599; U. S. *v.* Hart, 78 Fed. 868 [*affirmed* in 84 Fed. 799, 28 C. C. A. 612]; U. S. *v.* O'Brien, 75 Fed. 900; U. S. *v.* Hart, 74 Fed. 724 (holding that in such case the persons transported and the shipper and transporter only run the risk of capture, and the seizure of such arms and munitions by the foreign power against which the arms are intended to be used); U. S. *v.* Wiborg, 73 Fed. 159; U. S. *v.* Pena, 69 Fed. 983; U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7.

38. Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289 [*affirming* 73 Fed. 159]; U. S. *v.* Nunez, 82 Fed. 599; U. S. *v.* Hart, 78 Fed. 868 [*affirmed* in 84 Fed. 799, 28 C. C. A. 612]; U. S. *v.* Hart, 74 Fed. 724; U. S. *v.* Ybanez, 53 Fed. 536.

A military expedition, within the statute, means a military organization of some kind, designated as cavalry, infantry, or artillery, officered and equipped, or ready to be officered and equipped, for actual hostile operations. U. S. *v.* Pena, 69 Fed. 983. A combination of a number of men in the United States, with a common intent to proceed in a body to foreign territory, to engage in hostilities, either by themselves or in coöperation with others, against a power with whom the United States is at peace, constitutes a military expedition, when they actually proceed from the United States, whether they are then provided with arms, or intend to secure them in transit. U. S. *v.* Murphy, 84 Fed. 609; U. S. *v.* Hart, 78 Fed. 868 [*affirmed* in 84 Fed. 799, 28 C. C. A. 612]. "An armed body of men, organized with a view to invade the territory of a neighboring people with whom we are at peace, and forcibly resist the public authorities there if opposed, may well be deemed a military enterprise . . . though the ultimate object is plunder." 17 Op. Atty.-Gen. 242, 243.

Drilling and uniforming unnecessary.— It is not necessary that all the persons shall be brought in personal contact with each other in the United States, or that they shall be drilled, uniformed, or prepared for efficient service. Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289; U. S. *v.* Murphy, 84 Fed. 609.

No particular number of men is necessary to complete the crime, nor is it necessary that such an expedition should actually set out, for the crime is completed by the mere organization, or any other step in the inception thereof. U. S. *v.* Ybanez, 53 Fed. 536.

Manner of making war immaterial.— It is immaterial whether the expedition intends to make war as an independent body, or in combination with others in the foreign country. U. S. *v.* Hart, 78 Fed. 868 [*affirmed* in 84 Fed. 799, 28 C. C. A. 612].

Offense although war inevitable.— The setting on foot or providing the means of a military expedition against a nation with which the United States is at peace is an offense notwithstanding it appear that war is inevitable, unless the prosecution of the expedition depends upon its taking place. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694*a*.

Persons engaged in expedition departing as passengers.— It is unimportant whether the persons engaged in an expedition from the United States to commit hostilities against a power at peace with the United States engage a whole vessel for themselves, or depart from the United States as passengers. *Ex p.*

or procuring means therefor,[39] and this intent must be formed in the United States.[40] So also there must be the commission of an overt act. Mere words will not constitute an offense under this section; nor will procuring means, with a mere intent to use them on the occurrence of a contingent event, upon the occurrence of which they might lawfully be used.[41] The statute applies not only to

Needham, 17 Fed. Cas. No. 10,080, Pet. C. C. 487.

Members of expedition become pirates.— Citizens of the United States who organize an expedition, and invade a province or colony which is part of the dominions of a power with which the United States is at peace, thereby place themselves beyond the pale of civilization, and become pirates and outlaws. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306. "In 1838 a body of men invaded Canada from the United States, after supplying themselves with artillery and other arms from a United States arsenal. Their proceedings were not in the nature of a surprise, and some of their preparations and acts of open hostility were carried on in the presence of a regiment of militia which made no attempt to interfere. In 1866 the Fenians in the United States held public meetings in which an intention of invading Canada was avowed, and preparations were made which lasted for several months, and were sufficiently notorious to induce the Canadian Government to call out ten thousand volunteers, three months before an attack was actually made. In the end of May they invaded Canada without opposition from the authorities of the United States. On being driven back their arms were taken from them and some of the leaders were arrested — a prosecution being commenced against them in the District Court of Buffalo. Six weeks afterward it was resolved by the House of Representatives that 'this House respectfully request the President to cause the prosecutions instituted in the United States against the Fenians to be discontinued if compatible with the public interest, and the prosecutions were accordingly abandoned. In October the arms taken from the Fenians were restored.'" Hall Int. L. (3d ed.) 214.

Existence of military expedition question for jury.— The fact that men intending to enlist, and munitions designed to be used, against a foreign power, are carried in the same ship, and landed in such foreign country, and that the men there handled and carried the arms and munitions, is not of itself absolutely conclusive of a military expedition; it being possible that the men may intend to act merely as individuals, and simply as porters of the arms. In such case the existence of the military expedition is one of fact for the jury, in determining which they are to consider, not single circumstances alone, but all the circumstances together, the whole sequence of events, to ascertain whether there was merely a use of accidental opportunity or such a successive order of events as shows prearrangement and concert. U. S. *v.* O'Brien, 75 Fed. 900. See also Hart *v.* U. S., 84 Fed. 799, 28 C. C. A. 612; U. S. *v.* Murphy, 84 Fed. 609; U. S. *v.* Hughes, 75 Fed. 267.

39. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,268.

40. U. S. *v.* Wiborg, 73 Fed. 159.

41. U. S. *v.* Hughes, 70 Fed. 972; U. S. *v.* Lumsden, 26 Fed. Cas. No. 15,641, 1 Bond 5.

The overt act is not an invasion of a foreign country, but taking the incipient steps in the enterprise, such as providing means for the expedition, furnishing munitions of war or money, enlisting men, in short, doing anything and everything that is necessary to the commencement of the prosecution of the enterprise. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,266, 5 McLean 249. "In March 1866, Mr. Seward was confidentially informed of the arrival in Buffalo, New York, consigned to an Irish resident of that city, of sundry boxes filled with arms, cartridges and other munitions of war. He was also furnished with a public advertisement extracted from a newspaper published in the same city in which a committee solicited aid 'in establishing a Republican form of government in Ireland.' 'Our field of operations,' said the advertisement, 'is guessed at by the public, and subscribers can rest assured that work of the most active character is meant.' These incidents, said Mr. Seward, occurring simultaneously with popular meetings held in various parts of the country at which contributions of men, money and arms were solicited for the purpose avowed in some instances of levying war against Great Britain and Ireland, and in others of levying war against the same power in British America, had engaged the attention of the President, and had made it his duty to ask the Attorney General to instruct the attorneys and marshals of the United States to be vigilant in preventing any violation of the Neutrality Laws, and of bringing before the Courts of Justice all persons who might be found to have engaged in such unlawful attempts." 7 Moore Dig. Int. L. 930. The Fenian raid into Canada took place on May 30, 1866 (U. S. For. Rel. (1866) Pt. I, p. 126); and the president's proclamation warning citizens of the United States against it was issued on June 6, 1866 (U. S. For. Rel. (1866) Pt. I, p. 135). See Wharton Int. L. § 439*e*.

Consummation of expedition without deviation unnecessary.— A military expedition against a nation at peace with the United States need not have been consummated without deviation of course. It is sufficient if it was begun, and the means prepared to be carried on from the United States, although the vessel at the identical time of sailing was not in complete readiness for hostile en-

citizens of the United States, but to all persons within its territory or jurisdiction, whether permanently or temporarily residing therein.[42]

2. BEGINNING OR SETTING ON FOOT. The offense of beginning or setting on foot a military expedition is consummated by any overt act which shall be a commencement of an expedition, although it should not be prosecuted.[43] It is not necessary that the expedition shall be actually set on foot. It is sufficient if such preparations are made for it as show an intent to set it on foot;[44] nor is it necessary that the expedition shall have actually started for its destination.[45]

3 PROVIDING OR PREPARING MEANS. To constitute the offense of providing or preparing the means for a military expedition the individual need not engage personally in the expedition,[46] but such preparation must be made as shall aid the expedition.[47]

IV. ENFORCEMENT OF NEUTRALITY LAWS.

A. Forfeiture of Vessels — 1. IN GENERAL. The statute rendering the arming or fitting out of a vessel to be employed in the service of a foreign power an offense[48] provides further for forfeiture of the vessel, one half to the use of the informer, and the other half to the use of the United States.[49] A proceeding to enforce a forfeiture under this statute is a simple suit in admiralty, in which the decree will be simply that the libel be dismissed, or the vessel condemned; and no decree of restitution is necessary.[50] The suit is solely against the vessel herself, and the court is not concerned with the question as to who are her real owners.[51] Where a libel has been filed against a vessel belonging to a foreign government to secure her forfeiture, a consul, who is the only representative of such government present, has the right to intervene and claim the vessel.[52]

gagements U. S. *v.* Smith, 27 Fed. Cas. Nos. 16,342*a*, 16,342*b*.

42. *In re* Charge to Grand Jury, 30 Fed. Cas No. 18,264, 5 Blatchf. 556.

Association originating in another country — The carrying on from the United States of an expedition against a neutral power is an offense, although the association originated in another country. *Ex p.* Needham, 17 Fed. Cas. No. 10,080, Pet C. C. 487.

43. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306, in which it is said that to set an expedition on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on an expedition is "setting it on foot," within the meaning of the statute.

44. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1.

45. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975.

46. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306.

47. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1; *In re* Charge to Grand Jury, 30 Fed. Cas No. 18,268.

The contribution of money, clothing, provisions, arms, or any other contributions which shall tend to forward the expedition, or add to the comfort or maintenance of those engaged in it, is a violation of the law. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,265, 2 McLean 1; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,268.

Furnishing money not to be used in fitting out expedition. — Furnishing money to be used on behalf of the people of another country in a struggle for independence, providing it is not to be used in organizing and fitting out with arms and munitions of war expeditions into and against any foreign country or its commerce, is not in contravention of the neutrality laws. Bailey *v.* O'Mahony, 33 N. Y. Super. Ct. 239, 10 Abb. Pr. N. S. 270.

Providing means of transportation. — One who provides the means for the transportation of a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, is guilty of an offense under this section. Wiborg *v.* U. S., 163 U. S 632, 16 S. Ct. 1127, 41 L. ed. 289 [*affirming* 73 Fed. 159]; Hart *v.* U. S., 84 Fed. 799, 28 C. C. A. 612 [*affirming* 78 Fed. 868]; U. S. *v.* Murphy, 84 Fed. 609; U. S. *v.* O'Brien, 75 Fed. 900; U. S. *v.* Hughes, 75 Fed. 267; U. S. *v.* Rand, 17 Fed. 142.

The transportation of arms, ammunition, and munitions of war from the United States to a foreign country is no offense, whether they are to be used in war or not, and the shipper or transporter merely runs the risk of capture, seizure, etc. U. S. *v.* Murphy, 84 Fed 609; U. S. *v.* Wiborg, 73 Fed. 159; U. S. *v.* Trumbull, 48 Fed. 99.

48. See U. S. Rev. St. (1878) § 5283 [U. S. Comp. St (1901) p. 3599]. And see also *supra*, III, C.

49. See cases cited in the following notes.

50. The Conserva, 38 Fed. 431.

51. The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760].

52. The Conserva, 38 Fed. 431; Williamson

All questions of forfeiture upon seizures made under the neutrality laws are exclusively cognizable by the courts of the United States.[53] A libel or information is sufficient if in the words of the statute.[54] If two libels are filed against the same vessel — the one for prize, the other for forfeiture — the government cannot be required to elect to proceed upon one and abandon the other.[55] It is within the discretion of the court to permit amendments to a libel for forfeiture, even after the evidence is all in and the arguments completed, in matters of substance as well as of form, when public justice and the merits of the controversy require it, the only limitation being that such amendments shall not introduce any new *res* or subject of litigation.[56]

2. Rights of Informers. An informer, under the statute, is one who gives the information which leads directly to the seizure and condemnation, regardless of the question of evidence furnished or interest taken in the prosecution.[57] It does not require a petition to give an informer standing in court as such.[58] Where a vessel is forfeited and sold under this provision, and one half of the proceeds is paid to the United States, the other half remaining in the custody of the court, the latter one half will not be paid to the United States, even after the lapse of many years, where it does not appear that it will not be needed to satisfy a judgment for some claimant as informer.[59] Even if no other claimant ever appears, such fund is not the property of the United States, under the statute.[60]

B. Seizure and Detention of Vessels — 1. By Collectors of Customs. In case there is a probability that a vessel about to depart from the United States is to be employed in hostilities against a power with whom the United States is at peace, provision is made by statute for the detention of such vessel at the instance of collectors of the customs, until the decision of the president is had, or until the owner gives such bond and security as is required by statute of the owners of armed vessels.[61] This statute is intended to prevent the departure from our ports of any vessel intended to carry on war, when the vessel has been specially adapted, wholly or in part, within our jurisdiction, to warlike use.[62] The fact

v. The Betsy, 30 Fed. Cas. No. 17,750, Bee 67.

53. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561]. In the Trent affair, where the vessel was released by the captor after taking the diplomatic agents of the Confederacy therefrom and there was therefore no adjudication by a prize court, the American government admitted that the capture was thereby invalidated; the British government contending that the case fell within the doctrine of international law respecting diplomatic agents and the carrying of despatches, and that there was no violation of neutrality on the part of the Trent. U. S. For. Rel. (1862) 245, 248.

54. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561], holding that an information for a forfeiture under the Neutrality Act of 1794 need not state the prince or state by name against whom the ship was fitted out to cruise.

55. The City of Mexico, 28 Fed. 148.

56. The Meteor, 17 Fed. Cas. No. 9,498 [*reversed* on other grounds in 26 Fed. Cas. No. 15,760].

57. The City of Mexico, 32 Fed. 105.

Conveying information received in regular line of duty. — United States naval officers, and a consular agent, who convey information received by them, leading to the seizure of a vessel, to other official authorities, but give no information except what has been received in the regular discharge of their duty, are not informers. The City of Mexico, 32 Fed. 105.

Information not acted on. — Where acts and information do not result in the seizure of the vessel, the person giving such information is not an informer. The City of Mexico, 32 Fed. 105.

58. The City of Mexico, 32 Fed. 105, holding that the fact that, after a decree of forfeiture, the case is allowed to remain open for a further hearing on the question of who were entitled to part of the proceeds as informers, and that only one person filed a petition making a claim, does not deprive others appearing on the original evidence to be entitled to share as informers.

59. U. S. *v.* The Resolute, 40 Fed. 543, holding further that it is immaterial that by U. S. Rev. St. (1878) § 3689, a provision is made for the refunding of moneys, "received and covered into the treasury before the payment of legal and just charges against the same."

60. U. S. *v.* The Resolute, 40 Fed. 543, 544, where it is said: "Such a case seems to have been left without any provision as to the disposal of the share set apart for the informer."

61. U. S. Rev. St. (1878) § 5290 [U. S. Comp. St. (1901) p. 3602].

62. Hendricks *v.* Gonzales, 67 Fed. 351, 14 C. C. A. 659.

alone that a vessel is built for warlike purposes will not authorize her detention by the collector. The number of men shipped on board must render it probable that she is intended to be employed to engage in naval warfare against the subjects or property of a friendly power.[63] The act of 1838 authorized collectors and the officers therein named to seize and detain vessels about to pass the frontier for a place within a foreign state or colony conterminous with the United States when they had reason to believe that such vessels were to be employed in a military expedition or operation against such state or colony. Under this act the term "frontier" is held to mean a tract of country contiguous to the boundary line, and it is not material whether such vessels were actually intended to be passed across the boundary line into a foreign territory.[64] A vessel may be seized by a commanding officer of a military force ordered out to prevent the violation of this act, with a view to detaining the same until it can be proceeded against in the manner directed by law;[65] and, if wrecked after such seizure, without any fault on the part of the seizing officer, he is not liable.[66]

2. By Order of President. A power similar to that conferred upon the collectors of customs may be exercised by the president or such person as he shall have employed for that purpose.[67] The power intrusted to the president is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, subject to that high responsibility which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions are completely justified in taking possession of, and detaining, the offending vessel, and are not responsible in damages, for any injury which the party may suffer by reason of such proceeding.[68]

3. Liability For Wrongful Seizure. In case a vessel or property is wrongfully seized under the neutrality acts, the officer or person making such seizure may be liable in trespass.[69] To obviate this liability it is by statute[70] provided that in case a reasonable cause of seizure appears to the court, a certificate thereof shall be entered for the protection of the officer making the seizure. Under this statute reasonable cause is construed to mean probable cause.[71] A plea in answer to an action of trespass for wrongful seizure which sets up a forfeiture under the neutrality acts, on the ground that a vessel was fitted out to cruise against a newly created foreign government or state, must aver the recognition of such govern-

63. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; Hendricks *v.* Gonzalez, 67 Fed. 351, 14 C. C. A. 659. See also The Steamship R. R. Cuyler, 12 Op. Atty.-Gen. 113.

64. Stoughton *v.* Mott, 15 Vt. 162; Stoughton *v.* Dimick, 23 Fed. Cas. No. 13,500, 3 Blatchf. 356, 29 Vt. 535.

Application of the act of 1818 not affected.— The statute of 1838 does not affect the application of the statute of 1818 to all ordinary cases. The former act was only a temporary provision intended to stop incursions into Canada. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975.

65. Stoughton *v.* Dimick, 23 Fed. Cas. No. 13,500, 3 Blatchf. 356, 29 Vt. 535.

66. Stoughton *v.* Dimick, 23 Fed. Cas. No. 13,500, 3 Blatchf. 356, 29 Vt. 535.

67. U. S. Rev. St. (1878) § 5287 [U. S. Comp. St. (1901) p. 3601].

68. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561].

Detention of vessel not taking without due process of law.— The detention of a vessel in port by the president, under this act, is not a taking and use of private property for public purposes within the meaning of the constitution, but is an arrest "by due process of law." Graham *v.* U. S., 2 Ct. Cl. 327.

69. See Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561]. If a belligerent man-of-war destroys a neutral ship on the high seas, the owner thereof is entitled to be put in the same position that he was before the destruction of his vessel, that is, as to damages and costs. The commander of the belligerent ship may have good reason for destroying such neutral vessel, but that fact does not relieve him from responsibility to its neutral owner for damages resulting therefrom. The Actaeon, 2 Dods. 48.

Liability for wrongful seizure generally see Searches and Seizures.

70. U. S. Rev. St. (1878) § 970 [U. S. 2 Comp. St. (1901) p. 702].

71. The City of Mexico, 25 Fed. 924.

Circumstances affording probable cause see The City of Mexico, 25 Fed. 924.

ment by the United States or by the government of the country to which the new state belongs.[72] Such a plea should not only state the facts relied on to establish the forfeiture, but should also aver that thereby the property became and was actually forfeited, and was seized as forfeited.[73] A sentence of restitution of a vessel seized by a collector is conclusive evidence that the seizure was illegal.[74]

C. Criminal Prosecutions — 1. Jurisdiction and Venue. A person accused of violating the neutrality laws should be tried in the judicial district in which the guilty purpose was formed and the guilty acts done.[75] Where the violation is committed at sea, by taking the members of a military expedition on board defendant's vessel, he should be tried in the district where he is arrested, and cannot be removed to that of the port from which he sailed.[76]

2. Indictment.[77] An indictment under the neutrality act is sufficient where the offense is charged in the words of the act.[78]

3. Evidence.[79] Upon the preliminary examination of one accused of conducting a military expedition, the examining magistrate has no authority to determine the credibility of the testimony adduced, or to find any fact. He can only determine whether there is probable cause to put defendant on trial.[80] On trial of an indictment for setting on foot a military expedition against a nation at peace with the United States, any legal testimony which shows the expedition in question to be military, or to have been designed against the dominions of the nation, as charged, is admissible.[81] Defendant is entitled to show the existence of war at the time the acts constituting the offense were committed.[82] He is also entitled to show a motive for the prosecution.[83]

D. Bond to Observe Neutrality Laws. Under the general authority vested in judges of the United States courts to require security to keep the peace,

72. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561 (*affirming* 13 Johns. 141)].

73. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 561 (*affirming* 13 Johns. 141)].

74. Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141 [*affirmed* in 13 Johns. 561 (*affirmed* in 3 Wheat. (U. S.) 246, 4 L. ed. 381)].

75. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975.

76. U. S. *v.* Hughes, 70 Fed. 972.

77. Indictments generally see Indictments and Informations.

78. U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 8 L. ed. 458; U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974, 9 N. Y. Leg. Obs. 257, holding that it is not necessary to state what acts were done by defendants to begin or set on foot a military expedition, or what constituted or composed the expedition, or that it was begun or set on foot with criminal intent, or to aver from what place in particular in the United States, or at what time, the expedition or enterprise was to be carried on.

79. Evidence generally see Criminal Law, 12 Cyc. 379 *et seq.*

80. U. S. *v.* Hughes, 70 Fed. 972, holding that evidence that the vessel of which defendant was captain stopped outside Sandy Hook, took on arms and men, that the men were drilled during the voyage, and were secretly landed at night on the coast of Cuba, is sufficient to justify holding defendant for trial.

81. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694.

Confessions and declarations.— In a prosecution for setting on foot an enterprise for the invasion of a country with which the United States is at peace, written and printed evidence, although containing no proof of an overt act, is admissible as confessions and declarations, subject to the rule that the parts favorable to defendants must be considered, as well as those implying guilt. U. S. *v.* Lumsden, 26 Fed. Cas. No. 15,641, 1 Bond 5.

Statements of accomplice.— Evidence that defendant admitted that a certain person was associated with him in the plan to invade a foreign territory is sufficient to render admissible statements of such person to show the extent of the plan and whether it was legal. U. S. *v.* Workman, 28 Fed. Cas. No. 16,764.

82. U. S. *v.* Smith, 27 Fed. Cas. No. 16,342*a*, 3 Wheel. Cr. (N. Y.) 100, holding, however, that the president's message to congress, and other documents transmitted therewith, are inadmissible to show the existence of war at the time the acts were charged to have been committed.

83. U. S. *v.* Workman, 28 Fed. Cas. No. 16,764, holding that evidence is admissible that, a short time before defendant's arrest, he had been instrumental in instituting habeas corpus proceedings to release one imprisoned by the United States military authorities, with the object of showing that the prosecution arose from the animosity of such authorities, engendered by this conduct on his part.

such a judge has power upon just grounds of suspicion to require a bond to observe the neutrality laws.[84]

V. NEUTRALITY ACTS OF GREAT BRITAIN.

The first British act prohibiting the subjects of the crown enlisting themselves to serve as soldiers under foreign princes, states, or potentates was passed in 1735.[85] This was extended by the second British act on the same subject in 1756.[86] A more comprehensive act was passed in 1819,[87] which remained in force until 1870, when it was superseded by the present act to regulate the conduct of British subjects during the existence of hostilities between foreign states with which her majesty is at peace,[88] by which the following acts and services are prohibited on the part of British subjects and others, within, or without, the British dominions, respecting the naval or military service in any foreign state then at war with a friendly state, with which her majesty is at peace[89]: (1) Accepting, or agreeing to accept, any commission or engagement; or, whether a British subject or not, inducing any other person to accept or agree to accept any such commission or engagement.[90] (2) Quits, or goes on board a ship, with intent to accept any such commission or engagement; or whether a British subject or not, induces any other person to quit, or go on board any ship, with the like intent. (3) Induces any other person to embark on any ship within the British dominions, under a false representation as to service or in order that such person may accept any such commission or engagement.[91] (4) Master or owner of a ship knowingly taking on board, or engages to take on board, or has on board such ship, any of

84. U. S. *v.* Quitman, 27 Fed. Cas. No. 16,111.

Sufficient ground for requiring a bond exists when a party, suspected of being connected with an organization whose object is the invasion of the territory of a friendly power, refuses to answer questions propounded to him on the subject, on the ground that it would incriminate him. U. S. *v.* Quitman, 27 Fed. Cas. No. 16,111.

85. 9 Geo. II, c. 30.

86. 29 Geo. II, c. 17.

87. 59 Geo. III, c. 69. The cases under this act respecting the enlistment and despatch of soldiers, and the equipment of ships in Great Britain up to the American Civil war, are collected as a memorandum to the Report of the Neutrality Laws Commission (1868), pp. 38, 39.

88. St. 33 & 34 Vict. c. 90; and by the Washington treaty of 1871 (Alabama claims) the following rules respecting neutrality were agreed to by Great Britain and the United States:

"A neutral government is bound,—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise, or carry on war, against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise, or carry on war as above, such vessel having been specially adapted, in whole, or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer, either belligerent to make use of its ports, or waters, as the base of naval operations against the other, or for the purpose of the renewal, or augmentation, of military supplies, or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

89. By the British Foreign Enlistment Act of 1870, it is provided that if any person within the limits of her majesty's dominions, and without the license of her majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, every person acting, assisting, or employed in any capacity in such expedition shall be guilty of an offense, and it has been held that any act which contributes in any material degree toward setting on foot an expedition fitted for warlike purposes includes the preparation. Reg. *v.* Jameson, [1896] 2 Q. B. 425, 18 Cox C. C. 392, 60 J. P. 662, 65 L. J. M. C. 218, 75 L. T. Rep. N. S. 77; Reg. *v.* Sandoval, 16 Cox C. C. 206, 51 J. P. 709, 56 L. T. Rep. N. S. 526, 35 Wkly. Rep. 500.

90. Burton *v.* Pinkerton, L. R. 2 Exch. 340, 36 L. J. Exch. 137, 16 L. T. Rep. N. S. 419, 15 Wkly. Rep. 1139, holding that to serve voluntarily on board a vessel used as a storeship in aid of a belligerent, the fitting out of which to be so used is an offense of serving on board a vessel for warlike purposes in aid of a foreign state, after knowledge of hostilities on the ground that the voyage had become illegal, under the Foreign Enlistment Act, but not so if objected to, and the vessel left.

91. Reg. *v.* Corbett, 4 F. & F. 555; Reg. *v.*

the following as illegally enlisted persons: (a) Any British subject who within, or without, the British dominions has accepted or agreed to accept any such commission or engagement, (b) any British subject who is about to quit the British dominions with intent to accept any such commission or engagement; (c) any person who has been induced to embark under a false representation of the service, with intent that such person may accept, or agree to accept, any such commission or engagement. And as to illegal shipbuilding and illegal expeditions the following are prohibited by "[any person] within Her Majesty's dominions:" (1) Builds or agrees, or causes to be built, any ship with intent, or knowledge, or reasonable cause to believe, that the same shall, or will be used in the military or naval service of any foreign state at war with any friendly state.[92] (2) Issues or delivers any commission for any such ship with similar intent, or knowledge or reasonable cause to believe. (3) Equips any ship with similar intent, or knowledge or reasonable cause to believe.[93] (4) Despatches, or causes, or allows to be despatched, any ship with similar intent, or knowledge, or reasonable cause to believe. Other clauses prohibit an addition to the warlike equipment or any increase or augmentation or changing of guns, or warlike force of any ship which while within the British dominions was a ship in the military or naval service of any foreign state at war with any friendly state; and also the preparation or fitting out of any military or naval expedition to proceed against the dominions of any friendly state.[94] Accessaries in any of the above acts to be punished as principal offenders.

Jones, 4 F. & F. 25, both holding, where defendants engaged men in Liverpool as a crew of a vessel sailing to China, but in fact to enlist as sailors in the service of a belligerent state, and when the vessel was at sea the men were enlisted in the presence of defendants in the belligerent's service, it was proper to direct the jury that if defendants had engaged the men with the intention that they should be enlisted in the belligerent's service, the indictment was sustained.

92. *Ex p.* Chavasse, 4 De G. J. & S. 655, 11 Jur. N. S. 400, 34 L. J. Bankr. 17, 12 L. T. Rep. N. S. 249, 13 Wkly. Rep. 627, 69 Eng. Ch. 655, 46 Eng. Reprint 1072 (holding that if a British ship builder builds a vessel of war in a British port and arms and equips her for war, *bona fide* on his own account, as an article of merchandise and not under any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bona fide*, send the ship so armed and equipped to a belligerent country for sale as merchandise, and will not by so doing violate the provision of the Foreign Enlistment Act of 1819); Atty.-Gen. *v.* Sillim, 3 F. & F. 646, 2 H. & C. 431 (holding that the building in pursuance of a contract with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed and not equipped, furnished or fitted out with anything that would enable her to commit hostilities or to do any warlike act, was not a violation of the Foreign Enlistment Act of 1819). See Wheaton Int. L § 439*c*.

93. Reg. *v.* Carlin, L. R. 3 P. C. 218, 39 L. J. Adm. 33, 23 L. T. Rep. N. S. 203, 18 Wkly. Rep. 1054, holding that where a British ship was fitted out as a transport or storeship for the purpose of convoying men of war and other material to Cuba for the service of certain persons there who had revolted and who were conducting hostilities against Spain and had assumed government there, that there was such a fitting out and arming as amounted to a breach of the Foreign Enlistment Act of 1819, and that the ship was liable to forfeiture. An old gunboat, dismantled of all warlike equipments, was purchased at Sheerness with a view to her being engaged in the Confederate naval service. Defendant took an active part in repairing her, and fitting her for sea, and also in engaging men to go in her as firemen and stokers for a trial trip. She then went over to Calais where a Confederate captain came on board who attempted to enlist the men, and the Confederate flag was hoisted. Defendant still used endeavors to get men on board as stokers. It was held that his acts after his knowledge of the ultimate destination of the vessel were evidence of his having such knowledge before the acts of engagement, and that his acts abroad were evidence of his intention of his acts in England, and the clause as to the enlistment applied to the engagement of the men as firemen and stokers. Reg. *v.* Rumble, 4 F. & F. 175.

94. *In re* Burleigh, 1 Can. L. J. N. S. 34, holding, where a British subject who held a commission from the executive of the Confederate states went with others on board an American vessel at a Canadian port, and, when the vessel reached American waters, seized the vessel and by force and violence took certain moneys from a citizen of the United States and returned to Canada where he was arrested and held for extradition, that his taking the money as alleged was robbery as defined by the Ashburton treaty, and that he could be surrendered to the United States; and further, that even if there had been a lawful act of war against a belligerent it could not have been commenced

NE VARIETUR. Literally "It must not be altered."[1]

NEVER INDEBTED. See NUNQUAM INDEBITATUS.

NEVERTHELESS. A word that has been held to be equivalent in meaning to notwithstanding.[2]

NEW. Having existed or having been made but a short time; having originated or occurred lately; not early in being; of late origin; recent; fresh, modern.[3] In its ordinary acceptation, the opposite of the term "old."[4]

NEW ASSIGNMENT. A restatement with greater particularity and exactness, in the reply, of the same cause of action already set out in the complaint.[5] (See, generally, LIBEL AND SLANDER; PLEADING.)

NEWGATE. The name of a prison in London said to have existed as early as 1207.[6]

NEWLY DISCOVERED EVIDENCE. Proof of some new and material fact in the case, which has come to light since the verdict.[7] (Newly Discovered Evidence:

or continued against such belligerent on neutral Canadian territory, and that the act committed deprived the expedition of lawful hostility.

1. Black L. Dict. [*citing* Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 346, 5 L. ed. 631], where it is said to be "a phrase sometimes written by a notary upon a bill or note, for the purpose of establishing its identity."

Ne varietur indorsed upon commercial paper does not destroy its negotiability. Abat *v.* Gormley, 3 La. 238; Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

2. Com. *v.* Rowe, 112 Ky. 482, 486, 66 S. W. 29, 23 Ky. L. Rep. 1718.

3. Webster Dict.

4. Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 364, 10 L. ed. 490.

A relative term see Mills County *v.* Brown County, 87 Tex. 475, 483, 29 S. W. 650.

Used in connection with other words see the following phrases: "New acquisition." H. C. Frick Coke Co. *v.* Laughead, 203 Pa. St. 168, 172, 52 Atl. 172. "New and useful improvements." Adams *v.* Turner, 73 Conn. 38, 43, 46 Atl. 247. "New article." Milligan, etc., Glue Co. *v.* Upton, 97 U. S. 3, 6, 24 L. ed. 985; MacKay *v.* Jackman, 12 Fed. 615, 619, 20 Blatchf. 466. "New assets." Littlefield *v.* Eaton, 74 Me. 516, 521; Robinson *v.* Hodge, 117 Mass. 222, 224; Veazie *v.* Marrett, 6 Allen (Mass.) 372; Sturtevant *v.* Sturtevant, 4 Allen (Mass.) 122, 124. "New bond." Brooks *v.* Whitmore, 139 Mass. 356, 358, 31 N. E. 731. "New building." Warren *v.* Freeman, 187 Pa. St. 455, 459, 41 Atl. 290, 67 Am. St. Rep. 583; Brice's Appeal, 89 Pa. St. 85, 87; Miller *v.* Hershey, 59 Pa. St. 64, 69; Bowers *v.* Bache, 12 Phila. (Pa.) 402, 403. "New cause of action." Love *v.* Southern R. Co., 108 Tenn. 104, 108, 65 S. W. 475, 55 L. R. A. 471. "New county." Jones *v.* Rountree, 96 Ga. 230, 233, 23 S. E. 311. "New dress" (in printer's parlance). Reimer *v.* Newel, 47 Minn. 237, 241, 49 N. W. 865. "New edition." Reade *v.* Bentley, 4 Kay & J. 656, 667, 70 Eng. Reprint 273. "New election." Gilbert *v.* Craddock, 67 Kan. 346, 355, 72 Pac. 869. "New grant." Pollard *v.* Kibbe, 9 Port. (Ala.) 712, 722. "New history." Paton *v.* Duncan, 3 C. & P. 336, 14 E. C. L. 596. "New house." Sherley *v.* Burns, 58 S. W. 691, 22 Ky. L. Rep. 788. "New industry." U. S. *v.* Bromiley, 58 Fed. 554, 556; U. S. *v.* McCallum, 44 Fed. 745, 746. "New machinery." Maxwell *v.* Bastrop Mfg. Co., 77 Tex. 233, 237, 14 S. W. 35. "New manufacture." Crane *v.* Price, 12 L. J. C. P. 81, 82, 4 M. & G. 580, 5 Scott N. R. 338, 43 E. C. L. 301. "New matter." Landis *v.* Morrissey, 69 Cal. 83, 86, 10 Pac. 258; Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 461, 47 N. W. 151; Craig *v.* Cook, 28 Minn. 232, 234, 9 N. W. 712; Nash *v.* St. Paul, 11 Minn. 174, 178; Mauldin *v.* Ball, 5 Mont. 96, 101, 1 Pac. 409; Cady *v.* South Omaha Nat. Bank, 46 Nebr. 756, 764, 65 N. W. 906; Ferguson *v.* Rutherford, 7 Nev. 385, 390; State *v.* Hartigan, 19 N. H. 248, 254; Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 314, 79 N. Y. Suppl. 244; Bell *v.* Yates, 33 Barb. (N. Y.) 627, 629; Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573, 576; Weil *v.* Unique Electric Device Co., 39 Misc. (N. Y.) 527, 528, 80 N. Y. Suppl. 484; Pascekwitz *v.* Richards, 37 Misc. (N. Y.) 250, 252, 75 N. Y. Suppl. 291; Burkert *v.* Bennett, 35 Misc. (N. Y.) 318, 319, 71 N. Y. Suppl. 144; Staten Island Midland R. Co. *v.* Hinchcliffe, 34 Misc. (N. Y.) 624, 628, 70 N. Y. Suppl. 601; Hogen *v.* Klabo, 13 N. D. 319, 323, 100 N. W. 847. "New nuisance." Langfeldt *v.* McGrath, 33 Ill. App. 158, 161. "New parties." Ladner *v.* Ogden, 31 Miss. 332, 341. "New pound." Bosworth *v.* Trowbridge, 45 Conn. 161, 165. "New promise." Hellman *v.* Kiene, 73 Iowa 448, 450, 35 N. W. 516, 5 Am. St. Rep. 693; Peabody *v.* Tenney, 18 R. I. 498, 502, 30 Atl. 456; McCrillis *v.* Millard, 17 R. I. 724, 726, 24 Atl. 576. "New proof." Ketchum *v.* Breed, 66 Wis. 85, 97, 26 N. W. 271. "New road." Schneider *v.* Chicago, etc., R. Co., 42 Minn. 68, 72, 43 N. W. 783; People *v.* Griswold, 67 N. Y. 59, 61. "New term." Com. *v.* Justices Norfolk County Ct. of Sess., 5 Mass. 435, 436.

5. Bishop *v.* Travis, 51 Minn. 183, 185, 53 N. W. 461.

6. Black L. Dict.

7. 3 Graham & W. New Tr. [*quoted* in

Consideration on Appeal, see APPEAL AND ERROR; CRIMINAL LAW. Ground For — Bill of Review, see EQUITY; Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; New Trial, see CRIMINAL LAW; NEW TRIAL; Opening or Vacating Judgment, see JUDGMENTS; Relief Against Judgment, see JUDGMENTS; Reopening Case, see TRIAL.)

NEW MATTER. See EQUITY; PLEADING.

NEW NUISANCE. See NUISANCES.

NEW PARTIES. See PARTIES.

NEW PROMISE. An undertaking or promise, based upon and having relation to a former promise which, for some reason, can no longer be enforced, whereby the promisor recognizes and revives such former promise and engages to fulfil it.[8] (New Promise: After Discharge — By Accord and Satisfaction, see ACCORD AND SATISFACTION; In Bankruptcy, see BANKRUPTCY; In Insolvency, see INSOLVENCY. After Dishonor of Paper, see COMMERCIAL PAPER. Interrupting Statute of Limitations, see LIMITATIONS OF ACTIONS. Reviving Cause of Action, see LIMITATIONS OF ACTIONS. Validating Agreement For Preference, see COMPOSITIONS WITH CREDITORS.)

NEW ROAD. See STREETS AND HIGHWAYS.

NEWS. Information, intelligence, knowledge.[9] (See, generally, NEWSPAPERS.)

NEWSPAPER REPORT. A rumor or current story printed in a newspaper.[10] (See REPORT; RUMOR.)

Matter of McManus, 35 Misc. (N. Y.) 678, 683, 72 N. Y. Suppl. 409].

8. Black L. Dict.

9. State *v.* Associated Press, 159 Mo. 410, 457, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

10. State *v.* Culler, 82 Mo. 623, 627, where "report" and "rumor" are also defined.

NEWSPAPERS

EDITED BY JOHN KING, M. A., K. C.
One of the Lecturers to the Law Society of Upper Canada *

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Liability of Owner of Newspaper For Libel, see LIBEL AND SLANDER.

*Author of "King's Law of Defamation: Slander and Libel in Canada;" "A Decade in the History of Newspaper Libel;" "The Criminal Law of Libel;" "The Ontario Libel Law;" "The Newspapers and the Courts."

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I. DEFINITION.

A newspaper in the ordinary acceptation of the term is a publication in sheet form, intended for general circulation, published regularly at short intervals, and containing intelligence of current events of general interest.[1] It follows from this definition that if a publication contains the general current news of the

1. See the following cases:
Michigan.— Lynch *v.* Durfee, 101 Mich. 171, 175, 59 N. W. 409, 45 Am. St. Rep. 404, 24 L. R. A. 793.
Minnesota.— Hull *v.* King, 38 Minn. 349, 37 N. W. 792; Beecher *v.* Stephens, 25 Minn. 146.
Nebraska.— Rosewater *v.* Pinzenscham, 38 Nebr. 835, 844, 57 N. W. 563.
New York.— Williams *v.* Colwell, 18 Misc. 399, 401, 43 N. Y. Suppl. 720 [*affirmed* in 14 N. Y. App. Div. 26, 43 N. Y. Suppl. 720, 1167].
Rhode Island.— Crowell *v.* Parker, 22 R. I. 51, 52, 46 Atl. 35, 84 Am. St. Rep. 815.
United States.— 4 Op. Atty.-Gen. 10, 12.
England.— Atty.-Gen. *v.* Bradbury, 7 Exch. 97, 103, 16 Jur. 130, 21 L. J. Exch. 12.

Another definition is: "A publication which usually contains, among other things, what is called the general news, the current news, or the news of the day." Beecher *v.* Stephens, 25 Minn. 146, 147.

An official newspaper of a county is one in which the public acts, resolves, advertisements, and notices are required to be published. Albany County *v.* Chaplin, 5 Wyo. 74, 80, 37 Pac. 370.

Daily newspaper.— The term "daily newspaper," in its popular sense, means a paper which, according to its usual custom, is published six consecutive days in each week. Tribune Pub. Co. *v.* Duluth, 45 Minn. 27, 28, 47 N. W. 309; Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 560, 74 Pac. 802. It is "a paper which, according to its usual custom, is published every day of the week except one." Richardson *v.* Tobin, 45 Cal. 30, 33 [*approved* in Puget Sound Pub. Co. *v.* Times Printing Co., *supra*]. A Sunday edition of a daily newspaper bearing a number consecutive with the issues of the other days of the week, and advertising a daily seven days in the week at a certain price, is a daily, and not a weekly, paper. State *v.* Franklin County, 9 Ohio S. & C. Pl. Dec. 829, 830.

Public newspaper.—A newspaper is of itself a public print, and imports publicity. A private newspaper would be, according to the definition of newspaper, a contradiction in terms. Bailey *v.* Myrick, 50 Me. 171, 181.

Political newspaper.—A newspaper to be of a political party must profess to be so or be so known; it is not sufficient that it has, while professing to be an independent newspaper, supported a political party. Ohio State Journal Co. *v.* Brown, 19 Ohio Cir. Ct. 325, 326, 10 Ohio Cir. Dec. 470.

Sporting paper.— A newspaper which excludes racing and betting intelligence is not a sporting paper within the meaning of an agreement framed to protect a copyright of papers especially connected with horse-racing, although such paper is devoted to sports such as cricket, foot-ball, cycling, running, etc. McFarlane *v.* Hulton, [1899] 1 Ch. 884, 68 L. J. Ch. 408, 80 L. T. Rep. N. S. 486, 47 Wkly. Rep. 507.

Paper issued by collection agency.—A paper issued by a collection agency showing on its first page that its purpose is to collect debts, and a large part of which paper contains notices warning the public against persons alleged to have failed to pay their debts, or asking for information as to such persons, is in no sense a newspaper, as that term is generally understood. U. S. *v.* Burnell, 75 Fed. 824.

That the circulation of a paper is very limited does not prevent its coming within the definition of a newspaper. Kansas City *v.* Overton, 68 Kan. 560, 75 Pac. 549.

Printed for sale.— Under a statute having reference to papers "printed for sale" it has been held, that there is no distinction between supplying a paper in consideration of a sum paid annually and a sum paid for each number of the paper, and such paper

day, it is none the less a newspaper because it is devoted primarily to special interests,[2] such as legal,[3] religious,[4] political,[5] mercantile,[6] or sporting.[7]

cannot be said to be less printed for sale because it is printed for sale to a limited number. The words "printed for sale" are used in contradistinction to sheets that are printed for gratuitous circulation, as handbills, and even such as are within the definition "newspaper" when they are of the class described by the words "paper printed . . . containing only, or principally, advertisements." Slattery *v.* Dun, 18 Ont. Pr. 168.

Statutory definitions in England — *For statutes* in which newspapers have been defined see 10 Anne, c. 19 (Imp.); 60 Geo. III–1 Geo. IV, c. 9 (Imp.); 6 & 7 Wm. IV, c. 76 (Imp.); 33 & 34 Vict. c. 65, § 2 (Imp.); 33 & 34 Vict. c. 9, § 34 (Ireland); 44 & 45 Vict. c. 60, § 1 (Imp.); 51 & 52 Vict. c. 64, § 1 (Imp.).

"*British newspapers*" are newspapers printed and published in the United Kingdom (Post Office (Offences) Act (1837), § 47); and newspapers printed and published in the United Kingdom; and also newspapers printed in the islands of Guernsey, Jersey, Alderney, Sark, or Mann (Post Office (Duties) Act (1840), 3 & 4 Vict. c. 96, § 71).

"*Foreign newspapers*" are newspapers printed and published in a foreign country in the language of that country. Post Office (Offences) Act (1837), § 47.

A "*local newspaper*" is any newspaper circulated in the county or burgh, as the case may be. Roads and Bridges (Scot.) Act (1878), 41 & 42 Vict. c. 51, § 3.

A "*registered newspaper*" is a newspaper registered by the postmaster-general for transmission by inland post. Post Office Act (1891), 54 & 55 Vict. c. 46, § 12.

"*Colonial newspapers*" see 7 Wm. IV–1 Vict. c. 36, § 47.

Statutory definitions in Canada and the provinces.— For statutes bearing upon the definitions of newspapers see Can. Rev. St. (1906) c. 146, § 2 (22) (Dominion); Ont. Rev. St. (1897) c. 68, § 1, as amended by 6 Edw. VII, c. 22, § 1; Brit. Col. Rev. St. (1897) c. 120, § 2; N. Brunsw. Consol. St. (1903) c. 136, § 2 (1); Nova Scotia Rev. St. (1900) c. 180, § 1 (a); Manitoba Rev. St. (1902) c. 97, § 2 (a); 52 Vict. c. 9, § 54 (Prince Edward Island).

2. See cases cited in following notes. And see Slattery *v.* Dun, 18 Ont. Pr. 168.

3. *Illinois.*— Maass *v.* Hess, 140 Ill. 576, 29 N. E. 887; Railton *v.* Lauder, 126 Ill. 219, 18 N. E. 555 [*cited* in Slattery *v.* Dun, 18 Ont. Pr. 168]; Kerr *v.* Hitt, 75 Ill. 51 [*cited* in Slattery *v.* Dun, *supra*].

Indiana.— Lynn *v.* Allen, 145 Ind. 584, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779.

Michigan — Lynch *v.* Durfee, 101 Mich. 171, 59 N. W. 409, 45 Am. St. Rep. 404, 24 L. R. A. 793.

Missouri.— Benkendorf *v.* Vincenz, 52 Mo. 441; Kellogg *v.* Carrico, 47 Mo. 157.

Nebraska.— Merrill *v.* Conroy, (1906) 109 N. W. 175; Turney *v.* Blomstrom, 62 Nebr. 616, 87 N. W. 339; Hanscom *v.* Meyer, 60 Nebr. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409.

Ohio.— Bigalke *v.* Bigalke, 19 Ohio Cir. Ct. 331, 10 Ohio Cir. Dec. 394.

Washington.— Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 74 Pac. 802.

Wisconsin.— Hall *v.* Milwaukee, 115 Wis. 479, 91 N. W. 998.

But *compare* Beecher *v.* Stephens, 25 Minn. 146 (holding that a paper which purports to be and is devoted especially to the interests of the legal profession does not come within the definition of a newspaper); *In re* Application for Charter, 11 Phila. (Pa.) 200 (holding that a paper whose circulation is mainly, if not entirely, confined to the legal profession is not a newspaper).

The presence of advertisements, not appealing to any particular class, constitutes a factor tending to bring a publication devoted largely to the interests of the legal profession within the designation of a newspaper. Hanscom *v.* Meyer, 60 Nebr. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409.

4. Hernandez *v.* Drake, 81 Ill. 34; Hull *v.* King, 38 Minn. 349, 37 N. W. 792. See also Lynch *v.* Durfee, 101 Mich. 171, 59 N. W. 409, 45 Am. St. Rep. 404, 24 L. R. A. 793.

5. See Lynch *v.* Durfee, 101 Mich. 171, 59 N. W. 409, 45 Am St. Rep. 404, 24 L. R. A. 793.

6. Williams *v.* Colwell, 14 N. Y. App. Div. 26, 43 N. Y. Suppl. 720, 1167 [*affirming* 18 Misc. 399, 43 N. Y. Suppl. 720]; Slattery *v.* Dun, 18 Ont. Pr. 168, holding that a daily printed sheet issued by a mercantile agency to persons who were subscribers to the agency, for the purpose of giving the information required by such persons, and which was distributed by way of exchange with other newspapers, and by being sent to assignees, bailiffs, and solicitors, in exchange for information supplied by them, but which was not clearly otherwise sold, was a newspaper within the meaning of a statute having reference to "any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers, or any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, and containing only, or principally, advertisements." See also Hall *v.* Milwaukee, 115 Wis. 479, 91 N. W. 998.

7. U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

II. APPOINTMENT OR DESIGNATION OF OFFICIAL NEWSPAPERS.

A. Authority or Duty to Appoint or Designate — 1. AUTHORITY — a. Source of. The authority of an officer or body to designate an official newspaper is derivable only from some express or positive provision of law.[8]

b. Who May Exercise. The general rule is that only the officer or body contemplated by the statute can exercise authority to designate an official newspaper.[9] But if the statute directs an officer to publish an advertisement in an official news-

8. Washington County *v.* Kemp, 14 Ind. App. 604, 43 N. E. 314. See also State *v.* Dixon County, 24 Nebr. 106, 37 N. W. 936.

Official gazette.— In Canada and the provinces the authority to print and publish official gazettes is conferred by statute, which also prescribes the publications in such gazettes, charges therefor, and subscriptions thereto, etc. See Can. Rev. St. (1906) c. 80, §§ 32–34 (Dominion); 31 Vict. c. 6, § 3; Ont. Rev. St. (1897) c. 20 (Ontario); Quebec Rev. St. (1888) art. 725–731 (Quebec); N. Brunsw. Consol. St. (1903) c. 15 (New Brunswick); Manitoba Rev. St. (1902) c. 142, §§ 3–14 (Manitoba); Nova Scotia Rev. St. (1900) c. 11, §§ 12–15 (Nova Scotia); Brit. Col. Rev. St. (1897) c. 174 (British Columbia); N. W. Terr. Consol. Ord. (1905) c. 11, §§ 2–5 (Northwest Territories); Alberta St. (1906) c. 9, §§ 2–5 (Alberta); Saskatchewan St. (1906) c. 14, §§ 2–8 (Saskatchewan).

Meaning of the term "Gazette" and use of its contents in evidence in England.— The "Gazette" means the London Gazette, published under the authority of the English government (Rex *v.* Holt, Leach C. C. 676, 5 T. R. 436), unless otherwise provided by an interpretation clause, and there the word is made to mean *qua* Scotland, the Edinburgh Gazette, and *qua* Ireland, the Dublin Gazette. See 30 & 31 Vict. c. 127, § 3; 31 & 32 Vict. c. 18, § 2, c. 37, § 5; 38 & 39 Vict. c. 60, § 4; 39 & 40 Vict. c. 45, § 3; 56 & 57 Vict. c. 39, § 79; 59 & 60 Vict. c. 25, § 105; 19 & 20 Vict. c. 79, § 4 (Scotland); 20 & 21 Vict. c. 60, § 4 (Ireland). A Gazette which merely purports to be printed "by authority" does not purport to be printed "by the Queen's printers," or by the Queen's authority, and is not receivable as evidence. Reg. *v.* Wallace, 17 Ir. C. L 206, 14 Wkly. Rep. 462. Where purporting to be printed by the King's printer, the Gazette is good evidence of all acts of state therein contained (Rex *v.* Holt, Leach C. C. 676, 5 T R. 436); of a proclamation issued under an order in council, because such proclamation is a public act regarding the Crown and government, and must pass the great seal before it can be admitted into the Gazette (Atty.-Gen. *v.* Theakstone, 8 Price 89, 22 Rev. Rep. 716); but alone the Gazette is not good evidence of the appointment of an officer to a commission in the army, unless the commission is not produced after notice (Kirwan *v.* Cockburn, 5 Esp. 233, 8 Rev. Rep. 849. See also Rex *v.* Gardner, 2 Campb. 513, 11 Rev. Rep. 784); nor of a declaration alleging the division of a parish into several district parishes by order of the king in council (under 58 Geo. III, c. 45), by the production of the Gazette containing a copy of such order (Greenwood *v.* Woodham, 2 M. & Rob. 363); but, where the Gazette contains the advertisement of a person being adjudicated a bankrupt, it is conclusive evidence of the bankruptcy in criminal and civil proceedings against him, if he takes no steps within the prescribed period to annul the adjudication (Reg. *v.* Levi, 10 Cox C. C. 110, 11 Jur. N. S. 450, L. & C. 597, 34 L. J. M. C. 174, 12 L. T. Rep. N. S. 502, 13 Wkly. Rep. 724. See also Reg. *v.* Robinson, L. R. 1 C. C. 80, 10 Cox C. C. 467, 36 L. J. M. C. 78, 16 L. T. Rep. N. S. 605, 15 Wkly. Rep. 966; Revell *v.* Blake, L. R. 7 C. P. 300, 41 L. J. C. P. 129; 26 L T. Rep. N. S. 578, 20 Wkly. Rep. 756; Reg. *v.* Raudnitz, 11 Cox C. C. 360, 21 L. T. Rep. N. S. 621; Reg. *v.* Harris, 4 Cox C. C. 140). A notice published in the Gazette, purporting to be given by the lords commissioners of the admiralty, but signed only "by command of their lordships, W. G. Romaine," was, by production of the Gazette, proved to be duly made by the admiralty (The Olivia, 6 L. T. Rep. N. S. 398, Lush, 497); but a single sheet or cutting from the Gazette, containing a notice, is not proof that such notice has appeared therein (Reg. *v.* Lowe, 15 Cox C. C. 286, 47 J. P. 535, 52 L. J. M. C. 122, 48 L. T. Rep. N. S. 768).

9. *Indiana.*— Washington County *v.* Kemp, 14 Ind. App. 604, 43 N. E. 314, holding that the act is administrative.

Kansas.—Wren *v.* Nemaha County, 24 Kan. 301.

Nebraska.— Bee Pub. Co. *v.* Douglas County, (1907) 110 N. W. 624, holding that on the filing of a petition for the foreclosure of taxes, under Comp. St. (1905) c. 77, art. 9, the county treasurer has authority to designate a paper for the publication of notice of the pendency of the action, if the county commissioners have failed so to do.

New Jersey.— See Wilson *v.* Trenton, 56 N. J. L. 469, 29 Atl. 183, holding that where the consent of the mayor is necessary to the validity of a designation of an official newspaper by the common council, such designation cannot be made by resolution of the common council adopted over the mayor's veto.

New York.— People *v.* Hamilton County,

paper, and no official newspaper has been designated,[10] or the official newspaper is, for any reason, unable to publish,[11] such officer may designate another newspaper to publish that particular advertisement.

c. Duration of. The general rule is that where a statute requires that a local legislative body shall designate, at a given session, an official newspaper, the authority, whether it be exercised[12] or not,[13] at that session, is terminated and cannot be exercised at a subsequent session. An exception to this rule is recognized where the selection, owing to the absence of a member of the legislative body, cannot be made at the session specified by the statute.[14] Under a statute providing for the designation of an official newspaper and authorizing certain officers to designate such paper, the act not to be performed within a specified time, the power thus committed is a continuing one and is not exhausted by a single designation.[15]

d. Statutory Provisions. The general rule that where the provision of a statute as to the time when an act shall be done is intended merely for the guidance of public officers, so as to insure the orderly and seasonable performance of public duties, it will be deemed merely directory, not mandatory, applies to a statute

73 N. Y. 604 See also Standard Pub. Co. *v.* New York, 111 N. Y. App. Div. 260, 97 N. Y. Suppl. 740.

Ohio.— State *v.* Holmes, 44 Ohio St. 489, 8 N. E. 870

Oklahoma.— Woodward County *v.* Smith, 18 Okla. 132, 89 Pac. 1121 (holding that the matter of the printing and publication of delinquent taxes is under the control of the county treasurer); Logan County *v.* State Capital Co., 16 Okla. 625, 86 Pac. 518.

South Dakota.— Dewell *v.* Hughes County, 8 S. D. 452, 66 N. W. 1079.

Disqualification of member of council by interest.— In England, under the Municipal Corporations Act (1882), (44 & 45 Vict. c. 50, § 12), certain persons are disqualified for being elected and for being councilors, "who have a share or interest in any contract with the municipal body," "but a person shall not be so disqualified or be deemed to have any share or interest in any contract of employment, by reason only of his having any share or interest in any newspaper in which any advertisement relating to the affairs of the borough or council is inserted." "A member must not, however, (§ 22) vote or take part in the discussion of any matter before the council or the committee in which he has directly or indirectly, by himself or his partner, any pecuniary interest." There are similar provisions in the Local Government Act (1894), 56 & 57 Vict. c. 73, § 46, concerning parish or district councils, which are also made applicable to Metropolitan borough councils, under London Government Act (1899), 62 & 63 Vict. c. 14, § 2 (5). Under an Ontario act to amend the statute law (62 Vict. (2d sess.) c. 11, § 22), no person shall be disqualified from being elected a member of the council of any municipal corporation, or from being elected a member of any public school, separate school, or high school board, or from sitting or voting in such council or board, by reason only of his being proprietor of, or otherwise interested in, a newspaper or periodical published in which, from time to time, official advertisements are inserted by the council or board, which appear in other newspapers or publications in the municipality or school-district, or which is subscribed for by the council or board or by any of the departments or offices of the municipality or school-district, although such advertisements or subscriptions are paid for at the usual rate, out of the moneys of the municipal corporation or school-board, but this shall not apply to any person who has entered into an agreement or contract with a municipal corporation or school-board to do, at a specified rate, all or the greater part of the printing required by such corporation or board, during the term of such agreement or contract, but such member of council or school-board shall not be entitled to vote where his own account is in question.

10. Kernitz *v.* Long Island City, 50 Hun (N. Y.) 428, 3 N. Y. Suppl. 144, so holding in an action for compensation.

11. State *v.* Purdy, 14 Wash. 343, 44 Pac. 857.

12. Welch *v.* Mahaska County, 23 Iowa 199. See also People *v.* Troy, 78 N. Y. 33, 34 Am. Rep. 500, holding that under a statute requiring the common council of a city to designate not to exceed four newspapers having the largest circulation in the city in which the city advertising is to be done, the owner of a newspaper shown to have the largest circulation has no right to compel the designation of his paper after the year has elapsed for which the designation is to be made and four newspapers have been designated.

13. Finnegan *v.* Gronerud, 63 Minn. 53, 65 N. W. 128, 348; Hall *v.* Ramsey County, 30 Minn. 68, 14 N. W. 263.

14. Hoxie *v.* Shaw, 75 Iowa 427, 39 N. W. 673.

15. Weed *v.* Tucker, 19 N. Y. 422; Daily Register Printing, etc., Co. *v.* New York, 3 N. Y. Suppl. 669 [*affirmed* in 52 Hun 542, 6 N. Y. Suppl. 10].

authorizing a public officer to designate an official newspaper.[16] A statute which provides for the publication of a notice only in newspapers published in a given place is not in violation of a constitutional provision against the taking of property without due process of law, in that it deprives owners of all newspapers published at that particular place from competing for public printing.[17] Whenever the statute provides a complete scheme for the designation of an official newspaper it supplants and annuls all earlier statutes having the same purpose.[18]

2. DUTY. The duty of designating an official newspaper, when it devolves upon a public officer, is frequently regarded as a mere ministerial duty;[19] and whenever the statute provides that an official newspaper shall be designated by a certain officer or body the duty to make such designation is mandatory.[20]

B. Newspapers Eligible to Appointment or Designation — 1. EXISTENCE PRIOR TO DESIGNATION. Where a statute providing for the designation of an official newspaper requires that it shall have existed for a certain period before the passage of the act, a newspaper not existing for the required period is not eligible for designation.[21] But an act governing the designation of an official newspaper is special, and therefore unconstitutional, if it is confined to cities in which a newspaper of a specific nature has been published for a designated period prior to the passage of the act.[22]

2. FREQUENCY OF ISSUE. A newspaper printed and published six days consecutively in each week, except on Monday, is a daily newspaper within the meaning of a statute authorizing the designation of an official newspaper.[23]

3. CIRCULATION. Where an officer or public body is required to select as official newspapers those having the largest number of *bona fide* yearly subscribers, no two or more papers can combine their subscription lists and be selected as one paper, to the prejudice of a third paper having a larger subscription list than either.[24] Where a public body is directed by statute to select as official newspapers those having the largest circulation, and the statute is silent as to the sources of evidence upon which this determination shall be made, the body is not confined to the affidavits of newspaper proprietors, but may consult all available sources of information.[25]

4. LANGUAGE. If the legislative intent is to leave the choice of an official newspaper, whether printed in one language or another, to a local legislative body, it

16. Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635.

17. State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88.

Taking property without due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1080.

18. Wilson *v.* Trenton, 56 N. J. L. 469, 29 Atl. 183. See also *In re* Troy Press Co., 187 N. Y. 279, 79 N. E. 1006 [*affirming* 115 N. Y. App. Div. 25, 100 N. Y. Suppl. 516]; Matter of Troy Press Co., 94 N. Y. App. Div. 514, 88 N. Y. Suppl. 115 [*affirmed* in 179 N. Y. 529, 71 N. E. 1141].

19. Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40; Washington County *v.* Kemp, 14 Ind. App. 604, 43 N. E. 314.

Mandamus to compel selection see MANDAMUS, 26 Cyc. 289.

20. Packard *v.* Snyder, 110 Iowa 628, 82 N. W. 327. See also State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88, holding that under a statute requiring an advertisement to be published in two newspapers of opposite politics at the county-seat, the duty to designate is mandatory in so far as it requires the publication to be in newspapers at the county-seat.

21. Chamberlain *v.* Hoboken, 38 N. J. L. 110.

22. State *v.* Trenton, 54 N. J. L. 444, 24 Atl. 478.

Special and local laws in general see STATUTES.

23. Tribune Pub. Co. *v.* Duluth, 45 Minn. 27, 47 N. W. 309. See also *supra*, I, note 1.

24. Packard *v.* Snyder, 110 Iowa 628, 82 N. W. 327.

Who is a bona fide subscriber.— The intent of the publisher to reduce the price of subscriptions in order to increase the circulation of his paper and thereby obtain its designation as an official newspaper does not affect the *bona fides* of the subscribers so obtained, in the absence of evidence of collusion between them and the publisher. Smith *v.* Rockwell, 113 Iowa 452, 85 N. W. 632. A person to whom a newspaper is sent without his knowledge or consent, express or implied, is not a *bona fide* subscriber within the meaning of the statute requiring the selection as an official newspaper of one having the largest number of *bona fide* yearly subscribers. Ashton *v.* Stoy, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584.

25. Smith *v.* Yoram, 37 Iowa 89.

is competent for such body to designate a newspaper published in a foreign language, providing the publication be also made in the English language.[26]

5. Politics. A newspaper which holds itself out to the public as an independent newspaper, and is such, is not entitled to be designated for the publication of an advertisement as the newspaper of a political party, although it has at one time supported such party.[27]

6. Lowest Bid. Under a statute providing that certain officers shall designate the newspaper making the lowest bid to publish an advertisement, such officer may designate any one of several papers whose bids are the same or lower than any other.[28]

C. Sufficiency and Validity of Designation — 1. In General. The general rule is that the mode of and the formalities to be observed in designating an official newspaper, as pointed out by the statute, must be strictly complied with, and a failure so to do is fatal.[29] Thus if the statute points out the mode of ascertaining the eligibility of a newspaper as to circulation, such provision is mandatory

26. Kellogg *v.* Oshkosh, 14 Wis. 623.

27. People *v.* Troy, 114 N. Y. App. Div. 354, 99 N. Y. Suppl. 1045; Ohio State Journal Co. *v.* Brown, 19 Ohio Cir. Ct. 325, 10 Ohio Cir. Dec. 470.

28. Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325.

29. Russell *v.* Gilson, 36 Minn. 366, 31 N. W. 692; *In re* Astor, 50 N. Y. 363; People *v.* Seneca County, 18 How. Pr. (N. Y.) 461, holding further that under a statute peremptorily requiring a board of supervisors to designate by ballot newspapers in which to publish the session laws, it must be done not by a resolution but by ballot, and if there is a tie vote there can be no choice. See also *In re* Anderson, 60 N. Y. 457 (holding that under a statute giving power to designate official newspapers to the mayor and controller, the mere signing by them of the designation of the paper, without communicating it to the common council, as required by the act, is not a sufficient designation); People *v.* Troy, 114 N. Y. App. Div. 354, 99 N. Y. Suppl. 1045; *In re* Foster, 10 Hun (N. Y.) 307 (holding that under Laws (1871), c. 574, § 1, the designation of a newspaper for the publication of notices or advertisements is not complete until, as prescribed by the statute, a certificate of designation is filed in the office of the controller); People *v.* Greene County, 13 Abb. N. Cas. (N. Y.) 421; Matter of Hall, 66 How. Pr. (N. Y.) 330. But see Continental Trust Co. *v.* Link, (Nebr. 1907) 112 N. W. 352, holding that where a board of county commissioners contracts with a newspaper of general circulation for the publication of a legal advertisement for a year and for succeeding years, and deals with it as the official paper of the county, such paper is, for the publication of notices of tax-sales, a paper designated by the board of county commissioners as required by Comp. St. (1897) c. 77, art. 1, § 109.

Time of designation.— Whenever designation of a newspaper in which to publish an advertisement is required by statute to be made within a given time, a designation not made within the time specified is insufficient. Eastman *v.* Linn, 26 Minn. 215, 2 N. W. 693.

Written designation.— However, where a written designation is to be made by a majority of the democratic members of a local legislative body, the fact that such members, after signing a written designation, presented it to the whole body as a resolution and caused it to be passed as such makes the written designation none the less valid. People *v.* Barnes, 17 N. Y. App. Div. 197, 45 N. Y. Suppl. 356.

The fact that a certain newspaper happens to be the first named in a single designation of more papers than contemplated by the statute cannot be regarded as constituting a legal designation of the paper so first named. Ford *v.* Delaware County, 92 N. Y. App. Div. 119, 87 N. Y. Suppl. 407.

Designating at rate below minimum fixed by statute.— The designation of a newspaper to publish advertisements by which the compensation is fixed at less than the minimum rate prescribed by law is void, as against a subsequent designation in compliance with the statute. People *v.* Monroe County, 60 Hun (N. Y.) 328, 14 N. Y. Suppl. 867.

Complying substantially with statute.— But a substantial compliance with the statute, as where the statute provides that bids for official advertising of a city shall be opened in the presence of the mayor, and that the clerk shall thereupon in the presence of the mayor enter on his minutes all the proposals, with the price for which each newspaper should offer to do the same, and thereupon the clerk should also enter on the minutes an order awarding such printing to one English newspaper and one German newspaper, the official newspaper is sufficiently designated where it appears that the clerk reported to the council, stating what papers had been designated by him and the successful bidders, and his report was received by the council and ordered on file. Wright *v.* Forrestal, 65 Wis. 341, 27 N. W. 52. And a resolution of the county commissioners, designating "The Enterprise" as a newspaper for the publication of a delinquent tax list, is a sufficient designation of the

and must be strictly observed.[30] But if the statute is merely directory and a designation is made in a mode different from that prescribed, the error may be subsequently corrected by the officer or body empowered to designate.[31]

2. When Designation of One Paper Includes Another. If two advertisements must necessarily be published together in the same paper, a designation of a newspaper in which to publish one advertisement is sufficient for both.[32]

3. Change of Name Between Time of Designation and That of Publication. The mere fact that a newspaper, designated to publish an advertisement, changes its name between the time of the designation and the time of the publication, does not affect the validity of the designation.[33]

D. Proceedings Between Contesting Applicants — 1. In General. Under a statute providing that a local legislative body shall select as official newspapers the two having the largest circulation, and that in case of contest the applicants shall file a certified statement of their *bona fide* subscribers, the two applicants showing the greater number of subscribers to be the official papers, a contest arises when more than two statements are filed,[34] and the legislative body cannot ignore or defeat such contest by neglecting to fix a day for the filing of the statements and having a hearing.[35] If a statute requires that in case of contest each applicant shall file a certified statement of its *bona fide* yearly subscriptions, and that the two applicants having the greater number of subscribers shall be the official papers, only applications of publishers who have filed certified statements can be considered when a contest arises.[36]

2. Pleading. Where the hearing of a contest is before a board of supervisors or similar inferior legislative body, formal pleadings are not in all cases required,[37] but the issues should be presented to the body for determination,[38] and where fraud is charged in a contest before a legislative body over the selection of an official newspaper, it must be alleged before the hearing is had, and the selection is made.[39]

3. Evidence.[40] On appeal from a designation of an official newspaper under a statute giving the right of appeal as in ordinary actions, the admissibility of evidence must be determined as in ordinary actions, and it is error to admit *ex parte* affidavits.[41] If the statute requires the lowest bidder to be designated as the official newspaper and a contest arises over the designation of a newspaper whose bid exceeded that of another, evidence tending to show the bid accepted was a reasonable one is immaterial.[42]

4. Review. Under a statute providing that publishers of newspapers may appeal as in ordinary actions from the award of county printing by county supervisors, an appeal can be taken only on a proper notice served and appeal-bond

"Glencoe Enterprise," that being the only newspaper bearing that name published in the county. Knight *v.* Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675.

Revocation of designation.— A supervisor may revoke his signature to a designation by written notice to the county clerk to that effect before the clerk has acted upon the designation; and where after such revocation a minority of the members of the board only is affixed to the designation, a subsequent designation bearing the signatures of the majority of the members is effective and the clerk cannot designate a third paper as upon the ground of a tie. People *v.* Roberts, 52 Misc. (N. Y.) 308, 102 N. Y. Suppl. 1110.

30. People *v.* Troy, 2 N. Y. Suppl. 114.

31. People *v.* Cahill, 5 N. Y. App. Div. 570, 39 N. Y. Suppl. 372.

32. Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325; Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96.

33. Reimer *v.* Newell, 47 Minn. 237, 49 N. W. 865.

34. Ross *v.* Campbell, 98 Iowa 1, 66 N. W. 1064; Runyon *v.* Haislet, 90 Iowa 376, 57 N. W. 902. See also Cory *v.* Hamilton, 84 Iowa 594, 51 N. W. 54.

35. Runyon *v.* Haislet, 90 Iowa 376, 57 N. W. 902.

36. Runyon *v.* Haislet, 90 Iowa 376, 57 N. W. 902.

37. Ashton *v.* Stoy, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584.

38. Ashton *v.* Stoy, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584.

39. Ashton *v.* Stoy, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584. See also Runyon *v.* Haislet, 90 Iowa 376, 57 N. W. 902.

40. Evidence generally see Evidence.

41. Democrat Pub. Co. *v.* Lewis, 90 Iowa 304, 57 N. W. 869.

42. Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 74 Pac. 802.

filed.[43] Under a statute providing for an appeal from the result of a contest between newspapers making application to be designated as official newspapers, no appeal lies when the contest is still pending.[44] Under a statute providing that certain public bodies shall, in selecting official newspapers, select those which, according to the best information obtainable, have the largest circulation, the action of such body in selecting a newspaper is judicial and may not be reviewed by certiorari.[45] Refusal of a public body to consider additional affidavits of a newspaper as to circulation, after actual designation of the official newspaper, is no ground for reversal of the action of such body.[46]

E. Conclusiveness or Effect of Designation — 1. Constitutes an Employment. If the statute provides that an officer shall publish an advertisement in newspapers designated by others, a designation duly made throws upon him the absolute duty of publishing in the newspaper designated.[47] A designation by the proper officers of an official newspaper constitutes an employment, in the absence of any evidence that the service was declined by the paper.[48]

2. Not Impeachable Collaterally. The regularity of a designation by a local legislative body of a newspaper in which to publish an advertisement cannot be impeached collaterally.[49]

F. Duration of Designation or Appointment. If the evident purpose of a statute is to require the publication of an advertisement with reference to the current year, a designation cannot be made for a period exceeding one year;[50] and where the designation is limited to a given period, it expires when that period has elapsed without a new designation.[51] But if the designation is not limited to a given period and is made by a proper officer or body, it will be presumed to continue, in the absence of evidence that it has been revoked[52] or a new designation made.[53]

G. Compensation — 1. Right Thereto. If a publisher of an official newspaper is not to be regarded as a public officer, his position is so analogous to that of a public officer that the rules governing the conflicting claims of officers[54] *de facto* and officers *de jure* against state, county, or municipality are applicable.[55]

43. Starr *v.* Ingham, 84 Iowa 580, 51 N. W. 175.

44. Hoxie *v.* Shaw, 75 Iowa 427, 39 N. W. 673.

45. People *v.* Martin, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592.

46. People *v.* Martin, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592.

47. Armstrong *v.* Haight, 53 N. J. L. 333, 21 Atl. 303.

Mandamus to compel publication see Mandamus, 26 Cyc. 289.

48. *In re* Phillips, 60 N. Y. 16; *In re* Astor, 50 N. Y. 363. *Compare In re* Ketteltas, 2 Hun (N. Y.) 221, 4 Thomps. & C. 657, holding that the mere selection of a newspaper to publish official proceedings, without proof of its acceptance of the appointment, is not sufficient to show an employment.

49. People *v.* Kings County, 3 Abb. Dec. (N. Y.) 560, 3 Keyes 630, 4 Transcr. App. 390.

50. Matter of Troy Press Co., 94 N. Y. App. Div. 514, 88 N. Y. Suppl. 115 [*affirmed* in 179 N. Y. 529, 71 N. E. 1141].

51. *In re* Burke, 62 N. Y. 224. *Compare* North Yakima *v.* Scudder, 41 Wash. 15, 82 Pac. 1022, holding that where, at the time a resolution for the improvement of a street was published, the time for which the paper in which the resolution was published had been designated as the official paper had expired, but no other paper had been designated as the official paper, such paper was the *de facto* official paper for the purpose of that publication.

52. *In re* Phillips, 60 N. Y. 16. See also *In re* Astor, 50 N. Y. 363.

When designation not revokable.— Under a statute providing that the members of the board of supervisors in each county representing each of the two principal political parties shall designate a paper representing the party to which they belong to publish session laws and concurrent resolutions, a designation properly made is not revokable. Matter of Troy Press Co., 94 N. Y. App. Div. 514, 88 N. Y. Suppl. 115 [*affirmed* in 179 N. Y. 529, 71 N. E. 1141].

53. Petillon *v.* Ford County, 5 Kan. App. 794, 48 Pac. 1002 (holding that where a board of commissioners by written order designates a newspaper as the official newspaper of a county for a term extending beyond the life of the board, such order remains in force until a new designation is made); Democrat Pub. Co. *v.* Patterson, 78 S. W. 131. 25 Ky. L. Rep. 1457; *In re* Phillips, 60 N. Y. 16; *In re* Folsom, 56 N. Y. 60.

54. See, generally, Officers.

55. Smith *v.* Van Buren County, 125 Iowa 454, 101 N. W. 186.

It follows that one who claims to recover for services rendered as publisher of an official newspaper must show that he has been duly and lawfully selected or designated for that purpose, and it is not enough merely to show that he rendered services.[56] When, however, a newspaper has been duly and lawfully designated as an official paper, the publisher thereof is entitled to recover compensation for all services rendered up to the time when the designation is terminated.[57] And the publisher's right to compensation is not defeated by the fact that, after proper designation of his paper, the officer empowered to make such designation subsequently published the advertisement himself by mere posting of the same,[58] or furnished an incorrect advertisement for publication,[59] or colluded with the publisher in publishing the advertisement sooner than customary,[60] or had assented to a contract made, or previously attempted to be made, by a set of officers having no authority whatever.[61] Nor is the right to compensation lost because the publisher incorporated unnecessary matter in the advertisement, for which he is not entitled to charge, if the advertisement answered the purpose and complied with the law.[62] But even after lawful designation of his newspaper a publisher is not entitled to compensation for publishing an advertisement, with knowledge, after the designation has been revoked,[63] nor can the publisher recover his compensation where he fails to make the number of publications required by law,[64] or where he refuses to deliver to the proper officer proof of publication until paid his charges therefor.[65]

2. Contract Therefor — a. Publication on Sunday. It has been held that a contract for the publication of an advertisement in a Sunday newspaper is void, on the ground that it is within a statute prohibiting the performance of servile work upon the Sabbath, and that the compensation stipulated in such contract is not recoverable.[66]

b. Authority of Officer or Body to Contract. The authority to designate an official newspaper being statutory,[67] it follows that unless the contracting officer or body had statutory authority to make the designation, the public,[68] as for example

56. Smith *v.* Van Buren County, 125 Iowa 454, 101 N. W. 186; Mierson *v.* New York, 5 Daly (N. Y.) 458; People *v.* Kings County, 23 How. Pr. (N. Y.) 89 [*affirmed* in 3 Abb. Dec. 560, 3 Keyes 630, 4 Transcr. App. 390].

Proof of designation is proof of employment. *In re* Burke, 62 N. Y. 224; *In re* Astor, 50 N. Y. 363.

57. People *v.* Spicer, 99 N. Y. 225, 1 N. E. 680.

58. Bogert *v.* Luzerne County, 13 Pa. Super. Ct. 549.

59. Hoffman *v.* Clark County, 61 Wis. 5, 20 N. W. 376.

60. Hoffman *v.* Clark County, 61 Wis. 5, 20 N. W. 376.

61. Randall *v.* Yuba County, 14 Cal. 219; Beal *v.* St. Croix County, 13 Wis. 500.

62. People *v.* Allegany County, 105 N. Y. App. Div. 629, 93 N. Y. Suppl. 1143; People *v.* Allegany County, 105 N. Y. App. Div. 40, 93 N. Y. Suppl. 426.

Employing such language or form as will occupy the least space. — Where the county clerk delivers to a publisher a mass of material from which to publish an election notice and intrusts him with the responsibility of publishing such notice, the publisher, in order to charge the county for the work, is not required to employ such language or form as will occupy the least possible space and still comply with the law. People *v.* Allegany County, 105 N. Y. App. Div. 629, 93 N. Y. Suppl. 1143; People *v.* Allegany County, 105 N. Y. App. Div. 40, 93 N. Y. Suppl. 426.

63. Hundley *v.* Finney County, 2 Kan. App. 41, 42 Pac. 59.

64. Endion Imp. Co. *v.* Evening Telegram Co., 104 Wis. 432, 80 N. W. 732.

65. Brown *v.* Otoe County Com'rs, 6 Nebr. 111, in which the court also incidentally expresses itself as of opinion that in dealing with a private person one who publishes an advertisement may demand his compensation as a condition precedent to the delivery of the proof of publication.

66. Smith *v.* Wilcox, 24 N. Y. 353, 82 Am. Dec. 302.

Validity of contracts to be performed on Sunday in general see Sunday.

67. See *supra*, II, A, 1, a.

68. *California.* — Randall *v.* Yuba County, 14 Cal. 219.

Indiana. — Martin County *v.* Kierolf, 14 Ind. 284; Washington County *v.* Kemp, 14 Ind. App. 604, 43 N. E. 314.

Nebraska. — Hamilton County *v.* Bailey, 12 Nebr. 56, 10 N. W. 539.

Ohio. — State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88.

Oklahoma. — Allen *v.* Cleveland County, 12 Okla. 603, 73 Pac. 286.

Wisconsin. — Beal *v.* St. Croix County, 13

the state[69] or the county,[70] is not liable for the printing done under the contract. Nor is a county liable where the officer or body having authority to designate the official newspapers exceeds his or its authority by designating a greater number of newspapers than contemplated by the statute,[71] at least where the publication is with the knowledge that it has previously been made in the proper number of newspapers.[72]

c. Nullification by Subsequent Statute. Where an officer or body contracts for the publication of an advertisement, such contract may be modified[73] or nullified,[74] by a subsequent statute passed before any printing is done under the contract.

3. Amount. In the absence of special contract as to the rate of compensation the publisher of a newspaper which accepts a designation to publish an advertisement can, at common law, recover only the reasonable value of the services.[75] But where the common law has been abrogated by a statute fixing the rate of compensation, the parties, in default of any agreement, are presumed to have

Wis. 500, holding that Laws (1859), c. 22, § 3, authorized the treasurer to publish the delinquent tax list in a county newspaper of his selection, and the publisher with whom he contracts may recover of the county for such services notwithstanding the county supervisors have contracted with some other parties to do the whole of the county printing.

Wyoming.— Albany County *v.* Chaplin, 5 Wyo. 74, 37 Pac. 370.

See 37 Cent. Dig. tit. "Newspapers," § 22.

Statute to be strictly observed.— However, under a statute providing that a city council shall by ordinance or resolution contract as they may determine with a public newspaper as the official newspaper of the city, a contract signed by the mayor, without authority of the council by ordinance or resolution, is not binding, although the council afterward, without resolution or ordinance, act thereon. Penn *v.* Laredo, (Tex. Civ. App. 1894) 26 S. W. 636.

69. Com. *v.* McCandless, 129 Pa. St. 492, 8 Atl. 159.

70. *California.*— Keller *v.* Hyde, 20 Cal. 593. See also Smeltzer *v.* Miller, 113 Cal. 163, 45 Pac. 264, holding that where the statute provides that the board of supervisors "must" contract for publishing the delinquent tax list to the lowest bidder after ten days' notice of the letting of the contract and requires the tax-collector to publish the delinquent tax list by June 5, the tax-collector, on failure of the supervisors to contract for publishing the list, is not authorized to do so.

Florida.— Payne *v.* Washington County, 25 Fla. 798, 6 So. 881.

Indiana.— Stropes *v.* Greene County, 72 Ind. 42; Brown *v.* Bartholomew County, 5 Ind. App. 75, 31 N. E. 811.

Iowa.— Haislett *v.* Howard County, 58 Iowa 377, 10 N. W. 790; McBride *v.* Hardin County, 58 Iowa 219, 12 N. W. 247.

Kentucky.—See Butler *v.* Jefferson County Fiscal Ct., 103 S. W. 251, 31 Ky. L. Rep. 597, holding that where the publisher of a newspaper publishes a notice, although the county judge has not required a deposit sufficient to cover the cost of publication and other expenses, the cost of publication cannot be recovered from the county or the petitioners.

Minnesota.— Hall *v.* Ramsey County, 30 Minn. 68, 14 N. W. 263.

New York.— People *v.* Hamilton County, 73 N. Y. 604; Rogers *v.* Westchester County, 77 N. Y. App. Div. 501, 78 N. Y. Suppl. 1081.

Ohio.— Schloenbach *v.* State, 53 Ohio St. 345, 41 N. E. 441.

See 37 Cent. Dig. tit. "Newspapers," § 22. And see also cases cited *supra*, note 68.

Contracting for advertisement not contemplated by statute.— Where county commissioners, in procuring the publication of an annual statement of receipts and expenditures of the county, act under special statutory authority, they cannot bind the county to pay for the publication of a statement different or covering another period from that therein prescribed. Mitchell *v.* St. Louis County, 24 Minn. 459.

71. Bartholomew *v.* Lehigh County, 148 Pa. St. 82, 23 Atl. 1122.

72. Elliott *v.* Franklin County, 9 Ohio Dec. (Reprint) 644, 16 Cinc. L. Bul. 69.

73. Murtagh *v.* District of Columbia, 3 MacArthur (D. C.) 455.

74. Potts *v.* Sheboygan County Sup'rs, 25 Wis. 506.

75. Fergus Printing, etc., Co. *v.* Otter Tail County, 60 Minn. 212, 62 N. W. 272. See also Murtagh *v.* District of Columbia, 3 MacArthur (D. C.) 455 (holding that where the publisher of a newspaper contracted for the publication of an advertisement, but before he formed the contract congress changed the law under which it was made, and there was no special agreement under the new act, the publisher could only recover what the publication was fairly and reasonably worth); Miami County *v.* Woodring, 12 Ind. App. 173, 40 N. E. 31 (holding that one who publishes in his newspaper state and county ballots, pursuant to an order of the clerk of the circuit court, may recover therefor on a *quantum meruit*, although he is not entitled to the rate fixed by statute, because the ballots were not printed in the style of type therein specified for such advertisements); Press Pub. Co. *v.* Baker, 13 N. Y. Suppl. 822.

contracted with reference to the existing legal rate.[76] And indeed it has been held that when a statute fixes the rate of compensation, it absolutely governs, so that the officer having the authority to designate the newspaper is powerless to make any special contract as to price.[77] The rate of compensation for the publication of an advertisement may, after a contract therefor is made with a newspaper, be modified by a subsequent statute[78] or resolution[79] passed before any printing is done under the contract.

4. Actions. In an action to recover compensation for publishing an advertisement which the statute requires that a certain officer shall cause to be published, the complaint must allege that such officer caused the advertisement to be published, or ordered or required its publication, and also that such publication was to be made in the paper named in the complaint.[80] Where, in an action to recover the compensation for publishing an advertisement required to be set in type of the same size as the body of ordinary business advertising, without leads for increasing space or more than two display lines in each advertisement, a finding, in the absence of evidence to the contrary, that the form of advertisement could have been preserved by setting up the publication in solid reading type of the same size as that in which the body of ordinary business advertising is set, with two display lines, and a judgment on that basis will not be disturbed.[81]

III. Rights and Liabilities of Publisher.[82]

The rights and liabilities of the publishers of newspapers, arising out of contracts of subscription or for the publication of advertisements,[83] are governed by

76. Daly *v.* Ely, 53 N. J. Eq. 270, 31 Atl. 396; Eberle *v.* Krebs, 50 N. Y. App. Div. 450, 64 N. Y. Suppl. 246; Press Pub. Co. *v.* Baker, 13 N. Y. Suppl. 822. See also Bee Pub. Co. *v.* Douglas County, (Nebr. 1907) 110 N. W. 624; Woodward County *v.* Smith, 18 Okla. 132, 89 Pac. 1121 (holding that under Wilson Rev. & Annot. St. Okla. (1903) §§ 6013, 6015, 6021, delinquent personal taxes need be published in one issue of the newspaper only; and where publication is made for three weeks the amount due for the first publication only may be recovered); Bohan *v.* Ozaukee County, 88 Wis. 498, 60 N. W. 702.

Modification of rate of compensation by subsequent statute.— The District of Columbia, under an act of congress directing the publication of a tax list twice a week for four weeks, contracted with a newspaper for such publication for one dollar a line. Before the list was published, congress changed the law to "twice a week for two weeks." The publishers of the newspaper were duly notified, but denied the authority of the commissioners to rescind the contract, and made the number of publications required under the old law. It was held that the District was liable only for the number of publications required by the new law. Murtagh *v.* District of Columbia, 3 MacArthur (D. C.) 455.

77. Crouch *v.* Hayes, 27 Hun (N. Y.) 222 [*affirmed* in 98 N. Y. 183]; Hoffman *v.* Chippewa County, 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781. See also Wooster *v.* Mahaska County, 122 Iowa 300, 98 N. W. 103, holding that Code, § 441, providing that the cost of publication of the proceedings of a board of supervisors in the county papers shall not exceed thirty-three and one-third cents per square, does not fix the compensation absolutely, but gives the board power to contract that the work be done for less, especially in view of a subsequent statute substituting "be" for "not exceed."

78. Murtagh *v.* District of Columbia, 3 MacArthur (D. C.) 455.

79. MacArthur *v.* Troy, 24 Hun (N. Y.) 55.

80. Becker *v.* Yellowstone County, 11 Mont. 490, 28 Pac. 1116.

81. Walker *v.* Hamilton County, 10 Ind. App. 701, 37 N. E. 809; Holmes *v.* Sullivan County, 10 Ind. App. 195, 37 N. E. 807.

82. Prosecutions or suits for libel see Libel and Slander.

83. Annand *v.* Brennan, 15 Nova Scotia, 32 (holding that where plaintiff sued on a contract to publish an advertisement for defendant, for a year, to occupy a stipulated space, for two hundred dollars per annum, defendant to have the privilege of changing the advertisement, and previous to the expiration of the year defendant ordered the advertisement to be discontinued and no other advertisement was published for defendant and the space was filled with other matter, that plaintiff was entitled to recover for the whole year including the period during which no advertisement was published); Henning *v.* Toronto R. Co., 11 Ont. L. Rep. 142 (holding that a provision in a contract for the right to use space for advertising purposes, for its renewal "at the end of three years at a price to be agreed upon but not less than $5,000 per annum," leaves the matter at large unless the price is agreed upon, and the person using the space cannot insist upon a renewal at the rate of five thousand dollars per annum); Sinclair *v.* Ottawa Iron, etc., Mfg. Co., 27

the rules applicable to contracts in general,[84] and this is true also of contracts for the supplying of news,[85] or of contracts for the purchase of newspaper businesses and property.[86] It has in some cases been held that, although one has not ordered a newspaper or periodical to be sent to him, or his subscription has expired, yet if the paper is sent to him through the post and he takes it out and uses it, a liability to pay therefor will be implied.[87] One who is employed to conduct a newspaper has no right to change the political color of the paper without the owner's consent.[88] It has been held in England that newspaper reporters have no right to attend the meetings of the borough council.[89]

IV. STATUTORY REGULATIONS.

In England and in some of the provinces of Canada restrictions are imposed by statute upon the publication of newspapers,[90] among which are the require-

U. C. C. P. 410 (where it is said that, in the absence of express contract for charges for advertisements, a court must consider as a jury would what would be a reasonable charge).

84. See CONTRACTS.

85. Woods *v.* Johnstone, 1 F. & F. 455, holding that on a contract to furnish intelligence to the proprietor of a morning newspaper, to be published therein only, on the day after it was received, defendant also publishing an evening edition of the same paper, and the contract being that plaintiff should be at liberty to send the intelligence to other morning newspapers, the publication of such intelligence in the evening edition on the day on which it is received is a breach of contract, for which plaintiff is entitled to recover the sums he would otherwise have received from the other morning papers.

86. Bowater *v.* Mirror of Life Co., 50 Wkly. Rep. 381, holding that where an agreement for the purchase and sale of a newspaper business contained a term or condition that the vendors should sell, and the purchasers should purchase, "the full benefit of all pending contracts and engagements and of all other property to which the vendors are or may be entitled in connection with the said journal," the purchasers took the burden of pending contracts, and did not merely acquire an option to take the benefit of such contracts; and that without an express indemnity there was an implied indemnity.

87. See CONTRACTS, 9 Cyc. 259, text and note 94.

Statutory provisions.— Under Nova Scotia Rev. St. (1900) c. 149, no person is liable to pay for any newspaper sent him by post, merely because he has taken such newspaper from any post-office or way office and kept same, nor to pay for any newspaper for which he has subscribed, after the expiration of the year for which he has subscribed, or after the expiration of any current year, if before the end of such year he notifies the publishers of the newspaper to discontinue sending it, such notice to be given by mailing a registered letter, or by notice otherwise given to the publishers.

88. Bélanger *v.* Bélanger, 24 Can. Sup. Ct. 678, holding that where two persons were associated together in the publication of a newspaper, the former as owner and the latter as the director and editor, under an agreement by which the latter was to be paid for his services and which was not to be terminated without his consent, the latter had become an employee of the owner of the paper, and was rightfully dismissed for changing its political color.

89. Tenby Corp. *v.* Mason, [1907], 24 T. L. R. 123 [*affirmed* in [1908] 24 T. L. R. 254].

90. See the statutes of England and of Canada and the various provinces. And see cases cited *infra*, this note.

England.— Any person who prints any paper for "hire, reward, gain, or profit" must, under a penalty of £20, preserve one copy for six months, and on it must be written or printed, in fair and legible characters, the name and address of the person employing him, and he must produce the same to any justice of the peace requiring him to do so (39 Geo. III, c. 79, reënacted by 32 & 33 Vict. c. 24). The printer of a newspaper must print his name and address on the first or last leaf of each copy; and neglect to do this renders the printer, and every person who shall "publish or disperse, or assist in publishing or dispersing," the newspaper, liable to a penalty of £5, for each copy (2 & 3 Vict. c. 12).

Manitoba.— By "The Newspaper Act" of Manitoba (Rev. St. (1902) c. 123), no newspaper is to be published in that province until an affidavit shall have been delivered to the prothonotary of the Court of King's Bench, or the deputy clerk of the crown and pleas of the judicial district in which such newspaper is published, containing the true names and other particulars of the printer, publisher, and proprietors of such newspaper, the proportional shares of the proprietors in the newspaper property, a true description of the building where the newspaper is to be printed, and the title of the newspaper. The affidavit shall be signed by the persons making the same, and shall be made by all the printers, publishers, and proprietors where these do not exceed four in number, and by four also where the number exceeds four, but full particulars shall be given as to all the printers, publishers, and proprietors, and notice of the same given to those named in, but

ments that the paper must be registered and that the name of the publisher shall

who have not sworn to, the affidavit. A new affidavit of like import shall be made when changes take place in the printing, publishing, proprietorship, place of business, title, etc., of the paper. Proof shall be made by affidavit of any person named in the original affidavit filed who has ceased to be publisher, etc. Notice of the true name and address of every printer and publisher of the paper shall be contained therein, and, in proceedings for penalties under the Act, proof that a copy of the paper was bought at defendant's office shall be dispensed with whenever the affidavit, or a copy thereof certified by the prothonotary or deputy clerk of the crown, is produced in evidence. Such certified copy shall be *prima facie* evidence of the contents of the original affidavit and that it was duly sworn, and shall have the same evidential effect as the original; and in all cases and proceedings concerning the particular newspaper, or any publication therein, and concerning all persons mentioned in the affidavit as publisher, etc., the affidavit, or a certified copy thereof, shall be conclusive evidence of the truth of all such matters set forth therein as are required by the Act, unless the contrary shall be satisfactorily proved. Compliance with the Act is necessary, *inter alia* (§ 16), to entitle any person or corporation to the benefit of the Provincial Libel Act (Rev. St. (1902) c. 97, § 14). The Act penalizes infractions of the Act generally, including the publication of a newspaper by any person without his having made the affidavit required, and provides for the recovery and disposition of the fines, etc., and for imprisonment in case of default in payment. The provisions of this Act apply to the case of a corporation being the sole publisher and proprietor of a newspaper, and, where a corporation is proprietor, the affidavit or affirmation under the Act may be made by the managing director. There is an option either to swear or affirm; and the right to affirm is not confined to members of certain religious bodies, or persons having religious scruples; and if the affidavit or affirmation purport to have been taken before a commissioner, his authority will be presumed. Ashdown *v.* Manitoba Free Press Co., 20 Can. Sup. Ct. 43 [*affirming* 6 Manitoba 578]. Under the plea of not guilty it is unnecessary to plead The Newspaper Act. Ashdown *v.* Manitoba Free Press Co., 6 Manitoba 578 [*affirmed* in 20 Can. Sup. Ct. 43]. And where defendant did not comply with the provisions of the Act until after writ issued, an application by defendant for security for costs was dismissed. Daly *v.* White, 5 Manitoba 55. See also Hitchcock *v.* Way, 6 A. & E. 943, 2 N. & P. 72, 33 E. C. L. 490, and Chappell *v.* Purday, 1 D. & L. 458, 13 L. J. Exch. 7, 12 M. & W. 303.

Quebec.— The Revised Statutes of the Province of Quebec, 1888, articles 2924–2938, contain provisions substantially the same as the sections in the Manitoba Newspaper Act requiring registration of newspapers, and imposing penalties for non-registration.

New Brunswick.— Under a New Brunswick Act (Con. St. (1903) c. 136, § 11), no publisher is entitled to the benefit of the Act unless he publishes his name as publisher in a conspicuous place in the paper.

Proprietors' rights and remedies arising out of registration, etc., in England.— The fact of A's name appearing as the proprietor of a newspaper in the declaration filed at the stamp office, pursuant to 6 & 7 Wm. IV, c. 76, §§ 6, 8, does not render A liable in respect of a contract entered into specifically with B, the real proprietor of the newspaper, after A has ceased to be interested therein. Holcroft *v.* Hoggins, 2 C. B. 488, 15 L. J. C. P. 129, 52 E. C. L. 488. Where A, the proprietor of a newspaper, prevailed on B to make and deliver at the stamp office an affidavit that he, B, was the proprietor of the paper, and B afterward agreed to sell the paper to D, and A having become insolvent, his assignees filed a bill to set aside the sale for fraud, it was held that as B had, at A's instance, violated the statute, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, A's assignees were not entitled to the relief asked. Harmer *v.* Westmacott, 6 Sim. 284, 9 Eng. Ch. 284, 58 Eng. Reprint 600. The use for many years of two words of common use, "Newcastle Chronicle," as the name of a newspaper, does not give the owner of the newspaper an exclusive right to the use of one of the words, "Chronicle," so as to entitle him to restrain defendant from publishing in the same town a newspaper having for its name the word "Chronicle," in conjunction with the name "Sporting Chronicle"; the appearance and contents of the two papers being dissimilar, there being no evidence of any one having been deceived, and no apparent intention to deceive on the part of defendant. Cowen *v.* Hulton, 46 L. T. Rep. N. S. 897. There is nothing analogous to copyright in the name of a newspaper, but the proprietor has a right to prevent any other person from adopting the same name for any other similar publication, which is a chattel interest capable of assignment. Kelly *v.* Hutton, L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. Rep. N. S. 228, 16 Wkly. Rep. 1182. Where the titles of two papers were different, and the papers themselves were not similar in appearance or contents — the one not likely to be mistaken for the other except momentarily — and where there was no implied representation that defendant's newspaper had any connection whatever, proprietary or otherwise, with plaintiffs' paper, and the papers were not substantial competitors, and defendant acted *bona fide* in adopting the name and without any fraudulent intention, it was held that plaintiffs, who published the "Evening Express" at L, were not entitled to restrain the publication of a morning

appear upon each copy. The sale of newspapers,[91] or the propriety of advertisements,[92] is also frequently regulated by statute or municipal ordinance.

paper, the "North Express," at L, by defendant, such publication not representing or leading to the belief that defendant's paper was an edition of plaintiffs' paper, or was owned, edited, or written by the owners, editor, or staff of that paper. Willcox *v.* Pearson, 18 L. T. R. 220. Defendant having devised a scheme for selling a kind of cycle, which he called "The Times Cycle," and his circulars, advertisements, and the general conduct of the business carried on by him, in regard to these cycles, having made it clear that he intended to induce the belief that the proprietors of the Times newspaper were the vendors, for whom a person in Chancery lane was the manager of the department, or that they were partners, or in some way pecuniarily and responsibly connected with the sale of the bicycles, it was held (on the authority of Routh *v.* Webster, 10 Beav. 561, 50 Eng. Reprint 698), that there was such a reasonable probability of the proprietors of the Times newspaper being exposed to litigation, and possibility of being made responsible, had they not taken steps to disconnect their names from the advertisements and circulars issued by defendant, that defendant should be restrained from representing that the cycles offered by him for sale were in fact offered for sale by the proprietors of the Times, or that he was carrying on the business as a department of, or in connection with, the Times, or in any way holding out the Times, or the proprietors thereof, to be the owners of his business. Walter *v.* Ashton, [1902] 2 Ch. 282, 71 L. J. Ch. 839, 87 L. T. Rep. N. S. 196, 17 T. L. R. 445. See, generally, TRADE-MARKS AND TRADE-NAMES.

Wireless telegraphy.— In England, under the Wireless Telegraphy Act of 1904 (4 Edw. VII, c. 24), § 2 (3), the postmaster-general is empowered to grant special licenses to registered newspapers for the establishment of wireless telegraph stations.

91. See Scott *v.* Pilliner, [1904] 2 K. B. 855, 68 J. P. 518, 73 L. J. K. B. 998, 2 Loc. Gov. 1018, 91 L. T. Rep. N. S. 658, 20 T. L. R. 662, holding that a by-law made by a county council, imposing a penalty on any person frequenting and using any street and public place "for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions," was unreasonable.

Lord's Day Act.— It is unlawful for any person to bring into Canada for sale or distribution, or to sell or distribute in Canada, on the Lord's Day, any foreign newspaper or publication classified as a newspaper (Can. Rev. St. (1906) c. 153 (Lord's Day Act), § 11). Any unavoidable work after six o'clock in the afternoon of the Lord's Day, in the preparation of the regular Monday morning edition of a daily newspaper, comes within the expression "work of necessity or mercy" and is not prohibited (§ 12p). See, generally, SUNDAY.

Sale by children.— Under the Ontario Municipal Act (Rev. St. (1897) c. 223, § 484 (4)), the board of commissioners of police in cities shall regulate and control children engaged as vendors of newspapers, presumably from the necessity of protecting the public, and especially those unable to protect themselves against probable fraud or injustice. But by-laws of this class should be strictly construed, and any ambiguity or doubt, as to the extent of the statutory authority of municipalities in respect thereof, is to be determined in favor of the public as against the grantee of the power, especially when the by-law is in derogation of common-law rights and of the liberty of every subject to employ himself in any lawful trade or calling. *Re* Taylor, 11 Manitoba 420 [*citing* Osler, J. A., in Merritt *v.* Toronto, 22 Ont. App. 205, 207]. The duty imposed on the commissioners is imperative.

News-vendors' shops are excepted from the English Shop Hours Acts. See 4 Edw. VII, c. 31, § 2 (4) (Imperial) (schedule).

92. See cases cited *infra*, this note.

Prohibited advertisements.— In his business as a publisher of advertisements, the proprietor of a newspaper in England is also subject to the law relating to the publication of lottery advertisements, advertisements relating to stolen property, and advertisements relating to betting, gaming, and wagering. In the case of lotteries the penalty is more severe when the advertisement is by the lottery keeper than when it is by printers or newspaper proprietors, who are liable under the Act. Rex *v.* Smith, 4 T. R. 414. In Canada it is unlawful to advertise in any manner whatsoever, any performance or other thing prohibited by the Lord's Day Act, or any performance or other thing which, if given or done in Canada, would be a violation of said Act (Can. Rev. St. (1906) c. 153, § 9), or to advertise how any counterfeit money may be procured or had (Can. Rev. St. (1906) c. 146, § 569), or to advertise a reward for the return of stolen property and immunity for the offender, or that money advanced on stolen property will be paid, or to print and publish any such advertisement (Can. Rev. St. (1906) c. 146, § 183).

Advertisement within Alien Labor Act.— Where a company published in a Seattle newspaper "Wanted. First-class machinist. Apply Vancouver Engineering Works, Limited, Vancouver, B. C.," it was held, that the advertisement did not contain a promise of employment within the meaning of the Alien Labor Act as amended by 1 Edw. VII, c. 13, § 4. Downie *v.* Vancouver Engineering Works, 10 Brit. Col. 367. See, generally, ALIENS, 2 Cyc. 121.

Violations of postal laws see POST-OFFICE.

NEW TRIAL

By Charles Augustus Robbins
Professor of Law, University of Nebraska College of Law

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I. NATURE AND SCOPE OF REMEDY.[1]

A. Definition. At common law a new trial is a retrial in the same court of

1. For the origin and history of new trials see 3 Blackstone Comm. *388 *et seq.*; Kearney *v.* Snodgrass, 12 Oreg. 311, 7 Pac. 309; Gunn *v.* Union R. Co., 23 R. I. 289, 49 Atl.

an issue or issues of fact after a verdict by a jury.[2] The statutory definitions of new trial are usually somewhat broader in scope.[3]

999; Kinney *v.* Beverley, 2 Hen. & M. (Va.) 318; Bright *v.* Eynon, 1 Burr. 390, 2 Ld. Ken. 53.

2. See Bouvier L. Dict.; Bosseker *v.* Cramer, 18 Ind. 44; Hine *v.* Myrick, 60 Minn. 518, 62 N. W. 1125; Dodge *v.* Bell, 37 Minn. 382, 34 N. W. 739.

"A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before." 3 Blackstone Comm. *391 [*quoted* and *approved* in Gott *v.* Judge Super. Ct., 42 Mich. 625, 627, 4 N. W. 529; Gunn *v.* Union R. Co., 23 R. I. 289, 301, 49 Atl. 999].

"A general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury, where there is a reasonable doubt, or perhaps a certainty, that justice has not been done." "Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. . . . It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial." Bright *v.* Eynon, 1 Burr. 390, 393, 2 Ld. Ken. 53, per Lord Mansfield.

"The term 'new trial' has been a familiar one to the profession in this state since our early colonial history, and had acquired a settled meaning in England before our ancestors came to this country. It is believed that it has always been used in the sense of a complete re-trial of a cause, except in certain instances. . . . These new trials were always re-trials of the facts of a case, and the term 'new trial' is defined by Bouvier in his Law Dictionary, as 'a re-examination of an issue in fact.'" Zaleski *v.* Clark, 45 Conn. 397, 401.

3. "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court." Mansfield Dig. Ark. § 5151; Indian Terr. Annot. St. (1899) § 3356; Harris *v.* Bruton, 2 Indian Terr. 524, 528, 53 S. W. 322; Ky. Civ. Code, § 340; Riglesberger *v.* Bailey, 102 Ky. 608, 44 S. W. 118, 19 Ky. L. Rep. 1660; Skinner *v.* Walker, 98 Ky. 729, 34 S. W. 233, 17 Ky. L. Rep. 1286; Humphreys *v.* Walton, 2 Bush (Ky.) 580. See also Bellinger & C. Annot. Code & St. Oreg. § 173.

"A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court, or by referees." Cal. Civ. Code, § 656; Harper *v.* Hildreth, 99 Cal. 265, 270, 33 Pac. 1103; Leach *v.* Pierce, 93 Cal. 614, 619, 29 Pac. 235; San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 64, 20 Pac. 372, 3 L. R. A. 83; Martin *v.* Matfield, 49 Cal. 42, 45; Castellaw *v.* Blanchard, 106 Ga. 97, 100, 31 S. E. 801; Ida. Rev. St. § 4438; People *v.* George, 3 Ida. 108, 111, 27 Pac. 680; Mont. Code Civ. Proc. § 1170; Beach *v.* Spokane Ranch, etc., Co., 21 Mont. 7, 9, 52 Pac. 560; Froman *v.* Patterson, 10 Mont. 107, 111, 24 Pac. 692; Ballinger Annot. Code & St. Wash. (1897) § 5070; 2 Hill Code Wash. § 399; Dossett *v.* St. Paul, etc., Lumber Co., 28 Wash. 618, 624, 69 Pac. 9; J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 602, 50 Pac. 484; Freeman *v.* Ambrose, 12 Wash. 1, 2, 40 Pac. 381. See also Nev. Comp. Laws (1900), § 3289; N. D. Rev. Codes (1899), § 5471; S. D. Code Civ. Proc. (1903) § 300. To the same effect see Mobile Light, etc., Co. *v.* Hansen, 135 Ala. 284, 33 So. 664; Truss *v.* Birmingham, etc., R. Co., 96 Ala. 316, 11 So. 454; Castellaw *v.* Blanchard, 106 Ga. 97, 31 S. E. 801.

"A new trial is a reëxamination in the same court of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court." Kan. Gen. St. (1905) § 5202; McDermott *v.* Halleck, 65 Kan. 403, 408, 69 Pac. 335; Barber Asphalt Paving Co. *v.* Topeka, 6 Kan. App. 133, 50 Pac. 904; Nebr. Code Civ. Proc. § 314; Gibson *v.* Gibson, 24 Nebr. 394, 407, 39 N. W. 450; Okla. Rev. St. (1903) § 4493; Blevins *v.* Morledge, 5 Okla. 141, 143, 47 Pac. 1068; Wyo. Comp. Laws, pp. 71, 72, § 306; U. S. *v.* Trabing, 3 Wyo. 144, 148, 6 Pac. 721.

"A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, a report of a referee or master, or a decision by the court." Wyo. Code, § 2652; Wyo. Rev. St. (1899) § 3746; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 370, 23 Pac. 743. See also Bates Annot. St. Ohio (1904), § 5305.

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, judicial officer, or referees." Utah Riv. St. (1898) § 3291.

"A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court." Iowa Code (1897), § 3755; Hooker *v.* Chittenden, 106 Iowa 321, 323, 76 N. W. 706; Crossland *v.* Admire, 118 Mo. 87, 91, 24 S. W. 154, adopting the Iowa code definition. "Issue of fact" means an issue under the pleadings. Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103; Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235; McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335; Beach *v.* Spokane Ranch, etc., Co., 21 Mont. 7, 52 Pac. 560; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

Other decisions explanatory of new trial.— A motion to set aside a judgment entered after a trial and restore a cause to the trial calendar is equivalent to a motion for a new trial. Neulander *v.* Rothschild, 67 Ill. App. 288. Setting aside a verdict directed by the court for defendant because plaintiff refused to proceed with the trial of a case at the time set is not granting a new trial. J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 50 Pac. 484. A motion to set aside an order withdrawing a cause from the jury and dismissing the

B. Powers of Courts — 1. Courts of General Jurisdiction. Courts of general common-law jurisdiction have inherent power to grant new trials.[4] And statutes conferring on appellate courts authority to grant new trials do not take away or restrict this inherent power of courts of general jurisdiction, unless the intent to do so is clear.[5] Whether the mere enumeration by statute of grounds for new trials restricts the power of courts of general jurisdiction in granting new trials to such grounds is a disputed question.[6]

2. Courts of Limited Jurisdiction. Inferior courts have no authority to grant new trials,[7] except such as is given them by statutes.[8] It follows that they may grant new trials only upon the grounds and in the manner authorized by the statutes.[9] Authority to grant new trials upon original applications is sometimes con-

case is not a motion for a new trial. Harris *v.* Bruton, 2 Indian Terr. 524, 53 S. W. 322. An order setting aside a nonsuit taken by plaintiff after a motion to strike out his evidence had been sustained is not an order granting a new trial. Mobile Light, etc., Co. *v.* Hansen, 135 Ala. 284, 33 So. 664. Setting aside a default and giving leave to answer is not granting a new trial. Truss *v.* Birmingham, etc., R. Co., 96 Ala. 316, 11 So. 454; Freeman *v.* Ambrose, 12 Wash. 1, 40 Pac. 381 A motion for a rehearing and not for a new trial is the proper practice under the California and Idaho codes in cases of original jurisdiction in the supreme court. *In re* Philbrook, 108 Cal. 14, 40 Pac. 1061; Granger's Bank *v.* San Francisco Super. Ct., 101 Cal 198, 35 Pac. 642; *In re* Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; People *v.* George, 3 Ida. 108, 27 Pac. 680. In disbarment proceedings in the supreme court of California, the decision of the court is reviewable by petition for rehearing and not by motion for a new trial. *In re* Tyler, *supra*. But *compare Ex p.* Walls, 64 Ind. 461.

4. *Connecticut.*— Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226; Bartholomew *v.* Clark, 1 Conn. 472.

Georgia.— Eufaula Home Ins. Co. *v.* Plant, 37 Ga. 672. See also Spears *v.* Smith, 7 Ga. 436.

Minnesota.— McNamara *v.* Minnesota Cent. R. Co., 12 Minn. 388.

Missouri.— Bartling *v.* Jamison, 44 Mo. 141.

New Jersey.— Van Waggoner *v.* Coe, 25 N J. L. 197; Squier *v.* Gale, 6 N. J. L. 157. See 37 Cent. Dig. tit. "New Trial," § 1.

5. Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226. *Compare* Thomas *v.* Brown, 1 McCord (S. C.) 557.

6 See *infra*, III, A, 1.

7. Daniel *v.* State, 55 Ga. 222 (county court); Tate *v.* State, 48 Ga. 37 (city court); Marchman *v.* Todd, 15 Ga. 25 (inferior court); Booth *v.* Stamper, 6 Ga. 172 (inferior court); Bartling *v.* Jamison, 44 Mo. 141 (probate court); Arellano *v.* Chacon, 1 N. M. 269 (probate court); Williams *v.* Tradesmen's F. Ins. Co., 1 Daly (N. Y.) 437 (marine court); Nicholson *v.* Moriarty, 13 Misc. (N. Y.) 244, 34 N. Y. Suppl. 57 (district court of New York city); Zimmermann *v.* Bloch, 12 Misc. (N. Y.) 158, 32 N. Y. Suppl. 1073 (district court of New York city); Bloomingdale *v.* Adler, 7 Misc. (N. Y.) 182, 27 N. Y. Suppl. 321 (district court of New York city); Hecht *v.* Mothner, 4 Misc. (N. Y.) 536, 24 N. Y. Suppl. 826 (district court of New York city); Schwartz *v.* Wechler, 2 Misc. (N. Y.) 67, 20 N. Y. Suppl. 861 (district court of New York city); People *v* Justices New York Mar. Ct., 12 Wend. (N. Y.) 220; People *v.* Justices Chenango County Sess., 1 Johns. Cas. (N. Y.) 179 (court of sessions); People *v.* Chenango Sess., 2 Cai. Cas. (N. Y.) 319 (court of sessions). And see, generally, Justices of the Peace.

8. *Ex p.* Simpson, R. M. Charlt. (Ga.) 111 (inferior court); Schwab *v.* Elias, 2 N. Y. Civ. Proc. 340 (marine court); Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 2 Jur. N. S. 21, 25 L. J. C. P. 22, 4 Wkly. Rep. 116, 84 E. C. L. 130.

Failure to provide remedy by appeal.— No implication arises that an inferior court may grant new trials because no remedy by appeal is provided. Arellano *v.* Chacon, 1 N. M. 269. *Compare* Marchman *v.* Todd, 15 Ga. 25.

Statutes and organic provisions held not to confer power.—A general statutory provision limiting the number of new trials to be allowed by "the court" restricts the powers of courts of general jurisdiction rather than confers powers on inferior courts. Bartling *v.* Jamison, 44 Mo. 141. The power to grant new trials is not conferred by a constitutional provision allowing writs of error from judgments of inferior courts. Tate *v.* State, 48 Ga. 37. Where a constitutional provision gave the power to grant new trials to the superior courts, it was held that such power could not be conferred by statute upon county judges. Pitts *v.* Carr, 61 Ga. 454.

Statutes held to confer power.—A statute giving the power to grant new trials to the "courts of sessions of the several counties" was held to confer such power upon the "court of general sessions of the peace in and for the city and county of New York." Lanergan *v.* People, 39 N. Y. 39, 6 Transcr. App. 84, 5 Abb. Pr. N. S. 113 [*reversing* 50 Barb. 266, 34 How. Pr. 390]; People *v.* Powell, 14 Abb. Pr. (N. Y.) 91.

The United States court of claims may grant new trials. *Ex p.* U. S., 16 Wall. (U. S.) 699, 21 L. ed. 507; *Ex p.* Russell, 13 Wall. (U. S.) 664, 20 L. ed. 632.

9. State *v.* Shrader, 73 Nebr. 618, 103 N. W 276 (county court may not grant in habeas corpus proceedings); Cox *v.* Tyler, 6 Nebr.

ferred upon appellate courts;[10] but this authority can be exercised only under the circumstances, upon the grounds,[11] and in the manner[12] provided by statute.

3. As Related to the Place of Trial. Ordinarily a new trial can be allowed only by the trial court.[13] A new trial of an issue directed out of chancery must be ordered by the chancery court.[14] But the chancery practice does not obtain in some states as to cases referred by one court to another for the trial of questions of fact.[15]

C. Causes and Proceedings in Which New Trials May Be Granted — 1. Actions at Law. Independent of statute, new trials are grantable in actions tried in law courts only.[16] New trials may be granted in mandamus[17] and quo warranto.[18]

2. Suits in Equity. In chancery a reëxamination of the issues is obtained by petition for rehearing or bill of review.[19] But a court of equity may order a new trial of an issue directed to be tried in a law court.[20] In those states where the distinctions between law and equity actions are abolished, new trials may be had in equity cases.[21]

297; *In re* Kranz, 41 Hun (N. Y.) 463; De Lemos *v.* Cohen, 28 Misc. (N. Y.) 579, 59 N. Y. Suppl. 498 (justice of municipal court of New York city may not grant for newly discovered evidence); Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 2 Jur. N. S. 21, 25 L. J. C. P. 22, 4 Wkly. Rep. 116, 84 E. C. L. 130; Rex *v.* Oxford, 3 N. & M. 877, 28 E. C. L. 629. Thus where county courts are given the jurisdiction of justices of the peace in certain classes of cases they may grant new trials in such cases only where justices may grant them. Cox *v.* Tyler, 6 Nebr. 297.

10. *North Carolina.*— Henry *v.* Smith, 78 N. C. 27; Bledsoe *v.* Nixon, 69 N. C. 81.

North Dakota.— McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608.

Pennsylvania.— Reno *v.* Shallenberger, 8 Pa. Super. Ct. 436.

Rhode Island.— Clewley *v.* Rhode Island Co., 26 R. I. 485, 59 Atl. 391; Thurston *v.* Schroeder, 6 R. I. 272.

Vermont.— Nelson *v.* Marshall, 77 Vt. 44, 58 Atl. 793.

See 37 Cent. Dig. tit. "New Trial," § 2.

As to the power of the supreme court of Canada to grant new trials on the evidence see Connecticut Mut. L. Ins. Co. *v.* Moore, 6 App. Cas. 644 [*affirming* 6 Can. Sup. Ct. 634 (*affirming* 3 Ont. App. 230)].

11. Schuyler *v.* Mills, 28 N. J. L. 137; Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598; Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; Clewley *v.* Rhode Island Co., 26 R. I. 485, 59 Atl. 391; Bassett *v.* Loewenstein, 23 R. I. 41, 49 Atl. 97; Brayton *v.* Dexter, 16 R. I. 70, 12 Atl. 132; Vaughan *v.* Allen, 3 R. I. 122; Beckwith *v.* Middlesex, 20 Vt. 593; Minkler *v.* Minkler, 14 Vt. 558; Fuller *v.* Wright, 10 Vt. 512. See also Bossout *v.* Rome, etc., R. Co., 131 N. Y. 37, 29 N. E. 753; Gower *v.* Tobitt, 39 Wkly. Rep. 193.

12. Haggelund *v.* Oakdale Mfg. Co., 26 R. I. 520, 60 Atl. 106; Blodgett *v.* Royalton, 16 Vt. 497; Minkler *v.* Minkler, 14 Vt. 558.

13. Smith *v.* Hall, 71 Conn. 427, 42 Atl. 86; Loomis *v.* Perkins, 70 Conn. 444, 39 Atl. 797; Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226; Adams *v.* Kellogg, 1 Root (Conn.) 255; Matter of Laudy, 14 N. Y. App. Div. 160, 43 N. Y. Suppl. 689; Howell *v.* Howell, 30 Hun (N. Y.) 625; Minkler *v.* Minkler, 14 Vt. 558. See also Yaw *v.* Whitmore, 66 N. Y. App. Div. 317, 72 N. Y. Suppl. 765. And see *infra*, IV, B, 1, 2.

Effect of appeal.— Where a proceeding begun in the probate court is tried on appeal in the district court, a motion for a new trial for newly discovered evidence must be made in the latter court. Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

Effect of change of venue.— Where an action commenced in the common pleas was tried on change of venue before a judge of the circuit court, an order on a motion for a new trial made by him in his own court was void. Stinson *v.* State, 32 Ind. 124.

Where the trial court has been abolished and its jurisdiction conferred on another court, it would seem that the latter court might allow a new trial in an action tried by its predecessor. Bauder *v.* Tyrrel, 59 Cal. 99. *Compare* Cummings *v.* White Mountains R. Co., 43 N. H. 114.

14. See Equity, 16 Cyc. 426; *In re* Comfort, 66 N. J. Eq. 6, 57 Atl. 426; Hodge *v.* Reid, 12 N. Brunsw. 89.

15. Waters *v.* Waters, 26 Md. 53; La Valle *v.* Electric Cutlery Co., 56 N. J. L. 59, 27 Atl. 1066; Rogers *v.* Goodwin, 64 N. C. 278; Peebles *v.* Peebles, 63 N. C. 656. *Compare* People *v.* Holloway, 41 Cal. 409.

16. Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; Sheafe *v.* Sheafe, 29 N. H. 269. And see, generally, Equity.

17. See Mandamus, 26 Cyc. 482.

18. See Quo Warranto.

19. See Equity, 16 Cyc. 504 *et seq.*, 517 *et seq.*

20. See Equity, 16 Cyc. 426 *et seq.*

21. *Indiana.*— Jones *v.* Jones, 91 Ind. 72.

Nebraska.— Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

New York.— Stanton *v.* Miller, 65 Barb.

3. Appealed Cases and Special Proceedings. New trials may be granted in cases tried in courts of general jurisdiction on appeals from inferior courts.[22] An application for a new trial after the term is an independent action in the sense that a new trial may be granted after a decision therein,[23] and so is a proceeding after the term to vacate a judgment.[24]

4. Nature of Proceedings — a. After Trial. Since a new trial can be granted only after a trial has been had, it should not be moved after judgment by default,[25] nor after dismissal for failure of plaintiff to appear,[26] nor where the jury have disagreed,[27] nor where a mistrial has resulted from the withdrawal of a juror by the court.[28] But a new trial may be ordered where the court has excluded all evidence offered by plaintiff and rendered judgment for defendant.[29] A new trial may be moved in an equity suit after a decision passing on the general merits of the case, although further proceedings are necessary to carry the decision into effect.[30]

b Issue of Fact. As not being a reëxamination of an issue of fact under the pleadings, a new trial is not the proper remedy to review an order settling the accounts and fixing the compensation of a receiver,[31] or refusing to direct a receiver to allow a claim,[32] or discharging an attachment on motion,[33] or allowing alimony in divorce proceedings,[34] or fixing a widow's allowance,[35] or correcting a bill of exceptions,[36] or correcting[37] or refusing to vacate[38] a former order. A new trial is not the appropriate method of reviewing a judgment entered on an agreed statement of facts.[39] A new trial may be granted after an order appointing an

58 1 Thomps. & C. 23 [*reversed* on other grounds in 58 N. Y. 192].

Ohio.— See Brock *v* Becker, 8 Ohio Dec. (Reprint) 263, 6 Cinc. L. Bul. 755.

South Carolina.— Covington *v.* Covington. 47 S C. 263, 25 S E 193; Durant *v.* Philpot, 16 S. C. 116.

Utah.— Fisher *v* Emerson, 15 Utah 517, 50 Pac. 619

22. *Ex p.* Huntt, 10 App. Cas. (D. C.) 275; State *v.* Second Judicial Dist. Ct., 23 Nev. 343, 47 Pac. 100; Van Waggoner *v.* Coe, 25 N. J. L. 197. But *compare* Schuyler *v.* Mills, 28 N. J. L. 137.

23 McConahey *v.* Foster, 21 Ind. App. 416, 52 N. E. 619; Ruggles *v.* Freeland, 6 Mass. 513.

24. Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

25. *California.*— Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 184; Savings, etc., Soc. *v.* Meeks, 66 Cal. 371, 5 Pac. 624.

Indiana.— Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23; Corwin *v.* Thomas, 83 Ind. 110; Reed *v.* Spayde, 56 Ind. 394; Fisk *v.* Baker, 47 Ind. 534.

Kentucky.—Riglesberger *v.* Bailey, 102 Ky. 608, 44 S. W 118, 19 Ky. L. Rep. 1660.

Minnesota.— Myrick *v.* Pierce, 5 Minn. 65.

Missouri.— Crossland *v.* Admire, 118 Mo. 87, 24 S. W. 154.

Vermont.— Adams *v.* Howard, 14 Vt. 158.

Washington.— Freeman *v.* Ambrose, 12 Wash. 1, 40 Pac. 381. See also J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 50 Pac. 484.

See 37 Cent. Dig. tit. "New Trial," § 5.

The proper remedy is by proceedings to vacate the judgment. Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23; Myrick *v.* Pierce, 5 Minn. 65; Merchants' Bank *v.* Scott, 59 Barb. (N. Y.) 641.

26 *In re* Dean, 149 Cal. 487, 87 Pac. 13.

27. Hartman *v.* Rose, (N. J. Sup. 1890) 20 Atl. 29.

28. Rosengarten *v.* New Jersey Cent. R. Co., 69 N. J. L. 220, 54 Atl. 564; Dossett *v.* St. Paul, etc., Lumber Co., 28 Wash. 618, 69 Pac. 9.

29. Moore *v.* Bates, 46 Cal. 29.

30. Ashton *v.* Thompson, 28 Minn. 330, 9 N. W. 876 (where fraud has been found and an accounting decreed but not had); Stanton *v.* Miller, 65 Barb. (N. Y.) 58 [*reversed* on other grounds in 58 N. Y. 192]. And see Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42, as upon finding of title in partition.

31. State *v.* Second Judicial Dist. Ct., 28 Mont. 227, 72 Pac. 613.

32. McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335.

33. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

34. Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411.

35. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235.

36. Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214.

37. Beach *v.* Spokane Ranch, etc., Co., 21 Mont. 7, 52 Pac. 560.

38. Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103.

An application for leave to renew the motion to vacate was said to be the appropriate remedy. Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103.

An order in proceedings supplementary to execution is not reviewable by motion for a new trial. McCullough *v.* Clark, 41 Cal. 298.

39. Gregory *v.* Gregory, 102 Cal. 50, 36

administrator where objections to the appointment have been properly presented in writing,[40] but not otherwise.[41] A new trial is grantable on the rejection or allowance of a claim against an estate,[42] or the approval of the final report of an executor,[43] or the finding of a jury in proceedings to probate a will.[44] A motion for new trial is not the proper remedy to review a decision upon a demurrer[45] or to correct errors of the court or clerk in entering judgment on a verdict or finding.[46]

c. Decision by Court or Referee. Under some statutes new trials are not grantable in cases tried by the court without a jury.[47] In some jurisdictions new trials are granted after a decision by a court[48] or a report by a referee.[49]

D. State of the Proceedings[50] **— 1. Effect of Various Motions — a. In Arrest of Judgment.** In some jurisdictions moving in arrest of judgment waives the right to move for a new trial,[51] except upon grounds unknown to the moving

Pac. 364; Noble *v.* Harter, 6 Kan. App. 823, 49 Pac. 794; Schnitzler *v.* Green, 5 Kan. App. 656, 47 Pac. 990.

40. *In re* Heldt, 98 Cal. 553, 33 Pac. 549; Banquier's Estate, 88 Cal. 302, 26 Pac. 178, 532.

41. *In re* Heldt, 98 Cal. 553, 33 Pac. 549.

42. McConahey *v.* Foster, 21 Ind. App. 416, 52 N. E. 619; Eighmie *v.* Strong, 49 Hun (N. Y.) 16, 1 N. Y. Suppl. 502, 15 N. Y. Civ. Proc. 119.

43. McDonald *v.* Moak, 24 Ind. App. 528, 57 N. E. 159; Hunt *v.* Hines, 21 R. I. 207, 42 Atl. 867.

44. Wood *v.* Lane, 102 Ga. 199, 29 S. E. 180; Ellis *v.* Ellis, 104 Ky. 121, 46 S. W. 521, 20 Ky. L. Rep. 438.

45. Barber Asphalt Paving Co. *v.* Topeka, 6 Kan. App. 133, 50 Pac. 904; Dodge *v.* Bell, 37 Minn. 382, 34 N. W. 739.

46. Adams *v.* Carnes, 111 Ga. 505, 36 S. E. 597; Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271.

47. *Georgia.*— Lester *v.* Johnson, 64 Ga. 295; Moreland *v.* Stephens, 64 Ga. 289.

Mississippi.— Quin *v.* Myles, 59 Miss. 375. The rule was otherwise under the Mississippi code prior to 1880. Quin *v.* Myles, *supra.*

New York.— City Trust, etc., Co. *v.* Wilson Mfg. Co., 58 N. Y. App. Div. 271, 68 N. Y. Suppl. 1004 (motion on exceptions); Rosenquest *v.* Canary, 27 N. Y. App. Div. 30, 50 N. Y. Suppl. 111 (motion on minutes); Simpson *v.* Hefter, 43 Misc. 608, 88 N. Y. Suppl. 282.

North Dakota.— Park River Bank *v.* Norton, 12 N. D. 497, 97 N. W. 860. See also Chaffee-Miller Land Co. *v.* Barber, 12 N. D. 478, 97 N. W. 850.

Rhode Island.—Bristow *v.* Nichols, 19 R. I. 719, 37 Atl. 1033.

England.— Pannell *v.* Nunn, 28 Wkly. Rep. 940.

Where there are no definite issues of fact settled at the commencement of the trial, the findings of fact, as well as the judgment, are the subject of appeal, and not of motion for a new trial. Dollman *v.* Jones, 12 Ch. D. 553, 41 L. T. Rep. N. S. 258, 27 Wkly. Rep. 877; Lowe *v.* Lowe, 10 Ch. D. 432, 48 L. J. Ch. 383, 40 L. T. Rep. N. S. 236, 27 Wkly. Rep. 309; Potter *v.* Cotton, 5 Ex. D. 137, 49 L. J. Q. B. 158, 41 L. T. Rep. N. S. 460, 28 Wkly. Rep. 160.

48. See *supra,* I, A, note 3.

49. Cappe *v.* Brizzolara, 19 Cal. 607 [*overruling* Tyson *v.* Wells, 2 Cal. 122]; Thayer *v.* Barney, 12 Minn. 502 (errors in admission of evidence); Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450.

Where a case is tried before a referee by agreement the decision of the referee has the effect of a verdict and a new trial may be granted. Robinson *v.* Mutual Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194.

Rulings on exceptions of law to a master's report have been held not ground for a new trial after verdict. Taylor *v.* Central R. Co., 67 Ga. 122.

50. Pendency of appellate proceedings as affecting right to move for new trial see Appeal and Error, 2 Cyc. 975, 3 Cyc. 497.

51. *Illinois.*— Hall *v.* Nees, 27 Ill. 411, where party, having filed both motions, had the motion in arrest disposed of first and permitted judgment to be entered against him without directing the attention of the court to the other motion.

Indiana.— Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Cincinnati, etc., R. Co. *v.* Case, 122 Ind. 310, 23 N. E. 797; Shrewsbury *v.* Smith, 12 Ind. 317; Gillespie *v.* State, 9 Ind. 380; Bates *v.* Reiskenhianzer, 9 Ind. 178; Marion, etc., R. Co. *v.* Lomax, 7 Ind. 406; Chrisman *v.* Melne, 6 Ind. 487; Doe *v.* Clark, 6 Ind. 466; McKinney *v.* Springer, 6 Ind. 453; Sherry *v.* State Bank, 6 Ind. 397; Van Pelt *v.* Corwine, 6 Ind. 363; Hord *v.* Noblesville, 6 Ind. 55; Sherry *v.* Ewell, 4 Ind. 652; Rogers *v.* Maxwell, 4 Ind. 243; Mason *v.* Palmerton, 2 Ind. 117; Willard *v.* Albertson, 23 Ind. App. 166, 53 N. E. 1078, 54 N. E. 446; Noblesville School City *v.* Heinzman, 13 Ind. App. 195, 41 N. E. 464. In Cincinnati, etc., R. Co. *v.* Case, 122 Ind. 310, 23 N. E. 797, it was admitted that there was no reason for the rule except that of a settled practice.

Missouri.— McReynolds *v.* Anderson, 56 Mo. App. 398.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140. See also Snapp *v.* Moore, 2 Overt. 236.

Texas.— Hipp *v.* Ingram, 3 Tex. 17, by statute.

England.— Turbervil *v.* Stamp, 2 Salk. 647. See 37 Cent. Dig. tit. "New Trial," § 13.

party at the time he moved in arrest of judgment.[52] In other jurisdictions a motion for new trial may follow a motion in arrest of judgment.[53] In some states it is proper to file the motions together.[54]

b. For Venire Facias De Novo. A motion for a new trial may follow a motion for a venire facias de novo.[55]

c. For Judgment Non Obstante Veredicto or on Special Findings. A motion for new trial may follow a motion for judgment *non obstante veredicto*,[56] or, generally, a motion for judgment on a special verdict or findings.[57]

2. Taking Bill of Exceptions. At common law a motion for a new trial upon grounds covered by a bill of exceptions taken by the moving party will not be entertained, unless in cases where such exceptions are waived.[58] But it has been

Motion in arrest of judgment supersedes motion for new trial.— Smith *v.* Porter, 5 Ind. 429.

Order in which motions made — Presumptions.— Where motions in arrest of judgment and for a new trial were made and acted on the same day, it was presumed that they were made in proper order. Water, etc., Co. *v.* Gildersleeve, 4 N. M. 171, 16 Pac. 278.

When a motion for a new trial is sustained, there is no longer a verdict on which to predicate a motion in arrest of judgment. Habersham *v.* Wetter, 59 Ga. 11.

52. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; McKinney *v.* Springer, 6 Ind. 453; Mason *v.* Palmerton, 2 Ind. 117.

53. *Arkansas.*— Pope *v.* Latham, 1 Ark. 66.

Georgia.— Candler *v.* Hammond, 23 Ga. 493.

Iowa.— Schulte *v.* Chicago, etc., R. Co., 124 Iowa 191, 99 N. W. 714, under statute.

Kentucky.— Jewell *v.* Blandford, 7 Dana 472, English cases reviewed.

North Dakota.— Nelson *v.* Grondahl, 12 N. D. 130, 96 N. W. 299.

United States.— Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324.

See 37 Cent. Dig. tit. "New Trial," § 13.

In California an unsuccessful motion by defendant for relief against a judgment in unlawful detainer proceedings under the code of civil procedure, section 1179, does estop him from moving for a new trial. Schnittger *v.* Rose, 139 Cal. 656, 73 Pac. 449.

54. Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017; Farmers' Bank *v.* Bayliss, 41 Mo. 274; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

In Tennessee this is not permissible. Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140.

55. Jenkins *v.* Parkhill, 25 Ind. 473.

56. Schulte *v.* Chicago, etc., R. Co., 124 Iowa 191, 99 N. W. 714 (under statute); Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017; Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; Fisk *v.* Henarie, 15 Oreg. 89, 13 Pac. 760.

Where judgment non obstante veredicto was rendered without disposing of a motion for new trial, and the judgment was reversed on appeal, the motion for a new trial was held to be still pending. Fisk *v.* Henarie, 15 Oreg. 89, 13 Pac. 760.

In Minnesota a motion by defendant for judgment *non obstante veredicto*, not asking for a new trial in the alternative, is a waiver of the right to a new trial. Bragg *v.* Chicago, etc., R. Co., 81 Minn. 130, 83 N. W. 511; Cruikshank *v.* St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958. *Compare* Nelson *v.* Grondahl, 12 N. D. 130, 96 N. W. 299.

Where both motions are pending at the same time, the motion for a new trial may be withdrawn for the purpose of disposing of the other motion without prejudicing the right to a new trial. Stein *v.* Chicago, etc., R. Co., 41 Ill. App. 38.

57. Chicago, etc., R. Co. *v.* Dimick, 96 Ill. 42; Lesile *v.* Merrick, 99 Ind. 180; Ronan *v.* Meyer, 84 Ind. 390; Indianapolis, etc., R. Co. *v.* McCaffrey, 62 Ind. 552; Brannon *v.* May, 42 Ind. 92; Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105; Atchison, etc., R. Co. *v.* Holland, 58 Kan. 317, 49 Pac. 71; Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819.

In Iowa, if the motion for judgment upon special findings is sustained, the motion for a new trial is waived. Schulte *v.* Chicago, etc., R. Co., 124 Iowa 191, 99 N. W. 714; Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017; Nixon *v.* Downey, 49 Iowa 166.

58. *Alabama.*— West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

Arkansas.— Danley *v.* Robbins, 3 Ark. 144.

Georgia.— Nicholls *v.* Popwell, 80 Ga. 604, 6 S. E. 21.

Kentucky.— Reed *v.* Miller, 1 Bibb 142.

Massachusetts.—Sylvester *v.* Mayo, 1 Cush. 308; Byrnes *v.* Piper, 5 Mass. 363; Cogswell *v.* Brown, 1 Mass. 237.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

New Jersey.— Meeker *v.* Boylan, 27 N. J. L. 262; Mann *v.* Glover, 14 N. J. L. 195.

New York.— Corlies *v.* Cummings, 5 Cow. 415.

United States.— Cunningham *v.* Bell, 6 Fed. Cas. No. 3,479, 5 Mason 161.

England.— Fabrigas *v.* Mostyn, W. Bl. 929.

See 37 Cent. Dig. tit. "New Trial," § 13.

Necessity of election between motion for new trial and bill of exceptions.— If a bill of exceptions is tendered while a motion for a new trial is pending, the moving party must elect whether he will waive the motion for a new trial as to grounds that might be

held proper to move for a new trial upon grounds not included in the bill of exceptions.[59]

3. Entry of Judgment. At common law judgment was not entered until any motion for a new trial had been disposed of.[60] Where judgment had been entered for security with a reservation of the right to move for a new trial,[61] or where further proceedings had been stayed for that purpose,[62] the motion might be made after judgment. In some states a motion for a new trial must still be made before judgment.[63] Probably in most jurisdictions it may be made as well after as before the entry of judgment;[64] and this is especially true in cases where no reasonable opportunity has been afforded for making the motion earlier,[65] or

embodied in the bill, or abandon his exceptions upon those grounds. Sorrelle *v.* Craig, 9 Ala. 534; Preble *v.* Bates, 37 Fed. 772.

Exception to conclusions of law no bar to motion for new trial on evidence.— An exception to the conclusions of law in a case tried by the court admits the findings of fact for the purpose of the exception only and does not bar the right to move for a new trial on the evidence. Dodge *v.* Pope, 93 Ind. 480; Bertelson *v.* Bower, 81 Ind. 512; Gray *v.* Taylor, 2 Ind. App. 155, 28 N. E. 220.

59. Dodge *v.* Pope, 93 Ind. 480; Bertelson *v.* Bower, 81 Ind. 512; Lockwood *v.* Dills, 74 Ind. 56; Meeker *v.* Boylan, 27 N. J. L. 262.

60. Spanagel *v.* Dellinger, 34 Cal. 476; Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249. And see *infra*, IV, D, 5.

61. Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. 281, 21 How. Pr. 279; Benedict *v.* Caffe, 3 Duer (N. Y.) 669.

62. Droz *v.* Lakey, 2 Sandf. (N. Y.) 681; Droz *v.* Oakley, 2 Code Rep. (N. Y.) 83.

63. Gardner *v.* Cumming, Ga. Dec. 1 (unless proceedings stayed); Syracuse Pit Hole Oil Co. *v.* Carothers, 63 Pa. St. 379; Lawrence *v.* Isear, 27 S. C. 244, 3 S. E. 222; Rooney *v.* Rooney, 29 U. C. C. P. 347, 4 Ont. App. 255. Such was formerly the practice in New York. Merchants' Bank *v.* Scott, 59 Barb. (N. Y.) 641; Sheldon *v.* Stryker, 42 Barb. (N. Y.) 284, 27 How. Pr. 387; Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. 281, 21 How. Pr. 279 [*reversing* 17 How. Pr. 453]; Peck *v.* Hiler, 30 Barb. (N. Y.) 655; Gurney *v.* Smithson, 7 Bosw. (N. Y.) 396; Barnes *v.* Roberts, 5 Bosw. (N. Y.) 73; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503; Anderson *v.* Dickie, 26 How. Pr. (N. Y.) 199; Ball *v.* Syracuse, etc., R. Co., 6 How. Pr. (N. Y.) 198, Code Rep. N. S. 410; Rapelye *v.* Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267; Jackson *v.* Chace, 15 Johns. (N. Y.) 354. See also Hastings *v.* McKinley, 3 Code Rep. (N. Y.) 10. The rule was held to apply where judgment had been entered contrary to the judge's order at the trial. Merchants' Bank *v.* Scott, *supra*.

Appearing and arguing against a new trial on the merits is a waiver of an objection that the motion was made too late after the entry of judgment. Roosevelt *v.* Fulton, 7 Cow. (N. Y.) 107.

After the overruling of a motion for a new trial in condemnation proceedings and the entry of judgment confirming the verdict under the Michigan statute, the court has no power to grant a new trial. Zoltowski *v.* Chambers, 112 Mich. 349, 70 N. W. 1018.

64. *Illinois.*— Mobile Fruit, etc., Co. *v.* Judy, 91 Ill. App. 82.

Indian Territory.— Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Iowa.— Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222.

Minnesota.— Deering *v.* Johnson, 33 Minn. 97, 22 N. W. 174 (except on judge's minutes); Kimball *v.* Palmerlee, 29 Minn. 302, 13 N. W. 129 (except on judge's minutes); Eaton *v.* Caldwell, 3 Minn. 134.

New York.— Tracey *v.* Altmyer, 46 N. Y. 598; Smith *v.* Lidgerwood Mfg. Co., 60 N. Y. App. Div. 467, 69 N. Y. Suppl. 975 (under section 1005 Code Civ. Proc.); Cunningham *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 211, 58 N. Y. Suppl. 22 (holding that the entry of judgment prior to a decision on an application to set aside a verdict as against the weight of evidence cannot prejudice the application); Russell *v.* Agricultural Ins. Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 186 (where notice given in time); Holmes *v.* Roper, 10 N. Y. Suppl. 284 (under statute); Blydenburg *v.* Johnson, 9 Abb. Pr. N. S. 459; Tucker *v.* White, 27 How. Pr. 97; Case *v.* Shepherd, 1 Johns. Cas. 245; Van Rensselaer *v.* Dole, 1 Johns. Cas. 239.

Under the California code, and similar codes, a motion for a new trial proceeds upon its own record and may be made either before or after judgment. Spanagel *v.* Dellinger, 34 Cal. 476; Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Fisher *v.* Emerson, 15 Utah 517, 50 Pac. 619.

Vacating judgment.— It has been held necessary to vacate the judgment before moving for a new trial. Cook *v.* U. S., 1 Greene (Iowa) 56; Merchants' Bank *v.* Scott, 59 Barb. (N. Y. 641. See also Smith *v.* Thornburgh, 7 Ind. 144.

Joining motions.— In Wisconsin motions to vacate the judgment and for a new trial may be joined. Bailey *v.* Costello, 94 Wis. 87, 68 N. W. 663; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Whitney *v.* Karner, 44 Wis. 563.

As to the effect of the order for a new trial in vacating the judgment see *infra*, IV, O, 8, b.

65. Evans *v.* Humphreys, 9 App. Cas. (D. C.) 392 (where parties could not agree on bill of exceptions and court was unable to settle same); Deering *v.* Johnson, 33 Minn. 97, 22 N. W. 174; Kimball *v.* Palmerlee, 29

where a certain time within which the motion may be made is fixed by some statutory provision.[66]

4. Stay of Execution. While at common law a stay of proceedings might be had, especially before judgment, for the purpose of saving the right to move for a new trial,[67] under some statutes a request for a stay of execution is a waiver of the right to move for a new trial.[68]

5. Successive Applications For a New Trial. A number of decisions lay down the rule, without qualification, that where a motion for a new trial regularly submitted is overruled unconditionally, no further motion for a new trial can be entertained, and that the order made on the motion is reviewable only on appeal.[69] According to other decisions, a second motion for a new trial based upon substantially the same grounds cannot be entertained,[70] at least, in the absence of a showing of irregularity, fraud, unavoidable casualty, or misfortune.[71] This is especially true after the term at which the first motion was made,[72] or after the lapse of several years.[73] According to this second line of decisions a second application for a new trial may be sustained when it is based on grounds not included in the first

Minn. 302, 13 N. W. 129. See also Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249; Conklin *v.* Hinds, 16 Minn. 457.

66. Board of Education *v.* Hoag, 21 Ill. App. 588; Cox *v.* Baker, 113 Ind. 62, 14 N. E. 740; Hinkle *v.* Margerum, 50 Ind. 240; Beals *v.* Beals, 20 Ind. 163; Smith *v.* Thornburgh, 7 Ind. 144; Eaton *v.* Caldwell, 3 Minn. 134; Jennings *v.* Frazier, 46 Oreg. 470, 80 Pac. 1011. See also Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249.

In Louisiana the premature entry of a judgment within the time given for filing a motion for a new trial does not bar the motion. State *v.* Judge Twenty-Second Judicial Dist., 35 La. Ann. 1104; State *v.* Judge Sixth Dist. Ct., 32 La. Ann. 207; McWillie *v.* Perkins, 20 La. Ann. 168; Fretz *v.* Carlile, 4 La. Ann. 561; Gardere *v.* Murray, 5 Mart. N. S. 244. But after the regular entry of judgment, the motion is too late. Carraby's Succession, 23 La. Ann. 110.

67. See *supra*, I, D, 3.

68. Banks *v.* Hitchcock, 20 Nebr. 315, 30 N. W. 56; Miller *v.* Hyers, 11 Nebr. 474, 9 N. W. 645.

69. Dorland *v.* Cunningham, 66 Cal. 484, 6 Pac. 135; Odd Fellows' Sav. Bank *v.* Deuprey, 66 Cal. 168, 4 Pac. 1173; People *v.* Center, 61 Cal. 191; Thompson *v.* Lynch, 43 Cal. 482; Coombs *v.* Hibberd, 43 Cal. 452; Waggenheim *v.* Hook, 35 Cal. 216; Nichols *v.* Denning, (Cal.) 10 Pac. Coast L. J. 193; Wimpy *v.* Gaskill, 76 Ga. 41; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Houston *v.* Kidwell, 83 Ky. 301; Scull *v.* Daniel, 3 N. J. L. 576. And see Bean *v.* Bachelder, (Me. 1886) 5 Atl. 265; Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 2 Jur. N. S. 21, 25 L. J. C. P. 22, 4 Wkly. Rep. 116, 84 E. C. L. 130.

A party who has withdrawn a motion for a new trial and asked that judgment be entered cannot of right file a second motion. King *v.* Redmond, 2 Ohio Dec. (Reprint) 380, 2 West. L. Month. 554.

Waiver of irregularity in granting motion. —An irregularity in granting defendant's second motion for a new trial is waived by plaintiff appearing and amending his declaration. Powers *v.* Bridges, 1 Greene (Iowa) 235.

A second application for a new trial in trustee process made at a subsequent term was overruled where the property in controversy had been sold by a receiver. Hills *v.* Smith, 19 N. H. 381.

As to vacating orders refusing new trials see *infra*, IV, O, 9.

Relief in equity.— Where a law court has overruled a motion for a new trial, a court of equity will not give relief against the judgment on the same grounds. See Judgments, 23 Cyc. 976 *et seq.*

70. Neulander *v.* Rothschild, 67 Ill. App. 288; White *v.* Perkins, 16 Ind. 358; Lookabaugh *v.* Cooper, 5 Okla. 102, 48 Pac. 99; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227; Rogers *v.* Hœnig, 46 Wis. 361, 1 N. W. 17; Branger *v.* Buttrick, 28 Wis. 450; Kabe *v.* Eagle, 25 Wis. 108. And see McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83, holding that whether a second motion made by the same party would be granted in any case, when its condition is the same as when the first application was denied, is a question unnecessary to determine, but if ever authorized it would be under exceptional conditions which do not exist in this case.

A petition for a new trial in an appellate court, on the same grounds on which a motion for new trial was based in the trial court, will be denied. Newby *v.* Territory, 1 Oreg. 163; Stilphen *v.* Read, 64 Vt. 400, 23 Atl. 725. *Compare* Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074 (holding under a special statutory provision that such motion was permissible); Anderson *v.* Carter, 24 N. Y. App. Div. 462, 49 N. Y. Suppl. 255 [*affirmed* in 165 N. Y. 624].

71. Lookabaugh *v.* Cooper, 5 Okla. 102, 48 Pac. 99.

72. Moll *v.* Benckler, 28 Wis. 611; Branger *v.* Buttrick, 28 Wis. 450.

73. Conrad *v.* Commercial Mut. Ins. Co., 81* Pa. St. 66.

application, and satisfactory reasons are given for the omission,[74] or when it is based on distinct grounds under a distinct statute,[75] or on newly discovered evidence.[76] When a new trial has been refused by the trial judge it should not in any event be allowed by another judge.[77] A refusal to set aside a verdict for supposed want of authority in the court is not a bar to a second application for the same relief.[78] Where a new trial had been granted, it is improper to move for a new trial upon other grounds for the evident purpose of fortifying the moving party's case upon appeal from the order.[79]

6. Number of New Trials — a. At Common Law. At common law there is no absolute rule limiting the number of new trials that may be allowed in a case for any cause or causes.[80] But it is held that the reasons given for granting more than one new trial to the same party should appeal strongly to the discretion of the court.[81] More than one new trial, after concurring verdicts, on the ground that the verdict is against the weight of the evidence, is rarely granted.[82] The

74. Hughes *v.* McGee, 1 A. K. Marsh (Ky.) 28 (surprise); Thompson *v.* Thompson, 109 Mo. App. 462, 84 S. W. 1022; Hayes *v.* Kenyon, 7 R. I. 531; Bryorly *v.* Clark, 48 Tex. 345.

75. Bevering *v.* Smith, 121 Iowa 607, 96 N. W. 1110. See also Garofalo *v.* Privídi, 43 Misc. (N. Y.) 359, 87 N. Y. Suppl. 467.

The overruling of a motion for a new trial upon the judge's minutes without argument was held not to bar a motion for a new trial on the case at special term. Schmidt *v.* Cohn, 12 Daly (N. Y.) 134.

76. White *v.* Perkins, 16 Ind. 358.

The newly discovered evidence should be very persuasive and such as the most careful inquiry would have failed to discover. Miller *v.* Ross, 43 N. J. L. 552.

77. Knapp *v.* Post, 10 Hun (N. Y.) 35; Reich *v.* McCrea, 7 N. Y. Suppl. 600; Cascia *v.* Gilbane, 26 R. I. 584, 60 Atl. 237; Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

78. Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 41 N. Y. Suppl. 289.

79. Magnus *v.* Buffalo R. Co., 24 N. Y. App. Div. 449, 48 N. Y. Suppl. 490.

80. *Georgia.*— Vickery *v.* Central R., etc., Co., 89 Ga. 365, 15 S. E. 464; Taylor *v.* Central R., etc., Co., 79 Ga. 330, 5 S. E. 114; Hiett *v.* Cherokee R. Co., 77 Ga. 574. *Compare* Neal *v.* Robinson, 76 Ga. 838.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Massachusetts.— Clark *v.* Jenkins, 162 Mass. 397, 38 N. E. 974; Coffin *v.* Phenix Ins. Co., 15 Pick. 291.

New Jersey.— Brown *v.* Paterson Parchment Paper Co., 69 N. J. L. 474, 55 Atl. 87.

New York.— Wilkie *v.* Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149.

South Carolina.— Moore *v.* Cherry, 1 Bay 269.

United States.— Clear *v.* Fox, 26 Fed. 90; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72. *Compare* Joyce *v.* Charleston Ice Mfg. Co., 50 Fed. 371 [*affirmed* in 54 Fed. 332, 4 C. C. A. 368].

See 37 Cent. Dig. tit. "New Trial," § 15.

That there had been three prior disagreements of the jury did not relieve the court of the duty of setting aside a verdict that did not meet its approval. Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772.

81. Cumming *v.* Fryer, Dudley (Ga.) 182; Wolbrecht *v.* Baumgarten, 26 Ill. 291; Wright *v.* Milbank, 9 Bosw. (N. Y.) 672; Whitaker *v.* White, 22 N. Y. Suppl. 240; Emery *v.* Hawley, 1 Wyo. 303. See also Harwell *v.* Foster, 97 Ga. 264, 22 S. E. 994.

Verdict against weight of evidence.— "The verdict upon a second trial should not be set aside because against the weight of evidence unless the court is satisfied from the evidence in the cause that it must have been the result of (1) the disregarding of the force of the whole range of the unimpeached testimony, or (2) the palpable failure to give proper force to the unimpeached evidence in the cause offered by the party against whom the verdict is found, or (3) the giving to the testimony of the prevailing party a force to which, under the law and the facts, it was not entitled, or (4) the verdict must have been controlled by prejudice, partiality or passion, and not based upon the weighing of the conflicting testimony in the cause." Brown *v.* Paterson Parchment Paper Co., 69 N. J. L. 474, 475, 55 Atl. 87.

Newly discovered evidence.— A second new trial should not be granted for newly discovered evidence unless it is of a controlling character. Helmke *v.* Stetler, 69 Hun (N. Y.) 109, 23 N. Y. Suppl. 394; Whitaker *v.* White, 22 N. Y. Suppl. 240.

82. *Georgia.*— Hendricks *v.* Southern R. Co., 123 Ga. 342, 51 S. E. 415 (second verdict for reduced sum held conclusive); McLean *v.* Clark, 52 Ga. 455; Davis *v.* Hale, Ga. Dec. Pt. II, 82. See also Harwell *v.* Foster, 97 Ga. 264, 22 S. E. 994.

Idaho.— Monarch Gold, etc., Min. Co. *v.* McLaughlin, 1 Ida. 650.

Illinois.— Wolbrecht *v.* Baumgarten, 26 Ill. 291.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Pacific R. Co. *v.* Nash, 7 Kan. 280.

Kentucky.— Ross *v.* Ross, 5 B. Mon. 20.

Louisiana.— See Valega *v.* Broussard, 3 La. Ann. 145.

Maine.— Handly *v.* Call, 30 Me. 9.

Massachusetts.— Coffin *v.* Phenix Ins. Co., 15 Pick. 291.

rule is settled by a great number of decisions that any number of new trials may granted on the ground that the verdict is contrary to the instructions of the court,[83]

Michigan.— Hyde *v.* Haak, 132 Mich. 364, 93 N. W. 876, third verdict.

Minnesota.— Atwood Lumber Co. *v.* Watkins, 94 Minn. 464, 103 N. W. 332; Buenemann *v.* St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379. See also Park *v.* Electric Thermostat Co., 75 Minn. 349, 77 N. W. 988.

New Jersey.— Brown *v.* Paterson Parchment Paper Co., 69 N. J. L. 474, 55 Atl. 87; Van Blarcom *v.* Kip, 26 N. J. L. 351.

New York.— Lacs *v.* James Everard's Breweries, 107 N. Y. App. Div. 250, 95 N. Y. Suppl. 25; McCann *v.* New York, etc., R. Co., 73 N. Y. App. Div. 305, 76 N. Y. Suppl. 684 (not after four verdicts unless circumstances extraordinary and verdict outrageous); Stewart *v.* Bates, 6 N. Y. Suppl. 61; Fowler *v.* Ætna F. Ins. Co., 7 Wend. 270; Talcot *v.* Commercial Ins. Co., 2 Johns. 467. *Compare* Mahar *v.* Simmons, 47 Hun 479, excessive damages.

Pennsylvania.— Berks County *v.* Ross, 3 Binn. 520, 5 Am. Dec. 383; Keble *v.* Arthurs, 3 Binn. 26; Yeager *v.* Yeager, 25 Leg. Int. 21.

Rhode Island.— Rounds *v.* Humes, 7 R. I. 535.

South Carolina.— Watson *v.* Hamilton, 6 Rich. 75; Peay *v.* Briggs, 2 Nott & M. 184; Frost *v.* Brown, 2 Bay 133.

Texas.— Gibson *v.* Hill, 23 Tex. 77.

Virginia.— Adams *v.* Hubbard, 25 Gratt. 129.

United States.— Clark *v.* Barney Dumping Co., 109 Fed. 235; Joyce *v.* Charleston Ice Mfg. Co., 50 Fed. 371 [*affirmed* in 54 Fed. 332, 4 C. C. A. 368]; Thompson *v.* Shea, 11 Fed. 847, 4 McCrary 93 (third new trial for inadequacy of damages denied); Milliken *v.* Ross, 9 Fed. 855, 4 Woods 69. *Compare* Clear *v.* Fox, 26 Fed. 90 (excessive damages); Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, 1 Hempst. 72 (excessive damages).

England.— Foster *v.* Steele, 3 Bing. N. Cas. 892, 3 Hodges 231, 6 L. J. C. P. 265, 5 Scott 25, 32 E. C. L. 409; Swinnerton *v.* Stafford, 3 Taunt. 232.

Canada.— Gibson *v.* North British, etc., Ins. Co., 19 N. Brunsw. 652; Lynds *v.* Hoar, 17 Nova Scotia 148 (although contrary to the direction of the judge on the facts); Ireson *v.* Mason, 13 U. C. C. P. 323; Wight *v.* Moody, 6 U. C. C. P. 502, 506; Lynch *v.* O'Hara, 6 U. C. C. P. 259; McCulloch *v.* Gore Dist. Mut. F. Ins. Co., 34 U. C. Q. B. 384 (especially where a contrary verdict would involve a charge of arson); Hunter *v.* Corbett, 7 U. C. Q. B. 75; Doe *v.* Benson, 3 U. C. Q. B. 164 (in ejectment); Power *v.* Ruttan, 5 U. C. Q. B. O. S. 132 (especially where the verdict finds against alleged fraud); Terriberry *v.* Miller, 5 U. C. Q. B. O. S. 129. See also Smith *v.* McKay, 11 U. C. Q. B. 111, where there had been four verdicts and lack of diligence.

See 37 Cent. Dig. tit. "New Trial," § 15.

That two verdicts are not necessarily conclusive see Goodwin *v.* Gibbons, 4 Burr. 2108.

Two verdicts, assessing the value of lands taken for public use at different sums, do not amount to two concurring verdicts. U. S. *v.* Taffe, 78 Fed. 524.

After three or four verdicts.— A new trial is very rarely granted after three (Savannah, etc., R. Co. *v.* Smith, 86 Ga. 229, 12 S. E. 579; Harrigan *v.* Savannah, etc., R. Co., 84 Ga. 793, 11 S. E. 965; Wolhrecht *v.* Baumgarten, 26 Ill. 291. See also Foster *v.* Steele, 3 Bing. N. Cas. 892, 3 Hodges 231, 6 L. J. C. P. 265, 5 Scott 25, 32 E. C. L. 409) or four concurring verdicts (Van Doren *v.* Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22; Smith *v.* McKay, 11 U. C. Q. B. 111), especially where the movant had been negligent in not asking for a special jury. After four successive verdicts for plaintiff in a personal injury case, a new trial should not be granted unless "the circumstances are extraordinary, and the verdict is clearly outrageous." McCann *v.* New York, etc., R. Co., 73 N. Y. App. Div. 305, 76 N. Y. Suppl. 684. But *compare* Graham *v.* Consolidated Traction Co., 65 N. J. L. 539, 47 Atl. 453.

Excessive verdict.— Under the rule in England, a second new trial on the grounds that the verdict was excessive was not allowable. Clerk *v.* Udall, 2 Salk. 649; Chambers *v.* Robinson, Str. 691. *Compare* Coffin *v.* Phenix Ins. Co., 15 Pick. (Mass.) 291; Parker *v.* Lewis, 18 Fed. Cas. No. 10,714*a*, 1 Hempst. 72.

Conflicting evidence.— It was held error to grant a third new trial on conflicting evidence. Harrigan *v.* Savannah, etc., R. Co., 84 Ga. 793, 11 S. E. 965. *Compare* Clark *v.* Jenkins, 162 Mass. 397, 38 N. E. 974.

Change of issues by amendments.— A third new trial may be granted where the issues have been changed by amendment of the pleadings after the first trial. Hodge *v.* Lehigh Valley R. Co., 66 Fed. 195.

83. *Georgia.*— Monroe Female University *v.* Broadfield, 30 Ga. 1; Chambers *v.* Collier, 4 Ga. 193.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Maine.— McKay *v.* New England Dredging Co., 93 Me. 201, 44 Atl. 614.

Missouri.— Wear *v.* Lee, 26 Mo. App. 99.

New York.— Wilkie *v.* Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149.

North Carolina.— Hamilton *v.* Bullock, 3 N. C. 224; Murphy *v.* Guion, 3 N. C. 162, 2 Am. Dec. 623. *Compare* Allen *v.* Jordan, 3 N. C. 132.

Pennsylvania.— Howard Express Co. *v.* Wile, 64 Pa. St. 201; Berks County *v.* Ross, 3 Binn. 520, 5 Am. Dec. 383; Keble *v.* Arthurs, 3 Binn. 26; Stewart *v.* Richardson, 3 Yeates 200.

South Carolina.— Peay *v.* Briggs, 2 Nott & M. 184; Payne *v.* Trezevant, 2 Bay 23.

United States.— Milliken *v.* Ross, 9 Fed. 855, 4 Woods 69.

or on the ground that there is no legal evidence to prove some material fact in issue.[84]

b. Under Statutes. Statutes providing that not more than two new trials shall be granted to the same party are usually construed as limiting the number of new trials that may be allowed on the ground that the verdict is not sufficiently supported by the evidence, or is contrary to the evidence,[85] and not as limiting the number that may be ordered for errors in the charge of the court, for error in the admission or rejection of testimony, for misconduct of the jury, and the like.[86] Similar statutes in other states are construed either to limit the number of new trials grantable for any of the causes named in the statutes,[87] or grantable for any causes whatever.[88] Statutes providing that not more than one new trial shall be granted to a party except where the triers of fact have erred in matters of law, or the jury has been guilty of misconduct, limit the number of new trials that may be ordered on the weight of the evidence;[89] but not the

England.— Davies *v.* Roper, 2 Jur. N. S. 167.

Canada.— Kerby *v.* Lewis, 1 U. C. Q. B. 66, 285, 6 U. C. Q. B. O. S. 489, third trial.

See 37 Cent. Dig. tit. "New Trial," § 15.

84. *Georgia.*— Wood *v.* Lane, 102 Ga. 199, 29 S. E. 180.

Massachusetts.— Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543, third verdict for total fire loss contrary to evidence.

Pennsylvania.— Howard Express Co. *v.* Wile, 64 Pa. St. 201; Lodge *v.* Railroad Co., 10 Phila. 153.

Rhode Island.— Rounds *v.* Humes, 7 R. I. 535.

Texas.— Gibson *v.* Hill, 23 Tex. 77.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85, second verdict.

Canada.— Hartley *v.* Fisher, 6 N. Brunsw. 694; Jaffrey *v.* Toronto, etc., R. Co., 24 U. C. C. P. 271; Coatsworth *v.* Toronto, 7 U. C. C. P. 490, 8 U. C. C. P. 364; Coulson *v.* Ontario F. & M. Ins. Co., 6 U. C. C. P. 63; Haworth *v.* British American Assur. Co., 6 U. C. C. P. 60; Vidal *v.* Ford, 19 U. C. Q. B. 88; Sutherland *v.* Black, 10 U. C. Q. B. 515, 11 U. C. Q. B. 243; Smith *v.* McKay, 10 U. C. Q. B. 412, 613; Sanderson *v.* Kingston Mar. R. Co., 4 U. C. Q. B. 340.

85. Thornton *v.* West Feliciana R. Co., 29 Miss. 143; Ray *v.* McCary, 26 Miss. 404; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652; Burton *v.* Gray, 10 Lea (Tenn.) 580.

Constitutionality of statute.— Such statutes do not violate the fourteenth amendment to the United States constitution. Louisville, etc., R. Co. *v.* Woodson, 134 U. S. 614, 10 S. Ct. 628, 33 L. ed. 1032.

Granting of new trial by appellate court.— As to whether such statutes apply to the granting of new trials by appellate courts see APPEAL AND ERROR, 3 Cyc. 457.

Disregard of instructions.— Under the Tennessee statute, it was held error to grant a third new trial "because of refusal on part of jury to regard the charge of court." Burton *v.* Gray, 10 Lea (Tenn.) 580.

86. *Illinois.*— Silsbe *v.* Lucas, 53 Ill. 479; Osner *v.* Zadek, 120 Ill. App. 444.

Kentucky.— Illinois Cent. R. Co. *v.* McManus, 118 Ky. 780, 82 S. W. 399, 26 Ky. L. Rep. 675; Burton *v.* Brashear, 3 A. K. Marsh. 276.

Mississippi.— Kirkland *v.* Carr, 35 Miss. 584; Munn *v.* Perkins, 1 Sm. & M. 412.

Tennessee.—Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832 (erroneous instructions); Louisville, etc., R. Co. *v.* Green, 100 Tenn. 238, 47 S. W. 221; Knoxville Iron Co. *v.* Dobson, 15 Lea 409; Burton *v.* Gray, 10 Lea 580; Caruthers *v.* Crockett, 7 Lea 91; Whitemore *v.* Haroldson, 2 Lea 312; East Tennessee, etc., R. Co. *v.* Hackney, 1 Head 169; Ferrell *v.* Alder, 2 Swan 77; Wilson *v.* Greer, 7 Humphr. 513; Turner *v.* Ross, 1 Humphr. 16; Trott *v.* West, 10 Yerg. 499.

United States.— Louisville, etc., R. Co. *v.* Woodson, 134 U. S. 614, 10 S. Ct. 628, 33 L. ed. 1032, construing Tennessee code.

See 37 Cent. Dig. tit. "New Trial," § 16.

But an application for a third new trial must be refused unless the record shows that one of the new trials was for some error of the court, misconduct of the jury, or the like. Louisville, etc., R. Co. *v.* Green, 100 Tenn. 238, 47 S. W. 221; East Tennessee, etc., R. Co. *v.* Hackney, 1 Head (Tenn.) 169; Ferrell *v.* Alder, 2 Swan (Tenn.) 77; Turner *v.* Ross, 1 Humphr. (Tenn.) 16. *Compare* Collins *v.* Ballow, 72 Tex. 330, 10 S. W. 248.

Surprise in the introduction of evidence.— The statute does not apply where one of the new trials was granted on the ground of surprise in the introduction of evidence. Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154.

The addition of new counts for the same general cause of action after two new trials have been had does not take a case out of the statute. East Tennessee, etc., R. Co. *v.* Hackney, 1 Head (Tenn.) 169.

87. Charles *v.* Malott, 65 Ind. 184; Headrick *v.* Wisehart, 57 Ind. 129; Shirts *v.* Irons, 47 Ind. 445; Carmichael *v.* Geary, 27 Ind. 362; Judah *v.* Vincennes University, 23 Ind. 272; Roberts *v.* Robeson, 22 Ind. 456.

88. Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881; Watterson *v.* Moore, 23 W. Va. 404.

89. McFarland *v.* U. S. Mutual Acc. Assoc.,

number that may be granted for the excepted causes or for errors of law in the rulings and instructions of the court.[90] New trials ordered by appellate courts for causes within the statutes are to be counted in determining whether trial courts may grant further new trials,[91] but not new trials ordered by appellate courts on other grounds.[92]

7. Agreements Waiving New Trials. It is competent for the parties to make a binding agreement not to ask for a new trial.[93] And a party may waive the right to move for a new trial for particular errors.[94]

E. Partial New Trials — 1. Of a Part of the Issues. According to a number of decisions a new trial cannot be ordered as to a part of the issues but should be granted for the entire case.[95] The weight of authority, however, is to the con-

124 Mo. 204, 27 S. W. 436; McShane *v.* Sanderson, 108 Mo. 316, 18 S. W. 912; Hill *v.* Deaver, 7 Mo. 57; Nicol *v.* Hyre, 58 Mo. App. 134.

One new trial may be allowed a party because the verdict is against the weight of evidence, without regard to the number already granted on other grounds. Kreis *v.* Missouri Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150 [*distinguishing* McShane *v.* Sanderson, 108 Mo. 316, 18 S. W. 912, and *overruling* O'Neil *v.* Young, etc., Seed, etc., Co., 58 Mo. App. 628; Nicol *v.* Hyre, 58 Mo. App. 134]; Dean *v.* Philadelphia Fire Assoc., 65 Mo. App. 209.

90. McShane *v.* Sanderson, 108 Mo. 316, 18 S. W. 912; State *v.* Horner, 86 Mo. 71; Harrison *v.* Cachelin, 23 Mo. 117; Boyce *v.* Smith, 16 Mo. 317; Ramsey *v.* Hamilton, 14 Mo. 358; Hill *v.* Deaver, 7 Mo. 57; O'Neil *v.* Young, etc., Seed, etc., Co., 58 Mo. App. 628; Nicol *v.* Hyre, 58 Mo. App. 134; Lovell *v.* Davis, 52 Mo. App. 342; State *v.* Edwards, 36 Mo. App. 425; Wright *v.* Adams, 12 Mo. App. 376; Collins *v.* Ballow, 72 Tex. 330, 10 S. W. 248; Rains *v.* Hood, 23 Tex. 555; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1898) 49 S. W. 265.

91. Shirts *v.* Irons, 47 Ind. 445; Carmichael *v.* Geary, 27 Ind. 362; Knoxville Iron Co. *v.* Dobson, 15 Lea (Tenn.) 409. The supreme court having held it error to grant a nonsuit upon the evidence offered upon a first trial, and the trial court having since granted one new trial, it was held error to grant another new trial in a case turning upon the credibility of witnesses. Dempsey *v.* Rome, 99 Ga. 192, 27 S. E. 668.

92. Charles *v.* Malott, 65 Ind. 184; Shirts *v.* Irons, 47 Ind. 445; Judah *v.* Vincennes University, 23 Ind. 272; Caruthers *v.* Crockett, 7 Lea (Tenn.) 91.

Under the Mississippi statute, the award of a venire facias de novo by the supreme court on exceptions was not counted. Wildy *v.* Bonney, 35 Miss. 77; Garnett *v.* Kirkman, 33 Miss. 389; Ray *v.* McCary, 26 Miss. 404.

93. McClellan *v.* Hurd, 11 Colo. 126, 17 Pac. 288; Lundon *v.* Waddick, 98 Iowa 478, 67 N. W. 388; Bray *v.* Doheny, 39 Minn. 355, 40 N. W. 262; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445. See also Lewin *v.* Lehigh Valley R. Co., 66 N. Y. App. Div. 409, 72 N. Y. Suppl. 881; U. S. *v.* 20,550 Pounds of Unwashed Wool, 149 Fed. 795.

Stipulation for judgment on referee's report.— It seems that where a cause has been tried by a referee under a stipulation that judgment should be entered in conformity with his report, the court has no power to grant a new trial. Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28 [*affirmed* in 18 How. 246, 15 L. ed. 380]; Neafie *v.* Cheesebrough, 17 Fed. Cas. No. 10,064, 14 Blatchf. 313.

An agreement for the withdrawal of a bill of exceptions and the continuance of the case for judgment till the next term does not prevent the making of a motion for a new trial on the ground of newly discovered evidence. Emery *v.* Mayberry, (Me. 1886) 5 Atl. 562.

Where the parties agreed that their respective claims should be left to the jury without objection as to legal liability upon such claims, the unsuccessful party was not entitled to a new trial on the ground that the other party had failed to show any cause of action. Foxwell *v.* Smith, 18 N. Brunsw. 439.

94. T. Wilce Co. *v.* Kelley Shingle Co., 130 Mich. 319, 89 N. W. 957.

95. *Alabama.*— Dale *v.* Mosely, 4 Stew. & P. 371. See also Edwards *v.* Lewis, 18 Ala. 494.

Indiana.— Johnson *v.* McCulloch, 89 Ind. 270; Peed *v.* Brenneman, 72 Ind. 288. See, however, other Indiana decisions cited in subsequent notes in this section.

New Hampshire.—Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163. But see New Hampshire cases cited in the following note.

Texas.— Long *v.* Garnett, 45 Tex. 400; Hume *v.* Schintz, 16 Tex. Civ. App. 512, 40 S. W. 1067; Schintz *v.* Morris, 13 Tex. Civ. App. 580, 35 S. W. 516, 825, 36 S. W. 292. It has been held, however, in this state that the supreme court may direct a new trial as to part of the issues only, and that the rule is applicable only in the trial courts. Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

Virginia.— Gardner *v.* Vidal, 6 Rand. 106.

Canada.— McNah *v.* Stewart, 15 U. C. C. P. 189, holding that a new trial may be limited to part of the issues in ejectment where such new trial is matter of discretion, but not where it is matter of right, unless the parties assent thereto.

See 37 Cent. Dig. tit. "New Trial," § 12.

A new trial as to part only of several alleged breaches of the conditions of a bond cannot be granted. State *v.* Templin, 122 Ind. 235, 23 N. E. 697.

trary. In the majority of jurisdictions, especially those which have adopted the practice codes, new trials may be so limited,[96] provided all the material issues have been disposed of,[97] and the issues are so distinct that no complications are thereby created.[98] A partial new trial will be more readily granted when a trial of the doubtful point can be had without examining the general merits of the case.[99] Thus in many jurisdictions a new trial may be ordered to determine the measure of damages only.[1] Where there are distinct counts and causes of action and

A new trial as to the right to part only of personal property involved in an action is not allowable. Dale *v.* Mosely, 4 Stew. & P. (Ala.) 371; Parker *v.* Godin, Str. 813. *Compare* Warshauer *v.* Jones, 117 Mass. 345.

Effect of order granting new trial as to part of issues.— Where the court has no authority to grant a new trial as to part of the issues only, an order granting a new trial as to part of the issues has the legal effect of granting a new trial as to all. State *v.* Templin, 122 Ind. 235, 23 N. E. 697.

Effect of agreement between parties.— A new trial may be restricted to certain issues when the parties so agree. Newbury Bank *v.* Eastman, 44 N. H. 431. See also Merchants' Ins. Co. *v.* Abbott, 131 Mass. 397.

96. *California.*— Duff *v.* Duff, 101 Cal. 1, 35 Pac. 437; San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

Iowa.— Dawson *v.* Wisner, 11 Iowa 6; Woodward *v.* Horst, 10 Iowa 120.

Kansas.— Ord Nat. Bank *v.* Massey, 7 Kan. App. 680, 51 Pac. 570.

Massachusetts.— Warshauer *v.* Jones, 117 Mass. 345; Wayland *v.* Ware, 109 Mass. 248.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

New Hampshire.— Lisbon *v.* Lyman, 49 N. H. 553.

New York.— Lavelle *v.* Corrignio, 86 Hun 135, 33 N. Y. Suppl. 376; Amory *v.* Amory, 6 Rob. 514, 33 How. Pr. 490.

North Carolina.— Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922; Tillett *v.* Lynchburg, etc., R. Co., 115 N. C. 662, 20 S. E. 480; Allen *v.* Baker, 86 N. C. 91, 40 Am. Rep. 444.

England.— See Hutchinson *v.* Piper, 4 Taunt. 555.

Canada.— Baker *v.* Read, 1 Nova Scotia Dec. 199.

See 37 Cent. Dig. tit. "New Trial," § 12. And see APPEAL AND ERROR, 3 Cyc. 457.

Where the evidence under the general issue had been confined to a single point, it was considered proper to restrict a new trial to the same point. Thwaites *v.* Sainsbury, 7 Bing. 437, 20 E. C. L. 198.

Discretion of court.—Generally the limiting of new trial to part of the issues lies wholly in the discretion of the court. Hall *v.* Hall, 131 N. C. 185, 42 S. E. 562; Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922; Nathan *v.* Charlotte St. R. Co., 118 N. C. 1066, 24 S. E. 511. See also Dever *v.* Anson, 43 Wis. 60.

97. San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Merony *v.* McIntyre, 82 N. C. 103.

Where the verdict upon one issue shows that the jury was manifestly unfair, a new trial should be granted as to all the issues. Matter of Booth, 2 Silv. Sup. (N. Y.) 213, 6 N. Y. Suppl. 41.

98. Lavelle *v.* Corrignio, 86 Hun (N. Y.) 135, 33 N. Y. Suppl. 376; Jarrett *v.* High Point Trunk, etc., Co., 144 N. C. 299, 56 S. E. 937; Hall *v.* Hall, 131 N. C. 185, 42 S. E. 562; Beam *v.* Jennings, 96 N. C. 82, 2 S. E. 245. It is error to limit a new trial to a single issue, where all the issues are essential and each touches the merits of the controversy. In such case the new trial granted should be general. Merony *v.* McIntyre, 82 N. C. 103.

99. Hubbell *v.* Bissell, 2 Allen (Mass.) 196 (as defendant's capacity to contract); Robbins *v.* Townsend, 20 Pick. (Mass.) 345 (or plaintiff's right to bring the action); Holmes *v.* Godwin, 71 N. C. 306.

A new trial may be granted as to the issues under an affidavit for attachment without granting a new trial as to the issues under the complaint. Parsons *v.* Stockbridge, 42 Ind. 121.

1. *Indiana.*— Radcliff *v.* Radford, 96 Ind. 482.

Maine.— McKay *v.* New England Dredging Co., 93 Me. 201, 44 Atl. 614.

Massachusetts.— Pratt *v.* Boston Heel, etc., Co., 134 Mass. 300; Negus *v.* Simpson, 99 Mass. 388; Kent *v.* Whitney, 9 Allen 62, 85 Am. Dec. 739; Haley *v.* Dorchester Mut. F. Ins. Co., 12 Gray 545; Boyd *v.* Brown, 17 Pick. 453; Winn *v.* Columbian Ins. Co., 12 Pick. 279.

New York.— Yaw *v.* Whitmore, 66 N. Y. App. Div. 317, 72 N. Y. Suppl. 765.

North Carolina.— Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; Strother *v.* Aberdeen, etc., R. Co., 123 N. C. 197, 31 S. E. 386; Silver Valley Min. Co. *v.* North Carolina Smelting Co., 122 N. C. 542, 29 S. E. 940; Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922; Pickett *v.* Wilmington, etc., R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; Boing *v.* Raleigh, etc., R. Co., 91 N. C. 199; Price *v.* Deal, 90 N. C. 290; Jones *v.* Mial, 89 N. C. 89; Roberts *v.* Richmond, etc., R. Co., 88 N. C. 560; Crawford *v.* Geiser Mfg. Co., 88 N. C. 554; Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547; Burton *v.* Wilmington, etc., R. Co., 84 N. C. 192; Holmes *v.* Godwin, 71 N. C. 306; Key *v.* Allen, 7 N. C. 523. See also Merony *v.* McIntyre, 82 N. C. 103.

separate findings, there may be a new trial as to a part only of such causes.[2] A new trial of the issues under a cross complaint may be granted leaving the verdict or findings upon the issues under the complaint to stand.[3] Where issues are submitted separately to a jury, and separately answered, a new trial may be limited to part of them.[4] In those jurisdictions where partial new trials are permissible, a new trial may be restricted to the issues between some of the parties only,[5] when it can be done without affecting the rights of the other parties.[6]

2. As to a Part of the Parties. Where defendants are liable jointly, if at all, a new trial should not be granted to less than the whole number.[7] And it

South Carolina.— Laney *v.* Bradford, 4 Rich. 1.

Canada.— Delissor *v.* Provincial Ins. Co., 2 Nova Scotia Dec. 20.

See 37 Cent. Dig. tit. "New Trial," § 12; and Appeal and Error, 3 Cyc. 458.

Compare Clewley *v.* Rhode Island Co., 26 R. I. 485, 59 Atl. 391; Treat *v.* Hiles, 75 Wis. 265, 44 N. W. 1088.

Evidence in mitigation of damages.— That some of the evidence introduced on the other issues may have tended to mitigate damages does not change the rule, since such evidence is admissible on the issue of damages. Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33.

Measure of damages.— Where two new trials had already been granted on the ground of excessive damages, it was held that the measure of damages only should be submitted to another jury. McKay *v.* New England Dredging Co., 93 Me. 201, 44 Atl. 614.

The acceptance of alimony by defendant under a judgment for a divorce precludes her from obtaining a new trial (Storke *v.* Storke, 132 Cal. 349, 64 Pac. 578), but her acceptance of money under a prior decree of maintenance does not (Smith *v.* Smith, 145 Cal. 615, 79 Pac. 275).

The proper procedure in New York is by motion at special term to set aside the assessment of damages and for a reassessment. Hanover Nat. Bank *v.* American Dock, etc., Co., 14 N. Y. App. Div. 255, 43 N. Y. Suppl. 544.

2. Dawson *v.* Wisner, 11 Iowa 6; Woodward *v.* Horst, 10 Iowa 120; Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74 (divorce and property rights); Joseph Schlitz Brewing Co. *v.* Ester, 86 Hun (N. Y.) 22, 33 N. Y. Suppl. 143 [*affirmed* in 157 N. Y. 714, 53 N. E. 1126]; Ainslie *v.* Ray, 21 U. C. C. P. 152. See also Nutter *v.* Hendricks, 150 Ind. 605, 50 N. E. 748; and Appeal and Error, 3 Cyc. 448. *Compare* Elwood *v.* Cameron, 17 U. C. Q. B. 528, suggesting that a new trial as to part of the issues only should only be granted where the limitation may be imposed as a condition on the movant. *Contra*, Schintz *v.* Morris, 13 Tex. Civ. App. 580, 35 S. W. 516, 825, 36 S. W. 292, under statute.

Under some codes it is the duty of the court to limit a new trial to such causes of action as have not been properly tried. Ord Nat. Bank *v.* Massey, 7 Kan. App. 680, 51 Pac. 570; Hamilton *v.* Nelson, 22 Mont. 539, 57 Pac. 146; Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591.

Where the verdict on distinct causes of action in tort is general, error in the reception of evidence as to one cause necessitates the allowance of a new trial as to both causes. Simmons *v.* Holster, 13 Minn. 249.

Effect of special statutes.— Under a statute providing that only one judgment should be rendered in any cause, except where otherwise specially provided, it was held that a verdict for plaintiff on an issue of false imprisonment and for defendant on an issue of malicious prosecution could not be set aside as to the former issue only. Hume *v.* Schintz, 16 Tex. Civ. App. 512, 40 S. W. 1067.

3. Jacob *v.* Carter, (Cal. 1894) 36 Pac. 381; Upland Land Co. *v.* Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181; Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Dodge *v.* Dunham, 41 Ind. 186; McAfferty *v.* Hale, 24 Iowa 355; Hall *v.* Hall, 131 N. C. 185, 42 S. E. 562. See also McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83. *Compare* Bisel *v.* Tucker, 121 Ind. 249, 23 N. E. 81; Johnson *v.* McCulloch, 89 Ind. 270.

Illustration.— Where defendants in an action on a promissory note may litigate the question of liability as between themselves, there may be a new trial of such issue without disturbing a general verdict in favor of plaintiff. Houston *v.* Bruner, 39 Ind. 376.

4. Mitchell *v.* Mitchell, 122 N. C. 332, 29 S. E. 367.

Issues erroneously withheld from jury.— Where one or more distinct issues have been erroneously withheld from the jury by the court, a trial may be had of such issues only. Merchants' Ins. Co. *v.* Abbott, 131 Mass. 397; Leiter *v.* Lyons, 24 R. I. 42, 52 Atl. 78.

Where the jury does not agree as to all the issues, a venire facias de novo should issue at common law. Smith *v.* Smith, 27 Misc. (N. Y.) 252, 57 N. Y. Suppl. 774. *Compare* Barnes *v.* Brown, 69 N. C. 439.

Where the jury's answer to a specific question is inconsistent with the general verdict, a new trial of that question cannot be had without a new trial of the whole case. Wilcox *v.* Hoch, 62 Barb. (N. Y.) 509.

5. See *infra*, I, E, 2.

6. Bennett *v.* Closson, 138 Ind. 542, 38 N. E. 46; Tillett *v.* Lynchburg, etc., R. Co., 115 N. C. 662, 20 S. E. 480; Strand *v.* Griffin, 109 Fed. 597.

7. *Florida.*— Pollak *v.* Hutchinson, 21 Fla. 128.

Indiana.— Sperry *v.* Dickinson, 82 Ind. 132.

Kentucky.— Reynolds *v.* Horine, 13 B. Mon. 234.

has been held that a new trial cannot be granted to part only of defendants against whom a verdict has been returned in a tort action;[8] but since their liability is several, as well as joint, most courts now hold that a new trial may be granted to part of them and the verdict allowed to stand as to the others, when it can be done without confusing the issues.[9] So where the property interests of copartners are distinct, and separate verdicts or finding have been rendered, a new trial may be granted to part of them only.[10] So where the liabilities of

New York.— Bamberg *v.* International R. Co., 121 N. Y. App. Div. 1, 105 N. Y. Suppl. 621 [*reversing* 53 Misc. 403, 103 N. Y. Suppl. 297]; Does *v.* Crosstown St. R. Co., 106 N. Y. Suppl. 1122.

Ohio.— Carr *v.* Beckett, 1 Ohio Cir. Ct. 73, 1 Ohio Cir. Dec. 43. *Compare* Sprague *v.* Childs, 16 Ohio St. 107.

Texas.— Long *v.* Garnett, 45 Tex. 400.

United States.—Albright *v.* McTighe, 49 Fed. 817, so where several liabilities of tort-feasors not considered.

Canada.— Commercial Bank *v.* Hughes, 4 U. C. Q. B. 167.

See 37 Cent. Dig. tit. "New Trial," § 11.

Compare Gordon *v.* Pitt, 3 Iowa 385.

Where the liability of one defendant cannot exist without that of another, a new trial should not be granted to the latter only. Holborn *v.* Naughton, 60 Mo. App. 100; Hamilton *v.* Prescott, 73 Tex. 565, 11 S. W. 548.

Estoppel to avail of error.— Where a new trial is granted to one of joint defendants on his application, he is estopped after the second trial from availing himself of the error in not having granted the new trial to both defendants. Lee *v* West, 47 Ga. 311.

8. McCalla *v.* Shaw, 72 Ga. 458; Cochran *v.* Ammon, 16 Ill. 316; Maxwell *v.* Habel, 92 Ill. App. 510; Doe *v.* Martin, 2 D. & L. 678, 14 L. J. Exch. 128, 13 M. & W. 811; Bond *v.* Spark, 12 Mod. 275; Berrington's Case, 3 Salk. 362; Parker *v.* Godin, Str. 813; Ward *v.* Murphy, 11 U. C. Q. B. 445 [seemingly *overruling* Davis *v.* Moore, 2 U. C. Q. B. 180]. See also Menton *v.* Lee, 30 U. C. Q. B. 281, where part of evidence was inadmissible against defendant who was liable.

9. *Illinois.*— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890.

Iowa.— Terpenning *v.* Gallup, 8 Iowa 74.

Kansas.— Kansas City *v.* File, 60 Kan. 157, 55 Pac. 877.

Kentucky.— Loving *v.* Com., 103 Ky. 534, 45 S. W. 773, 20 Ky. L. Rep. 229; Buckles *v.* Lambert, 4 Metc. 330.

Michigan.— Moreland *v.* Durocher, 121 Mich. 398, 80 N. W. 284.

Nebraska.— Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418; Cortelyou *v.* McCarthy, 53 Nebr. 479, 73 N. W. 921; Hayden *v.* Woods, 16 Nebr. 306, 20 N. W. 345, under code.

New York.— Seeley *v.* Chittenden, 4 How. Pr. 265. It was suggested, however, in the above case that the rule might be otherwise where all defendants have joined in a plea of justification. *Contra,* where liability joint. Bamberg *v.* International R. Co., 121 N. Y. App. Div. 1, 105 N. Y. Suppl. 621 [*reversing* 53 Misc. 403, 103 N. Y. Suppl. 297]; Does *v.* Crosstown St. R. Co., 106 N. Y. Suppl. 1122.

Texas.— Parker *v.* Adams, 2 Tex. Civ. App. 357, 23 S. W. 902. See also Parker *v.* Stephens, (Civ. App. 1899) 48 S. W. 878. But see St. Louis, etc., R. Co. *v.* Smith, (Civ. App. 1906) 99 S. W. 171.

United States.— Strand *v.* Griffin, 109 Fed. 597; Albright *v.* McTighe, 49 Fed. 817. See also Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543.

England.— Price *v.* Harris, 10 Bing. 331, 3 L. J. C. P. 73, 3 Moore & S. 838, 25 E. C. L. 159.

See 37 Cent. Dig. tit. "New Trial," § 11.

And see Heffner *v.* Moyst, 40 Ohio St. 112.

Applications of rule.— Where it appears as matter of law that one of defendants against whom a verdict has been rendered is not liable, the verdict may be set aside as to him only. Fitzgerald *v.* Quann, 10 Abb. N. Cas. (N. Y.) 28, 62 How. Pr. 331 [*reversed* on other grounds in 33 Hun 652]. Where, in an action against two defendants for tort connected with the ownership of property, it was established that one defendant had no interest in the property, it was proper to set aside a verdict as to him and permit it to stand against the other defendant. Nashville St. R. Co. *v.* Gore, 106 Tenn. 390, 61 S. W. 777. It was held proper to grant a new trial to part only of persons against whom a verdict had been rendered as joint tort-feasors and dismiss the action as to them. Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890. In an action against liquor sellers for damages arising from the sale of intoxicating liquors, a new trial may be granted as to part of defendants only. Moreland *v.* Durocher, 121 Mich. 398, 80 N. W. 284.

10. Equitable Mortg. Co. *v.* McWaters, 119 Ga. 337, 46 S. E. 437; Stubbings *v.* Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839 (tenant and reversioner in condemnation suit); Clay County *v.* Redifer, 32 Ind. App. 93, 69 N. E. 305 (several claimants against county — no question of misjoinder having been raised); McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83 (cotenants in partition suit). See also Bennett *v.* Closson, 138 Ind. 542, 38 N. E. 46; and APPEAL AND ERROR, 3 Cyc. 448.

Illustration.— Where judgments were entered severally in favor of different creditors of defendant corporation who had joined in the proceeding, error in one of the judgments was no ground for a new trial of the whole cause. Chicago, etc., R. Co. *v.* Cason, 151 Ind. 329, 50 N. E. 569.

Where defendants have disclaimed any interest in the subject of controversy, a new trial may be ordered as to other defendants

defendants upon a note[11] or other obligation[12] are several, a new trial may be granted to some of them and the verdict allowed to stand against others. Where a verdict has been rendered in favor of some defendants and against others, it may be set aside and a new trial allowed as to the latter only.[13] A new trial may be ordered as to all defendants except those in default.[14]

II. NECESSITY OF MOTION FOR NEW TRIAL TO OBTAIN REVIEW OF ERRORS ON APPEAL.

A. In Actions Tried by Jury. By virtue of statutes and rules of courts in many states, it is necessary that errors occurring during the progress of the trial be made the basis of a motion for new trial as a prerequisite to the consideration of such errors on appeal.[15] These errors are variously designated as "errors

only. Boehmer *v.* Big Rock Creek Irr. Co., 117 Cal. 19, 48 Pac. 908.

11. *Georgia.*— Adams *v.* Stewart County Bank, 94 Ga. 718, 20 S. E. 356.

Massachusetts.— Way *v.* Butterworth, 106 Mass. 75.

Missouri.— Bremen Bank *v.* Umrath, 55 Mo. App. 43.

New York.— People *v.* New York C. Pl., 19 Wend. 118.

Tennessee.— Union Bank *v.* McClung, 9 Humphr. 98. See also Webbs *v.* State, 4 Coldw. 199.

Canada.— Hanscome *v.* Cotton, 15 U. C. Q. B. 42; Maulson *v.* Arrol, 11 U. C. Q. B. 81.

Compare Riggs *v.* Hatch, 16 Fed. 838, 21 Blatchf. 318.

Special statutory provisions.— A statute providing that in suits upon joint and several bills of exchange and notes judgment might be entered by default against any defendant severally liable, and the suit proceed to trial against the other defendants as if it had been commenced against them only, was held to authorize the granting of a new trial as to part of defendants. Williams *v.* Kirby, 81 Ill. App. 154. A statute providing that contracts joint at the common law should be construed as joint and several was held not to authorize the granting of a new trial as to one of two parties sued jointly and a dismissal as to him and the entry of judgment against the other defendant on the verdict. Holmes *v.* Tyler, 8 N. M. 613, 45 Pac. 1129.

12. Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75, principal and surety in a judgment. See also De Bernardy *v.* Harding, 8 Exch. 821, 22 L. J. Exch. 340, as to granting new trial on condition that the action be dismissed as to one defendant.

13. Bicknell *v.* Dorion, 16 Pick. (Mass.) 478 [*overruling* Sawyer *v.* Merrill, 10 Pick. (Mass.) 16]; Brown *v.* Burrus, 8 Mo. 26; Roberts *v.* Heffner, 19 Tex. 129; Green *v.* Elgie, 5 Q. B. 99, Dav. & M. 199, 8 Jur. 187, 14 L. J. Q. B. 162, 48 E. C. L. 99; Price *v.* Harris, 10 Bing. 331, 3 L. J. C. P. 73, 3 Moore & S. 838, 25 E. C. L. 159. See also Lee *v.* Fletcher, 46 Minn. 49, 48 N. W. 456, 12 L. R. A. 171. *Contra*, Cochran *v.* Ammon, 16 Ill. 316; Purnell *v.* Great Western R. Co., 1 Q. B. D. 636, 45 L. J. Q. B. 687, 35 L. T. Rep. N. S. 605, 24 Wkly. Rep. 909; Belcher *v.* Magnay, 3 D. & L. 70, 9 Jur. 475, 14 L. J. Exch. 305, 13 M. & W. 815 note; Doe *v.* Martin, 2 D. & L. 678, 14 L. J. Exch. 128, 13 M. & W. 811; Bond *v.* Spark, 12 Mod. 275; Berrington's Case, 3 Salk. 362; Davis *v.* Lennon, 8 U. C. Q. B. 599.

Where the claim of one of defendants to real estate is admitted of record by plaintiff, a new trial should not be granted as to him. Lee *v.* Fletcher, 46 Minn. 49, 48 N. W. 456, 12 L. R. A. 171.

Applications of rule.— Where a joint action for damages against a city and an individual was dismissed as to the city by order of court because the declaration showed no cause of action against it, the granting of a new trial after verdict for the other defendant did not reopen the case against the city. Atlanta *v.* Anderson, 90 Ga. 481, 16 S. E. 209. Where, in trespass to try title, the verdict was against part of defendants and in favor of the remainder who had not defended separately, an order granting plaintiff a new trial as to part of the latter was held to set aside the judgment as to all. Parker *v.* Stephens, (Tex. Civ. App. 1899) 48 S. W. 878, 2 Tex. Civ. App. 357, 23 S. W. 902.

14. Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Price *v.* Harris, 10 Bing. 331, 3 L. J. C. P. 73, 3 Moore & S. 838, 25 E. C. L. 159.

15. *Arizona.*— Newhall *v.* Porter, 7 Ariz. 160, 62 Pac. 689; Svea Ins. Co. *v.* McFarland, 7 Ariz. 131, 60 Pac. 936.

Arkansas.— Pearrow *v.* Gleason, 66 Ark. 646, 50 S. W. 870; Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212.

Colorado.— Roop *v.* Delahaye, 2 Colo. 307; Phelps *v.* Spruance, 1 Colo. 414.

Georgia.— Sikes *v.* Norman, 122 Ga. 387, 50 S. E. 134; Savannah Ocean Steamship Co. *v.* Hamilton, 112 Ga. 901, 38 S. E. 204; Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407 (except where the rulings complained of necessarily control the verdict or judgment); Holsey *v.* Porter, 105 Ga. 837, 31 S. E. 784.

Indiana.— Ross *v.* Becker, (1907) 81 N. E. 478; Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; Singer *v.* Tormoehlen, 150 Ind. 287, 49 N. E. 1055; Nordyke, etc., Co. *v.* Keokuk Bag Co., 26 Ind. App. 548, 59 N. E. 393.

Indian Territory.— Harris *v.* Bruton, 2 Indian Terr. 524, 53 S. W. 322; Severs *v.*

occurring at the trial," "errors of law occurring at the trial," "errors which are grounds for new trial," "errors which it is necessary to preserve by bill of exceptions," etc. An examination of the decisions shows that practically the same kind of errors is intended by these different designations. For the sake of brevity the decisions are cited *en masse* to the general proposition first stated. Specific applications of this general doctrine are shown in subsequent sections in this chapter. In a number of other jurisdictions, there being no statutes or rules of court requiring it, no motion for new trial is necessary to present for review on appeal alleged

Northern Trust Co., 1 Indian Terr. 1, 35 S. W. 232.

Kansas.— Insurance Co. of North America *v.* Evans, (1902) 68 Pac. 623; Duigenan *v.* Claus, 46 Kan. 275, 26 Pac. 699; Fairfield *v.* Dawson, 39 Kan. 147, 17 Pac. 804; Longfellow *v.* Smith, 10 Kan. App. 575, 61 Pac. 875.

Kentucky.— Hatfield *v.* Adams, 96 S. W. 583, 29 Ky. L. Rep. 880; Bailey *v.* Louisville, etc., R. Co., 44 S. W. 105, 19 Ky. L. Rep. 1617; Castle *v.* Bays, 40 S. W. 242, 19 Ky. L. Rep. 345.

Minnesota.— Borgerson *v.* Cook-Stone Co., 91 Minn. 91, 97 N. W. 734.

Mississippi.—Armstrong *v.* Whitehead, 81 Miss. 35, 32 So. 917.

Missouri.— State *v.* Fargo, 151 Mo. 280, 52 S. W. 199; Danforth *v.* Lindell R. Co., 123 Mo. 196, 27 S. W. 715; Taylor *v.* Brotherhood of Railroad Trainmen, 106 Mo. App. 212, 80 S. W. 306; Blattner *v.* Metz, (App. 1904) 80 S. W. 270; Steele *v.* Steele, 85 Mo. App. 224; Cavolt *v.* Wabash R. Co., 76 Mo. App. 571.

Nebraska.— Shelton Implement Co. *v.* Parlor Furniture, etc., Co., (1907) 112 N. W. 618; Carmack *v.* Erdenberger, (1906) 110 N. W. 315; Hanson *v.* Nathan, (1905) 104 N. W. 175; State *v.* Ellsworth, 72 Nebr. 277, 100 N. W. 314; Norbury *v.* Harper, 70 Nebr. 389, 97 N. W. 438; Aultman *v.* Moline, (1901) 95 N. W. 367; Engel *v.* Dado, 66 Nebr. 400, 92 N. W. 629; Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552; Green *v.* Tierney, 62 Nebr. 561, 87 N. W. 331; Schmitt *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99; Palmer *v.* Ulysses First Bank, (1899) 81 N. W. 303; Farwell *v.* Chicago, etc., R. Co., 52 Nebr. 614, 72 N. W. 1036; Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855; Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953; Hodgin *v.* Whitcomb, 51 Nebr. 617, 71 N. W. 314; Union Pac. R. Co. *v.* Thorne, 51 Nebr. 472, 70 N. W. 1119; Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367; *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730; Lancaster County *v.* Lincoln Packing Co., 5 Nebr. (Unoff.) 521, 99 N. W. 265; Lau *v.* Lindsey, 3 Nebr. (Unoff.) 681, 92 N. W. 642; Cedar County *v.* Goetz, 3 Nebr. (Unoff.) 172, 91 N. W. 177; Marsh *v.* State, 2 Nebr. (Unoff.) 372, 96 N. W. 520; Woodard *v.* Cutter, 2 Nebr. (Unoff.) 84, 96 N. W. 54; Cobb *v.* Hadley, 1 Nebr. (Unoff.) 294, 95 N. W. 482.

New Mexico.—Henry *v.* Lincoln Lucky, etc., Min. Co., (1906) 85 Pac. 1043.

North Dakota.— McNab *v.* Northern Pac. R. Co., 12 N. D. 568, 98 N. W. 353.

Oklahoma.— Bradford *v.* Brennan, 15 Okla. 47, 78 Pac. 387; Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944; Boyd *v.* Bryan, 11 Okla. 56, 65 Pac. 940; Carson *v.* Butt, 4 Okla. 133, 46 Pac. 596.

Tennessee.— St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671; Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154; Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

Virginia.— Newberry *v.* Williams, 89 Va. 298, 15 S. E. 865.

West Virginia.—Brown *v.* Brown, 29 W. Va. 777, 2 S. E. 808; Danks *v.* Rodeheaver, 26 W. Va. 274.

Wyoming.— Perkins *v.* Hoyt, 3 Wyo. 55, 31 Pac. 1046; Dolan *v.* Church, 1 Wyo. 187.

See 2 Cent. Dig. tit. "Appeal and Error," § 1650.

In Idaho on appeal from the judgment only, where it does not appear that a motion for new trial was made, or any statement filed, pursuant to the provisions of the statute (Rev. St. § 4443) the judgment-roll only can be considered. Washington, etc., R. Co. *v.* Osborne, 2 Ida. (Hasb.) 557, 21 Pac. 421 [*citing* Gamble *v.* Dunwell, 1 Ida. 268; Purdy *v.* Steel, 1 Ida. 216].

Rule applies to questions reserved.— The rule that errors occurring on the trial cannot be considered on appeal, unless presented to the trial court as a ground for a new trial, applies to "questions of law reserved on the trial for the decision of the supreme court," as provided by statute, as well as to questions reserved on the trial under the general rules of practice. Cross *v.* Cross, 156 Ind. 378, 59 N. E. 1049.

Cross appeal.— Where an appellee did not move for a new trial, his cross appeal cannot be considered. Asher *v.* Helton, 101 S. W. 350, 31 Ky. L. Rep. 9; Louisville, etc., R. Co. *v.* Whitehead, 73 S. W. 1128, 24 Ky. L. Rep. 2315.

A motion to set aside the verdict is equivalent to a motion for a new trial for the purpose of presenting questions for review, especially where it is so treated by the trial court. Morgan *v.* Keller, 194 Mo. 663, 92 S. W. 75.

Failure to file a motion for a new trial is not fatal to jurisdiction on appeal, and will not support a motion to dismiss a petition in error. At most it limits the scope of inquiry upon that petition. State *v.* Shrader, 73 Nebr. 618, 103 N. W. 276.

errors occurring during the progress of the trial.[16] So in one state it is held that the court in general term will hear a motion for new trial upon a bill of exceptions notwithstanding no motion for new trial has been made in the court below,[17] and in another it is held that errors committed by the judge during the progress of the trial and duly excepted to at the time may be assigned for error in an appellate court, although no motion for a new trial was interposed in the trial court;[18] but, if a motion for new trial is made, no other grounds than those therein stated will be considered, whether or not the errors are such as are grounds for new trial.[19]

B. In Actions Tried by Court — 1. In General. In jurisdictions where in trials by jury no motion for new trial is necessary to present for review on appeal errors committed during the course of the trial, no motion for new trial is necessary to preserve for review errors committed during the course of the trial in an action tried by the court. In some of the states where such a motion is held necessary in actions tried by a jury to present errors of this character, a motion for new trial in actions tried by the court is just as much necessary as in actions

The issuance of a peremptory writ of mandamus without notice is not a trial, and therefore it is not necessary to present a motion for a new trial in order to obtain a review of the action of the court in allowing such writ. Horton *v.* State, 60 Nebr. 701, 84 N. W. 87.

Where motions in a cause are mere adjuncts to the original proceeding, motions for new trial are not deemed necessary, and the appellate court will review them on proper exceptions preserved; but where motions are more than such adjuncts, motions for new trial are required to authorize a review of the action of the court on appeal, and in both instances exceptions must be taken at the time of the ruling complained of, or no review thereof can be had. Lilly *v.* Menke, 92 Mo. App. 354.

16. *California.*— Yeager *v.* Southern California R. Co., (1897) 51 Pac. 190; Caldwell *v.* Parks, 47 Cal. 640; Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Harper *v.* Minor, 27 Cal. 107.

Florida.— Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696; Dupuis *v.* Thompson, 16 Fla. 69; Carter *v.* Bennett, 4 Fla. 283.

Iowa.— Stewart *v.* Equitable Mut. Life Assoc., 110 Iowa 528, 81 N. W. 782; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Ellis *v.* Leonard, 107 Iowa 487, 78 N. W. 246; Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360; Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473; Drefahl *v.* Tuttle, 42 Iowa 177. Under the express provisions of Code, § 4106, a motion for a new trial is not necessary to entitle a party to appeal. Centerville Independent School Dist. *v.* Swearngin, 119 Iowa 702, 94 N. W. 206.

Louisiana.—Jackson *v.* Michie, 33 La. Ann. 723. *Compare* the earlier decisions Nettles *v.* Scott, 17 La. 336; Lambeth *v.* McMurray, 15 La. 466.

Nevada.— Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116, 8 Am. Rep. 705. But see Neil *v.* Daniel, 4 Nev. 436, which is not mentioned in the case above cited but which is in direct conflict with it.

North Carolina.— Tillett *v.* Lynchburg, etc., R. Co., 116 N. C. 937, 21 S. E. 698; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

North Dakota.—McPherrin *v.* Jones, 5 N. D. 261, 65 N. W. 685. See also Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127.

Ohio.— Earp *v.* Pittsburg, etc., R. Co., 12 Ohio St. 621; Seagrave *v.* Hall, 10 Ohio Cir. Ct. 395, 6 Ohio Cir. Dec. 497.

South Carolina.— See Brice *v.* Hamilton, 12 S. C. 32, holding that exceptions which raise questions purely legal may be reviewed on appeal, although no motion was made before the lower court for a new trial.

South Dakota.— Northwestern Elevator Co. *v.* Lee, 13 S. D. 450, 83 N. W. 565; Haggarty *v.* Strong, 10 S. D. 585, 74 N. W. 1037; Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192; Gade *v.* Collins, 8 S. D. 322, 66 N. W. 466; Le Claire *v.* Wells, 7 S. D. 426, 64 N. W. 519; Miller *v.* Way, 5 S. D. 468, 59 N. W. 467; Jones Lumber, etc., Co. *v.* Faris, 5 S. D. 348, 58 N. W. 813; Barnard, etc., Mfg. Co. *v.* Galloway, 5 S. D. 205, 58 N. W. 565.

Washington.—Dubcich *v.* Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832; Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758; Kennedy *v.* Derrickson, 5 Wash. 289, 31 Pac. 766; Burns *v.* Commencement Bay Land, etc., Co., 4 Wash. 558, 30 Pac. 668, 709; Tullis *v.* Shannon, 3 Wash. 716, 29 Pac. 449; Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022; Johnson *v.* Maxwell, 2 Wash. 482, 27 Pac. 1071.

See 2 Cent. Dig. tit. "Appeal and Error," § 1650.

17. Lewis *v.* Shepherd, 1 Mackey (D. C.) 46.

18. Illinois Cent. R. Co. *v.* O'Keefe, 154 Ill. 508, 39 N. E. 606; Purcell *v.* Henry, 67 Ill. App. 256; Bernhard *v.* Brown, 31 Ill. App. 385.

19. West Chicago St. R. Co. *v.* Krueger, 168 Ill. 586, 48 N. E. 442; Hollenbeck *v.* Detrick, 162 Ill. 388, 44 N. E. 732; Brewer, etc., Brewing Co. *v.* Boddie, 162 Ill. 346, 44 N. E. 819; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Cary *v.* Welch, 79 Ill. App. 401;

tried by jury;[20] but the contrary view is taken in some of the states where motions for new trial are necessary in cases tried by a jury.[21] By some statutes the necessity of a motion for a new trial in such case is expressly dispensed with.[22] And in one state, where a case in the circuit court is submitted to the judge without a jury, a general bill of exceptions embodying all the testimony will be considered by the supreme court, although no motion for a new trial has been made or acted upon. While the statute authorizes it, it does not require such motion.[23]

2. In Suits in Equity — a. In General. In Arkansas in equity cases all papers properly filed in the cause become on appeal parts of the record to be included in the transcript and no motion for new trial is necessary before taking an appeal in equity,[24] and this seems to be the rule in Kentucky.[25] In Illinois it has been held that no application for a rehearing is necessary before taking an appeal.[26] In California, Nevada, Ohio, and Utah a motion for new trial is necessary to authorize the appellate court to review the sufficiency of the evidence to sustain the findings;[27] but in Wisconsin the supreme court reviews the evi-

Corbin *v.* Western Electric Co., 78 Ill. App. 516; Dallemand *v.* Saalfeldt, 73 Ill. App. 151; Hardy *v.* Chicago, etc., R. Co., 58 Ill. App. 278.

20. *Arkansas.*— Smith *v.* Hollis, 46 Ark. 17; Gardner *v.* Miller, 21 Ark. 398; Martin *v.* Jackson, 21 Ark. 286.

Indiana.— Bowman *v.* Ely, 135 Ind. 494, 35 N. E. 123; Tilden *v.* Whitely Malleable Castings Co., 27 Ind. App. 53, 60 N. E. 963.

Kentucky.— Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public School, 105 Ky. 358, 49 S. W. 34, 20 Ky. L. Rep. 1228; Helm *v.* Coffey, 80 Ky. 176, 3 Ky. L. Rep. 677; Cincinnati, etc., R. Co. *v.* Hansford, 100 S. W. 251, 30 Ky. L. Rep. 1105 (holding, however, that where an action was tried to the court, and there was nothing in the record on appeal to sustain the judgment, it will be reversed, although there was no motion for a new trial); Day *v.* Adams, 50 S. W. 2, 20 Ky. L. Rep. 1827; Beeler *v.* Sandidge, 49 S. W. 533, 20 Ky. L. Rep. 1581; Jenne *v.* Matlack, 41 S. W. 11, 19 Ky. L. Rep. 503; Simms *v.* Lanehart, 38 S. W. 490, 19 Ky. L. Rep. 1439; Louisville, etc., R. Co. *v.* Com., 17 S. W. 274, 13 Ky. L. Rep. 439; Murray *v.* De Jarnette, 15 Ky. L. Rep. 879; Wilson *v.* Brown, 14 Ky. L. Rep. 240; Southern Div. Cumberland, etc., R. Co. *v.* Marion County, 11 Ky. L. Rep. 329; Watts *v.* Phillips, 10 Ky. L. Rep. 938; Henderson *v.* Dupree, 6 Ky. L. Rep. 667; Combs *v.* Hargis, 4 Ky. L. Rep. 446; Arstman *v.* Thoma, 4 Ky. L. Rep. 430.

Missouri.— Watson *v.* Pierce, 11 Mo. 358; Johnson *v.* Strader, 3 Mo. 355.

Nebraska.— Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35; Shoning *v.* Coburn, 36 Nebr. 76, 54 N. W. 84.

Texas.— Gillett *v.* Missouri, etc., R. Co., (Civ. App. 1902) 68 S. W. 61; Black *v.* Black, (Civ. App. 1902) 67 S. W. 928 [*reversed* on other grounds in 95 Tex. 627, 69 S. W. 65]; Wetz *v.* Wetz, 27 Tex. App. 597, 66 S. W. 869.

Wyoming.— Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878. *Compare* Natrona County *v.* Shaffner, 10 Wyo. 181, 68 Pac. 14, where no question of fact is involved.

See 2 Cent. Dig. tit. "Appeal and Error," § 1662.

21. *Colorado.*— Phelps *v.* Spruance, 1 Colo. 414.

Georgia.— Hyfield *v.* Sims, 87 Ga. 280, 13 S. E. 554.

Illinois.— Alton *v.* Foster, 207 Ill. 150, 69 N. E. 783; Niagara F. Ins. Co. *v.* Forehand, 169 Ill. 626, 48 N. E. 830; Illinois Cent. R. Co. *v.* O'Keefe, 154 Ill. 508, 39 N. E. 606; Sands *v.* Kagey, 150 Ill. 109, 36 N. E. 956; Gage *v.* Goudy, 128 Ill. 566, 21 N. E. 565; Firemen's Ins. Co. *v.* Peck, 126 Ill. 493, 18 N. E. 752; Hemmer *v.* Wolfer, (1887) 11 N. E. 885; Jones *v.* Buffum, 50 Ill. 277; Samuel Morganstein *v.* Commercial Nat. Bank, 125 Ill. App. 397; Barrere *v.* Griffith, 109 Ill. App. 165; Stern *v.* Glattstein, 80 Ill. App. 367; Dickinson *v.* Gray, 72 Ill. App. 55.

Tennessee.— Barr *v.* Southern R. Co., 105 Tenn. 544, 58 S. W. 849; Lancaster *v.* Fisher, 94 Tenn. 222, 28 S. W. 1094.

Virginia.— Citizens' Nat. Bank *v.* Walton, 96 Va. 435, 31 S. E. 890; Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698.

The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself, without a motion for a new trial. *In re* Geary, 146 Cal. 105, 79 Pac. 855.

22. Bessie *v.* Northern Pac. R. Co., 14 N. D. 614, 105 N. W. 936.

23. Nicholson *v.* Karpe, 58 Miss. 34.

24. Lemay *v.* Johnson, 35 Ark. 225.

25. List *v.* List, 82 S. W. 446, 26 Ky. L. Rep. 691; White *v.* Thorne-Franklin Shoe Co., 65 S. W. 819, 23 Ky. L. Rep. 1548; Salyer *v.* Arnett, 62 S. W. 1031, 23 Ky. L. Rep. 321; Hillman *v.* Morton, 9 Ky. L. Rep. 198, in which it was held that in order to appeal it is not necessary in an equity action to have both conclusions of law and fact stated separately or to move for a new trial, nor to have the evidence preserved in a bill of exceptions.

26. Ribordy *v.* Murray, 70 Ill. App. 527 [*affirmed* in 177 Ill. 134, 52 N. E. 325].

27. Deputy *v.* Stapleford, 19 Cal. 302; Burbank *v.* Rivers, 20 Nev. 81, 16 Pac. 432; Spangler *v.* Brown, 26 Ohio St. 389; Ide *v.*

dence without any motion for new trial having been made in the court below.[28] In Iowa the fact that no motion was made for new trial upon written evidence in the court below in an equity cause will not deprive the supreme court of authority or jurisdiction to try the cause upon the errors assigned.[29] In Nebraska a review by a petition in error of a ruling during the trial of an equity cause cannot be obtained if no motion for new trial was filed in the trial court. The record will be examined no further than to ascertain whether the pleadings state a cause of action or defense and support the judgment or decree. To obtain a review by petition in error of the proceedings during the trial, a motion for new trial must be made in the trial court as in a law action.[30] It necessarily follows, however, from what has been said, that a mere failure to file a motion for a new trial in an equity case is not sufficient ground for dismissing a petition in error.[31] A motion for new trial is, however, not necessary to the review of an equitable action on appeal.[32] Yet it has been held that an appeal in an equity case does not present the rulings of the court in the exclusion of improper evidence, the court saying: "If a party elects to appeal from a judgment in an equitable action, his election seems to imply that he is content to retry the cause in the supreme court upon the evidence actually considered by the district court."[33]

b. Where Common-Law Action Is Transferred to Equity. In Kentucky where a motion for new trial is not a prerequisite to an appeal in an equitable action, if an ordinary action has been properly transferred to equity and heard as an equity action, a motion for new trial is not necessary to prosecution of an appeal.[34]

c. Where Issues of Fact Are Tried by Jury. Where in an equity cause issues of fact are tried by a jury a motion for new trial is essential to a review of their verdict or findings.[35]

C. In Trials on Agreed Statements of Facts. There is some conflict of opinion as to whether a judgment on an agreed statement of facts will be reviewed in the absence of a motion for new trial. In Arkansas, Colorado, North Carolina, and Ohio it has been held that a motion is unnecessary.[36] So in Kansas no motion for a new trial is necessary where the case is tried on an agreed statement of facts;[37] but such motion is necessary where a case is tried upon an agreed statement of facts and written evidence, and on testimony of absent witnesses.[38] In

Churchill, 14 Ohio St. 372; Swenson *v.* Snell, 22 Utah 191, 61 Pac. 555.

28. Sanford *v.* McCreedy, 28 Wis. 103; Felch *v.* Lee, 15 Wis. 265; Catlin *v.* Henton, 9 Wis. 476.

29. Jordan *v.* Wimer, 45 Iowa 65.

30. Danforth *v.* Fowler, 68 Nebr. 452, 94 N. W. 637; Storey *v.* Burns, 53 Nebr. 535, 74 N. W. 39; Burke *v.* Cunningham, 42 Nebr. 645, 60 N. W. 903; Farmers L. & T. Co. *v.* Davis, 42 Nebr. 46, 60 N. W. 621; Gray *v.* Disbrow, 36 Nebr. 857, 55 N. W. 255; Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873; Curran *v.* Hageman, 3 Nebr. (Unoff.) 779, 92 N. W. 1003; Miles *v.* Deming, 2 Nebr. (Unoff.) 626, 89 N. W. 599.

31. Gaughran *v.* Crosby, 33 Nebr. 33, 49 N. W. 776.

32. Smith *v.* Silver, 58 Nebr. 429, 78 N. W. 725; Swansen *v.* Swansen, 12 Nebr. 210, 10 N. W. 713.

33. Ainsworth *v.* Taylor, 53 Nebr. 484, 73 N. W. 927.

34. Keaton *v.* Sublett, 109 Ky. 106, 58 S. W. 528, 22 Ky. L. Rep. 631; Covington *v.* Limerick, 40 S. W. 254, 19 Ky. L. Rep. 330.

35. Tucker *v.* Cole, 169 Ill. 150, 48 N. E. 440; Fanning *v.* Russell, 94 Ill. 386; Henderson *v.* Dupree, 82 Ky. 678; Simms *v.* Lanehart, 38 S. W. 490, 19 Ky. L. Rep. 1439; Woodson *v.* McClelland, 4 Mo. 495; Ward *v.* Warren, 15 Hun (N. Y.) 600 [*affirmed* in 82 N. Y. 265]. See also Hall *v.* Linn, 8 Colo. 264, 5 Pac. 641 [*citing* Duff *v.* Fisher, 15 Cal. 375], in which it was held that, in an equity cause, facts submitted to the jury will not be reviewed on appeal, unless appellants moved for a new trial or for a decree in disregard of the verdict in the court below.

36. Arringtoe *v.* Smith, 22 Ark. 425; Baker *v.* State, 21 Ark. 405; Walker *v.* Swigart, 21 Ark. 404; Gardner *v.* Miller, 21 Ark. 398; Clayton *v.* Smith, 1 Colo. 95; Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270; Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. 178; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *In re* Hinton, 64 Ohio St. 485, 60 N. E. 621; Hance *v.* Chappell, 20 Ohio Cir. Ct. 214, 11 Ohio Cir. Dec. 139; Celtic Bldg. Assoc. *v.* Regan, 9 Ohio Dec. (Reprint) 364, 12 Cinc. L. Bul. 236.

37. Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718; Schnitzler *v.* Green, 5 Kan. App. 656, 47 Pac. 990.

38. Thomas *v.* Arthurs, 8 Kan. App. 126, 54 Pac. 694.

Indiana where a cause is submitted upon an agreed statement in accordance with a statute providing therefor, no motion for new trial is necessary;[39] but where an agreed statement of facts is used merely as evidence upon a trial of issues regularly formed a motion for a new trial is necessary.[40]

D. In Actions Tried by Referee. In a number of states to authorize a review of rulings made by a referee during the progress of the trial alleged errors must be brought before the court by motion for new trial. It is not sufficient merely to take exceptions to the ruling of the court confirming the report of the referee.[41] To obtain a review of a ruling on the admissibility of evidence, the ruling must be excepted to at the time and made the basis of a motion for new trial.[42] And in the absence of a motion for new trial the supreme court cannot consider whether the facts found justify the conclusions of law.[43]

E. On Appeal From Intermediate Court. In Kansas if on a petition in error the district court reverses the judgment of a justice of the peace, the reversal may be reviewed in the supreme court without a motion for new trial,[44] and in Indiana and Nebraska a motion for a new trial is not necessary to obtain a review of a judgment of the district court affirming or reversing an order or judgment made by the county court or a justice of the peace.[45] In New York no appeal lies to the general term from a judgment of the county court entered in

39. Hall *v.* Pennsylvania Co., 90 Ind. 459; Lofton *v.* Moore, 83 Ind. 112; Martin *v.* Martin, 74 Ind. 207; State *v.* Newton County, 66 Ind. 216; Fisher *v.* Purdue, 48 Ind. 323.

40. Lofton *v.* Moore, 83 Ind. 112; Slessman *v.* Crozier, 80 Ind. 487.

41. *California.*— Harris *v.* San Francisco Sugar Refining Co., 41 Cal. 393; Hihn *v.* Peck, 30 Cal. 280; Peck *v.* Vandenberg, 30 Cal. 11.

Minnesota.— Griffin *v.* Jorgenson, 22 Minn. 92.

Missouri.— Maloney *v.* Missouri Pac. R. Co., 122 Mo. 106, 26 S. W. 702; State *v.* Hurlstone, 92 Mo. 327, 5 S. W. 38; State *v.* Elliott, 82 Mo. App. 458; Wallace *v.* Underwood, 32 Mo. App. 473; Ellison *v.* Bowman, 29 Mo. App. 439; Donahue *v.* Maloney, 14 Mo. App. 578.

Montana.— Kleinschmidt *v.* Iler, 6 Mont. 122, 9 Pac. 901.

Nebraska.— Light *v.* Kennard, 11 Nebr. 129, 7 N. W. 539; Hosford *v.* Stone, 6 Nebr. 378.

Utah.— See Spencer *v.* Van Cott, 2 Utah 337.

See 2 Cent. Dig. tit. "Appeal and Error," § 1663.

Ohio — Necessity of asking referee for new trial.— Where, under Rev. St. § 5210, the court appoints a referee to hear and determine all the issues of fact and law in a case, and to report his findings of fact and conclusions of law separately, a party desiring to review in the higher court the findings of fact on the weight of the evidence should ask the referee for a new trial by motion containing the proper ground for that purpose, and, if it be overruled, except thereto; and further, that to obtain such review, as well as a review of any other errors committed on the trial, a bill of exceptions must be tendered to and signed by the referee. Guthrie *v.* Angosta Milling Co., 17 Ohio Cir. Ct. 256, 9 Ohio Cir. Dec. 739.

In New York the rule is different from that stated in the text. It has been held that one unsuccessfully opposing confirmation of a referee's report on a claim against an estate may appeal from the judgment entered thereon, without first moving at special term for a new trial upon a case and exceptions. Kellogg *v.* Clark, 23 Hun 393; Broughton *v.* Mitchell, 19 Abb. Pr. 163, 29 How. Pr. 68. See also Cook *v.* Darrow, 22 Hun 306.

In North Carolina exceptions to a referee's report are passed upon by the judge whose rulings upon the exceptions to findings of fact are final and whose rulings upon exceptions to the conclusions of law are reviewable, if duly excepted to, without being made the foundation of a motion for a new trial. Parker *v.* McPhail, 112 N. C. 502, 16 S. E. 848: Gatewood *v.* Burns, 99 N. C. 357, 6 S. E. 635; Green *v.* Castlebury, 70 N. C. 20.

42. Donahue *v.* Maloney, 14 Mo. App. 578; Light *v.* Kennard, 11 Nebr. 129, 7 N. W. 539.

43. Griffin *v.* Jorgenson, 22 Minn. 92.

44. Lyons *v.* Osborn, 45 Kan. 650, 26 Pac. 31.

45. Kelly *v.* Lawson, 39 Ind. App. 613, 80 N. E. 553; Biart *v.* Myers, 59 Nebr. 711, 82 N. W. 7; Weitz *v.* Walter A. Wood Reaping, etc., Mach. Co., 49 Nebr. 434, 68 N. W. 613; Claflin *v.* American Nat. Bank, 46 Nebr. 884, 65 N. W. 1056; Dryfus *v.* Moline, etc., Co., 43 Nebr. 233, 61 N. W. 599; Leach *v.* Sutphen, 11 Nebr. 527, 10 N. W. 409; Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237; Bastian *v.* Adams, 5 Nebr. (Unoff.) 32, 97 N. W. 231.

Appeal from order of licensing board.— A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on a hearing of an appeal taken from the order of a license board granting or refusing a license to sell intoxicating liquors. Lee *v.* Brittain, (Nebr. 1905) 104 N. W. 1076; *In re* Krug, 72 Nebr. 576, 101 N. W. 242; Bennett *v.* Otto, 68 Nebr. 652, 94 N. W. 807.

an action originating in the court of a justice of the peace, until a motion for new trial has first been made in the county court upon the case and exceptions.[46] In Missouri it has been held that rulings of a circuit court setting aside an affirmance at the same term of a judgment of a justice of the peace and denying a motion to affirm such judgment cannot be reviewed on appeal where no exception was taken thereto, no bill of exceptions made, and there was no motion for a new trial or in arrest of judgment.[47] In Texas it has been held that on application for a writ of error of the court of civil appeals grounds not presented to that court in a motion for rehearing as required by supreme court rules cannot be considered.[48]

F. Necessity of Motion Considered in Relation to Particular Errors — 1. Rulings in Relation to Admission or Exclusion of Evidence — a. Statement and Extent of Rule. In many jurisdictions the right to take advantage of error in the admission or rejection of evidence will be deemed waived unless a new trial is moved for on that ground,[49] and that too, although exceptions to the

46. Tallman *v.* American Express Co., 6 Hun (N. Y.) 377; Murray *v.* Vanderveer, 6 Hun (N. Y.) 302; Dabash *v.* Flanders, 2 Thomps. & C. (N. Y.) 445; Simmons *v.* Sherman, 30 How. Pr. (N. Y.) 4; Carter *v.* Werner, 27 How. Pr. (N. Y.) 385. But see Broughton *v.* Mitchell, 19 Abb. Pr. (N. Y.) 163, 29 How. Pr. 68; Monroe *v.* Monroe, 27 How. Pr. (N. Y.) 208.

47. Frick Co. *v.* Marshall, 86 Mo. App. 463; Mockler *v.* Skellett, 36 Mo. App. 174. See also Lewis *v.* Moxey, 9 Mo. App. 597, in which it was held that the action of the trial court in overruling a motion to affirm the judgment of a justice for want of notice of appeal will not be reviewed in the appellate court if not noticed in the motion for new trial.

48. San Antonio *v.* Hoefling, 90 Tex. 511, 39 S. W. 918; Nixon *v.* Malone, (Tex. 1906) 98 S. W. 380 [*modifying* (Civ. App. 1906) 95 S. W. 585]. See also Nixon *v.* Malone, (Tex. 1907) 99 S. W. 403.

49. *Alabama.*—Mobile *v.* Murphree, 96 Ala. 141, 11 So. 201.

Arizona.— Green *v.* Miller, (1890) 73 Pac. 399; Newhall *v.* Porter, 7 Ariz. 160, 62 Pac. 689.

Arkansas.— Young *v.* Stevenson, 75 Ark. 181, 86 S. W. 1000; Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879; St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941; Pearrow *v.* Gleason, (1899) 50 S. W. 870; Knox *v.* Hellums, 38 Ark. 413; Young *v.* King, 33 Ark. 745; Lambert *v.* Killian, 27 Ark. 549; Ward *v.* Carlton, 26 Ark. 662; Steck *v.* Mahar, 26 Ark. 536; Graham *v.* Roark, 23 Ark. 19.

California.— Smith *v.* Smith, (1897) 48 Pac. 730.

Georgia.— Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646; Irvin *v.* Corbin, 57 Ga. 594; Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.— Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798; Toluca *v.* Arnold, 108 Ill. App. 584; Voigt *v.* Anglo-American Provision Co., 104 Ill. App. 423 [*affirmed* in 202 Ill. 462, 66 N. E. 1054]; Illinois Cent. R. Co. *v.* Johnson, 95 Ill. App. 54 [*affirmed* in 191 Ill. 594, 61 N. E. 334].

Indiana.— Storer *v.* Markley, 164 Ind. 535, 73 N. E. 1081; Hartwell *v.* Peck, 163 Ind. 357, 71 N. E. 958; Hedrick *v.* Hall, 155 Ind. 371, 58 N. E. 257; Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49; Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Balue *v.* Sear, 131 Ind. 301, 28 N. E. 707; McGuffey *v.* McClain, 130 Ind. 327, 30 N. E. 296; Racer *v.* Baker, 113 Ind. 177, 14 N. E. 241; Harter *v.* Eltzroth, 111 Ind. 159, 12 N. E. 129; Moore *v.* Harland, 107 Ind. 474, 8 N. E. 272; Frybarger *v.* Andre, 106 Ind. 337, 7 N. E. 5; Trout *v.* Percifnl, 105 Ind. 532, 5 N. E. 558; Lake Erie, etc., R. Co. *v.* Parker, 94 Ind. 91; Kenney *v.* Phillipy, 91 Ind. 511; Boots *v.* Griffith, 89 Ind. 246; Malson *v.* State, 75 Ind. 142; Owen *v.* Phillips, 73 Ind. 284; Stahl *v.* Hammontree, 72 Ind. 103; Merrifield *v.* Weston, 68 Ind. 70; Vandever *v.* Garshwiler, 63 Ind. 185; Kyser *v.* Wells, 60 Ind. 261; Fromer *v.* State, 49 Ind. 580; Parks *v.* Hill, 45 Ind. 172; McDill *v.* Gunn, 43 Ind. 315; Harding *v.* Whitney, 40 Ind. 379; Sage *v.* Brown, 34 Ind. 464; Ringle *v.* Bicknell, 32 Ind. 369; Horton *v.* Wilson, 25 Ind. 316; Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413; McCammock *v.* Clark, 16 Ind. 320; Hindman *v.* Troxell, 15 Ind. 123; State *v.* Manly, 15 Ind. 8; Ridge *v.* Sunman, 14 Ind. 540; Fleming *v.* Potter, 14 Ind. 486; Daily *v.* Nuttman, 14 Ind. 339; Kent *v.* Lawson, 12 Ind. 675, 74 Am. Dec. 233; Capital Nat. Bank *v.* Wilkerson, 36 Ind. App. 550, 76 N. E. 258; Nordyke, etc., Co. *v.* Keokuk Bag Co., 26 Ind. App. 548, 59 N. E. 393; Adams *v.* Ulsh, 26 Ind. App. 516, 60 N. E. 162; Jean *v.* State, 25 Ind. App. 339, 58 N. E. 209; Marion School Tp. *v.* Carpenter, 12 Ind. App. 191, 39 N. E. 878; Knisely *v.* Hire, 2 Ind. App. 86, 28 N. E. 195; Ortwein *v.* Jeffries, 1 Ind. App. 290, 27 N. E. 570.

Iowa.— Crawford *v.* Nebraska University Athletic Assoc., 111 Iowa 736, 82 N. W. 944, which, however, is not in accord with the general rule prevailing in Iowa. See *infra*, II, F, 2, b. And see McCoy *v.* Julien, 15 Iowa 371.

Kansas.—Schaum *v.* Watkins, (App. 1897) 50 Pac. 951; Golding *v.* Eidson, 2 Kan. App. 307, 43 Pac. 104.

Kentucky.— Green *v.* Green, 119 Ky. 103,

rulings alleged to be erroneous have been taken,[50] and although there has been a joinder by the appellee in the errors assigned.[51] This general doctrine has also

82 S. W. 1011, 26 Ky. L. Rep. 1007; Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734; Henderson *v.* Dupree, 82 Ky. 678; Com. *v.* Williams, 14 Bush 297; McLain *v.* Dibble, 13 Bush 297; Humphreys *v.* Walton, 2 Bush 580; Finley *v.* Curd, 62 S. W. 501, 22 Ky. L. Rep. 1912; Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836; Louisville, etc., R. Co. *v.* Henry, 44 S. W. 428, 19 Ky. L. Rep. 1783; Todd *v.* Louisville, etc., R. Co., 11 S. W. 8, 10 Ky. L. Rep. 864; Com. *v.* McKee, 15 Ky. L. Rep. 207; Coombs *v.* Stilzer, 13 Ky. L. Rep. 332; Binkley *v.* Berry, 9 Ky. L. Rep. 57.

Missouri.— Phillips *v.* Jones, 176 Mo. 328, 75 S. W. 920; Needles *v.* Ford, 167 Mo. 495, 67 S. W. 240; Ward *v.* Gentry County Bd. of Equalization, 135 Mo. 309, 36 S. W. 648; Mays *v.* Mays, 114 Mo. 536, 21 S. W. 921; St. Louis *v.* Sieferer, 111 Mo. 662, 20 S. W. 318; German Sav. Inst. *v.* Jacoby, 97 Mo. 617, 11 S. W. 256; St. Louis *v.* Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477; Giddings *v.* Phœnix Ins. Co., 90 Mo. 272, 2 S. W. 139; Snell *v.* Harrison, 83 Mo. 651; State *v.* Richardson, 77 Mo. 589; Hulett *v.* Nugent, 71 Mo. 131; Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Carver *v.* Thornhill, 53 Mo. 283; Margrave *v.* Ausmuss, 51 Mo. 561; Saxton *v.* Allen, 49 Mo. 417; Kanada *v.* North, 14 Mo. 615; Vivian *v.* Lafayette County, 13 Mo. 453; Pogue *v.* State, 13 Mo. 444; Lyle *v.* White, 11 Mo. 624; Rhodes *v.* White, 11 Mo. 623; Floersh *v.* State Bank, 10 Mo. 515; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; Gordon *v.* Mansfield, 84 Mo. App. 367; Cody *v.* Gutman, 73 Mo. App. 263; Maxwell *v.* Edens, 65 Mo. App. 439; Smith *v.* Zimmerman, 51 Mo. App. 519; Johnson *v.* Loomis, 50 Mo. App. 142; Gentry *v.* Templeton, 47 Mo. App. 55; Powell *v.* Palmer, 45 Mo. App. 236; Fields *v.* Baum, 35 Mo. App. 511; Albert *v.* Seiler, 31 Mo. App. 247; Thomas *v.* Hooker-Colville Steam Pump Co., 28 Mo. App. 563.

Montana.— Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123.

Nebraska.— Pioneer Sav., etc., Co. *v.* Eyer, 62 Nebr. 810, 87 N. W. 1058; Humpert *v.* McGavock, 59 Nebr. 346, 80 N. W. 1038; Burke *v.* Brown, 49 Nebr. 723, 68 N. W. 1026; Miller *v.* Antelope County, 35 Nebr. 237, 52 N. W. 1116; Yates *v.* Kinney, 25 Nebr. 120, 41 N. W. 128; Republican Valley R. Co. *v.* Hayes, 13 Nebr. 489, 14 N. W. 521; Johnson *v.* Ghost, 11 Nebr. 414, 8 N. W. 391; Birdsall *v.* Carter, 11 Nebr. 143, 7 N. W. 751; Stanton County *v.* Canfield, 10 Nebr. 389, 6 N. W. 466; McCormick *v.* Keith, 8 Nebr. 142; Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811; Scofield *v.* Brown, 7 Nebr. 221; Saling *v.* Saling, 4 Nebr. (Unoff.) 507, 94 N. W. 963; State *v.* Alstadt, 4 Nebr. (Unoff.) 211, 93 N. W. 696; Kellar *v.* Van Brunt, 1 Nebr. (Unoff.) 301, 95 N. W. 668; Quigley *v.* Mulford, 1 Nebr. (Unoff.) 265, 95 N. W. 490.

New Mexico.— Rogers *v.* Richards, 8 N. M. 658, 47 Pac. 719; Territory *v.* Anderson, 4 N. M. 213, 13 Pac. 21.

New York.—Alden *v.* Supreme Tent of K. M., 178 N. Y. 535, 71 N. E. 104 [*reversing* 78 N. Y. App. Div. 18, 79 N. Y. Suppl. 89].

Ohio.— Dummick *v.* Howitt, 8 Ohio Dec. (Reprint) 196, 6 Cinc. L. Bul. 247.

Oklahoma.— Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944.

South Dakota.— State *v.* Pierre, 15 S. D. 559, 90 N. W. 1047.

Utah.— Touse *v.* Consolidated R., etc., Co., 29 Utah 95, 80 Pac. 506.

Virginia.— Bridgewater *v.* Allemong, 93 Va. 542, 25 S. E. 595; Newberry *v.* Williams, 89 Va. 298, 15 S. E. 865.

West Virginia.— Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240; Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953.

See 2 Cent. Dig. tit. "Appeal and Error," § 1691.

Contra.— McFadden *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1906) 92 S. W. 989. See also Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

Effect of overruling motion at request of party making.— Where a motion for a new trial has been overruled at the request of the party making it, such ruling being not assignable as error, the appellate court cannot review the rulings of the court with respect to the admission or exclusion of evidence. Brecher *v.* Chicago Junction R. Co., 119 Ill. App. 554.

The rejection of competent evidence which pertained to the amount of the damages cannot be complained of where the excessiveness of the verdict was not made one of the grounds for a new trial. Danley *v.* Hibbard, 123 Ill App. 666 [*affirmed* in 222 Ill. 88, 78 N. E. 39].

50. *Kentucky.*— Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734.

Missouri.— Hill *v.* Alexander, 77 Mo. 296; Hannibal, etc., R. Co. *v.* Clark, 68 Mo. 371; Vineyard *v.* Matney, 68 Mo. 105; Berman *v.* Hoke, 61 Mo. App. 376; Warren County Bank *v.* Kemble, 61 Mo. App. 215; Hubbard *v.* Quisenberry, 32 Mo. App. 459; Simpson *v.* Schulte, 21 Mo. App. 639.

Nebraska.— Johnson *v.* Ghost, 11 Nebr. 414, 8 N. W. 391.

New Mexico.—Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21.

Ohio.— Dummick *v.* Howitt, 8 Ohio Dec. (Reprint) 196, 6 Cinc. L. Bul. 247.

Texas.— Pendarvis *v.* Gray, 41 Tex. 326.

Virginia.— Bridgewater *v.* Allemong, 93 Va. 542, 25 S. E. 595.

West Virginia.— Brown *v.* Brown, 29 W. Va. 777, 2 S. E. 808.

See 2 Cent. Dig. tit. "Appeal and Error," § 1691.

51. Mobile *v.* Murphree, 96 Ala. 141, 11 So. 201.

been held to apply in the case of an erroneous refusal of the court to strike out evidence.[52]

b. Limitations of Rule. In some jurisdictions certain limitations have been placed upon the general doctrine as stated. Thus in one state it has been held that while the supreme court will not allow questions of the admissibility of the evidence to be raised by bills of exception, but requires that they be presented on motion for new trial, yet such questions may be presented in special findings and then they will be treated precisely as if brought up by motion for new trial.[53] In another where no statement in writing of the points relied on for a new trial is filed with the motion and no objection is made because of the omission to file such statement, the filing of such statement will be treated as waived and cannot be urged in the appellate court;[54] but where there is a written motion assigning reasons therefor and the admission or exclusion of evidence is not one of the reasons assigned, it cannot be considered on appeal.[55]

2. Rulings in Relation to Giving or Refusing Instructions — a. View That Motion Is Necessary. In a considerable number of states it is well settled that objections to the giving or refusing of instructions will not be reviewed unless presented to the trial court as a ground for new trial.[56] This is true, although exceptions were

Contra, in North Carolina, where it is sufficient if exception is taken at the time to the exclusion or admission of evidence and such exception is preserved in the case on appeal. Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266; Clark Code Civ. Proc. (1900) pp. 921–924.

52. Pennsylvania County *v.* Smith, 98 Ind. 42.

Refusal to strike out deposition.— An objection to the court's refusal to strike out a deposition is waived by the failure to assign specific error on a motion for new trial. Morningstar *v.* Hardwick, 3 Ind. App. 431, 29 N. E. 929.

A refusal to strike matter from a deposition will not be reviewed if it was not assigned as error on motion for new trial. Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154.

53. Selleck *v.* Rusco, 46 Conn. 370.

54. Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104.

55. Cary *v.* Welch, 79 Ill. App. 401; Corbin *v.* Western Electric Co., 78 Ill. App. 516; Hardy *v.* Chicago, etc., R. Co., 58 Ill. App. 278; Chicago, etc., R. Co. *v.* Elmore, 32 Ill. App. 418; Miller *v.* Ridgely, 19 Ill. App. 306.

56. *Alabama.*—Montgomery Traction Co. *v.* Haygood, (1907) 44 So. 560.

Arizona.— Pringle *v.* King, (1904) 78 Pac. 367.

Arkansas.— Massey *v.* Dixon, (1907) 99 S. W. 383; Schenck *v.* Griffith, 74 Ark. 557, 86 S. W. 850; Savage *v.* Lichlyter, 59 Ark. 1, 26 S. W. 12; Adler-Goldman Commission Co. *v.* Hathcock, 55 Ark. 579, 18 S. W. 1048; Fry *v.* Ford, 38 Ark. 246; Ray *v.* Light, 34 Ark. 421; Young *v.* King, 33 Ark. 745; Lambert *v.* Killian, 27 Ark. 549; Steck *v.* Mahar, 26 Ark. 536; McCarroll *v.* Stafford, 24 Ark. 224.

Georgia.— Ray *v.* Morgan, 112 Ga. 923, 38 S. E. 335; Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407; Irvin *v.* Corbin, 57 Ga. 594; Whitlock *v.* Gains, 28 Ga. 25.

Indiana.— Young *v.* Montgomery, 161 Ind. 68, 67 N. E. 684; Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Cline *v.* Lindsey, 110 Ind. 337, 11 N. E. 441; Northwest Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24; Wright *v.* Nipple, 92 Ind. 310; Williams *v.* Riley, 88 Ind. 290; Louisville, etc., R. Co. *v.* Krinnings, 87 Ind. 351; Taylor *v.* Shelkett, 66 Ind. 297; Vandever *v.* Garshwiler, 63 Ind. 185; Bridgewater *v.* Bridgewater, 62 Ind. 82; Freeze *v.* De Puy, 57 Ind. 188; Eckleman *v.* Miller, 57 Ind. 88; Sowle *v.* Cosner, 56 Ind. 276; Patterson *v.* Indianapolis, etc., Plank-Road Co., 56 Ind. 20; Schenck *v.* Butsch, 32 Ind. 338; Hallock *v.* Iglehart, 30 Ind. 327; Smith *v.* Allen, 16 Ind. 316; Kent *v.* Lawson, 12 Ind. 675, 74 Am. Dec. 233; Baecher *v.* State, 19 Ind. App. 100, 49 N. E. 42; Fourthman *v.* Fourthman, 15 Ind. App. 199, 43 N. E. 965; Cannelton Water Co. *v.* Burkett, 13 Ind. App. 277, 41 N. E. 477.

Indian Territory.— Missouri, etc., R. Co. *v.* Wilhoit, 6 Indian Terr. 534, 98 S. W. 341; Gooding *v.* Watkins, 5 Indian Terr. 578, 82 S. W. 913.

Kentucky.— Humphreys *v.* Walton, 2 Bush 580; Letton *v.* Young, 2 Metc. 558; Gray *v.* Parrott, 99 S. W. 640, 30 Ky. L. Rep. 777; Merchants' Nat. Bank *v.* Ford, 99 S. W. 260, 30 Ky. L. Rep. 558; Brownsville *v.* Arbuckle, 99 S. W. 239, 30 Ky. L. Rep. 414; Louisville Water Co. *v.* Phillips, 89 S. W. 700, 28 Ky. L. Rep. 557; Hoskins *v.* Brown, 84 S. W. 767, 27 Ky. L. Rep. 216; Evening Post Co. *v.* Caufield, 66 S. W. 502, 23 Ky. L. Rep. 2028; Castle *v.* Bays, 40 S. W. 242, 19 Ky. L. Rep. 345; Green *v.* Culver, 39 S. W. 426, 19 Ky. L. Rep. 186; American Ins. Co. *v.* Austin, 37 S. W. 678, 18 Ky. L. Rep. 632; Mercer *v.* King, 13 Ky. L. Rep. 429; Louisville, etc., R. Co. *v.* Yowell, 10 Ky. L. Rep. 721; Alexander *v.* Humber, 6 S. W. 453, 9 Ky. L. Rep. 734; Daniels *v.* Carter, 6 Ky. L. Rep. 585; Gutzwilder *v.* Wagner, 3 Ky. L. Rep. 470.

Missouri.— State *v.* Thompson, 149 Mo. 441, 51 S. W. 98; Wilson *v.* Taylor, 119 Mo. 626, 25 S. W. 199; State *v.* Johnson, 115

saved at the time the alleged erroneous ruling was made,[57] although the instructions are made part of the record by bill of exceptions,[58] and although the ruling is challenged by the petition in error and in argument of counsel.[59]

b. View That Motion Is Not Necessary. In two states, Florida and North Carolina, no motion for new trial is necessary to preserve for review in the supreme court error in the giving or refusing of instructions.[60] In both of these states it seems that a motion for new trial is not necessary in any case. But in one of them a motion for new trial based on error in giving or refusing instructions is not improper.[61] In three other states, North Dakota, Tennessee, and Texas, where a motion for new trial is in some cases necessary, it is not necessary to preserve for review error in the giving or refusing of instructions.[62] In Illi-

Mo. 480, 22 S. W. 463; State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; Griffith *v.* Hanks, 91 Mo. 109, 4 S. W 508; Light *v.* St. Louis, etc., R. Co., 89 Mo. 108, 1 S. W. 380; Gaines *v.* Fender, 82 Mo. 497; Griffin *v.* Regan, 79 Mo. 73; State *v.* Richardson, 77 Mo. 589; Anthony *v.* St. Louis, etc., R. Co., 76 Mo. 18; Matlock *v.* Williams, 59 Mo. 105; Brady *v.* Connelly, 52 Mo. 19; Vivian *v.* Lafayette County, 13 Mo 453; Pogue *v.* State, 13 Mo. 444; Gordon *v.* Gordon, 13 Mo. 215; Lyle *v.* White, 11 Mo. 624; Rhodes *v.* White, 11 Mo. 623; Floersh *v.* State Bank, 10 Mo. 515; Brown *v.* Mays, 80 Mo. App. 81; Fields *v.* Baum, 35 Mo. App. 511; Crum *v.* Elliston, 33 Mo. App. 620; McPherson *v.* Meyer, 1 Mo. App. Rep. 464; State *v.* Ragsdale, 59 Mo. App. 590; King *v.* Greaves, 51 Mo. App. 534; Connelly *v.* Shamrock Benev. Soc., 43 Mo. App. 283; Price *v.* Vanstone, 40 Mo. App. 207.

Nebraska.— Tarpenning *v.* Knapp, (1907) 112 N. W. 290; Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99; Peaks *v.* Lord, 42 Nebr. 15, 60 N. W. 349; Wanzer *v.* State, 41 Nebr. 238, 59 N. W. 909; Barton *v.* McKay, 36 Nebr. 632, 54 N. W 968; Hanover F. Ins. Co. *v.* Schellak, 35 Nebr. 701, 53 N. W. 605; Walker *v.* Haggerty, 30 Nebr. 120, 46 N. W. 221; Sherwin *v.* O'Connor, 24 Nebr. 603, 39 N. W. 620; Omaha, etc., R. Co. *v.* O'Donnell, 22 Nebr. 475, 35 N. W. 235; Nyce *v.* Shaffer, 20 Nebr. 507, 30 N. W. 943; Schreckengast *v.* Ealy, 16 Nebr. 510, 20 N. W. 853; Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762; Cleveland Paper Co. *v.* Banks, 15 Nebr. 20, 16 N. W. 833, 48 Am. Rep. 344; McCormick *v.* Keith, 8 Nebr. 142.

New Mexico.— Rogers *v.* Richards, 8 N. M. 658, 47 Pac. 719.

Oklahoma.— Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944.

South Carolina.— Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762.

West Virginia.—Brown *v.* Brown, 29 W. Va. 777, 2 S. E. 808.

See 2 Cent. Dig. tit. "Appeal and Error," § 1697.

In North Carolina it will suffice if the exceptions are set out in the case on appeal. Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266.

Error in giving modified instructions can only be saved by a motion for a new trial. Central Union Bldg. Co *v.* Kolander, 212 Ill. 27, 72 N. E. 50 [*affirming* 113 Ill. App. 305]; Citizens St. R. Co. *v.* Shepherd, 30 Ind. App. 193, 65 N. E. 765, 29 Ind. App. 412, 62 N. E. 300; Kimball-Fowler Cereal Co. *v.* Chapman, etc., Lumber Co., 125 Mo. App. 326, 102 S. W. 625.

The general objection in a motion for new trial that the verdict was contrary to the evidence is not sufficient to entitle complainant to urge objections to the instructions on appeal. Alexander *v.* Flood, 77 Miss. 925, 28 So. 787.

That instructions given were not full enough.—An assignment of error that the instructions given were not full enough, and that the court failed to instruct on certain relevant matters, is not available, unless proper instructions covering the omitted points were tendered and refused, and such refusal was made a ground for motion for new trial. Conner *v.* Citizens' St. R. Co., (Ind. 1896) 44 N. E. 16; Howard *v.* Turner, 125 N. C. 107, 34 S. E. 229; State *v.* Ridge, 125 N. C. 655, 34 S. E. 439; Clark Code Civ. Proc. (1900) p. 514.

Giving instruction on its own motion instead of one requested.— The action of the court in refusing a special charge and in giving an erroneous instruction on its own motion will be considered on appeal only when assigned as error in the motion for new trial. Knisely *v.* Hire, 2 Ind. App. 86, 28 N. E. 195. Or in some states by exceptions filed thereto in apt time. Tillett *v.* Lynchburg, etc., R. Co., 116 N. C. 937, 21 S. E. 698; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922.

57. Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734; Brown *v.* Mays, 80 Mo. App. 81; Linneus *v.* Dusky, 19 Mo. App. 20.

58. Bodamer *v.* Hutton, 40 Ind. 244.

59. Dunphy *v.* Bartenbach, 40 Nebr. 143, 58 N. W. 856. *Contra*, State *v.* Varner, 115 N. C. 744, 20 S. E. 518; Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175.

60. Williams *v.* La Penotiere, 32 Fla. 491, 14 So. 157; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

61. Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513. See cases collected in Clark Code Civ. Proc. (1900) p. 513.

62. Minnesota Security Bank *v.* Kingsland,

nois no motion for new trial is necessary to present to the reviewing court error in giving or refusing instructions.[63] But if a motion for new trial is made in writing and error in the giving or refusing of instructions is not enumerated therein, the action of the trial court cannot be reviewed.[64] In Iowa, under a statute providing that "the supreme court, on appeal, may review and reverse any judgment or order of the superior or district court, although no motion for a new trial was made in such court" error in the giving or refusing of instructions to which exceptions have been duly saved may be considered on appeal, although not made the basis of a motion for new trial,[65] or although the motion for a new trial in which they are incorporated is stricken from the files because filed too late.[66]

3. Giving Oral Instead of Written Instructions. Error in giving an oral instruction to the jury instead of a written one is no exception to the rule that all alleged errors occurring during the trial of a cause must be excepted to and complained of in the motion for new trial in order to obtain a review of the same in the supreme court, even though the instruction orally given forms but a small part of the charge.[67]

4. Time of Giving Instructions. Error in giving an instruction to the jury after the submission of the cause,[68] or in recalling the jury and substituting instructions for those given, will be disregarded unless presented in the motion for new trial.[69]

5. Giving Instructions in Absence of Counsel. So the objection that the court instructed the jury in the absence of counsel cannot be heard on appeal when not alleged in the motion for new trial.[70]

6. Filing and Marking Instructions. Neglect of the court to file with the clerk instructions given must be called to the attention of the court by means of a motion for new trial in order to be available as ground for reversal.[71] So failure of the court to mark an instruction "given" must be made the ground for a motion for new trial to be available on appeal.[72]

5 N. D. 263, 65 N. W. 697; McPherrin *v.* Jones, 5 N. D. 261, 65 N. W. 685; Luty *v.* Purdy, 2 Overt. (Tenn.) 163; Western Union Tel. Co. *v.* Mitchell, 89 Tex. 441, 35 S. W. 4; Gulf, etc., R. Co. *v.* Sparger, (Tex. Civ. App. 1895) 32 S. W. 49; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Allen *v.* Stephanes, 18 Tex. 658; McFadden *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1906) 92 S. W. 989; Northern Texas Traction Co. *v.* Jamison, (Tex. Civ. App. 1905) 85 S. W. 305; Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371. *Contra*, Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702; Hammond *v.* Garcia, (Tex. Civ. App. 1894) 25 S. W. 823.

63. Illinois Cent. R. Co. *v.* O'Keefe, 154 Ill. 508, 39 N. E. 606. See also McClurkin *v.* Ewing, 42 Ill. 282; Hill *v.* Chicago R. Co., 126 Ill. App. 152; Gerhards *v.* Johnson, 105 Ill. App. 65; Bennett *v.* Brown Hoisting, etc., Mach. Co., 89 Ill. App. 113.

Where the propriety of giving or refusing instructions raises only a question of law, a motion for a new trial is not required in order to entitle the party complaining to a review of the instructions on appeal. Bennett *v.* Brown Hoisting, etc., Mach. Co., 89 Ill. App. 113.

64. French *v.* French, 215 Ill. 470, 74 N. E. 403; Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77]; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; St. Louis Consol. Coal Co. *v.* Schaefer, 135 Ill. 210, 25 N. E. 788; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Toluca *v.* Arnold, 108 Ill. App. 584; Supreme Court of Honor *v.* Barker, 96 Ill. App. 490; Theile *v.* Chicago Brick Co., 60 Ill. App. 559; Hoffmann *v.* World's Columbian Exposition, 55 Ill. App. 290; Stuve *v.* McCord, 52 Ill. App. 331; Baylor *v.* Baylor, 9 Ill. App. 410. *Contra*, Smith *v.* Hall, 37 Ill. App. 28; Lyenberger *v.* Paul, 25 Ill. App. 480.

Where a motion for a new trial has been overruled at the request of the party making it, such ruling being not assignable as error, the appellate court may pass on alleged errors in the instructions. Brecher *v.* Chicago Junction R. Co., 119 Ill. App. 554.

65. Schulte *v.* Chicago, etc., R. Co., 124 Iowa 191, 99 N. W. 714; Ellis *v.* Leonard, 107 Iowa 487, 78 N. W. 246.

66. Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222.

67. Horbach *v.* Miller, 4 Nebr. 31.

68. Cordes *v.* Straszer, 8 Mo. App. 61.

69. Hofheimer *v.* Losen, 24 Mo. App. 652.

70. Kuhl *v.* Long, 102 Ala. 563, 15 So. 267.

Special interrogatories.— Any error of the court in submitting special interrogatories to the jury without first submitting them to counsel, not having been assigned in the motion for new trial, cannot be complained of on appeal. Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209].

71. Chicago, etc., R. Co. *v.* Shafer, 49 Nebr. 25, 68 N. W. 342; Tagg *v.* Miller, 10 Nebr. 442, 6 N. W. 764.

72. Fish *v.* Chicago, etc., R. Co., 81 Iowa 280, 46 N. W. 998; Tagg *v.* Miller, 10 Nebr. 442, 6 N. W. 764.

7. Declarations of Law. Although there is an exception to declarations of law made by the court, they will be deemed waived if not made the basis of a motion for a new trial in certain states, as already stated.[73]

8. Sufficiency of Evidence to Support Verdict — a. Statement of Rule. In the majority of the states the rule is well settled that the appellate court cannot review the evidence for the purpose of determining whether it sustains the verdict of the jury, unless a motion for new trial on that ground was made in the court below.[74] So in another state it is held that, except in extreme cases, a judgment

73. Pearrow *v.* Gleason, (Ark. 1899) 50 S. W. 870.

74. *Alabama.*— Main *v.* Galloway, (1905) 39 So. 770.

Arkansas.—State *v.* Jennings, 10 Ark. 428; Ringo *v.* Field, 6 Ark. 43.

California.— Forsythe *v.* Los Angeles R. Co., 149 Cal. 569, 87 Pac. 24; Green *v.* Green, 103 Cal. 108, 37 Pac. 188; Allen *v.* Fennon, 27 Cal. 68; Liening *v.* Gould, 13 Cal. 598.

Colorado.— Roop *v.* Delahaye, 2 Col. 307.

Georgia.— Bacon *v.* Jones, 117 Ga. 497, 43 S. E. 689; Ford *v.* Wilson, 85 Ga. 109, 11 S. E. 559; Sanders *v.* State, 84 Ga. 217, 10 S. E. 629; Stanford *v.* Treadwell, 69 Ga. 725; Crim *v.* Sellars, 37 Ga. 324; McRae *v.* Adams, 36 Ga. 442; Farris *v.* State, 35 Ga. 241; Ellington *v.* Coleman, 34 Ga. 425; Fish *v.* Van Winkle, 34 Ga. 339; Wright *v.* Georgia R., etc., Co., 34 Ga. 330.

Illinois.—Wehrheim *v.* Gilbert, 158 Ill. 542, 42 N. E. 142; McCord *v.* Mechanics' Nat. Bank, 84 Ill. 49; Law *v.* Fletcher, 84 Ill. 45; Reichwald *v.* Gaylord, 73 Ill. 503; Daniels *v.* Shields, 38 Ill. 197; Retzer *v.* Gourley, 80 Ill. App. 630; Dearhorn Foundry Co. *v.* Rielly, 79 Ill. App. 281; Mueller *v.* Grant, 26 Ill. App. 585; Rock Island *v.* Riley, 26 Ill. App. 171.

Indiana.— Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138; Galbreath *v.* Doe, 8 Blackf. 366; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Iowa.— Schulte *v.* Chicago, etc., R. Co., 124 Iowa 191, 99 N. W. 714.

Kansas.— Decker *v.* House, 30 Kan. 614, 1 Pac. 584; Cloud County *v.* Citizens' Nat. Bank, (App. 1898) 52 Pac. 703.

Kentucky.—Brown *v.* Bennett, 102 Ky. 518, 44 S. W. 85, 19 Ky. L. Rep. 1579.

Minnesota.— Barringer *v.* Stoltz, 39 Minn. 63, 38 N. W. 808; Byrne *v.* Minneapolis, etc., R. Co., 29 Minn. 200, 12 N. W. 698.

Mississippi.— Gale *v.* Lancaster, 44 Miss. 413.

Missouri.— Lyle *v.* White, 11 Mo. 624; Rhodes *v.* White, 11 Mo. 623; Montgomery *v.* Blair, 2 Mo. 189; Brun *v.* Dumay, 2 Mo. 125; Scudder *v.* Payton, 65 Mo. App. 314.

Montana.— Porter *v.* Clark, 6 Mont. 246, 11 Pac. 638.

Nebraska.—Kafka *v.* Union Stockyards Co., (1907) 110 N. W. 672; Cassidy *v.* Collier, 72 Nebr. 376, 100 N. W. 802; Hake *v.* Woolner, 55 Nebr. 471, 75 N. W. 1087; Hansen *v.* Kinney, 46 Nebr. 207, 64 N. W. 710.

Nevada.— Colquhoun *v.* Wells, 21 Nev. 459, 33 Pac. 977; Whitmore *v.* Shiverick, 3 Nev. 288.

New Hampshire.— Rockingham Bank *v.* Claggett, 29 N. H. 292.

New Mexico.— Rogers *v.* Richards, 8 N. M. 658, 47 Pac. 719; Sierra County *v.* Dona Ana County, 5 N. M. 190, 21 Pac. 83; Spiegelberg *v.* Mink, 1 N. M. 308.

New York.— Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Third Ave. R. Co. *v.* Ebling, 100 N. Y. 98, 2 N. E. 878; Boos *v.* World Mut. L. Ins. Co., 64 N. Y. 236; Morrison *v.* New York, etc., R. Co., 32 Barb. 568; Marquart *v.* La Farge, 5 Duer 559; Jaeger *v.* German-American Ins. Co., 94 N. Y. Suppl. 310; Leach *v.* Buffalo, etc., R. Co., 12 N. Y. Suppl. 416; Mass *v.* Ellis, 9 N. Y. St. 512, 12 N. Y. Civ. Proc. 323; Moorhead *v.* Holden, 7 N. Y. Civ. Proc. 188; Morange *v.* Morris, 12 Abb. Pr. 164, 20 How. Pr. 257.

Ohio.— Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Everett *v.* Sumner, 32 Ohio St. 562; Westfall *v.* Dungan, 14 Ohio St. 276.

South Dakota.— Gade *v.* Collins, 8 S. D. 322, 66 N. W. 466; Baird *v.* Gleckler, 7 S. D. 284, 64 N. W. 118; Jones Lumber, etc., Co. *v.* Faris, 5 S. D. 348, 58 N. W. 813; Norwegian Plow Co. *v.* Bellon, 4 S. D. 384, 57 N. W. 17; Evenson *v.* Webster, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802; Hawkins *v.* Hubbard, 2 S. D. 631, 51 N. W. 774; Pierce *v.* Manning, 2 S. D. 517, 51 N. W. 332.

Tennessee.—Wells *v.* Moseley, 4 Coldw. 401.

Texas.— Ellis *v.* Brooks, (1907) 102 S. W. 94; Degener *v.* O'Leary, 85 Tex. 171, 19 S. W. 1004; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Cain *v.* Mack, 33 Tex. 135; Pyron *v.* Grinder, 25 Tex. Suppl. 159; King *v.* Gray, 17 Tex. 62; Hart *v.* Ware, 8 Tex. 115; Wright *v.* Wright, 6 Tex. 3; Reynolds *v.* Williams, 1 Tex. 311; Foster *v.* Smith, 1 Tex. 70; Dean *v.* Cate, (Civ. App. 1905) 87 S. W. 234; Dodd *v.* Presley, (Civ. App. 1905) 86 S. W. 73; Cushman *v.* Masterson, (Civ. App. 1901) 64 S. W. 1031; San Antonio, etc., R. Co. *v.* Ilse, (Civ. App. 1900) 59 S. W. 564; Dockery *v.* Tyler Car, etc., Co., (Civ. App. 1896) 34 S. W. 660; Clarendon Land, etc., Co. *v.* McClelland, (Civ. App. 1895) 31 S. W. 1088; Western Union Tel. Co. *v.* Apple, (Civ. App. 1894) 28 S. W. 1022; Ft. Worth, etc., R. Co. *v.* Osborne, (Civ. App. 1894) 26 S. W. 274; Sanborn *v.* Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459.

Utah.— Oregon Short Line R. Co. *v.* Russell, 27 Utah 457, 76 Pac. 345.

Washington.— Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

Wisconsin.— Guetzkow *v.* Smith, 105 Wis. 94, 80 N. W. 1109; Shores Lumber Co. *v.*

will not be reversed on the facts where no motion for new trial was made in the court below;[75] and in another, a party who desires to challenge the sufficiency of evidence to support a verdict must either request that a verdict be directed in his favor or except to the charge of the court submitting questions of fact to the jury; in either of which cases he may review the ruling of the court as errors in law. Or he may move for a new trial on the ground of the insufficiency of the evidence. No other mode of raising the question of sufficiency of evidence is provided by law.[76]

b. Limitations of Rule. Nevertheless it has been held that even in the absence of a motion for new trial it is proper to determine whether there is any testimony whatever to support the verdict, and this on the ground that if there is no evidence then only a question of law was presented to the trial judge and a party ought not to be required to call his attention to the fact that the adverse party has no case or defense whatever.[77] So it has been held that where the court below ruled on the sufficiency of the evidence on a motion to direct the verdict for defendant, the sufficiency of the evidence to sustain the verdict may be reviewed on appeal from the judgment, although no motion for new trial had been made.[78] So also the sufficiency of the evidence to sustain a verdict may be reviewed on appeal where such verdict resulted on an inquest of damages ensuing the entry of a default against defendant, notwithstanding there was no motion to set aside the verdict.[79]

9. Verdict Opposed to Evidence. It has been similarly held that the objection that the verdict is contrary to the evidence must be raised by motion for new trial before it can be considered by the reviewing court.[80]

10. Sufficiency of Evidence to Support Findings or Judgment — a. View That Motion Is Necessary. In most jurisdictions where a motion for new trial is necessary to authorize the reviewing court to consider the objection that the evidence is insufficient to support the verdict, a motion for new trial is equally necessary to present the objection that the findings or judgment of the trial judge in an action tried by the court are not supported by the evidence.[81] This rule, it has been

Starke, 100 Wis. 498, 76 N. W. 366; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182; Anstedt *v.* Bentley, 61 Wis. 629, 21 N. W. 807; Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689; Hayward *v.* Ormsbee, 11 Wis. 3.

Wyoming.— U. S. *v.* Trabing, 3 Wyo. 144, 6 Pac. 721.

See 2 Cent. Dig. tit. "Appeal and Error," § 1727.

Failure of proof on particular facts.—When it appears that no question was made on the trial as to plaintiff's incorporation, and the motion for new trial does not suggest failure of proof thereof, the fact that the bill of exceptions does not preserve proof of such incorporation will not be ground for reversal. Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344.

A special finding by the jury is deemed conclusive on appeal, where it is not attacked in the written motion for a new trial specifying grounds therefor. Pittsburgh, etc., R. Co. *v.* Bovard, 121 Ill. App. 49 [*affirmed* in 223 Ill. 176, 79 N. E. 128]; Toluca *v.* Arnold, 108 Ill. App. 584.

75. Hogan *v.* Nicholson, 6 Rob. (La.) 361; Denton *v.* Murdock, 5 Rob. (La.) 127; Hughes *v.* Lee, 3 Rob. (La.) 429; Carter *v.* Cooper, 5 La. 446; Morgan *v.* Bickle, 2 Mart. N. S. (La.) 377; Lepretre *v.* Mioton, 1 Mart. N. S. (La.) 713; Woolsey *v.* Paulding, 9 Mart. (La.) 280.

76. Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127; Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192; Gade *v.* Collins, 8 S. D. 322, 66 N. W. 466.

77. Henderson *v.* Dupree, 82 Ky. 678.

78. Hefferen *v.* Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526; McGinn *v.* French, 107 Wis. 54, 82 N. W. 724.

79. Chicago, etc., Electric R. Co. *v.* Krempel, 116 Ill. App. 253.

80. *Georgia.*— Jacobs' Pharmacy Co. *v.* Norcross, 110 Ga. 304, 34 S. E. 999.

Indiana.— Adams *v.* Ulsh, 26 Ind. App. 516, 60 N. E. 162.

New Mexico.— Rogers *v.* Richards, 8 N. M. 658, 47 Pac. 719.

Ohio.— Mercantile Trust Co. *v.* Etna Iron Works, 4 Ohio Cir. Ct. 579, 2 Ohio Cir. Dec. 718; Celtic Bldg. Assoc. *v.* Regan, 9 Ohio Dec. (Reprint) 364, 12 Cinc. L. Bul. 236.

Texas.— Degener *v.* O'Leary, 85 Tex. 171, 19 S. W. 1004; White *v.* Wadlington, 78 Tex. 159, 14 S. W. 296; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W 863; Friar *v.* Orange, etc., R. Co., (Civ. App. 1907) 101 S. W. 274; Missouri, etc., R. Co. *v.* Ball, 25 Tex. Civ. App. 500, 61 S. W. 327.

See 2 Cent. Dig. tit "Appeal and Error," § 1727.

81. *Arizona.*— Turner *v.* Franklin, (1906) 85 Pac. 1070; Putnam *v.* Putnam, 2 Ariz. 259, 14 Pac. 356.

held, applies both to cases where the finding of the court is based in whole or in part upon its inferences drawn from circumstances established by the evidence but which do not give rise to any presumption at law, as to cases where there is a conflict of evidence as to such circumstances.[82]

b. View That Motion Is Not Necessary. In other jurisdictions this view has

Arkansas.— Griffith *v.* McPherrin, (1893) 22 S. W. 29; Taylor *v.* Van Meter, 53 Ark. 204, 13 S. W. 699; Smith *v.* Hollis, 46 Ark. 17; Obermier *v.* Core, 25 Ark. 562; Strayhorn *v.* Giles, 22 Ark. 517; Sandefur *v.* Mattingley, 16 Ark. 237; Camp *v.* Gullett, 7 Ark. 524. *Contra*, State *v.* Jennings, 10 Ark. 428; Campbell *v.* Thruston, 6 Ark. 441.

California.— Rankin *v.* Newman, 107 Cal. 602, 40 Pac. 1024; Raskin *v.* Robarts, (1894) 35 Pac. 763; Reed *v.* Bernal, 40 Cal. 628; Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Rice *v.* Inskeep, 34 Cal. 224; Gay *v.* Moss, 34 Cal. 125; James *v.* Williams, 31 Cal. 211; People *v.* Banvard, 27 Cal. 470; Allen *v.* Fennon, 27 Cal. 68; Gagliardo *v.* Hoberlin, 18 Cal. 394; Rhine *v.* Bogardus, 13 Cal. 73; Brown *v.* Graves, 2 Cal. 118; Griswold *v.* Sharpe, 2 Cal. 17.

Idaho.— Toulous *v.* Burkett, 2 Ida. (Hasb.) 184, 10 Pac. 26.

Indiana.— Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037; Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; Ritter *v.* Mendenhall, 38 Ind. 383; Roberts *v.* Smith, 34 Ind. 550; Caldwell *v.* Asbury, 29 Ind. 451; Whitinger *v.* Nelson, 29 Ind. 441; Nelson *v.* Hart, 14 Ind. 448; Little *v.* Waller, 14 Ind. 447; Filson *v.* Bleeker, 10 Ind. 544; Dearborn County Com'rs *v.* Tufts, 10 Ind. 421; Gates *v.* Meredith, 10 Ind. 275; Swarts *v.* State, 9 Ind. 293; Spencer *v.* Russell, 9 Ind. 157; Doe *v.* Herr, 8 Ind. 24; Stump *v.* Fraley, 7 Ind. 679; Leedy *v.* Capital Nat. Bank, 35 Ind. App. 247, 73 N. E. 1000; Kisling *v.* Barrett, 34 Ind. App. 304, 71 N. E. 507; Bass *v.* Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

Iowa.— Brayton *v.* Boone, 19 Iowa 506.

Kansas.— Moses *v.* White, (App. 1897) 51 Pac. 622; McNally *v.* Keplinger, 37 Kan. 556, 15 Pac. 534; Decker *v.* House, 30 Kan. 614, 1 Pac. 584.

Kentucky.— Albin Co. *v.* Ellinger, 103 Ky. 240, 44 S. W. 655, 19 Ky. L. Rep. 1886; Humphreys *v.* Walton, 2 Bush 580. *Compare* Union Ins. Co. *v.* Groom, 4 Bush 289.

Missouri.— Blakely *v.* Hannibal, etc., R. Co., 79 Mo. 388; Hobein *v.* Murphy, 33 Mo. 43; Freeland *v.* Eldridge, 19 Mo. 325; Hughes *v.* Fitzpatrick, 18 Mo. 254; Polk *v.* State, 4 Mo. 544; Davis *v.* Scripps, 2 Mo. 187; Brun *v.* Dumay, 2 Mo. 125; Green *v.* Supreme Lodge Nat. Reserve Assoc., 79 Mo. App. 179; Mahan *v.* School Dist. No. 1, 29 Mo. App. 269; Putnam *v.* Hannibal, etc., R. Co., 22 Mo. App. 589.

Montana.— Harrington *v.* Butte, etc., Min. Co., 35 Mont. 530, 90 Pac. 748; Alder Gulch Consol. Min. Co. *v.* Hayes, 6 Mont. 31, 9 Pac. 581; Twell *v.* Twell, 6 Mont. 19, 9 Pac. 537; Broadwater *v.* Richards, 4 Mont. 52, 80, 2 Pac. 544, 546; Largey *v.* Sedman, 3 Mont. 472; Chumasero *v.* Vial, 3 Mont. 376.

Nebraska.— Wollam *v.* Brandt, 56 Nebr. 527, 76 N. W. 1081; Gretna State Bank *v.* Grabow, 52 Nebr. 354, 72 N. W. 361; Hansen *v.* Kinney, 46 Nebr. 207, 64 N. W. 710; Losure *v.* Thompson, 45 Nebr. 466, 63 N. W. 863; Losure *v.* Miller, 45 Nebr. 465, 63 N. W. 863; Appelget *v.* McWhinney, 41 Nebr. 253, 59 N. W. 918; Brown *v.* Ritner, 41 Nebr. 52, 59 N. W. 360; Miller *v.* Antelope County, 35 Nebr. 237, 52 N. W. 1116; Lichty *v.* Clark, 10 Nebr. 472, 6 N. W. 760; Westervelt *v.* Baker, 1 Nebr. (Unoff.) 635, 95 N. W. 793.

Nevada.— State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; Beck *v.* Truckee Lodge, 18 Nev. 246, 2 Pac. 390; Bassett *v.* Monte Christo Gold, etc., Min. Co., 15 Nev. 293.

New Mexico.— Sierra County *v.* Dona Ana County, 5 N. M. 190, 21 Pac. 83.

New York.— Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Third Ave. R. Co. *v.* Ebling, 100 N. Y. 98, 2 N. E. 878; Passey *v.* Craighead, 89 Hun 76, 35 N. Y. Suppl. 36 [*affirmed* in 155 N. Y. 680, 50 N. E. 1120]; Wagner *v.* Jones, 7 Daly 375 [*affirmed* in 77 N. Y. 590]; Mass *v.* Ellis, 9 N. Y. St. 512.

Ohio.—Everett *v.* Sumner, 32 Ohio St. 562; Spangler *v.* Brown, 26 Ohio St. 389; Turner *v.* Turner, 17 Ohio St. 449; Westfall *v.* Dungen, 14 Ohio St. 276; Choteau *v.* Raitt, 20 Ohio 132; Kepner *v.* Snively, 19 Ohio 296; Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179; Buckeye Pipe Line Co. *v.* Fee, 15 Ohio Cir. Ct. 637, 8 Ohio Cir. Dec. 727; Mercantile Trust Co. *v.* Etna Iron Works, 4 Ohio Cir. Ct. 579, 2 Ohio Cir. Dec. 718; Werk *v.* Voss, 8 Ohio Dec. (Reprint) 205, 6 Cinc. L. Bul. 271.

South Dakota.— Subera *v.* Jones, (1906) 108 N. W. 26; Northwestern Elevator Co. *v.* Lee, 15 S. D. 114, 87 N. W. 581, 13 S. D. 450, 83 N. W. 565; Murphy *v.* Plankinton Bank, 13 S. D. 501, 83 N. W. 575; Gade *v.* Collins, 8 S. D. 322, 66 N. W. 466; Fish *v.* De Laray, 8 S. D. 320, 66 N. W. 465, 59 Am. St. Rep. 764; Norwegian Plow Co. *v.* Bellon, 4 S. D. 384, 57 N. W. 17; Evenson *v.* Webster, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802; Pierce *v.* Manning, 2 S. D. 517, 51 N. W. 332.

Texas.— Hausmann *v.* Trinity, etc., R. Co., (Civ. App. 1904) 82 S. W. 1052; San Antonio, etc., R. Co. *v.* Ilse, (Civ. App. 1900) 59 S. W. 564; Childress *v.* Smith, (Civ. App. 1896) 37 S. W. 1076. But see Greer *v.* Featherston, 95 Tex. 654, 69 S. W. 69; Foote *v.* Heisig, (Civ. App. 1906) 94 S. W. 362; Griffin *v.* McKinney, (Civ. App. 1901) 62 S. W. 78.

Wyoming.— Johnson *v.* Golden, (1897) 48 Pac. 196; Seibel *v.* Bath, (1895) 40 Pac. 756.

See 2 Cent. Dig. tit. "Appeal and Error," § 1728.

82. Spangler *v.* Brown, 26 Ohio St. 389.

not been adopted. In Minnesota, Utah, and Wisconsin, in an action tried by the court, the question whether the evidence was sufficient may be raised on appeal, without a motion for new trial.[83] In Iowa it has been held that, where there is no special finding of fact and no motion for new trial on the ground that the finding is against the evidence, the decision will not be reviewed, notwithstanding the evidence is well set out in the record.[84] In Illinois, where a case is tried by the court without a jury and the findings and judgment are excepted to, a motion for new trial is not necessary to present to the reviewing court the objection that the finding is not supported by the evidence;[85] but where there is neither a motion for new trial or exceptions taken, the reviewing court will not review the evidence to see if it sustains the findings.[86]

11. EXCESSIVE RECOVERY. Where the objection that the amount of recovery is excessive is not made the basis of a motion for new trial, it is not available on appeal.[87] This is true, although the evidence contained in the record on appeal

83. Jordan *v.* Humphrey, 31 Minn. 495, 18 N. W. 450; St. Paul F. & M. Ins. Co. *v.* Allis, 24 Minn. 75; Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510; North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; Walsh *v.* Dart, 23 Wis. 334, 99 Am. Dec. 1077; Fisher *v.* Farmers' Loan, etc., Co., 21 Wis. 73 (where the earlier Wisconsin decisions maintained the opposite view); Jewett *v.* Whallin, 11 Wis. 124; Davis *v.* Judd, 11 Wis. 11; Woodward *v.* Howard, 10 Wis. 512; Hutchinson *v.* Eaton, 9 Wis. 226.

84. Reynolds *v.* Miller, 14 Iowa 97; Gillett *v.* Foreman, 11 Iowa 512; Kelso *v.* Ely, 11 Iowa 501; Warner *v.* Pace, 10 Iowa 391.

85. David M. Force Mfg. Co. *v.* Horton, 74 Ill. 310; Jones *v.* Buffum, 50 Ill. 277; Metcalf *v.* Fouts, 27 Ill. 110; Brettman *v.* Braun, 37 Ill. App. 17; Hubbard *v.* McCormick, 33 Ill. App. 386; Hyde Park *v.* Cornell, 4 Ill. App. 602.

86. Cochran *v.* Park Ridge, 138 Ill. 295, 27 N. E. 939; Nimmo *v.* Kuykendall, 85 Ill. 476.

87. *Arkansas.*— St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524; Crump *v.* Starke, 23 Ark. 131.

California.— Livermore *v.* Stine, 43 Cal. 274.

Georgia.— Georgia Cent. R. Co. *v.* Berry, 114 Ga. 274, 40 S. E. 290; Jacobs' Pharmacy Co. *v.* Norcross, 110 Ga. 304, 34 S. E. 999.

Illinois.—Brewer, etc., Brewing Co. *v.* Boddie, 162 Ill. 346, 44 N. E. 819; Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Jones *v.* Jones, 71 Ill. 562; Emory *v.* Addis, 71 Ill. 273; Hearst's Chicago American *v.* Spiss, 117 Ill. App. 436; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394; Layton *v.* Deck, 63 Ill. App. 553; Stewart *v.* Butts, 61 Ill. App. 483; Crooks *v.* Hibbard, 58 Ill. App. 568; Stern *v.* Tuch, 55 Ill. App. 445; Leyenberger *v.* Rebanks, 55 Ill. App. 441; Dressel *v.* Lonsdale, 46 Ill. App. 454; Rice *v.* Heap, 46 Ill. App. 448; Hansen *v.* Miller, 44 Ill. App. 550; Larson *v.* Johnson, 42 Ill. App. 198; Linck *v.* Scheffel, 32 Ill. App. 17; Western Union Tel. Co. *v.* De Golyer, 27 Ill. App. 489; Springfield *v.* Scheevers, 21 Ill. App. 203; Vanliew *v.* Galesburg Second Nat. Bank, 21 Ill. App. 126; Chicago, etc., R. Co. *v.* Glinny, 19 Ill. App. 639; Peoria, etc., R. Co. *v.* Booth, 11 Ill. App. 358; Rosenberg *v.* Barrett, 2 Ill. App. 386; Ottawa, etc., R. Co. *v.* McMath, 1 Ill. App. 429.

Indiana.— Michigan City *v.* Ballance, 123 Ind. 334, 24 N. E. 117; Thickstun *v.* Baltimore, etc., R. Co., 119 Ind. 26, 21 N. E. 323; Queen Ins. Co. *v.* Studebaker Bros. Mfg. Co., 117 Ind. 416, 20 N. E. 299; Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 6; Thompson *v.* Marion, etc., Gravel Road Co., 98 Ind. 449; Chicago, etc., R. Co. *v.* Linard, 94 Ind. 319, 48 Am. Rep. 155; Bake *v.* Smiley, 84 Ind. 212; Langohr *v.* Smith, 81 Ind. 495; Lawson *v.* Hilgenberg, 77 Ind. 221; Warner *v.* Curran, 75 Ind. 309; Baldwin *v.* Webster, 68 Ind. 133; Floyd *v.* Maddux, 68 Ind. 124; Marks *v.* Purdue University, 56 Ind. 288; Walpole *v.* Carlisle, 32 Ind. 415; Indianapolis *v.* Parker, 31 Ind. 230; Dix *v.* Akers, 30 Ind. 431; Westcott *v.* Huff, 18 Ind. 245; Smith *v.* Elsas, 17 Ind. 201; Campbell *v.* Swasey, 12 Ind. 70; Bartlett *v.* Burden, 11 Ind. App. 419, 39 N. E. 175; Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928.

Kansas.— Anderson *v.* Connecticut Mut. L. Ins. Co., 55 Kan. 81, 39 Pac. 1038.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186.

Maryland.— Baltimore Belt R. Co. *v.* McColgan, 83 Md. 650, 35 Atl. 59.

Michigan.—Brockmiller *v.* Industrial Works, 148 Mich. 642, 112 N. W. 688. *Compare* McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829, holding that in an action by a parent for the death of a child, in which the measure and data for computation of damages is fixed by law, error may be assigned on a clearly excessive verdict, as on one not supported by the evidence, without a motion for a new trial.

Minnesota.— English *v.* Minneapolis, etc., Suburban R. Co., 96 Minn. 213, 104 N. W. 886; Hennepin County Com'rs *v.* Jones, 18 Minn. 199.

Mississippi.—Kelly *v.* Brown, 32 Miss. 202.

Missouri.— Elley *v.* Caldwell, 158 Mo. 372, 59 S. W. 111; State *v.* Farmers', etc., Nat. Bank, 144 Mo. 381, 46 S. W. 148; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Weese *v.*

shows that the damages assessed were excessive,[88] or although the evidence may not show that the amount of damages is correct.[89] The doctrine stated is applicable regardless of how the excess may arise. Thus it applies in cases where the excess is caused by mere errors in computation,[90] where a larger amount is awarded than is claimed in the petition or declaration,[91] or where the recovery is excessive in awarding costs not properly taxable,[92] or in improperly imposing penalties.[93]

12. INADEQUATE RECOVERY. Where the objection that the recovery is inadequate is not raised in a motion for new trial it is waived and cannot be urged on appeal,[94] and this is true, although an exception is taken to the instructions on the measure of damages.[95] Thus a judgment will not be reversed for failure to allow interest where the omission was not made a special ground for new trial,[96] and where through mere oversight a judgment rendered is for a less sum than the successful party is entitled to an objection on that ground must be embodied in the motion for new trial or it will be waived.[97]

13. GRANTING OR REFUSING CONTINUANCE. In a considerable number of jurisdictions the action of the court in granting or refusing a continuance cannot be assigned for error in the reviewing court, unless made the basis of a motion for new trial in the court below;[98] but in one state it has been held that when the

Brown, 102 Mo. 299, 14 S. W. 945; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Alexander *v.* Relfe, 74 Mo. 495; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479; Cook *v.* Clary, 48 Mo. App. 166; McNichols *v.* Nelson, 45 Mo. App. 446; Witte *v.* Quinn, 38 Mo. App. 681; Chicago, etc., R. Co. *v.* Vivian, 33 Mo. App. 583; Bridges *v.* Russell, 30 Mo. App. 258; Ray *v.* Thompson, 26 Mo. App. 431; Brosnahan *v.* Philip Best Brewing Co., 26 Mo. App. 386; Joyce *v.* Murnaghan, 17 Mo. App. 11.

Nebraska.— Miller *v.* Neely, 59 Nebr. 539, 81 N. W. 443; Everett *v.* Tidball, 34 Nebr. 803, 52 N. W. 816; Volker *v.* Tecumseh First Nat. Bank, 26 Nebr. 602, 42 N. W. 732.

New York.— Bulkeley *v.* Keteltas, 4 Sandf. 450; Houghton *v.* Starr, 4 Wend. 175.

Texas.— Seele *v.* Neumann, (1886) 1 S. W. 274; Jacobs *v.* Hawkins, 63 Tex. 1; Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757.

Virginia.— Humphrey *v.* West, 3 Rand. 516.

Washington.— Harris *v.* Van De Vanter, 17 Wash. 489, 50 Pac. 50.

West Virginia.— Riddle *v.* Core, 21 W. Va. 530.

Wisconsin.— Lumsden *v.* Cross, 10 Wis. 282.

Wyoming.— Boswell *v.* Bliler, 9 Wyo. 277, 62 Pac. 350; Syndicate Imp. Co. *v.* Bradley, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

See 2 Cent. Dig. tit. "Appeal and Error," § 1704.

88. Kansas City Southern R. Co. *v.* Short, 75 Ark. 345, 87 S. W. 640; Hunt *v.* Milligan, 57 Ind. 141.

89. Rout *v.* Menifee, 59 Ind. 525.

90. Memory *v.* Niepert, 33 Ill. App. 131 [*affirmed* in 131 Ill. 623, 23 N. E. 431]; Youmans *v.* Heartt, 34 Mich. 397; Lumsden *v.* Cross, 10 Wis. 282.

91. Van Vlissingen *v.* Roth, 121 Ill. App. 600; Doubet *v.* Peoria Sav. L. & T. Co., 93 Ill. App. 637; Fox *v.* Graves, 46 Nebr. 812, 65 N. W. 887; Flannagan *v.* Heath, 31 Nebr. 776, 48 N. W. 904; Houghton *v.* Starr, 4 Wend. (N. Y.) 175.

92. Hennepin County Com'rs *v.* Jones, 18 Minn. 199.

93. Wilson *v.* State, 51 Ark. 212, 10 S. W. 491. In some states excessive damages are not reviewable by appeal, the sole remedy being the power of the trial judge to set aside the verdict if excessive. Benton *v.* North Carolina R. Co., 122 N. C. 1007, 30 S. E. 333; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

94. *Indiana.*— Mackison *v.* Clegg, 95 Ind. 373; Millikan *v.* Patterson, 91 Ind. 515.

Louisiana.— Edelin *v.* Richardson, 4 La. Ann. 502; Lambeth *v.* Burney, 3 Rob. 251.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62; Edwards *v.* Missouri R. Co., 82 Mo. App. 478.

Virginia.— Western Union Tel. Co. *v.* Virginia Paper Co., 87 Va. 418, 12 S. E. 755.

Wisconsin.— Newton *v.* Allis, 16 Wis. 197.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

See 2 Cent. Dig. tit. "Appeal and Error," § 1704.

In North Carolina inadequacy of damages is ground only for motion to the trial judge to set the verdict aside, but his action is not reviewable, whether he grant or refuse the motion. Burns *v.* Ashboro, etc., R. Co., 125 N. C. 304, 34 S. E. 495.

95. Western Union Tel. Co. *v.* Virginia Paper Co., 87 Va. 418, 12 S. E. 755.

96. Edelin *v.* Richardson, 4 La. Ann. 502; Lambeth *v.* Burney, 3 Rob. (La.) 251.

97. Newton *v.* Allis, 16 Wis. 197.

98. *Arkansas.*— Watts *v.* Cohn, 40 Ark. 114.

California.— Pilot Rock Creek Canal Co. *v.* Chapman, 11 Cal. 161.

Illinois.— Lichliter *v.* Russell, 89 Ill. App. 62.

Indiana.— Continental L. Ins. Co. *v.* Kessler, 84 Ind. 310; Morgan *v.* Hyatt, 62 Ind. 560; Arbuckle *v.* McCoy, 53 Ind. 63; Carr *v.*

court below errs in refusing a continuance and an exception is taken and made a part of the record by a regular bill of exceptions signed by the judge, there is no imperative necessity for the motion for new trial to bring the point before the appellate court.[99] So in another state it has been held that where in a justice's court an application for a continuance has been made and refused by the court, alleged error growing out of such refusal may be reviewed without any motion for new trial.[1]

14. Granting or Refusing Change of Venue. Error in granting or refusing a change of venue must be made the ground of a motion for a new trial, as a condition precedent to the right to a review of that question on appeal.[2] On the same principle, error in overruling a petition to remove a cause to the federal court is not available on appeal, unless assigned as a reason for a new trial.[3]

15. Granting Nonsuit. In some jurisdictions an order granting a nonsuit must be assigned as error in the motion for new trial to preserve it for review in the appellate court;[4] in others it is not necessary.[5]

16. Directing Verdict. In some jurisdictions a motion for a new trial is necessary to obtain a review of errors in the action of the trial court in directing or refusing to direct a verdict.[6] In others, however, it is held that a motion for a

Eaton, 42 Ind. 385; Hughes *v.* Ainslee, 28 Ind. 346; McCammock *v.* Clark, 16 Ind. 320; Downing *v.* Evansville, etc., Straight Line R. Co., 13 Ind. 148; Kent *v.* Lawson, 12 Ind. 675, 74 Am. Dec. 233; Adams *v.* Ulsh, 26 Ind. App. 516, 60 N. E. 162.

Kentucky.— French *v.* Sewell, 13 Ky. L. Rep. 928.

Missouri.— State *v.* French, 47 Mo. App. 474; Jones *v.* Missouri Pac. R. Co., 31 Mo. App. 614; McMurdock *v.* Kimberlin, 23 Mo. App. 523.

Texas.— Lion Ins. Co. *v.* Wicker, (Civ. App. 1899) 54 S. W. 294.

99. Beatty *v.* Sylvester, 3 Nev. 228.

1. Cook *v.* Larson, 47 Kan. 70, 72, 27 Pac. 113, in which it was said: "The application for the continuance, and the affidavit in support thereof, became a part of the record in the justice's court, and when brought up to the district court and to this court by the bill of exceptions, the alleged error complained of is apparent upon the record, and needs no motion for new trial to bring it to the attention of the court."

2. Scanlin *v.* Stewart, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Mannix *v.* State, 115 Ind. 245, 17 N. E. 565; Norwood *v.* Harness, 98 Ind. 134, 49 Am. Rep. 739; Walker *v.* Heller, 73 Ind. 46; Berlin *v.* Oglesbee, 65 Ind. 308; Knarr *v.* Conaway, 53 Ind. 120; Horton *v.* Wilson, 25 Ind. 316; Bonham *v.* Doyle, 39 Ind. App. 438, 77 N. E. 859, 79 N. E. 458; Citizens St. R. Co. *v.* Shepherd, 29 Ind. App. 412, 62 N. E. 300; Bogue *v.* Murphy, 29 Ind. App. 292, 61 N. E. 957; Chicago, etc., R. Co. *v.* Weeks, 27 Ind. App. 438, 60 N. E. 723; Chicago, etc., R. Co. *v.* Curless, 27 Ind. App. 306, 60 N. E. 467; State *v.* Alred, 115 Mo. 471, 22 S. W. 363; Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161; Klotz *v.* Perteet, 101 Mo. 213, 13 S. W. 955.

Granting or refusing change of judge.—The overruling of an application for a change of judge made in an action in which a judgment was rendered by default may be considered on appeal without having been presented to the trial court by motion for new trial. The rendition of a judgment by default is not a trial in the sense that a party may afterward apply for a new trial.

Motion to remand cause.— The ruling on a motion to remand a cause to the court from which the venue had been changed should be questioned by making it a reason for a new trial rather than by separate assignment of error. Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169.

Rescinding an order for remand of cause.— Error of the court to which a change of venue has been granted in rescinding an order remanding the cause to the court in which it originated is not ground for reversal unless made a cause in the motion for new trial. Sidner *v.* Davis, 87 Ind. 342.

Waiving defects in affidavit — change of venue.—A motion for new trial which does not set up a change of venue as a ground therefor waives any defect in the affidavit on which the change of venue was based. Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930.

3. Southern R. Co. *v.* Sittasen, 166 Ind. 257, 76 N. E. 973 [*reversing* (App. 1905) 74 N. E. 898]; Southern R. Co. *v.* Roach, (Ind. App. 1906) 77 N. E. 606, 38 Ind. App. 211, 78 N. E. 201.

4. Toulouse *v.* Pare, 103 Cal. 251, 37 Pac. 146; McCreery *v.* Everding, 44 Cal. 284; Donahue *v.* Gallavan, 43 Cal. 573. But see Darst *v.* Rush, 14 Cal. 81.

5. Emerson *v.* Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969; Williams Mercantile Co. *v.* Fussy, 13 Mont. 401, 34 Pac. 189, McKay *v.* Montana Union R. Co., 13 Mont. 15, 31 Pac. 999; Burns *v.* Commencement Bay Land, etc., Co., 4 Wash. 558, 30 Pac. 668, 709.

6. Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 110 Ill. App. 648 [*affirmed* in 209 Ill. 550, 70 N. E. 1066]; Chicago, etc., R. Co. *v.* Richards, 28 Ind. App. 46, 61 N. E.

new trial is unnecessary in such case, if an exception to the action of the court is duly taken.[7]

17. Rulings on Motion to Dismiss. To present for review the action of the trial court in dismissing the cause, it has been held unnecessary, in some jurisdictions, to move for a new trial on this ground;[8] but in one state it has been held that where, on motion to dismiss because of non-residence of plaintiff and its failure to file bond, the facts do not appear of record, the overruling of such motion cannot be reviewed without a motion for new trial.[9]

18. Rulings on Motion For Judgment Non Obstante Veredicto. A motion for new trial is not a condition precedent to the right to review denial of a motion for judgment notwithstanding the verdict.[10]

19. Rulings on Demurrers to Evidence. In Kansas it was held that the ruling on a demurrer to the evidence is a decision occurring on the trial, and that in order to enable the supreme court to review such ruling it is necessary that a motion for a new trial be made and filed within the prescribed time.[11] In Indiana, North Carolina, Virginia, and West Virginia no motion for new trial is necessary,[12] except to correct error in the assessment of damages.[13]

20. Verdict — a. Form of Verdict. Objections to the form of the verdict must be raised in the motion for new trial, or they will be considered as waived.[14] Thus a verdict of guilty in assumpsit where not strictly formal will be sustained on appeal when no objection was taken to it under the motion for new trial;[15] and an objection to a general verdict containing two counts that it does not specify the amount found due on each count will not be considered by the supreme court if it was not alleged in the motion for new trial or in arrest.[16]

18; Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942; State *v.* Turner, 113 Mo. App. 53, 87 S. W. 464; Seymour *v.* Southern R. Co., 117 Tenn. 98, 98 S. W. 174.

7. Webb *v.* Hicks, 117 Ga. 335, 43 S. E. 738; Collins *v.* Potts, 9 Ky. L. Rep. 536; Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403; 55 Am. St. Rep. 814; Wheeler *v.* Seamans, 123 Wis. 573, 102 N. W. 28; Prichard *v.* Deering Harvester Co., 117 Wis. 97, 93 N. W. 827; Zahn *v.* Milwaukee, etc., R. Co., 114 Wis. 38, 89 N. W. 889; Plankinton *v.* Gorman, 93 Wis. 560, 67 N. W. 1128.

8. O'Connor *v.* Brucker, 117 Ga. 451, 43 S. E. 731; Lines *v.* Benner, 52 Ind. 195; Wall *v.* Albertson, 18 Ind. 145; Butler *v.* Lawson, 72 Mo. 227; McCoy *v.* Farmer, 65 Mo. 244; O'Connor *v.* Koch, 56 Mo. 253; Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24.

Motion to quash summons.— On the overruling of a motion to quash a summons, defendant may have the order reviewed, without filing any motion for a new trial. Buxton *v.* Alton-Dawson Mercantile Co., 18 Okla. 287, 90 Pac. 19.

9. Severs *v.* Bull, 1 Indian Terr. 8, 35 S. W. 234; Severs *v.* Northern Trust Co., 1 Indian Terr. 1, 35 S. W. 232.

10. Satterlee *v.* Modern Brotherhood of America, 15 N. D. 92, 106 N. W. 561.

11. Coy *v.* Missouri Pac. R. Co., 69 Kan. 321, 76 Pac. 844; Lott *v.* Kansas City, etc., R. Co., 42 Kan. 293, 21 Pac. 1070; Norris *v.* Evans, 39 Kan. 668, 18 Pac. 818; Buck *v.* Kelley, 37 Kan. 19, 14 Pac. 544; Gruble *v.* Ryus, 23 Kan. 195. But see Wagner *v.* Atchison, etc., R. Co., 73 Kan. 283, 85 Pac. 299, disapproving the preceding cases.

12. Strough *v.* Gear, 48 Ind. 100; Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698 [*overruling* Richmond, etc., R. Co. *v.* Scott, (Va. 1894) 20 S. E. 826]; Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394.

13. Strough *v.* Gear, 48 Ind. 100; Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394.

14. *California.*— Douglass *v.* Kraft, 9 Cal. 562.

Illinois.— Parmelee *v.* Smith, 21 Ill. 620.

Indiana.— Weatherly *v.* Higgins, 6 Ind. 73.

Louisiana.— Simon *v.* Brashear, 9 Rob. 59, 41 Am. Dec. 321.

Mississippi.— Eaton *v.* Barnhill, 68 Miss. 305, 8 So. 849.

Missouri.—Chapman *v.* White, 52 Mo. 179; Kamerick *v.* Castleman, 29 Mo. App. 658.

Nebraska.— Crooker *v.* Stover, 41 Nebr. 693, 60 N. W. 10; Armstrong *v.* Lynch, 29 Nebr. 87, 45 N. W. 274.

New Hampshire.— Hewett *v.* Woman's Hospital Aid Assoc., 73 N. H. 556, 64 Atl. 190, 7 L. R. A. N. S. 496.

South Carolina.— Dantzler *v.* Cox, 75 S. C. 334, 55 S. E. 774.

Texas.— Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485, 67 S. W. 343; Von Carlowitz *v.* Bernstein, 28 Tex. Civ. App. 8, 66 S. W. 464.

United States.— Cochran *v.* Schreiber, 107 Fed. 371, 46 C. C. A. 349.

See 2 Cent. Dig. tit. "Appeal and Error," § 1701.

15. Parmelee *v.* Smith, 21 Ill. 620.

16. Chapman *v.* White, 52 Mo. 179.

b. Miscellaneous. So also the following objections must be made the basis of a motion for new trial to entitle him to consideration on appeal; error in amending a verdict,[17] in overruling a motion to strike out parts of a special verdict,[18] that the verdict is opposed to the instructions,[19] and that the verdict contains no assessment of damages.[20] So in some jurisdictions error in striking or refusing to strike a verdict must be made the basis of a motion for new trial to authorize a review thereof on appeal,[21] but in others the contrary view is taken.[22] Refusal of the trial court to send the jury back to consider further on their special verdict must be alleged as a ground for new trial or it will not be considered on appeal.[23]

21. Judgment. Objections to a judgment or decree which might form the basis for and be properly embraced in a motion for a new trial cannot be independently assigned as error on appeal.[24]

22. Improper Remarks, Argument, or Misconduct of Counsel. To make available as ground for reversal improper remarks, argument, or misconduct of counsel during the trial, the attention of the court should be directed thereto in the motion for new trial. If this is not done, it will be ignored on appeal.[25]

23. Improper Remarks or Misconduct of Trial Judge. Improper remarks made by the trial judge to the jury,[26] or during any ruling on a question of evidence,[27] or relative to the examination of a witness,[28] or during the examination of a witness,[29] must be made the basis of a motion for new trial to present objections based on such grounds to the reviewing court. The judgment cannot be impeached

17. Lures *v.* Botte, 26 Ind. 343.

18. Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549.

19. Palmer *v.* Ulysses First Bank, 59 Nebr. 412, 81 N. W. 303; Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

20. Hart *v.* Weber, 57 Nebr. 442, 77 N. W. 1085.

21. Kistler *v.* Slaughter, 50 S. W. 529, 20 Ky. L. Rep. 1937; Albright *v.* Peters, 58 Nebr. 534, 78 N. W. 1063. But see Collins *v.* Potts, 9 Ky. L. Rep. 536.

22. Haskins *v.* Throne, 101 Ga. 126, 28 S. E. 611; Sanford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434; Dunn *v.* Canton Nat. Bank, 11 S. D. 305, 77 N. W. 111; Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 103, 55 Am. St. Rep. 814; Richter *v.* Leiby, 101 Wis. 434, 77 N. W. 745; Plankinton *v.* Gorman, 93 Wis. 560, 67 N. W. 1128.

23. Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327.

24. Migatz *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; St. Joseph Mfg. Co. *v.* Hubbard, 36 Ind. App. 84, 75 N. E. 17; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219. But see Hancock *v.* Heaton, 53 Ind. 111; Letot *v.* Peacock, (Tex. Civ. App. 1906) 94 S. W. 1121, holding that an objection that the judgment rendered did not conform to the verdict need not be specifically called to the attention of the trial court by a motion for a new trial to enable the party objecting to raise such question on appeal.

An irregularity in rendering judgment must be taken advantage of by motion for a new trial, and the objection cannot be raised for the first time on appeal. Smith *v.* Foster, 59 Ind. 595; Jenkins *v.* Esterly, 22 Wis. 128.

A question as to rendering a personal judgment against a defendant, which was not made a ground for a new trial, cannot be considered on appeal. Hot Springs R. Co. *v.* McMillan, 76 Ark. 88, 88 S. W. 846.

Error in rendering judgment for costs against a defendant, which is not brought to the attention of the trial court in the motion for a new trial nor by motion to retax the same, is not available on appeal. Cunningham *v.* McDonald, (Tex. Civ. App. 1904) 80 S. W. 871, 81 S. W. 52 [*reversed* on other grounds in 98 Tex. 316, 83 S. W. 372].

Any error in the rate of interest prescribed by the decree not having been called to the attention of the trial court in the motion for new trial cannot be considered on appeal. Elley *v.* Coldwell, 158 Mo. 372, 59 S. W. 111.

25. Branner *v.* Nichols, 61 Kan. 356, 59 Pac. 633; Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; St. Louis Belt, etc., R. Co. *v.* Cartan Real Estate Co., 204 Mo. 565, 103 S. W. 519; Eppstein *v.* Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091; Edmonston *v.* Henry, 45 Mo. App. 346; Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674; Kauffman *v.* Harrington, 23 Mo. App. 572; International, etc., R. Co. *v.* Smith, (Tex. 1886) 1 S. W. 565; Lockwood *v.* Fletcher, 74 Vt. 72, 52 Atl. 119.

26. McLaughlin *v.* Schawacker, 31 Mo. App. 365. *Contra*, Coldren *v.* Le Gore, 118 Iowa 212, 91 N. W. 1066.

27. McClintock *v.* Kansas City Cent. R. Co., 120 Mo. 127, 24 S. W. 1052; Ashby *v.* Elsberry, etc., Gravel Road Co., 111 Mo. App. 79, 85 S. W. 957; Harris *v.* Powell, 56 Mo. App. 24.

28. O'Connor *v.* National Ice Co., 56 N. Y. Super. Ct. 410, 4 N. Y. Suppl. 537 [*affirmed* in 121 N. Y. 662, 24 N. E. 1092].

29. Sloan *v.* Frye, 36 Mo. App. 523.

because the judge left the court-room during the argument, unless such action was made ground for new trial.[30]

24. Misconduct of Jury. To authorize a reversal on appeal for the misconduct of the jury, it must be made the basis of a motion for new trial,[31] and in one state the facts showing such misconduct must be supported by affidavits in the motion.[32]

25. Ruling in Regard to Jury — a. In General. Impaneling a jury and forcing a cause to trial in the absence of a party must be made the basis of a motion for new trial to authorize a review thereof on appeal.[33] So a refusal to permit a jury to take written evidence to the jury room cannot be reviewed when not made a ground for new trial.[34] It has also been held that where a juror fails to attend and the cause is adjourned to a future day and the defaulting juror is brought in and the case proceeds to judgment, any irregularity in the proceedings is waived when not made the ground of a motion for new trial.[35]

b. Rulings on Competency of Jurors. Objections to the competency of jurors cannot be reviewed where no such question was raised in the motion for new trial.[36]

26. Rulings Submitting Cause to Jury or Refusing Jury Trial. Error in submitting a cause to a jury[37] or in refusing a jury trial,[38] unless assigned in the motion for new trial as one of the grounds for the motion, cannot be considered.

27. Rulings in Relation to Examination of Witnesses. Error in limiting a number of witnesses,[39] or in separating the witnesses at the trial,[40] or objections relating to the asking of leading questions,[41] or any failure to compel plaintiff to make true and perfect answers to interrogatories propounded to him,[42] are not available on appeal if not made a ground for new trial.

28. Failure or Refusal to Find Upon Certain Issues. An objection based on the refusal of the court to find on certain issues,[43] or the failure of the jury to make any finding on a counter-claim, will be disregarded on appeal presented to the trial court by motion for new trial.[44]

30. Colburn *v.* Brunswick Flour Co., 49 Mo. App. 415.

31. McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314; Houston *v.* Omaha, 44 Nebr. 63, 62 N. W. 251.

32. Houston *v.* Omaha, 44 Nebr. 63, 62 N. W. 251.

33. Martin *v.* Motsinger, 130 Ind. 555, 30 N. E. 523.

34. State *v.* Rabourn, 14 Ind. 300.

35. Hall *v.* Haun, 5 Dana (Ky.) 55.

36. Mengedoht *v.* Van Dorn, 48 Nebr. 880, 67 N. W. 858; Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762.

37. Peden *v.* Mail, 118 Ind. 556, 560, 20 N. E. 446, 493; Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162.

38. Horlacher *v.* Brafford, 141 Ind. 528, 40 N. E. 1078; Huffmond *v.* Bence, 128 Ind. 131, 27 N. E. 347; Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515; Meloy *v.* Weathers, 35 Ind. App. 165, 73 N. E. 924; Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1016; Kansas City, etc., R. Co. *v.* Carlisle, 94 Mo. 166, 7 S. W. 102; Griffin *v.* Regan, 79 Mo. 73; Ward *v.* Quinlivin, 65 Mo. 453. *Contra, In re* Robinson, 106 Cal. 493, 496, 39 Pac. 862, in which it was held that where the petitioner in proceedings to revoke a will goes to trial after his request for a jury trial has been erroneously denied, a motion for new trial is not a condition precedent to a review of the error on appeal. The court said: "The petitioners were not required to move for a new trial in order to have this error of the court reviewed. It was incorporated in a bill of exceptions, and forms a part of the judgment-roll, and, like any other error appearing on the record of the judgment, can be reviewed upon a direct appeal from the judgment."

Refusal to submit issues of fact.— Errors assigned in refusing to submit issues of fact to a jury cannot be considered on appeal where a motion for new trial was not made. Klotz *v.* Perteet, 101 Mo. 213, 13 S. W. 955. See also Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942.

Submission of special findings on irrelevant and immaterial matters will not be reviewed, unless assigned as error on motion for a new trial. Livingston *v.* Moore, 2 Nebr. (Unoff.) 498, 89 N. W. 289.

Refusal of demand for a jury other than the regular panel must be made the ground of motion for new trial, that it may be reviewed. Abbott *v.* Inman, 35 Ind. App. 262, 72 N. E. 284; Chicago, etc., R. Co. *v.* Weeks, 27 Ind. App. 438, 60 N. E. 723.

39. Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088.

40. Cobb *v.* Krutz, 40 Ind. 323.

41. Anderson *v.* Hervey, 67 Ind. 420.

42. Hill *v.* Jamieson, 16 Ind. 125, 79 Am. Dec. 414.

43. Haight *v.* Tryon, 112 Cal. 4, 44 Pac. 318.

44. Bacon *v.* Perry, 25 Mo. App. 73.

Failure to consider evidence.—After final judgment, the court's failure to consider cer-

29. Refusal to Hear Evidence. Where the court refuses to hear any evidence and gives judgment against plaintiff, no motion for new trial is necessary.[45]

30. Rulings on Right to Open and Close. Error in giving the right to open and close to the wrong party will not be reviewed when not assigned as a cause for new trial,[46] and under rule of court in one state the right to open and close except in cases where defendant has introduced no evidence is left to the discretion of the trial judge whose decision is not reviewable.[47]

31. Order or Judgment in Attachment Proceedings. To present for review an order or judgment sustaining or dissolving an attachment, no motion for new trial is necessary.[48] In one state it was held that the action of the court in hearing and determining a motion to discharge a judgment was not a trial within the meaning of the statute defining a trial as a judicial examination of issues of fact arising on the pleadings,[49] and in another it was held that a statute making a motion for new trial necessary to present certain errors for review on appeal does not apply to the trial of provisional remedies.[50]

32. Rulings on Motion to Set Aside Award. In one jurisdiction it has been held, without assigning any reason, that a motion for new trial was not necessary to authorize the review of a decision on a motion to vacate an award.[51] In another it was held, under a statute providing that the party aggrieved by the confirmation or vacation of an award of arbitrators "may take his writ of error or an appeal, as upon any other judgment of such court," that in appealing from a judgment vacating an award of arbitrators a motion for new trial was necessary pointing out the errors alleged.[52]

33. Ruling on Motion to Set Aside Judicial Sale. In one state it has been held that an appeal from an order setting aside an execution sale will not be considered where it appears that there was no motion for a new trial and no error in the proceedings in any manner designated are pointed out.[53] In other jurisdictions it was held that a motion for new trial is not necessary to review proceedings on motion to set aside a judicial sale; that the statutes providing for the making of motions for new trial have no application to motions made after final judgment.[54]

34. Findings of Fact. The inclusion of matters not warranted by the evidence in the court's findings of fact, if not presented by a motion for new trial, will not be considered on appeal.[55] A refusal of a special request for findings must also be

tain evidence offered on the trial can only be raised in a motion for new trial. People *v.* Terry, (Tex. Civ. App. 1898) 43 S. W. 846.

45. Werley *v.* Huntington Waterworks Co., 138 Ind. 148, 37 N. E. 582 (in which it was held that the court having refused to try and hear the questions raised by the exception a motion for new trial is not a question precedent to a review); Coots *v.* Morgan, 24 Mo. 522.

46. White *v.* Carlton, 52 Ind. 371; Abshire *v.* State, 52 Ind. 99; White Water Valley R. Co. *v.* McClure, 29 Ind. 536; Gillenwaters *v.* Culton, 15 Ky. L. Rep. 158; Sammons *v.* Hawvers, 25 W. Va. 678.

47. Morehead Banking Co. *v.* Walter, 121 N. C. 115, 28 S. E. 253; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328; Cheak *v.* Watson, 90 N. C. 302.

48. Crouch *v.* Meguiar-Harris Co., 42 S. W. 91, 19 Ky. L. Rep. 819; Linton *v.* Cathers, 4 Nebr. (Unoff.) 641, 95 N. W. 1044; Beitman *v.* McKenzie, 9 Ohio Dec. (Reprint) 403, 12 Cinc. L. Bul. 321; Sibley *v.* Condensed Lubricating Oil Co., 9 Ohio Dec. (Reprint) 399, 12 Cinc. L. Bul. 308; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743. *Compare* Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19, holding that the failure of a party to file a motion for new trial after verdict on a plea in abatement in an attachment proceeding, as required by Rev. St. (1899) § 407, is a waiver of any errors occurring at the trial on the plea, although he files a motion for new trial on the merits in the main action.

49. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

50. Crouch *v.* Meguiar-Harris Co., 42 S. W. 91, 19 Ky. L. Rep. 819.

51. Graves *v.* Scoville, 17 Nebr. 593, 24 N. W. 222.

52. Wallace *v.* Underwood, 32 Mo. App. 473.

53. Tunstall *v.* Jones, 25 Ark. 272.

54. Dreese *v.* Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; St. Louis *v.* Brooks, 107 Mo. 380, 18 S. W. 22 [*overruling* Bishop *v.* Ransom, 39 Mo. 417].

55. Baldwin *v.* Heil, 155 Ind. 682, 58 N. E. 200; Redman *v.* Adams, 165 Mo. 60, 65 S. W. 300.

made the basis of a motion for new trial, if a consideration thereof by the reviewing court is desired.[56]

35. Conclusions of Law. To authorize the reviewing court to correct error in conclusions of law it is not necessary that a motion for new trial based upon such error should have been made.[57]

36. Errors Apparent of Record. All errors apparent of record may be reviewed by the appellate court without a motion for new trial.[58]

37. Rulings in Regard to Pleadings — a. Sufficiency to State Cause of Action. To authorize the appellate court to review the action of the court below in holding a pleading sufficient or insufficient to state a cause of action or defense, it is not necessary to assign such ruling as error in the motion for new trial.[59] This doctrine has been held to apply whether the sufficiency of the pleading is called in question by demurrer,[60] or by motion to dismiss for insufficiency of the plead-

56. Haight *v.* Tryon, 112 Cal. 4, 44 Pac. 318; Morris *v.* Peffer, 77 Ill. App. 516.

57. Montmorency Gravel Road Co. *v.* Rock, 41 Ind. 263; Luirance *v.* Luirance, 32 Ind. 198; Rathburn *v.* Wheeler, 29 Ind. 601; Pond *v.* National Mortg., etc., Co., 6 Kan. App. 718, 50 Pac. 973; Bannard *v.* Duncan, 65 Nebr. 179, 90 N. W. 947. But see Donaldson *v.* Thompson, 120 Mo. 152, 25 S. W. 358.

58. *Arkansas.*—Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740; Smith *v.* Hollis, 46 Ark. 17.

California.—California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38.

Georgia.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803.

Indian Territory.— Hargrove *v.* Cherokee Nation, 3 Indian Terr. 478, 58 S. W. 667 [*citing* Little *v.* Atchison, etc., R. Co., 2 Indian Terr. 551, 53 S. W. 331; Severs *v.* Northern Trust Co., 1 Indian Terr. 1, 35 S. W. 232].

Iowa.— Brown *v.* Rose, 55 Iowa 734, 7 N. W. 133.

Kansas.— Crawford *v.* Shaft, 46 Kan. 704, 27 Pac. 156; Phelps, etc., Windmill Co. *v.* Buchanan, 46 Kan. 314, 26 Pac. 708.

Kentucky.— Humphreys *v.* Walton, 2 Bush 580; Forrester *v.* Howard, 98 S. W. 984, 30 Ky. L. Rep. 375; Orient Ins. Co. *v.* Meers, 92 S. W. 584, 29 Ky. L. Rep. 206.

Missouri.— State *v.* Thompson, 149 Mo. 441, 51 S. W. 98; Bagby *v.* Emberson, 79 Mo. 139; Beall *v.* Graham, 125 Mo. App. 38, 102 S. W. 636; State *v.* Carroll, 101 Mo. App. 110, 74 S. W. 468; Jones *v.* Kansas City, etc., Connecting R. Co., 86 Mo. App. 134.

Nebraska.— Eccles *v.* U. S. Fidelity, etc., Co., 72 Nebr. 439, 100 N. W. 942; Horton *v.* State, 60 Nebr. 701, 84 N. W. 87; Slobodisky *v.* Curtis, 58 Nebr. 211, 78 N. W. 522.

Oklahoma.— Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110.

Tennessee.— Wells *v.* Moseley, 4 Coldw. 401.

See 2 Cent. Dig. tit. "Appeal and Error," § 1654.

59. *Arkansas.*— Clark *v.* Hare, 39 Ark. 258.

Illinois.— George B. Swift Co. *v.* Gaylord, 126 Ill. App. 281 [*reversed* on other grounds in 229 Ill. 330, 82 N. E. 299].

Indiana.— Craig *v.* Ensey, 63 Ind. 140; Gray *v.* Stiver, 24 Ind. 174; Rodgers *v.* Lacey, 23 Ind. 507; Kent *v.* Lawson, 12 Ind. 675, 74 Am. Dec. 233.

Kansas.—Nute *v.* American Glucose Co., 55 Kan. 225, 40 Pac. 279; Dodge City Water-Supply Co. *v.* Dodge City, 55 Kan. 60, 39 Pac. 219; Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718; Earlywine *v.* Topeka, etc., R. Co., 43 Kan. 746, 23 Pac. 940; Barber Asphalt Paving Co. *v.* Topeka, 6 Kan. App. 133, 50 Pac. 904; Oakland Home Ins. Co. *v.* Allen, 1 Kan. App. 108, 40 Pac. 928.

Kentucky.— Simms *v.* Lanehart, 38 S. W. 490, 19 Ky. L. Rep. 1439; Bogenschutz *v.* Smith, (1887) 3 S. W. 800; Neff *v.* Burch, 15 Ky. L. Rep. 812.

Missouri.— Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373.

Nebraska.— Farmers' State Bank *v.* Sutton Mercantile Co., (1906) 110 N. W. 308; Sutton First Nat. Bank *v.* Sutton Mercantile Co., (1906) 110 N. W. 306; Eccles *v.* U. S. Fidelity, etc., Co., 72 Nebr. 439, 100 N. W. 942; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Farris *v.* State, 46 Nebr. 857, 65 N. W. 890; Schmid *v.* Schmid, 37 Nebr. 629, 56 N. W. 207; Hays *v.* Mercier, 22 Nebr. 656, 35 N. W. 894; O'Donohue *v.* Hendrix, 13 Nebr. 255, 13 N. W. 215.

Oklahoma.— Dunn *v.* Claunch, 15 Okla, 27, 78 Pac. 388.

Tennessee.—Wise *v.* Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

West Virginia.— Spence *v.* Robinson, 35 W. Va. 313, 13 S. E. 1004; Brown *v.* Brown, 29 W. Va. 777, 2 S. E. 808; State *v.* Phares, 24 W. Va. 657.

Wyoming.— Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

See 2 Cent. Dig. tit. "Appeal and Error," § 1687.

Right to intervene.—A motion for new trial is not necessary to obtain a review of error on an order refusing to permit a third person to intervene in an action, such refusal being based on a consideration of the petition alone without the issues joined for trial. Deere *v.* Eagle Mfg. Co., 49 Nebr. 385, 68 N. W. 504.

60. *Arkansas.*— Clark *v.* Hare, 39 Ark. 258.

Indiana.— Gray *v.* Stiver, 24 Ind. 174; Rodgers *v.* Lacey, 23 Ind. 507.

ing,[61] or by objection to the introduction of any evidence on the ground that a cause of action was not stated,[62] or on motion to set aside a judgment for failure of a petition to state a cause of action,[63] or on motion for judgment on the pleadings.[64] So where the facts stated in the petition neither authorize nor justify the decree rendered, the case will be reversed and the appeal dismissed notwithstanding the absence of a motion for new trial.[65] The reason on which this rule is based is that the pleadings are a part of the record, and, as was previously shown, no motion for new trial is necessary to authorize a review of errors apparent of record.[66]

b. Rulings on Motions to Strike Out. In a number of Missouri decisions it has been held that the action of the court in striking out a part of the petition,[67] or in refusing to strike out the petition,[68] cannot be considered on appeal unless made one of the grounds for a new trial, and that the striking out [69] or refusing to strike out [70] part of an answer must also be made the basis of a motion for new trial to authorize a review of such ruling. But in a recent decision, no allusion being made to the decisions just cited, it was held that, where a bill of exceptions sets out the portion of a pleading challenged, the motion to strike it out, the ruling of the court sustaining the motion, the motion to vacate such order, and ruling thereon, and exceptions properly saved to all such rulings, the action of the trial court on such matters may be reviewed without a motion for new trial having been made.[71]

c. Miscellaneous. Rulings of the court in permitting[72] or refusing[73] an amendment of a pleading must be complained of in the motion for new trial to authorize a review thereof; otherwise, however, as to the ruling on a motion to make more definite and certain.[74] Where a trial is had without an issue being made on an affirmative answer of defendant, error will not be noticed in the supreme court unless a motion for new trial or in arrest of judgment be made below,[75] and where the action of the trial court in refusing to allow plaintiff to file an answer to a motion by defendant is not made a ground for new trial, nor

Indian Territory.— Brought *v.* Cherokee Nation, 4 Indian Terr. 462, 69 S. W. 937.

Kansas.— Earlywine *v.* Topeka, etc., R. Co., 43 Kan. 746, 23 Pac. 940.

Kentucky.— Bogenschutz *v.* Smith, (1887) 3 S. W. 800.

Missouri.— Dysart *v.* Crow, 170 Mo. 275, 70 S. W. 689; Cape Girardeau, etc., R. Co. *v.* Wingerter, 124 Mo. App. 426, 101 S. W. 1113; Crow *v.* Reliable Jewelry Co., 116 Mo. App. 624, 92 S. W. 742. *Compare* Macdonald *v.* St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001.

Nebraska.— Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; O'Donohue *v.* Hendrix, 13 Nebr. 255, 13 N. W. 215.

Tennessee.—Wise *v.* Morgan, 102 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

Wyoming.— Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

See 2 Cent. Dig. tit. "Appeal and Error," § 1686.

61. Craig *v.* Ensey, 63 Ind. 140.

62. Dodge City Water-Supply Co. *v.* Dodge City, 55 Kan. 60, 39 Pac. 219.

63. Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373.

64. Murphy *v.* New York Bowery F. Ins. Co., 62 Mo. App. 495; Becker *v.* Simonds, 33 Nebr. 680, 50 N. W. 1129.

65. Bagby *v.* Emberson, 79 Mo. 139; Bixby *v.* Jewell, 72 Nebr. 755, 101 N. W. 1026; Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503.

66. See *supra*, II, F, 36.

67. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Acock *v.* Acock, 57 Mo. 154.

68. Childs *v.* Kansas City, etc., R. Co., (Mo. 1891) 17 S. W. 941; Caproon *v.* Mitchell, (Nebr. 1906) 110 N. W. 378.

A party who pleads over after his motion to strike out pleadings is overruled, and tries the case on instructions following the theory of the pleadings, and fails to object to the overruling of his motion to strike out in his motion for new trial, will not be permitted to object to such action of the trial court on appeal. Anderson *v.* Stapel, 80 Mo. App. 115.

69. Palmer *v.* Shenkel, 50 Mo. App. 571; Boatman's Sav. Bank *v.* McMenamy, 35 Mo. App. 198; State *v.* Shobe, 23 Mo. App. 474.

70. Crow *v.* Stevens, 44 Mo. App. 137.

71. Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438.

72. Morgan *v.* Hyatt, 62 Ind. 560; Schaefer *v.* Green, 68 Mo. App. 168.

73. German Sav. Inst. *v.* Jacoby, 97 Mo. 617, 11 S. W. 256.

74. Barker *v.* Davies, 47 Nebr. 78, 66 N. W. 11.

75. Peru, etc., R. Co. *v.* Dayton, 18 Ind. 326; Davis *v.* Engler, 18 Ind. 312; Henly *v.* Kern. 15 Ind. 391; Martindale *v.* Price, 14 Ind. 115.

included in the assignment of errors, the supreme court will not consider it.[76] A motion for new trial is also necessary to present for review an objection that judgment was erroneously taken for want of an answer,[77] or that the petition imperfectly described the property in litigation,[78] or to present for review the overruling of a plea in abatement.[79] On the other hand error in rejecting an answer denying the truth of an affidavit in attachment is available without a motion for a new trial on that ground,[80] and so is an objection based on a variance which causes no surprise;[81] and it has been held that where a verdict and judgment have been rendered in the court below on a declaration containing some good and some bad counts and no objection is made to the evidence on a motion for new trial or in arrest of judgment, the verdict will not be disturbed; that the court will presume that the verdict and judgment therefor was entered on testimony applicable to the good counts only.[82] So a party may take advantage in the appellate court of an error committed by the trial court in permitting a plea to be filed, where the record shows that such party objected to the filing of such plea in the trial court, and that he need not in such case take a bill of exceptions, or except to the action of the court overruling his objection. This rule is equally applicable to the filing of a replication.[83]

III. GROUNDS.

A. Errors and Irregularities in General[84] — **1. Effect of Statutes.** In some states the statutory enumeration of the grounds for new trials is exclusive.[85] In other states the statutes are construed as not limiting the powers of courts of general jurisdiction to grant new trials on any common-law grounds.[86] At early common law a new trial might be allowed whenever injustice appeared to have been done by a verdict.[87]

2. Jurisdiction of Court. A motion for a new trial is not an appropriate remedy to contest the jurisdiction of the court.[88]

76. Atkison *v.* Dixon, 96 Mo. 582, 10 S. W. 163.

77. Fuller *v.* Indianapolis, etc., R. Co., 18 Ind. 91.

78. Brown *v.* McKee, 80 Tex. 594, 16 S. W. 435.

79. Burgen *v.* Dwinal, 11 Ark. 314. *Contra*, Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

80. Fleming *v.* Dorst, 18 Ind. 493.

81. Chicago, etc., R. Co. *v.* Byrum, 48 Ill. App. 41.

82. Burns *v.* Allen, 2 B. Mon. (Ky.) 246.

83. Quaker City Nat. Bank *v.* Showacre, 26 W. Va. 48.

84. In the nature of the case, "irregularities in the proceedings" "by which a party was prevented from having a fair trial" are not susceptible of accurate classification. Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540. "It is quite evident that this ground [irregularity in the proceedings of the court] . . . is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial." Woods *v.* Jensen, 130 Cal. 200, 205, 62 Pac. 473.

85. *California.*— Townley *v.* Adams, 118 Cal. 382, 50 Pac. 550; Benjamin *v.* Stewart, 61 Cal. 605.

Georgia.— McElveen Commission Co. *v.* Jackson, 94 Ga. 549, 20 S. E. 428.

Kansas.— St. Louis, etc., R. Co. *v.* Werner, 70 Kan. 190, 78 Pac. 410.

Minnesota.— Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534; Flower *v.* Grace, 23 Minn. 32.

Montana.— Porter *v.* Industrial Printing Co., 26 Mont. 170, 66 Pac. 839, 67 Pac. 69; Ogle *v.* Potter, 24 Mont. 501, 62 Pac. 920.

Nebraska.— Risse *v.* Gasch, 43 Nebr. 287, 61 N. W. 616.

North Dakota. — McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608.

86. Zaleski *v.* Clark, 45 Conn. 397; Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372; Fassett *v.* Fassett, 41 Mo. 516; Fine *v.* Rogers, 15 Mo. 315; Donnelly *v.* McArdle, 14 N. Y. App. Div. 217, 43 N. Y. Suppl. 560; Emmerich *v.* Hefferan, 33 Hun (N. Y.) 54 [*affirmed* in 97 N. Y. 619].

87. Dulaney *v.* Rankin, 47 Miss. 391; Bright *v.* Eynon, 1 Burr. 390, 2 Ld. Ken. 53.

88. State *v.* Cady, 47 Conn. 44; Hawkins *v.* Chambliss, 120 Ga. 614, 48 S. E. 169; Heery *v.* Burkhalter, 113 Ga. 1043, 39 S. E. 406; Chapin *v.* Jackson, 45 Ind. 153; Campbell *v.* Davidson, 19 U. C. Q. B. 222. See also Taylor *v.* Sutton, 6 La. Ann. 709 (where party guilty of laches); Palmer *v.* Gilbert, 6 N. Brunsw. 505 (mistake in *jurata* of *nisi prius* record).

A mistake in a summons necessitating the issuance of an alias, but not affecting the rights of the parties at the trial, is not ground for a new trial. Menger *v.* North British, etc., Ins. Co., (Kan. App. 1900) 61 Pac. 874.

3. PRELIMINARY PROCEEDINGS — a. Motions to Dismiss. An error in ruling upon a motion before trial to dismiss the action cannot be reviewed on motion for a new trial.[89]

b. Change of Venue. The erroneous overruling of an application for a change of venue is an irregularity in the proceedings affecting a fair trial for which a new trial should be granted.[90]

c. Continuances. The improper refusal of a continuance before trial,[91] or during the trial,[92] may be ground for a new trial. It must appear that there was an abuse of judicial discretion,[93] and that the moving party was prejudiced by the refusal.[94]

d. Setting For Trial. The refusal to set a day certain for the trial of a cause,[95] or the trying of a cause out of its regular order, is not ground for a new trial where surprise is not shown.[96]

4. FORM OF ACTION, AND PARTIES. Objections to the form of the action which are of a purely technical character are not grounds for new trial.[97] It is held not a ground for new trial that there was a defect of parties plaintiff[98] or

Actual notice of suit.—A statute giving a new trial "for good cause shown" to a non-resident served by publication does not apply when the non-resident had actual notice of the suit. Roller *v.* Ried, (Tex. Civ. App. 1894) 24 S. W. 655.

89. Hill *v.* Lundy, 118 Ga. 93, 44 S. E. 830; Heery *v.* Burkhalter, 113 Ga. 1043, 39 S. E. 406; Tyler *v.* Bowlus, 54 Ind. 333. See also McElveen Commission Co. *v.* Jackson, 94 Ga. 549, 20 S. E. 428; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023, for not attaching affidavit of residence to divorce complaint.

The refusal of the court to dismiss a petition for defects in the entry of filing and service is not ground for a new trial on motion. Southern R. Co. *v.* Beach, 117 Ga. 31, 43 S. E. 413.

90. Berlin *v.* Oglesbee, 65 Ind. 308; Wiley *v.* Barclay, 58 Ind. 577; Horton *v.* Wilson, 25 Ind. 316; Goodwin *v.* Bentley, 30 Ind. App. 477, 66 N. E. 496; Galveston, etc., R. Co. *v.* Nicholson, (Tex Civ. App. 1900) 57 S. W. 693. Strong public prejudice against a party is not ground for new trial where it is not shown to have influenced the verdict. Stachlin *v.* Destrehan, 2 La. Ann. 1019.

91. Young *v* Gibson, 2 Tex. 417.

Where a defendant is prejudiced by being required to proceed to trial before the furnishing of a bill of particulars ordered by the court, a new trial will be granted. Prager *v.* Borden's Condensed-Milk Co., 34 Misc. (N Y.) 193, 68 N. Y. Suppl. 833.

Where a continuance asked for on the ground of the absence of a witness was overruled because the same facts could be proved by a witness who was present, and the court charged the jury that two witnesses were needed to prove such facts, new trial was granted. Young *v.* Gibson, 2 Tex. 417. The refusal of a continuance because of the absence of a witness is not ground for a new trial, where the unsuccessful party offered to admit what such witness would testify to. Farrand *v.* Bouchell, Harp. (S. C.) 83.

Insufficient showing for continuance.— Although a continuance may have been properly refused by reason of the insufficiency of the showing made, a new trial may be granted, where good ground for the continuance actually existed and the applicant appears to have suffered injustice. Chilson *v.* Reeves, 29 Tex. 275.

Motion for continuance not acted on.— It is not ground for new trial that a motion for a continuance made several days before trial does not appear to have been acted on. Hastings *v.* Winters, (Tex. Civ. App. 1894) 26 S. W. 283.

92. McGowen *v.* Campbell, 28 Kan. 25 (as where the trial was unnecessarily continued through the night); Smith *v.* Lidgerwood Mfg. Co., 60 N. Y. App. Div. 467, 69 N. Y. Suppl. 975.

93. Cohen *v.* Weigle, 46 Ga. 438; Schamper *v.* Ullrich, 131 Wis. 524, 111 N. W. 691. See also Foster *v.* Lamie, 12 Nova Scotia 269, as to continuance of cause until following day.

94. People *v.* Sackett, 14 Mich. 320.

95. Potter *v.* Padelford, 3 R. I. 162.

96. Bowes *v.* Sutherland, 4 N. Brunsw. 1.

97. Crowley *v.* Pendleton, 46 Conn. 62; Cogswell *v.* Brown, 1 Mass. 237; Buck *v.* Waddle, 1 Ohio 357; Hunter *v.* Corbett, 7 U. C. Q. B. 75, after second trial. And see McConnell *v.* Strong, 11 Vt. 280.

A new trial asked for solely on the ground that minor defendants appeared by attorney, instead of by guardian, was refused. Mercer *v.* Watson, 9 Lanc. Bar (Pa.) 53. *Compare* State *v.* Gawronski, 110 Mo. App. 414, 85 S. W. 126.

98. Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303; Gottschalk *v.* Jarmuth, 69 Ill. App. 623; Mather *v.* Dunn, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788; Brackenridge *v.* Claridge, (Tex. Civ. App. 1897) 42 S. W. 1005. See also Western Union Tel. Co. *v.* Walker, (Tex. Civ. App. 1894) 26 S. W. 858. *Compare* Sims *v* Tyre, 1 Treadw. (S. C.) 123.

Non-joinder, first disclosed on trial.— In Texas, where the non-joinder of necessary parties plaintiff is first disclosed on the trial, and the court fails to arrest the proceedings,

defendant.[99] The rule is established that any objection which could at the trial be removed by amendment comes too late when made for the first time after verdict.[1] Nor is it a ground for new trial that there was a misjoinder of plaintiffs,[2] or defendants,[3] where no prejudice is shown to have resulted from such misjoinder. So an objection to the right or capacity of plaintiff to sue cannot be raised for the first time on motion for new trial.[4]

5. Pleadings — a. In General. Objections to the sufficiency or form of the pleadings cannot be raised by motion for new trial.[5] It is therefore no ground for new trial on the order of a trial court that the declaration, complaint, or petition is defective in substance,[6] or form;[7] or that the plea or answer is defective in substance,[8]

a new trial will be ordered. Ft. Worth, etc., R. Co. *v.* Wilson, 85 Tex. 516, 22 S. W. 578; East Line, etc., R. Co. *v.* Culberson, 68 Tex. 664, 5 S. W. 820; Dallas, etc., R. Co. *v.* Spiker, 59 Tex. 435; Galveston, etc., R. Co. *v.* McCray, (Tex. Civ. App. 1897) 43 S. W. 275.

99. Phillips *v.* Stewart, 27 Ga. 402; Fitzgerald *v.* Garvin, T. U. P. Charlt. (Ga.) 281 (especially if no objection was offered before trial); Darnall *v.* Simpkins, 10 Ind. App. 469, 38 N. E. 219; Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928; Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639 (at least if not objected to before verdict); Zwicker *v.* Zink, 2 Nova Scotia Dec. 291. And see Thrasher *v.* Postal, 79 Wis. 503, 48 N. W. 600, holding that a defendant is not entitled to a new trial to permit him to call in a person liable over to him. *Compare* McVean *v.* Scott, 46 Barb. (N. Y.) 379; Maverick *v.* Burney, 88 Tex. 560, 32 S. W. 512.

1. Gottschalk *v.* Jarmuth, 69 Ill. App. 623.

2. Porter *v.* Orient Ins. Co., 72 Conn. 519, 45 Atl. 7.

3. Bullock *v.* Dunbar, 114 Ga. 754, 40 S. E. 783; Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

4. Thus an objection that plaintiff corporation has no right to sue because it has not paid its franchise tax cannot be raised for the first time on a motion for new trial. Frazier *v.* Waco Bldg. Assoc., 25 Tex. Civ. App. 476, 61 S. W. 132.

5. Minor *v.* Mead, 3 Conn. 289 (in replication); Breed *v.* Northern Pac. R. Co., 35 Fed. 642. And see cases cited *infra*, this note.

A motion for a new trial based upon an alleged want of evidence of error committed during the trial does not raise any question as to the sufficiency of a pleading. Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617; Florsheim *v.* Dullaghan, 58 Ill. App. 626; Daubenspeck *v.* Daubenspeck, 44 Ind. 320; Meyer *v.* McLean, 1 Johns. (N. Y.) 509; Gravelle *v.* Minneapolis, etc., R. Co., 11 Fed. 569, 3 McCrary 359. *Compare* Johnson *v.* U. S. Bank, 2 B. Mon. (Ky.) 310.

Limitations of rule.—A variance between a record pleading and that served on a party might justify granting new trial where surprise is alleged (Kimball *v.* Huntington, 7 Wend. (N. Y.) 472); so it has been held that where the issues are so confused as to render the verdict uncertain, a venire de novo should issue (Turrentine *v.* Richmond, etc., R. Co., 92 N. C. 638), or new trial be granted (Pearce *v.* Jordan, 9 Fla. 526).

6. *Connecticut.*— State *v.* Cady, 47 Conn. 44; Canterbury *v.* Bennett, 22 Conn. 623; Pearl *v.* Rawdin, 5 Day 244.

Georgia.— Taylor *v.* Globe Refinery Co., 127 Ga. 138, 56 S. E. 292; Simpson *v.* Wicker, 120 Ga. 418, 47 S. E. 965; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617.

Indiana.— Chapin *v.* Jackson, 45 Ind. 153; Mann *v.* Barkley, 21 Ind. App. 152, 51 N. E. 946.

Iowa.— Linden *v.* Green, 81 Iowa 365, 46 N. W. 1108.

South Carolina.— Saluda Mfg. Co. *v.* Pennington, 2 Speers 735.

Texas.— Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829.

Canada.— Breen *v.* Elkin, 9 N. Brunsw. 187.

See 37 Cent. Dig. tit. "New Trial," § 24.

Contra.— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74; Nichols *v.* Alsop, 10 La. 407. And see Brown *v.* Wilson, 12 B. Mon. (Ky.) 100, holding that, where the declaration does not state a cause of action, a new trial will not be granted, as a matter of course, although defendant's evidence be insufficient to sustain a verdict in his favor. See Judgments, 23 Cyc. 824.

7. *Alaska.*— Runner *v.* Woitke, 2 Alaska 469.

New Jersey.— Baldwin *v.* O'Brian, 1 N. J. L. 418, 1 Am. Dec. 208.

New York.— Kimball *v.* Huntington, 7 Wend. 472.

Ohio.— Buck *v.* Waddle, 1 Ohio 357.

Pennsylvania.— See Vann *v.* Downing, 20 Phila. 348.

United States.— Gravelle *v.* Minneapolis, etc., R. Co., 11 Fed. 569, 3 McCrary 359.

England.— Goslin *v.* Wilcock, 2 Wils. C. P. 302.

8. *Illinois.*— Florsheim *v.* Dullaghan, 58 Ill. App. 626.

Indiana.— Daubenspeck *v.* Daubenspeck, 44 Ind. 320.

Kentucky.— See McMurtry *v.* Henry, 4 Bibb 410, holding that where a plea is insufficient, irregularities in the trial of the issue thereunder are not ground for a new trial.

Massachusetts.—Dwyer *v.* Brannon, 6 Mass. 330.

New York.— Meyer *v.* McLean, 1 Johns. 509.

or form;[9] or that the court erred in its ruling on a demurrer,[10] on a motion to dismiss in the nature of a demurrer,[11] on a motion to make a pleading more specific and certain,[12] on a motion to strike a pleading,[13] or to strike out parts of a pleading.[14] A ruling on an application to file a pleading out of time is not ordinarily reviewable on motion for new trial.[15] Neither is a refusal to enter judgment on the pleadings before the trial.[16] It is generally no cause for new trial that no replication was filed where the case has been tried without objection on that ground,[17] and new trial need not be granted for failure to file a plea of set-off, where the case has been tried, without objection, on the supposition that such plea had been filed.[18]

b. Amendments. The allowance of an amendment to a pleading is not ground for new trial,[19] except where such an amendment at the trial may have occasioned

South Carolina.— Stoll *v.* Ryan, 1 Treadw. 96.

Vermont.— Dodge *v.* Kendall, 4 Vt. 31.

See 37 Cent. Dig. tit. "New Trial," § 26.

9. Winslow *v.* Cumberland Bank, 26 Me. 9; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

10. Lang *v.* Yearwood, 127 Ga. 155, 56 S. E. 305; Savannah, etc., R. Co. *v.* Renfroe, 115 Ga. 774, 42 S. E. 88; Carter *v.* Johnson, 112 Ga. 494, 37 S. E. 736; Equitable Securities Co. *v.* Worley, 108 Ga. 760, 33 S. E. 49; Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Holleman *v.* Bradley Fertilizer Co., 106 Ga. 156, 32 S. E. 83; Shuman *v.* Smith, 100 Ga. 415, 28 S. E. 448; Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841; Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294; Ledbetter *v.* McWilliams, 90 Ga. 43, 15 S. E. 634; Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719; Gibson *v.* Carreker, 82 Ga. 46, 9 S. E. 124; Nicholls *v.* Popwell, 80 Ga. 604, 6 S. E. 21; Rogers *v.* Rogers, 78 Ga. 688, 3 S. E. 451; De Barry-Baya Merchants' Line *v.* Austin, 76 Ga. 306; Griffin *v.* Justices Baker County Inferior Ct., 17 Ga. 96; Irwin *v.* Smith, 72 Ind. 482; Glendy *v.* Lanning, 68 Ind. 142; Davis *v.* Pool, 67 Ind. 425; Garess *v.* Foster, 62 Ind. 145; Line *v.* Huber, 57 Ind. 261; Marks *v.* Purdue University, 56 Ind. 288; Cool *v.* Cool, 54 Ind. 225; Hamilton *v.* Elkins, 46 Ind. 213; Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462; Helms *v.* Kearns, 40 Ind. 124; Ray *v.* Indianapolis Ins. Co., 39 Ind. 290; Cincinnati, etc., R. Co. *v.* Washburn, 25 Ind. 259; Gray *v.* Stiver, 24 Ind. 174; Helberg *v.* Hammond Bldg., etc., Assoc., 31 Ind. App. 58, 67 N. E. 111; Hardison *v.* Mann, 20 Ind. App. 404, 50 N. E. 899; Leiter *v.* Jackson, 8 Ind. App. 98, 35 N. E. 289; Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71. *Contra*, Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431; Rochell *v.* Phillips, 20 Fed. Cas. No. 11,974, Hempst. 22. And *compare* Johnson *v.* U. S. Bank, 2 B. Mon. (Ky.) 310. A new trial will not be granted merely because a demurrer to the answer had not been disposed of before the trial. Calderwood *v.* Tevis, 23 Cal. 335.

Failure to dispose of motion.— The refusal of the court to hear a demurrer or motion to dismiss is not ground for a new trial on motion. Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830.

11. Cooper *v.* Chamblee, 114 Ga. 116, 39 S. E. 917; Cedartown *v.* Freeman, 89 Ga. 451, 15 S. E. 481; Vandever *v.* Garshwiler, 63 Ind. 185.

12. Knickerbocker Ice Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

The refusal to dismiss a case for failure of plaintiff to attach a bill of particulars is not ground for a new trial. Simpson *v.* Wicker, 120 Ga. 418, 47 S. E. 965.

13. Vandever *v.* Garshwiler, 63 Ind. 185; Reed *v.* Spayde, 56 Ind. 394; Hamilton *v.* Elkins, 46 Ind. 213; Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462; Shafer *v.* Bronenberg, 42 Ind. 89; Leiter *v.* Jackson, 8 Ind. App. 98, 35 N. E. 289; Scherrer *v.* Hale, 9 Mont. 63, 22 Pac. 151.

14. New Albany *v.* White, 100 Ind. 206; Vandever *v.* Garshwiler, 63 Ind. 185; Reed *v.* Spayde, 56 Ind. 394 (motion to strike interrogatories attached to a pleading); Hamilton *v.* Elkins, 46 Ind. 213; Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462; Milliken *v.* Ham, 36 Ind. 166; Ward *v.* Bateman, 34 Ind. 110; Brackett *v.* Brackett, 23 Ind. App. 530, 55 N. E. 783 (striking out cross complaint). *Compare* Marshall *v.* Hamilton, 41 Miss. 229.

The striking out of a plea on the trial is not ground for a new trial, where defendant is not deprived of the benefit of any legal evidence. Atlanta Glass Co. *v.* Noizet, 88 Ga. 43, 13 S. E. 833; Hiller *v.* Howell, 74 Ga. 174; Toole *v.* Perry, 56 Ga. 627.

Interrogatories filed with pleading.— The refusal of the court to reject, on motion, interrogatories filed with a pleading is not ground for a new trial. Reed *v.* Spayde, 56 Ind. 394.

15. Rigdon *v.* Ferguson, 172 Mo. 49, 72 S. W. 504. Refusing leave to reply to a plea of set-off after the overruling of a demurrer thereto was held to require a new trial. Rochell *v.* Phillips, 20 Fed. Cas. No. 11,974*a*, Hempst. 22.

16. Powder River Cattle Co. *v.* Custer County, 9 Mont. 145, 22 Pac. 383.

17. Maxwell *v.* Potter, 47 Me. 487; Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Franklin *v.* Mackey, 9 Lanc. Bar (Pa.) 197. See also Stevens *v.* Bachelder, 28 Me. 218. *Contra*, Martin *v.* Tarver, 43 Miss. 517; McMillion *v.* Dobbins, 9 Leigh (Va.) 422.

18. Smith *v.* Gross, 27 Pa. Co. Ct. 384.

19. Lowery *v.* Idleson, 117 Ga. 778, 45

surprise.[20] The refusal at the trial to allow a proper amendment to prevent a variance is ground for new trial.[21] The denial of an amendment before the trial seems to be ground for new trial at common law.[22]

c. Variance, and Failure of Proof. A material variance between the pleadings and the proofs is ground for new trial,[23] where seasonably objected to.[24] But an immaterial variance, on a point on which a pleading might be amended at the trial, is not.[25] Where there is a failure of proof, a new trial must be ordered.[26]

6. JURY TRIAL — a. In General. A refusal of a proper demand for a jury trial is ground for new trial.[27] But where a cause more properly triable to a jury is tried by a judge without objection,[28] or where a case triable by a judge is tried by a jury without objection,[29] the irregularity is waived. The trial of a case to eleven jurors, the losing party having no knowledge of the defect, is ground for new trial.[30] But the objection may be waived[31] and is waived if the defect is known and no objection is made.[32]

b. Impaneling Jury. Mere irregularities in the selection of a jury,[33] or in the

S. E. 51; Hammond *v.* George, 116 Ga. 792, 43 S. E. 53; Bullock *v.* Cordele Sash, etc., Co., 114 Ga. 627, 40 S. E. 734; Smith *v.* Gerow, 15 N. Brunsw. 425, declaration. *Compare* Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372.

If the allowance of an amendment at the trial was not objected to a new trial cannot be allowed on that ground. Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Doe *v.* Baxter, 7 N. Brunsw. 377.

Where no prejudice is shown to have resulted to the other party from an amendment, a new trial is properly denied. Crane *v.* Lincoln, 2 Gray (Mass.) 401; New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141.

20. See *infra*, III, H, 1, d.

Amendment after verdict.—A new trial may be allowed where a party is permitted improperly to amend his pleadings after verdict. Floyd *v.* Woods, 4 Yerg. (Tenn.) 165.

21. Lestrade *v.* Barth, 17 Cal. 285; Wildman *v.* Wildman, 72 Conn. 262, 44 Atl. 224; Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258. And see *infra*, III, H, 1, d.

Surprise.—A refusal to permit an amendment on the trial to prevent a variance may be ground for a new trial on the ground of surprise. Holmes *v.* The Chieftain, 1 La. Ann. 136.

22. Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372, 374, in which it was said: "If, as is true in this case, such ruling lays the foundation for the introduction of other and different evidence, in respect to another and different subject matter, and the recovery of greater damages, the party is clearly entitled, if the ruling is wrong, to a new, because to a different trial, whether the evidence is admitted because of an erroneous ruling before or during the trial." Halifax Banking Co. *v.* Gillis, 20 Nova Scotia 406.

23. *Georgia.*— Port Royal, etc., R. Co. *v.* Tompkins, 83 Ga. 759, 10 S. E. 356.

Mississippi.— Drake *v.* Surget, 36 Miss. 458.

New Jersey.— Powell *v.* Mayo, 26 N. J. Eq. 120.

Ohio.— Conn *v.* Gano, 1 Ohio 483, 13 Am. Dec. 639.

West Virginia.— Hutchinson *v.* Parkersburg, 25 W. Va. 226; Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

See 37 Cent. Dig. tit. "New Trial," § 29.

24. See *infra*, III, C, 6, b.

25. *Connecticut.*— Rice *v.* Almy, 32 Conn. 297; Allen *v.* Jarvis, 20 Conn. 38; Meade *v.* Smith, 16 Conn. 346.

Massachusetts.— Aldrich *v.* Aldrich, 143 Mass. 45, 8 N. E. 870; Cunningham *v.* Kimball, 7 Mass. 65.

Minnesota.— Short *v.* McRea, 4 Minn. 119.

New York.— Updike *v.* Abel, 60 Barb. 15; Cole *v.* Goodwin, 19 Wend. 251, 32 Am. Dec. 470.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Reading, etc., R. Co., 2 Pa. Dist. 857; Shunk *v.* Propeller Co., 6 Phila. 231.

Rhode Island.— Cleasby *v.* Reynolds, 26 R. I. 236, 58 Atl. 786.

United States.— Gravelle *v.* Minneapolis, etc., R. Co., 11 Fed. 569, 3 McCrary 359.

England.— Sampson *v.* Appleyard, 3 Wils. C. P. 272.

Canada.— Deady *v.* Goodenough, 5 U. C. C. P. 163; Kennedy *v.* Freeth, 23 U. C. Q. B. 92.

See 37 Cent. Dig. tit. "New Trial," § 29. And see *supra*, III, A, 5, b.

26. Ryan *v.* Copes, 11 Rich. (S. C.) 217, 73 Am. Dec. 106. And see *infra*, II, F.

27. Alley *v.* State, 76 Ind. 94.

28. Griffin *v.* Pate, 63 Ind. 273.

29 Casey *v.* Briant, 1 Stew. & P. (Ala.) 51; Morse *v.* Wilson, 138 Cal. 558, 71 Pac. 801. See also Wright *v.* Sun Mut. L. Ins. Co., 29 U. C. C. P. 221.

30. Cowles *v.* Buckman, 6 Iowa 161.

31. Cowles *v.* Buckman, 6 Iowa 161.

32. Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48.

33. *Georgia.*— Faulkner *v.* Snead, 122 Ga. 28, 49 S. E. 747 (juror's name not on jury list); Dasher *v.* State, 113 Ga. 3, 38 S. E. 348 (juror's name not on jury book); Pool *v.* Callahan, 88 Ga. 468, 14 S. E. 867 (mistake in juror's name on jury list); Brown *v.* Autrey, 78 Ga. 753, 3 S. E. 669 (calling talesman before regular panel exhausted); Urquhart *v.* Powell, 59 Ga. 721 (juror's name not on jury list).

swearing of the jury,[34] no objection having been offered and no injury being shown,[35] are not grounds for new trial. The overruling of proper questions on the *voir dire* examination of a juror has been held to require the granting of

Indiana.— Telford *v.* Wilson, 71 Ind. 555.

Massachusetts.—Howland *v.* Gifford, 1 Pick. 43 note (juror serving in case for which he was not drawn); Amherst *v.* Hadley, 1 Pick. 38 (juror drawn prematurely, although fact unknown to losing party at trial).

Ohio.— Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 12 Ohio Cir. Ct. 367, 5 Ohio Cir. Dec. 643, innocent substitution of juror not summoned.

Pennsylvania.—Jordan *v.* Meredith, 1 Binn. 27 (juror serving after being struck from list); Sparks *v.* Plankinhorne, 4 Yeates 384 (mistake in name of one of list of special jurors); Koenig *v.* Bauer, 1 Brewst. 304 (calling jurors previously struck from list); Eshleman *v.* Miller, 3 Lanc. L. Rev. 57 (juror not on regular panel); Loucks *v.* Lightner, 11 York Leg. Rec. 157 (mistake in name of juror struck).

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

South Carolina.—Boland *v.* Greenville, etc., R. Co., 12 Rich. 368, substitution of juror during trial without objection.

Tennessee.— Park *v.* Harrison, 8 Humphr. 412, mere pointing out of person as fit juror by party, not influencing sheriff.

Vermont.— Mann *v.* Fairlee, 44 Vt. 672.

Wisconsin.— Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243, failure of county board to prepare proper jury lists.

England.— Dickenson *v.* Blake, 7 Bro. P. C. 177, 3 Eng. Reprint 114 (mistake in juror's name in panel); *In re* Chelsea Waterworks Co., 3 C. L. R. 329, 10 Exch. 731, 1 Jur. N. S. 143, 24 L. J. Exch. 79, 3 Wkly. Rep. 174 (juror's name not on jury list); Hill *v.* Yates, 12 East 229, 11 Rev. Rep. 371 (son of person intended to be called serving as juror. But *compare* Falmouth *v.* Roberts, 1 Dowl. P. C. N. S. 633, 11 L. J. Exch. 180, 9 M. & W. 469, as to discretionary right to order new trial under such circumstances); Torbock *v.* Lainy, 5 Jur. 318 (court officer writing wrong name for juror sworn); Pryme *v.* Titchmarsh, 2 Dowl. P. C. N. S. 474, 7 Jur. 202, 12 L. J. Exch. 45, 10 M. & W. 605 (jurors' names not on county jury list); Wells *v.* Cooper, 30 L. T. Rep. N. S. 721 (juror of same name not on regular panel serving by mistake. But where the objection is taken before verdict, there must be a venire de novo. Doe *v.* Michael, 16 Q. B. 620, 15 Jur. 677, 20 L. J. Q. B. 276, 71 E. C. L. 620).

Canada.— Cowling *v.* Le Cain, 5 Nova Scotia 717 (irregularity in drawing names); Seaman *v.* Campbell, 2 Nova Scotia 94 (defects in jury lists); Shipman *v.* Birmingham, 5 U. C. Q. B. O. S. 442 (special jury improperly struck).

See 37 Cent. Dig. tit. "New Trial," §§ 31, 106, 116.

Where a person not drawn served as a juror, the irregularity being unknown to the losing party, a new trial was granted. Kennedy *v.* Williams, 2 Nott & M. (S. C.) 79.

That the person summoning the jury is related to a party or interested in the case is not necessarily ground for a new trial. Walker *v.* Green, 3 Me. 215 (sheriff summoning juror where deputy party); Rector *v.* Hudson, 20 Tex. 234 (sheriff relative of party); Brunskill *v.* Giles, 9 Bing. 13, 1 L. J. C. P. 143, 2 Moore & S. 41, 23 E. C. L. 464 (partner of attorney); Briggs *v.* Sowton, 9 Dowl. P. C. 105, 4 Jur. 1014, Wils. P. C. 3 (attorney of party); Mason *v.* Vickery, 1 Smith K. B. 304 (attorney of party); Power *v.* Ruttan, 5 U. C. Q. B. O. S. 132 (relative of party).

In Pennsylvania the substitution of a person not on the venire for one regularly called is ground for a new trial. Jejorek *v.* Nanticoke, 9 Kulp 501 (impersonation apparently wilful); Hieter *v.* Kaufman, 20 Pa. Co. Ct. 198 (impersonation apparently unintentional). See also Reynoldsville First Nat. Bank *v.* Ahlers, 7 Pa. Dist. 99, 20 Pa. Co. Ct. 505 (both parties mistaken as to substitution of juror for another of similar name); Haller *v.* Peoples, 31 Pittsb. Leg. J. N. S. 164 (rejected juror serving by mistake).

A sheriff is not entitled to a new trial because the jury was summoned by himself instead of by the coroner. Payne *v.* McLean, Taylor (U. C.) 325; Ainslie *v.* Rapelje, 3 U. C. Q. B. 275.

34. Caldwell *v.* Irvine, 4 J. J. Marsh. (Ky.) 107; Burns *v.* Mathews, (Tex. Civ. App. 1898) 46 S. W. 79 (juror not sworn); Scott *v.* Moore, 41 Vt. 205, 98 Am. Dec. 581 (juror not sworn); Goose *v.* Grand Trunk R. Co., 17 Ont. 721 (juror not sworn).

35. *California.*— Thrall *v.* Smiley, 9 Cal. 529.

Georgia.— Faulkner *v.* Snead, 122 Ga. 28, 49 S. E. 747.

Maine.— Walker *v.* Green, 3 Me. 215.

Massachusetts.— Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271.

New Hampshire.— Pittsfield *v.* Barnstead, 40 N. H. 477; Bodge *v.* Foss, 39 N. H. 406; Wilcox *v.* Lempster School Dist. No. 1, 26 N. H. 303.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636, it being the duty of a party to inquire as to the method of drawing jurors.

Vermont.— Scott *v.* Moore, 41 Vt. 205, 98 Am. Dec. 581.

Wisconsin.— Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393. And see cases in last two notes.

England.— *In re* Chelsea Waterworks Co., 3 C. L. R. 329, 10 Exch. 731, 1 Jur. N. S. 143, 24 L. J. Exch. 79, 3 Wkly. Rep. 174, juror's name not on jury list.

Canada.— Shipman *v.* Bermingham, 5 U. C. Q. B. O. S. 442; Power *v.* Ruttan, 5 U. C. Q. B. O. S. 132.

a new trial.[36] The improper rejection of a qualified juror is ground for new trial only where probable injury has resulted.[37]

c. Disqualification or Incompetency of Jurors — (I) *In General.* An objection to a juror that would have been good cause for challenge on his *voir dire* examination is not necessarily ground for new trial.[38] Generally an objection is insufficient on motion for new trial, unless it shows probable partiality on the part of the juror.[39]

(II) *Disqualification.*[40] Failure to remove from a panel jurors disqualified for any reason to act as such is ground for new trial.[41] Either because the unknown disqualification would have been disclosed by a proper examination of the juror on his *voir dire*, or because it did not affect his impartiality, it has been held not sufficient ground for new trial that a juror was an alien,[42] or a nonresident of the county,[43] or was not a householder,[44] or was not of proper age,[45] or was unable to understand the English language.[46] The physical unfitness of a

Excuse for failure to challenge juror.—That the failure of the losing party to challenge a juror was caused by the fact that he had known the juror under a different name and did not recognize him as the same person was held not ground for a new trial. Megargel *v.* Waltz, 21 Pa. Co. Ct. 633.

36. Houston, etc., R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670.

37. Citizens' Bank *v.* Strauss, 26 La. Ann. 736; West *v.* Forrest, 22 Mo. 344; O'Brien *v.* Vulcan Iron-Works, 7 Mo. App. 257; Gore *v.* Scranton City, 5 Pa. Co. Ct. 545. But see Cartersville *v.* Lyon, 69 Ga. 577; Scranton *v.* Gore, 23 Wkly. Notes Cas. (Pa.) 419 [*reversing* Wilcox 197]; Empey *v.* Carscallen, 24 Ont. 658. *Compare* Kingston Union *v.* Landed Estates Co., 28 L. T. Rep. N. S. 644, where other jurors were impaneled instead of viewers who had been impaneled but were engaged in trying another cause before another judge.

If objection is not made, the irregularity is waived. Downey *v.* Pence, 98 Ky. 261, 32 S. W. 737, 17 Ky. L. Rep. 824.

38. *District of Columbia.*— Raub *v.* Carpenter, 17 App. Cas. 505, immoral character.

Kansas.— Schrader *v.* Saline County Alliance Exch. Co., 7 Kan. App. 813, 54 Pac. 513.

Massachusetts.— Cook *v.* Castner, 9 Cush. 266.

Tennessee.— Magness *v.* Stewart, 2 Coldw. 309.

West Virginia.— Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870.

Compare Glover *v.* Woolsey, Dudley (Ga.) 85; Cain *v.* Cain, 1 B. Mon. (Ky.) 213; McKinley *v.* Smith, Hard. (Ky.) 167.

Conviction of larceny.— Under the South Carolina constitution it is ground for a new trial that a juror had been convicted of larceny. Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

39. Williams *v.* McGrade, 18 Minn. 82.

40. See Juries, 24 Cyc. 196.

41. Atlantic Coast Line R. Co. *v.* Bunn, 2 Ga. App. 305, 58 S. E. 538, juror employee of party. See also Gibney *v.* St. Louis Transit Co., 204 Mo. 704, 103 S. W. 43.

42. *Colorado.*— Turner *v.* Hahn, 1 Colo. 23.

Illinois.— Greenup *v.* Stoker, 8 Ill. 202.

Michigan.— Johr *v.* People, 26 Mich. 427.

New York.— Bennett *v.* Matthews, 40 How. Pr. 428.

United States.— Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,618, 4 Dall. 353, 1 L. ed. 864, Wall. Sr. 147.

See 37 Cent. Dig. tit. "New Trial," § 74.

Contra.— Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119; Quinn *v.* Halbert, 52 Vt. 353; Mann *v.* Fairlee, 44 Vt. 672.

43. *Arkansas.*— Fain *v.* Goodwin, 35 Ark. 109.

Kentucky.— Major *v.* Pulliam, 3 Dana 582.

Minnesota.— Keegan *v.* Minneapolis, etc., R. Co., 76 Minn. 90, 78 N. W. 965.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569.

Pennsylvania.— Baird *v.* Otte, 2 Pa. Dist. 449, 12 Pa. Co. Ct. 445.

Texas.— Wooters *v.* Craddock, (Civ. App. 1898) 46 S. W. 916, or state.

Wisconsin.— Rockwell *v.* Elderkin, 19 Wis. 367, where it is said: "It is an objection which does not affect the impartiality or intelligence of the juror, and furnishes no presumption against the justice of the verdict."

See 37 Cent. Dig. tit. "New Trial," § 74.

44. Finley *v.* Hayden, 3 A. K. Marsh. (Ky.) 330; Rennick *v.* Walthal, 2 A. K. Marsh. (Ky.) 23. *Contra,* Briggs *v.* Georgia, 15 Vt. 61, as to freeholder.

45. *District of Columbia.*— Raub *v.* Carpenter, 17 App. Cas. 505.

Maryland.— Johns *v.* Hodges, 60 Md. 215, 45 Am. Rep. 722.

Massachusetts.— Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258.

Missouri.—Pitt *v.* Bishop, 53 Mo. App. 600.

Ohio.— Watts *v.* Ruth, 30 Ohio St. 32.

Contra.— Mann *v.* Fairlee, 44 Vt. 672.

That a juror was privileged from serving by reason of his age is not ground for a new trial. Munroe *v.* Brigham, 19 Pick. (Mass.) 368.

46. Whitehead *v.* Wells, 29 Ark. 99; Dickerson *v.* North Jersey St. R. Co., 68 N. J. L. 45, 52 Atl. 214; Watts *v.* Ruth, 30 Ohio St. 32; Eastman *v.* Wight, 4 Ohio St. 156; Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76; Boetge *v.* Landa, 22 Tex. 105. *Contra,* Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec.

juror to serve might be ground for new trial as for instance deafness which prevents his hearing some of the most important evidence.[47]

(III) *Incompetency*— (A) *In General.* In a number of cases in which the duty of the parties to examine jurors appears not to have been considered, it has been held ground for new trial that, unknown to the movant before verdict, a juror was interested in the result of the action,[48] or was related to a party or person having an interest in the action,[49] even though, before verdict, the interest of his relative was unknown to the juror,[50] or the relationship was unknown to both the juror and the parties.[51] So also new trials have been granted because of the partiality of jurors,[52] and for expressions of opinions by jurors unknown to the

246 (holding failure to discover deficiency not negligence); Shaw *v.* Fisk, 21 Wis. 368, 94 Am. Dec. 547.

47. Cameron *v.* Ottawa Electric R. Co., 32 Ont. 24.

Where a new trial is asked for on account of deafness of a juror, it should appear that evidence that he did not hear was material. Conover *v.* Jones, 5 N. J. L. J. 349.

That a juror was insane not long after the trial and was probably insane to some extent at the time of the trial is not ground for a new trial, where he acted with apparent saneness and intelligence at the time. Burik *v.* Dundee Woolen Co., 66 N. J. L. 420, 49 Atl. 442.

In Massachusetts the decision of the trial court that a juror was not disabled by sickness is final. Hubbard *v.* Gale, 105 Mass. 511.

48. Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815. *Compare* Josey *v.* Wilmington, etc., R. Co., 12 Rich. (S. C.) 134 (stock-holder in defendant corporation); Magness *v.* Stewart, 2 Coldw. (Tenn.) 309; Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870 (interest in similar case). See also Shobe *v.* Bell, 1 Rand. (Va.) 39.

That a juror has acquired an interest in a case during the trial is ground for a new trial. Turner *v.* Latorre, 18 La. 74.

49. *Georgia.*— University Bank *v.* Tuck, 107 Ga. 211, 33 S. E. 70 (relatives of stockholders in plaintiff bank); Moore *v.* Farmers' Mut. Ins. Assoc., 107 Ga. 199, 33 S. E. 65 (relative of member of mutual fire insurance company); Swift *v.* Mott, 92 Ga. 448, 17 S. E. 631 (cousin of party's attorney in suit on note providing attorney's fees); Georgia R. Co. *v.* Cole, 73 Ga. 713 (juror's brother and son-in-law of stock-holder in defendant corporation); Beall *v.* Clark, 71 Ga. 818 (juror half brother of witness promised superintendency of plantation in litigation); Moody *v.* Griffin, 65 Ga. 304; Bullard *v.* Trice, 63 Ga. 165; Georgia R. Co. *v.* Hart, 60 Ga. 550 [*criticizing* Magness *v.* Stewart, 2 Coldw. (Tenn.) 309] (son of stock-holder in defendant corporation); Rust *v.* Shackleford, 47 Ga. 538.

Indiana.— Hudspeth *v.* Herston, 64 Ind. 133; Tegarden *v.* Phillips, (App. 1894) 39 N. E. 212.

Kentucky.— Dailey *v.* Gaines, 1 Dana 529; Gardner *v.* Arnett, 50 S. W. 840, 21 Ky. L. Rep. 1.

Maine.— Jewell *v.* Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473 (related to both parties); Lane *v.* Goodwin, 47 Me. 593; Hardy *v.* Sprowle, 32 Me. 310.

Pennsylvania.— Caldwell *v.* Kumerant, 20 Pa. Co. Ct. 608.

Canada.— Lynds *v.* Hoar, 10 Nova Scotia 327, related to both parties. But see Bishop *v.* Goff, 11 N. Brunsw. 389.

See 37 Cent. Dig. tit. "New Trial," § 77.

Compare Hayes *v.* Thompson, 15 Abb. Pr. N. S. (N. Y.) 220 [*affirmed* in 2 Hun 518]; Cole *v.* Van Keuren, 51 How. Pr. (N. Y.) 451; Spicer *v.* Fulghum, 67 N. C. 18 (holding the matter one for discretion of court); Onions *v.* Naish, 7 Price 203.

Where the verdict is against the juror's relation, a new trial need not be granted. Wright *v.* Smith, 104 Ga. 174, 30 S. E. 651 (at least where the relationship was unknown to the juror until after the verdict); McKinney *v.* McKinney, 72 Ga. 80.

Rule in equity.—Since the verdict of a jury in equity is advisory only, the relationship of a juror to a party is not ground for a new trial. Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357.

50. University Bank *v.* Tuck, 107 Ga. 211, 33 S. E. 70.

51. Tegarden *v.* Phillips, (Ind. App. 1894) 39 N. E. 212; Jewell *v.* Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473 (related to both parties); Salisbury *v.* McClaskey, 26 Hun (N. Y.) 262. *Contra*, Cole *v.* Van Keuren, 51 How. Pr. (N. Y.) 451; Senterfeit *v.* Shealey, 71 S. C. 259, 51 S. E. 142. And see Larkin *v.* Baty, 111 Ala. 303, 18 So. 666 (relationship to surety for party on delivery bond); Northcutt *v.* Jouett, 36 S. W. 179, 18 Ky. L. Rep. 327.

52. *Kentucky.*— Cain *v.* Cain, 1 B. Mon. 213; McKinley *v.* Smith, Hard. 167.

Mississippi.— Childress *v.* Ford, 10 Sm. & M. 25.

New Hampshire.— Tenney *v.* Evans, 13 N. H. 462, 40 Am. Dec. 166.

Vermont.—Deming *v.* Hurlbut, 2 D. Chipm. 45.

Wisconsin.— See Langton *v.* Hagerty, 35 Wis. 150, as to sufficiency of evidence of partiality.

United States.— Wilson *v.* Clement, 126 Fed. 808, one juror employee of corporation under party and another his political partisan.

England.— Ramadge *v.* Ryan, 2 Moore & S. 421, 9 Bing. 333, 2 L. J. C. P. 7, 23 E. C.

unsuccessful parties before verdict.[53] That a juror had bet on the result of the trial is generally sufficient cause for new trial.[54] Where a supposed interest, relationship, or other incompetency is so remote as to raise no reasonable presumption of partiality, new trial is properly refused.[55] Because the fact should have been remembered by the movant or might have been discovered by proper inquiry, it is not usually sufficient cause for new trial that a juror was a member of the jury on a previous trial of the case.[56]

(B) *Incompetency or Disqualification Denied on Voir Dire Examination.* It is ground for new trial that a juror had personal knowledge of material facts in the case,[57] had formed and expressed an opinion on the case,[58] had served as a

L. 604. *Compare* Onions *v.* Naish, 7 Price 203.

See 37 Cent. Dig. tit. "New Trial," § 76.

Where the conduct of a juror was fair and impartial, a new trial on the ground that he had said that he did not know why plaintiff had taken him as he did not like him was denied. Baker *v.* Moore, 84 Ga. 186, 10 S. E. 737.

That it took a jury less than five minutes to return a verdict in a proceeding on a note is no reason for setting the verdict aside. Farnsworth *v.* Fraser, 137 Mich. 296, 100 N. W. 400.

A new trial is not granted for prejudice of the people of the county first raised by motion for a new trial. Anderson *v.* Mammoth Min. Co., 26 Utah 357, 73 Pac. 412; Wood *v.* McPherson, 17 Ont. 163. But see *supra*, III, A, 3, b.

53. Vance *v.* Haslett, 4 Bibb (Ky.) 191; Pierce *v.* Bush, 3 Bibb (Ky.) 347; French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616. *Contra*, Pelton *v.* Jones, Morr. (Iowa) 491; Cook *v.* Castner, 9 Cush. (Mass.) 266; Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757. See also Thrall *v.* Lincoln, 28 Vt. 356, as to insufficient proof of fact of present bias.

54. Essex *v.* McPherson, 64 Ill. 349 (holding it not negligence not to have failed to examine the juror for such an unusual ground of objection); Seaton *v.* Swem, 58 Iowa 41, 11 N. W. 726. *Compare* Olive *v.* Belyea, 6 N. Brunsw. 462, where juror did not consider the matter a bet and claimed to have forgotten it.

Where the evidence was not doubtful, the court refused to set aside a verdict because a juror had wagered a cigar on the result. Butts *v.* Union R. Co., 21 R. I. 505, 44 Atl. 933.

55. *Colorado.*— Hill *v.* Corcoran, 15 Colo. 270, 25 Pac. 171, employment of counsel for prevailing party by juror to defend him against a criminal charge preferred against him during the trial.

Florida.— Morrison *v.* McKinnon, 12 Fla. 552.

Georgia.— Walton *v.* Augusta Canal Co., 54 Ga. 245, applicant for office of policeman under defendant city government.

Indiana.— Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416 (juror husband of niece of wife of attorney in case); Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

Kansas.— Schrader *v.* Salina County Alliance Exch. Co., (App. 1898) 54 Pac. 513, creditor of person interested with plaintiff.

Kentucky.— Rice *v.* Wyatt, 76 S. W. 1087, 25 Ky. L. Rep. 1060; Northcutt *v.* Jouett, 36 S. W. 179, 18 Ky. L. Rep. 327; Rhodes *v.* Crooke, 11 Ky. L. Rep. 952.

New York.— Stedman *v.* Batchelor, 49 Hun 390, 3 N. Y. Suppl. 580 (deputy sheriff in action where sheriff nominal party only, construing code provisions); Cain *v.* Ingham, 7 Cow. 478.

South Carolina.— Todd *v.* Gray, 16 S. C. 635.

See 37 Cent. Dig. tit. "New Trial," § 116.

That a juror's father paid eighty cents a year poor tax in a town is not ground for setting aside a verdict sustaining a will leaving property for the support of the poor of the town. Fiske *v.* Paine, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

56. McDonald *v.* Beall, 55 Ga. 288; Edmondson *v.* Wallace, 20 Ga. 660; Buck *v.* Hughes, 127 Ind. 46, 26 N. E. 558; Fitzpatrick *v.* Harris, 16 B. Mon. (Ky.) 561; Hayward *v.* Calhoun, 2 Ohio St. 164. *Compare* Hawkins *v.* Andrews, 39 Ga. 118 (as to members of grand jury who returned indictment for same trespass); Herndon *v.* Bradshaw, 4 Bibb (Ky.) 45 (where party did not attend former trial and had changed counsel); Williams *v.* McGrade, 18 Minn. 82 (holding it no negligence not to remember service of juror in case three years earlier); Carr *v.* Philadelphia, etc., St. R. Co., 12 Pa. Dist. 559, 8 Del. Co. 580 (where juror served on the second trial under a different name). See also Atkinson *v.* Allen, 12 Vt. 619, 6 Am. Dec. 361, where verdict in former case was directed.

That it is the duty of counsel to examine the record see McDonald *v.* Beall, 55 Ga. 288; Hayward *v.* Calhoun, 2 Ohio St. 164. *Contra*, after three years. Williams *v.* McGrade, 18 Minn. 82. See also Fitzpatrick *v.* Harris, 16 B. Mon. (Ky.) 561.

57. Murphy *v.* Hindman, 37 Kan. 267, 15 Pac. 182; Hyman *v.* Eames, 41 Fed. 676. See also Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58, as to sufficient disclosure of facts on *voir dire*.

58. *Illinois.*— Vennum *v.* Harwood, 6 Ill. 659.

Maine.— Studley *v.* Hall, 22 Me. 198, holding it sufficient to ask a juror whether he was impartial.

Massachusetts.— Woodward *v.* Leavitt, 107

juror on a former trial,[59] was prejudiced against the unsuccessful party or partial to the successful party,[60] or was incompetent by reason of interest, relationship, or otherwise,[61] if such ground of objection was denied or concealed by the juror on proper inquiry on his *voir dire* examination.

(IV) *NECESSITY OF OBJECTION.* As a general rule the failure of a party to challenge a juror is a waiver of any disqualification or incompetency known to the party at the time.[62] In many jurisdictions it is a waiver of any disqualification or incompetency which would have been disclosed by proper examination of the juror upon his *voir dire.*[63] It is not therefore ground for new trial that a

Mass. 453, 9 Am. Rep. 49, where a juror was allowed to explain that he did not remember at the time having previously expressed an opinion.

Mississippi.— Childress *v.* Ford, 10 Sm. & M. 25.

New Hampshire.— Wiggin *v.* Plumer, 31 N. H. 251. *Compare* Dole *v.* Erskine, 37 N. H. 316 (as to expression of opinion three years before); Temple *v.* Sumner, Smith 226.

Washington.—Heasley *v.* Nichols, 38 Wash. 485, 80 Pac. 769.

United States.— Hyman *v.* Eames, 41 Fed. 676.

See 37 Cent. Dig. tit. "New Trial," § 79.

59. Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643; Endowment Rank O. K. P. *v.* Steele, 107 Tenn. 1, 63 S. W. 1126. *Compare* Swarnes *v.* Sitton, 58 Ill. 155 (where statement of case too general for juror to identify it); Buck *v.* Hughes, 127 Ind. 46, 26 N. E. 558 (where party was presumed to remember prior service).

Bias.— It has been held that the bias of such a juror need not be affirmatively shown. Williams *v.* McGrade, 18 Minn. 82.

60. West Chicago St. R. Co. *v.* Huhnke, 82 Ill. App. 404; Childress *v.* Ford, 10 Sm. & M. (Miss.) 25; Heasley *v.* Nichols, 38 Wash. 485, 80 Pac. 769.

61. *Indiana.*— Pearcy *v.* Michigan Mut. L. Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673 (juror a policy-holder in defendant insurance company); Hudspeth *v.* Herston, 64 Ind. 133 (relationship).

New York.— Fealy *v.* Bull, 11 N. Y. App. Div. 468, 42 N. Y. Suppl. 569 (business relations with attorney in case); McGarry *v.* Buffalo, 24 N. Y. Suppl. 16 (liveryman regularly furnishing carriages to attorney for defendant).

Ohio.— Watts *v.* Ruth, 30 Ohio St. 32, *semble.*

Texas.— Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410.

Utah.— Tarpey *v.* Madsen, 26 Utah 294, 73 Pac. 411, business relations with party.

Canada.— Cameron *v.* Ottawa Electric R. Co., 32 Ont. 24.

See 37 Cent. Dig. tit. "New Trial," § 77.

Contra.—Temple *v.* Sumner, Smith (N. H.) 226. And see Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815, holding it the affirmative duty of juror to disclose interest. *Compare* Hall *v.* Graziana, 74 S. W. 670, 25 Ky. L. Rep. 14 (juror client of plaintiff); Spicer *v.* Fulghum, 67 N. C. 18 (holding the matter one for discretion of court); Senterfeit *v.* Shealey, 71 S. C. 259, 51 S. E. 142 (where juror stated that he knew of no relationship to a party and discovered relationship after the trial).

That the juror subsequently denied any partiality was held immaterial. Pearcy *v.* Michigan Mut. L. Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673.

That a juror was ignorant of his relationship to a party and accordingly denied any relationship on his preliminary examination was held not to affect the right to a new trial. Tegarden *v.* Phillips, (Ind. App. 1894) 39 N. E. 212.

The fact that a juror's deceased first wife had been plaintiff's second cousin was not ground for a new trial, where the juror was ignorant of the fact until after the verdict was rendered, and declared on his *voir dire* that he was not related to any of the parties. Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

62. See JURIES, 24 Cyc. 316.

That a challenge for relationship or partiality was overruled is not ground for a new trial, where the objecting party did not exercise his privilege of challenging peremptorily. Florence, etc., R. Co. *v.* Ward, 29 Kan. 354; Whitaker *v.* Carter, 26 N. C. 461; Wood *v.* McPherson, 17 Ont. 163. And see JURIES, 24 Cyc. 323.

63. *Alabama.*— Larkin *v.* Baty, 111 Ala. 303, 18 So. 666.

Arkansas.— Daniel *v.* Guy, 23 Ark. 50, expression of opinion.

Colorado.— Turner *v.* Hahn, 1 Colo. 23.

Georgia.—See Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142, as to practice in examining jurors.

Illinois.— Byars *v.* Mt. Vernon, 77 Ill. 467 (expression of opinion); New York Mut. L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200]; Rabberman *v.* Peirce, 66 Ill. App. 391.

Indiana.— Alexander *v.* Dunn, 5 Ind. 122, bias.

Iowa.— Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380 (expression of opinion); McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535 (expression of opinion); Stewart *v.* Ewbank, 3 Iowa 191 (expression of opinion).

Kansas.— Schrader *v.* Salina County Alliance Exch. Co., (App. 1898) 54 Pac. 513.

Maine.— Minot *v.* Bowdoin, 75 Me. 205.

Maryland.— Johns *v.* Hodges, 60 Md. 215, 45 Am. Rep. 722.

Massachusetts.— Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222; Smith *v.* Earle, 118 Mass. 531 (relationship); Woodward *v.* Dean, 113 Mass. 297 (relationship); Jeffries

juror was an alien,[64] was not a resident of the county[65] or of the state,[66] was not an elector[67] or a householder or freeholder,[68] did not understand the English language,[69] was insane,[70] was interested in the result of the case[71] or was related to a party or interested person,[72] was prejudiced against the losing party or partial to

v. Randall, 14 Mass. 205. And see Russell *v.* Quinn, 114 Mass. 103.

Missouri.— Pitt *v.* Bishop, 53 Mo. App. 600.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569.

New York.— Cole *v.* Van Keuren, 51 How. Pr. 451.

Ohio.— Watts *v.* Ruth, 30 Ohio St. 32; Simpson *v.* Pitman, 13 Ohio 365, expression of opinion.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636; Fiske *v.* Paine, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

South Carolina.— Jones *v.* Fitzpatrick, 47 S. C. 40, 24 S. E. 1030 (relationship); Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

Virginia.— Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838, unless the verdict indicates perversity, passion, or prejudice.

See 37 Cent. Dig. tit. "New Trial," §§ 107, 108; and JURIES, 24 Cyc. 318, 321.

Character of questions necessary.— The questions must have been of a character fairly calculated to call for the facts upon which partiality is claimed. New York Mut. L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200]; Missouri, etc., R. Co. *v.* Munkers, 11 Kan. 223; Rapp *v.* Becker, 26 Ohio Cir. Ct. 321.

Prejudice caused by speech on former trial. — A party having reason to think that the jury has been prejudiced by a speech made in their hearing in the trial of a previous case should examine the jurors on the matter, and, if necessary, ask for a continuance. Rabberman *v.* Peirce, 66 Ill. App. 391.

Excuse for failure to examine.—It had been held that the duty of counsel to examine jurors for disqualification is not discharged by the fact that the court directs certain disqualified classes to leave their seats. Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222.

64. Chase *v.* People, 40 Ill. 352; Greenup *v.* Stoker, 8 Ill. 202; Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; State *v.* Quarrel, 2 Bay (S. C.) 150, 1 Am. Dec. 637; Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51. Otherwise if the disqualification was not known to the parties till after the trial. Schumaker *v.* State, 5 Wis. 324.

65. Wilcox *v.* Saunders, 4 Nebr. 569; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757; Zickefoose *v.* Kuykendall, 12 W. Va. 23.

66. Wooters *v.* Craddock, (Tex. Civ. App. 1898) 46 S. W. 916.

67. Whitehead *v.* Wells, 29 Ark. 99; Wooters *v.* Craddock, (Tex. Civ. App. 1898) 46 S. W. 916.

68. Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; Schuster *v.* La Londe, 57 Tex. 28; Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957; Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

69. Dickerson *v.* North Jersey St. R. Co., 68 N. J. L. 45, 52 Atl. 214; Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76; Boetge *v.* Landa, 22 Tex. 105. *Compare* Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

70. Pfeiffer *v.* Dubuque, (Iowa 1903) 94 N. W. 492, holding that it is not sufficient to call the judge's attention to the matter without making any objection to proceeding with the trial.

71. *Georgia.*— Georgia R. Co. *v.* Cole, 73 Ga. 713.

Illinois.— Bradshaw *v.* Hubbard, 6 Ill. 390.

Maine.— Minot *v.* Bowdoin, 75 Me. 205; Jameson *v.* Androscoggin R. Co., 52 Me. 412.

Massachusetts.— Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222; Kent *v.* Charlestown, 2 Gray 281 (although unknown to party if known to counsel); Jeffries *v.* Randall, 14 Mass. 205.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

South Carolina.— Pearson *v.* Wightman, 1 Mill 336, 12 Am. Dec. 636.

Tennessee.— Magness *v.* Stewart, 2 Coldw. 309.

West Virginia.— Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870, interest in similar case.

England.— Williams *v.* Great Western R. Co., 3 H. & N. 869, 28 L. J. Exch. 2, 7 Wkly. Rep. 97 (juror stock-holder in defendant company); Peermain *v.* Mackay, 9 Jur. 491 (holding that ignorance of the disqualification must affirmatively appear).

Canada.— Richardson *v.* Canada West Farmers' Ins. Co., 17 U. C. C. P. 341.

72. *Alabama.*— Sowell *v.* Brewton Bank, 119 Ala. 92, 24 So. 585.

Florida.— Morrison *v.* McKinnon, 12 Fla. 552, although counsel ignorant of fact, if party knew it.

Georgia.— Moody *v.* Griffin, 65 Ga. 304; Cannon *v.* Bullock, 26 Ga. 431.

Indiana.— Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549, at least under statute.

Maine.— Tilton *v.* Kimball, 52 Me. 500; Dolloff *v.* Stimpson, 33 Me. 546 (ignorance of laws of disqualification no excuse); McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Smith *v.* Earle, 118 Mass. 531; Woodward *v.* Dean, 113 Mass. 297.

Michigan.— Sleight *v.* Henning, 12 Mich. 371.

Minnesota.— Wells-Stone Mercantile Co. *v.* Bowman, 59 Minn. 364, 61 N. W. 135.

New Hampshire.— Ready *v.* Manchester Gas Light Co., 67 N. H. 147, 36 Atl. 878, 68 Am. St. Rep. 642; Harrington *v.* Manchester, etc., R. Co., 62 N. H. 77.

New York.— Cole *v.* Van Keuren, 51 How. Pr. 451.

the successful party,[73] had formed and expressed an opinion on the case,[74] had served as a juror on a prior trial of the action,[75] or that any other disqualification or incompetency existed,[76] if the unsuccessful party, having knowledge of such disqualification or incompetency, failed to object to the juror for such cause.[77] If the disqualification or incompetency was discovered during the trial, a proper objection or application for relief must have been made at that time.[78] In some states a party must have used reasonable diligence to discover any objections to jurors by inquiry before the trial.[79]

South Carolina.— Jones *v.* Fitzpatrick, 47 S. C. 40, 24 S. E. 1030.

See 37 Cent. Dig. tit. "New Trial," § 108.

73. Alexander *v.* Dunn, 5 Ind. 122; Fox *v.* Hazelton, 10 Pick. (Mass.) 275 (referee); Jarchover *v.* Dry Dock, etc., R. Co., 54 N. Y. App. Div. 238, 66 N. Y. Suppl. 575; Ahrhart *v.* Stark, 10 Misc. (N. Y.) 448, 31 N. Y. Suppl. 871; Reynolds *v.* Richmond, etc., R. Co., 92 Va. 400, 23 S. E. 770.

74. *Arkansas.*— Daniel *v.* Guy, 23 Ark. 50.

California.—Lawrence *v.* Collier, 1 Cal. 37.

Illinois.— Rabberman *v.* Peirce, 66 Ill. App. 391.

Iowa.— McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535; Stewart *v.* Ewbank, 3 Iowa 191.

Kentucky.— Bell *v.* Howard, 4 Litt. 117.

Louisiana.— Stachlin *v.* Destrehan, 2 La. Ann. 1019.

Nebraska.— Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315.

Oklahoma.— Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Pennsylvania.— McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420.

Tennessee.— See Jackson *v.* Blanton, 2 Baxt. 63, as to necessity of stating causes of objection by affidavit.

Texas.— McGehee *v.* Shafer, 9 Tex. 20.

Canada.— Olive *v.* Belyea, 6 N. Brunsw. 462; Brown *v.* Sheppard, 13 U. C. Q. B. 178.

See 37 Cent. Dig. tit. "New Trial," § 108.

75. *Illinois.*— Swarnes *v.* Sitton, 58 Ill. 155.

Indiana.— Buck *v.* Hughes, 127 Ind. 46, 26 N. E. 558.

Kentucky.— Fitzpatrick *v.* Harris. 16 B. Mon. 561; Craig *v.* Elliott, 4 Bibb 272.

Michigan.— Bourke *v.* James, 4 Mich. 336, even after the jury had retired.

Pennsylvania.—Eakman *v.* Sheaffer, 48 Pa. St. 176.

Texas.— McGehee *v.* Shafer, 9 Tex. 20, member of grand jury returning indictment for same assault and battery.

See 37 Cent. Dig. tit. "New Trial," § 109.

76. *Georgia.*—Pool *v.* Callahan, 88 Ga. 468, 14 S. E. 867; Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

Louisiana.— State *v.* Garig, 43 La. Ann. 365, 8 So. 934, juror under age.

Massachusetts.—Russell *v.* Quinn, 114 Mass. 103 (conviction of scandalous crime); Hallock *v.* Franklin County, 2 Metc. 558 (juror special county commissioner); Munroe *v.* Brigham, 19 Pick. 368.

New Hampshire.— Rollins *v.* Ames, 2 N. H. 349, 9 Am. Dec. 79, foreman of jury magistrate who took depositions.

New York.— Ayres *v.* Hammondsport, 13 N. Y. Civ. Proc. 236; Seacord *v.* Burling, 1 How. Pr. 175, juror above lawful age.

Vermont.— Bellows *v.* Weeks, 41 Vt. 590, juror having cause pending at term.

See 37 Cent. Dig. tit. "New Trial," § 106 *et seq.*

77. See JURIES, 24 Cyc. 319.

78. *Michigan.*— Bourke *v.* James, 4 Mich. 336.

Minnesota.— Wells-Stone Mercantile Co. *v.* Bowman, 59 Minn. 364, 61 N. W. 135, relationship.

Pennsylvania.— Eakman *v.* Sheaffer, 48 Pa. St. 176; McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420.

Virginia.— Reynolds *v.* Richmond, etc., R. Co., 92 Va. 400, 23 S. E. 770.

Canada.— Ham *v.* Lasber, 24 U. C. Q. B. 533 note.

See 37 Cent. Dig. tit. "New Trial," § 108.

Compare McKinley *v.* Smith, Hard. (Ky.) 167, as to declarations showing partiality discovered after jury had retired.

Waiver.— Where the bias of a juror is first discovered during the trial, the right to move for a new trial is not waived by proceeding with the trial under the direction of the court. Wilson *v.* Clement, 126 Fed. 808.

Where a juror was taken ill, the movant should have asked for a postponement. Lloyd *v.* Rawl, 63 S. C. 219, 41 S. E. 312.

If it was apparent that a juror was unable to hear the testimony through deafness, permission should have been asked that he be withdrawn. Messenger *v.* New York Fourth Nat. Bank, 48 How. Pr. (N. Y.) 542 [*affirmed* in 6 Daly 190].

79. *New Hampshire.*— Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33; Ready *v.* Manchester Gas Light Co., 67 N. H. 147, 36 Atl. 878, 68 Am. St. Rep. 642; Harrington *v.* Manchester, etc., R. Co., 62 N. H. 77.

Ohio.— Eastman *v.* Wight, 4 Ohio St. 156.

Pennsylvania.— Baird *v.* Otte, 2 Pa. Dist. 449, 12 Pa. Co. Ct. 445.

Rhode Island.— Guckian *v.* Newbold, 23 R. I. 553, 594, 51 Atl. 210; Ryan *v.* River Side, etc., Mills, 15 R. I. 436, 8 Atl. 246.

South Carolina.— Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828, as to duty to examine registration books for jurors' electoral qualifications.

West Virginia.— Beck *v.* Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870, interest in similar case.

Compare Moore *v.* Farmers' Mut. Ins. Assoc., 107 Ga. 199, 33 S. E. 65 (as to requirement of diligence in discovering policy-holder

7. Conduct of Trial — a. In General. Irregularities in the trial of a cause are ground for new trial only where they have occasioned injury to the losing party.[80]

b. Swearing Witnesses. The failure to swear a witness, not objected to at the time,[81] or the administration of an irregular oath without objection, is not generally ground for a new trial.[82]

c. Conduct of Judge — (I) *Remarks.* Under the statutes in many jurisdictions, an expression of opinion by the judge on the weight or credibility of the evidence is ground for new trial.[83] If the evidence requires the verdict rendered, new trial will not be ordered for improper comments of the trial judge, on the admission of certain evidence.[84] Nor will new trial be ordered because the trial judge, in overruling a motion to dismiss a petition, before any evidence had been introduced, remarked, in the presence of the jury: "I will overrule the motion and let you go on; but I don't see how the plaintiff can recover."[85] The improper criticism of counsel,[86] or a witness by the judge, may be ground for a new trial.[87] That improper remarks of a judge must have been excepted to at the time has been affirmed[88] and denied.[89]

(II) *Absence From Court-Room.* The absence of the judge from the court-room during the argument of counsel is not of itself a sufficient ground for new trial;[90] but where, by reason of such absence, counsel or others are guilty

in defendant company); Glover *v.* Woolsey, Dudley (Ga.) 85 (at least where the party should know the objection, as where the juror was surety on the appeal-bond of the other party); Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645 (holding that where appeal is to the discretion of the court, inquiry or investigation need not be shown).

Immoral character of juror.—It is not negligence on the part of a corporation employing hundreds of men not to know that a juror was of immoral character, although he had formerly worked as a laborer for such corporation. Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645.

80. See *infra*, III, B, C, D.

Irregularities not authorizing new trial.— Numerous interruptions in the trial of a case occasioned by persons applying for naturalization are not ground for a new trial where prejudice to the losing party is not shown. Higgins *v.* Drucker, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220. The applause of bystanders within the bar, which was promptly checked by the court, was held not sufficient ground for a new trial. Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561. That plaintiff was not present at a view by the jury is not ground for a new trial where no objection was made to the irregularity before verdict. Sanderson *v.* Nashua, 44 N. H. 492.

Irregularities authorizing new trial.— The taking of evidence in the case while considering a motion for a postponement is an "irregularity" authorizing the allowance of a new trial. Alley *v.* State, 76 Ind. 94.

An error of the court in ruling on a question of law is not included in the term "irregularity" of the court. Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534.

81. Sheeks *v.* Sheeks, 98 Ind. 288; Riley *v.* Monohan, 26 Iowa 507; Trammell *v.* Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

82. Seymour *v.* Purnell, 23 Fla. 232, 2 So. 312; Candler *v.* Hammond, 23 Ga. 493; Sells *v.* Hoare, 3 B. & B. 232, 7 Moore C. P. 36, 7 E. C. L. 702.

83. Savannah, etc., R. Co. *v.* Hardin, 110 Ga. 433, 35 S. E. 681; Lellyett *v.* Markham, 57 Ga. 13; McDowell *v.* Crawford, 11 Gratt. (Va.) 377; Neill *v.* Rogers Bros. Produce Co., 38 W. Va. 228, 18 S. E. 563. And see *infra*, III, C, 4, a, (I).

Where there were no facts calling for the expression of opinion given and no practical effect resulted from it a new trial should not be granted. Williams *v.* Cheesebrough, 4 Conn. 356.

In Maine suggestions as to matters of fact or expressions of opinion by the presiding judge with regard to the state of facts in a case, so long as the determination of the facts is not withdrawn from the jury, are not subjects of exception. Stephenson *v.* Thayer, 63 Me. 143; Phillips *v.* Veazie, 40 Me. 96.

84. Young *v.* Moody, 48 Ga. 498.

85. Childs *v.* Ponder, 117 Ga. 553, 43 S. E. 986.

86. Walker *v.* Coleman, 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254. But the mere fact that the judge and counsel of the losing party engaged in a controversy during the trial in which nothing prejudicial to such party was said is not ground for a new trial Herdler *v.* Buck's Stove, etc., Co., 136 Mo. 3, 37 S. W. 115.

87. Lorch *v.* Lorch, 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 567. A new trial was granted where the trial judge said, in the presence of the jury, that a material witness was "apparently interested." Lellyett *v.* Markham, 57 Ga. 13.

88. Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 545.

89. Neill *v.* Rogers Bros. Produce Co., 38 W. Va. 228, 18 S. E. 563.

90. Rose *v.* Otis, 18 Colo. 59, 31 Pac. 493; Baxter *v.* Ray, 62 Iowa 336, 17 N. W. 576. Thus the absence of a judge during the tak-

of misconduct prejudicial to the losing party, a new trial may be allowed.[91] It seems that objection must ordinarily have been made to the absence of the judge.[92]

(III) *Misconduct.* Misconduct on the part of the presiding judge is classified as an irregularity in the proceedings of the court.[93]

(IV) *Disqualification of Judge.* That the judge or referee was disqualified by interest to try the case appears to be ground for new trial; but such disqualification if known must have been objected to seasonably.[94]

d. Misconduct of Witnesses. Misconduct on the part of a witness in the court-room may be ground for a new trial.[95]

8. Judgment. An objection that the judgment does not follow the verdict, is contrary to the weight of the evidence, is contrary to law,[96] is irregularly

ing of part of the testimony on a trial before him is not ground for a new trial where there is no dispute as to the facts testified to. Crook *v.* Hamlin, 71 Hun (N. Y.) 136, 24 N. Y. Suppl. 543 [*affirmed* in 140 N. Y. 297, 35 N. E. 499].

91. Rose *v.* Otis, 18 Colo. 59, 31 Pac. 493.

92. Western Union Tel. Co. *v.* Lewelling, 58 Ind. 367.

93. "The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be made the subject of an exception. It may of course be freely conceded that the 'personal habits, conduct, deportment, or statements of the judge,' having no relation to or effect on the disposition of the cause, are not the proper subject of complaint upon a motion for a new trial. The question always is as to whether the acts were of such a nature, and done under such circumstances as to afford reasonable grounds for the conclusion that by reason thereof the defeated party has not had a fair and impartial trial." Gay *v.* Torrance, 145 Cal. 144, 150, 78 Pac. 540.

Communications between judge and agent of successful party.— Where, in an action tried to the court, there is evidence that the judge had communications with an agent of the successful party containing references to benefits to be derived by the judge, should he decide in favor of such party, and that the judge had subsequent conversations with the agent, a new trial should be ordered. Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123.

Offer to protect interests of parties in another suit.— The fact that a referee, on the hearing and openly, offered to protect the interests of one of the parties in another suit is not evidence of improper influence. Donohue *v.* Hommel, 1 N. Y. Suppl. 401.

If the partiality of a judge was not objected to, it is not ground for a new trial. *Ex p.* Ferguson, 19 N. Brunsw. 117.

94. Crosby *v.* Blanchard, 7 Allen (Mass.) 385; Wehrum *v.* Kuhn, 34 N. Y. Super. Ct. 336; Anonymous, 6 T. R. 623 note; *Ex p.* Ferguson, 19 N. Brunsw. 117.

95. Ensor *v.* Smith, 57 Mo. App. 584.

Threats and improper remarks by a witness may be ground for a new trial. Chesebrough *v.* Conover, 13 N. Y. Suppl. 374; Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561. *Compare* Kinna *v.* Horn, 1 Mont. 597.

That a witness intentionally deceived the court as to the statements he was about to make was held insufficient ground for a new trial, where the testimony was relevant and cumulative. Joyce *v.* Charleston Ice Mfg. Co., 50 Fed. 371.

As to misconduct in communicating with jurors see *infra*, III, D, 1, b.

In absenting himself from trial, or committing perjury see *infra*, III, H, 3, a, (I), c, (VI).

Perjury or false swearing is not in itself sufficient fraud to justify the granting of a new trial. Dooley *v.* Gladiator Consol. Gold Min., etc., Co., 134 Iowa 468, 109 N. W. 864.

96. *California.*— Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16; Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22; Martin *v.* Matfield, 49 Cal. 42; Shepard *v.* McNeil, 38 Cal. 72; Jenkins *v.* Frink, 30 Cal. 586, 89 Am. Dec. 134.

Georgia.— Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173; Eubanks *v.* West, 119 Ga. 804, 47 S. E. 194; Chason *v.* Anderson, 119 Ga. 495, 46 S. E. 629; Berry *v.* Clark, 117 Ga. 964, 44 S. E. 824; Bullock *v.* Dunbar, 114 Ga. 754, 40 S. E. 783; First State Bank *v.* Carver, 111 Ga. 876, 36 S. E. 960; Herz *v.* H. B. Claflin Co., 101 Ga. 615, 29 S. E. 33; Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102; Creech *v.* Richards, 76 Ga. 36; Coleman *v.* Slade, 75 Ga. 61; Brand *v.* Kennedy, 71 Ga. 707; Taylor *v.* Central R. Co., 67 Ga. 122; Greer *v.* Willis, 67 Ga. 43; Loudon *v.* Coleman, 62 Ga. 146.

Idaho.— Curtis *v.* Walling, 2 Ida. (Hasb.) 416, 18 Pac. 54.

Indiana.— Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543; People's Sav. Loan, etc., Assoc. *v.* Spears, 115 Ind. 297, 17 N. E. 570; Rodefer *v.* Fletcher, 89 Ind. 563; Rosenzweig *v.* Frazer, 82 Ind. 342; Thompson *v.* Eagleton, 33 Ind. 300; Groves *v.* Ruby, 24 Ind. 418 (improper rate of interest); Bosseker *v.* Cramer, 18 Ind. 44.

Louisiana.— Smith *v.* Delahoussaye, 9 Rob. 50. *Compare* Downes *v.* Ferry, 4 La. Ann. 109, holding that error in a judgment in calculating interest is ground for new trial.

Montana.— Froman *v.* Patterson, 10 Mont. 107, 24 Pac. 692.

New York.— Garbutt *v.* Garbutt, 4 N. Y.

entered,[97] as for instance that it was not entered in proper time,[98] that it fails to certify which party in an action on an official bond was surety or which was principal,[99] or that costs have been taxed improperly,[1] cannot be raised by motion for new trial. A denial of judgment on special findings cannot be reviewed on such motion.[2] And error in overruling a motion to modify a judgment is not ground for new trial.[3]

B. Misconduct of Parties and Counsel[4] — **1. In General.** Unfairly pressing a case to trial in the absence of opposing counsel may be ground for new trial.[5] Where a party wilfully misleads his adversary as to the nature of his case, resulting in surprise to the latter, a new trial may be allowed.[6] An attempt upon the part of the prevailing party to pack the jury is ground for new trial,[7] as is also the subpœnaing of members of the jury panel to gain an undue advantage in the selection of the jury.[8] The filing of a brief with the court without the knowledge of opposing counsel and the reading of the brief by the court was held such an irregularity as demanded a new trial.[9] Misconduct of the prevailing party as ground for new trial is not confined to something occurring at the trial. It may

St. 416; Walsh *v.* Kelly, 27 How. Pr. 359 [*affirmed* in 40 N. Y. 556].

See 37 Cent. Dig. tit. "New Trial," § 35.

Contra.— Morrison *v.* Watson, 95 N. C. 479, evidently using the terms "new trial" and 'venire de novo" interchangeably. And *compare* Hinote *v.* Simpson, 17 Fla. 444 (holding that a new trial must be allowed where the court entered judgment for defendant on his demurrer to plaintiff's evidence without entering the express admission of record); Whitwell *v.* Atkinson, 6 Mass. 272 (holding that error in a judgment in calculating interest is ground for new trial); Timon *v.* San Patricio County, 58 Tex. 263 (which reaches a conclusion similar to the two preceding cases).

That the judgment is not supported by the findings in a case tried by the court is not ground for a new trial. Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; Brison *v.* Brison, 90 Cal. 323, 27 Pac. 186.

Where the court has found the facts specially, error in its conclusions of law is not ground for a new trial. Clayton *v.* Blough, 93 Ind. 85; Daubenspeck *v.* Daubenspeck, 44 Ind. 320. See also Price *v.* Price, 33 Hun (N. Y.) 432, as to referee's misconception of the legal effect of facts proved. An improper conclusion of law from the facts found is not an "error in law occurring at the trial" for which a motion for a new trial will lie. McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W 608. But in Minnesota an objection that conclusions of law are not justified by the findings of fact may be raised by motion for a new trial. Tilleny *v.* Wolverton, 54 Minn. 75, 55 N. W. 822; Farnham *v.* Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59.

Where the judgment does not conform to the admitted facts, the remedy is by appeal and not by motion for a new trial. Doyle's Estate, 73 Cal. 564, 15 Pac. 125.

97. Gage *v.* Sartor, 2 Mill (S. C.) 247.

98. Quinlan *v.* Stratton, 7 N. Y. Suppl. 786 [*affirmed* in 121 N. Y. 705, 24 N. E. 1100]. *Compare* Hodecker *v.* Hodecker, 39 N. Y. App. Div. 353, 56 N. Y. Suppl. 954, holding Code Civ. Proc. § 1010, providing that either party may move for a new trial if the decision in a case tried by the court is not filed within certain times therein fixed is mandatory.

99. Backus *v.* Aurora F. & M. Ins. Co., 4 Ohio Dec. (Reprint) 470, 2 Clev. L. Rep. 204.

1. Broward *v.* Roche, 21 Fla. 465; Green *v.* Frank, 63 Ga. 78; Burlington, etc., R. Co. *v.* Beebe, 14 Nebr. 463, 16 N. W. 747.

2. Cincinnati, etc., R. Co. *v.* Cregor, 150 Ind. 625, 50 N. E. 760; Hoppes *v.* Chapin, 15 Ind. App. 258, 43 N. E. 1014.

3. Duckwell *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

4. **As to misconduct in communicating with jurors** see *infra*, III, D, 1, a, b.

5. Chicago, etc., R. Co. *v.* Deaver, 45 Nebr. 307, 63 N. W. 790; Preston *v.* Mut. L. Ins. Co., 71 Fed. 467. And see *infra*, III, H, 2, a, (II).

6. Chamberlain *v.* Lindsay, 1 Hun (N. Y.) 231, 4 Thomps. & C. 23; Anderson *v.* George, 1 Burr. 352. See also Taylor *v.* Moore, 3 Harr. (Del.) 6, insisting on variance at trial after agreeing to try case on merits.

Failure to carry out agreement.— Where a verdict is taken for plaintiff under an agreement of counsel which plaintiff refuses to carry out, a new trial should be awarded. Laninger *v.* Lowenthal, 16 Lanc. L. Rev. (Pa.) 312.

7. May *v.* Ham, 10 Kan. 598; Boyce *v.* Aubuchon, 34 Mo. App. 315. See also Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, as to insufficient evidence of sheriff packing jury.

Proof of injury to losing party unnecessary. — Where, after a trial, there is evidence that the prevailing party may have exercised an unlawful interference with the drawing of the jury, the court should set aside the verdict and order a new trial without proof that the rights of the other parties have been materially affected by such misconduct. Phares *v.* Krhut, (Kan. 1907) 91 Pac. 52.

8. Boyce *v.* Aubuchon, 34 Mo. App. 315.

9. Spiro *v.* Nitkin, 72 Conn. 202, 44 Atl. 13.

include acts amounting to misconduct which, although occurring before, operate at, the trial.[10] It has been said that a new trial should be granted for the wilful misconduct of the prevailing party, without inquiring as to the effect of such misconduct upon the verdict.[11]

2. Relating to Evidence. Misconduct of the prevailing party or his attorney in inducing a witness to absent himself from the trial or to avoid the service of a subpœna,[12] in suppressing evidence,[13] or in the wilful introduction of false evidence,[14] is ground for new trial. The feigning of injury by plaintiff in a personal damage case in the presence of the jury has been held to authorize the allowance of new trial.[15] So has the refusal of a party to answer proper questions on cross-examination.[16] It is not ground for new trial that the prevailing party gave a witness who had no money his dinner,[17] or circulated false reports against his adversary, tending to cause prejudice against him, where they do not come to the knowledge of the jury;[18] that the compensation of an expert witness was contingent on the result of the suit, where the verdict was justified by the other evidence;[19] or that an attorney in the case was allowed to testify.[20]

3. Remarks and Argument of Counsel. While even the repetition of an offer of evidence rejected by the court is seldom ground for new trial,[21] an offer to prove specific irrelevant facts made in the presence of, and for the evident pur-

10. Phares *v.* Krhut, (Kan. 1907) 91 Pac. 52.

11. Huston *v.* Vail, 51 Ind. 299; Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650. *Contra*, Kinna *v.* Horn, 1 Mont. 597. See also Johnstone *v.* Seattle, etc., R. Co., (Wash. 1906) 87 Pac. 1125, holding that, although it is reprehensible to plead allegations tending to prejudice the jury, with no intention of attempting to prove them, before a new trial should be granted upon that ground alone the abuse should be flagrant, and its prejudicial effects plainly evident, or exceedingly probable.

12. Carey *v.* King, 5 Ga. 75; Barron *v.* Jackson, 40 N. H. 365; Crafts *v.* Union Mut. F. Ins. Co., 36 N. H. 44. See also Stumer *v.* Pitchman, 124 Ill. 250, 15 N. E. 757. *Compare* Messenger *v.* New York Fourth Nat. Bank, 48 How. Pr. (N. Y.) 542 [*affirmed* in 6 Daly 190].

The misconduct must be clearly established. — Marsh *v.* Monckton, Tryw. & G. 34.

13. Atlantic Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24; Warren *v.* Hope, 6 Me. 479; Hastings *v.* McKinley, 2 E. D. Smith (N. Y.) 45, especially where it had been stipulated that such evidence should go to the jury. See also Chesebrough *v.* Conover, 13 N. Y. Suppl. 374.

The direction of a verdict for plaintiff upon defendants' refusal to proceed with the case because, during a recess, plaintiff had taken papers from him claiming a right to use them as exhibits is not ground for a new trial. Eustis *v.* Steinson, 84 N. Y. Suppl. 155.

14. *Indiana.*— State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543.

Iowa.— Clesle *v.* Frerichs, 95 Iowa 83, 63 N. W. 581; Shenandoah First Nat. Bank *v.* Wabash, etc., R. Co., 61 Iowa 700, 17 N. W. 48. See also Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430.

New Hampshire.— Barron *v.* Jackson, 40 N. H. 365.

New York.— Klinger *v.* Markowitz, 54 N. Y. App. Div. 299, 65 N. Y. Suppl. 369 [*affirmed* in 66 N. Y. Suppl. 1135].

England.— Fabrilius *v.* Cock, 3 Burr. 1771; Cole *v.* Langford, [1898] 2 Q. B. 36, 67 L. J. Q. B. 698.

Compare McCormick *v.* Gross, (Cal. 1900) 60 Pac. 858.

The fact that the evidence offered to show perjury is cumulative of evidence offered on the trial is not sufficient reason for denying a new trial. Klinger *v.* Markowitz, 54 N. Y. App. Div. 299, 65 N. Y. Suppl. 369 [*affirmed* in 66 N. Y. Suppl. 1135].

15. Corley *v.* New York, etc., R. Co., 12 N. Y. App. Div. 409, 42 N. Y. Suppl. 941. See also Atlantic Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24.

That plaintiff in a personal injury case broke down with hysteria while on the witness' stand is not ordinarily ground for a new trial, where there is no evidence of intention to prejudice the jury. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290.

16. Foreman *v.* Sandusky, etc., R. Co., 2 Ohio Dec. (Reprint) 611, 6 West. L. Month. 161.

17. Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841.

18. McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

19. Beeks *v.* Odom, 70 Tex. 183, 7 S. W. 702.

20. Cobbett *v.* Hudson, 1 E. & B. 11, 17 Jur. 488, 22 L. J. Q. B. 11, 1 Wkly. Rep. 54, 72 E. C. L. 11 [*criticizing* Stones *v.* Byron, 4 D. & L. 393, 11 Jur. 44, 16 L. J. Q. B. 32, 1 Saund. & C. 248; Dunn *v.* Packwood, 11 Jur. 242, 1 Saund. & C. 312]; Nova Scotia Bank *v.* Fish, 24 Can. Sup. Ct. 709. *Compare* Shields *v.* McGrath, 5 N. Brunsw. 398.

21. Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580; Henrietta Coal Co. *v.* Campbell, 112 Ill. App. 452 [*affirmed* in 211 Ill. 216, 71 N. E. 863].

pose of improperly influencing, the jury may be.[22] Improper questions and remarks of counsel in the examination of witnesses may require the granting of a new trial,[23] but only where they have probably misled or prejudiced the jury.[24] A new trial may be allowed where the court has failed or refused to properly check improper remarks or arguments of counsel or to properly instruct the jury thereon.[25] The statements must have been fairly calculated to improperly influ-

22. Georgia Midland, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580.

Illustration.— Where the jury was apparently influenced, in assessing damages, by an offer of counsel which was to be carried into effect without reference to the verdict, and the party represented by such counsel refused to carry the offer into effect after verdict, a new trial was granted. Watson *v.* Gas Light Co., 5 U. C. Q. B. 244.

23. George *v.* Swafford, 75 Iowa 491, 39 N. W. 804; Derr *v.* Schweitzer, 2 Woodw. (Pa.) 420, indicating to witness proper answer on cross-examination by adversary.

Improper remarks of counsel in his opening statement to the jury may be ground for a new trial. Mattoon Gas Light, etc., Co. *v.* Dolan, 111 Ill. App. 333.

The making of proper objections by counsel cannot be ground for a new trial. Farwell *v.* Cramer, 38 Nebr. 61, 56 N. W. 716.

That a proposition to submit a case without argument was made in the presence of the jury is not ground for a new trial where the proposition is accepted and no ruling of the court as to the manner of making it is invoked. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

24. Crosby *v.* Blanchard, 7 Allen (Mass.) 385. See also McDonald *v.* Murray, 5 Ont. 559, as to interruptions of delivery of charge.

Questions which are inadmissible, if unanswered by the witness, are not ground for a new trial. Brown *v.* Waterbury, (Conn. 1903) 54 Atl. 1005.

Motion by counsel to permit the jury to take all documents in evidence to the jury room, not made in such language or under such circumstances as to warrant an inference of bad faith, is not ground for a new trial. Farwell *v.* Cramer, 38 Nebr. 61, 56 N. W. 716.

Interrupting the argument of opposing counsel and charging him with "dodging the main issue" has been held not a sufficient ground for a new trial. Overcash *v.* Kitchie, 89 N. C. 384.

25. *Alabama.*— Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538.

Colorado.— Cook *v.* Doud, 14 Colo. 483, 23 Pac. 906.

Georgia.— Bulloch *v.* Smith, 15 Ga. 395.

Illinois.— Mattoon Gas Light, etc., Co. *v.* Dolan, 111 Ill. App. 333; North Chicago St. R. Co. *v.* Leonard, 67 Ill. App. 603.

Indiana.— Campbell *v.* Maher, 105 Ind. 383, 4 N. E. 911; Rochester School Town *v.* Shaw, 100 Ind. 268; Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196. *Compare* Goff *v.* Scott, 126 Ind. 200, 25 N. E. 906.

Iowa.— Sullivan *v.* Chicago, etc., R. Co., 119 Iowa 464, 93 N. W. 367; Hall *v.* Wolff, 61 Iowa 559, 16 N. W. 710, especially in the absence of the judge.

Kansas.— McGowan *v.* Campbell, 28 Kan. 25.

Minnesota.— Jung *v.* Theo. Hamm Brewing Co., 95 Minn. 367, 104 N. W. 233; Belyea *v.* Minneapolis, etc., R. Co., 61 Minn. 224, 63 N. W. 627.

Missouri.— Schuette *v.* St. Louis Transit Co., 108 Mo. App. 21, 82 S. W. 541; Thompson *v.* Bernays, 85 Mo. App. 575; Ensor *v.* Smith, 57 Mo. App. 584; Smith *v.* Western Union Tel. Co., 55 Mo. App. 626; McDonald *v.* Cash, 45 Mo. App. 66; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642; Gibson *v.* Zeibig, 24 Mo. App. 65.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462.

New Hampshire.— Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233; Jordon *v.* Wallace, 67 N. H. 175, 32 Atl. 174; Perkins *v.* Burley, 64 N. H. 524, 15 Atl. 21; Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; Tucker *v.* Henniker, 41 N. H. 317.

North Carolina.— Smith *v.* Nimocks, 94 N. C. 243.

Ohio.— Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879; Union Cent. L. Ins. Co. *v.* Cheever, 36 Ohio St. 201, 38 Am. Rep. 573.

Pennsylvania.— Scranton *v.* Chase, 4 L. T. Rep. N. S. 17.

Rhode Island.— Salter *v.* Rhode Island Co., 27 R. I. 27, 60 Atl. 588.

Texas.— Prather *v.* McClelland, (Civ. App. 1894) 26 S. W. 657.

Canada.— Gott *v.* Ferris, 15 U. C. C. P. 295; Case *v.* Benway, 18 U. C. Q. B. 476, second new trial.

See 37 Cent. Dig. tit. "New Trial," §§ 44, 50. And see TRIAL.

The discussion of prejudicial, irrelevant matters is ground for a new trial. Kinnaman *v.* Kinnaman, 71 Ind. 417; Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196; Henry *v.* Sioux City, etc., R. Co., 70 Iowa 233, 30 N. W. 630; Hall *v.* Wolff, 61 Iowa 559, 16 N. W. 710; Smith *v.* Western Union Tel. Co., 55 Mo. App. 626; Smith *v.* Nimocks, 94 N. C. 243; Sweeney *v.* Lehigh Valley R. Co., 2 Kulp (Pa.) 391.

An appeal calculated to incite prejudice of a jury against railroad corporations may be ground for a new trial. Sullivan *v.* Chicago, etc., R. Co., 119 Iowa 464, 93 N. W. 367; Dillingham *v.* Scales, 78 Tex. 205, 14 S. W. 566. See also Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381. *Compare* Texas, etc., R. Co. *v.* Raney, (Tex. Civ. App. 1893) 23 S. W. 340.

An unrebuked appeal to the prejudice of jurors against a rival city may be ground for

ence the jury.[26] Generally a new trial will be denied where improper argument has been checked by the court and the jury has been instructed to disregard the improper statements.[27] If, however, counsel persists in such argument after the

a new trial. Gibson *v.* Zeibig, 24 Mo. App. 65.

The calling of opprobrious names may justify the allowance of a new trial. Huckell *v.* McCoy, 38 Kan. 53, 15 Pac. 870. *Compare* Kinna *v* Horn, 1 Mont. 597.

The discussion before the jury of illegal and prejudicial evidence after the rejection of such evidence by the court is ground for a new trial. Belyea *v.* Minneapolis, etc., R. Co., 61 Minn. 224, 63 N. W. 627; Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879; Emery *v.* Christman, 4 Phila. (Pa.) 118. See also Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642; Preston *v.* New York Mut. L. Ins. Co., 71 Fed. 467.

Remarks as to absence of evidence.—A new trial may be allowed for prejudicial remarks of counsel as to the absence of evidence of a certain character, which the court had excluded. Cook *v.* Doud, 14 Colo. 483, 23 Pac. 906.

Improper references to a change of venue may require a new trial. Campbell *v.* Maher, 105 Ind. 383, 4 N. E. 911; McDonald *v.* Cash, 45 Mo. App. 66; Scranton *v.* Chase, 4 L. T. N. S. (Pa.) 17; Lindsay *v.* Pettigrew, 3 S. D. 199, 52 N. W. 873. See also Winter *v.* Sass, 19 Kan. 556. And see cases in principal note.

Improper references to a former trial or other litigation may authorize the allowance of a new trial. Thompson *v.* Bernays, 85 Mo. App. 575; Lindsay *v.* Pettigrew, 3 S. D. 199, 52 N. W. 873. See also Rothwell *v.* Elliott, 2 Marv. (Del.) 151, 42 Atl. 424; Reese *v.* Payne, 2 Kulp (Pa.) 361.

The refusal of the court to prevent the reading of inapplicable and misleading extracts from a law book is ground for a new trial. Lesser *v.* Perkins, 39 Hun (N. Y.) 341.

That a diagram is used for the first time in the closing argument of counsel is not necessarily ground for a new trial. Rogers *v.* Kenrick, 63 N. H. 335.

That counsel reasoned illogically is not ground for a new trial. Proctor *v.* De Camp, 83 Ind. 559.

Where the improper remarks occur in the closing argument a new trial will be granted the more readily. Kinnaman *v.* Kinnaman, 71 Ind. 417; Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196; Huckell *v.* McCoy, 38 Kan. 53, 15 Pac. 870; Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233.

The fact that the moving party's counsel was guilty of equal misconduct is no reason for refusing a new trial. Ensor *v.* Smith, 57 Mo. App. 584. *Compare*, however, Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. 478.

Failure to stop repetition of improper remarks.— Where the court, after repeated objections, directed the jury to disregard certain improper statements of counsel, but failed to stop the repetition of such statements or to give further directions in regard thereto, a new trial was ordered. Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196.

26. *Dakota.*— Burdick *v.* Haggart, 4 Dak. 13, 22 N. W. 589.

Delaware.— Rothwell *v.* Elliott, 2 Marv. 151, 42 Atl. 424.

Georgia.— Cooper *v.* Delk, 108 Ga. 550, 34 S. E. 145. See also City Electric R. Co. *v.* Salmon, 1 Ga. App. 491, 57 S. E. 926.

Indiana.— Goff *v.* Scott, 126 Ind. 200, 25 N. E. 906.

Iowa.— Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041; Burdick *v.* Chicago, etc., R. Co., 87 Iowa 384, 54 N. W. 439.

Kansas.— Winter *v.* Sass, 19 Kan. 556, 566, in which Judge Brewer said: "All that can safely be laid down is, that whenever in the exercise of a sound discretion, it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside." Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910.

Minnesota.— McKenzie *v.* Banks, 94 Minn. 496, 103 N. W. 497.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New Hampshire.— Gault *v.* Concord R. Co., 63 N. H. 356.

Oklahoma.— Easterly *v.* Gater, 17 Okla. 93, 87 Pac. 853.

Pennsylvania.— Scherff *v.* Darby, 9 Del. Co. 331; Buchanan *v.* Chester, 9 Del. Co. 328; Brown *v.* Tees, 2 Phila. 161.

Rhode Island.— Angell *v.* Granger, 22 R. I. 495, 48 Atl. 668.

Texas.— Galveston, etc., R. Co. *v.* Johnson, (1892) 19 S. W. 867; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. 478; Texas, etc., R. Co. *v.* Raney, (Civ. App. 1893) 23 S. W. 340.

Washington.— Reeder *v.* Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461.

See 37 Cent. Dig. tit. "New Trial," § 44.

In Alabama the remarks must have been grossly improper and highly prejudicial. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 95, 27 So. 760.

If the evidence would not have justified any other verdict, a new trial should not be granted for improper argument. Cooper *v.* Delk, 108 Ga. 550, 34 S. E. 145.

Where a case is tried by a judge without a jury, improper remarks of counsel are not ground for a new trial. Spiro *v.* Nitkin, 72 Conn. 202, 44 Atl. 13.

27. *Georgia.*—Macon, etc., R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

Illinois.— Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583 [*affirming* 123 Ill. App. 550]; Henry *v.* Centralia, etc., R. Co., 121

admonition of the court,[28] or if it appears that the unfavorable influence of the argument was probably not wholly removed by the court's action, a new trial may be allowed.[29] A new trial may be granted, although the improper statements have been qualified or withdrawn by counsel.[30] That counsel for the prevailing party misstated the law to the jury is seldom ground for a new trial,[31] especially where the jury was properly instructed by the court.[32]

4. Necessity of Objection. The misconduct of a party or attorney must have been objected to at the time.[33] Ordinarily improper remarks and arguments by counsel must have been objected to when made.[34] It has been held, however,

Ill. 264, 12 N. E. 744; Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381.

Indiana.— Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543; Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216.

Kansas.— Winter *v.* Sass, 19 Kan. 556.

Nebraska.— Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123.

New York.— Kingsley *v.* Finch, 54 Misc. 317, 105 N. Y. Suppl. 968.

North Carolina.— Greenlee *v.* Greenlee, 93 N. C. 278.

Pennsylvania.— Ruddy *v.* Ruddy, 5 Pa. Co. Ct. 544.

Texas.—San Antonio Traction Co. *v.* Parks, (Civ. App. 1906) 97 S. W. 510; Tyler Chair, etc., Works *v.* St. Louis Southwestern R. Co., (Civ. App. 1900) 55 S. W. 350.

Washington.— Brennan *v.* Seattle, (1907) 90 Pac. 434.

United States.— Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524.

Canada.— Moore *v.* Boyd, 15 U. C. C. P. 513.

See 37 Cent. Dig. tit. "New Trial," § 47.

"No mere statement, that it [grossly improper remarks of counsel] is out of order or improper, can meet the exigencies of the case." Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538.

28. *Indiana.*— Rudolph *v.* Landwerlen, 92 Ind. 34; Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196.

Minnesota.— Belyea *v.* Minneapolis, etc., R. Co., 61 Minn. 224, 63 N. W. 627.

Missouri.— Thompson *v.* Bernays, 85 Mo. App. 575; Ensor *v.* Smith, 57 Mo. App. 584; Smith *v.* Western Union Tel. Co., 55 Mo. App. 626.

New York.— Reich *v.* New York, 12 Daly 72.

Pennsylvania.— Emery *v.* Christman, 4 Phila. 118.

South Dakota.— Lindsay *v.* Pettigrew, 3 S. D. 199, 52 N. W. 873.

Canada.— Shaver *v.* Great Western R. Co., 6 U. C. C. P. 321.

29. Sullivan *v.* Chicago, etc., R. Co., 119 Iowa 464, 93 N. W. 367; Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233. See also Ruddy *v.* Ruddy, 5 Pa. Co. Ct. 544.

30. Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538; Henry *v.* Sioux City, etc., R. Co., 70 Iowa 233, 30 N. W. 630; Bullard *v.* Boston, etc., R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; Dillingham *v.* Scales, 78 Tex. 205, 14 S. W. 566.

31. Proctor *v.* De Camp, 83 Ind. 559; Scott *v.* Chicago, etc., R. Co., 68 Iowa 360, 24 N. W. 584, 27 N. W. 276; Hansbro *v.* Blum, 3 Tex. Civ. App. 108, 22 S. W. 270. However, if it is apparent that the jury adopted counsel's misstatement of the law, made in the absence of the other party and his counsel, and included illegal interest in the verdict, a new trial should be allowed. Ormsby *v.* Johnson, 1 B. Mon. (Ky.) 80. So the reading to the jury of inapplicable and misleading passages from a law text-book may be ground for a new trial. Lesser *v.* Perkins, 39 Hun (N. Y.) 341. So may the persistence of counsel in stating to the jury the contents of a law book, after being stopped by the court from reading it. Reich *v.* New York, 12 Daly (N. Y.) 72.

32. Hansbro *v.* Blum, 3 Tex. Civ. App. 108, 22 S. W. 270.

33. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290 (improper conduct as witness); Pierce *v.* Cubberly, 19 Ind. 157 (refusal of party to obey subpœna); Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650 (furnishing meals to witnesses); Tabor *v.* Judd, 62 N. H. 288 (improper behavior at a view); Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561 (making threats while testifying).

Asking for withdrawal of jury.— It may become the duty of the party offended against to ask for the withdrawal of a jury or for a continuance. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 45 N. E. 290.

Evidence of offer to confess judgment.— The failure of defendant to object to an offer of plaintiff's counsel to introduce in evidence defendant's offer to confess judgment for a specified sum amounts to a waiver of the latter's right under a statute forbidding mention of such offer. Riech *v.* Bolch, 68 Iowa 526, 27 N. W. 507.

Where an attempt by the prevailing party to pack the jury was discovered during the trial, it was held that the objection might be made on motion for new trial. May *v.* Ham, 10 Kan. 598.

34. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 95, 27 So. 760.

California.— Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

Colorado.— Cook *v.* Doud, 14 Colo. 483, 23 Pac. 906.

Georgia.— Southern R. Co. *v.* Dean, 128 Ga. 366, 57 S. E. 702. And see Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

that the court, in its discretion, may allow a new trial for highly prejudicial statements to which no objection was made at the time.[35]

C. Rulings and Instructions at Trial — 1. In General. The rule that a new trial will not be granted where the damages awarded are trifling does not apply where the verdict has probably resulted from an error in the court's ruling at the trial.[36] Rulings of the court in the conduct of the trial on matters resting in discretion are not ground for new trial, unless substantial injustice is shown to have resulted therefrom.[37] Leading questions being permissible in the discretion

Illinois.— North Chicago St. R. Co. *v.* Shreve, 70 Ill. App. 666; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488.

Indiana.— Hasper *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191; St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566; State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543; Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216.

Iowa.— Riech *v.* Bolch, 68 Iowa 526, 27 N. W. 507.

Kansas.— Fish-Keck Co. *v.* Redlon, 7 Kan. App. 93, 53 Pac. 72.

Maine.— Powers *v.* Mitchell, 77 Me. 361.

Michigan.— Saltmarsh *v.* Chicago, etc., R. Co., 122 Mich. 103, 80 N. W. 981.

Missouri.— State *v.* Branch, 151 Mo. 622, 52 S. W. 390; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642. The attention of the court should be called to improper remarks of counsel made in his absence. Muirhead *v.* Hannibal, etc., R. Co., 31 Mo. App. 578.

Pennsylvania.— Sweeney *v.* Lehigh Valley R. Co., 2 Kulp 391; Reese *v.* Payne, 2 Kulp 361; Myers *v.* Devens, 2 Kulp 312; Groff *v.* Groff, 21 Lanc. L. Rev. 137; Steele *v.* Traction Co., 30 Pittsb. Leg. J. N. S. 290; Connellee *v.* Ziegler, 16 York Leg. Rec. 169.

Rhode Island.— Angell *v.* Granger, 22 R. I. 495, 48 Atl. 668.

Texas.— Tyler Chair, etc., Works *v.* St. Louis Southwestern R. Co., (Civ. App. 1900) 55 S. W. 350; Jones *v.* Smith, 21 Tex. Civ. App. 440, 52 S. W. 561; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

United States.— Chandler *v.* Tompson, 30 Fed. 38.

Canada.— Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263.

See 37 Cent. Dig. tit. "New Trial," § 46.

Asking withdrawal of case from jury.— It has been said that the party offended against should ask to have the case withdrawn from the jury. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49; Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216.

35. *Colorado.*— Cook *v.* Doud, 14 Colo. 483, 23 Pac. 906.

Illinois.— North Chicago St. R. Co. *v.* Leonard, 67 Ill. App. 603.

Indiana.— Kinnaman *v.* Kinnaman, 71 Ind. 417.

Iowa.— Hall *v.* Wolff, 61 Iowa 559, 16 N. W. 710, especially where the judge was absent from the room when the improper remarks were made.

Missouri.— Schuette *v.* St. Louis Transit Co., 108 Mo. App. 21, 82 S. W. 541.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462.

United States.— Preston *v.* Mutual L. Ins. Co., 71 Fed. 467.

In Texas a new trial must be ordered where the improper remarks of counsel were intentionally made to prejudice the jury, although no objection was made to them at the time. Houston, etc., R. Co. *v.* Rehm, 36 Tex. Civ. App. 553, 82 S. W. 526; Prather *v.* McClelland, (Civ. App. 1894) 26 S. W. 657.

Appeal.— Where no objection is made at the time to the argument of counsel, the overruling of a motion for a new trial by the trial court will usually be sustained on appeal. Schuette *v.* St. Louis Transit Co., 108 Mo. App. 21, 82 S. W. 541.

36. Boyden *v.* Moore, 5 Mass. 365; U. S. *v.* Barnhart, 17 Fed. 579, 9 Sawy. 159; Haine *v.* Davey, 4 A. & E. 892, 2 H. & W. 30, 5 L. J. K. B. 167, 6 N. & M. 356, 31 E. C. L. 390; —— *v.* Phillips, 1 Cromp. & M. 26, 3 Tyrw. 181. *Compare* Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; York *v.* Stiles, 21 R. I. 225, 42 Atl. 876; Young *v.* Laidlaw, 12 U. C. C. P. 612; Brown *v.* Street, 1 U. C. Q. B. 124, error in instruction.

37. *Arkansas.*— Randolph *v.* McCain, 34 Ark. 696, improper exclusion of a party from hearing the testimony of some of the other party's witnesses.

North Carolina.— Purnell *v.* Purnell, 89 N. C. 42, refusal to exclude witnesses from the court-room.

Pennsylvania.—Phillips *v.* Kritzer, 1 Phila. 19, refusal to have jury view premises.

South Carolina.— Morein *v.* Solomons, 7 Rich. 97, refusal to compel witness who has been examined at length and who has not been subpœnaed to go upon the stand a second time.

Texas.— Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734, refusal to try pleas in abatement and in bar separately.

Canada.— Gleason *v.* Williams, 27 U. C. C. P. 93 (refusal to permit second recalling of witness); Hickey *v.* Fitzgerald, 41 U. C. Q. B. 303 (limiting cross-examination on matter irrelevant to issue); Herbert *v.* Mercantile F. Ins. Co., 43 U. C. Q. B. 384 (permitting party to contradict his own witness as adverse).

If the trial court is in doubt as to the proper ruling on a question of law, and the losing party has duly excepted to his ruling, a new trial should not be granted by such court. Von Steuben *v.* New Jersey Cent. R. Co., 4 Pa. Dist. 589; Becker *v.* Maurer, 2 Woodw. (Pa.) 264.

of the court are not ground for a new trial.[38] A new trial will not be granted at the instance of the party in whose favor the alleged improper ruling was made.[39]

2. RIGHT TO OPEN AND CLOSE. In some jurisdictions an improper refusal of the right to open and close the case is ground for a new trial,[40] unless it clearly appears that no injury could have resulted to the losing party.[41] In other jurisdictions such irregularity is not ground for a new trial, unless it be shown that substantial injustice has been done.[42]

3. EVIDENCE — a. Admission. A new trial should be granted for the erroneous admission of evidence which is incompetent,[43] or otherwise inadmissible,[44] and

Motion to require election.— An error committed in overruling a motion to require plaintiff to elect on which of several counts he would proceed was not ground for a new trial where the court confined plaintiff to two counts, stating different causes of action, on which the proof was sufficient. Barton *v.* Odessa, 109 Mo. App. 76, 82 S. W. 1119.

In Rhode Island error in rulings appears not to be ground for a new trial. Bristow *v.* Nichols, 19 R. I. 719, 37 Atl. 1033.

38. Moran *v.* Ahbey, 63 Cal. 56. See also Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816, holding that the suggestion of a different form of question by the court was not ground for a new trial.

39. Hooks *v.* Frick, 75 Ga. 715.

40. Haines *v.* Kent, 11 Ind. 126; Davis *v.* Mason, 4 Pick. (Mass.) 156; Singleton *v.* Millet, 1 Nott & M. (S. C.) 355.

41. Ayrault *v.* Chamberlain, 33 Barb. (N Y.) 229; Huntington *v.* Conkey, 33 Barb. (N. Y.) 218, discussing cases very fully.

42. *Connecticut.*— Scott *v.* Hull, 8 Conn. 296.

Georgia.— Bethea *v.* Prothro, 28 Ga. 109.

Minnesota.—Gran *v.* Spangenberg, 53 Minn. 42, 54 N. W. 933.

Missouri.— Lucas *v.* Sullivan, 33 Mo. 389; McClintock *v.* Curd, 32 Mo. 411; Farrell *v.* Brennan, 32 Mo. 328, 82 Am. Dec. 137.

England.— Doe *v.* Brayne, 5 C. B. 655, 17 L. J. C. P. 127, 57 E. C. L. 655; Edwards *v.* Matthews, 4 D. & L. 721, 16 L. J. Exch. 291; Booth *v.* Millns, 4 D. & L. 52, 15 L. J. Exch. 354, 15 M. & W. 669; Brandford *v.* Freeman, 5 Exch. 734, 14 Jur. 987, 20 L. J. Exch. 36. *Compare* Geach *v.* Ingall, 9 Jur. 691, 15 L. J. Exch. 37, 14 M. & W. 95; Huckman *v.* Fernie, 3 M. & W. 505.

Canada.— McDonald *v.* McHugh, 12 U. C. Q. B. 503.

See 37 Cent. Dig. tit. "New Trial," § 33.

If the verdict rendered was demanded by the evidence, a new trial will be denied. Peoples' Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920.

The party in whose favor the erroneous ruling was made cannot be heard to complain. Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

43. *Georgia.*— Foster *v.* Atlanta Rapid Transit Co., 119 Ga. 675, 46 S. E. 840; Park *v.* Park, 66 Ga. 543.

Illinois.— Chicago *v.* Wright, etc., Oil, etc., Co., 14 Ill. App. 119.

Kansas.— Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641; Marshall *v.* Weir Plow Co., 4 Kan. App. 615, 45 Pac. 621.

Massachusetts.— Brown *v.* Cummings, 7 Allen 507.

Michigan.— Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

New Hampshire.— Ellingwood *v.* Bragg, 52 N. H. 488; Winkley *v.* Foye, 33 N. H. 171, 66 Am. Dec. 715.

New York.— Sherman *v.* Delaware, etc., R. Co., 106 N. Y. 542, 13 N. E. 616; National City Bank *v.* Pacific Co., 117 N. Y. App. Div. 12, 101 N. Y. Suppl. 1098; Scott *v.* Lilienthal, 9 Bosw. 224; Harris *v.* Panama R. Co., 5 Bosw. 312; Driggs *v.* Smith, 45 How. Pr. 447.

Ohio.— Gibbs *v.* Fulton, 2 Ohio 180.

Pennsylvania.— Hoskins *v.* Lindsay, 1 Del. Co. 249.

Vermont.—Stanton *v.* Bannister, 2 Vt. 464; Barney *v.* Goff, 1 D. Chipm. 304.

Canada.— Hanington *v.* Cormier, 15 N. Brunsw. 450; Girvan *v.* St. John, 11 N. Brunsw. 411; Maynes *v.* Dolan, 8 N. Brunsw. 573; McMillan *v.* Fraser, 7 N. Brunsw. 615.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52.

44. *California.*— Santillan *v.* Moses, 1 Cal. 92.

Georgia.— Neal *v.* Simmons, 83 Ga. 363, 9 S. E. 671; Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393.

Illinois.— Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987.

Kentucky.— Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Massachusetts.— Ellis *v.* Short, 21 Pick. 142.

Michigan.— Rickabus *v.* Gott, 51 Mich. 227, 16 N. W. 384; Earle *v.* Westchester F. Ins. Co., 29 Mich. 414.

Minnesota.— Flower *v.* Grace, 23 Minn. 32.

Mississippi.— Melius *v.* Houston, 41 Miss. 59.

Missouri.— Eddy *v.* Baldwin, 32 Mo. 369.

Nebraska.— Simpson *v.* Armstrong, 20 Nebr. 512, 30 N. W. 941; Harrison *v.* Baker, 15 Nebr. 43, 14 N. W. 541.

New Hampshire.— Cole *v.* Boardman, 63 N. H. 580, 4 Atl. 572; Shepherd *v.* Thompson, 4 N. H. 213.

New York.— Bull *v.* Bath Iron Works, 75 N. Y. App. Div. 380, 78 N. Y. Suppl. 181; Dresser *v.* Ainsworth, 9 Barb. 619; Weeks *v.* Lowerre, 8 Barb. 530; Wehrum *v.* Kuhn, 34 N. Y. Super. Ct. 336 [*affirmed* in 61 N. Y. 623]; Waring *v.* U. S. Telegraph Co.,

which may have influenced the jury in arriving at its verdict. The improper admission of the testimony of an incompetent witness,[45] or the admission of secondary evidence without proper foundation,[46] is ground for new trial. Misleading hypothetical questions, assuming controverted facts, may be ground for a new trial.[47] It has been decided that the admission of evidence which is apparently irrelevant, on the statement of counsel that its relevancy will be made to appear by other evidence to be offered, may be ground for a new trial if proper connecting evidence is not adduced.[48] Where it is quite clear that irrelevant[49] or

4 Daly 233; Clark *v.* Vorce, 19 Wend. 232; Gillet *v.* Mead, 7 Wend. 193, 22 Am. Dec. 578.

Pennsylvania.— Stewart *v.* Richardson, 3 Yeates 200; Rahlfing *v.* Heidrich, 4 Phila. 3.

Rhode Island.— Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159.

South Carolina.— Langton *v.* Everingham, 2 McCord 157.

Vermont.— Barney *v.* Goff, 1 D. Chipm. 304.

United States.— Trigg *v.* Conway, 24 Fed. Cas. No. 14,172, 1 Hempst. 538.

England.— Wright *v.* Doe, 7 A. & E. 313, 7 L. J. Exch. 340, 34 E. C. L. 178; De Rutzen *v.* Farr, 4 A. & E. 53, 1 Harr. & W. 735, 5 L. J. K. B. 38, 5 N. & M. 617, 31 E. C. L. 43; Hodson *v.* Midland Great Western R. Co., Ir. R. 11 C. L. 109.

Canada.— Hesse *v.* St. John R. Co., 30 Can. Sup. Ct. 218; McDonald *v.* Cummings, 15 N. Brunsw. 282; Jackson *v.* McLellan, 15 N. Brunsw. 83; Zirkler *v.* Robertson, 30 Nova Scotia 61; Hamilton Bank *v.* Isaacs, 16 Ont. 450; McBride *v.* Bailey, 6 U. C. C. P. 9 (although there was other evidence of same general character); Ferguson *v.* Veitch, 45 U. C. Q. B. 160; Edwards *v.* Ottawa River Nav. Co., 39 U. C. Q. B. 264.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52. And see *infra*, III, H, 3, b.

Applications of rule.— It is ground for a new trial that depositions went to the jury without the erasure of evidence which the court had ordered erased as inadmissible. Shepherd *v.* Thompson, 4 N. H. 213. Error in the reception of evidence as to one of two distinct causes of action requires a new trial, where the verdict is general. Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222; Simmons *v.* Holster, 13 Minn. 249. Where the court has stopped the cross-examination of a witness on matters testified to without objection on the examination in chief, on the ground that such evidence should not have been admitted, his refusal to strike out the testimony in chief may be ground for a new trial. Phelps *v.* Hunt, 43 Conn. 194. That the court gave an unsatisfactory reason for the admission of evidence to which there could be no objection is not ordinarily ground for a new trial. Dale's Appeal, 57 Conn. 127, 17 Atl. 757. The admission of wholly irrelevant evidence tending to the disparagement of a party is ground for a new trial. Rickabus *v.* Gott, 51 Mich. 227, 16 N. W. 384.

45. Ellingwood *v.* Bragg, 52 N. H. 488; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225.

Witness subsequently rendered competent by statute.— A new trial asked for on the ground that the testimony of an incompetent witness had been admitted over objection was refused where the witness had since been rendered competent by statute. Camp *v.* Pulver, 5 Barb. (N. Y.) 91. *Contra*, Doe *v.* Attica, 7 Ind. 641; Wright *v.* Gaff, 6 Ind. 416.

46. *Arkansas.*— Thomas *v.* Hutchinson, 25 Ark. 558.

Delaware.— Bartholomew *v.* Edwards, 1 Houst. 247.

Indiana.— Myer *v.* Avery, 23 Ind. 510.

Pennsylvania.— Bradley *v.* Bradley, 4 Dall. 112, 1 L. ed. 763.

United States.— Savage *v.* D'Wolf, 21 Fed. Cas. No. 12,383, 1 Blatchf. 343.

See 37 Cent. Dig. tit. "New Trial," § 52.

Where it is shown that there are material errors in the copy of an instrument improperly admitted in evidence, a new trial should be ordered. Thomas *v.* Hutchinson, 25 Ark. 558; Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636.

Evidence substantially correct.—A new trial will not be granted because the court admitted, without objection, secondary evidence of a writing without a proper accounting for the non-production of the original, where it does not appear that such secondary evidence was not substantially correct, although the moving party was not present or represented at the trial. Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636.

47. McFall *v.* Smith, 32 Ill. App. 463; Haish *v.* Munday, 12 Ill. App. 539.

48. Mussey *v.* Mussey, 68 Me. 346; Smith *v.* Sedalia, 182 Mo. 1, 81 S. W. 165, especially where the court refuses to charge the jury to disregard such evidence.

49. *Georgia.*— Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Hollingsworth *v.* Howard, 113 Ga. 1099, 39 S. E. 465; Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862, 39 S. E. 555; Harrell *v.* Davis, 108 Ga. 789, 33 S. E. 852; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Eagle, etc., Mfg. Co. *v.* West, 61 Ga. 120; Jackson *v.* Jackson, 47 Ga. 99; Green *v.* Cock, 39 Ga. 339; Williams *v.* Hamilton, 30 Ga. 968; Robson *v.* Jones, 27 Ga. 266.

Illinois.— Creote *v.* Willey, 83 Ill. 444; Bestor *v.* Moss, 61 Ill. 497.

Maine.— Dutch *v.* Bodwell Granite Co., 94 Me. 34, 46 Atl. 787; Skowhegan Bank *v.* Cutler, 52 Me. 509; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Massachusetts.— McAvoy *v.* Wright, 137 Mass. 207; Packard *v.* New Bedford, 9 Allen

incompetent[50] evidence has neither misled nor prejudiced the jury, a new trial may be refused. Accordingly, it has been decided that if incompetent[51] or

200; Flint *v.* Hubbard, 1 Allen 252; Barry *v.* Bennett, 7 Metc. 354; Ellis *v.* Short, 21 Pick. 142.

Minnesota.—Aske *v.* Duluth, etc., R. Co., 83 Minn. 197, 85 N. W. 1011; Wass *v.* Atwater, 33 Minn. 83, 22 N. W. 8; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

New Hampshire.— Rowell *v.* Hollis, 62 N. H. 129; Blodgett Paper Co. *v.* Farmer, 41 N. H. 398; Hatch *v.* Hart, 40 N. H. 93; Page *v.* Parker, 40 N. H. 47; Cook *v.* Brown, 34 N. H. 460; Clement *v.* Brooks, 13 N. H. 92.

New York.— Lapham *v.* Marshall, 51 Hun 36, 3 N. Y. Suppl. 601; Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317.

North Carolina.— Collins *v.* Collins, 125 N. C. 98, 34 S. E. 195.

Pennsylvania.— Similroth *v.* Lehr, 5 Phila. 87.

Texas.— Hunter *v.* Hubbard, 26 Tex. 537; Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899.

Canada.— McDonald *v.* Cummings, 15 N. Brunsw. 282; McKenzie *v.* Scovil, 13 N. Brunsw. 6; Carter *v.* Saunders, 11 N. Brunsw. 147; Embree *v.* Wood, 20 Nova Scotia 40.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52.

It should clearly appear that the illegal evidence did not influence the verdict.— Skidmore *v.* Clark, 47 Conn. 20; Marshall *v.* Weir Plow Co., 4 Kan. App. 615, 45 Pac. 621; Ellingwood *v.* Bragg, 52 N. H. 488; Clark *v.* Crandall, 3 Barb. (N. Y.) 612; Waring *v.* U. S. Telegraph Co., 4 Daly (N. Y.) 233; Maynes *v.* Dolan, 8 N. Brunsw. 573.

Courts have sometimes refused to consider the question as to whether illegal evidence may not have influenced the jury. Dresser *v.* Ainsworth, 9 Barb. (N. Y.) 619; Langton *v.* Everingham, 2 McCord (S. C.) 157.

In England it was formerly held that a new trial should not be granted for the admission of illegal evidence, if there was sufficient legal evidence to support the verdict, but new trials are now granted if the illegal evidence may have influenced the verdict. Wright *v.* Doe, 7 A. & E. 313, 7 L. J. Exch. 340, 34 E. C. L. 178; De Rutzen *v.* Farr, 4 A. & E. 53, 5 N. & M. 617, 1 Harr. & W. 735, 5 L. J. K. B. 38, 31 E. C. L. 43; Doe *v.* Tyler, 6 Bing. 561, 4 M. & P. 377, 8 L. J. C. P. O. S. 222, 31 Rev. Rep. 496, 19 E. C. L. 255; Herman *v.* Lester, 12 C. B. N. S. 776, 9 Jur. N. S. 601, 104 E. C. L. 776; Crease *v.* Barrett, 1 C. M. & R. 919, 4 L. J. Exch. 297, 5 Tyrw. 458; Hodson *v.* Midland Great Western R. Co. Ir. R. 11 C. L. 109; McCreesh *v.* McGeough, Ir. R. 7 C. L. 236.

The admission of irrelevant testimony solely to remove a ground of prejudice caused by the irrelevant testimony of the objecting party is not ground for a new trial. Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159.

A mere ruling in favor of the admission of evidence not actually received is not ground for a new trial. Vallance *v.* King, 3 Barb. (N. Y.) 548.

In equity cases not tried to juries rulings on the admissibility of evidence are not ground for a new trial. Evans *v.* Sims, 82 Hun (N. Y.) 396, 31 N. Y. Suppl. 259 [*affirmed* in 152 N. Y. 622, 46 N. E. 1146].

50. *Colorado.*— Ullman *v.* McCormic, 12 Colo. 553, 21 Pac. 716.

Georgia.— Taylor *v.* Martin, 49 Ga. 572.

Illinois.— Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723, especially when asked by court to state objection at time and did not do so.

Maine.— Dodge *v.* Greeley, 31 Me. 343.

Massachusetts.— Bragg *v.* Boston, etc., R. Corp., 9 Allen 54.

New York.— Leszynsky *v.* Leszynsky, 3 Silv. Sup. 242, 6 N. Y. Suppl. 857; Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63; Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317; Ackley *v.* Kellogg, 8 Cow. 223.

Pennsylvania.— Blum *v.* Warner, 1 Leg. Rec. 113.

Rhode Island.—Ames *v.* Potter, 7 R. I. 265.

Texas.— Dailey *v.* Starr, 26 Tex. 562; Smith *v.* Hughes, 23 Tex. 248.

United States.— Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649; North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125, 6 Sawy. 503; *In re* Marsh, 16 Fed. Cas. No. 9,108.

England.— Stindt *v.* Roberts, 5 D. & L. 460; Stindt *v.* Roberts, 12 Jur. 518, 17 L. J. Q. B. 166, 2 Saund. & C. 212.

Canada.— Coleman *v.* Toronto, 23 Ont. 345.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52.

Where both parties introduced opinion evidence of persons who were not experts, a new trial was denied plaintiff. Rice *v.* Ditmars, 21 Nova Scotia 140.

Curing error in admission.— Where a copy of a foreign record of a mortgage was improperly admitted because not sufficiently attested, the court overruled a motion for a new trial upon the production of proper certificates. Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55.

Where it appears that improper hypothetical questions were harmless, a new trial should not be allowed. Hine *v.* Cushing, 53 Hun (N. Y.) 519, 6 N. Y. Suppl. 850.

Evidence improperly admitted to explain a writing where no latent ambiguity existed is not ground for a new trial, since the writing was for the court to construe without such evidence. Bruff *v.* Conybeare, 13 C. B. N. S. 263, 9 Jur. N. S. 78, 106 E. C. L. 263; Spring *v.* Cockburn, 19 U. C. C. P. 63.

51. *Georgia.*— Payne *v.* Miller, 89 Ga. 73, 14 S. E. 926.

New York.— Chenango County *v.* Birdsall, 4 Wend. 453.

Ohio.— Allen *v.* Parish, 3 Ohio 107.

United States.—Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121.

Canada.— Shaw *v.* De Salaberry Nav. Co.,

irrelevant[52] evidence was cumulative of legal evidence clearly establishing the point to which it was adduced, or if the point was conceded by the objecting party,[53] or was already proved by his evidence,[54] or was found in his favor by the jury,[55] a new trial should not be granted. If any other verdict than that rendered must have been set aside as against the legal evidence in the case, a new trial should not be granted, although illegal evidence was admitted.[56] Merely technical errors in the admission of secondary evidence are not ground for a new trial, if the competency of the evidence is made to appear during the trial.[57] Ordinarily error in the admission of evidence is cured if the court orders the evidence to be stricken out and instructs the jury to disregard it.[58] If, how-

18 U. C. Q. B. 541. See also Cook *v.* Grant, 32 U. C. C. P. 511, where the point had been established by other illegal evidence received without objection.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52.

52. *Connecticut.*— Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia.— McLendon *v.* Frost, 57 Ga. 448.

Massachusetts.— McAvoy *v.* Wright, 137 Mass. 207; Prince *v.* Shepard, 9 Pick. 176.

New Jersey.— Hadley *v.* Geiger, 9 N. J. L. 225.

Rhode Island.— Bowman *v.* Tripp, 14 R. I. 242.

Texas.— Lindsay *v.* Jaffray, 55 Tex. 626; Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899.

53. Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Schramm *v.* Boston Sugar Refining Co., 146 Mass. 211, 15 N. E. 571; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87. See also Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63, under Code Civ. Proc. § 1003.

54. Knorr *v.* Raymond, 73 Ga. 749; Desverges *v.* Desverges, 31 Ga. 753; Heavener *v.* Tilli, 19 Montg. Co. Rep. (Pa.) 13; Appleton *v.* Lepper, 20 U. C. C. P. 138.

55. *Connecticut.*— Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739, illegal evidence offered to show special damages and the verdict for nominal damages only.

Mississippi.— Richardson *v.* Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 481, although the judge knew the fact and punished the juror.

Montana.— Bradshaw *v.* Degenhart, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

Pennsylvania.— Jejorek *v.* Nanticoke, 9 Kulp 501.

West Virginia.—Flesher *v.* Hale, 22 W. Va. 44.

Canada.— Rogers *v.* Munns, 25 U. C. Q. B. 153.

And see Ullman *v.* McCormic, 12 Colo. 553, 21 Pac. 716.

Where the answer to a question is favorable to the objecting party, the error, if any, is cured. Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Nova Scotia Bank *v.* Fish, 32 N. Brunsw. 434.

56. *California.*— Zeigler *v.* Wells, 28 Cal. 263.

Florida.— Bucki *v.* Seitz, 39 Fla. 55, 21 So. 576; Pensacola, etc., R. Co. *v.* Anderson, 26 Fla. 425, 8 So. 127.

Georgia.— Lane *v.* Macon, 118 Ga. 840, 45 S. E. 679; Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Williams *v.* Central R., etc., Co., 94 Ga. 702, 19 S. E. 827; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; McLendon *v.* Frost, 57 Ga. 448; Shacklett *v.* Ransom, 54 Ga. 350.

New Mexico.— Romero *v.* Desmarais, 4 N. M. 367, 20 Pac. 787.

New York.— Bronson *v.* Tuthill, 1 Abb. Dec. 206, 3 Keyes 32.

Ohio.— Allen *v.* Parish, 3 Ohio 107.

Pennsylvania.— Szuchy *v.* Lehigh Traction Co., 12 Luz. Leg. Reg. 123; Spahr *v.* Dissinger, 17 York Leg. Rec. 174.

Rhode Island.— Bowman *v.* Tripp, 14 R. I. 242.

Texas.— Lindsay *v.* Jaffray, 55 Tex. 626.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85; Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649.

Canada.— Brown *v.* Black, 21 Nova Scotia 349; Kyle *v.* Buffalo, etc., R. Co., 16 U. C. C. P. 76; Dundas *v.* Johnston, 24 U. C. Q. B. 547.

See 37 Cent. Dig. tit. "New Trial," §§ 51, 52.

57. Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636; Guerry *v.* Brown, 49 Ga. 520; Handly *v.* Call, 30 Me. 9; Flint *v.* Hubbard, 1 Allen (Mass.) 252; Irwin *v.* Jordan, 7 Humphr. (Tenn.) 167. Thus the mere failure to subject an insane witness to a preliminary examination as to her sense of the obligation of an oath was not ground for a new trial, where it appeared, from what occurred on the trial, that she could have stood the test. Wright *v.* Southern Express Co., 80 Fed. 85.

58. *Iowa.*— Woodward *v.* Horst, 10 Iowa 120.

Maine.— Philbrook *v.* Burgess, 52 Me. 271.

Mississippi.— Herndon *v.* Henderson, 41 Miss. 584.

New York.— Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63.

Pennsylvania.— Brooks *v.* Baizley, 7 Del. Co. 529; Tompkins *v.* Merriman, 6 Kulp 543; Whiteley *v.* Billington, 18 Phila. 288, 17 Wkly. Notes Cas. 254.

England.— Cattlin *v.* Barker, 5 C. B. 201, 11 Jur. 1105, 57 E. C. L. 201.

Canada.— Stewart *v.* Snowhall, 19 N. Brunsw. 597; Napier *v.* Ferguson, 18 N. Brunsw. 415; Wilmot *v.* Vanwart, 17 N. Brunsw. 456.

ever, the prejudicial effect of the evidence upon the jury has probably not been fully overcome by such action, a new trial may be allowed.[59]

b. Exclusion. The exclusion of proper evidence is ground for a new trial.[60] That there was other evidence of the same general character,[61] or even that the rejected evidence was cumulative, where the other evidence in the case is conflicting,[62] may not render the error harmless. If the point upon which the rejected evidence was offered was conceded by the other party,[63] or was clearly established by other evidence,[64] or if some other point was decisive of the

59. Chicago *v.* Wright, etc., Oil, etc., Mfg. Co., 14 Ill. App. 119; Cumins *v.* Leighton, 9 Ill. App. 186; Arthur *v.* Griswold, 55 N. Y. 400; Erben *v.* Lorillard, 19 N. Y. 299; Lewin *v.* Lehigh Valley R. Co., 66 N. Y. App. Div. 409, 72 N. Y. Suppl. 881 [*affirmed* in 169 N. Y. 336, 62 N. E. 385]; Gillet *v.* Mead, 7 Wend. (N. Y.) 193, 22 Am. Dec. 578; Stewart *v.* Richardson, 3 Yeates (Pa.) 200; Rahlfing *v.* Heidrick, 4 Phila. (Pa.) 3; Hesse *v.* St. John R. Co., 30 Can. Sup. Ct. 218.

60. *California.*— Wheeler *v.* Bolton, 66 Cal. 83, 4 Pac. 981; Payne *v.* Kripp, (1884) 4 Pac. 426.

Georgia.— Whitley *v.* Hudson, 114 Ga. 668, 40 S. E. 838 (holding that the refusal to permit a defendant in a contract action to show that he was a surety is ground for a new trial); Hill *v.* Vanduzer, 37 Ga. 293.

Illinois.— Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987.

Indiana.— Shirk *v.* Cartright, 29 Ind. 406, holding that the improper exclusion of evidence is an "error of law occurring at the trial."

Kentucky.— Coleman *v.* Allen, 3 J. J. Marsh. 229; Crumbaugh *v.* Russel, 1 A. K. Marsh. 385.

Minnesota.— Tunell *v.* Larson, 37 Minn. 258, 34 N. W. 29, exclusion of impeaching evidence.

Missouri.—Moreland *v.* McDermott, 10 Mo. 605.

New York.— Wehrum *v.* Kuhn, 34 N. Y. Super. Ct. 336 [*affirmed* in 61 N. Y. 623].

Pennsylvania.—Grossman *v.* Nunnamacher, 18 Lanc. L. Rev. 286.

South Carolina.— McElwee *v.* Sutton, 2 Bailey 128.

Vermont.— Bradley Fertilizer Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162.

United States.—Cable *v.* Paine, 8 Fed. 788, 3 McCrary 169.

England.— Boyle *v.* Wiseman, 3 C. L. R. 482, 10 Exch. 647, 1 Jur. N. S. 115, 24 L. J. Exch. 160, 3 Wkly. Rep. 206; Crease *v.* Barrett, 1 C. M. & R. 919, 4 L. J. Exch. 297, 5 Tyrw. 458, holding that for the rejection of proper evidence a new trial should be granted, unless, with the addition of the rejected evidence, a verdict for the party offering it would be manifestly against the weight of evidence.

Canada.— Nova Scotia Bank *v.* Fish, 24 Can. Sup. Ct. 709; Manitoba Free Press Co. *v.* Martin, 21 Can. Sup. Ct. 518; Cain *v.* Uhlman, 8 Can. L. T. Occ. Notes 373, 20 Nova Scotia 148; Bank of British North America *v.* McElroy, 15 N. Brunsw. 462; McLeod *v.* McGuirk, 15 N. Brunsw. 238; Brown *v.* Moore, 15 N. Brunsw. 42; Stirton *v.* Gummer, 31 Ont. 227; Black *v.* Besse, 12 Ont. 522; Mahoney *v.* Macdonnell, 9 Ont. 137; Waterloo Mut. Ins. Co. *v.* Robinson, 4 Ont. 295; Exchange Bank *v.* Stinson, 32 U. C. C. P. 158; McMillan *v.* McMillan, 12 U. C. C. P. 158; McCreary *v.* Grundy, 39 U. C. Q. B. 316.

See 37 Cent. Dig. tit. "New Trial," §§ 53, 70. And see *infra*, III, H, 3, b.

Necessity for tender of evidence.— There must have been a formal tender of the evidence alleged to have been excluded. Allen *v.* Kessler, 120 Ga. 319, 47 S. E. 900; Penn *v.* Bibby, L. R. 2 Ch. 127, 36 L. J. Ch. 455, 15 L. T. Rep. N. S. 399, 15 Wkly. Rep. 208; Gibbs *v.* Pike, 1 Dowl. P. C. N. S. 409, 12 L. J. Exch. 257, 9 M. & W. 351, 6 Jur. 465; Campbell *v.* Loader, 3 H. & C. 520, 34 L. J. Exch. 50, 11 Jur. N. S. 286, 11 L. T. Rep. N. S. 608, 13 Wkly. Rep. 348; Whitehouse *v.* Hemmant, 27 L. J. Exch. 295, 6 Wkly. Rep. 488. But *compare* Martin *v.* Manitoba Free Press Co., 8 Manitoba 50, where the character of the evidence was sufficiently disclosed by the examination.

Subsequent offer to admit.— The exclusion of competent evidence at an early stage of the trial is ground for a new trial, although the court afterward offered to admit it when it was too late to procure the witnesses. Bradley Fertilizer Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162.

Subsequent admission of evidence.— The subsequent admission of the evidence may not cure the error in formerly excluding it, if such exclusion has operated to shift the weight of evidence and made the proof of the party's case more complex and difficult. Woodman *v.* Dana, 52 Me. 9.

Evidence excluded on party's objection.—A party cannot have a new trial because competent evidence was excluded on his own objection. Whiton *v.* Chicago, etc., R. Co., 29 Fed. Cas. No. 17,597, 2 Biss. 282.

61. Goddard *v.* Gardner, 28 Conn. 172.

Where the evidence excluded is of so controlling a character that it must have changed the result, a new trial should be granted. Keys *v.* Baldwin, 33 Tex. 666.

62. Howell *v.* Howell, 47 Ga. 492; Pettingill *v.* Olean, 17 N. Y. Suppl. 433; Dossett *v.* Miller, 3 Sneed (Tenn.) 72. *Compare* Herreshoff *v.* Tripp, 15 R. I. 92, 23 Atl. 104; Copeland *v.* Blenheim, 9 Ont. 19.

63. Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231; Sacra *v.* Stewart, 32 Tex. 185; Edwards *v.* Evans, 3 East 451.

64. Alexander *v.* Barker, 2 Cromp. & J. 133, 1 L. J. Exch. 40, 2 Tyrw. 140.

case,[65] a new trial should not be granted; if a verdict for the moving party must have been set aside on the evidence, even had the rejected evidence been admitted, a new trial should be denied.[66] If the materiality of evidence is not apparent, and is not shown, when it is offered, its rejection is not error.[67] An error in the exclusion of evidence is generally cured by its subsequent admission during the trial.[68]

c. Order of Proof. Where there is not a clear abuse of discretion resulting in surprise,[69] it is not ground for a new trial that the court admitted legal evidence out of the regular order of proof,[70] or refused to admit it out of the regular order.[71] When there has been no negligence in failing to offer evidence before the opening of the argument, its exclusion at that time may be ground for a new trial.[72]

d. Compelling Production of Evidence. A new trial should be granted where the court has improperly compelled the production of papers at the trial,[73] or has

65. Carpenter *v.* Norris, 20 Cal. 437; Parker *v.* Griffith, 172 Mass. 87, 51 N. E. 462; Benjamin *v.* Smith, 12 Wend. (N. Y.) 404 (evidence on measure of damages where no liability found); Lippus *v.* Columbus Watch Co., 13 N. Y. Suppl. 319 (same ruling); Edwards *v.* Evans, 3 East 451; Manley *v.* Palache, 73 L. T. Rep. N. S. 98, 11 Reports 566 (evidence to show the breach of an alleged duty, where the jury negatived the facts on which the duty was founded).

66. *Georgia.*— Rountree *v.* Gaulden, 123 Ga. 449, 51 S. E. 346; Allen *v.* Kessler, 120 Ga. 319, 47 S. E. 900; Union Fraternal League *v.* Walton, 112 Ga. 315, 37 S. E. 389; Long *v.* Oliver, 107 Ga. 360, 33 S. E. 424.

Illinois.— Wheeler *v.* Shields, 3 Ill. 348.

Mississippi.— Cogan *v.* Frisby, 36 Miss. 178.

Pennsylvania.— Szuchy *v.* Lehigh Tract. Co., 12 Luz. Leg. Reg. 123; Spahr *v.* Dissinger, 17 York Leg. Rec. 174.

Rhode Island.— Spink *v.* New York, etc., R. Co., 26 R. I. 115, 58 Atl. 499.

South Carolina.— McKie *v.* Garlington, 3 McCord 276.

United States.— Walker *v.* Hawxhurst, 28 Fed. Cas. No. 17,071, 5 Blatchf. 494.

England.— Alexander *v.* Barker, 2 Cromp. & J. 133, 1 L. J. Exch. 40, 2 Tyrw. 140; Doe *v.* Langfield, 16 M. & W. 497.

Canada.— Almon *v.* Law, 26 Nova Scotia 340; O'Connor *v.* Dunn, 2 Ont. App. 247; Copeland *v.* Blenheim, 9 Ont. 19; Davis *v.* Canada Farmers Mut. Ins. Co., 39 U. C. Q. B. 452, no "substantial wrong or miscarriage."

67. Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101; Weaver *v.* Mississippi, etc., Boom Co., 31 Minn. 74, 16 N. W. 494. It must appear of course that the evidence was legally admissible to prove some issue in the case (Patterson *v.* Ramspeck, 81 Ga. 808, 10 S. E. 9, 12 Am. St. Rep. 356; Barker *v.* Blount, 63 Ga. 423; Clemmons *v.* Rouse, 4 N. Y. App. Div. 129, 38 N. Y. Suppl. 999; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325), and that the foundation for its introduction had been properly laid (Rencher *v.* Aycock, 104 N. C. 144, 10 S. E. 132).

Failure to state object of evidence.—A new trial may be refused if the party offering evidence excluded by the court omitted, at the trial, to state the object for which it was offered. Barker *v.* Blount, 63 Ga. 423; Barksdale *v.* Toomer, 2 Bailey (S. C.) 180.

Where evidence is offered upon an untenable ground and is rejected, it is not ordinarily ground for a new trial that the evidence might have been admissible on other grounds. Doe *v.* Beviss, 7 C. B. 456, 18 L. J. C. P. 128, 62 E. C. L. 456.

68. *Georgia.*— City Electric R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Doggett *v.* Exchange Bank, 113 Ga. 950, 39 S. E. 506; White *v.* Columbus Iron Works Co., 113 Ga. 577, 38 S. E. 944; Frey *v.* Macon Sash, etc., Co., 112 Ga. 242, 37 S. E. 376.

Minnesota.— Weaver *v.* Mississippi, etc., Boom Co., 31 Minn. 74, 16 N. W. 494.

Nebraska.— Dietrich *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624.

New York.— Hunt *v.* Fish, 4 Barb. 324.

Pennsylvania.— Jacoby *v.* West Chester F. Ins. Co., 11 York Leg. Rec. 153.

Canada.—Tufts *v.* Hatheway, 9 N. Brunsw. 62.

69. See *infra*, III, H, 3, b, (III).

70. Rice *v.* Cunningham, 29 Cal. 492; Campbell *v.* Ingraham, 1 Mill (S. C.) 293; Faund *v.* Wallace, 35 L. T. Rep. N. S. 361; Earp *v.* Faulkner, 34 L. T. Rep. N. S. 284, 24 Wkly. Rep. 774 (under ordinance 39, rule 6, providing that a new trial should be granted only where there has been "substantial wrong or miscarriage"); McDonald *v.* Cummings, 15 N. Brunsw. 282; Godard *v.* Fredericton Boom Co., 11 N. Brunsw. 448; Oulton *v.* Read, 11 N. Brunsw. 283 (receiving evidence after the argument of counsel).

71. Alexander *v.* Byron, 2 Johns. Cas. (N. Y.) 318; Middleton *v.* Barned, 18 L. J. Exch. 433; Herbert *v.* Mercantile F. Ins. Co., 43 U. C. Q. B. 384; Blakely *v.* Garrett, 16 U. C. Q. B. 261; Armour *v.* Phillips, 4 U. C. Q. B. 152; Benedict *v.* Boulton, 4 U. C. Q. B. 96.

72. Watterson *v.* Watterson, 1 Head (Tenn.) 1.

73. Dover *v.* Harrell, 58 Ga. 572, in violation of privilege of attorney.

Failure to object.— If papers produced at the trial under order of court are excluded,

refused to compel the production of books and papers in evidence in a proper case.[74] Failure to compel a party to answer interrogatories is not ground for a new trial.[75] An improper order requiring a plaintiff to submit to a medical examination and to give testimony before trial in the nature of discovery, not being error of law at the trial, is not ground for a new trial.[76]

e. Submission to Jury. An improper nonsuit or dismissal of an action on the evidence,[77] an improper sustaining of a demurrer to the evidence,[78] the improper direction of a verdict,[79] the submission to the jury of a question of law,[80] or the withdrawal of a question of fact from the jury where the evidence is conflicting or doubtful[81] is ground for new trial. The erroneous refusal to enter a nonsuit or

or are admitted without objection, the order, although improperly granted, is not ground for a new trial. Southern R. Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. 816.

Harmless error.— Error in compelling an attorney for defendant to introduce a document in evidence is not ground for a new trial, where the answer admits the existence of the document and sets forth its contents. Bullock *v.* Dunbar, 114 Ga. 754, 40 S. E. 783. Error in compelling the production of a paper does not require a new trial where the paper is not used. Macon Consol. St. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756.

The action of a referee in requiring a party to call a hostile witness on his own account may be ground for a new trial. Beaman *v.* Todd, 4 N. Y. St. 84.

74. Carrington *v.* Brooks, 121 Ga. 250, 48 S. E. 970.

Inadmissible papers.—A new trial should not be granted because the court refused to compel the production of papers which would be inadmissible in evidence. Beatson *v.* Skene, 5 H. & N. 838, 6 Jur. N. S. 780, 29 L. J. Exch. 430, 2 L. T. Rep. N. S. 378, 8 Wkly. Rep. 544.

75. Cates *v.* Thayer, 93 Ind. 156.

76. Pfaffenbach *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530.

77. *California.*— McCreery *v.* Everding, 44 Cal. 284.

Georgia.— Venable *v.* Randall, 113 Ga. 1042, 39 S. E. 470.

New York.— Tenoza *v.* Golliek, 80 N. Y. App. Div. 638, 81 N. Y. Suppl. 353.

Pennsylvania.— Bodine *v.* Camden, etc., R. Co., 1 Phila. 28.

Rhode Island.— Thurston *v.* Schroeder, 6 R. I. 272, under a statute providing for a new trial where a party has not had "a full, fair, and impartial trial."

South Dakota.— Sioux Banking Co. *v.* Kendall, 6 S. D. 543, 62 N. W. 377, as "error of law occurring at the trial."

England.— Edgar *v.* Knapp, 1 D. & L. 73, 7 Jur. N. S. 583, 5 M. & G. 753, 6 Scott N. R. 707, 44 E. C. L. 393.

Canada.— Rajotte *v.* Canadian Pac. R. Co., 5 Manitoba 365.

See 37 Cent. Dig. tit. "New Trial," §§ 56, 70.

The act of the court in improperly withdrawing plaintiff's evidence, discharging the jury and rendering judgment for defendant on the latter's motion is a "decision" "contrary to law." Weaver *v.* Columbus, etc., R. Co., 55 Ohio St. 491, 45 N. E. 717.

Failure of complaint to state cause of action.— Where the court took the case from the jury of its own motion because the petition did not state a cause of action, no question as to the sufficiency of the pleading having been raised by defendant, the granting of a new trial on plaintiff's motion was not error. Brown *v.* Illinois Cent. R. Co., 123 Iowa 239, 98 N. W. 625.

78. Missouri Pac. R. Co. *v.* Goodrich, 38 Kan. 224, 16 Pac. 439.

79. Process Copper, etc., Co. *v.* Perfect Arc Lamp, etc., Co., 94 N. Y. App. Div. 198, 87 N. Y. Suppl. 987; Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; York Felt, etc., Co. *v.* Paper Co., 14 York Leg. Rec. (Pa.) 171. *Compare* Rutland Mfg. Co. *v.* Quinlan, 1 Wkly. Notes Cas. (Pa.) 456; Keel *v.* Herbert, 1 Wash. (Va.) 203; Kingston Race Stand *v.* Kingston, [1897] A. C. 509, 66 L. J. P. C. 111; Brew *v.* Conole, Ir. R. 9 C. L. 151. And see Gardner *v.* Burwell, Taylor (U. C.) 54.

Directing verdict where amendment proper. — The direction of a verdict on the pleadings, because of a variance, where an amendment of the pleadings was proper, is ground for a new trial. Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258.

Depriving defendant of exceptions to evidence.— Where the direction of a verdict for plaintiff subject to the opinion of the court operated to deprive defendant of his exceptions to evidence admitted for plaintiff, a new trial was ordered. Briggs *v.* Merrill, 58 Barb. (N. Y.) 389.

An improper direction of a verdict on the ground that the action should have been in equity justifies an order for a new trial. Jones *v.* Jones, 17 S. D. 256, 96 N. W. 88.

Where new trial not granted.— The refusal to submit the evidence on a counter-claim to the jury, and the direction of a verdict for plaintiff, do not require a new trial, where the evidence would not have justified more than nominal damages on the counter-claim. Harris *v.* Kerr, 37 Minn. 537, 35 N. W. 379.

80. Beals *v.* Cleveland, etc., R. Co., 153 Fed. 211.

81. Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; Forrest *v.* Almon, 12 Nova Scotia 110; Shey *v.* Chisholm, 2 Nova Scotia 52; Stimpson *v.* New England, etc., Steamship Co., 3 Nova Scotia Dec. 184; Pitts *v.* Taylor, 2

dismiss an action for want of evidence or direct a verdict, the submission of the case to the jury on theories not authorized by the pleadings or the evidence,[82] or the submission to the jury of a matter of defense upon which there is no evidence is ground for a new trial.[83] It has been held that a new trial will not be granted for the improper overruling of a demurrer to the evidence.[84] But the contrary view is also maintained.[85] Error in the refusal of a nonsuit or direction of a verdict may be cured by the subsequent admission of evidence tending to prove the case or defense.[86]

4. INSTRUCTIONS — a. Giving — (I) *IN GENERAL.* An improper instruction to the jury upon a point of law which may have influenced their verdict is ground for a new trial.[87] Where there is an irreconcilable conflict in the instruc-

Nova Scotia Dec. 378; Campbell *v.* Halliburton, 2 Nova Scotia Dec. 111; Tylden *v.* Bullen, 3 U. C. Q. B. 10.

82. Hendricks *v.* Allen, 128 Ga. 181, 57 S. E. 224.

83. Barge *v.* Haslam, 65 Nebr. 656, 91 N. W. 528; Walsh *v.* Riesenberg, 94 N. Y. App. Div. 466, 89 N. Y. Suppl. 58; Underhill *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 489; Gale *v.* Wells, 12 Barb. (N. Y.) 84; Doing *v.* New York, etc., R. Co., 17 N. Y. Suppl. 689; Benson *v.* Gerlach, 4 N. Y. Suppl. 273; Howard *v.* Holbrook, 23 How. Pr. (N. Y.) 64; Prevatt *v.* Harrelson, 132 N. C. 250, 43 S. E. 800 (under statute); McFarlane *v.* Flinn, 2 Nova Scotia Dec. 141. *Contra*, Trenton Pass. R. Co. *v.* Bennett, 58 N. J. L. 556, 34 Atl. 815; Shields *v.* Windsor, 1 Phila. (Pa.) 72, as to overruling motion for nonsuit, since the moving party may obtain relief in the court's charge to the jury.

84. Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152.

85. Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436, 75 Pac. 466.

86. Atlanta *v.* Word, 78 Ga. 276; American L. Ins. Co. *v.* Green, 57 Ga. 469; Mershon *v.* Hobensack, 22 N. J. L. 372 [*affirmed* in 23 N. J. L. 580]; Bronson *v.* Wiman, 10 Barb. (N. Y.) 406 [*affirmed* in 8 N. Y. 182]; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Allen *v.* Cary, 7 E. & B. 463, 3 Jur. N. S. 1146, 90 E. C. L. 463.

87. *Alabama.*— Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 95, 27 So. 760.

California.— Lathrope *v.* Flood, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215, (1901) 63 Pac. 1007; Yonge *v.* Pacific Mail Steamship Co., 1 Cal. 353.

Georgia.— Savannah, etc., R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677; Singer Mfg. Co. *v.* Lancaster, 75 Ga. 280; King *v.* King, 37 Ga. 205; Keller *v.* Dillon, 26 Ga. 701; Baker *v.* Ezzard, Ga. Dec. Pt. II, 112.

Illinois.— Ball *v.* Hooten, 85 Ill. 159; Higgins *v.* Lee, 16 Ill. 495; Chicago, etc., R. Co. *v.* Garner, 83 Ill. App. 118; Peoria, etc., R. Co. *v.* Foltz, 13 Ill. App. 535.

Iowa.— Hydinger *v.* Chicago, etc., R. Co., 126 Iowa 222, 101 N. W. 746; Caffrey *v.* Groome, 10 Iowa 548.

Kansas.— Kansas City Belt Line R. Co. *v.* Cain, 56 Kan. 786, 44 Pac. 995; Bedell *v.* Burlington Nat. Bank, 16 Kan. 130.

Kentucky.— Chrisman *v.* Gregory, 4 B. Mon. 474; Fightmaster *v.* Beasly, 7 J. J. Marsh. 410; Reliance Textile, etc., Works *v.* Mitchell, 71 S. W. 425, 24 Ky. L. Rep. 1286.

Maine.— Noyes *v.* Shepherd, 30 Me. 173, 50 Am. Dec. 625; Hastings *v.* Bangor House, 18 Me. 436.

Massachusetts.— Sullivan *v.* Boston Electric Light Co., 181 Mass. 294, 63 N. E. 904; Eldridge *v.* Hawley, 115 Mass. 410; Boyden *v.* Moore, 5 Mass. 365; Lane *v.* Crombie, 12 Pick. 177; Baylies *v.* Davis, 1 Pick. 206.

Michigan.— Warner *v.* Beebe, 47 Mich. 435, 11 N. W. 258.

Minnesota.— Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Whitacre *v.* Culver, 8 Minn. 133.

Missouri.— Byington *v.* St. Louis R. Co., 147 Mo. 673, 49 S. W. 876.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Suppl. 147; Gale *v.* Wells, 12 Barb. 84; Brush *v.* Kohn, 9 Bosw. 589; Bulkeley *v.* Keteltas, 4 Sandf. 450 [*reversed* on other grounds in 6 N. Y. 384]; Bagley *v.* Consolidated Gas Co., 13 Misc. 6, 34 N. Y. Suppl. 187; Wardell *v.* Hughes, 3 Wend. 418.

North Dakota.— Welter *v.* Leistikow, 9 N. D. 283, 83 N. W. 9.

Pennsylvania.— Stroh *v.* Hess, 1 Watts & S. 147; Keemer *v.* Bausman, 1 Lanc. Bar, March 5, 1870.

South Dakota.— Weller *v.* Hilderbrandt, 19 S. D. 45, 101 N. W. 1108.

West Virginia.— Dorr *v.* Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348.

Wisconsin.— Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112.

United States.— Blake *v.* Smith, 3 Fed. Cas. No. 1,502. *Compare* Thorne *v.* American Distributing Co., 117 Fed. 973, holding that only errors committed through inadvertence should be reconsidered by the trial court.

England.— Kingston Race Stand *v.* Kingston, [1897] A. C. 509, 66 L. J. P. C. 111; Bray *v.* Ford, [1896] A. C. 44, 65 L. J. Q. B. 213, 73 L. T. Rep. N. S. 609 ((E) under Order XXXIV, rule 6, as to "substantial wrong or miscarriage"); Haine *v.* Davey, 4 A. & E. 892, 2 H. & W. 30, 5 L. J. K. B. 167, 6 N. & M. 356, 31 E. C. L. 390; Anthony *v.* Halstead, 37 L. T. Rep. N. S. 433.

Canada.— Hesse *v.* St. John R. Co., 30 Can. Sup. Ct. 218; Peers *v.* Elliott, 21 Can. Sup. Ct. 19; Driscoll *v.* Collins, 31 N.

tions,[88] or the instruction is inconsistent in itself,[89] or the instructions are so ambiguous or obscure as probably to have been misleading,[90] a new trial should be granted. An instruction upon an abstract proposition of law, not applicable to the issues on the case,[91] or the evidence adduced,[92] if calculated to mislead the jury, is ground for a

Brunsw. 604; Doe *v.* Baxter, 8 N. Brunsw. 306; McKenzie *v.* Jackson, 31 Nova Scotia 70; Pudsey *v.* Dominion Atlantic R. Co., 27 Nova Scotia 498; McLellan *v.* Ingraham, 15 Nova Scotia 164; Brittain *v.* Parker, 12 Nova Scotia 589; Dill *v.* Wilkins, 2 Nova Scotia 113; Smith *v.* McEachren, 3 Nova Scotia Dec. 279; Arthur *v.* Grand Trunk R. Co., 25 Ont. 37 [*affirmed* in 22 Ont. App. 89]; Nunn *v.* Brandon, 24 Ont. 375; Winfield *v.* Kean, 1 Ont. 193; McCreary *v.* Grundy, 39 U. C. Q. B. 316; Doe *v.* Girty, 9 U. C. Q. B. 41; McNicol *v.* McEwen, 3 U. C. Q. B. O. S. 485.

See 37 Cent. Dig. tit. "New Trial," §§ 57, 71. See also *supra*, III, A, 7, c.

The giving of an improper instruction is an "error of law occurring at the trial" and not an "irregularity in the proceedings of the court." St. Louis, etc., R. Co. *v.* Werner, 70 Kan. 190, 78 Pac. 410; Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534.

If the charge of the court is improper on any one of several material issues, there must be a new trial. Herbert *v.* Drew, 32 Ind. 364; Leonard *v.* Smith, 11 Metc. (Mass.) 330; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Whitacre *v.* Culver, 8 Minn. 133; Byington *v.* St. Louis R. Co., 147 Mo. 673, 49 S. W. 876.

Where there is not a miscarriage of justice misdirection will not be ground for new trial. Wells *v.* Lindop, 15 Ont. App. 695.

Misdirection as to one of several defenses. — There must be a new trial where the verdict is general for defendant, although the misdirection could have influenced the jury as to but one of several distinct defenses. Ball *v.* Hooten, 85 Ill. 159.

Misdirection as to one of two causes of action.— Where the court instructs the jury that plaintiff can recover on either of two causes of action, one of which is insufficient, a new trial must be ordered. Byington *v.* St. Louis R. Co., 147 Mo. 673, 49 S. W. 876.

A misdirection as to the burden of proof is ground for a new trial. Peoria, etc., R. Co. *v.* Foltz, 13 Ill. App. 535.

A misstatement of the law upon a material issue by the court during the argument of counsel is equivalent to an erroneous instruction. State *v.* Stowell, 60 Iowa 535, 15 N. W. 417.

If the instruction supposed to be erroneous is in fact correct, the ordering of a new trial is error. Epperson *v.* Stansill, 64 S. C. 485, 42 S. E. 426.

Charge to jurors in equity.— Since the verdict of a jury in equity is merely advisory, errors in the charge are not necessarily ground for a new trial. Cutler *v.* Cutler, 103 Wis. 258, 79 N. W. 240.

For instructions after submission of cause see *infra*, III, D, 7, f.

Where an instruction is so erroneous as to necessitate a reversal on appeal, a new trial should be ordered. Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 95, 27 So. 760.

88. Frederick *v.* Allgaier, 88 Mo. 598; Staples *v.* Canton, 69 Mo. 592; Samuelson *v.* Gale Mfg. Co., 1 Nebr. (Unoff.) 815, 95 N. W. 809.

89. Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415.

90. *Georgia.*— West *v.* Wheatley, 59 Ga. 559: Stell *v.* Glass, 1 Ga. 475.

Illinois.— Singer Mfg. Co. *v.* Pike, 12 Ill. App. 506.

Indiana.— Herbert *v.* Drew, 32 Ind. 364.

Maine.— King *v.* Ward, 74 Me. 349.

Massachusetts.— Eldridge *v.* Hawley, 115 Mass. 410; Holmes *v.* Doane, 9 Cush. 135.

Missouri.— Joyce *v.* St. Louis Transit Co., 111 Mo. App. 565, 86 S. W. 469.

New York.— Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 467, 82 N. Y. Suppl. 401.

Ohio.— Marietta, etc., R. Co. *v.* Picksley, 24 Ohio St. 654.

Canada.— Pettit *v.* Kerr, 5 Manitoba 359 (on the measure of damages); Hoyt *v.* Stockton, 13 N. Brunsw. 60.

See 37 Cent. Dig. tit. "New Trial," § 58.

That a juror misunderstood the instructions is not ground for a new trial. Bishop *v.* Williamson, 11 Me. 495. See also Backus *v.* Gallentine, 76 Ind. 367.

Inability of person of good hearing to understand all the charge.— The fact that a person of good hearing who was as near the judge as the jury was could not understand all the contents of the charge from the reading was held insufficient ground for a new trial. Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028.

91. Mobile, etc., R. Co. *v.* Glover, (Ala. 1907) 43 So. 719; Strong *v.* District of Columbia, 3 MacArthur (D. C.) 499; Travelers' Ins. Co. *v.* Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; McRoberts *v.* McBride, 16 N. Brunsw. 48.

92. *Dakota.*— Jones *v.* Matthieson, 2 Dak. 523, 11 N. W. 109.

Georgia.— Formby *v.* Pryor, 15 Ga. 258.

Kansas.— Kansas City Belt Line R. Co. *v.* Cain, 56 Kan. 786, 44 Pac. 995.

Maine.— Hopkins *v.* Fowler, 39 Me. 568.

Massachusetts.—King *v.* Nichols, 138 Mass. 18.

Michigan.— Nelson *v.* Dutton, 51 Mich. 416, 16 N. W. 791.

Nevada.— Tognini *v.* Hansen, 18 Nev. 61, 1 Pac. 198.

New York.— Gale *v.* Wells, 12 Barb. 84.

North Carolina.— Finch *v.* Elliott, 11 N. C. 61.

North Dakota.— Welter *v.* Leistikow, 9 N. D. 283, 83 N. W. 9.

new trial. So is an instruction which states or assumes facts not admitted or proved,[93] or which misstates[94] or withholds[95] from the jury the real issue in the case. So instructions which are so indefinite that the jury may have been misled may be ground for new trial,[96] but, where the charge is substantially correct, mere lack of verbal precision is not.[97] And it is ground for new trial that the judge's charge showed passion and bias.[98] At common law, and in some jurisdictions at the present time, it is permissible for a judge to express an opinion on the evidence and to charge the jury thereon.[99] In most jurisdictions instructions on the weight of the evidence are ground for a new trial.[1] Instructions and remarks calculated to arouse the prejudice of jurors against a party are ground for a new trial.[2] An improper instruction is not ground for a new trial, unless it was upon a material point or was of a character calculated to mislead the jury.[3] An abstract

Wisconsin.— Stutz *v.* Chicago, etc., R. Co., 69 Wis. 312, 34 N. W. 147.

United States.— Davis *v.* Patrick, 122 U. S. 138, 7 S. Ct. 1102, 30 L. ed. 1090.

Canada.— White *v.* Crawford, 2 U. C. C. P. 352.

See 37 Cent. Dig. tit. "New Trial," § 59.

Where the jury is instructed to find for a party, if either of two facts are proved, and one of the facts is not legally provable by the evidence, a new trial should be allowed. Leonard *v.* Smith, 11 Metc. (Mass.) 330.

Where an instruction is justified by the evidence, it is not ground for a new trial that counsel did not think of the point involved; but if evidence could have been given showing the point to be of no force, had it been presented earlier, a new trial may be allowed. Sawyer *v.* Merrill, 6 Pick. (Mass.) 478.

93. *Georgia.*— Cook *v.* Wood, 30 Ga. 891, 76 Am. Dec. 677; Formby *v.* Pryor, 15 Ga. 258.

Kentucky.— Fightmaster *v.* Beasly, 7 J. J. Marsh. 410.

Maine.— Palmer *v.* Thomas, (1886) 5 Atl. 530; King *v.* Ward, 74 Me. 349.

Pennsylvania.— Keemer *v.* Bausman, 1 Lanc. Bar, March 5, 1870; Edwards *v.* Edwards, 4 Phila. 11.

Rhode Island.—L'Esperance *v.* Hebron Mfg. Co., 25 R. I. 81, 54 Atl. 930.

South Carolina.— Johnson *v.* Harth, 1 Bailey 482; Jones *v.* McNeil, 1 Bailey 235; Murden *v.* South Carolina Ins. Co., 1 Mill 200.

South Dakota.— Weller *v.* Hilderbrandt, 19 S. D. 45, 101 N. W. 1108.

See 37 Cent. Dig. tit. "New Trial," § 57 *et seq.*

94. Goss *v.* Messinett, 5 N. Brunsw. 201.

A charge so framed as to permit the jury to find on an abandoned cause of action may require a new trial. Cantor *v.* New York Tattersalls, 13 Misc. (N. Y.) 17, 34 N. Y. Suppl. 96.

95. Macpherson *v.* St. John, 14 Can. L. T. Occ. Notes 264, 32 N. Brunsw. 423; Kelly *v.* Rhodes, 18 Nova Scotia 524; West *v.* Boutilier, 18 Nova Scotia 297.

Substantial submission of point.— Where the issue submitted to, and found by, the jury involves, and as a necessary sequence determines the issue raised by the pleading, a new trial will not be granted, although the precise point was not submitted. Porter *v.* Tibbits, 37 N. Brunsw. 25.

96. Gaither *v.* Kansas City, etc., R. Co., 27 Fed. 544.

97. Savannah Electric Co. *v.* Mullikin, 126 Ga. 722, 55 S. E. 945.

98. Bustin *v.* Thorne, 37 Can. Sup. Ct. 532 [*reversing* 37 N. Brunsw. 163].

99. Eastwick *v.* Singerly, 16 Phila. (Pa.) 162; Kinloch *v.* Palmer, 1 Mill (S. C.) 216; Smith *v.* Dart, 14 Q. B. D. 105, 54 L. J. Q. B. 121, 52 L. T. Rep. N. S. 218, 33 Wkly. Rep. 455; Newcastle *v.* Broxtowe, 4 B. & Ad. 273, 1 N. & M. 598, 24 E. C. L. 126; Belcher *v.* Prittie, 10 Bing. 408, 3 L. J. C. P. 85, 4 Moore & S. 295, 23 E. C. L. 195; Foster *v.* Steele, 3 Bing. N. Cas. 892, 3 Hodges 231, 6 L. J. C. P. 265, 5 Scott 28, 32 E. C. L. 409; Taylor *v.* Ashton, 12 L. J. Exch. 363, 11 M. & W. 401; Davidson *v.* Stanley, 2 M. & G. 721, 3 Scott N. R. 49, 40 E. C. L. 824; Doe *v.* St. James' Church, 18 N. Brunsw. 479; Doe *v.* Nevers, 16 N. Brunsw. 614; McLeod *v.* McGuirk, 15 N. Brunsw. 238; French *v.* Wallace, 2 Nova Scotia 337; Lordly *v.* McRae, 3 Nova Scotia Dec. 521; Peters *v.* Silver, 1 Nova Scotia Dec. 75; Crandell *v.* Nott, 30 U. C. C. P. 63; Dougherty *v.* Williams, 32 U. C. Q. B. 215.

Misdirection on a question of fact was ground for a new trial only when it probably induced the jury to form a wrong conclusion. Stoddard *v.* McIlwain, 7 Rich. (S. C.) 525; Union Bank *v.* Sollee, 2 Strobh. (S. C.) 390; Kinloch *v.* Palmer, 1 Mill (S. C.) 216; Newcastle *v.* Broxtowe, 4 B. & Ad. 273, 1 N. & M. 598, 24 E. C. L. 126; Davidson *v.* Stanley, 2 M. & G. 721, 3 Scott N. R. 49, 40 E. C. L. 824.

Comment or argument of counsel.— At common law it was permissible for the judge to comment on the argument of counsel in summing up the case to the jury. Darby *v.* Ouseley, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227.

1. See *supra*, III, A, 7, c.

2. King *v.* King, 37 Ga. 205; Kearney *v.* Fagan, 2 Del. Co. (Pa.) 462.

3. *California.*— Tompkins *v.* Mahoney, 32 Cal. 231.

Connecticut.—Rice *v.* Almy, 32 Conn. 297; Branch *v.* Doane, 17 Conn. 402; Hoyt *v.* Dimon, 5 Day 479.

Georgia.— Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173; Heard *v.* Tappan, 121 Ga. 437,

instruction upon a matter wholly irrelevant to the issues and not calculated to prejudice the jury is not ground for a new trial.[4] A new trial for misdirection of

49 S. E. 292; Seabord Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494; Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389; Southern R. Co. *v.* Sommer, 112 Ga. 512, 37 S. E. 735; Maddox *v.* Morris, 110 Ga. 309, 35 S. E. 170; Edgar *v.* Walker, 106 Ga. 454, 32 S. E. 582; Denham *v.* Jones, 96 Ga. 130, 23 S. E. 78; Brunner *v.* Black, 92 Ga. 497, 17 S. E. 767; Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 896; Green *v.* Cock, 39 Ga. 339; Morton *v.* Pearman, 30 Ga. 281; Boon *v.* Boon, 29 Ga. 134. *Compare* Shadwick *v.* McDonald, 15 Ga. 392, under statute.

Illinois.— De Clerq *v.* Mungin, 46 Ill. 112; Beifeld *v.* Pease, 101 Ill. App. 539; Roseville Union Bank *v.* Gilbert, 24 Ill. App. 334.

Kentucky.— Rucker *v.* Hamilton, 3 Dana 36; Lee *v.* Chambers, 3 J. J. Marsh. 506; Dale *v.* Arnold, 2 Bibb 605.

Maine.— Stephenson *v.* Thayer, 63 Me. 143. *Compare* Thacher *v.* Jones, 31 Me. 528, holding that it must appear "morally certain" that an improper instruction did not mislead the jury.

Massachusetts.— Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Remington *v.* Congdon, 2 Pick. 310, 13 Am. Dec. 431; Train *v.* Collins, 2 Pick. 145.

Minnesota.— Farnham *v.* Thompson, 32 Minn. 22, 18 N. W. 833.

New Hampshire.— Wendell *v.* Moulton, 26 N. H. 41; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; Carpenter *v.* Pierce, 13 N. H. 403.

New York.— Holdane *v.* Butterworth, 5 Bosw. 1 (verdict special); Mansfield *v.* Wheeler, 23 Wend. 79; Deems *v.* Crook, 1 Edm. Sel. Cas. 95.

North Carolina.— Lewis *v.* Albemarle, etc., R. Co., 95 N. C. 179.

Pennsylvania.—Heffron *v.* Scranton R. Co., 4 Lack. Jur. 307; Szuchy *v.* Lehigh Tract. Co., 12 Luz. Leg. Reg. 123.

South Carolina.— Stoddard *v.* McIlwain, 7 Rich. 525; Crawley *v.* Littlefield, 3 Strobh. 154; Kinloch *v.* Palmer, 1 Mill 216.

Vermont.— Brackett *v.* Wait, 6 Vt. 411; Rogers *v.* Page, Brayt. 169.

Washington.— Armstrong *v.* Musser Lumber, etc., Co., 43 Wash. 584, 86 Pac. 944.

United States.— Butler *v.* Barret, 130 Fed. 944; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; *In re* Marsh, 16 Fed. Cas. No. 9,108.

England.— Jenkins *v.* Morris, 14 Ch. 674, 42 L. T. Rep. N. S. 817; Haine *v.* Davey, 4 A. & E. 892, 2 Harr. & W. 30, 5 L. J. K. B. 167, 6 N. & M. 356, 31 E. C. L. 390; Caillaud *v.* Estwick, Anstr. 381, 5 T. R. 420; Wickes *v.* Clutterbuck, 2 Bing. 483, 3 L. J. C. P. O. S. 67, 10 Moore C. P. 63, 27 Rev. Rep. 692, 9 E. C. L. 670; Black *v.* Jones, 6 Exch. 213, 20 L. J. Exch. 152; Norbury *v.* Kitchin, 7 L. T. Rep. N. S. 685.

Canada.— Wells *v.* Lindop, 15 Ont. App. 695; Reid *v.* McDonald, 26 U. C. C. P. 147 ("substantial wrong or miscarriage"); Morrison *v.* Shaw, 40 U. C. Q. B. 403.

See 37 Cent. Dig. tit. "New Trial," § 71.

That an instruction was not so qualified as to express the law accurately for all cases is not ground for a new trial in a case where there are no qualifying facts in evidence (Tucker *v.* Georgia Cent. R. Co., 122 Ga. 387, 50 S. E. 128), or where the jury make a proper application of the law (Lee *v.* Chambers, 3 J. J. Marsh. (Ky.) 506).

Modification by other instructions.— Although a single instruction is erroneous when taken alone, it may be so modified by other instructions as not to require the allowance of a new trial. Augusta *v.* Tharpe, 113 Ga. 152, 38 S. E. 389; Southern R. Co. *v.* Sommer, 112 Ga. 512, 37 S. E. 735; Farnham *v.* Thompson, 32 Minn. 22, 18 N. W. 833; Lewis *v.* Albemarle, etc., R. Co., 95 N. C. 179; Charleston *v.* People's Nat. Bank, 23 S. C. 410; *In re* Marsh, 16 Fed. Cas. No. 9,108.

Where the jury finds no cause of action, a misdirection on the measure of damages is not ground for a new trial. Morrison *v.* Shaw, 40 U. C. Q. B. 403.

Where the instructions taken together state hypothetically every material fact, it is not ground for a new trial that, in some of them, considered separately, there are omissions of material hypotheses. Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

Giving wrong reasons.— Where a rule of law is correctly stated, a new trial is not necessarily demanded, because the court gave a wrong reason for the rule. Dale *v.* Arnold, 2 Bibb (Ky.) 605; Carpenter *v.* Pierce, 13 N. H. 403.

Where it is clear that the jury has disregarded an improper instruction, a new trial will not be granted for the misdirection. Twigg *v.* Potts, 1 C. M. & R. 89, 3 L. J. Exch. 336, 3 Tyrw. 969.

4. *Connecticut.*—Williams *v.* Cheesebrough, 4 Conn. 356.

Georgia.— Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405; Maynor *v.* Lewis, Ga. Dec. Pt. II, 205.

Maine.— Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514; Fillebrown *v.* Webber, 14 Me. 441.

New York.— Horner *v.* Wood, 16 Barb. 386.

Ohio.— Reed *v.* McGrew, 5 Ohio 375; Jordan *v.* James, 5 Ohio 88.

South Carolina.— Barksdale *v.* Brown, 1 Nott & M. 517, 9 Am. Dec. 720.

England.— Clarke *v.* Arden, 16 C. B. 227, 1 Jur. N. S. 710, 24 L. J. C. P. 162, 3 Wkly. Rep. 444, 81 E. C. L. 227; Seare *v.* Prentice, 8 East 348.

Canada.—Jones *v.* McIntosh, 15 N. Brunsw. 343.

See 37 Cent. Dig. tit. "New Trial," § 71.

Applications of rule.— That part of a code section read to the jury by the court was in-

the jury may be denied where a verdict for the objecting party would have been contrary to the evidence.[5] A party cannot be heard to complain of an instruction that was favorable to him.[6] But it is no objection to the allowance of a new trial that there were other errors of law favorable to the moving party.[7] The successful party may demand a new trial where the amount of damages awarded may have been reduced by an improper instruction.[8]

(II) *Oral Instructions.* Where a statute requires that instructions be in writing in all cases, or when requested by a party, the improper giving of oral instructions is ground for a new trial.[9]

b. Withholding. Refusal to give a proper instruction requested by a party is ordinarily ground for a new trial,[10] and the fact that the court was of the opinion at the time that there was no evidence upon the point upon which the instruction was asked is immaterial;[11] but refusal to give an instruction upon a matter sufficiently covered by other instructions[12] or an instruction not applicable to the evidence,[13] or on principles which are not controlling,[14] is not. And generally a

applicable to the facts of the case is not necessarily ground for a new trial. Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405. Where the verdict is rendered on grounds making the subject-matter of an improper instruction immaterial, a new trial is not allowable. Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

5. *Connecticut.*— Hoyt *v.* Dimon, 5 Day 479.

Georgia.— White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411; Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Commercial Guano Co. *v.* Neather, 114 Ga. 416, 40 S. E. 299; Peoples' Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920; Cooper *v.* Delk, 108 Ga. 550, 34 S. E. 145.

Maine.— Copeland *v.* Copeland, 28 Me. 525.

Missouri.— Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; Bartley *v.* Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840.

New York.— Goodrich *v.* Walker, 1 Johns. Cas. 251; Woodbeck *v.* Keller, 6 Cow. 118.

England.—Atkinson *v.* Pocock, 1 Exch. 796; Edmondson *v.* Machell, 2 T. R. 4.

Canada.— Bradshaw *v.* Foreign Mission Bd., 1 N. Brunsw. Eq. 346 (especially on jury trial of issue in equity); Smith *v.* Murphy, 35 U. C. Q. B. 569 (no "substantial wrong or miscarriage"); Connell *v.* Cheney, 1 U. C. Q. B. 307.

See 37 Cent. Dig. tit. "New Trial," § 71.

6. Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790; Central R. Co. *v.* Smith, 74 Ga. 112; Atlanta, etc., Air Line R. Co. *v.* Tanner, 68 Ga. 384; Vincent *v.* Willis, 82 S. W. 583, 26 Ky. L. Rep. 842; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663 [*affirmed* in 169 N. Y. 375, 62 N. E. 424].

7. De Haven *v.* McAuley, 138 Cal. 573, 72 Pac. 152.

8. Hotchkiss *v.* Porter, 30 Conn. 414; Reliance Textile, etc., Works *v.* Mitchell, 71 S. W. 425, 24 Ky. L. Rep. 1286.

9. Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Wheatley *v.* West, 61 Ga. 401; Fry *v.* Shehee, 55 Ga. 208; Bottorff *v.* Shelton, 79 Ind. 98; Shafer *v.* Stinson, 76 Ind. 374; Davis *v.* Foster, 68 Ind. 238; Watts *v.* Coxen, 52 Ind. 155. See also Currie *v.* Clark, 90 N. C. 355, as to the necessity of objection at the time.

10. *Georgia.*—Owen *v.* Palmour, 99 Ga. 92, 24 S. E. 859; Georgia R., etc., Co. *v.* Scott, 37 Ga. 94; Cook *v.* Wood, 30 Ga. 891, 76 Am. Dec. 677; Adair *v.* Adair, 30 Ga. 102.

Illinois.— Higgins *v.* Lee, 16 Ill. 495.

Indiana.— Berlin *v.* Oglesbee, 65 Ind. 308.

Kentucky.— Layson *v.* Galloway, 4 Bibb 100.

Maine.— Matthews *v.* Williams Mfg. Co., 98 Me. 234, 56 Atl. 759.

Massachusetts.— Dole *v.* Thurlow, 12 Metc. 157.

Ohio.— Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 35 Am. Rep. 620.

United States.— Malloy *v.* Bennett, 15 Fed. 371.

Canada.— Griffiths *v.* Boscowitz, 18 Can. Sup. Ct. 718; Turner *v.* Burns, 24 Ont. 28.

See 37 Cent. Dig. tit. "New Trial," §§ 60, 61.

Modification.— A slight modification of instructions asked for is generally no ground for a new trial. Warren *v.* Wright, 103 Ill. 298. See also Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291, as to effect of statute requiring the giving of an instruction on request without change.

Refusal to instruct as to one of two causes of action.— Where there is a general verdict for plaintiff on a petition stating two causes of action, a refusal to give a proper instruction for defendant as to either cause is ground for a new trial. Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 35 Am. Rep. 620.

11. Cook *v.* Wood, 30 Ga. 891, 76 Am. Dec. 677.

12. Toledo, etc., R. Co. *v.* Ingraham, 58 Ill. 120; McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Robinson *v.* Gleadow, 2 Bing. N. Cas. 156, 1 Hodges 245, 2 Scott 250, 29 E. C. L. 480.

13. Tucker *v.* Georgia Cent. R. Co., 122 Ga. 387, 50 S. E. 128; Wells *v.* Prince, 15 Gray (Mass.) 562.

14. Hamilton *v.* Du Pre, 111 Ga. 819, 35 S. E. 684.

failure to instruct the jury upon some point is not ground for a new trial, unless a proper request for an instruction upon that point was made.[15] It has been held, however, that a total omission to charge the jury,[16] or a failure to call the attention of the jury to the real issues,[17] or the most important facts,[18] or vital points in the case,[19] or to instruct on the measure of damages,[20] or an omission to charge on certain points in connection with errors in the verdict,[21] may be ground for new trial in the absence of a request for instructions. Where any other verdict than that rendered by the jury would be contrary to the evidence, the failure or refusal to give an instruction is not ground for new trial.[22]

15. *Arkansas.*— Carpenter *v.* Rosenbaum, 73 Ark. 259, 83 S. W. 1047.

Colorado.— Lacey *v.* Bentley, 39 Colo. 449, 89 Pac. 789.

Connecticut.— Torry *v.* Holmes, 10 Conn. 499.

Georgia.— Powell *v.* Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759; Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719; Atlanta R., etc., Co. *v.* Johnson, 120 Ga. 908, 48 S. E. 389; Cooper *v.* Nisbet, 119 Ga. 752, 47 S. E. 173; Savannah, etc., R. Co. *v.* Horn, 69 Ga. 759; Western, etc., R. Co. *v.* Clements, 60 Ga. 319; McDaniel *v.* Walker, 29 Ga. 266.

Massachusetts.— Fitch *v.* Jefferson, 175 Mass. 56, 55 N. E. 623; Whittaker *v.* West Boylston, 97 Mass. 273.

New York.— Murphy *v.* Boker, 3 Rob. 1; Stoddard *v.* Long Island R. Co., 5 Sandf. 180.

Pennsylvania.— Mix *v.* North American Co., 12 Pa. Dist. 446, 17 York Leg. Rec. 49; Wehr *v.* Reitz, 11 Pa. Dist. 727, 27 Pa. Co. Ct. 136, 16 York Leg. Rec. 98; Carpenter *v.* Lancaster, 22 Lanc. L. Rev. 33; Hafer *v.* Boner, 11 York Leg. Rec. 17.

United States.—Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121.

England.— Martin *v.* Great Northern R. Co., 16 C. B. 179, 3 C. L. R. 817, 1 Jur. N. S. 613, 24 L. J. C. P. 209, 3 Wkly. Rep. 477, 81 E. C. L. 179; Morgan *v.* Couchman, 14 C. B. 100, 3 C. L. R. 53, 23 L. J. C. P. 36, 2 Wkly. Rep. 59, 78 E. C. L. 100; Doe *v.* Strickland, 8 C. B. 724, 19 L. J. C. P. 89, 65 E. C. L. 724; Horlor *v.* Carpenter, 3 C. B. N. S. 172, 27 L. J. C. P. 1, 91 E. C. L. 172; Robinson *v.* Gleadow, 2 Bing. N. Cas. 156, 1 Hodges 245, 2 Scott 250, 29 E. C. L. 480; Gibbs *v.* Liverpool Dock, 28 L. J. Exch. 57.

Canada.— Waterland *v.* Greenwood, 8 Brit. Col. 396; Burrill *v.* Sanford, 37 Nova Scotia 535.

See 37 Cent. Dig. tit. "New Trial," §§ 60, 61.

Where a request in writing is required by statute, the failure to give an instruction requested orally does not require a new trial. Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719; Savannah, etc., R. Co. *v.* Horn, 69 Ga. 759.

Verdict against weight of evidence.— It has been held that non-direction is ground for a new trial only where the verdict is against the weight of the evidence. Ford *v.* Lacy, 7 H. & N. 151, 7 Jur. N. S. 684, 30 L. J. Exch. 351; Canada Great Western R. Co. *v.* Braid, 9 Jur. N. S. 339, 8 L. T. Rep. N. S. 31, 1 Moore P. C. N. S. 101, 1 New Rep. 527, 11 Wkly. Rep. 444, 15 Eng. Reprint 640; Spring *v.* Cockburn, 19 U. C. C. P. 63; Montreal Bank *v.* Scott, 17 U. C. C. P. 358; Spence *v.* Hector, 24 U. C. Q. B. 277.

Failure to provide the jury with a form of verdict in an action against several persons on a note does not require a new trial. Barton *v.* Hughes, 117 Ga. 867, 45 S. E. 232.

16. Page *v.* Pattee, 6 Mass. 459; Beales *v.* Canada F. & M. Ins. Co., 13 Nova Scotia 401; Boulton *v.* Cooper, 4 U. C. Q. B. 278.

17. Strong *v.* District of Columbia, 3 MacArthur (D. C.) 499; Elliott *v.* South Devon R. Co., 2 Exch. 725, 17 L. J. Exch. 262, 5 R. & Can. Cas. 500.

18. Markley *v.* Amos, 2 Bailey (S. C.) 603. And see Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,295, 1 Wash. 198, holding that, although omission to charge on important questions is not in itself ground for a new trial, the court may in its discretion grant a new trial if the justice of the case will be promoted.

19. York *v.* Canada Atlantic Steamship Co., 22 Can. Sup. Ct. 167; Reid *v.* Barnes, 25 Ont. 223; Ireson *v.* Mason, 12 U. C. C. P. 475, failure of court to construe written contract.

20. Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea (Tenn.) 488; Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302; Knight *v.* Egerton, 7 Exch. 407. But not for defendant for failure to define punitive damages where such damages were not assessed by the jury. Newton *v.* Weaver, 13 R. I. 616.

21. Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea (Tenn.) 488.

22. *Alabama.*— Shaw *v.* Wallace, 2 Stew. & P. 193.

Arkansas.— Sexton *v.* Brock, 15 Ark. 345.

Connecticut.— Brown *v.* Keach, 24 Conn. 73; Hoyt *v.* Dimon, 5 Day 479.

Florida.— Randall *v.* Parramore, 1 Fla. 409.

Georgia.—People's Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920; Cooper *v.* Delk, 108 Ga. 550, 34 S. E. 145; Charleston, etc., R. Co. *v.* Green, 95 Ga. 362, 22 S. E. 540; McCord *v.* Laidley, 87 Ga. 221, 13 S. E. 509; Georgia R., etc., Co. *v.* Scott, 37 Ga. 94.

Illinois.— Greenup *v.* Stoker, 8 Ill. 202; Beifeld *v.* Pease, 101 Ill. App. 539.

Kentucky.— Breckenridge *v.* Anderson, 3 J. J. Marsh. 710.

5. Argument of Counsel. An undue limitation of the time allowed for argument of counsel to the jury,[23] or an improper limitation of the scope of such argument,[24] may be ground for new trial.

6. Necessity of Objections — a. In General. Ordinarily, and especially under the statutes governing new trials, a new trial will not be granted because of an erroneous ruling of the court at the trial, unless the ruling was objected to and an exception taken.[25] In some jurisdictions, however, a new trial may be allowed, as a matter of judicial discretion, although no such objection was made, and no exception was taken at the time.[26]

b. To Evidence. In order that it may be available, an objection must be made at the time to the admission of incompetent,[27] or otherwise inadmissible

Maine.— Springer *v.* Bowdoinham, 7 Me. 442; Copeland *v.* Wadleigh, 7 Me. 141.

Mississippi.— Wilkinson *v.* Griswold, 12 Sm. & M. 669.

Missouri.— Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629, 31 S. W. 903.

New Jersey.— Penton *v.* Sinnickson, 9 N. J. L. 149.

North Carolina.— Marshall *v.* Fisher, 46 N. C. 111.

Rhode Island.— Newton *v.* Weaver, 13 R. I. 616.

South Carolina.— Woody *v.* Dean, 24 S. C. 499; Charleston *v.* People's Nat. Bank, 23 S. C. 410.

Vermont.— Morse *v.* Weymouth, 28 Vt. 824.

United States.— Nyback *v.* Champagne Lumber Co., 130 Fed. 784 [*affirmed* in 130 Fed. 1021, 64 C. C. A. 615]; Edwards *v.* Southern R. Co., 102 Fed. 720.

See 37 Cent. Dig. tit. "New Trial," §§ 60, 61.

23. Van Dyke *v.* Martin, 55 Ga. 466.

24. Belmore *v.* Caldwell, 2 Bibb (Ky.) 76.

Reading books to jury.— A new trial will not be granted because the court refused to permit counsel to read an adjudged case to the court in the hearing of the jury. House *v.* McKinney, 54 Ind. 240.

25. *California.* — Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890.

Georgia.— Georgia R., etc., Co. *v.* Fitzgerald, 111 Ga. 869, 36 S. E. 955.

Indiana.— Farman *v.* Lauman, 73 Ind. 568, at least for purposes of review in appellate court.

Iowa.—German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399, refusal to permit jury to take papers to jury room.

Kentucky.— Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

Massachusetts.— Holdsworth *v.* Tucker, 147 Mass. 572, 18 N. E. 430.

Minnesota.— Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534.

Missouri.— Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642.

Montana.— Froman *v.* Patterson, 10 Mont. 107, 24 Pac. 692.

New York.— Swartout *v.* Willingham, 6 Misc. 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66, improper limitation of argument.

England.— Jones *v.* Provincial Insurance Co., 3 C. B. N. S. 65, 26 L. J. C. P. 272, 3 Jur. N. S. 1004, 5 Wkly. Rep. 885, 91 E. C. L. 65; Eyre *v.* New Forest Highway Bd., 56 J. P. 517; Green *v.* Read, 8 L. T. Rep. N. S. 83.

See 37 Cent. Dig. tit. "New Trial," § 62.

On a motion for a new trial in an appellate court, only such objections as were made below can ordinarily be considered. Dickey *v.* Maine Tel. Co., 46 Me. 483.

Where a motion for a nonsuit made upon a particular ground is overruled, it is not ground for a new trial, that it might have been sustained on another ground. Boehm *v.* Commercial Alliance L. Ins. Co., 9 Misc. (N. Y.) 529, 30 N. Y. Suppl. 660 [*affirmed* in 86 Hun 617, 35 N. Y. Suppl. 1103].

26. Hastings *v.* McKinley, 3 Code Rep. (N. Y.) 10; Merner *v.* Klein, 17 U. C. C. P. 287; Paton *v.* Currie, 19 U. C. Q. B. 388. And see *infra*, III, C, 6, b, c.

27. *Arkansas.*— Main *v.* Gordon, 12 Ark. 651.

Connecticut.— Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

Florida.— Greeley *v.* Percival, 21 Fla. 535.

Georgia.— Thompson *v.* Lanfair, 127 Ga. 557, 56 S. E. 770; Wheelwright *v.* Aiken, 92 Ga. 394, 17 S. E. 610; Central R., etc., Co. *v.* Kitchens, 83 Ga. 83, 9 S. E. 827; Evans *v.* State, 33 Ga. 4; Carhart *v.* Wynn, 22 Ga. 24.

Illinois.— Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105, 3 Ill. 248.

Kentucky.— Outen *v.* Merrill, 2 Litt. 306.

Massachusetts.— Hubbell *v.* Bissell, 2 Allen 196; Rice *v.* Bancroft, 11 Pick. 469; Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367; Carter *v.* Taylor, 6 Sm. & M. 367.

New York.— Walsh *v.* Washington Mar. Ins. Co., 3 Rob. 202 [*affirmed* in 32 N. Y. 427]; Matter of Gannon, 2 Misc. 329, 21 N. Y. Suppl. 960 [*affirmed* in 139 N. Y. 654, 35 N. E. 207]; White *v.* Kibling, 11 Johns. 128.

North Carolina.— Codner *v.* Bizzell, 82 N. C. 390; Dowdle *v.* Stalcup, 25 N. C. 45; Tatem *v.* Paine, 11 N. C. 64, 15 Am. Dec. 507.

Pennsylvania.— Hertzler *v.* Geigley, 22 Lanc. L. Rev. 1.

South Carolina.— Wingo *v.* Inman Mills, 76 S. C. 550, 57 S. E. 525; Lloyd *v.* Monpoey, 2 Nott & M. 446.

Texas.— Walton *v.* Payne, 18 Tex. 60.

evidence,[28] to a variance between the pleadings and proofs,[29] to the competency of a witness,[30] or to the form[31] or character[32] of questions asked a witness. The ground of an objection to evidence should be distinctly stated,[33] and the objection-

United States.— Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1; Russel *v.* Union Ins. Co., 21 Fed. Cas. No. 12,147, 1 Wash. 440.

Canada.— Rose *v.* Lindsay, 5 N. Brunsw. 645; Gillis *v.* Campbell, 2 Nova Scotia 48; Davis *v.* McSherry, 7 U. C. Q. B. 490.

See 37 Cent. Dig. tit. "New Trial," § 64.

28. *Arkansas.*— Cheatham *v.* Roberts, 23 Ark. 651.

California.— Clark *v.* Gridley, 35 Cal. 398.

Connecticut.— Wilcox *v.* Green, 28 Conn. 572; Nichols *v.* Alsop, 10 Conn. 263; Davidson *v.* Bridgeport Borough, 8 Conn. 472; Lyon *v.* Summers, 7 Conn. 399.

Georgia.— Pool *v.* Warren County, 123 Ga. 205, 51 S. E. 328; Atlantic, etc., R. Co. *v.* Rabinowitz, 120 Ga. 864, 48 S. E. 326; Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636; Bond *v.* Baldwin, 9 Ga. 9.

Illinois.— Niedmer *v.* Friedrich, 69 Ill. App. 622.

Indiana.— Goldsby *v.* Gentle, 5 Blackf. 436.

Iowa.— Manning *v.* Burlington, etc., R. Co., 64 Iowa 240, 20 N. W. 169.

Kentucky.— Cannon *v.* Alsbury, 1 A. K. Marsh. 76, 10 Am. Dec. 709; Worford *v.* Isbel, 1 Bibb 247, 4 Am. Dec. 633.

Louisiana.—Peytavin *v.* Winter, 6 La. 553.

Mississippi.— Mississippi Union Bank *v.* Graves, 12 Sm. & M. 130.

Missouri.— Weller *v.* Wagner, 181 Mo. 151, 79 S. W. 941; Herdler *v.* Buck's Stove, etc., Co., 136 Mo. 3, 37 S. W. 115.

New Jersey.— Hadley *v.* Geiger, 9 N. J. L. 225.

New York.— Thurman *v.* Cameron, 24 Wend. 87; Jackson *v.* Jackson, 5 Cow. 173.

Pennsylvania.— Buchanan *v.* Chester, 9 Del. Co. 328.

South Carolina.— Alston *v.* Huggins, 2 Treadw. 688.

Texas.— White *v.* Pyron, (Civ. App. 1901) 62 S. W. 82; Barber *v.* Hoffman, (Civ. App. 1896) 37 S. W. 769.

Canada.— Whittaker *v.* Welch, 15 N. Brunsw. 436; Holmes *v.* Billings, 10 N. Brunsw. 232 (where defendant had been nonsuited at his own request in consequence of the improper evidence); Embree *v.* Wood, 20 Nova Scotia 40; Teed *v.* Beebe, 3 Nova Scotia 426; Campbell *v.* Beamish, 8 U. C. Q. B. 526.

See 37 Cent. Dig. tit. "New Trial," § 64.

That the moving party was not present at the hearing to make objections does not change the general rule. Clark *v.* Gridley, 35 Cal. 398; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220.

Where a party has objected to the admission of certain evidence when offered, he need not ask for an instruction as to such evidence. Crow *v.* Becker, 5 Rob. (N. Y.) 262, 33 How. Pr. 208.

Motion to strike out.— Where inadmissible evidence is received in reply to a proper question or on cross-examination, the objecting party should move to strike out such evidence. Blewett *v.* Tregonning, 3 A. & E. 554, 1 Harr. & W. 432, 30 E. C. L. 260; Ferrand *v.* Milligan, 15 L. J. Q. B. 103, 10 Jur. 6.

The cross-examination of a witness after proper objection to the admission of his testimony is not a waiver of the objection. Ferguson *v.* Veitch, 45 U. C. Q. B. 160.

29. *Connecticut.*— Flint *v.* Clark, 13 Conn. 361; Hayden *v.* Nott, 9 Conn. 367.

Georgia.— Haiman *v.* Moses, 39 Ga. 708.

Illinois.— Hinton *v.* Ring, 111 Ill. App. 369; Fox *v.* Starr, 106 Ill. App. 273; Rockford *v.* Hollenbeck, 34 Ill. App. 40.

Kansas.— Feidler *v.* Motz, 42 Kan. 519, 22 Pac. 561.

Maine.— Cowan *v.* Bucksport, 98 Me. 305, 56 Atl. 901.

New Jersey.— Powell *v.* Mayo, 26 N. J. Eq. 120.

New York.— New York, etc., R. Co. *v.* Cook, 2 Sandf. 732; Provost *v.* New York, 15 Daly 87, 3 N. Y. Suppl. 531 [*affirmed* in 117 N. Y. 626, 22 N. E. 1128]; Chadbourne *v.* Delaware, etc., R. Co., 6 Daly 215.

Pennsylvania.— Gibbons *v.* Scranton R. Co., 5 Lack. Jur. 38.

England.— Abbott *v.* Parsons, 7 Bing. 563, 5 M. & P. 521, 20 E. C. L. 252.

Canada.— Cameron *v.* Domville, 17 N. Brunsw. 647; Campbell *v.* Wheeler, 12 N. Brunsw. 269 (affirmative defense under general issue); Brown *v.* Cunard, 8 N. Brunsw. 316 (affirmative defense under general issue); McGregor *v.* Daly, 5 U. C. C. P. 126.

30. *Arkansas.*— Crump *v.* Starke, 23 Ark. 131.

Connecticut.— Steene *v.* Aylesworth, 18 Conn. 244.

New York.— Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557.

North Carolina.— Tatem *v.* Paine, 11 N. C. 64, 15 Am. Dec. 507.

Vermont.— Dodge *v.* Kendall, 4 Vt. 31.

West Virginia.— Cunningham *v.* Porterfield, 2 W. Va. 447.

Wisconsin.— Dickinson *v.* Buskie, 59 Wis. 136, 17 N. W. 685.

England.— Turner *v.* Pearte, 1 T. R. 717.

Canada.— Doe *v.* Read, 3 U. C. Q. B. 293.

See 37 Cent. Dig. tit. "New Trial," § 63.

Intoxication of witness.— It is not ground for a new trial that a witness was intoxicated while on the stand, where attention was not called to it at the time. Dickinson *v.* Buskie, 59 Wis. 136, 17 N. W. 685.

31. Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220, leading questions.

32. Martz *v.* Cook, 24 Ind. App. 432, 56 N. E. 951, extent of cross-examination.

33. Wilcox *v.* Green, 28 Conn. 572; Steene *v.* Aylesworth, 18 Conn. 244; Rockford *v.*

able part of the evidence pointed out.[34] On a motion for a new trial, no other objections can be raised as a matter of right.[35] Where the common-law powers of the courts have not been limited by statutes, a trial court, in its discretion, may allow a new trial because of illegal evidence, not objected to at the time of its admission, which probably has influenced the jury in arriving at its verdict.[36]

c. Submission to Jury. Generally a nonsuit or dismissal of an action for lack of evidence,[37] the direction of a verdict,[38] or the refusal of such direction,[39] or the failure to submit a question of fact to the jury,[40] does not entitle the party to a new trial, unless the ruling was excepted to at the time. But in some jurisdictions a new trial may be allowed where no such exception has been taken, if an injustice has been done.[41]

d. To the Charge. The giving of an improper instruction to the jury is not usually ground for a new trial, unless the instruction was excepted to at the time it was given, or within the time provided by rule of court or statute.[42] So gen-

Hollenbeck, 34 Ill. App. 40; Corbitt *v.* Harrington, 14 Wash. 197, 44 Pac. 132; Otis *v.* Montgomery, etc., R. Co., 18 Fed. Cas. No. 10,612. It was held unnecessary to point out the particular count which the evidence was incompetent to prove. Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

34. Flint *v.* Norwich, etc., Transp. Co., 9 Fed. Cas. No. 4,874, 7 Blatchf. 536 [*affirmed* in 13 Wall. 3, 20 L. ed. 556].

35. Flint *v.* Clark, 13 Conn. 361; Nichols *v.* Alsop, 10 Conn. 263; Burnside *v.* Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474; Doe *v.* Hughes, 18 N. Brunsw. 296. *Compare* Union Bank *v.* Sollee, 2 Strobh. (S. C.) 390; Kinloch *v.* Palmer, 1 Mill (S. C.) 216.

36. *Arkansas.*— Cheatham *v.* Roberts, 23 Ark. 651.

Connecticut.— Edwards *v.* Lambert, 2 Root 430, granting a new trial for the admission without objection of instruments which the court had previously held void.

Kentucky.— Barger *v.* Casbman, 4 Bibb 278.

New York.— Scott *v.* Lilienthal, 9 Bosw. 224; Harris *v.* Panama R. Co., 5 Bosw. 312; Maier *v.* Homan, 4 Daly 168; Matter of Gannon, 2 Misc. 329, 21 N. Y. Suppl. 960 [*affirmed* in 139 N. Y. 654, 35 N. E. 207].

Rhode Island.— Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

South Carolina.— Wingo *v.* Inman Mills, 76 S. C. 550, 57 S. E. 525.

Vermont.— Stanton *v.* Bannister, 2 Vt. 464, especially where there is an element of surprise.

United States.— Alvord *v.* U. S., 9 Ct. Cl. 133.

See 37 Cent. Dig. tit. "New Trial," § 64.

Failure to except.— Where illegal evidence was duly objected to, the failure to except to the court's ruling admitting it was held not fatal to the allowance of a new trial. McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34.

Depositions illegally taken.— A new trial may be granted for the admission in evidence of depositions illegally taken, although no objection was made to their admission, where the fact of the illegal taking was then unknown and there was nothing on the face of the depositions to indicate it. Doss *v.* Soap, (Tex. Civ. App. 1901) 65 S. W. 38.

37. Banks *v.* Wilson, 1 Alaska 241; Volmer *v.* Stagerman, 24 Minn. 434; Austin *v.* Evans, 2 M. & G. 430, 40 E. C. L. 676; Donnelly *v.* Bawden, 40 U. C. Q. B. 611.

Where plaintiff consents to a nonsuit to prevent a verdict for defendant upon either of two grounds covered by the instructions, he is not entitled to a new trial if the instructions as to either ground are proper. Vacher *v.* Cocks, 1 B. & Ad. 145, 20 E. C. L. 431, 8 L. J. K. B. O. S. 341, M. & M. 353, 22 E. C. L. 542.

38. Chambers *v.* Goldklang, 60 N. Y. Suppl. 998 [*reversed* on other grounds in 31 Misc. 247, 64 N. Y. Suppl. 36]; Smith *v.* Simmons, 21 N. Y. Suppl. 47; Booth *v.* Clive, 10 C. B. 827, 20 L. J. C. P. 151, 2 L. M. & P. 283, 70 E. C. L. 827; Morrish *v.* Murrey, 13 L. J. Exch. 261, 13 M. & W. 52; Robinson *v.* Cook, 6 Taunt. 336, 16 Rev. Rep. 624, 1 E. C. L. 642.

39. Lincoln *v.* Felt, 132 Mich. 49, 92 N. W. 780; Greene *v.* Bateman, L. R. 5 H. L. 591; Robinson *v.* Cook, 6 Taunt. 336, 16 Rev. Rep. 624, 1 E. C. L. 642; Corner *v.* McKinnon, 4 U. C. Q. B. 350.

40. Clark *v.* New York, 24 How. Pr. (N. Y.) 333; Nelson *v.* Jordeth, 15 S. D. 46, 87 N. W. 140; Fairbanks *v.* Creighton, 20 Nova Scotia 83.

Objection to the form of a question submitted to the jury must be made at the time. Button *v.* Chapin, 7 N. Y. Civ. Proc. 278.

41. Breckenridge *v.* Anderson, 3 J. J. Marsh. (Ky.) 710; Benson *v.* Gerlach, 4 N. Y. Suppl. 273.

42. *California.*—Letter *v.* Putney, 7 Cal. 423.

Indiana.— Acts (1903), p. 383, c. 193, § 1, providing that exceptions to giving and refusing instructions may be taken at any time during the term, must be construed with Burns Annot. St. (1901) § 568 (8), providing that a new trial may be granted for "error of law occurring at the trial and excepted to by the party making the application," so that no question is presented by exceptions not taken until after the motion for new trial was overruled. Providence Washington Ins. Co. *v.* Wolf, 168 Ind. 690, 80 N. E. 26; Beals *v.* Beals, 20 Ind. 163.

erally a failure to give a requested instruction is not ground for a new trial unless an exception was taken thereto.[43] Under some statutes the rule is absolute.[44] At common law,[45] and in those jurisdictions in which statutes are not held to deprive trial courts of common-law powers, such courts may allow new trials, in their discretion,[46] for the giving of improper instructions not objected to,[47] or the

Iowa.— Turley *v.* Griffin, 106 Iowa 161, 76 N. W. 660; Darrance *v.* Preston, 18 Iowa 396; Gordon *v.* Pitt, 3 Iowa 385.

Kentucky.— Cannon *v.* Alsburg, 1 A. K. Marsh. 76, 10 Am. Dec. 709.

Minnesota.— Bergh *v.* Sloan, 53 Minn. 116, 54 N. W. 943; Farnham *v.* Thompson, 32 Minn. 22, 18 N. W. 833.

Missouri.— Dozier *v.* Jerman, 30 Mo. 216; Powers *v.* Allen, 14 Mo. 367; Randolph *v.* Alsey, 8 Mo. 656; Bompart *v.* Boyer, 8 Mo. 234; Lefkow *v.* Allred, 54 Mo. App. 141.

New York.— Varnum *v.* Taylor, 10 Bosw. 148; Cook *v.* Hill, 3 Sandf. 341.

North Carolina.— Clements *v.* Rogers, 95 N. C. 248.

Oklahoma.— Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Pennsylvania.— Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. 545; Sweet *v.* Lewis, 4 Lack. Leg. N. 153.

Virginia.— Danville Bank *v.* Waddill, 31 Gratt. 469.

West Virginia.— Core *v.* Marple, 24 W. Va. 354.

United States.— Root *v.* Catskill Mt. R. Co., 33 Fed. 858; Cady *v.* Phœnix F. Ins. Co., 4 Fed. Cas. No. 2,284; Hamlin *v.* Pettibone, 11 Fed. Cas. No. 5,995, 6 Biss. 167.

Canada.— Wills *v.* Carman, 17 Ont. 223; Spring *v.* Cockburn, 19 U. C. C. P. 63; Cousins *v.* Merrill, 16 U. C. C. P. 114; Eades *v.* McGregor, 8 U. C. C. P. 260; Parsons *v.* Queen Ins. Co., 43 U. C. Q. B. 271; Fitzpatrick *v.* Casselman, 29 U. C. Q. B. 5; Manners *v.* Boulton, 6 U. C. Q. B. O. S. 663.

See 37 Cent. Dig. tit. "New Trial," § 66.

Requests for rulings after retirement of the jury come too late. Garrity *v.* Higgins, 177 Mass. 414, 58 N. E. 1010.

Giving written instructions to jury without reading.— An objection that the court gave written instruction to the jury without reading under the supposition that the jurors would read them in their retirement cannot be first raised on a motion for a new trial. Talty *v.* Lusk, 4 Iowa 469.

Obscure charge.— An objection that the charge is obscure must be made before verdict. Farnham *v.* Thompson, 32 Minn. 22, 18 N. W. 833.

Request for contrary instruction by a party objecting to an instruction is not necessary. Lochrane *v.* Solomon, 38 Ga. 286.

Oral instructions.— Where no objection is made at the time, a new trial is not necessarily required because the judge gave oral instructions not inconsistent with those given in writing at the request of counsel. Currie *v.* Clark, 90 N. C. 355.

A failure to number the paragraphs of instructions, as required by statute, is not ground for a new trial. *In re* Evans, 114 Iowa 240, 86 N. W. 283.

Failure of a party to number and sign requests for instructions as required by statute cannot be objected to for the first time on a motion for a new trial. Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348.

43. *Arkansas.*— Carpenter *v.* Rosenbaum, 73 Ark. 259, 83 S. W. 1047.

Georgia.— McDaniel *v.* Walker, 29 Ga. 266. See also Shewmake *v.* Jones, 37 Ga. 102, holding that attention should be called to an accidental omission to give an instruction requested.

Maine.— Barrett *v.* Delano, (1888) 14 Atl. 288.

New York.— Raymond *v.* Howland, 17 Wend. 389.

North Carolina.— Simmons *v.* Mann, 92 N. C. 12.

Pennsylvania.— Hoffman *v.* Whallen, 3 Lanc. L. Rev. 217.

South Carolina.— Ingraham *v.* South Carolina Ins. Co., 2 Treadw. 707.

Vermont.— Rogers *v.* Page, Brayt. 169.

United States.— Edwards *v.* Southern R. Co., 102 Fed. 720; Root *v.* Catskill Mt. R. Co., 33 Fed. 858.

See 37 Cent. Dig. tit. "New Trial," § 66.

44. Carpenter *v.* Rosenbaum, 73 Ark. 259, 83 S. W. 1047; St. Louis, etc., R. Co. *v.* Werner, 70 Kan. 190, 78 Pac. 410; Whittaker *v.* West Boylston, 97 Mass. 273; Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534.

45. Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534. And see cases in following note.

46. Not as a matter of right. Ackart *v.* Lansing, 6 Hun (N. Y.) 476; Kline *v.* Wynne, 10 Ohio St. 223.

47. *Iowa.*— Farr *v.* Fuller, 8 Iowa 347.

Louisiana.— Merchants', etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592.

Maine.— Belmont *v.* Morrill, 69 Me. 314.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

Missouri.— Nulton *v.* Croskey, 111 Mo. App. 18, 85 S. W. 644.

New York.— Standard Oil Co. *v.* Amazon Ins. Co., 79 N. Y. 506; Dovale *v.* Ackermann, 2 N. Y. App. Div. 404, 37 N. W. Suppl. 959; Brigden *v.* Osmun, 11 Misc. 232, 32 N. Y. Suppl. 782 [*affirmed* in 92 Hun 578, 36 N. Y. Suppl. 1025]; Powell *v.* Lamb, 1 N. Y. Suppl. 431 [*affirmed* in 15 Daly 139, 3 N. Y. Suppl. 930]; Archer *v.* Hubbell, 4 Wend. 514.

Ohio.— Kline *v.* Wynne, 10 Ohio St. 223.

Wisconsin.— McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493.

United States.— Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121.

Canada.— British Columbia Iron Works Co. *v.* Buse, 4 Brit. Col. 419; Bradshaw *v.*

failure to give proper instructions not requested,[48] where it is apparent that the jury may have been misled. Where the motion for a new trial is on a case stated, and not on bill of exception, a new trial may be granted, although an improper instruction was not excepted to when offered.[49]

D. Misconduct of or Affecting Jurors[50] — **1. Communications With Jurors — a. Parties and Counsel.** Where remarks have been made by the successful party[51] or by his attorney[52] to, or in the hearing of, a juror or jurors, intended or calculated to affect the verdict, a new trial should be granted. Private conversation between a party[53] or his attorney,[54] and a juror during the trial, and especially after the submission of the case,[55] are presumed to be of a prejudicial nature in some states. In other states there is no such presumption.[56] A casual remark

Foreign Mission Bd., 1 N. Brunsw. Eq. 346 (especially on issue in equity); McLellan *v.* Ingraham, 15 Nova Scotia 164.

See 37 Cent. Dig. tit. "New Trial," § 66.

48. Moore *v.* Batten, 5 Misc. (N. Y.) 20, 25 N. Y. Suppl. 141.

49. Geer *v.* Archer, 2 Barb. (N. Y.) 420. See also Smith *v.* Simmons, 21 N. Y. Suppl. 47.

50. Misconduct of the jury is ground for a motion in arrest of judgment, rather than for a new trial, in some states. Brown *v.* Congdon, 50 Conn. 302.

51. *Connecticut.*— Hamilton *v.* Pease, 38 Conn. 115.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205, as saying to a juror, "don't hang."

Maine.— McIntire *v.* Hussey, 57 Me. 493 (before trial); Heffron *v.* Gallupe, 55 Me. 563 (furnishing juror copy of evidence on former trial).

Minnesota.— Hayward *v.* Knapp, 22 Minn. 5, upon a view of premises.

New Hampshire.— Allen *v.* Aldrich, 29 N. H. 63; Cilley *v.* Bartlett, 19 N. H. 312; Perkins *v.* Knight, 2 N. H. 474.

New Jersey.— Chews *v.* Driver, 1 N. J. L. 166; Sloan *v.* Harrison, 1 N. J. L. 145.

New York.—Reynolds *v.* Champlain Transp. Co., 9 How. Pr. 7.

Ohio.— Bender *v.* Buehrer, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507.

Pennsylvania.— Ritchie *v.* Holbrooke, 7 Serg. & R. 458; Boreland *v.* St. Clair, 4 Pa. Co. Ct. 541; Sohn *v.* Heishey, 5 Lanc. L. Rev. 301, although before jury sworn and party intoxicated.

South Carolina.— Cohen *v.* Robert, 2 Strobh. 410.

Texas.— Larson *v.* Levy, (Civ. App. 1900) 57 S. W. 52.

Vermont.— Grand Trunk R. Co. *v.* Davis, 76 Vt. 187, 56 Atl. 982.

United States.— Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish Pat. Cas. 291.

See 37 Cent. Dig. tit. "New Trial," §§ 88, 95, 119.

Remarks to one of the general jury panel not called to sit in the particular case are not ground for a new trial. Van Mere *v.* Farewell, 12 Ont. 285.

Answer as to boundaries on view of premises.— A correct answer by plaintiff as to a boundary line in response to a question by a juror or the officer in charge, on a view of premises, was held insufficient ground for a new trial. Oswald *v.* Minneapolis, etc., R. Co., 29 Minn. 5, 11 N. W. 112.

52. Martin *v.* Morelock, 32 Ill. 485; Oleson *v.* Meader, 40 Iowa 662 (talking on law of case to juror after conclusion of argument); Love *v.* Moody, 68 N. C. 200 (reading law to juror). *Compare* Turner *v.* St. John, 3 Coldw. (Tenn.) 376, as to action of appellate court.

53. *California.*— Wright *v.* Eastlick, 125 Cal. 517, 58 Pac. 87.

Delaware.— Johnson *v.* Porter, 2 Harr. 325.

New Jersey.— Cox *v.* Tomlin, 19 N. J. L. 76.

Pennsylvania.— Ritchie *v.* Holbrooke, 7 Serg. & R. 458.

Canada.— Stewart *v.* Woolman, 26 Ont. 714.

See 37 Cent. Dig. tit. "New Trial," § 89.

Compare Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41.

An unsuccessful attempt by a juror to send a letter to a party on a subject not related to the action was not sufficient ground for a new trial. Eich *v.* Taylor, 20 Minn. 378.

54. Edney *v.* Baum, 44 Nebr. 294, 62 N. W. 461.

55. *Georgia.*—Rohinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491.

New Hampshire.— Tenney *v.* Evans, 13 N. H. 462, 40 Am. Dec. 166.

South Dakota.— Peterson *v.* Siglinger, 3 S. D. 255, 52 N. W. 1062.

Tennessee.— Davidson *v.* Manlove, 2 Coldw. 346.

Texas.— Gulf, etc., R. Co. *v.* Schroeder, (Civ. App. 1894) 25 S. W. 306.

Compare McCarty *v.* McCarty, 4 Rich. (S. C.) 594.

Illustration.— Where, after the return of a sealed verdict, some of the jurors talked about it with one of the attorneys in the case, and on coming into court expressed dissatisfaction with the computation of interest, and, on being directed to retire and consider further of their verdict, returned a second verdict for a larger sum, a new trial was ordered, the court refusing to consider the materiality of the conversation. Martin *v.* Morelock, 32 Ill. 485.

56. Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881; Hamburger *v.* Rinkel, 164 Mo. 398, 64 S. W. 104; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

by a party[57] or counsel,[58] or even conversation with him, on a subject not connected with the litigation,[59] and where there is no appearance of an improper motive,[60] is not ground for a new trial. Even a casual[61] or jesting[62] reference to the case may afford no cause for a new trial, especially if the juror addressed was not known to be such.[63] A new trial will be more readily granted where the improper remarks appear to have been intended to influence a juror.[64] But if they were of a nature calculated to influence the juror, the party's ignorance of the juror's presence or identity will not avoid the necessity of a new trial.[65] The actual influence of improper remarks intentionally made by a party[66] or by his attorney[67] need not be shown.

b. Witnesses. Where a witness in the case has made statements to a juror, or in his hearing, of what purported to be facts, which may have influenced the juror against the losing party, a new trial should be granted.[68] It is immaterial that the successful party was not at fault.[69] Where the statements were favorable to the losing party,[70] or were not intended or calculated to prejudice his case,[71] a new trial should be refused. A conversation between a disinterested witness and a juror on a matter in no way related to the case affords no cause for a new trial.[72]

57. Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211; Clough *v.* Hoffman, 3 Del. Co. (Pa.) 213; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

That upon a view a party rode in a sleigh with the jury and counsel for both sides, the other party not objecting, is not ground for a new trial. Hahn *v.* Miller, 60 Iowa 96, 14 N. W. 119.

58. Burdick *v.* Chicago, etc., R. Co., 87 Iowa 384, 54 N. W. 439; Delaney *v.* Hartwig, 91 Wis. 412, 64 N. W. 1035.

Counsel sleeping in same room with juror and sheriff.— That on account of a lack of accommodations, the attorney of a party slept in the same room with a juror and the sheriff, there being no conversation about the case, was not ground for a new trial. Martin *v.* Mitchell, 28 Ga. 382.

59. Ayrhart *v.* Wilhelmy, (Iowa 1907) 112 N. W. 782, holding that misconduct of the jury, requiring a new trial, is not shown by the fact that during the trial one or more of the jurors and defendant played in a social game of cards at the hotel with a party of six, no reference to the suit being then made by any of the party.

60. McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132.

61. Wise *v.* Bosley, 32 Iowa 34; Shea *v.* Lawrence, 1 Allen (Mass.) 167; White *v.* Wood, 8 Cush. (Mass.) 413; Bentz *v.* South Bethlehem, 7 North. Co. Rep. (Pa.) 107, especially in presence of opponent.

62. Catterlin *v.* Frankfort, 87 Ind. 45.

63. Wise *v.* Bosley, 32 Iowa 34; Shea *v.* Lawrence, 1 Allen (Mass.) 167.

64. Wise *v.* Bosley, 32 Iowa 34; Allen *v.* Aldrich, 29 N. H. 63; Sloan *v.* Harrison, 1 N. J. L. 145.

65. Cilley *v.* Bartlett, 19 N. H. 312. *Compare* Jones *v.* Vail, 30 N. J. L. 135.

66. Wright *v.* Eastlick, 125 Cal. 517, 58 Pac. 87; Cox *v.* Tomlin, 19 N. J. L. 76; Cohen *v.* Robert, 2 Strobh. (S. C.) 410; Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291.

67. Martin *v.* Morelock, 32 Ill. 485; Edney *v.* Baum, 44 Nebr. 294, 62 N. W. 461. *Compare* Burdick *v.* Chicago, etc., R. Co., 87 Iowa 384, 54 N. W. 439, where court found conversation not prejudicial.

68. *Georgia.*— Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Maine.— Belcher *v.* Estes, 99 Me. 314, 59 Atl. 439.

New Jersey.— Deacon *v.* Shreve, 22 N. J. L. 176, on view of premises.

Pennsylvania.— Simpson *v.* Kent, 9 Phila. 30. See also Mench *v.* Bolbach, 4 Phila. 68, conversation had before action begun. *Compare* Hawley *v.* Acker, 2 Woodw. Dec. 237 (where juror refused to listen); Leitz *v.* Hohman, 16 Lanc. L. Rev. 409 (where party was not at fault and jurors swore the statements did not influence them).

West Virginia.— Vanmeter *v.* Kitzmiller, 5 W. Va. 380, asking witness if he had made certain statements in testifying.

See 37 Cent. Dig. tit. "New Trial," § 93.

If the presence of a juror is unknown when material facts are stated by a witness, and such facts are afterward testified to by the witness, a new trial may be denied. Thrift *v.* Redman, 13 Iowa 25.

69. Belcher *v.* Estes, 99 Me. 314, 59 Atl. 439.

70. Johnson *v.* Witt, 138 Mass. 79; Chalmers *v.* Whittemore, 22 Minn. 305.

71. *Georgia.*— Jackson *v.* Jackson, 32 Ga. 325, presence of juror unknown and witness apologized in open court.

Illinois.— Chicago Junction R. Co. *v.* McGrath, 107 Ill. App. 100 [*affirmed* in 203 Ill. 511, 68 N. E. 69].

Iowa.— Thrift *v.* Redman, 13 Iowa 25.

Maine.— Bishop *v.* Williamson, 11 Me. 495, where witness did not know juror as such.

Missouri.— Fendler *v.* Dewald, 14 Mo. App. 60.

Utah.— Tiernan *v.* Trewick, 2 Utah 393, relating solely to appearance of map used in evidence.

See 37 Cent. Dig. tit. "New Trial," § 93.

72. Bevelot *v.* Lestrade, 153 Ill. 625, 38 N. E. 1056; Omaha Fair, etc., Assoc. *v.* Mis-

c. Other Persons — (i) *In General.* A new trial will not be granted because of remarks about the case made during the trial to jurors, or in the hearing of jurors, by strangers to the litigation, where neither the successful party nor the jurors were at fault, unless such remarks probably influenced the verdict.[73] According to some decisions if the juror joined in a discussion of the case, a new trial must be granted.[74] According to others it must be shown that statements were made which might reasonably be presumed to have influenced the juror.[75] That a juror communicated with his family or business associates after the submission of the case on matters not connected therewith is not ground for a new trial.[76]

(ii) *Friends of Party.* It is well settled that a new trial may be allowed for remarks of a prejudicial character made to a juror by the relatives or friends of the successful party for the evident purpose of influencing the verdict, or which probably did influence the verdict,[77] although the party himself was not at

souri Pac. R. Co., 42 Nebr. 105, 60 N. W. 330. That after the evidence was in the foreman of the jury rode down the street alongside the jury with a witness of the successful party is not necessarily ground for a new trial. Hilton *v.* McDonald, 173 Mass. 124, 53 N. E. 208.

73. *Iowa.*— Montgomery *v.* Hanson, 122 Iowa 222, 97 N. W. 1081 (especially where presence of juror was unknown); Ridenour *v.* Clarinda, 65 Iowa 465, 21 N. W. 779.

Kentucky.— Barbour *v.* Archer, 3 Bibb 8, although such person intruded himself into jury room.

Louisiana.— De Blanc *v.* Martin, 2 Rob. 82.

Maine.—Caswell *v.* Pitcher, (1887) 10 Atl. 453.

Massachusetts.— Cowles *v.* Merchants, 140 Mass. 377, 5 N. E. 288, especially if offending person did not know he was speaking to juror.

Missouri.— Stewart *v.* Small, 5 Mo. 525.

New Hampshire.— Phœnix Mut. L. Ins. Co. *v.* Clark, 59 N. H. 345.

New York.— Hager *v.* Hager, 38 Barb. 92.

Ohio.— Armleder *v.* Lieberman, 33 Ohio St. 77, 31 Am. Rep. 530.

Texas.— Ellis *v.* Ponton, 32 Tex. 434.

West Virginia.— Dower *v.* Church, 21 W. Va. 23.

See 37 Cent. Dig. tit. "New Trial," §§ 88, 119.

Remarks reflecting on character of party. — Where a person not connected with the case slept in the room with the jury during the trial, and made statements to some of them reflecting on the character of the losing party, a new trial was allowed. Welch *v.* Taverner, 78 Iowa 207, 42 N. W. 650.

Trial of other cases.— That during a suspension of a case a juror was employed in the trial of other cases before another judge of the same court is not ground for a new trial, unless it appears that the other causes were of a character calculated to influence his verdict. Taylor *v.* Roby, 37 Ill. App. 147.

74. Perry *v.* Cottingham, 63 Iowa 41, 18 N. W. 680; Wooldridge *v.* White, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144; Campbell *v.* Chase Granite Co., 92 Me. 90, 42 Atl. 228 (general discussion of case at boarding house); Churchill *v.* Alpena Cir. Judge, 56 Mich. 536, 23 N. W. 211 (jurors drinking in public bar-room and asking as to public sentiment on case). See also Wightman *v.* Butler County, 83 Iowa 691, 49 N. W. 1041.

75. Walker *v.* Dailey, 87 Iowa 375, 54 N. W. 344.

76. West Chicago St. R. Co. *v.* Lundahl, 183 Ill. 284, 55 N. E. 667 [*affirming* 82 Ill. App. 553] (telephoning instructions to place of business); Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723; Baizley *v.* Welsh, 71 N. J. L. 471, 60 Atl. 59 (by telephone).

77. *Connecticut.*— Tomlinson *v.* Derby, 41 Conn. 268 (statements as to amount of recovery necessary to cover plaintiff's expenses); Hamilton *v.* Pease, 38 Conn. 115 (statement prejudicial to character of defeated party).

Georgia.— Smith *v.* Willingham, 44 Ga. 200.

Iowa.— Hydinger *v.* Chicago, etc., R. Co., 126 Iowa 222, 101 N. W. 746; McCash *v.* Burlington, 72 Iowa 26, 33 N. W. 346, holding remarks of citizen of defendant city denouncing the ruling of the court and denying defendant's liability not presumably prejudicial.

Maine.— Bradbury *v.* Cony, 62 Me. 223, 16 Am. Rep. 449.

Massachusetts.— Knight *v.* Freeport, 13 Mass. 218.

New Jersey.— Cox *v.* Tomlin, 19 N. J. L. 76.

New York.— Nesmith *v.* Clinton F. Ins. Co., 8 Abb. Pr. 141, statements reflecting on credit of witness.

Ohio.— Briggs *v.* Rowley, 10 Ohio S. & C. Pl. Dec. 177, 7 Ohio N. P. 651.

Pennsylvania.— Mix *v.* North American Co., 209 Pa. St. 636, 59 Atl. 272, with other acts of misconduct.

Rhode Island.— Tucker *v.* South Kingston, 5 R. I. 558.

South Carolina.—Cohen *v.* Robert, 2 Strobh. 410.

Vermont.— McDaniels *v.* McDaniels, 40 Vt. 363.

West Virginia.— Dower *v.* Church, 21 W. Va. 23.

fault.[78] That the juror was actually influenced by the remarks need not be affirmatively shown.[79] That a juror or jurors engaged in conversation with relatives or friends of a party on matters not connected with the case is not ground for a new trial.[80] It seems that there is no presumption that a conversation between such persons during the trial related to the litigation.[81]

d. Newspaper Comments. It is not ground for setting aside a verdict that during the progress of the trial jurors read newspaper comments thereon not published at the instance of the successful party and which probably did not affect the verdict.[82] But where jurors read articles or interviews in newspapers which were evidently published for the purpose of influencing their verdict, or which may reasonably be presumed to have influenced their verdict, a new trial may be allowed.[83]

2. Statements and Expressions of Opinion by Jurors — a. During the Trial — (i) *In General.* That during the progress of the trial and before the submission of the case a juror has made statements outside the jury room concerning the case, or evidence offered therein, indicating a fixed opinion unfavorable to the losing party or ill-will toward him, is ground for a new trial.[84] Although the case

United States.— Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108.

See 37 Cent. Dig. tit. "New Trial," §§ 91, 95, 119.

Illustrations.— That a juror who was a nephew of the assignee of the judgment was seen in animated conversation with the assignor after the argument in the case and before the jury retired, the subject of the conversation being unknown, was held to authorize the allowance of a new trial. Brown *v.* Pippin, 12 Heisk. (Tenn.) 657. Secret conversations of a juror with various persons under suspicious circumstances will justify the allowance of a new trial. Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Statements made by an agent and witness of the successful party, which, although not so intended, may have been heard by jurors, and may have influenced them, were held insufficient ground for a new trial, where the verdict was fully warranted by the evidence. Jones *v.* Vail, 30 N. J. L. 135.

The distribution in court of hand bills reflecting on the character of the losing party was held ground for a new trial, although the other party denied all knowledge of the matter. Coster *v.* Merest, 3 B. & B. 272, 1 L. J. C. P. O. S. 2, 7 Moore C. P. 87, 24 Rev. Rep. 667, 7 E. C. L. 726; Coster *v.* Symons, 1 C. & P. 148, 12 E. C. L. 95. *Compare* Spencely *v.* De Willott, 3 Smith K. B. 321, as to distribution of printed memoir of case not read by jury.

78. McDaniels *v.* McDaniels, 40 Vt. 363.

79. *Massachusetts.*— Knight *v.* Freeport, 13 Mass. 218.

Ohio.— Briggs *v.* Rowley, 10 Ohio S. & C. Pl. Dec. 177, 7 Ohio N. P. 651.

Rhode Island.— Tucker *v.* South Kingstown, 5 R. I. 558.

South Carolina.—Cohen *v.* Robert, 2 Strobh. 410.

United States.— Johnson *v.* Root, 13 Fed. Cas. No. 7,409, 2 Cliff. 108.

80. Smith *v.* Powers, 15 N. H. 546; Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111; Cady *v.* Phœnix F. Ins. Co., 4 Fed. Cas. No. 2,284.

81. Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111.

82. Fields *v.* Dewitt, 71 Kan. 676, 81 Pac. 467; Sherwood *v.* Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101 (stating amount of verdict on former trial); Copeland *v.* Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668. See also Bernstein *v.* Myers, 99 Ga. 90, 24 S. E. 854, an advertisement.

83. West Chicago St. R. Co. *v.* Grenell, 90 Ill. App. 30; Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337; Meyer *v.* Cadwalader, 49 Fed. 32.

Presumption that jury saw newspapers.— Where leading daily newspapers in the city where a trial is taking place publish improper matter from day to day, and the jury separate after each daily session, it may be presumed that they saw the matter published. Meyer *v.* Cadwalader, 49 Fed. 32.

Giving interviews to reporters.—The charge that an attorney caused his statements at a former trial to be published and distributed that they might be read by the juror is not proved by evidence that he gave interviews to newspaper reporters. Copeland *v.* Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

84. *Connecticut.*— Tomlinson *v.* Derby, 41 Conn. 268.

Georgia.— Blalock *v.* Phillips, 38 Ga. 216, especially where juror misstates evidence.

Illinois.— Jewsbury *v.* Sperry, 85 Ill. 56 (and expressing disregard for court's instructions); Chicago City R. Co. *v.* Brecher, 112 Ill. App. 106 (proper to request to withdraw juror).

Iowa.— Wightman *v.* Butler County, 83 Iowa 691, 49 N. W. 1041.

Kentucky.— Albin Co. *v.* Demorest Mfg. Co., 56 S. W. 982, 22 Ky. L. Rep. 245.

New York.— Nesmith *v.* Clinton F. Ins. Co., 8 Abb. Pr. 141.

Pennsylvania.— Mix *v.* North American Co., 209 Pa. St. 636, 59 Atl. 272, with other

is stronger if the opinion was expressed after a conversation with the other party,[85] a new trial should be allowed where the juror was clearly prejudiced, although such party was not at fault.[86] Nor need it be shown that the verdict was actually influenced by such opinion.[87] While the fact that a juror made remarks about the case to persons not jurors may properly be considered in connection with any other evidence of misconduct,[88] it is not of itself ground for a new trial, where such remarks did not indicate bias or corruption and the person addressed said nothing prejudicial in reply.[89] The rule has been applied to such remarks made to a witness,[90] to a relative of the successful party,[91] and to the party himself.[92] Even an expression of opinion by a juror, when evidently founded on evidence adduced on the proceedings and not indicating bias or a settled conviction, is not necessarily ground for a new trial.[93] It is not ground for a new trial that a juror

acts of misconduct. *Compare* Blaine *v.* Chambers, 1 Serg. & R. 169.

United States.— Ewers *v.* National Imp. Co., 63 Fed. 562; Pool *v.* Chicago, etc., R. Co., 6 Fed. 844, 2 McCrary 251.

England.— Allum *v.* Boultbee, 2 C. L. R. 1072, 9 Exch. 738, 18 Jur. 406, 23 L. J. Exch. 208, 2 Wkly. Rep. 459.

See 37 Cent. Dig. tit. "New Trial," §§ 81, 119.

Compare Peire *v.* Martin, 14 La. 64, where verdict just.

Where the manner of a juror in the box indicates resentment, anger, or disgust, and he declares that he will not regard certain competent evidence in the case, a new trial may be allowed. Chicago City R. Co. *v.* Brecher, 112 Ill. App. 106.

Misconduct of a juror in disputing with a party and his attorney and conducting himself in a reprehensible manner toward them was held not ground for a new trial, where the court gave a special instruction on such conduct. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278.

That a juror tried to dissuade a witness from testifying is ground for a new trial. Laughlin *v.* Harvey, 17 Can. L. T. Occ. Notes 227, 24 Ont. App. 438.

Requesting employment of party.— It is within the discretion of a trial court to allow a new trial because the jury, before verdict, sent a message to defendant in a personal injury case requesting that it give permanent employment to plaintiff. Svenson *v.* Chicago Great Western R. Co., 68 Minn. 14, 70 N. W. 795.

85. Tenney *v.* Evans, 13 N. H. 462, 40 Am. Dec. 166.

86. Pool *v.* Chicago, etc., R. Co., 6 Fed. 844, 2 McCrary 251.

87. Svenson *v.* Chicago Great Western R. Co., 68 Minn. 14, 70 N. W. 795.

88. *Connecticut.*— Tomlinson *v.* Derby, 41 Conn. 268.

Nebraska.— See Republican Valley R. Co. *v.* Boyse, 14 Nebr. 130, 15 N. W. 364, as to remark of juror to court not sufficiently indicating bias.

New Jersey.— Demund *v.* Gowen, 5 N. J. L. 687.

Ohio.— Farrer *v.* State, 2 Ohio St. 54, especially where the evidence is conflicting.

United States.— Pool *v.* Chicago, etc., R. Co., 6 Fed. 844, 2 McCrary 251, the juror's statement that what was said did not influence his judgment being entitled to no weight.

Canada.— Armour *v.* Boswell, 6 U. C. Q. B. O. S. 352, especially communications with jury while deliberating.

89. *California.*—Taylor *v.* California Stage Co., 6 Cal. 228.

Georgia.— Foster *v.* Brooks, 6 Ga. 287.

Indiana.— Harrison *v.* Price, 22 Ind. 165.

Iowa.— Stockwell *v.* Chicago, etc., R. Co., 43 Iowa 470.

Ohio.— Armleder *v.* Lieberman, 33 Ohio St. 77, 31 Am. Rep. 530.

Pennsylvania.— Goodright *v.* McCausland, 1 Yeates 372, 1 Am. Dec. 306; Scott *v.* Reyer, 5 Leg. Gaz. 73.

See 37 Cent. Dig. tit. "New Trial," § 81.

90. Pettibone *v.* Phelps, 13 Conn. 445, 35 Am. Dec. 88; McIlvaine *v.* Wilkins, 12 N. H. 474; Shomo *v.* Zeigler, 10 Phila. (Pa.) 611.

91. Yancey *v.* Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35.

92. Foedisch *v.* Chicago, etc., R. Co., 100 Iowa 728, 69 N. W. 1055 (where jurors, on a view, told plaintiff things were not as he had testified); Fleischmann *v.* Samuel, 18 N. Y. App. Div. 97, 45 N. Y. Suppl. 404 (remark that it was a long time to "sit here all day," the juror not recognizing the party). See also Jones *v.* Warner, 81 Ill. 343.

93. *Minnesota.*— Chalmers *v.* Whittemore, 22 Minn. 305.

Missouri.— Ern *v.* Rubinstein, 72 Mo. App. 337, expression of impatience by juror at length of trial.

Ohio.— Strauss *v.* Dashney, 9 Ohio Dec. (Reprint) 329, 12 Cinc. L. Bul. 182.

Oregon.— See Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655, to inquiry of court by jury not sufficiently indicating prejudice.

Pennsylvania.—Heiss *v.* Lancaster, 18 Lanc. L. Rev. 289.

Rhode Island.—Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336 (defendant having not yet introduced any evidence); Kaul *v.* Brown, 17 R. I. 14, 20 Atl. 10 (made to fellow juror and overheard by outsider).

Vermont.— Clement *v.* Spear, 56 Vt. 401.

Wisconsin.—Jackson *v.* Smith, 21 Wis. 26.

said after the evidence was in that his mind was made up, where he did not state how he would vote,[94] or that he could not be influenced by the argument of counsel.[95] If the verdict was contrary to an opinion expressed by a juror, no cause for a new trial exists.[96]

(II) *To Other Jurors.* That a juror talked about the case to other jurors before submission thereof is not generally ground for a new trial,[97] except where his remarks indicated bias or prejudgment.[98] A casual remark derogatory to a party, made by a juror during the deliberations of the jury, does not require a new trial, in the absence of a showing that any one gave heed to or was influenced by it.[99]

b. After Verdict. The discussion of a case by a juror or the expression of an opinion thereon, founded on the evidence and proceedings, after the verdict, is not ground for a new trial.[1]

c. Disclosure of Verdict. The disclosure by jurors of a verdict agreed upon but not yet returned into court is not of itself ground for vacating the verdict.[2]

3. View or Investigation by Jurors — a. In General. A new trial should ordinarily be granted when jurors, without the authority of the court or consent of the parties, have examined or inspected a place or thing which is the subject of conflicting evidence,[3] and especially when the examination or inspection was made

See also Newton *v.* Whitney, 77 Wis. 515, 46 N. W. 882.

Canada.— Thedibeau *v.* Everett, 3 Nova Scotia Dec. 318.

See 37 Cent. Dig. tit. "New Trial," §§ 81, 119.

Illustration.— It is not ordinarily ground for a new trial that jurors indicated, by their manner and language in the box, hostility to defendants' case, where they were impartial when the trial commenced, and plaintiff used no improper means to cause prejudice. Berry *v.* De Witt, 27 Fed. 723, 23 Blatchf. 544.

94. McAllister *v.* Sibley, 25 Me. 474; Marsh *v.* Clark County Com'rs, 11 Ohio Dec. (Reprint) 442, 27 Cinc. L. Bul. 56 (where verdict unanimous and eight jurors might have rendered a verdict); Darby *v.* Calhoun, 1 Mill (S. C.) 398. *Compare* Wightman *v.* Butler County, 83 Iowa 691, 49 N. W. 1041.

95. Taylor *v.* California Stage Co., 6 Cal. 228; Wightman *v.* Butler County, 83 Iowa 691, 49 N. W. 1041; McAllister *v.* Sibley, 25 Me. 474. See also Martin *v.* Tidwell, 36 Ga. 332; Langworthy *v.* Myers, 4 Iowa 18. *Compare* Jewsbury *v.* Sperry, 85 Ill. 56.

96. Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262; Rice *v.* Wyatt, 76 S. W. 1087, 25 Ky. L. Rep. 1060; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245.

97. Monaghan *v.* Pacific Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590, as statement of self-evident fact shown by evidence. See also Fulliam *v.* Muscatine, 70 Iowa 436, 30 N. W. 861.

The fact that some of the jurors talked among themselves about the case in the absence of part of the jury, after the evidence was in, is not of itself ground for a new trial. Paramore *v.* Lindsey, 63 Mo. 63.

98. Allum *v.* Boultbee, 2 C. L. R. 1072, 9 Exch. 738, 18 Jur. 406, 23 L. J. Exch. 208, 2 Wkly. Rep. 459.

99. Ayrhart *v.* Wilhelmy, (Iowa 1907) 112 N. W. 782.

1. West Chicago St. R. Co. *v.* Tuerk, 90 Ill. App. 105; Bernikow *v.* Pommerantz, 94 N. Y. Suppl. 487; Reese *v.* Stadler, 54 How. Pr. (N. Y.) 492; Moser *v.* South-West P. R. Co., 28 Pa. Co. Ct. 73; Lamb *v.* Saltus, 3 Brev. (S. C.) 130.

2. *California.*— Ingersoll *v.* Truebody, 40 Cal. 603.

Indiana.— McCarthy *v.* Kitchen, 59 Ind. 500, especially if it is not disclosed for whom the verdict is found.

Iowa.— Hyde *v.* Lookabill, 66 Iowa 453, 23 N. W. 920.

Michigan.— Wiest *v.* Luyendyk, 73 Mich. 661, 41 N. W. 839.

Mississippi.— James *v.* State, 55 Miss. 57, 30 Am. Rep. 496.

New Hampshire.— Fowler *v.* Tuttle, 24 N. H. 9.

New York.— Fash *v.* Byrnes, 14 Abb. Pr. 12.

Wisconsin.—Bushee *v.* Wright, 1 Pinn. 104.

See 37 Cent. Dig. tit. "New Trial," § 105.

Contra.— Orcutt *v.* Carpenter, 1 Tyler (Vt.) 250, 4 Am. Dec. 722.

Communication of court shown to counsel. — That a written communication from the jury to the court indicating that they had no hope of a verdict was shown to counsel of the successful party was not ground for a new trial. Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58.

3. *Kansas.*— Ortman *v.* Union Pac. R. Co., 32 Kan. 419, 4 Pac. 858.

Maine.— Winslow *v.* Morrill, 68 Me. 362 (especially where results reported to fellow jurors); Bowler *v.* Washington, 62 Me. 302 (and measurements taken).

Massachusetts.— Harrington *v.* Worcester, etc., St. R. Co., 157 Mass. 579, 32 N. E. 955.

Minnesota.— Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417 (inspecting similar car and track to test credibility of witness);

at the request of a party[4] or of a friend or relative of a party.[5] That the juror was actually influenced by the examination or inspection need not be shown.[6] It is sufficient that he may have been so influenced.[7] Where the location, condition, or construction of a place or thing is not disputed, and the examination made by a juror discloses nothing on any disputed point, a new trial may be refused.[8]

b. Receiving Outside Evidence. That jurors read documents not in evidence or made experiments not authorized may be ground for a new trial.[9]

4. Use of Intoxicating Liquors by Jurors. The mere drinking of intoxicating liquors by jurors during a recess of court is not of itself ground for a new trial.[10]

Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135; Woodbury *v.* Anoka, 52 Minn. 329, 54 N. W. 187; Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072.

Rhode Island.— Garside *v.* Ladd Watch Case Co., 17 R. I. 691, 24 Atl. 470.

Tennessee.— Wade *v.* Ordway, 1 Baxt. 229.

Wisconsin.— Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

United States.— Ewers *v.* National Imp. Co., 63 Fed. 562, and measurements taken.

See 37 Cent. Dig. tit. "New Trial," §§ 85, 95.

Reason for rule.— "If jurors were permitted to investigate out of court, there would be great danger of their getting an erroneous or one-sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain." Aldrich *v.* Wetmore, 52 Minn. 164, 173, 53 N. W. 1072.

That a plat of the locus in quo was introduced in evidence does not affect the rule. Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135.

Discretion of court.— Where a private view is not prompted by a party, agent, or officer, the allowance of a new trial rests largely in the discretion of the trial court. Harrington *v.* Worcester, etc., St. R. Co., 157 Mass. 579, 32 N. E. 955.

Second inspection.— Where animals have been inspected by consent of the parties, a second inspection by jurors, without consent, is not necessarily ground for a new trial. Trafton *v.* Pitts, 73 Me. 408.

4. Wooldridge *v* White, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144, examining alleged vicious dog. See also McIntire *v.* Hussey, 57 Me. 493, examination of article before trial.

5. Bradbury *v.* Cony, 62 Me. 223, 16 Am. Rep. 449; Koehler *v* Cleary, 23 Minn. 325; Deacon *v.* Shreve, 22 N. J. L. 176.

6. Bradbury *v.* Cony, 62 Me. 223, 16 Am. Rep. 449

7. Harrington *v.* Worcester, etc., St. R. Co., 157 Mass. 579, 32 N E. 955; Woodbury *v.* Anoka, 52 Minn. 329, 54 N. W. 187; Consolidated Ice Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898. *Compare* Indianapolis *v.* Scott, 72 Ind. 196 (as to independent acts of jurors on view of defective sidewalk); Caldwell *v.* Nashua, 122 Iowa 179, 97 N. W. 1000 (where juror did not impart fact to other jurors and swore that he was not influenced by view); Carbon *v.* Ottumwa, 95 Iowa 524, 64 N. W. 413 (where juror made affidavit that he did not communicate fact of taking measurements to other jurors and did not consider them in arriving at a verdict).

8. Siemsen *v.* Oakland, etc., Electric R. Co., 134 Cal. 494, 66 Pac. 672 (inspection of place of derailment of car and passing of cars where issue was whether derailment was caused by unlawful speed or latent defect in wheel); Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775; Brennan *v.* Seattle, (Wash. 1907) 90 Pac. 434. See also Stockwell *v.* Chicago, etc., R. Co., 43 Iowa 470, as to improper experiment showing only established fact.

Where the injury complained of was caused by snow and ice in a street, the fact that jurors examined the place after the snow and ice had melted, there being no dispute as to the location and condition of the street itself, was held insufficient ground for a new trial. Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193.

9. Rodgers *v.* Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377; Heffron *v.* Gallupe, 55 Me. 563, copy of evidence on former trial.

Reading judge's minutes.—Where a number of jurors read the judge's minutes, a new trial was granted. Mitchell *v.* Carter, 14 Hun (N. Y.) 448.

That two jurors had read the opinion of the supreme court on appeal from a former judgment in the case, the opinion not having been furnished by the successful party and not having been taken into the jury room, was not ground for a new trial. Fuller *v.* Fletcher, 44 Fed. 34.

That the jury experimented before the evidence was completed in imitating a signature alleged to have been forged was held ground for a new trial. Christy *v.* Keefer, 4 Ohio Dec. (Reprint) 442, 2 Clev. L. Rep. 171.

10. *Arkansas.*— Pelham *v.* Page, 6 Ark. 535.

Illinois.— Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723, after a view in condemnation proceedings.

Indiana.— Carter *v.* Ford Plate Glass Co., 85 Ind. 180, after charge under mistaken impression a recess had been granted.

Iowa.— O'Neill *v.* Keokuk, etc., R. Co., 45 Iowa 546 (taken for medicinal purposes); Van Buskirk *v.* Daugherty, 44 Iowa 42.

Michigan.— Merriman's Appeal, 108 Mich. 454, 66 N. W. 372.

New York.— Hanrahan *v.* Ayres, 10 Misc.

If a juror was under the influence of liquor during any part of the time he was sitting in the case, the verdict should be set aside.[11] That a juror was intoxicated during a recess of the court is not ground for a new trial, unless he continued under the influence of liquor during some part of the actual hearing of the case.[12] The drinking of intoxicating liquor as a beverage by jurors while deliberating on their verdict is cause for setting it aside in some jurisdictions,[13] without regard to the quantity used or its effect.[14] In some states such drinking during the hearing or in the jury room is not ground for a new trial unless it unfitted a juror for the proper discharge of his duty.[15] That a juror, during the deliberations of the jury, took a small quantity of liquor as a medicine is not cause for vacating the verdict.[16]

5. Entertaining, Treating, and Bribing Jurors — a. Entertaining and Treating. It is generally ground for a new trial that members of the jury were entertained or treated during the trial by the successful party,[17] or by his attor-

435, 31 N. Y. Suppl. 458; Wilson *v.* Abrahams, 1 Hill 207 [*overruling* Brant *v.* Fowler, 7 Cow. 562].

Vermont.— Carlisle *v.* Sheldon, 38 Vt. 440.

United States.— Henry *v.* Ricketts, 11 Fed. Cas. No. 6,385, 1 Cranch C. C. 545.

See 37 Cent. Dig. tit. "New Trial," § 86.

11. Perry *v.* Bailey, 12 Kan. 539; Ragland *v.* Wills, 6 Leigh (Va.) 1; Hedican *v.* Pennsylvania F. Ins. Co., 21 Wash. 488, 58 Pac. 574, although the court offered counsel an opportunity to reargue the case after the juror became sober.

In Kentucky it must appear that the juror was incapable of properly deciding the cause. Gordon *v.* Louisville, etc., R. Co., 29 S. W. 321, 16 Ky. L. Rep. 713.

12. State *v.* Livingston, 64 Iowa 560, 21 N. W. 34; Larimer *v.* Kelly, 13 Kan. 78, during separation after submission of cause. *Compare* Fairchild *v.* Snyder, 43 Iowa 23; Flesher *v.* Hale, 22 W. Va. 44.

13. *Delaware.*—Gregg *v.* McDaniel, 4 Harr. 367.

Iowa.— Hopkins *v.* Knapp, etc., Co., 92 Iowa 212, 60 N. W. 620; Ryan *v.* Harrow, 27 Iowa 494, 1 Am. Rep. 302.

New Hampshire.— Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

New York.— Patrick *v.* Victor Knitting Mills Co., 37 N. Y. App. Div. 7, 55 N. Y. Suppl. 340 (especially where ground to suspect influence of liquor on judgment); Hanrahan *v.* Ayres, 10 Misc. 435, 31 N. Y. Suppl. 458.

England.— Cooksey *v.* Haynes, 27 L. J. Exch. 371.

Canada.— Armour *v.* Boswell, 6 U. C. Q. B. O. S. 352, especially when furnished by party.

See 37 Cent. Dig. tit. "New Trial," § 86.

The mere presence of unused spirits in the jury room is not ground for a new trial. Gilmer *v.* Cameron, 1 Ga. Dec. Pt. II, 142.

14. Hopkins *v.* Knapp, etc., Co., 92 Iowa 212, 60 N. W. 620; Ryan *v.* Harrow, 27 Iowa 494, 1 Am. Rep. 302; Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

15. *Alabama.*—Alabama Lumber Co. *v.* Cross, (1907) 44 So. 563.

Kansas.— Perry *v.* Bailey, 12 Kan. 539.

Maine.— Purinton *v.* Humphreys, 6 Me. 379.

Nevada.— Richardson *v.* Jones, 1 Nev. 405.

Oklahoma.— Easterly *v.* Gater, 17 Okla. 93, 87 Pac. 853.

16. Nichols *v.* Nichols, 136 Mass. 256; Gilmanton *v.* Ham, 38 N. H. 108.

17. *Georgia.*— Walker *v.* Walker, 11 Ga. 203.

Illinois.— Doud *v.* Guthrie, 13 Ill. App. 653; Lyons *v.* Lawrence, 12 Ill. App. 531.

Maine.— McIntire *v.* Hussey, 57 Me 493 (before trial); Cottle *v.* Cottle, 6 Me. 140, 19 Am. Dec. 200.

New Jersey.— Phillipsburgh Bank *v.* Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193; Eakin *v.* Morris Canal, etc., Co., 24 N. J. L. 538; Drake *v.* Newton, 23 N. J. L. 111; Demund *v.* Gowen, 5 N. J. L. 687.

Ohio.— Bender *v.* Buehrer, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507, beer and cigars.

Pennsylvania.— Harvester Co. *v.* Hodge, 6 Pa. Dist. 378 (box of cigars after verdict rendered); Keegan *v.* McCandless, 7 Phila. 248; Redmond *v.* Royal Ins. Co., 7 Phila. 167 (especially where verdict excessive).

South Carolina.— McGill *v.* Seaboard Air Line R. Co., 75 S. C. 177, 55 S. E. 216.

Tennessee.— Sexton *v.* Lelievrre, 4 Coldw. 11. *Compare* Vaughn *v.* Dotson, 2 Swan 348, where there was no intention to influence verdict and juror voted for other party, the verdict being by a majority.

Vermont.— Baker *v.* Jacobs, 64 Vt. 197, 23 Atl. 588, under statute.

United States.—Johnson *v.* Hobart, 45 Fed. 542 (although furnished at the suggestion of the court); Harrison *v.* Rowan, 11 Fed. Cas. No. 6,142, 4 Was 32.

Canada.—Ferguson *v.* Troop, 15 N. Brunsw. 183 [*distinguishing* Spence *v.* Trenholm, 12 N. Brunsw. 77]; McNeil *v.* Moore, 14 N. Brunsw. 234; Armour *v.* Boswell, 6 U. C. Q. B. O. S. 352 (especially in jury room).

See 37 Cent. Dig. tit. "New Trial," § 98.

Compare Kennedy *v.* Holladay, 105 Mo. 24, 16 S. W. 688 (where a juror treated to oysters was not known to be such when invited); Morris *v.* Vivian, 2 Dowl. P. C. N. S. 235, 11 L. J. Exch. 367, 10 M. & W. 137 (where two jurors, having slept and dined at house of party, he, having no substantial interest in case, which was not discussed, and there being no other available accommodations).

ney [18] or agent,[19] and especially that a juror or jurors were furnished with intoxicating liquor by, or on account of, such party.[20] It need not be shown that the offending person understood the impropriety of his act,[21] or that any juror was actually influenced thereby.[22] If, however, the jurors had no knowledge before verdict that a treat or refreshments furnished them was at the expense of a party, and deny that they were influenced thereby, a new trial may be denied.[23] That the

Entertainment by friend of party.—Where before the trial, but during the term, a party conveyed one of the jurors several miles to the house of a friend where he was hospitably entertained for the night, a new trial was allowed. Cottle *v.* Cottle, 6 Me. 140, 19 Am. Dec. 200.

That two jurors asked the losing party to entertain them for the night, which he refused to do, and that the court refused to withdraw the jurors, being satisfied that their conduct was the result of ignorance and inexperience, was held insufficient ground for a new trial. Southwestern R. Co. *v.* Mitchell, 80 Ga. 438, 5 S. E. 490.

18. Walker *v.* Hunter, 17 Ga. 364; Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668.

19. Georgia Cent. R. Co. *v.* Hammond, 109 Ga. 383, 34 S. E. 594; Shattuck *v.* Wrought Iron Range Co., 69 Vt. 468, 38 Atl. 72, cigars after verdict. See also Veneman *v.* McCurtain, 33 Nebr. 643, 50 N. W. 955, accepting cigars from outsider while deliberating on verdict. *Compare* Carlisle *v.* Sheldon, 38 Vt. 440, refreshments furnished by inhabitants of defendant town.

Paying for entertainment of person without their knowledge.— Where an employee of the successful party ate oysters with jurors and others, and, on coming away first, paid for the party without their knowledge, no conversation concerning the case having taken place, a new trial was refused. Eakin *v.* Morris Canal, etc., Co., 24 N. J. L. 538.

Entertainment by disinterested witness.— That jurors were entertained by a witness of the successful party who was evidently distinterested was not ground for a new trial. Harris *v.* Harris, Ir. R. 3 C. L. 294. See also St. Louis Belt, etc., R. Co. *v.* Cartan Real Estate Co., 204 Mo. 565, 103 S. W. 519.

20. *California.*— Wright *v.* Eastlick, 125 Cal. 517, 58 Pac. 87.

Idaho.— Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98.

Indiana.— Huston *v.* Vail, 51 Ind. 299.

Kansas.— Perry *v.* Bailey, 12 Kan. 539.

Maine.— Studley *v.* Hall, 22 Me. 198.

Montana.— Bradshaw *v.* Degenhart, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

Nebraska.— Vose *v.* Muller, 23 Nebr. 171, 36 N. W. 583.

Nevada.— Sacramento, etc., Min. Co. *v.* Showers, 6 Nev. 291, discussing cases fully.

New Jersey.— Drake *v.* Newton, 23 N. J. L. 111; Demund *v.* Gowen, 5 N. J. L. 687.

Ohio.— Bender *v.* Buehrer, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507. *Compare* Marsh *v.* Clark County Com'rs, 11 Ohio Dec. (Reprint) 442, 27 Cinc. L. Bul. 56, where refreshments and liquors were given jurors at their request after a view in ditch proceedings.

Pennsylvania.— *In re* Fairmount Park Case, 6 Phila. 285.

Tennessee.— Sexton *v.* Lelievrre, 4 Coldw. 11.

Canada.— Stewart *v.* Woolman, 26 Ont. 714.

See 37 Cent. Dig. tit. "New Trial," § 98.

Compare Pelham *v.* Page, 6 Ark. 535 (where some of the jurors were intoxicated during part of the trial); Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058 (as to insufficient proof of fact); Brookhaven Lumber, etc., Co. *v.* Illinois Cent. R. Co., 68 Miss. 432, 10 So. 66 (as to single draught furnished juror habituated to drink at request of friend and not with intent to influence juror); McCarty *v.* McCarty, 4 Rich. (S. C.) 594.

21. Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98; Sacramento, etc., Min. Co. *v.* Showers, 6 Nev. 291.

22. *Idaho.*— Burke *v.* McDonald, 3 Ida. 291, 29 Pac. 98.

Indiana.— Huston *v.* Vail, 51 Ind. 299.

Kansas.— Missouri Pac. R. Co. *v.* Bowman, 68 Kan. 489, 75 Pac. 482.

Maine.— Cottle *v.* Cottle, 6 Me. 140, 19 Am. Dec. 200.

Montana.— Bradshaw *v.* Degenhart, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

Nevada.— Sacramento, etc., Min. Co. *v.* Showers, 6 Nev. 291.

Tennessee.— Sexton *v.* Lelievrre, 4 Coldw. 11.

Canada.—Ferguson *v.* Troop, 15 N. Brunsw. 183 [*distinguishing* Spence *v.* Trenholm, 12 N. Brunsw. 77]; McNeil *v.* Moore, 14 N. Brunsw. 234.

Overcoming presumption of improper influence.— In Pittsburg, etc., R. Co. *v.* Porter, 32 Ohio St. 328, it was held that the presumption of improper influence arising from the furnishing of intoxicating liquors to a juror might be overcome by clear proof that there was no intention to influence the juror's action, and that his action was not influenced. *Compare* Sacramento, etc., Min. Co. *v.* Showers, 6 Nev. 291.

23. Van *v.* Evanston, 150 Ill. 616, 37 N. E. 901 (lunch furnished at a view on the suggestion of the judge); Wichita, etc., R. Co. *v.* Fechheimer, 49 Kan. 643, 31 Pac. 127 (cigars, party not being present); Tripp *v.* Bristol County Com'rs, 2 Allen (Mass.) 556 (cider, without party's knowledge). See also Johnson *v.* Greim, 17 Nebr. 447, 23 N. W. 338 (where dinner was provided by bailiff at home of party, that being the only convenient place); Spence *v.* Trenholm, 12 N. Brunsw.

successful party or his attorney or agent drank intoxicating liquor with jurors at a chance meeting in a drinking place, the party, attorney, or agent not paying for the jurors' drinks, is not of itself ground for a new trial.[24] But if there be evidence of intimacy with jurors or of unusual attentions paid to them, coupled with such drinking, a new trial should be allowed.[25] A verdict will not be set aside because intoxicating liquor was furnished jurors during a recess by the unsuccessful party,[26] or with his consent,[27] or was furnished by both parties,[28] if there was no intoxication. It is not ordinarily ground for a new trial that a party treated jurors after the rendition of the verdict,[29] but is a matter for consideration in connection with any other suspicious circumstances.[30]

b. Favoring and Bribing. Ordinary acts of courtesy to jurors by a party or his counsel are not of themselves ground for a new trial,[31] but unusual attention or favors may be.[32] It is ground for a new trial that a juror was bribed by the

77 (where, after a view, jurors were lodged and fed at the home of a party at the request of the officer in charge, that being the only convenient place).

24. Georgia Cent. R. Co. *v.* Hammond, 109 Ga 383, 34 S. E. 594; St. Paul F. & M. Ins. Co. *v.* Kelly, 43 Kan. 741, 23 Pac. 1046; Goodright *v.* McCausland, 1 Yeates (Pa.) 372, 1 Am. Dec. 306.

25. Wright *v.* Eastlick, 125 Cal. 517, 58 Pac. 87 (attending dance with party and drinking to intoxication); Hughes *v.* Budd, 8 Dowl. P. C. 315, 4 Jur. 150.

Applications of rule.— Where between the close of the testimony and the argument one of the jurors drank with the attorney of the successful party at a saloon, and talked with him in a very friendly manner about a case to which the former's wife was a party and in which the attorney represented the adverse party, and which had been compromised that day, a new trial was allowed. Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 22 N. E. 850 [*reversing* 31 Ill. App. 490]. A new trial was granted where the successful party and a juror played cards and drank together at a saloon, although it did not appear that said party paid for the liquor or that they talked about the case. Vollrath *v.* Crowe, 9 Wash. 374, 37 Pac. 474.

26. Webster County *v.* Hutchinson, 60 Iowa 721, 9 N. W. 901, 12 N. W. 534; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245.

27. Tower *v.* Hewett, 11 Johns. (N. Y.) 134. *Compare* Pelham *v.* Page, 6 Ark. 535.

Moderate eating and drinking at the expense of the successful party, with the consent of the other party, was held not ground for a new trial. Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

28. Copper Queen Min. Co. *v.* Arizona Prince Copper Co., 2 Ariz. 10, 7 Pac. 718; Dennison *v.* Collins, 1 Cow. (N. Y.) 111. See also McLaughlin *v.* Hinds, 151 Ill. 403, 38 N. E. 136 [*affirming* 47 Ill. App. 598], by attorneys for both parties after the verdict had been agreed on.

29. Pinkston *v.* Mercer, 112 Ga. 365, 37 S. E. 365; Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841; Todd *v.* Gray, 16 S. C. 635; Larson *v.* Levy, (Tex. Civ. App. 1900) 57 S. W. 52 (cigars furnished after verdict by party's son); Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41. *Contra*, Shattuck *v.* Wrought Iron Range Co., 69 Vt. 468, 38 Atl. 72.

30. Endowment Rank O. K. P. *v.* Steele, 107 Tenn 1, 63 S. W. 1126, where demeanor of jurors indicated desire to serve on jury.

31. Ford *v.* Holmes, 61 Ga. 419 (juror going to and from court in buggy with party who was neighbor); Hilton *v.* Southwick, 17 Me. 303, 35 Am. Dec. 253 (conveying home juror who lived on same road); Mitchell *v.* Corpening, 124 N. C. 472, 32 S. E. 798 (attorney giving jurors drink of water).

Courtesies extended with consent of court. — That upon a view, the jurors were conveyed at the expense of a party, in carriages owned by a juror, upon the consent of court, openly announced, was held not to require the granting of a new trial. Missouri Pac. R. Co. *v.* Bowman, 68 Kan. 489, 75 Pac. 482.

Assistance rendered party by juror.— The mere fact that a juror, in a personal injury case, assisted plaintiff, who claimed to be disabled, downstairs in the court-house is not cause for a new trial. Central R., etc., Co. *v.* Wiggins, 91 Ga. 208, 18 S. E 187.

Furnishing medicine to juror.— Where counsel for the successful party furnished a bottle of medicine to a juror suffering from an ailment, not recognizing him as a juror, in the presence of opposing counsel, who offered no objection, and the juror understood that he was to pay for the medicine, a new trial was denied. Barker *v.* Stewart, 110 Ga. 854, 36 S. E. 238.

The mere possession of a book of free tickets on defendant railroad is not ground for a new trial; no prejudice being shown, and it being expressly disclaimed by counsel for plaintiff that the book was issued or received for any corrupt motive. Shepard *v.* Lewiston, etc., St. R. Co., 101 Me. 591, 65 Atl. 20.

32. Georgia Cent. R. Co. *v.* Hammond, 109 Ga. 383, 34 S. E. 594; Hilton *v.* Southwick, 17 Me. 303, 35 Am. Dec. 253; Ensign *v.* Harney, 15 Nebr. 330, 18 N. W. 73, 48 Am. Rep. 344 (loaning two jurors a horse and buggy to take them home during adjournment from Saturday to Monday); Phillipsburgh Bank *v.* Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193.

successful party,[33] or that a juror asked a party for a bribe or matter of favor calculated to influence his action;[34] but not necessarily that a stranger to the action offered a bribe to a juror, if the offer was rejected and did not influence or prejudice the juror.[35]

6. Separation of Jury — a. Before Verdict. The separation of the jury by permission of the court, after proper admonition, is not ground for a new trial.[36] Separation of the jury before the submission of the case without the consent of the parties or permission of the court is seldom of itself ground for a new trial.[37] Such separation after the submission of the case is sufficient cause for setting aside the verdict in some jurisdictions,[38] but not in others.[39] The separation of one or more jurors from the remainder of the jury during the trial,[40] or after the sub-

33. Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134. See also Merritt *v.* Bunting, (Va. 1907) 57 S. E. 567.

The liberal and conspicuous patronage of a juror's saloon by a relative of the successful party was held ground for a new trial. Palmer *v.* Utah, etc., R. Co., 2 Ida. (Hash.) 315, 13 Pac. 425.

Witness' fees paid juror.— That one of the jurors had been summoned as a witness for the prevailing party, and had received witness' fees, was held insufficient ground for a new trial, where neither the party nor the juror knew the act to be irregular nor had any corrupt intention. Handly *v.* Call, 30 Me. 9; Rankin *v.* Nelson, 10 N. Y. St. 337.

Time of giving gratuity.—Me. Rev. St. c. 84, § 104, providing for a new trial where any one of the parties to the action, before or after the trial, gives any gratuity to the jury, has reference to misconduct of parties during the term of court, and not to innocent acts of the parties occurring months before the term. Shepard *v.* Lewiston, etc., R. Co., 101 Me. 591, 65 Atl. 20.

34. Johnson *v.* Chester, etc., R. Co., 8 Del. Co. (Pa.) 346 (where juror asked agent of defendant corporation for position); Fairmount Park Case, 6 Phila. (Pa.) 285; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147.

Promise of improvements in juror's neighborhood.— Promises by an agent of a defendant railroad company of public improvements in a juror's neighborhood may be ground for a new trial without regard to the motive of the agent or juror. Baltimore, etc., R. Co. *v.* Phelps, 8 Ohio Dec. (Reprint) 11, 5 Cinc. L. Bul. 28.

That a juror asked the successful party for money after the verdict, the party himself disclosing the fact, and the verdict being satisfactory, was not ground for a new trial. Sabey *v.* Stephens, 7 L. T. Rep. N. S. 274, 11 Wkly. Rep. 19.

35. Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

36. Adkins *v.* Williams, 23 Ga. 222.

Failure to repeat admonition.— Where an admonition was given to the jury on its first separation, the failure to repeat it on each subsequent separation, when not demanded, is not ground for a new trial. Stewart *v.* Randolph, 2 Cinc. Super. Ct. (Ohio) 132.

37. Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723; Gleason *v.* Strauss, 5 Kan. App. 80, 48 Pac. 881.

38. *Georgia.*— Obear *v.* Gray, 68 Ga. 182.

Kansas.— Ehrhard *v.* McKee, 44 Kan. 715, 25 Pac. 193 (unless admonished by court); Pracht *v.* Whitridge, 44 Kan. 710, 25 Pac. 192 (unless admonished by court). *Compare* Morrow *v.* Saline County, 21 Kan. 484.

Virginia.— Howle *v.* Dunn, 1 Leigh 455.

United States.— Lester *v.* Stanley, 15 Fed. Cas. No. 8,277, 3 Day 287.

Canada.— Stillwell *v.* Rennie, 11 Ont. App. 724 [*reversing* 7 Ont. 355].

See 37 Cent. Dig. tit. "New Trial," §§ 86½.

Separation without admonition.—Where a jury is not admonished on separation after submission of a cause, as required by statute, and members converse with the general public, there is a presumption of prejudice to the losing party. Ehrbard *v.* McKee, 44 Kan. 715, 25 Pac. 193; Pracht *v.* Whittridge, 44 Kan. 710, 25 Pac. 192. But separation during a few minutes' recess, without admonition, is not ground for a new trial, where the jury had been previously admonished as to their conduct during separation, and there was no misconduct. Gleason *v.* Strauss, 5 Kan. App. 80, 48 Pac. 881.

39. *Colorado.*— Dozenback *v.* Raymer, 13 Colo. 451, 22 Pac. 787.

Indiana.— Drummond *v.* Leslie, 5 Blackf. 453, especially if the separation was consented to.

Maine.— Parsons *v.* Huff, 38 Me. 137.

Missouri.— Compton *v.* Arnold, 54 Mo. 149.

New Hampshire.— Evans *v.* Foss, 49 N. H. 490.

New York.— Hager *v.* Hager, 38 Barb. 92; Anthony *v.* Smith, 4 Bosw. 503.

Ohio.— Armleder *v.* Lieberman, 33 Ohio St. 77, 31 Am. Rep. 530.

South Carolina.— Pulaski *v.* Ward, 2 Rich. 119.

South Dakota.— Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764.

Texas.— Burns *v.* Paine, 8 Tex. 159.

Vermont.— Downer *v.* Baxter, 30 Vt. 467.

United States.— Henry *v.* Ricketts, 11 Fed. Cas. No. 6,385, 1 Cranch C. C. 545.

See 37 Cent. Dig. tit. "New Trial," §§ 86½, 118.

40. Stutsman *v.* Barringer, 16 Ind. 363; Newell *v.* Ayer, 32 Me. 334; Crane *v.* Sayre, 6 N. J. L. 110; *Ex p.* Hill, 3 Cow. (N. Y.)

mission of the case,[41] is not of itself ground for new trial, especially where the separation was due to a misapprehension.[42] Where there is reason to believe that jurors may have been tampered with during a separation, a new trial should be granted.[43] Where the jury secured its liberty by force,[44] or by falsely representing that a verdict had been agreed upon,[45] a verdict arrived at on the reassembling of the jury should be set aside.

b. After Agreeing on Verdict. The unauthorized separation of the jury,[46] or of one or more jurors from the remainder of the jury,[47] after they had agreed upon a verdict, is not ground for a new trial,[48] in the absence of evidence of an improper motive for the separation. That it was necessary to amend the verdict after the coming together of the jury does not change the general rule.[49]

355. See also Keller *v.* Bley, 15 Oreg. 429, 15 Pac. 705.

41. *California.*— *In re* McKenna, 143 Cal. 580, 77 Pac. 461.

Georgia.— Medlock *v.* De Kalb County, 115 Ga. 337, 41 S. E. 579.

Illinois.— Jones *v.* Warner, 81 Ill. 343.

Indiana.— New Albany *v.* McCulloch, 127 Ind. 500, 26 N. E. 1074 (where no probable injury); Carter *v.* Ford Plate Glass Co., 85 Ind. 180; Alexander *v.* Dunn, 5 Ind. 122.

Kentucky.— Bledsoe *v.* Bledsoe, (1886) 1 S. W. 10.

Maine.— Newell *v.* Ayer, 32 Me. 334.

Mississippi.— Graves *v.* Monet, 7 Sm. & M. 45.

New Jersey.— Baizley *v.* Welsh, 71 N. J. L. 471, 60 Atl. 59; Oram *v.* Bishop, 12 N. J. L. 153.

New York.— Smith *v.* Thompson, 1 Cow. 221.

Texas.— Edrington *v.* Kiger, 4 Tex. 89.

England.— Hughes *v.* Budd, 8 Dowl. P. C. 315, 4 Jur. 150.

Canada.— O'Mullin *v.* Bishop, 20 U. C. Q. B. 275.

See 37 Cent. Dig. tit. "New Trial," § 86½.

42. Carter *v.* Ford Plate Glass Co., 85 Ind. 180; Perkins *v.* Ermel, 2 Kan. 325; Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360; O'Mullin *v.* Bishop, 20 U. C. Q. B. 275.

43. *Colorado.*—Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Georgia.— Robinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491.

Idaho.— Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98.

Kansas.— Murphy *v.* Hindman, 37 Kan. 267, 15 Pac. 182.

Mississippi.— Offit *v.* Vick, Walk. 99.

Compare Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169.

44. Shepherd *v.* Baylor, 5 N. J. L. 827.

45. Short *v.* West, 30 Ind. 367; Ætna Ins. Co. *v.* Grube, 6 Minn. 82; Oliver *v.* Springfield First Presb. Church, 5 Cow. (N. Y.) 283 (especially where there was conversation regarding case in their presence during their separation); Sawvel *v.* Bitterlee, 86 Wis. 420, 56 N. W. 1086.

46. *Illinois.*— Cleveland, etc., R. Co. *v.* Monaghan, 140 Ill. 474, 30 N. E. 869, jury separated after having delivered a sealed verdict to the bailiff without permission of court.

Indiana.— See Leas *v.* Cool, 68 Ind. 166 (as to separation by order of court because of the absence of the movant and his attorney); Crocker *v.* Hoffman, 48 Ind. 207 (as to separation without admonition by the court by consent of the parties); Lucas *v.* Marine, 40 Ind. 289 (separation by permission of court).

Kentucky.— Smith *v.* Harrow, 3 Bibb 446; Brown *v.* McConnel, 1 Bibb 265.

Massachusetts.— Winslow *v.* Draper, 8 Pick. 170.

Mississippi.— James *v.* State, 55 Miss. 57, 30 Am. Rep. 496, although verdict discussed with outsiders during recess after it had been handed to clerk.

New Hampshire.— Nims *v.* Bigelow, 44 N. H. 376.

New York.— Douglass *v.* Tousey, 2 Wend. 352, 20 Am. Dec. 616; Horton *v.* Horton, 2 Cow. 589.

Ohio.— Sutliff *v.* Gilbert, 8 Ohio 405; Wright *v.* Burchfield, 3 Ohio 53.

South Carolina.— Sartor *v.* McJunkin, 8 Rich. 451.

See 37 Cent. Dig. tit. "New Trial," § 87.

Compare Ehrhard *v.* McKee, 44 Kan. 715, 25 Pac. 193.

47. Chemical Electric Light, etc., Co. *v.* Howard, 150 Mass. 495, 23 N. E. 317.

48. Horton *v.* Horton, 2 Cow. (N. Y.) 589.

Agreement after separation by dissenting jurors.— Where, on coming into court, after rendering a sealed verdict and separating, two jurors dissented to the verdict, and the jury being sent out again agreed on a verdict, a new trial was granted. Ætna Ins. Co. *v.* Grube, 6 Minn. 82. *Compare* Douglass *v.* Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

49. *Illinois.*— St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715.

Massachusetts.—Levine *v.* Globe St. R. Co., 177 Mass. 204, 58 N. E. 685 (where foreman had signed wrong verdict); Winslow *v.* Draper, 8 Pick. 170.

Minnesota.— Nininger *v.* Knox, 8 Minn. 140, mistake in figuring.

New Hampshire.— Nims *v.* Bigelow, 44 N. H. 376.

Ohio.— Sutliff *v.* Gilbert, 8 Ohio 405.

Pennsylvania.—Com. *v.* Adaire, 18 Lanc. L. Rev. 42.

See 37 Cent. Dig. tit. "New Trial," § 87.

7. Deliberations and Manner of Arriving at Verdict — a. General Conduct of Jury During Deliberations. The disorderly conduct of a jury after retiring for deliberation may be considered with other evidence of misconduct,[50] but generally is not of itself sufficient cause for setting aside the verdict.[51] At the present time, it is not of itself ground for a new trial that the jury partook of refreshments in the jury room provided by the officer having them in charge,[52] or by themselves.[53]

b. Presence and Remarks of Officers and Other Persons in Jury Room. It is improper for the officer in charge of the jury to remain in the jury room while they are deliberating on their verdict.[54] But the mere temporary presence of the officer in the jury room, not engaging in the discussion of the case or observing the voting, is not ground for a new trial.[55] If the officer has taken part in the deliberations of the jury, or has made remarks of a prejudicial nature on the case, the verdict should be set aside.[56] That the remarks actually influenced the jury need not be shown.[57] Remarks by the officer on matters foreign to the case do not require the allowance of a new trial.[58] The mere presence of an intruder in the jury room has been held insufficient ground for granting a new trial.[59] But if such a person has participated in the deliberations of the jury, the verdict should be set aside.[60]

c. Taking or Sending Papers to Jury Room — (i) *Papers Not in Evidence.* It is ground for a new trial that the jury, in arriving at their verdict, considered depositions not in evidence,[61] or documents or papers not in evidence of a character that might have influenced the verdict.[62] This is especially true where the

50. Edney *v.* Baum, 44 Nebr. 294, 62 N. W. 461.

That some of the jurors played poker after they had retired to deliberate is a fact for consideration in connection with other acts of misconduct. Mix *v.* North American Co., 209 Pa. St. 636, 59 Atl. 272.

51. Thus the fact that the jury made a great noise and confusion in the jury room is not ground for a new trial. Oram *v.* Bishop, 12 N. J. L. 153.

52. Morningstar *v.* Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211.

53. Cooper *v.* Robertson, 87 Ind. 222; Purinton *v.* Humphreys, 6 Me. 379; Harrison *v.* Rowan, 11 Fed. Cas. No. 6,142, 4 Wash. 32; Everett *v.* Youells, 4 B. & Ad. 681, 1 N. & M. 530, 24 E. C. L. 299. *Compare* Cooksey *v.* Haynes, 27 L. J. Exch. 371, holding it discretionary with the court to grant a new trial where the juror covertly obtained victuals and liquor.

54. Fitzgerald *v.* Goff, 99 Ind. 28. And see Trials.

55. Fitzgerald *v.* Goff, 99 Ind. 28; Brady *v.* American Print Works, 119 Mass. 98; *In re* Benson, 16 N. Y. Suppl. 111.

56. Cole *v.* Swan, 4 Greene (Iowa) 32; Barnett *v.* Eaton, 62 Miss. 768; Thomas *v.* Chapman, 45 Barb. (N. Y.) 98.

Extent and limits of rule.— That the judge requested defendant, who was sheriff of the county, to ascertain when the jury would probably agree, does not excuse his action in mingling and conversing with the jurors while they were deliberating upon their verdict. Peterson *v.* Siglinger, 3 S. D. 255, 52 N. W. 1062. That the clerk of the court correctly instructed the jury, at their request, and after they had determined on their verdict, how to make a computation on an execution was not ground for a new trial. Dennison *v.* Powers, 35 Vt. 39.

57. Thomas *v.* Chapman, 45 Barb. (N. Y.) 98.

58. Daniel *v.* Frost, 62 Ga. 697; Hager *v.* Hager, 38 Barb. (N. Y.) 92; Taylor *v.* Everett, 2 How. Pr. (N. Y.) 23.

59. Barbour *v.* Archer, 3 Bibb (Ky.) 8; Graves *v.* Monet, 7 Sm. & M. (Miss.) 45.

The admission of a physician to the jury room to attend a sick juror is not of itself cause for a new trial. Wesley *v.* Chicago, etc., R. Co., 84 Iowa 441, 51 N. W. 163 (especially by consent of parties and after verdict agreed on); Nichols *v.* Nichols, 136 Mass. 256.

Waiver of misconduct.— It seems that the consent of parties that jurors should consider their verdict without a constable to attend them is a waiver of their misconduct in admitting other persons in the room while consulting. Tower *v.* Hewett, 11 Johns. (N. Y.) 134.

60. Starling *v.* Thorne, 87 Ga. 513, 13 S. E. 552. *Compare* Barbour *v.* Archer, 3 Bibb (Ky.) 8.

61. Coffin *v.* Gephart, 18 Iowa 256; Stewart *v.* Burlington, etc., R. Co., 11 Iowa 62; Hix *v.* Drury, 5 Pick. (Mass.) 296; Taylor *v.* Sorsby, Walk. (Miss.) 97; Brownson *v.* Metcalf, 1 Disn. (Ohio) 21, 12 Ohio Dec. (Reprint) 462, and that jury read them presumed. *Compare* Gardner *v.* Kimball, 58 N. H. 202, as to jury taking deposition from which certain words had been excluded.

62. *Georgia.*— Walker *v.* Hunter, 17 Ga. 364.

Iowa.— McLeod *v.* Humeston, etc., R. Co., 71 Iowa 138, 32 N. W. 246, testimony taken

documents or papers were given to the jury by the successful party or his attorney.[63] If papers improperly considered by a jury were material or fitted to prejudice the unsuccessful party, a new trial should be granted, although the successful party was not at fault.[64] Nor will the actual measure of influence of such papers be inquired into.[65] If papers not in evidence were intentionally given to the jury by a party, the court will not inquire into the importance or materiality of such papers,[66] or whether they were read by the jury.[67] If the papers were not furnished by a party and were not read by the jury, a new trial should be denied.[68] Where papers improperly considered by the jury are unimportant and were not intentionally given to them by a party, the refusal of a new trial rests largely in the discretion of the court.[69] And where it appears that the verdict was affected

at inquest upon death of person killed in same accident.

Maine.— Benson *v.* Fish, 6 Me. 141, statement of items of claim.

Massachusetts.— Munde *v.* Lambie, 125 Mass. 367 (bill of exceptions on former trial); Alger *v.* Thompson, 1 Allen 453 (especially paper offered in evidence and rejected); Whitney *v.* Whitman, 5 Mass. 405.

New Hampshire.— Flanders *v.* Davis, 19 N. H. 139.

Pennsylvania.— Wilman *v.* Wagner, 4 Luz. Leg. Reg. 252, 23 Pittsb. Leg. J. 40. *Compare* Ehrhart *v.* Standard Guard Rail Fastener Co., 20 Lanc. L. Rev. 85, as to practice permitting party to furnish statement of items of claim by permission of court.

Wisconsin.— State *v.* Hartmann, 46 Wis. 248, 50 N. W. 193, map in highway case.

United States.— Hutchinson *v.* Decatur, 12 Fed. Cas. No. 6,956, 3 Cranch C. C. 291.

See 37 Cent. Dig. tit. "New Trial," §§ 83, 90.

Where an account improperly taken out by a jury was withdrawn from them in a few minutes by order of court, a new trial was refused. Simms *v.* Templeman, 22 Fed. Cas. No. 12,872, 5 Cranch C. C. 163.

Taking statutes to the jury room has been considered sufficient ground for a new trial. Merrill *v.* Nary, 10 Allen (Mass.) 416; Griffin *v.* Bartlett, 58 N. H. 141.

63. *Connecticut.*— Hamilton *v.* Pease, 38 Conn. 115, printed pamphlet reflecting on character of adversary.

Georgia.— Killen *v.* Sistrunk, 7 Ga. 283.

Louisiana.— Morgan *v.* Bell, 4 Mart. 615, counsel handing jury form of verdict.

Maine.— Heffron *v.* Gallupe, 55 Me. 563.

Mississippi.— Offit *v.* Vick, Walk. 99.

New Jersey.— Jessup *v.* Eldridge, 1 N. J. L. 401, especially after submission of case to jury, although paper of little moment.

Pennsylvania.— Sheaff *v.* Gray, 2 Yeates 273; Wilman *v.* Wagner, 4 Luz. Leg. Reg. 252, 23 Pittsb. Leg. J. 40.

Presumptions.— It has been held that there is no presumption that a paper handed to a juror as the jury was going out was not a pleading in the case. Wright *v.* Rogers, 3 N. J. L. 547.

See 37 Cent. Dig. tit. "New Trial," § 90.

That jurors requested the party to furnish the papers seems immaterial. Heffron *v.* Gallupe, 55 Me. 563; Offit *v.* Vick, Walk. (Miss.) 99.

64. Killen *v.* Sistrunk, 7 Ga. 283; Heffron *v.* Gallupe, 55 Me. 563; Benson *v.* Fish, 6 Me. 141; Munde *v.* Lambie, 125 Mass. 367; Hix *v.* Drury, 5 Pick. (Mass.) 296; Whitney *v.* Whitman, 5 Mass. 405; Page *v.* Wheeler, 5 N. H. 91.

65. Kruidenier *v.* Shields, 77 Iowa 504, 42 N. W. 432, 70 Iowa 428, 30 N. W. 681; Whitney *v.* Whitman, 5 Mass. 405; Page *v.* Wheeler, 5 N. H. 91.

66. Killen *v.* Sistrunk, 7 Ga. 283; Page *v.* Wheeler, 5 N. H. 91.

67. Hix *v.* Drury, 5 Pick. (Mass.) 296.

68. *Alabama.*— Louisville, etc., R. Co. *v.* Sides, 129 Ala. 399, 29 So. 798.

Georgia.— Edmundson *v.* Swain, 122 Ga. 841, 50 S. E. 942; Schmertz *v.* Johnson, 72 Ga. 472; Wilkins *v.* Maddrey, 67 Ga. 766; Killen *v.* Sistrunk, 7 Ga. 283.

Indiana.— Wilds *v.* Bogan, 57 Ind. 453.

Iowa.— Shields *v.* Guffey, 9 Iowa 322.

Louisiana.— Littlefield *v.* Beamis, 5 Rob. 145.

Massachusetts.—Hix *v.* Drury, 5 Pick. 296.

New Hampshire.—Page *v.* Wheeler, 5 N. H. 91.

New York.— New York, etc., Ice Lines *v.* Howell, 19 N. Y. App. Div. 341, 46 N. Y. Suppl. 493; Hackley *v.* Hastie, 3 Johns. 252.

Applications of rule.— Where, after a jury had agreed on its verdict and had asked for paper on which to write it, the officer in charge accidentally gave them paper on which part of the testimony had been taken, a new trial on that ground was refused. Glidden *v.* Towle, 31 N. H. 147. Where a rejected affidavit came into the hands of jurors after eleven of them had agreed on a verdict, and was not seen by the other juror, a new trial was refused. Abel *v.* Kennedy, 3 Greene (Iowa) 47. Where the jury are told by the court not to consider papers which have been sent out to them inadvertently, there is generally no cause for a new trial. Kaplan *v.* Glover, 108 Ga. 301, 33 S. E. 967.

69. *Georgia.*—Russell *v.* Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528 (former verdict indorsed on pleadings, where no erasure was asked and jurors swore they were not influenced thereby); Bryant *v.* Booze, 55 Ga. 438 (memorandum by counsel on document in evidence, where verdict fully sustained by evidence).

Louisiana.— Littlefield *v.* Beamis, 5 Rob. 145.

only in being rendered more favorable to the losing party, there is no cause for a new trial.[70]

(II) *Papers in Evidence.* That the jury took to their room and considered papers regularly admitted in evidence is generally no ground for a new trial.[71] But the reading of depositions in the jury room, although received in evidence, is ground for a new trial in some states.[72]

d. Taking Additional Testimony and Rehearing Testimony. It is not ground for a new trial that a case was reopened after submission to the jury and additional witnesses examined in open court.[73] But it is ground for a new trial that the jury examined witnesses in the jury room in the absence of counsel.[74] That a shorthand reporter was permitted to enter the jury room and read parts of the testimony from his notes, at the request of the jury and in the absence of counsel for the losing party, is ground for a new trial.[75]

e. Personal Knowledge of Jurors. It is ground for a new trial that, after the jury retired for deliberation, a juror stated to other jurors, as of his own knowledge, facts material to the case,[76] or tending to discredit the losing party or a witness for him.[77] Where the juror's statements were not calculated to influence

Maine.— Harriman *v.* Wilkins, 20 Me. 93, verdict of former jury.

Massachusetts.— Clapp *v.* Clapp, 137 Mass. 183; writ in court below with judgment indorsed thereon.

New Hampshire.— Maynard *v.* Fellows, 43 N. H. 255; Page *v.* Wheeler, 5 N. H. 91.

Ohio.—Tracy *v.* Card, 2 Ohio St. 431, paper containing computation of interest, where jury made independent computation.

Vermont.— Winslow *v.* Campbell, 46 Vt. 746; Peacham *v.* Carter, 21 Vt. 515, letter on point clearly proved by oral evidence.

Washington.— Longsdale *v.* Brown, 1 Fed. Cas. No. 8,494, 4 Wash. 148, rejected deposition totally irrelevant to count on which verdict was returned.

See 37 Cent. Dig. tit. "New Trial," § 118.

In New Hampshire it seems to be the duty of counsel to see that no improper papers are taken out by the jury. Gardner *v.* Kimball, 58 N. H. 202; Maynard *v.* Fellows, 43 N. H. 255. *Compare* Flanders *v.* Davis, 19 N. H. 139.

70. Graves *v.* Gans, 25 Wis. 41, judge's minutes.

71. Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31. See also Royal Bank of Canada *v.* Hale, 37 N. Brunsw. (Can.) 47. And see, generally, TRIAL.

72. Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719 (interrogatories); Fottori *v.* Vesella, 27 R. I. 177, 61 Atl. 143. *Compare* Andrews *v.* Tinsley, 19 Ga. 303, interrogatories.

Illustrations.— Where in giving the jury an exhibit proper to go to them, an attached deposition is also given them, a new trial need not be granted, where the only fact testified to in the deposition was one which could not have been forgotten. Fottori *v.* Vesella, 27 R. I. 177, 61 Atl. 143. That the jury took with them a deposition offered in evidence by the losing party is not ground for a new trial. Davenport *v.* Cummings, 15 Iowa 219.

73. Parish *v.* Fite, 6 N. C. 258. And see, generally, TRIAL.

74. Luttrell *v.* Maysville, etc., R. Co., 18 B. Mon. (Ky.) 291; Perine *v.* Van Note, 4 N. J. L. 146; Brunson *v.* Graham, 2 Yeates (Pa.) 166; Smith *v.* Graves, 1 Brev. (S. C.) 16; Thompson *v.* Mallet, 2 Bay (S. C.) 94. *Compare* Henlow *v.* Leonard, 7 Johns. (N. Y.) 200.

Witness not examined.— The swearing of a witness and sending him to the jury is not ground for a new trial where he is not examined. Jones *v.* Butterworth, 3 N. J. L. 456.

75. Fleming *v.* Shenandoah, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354. It is otherwise where both parties consent to such action. Hahn *v.* Miller, 60 Iowa 96, 14 N. W. 119. And see, generally, TRIAL.

76. *Iowa.*— Hydinger *v.* Chicago, etc., R. Co., 126 Iowa 222, 101 N. W. 746; Douglass *v.* Agne, 125 Iowa 67, 99 N. W. 550; Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957 (especially after final submission of cause); Bohn *v.* Chicago, etc., R. Co., (1899) 78 N. W. 200; Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

Kansas.— Atchison, etc., R. Co. *v.* Bayes, 42 Kan. 609, 22 Pac. 741; Gottleib *v.* Jasper, 27 Kan. 770; Salina *v.* Trosper, 27 Kan. 544.

Maine.— See McIntire *v.* Hussey, 57 Me. 493.

Nebraska.— Wood River Bank *v.* Dodge, 36 Nebr. 708, 55 N. W. 234.

Pennsylvania.— Bradley *v.* Bradley, 4 Dall. 112, 1 L. ed. 763. See also Ritchie *v.* Holbrooke, 7 Serg. & R. 458, as to juror reporting conversation with party.

Tennessee.— Wade *v.* Ordway, 1 Baxt. 229.

United States.— Hyman *v.* Eames, 41 Fed. 676. *Compare* Cherry *v.* Sweeny, 5 Fed. Cas. No. 2,641, 1 Cranch C. C. 530.

See 37 Cent. Dig. tit. "New Trial," § 102.

Compare Davis *v.* Lowman, 9 Ga. 504, where there was sufficient evidence to sustain the verdict independent of the juror's statements.

77. Darrance *v.* Preston, 18 Iowa 396; Wade *v.* Ordway, 1 Baxt. (Tenn.) 229. *Compare* Purinton *v.* Humphreys, 6 Me. 379.

other jurors, or evidently did not influence them, a new trial may be denied.[78]

f. Instructions and Communications With Judge After Submission of Cause. The court may properly give a jury further instructions on their request for the same in open court and in the presence of counsel.[79] For the giving of written instructions out of court and in the absence of counsel a new trial must be granted in some states,[80] but in one state at least such practice is considered proper where the instructions and written request therefor are filed with the verdict.[81] Where the judge has gone to the jury room and instructed the jury orally or answered questions, although upon their request, a new trial must ordinarily be granted.[82] Where the judge entered the jury room, without the knowledge of the parties, and communicated with the jury about ordering supper if they were not likely to agree before meal time, a new trial was granted.[83]

g. Urging or Coercing Agreement. Where after the jury had been out a considerable length of time, a verdict was quickly agreed upon, under the evident influence of a threat by the judge or officer in charge, of a long confinement,[84] or other hardship,[85] or the jury was told that it must agree,[86] or jurors were urged to make a compromise,[87] a new trial should be granted. A new trial should not

A statement by a juror to his fellows that a certain witness was a responsible and truthful man, made after the verdict was found, was not ground for a new trial. Wise *v.* Bosley, 32 Iowa 34.

78. Montgomery *v.* Hanson, 122 Iowa 222, 97 N. W. 1081 (report of remarks heard outside jury room); Wilberding *v.* Dubuque, 111 Iowa 484, 82 N. W. 957 (statement of amount of damages awarded in a similar cause); Hall *v.* Robison, 25 Iowa 91 (especially where the facts are stated to a few jurors only and not as of the juror's personal knowledge); Florence, etc., R. Co. *v.* Ward, 29 Kan. 354 (statement of offer to confess judgment); Alm *v.* Andrews Bros. Co., 9 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 514.

79. Dent *v.* King, 1 Ga. 200, 44 Am. Dec. 638; Goodman *v.* Norton, 17 Me. 381. See also Walsh *v.* Matchett, 6 Misc. (N. Y.) 114, 26 N. Y. Suppl. 43, where the clerk for movant's counsel was present and no objection was made to receiving the verdict and the instruction did not touch the measure of damages which was complained of.

80. Read *v.* Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Sargent *v.* Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Allen *v.* Aldrich, 29 N. H. 63; Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Kehrley *v.* Shafer, 92 Hun (N. Y.) 196, 36 N. Y. Suppl. 510, 3 N. Y. Annot. Cas. 19; Plunkett *v.* Appleton, 51 How. Pr. (N. Y.) 469 [*affirmed* in 41 N. Y. Super. Ct. 159]. And see, generally, TRIAL.

Instruction as to disposition of goods not in litigation.— That the court orally informed the jury, in response to a question as to the disposition of certain goods not in litigation, that they had nothing to do with them, was not ground for a new trial. Seymour *v.* Colburn, 43 Wis. 67.

81. Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; Shapley *v.* White, 6 N. H. 172. See also Goldsmith *v.* Solomons, 2 Strobh. (S. C.) 296.

82. Crabtree *v.* Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694; Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111. And see, generally, TRIAL. *Compare* Compton *v.* Arnold, 54 Mo. 149.

Limitation of rule.— That the judge went to the door of the jury room at the request of a juror, and in reply to a question stated that it was not necessary for all the jurors to sign the verdict, was held not ground for a new trial. McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810. It is not ground for a new trial that, during the deliberations of the jury, the judge was called to the jury room and asked questions by a juror, the nature of which affiant was unable to state, and which the judge did not answer. Ayrhart *v.* Wilhelmy, (Iowa 1907) 112 N. W. 782.

83. Danes *v.* Pearson, 6 Ind. App. 465, 33 N. E. 976.

84. Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65 (where jurors understood from officer in charge that they were to be detained eight days longer); Obear *v.* Gray, 68 Ga. 182; Thomas *v.* Chapman, 45 Barb. (N. Y.) 98. And see, generally, TRIAL.

85. Physioc *v.* Shea, 75 Ga. 466 (being told by court they might have breakfast at their own expense); Gholston *v.* Gholston, 31 Ga. 625 (being told by officer that they were to be taken with the court to another county); Cole *v.* Swan, 4 Greene (Iowa) 32.

86. Taylor *v.* Jones, 2 Head (Tenn.) 565. *Compare* Derr *v.* Schweitzer, 2 Woodw. (Pa.) 420.

87. Whitelaw *v.* Whitelaw, 83 Va. 40, 1 S. E. 407.

Bailiff urging jury to agree.— That the bailiff in charge of the jury entered the jury room several times at his own instance and urged the jury to hurry, as the court could do no business until they came out, was held insufficient ground for a new trial, where no prejudice appeared to have resulted from his action. Stoppel *v.* Woolner, 4 Cinc.

be granted because the court told the jury that they should find a verdict if possible,[88] or because the court or officer in charge did not promise an early release or name any time when they would be discharged.[89]

h. Manner of Arriving at Verdict. A verdict will not be set aside merely because the amount thereof was the result of a compromise between jurors,[90] nor because the amount was first found by adding together the amounts the several jurors thought should be given and dividing the sum by twelve, if there was no agreement in advance to return a verdict for the quotient so found.[91] Where the

L. Bul. (Ohio) 576, 4 Ohio Dec. (Reprint) 489, 2 Clev. L. Rep. 252.

88. McNulty *v.* Stewart, 12 Minn. 434 (where jury stood eleven to one after twenty-four hours deliberation); Everett *v.* Youells, 4 B. & Ad. 681, 1 N. & M. 530, 24 E. C. L. 299. A verdict will not be set aside because agreed upon just after the jury were told by the officer in charge, by direction of the court, that they were discharged from further service. Gamshy *v.* Columbia, 58 N. H. 60.

89. Morrison *v.* Dickey, 122 Ga. 417, 50 S. E. 178; Leach *v.* Wilbur, 9 Allen (Mass.) 212; Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507; Wiggins *v.* Downer, 67 How. Pr. (N. Y.) 65 (where officer expressed opinion that they would be detained until the next day); Erwin *v.* Hamilton, 50 How. Pr. (N. Y.) 32 [*disapproving* Green *v.* Telfair, 11 How. Pr. 260].

Failure of foreman to tell jury they might separate.— That the foreman kept the jury out until two o'clock in the morning, and did not tell them that the judge had directed that they might separate three hours earlier if they had not agreed upon a verdict, was not ground for a new trial. Spinney *v.* Bowman, (Me. 1887) 10 Atl. 252.

That a juror was impatient at his detention and desired release to attend the marriage of his daughter was held insufficient ground for a new trial. Morrison *v.* Dickey, 122 Ga. 417, 50 S. E 178.

A charge that the verdict was hastened by an alarm of fire in the town was held insufficient to authorize a new trial. Bratton *v.* Lowry, 39 S. C. 383, 17 S. E. 832.

90. *Alabama.*— Martin *v.* McLeod, (1906) 42 So. 622.

Georgia.— Godwin *v.* Albany Fertilizer Co., 99 Ga. 180, 25 S. E. 181.

Indiana.— St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Iowa.— Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430.

Michigan.—Benedict *v.* Michigan Beef, etc., Co., 115 Mich. 527, 73 N. W. 802.

Pennsylvania.— Coyle *v.* Gorman, 1 Phila. 326; Hertzler *v.* Geigley, 22 Lanc. L. Rev. 1; Monitor Steam Generator Mfg Co. *v.* Miller, 20 Lanc. L. Rev. 95.

Compare Kelly *v.* Sherlock, L. R. 1 Q. B. 686, 6 B. & S. 480, 12 Jur. N. S. 937, 35 L. J. Q. B. 209 (as to plain evasion of duty to decide issue); Hall *v.* Poyser, 14 L. J. Exch. 98, 13 M. & W. 600 (as to plain evasion of duty to decide merits of case); Keys *v.* Flinn, 2 N. Brunsw. 125 (as to verdict clearly against evidence).

91. *California.*— McDonnell *v.* Pescadero, etc., Stage Co., 120 Cal. 476, 52 Pac. 725.

Colorado.—Empson Packing Co. *v.* Vaughn, 27 Colo. 66, 59 Pac. 749; Colorado Springs *v.* Duff, (App. 1900) 62 Pac. 959.

Delaware.— Chandler *v.* Barker, 2 Harr. 387.

Illinois.— John Spry Lumber Co. *v.* Duggan, 80 Ill. App. 394.

Iowa.— Barton *v.* Holmes, 16 Iowa 252.

Kansas.— Kingsley *v.* Morse, 40 Kan. 588, 20 Pac. 222; Bailey *v.* Beck, 21 Kan. 462.

Kentucky.— Heath *v.* Conway, 1 Bibb 398.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521; Grinnell *v.* Phillips, 1 Mass. 530.

Missouri.— Jobe *v.* Weaver, 77 Mo. App. 665; McMurdock *v.* Kimberlin, 23 Mo. App. 523; Miller *v.* St. Louis R. Co., 5 Mo. App. 471, "chalking."

Nebraska.— Ponca *v.* Crawford, 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144.

New Hampshire.— Knight *v.* Epsom, 62 N. H. 356; Dodge *v.* Carroll, 59 N. H. 237.

New Jersey.— Kennedy *v.* Kennedy, 18 N. J. L. 450.

New York.— Driscoll *v.* Nelligan, 46 N. Y. App. Div. 324, 61 N. Y. Suppl. 692; Dana *v.* Tucker, 4 Johns. 487.

Pennsylvania.— Cowperthwaite *v.* Jones, 2 Dall. 55, 1 L. ed. 287; Hertzler *v.* Geigley, 22 Lanc. L. Rev. 1.

South Carolina.— Finch *v.* Finch, 21 S. C. 342; Sheppard *v.* Lark, 2 Bailey 576.

Tennessee.— Tinkle *v.* Dunivant, 16 Lea 503; Harvey *v.* Jones, 3 Humphr. 157; Johnson *v.* Perry, 2 Humphr. 569; Bennett *v.* Baker, 1 Humphr. 399, 34 Am. Dec. 655.

Texas.— Gulf, etc., R. Co. *v.* Blue, (Civ. App. 1907) 102 S. W. 128.

Utah.— Archibald *v.* Kolitz, 26 Utah 226, 72 Pac. 935.

Washington.— Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; Bell *v.* Butler, 34 Wash. 131, 75 Pac. 130; Watson *v.* Reed, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899.

Wisconsin.— Fowler *v.* Colton, 1 Pinn. 331.

United States.— Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649.

See 37 Cent. Dig. tit. "New Trial," § 104.

Presumptions.— There is no presumption that a quotient verdict had been previously agreed to. McMurdock *v.* Kimberlin, 23 Mo. App. 523. The finding of a piece of paper in the jury room containing twelve different amounts, the total being divided by twelve and the quotient agreeing with the verdict, is generally held not to raise a presumption of a prior agreement to so fix upon the

jurors agree in advance to be bound by a quotient so determined,[92] or, where the consent of any juror to a verdict is determined by any resort to chance, a new trial must be granted.[93]

8. Necessity of Objection. The misconduct of jurors or of other persons affecting jurors is not ordinarily ground for a new trial if the unsuccessful party, having knowledge of the misconduct before the verdict, failed to call the attention of the court thereto and ask proper relief.[94] Thus it has been decided that improper communication by or with jurors,[95] an improper view or examination by

amount of the verdict. John Spry Lumber Co. *v.* Duggan, 80 Ill. App. 394; Jobe *v.* Weaver, 77 Mo. App. 665; McMurdock *v.* Kimberlin, 23 Mo. App. 523; Driscoll *v.* Nelligan, 46 N. Y. App. Div. 324, 61 N. Y. Suppl. 692. *Contra*, Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328.

Where the amount of the verdict differs from the quotient, the verdict is even less objectionable. Bailey *v.* Beck, 21 Kan. 462; Johnson *v.* Perry, 2 Humphr. (Tenn.) 569; Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841.

92. *Alabama.*— Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328.

California.— Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698; Weinburg *v.* Somps, (1893) 33 Pac. 341; Turner *v.* Tuolumne County Water Co., 25 Cal. 397; Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 121.

Colorado.— Pawnee Ditch, etc., Co. *v.* Adams, 1 Colo. App. 250, 28 Pac. 662.

Idaho.— Flood *v.* McClure, 3 Ida. 587, 32 Pac. 245.

Indiana.— Dunn *v.* Hall, 8 Blackf. 32; Fifth Ave. Sav. Bank *v.* Cooper, 19 Ind. App. 13, 48 N. E. 236.

Iowa.— Darland *v.* Wade, 48 Iowa 547; Hendrickson *v.* Kingsbury, 21 Iowa 379; Barton *v.* Holmes, 16 Iowa 252; Denton *v.* Lewis, 15 Iowa 301; Schanler *v.* Porter, 7 Iowa 482; Manix *v.* Malony, 7 Iowa 81.

Kansas.— Werner *v.* Edminston, 24 Kan. 147; Bailey *v.* Beck, 21 Kan. 462.

Missouri.— Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

New Hampshire.—Boynton *v.* Trumbull, 45 N. H. 408.

New York.— Smith *v.* Cheetham, 3 Cai. 57.

Tennessee.— East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790; Elledge *v.* Todd, 1 Humphr. 43, 34 Am. Dec. 616.

Utah.— Lambourne *v.* Halfin, 23 Utah 489, 65 Pac. 206; Wright *v.* Union Pac. R. Co., 22 Utah 338, 62 Pac. 317. Under the Utah statute, it was held that if any one juror was induced to assent to a verdict by taking a quotient, the verdict should be set aside. Wright *v.* Union Pac. R. Co., *supra*.

See 37 Cent. Dig. tit. "New Trial," § 104.

93. *California.*— Levy *v.* Brannan, 39 Cal. 485; Donner *v.* Palmer, 23 Cal. 40.

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545.

Iowa.— Thompson *v.* Perkins, 26 Iowa 486.

Massachusetts.— Wright *v.* Abbott, 160 Mass. 395, 36 N. E. 62, 39 Am. St. Rep. 499.

Montana.—Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452.

New York.— Mitchell *v.* Ehle, 10 Wend. 595.

England.— Harvey *v.* Hewitt, 8 Dowl. P. C. 598, 4 Jur. 292.

Compare McCarty *v.* McCarty, 4 Rich. (S. C.) 594, where it was agreed in advance that a majority should determine the verdict.

Subsequent repudiation.— Where a verdict is first determined by lot, evidence of its subsequent repudiation must be very clear. Thompson *v.* Perkins, 26 Iowa 486.

Where the jury left it to three jurors to agree upon the amount of the verdict, a new trial was granted. Memphis, etc., R. Co. *v.* Pillow, 9 Heisk. (Tenn.) 248.

94. *Illinois.*— Taylor *v.* Roby, 37 Ill. App. 147, employment of juror on other case during suspension of proceedings.

Indiana.— Aurora, etc., Turnpike Co. *v.* Niebruggee, 25 Ind. App. 567, 58 N. E. 864, at view.

Maine.—Pellitier *v.* Milford Land, etc., Co., (1886) 5 Atl. 262, taking notes of testimony.

Minnesota.— Gurney *v.* Minneapolis, etc., R. Co., 41 Minn. 223, 43 N. W. 2, failure of a juror to accompany the other jurors to view premises.

Missouri.— Grove *v.* Kansas, 75 Mo. 672, failure to take to jury room instructions which had been read and discussed.

New Hampshire.—Noyes *v.* Gould, 57 N. H. 20, stranger furnishing liquor to referees.

New York.— Bruswitz *v.* Netherlands Steam Nav. Co., 64 Hun 262, 19 N. Y. Suppl. 75 (juror assuming conduct of case); Paulitsch *v.* New York Cent., etc., R. Co., 50 N. Y. Super. Ct. 241; Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236.

Tennessee.— Tinkle *v.* Dunivant, 16 Lea 503, attempt to influence juror.

Canada.— Scribner *v.* McLaughlin, 6 N. Brunsw. 379.

See 37 Cent. Dig. tit. "New Trial," §§ 110, 114, 115.

95. *California.*— Monaghan *v.* Pacific Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590.

Georgia.— Barker *v.* Stewart, 110 Ga. 854, 36 S. E. 238; Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Martin *v.* Tidwell, 36 Ga. 332; Jackson *v.* Jackson, 32 Ga. 325.

Illinois.— Chicago Junction R. Co. *v.* McGrath, 107 Ill. App. 100 [*affirmed* in 203 Ill. 511, 68 N. E. 69].

Iowa.— Foedisch *v.* Chicago, etc., R. Co.,

jurors,[96] the use of intoxicating liquor by jurors,[97] the improper furnishing of refreshments or liquors to jurors,[98] an improper separation of the jury,[99] or of jurors from the remainder of the jury,[1] inattention on the part of jurors,[2] or the taking of improper papers to the jury room,[3] is usually waived by failure to call the attention of the court thereto promptly after discovery. In some jurisdictions the failure to make objection during the trial to the misconduct of jurors is not necessarily fatal to the allowance of a new trial where the prejudice resulting from the misconduct might not have been fully overcome by reproval or other

100 Iowa 728, 69 N. W. 1055; Hahn *v.* Miller, 60 Iowa 96, 14 N. W. 119.

Kentucky.— Drake *v.* Drake, 107 Ky. 32, 52 S. W. 846, 21 Ky. L. Rep. 636.

Maine.— Fessenden *v.* Sager, 53 Me. 531.

Massachusetts.— Hill *v.* Greenwood, 160 Mass. 256, 35 N. E. 668; Rowe *v.* Canney, 139 Mass. 41, 29 N. E. 219.

Missouri.—Ern *v.* Rubinstein, 72 Mo. App. 337; St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 351.

Nevada.— Lee *v.* McLeod, 15 Nev. 158.

New York.— Mahoney *v.* Decker, 18 Hun 365 (by the judge); Bernikow *v.* Pommerantz, 94 N. Y. Suppl. 487; Valiente *v.* Bryan, 66 How. Pr. 302.

Pennsylvania.— Bentz *v.* South Bethlehem, 7 North. Co. Rep. 107.

South Dakota.— Peterson *v.* Siglinger, 3 S. D. 255, 52 N. W. 1062.

Tennessee.— Tinkle *v.* Dunivant, 16 Lea 503.

Virginia.— Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348.

West Virginia.— Dower *v.* Church, 21 W. Va. 23.

United States.— Berry *v.* De Witt, 27 Fed. 723, 23 Blatchf. 544; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121.

See 37 Cent. Dig. tit. "New Trial," § 111.

Improper newspaper articles.— The attention of the court should have been called to improper newspaper articles at the time. Tiffany *v.* McNee, 24 Ont. 551. Where a party has asked the withdrawal of a juror after the publication of an improper newspaper article, he is not bound to renew his motion on the publication of other articles. Meyer *v.* Cadwalader, 49 Fed. 32. A party is not precluded from asking a new trial for improper newspaper articles because he did not have the publishers cited for contempt of court or did not ask for a continuance. Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337.

96. *Illinois.*— Stampofski *v.* Steffens, 79 Ill. 303; Shelbyville *v.* Brant, 61 Ill. App. 153.

Indiana.— Fifth Ave. Sav. Bank *v.* Cooper, 19 Ind. App. 13, 48 N. E. 236.

Maine.—Townsend *v.* Kelley, (1886) 5 Atl. 69.

Missouri.— Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073.

Vermont.— Whitcher *v.* Peacham, 52 Vt. 242.

United States.—Consolidated Ice-Mach. Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898.

Canada.— Widder *v.* Buffalo, etc., R. Co., 24 U. C. Q. B. 520.

Continuing trial without objection.— It is not sufficient to simply call the court's attention to the matter and continue the trial without objection. Widder *v.* Buffalo, etc., R. Co., 24 U. C. Q. B. 520.

97. Ipswitch *v.* Fernandez, 84 Cal. 639, 24 Pac. 298; Merriman's Appeal, 108 Mich. 454, 66 N. W. 372; Jejorek *v.* Nanticoke, 9 Kulp (Pa.) 501.

Lack of opportunity to object.— If there was no opportunity between the assembling of the court and the return of the verdict to make objection, the irregularity is not waived. Hanrahan *v.* Ayres, 10 Misc. (N. Y.) 435, 31 N. Y. Suppl. 458.

98. Salter *v.* Glenn, 42 Ga. 64; Bradshaw *v.* Degenhart, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677; Patton *v.* Hughesdale Mfg. Co., 11 R. I. 188; Clark *v.* Elmendorf, (Tex. Civ. App. 1904) 78 S. W. 538. See also Barker *v.* Stewart, 110 Ga. 854, 36 S. E. 238.

Necessity of insisting on objection.— It is not sufficient to call the court's attention to the matter if the objection is not insisted upon. Clark *v.* Elmendorf, (Tex. Civ. App. 1904) 78 S. W. 538.

99. Adkins *v.* Williams, 23 Ga. 222; Riggins *v.* Brown, 12 Ga. 271; Spring *v.* Cockburn, 19 U. C. C. P. 63.

Waiver of objection.— Where, after one juror has gone home, the parties consent to the separation of the rest of the panel, the error is waived. Parsons *v.* Huff, 38 Me. 137.

1. Steward *v.* Hinkel, 72 Cal. 187, 13 Pac. 494; Medlock *v.* De Kalb County, 115 Ga. 337, 41 S. E. 579.

2. Lee *v.* McLeod, 15 Nev. 158.

Jurors sleeping.— Attention should be called to jurors sleeping. Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881; Scott *v.* Waldeck, 12 Nebr. 5, 10 N. W. 413. A new trial will not be granted merely because a juror appeared to be asleep during a portion of the trial. Pelham *v.* Page, 6 Ark. 535.

Reading newspapers.— That jurors read newspapers during the trial and did not read instructions given at the request of the unsuccessful party was not ground for a new trial. Langworthy *v.* Myers, 4 Iowa 18.

3. Davenport *v.* Cummings, 15 Iowa 219; State *v.* Delong, 12 Iowa 453; Turner *v.* Kelley, 10 Iowa 573; Shields *v.* Guffey, 9 Iowa 322; Littlefield *v.* Beamis, 5 Rob. (La.) 145; Boyer *v.* Shenandoah, 16 Pa. Co. Ct. 75; Blum *v.* Warner, 1 Leg. Rec. (Pa.) 113.

action by the court.[4] Where an offending juror is retained upon the jury by the consent of the parties,[5] or is excused and the cause tried to the remainder of the jury by consent, the misconduct of the juror is waived.[6]

E. Irregularities and Defects in Verdicts and Findings — 1. In Rendition of Verdict or Decision. A slight irregularity in returning or receiving a verdict is not ground for a new trial,[7] especially where the irregularity was not objected to at the time.[8] The refusal to poll a jury on demand of the unsuccessful party is ground for a new trial in some states,[9] but not in others.[10] The amendment of a verdict after the discharge of the jury is cause for setting it aside.[11] That findings of a court or referee were filed out of time is not ground for a new trial.[12]

2. In Verdict or Findings — a. Verdict or Decision on Immaterial Matter or Not Responsive to Issues. New trials seem to have been awarded in some cases where verdicts were rendered on immaterial issues,[13] but the more appropriate remedy would seem to be a repleader.[14] Where a verdict or decision is not responsive to the issues under the pleadings a new trial may be granted.[15]

4. Oleson *v.* Meader, 40 Iowa 662 (attorney talking on law of case to juror after conclusion of argument); Peterson *v.* Siglinger, 3 S. D. 255, 52 N. W. 1062; McDaniels *v.* McDaniels, 40 Vt. 363; Allum *v.* Boultbee, 2 C. L. R. 1072, 9 Exch. 738, 18 Jur. 406, 23 L. J. Exch. 208, 2 Wkly. Rep. 459. See also Henlow *v.* Leonard, 7 Johns. (N. Y.) 200, presence of judge in jury room.

5. Gale *v.* New York Cent., etc., R. Co., 13 Hun (N. Y.) 1 [*affirmed* in 76 N. Y. 594]; Flesher *v.* Hale, 22 W. Va. 44.

6. Young *v.* Otto, 57 Minn. 307, 59 N. W. 199.

7. Gholston *v.* Gholston, 31 Ga. 625 (where judge offered to receive verdict on Sunday, but sent jury back till Monday, one of the parties withdrawing consent); Sheeks *v.* Sheeks, 98 Ind. 288 (mistake in name of party in reading verdict). *Compare* Bentley *v.* Fleming, 1 C. B. 479, 3 D. & L. 23, 9 Jur. 402, 14 L. J. C. P. 174, 50 E. C. L. 479, where doubt existed as to whether a juror assented to the verdict.

Absence of counsel at the rendition of a verdict, not due to any fault of the court, is not ordinarily ground for a new trial. Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803; Gale *v.* Hoysradt, 1 How. Pr. (N. Y.) 19. But where a verdict was returned and filed and the jury discharged after court had adjourned and, in the absence of counsel, a new trial was granted upon a showing that, had counsel been present to poll the jury, sufficient jurors would not have agreed to the verdict. Holgate *v.* Parker, 18 Wash. 206, 51 Pac. 368.

Juror not agreeing to verdict.— Where it was contended that the answers of a juror, on a poll of the jury, showed that he did not agree to the verdict, it was held that the complaining party should have moved not to receive the verdict. Macon R., etc., Co. *v.* Barnes, 121 Ga. 443, 49 S. E. 282. See also Farrell *v.* Hennesy, 21 Wis. 632.

Mere irregularity in the submission of interrogatories, not prejudicial to the losing party, is not ground for a new trial. Petrie *v.* Boyle, 56 Iowa 163, 9 N. W. 114. See also Warren *v.* Williams, 52 Me. 343.

8. Blake *v.* Bayley, 16 Gray (Mass.) 531, return of verdict after adjournment of court.

9. Jackson *v.* Hawks, 2 Wend. (N. Y.) 619; Fox *v.* Smith, 3 Cow. (N. Y.) 23; White *v.* Archbald School Dist., 2 Pa. Co. Ct. 1.

The failure, on demand, to call together a jury to assent to a sealed verdict which it had returned was held ground for a new trial. Campbell *v.* Linton, 27 U. C. Q. B. 563.

10. Rutland *v.* Hathorn, 36 Ga. 380; Martin *v.* Maverick, 1 McCord (S. C.) 24.

11. Hine *v.* Robbins, 8 Conn. 342; Weston *v.* Gilmore, 63 Me. 493; Wertz *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 872, 30 Cinc. L. Bul. 280.

A mistake in recording a verdict may be cause for setting it aside. Jamieson *v.* Harker, 18 U. C. Q. B. 590.

12. Kepfler *v.* Kepfler, 134 Cal. 205, 66 Pac. 208; McQuillan *v.* Donahue, 49 Cal. 157; Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621; Quinlan *v.* Stratton, 7 N. Y. Suppl. 786 [*affirmed* in 121 N. Y. 705, 24 N. E. 1100].

13. Hitchcock *v.* Haight, 7 Ill. 604; Jones *v.* Fennimore, 1 Greene (Iowa) 134; Beatty *v.* Smith, 5 Munf. (Va.) 39; Cogswell *v.* Holland, 21 Nova Scotia 155, on appeal.

14. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105. And see Andrews' Stephen Pl. § 127.

15. Jeffersonville Water Supply Co. *v.* Riter, 138 Ind. 170, 37 N. E. 652 (although finding supported by evidence); Wilson *v.* City Nat. Bank, 51 Nebr. 87, 70 N. W. 501 (as contrary to law); Marshall *v.* Golden Fleece Gold, etc., Min. Co., 16 Nev. 156 (decision of referee); Bowen *v.* White, 26 R. I. 68, 58 Atl. 252; Marsalis *v.* Patton, 83 Tex. 521, 18 S. W. 1070; Kesler *v.* Zimmerschitte, 1 Tex. 50, on appeal.

A mere finding of fact by the jury on an issue not submitted to them may be disregarded. Brashears *v.* Barrabino, 8 Mart. (La.) 641. See also Walker *v.* Smith, 29 Fed. Cas. No. 17,087, 1 Wash. 202, as to find-

b. Issues or Question Not Decided. Where a cause of action[16] or a good plea[17] or any material issue[18] is not passed on by the verdict or decision, a motion for a

ing on liability for costs. *Compare* Power *v.* Fairbanks, 146 Cal. 611, 80 Pac. 1075, holding that the remedy is by appeal.

Failure to find on all the material issues on which evidence is introduced is ground for new trial. Brown *v.* Macey, 13 Ida. 451, 90 Pac. 339. But see Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037.

16 Guerin *v.* Smith, 62 Mich. 369, 28 N. W 906; Edington *v.* Pickle, 1 Sneed (Tenn.) 122 (verdict on set-off only); Biggs *v.* Barry, 3 Fed. Cas. No. 1,402, 2 Curt. 259. See also Ridenour *v.* Miller, 83 Ind. 208, on motion for venire de novo.

Refusal to require the jury to declare on which count they found their verdict was held no ground for new trial. Bulkley *v.* Andrews, 39 Conn. 523. *Compare* Biggs *v.* Barry, 3 Fed. Cas. No. 1,402, 2 Curt. 259.

17. Welsh *v.* Barrow, 9 Rob. (La.) 520; Johnston *v.* Bagley, 4 La. 333; Robertson *v.* Netherton, 2 Overt. (Tenn.) 326; Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50; Baker *v.* Read, 1 Nova Scotia Dec. 199; Talbot *v.* McDougall, 3 U. C. Q. B. O. S. 644. See also Postmaster-Gen. *v.* Cross, 19 Fed. Cas. No. 11,306, 4 Wash. 326, on motions in arrest of judgment and for venire de novo. *Compare* Quinlan *v.* Stratton, 7 N. Y. Suppl. 786 [*affirmed* in 121 N. Y. 705, 24 N. E. 1100].

18. *California.*— Power *v.* Fairbanks, 146 Cal. 611, 80 Pac. 1075 (failure of trial court to find on material issue); Millard *v.* Supreme Council A. L. H., (1889) 21 Pac. 825; West *v.* Girard, (1884) 4 Pac. 565; Porter *v.* Muller, 65 Cal. 512, 4 Pac. 531 (decision by court); Southern Pac. R. Co. *v.* Bennett, (1884) 1 Pac. 702 (decision by court); Garlick *v.* Bower, 62 Cal. 65; Brown *v.* Burbank, 59 Cal. 535 (decision by court); Knight *v.* Roche, 56 Cal. 15; Hawkins *v.* Reichert, 28 Cal. 534.

Indiana.— Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146 (not venire de novo); Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327; Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Indiana, etc., R. Co. *v.* Finnell, 116 Ind. 414, 19 N. E. 204; Vinton *v.* Baldwin, 95 Ind. 433; Dodge *v.* Pope, 93 Ind. 480; Dodge *v.* Dunham, 41 Ind. 186; Gray *v.* Taylor, 2 Ind. App. 155, 28 N. E. 220. See also Gauntt *v.* State, 81 Ind. 137, as to insufficiency of facts found by referee.

Massachusetts.— Brooks *v.* Prescott, 114 Mass. 392.

New York.— Kintz *v.* McNeal, 1 Den. 436, special verdict.

Texas.— Collins *v.* Kay, 69 Tex. 365, 6 S. W. 313. *Compare* Huff *v.* Crawford, (Civ. App. 1895) 32 S. W. 592, where it was held that no findings need be made on a cross bill which had been virtually abandoned.

Virginia.— Triplett *v.* Micou, 1 Rand 269.

Canada.— Manitoba Free Press Co. *v.* Martin, 21 Can. Sup. Ct. 518; Dixon *v.* Dauphinee, 37 Can. L. J. N. S. 366, 34 Nova Scotia 239; Thompson *v.* Mott, 32 N. Brunsw. 350; Whitford *v.* Mills, 27 Nova Scotia 223 (decision of court); Lynett *v.* Parkinson, 1 U. C. C. P. 144; McMartin *v.* Graham, 2 U. C. Q. B. 365.

See 37 Cent. Dig. tit. "New Trial," § 124.

Issues not presented by pleadings.— The court is not bound to make findings on issues not presented by the pleadings. Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890.

The failure to answer questions specifically which are substantially answered in findings on other questions is not ground for new trial. Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173.

Motion in arrest of judgment.— It seems that the appropriate common-law remedy was a motion in arrest of judgment. Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

An omission to find material facts within the issue as distinguished from a failure to find upon the issue has been held ground for new trial. Lafayette *v.* Allen, 81 Ind. 166. See also Schmitz *v.* Lauferty, 29 Ind. 400.

If a finding upon the particular issue in favor of the movant could not change the result, a new trial should be refused. Gates *v.* McLean, 70 Cal. 42, 11 Pac. 489; Finch *v.* Green, 16 Minn. 355.

In Indiana it was formerly held **that the** failure to find upon a material issue was ground for a venire de novo and not for a new trial. Locke *v.* Merchants' Nat. Bank, 66 Ind. 353; Anderson *v.* Donnell, 66 Ind. 150 [*overruling* Cruzan *v.* Smith, 41 Ind. 288; Schmitz *v.* Lauferty, 29 Ind. 400]; Dehority *v.* Nelson, 56 Ind. 414; Whitworth *v.* Ballard, 56 Ind. 279; Housworth *v.* Bloomhuff, 54 Ind. 487; Jenkins *v.* Parkhill, 25 Ind. 473. But in later cases the failure to find expressly upon an issue was held equivalent to a negative finding. Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Lafayette *v.* Allen, 81 Ind. 166; Parker *v.* Hubble, 75 Ind. 580; *Ex p.* Walls, 73 Ind. 95 (expressly overruling or modifying prior cases); Graham *v.* State, 66 Ind. 386.

If a special finding states only matter of evidence and not the facts proved, a motion for a venire de novo is proper. Parker *v.* Hubble, 75 Ind. 580.

In Kansas the failure of a trial court to make findings on material facts sufficiently proved is not ground for a new trial unless the court has been requested to make such findings and has refused to do so. Shuler *v.* Lashhorn, 67 Kan. 694, 74 Pac. 264.

In North Dakota the refusal or failure of a trial judge to find on all the issues in an action tried by him is not ground for a new trial, but the aggrieved party may have a trial *de novo* in the supreme court. Chaffee-Miller Land Co. *v.* Barber, 12 N. D. 478, 97 N. W. 850.

new trial is proper in some jurisdictions. A verdict or decision which does not cover a material point on which there was legal evidence is "contrary to law," within a statute allowing a new trial on that ground,[19] and contrary to evidence.[20] That a jury has refused or failed to answer any special question on a material matter, which they were required to answer,[21] or that the court has refused improperly to require the jury to answer any such question,[22] when properly presented,[23] is ground for new trial.

c. Uncertainty or Inconsistency in Verdict or Findings. In some states a new trial will be granted, on motion, where the verdict fails to assess definitely the amount of recovery,[24] or where it is otherwise so indefinite and uncertain that judgment cannot be entered thereon.[25] That special findings on material facts

19. Knight *v.* Roche, 56 Cal. 15; Lafayette *v.* Allen, 81 Ind. 166; Welsh *v.* Barrow, 9 Rob. (La.) 520.

20. Vinton *v.* Baldwin, 95 Ind. 433.

Where the verdict is against a part only of defendants and there is no finding as to other defendants, the obligation or liability not being joint, a new trial need not necessarily be granted. Shapleigh *v.* Abbott, 41 Me. 173; Chanet *v.* Parker, 1 Mill (S. C.) 333.

21. *California.*— People *v.* Russ, 132 Cal. 102, 64 Pac. 111.

Colorado.— Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 45 Pac. 383, wilfully evasive answer.

Kansas.— Baehler *v.* Kansas City Consol. Ranch Co., 31 Kan. 502, 3 Pac. 343; Minneapolis Harvester Works Co. *v.* Cummings, 26 Kan. 367.

South Carolina.— Hedley *v.* Jordan, 2 Rich. 453.

Vermont.—Whitney *v.* Londonderry, 54 Vt. 41.

Wisconsin.— See Schillinger *v.* Verona, 85 Wis. 589, 55 N. W. 1040, insufficient answer.

Canada.— Pudsey *v.* Dominion Atlantic R. Co., 25 Can. Sup. Ct. 691.

See 37 Cent. Dig. tit. "New Trial," § 125.

Compare Smith *v.* Broughton, 1 Harr. & M. (Md.) 33, as to failure of jury to return special verdict as instructed.

Failure to make special findings.— The failure of the jury to make distinct findings is not ground for a new trial, where it is agreed that the jury is to find generally for one of the parties, and the court is to put the verdict into proper form. Collins *v.* Carr, 118 Ga. 205, 44 S. E. 1000; Fearon *v.* Murray, 10 N. Brunsw. 11. At common law a jury may refuse to make special findings, and such refusal is not ground for a new trial. Devizes *v.* Clark, 3 A. & E. 506, 30 E. C. L. 240. Where a verdict is taken subject to the opinion of the court on a question of law reserved, failure to state the facts on which the question may be determined is ground for a new trial. Banyer *v.* Ellice, 1 Hill (N. Y.) 23; Pittsburgh Cent. Bank *v.* Earley, 115 Pa. St. 359, 10 Atl. 33.

22. Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327 (as "error of law"); Astley *v.* Capron, 89 Ind. 167; Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222, 42 Pac. 699; St. Louis, etc., R. Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. 312; Baehler *v.* Kansas City Consol. Ranch Co., 31 Kan. 502, 3 Pac. 343. *Compare* Turner *v.* Burns, 24 Ont. 28.

If the matters referred to in an interrogatory are fully covered by the answers to other interrogatories, the refusal of the court to require an answer thereto is not ground for a new trial. Louisville, etc., R. Co. *v.* Kane, 120 Ind. 140, 22 N. E. 80.

23. Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415.

24. Lake *v.* Hardee, 57 Ga. 459 (verdict in equity); New Orleans Commercial Bank *v.* Stein, 4 Rob. (La.) 189; Collings *v.* Hamilton, 14 La. 343; Hosea *v.* Miles, 13 La. 107; Peterson *v.* Patrick, 126 Mass. 395; Eppes *v.* Smith, 4 Munf. (Va.) 466. But see Goosely *v.* Holmes, 3 Call (Va.) 424, in which a venire de novo was awarded.

In Illinois the remedy is by motion for venire de novo. Broeck *v.* Wabash, etc., R. Co., 13 Ill. App. 556.

Where all the facts on which to base a judgment are found, the mere failure to compute the amount due does not render a new trial necessary. People *v.* Sierra Buttes Quartz Min. Co., 39 Cal. 511.

25. *Georgia.*— Abbott *v.* Roach, 113 Ga. 511, 38 S. E. 955; Lake *v.* Hardee, 55 Ga. 667.

New York.— Hyatt *v.* New York Cent., etc., R. Co., 6 Hun 306.

North Carolina.— Turrentine *v.* Richmond, etc., R. Co., 92 N. C. 638.

South Carolina.— Eason *v.* Miller, 18 S. C. 381; Ryan *v.* Copes, 11 Rich. 217, 73 Am. Dec. 106.

Virginia.— McLean *v.* Copper, 3 Call 367 (on appeal); Doe *v.* Northern, 1 Wash. 282 (on appeal).

West Virginia.— Oney *v.* Clendenin, 28 W. Va. 34, holding either motion in arrest of judgment or motion for new trial proper.

England.— Oakley *v.* Ood-Deen, 2 L. T. Rep. N. S. 357.

Canada.—St. Denis *v.* Baxter, 15 Ont. App. 387.

See 37 Cent. Dig. tit. "New Trial," §§ 121, 122.

A motion for venire de novo is the proper remedy in some states (Leeds *v.* Boyer, 59 Ind. 289; Smith *v.* Jeffries, 25 Ind. 376; Cincinnati, etc., R. Co. *v.* Washburn, 25 Ind. 259; Kessler *v.* Citizens' St. R. Co., 20 Ind.

by a jury or judge are inconsistent with each other,[26] or with a general verdict returned with them,[27] is ground for new trial in some jurisdictions. In some states the party against whom the general verdict is given should move for judgment on the special findings, if they are sufficient to sustain his case.[28] Where the jury has found for defendant upon a plea to the jurisdiction, a finding against plaintiff on a defense in bar should be attacked by motion in arrest of judgment rather than by motion for a new trial.[29]

F. Verdict or Decision Contrary to Law. A verdict or decision that under the evidence is contrary to the law governing the case must be set aside.[30] As a

App. 427, 50 N. E. 891 (special verdict); Ford *v.* Ford, 3 Wis. 399.

Application of rule.— Where separate actions against different defendants are tried together and the jury are separately instructed in each case, but return a single verdict against all the defendants, a new trial is necessary. Sellers *v.* Green, 69 N. J. L. 228, 54 Atl. 556.

That a verdict was rendered in favor of two plaintiffs which should have been for one only is not ground for a new trial where, by statute, a party "may be dropped at any stage of the case as justice may require." Maher *v.* James Hanley Brewing Co., 23 R. I. 343, 50 Atl. 392.

26. *California.*— Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (findings of jury adopted by court in equity case); Sloss *v.* Allman, 64 Cal. 47, 30 Pac. 574; Harris *v.* Harris, 59 Cal. 623; Cottle *v.* Morris, 57 Cal. 317; Manly *v.* Howlett, 55 Cal. 94; Reese *v.* Corcoran, 52 Cal. 495.

Georgia.— Mitchell *v.* Printup, 27 Ga. 469.

Idaho.— Gwin *v.* Gwin, 5 Ida. 271, 48 Pac. 295.

Indiana.— Van Hook *v.* Young, 29 Ind. App. 471, 64 N. E. 670. But see Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599, holding that the method of objecting to an inconsistency in special findings is by exception to conclusions of law predicated thereon.

Kansas.— Anderson *v.* Pierce, 62 Kan. 756, 64 Pac. 633; Topeka Bank *v.* Miller, 59 Kan. 743, 54 Pac. 1070; Chicago, etc., R. Co. *v.* Williams, 59 Kan. 700, 54 Pac. 1047; Kansas City *v.* Brady, 53 Kan. 312, 36 Pac. 726; Southern Kansas R. Co. *v.* Gorsuch, 47 Kan. 583, 28 Pac. 803; St. Louis, etc., R. Co. *v.* Shoemaker, 38 Kan. 723, 17 Pac. 584; Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Shoemaker *v.* St. Louis, etc., R. Co., 30 Kan. 359, 2 Pac. 517; Minneapolis Harvester Works Co. *v.* Cummings, 26 Kan. 367.

Wisconsin.— Farley *v.* Chicago, etc., R. Co., 89 Wis. 206, 61 N. W. 769; Burns *v.* North Chicago Rolling Mill Co., 60 Wis. 541, 19 N. W. 380; Lawton *v.* Royal Canadian Ins. Co., 50 Wis. 163, 6 N. W. 505; Kearney *v.* Chicago, etc., R. Co., 47 Wis. 144, 2 N. W. 82.

See 37 Cent. Dig. tit. "New Trial," § 126.

In North Carolina the proper remedy is a motion for a venire de novo. State *v.* White Oak River Corp., 111 N. C. 661, 16 S. E. 331; Puffer *v.* Lucas, 107 N. C. 322, 12 S. E. 130, 464; Allen *v.* Sallinger, 105 N. C. 333, 10 S. E. 1020; Morrison *v.* Watson, 95 N. C. 479; Mitchell *v.* Brown, 88 N. C. 156.

A merely technical conflict in findings which are consistent with the general verdict is not ground for a new trial. Anthony *v.* Atwood, (Kan. App. 1900) 62 Pac. 720.

27. *Illinois.*— St. Louis Bridge Co. *v.* Fellows, 31 Ill. App. 282.

Indiana.— Burkhart *v.* Gladish, 123 Ind. 337, 24 N. E. 118; Van Hook *v.* Young, 29 Ind. App. 471, 64 N. E. 670.

Iowa.— See Ford *v.* Central Iowa R. Co., 69 Iowa 627, 21 N. W. 587, 29 N. W. 755.

Kansas.— Anderson *v.* Pierce, 62 Kan. 756, 64 Pac. 633; Topeka Bank *v.* Miller, 59 Kan. 743, 54 Pac. 1070; Kansas City *v.* Brady, 53 Kan. 312, 36 Pac. 726; Latshaw *v.* Moore, 53 Kan. 234, 36 Pac. 342; Southern Kansas R. Co. *v.* Gorsuch, 47 Kan. 583, 28 Pac. 703 (especially where special findings show unfairness); St. Louis, etc., R. Co. *v.* Shoemaker, 38 Kan. 723, 17 Pac. 584; Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Shoemaker *v.* St. Louis, etc., R. Co., 30 Kan. 359, 2 Pac. 517; Minneapolis Harvester Works Co. *v.* Cummings, 26 Kan. 367; Atchison, etc., R. Co. *v.* Maher, 23 Kan. 163.

Nebraska.— Omaha Valley R. Co. *v.* Hall, 33 Nebr. 229, 50 N. W. 10.

Canada.— McKinnon *v.* McNeill, 16 Nova Scotia 25.

See 37 Cent. Dig. tit. "New Trial," § 126.

28. Louisville, etc., R. Co. *v.* Kane, 120 Ind. 140, 22 N. E. 80; Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394; Adamson *v.* Rose, 30 Ind. 380; Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162; Blevins *v.* Atchison, etc., R. Co., 3 Okla. 512, 41 Pac. 92.

29. Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

30. *California.*— Martin *v.* Matfield, 49 Cal. 42; Speck *v.* Hoyt, 3 Cal. 413, where no instruction given on point.

Georgia.— Monroe Female University *v.* Broadfield, 30 Ga. 1; Chambers *v.* Collier, 4 Ga. 193.

Indiana.—Robinson Mach. Works *v.* Chandler, 56 Ind. 575.

Iowa.— Jourdan *v.* Reed, 1 Iowa 135; Jones *v.* Fennimore, 1 Greene 134.

Massachusetts.— Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543.

New York.— Gale *v.* Wells, 12 Barb. 84;

general rule a verdict will be set aside as contrary to law, where, under the evidence, it is contrary to the instructions given by the court.[31] In some jurisdic-

Wilkie *v.* Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149.

North Carolina.— Hamilton *v.* Bullock, 3 N. C. 224.

South Carolina.— Markley *v.* Amos, 2 Bailey 603; Payne *v.* Trezevant, 2 Bay 23.

Vermont.— Hall *v.* Downs, Brayt. 168.

England.— Gregory *v.* Tuffs, 1 C. M. & R. 310, 2 Dowl. P. C. 711, 3 L. J. Exch. 295, 4 Tyrw. 820, whether arising from a misapprehension of the jury or the misdirection of a judge.

Canada.— Blake *v.* Shaw, 10 U. C. Q. B. 180.

See 37 Cent. Dig. tit. "New Trial," § 132.

If in answer to questions by the judge it appears that the jury have returned a verdict on an erroneous principle, a new trial should be granted. Parrott *v.* Thacher, 9 Pick. (Mass.) 426; Pierce *v.* Woodward, 6 Pick. (Mass.) 206. See also State *v.* Layton, 3 Harr. (Del.) 469, as to statement accompanying verdict showing error of law in making calculation.

Where an error of law results in an erroneous verdict or decision of fact, the latter is contrary to law. Martin *v.* Matfield, 49 Cal. 42; Robinson Mach. Works *v.* Chandler, 56 Ind. 575, improper ruling on admission of evidence.

That the unsuccessful party did not ask instructions that might have prevented an erroneous verdict is not sufficient reason for refusing to set aside a verdict erroneous on the evidence and instructions given. Stell *v.* Paschal, 41 Tex. 640. *Compare* Thayer *v.* Stevens, 44 N. H. 484; Codner *v.* Bizzell, 82 N. C. 390.

Where a judgment is entered on findings which do not determine all the material issues raised by the pleadings with respect to which evidence was introduced, the decision is against the law, and a new trial may be granted on that account. Brown *v.* Macey, 13 Ida. 451, 90 Pac. 339.

31. *California.*— Emerson *v.* Santa Clara County, 40 Cal. 543.

Delaware.— State *v.* Layton, 3 Harr. 469.

Georgia.— Wilkins *v.* Grant, 118 Ga. 522, 45 S. E. 415; Pomeroy *v.* Gershon, 118 Ga. 521, 45 S. E. 415; Kane *v.* Savannah, etc., R. Co., 85 Ga. 858, 11 S. E. 493; Bradley *v.* Burkett, 82 Ga. 255, 11 S. E. 492 (failure to render alternative verdict in trover as instructed); Jones *v.* Lynch, 54 Ga. 271; Pace *v.* Mealing, 21 Ga. 464; Thornton *v.* Lane, 11 Ga. 459; Tyler *v.* Gray, 9 Ga. 408; Bank *v.* Marchand, T. U. P. Charlt. 247.

Illinois.— Higgins *v.* Lee, 16 Ill. 495.

Iowa.— Battin *v.* Marshalltown, (1898) 77 N. W. 493; Bushnell *v.* Chicago, etc., R. Co., 69 Iowa 620, 29 N. W. 753; Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276; Graham *v.* McGeoch, 61 Iowa 51, 15 N. W. 592; Farley *v.* Budd, 14 Iowa 289.

Kentucky.— Taylor *v.* Howser, 12 Bush 465.

Massachusetts.— Peterson *v.* Patrick, 126 Mass. 395; Cunningham *v.* Magoun, 18 Pick. 13 (second new trial); Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543.

Mississippi.— New Orleans, etc., R. Co. *v.* Enochs, 42 Miss. 603; Garvin *v.* Lowry, 7 Sm. & M. 24.

Missouri.— Laclede Power Co. *v.* Nash Smith Tea, etc., Co., 95 Mo. App. 412, 69 S. W. 27, nominal damages under instruction for actual damages.

Nebraska.— Omaha, etc., R. Co. *v.* Hall, 33 Nebr. 229, 50 N. W. 10; Aultman *v.* Reams, 9 Nebr. 487, 4 N. W. 81; Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

Nevada.— Hoffman *v.* Bosch, 18 Nev. 360, 4 Pac. 703, on measure of damages.

New York.— Tinson *v.* Welch, 7 Rob. 392 [*affirmed* in 51 N. Y. 244]; Bigelow *v.* Garwitz, 15 N. Y. Suppl. 940; H. B. Smith Co. *v.* Chapin, 13 N. Y. Suppl. 799.

Pennsylvania.— Lehr *v.* Brodbeck, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. Rep. 828; Cresman *v.* Caster, 2 Browne 123; Weber *v.* Berger, 5 Lack. Jur. 137; Wilson *v.* Whittaker, 5 Phila. 358 (on measure of damages); Keim *v.* Maurer, 2 Woodw. 412 (charge on evidence); Moore *v.* Hollenbach, 2 Woodw. 99.

South Carolina.— Robert Buist Co. *v.* Lancaster Mercantile Co., 68 S. C. 523, 47 S. E. 978; Thompson *v.* Lee, 19 S. C. 489; Charleston *v.* Hollenback, 3 Strobh. 355; Markley *v.* Amos, 2 Bailey 603; Munro *v.* Gardner, 1 Mill 328; Moore *v.* Cherry, 1 Bay 269.

South Dakota.— Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205.

Tennessee.— Dickinson *v.* Cruise, 1 Head 258; Tate *v.* Gray, 4 Sneed 591; Marr *v.* Johnson, 9 Yerg. 1.

Texas.— Marsalis *v.* Patton, 83 Tex. 521, 18 S. W. 1070; Collins *v.* Kay, 69 Tex. 365, 6 S. W. 313; Hilliard *v.* Johnson, (Civ. App. 1895) 32 S. W. 914.

Washington.— Trumbull *v.* Callum County School Dist. No. 7, 22 Wash. 631, 61 Pac. 714.

Wisconsin.— Charles Baumbach Co. *v.* Gessler, 79 Wis. 567, 48 N. W. 802.

United States.— Hunt *v.* Pooke, 12 Fed. Cas. No. 6,895, 1 Abb. 556; Stafford *v.* Pawtucket Haircloth Co., 22 Fed. Cas. No. 13,275, 2 Cliff. 82; Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170; U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356; Walker *v.* Smith, 28 Fed. Cas. No. 17,087, 1 Wash. 202.

England.— See Quinlane *v.* Murnane, L. R. 18 Ir. 53.

Canada.— Rajotte *v.* Canadian Pac. R. Co., 5 Manitoba 365; Whitehead *v.* Howard, 3 Nova Scotia Dec. 458; McNabb *v.* Howland, 11 U. C. C. P. 434; Logan *v.* Ryan, 10 U. C. Q. B. 15; Kerby *v.* Lewis, 1 U. C. Q. B. 66, 285, 6 U. C. Q. B. O. S. 489, third trial. See also Doe *v.* McDonald, 2 U. C. Q. B. 267, as to verdict contrary to judge's charge on

tions the rule is the same, although the instructions were unsound in law or improperly given,[32] while in other jurisdictions a new trial will be denied where the verdict would not be contrary to the evidence under proper instructions.[33] Where the evidence was conflicting, and there was evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions.[34]

G. Verdict or Decision Contrary to or Not Sustained by Evidence — 1. Contrary to Evidence in General — a. Statement of General Principles. Generally speaking it is ground for new trial that the verdict is contrary to the evidence,[35]

the evidence. *Compare* McMahon *v.* Campbell, 2 U. C. Q. B. 158, where substantial justice had been done.

See 37 Cent. Dig. tit. "New Trial," §§ 132, 134.

The phrase "contrary to law" means contrary to the instructions. Valerius *v.* Richard, 57 Minn. 443, 59 N. W. 534.

Where the jury are judges of both law and fact, it is not ground for a new trial that they misunderstood the law. Witter *v.* Brewster, Kirby (Conn.) 422; Scovel *v.* Tyler, 2 Root (Conn.) 144.

Where the evidence was susceptible of two inferences, a new trial will not be granted because the jury disregarded an instruction applicable to one of them only. Hasseltine *v.* Southern R. Co., 75 S. C. 141, 55 S. E. 142, 6 L. R. A. N. S. 1009.

Harmless error.— Where the court has reduced the damages to one dollar, a new trial should not be granted merely on the ground that the jury disregarded an instruction that they could not award more than nominal damages. Morlan *v.* Russell, 71 Iowa 214, 32 N. W. 266.

As to proper specification of the error especially in Indiana see *infra*, IV, H, 3, f.

32 *California.*— Aguirre *v.* Alexander, 58 Cal. 21; Emerson *v.* Santa Clara County, 40 Cal. 543, as "against law."

Iowa.— Crane *v.* Chicago, etc., R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479; Evans *v.* St. Paul Harvester Works, 63 Iowa 204, 18 N. W. 881; Sullivan *v.* Otis, 39 Iowa 328; Jewett *v.* Smart, 11 Iowa 505; Caffrey *v.* Groome, 10 Iowa 548.

Montana.— King *v.* Lincoln, 26 Mont. 157, 66 Pac. 836; Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

Nebraska.— Standiford *v.* Green, 54 Nebr. 10, 74 N. W. 263, as contrary to law.

New York.— Rogers *v.* Murray, 3 Bosw. 357. See also Bunten *v.* Orient Mut. Ins. Co., 4 Bosw. 254.

Pennsylvania.— Flemming *v.* Marine Ins. Co., 4 Whart. 59, 33 Am. Dec. 33 (as to evidence); Paul *v.* Cassellberry, 12 Phila. 313.

South Carolina.—Dent *v.* Bryce, 16 S. C. 1.

England.— Wood *v.* Cox, 17 C. B. 280, 84 E. C. L. 280.

Canada.— See Doe *v.* Thompson, 17 N. Brunsw. 516.

See 37 Cent. Dig. tit. "New Trial," § 133.

A verdict rendered pursuant to an improper instruction is not "contrary to law" under N. Y. Code Civ. Proc. § 999. Swartout *v.* Willingham, 6 Misc. (N. Y.) 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66.

Obvious mistake in instruction.— The jury may properly disregard an obvious mistake in an instruction. Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879.

33. *Georgia.*— Pitts *v.* Thrower, 30 Ga. 312; Dozier *v.* Dozier, 20 Ga. 263; Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Kentucky.— Armstrong *v.* Keith, 3 J. J. Marsh. 153, 20 Am. Dec. 131.

Mississippi.— Van Vacter *v.* Brewster, 1 Sm. & M. 400.

Texas.—Cochrane *v.* Winburn, 13 Tex. 143, no evidence to justify instruction. See also Pearson *v.* Burditt, 26 Tex. 157, 80 Am. Dec. 649.

Canada.— Todd *v.* Liverpool, etc., Ins. Co., 18 U. C. C. P. 192.

See 37 Cent. Dig. tit. "New Trial," § 133.

34. *California.*— Townley *v.* Adams, 118 Cal. 382, 50 Pac. 550.

Massachusetts.— Hannum *v.* Belchertown, 19 Pick. 311.

Oregon.— Ruckman *v.* Ormond, 42 Oreg. 209, 70 Pac. 707.

South Carolina.— Brown *v.* Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40.

Vermont.— Smith *v.* Hubbard, 1 Tyler 142.

United States.—Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

England.— Hawkins *v.* Alder, 18 C. B. 640, 86 E. C. L. 640 (not "perverse"); Chilvers *v.* Greaves, 5 M. & G. 578, 6 Scott N. R. 539, 44 E. C. L. 305 (a verdict for substantial damages under a recommendation to find for plaintiff with nominal damages).

35. *Alaska.*— McMorry *v.* Ryan, 1 Alaska 516.

Arkansas.— Benedict *v.* Lawson, 5 Ark. 514.

California.— Crocker *v.* Garland, (App. 1906) 87 Pac. 209.

Connecticut.— Fell *v.* John Hancock Mut. L. Ins. Co., 76 Conn. 494, 57 Atl. 175.

Georgia.— Pomeroy *v.* Gershon, 118 Ga. 521, 45 S. E. 415; Collins *v.* Wilcox, 84 Ga. 599, 11 S. E. 142; Ft. Valley Planters' Bank *v.* Kersh, 66 Ga. 255; Monroe Female University *v.* Broadfield, 30 Ga. 1; Jones *v.* Keaton, 22 Ga. 582; Fleming *v.* Hammond, 19 Ga. 145; Mealing *v.* Pace, 14 Ga. 596, at common law.

Kansas.— Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772.

Massachusetts.— Clark *v.* Jenkins, 162

or to the weight of the evidence.[36] This statement may perhaps be somewhat too general. A more accurate statement deduced from the language of various courts is that a new trial will be granted where the verdict is plainly, manifestly, palpably, clearly, decidedly, or strongly against the evidence or the weight of

Mass. 397, 38 N. E. 974; Fitchburg R. Co. *v.* Eastern R. Co., 6 Allen 98.

Mississippi.— Rives *v.* Odeneal, 8 Sm. & M. 691; Nye *v.* Grubbs, 8 Sm. & M. 643; Garvin *v.* Lowry, 7 Sm. & M. 24.

Missouri.— State *v.* Todd, 92 Mo. App. 1. See also Woodfolk *v.* Tate, 25 Mo. 597, as to duty of successor of trial judge to hear motion.

New York.— Reid *v.* Young, 7 N. Y. App. Div. 400, 39 N. Y. Suppl. 899; Bunten *v.* Orient Mut. Ins. Co., 4 Bosw. 254; Klein *v.* Dunn, 86 N. Y. Suppl. 101.

Pennsylvania.— Duane *v.* Miercken, 4 Yeates 437.

South Carolina.—Abel *v.* Hutto, 8 Rich. 42.

Tennessee.— Cumberland Tel., etc., Co. *v.* Smithwick, 112 Tenn. 463, 79 S. W. 803; Vaulx *v.* Herman, 8 Lea 683.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 16 Wash. 288, 47 Pac. 738.

United States.— Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, 1 Hempst. 72; Rochell *v.* Phillips, 20 Fed. Cas. No. 11,974*a*, 1 Hempst. 22.

Canada.—Doe *v.* Humphreys, 12 N. Brunsw. 104 (in ejectment where statute of limitations would bar a new trial); McEachern *v.* Ferguson, 5 N. Brunsw. 242; Andrews *v.* Wilson, 5 N. Brunsw. 86 (libel); Burnham *v.* White, 4 N. Brunsw. 571.

See 37 Cent. Dig. tit. "New Trial," §§ 135, 140.

Where the verdict is not to be reconciled with the evidence on any theory of the case, a new trial should be granted. Wheeling Mold, etc., Co. *v.* Wheeling Steel, etc., Co., 62 W. Va. 288, 57 S. E. 826.

The code term "insufficient evidence" is equivalent to "against evidence." Algeo *v.* Duncan, 39 N. Y. 313 [*affirming* 24 How. Pr. 210].

Evidence improperly admitted.— It had been held that in passing on a motion for a new trial on the sole ground that the verdict is against the evidence, the court cannot refuse to consider evidence improperly admitted. McCloud *v.* O'Neall, 16 Cal. 392. *Compare* Hazen *v.* Henry, 6 Ark. 86.

A verdict which is contrary to the evidence under the rule of law adopted by the court will generally be set aside. Bunten *v.* Orient Mut. Ins. Co., 4 Bosw. (N. Y.) 254.

If plaintiff was clearly entitled to recover as to part of personal property sued for, a general verdict for defendant must be set aside. Moak *v.* Bourne, 13 Wis. 514.

As to proper specification of the ground for a new trial see *infra*, IV, H, 3, f.

36. *California.*— Martin *v.* Martin, 113 Cal. 479, 45 Pac. 813; Central Trust Co. *v.* Stoddard, 4 Cal. App. 647, 88 Pac. 806.

Connecticut.— Parsons *v.* Utica Cement Mfg. Co., 80 Conn. 58, 66 Atl. 1024.

Florida.— Branch *v.* Wilson, 12 Fla. 543.

Georgia.— Hiett *v.* Cherokee R. Co., 77 Ga. 574; Long *v.* Lewis, 16 Ga. 154.

Mississippi.— McQueen *v.* Bostwick, 12 Sm. & M. 604.

Missouri.— Herndon *v.* Lewis, 175 Mo. 116, 74 S. W. 976; Brunswick First Nat. Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554; Dean *v.* Philadelphia Fire Assoc., 65 Mo. App. 209.

New Jersey.— Hutchinson *v.* Coleman, 10 N. J. L. 74.

New York.— Kellogg *v.* New York Edison Co., 120 N. Y. App. Div. 410, 105 N. Y. Suppl. 398; Krakower *v.* Davis, 20 Misc. 350, 45 N. Y. Suppl. 780.

Oregon.—Multnomah County *v.* Willamette Towing Co., (1907) 89 Pac. 389.

Rhode Island.— Leeds *v.* Cetenich, (1906) 67 Atl. 446.

Tennessee.— Turner *v.* Turner, 85 Tenn. 387, 3 S. W. 121.

Vermont.— Averill *v.* Robinson, 70 Vt. 161, 40 Atl. 49.

Washington.— Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,921, 1 Wash. 123.

West Virginia.— Reynolds *v.* Tompkins, 23 W. Va. 229.

Canada.— Raymond *v.* Cummings, 17 N. Brunsw. 544; Smith *v.* Andrews, 17 N. Brunsw. 541; Hayward *v.* White, 4 N. Brunsw. 304; Keys *v.* Flinn, 2 N. Brunsw. 125; Doe *v.* Whitney, Taylor (U. C.) 130 (as to verdict in ejectment not necessarily conclusive); Cameron *v.* Milloy, 14 U. C. C. P. 340; Scanlon *v.* McDonagh, 8 U. C. C. P. 82; Provincial Ins. Co. *v.* Maitland, 7 U. C. C. P. 426; Stock *v.* Ward, 7 U. C. C. P. 127; Street *v.* Cuthbert, 6 U. C. C. P. 225. *Compare* Doe *v.* McWilliams, 3 U. C. Q. B. 165, where the unsuccessful party had been wanting in diligence.

See 37 Cent. Dig. tit. "New Trial," §§ 146, 147, 148.

Where there is some evidence to sustain verdict.— But it has sometimes been held, or said, that a new trial should not be granted where there is any evidence sufficient to sustain the verdict. Lindsay *v.* Wayland, 17 Ark. 385; Fender *v.* Valdosta Lumber Co., 128 Ga. 622, 58 S. E. 163; Lawrenceville *v.* Born, 128 Ga. 240, 57 S. E. 318; Epps *v.* Miller, 127 Ga. 118, 56 S. E. 123; Collier *v.* Whatley, 127 Ga. 96, 56 S. E. 128; Swartout *v.* Willingham, 6 Misc. (N. Y.) 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66; Deysher *v.* Hilsinger, 2 Woodw. (Pa.) 153; Brown *v.* Philadelphia, etc., R. Co., 2 Woodw. (Pa.) 144; Moll *v.* Zimmerman, 1 Woodw. (Pa.) 501; Morien *v.* Norfolk, etc., Terminal Co., 102 Va. 622, 46 S. E. 907. See also Davey *v.* Ætna L. Ins. Co., 20 Fed. 494. *Compare* Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

The term "contrary to the evidence" in N. Y. Code Civ. Proc. § 999, includes

evidence.[37] Where the verdict is so strongly against the weight of evidence as to

"against the weight of the evidence." Krakower *v.* Davis, 20 Misc. (N. Y.) 350, 45 N. Y. Suppl. 780.

A statute authorizing a new trial "for insufficient evidence" confers power to grant a new trial where the verdict is "against the weight of evidence." McDonald *v.* Walter, 40 N. Y. 551; Inland, etc., Coasting Co. *v.* Hall, 124 U. S. 121, 8 S. Ct. 397, 31 L. ed. 369; Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. ed. 1022.

In ejectment the court may refuse to set aside a verdict as against evidence where a new trial may be had as a matter of right. Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370; Doe *v.* Hache, 15 N. Brunsw. 348. See EJECTMENT, 15 Cyc. 172.

Where the cause of action or defense is disfavored, new trials are seldom given because against the weight of evidence. East River Bank *v.* Hoyt, 22 How. Pr. (N. Y.) 478 (defense of usury); Walker *v.* Entwisle, 1 L. T. Rep. N. S. 553 (action for seduction).

37. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, (1900) 30 So. 546, (1897) 23 So. 53, against overwhelming preponderance.

Arkansas.—Anderson *v.* Wilburn, 8 Ark. 155.

California.—Cooper *v.* Spring Valley Water Works, 145 Cal. 207, 78 Pac. 654; Green *v.* Soule, 145 Cal. 96, 78 Pac. 337; Franz *v.* Mendonca, 131 Cal. 205, 63 Pac. 361; Byxbee *v.* Dewey, 128 Cal. 322, 60 Pac. 847; Condee *v.* Gyger, 126 Cal. 546, 59 Pac. 26; Bjorman *v.* Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591; Curtiss *v.* Starr, 85 Cal. 376, 24 Pac. 806; Bennett *v.* Hobro, 72 Cal. 178, 13 Pac. 473; Irving *v.* Cunningham, 58 Cal. 306; Mason *v.* Austin, 46 Cal. 385; Dickey *v.* Davis, 39 Cal. 565; Hall *v.* The Emily Banning, 33 Cal. 522.

Colorado.— Rankin *v.* Cardillo, 38 Colo. 216, 88 Pac. 170; Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

Connecticut.— Howe *v.* Raymond, 74 Conn. 68, 49 Atl. 854; Newell *v.* Wright, 8 Conn. 319; Nichols *v.* Alsop, 6 Conn. 477; Johnson *v.* Scribner, 6 Conn. 185; Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.

Florida.— Sanderson *v.* Hagan, 7 Fla. 318.

Georgia.— Sawyer *v.* Georgia R., etc., Co., 123 Ga. 251, 51 S. E. 321; Buice *v.* Buice, 111 Ga. 887, 36 S. E. 969; Clayton *v.* Daniel, 88 Ga. 300, 14 S. E. 470; Smith *v.* Kirkpatrick, 79 Ga. 410, 7 S. E. 258; Taylor *v.* Central R., etc., Co., 79 Ga. 330, 5 S. E. 114; Williams *v.* Central R. Co., 77 Ga. 612, 3 S. E. 88; Oliver *v.* Coleman, 36 Ga. 552; Rich *v.* Mobley, 33 Ga. 85; Stancell *v.* Kenan, 33 Ga. 56; Cook *v.* Jones, 28 Ga. 589; Clements *v.* Little, 28 Ga. 491; Lucas *v.* Parsons, 27 Ga. 593; Calhoun *v.* Stokes, 26 Ga. 325; Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400; Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

Illinois.— People *v.* Alton, 209 Ill. 461, 70 N. E. 640; Belden *v.* Innis, 84 Ill. 78; Lincoln *v.* Stowell, 62 Ill. 84; Peoria School Inspectors *v.* Hughes, 24 Ill. 231; Boyle *v.* Levings, 24 Ill. 223; Higgins *v.* Lee, 16 Ill. 495; Schwab *v.* Gingerick, 13 Ill. 697; Chicago Union Traction Co. *v.* O'Donnell, 113 Ill. App. 259 [*affirmed* in 211 Ill. 349, 71 N. E. 1015]; Johnston *v.* Sochurek, 104 Ill. App. 350; Sibley Warehouse, etc., Co. *v.* Durand, etc., Co., 102 Ill. App. 406 [*affirmed* in 200 Ill. 354, 65 N. E. 676]; Chicago City R. Co. *v.* Maloney, 99 Ill. App. 623; Belt R. Co. *v.* Kinnare, 83 Ill. App. 200; Wells, etc., Co. *v.* Novak, 73 Ill. App. 403.

Indiana.— Hammond *v.* Schweitzer, 112 Ind. 246, 13 N. E. 869; Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329.

Iowa.— Battin *v.* Marshalltown, (1898) 77 N. W. 493; Ford *v.* Central Iowa R. Co., 69 Iowa 627, 21 N. W. 587, 29 N. W. 755; Sullivan *v.* Wabash, etc., R. Co., 58 Iowa 602, 12 N. W. 621 (as to evidence not necessarily conflicting); Jourdan *v.* Reed, 1 Iowa 135; Humphreys *v.* Hoyt, 4 Greene 245.

Kansas.— Ireton *v.* Ireton, 62 Kan. 358, 63 Pac. 429; Atchison, etc., R. Co. *v.* Matthews, 58 Kan. 447, 49 Pac. 602; Cherokee, etc., Coal, etc., Co. *v.* Stoop, 56 Kan. 426, 43 Pac. 766; Union Pac. R. Co. *v.* Diehl, 33 Kan. 422, 6 Pac. 566; Williams *v.* Townsend, 15 Kan. 563; McIntosh *v.* Crane, 9 Kan. App. 314, 61 Pac. 331.

Maine.— Phillips *v.* Laughlin, 99 Me. 26, 58 Atl. 64, 105 Am. St. Rep. 253; Lewis *v.* Washington County R. Co., 97 Me. 340, 54 Atl. 766.

Michigan.— Wheeler *v.* Jenison, 120 Mich. 422, 79 N. W. 643.

Minnesota.— Voge *v.* Penney, 74 Minn. 525, 77 N. W. 422.

Mississippi.— Sims *v.* McIntyre, 8 Sm. & M. 324.

Missouri.— Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Lawson *v.* Mills, 130 Mo. 170, 31 S. W. 1051; Iron Mountain Bank *v.* Armstrong, 92 Mo. 256, 4 S. W. 720; Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421; Roman *v.* Boston Trading Co., 87 Mo. App. 186; Dean *v.* Philadelphia Fire Assoc., 65 Mo. App. 209; Reid *v.* Lloyd, 61 Mo. App. 646; Hull *v.* Missouri Pac. R. Co., 60 Mo. App. 593; Wight *v.* Missouri Pac. R. Co., 20 Mo. App. 481.

Montana.— Harrington *v.* Butte, etc., Min. Co., 27 Mont. 1, 69 Pac. 102; Michaud *v.* Freischeimer, 16 Mont. 472, 41 Pac. 231; Silver Bow Min., etc., Co. *v.* Lowry, 6 Mont. 288, 12 Pac. 652.

Nevada.— Phillpotts *v.* Blasdel, 8 Nev. 61.

New Jersey.— Ames *v.* North Jersey St. R. Co., 65 N. J. L. 110, 46 Atl. 701; Hays *v.* Pennsylvania R. Co., 42 N. J. L. 446; Corlis *v.* Little, 14 N. J. L. 373.

New York.— Fick *v.* Metropolitan St. R. Co., 26 N. Y. App. Div. 84, 49 N. Y. Suppl. 693; Seibert *v.* Erie R. Co., 49 Barb. 583; Fleming *v.* Smith, 44 Barb. 554; Wehrum *v.* Kuhn, 34 N. Y. Super. Ct. 336; Kinsman *v.*

shock the court's sense of justice,[38] or indicate that the jury were influenced by passion, prejudice, or other improper motive,[39] a new trial will presumably be

New York Mut. Ins. Co., 5 Bosw. 460; Clark *v.* Mechanics' Nat. Bank, 8 Daly 481; Surkin *v.* Interborough St. R. Co., 45 Misc. 407, 90 N. Y. Suppl. 342; Cullinan *v.* Kisselbrack, 43 Misc. 103, 87 N. Y. Suppl. 1025; Johnson *v.* New York Cent., etc., R. Co., 40 Misc. 350, 82 N. Y. Suppl. 254; Chavias *v.* Dry Dock, etc., R. Co., 34 Misc. 694, 70 N. Y. Suppl. 1014; East River Bank *v.* Hoyt, 22 How. Pr. 478; Mumford *v.* Smith, 1 Cai. 520; Wilkie *v.* Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149 note.

North Dakota.— Ross *v.* Robertson, 12 N. D. 27, 94 N. W. 765.

Pennsylvania.— Dougherty *v.* Andrews, 202 Pa. St. 633, 52 Atl. 47; Buggy *v.* Welling, 5 Phila. 365; McIntosh *v.* The Church, 3 Phila. 33; Scull *v.* Kensington Bank, 30 Leg. Int. 117.

Rhode Island.— Gunn *v.* Union R. Co., 22 R. I. 579, 48 Atl. 1045.

South Carolina.—Bradley *v.* Long, 2 Strobh. 160; Hudson *v.* Williamson, 3 Brev. 342; Munro *v.* Gairdner, 3 Brev. 31, 5 Am. Dec. 531; Byrnes *v.* Alexander, 1 Brev. 213.

Tennessee.— Nashville Spoke, etc., Co. *v.* Thomas, 114 Tenn. 458, 86 S. W. 379; Nashville, etc., R. Co. *v.* Neely, 102 Tenn. 700, 52 S. W. 167; Tate *v.* Gray, 4 Sneed 591.

Texas.— Howerton *v.* Holt, 23 Tex. 51; Houston, etc., R. Co. *v.* Loeffler, (Civ. App. 1900) 59 S. W. 558.

Virginia.— Black *v.* Virginia Portland Cement Co., 106 Va. 121, 55 S. E. 587.

Washington.— Rotting *v.* Cleman, 12 Wash. 615, 41 Pac. 907.

West Virginia.— Coalmer *v.* Barrett, 61 W. Va. 237, 56 S. E. 385; Laidley *v.* Kanawha County Ct., 44 W. Va. 566, 30 S. E. 109; Black *v.* Thomas, 21 W. Va. 709; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452; Gaus *v.* Kammer, 9 W. Va. 64.

Wisconsin.— Lee *v.* Chicago, etc., R. Co., 101 Wis. 352, 77 N. W. 714; Flaherty *v.* Harrison, 98 Wis. 559, 74 N. W. 360; McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 52 N. W. 93; Moak *v.* Bourne, 13 Wis. 514.

United States.—Boudrot *v.* Cochrane Chemical Co., 110 Fed. 919 (holding United States circuit court has such power); Ulman *v.* Clark, 100 Fed. 180; Wright *v.* Southern Express Co., 80 Fed. 85; Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321. *Compare* Stewart *v.* Sixth-Ave. R. Co., 45 Fed. 21; Hunt *v.* Pooke, 12 Fed. Cas. No. 6,895, 1 Abb. 556; Thomas *v.* Hatch, 22 Fed. Cas. No. 13,899, 3 Sumn. 170; U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

England.—Aitken *v.* McMeckan, [1895] A. C. 310.

Canada.— Maxwell *v.* Malcolm, 33 N. Brunsw. 595; Doe *v.* Watson, 6 N. Brunsw. 675; Doe *v.* Hatch, 6 N. Brunsw. 200 (on question of fraud); Grieve *v.* Molsons Bank, 8 Ont. 162; McMillan *v.* Gore Dist. Mut. F. Ins. Co., 21 U. C. C. P. 123 (although a contrary verdict would prove the prevailing party guilty of a crime); Ray *v.* Blair, 12 C. P. 238; Canadian Bank of Commerce *v.* McMillan, 31 U. C. Q. B. 596 (especially where verdict rested solely on the testimony of the prevailing party); Doe *v.* Massecar, 5 U. C. Q. B. 455.

See 37 Cent. Dig. tit. "New Trial," §§ 135, 146.

Verdict must be palpably unjust.— To justify setting aside a verdict on the ground that it is plainly against the weight and preponderance of conflicting evidence, a verdict must be palpably unjust. A doubtful case or a slight weight in the preponderance of the evidence is not sufficient to warrant setting it aside. Miller Supply Co. *v.* Crane, 61 W. Va. 658, 57 S. E. 268; Coalmer *v.* Barrett, 61 W. Va. 237, 56 S. E. 385.

38. Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

39. *Alaska.*— Williams *v.* Alaska Commercial Co., 2 Alaska 43.

California.— Bagley *v.* Eaton, 8 Cal. 159.

Florida.— Schultz *v.* Pacific Ins. Co., 14 Fla. 73.

Georgia.— Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

Illinois.— Illinois Cent. R. Co. *v.* Satkowski, 107 Ill. App. 524; Close *v.* Hinsley, 104 Ill. App. 65; St. Louis Nat. Stock Yards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90]; Armour *v.* McFadden, 9 Ill. App. 508.

Iowa.— Miller *v.* Chicago, etc., R. Co., 70 Iowa 302, 30 N. W. 580.

Kansas.— Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

Maine.— Boston *v.* Buffum, 97 Me. 230, 54 Atl. 392; Roberts *v.* Boston, etc., R. Co., 83 Me. 298, 22 Atl. 174; Hunnewell *v.* Hobart, 40 Me. 28.

Missouri.— Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Garrett *v.* Greenwell, 92 Mo. 120, 4 S. W. 441 (on appeal); Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74 (on appeal); Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 335; Empey *v.* Grand Ave. Cable Co., 45 Mo. App. 422 (on appeal); Friesz *v.* Fallon, 24 Mo. App. 439 (on appeal).

New Jersey.— Hollister *v.* Wood, (Sup. 1899) 43 Atl. 653; Consumers' Coal Co. *v.* Hutchinson, 36 N. J. L. 24, verdict presumptively influenced by jurors' unfounded suspicions of corrupt arrangement between defendant and a juror.

New York.— Schmidt *v.* Brown, 80 Hun 183, 30 N. Y. Suppl. 68; McCarthy *v.* Christopher, etc., St. R. Co., 10 Daly 540; Kingsley *v.* Finch, 54 Misc. 317, 105 N. Y. Suppl. 968.

Pennsylvania.— Bartholomew *v.* Speer, 7 North. Co. Rep. 152.

South Carolina.— English *v.* Clerry, 3 Hill 279.

granted in any jurisdiction. That the verdict is so clearly against evidence as to indicate that the jury misapprehended the facts or the principle of law governing the case is generally ground for a new trial.[40] Yet it is generally held an invasion of the province of the jury to set aside a verdict that is not clearly or decidedly against the evidence,[41] or the weight of

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

United States.—Dow *v.* Wells, 11 Fed. 132; Hunt *v.* Pooke, 12 Fed. Cas. No. 6,895, 1 Abb. 556; Shaw *v.* Scottish Commercial Ins. Co., 21 Fed. Cas. No. 12,723, 2 Hask. 246; Stafford *v.* Pawtucket Haircloth Co., 22 Fed. Cas. No. 13,275, 2 Cliff. 82.

Canada.— McGunigal *v.* Grand Trunk R. Co., 33 U. C. Q. B. 194.

See 37 Cent. Dig. tit. "New Trial," § 157.

Verdict against one in joint action.—A verdict in an action against a railroad company and its agent for a joint tort against the company alone, where the evidence was much stronger against the agent, is not ground for setting the verdict aside as due to prejudice. Ruddell *v.* Seaboard Air Line R. Co., 75 S. C. 290, 55 S. E. 528.

40. *California.*— George *v.* Law, 1 Cal. 363; Payne *v.* Pacific Mail Steamship Co., 1 Cal. 33.

Georgia.— Patterson *v.* Phinizy, 51 Ga. 33; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

Illinois.— St. Louis Nat. Stockyards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90].

Iowa.— Jourdan *v.* Reed, 1 Iowa 135.

Kansas.— Williams *v.* Townsend, 15 Kan. 563.

Maine.— Merrill *v.* Bassett, 97 Me. 501, 54 Atl. 1102 (as to defendant's legal duty); Boston *v.* Buffum, 97 Me. 230, 54 Atl. 392. *Compare* Bishop *v.* Williamson, 8 Me. 162.

Massachusetts.— Treanor *v.* Donahoe, 9 Cush. 228 (of principle of law); Worster *v.* Canal Bridge, 16 Pick. 541.

Minnesota.— Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388 (slander); Shartle *v.* Minneapolis, 17 Minn. 308; Du Laurans *v.* St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102.

Mississippi.— Vicksburg, etc., R. Co. *v.* Lawrence, 78 Miss. 86, 28 So. 826, evident mistake as to effect of instructions.

Nebraska.— Lenzen *v.* Miller, 51 Nebr. 855, 71 N. W. 715.

New Hampshire.— Lucier *v.* Larose, 66 N. H. 141, 20 Atl. 249.

New York.— McDonald *v.* Long Island R. Co., 6 N. Y. St. 691.

Ohio.— Fisher *v.* Patterson, 14 Ohio 418.

Pennsylvania.— Whipple *v.* West Philadelphia Pass. R. Co., 11 Phila. 345. But see Shields *v.* Windsor, 1 Phila. 72.

Rhode Island.— McGowan *v.* Interstate Consol. St. R. Co., 20 R. I. 264, 38 Atl. 497.

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

Virginia.— Deems *v.* Quarrier, 3 Rand. 475.

United States.— Thurston *v.* Martin, 23 Fed. Cas. No. 14,018, 5 Mason 497; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524.

England.— Lambkin *v.* South Eastern R. Co., 5 App. Cas. 352, 28 Wkly. Rep. 837; Edgell *v.* Francis, 1 M. & G. 222, 39 E. C. L. 729; Gough *v.* Farr, 1 Y. & J. 477, breach of promise of marriage.

Canada.— Lough *v.* Coleman, 29 U. C. Q. B. 367.

But see Witter *v.* Brewster, Kirby (Conn.) 422; Newton *v.* Whitney, 77 Wis. 515, 46 N. W. 882.

See 37 Cent. Dig. tit. "New Trial," § 157.

It seems that a misapprehension on the part of jury or jurors as to the legal effect of their verdict is not ground for a new trial. Minter *v.* Hite, 4 Iowa 583; Newton *v.* Booth, 13 Vt. 320, 37 Am. Dec. 596.

41. *Arkansas.*—Drennen *v.* Brown, 10 Ark. 138.

Connecticut.— Babcock *v.* Porter, 20 Conn. 570; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Bishop *v.* Perkins, 19 Conn. 300; Laflin *v.* Pomeroy, 11 Conn. 440; Palmer *v.* Hyde, 4 Conn. 426.

Delaware.— Johnson *v.* Porter, 2 Harr. 325.

Florida.— Farrell *v.* Solary, 43 Fla. 124, 31 So. 283; Tallahassee R. Co. *v.* Macon, 8 Fla. 299.

Georgia.— Pitts *v.* Thrower, 30 Ga. 212; Smith *v.* Smith, 29 Ga. 365; Mealing *v.* Pace, 14 Ga. 596 (under statute); Stroud *v.* Mays, 7 Ga. 269 (especially where fraud in fact in issue); Mayer *v.* Wiltberger, Ga. Dec. Pt. II, 20 (especially after two verdicts).

Kentucky.— Thomson *v.* Thomson, 93 Ky. 435, 20 S. W. 373, 14 Ky. L. Rep. 513; Page *v.* Carter, 8 B. Mon. 192; Hunt *v.* Hunt, 3 B. Mon. 575; McCoy *v.* Martin, 4 Dana 580; Steele *v.* Logan, 3 A. K. Marsh. 394; Tonstal *v.* Bishong, 2 A. K. Marsh. 521; Hemstein *v.* Depue, 70 S. W. 190, 24 Ky. L. Rep. 886.

Louisiana.— Wilkins *v.* East Baton Rouge Parish, 10 Rob. 57; Mason *v.* Louisiana State M. & F. Ins. Co., 1 Rob. 192.

Maine.— Stone *v.* Lewiston, etc., St. R. Co., 99 Me. 243, 59 Atl. 56; Lishon *v.* Winthrop, 93 Me. 541, 45 Atl. 528; Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Frost *v.* Wood, (1888) 14 Atl. 290; Nash *v.* Somes, (1887) 10 Atl. 447; Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472.

Massachusetts.— Hammond *v.* Wadhams, 5 Mass. 353.

Minnesota.— Gustafson *v.* Gustafson, 92 Minn. 139, 99 N. W. 631; Hunt *v.* St. Paul City R. Co., 89 Minn. 448, 95 N. W. 312.

Mississippi.— Prewett *v.* Coopwood, 30 Miss. 369.

New Jersey.— Garrett *v.* Driver Harris

evidence.[42] It is usually held that a new trial should not be granted because the verdict appears to be against the mere preponderance of the evidence,[43] or merely

Wire Co., 70 N. J. L. 382, 57 Atl. 127; Dickerson *v.* Payne, (Sup. 1902) 53 Atl. 699.

New York.— Cox *v.* Halloran, 82 N. Y. App. Div. 639, 81 N. Y. Suppl. 803; Jarchover *v.* Dry-Dock, etc., R. Co., 54 N. Y. App. Div. 238, 66 N. Y. Suppl. 575; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

Pennsylvania.— Blum *v.* Warner, 1 Leg. Rec. 113; Dentzel *v.* Fluck, 14 Montg. Co. Rep. 9.

Rhode Island.— Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092; Patton *v.* Hughesdale Mfg. Co., 11 R. I. 188; Johnson *v.* Blanchard, 5 R. I. 24.

South Carolina.— Scanlan *v.* Turner, 1 Bailey 421; McKane *v.* Bonner, 1 Bailey 113; Izard *v.* Montgomery, 1 Nott & M. 381.

Texas.— Morgan *v.* Giddings, (1886) 1 S. W. 369; Sims *v.* Chance, 7 Tex. 561.

Virginia.— Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455; Blosser *v.* Harsharger, 21 Gratt. 214; Hill *v.* Com., 2 Gratt. 594.

West Virginia.— Jones *v.* Singer Mfg. Co., 38 W. Va. 147, 18 S. E. 478; Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880; Ruffner *v.* Hill, 31 W. Va. 428, 7 S. E. 13; Sheff *v.* Huntington, 16 W. Va. 307; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

United States.— Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429; Fuller *v.* Fletcher, 6 Fed. 128; Cady *v.* Phœnix F. Ins. Co., 4 Fed. Cas. No. 2,284 (holding that the jury "must have fallen into some important mistake, or must have departed from some rule of law, or have made deductions from the evidence, which are plainly not warranted by it"); Fearing *v.* De Wolf, 8 Fed. Cas. No. 4,711, 3 Woodb. & M. 185; Hunt *v.* Pooke, 12 Fed. Cas. No. 6,895, 1 Abb. 556; Roberts *v.* Schuyler, 20 Fed. Cas. No. 11,915, 12 Blatchf. 444 (action for infringement of patent); U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

Canada.— Bates *v.* Lyon, 2 N. Brunsw. 63 (especially where movant was negligent in presenting case); Hooper *v.* Christoe, 14 U. C. C. P. 117. See also Estabrooks *v.* Breau, 15 N. Brunsw. 304, as between parties without title, each seeking to make title for himself.

See 37 Cent. Dig. tit. "New Trial," § 135.

To what cases rule not applicable.— It has been held that the rule does not apply to cases in which the verdict depends upon a question of science which is not fully solved but is still within the region of *bona fide* controversy. Metropolitan Dist. Asylum *v.* Hill, 47 J. P. 148, 47 L. T. Rep. N. S. 29.

42. *Connecticut.*— Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Georgia.— Cohen *v.* Weigle, 46 Ga. 438; Salter *v.* Glenn, 42 Ga. 64; Roe *v.* Mongin, 32 Ga. 625; Chamberlain *v.* Sheftall, 32 Ga. 567; Hobgood *v.* Cochran, 32 Ga. 539; Whitten *v.* Knox, 26 Ga. 560; Durham *v.* Broddus, 26 Ga. 524; Terrell *v.* McKinny, 26 Ga. 447; McIntyre *v.* Crawford, 26 Ga. 438; Askew *v.* Taylor, 19 Ga. 17; Wright *v.* Greenwood, 17 Ga. 418.

Illinois.— Summers *v.* Stark, 76 Ill. 208; Chicago, etc., R. Co. *v.* Hutchins, 34 Ill. 108; Kincaid *v.* Turner, 7 Ill. 618; Hill *v.* Ward, 7 Ill. 285.

Iowa.— McKay *v.* Thorington, 15 Iowa 25; Bowman *v.* Torr, 3 Iowa 571.

Maine.— Purinton *v.* Maine Cent. R. Co., 78 Me. 569, 7 Atl. 707; Myron *v.* Beal, (1887) 7 Atl. 601.

Mississippi.— Buckingham *v.* Walker, 48 Miss. 609.

New York.— Cheney *v.* New York Cent., etc., R. Co., 16 Hun 415 (against "overwhelming" weight); Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. 161; Swartout *v.* Willingham, 6 Misc. 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66; Martin *v.* Platt, 15 N. Y. Suppl. 49, 26 Abb. N. Cas. 382 [*affirmed* in 61 Hun 626, 16 N. Y. Suppl. 115]; Fash *v.* East River Ferry Co., 8 N. Y. St. 363; Redlein *v.* Long Island R. Co., 7 N. Y. St. 263 (holding the number of witnesses not controlling); Harton *v.* Carrick, 6 N. Y. St. 647. See also Oberlie *v.* Bushwick Ave. R. Co., 6 N. Y. St. 771.

Pennsylvania.— Evans *v.* Bitner, 4 Lanc. Bar, Sept. 7, 1872.

United States.— Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 3 Woodb. & M. 348; Carr *v.* Gale, 5 Fed. Cas. No. 2,435, 3 Woodb. & M. 38; Fearing *v.* De Wolf, 8 Fed. Cas. No. 4,711, 3 Woodb. & M. 185.

See 37 Cent. Dig. tit. "New Trial," § 146.

Setting aside verdict on motion of court.— In some states a clearer disregard of evidence must appear where the verdict is set aside on the court's own motion. Clement *v.* Barnes, 6 S. D. 483, 61 N. W. 1126.

New trial after death of trial judge.— Where, after the death of the trial judge, a new trial is asked in a case tried without a jury, it must clearly appear, after making due allowances for the superior advantages of the trial judge, that the findings were opposed to the weight of evidence. Reynolds *v.* Reynolds, 44 Minn. 132, 46 N. W. 236.

43. *Arkansas.*— Lindsay *v.* Wayland, 17 Ark. 385; Allen *v.* Nordheimer, 13 Ark. 339.

Connecticut.— Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Florida.—Gaines *v.* Forcheimer, 9 Fla. 265.

Georgia.— Georgia R., etc., Co. *v.* Rhodes, 87 Ga. 602, 13 S. E. 637; Roe *v.* Mongin, 32 Ga. 625; Chamberlain *v.* Sheftall, 32 Ga. 567; Hobgood *v.* Cochran, 32 Ga. 539; Smith *v.* Smith, 29 Ga. 365; Armis *v.* Barker, 4 Ga. 170; Peck *v.* Laud, 2 Ga. 1, 46 Am. Dec. 368. *Compare* Odom *v.* Nelms, 24 Ga. 412.

Illinois.— Bloom *v.* Crane, 24 Ill. 48; Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33; Chicago Union Traction Co. *v.* O'Donnell, 113 Ill. App. 259 [*affirmed* in 211 Ill. 349, 71 N. E. 1015]; Van Meter *v.* Lambert,

because the trial judge would probably have reached a conclusion different from that of the jury.[44] Where the evidence was so conflicting that different persons

104 Ill. App. 243; St. Louis Nat. Stock Yards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90].

Indiana.— Jerauld *v.* Watkins, 1 Ind. App. 466, 27 N. E. 872.

Maine.— Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91; Lavigne *v.* Lewiston Mills Co., (1887) 10 Atl. 62; Enfield *v.* Buswell, 62 Me. 128; Glidden *v.* Dunlap, 28 Me. 379.

Mississippi.— Buckingham *v.* Walker, 48 Miss. 609; Brown *v.* Forbes, 8 Sm. & M. 498; Dickson *v.* Parker, 3 How. 219, 34 Am. Dec. 78, in appellate court.

Missouri.— Price *v.* Evans, 49 Mo. 396. *Compare* Haven *v.* Missouri R. Co., 155 Mo. 216, 55 S. W. 1035.

New York.— Hutchinson *v.* Troy Market Bank, 48 Barb. 302; Leszynsky *v.* Leszynsky, 3 Silv. Sup. 242, 6 N. Y. Suppl. 857 [*affirmed* in 127 N. Y. 652, 27 N. E. 856]; Craswell *v.* New York, etc., Ferry, etc., Co., 27 Misc. 822, 57 N. Y. Suppl. 827 [*affirmed* in 28 Misc. 487, 59 N. Y. Suppl. 554]; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11; Rice *v.* Welling, 5 Wend. 595.

Pennsylvania.— Goodright *v.* McCausland, 1 Yeates 372, 1 Am. Dec. 306.

South Carolina.— Parker *v.* Bryce, 3 Strobh. 549.

Vermont.— Lewis *v.* Roby, 79 Vt. 487, 65 Atl. 524.

Virginia.— Morien *v.* Norfolk, etc., Terminal Co., 102 Va. 622, 46 S. E. 907.

United States.— Davey *v.* Ætna L. Ins. Co., 20 Fed. 494; Mengis *v.* Lebanon Mfg. Co., 10 Fed. 665; Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 3 Woodb. & M. 348; Fearing *v.* De Wolf, 8 Fed. Cas. No. 4,711, 3 Woodb. & M. 185; Johnson *v.* Harris, 13 Fed. Cas. No. 7,388, 1 Cranch C. C. 257; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

England.— Swain *v.* Hall, 3 Wils. C. P. 45.

Canada.— Brown *v.* Malpus, 7 U. C. C. P. 185; Doe *v.* McQueen, 9 U. C. Q. B. 576; McMillan *v.* Fairfield, 2 U. C. Q. B. O. S. 527, especially where verdict is against a plea of the statute of limitations.

See 37 Cent. Dig. tit. "New Trial," § 148.

Compare Mason *v.* Austin, 46 Cal. 385; Dart *v.* Russell, 99 Minn. 364, 109 N. W. 702; St. Amand *v.* Manville Co., (R. I. 1907) 67 Atl. 368; Di Stefano *v.* Rhode Island Co., (R. I. 1906) 66 Atl. 200; Turner *v.* Turner, 85 Tenn. 387, 3 S. W. 121.

44. *Alaska.*—Reams *v.* McAlpine, 2 Alaska 165; Williams *v.* Alaska Commercial Co., 2 Alaska 43; McMorry *v.* Ryan, 1 Alaska 516.

Arkansas.— Lindsay *v.* Wayland, 17 Ark. 385.

Connecticut.— Babcock *v.* Porter, 20 Conn. 570; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Bishop *v.* Perkins, 19 Conn. 300; Palmer *v.* Hyde, 4 Conn. 426.

Delaware.— Burton *v.* Philadelphia, etc., R. Co., 4 Harr. 252.

Georgia.— Ferst *v.* Hall, 108 Ga. 792, 33 S. E. 951.

Illinois.— Bloom *v.* Crane, 24 Ill. 48; Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33.

Kansas.— Atchison, etc., R. Co. *v.* Matthews, 58 Kan. 447, 49 Pac. 602; Middleton *v.* Drumm, (1897) 48 Pac. 579 (special findings); Johnson *v.* Leggett, 28 Kan. 590.

Kentucky.—Steele *v.* Logan, 3 A. K. Marsh. 394; Tonstal *v.* Bishong, 2 A. K. Marsh. 521.

Maine.— Garland *v.* Hewes, 101 Me. 549, 64 Atl. 914; Monroe *v.* Hampden, 95 Me. 111, 49 Atl. 604; Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Parks *v.* Libby, 92 Me. 133, 42 Atl. 318; Nash *v.* Somes, (1887) 10 Atl. 447; Lavigne *v.* Lewiston Mills Co., (1887) 10 Atl. 62; Milo *v.* Gardiner, 41 Me. 549; Bryant *v.* Glidden, 39 Me. 458.

Massachusetts.— Greenfield Bank *v.* Crafts, 4 Allen 447. See also Reeve *v.* Dennett, 137 Mass. 315, holding that a trial judge is not bound to set aside a verdict because, in his opinion, it is against the weight of evidence.

Michigan.— Rohde *v.* Biggs, 108 Mich. 446, 66 N. W. 331.

New Hampshire.— Clark *v.* Keene First Cong. Soc., 45 N. H. 331; Wendell *v.* Safford, 12 N. H. 171.

New Jersey.— Bennett *v.* Busch, (Sup. 1907) 67 Atl. 188.

New York.— Grogan *v.* Brooklyn Heights R. Co., 107 N. Y. App. Div. 254, 95 N. Y. Suppl. 23; Layman *v.* Anderson, 4 N. Y. App. Div. 124, 38 N. Y. Suppl. 883; Minick *v.* Troy, 19 Hun 253; Gale *v.* New York Cent., etc., R. Co., 13 Hun 1 [*affirming* 53 How. Pr. 385]; Hutchinson *v.* Troy Market Bank, 48 Barb. 302; Fleming *v.* Smith, 44 Barb. 554; Mackey *v.* New York Cent. R. Co., 27 Barb. 428; Murphy *v.* Boker, 3 Rob. 1; Corrigan *v.* Dry Dock, etc., R. Co., 14 Daly 120, 6 N. Y. St. 243; Salcinger *v.* Interurban St. R. Co., 52 Misc. 179, 101 N. Y. Suppl. 804; Craswell *v.* New York, etc., Ferry, etc., Co., 27 Misc. 822, 57 N. Y. Suppl. 827 [*affirmed* in 28 Misc. 487, 59 N. Y. Suppl. 554]; Vogel *v.* Werner, 101 N. Y. Suppl. 21; Benjamin *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1052; Eagan *v.* Hyde, 84 N. Y. Suppl. 540; Cothran *v.* Collins, 29 How. Pr. 155; Schlesinger *v.* Malloy, 1 N. Y. City Ct. 458; Mansfield *v.* Wheeler, 23 Wend. 79 (especially in hard case); Rice *v.* Welling, 5 Wend. 595; Baker *v.* Richardson, 1 Cow. 77. And see Grogan *v.* Brooklyn Heights R. Co., 107 N. Y. App. Div. 254, 95 N. Y. Suppl. 23, holding that the fact that the trial judge would have drawn a different inference of fact from undisputed evidence is not ground for a new trial.

North Carolina.— McCord *v.* Atlanta, etc., Air Line R. Co., 134 N. C. 53, 45 S. E. 1031.

Ohio.— Flagg *v.* Schubert, 10 Ohio S. & C. Pl. Dec. 120, 7 Ohio N. P. 244, 7 Ohio N. P. 608.

might honestly and intelligently have formed different conclusions therefrom, the verdict should stand.[45] Some decisions hold, especially under statutes, that a new

Pennsylvania.— Campbell *v.* Sproat, 1 Yeates 327; Flower *v.* Houghton, 12 Pa. Dist. 8; Mathews *v.* Pittsburg, etc., R. Co., 24 Pa. Co. Ct. 370; Boak *v.* Commings, 19 Pa. Co. Ct. 79; Buchanan *v.* Chester, 9 Del. Co. 328; Blum *v.* Warner, 1 Leg. Rec. 113; McGroarty *v.* Lehigh Valley Coal Co., 12 Luz. Leg. Reg. 204; Szuchy *v.* Lehigh Traction Co., 12 Luz. Leg. Reg. 123; Heft *v.* Griswold, 5 Phila. 365; Keim *v.* Maurer, 2 Woodw. 412; Becker *v.* Maurer, 2 Woodw. 264; Deysher *v.* Hilsinger, 2 Woodw. 153; Brown *v.* Philadelphia, etc., R. Co., 2 Woodw. 144; Moll *v.* Zimmerman, 1 Woodw. 501. *Compare* Emlen *v.* Robinson, 4 Phila. 92, where jury evidently misunderstood charge.

Rhode Island.— Watson *v.* Tripp, 11 R. I. 98, 23 Am. Rep. 420.

South Carolina.— Beandrot *v.* Southern R. Co., 69 S. C. 160, 48 S. E. 106.

Tennessee.— Tennessee Coal, etc., Co. *v.* Roddy, 85 Tenn. 400, 5 S. W. 286.

Vermont.— Lewis *v.* Roby, 79 Vt. 487, 65 Atl. 524.

Virginia.— Morien *v.* Norfolk, etc., Terminal Co., 102 Va. 622, 46 S. E. 907; Blosser *v.* Harshbarger, 21 Gratt. 214; Brugh *v.* Shanks, 5 Leigh 598.

West Virginia.— Parrish *v.* Huntington, 57 W. Va. 286, 50 S. E. 416; Sigler *v.* Beebe, 44 W. Va. 587, 30 S. E. 76; Jones *v.* Singer Mfg. Co., 38 W. Va. 147, 18 S. E. 478; Sheff *v.* Huntington, 16 W. Va. 307; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

United States.— Pringle *v.* Guild, 119 Fed. 962; Plummer *v.* Granite Mountain Min. Co., 55 Fed. 755; Davey *v.* Ætna L. Ins. Co., 20 Fed. 494; Muskegon Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 19 Fed. 405; Gilmer *v.* Grand Rapids, 16 Fed. 708; Mangis *v.* Lebanon Mfg. Co., 10 Fed. 665; Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb. Pat. Cas. 644, 3 Woodb. & M. 348; Bayly *v.* London, etc., Ins. Co., 2 Fed. Cas. No. 1,145; Fearing *v.* De Wolf, 8 Fed. Cas. No. 4,711, 3 Woodb. & M. 185; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193; Roberts *v.* Schuyler, 20 Fed. Cas. No. 11,915, 2 Ban. & A. 5, 12 Blatchf. 444; Shaw *v.* Scottish Commercial Ins. Co., 21 Fed. Cas. No. 12,723, 2 Hask. 246; U. S. *v.* Five Cases of Cloth, 25 Fed. Cas. No. 15,110, 2 N. Y. Leg. Obs. 84; Walker *v.* Smith, 29 Fed. Cas. No. 17,087, 1 Wash. 202; Waters *v.* Mutual L. Ins. Co., 29 Fed. Cas. No. 17,267.

England.— Solomon *v.* Britton, 8 Q. B. D. 176; Sprague *v.* Michell, 2 Chit. 271, 18 E. C. L. 630; Ferrand *v.* Bingley Local Bd., 56 J. P. 277; Hampson *v.* Guy, 64 L. T. Rep. N. S. 778; Camden *v.* Cowley, W. Bl. 418; Anonymous, 1 Wils. C. P. 22. *Compare* Cooke *v.* Green, 11 Price 736, where verdict against direction of judge on the evidence.

Canada.— Fraser *v.* Drew, 30 Can. Sup. Ct. 241; Doherty *v.* St. John, 26 N. Brunsw. 618; Fleming *v.* North British, etc., Ins. Co., 20 N. Brunsw. 153; Gourlay *v.* Ingram, 2 Ch. Chamb. (U. C.) 309 (issue in chancery); Miller *v.* Ball, 19 U. C. C. P. 447; Lyon *v.* Tiffany, 16 U. C. C. P. 197; Tuer *v.* Harrison, 14 U. C. C. P. 449; Knox *v.* Cleveland, 8 U. C. C. P. 176; Nolan *v.* Tipping, 7 U. C. C. P. 524; Brown *v.* Malpus, 7 U. C. C. P. 185; Anderson *v.* Anderson 1 U. C. C. P. 344; McLean *v.* Dun, 39 U. C. Q. B. 551; Davis *v.* Fortune, 6 U. C. Q. B. 281; Kenny *v.* Cook, 4 U. C. Q. B. 268; Wilson *v.* Hill, 5 U. C. Q. B. O. S. 56 (especially where a different verdict would involve an imputation of crime). *Compare* Heintzman *v.* Graham, 15 Ont. 137; Watson *v.* Munro, 6 Grant Ch. (U. C.) 385, as to dissatisfaction of trial judge with verdict on issue in chancery.

See 37 Cent. Dig. tit. "New Trial," § 137.

45. *Alaska.*—Barnette *v.* Freeman, 2 Alaska 286.

California.— Crystal Lake Ice Co. *v.* McAulay, 75 Cal. 631, 17 Pac. 924; Crook *v.* Forsyth, 30 Cal. 662 (especially where the testimony of the unsuccessful party is inconsistent); Hopper *v.* Jones, 29 Cal. 18; Wright *v.* Carillo, 22 Cal. 595; Armsby *v.* Dickhouse, 4 Cal. 102. *Compare* Sherman *v.* Mitchell, 46 Cal. 576.

Connecticut.— Lewis *v.* Healy, 73 Conn. 136, 46 Atl. 869; Allen *v.* Jarvis, 20 Conn. 38.

District of Columbia.— Murray *v.* Washington, etc., R. Co., 2 MacArthur 195.

Florida.— Tallahassee R. Co. *v.* Macon, 8 Fla. 299.

Georgia.— Linder *v.* Rowland, 122 Ga. 425, 50 S. E. 124; Revis *v.* Roper, 121 Ga. 428, 49 S. E. 291; Watt-Harley Hardware Co. *v.* Redding, 120 Ga. 904, 48 S. E. 350; Hill *v.* Lundy, 118 Ga. 93, 44 S. E. 830; Dover, etc., R. Co. *v.* Deal, 115 Ga. 42, 41 S. E. 256; Trammell *v.* Brooks, 112 Ga. 345, 37 S. E. 404; Taylor *v.* Allen, 112 Ga. 330, 37 S. E. 408; Cox *v.* Cagle, 112 Ga. 157, 37 S. E. 176; Powell *v.* State, 111 Ga. 831, 35 S. E. 649; Dean *v.* Rampley, 111 Ga. 813, 35 S. E. 650; Woodburn *v.* Smith, 108 Ga. 815, 34 S. E. 167; Thornton *v.* Abbott, 105 Ga. 846, 32 S. E. 603; Parks *v.* Ragan, 97 Ga. 335, 22 S. E. 939; McBride *v.* Bagley, 88 Ga. 462, 14 S. E. 866; Cooley *v.* McKinney, 88 Ga. 194, 14 S. E. 190; Miller *v.* Miller, 87 Ga. 600, 13 S. E. 635; Nolen *v.* Heard, 87 Ga. 293, 13 S. E. 554 (where jury credited single witness in opposition to two others); Hooks *v.* Hays, 86 Ga. 797, 13 S. E. 134; Georgia Pac. R. Co. *v.* Weaver, 85 Ga. 869, 11 S. E. 614; Georgia Pac. R. Co. *v.* Rigden, 85 Ga. 867, 11 S. E. 603; American Marble Co. *v.* Delk, 84 Ga. 101, 10 S. E. 502; Archer *v.* Heidt, 55 Ga. 200; Elliott *v.* Pinkus, 55 Ga. 163; Quin *v.* Guerry, 51 Ga. 466; Dart *v.* Dupree, 44 Ga. 55; Kitchens *v.* Kitchens, 39 Ga. 168, 99 Am. Dec. 453; Mayer *v.* Dawson, 33 Ga. 529; Coggin *v.* Jones, 29 Ga. 257; Goodwyn *v.* Goodwyn, 29

trial should not be granted unless the verdict is so strongly against the weight of

Ga. 225; Boon *v.* Boon, 29 Ga. 134; Brooks *v.* Smith, 21 Ga. 261; Dozier *v.* Dozier, 20 Ga. 263; Walker *v.* Walker, 11 Ga. 203. See also Southern R. Co. *v.* Puryear, 127 Ga. 88, 56 S. E. 73. *Compare* Creel *v.* Bush, 81 Ga. 342, 6 S. E. 598.

Illinois.— Buchanan *v.* McLennan, 105 Ill. 56; Clifford *v.* Luhring, 69 Ill. 401; St. Louis Nat. Stockyards *v.* Godfrey, 101 Ill. App. 40 [*affirmed* in 198 Ill. 288, 65 N. E. 90].

Indiana.— Jerauld *v.* Watkins, 1 Ind. App. 466, 27 N. E. 872.

Iowa.— Stoutenburgh *v.* Dow, etc., Co., 82 Iowa 179, 47 N. W. 1039; McNorton *v.* Akers, 24 Iowa 369; Stark *v.* Noble, 24 Iowa 71. *Compare* Sullivan *v.* Wabash, etc., R. Co., 58 Iowa 602, 12 N. W. 621, as to evidence not necessarily conflicting.

Kansas.— Johnson *v.* Leggett, 28 Kan. 590, 607, where it is said: "When some men would naturally come to one conclusion, and others to the opposite — then the verdict of the jury is conclusive." Atchison, etc., R. Co. *v.* Matthews, 58 Kan. 447, 49 Pac. 602; Pacific R. Co. *v.* Nash, 7 Kan. 280; Carson *v.* Kerr, 7 Kan. 268, finding by court.

Kentucky.— Patton *v.* Patton, 5 J. J. Marsh. 389; Sharp *v.* Wickliffe, 3 Litt. 10, 14 Am. Dec. 37; Vincent *v.* Willis, 82 S. W. 583, 26 Ky. L. Rep. 842; Alcorn *v.* Powell, 60 S. W. 520, 22 Ky. L. Rep. 1353, mere numerical superiority not controlling.

Maine.— Stone *v.* Lewiston, etc., St. R. Co., 99 Me. 243, 59 Atl. 56; Monroe *v.* Hampden, 95 Me. 111, 49 Atl. 604; Smith *v.* Brunswick, 80 Me. 189, 13 Atl. 890; Hunter *v.* Heath, 67 Me. 507.

Massachusetts.— Cunningham *v.* Magoun, 18 Pick. 13 (especially where the verdict is against the party having the burden of proof); Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311; Hall *v.* Huse, 10 Mass. 39; Hammond *v.* Wadhams, 5 Mass. 353. *Compare* Parrott *v.* Thacher, 9 Pick. 426, as to insufficient proof of usage.

Michigan.— Lee *v.* Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709; Rohde *v.* Biggs, 108 Mich. 446, 66 N. W. 331.

Missouri.— Obert *v.* Strube, 51 Mo. App. 621. *Compare* Fitsjohn *v.* St. Louis Transit Co., 183 Mo. 74, 81 S. W. 907.

New Hampshire.— Wendell *v.* Safford, 12 N. H. 171.

New Jersey.— Garrett *v.* Driver Harris Wire Co., 70 N. J. L. 382, 57 Atl. 127; Terhune *v.* McKiernan, (Sup. 1899) 44 Atl. 951. *Compare* Ryerson *v.* Morris Canal, etc., Co., 28 N. J. L. 97.

New York.— Von der Born *v.* Schultz, 104 N. Y. App. Div. 94, 93 N. Y. Suppl. 547; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617; Jarchover *v.* Dry Dock, etc., R. Co., 54 N. Y. App. Div. 238, 66 N. Y. Suppl. 575; Cheney *v.* New York Cent., etc., R. Co., 16 Hun 415; Brooks *v* Moore, 67 Barb. 393; McKinley *v.* Lamb, 64 Barb. 199; Williams *v.* Vanderbilt, 29 Barb. 491 [*affirmed* in 28 N. Y. 217, 84 Am. Dec. 333]; Colt *v.* Sixth-Ave. R. Co., 33 N. Y. Super. Ct. 189 [*affirmed* in 49 N. Y. 671]; Eagan *v.* Hyde, 84 N. Y. Suppl. 540; Danzig *v.* Abbey, 3 N. Y. Suppl. 14; Miller *v.* O'Dwyer, 1 N. Y. Suppl. 618; Cummings *v.* Vanderbilt, 1 N. Y. Suppl. 523; Emberson *v.* Dean, 46 How. Pr. 236; Smith *v.* Hicks, 5 Wend. 48; Lewis *v.* Payn, 4 Wend. 423; Woodward *v.* Paine, 15 Johns. 493; Ward *v.* Center, 3 Johns. 271.

Pennsylvania.— Flower *v.* Houghton, 12 Pa. Dist. 8; Mathews *v.* Pittsburg, etc., R. Co., 24 Pa. Co. Ct. 370; Megargel *v.* Waltz, 21 Pa. Co. Ct. 633; Metz *v.* Clark, 2 Dauph. Co. Rep. 415; Pusey *v.* Ledward, 1 Del. Co. 185; Houghton *v.* Moyer, 7 Kulp 68; McGroarty *v.* Lehigh Valley Coal Co., 12 Luz. Leg. Reg. 204; Dentzel *v.* Fluck, 14 Montg. Co. Rep. 9.

Rhode Island.— Early *v.* Rhode Island Co., (1906) 67 Atl. 363; Steere *v.* Page, (1907) 67 Atl. 363; Shibley *v.* Gendron, 25 R. I. 519, 57 Atl. 304 (on motion in appellate court); Hackett *v.* Shaw, 24 R. I. 29, 51 Atl. 1040; Patton *v.* Hughesdale Mfg. Co., 11 R. I. 188; Watson *v.* Tripp, 11 R. I. 98, 23 Am. Rep. 420.

South Carolina.— Myers *v.* McBride, 13 Rich. 178.

Tennessee.— Chattanooga Electric R. Co. *v.* Finney, 105 Tenn. 648, 58 S. W. 540.

Texas.— East Line, etc., R. Co. *v.* Boon, (1886) 1 S. W. 632; Davidson *v.* Edgar, 5 Tex. 492; Insurance Co. of North America *v.* Bell, 25 Tex. Civ. App. 129, 60 S. W. 262; Herring *v.* Herring, (Civ. App. 1899) 51 S. W. 865.

Virginia.— Dew *v.* Baldwin, 89 Va. 870, 17 S. E. 548; Brugh *v.* Shanks, 5 Leigh 598.

Washington.— Anderson *v.* McDonald, 31 Wash. 274, 71 Pac. 1037.

West Virginia.— Sigler *v.* Beebe, 44 W. Va. 587, 30 S. E. 76; Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

United States.— Hellyer *v.* Trenton City Bridge Co., 133 Fed. 843; Pringle *v.* Guild, 119 Fed. 962; Williams *v.* New York, etc., R. Co., 101 Fed. 375; Wilcox *v.* New York, etc., R. Co., 81 Fed. 143; Plummer *v.* Granite Mountain Min. Co., 55 Fed. 755; Stewart *v.* Sixth-Ave. R. Co., 45 Fed. 21; Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429; Pim *v.* Wait, 32 Fed. 741; William Cramp, etc., Ship, etc., Bldg. Co. *v.* Sloan, 21 Fed. 561; Blagg *v.* Phœnix Ins. Co., 3 Fed. Cas. No. 1,478, 3 Wash. 58; Walker *v.* Smith, 29 Fed. Cas. No. 17,087, 1 Wash. 202; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380.

England.— Brisbane Municipality *v.* Martin, [1894] A. C. 249; Brown *v.* Railway Com'rs, 15 App. Cas. 240, 59 L. J. P. C. 62, 62 L. T. Rep. N. S. 469; Solomon *v.* Bitton, 8 Q. B. D. 176; Swinfen *v.* Swinfen, 27 Beav. 148, 5 Jur. N. S. 1276, 28 L. J. Ch. 849, 54 Eng. Reprint 57 (but a court of equity is not bound by the rules prevailing in courts of law); Dallas *v.* Great Western R. Co., 57 J. P. 584.

evidence as to shock the court's sense of justice,[46] or indicate that the jury were influenced by passion, prejudice, or other improper motive,[47] or that they have

Canada.— Fraser *v.* Drew, 30 Can. Sup. Ct. 241; Fairweather *v.* McFarlane, 33 N. Brunsw. 180 (especially where trial judge does not pass on application); Kibby *v.* Leighton, 33 N. Brunsw. 4; Northrup *v.* Canadian Pac. R. Co., 32 N. Brunsw. 365; Doherty *v.* St. John, 26 N. Brunsw. 618; Russell *v.* Bishop, 24 N. Brunsw. 322; Russell *v.* Legere, 24 N. Brunsw. 298; Belyea *v.* Merritt, 23 N. Brunsw. 225; Doane *v.* Doane, 17 N. Brunsw. 339; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398; Little *v.* Johnson, 3 N. Brunsw. 496; O'Mullin *v.* McDonald, 10 Nova Scotia 46; Lyon *v.* Morton, 3 Nova Scotia Dec. 459; Miller *v.* Ball, 19 U. C. C. P. 447; Wilkins *v.* Row, 15 U. C. C. P. 325; Tuer *v.* Harrison, 14 U. C. C. P. 449 (especially where verdict small); Braid *v.* Great Western R. Co., 10 U. C. C. P. 137; City Bank *v.* Strong, 7 U. C. C. P. 96; Creighton *v.* Chambers, 6 U. C. C. P. 282; Adams *v.* Capner, 6 U. C. C. P. 277; Lizars *v.* Farrell, 6 U. C. C. P. 276; Holme *v.* Turner, 5 U. C. C. P. 116; Stevenson *v.* Rae, 2 U. C. C. P. 406; Anderson *v.* Anderson, 1 U. C. C. P. 344; Vail *v.* Flood, 2 U. C. Q. B. 133; Dear *v.* Western Assur. Co., 41 U. C. Q. B. 553; Gould *v.* British America Assur. Co., 27 U. C. Q. B. 473 (especially where opposite verdict would find prevailing party guilty of a crime); Evans *v.* Morley, 21 U. C. Q. B. 547, 20 U. C. Q. B. 236 (especially where the defense found against was one not favored); Sills *v.* Hunt, 16 U. C. Q. B. 521 (especially where losing party was a wrong-doer); Hemmingway *v.* Hemmingway, 11 U. C. Q. B. 237 (especially where verdict is against claim of title by adverse possession); Tossell *v.* Dick, 4 U. C. Q. B. 486 (especially where verdict is on plea in abatement); Doe *v.* McWilliams, 4 U. C. Q. B. 30 (especially where losing party has been negligent in not presenting stronger case); Commercial Bank *v.* Denison, 1 U. C. Q. B. 13. *Compare* Ketchum *v.* Mighton, 14 U. C. Q. B. 99.

See 37 Cent. Dig. tit. "New Trial," §§ 144, 145, 148.

Compare Clifford *v.* Latham, 19 S. D. 376, 103 N. W. 642.

That the verdict must be such as the jury could not have found as reasonable men see Australian Newspaper Co. *v.* Bennett, [1894] A. C. 284, 58 J. P. 604, 63 L. J. P. C. 105, 70 L. T. Rep. N. S. 597, 6 Reports 484; Brown *v.* Railway Com'rs, 15 App. Cas. 240, 59 L. J. P. C. 62, 62 L. T. Rep. N. S. 469; Hampson *v.* Guy, 64 L. T. Rep. N. S. 778.

Where the evidence is highly conflicting, but the verdict is adverse to a permanent right of public interest, a new trial may be allowed. Ryerson *v.* Morris Canal, etc., Co., 28 N. J. L. 97. See also Metropolitan Asylum Dist. *v.* Hill, 47 J. P. 148, 47 L. T. Rep. N. S. 29; Swinnerton *v.* Stafford, 3 Taunt. 91.

The novelty of the question at issue is an element for consideration. Metropolitan Asylum Dist. *v.* Hill, 47 J. P. 148, 47 L. T. Rep. N. S. 29.

46. *Arkansas.*— Lewis *v.* Read, 6 Ark. 428; Hazen *v.* Henry, 6 Ark. 86, especially where the unsuccessful party was permitted to introduce illegal evidence.

Connecticut.— Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Georgia.— Lang *v.* Brown, 29 Ga. 628.

Illinois.— Chicago, etc., R. Co. *v.* Fox, 41 Ill. 106; Dawson *v.* Robbins, 10 Ill. 72.

New Hampshire.— Cox *v.* Leviston, 66 N. H. 167, 20 Atl. 246.

Pennsylvania.— Peyson *v.* De Roux, 1 Phila. 205.

47. *Colorado.*—Green *v.* Taney, 7 Colo. 278, 3 Pac. 423.

Connecticut.— Howe *v.* Raymond, 74 Conn. 68, 49 Atl. 854, breach of contract.

Georgia.— Dobbins *v.* Dupree, 39 Ga. 394; Perkins *v.* Attaway, 14 Ga. 27.

Illinois.— Tapp *v.* Greenwald, 109 Ill. App. 504.

Iowa.— Inghram *v.* National Union, 103 Iowa 395, 72 N. W. 559, in appellate court. See also McKay *v.* Thorington, 15 Iowa 25.

Kansas.— Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78.

Maine.— Parks *v.* Libby, 92 Me. 133, 42 Atl. 318; Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91; Enfield *v.* Buswell, 62 Me. 128; Bryant *v.* Glidden, 39 Me. 458; West Gardiner *v.* Farmingdale, 36 Me. 252; Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; Glidden *v.* Dunlap, 28 Me. 379.

Missouri.— Price *v.* Evans, 49 Mo. 396; Obert *v.* Strube, 51 Mo. App. 621.

New Hampshire.— Cox *v.* Leviston, 66 N. H. 167, 20 Atl. 246; Fuller *v.* Bailey, 58 N. H. 71.

New York.— Layman *v.* Anderson, 4 N. Y. App. Div. 124, 38 N. Y. Suppl. 883; Morss *v.* Sherrill, 63 Barb. 21; Colt *v.* Sixth Ave. R. Co., 33 N. Y. Super. Ct. 189; Murphy *v.* Boker, 3 Rob. 1; Finney *v.* Gallaudet, 15 Daly 66, 2 N. Y. Suppl. 707 [*affirmed* in 119 N. Y. 661, 23 N. E. 1113]; Corrigan *v.* Dry Dock, etc., R. Co., 14 Daly 120, 6 N. Y. St. 243; Craswell *v.* New York, etc., Ferry, etc., Co., 27 Misc. 822, 57 N. Y. Suppl. 827 [*affirmed* in 28 Misc. 487, 59 N. Y. Suppl. 554]; Benjamin *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1052; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11 (or misapprehension); Cothran *v.* Collins, 29 How. Pr. 155.

Rhode Island.— Sweet *v.* Wood, 18 R. I. 386, 28 Atl. 335.

United States.— Peltomaa *v.* Katahdin Pulp, etc., Co., 149 Fed. 282; William Cramp, etc., Ship, etc., Bldg. Co. *v.* Sloan, 21 Fed. 561; Reese *v.* Third Ave. R. Co., 16 Fed. 368; Marriott *v.* Fearing, 11 Fed. 846; Mengis *v.* Lebanon Mfg. Co., 10 Fed. 665; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Wiggin *v.* Coffin, 29 Fed. Cas.

misapprehended the facts adduced in evidence by the parties or the law of the case.[48]

b. Uncontradicted Evidence. A verdict rendered contrary to, or in disregard of, evidence which was not improbable or inconsistent and was not contradicted or discredited will be set aside.[49]

c. Correctness of Verdict Dependent Upon Credibility of Witnesses. Where the correctness of the verdict depends on the credibility of witnesses, it should seldom be disturbed.[50] If, however, the conclusion of the jury appears to have

No. 17,624, 3 Story 1; Wilkinson *v.* Greely, 29 Fed. Cas. No. 17,671, 1 Curt. 63.

48. *Maine.*— Bryant *v.* Glidden, 39 Me. 458; Bangor *v.* Brunswick, 27 Me. 351.

Missouri.— Price *v.* Evans, 49 Mo. 396; Obert *v.* Strube, 51 Mo. App. 621.

New York.— Craswell *v.* New York, etc., Ferry, etc., Co., 27 Misc. 822, 57 N. Y. Suppl. 827 [*affirmed* in 28 Misc. 487, 59 N. Y. Suppl. 554]; Benjamin *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1052.

United States.— Mengis *v.* Lebanon Mfg. Co., 10 Fed. 665.

Canada.— Doe *v.* Towse, 22 N. Brunsw. 10; Morton *v.* Bartlett, 15 N. Brunsw. 215.

Compare Murdock *v.* Sumner, 22 Pick. (Mass.) 156.

49. *Alabama.*— Hamilton *v.* Maxwell, 133 Ala. 233, 32 So. 13.

Colorado.— Rankin *v.* Thompson, 7 Colo. 381, 3 Pac. 719.

Georgia.— Georgia Cent. R. Co. *v.* Mote, 120 Ga. 593, 48 S. E. 136; Alabama Great Southern R. Co. *v.* Scruggs, 119 Ga. 70, 45 S. E. 689; Fain *v.* Jones, 26 Ga. 360.

Illinois.— Higgins *v.* Lee, 16 Ill. 495.

Indiana.— Roe *v.* Cronkhite, 55 Ind. 183; Young *v.* Urich, 15 Ind. 326.

Iowa.— Sleeper *v.* Des Moines, (1903) 93 N. W. 585 (second verdict); Anderson *v.* Cahill, 65 Iowa 252, 21 N. W. 593.

Louisiana.— Welsh *v.* Barrow, 9 Rob. 520, evidence of reconventional demand.

Maine.— Franklin Bank *v.* Small, 26 Me. 136.

Missouri.— Roman *v.* Boston Trading Co., 87 Mo. App. 186; Wear *v.* Lee, 26 Mo. App. 99.

Montana.— Boe *v.* Lynch, 20 Mont. 80, 49 Pac. 381.

Nebraska.— Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976, by appellate court.

New York.— Algeo *v.* Duncan, 39 N. Y. 313 [*affirming* 24 How. Pr. 210]; Cunningham *v.* Gans, 79 Hun 434, 29 N. Y. Suppl. 979; Baker *v.* Bonesteel, 2 Hilt. 397; Tuxedo Automobile Station *v.* Lyman, 88 N. Y. Suppl. 1008; Dolsen *v.* Arnold, 10 How. Pr. 528.

North Carolina.— Spurlin *v.* Rutherford, 6 N. C. 360, evidence of plea of statute of limitations.

Pennsylvania.— Denkla *v.* Insurance Co., 6 Phila. 233; Stack *v.* Patterson, 6 Phila. 225.

Rhode Island.— Nicholas *v.* Peck, 21 R. I. 404, 43 Atl. 1038, 20 R. I. 533, 40 Atl. 418.

South Carolina.—Charleston *v.* Hollenback, 3 Strobh. 355; Bradley *v.* Long, 2 Strobh. 160; Roberts *v.* Stagg, 1 Nott & M. 429; Payne *v.* Trezevant, 2 Bay 23.

Tennessee.— Sweany *v.* Bledsoe, 8 Humphr. 612, in appellate court.

Texas.— Nading *v.* Denison, etc., R. Co., 22 Tex. Civ. App. 173, 54 S. W. 412, verdict for damages to property less than testified to by any witness.

United States.— Kelly *v.* Morris, 6 Pet. 622, 8 L. ed. 523; Morse *v.* St. Paul F. & M. Ins. Co., 129 Fed. 233 (second verdict); U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

England.— Bright *v.* Eynon, 1 Burr. 390, 2 Ld. Ken. 53.

Canada.— Robson *v.* Suter, 1 Brit. Col. 375; Hartley *v.* Fisher, 6 N. Brunsw. 694.

See 37 Cent. Dig. tit. "New Trial," § 138.

Illustration.— There is "insufficient evidence" to support a verdict for plaintiff in an action on a note where the defense of infancy is established by uncontradicted testimony. Algeo *v.* Duncan, 39 N. Y. 313 [*affirming* 24 How. Pr. 210].

50. *Connecticut.*— Reboul *v.* Chalker, 27 Conn. 114; Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

Georgia.— Thornton *v.* Abbott, 105 Ga. 846, 32 S. E. 603; Creighton *v.* Hewitt, 51 Ga. 174; Dart *v.* Dupree, 44 Ga. 55; Pitts *v.* Thrower, 30 Ga. 212; Brooks *v.* Smith, 21 Ga. 261; Stroud *v.* Mays, 7 Ga. 269.

Illinois.— Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409; Delaware, etc., Canal Co. *v.* Mitchell, 113 Ill. App. 429 [*affirmed* in 211 Ill. 379, 71 N. E. 1026], plaintiff contradicted by two unimpeached witnesses.

Kentucky.— Alcorn *v.* Powell, 60 S. W. 520, 22 Ky. L. Rep. 1353.

Massachusetts.— Wait *v.* McNeil, 7 Mass. 261.

Mississippi.— Stovall *v.* Farmers' etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

Missouri.— Noble *v.* Kansas City, 95 Mo. App. 167, 68 S. W. 969.

New Hampshire.— Clark *v.* Congregational Soc., 44 N. H. 382; Wendell *v.* Safford, 12 N. H. 171.

New York.—Odell *v.* Webendorfer, 60 N. Y. App. Div. 460, 69 N. Y. Suppl. 930; Radjaviller *v.* Third Ave. R. Co., 58 N. Y. App. Div. 11, 68 N. Y. Suppl. 617; Jarchover *v.* Dry Dock, etc., R. Co., 54 N. Y. App. Div. 238, 66 N. Y. Suppl. 575; Layman *v.* Anderson, 4 N. Y. App. Div. 124, 38 N. Y. Suppl. 883; Cheney *v.* New York Cent., etc., R. Co., 16 Hun 415; Smith *v.* Tiffany, 36 Barb. 23; Colt *v.* Sixth-Ave. R. Co., 33 N. Y. Super.

been arbitrary or capricious,[51] or the jury plainly disregarded the uncontradicted testimony of a witness who was not impeached or discredited,[52] even though he was a party to the action,[53] a new trial will be granted. A jury is not, however, required to accept the direct testimony of a single witness to a fact which is opposed by other facts and circumstances.[54]

d. Effect of View by Jury. It is not an insuperable obstacle to the allowance of a new trial that the jury viewed or examined a place or thing which was the subject of conflicting evidence.[55]

e. Where Court Would Not Have Been Justified in Directing Verdict. In most jurisdictions a verdict may be set aside as contrary to the evidence or weight of evidence, although the court would not have been justified in directing a verdict or compulsory nonsuit for insufficiency of evidence.[56] That the court refused

Ct. 189 [*affirmed* in 49 N. Y. 671]; Finney *v.* Gallaudet, 15 Daly 66, 2 N. Y. Suppl. 707 [*affirmed* in 119 N. Y. 661, 23 N. E. 1113] (one witness contradicted by two); Foreman *v.* New York City Ry. Co., 54 Misc. 557, 104 N. Y. Suppl. 932; Ilsley *v.* Keith, 9 N. Y. St. 828 (one witness contradicted by three but corroborated by circumstances); Emberson *v.* Dean, 46 How. Pr. 236. *Compare Ex p.* Bassett, 2 Cow. 458.

Pennsylvania.— Boak *v.* Commings, 19 Pa. Co. Ct. 79; Metz *v.* Clark, 2 Dauph. Co. Rep. 415; Fell *v.* Fortner, 3 Del. Co. 568. *Compare* Metz *v.* Clark, 19 Pa. Co. Ct. 286 (as to case of clear mistake by jury); Sandford *v.* Atlee, 17 Leg. Int. 332 (where testimony of some witnesses clearly evasive).

Texas.— Morgan *v.* Bement, 24 Tex. Civ. App. 564, 59 S. W. 907.

West Virginia.— Coalmer *v.* Barrett, 61 W. Va. 237, 56 S E. 385.

United States.— Pringle *v.* Guild, 119 Fed. 962; Blagg *v.* Phoenix Ins. Co., 3 Fed. Cas. No. 1,478, 3 Wash. 58; Fearing *v.* De Wolf, 8 Fed. Cas No. 4,711, 3 Woodb. & M. 185; U. S. *v.* Five Cases of Cloth, 25 Fed. Cas. No. 15,110.

Canada.— Northrup *v.* Canadian Pac. R. Co., 32 N. Brunsw. 365; Fleming *v.* North British, etc., Ins. Co., 20 N. Brunsw. 153; Edmundson *v.* Temple, 17 N. Brunsw. 568; Smith *v.* Neill, 9 N. Brunsw. 105; Wortman *v.* Marter, 8 N. Brunsw. 309; Reed *v.* Mercer, 16 U. C. C. P. 279; Brown *v.* Bruce, 19 U. C. Q. B. 35.

See 37 Cent. Dig. tit. "New Trial," § 141.

Compare McCreary *v.* Hart, 39 Kan. 216, 17 Pac. 839; Clifford *v.* Latham, 19 S. D. 376, 103 N. W. 642.

51. *Alabama.*— Roe *v.* Doe, (1907) 43 So. 856.

Illinois.— Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409 (testimony of two boys aged seven and eleven years contradicted by five unimpeached witnesses); Lincoln *v.* Stowell, 62 Ill. 84 (plaintiff contradicted by defendant and two other witnesses).

Maine.— Pollard *v.* Grand Trunk R. Co., 62 Me. 93, party contradicted by five unimpeached witnesses.

New York.— Seibert *v.* Erie R. Co., 49 Barb. 583; Chavias *v.* Dry-Dock, etc., R. Co., 34 Misc. 694, 70 N. Y. Suppl. 1014, indefinite testimony of four witnesses contradicted by clear testimony of seven disinterested witnesses.

Pennsylvania.— Melody *v.* Chester Tract. Co., 9 Del. Co. 105, 17 York Leg. Rec. 122 (where a single discredited witness was contradicted by many witnesses); Ernst *v.* Tombler, 1 Lehigh Val. L. Rep. 133.

Rhode Island.— Gunn *v.* Union R. Co., 22 R. I. 579, 48 Atl. 1045, plaintiff contradicted by five witnesses.

South Carolina.— Burt *v.* Stackney, 2 Mill 323, contradicted testimony of impeached witness.

Wisconsin.— Lee *v.* Chicago, etc., R. Co., 101 Wis. 352, 77 N. W. 714.

Canada.— Grieve *v.* Molsons Bank, 8 Ont. 162, party contradicted by two disinterested witnesses.

See 37 Cent. Dig. tit. "New Trial," § 141.

Number of witnesses.— "While the weight of testimony does not necessarily depend upon the number of witnesses, yet, where the witnesses are of equal credibility, it may undoubtedly be increased by the number of witnesses.' McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 218, 52 N. W. 93.

52. Cunningham *v.* Gans, 79 Hun (N. Y.) 434, 29 N. Y. Suppl. 979; Seibert *v.* Erie R. Co., 49 Barb. (N. Y.) 583; Burk *v.* Coy, 22 Leg. Int. (Pa.) 117; Ernst *v.* Tombler, 1 Lehigh Val. L. Rep. (Pa.) 133; Sweany *v.* Bledsoe, 8 Humphr. (Tenn.) 612; Doe *v.* Hatch, 6 N. Brunsw. 200.

53. Pumphrey *v.* Walker, 71 Iowa 383, 32 N. W. 386. See also Rochford *v.* Albaugh, 16 S. D. 628, 94 N. W. 701; Verdier *v.* Hume, 4 Hen. & M. (Va.) 479, where witness was contradicted in subsequent suit in equity.

54. Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. (Miss.) 305, 47 Am. Dec. 85; Edmundson *v.* Temple, 17 N. Brunsw. 568; Wortman *v.* Marter, 8 N. Brunsw. 309; Lane *v.* Jarvis, 5 U. C. Q. B. 127. See also Lacey *v.* Forrester, 3 Dowl. P. C. 668.

55. McQueen *v.* Mechanics' Inst., 107 Cal. 163, 40 Pac. 114; Buice *v.* Buice, 111 Ga. 887, 36 S. E. 969; Tully *v.* Fitchburg R. Co., 134 Mass. 499.

56. *Colorado.*— Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

Georgia.— Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595.

Illinois.— Illinois Cent. R. Co. *v.* Satkowski, 107 Ill App. 524; Chicago, etc., R.

to dismiss the action or direct a verdict or nonsuit is not therefore a bar to the allowance of a new trial, at least on the ground that the verdict is against the weight of evidence.[57] Nor generally will a new trial be refused because the movant failed to ask that the case be taken from the jury,[58] although a contrary rule has been announced frequently.[59]

2. Sufficiency of Evidence in General — a. Statement of General Principles. It is ground for new trial that there was a total failure of evidence to support the verdict or a failure of evidence as to some material fact necessary to support the verdict,[60] or that the evidence received to prove a fact essential to support

Co. *v.* Rains, 106 Ill. App. 539 [*affirmed* in 203 Ill. 417, 67 N. E. 840]. See also Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357.

Minnesota.—Voge *v.* Penney, 74 Minn. 525, 77 N. W. 422.

Missouri.— Lockwood *v.* Atlantic Mut. Ins. Co., 47 Mo. 50.

New York.—Walker *v.* Newton Falls Paper Co., 99 N. Y. App. Div. 47, 90 N. Y. Suppl. 530; Larkin *v.* United Traction Co., 76 N. Y. App. Div. 238, 78 N. Y. Suppl. 538; Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Ludeman *v.* Third Ave. R. Co., 30 N. Y. App. Div. 520, 52 N. Y. Suppl. 310; Graham *v.* New York City R. Co., 54 Misc. 566, 104 N. Y. Suppl. 869; Schnitzler *v.* Oriental Metal Bed Co., 93 N. Y. Suppl. 1118. But see Schlesinger *v.* Malloy, 1 N. Y. City Ct. 458.

Oregon.— Serles *v.* Serles, 35 Oreg. 289, 57 Pac. 634.

Wisconsin.— Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85; Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321 [*reversing* 73 Fed. 91]; Stewart *v.* Sixth-Ave. R. Co., 45 Fed. 21.

Contra.—Hensley *v.* Davidson, (Iowa 1907) 112 N. W. 227; Sovereign Camp W. W. *v.* Thiebaud, 65 Kan. 332, 69 Pac. 348.

57. Clark *v.* Jenkins, 162 Mass. 397, 38 N. E. 974; Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460; Martin *v.* Platt, 16 N. Y. Suppl. 115 [*affirming* 15 N. Y. Suppl. 49, 26 Abb. N. Cas. 382, under statute].

58. Sweeney *v.* Coe, 12 Colo. 485, 21 Pac. 705; Haist *v.* Bell, 24 N. Y. App. Div. 252, 48 N. Y. Suppl. 405; Mitchell *v.* Rouse, 19 N. Y. App. Div. 561, 46 N. Y. Suppl. 523; Picard *v.* Lang, 3 N. Y. App. Div. 51, 38 N. Y. Suppl. 229; Slater *v.* Drescher, 72 Hun (N. Y.) 425, 25 N. Y. Suppl. 153 (suggesting, however, that the rule might be otherwise where there was no evidence to support the verdict); Kelly *v.* Frazier, 27 Hun (N. Y.) 314, 2 N. Y. Civ. Proc. 322; Lucas *v.* McEnerna, 19 Hun (N. Y.) 14; Shearman *v.* Henderson, 12 Hun (N. Y.) 170; Curtiss *v.* Marshall, 8 Bosw. (N. Y.) 22; McCarthy *v.* Christopher, etc., St. R. Co., 10 Daly (N. Y.) 540; Martin *v.* Platt, 15 N. Y. Suppl. 49, 26 Abb. N. Cas. 382 [*affirmed* in 16 N. Y. Suppl. 115]; Powell *v.* Lamb, 1 N. Y. Suppl. 431 [*affirmed* in 15 Daly 139, 3 N. Y. Suppl. 930]; Allgro *v.* Duncan, 24 How. Pr. (N. Y.) 210 [*affirmed* in 39 N. Y. 313]. See also Bridge *v.* Austin, 4 Mass. 115; Cohn *v.* Goldman, 43 N. Y. Super. Ct. 436 [*reversed* on other grounds in 76 N. Y. 284] (holding that a motion for a new trial is not barred where the preponderance of the witnesses is largely in defendant's favor); Rowe *v.* Stevens, 12 Abb. Pr. N. S. (N. Y.) 389.

59. Peake *v.* Bell, 7 Hun (N. Y.) 454; Keeler *v.* Barretts, etc., Dyeing Establishment, 54 N. Y. Super. Ct. 369 (stating that the rule would be otherwise where there is any evidence to support the verdict); Pollock *v.* Brennan, 39 N. Y. Super. Ct. 477; Rowe *v.* Stevens, 34 N. Y. Super. Ct. 436, 12 Abb. Pr. N. S. 389, 44 How. Pr. 10; Halsted *v.* Manhattan R. Co., 2 Misc. (N. Y.) 498, 22 N. Y. Suppl. 390; Clement *v.* Congress Spring Co., 35 N. Y. Suppl. 1004; Mortimer *v.* Doelger, 11 N. Y. Suppl. 583; Barrett *v.* Third Ave. R. Co., 8 Abb. Pr. N. S. (N. Y.) 205 [*affirmed* in 45 N. Y. 628]; Sickels *v.* Gillies, 45 How. Pr. (N. Y.) 94; St. John *v.* Skinner, 44 How. Pr. (N. Y.) 198. See also Meyrich *v.* Shainowsky, 62 N. Y. Suppl. 432 (where no evidence to support verdict); Turley *v.* Grafton Road Co., 8 U. C. Q. B. 579 (where objection was not taken at time that action was premature).

Not a matter of right.— It has been held that a party who did not request the judge to rule on the sufficiency of the evidence at the trial is not entitled, as matter of right, to a ruling on the subject on motion for a new trial. Capper *v.* Capper, 172 Mass. 262, 52 N. E. 98.

60. *Arkansas.*—Watkins *v.* Rogers, 21 Ark. 298; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Johnson *v.* McDaniel, 15 Ark. 109; Field *v.* Ringo, 7 Ark. 435.

California.— Hawkins *v.* Reichert, 28 Cal. 534.

Colorado.— Carothers *v.* Jones, 1 Colo. 196, as to part of property in replevin.

Florida.— Clinch *v.* Canova, 33 Fla. 655, 15 So. 427.

Georgia.— Rome *v.* Shropshire, 112 Ga. 93, 37 S. E. 168; Watkins *v.* Defoor, 33 Ga. 494; Mealing *v.* Pace, 14 Ga. 596; Childress *v.* Stone, Ga. Dec. Pt. II, 157; McBride *v.* Whitehead, Ga. Dec. 165.

Illinois.— Corey *v.* McDaniel, 42 Ill. 512 (as where there is no evidence of one of several successive links in a chain of proof on the truth of each of which the verdict depends); Chicago, etc., R. Co. *v.* Fox, 41 Ill. 106; Baker *v.* Pritchett, 16 Ill. 66; Scott *v.* Blumb, 7 Ill. 595.

Indiana.— Wheeler, etc., Mfg. Co. *v.* Wor-

the verdict was insufficient in law.[61] A verdict will not, however, be set aside

rall, 80 Ind. 297; Spicely *v.* True, 14 Ind. 437; Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836.

Iowa.— Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463; Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276.

Kansas.— Ermul *v.* Kullok, 3 Kan. 499; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Wendt *v.* Diemer, 9 Kan. App. 481, 58 Pac. 1003; Gano *v.* Prindle, 6 Kan. App. 851, 50 Pac. 110.

Massachusetts.— Brightman *v.* Eddy, 97 Mass. 478; Maynard *v.* Hunt, 5 Pick. 240.

Minnesota.— Gustafson *v.* Gustafson, 92 Minn. 139, 99 N. W. 631.

Missouri.— Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720; Moore *v.* Missouri Pac. R. Co., 28 Mo. App. 622.

New York.— Kelly *v.* Frazier, 2 N. Y. Civ. Proc. 322.

North Dakota.— Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612.

Pennsylvania.— Malson *v.* Fry, 1 Watts 433; Lodge *v.* Railroad Co., 10 Phila. 153.

Rhode Island.— Rounds *v.* Humes, 7 R. I. 535.

South Carolina.—Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Charleston *v.* Hollenback, 3 Strobh. 355; Dogan *v.* Ashby, 1 Strobh. 433; Means *v.* Moore, 3 McCord 282; Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622.

South Dakota.— Baird *v.* Vines, 18 S. D. 52, 99 N. W. 89, insufficient evidence of law of another state.

Tennessee.— Dickinson *v.* Cruise, 1 Head 258.

Texas.— Moore *v.* Anderson, 30 Tex. 224; Rowe *v.* Collier, 25 Tex. Suppl. 252; Hilliard *v.* Johnson, (Civ. App. 1895) 32 S. W. 914; Sulzbacher *v.* Wilkinson, Tex. App. Civ. Cas. § 994.

Vermont.— Averill *v.* Robinson, 70 Vt. 161, 40 Atl. 49.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692; Black *v.* Thomas, 21 W. Va. 709.

Wisconsin.— Cawley *v.* La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179; Hickey *v.* Chicago, etc., R. Co., 64 Wis. 649, 26 N. W. 112.

Canada.— Wilson *v.* Street, 8 N. Brunsw. 80; Mitchell *v.* Lantz, I Nova Scotia Dec. 518; Murray *v.* McDonald, Ritch. Eq. Cas. (Nova Scotia) 142; Wade *v.* Ball, 20 U. C. C. P. 302; Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500; Coatsworth *v.* Toronto, 7 U. C. C. P. 490, 8 U. C. C. P. 364. See also Hogle *v.* Hogle, 16 U. C. Q. B. 518, where judgment was arrested instead of granting defendant a new trial.

See 37 Cent. Dig. tit. "New Trial," § 142.

As to effect of concurring verdicts see *supra*, I, D, 6.

Where there is any legal evidence to sustain a verdict, a new trial will not be granted on the ground that there was no evidence to support the verdict. Goodwyn *v.* Goodwyn, 29 Ga. 225; Warner *v.* Robertson, 13 Ga. 370; Stoutenburgh *v.* Dow, etc., Co., 82 Iowa 179, 47 N. W. 1039; McCord *v.* Atlantic Coast Line R. Co., 76 S. C. 469, 57 S. E. 477; Reed *v.* Carolina Div. Southern R. Co., 75 S. C. 162, 55 S. E. 218. *Compare* Parrott *v.* Thacher, 9 Pick. (Mass.) 426. A new trial will not be granted for insufficiency of evidence; the evidence being conflicting and the verdict not against the preponderance of it. Kenyon *v.* Kenyon, (R. I. 1906) 67 Atl. 431.

61. *Alaska.*—Barnette *v.* Freeman, 2 Alaska 286; McMorry *v.* Ryan, 1 Alaska 516.

Arkansas.— White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060.

California.— Fox *v.* Southern Pac. Co., 95 Cal. 234, 30 Pac. 384.

Georgia.— Merce *v.* Merry, 112 Ga. 823, 38 S. E. 40; Moseley *v.* Rambo, 106 Ga. 597, 32 S. E. 638 (second verdict); Georgia R., etc., Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939; Central R., etc., Co. *v.* Kenny, 58 Ga. 485; Raefle *v.* Moore, 58 Ga. 94; Fleming *v.* Hammond, 19 Ga. 145; Keaton *v.* Governor, 17 Ga. 228.

Indiana.— Louisville, etc., R. Co. *v.* Ader, 110 Ind. 376, 11 N. E. 437; Christy *v.* Holmes, 57 Ind. 314.

Iowa.— Holman *v.* Omaha, etc., R., etc., Co., 110 Iowa 485, 81 N. W. 704; Kirk *v.* Litterst, 71 Iowa 71, 32 N. W. 106.

Kansas.— Chicago, etc., R. Co. *v.* Reardon, 1 Kan. App. 114, 40 Pac. 931.

Louisiana.— Reed *v.* Corbin, 111 La. 654, 35 So. 801; Gill *v.* Reneau, 12 La. 399.

Maine.— Seavey *v.* Laughlin, 98 Me. 517, 57 Atl. 796; Sawyer *v.* Huff, 25 Me. 464, under stipulation as to vacation of nonsuit. See also Lord *v.* Buffum, 19 Me. 195, under stipulation as to vacating nonsuit.

Massachusetts.— Bridge *v.* Austin, 4 Mass. 115; Dunham *v.* Baxter, 4 Mass. 79, where the court had stopped defendant from producing evidence, thinking plaintiff's evidence insufficient.

Minnesota.— Breen *v.* Minneapolis R. Transfer Co., 51 Minn. 4, 52 N. W. 975, to prove want of contributory negligence.

Missouri.— Kreis *v.* Missouri Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150; Kreis *v.* Missouri Pac. R. Co., (1895) 30 S. W. 310; Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421; Nicol *v.* Hyre, 58 Mo. App. 134.

Nebraska.— Meyer *v.* Midland Pac. R. Co., 2 Nebr. 319.

New York.— Mackey *v.* New York Cent. R. Co., 27 Barb. 528; Curtiss *v.* Marshall, 8 Bosw. 22; Oliver *v.* Moore, 12 N. Y. Suppl. 343.

Pennsylvania.— Howard Express Co. *v.* Wile, 64 Pa. St. 201; Lloyd *v.* Wunderlich, 2 Del. Co. 377. *Compare* Olsen *v.* Gillan, 7 Dauph. Co. Rep. 273, where defendant was not permitted to set up want of certain proof which had been offered but withdrawn on his objection thereto.

South Carolina.— Fox *v.* Levingsworth, 2 Bay 520.

merely because the evidence to sustain it was circumstantial[62] or was slight,[63] if it was uncontradicted and fairly tended to prove the issues. If the evidence

Tennessee.— Railroad *v.* Brown, 96 Tenn. 559, 35 S. W. 560; Nailing *v.* Nailing, 2 Sneed 630.

Texas.—Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Collins *v.* Ballow, 72 Tex. 330, 10 S. W. 248; Gibson *v.* Hill, 23 Tex. 77.

West Virginia.— Hatfield *v.* Workman, 35 W. Va. 578, 14 S. E. 153.

Wisconsin.— See Collins *v.* Janesville, 117 Wis. 415, 94 N. W. 309.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85 (second verdict); Southern Pac. Co. *v.* Hamilton, 54 Fed. 468, 4 C. C. A. 441 [*following* Pleasants *v.* Fant, 22 Wall. 116, 22 L. ed. 780]; Gaither *v.* Kansas City, etc., R. Co., 27 Fed. 544.

Canada.—McDermott *v.* Bell, 4 N. Brunsw. 363; Doe *v.* Phillips, 3 N. Brunsw. 533; Murray *v.* McDonald, Rich. Eq. Cas. (Nova Scotia) 142; Jaffrey *v.* Toronto, etc., R. Co., 24 U. C. C. P. 271; Coulson *v.* Ontario F. & M. Ins. Co., 6 U. C. C. P. 63; Haworth *v.* British America Assur. Co., 6 U. C. C. P. 60; Bartels *v.* Benson, 21 U. C. Q. B. 143; Robinson *v.* Bletcher, 15 U. C. Q. B. 159; Sutherland *v.* Black, 10 U. C. Q. B. 515, 11 U. C. Q. B. 243 (third new trial); Smith *v.* McKay, 10 U. C. Q. B. 412, 613; Tyler *v.* Babington, 4 U. C. Q. B. 202.

A verdict or decision not sustained by sufficient legal evidence is contrary to law (Taylor *v.* Globe Refinery Co., 127 Ga. 138, 56 S. E. 292; Merce *v.* Merry, 112 Ga. 823, 38 S. E. 40; Oslin *v.* Telford, 108 Ga. 803, 34 S. E. 168; Raefle *v.* Moore, 58 Ga. 94; Louisville, etc., R. Co. *v.* Ader, 110 Ind. 367, 11 N. E. 437); and contrary to evidence (White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060; Rome *v.* Shropshire, 112 Ga. 93, 37 S. E. 168).

"Insufficiency" of evidence to justify the verdict does not necessarily mean that there is no evidence whatever to support it. Welever *v.* Advance Shingle Co., 34 Wash. 331, 75 Pac. 863.

The alleged insufficiency of evidence must relate to a material issue under the pleadings. Parker *v.* Hendrie, 3 Iowa 263.

Where a nonsuit for want of sufficient evidence has been reversed, the trial court should not set aside a verdict subsequently rendered on substantially the same evidence on the ground of want of evidence to support it. Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102.

62. Waycross Lumber Co. *v.* Guy, 89 Ga. 148, 15 S. E. 22; Greenfield Bank *v.* Crafts, 4 Allen (Mass.) 447; Blosser *v.* Harshbarger, 21 Gratt. (Va.) 214.

63. *Illinois.*— Chicago, etc., R. Co. *v.* Williams, 44 Ill. 176; Gallup *v.* Smith, 24 Ill. 586.

New Jersey.— Smith *v.* P. Lorillard Co., 67 N. J. L. 361, 51 Atl. 928.

New York.— Williams *v.* Vanderbilt, 29 Barb. 491 [*affirmed* in 28 N. Y. 217, 84 Am. Dec. 333].

West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Wisconsin.— Harrison *v.* Doyle, 11 Wis. 283, especially where other party might easily contradict such evidence if untrue. *Compare* Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854.

Canada.— Molloy *v.* Stansfield, 2 U. C. Q. B. 390, at least where damages small. See also Leith *v.* O'Neil, 19 U. C. Q. B. 233. *Compare* Jaffrey *v.* Toronto, etc., R. Co., 23 U. C. C. P. 553.

Compare Allen *v.* Jarvis, 20 Conn. 38; Georgia R., etc., Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939; Hoffman *v.* McGroerty, 9 Del. Co. (Pa.) 31 (where slight evidence of inferential character was positively contradicted); Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734.

In England and Canada new trials seem to be granted sometimes because the court is not satisfied with the evidence presented. *Ex p.* Sunderland Freemen, etc., 1 Drew. 184, 16 Jur. 370, 61 Eng. Reprint 422 (on issue in chancery); East India Co. *v.* Bazett, Jac. 91, 4 Eng. Ch. 91, 37 Eng. Reprint 784 (especially where there is evidence of misconduct on the part of the jury); Gainsford *v.* Blachford, 6 Price 36, 7 Price 544 (especially where the jury stopped the judge in summing up in favor of a party by expressing themselves as satisfied and finding for the other party); Swinnerton *v.* Stafford, 3 Taunt. 91 (especially where the question is of permanent importance); Byram *v.* Violette, 32 N. Brunsw. 68 (boundary case); Scribner v. McLaughlin, 6 N. Brunsw. 379 (boundary case); Merithew *v.* Sisson, 5 N. Brunsw. 373 (boundary case); Wheelock *v.* Morrison, 1 Nova Scotia Dec. 332 (boundary case); Heintzman *v.* Graham, 15 Ont. 137; Sewell *v.* Richmond, Taylor (U. C.) 423; Fitch *v.* McCrimmon, 30 U. C. C. P. 183; Turcotte *v.* Dawson, 30 U. C. C. P. 23 (where the evidence was conflicting on a question of foreign law); Nasmith *v.* Manning, 29 U. C. C. P. 34; Whitlaw *v.* Phœnix Ins. Co., 28 U. C. C. P. 53; Austin *v.* Armstrong, 28 U. C. C. P. 47; Burnett *v.* Conger, 23 U. C. C. P. 590; Northern R. Co. *v.* Patton, 15 U. C. C. P. 332; Lowell *v.* Todd, 15 U. C. C. P. 306; Fowler *v.* Hendry, 7 U. C. C. P. 350; Wideman *v.* Bruel, 7 U. C. C. P. 134; Morse *v.* Chisholm, 7 U. C. C. P. 131; Gallina *v.* Colton, 6 U. C. C. P. 247; Canniff *v.* Bogart, 5 U. C. C. P. 341; Mellish *v.* Wilkes, 4 U. C. C. P. 407; Gore Bank *v.* Hodge, 2 U. C. C. P. 359; Matthews *v.* Lloyd, 36 U. C. Q. B. 381; Jackson *v.* Yeomans, 28 U. C. Q. B. 307; Watson *v.* Northern R. Co., 24 U. C. Q. B. 98; Gross *v.* Bricker, 18 U. C. Q. B. 410; Beckett *v.* Foy, 12 U. C. Q. B. 361; Doe *v.* Auldjo, 5 U. C. Q. B. 171; Whethen *v.* Caverley, 5 U. C. Q. B. O. S. 71; Doe *v.* Gilchrist, 4 U. C. Q. B. O. S. 276; Short *v.* Lewis, 3 U. C. Q. B. O. S. 385. See also McKay *v.* Lyons, 6 U. C. Q. B.

was legally insufficient to sustain the verdict upon the ground taken by the successful party, a new trial will be granted ordinarily, although the evidence might support the verdict upon some other ground.[64] A verdict against the party sustaining the burden of proof will not be set aside where the evidence was not legally sufficient to sustain a verdict in his favor.[65]

b. Facts Admitted. Where evidence of a fact capable of proof was not offered because the fact was tacitly conceded at the trial,[66] or was admitted of record,[67] a new trial should be denied.

3. Several Issues, Parties, or Actions. Where a verdict is general, it will not be set aside as contrary to evidence, if the evidence fairly sustained any sufficient count[68] or plea[69] of the prevailing party. If the evidence was insufficient to sustain a plea on which the verdict is specifically put, a new trial should be granted.[70] If the evidence was insufficient as against any one of defendants against whom a joint verdict was returned, there must be a new trial.[71] That contrary verdicts have been returned on substantially the same evidence in two actions would not seem to require the allowance of new trials in both actions.[72] The fact that a

O. S. 507, where jury made several changes in verdict. *Compare* Austin *v.* Snyder, 21 U. C. Q. B. 299 (as to amount of damages); Doe *v.* Wheeler, 5 U. C. Q. B. 238 (where both parties had been negligent in presenting case).

64. **Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108, 31 N. E. 836;** Union Pac. R. Co. *v.* Springsteen, 41 Kan. 724, 21 Pac. 774; Penniman *v.* Tucker, 11 Mass. 66; Sensfelder *v.* Stokes, 69 N. J. L. 86, 54 Atl. 517. See also Connell *v.* Miller, 4 N. Brunsw. 116, second new trial. See also *infra*, III, H, 1, e.

Question not presented to jury.—A general verdict for defendant in an action on an insurance policy need not be set aside because plaintiff was entitled to a return of premium, where the point was not taken to the jury and plaintiff is not without other remedy. Penniman *v.* Tucker, 11 Mass. 66.

65. Philadelphia Underwriters' Ins. Co. *v.* Bigelow, 48 Fla. 105, 37 So. 210 (decision of court); Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287; Roberts *v.* Missouri, etc., Tel. Co., 166 Mo. 370, 66 S. W. 155.

66. Maynard *v.* Hunt, 5 Pick. (Mass.) 240; Demeyer *v.* Legg, 18 Barb. (N. Y.) 14; New York, etc., R. Co. *v.* Cook, 2 Sandf. (N. Y.) 732; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543; Wafer *v.* Burns, 12 U. C. Q. B. 384, especially after third trial. See also Selby *v.* Detroit R. Co., 122 Mich. 311, 81 N. W. 106; Brown *v.* Baldwin, etc., Co., 13 N. Y. Suppl. 893 (as to admission of liability by defendant by requesting to go to the jury on the amount of damages); Lynch *v.* Ring, 3 Nova Scotia 418 (where proof of title was not objected to at time); Crandell *v.* Nott, 30 U. C. C. P. 63 (where point not raised at trial)).

If it appears of record that other evidence could not have been produced, the rule is otherwise. Maynard *v.* Hunt, 5 Pick. (Mass.) 240.

67. State *v.* Layton, 3 Harr. (Del.) 469; Wightman *v.* Clapp, 2 Cow. (N. Y.) 517; Virginia-Carolina Chemical Co. *v.* Kirven, 65 S. C. 197, 43 S. E. 658 (admission of partial liability in answer and verdict for defendant); Marsalis *v.* Patton, 83 Tex. 521, 18 S. W. 1070. See also Floyd County *v.* Scott, 19 Ind. App. 227, 49 N. E. 395, as to consent to judgment in open court.

68. Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148. *Compare* Harper *v.* Davies, 45 U. C. Q. B. 442 (where verdict must have included damages on counts not proved); Link *v.* Hunter, 27 U. C. Q. B. 187.

Where one of two causes of action does not state sufficient facts and the verdict is for a greater amount than is recoverable on the other, a new trial must be granted. Fish-Keck Co. *v.* Redlon, 7 Kan. App. 93, 53 Pac. 72.

69. Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472.

70. Fuller *v.* Fletcher, 6 Fed. 128, although the evidence might have sustained a verdict on another plea.

Where the evidence is insufficient to sustain any good plea, although sufficient to sustain a bad plea, a new trial must be granted. Vidal *v.* Ford, 19 U. C. Q. B. 88.

71. Brownlee *v.* Abbott, 108 Ga. 761, 33 S. E. 44; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147. And see *supra*, I, E, 2.

A verdict on conflicting evidence for one defendant and against another, as to whom the evidence is the same, must be set aside. Gerner *v.* Yates, 61 Nebr. 100, 84 N. W. 596; Hyatt *v.* New York Cent., etc., R. Co., 6 Hun (N. Y.) 306.

Confession of judgment by one defendant.— That after a general verdict for defendants, in an action by a creditor against the debtor and his vendee to set aside a conveyance as in fraud of creditors, and pending a motion for new trial, the debtors confessed judgment for the amount of plaintiff's claim, is not ground for setting aside the verdict as to both defendants for insufficiency of evidence. Siegel, etc., Live Stock Commission Co. *v.* Johnson, 4 Okla. 99, 44 Pac. 206.

72. Cadman *v.* Strong, 10 U. C. Q. B. 591; Doe *v.* Denison, 8 U. C. Q. B. 610. See also

second verdict in the same action is contrary to the first is not ground for a new trial.[73]

4. Special Verdict or Findings. Where a special verdict finds facts contrary to the evidence it should be set aside.[74] And where facts found in any special finding returned with a general verdict are essential to the right of recovery, and such finding is not sustained by the evidence or is contrary to the evidence, a new trial should be granted.[75] This is especially true where special findings are evasive and inconsistent with each other or the general verdict.[76] Where the jury was unable to agree upon a special finding on any such determinative fact, it seems proper to set aside the general verdict.[77] In some jurisdictions a general verdict which is not contrary to the evidence or the weight of evidence will not be set aside because a special finding returned with it is against evidence or not supported by the evidence, if the special finding does not necessarily conflict with the general verdict.[78] In other jurisdictions, a new trial will be ordered under such circumstances, if the fact specially found is important, although it is not necessarily

Cheeves *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732 (where separate verdicts on same facts were disproportionate); Gildersleeve *v.* Bonter, 13 U. C. Q. B. 492; Wilson *v.* McNamara, 12 U. C. Q. B. 446 (where a new trial was awarded in the case in which the court considered the finding least supported by the evidence). *Contra*, Phillips *v.* McDowall, 2 Mill (S. C.) 70.

73. Parker *v.* Ansal, 2 W. Bl. 963.

74. Louisville, etc., R. Co. *v.* Green, 120 Ind. 367, 22 N. E. 327; Indiana, etc., R. Co. *v.* Finnell, 116 Ind. 414, 19 N. E. 204; Vinton *v.* Baldwin, 95 Ind. 433 (as "contrary to evidence"); Lafayette *v.* Allen, 81 Ind. 166 (as "contrary to law"); Spraker *v.* Armstrong, 79 Ind. 577; Casey-Swasey Co. *v.* Manchester F. Ins. Co., 32 Tex. Civ. App. 158, 73 S. W. 864; Ohlweiler *v.* Lohmann, 82 Wis. 198, 52 N. W. 172; Moore *v.* Dickie, 33 Nova Scotia 375.

75. *Arkansas.*— White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060.

Illinois.— Egmann *v.* East St. Louis Connecting R. Co., 65 Ill. App. 345.

Indiana.— New York, etc., R. Co. *v.* Baltz, 141 Ind. 661, 36 N. E. 414, 38 N. E. 402; Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607.

Iowa.— Heath *v.* Whitebreast Coal, etc., Co., 65 Iowa 737, 23 N. W. 148; McCarty *v.* James, 62 Iowa 257, 17 N. W. 492.

Kansas.— Atchison, etc., R. Co. *v.* Holland, 58 Kan. 317, 49 Pac. 71; Southern Kansas R. Co. *v.* Michaels, 49 Kan. 388, 30 Pac. 408; Atchison, etc., R. Co. *v.* Long, 46 Kan. 260, 26 Pac. 682; Rodgers Coal Co. *v.* Morgan, 42 Kan. 540, 22 Pac. 579; Southern Kansas R. Co. *v.* Duncan, 40 Kan. 503, 20 Pac. 195; Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499; Union Pac. R. Co. *v.* Fray, 31 Kan. 739, 3 Pac. 550; Parker *v.* Gilmore, 10 Kan. App. 527, 63 Pac. 20; Burton *v.* J. M. Yost Milling Co., (App. 1897) 51 Pac. 67; Atchison, etc., R. Co. *v.* Hine, 5 Kan. App. 748, 47 Pac. 190.

Minnesota.— Jordan *v.* St. Paul, etc., R. Co., 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573.

New York.— Rossenbach *v.* Supreme Court I. O. F., 116 N. Y. App. Div. 565, 101 N. Y. Suppl. 890.

Canada.— Cobban *v.* Canadian Pac. R. Co., 23 Ont. App. 115 [*affirming* 26 Ont. 732].

See 37 Cent. Dig. tit. "New Trial," § 149.

Compare Warren *v.* Quill, 9 Nev. 259, as to findings not requested.

Motion to strike out findings improper.— The proper remedy is a motion for a new trial instead of a motion to strike out the findings. Chappell *v.* Jasper County Oil, etc., Co., 31 Ind. App. 170, 66 N. E. 515.

76. Ford *v.* Central Iowa R. Co., 69 Iowa 627, 21 N. W. 587, 29 N. W. 755; Atchison, etc., R. Co. *v.* Holland, 58 Kan. 317, 49 Pac. 71; Union Pac. R. Co. *v.* Sternbergh, 54 Kan. 410, 38 Pac. 486; Southern Kansas R. Co. *v.* Gorsuch, 47 Kan. 583, 28 Pac. 703; Manhattan, etc., R. Co. *v.* Keeler, 32 Kan. 163, 4 Pac. 143. And see *supra*, III, E, 2, c.

77. Elliott *v.* Graceville, 76 Minn. 430, 79 N. W. 503; Parsons *v.* Citizens' Ins. Co., 43 U. C. Q. B. 261. See also Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 45 Pac. 383, where finding was wilfully evasive. *Contra*, Olsen *v.* Lantalum, 32 N. Brunsw. 526.

78. Hayes *v.* Fine, 91 Cal. 391, 27 Pac. 772; Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Burkhart *v.* Gladish, 123 Ind. 337, 24 N. E. 118; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309; Boss *v.* State, 11 Ind. App. 257, 39 N. E. 197; Jordan *v.* St. Paul, etc., R. Co., 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573; Baker *v.* New York, etc., R. Co., 101 Fed. 545. See also Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Parsons *v.* Citizens' Ins. Co., 43 U. C. Q. B. 261.

Inconsistency of special findings.—A general verdict will not be set aside on the ground that it is not supported by the evidence as shown solely by the inconsistency of special findings with each other, where such inconsistency is not so manifest as to indicate a disposition by the jury to distort the evidence. Chicago, etc., R. Co. *v.* Kennington, 123 Ind. 409, 24 N. E. 137; Staser

decisive of the action, especially as such finding tends to show that the jury did not consider the evidence fairly and impartially.[79]

5. Decision of Court or Referee. A new trial should be granted where the evidence is not legally sufficient to sustain the decision of a court in a case tried without a jury,[80] or the decision of a referee,[81] or where the decision of the court or referee is against the decided weight of the evidence.[82]

6. Amount of Recovery — a. As Affecting Right to New Trial on Weight of Evidence. A new trial will not be granted on the weight of the evidence to enable a plaintiff to recover merely nominal damages,[83] except where some question of

v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

79. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Baldwin *v.* St. Louis, etc., R. Co., 63 Iowa 210, 18 N. W. 884 (indicating unfairness on part of jury); Jeffrey *v.* Keokuk, etc., R. Co., 51 Iowa 439, 1 N. W. 765 (as indication of passion or prejudice); Atchison, etc., R. Co. *v.* Davis, 64 Kan. 127, 67 Pac. 441; Southern Kansas R. Co. *v.* Michaels, 49 Kan. 388, 30 Pac. 408; St. Louis, etc., R. Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. 312; Southern Kansas R. Co. *v.* Gorsuch, 47 Kan. 583, 28 Pac. 703; Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499; Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456; Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772. See also Sloss *v.* Allman, 64 Cal. 47, 30 Pac. 574. *Compare* Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456, where an affirmative answer to any one of three alternative questions would sustain general verdict.

80. Dundon *v.* McDonald, 137 Cal. 1, 69 Pac. 498; Carpentier *v.* Small, 35 Cal. 346 (contrary to stipulation); Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415; Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037; Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Hilgenberg *v.* Northup, 134 Ind. 92, 33 N. E. 786; Crawford *v.* Powell, 101 Ind. 421; Montmorency Gravel Road Co. *v.* Rock, 41 Ind. 263; Chadron Bank *v.* Anderson, 7 Wyo. 441, 53 Pac. 280. *Compare* Bass *v.* Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400. And see *supra*, I, C, 4, c.

The word "decision" is equivalent to "finding" where a cause is tried by the court. Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642.

A dismissal of an action for insufficiency of evidence is a "decision" within the meaning of a statute allowing a new trial where a "decision" is not justified by the evidence or is contrary to law. Volmer *v.* Stagerman, 25 Minn. 234; McCormick *v.* Miller, 19 Minn. 443.

Where the evidence was conflicting, a new trial will generally be denied. Meyer *v.* Mowry, 34 Cal. 514. But the trial court may, in its discretion, allow a new trial though the evidence was conflicting. Bates *v.* Howard, 105 Cal. 173, 38 Pac. 715.

81. Koktan *v.* Knight, 44 Minn. 304, 46 N. W. 354; Strittmacher *v.* Salina, etc., Plankroad Co., 34 How. Pr. (N. Y.) 74; Morgan *v.* Bruce, 1 Code Rep. N. S. (N. Y.) 364.

82. *California.*— Hooper *v.* Fletcher, 145 Cal. 375, 79 Pac. 418; McCarty *v.* Southern Pac. Co., 144 Cal. 677, 78 Pac. 260; Condee *v.* Gyger, 126 Cal. 546, 59 Pac. 26.

Illinois.— McClelland *v.* Mitchell, 82 Ill. 35.

Indiana.— Walters *v.* Walters, 168 Ind. 45, 79 N. E. 1037; Tewkshury *v.* Howard, 138 Ind. 103, 37 N. E. 355; Bunch *v.* Hart 138 Ind. 1, 37 N. E. 537; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Bartley *v.* Phillips, 114 Ind. 189, 16 N. E. 508; Dodge *v.* Pope, 93 Ind. 480; Riley *v.* Boyer, 76 Ind. 152 (against uncontradicted evidence); Richardson *v.* Seybold, 76 Ind. 58; Robinson *v.* Snyder, 74 Ind. 110.

Iowa.— See Humphreys *v.* Hoyt, 4 Greene 245.

Nebraska.— Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450.

New York.— Spencer *v.* Utica, etc., R. Co., 5 Barb. 337; Oakley *v.* Aspinwall, 2 Sandf. 7 [*reversed* on other grounds in 4 N. Y. 513]; Osborn *v.* Marquand, 1 Sandf. 457; Brown *v.* Penfield, 24 How. Pr. 64 [*affirmed* in 36 N. Y. 473, 2 Transcr. App. 196], and decision contrary to law. See also Wehrum *v.* Kuhn, 34 N. Y. Super. Ct. 336 [*affirmed* in 61 N. Y. 623].

Canada.— Boggs *v.* Scott, 34 N. Brunsw. 110.

Compare O'Grady *v.* Supple, 148 Miss. 522, 20 N. E. 114, under statute.

Must be clearly against evidence.— The decision of the trier or referee must be clearly against the evidence in order that the court may be justified in setting it aside. Strittmacher *v.* Salina, etc., Plankroad Co., 34 How. Pr. (N. Y.) 74; Thayer *v.* Central Vermont R. Co., 60 Vt. 214, 13 Atl. 859. *Compare* Young *v.* Kelly, 9 Mo. 50; McEvoy *v.* Lane, 9 Mo. 48; Scott *v.* Dent, 38 U. C. Q. B. 30. See also Smith *v.* Hamilton, 29 U. C. Q. B. 394.

83. *Arkansas.*— Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710.

Connecticut.— Michael *v.* Curtis, 60 Conn. 363, 22 Atl. 949.

Illinois.— Comstock *v.* Brosseau, 65 Ill. 39; Plumleigh *v.* Dawson, 6 Ill. 544, 41 Am. Dec. 199.

Indiana.— Hudspeth *v.* Allen, 26 Ind. 165; Jennings *v.* Loring, 5 Ind. 250; State *v.* Miller, 5 Blackf. 381.

Iowa.— Watson *v.* Van Meter, 43 Iowa 76, damages for overflowing lands.

permanent property right is involved.[84] So a new trial will not be allowed to give a plaintiff an opportunity to recover punitive,[85] or nominal,[86] damages; and it has sometimes been held that a new trial may properly be denied where the amount involved is trifling or the difference between the amount claimed to be correct and that found by the verdict is small.[87] And in England and Canada a new trial

Maine.— Jenney *v.* Delesdernier, 20 Me. 183.

Montana.— Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591.

New Jersey.—Phillips *v.* Phillips, 34 N. J. L. 208.

New York.— Devendorf *v.* Wert, 42 Barb. 227; Chase *v.* Bassett, 15 Abb. Pr. N. S. 293; Nolan *v.* Harris, 52 How. Pr. 409; Rundell *v.* Butler, 10 Wend. 119; Brantigham *v.* Fay, 1 Johns. Cas. 255. See also Van Slyck *v.* Hogeboom, 6 Johns. 270.

South Carolina.— Westbrook *v.* McMillan, 1 Hill 317, 26 Am. Dec. 187.

England.— Burton *v.* Thompson, 2 Burr. 664, 2 Ld. Ken. 375.

Canada.— Scammell *v.* Clarke, 23 Can. Sup. Ct. 307 [*affirming* 31 N. Brunsw. 250]; Simonds *v.* Chesley, 20 Can. Sup. Ct. 174; Beatty *v.* Oille, 12 Can. Sup. Ct. 706; Haines *v.* Dunlap, 33 N. Brunsw. 556; Scammell *v.* Clark, 31 N. Brunsw. 250; Belyea *v.* Hamm, 13 N. Brunsw. 27; Atkinson *v.* Mitchell, 11 N. Brunsw. 345 (although verdict contrary to instruction to find nominal damages); Ruel *v.* Beer, 8 N. Brunsw. 369; Rogers *v.* Peck, 2 N. Brunsw. 318 (at least where point was not raised on the trial); Wilkie *v.* Richards, 32 Nova Scotia 295; Lemay *v.* Chamberlain, 10 Ont. 638; Milligan *v.* Jamieson, 4 Ont. L. Rep. 650; Eaton *v.* Gore Bank, 27 U. C. Q. B. 490; Cleaver *v.* Culloden, 15 U. C. Q. B. 582; Curtis *v.* Jarvis, 10 U. C. Q. B. 466. *Compare* Gore Bank *v.* Hodge, 2 U. C. C. P. 359, as to nominal damages on counts unanswered.

See 37 Cent. Dig. tit. "New Trial," § 150. And see APPEAL AND ERROR, 3 Cyc. 446; DAMAGES, 13 Cyc. 21.

Evidence insufficient to support verdict for nominal damages.—A verdict against a defendant for nominal damages may be set aside, where the evidence was legally insufficient to support it. Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463.

The rule applies to the findings of the court in a case tried without a jury. Briggs *v.* Morse, 42 Conn. 258; Cooke *v.* Barr, 39 Conn. 296.

84. Plumleigh *v.* Dawson, 6 Ill. 544, 41 Am. Dec. 199; Watson *v.* Van Meter, 43 Iowa 76; Applegarth *v.* Rhymal, Taylor (U. C.) 427. And see DAMAGES, 13 Cyc. 21.

Where an important right or interest is involved, a verdict may be set aside as contrary to law to allow the recovery of nominal damages. Shenk *v.* Mundorf, 2 Browne (Pa.) 106. *Compare* Mishler *v.* Baumgardner, 4 Pa. L. J. Rep. 266, 8 Pa. L. J. 304, failure to give nominal damages in hard case.

85. Comstock *v.* Brosseau, 65 Ill. 39; Johnson *v.* Weedman, 5 Ill. 495; McKee *v.* Ingalls, 5 Ill. 30; Palmer *v.* Leader Pub. Co., 6 Pa. Dist. 182.

86. People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652]; Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591.

87. *Colorado.*— Kimball *v.* Castagnio, 8 Colo. 525, 9 Pac. 488.

Connecticut.— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345 (refusal to set aside verdict for fifty dollars as excessive); Michael *v.* Curtis, 60 Conn. 363, 22 Atl. 949.

Georgia.— Jones *v.* Columbus Water Lot Co., 18 Ga. 539.

Illinois.— Badgley *v.* Heald, 9 Ill. 64; Engel *v.* Fischer, 44 Ill. App. 362. But see Galloway *v.* Weber, 55 Ill. App. 366.

Kentucky.— Luckett *v.* Clark, Litt. Sel. Cas. 178, amount controverted less than cost of new trial.

Massachusetts.—Hagar *v.* Weston, 7 Mass. 110; Boyden *v.* Moore, 5 Mass. 365.

Minnesota.— Maher *v.* Winona, etc., R. Co., 31 Minn. 401, 18 N. W. 105.

New York.— Hunt *v.* Burrel, 5 Johns. 137.

Pennsylvania.— Harper *v.* Busse, 4 Lanc. L. Rev. 74; Todd *v.* Jones, 1 Phila. 45.

Rhode Island.— Wightman *v.* Kruger, 23 R. I. 78, 49 Atl. 395; York *v.* Stiles, 21 R. I. 225, 42 Atl. 876.

South Carolina.— Cassidy *v.* Varni, 3 Strobh. 358.

Vermont.— Pomeroy *v.* Taylor, Brayt. 169.

Wyoming.— Emery *v.* Hawley, 1 Wyo. 303.

United States.— Broadnax *v.* United Engineering, etc., Co., 128 Fed. 649 [*affirmed* in 136 Fed. 351, 69 C. C. A. 177]; Boone City Bank *v.* Mershon, 33 Fed. 240; U. S. *v.* Barnhart, 17 Fed. 579, 9 Sawy. 159. See also Chillicothe Branch State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431.

England.— Goodwin *v.* Gibbons, 4 Burr. 2108; Farewell *v.* Chaffey, 1 Burr. 54; Macrow *v.* Hull, 1 Burr. 11; Nichol *v.* Bestwick, 28 L. J. Exch. 4.

Canada.—Sinclair *v.* Spence, 16 N. Brunsw. 263; Adam *v.* Berlanquet, 15 N. Brunsw. 70; Tomkins *v.* Tibbits, 12 N. Brunsw. 317; Caldwell *v.* Keith, 10 N. Brunsw. 590; Crookshank *v.* Macfarlane, 7 N. Brunsw. 544; Moore *v.* Ogden, 3 N. Brunsw. 278 (injury slight in assault and battery); White *v.* Yarmouth Gas Light Co., 1 Nova Scotia Dec. 204; Campbell *v.* Denniestoun, 23 U. C. C. P. 339; Comstock *v.* Moore, 6 U. C. C. P. 434 (especially where the action might have been brought in a court in inferior jurisdiction); Playter *v.* Taylor, 1 U. C. Q. B. 159. See also Lewis *v.* Kelly, 17 U. C. C. P. 250 (as to refusal of a new trial in ejectment to recover a very inconsiderable portion of the

will not be granted on the weight of evidence ordinarily, where the verdict is for less than £20.[88] The court on a motion for a new trial will not ordinarily inquire into the consequences of the verdict as it may relate to costs.[89] But where it is palpable that the jury has attempted to shift the burden of costs by returning a verdict for a small amount, a new trial will be allowed.[90]

b. Excessive Damages — (i) *In General.* That the jury has clearly and manifestly erred in assessing the amount of recovery or has given excessive damages is ground for a new trial,[91] and this is especially true where it is so excessive as to

land in question); Owens *v.* Purcell, 11 U. C. Q. B. 390. *Compare* Mitchell *v.* Barry, 26 U. C. Q. B. 416; Knowlson *v.* Conger, 7 U. C. Q. B. 455 (where, in trover, the court thought the transaction fraudulent on plaintiff's own showing); Sherwood *v.* Gibson, 5 U. C. Q. B. 205 (where "the ordinary rights of property seem to have been lost sight of"); Baldwin *v.* McLean, 6 U. C. Q. B. O. S. 636 (where against court's direction).

See 37 Cent. Dig. tit. "New Trial," § 136.

But see Trumbull *v.* Callam County School Dist. No. 7, 22 Wash. 631, 61 Pac. 714, a verdict for twenty-six dollars under instruction to find nominal damages.

Where rule not applicable.— The rule was held not applicable where the damages recoverable might not exceed thirty or forty dollars. Michael *v.* Curtis, 60 Conn. 363, 22 Atl. 949.

Excessive damages.— Where the amount of recovery is small, a new trial asked for on the ground of excessive damages may be refused. Buddington *v.* Knowles, 30 Conn. 26, sixty-six dollars for flooding land.

88. Sowell *v.* Champion, 6 A. & E. 407, 2 N. & P. 627, W. W. & D. 667, 33 E. C. L. 226 (although the case was of general importance); Howard *v.* Barnard, 11 C. B. 653, 73 E. C. L. 653; Allum *v.* Boultbee, 2 C. L. R. 1072, 9 Exch. 738, 18 Jur. 406, 23 L. J. Exch. 208, 2 Wkly. Rep. 459; —— *v.* Phillips, 1 Cromp. & M. 26, 3 Tyrw. 181; Leese *v.* Sylvester, 12 L. J. C. P. 250 (although other actions depended on the result of the action); Adams *v.* Midland R. Co., 31 L. J. Exch. 35, 10 Wkly. Rep. 84; Joyce *v.* Metropolitan Bd. of Works, 44 L. T. Rep. N. S. 811; Manning *v.* Underwood, McClell. & Y. 266; Cleaver *v.* Blanchard Municipality, 4 Manitoba 464; Williston *v.* Walsh, 4 N. Brunsw. 181; Jowett *v.* Haacke, 14 U. C. C. P. 447; Munn *v.* Galbraith, 13 U. C. C. P. 75; Grimm *v.* Fischer, 25 U. C. Q. B. 383 (and this rule refers to the amount recovered in excess of any money paid into court); Phillips *v.* Hutchinson, 13 U. C. Q. B. 136.

Extent and limits of rule.— The rule applies even though the verdict was contrary to the direction of the judge on the evidence. Scott *v.* Watkins, 8 L. J. C. P. O. S. 158, 4 M. & P. 237; Roberts *v.* Karr, 1 Taunt. 495, 10 Rev. Rep. 592; Tarlington *v.* Starey, 7 Wkly. Rep. 188. It has been held, however, that the rule does not apply to replevin as damages are usually nominal (Edgson *v.* Cardwell, L. R. 8 C. P. 647, 28 L. T. Rep. N. S. 819. *Compare* Brown *v.* Ray, 9 Moore C. P. 583, 17 E. C. L. 560); nor where a public or permanent right is involved (Prouse *v.* Glenny, 13 U. C. C. P. 560; Soper *v.* Marsh, 5 U. C. Q. B. O. S. 68), nor where the jury was misdirected (Young *v.* Harris, 2 Cromp. & J. 14, 1 L. J. Exch. 5, 2 Tyrw. 167; —— *v.* Phillips, 1 Comp. & M. 26, 3 Tyrw. 181); nor where the verdict is plainly perverse (Freeman *v.* Price, 1 Y. & J. 402 (libel); Moodie *v.* Bradshaw, 4 U. C. Q. B. 199). But perverse verdict means a verdict contrary to the direction of the judge on a matter of law. Adams *v.* Midland R. Co., 31 L. J. Exch. 35, 10 Wkly. Rep. 84. See also Hawkins *v.* Alder, 18 C. B. 640, 86 E. C. L. 640.

89. Hagar *v.* Weston, 7 Mass. 110.

That a jury was ignorant that its verdict would not carry costs is no reason for disturbing the verdict. Kilmore *v.* Abdoolah, 27 L. J. Exch. 307; Mears *v.* Griffin, 1 M. & G. 796, 2 Scott N. R. 15, 39 E. C. L. 1031.

90. Brewer *v.* Tyringham, 12 Pick. (Mass.) 547; Levi *v.* Milne, 4 Bing. 195, 5 L. J. C. P. O. S. 153, 12 Moore C. P. 418, 13 E. C. L. 464; Russell *v.* Weniweser, 16 Wkly. Rep. 710. See also Cutler *v.* Cutler, 43 Vt. 660.

91. *Alabama.*— Hamilton *v.* Maxwell, 133 Ala. 637, 32 So. 13 (set-off); Richardson *v.* Birmingham Cotton Mfg. Co., 116 Ala. 381, 22 So. 478.

Arkansas.— Ayliff *v.* Hardy, 25 Ark. 49.

California.— Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019 (although no conflict in evidence as to circumstances jury might regard in fixing damages for wrongful death); Potter *v.* Seale, 5 Cal. 410.

Colorado.— Black *v.* Drake, 2 Colo. 330.

Georgia.— Hamer *v.* White, 110 Ga. 300, 34 S. E. 1001; Levens *v.* Smith, 102 Ga. 480, 31 S. E. 104 (so on plea of recoupment); White *v.* Beasland, 42 Ga. 184; Broach *v.* King, 23 Ga. 500 (slander); Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400.

Illinois.— Schwabacher *v.* Wells, 49 Ill. 257; Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253; Blanchard *v.* Morris, 15 Ill. 35; Halberg *v.* Brosseau, 64 Ill. App. 520; Fair *v.* Himmel, 50 Ill. App. 215; Thompson *v.* Evans, 49 Ill. App. 289; McDole *v.* Simmons, 45 Ill. App. 328.

Indiana.— Hill *v.* Newman, 47 Ind. 187.

Iowa.—Tathwell *v.* Cedar Rapids, 122 Iowa 50, 97 N. W. 96; La Salle *v.* Tift, 52 Iowa 164, 2 N. W. 1031.

Kansas.— Atchison, etc., R. Co. *v.* Richards, 58 Kan. 344, 49 Pac. 436; Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108;

indicate that the jury were influenced by passion, prejudice, or other improper

Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352; Fish-Keck Co. *v.* Redlon, 7 Kan. App. 93, 53 Pac. 72; Chicago, etc., R. Co. *v.* Guild, 3 Kan. App. 736, 45 Pac. 452.

Kentucky.— Taylor *v.* Howser, 12 Bush 465; Mobile, etc., R. Co. *v.* Reeves, 80 S. W. 471, 25 Ky. L. Rep. 2236.

Louisiana.— Driggs *v.* Morgan, 10 Rob. 119.

Massachusetts.— Tully *v.* Fitchburg R. Co., 134 Mass. 499; Harding *v.* Medway, 10 Metc. 465; Lambert *v.* Craig, 12 Pick. 199; Taunton Mfg. Co. *v.* Smith, 9 Pick. 11; Sampson *v.* Smith, 15 Mass. 365.

Minnesota.— Marsh *v.* Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630; Trow *v.* White Bear, 78 Minn. 432, 80 N. W. 1117; Park *v.* Electric Thermostat Co., 75 Minn. 349, 77 N. W. 988 (second verdict); Minneapolis First Nat. Bank *v.* St. Cloud, 73 Minn. 219, 75 N. W. 1054; Blaise *v.* Anderson, 35 Minn. 306, 28 N. W. 922.

Mississippi.— Vicksburg, etc., R. Co. *v.* Lawrence, 78 Miss. 86, 28 So. 826. *Compare* Lewis *v.* Black, 27 Miss. 425, under statute.

Missouri.— Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571; Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Lee *v.* Knapp, (1897) 38 S. W. 1107 (distinguishing between rules in trial and appellate courts); Wells *v.* Andrews, 133 Mo. 663, 34 S. W. 865; Watson *v.* Harmon, 85 Mo. 443; Pratt *v.* Blakey, 5 Mo. 205; Pacific Express Co. *v.* Emerson, 86 Mo. App. 683.

Nebraska.— Lenzen *v.* Miller, 51 Nebr. 855, 71 N. W. 715.

New Jersey.— Graham *v.* Consolidated Traction Co., 65 N. J. L. 539, 47 Atl. 453 (fourth verdict); Hollister *v.* Wood, (Sup. 1899) 43 Atl. 653.

New York.— Houghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; McDonald *v.* Walter, 40 N. Y. 551; Von Au *v.* Magenheimer, 115 N. Y. App. Div. 84, 100 N. Y. Suppl. 659; Ross *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 378, 93 N. Y. Suppl. 679 (personal injury); Fawdrey *v.* Brooklyn Heights R. Co., 64 N. Y. App. Div. 418, 72 N. Y. Suppl. 283 (although liability for some damages be conceded); De la Torre *v.* Metropolitan St. R. Co., 48 N. Y. App. Div. 126, 62 N. Y. Suppl. 604; Branagan *v.* Long Island R. Co., 28 N. Y. App. Div. 461, 51 N. Y. Suppl. 112 (trial term New York supreme court); Bishop *v.* Autographic Register Co., 19 N. Y. App. Div. 268, 46 N. Y. Suppl. 97 [*affirmed* in 165 N. Y. 662, 59 N. E. 1119 (occasioned by mistake of court in stating facts); Lovatt *v.* Watson, 54 N. Y. Super. Ct. 506; Schneider *v.* McCabe, 36 N. Y. Super. Ct. 83; Wehrum *v.* Kuhn, 34 N. Y. Super Ct. 336 [*affirmed* in 61 N. Y. 623]; Harris *v.* Panama R. Co., 5 Bosw. 312; Krakower *v.* Davis, 20 Misc. 350, 45 N. Y. Suppl. 780; Tuxedo Automobile Station *v.* Lyman, 88 N. Y. Suppl. 1008; Hoe *v.* Hoey, 15 N. Y. Suppl. 105; Platz *v.* Cohoes, 8 Abb. N. Cas. 392; McConnell *v.* Hampton, 12 Johns. 234.

North Carolina.— Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33.

Ohio.— Bailey *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225.

Pennsylvania.— Vallo *v.* U. S., Express Co., 147 Pa. St. 404, 23 Atl. 594, 30 Am. St. Rep. 741, 14 L. R. A. 743; Palmer *v.* Leader Pub. Co., 7 Pa. Super. Ct. 594, 42 Wkly. Notes Cas. 556; Shoemaker *v.* Livezely, 2 Browne 286; Bell *v.* Hamilton, 1 Browne 302; Smith *v.* Uhler, 14 Leg. Int. 133; Hallett *v.* Lelar, 1 Phila. 20; Crouthamel *v.* Lehigh Valley Traction Co., 20 Montg. Co. Rep. 212; Bartholomew *v.* Speer, 7 North. Co. Rep. 152; Hunt *v.* Bruner, 6 Phila. 204; Hill *v.* Philadelphia, 2 Phila. 351.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943; Stuckey *v.* Atlantic Coast Line R. Co., 57 S. C. 395, 35 S. E. 550; Carwile *v.* Harvey, 15 Rich. 314; Verdier *v.* Trowell, 6 Rich. 166; Poppenheim *v.* Wilkes, 2 Rich. 354; English *v.* Clerry, 3 Hill 279; Duff *v.* Hutson, 2 Bailey 215; Wallace *v.* Frazier, 2 Nott & M. 516; Houston *v.* Gilbert, 3 Brev. 63, 5 Am. Dec. 542; Lehre *v.* Sumter, 3 Brev. 19; Bacot *v.* Keith, 2 Bay 466.

Tennessee.— Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea 488.

Texas.— Nunnally *v.* Taliaferro, 82 Tex. 286, 18 S. W. 149; Texas Cent. R. Co. *v.* Ascue, (1887) 4 S. W. 13; May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416; Nading *v.* Denison, etc., Suburban R. Co., 22 Tex. Civ. App. 173, 54 S. W. 412, verdict for damages to property less than testified to by any witness.

Vermont.— Barrette *v.* Carr, 75 Vt. 425, 56 Atl. 93.

Virginia.— Rowland Lumber Co. *v.* Ross, 100 Va. 275, 40 S. E. 922.

Washington.— Kohler *v.* Fairhaven, etc., R. Co., 8 Wash. 452, 36 Pac. 253, 681.

United States.— Usher *v.* Scranton R. Co., 132 Fed. 405; U. S. *v.* Taffe, 78 Fed. 524; Blunt *v.* Little, 2 Fed. Cas. No. 1,578, 3 Mason 102; Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,502, 2 McLean 611; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147.

England.—Goldsmith *v.* Sefton, Anstr. 808; Price *v.* Severn, 7 Bing. 316, 9 L. J. C. P. O. S. 99, 5 M. & P. 125, 20 E. C. L. 145; Corkery *v.* Hickson, Ir. R. 10 C. L. 174 ("enormous and excessive" in false imprisonment); Hewlett *v.* Cruchley, 5 Taunt. 277, 1 E. C. L. 149; Jones *v.* Sparrow, 5 T. R. 257; Ducker *v.* Wood, 1 T. R. 277.

Canada.— Stevens *v.* Queen Ins. Co., 32 N. Brunsw. 387; Demill *v.* Foshay, 9 N. Brunsw. 86; Campbell *v.* Prince, 5 Ont. App. 330 (especially where reason to believe jury might have been misled by charge); Crandall *v.* Crandall, 30 U. C. C. P. 497; Crawford *v.* McLaren, 9 U. C. C. P. 215; Batchelor

motive.[92] The rule is held to apply to the allowance of excessive punitive dam-

v. Buffalo, etc., R. Co., 5 U. C. C. P. 127; Munroe *v.* Abbott, 39 U. C. Q. B. 78; Cook *v.* Cook, 36 U. C. Q. B. 553 (slander); Link *v.* Hunter, 27 U. C. Q. B. 187; Mitchell *v.* Barry, 26 U. C. Q. B. 416; McGillivray *v.* Great Western R. Co., 25 U. C. Q. B. 69; Armour *v.* Boswell, 6 U. C. Q. B. O. S. 153; Jeffers *v.* Markland, 5 U. C. Q. B. O. S. 677; Muirhead *v.* McDougall, 5 U. C. Q. B. O. S. 642.

See 37 Cent. Dig. tit. "New Trial," §§ 153, 154, 165. And see DAMAGES, 13 Cyc. 123.

Where there is no evidence of part of a claim allowed in full, it is proper to grant a new trial. Blaise *v.* Anderson, 35 Minn. 306, 28 N. W. 922; Fury *v.* Merriman, 45 Mo. 500; Hewitt *v.* Gzowski, 6 U. C. C. P. 89; Harper *v.* Davies, 45 U. C. Q. B. 442, where verdict must have included damages on counts not proved.

If a verdict for partial destruction of property or damage thereto equals the highest valuation placed on all the property, a new trial should be granted. Thompson *v.* Evans, 49 Ill. App. 289; Texas Cent. R. Co. *v.* Ascue, (Tex. 1887) 4 S. W. 13. See also Ingraham *v.* Russell, 4 Miss. 304, where verdict on warranty for two slaves nearly equaled valuation placed on three.

Verdict excessive as to one defendant.— Where each defendant is liable for the damages occasioned by joint trespasses, the court will not interfere with the verdict because it may seem excessive as to one defendant. Grantham *v.* Severs, 25 U. C. Q. B. 468.

Dismissal as to one defendant.— Where plaintiff has dismissed his action after verdict and before judgment as to that one of several defendants by whose conduct the damages were aggravated, a new trial may be allowed the other defendants. Thomas *v.* Hoffman, 22 Mich. 45. See also Chicago, etc., R. Co. *v.* Hardie, 85 Ill. App. 122, as to effect of prejudice against dismissed defendant.

Excessive valuation of property in detinue. — That the jury fixed an excessive valuation on property in detinue was held not ground for a new trial where it was not shown that defendant could not restore the property. Tarlton *v.* Briscoe, 1 A. K. Marsh. (Ky.) 67; Thompson *v.* Porter, 4 Bibb (Ky.) 70.

Deductions not claimed at trial.—A new trial will not be granted on the ground that the jury made no deductions for benefits to plaintiff of which no point was made on the trial. Broadnax *v.* United Engineering, etc., Co., 128 Fed. 649 [*affirmed* in 136 Fed. 351, 69 C. C. A. 177].

Amount fixed by court and not by verdict. — That the amount defendant in bastardy proceedings is required to pay is excessive, such amount being determined by the court and not by the verdict, is not ground for a new trial. McIlvain *v.* State, 80 Ind. 69.

Action for damages — Death of child after verdict and before judgment.— Where, in an action for the negligent injury of a child brought by his next friend, the child died after verdict and before judgment, a new trial was refused, although damages were presumably given on the supposition that the child would continue to live. Kramer *v.* Waymark, L. R. 1 Exch. 241, 4 H. & C. 427, 12 Jur. N. S. 395, 35 L. J. Exch. 148, 14 L. T. Rep. N. S. 368, 14 Wkly. Rep. 659. *Compare* Sibbald *v.* Grand Trunk R. Co., 19 Ont. 164.

Presumptions.— Where the verdict does not exceed that portion of personal property destroyed, there is no presumption that the jury gave damages as to other property as to which defendant's act was justified. St. Louis, etc., R. Co. *v.* Lindsay, 55 Ark. 281, 18 S. W. 59.

A second or third verdict may be set aside as excessive. Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141, 583; Clear *v.* Fox, 26 Fed. 90; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72. But in such case, the court will be more reluctant to award a new trial. Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425; Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913; Thompson *v.* Shea, 11 Fed. 847, 4 McCrary 93. *Compare* Bass *v.* Chicago, etc., R. Co., 39 Wis. 636, where exemplary damages were improperly awarded on the first trial. That the material findings on a former trial were adverse to plaintiff is not cause for setting aside the verdict on a second trial as excessive. Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826. A verdict is not necessarily excessive because it equals or exceeds a former verdict set aside as excessive, if the evidence on the two trials was materially different. Central R., etc., Co. *v.* Smith, 80 Ga. 526, 5 S. E. 772; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409.

For the proper specification of such ground for a new trial see *infra*, IV, H, 3, f, (II).

92. *Arkansas.*— Walworth *v.* Pool, 9 Ark. 394.

California.— Kinsey *v.* Wallace, 36 Cal. 462.

Georgia.— Lang *v.* Hopkins, 10 Ga. 37.

Indiana.— Pittsburg, etc., R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033.

Kansas.—Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78; Bell *v.* Morse, 48 Kan. 601, 29 Pac. 1086; Parsons, etc., R. Co. *v.* Montgomery, 46 Kan. 120, 26 Pac. 403; Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500; Steinbuchel *v.* Wright, 43 Kan. 307, 23 Pac. 560; Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499; Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

Kentucky.— Louisville, etc., R. Co. *v.* Fox, 11 Bush 495.

Massachusetts.— Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189, slander.

Missouri.— Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75.

New Hampshire.— Belknap *v.* Boston, etc., R. Co., 49 N. H. 358.

New Jersey.— Quinlan *v.* Welsh, (Sup. 1907) 66 Atl. 950; Barry *v.* Pennsylvania R. Co., 65 N. J. L. 407, 47 Atl. 464; Reuck *v.* McGregor, 32 N. J. L. 70.

ages,[93] and to the allowances of such damages where none were properly recoverable.[94] The assessment of damages being peculiarly within the province of the jury, a verdict should seldom be disturbed upon the ground that the damages awarded are excessive if the evidence relating to such damages was fairly conflicting.[95] And where the amount of damages is largely a matter of opinion, it is not necessarily ground for a new trial that the jury gave an amount greater, or less, than that testified to by the witnesses.[96] More than two trials on the mere measure of damages are seldom given.[97] It is not sufficient cause for granting a new trial that the judge would have been better satisfied by a smaller verdict.[98] The rule is well settled that in any case the assessment of damages

New York.—Clapp *v.* Hudson River R. Co., 19 Barb. 461; Collins *v.* Albany, etc., R. Co., 12 Barb. 492.

Tennessee.— Massadillo *v.* Nashville, etc., R. Co., 89 Tenn. 661, 15 S. W. 445.

Texas.— Thomas *v.* Womack, 13 Tex. 580.

Wisconsin.— Gillen *v.* Minneapolis, etc., R. Co., 91 Wis. 633, 65 N. W. 373; Murray *v.* Buell, 74 Wis. 14, 41 N. W. 1010; Goodno *v.* Oshkosh, 28 Wis. 300.

United States.— Shaw *v.* Scottish Commercial Ins. Co., 21 Fed. Cas. No. 12,723, 2 Hask. 246.

Canada.— Key *v.* Thomson, 12 N. Brunsw. 295; Huntsman *v.* Great Western R. Co., 20 U. C. Q. B. 24.

Mistake in rendering excessive verdict.— Where the mistake of a jury in rendering an excessive verdict can be harmonized with an honest regard for duty and with a proper comprehension of most of the salient facts in evidence, the court does not abuse its discretion in denying a new trial on the ground that the verdict is the result of passion or prejudice. McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132.

93. Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; Nunnally *v.* Taliaferro, 82 Tex. 286, 18 S. W. 149; Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315.

94. Domico *v.* Casassa, 101 Cal. 411, 35 Pac. 1024; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1. See also Fair *v.* Himmel, 50 Ill. App. 215, malicious prosecution.

95. *Georgia.*— Western, etc., R. Co. *v.* Mathis, 77 Ga. 488, 2 S. E. 692. See also Donaldson *v.* Cothran, 60 Ga. 603.

New Jersey.— Winans *v.* Brookfield, 5 N. J. L. 847.

New York.—Brooks *v.* Ludin, 1 N. Y. Suppl. 338 [*affirmed* in 57 N. Y. Super. Ct. 145, 6 N. Y. Suppl. 510].

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Rhode Island.— Hackett *v.* Shaw, 24 R. I. 29, 51 Atl. 1040.

Texas.— Texas, etc., R. Co. *v.* Gill, 2 Tex. App. Civ. Cas. § 175.

United States.— Hellyer *v.* Trenton City Bridge Co., 133 Fed. 843.

Canada.— Prescott *v.* Walton, 13 N. Brunsw. 230; Crozier *v.* The Phœnix Ins. Co., 13 N. Brunsw. 200.

96. Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Brewer *v.* Tyringham, 12 Pick. (Mass.) 547; Cann *v.* Facey, 1 Harr. & W. 482, 5 N. & M. 405. See also Murdock *v.* Sumner, 22 Pick. (Mass.) 156; Hopkins *v.* Myers, Harp. (S. C.) 56.

A verdict need not be set aside because it differs from the opinions of the witnesses as to the value of land where it is not inconsistent with the facts on which the witnesses stated that they based their opinions. Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486. *Compare* Nading *v.* Denison, etc., R. Co., 22 Tex. Civ. App. 173, 54 S. W. 412.

If defendant leaves the measure of damages to general inference when the data for fixing the amount with reasonable certainty are in his control, he cannot complain of the finding of the jury except in a case of palpable extravagance. Stephens *v.* Felt, 22 Fed. Cas. No. 13,368*a*, 2 Blatchf. 37, 1 Fish. Pat. Rep. 144.

97. Clerk *v.* Udall, 2 Salk. 649; Chambers *v.* Robinson, Str. 691; Curtis *v.* Grand Trunk R. Co., 12 U. C. C. P. 89; Stock *v.* Great Western R. Co., 9 U. C. C. P. 134; Nicholson *v.* Page, 27 U. C. Q. B. 505; Corner *v.* McKinnon, 4 U. C. Q. B. 350. *Compare* Coffin *v.* Phenix Ins. Co., 15 Pick. (Mass.) 221; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72.

Concurring verdict.—Two verdicts assessing the value of lands taken for public use at different sums cannot be considered concurring verdicts. U. S. *v.* Taffe, 78 Fed. 524.

98. *Illinois.*— Blanchard *v.* Morris, 15 Ill. 35.

Minnesota.— Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

New Hampshire.— Lucier *v.* Larose, 66 N. H. 141, 20 Atl. 249.

New Jersey.— Dickerson *v.* Payne, (Sup. 1902) 53 Atl. 699; Winans *v.* Brookfield, 5 N. J. L. 847.

New York.— Murphy *v.* Weidmann Cooperage Co., 1 N. Y. App. Div. 283, 37 N. Y. Suppl. 151; Minick *v.* Troy, 19 Hun 253 [*affirmed* in 83 N. Y. 514]; Gale *v.* New York Cent., etc., R. Co., 13 Hun 1 [*affirming* 53 How. Pr. 385, and *affirmed* in 76 N. Y. 594]; Mackey *v.* New York Cent. R. Co., 27 Barb. 528; Oehlhof *v.* Solomon, 32 Misc. 773, 66 N. Y. Suppl. 484 [*reversed* on other grounds in 33 Misc. 771, 67 N. Y. Suppl. 935]; Brooks *v.* Ludin, 1 N. Y. Suppl. 338 [*affirmed* in 57 N. Y. Super. Ct. 145, 6 N. Y. Suppl. 510].

Pennsylvania.— Sommer *v.* Wilt, 4 Serg. & R. 19; Shoemaker *v.* Livezely, 2 Browne

must be clearly or manifestly excessive to justify the court in awarding a new trial.[99]

(II) *Nature of the Action.* In actions for breach of contract,[1] or for injury to or detention of property,[2] where there is a definite measure of damages, new trials will be more readily granted on the ground of excessive recovery. In actions in which there is no definite or legal measure of damages, as is especially the case in most actions sounding in tort, a verdict should not be

286; Meuser *v.* Palmer Tp., 7 North. Co. Rep. 202.

South Carolina.— Williams *v.* Tolbert, 76 S. C. 211, 56 S. E. 908; Davis *v.* Ruff, Cheves 17, 34 Am. Dec. 584.

Wisconsin.— Birchard *v.* Booth, 4 Wis. 67.

United States.— Occidental Consol. Min. Co. *v.* Comstock Tunnel Co., 125 Fed. 244; Daisley *v.* Dun, 107 Fed. 218 (libel); Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783; Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14; Thurston *v.* Martin, 23 Fed. Cas. No. 14,018, 5 Mason 497; Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524.

England.—Adams *v.* Midland R. Co., 31 L. J. Exch. 35, 10 Wkly. Rep. 84; Evans *v.* Davies, 17 Wkly. Rep. 679.

Canada.— Brewing *v.* Berryman, 15 N. Brunsw. 515; Morton *v.* Bartlett, 15 N. Brunsw. 215; Prescott *v.* Walton, 13 N. Brunsw. 230; Crozier *v.* Phœnix Ins. Co., 13 N. Brunsw. 200; Godard *v.* Fredericton Boom Co., 12 N. Brunsw. 544; Wilson *v.* Street, 8 N. Brunsw. 251; Smith *v.* Millidge, 4 N. Brunsw. 408; Woodman *v.* Blair, 30 U. C. C. P. 452; Stock *v.* Great Western R. Co., 9 U. C. C. P. 134; Natrass *v.* Nightingale, 7 U. C. C. P. 266; Lough *v.* Coleman, 29 U. C. Q. B. 367; Nicholson *v.* Page, 27 U. C. Q. B. 505 (exemplary damages); Gfroerer *v.* Hoffman, 15 U. C. Q. B. 441 (libel); Commercial Bank *v.* Weller, 5 U. C. Q. B. 543; Corner *v.* McKinnon, 4 U. C. Q. B. 350.

99. *Arkansas.*— Bright *v.* Bostick, 27 Ark. 55; Peterson *v.* Gresham, 25 Ark. 380.

California.— George *v.* Law, 1 Cal. 363; Payne *v.* Pacific Mail Steamship Co., 1 Cal. 33.

Connecticut.—Clark *v.* Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

District of Columbia.— Washington Fifth Baptist Church *v.* Baltimore, etc., R. Co., 5 Mackey 269.

Florida.— Clark *v.* Pope, 29 Fla. 238, 10 So. 586.

Georgia.— Baker *v.* Moor, 84 Ga. 186, 10 S. E. 737.

Iowa.— Russ *v.* The War Eagle, 14 Iowa 363, especially second verdict.

Mississippi.— Harris *v.* Halliday, 4 How. 338.

Missouri.— Woodson *v.* Scott, 20 Mo. 272.

New Jersey.— Paulmier *v.* Erie R. Co., 34 N. J. L. 151; Ellsworth *v.* Central R. Co., 34 N. J. L. 93.

New York.— Murphy *v.* Weidmann Cooperage, 1 N. Y. App. Div. 283, 37 N. Y. Suppl. 151; Campbell *v.* Page, 67 Barb. 113; Rowe *v.* Smith, 10 Bosw. 268; Rompillon *v.* Abbott, 1 N. Y. Suppl. 662, personal injury.

Pennsylvania.— Kerr *v.* Atticks, 20 Pa. Co. Ct. 233.

South Carolina.— Mathews *v.* West, 2 Nott & M. 415; Fripp *v.* Martin, 1 Speers 236; Davis *v.* Ruff, Cheves 17, 34 Am. Dec. 584; Stott *v.* Ryan, 3 Brev. 417.

Tennessee.— Thompson *v.* French, 10 Yerg. 452.

Texas.— Texas, etc., R. Co. *v.* Gill, 2 Tex. App. Civ. Cas. § 175.

United States.— White *v.* Arleth, 29 Fed. Cas. No. 17,536, 1 Bond 319. See also Stimpson *v.* The Railroads, 23 Fed. Cas. No. 13,456; 1 Wall. Jr. 164, 2 Robb. Pat. Cas. 595, where damages improperly assessed did not exceed power of court to increase damages.

Canada.— Brewing *v.* Berryman, 15 N. Brunsw. 515; Godard *v.* Fredericton Boom Co., 12 N. Brunsw. 544; Wilson *v.* Street, 8 N. Brunsw. 251; Smith *v.* Millidge, 4 N. Brunsw. 408.

See 37 Cent. Dig. tit. "New Trial," § 153.

1. *Alabama.*— Prince *v.* Bissinger, 101 Ala. 358, 13 So. 495.

Arkansas.—Walworth *v.* Finnegan, 33 Ark. 751.

Georgia.—Rockdale Paper Mills *v.* Stevens, 65 Ga. 380; Killen *v.* Sistrunk, 7 Ga. 283.

Kentucky.— White *v.* Green, 3 T. B. Mon. 155.

Mississippi.— Hariston *v.* Sale, 6 Sm. & M. 634; Ingraham *v.* Russell, 3 How. 304.

New Jersey.— Dodd *v.* Pierson, 11 N. J. L. 284.

Texas.— Houston *v.* Morrison, 10 Tex. 1.

England.— Pleydell *v.* Dorchester, 7 T. R. 529.

Canada.— Guilford *v.* Anglo-French Steamship Co., 9 Can. Sup. Ct. 303; Smith *v.* Lunt, 15 N. Brunsw. 64; Demill *v.* Foshay, 9 N. Brunsw. 86; Archbold *v.* Merchants' Mar. Ins. Co., 16 Nova Scotia 98; Chaplin *v.* Provincial Ins. Co., 23 U. C. C. P. 278; Moffatt *v.* Grand Trunk R. Co., 15 U. C. C. P. 392; Phelps *v.* Wilson, 13 U. C. C. P. 38; Stock *v.* Great Western R. Co., 7 U. C. C. P. 526; Barclay *v.* Adair, 7 U. C. C. P. 157; Stephenson *v.* Ranney, 2 U. C. C. P. 196; Hood *v.* Cronkite, 29 U. C. Q. B. 98; Roblin *v.* Moodie, 15 U. C. Q. B. 185.

See 37 Cent. Dig. tit. "New Trial," § 155.

An excessive allowance of interest is ground for a new trial. Prettyman *v.* Waples, 4 Harr. (Del.) 299; Holmes *v.* Misroon, 3 Brev. (S. C.) 209, unless remitted. And see DAMAGES, 13 Cyc. 125.

2. Covert *v.* Brooklyn, 6 N. Y. App. Div. 73, 39 N. Y. Suppl. 744. The rule that a verdict will not be set aside unless so excessive as to indicate improper motive does not apply in actions for injuries to property

set aside unless the damages awarded are manifestly or flagrantly excessive.[3] In many jurisdictions, and especially under statutes, a verdict will not be disturbed in such cases unless the damages recovered are so excessive as to appear to have been given under the influence of prejudice, passion, or corruption,[4] or under a

without malice or wantonness. Covert *v.* Brooklyn, *supra.*

3. *Georgia.*— Dye *v.* Denham, 54 Ga. 224; Broach *v.* King, 23 Ga. 500.

Illinois.— Hinchman *v.* Whetstone, 23 Ill. 185.

Indiana.— Guard *v.* Risk, 11 Ind. 156, slander.

Kentucky.—Vanzant *v.* Jones, 3 Dana 464; Respass *v.* Parmer, 2 A. K. Marsh. 365; Webber *v.* Kenny, 1 A. K. Marsh. 345; Taylor *v.* Giger, Hard. 586.

Massachusetts.— Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228, slander.

Minnesota.— Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 466, slander.

New Jersey.— Campbell *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 195, 56 Atl. 303; Deacon *v.* Allen, 4 N. J. L. 338; Vunck *v.* Hull, 3 N. J. L. 814.

New York.— Kendall *v.* Stone, 2 Sandf. 269 [*reversed* on other grounds in 5 N. Y. 14]; Oehlof *v.* Solomon, 32 Misc. 773, 66 N. Y. Suppl. 484; Tisdale *v.* Delaware, etc., Canal Co., 4 N. Y. St. 812; Douglass *v.* Tousey, 2 Wend. 352, 20 Am. Dec. 616 (slander); Root *v.* King, 7 Cow. 613 [*affirmed* in 4 Wend. 113, 21 Am. Dec. 102] (libel).

Pennsylvania.— Sommer *v.* Wilt, 4 Serg. & R. 19; Carpenter *v.* Lancaster, 22 Lanc. L. Rev. 23 [*affirmed* in 212 Pa. St. 581, 61 Atl. 1113]; Kenderdine *v.* Phelin, 1 Phila. 343.

United States.— Peltomaa *v.* Katahdin Pulp, etc., Co., 149 Fed. 282 [*affirmed* in 156 Fed. 342]; Edwards *v.* Southern R. Co., 102 Fed. 720 (tortious death); Brown *v.* Memphis, etc., R. Co., 7 Fed. 51 (especially where there are elements of gross indignity and injury).

England.— Praed *v.* Graham, 24 Q. B. D. 53, 59 L. J. Q. B. 230, 38 Wkly. Rep. 103 (holding that in libel it must be so large that no twelve reasonable men could have given them); Bolton *v.* O'Brien, L. R. 16 Ir. 97, 483; Gilbert *v.* Burtenshaw, Cowp. 230, Lofft. 771; Edgell *v.* Francis, 1 M. & G. 222, 39 E. C. L. 729; Leeson *v.* Smith, 4 N. & M. 304, 30 E. C. L. 575; Leith *v.* Pope, W. Bl. 1327; Sharpe *v.* Brice, W. Bl. 942; Leeman *v.* Allen, 2 Wils. C. P. 160; Evans *v.* Davies, 17 Wkly. Rep. 679 (although disproportioned to condition of plaintiff in seduction).

Canada.— Wentworth *v.* Hallett, 4 N. Brunsw. 560; Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263; Johnson *v.* Port Dover Harbour Co., 17 U. C. Q. B. 151; Robertson *v.* Meyers, 7 U. C. Q. B. 423 (so as to exemplary damages); McDonald *v.* Cameron, 4 U. C. Q. B. 1; Eakins *v.* Evans, 3 U. C. Q. B. O. S. 383.

See 37 Cent. Dig. tit. "New Trial," § 154.

Another statement of the rule is that there must be no reasonable proportion between the damages awarded and the injury sustained. Reeves *v.* Penrose, L. R. 26 Ir. 141; Harris *v.* Arnott, L. R. 26 Ir. 55; Beattie *v.* Moore, L. R. 2 Ir. 28; Williams *v.* Currie, 1 C. B. 841, 50 E. C. L. 841 ("grossly" disproportionate); McGrath *v.* Bourne, Ir. R. 10 C. L. 160 (criticizing the use of the term "outrageous," "scandalous," and "grossly extravagant").

Breach of contract.— The rule may be applicable in actions for breach of contract. Long *v.* Perry, Hard. (Ky.) 317; Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 446.

Trial before recovery of plaintiff.— Where the verdict in a personal injury case was large and the trial had occurred so soon after a surgical operation on plaintiff that the physicians were unable to determine whether the operation would result in a complete or partial recovery, a new trial was granted. Stevens *v.* New Jersey, etc., R. Co., (N. J. Sup. 1907) 65 Atl. 874; Searles *v.* Elizabeth, etc., R. Co., 70 N. J. L. 388, 57 Atl. 134. See also Fogel *v.* Interborough Rapid Transit Co., 53 Misc. (N. Y.) 32, 103 N. Y. Suppl. 977. It has sometimes been held that a verdict in an action for criminal conversation should never be set aside on the ground of excessive damages. Scherpf *v.* Szadeczky, 4 E. D. Smith (N. Y.) 110, 1 Abb. Pr. 366 (for enticing away wife); Shoemaker *v.* Livezely, 2 Browne (Pa.) 286. And see DAMAGES, 13 Cyc. 121, 126.

4. *Arkansas.*— Sexton *v.* Brock, 15 Ark. 345, second verdict.

California.— Russell *v.* Dennison, 45 Cal. 337; Wheaton *v.* North Beach, etc., R. Co., 36 Cal. 590; Boyce *v.* California Stage Co., 25 Cal. 460; Aldrich *v.* Palmer, 24 Cal. 513.

Colorado.— Denver *v.* Dunsmore, 7 Colo. 328, 3 Pac. 705.

Florida.— McMurray *v.* Basnett, 18 Fla. 609.

Georgia.— Patterson *v.* Phinizy, 51 Ga. 33; Longstreet *v.* Reeside, Ga. Dec. 39; Pomeroy *v.* Golly, Ga. Dec. 26.

Illinois.— Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; McNamara *v.* King, 7 Ill. 432; Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Mills *v.* Larrance, 111 Ill. App. 140; Stumer *v.* Pitchman, 22 Ill. App. 399 [*affirmed* in 124 Ill. 250, 15 N. E. 757], slander.

Indiana.— Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453; Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134; Alexander *v.* Thomas, 25 Ind. 268 (slander); Guard *v.* Risk, 11 Ind. 156

plain misapprehension of the facts or principle of law governing the allowance of

(slander). See also Harris *v.* Rupel, 14 Ind. 209.

Iowa.— Rice *v.* Council Bluffs, 124 Iowa 639, 100 N. W. 506; Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790, as to insufficient evidence of passion or prejudice predicated on arguments of jurors.

Kansas.— Chicago, etc., R. Co. *v.* Frazier, 66 Kan. 422, 71 Pac. 831; Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456. *Compare* Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244.

Kentucky.— Owings *v.* Ulory, 3 A. K. Marsh. 454; Riley *v.* Nugent, 1 A. K. Marsh. 431 (slander); North *v.* Cates, 2 Bibb 591; Worford *v.* Isbel, 1 Bibb 247, 4 Am. Dec. 633; Croshy *v.* Bradley, 11 Ky. L. Rep. 954; Louisville, etc., R. Co. *v.* Wade, 11 Ky. L. Rep. 904. See also Pittsburgh, etc., R. Co. *v.* Geltmaker, 30 S. W. 394, 16 Ky. L. Rep. 861.

Maine.— Gilbert *v.* Woodbury, 22 Me. 246; Jacobs *v.* Bangor, 16 Me. 187, 33 Am. Dec. 652; Tompson *v.* Mussey, 3 Me. 305.

Massachusetts.— Treanor *v.* Donahoe, 9 Cush. 228; Worster *v.* Proprietors Canal Bridge, 16 Pick. 541; Shute *v.* Barrett, 7 Pick. 82 (slander); Clark *v.* Binney, 2 Pick. 113 (slander); Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189 (slander).

Minnesota.— Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439; Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 446 (slander); Meeks *v.* St. Paul, 64 Minn. 220, 66 N. W. 966; Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149; Pratt *v.* Pioner Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87 (under statute); Shartle *v.* Minneapolis, 17 Minn. 308; Du Laurans *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102; Chapman *v.* Dodd, 10 Minn. 350; Chamberlain *v.* Porter, 9 Minn. 260; St. Paul *v.* Kuby, 8 Minn. 154; Beaulieu *v.* Parsons, 2 Minn. 37; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Mississippi.— Mississippi Cent. R. Co. *v.* Caruth, 51 Miss. 77.

Missouri.— Kennedy *v.* North Missouri R. Co., 36 Mo. 351; Goetz *v.* Ambs, 27 Mo. 28; Wells *v.* Sanger, 21 Mo. 345; Fallenstein *v.* Booth, 13 Mo. 427 (slander); Merrill *v.* St. Louis, 12 Mo. App. 466. *Compare* Reid *v.* Lloyd, 61 Mo. App. 646, holding that a trial court may grant a new trial, although the verdict does not show the results of prejudice or passion.

New Hampshire.— Lucier *v.* Larose, 66 N. H. 141, 20 Atl. 249; Hovey *v.* Brown, 59 N. H. 114.

New Jersey.— Deacon *v.* Allen, 4 N. J. L. 338, seduction.

New York.— Scott *v.* Sun Printing, etc., Assoc., 74 Hun 284, 26 N. Y. Suppl. 690 (libel); Kiff *v.* Youmans, 20 Hun 123 [*reversed* on other grounds in 86 N. Y. 324, 40 Am. Rep. 543]; Minick *v.* Troy, 19 Hun 253 [*affirmed* in 83 N. Y. 514]; Gale *v.* New York Cent., etc., R. Co., 13 Hun 1 [*affirming* 53 How. Pr. 385, and *affirmed* in 76 N. Y. 594]; Potter *v.* Thompson, 22 Barb. 87 (slander); Howley *v.* Kraemer, 36 Misc. 190, 73 N. Y. Suppl. 142; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11; McDonald *v.* Long Island R. Co., 6 N. Y. St. 691; Whiteman *v.* Leslie, 54 How. Pr. 494 [*affirmed* in 77 N. Y. 609]; Hager *v.* Danforth, 8 How. Pr. 435 [*reversed* in 20 Barb. 16]; Sargent *v.* ——, 5 Cow. 106 (seduction); Coleman *v.* Southwick, 9 Johns. 45, 6 Am. Dec. 253 (libel).

North Carolina.— Dodd *v.* Hamilton, 4 N. C. 471.

Ohio.— Fisher *v.* Patterson, 14 Ohio 418; Simpson *v.* Pitman, 13 Ohio 365; Cincinnati St. R. Co. *v.* Kelsey, 9 Ohio Cir. Ct. 170, 6 Ohio Cir. Dec. 209; Cribbett *v.* Mathers, 3 Ohio Dec. (Reprint) 322, breach of promise of marriage and seduction.

Pennsylvania.— Whipple *v.* West Philadelphia Pass. R. Co., 11 Phila. 345.

Rhode Island.— McGowan *v.* Interstate Consol. St. R. Co., 20 R. I. 264, 38 Atl. 497.

South Carolina.— Stuckey *v.* Atlantic Coast Line R. Co., 57 S. C. 395, 35 S. E. 550, the improper motive need not have affected the whole verdict.

Tennessee.— Jenkins *v.* Hankins, 98 Tenn. 545, 41 S. W. 1028 (as to measure of damages only); Tennessee Coal, etc., Co. *v.* Roddy, 85 Tenn. 400, 5 S. W. 286; Tinkle *v.* Dunivant, 16 Lea 503; Boyers *v.* Pratt, 1 Humphr. 90.

Texas.— McGehee *v.* Shafer, 9 Tex. 20 (especially where exemplary damages are permissible); Barnette *v.* Hicks, 6 Tex. 352 (vindictive damages); Gulf, etc., R. Co. *v.* Wright, 10 Tex. Civ. App. 179, 30 S. W. 294.

Wisconsin.— Donovan *v.* Chicago, etc., R. Co., 93 Wis. 373, 67 N. W. 721; Brown *v.* Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860; Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468; Karasich *v.* Hasbrouck, 28 Wis. 569; Birchard *v.* Booth, 4 Wis. 67.

United States.— Occidental Consol. Min. Co. *v.* Comstock Tunnel Co., 125 Fed. 244; Dwyer *v.* St. Louis, etc., R. Co., 52 Fed. 87; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488; Bierbach *v.* Goodyear Rubber Co., 15 Fed. 490; Malloy *v.* Bennett, 15 Fed. 371 (libel); Reiss *v.* North German Lloyd, 11 Fed. 844; Rose *v.* Stephens, etc., Transp. Co., 11 Fed. 438, 20 Blatchf. 411; Swann *v.* Bowie, 23 Fed. Cas. No. 13,672, 2 Cranch C. C. 221; Thurston *v.* Martin, 23 Fed. Cas. No. 14,018, 5 Mason 497; Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524.

England.— Lambkin *v.* South Eastern R. Co., 5 App. Cas. 352, 28 Wkly. Rep. 837; Berry *v.* Da Costa, L. R. 1 C. P. 331, 1 Harr.

damages.[5] This rule seems to apply to verdicts giving punitive damages.[6] The rule announced by some courts is that the damages awarded must appear grossly excessive at first blush,[7] and by other courts that they must be so large as to shock the conscience or the court's sense of justice.[8] That the court deems a remittitur of part of the amount of recovery proper does not necessarily show that he found that the jury was influenced by prejudice or passion.[9]

& R. 291, 12 Jur. N. S. 588, 35 L. J. C. P. 191, 14 Wkly. Rep. 279 (seduction under breach of promise of marriage); Smith *v.* Woodfine, 1 C. B. N. S. 660, 87 E. C. L. 660 (breach of promise of marriage); Creed *v.* Fisher, 9 Exch. 472, 18 Jur. 228, 23 L. J. Exch. 143, 2 Wkly. Rep. 196; Roberts *v.* Owen, 53 J. P. 502 (libel); Leith *v.* Pope, W. Bl. 1327; Fabrigas *v.* Mostyn, W. Bl. 929; Gough *v.* Farr, 1 Y. & J. 477 (breach of promise of marriage).

Canada.—Morton *v.* Bartlett, 15 N. Brunsw. 215; Appleton *v.* Lepper, 20 U. C. C. P. 138; Campbell *v.* McDonell, 27 U. C. Q. B. 343.

See 37 Cent. Dig. tit. "New Trial," §§ 158, 159, 160.

Passion has been defined as "excited feeling" and prejudice as a "state of mind partial to the successful party, or unfair to the other." Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

Rule as stated by Judge Kent.— "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption." Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 52, 6 Am. Dec. 253, libel.

Rule as stated by Judge Shaw.— "Sometimes it has been said, that, although the court has full power to set aside the verdict in this class of cases, they will not do it, unless the damages are enormous, outrageous, or entirely disproportionate. But there intensive epithets afford very little aid in forming a standard, or arriving at any general and practical rule. For the question still recurs, on the facts in each case, what is 'enormous' or 'outrageous'; and this depends on the nature and aggravation of each case, to be determined by all the circumstances." Treanor *v.* Donahoe, 9 Cush. (Mass.) 228, 230.

That the jury awarded damages for less than half the uncontradicted value of the property sued for is a circumstance indicating that the jury were influenced by passion, prejudice, or partiality in awarding any damages to the successful party. Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 335.

That the answers to special questions are clearly not supported by the evidence tends to show passion or prejudice on the part of the jury. Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

5. Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17,516, 2 Story 661; Wightman *v.* Providence, 29 Fed. Cas. No. 17,630, 1 Cliff. 524; Berry *v.* Da Costa, L. R. 1 C. P. 331, 1 Harr. & R. 291, 12 Jur. N. S. 588, 35 L. J. C. P. 191, 14 Wkly. Rep. 279; Creed *v.* Fisher, 9 Exch. 472, 18 Jur. 228, 23 L. J. Exch. 143, 2 Wkly. Rep. 196; Doe *v.* Towse, 22 N. Brunsw. 10; Morton *v.* Bartlett, 15 N. Brunsw. 215.

6. Allen *v.* Craig, 13 N. J. L. 294; Barnette *v.* Hicks, 6 Tex. 352; Reeves *v.* Penrose, L. R. 26 Ir. 141.

7. Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Owings *v.* Ulory, 3 A. K. Marsh. (Ky.) 454.

8. *District of Columbia.*— Washington Fifth Baptist Church *v.* Baltimore, etc., R. Co., 5 Mackey 269.

Minnesota.— Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 446; Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

New York.— Cook *v.* Hill, 3 Sandf. 341, libel.

Rhode Island.— McGowan *v.* Interstate Consol. St. R. Co., 20 R. I. 264, 38 Atl. 497.

United States.— Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. 783.

9. Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Grant *v.* Wolf, 34 Minn. 32, 24 N. W. 289; Price *v.* Evans, 49 Mo. 396; Adcock *v.* Oregon R. Co., 45 Oreg. 173, 77 Pac. 78 (personal injury); Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854. See also Chicago City R. Co. *v.* Gemmill, 209 Ill. 638, 71 N. E. 43 (remittitur of half of verdict); Johnson *v.* Eckberg, 94 Ill. App. 634 (as to wholly voluntary remittitur); Bell *v.* Morse, 48 Kan. 601, 29 Pac. 1086; Landry *v.* New Orleans Shipwright Co., 112 La. 515, 36 So. 548 (remittitur of three fourths of verdict); Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500 (personal injury). There are, however, cases on the particular facts of which a contrary rule seems to have been followed. Tifton, etc., R. Co. *v.* Chastain, 122 Ga. 250, 50 S. E. 105 (remittitur of half of verdict); Steinbuchel *v.* Wright, 43 Kan. 307, 23 Pac. 560 (remittitur of seven eighths of verdict); Plaunt *v.* Minneapolis R. Transfer Co., 90 Minn. 499, 97 N. W. 433 (remittitur of three fourths of recovery); Cox *v.* Buck, 3 Strobh. (S. C.) 367; Murray *v.* Leonard, 11 S. D. 22, 75 N. W. 272.

A voluntary remittitur is not conclusive evidence that a verdict is excessive. Stumer *v.* Pitchman, 22 Ill. App. 399 [*affirmed* in 124 Ill. 250, 15 N. E. 757]; Lehre *v.* Murray, 2 Brev. (S. C.) 18; International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382; Lanning *v.* London, 14 Fed. Cas. No. 8,075, 4 Wash. 332. *Compare* Atchison *v.* Plunkett, 61 Kan. 297, 59 Pac. 646; Nunnally *v.* Taliaferro, 82 Tex. 286, 18 S. W. 149.

(III) *In Excess of Demand.* It has been held that a verdict should be set aside where the amount of recovery exceeds the demand for damages in the declaration or plea of set-off,[10] but under the practice codes at least the pleadings may be amended and the verdict allowed to stand if not excessive under the evidence.[11] It seems that a recovery which exceeds that demanded in the writ is not for that reason cause for setting aside the verdict.[12]

c. Inadequate Damages — (I) *In General.* That the damages recovered are clearly inadequate compensation for the injury sustained is generally ground for a new trial.[13] Where the evidence shows that the prevailing party was entitled to substantial damages, if any, a verdict for nominal damages only, or for an amount clearly less than the damages proved, should be set aside, although the evidence as to liability was conflicting.[14] A new trial for inadequacy of damages

10. *California.*— Garlick *v.* Bower, 62 Cal. 65.

Georgia.— Kytle *v.* Kytle, 128 Ga. 387, 57 S. E. 748 (cross bill); McCall *v.* Wilkes, 121 Ga. 722, 49 S. E. 722 (set-off).

Illinois.— See Henning *v.* Hall, 38 Ill. App. 528, verdict allowing more than set-off claimed.

Indiana.— Roberts *v.* Muir, 7 Ind. 544.

New York.—McIntire *v.* Clark, 7 Wend. 330.

West Virginia.— Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54.

Canada.— Mulhall *v.* Barss, 3 Nova Scotia 46 (unless excess is remitted); Wilde *v.* Crow, 10 U. C. C. P. 406 (unless excess is remitted). See also Robinson *v.* Hall, 1 Ont. 266.

See 37 Cent. Dig. tit. "New Trial," § 153.

Compare Tebbs *v.* Barron, 12 L. J. C. P. 33, 4 M. & G. 844, 5 Scott N. R. 837, 43 E. C. L. 436.

11. McKinney *v.* State, 117 Ind. 26, 19 N. E. 613; Noyes Carriage Co. *v.* Robbins, 31 Ind. App. 300, 67 N. E. 959; Kettry *v.* Thumma, 9 Ind. App. 498, 36 N. E. 919 (under statute); Chadbourne *v.* Delaware, etc., R. Co., 6 Daly (N. Y.) 215.

That the verdict is for an amount slightly in excess of that claimed is not sufficient evidence of passion or prejudice. Wainwright *v.* Satterfield, 52 Nebr. 403, 72 N. W. 359.

12. Raymond *v.* Williams, 24 Ind. 416; Webb *v.* Thompson, 23 Ind. 428; Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54. *Compare* Mulhall *v.* Barss, 3 Nova Scotia 46.

13. Tathwell *v.* Cedar Rapids, 122 Iowa 50, 97 N. W. 96 (in which it was said that a verdict for inadequate damages is "not sustained by sufficient evidence"); Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; Powell *v.* Wark, 19 N. Brunsw. 57; Leonard *v.* Pawling, 3 U. C. Q. B. O. S. 17. *Compare* Union Road Co. *v.* Talbot, 15 U. C. Q. B. 106, a hard case.

Deduction for incomplete performance.— A verdict that does not allow a sufficient deduction from the contract price of services for incomplete performance is not "justified by the evidence." Minneapolis First Nat. Bank *v.* St. Cloud, 73 Minn. 219, 75 N. W. 1054.

Where a distinct item of plaintiff's claim clearly proved by the evidence has been disallowed by the jury, a new trial should be allowed. Maddock *v.* Glass, 5 U. C. Q. B. 229.

Action on illegal agreement.— A new trial will not be granted for smallness of damages in an action upon an illegal agreement. Bleeker *v.* Meyers, 6 U. C. Q. B. 134.

Successive verdicts.— Two successive verdicts for the same amount will not be set aside for inadequacy. Linss *v.* Chesapeake, etc., R. Co., 91 Fed. 964.

14. *Georgia.*— Hamer *v.* White, 110 Ga. 300, 34 S. E. 1001.

Illinois.— Conrad Seipp Brewing Co. *v.* Peck, 85 Ill. App. 637, verdict for part of promissory note.

Iowa.— Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463.

Kansas.— Thompson *v.* Burtis, 65 Kan. 674, 70 Pac. 603.

Kentucky.— Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867, 9 Ky. L. Rep. 602.

Minnesota.— Rawitzer *v.* St. Paul City R. Co., 94 Minn. 494, 103 N. W. 499 (nominal damages for wrongful death); Conrad *v.* Dobmeier, 57 Minn. 147, 58 N. W. 870.

Missouri.— Loevenhart *v.* Lindell R. Co., 190 Mo. 342, 88 S. W. 757 (nominal damages for a considerable personal injury); Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Laclede Power Co. *v.* Nash Smith Tea Co., 95 Mo. App. 412, 69 S. W. 27.

New York.— McDonald *v.* Walter, 40 N. Y. 551 (even though a verdict for defendant would not have been disturbed); De la Torre *v.* Metropolitan St. R. Co., 48 N. Y. App. Div. 126, 62 N. Y. Suppl. 604; Aherne *v.* Plate, 34 Misc. 480, 70 N. Y. Suppl. 254 (personal injury case); Aiello *v.* Aaron, 33 Misc. 580, 68 N. Y. Suppl. 186; Kerr *v.* Union R. Co., 20 Misc. 171, 45 N. Y. Suppl. 819; Powers *v.* Gouraud, 19 Misc. 268, 44 N. Y. Suppl. 249 (on motion of defendant); Hoe *v.* Hoey, 15 N. Y. Suppl. 105 (as not sustained by evidence); Kelly *v.* Rochester, 15 N. Y. Suppl. 29; O'Shea *v.* McLear, 1 N. Y. Suppl. 407, 15 N. Y. Civ. Proc. 69. See also Tuxedo Automobile Station *v.* Lyman, 88 N. Y. Suppl. 1008.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 20 Atl. 1046; McCombs *v.* Logan, 34 Pittsb. Leg. J. N. S. 162.

will not allowed when, in the judgment of the court, the verdict should have been against the prevailing party,[15] or when a verdict appears to have been given for nominal damages only, because the jury concluded that there was no liability.[16] A new trial for inadequacy of damages will not be granted on the application of the party against whom they were awarded.[17]

(II) *Nature of Action.* A new trial will be more readily granted because of the smallness of the recovery in actions for breach of contract or for injury to or detention of property.[18] But a new trial may be granted in actions in which there is no certain rule for computing damages.[19] Independently of statutes, it has been held improper in some states to grant new trials in actions for injury to the person for inadequacy of damages that cannot be definitely ascertained.[20] In the absence of a contrary statute, a new trial will be granted in, presumably,

Rhode Island.— McNeil *v.* Lyons, 20 R. I. 672, 20 Atl. 831; Gartner *v.* Saxon, 19 R. I. 461, 36 Atl. 1132.

South Carolina.— Carwile *v.* Harvey, 15 Rich. 314; Verdier *v.* Trowell, 6 Rich. 166; English *v.* Clerry, 3 Hill 279; Duff *v.* Hutson, 2 Bailey 215; Wallace *v.* Frazier, 2 Nott & M. 516; Bacot *v.* Keith, 2 Bay 466.

Texas.— May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

Wisconsin.— Whitney *v.* Milwaukee, 65 Wis. 409, 27 N. W. 39; Emmons *v.* Sheldon, 26 Wis. 648, "for insufficient evidence."

United States.— Carter *v.* Wells, 64 Fed. 1005.

England.— Falvey *v.* Stanford, L. R. 10 Q. B. 54, 44 L. J. Q. B. 7, 31 L. T. Rep. N. S. 677, 23 Wkly. Rep. 162; Beattie *v.* Moore, L. R. 2 Ir. 28. *Compare* Howard *v.* Barnard, 11 C. B. 653, 73 E. C. L. 653; Gibbs *v.* Tunaley, 1 C. B. 640, 50 E. C. L. 640; Mostyn *v.* Coles, 7 H. & N. 872, 31 L. J. Exch. 151, 10 Wkly. Rep. 355; Freeman *v.* Price, 1 Y. & J. 402, libel.

Canada.— Connell *v.* Miller, 4 N. Brunsw. 116 (second new trial); Dobbyn *v.* Decow, 25 U. C. C. P. 18 (action for malicious arrest).

See 37 Cent. Dig. tit. "Negligence," §§ 151, 152.

15. *Illinois.*— Lovett *v.* Chicago, 35 Ill. App. 570; O'Malley *v.* Chicago City R. Co., 33 Ill. App. 354, 30 Ill. App. 309.

Iowa.— Hubbard *v.* Mason City, 64 Iowa 245, 20 N. W. 172.

Minnesota.— Young *v.* Great Northern R. Co., 80 Minn. 123, 83 N. W. 32.

Pennsylvania.— Murray *v.* Gearing, 31 Pittsb. Leg. J. N. S. 329.

United States.— Reading *v.* Texas, etc., R. Co., 4 Fed. 134.

See 37 Cent. Dig. tit. "Negligence," § 151.

Compare Milliken *v.* New York, 82 N. Y. App. Div. 471, 81 N. Y. Suppl. 866.

16. *Iowa.*— Hubbard *v.* Mason City, 64 Iowa 245, 20 N. W. 172.

Kentucky.— Simrall *v.* Morton, 12 S. W. 185, 12 Ky. L. Rep. 31.

Missouri.— Haven *v.* Missouri R. Co., 155 Mo. 216, 55 S. W. 1035.

New York.— Wavle *v.* Wavle, 9 Hun 125.

Pennsylvania.— Reeve *v.* Wilkes-Barre, etc., Traction Co., 9 Kulp 182; King *v.* Consolidated Traction Co., 33 Pittsb. Leg. J. N. S. 138.

17. Strickland *v.* Hutchinson, 123 Ga. 396, 51 S. E. 348; Smith *v.* Lee, 82 Ga. 674, 10 S. E. 201; Roberts *v.* Rigden, 81 Ga. 440, 7 S. E. 742; Schaefer *v.* Knott, 69 Ga. 772; Mullins *v.* Murphy, 69 Ga. 754; Fischer *v.* Holmes, 123 Ind. 525, 24 N. E. 377; Evans *v.* Koons, 10 Ind. App. 603, 38 N. E. 350; Scheider *v.* Corby, 15 Hun (N. Y.) 493; Wolf *v.* Goodhue F. Ins. Co., 43 Barb. (N. Y.) 400 [*affirmed* in 41 N. Y. 620]; Blassingame *v.* Davis, 68 Tex. 595, 5 S. W. 402.

18. Watson *v.* Harmon, 85 Mo. 443; Wilson *v.* Morgan, 58 N. J. L. 426, 34 Atl. 752; May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

Failure to allow full amount of interest.— Where the jury, having found that defendant executed a note or agreement sued on, has perversely refused to return a verdict for the full amount of interest agreed on, a new trial will be granted. Young *v.* Fluke, 15 U. C. C. P. 360.

19. *Iowa.*— Tathwell *v.* Cedar Rapids, 122 Iowa 50, 97 N. W. 96, personal injury.

Kentucky.— Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867, 9 Ky. L. Rep. 602 (personal injury); Taylor *v.* Howser, 12 Bush 465 (personal injury); Jesse *v.* Shuck, 12 S. W. 304, 11 Ky. L. Rep. 463 (personal injury).

Minnesota.— Henderson *v.* St. Paul, etc., R. Co., 52 Minn. 479, 55 N. W. 53, personal injury.

North Carolina.— Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33, assault and battery.

Ohio.— Bailey *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225, personal injury.

Rhode Island.— Hill *v.* Union R. Co., 25 R. I. 565, 57 Atl. 374, personal injury.

South Carolina.— Bacot *v.* Keith, 2 Bay 466, assault and battery.

England.— Armytage *v.* Haley, 4 Q. B. 917, Dav. & M. 139, 7 Jur. 671, 12 L. J. Q. B. 323, 45 E. C. L. 917, personal injury.

Canada.— Price *v.* Erb, 17 N. Brunsw. 708, at least where the jury was wrongly instructed.

See 37 Cent. Dig. tit. "New Trial," § 152.

20. Hamilton *v.* Pittsburgh, etc., R. Co., 104 Ill. App. 207; Edwards *v.* Missouri R. Co., 82 Mo. App. 478. Especially in trespass

any jurisdiction, where the damages awarded in an action for personal injury are less than the pecuniary loss definitely shown.[21] It has been held that inadequacy of damages is not ground for a new trial in actions for defamation of character;[22] but, independently of statute, the contrary doctrine is probably more generally entertained at the present time.[23] In actions in which there is no definite measure of damages, and especially in actions for injury to the person, the inadequacy of the recovery must be very apparent to justify the allowance of a new trial.[24] It is not sufficient that the judge favored a large verdict.[25] In some jurisdictions, especially under statutes, the inadequacy must be so great as to indicate passion, prejudice, or other improper motive on the part of the jury;[26] but where such improper influence is indicated, a new trial should be granted.[27]

(III) *Under Statutes.* Under statutes in some states a new trial cannot be granted on account of the smallness of damages given in an action for injury to the person or reputation,[28] and this has been held to be the case although such damages do not equal the actual pecuniary injury sustained by plaintiff.[29] The

vi et armis. Hackett *v.* Pratt, 52 Ill. App. 346; Jackson *v.* Boast, 2 Va. Cas. 49.

21. Hamilton *v.* Pittsburgh, etc., R. Co., 104 Ill. App. 207; May *v.* Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416; Phillips *v.* London, etc., R. Co., 5 Q. B. D. 78, 49 L. J. Q. B. 233, 41 L. T. Rep. N. S. 121, 28 Wkly. Rep. 10; Tedd *v.* Douglas, 5 Jur. N. S. 1029; Church *v.* Ottawa, 25 Ont. 298 [*affirmed* in 22 Ont. App. 348]. *Compare* Bradlaugh *v.* Edwards, 11 C. B. N. S. 377, 103 E. C. L. 377, as to expenses of plaintiff in procuring discharge from false imprisonment.

Even in an action for death by tortious act, a verdict may be set aside which does not compensate plaintiff for damages definitely proved. Hackett *v.* Pratt, 52 Ill. App. 346; Lee *v.* Knapp, 137 Mo. 385, 38 S. W. 1107.

22. Colyer *v.* Huff, 3 Bibb (Ky.) 34; Lufkin *v.* Hitchcock, 194 Mass. 231, 80 N. E. 456; Forsdike *v.* Stone, L. R. 3 C. P. 607, 37 L. J. C. P. 301; Rendall *v.* Hayward, Arn. 14, 5 Bing. N. Cas. 424, 3 Jur. 363, 8 L. J. C. P. 243, 7 Scott 407, 35 E. C. L. 231; Atkins *v.* Thornton, Draper (U. C.) 239.

23. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 467, 82 N. Y. Suppl. 401; Harton *v.* Reavis, 4 N. C. 256; Rixey *v.* Ward, 3 Rand. (Va.) 52 (by statute only); Falvey *v.* Stanford, L. R. 10 Q. B. 54, 44 L. J. Q. B. 7, 31 L. T. Rep. N. S. 677, 23 Wkly. Rep. 162. See also Hurtin *v.* Hopkins, 9 Johns. (N. Y.) 36.

24. *Illinois.*— Hackett *v.* Pratt, 52 Ill. App. 346.

Kentucky.— Colyer *v.* Huff, 3 Bibb 34.

Missouri.— Watson *v.* Harmon, 85 Mo. 443; Brown *v.* Union R. Co., 51 Mo. App. 192.

New Jersey.— Caswell *v.* North Jersey St. R. Co., 69 N. J. L. 226, 54 Atl. 565.

Ohio.— Bailey *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225.

Rhode Island.— Hackett *v.* Shaw, 24 R. I. 29, 51 Atl. 1040.

United States.— Wunderlich *v.* New York, 33 Fed. 854; Walker *v.* Smith, 29 Fed. Cas. No. 17,087, 1 Wash. 202.

England.— Mauricet *v.* Brecknock, Dougl. (3d ed.) 509; Richards *v.* Rose, 9 Exch. 218, 23 L. J. Exch. 3 (trespass to property); Nichol *v.* Bestwick, 28 L. J. Exch. 4 (breach of contract).

Canada.— Sewell *v.* Olive, 9 N. Brunsw. 394; Hyde *v.* Gooderham, 6 U. C. C. P. 539; McDonald *v.* McDonald, 4 U. C. Q. B. 133.

See 37 Cent. Dig. tit. "Negligence," § 152.

25. Phillips *v.* London, etc., R. Co., 5 Q. B. D. 78, 49 L. J. Q. B. 233, 41 L. T. Rep. N. S. 121, 28 Wkly. Rep. 10; Kelly *v.* Sherlock, L. R. 1 Q. B. 686, 6 B. & S. 480, 12 Jur. N. S. 937, 35 L. J. Q. B. 209; Rendall *v.* Hayward, Arn. 14, 5 Bing. N. Cas. 424, 3 Jur. 363, 8 L. J. C. P. 243, 7 Scott 407, 35 E. C. L. 231; Gibbs *v.* Tunaley, 1 C. B. 640, 50 E. C. L. 640

26. Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149; Dowd *v.* Westinghouse Air Brake Co., 132 Mo. 579, 34 S. W. 493; Pritchard *v.* Hewitt, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; Donoghue *v.* Consolidated Traction Co., 17 Pa. Super. Ct. 582; Lancaster *v.* Providence, etc., Steamship Co., 26 Fed. 233.

27. Anglin *v.* Columbus, 128 Ga. 469, 57 S. E. 780; Richards *v.* Sandford, 2 E. D. Smith (N. Y.) 349; Kelly *v.* Rochester, 15 N. Y. Suppl. 29. *Contra*, Benjamin *v.* Stewart, 61 Cal. 605, under statute.

28. *Indiana.*— Sharpe *v.* O'Brien, 39 Ind. 501 [*overruling* Sullivan *v.* Wilson, 15 Ind. 246].

Iowa.— Hubbard *v.* Mason City, 64 Iowa 245, 20 N. W. 172.

Kansas.— Metropolitan St. R. Co. *v.* O'Neill, 68 Kan. 252, 74 Pac. 1105.

Kentucky.— Lloyd *v.* Knadler, 58 S. W. 803, 22 Ky. L. Rep. 776; Sears *v.* Louisville, etc., R. Co., 56 S. W. 725, 22 Ky. L. Rep. 152.

Nebraska.— O'Reilly *v.* Hoover, 70 Nebr. 357, 97 N. W. 470 (although subject to computation); Shoff *v.* Wells, 1 Nebr. 168.

See 37 Cent. Dig. tit. "Negligence," §§ 151, 152.

29. *Illinois.*— O'Malley *v.* Chicago City R. Co., 30 Ill. App. 309.

Indiana.— Gann *v.* Worman, 69 Ind. 458; Sharpe *v.* O'Brien, 39 Ind. 501 [*overruling* Sullivan *v.* Wilson, 15 Ind. 246].

statutes have been held to apply to actions for death caused by the tortious act of defendant.[30]

(IV) *Several Grounds of Claim.* Where the verdict is general and the damages are not inadequate under the evidence as to any one of several grounds of claim which are not admitted, it will be presumed ordinarily that the jury found for the prevailing party on that ground only, and a new trial will be denied.[31] Where a defendant has pleaded a recoupment, counter-claim, or set-off, a verdict for plaintiff which does not find the amount of defendant's damages will be presumed to have been reduced in amount by defendant's claim and will not be set aside.[32]

H. Surprise, Accident, Mistake, and Inadvertence[33] — **1. Failure to Defend, and Mistake, Inadvertence, or Negligence in Presenting Case or Defense — a. Want of Actual Notice of Action.** New trials have been granted in a few instances for want of actual notice of the action.[34] But ordinarily, where the service of process was regular and a defense to the action might have been made had the agent or representative of defendant exercised proper diligence to inform his principal of the action or to defend it, a new trial will be refused.[35]

b. Accident or Misfortune Preventing Defense. If the failure to offer a timely defense was due to unavoidable accident, and especially if further time was denied on proper application therefor, a new trial may be allowed.[36] Where the failure to file or report a pleading or defense properly tendered or made was due to the negligence or default of an officer of the court, a new trial should be granted.[37]

c. Mistake, Inadvertence, or Negligence in Presenting Case or Defense — (I) *Of Party.* Ordinarily a new trial will not be granted because a defendant

Iowa.— Hubbard *v.* Mason City, 64 Iowa 245, 20 N. W. 172.

Kansas.—Metropolitan St. R. Co. *v.* O'Neill, 68 Kan. 252, 74 Pac. 1105.

Nebraska.— O'Reilly *v.* Hoover, 70 Nebr. 357, 97 N. W. 470; Sboff *v.* Wells, 1 Nebr. 168.

See 37 Cent. Dig. tit. "Negligence," § 152.

Contra.— Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867, 9 Ky. L. Rep. 602; Taylor *v.* Howser, 12 Bush (Ky.) 465; Jesse *v.* Shuck, 12 S. W. 304, 11 Ky. L. Rep. 463. *Compare* Bailey *v.* Cincinnati, 1 Handy 438, 12 Ohio Dec. (Reprint) 225, as to elements of damage clearly ascertainable.

30. Gann *v.* Worman, 69 Ind. 458.

31. Edney *v.* Baum, 44 Nebr. 294, 62 N. W. 461.

32. Harton *v.* Bloom, 33 N. Y. Super. Ct. 115.

33. Discretion of court in general see *infra*, IV, O, 5, e.

In criminal prosecutions see Criminal Law, 12 Cyc. 702.

In suits in equity see Equity, 16 Cyc. 426.

34. *Connecticut.*— Winchell *v.* Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935.

Illinois.— Stumer *v.* Pitchman, 124 Ill. 250, 15 N. E. 757.

Iowa.— Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420.

Minnesota.— See Huntress-Brown Lumber Co. *v.* Wyman, 55 Minn. 262, 56 N. W. 896, where an executrix, against whom the action had been revived upon the death of the original defendant, was granted a new trial on showing want of knowledge of the action.

England.— Beale *v.* Martin, 12 Wkly. Rep. 135.

Canada.— Kitchen *v.* Murray, 16 U. C. C. P. 69.

Instances.— Where the failure of a woman to defend an action against her on a note was due to her absence in another state and her failure to receive notice of the action left with her husband, who had wrongfully procured her name to be affixed to the note without her knowledge, a new trial was properly allowed. Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420. Where one of partners sued jointly had no personal knowledge of the action until after verdict, he was given a new trial to make a meritorious personal defense. Albright *v.* McTighe, 49 Fed. 817.

35. Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811; Sioux City Vinegar Mfg. Co. *v.* Boddy, 108 Iowa 538, 79 N. W. 350; Overstreet *v.* Brown, 62 S. W. 885, 23 Ky. L. Rep. 317. And see *supra*, III, A, 2.

36. Jackson *v.* Shapard, 69 S. W. 954, 24 Ky. L. Rep. 713 (sickness in family); Doe *v.* McQueen, 3 U. C. Q. B. O. S. 69.

37. Barnes *v.* McDaniels, 35 Iowa 381 (failure of clerk to file replication and verdict directed for want thereof); Price *v.* Thompson, 84 Ky. 219, 1 S. W. 408, 8 Ky. L. Rep. 201 (failure of court commissioner to report claims paid by administrator and judgment by default); McCall *v.* Hitchcock, 9 Bush (Ky.) 66 (where on the application of a defendant sued in several actions the clerk of the court failed to find any papers filed in a particular action, and judgment was taken by default). See also National State Capital Bank *v.* Noyes, 62 N. H. 35.

neglected to make a defense.[38] Nor is it a sufficient ground that he neglected to retain counsel,[39] or because a party neglected to inform his counsel of facts or evidence material to his case or defense.[40]

(II) *Of Counsel.* Nor as a rule is it sufficient cause for awarding a new trial that an attorney failed to file the necessary pleadings or otherwise defend the action,[41] or made mistakes in preparing the pleadings.[42] The failure of counsel, through mistake or inattention, to challenge a juror,[43] or to take note of matters occurring during the progress of the trial, is seldom ground for a new trial.[44]

38. Loonie *v.* Burt, 80 Tex. 582, 16 S. W. 439, especially where matter of defense may be enforced in a separate suit.

Under a number of the practice codes, mistake or inadvertence, as distinguished from accident or surprise, is not a ground for new trials. Fincher *v.* Malcolmson, 96 Cal. 38, 30 Pac. 835. See also Holderman *v.* Jones, 52 Kan. 743, 34 Pac. 352.

39. Singer Mfg. Co. *v.* May, 86 Ill. 398; Mogelberg *v.* Clevinger, 93 Iowa 736, 61 N. W. 1092; O'Donnell *v.* Flanigan, 9 Pa. Super. Ct. 136; Claussen *v.* Salinas, 12 Rich. (S. C.) 124. *Compare* White *v.* Gray, 92 Iowa 525, 61 N. W. 173 (where defendant understood that his attorney had engaged other counsel); Kilts *v.* Neahr, 101 N. Y. App. Div. 317, 91 N. Y. Suppl. 945 (as to due diligence by non-resident in attempting to secure counsel by mail).

40. *Alabama.*— Barron *v.* Robinson, 98 Ala. 351, 13 So. 476; White *v.* Ryan, 31 Ala. 400.

Georgia.— Ferguson *v.* Beck, etc., Hardware Co., 92 Ga. 531, 17 S. E. 914.

Iowa.— Robins *v.* Modern Woodman of America, 127 Iowa 444, 103 N. W. 375.

Louisiana.— Doat *v.* Maltby, 2 La. Ann. 583.

Mississippi.— Moody *v.* Harper, 33 Miss. 465, where agreement as to day of trial not consummated.

North Carolina.— Waddell *v.* Wood, 64 N. C. 624.

Texas.— See Dathe *v.* Ohnsteadt, (Civ. App. 1900) 56 S. W. 685.

Washington.— Friedman *v.* Manley, 21 Wash. 43, 56 Pac. 832, failure by absent party to furnish attorney with letters written by adversary.

England.— Tharpe *v.* Stallwood, 1 D. & L. 24, 7 Jur. 492, 12 L. J. C. P. 241, 5 M. & G. 760, 6 Scott N. R. 715, 44 E. C. L. 397; Vernon *v.* Hankey, 2 T. R. 113, 1 Rev. Rep. 444.

See 37 Cent. Dig. tit. "New Trial," § 184. See also *infra*, III, H, 3, a.

Compare Childs *v.* District of Columbia, 19 Ct. Cl. 332.

41. *Alabama.*— Wheeler *v.* Morgan, 51 Ala. 573; *Ex p.* North, 49 Ala. 385; Dothard *v.* Teague, 40 Ala. 583, mistake or inadvertence on the part of defendant as to necessity of making a defense.

Iowa.— Church *v.* Lacy, 102 Iowa 235, 71 N. W. 338; Jones *v.* Leech, 46 Iowa 186. *Compare* Peterson *v.* Koch, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 26; Ennis *v.* Fourth St. Bldg. Assoc., 102 Iowa 520, 71 N. W. 426, where unknown to defendant his attorney had absconded.

Kentucky.— Patterson *v.* Matthews, 3 Bibb 80. *Compare* Head *v.* Ayer, etc., Tie Co., 70 S. W. 55, 24 Ky. L. Rep. 728, where failure to answer was due to loss of papers in case.

Mississippi.— Thompson *v.* Williams, 7 Sm. & M. 270.

New Hampshire.— Carroll *v.* McCullough, 63 N. H. 95; Bergeron *v.* Dartmouth Sav. Bank, 62 N. H. 655.

New York.— Broas *v.* Mersereau, 18 Wend. 653, mistake as to necessity of making defense after objection in abatement.

Texas.— Dathe *v.* Ohnsteadt, (Civ. App. 1900) 56 S. W. 685. See also Loonie *v.* Burt, 80 Tex. 582, 16 S. W. 439, especially where the matter of defense may be enforced in a separate suit.

England.— Breach *v.* Casterton, 7 Bing. 242, 9 L. J. C. P. O. S. 48, 4 M. & P. 867, 20 E. C. L. 107. *Compare* De Roufigny *v.* Peale, 3 Taunt. 484, 12 Rev. Rep. 687, where the attorney failed to deliver his brief to counsel.

See 37 Cent. Dig. tit. "New Trial," § 184 *et seq.*

Compare Seymour *v.* Miller, 32 Conn. 402 (as to sufficient diligence in notifying clerk of the appearance of counsel); Cutler *v.* Rice, 14 Pick. (Mass.) 494 (as to perturbation of mind of counsel caused by news of sudden illness in family).

Refusal of court to try case to special jury.— Where defendant refused to defend an important action because the judge properly refused to try the case to a special jury, a new trial was allowed on payment into court of the amount of the verdict as security. Bell *v.* Flintoft, 3 U. C. Q. B. 122.

That counsel was prevented from stating to the jury all that he desired to state, it not being shown that he was so prevented by the court, is not ground for a new trial. Dyson *v.* State, 72 Ga. 206.

42. Fretwell *v.* Laffoon, 77 Mo. 26; McNeish *v.* Stewart, 7 Cow. (N. Y.) 474. *Compare* Holmes *v.* The Chieftain, 1 La. Ann. 136.

43. Faulkner *v.* Snead, 122 Ga. 28, 49 S. E. 747; Brown *v.* Autrey, 78 Ga. 753, 3 S. E. 669; Cannon *v.* Bullock, 26 Ga. 431.

A false statement in answer to a proper question on voir dire entitles the party to a new trial on the ground of accident or surprise. Tarpey *v.* Madsen, 26 Utah 294, 73 Pac. 411. And see *supra*, III, A, 6, b.

44. Wheeler *v.* Morgan, 51 Ala. 573 (failure of counsel to hear calling of case and

But where counsel made a mutual mistake in preparing a stipulation of facts and the court was misled thereby,[45] or made a mistake in the preparation of a verdict agreed upon,[46] or as to the terms upon which a verdict was taken subject to the opinion of the court,[47] the verdict should be set aside.

d. Surprise at Ruling. Surprise at a correct ruling of law in the admission or exclusion of evidence,[48] or in the giving of instructions,[49] or upon any other matter arising during the progress of the action, is generally insufficient cause for granting a new trial.[50] But where the ruling was upon a doubtful point of practice and great injustice appears to have resulted, it seems that a new trial may be allowed.[51]

e. Change of Theory of Action or Defense. A new trial will not be granted merely because the losing party or his attorney did not exercise prudence or erred in judgment and can probably make a better case or defense on another trial.[52] A new trial will not be granted ordinarily to enable a plaintiff to recover on some ground not claimed at the trial, even though it be apparently disclosed

default); Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657 (amendment of complaint during trial); Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195 (assent to default); Handy *v.* Davis, 38 N. H. 411 (statement by counsel for adverse party). See also Schellhous *v.* Ball, 29 Cal. 605, as to formal offer of note in evidence.

A considerable mistake in the computation of interest on an account for which plaintiff was not blamable, and which probably induced the jury to find for defendant, was held to justify the allowance of a new trial. Sultan *v.* Sherwood, 18 Nev. 454, 5 Pac. 71.

Misapprehension as to objection to testimony.— Where the party objecting to the testimony of an incompetent witness understood his objection to be continued, but the court understood otherwise and admitted the testimony, a new trial was granted. Park *v.* Park, 66 Ga. 543.

45. McCorkle *v.* Everett, 16 Tex. Civ. App. 552, 41 S. W. 136. See also W. W. Kimball Co. *v.* Huntington, 80 Wis. 270, 50 N. W. 177, where party held not negligent in failing to discover omission in stipulation prepared by attorney.

46. Lucas *v.* Lucas, 30 Ga. 191, 76 Am. Dec. 642.

47. McLeod *v.* Boulton, 2 U. C. Q. B. 44.

48. See *infra*, III, H, 3, b, (I), (II).

49. Hilliker *v.* Francisco, 65 Mo. 598.

50. *Indiana.*— Beals *v.* Beals, 27 Ind. 77, rule of practice.

Louisiana.— Rawle *v.* Skipwith, 8 Mart. N. S. 407, as to case being at issue.

Missouri.— Hilliker *v.* Francisco, 65 Mo. 598.

New York.— Waite *v.* New York Cent., etc., R. Co., 110 N. Y. 635, 17 N. E. 730 (as to matters submitted to jury); Giraudat *v.* Korn, 8 Daly 406; Perkins *v.* Brainerd Quarry Co., 11 Misc. 328, 32 N. Y. Suppl. 230; Anderson *v.* Market Nat. Bank, 66 How. Pr. 8 (rule of practice).

Rhode Island.— Bassett *v.* Loewenstein, 23 R. I. 24, 49 Atl. 41.

Vermont.— Morgan *v.* Houston, 25 Vt. 570.

See 37 Cent. Dig. tit. "New Trial," § 187.

Compare Argentine *v.* Simmons, 59 Kan. 164, 52 Pac. 424, as to misprint in statutes.

That an appellate court has rendered a decision since the trial, changing the law, is not ground for a new trial. Forstman *v.* Schulting, 38 Hun (N. Y.) 482.

51. Pope *v.* Mooney, 40 Mo. 104 (mistaken construction of doubtful statute); Chinn *v.* Taylor, 64 Tex. 385; Keeter *v.* Case, (Tex. Civ. App. 1897) 41 S. W. 528 (exclusion of evidence). See also Rogers *v.* Niagara Ins. Co., 2 Hall (N. Y.) 599.

52. *California.*—Fincher *v.* Malcolmson, 96 Cal. 38, 30 Pac. 835.

Kansas.— Holderman *v.* Jones, 52 Kan. 743, 34 Pac. 352.

New Hampshire.— Heath *v.* Marshall, 46 N. H. 40.

Pennsylvania.— Gray *v.* Singerly, 6 Phila. 539.

Texas.— Malry *v.* Grant, (Civ. App. 1898) 48 S. W. 614.

England.— Waters *v.* Waters, 2 De G. & Sm. 591, 64 Eng. Reprint 263.

Canada.— Root *v.* Woodward, 1 U. C. Q. B. 311.

See 37 Cent. Dig. tit. "New Trial," § 185.

Applications of rule.— That counsel disagreed as to the proper case to be presented is not ground for a new trial. Pickering *v.* Dowson, 4 Taunt. 779. That counsel did not examine a witness according to the request of the attorney is not ground for a new trial. Hall *v.* Stothard, 2 Chit. 267, 18 E. C. L. 627.

Limitations of rule.— Where plaintiff was nonsuited for refusal to answer proper questions on cross-examination, a new trial was allowed on its being shown that she was a foreigner and did not understand the importance of answering the questions. Wiedegemann *v.* Walpole, 53 J. P. 614. A new trial was granted because the case involved difficult legal questions which had not been fully argued. Reed *v.* Aubrey, 85 Ga. 882, 11 S. E. 800. *Compare* Dickinson *v.* Edwards, 2 Abb. N. Cas. (N. Y.) 300 [*reversed* on other grounds in 13 Hun 405]; Von Steuben *v.* New Jersey Cent. R. Co., 4 Pa. Dist. 589. The English and Canadian courts appear to allow new trials in some cases where the evidence is unsatisfactory. See *infra*, III, H, 3, d.

by the evidence,[53] or to enable a defendant to avail himself of a defense which was within the issues but not presented at the trial,[54] or to make a defense inconsistent with the one presented,[55] or contradictory to admissions made,[56] or points tacitly conceded.[57] A new trial, it has been held, may be allowed, as a matter of favor, to plead a good defense to the merits,[58] but not to plead,[59] or raise by

53. *California.*— Bates *v.* Bates, 71 Cal. 307, 12 Pac. 223.

Louisiana.— Parker *v.* Ricks, 114 La. 942, 38 So. 687.

Minnesota.— Engler *v.* Schneider, 66 Minn. 388, 69 N. W. 139; Bullis *v.* Cheadle, 36 Minn. 164, 30 N. W. 549.

New York.— See Quimby *v.* Carhart, 58 N. Y. Super. Ct. 490, 12 N. Y. Suppl. 556 [*affirmed* in 133 N. Y. 579, 30 N. E. 972].

North Carolina.— Simmons *v.* Mann, 92 N. C. 12.

Pennsylvania.— Beaver *v.* Sandham, 3 Del. Co. 163.

South Carolina.— Leonard *v.* Brockman, 46 S. C. 128, 24 S. E. 96.

Canada.— Doe *v.* Daniel, 15 N. Brunsw. 372; Moor *v.* Boyd, 23 U. C. Q. B. 459; Turley *v.* Grafton Road Co., 8 U. C. Q. B. 579 (action premature); Tyrrel *v.* Myers, 6 U. C. Q. B. O. S. 433 (at least where probable recovery would not exceed costs). *Compare* Carscaden *v.* Shore, 17 U. C. C. P. 493; Hamilton *v.* Moore, 33 U. C. Q. B. 100 (where plaintiff given leave to amend); Elliott *v.* Croker, 8 U. C. Q. B. 156 (where plaintiff given leave to amend).

After a valid election by plaintiff between two grounds of recovery, he is not entitled to a new trial on the other ground. Powell *v.* Mayo, 27 N. J. Eq. 440.

54. Kenney *v.* Knight, 127 Fed. 403; Martin *v.* Great Northern R. Co., 16 C. B. 179, 3 C. L. R. 817, 1 Jur. N. S. 613, 24 L. J. C. P. 209, 3 Wkly. Rep. 477, 81 E. C. L. 179; Horlor *v.* Carpenter, 3 C. B. N. S. 172, 27 L. J. C. P. 1, 91 E. C. L. 172.

55. *Illinois.*— Winchester *v.* Grosvenor, 48 Ill. 517. See also Niedner *v.* Friedrich, 69 Ill. App. 622.

New York.— Boehm *v.* Commercial Alliance L. Ins. Co., 9 Misc. 529, 30 N. Y. Suppl. 660 [*affirmed* in 35 N. Y. Suppl. 1103]; Hatfield *v.* Macy, 52 How. Pr. 193.

Texas.— Carver *v.* J. S. Mayfield Lumber Co., 29 Tex. Civ. App. 434, 68 S. W. 711, set-off.

United States.— McCune *v.* Northern Pac. R. Co., 18 Fed. 875, 9 Sawy. 551, unless, it is said, the right to a contrary verdict is very clear.

Canada.— Hickey *v.* Stover, 11 Ont. 106.

56. Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; Gibson *v.* Sutton, 70 S. W. 188, 24 Ky. L. Rep. 868. See also Johns *v.* Bolling, 50 S. W. 683, 20 Ky. L. Rep. 1989.

Applications of rule.—A party who, to avoid a continuance, admits that an absent witness will testify to certain facts, is not entitled to a new trial on the ground that the witness would in fact have testified differently. Gibson *v.* Sutton, 70 S. W. 188, 24 Ky. L. Rep. 868. A demurrer to the evidence admits the facts in evidence, and a new trial will not ordinarily be granted, except, it may be, as to the measure of damages. Radcliff *v.* Radford, 96 Ind. 482; Green *v.* Judith, 5 Rand. (Va.) 1.

57. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092; Jackson *v.* Russell, 4 Wend. (N. Y.) 543 [*affirmed* in 22 Wend. 277]. See also Breed *v.* Northern Pac. R. Co., 35 Fed. 642. A new trial in an action on contract to give the movant the benefit of the law of another state where the contract was made, which had not been particularly insisted on at the trial, was denied. Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303.

58. Rielly *v.* Bader, 50 Minn. 199, 52 N. W. 522; Maloney *v.* Mintzer, 6 Phila. (Pa.) 221; Richardson *v.* Johnston, 2 Call (Va.) 527 (to permit an executor to plead defense not before known to counsel); Hurlbert *v.* Sleeth, 25 Nova Scotia 511; Germain *v.* Shuert, 7 U. C. C. P. 86; McMartin *v.* Traveller, 5 U. C. Q. B. O. S. 155 (to allow executors to plead *plene administravit* in hard case); Lee *v.* Rapelje, 2 U. C. Q. B. 368 (to allow sheriff to correct slip in pleadings); McDonald *v.* De Tuyle, 6 U. C. Q. B. O. S. 335. See also Talbot *v.* Rossin, 23 U. C. Q. B. 170, where after verdict for defendant his plea was held bad. *Contra*, see Bunge *v.* Koop, 5 Rob. (N. Y.) 1 [*affirmed* in 48 N. Y. 225, 8 Am. Rep. 546]; Vernon *v.* Hankey, 2 T. R. 113, 1 Rev. Rep. 444; McKechnie *v.* McKeyes, 10 U. C. Q. B. 37.

Pleading stipulation.—As a matter of favor, a new trial was granted to permit a defendant to plead a stipulation which defendant had refused to plead, but had relied on by motion for a discontinuance and by protesting against the trial. Kuehn *v.* Syracuse Rapid Transit R. Co., 104 N. Y. App. Div. 580, 93 N. Y. Suppl. 883 [*reversed* on other grounds in 183 N. Y. 456, 76 N. E. 589].

59. *Arkansas.*— Hickey *v.* Thompson, 52 Ark. 234, 12 S. W. 475.

Connecticut.— Doty *v.* White, 2 Root 426, statute of limitations.

Georgia.— McLeod *v.* Wilson, 108 Ga. 790, 33 S. E. 951, action prematurely brought.

Minnesota.— Barrows *v.* Fox, 39 Minn. 61, 38 N. W. 777, statute of limitations.

Ohio.— Bush *v.* Critchfield, 5 Ohio 109.

Vermont.— McConnell *v.* Strong, 11 Vt. 280.

Washington.—Leo Kee *v.* Wah Sing Chong, 31 Wash. 678, 72 Pac. 473, action prematurely brought.

Canada.—Clarke *v.* Robinson, 2 N. Brunsw. 86 (release by husband of wages of wife living apart from him); Cook *v.* Grant, 32 U. C. C. P. 511 (statute of limitations);

objection,[60] a merely technical defense, where the verdict appears to be just. If a verdict can be sustained only on grounds not presented at the trial,[61] and especially on grounds inconsistent with those presented,[62] a new trial should be ordered.

2. Absence or Disability of Party or Counsel — a. Ignorance of Time of Trial — (i) *In General.* Ordinarily it is not a sufficient excuse for the absence or want of preparation of a party or counsel that he did not know that the case was ready for trial,[63] or did not know the day upon which the court convened or the case stood regularly for trial,[64] or was mistaken as to the condition of the trial

Higby *v.* Cummings, 10 U. C. Q. B. 222 (discharge of surety by extension of time to principal); Stephens *v.* Allan, 2 U. C. Q. B. 282.

Objection to form of action.— Where substantial justice has been done, a new trial should not be granted to enable defendant to avail himself of a technical defense to the particular form of action. McConnell *v.* Strong, 11 Vt. 280.

Where, by advice of counsel, defendant relied on a plea in abatement instead of pleading in bar, a new trial was refused. Winchester *v.* Grosvenor, 48 Ill. 517.

Matter in discharge arising after verdict.— A new trial to plead matter in discharge that has risen since the verdict should be denied. Goodall *v.* Batchelder, 17 N. H. 386; Putnam *v.* MacLeod, 23 R. I. 373, 50 Atl. 646.

60. *Iowa.*— Fanning *v.* McCraney, Morr. 398.

Kentucky.— Johns *v.* Bolling, 50 S. W. 683, 20 Ky. L. Rep. 1989.

Louisiana.— Taylor *v.* Sutton, 6 La. Ann. 709.

United States.— Ford *v.* U. S., 18 Ct. Cl. 62.

Canada.— Doe *v.* Maybee, 2 U. C. Q. B. 389; McMahon *v.* Campbell, 2 U. C. Q. B. 158.

61. Hays *v.* Pennsylvania R. Co., 42 N. J. L. 446; Harris *v.* Wilson, 1 Wend. (N. Y.) 511. *Compare* Guerin *v.* Smith, 62 Mich. 369, 28 N. W. 906.

62. Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26; Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478; Harris *v.* Wilson, 1 Wend. (N. Y.) 511.

63. *Kentucky.*— Legrand *v.* Baker, 6 T. B. Mon. 235. *Compare* Illinois Cent. R. Co. *v.* Beauchamp, 77 S. W. 1096, 25 Ky. L. Rep. 1429, as to amended answer.

Louisiana.— See Wolfe *v.* Pruitt, 7 La. Ann. 572.

Mississippi.— O'Brien *v.* Liddell, 10 Sm. & M. 371, where garnishee mistakenly supposed he had been discharged on his answer.

Missouri.— Patchin *v.* Wegman, 19 Mo. 151, where defendant supposed his attorney had compromised case as authorized.

Texas.— Power *v.* Gillespie, 27 Tex. 370. *Compare* Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207, where the action was tried without notice to non-resident defendants six years after their counsel had notified them of its discontinuance, counsel having been paid off and refusing to represent them.

England.— Moody *v.* Dick, 4 N. & M. 348, 30 E. C. L. 581.

Compare Vickers *v.* Graham, 122 Ga. 178, 50 S. E. 59 (as to inexcusable failure to discover mistakes in numbering paragraphs in substituted copy of lost petition); Burrough *v.* Hill, 15 R. I. 190, 2 Atl. 382 (as to excusable mistake in failing to reënter cause due to similarity in names of cases).

That movant's attorney did not know that the cause had been remanded from an appellate court is not an excuse for absence from the trial. Legrand *v.* Baker, 6 T. B. Mon. (Ky.) 235; Power *v.* Gillespie, 27 Tex. 370.

64. *Alabama.*— Renfro *v.* Merryman, 71 Ala. 195.

Colorado.— Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Georgia.— Seifert *v.* Holt, 82 Ga. 757, 9 S. E. 843.

Illinois.—Hartford F. Ins. Co. *v.* Vanduzor, 49 Ill. 489; Miller *v.* McGraw, 20 Ill. App. 203.

Kentucky.— Brevard *v.* Graham, 2 Bibb 177.

Missouri.— Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339 (misled by different rule in adjoining circuit); Field *v.* Matson, 8 Mo. 686; Steigers *v.* Darby, 8 Mo. 679; Stout *v.* Calver, 6 Mo. 254, 35 Am. Dec. 438.

Ohio.— Clark *v.* Delorac, 7 Ohio Dec. (Reprint) 325, 2 Cinc. L. Bul. 113.

Pennsylvania.— Amwake *v.* Gerhart, 11 Lanc. Bar 191; McDuffy *v.* McGittigen, 1 Phila. 69; Lincoln *v.* Parmentier, 1 Phila. 25, although case on trial list twice.

Texas.— Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Flanagan *v.* Holbrook, (Civ. App. 1900) 60 S. W. 321 (failure of attorney to examine assignment of cases); International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233; Bolls *v.* Galloway, 1 Tex. App. Civ. Cas. § 724. See also McAnally *v.* Vickry, (Civ. App. 1904) 79 S. W. 857.

See 37 Cent. Dig. tit. "New Trial," § 169.

Compare New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170 (mistake as to time of session of court); Kirkpatrick *v.* Mills, 30 Nova Scotia 426 (where counsel failed to attend on first day of sittings when cases were set for trial); Dove *v.* Dalby, 5 U. C. Q. B. 457 (mistake as to place of cause on docket under exceptional circumstances).

Errors in the names of parties in the trial docket which were not of a misleading character were not cause for surprise. Lincoln *v.* Parmentier, 1 Phila. (Pa.) 25.

docket and the probable time of trial,[65] or mistakenly believed, not having been misled by the court or the other party, that the case would not be tried.[66] Nor is it a sufficient excuse for the absence of a party or counsel that the case was tried at a day in the term later than that for which it was set.[67] The trial of a case without notice, and in the absence of the movant and his attorney, before it was regularly at issue,[68] or before the time for which it was set,[69] or at which it was triable in regular order,[70] or at which it was triable only upon notice,[71] is ground for a new trial. Where notice of a trial was too short to secure the attendance of the unsuccessful party and his witnesses, a new trial should be ordered.[72]

(II) *Trial Contrary to Announcement by Court or Agreement of Parties.* Where a trial has been had in the absence of the movant or his attorney, after an announcement by the court that the case would not be tried at the term or at the time at which it was tried, a new trial should be granted.[73] Where the case

65. *Alabama.*— White *v.* Ryan, 31 Ala. 400.

Illinois.— Walsh *v.* Walsh, 114 Ill. 655, 3 N. E. 437; Miller *v.* McGraw, 20 Ill. App. 203.

Iowa.— Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88. *Compare* Storm Lake First Nat. Bank *v.* Harwick, 74 Iowa 227, 37 N. W. 171.

Minnesota.— Latusek *v.* Davies, 79 Minn. 279, 82 N. W. 587, belief that no cases would be tried on first day of term.

Tennessee.— State Bank *v.* Officer, 3 Baxt. 173; Simonton *v.* Buchanan, 2 Baxt. 279; McAuly *v.* Lockhart, 4 Humphr. 229.

Texas.— Devine *v.* Martin, 15 Tex. 25; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126, belief that criminal docket was being tried.

England.— See Gwilt *v.* Crawley, 8 Bing. 144, 1 L. J. C. P. 49, 1 Moore & Sc. 229, 21 E. C. L. 481. *Compare* Doe *v.* Appleby, 9 Dowl. P. C. 556, 4 P. & D. 538.

Compare Trueman *v.* Wood, 18 N. Brunsw. 219 (where prior cases were disposed of more quickly than had been anticipated); Elliott *v.* Ladds, 6 Nova Scotia 170 (where case standing number 65 on docket of jury trials was tried on first day of jury trials).

66. Yater *v.* Mullen, 23 Ind. 562; Russell *v.* Nelson, 32 Iowa 215; Holburn *v.* Neal, 4 Dana (Ky.) 120; Owings *v.* Gibson, 2 A. K. Marsh. (Ky.) 515, because trial judge had been of counsel.

67. Cotton *v.* Brashiers, 2 A. K. Marsh. (Ky.) 153.

68. Chicago Cottage Organ Co. *v.* Standen, 5 Nebr. (Unoff.) 488, 494, 98 N. W. 1051, 1052. But the trial of an action, in which the pleadings were known to have been lost and no answer had ever been filed, in the absence of plaintiff, was held ground for a new trial. Chicago Cottage Organ Co. *v.* Standen, *supra.*

69. Hanslow *v.* Wilks, 5 Dowl. P. C. 295. It must appear that neither the attorney nor the movant had notice of a change in the time of trial. Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278.

70. Bostwick *v.* Blair, 2 Kan. App. 89, 43 Pac. 297; Donallen *v.* Lennox, 6 Dana (Ky.) 89 (where the trial of the case in regular order would have been impossible at term); Bostwick *v.* Bostwick, 73 Tex. 182, 11 S. W. 178 (especially to defendant in divorce proceedings); Dorrien *v.* Howell, 6 Bing. N. Cas. 245, 8 Dowl. P. C. 277, 4 Jur. 195, 8 Scott 508, 37 E. C. L. 605; Aust *v.* Fenwick, 2 Dowl. P. C. 246; Wolff *v.* Goldring, 44 L. J. C. P. 214, 32 L. T. Rep. N. S. 161, 23 Wkly. Rep. 473; McIntosh *v.* Hamilton, 18 N. Brunsw. 654; Sayre *v.* Steeces, 10 N. Brunsw. 86. See also Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278 (as to insufficient evidence that a case was not tried in regular order); Fourdrinier *v.* Bradbury, 3 B. & Ald. 328, 5 E. C. L. 194; De Medina *v.* Shrapnell, 12 L. J. C. P. 37; Cook *v.* Beardsall, 29 L. J. Exch. 35, 1 L. T. Rep. N. S. 14 (as to trial in another division of the court without proper notice). *Compare* Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278 (where counsel had no reason to suppose that the case would not be tried as early as it was); Cottam *v.* Banks, 11 Jur. 148, 1 Saund. & C. 302.

The fact that a case was not tried in the order it stood in on the docket is not ground for a new trial where it is not known that it was tried at an earlier date than it otherwise would have been. International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233.

Where the failure of counsel to appear was not due to the calling of the case out of the regular order, a new trial may be refused. Parsons *v.* Ferriby, 26 U. C. Q. B. 380.

The mere trial of a case out of its regular order, the unsuccessful party and counsel being present in the court-room, is not ground for a new trial. Blackhurst *v.* Bulmer, 5 B. & Ald. 907, 1 D. & R. 553, 7 E. C. L. 493.

71. Williams *v.* Williams, 2 Dowl. P. C. 350. See also Bennett *v.* Jackson, 34 W. Va. 62, 11 S. E. 734; Lett *v.* Watkins, 27 L. J. Exch. 319, as to sufficiency of notice.

72. Leighton *v.* Dixon, 42 Kan. 616, 22 Pac. 732; Drummond *v.* Carritt, 2 Nova Scotia 268; Armstrong *v.* Beacon L. Ins. Co., 4 U. C. C. P. 547; Harrington *v.* O'Lone, 5 U. C. Q. B. O. S. 78. See also Pollock *v.* Goldstein, 10 Manitoba 631, case not on trial list of postponed cases until day of trial.

73. *Georgia.*—Smith *v.* Brand, 44 Ga. 588; See also Massey *v.* Allen, 48 Ga. 21.

was tried in the absence of the unsuccessful party or his attorney in violation of a stipulation to continue the case or not to try it at that particular time,[74] or to try it only upon notice,[75] a new trial should be granted. So also where the party and his attorney were absent from the trial because a compromise of the action had been agreed upon,[76] or where they were not prepared for trial because a compromise had been agreed upon,[77] a new trial should be allowed.

b. Cause of Absence of Party. The absence from the trial of the unsuccessful party, and the consequent loss of his testimony or assistance, is not ground for a new trial, unless his failure to attend was not attributable to the negligence of himself or his attorney.[78] That his attorney or agent, not being misled by the

Indiana.— Edsall *v.* Ayres, 15 Ind. 286, cause tried over objection of attorney.

Iowa.— Tegeler *v.* Jones, 33 Iowa 234.

Kentucky.— Goff *v.* Wilburn, 79 S. W. 232, 25 Ky. L. Rep. 1963; Brooks *v.* Crane, 42 S. W. 337, 19 Ky. L. Rep. 1120, where case was tried without notice in plaintiff's absence after having been dismissed for want of prosecution.

Tennessee.— Clark *v.* Jarrett, 2 Baxt. 467.

Texas.— Lanius *v.* Shuber, 77 Tex. 24, 13 S. W. 614; Davis *v.* Terry, 33 Tex. 426; Fitzgerald *v.* Wygal, 24 Tex. Civ. App. 372, 59 S. W. 621.

West Virginia.— Simpkins *v.* White, 43 W. Va. 200, 27 S. E. 241.

See 37 Cent. Dig. tit. "New Trial," § 170.

Compare Siebert *v.* Sportsman's Park, etc., 72 Mo. App. 158, where statement was made by the judge of another division from which the case had been transferred and no application was made by the party for a continuance.

74. *California.*— Symons *v.* Bunnell, 80 Cal. 330, 22 Pac. 193, 550.

Georgia.— See Smith *v.* Brand, 44 Ga. 588.

Illinois.— Putnam *v.* Murphy, 53 Ill. 404; Hankins *v.* Mutual Ben. L. Ins. Co., 4 Ill. App. 130, especially where it was represented that defendant did not intend to make a defense.

Kentucky.— White *v.* Richards, 49 S. W. 337, 20 Ky. L. Rep. 1369.

Nebraska.— Mordhorst *v.* Reynolds, 23 Nebr. 485, 37 N. W. 80, oral agreement.

Ohio.— Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729.

Pennsylvania.— Myers *v.* Filley, 18 Montg. Co. Rep. 67.

Canada.— Dougall *v.* Wilson, 24 U. C. Q. B. 433.

See 37 Cent. Dig. tit. "New Trial," § 172.

Compare Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906 (where court did not approve of continuance); Moody *v.* Harper, 33 Miss. 465 (where agreement as to day of trial not consummated).

Written stipulation necessary.— Under some statutes, such stipulations must have been in writing. Barnes *v.* Emmenga, 53 Iowa 497, 5 N. W. 597; Birdwell *v.* Cox, 18 Tex. 535.

75. Robertson *v.* Williams, 81 Cal. 268, 22 Pac. 665, oral promise. *Compare* Tams *v.* Graeff, 1 Phila. (Pa.) 70, as to absence of counsel under promise of opposing counsel to notify him when the case was called.

The failure of one attorney to notify another when a case was to be called is not ground for a new trial, if the latter did not use diligence in attending after learning from other reliable sources when the case was to be called. Josephson *v.* Sigfusson, 13 N. D. 312, 100 N. W. 703.

76. Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729; Skinner *v.* Tyson, 17 L. T. Rep. N. S. 551; Johnston *v.* McDonald, 10 N. Brunsw. 379. See also Head *v.* Ayer, etc., Tie Co., 70 S. W. 55, 24 Ky. L. Rep. 728, where plaintiff's agent informed defendant's attorney that the case had been settled.

Failure to notify of result of offer to compromise.— Failure of plaintiff to notify the agent of defendant having charge of the defense of the result of an offer of compromise made to defendant by letter, at the suggestion of the agent, and the trial of the cause in the agent's absence are not ground for a new trial. Jackson *v.* Van Antwerp, 8 Cow. (N. Y.) 273.

77. Comply *v.* Browne, 3 Brev. (S. C.) 240, 419.

78. *Alabama.*— Renfro *v.* Merryman, 71 Ala. 195; White *v.* Ryan, 31 Ala. 400.

Georgia.— Newman *v.* Malsby, 108 Ga. 339, 33 S. E. 997; Seifert *v.* Holt, 82 Ga. 757, 9 S. E. 843; Ferrill *v.* Marks, 76 Ga. 21; Bowling *v.* Whatley, 53 Ga. 24.

Illinois.— Koon *v.* Nichols, 85 Ill. 155; Hartford F. Ins. Co. *v.* Vanduzor, 49 Ill. 489; Thompson *v.* Anthony, 48 Ill. 468; Byrne *v.* O'Neill, 35 Ill. App. 361 (although due to misunderstanding between party and attorney); Miller *v.* McGraw, 20 Ill. App. 203.

Indiana.— Elmore *v.* McCrary, 80 Ind. 544 (especially where there have been several continuances); Blacketer *v.* House, 67 Ind. 414; Yater *v.* Mullen, 23 Ind. 562 (where defendant left the place of trial thinking that the case could not be tried or that he could return in time for the trial).

Kansas.—Mehnert *v.* Thieme, 15 Kan. 368; Washington *v.* Byers, 7 Kan. App. 812, 53 Pac. 150.

Kentucky.— Turner *v.* Booker, 2 Dana 334.

Louisiana.— Adams *v.* Ryder, 5 La. 261; Erwin *v.* Trion, 2 La. 305.

Minnesota.— Cheney *v.* Dry Wood Lumber Co., 34 Minn. 440, 26 N. W. 236.

Mississippi.— Haber *v.* Lane, 45 Miss. 608.

Ohio.— Backus *v.* Fire, etc., Ins. Co., 4 Ohio Dec. (Reprint) 518, 2 Clev. L. Rep. 299.

court or adversary party, failed to notify him of the time of trial,[79] or failed to notify him correctly or in proper time or manner,[80] or notified him that the case had been continued,[81] furnished no legal ground for his non-attendance, where the absence of the party and injury to his cause resulting therefrom could not have been guarded against by the exercise of ordinary prudence, a new trial may be granted,[82] at least where a continuance for the party's absence was refused.[83] So it has been held that severe sickness of the party,[84] or of a member of his

Pennsylvania.— Ranck *v.* Morton, 5 L. T. N. S. 111; Field *v.* Sergeant, 1 Phila. 72.

Texas.— Freeman *v.* Neyland, 23 Tex. 529; Millar *v.* Smith, 28 Tex. Civ. App. 386, 67 S. W. 429.

Canada.— Archibald *v.* Goldstein, 1 Manitoba 146; Rankin *v.* Weldon, 11 N. Brunsw. 220 (where plaintiff elected to give his deposition rather than attend and therefore could not deny defendant's testimony); Gibbs *v.* Steadman, 4 N. Brunsw. 406 (delay in travel which might have been avoided).

See 37 Cent. Dig. tit. "New Trial," §§ 170, 191.

79. *Kentucky.*— Holburn *v.* Neal, 4 Dana 120.

Missouri.— Patchin *v.* Wegman, 19 Mo. 151.

Ohio.— Endress *v.* Nelp, 1 Disn. 411, 12 Ohio Dec. (Reprint) 702; Backus *v.* Fire, etc., Ins. Co., 4 Ohio Dec. (Reprint) 518, 2 Clev. L. Rep. 299.

Pennsylvania.— Amwake *v.* Gerhart, 11 Lanc. Bar 191.

Texas.—Halton *v.* Salmons, (1886) 2 S. W. 753; Flanagan *v.* Holbrook, (Civ. App. 1900) 60 S. W. 321.

England.— Moody *v.* Dick, 4 N. & M. 348, 30 E. C. L. 581.

See 37 Cent. Dig. tit. "New Trial," § 171.

Compare Preston *v.* Eureka Artificial Stone Co., 54 Cal. 198; Fegeler *v.* Jones, 33 Iowa 234; State Bank *v.* Officer, 3 Baxt. (Tenn.) 173. *Contra*, Peterson *v.* Koch, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 26.

Acts of attorney not authorized to appear. — Where the steps leading to the refiling of a petition and the setting of a case for trial were caused by the action of an attorney not authorized to appear for defendant, and defendant's original attorney supposed himself superseded and did not notify defendant, and a trial was held in his absence, a new trial was granted. Clutz *v.* Carter, 12 Nebr. 113, 10 N. W. 541.

80. *Kansas.*— Griffin *v.* O'Neil, 47 Kan. 116, 27 Pac. 826, failure of telegraph agent to deliver message promptly under agreement with party.

Michigan.— Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742.

Minnesota.—Desnoyer *v.* McDonald, 4 Minn. 515.

Mississippi.— Cole *v.* Harman, 8 Sm. & M. 562.

New Jersey.— Winants *v.* Davis, 18 N. J. L. 306.

Tennessee.— State Bank *v.* Officer, 3 Baxt. 173.

Texas.— Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Rice *v.* Scottish-American Mortg. Co., (Civ. App. 1895) 30 S. W. 75.

Canada.—Smiley *v.* Winslow, 4 N. Brunsw. 349; Proudfoot *v.* Harley, 11 U. C. C. P. 389.

See 37 Cent. Dig. tit. "New Trial," § 171.

Illustration.— Where a defendant was defaulted by reason of his attorney having misinformed him as to the county to which a change of venue had been taken, the attorney having been misinformed by another attorney who from courtesy applied for the change, a new trial was granted. Hannah *v.* Indiana Cent. R. Co., 18 Ind. 431.

81. Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918, 22 Ky. L. Rep. 1510.

82. *Georgia.*— Goodrich *v.* Handy, 91 Ga. 29, 16 S. E. 108, misunderstanding arising from confusion in calling docket.

Kentucky.— Gill *v.* Fugate, 117 Ky. 257, 78 S. W. 188, 25 Ky. L. Rep. 1367 (where plaintiff did not appear because evidence was documentary and deed had been fraudulently altered by defendant without his knowledge); South *v.* Thomas, 7 T. B. Mon. 59 (detained as witness in another court); Grimes *v.* Com., 4 Litt. 1 (detained as juror in another county); Guthrie *v.* Bogart, 1 A. K. Marsh. 334.

Mississippi.— Vannerson *v.* Pendleton, 8 Sm. & M. 452, detention by floods.

Nebraska.— See Chicago Cottage Organ Co. *v.* Standen, 5 Nebr. (Unoff.) 488, 494, 98 N. W. 1051, 1052.

Texas.— Spencer *v.* Kinnard, 12 Tex. 180; Griffin *v.* Towns, (Civ. App. 1894) 25 S. W. 968; Wortham *v.* Bolton, 3 Tex. App. Civ. Cas. § 312.

Canada.— Lockhart *v.* Milne, 1 U. C. Q. B. 444 (absence attending court-martial); Harrington *v.* O'Lone, 5 U. C. Q. B. O. S. 78 (short notice and unavoidable delay in travel). See also Arnold *v.* Higgins, 11 U. C. Q. B. 191, where a witness whose deposition was taken could not be cross-examined because of the absence of the movant.

See 37 Cent. Dig. tit. "New Trial," § 170.

83. Hopkins *v.* Niggli, (Tex. 1887) 6 S. W. 625 (under process to appear at same time in another county); McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483 (change in train service and impassable roads); Smith *v.* Rawlings, 83 Va. 674, 3 S. E. 238 (failure of regular train service).

84. White *v.* Martin, 63 Ga. 659; Stewart *v.* Durrett, 3 T. B. Mon. (Ky.) 113; Low, etc., Water Co. *v.* Hickson, 32 Tex. Civ. App. 457, 74 S. W. 781; Walker *v.* Stewart, 19 Nova Scotia 182, 7 Can. L. T. Occ. Notes 247; Farley *v.* Glassford, 7 U. C. C. P. 285. See also Ricker *v.* Horn, 74 Me. 289; Chicago,

family,[85] notice of which could not be given before the trial,[86] or for which a continuance was refused,[87] may be ground for a new trial. The speedy disposition of prior cases contrary to the assurances of attorneys engaged therein,[88] or the unexpected termination of a prior case by compromise,[89] is sometimes a sufficient excuse for a slight delay by a party in attending a trial.

c. Necessity For Presence of Party. The presence of the absent party must have been necessary, for the purpose of giving his testimony or of assisting in the preparation or presentation of his case, and ordinary prudence must have been exercised to prepare his case before the trial.[90] A new trial will not be granted for the absence of a party where there was no defense to the action,[91] or no defense was offered,[92] or where the particular defense which it is claimed he would have established, if present, was not pleaded.[93]

d. Cause of Absence of Counsel. The absence from the trial, without sufficient excuse, of counsel for the unsuccessful party is not ground for a new trial.[94] That

etc., R. Co. *v.* Genesee County Cir. Judge, 89 Mich. 549, 50 N. W. 879, as to physical disability of party to testify and excusable failure to ask for a continuance.

85. Cleveland Nat. Bank *v.* Reynolds, 76 Ga. 834; Peebles *v.* Ralls, 1 Litt. (Ky.) 24; Miller *v.* Layne, 84 Minn. 221, 87 N. W. 605.

86. See cases *supra*, notes 84, 85.

87. Sherrard *v.* Olden, 6 N. J. L. 344. See *infra*, III, H, 5, b, (II).

88. McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483. *Contra*, Green *v.* Bulkley, 23 Kan. 130. See also Hinman *v.* C. H. Hamilton Paper Co., 53 Wis. 169, 10 N. W. 160, where the absent party, who resided in town, was to be called by the clerk of the court by telephone, but the case was tried before he could arrive.

89. Vittetow *v.* Ames, 51 S. W. 1, 21 Ky. L. Rep. 225.

90. *Georgia.*—Ferrill *v.* Marks, 76 Ga. 21; Bowling *v.* Whatley, 53 Ga. 24; Peacock *v.* Usry, 52 Ga. 353.

Illinois.—Poznanski *v.* Szczech, 71 Ill. App. 670.

Indiana.— Cox *v.* Harvey, 53 Ind. 174.

Kentucky.— Mussin *v.* Collins, 1 A. K. Marsh. 350; Prentice *v.* Oliver, 78 S. W. 469, 25 Ky. L. Rep. 1576; Townsend *v.* Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901.

Michigan.— Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742.

Missouri.— Frick Co. *v.* Caffery, 48 Mo. App. 120.

Pennsylvania.— Cowperthwaite *v.* Miller, 2 Phila. 219; Matthews *v.* Warren, 1 Phila. 133, failure to produce receipt in evidence.

Rhode Island.— Roberts *v.* Roberts, 19 R. I. 349, 33 Atl. 872.

West Virginia.— Tefft *v.* Marsh, 1 W. Va. 38.

See 37 Cent. Dig. tit. "New Trial," § 191.

Compare Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729.

Where the set-off which defendant lost by absence might be regained in another action, a new trial was denied. Rhoades *v.* Jermon, 25 Leg. Int. (Pa.) 28.

91. Stahl *v.* Dayton, 126 Mich. 70, 85 N. W. 249; Proudfoot *v.* Harley, 11 U. C. C. P. 389, Reg. *v.* Baker, 6 U. C. C. P. 68; Kerr *v.* Boulton, 25 U. C. Q. B. 282; Pardow *v.* Beatty, 6 U. C. Q. B. 496; Moore *v.* Hicks, 6 U. C. Q. B. 27; Doyle *v.* Fraser, 5 U. C. Q. B. O. S. 59.

92. Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648; Prentice *v.* Oliver, 78 S. W. 469, 25 Ky. L. Rep. 1576; Roberts *v.* Roberts, 19 R. I. 349, 33 Atl. 872. See also Cook *v.* De la Guerra, 24 Cal. 237 (where the answer was insufficient); Goodrich *v.* Handy, 91 Ga. 29, 16 S. E. 108 (as to appearance by attorney equivalent to general issue). *Compare* Marchand *v.* Noyes, 33 La. Ann. 882, as to excusable oversight of mayor in failing to answer in garnishment proceedings.

93. Thompson *v.* Williams, 7 Sm. & M. (Miss.) 270; Holliday *v.* Holliday, 72 Tex. 581, 10 S. W. 690.

94. *Alabama.*— Western Union Tel. Co. *v.* Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89; McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326; Wheeler *v.* Morgan, 51 Ala. 573; *Ex p.* North, 49 Ala. 385.

Arizona.— Solomon *v.* Norton, 2 Ariz. 100, 11 Pac. 108.

California.— Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932.

Georgia.— Cauthen *v.* Barnesville Sav. Bank, 69 Ga. 767; Warren *v.* Purtell, 63 Ga. 428, although circumstances indicated case would not be reached or not tried if reached.

Illinois.— Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278; Koon *v.* Nichols, 85 Ill. 155; Walker *v.* Armour, 22 Ill. 658; Miller *v.* McGraw, 20 Ill. App. 203.

Indiana.— Blacketer *v.* House, 67 Ind. 414.

Iowa.— Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88.

Kentucky.— Alexander *v.* Lewis, 1 Metc. 407.

Louisiana.— Dwight *v.* Richard, 4 La. Ann. 240; Union Bank *v.* Robert, 9 Rob. 177. *Compare* Ivor *v.* Sullivan, 2 La. Ann. 292, where counsel was unexpectedly absent without consent of the party and had important evidence in his possession.

Minnesota.— Caughey *v.* Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

Mississippi.— Green *v.* Robinson, 3 How. 105.

Missouri.— Field *v.* Matson, 8 Mo. 686, case overlooked.

the attorney had been misinformed as to the time of trial by his own agent is not usually a sufficient excuse.[95] The necessary or excusable absence from the trial of the sole or leading counsel of the unsuccessful party, resulting in prejudice which ordinary prudence could not have guarded against, is ground for a new trial.[96] That the attorney of the unsuccessful party was engaged in trying a case in another court at the time, and was therefore absent from the trial, has been held insufficient ground for a new trial, where no attempt was made to continue the other case or to secure other counsel, or other special circumstances did not exist.[97] But where a case has been tried under such circumstances in violation of a rule of court, a new trial may be allowed.[98] Absence under leave of

New York.— Bodle *v.* Chenango County Mut. Ins. Co., 1 How. Pr. 20.

North Dakota.— Josephson *v.* Sigfusson, 13 N. D. 312, 100 N. W. 703.

Pennsylvania.— Ranck *v.* Morton, 5 L. T. N. S. 111; Field *v.* Sergeant, 1 Phila. 72.

South Carolina.— Allen *v.* Donelly, 1 McCord 113. See also Claussen *v.* Salinas, 12 Rich. 124, where defendant failed to instruct counsel to appear, thinking he had done so.

Texas.— Browning *v.* Pumphrey, 81 Tex. 163, 16 S. W. 870; Freeman *v.* Neyland, 23 Tex. 529; Verschoyle *v.* Darragh, (Civ. App. 1902) 67 S. W. 1099; Millar *v.* Smith, 28 Tex. Civ. App. 386, 67 S. W. 429; Bridgeport, etc., Coal Min. Co. *v.* Wise County Coal Co., (Civ. App. 1897) 39 S. W. 965.

England.— Blogg *v.* Bousquet, 6 C. B. 75, 60 E. C. L. 75, at least where a proposed defense is without equity. See also Watson *v.* Reeve, Arn. 388, 5 Bing. N. Cas. 112, 7 Dowl. P. C. 127, 2 Jur. 991, 8 L. J. C. P. 36, 6 Scott 783. *Compare* Ayling *v.* Goldring, 1 C. B. 635, 50 E. C. L. 635 (where a new action would be barred by the statute of limitations); Townley *v.* Jones, 8 C. B. N. S. 289, 6 Jur. N. S. 1158, 29 L. J. C. P. 299, 98 E. C. L. 289 (on payment of costs); Third *v.* Goodier, 1 L. M. & P. 717 (on payment of costs).

Canada.— Doherty *v.* Hogan, 4 N. Brunsw. 492 (especially where the defense might be made the subject of another action); Gibbs *v.* Steadman, 4 N. Brunsw. 406. *Compare* Kirkpatrick *v.* Mills, 30 Nova Scotia 426; Vidal *v.* Upper Canada Bank, 15 U. C. C. P. 421, 24 U. C. Q. B. 430; Martin *v.* Corbett, 7 U. C. Q. B. 169 (where verdict was against a sheriff); Driscoll *v.* Hart, 5 U. C. Q. B. O. S. 677 (on payment of costs).

See 37 Cent. Dig. tit. "New Trial," §§ 174, 191.

Compare Donnelly *v.* McAdams, (R. I. 1887) 13 Atl. 108, where attorney overlooked case.

95. Zimmerer *v.* Fremont Nat. Bank, 59 Nebr. 661, 81 N. W. 849. *Compare* Hannah *v.* Indiana Cent. R. Co., 18 Ind. 431 (where an attorney, who, as an act of courtesy to the movant's attorney, obtained a change of venue, had wrongly notified the latter as to the county to which the case had been sent); Maddox *v.* Cleary, 34 Nebr. 586, 52 N. W. 288 (where a new trial was granted because of conflicting notices); Walton *v.* Jarvis, 13 U. C. Q. B. 616 (where, by the negligence of his clerk, the attorney was not informed of notice of trial).

96. *Georgia.*— Ayer *v.* James, 120 Ga. 578, 48 S. E. 154; Thompson *v.* Hays, 119 Ga. 167, 45 S. E. 970 (sickness); Thrasher *v.* Anderson, 45 Ga. 538.

Indiana.— Sturgeon *v.* Hitchens, 22 Ind. 107.

Iowa.— White *v.* Gray, 92 Iowa 525, 61 N. W. 173, where defendant understood that his attorney had engaged other counsel.

Kentucky.— Triplett *v.* Scott, 5 Bush 81 (especially where party did not reside in county and was not present at trial); Bone *v.* Blankenbaker, 71 S. W. 638, 24 Ky. L. Rep. 1438.

Texas.— Harris *v.* Musgrave, 72 Tex. 19, 9 S. W. 90 (sickness and notice thereof to non-resident client by mail not received); Howard *v.* Emerson, (Civ. App. 1900) 59 S. W. 49 (sickness in family); Alexander *v.* Smith, 20 Tex. Cix. App. 304, 49 S. W. 916 (sickness).

Wisconsin.— Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

England.— Hunter *v.* Hornblower, 3 Dowl. P. C. 491, where case was entered on wrong trial list.

See 37 Cent. Dig. tit. "New Trial," § 173.

Compare Dougherty *v.* Winter, 57 Ill. App. 128, as to absence of counsel opposing discharge of debtor under arrest.

97. *Alabama.*— Western Union Tel. Co. *v.* Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89; Brock *v.* South, etc., R. Co., 65 Ala. 79.

California.— Boehm *v.* Gibson, (1894) 35 Pac. 1014.

Georgia.— Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220.

Iowa.— Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88.

Louisiana.— Shields *v.* Lanna, 10 La. Ann. 193; Soey *v.* Soey, 13 La. 424.

Minnesota.— Adamek *v.* Plano Mfg. Co., 64 Minn. 304, 66 N. W. 981.

Missouri.— Jacob *v.* McLean, 24 Mo. 40.

Nebraska.— Zimmerer *v.* Fremont Nat. Bank, 59 Nebr. 661, 81 N. W. 849.

Pennsylvania.— See Peterson *v.* Reading R. Co., 4 Pa. Dist. 327.

Texas.— Power *v.* Gillespie, 27 Tex. 370; Cromer *v.* Sgitcovich, 28 Tex. Civ. App. 193, 66 S. W. 882; International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233, where continuance was refused in ample time to secure other counsel.

98. Hearson *v.* Graudine, 87 Ill. 115. See also Jackson *v.* McLellan, 19 N. Brunsw. 432.

court,[99] or occasioned by unavoidable delays in travel in reaching the place of trial, may be excusable.[1]

e. Withdrawal of Counsel.[2] The unexpected withdrawal from the case of movant's counsel during the trial,[3] or so shortly before the trial as to have rendered it impossible to obtain other counsel and acquaint him with the facts of the case,[4] may be ground for new trial. Where the withdrawal of his attorney just before the trial was due to movant's failure, after timely notice, to provide for the payment of necessary fees and expenses, a new trial was refused.[5] The absence or withdrawal of counsel must have resulted in injury to the unsuccessful party.[6] Where the trial proceeded without objection and the movant was represented by other counsel, a new trial will not be allowed even though absent counsel might have tried the case better.[7]

f. Necessity For Diligence in Attempting to Procure Other Counsel. It is ordinarily held that the necessary absence from the trial of counsel because of sickness[8] or other cause,[9] or the death of counsel shortly before the trial,[10] or the withdrawal of counsel from the case,[11] is not ground for a new trial unless the

99. Rust *v.* Ketchum, 46 Ga. 534. See also Smith *v.* Brand, 44 Ga. 588.

1. Storm Lake First Nat. Bank *v.* Harwick, 74 Iowa 227, 37 N. W. 171; Stoppelfeldt *v.* Milwaukee, etc., R. Co., 29 Wis. 688. *Compare* Mehnert *v.* Thieme, 15 Kan. 368; Caughey *v.* Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

Where the failure of counsel to arrive in time for the trial was due to negligence in traveling a new trial may be refused. McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326; Walker *v.* Armour, 22 Ill. 658; Bodle *v.* Chenango County Mut. Ins. Co., 1 How. Pr. (N. Y.) 20. But it seems sufficient that counsel used ordinary diligence in proceeding by the usual all-rail route. Storm Lake First Nat. Bank *v.* Harwick, 74 Iowa 227, 37 N. W. 171.

2. **Prudence and diligence required of movant to procure other counsel** see *infra*, IV, H, 2, f.

3. Donnelly *v.* McArdle, 14 N. Y. App. Div. 217, 43 N. Y. Suppl. 560.

4. Adams *v.* Rathbun, 14 S. D. 552, 86 N. W. 629.

Employment without client's knowledge of other counsel.— Where an attorney withdraws from a case and employs other counsel to defend it without the knowledge of his client and so short a time before the trial that his successor is unable to acquaint himself with the facts, a new trial should be granted. Adams *v.* Rathbun, 14 S. D. 552, 86 N. W. 629.

5. Stewart Min. Co. *v.* Coulter, 3 Utah 174, 183, 5 Pac. 557, 563, fees and expenses for witnesses, etc.

6. *Louisiana.*— Hewlett *v.* Henderson, 4 La. Ann. 333.

Minnesota.— Caughey *v.* Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

Mississippi.—Garnett *v.* Kirkman, 41 Miss. 94.

Pennsylvania.— Amwake *v.* Gerhart, 11 Lanc. Bar 191; Brock *v.* Richardson, 9 Phila. 233, case tried on depositions.

Texas.— Ratcliff *v.* Hicks, 23 Tex. 173. See also Montgomery *v.* Carlton, 56 Tex. 431, as to failure of plaintiff to show proof of a good cause of action.

United States.— Van Dyke *v.* Tinker, 28 Fed. Cas. No. 16,849 [*affirming* 23 Fed. Cas. No. 14,058, 1 Flipp 521].

England.— Clark *v.* Manns, 1 Dowl. P. C. 656. See also Gwilt *v.* Crawley, 8 Bing. 144, 1 L. J. C. P. 49, 1 Moore & S. 229, 21 E. C. L. 481, failure of attorney to prepare briefs for counsel.

See 37 Cent. Dig. tit. "New Trial," § 173.

7. *Illinois.*— Winchester *v.* Grosvenor, 48 Ill. 517.

Indiana.—Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906. See also Washer *v.* White, 16 Ind. 136.

Louisiana.— Flower *v.* McMicken, 2 Mart. N. S. 132.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524, withdrawal of junior counsel only.

Texas.—Western Union Tel. Co. *v.* Brooks, 78 Tex. 331, 14 S. W. 699; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126.

See 37 Cent. Dig. tit. "New Trial," § 173.

Compare Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62 (where brief was prepared by partner of attorney who tried case); Starr *v.* Torrey, 22 N. J. L. 190.

8. Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88; Landrum *v.* Farmer, 7 Bush (Ky.) 46; Strippelmann *v.* Clark, 11 Tex. 296; Western Union Tel. Co. *v.* Wofford, (Tex. Civ. App. 1900) 58 S. W. 627. *Compare* Alexander *v.* Smith, 20 Tex. Civ. App. 304, 49 S. W. 916, where plaintiff attended court but was too poor to retain other counsel.

9. Brock *v.* South, etc., Alabama R. Co., 65 Ala. 79 (although informed by his absent counsel that his attendance was unnecessary); Dwight *v.* Richard, 4 La. Ann. 240; Cromer *v.* Sgitcovich, 28 Tex. Civ. App. 193, 66 S. W. 882.

10. Wilson *v.* Woodward, (Tex. Civ. App. 1899) 54 S. W. 385.

11. Goldstone *v.* Sperling, 39 Cal. 447 (for

moving party attended the trial and made a reasonable effort to secure other counsel.

3. Witnesses and Evidence — a. Absence of Witnesses or Evidence[12] — (I) *Absence or Death of Witness.* The unexpected absence from the county at the time of the trial of a witness who resided therein,[13] or his absence from the trial where delay to secure his attendance was refused,[14] may be ground for a new trial, if the movant was not guilty of negligence in failing to secure his attendance. So also the absence from the trial of a non-resident witness, who had been expected, on reasonable grounds, to attend, has been held sufficient cause for allowing a new trial.[15] The unexpected absence of a witness who had been subpœnaed,[16] especially where he had been present in the court-room shortly before the trial,[17] or during the trial,[18] may be ground for a new trial. The death of an important witness a short time before the trial, his death being then unknown to the movant and there being no other witness to the same fact then known to him, has been held to authorize the allowance of a new trial.[19]

(II) *Absence of Written Evidence.* A new trial may be allowed for the absence of material written evidence at the trial without fault or negligence on the part of the movant.[20]

(III) *Character of Absent Evidence.* The testimony of the absent witness must have been material to the movant,[21] and of sufficient importance to have justified a different verdict had it been presented to the jury.[22] Where it would

non-payment of fees); Bridgeport, etc., Coal Min. Co. *v.* Wise County Coal Co., (Tex. Civ. App. 1897) 39 S. W. 965. See also Hopkins *v.* Niggli, (Tex. 1887) 6 S. W. 625, as to diligence in retaining counsel.

12. As to misconduct of party in inducing witness to absent himself see *supra*, III, B, 2.

Prudence and diligence in avoiding surprise see *infra*, III, H, 3, f, (II).

13. Sherrard *v.* Olden, 6 N. J. L. 344; Lockhart *v.* Milne, 1 U. C. Q. B. 444, absent attending court-martial. *Compare* Stinson *v.* Scollick, 2 U. C. Q. B. O. S. 251, holding that a new trial for the absence of a witness was denied in a penal action against a magistrate.

14. Where, on the third trial of an action, the presentation of plaintiff's case occupied a very much less time than on the former trials and part of defendant's witnesses were not present, and the court refused a short delay until witnesses not subpœnaed but called by telephone could arrive, a new trial was granted. Smith *v.* Lidgerwood Mfg. Co., 60 N. Y. App. Div. 467, 69 N. Y. Suppl. 975. See also Smith *v.* State Ins. Co., 58 Iowa 467, 12 N. W. 542 (where witness on the way to the trial was delayed by accident); Watterson *v.* Watterson, 1 Head (Tenn.) 1 (where witness having been delayed by sickness did not arrive until after the beginning of the argument and the court refused to permit him to testify at that time); Oliver *v.* Stephens, 3 U. C. Q. B. O. S. 21.

15. Cahill *v.* Hilton, 31 Hun (N. Y.) 114 [*affirmed* in 96 N. Y. 675], where witness had attended twice before and had promised to attend present trial. *Compare* Lehde *v.* Lehde, 17 Tex. Civ. App. 240, 42 S. W. 585, where no sufficient excuse shown for delay of non-resident witness.

16. Shillito *v.* Theed, 6 Bing. 753, 8 L. J. C. P. O. S. 293, 4 M. & P. 575, 19 E. C. L. 337.

17. Ruggles *v.* Hall, 14 Johns. (N. Y.) 112; Chilson *v.* Reeves, 29 Tex. 275.

18. Tilden *v.* Gardinier, 25 Wend. (N. Y.) 663.

19. South *v.* Thomas, 7 T. B. Mon. (Ky.) 59.

20. Ivor *v.* Sullivan, 2 La. Ann. 292 (where counsel was unexpectedly absent without consent of the party and had important evidence in his possession); Atkins *v.* Owen, 4 A. & E. 819, 2 Harr. & W. 59, 6 L. J. K. B. 267, 6 N. & M. 309, 31 E. C. L. 360, 2 A. & E. 35, 4 L. J. K. B. 15, 4 N. & M. 123, 29 E. C. L. 38 (where the evidence was not within the jurisdiction of the court); Murphy *v.* Case, 21 U. C. Q. B. 470. Thus the failure of the adversary party to produce, on due notice, important papers which had been in his possession, but which had been given by him to another person without the knowledge of the movant, may require the allowance of a new trial. Jackson *v.* Warford, 7 Wend. (N. Y.) 62.

21. Garnett *v.* Kirkman, 41 Miss. 94; Peebles *v.* Overton, 6 N. C. 384; Lester *v.* Goode, 6 N. C. 37; Jernigan *v.* Wainer, 12 Tex. 189; Dunn *v.* Edwards, 19 L. T. Rep. N. S. 394; Flooks *v.* Marriott, 7 L. T. Rep. N. S. 363, 11 Wkly. Rep. 121; Beale *v.* Martin, 12 Wkly. Rep. 135.

Testimony unworthy of credit.— Where the testimony of a witness which was not obtainable before the trial of the case shows that it is unworthy of credit, a new trial should be refused. Jernigan *v.* Wainer, 12 Tex. 189.

22. Hirsch *v.* Patterson, 23 Ark. 112; Poznanski *v.* Szczech, 71 Ill. App. 670; Andrist *v.* Union Pac. R. Co., 30 Fed. 345; Archibald *v.* Goldstein, 1 Manitoba 146; Shipman *v.* Stevens, 6 U. C. C. P. 17.

have been merely cumulative of other evidence that was introduced, a new trial will generally be denied.[23] Where a new trial is asked for because of the absence or exclusion of written evidence, it must appear that the evidence was sufficiently material to have probably changed the verdict.[24]

b. Admission or Exclusion of Evidence — (I) *Admission.* Surprise at the admission of proper evidence is generally not ground for a new trial.[25] But the admission of depositions previously held inadmissible,[26] or the admission of evidence where a stipulation of facts appeared to be exclusive of other evidence,[27] may be ground for new trial if the movant was unprepared to meet such evidence.

(II) *Exclusion.* Surprise at the exclusion of inadmissible evidence is seldom ground for a new trial.[28] The rule applies to the exclusion of the testimony of an incompetent witness,[29] to the rejection of documentary evidence or secondary

Testimony sufficient to justify continuance.— It has been held that the testimony must have been of sufficient importance to have justified a continuance of the case. Peebles *v.* Overton, 6 N. C. 384. *Compare* Quincey *v.* Perkins, 76 N. C. 295, where continuance on same ground had been refused.

The rule against granting new trials where damages are small applies where a new trial is asked for because of the absence of witnesses. Hodgkinson *v.* Brown, 3 U. C. Q. B. 461.

23. Miller *v.* Manhattan R. Co., 73 Hun (N. Y.) 514, 26 N. Y. Suppl. 163; Dowell *v.* Dergfield, (Tex. Civ. App. 1905) 87 S. W. 1051. See also *infra*, III, H, 5, b, (VI).

24. *Indiana.*— Sullivan *v.* O'Conner, 77 Ind. 149.

New York.— High *v.* Wilson, 2 Johns. 46.

Pennsylvania.— Voorsanger *v.* Field, 2 Pa. Dist. 391.

South Carolina.— Mathews *v.* West, 2 Nott & M. 415.

Texas.— Dempsey *v.* Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220.

25. Santa Cruz Rock Pavement Co. *v.* Bowie, 104 Cal. 286, 37 Pac. 934; Klockenbaum *v.* Pierson, 22 Cal. 160; Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Boston Mercantile Co. *v.* Ould-Carter Co., 123 Ga. 458, 51 S. E. 466; Thiele *v.* Citizens' R. Co., 140 Mo. 319, 41 S. W. 800; Hite *v.* Lenhart, 7 Mo. 22. See also James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978. *Compare* Edie *v.* East India Co., 2 Burr. 1216, W. Bl. 295.

The admission in evidence of communications made by the movant to his solicitor may be ground for surprise. Livingstone *v.* Gartshore, 23 U. C. Q. B. 166.

26. The Steamboat Violet, 23 Ark. 543; Morrow *v.* Hatfield, 6 Humphr. (Tenn.) 108.

27. Kansas City, etc., R. Co. *v.* Hines, 29 Kan. 695. *Compare* Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198, as to mistake in construction of stipulation.

28. *Arkansas.*— Dunnahoe *v.* Williams, 24 Ark. 264.

California.— Lawrence *v.* Fulton, 19 Cal. 683.

Kentucky.— Morgan *v.* Marshall, 7 J. J. Marsh. 316; Hunt *v.* Owings, 4 T. B. Mon. 20; Holmes *v.* McKinney, 4 T. B. Mon. 4.

Louisiana.— Mead *v.* Chadwick, 8 Mart. N. S. 296. See also Wolfe *v.* Pruitt, 7 La. Ann. 572.

Mississippi.— Curry *v.* Kurtz, 33 Miss. 24; Dorsey *v.* Maury, 10 Sm. & M. 298; Smith *v.* Natchez Steamboat Co., 1 How. 479.

Missouri.— Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Kitchen *v.* Reinsky, 42 Mo. 427, rejection on second trial of admission made to prevent continuance on first trial.

Ohio.— Smucker *v.* Wright, 3 Ohio Cir. Ct. 620, 2 Ohio Cir. Dec. 360.

Tennessee.—Nane *v.* Simpson, 5 Sneed 612; Morgan *v.* Winston, 2 Swan 472; Turnley *v.* Evans, 3 Humphr. 222, deposition irregularly taken.

Texas.— Beauchamp *v.* International, etc., R. Co., 56 Tex. 239. *Compare* Chinn *v.* Taylor, 64 Tex. 385. *Contra*, Buford *v.* Bostick, 50 Tex. 371.

Virginia.— Law *v.* Law, 2 Gratt. 366.

See 37 Cent. Dig. tit. "New Trial," § 178.

Compare Braynard *v.* Fisher, 6 Pick. (Mass) 355 (as to allowance of new trial as matter of grace for rejection of notes excluded because not regularly filed); Rutledge *v.* Read, 3 N. C. 242; Soules *v.* Donovan, 14 U. C. C. P. 510.

Instance.—The exclusion of illegal evidence contained in answers to questions propounded by the objecting party in a deposition taken by him was held insufficient ground for a new trial. Morgan *v.* Winston, 2 Swan (Tenn.) 472.

29. *California.*— Bagnall *v.* Roach, 76 Cal. 106, 18 Pac. 137; Packer *v.* Heaton, 9 Cal. 568.

Missouri.— Morrison *v.* Murphy, 36 Mo. App. 36.

New Jersey.— Matthews *v.* Allaire, 11 N. J. L. 242.

North Carolina.— Arrington *v.* Coleman, 3 N. C. 300, deposition of incompetent witness rejected.

Ohio.— How *v.* Bodman, 1 Disn. 115, 12 Ohio Dec. (Reprint) 521, through failure to give notice of party's intention to testify.

Vermont.— Haskins *v.* Smith, 17 Vt. 263.

See 37 Cent. Dig. tit. "New Trial," § 180.

The rejection of a witness as incompetent for having indorsed the writ and the refusal of the court to cancel the indorsement and

evidence for the introduction of which no proper foundation had been laid,[30] and to the rejection of depositions for irregularities apparent on the face thereof or known to the moving party,[31] or because the deponent was within reach of the process of the court and might have been called as a witness.[32] Surprise at the exclusion of evidence which the party offering it had the right to believe admissible may be ground for a new trial.[33] The rejection of a deposition for an irregularity in taking it,[34] or the rejection of a certified copy of a record because the signature to the certificate was not in the handwriting of the officer purporting to have made it,[35] has been held ground for a new trial, where the party offering the deposition or copy, without negligence on his part, had no prior knowledge of the irregularity or defect. The exclusion of evidence admitted under a previous ruling of the court,[36] or admitted without objection on a former trial of the case,[37] may be cause for new trial.

(III) *Evidence Offered Out of Regular Order.* The admission of evidence in rebuttal, which should have been offered in chief, and which the movant was unable to meet because it was not offered at the proper time,[38] or the admission of evidence after the party offering it had rested, and the refusal to admit other evidence to rebut it,[39] may require the allowance of a new trial on the ground of surprise. Mistake or inadvertence of counsel in failing to make a formal offer in evidence of a document properly proved, and the rejection of the document when offered during argument of the case, may be ground for a new trial.[40]

c. Character of Evidence — (I) *In General.* That the unsuccessful party, who had exercised proper diligence to discover the facts material to the case, was surprised by evidence which he had no reason to believe existed may be ground for a new trial.[41] This is especially true where false testimony has been intro-

substitute another indorser was held ground for a new trial. Riley *v.* Emerson, 5 N. H. 531.

30. *Georgia.*— Sheftall *v.* Clay, R. M. Charlt. 7.

Kentucky.— Lee *v.* Banks, 4 Litt. 11.

Missouri.— Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

North Carolina.— Thompson *v.* Thompson, 3 N. C. 405.

South Carolina.— See Barry *v.* Wilbourne, 2 Bailey 91. *Compare* Blythe *v.* Sutherland, 3 McCord 258, inadvertence in failing to prove death of surveyor to render declarations admissible, where his death appears to have been taken for granted.

Wisconsin.— Davis *v.* Ruggles, 2 Pinn. 477, 2 Chandl. 152.

United States.— See U. S. *v.* Humason, 8 Fed. 71, 7 Sawy. 252.

Compare Grey *v.* Dayfoot, 7 U. C. C. P. 156.

31. Rupert *v.* Grant, 6 Sm. & M. (Miss.) 433.

Suppression of a deposition before trial can seldom be cause for a new trial on the ground of surprise. Hirsch *v.* Patterson, 23 Ark. 112.

32. Lee *v.* Banks, 4 Litt. (Ky.) 11; Peers *v.* Davis, 29 Mo. 184.

33. Boyce *v.* Yoder, 2 J. J. Marsh. (Ky.) 515; Guffey *v.* Moseley, 21 Tex. 408, where ruling was probably erroneous.

Rejection of evidence on the ground of variance may be ground for a new trial where there was an agreement to try the case on the merits. Taylor *v.* Moore, 3 Harr. (Del.) 6.

34. State Bank *v.* Cowan, 7 Humphr. (Tenn.) 70 (as that appearance of attorney for other party was without authority); Starkweather *v.* Loomis, 2 Vt. 573. See also Scott *v.* Delk, 14 Tex. 341, as to rejection of deposition to which no formal written objections had been made.

35. McDaniel *v.* Tullock, 2 Brev. (S. C.) 95.

36. Stockell *v.* Ryan, 1 Baxt. (Tenn.) 476.

37. Helm *v.* Jones, 9 Dana (Ky.) 26; Balcom *v.* Woodruff, 7 Barb. (N. Y.) 13; Keeter *v.* Case, (Tex. Civ. App. 1897) 41 S. W. 528, especially if the ruling was doubtful. *Compare* Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479.

38. Seeley *v.* Chittenden, 4 How. Pr. (N. Y.) 265. And see *supra*, III, C, 3, c.

39. Sanders *v.* Hutchinson, 26 Ill. App. 633; Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315. See also Harnsbarger *v.* Kinney, 6 Gratt. (Va.) 287, where argument on matters not in evidence was explained and replied to.

40. Rolfe *v.* Rolfe, 10 Ga. 143. *Compare* Haskins *v.* Smith, 17 Vt. 263, where because of the failure to offer a writing the other party did not offer evidence to disprove.

41. *California.*—Delmas *v.* Martin, 39 Cal. 555, unrecorded deed given by same grantor who gave prior deed in evidence.

Colorado.— Van Wagenen *v.* Carpenter, 27 Colo. 444, 61 Pac. 698, unrecorded deed.

duced in the absence of the unsuccessful party.[42] A party cannot claim surprise which will entitle him to a new trial by evidence contained in depositions which were on file in the action before the trial,[43] nor by evidence which had been introduced on a former trial,[44] nor by evidence contained in letters written by him,[45] nor, generally, by matters contained in his own documentary evidence which he had not examined properly.[46] Where a wrong document was offered through the mistake of a third person a new trial was ordered.[47]

(II) *Relevancy to Issues*—(A) *In General.* Ordinarily it is not ground for a new trial that the movant was surprised by the introduction of evidence which was clearly within the issues, and therefore should have been anticipated and met.[48] The rule is usually the same, although the allegations of the pleadings

Illinois.— Holbrook *v.* Nichol, 36 Ill. 161, certified copy of deed showing seal not shown on original when examined shortly before the trial.

Kentucky.— Kirtley *v.* Kirtley, 1 J. J. Marsh. 96, discovery by administrator during trial and too late for continuance of alteration of bond of deceased.

Minnesota.—Miller *v.* Layne, 84 Minn. 221, 87 N. W. 605, mistake in filing marks on papers.

Mississippi.— Dorr *v.* Watson, 28 Miss. 383, notice for production of paper on apparently reliable information and production of wrong paper.

New Hampshire.— Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198, where record bore no seal at time counsel for losing party examined it.

New York.— See Tyler *v.* Hoornbeck, 48 Barb. 197, calling party as witness in violation of agreement not to do so.

Pennsylvania.— Moore *v.* Webster, 14 Pa. Co. Ct. 433, alleged admissions.

South Carolina.— Libenintz *v.* Greenland, 2 McCord 313, obliterated memorandum on bond unnoticed by parties and counsel.

Canada.— Chamberlain *v.* Torrance, 14 Grant Ch. (U. C.) 181; Smith *v.* McGowan, 11 U. C. Q. B. 399.

Oral evidence to dispute a record as to time of filing a mortgage may be ground for surprise. Shaw *v.* Henderson, 7 Minn. 480.

Errors in copy of record.— The fact that a certified copy of a lost record contained errors of which the movant had no information when the paper was offered in evidence may be ground for new trial. Farnham *v.* Jones, 32 Minn. 7, 19 N. W. 83. *Compare* U. S. *v.* Humason, 8 Fed. 71, 7 Sawy. 252.

Production of written evidence supposed to have been lost at the trial by a party not entitled to its possession, which the movant was not then prepared to explain, is ground for new trial. Russell *v.* Reed, 32 Minn. 45, 19 N. W. 86.

42. Thomas Brass, etc., Works *v.* Leonard, 91 Ill. App. 599 (alleged conversation with president of defendant company who was necessarily absent); Ricker *v.* Horn, 74 Me. 289 (alleged admission); Miller *v.* Layne, 84 Minn. 221, 87 N. W. 605; Texas, etc., R. Co. *v.* Barron, 78 Tex. 421, 14 S. W. 698 (alleged admission of absent manager denied by him on motion). See also Seligman *v.* Sivin, 46 Misc. (N. Y.) 58, 91 N. Y. Suppl. 395. *Compare* Mutual L. Ins. Co. *v.* Parrish, 66 Ark. 612, 52 S. W. 438 (alleged transaction with absent person); Dewey *v.* Frank, 62 Cal. 343 (as to transaction with absent agent where it was known negotiations had been had with such agent); Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292 (alleged conversation with absent superintendent).

43. Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14; Gentry *v.* McKeben, 5 Dana (Ky.) 34; Friedman *v.* Manley, 21 Wash. 43, 56 Pac. 832. See also Chapman *v.* Chapman, 4 Call (Va.) 430, depositions not read, although lost, if uncalled for.

Deeds inspected by agent.— A party cannot claim surprise at the production of deeds or their effect which had been inspected by his attorney's clerk on notice to admit. Caldwell *v.* Johnston, Ir. R. 6 C. L. 233.

44. Rabun *v.* Cage, 23 La. Ann. 675; Curry *v.* Kurtz, 33 Miss. 24. *Compare* Connally *v.* Pehle, 105 Mo. App. 417, 79 S. W. 1006.

45. Donnell *v.* Parrott, 12 La. Ann. 690; Skillman *v.* Leverich, 11 La. 517; Henckley *v.* Hendrickson, 11 Fed. Cas. No. 6,348, 5 McLean 170.

46. Borderre *v.* Den, 106 Cal. 594, 39 Pac. 946. See also U. S. *v.* Humason, 8 Fed. 71, 7 Sawy. 252. *Compare* Rose *v.* Daniel, 1 Nott & M. (S. C.) 33.

47. Floyd *v.* Hamilton, 10 Iowa 552.

48. *Alabama.*— Baker *v.* Boon, 100 Ala. 622, 13 So. 481.

Arkansas.— Dunnahoe *v.* Williams, 24 Ark. 264.

California.— Klockenbaum *v.* Pierson, 22 Cal. 160.

Colorado.— Salida Bldg., etc., Assoc. *v.* Davis, 16 Colo. App. 294, 64 Pac. 1046.

Illinois.— Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Heenan *v.* Redmen, 101 Ill. App. 603; Dueber Watch Case Mfg. Co. *v.* Lapp, 35 Ill. App. 372.

Indiana.— Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Sullivan *v.* O'Conner, 77 Ind. 149; Brownlee *v.* Kenneipp, 41 Ind. 216; Larrimore *v.* Williams, 30 Ind. 18; Peck *v.* Hensley, 21 Ind. 344; Cox *v.* Hutchings, 21 Ind. 219; Travis *v.* Barkhurst, 4 Ind. 171; Cummins *v.* Walden, 4 Blackf. 307.

Iowa.— McManus *v.* Finan, 4 Iowa 283.

are general, if there was no request for a more specific statement.[49] Surprise at evidence not properly admissible under the issues,[50] or under an order of court defining the issues,[51] is ground for new trial. So is surprise at evidence admitted under a material amendment of the pleadings at the trial, which the moving party could not meet without a delay or continuance which was refused.[52]

(B) *Impeaching Evidence.* Surprise at the introduction of evidence to

Kansas.— Beachley *v.* McCormick, 41 Kan. 485, 21 Pac. 646; Knuffke *v.* Knuffke, (App. 1899) 56 Pac. 326.

Kentucky.— Smith *v.* Morrison, 3 A. K. Marsh. 81.

Louisiana.— Donnell *v.* Parrott, 12 La. Ann. 690.

Maine.— Blake *v.* Madigan, 65 Me. 522; Atkinson *v.* Conner, 56 Me. 546.

Missouri.— Thiele *v.* Citizens' R. Co., 140 Mo. 319, 41 S. W. 800; Savoni *v.* Brashear, 46 Mo. 345; Bragg *v.* Moberly, 17 Mo. App. 221.

Montana.— Francisco *v.* Benepe, 6 Mont. 243, 11 Pac. 637.

New York.— Harvey *v.* Fargo, 99 N. Y. App. Div. 599, 91 N. Y. Suppl. 84; Dixson *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 302, 74 N. Y. Suppl. 49 [*reversing* 35 Misc. 422, 71 N. Y. Suppl. 969]; Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Suppl. 434; Sproul *v.* Resolute F. Ins. Co., 1 Lans. 71; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 401 [*affirmed* in 138 N. Y. 638, 34 N. E. 512]; Cole *v.* Fall Brook Coal Co., 10 N. Y. Suppl. 417 (extent of injuries); Seaman *v.* Koehler, 12 N. Y. St. 582 (extent of injuries); People *v.* Marks, 10 How. Pr. 261; Jackson *v.* Roe, 9 Johns. 77. See also McBride *v.* McBride, 5 N. Y. Suppl. 388 [*reversed* on other grounds in 9 N. Y. Suppl. 827] (where evidence was applicable to issues settled without formal amendment of complaint); Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450. *Compare* Rubenfel *v.* Rabiner, 33 N. Y. App. Div. 347, 54 N. Y. Suppl. 68.

Pennsylvania.— Bitting *v.* Mowry, 1 Miles 216; Hillary *v.* Duross, 5 Phila. 170.

Texas.— Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Pickett *v.* Martin, (1891) 16 S. W. 1007; McNeally *v.* Stroud, 22 Tex. 229; Anderson *v.* Duffield, 8 Tex. 237; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; Gulf, etc., R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

Vermont.— Knapp *v.* Fisher, 49 Vt. 94; Dodge *v.* Kendall, 4 Vt. 31.

Washington.—Wilson *v.* Waldron, 12 Wash. 149, 40 Pac. 740.

United States.— Henckley *v.* Hendrickson, 11 Fed. Cas. No. 6,348, 5 McLean 170.

England.— Dillon *v.* City of Cork Steam Packet Co., Ir. R. 9 C. L 118.

Canada.— Walcott *v.* Stolicker, 16 U. C. C. P. 555; Young *v.* Moderwell, 14 U. C. C. P. 143; Prout *v.* Pollard, 1 U. C. Q. B. 170.

See 37 Cent. Dig. tit. "New Trial," § 177.

Ignorance of the character of his adversary's pleading does not entitle a party to claim surprise. Richardson *v.* Farmer, 36 Mo. 35, 88 Am. Dec. 129.

Supposition that special plea was interposed for delay.— That plaintiff, not having been misled by defendant, supposed that a special plea was interposed for delay and that no attempt would be made to prove it, was held insufficient cause for surprise. Cooke *v.* Berry, 1 Wils. C. P. 98; Prout *v.* Pollard, 1 U. C. Q. B. 170.

49. Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164; Prettyman *v.* Waples, 4 Harr. (Del.) 299; Heenan *v.* Redman, 101 Ill. App. 603. *Compare* Seligman *v.* Sivin, 46 Misc. (N. Y.) 58, 91 N. Y. Suppl. 395 (where bill of particulars was denied); Doe *v.* Stewart, 7 U. C. Q. B. 174.

Where plaintiff declared specially on a written contract and added the common counts, evidence of an oral contract only was held sufficient cause for surprise. Goldstein *v.* Lowther, 81 Ill. 399. See also Bitting *v.* Mowry, 1 Miles (Pa.) 216.

50. German *v.* Maquoketa Sav. Bank, 38 Iowa 368; Merritt *v.* Mayfield, 89 N. Y. App. Div. 470, 85 N. Y. Suppl. 801; Barton *v.* Dunlap, 2 Mill (S. C.) 140; Brocheau *v.* Desbrisay, 9 N. Brunsw. 122. See also Tannenbaum *v.* Armeny, 81 Hun (N. Y.) 581, 31 N. Y. Suppl. 55. *Compare* Edwards *v.* Broxon, 2 Cromp. & J. 18, 2 Tyrw. 163.

Evidence of title different from that laid in the pleadings may be ground for surprise. Eagan *v.* Delaney, 16 Cal. 85; Powell *v.* Mayo, 26 N. J. Eq. 120. See also Gravier *v.* Rapp, 12 La. 162.

The movant must have been misled in preparing his case by the variance. Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Portland, etc., Steam Ferry Co. *v.* Pratt, 7 N. Brunsw. 17.

Failure to procure testimony to disprove a fact of which the party is not advised by the pleadings does not amount to want of diligence. German *v.* Maquoketa Sav. Bank, 38 Iowa 368.

51. Colorado Midland R. Co. *v.* Bowles, 14 Colo. 85, 23 Pac. 467.

52. Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24; Keller *v.* Blasdel, 2 Nev. 162 (in absence of party and requiring evidence inconsistent with that given on former trial); Oats *v.* New York Dock Co., 99 N. Y. App. Div. 487, 90 N. Y. Suppl. 878 (where court had indicated in advance that movant should have been prepared to meet the evidence); Cowan *v.* Williams, 49 Tex. 380 (amendment in necessary absence of party and regular counsel). See also Pride *v.* Whitfield, (Tex. Civ. App. 1899) 51 S. W. 1100. *Compare* White *v.* South Eastern R. Co., 10 Wkly. Rep. 564, as to amendment not requiring different evidence.

impeach a witness is not usually sufficient cause for granting a new trial;[53] but, where the character of an important witness residing at a considerable distance from the place of trial had been attacked unexpectedly, a new trial was allowed.[54]

(III) *Evidence Not Offered on Former Trial.* That evidence pertinent to the issues had not been offered on a former trial was not sufficient cause for surprise to entitle the losing party to a new trial,[55] nor was the mere unexplained fact that a witness testified to facts not testified to by him on a former trial.[56] That evidence offered on a second trial was inconsistent with that adduced on the first trial,[57] or tended to prove a different point, although sustaining the same general defense,[58] or that the testimony of the adversary party or a witness on the second trial was inconsistent with his testimony on the first trial,[59] may be ground for a new trial because of surprise.

(IV) *Testimony Contrary to Expectations of Movant* — (A) *In General.* Usually it is not ground for a new trial that the movant was surprised at the testimony of his adversary or of other witnesses, who had not misled him by previous statements inconsistent therewith,[60] or at the testimony of an adversary witness

53. Frorer *v.* Rowley, 84 Ill. App. 446; Jennings *v.* Howard, 80 Ind. 214; Bell *v.* Howard, 4 Litt. (Ky.) 117. See also Dettman *v.* Zimmerman, 53 Iowa 709, 6 N. W. 45. *Compare* Bishop *v.* Lehman, 9 Phila. (Pa.) 112, as to unexpected attack on character of important witness at close of trial and in his absence.

54. Wilson *v.* Clarke, 27 Miss. 270. See also Lee-Clark-Andreeson Hardware Co. *v.* Yankee, 9 Colo. App. 443, 48 Pac. 1050. *Contra*, Frorer *v.* Rowley, 84 Ill. App. 446.

55. Rockford, etc., R. Co. *v.* Rose, 72 Ill. 183; Taylor *v.* Thomas, 17 Kan. 598; Pospisil *v.* Kane, 73 N. Y. App. Div. 457, 77 N. Y. Suppl. 307. *Compare* Croner *v.* Farmers' F. Ins. Co., 18 N. Y. App. Div. 263, 46 N. Y. Suppl. 108, where damaging evidence not offered in four similar suits was offered too late in the case to be met.

56. Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14 (or that later testimony more definite); Underwood *v.* Ainsworth, 72 Miss. 328, 18 So. 379. See also State *v.* Bottorff, 82 Ind. 538.

57. Pawley *v.* McGimpsey, 7 Yerg. (Tenn.) 502, as where defendant relied on an account on trial before justice and on receipt for notes to be collected on trial on appeal. See also *infra*, III, I, 4, f, (I).

58. Louisville, etc., R. Co. *v.* Bickel, 97 Ky. 222, 30 S. W. 600, 17 Ky. L. Rep. 107, alleged oral consent to subletting by absent manager not claimed on former trial.

59. Levy *v.* Brown, 11 Ark. 16; Coghill *v.* Marks, 29 Cal. 673; Durkee *v.* Fessenden, Brayt. (Vt.) 167. See also Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62, where court found no actual variance. *Compare* Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710 (as to testimony of party inconsistent with deposition previously given); Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009 (where conflict in testimony disputed); McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512; Steinlein *v.* Dial, 10 Tex. 268 (where effect of evidence would be merely cumulative).

60. *California.*— Klockenbaum *v.* Pierson, 22 Cal. 160; Taylor *v.* California Stage Co., 6 Cal. 228.

Illinois.— Blair *v.* Blair, 125 Ill. App. 341.

Indiana.— Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165; Humphreys *v.* State, 75 Ind. 469; Pauley *v.* Short, 41 Ind. 180 (testimony of plaintiff that certain payments pleaded were on a different account); Atkisson *v.* Martin, 39 Ind. 242; Peck *v.* Hensley, 21 Ind. 344; Cox *v.* Hutchings, 21 Ind. 219; Travis *v.* Barkhurst, 4 Ind. 171; Manion *v.* Lake Erie, etc., R. Co., (App. 1907) 80 N. E. 166.

Kansas.— Taylor *v.* Thomas, 17 Kan. 598; Knuffke *v.* Knüffke, (App. 1899) 56 Pac. 326.

Kentucky.— Soper *v.* Crutcher, 96 S. W. 907, 29 Ky. L. Rep. 1080.

Minnesota.— Strand *v.* Great Northern R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987.

Mississippi.— Underwood *v.* Ainsworth, 72 Miss. 328, 18 So. 379.

Missouri.— Shotwell *v.* McElhinney, 101 Mo. 677, 14 S. W. 754; Robbins *v.* Alton M. & F. Ins. Co., 12 Mo. 380; Harrison *v.* White, 56 Mo. App. 175.

Montana.— Rand *v.* Kipp, 27 Mont. 138, 69 Pac. 714.

New York.— Pospisil *v.* Kane, 73 N. Y. App. Div. 457, 77 N. Y. Suppl. 307; Meakim *v.* Anderson, 11 Barb. 215; Hawxhurst *v.* Hennion, 9 N. Y. Suppl. 542.

Ohio.— Heisel *v.* Heisel, 8 Ohio Dec. (Reprint) 653, 9 Cinc. L. Bul. 110.

Washington.— Friedman *v.* Manley, 21 Wash. 43, 56 Pac. 832.

Wisconsin.— Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121; Delaney *v.* Brunette, 62 Wis. 615, 23 N. W. 22.

Wyoming.— Harden *v.* Card, (1907) 88 Pac. 217.

United States.— See Sommers *v.* Carbon Hill Coal Co., 91 Fed. 337.

See 37 Cent. Dig. tit. "New Trial," §§ 181, 194.

called by him,[61] or at the testimony of his own witness, where there is no evidence of trickery or of tampering with the witness.[62] This is especially true where such witnesses called by him,[63] or by his adversary,[64] had not been questioned previously by the movant. Surprise at the false testimony of the successful party may be ground for a new trial where his adversary was compelled to call him to prove a deed or act of which there was no other available evidence at the time.[65]

(B) *Testimony Contrary to Previous Statements*—(1) ADVERSARY PARTY. A new trial may be granted for surprise at the testimony of the successful party contrary to his sworn pleading or admission of record,[66] or contrary to a written statement made by his attorney,[67] or contrary to prior statements made by him to the movant, which misled the latter in the preparation of his case.[68]

(2) OTHER WITNESSES. It may be sufficient cause for surprise and a new trial that a witness for the movant gave testimony inconsistent with his previous statements, where there is evidence of his having been tampered with,[69] or that his mind was affected at the time of the trial,[70] or that his testimony was contrary to his previous sworn statement given to the movant,[71] or that the movant was misled by his previous statements and did not call other witnesses,[72] or that the movant, relying on the statement of a witness that he would testify to a material fact which he was unable to testify to when called, was unprepared to call other witnesses to prove it.[73] Where the differences between the testimony of a witness and his previous statements to the movant were immaterial, or the legal effect of his testimony and statements were the same, a new trial should be denied.[74] It has been held insufficient excuse for not having been prepared to call other witnesses that the movant had been misled by previous statements of an adversary witness inconsistent with his testimony.[75] In the absence of deceit on the part of

Evidence shown to be anticipated.—Where, in a personal injury action, plaintiff, while testifying in his own behalf on redirect examination, denied making any admissions to an officer of defendant that he contributed to the injury, plaintiff could not claim surprise as a ground for a new trial, based on the testimony of the officer that such admission was made. Geter *v.* Central Coal Co., (Ala. 1907) 43 So. 367.

61. Higden *v.* Higden, 2 A. K. Marsh. (Ky.) 42.

62. Guard *v.* Risk, 11 Ind. 156; Graeter *v.* Fowler, 7 Blackf. (Ind.) 554; Van Tassell *v.* New York, etc., R. Co., 1 Misc. (N. Y.) 312, 20 N. Y. Suppl. 715 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Adam *v.* Hay, 7 N. C. 149.

63. *Arkansas.*—Merrick *v.* Britton, 26 Ark. 496; Nelson *v.* Waters, 18 Ark. 570.

Georgia.— Crawford *v.* Georgia Pac. R. Co., 86 Ga. 5, 12 S. E. 176.

Indiana.— *Ex p.* Walls, 64 Ind. 461; Ruger *v.* Bungan, 10 Ind. 451.

Kentucky.— Theobald *v.* Hare, 8 B. Mon. 39.

Missouri.— O'Conner *v.* Duff, 30 Mo. 595.

South Carolina.— Barry *v.* Wilbourne, 2 Bailey 91.

Texas.— Dotson *v.* Moss, 58 Tex. 152.

Canada.— Walcott *v.* Stolicker, 16 U. C. C. P. 555.

See 37 Cent. Dig. tit. "New Trial," § 194.

64. Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662. See also *In re* Semple, 28 Pittsb. Leg. J. N. S. (Pa.) 434.

65. Guard *v.* Risk, 11 Ind. 156; Millar *v.* Field, 3 A. K. Marsh. (Ky.) 104; Stowell *v.* Eldred, 26 Wis. 504. See also Robertson *v.* Ross, 2 U. C. C. P. 193, as to testimony of adversary's counsel as to the amount of an offer of compromise on which movant relied to prove the measure of damages only.

Illustration.— Where defendant falsely testified that he had not signed an agreement testified to by plaintiff, and which plaintiff had no reason to believe would be contested, a new trial was awarded the latter. Seely *v.* Purdy, 3 Nova Scotia 414.

66. Coghill *v.* Marks, 29 Cal. 673; Newhall *v.* Appleton, 47 N. Y. Super. Ct. 38.

67. Arthur *v.* Mitchell, 10 Sm. & M. (Miss.) 326.

68. McFarland *v.* Clark, 9 Dana (Ky.) 134 (denial of signature previously admitted); Webster *v.* Smith, 72 Vt. 12, 47 Atl. 101.

69. Peterson *v.* Barry, 4 Binn. (Pa.) 481.

70. Rodriguez *v.* Comstock, 24 Cal. 85; Helwig *v.* Second Ave. R. Co., 9 Misc. (N. Y.) 61, 29 N. Y. Suppl. 9.

71. Gotzian *v.* McCollum, 8 S. D. 186, 65 N. W. 1068.

72. Delmas *v.* Margo, 25 Tex. 1, 78 Am. Dec. 516.

73. Wilson *v.* Brandon, 8 Ga. 136; Walcott *v.* Stolicker, 16 U. C. C. P. 555; Murphy *v.* Fraser, 4 U. C. Q. B. 194.

74. Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156; Mehan *v.* Chicago, etc., R. Co., 55 Iowa 305, 7 N. W. 613; Wolf *v.* Brass, 72 Tex. 133, 12 S. W. 159.

75. Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165.

a witness, it is not ground for a new trial that counsel had misunderstood what he would testify to.[76]

(v) *Mistake of Witness.* That a witness claims to have made a mistake in his testimony is not ordinarily ground for a new trial,[77] especially where the verdict is sustained by other evidence.[78] But where it is clear that a witness was mistaken in giving the only or controlling testimony to a material fact,[79] or that the testimony of witnesses on which the verdict proceeded was founded on particular circumstances which have been clearly falsified,[80] a new trial should be granted. It must appear, however, that the mistake was of so important or controlling a character as probably to have affected the verdict.[81]

(vi) *False Swearing.*[82] That an important witness wilfully testified falsely to a material fact has been held ground for a new trial,[83] especially where the wit-

76. Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

77. *California.*— Howe *v.* Briggs, 17 Cal. 385.

Georgia.— Johnson *v.* A. Leffler Co., 122 Ga. 670, 50 S. E. 488; O'Kelly *v.* Felker, 71 Ga. 775; Maddox *v.* Oxford, 70 Ga. 179; Jossey *v.* Stapleton, 57 Ga. 144. See also Crawford *v.* Georgia Pac. R. Co., 86 Ga. 5, 12 S. E. 176.

Illinois.— Cooke *v.* Murphy, 70 Ill. 96.

Maine.—See Littlehale *v.* Littlefield, (1887) 11 Atl. 420.

Minnesota.— Webb *v.* Barnard, 36 Minn. 336, 31 N. W. 214.

Missouri.— Dennehy *v.* Crohn, 64 Mo. App. 79.

New York.— Steinbach *v.* Columbian Ins. Co., 2 Cai. 129.

Pennsylvania.— See McGee *v.* McKinsey, 1 Phila. 326; Sitler *v.* Spring Garden Mut. F. Ins. Co., 14 York Leg. Rec. 153 [*affirmed* in 18 Pa. Super. Ct. 139].

United States.— Carr *v.* Gale, 5 Fed. Cas. No. 2,433, 1 Curt. 384. See also Norton *v.* Dover, 26 Fed. 679.

See 37 Cent. Dig. tit. "New Trial," § 183. And see *infra*, III, H, 3, e.

78. Davis *v.* Bagley, 99 Ga. 142, 25 S. E. 20; Magee *v.* Wetmore, 10 N. Brunsw. 230; Doe *v.* Albee, 8 N. Brunsw. 375.

79. *Georgia.*— Scofield Rolling Mill Co. *v.* State, 54 Ga. 635.

Illinois.— Beveridge *v.* Chetlain, 1 Ill. App. 231.

Iowa.— Pickering *v.* Kirkpatrick, 32 Iowa 163.

Maine.— Warren *v.* Hope, 6 Me. 479.

New York.— Randall *v.* Packard, 1 Misc. 347, 20 N. Y. Suppl. 718 [*affirmed* in 142 N. Y. 47, 36 N. E. 823]; Huson *v.* Egan, 6 N. Y. Suppl. 661 (where witness misunderstood question); Coddington *v.* Hunt, 6 Hill 595.

Pennsylvania.— Hause *v.* Sloyer, 3 Pa. Dist. 320.

England.— Richardson *v.* Fisher, 1 Bing. 145, 7 Moore C. P. 546, 24 Rev. Rep. 690, 8 E. C. L. 444; Dudley *v.* Robins, 3 C. & P. 26, 14 E. C. L. 432; Trubody *v.* Brain, 9 Price 76.

Canada.— Doe *v.* McGill, 5 U. C. Q. B. O. S. 56, mistake of surveyor as to correct monument from which survey was run.

See 37 Cent. Dig. tit. "New Trial," § 183.

80. Lister *v.* Mandell, 1 B. & P. 427.

81. Howe *v.* Briggs, 17 Cal. 385; Johnson *v.* A. Leffler Co., 122 Ga. 670, 50 S. E. 488; Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923; Hewey *v.* Nourse, 54 Me. 256; Magnay *v.* Knight, Drinkw. 13, 4 Jur. 1088, 1 M. & G. 944, 2 Scott N. R. 64, 39 E. C. L. 1111; Hughes *v.* Jones, 1 New Rep. 124.

82. Credibility of witnesses in general see *supra*, III, G, 1, c.

83. *Illinois.*— Seward *v.* Cease, 50 Ill. 228; Hewitt *v.* Hexter, 39 Ill. App. 585.

Iowa.— Shenandoah First Nat. Bank *v.* Wabash, etc., R. Co., 61 Iowa 700, 17 S. W. 48.

Kansas.— See Laithe *v.* McDonald, 7 Kan. 254. *Compare* Boyd *v.* Sanford, 14 Kan. 280, as to incorrect testimony as to contents of letter apparently not wilful and lack of diligence in failing to produce letter.

Minnesota.— Nudd *v.* Home Ins. Co., 25 Minn. 100, as to admissions in pretended lost letter.

Missouri.— See Noble *v.* Kansas City, 95 Mo. App. 167, 68 S. W. 969, as to insufficient evidence of perjury. *Compare* Powers *v.* Penn Mut. L. Ins. Co., 91 Mo. App. 55; Bragg *v.* Moberly, 17 Mo. App. 221, as to extent of injury. *Contra*, Thiele *v.* Citizens' R. Co., 140 Mo. 319, 41 S. W. 800.

New Hampshire.— See Russell *v.* Dyer, 39 N. H. 528.

New York.— Bennett *v.* Riley, 82 N. Y. App. Div. 639, 81 N. Y. Suppl. 882; Serwer *v.* Serwer, 71 N. Y. App. Div. 415, 75 N. Y. Suppl. 842; McCarthy *v.* Christopher St., etc., R. Co., 10 Daly 540. See also Ross *v.* Wood, 8 Hun 185 [*affirmed* in 70 N. Y. 8]; Wehrkamp *v.* Willet, 1 Daly 4. *Compare* Randall *v.* Packard, 142 N. Y. 47, 36 N. E. 823 [*affirming* 1 Misc. 347, 20 N. Y. Suppl. 718], where other party negligent in not meeting false testimony.

Pennsylvania.— Struthers *v.* Wagner, 6 Phila. 262.

England.—Fabrilius *v.* Cock, 3 Burr. 1771; Coddrington *v.* Webb, 2 Vern. Ch. 240, 23 Eng. Reprint 755. *Compare* Proctor *v.* Simmons, 9 Moore C. P. 581, 17 E. C. L. 560.

Canada.— Seely *v.* Purdy, 3 Nova Scotia 414; Talbot *v.* McDougall, 3 U. C. Q. B. O. S. 644.

See 37 Cent. Dig. tit. "New Trial," § 183.

ness has been convicted of perjury in so testifying.[84] The fact testified to must have been material and important.[85] In original proceedings to set aside a verdict and judgment for false swearing, the conviction of the witness of perjury, or his death rendering conviction impossible, is generally held necessary.[86] Where perjury by a witness is a distinct ground for a new trial, it is generally held that he must have been convicted of the crime.[87] It is not enough that he has been indicted for it.[88]

d. Sufficiency of Evidence — (I) *Failure of Proof* — (A) *In General.* It is seldom ground for a new trial that the unsuccessful party was surprised by the action of the court in holding the evidence insufficient to support his action or defense.[89] A mistake of counsel as to the necessity of proving or disproving a fact is not ordinarily ground for a new trial.[90] An unexpected failure of evidence to establish some subordinate fact of the existence of which there is no doubt may be ground for a new trial.[91]

Compare Brugh *v.* Shanks, 5 Leigh (Va.) 598.

Contra.— Pepin *v.* Lautman, 28 Ind. App. 74, 62 N. E. 60.

Affidavit of perjury.— Where a material witness has made an affidavit admitting that he committed perjury on the trial and the affidavit is corroborated a new trial may be granted. O'Hara *v.* Brooklyn Heights R. Co., 102 N. Y. App. Div. 398, 92 N. Y. Suppl. 777; Chapman *v.* Delaware, etc., R. Co., 102 N. Y. App. Div. 176, 92 N. Y. Suppl. 304; Benda *v.* Keil, 34 Misc. (N. Y.) 396, 69 N. Y. Suppl. 655.

The falsity of a statement in an affidavit as to what an absent witness would swear to, admitted by the losing party to prevent a continuance, is not ground for a new trial where it appears that the affiant was innocent of any wrongful intent. Louisville R. Co. *v.* De Gore, 84 S. W. 326, 27 Ky. L. Rep. 54.

84. Great Falls Mfg. Co. *v.* Mathes, 5 N. H. 574; Benfield *v.* Petrie, 3 Dougl. 24, 26 E. C. L. 27. See also Dexter *v.* Handy, 13 R. I. 474. *Compare* Horne *v.* Horne, 75 N. C. 101, as to conviction on testimony of party incompetent to testify in pending case.

That conviction of perjury is not necessarily ground for a new trial in an action brought for that purpose see Davies *v.* Brecknell, L. R. 3 P. & D. 88, 42 L. J. P. & M. 39, 28 L. T. Rep. N. S. 604; Baker *v.* Wadsworth, 67 L. J. Q. B. 301.

85. Guy *v.* Hanly, 21 Cal. 397; Magnay *v.* Knight, Drinkw. 13, 4 Jur. 1088, 1 M. & G. 944, 2 Scott N. R. 64, 39 E. C. L. 1111; Chadd *v.* Meagher, 24 U. C. C. P. 54. See also Key *v.* Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614; Stites *v.* McKibben, 2 Ohio St. 588.

The alleged false testimony must involve questions of fact only upon which perjury might be predicated. Randall *v.* Packard, 1 Misc. (N. Y.) 347, 20 N. Y. Suppl. 718 [*affirmed* in 142 N. Y. 47, 36 N. E. 823].

86. Holtz *v.* Schmidt, 44 N. Y. Super. Ct. 327; Dyche *v.* Patton, 56 N. C. 332 (in chancery); Wheatley *v.* Edwards, Lofft. 87; Tilly *v.* Wharton, 2 Vern. Ch. 378, 23 Eng. Reprint 840.

87. Munro *v.* Moody, 78 Ga. 127, 2 S. E. 688; Richardson *v.* Roberts, 25 Ga. 671.

Under the Missouri statute, perjury is ground for a new trial distinct from that of surprise. Rickroad *v.* Martin, 43 Mo. App. 597.

Evidence of perjury.— A charge of perjury is not sustained by evidence that a witness testified differently in a similar case. Sly *v.* Union Depot R. Co., 134 Mo. 681, 36 S. W. 235.

88. Seeley *v.* Mayhew, 4 Bing. 561, 13 E. C. L. 636; Thurtell *v.* Beaumont, 1 Bing. 339, 2 L. J. C. P. O. S. 4, 8 Moore C. P. 612, 25 Rev. Rep. 644, 8 E. C. L. 538; Benfields *v.* Petrie, 3 Dougl. 24, 26 E. C. L. 27; Hampshire *v.* Harris, 3 Jur. 980. See also Great Falls Mfg. Co. *v.* Mathes, 5 N. H. 574.

89. Smith *v.* Rentz, 73 Hun (N. Y.) 195, 25 N. Y. Suppl. 914; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Murray *v.* Marsh, 17 Fed. Cas. No. 9,965, 1 Brunn. Col. Cas. 22, 3 N. C. 390. See also Jackson *v.* Roe, 9 Johns. (N. Y.) 77. And see *supra*, II, C, 3, e.

90. *California.*— Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

New Hampshire.— Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198, mistaken construction of stipulation.

New York.— Northampton Nat. Bank *v.* Kidder, 50 N. Y. Super. Ct. 246 (burden of proof); Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555.

North Carolina.— Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122.

Pennsylvania.— Hillary *v.* Duross, 5 Phila. 170.

Texas.— Philips *v.* Wheeler, 10 Tex. 536, relying on the weakness of the adversary's evidence.

Canada.— Young *v.* Moodie, 6 U. C. C. P. 244 (where defendant thought plaintiff's evidence insufficient); Hurrell *v.* Simpson, 22 U. C. Q. B. 65 (where defendant relied on supposed weakness of plaintiff's case). *Compare* Macdougall *v.* Macdonell, 5 U. C. C. P. 355.

Compare Sawyer *v.* Merrill, 6 Pick. (Mass.) 478 (as to matter first presented by the court's charge); Moll *v.* Semler, 32 Wis. 228 (where evidence doubtful).

91. Taylor *v.* Frost, 2 How. Pr. (N. Y.) 214.

(B) *Reliance on Prior Ruling.* Where the failure to offer evidence upon some point was caused by the movant's reliance upon some ruling of the court in the action,[92] or upon some prior decision of the supreme court,[93] under which such evidence was unnecessary, a new trial may be allowed. It seems that a failure to offer evidence is not excused by a mere suggestion of the court, not amounting to a ruling, that such evidence was unnecessary.[94]

(C) *Facts Apparently Admitted.* Where no evidence was offered of a material fact because the fact seemed to be admitted by the pleadings, but the court held such evidence necessary, a new trial was allowed.[95] A new trial may be granted if the unsuccessful party failed for want of evidence of some fact in issue which his adversary had actually led him to believe would not be contested on the trial.[96] But it seems that there must have been a positive promise not to require proof of the fact or conduct amounting to fraud.[97]

(II) *Surprise at Verdict*—(A) *In General.* Surprise at a verdict which was justified by the evidence is not ground for a new trial.[98] Nor will a new trial be granted ordinarily to enable the movant to obtain additional evidence,[99] where his application does not meet the requirements as to newly discovered evidence.[1]

(B) *Mistake of Judgment or Inadvertence as to Producing or Offering Evidence.* It is not ground for a new trial that evidence was not offered because it was overlooked or forgotten or was not thought to be material or necessary,[2]

92. Moreland *v.* McDermott, 10 Mo. 605; Porter *v.* Industrial Printing Co., 26 Mont. 170, 66 Pac. 839, 67 Pac. 67; Simpson *v.* Hefter, 43 Misc. (N. Y.) 608, 88 N. Y. Suppl. 282; Ruthven *v.* Stinson, 14 U. C. C. P. 181; McMurray *v.* Ryan, 23 U. C. Q. B. 19. See also Baker *v.* Grand Trunk R. Co., 11 Ont. App. 68, where new trial ordered on setting aside nonsuit. *Compare* Davis *v.* Scottish Provincial Ins. Co., 16 U. C. C. P. 176.

93. Allen *v.* Chambers, 18 Wash. 341, 51 Pac. 478; Bowden *v.* Morris, 3 Fed. Cas. No. 1,715, 1 Hughes 378.

94. Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555; Peekman *v.* Bemus, 7 Cow. (N. Y.) 29 [*reversed* on other grounds in 3 Wend. 667]; Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122. *Contra*, Merritt *v.* Mayfield, 89 N. Y. App. Div. 470, 85 N. Y. Suppl. 801; Simpson *v.* Hefter, 43 Misc. (N. Y.) 608, 88 N. Y. Suppl. 282.

95. Smith *v.* Richmond, 15 Cal. 501.

96. Haynes *v.* State, 45 Ind. 424; Merritt *v.* Mayfield, 89 N. Y. App. Div. 470, 85 N. Y. Suppl. 801; Chamberlain *v.* Lindsay, 1 Hun (N. Y.) 231, 4 Thomps. & C. 23; Continental Nat. Bank *v.* Adams, 67 Barb. (N. Y.) 318 (where defendant's attorney had said that defendant only wanted time and did not expect to prove his defense); Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394; Anderson *v.* George, 1 Burr. 352. See also Pickering *v.* Kirkpatrick, 32 Iowa 163. *Compare* Rubenfeld *v.* Rabiner, 33 N. Y. App. Div. 374, 54 N. Y. Suppl. 68.

97. Smith, etc., Implement Co. *v.* Wheeler, 27 Mo. App. 16; Taylor *v.* Harlow, 11 How. Pr. (N. Y.) 285; Andrew *v.* Stuart, 6 Ont. App. 495. *Compare* Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394.

98. Dewey *v.* Frank, 62 Cal. 343; Lane *v.* Brown, 22 Ind. 239; Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76.

99. Dunnahoe *v.* Williams, 24 Ark. 264; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867 [*reversed* on other grounds in 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264]; Shedden *v.* Atty.-Gen., L. R. 1 H. L. Sc. 470, 545, 22 L. T. Rep. N. S. 631; Doe *v.* Price, 6 L. J. K. B. O. S. 157, 1 M. & R. 683; Timmins *v.* Birmingham Gas Co, 10 Wkly. Rep. 546.

1. See *infra*, II, I.

2. *Georgia.*— Jinks *v.* Lewis, 89 Ga. 787, 15 S. E. 685; Gaulden *v.* Lawrence, 33 Ga. 159.

Indiana.— Test *v.* Larsh, 100 Ind. 562.

Iowa.— State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070.

Louisiana.— Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556, failure to examine witness on particular point.

Nebraska.— Crowell *v.* Harvey, 30 Nebr. 570, 46 N. W. 709.

New Jersey.— Wendt *v.* Duff, 67 N. J. L. 34, 50 Atl. 350.

New York.— Smith *v.* Rentz, 73 Hun 195, 25 N. Y. Suppl. 914; Munn *v.* Worrall, 16 Barb. 221; Oakley *v.* Sears, 7 Rob. 111; Mills *v.* Husson, 18 N. Y. Suppl. 519 [*reversed* on other grounds in 140 N. Y. 99, 35 N. E. 422], where counsel was doubtful of the effect of the evidence.

North Carolina.— Reed *v.* Moore, 25 N. C. 310.

Texas.—Clardy *v.* Wilson, (Civ. App. 1901) 64 S. W. 489.

Virginia.— Pleasants *v.* Clements, 2 Leigh 474.

United States.— Coote *v.* U. S. Bank, 6 Fed. Cas. No. 3,204, 3 Cranch C. C. 95 (want of knowledge of officer of corporation of documents in its possession); Dickson *v.* Mathers, 7 Fed. Cas. No. 3,898*a*, Hempst. 65.

England.— Spong *v.* Hog, W. Bl. 802.

and this is especially true if such evidence was not of a decisive or controlling character.[3]

e. Failure or Inability of Witness to Testify — (i) *Forgetfulness or Withholding of Facts.* The failure of a witness to testify to facts which might have been remembered by him by due attention is seldom ground for a new trial,[4] especially where the witness was not properly or fully examined or cross-examined by the movant.[5] But where the witness, on being previously questioned, had concealed his knowledge of such facts, a new trial may be allowed.[6]

(ii) *Conduct of Witness.* That the unsuccessful party was so nervous, excited, or embarrassed while testifying as to forget material facts or prejudice his case is not ground for a new trial.[7] The intoxication of a witness, which deprived the defeated party of his testimony, may be sufficient cause for allowing a new trial.

f. Prudence and Diligence in Avoiding Surprise or Accident and Injury Therefrom — (i) *Evidence in General.* A party moving for a new trial on the ground of surprise at evidence must have exercised ordinary prudence before the trial to discover what the evidence would be and ordinary diligence before and at the trial to overcome by other evidence the evidence by which he was surprised.[9]

Canada.— McDonald *v.* McDonald, 26 Nova Scotia 103; Brown *v.* Sheppard, 13 U. C. Q. B. 178.

See 37 Cent. Dig. tit. "New Trial," § 186.

3. Allington *v.* Tucker, 38 Ala. 655; Malloy *v.* Bennett, 15 Fed. 371.

4. *California.*— Hendy *v.* Desmond, 62 Cal. 260.

Georgia.— See Archer *v.* Heidt, 55 Ga. 200, where witness remembered a fact only after refreshing his recollection from a memorandum after the trial.

Indiana.— McQueen *v.* Stewart, 7 Ind. 535 (witness intoxicated); Duignan *v.* Wyatt, 3 Blackf. 385; Rees *v.* Blackwell, 6 Ind. App. 506, 33 N. E. 988.

Massachusetts.— Bond *v.* Cutler, 7 Mass. 205.

Texas.— King *v.* Gray, 17 Tex. 62; Cochrane *v.* Middleton, 13 Tex. 275; Watts *v.* Johnson, 4 Tex. 311.

Wisconsin.— Sawyer *v.* La Flesh, 65 Wis. 659, 27 N. W. 407.

United States.— Martin *v.* Clark, 16 Fed. Cas. No. 9,158*a*, Hempst. 259. See also Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14

See 37 Cent. Dig. tit. "New Trial," §§ 182, 194.

Compare Fitzgibbon *v.* Kinney, 3 Harr. (Del.) 72 (where circumstances exceptional); Connally *v.* Pehle, 105 Mo. App. 407, 79 S. W. 1006; Germain *v.* Shuert, 7 U. C. C. P. 86.

5 Davis *v.* Presler, 5 Sm. & M. (Miss.) 459; Houston *v.* Smith, 2 Sm. & M. (Miss.) 597; Sawyer *v.* La Flesh, 65 Wis. 659, 27 N. W. 407; Adams *v.* Toland, 12 U. C. C. P. 119. *Compare* Seely *v.* Purdy, 3 Nova Scotia 414.

6. King *v.* Gray, 17 Tex. 62.

That a witness who had been excused from testifying because his testimony might subject him to a penalty had since the trial expressed a willingness to testify was held insufficient ground for a new trial. Lister *v.* Boker, 6 Blackf. (Ind.) 439.

7. Korte *v.* Hoffman, 97 Mo. 284, 10 S. W. 390. See also Richards *v.* Hammond, McClel. 179. *Compare* Ainsworth *v.* Sessions, 1 Root (Conn.) 175, where witness so disconcerted as to be unable to be understood.

8. Leckie *v.* Crain, 12 La. 432. *Compare* McQueen *v.* Stewart, 7 Ind. 535.

9. *Alabama.*— Baker *v.* Boon, 100 Ala. 622, 13 So. 481.

Arkansas.— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

California.— Heath *v.* Scott, 65 Cal. 548, 4 Pac. 557; Dewey *v.* Frank, 62 Cal. 343; Schellhous *v.* Ball, 29 Cal. 605; Berry *v.* Metzler, 7 Cal. 418. See also Howe *v.* Briggs, 17 Cal. 385.

Colorado.— Clifford *v.* Denver, etc., R. Co., 12 Colo. 125, 20 Pac. 333.

Delaware.— McCrone *v.* Eves, 3 Houst. 76.

Georgia.— Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923; Beckford *v.* Chipman, 44 Ga. 543.

Illinois.— Rockford, etc., R. Co. *v.* Rose, 72 Ill. 183; Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Yates *v.* Monroe, 13 Ill. 212; Halsey *v.* Stillman, 48 Ill. App. 413; Dueber Watch Case Mfg. Co. *v.* Lapp, 35 Ill. App. 372.

Indiana.— Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58; Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710; Mooney *v.* Kinsey, 90 Ind. 33; Pittsburgh, etc., R. Co. *v.* Sponier, 85 Ind. 165; State *v.* Bottorff, 82 Ind. 538; Smith *v.* Harris, 76 Ind. 104; Pauley *v.* Short, 41 Ind. 180; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009.

Iowa.— Mehan *v.* Chicago, etc., R. Co., 55 Iowa 305, 7 N. W. 613; Keys *v.* Francis, 28 Iowa 321; Richards *v.* Nuckolls, 19 Iowa 555. See also Dettman *v.* Zimmerman, 53 Iowa 709, 6 N. W. 45, as to necessity of offering contradictory evidence not obtainable before argument of the case.

Kansas.— Beachley *v.* McCormick, 41 Kan. 485, 21 Pac. 646; Beal *v.* Codding, 32 Kan. 107, 4 Pac. 180; Boyd *v.* Sanford, 14 Kan.

A party surprised at the testimony of his own witness should have corrected any mistake made by him at the time,[10] or should have overcome his testimony, if possible, by any other evidence then obtainable.[11] Where it is claimed that a witness testified differently on successive trials and thereby surprised the movant, the effect of his later testimony should have been weakened by cross-examination or by showing his contradictory statements, or overcome, if possible, by other evidence.[12]

(II) *Absence of Witnesses or Evidence*—(A) *In General.* Unless the movant used reasonable diligence to procure the attendance of witnesses,[13] or the

280; Washington *v.* Byers, (App. 1898) 53 Pac. 150.

Kentucky.— Babbitt *v.* Woolley, 3 Bush 703; Bell *v.* Howard, 4 Litt. 117; Smith *v.* Morrison, 3 A. K. Marsh. 81; Phœnix Ins. Co. *v.* Wintersmith, 98 S. W. 987, 30 Ky. L. Rep. 369.

Maine.— Atkinson *v.* Conner, 56 Me. 546.

Minnesota.— Scott, etc., Lumber Co. *v.* Sharvy, 62 Minn. 528, 64 N. W. 1132.

Mississippi.— Dorsey *v.* Maury, 10 Sm. & M. 298.

Missouri.—Fretwell *v.* Laffoon, 77 Mo. 26; Hanley *v.* Blanton, 1 Mo. 49; Morrison *v.* Murphy, 36 Mo. App. 36.

Montana.— Rand *v.* Kipp, 27 Mont. 138, 69 Pac. 714; O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044.

New Jersey.— Matthews *v.* Allaire, 11 N. J. L. 242.

New York.— Randall *v.* Packard, 142 N. Y. 47, 36 N. E. 823 [*affirming* 1 Misc. 347, 20 N. Y. Suppl. 718]; Sayer *v.* King, 21 N. Y. App. Div. 624, 47 N. Y. Suppl. 420, 422; Peck *v.* Hiler, 30 Barb. 655; Randall *v.* Packard, 1 Misc. 347, 20 N. Y. Suppl. 718 [*affirmed* in 142 N. Y. 47, 36 N. E. 823]. It is negligence for a party to fail to inform himself of the testimony that might be given by persons present in court who are known to be cognizant of the matters in controversy. Leavy *v.* Roberts, 2 Hilt. 285, 8 Abb. Pr. 310.

Tennessee.— Nellums *v.* Nashville, 106 Tenn. 222, 61 S. W. 88.

Texas.—Pickett *v.* Martin, (1891) 16 S. W. 1007; Texas Cent. R. Co. *v.* Yarbro, 32 Tex. Civ. App. 246, 74 S. W. 357; Taylor Water Co. *v.* Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662.

Vermont.— Burr *v.* Palmer, 23 Vt. 244.

Washington.— Reeder *v.* Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; Friedman *v.* Manley, 21 Wash. 43, 56 Pac. 832.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292, alleged conversation with absent superintendent.

Wisconsin.—Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

Wyoming.— Harden *v.* Card, (1907) 88 Pac. 217.

England.— Bell *v.* Thompson, 2 Chit. 194, 18 E. C. L. 586; Roberts *v.* Holmes, 2 C. L. R. 726; Doe *v.* Price, 6 L. J. K. B. O. S. 157, 1 M. & R. 683; Proctor *v.* Simmons, 9 Moore C. P. 581, 17 E. C. L. 560; White *v.* South Eastern R. Co., 10 Wkly. Rep. 564; Holme *v.* Clark, 10 Wkly. Rep. 527.

Canada.—Chadd *v.* Meagher, 24 U. C. C. P. 54.

See 37 Cent. Dig. tit. "New Trial," §§ 186, 190, 192, 193, 194.

Contradicting evidence occasioning surprise. — It seems that the party surprised is not required to put his attorney on the stand to contradict the evidence occasioning the surprise. Alger *v.* Merritt, 16 Iowa 121. *Compare* Abeles *v.* Cohen, 8 Kan. 180.

10. *Georgia.*— Valentino *v.* Weil, 67 Ga. 15.

Illinois.— Cooke *v.* Murphy, 70 Ill. 96.

Indiana.—Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565.

Minnesota.— Nelson *v.* Carlson, 54 Minn. 90, 55 N. W. 821.

Missouri.— Howell *v.* Howell, 37 Mo. 124; F. O. Sawyer Paper Co. *v.* Mangan, 68 Mo. App. 1.

Answers not responsive to questions asked. — If the movant was surprised at answers of his own witness that were not responsive to questions asked he should have asked to have the objectionable answers excluded from the consideration of the jury. Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912.

11. Adamant Mfg. Co. *v.* Pete, 61 Minn. 464, 63 N. W. 1027; Walcott *v.* Stolicker, 16 U. C. C. P. 555.

12. Halsey *v.* Stillman, 48 Ill. App. 413; Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009; Abeles *v.* Cohen, 8 Kan. 180; Howell *v.* Howell, 37 Mo. 124.

13. *Alabama.*—Elliott *v.* Cook, 33 Ala. 490.

Connecticut.— Norwich, etc., R. Co. *v.* Cahill, 18 Conn. 484.

Georgia.— Carey *v.* King, 5 Ga. 75, although witness absent at request of other party.

Illinois.— Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311.

Indiana.— Nordman *v.* Stough, 50 Ind. 280; Pierce *v.* Cubberly, 19 Ind. 157; Washer *v.* White, 16 Ind. 136.

Kansas.— Washington *v.* Byers, (App. 1898) 53 Pac. 150.

Kentucky.— Mussin *v.* Collins, 1 A. K. Marsh. 350.

Minnesota.— Otterness *v.* Botten, 80 Minn. 430, 83 N. W. 382.

New York.— Gawthrop *v.* Leary, 9 Daly 353, where witness had remained in attendance two days and left subject to call by telegraph which was not received because of absence from place of business.

presence of evidence,[14] at the trial, a new trial for absence of witnesses or evidence will be refused. Ordinarily it is not enough that the movant had expected an absent witness to attend,[15] but he must have taken the proper steps for the timely issuance and service of a subpœna.[16] Where a witness refused to obey a subpœna or absented himself during the trial, compulsory process to compel his attendance must have been requested.[17] So also the proper steps must generally have been taken to compel the production of necessary written evidence.[18] Generally the movant must have used reasonable diligence to obtain the depositions of absent,[19] or non-resident witnesses.[20]

(B) *Failure of Adversary to Produce or Offer Witnesses or Evidence.* It is not sufficient excuse for failure to have used reasonable diligence to procure the

Texas.— Chew *v.* Jackson, (Civ. App. 1907) 102 S. W. 427.

England.— Dunn *v.* Edwards, 19 L. T. Rep. N. S. 394.

See 37 Cent. Dig. tit. "New Trial," § 192.

That the trial of a prior case closed sooner than had been expected, not all of the witnesses called therein having been examined, and part of movants' witness did not arrive in time to testify, was held insufficient cause for a new trial. Wells *v.* Sanger, 21 Mo. 354. *Compare* Smith *v.* Lidgerwood Mfg. Co., 60 N. Y. App. Div. 467, 69 N. Y. Suppl. 975.

14. *Arkansas.*—Merrick *v.* Britton, 26 Ark. 496.

Georgia.— Sheftall *v.* Clay, R. M. Charlt. 7.

Indiana.— Sullivan *v.* O'Connor, 77 Ind. 149.

Missouri.— Peers *v.* Davis, 29 Mo. 184.

South Carolina.— Barry *v.* Wilbourne, 2 Bailey 91.

Texas.— Linard *v.* Crossland, 10 Tex. 462, 60 Am. Dec. 213, no attempt before trial to ascertain whether patent filed with papers still there.

Vermont.— Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553.

Washington.— Pineus *v.* Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930.

West Virginia.— Tefft *v.* Marsh, 1 W. Va. 38.

Wisconsin.— Davis *v.* Ruggles, 2 Pinn. 477, 2 Chandl. 152.

United States.— U. S. *v.* Humason, 8 Fed. 71, 7 Sawy. 252; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

See 37 Cent. Dig. tit. "New Trial," § 192.

15. Carey *v.* King, 5 Ga. 75; Waddell *v.* Wood. 64 N. C. 624.

16. *Alabama.*— Hoskins *v.* Hight, 95 Ala. 284, 11 So. 253.

California.— Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Kentucky.— Stewart *v.* Durrett, 2 T. B. Mon. 122.

Michigan.— Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742.

Minnesota.—Eiche *v.* Taylor, 17 Minn. 172.

Missouri.— Roach *v.* Colbern, 76 Mo. 653, holding it insufficient to rely on promise of witness to attend, although present at beginning of term.

New York.— Brady *v.* Valentine, 3 Misc. 20, 21 N. Y. Suppl. 776 [*affirmed* in 144 N. Y. 698, 39 N. E. 856]; Tigue *v.* Annowski, 7 N. Y. Suppl. 9.

North Dakota.— Josephson *v.* Sigfusson, 13 N. D. 312, 100 N. W. 703.

Texas.— Love *v.* Breedlove, 75 Tex. 649, 13 S. W. 222, especially if no reasonable ground to believe witness would attend.

Washington.— Clemans *v.* Western, 39 Wash. 290, 81 Pac. 824.

West Virginia.— Davis *v.* Walker, 7 W. Va. 447.

Wisconsin.— Kellogg *v.* Ballard, 10 Wis. 440.

See 37 Cent. Dig. tit. "New Trial," § 192.

17. *Indiana.*— Pierce *v.* Cubberly, 19 Ind. 157.

Missouri.— Stewart *v.* Small, 5 Mo. 525.

New York.— Brady *v.* Valentine, 3 Misc. 20, 21 N. Y. Suppl. 776 [*affirmed* in 144 N. Y. 698, 39 N. E. 856].

Pennsylvania.— Keim *v.* Maurer, 2 Woodw. 412.

Tennessee.— McAuly *v.* Lockhart, 4 Humphr. 229.

West Virginia.— Davis *v.* Walker, 7 W. Va. 447.

Wisconsin.— O'Brien *v.* Home Ins. Co., 79 Wis. 399, 48 N. W. 714.

Canada.— Woodruff *v.* Campbell, 5 U. C. Q. B. O. S. 305.

See 37 Cent. Dig. tit. "New Trial," § 192.

18. Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (Ind. App. 1902) 62 N. E. 649. See also Austin *v.* Evans, 2 M. & G. 430, 40 E. C. L. 676, as to proper method of procuring document from public office.

19. Allington *v.* Tucker, 38 Ala. 655.

Excuses for not obtaining evidence.— That a witness "moved and travelled about a great deal before said trial, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony," was held not sufficient excuse for not obtaining his testimony. Allington *v.* Tucker, 38 Ala. 655.

20. Atlantic, etc., R. Co. *v.* Johnson, 127 Ga. 392, 56 S. E. 482; Conwell *v.* Anderson, 2 Ind. 122; Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565 (although witness a party); Lehde *v.* Lehde, (Tex. Civ. App. 1897) 42 S. W. 585; Davis *v.* Walker, 7 W. Va. 447. *Compare* Low, etc., Water Co. *v.* Hickson, 32 Tex. Civ. App. 457, 74 S. W. 781, where witness a party residing in another county and temporarily absent from state and detained by sickness.

attendance of witnesses,[21] or the presence of written evidence at the trial,[22] that the movant expected his adversary to produce such witnesses or evidence. It has even been held that the promise of the adversary party to produce written evidence is not sufficient excuse for not having taken the proper steps to compel its production.[23] Nor is it ground for a new trial that the successful party did not use other witnesses who had been called or subpœnaed.[24]

(c) *Failure of Movant to Offer Other Evidence.* It must appear that the facts expected to be proved by the testimony of an absent witness or other absent evidence could not have been proved by the testimony of other witnesses who might have been called,[25] or by secondary or other original evidence.[26]

4. Accident or Misfortune Preventing Review of Case — a. In General. Accident which ordinary prudence could not have guarded against and which has prevented the review of a case is sometimes ground for a new trial.[27]

b. Loss of Court Files or Stenographer's Notes. New trials have been granted where a review of the case has been prevented by the loss of the files,[28] or of instructions,[29] or of the official stenographic notes of the proceedings.[30] Where it is possible to substitute the lost files or instructions,[31] or to make a proper case or bill of exceptions without the stenographic notes,[32] a new trial will be refused.

c. Failure to Obtain Transcript of Evidence or Record. Where the unsuccessful party has been deprived, without his fault or negligence, of the official stenographer's transcript of the evidence,[33] or of an official transcript of the

21. Gentry *v.* McKehen, 5 Dana (Ky.) 34; Shepherd *v.* Hayes, 16 Vt. 486; Smith *v.* Chapman, 25 N. Brunsw. 206. See also Toledo, etc., R. Co. *v.* Endres, 57 Ill. App. 69.

The issuance of a subpœna on the morning of the day of trial, which is not served, is not proper diligence. Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Necessity for summons.—If a party desires to call his adversary as a witness, he should have him summoned. Kellogg *v.* Ballard, 10 Wis. 440. And if the latter disobeys the subpœna, the former should apply for process to compel attendance. Pierce *v.* Cubberly, 19 Ind. 157.

22. Seybold *v.* Morgan, 43 Ill. App. 39; Chiles *v.* Dedman, 3 A. K. Marsh. (Ky.) 463.

23. Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (Ind. App. 1902) 62 N. E. 649.

24. Patrick *v.* Boonville Gas Light Co., 17 Mo. App. 462; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489. See also *In re* Semple, 28 Pittsb. Leg. J. N. S. (Pa.) 434.

25. Martin *v.* Hudson, 52 Ala. 279; Norwich, etc., R. Co. *v.* Cahill, 18 Conn. 484; Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311; Adam *v.* Hay, 7 N. C. 149, evidence of custom. And see *infra*, II, I, 2.

26. Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627, where testimony taken on former trial might have been proved by stenographer's notes.

27. Ritchey *v.* Seeley, 73 Nebr. 164, 102 N. W. 256; Owens *v.* Paxton, 106 N. C. 480, 11 S. E. 375 (loss of judge's minutes preventing settlement of case); McCotter *v.* New Shoreham, 21 R. I. 425, 44 Atl. 473, 23 R. I. 100, 49 Atl. 695 (failure of appeal-bond seasonably forwarded by mail to reach clerk in time); Nelson *v.* Marshall, 77 Vt. 44, 58 Atl. 793. *Compare* Etchells *v.* Wainwright, 76 Conn. 534, 57 Atl. 121 (where, although deprived of review on error, an appeal was possible); Southwestern R. Co. *v.* Craig, 62 Ga. 361 (as to mistake in naming party in motion for new trial and writ of error causing dismissal).

Failure to perfect an appeal because of a mistake of law on the part of one defendant is not ground for a new trial. Bassett *v.* Loewenstein, 23 R. I. 24, 49 Atl. 41.

28. Zweibel *v.* Caldwell, 72 Nebr. 47, 99 N. W. 843, 102 N. W. 84 (by petition in equity); Sanders *v.* Norris, 82 N. C. 243; Philadelphia Fire Assoc. *v.* McNerney, (Tex. Civ. App. 1900) 54 S. W. 1053 (record destroyed by fire). *Compare* Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98.

29. Zweibel *v.* Caldwell, 72 Nebr. 47, 99 N. W. 843, 102 N. W. 84, by petition in equity. *Compare* Visher *v.* Webster, 13 Cal. 58; Porth *v.* Gilbert, 85 Mo. 125, where probably they might be supplied.

30. James *v.* French, 5 Pa. Co. Ct. 270. See also Sanders *v.* Norris, 82 N. C. 243.

31. Addems *v.* Suver, 89 Ill. 482; Saxton *v.* Harrington, 68 Nebr. 446, 94 N. W. 605; Owens *v.* Paxton, 106 N. C. 480, 11 S. E. 375.

32. Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98.

33. Mathews *v.* Mulford, 53 Nebr. 252, 73 N. W. 661 (on petition); Holland *v.* Chicago, etc., R. Co., 52 Nebr. 100, 71 N. W. 989 (on petition); Curran *v.* Wilcox, 10 Nebr. 449, 6 N. W. 762; Owens *v.* Paxton, 106 N. C. 480, 11 S. E. 375. See also Saxton *v.* Harrington, 68 Nebr. 446, 94 N. W. 605. *Compare* McKinley *v.* McKinley, 123 Iowa 574, 99 N. W. 162, where movant was not diligent in ordering transcript at early date.

record,[34] in time to obtain a review of the case, a new trial may be granted in some jurisdictions. If a proper case or bill of exceptions may be made without the notes of the stenographer, his death is not cause for a new trial.[35]

d. Failure to Rule on Motion For New Trial. The failure of the trial judge to pass on an application for a new trial during his term of office has been held ground for setting aside the verdict where his successor in office was not authorized to pass on the application.[36]

e. Failure to Settle Exceptions or Case. That the trial judge is unable to settle a bill of exceptions,[37] or that a case or bill of exceptions has been retained by him and not settled by him during his term of office,[38] or before his death occurring during his term of office,[39] is ground for new trial in some jurisdictions. The death of the judge before the expiration of the time during which a bill of exceptions might be presented is cause for a new trial in some states,[40] but not in others, at least where the bill might have been presented before his death.[41] Where no exceptions had been preserved for the judge to consider, his death was not ground for a new trial.[42]

5. Necessity of Objection or Application For Relief — a. Objections. Usually an irregularity or error in the proceedings by which the movant was surprised must have been objected to.[43] The rule applies to the admission of evidence not relevant to the issues.[44] Where the testimony of an incompetent witness upon a doubtful matter was admitted without objection because such incompetency was not then known to the unsuccessful party, a new trial may be allowed,[45] but not

That a referee had absconded without filing a transcript of the evidence and before the submission to him of defendant's statement for a new trial and amendments proposed thereto was held not ground for a new trial. Ogle *v.* Potter, 24 Mont. 501, 62 Pac. 920.

34. Zweibel *v.* Caldwell, 72 Nebr. 47, 99 N. W. 843, 102 N. W. 84.

35. Lidgerwood Mfg. Co. *v.* Rogers, 56 N. Y. Super. Ct. 350, 4 N. Y. Suppl. 716.

36. American Cent. Ins. Co. *v.* Neff, 43 Kan. 457, 23 Pac. 606; Bass *v.* Swingley, 42 Kan. 729, 22 Pac. 714; St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249; Cocker *v.* Cocker, 56 Mo. 180; Woodfolk *v.* Tate, 25 Mo. 597.

37. Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144 [*reversing* 100 Fed. 581]; Benett *v.* Peninsular, etc., Steam Boat Co., 16 C. B. 29, 81 E. C. L. 29. See also Evans *v.* Humphreys, 9 App. Cas. (D. C.) 392, where parties could not agree on bill of exceptions and court was unable to settle same.

38. Borrowscale *v.* Bosworth, 98 Mass. 34; Malony *v.* Adsit, 175 U. S. 281, 20 S. Ct. 115, 44 L. ed. 163. See also Crittenden *v.* Schermerhorn, 35 Mich. 370 (where bill settled after term under stipulation of parties); Nichols *v.* Dunning, 91 N. C. 4 (as to necessity of effort to recover papers carried off by judge).

39. Parker *v.* Coggins, 116 N. C. 71, 20 S. E. 962; Taylor *v.* Simmons, 116 N. C. 70, 20 S. E. 961; Shelton *v.* Shelton, 89 N. C. 185, 91 N. C. 329; Jones *v.* Holmes, 83 N. C. 108; Simonton *v.* Simonton, 80 N. C. 7; Mason *v.* Osgood, 72 N. C. 120; Isler *v.* Haddock, 72 N. C. 119; Hume *v.* Bowie, 148 U. S. 245, 13 S. Ct. 582, 37 L. ed. 438; Newton *v.* Boodle, 3 C. B. 795, 4 D. & L. 664, 11 Jur. 148, 16 L. J. C. P. 135, 54 E. C. L. 795; Nind *v.* Arthur, 7 D. & L. 252.

If the appellee withdraws his counter case and consents to have the appeal tried on appellant's unsettled case, a new trial need not be granted. Ridley *v.* Seaboard, etc., R. Co., 116 N. C. 923, 20 S. E. 962.

40. People *v.* Judge Super. Ct., 41 Mich. 726, 49 N. W. 925; Stebbins *v.* Field, 41 Mich. 373, 2 N. W. 190; People *v.* Judge Super. Ct., 40 Mich. 630; German Ins. Co. *v.* Manning, 100 Fed. 581. *Compare* Benedix *v.* German Ins. Co., 80 Wis. 148, 49 N. W. 811, as to failure to serve bill within time limited by statute.

Where the successor of the trial judge is authorized to settle a bill of exceptions, but is unable to do so because the transcript of the evidence prepared by the official stenographer is not conclusive and the facts are disputed, a new trial is properly granted. Henrichsen *v.* Smith, 29 Oreg. 475, 42 Pac. 486, 44 Pac. 496.

41. Alley *v.* McCabe, 147 Ill. 410, 35 N. E. 615 [*affirming* 46 Ill. App. 368].

42. Richardson *v.* Schuyler County Agricultural, etc., Assoc., 156 Mo. 407, 57 S. W. 117.

43. Davis *v.* Dale, 2 La. Ann. 205. And see *supra*, III, C, 6, a.

44. Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Tripp, etc., Boot, etc., Co. *v.* Martin, 45 Kan. 765, 26 Pac. 424; Bailey *v.* Hicks, 16 Tex. 222; Fowler *v.* Chapman, 1 Tex. App. Civ. Cas. § 963. *Compare* Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191 (as to the allowance of an amendment); Stanton *v.* Bannister, 2 Vt. 464 (as to the admission of a void levy without objection).

45. Niles *v.* Brackett, 15 Mass. 378. See also Turner *v.* Pearte, 1 T. R. 717. *Compare*

if the failure to discover the incompetency or make the objection was due to a want of ordinary diligence.[46] Where a witness refused to testify, the court should have been requested to require him to do so.[47]

b. Application For Delay or Continuance — (I) *In General.* When a new trial is asked for because of surprise or accident by reason of which a party was not prepared to proceed to trial, or to proceed further with the trial, at that time, a delay or continuance must have been requested,[48] unless no grounds for a motion for a continuance existed.[49]

(II) *Absence of Party.* That the necessary absence of a party from the trial may be ground for a new trial, he must have sent notice to his counsel, or the court, if possible, of the necessity and cause for his absence,[50] and must have informed his counsel, at some time, of the facts making his attendance necessary,[51] and proper application for delay or a continuance for such cause must have been made.[52] Where it became necessary for a party to absent himself during the trial, a similar application must have been made.[53]

(III) *Absence, Disability, or Disqualification of Counsel.* A new trial will not be granted as a rule because of the absence of counsel from the trial,[54]

Eakins *v.* Evans, 3 U. C. Q. B. O. S. 383, not where verdict sustained by other evidence.

46. McCrone *v.* Eves, 3 Houst. (Del.) 76.

47. Hinds *v.* Terry, Walk. (Miss.) 80; Martin *v.* Clark, 16 Fed. Cas. No. 9,158*a*, Hempst. 259.

That a party absented himself after being sworn and partially examined as a witness for his adversary and refused to obey a subpœna was held insufficient ground for a new trial, where his conduct was not brought to the attention of the court. Pierce *v.* Cubberly, 19 Ind. 157.

48. *Alabama.*— Geter *v.* Central Coal Co., (1907) 43 So. 367; Barron *v.* Robinson, 98 Ala. 351, 13 So. 476.

California.— Schellhous *v.* Ball, 29 Cal. 605.

Georgia.— Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485.

Illinois.— Nehring *v.* Ricker, 126 Ill. App. 262.

Indiana.— Stewart *v.* Smith, 111 Ind. 526, 13 N. E. 48.

Iowa.— Patton *v.* Sanborn, 133 Iowa 650, 110 N. W. 1032.

Louisiana.— Wolfe *v.* Pruitt, 7 La. Ann. 572; Dwight *v.* Richard, 4 La. Ann. 240.

Montana.— O'Neill *v.* State Sav. Bank, 34 Mont. 521, 87 Pac. 970.

Nebraska.— Corbett *v.* National Bank of Commerce, 44 Nebr. 230, 62 N. W. 445.

New Hampshire.— Couillard *v.* Seaver, 64 N. H. 614, 9 Atl. 724.

New York.— Peck *v.* Hiler, 30 Barb. 655.

Texas.— Birdwell *v.* Cox, 18 Tex. 535; Cato *v.* Scott, (Civ. App. 1906) 96 S. W. 667; Pride *v.* Whitfield, (Civ. App. 1899) 51 S. W. 1100, filing of amended complaint unknown before trial.

See 37 Cent. Dig. tit. "New Trial," § 195. And see *supra*, III, A, 3, c.

49. Hughes *v.* Rhode Island Co., (R. I. 1907) 67 Atl. 450, holding that where at the time of the trial defendant was justified in believing a witness was beyond its reach and that it was hopeless to attempt to produce him at a subsequent time, this was no ground for a motion for continuance, so that failure to make such motion is no ground for refusing a new trial on the witness being discovered.

50. Lumpkin *v.* Respess, 68 Ga. 822; Hart *v.* Thomas, 61 Ga. 470; Bruson *v.* Clark, 151 Ill. 495, 38 N. E. 252 [*affirming* 42 Ill. App. 88]; McManus *v.* Humes, 6 Iowa 159; Verschoyle *v.* Darragh, (Tex. Civ. App. 1902) 67 S. W. 1099.

51. Whilworth *v.* Murphy, 29 Iowa 470.

52. *Colorado.*— Reynolds *v.* Manville, 5 Colo. App. 486, 39 Pac. 350.

Indiana.— Cox *v.* Harvey, 53 Ind. 174; Grant *v.* Popejoy, 15 Ind. 311.

Iowa.— Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513; Whilworth *v.* Murphy, 29 Iowa 470.

Missouri.— Frick Co. *v.* Caffery, 48 Mo. App. 120.

Nebraska.— Newtson *v.* Walker, 1 Nebr. (Unoff.) 118, 95 N. W. 470.

New York.— See Foster *v.* Easton, 2 N. Y. Suppl. 772.

Pennsylvania.— Cowperthwaite *v.* Miller, 2 Phila. 219.

Texas.— Devine *v.* Martin, 15 Tex. 25; Strippelmann *v.* Clark, 11 Tex. 296.

West Virginia.— Thompson *v.* Updergraff, 3 W. Va. 629.

See 37 Cent. Dig. tit. "New Trial," § 196.

53. Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736; Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928, holding that where a new trial is asked because of physical or mental disability of the party preventing a fair trial, a continuance must have been applied for.

54. *Georgia.*—Ayer *v.* James, 120 Ga. 578, 48 S. E. 154; Hart *v.* Thomas, 61 Ga. 470.

Illinois.—Porter *v.* Triola, 84 Ill. 325 (continuance should be asked before the commencement of the trial); Dougherty *v.* Winter, 57 Ill. App. 128.

Indiana.— Washer *v.* White, 16 Ind. 136.

Kentucky.— Louisville *v.* Keher, 117 Ky. 841, 79 S. W. 270, 25 Ky. L. Rep. 2003.

Minnesota.— Caughey *v.* Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

or during a portion of the trial,[55] or because of his withdrawal from the case,[56] unless application was made for a delay or continuance. The intoxication of counsel for the unsuccessful party during the trial is not sufficient cause for granting a new trial, where no request for delay was made at the time.[57] That the attorney for the successful party was disqualified to prosecute the action as against the movant is not ground for a new trial, where no objection on that ground was offered at the time of the trial.[58]

(iv) *Absence of Witness or Evidence.* The movant for a new trial on the ground of the absence of witnesses must have used diligence to learn what such witnesses could testify to,[59] and must have applied seasonably for a continuance.[60] When the absence of a witness,[61] or the loss or absence of written evidence,[62] was discovered during the trial, a delay or continuance must have been requested.

(v) *Disability of Witness.* When it was apparent on the trial that because

Missouri.— Siebert *v.* Sportsman's Park, etc., 72 Mo. App. 158.

Nebraska.— Corbett *v.* National Bank of Commerce, 44 Nebr. 230, 62 N. W. 445.

Tennessee.— Hawthorne *v.* Bowman, 3 Sneed 524.

Texas.— Western Union Tel. Co. *v.* Brooks, 78 Tex. 331, 14 S. W. 699; Strippelman *v.* Clark, 11 Tex. 296.

United States.— Van Dyke *v.* Tinker, 28 Fed. Cas. No. 16,849 [*affirming* 23 Fed. Cas. No. 14,058, 1 Flipp. 521].

Canada.— Boyne *v.* Elston, 10 N. Brunsw. 164; Gunn *v.* Van Allen, 5 U. C. Q. B. 513.

See 37 Cent. Dig. tit. "New Trial," § 196.

55. Starr *v.* Torrey, 22 N. J. L. 190; Hurlbert *v.* Parker, 5 N. Y. St. 454; Meyer *v.* Smith, 7 Phila. (Pa.) 105.

56. Gaines *v.* White, 1 S. D. 434, 47 N. W. 524, withdrawal of junior counsel only.

57. Fitch *v.* Ellison, 15 Colo. 418, 24 Pac. 872.

58. Conley *v.* Arnold, 93 Ga. 823, 20 S. E. 762.

59. Elliott *v.* Cook, 33 Ala. 490.

60. *Alabama.*— Hoskins *v.* Hight, 95 Ala. 284, 11 So. 253.

California.— Turner *v.* Morrison, 11 Cal. 21.

Georgia.—Crawford *v.* Georgia Pac. R. Co., 86 Ga. 5, 12 S. E. 176.

Illinois.— Kunkel *v.* Chicago, 64 Ill. App. 354.

Indiana.— Schlotter *v.* State, 127 Ind. 493, 27 N. E. 149; Myers *v.* Conway, 62 Ind. 474.

Iowa.— Gee *v.* Moss, 68 Iowa 318, 27 N. W. 268.

Kentucky.— Gill *v.* Warren, 1 J. J. Marsh. 590; Hatcher *v.* Reed, Hard. 515. See also Turner *v.* Booker, 2 Dana 334, as to sufficient diligence in sending agent to apply for continuance.

Maine.— Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424.

Michigan.— Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742.

Minnesota.— Otterness *v.* Botten, 80 Minn. 430, 83 N. W. 382; Cheney *v.* Dry Wood Lumber Co., 34 Minn. 440, 26 N. W. 236; Eiche *v.* Taylor, 17 Minn. 172.

Nebraska.— Kreamer *v.* Irwin, 46 Nebr. 827, 65 N. W. 885; Van Etten *v.* Butt, 32 Nebr. 285, 49 N. W. 365; Goracke *v.* Hintz, 13 Nebr. 390, 14 N. W. 379.

New York.— Leonard *v.* Germania F. Ins. Co., 2 Misc. 548, 23 N. Y. Suppl. 684, 23 N. Y. Civ. Proc. 155; Messenger *v.* Fourth Nat. Bank, 48 How. Pr. 542 [*affirmed* in 6 Daly 190]; Jackson *v.* Malin, 15 Johns. 293.

North Dakota.— Josephson *v.* Sigfusson, 13 N. D. 312, 100 N. W. 703.

Pennsylvania.— Farmer's Bank *v.* Miller, 2 Dauph. Co. Rep. 105; Filbert *v.* Howard Express Co., 1 Woodw. 304.

Rhode Island.— Potter *v.* Padelford, 3 R. I. 162.

Texas.— Love *v.* Breedlove, 75 Tex. 649, 13 S. W. 222 (especially if no reasonable ground to believe witness would attend); Strippelman *v.* Clark, 11 Tex. 296; Dowell *v.* Dergfield, (Civ. App. 1905) 87 S. W. 1051; St. Louis Southwestern R. Co. *v.* Dickens, (Civ. App. 1900) 56 S. W. 124.

Washington.— Clemans *v.* Western, 39 Wash. 290, 81 Pac. 824.

England.— Turquand *v.* Dawson, 1 C. M. & R. 709, 5 Tyrw. 488; Edwards *v.* Dignam, 2 Dowl. P. C. 642; Marsh *v.* Monckton, Tyrw. & G. 34.

Canada.—Morice *v.* Baird, 6 Manitoba 241; Longueuil *v.* Cushman, 24 U. C. Q. B. 602.

See 37 Cent. Dig. tit. "New Trial," § 197.

Although a motion for continuance was refused because of defects in the affidavit, a new trial may be granted. Chilson *v.* Reeves, 29 Tex. 275.

61. *Nebraska.*— Lincoln *v.* Staley, 32 Nebr. 63, 48 N. W. 887.

New Jersey.— Read *v.* Barker, 30 N. J. L. 378 [*affirmed* in 32 N. J. L. 477].

New York.— Erichson *v.* Sidlo, 76 N. Y. App. Div. 347, 78 N. Y. Suppl. 487; Cassiano *v.* Strano, 4 Misc. 282, 23 N. Y. Suppl. 1036.

Texas.— St. Louis Southwestern R. Co. *v.* Dickens, (Civ. App. 1900) 56 S. W. 124.

West Virginia.— Thompson *v.* Updegraff, 3 W. Va. 629.

Wisconsin.— O'Brien *v.* Home Ins. Co., 79 Wis. 399, 48 N. W. 714; Kellogg *v.* Ballard, 10 Wis. 440.

See 37 Cent. Dig. tit. "New Trial," § 197.

62. *Alabama.*—Baker *v.* Boon, 100 Ala. 622, 13 So. 481.

of illness [63] or intoxication [64] a witness was unable to properly remember facts and testify thereto, the attention of the court should have been called to the condition of the witness and a delay asked for.

(VI) *Surprise at Evidence.* As a rule a party asking a new trial for surprise at evidence must have indicated his surprise to the court at the time, usually by affidavit, and have asked for delay or a continuance to enable him to obtain other evidence.[65] The rule applies to surprise occasioned by a variance between

California.— Heath *v.* Scott, 65 Cal. 548, 4 Pac. 557, depositions.

Indiana.— Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1902) 62 N. E. 649.

Louisiana.— McClure *v.* King, 15 La. Ann. 220.

New York.— Randall *v.* Packard, 1 Misc. 347, 20 N. Y. Suppl. 718 [*affirmed* in 142 N. Y. 47, 36 N. E. 823].

Tennessee.— Blair *v.* Childs, 10 Heisk. 199, depositions.

Texas.— Birdwell *v.* Cox, 18 Tex. 535; Kilgore *v.* Jordan, 17 Tex. 341; Bridges *v.* Williams, 28 Tex. Civ. App. 38, 66 S. W. 120, 484.

See 37 Cent. Dig. tit. "New Trial," § 197.

63. Rees *v.* Blackwell, 6 Ind. App. 506, 33 N. E. 988; King *v.* Gray, 17 Tex. 62; Cochrane *v.* Middleton, 13 Tex. 275; Watts *v.* Johnson, 4 Tex. 311

64. McQueen *v.* Stewart, 7 Ind. 535; Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5; Pittsburgh, etc., R. Co. *v.* Geltmaker, 30 S. W. 394, 16 Ky. L. Rep. 861; Land *v.* Miller, 7 Tex. 463; Dickinson *v* Buskie, 59 Wis. 136, 17 N. W. 685.

65. *Alabama.*—Simpson *v.* Golden, 114 Ala. 336, 21 So. 990; Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Arizona.— Walker *v.* Gray, 6 Ariz. 359, 57 Pac. 614.

Arkansas.— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971; Merrick *v.* Britton, 26 Ark. 496.

California.— Bailey *v.* Richardson, 66 Cal. 416, 5 Pac. 910; Heath *v.* Scott, 65 Cal. 548, 4 Pac. 557; Dewey *v.* Frank, 62 Cal. 343; Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; Delmas *v.* Martin, 39 Cal. 555; Schellhous *v.* Ball, 29 Cal. 605; Klockenbaum *v.* Pierson, 22 Cal. 160.

Colorado.— Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Lee-Clark-Andreeson Hardware Co. *v.* Yankee, 9 Colo. App. 443, 48 Pac. 1050.

Georgia.— Boston Mercantile Co. *v.* Ould-Carter Co., 123 Ga. 458, 51 S. E. 466; Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Beckford *v.* Chipman, 44 Ga. 543; Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485.

Illinois.— S. K. Martin Lumber Co. *v.* Walsh, 81 Ill. App. 403; Toledo, etc., R. Co. *v.* Endres, 57 Ill. App. 69; Dueber Watch Case Mfg. Co. *v.* Lapp, 35 Ill. App. 372.

Indiana.— Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565; Working *v* Garn, 148 Ind. 546, 47 N. E. 951; Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58; Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Scheible *v.* Slagle, 89 Ind. 323; State *v.* Bottorff, 82 Ind. 538; McQueen *v.* Stewart, 7 Ind. 535; Pepin *v.* Lautman, 28 Ind. App. 74, 62 N. E. 60; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009.

Iowa.— Mehan *v.* Chicago, etc., R. Co., 55 Iowa 305, 7 N. W. 613; Hopper *v.* Moore, 42 Iowa 563; Dunlavey *v.* Watson, 38 Iowa 398.

Kansas.— Argentine *v.* Simmons, 59 Kan. 164, 52 Pac. 424; Beal *v.* Codding, 32 Kan. 107, 4 Pac. 180.

Kentucky.— Thompson *v.* Porter, 4 Bibb 70.

Maine.— Maynell *v.* Sullivan, 67 Me. 314.

Missouri.— James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Thiele *v.* Citizens' R. Co., 140 Mo. 319, 41 S. W. 800; Dalton *v.* Shaffner, 38 Mo. App. 165; Albert *v.* Seiler, 31 Mo. App. 247.

New Hampshire.— Willard *v.* Wetherbee, 4 N. H. 118.

New Mexico.— Romero *v.* Lopez, (1889) 21 Pac. 679; Romero *v.* Desmarais, 4 N. M. 367, 20 Pac. 787.

New York.— Dixson *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 302, 74 N. Y. Suppl. 49 [*reversing* 35 Misc. 422, 71 N. Y. Suppl. 969]; Rubenfeld *v.* Rabiner, 33 N. Y. App. Div. 374, 54 N. Y. Suppl. 68; Peck *v.* Hiler, 30 Barb. 655; Messenger *v.* New York Fourth Nat. Bank, 6 Daly 190; Berman *v.* Goldsand, 22 Misc. 735, 49 N. Y. Suppl. 1098; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 312, 20 N. Y. Suppl. 715 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Cole *v.* Fall Brook Coal Co., 10 N. Y. Suppl. 417; Tigue *v.* Annowski, 7 N. Y. Suppl. 9; Foster *v.* Easton, 2 N. Y. Suppl. 772; Seaman *v.* Koehler, 12 N. Y. St. 582. *Compare* Oats *v.* New York Dock Co., 99 N. Y. App. Div. 487, 90 N. Y. Suppl. 878 (where court had indicated in advance that movant should have been prepared to meet the evidence); Tyler *v.* Hoornbeck, 48 Barb. 197.

Pennsylvania. — Martin *v.* Marvine, 1 Phila. 280; Keim *v.* Maurer, 2 Woodw. 412.

Rhode Island.— Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989; Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

Tennessee.— Nellums *v.* Nashville, 106 Tenn. 222, 61 S. W. 88.

Texas.— Pickett *v.* Martin, (1891) 16 S. W. 1007; Love *v.* Breedlove, 75 Tex. 649, 13 S. W. 222 (especially if no reasonable ground to believe witness would attend); Dotson *v.* Moss, 58 Tex. 152; Kilgore *v.* Jordan, 17 Tex. 341; Presidio County *v.* Clarke, (Civ. App. 1905) 85 S. W. 475; Texas Cent. R. Co. *v.* Yarbro, 32 Tex. Civ. App. 246, 74 S. W. 357.

evidence admitted and the pleadings.[66] A new trial may be allowed for surprise at evidence, although no delay was asked for, if the movant, although ordinarily diligent in preparing his case, then knew of no other evidence to refute evidence by which he was surprised.[67] It seems too that where the evidence which occasioned the surprise was offered at the close of the trial, a new trial may be allowed, although a continuance was not asked for.[68]

c. Nonsuit or Dismissal Without Prejudice. Where a plaintiff was surprised at evidence, or dissatisfied with the case made by him, and a continuance was refused, he should ordinarily have taken a nonsuit or dismissed his case without prejudice.[69]

6. Probable Effect of Surprise or Accident and Result of New Trial — a. In General. Ordinarily a new trial will not be granted for surprise or accident unless it appears probable that except for the surprise or accident a different verdict

Vermont.— Briggs *v.* Gleason, 27 Vt. 114 (where failure of defendant to use deposition prevented use of deposition taken in rebuttal); Haskins *v.* Smith, 17 Vt. 263.

Washington.— Reeder *v.* Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; Pincus *v.* Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930.

United States.— Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210; Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Carr *v.* Gale, 5 Fed. Cas. No. 2,433, 1 Curt. 384.

England.— Caldwell *v.* Johnston, Ir. R. 6 C. L. 233.

Canada.— Gilbert *v.* Stockton, 12 N. Brunsw. 58; City Bank *v.* Strong, 7 U. C. C. P. 96 (exclusion of depositions); Longueuil *v.* Cushman, 24 U. C. Q. B. 602.

See 37 Cent. Dig. tit. "New Trial," § 198.

66. Aulbach *v.* Dahler, 4 Ida. 654, 43 Pac. 322; Tripp, etc., Boot, etc., Co. *v.* Martin, 45 Kan. 765, 26 Pac. 424; McCormick *v.* Goff, 2 Lanc. L. Rev. (Pa.) 193; Land *v.* Miller, 7 Tex. 463.

67. *Arkansas.*— Mutual L. Ins. Co. *v.* Parrish, 66 Ark. 612, 52 S. W 438.

California.— Rodriguez *v.* Comstock, 24 Cal. 85.

Illinois.— Felver *v.* Judd, 81 Ill. App. 529.

Iowa.— Alger *v.* Merritt, 16 Iowa 121.

Minnesota.— Russell *v.* Reed, 32 Minn. 45, 19 N. W. 86.

New York.— Seligman *v.* Sivin, 46 Misc. 58, 91 N. Y. Suppl. 395.

See 37 Cent. Dig. tit. "New Trial," § 198.

If the party surprised learns later during the trial of witnesses who will testify differently, he should ask for time to secure their attendance. Mehan *v.* Chicago, etc., R. Co., 55 Iowa 305, 7 N. W. 613.

Error in copy of record.— A new trial was granted because of an error in a certified copy of a lost record of which the movant had no knowledge when the copy was introduced in evidence, and for which therefore he had not asked a continuance. Farnham *v.* Jones, 32 Minn. 7, 19 N. W. 83.

68. Mutual L. Ins. Co. *v.* Parrish, 66 Ark. 612, 52 S. W. 438; Delmas *v.* Martin, 39 Cal. 555.

69. *California.*— Schellhous *v.* Ball, 29 Cal. 605; Live Yankee Co. *v.* Oregon Co., 7 Cal. 40.

Illinois.— Dueber Watch Case Mfg. Co. *v.* Lapp, 35 Ill. App. 372.

Indiana.— Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Scheible *v.* Slagle, 89 Ind. 323; Cummins *v.* Walden, 4 Blackf. 307.

Iowa.— Mehan *v.* Chicago, etc., R. Co., 55 Iowa 305, 7 N. W. 613; Hopper *v.* Moore, 42 Iowa 563.

Kansas.— Argentine *v.* Simmons, 59 Kan. 164, 52 Pac. 424; Tripp, etc., Boot, etc., Co. *v.* Martin, 45 Kan. 765, 26 Pac. 424.

Missouri.— Savoni *v.* Brashear, 46 Mo. 345; Dalton *v.* Shaffner, 38 Mo. App. 165; Bragg *v.* Moberly, 17 Mo. App. 221.

New York.— Oakley *v.* Sears, 7 Rob. 111; Brady *v.* Valentine, 3 Misc. 20, 21 N. Y. Suppl. 776 [*affirmed* in 144 N. Y. 698, 39 N. E. 856]; Leonard *v.* Germania F. Ins. Co., 2 Misc. 548, 23 N. Y. Suppl. 684, 23 N. Y. Civ. Proc. 155; Cole *v.* Fall Brook Coal Co., 10 N. Y. Suppl. 417; Tigue *v.* Annowski, 7 N. Y. Suppl. 9; People *v.* Marks, 10 How. Pr. 261; Depeyster *v.* Columbian Ins. Co., 2 Cai. 85.

Pennsylvania.— Withers *v.* Ralston, 3 Phila. 412; Hansell *v.* Lutz, 1 Phila. 340; Martin *v.* Marvine, 1 Phila. 280, at least if the statute of limitations has not run and defendant is within the jurisdiction.

Texas.— Pickett *v.* Martin, (1891) 16 S. W. 1007; Dotson *v.* Moss, 58 Tex. 152; Kilgore *v.* Jordan, 17 Tex. 341.

Washington.— Pincus *v.* Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930.

United States.— Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210.

England.— Turquand *v.* Dawson, 1 C. M. & R. 709, 5 Tyrw. 488.

Canada.— Rankin *v.* Waldon, 11 N. Brunsw. 220; Hooper *v.* Christoe, 14 U. C. C. P. 117; City Bank *v.* Strong, 7 U. C. C. P. 96; Longueuil *v.* Cushman, 24 U. C. Q. B. 602.

Sickness of witness.— Where the sickness of a witness for plaintiff prevented him from finishing the giving of his testimony, which was material to plaintiff's case, the latter should have taken a nonsuit. Depeyster *v.* Columbian Ins. Co., 2 Cai. (N. Y.) 85.

Limitations of rule.— The rule that plaintiff should submit to a nonsuit does not apply where the claim is barred by the statute of limitations or defendant is beyond the juris-

would have been rendered;[70] but, where a case has been tried without notice or out of regular order and in the absence of the unsuccessful party and his counsel, a new trial is sometimes allowed without such showing.[71] Nor will a new trial be granted ordinarily unless it will probably result in a changed verdict.[72] The smallness of the amount involved may influence the court in refusing a new trial.[73]

b. New Evidence. The absent evidence for which a new trial is asked,[74] or the evidence which it is proposed to offer on a new trial to overcome the effect of evidence by which the movant was surprised,[75] must be of such character and importance as will probably result in a different verdict. Ordinarily a new trial will be refused where the proposed new evidence is merely cumulative of evi-

diction of the court. Martin *v.* Marvine, 1 Phila. (Pa.) 280.

70. Patterson *v.* Ely, 19 Cal. 28 (construction of pleading); Martin *v.* Hill, 3 Utah 157, 2 Pac. 62 (surprise at ruling); Bramhall *v.* U. S., 6 Ct. Cl. 238 (insanity of party); Tharpe *v.* Stallwood, 1 D. & L. 24, 7 Jur. 492, 12 L. J. C. P. 241, 5 M. & G. 760, 6 Scott N. R. 715, 44 E. C. L. 397. See also Coolidge *v.* Taylor, 79 Vt. 528, 65 Atl. 582. And see *supra*, III, H, 3, a, (III).

Where the evidence as to which no surprise is claimed is sufficient to support the verdict, a new trial may be refused. Hartwright *v.* Badham, 11 Price 383; Holme *v.* Clark, 10 Wkly. Rep. 527.

71. Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729 (trial had in absence of party and counsel in breach of agreement to continue case); Williams *v.* Williams, 2 Dowl. P. C. 350 (trial without notice); Moore *v.* Hicks, 6 U. C. Q. B. 27 (trial of cause out of turn). See also Donallen *v.* Lennox, 6 Dana (Ky.) 89, where party forced unreasonably to trial by irregular calling of docket.

72. Haber *v.* Lane, 45 Miss. 608; Molson's Bank *v.* Bates, 7 U. C. C. P. 312 (failure to defend); Shipman *v.* Stevens, 6 U. C. C. P. 17. *Compare* New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170, as to absence from trial by accident.

Absence of counsel.—A new trial will not be allowed because the movant's attorney was absent from the trial, unless it seems probable that a new trial will probably result in a different verdict. Porter *v.* Triola, 84 Ill. 325; New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170. *Compare* Mitchell *v* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729.

Defendant's failure to prove a statute of another state about which no point was made at the trial is not ground for refusing him a new trial on other grounds. Brick *v.* Campbell, 50 N. J. L. 282, 13 Atl. 255 [*affirmed* in 51 N. J. L. 563, 20 Atl. 60].

73. Wightman *v.* Kruger, 23 R. I. 78, 49 Atl. 395; Harnden *v.* Anchor, 6 U. C. C. P. 517; Petrie *v.* Taylor, 3 U. C. Q. B. 457.

The English rule against allowing new trials on the evidence where the damages awarded are under £20 has been held to apply to cases of surprise. Branson *v.* Didsbury, 12 A. & E. 631, 9 Dowl. P. C. 199, 4 P. & D. 441, Wils. P. C. 46, 40 E. C. L. 315. See also Watson *v.* Reeve, Arn. 388, 5 Bing. N. Cas. 112, 7 Dowl. P. C. 127, 2 Jur. 991, 8 L. J. C. P. 36, 6 Scott 783, 35 E. C. L. 69.

74. Hargis *v.* Price, 4 Dana (Ky.) 79; Doe *v.* Yager, 5 U. C. Q. B. 584.

75. *California.*—Mazor *v.* Springer, (1904) 78 Pac. 474; Brooks *v.* Douglass, 32 Cal. 208.

Colorado.— Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

Connecticut.— Norwich, etc., R. Co. *v.* Cahill, 18 Conn. 484.

Georgia.— Davis *v.* Bagley, 99 Ga. 142, 25 S. E. 20 (mistake by witness); Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923; Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156.

Indiana.— Ruger *v.* Bungan, 10 Ind. 451.

Kentucky.— Theobald *v.* Hare, 8 B. Mon. 39; Morgan *v.* Marshall, 7 J. J. Marsh. 316.

Massachusetts.— Cutler *v.* Rice, 14 Pick. 494.

Mississippi.— Haber *v.* Lane, 45 Miss. 608.

Missouri.— Gidionsen *v.* Union Depot R. Co., 129 Mo. 392, 31 S. W. 800; Howell *v.* Howell, 37 Mo. 124; O'Conner *v.* Duff, 30 Mo. 595.

Nevada.— McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512.

New Hampshire.— Handy *v.* Davis, 38 N. H. 411.

New Jersey.— Read *v.* Barker, 30 N. J. L. 378 [*affirmed* in 32 N. J. L. 477].

Ohio.— Stites *v.* McKibben, 2 Ohio St. 588.

Texas.— Ellis *v.* Blanks, (Civ. App. 1894) 25 S. W. 309, where deposition of party unavoidably absent was used.

Wisconsin.— O'Brien *v.* Home Ins. Co., 79 Wis. 399, 48 N. W. 714.

United States.— Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867 [*reversed* on other grounds in 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264]; U. S. *v.* Bellaire First Nat. Bank, 86 Fed. 861 (where the testimony of the new witness was contradictory); Stellwagen *v.* Life Assoc. of America, 22 Fed. Cas. No. 13,359, 14 Blatchf. 349.

England.— See Branson *v.* Didshury, 12 A. & E. 631, 9 Dowl. P. C. 199, 4 P. & D. 441, Wils. P. C. 46, 40 E. C. L. 315, as to verdict under £20.

Canada.—Magee *v.* Wetmore, 10 N. Brunsw. 230 (mistake by witness); Tisdale *v.* Hartt,

dence actually introduced by the movant on the trial,[76] or is merely impeaching in its character.[77] It is no objection, however, to the allowance of a new trial that new evidence of a controlling character will impeach, incidentally, the witness whose testimony surprised the movant.[78]

I. Newly Discovered Evidence[79] — **1. In General.** Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial.[80] But

9 N. Brunsw. 257; Young *v.* Moderwell, 14 U. C. C. P. 143; Moore *v.* Gurney, 22 U. C. Q. B. 209.

See 37 Cent. Dig. tit. "New Trial," § 200. And see *infra*, III, I, 5, b, (I).

76. *Illinois.*— Heenan *v.* Redmen, 101 Ill. App. 603.

Indiana.— Schlotter *v.* State, 127 Ind. 493, 27 N. E. 149; Mooney *v.* Kinsey, 90 Ind. 33; Atkisson *v.* Martin, 39 Ind. 242.

Iowa.— Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14; Key *v.* Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614.

Missouri.— Wells *v.* Sanger, 21 Mo. 354; Albert *v.* Seiler, 31 Mo. App. 247.

New Jersey.— Read *v.* Barker, 30 N. J. L. 378 [*affirmed* in 32 N. J. L. 477].

New York.— Gawthrop *v.* Leary, 9 Daly 353.

Canada.— Howarth *v.* McGugan, 23 Ont. 396.

And see *infra*, III, I, 5, b, (VI).

77. Slade *v.* McClure, 76 Ill. 319; Beach *v.* Tooker, 10 How. Pr. (N. Y.) 297; Brugh *v.* Shanks, 5 Leigh (Va.) 598; Magnay *v.* Knight, Drinkw. 13, 4 Jur. 1088, 1 M. & G. 944, 2 Scott N. R 64, 39 E. C. L. 1111. And see *infra*, III, I, 5, b, (VII).

78. Levy *v.* Brown, 11 Ark. 16; McFarland *v.* Clark, 9 Dana (Ky.) 134, denial of signature previously admitted.

79. As ground for: Equitable relief against judgment see JUDGMENTS. New trial in criminal prosecutions see CRIMINAL LAW. New trial in ejectment see EJECTMENT. New trial in equity see EQUITY. Opening or vacating judgment see JUDGMENT.

Requisites of application in general see *infra*, IV, H, 3, i.

Time for application see *infra*, IV, D, 3, b.

80. In the following cases new trials were granted:

Alabama.— Cox *v.* Mobile, etc., R. Co., 44 Ala. 611.

California.— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157; Heintz *v.* Cooper, 104 Cal. 668, 38 Pac. 511; Kenezleber *v.* Wahl, 92 Cal. 202, 28 Pac. 225; People *v.* Carty, (1884) 3 Pac. 609; Jones *v.* Singleton, 45 Cal. 92.

Colorado.— Wells, etc., Co. *v.* Gunn, 33 Colo. 217, 79 Pac. 1029.

Georgia.— Florida Cent., etc., R. Co. *v.* Grant, 110 Ga. 328, 35 S. E. 271; Hays *v.* Westbrook, 96 Ga. 219, 22 S. E. 893 (papers of decedent found in unusual place); Atlantic Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24; Gregory *v.* Harrell, 88 Ga. 170, 14 S. E. 186; Holdridge *v.* Hamilton, 37 Ga. 676; Roe *v.* Doe, 34 Ga. 492; Clark *v* Carter, 12 Ga. 500, 58 Am. Dec. 485.

Illinois.—Cairo, etc., R. Co. *v.* Schumacker, 77 Ill. 583; Wilder *v.* Greenlee, 49 Ill. 253.

Indiana.— Bronson *v.* Hickman, 10 Ind. 3; Oldfather *v.* Zent, 14 Ind. App. 89, 41 N. E. 555.

Iowa.— Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43 (slander); Van Horn *v.* Redmon, 67 Iowa 689, 25 N. W. 881; Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217; Hedrick *v.* Eno, 42 Iowa 411; Deere *v.* McConnells, 15 Iowa 269.

Kentucky.— Duncan *v.* Allender, 110 Ky. 826, 62 S. W. 851, 23 Ky. L. Rep. 256; Louisville, etc., R. Co. *v.* Whitley County Ct., 100 Ky. 413, 38 S. W. 678, 18 Ky. L. Rep. 868; Skinner *v.* Walker, 98 Ky. 729, 34 S. W. 233, 17 Ky. L. Rep. 1286.

Louisiana.— Buckley *v.* Seymour, 30 La. Ann. 1341; Robison *v.* Howell, 22 La. Ann. 524; Stone *v.* Rose, 2 La. Ann. 225.

Maine.— Putnam *v.* Woodbury, 68 Me. 58.

Massachusetts.— Wattes *v.* Howard, 7 Metc. 478.

Minnesota.—McDonald *v.* Smith, 101 Minn. 476, 112 N. W. 627.

Mississippi.— Kane *v.* Burrus, 2 Sm. & M. 313; Vardeman *v.* Byrne, 7 How. 365.

Missouri.— McLane *v.* Harris, 1 Mo. 700.

Nebraska.— McDonald *v.* Early, 24 Nebr. 818, 40 N. W. 410; Smith *v.* Groves, 24 Nebr. 545, 39 N. W. 597.

New Jersey.— Van Riper *v.* Dundee Mfg. Co., 33 N. J. L. 152.

New York.— Beers *v.* West Side R. Co., 101 N. Y. App. Div. 308, 91 N. Y. Suppl. 957 (after three trials); Berger Mfg. Co. *v.* Block, 69 N. Y. App. Div. 186, 74 N. Y. Suppl. 753; Phelps *v.* Delmore, 4 Misc. 508, 26 N. Y. Suppl. 278; People *v.* Holmes, 52 N. Y. Suppl. 939; Upington *v.* Keenan, 21 N. Y. Suppl. 699; Wiedersum *v.* Naumann, 10 Abb. N. Cas. 149, 62 How. Pr. 369 (especially where rights of infants are injuriously affected by misconduct of their attorney); Doe *v.* Roe, 1 Johns. Cas. 402.

Ohio.— Moore *v.* Coates, 35 Ohio St. 177.

Tennessee.— Demonbreun *v.* Walker, 4 Baxt. 199.

Texas.— Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31; Hilburn *v.* Harris, 1 Tex. Civ. App. 395, 21 S. W. 572.

Vermont.— Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539; Kirby *v.* Waterford, 14 Vt. 414.

Wisconsin.— Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Carroll *v.* More, 30 Wis. 574; Dierolff *v.* Winterfield, 26 Wis. 175; Knox *v.* Bigelow, 15 Wis. 415; Blood *v.* Whitman, 3 Pinn. 54, 3 Chandl. 54.

United States.— Usher *v.* Scranton R. Co.,

applications for new trials for this cause are not favored.[81] A new trial will not be allowed to establish a technical right of action, where the substantial rights of the parties have been adjudicated fairly.[82]

2. Failure to Produce Other Evidence. Where the unsuccessful party might, with reasonable diligence, have produced other testimony at the trial of the same character and to the same point as that alleged to have been newly discovered, a new trial should be refused.[83] If he had personal knowledge of the matter and

132 Fed. 405 (although without such newly discovered evidence the court would be obliged to render judgment for defendant for insufficiency of evidence to sustain verdict for plaintiff); Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348; Marshall *v.* Union Ins. Co., 16 Fed. Cas. No. 9,134, 2 Wash. 411.

England.— Weak *v.* Callaway, 7 Price 677, 21 Rev. Rep. 780, in ejectment where verdict was for defendant.

Canada.— Downey *v.* Patterson, 38 U. C. Q. B. 513.

See 37 Cent. Dig. tit. "New Trial," §§ 201–203.

Compare Ordway *v.* Haynes, 47 N. H. 9, where right to new trial on review of exists.

81. *California.*— Arnold *v.* Skaggs, 35 Cal. 684; Baker *v.* Joseph, 16 Cal. 173.

Georgia.— Norman *v.* Goode, 121 Ga. 449, 49 S. E. 268 (especially on extraordinary motion); Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; Erskine *v.* Duffy, 76 Ga. 602; Morgan *v.* Hardee, 71 Ga. 736 (especially after death of successful party whose character was involved); Wallace *v.* Tumlin, 42 Ga. 462; Grubb *v.* Kalb, 37 Ga. 459; Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485.

Indiana.— Zimmerman *v.* Weigel, 158 Ind. 370, 63 N. E. 566; Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Hines *v.* Driver, 100 Ind. 315; Swift *v.* Wakeman, 9 Ind. 552; Coe *v.* Givan, 1 Blackf. 367; Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543.

Kentucky.—Adams *v.* Ashby, 2 Bibb 287.

Louisiana.— Burton *v.* Maltby, 18 La. 531; Arpine *v.* Harrison, 6 Mart. N. S. 326; Hernandez *v.* Garetage, 4 Mart. N. S. 419.

Michigan.— Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

Minnesota.— Lampsen *v.* Brander, 28 Minn. 526, 11 N. W. 94.

Missouri.— Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Miller *v.* Whitson, 40 Mo. 97; Callahan *v.* Caffarata, 39 Mo. 136; Howard *v.* St. Louis Terminal R. Assoc., 110 Mo. App. 574, 85 S. W. 608; Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82.

Montana.— *In re* Colbert, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439.

New Hampshire.— Ordway *v.* Haynes, 47 N. H. 9.

New York.— Baily *v.* Hornthal, 1 N. Y. App. Div. 44, 36 N. Y. Suppl. 1082; *In re* Kranz, 41 Hun 463; Weston *v.* New York El. R. Co., 42 N. Y. Super. Ct. 156 [*affirmed* in 73 N. Y. 595]; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514].

North Carolina.— Sikes *v.* Parker, 95 N. C. 232; Simmons *v.* Mann, 92 N. C. 12; Henry *v.* Smith, 78 N. C. 27.

North Dakota.— Braithwaite *v.* Aiken, 2 N. D. 57, 49 N. W. 419.

Ohio.— Moore *v.* Coates, 35 Ohio St. 177.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Texas.— Mitchell *v.* Bass, 26 Tex. 372; Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in (1900) 58 S. W. 951]; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796.

Wisconsin.— Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Conradt *v.* Sixbee, 21 Wis. 383.

United States.— Fuller *v.* Harris, 29 Fed. 814.

England.— Thurtell *v.* Beaumont, 1 Bing. 339, 2 L. J. C. P. O. S. 4, 8 Moore C. P. 612, 25 Rev. Rep. 644, 8 E. C. L. 538; Caldwell *v.* Johnston, Ir. R. 6 C. L. 233.

Canada.— Doe *v.* Baker, 8 N. Brunsw. 591; Moser *v.* Snarr, 45 U. C. Q. B. 428; Robinson *v.* Rapelje, 4 U. C. Q. B. 289.

See 37 Cent. Dig. tit. "New Trial," §§ 201, 203.

Verdict affecting character of applicant.— A new trial will not be granted simply because the verdict seriously affects the character of the applicant. Lewis *v.* Trussler, 2 C. L. R. 727. *Compare* Shields *v.* Boucher, 1 De G. & Sm. 40, 63 Eng. Reprint 962.

82. McLain *v.* Lawson, 25 Iowa 277.

83. *Connecticut.*— Travelers' Ins. Co. *v.* Savage, 43 Conn. 187.

Georgia.— Norman *v.* Goode, 121 Ga. 449, 49 S. E. 268; Lamb *v.* Murray, 54 Ga. 218.

Illinois.— Dyk *v.* De Young, 133 Ill. 82, 24 N. E. 520; Crozier *v.* Cooper, 14 Ill. 139.

Iowa.— Whittlesey *v.* Burlington, etc., R. Co., 121 Iowa 597, 90 N. W. 516, 97 N. W. 66.

Kentucky.— Clarke *v.* Rutledge, 2 A. K. Marsh. 381; Ripperdan *v.* Scott, 1 A. K. Marsh. 151; Louisville Ins. Co. *v.* Hoffman, 70 S. W. 403, 24 Ky. L. Rep. 980.

Louisiana.— Valega *v.* Broussard, 3 La. Ann. 145.

Mississippi.— Bledsoe *v.* Little, 4 How. 13.

Missouri.— Hanley *v.* Life Assoc. of America, 69 Mo. 380 [*affirming* 4 Mo. App. 253].

New Jersey.—Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819.

was a competent witness, he should have testified in his own behalf.[84] New expert testimony,[85] or new evidence of a custom,[86] is not ground for a new trial.

3. Time of Discovery — a. In General. A new trial on the ground of newly discovered evidence will not be granted for evidence that was known to the unsuccessful party at the time of the trial.[87] Evidence then known to one of

Pennsylvania.— Slattery *v.* Supreme Tent K. M. W., 19 Pa. Super. Ct. 108.

Tennessee.— Kannon *v.* Galloway, 2 Baxt. 230.

Texas.— Johnson *v.* Brown, (Civ. App. 1901) 65 S. W. 485; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

Wisconsin.— Ketchum *v.* Breed, 66 Wis. 85, 26 N. W. 271; Herman *v.* Mason, 37 Wis. 273.

See also *supra*, III, H, 3, f, (II), (C).

84. Watkins *v.* Paine, 57 Ga. 50; Mead *v.* Constans, 5 Minn. 171; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

85. *Iowa.*— Whittlesey *v.* Burlington, etc., R. Co., 121 Iowa 597, 90 N. W. 516, 97 N. W. 66.

Kansas.— Manwell *v.* Turner, 25 Kan. 426.

Maine.— Hunter *v.* Randall, 69 Me. 183; Howard *v.* Grover, 28 Me. 97, 48 Am. Dec. 478.

New York.— Sullivan *v.* Dahlman, 1 N. Y. City Ct. 475.

Tennessee.— Kannon *v.* Galloway, 2 Baxt. 230.

Canada.— Moser *v.* Snarr, 45 U. C. Q. B. 428.

Compare Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565; Lewis *v.* Crow, 69 Ind. 434.

86. Adam *v.* Hay, 7 N. C. 149.

87. *Alaska.*— Chase *v.* Alaska Fish, etc., Co., 2 Alaska 82; Marks *v.* Shoup, 2 Alaska 66.

Arizona.— Ryder *v.* Leach, 3 Ariz. 129, 77 Pac. 490.

Arkansas.— Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181; Merrick *v.* Britton, 26 Ark. 496; Bourland *v.* Skimnee, 11 Ark. 671; Robins *v.* Fowler, 2 Ark. 133; Burriss *v.* Wise, 2 Ark. 33.

California.— People *v.* Lyle, (1884) 4 Pac. 977; Baker *v.* Joseph, 16 Cal. 173; Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Connecticut.— Parsons *v.* Platt, 37 Conn. 563.

Georgia.— Norman *v.* Goode, 121 Ga. 499, 49 S. E. 268; McNatt *v.* McRae, 117 Ga. 898, 45 S. E. 248; Newman *v.* Malsby, 108 Ga. 339, 33 S. E. 997; Cordele Guano Co. *v.* Carter, 94 Ga. 702, 19 S. E. 827; Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991; Statham *v.* Shellnut, 86 Ga. 377, 12 S. E. 641; Robinson *v.* Veal, 79 Ga. 633, 7 S. E. 159; Huntington *v.* Bonds, 68 Ga. 23; Shiels *v.* Lamar, 58 Ga. 590; Morgan *v.* Taylor, 55 Ga. 224; Wallace *v.* Tumlin, 42 Ga. 462; O'Barr *v.* Alexander, 37 Ga. 195; Moore *v.* Ulm, 34 Ga. 565; Carlisle *v.* Tidwell, 16 Ga. 33.

Illinois.— Dyk *v.* De Young, 133 Ill. 82, 24 N. E. 520; Crozier *v.* Cooper, 14 Ill. 139; Bracewell *v.* Self, 109 Ill. App. 140; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Chicago, etc., R. Co. *v.* Stewart, 104 Ill. App. 37 [*affirmed* in 203 Ill. 223, 67 N. E. 830]; Possehl *v.* Arnold, 78 Ill. App. 590; Smith *v.* Belt, 31 Ill. App. 96.

Indiana.—Carver *v.* Compton, 51 Ind. 451; Simpson *v.* Wilson, 6 Ind. 474; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057.

Iowa.— Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460; Sully *v.* Kuehl, 30 Iowa 275; Lisher *v.* Pratt, 9 Iowa 59; Mays *v.* Deaver, 1 Iowa 216.

Kansas.— Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Sexton *v.* Lamb, 27 Kan. 432; Swartzel *v.* Rogers, 3 Kan. 374; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504; Comstock Castle Stove Co. *v.* Galland, 6 Kan. App. 833, 49 Pac. 692.

Kentucky.— Bronson *v.* Green, 2 Duv. 234; Higden *v.* Higden, 2 A. K. Marsh. 42; Nisbet *v.* Wells, 76 S. W. 120, 25 Ky. L. Rep. 511; Richardson *v.* Huff, 43 S. W. 454, 19 Ky. L. Rep. 1428.

Louisiana.— Long *v.* Robinson, 5 La. Ann. 627; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Rhodes *v.* Beaman, 10 La. 363; Stafford *v.* Callihan, 3 Mart. N. S. 124; Innis *v.* Ware, 1 Mart. N. S. 643; Smith *v.* Crawford, 10 Mart. 81.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241; Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900; Trask *v.* Unity, 74 Me. 208; Mardon *v.* Jordan, 65 Me. 9; Ham *v.* Ham, 39 Me. 263.

Massachusetts.— Gardner *v.* Gardner, 2 Gray 434.

Michigan.— Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

Minnesota.— Broat *v.* Moor, 44 Minn. 468, 47 N. W. 55; Knoblauch *v.* Kronschnabel, 18 Minn. 300.

Mississippi.—Garnett *v.* Kirkman, 41 Miss. 94.

Missouri.— Southern Express Co. *v.* Moeller, 85 Mo. 208; Goff *v.* Mulholland, 33 Mo. 203; Mercantile Bank *v.* Hawe, 33 Mo. App. 214.

Montana.— Spencer *v.* Spencer, 31 Mont. 631, 79 Pac. 320; Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513.

Nebraska.— McNeal *v.* Hunter, 72 Nebr. 579, 101 N. W. 236.

New York.— Hagen *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914 [*reversing* 44 Misc. 540, 90 N. Y. Suppl. 125]; Ward *v.* Ward, 67 N. Y. App. Div. 121, 73 N. Y. Suppl. 450; Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Smith *v.* Rentz, 73 Hun 195, 25 N. Y. Suppl. 914; Price *v.* Price, 33 Hun 432; Fellows *v.* Emperor, 13 Barb. 92; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct.

joint parties is not newly discovered.[88] That the movant, having knowledge of the evidence at the time of the trial, did not inform his counsel of it,[89] or did not

31; Hagen *v.* New York Cent., etc., R. Co., 44 Misc. 540, 90 N. Y. Suppl. 125 [*reversed* on other grounds in 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914]; Jones *v.* Lustig, 37 Misc. 834, 76 N. Y. Suppl. 975; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Huse, etc., Ice, etc., Co. *v.* Wielar, 86 N. Y. Suppl. 24; Conable *v.* Smith, 19 N. Y. Suppl. 446; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 401; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432; Dodge *v.* New York Steamship Co., 6 Abb. Pr. N. S. 451, 37 How. Pr. 524; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]; Hatfield *v.* Macy, 52 How. Pr. 193; Messenger *v.* Fourth Nat. Bank, 48 How. Pr. 542 [*affirmed* in 6 Daly 190].

North Carolina.— Henry *v.* Smith, 78 N. C. 27.

North Dakota.— Goose River Bank *v.* Gilmore, 3 N. D. 188, 54 N. W. 1032.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Pennsylvania.— Moore *v.* Philadelphia Bank, 5 Serg. & R. 41; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235; Evans *v.* Bitner, 4 Lanc. Bar, Sept. 7, 1872; Ream *v.* Oldweiler, 2 Leg. Gaz. 147; Blum *v.* Warner, 1 Leg. Rec. 113; Withers *v.* Ralston, 3 Phila. 412; Fey *v.* Ryan, 3 Phila. 406; Marsh *v.* Mosher, 1 Woodw. 218.

Rhode Island.— Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876; Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989.

South Carolina.— Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719.

Tennessee.— Cozart *v.* Lisle, Meigs 65.

Texas.— Richards *v.* Smith, 67 Tex. 610, 4 S. W. 571; Hatchett *v.* Conner, 30 Tex. 104; Frizzell *v.* Johnson, 30 Tex. 31; Harrell *v.* Hill, 15 Tex. 270; Madden *v.* Shapard, 3 Tex. 49; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; El Paso Southwestern R. Co. *v.* Barrett, (Civ. App. 1907) 101 S. W. 1025; Campbell Real Estate Co. *v.* Wiley, (Civ. App. 1904) 83 S. W. 251; Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605; San Antonio, etc., R. Co. *v.* Moore, 31 Tex. Civ. App. 371, 72 S. W. 226; McBride *v.* Puckett, (Civ. App. 1901) 66 S. W. 242; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489; Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in (1900) 58 S. W. 951]; Pride *v.* Whitefield, (Civ. App. 1899) 51 S. W. 1100; State *v.* Zanco, 18 Tex. Civ. App. 127, 44 S. W. 527; Primm *v.* Mensing, 14 Tex. Civ. App. 395, 38 S. W. 382; Wisson *v.* Baird, 1 Tex. App. Civ. Cas. § 709; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

Vermont.—Brainard *v.* Morse, 47 Vt. 320; Bradish *v.* State, 35 Vt. 452; Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Swisher *v.* Malone, 31 W. Va. 442, 7 S. W. 439; Markham *v.* Boyd, 22 Gratt. 544; Brown *v.* Speyers, 20 Gratt. 296.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Wilson *v.* Plank, 41 Wis. 94.

United States.— Fikes *v.* Bentley, 9 Fed. Cas. No. 4,785*a*, Hempst. 61; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 793; Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14; Vose *v.* Nayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

Canada.— Smith *v.* Neill, 9 N. Brunsw. 105; Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500.

See 37 Cent. Dig. tit. "New Trial," §§ 205, 206.

That the unsuccessful party lived in another state is not usually an excuse for want of diligence in discovering evidence. Grubbs *v.* Collins, 54 Miss. 485.

Where evidence was discovered by a party some time before the court made its finding, but no attempt was made to have the court consider the evidence before the finding was announced, it was not newly discovered, so as to constitute a ground for a new trial. Burk *v.* Matthews Glass Co., (Ind. App. 1907) 81 N. E. 88.

88. Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191; Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Berry *v.* Daily, 30 Ind. 183; Smith *v.* Neill, 9 N. Brunsw. 105.

Evidence not known to single officer or attorney.— It is not sufficient that a single officer or attorney of a corporation did not know of the alleged newly discovered evidence. Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191; Campbell Real Estate Co. *v.* Wiley, (Tex. Civ. App. 1904) 83 S. W. 251.

89. *Georgia.*— Gibson *v.* Williams, 39 Ga. 660; O'Barr *v.* Alexander, 37 Ga. 195.

Iowa.— Robins *v.* Modern Woodmen of America, 127 Iowa 444, 103 N. W. 375; State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070; Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635; Roziene *v.* Wolf, 43 Iowa 393.

Kansas.— Thisler *v.* Miller, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302; Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255. *Compare* Continental Ins. Co. *v.* Hillmer, 42 Kan. 275, 287, 21 Pac. 1044, where party foreign corporation.

Kentucky.— Richardson *v.* Huff, 43 S. W. 454, 19 Ky. L. Rep. 1428.

Louisiana.— Chew *v.* Rapides Police Jury, 2 La. Ann. 796; Doat *v.* Maltby, 2 La. Ann. 583 (although party absent from state at time of trial); Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Williams *v.* Brashear, 16 La. 77; Stafford *v.* Calliham, 3 Mart. N. S. 124; Innis *v.* Ware, 1 Mart. N. S. 643.

know that the evidence or witness was competent,[90] does not authorize the allowance of a new trial.

b. Absence of Witness or Evidence or Incompetency of Witness — (I) *In General.* Facts known to the movant at the time of the trial are not newly discovered because he did not then know the whereabouts of a witness who can testify thereto,[91] or because of the removal since the trial of the incompetency of a witness to such facts whose incompetency might have been removed by the applicant in time to have permitted him to testify.[92]

(II) *Necessity of Application For Relief at Trial.* Where the movant was unable to procure the attendance at the trial of material witnesses whose testimony was then known to him,[93] where such witnesses absented themselves during the trial,[94] where written evidence was lost or missing at the time of the trial,[95] he must have asked for a continuance or delay to enable him to produce such witnesses or evidence. If the evidence which it is proposed to offer on a new trial to refute evidence by which the movant was surprised at the trial was then unknown to him, a request for a delay or continuance was unnecessary.[96]

c. Discovery During Trial. Evidence discovered during the progress of the trial must have been offered, if possible, although out of the regular order of proof,[97]

Maine.— Keen *v.* Sprague, 3 Me. 77.

Missouri.— Madden *v.* Paroneri Realty Co., 75 Mo. App. 358.

Nebraska.— Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709.

Texas.— Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264; King *v.* Hill, (Civ. App. 1903) 75 S. W. 550; Missouri, etc., R. Co. *v.* Rack, 21 Tex. Civ. App. 667, 52 S. W. 988, known to other agents employed to secure evidence.

United States.— Fikes *v.* Bentley, 9 Fed. Cas. No. 4,785*a*, Hempst. 61.

See 37 Cent. Dig. tit. "New Trial," § 206. See also *supra*, III, H, 1, c, (I).

90. Gibson *v.* Williams, 39 Ga. 660; Hoffmeyer *v.* White, 2 La. Ann. 597.

91. Kendall *v.* Limberg, 69 Ill. 355; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 401; Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485.

92. Franklin Bank *v.* Pratt, 31 Me. 501.

93. *California.*—Scanlan *v.* San Francisco, etc., R. Co., 128 Cal. 586, 61 Pac. 271.

Georgia.— Newman *v.* Malsby, 108 Ga. 339, 33 S. E. 997.

Illinois.— Tobin *v.* People, 101 Ill. 121; Kendall *v.* Limberg, 69 Ill. 355.

Indiana.— Fleming *v.* McClaflin, 1 Ind. App. 537, 27 N. E. 875.

Iowa.— Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324; Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460; Hopper *v.* Moore, 42 Iowa 563; Mays *v.* Deaver, 1 Iowa 216.

Massachusetts.— See Damon *v.* Carrol, 167 Mass. 198, 45 N. E. 85, as to lack of diligence in obtaining amendment of record used in evidence.

Minnesota.—Hendrickson *v.* Tracy, 53 Minn. 404, 55 N. W. 622; Ward *v.* Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187.

Missouri.— Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97.

Nebraska.— McNeal *v.* Hunter, 72 Nebr. 579, 101 N. W. 236.

New Jersey.— Sheppard *v.* Sheppard, 10 N. J. L. 250.

New York.— Ward *v.* Ward, 67 N. Y. App. Div. 121, 73 N. Y. Suppl. 450; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 401.

South Dakota.— Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822.

Texas.— Richards *v.* Smith, 67 Tex. 610, 4 S. W. 571; Hatchett *v.* Conner, 30 Tex. 104; Gregg *v.* Bankhead, 22 Tex. 245; Johnson *v.* Brown, (Civ. App. 1901) 65 S. W. 485; Gregory *v.* Southern Pac. R. Co., 2 Tex. Civ. App. 279, 21 S. W. 417, where movant surprised at testimony of his witness.

Virginia.— Gordon *v.* Harvey, 4 Call 450.

Washington.— Dumontier *v.* Stetson, etc., Mill Co., 39 Wash. 264, 81 Pac. 693.

Wisconsin.— Dingman *v.* State, 48 Wis. 485, 4 N. W. 668.

See 37 Cent. Dig. tit. "New Trial," § 207. See also *supra*, III, H, 5, b, (IV).

Whereabouts of witnesses unknown.—Where the existence of certain evidence is known, it is not sufficient excuse for not asking a continuance to obtain it that the whereabouts of the witnesses were not known. Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485.

Where the movant knew that an absent person had conversed with his adversary about the matters in litigation, he should have asked for a continuance, although he did not then know to what such person could testify. Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324.

94. Parker *v.* Martin, 68 Ga. 453.

95. Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; McLain *v.* Lawson, 25 Iowa 277; Hanley *v.* Blanton, 1 Mo. 49. See also Oakes *v.* Prather, (Tex. Civ. App. 1904) 81 S. W. 557 (as to data to refresh memory of witness); Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500.

96. Keister *v.* Rankin, 34 N. Y. App. Div. 288, 54 N. Y. Suppl. 274 [*reversing* 29 N. Y. App. Div. 539, 51 N. Y. Suppl. 634]. And see *supra*, III, H, 5, b, (VI).

97. *California.*—Weinburg *v.* Somps, (1893) 33 Pac. 341; Berry *v.* Metzler, 7 Cal. 418.

and even during or after argument,[98] or, it seems, after the submission of the case to the jury.[99] Where necessary, a delay must have been asked for by the movant to enable him to procure such evidence,[1] and, where possible, subpœnas must have been issued and served upon the necessary witnesses.[2] Where it was discovered by the movant during the trial that an absent person had knowledge of a transaction in controversy, any necessary delay must have been requested to procure his testimony, although the movant did not then know to what such person could testify.[3]

4. Diligence in Discovering and Producing Evidence — a. In General.[4] An applicant for a new trial on the ground of newly discovered evidence must have used ordinary diligence to discover and produce the evidence at the trial.[5]

Colorado.— Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191.

Kansas.— Swartzel *v.* Rogers, 3 Kan. 374.

South Carolina.— Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719.

Tennessee.—Nashville, etc., R. Co. *v.* Jones, 100 Tenn. 512, 45 S. W. 681.

Texas.— Oakes *v.* Prather, (Civ. App. 1904) 81 S. W. 557.

Virginia.— Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830.

98. Fleet *v.* Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563; San Antonio *v.* Kreusel, 17 Tex. Civ. App. 594, 43 S. W. 615.

99. Oakes *v.* Prather, (Tex. Civ. App. 1904) 81 S. W. 557.

1. *California.*— Weinburg *v.* Somps, (1893) 33 Pac. 341; Klockenbaum *v.* Pierson, 22 Cal. 160.

Indiana.—Fleming *v.* McClaflin, 1 Ind. App. 537, 27 N. E. 875.

Iowa.— Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460.

Montana.— Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513.

New York.— Briel *v.* Buffalo, 68 Hun 219, 22 N. Y. Suppl. 845 [*reversed* on other grounds in 144 N. Y. 163, 38 N. E. 977]; Van Tassel *v.* New York, etc., R. Co., 1 Misc. 312, 20 N. Y. Suppl. 715.

Texas.— San Antonio Foundry Co. *v.* Drish, (Civ. App. 1905) 85 S. W. 440; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518; Gregory *v.* Southern Pac. R. Co., 2 Tex. Civ. App. 279, 21 S. W. 417.

Virginia.— Wright *v.* Agelasto, 104 Va. 159, 51 S. E. 191.

United States.— Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

See also *supra*, III, H, 5, b, (IV).

2. *California.*— Weinburg *v.* Somps, (1893) 33 Pac. 341.

Indiana.— Fleming *v.* McClaflin, 1 Ind. App. 537, 27 N. E. 875.

Kentucky.— Illinois Cent. R. Co. *v.* McManus, 67 S. W. 1000, 24 Ky. L. Rep. 81.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343.

Texas.— San Antonio Foundry Co. *v.* Drish, (Civ. App. 1905) 85 S. W. 440.

3. Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324; Simonowitz *v.* Schwartz, 73 N. Y. App. Div. 489, 77 N. Y. Suppl. 209; Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736 [*affirmed* in 35 N. Y. App. Div. 632, 55 N. Y. Suppl. 1148].

4. Failure to produce other evidence see *supra*, III, I, 2.

5. *Alabama.*— Jernigan *v.* Clark, 134 Ala. 313, 32 So. 686; Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. 729; Simpson *v.* Golden, 114 Ala. 336, 21 So. 990; McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326; Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65.

Alaska.— Marks *v.* Shoup, 2 Alaska 66.

Arkansas.—Arkadelphia Lumber Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; St. Louis Southwestern R. Co. *v.* Goodwin, 73 Ark. 528, 84 S. W. 728; Files *v.* Reynolds, 66 Ark. 314, 50 S. W. 509; Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181; Halliburton *v.* Johnson, 30 Ark. 723; Merrick *v.* Britton, 26 Ark. 496; Peterson *v.* Gresham, 25 Ark. 380; Bourland *v.* Skimnee, 11 Ark. 671; Olmstead *v.* Hill, 2 Ark. 346; Robins *v.* Fowler, 2 Ark. 133; Ballard *v.* Noaks, 2 Ark. 45; Burriss *v.* Wise, 2 Ark. 33.

California.—Sonoma County *v.* Stofen, 125 Cal. 32, 57 Pac. 681 (failure to follow clue); Harralson *v.* Barrett, 99 Cal. 607, 34 Pac. 342; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157; Moran *v.* Abbey, 63 Cal. 56; Butler *v.* Vassault, 40 Cal. 74; Stoakes *v.* Monroe, 36 Cal. 383; Arnold *v.* Skaggs, 35 Cal. 684; Levitsky *v.* Johnson, 35 Cal. 41; Klockenbaum *v.* Pierson, 22 Cal. 160; Baker *v.* Joseph, 16 Cal. 173; Berry *v.* Metzler, 7 Cal. 418; Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Colorado.—Lee-Kinsey Improvement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191; Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284; Cole *v.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013.

Connecticut.— Selleck *v.* Head, 77 Conn. 15, 58 Atl. 224; Travelers' Ins. Co. *v.* Savage, 43 Conn. 187; Waller *v.* Graves, 20 Conn. 305; Lester *v.* State, 11 Conn. 415.

Delaware.— McCombs *v.* Chandler, 5 Harr. 423.

Florida.— Milton *v.* Blackshear, 8 Fla. 161.

Georgia.— Chambless *v.* Melton, 127 Ga. 414, 56 S. E. 414; Greer *v.* Raney, 120 Ga. 290, 47 S. E. 939; Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; Rodgers *v.* Turpin, 118 Ga. 831, 45 S. E. 700; Atlanta Rapid Transit Co. *v.* Young, 117 Ga. 349, 43 S. E. 861;

Although the granting of a new trial for newly discovered evidence is specially

Atwater *v.* Hannah, 116 Ga. 745, 42 S. E. 1007; Louisville, etc., R. Co. *v.* Harrison, 113 Ga. 1153, 39 S. E. 472; Watts *v.* White Hickory Wagon Co., 108 Ga. 809, 34 S. E. 147; Macon *v.* Small, 108 Ga. 309, 34 S. E. 152; Canfield *v.* Jones, 97 Ga. 334, 22 S. E. 908; Cordele Guano Co. *v.* Carter, 94 Ga. 702, 19 S. E. 827; Thompson *v.* Ray, 92 Ga. 540, 17 S. E. 903; Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991; Cedartown *v.* Freeman, 89 Ga. 451, 15 S. E. 481; Nixon *v.* Christie, 84 Ga. 469, 10 S. E. 1087; Spurlock *v.* West, 80 Ga. 302, 4 S. E. 891; Robinson *v.* Veal, 79 Ga. 633, 7 S. E. 159; Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119; Dalton *v.* Drake, 75 Ga. 115; Leverett *v.* Cook, 68 Ga. 838; Georgia R. Co. *v.* Kicklighter, 63 Ga. 708; Boehm *v.* Juchter, 62 Ga. 580; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Arnett *v.* Paulett, 59 Ga. 856; Wilkinson *v.* Smith, 57 Ga. 609; Savannah, etc., R. Co. *v.* George, 57 Ga. 164; Watkins *v.* Paine, 57 Ga. 50; Morgan *v.* Taylor, 55 Ga. 224; Lamb *v.* Murray, 54 Ga. 218; Wallace *v.* Tumlin, 42 Ga. 462; Cunningham *v.* Schley, 41 Ga. 426; Moore *v.* Ulm, 34 Ga. 565; Parker *v.* Chambers, 24 Ga. 518; Beard *v.* Simmons, 9 Ga. 4; Glover *v.* Woolsey, Dudley 85; Cuesta *v.* Goldsmith, 1 Ga. App. 48, 57 S. E. 983; Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046.

Illinois.— Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23 [*affirming* 128 Ill. App. 375]; McDonald *v.* People, 222 Ill. 325, 78 N. E. 609 [*affirming* 123 Ill. App. 346]; Springer *v.* Schultz, 205 Ill. 144, 68 N. E. 753 [*affirming* 105 Ill. App. 544]; Chicago, etc., R. Co. *v.* Raidy, 203 Ill. 310, 61 N. E. 783 [*affirming* 100 Ill. App. 506]; Farrell *v.* West Chicago Park Com'rs, 182 Ill. 250, 55 N. E. 325 [*affirmed* in 181 U. S. 404, 21 S. Ct. 609, 45 L. ed. 916, 924]; Polo Exch. Nat. Bank *v.* Darrow, 177 Ill. 362, 52 N. E. 356; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720; Dyk *v.* De Young, 133 Ill. 82, 24 N. E. 520; Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790; Tobin *v.* People, 101 Ill. 121; Edgmon *v.* Ashelby, 76 Ill. 161; Wright *v.* Gould, 73 Ill. 56; Champion *v.* Ulmer, 70 Ill. 322; Wood *v.* Echternach, 65 Ill. 149; Laflin *v.* Herrington, 17 Ill. 399; Crozier *v.* Cooper, 14 Ill. 139; Yates *v.* Monroe, 13 Ill. 212; Hixson *v.* Carqueville Lith. Co., 115 Ill. App. 427; Bracewell *v.* Self, 109 Ill. App. 140; Pittsburg, etc., R. Co. *v.* Banfill, 107 Ill. App. 254 [*affirmed* in 206 Ill. 553, 69 N. E. 489]; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Chicago, etc., R. Co. *v.* Stewart, 104 Ill. App. 37 [*affirmed* in 203 Ill. 223, 67 N. E. 830]; Chicago, etc., R. Co. *v.* Raidy, 100 Ill. App. 506 [*affirmed* in 203 Ill. 310, 67 N. E. 783]; Heldmaier *v.* Taman, 88 Ill. App. 209 [*affirmed* in 188 Ill. 283, 58 N. E. 960]; Chicago *v.* Hogan, 80 Ill. App. 344; Possehl *v.* Arnold, 78 Ill. App. 599; McDavitt *v.* McNay, 78 Ill. App. 396; McDonald *v.* Harris, 75 Ill. App. 111; La Fevre *v.* Du Brule, 71 Ill. App. 263; Harley *v.* Harley, 67 Ill. App. 138; Chicago Exhaust, etc., Pipe Co. *v.* Johnson, 44 Ill. App. 224; Chicago First Nat. Bank *v.* William Ruehl Brewing Co., 33 Ill. App. 121.

Indiana.— Zimmerman *v.* Weigel, 158 Ind. 370, 63 N. E. 566; Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530; McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7; Anderson *v.* Hathaway, 130 Ind. 528, 30 N. E. 638; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Graham *v.* Payne, 122 Ind. 403, 24 Atl. 216; Ward *v.* Voris, 117 Ind. 368, 20 N. E. 261; Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492; Pennsylvania Co. *v.* Nations, 111 Ind. 203, 12 N. E. 309; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Test *v.* Larsh, 100 Ind. 562; Hines *v.* Driver, 100 Ind. 315; Ragsdale *v.* Matthews, 93 Ind. 589; Johnson *v.* Herr, 88 Ind. 280; Suman *v.* Cornelius, 78 Ind. 506; Toney *v.* Toney, 73 Ind. 34; Lewis *v.* Crow, 69 Ind. 434; *Ex p.* Walls, 64 Ind. 461; Ft. Wayne, etc., R. Co. *v.* Fhalor, 51 Ind. 485; Carver *v.* Compton, 51 Ind. 451; Cook *v.* Hare, 49 Ind. 268; Reno *v.* Robertson, 48 Ind. 106; Bartholomew *v.* Loy, 44 Ind. 393; Rickart *v.* Davis, 42 Ind. 164; Martin *v.* Garver, 40 Ind. 351; Harris *v.* Rupel, 14 Ind. 209; Simpkins *v.* Wilson, 11 Ind. 541; Beard *v.* Peru First Presb. Church, 10 Ind. 568; Ruger *v.* Bungan, 10 Ind. 451; Simpson *v.* Wilson, 6 Ind. 474; Conwell *v.* Anderson, 2 Ind. 122; McIntire *v.* Young, 6 Blackf. 496, 39 Am. Dec. 443; Coe *v.* Givan, 1 Blackf. 367; Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264; Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479; Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (1902) 62 N. E. 649; Franklin *v.* Lee, (App. 1901) 62 N. E. 78; Campbell *v.* Nixon, 25 Ind. App. 90, 56 N. E. 248; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Huntington-White Lime Co. *v.* Mock, 14 Ind. App. 221, 42 N. E. 761; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057; Martin *v.* Prince, 12 Ind. App. 213, 40 N. E. 33; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305; Chicago, etc., R. Co. *v.* McKeehan, 5 Ind. App. 124, 31 N. E. 831; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582; State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543; Beers *v.* Flock, 2 Ind. App. 567, 28 N. E. 1011; Keisling *v.* Readle, 1 Ind. App. 240, 27 N. E. 583; Baldwin *v.* Biersdorfer, Wils. 1.

Iowa.—Arnd *v.* Aylesworth, (1907) 111 N. W. 407; Robins *v.* Modern Woodmen of America, 127 Iowa 444, 103 N. W. 375; Kringle *v.* Kringle, 123 Iowa 365, 98 N. W. 883; Grapes *v.* Sheldon, 119 Iowa 112, 93 N. W. 57; Welch *v.* Browning, 115 Iowa 690, 87 N. W. 430; Dunbauld *v.* Thompson, 109

within the court's discretion, yet where the movant shows no diligence, and the

Iowa 199, 80 N. W. 324; McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83; Scott *v.* Hawk, 105 Iowa 467, 75 N. W. 368; Benjamin *v.* Flitton, 106 Iowa 417, 76 N. W. 737; State *v.* Stevenson, 104 Iowa 50, 73 N. W. 360; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Searcy *v.* Martin Woods Co., 93 Iowa 420, 61 N. W. 934; Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Cahalan *v.* Cahalan, 82 Iowa 416, 48 N. W. 724; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070; Norris *v.* Hix, 74 Iowa 524, 38 N. W. 395; Moody *v.* Priest, 69 Iowa 23, 28 N. W. 415; Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713; Woodman *v.* Dutton, 49 Iowa 398; Creighton *v.* Todhunter, 47 Iowa 694; Carman *v.* Roennan, 45 Iowa 135; Roziene *v.* Wolf, 43 Iowa 393; Hopper *v.* Moore, 42 Iowa 563; Hesser *v.* Doran, 41 Iowa 468; Clark *v.* Nelson, 40 Iowa 678; Iowa City First Nat. Bank *v.* Charter Oak Ins. Co., 40 Iowa 572; Goddard *v.* Leffingwell, 40 Iowa 249; Stuckslager *v.* McKee, 40 Iowa 212; Mather *v.* Butler County, 33 Iowa 250; Sully *v.* Kuehl, 30 Iowa 275; Carson *v.* Cross, 14 Iowa 463; Lisher *v.* Pratt, 9 Iowa 59; Pelamourges *v.* Clark, 9 Iowa 1; Mays *v.* Deaver, 1 Iowa 216; Reeves *v.* Royal, 2 Greene 451; Millard *v.* Singer, 2 Greene 144.

Kansas.— Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895; Mattern *v.* Suddarth, 65 Kan. 862, 70 Pac. 874; Olathe *v.* Horner, 38 Kan. 312, 16 Pac. 468; Carson *v.* Henderson, 34 Kan. 404, 8 Pac. 727; Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508; Kansas State Agricultural College *v.* Linscott, 30 Kan. 241, 1 Pac. 81; Sexton *v.* Lamb, 27 Kan. 432; Manwell *v.* Turner, 25 Kan. 426; Moon *v.* Helfer, 25 Kan. 139; Mitchell *v.* Stillings, 20 Kan. 276; Boyd *v.* Sanford, 14 Kan. 280; Smith *v.* Williams, 11 Kan. 104; Swartzel *v.* Rogers, 3 Kan. 374; Ott *v.* Anderson, 9 Kan. App. 320, 61 Pac. 330; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504; Lukens *v.* Garrett, 2 Kan. App. 722, 44 Pac. 23.

Kentucky.— Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957, 15 Ky. L. Rep. 477; Fleet *v.* Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563; Eccles *v.* Shackleford, 1 Litt. 35; Ewing *v.* McConnell, 1 A. K. Marsh. 188; Berger *v.* Standard Oil Co., 103 S. W. 245, 31 Ky. L. Rep. 613, 11 L. R. A. N. S. 238; Hall *v.* Roberts, 96 S. W. 555, 29 Ky. L. Rep. 851; Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Louisville *v.* Walter, 76 S. W. 516, 25 Ky. L. Rep. 893; Louisville Ins. Co. *v.* Hoffman, 70 S. W. 403, 24 Ky. L. Rep. 980; Stovers *v.* Singer, 67 S. W. 822, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395; Johnson *v.* Carter, 63 S. W. 485, 23 Ky. L. Rep. 591; Bragg *v.* Moore, 56 S. W. 163, 21 Ky. L. Rep. 1721; Interstate Petroleum Co. *v.* Adams, 53 S. W. 26, 21 Ky. L. Rep. 768; Ferrell *v.* McCoy, 53 S. W. 23, 21 Ky. L. Rep. 787; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784; Ashcraft *v.* Barker, 39 S. W. 510, 18 Ky. L. Rep. 222; Bramel *v.* Clark, 6 Ky. L. Rep. 220. See also Berberich *v.* Louisville Bridge Co., 46 S. W. 691, 20 Ky. L. Rep. 467, as to degree of diligence required of person not fully recovered from effects of personal injury which was basis of action.

Louisiana.—Coste's Succession, 43 La. Ann. 144, 9 So. 62; Chiapella *v.* Brown, 14 La. Ann. 189; Berger *v.* Spalding, 13 La. Ann. 580; Valega *v.* Broussard, 3 La. Ann. 145; Pahnvitz *v.* Fassman, 2 La. Ann. 625; Union Bank *v.* Hobert, 9 Rob. 177; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Bonnet *v.* Legras, 1 Rob. 92; Ingram *v.* Croft, 7 La. 82; Arpine *v.* Harrison, 6 Mart. N. S. 326; Hernandez *v.* Garetage, 4 Mart. N. S. 419; Loccard *v.* Bullitt, 3 Mart. N. S. 170; Stafford *v.* Calliham, 3 Mart. N. S. 124.

Maine.— Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900; Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Stewart *v.* Pattangall, 91 Me. 172, 39 Atl. 474; Michaud *v.* Canadian Pac. R. Co., 88 Me. 381, 34 Atl. 172; Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461; Trask *v.* Unity, 74 Me. 208; Hunter *v.* Randall, 69 Me. 183; Blake *v.* Madigan, 65 Me. 522; Marden *v.* Jordan, 65 Me. 9; McLaughlin *v.* Doane, 56 Me. 289; Ham *v.* Ham, 39 Me. 263; Howard *v.* Grover, 28 Me. 97, 48 Am. Dec. 478; Titcomb *v.* Potter, 11 Me. 218.

Massachusetts.— Damon *v.* Carrol, 167 Mass. 198, 45 N. E. 85; Gardner *v.* Gardner, 2 Gray 434. *Compare* Keet *v.* Mason, 167 Mass. 154, 45 N. E. 81, case tried without jury.

Michigan.— Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404; Pinkerton Bros. Co. *v.* Bromley, 128 Mich. 236, 87 N. W. 200; Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444; Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

Minnesota.— Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957; Revor *v.* Bagley, 76 Minn. 326, 79 N. W. 171; Bradley *v.* Norris, 67 Minn. 48, 69 N. W. 624; Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223; Meeks *v.* St. Paul, 64 Minn. 220, 66 N. W. 966; Elmborg *v.* St. Paul City R. Co., 51 Minn. 70, 52 N. W. 969; Austin *v.* Northern Pac. R. Co., 34 Minn. 351, 25 N. W. 798; Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91; Fenno *v.* Chapin, 27 Minn. 519, 8 N. W. 762; Laurel *v.* State Nat. Bank, 25 Minn. 48; Evans *v.* Christopherson, 24 Minn. 330; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Nininger *v.* Knox, 8 Minn. 140; Keough *v.* McNitt, 6 Minn. 513. See also Humphrey *v.* Havens, 9 Minn. 318, as to sufficient diligence in discovering correspondence of adversaries.

Mississippi.—Vanderburg *v.* Campbell, 64 Miss. 89, 8 So. 206; Grubbs *v.* Collins, 54 Miss. 485; Dean *v.* Young, 13 Sm. & M. 118; Bledsoe *v.* Doe, 4 How. 13.

Missouri.— King *v.* Gilson, 206 Mo. 264, 104 S. W. 52; Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437; De Lassus *v.* Winn, 174 Mo. 636, 74 S. W. 635; James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Kansas City *v.* Marsh Oil

contrary appears by affidavits, and the newly discovered evidence is merely

Co., 140 Mo. 458, 41 S. W. 943; State *v.* Johnson, 139 Mo. 197, 40 S. W. 767; Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; Fretwell *v.* Laffoon, 77 Mo. 26; Shaw *v.* Besch, 58 Mo. 107; Tilford *v.* Ramsey, 43 Mo. 410; Miller *v.* Whitson, 40 Mo. 97; Callahan *v.* Caffarata, 39 Mo. 136; Goff *v.* Mulholland, 33 Mo. 203; Barry *v.* Blumenthal, 32 Mo. 29; Smith *v.* Matthews, 6 Mo. 600; Hanley *v.* Blanton, 1 Mo. 49; Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691; Jones *v.* H. Martini Furnishing Co., 77 Mo. App. 474; Madden *v.* Paroneri Realty Co., 75 Mo. App. 358; Bresnan *v.* Grogan, 74 Mo. App. 587; Tall *v.* Chapman, 66 Mo. App. 581; Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82; Sturdy *v.* St. Charles Land, etc., Co., 33 Mo. App. 44; Mercantile Bank *v.* Hawe, 33 Mo. App. 214.

Montana.— *In re* Colbert, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439; Scheuer *v.* State, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248; Nicholson *v.* Metcalf, 31 Mont. 276, 78 Pac. 483; Rand *v.* Kipp, 27 Mont. 138, 69 Pac. 714; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.— Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; McNeal *v.* Hunter, 72 Nebr. 579, 101 N. W. 236; Grand Lodge A. O. U. W. *v.* Bartes, 69 Nebr. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. Rep. 577; Matoushek *v.* Dutcher, 67 Nebr. 627, 93 N. W. 1049; Hoffine *v.* Ewings, 60 Nebr. 729, 84 N. W. 93; Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197; Burlington, etc., R. Co. *v.* Kittridge, 52 Nebr. 16, 71 N. W. 986; Smith *v.* Mount, 38 Nebr. 111, 56 N. W. 793; Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791; Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992; Axtell *v.* Warden, 7 Nebr. 186; Heady *v.* Fishburn, 3 Nebr. 263.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454; Howard *v.* Winters, 3 Nev. 539.

New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819; Nagel *v.* Mayo, (Sup. 1899) 44 Atl. 944; Thomas *v.* Consolidated Traction Co., 62 N. J. L. 36, 42 Atl. 1061; Servis *v.* Cooper, 33 N. J. L. 68; Sheppard *v.* Sheppard, 10 N. J. L. 250; Deacon *v.* Allen, 4 N. J. L. 338.

New Mexico.—Armstrong *v.* Aragon, (1905) 79 Pac. 291; U. S. *v.* Rio Grande Dam, etc., Co., 10 N. M. 617, 65 Pac. 276.

New York.— Hagen *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914 [*reversing* 44 Misc. 540, 90 N. Y. Suppl. 125]; Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49; Lyon *v.* Wilcox, 85 N. Y. App. Div. 617, 83 N. Y. Suppl. 332; Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057 [*affirmed* in 178 N. Y. 623, 70 N. E. 1011]; Bridenbecker *v.* Bridenbecker, 75 N. Y. App. Div. 6, 77 N. Y. Suppl. 802; Simonowitz *v.* Schwartz, 73 N. Y. App. Div. 489, 77 N. Y. Suppl. 209; Pospisil *v.* Kane, 73 N. Y. App. Div. 457, 77 N. Y. Suppl. 307; Matter of McManus, 66 N. Y. App. Div. 53, 73 N. Y. Suppl. 88; Biddescomb *v.* Cameron, 58 N. Y. App. Div. 42, 68 N. Y. Suppl. 568; McIver *v.* Hallen, 50 N. Y. App. Div. 441, 64 N. Y. Suppl. 26; Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Reid *v.* Gaedeke, 38 N. Y. App. Div. 107, 57 N. Y. Suppl. 414 (motion by executor); Rubenfeld *v.* Rabiner, 33 N. Y. App. Div. 374, 54 N. Y. Suppl. 68; Thompson *v.* Welde, 27 N. Y. App. Div. 186, 50 N. Y. Suppl. 618 (neglect of attorney); Sayer *v.* King, 21 N. Y. App. Div. 624, 47 N. Y. Suppl. 422; Baily *v.* Hornthal, 1 N. Y. App. Div. 44, 36 N. Y. Suppl. 1082; Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Smith *v.* Rentz, 73 Hun 195, 25 N. Y. Suppl. 914; Briel *v.* Buffalo, 68 Hun 219, 22 N. Y. Suppl. 845 [*reversed* on other grounds in 144 N. Y. 163, 38 N. E. 977]; Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Suppl. 432; Sproul *v.* Resolute F. Ins. Co., 1 Lans. 71; Fellows *v.* Emperor, 13 Barb. 92; Hooker *v.* Terpenning, 5 Silv. Sup. 487, 8 N. Y. Suppl. 639; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 280, 19 N. Y. Suppl. 716; Kepner *v.* Betz, 51 N. Y. Super. Ct. 18; Starin *v.* Kelly, 47 N. Y. Super. Ct. 288 [*affirmed* in 88 N. Y. 418, 14 N. Y. Wkly. Dig. 283]; Schultz *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Weston *v.* New York El. R. Co., 42 N. Y. Super. Ct. 156 [*affirmed* in 73 N. Y. 595]; Quinn *v.* Lloyd, 1 Sweeny 253 [*reversed* on other grounds in 41 N. Y. 349]; Oakley *v.* Sears, 7 Rob. 111; Campbell *v.* Genet, 2 Hilt. 290; Leavy *v.* Roberts, 2 Hilt. 285, 8 Abb. Pr. 310; Hagen *v.* New York Cent., etc., R. Co., 44 Misc. 540, 90 N. Y. Suppl. 125 [*reversed* on other grounds in 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914]; Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736; Broadbelt *v.* Loew, 21 Misc. 169, 47 N. Y. Suppl. 73; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Queen *v.* Bell, 2 Misc. 575, 22 N. Y. Suppl. 398; Levy *v.* Hatch, 92 N. Y. Suppl. 287; Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Huse, etc., Ice, etc., Co. *v.* Wielar, 86 N. Y. Suppl. 24; Conable *v.* Keeney, 19 N. Y. Suppl. 449; Conable *v.* Smith, 19 N. Y. Suppl. 446; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Ott *v.* Buffalo, 16 N. Y. Suppl. 1 [*affirmed* in 131 N. Y. 594, 30 N. E. 67]; Wilcox *v.* Joslin, 10 N. Y. Suppl. 342; Hawxhurst *v.* Hennion, 9 N. Y. Suppl. 542; Behrens *v.* Bloom, 3 N. Y. Suppl. 551; Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450; Wilson *v.* Wilson, 14 N. Y. St. 518; Anderson *v.* Market Nat. Bank, 66 How. Pr. 8; Reese *v.* Stadler, 54 How. Pr. 492; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]; Hatfield *v.* Macy, 52 How. Pr. 193; Cole *v.* Cole, 50 How. Pr. 59 [*affirmed* in 12 Hun 373]; Raphelsky *v.* Lynch, 43 How. Pr. 157; People *v.* Marks, 10 How. Pr. 261;

cumulative, it is an abuse of discretion to grant a new trial, and the order will

People *v.* New York Super. Ct., 5 Wend. 114; Williams *v.* Baldwin, 18 Johns. 489. See also Coy *v.* Martin, 24 Misc. 211, 53 N. Y. Suppl. 540, as to sufficient diligence on the part of executors.

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204; Sikes *v.* Parker, 95 N. C. 232; Matthews *v.* Joyce, 85 N. C. 258; Henry *v.* Smith, 78 N. C. 27; Shehan *v.* Malone, 72 N. C. 59.

North Dakota.— Goose River Bank *v.* Gilmore, 3 N. D. 188, 34 N. W. 1032.

Oklahoma.— B. S. Flersheim Mercantile Co. *v.* Gillespie, 14 Okla. 143, 77 Pac. 183; Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Pennsylvania.— Prior *v.* Craig, 5 Serg. & R. 44; Moore *v.* Philadelphia Bank, 5 Serg. & R. 41; Knox *v.* Work, 2 Binn. 582; Aubel *v.* Ealer, 2 Binn. 582 note; Waln *v.* Wilkins, 4 Yeates 461; Turnbull *v.* O'Hara, 4 Yeates 446; Leedom *v.* Pancake, 4 Yeates 183; Slattery *v.* Supreme Tent K. M. W., 19 Pa. Super. Ct. 108; Kambeitz *v.* Harrisburg Traction Co., 9 Pa. Dist. 750, 24 Pa. Co. Ct. 453; Green *v.* Reed, 22 Pa. Co. Ct. 401; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235; Stewart *v.* Press Co., 1 Pa. Co. Ct. 247; Scherff *v.* Darby, 9 Del. Co. 331; Heffron *v.* Scranton R. Co., 4 Lack. Jur. 307; Evans *v.* Bitner, 4 Lanc. Bar, Sept. 7, 1872; Ream *v.* Oldweiler, 2 Leg. Gaz. 147; Kenderdine *v.* Phelin, 1 Phila. 343; Marsh *v.* Moser, 1 Woodw. 218; Connellee *v.* Ziegler, 16 York Leg. Rec. 169.

Rhode Island.—Hill *v.* Union R. Co., (1906) 66 Atl. 836; Timony *v.* Casey, 20 R. I. 257, 38 Atl. 370; Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033; Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989; Hawkins *v.* Capron, 17 R. I. 679, 24 Atl. 466; Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; Harris *v.* Cheshire R. Co., (1889) 16 Atl. 512; Dexter *v.* Handy, 13 R. I. 474.

South Carolina.— Durant *v.* Philpot, 16 S. C. 116; Tillman *v.* Hatcher, Rice 271; Bogert *v.* Simons, 1 Mill 143; Drayton *v.* Thompson, 1 Bay 263.

South Dakota.— Hahn *v.* Dickinson, 19 S. D. 373, 103 N. W. 642; Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577; Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297; Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822; Demmon *v.* Mullen, 6 S. D. 554, 62 N. W. 380; Gaines *v.* White, 2 S. D. 410, 50 N. W. 901; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Tennessee.— Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239; Tabler *v.* Connor, 1 Baxt. 195; Martin *v.* Nance, 3 Head 649; Harbour *v.* Rayburn, 7 Yerg. 432; Savage *v.* Bon Air Coal, etc., Co., 2 Tenn. Ch. App. 594.

Texas.— Gulf, etc., R. Co. *v.* Blanchard, 96 Tex. 616, 75 S. W. 6 [*affirming* (Civ. App. 1903) 73 S. W. 88]; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; Waples *v.* Overaker, 77 Tex. 7, 13 S. W. 517, 19 Am. St. Rep. 727; Johnson *v.* Flint, 75 Tex. 379, 12 S. W. 1120; Sabine, etc., R. Co. *v.* Wood, 69 Tex. 679, 7 S. W. 372; Cleveland *v.* Sims, 69 Tex. 153, 6 S. W. 634; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Traylor *v.* Townsend, 61 Tex. 144; Griffith *v.* Eliot, 60 Tex. 334; Anderson *v.* Sutherland, 59 Tex. 409; Hatchett *v.* Conner, 30 Tex. 104; Gregg *v.* Bankhead, 22 Tex. 245; Vardeman *v.* Edwards, 21 Tex. 737; Burnley *v.* Rice, 21 Tex. 171; Harrell *v.* Hill, 15 Tex. 270; Watts *v.* Johnson, 4 Tex. 311; Madden *v.* Shapard, 3 Tex. 49; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; Belton, etc., Traction Co. *v.* Henry, (Civ. App. 1907) 99 S. W. 1032; San Antonio Traction Co. *v.* Parks, (Civ. App. 1906) 97 S. W. 510; Dowell *v.* Dergfield, (Civ. App. 1905) 87 S. W. 1051; Texas Cotton Products Co. *v.* McMillan, (Civ. App. 1905) 87 S. W. 846; Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605; Pelly *v.* Denison, etc., R. Co., (Civ. App. 1904) 78 S. W. 542; Missouri, etc., R. Co. *v.* Huff, (Civ. App. 1903) 78 S. W. 249 [*reversed* on other grounds in 98 Tex. 110, 81 S. W. 525]; Duckworth *v.* Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 66, 75 S. W. 913; Davis *v.* Tillar, 32 Tex. Civ. App. 383, 74 S. W. 921; Collins *v.* Weiss, 32 Tex. Civ. App. 282, 74 S. W. 46; Parham *v.* Shockler, (Civ. App. 1903) 73 S. W. 839; San Antonio, etc., R. Co. *v.* Moore, 31 Tex. Civ. App. 371, 72 S. W. 226; Edwards *v.* Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555; Texas, etc., R. Co. *v.* Funderburk, 30 Tex. Civ. App. 22, 68 S. W. 1006; Alexander *v.* Lovitt, (Civ. App. 1902) 67 S. W. 927 [*reversed* on other grounds in 95 Tex. 661, 69 S. W. 68]; Fitzgerald *v.* Compton, 28 Tex. Civ. App. 202, 67 S. W. 131; McBride *v.* Puckett, (Civ. App. 1901) 66 S. W. 242; Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583, 65 S. W. 657; Johnson *v.* Brown, (Civ. App. 1901) 65 S. W. 485; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489; Johnson *v.* Carter, 63 S. W. 485, 23 Ky. L. Rep. 591; Simonton *v.* Perry, (Civ. App. 1901) 62 S. W. 1090; Saunders *v.* Saunders, (Civ. App. 1901) 62 S. W. 797; San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 926; Smith *v.* Seymore, (Civ. App. 1900) 59 S. W. 816; Pippin *v.* Sherman, etc., R. Co., (Civ. App. 1900) 58 S. W. 961; Gulf, etc., R. Co. *v.* Marchland, 24 Tex. Civ. App. 47, 57 S. W. 860; Missouri, etc., R. Co. *v.* Jordan, (Civ. App. 1900) 56 S. W. 619; Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in 94 Tex. 120, 58 S. W. 951]; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249; Pride *v.* Whitfield, (Civ. App. 1899) 51 S. W. 1100; Ford *v.* Addison, (Civ. App. 1898) 46 S. W. 110; State *v.* Zanco, 18 Tex. Civ. App. 127, 44 S. W. 527; Primm *v.* Mansing, (Civ. App. 1896) 38 S. W. 382; Castle-

be reversed on appeal.[6] The rule is especially applicable where the applica-

man *v.* Norwood, (Civ. App. 1896) 36 S. W. 941; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796; Jester *v.* Francis, (Civ. App. 1895) 31 S. W. 245; Haley *v.* Cusenbary, (Civ. App. 1895) 30 S. W. 587; Adams *v.* Eddy, (Civ. App. 1894) 29 S. W. 180; Western Union Tel. Co. *v.* Walker, (Civ. App. 1894) 26 S. W. 858; Adams *v.* Halff, (Civ. App. 1893) 24 S. W. 334; Briggs *v.* Rush, 1 Tex. Civ. App. 19, 20 S. W. 771; Brown *v.* Grinnan, 2 Tex. App. Civ. Cas. § 413; Houston, etc., R. Co. *v.* Hollis, 2 Tex. App. Civ. Cas. § 218; Wisson *v.* Baird, 1 Tex. App. Civ. Cas. § 709; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

Utah.— Monmouth Pottery Co. *v.* White, 27 Utah 236, 75 Pac. 622; Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712; Tiernan *v.* Trewick, 2 Utah 393.

Vermont.— Taylor *v.* St. Clair, 79 Vt. 536, 65 Atl. 655; Thayer *v.* Central Vermont R. Co., 60 Vt. 214, 13 Atl. 859; Brainard *v.* Morse, 47 Vt. 320; Stearns *v.* Allen, 18 Vt. 119; Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Taliaferro *v.* Shepherd, (1907) 57 S. E. 585; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137; Markham *v.* Boyd, 22 Gratt. 544; Brown *v.* Speyers, 20 Gratt. 296; Arthur *v.* Chavis, 6 Rand. 142.

Washington.— Dumontier *v.* Stetson, etc., Mill Co., 39 Wash. 264, 81 Pac. 693; Bullock *v.* White Star Steamship Co., 30 Wash. 448, 70 Pac. 1106; Jordan *v.* Seattle, 30 Wash. 298, 70 Pac. 743; Wilson *v.* Waldron, 12 Wash. 149, 40 Pac. 740. See also Haner *v.* Furuya, 39 Wash. 122, 81 Pac. 98, as to obligation of acting railroad manager to know the company's office organization.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Dower *v.* Church, 21 W. Va. 23; Warner *v.* Core, 20 W. Va. 472; Sayre *v.* King, 17 W. Va. 562; Zickefoose *v.* Kuykendall, 12 W. Va. 23; Lucas *v.* Locke, 11 W. Va. 81; Snider *v.* Myers, 3 W. Va. 195.

Wisconsin.— Schmitt *v.* Northern Pac. R. Co., 120 Wis. 397, 98 N. W. 202; Rochester Mach. Tool Works *v.* Weiss, 108 Wis. 545, 84 N. W. 866; Johnson *v.* Goult, 106 Wis. 247, 82 N. W. 139; Kurtz *v.* Jelleff, 104 Wis. 27, 80 N. W. 41; Lewis *v.* Newton, 93 Wis. 405, 67 N. W. 724; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Wilson *v.* Johnson, 74 Wis. 337, 43 N. W. 148; Wilson *v.* Plank, 41 Wis. 94; Herman *v.* Mason, 37 Wis. 273; Edmiston *v.* Garrison, 18 Wis. 594.

Wyoming.— Harden *v.* Card, (1907) 88 Pac. 217.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85 (lack of diligence in not following up rumors); Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210; Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740; Chandler *v.* Tompson, 30 Fed. 38; Fuller *v.* Harris, 29 Fed. 814; Rose *v.* Stephens, etc., Transp. Co., 19 Fed. 808, 20 Blatchf. 465; Codman *v.* Vermont, etc., R. Co., 5 Fed. Cas. No. 2,936, 17 Blatchf. 1; Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1. *Compare* Ford *v.* U. S., 18 Ct. Cl. 62 [*overruling* Silvey *v.* U. S., 7 Ct. Cl. 305], and holding the rule not strictly applicable to the United States as defendant in the court of claims.

England.— Shedden *v.* Atty.-Gen., L. R. 1 H. L. Sc. 470, 545, 22 L. T. Rep. N. S. 631; Lewis *v.* Trussler, 2 C. L. R. 727; Caldwell *v.* Johnston, Ir. R. 6 C. L. 233.

Canada.— Haren *v.* Lyon, Taylor (U. C.) 370; White *v.* McKay, 43 U. C. Q. B. 226; Street *v.* Dolsen, 14 U. C. Q. B. 537.

See 37 Cent. Dig. tit. "New Trial," §§ 202, 210, 212. See also, generally, *supra*, III, H, 3, f.

Negligence of counsel is negligence of the party. Yates *v.* Monroe, 13 Ill. 212. And the employment of another attorney to procure a new trial does not excuse lack of diligence on the part of the former attorney. McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83.

Where there are joint parties, each must have exercised reasonable diligence in order to obtain the necessary evidence. Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479.

Absence from state.— That the applicant was absent from the state is not of itself a sufficient excuse for want of diligence. Burnley *v.* Rice, 21 Tex. 171.

Existence of paper unknown to party.— It is not negligence not to have searched for a paper, the existence of which was unknown until after the trial. Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49.

Prima facie showing of diligence — What is.— That the newly discovered evidence consisted of an account-book which had been in the possession of the successful party, but the existence of which he had denied on being asked to produce it, was sufficient *prima facie* showing of diligence. Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933.

Sufficient showing of diligence see James McCreery Realty Corp. *v.* Equitable Nat. Bank, 54 Misc. (N. Y.) 508, 104 N. Y. Suppl. 959 [*affirming* 52 Misc. 300, 102 N. Y. Suppl. 975]; *In re* McClellan, (S. D. 1907) 111 N. W. 540, (1906) 107 N. W. 681; Binns *v.* Emery, (Wash. 1907) 88 Pac. 133.

Deposition.— Diligence must have been used to get the deposition of a non-resident witness. Conwell *v.* Anderson, 2 Ind. 122.

6. Mowry *v.* Raabe, 89 Cal. 506, 27 Pac. 157. See also *infra*, III, I, 4, b, c.

tion is made after the term at which the verdict was rendered,[7] or where there have been several trials,[8] or where the evidence is cumulative to evidence offered at the trial.[9]

b. Failure to Make Proper Inquiry. That evidence was discovered soon after the trial by systematic inquiry or search usually indicates that proper diligence was not exercised to discover the evidence before the trial.[10] Ordinarily a new trial will not be granted for newly discovered evidence which might have been discovered before the trial by inquiry of a co-party,[11] or of a member of the applicant's family,[12] or of an agent or servant[13] or copartner,[14] who represented him in the matter in controversy. As a rule the applicant for a new trial must have made reasonable inquiry, where necessary, before the trial to learn what persons were present at the time a matter in controversy occurred.[15] He must have been reasonably diligent to find and inquire of persons known or supposed to have participated in an act, transaction, or conversation in controversy, or to have had some connection therewith or knowledge thereof, or to have been present at the time and place of its occurrence, as to their knowledge thereof.[16] The failure of the

7. Hines *v.* Driver, 100 Ind. 315; Gregg *v.* *r.* Bankhead, 22 Tex. 245.

8. *Maine.*— Trask *v.* Unity, 74 Me. 208.
New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819.
New York.— Hagen *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914 [*reversing* 44 Misc. 540, 90 N. Y. Suppl. 125].
Tennessee.— Harbour *r.* Rayburn, 7 Yerg. 432.
Vermont.— Stearns *v.* Allen, 18 Vt. 119.
Canada.— Connell *r.* Miller, 4 N. Brunsw. 433.

9. Levitsky *v.* Johnson, 35 Cal. 41; Baker *r.* Joseph, 16 Cal. 173; Hines *r.* Driver, 100 Ind. 315; Gish *r.* Gish, 7 Ind. App. 104, 34 N. E. 305.

10. *Alabama.*— Kansas City, etc., R. Co. *r.* Phillips, 98 Ala. 159, 13 So. 65.
Iowa.— Millard *r.* Singer, 2 Greene 144.
Kentucky.— Interstate Petroleum Co. *r.* Adams, 53 S. W. 26, 21 Ky. L. Rep. 768.
Louisiana.— Burton *r.* Maltby, 18 La. 531.
Maine.—McLaughlin *v.* Doane, 56 Me. 289.

11. Rand *v.* Kipp, 27 Mont. 138, 69 Pac. 714; Burnley *r.* Rice, 21 Tex. 171. See also Emmett *v.* Perry, 100 Me. 139, 60 Atl. 872, as to duty of nominal plaintiff to inquire of party in interest. *Compare* Commercial Bank *r.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121 (as to co-defendant who had been discharged in bankruptcy); American Surety Co. *v.* Crow, 17 N. Y. App. Div. 634, 45 N. Y. Suppl. 279 (where whereabouts of co-defendants were unknown at the time of the trial).

12. Colorado Springs Electric Co. *r.* Soper, 38 Colo. 126, 88 Pac. 161; Wilkinson *r.* Smith, 57 Ga. 609; Watkins *r.* Paine, 57 Ga. 50; Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; Toney *v.* Toney, 73 Ind. 34; Leavy *r.* Roberts, 2 Hilt. (N. Y.) 285, 8 Abb. Pr. 310; Behrens *r.* Bloom, 3 N. Y. Suppl. 551; Reese *v.* Stadler, 54 How. Pr. (N. Y.) 492.

13. *Georgia.*— Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; Canfield *v.* Jones, 97 Ga. 334, 22 S. E. 908; Ætna Ins. Co. *r.* Sparks, 62 Ga. 187; Savannah, etc., R. Co. *v.* George, 57 Ga. 164; Elliott *v.* Pinkus, 55 Ga. 163.
Indiana.— Du Souchet *r.* Dutcher, 113 Ind. 249, 15 N. E. 459; Martin *r.* Garver, 40 Ind. 351.
Kansas.— Ott *r.* Anderson, 9 Kan. App. 320, 61 Pac. 330.
Kentucky.— Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Interstate Petroleum Co. *v.* Adams, 53 S. W. 26, 21 Ky. L. Rep. 768.
Nebraska.— Burlington, etc., R. Co. *v.* Kittridge, 52 Nebr. 16, 71 N. W. 986.
New York.— Melver *r.* Hallen, 50 N. Y. App. Div. 441, 64 N. Y. Suppl. 26; Weston *r.* New York El. R. Co., 42 N. Y. Super. Ct. 156 [*affirmed* in 73 N. Y. 595]; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]; Meyer *v.* Fiegel, 38 How. Pr. 424.
North Carolina.— Wilkie *r.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204.
Wisconsin.— Scott *r.* Hobe, 108 Wis. 239, 84 N. W. 181.
Compare Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262, where the witness lived in distant part of state and did not mention newly discovered fact in prior correspondence.

14. Haley *v.* Cusenbary, (Tex. Civ. App. 1895) 30 S. W. 587.

15. Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713; Gulf, etc., R. Co. *v.* Blanchard, (Tex. 1903) 75 S. W. 6 [*affirming* (Civ. App. 1903) 73 S. W. 88]. And see cases in following note. *Compare* Schnee *r.* Dubuque, 122 Iowa 459, 98 N. W. 298.

16. *Arkansas.*— Arkadelphia Lumber Co. *r.* Posey, 74 Ark. 377, 85 S. W. 1127.
California.—Butler *r.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Klockenbaum *v.* Pierson, 22 Cal. 160.
Colorado.— Cole *r.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013.
Georgia.— Ætna Ins. Co. *r.* Sparks, 62 Ga. 187; Arnett *r.* Paulett, 59 Ga. 856; Morgan *r.* Taylor, 55 Ga. 224; Cunningham *v.* Schley, 41 Ga. 426.
Illinois.— Dyk *r.* De Young, 133 Ill. 82,

applicant to inquire what a person supposed to have knowledge of a matter in controversy knew about it or to call or examine him as a witness is not excused ordinarily by the fact that their relations were unfriendly or that the witness was believed to be hostile.[17]

24 N. E. 520; Chicago First Nat. Bank *v.* William Ruehl Brewing Co., 33 Ill. App. 121.

Indiana.— Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492; *Ex p.* Walls, 64 Ind. 461; Ft. Wayne, etc., R. Co. *v.* Fhalor, 51 Ind. 485; Martin *v.* Garver, 40 Ind. 351; Louisville, etc., R. Co. *v.* Howard, 39 Ind. App. 703, 79 N. E. 1119; Louisville, etc., R. Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Huntington-White Lime Co. *v.* Mock, 14 Ind. App. 221, 42 N. E. 761; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Chicago, etc., R. Co. *v.* McKeehan, 5 Ind. App. 124, 31 N. E. 831; Richter *v.* Meyer, 5 Ind. App. 33, 31 N. E. 582; Keisling *v.* Readle, 1 Ind. App. 240, 27 N. E. 583.

Iowa.— Benjamin *v.* Flitton, 106 Iowa 417, 76 N. W. 737; Searey *v.* Martin Woods Co., 93 Iowa 420, 61 N. W. 934; Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713; Roziene *v.* Wolf, 43 Iowa 393.

Kansas.— Lunkens *v.* Garrett, 2 Kan. App. 722, 44 Pac. 23.

Kentucky.— Louisville Ins. Co. *v.* Hoffman, 70 S. W. 403, 24 Ky. L. Rep. 980.

Maine.— Michaud *v.* Canadian Pac. R. Co., 88 Me. 381, 34 Atl. 172.

Minnesota.— Wherry *v.* Duluth, etc., R. Co., 64 Minn. 415, 67 N. W. 223; Elmborg *v.* St. Paul City R. Co., 51 Minn. 70, 52 N. W. 969; Fenno *v.* Chapin, 27 Minn. 519, 8 N. W. 762; Krassin *v.* Shearan, 24 Minn. 355; Evans *v.* Christopherson, 24 Minn. 330; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Nininger *v.* Knox, 8 Minn. 140; Keough *v.* McNitt, 6 Minn. 513.

Mississippi.— Grubbs *v.* Collins, 54 Miss. 485; Dean *v.* Young, 13 Sm. & M. 118.

Missouri.— Bresnan *v.* Grogan, 74 Mo. App. 587; Sturdy *v.* St. Charles Land, etc., Co., 33 Mo. App. 44.

Montana.— Nicholson *v.* Metcalf, 31 Mont. 276, 78 Pac. 483.

Nebraska.— Hoffine *v.* Ewings, 60 Nebr. 729, 84 N. W. 93.

New Hampshire.— Wheeler *v.* Troy, 20 N. H. 77.

New Jersey.— Servis *v.* Cooper, 33 N. J. L. 68; Sheppard *v.* Sheppard, 10 N. J. L. 250; Deacon *v.* Allen, 4 N. J. L. 338.

New York.— Lyon *v.* Wilcox, 85 N. Y. App. Div. 617, 83 N. Y. Suppl. 332; Simonowitz *v.* Schwartz, 73 N. Y. App. Div. 489, 77 N. Y. Suppl. 209 (although the identity of such persons is first disclosed on the trial); Biddescomb *v.* Cameron, 58 N. Y. App. Div. 42, 68 N. Y. Suppl. 568; Munn *v.* Worrall, 16 Barb. 221; Fellows *v.* Emperor, 13 Barb. 92; Leavy *v.* Roberts, 2 Hilt. 285, 8 Abb. Pr. 310; Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736 [*affirmed* in 35 N. Y. App. Div. 632, 55 N. Y. Suppl. 1148]; Conable *v.* Keeney, 19 N. Y. Suppl. 449; Conable *v.* Smith, 19 N. Y. Suppl. 446; Wilcox *v.* Joslin, 10 N. Y. Suppl. 342; People *v.* New York Super. Ct., 10 Wend. 285. See also Bridenbecker *v.* Bridenbecker, 75 N. Y. App. Div. 6, 77 N. Y. Suppl. 802.

North Carolina.— Sikes *v.* Parker, 95 N. C. 232.

Pennsylvania.— Kambeitz *v.* Harrisburg Traction Co., 9 Pa. Dist. 750, 24 Pa. Co. Ct. 453.

South Dakota.— Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822; Demmon *v.* Mullen, 6 S. D. 554, 62 N. W. 380.

Tennessee.— Harbour *v.* Rayburn, 7 Yerg. 432.

Texas.— Gulf, etc., R. Co. *v.* Blanchard, (1903) 75 S. W. 6 [*affirming* (Civ. App. 1903) 73 S. W. 88]; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Sabine, etc., R. Co. *v.* Wood, 69 Tex. 679, 7 S. W. 372; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Traylor *v.* Townsend, 61 Tex. 144; Upson *v.* Campbell, (Civ. App. 1907) 99 S. W. 1129; Pelly *v.* Denison, etc., R. Co., (Civ. App. 1904) 78 S. W. 542; Parham *v.* Shockler, (Civ. App. 1903) 73 S. W. 839; St. Louis Southwestern R. Co. *v.* Bowles, (Civ. App. 1903) 72 S. W. 451; San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920; Smith *v.* Seymore, (Civ. App. 1900) 59 S. W. 816; Gulf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Missouri, etc., R. Co. *v.* Jordan, (Civ. App. 1900) 56 S. W. 619; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796; Brown *v.* Grinnan, 2 Tex. App. Civ. Cas. § 413.

Vermont.— Brainard *v.* Morse, 47 Vt. 320.

Washington.— Bullock *v.* White Star Steamship Co., 30 Wash. 448, 70 Pac. 1106; Jordan *v.* Seattle, 30 Wash. 116, 70 Pac. 743.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Sayre *v.* King, 17 W. Va. 562.

Wisconsin.— Dingman *v.* State, 48 Wis. 485, 4 N. W. 668; Edmiston *v.* Garrison, 18 Wis. 594.

England.— Thurtell *v.* Beaumont, 1 Bing. 339, 2 L. J. C. P. O. S. 4, 8 Moore C. P. 612, 25 Rev. Rep. 644, 8 E. C. L. 538.

Defense known to principal.— Ordinarily it is negligence for a surety to fail to learn of a defense known to his principal. Sayre *v.* King, 17 W. Va. 562.

17. *Indiana.*— Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Kentucky.— Gratz *v.* Worden, 82 S. W. 395, 26 Ky. L. Rep. 721. *Compare* Illinois Cent. R. Co. *v.* McManus, 67 S. W. 1000, 24 Ky. L. Rep. 81.

New York.— Conable *v.* Smith, 19 N. Y. Suppl. 446.

c. Books and Papers in Movant's Possession. Evidence newly discovered in books or papers which were in the possession of the applicant before the verdict is seldom cause for granting a new trial.[18]

d. Matters of Record. The discovery after the trial of a judgment or judicial record,[19] or of an ordinance or resolution of a municipal corporation,[20] or of a deed or other instrument of record,[21] or of any other matter of public record,[22] is not ground for new trial, unless, on diligent search in the proper office, such record was not discovered before the trial.[23]

South Carolina.— See Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719, as to record which "cut both ways."

Texas.— San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920, although witness refused to disclose facts.

Virginia.— Norfolk, etc., R. Co. *v.* Draper, 90 Va. 245, 17 S. E. 883.

United States.— Nyback *v.* Champagne Lumber Co., 130 Fed. 784 [*affirmed* in 130 Fed. 1021, 64 C. C. A. 615].

That a witness had promised to conceal information from a party does not excuse the party from interviewing him. Chicago, etc., R. Co. *v.* McKeehan, 5 Ind. App. 124, 31 N. E. 831.

Failure to make inquiries of members of the adversary party's family is not usually considered negligence. Knox *v.* Bigelow, 15 Wis. 415.

18. *Alabama.*—Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. 729.

Connecticut.—See Selleck *v.* Head, 77 Conn. 15, 58 Atl. 224, as to books of adversary in custody of court and examined by party.

Georgia.— Richards *v.* Hunt, 65 Ga. 342; Boehm *v.* Juchter, 62 Ga. 580.

Kansas.— Carson *v.* Henderson, 34 Kan. 404, 8 Pac. 727.

Missouri.— James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Tilford *v.* Ramsey, 43 Mo. 410.

Montana.— Rand *v.* Kipp. 27 Mont. 138, 69 Pac. 714.

New York.— Quinn *v.* Lloyd, 1 Sweeny 253 [*reversed* on other grounds in 41 N. Y. 349]; Roundey *v.* Stillwell, 19 Misc. 415, 43 N. Y. Suppl. 1132; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 312, 20 N. Y. Suppl. 715; Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450. *Compare* Butterworth *v.* Warth, 4 Bosw. 624, as to discovery of material error in footings of account.

North Carolina.— Matthews *v.* Joyce, 85 N. C. 258.

Rhode Island.— Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

South Carolina.— Bogert *v.* Simons, 1 Mill 143.

Washington.— See Collins *v.* Bacon, 38 Wash. 80, 80 Pac. 268, as to books to which movant had access.

Wisconsin.— Schmitt *v.* Northern Pac. R. Co., 120 Wis. 397, 98 N. W. 202.

United States.— Cheeney *v.* Nebraska, etc., Stone Co., 41 Fed. 740; Coote *v.* U. S. Bank, 6 Fed. Cas. No. 3,204, 3 Cranch C. C. 95.

England.— Shedden *v.* Atty.-Gen., L. R. 1 H. L. Sc. 470, 545, 22 L. T. Rep. N. S. 631; Dixon *v.* Graham, 5 Dow. 267, 3 Eng. Reprint 1324.

Canada.— Murray *v.* Canada Cent. R. Co., 7 Ont. App. 646.

Discovery held to authorize trial.— The discovery of important new evidence by the attorney of an executor, the latter being absent from the country, among the papers of the executor in the possession of the attorney was held ground for a new trial. Broadhead *v.* Marshall, W. Bl. 955.

19. Beard *v.* Simmons, 9 Ga. 4; Morgan *v.* Houston, 25 Vt. 570.

20. Farrell *v.* West Chicago Park Com'rs, 182 Ill. 250, 55 N. E. 325 [*affirmed* in 181 U. S. 404, 21 S. Ct. 609, 645, 45 L. ed. 916, 924]; Walsh *v.* St. Paul, 62 Minn. 145, 64 N. W. 147; Simonton *v.* Perry, (Tex. Civ. App. 1901) 62 S. W. 1090. *Compare* Topeka *v.* Smelser, 3 Kan. App. 17, 44 Pac. 435, where action of trial court in granting a new trial was not disturbed.

21. *California.*— Weimer *v.* Lowery, 11 Cal. 104.

Georgia.— Shiels *v.* Lamar, 58 Ga. 590.

Kentucky.— Howton *v.* Roberts, 49 S. W. 340, 20 Ky. L. Rep. 331; Ashcraft *v.* Barker, 39 S. W. 510, 19 Ky. L. Rep. 222. *Compare* Elliott *v.* Harris, 81 Ky. 470, where indexes had been destroyed.

Minnesota.— Laurel *v.* State Nat. Bank, 25 Minn. 48.

New York.— Luthy *v.* Regan, 16 N. Y. Suppl. 400; Behrens *v.* Bloom, 3 N. Y. Suppl. 551.

Tennessee.—Smith *v.* Winton, 1 Overt. 230, 3 Am. Dec. 755.

Texas.— Johnson *v.* Flint, 75 Tex. 379, 12 S. W. 1120.

See 37 Cent. Dig. tit. "New Trial," § 213.

22. *Illinois.*— Farrell *v.* West Chicago Park Com'rs, 182 Ill. 250, 55 N. E. 325 [*affirmed* in 181 U. S. 404, 21 S. Ct. 609, 645, 45 L. ed. 916, 924].

Indiana.— Simpkins *v.* Wilson, 11 Ind. 541 (tax assessment); Robinoe *v.* Colwell, 6 Blackf. 85 (will on file in probate office).

Minnesota.— Scott, etc., Lumber Co. *v.* Sharvy, 62 Minn. 528, 64 N. W. 1132.

New York.— People *v.* Marks, 10 How. Pr. 261.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524, tax records.

Texas.— Vardeman *v.* Edwards, 21 Tex. 737.

See 37 Cent. Dig. tit. "New Trial," § 213.

Compare Gallup *v.* Fish, 2 Root (Conn.) 452.

23. Weimer *v.* Lowery, 11 Cal. 104; Grotte *v.* Schmidt, 80 Iowa 454, 45 N. W.

e. **Admissions by Adversary.**[24] That the movant did not discover before the trial evidence of admissions, not of the *res gestæ*, made by the successful party, does not ordinarily show a lack of reasonable diligence;[25] but where the movant knew that his adversary had conversed with another person regarding the matter in controversy his failure to make inquiry of such person as to what was said shows lack of diligence.[26]

f. **Surprise or Mistake as an Excuse** — (i) *Surprise at Adversary's Evidence.* Where the applicant for a new trial was surprised by evidence offered by his adversary, and then knew of no evidence to refute it, he cannot be charged with negligence in not having produced at the trial evidence of that character which he has since discovered.[27] Thus it is not usually negligence not to have discovered and produced evidence to refute evidence that was not pertinent to the issues or was contrary to his adversary's pleadings or of which he was not fairly put upon notice by such pleadings.[28] Nor was it negligence not to have been prepared to meet evidence which was contrary to the theory on which the case had been tried by his opponent in an inferior court.[29] Where the movant was surprised at the trial by evidence of an alleged act or admission, a new trial may sometimes be allowed to permit him to prove that he was not present at the time and place alleged.[30] Usually it is not negligence not to have anticipated and been prepared to meet evidence of alleged admissions by the unsuccessful party, not of the *res gestæ*, offered in his absence.[31]

771; Cox *v.* Prewitt, 26 S. W. 589, 16 Ky. L. Rep. 130, surveyor's book. See also Kriger *v.* Hanover Nat. Bank, 72 Miss. 462, 16 So. 351, where entry in books of corporation was made in unusual place and contrary to usual course of business.

24. See also *infra*, III, I, 5, b, (IV).

25. *California.*— Heintz *v.* Cooper, 104 Cal. 668, 38 Pac. 511.

Georgia.— Gregory *v.* Harrell, 88 Ga. 170, 14 S. E. 186.

Indiana.— Rains *v.* Ballow, 54 Ind. 79.

Iowa.— Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Woodman *v.* Dutton, 49 Iowa 398.

Missouri.— Standard Inv. Co. *v.* Hoyt, 164 Mo. 124, 63 S. W. 1093.

New York.— Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49 (memoranda found among papers of deceased person); Oakley *v.* Sears, 1 Rob. 73, 1 Abb. Pr. N. S. 368.

Compare Smith *v.* Williams, 11 Kan. 104; Tabler *v.* Connor, 1 Baxt. (Tenn.) 195 (as to admissions made to physician as to manner of receiving injury); Scott *v.* Hobe, 108 Wis. 239, 84 N. W. 181 (as to admissions made to movant's clerk); Kurtz *v.* Jelleff, 104 Wis. 27, 80 N. W. 41.

Applications of rule.— It is not negligence not to have made particular inquiries of all acquaintances of the adverse party as to conversations they might have had with him on the subject-matter of the suit for the purpose of learning of any admissions he may have made. Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493; Eckel *v.* Walker, 48 Iowa 225; Moran *v.* Friedman, 88 Hun (N. Y.) 515, 34 N. Y. Suppl. 911. See also Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Missouri Pac. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590. *Compare* Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697. Nor is it negligence to rely on the record title to property where the party has no notice of an unrecorded title. Van Wagenen *v.* Carpenter, 27 Colo. 444, 61 Pac. 698.

26. Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324.

27. Felver *v.* Judd, 81 Ill. App. 529; Newhall *v.* Appleton, 47 N. Y. Super. Ct. 38. See also *supra*, III, H, 3, c.

Parol evidence contradicting record.— It is not negligence not to anticipate parol evidence contradicting a record as to the time of filing a deed or not to have discovered parol evidence sustaining such record. Shaw *v.* Henderson, 7 Minn. 480.

That the movant did not anticipate what his adversary would testify to is rarely an excuse for not producing at the trial the evidence alleged to be newly discovered. Hawxhurst *v.* Hennion, 9 N. Y. Suppl. 542.

28. *California.*— Menk *v.* Commercial Ins. Co., 70 Cal. 585, 11 Pac. 654.

Georgia.— Kane *v.* Savannah, etc., R. Co., 85 Ga. 858, 11 S. E. 493.

New York.— Gillett *v.* Depuy, 48 N. Y. App. Div. 635, 63 N. Y. Suppl. 52; Hess *v.* Sloane, 47 N. Y. App. Div. 585, 62 N. Y. Suppl. 666. See also Clegg *v.* New York Newspaper Union, 51 Hun 232, 4 N. Y. Suppl. 280.

Pennsylvania.— Conrad *v.* Conrad, 9 Phila. 510.

Texas.— Missouri Pac. R. Co. *v.* Walker, (1888) 7 S.-W. 791.

29. Raub *v.* Nisbett, 111 Mich. 38, 69 N. W. 77. See also *supra*, III, H, 3, c, (III).

30. Benta *v.* Harris, 27 Misc. (N. Y.) 648, 58 N. Y. Suppl. 398; Sargent *v.* ——, 5 Cow. (N. Y.) 106. *Compare* Campbell *v.* Hyde, 1 D. Chipm. (Vt.) 65.

31. Manning *v.* Gignoux, 23 Nev. 322, 46 Pac. 886.

(11) *Mistake, Inadvertence, or Surprise in Presenting Case or Defense.* It is not sufficient excuse for want of preparation to prove or disprove a matter in issue that the movant did not know that evidence on such matter would be required or offered,[32] unless he was actively misled by the successful party.[33] Nor can known evidence be considered as in any sense newly discovered, or the failure to have produced it be excused, because the unsuccessful party did not understand its materiality or importance in time to produce it.[34] That the movant was disappointed in the testimony of his witnesses is not ordinarily a sufficient excuse for his having failed to discover and produce at the trial the evidence alleged to be newly discovered.[35] In determining the question of reasonable diligence, the court may properly consider the apparent sufficiency of the evidence produced at the trial by the applicant.[36] It is not reasonable diligence to rely upon a mere expectation that witnesses or evidence necessary to the movant's case or defense will be produced by the adversary party.[37] Forgetfulness or oversight of evidence or witnesses by the applicant until after the trial is not ground for a new trial.[38]

g. Witnesses Examined at Trial. A new trial will not be granted to permit a witness to testify to facts forgotten or overlooked by him, or to which his attention was not called, when giving his testimony at the trial.[39] That the witness is

32. Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806; McDonald *v.* Harris, 75 Ill. App. 111; Harris *v.* Cheshire R. Co., (R. I. 1889) 16 Atl. 512; Gaines *v.* White, 2 S. D. 410, 50 N. W. 901.

33. See *supra*, III, H, 3, d, (I), (A).

34. *Georgia.*— Newman *v.* Malsby, 108 Ga. 339, 33 S. E. 997 (testimony of party himself not thought necessary before the trial and party absent therefrom); O'Barr *v.* Alexander, 37 Ga. 195; Bright *v.* Central R., etc., Co., 21 Ga. 345.

Indiana.— Test *v.* Larsh, 100 Ind. 562.

Michigan.— Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

Missouri.— Southern Express Co. *v.* Moeller, 85 Mo. 208; Hanley *v.* Life Assoc. of America, 69 Mo. 380 [*affirming* 4 Mo. App. 253].

New York.— Smith *v.* Rentz, 73 Hun 195, 25 N. Y. Suppl. 914; Price *v.* Price, 33 Hun 432; Oakley *v.* Sears, 7 Rob. 111; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 312, 20 N. Y. Suppl. 715; Dillingham *v.* Flack, 17 N. Y. Suppl. 867.

United States.— Codman *v.* Vermont, etc., R. Co., 5 Fed. Cas. No. 2,936, 17 Blatchf. 1.

35. Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716.

36. Gilman *v.* Nichols, 42 Vt. 313.

37. Burnley *v.* Rice, 21 Tex. 171; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489. See also *supra*, III, H, 3, f, (I). (B).

38. *Indiana.*— Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Kansas.— Mitchell *v.* Stillings, 20 Kan. 276.

Kentucky.— Howton *v.* Roberts, 49 S. W. 340, 20 Ky. L. Rep. 1331.

Missouri.— Goff *v.* Mulholland, 33 Mo. 203.

Montana.— Nicholson *v.* Metcalf, 31 Mont. 276, 78 Pac. 483.

Nebraska.— Hoffine *v.* Ewings, 60 Nebr. 729, 84 N. W. 93; Upton *v.* Levy, 39 Nebr. 331, 58 N. W. 95.

New York.— Quinn *v.* Lloyd, 1 Sweeny 253 [*reversed* on other grounds in 41 N. Y. 349]; Wilcox *v.* Joslin, 10 N. Y. Suppl. 342; Hatfield *v.* Macy, 52 How. Pr. 193; People *v.* New York Super. Ct., 10 Wend. 286.

Pennsylvania.— Fey *v.* Ryan, 3 Phila. 406.

Rhode Island.— Johnson *v.* Blanchard, 5 R. I. 24.

Wisconsin.— Wilson *v.* Johnson, 74 Wis. 337, 43 N. W. 148.

United States.— Wilson *v.* Freedley, 129 Fed. 835 [*reversed* on other grounds in 136 Fed. 586, 69 C. C. A. 360].

Canada.— Preston *v.* Appleby, 27 N. Brunsw. 92.

Compare Klockenbaum *v.* Pierson, 22 Cal. 160.

That a party forgot the presence of a witness at a conversation on the matter in controversy does not exempt him from the charge of negligence. Munn *v.* Worrall, 16 Barb. (N. Y.) 221.

What is not negligence.— It is not negligence not to remember after five years that a person not interested in the transaction was present when a note was paid. Humphries *v.* Marshall, 12 Ind. 609.

39. *California.*— Moran *v.* Abbey, 63 Cal. 56; Arnold *v.* Skaggs, 35 Cal. 684.

Georgia.— Greer *v.* Raney, 120 Ga. 290, 47 S. E. 939; Richards *v.* Hunt, 65 Ga. 342; Archer *v.* Heidt, 55 Ga. 200; Elliott *v.* Pinkus, 55 Ga. 163; Gaulden *v.* Lawrence, 33 Ga. 159.

Illinois.— McDonald *v.* People, 222 Ill. 325, 78 N. E. 609 [*affirming* 123 Ill. App. 346].

Indiana.— Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264.

Iowa.—Marengo Sav. Bank *v.* Kent, (1907) 112 N. W. 767; Barber *v.* Maden, 126 Iowa 402, 102 N. W. 120; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

Kansas.— Mitchell *v.* Stillings, 20 Kan. 276.

Kentucky.— Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L.

better able to testify from having refreshed his memory,[40] or that memoranda have been found to refresh his memory and make his testimony more positive,[41] does not change the rule. Legal diligence requires that a witness be examined fully and specifically as to his knowledge of all the matters in controversy.[42] The rule applies to witnesses whose testimony is taken in the form of depositions.[43] So it applies to the examination of adversary witnesses,[44] and probably to the

Rep. 455, 18 L. R. A. 63; Howton *v.* Roberts, 49 S. W. 340, 20 Ky. L. Rep. 1331.

Louisiana.— Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556.

Missouri.— Tilford *v.* Ramsey, 43 Mo. 410.

New York.— Fleming *v.* Hollenback, 7 Barb. 271; Campbell *v.* Genet, 2 Hilt. 290; Huse, etc., Ice, etc., Co. *v.* Wielar, 86 N. Y. Suppl. 24; Hatfield *v.* Macy, 52 How. Pr. 193. See also McIver *v.* Hallen, 50 N. Y. App. Div. 441, 64 N. Y. Suppl. 26.

Tennessee.— Martin *v.* Nance, 3 Head 649.

Texas.— Watts *v.* Johnson, 4 Tex. 311; Cochrane *v.* Middleton, 13 Tex. 275; Neal *v.* Whitlock, (Civ. App. 1907) 101 S. W. 284. *Compare* Mitchell *v.* Bass, 26 Tex. 372.

West Virginia.— Bloss *v.* Hull, 27 W. Va. 503.

United States.— See Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14, errors of judgment on part of movant's engineer in not delineating on a plan certain objects tending to support movant's defense.

See 37 Cent. Dig. tit. "New Trial," § 206. See also *supra*, III, H, 3, e, (I).

Compare Foster *v.* Hough, 1 Root (Conn.) 173, as to facts learned by the witness after the trial.

40. Moran *v.* Abbey, 63 Cal. 56; Greer *v.* Raney, 120 Ga. 290, 47 S. E. 939; Archer *v.* Heidt, 55 Ga. 200; Sawyer *v.* La Flesh, 65 Wis. 659, 27 N. W. 407.

41. Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790.

42. *California.*— Arnold *v.* Skaggs, 35 Cal. 684; Gaven *v.* Dopman, 5 Cal. 342 (especially where jury disbelieved what witness actually testified to); Bartlett *v.* Hogden, 3 Cal. 55.

Georgia.— Dalton *v.* Drake, 75 Ga. 115; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Phillips *v.* Ocmulgee Mills, 55 Ga. 633.

Indiana.— Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Beard *v.* Peru First Presby. Church, 10 Ind. 568.

Iowa.— Sioux City Stock-Yards Co. *v.* Sioux City Packing Co., 110 Iowa 396, 81 N. W. 712; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; State *v.* Ginger, 80 Iowa 574, 46 N. W. 657; Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98; Carman *v.* Roennan, 45 Iowa 135; Fanning *v.* McCraney, Morr. 398.

Kansas.— Hindman *v.* Askew Saddlery Co., 9 Kan. App. 98, 57 Pac. 1050; Bowling *v.* Floyd, (App. 1897) 48 Pac. 875.

Kentucky.— Paul *v.* Williams, 2 B. Mon. 265.

Louisiana.— Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556. See also Chiapella *v.* Brown, 14 La. Ann. 189.

Maine.— Achorn *v.* Andrews, (1888) 12 Atl. 793.

Michigan.— Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

Minnesota.— Taylor *v.* Mueller, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199; Laurel *v.* State Nat. Bank, 25 Minn. 48.

Mississippi.— Wright *v.* Alexander, 11 Sm. & M. 411.

Missouri.— James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Shotwell *v.* McElhinney, 101 Mo. 677, 14 S. W. 754.

Montana.— Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92.

Nebraska.— Campion *v.* Littimer, 70 Nebr. 245, 97 N. W. 290; Burlington, etc., R. Co. *v.* Kittridge, 52 Nebr. 16, 71 N. W. 986; Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800; Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992; Axtell *v.* Warden, 7 Nebr. 186.

New York.— Plyer *v.* German-American Ins. Co., 1 N. Y. Suppl. 395 [*reversed* in 121 N. Y. 689, 24 N. E. 929]; Smith *v.* Clews, 14 Abb. N. Cas. 465; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]. *Compare* Jackson *v.* Laird, 8 Johns. 489.

Pennsylvania.— Cox *v.* Cox, 12 Montg. Co. L. Rep. 61.

Rhode Island.— Johnson *v.* Blanchard, 5 R. I. 24, especially where witness the movant.

Tennessee.— Martin *v.* Nance, 3 Head 649.

Texas.— Walker *v.* Graham, 17 Tex. 262; Duckworth *v.* Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 66, 75 S. W. 913. *Compare* Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171.

Utah.— See Heath *v.* White, 3 Utah 474, 24 Pac. 762.

Wisconsin.— Sawyer *v.* La Flesh, 65 Wis. 659, 27 N. W. 407.

United States.— Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

England.— Taylor *v.* Sheppard, 1 Y. & C. Exch. 271.

See 37 Cent. Dig. tit. "New Trial," § 208.

Where the witness had agreed with the prevailing party to keep secret the matter newly discovered, a new trial may properly be granted. Stokes *v.* Stokes, 34 N. Y. App. Div. 423, 54 N. Y. Suppl. 319.

43. Bowling *v.* Floyd, (App. 1897) 48 Pac. 875; Missouri, etc., R. Co. *v.* Rack, 21 Tex. Civ. App. 667, 52 S. W. 988.

44. Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Zimmerman *v.* Weigel, 158 Ind. 370, 63 N. E. 566; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Brennan *v.* Goodfellow, (Iowa 1903) 96 N. W. 962; Missouri, etc., R. Co. *v.* Rack, 21 Tex. Civ. App. 667, 52 S. W. 988, witness examined by deposition.

cross-examination of an adversary party.[45] The failure to examine a witness upon a particular point is not excused by a fear that his testimony may prove unfavorable.[46] It has been held that the denial before the trial by a person of any knowledge of a particular fact is not an excuse for failure to question him specifically as to such fact when he subsequently testifies in the case.[47]

5. Character of Newly Discovered Evidence — a. Competency and Relevancy — (i) *In General.* The newly discovered evidence must be competent and relevant under the issues.[48] If it is similar in character to evidence offered and excluded on the trial, a new trial will not be granted.[49]

(ii) *Attempted Change of Issues.* As a rule the newly discovered evidence must be relevant to the issues already framed.[50] Evidence to prove a case

45. McClendon *v.* McKissack, 143 Ala. 188, 38 So. 1020; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697. *Compare* Continental Ins. Co. *v.* Hillmer, 42 Kan. 275, 287, 21 Pac. 1044.

46. Taylor *v.* Mueller, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. (N. Y.) 325 [*affirmed* in 13 Hun 514].

47. Schultz *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Smith *v.* Clews, 14 Abb. N. Cas. (N. Y.) 465. *Contra,* Buford *v.* Bostick, 50 Tex. 371. *Compare* Kochel *v.* Bartlett, 88 Ind. 237, where witness was boy of fifteen who supposed that his knowledge amounted to nothing. And see *supra,* III, H, 3, e, (I).

48. *Alabama.*— Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160.

California.— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962; Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935.

Colorado.— Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771; Mackey *v.* Mackey, 16 Colo. 134, 26 Pac. 554; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.

Georgia.— Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Hooks *v.* Frick, 75 Ga. 715; Leverett *v.* Cook, 68 Ga. 838; Perry *v.* Mulligan, 58 Ga. 479.

Illinois.—North Chicago St. R. Co. *v.* Wellner, 105 Ill. App. 652 [*affirmed* in 206 Ill. 272, 69 N. E. 6].

Indiana.— Miller *v.* Cook, 124 Ind. 238, 24 N. E. 750; Rich *v.* Starbuck, 50 Ind. 126; Harris *v.* Rupel, 14 Ind. 209; Campbell *v.* Nixon, 25 Ind. App. 90, 56 N. E. 248; Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109.

Iowa.— Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940; Welch *v.* Browning, 115 Iowa 690, 87 N. W. 430; Sioux City Stock-Yards Co. *v.* Sioux City Packing Co., 110 Iowa 396, 81 N. W. 712; Moore *v.* Davenport, etc., R. Co., 94 Iowa 736, 62 N. W. 679; Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275.

Louisiana.— Burton *v.* Brewer, 7 La. Ann. 620; Rhodes *v.* Beaman, 10 La. 363; Ingram *v.* Croft, 7 La. 82.

Minnesota.— Smith *v.* Chapel, 36 Minn. 180, 30 N. W. 660.

Missouri.— De Lassus *v.* Winn, 174 Mo. 636, 74 S. W. 635; Miller *v.* Whitson, 40 Mo. 97; Spaulding *v.* Edina, 104 Mo. App. 45, 78 S. W. 302, alleged admissions by husband of plaintiff in personal injury case.

Nebraska.— McNeal *v.* Hunter, 72 Nebr. 579, 101 N. W. 236; Chmelir *v.* Sawyer, 42 Nebr. 362, 60 N. W. 547; Keiser *v.* Decker, 29 Nebr. 92, 45 N. W. 272.

New Jersey.— Sheppard *v.* Sheppard, 10 N. J. L. 250.

New York.— Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Baily *v.* Hornthal, 1 N. Y. App. Div. 44, 36 N. Y. Suppl. 1082; Fellows *v.* Emperor, 13 Barb. 92; Healey *v.* Healey, 32 Misc. 342, 66 N. Y. Suppl. 741; Chester *v.* Jumel, 10 N. Y. Suppl. 57; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514].

North Carolina.— Sikes *v.* Parker, 95 N. C. 232.

North Dakota.— Braithwaite *v.* Aiken, 2 N. D. 57, 49 N. W. 419.

Pennsylvania.—Martin *v.* Marvine, 1 Phila. 280; Marsh *v.* Moser, 1 Woodw. 218.

Tennessee.—Smith *v.* Winton, 1 Overt. 230, 3 Am. Dec. 755.

Texas.— Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117; Holman *v.* Herscher, (1891) 16 S. W. 984 (confidential communication between attorney and client); Rissell *v.* Anderson, (Civ. App. 1904) 83 S. W. 237; Saunders *v.* Saunders, (Civ. App. 1901) 62 S. W. 797; Phifer *v.* Mansur-Tebbetts Implement Co., 26 Tex. Civ. App. 57, 61 S. W. 968; Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in 94 Tex. 120, 58 S. W. 951].

Vermont.— See Ferris *v.* Barlow, 10 Vt. 133.

Virginia.— Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

West Virginia.— Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Gillilan *v.* Ludington, 6 W. Va. 128.

Wisconsin.— Beery *v.* Chicago, etc., R. Co., 73 Wis. 197, 40 N. W. 687.

United States.— Silvey *v.* U. S., 7 Ct. Cl. 305.

See 37 Cent. Dig. tit. "New Trial," §§ 215, 216.

49. Gautier *v.* Douglass Mfg. Co., 52 How. Pr. (N. Y.) 325 [*affirmed* in 13 Hun 514].

50. *Georgia.*— Claflin *v.* Briant, 58 Ga. 414.

Illinois.— Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346.

Indiana.— Rich *v.* Starbuck, 50 Ind. 126; Swift *v.* Wakeman, 9 Ind. 552.

or defense wholly distinct from that presented at the trial,[51] especially if inconsistent therewith,[52] or contradictory of admissions made in the pleadings,[53] or to prove a matter abandoned or waived at the trial,[54] is not ground for a new trial. Facts arising after the trial should be taken advantage of by supplemental proceedings and not by application for a new trial.[55]

b. Materiality and Probable Effect — (i) *In General.* The newly discovered evidence must be material or important to the moving party.[56] Evidence on a

Iowa.— Reed *v.* Corrigan, 114 Iowa 638, 87 N. W. 676. See also Brennan *v.* Goodfellow, (1903) 96 N. W. 962.

Kentucky.— Eccles *v.* Shackleford, 1 Litt. 35.

Louisiana.— Devot *v* Marx, 19 La. Ann. 491; Long *v.* Robinson, 5 La. Ann. 627; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Cox *v.* Bethany, 10 La. 152; Sorrel *v.* St. Julien, 4 Mart. 508.

New York.— Fellows *v.* Emperor, 13 Barb. 92; Hagen *v.* New York Cent., etc., R. Co., 44 Misc. 540, 90 N. Y. Suppl. 125 [*reversed* on other grounds in 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914]; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Anderson *v* Market Nat. Bank, 66 How. Pr. 8.

Pennsylvania.— Marsh *v.* Moser, 1 Woodw. 218.

South Carolina.— Turner *v.* Lyles, 68 S. C. 392, 48 S. E. 301.

Texas.— Jones *v.* Neal, (Civ. App. 1906) 98 S. W. 417.

Wisconsin.— Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

See 37 Cent. Dig. tit. "New Trial," § 215.

Newly discovered evidence of a defense which is inherently bad is not ground for a new trial. Robinson *v.* Martell, 11 Tex. 149.

51 Claflin *v.* Briant, 58 Ga. 414; Rich *v.* Starbuck, 50 Ind. 126; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Cox *v.* Bethany, 10 La. 152. See also *supra*, III, H, 1, e.

The proper remedy where distinct defense had been discovered is a review. Rich *v.* Starbuck, 50 Ind. 126.

52 *Connecticut.*— Wildman *v.* Wildman, 72 Conn. 262, 44 Atl. 224.

Georgia.— Huntington *v.* Bonds, 68 Ga. 23.

Illinois.— Chicago, etc., R. Co. *v.* Sullivan, (1888) 17 N. E. 460.

Kentucky.— Chesapeake, etc., R. Co. *v.* Friel, 39 S. W. 704, 19 Ky L. Rep. 152.

Louisiana.— Erwin *v.* Trion, 2 La. 305; Sorrel *v.* St Julien, 4 Mart. 508.

New York.— Gerard *v.* McCormick, 16 Daly 40, 8 N. Y. Suppl. 860 [*affirmed* in 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234].

Canada.— Hickey *v.* Stover, 11 Ont. 106.

Evidence contradictory of applicant's testimony.— That the newly discovered evidence is contradictory of the testimony given by the applicant at the trial is cause for refusing a new trial. Biggar *v.* Lister, (Tex. Civ. App. 1894) 27 S. W. 707.

53 Fellows *v.* Emperor, 13 Barb. (N. Y.) 92.

54. Crafts *v.* Union Mut. F. Ins. Co., 36 N. H. 44; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518. It seems that a new trial will not be granted for newly discovered evidence to disprove the execution of an instrument, to the admission of which in evidence, without proof of execution, no objection was made at the trial. McCrory *v.* Grandy, 92 Ga. 319, 18 S. E. 65.

55. *California.*— Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195.

Colorado.— Johnson *v.* Johnson, 18 Colo. App. 493, 72 Pac. 604.

Georgia.— Denny *v.* Broadway Nat. Bank, 118 Ga. 221, 44 S. E. 982.

Indiana.— See Miller *v.* Cook, 124 Ind. 238, 24 N. E. 750.

Rhode Island.— Putnam *v.* MacLeod, 23 R. I. 373, 50 Atl. 646.

Texas.— Von Koehring *v.* Witte, 15 Tex. Civ. App. 646, 40 S. W. 63. *Compare* Ablowich *v.* Greenville Nat. Bank, 22 Tex. Civ. App 272, 54 S. W. 794, where inability to perform services for which note sued on was given arose after verdict.

See 37 Cent. Dig. tit. "New Trial," § 216.

56. *Alabama.*— Freeman *v.* Gragg, 73 Ala. 199.

Alaska.— Marks *v.* Shoup, 2 Alaska 66.

Arkansas.— Bourland *v.* Skimnee, 11 Ark. 671; Olmstead *v* Hill, 2 Ark. 346; Robins *v.* Fowler, 2 Ark. 133.

California.— Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962; Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 155.

Connecticut.— Parsons *v.* Platt, 37 Conn. 563.

Delaware.— McCombs *v.* Chandler, 5 Harr. 423.

Georgia.— Greer *v.* Raney, 120 Ga. 290, 47 S. E. 939; Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991; Perry *v.* Mulligan, 58 Ga. 479; Wallace *v.* Tumlin, 42 Ga. 462; Gibson *v.* Williams, 39 Ga. 660; Moore *v.* Ulm, 34 Ga. 565.

Illinois.— Springer *v.* Schultz, 205 Ill. 144, 68 N. E. 753 [*affirming* 105 Ill. App. 544]; Chicago, etc., R. Co. *v.* Stewart, 203 Ill. 223, 67 N. E. 830 [*affirming* 104 Ill. App. 37]; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720; Crozier *v.* Cooper, 14 Ill. 139; Possehl *v.* Arnold, 78 Ill. App. 590.

Indiana.— Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Anderson *v.* Hathaway, 130 Ind. 528, 30 N. E. 638; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Shewalter *v.* Williamson, 125 Ind. 373, 25 N. E. 452; Hines *v.* Driver, 100 Ind. 315; Glidewell *v.* Daggy, 21 Ind. 95; Simpkins *v.* Wilson, 11 Ind. 541; Louisville, etc., R. Co. *v.* Howard, 39 Ind. App. 703, 79 N. E. 1119; Louisville, etc., R.

matter collateral to the issues is seldom ground for a new trial.[57] It is not suffi-

Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Stumph *v.* Bigham, Wils. 367.

Indian Territory.— Woolsey *v.* Jackson, 3 Indian Terr. 597, 64 S. W. 548.

Iowa.— Gibson *v.* Hunt, (1903) 94 N. W. 277; Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73; Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635; Reeves *v.* Royal, 2 Greene 451.

Kansas.— Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895; Olathe *v.* Horner, 38 Kan. 312, 16 Pac. 468; Clark *v.* Norman, 24 Kan. 515; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504.

Kentucky.— Hays *v.* Davis, 46 S. W. 212, 20 Ky. L. Rep. 342; Chesapeake, etc., R. Co. *v.* Friel, 39 S. W. 704, 19 Ky. L. Rep. 152; Helfrich Saw, etc., Mill Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795.

Louisiana.— Burton *v.* Brewer, 7 La. Ann. 620; Union Bank *v.* Robert, 9 Rob. 177; Bonnet *v.* Legras, 1 Rob. 92; Ingram *v.* Croft, 7 La. 82; Smith *v.* Crawford, 10 Mart. 81.

Massachusetts.— Tuttle *v.* Cooper, 5 Pick. 414.

Minnesota.— Smith *v.* Chapel, 36 Minn. 180, 30 N. W. 660; Knoblauch *v.* Kronschnabel, 18 Minn. 300.

Missouri.— Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Goff *v.* Mulholland, 33 Mo. 203; Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121; Young *v.* Warren County Bank, 91 Mo. App. 644; Dean *v.* Chandler, 44 Mo. App. 338.

Montana.— Butte, etc., Min. Co. *v.* Sloan, 16 Mont. 97, 40 Pac. 217.

Nebraska.— Matoushek *v.* Dutcher, 67 Nebr. 627, 93 N. W. 1049; Omaha, etc., R. Co. *v.* O'Donnell, 24 Nebr. 753, 40 N. W. 298; Heady *v.* Fishburn, 3 Nebr. 263.

Nevada.— Howard *v.* Winters, 3 Nev. 539.

New York.— Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057 [*affirmed* in 178 N. Y. 623, 70 N. E. 1101]; Sayer *v.* King, 21 N. Y. App. Div. 624, 47 N. Y. Suppl. 422; Kepner *v.* Betz, 51 N. Y. Super. Ct. 18; Fowler *v.* Kelly, 43 N. Y. Super. Ct. 380; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 43 How. Pr. 157; Oakley *v.* Sears, 7 Rob. 111; Hagen *v.* New York Cent., etc., R. Co., 44 Misc. 540, 90 N. Y. Suppl. 125 [*reversed* on other grounds in 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914]; Litchfield *v.* Sisson, 43 Misc. 411, 89 N. Y. Suppl. 338; Levy *v.* Hatch, 92 N. Y. Suppl. 287; Pierson *v.* Hughes, 88 N. Y. Suppl. 1065; Alliger *v.* Mail Printing Assoc., 19 N. Y. Suppl. 584; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Luthy *v.* Regan, 16 N. Y. Suppl. 400; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432; Meyer *v.* Fiegel, 38 How. Pr. 424; Halsey *v.* Watson, 1 Cai. 24.

Ohio.— Ludlow *v.* Park, 4 Ohio 5.

Pennsylvania.— Ream *v.* Oldweiler, 2 Leg. Gaz. 147.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Tennessee.— Louisville, etc., R. Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

Texas.— Johnson *v.* Flint, 75 Tex. 379, 12 S. W. 1120; Allyn *v.* Willis, 65 Tex. 65; Madden *v.* Shapard, 3 Tex. 49; Dugan *v.* McDonald, 2 Tex. 355; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; Gulf, etc., R. Co. *v.* Burroughs, 27 Tex. Civ. App. 422, 66 S. W. 83; Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583, 65 S. W. 657; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249; Pride *v.* Whitfield, (Civ. App. 1899) 51 S. W. 1100; Less *v.* Hooks, (Civ. App. 1896) 39 S. W. 319; Eddy *v.* Newton, (Civ. App. 1893) 22 S. W. 533.

Vermont.— Brainard *v.* Morse, 47 Vt. 320; Bradish *v.* State, 35 Vt. 452; Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137; Smith *v.* Watson, 82 Va. 712, 1 S. E. 96.

Wisconsin.— Rice *v.* Ashland County, 114 Wis. 130, 89 N. W. 908; Wilson *v.* Plank, 41 Wis. 94; Moss *v.* Vroman, 5 Wis. 147.

United States.— Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488 [*affirmed* in 109 U. S. 180, 3 S. Ct. 83, 27 L. ed. 898]; Macy *v.* De Wolf, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933; Palmer *v.* Fiske, 2 Curt. 14, 18 Fed. Cas. No. 10,691; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

Canada.— White *v.* McKay, 43 U. C. Q. B. 226.

See 37 Cent. Dig. tit. "New Trial," §§ 202–204, 215, 216.

If the evidence is material on that issue alone on which the verdict is based, a new trial may be granted. McMullen *v.* Winfield Bldg., etc., Assoc., 4 Kan. App. 459, 46 Pac. 410.

Decision of supreme court construing statute different from trial court.— A decision of the supreme court of another state construing a statute of such state read in evidence differently from the construction given it by the trial court may justify the allowance of a new trial on the ground of newly discovered evidence. Martin *v.* Clark, 111 Wis. 493, 87 N. W. 451.

Oral evidence.— Although written evidence may be more decisive and therefore furnish stronger cause for granting a new trial oral evidence is legally sufficient. Jones *v.* Singleton, 45 Cal. 92; Nichols *v.* Mechanic's F. Ins. Co., 16 N. J. L. 410. *Contra*, Evans *v.* Rogers, 2 Nott & M. (S. C.) 563; Ecfert *v.* Des Coudres, 1 Mill (S. C.) 69, 12 Am. Dec. 609; Faber *v.* Baldrick, 3 Brev. (S. C.) 350; Buchanan *v.* Carolin, 1 Brev. (S. C.) 185.

57. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775. See also *infra*, III, I, 5, b, (VII).

cient that the new evidence, had it been offered on the trial, might have changed the verdict.[58] According to the weight of authority, it must be sufficiently important to make it probable that a different verdict will be returned on another trial.[59] According to some authorities, the new evidence must be of a decisive

58. See cases in following note. Where on a motion heard by a judge who did not preside at the trial, the affidavits of newly discovered evidence left it doubtful whether or not the alleged witnesses to an accident had not been guilty of perjury and conspiracy, a new trial should have been granted. Bennett *v.* Riley, 82 N. Y. App. Div. 639, 81 N. Y. Suppl. 882.

59. *Alaska.*—Marks *v.* Shoup, 2 Alaska 66.

Arizona.— Ryder *v.* Leach, 3 Ariz. 129, 77 Pac. 490.

Arkansas.— Merrick *v.* Britton, 26 Ark. 496; Burriss *v.* Wise, 2 Ark. 33.

California.— Kuhlman *v.* Burns, 117 Cal. 469, 49 Pac. 585; Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; Childs *v.* Lanterman, 95 Cal. 369, 30 Pac. 553; Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201; Armstrong *v.* Davis, 41 Cal. 494; Stoakes *v.* Monroe, 36 Cal. 383.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.

Connecticut.— Button *v.* Button, 80 Conn. 157, 67 Atl. 478; Hart *v.* Brainerd, 68 Conn. 50, 35 Atl. 776.

Georgia.— Armsby Co. *v.* Shewmake Co., 113 Ga. 1086, 39 S. E. 473; Thompson *v.* Ray, 92 Ga. 540, 17 S. E. 903; McMahan *v.* Mitchell, 92 Ga. 539, 18 S. E. 37; Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119; Hooks *v.* Frick, 75 Ga. 715; Grimsly *v.* Jernigan, 66 Ga. 256; Georgia R. Co. *v.* Kicklighter, 63 Ga. 708; Aetna Ins. Co. *v.* Sparks, 62 Ga. 187; Lamb *v.* Murray, 54 Ga. 218; Durand *v.* Craig, 43 Ga. 444; Williams *v.* Adams, 43 Ga. 407; Wallace *v.* Tumlin, 42 Ga. 462; Roe *v.* Doe, 37 Ga. 459; Carlisle *v.* Tidwell, 16 Ga. 33; Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485; Glover *v.* Woolsey, Dudley 85. See also Nixon *v.* Christie, 84 Ga. 469, 10 S. E. 1087.

Illinois.— Watson *v.* Roth, 191 Ill. 382, 61 N. E. 65 [*affirming* 91 Ill. App. 111]; Lerna *v.* Wood, 122 Ill. App. 542; Moudy *v.* Snider, 64 Ill. App. 65; Paris *v.* Morrell, 52 Ill. App. 121.

Indiana.— Ellis *v.* Hammond, 157 Ind. 267, 61 N. E. 565; Hines *v.* Driver, 100 Ind. 315; Suman *v.* Cornelius, 78 Ind. 506; Humphreys *v.* State, 75 Ind. 469; Sanders *v.* Loy, 45 Ind. 229; Bartholomew *v.* Loy, 44 Ind. 393; Freeman *v.* Bowman, 25 Ind. 236; Simpkins *v.* Wilson, 11 Ind. 541; Bronson *v.* Hickman, 10 Ind. 3; Simpson *v.* Wilson, 6 Ind. 474; Franklin *v.* Lee, (App. 1901) 62 N. E. 78; Martz *v.* Cook, 24 Ind. App. 432, 56 N. E. 951; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435; Baldwin *v.* Biersdorfer, Wils. 1.

Indian Territory.—Woolsey *v.* Jackson, 3 Indian Terr. 597, 64 S. W. 548.

Iowa.— Thrush *v.* Graybill, 110 Iowa 585, 81 N. W. 798; Carpenter *v.* Brown, 50 Iowa 451; Woodman *v.* Dutton, 49 Iowa 398; Manix *v.* Malony, 7 Iowa 81; Millard *v.* Singer, 2 Greene 144; Fanning *v.* McCraney, Morr. 398.

Kansas.— Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Moon *v.* Helfer, 25 Kan. 139; Taylor *v.* Thomas, 17 Kan. 598; Comstock Castle Stove Co. *v.* Galland, 6 Kan. App. 833, 49 Pac. 692; Titus *v.* Mitchell, 3 Kan. App. 90, 45 Pac. 99.

Kentucky.—Owsley *v.* Owsley, 117 Ky. 47, 77 S. W. 397, 25 Ky. L. Rep. 1186; Fleet *v.* Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563; Ewing *v.* McConnel, 1 A. K. Marsh. 188; Ripperdan *v.* Scott, 1 A. K. Marsh. 151; Barrett *v.* Belshe, 4 Bibb 348; Illinois Cent. R. Co. *v.* Wilson, 103 S. W. 364, 31 Ky. L. Rep. 789; Richmond *v.* Martin, 78 S. W. 219, 25 Ky. L. Rep. 1516; Ramey *v.* Crum, 69 S. W. 950, 24 Ky. L. Rep. 741; Oberdorfer *v.* Newberger, 67 S. W. 267, 23 Ky. L. Rep. 2323.

Louisiana.—Hernandez *v.* Garetage, 4 Mart. N. S. 419.

Maine.— Parsons *v.* Lewiston, etc., St. R. Co., 96 Me. 503, 52 Atl. 1006; Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241; Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Stewart *v.* Pattangall, 91 Me. 172, 39 Atl. 474; Linscott *v.* Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435; Trask *v.* Unity, 74 Me. 208; Snowman *v.* Wardwell, 32 Me. 275; Handly *v.* Call, 30 Me. 9; Titcomb *v.* Potter, 11 Me. 218.

Michigan.— Morin *v.* Robarge, 132 Mich. 337, 93 N. W. 886; Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444.

Minnesota.— Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800; Meeks *v.* St. Paul, 64 Minn. 220, 66 N. W. 966; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837; Peck *v.* Small, 35 Minn. 465, 29 N. W. 69; Finch *v.* Green, 16 Minn. 355; Sharpe *v.* Traver, 8 Minn. 273; Eddy *v.* Caldwell, 7 Minn. 225; Keough *v.* McNitt, 6 Minn. 513; Mead *v.* Constans, 5 Minn. 171.

Mississippi.— Garnett *v.* Kirkman, 41 Miss. 94; Rulon *v.* Lintol, 2 How. 891.

Missouri.— Schmitt *v.* Missouri Pac. R. Co., 160 Mo. 43, 60 S. W. 1043; St. Joseph Folding-Bed Co. *v.* Kansas City, etc., R. Co., 148 Mo. 478, 50 S. W. 85; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Culbertson *v.* Hill, 87 Mo. 553; Stephens *v.* Macon, 83 Mo. 345; Shaw *v.* Besch, 58 Mo. 107; Howard *v.* St. Louis Terminal R. Assoc., 110 Mo. App. 574, 85 S. W. 608; Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121; Meisch *v.* Sippy, 102 Mo. App.

or conclusive character or such as to render a different result reasonably cer-

559, 77 S. W. 141; Madden *v.* Paroneri Realty Co., 75 Mo. App. 358; Bresnan *v.* Grogan, 74 Mo. App. 587; Terry *v.* Greer, 55 Mo. App. 507; Payne *v.* Weems, 36 Mo. App. 54; Donovan *v.* Ryan, 35 Mo. App. 160.

Montana.— *In re* Colbert, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439; Butte, etc., Min. Co. *v.* Sloan, 16 Mont. 97, 40 Pac. 217.

Nebraska.— *In re* Winch, (1907) 112 N. W. 293; Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; Smith *v.* Mount, 38 Nebr. 111, 56 N. W. 793; Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791; Omaha, etc., R. Co. *v.* O'Donnell, 24 Nebr. 753, 40 N. W. 298.

Nevada.— Wall *v.* Trainor, 16 Nev. 131; McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512.

New Hampshire.— Crafts *v.* Union Mut. F. Ins. Co., 36 N. H. 44.

New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., 10 N. M. 617, 65 Pac. 276.

New York.— Romaine *v.* Spring Valley, 120 N. Y. App. Div. 501, 105 N. Y. Suppl. 256; Ware *v.* Gautemalan, etc., Mahogany, etc., Co., 119 N. Y. App. Div. 262, 104 N. Y. Suppl. 520; O'Hara *v.* Brooklyn Heights R. Co., 102 N. Y. App. Div. 398, 92 N. Y. Suppl. 777; Hagen *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914 [*reversing* 44 Misc. 540, 90 N. Y. Suppl. 125]; Matter of McManus, 66 N. Y. App. Div. 53, 73 N. Y. Suppl. 88 [*reversing* 35 Misc. 678, 72 N. Y. Suppl. 409]; Tarbell *v.* Finnigan, 55 N. Y. App. Div. 629, 66 N. Y. Suppl. 1047; Hess *v.* Sloane, 47 N. Y. App. Div. 585, 62 N. Y. Suppl. 666; Kring *v.* New York Cent., etc., R. Co., 45 N. Y. App. Div. 373, 60 N. Y. Suppl. 1114; Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Reynolds *v.* Reynolds, 33 N. Y. App. Div. 625, 53 N. Y. Suppl. 135; Cameron *v.* Leonard, 17 N. Y. App. Div. 127, 45 N. Y. Suppl. 155; Hecla Powder Co. *v.* Sigua Iron Co., 1 N. Y. App. Div. 371, 37 N. Y. Suppl. 149; Baily *v.* Hornthal, 1 N. Y. App. Div. 44, 36 N. Y. Suppl. 1082; O'Harra *v.* New York Cent., etc., R. Co., 92 Hun 56, 36 N. Y. Suppl. 567 [*affirmed* in 153 N. Y. 690, 48 N. E. 1106]; Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Peyser *v.* Coney Island, etc., R. Co., 81 Hun 70, 30 N. Y. Suppl. 610; Wilson *v.* Heath, 68 Hun 209, 22 N. Y. Suppl. 833; Page *v.* New York, 57 Hun 123, 586, 10 N. Y. Suppl. 826; Powell *v.* Jones, 42 Barb. 24; Hooker *v.* Terpenning, 5 Silv. Sup. 487, 8 N. Y. Suppl. 639; Gallup *v.* Henderson, 2 Silv. Sup. 519, 521, 6 N. Y. Suppl. 914; Brady *v.* New York, 54 N. Y. Super. Ct. 457; Fowler *v.* Kelly, 43 N. Y. Super. Ct. 380; James McCreery Realty Corp. *v.* Equitable Nat. Bank, 54 Misc. 508, 104 N. Y. Suppl. 959 [*affirming* 52 Misc. 300, 102 N. Y. Suppl. 975]; Hagen *v.* New York Cent., etc., R. Co., 44 Misc. 540, 90 N. Y. Suppl. 125 [*reversed* on other grounds in 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914]; Jones *v.* Lustig, 37 Misc. 834, 76 N. Y. Suppl. 975; Reiss *v.* Pelham, 30 Misc. 545, 62 N. Y. Suppl. 607 [*affirmed* in 53 N. Y. App. Div. 459, 65 N. Y. Suppl. 1033]; Benta *v.* Harris, 27 Misc. 648, 58 N. Y. Suppl. 398; Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736; Smith *v.* Matthews, 21 Misc. 150, 47 N. Y. Suppl. 96; Swartout *v.* Willingham, 6 Misc. 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66; Phelps *v.* Delmore, 4 Misc. 508, 26 N. Y. Suppl. 278; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Rossin *v.* Petigor, 88 N. Y. Suppl. 350; Moorhead *v.* Webster, 77 N. Y. Suppl. 1062; Laing *v.* Rush, 21 N. Y. Suppl. 822; Upington *v.* Keenan, 21 N. Y. Suppl. 699; Duryea *v.* Vosburgh, 17 N. Y. Suppl. 742; Ott *v.* Buffalo, 16 N. Y. Suppl. 1 [*affirmed* in 131 N. Y. 594, 30 N. E. 67]; Jackson *v.* Ft. Covington, 15 N. Y. Suppl. 793; Dart *v.* Kudlich, 13 N. Y. Suppl. 61; Holmes *v.* Roper, 10 N. Y. Suppl. 284; Russell *v.* Randall, 9 N. Y. Suppl. 327 [*reversed* on other grounds in 123 N. Y. 436, 25 N. E. 931]; Rich *v.* Mayer, 7 N. Y. Suppl. 69 [*affirmed* in 8 N. Y. Suppl. 952]; Sistare *v.* Olcott, 5 N. Y. Suppl. 114; Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450; Wilson *v.* Wilson, 14 N. Y. St. 518; Smith *v.* Clews, 14 Abb. N. Cas. 465; Anderson *v.* Market Nat. Bank, 66 How. Pr. 8.

North Carolina.— Sikes *v.* Parker, 95 N. C. 232; Simmons *v.* Mann, 92 N. C. 12.

Ohio.— Ludlow *v.* Park, 4 Ohio 5.

Oklahoma.— Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Pennsylvania.— Prior *v.* Craig, 5 Serg. & R. 44; Moore *v.* Philadelphia Bank, 5 Serg. & R. 41; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235; Ream *v.* Oldweiler, 2 Leg. Gaz. 147; Rodel *v.* Bell, 6 Phila. 207; Keuderdine *v.* Phelin, 1 Phila. 343; Marsh *v.* Moser, 1 Woodw. 218; Connellee *v.* Ziegler, 16 York Leg. Rec. 169.

Rhode Island.— McDonald *v.* Lawton Spinning Co., (1906) 67 Atl. 451; Lee *v.* Rhode Island Co., (1906) 66 Atl. 835; Shepard *v.* New York, etc., R. Co., 27 R. I. 135, 61 Atl. 42; Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

Tennessee.— Sharp *v.* Treece, 1 Heisk. 446.

Texas.— Holman *v.* Herscher, (1891) 16 S. W. 984; Allyn *v.* Willis, 65 Tex. 65; Frizzell *v.* Johnson, 30 Tex. 31; Vardeman *v.* Edwards, 21 Tex. 737; Watts *v.* Johnson, 4 Tex. 311; Madden *v.* Shapard, 3 Tex. 49; McCartney *v.* Martin, 1 Unrep. Cas. 143; Missouri, etc., R. Co. *v.* Huff, (Civ. App. 1903) 78 S. W. 249 [*reversed* in 98 Tex. 110, 81 S. W. 525]; Western Union Tel. Co. *v.* Hardison, (Civ. App. 1907) 101 S. W. 541; Collins *v.* Weiss, 32 Tex. Civ. App. 282, 74 S. W. 46; San Antonio, etc., R. Co. *v.* Moore, 31 Tex. Civ. App. 371, 72 S. W. 226; El Paso *v.* Ft. Dearborn Nat. Bank, (Civ. App. 1903) 71 S. W. 799 [*reversed* on other grounds in 96

tain.[60] A new trial will be granted more readily where the verdict appears to be

Tex. 496, 4 S. W. 21]; Fitzgerald *v.* Compton, 28 Tex. Civ. App. 202, 67 S. W. 131; Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363; San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920; Pippin *v.* Sherman, etc., R. Co., (Civ. App. 1900) 58 S. W. 961; Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796; Adams *v.* Eddy, (Civ. App. 1894) 29 S. W. 180; Eddy *v.* Newton, (Civ. App. 1893) 22 S. W. 533; Ratto *v.* St. Paul's L., etc., Ins. Co., 2 Tex. App. Civ. Cas. § 117; Wilson *v.* Baird, 1 Tex. App. Civ. Cas. § 709; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596; Fort *v.* Cameron, 1 Tex. App. Civ. Cas. § 1112. See also Less *v.* Hooks, (Civ. App. 1896) 39 S. W. 319.

Utah.— Stringfellow *v.* Hanson, 25 Utah 480, 71 Pac. 1052; Baumgarten *v.* Hoffman, 9 Utah 338, 34 Pac. 294.

Vermont.— Taylor *v.* St. Clair, 79 Vt. 536, 65 Atl. 655; Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553; Brainard *v.* Morse, 47 Vt. 320; Perkins *v.* Dana, 19 Vt. 589; Waters *v.* Langdon, 16 Vt. 570; Middletown *v.* Adams, 13 Vt. 285; Dodge *v.* Kendall, 4 Vt. 31.

Virginia.— Tate *v.* Tate, 85 Va. 205, 7 S. E. 352; Travelers' Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553; Markham *v.* Boyd, 22 Gratt. 544.

West Virginia.— Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953; Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582; Lucas *v.* Locke, 11 W. Va. 81.

Wisconsin.— Anderson *v.* Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788; Kennedy *v.* Plank, 120 Wis. 197, 97 N. W. 895; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Ryan *v.* Rockford Ins. Co., 85 Wis. 573, 55 N. W. 1025; Humphrey *v.* State, 78 Wis. 569, 47 N. W. 836; Williams *v.* Riches, 77 Wis. 569, 46 N. W. 817; Conradt *v.* Sixbee, 21 Wis. 383, admissions of party.

United States.—Williams *v.* U. S., 137 U. S. 113, 11 S. Ct. 43, 34 L. ed. 590; Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210; Preble *v* Bates, 39 Fed. 755; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488; Buerk *v.* Imhaeuser, 4 Fed. Cas. No. 2,107, 2 Ban. & A. 452, 14 Blatchf 19; Ready Roofing Co *v.* Taylor, 20 Fed. Cas. No. 11,613, 3 Ban. & A. 368, 15 Blatchf. 94; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484; White *v.* Arleth, 29 Fed. Cas. No. 17,536, 1 Bond 319.

Canada.—Inch *v.* Flewelling, 30 N. Brunsw. 19; Connell *v.* Miller, 4 N. Brunsw. 433; Morton *v.* Thompson, 2 U. C. Q. B. 196.

See 37 Cent. Dig. tit. "New Trial," §§ 226–229. See also *supra*, III, H, 6, b.

Evidence strongly tending to prove essential fact.— It is sufficient that the newly discovered evidence strongly tends to prove an essential fact of which there was a failure of proof on the trial. Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

60. *Arkansas.*— Robins *v.* Fowler, 2 Ark. 133.

Georgia.— Robinson *v.* Veal, 79 Ga. 633, 7 S. E. 159; Moore *v.* Ewings, 44 Ga. 354, "with considerable certainty."

Illinois.— People *v.* McCullough, 210 Ill. 488, 71 N. E. 602; Springer *v.* Schultz, 205 Ill. 144, 68 N. E. 753 [*affirming* 105 Ill. App. 544]; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790; Edgmon *v.* Ashelby, 76 Ill. 161; Champion *v.* Ulmer, 70 Ill. 322; Wood *v.* Echternach, 65 Ill. 149; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Miller *v.* Potter, 102 Ill. App. 483; Reardon *v.* Steep, 74 Ill. App. 162 (at least to make a new trial imperative); Illinois Cent. R. Co. *v.* Trusdell, 68 Ill. App. 324 (as to some material matter, although not necessarily of the whole case); Dugan *v.* Daniels, 64 Ill. App. 90 (satisfactory proof by evidence of conclusive character necessary on bill in equity); Chicago *v.* Edson, 43 Ill. App. 417.

Indiana.— Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47.

Kansas.— Sexton *v.* Lamb, 27 Kan. 432.

Kentucky.— Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957, 15 Ky. L. Rep. 477; Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870; Allen *v.* Perry, 6 Bush 85; Finley *v.* Tyler, 3 T. B. Mon. 400 (upon bill of review); Illinois Cent. R. Co. *v.* Colly, 86 S. W. 538, 27 Ky. L. Rep. 713; Louisville *v.* Oberle, 82 S. W. 626, 26 Ky. L. Rep. 845; Johnson *v.* Carter, 63 S. W. 485, 23 Ky. L. Rep. 591 (at least where there is lack of diligence); Shely *v.* Shely, 47 S. W. 1071, 20 Ky. L. Rep. 1021 ("conclusive or preponderating character"); Bramel *v.* Clark, 6 Ky. L. Rep. 220. See also Collins *v.* Burge, 47 S. W. 444, 20 Ky. L. Rep. 992; Hays *v.* Davis, 46 S. W. 212, 20 Ky. L. Rep. 342; Nall *v.* Lancaster, 40 S. W. 242, 19 Ky. L. Rep. 350.

Louisiana.— Hernandez *v.* Garetage, 4 Mart. N. S. 419.

Maine.— State *v.* Stain, 82 Me. 472, 20 Atl. 72.

Mississippi.— Haber *v.* Lane, 45 Miss. 608.

Missouri.— Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82.

New Jersey.— Nichols *v.* Mechanic's F. Ins. Co., 16 N. J. L. 410, decisive.

New York.— Finelite *v.* Finelite, 68 Hun 82, 22 N. Y. Suppl. 729; Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Suppl. 432; Darbee *v.* Elwood, 67 Barb. 359 ("reasonable certainty"); Starin *v.* Kelly, 47 N. Y. Super. Ct. 288 [*affirmed* in 88 N. Y. 418, 14 N. Y. Wkly. Dig. 283]; Schultz *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Conable *v.* Smith, 19 N. Y. Suppl. 446; Kanter *v.* Rubin, 18 N. Y. Suppl. 168. See also Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736 [*affirmed* in 55 N. Y. Suppl. 1148]; Conable *v.* Smith, 19 N. Y. Suppl. 446; Behrens *v.* Bloom, 3 N. Y. Suppl. 551.

North Carolina.—Henry *v.* Smith, 78 N. C. 27.

against the weight of the evidence or where it is quite doubtful under the evidence.[61]

(II) *Amount of Recovery.* New trials for newly discovered evidence, not material on the main issues but only on the measure of unliquidated damages, have been refused frequently.[62] Proposed evidence to reduce the amount of the recovery only must be of so convincing a character that had it been offered at the trial, the verdict would be clearly excessive.[63]

(III) *Credibility and Availability of Alleged New Evidence.* The existence and character of the alleged new evidence must be definitely shown.[64]

Ohio.— Cleveland, etc., R. Co. *v.* Long, 24 Ohio St. 133.

Pennsylvania.— Stewart *v.* Press Co., 1 Pa. Co. Ct. 247; Martin *v.* Marvine, 1 Phila. 280. See also Wolfinger *v.* Fenton, 2 Phila. 19.

Rhode Island.— See Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 769; Burlingame *v.* Cowee, 16 R. I. 40, 12 Atl. 234.

Texas.— Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in 94 Tex. 120, 58 S. W. 951].

Utah.— Larsen *v.* Onesite, 21 Utah 38, 59 Pac. 234; Turner *v.* Stevens, 8 Utah 75, 30 Pac. 24. See also Heath *v.* White, 3 Utah 474, 24 Pac. 762; Tiernan *v.* Trewick, 2 Utah 393.

Washington.— Binns *v.* Emery, (1907) 88 Pac. 133.

West Virginia.— Farmers', etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258.

Wisconsin.— Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

United States.— Fuller *v.* Harris, 29 Fed. 814.

England.— Young *v.* Kershaw, 81 L. T. Rep. N. S. 531; Anderson *v.* Titmas, 36 L. T. Rep. N. S. 711.

See 37 Cent. Dig. tit. "New Trial," § 226 *et seq.*

Where an order granting a new trial is made by a judge other than the trial judge and after affirmance of the original judgment on appeal, the appellate court will reverse the order unless satisfied that a different result will be reached. Pawling *v.* Pawling, 13 N. Y. App. Div. 5, 43 N. Y. Suppl. 149.

61. *Georgia.*— Florida Cent., etc., R. Co. *v.* Grant, 110 Ga. 328, 35 S. E. 271; Girardey *v.* Bessman, 62 Ga. 654; Holdridge *v.* Hamilton, 37 Ga. 676; Collins *v.* Loyd, 31 Ga. 128.

Illinois.— Wilder *v.* Greenlee, 49 Ill. 253.

Indiana.— Swift *v.* Wakeman, 9 Ind. 552.

Iowa.— Germinder *v.* Machinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108.

Kentucky.— Illinois Cent. R. Co. *v.* McManus, 67 S. W. 1000, 24 Ky. L. Rep. 81.

Maine.— Stackpole *v.* Perkins, 85 Me. 298, 27 Atl. 160.

New York.— Schnitzler *v.* Oriental Metal Bed Co., 47 Misc. 356, 93 N. Y. Suppl. 1119; Benda *v.* Keil, 34 Misc. 396, 69 N. Y. Suppl. 655 (where a principal witness confessed to perjury); Upington *v.* Keenan, 21 N. Y. Suppl. 699.

Texas.— Mitchell *v.* Bass, 26 Tex. 372; Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712.

Vermont.— Gilman *v.* Nichols, 42 Vt. 313; Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729, newly discovered cumulative evidence.

Virginia.— Arthur *v.* Chavis, 6 Rand. 142.

Canada.— Townsend *v.* Hamilton, 4 U. C. C. P. 444, 5 U. C. C. P. 230.

62. Schlencker *v.* Risley, 4 Ill 483, 38 Am. Dec. 100; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Manix *v.* Malony, 7 Iowa 81; Roots *v.* Brown, 1 Bibb (Ky.) 354; Louisville, etc., Packet Co. *v.* Mulligan, 77 S. W. 704, 25 Ky. L. Rep. 1287; Louisville *v.* Walter, 76 S. W. 516, 25 Ky. L. Rep. 893; Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732 [*affirmed* in 180 N. Y. 551, 73 N. E. 1121], by cumulative evidence. See also Dexter *v.* Handy, 13 R. I. 474; Ham *v.* Taylor, 22 Tex. 225; Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 73 S. W. 857; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608 (such evidence being generally cumulative); Wilson *v.* Freedloy, 129 Fed. 835 [*reversed* on other grounds in 136 Fed. 586, 69 C. C. A. 360]. *Compare* Jensen *v.* Hamburg-American Packet Co., 23 N. Y. App. Div. 163, 48 N. Y. Suppl. 630.

63. St. Joseph Folding-Bed Co. *v.* Kansas City, etc., R. Co., 148 Mo. 478, 50 S. W. 85; Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; Burlingame *v.* Cowle, 16 R. I. 40, 12 Atl. 234. See also Thornton *v.* Rhode Island Suburban R. Co., (R. I. 1906) 67 Atl. 451; Geer *v.* Rhode Island Suburban R. Co., (R. I. 1906) 67 Atl. 449.

64. *Arkansas.*— Bourland *v.* Skimnee, 11 Ark. 671.

Colorado.— Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191.

Georgia.— White *v.* Wallen, 17 Ga. 106.

Iowa.— Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Alger *v.* Merritt, 16 Iowa 121.

Minnesota.— Schultz *v.* Faribault Consol. Gas, etc., Co., 82 Minn. 100, 84 N. W. 631.

Mississippi.— Hinds *v.* Terry, Walk. 80.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.— Grand Lodge A. O. U. W. *v.* Bartes, 69 Nebr. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. Rep. 577; German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106.

New York.— Hecla Powder Co. *v.* Sigua Iron Co., 1 N. Y. App. Div. 371, 37 N. Y.

If the affidavits offered in support of the application are inherently improbable or inconsistent or are rebutted by counter affidavits, a new trial will be refused.[65] Where the newly discovered witness has been impeached by counter affidavits,[66]

Suppl. 149; Conable *v.* Smith, 19 N. Y. Suppl. 446.

Pennsylvania.— Cox *v.* Cox, 12 Montg. Co. Rep. 61.

Texas.— Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117; Burnley *v.* Rice, 21 Tex. 171; Duckworth *v.* Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 66, 75 S. W. 913; Saunders *v.* Saunders, (Civ. App. 1901) 62 S. W. 797.

United States.— Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

Canada.— Robinson *v.* Rapelje, 4 U. C. Q. B. 289; Doe *v.* Fraser, 4 U. C. Q. B. O. S. 371.

65. *California.*— Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962; Burritt *v.* Gibson, 3 Cal. 396.

Georgia.— Webb *v.* Wright, etc., Co., 112 Ga. 432, 37 S. E. 710; Grace *v.* McKinney, 112 Ga. 425, 37 S. E. 737; Harmon *v.* Charleston, etc., R. Co., 88 Ga. 261, 14 S. E. 574; Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108; Erskine *v.* Duffy, 76 Ga. 602.

Indiana.— Miller *v.* Miller, 61 Ind. 471; Rich *v.* Starbuck, 50 Ind. 126; Richmond First Nat. Bank *v.* Gibbons, 7 Ind. App. 629, 35 N. E. 31; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

Iowa.— Barber *v.* Maden, 126 Iowa 402, 102 N. W. 120; Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; State *v.* Stevenson, 104 Iowa 50, 73 N. W. 360; Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

Kansas.— Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

Kentucky.— Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870; Nall *v.* Lancaster, 40 S. W. 242, 19 Ky. L. Rep. 350.

Louisiana.— Stone *v.* Clifford, 5 La. 10.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Minnesota.— Kosmerl *v.* Mueller, 91 Minn. 196, 97 N. W. 660; Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837; Finch *v.* Green, 16 Minn. 355.

Missouri.— Schmitt *v.* Missouri Pac. R. Co., 160 Mo. 43, 60 S. W. 1043.

Montana.— *In re* Colbert, 31 Mont. 477, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

New York.— Cameron *v.* Leonard, 17 N. Y. App. Div. 127, 45 N. Y. Suppl. 155; Powell *v.* Jones, 42 Barb. 24; Schultz *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Chapman *v.* O'Brien, 39 N. Y. Super. Ct. 244; Swartout *v.* Willingham, 6 Misc. 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66; Rich *v.* Mayer, 7 N. Y. Suppl. 69 [*affirmed* in 8 N. Y. Suppl. 952]; Anderson *v.* Market Nat. Bank, 66 How. Pr. 8.

Pennsylvania.— Sweigert *v.* Finley, 144 Pa. St. 266, 22 Atl. 702.

Rhode Island.— Shepard *v.* New York, etc., R. Co., 27 R. I. 135, 61 Atl. 42.

South Dakota.— Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297.

Tennessee.— Harbour *v.* Rayburn, 7 Yerg. 432.

Texas.— Traylor *v.* Townsend, 61 Tex. 144; El Paso *v.* Ft. Dearborn Nat. Bank, (Civ. App. 1903) 74 S. W. 21; Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 73 S. W. 857.

Utah.— Tiernan *v.* Trewick, 2 Utah 393.

Wisconsin.— Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

United States.— Boiakosky *v.* Philadelphia, etc., R. Co., 126 Fed. 230; U. S. *v.* Bellaire First Nat. Bank, 86 Fed. 861; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574.

Canada.— Smith *v.* Null, 9 N. Brunsw. 105; Connell *v.* Miller, 4 N. Brunsw. 433; Molson's Bank *v.* Bates, 7 U. C. C. P. 312; Maclem *v.* Dittrick, 7 U. C. Q. B. 144.

See 37 Cent. Dig. tit. "New Trial," § 224.

Untrustworthy and suspicious evidence.— A new trial should not be granted in any case on the ground of newly discovered evidence, if the evidence, when admitted, would be untrustworthy and suspicious. McDonald *v.* People, 123 Ill. App. 346 [*affirmed* in 222 Ill. 325, 78 N. E. 609].

Credibility of proposed new witness.— It has been held that the credibility of a proposed new witness will not be passed on. Peyzer *v.* Coney Island, etc., R. Co., 81 Hun (N. Y.) 70, 30 N. Y. Suppl. 610. See also Green *v.* People's Traction Co., 5 Pa. Dist. 284.

66. *Georgia.*— McNatt *v.* McBae, 117 Ga. 898, 45 S. E. 248.

Kansas.— Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Kentucky.— Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Massachusetts.— Parker *v.* Hardy, 24 Pick. 246.

Missouri.— Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82.

New York.— Hagen *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 218, 91 N. Y. Suppl. 914 [*reversing* 44 Misc. 540, 90 N. Y. Suppl. 125]; Cameron *v.* Leonard, 17 N. Y. App. Div. 127, 45 N. Y. Suppl. 155; Fleming *v.* Hollenback, 7 Barb. 271; Cole *v.* Cole, 50 How. Pr. 59 [*affirmed* in 12 Hun 373]; Pomroy *v.* Columbian Ins. Co., 2 Cai. Cas. 260.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343. *Compare* Green *v.* People's Traction Co., 5 Pa. Dist. 284.

Texas.— San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920.

United States.— Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

Canada.— Connell *v.* Miller, 4 N. Brunsw. 433.

See 37 Cent. Dig. tit. "New Trial," § 225.

or his testimony has been discredited by his conduct, a new trial should not be granted.[67] It must appear with reasonable certainty that the newly discovered evidence can be produced upon a new trial.[68]

(iv) *Admissions by Successful Party.* A new trial may be granted for newly discovered evidence of material admissions of the successful party, which is not cumulative to other evidence offered at the trial.[69] Evidence of admissions

Compare In re McClellan, (1906) 107 N. W. 681, (S. D. 1907) 111 N. W. 540.

67. *Minnesota.*— Eldridge *v.* Minneapolis, etc., R. Co., 32 Minn. 263, 20 N. W. 151; Peterson *v.* Faust, 30 Minn. 22, 14 N. W. 64. See also Kosmerl *v.* Mueller, 91 Minn. 196, 97 N. W. 660.

Missouri.— Dennehy *v.* Crohn, 64 Mo. App. 79; Donovan *v.* Ryan, 35 Mo. App. 160.

New York.— Hicks *v.* British American Assur. Co., 13 N. Y. App. Div. 444, 43 N. Y. Suppl. 623 [*reversed* on other grounds in 162 N. Y. 284, 56 N. E. 743]; Wilson *v.* Heath, 68 Hun 209, 22 N. Y. Suppl. 833; Chapman *v.* O'Brien, 39 N. Y. Super. Ct. 244; Smith *v.* Clews, 14 Abb. N. Cas. 465.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343.

Texas.— Walker *v.* Graham, 17 Tex. 262; Phifer *v.* Mansur-Tebbetts Implement Co., 26 Tex. Civ. App. 57, 61 S. W. 968.

Vermont.— Waters *v.* Langdon, 16 Vt. 570.

United States.— Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

Compare Gaven *v.* Dopman, 5 Cal. 342; Chicago, etc., R. Co. *v.* Syster, 32 Ind. App. 239, 69 N. E. 476; Ramey *v.* Crum, 69 S. W. 950, 24 Ky. L. Rep. 741.

68. *Arkansas.*— Bourland *v.* Skimnee, 11 Ark. 671.

Connecticut.— Parsons *v.* Platt, 37 Conn. 563.

Indiana.— Harris *v.* Rupel, 14 Ind 209; Lister *v.* Boker, 6 Blackf. 439.

Iowa.— Reeves *v.* Royal, 2 Greene 451.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241.

Missouri.— Donovan *v.* Ryan, 35 Mo. App. 160.

New York.— Lane *v.* Brooklyn Heights R. Co., 178 N. Y. 623, 70 N. E. 1101 [*affirming* 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057]; Adams *v.* Bush, 1 Abb. Dec. 7; Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732 [*affirmed* in 180 N. Y. 551, 73 N. E. 1121]; Hecla Powder Co. *v.* Sigua Iron Co., 1 N. Y. App. Div. 371, 37 N. Y. Suppl. 149; Armstrong Mfg Co. *v.* Thompson, 88 N. Y. Suppl. 151; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl 432; Heald *v.* Macgowan, 14 N. Y. Suppl. 280.

69. *California.*— Heintz *v.* Cooper, 104 Cal. 668, 38 Pac. 511.

Georgia.—Andrews *v.* Mitchell, 92 Ga. 629, 18 S. E. 1017; Girardey *v.* Bessman, 62 Ga. 654; Mills *v.* May, 42 Ga. 623; Collins *v.* Loyd, 31 Ga. 128. *Compare* Erskine *v* Duffy, 76 Ga. 602.

Illinois.— Schweyer *v.* Anstett, 2 Ill. App. 365.

Indiana.— Rains *v.* Ballow, 54 Ind. 79; Humphries *v.* Marshall, 12 Ind. 609; Bronson *v.* Hickman, 10 Ind. 3.

Iowa.— Sullivan *v.* Chicago, etc., R. Co., 119 Iowa 464, 93 N. W. 367; Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493; Van Horn *v.* Redmon, 67 Iowa 689, 25 N. W. 881; Spears *v.* Mt. Ayr, 66 Iowa 721, 24 N. W. 504; Seeley *v.* Perry, 52 Iowa 747, 3 N. W. 678; Eckel *v.* Walker, 48 Iowa 225; Woodman *v.* Dutton, 49 Iowa 398; Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217; Alger *v.* Merritt, 16 Iowa 121.

Kansas.— Missouri Pac. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590. See also Hotchkiss *v.* Patterson, 5 Kan. App. 358, 48 Pac. 435.

Kentucky.— Owsley *v.* Owsley, 77 S. W. 397, 25 Ky. L. Rep. 1186; Adams Oil Co. *v.* Stout, 41 S. W. 563, 19 Ky. L. Rep. 758. *Compare* Richardson *v.* Huff, 43 S. W. 454, 19 Ky. L. Rep. 1428.

Maine.— Foye *v.* Turner, 91 Me. 286, 39 Atl. 998; Strout *v.* Stewart, 63 Me. 227; Warren *v.* Hope, 6 Me. 479.

Minnesota.— Cairns *v.* Keith, 50 Minn. 32, 52 N. W. 267; Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018, admissions of deceased person.

Mississippi.— Kane *v.* Burrus, 2 Sm. & M. 313.

Missouri.— Standard Inv. Co. *v.* Hoyt, 164 Mo. 124, 63 S. W. 1093; Jones *v.* H. Martini Furnishing Co., 77 Mo. App. 474. *Compare* Payne *v.* Weems, 36 Mo. App. 54.

Nevada.— Wall *v.* Trainor, 16 Nev. 131.

New York.— Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49; Wilson *v.* Clancy, 6 N. Y. App. Div. 449, 39 N. Y. Suppl. 658 (unserved answer in another case); Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Newhall *v.* Appleton, 47 N. Y. Super. Ct. 38; Oakley *v.* Sears, 1 Rob. 73, 1 Abb. Pr. N. S. 368; Benta *v.* Harris, 27 Misc. 648, 58 N. Y. Suppl. 398; Coy *v.* Martin, 24 Misc. 211, 53 N. Y. Suppl. 540; Roundey *v.* Stillwell, 19 Misc. 415, 43 N. Y. Suppl. 1132; Holmes *v.* Roper, 10 N. Y. Suppl. 284; Weber *v.* Weber, 5 N. Y. Suppl. 178. *Compare* Rich *v.* Mayer, 7 N. Y. Suppl. 69 [*affirmed* in 8 N. Y. Suppl. 952]; Guyot *v.* Butts, 4 Wend. 579.

Texas.— Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171; Welch *v.* Nasboe, 8 Tex. 189; Missouri, etc., R. Co. *v.* Clark, 35 Tex. Civ. App. 189, 79 S. W. 827.

Vermont.— Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Preston *v.* Otey, 88 Va. 491, 14 S. E. 68.

made by the successful party after the trial,[70] or of subsequent declarations inconsistent with his testimony on the trial,[71] is not, it is held, cause for setting aside the verdict.

(v) *PRIMARY EVIDENCE.* A new trial may be allowed where an important document or book, which was lost at the time of the trial and was not found on diligent search, has been discovered since, and the evidence as to its execution or contents was seriously conflicting.[72] Ordinarily the movant must have offered secondary evidence of the document or book.[73] If a variance between such secondary evidence and the original document or book is not material, a new trial will be refused.[74]

(vi) *CUMULATIVE EVIDENCE* — (A) *What Evidence Is Cumulative* — (1) IN GENERAL. Cumulative evidence is commonly defined as additional evidence of the same kind to the same point.[75]

Washington.— Lafond *v.* Smith, 8 Wash. 26, 35 Pac. 404.

Wisconsin.— Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112. *Compare* Kennedy *v.* Plank, 120 Wis. 197, 97 N. W. 895.

See 37 Cent. Dig. tit. "New Trial," § 217. And see also *supra*, III, I, 4, e.

Compare Jones *v.* Tucker, 132 Ala. 305, 31 So. 21; Wintermute *v.* Wintermute, 13 N. J. L. 177.

70. Sullivan *v.* O'Conner, 77 Ind. 149; Crow *v.* Brunson, 1 Ind. App. 268, 27 N. E. 507. See also Fowler *v.* Kelly, 43 N. Y. Super. Ct. 380. *Contra*, Welch *v.* Nasboe, 8 Tex. 189. And *compare* Wall *v.* Trainor, 16 Nev. 131.

71. Lasseter *v.* Simpson, 78 Ga. 61, 3 S. E. 243. See also *infra*, III, I, 5, b, (VII).

72. *Illinois.*—Protection L. Ins. Co. *v.* Dill, 91 Ill. 174.

Kansas.— Winfield Bldg., etc., Assoc. *v.* McMullen, 59 Kan. 493, 53 Pac. 481 [*reversing* 4 Kan. App. 459, 46 Pac. 410].

Kentucky.— Collins *v.* Burge, 47 S. W. 444, 20 Ky. L. Rep. 992 (discovery of copy of lost will); Mercer *v.* King, 42 S. W. 106, 19 Ky. L. Rep. 781.

New York.—Platt *v.* Munroe, 34 Barb. 291; Katz *v.* Atfield, 1 Misc. 217, 20 N. Y. Suppl. 892 [*affirmed* in 3 Misc. 621, 22 N. Y. Suppl. 1135].

South Carolina.— Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139.

South Dakota.— Waite *v.* Fish, 17 S. D. 215, 95 N. W. 928.

See 37 Cent. Dig. tit. "New Trial," § 209. See also *infra*, III, I, 5, b, (VI), (A), (2).

Compare Hays *v.* Westbrook, 96 Ga. 219, 22 S. E. 893, deed to deceased person.

73. *California.*— Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

Georgia.— Nixon *v.* Christie, 84 Ga. 469, 10 S. E. 1087; Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156.

Illinois.— Reardon *v.* Steep, 74 Ill. App. 162.

Indiana.— Chapman *v.* Moore, 107 Ind. 223, 8 N. E. 80. *Compare* Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619, where copy used on trial.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741.

New York.— See Baily *v.* Hornthal, 1 N. Y. App. Div. 44, 36 N. Y. Suppl. 1082.

Pennsylvania.— Conrad *v.* Conrad, 9 Phila. 510.

South Carolina.— Hinson *v.* Catoe, 10 S. C. 311.

Canada.— Cyr *v.* Hartt, 15 N. Brunsw. 71.

See 37 Cent. Dig. tit. "New Trial," § 209. See also *supra*, II, G, 3, f, (I), (C).

74. Freeman *v.* Coleman, 88 Ga. 421, 14 S. E. 551; Peytavin *v.* Maurin, 2 La. 480.

75. *Arkansas.*— Robins *v.* Fowler, 2 Ark. 133.

California.— Kenezleber *v.* Wahl, 92 Cal. 202, 28 Pac. 225; Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65.

Connecticut.— Hart *v.* Brainerd, 68 Conn. 50, 35 Atl. 776; Waller *v.* Graves, 20 Conn. 305.

Georgia.— Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923; Perry *v.* Houseley, 40 Ga. 657; Roe *v.* Doe, 37 Ga. 459; Moore *v.* Ulm, 34 Ga. 565.

Illinois.— Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

Indiana.— De Hart *v.* Aper, 107 Ind. 460, 8 N. E. 275; Hines *v.* Driver, 100 Ind. 315; Kochel *v.* Bartlett, 88 Ind. 237; Lefever *v.* Johnson, 79 Ind. 554; Shirel *v.* Baxter, 71 Ind. 352; Zouker *v.* Wiest, 42 Ind. 169; Houston *v.* Bruner, 39 Ind. 376; Humphries *v.* Marshall, 12 Ind. 609; Indianapolis, etc., Rapid Transit Co. *v.* Edwards, 36 Ind. App. 202, 74 N. E. 533; Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264; Franklin *v.* Lee, (App. 1901) 62 N. E. 78; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784; Offutt *v.* Gowdy, 18 Ind. App. 602, 48 N. E. 654; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582; Westbrook *v.* Aultman, etc., Co., 3 Ind. App. 83, 28 N. E. 1011.

Iowa.— Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298; Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Means *v.* Yeager, 96 Iowa 694, 65 N. W. 993; Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628; Murry *v.* Weber, 92 Iowa 757, 60 N. W. 492; Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43; Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217; Able *v.* Frazier, 43 Iowa 175; Iowa City First Nat. Bank *v.* Charter Oak Ins. Co., 40

(2) As to the Issue or Point Involved. Evidence to prove a distinct issue is of course not cumulative.[76] It has sometimes been said, especially in older cases, that evidence is cumulative which tends to prove a fact or issue upon which evidence was offered at the trial.[77] The generally recognized rule is that evidence of a distinct probative fact is not cumulative to evidence of another fact, although both facts support the same issue.[78] Although the distinction has not often been

Iowa 572; German *v.* Maquoketa Sav. Bank, 38 Iowa 368.

Kansas.— Brown *v.* Wheeler, 62 Kan. 676, 64 Pac. 594.

Maine.— Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Glidden *v.* Dunlap, 28 Me. 379.

Massachusetts.— Gardner *v.* Gardner, 2 Gray 434; Parker *v.* Hardy, 24 Pick. 246.

Minnesota.— Layman *v.* Minneapolis St. R. Co., 66 Minn. 452, 69 N. W. 329; Nininger *v.* Knox, 8 Minn. 140.

Mississippi.— Vardeman *v.* Byrne, 7 How. 365.

Missouri.— St. Joseph Folding-Bed Co. *v.* Kansas City, etc., R. Co., 148 Mo. 478, 50 S. W. 85; Howland *v.* Reeves, 25 Mo. App. 458.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819; Corkery *v.* New Jersey Cent. R. Co., (Sup. 1899) 43 Atl. 655; Van Riper *v.* Dundee Mfg. Co., 33 N. J. L. 152.

New York.— Wilcox Silver Plate Co. *v.* Barclay, 48 Hun 54, 14 N. Y. Civ. Proc. 211; Parshall *v.* Klinck, 43 Barb. 203; Brisbane *v.* Adams, 1 Sandf. 195 [*reversed* on other grounds in 3 N. Y. 129]; Leavy *v.* Roberts, 2 Hilt. 285, 8 Abb. Pr. 310; Cole *v.* Van Keuren, 51 How. Pr. 451; Cole *v.* Cole, 50 How. Pr. 59 [*affirmed* in 12 Hun 373]; Seeley *v.* Chittenden, 4 How. Pr. 265; People *v.* New York Super. Ct., 5 Wend. 114, 10 Wend. 285; Guyot *v.* Butts, 4 Wend. 579.

Ohio.— Hurd *v.* French, 1 Cinc. Super. Ct. 365.

Oklahoma.— Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Pennsylvania.— Ruddy *v.* Ruddy, 6 Kulp 297.

Tennessee.— Tabler *v.* Connor, 1 Baxt. 195; McGavock *v.* Brown, 4 Humphr. 251.

Texas.— Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171.

Vermont.— Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539.

Virginia.— St. John *v.* Alderson, 32 Gratt. 140.

West Virginia.— Grogan *v.* Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. 563.

Wisconsin.—Finch *v.* Phillips, 41 Wis. 387.

United States.— Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348.

See 37 Cent. Dig. tit. "New Trial," §§ 219, 220.

Statement of rule.— "There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject." Waller *v.* Graves, 20 Conn. 305, 310.

"If the new evidence be specifically distinct and bear upon the issue, though it may be intimately connected with some part of the testimony at the trial, it is not cumulative." Alger *v.* Merritt, 16 Iowa 121, 127.

Evidence is not cumulative "where it is of an entirely different character and species from that given on the former trial, and tending to support the same point, in a separate and distinct way." Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

76. Longdon *v.* Kelly, 51 Mo. App. 572. See also cases in preceding note.

77. *Arkansas.*— Olmstead *v.* Hill, 2 Ark. 346.

Georgia.— Grubb *v.* Kalb, 37 Ga. 459.

Missouri.— Beauchamp *v.* Sconce, 12 Mo. 57.

New York.— Shute *v.* Jones, 24 N. Y. Suppl. 637.

Tennessee.—McGavock *v.* Brown, 4 Humphr. 251.

Vermont.—Kirby *v.* Waterford, 14 Vt. 414.

Canada.— Doe *v.* Babineau, 11 N. Brunsw. 89.

See 37 Cent. Dig. tit. "New Trial," § 219.

Evidence of a specific act was held cumulative of evidence of similar acts, on the question of general ill-treatment. Harris *v.* Rupel, 14 Ind. 209.

78. *Connecticut.*—Knowles *v.* Northrop, 53 Conn. 360, 4 Atl. 269; Waller *v.* Graves, 20 Conn. 305.

Georgia.— Georgia Southern, etc., R. Co. *v.* Zarks, 108 Ga. 800, 34 S. E. 127; Long *v.* State, 54 Ga. 564; Hughes *v.* Coursey, 46 Ga. 115; Durand *v.* Craig, 43 Ga. 444; Holdridge *v.* Hamilton, 37 Ga. 676; Moore *v.* Ulm, 34 Ga. 565; Lane *v.* Holliday, 27 Ga. 339.

Idaho.— Twin Springs Placer Co. *v.* Upper Boise Hydraulic Min. Co., 6 Ida. 687, 59 Pac. 535.

Illinois.— Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Wilder *v.* Greenlee, 49 Ill. 253.

Indiana.— Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Iowa.— Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; Means *v.* Yeager, 96 Iowa 694,

made, evidence of an admission of one probative fact is not cumulative to evidence of an admission of a different probative fact.[79] Evidence of the same kind to prove the same probative fact is cumulative.[80] Evidence of a distinct probative fact is not cumulative because it may also tend to prove another fact as to which evidence of a similar character was offered.[81] Evidence to contradict evidence which was not contradicted at the trial is not cumulative.[82] The fact that newly discovered evidence is cumulative of evidence incidentally favorable to the unsuccessful party drawn out on cross-examination of an adversary witness is no reason for refusing a new trial.[83]

(3) As to the Kind of Evidence. Direct and circumstantial evidence are not cumulative to each other.[84] Evidence that a party or witness was at a certain place at a particular time is not cumulative to testimony directly denying the

65 N. W. 993; Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43 (to establish lewdness); Able *v.* Frazier, 43 Iowa 175; German *v.* Maquoketa Sav. Bank, 38 Iowa 368; Stineman *v.* Beath, 36 Iowa 73; Alger *v.* Merritt, 16 Iowa 121.

Kansas.— Winfield Bldg., etc., Assoc. *v.* McMullen, 59 Kan. 493, 53 Pac. 481.

Massachusetts.— Chatfield *v.* Lathrop, 6 Pick. 417.

Minnesota.— Layman *v.* Minneapolis, St. R. Co., 66 Minn. 452, 69 N. W. 329; Nininger *v.* Knox, 8 Minn. 140.

Mississippi.— Vardeman *v.* Byrne, 7 How. 365.

Missouri.— Longdon *v.* Kelly, 51 Mo. App. 572; Howland *v.* Reeves, 25 Mo. App. 458.

Nebraska.— Lincoln *v.* Holmes, 20 Nebr. 39, 28 N. W. 851.

Nevada.— Wall *v.* Trainor, 16 Nev. 131.

New Jersey.— Corkery *v.* New Jersey Cent. R. Co., (Sup. 1899) 43 Atl. 655.

New York.— Wilcox Silver Plate Co. *v.* Barclay, 48 Hun 54, 14 N. Y. Civ. Proc. 211; Parshall *v.* Klinck, 43 Barb. 203; Cole *v.* Fall Brook Coal Co., 16 N. Y. Suppl. 789; Cole *v.* Cole, 50 How. Pr. 59 [*affirmed* in 12 Hun 373].

Ohio.— Hurd *v.* French, 1 Cinc. Super. Ct. 365.

South Dakota.— *In re* McClellan, (1907) 111 N. W. 540, (1906) 107 N. W. 681.

Tennessee.— Demonbreun *v.* Walker, 4 Baxt. 199.

Texas.— Day *v.* Goodman, (1891) 17 S. W. 475; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; Wolf *v.* Mahan, 57 Tex. 171; Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171; Mitchell *v.* Bass, 26 Tex. 372; St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1905) 86 S. W. 943, new experiment demonstrating falsity of testimony on trial.

Vermont.— Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539; Gilman *v.* Nichols, 42 Vt. 313; Kirby *v.* Waterford, 14 Vt 414.

West Virginia.— Grogan *v.* Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. 563.

Wisconsin.— Anderson *v.* Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788; Keeler *v.* Jacobs, 87 Wis. 545, 58 N. W. 1107; Bigelow *v.* Sickles, 75 Wis. 427, 44 N. W. 761; Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112; Finch *v.* Phillips, 41 Wis. 387; Wilson *v.* Plank, 41 Wis. 94.

United States.— Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348.

See 37 Cent. Dig. tit. "New Trial," § 219.

Evidence held not cumulative.— A judgment operating as an estoppel is not cumulative of other evidence of the facts litigated. Lane *v.* Holliday, 27 Ga. 339. Evidence of a conspiracy between the prevailing party and his witnesses to falsify an instrument material to the case as to which conspiracy no evidence had been offered was held not cumulative. Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb Pr. N. S. 224, 43 How. Pr. 157. Evidence of the payment of a claim is not cumulative to evidence of defendant's release from liability as surety by plaintiff's conduct. Longdon *v.* Kelly, 51 Mo. App. 572.

79. Means *v.* Yeager, 96 Iowa 694, 65 N. W. 993; Keeler *v.* Jacobs, 87 Wis. 545, 58 N. W. 1107. *Contra*, Wilson *v.* Heath, 68 Hun (N. Y.) 209, 22 N. Y. Suppl. 833.

80. Flannagan *v.* Newberg, 1 Ida. 78; Leavy *v.* Roberts, 2 Hilt. (N. Y.) 285, 8 Abb. Pr. 310

81. Hambel *v.* Williams, 37 Iowa 224; Stineman *v.* Beath, 36 Iowa 73; Alger *v.* Merritt, 16 Iowa 121.

82. Lincoln *v.* Holmes, 20 Nebr. 39, 28 N. W. 851; Powell *v.* Jones, 42 Barb. (N. Y.) 24; Cole *v.* Fall Brook Coal Co., 16 N. Y. Suppl. 789; Day *v.* Goodman, (Tex. 1891) 17 S. W. 475; Wolf *v.* Mahan, 57 Tex. 171 (to dispute evidence of alibi); Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953. *Compare* McDaniels *v.* Van Fosen, 11 Iowa 195.

83. White *v.* Nafus, 84 Iowa 350, 51 N. W. 5 [*disapproving dictum* in Simmons *v.* Fay, 1 E. D. Smith (N. Y.) 107].

84. *Indiana.*— Humphries *v.* Marshall, 12 Ind. 609.

Iowa.— Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; German *v.* Maquoketa Sav. Bank, 38 Iowa 368; Stineman *v.* Beath, 36 Iowa 73.

New Jersey.— Van Riper *v.* Dundee Mfg. Co., 33 N. J. L. 152.

New York.— Guyot *v.* Butts, 4 Wend. 579. See also Platt *v.* Munroe, 34 Barb. 291.

Texas.— West *v.* State, 2 Tex. App. 209.

Wisconsin.— Dierolff *v.* Winterfield, 26 Wis. 175.

Compare Hart *v.* Jackson, 77 Ga. 493, 3 S. E. 1.

doing of an act by him at another place, or his presence at such other place, at that time.[85] Direct and opinion evidence are not cumulative to each other.[86] It has sometimes been held that an original document is cumulative to secondary evidence of it,[87] but a contrary rule probably obtains more generally where the secondary evidence was conflicting.[88] Evidence of admissions and direct evidence are not cumulative to each other.[89] Neither are evidence of admissions and opinion evidence.[90] Evidence of admissions is cumulative to evidence of similar admissions.[91] Evidence of oral admissions is cumulative to evidence of written

85. *Connecticut.*—Knowles *v.* Northrop, 53 Conn. 360, 4 Atl. 269.

Idaho.— Twin Springs Placer Co. *v.* Upper Boise Hydraulic Min. Co., 6 Ida. 687, 59 Pac. 535.

Indiana.— Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264.

Iowa.— Germinder *v.* Machinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108.

Kentucky.— Adams Oil Co. *v.* Stout, 41 S. W. 563, 19 Ky. L. Rep. 758.

New York.— Seeley *v.* Chittenden, 4 How. Pr. 265; Sargent *v.* ——, 5 Cow. 106. *Compare* Adams *v.* Bush, 23 How. Pr. 262 [*affirmed* in 1 Abb. Dec. 7, 2 Abb. Pr. N. S. 112].

Texas.— Wolf *v.* Mahan, 57 Tex. 171.

See 37 Cent. Dig. tit. "New Trial," § 220.

Instance.— Evidence that a certain place at which an alleged transaction was sworn to have taken place did not exist is not cumulative to testimony directly denying the transaction. Union Cent. L. Ins. Co. *v.* Loughmiller, 33 Ind. App. 309, 69 N. E. 264.

86. Knowles *v.* Northrop, 53 Conn. 360, 4 Atl. 269; Bousman *v.* Stafford, 71 Kan. 648, 81 Pac. 184; Vardeman *v.* Byrne, 7 How. (Miss.) 365; Platt *v.* Munroe, 34 Barb. (N. Y.) 291; Cole *v.* Cole, 50 How. Pr. (N. Y.) 59 [*affirmed* in 12 Hun 373].

87. Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619 (where a copy was used on the trial); Oakley *v.* Sears, 7 Rob. (N. Y.) 111.

88. Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Winfield Bldg., etc., Assoc. *v.* McMullen, 59 Kan. 493, 53 Pac. 481 [*reversing* 4 Kan. App. 459, 46 Pac. 410]; Mercer *v.* King, 42 S. W. 106, 19 Ky. L. Rep. 781; Platt *v.* Munroe, 34 Barb. (N. Y.) 291. See also *supra*, III, I, 5, b, (VI), (A), (2).

89. *Georgia.*— Mills *v.* May, 42 Ga. 623; Collins *v.* Loyd, 31 Ga. 128.

Indiana.— Kochel *v.* Bartlett, 88 Ind. 237; Humphries *v.* Marshall, 12 Ind. 609.

Iowa.— Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217. *Compare* Cahalan *v.* Cahalan, 82 Iowa 416, 48 N. W. 724.

Kentucky.— Owsley *v.* Owsley, 117 Ky. 47, 77 S. W. 397, 25 Ky. L. Rep. 1186; Adams Oil Co. *v.* Stout, 41 S. W. 563, 19 Ky. L. Rep. 758; Lambert *v.* Hicks, 15 Ky. L. Rep. 240.

Maine.— Strout *v.* Stewart, 63 Me. 227.

Massachusetts.— Chatfield *v.* Lathrop, 6 Pick. 417.

Missouri.— Standard Inv. Co. *v.* Hoyt, 164 Mo. 124, 63 S. W. 1093.

Nevada.— Gray *v.* Harrison, 1 Nev. 502.

New York.— Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49 (memoranda formal among papers of deceased person); Sistare *v.* Olcott, 5 N. Y. Suppl. 114. *Compare* Shute *v.* Jones, 24 N. Y. Suppl. 637.

Texas.— Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171.

Vermont.— Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553; Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Preston *v.* Otey, 88 Va. 491, 14 S. E. 68; St. John *v.* Alderson, 32 Gratt. 140.

Wisconsin.— Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112.

See 37 Cent. Dig. tit. "New Trial," § 220. See also *supra*, III, I, 4, e.

Compare Bartlett *v.* Hogden, 3 Cal. 55.

90. Humphries *v.* Marshall, 12 Ind. 609.

Admissions implied from payments on a note are not cumulative to expert evidence as to the genuineness of the signature. Humphries *v.* Marshall, 12 Ind. 609.

91. *Arkansas.*— Bourdon *v.* Mason, 5 Ark. 256.

Georgia.— Hawkins *v.* Kermode, 85 Ga. 116, 11 S. E. 560; Perry *v.* Houseley, 40 Ga. 657.

Illinois.— Smith *v.* Belt, 31 Ill. App. 96.

Indiana.— McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7; Andis *v.* Richie, 120 Ind. 138, 21 N. E. 1111; Hines *v.* Driver, 100 Ind. 315; Kochel *v.* Bartlett, 88 Ind. 237; Lefever *v.* Johnson, 79 Ind. 554; Sbirel *v.* Baxter, 71 Ind. 352; Cox *v.* Harvey, 53 Ind. 174; Zonker *v.* Wiest, 42 Ind. 169; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784; Offutt *v.* Gowdy, 18 Ind. App. 602, 48 N. E. 654; Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616; Cooper *v.* Ellis, 3 Ind. App. 142, 29 N. E. 444.

Iowa.— Wilhelmi *v.* Thorington, 14 Iowa 537.

Kansas.— Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508.

Maine.— Berry *v.* Ross, 94 Me. 270, 47 Atl. 512; Glidden *v.* Dunlap, 28 Me. 379.

Nebraska.— Scofield *v.* Brown, 7 Nebr. 221.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New York.— Wilson *v.* Heath, 68 Hun 209, 22 N. Y. Suppl. 833; Brisbane *v.* Adams, 1 Sandf. 195 [*reversed* on other grounds in 3 N. Y. 129].

Oklahoma.— Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Tennessee.—McGavock *v.* Brown, 4 Humphr. 251.

admissions to the same point, and *vice versa*.[92] That the testimony of the unsuccessful party was the only evidence offered by him upon a particular point does not save newly discovered testimony of the same kind upon the same point from being cumulative.[93]

(B) *As Ground For New Trial.* It has been held or said in a very considerable number of decisions that a new trial will not be granted for newly discovered cumulative evidence offered by the applicant at the trial.[94] In other

Texas.— Bridges *v.* Williams, 28 Tex. Civ. App. 38, 66 S. W. 120, 484; Gulf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860.

Virginia.— Tate *v.* Tate, 85 Va. 205, 7 S. E. 352.

Washington.— Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805.

Wisconsin.— Gans *v.* Harmison, 44 Wis. 323.

See 37 Cent. Dig. tit. "New Trial," § 220.

Evidence to add to and explain conversations from which fraud had been inferred was held not cumulative. Simmons *v.* Fay, 1 E. D. Smith (N. Y.) 107.

92. Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; Brown *v.* Wheeler, 62 Kan. 676, 64 Pac. 594; Cook *v.* St. Louis, etc., R. Co., 56 Mo. 380; Bridges *v.* Williams, 28 Tex. Civ. App. 38, 66 S. W. 120, 484.

93. *Illinois.* — Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68.

Indiana.— Schnurr *v.* Stults, 119 Ind. 429, 21 N. E. 1089; Atkisson *v.* Martin, 39 Ind. 242; Fox *v.* Reynolds, 24 Ind. 46; Watts *v.* Moffett, 12 Ind. App. 399, 40 N. E. 533; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

Kansas.—Mitchell *v.* Stillings, 20 Kan. 276.

Minnesota.— Nininger *v.* Knox, 8 Minn. 140.

New York.— Shute *v.* Jones, 24 N. Y. Suppl. 637.

Compare Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112.

94. *Alabama.*— Geter *v.* Central Coal Co., (1907) 43 So. 367; Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160; McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326; Freeman *v.* Gragg, 73 Ala. 199; Martin *v.* Hudson, 52 Ala. 279.

Alaska.— Chase *v.* Alaska Fish, etc., Co., 2 Alaska 82; Marks *v.* Shoup, 2 Alaska 66.

Arizona.— Ryder *v.* Leach, 3 Ariz. 129, 77 Pac. 490.

Arkansas.— Arkadelphia Lumber Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; St. Louis Southwestern R. Co. *v.* Byrne, 73 Ark. 377, 84 S. W. 469; Arkansas Southern R. Co. *v.* Longbridge, 65 Ark. 300, 45 S. W. 907; St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203; Texas, etc., R. Co. *v.* Orr, 46 Ark. 182; Merrick *v.* Britton, 26 Ark. 496; Berry *v.* Elliott, 25 Ark. 89; Bourland *v.* Skimnee, 11 Ark. 671; Brown *v.* Stacy, 5 Ark. 403; Olmstead *v.* Hill, 2 Ark. 346; Robins *v.* Fowler, 2 Ark. 133; Burriss *v.* Wise, 2 Ark. 33.

California.— Kataoka *v.* Hanselman, 150 Cal. 673, 89 Pac. 1082; Patterson *v.* San Francisco, etc., Electric R. Co., 147 Cal. 178, 81 Pac. 531; Wood *v.* Moulton, 146 Cal. 317, 80 Pac. 92; Kuhlman *v.* Burns, 117 Cal. 469, 49 Pac. 585; Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185; Wells *v.* Snow, (1895) 41 Pac. 858; Christensen *v.* McBride, (1894) 36 Pac. 398; People *v.* Burdick, (1892) 29 Pac. 245; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157; Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962; Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65; Crystal Lake Ice Co. *v.* McAulay, 75 Cal. 631, 17 Pac. 924; Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20; People *v.* Lyle, (1884) 4 Pac. 977; Hobler *v.* Cole, 49 Cal. 250; Armstrong *v.* Davis, 41 Cal. 494; Stoakes *v.* Monroe, 36 Cal. 383; Meyer *v.* Mowry, 34 Cal. 514; Aldrich *v.* Palmer, 24 Cal. 513; Spencer *v.* Doane, 23 Cal. 418; Wright *v.* Carillo, 22 Cal. 595; Klockenbaum *v.* Pierson, 22 Cal. 160; Berry *v.* Metzler, 7 Cal. 418; Gaven *v.* Dopman, 5 Cal. 342; Bartlett *v.* Hogden, 3 Cal. 55.

Colorado.— Martin *v.* Hazzard Powder Co., 2 Colo. 596; Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284; Cole *v.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013.

Connecticut.— Selleck *v.* Head, 77 Conn. 15, 58 Atl. 224; Hart *v.* Brainard, 68 Conn. 50, 35 Atl. 776; Travelers' Ins. Co. *v.* Savage, 43 Conn. 187; Parsons *v.* Platt, 37 Conn. 563; Waller *v.* Graves, 20 Conn. 305.

Florida.—Simpson *v.* Daniels, 16 Fla. 677; Coker *v.* Merritt, 16 Fla. 416; Milton *v.* Blackshear, 8 Fla. 161.

Georgia.— Georgia R., etc., Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409; Louisville, etc., R. Co. *v.* Harrison, 113 Ga. 1153, 39 S. E. 472; Sims *v.* Sims, 113 Ga. 1083, 39 S. E. 435; Matthews *v.* Kennedy, 113 Ga. 378, 38 S. E. 854; Dawkins *v.* Willbanks, 108 Ga. 804, 34 S. E. 165; Macon *v.* Small, 108 Ga. 309, 34 S. E. 152; Ponder *v.* Walker, 107 Ga. 753, 33 S. E. 690; Zorn *v.* Hannah, 106 Ga. 61, 31 S. E. 797; Atlanta R. Co. *v.* Jett, 103 Ga. 569, 29 S. E. 767; White *v.* Butt, 102 Ga. 552, 27 S. E. 680; Johnson *v.* Palmour, 87 Ga. 244, 13 S. E. 637; Baker *v.* Moor, 84 Ga. 186, 10 S. E. 737; Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133; Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923; Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Munro *v.* Moody, 78 Ga. 127, 2 S. E. 688; Etheridge *v.* Hobbs, 77 Ga. 531, 3 S. E. 251; Hart *v.* Jackson, 77 Ga. 493, 3 S. E. 1; Dalton *v.* Drake, 75 Ga. 115; Mor-

cases, however, a disposition is shown to place certain limitations or qualifications

gan *v.* Hardee, 71 Ga. 736; Leverett *v.* Cook, 68 Ga. 838; Puryear *v.* State, 66 Ga. 753; Latimore *v.* State, 63 Ga. 557; Wilkinson *v.* Smith, 57 Ga. 609; Holmes *v.* Clark, 54 Ga. 303; Gardner *v.* Lamback, 47 Ga. 133; Wood *v.* Ross, 43 Ga. 596; Wallace *v.* Tumlin, 42 Ga. 462; Orand *v.* Walker, 41 Ga. 657; Perry *v.* Houseley, 40 Ga. 657; Roe *v.* Doe, 37 Ga. 459; Grubb *v.* Kalb, 37 Ga. 459; Moore *v.* Ulm, 34 Ga. 565; John *v.* State, 33 Ga. 257; Crawford *v.* Gaulden, 33 Ga. 173; Coggin *v.* Jones, 29 Ga. 257; Dickinson *v.* Solomons, 26 Ga. 684; Wright *v.* Greenwood, 17 Ga. 418; Irwin *v.* Morell, Dudley 72.

Idaho.— Flannagan *v.* Newberg, 1 Ida. 78.

Illinois.— People *v.* McCullough, 210 Ill. 488, 71 N. E. 602; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720; Bemis *v.* Horner, 165 Ill. 347, 46 N. E. 277; Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E 790; Sconce *v.* Henderson, 102 Ill. 376; Harvey *v.* Collins, 89 Ill. 255; Abrahams *v.* Weiller, 87 Ill. 179; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Skelly *v.* Boland, 78 Ill. 438; Bowers *v.* People, 74 Ill. 418; Wood *v.* Echternach, 65 Ill. 149; Toledo, etc., R. Co. *v.* Seitz, 53 Ill. 452; Calhoun *v.* O'Neal, 53 Ill. 354; Morrison *v.* Stewart, 24 Ill. 24; Laflin *v.* Herrington, 17 Ill. 399; Crozier *v.* Cooper, 14 Ill. 139; Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33; Kuhn *v.* Williams, 124 Ill. App. 390; United Breweries Co. *v.* O'Donnell, 124 Ill. App. 24 [*affirmed* in 221 Ill. 334, 77 N. E. 547]; Shutt Imp. Co. *v.* Thompson, 109 Ill. App. 540; Bracewell *v.* Self, 109 Ill. App. 140; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; Pittsburg, etc., R. Co. *v.* Banfill, 107 Ill. App. 254 [*affirmed* in 206 Ill. 553, 69 N. E. 499]; Janeway *v.* Burton, 102 Ill. App. 403 [*affirmed* in 201 Ill. 78, 66 N. E. 337]; Heenan *v.* Redman, 101 Ill. App. 603; McDonald *v.* Harris, 75 Ill. App. 111; La Fevre *v.* Du Brule, 71 Ill. App. 263; Illinois Cent. R. Co. *v.* Truesdell, 68 Ill. App. 324; Reid *v.* Flanders, 62 Ill. App. 106; Edwards *v.* Barnes, 55 Ill. App. 38; R. J. Gunning Co. *v.* Cusack, 50 Ill. App. 290; Davis *v.* Mann, 43 Ill. App. 301; Chicago, etc., R. Co. *v.* Clough, 33 Ill. App. 129 [*affirmed* in 134 Ill. 586, 25 N. E. 664, 29 N. E. 184]; Smith *v.* Belt, 31 Ill. App. 96; Cleary *v.* Cummings, 28 Ill. App. 237; Cooper *v.* Johnson, 27 Ill. App. 504; Jacobson *v.* Gunzburg, 25 Ill. App. 223.

Indiana.— Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619; McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7; Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Morrison *v.* Carey, 129 Ind. 277, 28 N. E. 697; Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216; Audis *v.* Richie, 120 Ind. 138, 21 N. E. 1111; Schnurr *v.* Stults, 119 Ind. 429, 21 N. E. 1089; Pennsylvania Co. *v.* Nations, 111 Ind. 203, 12 N. E. 309; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; De Hart *v.* Aper, 107 Ind. 460, 8 N. E. 275; Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120; Test *v.* Larsh, 100 Ind. 562; Hines *v.* Driver, 100 Ind. 315; Cox *v.* Harvey, 53 Ind. 174; Shigley *v.* Snyder, 45 Ind. 543; Martin *v.* Garver, 40 Ind. 351; Larrimore *v.* Williams, 30 Ind. 18; Merryman *v.* Ryan, 24 Ind. 262; Fox *v.* Reynolds, 24 Ind. 46; Cox *v.* Hutchings, 21 Ind. 219; State *v.* Clark, 16 Ind. 97; Harris *v.* Rupel, 14 Ind. 209; Swift *v.* Wakeman, 9 Ind. 552; Sloan *v.* State, 8 Ind. 312; Simpson *v.* Wilson, 6 Ind. 474; Jennings *v.* Loring, 5 Ind. 250; Indianapolis, etc., Rapid Transit Co. *v.* Edwards, 36 Ind. App. 202, 74 N. E. 533; Linton *v.* Smith, 31 Ind. App. 546, 68 N. E. 617; Franklin *v.* Lee, (App. 1901) 62 N. E. 78; Indianapolis *v.* Mitchell, 27 Ind. App. 589, 61 N. E. 947; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387; Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616; Offutt *v.* Gowdy, 18 Ind. App. 602, 48 N. E. 654; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Watts *v.* Moffett, 12 Ind. App. 399, 40 N. E. 533; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305; Richter *v.* Meyer, 5 Ind. App. 33, 31 N. E. 582; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435; Westbrook *v.* Aultman, 3 Ind. App. 83, 28 N. E. 1011; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172; Baldwin *v.* Biersdorfer, Wils. 1.

Iowa.— Hemmer *v.* Burger, 127 Iowa 614, 103 N. W. 957; Kringle *v.* Kringle, 123 Iowa 365, 98 N. W. 883; Council *v.* Connell, 119 Iowa 602, 93 N. W. 582; Grapes *v.* Sheldon, 119 Iowa 112, 93 N. W. 57; Sioux City Stock-Yards Co. *v.* Sioux City Packing Co., 110 Iowa 396, 81 N. W. 712; Ritchey *v.* Ritchey, (1899) 79 N. W. 280; McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83; Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; Allbright *v.* Hannah, 103 Iowa 98, 72 N. W. 421; Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628; Eaton *v.* Crips, 94 Iowa 176, 62 N. W. 687; Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, 57 N. W. 430; Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76; Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093; State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070; Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275; Hickenbottom *v.* Chicago, etc., R. Co., 57 Iowa 704, 11 N. W. 652; Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460; Cohol *v.* Allen, 37 Iowa 449; Bingham *v.* Foster, 37 Iowa 339; Stineman *v.* Beath, 36 Iowa 73; Alger *v.* Merritt, 16 Iowa 121; Wilhelmi *v.* Thorington, 14 Iowa 537; Sturgeon *v.* Ferron, 14 Iowa 160; Manix *v.* Malony, 7 Iowa 81; Mays *v.* Deaver, 1 Iowa 216; Reeves *v.* Royal, 2 Greene 451.

Kansas.— Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895; Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021; Brown *v.* Wheeler, 62 Kan. 676, 64 Pac. 594; Douglass *v.* Anthony, 45 Kan.

upon the doctrine as here enunciated. In these cases it has been held that a new trial

439, 25 Pac. 853; Olathe *v.* Horner, 38 Kan. 312, 16 Pac. 468; Baughman *v.* Penn, 33 Kan. 504, 6 Pac. 890; O'Leary *v.* Reed, 30 Kan. 749, 2 Pac. 114; Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508; Parker *v.* Bates, 29 Kan. 597; Sexton *v.* Lamb, 27 Kan. 432; Clark *v.* Norman, 24 Kan. 515; Mitchell *v.* Stillings, 20 Kan. 276; Swartzel *v.* Rogers, 3 Kan. 374; Hindman *v.* Askew Saddlery Co., 9 Kan. App. 98, 57 Pac. 1050; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504; McMullen *v.* Winfield Bldg., etc., Assoc., 4 Kan. App. 459, 46 Pac. 410; Titus *v.* Mitchell, 3 Kan. App. 90, 45 Pac. 99.

Kentucky.— Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870; Bronson *v.* Green, 2 Duv. 234; Withers *v.* Butts, 7 Dana 329; Chambers *v.* Chambers, 2 A. K. Marsh. 348; Ripperdan *v.* Scott, 1 A. K. Marsh. 151; Metropolitan L. Ins. Co. *v.* Ford, 102 S. W. 876, 31 Ky. L. Rep. 513; Phœnix Ins. Co. *v.* Wintersmith, 98 S. W. 987, 30 Ky. L. Rep. 369; Flint *v.* Illinois Cent. R. Co., 97 S. W. 736, 29 Ky. L. Rep. 1149; Dayton *v.* Hirth, 87 S. W. 1136, 27 Ky. L. Rep. 1209; Illinois Cent. R. Co. *v.* Colly, 86 S. W. 538, 27 Ky. L. Rep. 713; Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Richmond *v.* Martin, 78 S. W. 219, 25 Ky. L. Rep. 1516; Gibson *v.* Sutton, 70 S. W. 188, 24 Ky. L. Rep. 868; Akers *v.* Akers, 69 S. W. 715, 24 Ky. L. Rep. 686; Stowers *v.* Singer, 67 S. W. 822, 68 S. W. 637, 24 Ky. L. Rep. 395; Oberdorfer *v.* Newberger, 67 S. W. 267, 23 Ky. L. Rep. 2323; Finley *v.* Curd, 62 S. W. 501, 22 Ky. L. Rep. 1912; Bragg *v.* Moore, 56 S. W. 163, 21 Ky. L. Rep. 1721; Ferrell *v.* McCoy, 53 S. W. 23, 21 Ky. L. Rep. 787; Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784; Richardson *v.* Huff, 43 S. W. 454, 19 Ky. L. Rep. 1428; Newton *v.* Cook, 33 S. W. 934, 17 Ky. L. Rep. 1189; Sellars *v.* Cincinnati, etc., R. Co., 29 S. W. 332, 16 Ky. L. Rep. 833; Houston *v.* Kidwell, 14 S. W. 377, 12 Ky. L. Rep. 386; Klein *v.* Gibson, 2 S. W. 116, 8 Ky. L. Rep. 343.

Louisiana.— Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241; Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900; Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394; Bradford *v.* Hume, 90 Me. 233, 38 Atl. 143; Dodge *v.* Dodge, 86 Me. 393, 30 Atl. 14; McLaughlin *v.* Doane, 56 Me. 289; Ham *v.* Ham, 39 Me. 263; Snowman *v.* Wardwell, 32 Me. 275; Handly *v.* Call, 30 Me. 9; Gilbert *v.* Woodbury, 22 Me. 246; Warren *v.* Hope, 6 Me. 479, *dictum.*

Massachusetts.— Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775; Gardner *v.* Gardner, 2 Gray 434; Sawyer *v.* Merrill, 10 Pick. 16; Yarmouth *v.* Dennis, 6 Pick. 116 note; Gardner *v.* Mitchell, 6 Pick. 114, 17 Am. Dec. 349.

Michigan.— Morin *v.* Robarge, 132 Mich. 337, 93 N. W. 886; Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444; White *v.* Peabody, 106 Mich. 144, 64 N. W. 41.

Minnesota.— Strand *v.* Great Northern R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957; Meeks *v.* St. Paul, 64 Minn. 220, 66 N. W. 966; Adamant Mfg. Co. *v.* Pete, 61 Minn. 464, 63 N. W. 1027; Elmborg *v.* St. Paul City R. Co., 51 Minn. 70, 52 N. W. 969; Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837; Lowe *v.* Minneapolis St. R. Co., 37 Minn. 233, 34 N. W. 33; Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91; Johnson *v.* Coles, 21 Minn. 108; Nininger *v.* Knox, 8 Minn. 140.

Mississippi.— Louisville, etc., R. Co. *v.* Crayton, 69 Miss. 152, 12 So. 271; Vanderburg *v.* Campbell, 64 Miss. 89, 8 So. 206; Garnett *v.* Kirkman, 41 Miss. 94; Moody *v.* Earr, 27 Miss. 788; Hare *v.* Sproul, 2 How. 772.

Missouri.— St. Joseph Folding-Bed Co. *v.* Kansas City, etc., R. Co., 148 Mo. 478, 50 S. W. 85; James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; State *v.* Johnson, 139 Mo. 197, 40 S. W. 767; Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Dollman *v.* Munson, 90 Mo. 85, 2 S. W. 134; Culbertson *v.* Hill, 87 Mo. 553; Miller *v.* Whitson, 40 Mo. 97; Callahan *v.* Caffarata, 39 Mo. 136; Goff *v.* Mullholland, 33 Mo. 203; Boggs *v.* Lynch, 22 Mo. 563; Wells *v.* Sanger, 21 Mo. 354; State *v.* Larrimore, 20 Mo. 425; Beauchamp *v.* Sconce, 12 Mo. 57; Bresnan *v.* Grogan, 74 Mo. App. 587; Thayer *v.* Williams, 65 Mo. App. 673; Obert *v.* Strube, 51 Mo. App. 621; Mercantile Bank *v.* Hawe, 33 Mo. App. 214.

Montana.— O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; Morse *v.* Swan, 2 Mont. 306; Caruthers *v.* Pemberton, 1 Mont. 111.

Nebraska.— Norbury *v.* Harper, 70 Nebr. 389, 97 N. W. 438; Campion *v.* Lattimer, 70 Nebr. 245, 97 N. W. 290; Matoushek *v.* Dutcher, 67 Nebr. 627, 93 N. W. 1049; Hoffine *v.* Ewings, 60 Nebr. 729, 84 N. W. 93; Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992; Hill *v.* Helman, 33 Nebr. 731, 51 N. W. 128; Flannagan *v.* Heath, 31 Nebr. 776, 48 N. W. 904; Livesey *v.* Festner, 28 Nebr. 333, 44 N. W. 441; Omaha, etc., R. Co. *v.* O'Donnell, 24 Nebr. 753, 40 N. W. 298; Brooks *v.* Dutcher, 22 Nebr. 644, 36 N. W. 128; Campbell *v.* Holland, 22 Nebr. 587, 35 N. W. 871.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454; Howard *v.* Winters, 3 Nev. 539.

New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819; Nagel *v.* Mayo, (Sup. 1899) 44 Atl. 944; Thomas *v.* Consolidated Traction Co., 62 N. J. L. 36, 42 Atl. 1061; Kirk *v.* Rickerson, 46 N. J. L. 13; Joslin *v.* New Jersey Car Springs Co., 36

will not be granted for evidence of this character where it is not decisive of

N. J. L. 141; Cox *v.* Tomlin, 19 N. J. L. 76; Nichols *v.* Mechanic's F. Ins. Co., 16 N. J. L. 410; Wintermute *v.* Wintermute, 13 N. J. L. 177; Hadley *v.* Geiger, 9 N. J. L. 225; Jessup *v.* Cook, 6 N. J. L. 434.

New York.— Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732 [*affirmed* in 180 N. Y. 551, 73 N. E. 1121]; Pospisil *v.* Kane, 73 N. Y. App. Div. 457, 77 N. Y. Suppl. 307; Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755; Cameron *v.* Leonard, 17 N. Y. App. Div. 127, 45 N. Y. Suppl. 155 [*affirmed* in 153 N. Y. 690, 48 N. E. 1106]; Hicks *v.* British American Assur. Co., 13 N. Y. App. Div. 444, 43 N. Y. Suppl. 623 [*reversed* on other grounds in 162 N. Y. 284, 56 N. E. 743, 8 L. R. A. 424]; O'Harra *v.* New York, etc., R. Co., 92 Hun 56, 36 N. Y. Suppl. 567; Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Cohen *v.* Mayer, 84 Hun 586, 32 N. Y. Suppl. 851; Sproul *v.* Resolute F. Ins. Co., 1 Lans. 71; Powell *v.* Jones, 42 Barb. 24; Peck *v.* Hiler, 30 Barb. 655; Fellows *v.* Emperor, 13 Barb. 92; Fleming *v.* Hollenback, 7 Barh. 271; Hooker *v.* Terpening, 5 Silv. Sup. 487, 8 N. Y. Suppl. 639; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 278, 280, 19 N. Y. Suppl. 716; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abh. Pr. N. S. 224, 43 How. Pr. 157; Oakley *v.* Sears, 7 Rob. 111; Tripler *v.* Ehehalt, 5 Rob. 609; Burnett *v.* Phalon, 4 Bosw. 622; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Margolius *v.* Muldherg, 88 N. Y. Suppl. 1048; Sayer *v.* King, 47 N. Y. Suppl. 422; Reiffeld *v.* Delaware, etc., Canal Co., 47 N. Y. Suppl. 226; Shute *v.* Jones, 24 N. Y. Suppl. 637; Conable *v.* Smith, 19 N. Y. Suppl. 446; Kanter *v.* Rubin, 18 N. Y. Suppl. 168; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Ott *v.* Buffalo, 16 N. Y. Suppl. 1 [*affirmed* in 131 N. Y. 594, 30 N. E. 67]; Jackson *v.* Ft. Covington, 15 N. Y. Suppl. 793; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432; Cole *v.* Fall Brook Coal Co., 10 N. Y. Suppl. 417; Russell *v.* Randall, 9 N. Y. Suppl. 327 [*reversed* on other grounds in 123 N. Y. 436, 25 N. E. 931]; Hogan *v.* Carroll, 7 N. Y. Suppl. 183; Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450; Wilson *v.* Wilson, 14 N. Y. St. 518; Detjen *v.* Brooklyn City R. Co., 6 N. Y. St. 689; Hurlbert *v.* Parker, 5 N. Y. St. 454; Abrams *v.* Van Brunt St., etc., R. Co., 13 N. Y. Civ. Proc. 402; Taylor *v.* Pinckney, 12 N. Y. Civ. Proc. 107; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]; Cole *v.* Cole, 50 How. Pr. 59 [*affirmed* in 12 Hun 373]; Knoop *v.* Kammerer, 44 How. Pr. 449; Adams *v.* Bush, 23 How. Pr. 262 [*affirmed* in 1 Abh. Dec. 7]; People *v.* New York Super. Ct., 5 Wend. 114; Pike *v.* Evans, 15 Johns. 210; Smith *v.* Brush, 8 Johns. 84; Steinbach *v.* Columbia Ins. Co., 2 Cai. 129.

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204; Sikes *v.* Parker, 95 N. C. 232; Munden *v.* Casey, 93 N. C. 97; Simmons *v.* Mann, 92 N. C. 12; Matthews *v.* Joyce, 85 N. C. 258.

Ohio.— Perrin *v.* Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728; Reed *v.* McGrew, 5 Ohio 375; Allen *v.* Parish, 3 Ohio 107; Krum *v.* Stoll, 3 Ohio Cir. Ct. 500, 2 Ohio Cir. Dec. 287.

Oklahoma.— Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736; Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Pennsylvania.— Slattery *v.* Supreme Tent K. M. W., 19 Pa. Super. Ct. 108; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203; Stewart *v.* Press Co., 1 Pa. Co. Ct. 247; Winton *v.* Savage, 4 C. Pl. 47; Com. *v.* Yot Sing, 7 Kulp 349; Ream *v.* Oldweiler, 2 Leg. Gaz. 147; Thomas *v.* French, 6 Phila. 539; Potts *v.* Feeder Dam Coal Co., 6 Phila. 249; Withers *v.* Ralston, 3 Phila. 412; Ross *v.* Ross, 34 Pittsh. Leg. J. N. S. 354; Marsh *v.* Moser, 1 Woodw. 218; Loucks *v.* Lightner, 11 York Leg. Rec. 157.

Rhode Island.— Carroll *v.* Allen, 20 R. I. 541, 40 Atl. 419; Kaul *v.* Brown, 17 R. I. 14, 20 Atl. 10; Johnson *v.* Blanchard, 5 R. I. 24.

South Dakota.— Hahn *v.* Dickinson, 19 S. D. 373, 103 N. W. 642; Demmon *v.* Mullen, 6 S. D. 554, 62 N. W. 380; Scheffer *v.* Corson, 5 S. D. 233, 58 N. W. 555.

Tennessee.— Table *v.* Connor, 1 Baxt. 195; Noel *v.* McCrory, 7 Coldw. 623; Martin *v.* Nance, 3 Head 649; Dossett *v.* Miller, 3 Sneed 72; Jones *v.* White, 11 Humphr. 268; McGavock *v.* Brown, 4 Humphr. 251.

Texas.— San Antonio, etc., R. Co. *v.* Moore, (1903) 72 S. W. 226; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Sabine, etc., R. Co. *v.* Wood, 69 Tex. 679, 7 S. W. 372; Fears *v.* Albea, 69 Tex. 437, 56 S. W. 286, 5 Am. St. Rep. 78; Walker *v.* Brown, 66 Tex. 556, 1 S. W. 797; East Line, etc., R. Co. *v.* Boon, (1886) 1 S. W. 632; Traylor *v.* Townsend, 61 Tex. 144; Griffith *v.* Eliot, 60 Tex. 334; Frizzell *v.* Johnson, 30 Tex. 31; Burnley *v.* Rice, 21 Tex. 171; Harrell *v.* Hill, 15 Tex. 270; Castro *v.* Wurzbach, 13 Tex. 128; Latham *v.* Selkirk, 11 Tex. 314; State *v.* Moore, 7 Tex. 257; Madden *v.* Shapard, 3 Tex. 49; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; Houston Lighting Power Co. *v.* Hooper, (Civ. App. 1907) 102 S. W. 133; Cain *v.* Corley, (Civ. App. 1907) 99 S. W. 168; Powell *v.* Dergfield, (Civ. App. 1905) 87 S. W. 1051; Northern Texas Traction Co. *v.* Lewis, (Civ. App. 1904) 83 S. W. 894; Taylor *v.* San Antonio, etc., R. Co., 36 Tex. Civ. App. 658, 83 S. W. 738; Russell *v.* Anderson, (Civ. App. 1904) 83 S. W. 237; Oakes *v.* Prather, (Civ. App. 1904) 81 S. W. 557; Pelly *v.* Denison, etc., R. Co., (Civ. App. 1904) 78 S. W. 542; Parham *v.* Shockler, (Civ. App. 1903) 73 S. W. 839; Alexander *v.* Lovitt, (Civ. App. 1902) 67 S. W. 927 [*reversed* on other grounds in 95 Tex. 661, 69 S. W. 68]; Bridges *v.* Williams, 28 Tex. Civ. App. 38, 66 S. W. 120,484; Luke *v.* El Paso,

the merits of the case,[95] or where it does not render clear what before was doubt-

(Civ. App. 1900) 60 S. W. 363; Smith *v.* Seymore, (Civ. App. 1900) 59 S. W. 816; Gulf, etc., R. Co. *v.* Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Missouri, etc., R. Co. *v.* Gordon, 11 Tex. Civ. App. 672, 33 S. W. 684; Jester *v.* Francis, (Civ. App. 1895) 31 S. W. 245; Adams *v.* Eddy, (Civ. App. 1894) 29 S. W. 180; Ratto *v.* St. Paul's L., etc., Ins. Co., 2 Tex. App. Civ. Cas. § 117; Wisson *v.* Baird, 1 Tex. App. Civ. Cas. § 709; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

Utah.— Larsen *v.* Onesite, 21 Utah 38, 59 Pac. 234; Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712.

Vermont.—Kirby *v.* Waterford, 14 Vt. 414; Dodge *v.* Kendall, 4 Vt. 31; Bullock *v.* Beach, 3 Vt. 73.

Virginia.— Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830; Tate *v.* Tate, 85 Va. 205, 7 S. E. 352; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137; Smith *v.* Watson, 82 Va. 712, 1 S. E. 96; St. John *v.* Alderson, 32 Gratt. 140; Markham *v.* Boyd, 22 Gratt. 544; Brown *v.* Speyers, 20 Gratt. 296; Harnsbarger *v.* Kinney, 13 Gratt. 511; Nuckols *v.* Jones, 8 Gratt. 267; Hoomes *v.* Kuhn, 4 Call 274.

Washington.— O'Toole *v.* Faulkner, 34 Wash. 371, 75 Pac. 975 (although it tends to corroborate a party); Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805; McKilver *v.* Manchester, 1 Wash. Terr. 255.

West Virginia.— Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Dower *v.* Church, 21 W. Va. 23.

Wisconsin.— Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600; Krueger *v.* Merrill, 66 Wis. 28, 27 N. W. 836; Gans *v.* Harmison, 44 Wis. 323; Wilson *v.* Plank, 41 Wis. 94; Edmiston *v.* Garrison, 18 Wis. 594.

Wyoming.— Link *v.* Union Pac. R. Co., 3 Wyo. 680, 29 Pac. 741.

United States.— Wright *v.* Southern Express Co., 80 Fed. 85; Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210; Lowry *v.* Mt. Adams, etc., Incline Plane R. Co., 68 Fed. 827; Preble *v.* Bates, 39 Fed. 755; Chandler *v.* Thompson, 30 Fed. 38; Fuller *v.* Harris. 29 Fed. 814; Brown *v.* Evans, 17 Fed. 912, 8 Sawy 488; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb. Pat. Cas. 689, 1 Sumn. 482; Vose *v.* Mayo, 12 Fed. Cas. No. 7,009, 3 Cliff. 484; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193; Palmer *v.* Fiske, 18 Fed. Cas. No. 10,691, 2 Curt. 14; Ready Roofing Co. *v.* Taylor, 20 Fed. Cas. No. 11,613, 3 Ban. & A. 368, 15 Blatchf 94; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodh. & M. 380; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

England.—Scott *v.* Scott, 9 Jur. N. S. 1251, 33 L. J. P. & M. 1, 9 L. T. Rep. N. S. 454, 3 Swab. & Tr. 320, 12 Wkly. Rep. 126.

Canada.—Inch *v.* Flewelling, 30 N. Brunsw. 19; Doe *v.* Babineau, 11 N. Brunsw. 89; Smith *v.* Neill, 9 N. Brunsw. 105; Trumble *v.* Hortin, 22 Ont. App. 51; Miller *v.* Confederation L. Ins. Co., 14 Ont. App. 218 [*affirming* 11 Ont. 120]; Murray *v.* Canada Cent. R. Co., 7 Ont. App. 646; Howarth *v.* McGugan, 23 Ont. 396; Fawcett *v.* Mothersell, 14 U. C. C. P. 104; McDermott *v.* Ireson, 38 U. C. Q. B. 1. Generally a new trial will not be granted to permit a witness whose deposition had been taken and read to testify orally. McDermott *v.* Ireson, *supra.*

See 37 Cent. Dig. tit. "New Trial," §§ 203, 218, 220.

The discovery of "corroborative" evidence, cumulative in character, is not ordinarily ground for a new trial. Zeller *v.* Griffith, 89 Ind. 80; Westbrook *v.* Aultman, 3 Ind. App. 83, 28 N. E. 1011; Howarth *v.* McGugan, 23 Ont. 396; Hooper *v.* Christoe, 14 U. C. C. P. 117; Fawcett *v.* Mothersell, 14 U. C. C. P. 104; McDermott *v.* Ireson, 38 U. C. Q. B. 1.

95. *Arizona.*— Charles T. Hayden Milling Co. *v.* Lewis, (1891) 32 Pac. 263.

Arkansas.— Berry *v.* Elliott, 25 Ark. 89.

California.— Silva *v.* Silva, (1894) 38 Pac. 105; O'Rourke *v.* Vennekohl, 104 Cal. 254, 37 Pac. 930; Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596; McCormick *v.* Central R. Co., 75 Cal. 506, 17 Pac. 542; Levitsky *v.* Johnson, 35 Cal. 41.

Connecticut.— Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233; Waller *v.* Graves, 20 Conn. 305.

Georgia.— Hanye *v.* Candler, 99 Ga. 214, 25 S. E. 606; Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321; Coggin *v.* Parks, 85 Ga. 516, 11 S. E. 840; Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156; Erskine *v.* Duffy, 76 Ga. 602; Barber *v.* Terrell, 57 Ga. 538; Moore *v.* Ewings, 44 Ga. 354.

Illinois.— Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720 [*affirming* 70 Ill. App. 318]; Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401; Sterling *v.* Merrill, 124 Ill. 522, 17 N. E. 6; Sconce *v.* Henderson, 102 Ill. 376; McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 534; Laird *v.* Warren, 92 Ill. 204; Harvey *v.* Collins, 89 Ill. 255; Abrahams *v.* Weiller, 87 Ill. 179; Gottschalk *v.* Hughes, 82 Ill. 484; Skelly *v.* Boland, 78 Ill. 438; Krug *v.* Ward, 77 Ill. 603; Chapman *v.* Burt, 77 Ill. 337; Champion *v.* Ulmer, 70 Ill. 322; Fuller *v.* Little, 61 Ill. 21; Sulzer *v.* Yott, 57 Ill. 164; Calhoun *v.* O'Neal, 53 Ill. 354; Martin *v.* Ehrenfels, 24 Ill. 187; Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33; Springer *v.* Schultz, 105 Ill. App. 544 [*affirmed* in 205 Ill. 144, 68 N. E. 753]; Miller *v.* Potter, 102 Ill. App. 483; Bingham *v.* Spruill, 97 Ill. App. 374; Crone *v.* Garst, 88 Ill. App. 124; Hill *v.* Montgomery, 84 Ill. App. 300 [*affirmed* in

ful.[96] In comparatively few of the first class of cases did the facts demand a ruling that a new trial could not be granted for cumulative evidence under any possible circumstances.[97] A new trial may now be allowed, in some jurisdictions, for newly discovered cumulative evidence which, taken in connection with the evidence adduced at the trial, is sufficient to render a different verdict necessary, or highly probable, or probable,[98] as the general rule for newly discovered evidence may be

184 Ill. 220, 56 N. E. 320]; Drum *v.* Doepheide, 83 Ill. App. 146; Chandler *v.* Smith, 70 Ill. App. 658; Madison Coal Co. *v.* Beam, 63 Ill. App. 178; Reid *v.* Flanders, 62 Ill. App. 106; De Kalb *v.* Ashley, 61 Ill. App. 647; Toledo, etc., R. Co. *v.* Endres, 57 Ill. App. 69; Woolverton *v.* Summer, 53 Ill. App. 115; Biederman *v.* Brown, 49 Ill. App. 483; Chicago, etc., R. Co. *v.* Clough, 33 Ill. App. 129; Chicago First Nat. Bank *v.* William Ruehl Brewing Co., 33 Ill. App. 121; Fay *v.* Richards, 30 Ill. App. 477; Cleary *v.* Cummings, 28 Ill. App. 237; Sterling *v.* Merrill, 25 Ill. App. 596; Jacobson *v.* Gunzburg, 25 Ill. App. 223; Chicago, etc., R. Co. *v.* Sullivan, 21 Ill. App. 580.

Indiana.— Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Fleming *v.* McClaflin, 1 Ind. App. 537, 27 N. E. 875.

Kansas.— Douglass *v.* Anthony, 45 Kan. 439, 25 Pac. 853; Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255.

Kentucky.— Cahill *v.* Mullins, 101 S. W. 336, 31 Ky. L. Rep. 72; Newton *v.* Cook, 33 S. W. 934, 17 Ky. L. Rep. 1189; Palmer *v.* Mt. Sterling Nat. Bank, 18 S. W. 234, 13 Ky. L. Rep. 790.

Maine.— Dodge *v.* Dodge, 86 Me. 393, 30 Atl. 14.

Mississippi.— Louisville, etc., R. Co. *v.* Crayton, 69 Miss. 152, 12 So. 271.

Missouri.— Donovan *v.* Ryan, 35 Mo. App. 160.

Nebraska.— Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Flannagan *v.* Heath, 31 Nebr. 776, 48 N. W. 904; Keiser *v.* Lecker, 29 Nebr. 92, 45 N. W. 272.

New York.— Lee *v.* Supreme Council C. B. L., 64 N. Y. App. Div. 622, 72 N. Y. Suppl. 274; Hooker *v.* Terpenning, 5 Silv. Sup. 487, 8 N. Y. Suppl. 639; Jackson *v.* Ft. Covington, 15 N. Y. Suppl. 793.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343.

Rhode Island.— Shepard *v.* New York, etc., R. Co., 27 R. I. 135, 61 Atl. 42; McDonald *v.* Rhode Island Co., 26 R. I. 467, 59 Atl. 391; Heaton *v.* Manhattan Mut. F. Ins. Co., 7 R. I. 502; Windham County Bank *v.* Kendall, 7 R. I. 77; Potter *v.* Padelford, 3 R. I. 162.

Texas.— Wolf *v.* Mahan, 57 Tex. 171; Ziegler *v.* Stefanek, 31 Tex. 29; Stewart *v.* Hamilton, 19 Tex. 96; Collins *v.* Weiss, 32 Tex. Civ. App. 282, 74 S. W. 46; Missouri, etc., R. Co. *v.* Gordon, 11 Tex. Civ. App. 672, 33 S. W. 684; Eddy *v.* Newton, (Civ. App. 1893) 22 S. W. 533; Fort *v.* Cameron, 1 Tex. App. Civ. Cas. § 1112.

Vermont.— Thayer *v.* Central Vermont R. Co., 60 Vt. 214 13 Atl. 859; Burr *v.* Palmer, 23 Vt. 244.

Virginia.— Cody *v.* Conly, 27 Gratt. 313.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716.

96. Waller *v.* Graves, 20 Conn. 305; Hoffine *v.* Ewing, 60 Nebr. 729, 84 N. W. 93; Hill *v.* Helman, 33 Nebr. 731, 51 N. W. 128; Brooks *v.* Dutcher, 22 Nebr. 644, 36 N. W. 128; Schreckengast *v.* Ealy, 16 Nebr. 510, 20 N. W. 853.

97. See cases cited *supra*, note 94. But *compare* Finley *v.* Curd, 62 S. W. 501, 22 Ky. L. Rep. 1912; Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721.

98. *California.*— Oberlander *v.* Fixen, 129 Cal. 690, 62 Pac. 254.

Georgia.— See Holmes *v.* Clark, 54 Ga. 303.

Illinois.— Hupp *v.* McInturf, 4 Ill. App. 449. See also Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

Iowa.— Cleslie *v.* Frerichs, 95 Iowa 83, 63 N. W. 581. See also White *v.* Nafus, 84 Iowa 350, 51 N. W. 5.

Kentucky.— Butts *v.* Christy, 67 S. W. 377, 23 Ky. L. Rep. 2355; Mercer *v.* King, 42 S. W. 106, 19 Ky. L. Rep. 781. See also Berberich *v.* Louisville Bridge Co., 46 S. W. 691, 20 Ky. L. Rep. 467; Adams Oil Co. *v.* Stout, 41 S. W. 563, 19 Ky. L. Rep. 758.

Maine.— Parsons *v.* Lewiston, etc., R. Co., 96 Me. 503, 52 Atl. 1006.

Massachusetts.— Keet *v.* Mason, 167 Mass. 154, 45 N. E. 81, at least in case tried without a jury.

Nebraska.— St. Paul Harvester Co. *v.* Faulhaber, (1906) 109 N. W. 762; Beatrice German Nat. Bank *v.* Edwards, 63 Nebr. 604, 88 N. W. 657.

Nevada.— Wall *v.* Trainor, 16 Nev. 131.

New York.— Hess *v.* Sloane, 47 N. Y. App. Div. 585, 62 N. Y. Suppl. 666; Kring *v.* New York Cent., etc., R. Co., 45 N. Y. App. Div. 373, 60 N. Y. Suppl. 1114; Keister *v.* Rankins, 34 N. Y. App. Div. 288, 54 N. Y. Suppl. 274 [*reversing* 29 N. Y. App. Div. 539, 51 N. Y. Suppl. 634]; Vollkommer *v.* Nassau Electric R. Co., 23 N. Y. App. Div. 88, 48 N. Y. Suppl. 372; Clegg *v.* New York Newspaper Union, 51 Hun 232, 4 N. Y. Suppl. 280; James McCreery Realty Corp. *v.* Equitable Nat. Bank, 54 Misc. 508, 104 N. Y. Suppl. 959 [*affirming* 52 Misc. 300, 102 N. Y. Suppl. 975]; Schnitzler *v.* Oriental Metal Bed Co., 47 Misc. 356, 93 N. Y. Suppl. 1119 (especially where verdict on testimony of party alone); Solowye *v.* Hazlett, 35 Misc. 197, 71 N. Y. Suppl. 486; Benta *v.* Harris, 27 Misc. 648, 58 N. Y. Suppl. 398; Bulkin *v.* Ehret, 20 N. Y. Suppl. 731, 29 Abb. N. Cas. 62.

South Carolina.— Durant *v.* Philpot, 16 S. C. 116.

South Dakota.— Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577.

in the particular jurisdiction, or which will render clear what was doubtful at the trial,[99] the character of the evidence affecting its weight only. The allowance of new trials for new cumulative evidence is especially disfavored where the evidence might have been discovered before the trial by reasonable diligence,[1] where it is

Texas.— Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712, at least where the verdict is based on the testimony of a party.

Vermont.— Gilman *v.* Nichols, 42 Vt. 313; Hurd *v.* Barber, Brayt. 170.

Statement of rule.— "When the newly-discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evidence, or evidence of much more value, will generally be required when such evidence is cumulative; but if the newly-discovered testimony, although merely cumulative, is of such a character as to make it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted." Parsons *v.* Lewiston, etc., R. Co., 96 Me. 503, 509, 52 Atl. 1006. See also Millar *v.* Field, 3 A. K. Marsh. (Ky.) 104.

Evidence corroborating discredited witness. — Where the evidence of a material witness, being uncorroborated and unsatisfactory in other respects, had been discredited by the judge, a new trial was granted for newly discovered evidence substantially corroborating the witness. Shields *v.* Boucher, 1 De G. & Sm. 40, 63 Eng. Reprint 962

99. Barker *v.* French, 18 Vt. 460; Myers *v.* Brownell, 2 Aik. (Vt.) 407, 16 Am. Dec. 729.

1. *Arizona.*— Charles T. Hayden Milling Co. *v.* Lewis, (1891) 32 Pac. 263.

Arkansas.— Kirkpatrick *v.* Wolfe, 17 Ark. 96; Bourdon *v.* Mason, 5 Ark. 256.

California.— Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596; Russell *v.* Dennison, 45 Cal. 337; Jones *v.* Jones, 38 Cal 584; Levitsky *v.* Johnson, 35 Cal. 41; Baker *v.* Joseph, 16 Cal. 173.

Colorado.— Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Georgia.— Southern R. Co. *v.* Pulliam, 108 Ga. 808, 34 S. E. 147; Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Etheridge *v* Hobbs, 77 Ga. 531, 3 S. E. 251; Russell *v.* Hubbard, 76 Ga. 618; Dalton *v.* Drake, 75 Ga. 115; Hines *v.* Beers, 74 Ga. 839; Arnett *v.* Paulett, 59 Ga. 856; Wilkinson *v.* Smith, 57 Ga. 609; Crawford *v.* Gaulden, 33 Ga. 173; Dickinson *v.* Solomons, 26 Ga. 684.

Idaho.— Knollin *v.* Jones, 7 Ida. 466, 63 Pac. 638.

Illinois.— Bracewell *v.* Self, 109 Ill. App. 140; McDonald *v.* Harris, 75 Ill. App. 111; Wetz *v.* Greffe, 71 Ill. App. 313; La Fevre *v.* Du Brule, 71 Ill. App. 263; Dueber Watch Case Mfg. Co. *v.* Lapp, 35 Ill App. 372; Farrell *v.* Dooley, 17 Ill. App. 66.

Indiana.— Baldwin *v.* Biersdorfer, Wils. 1.

Iowa.— Kringle *v.* Kringle, 123 Iowa 365, 98 N. W. 883; McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64.

Kansas.— Beachley *v.* McCormick, 41 Kan. 485, 21 Pac. 646; Parker *v.* Bates, 29 Kan. 597; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504.

Kentucky.— Covington *v.* Bostwick, 82 S. W. 569, 26 Ky. L. Rep. 780; Stowers *v.* Singer, (1902) 67 S. W. 822, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395; Bragg *v.* Moore, 56 S. W. 163, 21 Ky. L. Rep. 1721; Ferrell *v.* McCoy, 53 S. W. 23, 21 Ky. L. Rep. 787; Sellars *v.* Cincinnati, etc., R. Co., 29 S. W. 332, 16 Ky. L. Rep. 833.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241.

Minnesota.— Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957.

Missouri.— Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Goff *v.* Mulholland, 33 Mo. 203; Corrigan *v.* Brady, 38 Mo. App. 649; Mercantile Bank *v.* Hawe, 33 Mo. App. 214.

Nevada.— Howard *v.* Winters, 3 Nev. 539.

New Jersey.—Thomas *v.* Consolidated Traction Co., 62 N. J. L. 36, 42 Atl. 1061.

New York.— Bastain *v.* Keystone Gas Co., 27 N. Y. App. Div. 584, 50 N. Y. Suppl. 537; Sayer *v.* King, 21 N. Y. App. Div. 624, 47 N. Y. Suppl. 422; Barteau *v.* Phœnix Mut. L. Ins. Co., 67 Barb. 354 [*affirmed* in 67 N. Y. 595]; Hooker *v.* Terpenning, 5 Silv. Sup. 487, 8 N. Y. Suppl. 639; Ott *v.* Buffalo, 16 N. Y. Suppl. 1 [*affirmed* in 131 N. Y. 594, 30 N. E. 67].

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204.

Pennsylvania.— Kambeitz *v.* Harrisburg Traction Co., 9 Pa. Dist. 750, 24 Pa. Co. Ct. 453; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203.

South Dakota.— Axiom Min. Co. *v.* White, 10 S. D. 198, 72 N. W. 462.

Texas.— Sabine, etc., R. Co. *v.* Wood, 69 Tex. 679, 7 S. W. 372; Dowell *v.* Dergfield, (Civ. App. 1905) 87 S. W. 1051; Alexander *v.* Lovitt, (Civ. App. 1902) 67 S. W. 927 [*reversed* on other grounds in 95 Tex. 661, 69 S. W. 68]; Missouri, etc., R. Co. *v.* Jordan, (Civ. App. 1900) 56 S W. 619; Texas, etc., R. Co. *v.* Porter, (Civ. App. 1897) 41 S. W. 88; Durnett *v.* Gulf City R., etc., Co., (Civ. App. 1896) 37 S. W. 336; Jester *v.* Francis, (Civ. App. 1895) 31 S. W. 245.

Utah.— Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712.

Vermont.— Thayer *v.* Central Vermont R. Co., 60 Vt. 214, 13 Atl. 859.

Virginia.— St. John *v.* Alderson, 32 Gratt. 140.

Wisconsin.— Wieting *v.* Millston, 77 Wis.

of an impeaching character,[2] or where it would be admissible only to reduce the amount of damages.[3] On the other hand a new trial for cumulative evidence will be allowed more readily where the applicant was surprised by evidence offered at the trial.[4]

(VII) *Impeaching or Contradictory Evidence.* Ordinarily a new trial will not be granted for newly discovered evidence to impeach a witness.[5] Thus evidence to show that a witness had made statements inconsistent with his testimony

523, 46 N. W. 879; Ketchum *v.* Breed, 66 Wis. 85, 26 N. W. 271.

United States.— Fuller *v.* Harris, 29 Fed. 814; Brown *v.* Evans, 17 Fed. 912, 8 Sawy. 488.

Compare Keet *v.* Mason, 167 Mass. 154, 45 N. E. 81.

2. *California.*— Klockenbaum *v.* Pierson, 22 Cal. 160; Live Yankee Co. *v.* Oregon Co., 7 Cal. 40.

Connecticut.— Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233.

Georgia.— Matthews *v.* Kennedy, 113 Ga. 378, 38 S. E. 854; Eatonton *v.* Reid, 108 Ga. 779, 33 S. E. 657; Thorpe *v.* Wray, 68 Ga. 359; Wilkinson *v.* Smith, 57 Ga. 609.

Illinois.— Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; Jacobson *v.* Gunzburg, 150 Ill. 135, 37 N. E. 229; Kendall *v.* Limberg, 69 Ill. 355; Chicago, etc., R. Co. *v.* Stewart, 104 Ill. App. 37 [*affirmed* in 203 Ill. 223, 67 N. E. 830].

Indiana.—Meurer *v.* State, 129 Ind. 587, 29 N. E. 392; Kochel *v.* Bartlett, 88 Ind. 237; Shigley *v.* Snyder, 45 Ind. 543; Harrison *v.* Price, 22 Ind. 165; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Iowa.— Sullivan *v.* Chicago, etc., R. Co., 119 Iowa 464, 93 N. W. 367; Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Morrow *v.* Chicago, etc., R. Co., 61 Iowa 487, 16 N. W. 572.

Massachusetts.— Hammond *v.* Wadhams, 5 Mass. 353.

Minnesota.— Brazil *v.* Peterson, 44 Minn. 212, 46 N. W. 331; Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837; Gilmore *v.* Brost, 39 Minn. 190, 39 N. W. 139.

Missouri.— Standard Inv. Co. *v.* Hoyt, 164 Mo. 124, 63 S. W. 1093; State *v.* Johnson, 139 Mo. 197, 40 S. W. 767; Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728.

South Dakota.— Axiom Min. Co. *v.* White, 10 S. D. 198, 72 N. W. 462.

Texas.— Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363.

Virginia.— St. John *v.* Alderson, 32 Gratt. 140.

West Virginia.— Bloss *v.* Hull, 27 W. Va. 503.

See 37 Cent. Dig. tit. "New Trial," § 223.

Ejectment for military tracts.— The rule has been otherwise in ejectment for military tracts. Jackson *v.* Hooker, 5 Cow. (N. Y.) 207; Jackson *v.* Crosby, 12 Johns. (N. Y.) 354.

3. Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

4. Millar *v.* Field, 3 A. K. Marsh. (Ky.) 104; Butts *v.* Christy, 67 S. W. 377, 23 Ky. L. Rep. 2355; Parshall *v.* Klinck, 43 Barb. (N. Y.) 203; Wolf *v.* Mahan, 57 Tex. 171.

5. *Alaska.*— Chase *v.* Alaska Fish, etc., Co., 2 Alaska 82; Marks *v.* Shoup, 2 Alaska 66.

Arkansas.—Minkwitz *v.* Steen, 36 Ark. 260; Robins *v.* Fowler, 2 Ark. 133.

California.— Baker *v.* Joseph, 16 Cal. 173.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Connecticut.— Parsons *v.* Platt, 37 Conn. 563; Tappin *v.* Clarke, 32 Conn. 367, at least where there has not been due diligence to produce such testimony at the trial.

Georgia.— Lang *v.* Yearwood, 127 Ga. 155, 56 S. E. 305; Louisville, etc., R. Co. *v.* Harrison, 113 Ga. 1153, 39 S. E. 472; Bowdoin *v.* State, 113 Ga. 1150, 39 S. E. 478; Matthews *v.* Kennedy, 113 Ga. 378, 38 S. E. 854; Grace *v.* McKinney, 112 Ga. 425, 37 S. E. 737; Reeves *v.* Johnson, 110 Ga. 303, 34 S. E. 1002; Dawkins *v.* Willbanks, 108 Ga. 804, 34 S. E. 165; Baker *v.* Moor, 84 Ga. 186, 10 S. E. 737; Wilkinson *v.* Smith, 57 Ga. 609; Wallace *v.* Tumlin, 42 Ga. 462; Dickinson *v.* Solomons, 26 Ga. 684.

Illinois.— Bemis *v.* Horner, 165 Ill. 347, 46 N. E. 277; Jacobson *v.* Gunzburg, 150 Ill. 135, 37 N. E. 229; Martin *v.* Ehrenfels, 24 Ill. 187; Cochran *v.* Ammon, 16 Ill. 316; Crozier *v.* Cooper, 14 Ill. 139; Chicago City R. Co. *v.* Bohnow, 108 Ill. App. 346; North Chicago St. R. Co. *v.* Wellner, 105 Ill. App. 652 [*affirmed* in 206 Ill. 272, 69 N. E. 6]; Keith *v.* Knoche, 43 Ill. App. 161 (especially where the witness is sustained by other credible testimony); Besse *v.* Sawyer, 28 Ill. App. 248.

Indiana.— Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Shirel *v.* Baxter, 71 Ind. 352; Jackson *v.* Sharpe, 29 Ind. 167; State *v.* Clark, 16 Ind. 97; McIntire *v.* Young, 6 Blackf. 496, 39 Am. Dec. 443; Baldwin *v.* Biersdorfer, Wils. 1.

Iowa.— McDermott *v.* Iowa Falls, etc., R. Co., (1891) 47 N. W. 1037; Dunlavey *v.* Watson, 38 Iowa 398.

Kansas.— Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255; Knuffke *v.* Knuffke, (App. 1899) 56 Pac. 326.

Kentucky.— Clarke *v.* Rutledge, 2 A. K. Marsh. 381; Barrett *v.* Belshe, 4 Bibb 348; McBurnie *v.* Stelsly, 97 S. W. 42, 29 Ky. L. Rep. 1191; Stowers *v.* Singer, (1902) 67 S. W. 822, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784. *Compare* Finley *v.* Curd, 62 S. W. 501, 22 Ky. L. Rep. 1912, as to parol testimony.

or to contradict him on immaterial or collateral matters is seldom ground for a new trial.[6] But evidence of contradictory statements made by a witness on

Louisiana.— Chiapella *v.* Brown, 14 La. Ann. 189.

Maryland.— Gott *v.* Carr, 6 Gill & J. 309.

Massachusetts.— Hammond *v.* Wadhams, 5 Mass. 353.

Minnesota.— Strand *v.* Great Northern R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Northrup *v.* Hayward, 99 Minn. 299, 109 N. W. 241; Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837.

Missouri.— State *v.* Johnson, 139 Mo. 197, 40 S. W. 767.

Montana.— Leyson *v.* Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429.

New Hampshire.— Crafts *v.* Union Mut. F. Ins. Co., 36 N. H. 44.

New Jersey.— Hadley *v.* Geiger, 9 N. J. L. 225.

New York.— Pospisil *v.* Kane, 73 N. Y. App. Div. 457, 77 N. Y. Suppl. 307; Corley *v.* New York, etc., Co., 12 N. Y. App. Div. 409, 42 N. Y. Suppl. 941; Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Brady *v.* Industrial Ben. Assoc., 79 Hun 156, 29 N. Y. Suppl. 768; Meakim *v.* Anderson, 11 Barb. 216; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 280, 19 N. Y. Suppl. 716; Schultz *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157; Solowye *v.* Hazlett, 35 Misc. 197, 71 N. Y. Suppl. 486; Garvey *v.* U. S. Horse, etc., Show, 3 Misc. 352, 22 N. Y. Suppl. 929; Dillingham *v.* Flack, 17 N. Y. Suppl. 867; Whitney *v.* Saxe, 2 N. Y. Suppl. 653, 15 N. Y. Civ. Proc. 450; Detjen *v.* Brooklyn City R. Co., 6 N. Y. St. 689; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]; Knoop *v.* Kammerer, 44 How. Pr. 449; Shumway *v.* Fowler, 4 Johns. 425; Bunn *v.* Hoyt, 3 Johns. 255.

Oregon.— Territory *v.* Latshaw, 1 Oreg. 146.

Pennsylvania.— Ream *v* Oldweiler, 2 Leg. Gaz. 147.

Texas.— Metzger *v.* Wendler, 35 Tex. 378; Scranton *v.* Tilley, 16 Tex. 183; Houston Lighting Power Co. *v.* Hooper, (Civ. App. 1907) 102 S. W. 133; Jones *v.* Neal, (Civ. App. 1906) 98 S. W. 417; Pelly *v.* Denison, etc., R Co., (Civ. App. 1904) 78 S. W. 542; Ellis *v.* Harrison, (Civ. App. 1899) 52 S. W. 581; Ratto *v.* St. Paul's L., etc., Ins. Co., 2 Tex. App. Civ. Cas. § 117.

Washington.— Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725.

West Virginia.— Farmers, etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258; Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716.

Wisconsin.— Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978; Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795; Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085, evidence to impeach competency of expert witnesses.

United States.— Brooke *v.* Peyton, 4 Fed. Cas. No. 1,934, 1 Cranch C. C. 128, especially where witness sought to be discredited was not the only witness to the point.

England.— Dickenson *v.* Blake, 7 Bro. P. C. 177, 3 Eng. Reprint 114.

See 37 Cent. Dig. tit. "New Trial," §§ 221–223. See also *supra*, III, H, 6, b.

Compare Durant *v.* Philpot, 16 S. C. 116; Thompson *v.* Clendening, 1 Head (Tenn.) 287, as to newly discovered evidence to impeach character of witness who was permitted to testify after the argument to the jury.

6. *Alabama.*— Southern R. Co. *v.* Wildmann, 119 Ala. 565, 24 So. 764.

Arkansas.— St. Louis Southwestern R. Co. *v.* Byrne, 73 Ark. 377, 84 S. W. 469.

California.— Wood *v.* Moulton, 146 Cal. 317, 80 Pac. 92; Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Stoakes *v.* Monroe, 36 Cal. 383; Klockenbaum *v.* Pierson, 22 Cal. 160; Live Yankee Co. *v.* Oregon Co., 7 Cal. 40.

Colorado.— Fist *v.* Fist, 3 Colo. App. 273, 32 Pac. 719.

Georgia.— Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Martin *v.* Kendrick, 94 Ga. 709, 21 S. E. 893; Robinson *v.* Veal, 79 Ga. 633, 7 S. E. 159; Etheridge *v.* Hobbs, 77 Ga. 531, 3 S. E. 251; Mitchell *v* White, 74 Ga. 327; Thorpe *v.* Wray, 68 Ga. 359; Lake *v.* Hardee, 55 Ga. 667; Mitchell *v.* Printup, 25 Ga. 182, Beard *v.* Simmons, 9 Ga. 4.

Illinois.— People *v.* McCullough, 210 Ill. 488, 71 N. E. 602; Chicago, etc., R. Co. *v.* Stewart, 203 Ill. 223, 67 N. E. 830 [*affirming* 104 Ill. App. 37]; Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720 [*affirming* 70 Ill. App. 318]; Tobin *v.* People, 101 Ill. 121; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; O'Reily *v.* Fitzgerald, 40 Ill. 310; Hixson *v.* Carqueville Lith. Co., 115 Ill. App. 427; Springer *v.* Schultz, 105 Ill. App. 544 [*affirmed* in 205 Ill. 144, 68 N. E. 753]; Miller *v.* Potter, 102 Ill. App. 483; Blumke *v.* Dailey, 67 Ill. App. 381; Smith *v.* Belt, 31 Ill. App. 96.

Indiana.— Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; Pennsylvania Co. *v.* Nations, 111 Ind. 203, 12 N. E. 309; Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120; Sullivan *v.* O'Conner, 77 Ind. 149; Humphreys *v.* State, 75 Ind. 469; Shirel *v.* Baxter, 71 Ind. 352; Shigley *v.* Snyder, 45 Ind. 543; Martin *v.* Garver, 40 Ind. 351; Jackson *v.* Sharpe, 29 Ind. 167; Taylor *v.* State, 4 Ind. 540; Keck *v.* Umphries, 4 Ind. 492; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Indian Territory.— Whitehead *v.* Breckenridge, 5 Indian Terr. 133, 82 S. W. 698.

whose testimony a doubtful verdict was founded has sometimes been held sufficient cause for setting aside the verdict.[7] Newly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial,[8]

Iowa.— Brennan *v.* Goodfellow, (1903) 96 N. W. 962; Morrow *v.* Chicago, etc., R. Co., 61 Iowa 487, 16 N. W. 572; Kline *v.* Kansas City, etc., R. Co., 50 Iowa 656.

Kansas.— Lee *v.* Birmingham, 39 Kan. 320, 18 Pac. 218; State *v.* Smith, 35 Kan. 618, 11 Pac. 908; Parker *v.* Bates, 29 Kan. 597; Clark *v.* Norman, 24 Kan. 515; Taylor *v.* Thomas, 17 Kan. 598; Titus *v.* Mitchell, 3 Kan. App. 90, 45 Pac. 99.

Kentucky.— Findly *v.* Tyler, 1 Litt. 161; Louisville Ins. Co. *v.* Hoffman, 70 S. W. 403, 24 Ky. L. Rep. 980; Louisville, etc., R. Co. *v.* Tinkham, 44 S. W. 439, 19 Ky. L. Rep. 1784.

Louisiana.— State *v.* Young, 34 La. Ann. 346.

Maine.— Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900; Dodge *v.* Dodge, 86 Me. 393, 30 Atl. 14. See also Keen *v.* Sprague, 3 Me. 77.

Massachusetts.—Hopcraft *v.* Kittredge, 162 Mass. 1, 37 N. E. 768.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114; Gilmore *v.* Brost, 39 Minn. 190, 39 N. W. 139; Cirkel *v.* Croswell, 36 Minn. 323, 31 N. W. 513; Peck *v.* Small, 35 Minn. 465, 29 N. W. 69; Gardner *v.* Kellogg, 23 Minn. 463; Nininger *v.* Knox, 8 Minn. 140; Mead *v.* Constans, 5 Minn. 171.

Mississippi.— Vanderburg *v.* Campbell, 64 Miss. 89, 8 So. 206; Moore *v.* Chicago, etc., R. Co., 59 Miss. 243.

Missouri.— Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Liberty *v.* Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Shotwell *v.* McElhinney, 101 Mo. 677, 14 S. W. 754; Phillips *v.* Phillips, 46 Mo. 607; Jaccard *v.* Davis, 43 Mo. 535; Boggs *v.* Lynch, 22 Mo. 563; Bresnan *v.* Grogan, 74 Mo. App. 587; Heintz *v.* Mertz, 58 Mo. App. 405.

Montana.— Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513; Baxter *v.* Hamilton, 20 Mont. 327, 51 Pac. 265; Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Nebraska.— Goracke *v.* Hintz, 13 Nebr. 390, 14 N. W. 379.

New Jersey.—Den *v.* Geiger, 9 N. J. L. 225.

New York.— Rubenfeld *v.* Rabiner, 33 N. Y. App. Div. 374, 54 N. Y. Suppl. 68; Reiffeld *v.* Delaware, etc., Canal Co., 20 N. Y. App. Div. 635, 47 N. Y. Suppl. 226; Carpenter *v.* Coe, 67 Barb. 411; Powell *v.* Jones, 42 Barb. 24; Meakin *v.* Anderson, 11 Barb. 215; Fleming *v.* Hollenback, 7 Barb. 271; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 286, 19 N. Y. Suppl. 716; Starin *v.* Kelly, 47 N. Y. Super. Ct. 288 [*affirmed* in 88 N. Y. 418, 14 Wkly. Dig. 283]; Warner *v.* Western Transp. Co., 5 Rob. 490; Healy *v.* Healy, 32 Misc. 342, 66 N. Y. Suppl. 741; Simon *v.* Long Island Mut. F. Ins. Co., 22 Misc. 471, 50 N. Y. Suppl. 736; Stewart *v.* J. Harper Bonnell Co., 20 Misc. 174, 45 N. Y. Suppl. 735; Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Whitaker *v.* White, 22 N. Y. Suppl. 240 (especially after two trials); Kanter *v.* Rubin, 18 N. Y. Suppl. 168; Harrington *v.* Bigelow, 2 Den. 109; Duryee *v.* Dennison, 5 Johns. 248; Halsey *v.* Watson, 1 Cai. 24. See also Heald *v.* Macgowan, 14 N. Y. Suppl. 280. *Compare* Upington *v.* Keenan, 21 N. Y. Suppl. 699.

North Carolina.— Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Ohio.—Reed *v.* McGrew, 5 Ohio 375; Briggs *v.* Rowley, 10 Ohio S. & C. Pl. Dec. 177, 7 Ohio N. P. 651.

Oklahoma.— Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Rhode Island.— Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876; Timony *v.* Casey, 20 R. I. 257, 38 Atl. 370; Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033; Francis *v.* Baker, 11 R. I. 103, 23 Am. Rep. 424.

South Dakota.— Scheffer *v.* Corson, 5 S. D. 233, 58 N. W. 555.

Texas.— Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Metzger *v.* Wendler, 35 Tex. 378; Pelly *v.* Denison, etc., R. Co., (Civ. App. 1904) 78 S. W. 542; Luke *v.* El Paso, (Civ. App. 1900) 60 S. W. 363; Smith *v.* Seymore, (Civ. App. 1900) 59 S. W. 816; Moore *v.* Temple Grocer Co., (Civ. App. 1898) 43 S. W. 843.

Utah.— Klopenstine *v.* Hays, 20 Utah 45, 57 Pac. 712.

Vermont.— Campbell *v.* Hyde, 1 D. Chipm. 65.

Virginia.— Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

West Virginia.— Carder *v.* State Bank, 34 W. Va. 38, 11 S. E. 716; Bloss *v.* Hull, 27 W. Va. 503; Gillilan *v.* Ludington, 6 W. Va. 128.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377, as to qualifications as expert.

United States.— Lowry *v.* Mt. Adams, etc., Incline Plane R. Co., 68 Fed. 827; Carr *v.* Gale, 5 Fed. Cas. No. 2,433, 1 Curt. 384; Silvey *v.* U. S., 7 Ct. Cl. 305.

England.— Pistrucci *v.* Turner, 5 Wkly. Rep. 85.

Canada.—Smith *v.* Neill, 9 N. Brunsw. 105.

See 37 Cent. Dig. tit. "New Trial," §§ 221–223. See also *supra*, III, I, 5, b, (I).

7. Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492. See also Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; Tappin *v.* Clarke, 32 Conn. 367; Morgan *v.* Bell, 41 Kan. 345, 21 Pac. 255; Stackpole *v.* Perkins, 85 Me. 298, 27 Atl. 160; Chatfield *v.* Lathrop, 6 Pick. (Mass.) 417; Roundey *v.* Stillwell, 19 Misc. (N. Y.) 415, 43 N. Y. Suppl. 1132; O'Bryan *v.* Bowers, 10 Pa. Co. Ct. 254. *Compare* Corley *v.* New York, etc., R. Co., 12 N. Y. App. Div. 409, 42 N. Y. Suppl. 941.

8. Shenandoah First Nat. Bank *v.* Wabash, etc., R. Co., 61 Iowa 700, 17 N. W. 48; Struthers *v.* Wagner, 6 Phila. (Pa.) 262; Hughes *v.* Rhode Island Co., (R. I. 1907) 67

and it is no objection to such allowance that the evidence may incidentally impeach a witness.[9]

IV. PROCEEDINGS TO PROCURE NEW TRIAL.[10]

A. New Trial on Court's Own Motion. Where the common-law power of a court of general jurisdiction has not been restricted by statute, such court may grant a new trial of its own motion,[11] and this, although an application on other grounds is pending at the time.[12] This power has been taken away or limited by statutes in some states.[13]

Atl. 450. See also *supra*, III, H, 3, c, (VI), as to false swearing.

9. *Indiana.*— Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Rains *v.* Ballow, 54 Ind. 79.

Iowa.— Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Alger *v.* Merritt, 16 Iowa 121.

Maine.— Stackpole *v.* Perkins, 85 Me. 298, 27 Atl. 160.

Nevada.— Manning *v.* Gignoux, 23 Nev. 322, 46 Pac. 886.

New York.— Hess *v.* Sloane, 47 N. Y. App. Div. 585, 62 N. Y. Suppl. 666; Keister *v.* Rankin, 34 N. Y. App. Div. 288, 54 N. Y. Suppl. 274 [*reversing* 29 N. Y. App. Div. 539, 51 N. Y. Suppl. 634]; Moran *v.* Friedman, 88 Hun 515, 34 N. Y. Suppl. 911; Wehrkamp *v.* Willet, 1 Daly 4; Simmons *v.* Fay, 1 E. D. Smith 107; Weber *v.* Weber, 5 N. Y. Suppl. 178; Seeley *v.* Chittenden, 4 How. Pr. 265, evidence to prove alibi. See also Oakley *v.* Sears, 1 Rob. 73, 1 Abb. Pr. N. S. 368.

Texas.— Houston, etc., R. Co. *v.* Forsyth, 49 Tex. 171.

Wisconsin.— Smith *v.* Smith, 51 Wis. 665, 8 N. W. 868.

10. Adoption of practice of state courts by federal courts see COURTS.

Limitation as to number of new trials see *supra*, I, D, 6.

Presentation and reservation before justices of the peace of grounds of review by motion for new trial see JUSTICES OF THE PEACE.

Proceedings to procure new trial: In criminal courts see CRIMINAL LAW. In justice's court see JUSTICES OF THE PEACE. On assessment of compensation by jury in condemnation proceedings see EMINENT DOMAIN.

Rehearing in equity see EQUITY.

Statutory new trial as of right see *infra*, VI.

11. *Iowa.*— Hensley *v.* Davidson Bros. Co., (1907) 112 N. W. 227; Allen *v.* Wheeler, 54 Iowa 628, 7 N. W. 111, conflict with evidence and instructions.

Kentucky.— See Dicken *v.* Smith, 1 Litt. 209, where verdict advisory only.

Louisiana.— State *v.* Blackman, 110 La. 266, 34 So. 438; Merchants', etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592; State *v.* McCrea, 40 La. Ann. 20, 3 So. 380; Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134 (bribery of jurors); Gale *v.* Kemper, 10 La. 205.

Massachusetts.— Forbes *v.* New York L. Ins. Co., 178 Mass. 139, 59 N. E. 636 (verdict improperly directed); Ellis *v.* Ginsburg, 163 Mass. 143, 39 N. E. 800 (mistake and misfortune).

Michigan.—Ft. Wayne, etc., R. Co. *v.* Donovan, 110 Mich. 173, 68 N. W. 115 [*criticizing* Lloyd *v.* Brinck, 35 Tex. 1], inadequacy of damages in personal injury case.

Minnesota.— Willmar Bank *v.* Lawler, 78 Minn. 135, 80 N. W. 868, preverse verdict.

Missouri.— E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704; State *v.* Adams, 84 Mo. 310; New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355; Baughman *v.* New York Nat. Waterworks Co., 58 Mo. App. 576 (verdict not authorized by pleadings); Ensor *v.* Smith, 57 Mo. App. 584 (improper argument); State *v.* Adams, 12 Mo. App. 436.

Nebraska.— Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35, error in rulings.

New Hampshire.— Lane *v.* Hill, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591, where jury failed to find on issue.

New York.— Scharmann *v.* Bard, 60 N. Y. App. Div. 449, 69 N. Y. Suppl. 1033 (holding the failure to object a waiver of the want of notice); Schmidt *v.* Brown, 80 Hun 183, 30 N. Y. Suppl. 68 (manifestly against evidence).

Virginia.— Anderson *v.* Fox, 2 Hen. & M. 245, vindictive damages.

See 37 Cent. Dig. tit. "New Trial," § 231.

Compare Long *v.* Kingfisher County, 5 Okla. 128, 47 Pac. 1063; Carnivan *v.* Repplier, 1 Phila. (Pa.) 70.

New trial instead of nonsuit.— Sometimes where a verdict has been taken subject to the right of defendant to move for a nonsuit, a new trial may be ordered in place of a nonsuit. Coons *v.* Ætna Ins. Co., 18 U. C. C. P. 305; Cameron *v.* Monarch Assur. Co., 7 U. C. C. P. 212 (a case where the statute of limitations had run against a new action); Pearman *v.* Hyland, 22 U. C. Q. B. 202; Hatton *v.* Beacon Ins. Co., 16 U. C. Q. B. 316; Doe *v.* Simmons, 7 U. C. Q. B. 196.

12. Hensley *v.* Davidson Bros. Co., (Iowa 1907) 112 N. W. 227; Ellis *v.* Ginsburg, 163 Mass. 143, 39 N. E. 800; E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

13. Under these statutes a clearer case is generally required where the court acts of its own motion. Eades *v.* Trowbridge, 143 Cal. 25, 76 Pac. 714 (only where there is gross disregard of evidence or instructions); Mizener *v.* Bradbury, 128 Cal. 340, 60 Pac. 928; Townley *v.* Adams, 118 Cal. 382, 50 Pac. 550; Flugel *v.* Henschel, 6 N. D. 205,

B. Court or Judge to Which Application Made — 1. The Court — a. In General. Generally an application for a new trial must be made to the court in which the case was tried.[14] An application for the retrial of an issue directed by a chancery court should be made to that court.[15] Where a case has been tried before a judge of another court or district presiding temporarily in the trial court, the application should be made in that court.[16]

b. Appellate Courts and Courts In Banc. At common law it is not a matter of right to make an application for a new trial or reserve it for hearing before a full bench,[17] or before an appellate division or court.[18] Statutes sometimes provide for making such applications to courts *in banc* or to appellate divisions or courts.[19]

2. The Judge[20] — a. In General. Ordinarily the application should be heard and determined by the judge who presided at the trial;[21] nevertheless, unless

69 N. W. 195 (requiring stronger case); Gould *v.* Duluth, etc., Elevator Co., 2 N. D. 216, 50 N. W. 969; Long *v.* Kingfisher County, 5 Okla. 128, 47 Pac. 1063; Clement *v.* Barnes, 6 S. D. 483, 61 N. W. 1126. It has been held that the grounds for a new trial should be so clear that the court may act promptly on the coming in of the verdict. Clement *v.* Barnes, 6 S. D. 483, 61 N. W. 1126. *Compare* Baughman *v.* New York, Nat. Waterworks Co., 58 Mo. App. 576, verdict not authorized by pleadings.

14. Hunt *v.* City of London Real Property Co., 3 Q. B. D. 19, 47 L. J. Q. B. 42, 37 L. T. Rep. N. S. 344, 26 Wkly. Rep. 37 (chancery case tried in common-law division); Jones *v.* Baxter, 5 Ex. D. 275, 28 Wkly. Rep. 817 (chancery case tried in common-law division). See also *supra*, I, B, 3.

In New York applications for new trials on some grounds are commonly heard at special term. Chapin *v.* Thompson, 80 N. Y. 275; McWhirter *v.* Bowen, 103 N. Y. App. Div. 447, 92 N. Y. Suppl. 1039 [*affirmed* in 187 N. Y. 516, 79 N. E. 1110]; Werner *v.* Interurban St. R. Co., 99 N. Y. App. Div. 592, 91 N. Y. Suppl. 111 (misconduct of jurors); Seeley *v.* Chittenden, 10 Barb. 303 (newly discovered evidence); Clarke *v.* Ward, 4 Duer 206; Moore *v.* New York El. R. Co., 15 Daly 506, 8 N. Y. Suppl. 329, 18 N. Y. Civ. Proc. 146, 24 Abb. N. Cas. 77 [*reversed* on other grounds in 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731] (misconduct of jurors); Giraudat *v.* Korn, 8 Daly 406 (under statute as to error of fact or law); Wilson *v.* Manhattan R. Co., 2 Misc. 127, 20 N. Y. Suppl. 852 [*affirmed* in 144 N. Y. 632, 39 N. E. 495]; Argall *v.* Jacobs, 56 How. Pr. 167 [*affirmed* in 21 Hun 114] (surprise); Ball *v.* Syracuse, etc., R. Co., 6 How. Pr. 198 (weight of evidence); Graham *v.* Milliman, 4 How. Pr. 435 (weight of evidence); Lusk *v.* Lusk, 4 How. Pr. 418, 3 Code Rep. 113 (weight of evidence); Crist *v.* New York Dry Dock Co., 3 Code Rep. 118 (error in fact in report of referee). See *supra*, I, B, 3.

15. Jones *v.* Stewart, 7 N. Y. Civ. Proc. 164; Jenkins *v.* Morris, 14 Ch. D. 674, 49 L. J. Ch. 392, 42 L. T. Rep. N. S. 817; Jones *v.* Baxter, 5 Ex. D. 275, 28 Wkly. Rep. 817 (otherwise where transferred to a law division for trial generally); Cole *v* Campbell, 9 Ont. Pr. 498. See also *supra*, I, B, 3.

16. Adams *v.* Kellogg, 1 Root (Conn.) 255; Stinson *v.* State, 32 Ind. 124; Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878. See also Lord *v.* Wilkinson, 66 Barb. (N. Y.) 607, as to determination in same department.

17. State *v.* Smith, 54 Me. 33; Ives *v.* Grand Trunk R. Co., 35 Fed. 176 (as to practice in United States circuit courts); Chipman *v.* Gavaza, Ritch. Eq. Cas. (Nova Scotia) 26. See also Synod *v.* De Blaquiere, 10 Ont. Pr. 11.

18. *Connecticut.*— Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328.

New York.—Purchase *v.* Matteson, 25 N. Y. 211.

North Carolina.— Alley *v.* Hampton, 13 N. C. 11.

Rhode Island.— McAleer *v.* Cavanagh, 23 R. I. 317, 50 Atl. 383; Hopkinton First Nat. Bank *v.* Greene, 23 R. I. 238, 50 Atl. 381.

England.— Robinson *v.* Tucker, 14 Q. B. D. 371, 53 L. J. Q. B. 317, 50 L. T. Rep. N. S. 380, 32 Wkly. Rep. 697; Etty *v.* Wilson, 3 Ex. D. 359, 47 L. J. Exch. 664, 39 L. T. Rep. N. S. 83; Gower *v.* Tobitt, 39 Wkly. Rep. 193. See also *supra*, I, B, 2.

19. People *v.* Justices New York Mar. Ct., 2 Abb. Pr. (N. Y.) 126, 11 How. Pr. 400 [*affirmed* in 2 Abb. Pr. 240]; Monk *v.* Bartram, [1891] 1 Q. B. 346, 60 L. J. Q. B. 267, 64 L. T. Rep. N. S. 45, 39 Wkly. Rep. 310 (under Judicature Act); Oastler *v.* Henderson, 2 Q. B. D. 575, 46 L. J. Q. B. 607, 37 L. T. Rep. N. S. 22 (where trial was without jury); Wilkins *v.* Wilkins, [1896] P. 108, 65 L. J. P. D. & Adm. 55, 74 L. T. Rep. N. S. 62, 44 Wkly. Rep. 305 (in court of appeal under Judicature Act). See also Averill *v.* Rooney, 59 Mo. 580 (as to election of tribunals by aggrieved party under statute); Mainz *v.* Lederer, 24 R. I. 166, 52 Atl. 887 (where appellate division evenly divided).

20. Power and duty of court in general see *supra*, I, B.

21. Clayton *v.* Wallace, 41 Ga. 268 (special judge after resignation of presiding judge); Louisville Ins. Co. *v.* Hoffman, 70 S. W. 403, 24 Ky. L. Rep. 980 (applying rule to action for new trial for newly discovered evidence); Ives *v.* Grand Trunk R. Co., 35 Fed. 176 (as to practice in United States circuit courts); Chipman *v.* Gavaza, Ritch. Eq. Cas.

it is otherwise provided by statute, it may be heard by any judge of the same court.[22]

b. Successor of Trial Judge. An application for a new trial cannot be passed upon by a judge whose term of office has expired or whose resignation from office has taken effect.[23] If there is no statute to the contrary,[24] it may be heard and determined by the successor in office of the trial judge,[25] if he is not disqualified to act in that particular case.[26] In some states, where transcripts of the evidence

(Nova Scotia) 26; Bank of British North America *v.* Western Assur. Co., 11 Ont. Pr. 434. *Compare* Wallace *v.* Columbia, 48 Me. 436, as to determination of motion at *nisi prius*.

Special judge.— The fact that the regular term is being held by a special judge, because of the disability of the regular judge as to certain cases, does not deprive the latter of the power at the time to rule on a motion for a new trial in a case heard by him. Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024. A special judge appointed to try a case may hear a motion for a new trial filed on the first day of the succeeding term. Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

22. *Alabama.*— Malone *v.* Eastin, 2 Port. 182, judge sitting subsequently at same term.

California.— Carter *v.* Lothian, 133 Cal. 451, 65 Pac. 962; Garton *v.* Stern, 121 Cal. 347, 53 Pac. 904.

Georgia.— Hudgins *v.* Veal, 98 Ga. 137, 26 S. E. 479; Field *v.* Thornton, 1 Ga. 306, even though brief of evidence has not been agreed on by counsel or sanctioned by trial judge.

Illinois.— Chicago, etc., R. Co. *v.* Marseilles, 107 Ill. 313, more properly heard by trial judge, if possible during term.

Indiana.— Hadley *v.* Lake Erie, etc., R. Co., (App. 1897) 46 N. E. 935, where trial was before special judge. See also Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145, 69 N. E. 304, as to entry of motion by regular judge in absence of special judge who tried case.

Montana.— Wright *v.* Mathews, 28 Mont. 442, 72 Pac. 820.

New York.— Fleischmann *v.* Samuel, 18 N. Y. App. Div. 97, 45 N. Y. Suppl. 404; *Ex p.* Ward, 5 Cow. 20. See also Smith *v.* Lidgerwood Mfg. Co., 60 N. Y. App. Div. 467, 69 N. Y. Suppl. 975, as to motion on grounds not otherwise specially provided.

See 37 Cent. Dig. tit. "New Trial," §§ 234, 235.

Where a case was tried by a judge of another district who returned to his district after the trial, a motion for a new trial may be passed on by a judge of the district in which the case was tried. State *v.* Gaslin, 32 Nebr. 291, 49 N. W. 353. Or the judge who tried the case may, after his return to his own circuit, hear and determine the motion, if presented within the time limited. Atlantic Coast Line R. Co. *v.* Mallard, 53 Fla. 515, 43 So. 755.

Construction of special statutory provision. — A statute requiring a motion for a new trial "founded upon an allegation of error in a finding of fact or ruling upon the law, made by the judge upon the trial," to be made before the judge who presided at the trial, does not govern a motion alleging the misconduct of a juror. Fleischmann *v.* Samuel, 18 N. Y. App. Div. 97, 45 N. Y. Suppl. 404. A motion for a new trial on the ground of surprise, mistake, inadvertence, excusable neglect, and irregularities in the judgment cannot be granted by a justice other than the one who rendered the judgment. McWhirter *v.* Bowen, 103 N. Y. App. Div. 447, 92 N. Y. Suppl. 1039 [*affirmed* in 187 N. Y. 516, 79 N. E. 1110].

23. Griffing *v.* Danbury, 41 Conn. 96. *Compare* Bartolet *v.* Faust, 5 Phila. (Pa.) 316.

24. St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249; Cocker *v.* Cocker, 56 Mo. 180; Woodfolk *v.* Tate, 25 Mo. 597.

25. *California.*—Jones *v.* Sanders, 103 Cal. 678, 37 Pac. 649; Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Macy *v.* Davila, 48 Cal. 646; Altschul *v.* Doyle, 48 Cal. 535.

Georgia.— McKendree *v.* Sikes, 40 Ga. 189.

Illinois.— McChesney *v.* Davis, 86 Ill. App. 380.

Nebraska.— Goos *v.* Fred Krug Brewing Co., 60 Nebr. 783, 84 N. W. 258.

West Virginia.— Ott *v.* McHenry, 2 W. Va. 73.

United States.— New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. ed. 949.

England.— Footner *v.* Figes, 2 Sim. 319, 2 Eng. Ch. 319, 57 Eng. Reprint 808.

Canada.— Bradshaw *v.* Foreign Mission Bd., 1 N. Brunsw. Eq. 346 [*affirmed* in 24 Can. Sup. Ct. 351 (*reversing* 32 N. Brunsw. 543)].

See 37 Cent. Dig. tit. "New Trial," § 235.

Where the county has been placed in a different district between the time of the trial and the filing of the motion, the judge of the new district may hear the motion. Manufacturers' Mut. F. Ins. Co. *v.* Gratiot County Cir. Judge, 79 Mich. 241, 44 N. W. 604.

The judge must act on the evidence on which the verdict was founded, however it may be proved. Ott *v.* McHenry, 2 W. Va. 73.

Transcript of testimony.— The successor of the trial judge may require the movant to furnish a transcript of the testimony for his consideration. McChesney *v.* Davis, 86 Ill. App. 380.

26. Finn *v.* Spagnoli, 67 Cal. 330, 7 Pac. 746, under statute providing for transfer of cause.

are provided for, he has the power and is required to pass on pending motions for new trials.[27]

C. Parties to Application[28] — **1. Parties to Record.** An application for a new trial can be made only by a party or parties to the record,[29] and against a party or parties to the record.[30] But the administrator of a deceased party may become a party to the record and make or prosecute the application.[31] Cause cannot, however, be shown by the attorney before administration is taken out.[32]

2. Parties Not Prejudiced by Alleged Ground. The application cannot be made by a party in whose favor the alleged error or irregularity was made,[33] or act of misconduct committed,[34] nor by one who has successfully disclaimed any interest in the matter in controversy.[35] Nor will a new trial be granted on the application of those parties against whom an erroneous judgment has been remitted.[36]

3. Joint and Separate Applications[37] — **a. As to Applicants.** Where several parties join in a motion for a new trial, it is proper in some states, and necessary in others, to overrule the motion, if any such party is not entitled to have it sustained.[38] In some jurisdictions the court may grant a new trial to those of joint

27. People *v.* McConnell, 155 Ill. 192, 40 N. E. 608.

In Kansas and Oklahoma a new trial must be granted where the new judge cannot pass on the application intelligently. American Cent. Ins. Co. *v.* Neff, 43 Kan. 457, 23 Pac. 606; Bass *v.* Swingley, 42 Kan. 729, 22 Pac. 714; Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869.

28. Service of notice see *infra*, IV, F.

29. Jones *v.* Coney, 111 Ga. 843, 36 S. E. 321.

Where the motion is made in the name of parties and with their consent, it is immaterial that another person employed counsel to make the motion. Whitley *v.* Alston, 68 Ga. 290.

30. See cases cited *infra*, in this note.

Interest in subject of litigation.— It is not enough that the persons against whom a new trial is asked have an interest in the subject of the litigation. Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154.

An execution purchaser under the judgment is not a "party" to the action on whom process must be served. Glaze *v.* Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662.

Persons beneficially interested.— It was held proper to make persons beneficially interested in a verdict defendants with the nominal party to a petition for a new trial. Magill *v.* Lyman, 6 Conn. 59.

31. Gates *v.* Treat, 25 Conn. 71; Linn *v.* Brecher, 90 Ill. App. 6; Turner *v.* Booker, 2 Dana (Ky.) 334, on terms to prevent abatement of action that does not survive.

32. Wildemann *v.* Walpole, 56 J. P. 5; Shoman *v.* Allen, 1 M. & G. 96 note, 39 E. C. L. 663.

33. *Georgia.*— Strickland *v.* Hutchinson, 123 Ga. 396, 51 S. E. 348, damages too small.

Maine.— Philbrook *v.* Burgess, 52 Me. 271.

New York.— Ayrault *v.* Chamberlain, 33 Barb. 229.

Pennsylvania.— Com. *v.* Ross, 5 Pa. Co. Ct. 593.

Texas.— Mitchell *v.* Bloom, (Civ. App. 1898) 46 S. W. 406.

United States.— Whiton *v.* Chicago, etc., R. Co., 29 Fed. Cas. No. 17,597, 2 Biss. 282.

34. See *supra*, III, D, 2, a, (II).

35. White *v.* Barlow, 72 Ga. 887; Central R., etc., Co. *v.* Craig, 59 Ga. 185. See also Boehmer *v.* Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908.

36. Mitchell *v.* Bloom, (Tex. Civ. App. 1898) 46 S. W. 406.

37. New trial as to one or more co-parties in general see *supra*, I, E, 2.

38. Coverdale *v.* Edwards, 155 Ind. 374, 58 N. E. 495; Yeoman *v.* Shaeffer, 155 Ind. 308, 57 N. E. 546; M. A. Sweeney Co. *v.* Fry, 151 Ind. 178, 51 N. E. 234; Wolfe *v.* Kable, 107 Ind. 565, 8 N. E. 559; Feeney *v.* Mazelin, 87 Ind. 226; Kendel *v.* Judah, 63 Ind. 291; Cambridge City First Nat. Bank *v.* Colter, 61 Ind. 153; Jones *v.* Peters, 28 Ind. App. 383, 62 N. E. 1019 (holding that the joinder of a defendant not affected by the judgment was fatal); Kentucky, etc., Cement Co. *v.* Morgan, 28 Ind. App. 89, 62 N. E. 68; Whiteley Malleable Castings Co. *v.* Bevington, 25 Ind. App. 391, 58 N. E. 268; Wines *v.* Hamilton State Bank, 22 Ind. App. 114, 53 N. E. 389; Johnson *v.* Winslow, 22 Ind. App. 104, 53 N. E. 388; Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196; Miller *v.* Adamson, 45 Minn. 99, 47 N. W. 452; Leonhardt *v.* Ulysses Citizens' Bank, 56 Nebr. 38, 76 N. W. 452; Cortelyou *v.* McCarthy, 53 Nebr. 479, 73 N. W. 921; Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064; D. M. Osborne Co. *v.* Plano Mfg. Co., 51 Nebr. 502, 70 N. W. 1124; Minick *v.* Huff, 41 Nebr. 516, 59 N. W. 795; Porter *v.* Sherman County Banking Co., 40 Nebr. 274, 58 N. W. 721; McDonald *v.* Bowman, 40 Nebr. 269, 58 N. W. 704; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Hagler *v.* State, 31 Nebr. 144, 47 N. W. 692, 28 Am. St. Rep. 514; Dorsey *v.* McGee, 30 Nebr. 657, 46 N. W. 1018; Wiggenhorn *v.* Kountz, 23 Nebr. 690, 37 N. W. 603, 8 Am. St. Rep. 150; Hoke *v.* Halverstadt, 22 Nebr. 421, 35 N. W. 204; Real *v.* Hollister, 20 Nebr. 112, 29 N. W. 189; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280; Real *v.* Hollister, 17 Nebr. 661, 24 N. W. 333; Long *v.* Clapp, 15

applicants who are entitled to it upon the merits of the application.[39] A party improperly joined cannot be heard to complain that a new trial was allowed to other applicants only.[40] Where the liability or interest of a defeated party or parties is distinct from that of co-parties, he, or they, may move for a new trial as to such liability or interest without joining co-parties.[41] Defendants against whom a verdict has been found in a tort action may move for a new trial, without being joined in the motion by defendants who were acquitted.[42] In general one defendant cannot be deprived of the right to apply for a new trial by the refusal of co-defendants to join in the application.[43] Joint parties who refuse to join in the application and whose interests might be adversely affected by the allowance of a new trial must be given proper notice of the application.[44]

b. As to Adverse Parties. In some states, if plaintiff's motion cannot be sustained as to all defendants against whom a new trial is asked, it may be overruled as to all.[45] A plaintiff should not apply for a new trial as against such defendants only as had a verdict in their favor.[46] But he need not, or should not, ask a new trial as against a defendant who has successfully disclaimed any interest in the subject of litigation.[47] A motion by a defendant for a new trial generally may be denied, if the finding in favor of plaintiff is correct, although the evidence was not sufficient to support a finding in favor of other defendants on a counter-claim.[48]

Nebr. 417, 19 N. W. 467; Kyner *v.* Laubner, 3 Nebr. (Unoff.) 370, 91 N. W. 491; McCarty *v.* Morgan, 2 Nebr. (Unoff.) 274, 96 N. W. 489; Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162; North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664. See also Kelley *v.* Kelley, (Ind. App. 1894) 36 N. E. 165, 8 Ind. App. 606, 34 N. E. 1009.

Applications of rule.— In a drainage proceeding to assess damages to separate tracts of lands, each landowner aggrieved should move separately for a new trial. Yeoman *v.* Shaeffer, 155 Ind. 308, 57 N. E. 546. Where two actions by the same plaintiff against different defendants are tried together and separate verdicts rendered, each defendant should file a separate motion for a new trial. Western Assur. Co. *v.* Way, 98 Ga. 746, 27 S. E. 167. Where a verdict is rendered against two defendants as joint trespassers and one of them is a non-resident of the county, the right to sue him in the county depending on the liability of the resident defendant, a new trial must be granted as to both or neither. Lee *v.* West, 47 Ga. 311.

Notice.— A notice by several defendants that they and each of them will move for a new trial is several as well as joint. Bathke *v.* Krassin, 78 Minn. 272, 80 N. W. 950.

39. Boehmer *v.* Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908; Equitable Mortg. Co. *v.* Gray, 68 Kan. 100, 74 Pac. 614; Albright *v.* McTighe, 49 Fed. 817, where a new trial was granted to part only of the movants, the point of joinder in the motion apparently not having been made.

Joinder of party against whom default judgment rendered.— Where a motion was made in the name of all defendants, including one against whom judgment had been entered by default, a new trial was awarded defendants not in default, the joinder of defendant in default being treated as a nullity. *Ex p.* Lowman, etc., Stationery, etc., Co., 2 Wash. 427, 27 Pac. 232.

40. Kelley *v.* Kelley, (Ind. App. 1894) 36 N. E. 165, 8 Ind. App. 606, 34 N. E. 1009; Loudon *v.* Coleman, 59 Ga. 653 (making successful claimants and custodian of fund parties); Maulson *v.* Arrol, 11 U. C. Q. B. 81 (action against makers and indorsers of note).

41. See also *supra*, I, E, 2.

42. Allen *v.* Feland, 10 B. Mon. (Ky.) 306; Brown *v.* Burrus, 8 Mo. 26.

Where the findings and judgment are for one defendant and against another, it has been held that a joint motion for a new trial can avail neither. Robertson *v.* Garshwiler, 81 Ind. 463.

43. Dodd *v.* Pierson, 11 N. J. L. 284; Sprague *v.* Childs, 16 Ohio St. 107 (new trial as of right); Kerr *v.* Gordon, 9 U. C. Q. B. 249.

44. See *infra*, IV, F, 1, h.

Application of one joint defendant.—A new trial may be granted as to all of joint defendants on the application of one. See also Tillett *v.* Lynchburg, etc., R. Co., 116 N. C. 937, 21 S. E. 698, where, however, the failure of counsel to entitle the motion in behalf of both was inadvertent.

45. Prescott *v.* Haughey, 152 Ind. 517, 51 N. E. 1051, 53 N. E. 766; Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. 332; Upland Land Co. *v.* Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181; Lydick *v.* Gill, 68 Nebr. 273, 94 N. W. 109. *Compare* Berger *v.* Content, 47 Misc. (N. Y.) 390, 94 N. Y. Suppl. 12, where granted as to one defendant only.

Sustaining motion as against part of defendants.— Plaintiff cannot complain if the court severs his motion against all the defendants and sustains it against those only as to whom good cause is shown. Williams *v.* Kirby, 81 Ill. App. 154.

46. Allen *v.* Feland, 10 B. Mon. (Ky.) 306.

47. Churchill *v.* Flournoy, 127 Cal. 355, 59 Pac. 791.

48. Noerr *v.* Schmidt, 151 Ind. 579, 51 N. E. 332.

4. Parties to Petition or Complaint. All the parties affected by the judgment in the original action should be made parties to a petition or complaint after the term for a new trial.[49]

D. Time For Application[50] — 1. In General. In some states an application for a new trial made before the findings of a referee[51] or court[52] are filed must be disregarded. And where special issues submitted to a jury form only a part of the matters in controversy, a notice of intention to move for a new trial filed before the decision of the court is premature.[53]

2. Limitation at Common Law — a. In General. Under the English common-law practice, a motion for a new trial must have been made as a rule within four days of the entry of a rule for judgment on the verdict.[54] But there seems to have been no absolute limit of time for making the application.[55] It might be made at any time during the term;[56] and even after the term, where the circumstances were unusual and the applicant had not been in laches.[57]

b. Effect of Laches. Independently of any strict limitation by statute or rule of court, an application for a new trial must be made within a reasonable time under the circumstances of the particular case.[58]

49. Carver *v.* Compton, 51 Ind. 451; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368. See also Bradish *v.* State, 35 Vt. 452, as to service of petition where state adverse party.

50. Continuance or postponement of hearing see *infra*, IV, O, 3, b, (II).

Motion on minutes of court see *infra*, IV, J, 2.

Rehearing in equity see Equity, 16 Cyc. 426 *et seq.*

Statement of grounds see *infra*, IV, H, 3.

Statutory new trial as of right see *infra*, VI.

Successive applications see *supra*, I, D, 5.

Time for filing and approval of brief of evidence see *infra*, IV, L, 3.

Time for hearing and decision see *infra*, IV, O, 3.

Time for settlement, filing, and service of bill, case, or statement of facts see *infra*, IV, K, 3.

51. Dominguez *v.* Mascotti, 74 Cal. 269, 15 Pac. 773; Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381; Careaga *v.* Fernald, 66 Cal. 351, 5 Pac. 615; Harris *v.* Careaga, (Cal. 1884) 2 Pac. 41; Hinds *v.* Gage, 56 Cal. 486; Bates *v.* Gage, 49 Cal. 126; Crowther *v.* Rowlandson, 27 Cal. 376; Mahoney *v.* Caperton, 15 Cal. 313.

52. Fountain Water Co. *v.* Dougherty, 134 Cal. 376, 66 Pac. 316 (holding application premature if made before findings were signed or entered in judgment book, although entered in minute book); Reclamation Dist. No. 556 *v.* Thisby, 131 Cal. 572, 63 Pac. 918; James *v.* Santa Cruz County Super. Ct., 78 Cal. 107, 20 Pac. 241; Mahoney *v.* Caperton, 15 Cal. 313. See also Atchison, etc., R. Co. *v.* Davis, 70 Kan. 578, 79 Pac. 130, as to motion handed to clerk while jury were revising a special finding with a request that it be not filled until their return. *Compare* Goode *v.* Lewis, 118 Mo. 357, 24 S. W. 61; Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705, where oral decision had been rendered on all issues.

53. *In re* McKenna, 138 Cal. 439, 71 Pac. 501; Reclamation Dist. No. 556 *v.* Thisby, 131 Cal. 572, 63 Pac. 918; James *v.* Santa Cruz County Super. Ct., 78 Cal. 107, 20 Pac. 241; Bates *v.* Gage, 49 Cal. 126.

54. Emma Silver Min. Co. *v.* Park, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411.

55. Emma Silver Min. Co. *v.* Park, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411.

56. Gant *v.* Shelton, 3 B. Mon. (Ky.) 420; Foushee *v.* Lea, 4 Call (Va.) 279.

57. Emma Silver Min. Co. *v.* Park, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411.

58. *California.*— Preston *v.* Eureka Artificial Stone Co., 54 Cal. 198, delay of a year after judgment in absence of movant.

Georgia.— King *v.* Sears, 91 Ga. 577, 18 S. E. 830. See also Lee *v.* Boddie, 51 Ga. 197, where after five years movant was not allowed to perfect motion and service probably made in time.

Idaho.— Stevens *v.* Northwestern Stage Co., 1 Ida. 604.

Illinois.— Exchange Nat. Bank *v.* Darrow, 177 Ill. 362, 52 N. E. 356 [*affirming* 74 Ill. App. 170], delay of eight months after discovery of new evidence.

Iowa.— Ewaldt *v.* Farlow, 62 Iowa 212, 17 N. W. 487.

Kentucky.— McDaniel *v.* Will, 2 Bibb 550, so in equity.

Massachusetts.— Damon *v.* Carrol, 167 Mass. 198, 45 N. E. 85, as to lack of diligence in obtaining amendment of record used in evidence.

Minnesota.— Kurtz *v.* St. Paul, etc., R. Co., 65 Minn. 60, 67 N. W. 808; Lathrop *v.* Dearing, 59 Minn. 234, 61 N. W. 24 (six months' delay after discovery of new evidence); Deering *v.* Johnson, 33 Minn. 97, 22 N. W. 174; Kimball *v.* Palmerlee, 29 Minn. 302, 13 N. W. 129.

Missouri.— Shewalter *v.* McGrew, 60 Mo. App. 288.

New York.— Biddescomb *v.* Cameron, 58 N. Y. App. Div. 42, 68 N. Y. Suppl. 568 (not after appeal decided, for evidence discovered at time of trial); Thompson *v.* Welde, 27 N. Y. App. Div, 186, 50 N. Y. Suppl. 618 (delay of nine months after discovery of new

3. Limitation by Statute or Rule of Court — a. In General. In most jurisdictions statutes or rules of court having the force of statutory enactments provide that an application for a new trial must be made within a certain number of days after the rendition of the verdict or decision,[59] or within some other fixed

evidence); Bath Gas Light Co. *v.* Claffy, 18 N. Y. App. Div. 155, 45 N. Y. Suppl. 433 (three years after discovery of new evidence); Davis *v.* Grand Rapids F. Ins. Co., 7 N. Y. App. Div. 403, 39 N. Y. Suppl. 1019 (seven months after discovery of new evidence with other circumstances); Fleet *v.* Kalbfleisch, 43 Hun 443; Church *v.* Kidd, 3 Hun 254; Peck *v.* Hiler, 30 Barb. 655 (surprise and newly discovered evidence); Evans *v.* U. S. Life Ins. Co., 21 Abb. N. Cas. 315 (newly discovered evidence). See also Dart *v.* Kudlich, 13 N. Y. Suppl. 61, as to reasonable time. *Compare* Hess *v.* Sloane, 47 N. Y. App. Div. 585, 62 N. Y. Suppl. 666, delay of six months in moving for newly discovered evidence where there had been much difficulty in ascertaining whereabouts of witnesses and securing books.

Pennsylvania.— Ward *v.* Patterson, 3 Del. Co. 429, two months after trial.

Rhode Island.— Hunt *v.* Hines, 21 R. I. 207, 42 Atl. 867; Tucker *v.* Carr, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893.

Wisconsin.— Ketchum *v.* Breed, 66 Wis. 85, 26 N. W. 271.

Canada.— Eaton *v.* Weatherbe, Ritch. Eq. Cas. (Nova Scotia) 48; Morton *v.* Thompson, 2 U. C. Q. B. 196.

See 37 Cent. Dig. tit. "New Trial," §§ 241, 243, 244.

Absence of witnesses.— Where a material witness for defendant arrived after the trial but while plaintiff's attorneys and witnesses were still present, it was held that a new trial on the ground of the absence of the witnesses should have been moved for at the time. Ketchum *v.* Breed, 66 Wis. 85, 26 N. W. 271.

The right to a new trial for failure to file a written decision within the time fixed by statute may be lost by long delay. Fleet *v.* Kalbfleisch, 43 Hun (N. Y.) 443.

Settlement of case and exceptions.— It is not laches to wait until a case and exceptions can be settled with reasonable expedition. Reynolds *v.* Champlain Transp. Co., 9 How. Pr. (N. Y.) 7.

Perjury.— The movant is not necessarily guilty of laches in failing to move on the ground of perjury before perfecting an appeal. Nugent *v.* Metropolitan St. R. Co., 46 N. Y. App. Div. 105, 61 N. Y. Suppl. 476, 7 N. Y. Annot. Cas. 193.

Discovery of new evidence.— Where, after defendants have obtained a new trial on appeal, they discover new evidence, it is not laches to wait until the judgment has been affirmed on a further appeal by plaintiff before moving for a new trial for such evidence. Smith *v.* Matthews, 21 Misc. (N. Y.) 150, 47 N. Y. Suppl. 96.

59. See the cases cited *infra*, this note.

For decisions in which these requirements are shown see the following cases:

Arkansas.— Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167.

California.— People *v.* Hill, 16 Cal. 113; Dennison *v.* Smith, 1 Cal. 437.

Colorado.— Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588.

Georgia.— New England Mortg. Security Co. *v.* Collins, 115 Ga. 104, 41 S. E. 270.

Indiana.— McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Dugdale *v.* Doney, 30 Ind. App. 240, 65 N. E. 934; Van Hook *v.* Young, 29 Ind. App. 471, 64 N. E. 670.

Indian Territory.— Mann *v.* Carson, 5 Indian Terr. 115, 82 S. W. 692; Kennedy *v.* Harris, 3 Indian Terr. 487, 58 S. W. 567; Waitman *v.* Bowles, 3 Indian Terr. 294, 58 S. W. 686; Julinson *v.* Anderson, 1 Indian Terr. 658, 43 S. W. 950.

Iowa.— German Sav. Bank *v.* Cady, 114 Iowa 228, 86 N. W. 277; Ewaldt *v.* Farlow, 62 Iowa 212, 17 N. W. 487; Patterson *v.* Jack, 59 Iowa 632, 13 N. W. 724; Boardman *v.* Beckwith, 18 Iowa 292.

Kansas.— Brubaker *v.* Brubaker, 74 Kan. 220, 86 Pac. 455; Hopkins *v.* Watson, 67 Kan. 858, 74 Pac. 233; Clement *v.* Hartzell, 60 Kan. 317, 56 Pac. 504; Gossett *v.* Missouri, etc., R. Co., (1899) 56 Pac. 78; Atchison, etc., R. Co. *v.* Holland, 58 Kan. 317, 49 Pac. 71; Douglass *v.* Antbony, 45 Kan. 439, 25 Pac. 853; Burtiss *v.* La Belle Wagon Co., 45 Kan. 413, 25 Pac. 852; Mercer *v.* Ringer, 40 Kan. 189, 19 Pac. 670; McNally *v.* Keplinger, 37 Kan. 556, 15 Pac. 534; McDonald *v.* Cooper, 32 Kan. 58, 3 Pac. 786; Osborne *v.* Hamilton, 29 Kan. 1; Hover *v.* Tenney, 27 Kan. 133; Pratt *v.* Kelley, 24 Kan. 111; Gruble *v.* Ryus, 23 Kan. 195; Lucas *v.* Sturr, 21 Kan. 480; Fowler *v.* Young, 19 Kan. 150; Nesbit *v.* Hines, 17 Kan. 316; Mitchell *v.* Milhoan, 11 Kan. 617; Odell *v.* Sargent, 3 Kan. 80; Ward *v.* Morrison, 6 Kan. App. 54, 49 Pac. 635, although case decided in movant's absence. See also Continental Ins. Co. *v.* Maxwell, (App. 1899) 57 Pac. 1057, as to presumption as to filing in time.

Kentucky.— Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706; Harris *v.* Ray, 15 B. Mon. 628.

Massachusetts.— Goodrum *v.* Grimes, 185 Mass. 80, 69 N. E. 1053.

Michigan.— Eikhoff *v.* Wayne Cir. Judge, 129 Mich. 150, 88 N. W. 397, holding statute providing for compulsory examination of witnesses did not change rule.

Missouri.— Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037; Young *v.* Downey, 150 Mo. 317, 51 S. W. 751 (as to record sufficiently indicating filing in time); Saxton Nat. Bank *v.* Bennett, 138 Mo. 494, 40 S. W. 97; St. Joseph *v.* Robison, 125 Mo. 1, 28 S. W. 166; Maloney *v.* Missouri Pac. R. Co., 122 Mo. 106, 26 S. W. 702; Moran *v.* January, 52 Mo. 523; Richmond *v.* Wardlaw, 36 Mo. 313; Williams *v.* St. Louis County Cir.

time.[60] The statutory provisions must be strictly complied with.[61] Where a motion is not filed until after the time therefor has expired, the effect is the same

Ct., 5 Mo. 248 (holding that the court may allow a new trial on suggestion or of its own motion, although the time for filing a motion has expired); Scott *v.* Joffee, 125 Mo. App. 573, 102 S. W. 1038; Pound *v.* Cassity, 91 Mo. App. 424; Hesse *v.* Seyp, 88 Mo. App. 66; State *v.* McGowan, 62 Mo. App. 625; Shewalter *v.* McGrew, 60 Mo. App. 288; Beckmann *v.* Phœnix Ins. Co., 49 Mo. App. 604; State *v.* Adams, 12 Mo. App. 436.

Nebraska.— Carmack *v.* Erdenberger, (1906) 110 N. W. 315 (statute mandatory); Gullion *v.* Traver, 64 Nebr. 51, 89 N. W. 404; Broken Bow First Nat. Bank *v.* Stockham, 59 Nebr. 304, 80 N. W. 899; Nebraska Nat. Bank *v.* Pennock, 59 Nebr. 61, 80 N. W. 255; Nelson *v.* Farmland Security Co., 58 Nebr. 604, 79 N. W. 161; Brown *v.* Ritner, 41 Nebr. 52, 59 N. W. 360; Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992; McDonald *v.* McAllister, 32 Nebr. 514, 49 N. W. 377; Aultman *v.* Leahey, 24 Nebr. 286, 38 N. W. 740; Roggencamp *v.* Dobbs, 15 Nebr. 620, 20 N. W. 100; Vaughn *v.* O'Conner, 12 Nebr. 478, 11 N. W. 738 (four days in county court cases); Fox *v.* Meacham, 6 Nebr. 530; Quigley *v.* Mulford, 1 Nebr. (Unoff.) 265, 95 N. W. 490.

New Mexico.— Schofield *v.* Slaughter, 9 N. M. 422, 54 Pac. 757.

New York.— Buchsbaum *v.* Feldman, 43 Misc. 85, 86 N. Y. Suppl. 747; Cothren *v.* Chaffee, 39 Misc. 339, 79 N. Y. Suppl. 841.

Ohio.— State *v.* Eager, 3 Ohio Cir. Ct. 581, 2 Ohio Cir. Dec. 335.

Oklahoma.— Ryland *v.* Coyle, 7 Okla. 226, 54 Pac. 456.

Pennsylvania.— Lane *v.* Shreiner, 1 Binn. 292.

Texas.— Gill *v.* Rodgers, 37 Tex. 628; Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in 94 Tex. 120, 58 S. W. 951].

Wyoming.— Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878; Boswell *v.* Bliler, 9 Wyo. 277, 62 Pac. 350; Kent *v.* Upton, 3 Wyo. 43, 2 Pac. 234; Wilson *v.* O'Brien, 1 Wyo. 42.

United States.— Post *v.* Wise Tp., 101 Fed. 204, under rule of court.

See 37 Cent. Dig. tit. "New Trial," § 238; 2 Cent. Dig. tit. "Appeal and Error," § 1740.

Compare Thomas *v.* Morris, 8 Utah 284, 31 Pac. 446, as to application of ten-days' limit.

Formerly in Ontario, a motion for a new trial must have been made within four days of the verdict, unless the circumstances were very unusual. Orser *v.* Stickler, Taylor (U. C.) 42; Rooney *v.* Rooney, 29 U. C. C. P. 347, 4 Ont. App. 255; Kitchen *v.* McIntyre, 16 U. C. C. P. 484 (record lost); Bens *v.* Stover, 12 U. C. Q. B. 623; White *v.* Church, 4 U. C. Q. B. 23; Montreal Bank *v.* Bethune, 4 U. C. Q. B. O. S. 303.

Four days "after the trial" means four days after verdict. St. Joseph *v.* Robison, 125 Mo. 1, 28 S. W. 166. See also Shaw *v.* Hope, 25 Wkly. Rep. 729. *Compare* Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840, 121 Iowa 607, 96 N. W. 1110.

Entry of judgment on the pleadings is not a trial requiring the filing of a motion for a new trial within four days. Todd *v.* Missouri Pac. R. Co., 33 Mo. App. 110.

A motion filed out of time will be treated as a suggestion invoking the exercise of judicial discretion. Scott *v.* Joffee, 125 Mo. App. 573, 102 S. W. 1038.

Cause not within scope of rule.—A justice of the supreme court may grant a rule to show cause why a verdict rendered in an issue out of the court, tried at a circuit, should not be set aside after the six days allowed by rule 34 of the court, on allegation of misconduct on the part of the jury, or for other causes not within the evident purpose of the rule. Rooney *v.* King, (N. J. Sup. 1906) 64 Atl. 955.

60. *Connecticut.*— Phelps *v.* Norton, 35 Conn. 327, in supreme court.

Georgia.— Candler *v.* Farmers' L. & T. Co., 96 Ga. 44, 22 S. E. 715.

Massachusetts.— See Fitch *v.* Jefferson, 175 Mass. 56, 55 N. E. 623, as to what constitutes trial.

New Hampshire.—Tuttle *v.* Stickney, 3 N. H. 319, three years from rendition of judgment.

New York.—Albertson *v.* Behrend Mfg. Co., 47 N. Y. App. Div. 232, 62 N. Y. Suppl. 640 (as to rule in Rochester municipal court); Church *v.* Kidd, 3 Hun 254 (before reference directed by interlocutory judgment); Green *v.* Roworth, 6 Misc. 130, 26 N. Y. Suppl. 37 (before hearing directed by interlocutory judgment).

Rhode Island.— Dillon *v.* O'Neal, 26 R. I. 87, 58 Atl. 455 (by petition); Blaisdell *v.* Harvey, 25 R. I. 572, 57 Atl. 371, by petition.

Vermont.— Mower *v.* Warner, 16 Vt. 495, petition in supreme court.

England.— Gambart *v.* Mayne, 14 C. B. N. S. 320, 108 E. C. L. 320.

Canada.— Orpwood *v.* Morrisey, 17 N. Brunsw. 3, first Saturday in ensuing term.

See 37 Cent. Dig. tit. "New Trial," § 245.

Before expiration of time for appeal see Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270; Deering *v.* Johnson, 33 Minn. 97, 22 N. W. 174; Kimball *v.* Palmerlee, 29 Minn. 302, 13 N. W. 129; Conklin *v.* Hinds, 16 Minn. 457; Heath *v.* New York Bldg. Loan Banking Co., 91 Hun (N. Y.) 170, 36 N. Y. Suppl. 213 (as to what is final judgment); Bright *v.* Juhl, 16 S. D. 440, 93 N. W. 648. See also Kehrley *v.* Shafer, 92 Hun (N. Y.) 196, 36 N. Y. Suppl. 510, 3 N. Y. Annot. Cas. 19, as to cases included in rule.

61. Roggencamp *v.* Dobbs, 15 Nebr. 620, 20 N. W. 100.

Presumption as to time of filing.— Where the record does not show when a motion was filed which was overruled two months after verdict, it will be presumed, on appeal, that

as if no motion were filed at all.[62] A motion filed out of time may be either stricken from the files or overruled,[63] and the reviewing court cannot correct the errors which are grounds for new trial.[64]

b. In Relation to Term. It is quite common to limit the time within the term at which the verdict or decision was rendered,[65] except for causes discovered

it was filed out of time. Burtiss *v.* La Belle Wagon Co., 45 Kan. 413, 25 Pac. 852.

62. State *v.* McGowan, 62 Mo. App. 625.

63. Clark *v.* Perry, 17 Colo. 56, 28 Pac. 329; Harris *v.* Jennings, 64 Nebr. 80, 89 N. W. 625, 97 Am. St. Rep. 635; Nelson *v.* Farmland Security Co., 58 Nebr. 604, 79 N. W. 161.

64. *Indiana.*— Evansville *v.* Martin, 103 Ind. 206, 2 N. E. 596.

Iowa.— Johnson *v.* Wright, 124 Iowa 61, 99 N. W. 103; Ewaldt *v.* Farlow, 62 Iowa 212, 17 N. W. 487.

Kansas.— Ritchie *v.* Kansas, etc., R. Co., 55 Kan. 36, 39 Pac. 718; Deford *v.* Orvis, 52 Kan. 432, 34 Pac. 1044; Eskridge *v.* Lewis, 51 Kan. 376, 32 Pac. 1104; Missouri Glass Co. *v.* Bailey, 51 Kan. 192, 32 Pac. 894; Fudge *v.* St. Louis, etc., R. Co., 31 Kan. 146, 1 Pac. 141; Hover *v.* Tenney, 27 Kan. 133; Gruble *v.* Ryus, 23 Kan. 195; Nesbit *v.* Hines, 17 Kan. 316; Barber Asphalt Paving Co. *v.* Topeka, 6 Kan. App. 133, 50 Pac. 904; Dudley *v.* Barney, 4 Kan. App. 122, 46 Pac. 178.

Kentucky.— Cundiff *v.* Luce, 11 Ky. L. Rep. 860.

Missouri.— Missouri, etc., R. Co. *v.* Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417; Widman *v.* American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003; Richmond *v.* Supreme Lodge O. M. P., 100 Mo. App. 8, 71 S. W. 736.

Nebraska.— Carmack *v.* Erdenberger, (1906) 110 N. W. 315; Harris *v.* Jennings, 64 Nebr. 80, 89 N. W. 625, 97 Am. St. Rep. 635; Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992.

Nevada.— Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441.

Wyoming.— Boswell *v.* Bliler, 9 Wyo. 277, 62 Pac. 350.

See 2 Cent. Dig. tit. "Appeal and Error," § 1740.

Exceptions lost.— The benefit of exceptions depending on the filing of a motion for a new trial will be lost, if the motion is overruled or stricken because not filed in proper time. State *v.* McGowan, 62 Mo. App. 625.

Motion prematurely made.— Neither can the court consider errors which are proper grounds for new trial when the motion was prematurely made. It is just as much a failure in statutory conformity to file a motion for new trial before the proper time as it is to file it after that time. St. Louis *v.* Boyce, 130 Mo. 572, 31 S. W. 594.

Ruling in anticipation of motion.—A court has no authority to rule on a motion for a new trial which has not been filed and is not before it in anticipation that it may be subsequently filed. Carmack *v.* Erdenberger, (Nebr. 1906) 110 N. W. 315.

Amendment of motion.—Assignments of error may be considered, although not embraced in the original motion for a new trial, but only in an amended motion filed more than two days after the judgment; the allowance of the amendment being in the discretion of the court. Texas, etc., R. Co. *v.* Green, (Tex. Civ. App. 1906) 95 S. W. 694.

65. *Colorado.*— Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771 (if time is not extended during the term); Clark *v.* Perry, 17 Colo. 56, 28 Pac. 329.

Connecticut.— Stearnes *v.* Richmond, 9 Conn. 112.

Florida.— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Georgia.— Castellaw *v.* Blanchard, 106 Ga. 97, 31 S. E. 801; Hill *v.* O'Brian, 104 Ga. 137, 30 S. E. 996; Benning *v.* Barlow, 75 Ga. 870; Brower *v.* Cothran, 74 Ga. 383 (although counsel and judge mistook the law); Graddy *v.* Hightower, 1 Ga. 252.

Illinois.— Campbell *v.* Conover, 26 Ill. 64.

Indiana.— Allen *v.* Adams, 150 Ind. 409, 50 N. E. 387; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Louisville, etc., Consol. R. Co. *v.* Summers, 131 Ind. 241, 30 N. E. 873; American White Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855; Evansville *v.* Martin, 103 Ind. 206, 2 N. E. 596; Secor *v.* Souder, 95 Ind. 95; Dodge *v.* Pope, 93 Ind. 480; Jones *v.* Jones, 91 Ind. 72; Christy *v.* Smith, 80 Ind. 573; Smith *v.* Little, 67 Ind. 549; Pennsylvania Co. *v.* Sedwick, 59 Ind. 336; Cutsinger *v.* Nebeker, 58 Ind. 401; Myers *v.* Jarboe, 56 Ind. 57; Wilson *v.* Vance, 55 Ind. 394; Greenup *v.* Crooks, 50 Ind. 410; Deering *v.* Armstrong, 18 Ind. App. 687, 48 N. E. 1045 (although special judge who tried the case absent); Hadley *v.* Lake Erie, etc., R. Co. (App. 1897) 46 N. E. 935; Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105.

Kansas.— Missouri Glass Co. *v.* Bailey, 51 Kan. 192, 32 Pac. 894; Earls *v.* Earls, 27 Kan. 538; Odell *v.* Sargent, 3 Kan. 80; Dudley *v.* Barney, 4 Kan. App. 122, 46 Pac. 178.

Kentucky.— Lovelace *v.* Lovell, 107 Ky. 676, 55 S. W. 549, 21 Ky. L. Rep. 1433; Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public School, 105 Ky. 358, 49 S. W. 34, 20 Ky. L. Rep. 1228; Humphreys *v.* Walton, 2 Bush 580; Harris *v.* Ray, 15 B. Mon. 628; Paul *v.* Williams, 2 B. Mon. 265; Turpin *v.* Turpin, 3 J. J. Marsh. 327; Buckner *v.* Conly, 1 T. B. Mon. 3; Farmer *v.* Wickliffe Bank, 51 S. W. 798, 21 Ky. L. Rep. 468; Beeler *v.* Sandidge, 49 S. W. 533, 20 Ky. L. Rep. 1581.

Massachusetts.— Hannum *v.* Belchertown, 19 Pick. 311.

Missouri.— Honey *v.* Honey, 18 Mo. 466;

after the expiration of the term.[66] In some states an application for a new trial for extraordinary causes may be by motion after the trial term;[67] but, in many states, an application after the term must be by petition or complaint,[68] and the rule

Griffin *v.* Wabash R. Co., 110 Mo. App. 221, 85 S. W. 111.

Nebraska.— Harris *v.* Jennings, 64 Nebr. 80, 89 N. W. 625, 97 Am. St. Rep. 635; Doolittle *v.* American Nat. Bank, 58 Nebr. 454, 78 N. W. 926.

New Mexico.— Schofield *v.* Slaughter, 9 N. M. 422, 54 Pac. 757.

Ohio.— Stuckey *v.* Bloomer, 2 Ohio Cir. Ct. 541, 1 Ohio Cir. Dec. 631.

Pennsylvania.— Hill *v.* Harder, 3 Pa. Super. Ct. 473.

Texas.— Kruegel *v.* Bolanz, (Civ. App. 1907) 103 S. W. 435; Graham *v.* Coolidge, 30 Tex. Civ. App. 273, 70 S. W. 231; Wilson *v.* Woodward, (Civ. App. 1899) 54 S. W. 385 (death of counsel); Marcus *v.* Hemphill, 1 Tex. App. Civ. Cas. § 1023.

United States.— Sanford *v.* White, 108 Fed. 928, holding that a United States court has no power over its proceedings after the term in which they were had.

See 37 Cent. Dig. tit. "New Trial," § 239.

Compare Spanagel *v.* Dellinger, 34 Cal. 476; Wolcott *v.* Jackson, 52 N. J. Eq. 387, 28 Atl. 1045, as to statute permitting application after term.

Vacation of a judgment void for uncertainty has been held not within the statute. Eason *v.* Miller, 18 S. C. 381.

Excuse for failure to file motion.— That the unsuccessful party was absent when the verdict was rendered and court adjourned the next day is not of itself sufficient excuse for not having filed the motion for a new trial. Paul *v.* Williams, 2 B. Mon. (Ky.) 265.

Although further time may be necessary to perfect the motion and file a brief of the evidence, where the movant has time to file the motion during the term, he should do so. Benning *v.* Barlow, 75 Ga. 870.

Trial concluded after term.— Where a trial is pending when the time arrives for closing the term, and court proceeds until it is concluded, the motion may be filed during such additional time. Krutz *v.* Craig, 53 Ind. 561.

The fact that the court had adjourned on the last day of the term and was only waiting to sign the minutes and record of the last case tried did not render it too late to present affidavits showing that the verdict was a gambling verdict. East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240, 1 S. W. 790.

Adjourned term.— The motion may be filed during an adjourned term. Baltimore, etc., R. Co. *v.* Ray, 36 Ind. App. 430, 73 N. E. 942.

The granting of a rule nisi on an adjourned day of the term was held to cure a defect in writing out the motion during an adjournment of the court. Duggar *v.* East Tennessee, etc., R. Co., 85 Ga. 437, 11 S. E. 811.

Agreement to enter judgment in vacation.— Where a case was submitted on the last day of the term under an agreement between the parties that the judgment might be returned and entered in vacation, the court has no power to permit a motion for a new trial to be filed the first day of the succeeding term where such right was not reserved in the agreement or judgment. Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public School, 105 Ky. 358, 49 S. W. 34, 20 Ky. L. Rep. 1228.

In Illinois the written points may be filed at any time before final judgment is entered, or during the same term, if it has been entered, unless otherwise ordered by the court. Chicago, etc., R. Co. *v.* Goff, 158 Ill. 453, 41 N. E. 1112.

Under the Indiana statute, if the verdict or decision is rendered on the last day of the session or term, an ordinary application must be made on the first day of the next term. McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164 (first day of adjourned term); Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Louisville, etc., Consol. R. Co. *v.* Summers, 131 Ind. 241, 30 N. E. 873; Dugdale *v.* Doney, 30 Ind. App. 240, 65 N. E. 934.

The right to insist on the dismissal of a petition filed out of time is not waived because the motion to dismiss was not filed at the term the petition was entered. Mower *v.* Warner, 16 Vt. 495.

66. Enfaula Home Ins. Co. *v.* Plant, 37 Ga. 672 (although not expressly excepted by the statute); Hunter *v.* Porter, 124 Iowa 351, 100 N. W. 53; Hellman *v.* David Adler, etc., Clothing Co., 60 Nebr. 580, 83 N. W. 846 (within one year for newly discovered evidence); Chadron Loan, etc., Assoc. *v.* Scott, 4 Nebr. (Unoff.) 694, 96 N. W. 220; Horton *v.* Feinberg, 23 R. I. 190, 49 Atl. 696 (within one year from decision, not from overruling of prior motion).

A statute of Kentucky providing that an application for a new trial for newly discovered evidence may be made not later than the second term after the discovery of the evidence means that the application must be made before the term in time for trial at the term. Scott *v.* Scott, 82 Ky. 328; Nickell *v.* Fallen, 23 S. W. 366, 15 Ky. L. Rep. 389.

67. Atlantic Contracting Co. *v.* Hyde, 108 Ga. 799, 33 S. E. 995; Hudgins *v.* Veal, 98 Ga. 137, 26 S. E. 479; Hays *v.* Westbrook, 96 Ga. 219, 22 S. E. 893; Candler *v.* Hammond, 23 Ga. 493.

What is not an "extraordinary" ground.— That the trial judge absented himself from court whereby the term terminated is not an "extraordinary" ground for a new trial, where a motion for a new trial might have been filed during the term and have gone over to the next term. East Tennessee, etc., R. Co. *v.* Whitlock, 75 Ga. 77.

68. See *infra*, IV, 1.

has been applied where a new trial was asked because of the insufficiency of the evidence to sustain a finding.[69]

c. Computation of Time — (i) *From What Event.* Generally the time for making application for a new trial begins to run from the rendition of the verdict or decision.[70] It runs from the rendition of a special verdict,[71] or the filing of findings of fact by the court,[72] rather than from the entry of judgment on such verdict or findings. But in the case of special findings of a jury in an equity case which are advisory only, the time begins to run from the adoption of such findings by the court.[73] Where an interlocutory judgment has been entered and the cause submitted to a referee for an accounting, the time limited to move for a new trial after the "decision of a court" begins to run from the approval of the referee's report.[74] Under some statutes the time runs from the entry of judgment.[75] Where time runs from the judgment the judgment must have been signed.[76] It runs from the judgment where a demurrer to evidence is sustained.[77] Where by statute the application for new trial may be made at any time "within

69. Suman *v.* Cornelius, 78 Ind. 506.

70. **The delay of the clerk of the court in spreading the verdict or decision on the court journal** does not extend the time for filing a motion for a new trial. Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503, 87 Am. St. Rep. 536; Nebraska Nat. Bank *v.* Pennock, 59 Nebr. 61, 80 N. W. 255; Shaw *v.* Hope, 25 Wkly. Rep. 729.

Where the trial court refused to receive a verdict until required to do so by mandate from the supreme court, the movant had the statutory time from the entry of the verdict under the mandate to file a motion for a new trial. Kansas City, etc., R. Co. *v.* Berry, 55 Kan. 186, 40 Pac. 288.

An application for leave to move for a new trial is not contemplated by law and does not extend the time for moving for a new trial. Odell *v.* Sargent, 3 Kan. 80.

Where an action is tried de novo on appeal, the time within which to move for a new trial begins to run from the decision in the appellate court. Williams *v.* Miles, 73 Nebr. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

Case taken under advisement.— Where a case is heard and taken under advisement at one term and the decision is rendered at a subsequent term, the time begins to run from the filing of the decision. Kendel *v.* Judah, 63 Ind. 291.

When findings are filed during vacation, they are effective and time begins to run as of the first day of the following term. Bush *v.* Barkman, 15 Ind. App. 407, 44 N. E. 62. *Compare* Earls *v.* Earls, 27 Kan. 538, where judgment rendered in vacation was held a nullity.

71. People *v.* Hill, 16 Cal. 113; Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Imperial F. Ins. Co. *v.* Kiernan, 83 Ky. 468.

72. Allen *v.* Adams, 150 Ind. 409, 50 N. E. 387; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Herkimer *v.* McGregor, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44; Wilson *v.* Vance, 55 Ind. 394; Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155, although some changes made later.

73. *In re* McKenna, 138 Cal. 439, 71 Pac. 501; Reclamation Dist. No. 556 *v.* Thisby, 131 Cal. 572, 63 Pac. 918; Bell *v.* Marsh, 80 Cal. 411, 22 Pac. 170 (or from notice of the decision of the court adopting the findings of the jury); James *v.* Santa Cruz County Super. Ct., 78 Cal. 107, 20 Pac. 241; Bates *v.* Gage, 49 Cal. 126; Jenkins *v.* Kirtley, 70 Kan. 801, 79 Pac. 671; Spencer *v.* Hersam, 31 Mont. 120, 77 Pac. 418; Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

Where, in an action triable by the court, specific questions of fact are tried by a jury, although the motion may be made on the minutes, the usual course is to make the motion at the term when final judgment is moved for or when remaining issues of fact are tried. Jones *v.* Stewart, 7 N. Y. Civ. Proc. 164.

74. Harris *v.* San Francisco Sugar Refining Co., 41 Cal. 393; Baumann *v.* Moseley, 63 Hun (N. Y.) 492, 18 N. Y. Suppl. 563; Blevins *v.* Morledge, 5 Okla. 141, 47 Pac. 1068.

Motion for new trial on exceptions.— It is said to be better practice to move for a new trial on exceptions before confirmation of the report that the motion may be heard with the motion for confirmation. Baumann *v.* Moseley, 63 Hun (N. Y.) 492, 18 N. Y. Suppl. 563, within a reasonable time.

75. Carraby's Succession, 23 La. Ann. 110; Louisiana Citizens' Bank *v.* Bellocq, 19 La. Ann. 376 [*overruling* Chandler *v.* Barker, 13 La. 316]; Smelser *v.* Williams, 4 Rob. (La.) 152; Smith *v.* Harrathy, 5 Mart. N. S. (La.) 319; Bedford *v.* Jacobs, 4 Mart. N. S. (La.) 528; Bradish *v.* State, 35 Vt. 452; Mower *v.* Warner, 16 Vt. 495.

76. Louisiana Citizens' Bank *v.* Bellocq, 19 La. Ann. 376 [*overruling* Chandler *v.* Barker, 13 La. 316]; Smelser *v.* Williams, 4 Rob. (La.) 152; Smith *v.* Harrathy, 5 Mart. N. S. (La.) 319.

Where judgment takes effect as of the last day of the term, time to petition for new trial runs from that date. Bradish *v.* State, 35 Vt. 452.

77. Pratt *v.* Kelley, 24 Kan. 111; Gruble *v.* Ryus, 23 Kan. 195, three days.

one year after the former trial," the time so limited begins to run from the judgment and not from the verdict.[78]

(II) *Days Counted.* In some jurisdictions the days of a recess of the court after the trial and during the term are to be counted as days within which a motion for a new trial may, or must, be filed.[79] In other jurisdictions judicial days only are counted against the applicant.[80] In some states secular days only are counted,[81] while in other states Sunday is counted except it be the last day of the time limited.[82] Where the last day is a holiday for some purposes, but not as to the transaction of judicial business, it is to be included in the computation.[83] In some jurisdictions both the day on which the verdict was rendered and that on which the motion was made are counted,[84] but in others the former day is excluded.[85]

d. Presentation to Judge. In some states it is sufficient to file a motion in proper time with the clerk of the court without presenting it to the judge.[86] In other states the motion must be presented to the judge during the term,[87] or within a time limited, when made in vacation.[88]

4. Extension of Time — a. By Court. It is generally held that a time limited by rule of court for making application for a new trial may be extended by the court.[89] In a number of jurisdictions it is held that statutes limiting the time are mandatory, and that a court may neither extend the time in the first instance nor permit an application to be made after the usual time has expired, except as provided by statute.[90] In other jurisdictions it is held that an application made out of time may be considered and allowed where the circumstances are unusual and

78. Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840, 121 Iowa 607, 96 N. W. 1110. As to meaning of "trial" *compare* St. Joseph *v.* Robison, 125 Mo. 1, 28 S. W. 166; Shaw *v.* Hope, 25 Wkly. Rep. 729.

79. Maloney *v.* Missouri Pac. R. Co., 122 Mo. 106, 26 S. W. 702; State *v.* McGowan, 62 Mo. App. 625; Beckmann *v.* Phœnix Ins. Co., 49 Mo. App. 604; Dietrich *v.* Southern Pennsylvania R., etc., Co., 14 York. Leg. Rec. (Pa.) 1.

80. McFarlane *v.* Renaud, 1 Mart. (La.) 220; Grant *v.* Holland, 49 L. J. Q. B. 800, 29 Wkly. Rep. 32; Hallums *v.* Hills, 46 L. J. Q. B. 88, 24 Wkly. Rep. 956.

81. Long *v.* Hawkins, 178 Mo. 103, 77 S. W. 77 (including non-judicial days); Metropolis Nat. Bank *v.* Williams, 46 Mo. 17; State *v.* McGowan, 62 Mo. App. 625; Hosli *v.* Yokel, 57 Mo. App. 622; Lewis *v.* Schwenn, 15 Mo. App. 342.

82. Svea Ins. Co. *v.* McFarland, 7 Ariz. 131, 60 Pac. 936; Chicago Label, etc., Co. *v.* Washburn, 15 Ohio Cir. Ct. 510, 8 Ohio Cir. Dec. 113.

83. German Sav. Bank *v.* Cady, 114 Iowa 228, 86 N. W. 277.

84. Interstate Petroleum Co. *v.* Adams, 52 S. W. 1059, 21 Ky. L. Rep. 768; Harlan *v.* Braxdale, 35 S. W. 916, 18 Ky. L. Rep. 171; Lane *v.* Shreiner, 1 Binn. (Pa.) 292, four days.

85. Blevins *v.* Morledge, 5 Okla. 141, 47 Pac. 1068.

86. Deputy *v.* Betts, 4 Harr. (Del.) 352; Freelove *v.* Gould, 3 Kan. App. 750, 45 Pac. 454 (a motion so filed is "made"); Chadron Loan, etc., Assoc. *v.* Scott, 4 Nebr. (Unoff.) 694, 96 N. W. 220; Bellocq *v.* U. S., 13 Ct. Cl. 195.

87. Hundley *v.* Yonge, 69 Ala. 89; Emison *v.* Shepard, 121 Ind. 184, 22 N. E. 883; William Deering, etc., Co. *v.* Armstrong, 18 Ind. App. 687, 48 N. E. 1045 (entry or memorandum by court necessary); Klein *v.* Meyers, 68 S. W. 144, 24 Ky. L. Rep. 183.

88. *Ex p.* Johnson, 60 Ala. 429, petition in vacation.

89. *Connecticut.*— Tomlinson *v.* Derby, 41 Conn. 268.

Maine.— Dennett *v.* Dow, 17 Me. 19 note.

Michigan.— People *v.* Judge Wayne Cir. Ct., 20 Mich. 220.

Washington.— McAllister *v.* Seattle Brewing, etc., Co., 44 Wash. 179, 87 Pac. 68.

United States.— German Ins. Co. *v.* Manning, 100 Fed. 581 (for failure of judge to settle bill of exceptions); Henning *v.* Western Union Tel. Co., 41 Fed. 864 (even after limit of original time, for misunderstanding of counsel as to practice).

An extension of time to perfect a motion "until the next term" was held to mean until the case was called at the next term. Glynn County Academy *v.* Dart, 67 Ga. 765.

90. *California.*— Bear River, etc., Water, etc., Co. *v.* Boles, 24 Cal. 354.

Indiana.— McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Secor *v.* Souder, 95 Ind. 95; Smith *v.* Little, 67 Ind. 549; Pennsylvania Co. *v.* Sedwick, 59 Ind. 336; Cutsinger *v.* Nebeker, 58 Ind. 401; Wilson *v.* Vance, 55 Ind. 394; Krutz *v.* Craig, 53 Ind. 561; Dugdale *v.* Doney, 30 Ind. App. 240, 65 N. E. 934. *Compare* Evansville *v.* Martin, 103 Ind. 206, 2 N. E. 596.

Iowa.— Laird *v.* Ashley, 1 Iowa 570.

Kentucky.— Farmer *v.* Wickliffe Bank, 51

the delay excusable,[91] at least where the application is made during the trial term.[92] In some states the power to extend the ordinary time is expressly given by statute.[93] Some statutes provide that the application may be made after the usual time, where the applicant was unavoidably prevented from making it within such time.[94]

b. By Parties — (i) *By Agreement.* That the parties may, by agreement, extend the time for applying for a new trial has been affirmed in some cases[95] and

S. W. 798, 21 Ky. L. Rep. 468. The time cannot be extended by reason of the fact that the court did not within three days state its conclusions of law and fact, nothing appearing to show that the appellant requested such a statement. Leyman *v.* Morrison, 10 Ky. L. Rep. 117.

Missouri.— King *v.* Gilson, 206 Mo. 264, 104 S. W. 52.

Nevada.— See Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237, as to failure to file "statement."

Pennsylvania.—Hill *v.* Harder, 3 Pa. Super. Ct. 473.

Wyoming.— Kent *v.* Upton, 3 Wyo. 43, 2 Pac. 234, holding that no extension of time can be granted on an *ex parte* application.

See 37 Cent. Dig. tit. "New Trial," § 242.

Cumulative error.—An omission to move during the term cannot be cured by a subsequent direction that the motion be made at a special term on the minutes. Thayer Mfg. Jewelry Co. *v.* Steinau, 58 How. Pr. (N. Y.) 315.

Entry nunc pro tunc.— In the absence of fraud, accident, or mistake, a motion for a new trial cannot be entered *nunc pro tunc* (Wilson *v.* Vance, 55 Ind. 394; Turpin *v.* Turpin, 3 J. J. Marsh. (Ky.) 327; Beeler *v.* Sandidge, 49 S. W. 533, 20 Ky. L. Rep. 1581; Griffin *v.* Wabash R. Co., 110 Mo. App. 221, 85 S. W. 111, where evidence of actual prior filing insufficient), except where the court is authorized by statute to extend or enlarge the time (Bailey *v.* Drake, 12 Wash. 99, 40 Pac. 631). *Compare* Sitler *v.* Springgarden Mut. F. Ins. Co., 14 York Leg. Rec. (Pa.) 153 (where failure to file was due to inadvertence); Montreal Bank *v.* Bethune, 4 U. C. Q. B. O. S. 303 (as to misunderstanding of counsel).

Written motion nunc pro tunc.— Where the motion may be oral without stating the grounds, permission to the movant after the term to file a written motion *nunc pro tunc* is not prejudicial. Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978.

91. *Arizona.*— Svea Ins. Co. *v.* McFarland, 7 Ariz. 131, 60 Pac. 936; Spicer *v.* Simms, 6 Ariz. 347, 57 Pac. 610.

Connecticut.— Uncas Paper Co. *v.* Corbin, 75 Conn. 675, 55 Atl. 165.

Georgia.— See Johnson *v.* Jackson, 60 Ga. 57, where an order extending the time on account of illness of counsel was held to amount to an adjudication of an extraordinary cause for filing the motion out of time.

Michigan.— Hayes *v.* Ionia Cir. Judge, 125 Mich. 277, 84 N. W. 141, holding that the strict limitation applies only where the new trial is asked as a matter of right.

Texas.— Wells *v.* Melville, 25 Tex. 337; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596. See also Aldridge *v.* Mardoff, 32 Tex. 204, where motion was denied..

Washington.— Leavenworth *v.* Billings, 26 Wash. 1, 66 Pac. 107 (under general statutory power as to enlarging time within which any act is to be done); Bailey *v.* Drake, 12 Wash. 99, 40 Pac. 631.

England.— Purnell *v.* Great Western R. Co., 1 Q. B. B. 636, 45 L. J. Q. B. 687, 35 L. T. Rep. N. S. 605, 24 Wkly. Rep. 909 [*reversing* 34 L. T. Rep. N. S. 822, 24 Wkly. Rep. 720]; Wilkins *v.* Wilkins, [1896] P. 108, 65 L. J. P. D. & Adm. 55, 74 L. T. Rep. N. S. 62, 44 Wkly. Rep. 305 (in court of appeal under Judicature Act); Peckett *v.* Short, 32 Wkly. Rep. 123.

Canada.— Rooney *v.* Rooney, 29 U. C. C. P. 347, 4 Ont. App. 255; Bens *v.* Stover, 12 U. C. Q. B. 623, record lost.

92. Head *v.* Randolph, 83 Mo. App. 284; Sanford *v.* White, 108 Fed. 928, holding that the United States court has no power over its proceedings after the term at which they were had.

93. See *infra*, IV, F, 3, c, (I).

94. Mann *v.* Carson, 5 Ind. Terr. 115, 82 S. W. 692; Waitman *v.* Bowles, 3 Ind. Terr. 294, 58 S. W. 686; Hopkins *v.* Watson, 67 Kan. 858, 74 Pac. 233; Mercer *v.* Ringer, 40 Kan. 189, 19 Pac. 670; Hemme *v.* Osage County School Dist. No. 4, 30 Kan. 377, 1 Pac. 104 (dangerous illness in movant's family); Odell *v.* Sargent, 3 Kan. 80; Roggencamp *v.* Dobbs, 15 Nebr. 620, 20 N. W. 100 (meaning "circumstances beyond control of the party"); Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878. See also King *v.* Dugan, 150 Cal. 258, 88 Pac. 925. In any event the motion must be accompanied by a showing that the party was unavoidably prevented from making the motion for new trial in time. Kent *v.* Upton, 3 Wyo. 43, 2 Pac. 234.

Pendency of motion for judgment on special findings.— Where the movant was unavoidably prevented from filing the motion on the third day after the verdict, the pendency of a motion for judgment on special findings is a reasonable excuse for not having filed it on the first or second day. Fudge *v.* St. Louis, etc., R. Co., 31 Kan. 146, 1 Pac. 141.

Unavoidable delay illustrated.— Where the written motion is forwarded by mail and reaches the office where the clerk of the court receives his mail at seven o'clock P. M. of the last day for filing the notice, but is not received by him or filed until the next day, a case of unavoidable delay is not shown. Mercer *v.* Ringer, 40 Kan. 189, 19 Pac. 670.

95. Wilson *v.* Vance, 55 Ind. 394; Eckel *v.* Walker, 48 Iowa 225; Huffman *v.* Charles, 97 S. W. 775, 30 Ky. L. Rep. 197 (motion

denied in others.[96] Where it is competent for the parties to make a binding agreement of such character, the application must be made within the stipulated time,[97] and default in this regard is not excused by the fact that associate counsel to whom it was forwarded for filing was absent at the time.[98]

(II) *By Waiver.*[99] The failure to file a motion for a new trial within the required time may be waived by contesting the motion on other grounds without objecting to such delay,[1] or by admitting "due and timely service of notice of the motion" for new trial.[2] So an irregularity in granting during the term an extension of time after the expiration of a first extension may be waived by a failure to move for a dismissal of the motion on the hearing.[3] But an agreement to a proposed case is not a waiver of the filing of a motion out of time.[4] And where a new trial was denied, the failure of the successful party to object that the motion was not filed in time raises no presumption that he consented to such filing.[5] Where the successful party was present when leave was granted to file a motion out of proper time, he must have objected to the order.[6]

c. Pendency of Other Proceedings. The pendency of a motion for judgment *non obstante veredicto*,[7] or for judgment on special findings,[8] or to modify findings of fact and conclusions of law,[9] or to set aside findings,[10] does not extend the time for making application for a new trial. The time for moving for a new trial runs from the rendition of the verdict, decision, or judgment in the trial court

filed under permission of court and agreement of parties); East *v.* Mooney, 7 Utah 414, 27 Pac. 4; Hastings *v.* Northern Pac. R. Co., 53 Fed. 224. See also Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511 (as to necessity of entering agreement in minutes); American White Bronze Co. *v.* Clark, 123 Ind. 280, 23 N. E. 855 (as to requirement that such agreement be entered on minutes).

Construction of agreement.—An agreement to extend the time will be held to include all possible grounds for a new trial, if not limited by its terms. Eckel *v.* Walker, 48 Iowa 225.

96. Hecht *v.* Heimann, 81 Mo. App. 370. See also Coopwood *v.* Prewett, 30 Miss. 206, as to allowance of new trial after statutory period.

Where an action has terminated by the expiration of the time for an appeal, a stipulation that a motion for a new trial may be heard does not confer on the court jurisdiction to grant a new trial. Bright *v.* Juhl, 16 S. D. 440, 93 N. W. 648.

97. Western, etc., R. Co. *v.* Johnson, 59 Ga. 626; Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222.

98. Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222.

99. See also *infra*, IV, H, 4.

1. Trentman *v.* Swartzell, 85 Ind. 443; Spears *v.* Mt. Ayr, 66 Iowa 721, 24 N. W. 504; Gribble *v.* Livermore, 64 Minn. 396, 67 N. W. 213. *Compare* Hilt *v.* Young, 116 Ga. 708, 43 S. E. 76.

2. Byrnes *v.* Palmer, 18 N. Y. App. Div. 1, 45 N. Y. Suppl. 479.

3. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

4. Deering *v.* Johnson, 33 Minn. 97, 22 N. W. 174.

5. Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694.

6. Geiss *v.* Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324 (objection after allowance of new trial that motion not seasonably made too late); Northcutt *v.* Buckles, 60 Ind. 577 (at subsequent term); Wilson *v.* Vance, 55 Ind. 394; Larson *v.* Ross, 56 Minn. 74, 57 N. W. 323.

7. Ruhrwein *v.* Gebhart, 90 Ky. 147, 13 S. W. 447, 11 Ky. L. Rep. 969. See also *supra*, I, D, 1, b.

A motion by plaintiff for a new trial for newly discovered evidence may be conditioned on a ruling in favor of defendant on a motion made by him for judgment *non obstante veredicto*. Usher *v.* Scranton R. Co., 132 Fed. 405.

Withdrawal of motion for new trial to move for judgment non obstante veredicto.—Where a party has withdrawn his motion for a new trial in order to move for a judgment *non obstante veredicto*, he may, upon such judgment being set aside, renew his motion for a new trial. Goedecke *v.* People, 125 Ill. App. 645.

8. Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105; Clement, etc., Co. *v.* Hartzell, 60 Kan. 317, 56 Pac. 504; Atchison, etc., R. Co. *v.* Holland, 58 Kan. 317, 49 Pac. 71; Osborne *v.* Hamilton, 29 Kan. 1; Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819. See also *supra*, I, D, 1, c.

Where the court sets aside a general verdict for plaintiff and enters a judgment on special findings for defendant, a motion for a new trial by plaintiff may be filed within the statutory time from the judgment. Severy *v.* Chicago, etc., R. Co., 6 Okla. 153, 50 Pac. 162.

9. California Imp. Co. *v.* Baroteau, 116 Cal. 136, 47 Pac. 1018; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694.

10. California Imp. Co. *v.* Baroteau, 116

and not from the affirmance of the judgment on appeal.[11] Where the time begins to run from the rendition of the judgment, and a judgment on special findings is reversed, the party aggrieved by the general verdict may move for a new trial within the time limited after the entry of judgment on the verdict.[12] And where a case was reversed on exceptions, but the judgment was subsequently affirmed because the case was not seasonably reëntered for trial, the time for making a motion for a new trial began to run from the affirmance.[13]

5. After Judgment. In some jurisdictions a motion for a new trial must be made before the entry of judgment,[14] but in other jurisdictions it may be made either before or after judgment.[15]

E. Stay of Proceedings.[16] In some states a motion for a new trial does not *per se* stay the entry of judgment,[17] nor proceedings to enforce the judgment.[18] In other states it stays all proceedings.[19] Generally the court may stay proceedings pending the determination of the motion.[20] In some states a motion for a new trial after the entry of judgment will not be considered unless further proceedings have been stayed.[21] The court may require the movant to give security as a condition.[22] In some states, under statutes, proceedings are regularly stayed

Cal. 136, 47 Pac. 1018, time for giving notice of intention.

An order staying judgment till the determination of a motion to set aside findings does not extend the time to move for new trial. California Imp. Co. *v.* Baroteau, 116 Cal. 136, 47 Pac. 1018.

11. *Arkansas.*— Jacks *v.* Adair, 33 Ark. 161.

Indiana.— Cutsinger *v.* Nebeker, 58 Ind. 401.

Iowa.— Gray *v.* Coan, 48 Iowa 424, petition after term.

Kansas.— Soper *v.* Medberry, 24 Kan. 128, at least where no bond was given on appeal.

Ohio.— Cleveland, etc., R. Co. *v.* Ohio Postal Tel. Cable Co., 22 Ohio Cir. Ct. 555, 12 Ohio Cir. Dec. 522.

Vermont.— Mower *v.* Warner, 16 Vt. 495, petition in supreme court.

12. Chicago, etc., R. Co. *v.* Dimick, 96 Ill. 42.

13. Burrough *v.* Hill, 15 R. I. 190, 2 Atl. 382.

14. See *supra*, I, D, 3.

15. See *supra*, I, D, 3.

16. Injunction pending new trial see Injunction.

Proceeding on decree see Equity.

Restraining enforcement of judgment pending new trial see Judgment.

17. Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058; Eaton *v.* Caldwell, 3 Minn. 134; Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800. See also Stephenson *v.* Hayward, 22 N. Brunsw. 104.

18. *California.*— People *v.* Loucks, 28 Cal. 68 [*explaining* Lurvey *v.* Wells, 4 Cal. 106].

Illinois.— Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104.

Indiana.— Logan *v.* Sult, 152 Ind. 434, 53 N. E. 456.

Kansas.— Church *v.* Goodin, 22 Kan. 527.

Minnesota.— Eaton *v.* Caldwell, 3 Minn. 134.

Nebraska.— Walker *v.* Fitzgerald, 69 Nebr. 52, 95 N. W. 32 (order of sale in foreclosure suit); Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.

See 37 Cent. Dig. tit. "New Trial," § 253.

19. Wright *v.* Haddock, 7 Dana (Ky.) 253; Leonard *v.* Cowling, 87 S. W. 812, 27 Ky. L. Rep. 1059; Truett *v.* Legg, 32 Md. 147 (until motion disposed of, although after term); Pearce *v.* Strickler, 9 N. M. 46, 49 Pac. 727; Goddard *v.* Thompson, 47 L. J. Q. B. 382, 38 L. T. Rep. N. S. 166, 26 Wkly. Rep. 362 (but only when rule *nisi* granted by trial court). See also Ross *v.* Garey, 7 How. (Miss.) 47, as to necessity of entry showing that case was taken under advisement during vacation.

20. Stephenson *v.* Hayward, 22 N. Brunsw. 104. See also Jackson *v.* Jackson, 3 Cow. (N. Y.) 73 (order by commissioner of supreme court); Monk *v.* Bartram, [1891] 1 Q. B. 364, 60 L. J. Q. B. 267, 64 L. T. Rep. N. S. 45, 39 Wkly. Rep. 310 (holding that a stay will not be granted by the court of appeal except under special circumstances); Goddard *v.* Thompson, 47 L. J. Q. B. 382, 38 L. T. Rep. N. S. 166, 26 Wkly. Rep. 362 (holding that the application for a stay should be made to the trial court).

21. Case *v.* Shepherd, 1 Johns. Cas. (N. Y.) 245; Van Rensselaer *v.* Dole, 1 Johns. Cas. (N. Y.) 239. See also *supra*, I, D, 3.

When stay commences to run.—A stay of execution to allow time for perfecting an application for a new trial was held to begin to run from the time allowed by statute for perfecting such application. Kendall *v.* O'Neal, 16 Mont. 303, 40 Pac. 599.

22. Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589, stay of proceedings to settle bill of exceptions and move for a new trial. See also Bentsen *v.* Taylor, [1893] 2 Q. B. 193, 62 L. J. Q. B. 516, 69 L. T. Rep. N. S. 333, 4 Reports 508, 41 Wkly. Rep. 593 (as to giving security for costs of the motion); Heckscher *v.* Crosley, [1891] 1 Q. B. 224, 60 L. J. Q. B. 75, 39 Wkly. Rep. 211 (as to giving security for costs of the motion). *Compare* Hallet *v.* Cotton, 1 Cai. (N. Y.) 11, as to requiring the bringing of money into court where bail had become insolvent.

by the giving of bond.[23] A motion for a new trial after the term need not recite that a proper undertaking has been given where the fact appears in the record.[24] A bond given by plaintiff inures to the benefit of a substituted plaintiff.[25] A bond conditioned to pay the judgment on the denial of the motion is enforceable, by action, although an appeal is pending.[26]

F. Notice of Application or Intention to Move[27] — **1. Necessity For Notice — a. In General.** Unless there is some statutory provision or rule of court requiring it, notice of a motion for a new trial made during the trial term appears to be unnecessary.[28] Nevertheless by rules of court or statutes, notice to other parties of the intention to move,[29] or of the motion,[30] or rule *nisi*,[31] or petition or

23. See Frevert *v.* Swift, 19 Nev. 400, 13 Pac. 6 (as to release of bond by giving appeal-bond); Baker *v.* Morath, 40 Ohio St. 157 (as to mistake in recital of judgment); Negley *v.* Jeffers, 28 Ohio St. 90 (as to bond signed by surety only and right to amend same); Mosebach *v.* Reis, 2 Ohio Dec. (Reprint) 295, 2 West. L. Month. 321 (as to time for giving bond); Edgarton *v.* Gill, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 316 (as to requirements of petition in action on bond); McKenna *v.* Tracy, 13 Nova Scotia 392 (as to giving bail-piece instead of bond); Rockwell *v.* Ross, 1 Nova Scotia Dec. 183 (as to practice in putting bail).

What is not an undertaking for new trial.— An entry on the clerk's journal of the deposit of a sum of money by the applicant for a new trial is not an undertaking for a new trial. Shamokin Bank *v.* Street, 16 Ohio St. 1.

24. Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457.

25. Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9.

26. Merchants' Nat. Bank *v.* Leland, 17 Fed. Cas. No. 9,452, 38 How. Pr. 31.

27. **Notice of hearing** see *infra*, IV, O, 4.

Statutory new trial as of right see *infra*, VI.

28. Sholes *v.* Stoddard, Kirby (Conn.) 163; Ryerson *v.* Grover, 1 N. J. L. 392; Hansen *v.* Fish, 27 Wis. 535. See also Herndon *v.* North Carolina R. Co., 121 N. C. 498, 28 S. E. 144, as to application in supreme court.

29. People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Calderwood *v.* Brooks, 28 Cal. 151; Flateau *v.* Lubeck, 24 Cal. 364 (and statement not supply office of notice); Bear River, etc., Water, etc., Co. *v.* Boles, 24 Cal. 354 (as to record not sufficiently showing notice in open court); Mahoney *v.* Caperton, 15 Cal. 313; Caney *v.* Silverthorne, 9 Cal. 67; Pierre First Nat. Bank *v.* Comfort, 4 Dak. 167, 28 N. W. 855; State *v.* State First Nat. Bank, 4 Nev. 358; Gould *v.* Duluth, etc., Elevator Co., 2 N. D. 216, 50 N. W. 969; MacGregor *v.* Pierce, 17 S. D. 51, 95 N. W. 281. See also Godchaux *v.* Mulford, 26 Cal. 316, 85 Am. Dec. 178, as to presumption that notice was given from stipulation settling statement.

Service on attorney.— Service on the attorney last acting for the adverse party is sufficient. Roussin *v.* Stewart, 33 Cal. 208. Service on all the attorneys appearing for adverse parties is not necessary, provided service is had on attorneys representing all such parties. Walsh *v.* Mueller, 14 Mont. 76, 35 Pac. 226.

Evidence of service.—A recital in a statement, unobjected to, of due service of notice of intention to move is conclusive evidence of such fact. Juckett *v.* Fargo Mercantile Co., 18 S. D. 347, 100 N. W. 742.

Presumptions.— Where a new trial is denied as "not the proper remedy," it will be presumed that proper notice of the motion was given. Healdsburg Bank *v.* Hitchcock, 76 Cal. 489, 18 Pac. 648.

Effect of failure to serve notice.— Where defendants fail to serve notice of their intention to move for a new trial, it is proper to settle the statement, although plaintiff objects, and to deny the motion for new trial. Vreeland *v.* Edens, 35 Mont. 413, 89 Pac. 735.

30. *Florida.*— Dupuis *v.* Thompson, 16 Fla. 69.

Iowa.— Callanan *v.* Lewis, 79 Iowa 452, 44 N. W. 892.

Massachusetts.— Cram *v.* Moore, 158 Mass. 276, 33 N. E. 524, failure to serve copy of motion.

New York.— Buchsbaum *v.* Feldman, 43 Misc. 85, 86 N. Y. Suppl. 747.

North Carolina.— Herndon *v.* North Carolina R. Co., 121 N. C. 498, 28 S. E. 144, and copy of affidavits.

Pennsylvania.— Henry *v.* Kennedy, 1 Binn. 458.

Wisconsin.— McWilliams *v.* Bannister, 42 Wis. 301, failure to serve motion and papers on which founded.

England.— Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667, 54 L. J. Q. B. 205, 52 L. T. Rep. N. S. 589, 33 Wkly. Rep. 673.

Canada.— Turner *v.* Hammond, 4 N. Brunsw. 536.

See also 37 Cent. Dig. tit. "New Trial," § 276.

Notice to trial judge.— Under court rules or statutes in some jurisdictions, notice of the motion must be given to the trial judge before the hearing. Lang *v.* Brown, 34 N. Brunsw. 492; Flaherty *v.* Sayre, 2 N. Brunsw. 83.

31. McMullen *v.* Citizens' Bank, 123 Ga. 400, 51 S. E. 342 [*disapproving* Baldwin *v.* Daniel, 69 Ga. 782, on latter point]. See also Shea *v.* Kelly, 96 Ga. 442, 23 S. E. 313, as to failure to serve rule *nisi* as required by order of court. A statute requiring notice of an application for a new trial was held not

complaint for a new trial after the term based on unavoidable casualty preventing prosecution or defense,[32] is generally required.

b. To Whom Given.[33] Where a new trial as to a part only of the parties to the action is permissible, notice need not be given to those parties as to whom a new trial is not asked.[34] Where a co-party of the movant, who would be affected by the allowance of a new trial, does not join in the application, he must be given such notice as is required to be given to adversary parties.[35] If he could not be affected prejudicially by the order, notice need not be served upon him.[36]

2. Form and Contents — a. Requirement of Writing and Signing. Statutes and rules of court generally require that notice of the intention to move or of the application be in writing.[37] Where a statute or rule of court which provides for notice does not expressly require it to be in writing, it must nevertheless be in writing or be given orally in open court and entered on the minutes.[38] A written notice should be signed by the applicant or his attorney.[39]

b. Form in General. Merely technical defects or informalities in a written notice, not calculated to mislead the party notified, should be disregarded.[40] Service of the motion itself specifying the grounds relied on has been held sufficient.[41] And obtaining a stay to make a case and exceptions, making and serving such case and exceptions, and the preparation of amendments thereto by the adverse party, constitute notice of a motion for a new trial.[42] Notice of an intention to move to vacate the judgment is not an equivalent of notice of motion for a new trial.[43] It has been held unnecessary that the notice should state in terms that

to apply to an application for a rule *nisi* in term. Gaulden *v.* Crawford, 30 Ga. 674; Powell *v.* Howell, 21 Ga. 214.

32. Engels *v.* Kiene, (Iowa 1901) 88 N. W. 331. See also Darrance *v.* Preston, 18 Iowa 396, as to sufficiency of notice to non-resident defendant by publication in attachment proceedings. *Compare* Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840.

33. See also *supra*, I, E, 2; IV, C, 3.

34. Adams *v.* Stewart County Bank, 94 Ga. 718, 20 S. E. 356.

35. U. S. *v.* Crooks, 116 Cal. 43, 47 Pac. 870; Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615; Purnell *v.* Great Western R. Co., 1 Q. B. D. 636, 45 L. J. Q. B. 687, 35 L. T. Rep. N. S. 605, 24 Wkly. Rep. 909 [*reversing* 34 L. T. Rep. N. S. 822, 24 Wkly. Rep. 720]; Wakley *v.* Healey, 4 Exch. 53, 18 L. J. Exch. 426 (rule *nisi*); Belcher *v.* Magnay, 3 D. & L. 70, 9 Jur. 475, 14 L. J. Exch. 305, 13 M. & W. 815 note; Commercial Bank *v.* Hughes, 4 U. C. Q. B. 167. See also Johnston *v.* Todd, 5 Beav. 394, 49 Eng. Reprint 630 (as to the right of one not joining in the motion to be heard in its favor); Kerr *v.* Gordon, 9 U. C. Q. B. 249 (as to assent of co-party to application); Belcher *v.* Magnay, 3 D. & L. 70, 9 Jur. 475, 14 L. J. Exch. 305, 13 M. & W. 815 note (holding that a rule *nisi* should be so drawn as to call upon a co-defendant, as well as plaintiff, to show cause why it should not be granted).

36. Sprague *v.* Walton, 145 Cal. 228, 78 Pac. 645.

37. Mallory *v.* See, 129 Cal. 356, 61 Pac. 1123; Galloway *v.* Negle, 1 Yeates (Pa.) 103.

38. Killip *v.* Empire Mill Co., 2 Nev. 34.

39. McMahon *v.* Thomas, 114 Cal. 588, 46 Pac. 732, by attorney of record only.

40. Cook *v.* Sudden, 94 Cal. 443, 29 Pac. 949 (inadvertent omission of one party in title of cause, motion being served on all attorneys in case); O'Connell *v.* Main St., etc., Hotel Co., 90 Cal. 515, 27 Pac. 373; Haight *v.* Tryon, (Cal. 1893) 34 Pac. 712; Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955; Jones *v.* Adams, 17 Nev. 84, 28 Pac. 64 (mistake in classifying error particularly specified); Van Valkenburg *v.* Hull, 1 Nev. 142; State *v.* Pierce County Super. Ct., 19 Wash. 114, 52 Pac. 522 (where notice for "defendant" was held to have been given for defendants).

In Wisconsin a motion for a new trial after judgment cannot be entertained unless joined with a motion to vacate the judgment. Bailey *v.* Costello, 94 Wis. 87, 68 N. W. 663.

41. Boarman *v.* Hinckley, 17 Wash. 126, 49 Pac. 226. And see Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53, holding that while it is correct practice, under the North Dakota code, to serve both a notice of intention to move and a notice of the motion, a notice of motion, otherwise in proper form, which contains a notice that the motion will be made upon the minutes of the court, and upon a ground specifically stated in the notice, will operate as a notice of intention, as well as a notice of motion.

42. Russell *v.* Watertown Agricultural Ins. Co., 19 N. Y. App. Div. 625, 46 N. Y. Suppl. 186.

43. Little *v.* Jacks, 67 Cal. 165, 7 Pac. 449; Sawyer *v.* Sargent, 65 Cal. 259, 3 Pac. 872; Martin *v.* Matfield, 49 Cal. 42. *Compare*, however, O'Connell *v.* Main St., etc., Hotel Co., 90 Cal. 515, 27 Pac. 373, as to motion to set aside the "decision and judgment," setting out grounds for a new trial.

the party seeking a new trial will ask the court to vacate or set aside the verdict or decision [44] or judgment.[45]

c. Statement of Grounds of Motion. Under some codes a notice is fatally defective which does not designate the grounds upon which the motion will be made,[46] and whether it will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case,[47] or which does not specify particular errors of law[48] or insufficiencies of evidence[49] complained of where the motion is made on the minutes of the court. It is sufficient that the notice specify with reasonable clearness and certainty the errors of law or insufficiencies of evidence.[50] A notice is not defective because it states that the motion will be made in two or more ways, and the movant may afterward elect in which way to make it.[51] Grounds not designated in the notice of intention to move are

44. Heinlen *v.* Heilbron, 71 Cal. 557, 12 Pac. 673.

45. Bauder *v.* Tyrrel, 59 Cal. 99.

46. Polk *v.* Boggs, 122 Cal. 114, 54 Pac. 536; Ogle *v.* Potter, 24 Mont. 501, 62 Pac. 920; Worthing *v.* Cutts, 8 Nev. 118; Furlong *v.* Reid, 12 Ont. Pr. 201; Scott *v.* Crerar, 11 Ont. 541.

In Minnesota the rule is otherwise, except where mere reference to the rulings would not disclose alleged errors. King *v.* Burnham, 93 Minn. 288, 101 N. W. 302.

Under the English Judicature Act, the rule is the same as that stated in the text. Pfeiffer *v.* Midland R. Co., 18 Q. B. D. 243, 35 Wkly. Rep. 335; Taplin *v.* Taplin, 13 P. D. 100, 52 J. P. 406, 57 L. J. P. D. & Adm. 79, 58 L. T. Rep. N. S. 925, 37 Wkly. Rep. 256; Murfeet *v.* Smith, 12 P. D. 116, 51 J. P. 374, 56 L. J. P. D. & Adm. 87, 57 L. T. Rep. N. S. 498, 35 Wkly. Rep. 460.

47. Hughes *v.* Alsip, 112 Cal. 587, 44 Pac. 1027; Gregg *v.* Garrett, 13 Mont. 10, 31 Pac. 721.

48. Packer *v.* Doray, 98 Cal. 315, 33 Pac. 118; Neale *v.* Depot R. Co., 94 Cal. 425, 29 Pac. 954; Stower *v.* Lightner, 2 Yeates (Pa.) 40; Wenke *v.* Hall, 17 S. D. 305, 96 N. W. 103; Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943, evidence improperly excluded.

Misdirection of jury.—The notice of motion required by the English Judicature Act must state wherein it is claimed that the jury were misdirected. Pfeiffer *v.* Midland R. Co., 18 Q. B. D. 243, 35 Wkly. Rep. 335; Taplin *v.* Taplin, 13 P. D. 100, 52 J. P. 406, 57 L. J. P. D. & Adm. 79, 58 L. T. Rep. N. S. 925, 37 Wkly. Rep. 256; Murfett *v.* Smith, 12 P. D. 116, 51 J. P. 374, 56 L. J. P. D. & Adm. 87, 57 L. T. Rep. N. S. 498, 35 Wkly. Rep. 460.

Non-direction.— A notice of motion to a divisional court for non-direction should show how and in what matter there was non-direction. Furlong *v.* Reid, 12 Ont. Pr. 201.

That the "judgment" is contrary to law or evidence has been held an insufficient statement of ground. Boston Tunnel Co. *v.* McKinzie, 67 Cal. 485, 8 Pac. 22; Martin *v.* Matfield, 49 Cal. 42; Curtis *v.* Walling, 2 Ida. (Hasb.) 416, 18 Pac. 54; Froman *v.* Patterson, 10 Mont. 107, 24 Pac. 692.

In a notice of intention to move for a new trial embodied in a bill of exceptions, a specification of error that the motion would be made on account of errors in law occurring on the trial and excepted to by plaintiffs is sufficient. Martin *v.* Southern Pac. Co., 150 Cal. 124, 88 Pac. 701.

49. Neale *v.* Depot R. Co., 94 Cal. 425, 29 Pac. 954; Parker *v.* Reay, 76 Cal. 103, 18 Pac. 124; Coveny *v.* Hale, 49 Cal. 552; Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127; Wenke *v.* Hall, 17 S. D. 305, 96 N. W. 103. *Contra,* Ettien *v.* Drum, 35 Mont. 81, 88 Pac. 659 (under Code Civ. Proc. §§ 1152, 1173).

A specification that the evidence is insufficient to support the first finding of fact is insufficient. Parker *v.* Reay, 76 Cal. 103, 18 Pac. 124.

50. *In re* Yoakam, 103 Cal. 503, 37 Pac. 485; Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943; Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205.

Notices held sufficient.— Insufficiency of evidence to justify the "findings and judgment" has been held a proper statement of cause, "judgment" being rejected as surplusage. Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805. *Contra,* Lynch *v.* Milwaukee Harvester Co., 159 Ind. 675, 65 N. E. 1025. A specification in a notice of motion on the ground of irregularity in the proceedings of the jury, that one of the jurors was insane at the time of the trial, is proper and sufficient. Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205. A notice is not insufficient because directed against the "findings" rather than against the "decision." Haight *v.* Tryon, (Cal. 1893) 34 Pac. 712. Notice on the ground that the evidence does not warrant the decision is equivalent to notice that the findings are not supported by the evidence. Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824.

Notice held insufficient.— That the court allowed the jury to take improper papers to their room, or that the verdict was returned in an irregular manner, is an irregularity that cannot be considered under a notice of intention to move because of excessive damages, insufficiency of evidence, and errors of law. Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937.

51. Duncan *v.* Times-Mirror Co., 120 Cal. 402, 52 Pac. 652 (where notice partly in disjunctive); Hart *v.* Kimball, 72 Cal. 283, 13 Pac. 852; Gamer *v.* Glenn, 8 Mont. 371, 20

waived. It is necessary for the moving party to state all the grounds on which he intends to rely.[52]

d. Amendment.[53] In some states a notice of intention to move that is fatally defective cannot be amended after time for giving notice has elapsed.[54] In other jurisdictions the notice may be amended even at the hearing,[55] to specify particular errors.[56]

3. Time For Serving and Filing — a. In General. The notice must be given or served within the time fixed by rule or statute;[57] and, if no time is so fixed, within a reasonable time.[58] It must be also filed within the time required by statute.[59] And it seems that the notice must be filed before it is served under some codes.[60]

b. When Time Commences to Run. Under some codes the time limited for giving notice of intention to move begins to run from the date the movant is served with written notice of the decision in a case tried without a jury,[61] unless

Pac. 654 (although it might be otherwise were the grounds stated in the alternative); Hall *v.* Harris, 1 S. D. 279, 46 N. W. 931, 36 Am. St. Rep. 730. See also Rutherford *v.* Talent, 6 Mont. 112, 9 Pac. 886.

52. Fitch *v.* Bunch, 30 Cal. 208; Stower *v.* Lightner, 2 Yeates (Pa.) 40; Sutterfield *v.* Magowan, 12 S. D. 139, 80 N. W. 180; Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937; Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637; Millner *v.* Sanford, 25 Nova Scotia 227.

53. Amendment of statement see *infra*, IV, K, 5.

54. Packer *v.* Doray, 98 Cal. 315, 33 Pac. 118 (by adding specification of errors); Little *v.* Jacks, 67 Cal. 165, 7 Pac. 449; Cooney *v.* Furlong, 66 Cal. 520, 6 Pac. 388; Sullivan *v.* Helena, 10 Mont. 134, 25 Pac. 94 (by additional ground).

55. Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450 (holding that an "amended notice" is an amendment of the old notice and not a substitution); Furlong *v.* Reid, 12 Ont. Pr. 201.

56. Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450.

57. *California.*— Little *v.* Jacks, 67 Cal. 165, 7 Pac. 449; San Fernando Farm Homestead Assoc. *v.* Porter, 58 Cal. 81; Brady *v.* Feisil, 54 Cal. 180; Sawyer *v.* San Francisco, 50 Cal. 370; Roussin *v.* Stewart, 33 Cal. 208; Carpentier *v.* Thurston, 30 Cal. 123; Ellsassar *v.* Hunter, 26 Cal. 279; People *v.* Hill, 16 Cal. 113, from special verdict.

Georgia.— Smedley *v.* Williams, 112 Ga. 114, 37 S. E. 111 (service of rule *nisi*); Powell *v.* Howell, 21 Ga. 214.

Nevada.— Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441; Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237 (holding that time runs from filing of decision and not from subsequent filing of findings); State *v.* State First Nat. Bank, 4 Nev. 358.

New York.— Buehsbaum *v.* Feldman, 43 Misc. 85, 86 N. Y. Suppl. 747.

Pennsylvania.— Henry *v.* Kennedy, 1 Binn. 458.

Utah.— McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574.

Vermont.— Guilford Overseers of Poor *v.* Jamaica Overseers of Poor, 2 D. Chipm. 104.

See 37 Cent. Dig. tit. "New Trial," § 280.

Equitable proceeding.— Under Nev. Prac. Act, § 197, providing that a party intending to move for a new trial shall give notice of the same, when the action has been tried by a jury, within five days after the rendition of the verdict, and when tried by the court, within ten days after receiving written notice of the decision of the judge, and that he shall prepare and file his statement within five days after giving such notice, where a suit for injunction is tried by the court with a jury, a party may give notice of intention to move for a new trial within ten days after receiving written notice of the decision of the judge, and may prepare and file his statement within five days after giving his notice. State *v.* Murphy, (Nev. 1907) 88 Pac. 335.

Special proceedings.— That N. Y. Code Civ. Proc. § 1002, limiting the time for giving notice does not apply to special proceedings as distinguished from actions see Baumann *v.* Moseley, 63 Hun (N. Y.) 492, 18 N. Y. Suppl. 563; Denise *v.* Denise, 41 Hun (N. Y.) 9 [*affirmed* in 110 N. Y. 562, 18 N. E. 368].

58. Baumann *v.* Moseley, 63 Hun (N. Y.) 492, 18 N. Y. Suppl. 563; Denise *v.* Denise, 41 Hun (N. Y.) 9 [*affirmed* in 110 N. Y. 562, 18 N. E. 368]. See also Martin *v.* Monroe, 107 Ga. 330, 33 S. E. 62, as to reasonableness of time.

59. Gardner *v.* Stare, 135 Cal. 118, 67 Pac. 5; Davis *v.* Hultgren, 125 Cal. 48, 57 Pac. 684 (where clerk refused to file in time for non-payment of fee); Sutton *v.* Symons, 100 Cal. 576, 35 Pac. 158 (although served in time); Forni *v.* Yoell, 99 Cal. 173, 33 Pac. 887; Girdner *v.* Beswick, (Cal. 1885) 8 Pac. 11; Hodgdon *v.* Griffin, 56 Cal. 610; Coveny *v.* Hale, 49 Cal. 552; Quivey *v.* Gambert, 32 Cal. 304; Ellsassar *v.* Hunter, 26 Cal. 279; Ogle *v.* Potter, 24 Mont. 501, 62 Pac. 920; Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441. See also Sullivan *v.* Wallace, 73 Cal. 307, 14 Pac. 789, as to time where service is by mail.

60. McBroom, etc., Co. *v.* Gaudy, 18 Wash. 79, 50 Pac. 572.

61. Mallory *v.* See, 129 Cal. 356, 61 Pac. 1123 [*criticizing* Dow *v.* Ross, 90 Cal. 562, 27 Pac. 409, not limited to time within which appeal will lie]; Forni *v.* Yoell, 99 Cal. 173, 33 Pac. 887; Waddingham *v.* Tubbs, 95 Cal. 249, 30 Pac. 527; Carpenter *v.* Hewel, 67 Cal.

a waiver of actual notice of the decision by the movant is shown by facts appearing in the records, files, or minutes of the court.[62] Where the court amends its conclusions of law and enters judgment, the time for serving notice by one aggrieved by the amendment runs from the entry of judgment.[63]

c. Extension of Time — (I) *By Court.* Statutes requiring notice of intention to move for a new trial usually provide that the time of serving and filing the notice may be extended by order of court on proper showing;[64] but any such order must be made before the expiration of the original time limited by the statute.[65] An order extending the time for preparing and serving a statement of the case does not operate to extend the time for serving or filing the time notice of intention to move.[66] And it has been held that an extension of time for moving for a new trial does not extend the time for giving notice of intention.[67] The additional time begins to run from the expiration of the statutory period, unless the order provides otherwise.[68] But if the notice is given within the statutory time, the extension of time cannot affect subsequent proceedings.[69]

(II) *By Agreement.* The parties may extend the time for serving and filing the notice by written stipulation.[70]

589, 8 Pac. 314; People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Polhemus *v.* Carpenter, 42 Cal. 375 (that the time begins to run from the filing of the decision where findings are not requested); Burnett *v.* Stearns, 33 Cal. 468; Roussin *v.* Stewart, 33 Cal. 208; Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441; State *v.* Murphy, 19 Nev. 89, 6 Pac. 840; Rapid City First Nat. Bank *v.* McCarthy, 13 S. D. 356, 83 N. W. 423 (of formal entry of decision); Everett *v.* Jones, (Utah 1907) 91 Pac. 360; Burlock *v.* Shupe, 5 Utah 428, 17 Pac. 19. See also Carpentier *v.* Thurston, 30 Cal. 123, that the decision of the court dates from the time of filing.

62. Gardner *v.* Stare, 135 Cal. 118, 67 Pac. 5; Mallory *v.* See, 129 Cal. 356, 61 Pac. 1123; California Imp. Co. *v.* Baroteau, 116 Cal. 136, 47 Pac. 1018; Gray *v.* Winder, 77 Cal. 525, 20 Pac. 47; San Fernando Farm Homestead Assoc. *v.* Porter, 58 Cal. 81.

Proof of notice held sufficient.— The obtaining of an order staying execution is record proof of notice of the decision (Gardner *v.* Stare, 135 Cal. 118, 67 Pac. 5. *Compare* Biagi *v.* Howes, 66 Cal. 469, 6 Pac. 100); so is the giving of notice of an intention to move for a new trial (California Imp. Co. *v.* Baroteau, 116 Cal. 136, 47 Pac. 1018; Thorne *v.* Finn, 69 Cal. 251, 10 Pac. 414; Girdner *v.* Beswick, (Cal. 1885) 8 Pac. 11); so is the giving of notice of motion to dismiss the action for failure of the successful party to have judgment entered on the court's findings (Forni *v.* Yoell, 99 Cal. 173, 33 Pac. 887); and notice of the "decision and judgment heretofore rendered and entered herein" is sufficient "notice of the decision of the court" (Waddingham *v.* Tubbs, 95 Cal. 249, 30 Pac. 527).

To constitute a waiver of notice of the decision, the party must do some affirmative act pointed out in the statute not necessary to be done until after the notice. Everett *v.* Jones, (Utah 1907) 91 Pac. 360; Burlock *v.* Shupe, 5 Utah 428, 17 Pac. 19.

What does not amount to waiver.— But it has been held that an application for time to file a motion and statement for a new trial is not a waiver. Burlock *v.* Shupe, 5 Utah 428, 17 Pac. 19. A waiver is not inferred by an oral request out of court by the unsuccessful party's attorney that no more costs be made in entering judgment than can be helped. State *v.* Murphy, 19 Nev. 89, 6 Pac. 840.

Lapse of time.— After fourteen years, the notice of motion is too late, although formal notice of the decision was never given, it appearing that the movant had actual notice of the decision. Gray *v.* Winder, 77 Cal. 525, 20 Pac. 47.

Where a defendant waived notice of decision by obtaining a stay of proceedings, the right of plaintiff to object because the notice of intention to move was not filed within the statutory time was not impaired by the fact that a co-defendant gave to such defendant a notice of the decision on a subsequent date. Gardner *v.* Stare, 135 Cal. 118, 67 Pac. 5.

63. Hamilton *v.* Dooly, 15 Utah 280, 49 Pac. 769.

64. Burton *v.* Todd, 68 Cal. 485, 9 Pac. 663 [*overruling* Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316, and Hook *v.* Hall, (Cal. 1885) 6 Pac. 422, as to time for filing notice]; Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Harper *v.* Minor, 27 Cal. 107.

65. Burton *v.* Todd, 68 Cal. 485, 9 Pac. 663; Clark *v.* Crane, 57 Cal. 629; Thompson *v.* Lynch, 43 Cal. 482; Killip *v.* Empire Mill Co., 2 Nev. 34. *Contra*, Peckett *v.* Short, 32 Wkly. Rep. 123.

66. McGrath *v.* Tallend, 7 Utah 256, 26 Pac. 574.

67. Stevens *v.* Northwestern Stage Co., 1 Ida. 604.

68. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

69. Cottle *v.* Leitch, 43 Cal. 320.

70. Gumpel *v.* Castagnetto, 97 Cal. 15, 31 Pac. 898; Clark *v.* Budd, (Cal. 1891) 27 Pac. 759 (although stipulation not filed within time limited); Simpson *v.* Budd, 91 Cal. 488, 27 Pac. 758.

4. Waiver of Notice or Delay. The adverse party may waive want of notice or delay in serving or filing it by filing a counter statement of the case,[71] or by agreeing upon a brief of the evidence or statement of the case, or assisting in the settlement thereof, without reserving or making the objection.[72] But an objection that the notice is out of time is not waived by accepting service thereof with an express reservation of the right to object on that ground, nor by appearing at the settlement of a bill of exceptions, if the objection is again made,[73] and consenting to an extension of time for preparing a statement with an express reservation of the right to object on other grounds is not a waiver of an objection for want of notice.[74] Defects in the notice may be waived by admitting service of the motion and statement without reserving the right to object,[75] or by appearing and resisting the motion on other grounds only,[76] or by participating in the new trial without making the objection.[77] Service of notice of a rule *nisi* is not waived by counsel for the respondent informing counsel for the movant that a certain day would be suitable for the hearing.[78]

G. Rule Nisi — 1. In General. An application for a rule *nisi* was formerly the common practice,[79] but it has been superseded quite generally by the motion for a new trial.[80]

2. Requisites and Sufficiency. It should state the grounds upon which a new trial is asked.[81] A rule *nisi* may be amended either by correcting informalities and defects,[82] or by adding new grounds at any time before the disposition thereof.[83]

H. Motion For New Trial[84]— 1. Requirement of Writing and Signing. Where not otherwise provided by statute or rule of court, a motion for a new trial on the judge's minutes may be made orally in open court.[85] But statutes and court rules

71. Williams *v.* Gregory, 9 Cal. 76.

72. Schieffery *v.* Tapia, 68 Cal. 184, 8 Pac. 878; Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824; Gray *v.* Nunan, 63 Cal. 220; Hobbs *v.* Duff, 43 Cal. 485; Ganldin *v.* Crawford, 30 Ga. 674; Rutherford *v.* Talent, 6 Mont. 112, 9 Pac. 886; Hamilton *v.* Dooly, 15 Utah 280, 49 Pac. 769 (where the only objection reserved was to time of serving statement); Cereghino *v.* Cereghino, 4 Utah 100, 6 Pac. 523.

73. Gnmpel *v.* Castagnetto, 97 Cal. 15, 31 Pac. 898.

74. Killip *v.* Empire Mill Co., 2 Nev. 34. See also Vreeland *v.* Edens, 35 Mont. 413, 89 Pac. 735.

75. Schieffery *v.* Tapia, 68 Cal. 184, 8 Pac. 878.

76. *Georgia.*— Powell *v.* Howell, 21 Ga. 214.

Iowa.— Means *v.* Yeager, 96 Iowa 694, 65 N. W. 993.

Montana.— Gregg *v.* Garrett, 13 Mont. 10, 31 Pac. 721.

North Dakota.—Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

Utah.—Cereghino *v.* Cereghino, 4 Utah 100, 6 Pac. 523.

See 37 Cent. Dig. tit. "New Trial," § 279.

Illustration.— Where the motion was made orally when the verdict was rendered and no objection was made that proper notice had not heen given, and the successfnl party appeared at the hearing, further notice was waived. O'Gorman *v.* Teets, 20 Misc. (N. Y.) 359, 45 N. Y. Suppl. 929; Krakower *v.* Davis, 20 Misc. (N. Y.) 350, 45 N. Y. Snppl. 780.

77. Jester *v.* Lekite, 5 Harr. (Del.) 19.

78. Smedley *v.* Williams, 112 Ga. 114, 37 S. E. 111.

79. See Georgia R., etc., Co. *v.* Usry, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140 (holding that while a rule *nisi* seems requisite to strict practice in some states, the regnlar entry thereof may be waived); Spence *v.* Holman, 30 Ga. 646 (holding that there can be no error in granting a rnle *nisi* which reserves all questions until the final hearing).

For service of rule nisi see *supra*, IV, F, 3.

80. Before the Judicature Act, a motion for a new trial, as distingnished from a rule *nisi*, was unknown. Scott *v.* Crerar, 11 Ont. 541.

81. Strange *v.* Dillon, 22 U. C. Q. B. 223. See also Watson *v.* Lane, 11 Exch. 769, 2 Jur. N. S. 119, 25 L. J. Exch. 101, 4 Wkly. Rep. 293, as to snfficient specification of misdirection on measnre of damages. Bnt it seems that the court is not limited to the consideration of snch grounds upon the hearing. Stanford *v.* Inland Nav. Co., 3 Nova Scotia 185; Moody *v.* Aetna Ins. Co., 3 Nova Scotia 173.

82. Longley *v.* Northern Ins. Co., 12 Nova Scotia 516.

83. McCully *v.* Dykeman, 12 Nova Scotia 482; Elliott *v.* Smith, 3 Nova Scotia 8.

84. Petition or statutory action for new trial after term see *infra*, IV, I.

Rehearing in equity see Equity, 16 Cyc. 426 *et seq.*

85. William Moneagle, etc., Co. *v.* Livingston, (Ala. 1907) 43 So. 840; Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375,

generally require all such motions to be in writing,[86] and signed by the movant or his attorney.[87] The motion need not be verified where it is supported by affidavits.[88]

2. Sufficiency in General. Technical informalities and defects do not render a motion invalid, if the purpose and grounds thereof are reasonably clear.[89] Where the movant claims to have been "unavoidably prevented" from making the motion within the usual statutory time, the motion must state facts showing such prevention.[90] A motion need not, because made after the term, definitely show when the judgment was rendered.[91]

3. Statement of Grounds[92] — a. In General. It seems that, in the absence of a statute or rule or order of court requiring it, a motion for a new trial need not state the grounds upon which it is made.[93] And under those codes which provide that the notice of intention to move for a new trial shall state the grounds of the motion and how it will be made, and that the notice or statement shall specify the particular errors or insufficiencies in evidence complained of, a formal written statement of the grounds in the motion may be dispensed with.[94] But, under statutes or rules of court in many jurisdictions, it is necessary to specify clearly the grounds of error in the motion, both for the purpose of a hearing thereof by the trial court, or for the purpose of review by the appellate court,[95] and all the grounds for a new trial, known to exist at the time, should be included in one

46 N. E. 978; Doster *v.* Sterling, 33 Kan. 381, 6 Pac. 556; Hansen *v.* Fish, 27 Wis. 535.

86. Addleman *v.* Erwin, 6 Ind. 494; McKinney *v.* Springer, 6 Ind. 453; Douglass *v.* Insley, 34 Kan. 604, 9 Pac. 475; Phœnix Ins. Co. *v.* Readinger, 28 Nebr. 586, 44 N. W. 864; Cedar County *v.* Goetz, 3 Nebr. (Unoff.) 172, 91 N. W. 177; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

87. Smith *v.* Fordyce, (Tex. 1891) 18 S. W. 663.

88. St. Louis, etc., R. Co. *v.* Gaston, 67 Kan. 217, 72 Pac. 777, newly discovered evidence. See also Wofford *v.* Buchel Power, etc., Co., 35 Tex. Civ. App. 531, 80 S. W. 1078.

89. *District of Columbia.*— Jones *v.* Pennsylvania R. Co., 7 Mackey 426, omission of words "bill of" in motion for new trial on bill of exceptions.

Florida.—Baggett *v.* Savannah, etc., R. Co., 45 Fla. 184, 34 So. 564.

Indiana.— Burt *v.* Hœttinger, 28 Ind. 214 (where motion was deemed to embrace all defendants); Kimball *v.* Whitney, 15 Ind. 280 (where reasons assigned showed motion intended for all plaintiffs); Humphries *v.* Marshall, 12 Ind. 609.

Kansas.— Hartley *v.* Chidester, 36 Kan. 363, 13 Pac. 578, where motion to "set aside and vacate the verdict" was treated as a motion for a new trial.

Washington.—McInnes *v.* Sutton, 35 Wash. 384, 77 Pac. 736, where protest against entry of judgment was treated as a motion for a new trial.

See 37 Cent. Dig. tit. "New Trial," § 250.

A petition for a new trial containing all the statements necessary to constitute a good motion may be treated as a motion, if it is essential to proceed by motion. Hunter *v.* Porter, 124 Iowa 351, 100 N. W. 53.

90. *Georgia.*— Watts *v.* White Hickory Wagon Co., 108 Ga. 809, 34 S. E. 147.

Indian Territory.— Mann *v.* Carson, 5 Indian Terr. 115, 82 S. W. 692 (insufficient reason given); Waitman *v.* Bowles, 3 Indian Terr. 294, 58 S. W. 686.

Kansas.— Hopkins *v.* Watson, 67 Kan. 858, 74 Pac. 233.

Pennsylvania.— O'Donnell *v.* Flanigan, 9 Pa. Super. Ct. 136.

Wyoming.— Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878; McLaughlin *v.* Upton, 3 Wyo. 48, 2 Pac. 534.

See 37 Cent. Dig. tit. "New Trial," § 250.

91. Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457.

92. Amendment see *infra*, IV, H, 5.

Requisites and sufficiency of statement in criminal prosecutions see Criminal Law, 12 Cyc. 755 *et seq.*

Statement of grounds in notice of motion for new trial see *supra*, IV, F, 2, c.

93. Jones *v.* Pennsylvania R. Co., 7 Mackey (D. C.) 426 (at least where enumerated in a bill of exceptions); Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978; May *v.* May, 36 Ill. App. 77; Ryerson *v.* Grover, 1 N. J. L. 392. *Compare* St. Louis Consol. Coal Co. *v.* Schaefer, 31 Ill. App. 364 [*affirmed* in 135 Ill. 210, 25 N. E. 788].

94. Rutherford *v.* Talent, 6 Mont. 112, 9 Pac. 886. And see Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

Motion made on minutes of court.— A motion for a new trial made on the minutes of the court may refer to the notice of intention to move for particular specifications of errors or insufficiencies of evidence; and a motion made on a statement of the case or bill of exceptions already on file may refer to such statement or bill for such specifications, or to the notice incorporated therein for grounds stated in it. Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762.

95. *Alaska.*—Barnette *v.* Freeman, 2 Alaska 286; Chase *v.* Alaska Fish, etc., Co., 2 Alaska

motion.[96] The rule as stated in some decisions is that the particular ground or cause must be set forth with such certainty that it may be known by a person of

82; Marks *v.* Shoup, 2 Alaska 66; Williams *v.* Alaska Commercial Co., 2 Alaska 43.

California.— Kent *v.* Williams, 146 Cal. 3, 79 Pac. 527; Leonard *v.* Shaw, 114 Cal. 69, 45 Pac. 1012; Bohnert *v.* Bohnert, 95 Cal. 444, 30 Pac. 590; Hershey *v.* Kness, 75 Cal. 115, 16 Pac. 548; Hutton *v.* Reed, 25 Cal. 478; Walls *v.* Preston, 25 Cal. 59.

Connecticut.— Hoey *v.* Hoey, 36 Conn. 386; Reed *v.* Gallagher, 34 Conn. 498; Beers *v.* St. John, 16 Conn. 322.

Georgia.— Newman *v.* Cross, 108 Ga. 776, 33 S. E. 641 (unintelligible statement); Bessman *v.* Girardey, 66 Ga. 18 (wherein verdict did not cover issues); Rooney *v.* Grant, 40 Ga. 191.

Illinois.— Hutchison *v.* Moore Bros. Furniture Co., 85 Ill. App. 456.

Indiana.— Emison *v.* Shepard, 121 Ind. 184, 22 N. E. 883; La Follette *v.* Higgins, 109 Ind. 241, 9 N. E. 780; Harris *v.* Boone, 69 Ind. 300; Vaughn *v.* Ferrall, 57 Ind. 182; Myers *v.* Jarboe, 56 Ind. 57; Krutz *v.* Craig, 53 Ind. 561; Noble *v.* Dickson, 48 Ind. 171; Shore *v.* Taylor, 46 Ind. 345; Rogers *v.* Rogers, 46 Ind. 1; Sim *v.* Hurst, 44 Ind. 579; Wilson *v.* Root, 43 Ind. 486; Marley *v.* Noblett, 42 Ind. 85; Ward *v.* Patrick, 41 Ind. 438; Whaley *v.* Gleason, 40 Ind. 405; Shover *v.* Jones, 32 Ind. 141; Stevens *v.* Nevitt, 15 Ind. 224; Lagro, etc., Plank Road Co. *v.* Eriston, 10 Ind. 342; Thompson *v.* Shaefer, 9 Ind. 500; Nutter *v.* State, 9 Ind. 178; Madison, etc., R. Co. *v.* Franklin Tp., 8 Ind. 528; Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492.

Indian Territory.— Harris *v.* Bruton, 2 Indian Terr. 524, 53 S. W. 322.

Iowa.— Beal *v.* Stone, 22 Iowa 447.

Kentucky.— McLain *v.* Dibble, 13 Bush 297; Reed *v.* Miller, 1 Bibb 142; Taylor *v.* Giger, Hard. 586; Sellars *v.* Cincinnati, etc., R. Co., 29 S. W. 332, 16 Ky. L. Rep. 833; Halloran *v.* Louisville, etc., R. Co., 5 Ky. L. Rep. 245; Combs *v.* Hargis, 4 Ky. L. Rep. 446.

Maine.— Bartlett *v.* Lewis, 58 Me. 350.

Massachusetts.— Brown *v.* Swan, 1 Mass. 202.

Minnesota.— Olson *v.* Berg, 87 Minn. 277, 91 N. W. 1103.

Montana.— Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258; Taylor *v.* Holter, 2 Mont. 476; Griswold *v.* Boley, 1 Mont. 545.

Nebraska.— Phœnix Ins. Co. *v.* Readinger, 28 Nebr. 587, 44 N. W. 864.

Nevada.— Hoopes *v.* Meyer, 1 Nev. 433.

New York.— Brunner *v.* Downs, 17 N. Y. Suppl. 633.

North Dakota.— Thompson *v.* Cunningham, 6 N. D. 426, 71 N. W. 128.

Ohio.— Hoffman *v.* Gordon, 15 Ohio St. 211; Westfall *v.* Dungan, 14 Ohio St. 276.

Oklahoma.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867.

Texas.— Wofford *v.* Buchel Power, etc., Co., 35 Tex. Civ. App. 531, 80 S. W. 1078; Connor *v.* Saunders, 9 Tex. Civ. App. 56, 29 S. W. 1140.

Utah.— Paragoonah Field, etc., Co. *v.* Edwards, 9 Utah 477, 35 Pac. 487.

Vermont.— Montpelier, etc., R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960.

Wyoming.— Uinta County *v.* Hinton, 1 Wyo. 355; Mosher *v.* Hilliard Flume, etc., Co., 1 Wyo. 355; Ivinson *v.* Alsop, 1 Wyo. 251; Wilson *v.* O'Brien, 1 Wyo. 42.

See 2 Cent. Dig. tit. "Appeal and Error," § 1743; 37 Cent. Dig. tit. "New Trial," §§ 254, 255, 256.

Rule of court requiring specification of errors not retroactive.— Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598.

A general assignment, in a motion for new trial, that the court erred in overruling objections of defendant, will be disregarded, where any one was properly overruled. Startzer *v.* Clarke, (Nebr. 1901) 95 N. W. 509.

Separate statement of grounds.— A separate statement of the grounds for a new trial need not be filed, unless required by statute or rule of court; and an entry of the grounds in the motion docket following the entry of the motion is sufficient. Dupuis *v.* Thompson, 16 Fla. 69.

Effect of joint motion for new trial.— Where a verdict is returned against plaintiff and in favor of several defendants on distinct defenses, and a single joint motion for new trial is overruled, the court on appeal is only required to examine the record enough to ascertain the fact that the verdict is good as to any one defendant. Lydick *v.* Gill, 68 Nebr. 273, 94 N. W. 109.

Where an error assigned does not apply to all the parties against whom the motion is directed, the party to whom it is applicable should be specified. Prescott *v.* Haughey, 152 Ind. 517, 51 N. E. 1051, 53 N. E. 766.

Statement of exception to ruling unnecessary.— It is unnecessary to follow a specific assignment of error in a motion for a new trial with a statement that the moving party excepts to the ruling so assigned. Prizer-Painter Stove, etc., Co. *v.* Peaslee, 99 Minn. 275, 109 N. W. 232.

Waiver of objection to specification.—After a new trial has been granted, it is too late to object that a specification of error was too general. Ohio, etc., R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; Kloster *v.* Elliott, 123 Ind. 176, 24 N. E. 99.

96. Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383; Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593.

Where a motion and "supplemental" motion were filed within the time limited for filing a motion, the latter motion only was considered. Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593. *Compare* Preble *v.* Bates, 37 Fed. 772.

good understanding what is relied upon,[97] and in others that the motion must be so certain and specific as not to impose upon the court the task of searching the record for alleged erroneous rulings.[98] It is sufficient to state a specific ground for a new trial included within one of the more general causes enumerated by the statute, without expressly alleging the existence of the general cause.[99]

b. Only Grounds Specified Considered. Grounds not stated in the motion or written statement will not be considered at the hearing by the trial court.[1] And

A second application under a distinct statute may be permissible. Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840.

97. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

98. Henley *v.* Brockman, 124 Ga. 1059, 53 S. E. 672; Hicks *v.* Mather, 107 Ga. 77, 32 S. E. 901; Herz *v.* H. B. Claflin Co., 101 Ga. 615, 29 S. E. 33; Reese *v.* Caffee, 133 Ind. 14, 32 N. E. 720; Craig *v.* Ensey, 63 Ind. 140; Stewart *v.* Ritterskamp, 54 Ind. 357; Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492; Beugnot *v.* State, 11 Ind. App. 620, 39 N. E. 531.

Applications of rule.— In accordance with the principles stated in the text the following specifications of error have been held too general for consideration: "That the court erred in rendering judgment for the defendant." Stone *v.* Wolfskill, 59 Mo. App. 441. Error of law occurring at the trial, and excepted to at the time. Cobb *v.* Malone, 92 Ala. 630, 9 So. 738; Williams *v.* Alaska Commercial Co., 2 Alaska 43; Moore *v.* Steelsmith, 1 Alaska 121; Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879; Etchells *v.* Wainwright, 76 Conn. 534, 57 Atl. 121; Baynes *v.* Allison, 108 Ga. 782, 33 S. E. 682; West Chicago St. R. Co. *v.* Krueger, 168 Ill. 586, 48 N. E. 442 [*affirming* 67 Ill. App. 574]; Petitt *v.* Petitt, 138 Ind. 597, 38 N. E. 179; Dutch *v.* Anderson, 75 Ind. 35; Mason *v.* Moulden, 58 Ind. 1; Bowman *v.* Phillips, 47 Ind. 341; Marley *v.* Noblett, 42 Ind. 85; Pittsburg, etc., R. Co. *v.* Hennigh, 39 Ind. 509; Elliott *v.* Woodward, 18 Ind. 183; Scoville *v.* Chapman, 17 Ind. 470; Ham *v.* Carroll, 17 Ind. 442; Phelps *v.* Tilton, 17 Ind. 432; McCammock *v.* Clark, 16 Ind. 320; Snodgrass *v.* Hunt, 15 Ind. 274; Medler *v.* Hiatt, 14 Ind. 405; Barnard *v.* Graham, 14 Ind. 322; Brackett *v.* Brackett, 23 Ind. App. 530, 55 N. E. 783; Hughes Bros. Mfg. Co. *v.* Reagan, 4 Indian Terr. 472, 69 S. W. 940; Meaux *v.* Meaux, 81 Ky. 475; Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; McLain *v.* Dibble, 13 Bush (Ky.) 297; Ohio Valley R., etc., Co. *v.* Kuhn, 5 S. W. 419, 9 Ky. L. Rep. 467; Wathen *v.* Byrne, 10 Ky. L. Rep. 193; Cincinnati, etc., R. Co. *v.* Pemberton, 9 Ky. L. Rep. 859; Taylor *v.* Holter, 2 Mont. 476; Walter A. Wood Mowing, etc., Mach. Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867; Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943. *Contra*, Da Lee *v.* Blackburn, 11 Kan. 190; Albright *v.* Peters, 58 Nebr. 534, 78 N. W. 1063; Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955. "That the verdict is contrary to law." Hoskins *v.* Brown, 84 S. W. 767, 27 Ky. L. Rep. 216; Sellars *v.* Cincinnati, etc., R. Co., 29 S .W. 332, 16 Ky. L. Rep. 833; Wathen *v.* Byrne, 10 Ky. L. Rep. 193. See also Hogg *v.* Gammon, 127 Ga. 296, 56 S. E. 404. "Error in the amount of recovery." Wathen *v.* Byrne, *supra*. That "the judgment of the court is contrary to law and the evidence." Buell *v.* Shuman, 28 Ind. 464. That "the verdict is contrary to the law and the evidence." Wallis *v.* Turner, (Tex. Civ. App. 1906) 95 S. W. 61; Texas, etc., R. Co. *v.* Norman, (Tex. Civ. App. 1906) 91 S. W. 594; San Antonio, etc., R. Co. *v.* Thigpen, (Tex. Civ. App. 1903) 75 S. W. 836; Voelcker *v.* McKay, (Tex. Civ. App. 1901) 61 S. W. 424 [*reversing* (Civ. App. 1901) 60 S. W. 798]. That "the verdict and judgment are contrary to law." Payton *v.* Love, 20 Tex. Civ. App. 613, 49 S. W. 1109. That "the court erred in the law on the trial of the case." Combs *v.* Hargis, 4 Ky. L. Rep. 446. "For irregularities in the proceedings of the Court, and abuse of discretion, by which the defendants were prevented from having a fair trial." Scoville *v.* Chapman, 17 Ind. 470. "Irregularity in the proceedings of the court." Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315. That the verdict is excessive and contrary to the charge and that there were no facts upon which to base a judgment against certain named defendants. Connor *v.* Saunders, 9 Tex. Civ. App. 56, 29 S. W. 1140. That "the findings and judgment are against law." Taylor *v.* Holter, 2 Mont. 476.

A concluding specification of "various other reasons apparent of record" presents no error not otherwise referred to. West Chicago St. R. Co. *v.* Krueger, 168 Ill. 586, 48 N. E. 442 [*affirming* 67 Ill. App. 574].

99. Marbourg *v.* Smith, 11 Kan. 554; Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944; Boyd *v.* Bryan, 11 Okla. 56, 65 Pac. 940. See also Chicago, etc., R. Co. *v.* Martin, 28 Ind. App. 468, 63 N. E. 247, where it was claimed that specification attempted to combine two grounds.

Illustration.— A ground complaining that the verdict is contrary to instructions is a complaint that it is contrary to law. Georgia R., etc., Co. *v.* Jordan, 122 Ga. 422, 50 S. E. 123; Spearman *v.* Sanders, 121 Ga. 468, 49 S. E. 296.

1. *Alabama.*— Dothan Bank *v.* Wilks, 132 Ala. 573, 31 So. 451.

Alaska.— Williams *v.* Alaska Commercial Co., 2 Alaska 43.

Arkansas.— Choctaw, etc., R. Co. *v.* Goset, 70 Ark. 427, 68 S. W. 879.

Connecticut.— Thompson School Dist. No. 8 *v.* Lynch, 33 Conn. 330.

Georgia.— Turner *v.* Pearson, 93 Ga. 515, 21 S. E. 104; Shipley *v.* Elswald, 54 Ga. 520 (although other grounds are stated fully in

similarly it is held that on appeal or error the reviewing court will not consider any grounds other than those specified in the motion. A party making a motion for new trial is bound by the reasons assigned therein and can urge no other on appeal. All matters which are grounds for new trial and which are not set out in the motion are waived.[2]

affidavits produced at the hearing); Powell *v.* Howell, 21 Ga. 214. See also Hunley *v.* Columbus, 92 Ga. 447, 17 S. E. 675, as to refusal to strike "superfluous" or "illegal" ground.

Illinois.— Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337 [*affirming* 102 Ill. App. 403]; Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658 [*affirming* 96 Ill. App. 536]; People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652]; West Chicago St. R. Co. *v.* Krueger, 168 Ill. 586, 48 N. E. 442; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Jones *v.* Jones, 71 Ill. 562; Richardson *v.* Benes, 115 Ill. App. 532; Cicero *v.* Bartelme, 114 Ill. App. 9 [*affirmed* in 212 Ill. 256, 72 N. E. 437]; Elgin *v.* Thompson, 98 Ill. App. 358; Hutchison *v.* Moore Bros. Furniture Co., 85 Ill. App. 456; Gilbert *v.* Schilz, 83 Ill. App. 185; Niedner *v.* Friedrich, 69 Ill. App. 622; St. Louis Consol. Coal Co. *v.* Schaefer, 31 Ill. App. 364 [*affirmed* in 135 Ill. 210, 25 N. E. 788]. *Compare* May *v.* May, 36 Ill. App. 77.

Iowa.— Beal *v.* Stone, 22 Iowa 447.

Kentucky.— Harris *v.* Southern R. Co., 76 S. W. 151, 25 Ky. L. Rep. 559; Todd *v.* Louisville, etc., R. Co., 11 S. W. 8, 10 Ky. L. Rep. 864.

Maine.— Tuell *v.* Paris, 23 Me. 556.

England.— Doe *v.* Baster, 5 A. & E. 129, 2 Harr. & W. 264, 6 N. & M. 541, 31 E. C. L. 552.

Canada.— Rogers *v.* Munns, 25 U. C. Q. B. 153.

See 37 Cent. Dig. tit. "New Trial," § 254 *et seq.*

2. *Alabama.*— Geter *v.* Central Coal Co., (1907) 43 So. 367.

Arkansas.— Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088; Ferguson *v.* Ehrenberg, 39 Ark. 420; Mills *v.* Jones, 27 Ark. 506; Graham *v.* Roark, 23 Ark. 19; Collier *v.* State, 20 Ark. 36; Daniel *v.* Guy, 19 Ark. 121; Hopkins *v.* Dowd, 11 Ark. 627.

California.— Kaiser *v.* Dalto, 140 Cal. 167, 73 Pac. 828; Himmelmann *v.* Hoadley, 44 Cal. 213; Hawkins *v.* Abbott, 40 Cal. 639; Vassault *v.* Seitz, 31 Cal. 225; Crowther *v.* Rowlandson, 27 Cal. 376; Moore *v.* Murdock, 26 Cal. 514.

Georgia.— Phœnix Ins. Co. *v.* Schwartz, 115 Ga. 113, 41 S. E. 240, 90 Am. St. Rep. 98, 57 L. R. A. 752; Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646.

Idaho.— Watson *v.* Molden, 10 Ida. 570, 79 Pac. 503.

Illinois.— Chicago City R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716 [*affirming* 124 Ill. App. 627]; Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122 [*affirming* 126 Ill. App. 119]; Spring Valley Coal Co. *v.* Chiaventone, 214 Ill. 314, 73 N. E. 420; Illinois Cent. R. Co. *v.* Johnson, 191 Ill. 594, 61 N. E. 334 [*affirming* 95 Ill. App. 54]; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Landt *v.* McCullough, 121 Ill. App. 328 [*affirmed* in 218 Ill. 607, 75 N. E. 1069]; Enright *v.* Gibson, 119 Ill. App. 411 [*affirmed* in 219 Ill. 550, 76 N. E. 689]; Koehler *v.* King, 119 Ill. App. 6; Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359; Brillow *v.* Oziemkowski, 112 Ill. App. 165; Chicago, etc., R. Co. *v.* Urhaniac, 106 Ill. App. 325; Tri-City R. Co. *v.* Weaver, 106 Ill. App. 312; Central School Supply House *v.* Hirschy, 106 Ill. App. 258; Spolek Denni Hlasatel *v.* Hoffman, 105 Ill. App. 170 [*affirmed* in 204 Ill. 532, 68 N. E. 400]; Enders *v.* Hitch, 104 Ill. App. 664; Janeway *v.* Burton, 102 Ill. App. 403 [*affirmed* in 201 Ill. 78, 66 N. E. 337]; Whiteside *v.* Collier, 100 Ill. App. 611; Newton Rubber Works *v.* Home Rattan Co., 100 Ill. App. 421; Supreme Ct. of Honor *v.* Barker, 96 Ill. App. 490; Chicago Great Western R. Co. *v.* Black, 96 Ill. App. 435; People *v.* Petrie, 94 Ill. App. 652 [*affirmed* in 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268]; Garden City Wire Spring Co. *v.* Boecher, 94 Ill. App. 96; Van Vlissingen *v.* Blum, 92 Ill. App. 145; Lichliter *v.* Russell, 89 Ill. App. 62; Gilbert *v.* Schilz, 83 Ill. App. 185; Geist *v.* Pollock, 58 Ill. App. 429; Stuve *v.* McCord, 52 Ill. App. 331; Radeke *v.* Cook, 21 Ill. App. 595; Clause *v.* Bullock Printing Press Co., 20 Ill. App. 113.

Indiana.— Nesbitt *v.* Stevens, 161 Ind. 519, 69 N. E. 256; Surber *v.* Mayfield, 156 Ind. 375, 60 N. E. 7; Kernodle *v.* Gibson, 114 Ind. 451, 17 N. E. 99; Myers *v.* State, 47 Ind. 293; Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475; Noah *v.* German-American Bldg. Assoc., 31 Ind. App. 504, 68 N. E. 615; Brandis *v.* Grissom, 26 Ind. App. 661, 60 N. E. 455.

Indian Territory.— Hughes Bros. Mfg. Co. *v.* Reagan, 4 Indian Terr. 472, 69 S. W. 940.

Iowa.— Sharpless Co. *v.* Day, (1902) 90 N. W. 814.

Kentucky.—Farmer *v.* Gregory, 78 Ky. 475; McLain *v.* Dibble, 13 Bush 297; Slater *v.* Sherman, 5 Bush 206; Illinois Cent. R. Co. *v.* Burton, 79 S. W. 231, 25 Ky. L. Rep. 1916; Prather *v.* Phelps, 5 Ky. L. Rep. 184; Burks *v.* McFela, 4 Ky. L. Rep. 833.

Minnesota.— Nye *v.* Kahlow, 98 Minn. 81, 107 N. W. 733.

Mississippi.—Bell *v.* Flaherty, 45 Miss. 694.

Missouri.—Coffey *v.* Carthage, 200 Mo. 616, 98 S. W. 562; Bollinger *v.* Carrier, 79 Mo. 318; Morton *v.* J. I. Case Threshing Mach. Co., (App. 1903) 74 S. W. 434; Story, etc., Piano Co. *v.* Gibbons, 96 Mo. App. 218, 70 S. W. 168; Snyder *v.* Wabash R. Co., 85 Mo. App. 495; Farmers, etc., Bank *v.* McMullen, 85 Mo. App. 142; Price Baking Powder Co.

c. Aider by Reference to Bill of Exceptions. In some states a general statement of ground is not aided by reference to a bill of exceptions not on file when

v. Calumet Baking Powder Co., 82 Mo. App. 19; Middleton Grocery Co. *v.* Day, 54 Mo. App. 419; Krum *v.* Jones, 25 Mo. App. 71; Hildreth Printing Co. *v.* Stokes, 14 Mo. App. 591.

Montana.— *In re* Colbert, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439; Carron *v.* Wood, 10 Mont. 500, 26 Pac. 388; Griswold *v.* Boley, 1 Mont. 545.

Nebraska.— Lincoln Traction Co. *v.* Moore, 70 Nebr. 422, 97 N. W. 605.

Ohio.— Remington *v.* Harrington, 8 Ohio 507.

New York.— Koehler *v.* New York Steam Co., 71 N. Y. App. Div. 222, 75 N. Y. Suppl. 597.

Oklahoma.— White *v.* Madison, 16 Okla. 212, 83 Pac. 798; McDonald *v.* Carpenter, 11 Okla. 115, 65 Pac. 942; Walter A. Wood Mowing, etc., Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867.

Texas.— Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

West Virginia.— Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

See 2 Cent. Dig. tit. "Appeal and Error," § 1753.

In Illinois, where the losing party fails to file a written motion for a new trial, specifying the grounds therefor, his right to review the judgment is in no wise affected where the successful party has failed to move that such a motion be filed. Merritt *v.* Le Clair, 118 Ill. App. 328; Streator Independent Tel. Co. *v.* Continental Tel. Constr. Co., 118 Ill. App. 14 [*affirmed* in 217 Ill. 577, 75 N. E. 546]; Kniel *v.* Spring Valley Coal Co., 96 Ill. App. 411.

Admission or exclusion of evidence.— Objections to evidence not referred to in a motion for a new trial are waived. McCarver *v.* Doe, 135 Ala. 542, 33 So. 486; Planters' Mut. Ins. Co. *v.* Hamilton, 77 Ark. 27, 90 S. W. 283; Mt. Nebo Anthracite Coal Co. *v.* Williamson, 73 Ark. 530, 84 S. W. 779; Springer *v.* Springer, (Cal. 1901) 64 Pac. 470; Pritchett *v.* Samuel Weichselbaum Co., 119 Ga. 293, 46 S. E. 99; Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668]; Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351.

Giving or refusing instructions.— Instructions not complained of in the motion for a new trial will not be reviewed. Chilton *v.* Chilton, 106 Ill. App. 388; Snyder *v.* Nelson, 101 Ill. App. 619; Blake *v.* Whitt, (Ky. 1906) 94 S. W. 661; Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Llewellyn *v.* Spangler, 109 Mo. App. 396, 88 S. W. 1021; Jennings *v.* Kansas City, 105 Mo. App. 677, 78 S. W. 1041; Waters-Pierce Oil Co. *v.* Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272; Fullerton *v.* Carpenter, 97 Mo. App. 197, 71 S. W. 98; Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51; Haggerty *v.* Lash, 34 Mont. 517, 87 Pac. 907; Davis *v.* Hall, 70 Nebr. 678, 97 N. W. 1023; Wayne First Nat. Bank *v.* Tolerton, etc., Co., 5 Nebr. (Unoff.) 43, 97 N. W. 248; Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944.

Sufficiency of evidence to sustain verdict.— Where no question was raised in a motion for a new trial as to the sufficiency of the testimony to sustain the verdict, assignments attempting to raise that issue on appeal will not be considered. Henderson Brewing Co. *v.* Folden, 76 S. W. 520, 25 Ky. L. Rep. 969; Clarke *v.* Case, 144 Mich. 148, 107 N. W. 893; Moore *v.* Pierson, (Tex. Civ. App. 1906) 93 S. W. 1007; Riske *v.* Rotan Grocery Co., (Tex. Civ. App. 1906) 93 S. W. 708; Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385; Houston, etc., R. Co. *v.* Shults, (Tex. Civ. App. 1903) 78 S. W. 45.

Where a motion for new trial is made on the ground that the verdict is contrary to the evidence because certain facts have not been proved, the party making the motion is precluded on appeal from urging the general ground that the verdict is not sustained by sufficient evidence. Myers *v.* State, 47 Ind. 293.

Judgment unsupported by law and evidence.— So where an appellant's motion for new trial is based only upon the alleged error of the court in not admitting proper evidence offered, the appellate court will not review the rulings of the trial court on instructions or determine whether the judgment is supported by the law and the evidence Middleton Grocery Co. *v.* Day, 54 Mo. App. 419.

Excessive damages.— If an appellant does not claim in his notice for a new trial in the court below that the damages awarded are excessive, he will not be heard to raise the question in the appellate court. Danville *v.* Bolton, 97 Ill. App. 94; Eggleston *v.* Hadfield, 94 Ill. App. 481; North Chicago St. R. Co. *v.* Burgess, 94 Ill. App. 337; Werner *v.* Evans, 94 Ill. App. 328; Central R. Co. *v.* Knowles, 93 Ill. App. 581 [*affirmed* in 191 Ill. 241, 60 N. E. 829]; Corrigan *v.* Kansas City, 93 Mo. App. 173; Chicago City R. Co. *v.* T. W. Jones Furniture Transit Co., 92 Ill. App. 507; Southwestern Cotton Seed Oil Co. *v.* Stroud Bank, 12 Okla. 168, 70 Pac. 205.

Ruling on motion to amend answer.— The appellate court cannot review the trial court's action in refusing an amendment of the answer at the trial, unless such action is assigned as error in the motion for a new trial. Stainback *v.* Henderson, 79 Ark. 176, 95 S. W. 786; Kirby *v.* Wabash R. Co., 85 Mo. App. 345.

Striking matter from answer.— The objection to the action of the court in striking certain averments from the answer is not available on appeal where the ruling is not made a ground for the motion for a new trial. Royer Wheel Co. *v.* Dunbar, 76 S. W. 366, 25 Ky. L. Rep. 746; Simpson *v.* Carr, 76 S. W. 346, 25 Ky. L. Rep. 849; Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95.

Remarks of court.— Remarks of the court

the motion or written grounds are filed,[3] but it may be aided by reference to a bill of exceptions already settled and filed.[4]

d. Admission or Exclusion of Evidence.[5] In some jurisdictions it is held that improper rulings in the admission or exclusion of evidence are sufficiently designated as errors of law occurring at the trial and excepted to by the applicant,[6] and in other jurisdictions, as errors of law, duly excepted to, in the admission or exclusion of evidence.[7] So in one state it has been held that a general allegation that the court admitted illegal evidence without specifically pointing out the evidence is sufficient.[8] On the other hand in a number of jurisdictions if error in admitting or rejecting evidence is relied on the evidence improperly admitted or excluded must be specifically designated in the motion for new trial.[9] But it

in the jury's presence will not be reviewed on appeal where the court's attention was not called to them in the motion for a new trial. Miller *v.* Nuckolls, 77 Ark. 64, 91 S. W. 759, 113 Am. St. Rep. 122, 4 L. R. A. N. S. 149; Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Joplin Waterworks Co. *v.* Joplin, 177 Mo. 496, 76 S. W. 960.

Directing or refusing to direct verdict.— A refusal to direct a verdict for defendant cannot be reviewed, unless assigned for error in the motion for a new trial. McDaniel *v.* Allison, 115 Ga. 751, 42 S. E. 93; Odin Coal Co. *v.* Tadlock, 216 Ill. 624, 75 N. E. 332 [*affirming* 119 Ill. App. 310]; Link *v.* Reeves, 3 Nebr. (Unoff.) 383, 91 N. W. 506.

Ruling on exception to referee's report.— In order to bring the action of the trial court in overruling exceptions to a referee's report before the appellate court for review, the appellant must not only save his exceptions to such action, but call attention thereto in his motion for a new trial. Menefee *v.* Beverforden, 95 Mo. App. 105, 68 S. W. 972; Bosley *v.* Cook, 85 Mo. App. 422; State *v.* Elliott, 82 Mo. App. 458.

3. Cain *v.* Goda, 94 Ind. 555; Harvey *v.* Huston, 94 Ind. 527; Arbuckle *v.* Biederman, 94 Ind. 168; Elliott *v.* Russell, 92 Ind. 526; Miller *v.* Shriner, 87 Ind. 141; McCammack *v.* McCammack, 86 Ind. 387; Sutherland *v.* Hankins, 56 Ind. 343; Cobble *v.* Tomlinson, 50 Ind. 550; Dawson *v.* Hemphill, 50 Ind. 422; Noble *v.* Dickson, 48 Ind. 171; Worthington *v.* Brown, 48 Ind. 152; Shore *v.* Taylor, 46 Ind. 345; Rogers *v.* Rogers, 46 Ind. 1; Sim *v.* Hurst, 44 Ind. 579.

4. Elliott *v.* Russell, 92 Ind. 526. See also Jones *v.* Pennsylvania R. Co., 7 Mackey (D. C.) 426. *Compare* Buck *v.* Nicholls Mfg. Co., 122 Ga. 255, 50 S. E. 82.

5. **Incorporating evidence in bill, statement, or case** see *infra*, IV, K, 2, b, (I).

6. Da Lee *v.* Blackburn, 11 Kan. 190; Albright *v.* Peters, 58 Nebr. 534, 78 N. W. 1063; Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255; Labaree *v.* Klosterman, 33 Nebr. 150, 49 N. W. 1102. But under an earlier statute such an assignment was held insufficient. Shaffer *v.* Maddox, 9 Nebr. 205, 2 N. W. 464; Uhl *v.* Robison, 8 Nebr. 272.

7. Newton *v.* Field, 98 Ky. 186, 32 S. W. 623, 17 Ky. L. Rep. 769. *Compare* Akers *v.* Akers, 69 S. W. 715, 24 Ky. L. Rep. 636, holding that assignment as ground for new trial that the court admitted incompetent evidence is too general to be considered.

8. Payne *v.* Payne, 57 Mo. App. 130.

A ground that "the verdict is against the law" is insufficient to comprehend an erroneous ruling on the admission of evidence. In order that a party may be entitled to a review of a ruling admitting incompetent or irrelevant evidence, it is necessary that an exception thereto should be specifically stated as a ground for new trial. Dreyfus *v.* St. Louis, etc., R. Co., 124 Mo. App. 585, 102 S. W. 53.

9. *Alabama.*— Alabama Midland R. Co. *v.* Brown, 129 Ala. 282, 29 So. 548.

Arkansas.— Sadler-Lusk Trading Co. *v.* Logan, (1907) 104 S. W. 205; Miller *v.* Nuckolls, 77 Ark. 64, 91 S. W. 759, 113 Am. St. Rep. 122, 4 L. R. A. N. S. 149; McClintock *v.* Frohlich, 75 Ark. 111, 86 S. W. 1001.

Connecticut.— Rathbone *v.* City F. Ins. Co., 31 Conn. 193, and show that proper exception was taken.

Georgia.—Atlantic Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622; Screws *v.* Anderson, 124 Ga. 361, 52 S. E. 429; Bennett *v.* Farmers, etc., Bank, 124 Ga. 223, 52 S. E. 330; Buck *v.* Nicholls Mfg. Co., 122 Ga. 255, 50 S. E. 82; Heard *v.* Tappan, 121 Ga. 437, 49 S. E. 292 (stated in motion or attached as an exhibit); McTier *v.* Crosby, 120 Ga. 878, 48 S. E. 355 (in motion itself); Long *v.* Powell, 120 Ga. 621, 48 S. E. 185; Robert Portner Brewing Co. *v.* Cooper, 120 Ga. 20, 47 S. E. 631; Courier-Journal *v.* Howard, 119 Ga. 378, 46 S. E. 440; Spinks *v.* Thornton, 117 Ga. 829, 45 S. E. 251; Ellis *v.* Union Sav. Bank, etc., Co., 115 Ga. 458, 41 S. E. 642; Thompson *v.* O'Connor, 115 Ga. 120, 41 S. E. 242; Denton *v.* Ward, 112 Ga. 532, 37 S. E. 729; Redding *v.* Lennon, 112 Ga. 491, 37 S. E. 711; Webb *v.* Wight, etc., Co., 112 Ga. 432, 37 S. E. 710; Willingham *v.* Slade, 112 Ga. 418, 37 S. E. 737; Taylor *v.* Allen, 112 Ga. 330, 37 S. E. 408; Wright *v.* Willingham, 111 Ga. 823, 35 S. E. 636; Commercial Pub. Co. *v.* Campbell Printing-Press, etc., Co., 111 Ga. 388, 36 S. E. 756; Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646; Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82; Hicks *v.* Mather, 107 Ga. 77, 32 S. E. 901; Cain *v.* Hill, 102 Ga. 573, 27 S. E. 681; Herz *v.* H. B. Claflin Co., 101 Ga. 615, 29

need not be recited verbatim; if the assignment be such that the trial judge cannot

S. E. 33; Stewart *v.* Social Circle Bank, 100 Ga. 496, 28 S. E. 249; Gate City Gas-Light Co. *v.* Farley, 95 Ga. 796, 23 S. E. 119; Wheelwright *v.* Aiken, 92 Ga. 394, 17 S. E. 610; Hagerstown Steam-Engine Co. *v.* Grizzard, 86 Ga. 574, 12 S. E. 939; Cox *v.* Weems, 64 Ga. 165 (failure to point out particular answers in deposition).

Indiana.— Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529; Reese *v.* Caffee, 133 Ind. 14, 32 N. E. 720; Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Queen Ins. Co. *v.* Studebaker Bros. Mfg. Co., 117 Ind. 416, 20 N. E. 299; Rogers *v.* Beach, 115 Ind. 413, 17 N. E. 609; Sertel *v.* Graeter, 112 Ind. 117, 13 N. E. 415; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Wallace *v.* Kirtley, 98 Ind. 485; Arbuckle *v.* Biederman, 94 Ind. 168; Miller *v.* Lebanon Lodge No. 48 I. O. O. F., 88 Ind. 286; Miller *v.* Shriner, 87 Ind. 141; McClain *v.* Jessup, 76 Ind. 120; Bruker *v.* Kelsey, 72 Ind. 51; Galvin *v.* State, 64 Ind. 96; Wilds *v.* Bogan, 57 Ind. 453; Grant *v.* Westfall, 57 Ind. 121; Watt *v.* De Haven, 55 Ind. 128; Johns *v.* Hays, 52 Ind. 147; Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Cobble *v.* Tomlinson, 50 Ind. 550; Bowman *v.* Phillips, 47 Ind. 341; Meek *v.* Keene, 47 Ind. 77; Rogers *v.* Rogers, 46 Ind. 1; Sim *v.* Hurst, 44 Ind. 579; Meyer *v.* Bohlfing, 44 Ind. 238; Sherlock *v.* Alling, 44 Ind. 184; Ohio, etc., R. Co. *v.* Hemberger, 43 Ind. 462; Reeves *v.* Plough, 41 Ind. 204; De Armond *v.* Glasscock, 40 Ind. 418; Mooklar *v.* Lewis, 40 Ind. 1; Call *v.* Byram, 39 Ind. 499; Cass *v.* Krimbill, 39 Ind. 357; Vankeuren *v.* Howard, 39 Ind. 291; Dorsch *v.* Rosenthall, 39 Ind. 209; Wright *v.* Potter, 38 Ind. 61; Streight *v.* Bell, 37 Ind. 550; Truitt *v.* Truitt, 37 Ind. 514; Waggoner *v.* Liston, 37 Ind. 357; Oiler *v.* Bodkey, 17 Ind. 600; Logansport, etc., Natural Gas Co. *v.* Coate, 29 Ind. App. 299, 64 N. E. 638; Felt *v.* East Chicago Iron, etc., Co., 27 Ind. App. 494, 61 N. E. 744; Rees *v.* Blackwell, 6 Ind. App. 506, 33 N. E. 988.

Kentucky.— Bruen *v.* Grahn, 5 Ky. L. Rep. 313.

Pennsylvania.— Wilson *v.* Hiestand, 21 Lanc. L. Rev. 329.

Rhode Island.— O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926.

Tennessee.— Memphis St. R. Co. *v.* Johnson, 114 Tenn. 632, 88 S. W. 169.

West Virginia.— Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604.

Canada.— Crandell *v.* Nott, 30 U. C. C. P. 63; McDermott *v.* Ireson, 38 U. C. Q. B. 1.

See 37 Cent. Dig. tit. "New Trial," § 258.

Other parts of record not consulted.— A ground of motion for new trial, complaining of the admission or rejection of evidence, must be complete in itself, or in connection with the exhibits attached to the motion; and the supreme court will not look to any other part of the record to make perfect an incomplete assignment of error in the motion for new trial. Benning *v.* Horkan, 120 Ga. 734, 48 S. E. 123; Georgia Cent. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590; Graham *v.* Baxley, 117 Ga. 42, 43 S. E. 405; Ellis *v.* Union Sav. Bank, etc., Co., 115 Ga. 458, 41 S. E. 642.

Assignments held insufficient.— In applying the doctrine stated, the following assignments have been held too general: That "the court erred in admitting incompetent testimony." Bruen *v.* Grahn, 5 Ky. L. Rep. 313. That "the court below erred in entering judgment for appellant." McGinnis *v.* Boyd, 144 Ind. 393, 42 N. E. 678. That the verdict is contrary to law. Shirk *v.* Cartright, 29 Ind. 406. That "the court admitted improper evidence and excluded proper evidence, as shown by bill of exceptions No. 2, herewith filed." Arbuckle *v.* Biederman, 94 Ind. 168. To the same effect see Queen Ins. Co. *v.* Studebaker Bros. Mfg. Co., 117 Ind. 416, 20 N. E. 299. So a ground of motion for new trial alleging that the court, after rejecting a certain writing, erred in ruling out "all the other evidence which the defendant has previously introduced which entered into the contents of the paper writing referred to," without specifying of what the evidence thus ruled out consisted, presents no question for review (Tompkins *v.* Compton, 97 Ga. 375, 23 S. E. 839), and a new trial will not be granted on account of an alleged error in allowing an answer to the question, "How much has . plaintiff's land . . been depreciated . . . over and above the value of the timber cut and taken off by defendant?" where the name of the witness to whom it was put is not given and does not appear in the record, and the motion fails to state the purport of the evidence (Knisely *v.* Hire, 2 Ind. App. 86, 28 N. E. 195). So it is not sufficient to specify error in admitting the testimony of a certain witness, unless all of his testimony was inadmissible. Logansport, etc., Gas Co. *v.* Coate, 29 Ind. App. 299, 64 N. E. 638. And a motion for a new trial for the alleged improper exclusion of evidence to impeach a witness by showing contradictory statements made by him must show the testimony sought to be contradicted. Dorsey *v.* Georgia Cent. R. Co., 113 Ga. 564, 38 S. E. 958.

Assignments held sufficient.— An assignment that the court erred in refusing to permit a witness named to answer the following question, followed by the question asked, was sufficient. Gough *v.* State, 32 Ind. App. 22, 68 N. E. 1043. On an assignment of excessive damages, the court may consider the inadmissibility of evidence hearing on that subject. Oiler *v.* Bodkey, 17 Ind. 600.

The withdrawal by the court of evidence admitted conditionally, with a statement to the jury that they should not consider it, is properly designated as a ruling withdrawing evidence rather than as an instruction. Lawler *v.* McPheeters, 73 Ind. 577.

Aider by bill of exceptions not filed.— A motion for new trial assigning improper

mistake the matter alluded to it will be sufficient.[10] In some states the grounds of objection to evidence alleged to have been improperly admitted must be stated.[11] And in one of them it should be alleged that the objection set forth in the motion was made at the time of the erroneous ruling complained of.[12] Where several rulings on the admission or exclusion of evidence are assigned collectively as error, the motion may be overruled if any of the rulings was proper.[13]

e. Instructions to Jury. According to some decisions a ground alleging errors of law, excepted to at the time, in the giving or refusing of instructions to the jury is sufficient.[14] By the weight of authority, however, the particular instruction or instructions improperly given or refused,[15] or the particular errors or omis-

rulings on evidence cannot be made sufficiently specific by reference to bills of exception not on file when the motion was filed. Burns *v.* Thompson, 91 Ind. 146; Sutherland *v.* Hankins, 56 Ind. 343; Cobble *v.* Tomlinson, 50 Ind. 550; Worthington *v.* Brown, 48 Ind. 152. A motion for a new trial, reciting certain evidence as having been erroneously admitted, cannot be made to bring into consideration the admissibility of other evidence than that recited. Maier *v.* Evansville, 151 Ind. 197, 51 N. E. 233; Bruker *v.* Kelsey, 72 Ind. 51.

10. Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Clark *v.* Bond, 29 Ind. 555; Gough *v.* State, 32 Ind. App. 22, 68 N. E. 1043; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153. See also Wright *v.* Willingham, 111 Ga. 823, 35 S. E. 636.

11. Williams *v.* Alaska Commercial Co., 2 Alaska 43; Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Hinkle *v.* Smith, 127 Ga. 437, 56 S. E. 464; McFarland *v.* Darien, etc., R. Co., 127 Ga. 97, 56 S. E. 74; Pool *v.* Warren County, 123 Ga. 205, 51 S. E. 328; Woodbridge *v.* Drought, 118 Ga. 671, 45 S. E. 266; Webb *v.* Wight, etc., Co., 112 Ga. 432, 37 S. E. 710; Bray *v.* Walker, 112 Ga. 364, 37 S. E. 370; Herz *v.* H. B. Claflin Co., 101 Ga. 615, 29 S. E. 33; Hicks *v.* Sharp, 89 Ga. 311, 15 S. E. 314; Phillips *v.* Dewald, 79 Ga. 772, 7 S. E. 151, 11 Am. St. Rep. 458; Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81 (where no specific objections to seemingly relevant evidence were made); Hoffer *v.* Gladden, 75 Ga. 532; Continental Casualty Co. *v.* Lloyd, 165 Ind. 52, 73 N. E. 824. See also Waller *v.* New Milford Eleventh School Dist., 22 Conn. 326, as to insufficient statement of ground of objection.

Exclusion of question and offer of proof.— It has been held that the motion should allege as error both the exclusion of the question asked and the exclusion of the offer to prove the facts which the answer would have proved. Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

In Georgia an allegation that the court erred in causing certain evidence to be withheld from the jury without indicating that it was "illegally withheld from the jury against the demand of the applicant" is insufficient. Ponder *v.* Walker, 107 Ga. 753, 33 S. E. 690.

12. Bennett *v.* Farmers', etc., Bank, 124 Ga. 223, 52 S. E. 330; Bourquin *v.* Bourquin, 110 Ga. 440, 35 S. E. 710; Georgia R., etc., Co. *v.* Bohler, 98 Ga. 184, 26 S. E. 739; Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826; Findley *v.* Johnson, 84 Ga. 69, 10 S. E. 594; Trice *v.* Rose, 80 Ga. 408, 7 S. E. 109.

13. Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

14. McCreery *v.* Everding, 44 Cal. 246; Irwin *v.* Smith, 72 Ind. 482; Bartholomew *v.* Langsdale, 35 Ind. 278; Dawson *v.* Coffman, 28 Ind. 220 [*overruling* Horne *v.* Williams, 23 Ind. 37]; Newton *v.* Field, 98 Ky. 186, 32 S. W. 623, 17 Ky. L. Rep. 769; Meaux *v.* Meaux, 81 Ky. 475; Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Helfrich Saw, etc., Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795 (in which it was said that the same particularity is not required in regard to instructions given or refused when errors are assigned; instructions can be ascertained by even a cursory examination of the bill of exceptions); Prueitt *v.* Cheltenham Quarry Co., 33 Mo. App. 18. *Compare* Indiana cases in following note.

Unreasonable particularity or technical accuracy in the description of the errors is not required or practicable. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

15. *Alabama.*— Southern R. Co. *v.* Kirsch, (1907) 43 So. 796; Alabama Midland R. Co. *v.* Brown, 129 Ala. 282, 29 So. 548.

Alaska.— Williams *v.* Alaska Commercial Co., 2 Alaska 43.

Arkansas.— Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088.

Georgia.— Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494; Smith *v.* Owen, 112 Ga. 531, 37 S. E. 729 (where it was held improper to identify an instruction by reference to a letter); St. John *v.* Leyden, 111 Ga. 152, 36 S. E. 610; Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299; Gate City Gas-Light Co. *v.* Farley, 95 Ga. 796, 23 S. E. 119; Payne *v.* Miller, 89 Ga. 73, 14 S. E. 926; Emery *v.* Real Estate Exch., 88 Ga. 321, 14 S. E. 556.

Indiana.— Wallace *v.* Spencer Exch. Bank, 126 Ind. 265, 26 N. E. 175; Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363; Rudolph *v.* Landwerlen, 92 Ind. 34 (where unnumbered instructions were referred to by numbers); Hyatt *v.* Cochran, 69 Ind. 436; Grant *v.* Westfall, 57 Ind. 121; Cobble *v.* Tomlinson, 50 Ind. 550; Douglass *v.* Blankenship, 50 Ind. 160; Bowman *v.* Phillips, 47 Ind. 341;

sions in the charge,[16] must be pointed out with reasonable certainty. In some jurisdictions this may be done by referring to the instructions given or refused by number,[17] or by setting forth the instruction or instructions, the giving or refusing of which is complained of, in the motion for new trial.[18] Each instruction, the giving or refusing of which is complained of as error, should be separately assigned. Where several instructions are grouped in one specification, they will be examined only so far as is necessary to determine whether all were regularly given or refused. In other words, if the action of the trial court was cor-

Holding *v.* Smith, 42 Ind. 536; Marley *v.* Noblett, 42 Ind. 85; Reeves *v.* Plough, 41 Ind. 204; Alley *v.* Gavin, 40 Ind. 446; Wright *v.* Potter, 38 Ind. 61; Streight *v.* Bell, 37 Ind. 550; Waggoner *v.* Liston, 37 Ind. 357; Estep *v.* Larsh, 21 Ind. 183; Elliott *v.* Woodward, 18 Ind. 183; Robinson *v.* Hadley, 14 Ind. 417. *Compare* Indiana cases cited in preceding note.

Indian Territory.—Cameron *v.* Peck, (1906) 97 S. W. 1015.

Iowa.— Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500.

Kentucky.— Akers *v.* Akers, 69 S. W. 715, 24 Ky. L. Rep. 636. *Compare* Kentucky cases cited in preceding note.

Nebraska.— Flower *v.* Nichols, 55 Nebr. 314, 75 N. W. 864; Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855; Graham *v.* Frazer, 49 Nebr. 90, 68 N. W. 367; Nyce *v.* Shaffer, 20 Nebr. 507, 30 N. W. 943; Weir *v.* R. Co., 19 Nebr. 212, 26 N. W. 627; Omaha, etc., R. Co. *v.* Walker, 17 Nebr. 432, 23 N. W. 348.

Tennessee.— Memphis St. R. Co. *v.* Johnson, 114 Tenn. 632, 88 S. W. 169.

Texas.—Sutherland *v.* McIntire, (Civ. App. 1894) 28 S. W. 578.

Wisconsin.— Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; Meno *v.* Hœffel, 46 Wis. 282, 1 N. W. 31.

See 37 Cent. Dig. tit. "New Trial," § 259; 2 Cent. Dig. tit. "Appeal and Error," § 1748.

Assignments held too general.— Within the rule stated in the text the following assignments have been held insufficient on account of their generality: "Errors of law occurring at the trial." Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855. That "the verdict was contrary to the law." McClintock *v.* Frolich, 75 Ark. 111, 86 S. W. 1001. "That the court erred in instructions to the jury." Horne *v.* Williams, 23 Ind. 37; Elliott *v.* Woodward, 18 Ind. 183; Meno *v.* Hœffel, 46 Wis. 282, 1 N. W. 3. "That the court erred in refusing to give instructions asked by defendant" and "that the court erred in refusing to give instructions to the jury on its own motion." Douglass *v.* Blankenship, 50 Ind. 160. That "the court misdirected the jury in a material matter of law." Schlicht *v.* State, 56 Ind. 173. So it has been held that error in instructions, if any, is waived where the motion for new trial states only "that the verdict is not sustained by sufficient evidence, and that it was procured by the fraud of the prevailing party" (Leavenworth, etc., R. Co. *v.* Whitaker, 42 Kan. 634, 22 Pac. 733), and instructions will not be reviewed where the record does not show whether a general motion on the minutes for a new trial was made on exceptions, or for insufficient evidence, or for excessive damages (Nisbet *v.* Gill, 38 Wis. 657).

Assignment held sufficient.— That "the court erred in giving instructions, 2, 3, 5, 6, 7, and 8, and each of them asked for by plaintiff." Aultman *v.* Martin, 49 Nebr. 103, 68 N. W. 340 [*overruling* Russel *v.* Rosenbaum, 24 Nebr. 769, 40 N. W. 287].

A specification of error directed to one instruction raises no question as to the correctness of another. Storrs *v.* Fusselman, 23 Ind. App. 293, 53 N. E. 345; Muldoon *v.* Meriwether, 79 S. W. 1183, 25 Ky. L. Rep. 2085; Bailey *v.* Louisville, etc., R. Co., 44 S. W. 105, 19 Ky. L. Rep. 1617.

Assigning as error fragmentary part of charge.— A ground of a motion for a new trial assigning as error a mere fragmentary part of the sentence in the charge, to the effect that if the jury believed certain things, "and if the jury further believed," is too incomplete, and furnishes no ground for reversal. Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023.

16. Glaze *v.* Josephine Mills, 119 Ga. 261, 46 S. E. 99 (as to necessity of charging that instructions were not applicable to facts of case); Georgia Cent. R. Co. *v.* Goodson, 118 Ga. 833, 45 S. E. 680; Robinson *v.* Hadley, 14 Ind. 417; Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500; Croasdaile *v.* Hall, 3 Brit. Col. 384; Furlong *v.* Reid, 12 Ont. Pr. 201; Montgomery *v.* Dean, 7 U. C. C. P. 513 (in rule *nisi*); McDermott *v.* Ireson, 38 U. C. Q. B. 1.

Construction of written contract.— The language of the court in "leaving to the jury" the construction of a portion of a written contract must be pointed out. Kehoe *v.* Hanley, 95 Ga. 321, 22 S. E. 539.

17. Nofsinger *v.* Reynolds, 52 Ind. 218; Douglass *v.* Blankenship, 50 Ind. 160; Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835; Weir *v.* Burlington, etc., R. Co., 19 Nebr. 212, 26 N. W. 627.

"Instructions numbered one to ——." — An assignment in a motion for a new trial that the court erred in giving instructions "numbered one to —" on behalf of plaintiff was defective as to instructions other than No. 1. Kansas City Southern R. Co. *v.* Davis, (Ark. 1907) 103 S. W. 603.

18. St. John *v.* Leyden, 111 Ga. 152, 36 S. E. 610; Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299; Wappoo Mills *v.* Commercial Guano Co., 91 Ga. 396, 18 S. E.

rect in regard to any one of the instructions so grouped, the assignment must fail.[19] In another jurisdiction where specific assignments are required, a general assignment upon a designated portion of the judge's charge will be considered only for the purpose of ascertaining whether or not the particular language complained of states a correct abstract principle of law. If it does the court will not inquire whether the words excepted to are or are not adjusted to the issues and facts of the case.[20]

f. Verdict or Decision Contrary to Law or Evidence — (i) *In General.* While in one jurisdiction it has been held that an assignment in a motion for a new trial that the verdict or findings are not sustained by sufficient evidence is good,[21] and

308; Payne *v.* Miller, 89 Ga. 73, 14 S. E. 926; Emery *v.* Atlanta Real Estate Exch., 88 Ga. 321, 14 S. E. 556.

Aider by bill of exceptions.— An exception to a judgment overruling a motion for a new trial, one of the grounds of the motion being that the entire charge of the court was contrary to law, is not strengthened by specifying in the bill of exceptions the grounds upon which it is claimed that the whole charge was unsound. Clay *v.* Smith, 108 Ga. 189, 33 S. E. 963. See also Newman *v.* Day, 108 Ga. 813, 34 S. E. 167.

19. Wade *v.* Goza, 78 Ark. 7, 96 S. W. 388; Clay *v.* Smith, 108 Ga. 189, 33 S. E. 963; Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644; Cleveland, etc., R. Co. *v.* Hayes, (Ind. 1906) 79 N. E. 448; Young *v.* Montgomery, 161 Ind. 68, 67 N. E. 684; Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Cincinnati, etc., R. Co. *v.* Cregor, 150 Ind. 625, 50 N. E. 760; Hoover *v.* Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647, 39 N. E. 912; Carger *v.* Fee, 140 Ind. 572, 39 N. E. 93; Lawrence *v.* Van Buskirk, 140 Ind. 481, 40 N. E. 54; Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, 34 N. E. 227; Ohio, etc., R. Co. *v.* McCartney, 121 Ind. 385, 23 N. E. 258; Elliott *v.* Woodward, 18 Ind. 183; Chicago Furniture Co. *v.* Cronk, 35 Ind. App. 591, 74 N. E. 627; Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. 1073; Harrod *v.* State, 24 Ind. App. 159, 55 N. E. 242; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281; Kackley *v.* Evansville, etc., R. Co., 7 Ind. App. 169, 34 N. E. 532; Rees *v.* Blackwell, 6 Ind. App. 506, 33 N. E. 988; Williamson *v.* Brandenberg, 6 Ind. App. 97, 32 N. E. 1022; Spirk *v.* Chicago, etc., R. Co., 57 Nebr. 565, 78 N. W. 272; McIntyre *v.* Union Pac. R. Co., 56 Nebr. 587, 77 N. W. 57; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Flower *v.* Nichols, 55 Nebr. 314, 75 N. W. 864; National Masonic Acc. Assoc. *v.* Day, 55 Nebr. 127, 75 N. W. 576; Mack *v.* Parkieser, 53 Nebr. 528, 74 N. W. 38; Peck *v.* Tingley, 53 Nebr. 171, 73 N. W. 450; Hanover F. Ins. Co. *v.* Stoddard, 52 Nebr. 745, 73 N. W. 291; Atwood *v.* Marshall, 52 Nebr. 173, 71 N. W. 1064; Home F. Ins. Co. *v.* Phelps, 51 Nebr. 623, 71 N. W. 303; Hodgin *v.* Whitcomb, 51 Nebr. 617, 71 N. W. 314; Meyer *v.* Shamp, 51 Nebr. 424, 71 N. W. 57; Kirchman *v.* Corcoran, 51 Nebr. 191, 70 N. W. 916; Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835; Denise *v.* Omaha, 49 Nebr. 750, 69 N. W. 119; Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619; Dempster Mill Mfg. Co. *v.* Holdrege First Nat. Bank, 49 Nebr. 321, 68 N. W. 477; Stough *v.* Ogden, 49 Nebr. 291, 68 N. W. 516; Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367; McCormal *v.* Redden, 46 Nebr. 776, 65 N. W. 881; Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796; Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598; Spears *v.* Chicago, etc., R. Co., 43 Nebr. 720, 62 N. W. 68; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Ledwith *v.* Campbell, 1 Nebr. (Unoff.) 695, 95 N. W. 838.

Assignment held to refer to each paragraph separately.— An assignment of error in a motion for new trial that "the court erred in giving paragraphs 3, 5, 7, 8, 9, 10, 11, 12, and 13 of the instructions, and in giving each of them, given by the court on its own motion," is sufficiently specific. It refers to each paragraph separately and not in group. Kirchman *v.* Corcoran, 51 Nebr. 191, 70 N. W. 916; Aultman *v.* Martin, 49 Nebr. 103, 68 N. W. 340. To the same effect see Chicago, etc., R. Co. *v.* Mines, 221 Ill. 448, 77 N. E. 898; Pennsylvania Co. *v.* Ebaugh, 152 Ind. 531, 53 N. E. 763.

20. Bullock *v.* State, 115 Ga. 241, 41 S. E. 609; O'Neal *v.* O'Neal, 112 Ga. 348, 37 S. E. 375; Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644.

21. Ellison *v.* Ganiard, 167 Ind. 471, 79 N. E. 450; Parkison *v.* Thompson, 164 Ind. 609, 73 N. E. 109; Young *v.* Berger, 132 Ind. 530, 32 N. E. 318; Weston *v.* Johnson, 48 Ind. 1; Collins *v.* Maghee, 32 Ind. 268. And see Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446 (holding that an assignment that the verdict is not sustained by the evidence includes the objection that the verdict is contrary to the evidence); Graham *v.* Henderson, 35 Ind. 195 (holding that where the evidence did not justify a finding against one of several defendants, but did against the others, and there was a finding against all, a motion alleging that the finding was not sustained by the evidence was sufficient.

in others that it is sufficient to state that the verdict is contrary to the evidence,[22] the weight of authority is to the effect that a motion for new trial, on the ground that the verdict or findings are not supported by the evidence or are contrary to the evidence, must point out specifically wherein the evidence does not support or is contrary to the verdict or findings,[23] except in cases where there is no evidence to support the verdict or finding assailed, in which case a specification that there

An assignment that the finding of the jury is "against the weight of the evidence" or "contrary to the evidence" is held not equivalent to the statutory ground "that the verdict or decision is not sustained by sufficient evidence." Waggoner *v.* Liston, 37 Ind. 357; Jennings *v.* Ingle, 35 Ind. App. 153, 73 N. E. 945; Bass *v.* Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

22. Meaux *v.* Meaux, 81 Ky. 475; Cameron *v.* Milloy, 14 U. C. C. P. 340. And see Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617; Adams *v.* Smith, 11 Wyo. 200, 70 Pac. 1043, holding it sufficient to state that the finding is "against and contrary to the weight of the evidence."

23. *Alaska.*— Williams *v.* Alaska Commercial Co., 2 Alaska 43. *Compare* Barnette *v.* Freeman, 2 Alaska 286.

California.— Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067; O'Leary *v.* Castle, 133 Cal. 508, 65 Pac. 950; Rauer *v.* Fay, 128 Cal. 523, 61 Pac. 90; McLennan *v.* Wilcox, 126 Cal. 52, 58 Pac. 305; Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; Haight *v.* Tryon, 112 Cal. 4, 44 Pac. 318; South Bend First Nat. Bank *v.* Kelso, (1895) 40 Pac. 427; Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 62; Malone *v.* Del Norte County, 77 Cal. 217, 19 Pac. 422; Silva *v.* Holland, 74 Cal. 530, 16 Pac. 385; Green *v.* Killey, 38 Cal. 201; Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30; Cowing *v.* Rogers, 34 Cal. 648; Reamer *v.* Nesmith, 34 Cal. 624; Vilhac *v.* Biven, 28 Cal. 409; Carleton *v.* Townsend, 28 Cal. 219; Nishkian *v.* Chisholm, 2 Cal. App. 496, 84 Pac. 312.

Illinois.— Congregation B'Nai Abraham *v.* Voigt, 67 Ill. App. 227.

Maine.— Freeman *v.* Morey, 41 Me. 588.

Montana.—Zickler *v.* Deegan, 16 Mont. 198, 40 Pac. 410; Taylor *v.* Holter, 2 Mont. 476; Griswold *v.* Boley, 1 Mont. 545.

North Dakota.— Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127; Pickert *v.* Rugg, 1 N. D. 230, 46 N. W. 446.

South Dakota.— Hermon *v.* Silver, 15 S. D. 476, 90 N. W. 141.

Texas.— Cason *v.* Connor, 83 Tex. 26, 18 S. W. 668; Texas, etc., R. Co. *v.* Norman, (Civ. App. 1906) 91 S. W. 594; Dodd *v.* Presley, (Civ. App. 1905) 86 S. W. 73; Moody *v.* Hahn, 25 Tex. Civ. App. 474, 62 S. W. 940; Texas Midland R. Co. *v.* Johnson, 20 Tex. Civ. App. 572, 50 S. W. 1044; Payton *v.* Love, 20 Tex. Civ. App. 613, 49 S. W. 1109 (or against "preponderance of the evidence"); Branch *v.* Simons, (Civ. App. 1898) 48 S. W. 40; Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210; Brownwood First Nat. Bank *v.* Routh, 18 Tex. Civ. App. 250, 44 S. W. 44; St. Louis, etc., R. Co. *v.* Bland, (Civ. App. 1896) 34 S. W. 768; Texas, etc., R. Co. *v.* Lancaster, (Civ. App. 1894) 30 S. W. 490; Texas, etc., R. Co. *v.* Commander, (Civ. App. 1894) 29 S. W. 263; Sutherland *v.* McIntire, (Civ. App. 1894) 28 S. W. 578; Western Union Tel. Co. *v.* Sanders, (Civ. App. 1894) 26 S. W. 734; Western Union Tel. Co. *v.* McMillan, (Civ. App. 1894) 25 S. W. 821; Atchison, etc., R. Co. *v.* Worley, (Civ. App. 1894) 25 S. W. 478.

See 2 Cent. Dig. tit. "Appeal and Error," § 1752.

The object of requiring specifications of insufficiency of evidence is to bring directly before the mind of the court the particular point the aggrieved party desires to be reviewed, and also to give notice to the adverse party of the point of attack, and thereby enable him to produce any additional evidence tending to support the finding of fact assailed by the specification. Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672.

Applications of rule.— In applying the rule stated in the text the following specifications have been held insufficient: That the verdict "is contrary to the law and the evidence." Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831. "That the verdict is against the evidence." Coleman *v.* Gilmore, 49 Cal. 340. That "the verdict is contrary to and not supported by the evidence." Degener *v.* O'Leary, 85 Tex. 171, 19 S. W. 1004; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787. "That the evidence is insufficient to justify the findings and judgment of the court." Taylor *v.* Holter, 2 Mont. 476. "That the verdict is contrary to the law and the evidence in the case." Ft. Worth, etc., R. Co. *v.* Osborne, (Tex. Civ. App. 1894) 26 S. W. 274. That the court erred in refusing the prayer of defendant's cross complaint. Petitt *v.* Petitt, 138 Ind. 597, 38 N. E. 179. "That the verdict is contrary to and unsupported by either the evidence or the law," and that it is "contrary to and against the weight of the evidence." Suggs *v.* Terry, (Tex. Civ. App. 1896) 34 S. W. 354. "Because the finding is for the plaintiff when it should have been for the defendant." Putnam *v.* Hannibal, etc., R. Co., 22 Mo. App. 589.

Limitations of rule.— The court will not refuse to entertain an appeal on the ground of insufficiency of the specifications in regard to the alleged insufficiency of the evidence to support the findings where they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed on the motion for new trial, especially where the transcript shows that all the evidence has been brought up; the statute in regard to such specifications being primarily

is no evidence to support it would be sufficient;[24] and it has also been held that a specification of insufficiency of evidence on one issue raises no question as to the sufficiency of the evidence on another issue.[25] So according to the weight of authority a motion for a new trial based on the ground that the verdict or findings are contrary to the law or to the charge of the court must specify particularly wherein the verdict or findings are contrary to the law or to the charge of the court.[26] A motion for a new trial on the ground that the "judgment," not

for the trial court. American Type Founders' Co. *v.* Packer, 130 Cal. 459, 62 Pac. 744. So where the substance of the evidence has been reduced to writing, a specification in a motion for a new trial that the verdict was contrary to the evidence was sufficient. Moneagle *v.* Livingston, (Ala. 1907) 43 So. 840.

Aider by agreed statement of facts.— Although the specifications in a statement on motion for new trial, of insufficiency of the evidence to justify the decision as to ownership of land involved in an action of ejectment, may be, in themselves considered, too general, yet where all the facts of the case are settled by stipulation of the parties, excepting one specific issue tried, upon which the ownership of the land depended, the specifications are aided by that fact. Tromans *v.* Mahlman, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579.

What evidence shows not considered.— Under a specification of the insufficiency of the evidence to support the verdict, the supreme court will not consider what the evidence does show, but only what it does not show, and a specification that the evidence is insufficient because it conclusively shows contributory negligence, etc., will be disregarded. Cain *v.* Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004.

Nature of pleadings and issues.— Where it is claimed that the verdict is contrary to law and the evidence, the nature of the pleadings and issues should be set forth. Bartlett *v.* Lewis, 58 Me. 350.

What specifications sufficient.— Specifications of particulars in which the evidence is alleged to be insufficient to sustain the verdict are sufficient if they give the opposite party and the court notice of the matters which will be urged on the hearing. Smith *v.* Ellis, 103 Cal. 294, 37 Pac. 400; Harnett *v.* Central Pac. R. Co., 78 Cal. 31, 20 Pac. 154.

24. Williams *v.* Alaska Commercial Co., 2 Alaska 43; Knott *v.* Peden, 84 Cal. 299, 24 Pac. 160.

25. Menk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158. And see Nishkian *v.* Chisholm, 2 Cal. App. 496, 84 Pac. 312; Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.

26. *Alabama.*— Moneagle *v.* Livingston, (1907) 43 So. 840; Parker *v.* Bond, 121 Ala. 529, 25 So. 898; Winter *v.* Judkins, 106 Ala. 259, 17 So. 627; Cobb *v.* Malone, 92 Ala. 630, 9 So. 738.

Alaska.— Williams *v.* Alaska Commercial Co., 2 Alaska 43; Moore *v.* Steelsmith, 1 Alaska 121.

Georgia.— Napier *v.* Burkett, 113 Ga. 607, 38 S. E. 941; Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617, where the particular holding was that a new trial would not be granted upon the ground that the petition is fatally defective in substance, the remedy for such a defect being by a demurrer before the trial on the merits or by motion in arrest after verdict, the court, however, indicating that it was committed to the rule that a general assignment in a motion for a new trial that the verdict is "contrary to law" is equivalent to no assignment at all, and relied upon Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719, and Jenkins *v.* State, 50 Ga. 258. In the first of the last two cases cited, it was held that points of law proper as grounds for demurrer ought not to be made first in the appellate court under a ground for new trial that the verdict was contrary to law, and in the second that where a verdict of guilty is rendered in a criminal case and a motion for a new trial is made on the sole ground that the verdict is contrary to law and the evidence and is overruled, the appellate court will not inquire into the sufficiency of the indictment, no such question having been decided by the trial judge. In several cases it is held that an assignment that the verdict is contrary to specified charges is in effect no more than a complaint that the verdict is contrary to law. Pomeroy *v.* Gershon, 118 Ga. 521, 45 S. E. 415; Palmer Mfg. Co. *v.* Drewry, 113 Ga. 366, 38 S. E. 837; Mickleberry *v.* O'Neal, 98 Ga. 42, 25 S. E. 933. This would seem to mean that such an assignment raises no question for decision (see Wilkins *v.* Grant, 118 Ga. 522, 45 S. E. 415), although in other cases it would seem that the impropriety of such an assignment rested on the fact that it was included in the general ground that the verdict was contrary to law and therefore it was unnecessary to repeat the ground specifically (Rushin *v.* Tharpe, 88 Ga. 779, 15 S. E. 830; Athens Mfg. Co. *v.* Rucker, 80 Ga. 291, 4 S. E. 885). And in so far as such assignment seems to be considered for some purpose (see Palmer Mfg. Co. *v.* Drewry, *supra*; Atlanta R., etc., Co. *v.* Walker, 112 Ga. 725, 38 S. E. 107), these cases would not appear to be in entire accord with those cited above which hold that an assignment that a verdict is contrary to law raised no question for decision.

Kentucky.— Jones *v.* Wocher, 90 Ky. 230, 13 S. W. 911, 12 Ky. L. Rep. 105; Trent *v.* Colvin, 35 S. W. 914, 18 Ky. L. Rep. 173.

Texas.— Dodd *v.* Presley, (Civ. App. 1905) 86 S. W. 73; Moody *v.* Hahn, 25 Tex. Civ. App. 474, 62 S. W. 940; Payton *v.* Love, 20 Tex. Civ. App. 613, 49 S. W. 1109; Branch *v.*

verdict or decision, is contrary to law or the evidence, or is not supported by sufficient evidence, is fatally defective as presenting no ground for new trial.[27]

(II) *Amount of Recovery.* It has been held that so far as the party against whom the verdict has gone depends upon the circumstances that damages have been allowed in too great or too small a sum, he may rely upon the ground that the verdict is not sustained by the evidence; that even when in the case of excessive damages he is prepared to show that the excess indicates passion or prejudice, in such case he may rely upon either the ground that the evidence does not sustain the verdict, or that the verdict is the result of passion or prejudice,[28] or that the verdict is not warranted by the evidence, or is contrary to law and the evidence;[29] or that there was no evidence authorizing a verdict for compensatory or punitive damages, and that the verdict should have been for nominal damages only.[30] But more generally it would seem that the objection that the damages awarded are excessive or that the jury erred in assessing the amount of the recovery must be specifically alleged;[31] that an objection that the recovery is excessive is not raised by an assignment that the verdict is "contrary to law and

Simons, (Civ. App. 1898) 48 S. W. 40; Brownwood First Nat. Bank *v.* Routh, 18 Tex. Civ. App. 250, 44 S. W. 44.

Utah.— Gilberson *v.* Millar Min., etc., Co., 4 Utah 46, 5 Pac. 699.

See 37 Cent. Dig. tit. "New Trial," § 261.

Compare Western R. Equipment Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28, holding that a motion for a new trial which alleges as grounds that the verdict is contrary to the law and the evidence is sufficient to raise the question as to the effect of a later contract on a former one between the same parties.

27. *Arkansas.*— Howcott *v.* Kilbourn, 44 Ark. 213.

California.—Mazkewitz *v.* Pimentel, 83 Cal. 450, 23 Pac. 527.

Georgia.— Coleman *v.* Slade, 75 Ga. 61.

Indiana.— Lynch *v.* Milwaukee Harvester Co., 159 Ind. 675, 65 N. E. 1025; Gates *v.* Baltimore, etc., R. Co., 154 Ind. 338, 56 N. E. 722; Rodefer *v.* Fletcher, 89 Ind. 563; Rosenzweig *v.* Frazer, 82 Ind. 342; Polk *v.* Johnson, (App. 1906) 77 N. E. 1139; Felt *v.* East Chicago Iron, etc., Co., 27 Ind. App. 494, 61 N. E. 744; Fenner *v.* Simon, 26 Ind. App. 628, 60 N. E. 363; McConahey *v.* Foster, 21 Ind. App. 416, 52 N. E. 619; Hubbs *v.* State, 20 Ind. App. 181, 50 N. E. 402.

New York.— Garbutt *v.* Garbutt, 4 N. Y. St. 416.

But see Gilmore *v.* Garnett Bank, 10 Kan. App. 496, 63 Pac. 89 (holding that a ruling of the trial court sustaining a demurrer to the evidence is presented for review by a motion for a new trial, duly filed, which alleges "that the decision of the court is not sustained by sufficient evidence and is contrary to law," although no other exception to the ruling appears in the record); Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am. St. Rep. 743 (holding that a general specification that the judgment is not sustained by sufficient evidence and is contrary to law is sufficient).

A motion for a new trial on the ground that "the finding and judgment of the court is contrary to the evidence," and "the finding and judgment of the court is contrary to law," states no ground for a new trial. Baltimore, etc., R. Co. *v.* Daegling, 30 Ind. App. 180, 65 N. E. 761; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306; Binford *v.* Dukes, 25 Ind. App. 670, 58 N. E. 854; Hubbs *v.* State, 20 Ind. App. 181, 50 N. E. 402. *Compare* Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805, where the word "judgment" was rejected as surplusage.

An assignment that the "decision" is not sustained by the evidence is not insufficient, the word "decision" being equivalent to "finding." Weston *v.* Johnson, 48 Ind. 1.

28. Du Brutz *v.* Jessup, 54 Cal. 118; McCloskey *v.* Pulitzer Pub. Co., 163 Mo. 22, 63 S. W. 99.

29. McCloskey *v.* Pulitzer Pub. Co., 163 Mo. 22, 63 S. W. 99; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474.

Damages not resting in discretion.— In Minnesota a new trial for error in assessing the amount of recovery in an action for actual damages, not resting in the discretion of the jury, should be asked for on the ground that the verdict is not justified by the evidence; but a new trial for excessive damages in an action in tort where the damages are largely in the discretion of the jury should on the part of the jury. Lane *v.* Dayton, 56 Minn. 90, 57 N. W. 328; Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149.

30. McCloskey *v.* Pulitzer Pub. Co., 163 Mo. 22, 63 S. W. 99.

31. Davis *v.* Montgomery, 123 Ind. 587, 24 N. E. 367; Thickstun *v.* Baltimore, etc., R. Co., 119 Ind. 26, 21 N. E. 323; Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 6; Milliken *v.* Patterson, 91 Ind. 315; McElhoes *v.* Dale, 81 Ind. 67; Lawson *v.* Hilgenberg, 77 Ind. 221; Kelso *v.* Wolf, 70 Ind. 105; Hyatt *v.* Mattingly, 68 Ind. 271; Dix *v.* Akers, 30 Ind. 431; Frank *v.* Kessler, 30 Ind. 8; Spurrier *v.* Briggs, 17 Ind. 529; Rariden *v.* Mason, 30 Ind. App. 425, 65 N. E. 554; Cox *v.* Westfield Bank, 18 Ind. App. 248, 47 N. E. 841; Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935; Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255;

the testimony,"[32] or that the verdict is against the evidence,[33] or that the verdict or the finding of the court was not sustained by sufficient evidence and that it was contrary to law,[34] or that the verdict is against the evidence and the weight of the evidence.[35] And it has been held that an objection that the verdict was too small is not raised by an assignment that the verdict and judgment were against the law and the evidence,[36] and that any question as to the allowance or refusal to allow interest is not raised by an assignment that the damages were excessive,[37] or that the verdict is contrary to the law and the evidence.[38]

g. Accident or Surprise. A motion for a new trial on the ground of accident or surprise must in some states allege the particular facts showing accident or surprise which ordinary prudence could not have guarded against;[39] and the particular facts showing a cause of action or a complete or partial defense which the movant could prove upon a new trial,[40] and the names of any absent witnesses by whom he expects to be able to prove such facts.[41]

h. Disqualification or Misconduct of or Affecting Jurors. A motion for a new trial because of the disqualification of a juror,[42] or because of misconduct of, or affecting, jurors, should state the facts of the complaint definitely and particu-

Jacobs *v.* Hawkins, 63 Tex. 1; St. Louis, etc., R. Co. *v.* Smith, 11 Tex. Civ. App. 550, 32 S. W. 828. And see Patterson *v.* Ely, 19 Cal. 28. *Compare* McGrimes *v.* State, 30 Ind. 140, as to assignment of error in assessing any amount whatever.

Specification held sufficient.— A specification that it appears from the evidence that the injuries of plaintiff were very serious and that the sum found by the verdict was unreasonably and grossly inadequate is sufficient. Bennett *v.* Hobro, 72 Cal. 178, 13 Pac. 473.

In Indiana the proper, and only, statement of ground in contract cases is "error in the assessment of the amount of the recovery," and, in tort cases, that the damages are excessive. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Gilmore *v.* Steffey, 153 Ind. 33, 53 N. E. 1017; Marvin *v.* Sager, 145 Ind. 261, 44 N. E. 310; Western Assur. Co. *v.* Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138; Hogshead *v.* State, 120 Ind. 327, 22 N. E. 330; Smith *v.* State, 117 Ind. 167, 19 N. E. 744 [*overruling* Hill *v.* Newman, 47 Ind. 187]; McKinney *v.* State, 117 Ind. 26, 19 N. E. 613; Moore *v.* State, 114 Ind. 414, 16 N. E. 836; McCormick Harvesting Mach. Co. *v.* Gray, 114 Ind. 340, 16 N. E. 787; Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244; Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453; American Quarries Co. *v.* Lay, 37 Ind. App. 386, 73 N. E. 608; Stabno *v.* Leeds, 27 Ind. App. 289, 701, 60 N. E. 1101; Pluffton Artificial Ice Co. *v.* Richardson. 25 Ind. App. 263, 57 N. E. 265; Norris *v.* Churchill, 20 Ind. App. 668, 51 N. E. 104; Milwaukee Mechanics' Ins. Co. *v.* Stewart, 13 Ind. App. 640, 42 N. E. 290; Bartlett *v.* Burden, 11 Ind. App. 419, 39 N. E. 175.

32. Payne *v.* McLean, 44 Ill. App. 354.

33. Star Brewery *v.* Croake, 57 Ill. App. 287.

34. *Indiana.*— Hyatt *v.* Mattingly, 68 Ind. 271.

Iowa.— Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659.

Minnesota.— English *v.* Minneapolis, etc., R. Co., 96 Minn. 213, 104 N. W. 886.

Nebraska.— Dickenson *v.* Columbus State Bank, 71 Nebr. 260, 98 N. W. 813; Hammond *v.* Edwards, 56 Nebr. 631, 77 N. W. 75; Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255. *Compare* Burkholder *v.* Burkholder, 25 Nebr. 70, 41 N. W. 145.

Wisconsin.— Sloteman *v.* Thomas, etc., Mfg. Co., 69 Wis. 499, 34 N. W. 225.

See 2 Cent. Dig. tit. "Appeal and Error," § 1749.

35. Pierson *v.* Slifer, 52 Mo. App. 273.

In Indiana it has been held that the assignment as a cause for new trial that the damages are excessive does not call in question the amount of recovery in an action on contract. That this assignment is only applicable to cases of tort. Hogshead *v.* State, 120 Ind. 327, 22 N. E. 330; Smith *v.* State, 117 Ind. 167, 19 N. E. 744; McKinney *v.* State, 117 Ind. 26, 19 N. E. 613; McCormick Harvesting Mach. Co. *v.* Gray, 114 Ind. 340, 16 N. E. 787; Indiana Ins. Co. *v.* Glenn, 13 Ind. App. 534, 40 N. E. 151.

36. Cook *v.* Clary, 48 Mo. App. 166.

37. Hopper *v.* Chicago, etc., R. Co., 91 Iowa 639, 60 N. W. 487.

38. Cochrane *v.* Murphy, 4 La. Ann. 6.

39. Cook *v.* De la Guerra, 24 Cal. 237; Ayer *v.* James, 120 Ga. 578, 48 S. E. 154 (show reasons why party did not secure postponement where counsel absent); Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; Sheppard *v.* Avery, (Tex. Civ. App. 1895) 32 S. W. 791.

An allegation of surprise in general terms is insufficient. To enable the movant to obtain a new trial therefor the motion should specifically state wherein the surprise consisted. Scoville *v.* Chapman, 17 Ind. 470; Snodgrass *v.* Hunt, 15 Ind. 274.

40. Cook *v.* De la Guerra, 24 Cal. 237; Montgomery *v.* Carlton, 56 Tex. 431; Sheppard *v.* Avery, (Tex. Civ. App. 1895) 32 S. W. 791; Yarborough *v.* Downes, 1 Tex. App. Civ. Cas. § 675.

41. Ward *v.* Cobbs, 14 Tex. 303.

42. Gibson *v.* Williams, 39 Ga. 660, particular degree of relationship to be stated.

larly,[43] and should allege want of knowledge of the disqualification[44] or misconduct by the applicant or his attorney in time to have applied for relief at the trial.[45]

i. Newly Discovered Evidence.[46] A motion for a new trial on the ground of newly discovered evidence must, in some states, set out the evidence claimed to have been newly discovered,[47] in order that it may appear that it is material,[48] and not merely cumulative[49] nor impeaching in character;[50] and, if oral, the names of the proposed witnesses should be given.[51] It should be stated that the movant expects to be able to produce such evidence upon a new trial.[52] It must allege that such evidence was not known to the movant before the verdict, and show that he could not, with reasonable diligence, have discovered and produced it at the trial.[53] So the motion must state the particular facts showing the diligence

43. Edmundson *v.* Swain, 122 Ga. 841, 50 S. E. 942 (character of improper papers alleged to have been read by jurors); Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841 (particular acts of misconduct by party); Lennox *v.* Knox, etc., R. Co., 62 Me. 322 (particular jurors communicated with and nature of communication). See also *supra*, III, D, 2.

44. Jameson *v.* Androscoggin R. Co., 52 Me. 412; Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33.

45. Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

46. Affidavits in support of motion based on newly discovered evidence see *infra*, IV, N, 7, a.

47. *Arkansas.*— Bourland *v.* Skimnee, 11 Ark. 671.

California.— Perry *v.* Cochran, 1 Cal. 180.

Colorado.— Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191.

Delaware.— McCombs *v.* Chandler, 5 Harr. 423.

Georgia.— Gibson *v.* Williams, 39 Ga. 660.

Kentucky.— Ewing *v.* McConnel, 1 A. K. Marsh. 188.

Maine.— Gilbert *v.* Woodbury, 22 Me. 246; Dennett *v.* Dow, 17 Me. 19.

Michigan.— Eickhoff *v.* Brooke, (1901) 88 N. W. 397.

Missouri.—King *v.* Gilson, 206 Mo. 264, 104 S. W. 52, holding that affidavits in support of a motion for new trial for newly discovered evidence are unavailable to supply an omission of the facts alleged to have been newly discovered.

New Jersey.— Sheppard *v.* Sheppard, 10 N. J. L. 250.

New York.— *In re* Kranz, 41 Hun 463; Halsey *v.* Watson, 1 Cai. 24.

Ohio.— Ludlow *v.* Park, 4 Ohio 5.

Texas.— Madden *v.* Shapard, 3 Tex. 49; Wisson *v.* Baird, 1 Tex. App. Civ. Cas. § 709.

Wisconsin.— Moss *v.* Vroman, 5 Wis. 147.

Canada.— Robinson *v.* Rapelje, 4 U. C. Q. B. 289.

See also 37 Cent. Dig. tit. "New Trials," § 252.

48. *California.*— Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Georgia.— Wallace *v.* Tumlin, 42 Ga. 462.

Iowa.— Manson *v.* Ware, 63 Iowa 345, 19 N. W. 275.

Kentucky.— Barrett *v.* Belshe, 4 Bibb 348.

New York.— Raphelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr N. S. 224, 43 How. Pr. 157.

Texas.— Frizzell *v.* Johnson, 30 Tex. 31.

See 37 Cent. Dig. tit. "New Trial," § 252.

49. *California.*— Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Georgia.— Wallace *v.* Tumlin, 42 Ga. 462.

Indiana.— Jackson *v.* Swope, 134 Ind. 111, 33 N. E. 909.

Iowa.— Mason *v.* Ware, 63 Iowa 345, 19 N. W. 275.

Missouri.— Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437.

New York.—Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157.

Texas.— Frizzell *v.* Johnson, 30 Tex. 31.

50. Wallace *v.* Tumlin, 42 Ga. 462; Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157.

51. Dennett *v.* Dow, 17 Me. 19; King *v.* Gilson, 206 Mo. 264, 104 S. W. 52; Denny *v.* Blumenthal, 8 Misc. (N. Y.) 544, 28 N. Y. Suppl. 744.

52. Wallace *v.* Tumlin, 42 Ga. 462; Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157. See also *supra*, III, I, 5, b, (III).

53. *California.*— Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Georgia.—Atlanta Rapid Transit Co. *v.* Young, 117 Ga. 349, 43 S. E. 861; Wallace *v.* Tumlin, 42 Ga. 462.

Indiana.— Working *v.* Garn, 148 Ind. 546, 47 N. E. 951.

Minnesota.— Keough *v.* McNitt, 6 Minn. 513.

Missouri.— Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437.

New York.— Thompson *v.* Welde, 27 N. Y. App. Div. 186, 50 N. Y. Suppl. 618 (neglect of attorney); Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157.

Texas.— Waples *v.* Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Frizzell *v.* Johnson, 30 Tex. 31; Madden *v.* Shapard, 3 Tex. 49.

United States.— Payan *v.* U. S., 15 Ct. Cl. 56.

See 37 Cent. Dig. tit. "New Trial," § 252. See also *supra*, III, I, 3, 4.

exercised by him before the trial,[54] and the particular time and circumstances of the discovery of the evidence.[55] It is sufficient to state the particular facts as to the accidental discovery of written evidence outside the line of ordinary inquiry, without stating particular acts of diligence used to discover it before the trial.[56]

j. Conclusions of Law. An alleged ground of motion for a new trial that the "decision" of the court is not sustained by sufficient evidence, and that such decision is contrary to law, is insufficient to raise any question as to the sufficiency of the court's conclusions of law.[57]

k. Rulings on Motions For Continuance. An assignment of error in a motion for new trial, "errors of law occurring at the trial, and excepted to at the time," is too general to present for review the action of the trial court in granting a continuance.[58] So an assignment that the court erred in overruling a motion for continuance on account of the absence of some indefinite and uncertain number of defendant's witnesses, none of them being named, is too uncertain and indefinite to present any question for review.[59] On the other hand an assignment that the court erred "in proceeding with the trial of said cause over the objection of the defendant, and while said case was pending and undetermined in the supreme court, as set forth in said defendant's motion for a continuance" is sufficiently definite to authorize the court to review the question whether a continuance should have been granted.[60]

l. Rulings on Motions For Change of Venue. An assignment of "irregularities in the proceedings of the court" or "error of law occurring at the trial, and excepted to by the plaintiffs" or "that the verdict of the jury is not sustained by the evidence" does not authorize the consideration of an exception to a refusal to grant a change of venue.[61]

m. Rulings on Right to Open and Close. A reviewing court will not sustain the ground of a motion for new trial which merely alleges that the trial court "erred in not allowing defendant's attorney to open and conclude."[62]

n. Rulings on Demurrers to Evidence. A ruling of the trial court sustaining a demurrer to the evidence is presented for review by a motion for new trial duly filed which alleges "that the decision of the court is not sustained by sufficient evidence and is contrary to law."[63]

54. *Arkansas.*— Bourland *v.* Skimnee, 11 Ark. 671.

Colorado.— Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.

Georgia.— Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119.

Indiana.— Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479.

Kentucky.— Cahill *v.* Mullins, 101 S. W. 336, 31 Ky. L. Rep. 72.

The time, place, and circumstances of inquiries made should be stated. Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119; Martin *v.* Prince, 12 Ind. App. 213, 40 N. E. 33; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

The names of persons of whom inquiry was made should be stated unless some reason be assigned for the omission. Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119.

Statement held insufficient.—An allegation of inquiry of all persons whom the applicant had reason to believe knew anything about the controversy is not sufficiently definite. Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582.

55. *Arkansas.*— Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181; Bourland *v.* Skimnee, 11 Ark. 671.

California.— Brooks *v.* Lyon, 3 Cal. 113; Bartlett *v.* Hogden, 3 Cal. 55.

Georgia.— Wallace *v.* Tumlin, 42 Ga. 462.

Indiana.— Berry *v.* Daily, 30 Ind. 183.

Louisiana.— Hernandez *v.* Garetage, 4 Mart. N. S. 419; Stafford *v.* Calliham, 3 Mart. N. S. 124; Innis *v.* Ware, 1 Mart. N. S. 643.

New York.— Raphaelsky *v.* Lynch, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. 224, 43 How. Pr. 157.

Texas.— Frizzell *v.* Johnson, 30 Tex. 31; Madden *v.* Shapard, 3 Tex. 49; Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975.

See 37 Cent. Dig. tit. "New Trial," § 252.

56. St. Louis, etc., R. Co. *v.* Gaston, 67 Kan. 217, 72 Pac. 777.

57. Wolverton *v.* Wolverton, 163 Ind. 26, 71 N. E. 123.

58. McCammock *v.* Clark, 16 Ind. 320.

59. Collett *v.* State, 156 Ind. 64, 59 N. E. 168.

60. Topeka *v.* Smelser, 5 Kan. App. 95, 48 Pac. 874.

61. Horton *v.* Wilson, 25 Ind. 316.

62. Clark *v.* Thompson, 99 Ga. 221, 25 S. E. 247.

63. Gilmore *v.* Garnett Bank, 10 Kan. App. 496, 63 Pac. 89.

4. Filing. It is usually essential to the validity of a motion for a new trial that it should be filed in the office of the clerk of the trial court and within the time prescribed by law,[64] unless the party is unavoidably prevented from filing the same within such time;[65] and a motion which has not been so filed will be dismissed.[66] Such a rule is equally as imperative in suits in equity as in actions at law.[67] But the actual filing of a written motion or written grounds may be waived by contesting the application on other grounds without objecting to such failure.[68] In some jurisdictions notice of intention to move for a new trial stands for the formal motion, and the latter need not be filed.[69]

5. Amendment. Within the time limited by rule of court or statute for filing a motion for a new trial, it may be amended either by adding additional grounds or by correcting informalities or defects.[70] After that time a motion duly filed may be amended by correcting mere technical defects or adding matters germane to the grounds stated in the original motion.[71] In some jurisdictions new grounds may be added by amendment, although the time for filing an original motion has expired.[72] In other jurisdictions nothing can be so added that is not germane

64. Hilt *v.* Young, 116 Ga. 708, 43 S. E. 76 (although rule *nisi* granted during time fixed for filing motion); New England Mortg. Security Co. *v.* Collins, 115 Ga. 104, 41 S. E. 270; Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878. See also Gale *v.* Hoysradt, 3 How. Pr. (N. Y.) 47, as to right of adverse party to enter rule *nisi* where movant delays doing so. And see *supra*, IV, D.

Statute mandatory.— A statute requiring a motion for new trial to be filed within ten days after the verdict or decision is rendered is mandatory. Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878.

Where a motion has been regularly indorsed as filed, but not entered on the minutes or the record, an order, at the next term, to correct the omission *nunc pro tunc* is proper. Gilmore *v.* Harp, 92 Mo. App. 386. But where a motion for a new trial was not filed with the clerk of the proper county within the time required, by reason of the mere inadvertence of defendant's attorneys, the court had no power at a subsequent term to enter an order directing the filing of the motion *nunc pro tunc*. Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878.

Where a motion for new trial has been continued until next term by agreement of the parties, it will be considered filed in time, although it did not come into the hands of the clerk until a few moments after the announcement of the adjournment for the term. Glover *v.* Ratcliff, 69 Kan. 428, 77 Pac. 89.

Leaving the motion in the office of the judge in the care of his special bailiff is not a filing. New England Mortg. Security Co. *v.* Collins, 115 Ga. 104, 41 S. E. 270.

Necessity that clerk be in office.— It is not absolutely necessary that the clerk, when he marks a motion filed, should be in his office in order to perfect the filing, provided the same be done in good faith by the clerk, and not in such a manner or under such circumstances as to work an injury to other parties. Hammock *v.* May, 38 Tex. 196.

Filing of copy.— Rules of court in some states provide that a copy of a motion for a new trial shall be filed at the same time as the original, and if this is not done, the motion may be stricken from the files, although the copy is filed before it is called for by the adverse party. Burgit *v.* Case, 84 Iowa 33, 50 N. W. 218.

65. Todd *v.* Peterson, 13 Wyo. 513, 81 Pac. 878, inadvertence of attorney insufficient excuse.

66. Hilt *v.* Young, 116 Ga. 708, 43 S. E. 76.

Default of clerk.— Where failure to file a motion for a new trial is due to the default of the clerk, it is error to dismiss the application. Sanders *v.* Williams, 73 Ga. 119; Hammock *v.* May, 38 Tex. 196.

67. Keaton *v.* Keaton, 74 Mo. App. 174.

68. Bailey *v.* Thornton, 94 Ga. 719, 19 S. E. 820; Chicago, etc., R. Co. *v.* Goff, 158 Ill. 453, 41 N. E. 1112; Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Armeny *v.* Madson, etc., Co., 111 Ill. App. 621; Gilbert *v.* Schilz, 83 Ill. App. 185. *Contra*, Walls *v.* Preston, 25 Cal. 59.

69. East *v.* Mooney, 7 Utah 414, 27 Pac. 4; Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

70. McLeod *v.* Morris, 120 Ga. 756, 48 S. E. 188; Lincoln *v.* Beckman, 23 Nebr. 677, 37 N. W. 593 (leave to so amend unnecessary); Kreielsheimer *v.* Nelson, 31 Wash. 406, 72 Pac. 72.

71. Mann *v.* Tallapoosa St. R. Co., 99 Ga. 117, 24 S. E. 871 (by signing name of counsel of movant); Andis *v.* Richie, 120 Ind. 138, 21 N. E. 1111 (by inserting other affidavits as to newly discovered evidence); State *v.* Anderson, (Iowa 1899) 80 N. W. 430; Means *v.* Yeager, 98 Iowa 694, 65 N. W. 993; Sowden *v.* Craig, 20 Iowa 477 (permitting accident and surprise to be added to ground of newly discovered evidence); Reamer *v.* Morrison Express Co., 93 Mo. App. 501, 67 S. W. 718 (by signing motion where omission mere oversight).

Immaterial matter.— Where a proposed amendment is immaterial, it will not be allowed. Shailer, etc., Co. *v.* Corcoran, 21 Ohio Cir. Ct. 639, 11 Ohio Cir. Dec. 599; Furlong *v.* Reid, 12 Ont. Pr. 201.

72. *Georgia.*— Central R., etc., Co. *v.* Pool,

to grounds stated in the original motion,[73] except, it may be, grounds that the movant was unavoidably prevented from including therein.[74]

6. Certification or Verification of Motion For Purposes of Review — a. Necessity. In some jurisdictions the statutes require certification or verification of the grounds of motion for new trial. Thus in Georgia it is held that grounds of motion for new trial not approved by the court or verified will not be considered on exceptions to the order overruling the motion.[75] In the absence of such verification the supreme court will consider only whether the verdict is contrary to the law and evidence,[76] and where all but one of the grounds of a motion are certified by the judge to be incorrect, that ground only will be considered on appeal.[77] In California a statement or motion for new trial not certified as correct by the judge or the parties will not be considered on appeal.[78] So it has been held in Nebraska that a paper included in the transcript, purporting to be a motion for new trial, will be disregarded unless authenticated by the certificate of the clerk.[79]

95 Ga. 410, 22 S. E. 631; Girardey *v.* Bessman, 62 Ga. 654; Moore *v.* Ulm, 34 Ga. 565; Snelling *v.* Darrell, 17 Ga. 141. *Compare* Lester *v.* Savannah Guano Co., 94 Ga. 710, 20 S. E. 1, as to adding ground without merit. *Contra,* Riggins *v.* Brown, 12 Ga. 271.

Kentucky.— Wooldridge *v.* White, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63 (but not ordinarily after motion overruled); Houston *v.* Kidwell, 83 Ky. 301. *Compare* Bell *v.* Howard, 4 Litt. 117, as to additional grounds causing surprise.

Minnesota.— Jung *v.* Theo. Hamm Brewing Co., 95 Minn. 367, 104 N. W. 233, even after hearing where no prejudice shown.

Ohio.— Seagrave *v.* Hall, 10 Ohio Cir. Ct. 395, 6 Ohio Cir. Dec. 497, under general power to amend pleadings, process, or proceedings.

Texas.— Day *v.* Goodman, (1891) 17 S. W. 475; Bell *v.* Walnitzch, 39 Tex. 132.

Canada.— Vary *v.* Muirhead, 2 U. C. Q. B. O. S. 121, on hearing.

Any time before motion disposed of.— An amendment to a motion for a new trial may be allowed at any time before the motion is finally disposed of. Tifton, etc., R. Co. *v.* Chastain, 122 Ga. 250, 50 S. E. 105, holding entry on proposed amendment sufficient approval.

A ground known to the movant at the time of the original motion cannot be added by amendment after the time for filing such motion has expired. Reed *v.* Miller, 1 Bibb (Ky.) 142.

73. Dutton *v.* Seevers, 89 Iowa 302, 56 N. W. 398 (denying the right to amend a motion alleging errors in instructions by alleging failure to instruct on the burden of proof); Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987; Perry *v.* Eaves, 4 Kan. App. 26, 45 Pac. 718; Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718 (although newly discovered evidence); Mt. Vernon Bank *v.* Porter, 148 Mo. 176, 49 S. W. 982 [*reversing* 65 Mo. App. 448]; Saxton Nat. Bank *v.* Bennett, 138 Mo. 494, 40 S. W. 97; Hesse *v.* Seyp, 88 Mo. App. 66 (not to add newly discovered evidence); Gullion *v.* Traver, 64 Nebr. 51, 89 N. W. 404; Aultman *v.* Leahey, 24 Nebr. 286, 38 N. W. 740. See also Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97.

74. Gullion *v.* Traver, 64 Nebr. 51, 89 N. W. 404; Aultman *v.* Leahey, 24 Nebr. 286, 38 N. W. 740; Preble *v.* Bates, 37 Fed. 772, by adding evidence discovered since filing the original motion. See also Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97, at least where it is not shown that newly discovered evidence sought to be made available by amendment was not known when the motion was filed.

75. Burdette *v.* Crawford, 125 Ga. 577, 54 S. E. 677; Horton *v.* Smith, 115 Ga. 66, 41 S. E. 253; Atlanta Mach. Works *v.* Pope, 111 Ga. 872, 36 S. E. 950; Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646; Knox *v.* Richards, 110 Ga. 5, 35 S. E. 295; Hagerstown Steam-Engine, etc., Co. *v.* Grizzard, 86 Ga. 574, 12 S. E. 939; Collins *v.* Spence, 84 Ga. 503, 11 S. E. 502; Graham *v.* Mitchell, 78 Ga. 310; McDowell *v.* Sutlive, 78 Ga. 142, 2 S. E. 937; Blackwell *v.* State, 74 Ga. 403; Georgia Land, etc., Co. *v.* Humphries, 66 Ga. 754; Puffer *v.* Peabody, 59 Ga. 295; Hathorn *v.* Maynard, 54 Ga. 687.

76. De Vaughn *v.* Armstrong, 69 Ga. 771.

Illustration of rule.— The refusal of a request to give a certain charge will not be considered on appeal, against objection, as a ground for a motion for new trial, unless the fact that such request was actually made and denied is verified by the judge in the bill of exceptions or elsewhere in the record. McDade *v.* Hawkins, 57 Ga. 151.

77. McDonald *v.* State, 72 Ga. 211.

78. Vilhac *v.* Biven, 28 Cal. 409.

Motion for new trial on ground of misconduct.— Under a statutory provision (Code Civ. Proc. § 658) to the effect that a motion for new trial on the ground of misconduct of the jury shall be made on affidavits, a motion made on the statement of the case is unauthorized. It has also been held under this statute that where a deputy sheriff having charge of the jury refuses to make an affidavit his deposition in open court must be taken as equivalent to such affidavit. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169.

79. Hake *v.* Woolner, 55 Nebr. 471, **75**

Under a statute of Montana providing that, if the amendments to the statement on motion for new trial prepared by the adverse party are not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, or delivered to the clerk for the judge, the court must disregard, on appeal, the statement and all questions sought to be presented thereby, when the moving party has failed to comply with such requirement.[80]

b. Sufficiency. A ground of a motion for new trial will not be held to be verified when the record is silent on the subject; when the record discloses an affirmative refusal to verify, and when the judge appends to the motion a note which states facts in conflict with any statement in the ground which would be material in the consideration of the errors complained of.[81] The granting of a rule *nisi* for a new trial and entry thereof upon the minutes, even with the order that the rule operate as supersedeas, will not authenticate matters of fact alleged in the motion for a new trial;[82] and an approval of a motion qualified by the statement that the ground therein stated should be corrected by reference to the charge appended to the motion is not a sufficient certification. The judge should either make the grounds speak the exact truth or refuse to certify their correctness.[83] A statement by the trial judge that he does not remember the ground of motion as stated by counsel, but that counsel is so confident of it that he, the judge, dislikes to disapprove it, is in effect a disapproval.[84] On the other hand entering the word "Approval" on the motion and signing the same is a sufficient verification;[85] and it has been held that the successor of the judge who presided at the trial may authenticate to the supreme court the grounds taken before himself in a motion for new trial.[86] Where it appears from the record on appeal that the failure of the court to charge a certain principle of law was presented in support of a motion for new trial, considered and overruled, and that the entire charge delivered to the jury had been approved by the judge, and was at that time a part of the record, and, from an examination thereof, it is manifest that the court did not give in charge that principle, such facts, taken together, will be considered by the appellate court as a sufficient verification of that ground.[87] In Montana a certification of the motion as correct by the attorneys instead of the judge is insufficient.[88]

I. Petition, Complaint, or Statutory Action For New Trial After the Term[89] **— 1. Necessary Requisites, and Sufficiency — a. In General.** In many states an application for new trial after the term must be by petition or com-

N. W. 1087; Romberg *v.* Fokken, 47 Nebr. 198, 66 N. W. 282.

80. Wright *v.* Mathews, 28 Mont. 442, 72 Pac. 820.

81. Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646.

82. Thompson *v.* Georgia R., etc., Co., 55 Ga. 458.

83. Maynard *v.* Ponder, 75 Ga. 664.

84. Macon *v.* Harris, 75 Ga. 761.

85. Loudon *v.* Coleman, 59 Ga. 653.

Motion marked "allowed," insufficient.— An amendment to a motion for new trial, which has an entry to the effect that it was allowed by the judge, with nothing else to show an approval of its grounds, is not sufficiently verified to authorize the supreme court to deal with assignments of error therein: approval does not follow from mere allowance of an amendment. Sterling *v.* Unity Cotton Mills, 119 Ga. 173, 45 S. E. 975; Jackson *v.* State, 116 Ga. 834, 43 S. E. 255; Dunn *v.* State, 116 Ga. 515, 42 S. E. 772; Taylor *v.* Brown, 114 Ga. 299, 40 S. E. 281; Gamble *v.* State, 113 Ga. 701, 39 S. E. 301; Merritt *v.* Merritt, 113 Ga. 569, 38 S. E. 973; Long *v.* Scanlan, 105 Ga. 424, 31 S. E. 436.

86. Watkins *v.* Paine, 57 Ga. 50.

87. Seaboard Air-Line R. Co. *v.* Bostock, 1 Ga. App. 189, 58 S. E. 136.

88. Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

89. **Continuance or postponement of hearing** see *infra*, IV, O, 3, b, (II).

Motion on minutes of court see *infra*, IV, J, 2, b.

Statutory new trial as of right see *infra*, VI, C, 2.

Successive applications see *supra*, I, D, 5.

Time for filing and approval of brief of evidence see *infra*, IV, L, 3.

Time for filing and service of notice of motion see *supra*, IV, F, 3.

Time for filing statement of grounds of motion see *supra*, IV, H, 4.

Time for hearing and decision see *infra*, IV, O, 3.

Time for settlement, filing, and service of bill, case or statement of facts see *infra*, IV, K, 3, 4.

plaint.[90] It should state all the facts necessary to show the applicant entitled to the relief sought.[91] And it should state facts, and not mere legal conclusions.[92] Affidavits filed in support of the application,[93] or a transcript of the evidence introduced on the trial,[94] or a copy of the pleadings,[95] attached or filed as an exhibit, will not supply the place of a necessary allegation or allegations.

b. Verification. There is a conflict of opinion as to the necessity for verification; some decisions holding that verification is necessary,[96] while others take the contrary view.[97] A petition is sufficiently verified by the affidavit of the real party in interest.[98]

c. Transcript of Record or Evidence. In the absence of a statute or rule to the contrary, a petition or complaint for a new trial need not be accompanied by a transcript of the record,[99] or by a transcript or statement of the evidence or the judge's minutes.[1]

d. Statement of Grounds — (i) *In General.* A petition or complaint after the term must show sufficient reasons for not making the application during the term,[2] and must present one of the grounds for a new trial enumerated by the

90. *Indiana.*— Hines *v.* Driver, 100 Ind. 315; Roush *v.* Layton, 51 Ind. 106; Webster *v.* Maiden, 41 Ind. 124; Sturgeon *v.* Hitchens, 22 Ind. 107; Stanley *v.* Peeples, 13 Ind. 232; Tereba *v.* Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N. E. 1033 (within a year after final judgment); McConahey *v.* Foster, 21 Ind. App. 416, 52 N. E. 619. But see Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457.

Iowa.— Hunter *v.* Porter, 124 Iowa 351, 100 N. W. 53; Engels *v.* Kiene, (1901) 88 N. W. 331; Tama City First Nat. Bank *v.* Murdough, 40 Iowa 26.

Kansas.— Odell *v.* Sargent, 3 Kan. 80.

Kentucky.— Hackett *v.* Rosenham, 105 Ky. 26, 47 S. W. 450, 22 Ky. L. Rep. 1569, filed in original case or otherwise.

Nebraska.— Chadron Loan, etc., Assoc. *v.* Scott, 4 Nebr. (Unoff.) 694, 96 N. W. 220.

New Hampshire.—Russell *v.* Dyer, 39 N. H. 528, surprise at perjury.

Ohio.— Stuckey *v.* Bloomer, 2 Ohio Cir. Ct. 541, 1 Ohio Cir. Dec. 631. See also Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670, as to term-time after expiration of three days' limit for motion.

Texas.— Spencer *v.* Kinnard, 12 Tex. 180.

United States.— See Clark *v.* Sohier, 5 Fed. Cas. No. 2,835, 1 Woodb. & M. 368, as to additional right under state statute.

91. Offutt *v.* Gowdy, 18 Ind. App. 602, 48 N. E. 654; Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840, and not require court to search former record to see what evidence tended to show.

A petition stating several grounds for a new trial states but one cause of action. Gottleib *v.* Jasper, 27 Kan. 770. Where the petition complains of erroneous rulings of the trial court and that the verdict is contrary to the evidence, the rulings should be stated as one ground and the other cause as a distinct ground. Eddy *v.* Wilkinson, 16 R. I. 557, 18 Atl. 202.

92. Bevering *v.* Smith, (Iowa 1902) 90 N. W. 840.

93. Freeman *v.* Gragg, 73 Ala. 199; Callahan *v.* Lott, 42 Ala. 167; Briggs *v.* Rowley, 10 Ohio S. & C. Pl. Dec. 177, 7 Ohio N. P. 651.

94. Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Shewalter *v.* Williamson, 125 Ind. 373, 25 N. E. 452; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933.

95. Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Shewalter *v.* Williamson, 125 Ind. 373, 25 N. E. 452.

96. Cox *v.* Hutchings, 21 Ind. 219; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368.

97. Allen *v.* Gillum, 16 Ind. 234; Moody *v.* Branham, 47 Kan. 314, 27 Pac. 975.

98. Bradish *v.* State, 35 Vt. 452.

99. Rickart *v.* Davis, 42 Ind. 164; McKee *v.* McDonald, 17 Ind. 518. *Compare* the following decisions under statutes. Duncan *v.* Alender, 110 Ky. 828, 62 S. W. 851, 23 Ky. L. Rep. 256; Overstreet *v.* Brown, 62 S. W. 885, 23 Ky. L. Rep. 317; Olney *v.* Chadsey, 7 R. I. 224; Potter *v.* Padelford, 3 R. I. 162.

1. Eddy *v.* Wilkinson, 16 R. I. 557, 18 Atl. 202 (as to report of evidence); Bradish *v.* State, 35 Vt. 452. *Compare* Haggelund *v.* Oakdale Mfg. Co., 26 R. I. 520, 60 Atl. 106, under statute.

2. *Georgia.*— Watts *v.* White Hickory Wagon Co., 108 Ga. 809, 34 S. E. 147.

Indiana.— Pepin *v.* Lautman, 28 Ind. App. 74, 62 N. E. 60.

Iowa.— Connell *v.* Connell, 119 Iowa 602, 93 N. W. 582.

Kansas.— Odell *v.* Sargent, 3 Kan. 80.

Rhode Island.— Haggelund *v.* Oakdale Mfg. Co., 26 R. I. 520, 60 Atl. 106; McDermott *v.* Rhode Island Co., (1903) 60 Atl. 48; McCudden *v.* Wheeler, etc., Mfg. Co., 23 R. I. 528, 51 Atl. 48.

Texas.— Ingle *v.* Bell, 84 Tex. 463, 19 S. W. 553; McGloin *v.* McGloin, 70 Tex. 643, 8 S. W. 305; Cook *v.* De la Garza, 13 Tex. 431; Spencer *v.* Kinnard, 12 Tex. 180.

See 37 Cent. Dig. tit. "New Trial," § 246 *et seq.*

Want of actual notice of the action is an excuse for not moving for a new trial during the term. Kitchen *v.* Crawford, 13 Tex. 516.

Adjournment of the court on the day the decision was rendered does not show a suffi-

statute,[3] and such as would have been sufficient had it been presented by motion within the usual time.[4]

(II) *Errors and Irregularities.* Where the application is made on the ground of errors or irregularities in the proceedings, verdict, or judgment, they must be alleged specifically,[5] and it must be shown that such errors or irregularities were prejudicial to the applicant.[6] The evidence need not be set forth where it is not material in the determination of the grounds alleged.[7] But a petition for a new trial on the ground of erroneous instructions should state the testimony or its purport with sufficient fullness to show that the alleged error was prejudicial.[8]

(III) *Accident or Surprise.* A petition or complaint for a new trial for accident or surprise must state the particular facts showing the accident or surprise.[9] It must state facts showing that the accident or surprise could not have been guarded against by ordinary prudence.[10] Where a new trial is asked for because of the absence of witnesses, the facts showing the diligence used to secure their attendance must be set out.[11] Where a new trial is asked because of the absence from the trial of defendant the petition or complaint must set out a meritorious defense if none was pleaded.[12] A petition for a new trial for accident or misfortune preventing a review of the case in the supreme court must show the utmost diligence to secure such review.[13]

(IV) *Newly Discovered Evidence.* Where a new trial is asked for on the ground of newly discovered evidence, the issues on the trial, the evidence introduced, and the evidence newly discovered must be stated.[14] The newly discovered

cient reason for not moving for a new trial at the term, where it is not alleged that movant's counsel was not present or that the court refused to remain in session until the motion could be prepared and filed. Menger *v.* North British, etc., Ins. Co., (Kan. App. 1900) 61 Pac. 874.

3. Coulson *v.* Ferree, 82 S. W. 1000, 26 Ky. L. Rep. 959.

Error in assessing the amount of the recovery is not ground for a new trial on petition after the term under a statute providing for such proceedings for a ground discovered after the term. Lovelace *v.* Lovell, 107 Ky. 676, 55 S. W. 549, 21 Ky. L. Rep. 1433.

4. Glidewell *v.* Daggy, 21 Ind. 95; Nelson *v.* Johnson, 18 Ind. 329; Allen *v.* Gillum, 16 Ind. 234; Stanley *v.* Peeples, 13 Ind. 232; Cook *v.* De la Garza, 13 Tex. 431.

5. Stanley *v.* Peeples, 13 Ind. 232; O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926, an allegation that plaintiff did not have a fair and full trial being insufficient.

Where a new trial is asked for because of the inability of the applicant to obtain a transcript for review on error, it is not necessary to allege or prove error in the judgment. Zweibel *v.* Caldwell, 72 Nebr. 47, 99 N. W. 843, 102 N. W. 84.

6. O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926. A petition alleging error in refusing to permit counsel to inquire whether they were employed by a certain corporation should allege that they were so employed. Shepard *v.* New York, etc., R. Co., 27 R. I. 135, 61 Atl. 42.

7. House *v.* Wright, 22 Ind. 383.

8. Burrows *v.* Keene, 15 R. I. 484, 8 Atl. 713.

9. Denison *v.* Foster, 18 R. I. 735, 31 Atl. 894. See also *supra*, III, H.

10. *Ex p.* Wallace, 60 Ala. 267; Taylor *v.* Sutton, 6 La. Ann. 709, unauthorized appearance by attorney.

11. Nordman *v.* Stough, 50 Ind. 280; Fisk *v.* Miller, 20 Tex. 572.

12. Prentice *v.* Oliver, 78 S. W. 469, 25 Ky. L. Rep. 1576; Taylor *v.* Sutton, 6 La. Ann. 709.

13. Langan *v.* Parkhurst, (Nebr. 1901) 96 N. W. 63.

14. *Connecticut.*— Traveler's Ins. Co. *v.* Savage, 43 Conn. 187; Parsons *v.* Platt, 37 Conn. 563.

Indiana.—Anderson *v.* Hathaway, 130 Ind. 528, 30 N. E. 638; Shewalter *v.* Williamson, 125 Ind. 373, 25 N. E. 452; Hiatt *v.* Ballinger, 59 Ind. 303; Carver *v.* Compton, 51 Ind. 451; Roush *v.* Layton, 51 Ind. 106; Sanders *v.* Loy, 45 Ind. 229; Bartholomew *v.* Loy, 44 Ind. 393; Rickart *v.* Davis, 42 Ind. 164; Freeman *v.* Bowman, 25 Ind. 236; Huntington *v.* Drake, 24 Ind. 347; Patteson *v.* Wilson, 22 Ind. 358; Glidewell *v.* Daggy, 21 Ind. 95; McKee *v.* McDonald, 17 Ind. 518; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368.

Kentucky.— Overstreet *v.* Brown, 62 S. W. 885, 23 Ky. L. Rep. 317.

Nebraska.— Omaha, etc., R. Co. *v.* O'Donnell, 24 Nebr. 753, 40 N. W. 298.

Ohio.— Briggs *v.* Rowley, 10 Ohio S. & C. Pl. Dec. 177, 7 Ohio N. P. 651.

Vermont.— Bradish *v.* State, 35 Vt. 452; Cardell *v.* Lawton, 16 Vt. 606.

See 37 Cent. Dig. tit. "New Trial," § 247.

Evidence on point not affected by newly discovered evidence.— A petition is not defective for failure to set out evidence offered on the trial on a point not affected by the newly discovered evidence. Travelers' Ins. Co. *v.* Savage, 43 Conn. 187.

evidence must be stated in direct and positive terms.[15] In some states it must be set out in full,[16] but in other states it is sufficient to state the substance of it.[17] The names of the witnesses must be given.[18] The petition or complaint must show that the evidence was discovered since the verdict,[19] and too late to be taken advantage of by a motion during the term.[20] It must show that, by the exercise of reasonable diligence, the new evidence could not have been discovered before the trial,[21] or after the trial in time to have applied for a new trial by motion,[22] and must state the particular facts showing diligence before[23] and after the trial.[24] It must show affirmatively that it has been filed within the time provided by law,[25] and promptly after the discovery of the new evidence.[26]

2. Answer or Demurrer. In some states issues must be formed as in other cases.[27] Under some statutes the allegation of the petition or complaint are considered as denied without answer.[28] The sufficiency of the petition or complaint may be tested by demurrer.[29] A demurrer admits the facts well pleaded, including the allegations as to the evidence.[30] The dismissal of a petition after a

15. Omaha, etc., R. Co. *v.* O'Donnell, 24 Nebr. 753, 40 N. W. 298.

16. Indiana State Spiritual Assoc. *v.* Reynolds, 61 Ind. 104; Anderson *v.* Sutherland, 59 Tex. 409.

17. Stineman *v.* Beath, 36 Iowa 73; Gottleib *v.* Jasper, 27 Kan. 770.

18. Hillyard *v.* Seamons, 1 Root (Conn.) 89; Noyce *v.* Huntington, Kirby (Conn.) 282; Cardell *v.* Lawton, 16 Vt. 606.

19. Freeman *v.* Gragg, 73 Ala. 199; Carver *v.* Compton, 51 Ind. 451; Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479.

The complaint must show that the evidence was not known to any of the applicants who were joint parties in the action. Bertram *v.* State, 32 Ind. App. 199, 69 N. E. 479.

20. Freeman *v.* Gragg, 73 Ala. 199; Mercer *v.* Mercer, 114 Ind. 558, 17 N. E. 182; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Indiana State Spiritual Assoc. *v.* Reynolds, 61 Ind. 104; Hiatt *v.* Ballinger, 59 Ind. 303; Tillson *v.* Crim, 22 Ind. 357; McDaniel *v.* Graves, 12 Ind. 465; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368.

21. Parsons *v.* Platt, 37 Conn. 563; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Carver *v.* Compton, 51 Ind. 451; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290.

22. Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290; Fisk *v.* Miller, 20 Tex. 572; Harris *v.* Haveman, 1 Tex. App. Civ. Cas. § 802.

23. Exchange Nat. Bank *v.* Darrow, 177 Ill. 362, 52 N. E. 356 [*affirming* 74 Ill. App. 170]; Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935; Anderson *v.* Hathaway, 130 Ind. 528, 30 N. E. 638; Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492; Blackburn *v.* Crowder, 110 Ind. 127, 10 N. E. 933; Ragsdale *v.* Matthews, 93 Ind. 589; Reno *v.* Robertson, 48 Ind. 106; Bartholomew *v.* Loy, 44 Ind. 393; Scott *v.* Hawk, 105 Iowa 467, 75 N. W. 368; Anderson *v.* Sutherland, 59 Tex. 409.

Time, place, and circumstances of inquiries made must be stated. Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935.

Motion to make more definite and certain. — A petition containing a general allegation of diligent search and inquiry is subject to a motion to make the same more definite and certain, but not to a general demurrer. Scott *v.* Hawk, 105 Iowa 467, 75 N. W. 368.

24. Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290; Burlington, etc., R. Co. *v.* Dobson, 17 Nebr. 450, 455, 23 N. W. 353, 511.

25. Hiatt *v.* Ballinger, 59 Ind. 303; Brock *v.* Becker, 8 Ohio Dec. (Reprint) 263, 6 Cinc. L. Bul. 755; McCudden *v.* Wheeler, etc., Mfg. Co., 23 R. I. 528, 51 Atl. 48.

26. Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492.

27. Slusser *v.* Palin, 35 Ind. App. 335, 74 N. E. 17. It has been held error to treat a petition filed in the original case as a motion and overrule it without requiring the adverse party to either demur or plead. Hackett *v.* Rosenham, 105 Ky. 26, 47 S. W. 450, 22 Ky. L. Rep. 1569.

28. Tama City First Nat. Bank *v.* Murdough, 40 Iowa 26.

Under the Iowa code, the issues are limited to denials of the allegations of the petition. Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291.

29. Brock *v.* South, etc., R. Co., 65 Ala. 79; Hines *v.* Driver, 100 Ind. 315; Carver *v.* Compton, 51 Ind. 451; Sanders *v.* Loy, 45 Ind. 229; Glidewell *v.* Daggy, 21 Ind. 95; Stanley *v.* Peeples, 13 Ind. 232; Slusser *v.* Palin, 35 Ind. App. 335, 74 N. E. 17; Tama City First Nat. Bank *v.* Murdough, 40 Iowa 26 (and not by motion to strike); Gottleib *v.* Jasper, 27 Kan. 770; Hackett *v.* Rosenham, 105 Ky. 26, 47 S. W. 450, 22 Ky. L. Rep. 1569.

Sufficiency of demurrer. — A demurrer stating that the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action" is sufficient. Stanley *v.* Peeples, 13 Ind. 232. "That the alleged accident, fraud, or mistake, was not shown to have occurred without the fault of the plaintiff, or petitioner" is sufficiently definite as a specification of the causes or grounds of demurrer. Brock *v.* South, etc., Alabama R. Co., 65 Ala. 79.

30. Sanders *v.* Loy, 45 Ind. 229; Turner *v.* Turner, 70 S. W. 833, 24 Ky. L. Rep. 1143.

Matters not admitted by demurrer. — A de-

demurrer thereto has been sustained is not error where the record does not show any application for leave to amend.[31]

3. AMENDMENT. The petition or complaint may be amended before or after demurrer as in other cases.[32] An amended petition filed after the dismissal of the original petition has no standing in court, either as an amendment or as a petition, since the relief it seeks is *res judicata* by the judgment on the original petition.[33] Where the ground for a new trial set up in the original petition is insufficient, a sufficient ground cannot be added by amendment after the time within which the petition should have been filed.[34]

4. EVIDENCE ON THE HEARING. On the trial of the issues under the petition or complaint, the issues in the original trial should be proved by the record, the evidence adduced thereat by competent evidence, and the new evidence and the facts relating to its discovery by oral testimony or depositions as in other cases.[35] It is sufficient to prove alleged surprise, accident, mistake, or fraud without proving the defense sufficiently pleaded in the action.[36]

J. Minutes of the Court[37] — 1. IN GENERAL. The term "minutes of the court" seems to have no well defined legal meaning, but is evidently used as referring to the judge's recollection of the evidence and rulings and to such minutes thereof as he may have made.[38] Where the motion is not heard at the circuit where made, the judge's minutes may be required.[39] Where the judge's minutes are not accessible and the minutes of the attorney who tried the case are used, they should be verified.[40]

2. MOTION ON THE MINUTES — a. In General. Under the statutes of some states[41] a new trial may be granted on the judge's minutes upon exceptions; or because the verdict is for excessive or insufficient damages,[42] or otherwise contrary to the evidence,[43] or contrary to law.[44] Such a motion can be made only on the grounds specified in the statute,[45] which does not include surprise,[46] or the refusal of the

murrer to a motion does not admit the general allegation that the judgment is erroneous. Etchells *v.* Wainwright, 76 Conn. 534, 57 Atl. 121. A demurrer does not admit an allegation that the exhibits contain all the evidence when the record shows that other evidence was introduced. Indiana State Spiritual Assoc. *v.* Reynolds, 61 Ind. 104.

31. Morrow *v.* Chicago, etc., R. Co., 61 Iowa 487, 16 N. W. 572.

32. Callahan *v.* Lott, 42 Ala. 167; Dothard *v.* Teague, 40 Ala. 583; Duncan *v.* Allender, 110 Ky. 828, 62 S. W. 851, 23 Ky. L. Rep. 256, where submission set aside.

33. Houston *v.* Hidwell, 14 S. W. 377, 12 Ky. L. Rep. 386.

34. Harnett *v.* Harnett, 59 Iowa 401, 13 N. W. 408.

35. Davis *v.* Davis, 145 Ind. 4, 43 N. E. 935 (it not being sufficient to set out the former evidence as part of the complaint); Kitch *v.* Oatis, 79 Ind. 96; Houston *v.* Bruner, 59 Ind. 25 (*ex parte* affidavits and suppressed depositions not being competent evidence); Larrimore *v.* Williams, 30 Ind. 18; Allen *v.* Gillum, 16 Ind. 234; Sloan *v.* State, 8 Ind. 312; Scott *v.* Hawk, 105 Iowa 467, 75 N. W. 368. *Compare* Burr *v.* Palmer, 23 Vt. 244, as to rebuttal of oral evidence by *ex parte* affidavits.

36. Pratt *v.* Keils, 28 Ala. 390.

37. For definition of minutes see 27 Cyc. 796.

38. Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205.

Transcript of testimony.— The successor of the trial judge may require the movant to furnish a transcript of the testimony for his consideration. McChesney *v.* Davis, 86 Ill. App. 380. See also Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649, where motion argued before a judge who did not try the case.

39. Copp *v.* Etter, 2 Nova Scotia 304.

40. Stephenson *v.* Dulhanty, 2 Nova Scotia 339.

41. Under the New York code of civil procedure, section 999, it is within the discretion of the justice whether he will hear a motion made at the term on the minutes, or direct it to be made more formally on a case and exceptions. Magnus *v.* Buffalo R. Co., 24 N. Y. App. Div. 449, 48 N. Y. Suppl. 490.

42. McDonald *v.* Walter, 40 N. Y. 551; Algeo *v.* Duncan, 39 N. Y. 313. See also Wavle *v.* Wavle, 9 Hun (N. Y.) 125. *Contra*, Moore *v.* Wood, 19 How. Pr. (N. Y.) 405, as to insufficient damages.

43. Malcolmson *v.* Harris, 90 Cal. 262, 27 Pac. 206; Kenner *v.* Morrison, 12 Hun (N. Y.) 204; Allgro *v.* Duncan, 24 How. Pr. (N. Y.) 210.

44. Robson *v.* New York Cent., etc., R. Co., 21 Hun (N. Y.) 387; Wasilewski *v.* Wendell, 9 N. Y. St. 508. *Contra*, under old code. Tinson *v.* Welch, 51 N. Y. 244.

45. Delaney *v.* Brett, 51 N. Y. 78; Swartout *v.* Willingham, 6 Misc. (N. Y.) 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66. But see Campanello *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 670.

46. Argall *v.* Jacobs, 21 Hun (N. Y.) 114 [*affirmed* in 87 N. Y. 110, 41 Am. Rep. 357]

court to allow counsel sufficient time to sum up the case to the jury.[47] Neither is a motion on the minutes of the court authorized, where the trial was by the court without a jury,[48] nor where the complaint was dismissed on plaintiff's own showing.[49]

b. Time For Application and Hearing. A motion for a new trial on the judge's minutes must be made,[50] and heard and decided,[51] at the term at which the trial is had. When the hearing of a motion for a new trial on the judge's minutes is continued, by consent, beyond the term, it becomes a motion for a new trial on the record; and although, on the hearing of such a motion, where no bill of exceptions has been settled, the testimony given at the trial cannot be considered, yet the objection must be taken at the hearing or it will be held to have been waived.[52]

K. Bill of Exceptions, Case, or Statement of Case[53] — **1. Necessity For**[54] — **a. In General.** When a motion for a new trial is made on the minutes of the court which tried the case, neither a bill of exceptions,[55] nor a statement of the case,[56] is necessary. Where, however, a motion for a new trial is required by statute to be heard upon a bill of exceptions or statement of the case, or where the notice of intention to move for a new trial specifies that the motion will be made upon a bill of exceptions or statement, a new trial will be denied unless such bill of exceptions or statement is prepared and settled.[57] In some states a motion for a new trial on an issue of fact is required to be made on a case settled and signed by the trial judge. A motion for a new trial on the ground of newly discovered evidence is one involving an issue of fact within such requirement.[58]

47. Swartout *v.* Willingham, 6 Misc. (N. Y.) 179, 26 N. Y. Suppl. 769, 31 Abb. N. Cas. 66.

48. Bosworth *v.* Kinghorn, 94 N. Y. App. Div. 187, 87 N. Y. Suppl. 983 [*affirmed* in 179 N. Y. 590, 72 N. E. 1139]; Knight *v.* Sackett, etc., Lith. Co., 61 N. Y. Super. Ct. 219, 19 N. Y. Suppl. 712, 31 Abb. N. Cas. 373 [*affirmed* in 141 N. Y. 404, 36 N. E. 392]; New York *v.* Constantine, 60 N. Y. Super. Ct. 469, 18 N. Y. Suppl. 788.

49. Harris *v.* Gregg, 4 N. Y. App. Div. 615, 38 N. Y. Suppl. 844; Union Mills First Nat. Bank *v.* Clark, 42 Hun (N. Y.) 90; Twenty-Third St. Baptist Church *v.* Cornwell, 56 N. Y. Super. Ct. 260, 3 N. Y. Suppl. 51 [*affirmed* in 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807]; Healy *v.* Twenty-Third St. R. Co., 11 Daly (N. Y.) 281; Dusenbury *v.* Dusenbury, 61 How. Pr. (N. Y.) 432. *Contra,* Duden *v.* Waitzfelder, 2 Abb. N. Cas. (N. Y.) 295.

50. Doddridge *v.* Gaines, 1 MacArthur (D. C.) 335; Hansen *v.* Fish, 27 Wis. 535.

An omission so to move cannot be cured by a subsequent direction that the motion be made at the special term on the judge's minutes. Thayer Mfg. Jewelry Co. *v.* Steinau, 58 How. Pr. (N. Y.) 315.

51. Doddridge *v.* Gaines, 1 MacArthur (D. C.) 335; Hinson *v.* Catoe, 10 S. C. 311; Prentiss *v.* Danaher, 20 Wis. 311; Dunbar *v.* Hollinshead, 10 Wis. 505.

After adjournment.— Such a motion cannot be heard after the adjournment of the court, although notice of the motion was given during term. Molair *v.* Port Royal, etc., R. Co., 31 S. C. 510, 10 S. E. 243.

52. Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26.

53. As part of record on appeal see Appeal and Error, 2 Cyc. 505 *et seq.*

Necessity for objection and exception at trial see *supra,* I, D, 2.

54. See also cases cited *supra,* IV, J, 2.

55. Emery *v.* Emery, 54 Iowa 106, 6 N. W. 152; Chandler *v.* Thompson, 30 Fed. 38.

The stenographer's notes need not be filed before the hearing of a motion for a new trial made on the minutes of the court. Schlotterer *v.* Brooklyn, etc., Ferry Co., 102 N. Y. App. Div. 363, 621, 627, 92 N. Y. Suppl. 674, 1144, 1145; Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205.

56. Malcolmson *v.* Harris, 90 Cal. 262, 27 Pac. 206; Thayer Mfg. Jewelry Co. *v.* Steinau, 58 How. Pr. (N. Y.) 315.

57. White *v.* Sacramento County Super. Ct., 72 Cal. 475, 14 Pac. 87; Cooney *v.* Furlong, 66 Cal. 520, 6 Pac. 388; Parrott *v.* Hot Springs, 9 S. D. 202, 68 N. W. 329. See also Durkee *v.* Marshall, 14 Vt. 559, where copy of the minutes of the trial judge were required on petition for a new trial.

The only difference between a statement of the case and a bill of exceptions is that the statement of the case follows a notice of intention to move for a new trial. People *v.* Crane, 60 Cal. 279; Juckett *v.* Fargo Mercantile Co., 18 S. D. 347, 100 N. W. 742. See also Stiasny *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 268, 72 N. Y. Suppl. 747, to the effect that a case under the New York code embraces a bill of exceptions.

58. Davis *v.* Grand Rapids F. Ins. Co., 5 N. Y. App. Div. 36, 39 N. Y. Suppl. 71; Harris *v.* Gregg, 4 N. Y. App. Div. 615, 38 N. Y. Suppl. 844; Bantleon *v.* Meier, 81 Hun (N. Y.) 162, 30 N. Y. Suppl. 706; Sproul *v.* Resolute F. Ins. Co., 1 Lans. (N. Y.) 71; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 280, 19 N. Y. Suppl. 716; Newhall *v.* Appleton, 46 N. Y. Super. Ct. 6; Boyd *v.* Boyd, 10 Misc. (N. Y.) 498, 31 N. Y. Suppl. 193; Katz *v.*

b. Waiver. That a motion is one which properly should not have been made on the minutes[59] or on affidavits[60] is waived, in some states, by arguing the motion on the merits without objection to the form of the application.

2. Requisites and Sufficiency in General — a. Bill of Exceptions.[61] A bill of exceptions must contain all the evidence necessary to a determination of the question raised by the motion for a new trial.[62] And some courts require oral testimony taken by way of question and answer to be reduced to narrative form.[63] Under the code of Montana where a motion for new trial is made on a bill of exceptions, the motion is not objectionable for failure of such bill to contain a specification of errors of law and insufficiencies of evidence as are found in a statement of the case.[64]

b. Statement of Case — (i) *Evidence.* A statement of the case should contain so much of the evidence as is necessary to a proper determination of the grounds presented by the notice or motion and no more.[65] The statement should contain all the evidence where it is claimed that the verdict is against the weight of the evidence or that the damages awarded are excessive,[66] or where it is claimed that the instructions were not relevant to the evidence.[67] To sustain the action of the trial court, it will be presumed that the statement contains all the evidence offered on the question involved.[68]

(ii) *Specification of Errors of Law and Insufficiencies of Evidence.* Where a new trial is demanded for errors of law occurring at the trial or for

Atfield, 17 N. Y. Suppl. 447; Holmes *v.* Evans, 13 N. Y. Suppl. 610; Anonymous, 7 Wend. (N. Y.) 331; Carroll *v.* More, 30 Wis. 574; Jones *v.* Evans, 28 Wis. 168. See also Russell *v.* Randall, 123 N. Y. 436, 25 N. E. 931 [*reversing* 9 N. Y. Suppl. 327].

59. Gribble *v.* Livermore, 64 Minn. 396, 67 N. W. 213; Larson *v.* Ross, 56 Minn. 74, 57 N. W. 323; Emmerich *v.* Hefferan, 33 Hun (N. Y.) 54 [*affirmed* in 97 N. Y. 619]; Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26. *Compare* Walls *v.* Preston, 25 Cal. 59; Baumer *v.* French, 8 N. D. 319, 79 N. W. 340, no specifications in statement of case.

The hearing of a motion without objection upon a "bill of exceptions" instead of a "statement of the case" is a mere irregularity not affecting the substantial rights of the parties. Dyer *v.* Placer County, 90 Cal. 276, 27 Pac. 197.

60. Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135; Russell *v.* Randall, 123 N. Y. 436, 25 N. E. 931 [*reversing* 9 N. Y. Suppl. 327]; Carroll *v.* More, 30 Wis. 574.

61. For requirements as to bills of exceptions in general see Appeal and Error, 3 Cyc. 23.

62. Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649.

63. U. S. *v.* Five Hundred and Eight Barrels Distilled Spirits, 25 Fed. Cas. No. 15,113, 5 Blatchf. 407.

64. Bond *v.* Hurd, 31 Mont. 314, 78 Pac. 579.

65. Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074; Clark *v.* Gridley, 35 Cal. 398; McMinn *v.* Whelan, 27 Cal. 300; McGarvey *v.* Little, 15 Cal. 27; York *v.* Stewart, 30 Mont. 367, 76 Pac. 756; Sherman *v.* Higgins, 7 Mont. 479, 17 Pac. 561; Cereghino *v.* Cereghino, 4 Utah 100, 6 Pac. 523. See also Churchill *v.* Flournoy, 127 Cal. 355, 59 Pac. 791 (as to want of prejudice by insertion of trial court's opinion); Lewis *v.* Hyams, 25 Nev. 242, 59 Pac. 376 (as to action of court in striking out reasons for giving instruction).

Transcript of evidence.— The movant is not required to obtain a transcript of the evidence prepared by the official stenographer from which to make the statement. York *v.* Steward, 30 Mont. 367, 76 Pac. 756.

Reference to notes of reporter.—A proposed statement presented for settlement which merely refers to the notes of the court reporter and directs that they be inserted in full therein is insufficient. Frazer *v.* San Francisco Super. Ct., 62 Cal. 49.

Reference to records.—Records, documentary evidence, and depositions, on file in the case, may be referred to in the draft offered for settlement and written at large in the engrossed statement only. Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 127 Cal. 37, 59 Pac. 206; Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074; Dickinson *v.* Van Horn, 9 Cal. 207.

Reference to documents filed as exhibits.— It is a sufficient engrossment for the purposes of the hearing in the trial court to refer to documents on file as exhibits with the direction, "Here insert." Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 127 Cal. 37, 59 Pac. 206.

66. Dawley *v.* Hovious, 23 Cal. 103; *In re* Hoover, 7 Mackey (D. C.) 541 (where case or result of evidence agreed on by counsel was held insufficient); Converse *v.* Washington, etc., R. Co., 2 MacArthur (D. C.) 504.

67. McGarvey *v.* Little, 15 Cal. 27.

Admission of correctness of statement.—An admission that a statement which does not purport to contain all the evidence is correct is not an admission that it contains all the evidence. Howard *v.* Winters, 3 Nev. 539.

68. Clark *v.* Gridley, 35 Cal. 398.

insufficiency of the evidence to support the verdict or decision, the statement of the case required by codes of the California type must specify the particular rulings or instructions complained of,[69] or must specify particularly wherein the evidence is insufficient to support the verdict or decision.[70] A specification which

69. *California.*— Thompson *v.* Los Angeles, 125 Cal. 270, 57 Pac. 1015; Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, (1895) 39 Pac. 634; Nye *v.* Marysville, etc., R. Co., 97 Cal. 461, 32 Pac. 530; Millan *v.* Hood, (1892) 30 Pac. 1107; Carter *v.* Allen, (1884) 4 Pac. 1064; Hill *v.* Weisler, 49 Cal. 146; Smith *v.* Christian, 47 Cal. 18; McCreery *v.* Everding, 44 Cal. 284 (improper nonsuit); Hawkins *v.* Ahhott, 40 Cal. 639; Butterfield *v.* California Cent. Pac. R. Co., 37 Cal. 381; Zenith Gold, etc., Min. Co. *v.* Irvine, 32 Cal. 302 (although but one question of error can be raised); Partridge *v.* San Francisco, 27 Cal. 415; Burnett *v.* Pacheco, 27 Cal. 408; Crowther *v.* Rowlandson, 27 Cal. 376; McGarvey *v.* Little, 15 Cal. 27.

Montana.— Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998; Bardwell *v.* Anderson, 18 Mont. 528, 46 Pac. 443; Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

Nevada.— Earles *v.* Gilham, 20 Nev. 46, 14 Pac. 586; Caldwell *v.* Greely, 5 Nev. 258.

North Dakota.— Baumer *v.* French, 8 N. D. 319, 79 N. W. 340.

South Dakota.— Nelson *v.* Jordeth, 15 S. D. 46, 87 N. W. 140; Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687.

Utah.— Gill *v.* Hecht, 13 Utah 5, 43 Pac. 626; Slater *v.* Union Pac. R. Co., 8 Utah 178, 30 Pac. 493; Cunnington *v.* Scott, 4 Utah 446, 11 Pac. 578; Gilbertson *v.* Miller Min., etc., Co., 4 Utah 46, 5 Pac. 699.

Washington.— Dawson *v.* Baum, 3 Wash. Terr. 464, 19 Pac. 46.

See 37 Cent. Dig. tit. "New Trial," §§ 256, 257.

Notice of intention to move and statement distinguished.—It is the office of the notice of intention to move to state the general grounds on which a new trial is asked and of the statement to specify the particular errors of law or insufficiencies of evidence. Worthing *v.* Cutts, 8 Nev. 118.

Notice incorporated in statement.— It is probably sufficient to specify the errors in the notice of intention to move for a new trial, if such notice is incorporated in the statement. Nye *v.* Marysville, etc., R. Co., 97 Cal. 461, 32 Pac. 530.

Failure of the court to pass on a material issue need not be set out in the statement. Millard *v.* Supreme Council A. L. H., (Cal. 1889) 21 Pac. 825. *Compare* Bessman *v.* Girardey, 66 Ga. 18.

70. *California.*— Bryan *v.* Bryan, (1902) 70 Pac. 304; Rauer *v.* Fay, 128 Cal. 523, 61 Pac. 90; Taylor *v.* Bell, 128 Cal. 306, 60 Pac. 853; Thompson *v.* Los Angeles, 125 Cal. 270, 57 Pac. 1015; De Molera *v.* Martin, 120 Cal. 544, 52 Pac. 825 (where ownership depended on several probative facts); Livestock Gazette Pub. Co. *v.* Union Stock-Yard Co., 114 Cal. 447, 46 Pac. 286 (sufficient specification of inadequacy of damages in bill of exceptions); Love *v.* Anchor Raisin Vineyard Co., (1896) 45 Pac. 1044; Adams *v.* Helbing, 107 Cal. 298, 40 Pac. 422; Moore *v.* Moore, (1893) 34 Pac. 90; Millan *v.* Hood, (1892) 30 Pac. 1107; Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31; Baird *v.* Peall, 92 Cal. 235, 28 Pac. 285 (bill of exceptions); Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; Mazkewitz *v.* Pimentel, 83 Cal. 450, 23 Pac. 527; Paris *v.* Raynor, 76 Cal. 647, 18 Pac. 788; Parker *v.* Reay, 76 Cal. 103, 18 Pac. 124; Menk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158 (insufficient specification of want of evidence of performance of condition of contract); Heilbron *v.* Centerville, etc., Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890; Weyl *v.* Sonoma Valley R. Co., 69 Cal. 202, 10 Pac. 510 (at least where the notice of motion does not contain such particular specifications); Donohoe *v.* Mariposa Land, etc., Co., 66 Cal. 317, 5 Pac. 495; Eddelhuttel *v.* Durrell, 55 Cal. 277; Kelly *v.* Mack, 49 Cal. 523; Coleman *v.* Gilmore, 49 Cal. 340; Mahon *v.* San Rafael Turnpike Road Co., 49 Cal. 269; Hill *v.* Weisler, 49 Cal. 146; Harding *v.* Vandewater, 40 Cal. 77; Brumagim *v.* Bradshaw, 39 Cal. 24; Beans *v.* Emanuelli, 36 Cal. 117; Carleton *v.* Townsend, 28 Cal. 219. See also Bennett *v.* Hobro, 72 Cal. 178, 13 Pac. 473, as to sufficient specification in inadequacy of damages in personal injury case.

Idaho.— Robson *v.* Colson, 9 Ida. 215, 72 Pac. 951.

Montana.— Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998; Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123; Cain *v.* Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004; King *v.* Lincoln, 26 Mont. 157, 66 Pac. 836; Bardwell *v.* Anderson, 18 Mont. 528, 46 Pac. 443; Zickler *v.* Deegan, 16 Mont. 198, 40 Pac. 410; Froman *v.* Patterson, 10 Mont. 107, 24 Pac. 692; Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 23 Pac. 718; Thorp *v.* Freed, 1 Mont. 651.

Nevada.— Caldwell *v.* Greely, 5 Nev. 258.

North Dakota.— Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127.

South Dakota.— Anderson *v.* Medhery, 16 S. D. 329, 92 N. W. 1087; Nelson *v.* Jordeth, 15 S. D. 46, 87 N. W. 140; Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687; Alt *v.* Chicago, etc., R. Co., 5 S. D. 20, 57 N. W. 1126, as to sufficient specification.

Utah.— Gill *v.* Hecht, 13 Utah 5, 43 Pac. 626; Sterling *v.* Parsons, 9 Utah 81, 33 Pac. 245.

See 37 Cent. Dig. tit. "New Trial," § 261.

"The object of the statute requiring specifications of insufficient evidence is for the

points out the error or insufficiency with reasonable clearness is sufficient.[71] On the hearing of the motion, only errors of law or insufficiencies of evidence so pointed out will be considered.[72] And, where a statement recites that the movant will rely on the argument on certain grounds thereinafter enumerated, all other grounds are waived.[73]

3. Serving and Filing Statement of Case — a. In General. The draft of a proposed statement of the case must be served upon the adverse party or his attorney[74]

purpose of bringing directly before the mind of the court the particular point the aggrieved party desires to be reviewed, and also to give notice to the adverse party of the point of attack, and thereby enable him to produce any additional evidence found in the record which may tend to support the finding of fact assailed by the specification." Brenot *v.* Brenot, 102 Cal. 294, 297, 36 Pac. 672. See also Sterling *v.* Parsons, 9 Utah 81, 33 Pac. 245.

71. Blake *v.* National L. Ins. Co., 123 Cal. 470, 56 Pac. 101 (that waiver of a forfeiture by an insurance agent involved but one fact); Smith *v.* Ellis, 103 Cal. 294, 37 Pac. 400; Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672; Tromans *v.* Mahlman, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579 (holding a general specification sufficient where but one issue was tried); Harnett *v.* Central Pac. R. Co., 78 Cal. 31, 20 Pac. 154; Newell *v.* Desmond, 63 Cal. 242; McCullough *v.* Clark, 41 Cal. 298; Patten *v.* Hyde, 23 Mont. 23, 57 Pac. 407 (insufficiency in evidence); Vogt *v.* Baldwin, 20 Mont. 322, 51 Pac. 157; Strasburger *v.* Beecher, 20 Mont. 143, 49 Pac. 740.

Sufficiency or insufficiency of specifications illustrated.—A specification that the evidence is not sufficient to justify the "judgment" or that the "judgment is against law" is insufficient. Kelly *v.* Mack, 49 Cal. 523; Mazkewitz *v.* Pimentel, 83 Cal. 450, 23 Pac. 527. See also Pierce *v.* Willis, 103 Cal. 91, 36 Pac. 1080. A specification that the evidence is insufficient to justify the "findings" of the court is directed to the "decision" of the court and not to the judgment. Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22. A specification that the evidence shows a certain fact inconsistent, presumably, with a finding is generally insufficient. Taylor *v.* Bell, 128 Cal. 306, 60 Pac. 853; Kumle *v.* Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Adams *v.* Helbing, 107 Cal. 298, 40 Pac. 422; Moore *v.* Moore, (Cal. 1893) 34 Pac. 90; Cain *v.* Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004; Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 23 Pac. 718. A specification that the court erred in rendering judgment for defendant is too general. Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335. Error in assessing the amount of the recovery may be shown under a statement of ground that the verdict is contrary to law or not sustained by sufficient evidence. Du Brutz *v.* Jessup, 54 Cal. 118. It was formerly held insufficient to say that any certain finding was not sustained by sufficient evidence, unless the finding was of a probative fact as distinguished from an ultimate fact. De Molera *v.* Martin, 120 Cal. 544, 52 Pac. 825; Parker *v.* Reay, 76 Cal. 103, 18 Pac. 124; Heilbron *v.* Centerville, etc., Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Eddelbuttel *v.* Durrell, 55 Cal. 277; Finlan *v.* Heinze, 28 Mont. 548, 73 Pac. 123. But at the present time a specification is sufficient when it points to a particular finding; or if the motion is directed against a general verdict, or an omnibus finding, which states that all or certain designated allegations of the complaint or answer are true. Harris *v.* Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; Holmes *v.* Hoppe, 140 Cal. 212, 73 Pac. 1002 (holding the recent rule to be more liberal); Gillies *v.* Clarke Fork Coal Min. Co., 32 Mont. 320, 80 Pac. 370. A specification is sufficient which recites that "the foregoing constitutes substantially all the evidence given upon the trial." Di Nola *v.* Allison, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419; Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113. "That the court erred in giving to the jury the instructions as set forth in this statement" is a sufficient specification of error, where the instructions were written and given as one continuous charge. Ellis *v.* Central Pac. R. Co., 5 Nev. 255. A statement is not fatally defective for failure to arrange specifications of error separately under appropriate headings. Gillies *v.* Clarke Fork Coal Min. Co., 32 Mont. 320, 80 Pac. 370. A specification in a statement of the case showing insufficiency of evidence to support a finding of fact is not to be disregarded because it is classified as an error of law. Gillies *v.* Clarke Fork Coal Min. Co., *supra*. *Compare* Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.

72. See cases in preceding notes.

73. Beans *v.* Emanuelli, 36 Cal. 117.

74. Calderwood *v.* Peyser, 42 Cal. 110; Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; Tillou *v.* Hutchinson, 13 N. J. L. 192; Honay *v.* Chesterman, 5 Cow. (N. Y.) 22.

The statement need not be served on all the attorneys of the adverse parties, if served on attorneys representing each party. Walsh *v.* Mueller, 14 Mont. 76, 35 Pac. 226.

Service of original draft.— Service by leaving the original draft with the attorney of the adverse party, who returns it, is sufficient. Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723.

Proof of service.— Service may be proved either by indorsement of acceptance of service or by affidavit of the person making the

within the time fixed by the rule of court or statute.[75] Unless the proposed statement is filed within the time limited by statute or rule of court,[76] or within any extension of time that may have been granted by the court,[77] or stipulated by the parties,[78] a new trial will be denied.

b. Extension of Time. The statutes generally provide that the court may extend the time for serving or filing a statement;[79] but where they limit the period of extension, the courts cannot grant an extension for a greater period than that designated.[80] That the parties have extended the time by stipulation does not limit the further time that may be given by order of court.[81] But extension of time by stipulation of parties after an extension of time by the court does not authorize the court to grant further extension which exceeds the total time which the court

service. Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723.

Signatures.— The draft of the proposed statement must be signed by the movant or his attorney. Snow *v.* Crowe, 3 Utah 172, 2 Pac. 209. Where the attorneys for the successful party acknowledge the receipt of a proposed statement as such, they cannot object, after the expiration of the time for preparing it, that it was not signed by, or in behalf of, the moving party. Pearce *v.* Boggs, 99 Cal. 340, 33 Pac. 906.

Striking from files.— The failure to serve the statement is not ground for striking it from the files. Calderwood *v.* Peyser, 42 Cal. 110.

75. Wheeler *v.* Karnes, 125 Cal. 51, 57 Pac. 893; Wills *v.* Rhen Kong, 70 Cal. 548, 11 Pac. 780; Beach *v.* Spokane Ranch, etc., Co., 25 Mont. 367, 65 Pac. 106; Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106; Tull *v.* Anderson, 15 Nev. 426; Honay *v.* Chesterman, 5 Cow. (N. Y.) 22; Jackson *v.* Harrington, 4 Cow. (N. Y.) 537; Peck *v.* Peck, 14 Johns. (N. Y.) 219.

Objections to the statement for want of timely service thereof should be made when it is presented for settlement rather than at the hearing on the motion. Cole *v.* Wilcox, 99 Cal. 549, 34 Pac. 114.

Striking from files.—A statement settled, certified, and filed should not be stricken from the record or files because it was not served in time; but a new trial should be denied if the objection has not been waived. Beach *v.* Spokane Ranch, etc., Co., 25 Mont. 367, 65 Pac. 106.

76. Mills *v.* Dearborn, 82 Cal. 51, 22 Pac. 1114 (insufficient proof of timely filing by stipulation as to service and correctness); Chase *v.* Evoy, 58 Cal. 348; Campbell *v.* Jones, 41 Cal. 515; Quivey *v.* Gambert, 32 Cal. 304; Le Roy *v.* Rassette, 32 Cal. 171; Hegeler *v.* Henckell, 27 Cal. 491; Easterby *v.* Larco, 24 Cal. 179; Munch *v.* Williamson, 24 Cal. 167 (where record was held not to show waiver by alleged appearance of adverse party); Wing *v.* Owen, 9 Cal. 247; Caney *v.* Silverthorne, 9 Cal. 67; Adams *v.* Oakland, 8 Cal. 510; Hill *v.* White, 2 Cal. 306; Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237; Tull *v.* Anderson, 15 Nev. 426. See also Grey *v.* Folwell, (N. J. Sup. 1891) 22 Atl. 623 (as to laches in failing to prepare statement for two terms); Martin *v.* Platt, 53 Hun (N. Y.) 42, 5 N. Y. Suppl. 862 (where leave to prepare a case more than a year after the trial and after exceptions had been overruled by the general term was denied).

Striking from files.— It is better practice to deny a new trial because the statement was not filed in time rather than to strike the statement on that ground. Quivey *v.* Gambert, 32 Cal. 304. *Compare* Doyle *v.* Gore, 13 Mont. 471, 34 Pac. 846.

Abandonment of notice of intention to move.— It has been held that the moving party is not entitled to abandon notice of intention to move for a new trial and file his statement within the statutory time after the giving of a second notice. Le Roy *v.* Rassette, 32 Cal. 171.

77. Freese *v.* Freese, 134 Cal. 48, 66 Pac. 43; Bunnel *v.* Stockton, 83 Cal. 319, 23 Pac. 301; Thompson *v.* Lynch, 43 Cal. 482; Jenkins *v.* Frink, 27 Cal. 337; Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441.

78. Walsh *v.* Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692, construing stipulation. So much of a stipulation for serving a statement and bringing on the motion as attempts to fix the time for hearing the motion may be disregarded. Sweeney *v.* Great Falls, etc., R. Co., 11 Mont. 523, 29 Pac. 15.

79. Curtis *v.* Yolo County Super. Ct., 70 Cal. 390, 11 Pac. 652; Carrillo *v.* Smith, 37 Cal. 337; Harper *v.* Minor, 27 Cal. 107; Easterby *v.* Larco, 24 Cal. 179; Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 35 Pac. 878.

By whom made.— The judge who presided at the trial in another county, the regular presiding judge being disqualified, may make the order in a county other than that in which the case was tried. Matthews *v.* Marin County Super. Ct., 68 Cal. 638, 10 Pac. 128.

80. Freese *v.* Freese, 134 Cal. 48, 66 Pac. 43; Desmond *v.* Faus, (Cal. 1893) 33 Pac. 457; Bunnel *v.* Stockton, 83 Cal. 319, 23 Pac. 301; Doyle *v.* Gore, 13 Mont. 471, 34 Pac. 846.

81. Curtis *v.* Yolo County Super. Ct., 70 Cal. 320, 11 Pac. 652.

Consent to an order extending the time, it seems, is not equivalent to a stipulation of parties. Desmond *v.* Faus, (Cal. 1893) 33 Pac. 457.

might have granted in the first instance.[82] Ordinarily an order extending the time must be made before the expiration of the time given by the statute or the additional time given by some prior order or agreement of the parties.[83] But the parties may agree to an extension of time even after the right to serve or file a statement has been lost.[84] Where the time for serving and filing a statement begins to run from the giving of notice of intention to move for a new trial, extending the time for giving notice operates to extend the time for serving and filing the statement.[85] But extending the time to move for a new trial does not of itself extend the time for filing the statement.[86] The order for extension should be signed by the judge and filed with the papers in the case or entered of record in the minutes of the court within the time prescribed by statute.[87] Mistakes in the order which could not mislead the opposite party do not vitiate it.[88] The extension runs from the date of the order,[89] and includes the day "to" which it is granted.[90] An improper extension of time must be objected to when the order is made.[91]

c. **Waiver of Delay.** If the adverse party joins in the settlement of a statement without objecting to it as having been filed out of time, the irregularity is waived.[92] But the right to object at the hearing that the notice and statement were not served or filed in proper time is not waived by proposing amendments to the statement with a preface that such party does so without prejudice to his right to so object.[93]

4. **Settlement of Statement of Case.** In the absence of any statutory provision fixing the time for presentation of a proposed statement to the judge for settlement, it may be presented within a reasonable time.[94] If, however, the time for presenting a proposed statement to the judge for settlement is prescribed by statute the statutory requirement must be complied with,[95] or the court may refuse to

82. Bunnel *v.* Stockton, 83 Cal. 319, 23 Pac. 301.

83. Freese *v.* Freese, 134 Cal. 48, 66 Pac. 43; Hegeler *v.* Henckell, 27 Cal. 491; Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237. See also Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128, as to presumption of loss of record intermediate extension.

Effect of mistake, inadvertence, surprise, or neglect.— It has been said that a court might extend the time after the expiration of the usual time under a general statute for relief in case of mistake, inadvertence, surprise, or neglect. Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104. And see Murphy *v.* Stelling, 1 Cal. App. 95, 81 Pac. 730, where relief was denied because excuse was not shown at time of settlement.

Where the order is made within the proper time, it may be filed after such time has expired. Elliot *v.* Whitmore, 10 Utah 253, 37 Pac. 463 [*distinguishing* Campbell *v.* Jones, 41 Cal. 515; Clark *v.* Strouse, 11 Nev. 76].

84. Simpson *v.* Budd, 91 Cal. 488, 27 Pac. 758.

85. Bryant *v.* Sternfeld, 89 Cal. 611, 26 Pac. 1091; Harper *v.* Minor, 27 Cal. 107.

86. Stevans *v.* Northwestern Stage Co., 1 Ida. 604.

87. Clark *v.* Strouse, 11 Nev. 76.

A verbal order extending the time is not good, although the omission to enter the order of record was an oversight. Campbell *v.* Jones, 41 Cal. 515.

88. Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074.

89. Easterby *v.* Larco, 24 Cal. 179.

90. Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 35 Pac. 878; Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

Where the last day of the extended time for serving a statement falls on Sunday, it may be served on the following Monday. Muir *v.* Galloway, 61 Cal. 498.

91. Wilson *v.* Vance, 55 Ind. 394.

92. Walsh *v.* Mueller, 14 Mont. 76, 35 Pac. 226; Plano Mfg. Co. *v.* Jones, 8 N. D. 315, 79 N. W. 338.

93. Quivey *v.* Gambert, 32 Cal. 304; Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106.

94. Miller *v.* Hunt, 7 Ida. 486, 63 Pac. 803, holding that, where no amendments are proposed, the statement may be presented to the clerk or judge for settlement within any reasonable time. Pendergrass *v.* Cross, 73 Cal. 475, 15 Pac. 63; Woodard *v.* Webster, 20 Mont. 279, 50 Pac. 791, both holding that, where proposed amendments are adopted, the statement may be presented for settlement within any reasonable time, there being no statute or rule fixing a definite time.

95. *California.*— Henry *v.* Merguire, 106 Cal. 142, 39 Pac. 599; McIntyre *v.* Southern California Motor Road Co., (1894) 35 Pac. 991; Conner *v.* Southern California Motor Road Co., 101 Cal. 429, 35 Pac. 990; Wills *v.* Rhen Kong, 70 Cal. 548, 11 Pac. 780.

Idaho.— Hoehnan *v.* New York Dry Goods Co., 8 Ida. 66, 67 Pac. 796.

settle the statement or may settle it and deny a new trial.[96] Where, however, the timely settlement of a statement is prevented by the adverse party, the right to a settlement is not thereby lost.[97] And it seems that the statement may be settled after the expiration of the statutory time where the movant has not been guilty of laches.[98] An order of court extending the time must be made ordinarily before the expiration of the usual statutory time.[99] It is the duty of the court to settle a proposed statement in all cases where the attorneys are unable to agree to it as filed, no matter what reasons exist which render them unable to agree to it,[1] on due notice to the parties.[2] It has been held, in several states, that the ruling of the trial court on the motion for a new trial will not be reviewed on appeal, unless the statement was settled before the ruling was made;[3] but in other states it has been held that the trial court need not "use" the statement on the hearing of the motion.[4] The statement must show on its face that it was agreed to by the

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 29 Mont. 176, 74 Pac. 414.

Rhode Island.— Reynolds *v.* Chapman, 18 R. I. 746, 31 Atl. 832, holding that a statute providing for hearing a petition on an unsigned statement supported by affidavits, in case the statement is not allowed and signed by the judge, contemplates the presentation of the statement to the judge for allowance and signing within the time provided by statute.

Texas.— Proctor *v.* Wilcox, 68 Tex. 219, 4 S. W. 375, where delay in presenting to judge caused by delay in mail was held not excused.

See 37 Cent. Dig. tit. "New Trial," § 267.

96. Wright *v.* Mathews, 28 Mont. 442, 72 Pac. 820.

Effect of subsequent adoption of amendments.— Where the movant did not appear at the time for which he had given notice of settlement of a statement and did not present it to the judge or leave it with the clerk or then and there adopt the proposed amendments, he lost the right to have the statement settled, and it could not be revived by a subsequent adoption of the amendments. State *v.* Silver Bow County Second Judicial Dist. Ct., 28 Mont. 123, 72 Pac. 412.

97. Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074.

98. Hoehnan *v.* New York Dry Goods Co., 8 Ida. 66, 67 Pac. 796.

99. Hoehnan *v.* New York Dry Goods Co., 8 Ida. 66, 67 Pac. 796; Miller *v.* Hunt, 7 Ida. 486, 63 Pac. 803.

1. Lucas *v.* Marysville, 44 Cal. 210. See also Cummings *v.* Irwin, 40 Cal. 354 (as to settlement of statement by county judge); Lewis *v.* Hyams, 25 Nev. 242, 59 Pac. 376 (as to credit given reporter's transcript on settling statement).

In a case tried by a referee, the judge of the court to which all proceedings have been reported may ordinarily settle the statement. Marshall *v.* Golden Fleece Gold, etc., Min. Co., 16 Nev. 156.

To compel a judge to settle a statement mandamus is the proper remedy. Hartmann *v.* Smith, 140 Cal. 461, 74 Pac. 7; *In re* Plume, 23 Mont. 41, 57 Pac. 408.

Improper action of the trial court in striking out matters from a proposed case is not ground for a new trial, the proper remedy being a mandamus proceeding. Schumany *v.* Mark, 35 Minn. 379, 28 N. W. 927.

2. State *v.* Silver Bow County Second Judicial Dist. Ct., 28 Mont. 123, 72 Pac. 412.

Where no amendments have been proposed, the statement may in some jurisdictions be settled without notice. Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; Juckett *v.* Fargo Mercantile Co., 18 S. D. 347, 100 N. W. 742.

Waiver.— Notice of settlement may be waived by stipulation. Cooper *v.* Burch, 140 Cal. 548, 74 Pac. 37.

As to proper notice of acceptance of amendments see State *v.* Silver Bow County Second Judicial Dist. Ct., 28 Mont. 123, 72 Pac. 412.

Presence of party at settlement.— Where notice of the settlement has been given, it is not necessary that the adverse party be present at the settlement. Vilhac *v.* Biven, 28 Cal. 409.

Notice to party giving notice of settlement. — The moving party having given notice of settlement is not himself entitled to notice because of the filing of the statement and amendments before the day fixed. Barbaires *v.* Gregory, 64 Cal. 230, 30 Pac. 805.

Notice of refusal to adopt amendments.— No notice of the refusal to adopt proposed amendments to the statement on motion for new trial is required to be given other than the delivery of the statement and amendments to the clerk or judge. Mellor *v.* Crouch, 76 Cal. 594, 18 Pac. 685.

3. Stevens *v.* Northwestern Stage Co., 1 Ida. 604; Demers *v.* McCormick, 5 Mont. 234, 2 Pac. 350.

4. State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887; Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758. But the trial court may not disregard a case properly settled and allowed because the court may be of the opinion that it does not state the facts correctly. Field *v.* Grey, 1 Ariz. 404, 25 Pac. 793; Steinkraus *v.* Minneapolis, etc., R. Co., 39 Minn. 135, 39 N. W. 70. *Contra*, Toplitz *v.* Raymond, 10 Abb. Pr. (N. Y.) 60, where charge set out in statement was at variance with one delivered by court.

parties,[5] or allowed by the judge.[6] And when duly filed and settled should not be stricken from the files or corrected except on proper showing of mistake therein.[7] On appeal from the denial of a motion, under some codes, the statement must be signed and certified by the judge, even though it is certified by the parties to be correct.[8] But it has been held that the failure to agree upon or settle a statement may be waived by arguing the motion without objection on that ground.[9]

5. Amendment of Statement of Case. In some states statutes fix the time within which a statement must be amended.[10] Within such time it may be amended by adding the grounds of the motion, where it already contains the specifications of errors of law or insufficiency of evidence,[11] or by adding the specifications where it already designates the grounds,[12] or by making additional specifications.[13]

L. Brief of Evidence[14]— **1. Necessity For.** In Georgia a brief of the evidence must be prepared, subject to the revision and approval of the court, or the motion for a new trial will be denied.[15] The rule may not be dispensed with by agreement of the parties and an order of the court directing the omission of a part of

Waiver of failure to settle case.— The failure to settle a case before the hearing on the motion may be waived by proceeding with the hearing and the settlement of the case thereafter without objection. Jones *v.* Evans, 28 Wis. 168.

5. Budd *v.* Drais, 50 Cal. 120; Linn *v.* Twist, 3 Cal. 89; Levey *v.* Fargo, 1 Nev. 415.

6. Budd *v.* Drais, 50 Cal. 120; Linn *v.* Twist, 3 Cal. 89; Levey *v.* Fargo, 1 Nev. 415; Tillou *v.* Hutchinson, 13 N. J. L. 192; Green *v.* Roworth, 4 Misc. (N. Y.) 141, 23 N. Y. Suppl. 777.

As to presumption that order for settlement was attached to statement see Volmer *v.* Stagerman, 25 Minn. 234.

As to the conclusiveness of the judge's certificate see Peck *v.* Parkis, 8 R. I. 364.

As to statute requiring the judge to file a statement of facts where the parties disagree see Collins *v.* Kay, 69 Tex. 365, 6 S. W. 313.

7. York *v.* Steward, 30 Mont. 367, 76 Pac. 756. See also Loucks *v.* Edmondson, 18 Cal. 203, as to insufficiency of motion to strike.

The certificate of the clerk that no amendments were proposed is sufficient proof of that fact and a sufficient authentication of the statement. Tull *v.* Anderson, 15 Nev. 426; Borden *v.* Bender, 16 Nev. 49. See also State *v.* Cheney, 24 Nev. 222, 52 Pac. 12.

8. *California.*— Adams *v.* Dohrmann, 63 Cal. 417 (an omission cannot be supplied after an appeal taken); Schreiber *v.* Whitney, 60 Cal. 431.

Idaho.— Van Meter *v.* Squibb, 9 Ida. 160, 72 Pac. 884.

Montana.— Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

South Dakota.— Parrott *v.* Hot Springs, 9 S. D. 202, 68 N. W. 329.

Utah.—Slater *v.* Union Pac. R. Co., 8 Utah 178, 30 Pac. 493.

See 37 Cent. Dig. tit. "New Trial," § 266.

As to sufficiency of certificate see Girdner *v.* Beswick, 69 Cal. 112, 10 Pac. 278; Overman Silver Min. Co. *v.* American Min. Co., 7 Nev. 312.

As to improper dismissal for laches see Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 127 Cal. 37, 59 Pac. 206.

9. Dickinson *v.* Van Horn, 9 Cal. 207. See also Munch *v.* Williamson, 24 Cal. 167, as to insufficient proof of waiver.

10. Fountain Water Co. *v.* Sonoma County Super. Ct., 139 Cal. 648, 73 Pac. 590; Smith *v.* Stockton, 73 Cal. 204, 14 Pac. 675; Earles *v.* Gilham, 20 Nev. 46, 14 Pac. 586; Chafee *v.* Sprague, 15 R. I. 135, 23 Atl. 110.

As to proper diligence where judge is absent from county see Warden *v.* Mendocino County, 32 Cal. 655.

11. Loucks *v.* Edmondson, 18 Cal. 203.

12. Smith *v.* Stockton, 73 Cal. 204, 14 Pac. 675; Valentine *v.* Stewart, 15 Cal. 387; Miller *v.* Hunt, 7 Ida. 486, 63 Pac. 803; Gill *v.* Hecht, 13 Utah 5, 43 Pac. 626.

13. Swett *v.* Gray, 141 Cal. 63, 74 Pac. 439; Lucas *v.* Marysville, 44 Cal. 210.

14. Incorporating evidence in bill, case, or statement see *supra*, IV, K, 2, b, (I).

15. Dublin Hame Works *v.* Ross-Mehan Foundry Co., 128 Ga. 399, 57 S. E. 683; Moxley *v.* Georgia R., etc., Co., 122 Ga. 493, 50 S. E. 339 (although on ground on which evidence taken not directly material); Brooks *v.* Proctor, 111 Ga. 835, 36 S. E. 99; Holloman *v.* Small, 111 Ga. 812, 35 S. E. 665; Keys *v.* Bell, 111 Ga. 795, 36 S. E. 967; Mize *v.* Americus Mfg., etc., Co., 106 Ga. 140, 32 S. E. 22; Baker *v.* Johnson, 99 Ga. 374, 27 S. E. 706 (although motion amended by addition of new ground, the determination of which will not require a consideration of the evidence); Georgia Pac. R. Co. *v.* Luther, 90 Ga. 249, 15 S. E. 818; Peacock *v.* Peacock, 50 Ga. 595; McKendree *v.* Sikes, 40 Ga. 189; Bliss *v.* Stevens, 13 Ga. 403; Davis *v.* Lowman, 9 Ga. 504 (misconduct of juror in stating alleged facts to the jury); Tomlinson *v.* Cox, 8 Ga. 111; Turner *v.* Rawson, 5 Ga. 399; Petty *v.* Mahaffy, 3 Ga. 217; Georgia R., etc., Co. *v.* Hamer, 1 Ga. App. 673, 58 S. E. 54, holding that a brief of the evidence is an indispensable requisite to a valid motion for a new trial, although the verdict be directed by the court and be based on grounds not requiring a consideration of the evidence.

A brief filed by one of two defendants may be considered on separate motions filed by

the evidence;[16] but it does not apply where a new trial is asked for because of the necessary absence from the trial of the moving party.[17]

2. REQUISITES AND SUFFICIENCY. On an application for a new trial under the Georgia practice a brief of the evidence in the cause must be filed by the party applying for such new trial,[18] under the revision and approval of the court,[19] or by agreement of counsel,[20] and such approval or agreement must appear on the minutes.[21] The brief of the evidence need not be entered on the minutes of the court,[22] or be recorded by the clerk.[23] Such entry may be made, however, and the revision of and approval by the court will be inferred therefrom.[24] The best mode of making out a brief of the testimony is to embody in it an abstract of the oral and a copy of the written evidence.[25] It is not sufficient to merely refer to evidence not actually incorporated in or appended to the brief.[26] Only such evidence as is material upon the questions raised by the motion is required,[27] and a

such defendant and plaintiff. McLain *v.* Wooten, 96 Ga. 331, 23 S. E. 189.

16. Georgia R. Co. *v.* Mitchell, 75 Ga. 144.

17. Audulph *v.* Josey, 44 Ga. 605.

18. White *v.* Newton Mfg. Co., 38 Ga. 587; Spears *v.* Smith, 7 Ga. 436. And see *supra*, preceding section.

Evidence of filing.— A certificate of the clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but it is not necessary evidence. Other evidence may be properly admitted to prove such paper was filed. Peterson *v.* Taylor, 15 Ga. 483, 60 Am. Dec. 705.

Waiver.— The failure to have the brief of evidence on a motion for new trial marked "Filed in office" by the clerk is waived by arguing the motion on its merits. Laslie *v.* Laslie, 94 Ga. 720, 19 S. E. 805.

19. Bliss *v.* Stevens, 13 Ga. 403; Tomlinson *v.* Cox, 8 Ga. 111; Spears *v.* Smith, 7 Ga. 436; Graddy *v.* Hightower, 1 Ga. 252.

The signing by the judge of an entry on the brief of evidence on a motion for a new trial that it was "agreed to" is in effect an approval of the brief. Laslie *v.* Laslie, 94 Ga. 720, 19 S. E. 805. But an indorsement by the judge on a brief of evidence that, six months having elapsed, he was unable to certify whether it was correct or not, although he recognized the correctness of portions of it, is not. Brown *v.* Groover, 65 Ga. 238.

Approval before filing.— An order giving defendant thirty days to file a brief of evidence, "subject to the approval of the court and revision of counsel" does not require the approval of the brief before it is filed; and, if filed within the time prescribed, it is error, on the call of the motion for a new trial, to dismiss it because the brief of evidence has not been approved. Randle *v.* Stone, 75 Ga. 887.

Presumptive approval.— On a motion for a new trial, the granting of a rule *nisi* is presumptive of approval of the brief of the evidence. Worsham *v.* Murchison, 66 Ga. 715; Spencer *v.* Smith, 60 Ga. 537; Vanover *v.* Turner, 41 Ga. 577.

Partial or qualified approval insufficient.— The trial judge is limited to an approval of the brief, as it is finally made up, and an approval of a brief which contemplates an addition thereto is not such an approval as is required by law (Brantley *v.* Meyer, 111 Ga. 693, 36 S. E. 924; Georgia R. Co. *v.* Mitchell, 75 Ga. 144; Erie City Iron Works *v.* Angier, 66 Ga. 634; Turner *v.* Wilcox, 65 Ga. 299. See also Freeman *v.* Macon Door, etc., Co., 92 Ga. 407, 17 S. E. 627), unless after the additions are made the judge again approves either the brief of evidence as a whole, or the additions which have been made thereto (Brantley *v.* Meyer, 111 Ga. 693, 36 S. E. 924; Royce *v.* Gazan, 76 Ga. 79; Georgia R. Co. *v.* Mitchell, 75 Ga. 144; Turner *v.* Wilcox, 65 Ga. 299).

20. **Necessity of approval by court after agreement by counsel.**— It has been decided in one case that a brief of evidence must be approved by the presiding judge, although it has been agreed on by counsel. Porter *v.* State, 56 Ga. 530. There are numerous cases, however, in which it is implied that the agreement of counsel is sufficient. Vanover *v.* Turner, 41 Ga. 577; Hamilton *v.* Conyers, 25 Ga. 158; Bliss *v.* Stevens, 13 Ga. 403; Hardin *v.* Decatur County Inferior Ct., 10 Ga. 93; Tomlinson *v.* Cox, 8 Ga. 111; Spears *v.* Smith, 7 Ga. 436; Graddy *v.* Hightower, 1 Ga. 252.

21. Hardin *v.* Decatur County Inferior Ct., 10 Ga. 93 (entry of agreement *nunc pro tunc*); Tomlinson *v.* Cox, 8 Ga. 111; Graddy *v.* Hightower, 1 Ga. 252.

A memorandum moved by the counsel who made the motion is not sufficient. Bliss *v.* Stevens, 13 Ga. 403.

22. Spears *v.* Smith, 7 Ga. 436.

23. White *v.* Newton Mfg. Co., 38 Ga. 587.

24. Snelling *v.* Dorrell, 15 Ga. 507.

25. Tomlinson *v.* Cox, 8 Ga. 111.

26. Brantley *v.* Meyer, 111 Ga. 693, 36 S. E. 924; Bliss *v.* Stevens, 13 Ga. 403 (declaring, however, a reference to a record on file in the court sufficient where sanctioned by agreement or the approval of the court); Tomlinson *v.* Cox, 8 Ga. 111 (although the presiding judge certified that he recognized such papers as in court before him on the hearing of the motion).

Oral evidence not incorporated in the brief cannot be considered. Ocean Steamship Co. *v.* Krauss, 62 Ga. 175.

27. Hamilton *v.* Conyers, 25 Ga. 158.

mere copy of the stenographic notes is not a proper brief.[28] But the fact that the brief contains some superfluous matter furnishes no ground for dismissing the motion.[29] If such an improper brief is approved by the court, a motion to vacate such approval is the proper method of objection.[30]

3. Filing and Approval. Usually the brief must be filed within the time limited by statute, or rule of court,[31] unless that time has been extended by rule or order of court made within the time fixed by the statute or a previous order,[32] in which event it must be filed within the time so extended,[33] unless good excuse

28. Collins Park, etc., R. Co. *v.* Ware, 110 Ga. 307, 35 S. E. 121; Price *v.* High, 108 Ga. 145, 33 S. E. 956; Jones *v.* West View Cemetery, 103 Ga. 560, 29 S. E. 710; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Brown *v.* Moore, 83 Ga. 605, 10 S. E. 277; Mehaffey *v.* Hambrick, 83 Ga. 597, 10 S. E. 274; Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719; Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607; Chambers *v.* Walker, 80 Ga. 642, 6 S. E. 165.

29. Hood *v.* Culver, 95 Ga. 120, 22 S. E. 123; Dawson *v.* Briscoe, 94 Ga. 723, 21 S. E. 589; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719.

30. Dawson *v.* Briscoe, 94 Ga. 723, 21 S. E. 589; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719.

31. Mize *v.* Americus Mfg., etc., Co., 106 Ga. 140, 32 S. E. 22; Peterson *v.* Taylor, 15 Ga. 483, 60 Am. Dec. 705 (insufficient proof of filing); Petty *v.* Mahaffy, 3 Ga. 217; Graddy *v.* Hightower, 1 Ga. 252.

Failure to have the brief marked "filed in office" by the clerk is waived by arguing the motion on the merits. Laslie *v.* Laslie, 94 Ga. 720, 19 S. E. 805.

Cases pending when statutes enacted.— Statutes limiting the time within which briefs of evidence may be filed have no application to cases pending at the time of their enactment. Bell *v.* Herndon, 89 Ga. 371, 15 S. E. 480; Smith *v.* Davis, 85 Ga. 625, 11 S. E. 1024.

32. Thompson *v.* Thompson, 118 Ga. 543, 45 S. E. 439; Dorsey *v.* Georgia Cent. R. Co., 113 Ga. 564, 38 S. E. 958 (at the hearing); Martin *v.* Monroe, 107 Ga. 330, 33 S. E. 62; Bates *v.* British American Assur. Co., 100 Ga. 249, 28 S. E. 155 (at time fixed for hearing in subsequent term); Hightower *v.* George, (Ga. 1897) 26 S. E. 729; Dillard *v.* Rickerson, 96 Ga. 818, 22 S. E. 990; Brunswick Light, etc., Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11; Wharton *v.* Sims, 88 Ga. 617, 15 S. E. 771; Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205; Central R., etc., Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757; Maynard *v.* Head, 78 Ga. 190, 1 S. E. 273; James *v.* James, 78 Ga. 140 (where continuance during vacation to regular term gave court full jurisdiction); Williams *v.* Georgia Cent. R. Co., 77 Ga. 612, 3 S. E. 88; Hardison *v.* Burr, 73 Ga. 125; Stone *v.* Taylor, 63 Ga. 309.

An order granting leave for filing after term must be clear and unequivocal. Barnes *v.* Macon, etc., R. Co., 105 Ga. 495, 30 S. E. 883.

What does not amount to extension.— An order continuing the hearing of the motion for a new trial does not, by mere implication, extend the time for presenting the brief (Cohen *v.* Lester, 103 Ga. 565, 29 S. E. 823; Watson *v.* Long, 94 Ga. 255, 21 S. E. 507; West *v.* Smith, 90 Ga. 284, 15 S. E. 912; Milner *v.* Burrus, 85 Ga. 642, 11 S. E. 1029; Cotton *v.* Slaughter, 69 Ga. 735. See also Durden *v.* Trubee, 94 Ga. 725, 20 S. E. 5, where right to object was reserved), unless the movant had previously been given until the hearing to present it (Hightower *v.* Brazeal, 101 Ga. 371, 29 S. E. 18; Central R., etc., Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757; Maynard *v.* Head, 78 Ga. 190, 1 S. E. 273; Williams *v.* Georgia Cent. R. Co., 77 Ga. 612, 3 S. E. 88. See also Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205; Crockett *v.* Roebuck, 77 Ga. 16, as to compliance with order), neither does an order giving further time to perfect a motion for a new trial amount to an extension of time (Barnes *v.* Macon, etc., R. Co., 105 Ga. 495, 30 S. E. 883; Cohen *v.* Lester, 103 Ga. 565, 29 S. E. 823).

Construction of order.— Where an order continuing the hearing of a motion for a new trial is susceptible of a construction which would allow the movant to prepare and file a brief of the evidence on the day to which the hearing is continued, and of a construction which would not preserve this right, this court will adopt that construction of the order which is placed upon it by the judge at the final hearing, when he dismisses the motion for a new trial because no brief of evidence was filed when the motion was first called. Brown *v.* Richards, 114 Ga. 318, 40 S. E. 224.

Extension in vacation.— The time cannot be extended in vacation except by an order on the day set for the hearing. Blackburn *v.* Alabama Midland R. Co., 116 Ga. 936, 43 S. E. 366.

33. Blackburn *v.* Alabama Midland R. Co., 116 Ga. 936, 43 S. E. 366; Western, etc., R. Co. *v.* Callaway, 111 Ga. 889, 36 S. E. 967; Whitton *v.* Reid, 109 Ga. 174, 34 S. E. 309; Eason *v.* Americus, 106 Ga. 179, 32 S. E. 106; Cass *v.* Harrell, 102 Ga. 590, 27 S. E. 726 (although court actually approved brief filed out of time); Hinson *v.* Guckenheimer, 95 Ga. 567, 22 S. E. 274; Durden *v.* Trubee, 94 Ga. 725, 20 S. E. 5; Ellington *v.* Hall, 94 Ga. 724, 19 S. E. 992; Arnold *v.* Hall, 70 Ga. 445; McCord *v.* Harden, 69 Ga. 747; Usry *v.*

for failure is shown.[34] And no further extension will in any event be granted where the movant has been guilty of laches.[35] For extraordinary reasons leave to file a brief of the evidence may be given after the expiration of the usual time.[36] The brief must be approved by the court.[37] Although no time is absolutely limited for such approval,[38] the court may refuse to approve it after long delay.[39]

4. WAIVER OF DELAY. The filing of a brief out of time may be waived by agreeing to its approval, or participating in its revision or arguing the motion on the merits without objection to such irregularity.[40]

Phillips, 68 Ga. 815; Middlebrooks *v.* Middlebrooks, 57 Ga. 193.

Failure of the stenographer to transcribe his notes is no ground for granting a second extension. Bryant *v.* Gray, 105 Ga. 483, 30 S. E. 732; Eason *v.* Americus, 106 Ga. 179, 32 S. E. 106; Western, etc., R. Co. *v.* Callaway, 111 Ga. 889, 36 S. E. 967.

As to order for filing made in another county being equivalent to filing see Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854.

In computing the number of days of an extension, the day on which the order was made is to be excluded. Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387.

Filing an unapproved brief within the time fixed is not a compliance with an order extending the time to file an approved brief. McCord *v.* Harden, 69 Ga. 747; Usry *v.* Phillips, 68 Ga. 815.

An approval and order for filing in vacation is equivalent to a filing as of that time. Whitton *v.* Reid, 109 Ga. 174, 34 S. E. 309.

34. Page *v.* Blackshear, 75 Ga. 885 (inability to prepare because of act of opposite party); Hicks *v.* Brantley, 75 Ga. 884 (inability to prepare because of act of opposite party); Thomas *v.* Dockins, 75 Ga. 347 (absence of judge at day named); Isbell *v.* Stillwell, 74 Ga. 387 (sickness of judge).

35. Newman *v.* Malsby, 99 Ga. 627, 25 S. E. 851.

If the brief filed within the extended time does not comply with the statutory requirement further time to perfect it should be denied. Collins Park, etc., R. Co. *v.* Wade, 110 Ga. 307, 35 S. E. 121; Bryant *v.* Gray, 105 Ga. 483, 30 S. E. 732.

36. Napier *v.* Heilker, 115 Ga. 168, 41 S. E. 689; Hinson *v.* Guckenheimer, 95 Ga. 567, 22 S. E. 274; Candler *v.* Hammond, 23 Ga. 493. See also Isbell *v.* Stillwell, 74 Ga. 387.

37. Freeman *v.* Macon Door, etc., Co., 92 Ga. 407, 17 S. E. 627, qualified approval insufficient. And see Brown *v.* Groover, 65 Ga. 238.

What approval sufficient.— The revision and approval of the brief may be inferred from its entry on the minutes. Snelling *v.* Dorrell, 15 Ga. 507. The granting of a rule *nisi* is a presumptive approval of the brief. Worsham *v.* Murchison, 66 Ga. 715 (and a direct approval may be made at the hearing by a different judge); Spencer *v.* Smith, 60 Ga. 537; Vanover *v.* Turner, 41 Ga. 577. The signing of an entry "agreed to" on the brief by the judge is a sufficient approval. Laslie *v.* Laslie, 94 Ga. 720, 19 S. E. 805.

Approval held insufficient.—An entry made by the presiding judge on a brief of evidence presented with a motion for a new trial, in the following language: "The within brief of evidence is hereby approved as correct, subject to such additions as either side may desire as taken from entries on the fieri facias mentioned herein, as the fi. fas. are not now accessible," did not serve as a legal approval of the brief of evidence. Brantley *v.* Meyer, etc., Co., 111 Ga. 693, 36 S. E. 924.

Approval before filing.— An order giving time to file a brief of evidence "subject to the approval of the court" does not require the approval of the brief before it is filed. Randle *v.* Stone, 75 Ga. 887.

For revocation of approval of insufficient brief see Keys *v.* Bell, 111 Ga. 795, 36 S. E. 967; Watts *v.* Watts, 108 Ga. 817, 34 S. E. 131.

38. Dorsey *v.* Georgia Cent. R. Co., 113 Ga. 564, 38 S. E. 958; Cherokee Iron Co. *v.* Barry, 109 Ga. 175, 34 S. E. 280 (at the hearing); University Bank *v.* Tuck, 107 Ga. 211, 33 S. E. 70 (where final approval had been continued from time to time); McCullough *v.* East Tennessee, etc., R. Co., 106 Ga. 275, 32 S. E. 97 (at the hearing); Co-operative Mfg. Co. *v.* Andrews, 105 Ga. 506, 31 S. E. 40; Kehely *v.* Atlantic Consol. St. R. Co., 103 Ga. 563, 29 S. E. 712; Bartow County *v.* Conyers, 102 Ga. 588, 27 S. E. 789; Central R., etc., Co. *v.* Pool, 95 Ga. 410, 22 S. E. 631; Anderson *v.* McLean, 94 Ga. 798, 22 S. E. 302 [*distinguishing* Arnold *v.* Hall, 70 Ga. 445]. See also Baird *v.* Bate, 114 Ga. 117, 39 S. E. 943, as to entry of approval after actual approval on hearing.

39. Hamburger *v.* Jackson, 114 Ga. 396, 40 S. E. 300; Lucas *v.* Cordele Guano Co., 106 Ga. 200, 32 S. E. 120 (especially where material evidence is omitted); Baldwin County *v.* Crawford, 101 Ga. 185, 28 S. E. 621; Heller *v.* De Leon, 96 Ga. 805, 22 S. E. 578; Central R., etc., Co. *v.* Pool, 95 Ga. 410, 22 S. E. 631; Williams *v.* Johnston, 94 Ga. 722, 19 S. E. 888; Watson *v.* Long, 94 Ga. 255, 21 S. E. 507; Milner *v.* Burrus, 85 Ga. 642, 11 S. E. 1029; Pease *v.* Pease, 66 Ga. 277; Brown *v.* Groover, 65 Ga. 238. *Compare* Kerchner *v.* Frazier, 89 Ga. 113, 14 S. E. 883, where delay was due to act of court.

40. Georgia Cent. R. Co. *v.* Dorsey, 106 Ga. 826, 32 S. E. 873; Wall *v.* Carter, 96 Ga. 766, 22 S. E. 297; Central R., etc., Co. *v.* Keller, 94 Ga. 721, 21 S. E. 580; Cook *v.* Childers, 94 Ga. 718, 19 S. E. 819 (holding motion to dismiss the proper practice); Moxley *v.* Kinloch, 80 Ga. 46, 7 S. E. 123; Goodwyn *v.* Hightower, 30 Ga. 249.

5. AMENDMENT. A brief of evidence may be amended at any time while the motion for a new trial is pending,[41] by substituting for it a proper and correct brief duly made out and signed by the judge,[42] or a more condensed statement of its material contents,[43] or by adding matter improperly omitted from the document when it was approved as a complete brief.[44]

M. Report of Evidence. In some states a report of the evidence prepared by the trial judge must be submitted with the motion when it is to be passed upon by an appellate court, or full bench.[45] Where it is claimed that the verdict is contrary to the evidence, the report must contain all the evidence.[46] The report must be filed as required by rule of court or statute.[47] An order extending the time for filing a transcript of the evidence under the statutes of one jurisdiction cannot be made after the time already granted has expired, at least where the delay is due to carelessness rather than to accident, mistake, or unforeseen cause.[48]

N. Affidavits and Extrinsic Evidence[49] — **1. IN GENERAL.** In general an application for a new trial upon any ground not shown by the record, or the minutes of the court,[50] or a bill of exceptions or statement of the case, must be supported by affidavits,[51] and ordinarily the affidavits must be direct and positive and not on information and belief.[52] In other cases, however, as where the motion is based upon an alleged error in rulings upon the admission or rejection of evidence, in misdirection or refusal to instruct upon request, or because the verdict is against the law or the evidence, supporting affidavits are not necessary;[53] but on the contrary, in such cases the court is confined to the evidence which was introduced upon the trial and cannot admit or consider any other testimony,[54]

41. Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719; Howard *v.* Munford, 80 Ga. 166, 4 S. E. 907 (at hearing of motion); Ford *v.* Holmes, 61 Ga. 419; Vanover *v.* Turner, 41 Ga. 577; Hamilton *v.* Conyers, 25 Ga. 158. *Compare* Baker *v.* Wright, 37 Ga. 327, as to amendment after approval on affidavit of witness whose testimony was incorporated in the brief.

42. Hood *v.* Culver, 95 Ga. 120, 22 S. E. 123.

43. Co-operative Mfg. Co. *v.* Andrews, 105 Ga. 506, 31 S. E. 40; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Tate *v.* Griffith, 83 Ga. 153, 9 S. E. 719.

44. Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224.

45. Hopson *v.* Doolittle, 13 Conn. 236; Brunswick First Parish *v.* McKean, 4 Me. 508; Eddy *v.* Wilkinson, 16 R. I. 557, 18 Atl. 202; Rutter *v.* Sullivan, 25 W. Va. 427, motion for newly discovered evidence.

46. Hopson *v.* Doolittle, 13 Conn. 236; Rogers *v.* Kennebec, etc., R. Co., 38 Me. 227.

47. Vinalhaven *v.* Washington, 33 Me. 584 (by middle of ensuing vacation); Blake *v.* Russ, 33 Me. 579 (by middle of ensuing vacation); Fiske *v.* Paine, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498 (not after time within which application must be made has expired).

48. Haggelund *v.* Oakdale Mfg. Co., 26 R. I. 520, 60 Atl. 106.

49. In criminal prosecutions see CRIMINAL LAW, 12 Cyc. 746 *et seq.*

Reception and use at hearing see *infra*, IV, O, 5, e.

50. Under a statute providing for a motion for a new trial on the judge's minutes upon grounds specified in the statute, such grounds must be apparent on the minutes. Jarchover *v.* Dry-Dock, etc., R. Co., 54 N. Y. App. Div. 238, 66 N. Y. Suppl. 575.

51. Harris *v.* Rupel, 14 Ind. 209; Cochrane *v.* Knowles, 3 Greene (Iowa) 115; Whitemore *v.* Shiverick, 3 Nev. 288; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484. See also Kahanek *v.* Galveston, etc., R. Co., 72 Tex. 476, 10 S. W. 570 (as to unsworn statement of judge, from whom case was transferred, as to his alleged disqualification); White *v.* Petch, 6 U. C. Q. B. 13 (as to affidavit sworn before the partner of movant's attorney).

Affidavits in a foreign language may be excluded. Spencer *v.* Doane, 23 Cal. 418.

Exclusive statutory provisions.— Where the only provision of a statute for supporting or controverting the grounds of a motion for a new trial by affidavit expressly specifies the cases in which such affidavits may be used, such express provision will exclude the use of affidavits as to grounds not mentioned. Feister *v.* Kent, 92 Iowa 1, 62 N. W. 493.

52. Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540; Gillotte *v.* Jackson, 41 N. Y. Super. Ct. 308; Scheffel *v.* Scheffel, (Tex. Civ. App. 1905) 84 S. W. 408; Texas Farm, etc., Co. *v.* Story, (Tex. Civ. App. 1898) 43 S. W. 933; Kerr *v.* Boulton, 25 U. C. Q. B. 282. See also *infra*, IV, N, 5, b, (III). *Compare* Com. *v.* Harrold, 204 Pa. St. 154, 53 Atl. 760.

53. Harris *v.* Rupel, 14 Ind. 209; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

54. Thomason *v.* Silvey, 123 Ala. 694, 26 So. 644 (ground that verdict is contrary to law and evidence or that the court erred in giving an affirmative charge); Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900 (ground that court erred in its directions to jury).

either in support of the motion,[55] or in support of the verdict and for the purpose of defeating an order for a new trial.[56] Therefore affidavits explaining or qualifying the evidence given at the trial,[57] or in support of the verdict,[58] or motion, will not be received in such cases.[59] So whether a verdict is excessive is to be determined solely from a consideration of the evidence in the case and whether it will clearly sustain the conclusion of the jury — a question which cannot be aided by the showing of extrinsic facts by affidavit or otherwise, and therefore affidavits in support of a motion based upon this ground are not necessary;[60] the affidavits of witnesses will not be received either to explain or to add to evidence given by them at the trial,[61] and error cannot be predicated upon the granting of a new trial for excessiveness in the verdict, because the order is granted without supporting affidavits.[62]

2. Oral Testimony and Written Evidence. On the hearing of a motion for a new trial, on which evidence *dehors* the record is admissible, it is a matter within the discretion of the court whether it will receive oral testimony,[63]

Affidavits of jurors in support of verdict see *infra*, IV, N, 5, d.

55. Mayeski *v.* His Creditors, 40 La. Ann. 94, 4 So. 9; Dickey *v.* Maine Tel. Co., 46 Me. 483; Williams *v.* Sapieha, (Tex. Civ. App. 1900) 59 S. W. 947.

56. *Arkansas.* — Townsley-Myrick Dry-Goods Co. *v.* Fuller, (1893) 22 S. W. 564, where under a statute prescribing the grounds for a new trial and specifying the particular grounds to be supported by affidavit and as to which counter affidavits may be filed, it was held that on a motion based upon other grounds than those specifically designated no response can be made setting up extraneous facts and that such a response if filed is properly stricken out.

Louisiana. — Hoey *v.* Twogood, 11 La. 195.

New Jersey. — Mott *v.* Pettit, 1 N. J. L. 298.

Virginia. — Street *v.* St. Clair, 6 Munf. 457.

United States. — Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900.

See 37 Cent. Dig. tit. "New Trial," § 302.

On a case made it has been held that where the party relies on some defect in the proofs which is afterward discovered to be material, it is within the discretion of the court to permit such evidence to be supplied when it is of such a nature that no dispute or conflict of testimony can arise upon it, as in the case of a judgment, recorded deed, or other document. Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55 (where a record which was improperly attested had been admitted upon the trial and the proper certificates were permitted to be produced and filed upon the motion for a new trial); Hart *v.* Coltrain, 24 Wend. (N. Y.) 14 (where defendant in ejectment claimed under a sale by virtue of an order of the judge of the court of probates, and it was held on a motion for a new trial on the case made that the court might admit an exemplification of an affidavit made by an administrator before the court of probates to show that the judge had jurisdiction, in order to supply the defect caused by the omission of such proof on the trial, where it was objected that the court of probates was without jurisdiction because it did not appear that the administrator had made and presented to the judge an account of the personal estate of the intestate, but that this rule could not be applied where the motion for a new trial is founded upon a bill of exceptions); Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524. But in other cases a defect of evidence cannot be supplied on the motion in order to support the verdict. Fry *v.* Bennett, 4 Duer (N. Y.) 247, 1 Abb. Pr. 289, where after a new trial ordered for error in permitting a deposition upon insufficient proof that the witness was absent from the state a motion for leave to supply such proof, and thus cure the defect, was denied.

Affidavit of jurors to impeach verdict see *infra*, IV, N, 5, c.

57. Herr *v.* Slough, 2 Browne (Pa.) 111.

58. Watson *v.* Delafield, 2 Cai. (N. Y.) 224; Street *v.* St. Clair, 6 Munf. (Va.) 457.

59. Brandner *v.* Krehbs, 54 Ill. App. 652. See also Plunket *v.* Kingsland, 7 Bro. P. C. 404, 3 Eng. Reprint 263.

The judge's notes alone will be looked to for information as to the reception or rejection of evidence or any other matter which transpired on the trial. Bee *v.* Fisher, 6 Serg. & R. (Pa.) 339; Brown *v.* Taylor, 2 N. Brunsw. 519. *Compare* Winchester *v.* Cornell, Draper (U. C.) 60.

Newly discovered evidence see *infra*, IV, N, 7.

60. Harris *v.* Rupel, 14 Ind. 209, where it was held that complaint could not be made of the action of the trial court in refusing to grant time to prepare affidavits in support of a motion for a new trial based upon the ground of excessiveness of the verdict.

61. Phillips *v.* Hatfield, 8 Dowl. P. C. 882.

62. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019, where the objection to an order granting a new trial was that there was no showing by affidavit or otherwise of any improper conduct on the part of the jury, and the court distinguished the ground of misconduct of the jury and that of excessive damages.

63. *Colorado.* — Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103.

or refuse to receive it.[64] The evidence, it has been held, may be presented in the form of depositions,[65] and relevant documentary evidence is of course admissible.[66]

3. General Rules As to The Making and Filing of Affidavits — a. Compelling the Making of Affidavits. In some states, under statutes, persons may be compelled to make affidavits as to relevant facts within their knowledge to be used on the hearing of an application for a new trial.[67] As a rule at least jurors cannot be required to make such affidavits[68] to prove their misconduct.[69]

b. Competency of Affiants. A party to the action[70] or his attorney is usually a competent affiant, on an application for a new trial, as to any fact of which he has knowledge.[71] Nevertheless, it has been held that the affidavit of any other

Kansas.— Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939.

Massachusetts.— Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645 (as to immoral character of juror); Borley *v.* Allison, 181 Mass. 246, 63 N. E. 260; Spaulding *v.* Knight, 118 Mass. 528.

Wisconsin.— Fowler *v.* Colton, 1 Pinn. 331.

United States.—Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

See 37 Cent. Dig. tit. "New Trial," § 284.

64. McKendree *v.* Sikes, 40 Ga. 189; Gano *v.* Wells, 36 Kan. 688, 14 Pac. 251; Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860; Fowler *v.* Colton, 1 Pinn. (Wis.) 331.

Refusal of witness to make affidavit.— The court may refuse to hear oral testimony, although the witness refuses to make an affidavit. Borley *v.* Allison, 181 Mass. 246, 63 N. E. 260. But in Whitmore *v.* Ball, 9 Lea (Tenn.) 35, where the right to impeach a verdict for improper conduct of jurors is recognized, it is held that upon an affidavit by the unsuccessful party showing such conduct on the part of a juror and the refusal of jurors to give affidavits it is the duty of the court to examine the jurors orally in court at the instance of the party complaining, and it is error to refuse such examination as improper in the absence of affidavits by the jurors themselves.

65. Greenwood *v.* Iddings, 1 Phila. (Pa.) 28; Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712; Fowler *v.* Colton, 1 Pinn. (Wis.) 331. In Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484, it was held that where the motion is properly verified by the affidavit of the party, *ex parte* affidavits of the witnesses are enough to warrant an application for notice to the opposite party; that such affidavits are not, without consent, admissible in the final hearing of the motion; but for that purpose testimony must be taken in open court in civil or criminal cases, by depositions as provided by the acts of congress, or by interrogatories and cross interrogatories, or, by consent, the court will, in its discretion, appoint a commissioner to take the testimony and report it to the court. Vose *v.* Mayo, *supra*.

Deposition used as affidavit.— Where a witness to the misconduct of jurors refuses to make an affidavit, his deposition taken in open court may be treated as equivalent to an affidavit. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169 (under a statute providing that a motion for a new trial on the ground of misconduct of the jury shall be based on affidavits); Whitmore *v.* Ball, 9 Lea (Tenn.) 35.

It has been held better practice to examine jurors in open court as to alleged misconduct. Whitmore *v.* Ball, 9 Lea (Tenn.) 35; Fowler *v.* Colton, 1 Pinn. (Wis.) 331.

66. Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712.

Docket entries.— The fact that a juror had been several times convicted of crime can be properly shown by docket entries, the records not having been extended. Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645.

67. Huston *v.* Vail, 51 Ind. 299; Eickhoff *v.* Brooke, (Mich. 1901) 88 N. W. 397; Denny *v.* Blumenthal, 8 Misc. (N. Y.) 544, 28 N. Y. Suppl. 744.

68. Forshee *v.* Abrams, 2 Iowa 571 (as to alleged quotient verdict); Howard *v.* Cobb, 12 Fed. Cas. No. 6,755, Brunn. Col. Cas. 75, 3 Day (Conn.) 309 (where the act of misconduct was a misdemeanor).

69. See Whitmore *v.* Ball, 9 Lea (Tenn.) 35.

70. Dailey *v.* Gaines, 1 Dana (Ky.) 529 (as to relationship of juror to adversary); Ewing *v.* Price, 3 J. J. Marsh. (Ky.) 520 (although the party is not a competent witness generally); Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; Caulker *v.* Banks, 3 Mart. N. S. (La.) 532; Sherrard *v.* Olden, 6 N. J. L. 344; Hawker *v.* Seale, 17 C. B. 595, 84 E. C. L. 295. In Donley *v.* Wiggins, 52 Tex. 301, it was held that an affidavit by a party to the suit will not be regarded when under the statute he would not be a competent witness if a new trial were granted. See also Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

But the unsupported affidavit of a defendant who was absent from the trial will not overcome the testimony of a disinterested witness as to the existence of a good defense. Silkman *v.* Boiger, 4 E. D. Smith (N. Y.) 236.

One of joint parties may make a necessary affidavit. South *v.* Thomas, 7 T. B. Mon. (Ky.) 59 (surprise); Howland *v.* Reeves, 25 Mo. App. 458 (newly discovered evidence).

71. Caulker *v.* Banks, 3 Mart. N. S. (La.) 532 (although prohibited by statute "from giving testimony in a suit"); Howland *v.* Reeves, 25 Mo. App. 458.

person is admissible to prove a fact to which he would not be competent to testify on the trial.[72]

c. Preparing, Serving, and Filing — (I) *In General.* In the absence of a statute or rule of court to the contrary, affidavits in support of a motion for a new trial need not be served or filed before the hearing of the motion.[73] Under statutes and rules of court in some jurisdictions, affidavits must be filed by a certain time,[74] or at least within a reasonable time,[75] and evidence in support of a motion for a new trial must be taken within the time limited by order of court.[76]

(II) *Extension of Time.* The time for filing affidavits may be extended by order of court,[77] or leave may be given to file out of time affidavits prepared in due time, but not filed through inadvertence.[78] The refusal to postpone the hearing of a motion for a new trial in order that supporting affidavits might be secured and prepared will not be disturbed where nothing was presented to a court from which it might have been able to determine or be informed that it was in the power of the party to produce the necessary affidavits to sustain the reasons assigned for the new trial.[79]

d. Amendment of Affidavits. An affidavit may be amended while the motion is still pending.[80]

4. Irregularities in the Proceedings and Misconduct of Party or Counsel. Usually a motion for a new trial on the ground of irregularity in the proceedings of the court,[81] or for misconduct of the prevailing party or his attorney, must be sus-

72. Hawker *v.* Seale, 17 C. B. 595, 84 E. C. L. 595; Ling *v.* Croker, 2 C. B. N. S. 760, 89 E. C. L. 760.

73. Werner *v.* Edmiston, 24 Kan. 147; Howland *v.* Reeves, 25 Mo. App. 458; Chadron Loan, etc., Assoc. *v.* Scott, 4 Nebr. (Unoff.) 694, 96 N. W. 220. But in Hubble *v.* Osborn, 31 Ind. 249, it was held that where counsel refused to file affidavits charging misconduct on the part of the jury, or to show them to the adverse party, after notice that objection would be made to reading them unless they were filed, the court might properly refuse to allow them to be read.

Affidavits charging jurors with misconduct are required in some states to be served on such jurors. Taylor *v.* Greely, 3 Me. 204; Haskell *v.* Becket, 3 Me. 92; Pulaski *v.* Ward, 2 Rich. (S. C.) 119; McCluney *v.* Lockhart, 1 Bailey (S. C.) 117.

And an affidavit of a witness that he had been bribed by a party must have been submitted to such party. Lloyd *v.* Monpoey, 2 Nott & M. (S. C.) 446.

Furnishing copies to court.— That the judges need not be furnished with copies of the affidavits see Burr *v.* Palmer, 23 Vt. 244. *Contra,* under rule. Gardner *v.* Gardner, 2 Gray (Mass.) 434.

Counter affidavits see *infra,* III, N, 8.

74. Howe *v.* Briggs, 17 Cal. 385; Adams *v.* Oakland, 8 Cal. 510; Stone *v.* Carter, 5 La. 448, under statute supporting affidavit to be filed with motion based upon newly discovered evidence.

Waiver of objection.— Where the affidavit in support of a motion for a new trial on the ground of newly discovered evidence is dated as of a later date than that on which the motion was made, this might have entitled the opposing party to demand a rescission of the order granting the rule to show cause, but if he chooses to have the motion argued on the merits he waives the objection. Flower *v.* O'Connor, 8 Mart. N. S. (La.) 592.

75. Morton *v.* Thompson, 2 U. C. Q. B. 196, without undue delay.

After rule nisi for a new trial, fresh affidavits will not be considered. Horrocks *v.* Maudsley, 23 L. T. Rep. N. S. 853, not in support of rule after it had been granted *nisi.*

76. Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652.

77. Oberlander *v.* Fixen, 129 Cal. 690, 62 Pac. 254; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Johnson *v.* Lovett, 31 Ga. 187; Eikhoff *v.* Wayne Cir. Judge, 129 Mich. 150, 88 N. W. 397 (holding that statute providing for compulsory examination of witnesses did not change rule); King *v.* Gilson, 206 Mo. 264, 104 S. W. 52; Howland *v.* Reeves, 25 Mo. App. 458.

78. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289, counter affidavit prepared and served, but not filed in time.

79. Harris *v.* Rupel, 14 Ind. 209, where there was nothing before the trial court except the statement of counsel excusing the non-production of the affidavits at the time the motion was determined, and it was held that something should have been presented to the court to go upon the record, as the affidavit of plaintiff or the party. See also Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435.

80. Goings *v.* Chapman, 18 Ind. 194; Howland *v.* Reeves, 25 Mo. App. 458.

81. Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540; Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473 (the asking of improper questions by the judge); Dehougne *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 84 S. W. 1066 (absence of judge from court-room during trial).

tained by affidavits.[82] In some states a motion based on the improper argument of counsel should be made on affidavits;[83] but in other states such misconduct must be shown by the minutes or a bill of exceptions.[84] The affidavits should state the facts relied on positively and definitely,[85] and should show that the irregularity was not known by either of them in time to make objection thereto at the trial,[86] and was prejudicial.[87]

5. Disqualification or Misconduct of or Affecting Jurors[88] **— a. In General.** A motion for a new trial on the ground of disqualification or misconduct of jurors or of misconduct of other persons affecting the jury must be sustained by affidavits.[89] But it has been held that in order to take advantage of the fact that a juror had, in advance of the trial, expressed an opinion upon the merits of the case, it must appear of record that the juror was examined as to whether he had formed or expressed such an opinion or belief, and that a showing thereof by affidavit is not sufficient.[90]

b. Affidavits of Parties, Attorneys, and Persons Not Jurors — (i) *Requisites and Sufficiency in General.* Affidavits as to the incompetency or disqualification of a juror must be definite and certain,[91] and show prejudice.[92] Affidavits charging misconduct must give the names of the jurors with respect to whom it

82. Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054; Paquetel *v.* Gauche, 17 La. Ann. 63.

83. Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010. See also Chesebrough *v.* Conover, 21 N. Y. Suppl. 568, as to unreliable report of stenographer.

84. Allen *v.* Clarkson, 108 Ill. App. 446; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Hasper *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191. See also Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

85. Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540.

Influence of improper remarks.— It has been held that the affidavit must state positively that improper remarks of counsel influenced the jury. Bothwell *v.* Elliott, 2 Marv. (Del.) 151, 42 Atl. 424.

Affidavits as to bias and prejudice of the judge should state the facts and grounds on which the opinions of affiants are founded. Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939.

Action by the judge in communicating with the jury, by answering a question asked by the jury after its retirement to consider the verdict, cannot be made the ground of a new trial under an affidavit alleging such action upon information. Gillotte *v.* Jackson, 41 N. Y. Super. Ct. 308.

86. Riley *v.* Monohan, 26 Iowa 507 (failure to swear witness); Deitrich *v.* Lancaster, 21 Lanc. L. Rev. (Pa.) 203; Powell *v.* Haley, 28 Tex. 52 (failure to swear juror).

87. Gillotte *v.* Jackson, 41 N. Y. Super. Ct. 308, holding an affidavit insufficient which set up, on information, that the judge had improperly communicated with the jury after its retirement to consider the verdict, in answer to a question asked by the jury, without showing what the judge's answer was.

88. **In criminal prosecutions** see Criminal Law.

89. *California.*— Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169.

Indiana.— Urban *v.* Kraigg, 21 Ind. 174.

Maine.— Gifford *v.* Clark, 70 Me. 94.

Minnesota.— Perry *v.* Miller, 61 Minn. 412, 63 N. W. 1040, bias of juror.

Texas.— Wofford *v.* Buchel Power, etc., Co., 35 Tex. Civ. App. 531, 80 S. W. 1078; Stubblefield *v.* Stubblefield, (Civ. App. 1898) 45 S. W. 965.

United States.— Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

See 37 Cent. Dig. tit. "New Trial," § 289.

Compare Fowler *v.* Colton, 1 Pinn. (Wis.) 331, where depositions required under rule.

Testimony of juror.— It has been held that a juror is a competent witness to his incompetency to serve, as that he is ignorant of the English language (Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246), or to explain the circumstances under which he came into the jury box (Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815).

90. Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380; McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535; State *v.* Funck, 17 Iowa 365 (holding that an entry that "the jury was impaneled, tried and sworn" is not sufficient to show that they were examined under oath, where under the practice prevailing they might have been examined generally without being sworn); State *v.* Shelledy, 8 Iowa 477. See also Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576, expression of opinion by juror.

91. Shinn *v.* Tucker, 37 Ark. 580 (degree of relationship); Waltz *v.* Neusbamer, 18 Ind. 374 (degree of relationship); Mullins *v.* Cottrell, 41 Miss. 291; Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

The expression of a general opinion that the jury was prejudiced is not sufficient. Withers *v.* Butts, 7 Dana (Ky.) 329.

92. McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535; Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576, which cases hold an affidavit that a juror had expressed an opinion before the case was tried and before he was called as a

is charged and state definitely the improper communication or act complained of.[93] It must be shown by the affidavits of the applicant[94] and his attorney[95] that neither of them had knowledge of the incompetency or disqualification or misconduct before the verdict.

(II) *Officer in Charge of Jury.* The officer who had charge of the jury may testify to acts of misconduct in or out of the jury room.[96]

(III) *Hearsay.* The disqualification or misconduct of jurors cannot be proved by evidence of declarations made by them after the rendition of the verdict.[97]

juror is not sufficient, without showing that the opinion was adverse to the movant.

93. Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227.

94. *Alabama.*— Sowell *v.* Brewton Bank, 119 Ala. 92, 24 So. 585.

Georgia.— Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Indiana.— Fifth Ave. Sav. Bank *v.* Cooper, 19 Ind. App. 13, 48 N. E. 236.

Iowa.— McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535.

Kentucky.— Drake *v.* Drake, 107 Ky. 32, 52 S. W. 846, 21 Ky. L. Rep. 636.

Maine.— Minot *v.* Bowdoin, 75 Me. 205; Jameson *v.* Androscoggin R. Co., 52 Me. 412.

Massachusetts.— Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645.

Nebraska.— Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Watson *v.* Roode, 43 Nebr. 348, 61 N. W. 625, juror making notes of evidence.

New Hampshire.— Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33.

New York.— Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236.

North Dakota.— Kinneberg *v.* Kinneberg, 8 N. D. 311, 79 N. W. 337.

Ohio.— Clerke *v.* Commercial Tribune Co., 10 Ohio S. & C. Pl. Dec. 176, 7 Ohio N. P. 479; Thomas *v.* Clark County, 5 Ohio S. & C. Pl. Dec. 510, 5 Ohio N. P. 453.

Oklahoma.— Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Texas.— McGehee *v.* Shafer, 9 Tex. 20; Wooters *v.* Craddock, (Civ. App. 1898) 46 S. W. 916.

See 37 Cent. Dig. tit. "New Trial," § 289.

The affidavit need not state that the movant made inquiries before the trial as to the immoral character of a juror. Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645.

95. Minot *v.* Bowdoin, 75 Me. 205; Jameson *v.* Androscoggin R. Co., 52 Me. 412 (interest of juror); Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Clerke *v.* Commercial Tribune Co., 10 Ohio S. & C. Pl. Dec. 176, 7 Ohio N. P. 479. And see the cases cited in preceding note.

Where the movant is represented by two attorneys, an affidavit alleging want of knowledge of the disqualification of a juror must be signed by both attorneys as well as by the movant. Clerke *v.* Commercial Tribune Co., 10 Ohio S. & C. Pl. Dec. 176, 7 Ohio N. P. 479.

96. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169; Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78; Wright *v.* Abbott, 160 Mass. 395, 398, 36 N. E. 62, 39 Am. St. Rep. 499, where, as to a chance verdict, the court said: "If, on grounds of public policy, the affidavits or the testimony of jurors concerning what took place in the jury room is excluded, as well as evidence of their subsequent declarations on the subject, still we are of opinion that independent evidence should be admitted, and that the consequences to be apprehended from admitting such evidence are less harmful than the consequences of forbidding all inquiry into such a matter."

97. *Alabama.*— Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009.

Arkansas.— Pleasants *v.* Heard, 15 Ark. 403.

California.— Siemsen *v.* Oakland, etc., Electric R. Co., 134 Cal. 494, 66 Pac. 672; Hoare *v.* Hindley, 49 Cal. 274.

Colorado.— Richards *v.* Richards, 20 Colo. 303, 38 Pac. 323.

Florida.— Godwin *v.* Bryan, 16 Fla. 396; Coker *v.* Hayes, 16 Fla. 368.

Georgia.— Southern R. Co. *v.* Sommer, 112 Ga. 512, 37 S. E. 735; Nelling *v.* Industrial Mfg. Co., 78 Ga. 260; Smith *v.* Banks, 65 Ga. 26.

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Heldmaier *v.* Rehor, 188 Ill. 458, 59 N. E. 9 [*affirming* 90 Ill. App. 96]; Smith *v.* Smith, 169 Ill. 623, 48 N. E. 306 [*affirming* 69 Ill. App. 314]; Niccolls *v.* Foster, 89 Ill. 386; Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558; Allison *v.* People, 45 Ill. 37; Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141; Virginia *v.* Plummer, 65 Ill. App. 419; Youle *v.* Brown, 49 Ill. App. 102; Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

Indiana.— Stanley *v.* Sutherland, 54 Ind. 339; Toliver *v.* Moody, 39 Ind. 148; McCray *v.* Stewart, 16 Ind. 377; Elliott *v.* Mills, 10 Ind. 368; Dunn *v.* Hall, 8 Blackf. 32; Drummond *v.* Leslie, 5 Blackf. 453; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961.

Iowa.— State *v.* Quinton, 59 Iowa 362, 13 N. W. 328.

Kansas.— Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445; Sharpe *v.* Williams, 41 Kan. 56, 20 Pac. 497; Gottleib *v.* Jasper, 27 Kan. 770.

Kentucky.— Grundy *v.* Jackson, 1 Litt. 11, although made in the presence of the court after the discharge of the jury.

Louisiana.— Irish *v.* Wright, 8 Rob. 428; Trahan *v.* McMannus, 2 La. 209.

Maine.— Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91.

And an affidavit by the applicant as to misconduct of jurors in their room, made necessarily on information and belief, is held to be insufficient.[98]

c. Affidavits and Testimony of Jurors to Impeach Verdict[99] — (i) *In General.* Matters transpiring in open court,[1] including statements made by the judge,[2] may be proved by the affidavits of jurors. It is a general rule, in most jurisdictions, that the testimony of jurors is not competent to impeach their verdict.[3] In some jurisdictions, under statute, such testimony is not competent for the purpose of impeachment except to show that assent to the verdict was induced

Massachusetts.— Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527.

Michigan.— Stevenson *v.* Detroit, etc., R. Co., 118 Mich. 651, 77 N. W. 247.

Missouri.— Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141; Herring *v.* Wabash R. Co., 80 Mo. App. 562; Proffer *v.* Miller, 69 Mo. App. 501.

Nebraska.— Peterson *v.* Skjelver, 43 Nebr. 663, 62 N. W. 43; Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290.

New Hampshire.— Griffin *v.* Auburn, 59 N. H. 286.

New York.— Mais *v.* Ruh, 57 N. Y. App. Div. 15, 67 N. Y. Suppl. 1051; Gans *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 914; Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236; Gale *v.* New York Cent., etc., R. Co., 53 How. Pr. 385 [*affirmed* in 13 Hun 1]; Taylor *v.* Everett, 2 How. Pr. 23. *Compare* Smith *v.* Cheetham, 3 Cai. 57.

North Carolina.— Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

Pennsylvania.— Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240.

Rhode Island.— Tucker *v.* South Kingstown, 5 R. I. 558.

South Carolina.— McIlvain *v.* Price, 2 Treadw. 503; Price *v.* McIlvain, 3 Brev. 419.

Wisconsin.— Langton *v.* Hagerty, 35 Wis. 150, as to sufficiency of evidence of partiality.

United States.—Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Kelley *v.* Pennsylvania R. Co., 33 Fed. 856.

England.— Davis *v.* Taylor, 2 Chit. 268, 18 E. C. L. 627; Burgess *v.* Langley, 1 D. & L. 21, 12 L. J. C. P. 257, 5 M. & G. 722, 6 Scott N. R. 518, 44 E. C. L. 377; Straker *v.* Graham, Dowl. P. C. 223, 1 H. & H. 449, 8 L. J. Exch. 86, 4 M. & W. 721; Aylett *v.* Jewel, W. Bl. 1299; Clark *v.* Stevenson, W. Bl. 803; Davis *v.* Roper, 4 Wkly. Rep. 9.

Canada.— Hodgson *v.* Carr, 5 N. Brunsw. 499; Doe *v.* Strong, 8 U. C. Q. B. 291; Jones *v.* Duff, 5 U. C. Q. B. 143.

See 37 Cent. Dig. tit. "New Trial," §§ 300, 301.

To impeach juror's affidavit.— Where the affidavit of a juror has been introduced to sustain the verdict, his declarations inconsistent with his affidavit may be used to impeach him. Aldrich *v.* Wetmore, 52 Minn. 164, 53 N. W. 1072.

98. Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009; Hoare *v.* Hindley, 49 Cal. 274; Pittsburgh, etc., R. Co. *v.* Collins, 168 Ind. 467, 80 N. E. 415; Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403 [*following* Stanley *v.* Sutherland, 54 Ind. 339, and *overruling* Chicago, etc., Coal R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Houk *v.* Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706]; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Eaken *v.* Thompson, 4 Ind. App. 393, 30 N. E. 1114.

99. **In criminal prosecutions** see Criminal Law.

Testimony of juror as to his incompetency see *supra*, IV, N, 5, a, note 89.

1. Kozlowski *v.* Chicago, 113 Ill. App. 513 (to show juror slept during trial); Everett *v.* Youells, 4 B. & Ad. 681, 1 N. & M. 530, 24 E. C. L. 299.

2. Everett *v.* Youells, 4 B. & Ad. 681, 1 N. & M. 530, 24 E. C. L. 299, but not to contradict judge's notes.

3. *Alabama.*— Birmingham R., etc., Co. *v.* Moore, (1906) 42 So. 1024.

California.— Castro *v.* Gill, 5 Cal. 40.

Colorado.— Richards *v.* Sanderson, 39 Colo. 270, 89 Pac. 769.

Georgia.— Southern R. Co. *v.* Sommer, 112 Ga. 512, 37 S. E. 735; Estes *v.* Carter, 105 Ga. 495, 30 S. E. 882; Bolden *v.* Georgia R., etc., Co., 102 Ga. 558, 27 S. E. 664; O'Barr *v.* Alexander, 37 Ga. 195; Rutland *v.* Hathorn, 36 Ga. 380.

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Niccolls *v.* Foster, 89 Ill. 386; Baldwin *v.* Smith, 82 Ill. 162; Peck *v.* Brewer, 48 Ill. 54; Martin *v.* Ehrenfels, 24 Ill. 187; Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544; Heldmaier *v.* Rehor, 90 Ill. App. 96; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41; Cleveland, etc., R. Co. *v.* Trimmell, 75 Ill. App. 585; Virginia *v.* Plummer, 65 Ill. App. 419 (incompetency of juror); Lechleiter *v.* Broehl, 17 Ill. App. 490.

Indiana.—McKinley *v.* Crawfordsville First Nat. Bank, 118 Ind. 375, 21 N. E. 36; Stanley *v.* Sutherland, 54 Ind. 339; Haun *v.* Wilson, 28 Ind. 296; McCray *v.* Stewart, 16 Ind. 377; Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761.

Iowa.— Purcell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120; Butt *v.* Tuthill, 10 Iowa 585; Abel *v.* Kennedy, 3 Greene 47.

Kentucky.— Pittsburg Coal Co. *v.* Withers, 37 S. W. 584, 19 Ky. L. Rep. 113.

Louisiana.— Duhon *v.* Landry, 15 La. Ann. 591; Cire *v.* Rightor, 11 La. 140.

Maine.— Greeley *v.* Mansur, 64 Me. 211, indisposition of juror and inability to hear and understand all the testimony.

Maryland.— Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450, 22 Am. Dec. 337.

by a resort to chance.[4] Under either of these rules, with the exception noted, the affidavits of jurors are generally inadmissible to prove misconduct of themselves or other jurors or misconduct of other persons affecting the jury either in[5] or out of the jury room.[6] In some states affidavits of jurors are competent evidence of

Michigan.— Stevenson *v.* Detroit, etc., R. Co., 118 Mich. 651, 77 N. W. 247.

Missouri.— Herring *v.* Wabash R. Co., 80 Mo. App. 562; Jobe *v.* Weaver, 77 Mo. App. 665; Clark *v.* Famous Shoe, etc., Co., 16 Mo. App. 463.

New Hampshire.— Dodge *v.* Carroll, 59 N. H. 237.

New York.—Messenger *v.* New York Fourth Nat. Bank, 6 Daly 190 [*affirming* 48 How. Pr. 542], deafness of juror and inability to hear testimony and charge.

North Carolina.— Jones *v.* Parker, 97 N. C. 33, 2 S. E. 370; Lafoon *v.* Shearin, 95 N. C. 391.

Ohio.— Parker *v.* Blackwelder, 7 Ohio Cir. Ct. 140, 3 Ohio Cir. Dec. 700, unless evidence *aliunde* is first offered.

Pennsylvania.— Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734; Swope *v.* Crawford, 17 Lanc. L. Rev. 196; Snyder's Estate, Wilcox 190.

Rhode Island.— Lee *v.* Rhode Island Co., (1906) 66 Atl. 835.

South Dakota.— Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764; Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820, holding that the only exceptions to the rule that the testimony of jurors is inadmissible to impeach a verdict for mistake, irregularity, or misconduct on the part of the jury are those in which the legislature has by express enactment authorized such attack.

Tennessee.— Roller *v.* Bachman, 5 Lea 153.

Texas.— Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Gurley *v.* Clarkson, (Civ. App. 1895) 30 S. W. 360.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104; Downer *v.* Baxter, 30 Vt. 467.

Virginia.— Moses *v.* Cromwell, 78 Va. 671; Danville Bank *v.* Waddill, 31 Gratt. 469; Steptoe *v.* Flood, 31 Gratt. 323; Koiner *v.* Rankin, 11 Gratt. 420.

United States.— Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826 (error in calculation); Chandler *v.* Thompson, 30 Fed. 38; Hurst *v.* Coley, 15 Fed. 645; Ladd *v.* Wilson, 14 Fed. Cas. No. 7,977, 1 Cranch C. C. 305; Rumford Chemical Works *v.* Finnie, 20 Fed. Cas. No. 12,130, 2 Flipp. 459.

See 37 Cent. Dig. tit. "New Trial," § 290. And see the cases cited in the notes following in this section.

"The grounds stated for the rejection of such affidavits have usually been, first, because they would tend to defeat the solemn act of the juror under oath; second, because their admission would open the door to tamper with jurymen, after their discharge; third, it would furnish to dissatisfied and corrupt jurors the means of destroying the verdict to which they had assented." Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 391, 35 N. E. 723; Taylor *v.* Garnett, 110 Ind. 287, 11 N. E. 309 [which cases *cite* 3 Graham & W. New Trial 1428].

4. See *infra*, IV, N, 5, c, (IV).

5. *Connecticut.*— Haight *v.* Turner, 21 Conn. 593.

Idaho.— Jacobs *v.* Dooley, 1 Ida. 41, duress of juror.

Louisiana.— Cire *v.* Rightor, 11 La. 140.

Maine.— Studley *v.* Hall, 22 Me. 198.

Massachusetts.— Hannum *v.* Belchertown, 19 Pick. 311.

Michigan.— Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005.

Minnesota.— Bradt *v.* Rommel, 26 Minn. 505, 5 N. W. 680; Knowlton *v.* McMahon, 13 Minn. 386, 97 Am. Dec. 236. See also Wester *v.* Hedberg, 68 Minn. 434, 71 N. W. 616.

Missouri.— Pratte *v.* Coffman, 33 Mo. 71.

New Jersey.— Brewster *v.* Thompson, 1 N. J. L. 36.

New York.— Castle *v.* Greenwich F. Ins. Co., 45 N. Y. Suppl. 901; Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236; Taylor *v.* Everett, 2 How. Pr. 23; Dana *v.* Tucker, 4 Johns. 487.

Pennsylvania.— White *v.* White, 5 Rawle 61 (drunkenness); Cluggage *v.* Swan, 4 Binn. 150, 5 Am. Dec. 400.

Rhode Island.— Tucker *v.* South Kingstown, 5 R. I. 558.

Texas.— Mason *v.* Russel, 1 Tex. 721.

United States.— Ladd *v.* Wilson, 14 Fed. Cas. No. 7,977, 1 Cranch C. C. 305.

England.— Davis *v.* Roper, 4 Wkly. Rep. 9.

Dissenting juror.— A constitutional provision making the concurrence of nine jurors sufficient for a verdict does not render a dissenting juror a competent witness as to matters occurring in the jury room. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169. See also Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

Waiver of objection.— When the affidavit of a juror is admitted without objection, it may be considered. Winn *v.* Reed, 61 Mo. App. 621.

6. *California.*— Siemsen *v.* Oakland, etc., Electric R. Co., 134 Cal. 494, 66 Pac. 672.

Connecticut.— State *v.* Freeman, 5 Conn. 348.

Illinois.— Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723, out of court.

Missouri.— Clark *v.* Famous Shoe, etc., Co., 16 Mo. App. 463.

New York.— Williams *v.* Montgomery, 60 N. Y. 648.

South Dakota.— Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764 (separation of jury); Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Texas.— Burns *v.* Paine, 8 Tex. 159.

Virginia.— Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

acts of misconduct of themselves or other persons without the jury room;[7] and in a few states they are admissible to prove any matters either within or without the jury room which do not essentially inhere in the verdict, which have been defined to be matters which are of sight and hearing and subject to contradiction.[8]

(II) *Deliberations and Ground of Verdict.* For the purpose of impeaching the verdict, the testimony of jurors is generally incompetent to show the deliberations or votes in the jury room,[9] or to show generally the principles, grounds, or evidence followed, considered, or rejected by the jury,[10] or the motives

West Virginia.— Pickens *v.* Coal River Boom, etc., Co., 58 W. Va. 11, 50 S. E. 872, treating to liquors by party.

See 37 Cent. Dig. tit. "New Trial," § 292.

7. *Maine.*— Studley *v.* Hall, 22 Me. 198.

Massachusetts.— Harrington *v.* Worcester, etc., St. R. Co., 157 Mass. 579, 32 N. E. 955; Johnson *v.* Witt, 138 Mass. 79.

Minnesota.— Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733.

New Jersey.— See Deacon *v.* Shreve, 22 N. J. L. 176.

New York.— Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236.

Wisconsin.— Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

See 37 Cent. Dig. tit. "New Trial," § 293.

8. Cowles *v.* Chicago, etc., R. Co., 32 Iowa 515; Wright *v.* Illinois, etc., Tel. Co., 20 Iowa 195; Gottleib *v.* Jasper, 27 Kan. 770; Perry *v.* Bailey, 12 Kan. 539 (drunkenness of juror); Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131 (where it is held that the affidavits must state facts concerning the acts of the jurors only; that it is not for a juror to say what effect certain conduct may have had upon the verdict, because of the well known principle that he cannot be heard to impeach the verdict). See also Grinnell *v.* Phillips, 1 Mass. 530.

9. *Alabama.*— Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

Georgia.— Spann *v.* Fox, Ga. Dec. 1.

Iowa.— Purcell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120; Dunleavy *v.* Watson, 38 Iowa 398; Bingham *v.* Foster, 37 Iowa 339, which cases all hold that the affidavit of a juror is not admissible to show that he was unduly influenced in his deliberations by his fellow jurors.

Kentucky.— Illinois Cent. R. Co. *v.* West, 60 S. W. 290, 22 Ky. L. Rep. 1387.

Maine.— Trafton *v.* Pitts, 73 Me. 408; Heffron *v.* Gallupe, 55 Me. 563.

New Hampshire.— Walker *v.* Kennison, 34 N. H. 257; Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323; Folsom *v.* Brawn, 25 N. H. 114.

North Carolina.— Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161.

Ohio.— Wertz *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 872, 30 Cinc. L. Bul. 280.

Rhode Island.— Luft *v.* Lingane, 17 R. I. 420, 22 Atl. 942; Tucker *v.* South Kingstown, 5 R. I. 558.

Texas.— Texas, etc., R. Co. *v.* Lyons, (Civ. App. 1899) 50 S. W. 161.

Vermont.— Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488; Robbins *v.* Windover, 2 Tyler 11.

Washington.— Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

West Virginia.— Probst *v.* Braeunlich, 24 W. Va. 356; Reynolds *v.* Tompkins, 23 W. Va. 229.

England.— Bailey *v.* Macaulay, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815.

Canada.— Doe *v.* Strong, 8 U. C. Q. B. 291.

See 37 Cent. Dig. tit. "New Trial," § 291.

10. *California.*— Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

Colorado.— Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265.

Connecticut.— Haight *v.* Turner, 21 Conn. 593, consideration of evidence which jury were instructed to disregard.

Georgia.— Estes *v.* Carter, 105 Ga. 495, 30 S. E. 882; Coleman *v.* Slade, 75 Ga. 61; Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485.

Illinois.— Smith *v.* Smith, 169 Ill. 623, 48 N. E. 306 [*affirming* 69 Ill. App. 314]; Suver *v.* O'Riley, 80 Ill. 104; Frank *v.* Taubman, 31 Ill. App. 592.

Indiana.— Withers *v.* Fiscus, 40 Ind. 131, 13 Am. Rep. 283 (mistake in calculation); Hughes *v.* Listner, 23 Ind. 396.

Iowa.— Clark *v.* Van Vleck, (1907) 112 N. W. 648; Kassing *v.* Walter, (1896) 65 N. W. 832 (method of computing interest); Wilkins *v.* Bent, 66 Iowa 531, 24 N. W. 29; Hall *v.* Robison, 25 Iowa 91; Moffit *v.* Rogers, 15 Iowa 453; Jack *v.* Naber, 15 Iowa 450.

Kansas.— Leroy, etc., R. Co. *v.* Anderson, 41 Kan. 528, 21 Pac. 588.

Louisiana.— Digard *v.* Michaud, 9 Rob. 387; Irish *v.* Wright, 8 Rob. 428.

Maine.—Hovey *v.* Luce, 31 Me. 346, method of computation.

Maryland.— Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450, 22 Am. Dec. 337.

Massachusetts.— Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Bridgewater *v.* Plymouth, 97 Mass. 382; Murdock *v.* Sumner, 22 Pick. 156 (alleged mistake as to necessity of accepting opinion of witness); Hannum *v.* Belchertown, 19 Pick. 311 (doubling of damages); Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Mississippi.— French *v.* Carson, (1889) 6 So. 613.

Missouri.— State *v.* Gage, 52 Mo. App. 464.

New Hampshire.— Smith *v.* Smith, 50 N. H. 212; Walker *v.* Kennison, 34 N. H.

or prejudices which influenced them.[11] Such testimony is therefore inadmissible to show that instructions by the court were misunderstood or disregarded,[12] or to

257; Folsom *v.* Brawn, 25 N. H. 114. It has been held proper for the court to interrogate the jury on coming in as to the grounds on which they found their verdict and that the answer may be considered on a motion for a new trial. Smith *v.* Powers, 15 N. H. 546.

New Jersey.— Schank *v.* Stevenson, 2 N. J. L. 387; Randall *v.* Grover, 1 N. J. L. 151.

New York.— Reiss *v.* Pelham, 30 Misc. 545, 62 N. Y. Suppl. 607 [*affirmed* in 53 N. Y. App. Div. 459, 65 N. Y. Suppl. 1033]; Castle *v.* Greenwich F. Ins. Co., 45 N. Y. Suppl. 901; Gale *v.* New York Cent., etc., R. Co., 53 How. Pr. 385 [*affirmed* in 13 Hun 1]; Taylor *v.* Everett, 2 How. Pr. 23; Clum *v.* Smith, 5 Hill 560; *Ex p.* Caykendoll, 6 Cow. 53; Sargent *v.* ——, 5 Cow. 106.

North Carolina.— Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161; Bellamy *v.* Pippin, 74 N. C. 46; Lester *v.* Goode, 6 N. C. 37.

Pennsylvania.— Com. *v.* Zuern, 10 Pa. Dist. 26, 24 Pa. Co. Ct. 264; Willing *v.* Swasey, 1 Browne 123.

Rhode Island.— Tucker *v.* South Kingstown, 5 R. I. 558.

Tennessee.— Roller *v.* Bachman, 5 Lea 153; Fish *v.* Cantrell, 2 Heisk. 578; Lewis *v.* Moses, 6 Coldw. 193; Larkins *v.* Tarter, 3 Sneed 681, effect of improper argument.

Texas.— Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Thomae *v.* Zushlag, 25 Tex. Suppl. 225 (disregard of evidence); Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24; Newcomb *v.* Babb, 2 Tex. App. Civ. Cas. § 760; Whitlow *v.* Moore, 1 Tex. App. Civ. Cas. § 1052.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104; Sheldon *v.* Perkins, 37 Vt. 550; Newton *v.* Booth, 13 Vt. 320, 37 Am. Dec. 596.

Virginia.— Street *v.* Broaddus, 96 Va. 823, 32 S. E. 466; Steptoe *v.* Flood, 31 Gratt. 323, issue out of chancery. *Compare* Hague *v.* Stratton, 4 Call 84.

Washington.— Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

West Virginia.— Probst *v.* Braeunlich, 24 W. Va. 356; Reynolds *v.* Tompkins, 23 W. Va. 229. See also Lewis *v.* McMullin, 5 W. Va. 582, as to insufficiency of such evidence.

Wisconsin.— Edmiston *v.* Garrison, 18 Wis. 594.

England.— Clark *v.* Stevenson, W. Bl. 803.

Canada.— Purdon *v.* Playfair, 20 U. C. Q. B. 282; Jones *v.* Duff, 5 U. C. Q. B. 143.

11. *California.*— Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169.

Georgia.— Nelling *v.* Industrial Mfg. Co., 78 Ga. 260, threat of long detention.

Iowa.— Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7 (desire of juror to attend sick father); Brown *v.* Cole, 45 Iowa 601 (desire to release sick juror).

Louisiana.— State *v.* Morris, 41 La. Ann. 785, 6 So. 639, desire to release sick juror.

Maryland.— Browne *v.* Browne, 22 Md. 103, desire to release sick juror.

Michigan.— Pierce *v.* Pierce, 38 Mich. 412, where court had improperly induced jury to render hasty verdict.

Montana.— Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803, desire of sick juror to obtain discharge, especially in equity case.

Nebraska.— Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290, ill-will to movant.

See 37 Cent. Dig. tit. "New Trial," § 291 *et seq.*

Affidavits of jurors are generally inadmissible to prove declarations of other jurors in the jury room indicating prejudice, bias, or prejudgment of the case. Cowles *v.* Chicago, etc., R. Co., 32 Iowa 515; Cain *v.* Cain, 1 B. Mon. (Ky.) 213; *In re* Merriman, 108 Mich. 454, 66 N. W. 372; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Johnson *v.* Parrotte, 34 Nebr. 26, 51 N. W. 290; Bennett *v.* Smith, 17 N. Brunsw. 27. But such evidence has been admitted in connection with other evidence of the same fact. Ewers *v.* National Imp. Co., 63 Fed. 562 (where affidavits were introduced to sustain verdict but used against it); Hyman *v.* Eams, 41 Fed. 676. And such evidence has been admitted for the purpose of showing that a juror swore falsely on his *voir dire.* West Chicago St. R. Co. *v.* Huhnke, 82 Ill. App. 404. *Contra,* Meisch *v.* Sippy, *supra.*

12. *Arkansas.*— St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105.

Connecticut.— Haight *v.* Turner, 21 Conn. 593, consideration of evidence which jury were instructed to disregard.

Illinois.— Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Iowa.— Christ *v.* Webster City, 105 Iowa 119, 74 N. W. 743; Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633 (written remarks by juror attached to instructions); Ward *v.* Thompson, 48 Iowa 588; Davenport *v.* Cummings, 15 Iowa 219.

Massachusetts.— Bridgewater *v.* Plymouth, 97 Mass. 382.

Missouri.— Pratte *v.* Coffman, 33 Mo. 71; Hanlow *v.* O'Keeffe, 38 Mo. App. 273.

New York.— Reiss *v.* Pelham, 30 Misc. 545, 62 N. Y. Suppl. 607 [*affirmed* in 53 N. Y. App. Div. 459, 65 N. Y. Suppl. 1033]; Paige *v.* Chedsey, 1 Misc. 396, 20 N. Y. Suppl. 899; Castle *v.* Greenwich F. Ins. Co., 45 N. Y. Suppl. 901. *Compare* Sargent *v.* ——, 5 Cow. 106.

North Carolina.— Jones *v.* Parker, 97 N. C. 33, 2 S. E. 370.

Ohio.— Holman *v.* Riddle, 8 Ohio St. 384.

Pennsylvania.— Field *v.* Datesman, 4 Leg. Gaz. 213.

Rhode Island.— Handy *v.* Providence Mut. F. Ins. Co., 1 R. I. 400.

show what items of claim were allowed or rejected by the jury,[13] or as a rule to show that matters not in issue were considered by them.[14]

(III) *Assent to Verdict.* The testimony of jurors is not admissible to prove that they did not assent to a verdict regularly returned and received,[15] or that they misunderstood the meaning or effect of the verdict.[16] But it has been

South Dakota.— Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820.

Tennessee.— Richardson *v.* McLemore, 5 Baxt. 586; Wade *v.* Ordway, 1 Baxt. 229; Lewis *v.* Moses, 6 Coldw. 193; Saunders *v.* Fuller, 4 Humphr. 516.

Texas.— Campbell *v.* Skidmore, 1 Tex. 475; Thomae *v.* Zushlag, 25 Tex. Suppl. 225; Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24; Haley *v.* Cusenbary, (Civ. App. 1895) 30 S. W. 587.

Vermont.— Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

Virginia.— Danville Bank *v.* Waddill, 31 Gratt. 469; Koiner *v.* Rankin, 11 Gratt. 420; Harnsbarger *v.* Kinney, 6 Gratt. 287.

West Virginia.— Probst *v.* Braeunlich, 24 W. Va. 356; Reynolds *v.* Tompkins, 23 W. Va. 229.

Wisconsin.—Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946.

United States.— Mirick *v.* Hemphill, 17 Fed. Cas. No. 9,647*a*, Hempst. 179.

See 37 Cent. Dig. tit. "New Trial," § 295.

13. *Iowa.*— Lloyd *v.* McClure, 2 Greene 139.

Missouri.— State *v.* Gage, 52 Mo. App. 464.

New Hampshire.—Smith *v.* Smith, 50 N. H. 212.

New York.— Sargent *v.* ——, 5 Cow. 106.

North Carolina.— Bellamy *v.* Pippin, 74 N. C. 46.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104; Newton *v.* Booth, 13 Vt. 320, 37 Am. Dec. 596.

Virginia.— Street *v.* Broaddus, 96 Va. 823, 32 S. E. 466.

Wisconsin.—Edmiston *v.* Garrison, 18 Wis. 594.

United States.— Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826.

14. Fain *v.* Goodwin, 35 Ark. 109; Perkins *v.* Brainard Quarry Co., 11 Misc. (N. Y.) 328, 32 N. Y. Suppl. 230; Brownell *v.* McEwen, 5 Den. (N. Y.) 367; Dunnawa *v.* State, 3 Baxt. (Tenn.) 206. A juror may not testify that he was influenced by reading a part of an answer and exhibit which had been held bad on demurrer, where there was no misconduct in sending or taking the papers to the jury room. Cowles *v.* Chicago, etc., R. Co., 32 Iowa 515.

15. *Arizona.*— Torque *v.* Carrillo, 1 Ariz. 336, 25 Pac. 526.

Arkansas.— Fain *v.* Goodwin, 35 Ark. 109.

Connecticut.— Meade *v.* Smith, 16 Conn. 346.

Delaware.— McCombs *v.* Chandler, 5 Harr. 423.

Florida.— Godwin *v.* Bryan, 16 Fla. 396; Coker *v.* Hayes, 16 Fla. 368.

Georgia.— Sims *v.* Sims, 113 Ga. 1083, 39 S. E. 435; Rutland *v.* Hathorn, 36 Ga. 380.

Idaho.— Jacobs *v.* Dooley, 1 Ida. 41, duress of juror.

Illinois.— Artz *v.* Robertson, 50 Ill. App. 27. *Compare* Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Indiana.—McKinley *v.* Crawfordsville First Nat. Bank, 118 Ind. 375, 21 N. E. 36.

Iowa.— Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417; Cook *v.* Sypher, 3 Iowa 484.

Kentucky.— Johnson *v.* Davenport, 3 J. J. Marsh. 390.

Louisiana.— Cire *v.* Rightor, 11 La. 140.

New Hampshire.— Breck *v.* Blanchard, 27 N. H. 100.

New Jersey.— Clark *v.* Read, 5 N. J. L. 486.

North Carolina.— Jones *v.* Parker, 97 N. C. 33, 2 S. E. 370; Suttrel *v.* Dry, 5 N. C. 94.

Pennsylvania.—McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420; Seltzer-Klahr Hardware Co. *v.* Dunlap, 17 Lanc. L. Rev. 106.

South Carolina.— Reaves *v.* Moody, 15 Rich. 312.

Texas.— Letcher *v.* Morrison, 79 Tex. 240, 14 S. W. 1010; Boetge *v.* Landa, 22 Tex. 105, assent under alleged duress.

Vermont.— Cheney *v.* Holgate, Brayt. 171.

Virginia.— Cochran *v.* Street, 1 Wash. 79.

England.— Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161.

Canada.— Bennett *v.* Smith, 17 N. Brunsw. 27; U. S. Express Co. *v.* Donahue, 13 Ont. Pr. 158 note.

See 37 Cent. Dig. tit. "New Trial," § 294.

16. *California.*— Polhemus *v.* Heiman, 50 Cal. 438; Castro *v.* Gill, 5 Cal. 40.

Georgia.— Anderson *v.* Green, 46 Ga. 361.

Indiana.— Sinclair *v.* Roush, 14 Ind. 450.

Kentucky.— Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. L. Rep. 734; Heath *v.* Conway, 1 Bibb 398.

Louisiana.— Duhon *v.* Landry, 15 La. Ann. 591; Jeter *v.* Heard, 12 La. Ann. 3.

Minnesota.— Stevens *v.* Montgomery, 27 Minn. 108, 6 N. W. 456.

Mississippi.— Jones *v.* Edwards, 57 Miss. 28, as to costs.

New Hampshire.— Folsom *v.* Brawn, 25 N. H. 114, as to costs.

New Jersey.— Lindauer *v.* Teeter, 41 N. J. L. 255.

New York.— Dean *v.* New York, 29 N. Y. App. Div. 350, 51 N. Y. Suppl. 586; People *v.* Columbia C. Pl., 1 Wend. 297.

Pennsylvania.— Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734; Com. *v.* Adaire, 18 Lanc. L. Rev. 42.

South Dakota.— Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820.

held in a number of cases that it may be proved by the testimony of jurors that the verdict as drawn or entered is not the one agreed upon by the jury.[17]

(IV) *MANNER OF ARRIVING AT VERDICT.*[18] In most jurisdictions, in the absence of statutes on the subject, the affidavits of jurors will not be received to show that the verdict is a quotient or chance verdict.[19] A contrary rule obtains

Virginia.— Howard *v.* McCall, 21 Gratt. 205; Moffett *v.* Bowman, 6 Gratt. 219.

United States.— Hurst *v.* Coley, 15 Fed. 645.

England.— Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161; Davis *v.* Taylor, 2 Chit. 268, 18 E. C. L. 627.

Canada.— Babbit *v.* Cowperthwaite, 8 N. Brunsw. 373; Farquhar *v.* Robertson, 13 Ont. Pr. 156.

See 37 Cent. Dig. tit. "New Trial," § 295.

Where the inconsistency of a special finding appears on the face of a general verdict, the rule that the affidavits of jurors will not be considered to impeach their verdict will not apply. Kennedy *v.* Ball, 91 Hun (N. Y.) 197, 36 N. Y. Suppl. 325. And affidavits of jurymen have been held admissible to show that their answer to a specific question submitted to them by the court was due to an entire misunderstanding of its meaning, owing to the ambiguity of its phraseology. Webber *v.* Reynolds, 52 N. Y. Suppl. 1007. But see McKinley *v.* Crawfordsville First Nat. Bank, 118 Ind. 375, 21 N. E. 36.

17. *Illinois.*— Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544, mistake as to identity of party.

Kentucky.— Doran *v.* Shaw, 3 T. B. Mon. 411.

Maine.— Little *v.* Larrabee, 2 Me. 37, 11 Am. Dec. 43, where whole jury were mistaken as to legal import of terms "tenant" and "defendant."

Massachusetts.— Capen *v.* Stoughton, 16 Gray 364.

New Jersey.— See Peters *v.* Fogarty, 55 N. J. L. 386, 26 Atl. 855.

New York.— Perkins *v.* Brainerd Quarry Co., 11 Misc. 328, 32 N. Y. Suppl. 230 (*dictum*); Jackson *v.* Dickenson, 15 Johns. 309, 8 Am. Dec. 236.

Ohio.— Wertz *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 872, 30 Cinc. L. Bul. 280.

Wisconsin.— Wolfgram *v.* Schoepke, 123 Wis. 19, 25, 100 N. W. 1054, where the court said: "Is the written paper filed, or the agreement which the jury reach, the verdict? We think the latter is what is intended when we say the jurors cannot impeach it. The former, like most records or writings, is but the expression or evidence of some mental conception. Hence it may well be said that a showing that such writing is not correct is not impeachment of the verdict itself."

United States.— Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826.

England.— Roberts *v.* Hughes, 1 Dowl. P. C. N. S. 82; Roberts *v.* Hughes, 10 L. J. Exch. 337, 7 M. & W. 399.

Canada.— Jamieson *v.* Harker, 18 U. C. Q. B. 590. *Compare* Morse *v.* Thompson, 19 U. C. C. P. 94.

See 37 Cent. Dig. tit. "New Trial," § 295.

But on the other hand, it is held that the verdict actually returned cannot be impeached by the testimony of jurors that it was not the verdict intended (Castro *v.* Gill, 5 Cal. 40; Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485; Stevens *v.* Montgomery, 27 Minn. 108, 6 N. W. 456; Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820), or to show mistake therein (Duhon *v.* Landry, 15 La. Ann. 591; Cire *v.* Rightor, 11 La. 140; Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734). See also the cases cited *supra*, note 16.

Answer in special verdict.— It may be shown by the affidavits of the jurors that the insertion of an answer in the special verdict was by mistake, and that they agreed on the opposite answer. Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054.

18. **Consideration of matters not in issue** see *supra*, note 14.

What items allowed or rejected see *supra*, note 19.

19. *Alabama.*— Montgomery St. R. Co. *v.* Mason, 133 Ala. 508, 32 So. 261; Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009.

Arkansas.— Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Pleasants *v.* Heard, 15 Ark. 403.

Delaware.— Croasdale *v.* Tantum, 6 Houst. 218.

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Cummins *v.* Crawford, 88 Ill. 312, 30 Am. St. Rep. 558; Reed *v.* Thompson, 88 Ill. 245.

Indiana.— Haun *v.* Wilson, 28 Ind. 296.

Kentucky.— Lucas *v.* Cannon, 13 Bush 650 (agreement to abide by majority vote); Heath *v.* Conway, 1 Bibb 398; Taylor *v.* Giger, Hard. 586.

Massachusetts.— Boston, etc., R. Corp. *v.* Dana, 1 Gray 83; Dorr *v.* Fenno, 12 Pick. 521, where the jury, on being interrogated by the court as to the grounds of their verdict, disclosed the fact that it was a quotient verdict, and the answer, not being responsive to the question, was held inadmissible evidence of misconduct.

Michigan.— Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005; Wixom *v.* Bixby, 127 Mich. 479, 86 N. W. 1001.

Minnesota.— St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri.— Philips *v.* Stewart, 69 Mo. 149 (identifying figures as having been made by juror); Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382; Jobe *v.* Weaver, 77 Mo. App. 665; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76.

in a few states.[20] In some states, under statutes, the testimony of jurors is not competent for the purpose of impeaching their verdict except to show that assent to the verdict was induced by a resort to the determination of chance,[21] and such statutes are held to render the affidavit of a juror competent to show that a verdict is a quotient verdict.[22]

(v) *Improper Reception of Evidence and Unauthorized View or Investigation.* In most jurisdictions affidavits of jurors are not admissible to prove that a juror stated matters not in evidence to other members of the jury,[23] or to prove that jurors received or read documents or writings which were not in

New Hampshire.— Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867.

New York.— Moses *v.* Central Park, etc., R. Co., 3 Misc. 322, 23 N. Y. Suppl. 23; Dana *v.* Tucker, 4 Johns. 487.

Oregon.— Cline *v.* Broy, 1 Oreg. 89.

Pennsylvania.— Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240; Kunkel *v.* Hughes, 6 Pa. Dist. 356.

Rhode Island.— Luft *v.* Linganie, 17 R. I. 420, 22 Atl. 942.

South Carolina.— Smith *v.* Culbertson, 9 Rich. 106.

Texas.— International, etc., R. Co. *v.* Gordon, 72 Tex. 44, 11 S. W. 1033; Texas, etc., R. Co. *v.* Lyons, (Civ. App. 1899) 50 S. W. 161.

Vermont.—Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488; Cheney *v.* Holgate, Brayt. 171.

Virginia.— Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

West Virginia.— Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

England.— Burgess *v.* Langley, 1 D. & L. 21, 12 L. J. C. P. 257, 5 M. & G. 722, 6 Scott N. R. 518, 44 E. C. L. 377; Straker *v.* Graham, 7 Dowl. P. C. 223, 1 H. & H. 449, 8 L. J. Exch. 86, 4 M. & W. 721; Vaise *v.* Delaval, 1 T. R. 11.

Canada.— Hodgson *v.* Carr, 5 N. Brunsw. 499.

See 37 Cent. Dig. tit. "New Trial," § 296.

20. *California.*—Donner *v.* Palmer, 23 Cal. 40.

Iowa.— Wright *v.* Illinois, etc., Tel. Co., 20 Iowa 195; Schanler *v.* Porter, 7 Iowa 482; Ruble *v.* McDonald, 7 Iowa 90; Manix *v.* Malony, 7 Iowa 81.

New Hampshire.— Knight *v.* Epsom, 62 N. H. 356.

Tennessee.— Elledge *v.* Todd, 1 Humphr. 43, 34 Am. Dec. 616.

West Virginia.— Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

United States.— See Parshall *v.* Minneapolis, etc., R. Co., 35 Fed. 649, where such affidavits appear to have been considered without objection.

21. *Arkansas.*— St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Fain *v.* Goodwin, 35 Ark. 109.

California.— Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305; Polhemus *v.* Heiman, 50 Cal. 438; Hoare *v.* Hindley, 49 Cal. 274.

Idaho.— Griffiths *v.* Montandon, 4 Ida. 377, 39 Pac. 548.

Kentucky.— Gartland *v.* Conner, 59 S. W. 29, 22 Ky. L. Rep. 920.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524; Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820.

Utah.— Black *v.* Rocky Mountain Bell Tel. Co., 26 Utah 451, 73 Pac. 514; Homer *v.* Inter-Mountain Abstract Co., 9 Utah 193, 33 Pac. 700.

See 37 Cent. Dig. tit. "New Trial," § 292.

22. *California.*—Weinburg *v.* Somps, (1893) 33 Pac. 341; Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698 [*overruling* Turner *v.* Tuolumne County Water Co., 25 Cal. 397, expressly, and Boyce *v.* California Stage Co., 25 Cal. 460, and Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132, in effect].

Colorado.— Pawnee Ditch, etc., Co. *v.* Adams, 1 Colo. App. 250, 28 Pac. 662.

Idaho.— Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Flood *v.* McClure, 3 Ida. 587, 32 Pac. 254.

Montana.—Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452.

South Dakota.— Long *v.* Collins, 12 S. D. 621, 82 N. W. 95 [*overruling* Ulrick *v.* Dakota L. & T. Co., 2 S. D. 285, 49 N. W. 1054].

See 37 Cent. Dig. tit. "New Trial," § 296.

23. *California.*— Amsby *v.* Dickhouse, 4 Cal. 102.

Illinois.— Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349.

Indiana.— Taylor *v.* Garnett, 110 Ind. 287, 11 N. E. 309; Stanley *v.* Sutherland, 54 Ind. 339; McCray *v.* Stewart, 16 Ind. 377; Dunn *v.* Hall, 8 Blackf. 32.

Kentucky.— Steel *v.* Logan, 3 A. K. Marsh. 394.

Louisiana.— Campbell *v.* Miller, 1 Mart. N. S. 514.

Maine.— Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91.

Massachusetts.— Rowe *v.* Canney, 139 Mass. 41, 29 N. E. 219; Folsom *v.* Manchester, 11 Cush. 334; Cook *v.* Castner, 9 Cush. 266.

New Hampshire.— Walker *v.* Kennison, 34 N. H. 257.

New Jersey.— Deacon *v.* Shreve, 22 N. J. L. 176; Popino *v.* McAllister, 7 N. J. L. 46.

New York.— Clum *v.* Smith, 5 Hill 560.

North Carolina.— Lafoon *v.* Shearin, 95 N. C. 391.

Pennsylvania.— Megargel *v.* Waltz, 21 Pa. Co. Ct. 633.

Texas.— St. Louis Southwestern R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315.

Virginia.— Price *v.* Warren, 1 Hen. & M. 385.

evidence.[24] In some states, however, affidavits of jurors are competent evidence of such statements,[25] or of such reception or reading of documents or writings.[26] In most states an unauthorized view or examination of premises or a thing in controversy by jurors cannot be proved by their affidavits.[27] In other states their affidavits are competent evidence of such misconduct.[28]

(VI) *Improper Communications.* In a number of jurisdictions affidavits of jurors will not be received to prove improper communications with jurors by the prevailing party,[29] or by the officer in charge of the jury,[30] or by other persons,[31] or to prove statements made by the judge in the jury room.[32] In other jurisdictions such affidavits are competent evidence of improper communications with jurors by such officer,[33] or by other persons,[34] or especially by the prevailing party.[35] But even in jurisdictions where a juror may testify to an improper communication, he should not be permitted to state what effect it produced on his mind.[36]

d. Affidavits and Testimony of Jurors to Sustain Verdict. The affidavits of

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

See 37 Cent. Dig. tit. "New Trial," § 292.

24. *Georgia.*— Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

Utah.— Homer *v.* Inter-Mountain Abstract Co., 9 Utah 193, 33 Pac. 700.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

Wyoming.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

25. Brown Land Co. *v.* Lehman, 134 Iowa 712, 112 N. W. 185; Douglass *v.* Agne, 125 Iowa 67, 99 N. W. 550; Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139; Hall *v.* Robison, 25 Iowa 91; Stewart *v.* Burlington, etc., R. Co., 11 Iowa 62; Gottleib *v.* Jasper, 27 Kan. 770; Whitmore *v.* Ball, 9 Lea (Tenn.) 35; Wade *v.* Ordway, 1 Baxt. (Tenn.) 229. See also Sawyer *v.* Stephenson, 1 Ill. 24; Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458.

26. Kruidenier *v.* Shields, 70 Iowa 428, 30 N. W. 681; Stewart *v.* Burlington, etc., R. Co., 11 Iowa 62.

27. *California.*— Siemsen *v.* Oakland, etc., Electric R. Co., 134 Cal. 494, 66 Pac. 672.

Idaho.— Griffiths *v.* Montandon, 4 Ida. 377, 39 Pac. 548.

Illinois.— Heldmaier *v.* Rehor, 90 Ill. App. 96.

Massachusetts.— Chadbourn *v.* Franklin, 5 Gray 312.

Missouri.— Herring *v.* Wabash R. Co., 80 Mo. App. 562; McCormick *v.* Monroe, 64 Mo. App. 197; Clark *v.* Famous Shoe, etc., Co., 16 Mo. App. 463.

New Jersey.— Deacon *v.* Shreve, 22 N. J. L. 176.

New York.— Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Moore *v.* New York El. R. Co., 15 Daly 506, 8 N. Y. Suppl. 329, 18 N. Y. Civ. Proc. 146, 24 Abb. N. Cas. 77.

See 37 Cent. Dig. tit. "New Trial," § 292.

28. Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Twaddle *v.* Mendenhall, 80 Minn. 177, 83 N. W. 135; Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

29. Griffiths *v.* Montandon, 4 Ida. 377, 39 Pac. 548.

30. *Georgia.*— Nelling *v.* Industrial Mfg. Co., 78 Ga. 260; O'Barr *v.* Alexander, 37 Ga. 195.

Illinois.— Chicago Sanitary Dist. *v.* Cullerton, 147 Ill. 385, 35 N. E. 723; Allison *v.* People, 45 Ill. 37.

Indiana.— Hughes *v.* Listner, 23 Ind. 396.

Kentucky.— Doran *v.* Shaw, 3 T. B. Mon. 411.

Minnesota.— Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199; Knowlton *v.* McMahon, 13 Minn. 386, 97 Am. Dec. 236.

Ohio.— Hulet *v.* Barnett, 10 Ohio 459.

Rhode Island.— See Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643, as to belief of jurors as to effect of remark on jurors.

See 37 Cent. Dig. tit. "New Trial," § 293.

31. Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41 (reading of newspaper articles); Godfrey *v.* Soniat, 33 La. Ann. 915; Williams *v.* Montgomery, 60 N. Y. 648; Clum *v.* Smith, 5 Hill (N. Y.) 560; Willing *v.* Swasey, 1 Browne (Pa.) 123.

32. Griffith *v.* Mosley, 70 Ark. 244, 67 S. W. 309.

33. Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134 (bribery); Thomas *v.* Chapman, 45 Barb. (N. Y.) 98.

34. Harrington *v.* Worcester, etc., R. Co., 157 Mass. 579, 32 N. E. 955 (stranger and witness); Johnson *v.* Witt, 138 Mass. 79 (by witness); Ayres *v.* Hammondsport, 11 N. Y. St. 706, 13 N. Y. Civ. Proc. 236.

35. Chews *v.* Driver, 1 N. J. L. 166; Reynolds *v.* Champlain Transp. Co., 9 How. Pr. (N. Y.) 7; Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458. See also Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134 (bribery); Knowlton *v.* McMahon, 13 Minn. 386, 97 Am. Dec. 236. *Compare* Williams *v.* Montgomery, 60 N. Y. 648.

36. Pursell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120; Harrington *v.* Worcester, etc., R. Co., 157 Mass. 579, 32 N. E. 955; Johnson *v.* Witt, 138 Mass. 79.

jurors are generally admissible, in support of their verdict, to disprove alleged bias or prejudice of themselves or misconduct of themselves or other persons.[37] In some jurisdictions the affidavits of jurors as to the grounds of the verdict,[38] or as to the discussions and voting by members of the jury in their room, to show that they were not improperly influenced by the alleged bias or prejudice of jurors or misconduct of jurors or others, will not be received,[39] and the affidavits of jurors have been held inadmissible to show that they were not influenced by improper remarks of counsel[40] or by improper communications,[41] or that they disregarded improper instructions by the court,[42] or incompetent material evidence which was before them and was not withdrawn or excluded before the case was submitted to them.[43]

37. *Alabama.*— Birmingham R., etc., Co. *v.* Moore, (1906) 42 So. 1024.

California.— Crawford *v.* Harris, (1896) 45 Pac. 819; Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78.

Georgia.— Fulton County *v.* Phillips, 91 Ga. 65, 16 S. E. 260 (to show papers not in evidence not read); Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841; Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839 (alleged improper language); Columbus *v.* Goetchius, 7 Ga. 139 (alleged expressions of bias explained).

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Peck *v.* Brewer, 48 Ill. 54; Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515; Virginia *v.* Plummer, 65 Ill. App. 419; Illinois Cent. R. Co. *v.* Robinson, 58 Ill. App. 181 (declaration indicating prejudice); Chicago, etc., R. Co. *v.* Kuster, 22 Ill. App. 188 (alleged prejudice).

Indiana.— Harding *v.* Whitney, 40 Ind. 379; Haun *v.* Wilson, 28 Ind. 296; Conwell *v.* Anderson, 2 Ind. 122, alleged improper expression relative to cause. *Compare* Tegarden *v.* Phillips, (App. 1894) 39 N. E. 212, as to conduct of juror on question of competency.

Kansas.— Perry *v.* Bailey, 12 Kan. 539.

Maine.— Sawyer *v.* Hopkins, 22 Me. 268 (on question of prejudgment); Taylor *v.* Greely, 3 Me. 204 (in explanation of language indicating prejudgment); Haskell *v.* Becket, 3 Me. 92.

Missouri.— McCormick *v.* Monroe, 64 Mo. App. 197.

Nebraska.— Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794, alleged discussion of case with affiant.

New Hampshire.— Dodge *v.* Carroll, 59 N. H. 237; Tenney *v.* Evans, 13 N. H. 462, 40 Am. Dec. 166.

New Jersey.—Kennedy *v.* Kennedy, 18 N. J. L. 450, to disprove quotient verdict.

New York.— Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Moore *v.* New York El. R. Co., 15 Daly 506, 8 N. Y. Suppl. 329, 18 N. Y. Civ. Proc. 146, 24 Abb. N. Cas. 77; Elliott *v.* Luengene, 17 Misc. 78, 39 N. Y. Suppl. 850 (to show papers improperly taken to jury room were not read); Dana *v.* Tucker, 4 Johns. 487.

Pennsylvania.— McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420 (to disprove alleged declarations indicating prejudgment); Heiss *v.* Bailey, 20 Lanc. L. Rev. 51.

South Dakota.—Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577; Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764.

Vermont.— Downer *v.* Baxter, 30 Vt. 467.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245, with caution.

Wisconsin.— See Gans *v.* Harmison, 44 Wis. 323, as to insufficiency of evidence of prejudgment.

United States.— Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337 (as to reading newspaper articles); Fuller *v.* Fletcher, 44 Fed. 34 (to show papers not in evidence not read).

England.— Standewick *v.* Hopkins, 2 D. & L. 502, 9 Jur. 161, 14 L. J. Q. B. 16; Jones *v.* Powell, 4 Wkly. Rep. 252.

See 37 Cent. Dig. tit. "New Trial," § 297.

Compare Vance *v.* Haslett, 4 Bibb (Ky.) 191, as to incompetency of juror to testify as to impartiality.

38. Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900, holding that the rule that the testimony of jurors may be received to sustain the verdict when assailed applies when the attack is based upon misconduct of the jurors, and does not extend to admission of such evidence to explain the verdict or show on what ground it was rendered. See Babbit *v.* Cowperthwaite, 8 N. Brunsw. 373.

39. Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49 [*overruling* Ferrill *v.* Simpson, 8 Pick. (Mass.) 359] (holding that the affidavit of a juror was competent to disprove alleged declarations of the juror made outside the jury room indicating bias, but that neither his affidavit nor those of other jurors as to discussions and votes in the jury room was admissible even to sustain the verdict); Pierce *v.* Pierce, 38 Mich. 412 (where court had improperly induced jury to render hasty verdict). But see Tenney *v.* Evans, 13 N. H. 462, 40 Am. Dec. 166, as to conduct alleged to show partiality.

40. Jordon *v.* Wallace, 67 N. H. 175, 32 Atl. 174.

41. Baltimore, etc., R. Co. *v.* Phelps, 8 Ohio Dec. (Reprint) 11, 5 Cinc. L. Bul. 28, (with the successful party's witnesses); Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337 (as to reading newspaper articles).

42. Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900.

43. Mason *v.* Knox, 66 N. H. 545, 27 Atl.

6. Surprise, Accident, or Mistake — a. In General. A motion for a new trial on the ground of surprise, accident, or mistake must be sustained by affidavits.[44]

b. Affidavit of Applicant or Attorney — (i) *The Surprise, Accident, or Mistake.* The particular facts showing surprise, accident, or mistake must be proved by the affidavit of the applicant or his attorney.[45]

(ii) *Prudence.* The affidavits must show that the accident or surprise could not have been guarded against by ordinary prudence.[46] The particular facts offered as an excuse for the absence from the trial of the applicant or his counsel must be stated,[47] and the acts of diligence to discover and produce necessary wit-

305. See also Page *v.* Wheeler, 5 N. H. 91. While testimony that the jury wholly ignored certain evidence before them might tend to sustain their verdict in some cases, it would show that they violated their oath in not trying the case according to the law and the evidence given them, and would come within the rule making the testimony of jurors incompetent to impeach their verdict. Mason *v.* Knox, *supra.*

If the evidence is in writing and has not been read in the presence of the jury, and was not placed in their possession through fault of the winning party or negligence of the losing party, it may be shown by the testimony of jurors that they did not read it, or have knowledge of its contents. Hix *v.* Drury, 5 Pick. (Mass.) 296; Mason *v.* Knox, 66 N. H. 545, 27 Atl. 305. In the absence of such testimony, it is not competent for the party who has obtained the verdict "to prove by the jurors that they were not influenced by the papers in finding their verdict; but the court must be governed by the tendency of the papers apparent from the face of them." Whitney *v.* Whitman, 5 Mass. 405; Mason *v.* Knox, 66 N. H. 545, 27 Atl. 305; Page *v.* Wheeler, 5 N. H. 91.

44. Smethurst *v.* Harwood, 30 N. J. L. 230; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43.

45. *Arkansas.*— Ballard *v.* Noaks, 2 Ark. 45.

California.— Schellhous *v.* Ball, 29 Cal. 605; Brooks *v.* Lyon, 3 Cal. 113.

Delaware.— Rice *v.* Simmons, 2 Harr. 309.

Indiana.— Sullivan *v.* O'Connor, 77 Ind. 149.

Kentucky.— Theobald *v.* Hare, 8 B. Mon. 39 (as to witness deceiving movant); Holmes *v.* McKinney, 4 T. B. Mon. 4; Smith *v.* Morrison, 3 A. K. Marsh. 81.

Missouri.— Smith, etc., Implement Co. *v.* Wheeler, 27 Mo. App. 16.

Texas.— Sheppard *v.* Avery, (Civ. App. 1895) 32 S. W. 791, at ruling.

Vermont.— Blake *v.* Howe, 1 Aik. 306, 15 Am. Dec. 681.

England.— Hoare *v.* Silverlock, 9 C. B. 20, 19 L. J. C. P. 215, 67 E. C. L. 20; Proctor *v.* Simmons, 9 Moore C. P. 581, 17 E. C. L. 560.

See 37 Cent. Dig. tit. "New Trial," § 303.

Conclusions not sufficient.—An affidavit claiming that the movant had been misled by statements of his adversary or opposing counsel should set out the alleged statements and not merely the movant's inferences or conclusions therefrom. Sullivan *v.* O'Conner, 77 Ind. 149; Smith, etc., Implement Co. *v.* Wheeler, 27 Mo. App. 16.

Affidavit of one of joint parties.— Where a suit is managed by one of several joint parties, his affidavit of surprise is generally sufficient. South *v.* Thomas, 7 T. B. Mon. (Ky.) 59.

Surprise caused by some act or ruling at the trial must be proved by the affidavit of counsel. Schellhous *v.* Ball, 29 Cal. 605; Martin *v.* Hill, 3 Utah 157, 2 Pac. 62, by instructions.

Illness of counsel.— On a motion to set aside a verdict on the ground that movant's attorney was absent, an affidavit may be read to show that the illness of counsel prevented movant from producing material evidence. Smethurst *v.* Harwood, 30 N. J. L. 230.

46. *Alabama.*— *Ex p.* Wallace, 60 Ala. 267.

Arkansas.— Nelson *v.* Waters, 18 Ark. 570.

California.— Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Georgia.— Ferrill *v.* Marks, 76 Ga. 21.

Illinois.— Singer Mfg. Co. *v.* May, 86 Ill. 398; Pomeroy *v.* Patterson, 40 Ill. App. 275.

Mississippi.— Haber *v.* Lane, 45 Miss. 608; Cole *v.* Harman, 8 Sm. & M. 562 (holding an affidavit insufficient to show excuse for absence from the trial, which set up that the affiant's counsel informed him that the case would not be taken up until later in the day); Thompson *v.* Williams, 7 Sm. & M. 270.

Rhode Island.—McDermott *v.* Rhode Island Co., (1903) 60 Atl. 48.

Canada.— An affidavit for a new trial on the ground that the movant was never served with process or other paper in the case, and that he had not retained or authorized the attorney who appeared to represent him, should deny knowledge of the existence of the action. Vaughan *v.* Ross, 8 U. C. Q. B. 506.

See 37 Cent. Dig. tit. "New Trial," §§ 303, 304.

47. *Colorado.*— Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Georgia.— Augusta Nat. Exch. Bank *v.* Walker, 80 Ga. 281, 4 S. E. 763; Bowling *v.* Whatley, 53 Ga. 24. See also Ferrill *v.* Marks, 76 Ga. 21, as to insufficient excuse.

Illinois.— Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278. See also Miller *v.* McGraw, 20 Ill. App. 203, as to insufficient excuse.

Kentucky.— Embry *v.* Devinney, 8 Dana 202.

Minnesota.— O'Keefe *v.* Lenfest, 35 Minn.

nesses must be set forth.[48] Where a continuance might have prevented the injury complained of, the affidavits should show that application for a continuance was made,[49] or reasons for not having made it.[50]

(III) *Merits and Additional Evidence.* Where the applicant was prevented from making a defense, his affidavit must set forth facts showing a meritorious defense.[51] And generally his affidavit should state any new facts which he expects to prove or any additional evidence which he expects to produce, on a new trial, and state the names of any absent or newly discovered witnesses who are expected to give such evidence.[52] It must show that the applicant suffered

237, 28 N. W. 260, trial in violation of stipulation.

Missouri.— Peers *v.* Davis, 29 Mo. 184; Meechum *v.* Judy, 4 Mo. 361; Campbell *v.* Buller, 32 Mo. App. 646. See also Frick Co. *v.* Caffery, 48 Mo. App. 120, as to insufficient excuse.

Nebraska.— See Felton *v.* Moffett, 29 Nebr. 582, 45 N. W. 930 (as to insufficient proof of agreement of parties as to time of trial, the prevailing party denying, while the movant asserted, such agreement).

Texas.— Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517, to the same effect as the last case.

Vermont.— Dow *v.* Hineshurgh, 1 Aik. 35, where no defense pleaded.

Canada.— Proudfoot *v.* Harley, 11 U. C. C. P. 389, in interpleader suit.

See 37 Cent. Dig. tit. "New Trial," § 303.

48. *Illinois.*— Pomeroy *v.* Patterson, 40 Ill. App. 275. The affidavit should show that the absence of a witness was not with the consent of the movant. North Chicago City R. Co. *v.* Gastaka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481 [*affirming* 27 Ill. App. 518].

Indiana.— Iseley *v.* Lovejoy, 8 Blackf. 462.

Kentucky.— Stewart *v.* Durrett, 2 T. B. Mon. 122.

Mississippi.— Ellis *v.* Kelly, 33 Miss. 695, as to mistake of witness.

Texas.— Spillars *v.* Curry, 10 Tex. 143; Lehde *v.* Lehde, 17 Tex. Civ. App. 240, 42 S. W. 585.

England.— Flooks *v.* Marriott, 7 L. T. Rep. N. S. 363, 11 Wkly. Rep. 121.

49. Prudential Ins. Co. *v.* De Bord, 17 Ind. App. 224, 46 N. E. 553.

50. Iseley *v.* Lovejoy, 8 Blackf. (Ind.) 462; Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513; Jones *v.* Gaither, 3 A. K. Marsh. (Ky.) 166; Addington *v.* Bryson, 1 Tex. App. Civ. Cas. § 1292.

51. *Colorado.*— Union Brewing Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Georgia.— Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648, absence of party because of unavoidable delay of notice and no defense pleaded.

Illinois.— Auburn Cycle Co. *v.* Foote, 69 Ill. App. 644; Waarich *v.* Winter, 33 Ill. App. 36; Slack *v.* Casey, 22 Ill. App. 412.

Indiana.— Davis *v.* Hardy, 76 Ind. 272 (refusal of court to give time to make a showing for filing additional pleas); Montgomery *v.* Wilson, 58 Ind. 591 (absence of party from sickness); Prudential Ins. Co. *v.* De Bord, 17 Ind. App. 224, 46 N. E. 553 (where movant was improperly forced into trial).

Mississippi.— Cole *v.* Harman, 8 Sm. & M. 562, as to insufficient defense.

Missouri.— Elliott *v.* Leak, 4 Mo. 540.

New York.—Travis *v.* Barger, 24 Barb. 614. But see Kilts *v.* Neahr, 101 N. Y. App. Div. 317, 91 N. Y. Suppl. 945.

Tennessee.— Gillespie *v.* Davis, 5 Yerg. 319; Hammonds *v.* Kemer, 3 Hayw. 145.

Texas.— Holliday *v.* Holliday, 72 Tex. 581, 10 S. W. 690, where no defense was pleaded.

Wisconsin.— Burnham *v.* Smith, 11 Wis. 258, where an affidavit that the movant has stated his defense to counsel is held insufficient.

Canada.— Reg. *v.* Baker, 6 U. C. C. P. 68; Pardow *v.* Beatty, 6 U. C. Q. B. 496; Moore *v.* Hicks, 6 U. C. Q. B. 27; Doyle *v.* Fraser, 5 U. C. Q. B. O. S. 59. See also Vidal *v.* Upper Canada Bank, 15 U. C. C. P. 421, holding, however, that the affidavit need not disclose what the merits are in an interpleader issue. But as to the last point see Proudfoot *v.* Harley, 11 U. C. C. P. 389.

See 37 Cent. Dig. tit. "New Trial," § 305.

But see New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170 (where it was held under a petition for a new trial under the statute of that state that the general rule was to grant an opportunity for a trial without inquiring into the merits when it appeared that a trial had not been had by reason of accident and misfortune); Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729 (where the movant was excusably absent and his affidavit averred simply that he had a good defense, which was not controverted and it was held sufficient).

Where a case is irregularly called out of its turn, a verdict may be set aside without an affidavit of merits. Dorrien *v.* Howell, 6 Bing. N. Cas. 245, 8 Dowl. P. C. 277, 4 Jur. 195, 8 Scott 508, 37 E. C. L. 605; Hanslow *v.* Wilks, 5 Dowl. P. C. 295 (where case tried before time specified in trial notice); Williams *v.* Williams, 2 Dowl. P. C. 350 (where case tried without notice of trial); Wolff *v.* Goldring, 44 L. J. C. P. 214, 32 L. T. Rep. N. S. 161, 23 Wkly. Rep. 473.

In form defendant's affidavit must show a good defense on the merits, the proper form of statement being that he has "a good defense to this action upon the merits." Page *v.* South, 7 Dowl. P. C. 412; Vidal *v.* Upper Canada Bank, 15 U. C. C. P. 421.

52. *Arkansas.*— Nelson *v.* Waters, 18 Ark. 570.

injury from the surprise, accident, or mistake, and that a new trial will probably result in a different verdict or decision.[53]

c. Affidavits of Witnesses or Written Evidence. The motion must be sustained by the affidavits of any persons whose testimony upon any matter not testified to by them upon the trial is relied upon to change the result should a new trial be granted, unless the absence of such affidavits is satisfactorily accounted for.[54] New written evidence must be presented with the application.[55]

7. Newly Discovered Evidence — a. In General. An application for a new trial on the ground of newly discovered evidence must be sustained by affidavits.[56]

b. Affidavit of Applicant, Attorney, and Agent — (i) *In General.* A motion

California.— Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Delaware.— Rice *v.* Simmons, 2 Harr. 309.

Georgia.— Cheney *v.* Walton, 46 Ga. 432.

Kansas.— Swartzel *v.* Rogers, 3 Kan. 374.

Kentucky.— South *v.* Thomas, 7 T. B. Mon. 59; Jones *v.* Gaither, 3 A. K. Marsh. 166; Smith *v.* Morrison, 3 A. K. Marsh. 81; Picket *v.* Richet, 2 Bibb 178; Reed *v.* Miller, 1 Bibb 142.

Mississippi.— Ellis *v.* Kelly, 33 Miss. 695, as to mistake of witness.

Missouri.— Warren *v.* Ritter, 11 Mo. 354.

Texas.— Ward *v.* Cobbs, 14 Tex. 303. See also Spillars *v.* Curry, 10 Tex. 143, as to showing materiality of statement made by witness.

Vermont.— Blake *v.* Howe, 1 Aik. 306, 15 Am. Dec. 681.

United States.— Boiakosky *v.* Philadelphia, etc., R. Co., 126 Fed. 230.

See 37 Cent. Dig. tit. "New Trial," § 303.

53. *Alabama.*— *Ex p.* Wallace, 60 Ala. 267.

California.— Brooks *v.* Douglass, 32 Cal. 208; Schellhous *v.* Ball, 29 Cal. 605; Patterson *v.* Ely, 19 Cal. 28, facts and not conclusions.

Florida.— Judge *v.* Moore, 9 Fla. 269.

Georgia.— Ferrill *v.* Marks, 76 Ga. 21; Bowling *v.* Whatley, 53 Ga. 24.

Kentucky.— Embry *v.* Devinney, 8 Dana 202; Holmes *v.* McKinney, 4 T. B. Mon. 4; Holley *v.* Christopher, 3 T. B. Mon. 14; Stewart *v.* Durrett, 2 T. B. Mon. 122.

Mississippi.— Haber *v.* Lane, 45 Miss. 608; Thompson *v.* Williams, 7 Sm. & M. 270.

Missouri.— Culbertson *v.* Hill, 87 Mo. 553; Campbell *v.* Buller, 32 Mo. App. 646.

New York.— Leonard *v.* Germania F. Ins. Co., 2 Misc. 548, 23 N. Y. Suppl. 684, 23 N. Y. Civ. Proc. 155.

North Carolina.— Gardner *v.* Harrel, 4 N. C. 51.

United States.— Boiakosky *v.* Philadelphia, etc., R. Co., 126 Fed. 230.

England.— Clark *v.* Manns, 1 Dowl. P. C. 656; Dunn *v.* Edwards, 19 L. T. Rep. N. S. 394; Flooks *v.* Marriott, 7 L. T. Rep. N. S. 363, 11 Wkly. Rep. 121.

Canada.— Young *v.* Moderwell, 14 U. C. C. P. 143; Kerr *v.* Boulton, 25 U. C. Q. B. 282; Doe *v.* Yager, 5 U. C. Q. B. 584.

See 37 Cent. Dig. tit. "New Trial," § 303.

Materiality of excluded deposition.—Where surprise is claimed by the exclusion of depositions, the materiality of the evidence must be shown. Peers *v.* Davis, 29 Mo. 184.

54. *Arkansas.*— Nelson *v.* Waters, 18 Ark. 570.

California.— Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Georgia.— Cheney *v.* Walton, 46 Ga. 432.

Idaho.— Lillienthal *v.* Anderson, 1 Ida. 673, application based on refusal of continuance.

Illinois.— Cowan *v.* Smith, 35 Ill. 416.

Indiana.— Cummins *v.* Walden, 4 Blackf. 307; Mann *v.* Clifton, 3 Blackf. 304.

New York.— Phenix *v.* Baldwin, 14 Wend. 62.

Tennessee.— Cozart *v.* Lisle, Meigs 65.

Texas.— Montgomery *v.* Carlton, 56 Tex. 431; Ward *v.* Cobbs, 14 Tex. 303; Steinlein *v.* Dial, 10 Tex. 268; Spillars *v.* Curry, 10 Tex. 143; Addington *v.* Bryson, 1 Tex. App. Civ. Cas. § 1292.

See 37 Cent. Dig. tit. "New Trial," § 303. And see *supra*, III, H, 6; *infra*, IV, N, 7, c.

An alleged mistake by a witness in testifying must be proved by his affidavit. Spillars *v.* Curry, 10 Tex. 143.

Perjury by a witness, it has been held, should be proved by oral testimony in open court, subject to cross-examination, and not by affidavits. Chicago, etc., R. Co. *v.* Stewart, 104 Ill. App. 37 [*affirmed* in 203 Ill. 223, 67 N. E. 830]. So the unsupported affidavit of a losing party that the testimony of the witnesses of his adversary was false will not warrant the granting of a new trial. Iser *v.* Cohen, 1 Baxt. (Tenn.) 421.

Alleged statements by a witness contradictory of his testimony must be proved by the affidavit of the person who heard such statements made. Lillienthal *v.* Anderson, 1 Ida. 673.

55. Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (Ind. App. 1902) 62 N. E. 649; Montgomery *v.* Carlton, 56 Tex. 431. See also *infra*, IV, N, 7, c.

56. *Arkansas.*— Halliburton *v.* Johnson, 30 Ark. 723.

California.— Beans *v.* Emanuelli, 36 Cal. 117.

Georgia.— Maddox *v.* Stephenson, 60 Ga. 125.

Illinois.— Richardson *v.* Benes, 115 Ill. App. 532.

Indiana.— Lewis *v.* Crow, 69 Ind. 434; McDaniel *v.* Graves, 12 Ind. 465, application after term.

Iowa.— Patterson *v.* Jack, 59 Iowa 632, 13 N. W. 724.

must be supported by the affidavit of the applicant or his attorney as well as by the affidavits of witnesses.[57] An affidavit by the attorney or agent, on information and belief, as to the diligence exercised by the applicant to discover the new evidence or as to his previous knowledge of such evidence, is ordinarily insufficient.[58]

(II) *NATURE OF EVIDENCE.* The affidavit must state, in a direct and positive

Kentucky.— Slone *v.* Slone, 2 Metc. 339; Soper *v.* Crutcher, 96 S. W. 907, 29 Ky. L. Rep. 1080; Hall *v.* Graziana, 74 S. W. 670, 25 Ky. L. Rep. 14.

Louisiana.— Stone *v.* Carter, 5 La. 448, under statute requiring the affidavit to accompany the motion.

Maine.— Emmett *v.* Perry, 100 Me. 139, 60 Atl. 872.

Missouri.— Leonard *v.* Schuler, 34 Mo. 475; Lovell *v.* Davis, 52 Mo. App. 342.

Pennsylvania.— Greenwood *v.* Iddings, 1 Phila. 28, or depositions.

Texas.— Houston Lighting Power Co. *v.* Hooper, (Civ. App. 1907) 102 S. W. 133; St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1905) 86 S. W. 943, where purported affidavit was not verified.

United States.—Boiakosky *v.* Philadelphia, etc., R. Co., 126 Fed. 230; Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

See 37 Cent. Dig. tit. "New Trial," § 306.

Burden to sustain credibility.— Where the credibility of a new witness is attacked, the burden is on the movant to prove him credible. Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193. See also Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870; Clark *v.* Chipman, 26 U. C. Q. B. 170.

57. *Pennsylvania.*— Deitrich *v.* Lancaster, 21 Lanc. L. Rev. 203.

Texas.— Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675.

Vermont.— Bradish *v.* State, 35 Vt. 452.

West Virginia.— Varner *v.* Core, 20 W. Va. 472.

United States.—Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

Where an attorney has had entire control and management of the case and his clients reside out of the county where the case was prepared and tried, he may make the affidavit. Sterling *v.* Arnold, 54 Ga. 690; Williams *v.* Brashear, 16 La. 77. *Compare* Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635.

58. *Arkansas.*—Merrick *v.* Britton, 26 Ark. 496; Robins *v.* Fowler, 2 Ark. 133; Burriss *v.* Wise, 2 Ark. 33.

Georgia.— Cordele Guano Co. *v.* Carter, 94 Ga. 702, 19 S. E. 827; Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991; Statham *v.* Shellnut, 86 Ga. 377, 12 S. E. 641; Morgan *v.* Taylor, 55 Ga. 224; Sterling *v.* Arnold, 54 Ga. 690. *Compare* Sharman *v.* Morton, 31 Ga. 34.

Illinois.— Dyk *v.* De Young, 133 Ill. 82, 24 N. E. 520; Crozier *v.* Cooper, 14 Ill. 139.

Indiana.— Ward *v.* Voris, 117 Ind. 368, 20 N. E. 261; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009.

Iowa.— Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635 (although the affidavit of the attorney alleges that the preparation of the case devolved exclusively upon the attorneys); Roziene *v.* Wolf, 43 Iowa 393; Mays *v.* Deaver, 1 Iowa 216.

Kentucky.— Bronson *v.* Green, 2 Duv. 234; Richardson *v.* Huff, 43 S. W. 454, 19 Ky. L. Rep. 1428.

Louisiana.— Chew *v.* Rapides Police Jury, 2 La. Ann. 796 (unless reasons be given why the party does not make the affidavit); Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Burton *v.* Maltby, 18 La. 531; Williams *v.* Brashear, 16 La. 77; Stafford *v.* Calliham, 3 Mart. N. S. 124.

Montana.— Spencer *v.* Spencer, 31 Mont. 631, 79 Pac. 320; Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513.

Nebraska.— Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197, 59 Nebr. 510, 81 N. W. 435; Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709.

New York.— Conable *v.* Smith, 19 N. Y. Suppl. 446.

North Dakota.— Goose River Bank *v.* Gilmore, 3 N. D. 188, 54 N. W. 1032.

Pennsylvania.— Evans *v.* Bitner, 4 Lanc. Bar, Sept. 7, 1872.

Rhode Island.— Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989.

Texas.— Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. 83; Campbell Real Estate Co. *v.* Wiley, (Civ. App. 1904) 83 S. W. 251. Where the affidavit is made by counsel, it should show that his client had no knowledge of the evidence before the trial. Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264.

Vermont.— Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Brown *v.* Speyers, 20 Gratt. 296.

England.— Horrocks *v.* Maudsley, 23 L. T. Rep. N. S. 853.

See 37 Cent. Dig. tit. "New Trial," § 310. And see *supra*, III, I, 3.

The affidavits of one of defendants sued jointly may be sufficient. Howland *v.* Reeves, 25 Mo. App. 458.

An affidavit by an agent of a corporation party alleging that knowledge of the new evidence did not come to him until after the trial, but not negativing prior knowledge thereof by other agents or attorneys, is insufficient. Campbell Real Estate Co. *v.* Wiley, (Tex. Civ. App. 1904) 83 S. W. 251; Missouri, etc., R. Co. *v.* Rack, 21 Tex. Civ. App. 667, 52 S. W. 988.

One of co-counsel.— Where the affidavit is by counsel, it should show that co-counsel had no prior knowledge of the new evidence. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556.

manner,[59] the names of newly discovered witnesses,[60] and the particular facts to which they will testify.[61] It must appear affirmatively that the evidence is not merely cumulative to the evidence adduced at the trial,[62] nor merely impeaching in character,[63] and that it is competent, relevant, and material under the issues.[64]

59. Alger *v.* Merritt, 16 Iowa 121; Axtell *v.* Warden, 7 Nebr. 186.

60. *Alabama.*—McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

Arkansas.— Merrick *v.* Britton, 26 Ark. 496.

Illinois.— Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141; Edwards *v.* Barnes, 55 Ill. App. 38.

Indiana.— Martin *v.* Garver, 40 Ind. 351.

Kentucky.— Adams *v.* Ashby, 2 Bibb 287.

Louisiana.—Arpine *v.* Harrison, 6 Mart. N. S. 326; Loccard *v.* Bullitt, 3 Mart. N. S. 170; Andre *v.* Bienvenu, 1 Mart. 148.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241.

New York.—Richardson *v.* Backus, 1 Johns. 59; Hollingsworth *v.* Napier, 3 Cai. 182, 2 Am. Dec. 268.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343; Marsh *v.* Moser, 1 Woodw. 218.

Rhode Island.— Harris *v.* Cheshire R. Co., (1889) 16 Atl. 512.

West Virginia.— Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Snider *v.* Myers, 3 W. Va. 195.

Canada.— Coy *v.* Gardiner, 7 N. Brunsw. 91.

See 37 Cent. Dig. tit. "New Trial," § 308.

61. *Arkansas.*—Merrick *v.* Britton, 26 Ark. 496; Bourland *v.* Skimnee, 11 Ark. 671.

Illinois.— Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141; Edwards *v.* Barnes, 55 Ill. App. 38.

Indiana.— Martin *v.* Carver, 40 Ind. 351.

Kentucky.—Adams *v.* Ashby, 2 Bibb 287.

Louisiana.—Arpine *v.* Harrison, 6 Mart. N. S. 326; Loccard *v.* Bullitt, 3 Mart. N. S. 170; Andre *v.* Bienvenu, 1 Mart. 148.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241.

Nebraska.— German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106.

New Hampshire.— Wheeler *v.* Troy, 20 N. H. 77.

New York.—Richardson *v.* Backus, 1 Johns. 59; Hollingsworth *v.* Napier, 3 Cai. 182, 2 Am. Dec. 268.

Pennsylvania.— Kenderdine *v.* Phelin, 1 Phila. 343; Marsh *v.* Moser, 1 Woodw. 218.

Rhode Island.— Harris *v.* Cheshire R. Co., (1889) 16 Atl. 512.

West Virginia.— Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439; Snider *v.* Myers, 3 W. Va. 195.

Canada.— Coy *v.* Gardiner, 7 N. Brunsw. 91; Bates *v.* Chisholm, 7 U. C. C. P. 46; Longueuil *v.* Cushman, 24 U. C. Q. B. 602; White *v.* Browne, 12 U. C. Q. B. 477; Robinson *v.* Rapelje, 4 U. C. Q. B. 289.

See 37 Cent. Dig. tit. "New Trial," § 308. And see *supra*, IV, N, 6, b, (III).

62. *Alabama.*— McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

Arkansas.— Merrick *v.* Britton, 26 Ark. 496; Robins *v.* Fowler, 2 Ark. 133; Burriss *v.* Wise, 2 Ark. 33.

Illinois.— Crozier *v.* Cooper, 14 Ill. 139.

Indiana.— Hines *v.* Driver, 100 Ind. 315; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435.

Iowa.— Mays *v.* Deaver, 1 Iowa 216.

New York.— Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Conable *v.* Smith, 19 N. Y. Suppl. 446.

Virginia.— Brown *v.* Speyers, 20 Gratt. 296.

See 37 Cent. Dig. tit. "New Trial," § 309. And see *supra*, III, I, 5, b, (VI).

Compare Hobler *v.* Cole, 49 Cal. 250 (holding that the fact that newly discovered evidence is cumulative is an affirmative proposition, and if it does not appear in the moving papers it must be shown by the party opposing the motion); Howland *v.* Reeves, 25 Mo. App. 458.

Affidavits without case.—An application for a new trial upon the ground of newly discovered evidence is peculiar in its nature, and, unlike other motions for new trials, depends mainly upon intrinsic facts, and not upon errors committed upon the trial. It must therefore necessarily be founded, in part if not wholly, upon affidavits and other proof. There is no other mode of bringing the material facts involved in such a motion, viz., the existence of the newly discovered proof; the time and circumstances of its discovery; the names of the witnesses by whom it is to be established, and the exercise of diligence in making it, before the court. The character of other facts which may be important in considering the motion, such, for instance, as whether the evidence is cumulative, or relevant, or will be likely to change the result on a new trial, may be made to appear by a case; but they can also, in many cases, be sufficiently shown by affidavit, and, when the parties consent to have the motion heard on such papers, there would seem to be no good reason why the court should not entertain it. Russell *v.* Randall, 123 N. Y. 436, 25 N. E. 931 [*reversing* 9 N. Y. Suppl. 327].

63. Crozier *v.* Cooper, 14 Ill. 139; Hixson *v.* Carqueville Lith. Co., 115 Ill. App. 427; Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048. See also *supra*, III, I, 5, b, (VII).

64. *Arkansas.*—Merrick *v.* Britton, 26 Ark. 496.

California.— Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935.

Georgia.— Gibson *v.* Williams, 39 Ga. 660.

Illinois.— Crozier *v.* Cooper, 14 Ill. 139; McDavitt *v.* McNay, 78 Ill. App. 396.

Indiana.— Hines *v.* Driver, 100 Ind. 315.

Louisiana.— Burton *v.* Brewer, 7 La. Ann. 620; Union Bank *v.* Robert, 9 Rob. 177; Bonnet *v.* Legras, 1 Rob. 92; Ingram *v.*

And in addition thereto, the truthfulness of the newly discovered testimony should be alleged.[65]

(iii) *Discovery of Evidence and Diligence.* The affidavit of the applicant should allege positively that the evidence was not known to the applicant before the verdict,[66] and the fact that the applicant or his attorney or agent used ordinary diligence to discover the new evidence before the trial must be shown.[67] The

Croft, 7 La. 82; Peytavin *v.* Maurin, 2 La. 480.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Missouri.— Commercial Bank *v.* Brinkerhoff, 110 Mo. App. 429, 85 S. W. 121; Spaulding *v.* Edina, 104 Mo. App. 45, 78 S. W. 302.

New York.— Brady *v.* New York, 54 N. Y. Super. Ct. 457; Levy *v.* Hatch, 92 N. Y. Suppl. 287; Conable *v.* Smith, 19 N. Y. Suppl. 446.

Pennsylvania.— Evans *v.* Bitner, 4 Lanc. Bar, Sept. 7, 1872.

Texas.— Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117.

Vermont.— Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia.— Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

West Virginia.— Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

United States.—Vose *v.* Mayo, 28 Fed. Cas. No. 17,009, 3 Cliff. 484.

See 37 Cent. Dig. tit. "New Trial," § 309.

65. *Georgia.*— Thompson *v.* Feagin, 60 Ga. 82.

Illinois.— Murphy *v.* McGrath, 79 Ill. 594; Ritchey *v.* West, 23 Ill. 385, at least where not accompanied by affidavits of witnesses.

Indiana.— McDaniel *v.* Graves, 12 Ind. 465.

Louisiana.— Stone *v.* Carter, 5 La. 448.

Mississippi.— Hinds *v.* Terry, Walk. 80.

Affidavits as to the character and credibility of new witnesses must be offered, under the statute in Georgia. Atwater *v.* Hannah, 116 Ga. 745, 42 S. E. 1007; Perryman *v.* Equitable Mortg. Co., 115 Ga. 769, 42 S. E. 94.

66. Carlisle *v.* Tidwell, 16 Ga. 33; Bronson *v.* Green, 2 Duv. (Ky.) 234 (holding that a defect caused by the omission of such a showing in the applicant's affidavit is not cured by the affidavit of the new witness wherein it is stated that the witness did not before the trial inform the applicant or his counsel of the facts to which he could testify, inasmuch as this does not preclude the possibility of the applicant's having acquired, through other means, knowledge that he could prove the particular facts by the witness); Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390; Bradish *v.* State, 35 Vt. 452.

The affidavit of both attorney and party should be offered in support on this point. Morgan *v.* Taylor, 55 Ga. 224; Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709. See also Nebraska Tel. Co. *v.* Jones, 60 Nebr. 466, 83 N. W. 197, 59 Nebr. 510, 81 N. W. 435. *Contra*, Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43. In King *v.* Hill, (Tex. Civ. App. 1903) 75 S. W. 550, it was held that, where defendant was represented by two attorneys, an application for a new trial for newly discovered evidence, sworn to by only one of his counsel, and averring that he did not know of the newly discovered testimony before the trial, but which did not negative the fact that defendant or his other attorney had knowledge thereof, was insufficient.

67. *Alabama.*— McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

Arkansas.— Halliburton *v.* Johnson, 30 Ark. 723.

Colorado.— Lee-Kinsey Implement Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.

Delaware.— McCombs *v.* Chandler, 5 Harr. 423.

Georgia.— Cordele Guano Co. *v.* Carter, 94 Ga. 702, 19 S. E. 827.

Illinois.— Dyk *v.* De Young, 133 Ill. 82, 24 N. E. 520.

Indiana.— Martin *v.* Garver, 40 Ind. 351; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057.

Iowa.— Mather *v.* Butler County, 33 Iowa 250; Mays *v.* Deaver, 1 Iowa 216.

Kansas.— Sexton *v.* Lamb, 27 Kan. 432.

Kentucky.— Nisbet *v.* Wells, 76 S. W. 120, 25 Ky. L. Rep. 511.

Louisiana.— Berger *v.* Spalding, 13 La. Ann. 580; Union Bank *v.* Robert, 9 Rob. 177; Bonnet *v.* Legras, 1 Rob. 92. But see Flower *v.* O'Connor, 8 Mart. N. S. 592, where the affidavit in the language of the statute was held sufficient without such showing.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Minnesota.— Keough *v.* McNitt, 6 Minn. 513.

Missouri.— Smith *v.* Matthews, 6 Mo. 600.

Nebraska.— Matoushek *v.* Dutcher, 67 Nebr. 627, 93 N. W. 1049.

New Mexico.—Armstrong *v.* Aragon, (1905) 79 Pac. 291.

New York.— Quinn *v.* Lloyd, 1 Sweeny 253 [*reversed* on other grounds in 41 N. Y. 349]; Levy *v.* Hatch, 92 N. Y. Suppl. 287; Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Conable *v.* Smith, 19 N. Y. Suppl. 446.

South Dakota.—Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Texas.— Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Harrell *v.* Hill, 15 Tex. 270; Houston Lighting Power Co. *v.* Hooper, (Civ. App. 1907) 102 S. W. 133; Adams *v.* Halff, (Civ. App. 1893) 24 S. W. 334.

West Virginia.— Varner *v.* Core, 20 W. Va. 472; Snider *v.* Myers, 3 W. Va. 195.

Wisconsin.— Johnson *v.* Goult, 106 Wis. 247, 82 N. W. 139.

See 37 Cent. Dig. tit. "New Trial," § 310.

particular facts showing such diligence must be stated,[68] including the time, place, and circumstances of inquiries made.[69] It has been held that the affidavits must negative every circumstance from which negligence might be inferred.[70]

(iv) *Availability of Evidence.* The applicant's affidavit should allege that

Where papers were not known to exist before the trial a showing of diligence and that a search would not have discovered such writings is unnecessary. Conlon *v.* Mission of Immaculate Virgin, 87 N. Y. App. Div. 165, 84 N. Y. Suppl. 49.

Aider of motion by affidavit.— The motion may be aided by affidavits filed in support of it in so far as such motion is deficient in not alleging that the movant, his attorney or counsel, could not have discovered the facts before trial if due diligence had been used. Payan *v.* U. S., 15 Ct. Cl. 56.

68. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Goodwin, 73 Ark. 528, 84 S. W. 728; Bourland *v.* Skimnee, 11 Ark. 671; Ballard *v.* Noaks, 2 Ark. 45.

Colorado.— Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.

Georgia.— Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991.

Illinois.— Chicago, etc., R. Co. *v.* Raidy, 203 Ill. 310, 67 N. E. 783 [*affirming* 100 Ill. App. 506]; Hixson *v.* Carqueville Lith. Co., 115 Ill. App. 427; Heldmaier *v.* Taman, 88 Ill. App. 209 [*affirmed* in 188 Ill. 283, 58 N. E. 960].

Indiana.— Graham *v.* Payne, 122 Ind. 403, 24 Atl. 216; Schnurr *v.* Stults, 119 Ind. 429, 21 N. E. 1089; Ward *v.* Voris, 117 Ind. 368, 20 N. E. 261; Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Toney *v.* Toney, 73 Ind. 34; Cook *v.* Hare, 49 Ind. 268; Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1902) 62 N. E. 649 ("fully and minutely"); Camphell *v.* Nixon, 25 Ind. App. 90, 56 N. E. 248; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009.

Iowa.— Scott *v.* Hawk, 105 Iowa 467, 75 N. W. 368; Cahalan *v.* Cahalan, 82 Iowa 416, 48 N. W. 724; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515; Woodman *v.* Dutton, 49 Iowa 398; Sully *v.* Kuehl, 30 Iowa 275; Carson *v.* Cross, 14 Iowa 463.

Kansas.— Wilkes *v.* Wolback, 30 Kan. 375, 2 Pac. 508; Boyd *v.* Sanford, 14 Kan. 280; Smith *v.* Williams, 11 Kan. 104.

Kentucky.— Burgess *v.* Grief, 101 S. W. 984, 31 Ky. L. Rep. 215.

Minnesota.— Revor *v.* Bagley, 76 Minn. 326, 79 N. W. 171; Bradley *v.* Norris, 67 Minn. 48, 69 N. W. 624.

Montana.— Nicholson *v.* Metcalf, 31 Mont. 276, 78 Pac. 483.

Nebraska.—Axtell *v.* Warden, 7 Nebr. 186; Heady *v.* Fishburn, 3 Nebr. 263.

Nevada.— Pinschower *v.* Hanks, 18 Nev. 99, 1 Pac. 454.

New Jersey.— Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819.

New York.— Wilcox *v.* Joslin, 10 N. Y. Suppl. 342.

North Carolina.— Sikes *v.* Parker, 95 N. C. 232; Shehan *v.* Malone, 72 N. C. 59.

Oklahoma.— B. S. Flersheim Mercantile Co. *v.* Gillespie, 14 Okla. 143, 77 Pac. 183; Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Texas.— Traylor *v.* Townsend, 61 Tex. 144; Hatchett *v.* Conner, 30 Tex. 104; Burnley *v.* Rice, 21 Tex. 171; Houston, etc., R. Co. *v.* Hollis, 2 Tex. App. Civ. Cas. § 218.

Wisconsin.— Kurtz *v.* Jelleff, 104 Wis. 27, 80 N. W. 41; Edmiston *v.* Garrison, 18 Wis. 594.

See 37 Cent. Dig. tit. "New Trial," § 310.

69. McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7; Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Kelley *v.* Kelley, 8 Ind. App. 606, 34 N. E. 1009; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582; Cahalan *v.* Cahalan, 82 Iowa 416, 48 N. W. 724; Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713 (where the showing was of an effort made to learn the names of particular persons who heard a certain conversation and other persons were known to be present, an inquiry of whom would likely disclose the desired names, but the affidavit was only that inquiry was made to ascertain the names of the persons whom affiant remembered were present, which case was distinguished in Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43, under the circumstances of which it was held that the affidavit was one from which the lower court could believe and find that due diligence had been exercised and was not deficient in the sbowing of diligence because names of persons inquired of were not set out); Hoban *v.* Sandford, etc., Co., 64 N. J. L. 426, 45 Atl. 819. An allegation that affiant "made inquiries among such persons as would be likely to know about the facts in said cause" is too indefinite. Pemberton *v.* Johnson, 113 Ind. 538, 15 N. E. 801; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582. And it is not sufficient to allege that plaintiff made every effort by inquiry of several persons whose names are not given. Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713.

70. Wright *v.* Gould, 73 Ill. 56; Champion *v.* Ulmer, 70 Ill. 322; Crosier *v.* Cooper, 14 Ill. 139; Ward *v.* Voris, 117 Ind. 368, 20 N. E. 261; Kannon *v.* Galloway, 2 Baxt. (Tenn.) 230. Thus the affidavit of the party should show that the particular facts could not be proved by other available evidence. Crozier *v.* Cooper, *supra*. And an affidavit alleging the discovery of expert evidence should state that there were no other experts by whom the same facts could have been proved. whose attendance could have been procured. Kannon *v.* Galloway, *supra*.

The particular circumstances of the discovery of the evidence must be set out. Bourland *v.* Skimnee, 11 Ark. 671; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284; Bradley *v.* Norris, 67 Minn. 48, 69 N. W. 624; Scranton *v.* Tilley, 16 Tex. 183; Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975.

he expects to be able to produce the newly discovered evidence upon a new trial;[71] and, when the application is not accompanied by the affidavits of proposed witnesses, his affidavit should show some reason for such expectation.[72]

e. Affidavits of Witnesses and Written Evidence. The application must be supported by the production of newly discovered written evidence,[73] or by the affidavits of newly discovered witnesses, as to the facts to which they will testify, unless the failure to produce such evidence or affidavits is satisfactorily accounted for,[74] or by other indifferent testimony showing that the proof relied on can be

71. McDonald *v.* People, 123 Ill. App. 346 [*affirmed* in 222 Ill. 325, 78 N. E. 609]; Eikhoff *v.* Wayne Cir. Judge, 129 Mich. 150, 88 N. W. 397 (especially where the affidavit of the witness is not attached); Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057 [*affirmed* in 178 N. Y. 623, 70 N. E. 1101].

72. Harris *v.* Rupel, 14 Ind. 209; Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241. See also Harris *v.* Cheshire R. Co., (R. I. 1889) 16 Atl. 512.

73. Eddy *v.* Caldwell, 7 Minn. 225; Edrington *v.* Kiger, 4 Tex. 89. But *compare* Sorrel *v.* St. Julien, 4 Mart. (La.) 508.

74. *Alabama.*—McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

California.—Arnold *v.* Skaggs, 35 Cal. 684; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Colorado.— Cole *v.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013.

Georgia.— Johnson *v.* Lovett, 31 Ga. 187; White *v.* Wallen, 17 Ga. 106; Suggs *v.* Anderson, 12 Ga. 461.

Illinois.— Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337 [*affirming* 102 Ill. App. 403]; Emory *v.* Addis, 71 Ill. 273; Cowan *v.* Smith, 35 Ill. 416; McDonald *v.* People, 123 Ill. App. 346 [*affirmed* in 222 Ill. 325, 78 N. E. 609].

Indiana.— Hines *v.* Driver, 100 Ind. 315; Hill *v.* Roach, 72 Ind. 57; Brandendistle *v.* Wilhelm, 32 Ind. 496; McQueen *v.* Stewart, 7 Ind. 535; Priddy *v.* Dodd, 4 Ind. 84; Cummins *v.* Walden, 4 Blackf. 307; East *v.* McKee, 14 Ind. App. 45, 42 N. E. 368; Ogden *v.* Kelsey, 4 Ind. App. 299, 30 N. E. 922; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435.

Iowa.— Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122; Sully *v.* Kuehl, 30 Iowa 275; Manix *v.* Malony, 7 Iowa 81; Mays *v.* Deaver, 1 Iowa 216.

Kentucky.— Bright *v.* Wilson, 7 B. Mon. 122; Adams *v.* Ashby, 2 Bibb 287; Dayton *v.* Hirth, 87 S. W. 1136, 27 Ky. L. Rep. 1209.

Maine.— Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241.

Michigan.— Eickhoff *v.* Brooke, (1901) 88 N. W. 397.

Minnesota.— Eddy *v.* Caldwell, 7 Minn. 225; Keough *v.* McNitt, 6 Minn. 513.

Mississippi.— Bledsoe *v.* Doe, 4 How. 13; Rulon *v.* Lintol, 2 How. 891; Hare *v.* Sproul, 2 How. 772.

Missouri.— Caldwell *v.* Dickson, 29 Mo. 227; Obert *v.* Strube, 51 Mo. App. 621.

Montana.— Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513; Elliott *v.* Martin, 27 Mont. 519, 71 Pac. 756; Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.— Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197; Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709; Axtell *v.* Warden, 7 Nebr. 186.

New Jersey.— Sheppard *v.* Sheppard, 10 N. J. L. 250.

New York.— Cheever *v.* Scottish Union, etc., Ins. Co., 180 N. Y. 551, 73 N. E. 1121 [*affirming* 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732]; Adams *v.* Bush, 1 Abb. Dec. 7; Hecla Powder Co. *v.* Sigua Iron Co., 1 N. Y. App. Div. 371, 37 N. Y. Suppl. 149; Cohen *v.* Mayer, 84 Hun 586, 32 N. Y. Suppl. 851; Gould *v.* Moore, 40 N. Y. Super. Ct. 387; Denn *v.* Morrell, 1 Hall 382; Denny *v.* Blumenthal, 8 Misc. 544, 28 N. Y. Suppl. 744; Garvey *v.* U. S. Horse, etc., Co., 3 Misc. 352, 22 N. Y. Suppl. 929; Armstrong Mfg. Co. *v.* Thompson, 88 N. Y. Suppl. 151; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432; Adams *v.* Bush, 2 Abb. Pr. N. S. 104; Shumway *v.* Fowler, 4 Johns. 425; Matter of Collins, 6 Dem. Surr. 286.

Oklahoma.— Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Oregon.— Lander *v.* Miles, 3 Oreg. 40.

Tennessee.— Cozart *v.* Lisle, Meigs 65; Read *v.* Staton, 3 Hayw. 159, 9 Am. Dec. 740; Scott *v.* Wilson, Cooke 315; Chambers *v.* Brown, Cooke 292.

Texas.— Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Anderson *v.* Sutherland, 59 Tex. 409; Burnley *v.* Rice, 21 Tex. 171; Scranton *v.* Tilley, 16 Tex. 183; Steinlein *v.* Dial, 10 Tex. 268; Edrington *v.* Kiger, 4 Tex. 89; Glascock *v.* Manor, 4 Tex. 7; Madden *v.* Shapard, 3 Tex. 49; Adams *v.* Halff, (Civ. App. 1893) 24 S. W. 334; Western Union Tel. Co. *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133; Wisson *v.* Baird, 1 Tex. App. Civ. Cas. § 709. In Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975, it is held that the affidavit of the informant should be offered.

Vermont.— Bradish *v.* State, 35 Vt. 452; Cardell *v.* Lawton, 16 Vt. 606; Webber *v.* Ives, 1 Tyler 441.

Virginia.— Brown *v.* Speyers, 20 Gratt. 296.

West Virginia.— Varner *v.* Core, 20 W. Va. 472; Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54.

Wisconsin.— Smith *v.* Cushing, 18 Wis. 295; Dunbar *v.* Hollinsbead, 10 Wis. 505.

Canada.— Coy *v.* Gardiner, 7 N. Brunsw. 91; Robinson *v.* Rapalje, 4 U. C. Q. B. 289.

See 37 Cent. Dig. tit. "New Trial," § 307.

had.[75] Where it is shown to be impracticable,[76] or impossible to obtain the affidavits of such new witnesses, their production may be excused.[77] The affidavits of the witnesses must set out fully and particularly the facts to which they will testify,[78] and state their willingness to testify upon a new trial.[79]

8. Counter Affidavits. While it has been said that the practice of presenting counter affidavits generally on motions for new trials is not proper,[80] or should not be encouraged,[81] and sometimes has been held not to be permissible,[82] it would seem that such affidavits are nevertheless generally admitted in opposition to the motion based upon matters outside of the record and supported by the affidavit.[83] This appears not only in those instances in which the practice is followed and recognized, although its propriety is not questioned or expressly determined,[84] as upon a motion based upon mistake affecting the jury,[85] and upon surprise, accident, or mistake,[86] but also in those in which it is expressly approved.[87] Sometimes the right of the party to take testimony in reply to that offered in support of the application is fixed by rule of court,[88] or the right to file counter affidavits

The unwillingness of a witness to make an affidavit, and the fact that he is out of the jurisdiction of the court, constituted a sufficient excuse for petitioner's failure to produce the affidavit in support of a motion for a new trial for newly discovered evidence. James McCreery Realty Corp. *v.* Equitable Nat. Bank, 54 Misc. 508, 104 N. Y. Suppl. 959 [*affirming* 52 Misc. 300, 102 N. Y. Suppl. 975].

75. Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740. If it is impracticable to produce the affidavits of the new witnesses stating the facts to which they will testify, affidavits of persons who have conversed with such witnesses showing the facts they will state should be produced. Brown *v.* Speyers, 20 Gratt. (Va.) 296.

76. See Brown *v.* Speyers, 20 Gratt. (Va.) 296, *supra*, note 75. See also Sorrel *v.* St. Julien, 4 Mart. (La.) 508.

77. Smith *v.* Cushing, 18 Wis. 295 (where witness absent from state and could not be found at the time); Payan *v.* U. S., 15 Ct. Cl. 56 (where witnesses were clerks of the other party); Coy *v.* Gardiner, 7 N. Brunsw. 91.

78. Burnley *v.* Rice, 21 Tex. 171.

79. Cheever *v.* Scottish Union, etc., Co., 180 N. Y. 551, 73 N. E. 1121 [*affirming* 86 N. Y. App. Div. 331, 83 N. Y. Suppl. 732]; Lane *v.* Brooklyn Heights R. Co., 178 N. Y. 623, 70 N. E. 1101 [*affirming* 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057]; Adams *v.* Bush, 1 Abb. Dec. (N. Y.) 7; Hecla Powder Co. *v.* Sigua Iron Co., 1 N. Y. App. Div. 371, 37 N. Y. Suppl. 149; Armstrong Mfg. Co. *v.* Thompson, 88 N. Y. Suppl. 151; Roberts *v.* Johnstown Bank, 14 N. Y. Suppl. 432; Shumway *v.* Fowler, 4 Johns. (N. Y.) 425.

80. Davis *v.* Ransom, 57 Tex. 333.

81. McGavock *v.* Brown, 4 Humphr. (Tenn.) 251.

82. See Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Chicago *v.* Edson, 43 Ill. App. 417.

83. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; New Castle, etc., R. Co. *v.* Chambers, 6 Ind. 346; Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; McGavock *v.* Brown, 4 Humphr. (Tenn.) 251 (where it was said that while the practice of introducing such affidavits should not be encouraged, in criminal cases it had been the constant practice to receive them and that the court knew of no rule that would exclude them in civil cases); Davis *v.* Ransom, 57 Tex. 333.

Counter affidavits need not be served before being read. Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; Strong *v.* Platner, 5 Cow. (N. Y.) 21.

84. Mitchell *v.* Chambers, 55 Ind. 289.

85. Hamm *v.* Romine, 98 Ind. 77.

86. *Indiana.*— Mitchell *v.* Chambers, 55 Ind. 289.

Nebraska.— Felton *v.* Moffett, 29 Nebr. 582, 45 N. W. 930, involving the denying of an agreement as to the time of trial.

Texas.— Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517.

United States.— U. S. *v.* Bellaire First Nat. Bank, 86 Fed. 861, holding that where three months after the entry of judgment a motion is made for a new trial on the ground of surprise at the testimony of a witness, and that the only person conversant with the facts sworn to by such witness was out of the state at the time of the trial, and an affidavit of such absent person is presented contradicting the testimony of the witness, and it appears that some of the material statements in such affidavit are in contradiction to his deposition taken in another cause concerning the same transaction, the motion will be denied.

Canada.— Shipman *v.* Stevens, 6 U. C. C. P. 17.

87. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; New Castle, etc., R. Co. *v.* Chambers, 6 Ind. 346; Brattan *v.* Bryan, 1 A. K. Marsh. (Ky.) 212 (surprise); Davis *v.* Ransom, 57 Tex. 333 (propriety of the reception of counter affidavits as to an asserted violation of a parol agreement not to try the case in the absence of a party).

88. In Vermont, under a rule promulgated by the supreme court in 1851, it was provided that in petition for new trials it should be allowed the petitionee to take testimony in reply to that which is served upon him in the petition and that it should always be upon reasonable notice to the adverse party and in the form of depositions, omitting the

is given by statute.[89] Where the motion is based upon the discovery of new evidence, some of the cases expressly approve the use of counter affidavits upon the question of diligence, without determining the propriety of their use in other respects,[90] or recognize the practice, although the question of propriety is not raised or decided,[91] while others, in which objection does not appear to have been made or the precise point of practice to be directly raised or determined, recognize its propriety not only for the purpose of overcoming the movant's showing upon the question of diligence, but also for the purpose of denying the truth of the new evidence or of making a counter showing,[92] as well as for the purpose of impeaching the credibility of the new witnesses.[93] And when these last cases are considered in connection with those in which the point has been directly raised and expressly determined in favor of the propriety of such practice,[94] it would seem that the weight of authority supports the rule that counter affidavits are admissible not only upon the question of diligence but also as to the truth of the matter stated by the newly discovered witnesses.

cause for taking, and that in like manner the petitioner might, if he desired, take testimony in reply to that taken by the petitionee, etc. See 22 Vt. 670. Previous to the promulgation of the rule such testimony had always been received, giving to the other party an election to have his case continued to rebut the evidence, although the practice of receiving such evidence was deprecated. Burr *v.* Palmer, 23 Vt. 244.

89. See Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

90. Zeller *v.* Griffith, 89 Ind. 80; Westbrook *v.* Aultman, 3 Ind. App. 83, 28 N. E. 1011.

91. See People *v.* New York Super. Ct., 10 Wend. (N. Y.) 285.

92. *California.*— Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962.

Georgia.— McNatt *v.* McRae, 117 Ga. 898, 45 S. E. 248; Webb *v.* Wright, etc., Co., 112 Ga. 432, 37 S. E. 710; Harmon *v.* Charleston, etc., R. Co., 88 Ga. 261, 14 S. E. 574; Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108 (affidavit of witness denying evidence in affidavit of new trial); Erskine *v.* Duffy, 76 Ga. 602.

Indiana.— De Hart *v.* Aper, 107 Ind. 460, 8 N. E. 275 (where the party resisting the motion procured an additional affidavit from the new witness and filed it as a counter affidavit to the one he had previously made on behalf of the movant, in which such witness withdrew some of his previous statements and modified others, and intimated that his first affidavit had been obtained from him by undue means and claimed that he had been induced to sign it in ignorance of many of its statements); Miller *v.* Miller, 61 Ind. 471; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

Iowa.— Barber *v.* Maden, 126 Iowa 402, 102 N. W. 120.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

New York.— Chapman *v.* O'Brien, 39 N. Y. Super. Ct. 244; Heald *v.* Macgowan, 14 N. Y. Suppl. 280; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514].

South Dakota.— Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297.

Texas.— Eddy *v.* Newton, (Civ. App. 1893) 22 S. W. 533.

United States.— Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574 (holding that affidavits on behalf of defendant that certain persons would testify that plaintiff had suffered from epileptic fits, which were sought to be attributed to his injuries, before the accident as well as afterward, are no ground for a new trial, where those persons themselves make affidavit that such is not the fact, and that they will not so testify); Ames *v.* Howard, 1 Fed. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482 (holding that the court will always decline to interfere to order a new trial in such cases because it will not undertake to measure the weight of the new testimony on either side or send the party again to litigation upon the chances of a verdict upon new conflicting evidence; and further that the movant will not be permitted to introduce new rebutting evidence to the affidavits of the other party).

93. McNatt *v.* McRae, 117 Ga. 898, 45 S. E. 248; Erskine *v.* Duffy, 76 Ga. 602; Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271; Chapman *v.* O'Brien, 39 N. Y. Super. Ct. 244. See Mercer *v.* Mercer, 87 Ky. 21, 7 S. W. 307, 9 Ky. L. Rep. 870.

94. *Indiana.*— Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Thornburg *v.* Buck, 13 Ind. App. 446, 41 N. E. 85; Richmond First Nat. Bank *v.* Gibbons, 7 Ind. App. 629, 35 N. E. 31, affidavits in denial of truth of supporting affidavit and in impeachment of the credibility of the witness.

Kansas.— Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273, where the affidavit of the new witness was received in opposition to affidavits by movant's attorneys as to the facts to which such witness would testify, but under a statutory provision that counter affidavits may be filed.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461, evidence to impeach the credibility of the new witness.

Massachusetts.— Parker *v.* Hardy, 24 Pick. 246, holding that depositions are admissible to impeach the character of the new witness for veracity.

O. Hearing and Determination of Application[95] — **1. Withdrawal.** An applicant for a new trial may withdraw his motion before it has been ruled upon, even though the adverse party has consented to its allowance,[96] and if the movant in open court waives errors committed against him on the trial, although the adversary party thereafter consents to a new trial,an order granting a new trial is erroneous.[97] Where the foundation of the proceeding for a new trial is the notice of intention to move, the mere withdrawal of a formal written motion which under the particular practice is not essential to the proceeding will not operate as a withdrawal of the notice of intention or as an abandonment of the proceeding.[98]

2. Abandonment, Dismissal, or Waiver[99] — **a. Delay.** A motion for a new trial may be dismissed or overruled for failure of the applicant to prosecute it[1] or bring it to a hearing with due diligence.[2] Where the real moving parties to the motion are minors, it is held that the question of laches in bringing the motion to a

Minnesota.— Finch *v.* Green, 16 Minn. 355.

Missouri.— Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82, impeachment of credibility and character of witness. See also Howland *v.* Reeves, 25 Mo. App. 458, 461.

Rhode Island.— Burlingame *v.* Cowee, 16 R. I. 40, 12 Atl. 234, holding that the court will receive such affidavits to enlighten, not to control, its discretion.

Tennessee.—McGavock *v.* Brown, 4 Humphr. 251, declaring, however, that the practice ought not to be encouraged.

Vermont.— See Burr *v.* Palmer, 23 Vt. 244. See 37 Cent. Dig. tit. "New Trial," § 311.

Contra.— Protection L. Ins. Co. *v.* Dill, 91 Ill. 174 (where it was held that, where the newly discovered evidence consisted of a writing, the question of the forgery of such evidence could not be tried on affidavits); Peyser *v.* Coney Island, etc., R. Co., 81 Hun (N. Y.) 70, 30 N. Y. Suppl. 610; Phelps *v.* Delmore, 4 Misc. (N. Y.) 508, 26 N. Y. Suppl. 278; Clark *v.* Chipman, 26 U. C. Q. B. 170, 173, where it was held: "If a fact sworn to on one side is positively denied on the other, it is, so far as the Court are concerned, put out of consideration, unless there be further matters so established that the Court can safely adopt them and apply them to the contradictory statements. But the impeachment of the veracity of a deponent is very different, and as at present advised we do not see how the Court can give weight to it. If allowed, the deponent will claim to sustain his character, or the party who has adduced his affidavit will do so, and if the attack is proper, the defence must surely be so." In New York the earlier cases are in accord with those cited in support of the text. Williams *v.* Baldwin, 18 Johns. (N. Y.) 489; Pomroy *v.* Columbian Ins. Co., 2 Cai. (N. Y.) 260, where it was held that if the information was stated to have been by a person of character and reputation, counter affidavits to show that such person was unworthy of belief might be read.

Affidavits to sustain the credit of proposed witnesses who were impeached by counter affidavits are held inadmissible. Callen *v.* Kearny, 2 Cow. (N. Y.) 529.

Decision upon conflict of evidence see *infra*, IV, O, 5, e, (I).

95. Authority of court or judge see *supra*, IV, B.

In criminal prosecutions see Criminal Law, 12 Cyc. 753 *et seq.*

96. Stoyell *v.* Cole, 19 Cal. 602; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152. But see Dinsmore *v.* Weston, 33 Me. 256, where it was held that by filing a motion for a new trial after verdict the parties waive the right of excepting to the rulings of the judge at the trial, and that where such motion is made by defendant after verdict for plaintiff who thereupon remits a part of the damage assessed for him, refusal to grant defendant leave to withdraw his motion is proper.

97. Atchison, etc., R. Co. *v.* Brown, 51 Kan. 6, 32 Pac. 630.

98. Wastl *v.* Montana Union R. Co., 13 Mont. 500, 34 Pac. 844, where movant withdrew the formal written motion and substituted another in its stead.

99. Effect of various motions and proceeding see *supra*, I, D, 1.

1. Moore *v.* Kendall, 121 Cal. 145, 53 Pac. 647; People *v.* Center, 61 Cal. 191. See also Seyfert *v.* Edison, 45 N. J. L. 304, construing particular practice rule regulating the grant of rules *nisi*, and holding that the rule requiring an application for a rule to show cause to be made within four days after verdict did not intend to impose on the judge the duty of immediate decision thereon, but that he was authorized to grant the application after the four days whenever he had not had time to consider it and come to a determination within the four days; that the time when such determination was reached and announced was the time when, within the meaning of the rules, the rule to show cause was granted, and that it was then the duty of the party to have the rule signed and entered forthwith; that the rule to show cause when granted was not to be prosecuted as it would have been before the adoption of the rules and as if the application had been made to the court at the next term and then allowed; that since the rules respecting such practice had not been before construed by the court the rule to show cause would not be discharged in this case.

2. Boggs *v.* Clark, 37 Cal. 236.

hearing does not arise.[3] Nor can the opposing party complain if the delay is caused by his own laches,[4] or where the movant is not at fault.[5] Where the adverse party has made no objection to the delay, or the hearing is continued from time to time by consent, complaint cannot be made that the motion was not sooner brought to a hearing.[6] The question as to whether reasonable

Denial of new trial or dismissal of motion. — In Quivey *v.* Gambert, 32 Cal. 304, it was indicated that the proper practice in California was to let the motion proceed to final hearing and then deny it for failing to prosecute with reasonable diligence. The same rule was adhered to in McDonald *v.* McConkey, 57 Cal. 325, and Calderwood *v.* Peyser, 42 Cal. 110, and the first case above cited was followed in Sweeney *v.* Great Falls, etc., R. Co., 11 Mont. 34, 27 Pac. 347. But in Chase *v.* Evoy, 58 Cal. 348, it was held that it made no difference whether the order was one of dismissal or denial of the motion for a new trial where the motion could never be put in condition to be heard through some default of the party. And since this last case dismissal has been held to be proper where the motion is not in a condition to be submitted. Descalso *v.* Duane, (Cal. 1893) 33 Pac. 328, where it was further held that an order denying a dismissing motion for a new trial, although somewhat inconsistent, must be considered as a dismissal, and proper where through inexcusable neglect of the moving party the motion has not been brought into condition for hearing. In Desmond *v.* Faus, (Cal. 1893) 33 Pac. 457, on motion to dismiss the motion for a new trial an order entered denying the motion for a new trial was approved.

Failure to appear or argue motion is held to justify its dismissal. Monroe *v.* Lippman, 115 Ga. 164, 41 S. E. 717 (where it was held to be error to reinstate a motion which was dismissed for failure of movant's counsel to appear after notice at the time set for hearing, no sufficient excuse being offered for such absence); Calumet Furniture Co. *v.* Reinhold, 51 Ill. App. 323 (holding that the failure on the part of the movant to argue his motion will justify its denial on the ground of abandonment as it would not be just to the parties to let the motion go on default and then appeal from the judgment rendered upon such default).

But where a statement of the case is required to specifically set out the grounds of the motion, the failure to argue the motion is not an abandonment of it and the grounds thereof must be considered. Carder *v.* Baxter, 28 Cal. 99; State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

And every point need not be read or commented on at the hearing of the motion, under the penalty of waiving points not so read or commented on, provided the movant does not in some way deceive the court or otherwise waive such points. O'Connor *v.* Prendergast, 99 Ill. App. 531; World's Columbian Exposition *v.* Bell, 76 Ill. App. 591.

In collateral proceedings a motion for a new trial may be considered as having been abandoned by long delay. Keaton *v.* Musgrove, 22 Ga. 566.

3. St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249.

4. Johnson *v.* Dansen, 13 N. J. L. 264, holding that a party who is in laches by failing to cause the *postea* to be returned and filed cannot complain of the neglect or delay of his adversary to prosecute a rule to set aside the verdict and grant a new trial, arising from that laches, and the rule will not be discharged.

5. West *v.* Jones, 69 Ga. 763; Mansfield *v.* Dudgeon, 6 Fed. 584, where the motion was considered after a delay of eleven years the fact that the party's attorney soon after the trial became and continued seriously ill and became an invalid and unable to attend to the ordinary duties of an attorney operating as some excuse for delay, besides which it appeared that two of the plaintiffs were adjudicated bankrupts and their assignee had never entered an appearance in the case and that one of such plaintiffs died not long after his bankruptcy, and there was no attempt to move in the case by either party until proceedings were taken a short time before the consideration of the motion, in behalf of the surviving plaintiffs, to enter judgment on the verdict, which was met by the old motion for a new trial.

6. Kehely *v.* Atlanta Consol. St. R. Co., 103 Ga. 563, 29 S. E. 712; Smidt *v.* Third Judicial Dist. Ct., 23 Utah 302, 64 Pac. 869. In King *v.* Carey, 5 Ga. 270, it was held that a rule *nisi* for a new trial, to be awarded "so soon as counsel can be heard," is not returnable and to be heard necessarily during the term at which it is taken, but is to be considered as for a hearing when it may suit the convenience of the court; and if the minutes show no action on such a rule at the first term, it will not be dismissed on the ground that plaintiff, who moved the rule, was in default, and failed to prosecute his suit; but in such a state of facts the rule is to be considered as having been continued by the court, the opposite party not having moved to speed the cause, so as to put plaintiff in default. But see Seyfert *v.* Edison, 45 N. J. L. 304.

Where either party may bring the motion to a hearing it is held that delay of the movant in bringing his motion to a hearing is not a ground for denying the motion. Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114. See also St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249. But in Descalso *v.* Duane, (Cal. 1893) 33 Pac. 328, it was held that the fact that under the statute either party might bring the motion to a hearing does not prevent the opposite party applying for dismissal, where, through inexcusable neglect,

diligence has been exercised by the movant is one which rests largely in the discretion of the court.[7]

b. Defective Preliminary Proceedings. A motion for a new trial may be dismissed before, or at, the hearing or overruled for the failure of the applicant to take the necessary preliminary steps, or to take them in due time,[8] unless such failure has been waived.[9]

3. Time For Hearing and Decision[10] — a. In General. The time for hearing a motion for a new trial, within any limitations imposed by statute, rests in the discretion of the court.[11]

b. In Relation to Trial Term[12] — (i) *In General.* In the absence of statutes otherwise controlling the question, a motion for a new trial made in due time may be heard or determined at a subsequent term,[13] at least where it has been expressly continued.[14] But under statutes, in some states, a motion for a new trial must be heard and determined at the trial term,[15] or within a certain time fixed by the

the motion has not been brought into condition for hearing.

Hearing at trial term see *infra*, IV, O, 3, b.

7. Boggs *v.* Clark, 37 Cal. 236; Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415 (holding that mere lapse of time is insufficient to show an abuse of the trial court's discretion in refusing to dismiss the motion); Equitable Mortg. Co. *v.* McWaters, 119 Ga. 337, 46 S. E. 437; Burlock *v.* Shupe, 5 Utah 428, 17 Pac. 19.

8. Moore *v.* Kendall, 121 Cal. 145, 53 Pac. 647 (delay of nearly a year and correctness of rescript of lost statement disputed); Descalso *v.* Duane, (Cal. 1893) 33 Pac. 328; Greehn *v.* Marker, 67 Cal. 364, 7 Pac. 783; People *v.* Center, 61 Cal. 191; Eckstein *v.* Calderwood, 27 Cal. 413; Stearnes *v.* Richmond, 9 Conn. 112; McMullen *v.* Citizens' Bank, 123 Ga. 400, 51 S. E. 342; Williams *v.* Johnston, 94 Ga. 722, 19 S. E. 888; Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203.

Setting aside order.— An order dismissing the proceedings on a motion for a new trial cannot be set aside on an *ex parte* application. Greehn *v.* Marker, 67 Cal. 364, 7 Pac. 783.

9. Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824; Oliver *v.* Nashville, 106 Tenn. 273, 61 S. W. 89. In Georgia where a point of practice, which would be fatal to the motion, is not presented by a motion to dismiss the application, it is waived. Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387. See also Miller *v.* Fries, 66 N. J. L. 377, 49 Atl. 674, as to motion to discharge or modify rule to show cause, for irregularity. But the hearing of a motion for a new trial on the merits is not a waiver of an objection to the preliminary proceedings taken in due time and properly preserved. Bantleon *v.* Meier, 81 Hun (N. Y.) 162, 30 N. Y. Suppl. 706.

10. **Motion on minutes of court** see *supra*, IV, J, 2, b.

Time for application see *supra*, IV, D.

11. Greer *v.* State, 87 Ga. 559, 13 S. E. 552; Phœnix *v.* Gardner, 13 Minn. 294.

Time fixed by order — waiver.— A right to the dismissal of a motion on the ground that it was not heard at the time fixed may be lost by arguing the motion subsequently on the merits. Davis *v.* Howard, 57 Ga. 607.

12. **Chambers and vacation** see JUDGES, 23 Cyc. 552.

13. *Alabama.*— Walker *v.* Hale, 16 Ala. 26.

Colorado.— Gomer *v.* Chaffe, 5 Colo. 383.

Georgia.— Kehely *v.* Atlanta Consol. St. R. Co., 103 Ga. 563, 29 S. E. 712 (rule *nisi* returnable at a date subsequent to the adjournment of the term); King *v.* Carey, 5 Ga. 270.

Indiana.— State *v.* Clark, 16 Ind. 97, continuance under advisement.

Iowa.— Van de Haar *v.* Van Domseler, 56 Iowa 671, 10 N. W. 227.

Kansas.— Mound City Mut. L. Ins. Co. *v.* Twining, 19 Kan. 349; Brenner *v.* Bigelow, 8 Kan. 496.

Kentucky.— Masterson *v.* Hagan, 17 B. Mon. 325; Turner *v.* Booker, 2 Dana 334.

Maryland.— Truett *v.* Legg, 32 Md. 147.

Nebraska.— Chadron Loan, etc., Assoc. *v.* Scott, 4 Nebr. (Unoff.) 694, 96 N. W. 220.

Ohio.— Coleman *v.* Edwards, 5 Ohio St. 51.

Utah.— Wasatch Min. Co. *v.* Jennings, 14 Utah 221, 46 Pac. 1106.

United States.— Walker *v.* Moser, 117 Fed. 230, 54 C. C. A. 262.

See 37 Cent. Dig. tit. "New Trial," § 316. And see *infra*, IV, O, 3, b, (I).

14. See McCarver *v.* Doe, 135 Ala. 542, 33 So. 486; *Ex p.* Humes, 130 Ala. 201, 30 So. 732; Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Hundley *v.* Yonge, 69 Ala. 89; U. S. *v.* Hood, 19 D. C. 372. See also Dorsey *v.* Georgia Cent. R. Co., 113 Ga. 564, 38 S. E. 958; Adamson *v.* Melson, 94 Ga. 725, 20 S. E. 253.

15. *Arizona.*— Ruff *v.* Hand, (1890) 24 Pac. 257, statute mandatory.

Arkansas.— Vallentine *v.* Holland, 40 Ark. 338 (where a defendant's motion for a new trial having been continued by the court of its own motion and overruled at a subsequent term and defendant's appeal from the judgment having been dismissed by the supreme court because the trial court had no power over the motion after the lapse of the term, equitable relief by way of new trial was awarded); Walker *v.* Jefferson, 5 Ark. 23 (at least when there is no express continuance of the motion).

statute.[16] Sometimes such a statute has been held to be directory, so far as the action of the court is required to be taken within a specified time,[17] and, notwithstanding such statutes, in some cases it has been held permissible to continue a motion to the ensuing term under a stipulation or consent.[18]

(11) *Postponement or Continuance*[19] — (A) *In General — Necessity.* An express continuance from time to time during the term is unnecessary.[20] In some

District of Columbia.— Doddridge *v.* Gaines, 1 MacArthur 335.

Indiana.— Ferger *v.* Wesler, 35 Ind. 53; Blair *v.* Russell, 1 Ind. 516.

Kentucky.— Snyder *v.* Cox, 53 S. W. 263, 21 Ky. L. Rep. 796.

Minnesota.—Le Tourneau *v.* Aitkin County, 78 Minn. 82, 80 N. W. 840, motion on minutes of court.

North Carolina.— England *v.* Duckworth, 75 N. C. 309.

South Carolina.— Calhoun *v.* Port Royal, etc., R. Co., 42 S. C. 132, 20 S. E. 30; Molair *v.* Port Royal, etc., R. Co., 31 S. C. 510, 10 S. E. 243; Hinson *v.* Catoe, 10 S. C. 311; Charles *v.* Jacobs, 5 S. C. 348.

Texas.— Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024; Bass *v.* Hays, 38 Tex. 128 (statute mandatory); San Antonio *v.* Dickman, 34 Tex. 647; Bullock *v.* Ballew, 9 Tex. 498; McKean *v.* Ziller, 9 Tex. 58; Hartzell *v.* Jones, 2 Tex. Unrep. Cas. 560; St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1905) 86 S. W. 843; Clements *v.* Buckner, 35 Tex. Civ. App. 497, 80 S. W. 235; Luther *v.* Western Union Tel. Co., 25 Tex. Civ. App. 31, 60 S. W. 1026 (continuance for any cause improper); Lightfoot *v.* Wilson, 11 Tex. Civ. App. 151, 32 S. W. 331 (statute mandatory); Marcus *v.* Hemphill, 1 Tex. App. Civ. Cas. § 1023.

Wisconsin.— Prentiss *v.* Danaher, 20 Wis. 311 (motion on minutes); Dunbar *v.* Hollinshead, 10 Wis. 505.

United States.— James *v.* Appel, 192 U. S. 129, 24 S. Ct. 222, 48 L. ed. 377, under Arizona code.

See 37 Cent. Dig. tit. "New Trial," § 315.

Order nunc pro tunc.— Under a statute which provided that a motion for a new trial "must be heard and decided" at the same term, it was held that a decision on such a motion might be filed after the term *nunc pro tunc*, where it was heard and argued during the term, although pending the decision a judgment was entered on the verdict. Calhoun *v.* Port Royal, etc., R. Co., 42 S. C. 132, 20 S. E. 30. Where the order is made during the term, it may be corrected *nunc pro tunc* at an ensuing term. Mosebach *v.* Reis, 2 Ohio Dec. (Reprint) 295, 2 West. L. Month. 321.

Condition to be performed at subsequent term.— In Gorman *v.* McFarland, 13 Tex. 237 [*modifying* Secrest *v.* Best, 6 Tex. 199], it is held that where the term at which a condition upon which a new trial is granted is to be performed at the next term, if it is intended to insist upon the nullity of the order granting the new trial, the objection should be made at the next term and it will not be permitted to the parties by their acts to treat the case as in court for any period, and especially for a series of terms, and then ask the enforcement of a rule by which the case would be regarded as no longer on the docket and the passing of the term at which the objection ought to be made should be regarded as a waiver of the objection.

16. *Ex p.* Highland Ave., etc., R. Co., 105 Ala. 221, 17 So. 182; Scarborough *v.* Smith, 52 Miss. 517; Coopwood *v.* Prewett, 30 Miss. 206.

17. Gomer *v.* Chaffe, 5 Colo. 383.

A statute fixing a time within which the motion for new trial must be "made" does not require that the motion shall be heard or ruled upon within such time. Lee *v.* De Bardeleben Coal, etc., Co., 102 Ala. 628, 15 So. 270; Whetstone *v.* Livingston, 54 S. C. 539, 32 S. E. 561; Speer *v.* Meschine, 46 S. C. 505, 24 S. E. 329. See also Seyfert *v.* Edison, 45 N. J. L. 304, where the same construction is given a rule requiring the application for a rule *nisi* to be made within a fixed time.

18. Myers *v.* Stafford, 114 N. C. 231, 19 S. E. 232; Richmond Second Nat. Bank *v.* Smith, 118 Wis. 18, 94 N. W. 664; Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852; Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26.

Waiver of requirement.— Where, after a motion for a new trial on the minutes had been made as authorized by the statute, the court announced that it would be decided July 3, which was still a day within the trial term, and also announced that no court would be held July 5, and counsel for the opposing party requested a later decision, and in response thereto the court postponed the decision till July 7, which was the first day of the succeeding term, counsel stating that he would arrange to be represented then, it was held that counsel had waived the statutory requirement that the motion must be decided at the trial term. Richmond Second Nat. Bank *v.* Smith, 118 Wis. 18, 94 N. W. 664.

Before expiration of office.— If a motion for a new trial be taken under advisement by a circuit judge, his decision must be made before the expiration of his term of office; if made afterward, no consent of the parties can give effect to the decision as a judicial act. Coopwood *v.* Prewett, 30 Miss. 206. But where a rule is argued before several judges constituting the court, the fact that the commission of one of them has expired at the time he announces the decision of his associates will not affect the validity of the decision. Reiber *v.* Boos, 110 Pa. St. 594, 1 Atl. 422.

19. Vacating judgment see JUDGMENTS, 23 Cyc. 904.

20. Carroll *v.* East Tennessee, etc., R. Co.,

jurisdictions, under statutes or rules of court, or in the absence thereof, a motion goes over to the succeeding term, or from term to term, until disposed of, without any special order continuing it,[21] while in others there must have been an express continuance from one term to another, or the power of the court to act upon the motion is lost.[22]

(B) *Application For an Allowance.* An affidavit for a continuance to enable the movant to obtain additional affidavits should name the proposed affiants,[23] and show that their affidavits will probably be procured, and give some reasonable

82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214. Where a motion was continued from a day in vacation to the first day of the ensuing term, it might be heard at any day of the term without further continuance. Higginbotham *v.* Campbell, 85 Ga. 638, 11 S. E. 1027.

21. *California.*— Lurvey *v.* Wells, 4 Cal. 106.

Georgia.— King *v.* Carey, 5 Ga. 270.

Iowa.— Van de Haar *v.* Van Domseler, 56 Iowa 671, 10 N. W. 227, by statute.

Kansas.— Mound City Mut. L. Ins. Co. *v.* Twining, 19 Kan. 349.

Mississippi.— Vicksburg *v.* Hennessey, 52 Miss. 178 [*criticizing* Kane *v.* Burrus, 2 Sm. & M. 313, as being decided on common-law grounds without noticing the statute], by statute providing that all suits and proceedings standing for trial and remaining undecided shall stand continued, of course, until the next term. But in Scarborough *v.* Smith, 52 Miss. 517, it was held that the motion must be disposed of at the term when made or at the next ensuing term, and cannot be kept under advisement by the judge beyond the term succeeding that at which it was made.

Missouri.— St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249; Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421.

See 37 Cent. Dig. tit. "New Trial," § 316.

A motion filed in recess may be heard at any time during the ensuing term. King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

22. *Ex p.* Highland, etc., R. Co., 105 Ala. 221, 17 So. 182 (holding that under an act constituting a particular court which provided that judgments of that court should, after a fixed number of days from their rendition, be deemed as completely beyond the control of the court as if the term had ended, and under a rule of practice which applied to said court providing that all motions not acted on or continued by order of the court should be considered as discharged on the last day of the term, the court had no power after the expiration of the number of days fixed in the statute first above referred to to pass on a motion for a new trial entered on the motion to docket but not acted on during the term); Hundley *v.* Yonge, 69 Ala. 89; Gunnells *v.* State Bank, 18 Ala. 676; Fitzpatrick *v.* Hill, 9 Ala. 783; Buckner *v.* Conly, 1 T. B. Mon. (Ky.) 3.

Waiver of discontinuance.— By appearing and proceeding to trial on the merits of the motion the opposing party waives the discontinuance by reason of the failure to enter an order of continuance of the motion at the term preceding that at which it was heard. McCarver *v.* Doe, 135 Ala. 542, 33 So. 486.

Nunc pro tunc entry.— Where a motion for a new trial is duly entered upon the motion docket of the court during the term, and an order is entered on said docket, at such term, for a continuance of the motion and the clerk fails to enter the order in the minutes of the court, it is within the power of the court at a subsequent term to amend the minutes *nunc pro tunc* so as to show the continuance of the motion, and the order of the judge on such motion docket is sufficient evidence to authorize the entry of such order. *Ex p.* Humes, 130 Ala. 201, 30 So. 732.

A continuance agreed upon by counsel, of which the court was informed at the time, may be entered *nunc pro tunc,* at a subsequent term. Spalding *v.* Meier, 40 Mo. 176. And where there has been a tacit understanding that a motion was to go over to the succeeding term, it cannot be objected that no continuance was entered. Dozier *v.* Owen, 63 Ga. 539; Pearce *v.* Strickler, 9 N. M. 46, 49 Pac. 727, where the motion was not passed on by the court within the time for which it was continued, and the court is considered not to have lost jurisdiction but to have deferred action for good cause within its power to further continue it.

Continuing term.— Where it is held that the court may not prolong or adjourn the term for the purpose of hearing a motion for a new trial, the motion itself may nevertheless be continued until a particular day, although that day falls within the next term. U. S. *v.* Hood, 19 D. C. 372, holding that, although the court intended to extend the term for the purpose of hearing the motion, yet having continued the motion until a particular day in the next term the intention to extend the term did not prevent the action of the court from having the legal effect and operation of continuing the motion from one term to a certain day in another term. Where the court is authorized to adjourn the term to a day intervening the next regular term, the adjourned term is a mere continuation of the former regular term and the court has full authority over all matters undisposed of at such term, including motions for new trials, the particular business to be transacted at the adjourned term not being prescribed in the order of adjournment. Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Hundley *v.* Yonge, 69 Ala. 89.

23. McElveen Commission Co. *v.* Jackson, 94 Ga. 549, 20 S. E. 428.

excuse for not having obtained them before.[24] The allowance or refusal of a continuance of a motion for a new trial rests largely in the discretion of the court.[25]

4. NOTICE OF HEARING. In the absence of statute the party applying for a new trial must take notice that his motion is on file liable to be called up at any time and is not entitled to notice of hearing.[26]

5. PROCEEDINGS AT HEARING[27] — a. Duty of Court in General. The court should hear and determine the motion for a new trial, or, if there is not time to do so before adjournment, the motion and proceedings should be continued to the next term of the court, and the court cannot arbitrarily adjourn the term in the midst of argument without taking such step or deciding the motion one way or the other.[28] It is improper,[29] or even reversible error, for a court to overrule a motion for a new trial *pro forma* and without proper consideration,[30] although on the

24. Harris *v.* Rupel, 14 Ind. 209.

25. King *v.* King, 42 Mo. App. 454; Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513 (to procure additional affidavits); Miller *v.* Koger, 9 Humphr. (Tenn.) 231. See also, generally, CONTINUANCES, 9 Cyc. 146.

Rule nisi to give time for affidavit.— On a motion for a new trial on the ground of newly discovered evidence, if there is a doubt as to its being newly discovered, the court should allow the rule *nisi*, so as to give time for an additional affidavit. Sharman *v.* Morton, 31 Ga. 34.

The loss of instructions given by the court on the trial is no ground for a motion to suspend the hearing of the motion for a new trial, since while the best evidence is undoubtedly the written charge, if the instructions are lost, other evidence for the judge's own memory may be resorted to to enable him to make known the instruction. Visher *v.* Webster, 13 Cal. 58.

26. Shafer *v.* Hewitt, 6 Colo. App. 374, 41 Pac. 509; Burnham *v.* Spokane Mercantile Co., 18 Wash. 207, 51 Pac. 363, holding that the provision of the code requiring notice of any trial, hearing, motion, etc., to be had in an action in which a party has appeared, before any judgment at chambers, is not applicable to a motion for a new trial.

Rule requiring notice.—In Cochran *v.* Philadelphia Mortg., etc., Co., 70 Nebr. 100, 96 N. W. 1051, it was held that a failure to comply with the rule of court governing a district court which required one day's notice in writing of the hearing on a motion for a new trial would not *ipso facto* render the ruling on the motion erroneous, but that in the appellate court the inquiry would be whether the trial court should have allowed or denied the motion. The complaining party was the movant. In Earl *v.* Burr, 12 N. J. L. 321, a rule to show cause was discharged under a rule requiring notice of argument to be filed with the clerk at least two days before the term at which the rule to show cause was to be argued. But in Kennedy *v.* Kennedy, 18 N. J. L. 51, it was held that for want of such notice the cause fails to obtain a place on the paper or fails to obtain its proper place, and that if Earle *v.* Burr, *supra*, goes to this extent the decision was right, but that where the cause is on the paper and is on the proper place then, until the contrary appears, the court must intend that it was put there by the clerk or by his permission; that the rule requiring notice to be filed was made for the convenience of the clerk and is a matter with which the adverse counsel have nothing to do provided they have due notice of argument and the cause occupies its proper place on the paper and that Earl *v.* Burr, *supra*, in so far as it seems in conflict with this instruction must be considered as overruled.

Absence of one attorney.— An order denying a motion for a new trial is not void because made in the absence of one attorney of record, where another was present. Romine *v.* Carralle, 80 Cal. 626, 22 Pac. 296.

27. **New trial as to one or more co-parties** see *supra*, I, E, 2.

New trial as to part of issues see *supra*, I, E, 1.

Sufficiency of affidavits and evidence see *supra*, IV, N.

28. Campbell *v.* Ayres, 4 Iowa 358.

29. Penn *v.* Oglesby, 89 Ill. 110; *Ex p.* Russell, 13 Wall. (U. S.) 664, 20 L. ed. 632.

30. *Georgia.*— McIntyre *v.* McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71; Thompson *v.* Warren, 118 Ga. 644, 45 S. E. 912.

Kansas.— Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772; Smith *v.* Benton, 54 Kan. 708, 39 Pac. 701; Larabee *v.* Hall, 50 Kan. 311, 31 Pac. 1062; Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 2, 30 Pac. 108; State *v.* Summers, 44 Kan. 637, 24 Pac. 1099; Manhattan, etc., R. Co. *v.* Keeler, 32 Kan. 163, 4 Pac. 143; Leavenworth, etc., R. Co. *v.* Cook, 18 Kan. 261; Starrett *v.* Shaffer, 8 Kan. App. 793, 61 Pac. 817; Myers *v.* Knabe, 4 Kan. App. 484, 46 Pac. 472; Pierson *v.* Thompson, 4 Kan. App. 173, 45 Pac. 944.

Louisiana.— Adams *v.* Webster, 25 La. Ann. 113.

New York.— Tracey *v.* Altmyer, 46 N. Y. 598; Yaw *v.* Whitmore, 66 N. Y. App. Div. 317, 72 N. Y. Suppl. 765.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lee, 95 Tenn. 388, 32 S. W. 249.

Vermont.— Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

See 37 Cent. Dig. tit. "New Trial," § 319.

other hand it is held that the court need not hear argument of counsel.[31] And, upon the coming on of the hearing, the court may consider the motion on the merits, instead of dismissing it, although the applicant is not present.[32] Where the hearing is had before the successor in office of the trial judge and he is unable to pass upon the merits of the motion, a new trial will be granted in some states.[33] So also it is error to grant a new trial before the motion has been submitted,[34] or to dismiss,[35] or to sustain a motion arbitrarily.[36]

b. Scope of Hearing. The parties will not be permitted to urge grounds for a new trial which are not embraced in the motion,[37] but sometimes the court may consider other grounds for which it may properly order a new trial of its own motion.[38] Where the motion is based upon newly discovered evidence, evidence discovered after the making of the motion may be considered.[39]

c. Evidence and Matters Considered.[40] On the hearing of a motion for a new trial it is the duty of the court to receive and consider proper evidence,[41] and it may consider ordinarily any matter shown by the records, minutes, or files of the

Previous mistrials or retrials at the instance of the opposing party.— The movant has a right to have his motion for a new trial considered upon its merits, without reference to the number of previous mistrials or of retrials at the instance of the adverse party. Langston *v.* Southern Electric R. Co., 147 Mo. 457, 48 S. W. 835.

31. Sweeny *v.* New York, 17 N. Y. Suppl. 797; Schuster *v.* State, 80 Wis. 107, 121, 49 N. W. 30, where it was said: "Frequently, perhaps usually, the judge desires argument at the bar on such motions to refresh his recollection of the case and enlighten his judgment. But it may sometimes happen that he is so fully possessed of the case and the law of it that the argument of such motion would be a waste of time. What the law does require is that the motion shall be heard by the judge who presided at the trial. This is the rule of Ohms *v.* State, 49 Wis. 415, 5 N. W. 827. This does not necessarily mean that counsel shall be allowed in every case to make a special oral argument to the court in support of the motion. It means that the judge should know the history of the case, and the facts thereof, and, in the light of such knowledge, should give to the question whether a new trial should be granted or denied calm, full deliberation and the exercise of his best judgment."

Contra.— On a motion involving the merits of the whole case on the testimony, it is held to be reversible error to refuse to hear argument of the motion. Atchison, etc., R. Co. *v.* Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71, where it is said that if a judge already has a well-defined opinion concerning the matter on which he is about to pass, he may decline to hear the party in whose favor he intends to decide but that he should never refuse the other party a fair chance to convince him that he is about to commit error.

32. Bosworth *v.* Hightower, 73 Ga. 46.

33. American Cent. Ins. Co. *v.* Neff, 43 Kan. 457, 23 Pac. 606; Bass *v.* Swingley, 42 Kan. 729, 22 Pac. 714; Cocker *v.* Cocker, 56 Mo. 180; Woodfolk *v.* Tate, 25 Mo. 597. *Compare* Glaves *v.* Wood, 78 Mo. App. 351.

34. De Gaze *v.* Lynch, 42 Cal. 362 (before engrossment of statement of case); Morris *v.* De Celis, 41 Cal. 331. It is error to sustain a motion for a new trial before the settlement of a statement of the case. Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605; De Gaze *v.* Lynch, *supra*; Hart *v.* Burnett, 10 Cal. 64.

35. Johnson *v.* Bemis, 4 Ga. 157; Board of Education *v.* Hoag, 21 Ill. App. 588; Payne *v.* Katz, McGloin (La.) 18.

36. Glaves *v.* Wood, 78 Mo. App. 351.

37. Hill *v.* Union R. Co., 25 R. I. 565, 57 Atl. 374, holding that, on plaintiff's application for a new trial for inadequacy of damages, contentions of defendant that the verdict is against the evidence and that judgment *non obstante veredicto* should be ordered should not be considered, that not being a ground of plaintiff's application and there being no application for a new trial on behalf of defendant. See also *supra*, IV, H, 3.

A new trial will not be denied for errors in favor of movant unless the point, when correctly determined, would render a new trial useless. Elsey *v.* Metcalf, 1 Den. (N. Y.) 323.

38. E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704; Lovell *v.* Davis, 52 Mo. App. 342. See also *supra*, IV, A.

39. Bousman *v.* Stafford, 71 Kan. 648, 81 Pac. 184; Moore *v.* Coates, 35 Ohio St. 177, including evidence subsequently discovered, and which, in the absence of such motion, could only be brought before the court by petition.

40. Petition, complaint, or statutory action for new trial after term see *supra*, IV, I, 4.

41. Higgins *v.* Haley, 26 La. Ann. 368. The court is not bound to receive an affidavit as true, but it is open to the scrutiny of its judgment and reason. Bruce *v.* Truett, 5 Ill. 454.

Evidence contrary to court's knowledge.— The court may properly refuse to hear affidavits to prove that a juror was not sworn contrary to his personal knowledge of the fact. Bradley *v.* Bradley, 13 Tex. 263.

The court may direct the trial by a jury of an issue to determine the facts, as to an alleged irregularity. Hastings *v.* McKinley, 2 E. D. Smith (N. Y.) 45.

case.[42] As to matters *dehors* the record, the court may hear oral testimony, or consider depositions, or affidavits and written evidence.[43] But the court should not examine witnesses in the absence of the parties and without notice.[44] The reception of additional affidavits after the hearing has closed rests largely in the discretion of the court.[45]

d. Burden of Proof. The burden of proving an alleged ground for a new trial rests upon the applicant.[46]

e. Discretion of Trial Courts[47] — (i) *In General.* In many cases it has been held or declared that trial courts exercise a considerable discretion in passing on applications for new trials.[48] But a new trial should be granted for some legal

42. Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762; Storm Lake First Nat. Bank *v.* Harwick, 74 Iowa 227, 37 N. W. 171; Spotswood *v.* National Bank of Commerce, 44 Nebr. 1, 62 N. W. 245; Silkman *v.* Boiger, 4 E. D. Smith (N. Y.) 236.

Matters not part of trial.— At the call of the calendar on the day of trial and on the previous day, defendant moved by affidavit for a postponement, which was denied, and at the trial defendant moved that a juror be withdrawn because it was not ready with its witnesses, without stating any reasons for not being ready, which was denied, and an exception taken. It was held that a motion for a new trial directed to the refusal to allow withdrawal of a juror, which stated no reason why defendant's witnesses were not ready, would be denied, since the court could not refer to the motions for a continuance made before trial for such reasons. Wilkins *v.* Beadleston, 33 Misc. (N. Y.) 489, 67 N. Y. Suppl. 683 [*affirmed* in 60 N. Y. App. Div. 632, 70 N. Y. Suppl. 1151].

Incompetent evidence.— It has been held that in passing upon the ground that the verdict is against evidence, the court must consider all the evidence submitted to the jury, although it was improperly admitted. Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762; McCloud *v.* O'Neall, 16 Cal. 392.

43. See *supra*, IV, N, 1, 2.

44. Macon City Bank *v.* Kent, 57 Ga. 283.

45. Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841 (affidavit handed to judge on street); Henry *v.* Diviney, 101 Mo. 378, 13 S. W. 1057.

46. Haughton *v.* Haughton, 11 La. Ann. 200 (incompetency of juror); Chesebrough *v.* Conover, 21 N. Y. Suppl. 568 (misconduct of counsel); Galveston Oil Co. *v.* Thompson, 76 Tex. 235, 13 S. W. 60 (false testimony); Boiakosky *v.* Philadelphia, etc., R. Co., 126 Fed. 230 (surprise).

Misconduct of or affecting jurors must be proved by the applicant for a new trial. Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646; Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132; Netcher *v.* Bernstein, 110 Ill. App. 484; Conwell *v.* Anderson, 2 Ind. 122; Fulliam *v.* Muscatine, 70 Iowa 436, 30 N. W. 861; McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535; Gurney *v.* Minneapolis, etc., R. Co., 41 Minn. 223, 43 N. W. 2; Haycraft *v.* Griggsby, 94 Mo. App. 74, 67 S. W. 965; McCausland *v.* McCausland, 1 Yeates (Pa.) 372, 1 Am. Dec. 306; Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934; Archibald *v.* Kolitz, 26 Utah 226, 72 Pac. 935; Pickens *v.* Coal River Boom, etc., Co., 58 W. Va. 11, 50 S. E. 872; Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337; Morton *v.* Thompson, 2 U. C. Q. B. 196. *Compare* Huston *v.* Vail, 51 Ind. 299, where counter affidavits of party did not fairly answer charge. But it has been held that, on proof of a separation of jurors contrary to the order of the court, the burden is on the prevailing party to show that no attempt was made to influence them improperly. Saltzman *v.* Sunset Tel., etc., Co., 125 Cal. 501, 58 Pac. 169. And it has been held also that there is a presumption that a private communication with a juror by the prevailing party was prejudicial. See *supra*, III, D, 1, a.

47. In criminal prosecutions see CRIMINAL LAW.

New trial as to part of issues see *supra*, I, E, 1.

Statutory new trial as of right see *infra*, VI.

48. *Georgia.*— Maxwell *v.* Inman, 116 Ga. 63, 42 S. E. 526; Gomez *v.* Johnson, 114 Ga. 962, 41 S. E. 48; Bentley *v.* Bell, 112 Ga. 464, 37 S. E. 718; Reed *v.* Aubrey, 85 Ga. 882, 11 S. E. 800; Cunningham *v.* Wasson, 73 Ga. 148.

Illinois.— Riggs *v.* Savage, 9 Ill. 129, second new trial in ejectment.

Louisiana.— Wilkins *v.* East Baton Rouge Parish, 10 Rob. 57.

Maryland.— Sittig *v.* Birkestack, 38 Md. 158.

Missouri.— McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Valois *v.* Warner, 1 Mo. 730.

New Mexico.— Buntz *v.* Lucero, 7 N. M. 219, 34 Pac. 50; Coleman *v.* Bell, 4 N. M. 46, 12 Pac. 657.

New York.— Bantleon *v.* Meier, 81 Hun 162, 30 N. Y. Suppl. 706, as to second application.

Ohio.—Brenzinger *v.* American Exch. Bank, 19 Ohio Cir. Ct. 536, 10 Ohio Cir. Dec. 775; Miller *v.* Sims, 1 Cinc. Super. Ct. 485.

Pennsylvania.— O'Donnell *v.* Flanigan, 9 Pa. Super. Ct. 136.

United States.— Alexandria *v.* Stabler, 50 Fed. 689, 1 C. C. A. 616; McClellan *v.* Pyeatt, 50 Fed. 686, 1 C. C. A. 613.

See 37 Cent. Dig. tit. "New Trial," §§ 9, 10. And see, generally, *supra*, III.

cause only;[49] and as a general rule a new trial should not be granted unless it appears that an injustice has been done.[50] If the existence of the alleged ground for a new trial is doubtful, the motion should be overruled,[51] and it is held that the court should not grant a new trial for insufficient legal cause to enable the applicant to shift his ground of action or defense,[52] or merely to reargue the whole case upon the law and facts as they were before the court on the first trial.[53]

(II) *Application of Rule to Particular Grounds of Motion.* The general rule that the action of the trial court upon a motion for a new trial is largely within the discretion of such court is applied to its action in passing upon the various grounds of such motion,[54] unless the error upon which the relief

Where there is no positive misapprehension of law, the court may exercise its discretion in ruling on an application for a new trial because of irregularities in the verdict. Holgate *v.* Parker, 18 Wash. 206, 51 Pac. 368; Schillinger *v.* Verona, 85 Wis. 589, 55 N. W. 1040.

Before judge who did not try case — *In general.* — In passing upon a motion for a new trial, a judge who did not try the case should exercise the discretion of a trial judge. Garton *v.* Stern, 121 Cal. 347, 53 Pac. 904; Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Gutierrez *v.* Brinkerhoff, (Cal. 1883) 1 Pac. 482; Macy *v.* Davila, 48 Cal. 646; Altschul *v.* Doyle, 48 Cal. 535; Georgia Cent. R. Co. *v.* Harden, 113 Ga. 453, 38 S. E. 949; Hughley *v.* Wabasha, 69 Minn. 245, 72 N. W. 78; Taylor *v.* Sorsby, Walk. (Miss.) 97; Woodfolk *v.* Tate, 25 Mo. 597.

Successor.— The successor of a trial judge should exercise such discretion in ruling on a motion for a new trial in a case tried without a jury. Jones *v.* Sanders, 103 Cal. 678, 37 Pac. 649. But see Reynolds *v.* Reynolds, 44 Minn. 132, 46 N. W. 236, as to superior advantages of trial judge.

Confined to evidence in record.— When a motion for a new trial is made before a judge who did not try the case, his discretion must be exercised entirely with reference to the evidence disclosed by the record. Hughley *v.* Wabasha, 69 Minn. 245, 72 N. W. 78. The same rule obtains where the case was tried before a referee. Minneapolis First Nat. Bank *v.* St. Cloud, 73 Minn. 219, 75 N. W. 1054.

49. Clifford *v.* Denver, etc., R. Co., 12 Colo. 125, 20 Pac. 333; Braithwaite *v.* Aiken, 2 N. D. 57, 49 N. W. 419; Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144.

50. Barksdale *v.* Smith, 31 Ga. 671; Woodward *v.* Horst, 10 Iowa 120; Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338; Rowe *v.* Matthews, 18 Fed. 132. "The power to set aside a verdict upon such a motion, rests upon considerations altogether behind mere legal objections to the verdict; and it is upon this ground that the motion goes to the discretion of the Court, and that the action upon it cannot be assigned for error upon appeal, or writ of error. It is upon this ground, also, that a motion for a new trial is distinguishable from a motion in arrest, or for a venire facias de novo. The latter motions go to legal defects in the verdict, or the record, and they call for determination according to the rules and principles of law applicable to them." Waters *v.* Waters, 26 Md. 53, 74.

Where a permanent or important right or the title to real property is affected by the verdict, a new trial will be allowed more freely. Bevering *v.* Smith, 121 Iowa 607, 96 N. W. 1110; Barson *v.* Mulligan, 40 Misc. (N. Y.) 470, 82 N. Y. Suppl. 677 [*affirmed* in 83 N. Y. App. Div. 643, 82 N. Y. Suppl. 1093].

51. Birdwell *v.* Cox, 18 Tex. 535.

52. Pottsville Safe Deposit Bank *v.* Schuylkill County, 190 Pa. St. 188, 42 Atl. 539 (holding that when a case has been tried, submitted, and decided upon a certain theory it is too late to advance another which might have been, but was not, put forward at the trial); Harnsbarger *v.* Kinney, 6 Gratt. (Va.) 287 (holding that if there is not sufficient ground for setting aside a verdict generally it is error to set it aside to enable defendant to withdraw his pleas and confess judgment with a view to resort to a court of equity for relief).

Grounds of motion taken together.— The unsatisfactory state of a case, taken as a whole, may justify the granting of a first new trial, in the exercise of the trial court's discretion in that regard, although no one of the grounds urged therefor, taken alone, might be held sufficient. Lewis *v.* Armstrong, 57 Ga. 127.

53. Roche *v.* District of Columbia, 18 Ct. Cl. 289.

54. Accident and surprise.— Trial courts exercise a large discretion in passing on applications for new trials on the ground of accident or surprise. Merrick *v.* Britton, 26 Ark. 496; Nelson *v.* Waters, 18 Ark. 570; Massey *v.* Allen, 48 Ga. 21; Smith *v.* Brand, 44 Ga. 588; Tegeler *v.* Jones, 33 Iowa 234; Green *v.* Bulkley, 23 Kan. 130; Ragan *v.* James, 7 Kan. 354; Donallen *v.* Lennox, 6 Dana (Ky.) 89; Turner *v.* Booker, 2 Dana (Ky.) 334; Illinois Cent. R. Co. *v.* Beauchamp, 77 S. W. 1096, 25 Ky. L. Rep. 1429; Jackson *v.* Shapard, 69 S. W. 954, 24 Ky. L. Rep. 713; Marchand *v.* Noyes, 33 La. Ann. 882; Holmes *v.* The Chieftain, 1 La. Ann. 136; Randall *v.* Bayon, 4 Mart. N. S. (La.) 132; Chicago, etc., R. Co. *v.* Genesee County Cir. Judge, 89 Mich. 549, 50 N. W. 879; Wingen *v.* May, 92 Minn. 255, 99 N. W. 809; Miller *v.* Layne, 84 Minn. 221, 87 N. W. 605; Otterness *v.* Botten, 80 Minn. 430, 83

is sought resolves itself into one of law, as where the facts are undisputed.

N. W. 382; Dorr *v.* Watson, 28 Miss. 383; Jacob *v.* McLean, 24 Mo. 40; Moreland *v.* McDermott, 10 Mo. 605; Frick Co. *v.* Caffery, 48 Mo. App. 120; Matoushek *v.* Dutcher, 67 Nebr. 627, 93 N. W. 1049; Zimmerer *v.* Fremont Nat. Bank, 59 Nebr. 661, 81 N. W. 849; Serwer *v.* Serwer, 71 N. Y. App. Div. 415, 75 N. Y. Suppl. 842; Tyler *v.* Hoornbeck, 48 Barb. (N. Y.) 197; Mulford *v.* Yager, 4 Silv. Sup. 58, 7 N. Y. Suppl. 88, 17 N. Y. Civ. Proc. 371; Van Tassel *v.* New York, etc., R. Co., 1 Misc. 312, 20 N. Y. Suppl. 715 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Jackson *v.* Ft. Covington, 15 N. Y. Suppl. 793; Josephson *v.* Sigfusson, 13 N. D. 312, 100 N. W. 703; Heisel *v.* Heisel, 8 Ohio Dec. (Reprint) 653, 9 Cinc. L. Bul. 110; Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76; Blythe *v.* Sutherland, 3 McCord (S. C.) 258; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524; Simonton *v.* Buchanan, 2 Baxt. (Tenn.) 279; Dotson *v.* Moss, 58 Tex. 152; Delmas *v.* Margo, 25 Tex. 1, 78 Am. Dec. 516; St. Louis Southwestern R. Co. *v.* Dickens, (Tex. Civ. App. 1900) 56 S. W. 124; Dempsey *v.* Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220; Bolls *v.* Galloway, 1 Tex. App. Civ. Cas. § 724; Tefft *v.* Marsh, 1 W. Va. 38; Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363; Davis *v.* Ruggles, 2 Pinn. (Wis.) 477, 2 Chandl. 152; Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144 [*reversing* 100 Fed. 581]; Albright *v.* McTighe, 49 Fed. 817. See also *supra*, III, H.

Excessive or inadequate damages.— So the allowance or refusal of a motion for a new trial on the ground of excessive or inadequate damages is generally a matter of discretion. Donalson *v.* Cothran, 60 Ga. 603; Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19; York *v.* Stiles, 21 R. I. 225, 42 Atl. 876; Thompson *v.* Shea, 11 Fed. 847, 4 McCrary 93; Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147. See also *supra*, III, G, 6.

Misconduct of parties or counsel or disqualification or misconduct of jurors.— The allowance or refusal of a new trial on the ground of misconduct of parties or counsel (Cook *v.* Doud, 14 Colo. 483, 23 Pac. 906; Rudolph *v.* Landwerlen, 92 Ind. 34; Cleslie *v.* Frerichs, 95 Iowa 83, 63 N. W. 581; George *v.* Swafford, 75 Iowa 491, 39 N. W. 804; Shenandoah First Nat. Bank *v.* Wabash, etc., R. Co., 61 Iowa 700, 17 N. W. 48; Winter *v.* Sass, 19 Kan. 556; Jung *v.* Theo. Hamm Brewing Co., 95 Minn. 367, 104 N. W. 233; Kinna *v.* Horn, 1 Mont. 597; Lindsay *v.* Pettigrew, 3 S. D. 199, 52 N. W. 873; Texas, etc., R. Co. *v.* Raney, (Tex. Civ. App. 1893) 23 S. W. 340); or of disqualification or misconduct of jurors, rests largely in the discretion of the trial court (Smith *v.* Willingham, 44 Ga. 200; Chicago Junction R. Co. *v.* McGrath, 107 Ill. App. 100 [*affirmed* in 203 Ill. 511, 68 N. E. 69]; Bohn *v.* Chicago, etc., R. Co., (Iowa 1899) 78 N. W. 200; Hopkins *v.* Knapp, etc., Co., 92 Iowa 212, 60 N. W. 620; Perry *v.* Cottingham, 63 Iowa 41, 18 N. W. 680; Stockwell *v.* Chicago, etc., R. Co., 43 Iowa 470; Fairchild *v.* Snyder, 43 Iowa 23; Ruble *v.* McDonald, 7 Iowa 90; Murphy *v.* Hindman, 37 Kan. 267, 15 Pac. 182; Johns *v.* Hodges, 60 Md. 215, 45 Am. Rep. 722; Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645; Hilton *v.* McDonald, 173 Mass. 124, 53 N. E. 208; Harrington *v.* Worcester, etc., St. R. Co., 157 Mass. 579, 32 N. E. 955; Johnson *v.* Witt, 138 Mass. 79; Clapp *v.* Clapp, 137 Mass. 183; Brady *v.* American Print Works, 119 Mass. 98; Borden *v.* Borden, 5 Mass. 67, 4 Am. Dec. 32; Bourke *v.* James, 4 Mich. 336; Svenson *v.* Chicago Great Western R. Co., 68 Minn. 14, 70 N. W. 795; Hewitt *v.* Pioneer-Press Co., 23 Minn. 178, 23 Am. Rep. 680; Hamburger *v.* Rinkel, 164 Mo. 398, 64 S. W. 104; Fendler *v.* Dewald, 14 Mo. App. 60; Republican Valley R. Co. *v.* Boyse, 14 Nebr. 130, 15 N. W. 364; Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; Moore *v.* Edmiston, 70 N. C. 471; Spicer *v.* Fulghum, 67 N. C. 18; McCarty *v.* McCarty, 4 Rich. (S. C.) 594; Pulaski *v.* Ward, 2 Rich. (S. C.) 119; Downer *v.* Baxter, 30 Vt. 467; Morris *v.* Vivian, 2 Dowl. P. C. N. S. 235, 11 L. J. Exch. 367, 10 M. & W. 137; Cooksey *v.* Haynes, 27 L. J. Exch. 371; Cameron *v.* Ottawa Electric R. Co., 32 Ont. 24]. See also *supra*, III, B, D.

Newly discovered evidence — *In general.*— So the action of the court upon the ground of newly discovered evidence is largely discretionary. Jones *v.* Tucker, 132 Ala. 305, 31 So. 21; St. Louis Southwestern R. Co. *v.* Goodwin, 73 Ark. 528, 84 S. W. 728; Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; Hobler *v.* Cole, 49 Cal. 250; Selleck *v.* Head, 77 Conn. 15, 58 Atl. 224; Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233; Parsons *v.* Platt, 37 Conn. 563; Thompson *v.* Warren, 118 Ga. 644, 45 S. E. 912; Doherty *v.* Lewis, 92 Ga. 573, 17 S. E. 913; Harmon *v.* Charleston, etc., R. Co., 88 Ga. 261, 14 S. E. 574; Erskine *v.* Duffy, 76 Ga. 602; Whitehead *v.* Breckenridge, 5 Indian Terr. 133, 82 S. W. 698; Chambliss *v.* Hass, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126; Searcy *v.* Martin-Woods Co., 93 Iowa 420, 61 N. W. 934; Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Grotte *v.* Schmidt, 80 Iowa 454, 45 N. W. 771; Alger *v.* Merritt, 16 Iowa 121; Shepherd *v.* Brenton, 15 Iowa 84; Mays *v.* Deaver, 1 Iowa 216; Millard *v.* Singer, 2 Greene (Iowa) 144; Powers *v.* Bridges, 1 Greene (Iowa) 235; Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Topeka *v.* Smelser, 3 Kan. App. 17, 44 Pac. 435; Louisville, etc., Packet Co. *v.* Mulligan, 77 S. W. 704, 25 Ky. L. Rep. 1287; Devot *v.* Marx, 19 La. Ann. 491; Pahnvitz *v.* Fassman, 2 La. Ann. 625; Roberts *v.* Rhodes, 3 Mart. N. S. (La.) 100; Andre *v.* Bienvenu, 1 Mart. (La.) 148; Keet *v.* Mason, 167 Mass.

In this event it is held that the rule that the action of the trial court in

154, 45 N. E. 81; Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775; Eldridge *v.* Minneapolis, etc., R. Co., 32 Minn. 253, 20 N. W. 151; Peterson *v.* Faust, 30 Minn. 22, 14 N. W. 64; Lampsen *v.* Brander, 28 Minn. 526, 11 N. W. 94; Taylor *v.* Sorsby, 1 Walk. (Miss.) 97; Coleman *v.* Cole, 96 Mo. App. 22, 69 S. W. 692; Longdon *v.* Kelly, 51 Mo. App. 572; Howland *v.* Reeves, 25 Mo. App. 458; Nicholson *v.* Metcalf, 31 Mont. 276, 78 Pac. 483; Riley *v.* Missouri Pac. R. Co., 69 Nebr. 82, 95 N. W. 20; Powell *v.* Jones, 42 Barb. (N. Y.) 24; Wright *v.* Milbank, 9 Bosw. (N. Y.) 672; Phelps *v.* Delmore, 4 Misc. (N. Y.) 508, 26 N. Y. Suppl. 278; Seeley *v.* Chittenden, 4 How. Pr. (N. Y.) 265; People *v.* New York Super. Ct., 5 Wend. (N. Y.) 114; Nathan *v.* Charlotte St. R. Co., 118 N. C. 1066, 24 S. E. 511; Redmond *v.* Stepp, 100 N. C. 212, 6 S. E. 727; Horne *v.* Horne, 75 N. C. 101; Pengilly *v.* J. I. Case Threshing Mach. Co., 11 N. D. 249, 91 N. W. 63; Braithwaite *v.* Aiken, 2 N. D. 57, 49 N. W. 419; Polk *v.* Carney, 17 S. D. 436, 97 N. W. 360; Waite *v.* Fish, 17 S. D. 215, 95 N. W. 928; Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577; Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524; Ables *v.* Donley, 8 Tex. 331; Gonzales *v.* Adoue, (Tex. Civ. App. 1900) 56 S. W. 543; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Monmouth Pottery Co. *v.* White, 27 Utah 236, 75 Pac. 622; Myers *v.* Brownell, 2 Aik. (Vt.) 407, 16 Am. Dec. 729; Dumontier *v.* Stetson, etc., Mill Co., 39 Wash. 264, 81 Pac. 693; Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978; Martin *v.* Clark, 111 Wis. 493, 87 N. W. 451; Williams *v.* Riches, 77 Wis. 569, 46 N. W. 817; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518; Smith *v.* Smith, 51 Wis. 665, 8 N. W. 868; Trumble *v.* Hortin, 22 Ont. App. 51; Murray *v.* Canada Cent. R. Co., 7 Ont. App. 646. See also *supra*, III, I.

Where the new evidence is cumulative or impeaching or might have been produced on the former trial by the exercise of ordinary diligenee, the court has no discretion to grant a new trial. Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157; Shepherd *v.* Brenton, 15 Iowa 84; People *v.* New York Super. Ct., 5 Wend. (N. Y.) 114; Tabler *v.* Connor, 1 Baxt. (Tenn.) 195.

Rulings and instructions.— Ordinarily a trial court has no discretion to refuse a new trial for errors of law occurring at the trial and duly excepted to by the complaining party (Cochran *v.* O'Keefe, 34 Cal. 554; O'Brien *v.* Brady, 23 Cal. 243; Johnson *v.* Renfroe, 73 Ga. 138; Weeks *v.* Lowerre, 8 Barb. (N. Y.) 530; Kline *v.* Wynne, 10 Ohio St. 223; U. S. *v.* Trabing, 3 Wyo. 144, 6 Pac. 721); but even in such cases, courts sometimes exercise a considerable discretion in determining whether the errors were calculated to affect any substantial right of the movant (West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300; Central R., etc., Co. *v.* Ogletree, 97 Ga. 325, 22 S. E. 953; Singer Mfg. Co. *v.* Lancaster, 75 Ga. 280; Buchanon *v.* Higginbotham, 42 Ga. 198; Hewitt *v.* Jones, 72 Ill. 218; Hydinger *v.* Chicago, etc., R. Co., 126 Iowa 222, 101 N. W. 746; Marr *v.* Burlington, etc., R. Co., 121 Iowa 117, 96 N. W. 716; Newell *v.* Sanford, 10 Iowa 396; Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436, 75 Pac. 466; Pierson *v.* Thompson, 4 Kan. App. 173, 45 Pac. 944; Waters *v.* Waters, 26 Md. 53; Purnell *v.* Purnell, 89 N. C. 42; York *v.* Stiles, 21 R. I. 225, 42 Atl. 876; McKie *v.* Garlington, 3 McCord (S. C.) 276; Kunz *v.* Dinneen, 18 S. D. 262, 100 N. W. 165; Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Rowe *v.* Matthews, 18 Fed. 132); and the allowance of a new trial for an error of law not excepted to, where permissible, is a matter of discretion (Cheatham *v.* Roberts, 23 Ark. 651; Waters *v.* Waters, 26 Md. 53). See also *supra*, III, C, 3, 4.

Weight and sufficiency of evidence — *In general.*— The allowance or refusal of a new trial on the weight of the evidence is peculiarly within the discretion of the trial court. Richardson *v.* Birmingham Cotton Mfg. Co., 116 Ala. 381, 22 So. 478; Johnson *v.* McDaniel, 15 Ark. 109; Holtum *v.* Germania L. Ins. Co., 139 Cal. 645, 73 Pac. 591; *In re* Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437; De Greayer *v.* Fidelity, etc., Co., (1899) 58 Pac. 390; Garton *v.* Stern, 121 Cal. 347, 53 Pac. 904; Martin *v.* Martin, 113 Cal. 479, 45 Pac. 813; Domico *v.* Casassa, 101 Cal. 411, 35 Pac. 1024; Fox *v.* Southern Pac. Co., 95 Cal. 234, 30 Pac. 384; Bjorman *v.* Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591; Bennett *v.* Hobro, 72 Cal. 178, 13 Pac. 473; Daggett *v.* Vanderslice, (Cal. 1887) 13 Pac. 402; Gutierrez *v.* Brinkerhoff, (Cal. 1883) 1 Pac. 482; Irving *v.* Cunningham, 58 Cal. 306; Sherman *v.* Mitchell, 46 Cal. 576; Lorenzana *v.* Camarillo, 41 Cal. 467; Hall *v.* The Emily Banning, 33 Cal. 522; Hawkins *v.* Reichert, 28 Cal. 534; Oullahan *v.* Starbuck, 21 Cal. 413; Walton *v.* Maguire, 17 Cal. 92; Stern *v.* Simons, 77 Conn. 150, 58 Atl. 696; Fell *v.* John Hancock Mut. L. Ins. Co., 76 Conn. 494, 57 Atl. 175; Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226; Laflin *v.* Pomeroy, 11 Conn. 440; Farrell *v.* Solary, 43 Fla. 124, 31 So. 283; Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287; McIntyre *v.* McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71; Georgia, etc., R. Co. *v.* Mathews, 116 Ga. 424, 42 S. E. 771; Buice *v.* Buice, 111 Ga. 887, 36 S. E. 969; Ferst *v.* Hall, 108 Ga. 793, 33 S. E. 951; Doherty *v.* Lewis, 92 Ga. 573, 17 S. E. 913; Clayton *v.* Daniel, 88 Ga. 300, 14 S. E. 470; Gainesville, etc., R. Co. *v.* Wall, 75 Ga. 282; Stewart *v.* Rodgers, 73 Ga. 810; Moore *v.* Asbury, 73 Ga. 148; Cleghorn *v.* Johnson, 73 Ga. 146; Lanier *v.* Tullis, 73 Ga. 142; Johnson *v.* Renfroe, 73 Ga. 138;

granting or refusing a new trial will not be disturbed unless it appears to be

Wheelus *v.* Long, 73 Ga. 110; Odom *v.* Nelms, 24 Ga. 412; Monarch Gold, etc., Min. Co. *v.* McLaughlin, 1 Ida. 650; Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33; Christy *v.* Holmes, 57 Ind. 314; Holman *v.* Omaha, etc., R., etc., Co., 110 Iowa 485, 81 N. W. 704; Moore *v.* Horton, 105 Iowa 376, 75 N. W. 195; Morgan *v.* Wagner, 79 Iowa 174, 44 N. W. 345; Conklin *v.* Dubuque, 54 Iowa 571, 6 N. W. 894; McKay *v.* Thorington, 15 Iowa 25; Humphreys *v.* Hoyt, 4 Greene (Iowa) 245; Sovereign Camp W. of W. *v.* Thiebaud, 65 Kan. 332, 69 Pac. 348; Myers *v.* Knabe, 4 Kan. App. 484, 46 Pac. 472; Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545, 76 S. W. 502, 25 Ky. L. Rep. 755; Mason *v.* Louisiana State M. & F. Ins. Co., 1 Rob. (La.) 192; Roberts *v.* Rodes, 3 Mart. N. S. (La.) 100; Lee *v.* Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439; Hughley *v.* Wabasha, 69 Minn. 245, 72 N. W. 78; Fitzjohn *v.* St. Louis Transit Co., 183 Mo. 74, 81 S. W. 907; Herndon *v.* Lewis, 175 Mo. 116, 74 S. W. 976; Kuenzel *v.* Stevens, 155 Mo. 280, 56 S. W. 1076; Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; St. Francis Mill Co. *v.* Sugg, 142 Mo. 364, 44 S. W. 249; Lee *v.* Knapp, 137 Mo. 385, 38 S. W. 1107; Parker *v.* Cassingham, 130 Mo. 348, 32 S. W. 487; Kreis *v.* Missouri Pac. R. Co., (Mo. 1895) 30 S. W. 310; Brunswick First Nat. Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554; Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720; Eidemiller *v.* Kump, 61 Mo. 340; Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 425; Scheutte *v.* St. Louis Transit Co., 108 Mo. App. 186, 83 S. W. 297; Farrell *v.* St. Louis Transit Co., 103 Mo. App. 454, 78 S. W. 312; Laclede Power Co. *v.* Nash Smith Tea Co., 95 Mo. App. 412, 69 S. W. 27; State *v.* Todd, 92 Mo. App. 1; Pacific Express Co. *v.* Emerson, 86 Mo. App. 683; Bemis Bros. Bag Co. *v.* Ryan Commission Co., 74 Mo. App. 627; Mason *v.* Onan, 67 Mo. App. 290; Dean *v.* Philadelphia Fire Assoc., 65 Mo. App. 209; Reed *v.* Lloyd, 61 Mo. App. 646; Hull *v.* Missouri Pacific R. Co., 60 Mo. App. 593; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 335; Ensor *v.* Smith, 57 Mo. App. 584; Wight *v.* Missouri Pac. R. Co., 20 Mo. App. 481; Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306; Ross *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 378, 93 N. Y. Suppl. 679; Serwer *v.* Serwer, 71 N. Y. App. Div. 415, 75 N. Y. Suppl. 842; Yaw *v.* Whitmore, 66 N. Y. App. Div. 317, 72 N. Y. Suppl. 765; Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Ludeman *v.* Third Avenue R. Co., 30 N. Y. App. Div. 520, 52 N. Y. Suppl. 310; Slater *v.* Drescher, 72 Hun 425, 25 N. Y. Suppl. 153; Surkin *v.* Interborough St. R. Co., 45 Misc. 407, 90 N. Y. Suppl. 342; Quirk *v.* Siegel-Cooper Co., 26 Misc. 244, 56 N. Y. Suppl. 49 [*affirmed* in 43 N. Y. App. Div. 464, 60 N. Y. Suppl. 228]; Leigh *v.* Interurban St. R. Co., 88 N. Y. Suppl. 959; Brill *v.* Levin, 86 N. Y. Suppl. 109; Oberlie *v.* Bushwick Ave. R. Co., 6 N. Y. St. 771; Gautier *v.* Douglas Mfg. Co., 52 How. Pr. (N. Y.) 325 [*affirmed* in 13 Hun 514]; *Ex p.* Bassett, 2 Cow. (N. Y.) 458; McCord *v.* Atlanta, etc., Air Line Co., 134 N. C. 53, 45 S. E. 1031; Redmond *v.* Stepp, 100 N. C. 212, 6 S. E. 727; Love *v.* McClure, 99 N. C. 290, 6 S. E. 247, 250; Ross *v.* Robertson, 12 N. D. 27, 94 N. W. 765; Pengilly *v.* J. I. Case Threshing Mach. Co., 11 N. D. 249, 91 N. W. 63; Gull River Lumber Co. *v.* Osborne McMillan Elevator Co., 6 N. D. 276, 69 N. W. 691; Dougherty *v.* Andrews, 202 Pa. St. 633, 52 Atl. 47; Reno *v.* Shallenberger, 8 Pa. Super. Ct. 436; McNeile *v.* Cridland, 6 Pa. Super. Ct. 428; Brown *v.* Frost, 2 Bay (S. C.) 126, 1 Am. Dec. 633; Clifford *v.* Latham, 19 S. D. 376, 103 N. W. 642; Kunz *v.* Dinneen, 18 S. D. 262, 100 N. W. 165; Rochford *v.* Albaugh, 16 S. D. 628, 94 N. W. 701; Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205; Averill *v.* Robinson, 70 Vt. 161, 40 Atl. 49; Newton *v.* Brown, 49 Vt. 16; Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455; Brugh *v.* Shanks, 5 Leigh (Va.) 598; Snyder *v.* Parker, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726; Welever *v.* Advance Shingle Co., 34 Wash. 331, 75 Pac. 863; Hughes *v.* Horton, 26 Wash. 110, 66 Pac. 109; O'Rorke *v.* Jones, 22 Wash. 629, 61 Pac. 709; McBroom, etc., Co. *v.* Gandy, 18 Wash. 79, 50 Pac. 572; Rotting *v.* Cleman, 12 Wash. 615, 41 Pac. 907; Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 297, 38 Pac. 147, 26 L. R. A. 425; Winter *v.* Shondy, 9 Wash. 52, 36 Pac. 1049; Kohler *v.* Fairhaven, etc., R. Co., 8 Wash. 452, 36 Pac. 253, 681; Collins *v.* Janesville, 117 Wis. 415, 94 N. W. 309; Lee *v.* Chicago, etc., R. Co., 101 Wis. 352, 77 N. W. 714; Heller *v.* Abbot, 79 Wis. 409, 48 N. W. 598; Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854; Dever *v.* Anson, 43 Wis. 60; Van Valkenburgh *v.* Hoskins, 7 Wis. 496; Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. ed. 1022; Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321; Preble *v.* Bates, 37 Fed. 772; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147; Eureka Woollen Mills Co. *v.* Moss, 11 Can. Sup. Ct. 91; Day *v.* Hagerman, 5 U. C. Q. B. 451. See also *supra*, III, G. It will be presumed that the court was not influenced by improper considerations. Davenport *v.* Terrell, 103 N. C. 53, 9 S. E. 197.

Insufficient legal evidence.— But the court may not refuse to set aside a verdict not supported by sufficient legal evidence. Ermul *v.* Kullok, 3 Kan. 499; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Wright *v.* Southern Express Co., 80 Fed. 85; Felton *v.* Spiro, 78 Fed. 576, 24 C. C. A. 321. See also *supra*, III, G, 1, 2.

Where there is no evidence to sustain the verdict it is error of law to refuse a new trial (Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380); but only where there is no evidence, and if there is any evi-

clearly erroneous cannot be invoked to sustain an erroneous conclusion of law drawn from such undisputed facts.[55]

(III) *CONSENT OF PARTIES.* A trial court may properly refuse to grant a new trial requested by all the parties to the action, where no legal ground for such new trial exists.[56]

(IV) *NEW TRIAL NOT BENEFICIAL.* Where a new trial would be ineffectual to obtain other or substantial relief, it may be denied, although technical grounds for granting it may exist.[57] Thus a new trial may be refused, although there were errors of law in the reception of evidence or in charging the jury, if any other verdict would have been contrary to law or the evidence had such errors not intervened.[58]

(V) *EXISTENCE OF OTHER REMEDY.* A new trial has been refused where the showing is unsatisfactory and the applicant may bring another action and obtain all the benefit that he would obtain by the new trial.[59]

f. Amendment of Pleadings. On the hearing of a motion for a new trial, the pleadings may be amended to conform to the evidence adduced at the trial where such amendment would be proper after verdict.[60]

g. Division of Court. Where the court is equally divided upon the hearing of a rule *nisi* for a new trial, the rule falls and the party retains his verdict,[61] upon which judgment follows.[62]

6. CONDITIONS AND TERMS ON GRANTING OR REFUSING NEW TRIALS — a. In General. Generally courts may impose conditions upon the allowance or disallowance of new trials,[63] especially where such allowance or disallowance is discre-

dence tending to establish all the material issues supporting the verdict it is not error to refuse to grant a new trial (Hagen *v.* Anderson County, 61 S. C. 490, 39 S. E. 712; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807). See also in this connection APPEAL AND ERROR, 3 Cyc. 348 *et seq.*

Law and fact.—A new trial will be more readily granted where the question submitted to the jury was a mixed question of law and fact. Littlefield *v.* Norwich, 40 Conn. 406; Potter *v.* Payne, 21 Conn. 361; Derwort *v.* Loomer, 21 Conn. 245.

55. McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

56. Phelan *v.* Ruiz, 15 Cal. 90; Smedley *v.* Chicago, etc., R. Co., 45 Ill. App. 426; Rock Island *v.* McEniry, 39 Ill. App. 218; Wright *v.* Miller, 63 Ind. 220; Aiken *v.* Bruen, 21 Ind. 137; Gunn *v.* Durkee, 41 Kan. 144, 21 Pac. 156; Nichols *v.* Sixth Ave. R. Co., 10 Bosw. (N. Y.) 260 [*affirmed* in 38 N. Y. 131]. See also Bryant *v.* Bryant, 35 Ala. 315.

57. *Minnesota.*— Smith *v.* St. Paul, 72 Minn. 472, 75 N. W. 708 (where new trial could only affect costs as against one of several interveners); Perry *v.* Minneapolis St. R. Co., 69 Minn. 165, 72 N. W. 55 (as for error in setting aside struck jury list where law providing for such juries since repealed).

New Jersey.— Christensen *v.* Lambert, 66 N. J. L. 531, 49 Atl. 577; Jessup *v.* Cook, 6 N. J. L. 434.

Ohio.— Earl *v.* Shoulder, 6 Ohio 409.

Rhode Island.— Hudson *v.* Geary, 4 R. I. 485.

South Carolina.— Ingraham *v.* South Carolina Ins. Co., 2 Treadw. 707.

United States.— Gerbier *v.* Emery, 10 Fed. Cas. No. 5,357, 2 Wash. 413; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193, where interest of witness who was permitted to testify would probably be released on second trial.

Amount of recovery see *supra*, III, G, 6.

58. Gilbert *v.* Walker, 64 Conn. 390, 30 Atl. 132; Foster *v.* Jenkins, 30 Ga. 476; Beardsley *v.* Knight, 4 Vt. 471.

59. Doe *v.* Downey, 14 N. Brunsw. 321 (where a new trial was refused plaintiff in ejectment); Brown *v.* Fraser, 4 U. C. Q. B. O. S. 371 (where a new trial was refused defendant in ejectment, the affidavits of new evidence being insufficient, the court holding that defendant could bring an action to recover back possession if his evidence should establish title).

60. Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27. *Compare* Gerbier *v.* Emery, 10 Fed. Cas. No. 5,357, 2 Wash. 413.

Amendment of pleadings generally see PLEADING.

61. Bennett *v.* Deacon, 2 C. B. 628, 15 L. J. C. P. 289, 52 E. C. L. 628; Coxhead *v.* Richards, 2 C. B. 569, 10 Jur. 985, 15 L. J. C. P. 278, 52 E. C. L. 569; Dansey *v.* Richardson, 2 C. L. R. 1442, 3 E. & B. 144, 18 Jur. 721, 23 L. J. Q. B. 217, 77 E. C. L. 144. In Burnett *v.* Allen, 4 Jur. N. S. 488, where on an equal division the court, instead of allowing the rule to drop, discharged it in order to enable the parties to appeal.

62. Cartlidge *v.* Eyles, 1 Barnes note 327; Gandin *v.* McKilligan, 7 N. Brunsw. 477; Gray *v.* Canada Steel Co., 12 Nova Scotia 506.

63. *Alabama.*— Walker *v.* Blassingame, 17 Ala. 810.

California.— Battelle *v.* Connor, 6 Cal. 140.

tionary.[64] The authority to do so where a verdict is contrary to law,[65] or reversible for errors of law,[66] has been denied, and it is generally improper to refuse a new trial on condition that the prevailing party perform some act, the performance of which was a condition precedent to his right of action or defense.[67] The conditions or terms imposed must have some direct relation to the issues in the case.[68] The imposition of a condition or conditions in a particular case is generally discretionary with the court.[69]

b. Security For Payment of Judgment. As a condition of the allowance of a new trial, the court may require the applicant to consent that the verdict stand as security for the adverse party's claim,[70] or may require him to pay money into court or give security for the payment of any judgment that may be rendered against him.[71]

c. Waiver of Other Remedy. An applicant for a new trial may be required to waive exceptions or the right to an appeal.[72] But the filing of a motion for a new trial does not of itself operate as a waiver of a bill of exceptions.[73]

d. Limitation of Issues and Use of Evidence.[74] In many jurisdictions an order allowing a new trial may limit the issues to be tried,[75] or may require the admis-

Georgia.— Gordon *v.* Mitchell, 68 Ga. 11.

Illinois.— Buntain *v.* Mosgrove, 25 Ill. 152, 76 Am. Dec. 789.

Iowa.— Loring *v.* Holt, 39 Iowa 574; Wright *v.* Antrim, Morr. 258.

Massachusetts.— Peirce *v.* Adams, 8 Mass. 383.

Michigan.— Mabley *v.* Judge Super. Ct., 41 Mich. 31, 1 N. W. 985, waiver of right to remove case to federal court.

Nebraska.—Kruger *v.* Adams, etc., Harvester Co., 9 Nebr. 526, 4 N. W. 252.

Nevada.— See Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231.

Pennsylvania.— Walker *v.* Long, 2 Browne 125.

South Carolina.— Laney *v.* Bradford, 4 Rich. 1.

Canada.— Paterson *v.* Maughan, 39 U. C. Q. B. 371 (assignment to defendant sheriff of security by which he might recoup himself); Boulton *v.* Defries, 2 U. C. Q. B. 432.

See 37 Cent. Dig. tit. "New Trial," § 321.

The granting of a new trial because of mistake in the insertion in the special verdict of an answer other than that agreed on by the jury should be on terms. Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054.

Effect of invalid condition.— In some cases an invalid condition renders the order void (Edwards *v.* Lewis, 18 Ala. 494; Gaines *v.* Dailey, 1 J. J. Marsh. (Ky.) 478; Secrest *v.* Best, 6 Tex. 199; Hargrave *v.* Boero, (Tex. Civ. App. 1893) 23 S. W. 403), although it is also held that the condition only is void and the order stands (Bledsoe *v.* Decrow, 132 Cal. 312, 64 Pac. 397).

64. Stauffer *v.* Reading, 206 Pa. St. 479, 55 Atl. 1072; Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054.

65. Tuttle *v.* Gates, 24 Me. 395; Holden *v.* Belmont, 32 Ohio St. 585 (damages assessed on illegal basis); Gorman *v.* McFarland, 13 Tex. 237; Territory *v.* Doty, 1 Pinn. (Wis.) 396.

66. McMasters *v.* Palmer, 4 La. Ann. 381.

67. De Ford *v.* Urbain, 48 Ind. 219, as tender of reconveyances essential to defense.

68. Haggin *v.* Christian, 1 A. K. Marsh. (Ky.) 579; Stauffer *v.* Reading, 206 Pa. St. 479, 55 Atl. 1072.

69. Green *v.* Brown, etc., Co., 11 N. M. 658, 72 Pac. 17; Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

70. Turner *v.* Booker, 2 Dana (Ky.) 334; Zantzinger *v.* Weightman, 30 Fed. Cas. No. 18,202, 2 Cranch C. C. 478; Pleydell *v.* Dorchester, 7 T. R. 529; Swan *v.* Clelland, 13 U. C. Q. B. 335.

In an action that does not survive, where defendant has died pending a motion for new trial, the condition of granting it should be that the judgment should be that the first judgment stand as security for the last. Turner *v.* Booker, 2 Dana (Ky.) 334. And see Swan *v.* Clelland, 13 U. C. Q. B. 335.

71. Loring *v.* Holt, 39 Iowa 574; Brenzinger *v.* American Exch. Bank, 19 Ohio Cir. Ct. 536, 10 Ohio Cir. Dec. 775; Merchants' Nat. Bank *v.* Leland, 17 Fed. Cas. No. 9,452, 38 How. Pr. 31; Gibbs *v.* Steadman, 4 N. Brunsw. 406; Dove *v.* Dalby, 5 U. C. Q. B. 457. See also Stokes *v.* Stokes, 38 N. Y. App. Div. 215, 56 N. Y. Suppl. 637. *Contra,* Dewey *v.* Leonhardt, 37 Mo. App. 517. *Compare* also Newschloss *v.* Wittner, 86 N. Y. Suppl. 211, where terms were adjudged harsh.

72. Meeker *v.* Boylan, 27 N. J. L. 262; Simpson *v.* Hefter, 46 Misc. (N. Y.) 67, 91 N. Y. Suppl. 326. See also Leonard *v.* Cowling, 87 S. W. 812, 27 Ky. L. Rep. 1059, holding the prosecution of a motion for a new trial an abandonment of an appeal.

73. Sorrelle *v.* Craig, 9 Ala. 534; West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300. *Compare* Danley *v.* Robbins, 3 Ark. 144. *Contra,* Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

74. See also *supra,* I, E, 1.

75. *California.*— Flinn *v.* Mowry, 131 Cal. 481, 63 Pac. 724, 1006.

Connecticut.— Zaleski *v.* Clark, 45 Conn. 397.

sion of facts clearly established,[76] or the filing of new or amended pleadings,[77] or consent to a new trial on the merits and a waiver of defects in the pleadings or the form of the action,[78] or consent to the use of a report of evidence taken at the trial.[79] But the applicant cannot be required to admit facts as to which the evidence is clearly conflicting.[80]

e. Dismissal as to Part of Defendants.[81] The overruling of an application for a new trial may be made conditional upon the entering of a *nolle prosequi* or discontinuance by plaintiff as to defendants whose liability was not sufficiently shown.[82]

f. Changing Verdict. As a rule it is improper to require the prevailing party to consent to judgment against himself for part of his adversary's claim as a condition of the overruling of a motion for a new trial,[83] especially where the effect is to raise an issue not passed upon by the jury and upon the court's decision of that issue to allow entry of judgment against defendant;[84] but if he consents the error is not ground for a reversal on plaintiff's appeal where the original verdict is warranted by the evidence.[85] It has been held, however, that where the evidence warranted a verdict for defendants, save only as to one item of damages, it is not an abuse of discretion to refuse to grant a new trial on condition that defendants pay such amount.[86] A new trial should not be refused because the applicant

Iowa.— Mackintosh *v.* Locke, 112 Iowa 252, 83 N. W. 973.

New Hampshire.— Ela *v.* Ela, 72 N. H. 216, 55 Atl. 358, 72 N. H. 598, 57 Atl. 921.

South Carolina.— Laney *v.* Bradford, 4 Rich. 1.

Virginia.— See Prunty *v.* Mitchell, 30 Gratt. 247, as to limiting new trial to present issues.

Canada.— Frey *v.* Wellington County Mut. Ins. Co., 4 Ont. App. 293, 43 U. C. Q. B. 102; McNab *v.* Stewart, 15 U. C. C. P. 189.

Compare Tuttle *v.* Gates, 24 Me. 395, where new trial matter of right.

Requisites of order.— The order should state, in terms, the issues to be retried, instead of referring to such issues as those covered by certain findings of fact. Mountain Tunnel Gravel Min. Co. *v.* Bryan, 111 Cal. 36, 43 Pac. 410.

76. Nicholson *v.* Burkholder, 21 U. C. Q. B. 108.

77. Mackintosh *v.* Locke, 112 Iowa 252, 83 N. W. 973; Townsend *v.* Hamilton, 5 U. C. C. P. 230; Commercial Bank *v.* Harris, 27 U. C. Q. B. 301, withdrawal of plea of usury.

78. Battelle *v.* Conner, 6 Cal. 140; Walker *v.* Long, 2 Browne (Pa.) 125; Gerbier *v.* Emery, 10 Fed. Cas. No. 5,357, 2 Wash. 413.

79. Hately *v.* Merchants Despatch Co., 2 Ont. 385; Conley *v.* Lee, 12 U. C. Q. B. 456.

Effect as to use of other evidence.— A condition that a transcript of the oral evidence given at the former trial might be read on the new trial was held not to preclude a party from calling a former witness to testify to matters not included in his former examination. Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637. It was held proper to require the movant to stipulate to call on the new trial one of his witnesses, who had corroborated his adversary's testimony, or to read the witness' testimony as part of the movant's case. Bulkin *v.* Ehret, 20 N. Y. Suppl. 731, 29 Abb. N. Cas. 62. *Compare* Bruce *v.* Davenport, 1 Abb. Dec. (N. Y.) 233, 3 Keyes 472, 3 Transcr. App. 82, 5 Abb. Pr. N. S. 185.

80. Crane *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 202, 74 N. Y. Suppl. 117.

81. See also *supra*, I, E, 2.

82. *Indiana.*— Tuell *v.* Wrink, 6 Blackf. 249.

Pennsylvania.— Peart *v.* Prosser, 6 Lanc. Bar 194.

South Carolina.— Bates *v.* Smith, 2 Nott & M. 84.

Texas.— Henderson *v.* Banks, 70 Tex. 398, 7 S. W. 815, as to defendants not served with process.

England.— De Bernardy *v.* Harding, 8 Exch. 822, 22 L. J. Exch. 340.

Canada.— Batchelor *v.* Buffalo, etc., R. Co., 5 U. C. C. P. 127.

In the absence of statutory authority it has been held improper to refuse a new trial on the condition that plaintiff should release his judgment as against one of three joint contractors, as to whom the judgment was clearly erroneous. Irwin *v.* Riley, 68 Ga. 605.

83. Kortjohn *v.* Altenbernd, 14 Mo. App. 342, judgment against a successful defendant for part of plaintiff's claim. But see Anderson *v.* Todd, 3 U. C. Q. B. 16.

Allowance of percentage of amount of judgment.— The terms imposed on granting a new trial should not include an extra allowance of a certain per cent of the amount claimed. Simpson *v.* Hefter, 46 Misc. (N. Y.) 67, 91 N. Y. Suppl. 326. *Compare* Batchelor *v.* Buffalo, etc., R. Co., 5 U. C. C. P. 127.

84. Crawford *v.* Brokaw, 64 Hun (N. Y.) 421, 19 N. Y. Suppl. 654.

85. Kortjohn *v.* Altenbernd, 14 Mo. App. 342.

86. Anderson *v.* Jenkins, 99 Ga. 299, 25 S. E. 648.

refuses to accept judgment for part of his claim,[87] or to consent to judgment for part of his adversary's demand.[88]

g. Payment of Costs and Expenses — (i) *In General.*[89] Generally the payment of costs by the applicant may be made a condition or term in an order allowing a new trial.[90] But where there is neither a statute nor a rule of court requiring the payment of costs as a condition of granting a new trial on the merits, the trial court may refuse to impose such a condition.[91] Payment of the expenses of the former trial[92] or of the motion[93] is sometimes required.

(ii) *Nature of Grounds.* In some jurisdictions the payment of costs[94] or expenses[95] cannot be required where a new trial is strictly a matter of right. Thus it has been held that the applicant should not be required to pay costs where a new trial is granted for errors of law occurring at the trial,[96] or because the ver-

87. Bledsoe *v.* Decrow, 132 Cal. 312, 64 Pac. 397; Lehr *v.* Brodbeck, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. Rep. 828, right to have jury fix damages generally.

88. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880; Nashville, etc., R. Co. *v.* Foster, 10 Lea (Tenn.) 351.

89. Costs in general see Costs.

90. *Alabama.*— Stephenson *v.* Mansony, 4 Ala. 317.

California.— Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11; Garoutte *v.* Haley, 104 Cal. 497, 38 Pac. 194; Reynolds *v.* Scott, (1884) 4 Pac. 346; Cordor *v.* Morse, 57 Cal. 301.

Colorado.— Schwed *v.* Hartwitz, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221, but not costs paid by the adversary party to obtain a second trial as a matter of right.

Illinois.— Buntain *v.* Mosgrove, 25 Ill. 152, 76 Am. Dec. 789.

Iowa.— Wright *v.* Antrim, Morr. 258, although payment ordered at subsequent term.

Kentucky.— Logan *v.* Gibbs, Litt. Sel. Cas. 19.

Massachusetts.— Johnson *v.* White, 98 Mass. 330.

New York.— Siegrist *v.* Holloway, 7 N. Y. Civ. Proc. 58, discretionary under statute.

Pennsylvania.— Ward *v.* Patterson, 46 Pa. St. 372.

Virginia.—See Prunty *v.* Mitchell, 30 Gratt. 247.

Wisconsin.— Hoffman *v.* Doolittle, 50 Wis. 505, 7 N. W. 342, modifying order so as to require payment of costs.

England.— In granting a new trial it is no ground for refusing to annex the condition of payment of costs by the party obtaining the rule that the attorney of the adverse party was not on the roll of attorneys when those costs were incurred. Punter *v.* Grantley, 3 M. & G. 161, 42 E. C. L. 161.

Canada.— Bank of British North America *v.* Travis, 7 N. Brunsw. 543; McEachern *v.* Ferguson, 5 N. Brunsw. 355 (not including costs of motion unless expressly specified); Irvine *v.* Nova Scotia Mar. Ins. Co., 8 Nova Scotia 510; Cameron *v.* Monarch Assur. Co., 7 U. C. C. P. 212 (where statute of limitations had run against a new action); Commercial Bank *v.* Harris, 27 U. C. Q. B. 526.

See 37 Cent. Dig. tit. "New Trial," § 322.

In Virginia the payment of costs is required by statute. Huggins *v.* Simons, 94 Va. 659, 27 S. E. 606; Haupt *v.* Tebault, 94 Va. 184, 26 S. E. 406; Central Land Co. *v.* Obenchain, 92 Va. 130, 22 S. E. 876, unless granted for misconduct of prevailing party.

Requisites of order.— The order for costs must be contained in the rule for a new trial. Justices Burlington County *v.* Fennimore, 1 N. J. L. 293.

Bills for witnesses.—The court may require a waiver of the right to bills for witnesses. Parshall *v.* Conklin, 81* Pa. St. 487.

91. Park *v.* Electric Thermostat Co., 75 Minn. 349, 77 N. W. 988.

92. Reynolds *v.* Scott, (Cal. 1884) 4 Pac. 346; Murphy *v.* Interurban St. R. Co., 88 N. Y. Suppl. 187.

93. Brooks *v.* San Francisco, etc., R. Co., 110 Cal. 173, 42 Pac. 570, on sufficiency of evidence.

94. Cohen *v.* Krulewitch, 77 N. Y. App. Div. 126, 78 N. Y. Suppl. 1044, 12 N. Y. Annot. Cas. 216; Smith *v.* City of New York, 55 N. Y. App. Div. 90, 66 N. Y. Suppl. 1046, 8 N. Y. Annot. Cas. 389.

95. Metropolitan St. R. Co. *v.* McClure, 58 Kan. 109, 48 Pac. 566, attorney's fees.

96. *Indiana.*— Fisher *v.* Bridges, 4 Blackf. 518.

Kansas.— North Center Creek Min., etc., Co. *v.* Eakins, 23 Kan. 317; Pierson *v.* Thompson, 4 Kan. App. 173, 45 Pac. 944.

New York.— Smith *v.* New York, 55 N. Y. App. Div. 90, 66 N. Y. Suppl. 1046, 8 N. Y. Annot. Cas. 389 (except costs of motion); North *v.* Sargeant, 14 Abb. Pr. 223.

Pennsylvania.— See Stauffer *v.* Reading, 206 Pa. St. 479, 55 Atl. 1072.

Washington.— Casey *v.* Malidore, 19 Wash. 279, 53 Pac. 60.

Wisconsin.— R. Connor Co. *v.* Goodwillie, 120 Wis. 603, 98 N. W. 528; Maxon *v.* Gates, 112 Wis. 196, 88 N. W. 54.

England.— Metropolitan Asylum Dist. *v.* Hill, 47 J. P. 148, 47 L. T. Rep. N. S. 29.

Canada.— Doupe *v.* Stewart, 28 U. C. Q. B. 192.

See 37 Cent. Dig. tit. "New Trial," § 323.

Compare Boyden *v.* Moore, 5 Mass. 365, where misdirection is of trifling consequence.

Misdirection of jury.— Certainly it is not error not to require the movant to pay costs where a new trial is granted for misdirection of the jury. Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

dict is contrary to law or not sustained by sufficient legal evidence.[97] Nor should he be required to pay costs where a new trial is granted because of the misconduct of the prevailing party or his attorney.[98] Under the settled practice in some states, it is error to grant a new trial on the ground that the verdict is against the weight of the evidence, except on payment of costs;[99] and it has been held better practice, on setting aside a verdict against a defendant as against the weight of evidence, to require defendant to stipulate that on final recovery his costs shall not be taxed against plaintiff, and, if plaintiff finally recovers, entire costs shall be taxed in his favor.[1] The court may require the payment of costs as a condition

97. *Connecticut.*— Johnson *v.* Scribner, 6 Conn. 185.

Kansas.— North Centre Creek Min., etc., Co. *v.* Eakins, 23 Kan. 317; Pierson *v.* Thompson, 4 Kan. App. 173, 45 Pac. 944.

New York.— Cohen *v.* Krulewitch, 77 N. Y. App. Div. 126, 78 N. Y. Suppl. 1044, 12 N. Y. Annot. Cas. 216.

Wisconsin.— R. Connor Co. *v.* Goodwillie, 120 Wis. 603, 98 N. W. 528; Becker *v.* Holm, 100 Wis. 281, 75 N. W. 999; Schweickhart *v.* Stuewe, 75 Wis. 157, 43 N. W. 722; Smith *v.* Lander, 48 Wis. 587, 4 N. W. 767; Pound *v.* Roan, 45 Wis. 129; Emmons *v.* Sheldon, 26 Wis. 648; Baxter *v.* Payne, 1 Pinn. 501; Territory *v.* Doty, 1 Pinn. 396.

Canada.— Doe *v.* Chace, 8 N. Brunsw. 501; Bank of British North America *v.* Traris, 7 N. Brunsw. 543.

See 37 Cent. Dig. tit. "New Trial," § 323.

Where the action should be dismissed for want of jurisdiction of defendants against whom a verdict is returned, costs should not be taxed against them. Majors *v.* Gunnell, 4 T. B. Mont. (Ky.) 449.

98. North Center Creek Min., etc., Co. *v.* Eakins, 23 Kan. 317; Pierson *v.* Thompson, 4 Kan. App. 173, 45 Pac. 944; Clark *v.* Eldred, 54 Hun (N. Y.) 5, 7 N. Y. Suppl. 95, and referee.

99. Larsen *v.* U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76, 93 N. Y. Suppl. 610; Lawrence *v.* Wilson, 86 N. Y. App. Div. 472, 83 N. Y. Suppl. 821 (excessive damages and order conditional on remittitur); Seggermann *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 637, 80 N. Y. Suppl. 1147 [*affirming* 38 Misc. 374, 77 N. Y. Suppl. 905]; Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Cunningham *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 211, 58 N. Y. Suppl. 22; Riegelman *v.* Brunnings, 36 N. Y. App. Div. 351, 56 N. Y. Suppl. 755 (costs and disbursements on new trial for inadequacy of damages); Buck *v.* Webb, 58 Hun (N. Y.) 185, 11 N. Y. Suppl. 617 (excessive damages); Peck *v.* Fonda, etc., R. Co., 3 Silv. Sup. (N. Y.) 10, 6 N. Y. Suppl. 379; O'Shea *v.* McLear, 1 N. Y. Suppl. 407, 15 N. Y. Civ. Proc. 69 (new trial for inadequacy of damages); Ward *v.* Woodburn, 27 Barb. (N. Y.) 407; Harris *v.* Panama R. Co., 5 Bosw. (N. Y.) 312; Karl *v.* Maillard, 3 Bosw. (N. Y.) 591; Brown *v.* Bradshaw, 1 Duer (N. Y.) 199; Sloane *v.* McCauley, 33 Misc. (N. Y.) 652, 68 N. Y. Suppl. 187 (inadequacy of damages); Falkenberg *v.* O'Neill, 88 N. Y. Suppl. 378 (costs of trial); Murphy *v.* Interurban St. R. Co., 88 N. Y. Suppl. 187 (costs of trial and disbursements); Carter *v.* Interurban St. R. Co., 86 N. Y. Suppl. 206 (even in case of seeming hardship); Kelly *v.* Frazier, 2 N. Y. Civ. Proc. 322; Overing *v.* Russell, 28 How. Pr. (N. Y.) 151; Goodyear *v.* Ogden, 4 Hill (N. Y.) 104; Utica Bank *v.* Ives, 17 Wend. (N. Y.) 501; Jackson *v.* Thurston, 3 Cow. (N. Y.) 342; North *v.* Sargeant, 14 Abb. Pr. (N. Y.) 223; Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054; R. Connor Co. *v.* Goodwillie, 120 Wis. 603, 98 N. W. 528; Wilson *v.* Eau Claire, 89 Wis. 47, 61 N. W. 290; Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512; Garny *v.* Katz, 86 Wis. 321, 56 N. W. 912; Schraer *v.* Stefan, 80 Wis. 653, 50 N. W. 778; Kittner *v.* Milwaukee, etc., R. Co., 77 Wis. 1, 45 N. W. 815; Hoffman *v.* Doolittle, 50 Wis. 505, 7 N. W. 342; Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854; Smith *v.* Lander, 48 Wis. 587, 4 N. W. 767; Pound *v.* Roan, 45 Wis. 129; Baxter *v.* Payne, 1 Pinn. (Wis.) 501. *Compare* Wentworth *v.* Candee, 17 How. Pr. (N. Y.) 405, as to new trial on report of referee.

Presumption as to ground on which new trial granted.— In the absence of a statement of the grounds on which a new trial was granted, it will be presumed to have been granted on the weight of the evidence. Giese *v.* Milwaukee Electric R., etc., Co., 116 Wis. 66, 92 N. W. 356; Mills *v.* Conley, 110 Wis. 525, 86 N. W. 203; Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512; Garny *v.* Katz, 86 Wis. 321, 56 N. W. 912; Schraer *v.* Stefan, 80 Wis. 653, 50 N. W. 778.

Conditioning payment of costs on failure to recover greater damages.— Where plaintiff complains of the inadequacy of the damages, the allowance of a new trial may be on the condition that he pay the costs should he not recover greater damages on the second trial. Craig *v.* Corcoran, 24 U. C. Q. B. 406; Jones *v.* McDowell, 12 U. C. Q. B. 214.

Amount of costs payable.— Ordinarily the party entitled to relief against a verdict for excessive damages should pay the costs of the trial, including witness' fees and disbursements, and the costs of opposing the motion, but not all the costs of the action. Buck *v.* Webb, 58 Hun (N. Y.) 185, 11 N. Y. Suppl. 617.

1. Saggerman *v.* Metropolitan St. R. Co., 38 Misc. (N. Y.) 374, 77 N. Y. Suppl. 905 [*affirmed* in 82 N. Y. App. Div. 637, 80 N. Y. Suppl. 1174].

to the allowance of a new trial on the ground of accident or surprise or of newly discovered evidence,[2] or of misconduct of individual jurors,[3] or may refuse to do so,[4] in its discretion.

(III) *As Condition Precedent*—(A) *In General.* While the authority of a trial court to make the payment of costs a condition precedent to the grant of a new trial as distinguished from a term of the order[5] has been denied by some courts,[6] the weight of authority is to the effect that, upon an application for a new trial, the court may in its discretion impose on the party applying therefor, as a condition to the grant, the payment of the costs which have accrued in the cause, and, if such condition is not performed, may vacate the order and enter judgment on the verdict,[7] unless the non-compliance is caused by the fault of the

2. Jones *v.* Williams, 108 Ala. 282, 19 So. 317 (at least where movant negligent); North Center Creek Min., etc., Co. *v.* Eakins, 23 Kan. 317; Matter of Ryan, 70 Hun (N. Y.) 149, 24 N. Y. Suppl. 277 [*affirmed* in 141 N. Y. 550, 36 N. E. 343]; Comstock *v.* Dye, 13 Hun (N. Y.) 113 (and should require payment ordinarily); Simpson *v.* Hefter, 46 Misc. (N. Y.) 67, 91 N. Y. Suppl. 326; Solowye *v.* Hazlett, 35 Misc. (N. Y.) 197, 71 N. Y. Suppl. 486; Newschloss *v.* Wittner, 86 N. Y. Suppl. 211; Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb. Pat. Cas. 644, 3 Woodb. & M. 348. *Compare* Seeley *v.* Chittenden, 4 How. Pr. (N. Y.) 265, as to surprise occasioned by act of prevailing party.

3. Hoffman *v.* Chicago, etc., R. Co., 86 Wis. 471, 56 N. W. 1093, provided the verdict is not perverse.

4. Kruger *v.* Adams, etc., Harvester Co., 9 Nebr. 526, 4 N. W. 252; Seeley *v.* Chittenden, 4 How. Pr. (N. Y.) 265.

5. **"Condition" synonymous with "terms."**—An order granting a new trial "on condition" that the party pay all costs is not invalid as being conditional, as the word "condition" is used as synonymous with the word "terms." Fenn *v.* Gulf, etc., R. Co., 76 Tex. 380, 13 S. W. 273; Galveston, etc., R. Co. *v.* Borden, (Tex. Civ. App. 1895) 29 S. W. 1100.

6. Summan *v.* Brewin, 52 Ind. 140; Murray *v.* Ebright, 50 Ind. 362; Ammerman *v.* Gallimore, 50 Ind. 131. *Contra*, see Watts *v.* Green, 30 Ind. 98; Chambers *v.* Bass, 18 Ind. 3; Moberly *v.* Davar, 5 Blackf. (Ind.) 409.

An order granting a new trial upon payment of costs is not an order conditioned upon such payment. The order is absolute, and the stipulation with reference to costs may be enforced by execution, or as any other order may be. Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 555; Gaines *v.* Dailey, 1 J. J. Marsh. (Ky.) 478; Johnson *v.* Taylor, 3 Sm. & M. (Miss.) 92; Heffner *v.* Scranton, 27 Ohio St. 579; Bland *v.* Warren, 6 Dowl. P. C. 21, 2 N. & P. 97; Doe *v.* Edwards, 2 Dowl. P. C. 572.

In Texas it is held that an order granting a new trial conditioned upon the payment of costs after the adjournment of the term is void, because the motion for a new trial must be disposed of before the adjournment of court (San Antonio *v.* Dickman, 34 Tex. 647; Gorman *v.* McFarland, 13 Tex. 237; Secrest *v.* Best, 6 Tex. 199); but an order granted upon the payment of costs before the adjournment of the court is valid (Town *v.* Guerguin, 93 Tex. 608, 57 S. W. 565). *Contra*, Hargrave *v.* Boero, (Tex. Civ. App. 1893) 23 S. W. 403.

7. *California.*— Brooks *v.* San Francisco, etc., R. Co., 110 Cal. 173, 42 Pac. 570; Garoutte *v.* Haley, 104 Cal. 497, 38 Pac. 194; Reynolds *v.* Scott, (Cal. 1884) 4 Pac. 346. Defendant having been granted a new trial on condition that he pay plaintiff's costs within five days, otherwise his motion to be denied, the court cannot, after expiration of such time, payment not having been made, make a final order granting his motion. Brown *v.* Cline, 109 Cal. 156, 41 Pac. 862.

Illinois.— Buntain *v.* Mosgrove, 25 Ill. 152, 76 Am. Dec. 789.

Kentucky.— Carbon *v.* Stout, 7 Bush 609, under statute.

Missouri.— Blumenthal *v.* Kurth, 22 Mo. 173, without notice after lapse of several terms.

New York.— Stokes *v.* Stokes, 38 N. Y. App. Div. 215, 56 N. Y. Suppl. 637.

Pennsylvania.— See Ward *v.* Patterson, 46 Pa. St. 372, as to abandonment of right to new trial by unreasonable delay in complying with condition.

Virginia.— Boswell *v.* Jones, 1 Wash. 322.

Wisconsin.— Hoffman *v.* Doolittle, 50 Wis. 505, 7 N. W. 342.

Canada.— Pacaud *v.* McEwan, 6 Ont. Pr. 20; Stacey *v.* McIntyre, 5 Ont. Pr. 205 (as to time of payment before next assizes); Ravidon *v.* Harkin, 2 Ont. Pr. 129; Stock *v.* Shewan, 18 U. C. C. P. 185; Johnson *v.* Sparrow, 1 U. C. Q. B. 396 (payment before next assizes); Thompson *v.* Sewell, 4 U. C. Q. B. O. S. 16.

See 37 Cent. Dig. tit. "New Trial," § 322.

An order granting a new trial on the payment of costs is not an absolute, but a conditional, grant of a new trial. *Ex p.* Lowe, 20 Ala. 330; Willis *v.* Mobile Planters', etc., Bank, 19 Ala. 141; Sloan *v.* Somers, 18 N. J. L. 46, 35 Am. Dec. 526 [*overruling* the intimation to the contrary in Gilliland *v.* Rappleyea, 15 N. J. L. 138]; Rixey *v.* Ward, 3 Rand. (Va.) 52; Scribner *v.* McLaughlin, 6 N. Brunsw. 440.

Effect of order for issuance of execution.—An order for a new trial upon the payment of costs for which execution is allowed to

prevailing party,[8] or is otherwise excused.[9] If the time within which the payment is to be made is not prescribed, the grant is conditional, having the effect to keep the cause in court until the next term;[10] and the payment of the costs at any time during vacation, or before the cause is regularly called for trial at the next term, is a compliance with the condition, rendering the grant absolute.[11] But if a particular time is appointed for the payment of the costs, although it may expire in vacation, the payment within the prescribed period is a condition precedent, with which there must be strict compliance.[12]

(B) *Extending Time For Payment.* Subsequent payment cannot restore vitality to the order or grant, the time for payment having expired without compliance with the order,[13] and it would seem that the court cannot properly extend the time thereafter.[14]

(C) *Waiver of Condition.* The non-payment of costs may be waived by proceeding with the new trial without objection or application for relief.[15]

h. Increasing Amount of Recovery. Where the jury has failed to include in its verdict a certain element or item of damages which was clearly proved and is definitely ascertainable, the court may overrule a motion for a new trial upon

issue is an absolute, unconditional grant of a new trial. *Ex p.* Beavers, 34 Ala. 71; Turney *v.* Lamont, 1 Baxt. (Tenn.) 265.

In the case of a "perverse verdict," the court may properly relieve the party from the payment of costs upon granting his motion for a new trial. Emmons *v.* Sheldon, 26 Wis. 648.

If the error be deemed the error of the jury, a party in whose favor a new trial is ordered must pay the costs. Harris *v.* Panama R. Co., 5 Bosw. (N. Y.) 312; North *v.* Sargeant, 14 Abb. Pr. (N. Y.) 223.

If the court subject the movant to more than the costs for that term, the grounds for so doing ought to be stated. Logan *v.* Gibbs, Litt. Sel. Cas. (Ky.) 19.

Where a new trial has been ordered, the order for costs must be contained in the rule, since costs cannot be annexed as a condition after the trial has been had. Burlington County *v.* Fennimore, 1 N. J. L. 190.

8. Doe *v.* Auldjo, 6 U. C. Q. B. 21; Thompson *v.* Sewell, 4 U. C. Q. B. O. S. 16.

9. Van Every *v.* Drake, 3 Ont. Pr. 84; Grantham *v.* Powell, 1 Ont. Pr. 256.

10. *Ex p.* Dillard, 68 Ala. 594; Tannenbaum *v.* Tankersly, 52 Ala. 489; *Ex p.* Lowe, 20 Ala. 330.

11. *Ex p.* Dillard, 68 Ala. 594.

On demand.— An order granting a new trial on condition that defendant pay the costs of trial, without a specification of the time of payment, requires payment of the amount on demand. Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11.

12. *Ex p.* Dillard, 68 Ala. 594; *Ex p.* Jones, 35 Ala. 706; Screws *v.* Upshaw, 34 Ala. 496; Watts *v.* Green, 30 Ind. 98. See also Grundy Center First Nat. Bank *v.* Brown, 81 Iowa 208, 46 N. W. 995, receipt for costs by clerk not actually paid sufficient compliance with order. *Compare* Haupt *v.* Tebault, 94 Va. 184, 26 S. E. 406, holding that when by statute costs are to be paid at or before the next term after the new trial is granted, in default of which the order may be set aside on motion, payment is sufficient if made before the order for new trial is set aside, although not at or before the next term.

The order cannot require payment in a shorter time than that given by statute. Myers *v.* Lummis, 80 Ky. 456.

Where the order does not specify the time for payment, payment must be made on demand, although a previous tender has been refused. Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11.

The fault of the clerk in asking more than the taxable costs will not excuse failure to pay or tender the amount due within the time. *Ex p.* Dillard, 68 Ala. 594.

Payment must be in cash unless there is an accord and satisfaction. Screws *v.* Upshaw, 34 Ala. 496.

Payment after term.— It is generally held proper practice to grant a new trial on the payment of costs after the adjournment of the term at which the order is made. *Ex p.* Dillard, 68 Ala. 594; Carbon *v.* Stout, 7 Bush (Ky.) 609 (under statute); Ogden *v.* Rosenthal, 55 Nebr. 163, 75 N. W. 545. *Contra*, Gaines *v.* Dailey, 1 J. J. Marsh. (Ky.) 478, prior to any statutory provision on the subject. See also Fenn *v.* Gulf, etc., R. Co., 76 Tex. 380, 13 S. W. 273; Secrest *v.* Best, 6 Tex. 199. *Compare* Edwards *v.* Lewis, 18 Ala. 494.

13. *Ex p.* Dillard, 68 Ala. 594, unless the failure was due to the fault of the officer to whom the costs were payable.

14. Adams Express Co. *v.* Gregg, 23 Kan. 376, where the power of the court does not seem to be involved, but the order extending the time was held erroneous, and it further appeared that no sufficient excuse for non-compliance with the original order was shown. But see otherwise under statute and rule of court pursuant thereto Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112.

15. Green *v.* Brown, etc., Co., 11 N. M. 638, 72 Pac. 17; Hudgins *v.* Simons, 94 Va. 659, 27 S. E. 606; Central Land Co. *v.* Obenchain, 92 Va. 130, 22 S. E. 876. *Compare* Watts *v.* Green, 30 Ind. 98, as to is-

defendant's consenting that the judgment may be increased by such amount,[16] or upon condition that the omitted item or amount be paid to the adverse party.[17]

i. Remission of Excess of Recovery — (I) *Property.* Where a verdict for plaintiff in an action for the recovery of property includes property as to which the verdict should have been for defendant, under the evidence, the court may require plaintiff to release his claim to such excess, by an amendment of his pleadings or otherwise, as a condition of overruling a motion for a new trial.[18]

(II) *Damages*[19] — (A) *Excess of Amount Claimed.* Where the amount of the recovery exceeds the demand of the successful party in his pleadings, a new trial may be refused if he will remit the excess.[20]

(B) *In Actions For Liquidated Damages.* Where the law recognizes some fixed rules and principles to regulate the measure of damages by which it may be determined in how much the verdict is excessive, as in actions on contract,[21] or

suing subpœna for second trial supposing all costs had been paid.

Time for objection.— Where a new trial is granted on condition that plaintiff pay costs on or before next term, if defendant intends to insist on the nullity of the order he must do it at said next term. San Antonio *v.* Dickman, 34 Tex. 647; Gorman *v.* McFarland, 13 Tex. 237.

16. James *v.* Morey, 44 Ill. 352; Carr *v.* Miner, 42 Ill. 179 (error in rate of interest); West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292 (interest not included); Aultman *v.* Thompson, 19 Fed. 490. See also Damages, 13 Cyc. 135.

17. Anderson *v.* Jenkins, 99 Ga. 299, 25 S. E. 648.

18. *California.*— Eaton *v.* Jones, 107 Cal. 487, 40 Pac. 798.

Georgia.— Johnson *v.* Duncan, 90 Ga. 1, 16 S. E. 88.

Massachusetts.— Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326.

Missouri.— McAllister *v.* Mullanphy, 3 Mo. 38.

Virginia.— Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482.

Canada.— Conley *v.* Lee, 12 U. C. Q. B. 456.

See 37 Cent. Dig. tit. "New Trial," § 324.

19. In appellate court see Appeal and Error, 3 Cyc. 435.

20. *Georgia.*— Georgia R., etc., Co. *v.* Crawley, 87 Ga. 191, 13 S. E. 508, unless an amendment covering the excess is offered.

Maryland.— Attrill *v.* Patterson, 58 Md. 226.

Mississippi.— Hurd *v.* Germany, 7 How. 675.

Missouri.— Higgs *v.* Hunt, 75 Mo. 106; Creve Cœur Lake Ice Co. *v.* Tamm, 90 Mo. App. 189. *Compare* Koeltz *v.* Bleckman, 46 Mo. 320, where jury did not consider movant's case.

New York.— Dox *v.* Dey, 3 Wend. 356.

South Carolina.— Givens *v.* Porteous, 2 McCord 48; Mooney *v.* Welsh, 1 Mill 133.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104.

West Virginia.— Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

Wisconsin.— Manson *v.* Robinson, 37 Wis. 339; Lester *v.* French, 6 Wis. 580.

Canada.— Mulhall *v.* Barss, 3 Nova Scotia 46; Wilde *v.* Crow, 10 U. C. C. P. 406.

See 37 Cent. Dig. tit. "New Trial," § 325.

Compare Stafford *v.* Pawtucket Haircloth Co., 22 Fed. Cas. No. 13,275, 2 Cliff. 82, where verdict contrary to evidence.

21. *Alabama.*— Stephenson *v.* Mansony, 4 Ala. 317; Smith *v.* Paul, 8 Port. 503.

Colorado.— Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947.

Florida.— Harrell *v.* Durrance, 9 Fla. 490.

Georgia.— McCall *v.* Wilkes, 121 Ga. 722, 49 S. E. 722; Gibson *v.* Talbotton R. Co., 112 Ga. 325, 37 S. E. 365 (part of claim barred by limitations); Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Whaley *v.* Broadwater, 78 Ga. 336, 2 S. E. 749.

Illinois.— Bingham *v.* Spruill, 97 Ill. App. 374; Locke *v.* Duncan, 47 Ill. App. 110.

Kansas.— Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

Massachusetts.— Doyle *v.* Dixon, 97 Mass. 208, 93 Am. Dec. 80; Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray 456; Lambert *v.* Craig, 12 Pick. 199.

Minnesota.— Minneapolis First Nat. Bank *v.* St. Cloud, 73 Minn. 219, 75 N. W. 1054; Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814; Glencoe First Nat. Bank *v.* Lincoln, 39 Minn. 473, 40 N. W. 573.

Mississippi.— Young *v.* Englehard, 1 How. 19.

Missouri.— Creve Cœur Lake Ice Co. *v.* Tamm, 90 Mo. App. 189; Ellis *v.* Mackie Constr. Co., 60 Mo. App. 67.

Nevada.— Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

New Hampshire.— Sanborn *v.* Emerson, 12 N. H. 57.

New York.— Hayden *v.* Florence Sewing Mach. Co., 54 N. Y. 221; Sears *v.* Conover, 4 Abb. Dec. 179, 3 Keyes 113, 33 How. Pr. 324; Rose *v.* King, 76 N. Y. App. Div. 308, 78 N. Y. Suppl. 419; Bishop *v.* Autographic Register Co., 19 N. Y. App. Div. 268, 46 N. Y. Suppl. 97 [*affirmed* in 165 N. Y. 662, 59 N. E. 1119].

North Dakota.— Rosse *v.* Robertson, 12 N. D. 27, 94 N. W. 765.

Pennsylvania.— Crew *v.* McCafferty, 124 Pa. St. 200, 16 Atl. 743, 10 Am. St. Rep. 578; Kerrigan *v.* Pardee, 9 Kulp 569; Krebs

for torts to property, the value of which may be ascertained,[22] or in cases of tortious homicides where the damages claimed are special and can with accuracy be computed in dollars and cents,[23] nearly all the decisions agree that the trial court may require a remittitur of the excess of damages recovered as a condition of refusing a new trial.[24] Such action on the part of the court is no invasion of the province of the jury;[25] nor can defendant complain of it if the judgment be not still excessive, and the verdict against him is warranted by the proof.[26] But there are exceptional cases in which an excessive verdict cannot be cured by a remittitur. Thus if the jury were erroneously charged concerning the measure of

v. Ewing, 7 Leg. & Ins. Rep. 126; Yeager *v.* Yeager, 25 Leg. Int. 21; Com. *v.* Credit Mobilier, 1 Leg. Op. 126; Moore *v.* Hollenbach, 2 Woodw. 99.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364.

South Carolina.— Warren *v.* Lagrone, 12 S. C. 45; Charles *v.* Jacobs, 5 S. C. 348 (action on judgment); Atkinson *v.* Fraser, 5 Rich. 519; Givens *v.* Porteous, 2 McCord 48.

South Dakota.— Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322.

Texas.— Goldstein *v.* Cook, (Civ. App. 1893) 22 S. W. 762.

Washington.— Winter *v.* Shoudy, 9 Wash. 52, 36 Pac. 1049.

United States.—Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889; Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157.

See 37 Cent. Dig. tit. "New Trial," § 324.

22. *Georgia.*— Carlisle *v.* Callahan, 78 Ga. 320, 2 S. E. 751; Mayer *v.* Tufts, 76 Ga. 96.

Kansas.— Kansas City, etc., R. Co. *v.* Turley, 71 Kan. 256, 80 Pac. 605, excess determinable from special findings.

Massachusetts.— Hodges *v.* Hodges, 5 Metc. 205, where excess clearly ascertainable.

Montana.— Chicago Title, etc., Co. *v.* O'Marr, 25 Mont. 242, 64 Pac. 506; Cunningham *v.* Quirk, 10 Mont. 462, 26 Pac. 184.

Pennsylvania.—Meckes *v.* Pocono Mountain Water Supply Co., 203 Pa. St. 13, 52 Atl. 16; Hill *v.* Philadelphia, 2 Phila. 351.

West Virginia.—Ohio River R. Co. *v.* Blake, 38 W. Va 718, 18 S. E. 957.

See 37 Cent. Dig. tit. "New Trial," § 324.

Compare Ingraham *v.* Weidler, 139 Cal. 588, 73 Pac. 415; Benson *v.* Wilmington, 9 Houst. (Del.) 359, 32 Atl. 1047 (grade damages); Vanderbeck *v.* Paterson, 68 N. J. L. 584, 53 Atl. 216.

23. Southern Pac. Co. *v.* Tomlinson, 4 Ariz. 126, 33 Pac. 710, tortious death. *Contra,* Georgia Cent. R. Co. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 310 [*overruling* Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463, which held the law to be as stated in the text].

24. See cases cited *supra,* notes 21, 22, 23; and *infra,* this note.

Effect of remittitur.— An offer to enter judgment upon the verdict, providing a certain amount is remitted, is equivalent to a decision in favor of the successful party upon all the grounds for a new trial, except such as may be involved in the sum proposed to be remitted. McCubbin *v.* Atchison, 12 Kan. 166.

Effect of failure to remit.— Although the excessiveness is in a case in which plaintiff might remedy the error by a remittitur, if he fails to avail himself of the privilege it cannot be said that the court is in error in ordering a new trial and not compelling a remittitur. Barton *v.* Odessa, 109 Mo. App. 76, 82 S. W. 1119.

After a new trial is granted on the ground of excessiveness of the verdict it is too late to offer to remit. Hill *v.* Newman, 47 Ind. 187.

For misconduct of another.— The court should not require plaintiff to remit a part of the verdict as a penalty for the misconduct of another person. Clark *v.* Elmendorf, (Tex. Civ. App. 1904) 78 S. W. 538.

Application to particular items.— The failure of the court, in ordering a remittitur, to specify to which of several disputed items it applies, is not a reversible error. Ingalls *v.* Allen, 43 Ill. App. 624 [*affirmed* in 144 Ill. 535, 33 N. E. 203].

Different amounts as to different defendants.— In an action for breach of contract, the court may require a remittitur in different amounts as to different defendants. Glencoe First Nat. Bank *v.* Lincoln, 39 Minn. 473, 40 N. W. 573. *Contra,* Chils *v.* Gronlund, 41 Fed. 505, in action for a joint tort.

25. *New York.*— Mooney *v.* Press Pub. Co., 58 N. Y. App. Div. 613, 68 N. Y. Suppl. 739.

Tennessee.—Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088; Branch *v.* Bass, 5 Sneed 366.

Wisconsin.—Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

United States.—Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

England.— Belt *v.* Lawes, 12 Q. B. D. 356, 53 L. J. Q. B. 249, 50 L. T. Rep. N. S. 441, 32 Wkly. Rep. 607.

See 37 Cent. Dig. tit. "New Trial," § 324.

26. *California.*— Dreyfous *v.* Adams, 48 Cal. 131.

Indiana.— Murray *v.* Phillips, 59 Ind. 56; Evansville, etc., Traction Co. *v.* Broermann, (App. 1907) 80 N. E. 972.

Tennessee.— Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088; Branch *v.* Bass, 5 Sneed 366.

United States.— Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

England.— Belt *v.* Lawes, 12 Q. B. D. 356, 53 L. J. Q. B. 249, 50 L. T. Rep. N. S. 441, 32 Wkly. Rep. 607.

See 37 Cent. Dig. tit. "New Trial," § 324.

damages, and, in obedience to the court's instruction, included in their assessment of damages improper elements, and it is impossible to ascertain precisely how much the verdict was increased thereby, a remittitur is insufficient to redress the error, and a new trial must be granted.[27] So in an action for liquidated damages, where the verdict is excessive, and it is evident that the error in assessing the damages arose from a misconception of the evidence, which probably affected the determination of the other issues, a new trial will be awarded, instead of permitting a remittitur of the excess,[28] and where the damages given are so excessive as to clearly indicate passion or prejudice on the part of the jury, the same rule applies.[29]

(c) *In Actions For Unliquidated Damages.* Where, however, the damages sought are unliquidated, as in actions for personal injuries, or other cases sounding in tort, where there is no positive criterion for determining what the damages ought to be, a difference of opinion exists as to the right of the trial court to give plaintiff the option of remitting the excess of damages or suffering a new trial. Some decisions unequivocally deny the right in actions for unliquidated damages.[30] On the other hand other courts have expressly extended the application of the doctrine to this class of cases,[31] while still other cases have recognized

27. Smith *v.* Dukes, 5 Minn. 373; Slattery *v.* St. Louis, 120 Mo. 183, 25 S. W. 521; Loder *v.* Jayne, 142 Fed. 1010 [*reversed* on other grounds in 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. N. S. 984]. See also Nickey *v.* Zonker, 22 Ind. App. 211, 53 N. E. 478.

28. Lenzen *v.* Miller, 51 Nebr. 855, 71 N. W. 715.

29. See *infra*, IV, O, 6, i, (II), (D).

30. *Arizona.*— Southern Pac. Co. *v.* Fitchett, (1905) 80 Pac. 359, injury to feelings.

Georgia.— Tifton, etc., R. Co. *v.* Chastain, 122 Ga. 250, 50 S. E. 105; Daniel *v.* Bailey, 118 Ga. 408, 45 S. E. 379; Georgia Cent. R. Co. *v.* Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210; Brunswick Light, etc., Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11; Savannah, etc., R. Co. *v.* Harper, 70 Ga. 119.

Kentucky.— Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184; Brown *v.* Morris, 3 Bush 81.

South Dakota.— Murray *v.* Leonard, 11 S. D. 22, 75 N. W. 272.

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512; Vinal *v.* Core, 18 W. Va. 1. But see Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957, *dictum* discussing and disapproving the two preceding cases.

See 37 Cent. Dig. tit. "New Trial." § 324.

If the excess is not due to inadvertence or errors in calculation, but is excessive in view of the character and extent of the injuries sustained, it is the duty of the court to award a new trial, and the error of its failure to do so cannot be cured by ordering a remission of a portion of the sum adjudged to be excessive. Atchison, etc., R. Co. *v.* Richards, 58 Kan. 344, 49 Pac. 436.

31. *California.*— Davis *v.* Southern Pac. Co., 98 Cal. 13, 32 Pac. 646; Gregg *v.* San Francisco, etc., R. Co., 59 Cal. 312.

Colorado.— Sills *v.* Hawes, 14 Colo. App. 157, 59 Pac. 422.

Illinois.— Chicago City R. Co. *v.* Gemmill, 209 Ill. 638, 71 N. E. 43; Union Rolling Mill Co. *v.* Gillen, 100 Ill. 52. But in Thomas *v.* Fischer, 71 Ill. 576, it was held that where a jury has passed upon a question of unliquidated damages, although the court has no right to direct plaintiff to remit on account of the damages being excessive, yet, if plaintiff, on a motion for a new trial being made, voluntarily remits part of the damages, the verdict for the balance must stand.

Indiana.—Cleveland, etc., R. Co. *v.* Beckett, 11 Ind. App. 547, 39 N. E. 429, including injury to feelings.

Iowa.— Brockman *v.* Berryhill, 16 Iowa 183.

Nebraska.— Wainwright *v.* Satterfield, 52 Nebr. 403, 72 N. W. 359.

Pennsylvania.—Myers *v.* Litts, 3 Lack. Leg. N. 363; Jewell *v.* Union Co., 20 Leg. Int. 36.

Tennessee.— Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088; Branch *v.* Bass, 5 Sneed 366.

Texas.— The Texas courts formerly denied the power to require a remittitur in actions to recover damages for torts (Gulf, etc., R. Co. *v.* Redeker, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887; Gulf, etc., R. Co. *v.* Coon, 69 Tex. 730, 7 S. W. 492; Thomas *v.* Womack, 13 Tex. 580; Clapp *v.* Walters, 2 Tex. 130; McCormick Harvesting Mach. Co. *v.* Wesson, (Civ. App. 1897) 41 S. W. 725; Missouri, etc., R. Co. *v.* Perry, 8 Tex. Civ. App. 78, 27 S. W. 496 (voluntary remittitur in personal injury case); Clifford *v.* Lee, (Civ. App. 1893) 23 S. W. 843; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 156 (damages to property); but the rule has been changed by statute (St. Louis Southwestern R. Co. *v.* Price, (Civ. App. 1906) 99 S. W. 120; Ft. Worth, etc., R. Co. *v.* Linthicum, (Civ. App. 1903) 77 S. W. 40; Houston, etc., R. Co. *v.* Jackson, (Civ. App. 1901) 61 S. W. 440; Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622).

Wisconsin.— Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468.

See 37 Cent. Dig. tit. "New Trial," § 324.

the practice of allowing a remittitur, although the question of its propriety is not discussed.[32]

(D) *Effect of Prejudice or Passion.* In most jurisdictions a remittitur to prevent a new trial is proper or permissible only where the excessive damages do not appear to have been given under the influence of prejudice or passion,[33] and not where they appear to have been so given.[34] In some of these decisions a distinction is made between cases in which prejudice and passion appear to have

32. *California.*— Phelps *v.* Cogswell, 70 Cal. 201, 11 Pac. 628; Kinsey *v.* Wallace, 36 Cal. 462; Benedict *v.* Cozzens, 4 Cal. 381; George *v.* Law, 1 Cal. 363.

Connecticut.— North *v.* New Britain, (1904) 58 Atl. 699 (personal injury); Platt *v.* Brown, 30 Conn. 336.

District of Columbia.—Hennessy *v.* District of Columbia, 19 D. C. 220; Sinclair *v.* Washington, etc., R. Co., MacArthur & M. 13.

Illinois.— Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191 (personal injury); Haymarket Theater Co. *v.* Rosenberg, 77 Ill. App. 183; West Chicago St. R. Co. *v.* Wheeler, 73 Ill. App. 368; Illinois Cent. R. Co. *v.* Robinson, 58 Ill. App. 181; Clayton *v.* Brooks, 31 Ill. App. 62 [*affirmed* in 150 Ill. 97, 37 N. E. 574].

Indiana.— Evansville, etc., Traction Co. *v.* Broermann, (App. 1907) 80 N. E. 972; Cleveland, etc., R. Co. *v.* Beckett, 11 Ind. App. 547, 39 N. E. 429.

Iowa.— Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743; Noel *v.* Dubuque, etc., R. Co., 44 Iowa 293.

Maine.— Snow *v.* Weeks, (1887) 8 Atl. 462.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500, personal injury.

New Hampshire.— Belknap *v.* Boston, etc., R. Co., 49 N. H. 358.

New Mexico.— Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

New York.— Lawrence *v.* Wilson, 86 N. Y. App. Div. 472, 83 N. Y. Suppl. 821; Mooney *v.* Press Pub. Co., 58 N. Y. App. Div. 613, 68 N. Y. Suppl. 739. But see Sourwine *v.* Truscott, 25 Hun 67, holding a remittitur improper where the damages are unliquidated.

Utah.— Kennedy *v.* Oregon Short Line R. Co., 18 Utah 325, 54 Pac. 988; Reddon *v.* Union Pac. R. Co., 5 Utah 344, 15 Pac. 262.

Washington.— Bailey *v.* Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334.

Wisconsin.— Heimlich *v.* Tabor, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Gillen *v.* Minneapolis, etc., R. Co., 91 Wis. 633, 65 N. W. 373; Murray *v.* Buell, 74 Wis. 14, 41 N. W. 1010.

United States.— Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755; Darnell *v.* Kronse, 134 Fed. 509; Bierbach *v.* Goodyear Rubber Co., 15 Fed. 490; Warren *v.* Robertson, 29 Fed. Cas. No. 17,198*a*.

England.— Belt *v.* Lawes, 12 Q. B. D. 356, 53 L. J. Q. B. 249, 50 L. T. Rep. N. S. 441, 32 Wkly. Rep. 607; Harris *v.* Arnott, L. R. 26 Ir. 55.

See 37 Cent. Dig. tit. "New Trial," § 324.

33. *Georgia.*— Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187, voluntary remittitur.

Iowa.— Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790, personal injury.

Kansas.— Argentine *v.* Bender, 71 Kan. 422, 80 Pac. 935; Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244 (personal injury); Haldeman *v.* Johnson, 8 Kan. App. 473, 54 Pac. 507.

Ohio.— Pendleton St. R. Co. *v.* Rahmann, 22 Ohio St. 446, personal injury.

Oregon.— Adcock *v.* Oregon R. Co., 45 Oreg. 173, 77 Pac. 78, personal injury.

See 37 Cent. Dig. tit. "New Trial," § 326.

34. *Arizona.*— Southern Pac. Co. *v.* Fitchett, (1905) 80 Pac. 359.

Colorado.— F. M. Davis Iron Works Co. *v.* White, 31 Colo. 82, 71 Pac. 384.

Georgia.—Savannah, etc., R. Co. *v.* Harper, 70 Ga. 119, personal injury.

Illinois.— Loewenthal *v.* Streng, 90 Ill. 74; Chicago Belt R. Co. *v.* Charters, 123 Ill. App. 322; Close *v.* Hinsley, 104 Ill. App. 65, breach of contract.

Kansas.— Argentine *v.* Bender, 71 Kan. 422, 80 Pac. 935; Atchison *v.* Plunkett, 61 Kan. 297, 59 Pac. 646; Atchison, etc., R. Co. *v.* Richards, 58 Kan. 344, 49 Pac. 436; Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78; Bell *v.* Morse, 48 Kan. 601, 29 Pac. 1086; Parsons, etc., R. Co. *v.* Montgomery, 46 Kan. 120, 26 Pac. 403; Steinbuchel *v.* Wright, 43 Kan. 307, 23 Pac. 560; Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 15 Pac. 499.

Minnesota.— Plaunt *v.* Minneapolis R. Transfer Co., 90 Minn. 499, 97 N. W. 433.

Oregon.— Adcock *v.* Oregon R. Co., 45 Oreg. 173, 77 Pac. 78.

South Dakota.— Murray *v.* Leonard, 11 S. D. 22, 75 N. W. 272.

Texas.— Thomas *v.* Womack, 13 Tex. 580.

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512 (personal injuries); Vinal *v.* Core, 18 W. Va. 1 (malicious prosecution).

United States.— Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

Canada.— McKay *v.* Woodill, 6 Can. L. T. 143, 18 Nova Scotia 88. See also Key *v.* Thomson, 12 N. Brunsw. 295.

See 37 Cent. Dig. tit. "New Trial," § 326.

affected the damages recovered only, in which remittiturs are permissible,[35] and cases in which they may have influenced the findings on other issues, in which new trials must be granted absolutely.[36]

(E) *Interest.* Where interest has been allowed by the jury improperly, or at an excessive rate, a remittitur of all interest, or of the excessive interest if ascertainable, will cure the error.[37]

(F) *Existence of Other Grounds Than Excessive Recovery.* As a general rule a verdict which is contrary to law or not sustained by the evidence as to any issue other than the measure of damages,[38] or which is affected by misconduct of the jury,[39] or by the misconduct of the prevailing party or his counsel,[40] cannot be cured by a remittitur of part of the amount recovered. But the court may refuse to grant a new trial, if plaintiff will remit the whole amount claimed under a separate count as to which a new trial is sought,[41] or the whole of a distinct item or element of claim not sustained by the evidence,[42] or the whole of a separable item or element of claim as to which an improper instruction was given,[43] or in support of which improper evidence was admitted,[44] or the whole amount of an alleged credit or set-off which was improperly disallowed or as to which

But see Belknap *v.* Boston, etc., R. Co., 49 N. H. 358.

35. Trow *v.* White Bear, 78 Minn. 432, 80 N. W. 1117; Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712; McNamara *v.* McNamara, 108 Wis. 613, 84 N. W. 901; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237; Murray *v.* Buell, 74 Wis. 14, 41 N. W. 1010.

36. Chicago, etc., R. Co. *v.* Cummings, 20 Ill. App. 333; Atchison *v.* Plunkett, 61 Kan. 297, 59 Pac. 646; Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500; McNamara *v.* McNamara, 108 Wis. 613, 84 N. W. 901; Stafford *v.* Pawtucket Haircloth Co., 22 Fed. Cas. No. 13,275, 2 Cliff. 82.

37. *California.*— Clark *v.* Gridley, 35 Cal. 398, provided the rate allowed is clear.

Georgia.— Teasley *v.* Bradley, 120 Ga. 373, 47 S. E. 925; Brinson *v.* Reid, 107 Ga. 250, 33 S. E. 31; Steadman *v.* Simmons, 39 Ga. 591.

Kansas.— Marsh *v.* Kendall, 65 Kan. 48, 68 Pac. 1070.

Missouri.— Barton *v.* Odessa, 109 Mo. App. 76, 82 S. W. 1119.

Pennsylvania.— Franklin *v.* Mackey, 9 Lanc. Bar 197.

South Carolina.— Holmes *v.* Misroon, 1 Treadw. 21, 3 Brev. 209. *Compare* Lesesne *v.* Grant, 1 Brev. 403, where amount allowed as interest not ascertainable.

See 37 Cent. Dig. tit. "New Trial," § 327.

38. Close *v.* Hinsley, 104 Ill. App. 65; Miller *v.* Hogan, 81 Minn. 312, 84 N. W. 40; Doty *v.* Steinberg, 25 Mo. App. 328; Stafford *v.* Pawtucket Haircloth Co., 22 Fed. Cas. No. 13,275, 2 Cliff. 82.

39. Darland *v.* Wade, 48 Iowa 547, holding that where a quotient verdict is rendered, the court is not authorized to accept a remittitur of all but the lowest amount which any juror was disposed to give.

40. Wabash R. Co. *v.* Mahoney, 79 Ill. App. 53. See also Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500.

41. McElhone *v.* Wilkinson, 121 Iowa 429, 96 N. W. 868.

42. *Georgia.*—Cramer *v.* Huff, 114 Ga. 981, 41 S. E. 57; Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446 (improper allowance of attorney's fee); Loyd *v.* Hicks, 31 Ga. 140.

Minnesota.— Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, 46 N. W. 79, tortious death.

New Jersey.— Vanderbeck *v.* Paterson, 68 N. J. L. 584, 53 Atl. 216.

Pennsylvania.— Moore *v.* Hollenbach, 2 Woodw. 99.

Texas.— Clapp *v.* Walters, 2 Tex. 130.

Virginia.— James River, etc., Co. *v.* Adams, 17 Gratt. 427.

Where a verdict for the recovery of real property is just, but the damages awarded for its detention are excessive, the verdict should be allowed to stand if plaintiff will remit all the damages. Carpentier *v.* Gardiner, 29 Cal. 160; Baughman *v.* New York Nat. Waterworks Co., 58 Mo. App. 576.

43. *Connecticut.*—Platt *v.* Brown, 30 Conn. 336.

Kentucky.— Johnson *v.* Johnson, 104 Ky. 714, 47 S. W. 883, 20 Ky. L. Rep. 890.

Massachusetts.— Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray 456.

New York.— Hayden *v.* Florence Sewing Mach. Co., 54 N. Y. 221.

South Dakota.— Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322.

United States.— Knapp *v.* Williamsport Nat. Bank, 15 Fed. 333; Cowing *v.* Rumsey, 6 Fed. Cas. No. 3,296, 8 Blatchf. 36, 4 Fish. Pat. Cas. 275. But where there is nothing in the record by which to apportion the damages that might be attributable to an improper instruction, a new trial must be granted. Jacoby *v.* Johnson, 120 Fed. 487, 56 C. C. A. 637.

England.— Moore *v.* Tuckwell, 1 C. B. 607, 15 L. J. C. P. 153, 50 E. C. L. 607.

44. Stickney *v.* Bronson, 5 Minn. 215; Scott *v.* Lilienthal, 9 Bosw. (N. Y.) 224 (although such evidence not excepted to); Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644. *Compare* Brown *v.* Jones, 5 Nev. 374, where it was not clear on which count the verdict was rendered.

evidence was improperly excluded.[45] A new trial may be denied where plaintiff will consent to reduce the verdict by the amount that the damages recovered might be reduced by newly discovered evidence.[46]

(G) *Determination of Amount of Remittitur.* It has been held that a voluntary offer to remit should be specific as to the amount which the party is willing to remit, as the court will not undertake to perform the functions of the jury upon an offer to remit so much of the verdict as the court may deem excessive.[47] On the other hand it has been held that, in determining the proper amount by which a verdict should be increased or reduced, reasonable doubt should be resolved in favor of the applicant for a new trial and against the party to whom the election is given.[48]

(H) *Compliance With Order* — (1) IN GENERAL. The prevailing party cannot be compelled to enter a remittitur or submit to a reduction of the amount of the verdict;[49] but, if he voluntarily elects to do so to prevent the granting of a new trial, he cannot be heard to complain afterward of the action of the court in requiring it.[50] He is not entitled to remit as to one defendant and refuse to remit as to another, under an order granting a new trial unless he should elect to take judgment against each for a certain specified sum, the order being entire.[51]

(2) TIME. The remittitur must be entered within the time fixed by an alternative order of court, or the order for a new trial will become absolute;[52] and if the party having the option to remit a part of his recovery or submit to a new trial appeals from the order before the expiration of the time limited therein for the exercise of the option, he is deemed to have exercised his option by the appeal and to have refused to remit, and the appellate court upon affirming the order will not revive the option by fixing a time within which the remittitur may be entered.[53] It has been held that the court may extend the time at the same term, although after the expiration of the original time,[54] but not after the

45. Baldwin *v.* Porter, 12 Conn. 473; Whaley *v.* Broadwater, 78 Ga. 336, 2 S. E. 749; Harper *v.* Parker, 28 Ga. 257.

46. Tyler *v.* North American Transp., etc., Co., 24 Wash. 252, 64 Pac. 162; Darnell *v.* Krouse, 134 Fed. 509.

47. La Salle *v.* Tift, 52 Iowa 164, 2 N. W. 1031. So in Richardson *v.* Birmingham Cotton Mfg. Co., 116 Ala. 381, 22 So. 478, it was held that a new trial may be granted, although plaintiff offers to accept any reduction of the judgment which the court may think proper to make, he not having offered to remit any specific sum.

48. Heimlich *v.* Tabor, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669.

Compensatory and punitive damages.— But it is held that the court cannot apportion the amount of the verdict between compensatory and punitory damages and require a remittitur of the latter. Reed *v.* Keith, 99 Wis. 672, 75 N. W. 392.

49. Brown *v.* McLeisch, 71 Iowa 381, 32 N. W. 385, as to entry of judgment by the court for an amount less than that of verdict. But where the court reduces the verdict, and plaintiff does not except thereto or appeal, the sum fixed by the court will be considered the amount of the verdict. Van Winter *v.* Henry County, 61 Iowa 684, 17 N. W. 94.

50. *Colorado.*— Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630.

Florida.— Pensacola Gas Co. *v.* Pebley, 25 Fla. 381, 5 So. 593.

Tennessee.— Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088; State *v.* Nonconnah Turnpike Co., (1875) 17 S. W. 128.

Virginia.— Lynchburg Tel. Co. *v.* Booker, 103 Va. 594, 50 S. E. 148.

United States.—Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889.

See 37 Cent. Dig. tit. "New Trial," § 328.

"Under protest."— A party cannot enter a remittitur "under protest," when the court determines that the verdict is excessive and that a new trial shall be granted unless a remittitur is entered. Such a remittitur should not be received, and if received and the excessive verdict is not remedied, the new trial must be ordered. Massadillo *v.* Nashville, etc., R. Co., 89 Tenn. 661, 15 S. W. 445.

51. Glencoe First Nat. Bank *v.* Lincoln, 39 Minn. 473, 40 N. W. 573.

52. Thompson *v.* Davison, 113 Ga. 109, 38 S. E. 306; Harris *v.* Georgia Cent. R. Co., 103 Ga. 495, 30 S. E. 425; Crew *v.* McCafferty, 124 Pa. St. 200, 16 Atl. 743, 10 Am. St. Rep. 578. Where the prevailing party has filed a refusal to modify a judgment in compliance with the order of the court, a new trial may be ordered without further notice to him. Eaton *v.* Jones, 107 Cal. 487, 40 Pac. 798.

53. Swett *v.* Gray, 141 Cal. 63, 74 Pac. 439.

54. Campbell *v.* Pittsburg Bridge Co., 23 Pa. Super. Ct. 138; Hutton *v.* Morrison, 10 Pa. Super. Ct. 364, entered *nunc pro tunc.*

term,[55] and it would seem that, if no time is prescribed in the order within which the release is to be perfected, it should be made pending the term.[56]

j. Compliance With Order Generally. A party who has accepted the terms or conditions of an order cannot be heard to complain that it was improper.[57] And, upon failure of the person given the election to comply with the conditions imposed, the order becomes absolute.[58]

7. Order For Dismissal or Judgment. Generally the court, on finding cause for setting aside a verdict or decision, should order a new trial rather than change or modify the verdict or decision or render judgment for the movant,[59] or dismiss the action for insufficiency of evidence,[60] or defects in the pleadings;[61] but the cause should again be set down on the docket and assigned for trial in due course.[62] But in some jurisdictions, under statutes, the court may modify the findings or render judgment for the movant, where the evidence of controlling facts is undisputed,[63] and the practice of entering an order which in effect corrects the verdict

Where a renunciation of title to property filed within the time required by order of court was held bad because made by counsel, additional time to secure the personal renunciation of the client, who was a non-resident, should have been given. Hill *v.* Printup, 67 Ga. 731.

55. Crew *v.* McCafferty, 124 Pa. St. 200, 16 Atl. 743, 10 Am. St. Rep. 578, as to changing original order not in accordance with the facts.

Where the order was granted in vacation, granting a new trial unless plaintiffs should within a specified number of days write off a certain amount, and this was not done within the time so prescribed, it was held that a new trial resulted and that the court had no authority at a subsequent term to pass an order allowing plaintiff to write off the amount *nunc pro tunc*. Thompson *v.* Davison, 113 Ga. 109, 38 S. E. 306.

56. Stephenson *v.* Mansony, 4 Ala. 317, where plaintiff was required to remit a certain part of the damages assessed by the jury, in default of which a new trial was granted upon payment of all costs, and shortly after the adjournment of the term defendants paid the costs but plaintiff did not release the damages until the second term thereafter, and it was held that the costs were paid in time and that if the failure to release the damages at the time when the order was made could not be regarded as an assent that the case should be retried, its reinstatement and continuance without objection at the succeeding term must have that effect.

57. Battelle *v.* Connor, 6 Cal. 140; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210; Prunty *v.* Mitchell, 30 Gratt. (Va.) 247. See also *supra*, IV, O, 6, i, (II), (G).

58. Bonelli *v.* Jones, 26 Nev. 176, 65 Pac. 374, holding that the filing of written consent subject to a condition named therein not authorized by the order is equivalent to a rejection of the proposed terms. See also Mabley *v.* Judge Super. Ct., 41 Mich. 31, 1 N. W. 985, as to the vacation of the order upon a departure therefrom by the party who was to perform certain conditions.

The suing out a writ of error and noncompliance with a conditional order for a new trial constitute a waiver of the new trial. Edwards *v.* Lewis, 18 Ala. 494; Stephens *v.* Brodnax, 5 Ala. 258. *Compare* Tannenbaum *v.* Tankersly, 52 Ala. 489. But that an appeal from the order by the prevailing party prevented the fulfilment of conditions imposed does not release the movant from fulfilling them on the affirmance of the order. Stokes *v.* Stokes, 38 N. Y. App. Div. 215, 56 N. Y. Suppl. 637.

59. *California.*— Mitchell *v.* Hackett, 14 Cal. 661.

Florida.— Baggett *v.* Savannah, etc., R. Co., 45 Fla. 184, 34 So. 564.

Illinois.— Travers *v.* Wormer, 13 Ill. App. 39 (on findings by court without jury); Harms *v.* Jacobs, 4 Ill. App. 169.

Indiana.— Wright *v.* Hawkens, 36 Ind. 264.

Massachusetts.— Phillips *v.* Granger, 134 Mass. 475.

Missouri.— Hurley *v.* Kennally, 186 Mo. 225, 85 S. W. 357.

See also 37 Cent. Dig. tit. "New Trial," § 333.

Upon report of referee.— But in Russell *v.* Dufresne, 1 Alaska 575, upon the report of a referee the court made findings and rendered judgment and a new trial was granted because wrong findings of fact and conclusions of law were drawn by the court from the testimony, and it was held not necessary or proper to require or permit the evidence to be taken *de novo*, but that the court should make correct findings and conclusions from the evidence already taken, and render judgment thereon.

In appellate court see Appeal and Error, 3 Cyc. 424 *et seq.*

60. Eagan *v.* Hyde, 84 N. Y. Suppl. 540, where there is any evidence to support a verdict.

61. Ives *v.* Jacobs, 2 N. Y. Suppl. 730.

62. State *v.* Blackman, 110 La. 266, 34 So. 438.

63. Gunn *v.* Union R. Co., 26 R. I. 112, 58 Atl. 452 (under statute, on petition for new trial); Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109, 84 N. W. 14; Gammon *v.* Abrams, 53 Wis. 323, 10 N. W. 479. See also J. & H. Clasgens Co. *v.* Silber, 87 Wis. 357, 58 N. W. 756. Under the Minnesota statute, providing

and gives to movant all that he is entitled to under the undisputed evidence has been approved.[64]

8. Order Granting or Refusing New Trial[65] — a. Requisites and Sufficiency. Where there is no statute requiring it, an order disposing of a motion for new trial need not specify the papers which were used on such motion.[66] It is not necessary to specifically recite in an order overruling a motion for new trial that the new trial is denied.[67] But the mere issuing of an execution will not warrant the inference that a motion for new trial was overruled.[68] Where a motion for a new trial based on several grounds was sustained on one of them and "no other," it was an explicit overruling of the motion on all other grounds.[69] In the absence of a statutory requirement, an order for a new trial need not recite the grounds upon which it is granted,[70] although in some decisions so holding it is said to be better practice to do so.[71] Statutes providing that an order shall state the grounds thereof are held to be mandatory by some courts[72] and directory by others.[73] Therefore an order granting a new trial will generally be sustained if it can be done on any ground named in the application, where the order names no ground,[74]

such remedy in favor of one who was entitled to a directed verdict on the trial and moved therefor, the movant must have asked for judgment in his papers on his motion for a new trial. Kernan *v.* St. Paul City R. Co., 64 Minn. 312, 67 N. W. 71.

The English court of appeal or a divisional court may enter judgment when satisfied that the verdict is perverse and that no further evidence can be given. Allcock *v.* Hall, [1891] 1 Q. B. 444, 60 L. J. Q. B. 416, 64 L. T. Rep. N. S. 309, 39 Wkly. Rep. 443; Williams *v.* Mercier, 9 Q. B. D. 337, 51 L. J. Q. B. 594, 47 L. T. Rep. N. S. 140, 30 Wkly. Rep. 270; Hamilton *v.* Johnson, 5 Q. B. D. 263, 49 L. J. Q. B. 155, 41 L. T. Rep. N. S. 461, 28 Wkly. Rep. 879; Yorkshire Banking Co. *v.* Beatson, 5 C. P. D. 109, 49 L. J. C. P. 380, 42 L. T. Rep. N. S. 455, 28 Wkly. Rep. 879; Daun *v.* Simmons, 48 L. J. C. P. 343, 40 L. T. Rep. N. S. 556 [*affirmed* in 44 J. P. 264, 41 L. T. Rep. N. S. 783, 28 Wkly. Rep. 129]. The court cannot consider evidence, the meaning and effect of which were not brought before the jury. Royal Mail Steam Packet Co. *v.* George, [1900] A. C. 480, 69 L. J. P. C. 107, 82 L. T. Rep. N. S. 539. Nor can the court enter judgment in disregard of findings to which no objection has been made. Ogilvie *v.* West Australian Mortg., etc., Corp., [1896] A. C. 257, 65 L. J. P. C. 46, 74 L. T. Rep. N. S. 201.

In Canada the same practice has been followed. Stewart *v.* Rounds, 7 Ont. App. 515.

64. Dawson *v.* Wisner, 11 Iowa 6.

65. **Appealability of order** see Appeal and Error, 2 Cyc. 599, 600.

Necessity of appeal from order to obtain review see Appeal and Error, 2 Cyc. 599, 600.

Statutory new trial as of right see *infra*, VI, C, 7, c.

66. Mahoney *v.* Dixon, 31 Mont. 107, 77 Pac. 519.

67. McMahon *v.* Polk, 10 S. D. 296, 73 N. W. 77, 47 L. R. A. 830.

Insufficient entry.— The word "off" found upon the docket of the term under the entry showing the filing of a motion for new trial does not amount to an entry of the overruling of a motion for new trial. St. Francis Mill Co. *v.* Sugg, 142 Mo. 358, 44 S. W. 247.

68. St. Francis Mill Co. *v.* Sugg, 142 Mo. 358, 44 S. W. 247.

69. Clyde Milling, etc., Co. *v.* Buoy, 71 Kan. 293, 80 Pac. 591.

70. *Connecticut.*— Reboul *v.* Chalker, 27 Conn. 114.

North Carolina.— Bird *v.* Bradburn, 131 N. C. 488, 42 S. E. 936, where not reviewable.

Pennsylvania.— Fisher *v.* Hestonville, etc., R. Co., 185 Pa. St. 602, 40 Atl. 97; Cronrath *v.* Border, 27 Pa. Super. Ct. 15.

Virginia.— Rixey *v.* Ward, 3 Rand. 52 (unless the cause be one for which the number of successive new trials allowable is limited); Boswell *v.* Jones, 1 Wash. 322 (holding, however, that, where they grant it against an established rule of practice, they ought to disclose the circumstances which induced them to depart from the rule).

Wisconsin.— Schraer *v.* Stefan, 80 Wis. 653, 50 N. W. 778.

See 37 Cent. Dig. tit. "New Trial," § 333.

71. Fisher *v.* Hestonville, etc., Pass. R. Co., 185 Pa. St. 602, 40 Atl. 97; Cronrath *v.* Border, 27 Pa. Super. Ct. 15; Schraer *v.* Stefan, 80 Wis. 653, 50 N. W. 778.

72. Gitelson *v.* Weisburg, 36 Misc. (N. Y.) 214, 73 N. Y. Suppl. 195.

73. Borkheim *v.* Fireman's Fund Ins. Co., 38 Cal. 505; Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018; McDaniel *v.* Strohecker, 19 Ga. 432; Taylor *v.* Kansas City, etc., R. Co., 163 Mo. 183, 63 S. W. 375; Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; Roman *v.* Boston Trading Co., 87 Mo. App. 186; Edwards *v.* Missouri R. Co., 82 Mo. App. 478; O'Meara *v.* Swandson, 62 Mo. App. 71; State *v.* Edwards, 35 Mo. App. 680, holding that the rule applies at least where prevailing party does not move the court to specify the grounds.

74. Oullahan *v.* Starbuck, 21 Cal. 413; Ortt *v.* Leonhardt, (Mo. App. 1902) 68 S. W. 577; Roman *v.* Boston Trading Co., 87 Mo. App. 186.

or the language of the order does not necessarily exclude such ground.[75] Under some statutes counsel for the applicant may require the judge to file written reasons for denying the motion.[76] Where the movant took many exceptions at the trial to rulings on the evidence, an order reciting the granting of a new trial for errors committed on the trial prejudicing him is sufficient;[77] and the order made in the minutes of the court, instead of stating the grounds of the motion at length, may refer to the specification of errors and insufficiency of evidence set forth in the bill of exceptions or statement of the case for the particulars.[78]

b. Effect.[79] An order for a new trial, not expressly limited to particular issues or parties, opens up the whole case for further proceedings.[80] It vacates the verdict[81] and special findings[82] and a judgment entered thereon,[83] even though it contains no express direction to that effect. Nevertheless if an appeal is taken from the order granting a new trial, it suspends the operation of the order, and pending such appeal the judgment remains subsisting for the purposes of an appeal therefrom, as if no order for new trial had been made.[84] Where the verdict is general, an order granting a new trial as to one cause of action opens the whole case.[85]

9. Rehearing of Application and Vacation or Modification of Order[86] **— a. In General.** Probably in most jurisdictions a motion may be reheard, vacated, or modified for any reasonable cause during the term at which the ruling was made.[87] But where a new trial has been granted under specific conditions with which the

75. O'Meara *v.* Swandson, 62 Mo. App. 71; Reno Mill, etc., Co. *v.* Westfield, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899. See also Newbound *v.* Interurban St. R. Co., 42 Misc. (N. Y.) 525, 86 N. Y. Suppl. 68, as to recital of grounds in order.

But the granting of a new trial upon a ground stated in the order has been held to amount to a denial thereof upon all other grounds named in the application. Long *v.* Bullard, 69 Ga. 678.

Where the court grants a new trial on a ground not stated in the motion, it has been held that it in effect overrules the motion. Vastine *v.* Rex, 93 Mo. App. 93.

76. Cronin *v.* Philadelphia Fire Assoc., 123 Mich. 277, 82 N. W. 45.

77. Gitelson *v.* Weisberg, 36 Misc. (N. Y.) 214, 73 N. Y. Suppl. 195.

78. Williams *v.* Hawley, 144 Cal. 97, 77 Pac. 762.

79. **On conclusiveness of adjudication** see JUDGMENTS.

On operation of judgment as a bar see JUDGMENTS.

80. *California.*—Kent *v.* Williams, 146 Cal. 3, 79 Pac. 527.

Connecticut.— Zaleski *v.* Clark, 45 Conn. 397.

Georgia.— Bourquin *v.* Bourquin, 110 Ga. 440, 35 S. E. 710.

Illinois.— Brenner *v.* Coerber, 42 Ill. 497.

Maine.— Tuttle *v.* Gates, 24 Me. 395.

See 37 Cent. Dig. tit. "New Trial," § 331.

81. Delano *v.* Bennett, 61 Ill. 83.

82. Fitzpatrick *v.* Papa, 89 Ind. 17; Hollenbeck *v.* Marshalltown, 62 Iowa 21, 17 N. W. 155; Ruble *v.* Atkins, 39 Iowa 694; McCrum *v.* Corby, 15 Kan. 112; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974.

The right to judgment on special findings is barred by an order for a new trial. Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Hollenbeck *v.* Marshalltown, 62 Iowa 21, 17 N. W. 155.

83. *Arkansas.*— Randolph *v.* McCain, 34 Ark. 696.

California.— Wheeler *v.* Kassabaum, 76 Cal. 90, 18 Pac. 119; Wittenbrock *v.* Bellmer, 62 Cal. 558 (as to parties to whom a new trial is granted); Bauder *v.* Tyrrel, 59 Cal. 99; Thompson *v.* Smith, 28 Cal. 527.

Connecticut.— Fleming *v.* Lord, 1 Root 214.

District of Columbia.— Evans *v.* Humphreys, 9 App. Cas. 392.

Indiana.— State *v.* Templin, 122 Ind. 235, 23 N. E. 697.

Iowa.— Means *v.* Yeager, 96 Iowa 694, 65 N. W. 993; Low *v.* Fox, 56 Iowa 221, 19 N. W. 131.

Louisiana.— State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637.

Oklahoma.— Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869.

See 37 Cent. Dig. tit. "New Trial," § 331.

84. Pierce *v.* Birkholm, 110 Cal. 669, 43 Pac. 205 [*criticizing dictum* in Kower *v.* Gluck, 33 Cal. 401]. And see Mountain Tunnel Gravel Min. Co. *v.* Bryan, 111 Cal. 36, 43 Pac. 410, holding that an order granting a new trial, until affirmed on appeal, or until the time to appeal has expired, does not have the effect of vacating the judgment so as to prevent an appeal from being taken therefrom.

85. Lampley *v.* Atlantic Coast Line R. Co., 63 S. C. 462, 41 S. E. 517.

86. **Mandamus to set aside order** see MANDAMUS, 26 Cyc. 208.

Order for statutory new trial as of right see *infra*, VI, C, 7, c.

Successive applications see *supra*, I, D, 5.

87. *Iowa.*— Dawson *v.* Wisner, 11 Iowa 6.

Nebraska.— Snow *v.* Vandeveer, 33 Nebr. 735, 51 N. W. 127, as where the supreme

party complies he acquires a right of which the court cannot deprive him by a subsequent revocation of its order.[88] In some jurisdictions where a motion for a new trial has been regularly submitted, a ruling thereon cannot be subsequently vacated on motion or a subsequent hearing had of another motion based upon the same grounds as the basis of another order; but the only remedy is by proper proceedings for review in the appellate court,[89] at least where there is no showing of irregularity, fraud, unavoidable casualty, or misfortune;[90] but if the ruling is premature it is irregular and should be vacated on motion.[91] A motion will not be

court rendered a decision in a similar case contrary to the ruling of the trial court.

New York.— Matthews *v.* Herdtfelder, 60 Hun 521, 15 N. Y. Suppl. 165 (especially where order on motion never signed or filed); Herzig *v.* Metzger, 62 How. Pr. 355.

Ohio.— Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879, holding that an application for a rehearing of a motion for a new trial need not be in writing, nor be made within the time after the entry of the order denying the new trial, limited for moving for a new trial.

Texas.— Watson *v.* Williamson, (Civ. App. 1903) 76 S. W. 793 (before passing on an application for change of venue); Hume *v.* John B. Hood Camp Confederate Veterans, (Civ. App. 1902) 69 S. W. 643; Nowlin *v.* Hughes, 2 Tex. App. Civ. Cas. § 313.

See 37 Cent. Dig. tit. "New Trial," § 334.

Filing other grounds.— While the court may, as a general rule, set aside orders made during the same term at which they were entered, and, under this well-recognized rule of practice, may set aside the order refusing a new trial and grant one, to permit counsel, after the motion has been overruled, to file other grounds, is in violation of the spirit and meaning of the code. Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63. See also Timony *v.* Casey, 20 R. I. 257, 38 Atl. 370, on motion to reargue petition where newly discovered evidence is merely impeaching.

Effect of vacating.— Where an order granting a new trial is vacated, the verdict and judgment thereon, if any, remain in full force. Com. *v.* Miller, 6 Dana (Ky.) 315; Holmes *v.* McKinney, 4 T. B. Mon. (Ky.) 4; Brevard *v.* Graham, 2 Bibb (Ky.) 177.

Notice.— The parties being in court for all purposes of the case until the end of the term, they are held to have constructive notice of all proceedings in the cause, so that the vacation of the first order and entry of a different one without actual notice is valid. Nowlin *v.* Hughes, 2 Tex. App. Civ. Cas. § 313.

88. Reiber *v.* Boos, 110 Pa. St. 594, 1 Atl. 422 (payment of costs); Van Vliet *v.* Conrad, 95 Pa St. 494.

89. Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11; Dorland *v.* Cunningham, 66 Cal. 484, 6 Pac. 135; Odd Fellows' Sav. Bank *v.* Deuprey, 66 Cal. 168, 4 Pac. 1173; Coombs *v.* Hibberd, 43 Cal. 452; Lang *v.* San Francisco Super. Ct., 71 Cal. 491, 12 Pac. 306, 416; Crosby *v.* North Bananza Silver Min. Co., 23 Nev. 70, 42 Pac. 583; Lookabaugh *v.* Cooper, 5 Okla. 102, 48 Pac. 99; Coyle *v.* Seattle Electric Co., 31 Wash. 181, 71 Pac. 733, where there are no "terms" of court. The rule applies to the successor of the trial judge. Burnham *v.* Spokane Mercantile Co., 18 Wash. 207, 51 Pac. 363. See also State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637 (as to the revoking of an order granting a new trial by the police board of the city of New Orleans, upon a conviction of parties tried by it for infractions of its rules and regulations); Jeansch *v.* Lewis, 1 S. D. 609, 48 N. W. 128 (as to overruling of motion by former judge not entered of record, evidence being received to show that the motion had been overruled, the court holding that such motion cannot be renewed except by leave of court and that this leave is a matter of discretion); Grantham *v.* U. S., 28 Ct. Cl. 528.

Modification of order.— The rule applies to motions to modify the original order. Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11, holding that where a new trial is granted on condition that defendant pay to plaintiff the costs of trial, a subsequent order of the trial court making the previous order absolute, on refusal of plaintiff to accept the amount because of intention to appeal therefrom, is void.

90. Lookabaugh *v.* Cooper, 5 Okla. 102, 48 Pac. 99.

Erroneous order.— In Coyle *v.* Seattle Electric Co., 31 Wash. 669, 71 Pac. 733, it is held that while under an express statutory provision a trial court may vacate its order awarding a new trial, in case of mistake, inadvertence, etc., it has no authority to vacate such order because it is deemed erroneous.

The denial of a motion on grounds not authorized by the statute does not preclude the hearing of a motion based on statutory grounds. Anglo-Nevada Assur. Corp. *v.* Ross, 123 Cal. 520, 56 Pac. 335.

91. Odd Fellows' Sav. Bank *v.* Deuprey, 66 Cal. 168, 4 Pac. 1173; Hall *v.* Polack, 42 Cal. 218; Morris *v.* De Celis, 41 Cal. 331; Crosby *v.* North Bonanza Silver Min. Co., 23 Nev. 70, 42 Pac. 583, holding that a ruling upon a motion based upon a statement, if made before the statement has been settled and authenticated, should be vacated on motion, but that one who consents to or induces the irregularity cannot complain of it.

Where a motion is heard and overruled in the absence of movant's counsel and after a continuance has been agreed upon, the order may be vacated. Spalding *v.* Meier, 40 Mo. 176.

reheard merely for the purpose of permitting a party to take exceptions or to perfect an appeal not taken in proper time.[92]

b. At Subsequent Term. As a rule a court cannot vacate an order granting or refusing a new trial after the term at which it was entered,[93] unless it is impeached as a nullity;[94] but where the motion to reconsider is made at the same term, it has been held that the court may take it into consideration until the next term, and continue the cause to and determine the motion at that term.[95]

10. Review.[96] The moving party must obtain a ruling on the motion,[97] and an

92. Coan *v.* Grimes, 63 Ind. 21; Stierle *v.* Union R. Co., 11 Misc. (N. Y.) 124, 31 N. Y. Suppl. 1008, as to resettlement of order.

Resettling order.— Where an order, setting aside as inadequate a verdict, properly expresses the decision of the court, a motion to resettle the order so that a new trial should be granted on condition that plaintiff pay costs of the first trial is properly refused, since if any error was committed in granting the original order, or in failing to impose proper terms, it might be reviewed on appeal from the original order without the necessity of appealing from the order declining to resettle. Bloomingdale *v.* Steubing, 10 Misc. (N. Y.) 229, 30 N. Y. Suppl. 1056. So where the court granted a motion for a new trial made on the minutes of all the grounds stated in N. Y. Code Civ. Proc. § 999, which order was reversed and judgment was directed to be entered on the verdict, it was held that defendant could not thereafter have a settlement of the order denying his motion on the ground that the verdict was contrary to the evidence or the law, which grounds were embraced in the above-mentioned section, since the party had a full opportunity to be heard upon the merits and there was no reason for a second appeal upon the same question or one so closely related to the former that it was of necessity disposed of in the determination of the original appeal. Sidmonds *v.* Brooklyn Heights R. Co., 75 N. Y. App. Div. 295, 78 N. Y. Suppl. 129.

Hearing on settled case.— Where a motion for a new trial is made on the minutes it is not necessary to determine the motion *de novo* on a settled case, since a settled case is only for the purposes of the appeal. J. I. Case Threshing Mach. Co. *v.* Huffman, 86 Minn. 30, 90 N. W. 5.

93. *Arkansas.*—Brooks *v.* Hanauer, 22 Ark. 174.

Illinois.— Becker *v.* Sauter, 89 Ill. 596.

Kansas.— Missouri Pac. R. Co. *v.* Mayberry, 63 Kan. 881, 64 Pac. 989; Kingman *v.* Chubb, 8 Kan. App. 167, 55 Pac. 474; Kauter *v.* Fritz, 5 Kan. App. 756, 47 Pac. 187.

Kentucky.— Louisville Rock, etc., Co. *v.* Kerr, 78 Ky. 12.

New York.— Mellen *v.* Mellen, 16 N. Y. Suppl. 191, 21 N. Y. Civ. Proc. 301, 27 Abb. N. Cas. 99; Rebhun *v.* Swartwout, 3 N. Y. Suppl. 419.

Texas.— Puckett *v.* Reed, 37 Tex. 308; Metzger *v.* Wendles, 35 Tex. 378; San Antonio *v.* Dickman, 34 Tex. 647; Wells *v.* Melville, 25 Tex. 337.

Virginia.— Lavell *v.* Gold, 25 Gratt. 473.

United States.— Smith *v.* Ontario, 22 Fed. Cas. No. 13,086, 17 Blatchf. 240.

See 37 Cent. Dig. tit. "New Trial," § 334.

94. Metzger *v.* Wendler, 35 Tex. 378. But see Coffield *v.* Warren, 72 N. C. 223; Cronrath *v.* Border, 27 Pa. Super. Ct. 15 (control over verdict until judgment entered); Clouser *v.* Hill, 33 Leg. Int. (Pa.) 297.

In vacation.— In Minnesota it is provided that the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered or proceedings had in or out of term, upon good cause shown, set aside or modify its judgments, orders, or proceedings, although the same were made or entered by the court or under or by virtue of its authority, order, or direction. Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923, applied to the setting aside of an order on a motion for a new trial, within the time for appeal.

Striking from docket.— An erroneous order granting a new trial is not a nullity, and the cause should not be stricken from the docket at a subsequent term. State *v.* Templin, 122 Ind. 235, 23 N. E. 697; San Antonio *v.* Dickman, 34 Tex. 647. *Compare* Buchannan *v.* Reese, 48 Ala. 553. Another judge should not strike from the docket at an ensuing term a cause in which a new trial has been granted. McClure *v.* Houston, 10 Sm. & M. (Miss.) 392; Lavell *v.* Gold, 25 Gratt. (Va.) 473. See also Morrow *v.* Tunkhannock Ice Co., 9 North. Co. Rep. (Pa.) 254.

95. Rhea *v.* Gibson, 10 Gratt. (Va.) 215.

96. Appealability of order see Appeal and Error, 2 Cyc. 599.

Review of discretion see Appeal and Error, 3 Cyc. 343.

Review on appeal from final judgment see Appeal and Error, 3 Cyc. 225 note 68.

97. *Arkansas.*— Kearney *v.* Moose, 37 Ark. 37.

California.— Meyers *v.* Casey, 14 Cal. 542; Ingraham *v.* Gildermester, 2 Cal. 483.

Illinois.— Henion *v.* Vavrik, 126 Ill. App. 292; Illinois Cent. R. Co. *v.* O'Keefe, 49 Ill. App. 320.

Indian Territory.— Merrill *v.* Martin, 3 Indian Terr. 571, 64 S. W. 539.

Kentucky.— Lyon *v.* Logan County Bank, 78 S. W. 454, 25 Ky. L. Rep. 1668.

Mississippi.— Yazoo, etc., R. Co. *v.* Wallace, (1907) 43 So. 469.

Nebraska.— Leach *v.* Renwald, 45 Nebr. 207, 63 N. W. 387; Jones *v.* Hayes, 36 Nebr. 526, 54 N. W. 858.

Ohio.—Snyder *v.* Wanamaker, 17 Ohio Cir. Ct. 184, 9 Ohio Cir. Dec. 620.

order denying the motion duly entered[98] in order to obtain a review of errors which are grounds for new trial.[99] Orders of trial courts allowing new trials are more favorably considered by appellate courts than orders refusing them.[1] But

Tennessee.— Memphis St. R. Co. *v.* Johnson, 114 Tenn. 632, 88 S. W. 169.

Texas.— Sears *v.* Green, 1 Tex. Unrep. Cas. 727.

See 2 Cent. Dig. tit. "Appeal and Error," § 1757.

Arizona — Effect of special statutory provision.— By a special statutory provision (Act No. 49, Sess. Laws, 1891) if no ruling is made on the motion for new trial it shall be deemed to have been denied and all questions that may have been raised thereby shall be subject to review by the supreme court as if the motion had been overruled and exception reserved and entered on the minutes of the court. Svea Ins. Co. *v.* McFarland, 7 Ariz. 131, 60 Pac. 936.

Where a motion for a new trial was withdrawn as to one defendant, a writ of error attacking the judgment in his favor will be dismissed. Carle *v.* Desoto, 156 Mo. 443, 57 S. W. 113.

Motion overruled at appellant's request.— Where the motion for a new trial was overruled at the special request of counsel representing appellant, assignments of error by appellant relating to the question of damages, and the amount thereof, raise no question on appeal. Atchison, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1905) 86 S. W. 38.

98. Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Wright *v.* Hunter, 46 N. Y. 409; May *v.* Menton, 20 Misc. (N. Y.) 723, 45 N. Y. Suppl. 1047; Chaimson *v.* Menshing, 12 Misc. (N. Y.) 651, 33 N. Y. Suppl. 271; Jagau *v.* Goetz, 11 Misc. (N. Y.) 380, 32 N. Y. Suppl. 144; Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 23 N. Y. Suppl. 675; Smith *v.* Simmons, 21 N. Y. Suppl. 47; Dixon *v.* Mitchell, 12 N. Y. St. 505; Mass *v.* Ellis, 9 N. Y. St. 512; Jones *v.* Sparks, 1 N. Y. St. 476; Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035.

99. **Illustrations of rule.**— Thus the facts on which the jury based its verdict cannot be reviewed on appeal to the general term where no order was entered upon the decision denying new trial. Halsey *v.* Rome, etc., R. Co., 12 N. Y. St. 319.

In Missouri it has been held in a memorandum decision that there can be no valid record of what judgment a court proposes to render in the future, and where the bill of exceptions shows that a motion was to be overruled at a future day there is no cause for review in the appellate court. State *v.* Lanham, 6 Mo. App. 577.

In Kansas it was also held in a memorandum decision that where a motion below for a new trial has not been ruled on the supreme court will affirm the judgment. Wilson *v.* Kestler, 34 Kan. 61, 7 Pac. 793. In neither of these decisions does it appear whether or not the errors relied on for a reversal were such only as might be made the basis of a motion for new trial. If there were other reasons there is no authority on which they can be sustained, because a judgment may be reversed for errors apparent of record without any motion for new trial.

Recital in bill of exceptions.— In one decision it has been held that the omission of the court to enter the order made upon the minute book cannot be supplied by a recital in the bill of exceptions that such motions were made and overruled (Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035); but the contrary conclusion has been reached in another (King *v.* Ohio Valley R. Co., 10 S. W. 631, 10 Ky. L. Rep. 748).

1. Harper *v.* Wilkes, 76 Ga. 106. "One reason for the distinction, to mention none others, is, that the parties can again go to a jury upon the issues joined, and the successful party has an opportunity to obtain a concurring verdict." Shepherd *v.* Brenton, 15 Iowa 84, 91.

Rulings and instructions.— Buchanon *v.* Higginbotham, 42 Ga. 198; Hydinger *v.* Chicago, etc., R. Co., 126 Iowa 222, 101 N. W. 746; Newell *v.* Sanford, 10 Iowa 396; Missouri Pac. R. Co. *v.* Goodrich, 38 Kan. 224, 16 Pac. 439.

On the evidence.— Richardson *v.* Birmingham Cotton Mfg. Co., 116 Ala. 381, 22 So. 478; Odom *v.* Nelms, 24 Ga. 412; Tathwell *v.* Cedar Rapids, 122 Iowa 50, 97 N. W. 96; Holman *v.* Omaha, etc., R., etc., Co., 110 Iowa 485, 81 N. W. 704; Moore *v.* Horton, 105 Iowa 376, 75 N. W. 195; Conklin *v.* Dubuque, 54 Iowa 571, 6 N. W. 894; Shepherd *v.* Brenton, 15 Iowa 84; Ireton *v.* Ireton, 62 Kan. 358, 63 Pac. 429; McCreary *v.* Hart, 39 Kan. 216, 17 Pac. 839; Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545, 76 S. W. 502, 25 Ky. L. Rep. 755; Fitzjohn *v.* St. Louis Transit Co., 183 Mo. 74, 81 S. W. 907; Mason *v.* Onan, 67 Mo. App. 290; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 335; Ensor *v.* Smith, 57 Mo. App. 584; Weber *v.* Kirkendall, 44 Nebr. 766, 63 N. W. 35; Pengilly *v.* J. I. Case Threshing Mach. Co., 11 N. D. 249, 91 N. W. 63; Gull River Lumber Co. *v.* Osborne McMillan Elevator Co., 6 N. D. 276, 69 N. W. 691; Megargel *v.* Waltz, 21 Pa. Co. Ct. 633; Clifford *v.* Latham, 19 S. D. 376, 103 N. W. 642; Kunz *v.* Dinneen, 18 S. D. 262, 100 N. W. 165; Rochford *v.* Albaugh, 16 S. D. 628, 94 N. W. 701; Distad *v.* Shanklin, 11 S. D. 1, 75 N. W. 205; Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455 (especially where there have been conflicting verdicts); Laidley *v.* Kanawha County Ct., 44 W. Va. 566, 30 S. E. 109; Reynolds *v.* Tompkins, 23 W. Va. 229; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452; Jones *v.* Chicago, etc., R. Co., 49 Wis. 352, 5 N. W. 854.

Misconduct of jury.— Bohn *v.* Chicago, etc., R. Co., (Iowa 1899) 78 N. W. 200; Ruble

the determination of the motion upon conflicting evidence or upon affidavits and counter affidavits creating a conflict of evidence will be treated as other decisions upon facts based upon conflicting evidence and ordinarily will not be disturbed.[2]

V. PROCEEDINGS AT NEW TRIAL.[3]

A. Time and Notice of Trial. Upon the allowance of a new trial, the case should be regularly set for hearing.[4] After ordering a new trial, the court cannot immediately take up the case, in the absence of the party in whose favor the judgment was pronounced, or his counsel, and without notice to them, pro-

v. McDonald, 7 Iowa 90; Murphy *v.* Hindman, 37 Kan. 267, 15 Pac. 182.

Accident or surprise.— Clifford *v.* Denver, etc., R. Co., 12 Colo. 125, 20 Pac. 333; Tegeler *v.* Jones, 33 Iowa 234; Pickering *v.* Kirkpatrick, 32 Iowa 163; Ragan *v.* James, 7 Kan. 354; Illinois Cent. R. Co. *v.* Beauchamp, 77 S. W. 1096, 25 Ky. L. Rep. 1429; Jackson *v.* Shapard, 69 S. W. 954, 24 Ky. L. Rep. 713; Gotzian *v.* McCollum, 8 S. D. 186, 65 N. W. 1068. *Compare* McLeod *v.* Shelly Mfg., etc., Co., 108 Ala. 81, 19 So. 326.

Newly discovered evidence.— House *v.* Wright, 22 Ind. 383; Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262; Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Grotte *v.* Schmidt, 80 Iowa 454, 45 N. W. 771; Topeka *v.* Smelser, 3 Kan. App. 17, 44 Pac. 435; Butts *v.* Christy, 67 S. W. 377, 23 Ky. L. Rep. 2355.

2. *Arkansas.*—Arkadelphia *v.* Lumber Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127.

California.— Crawford *v.* Harris, (1896) 45 Pac. 819; Symons *v.* Bunnell, (1889) 20 Pac. 859.

Georgia.— Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187; Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841; Erskine *v.* Duffy, 76 Ga. 602.

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Illinois Cent. R. Co. *v.* Robinson, 58 Ill. App. 181; Chicago, etc., R. Co. *v.* Kuster, 22 Ill. App. 188.

Indiana.— Hamm *v.* Romine, 98 Ind. 77; Miller *v.* Miller, 61 Ind. 471; Mitchell *v.* Chambers, 55 Ind. 289; Harding *v.* Whitney, 40 Ind. 379; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

Iowa.— Wightman *v.* Butler County, 83 Iowa 691, 49 N. W. 1041; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64; McNamara *v.* Dratt, 40 Iowa 413.

Kansas.— Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

Nebraska.— Felton *v.* Moffett, 29 Nebr. 582, 45 N. W. 930 (denial of alleged agreement as to time of trial, the court holding that the motion was properly denied as courts will not enforce oral agreements of attorneys or parties made out of court in regard to the postponement of the trial of a cause, especially when the evidence leaves it uncertain that the alleged agreement was made); Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794.

New York.— Haight *v.* Elmira, 42 N. Y. App. Div. 391, 59 N. Y. Suppl. 193; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. 325 [*affirmed* in 13 Hun 514]. *Compare* Kilts *v.* Neahr, 101 N. Y. App. Div. 317, 91 N. Y. Suppl. 945, where, as to affidavit of merits, it was held that on appeal by defendant to the county court from a justice's judgment pursuant to Code Civ. Proc. § 3064, which was the only remedy given him by law for the reopening of a default before the justice and the granting of a new trial, it would be unjust to require defendant to produce a preponderance of proof, and that defendant's excuse for not appearing before the justice being perfect it was an abuse of discretion to refuse a new trial, although defendant's affidavit of merits is denied by plaintiff and is uncorroborated.

Pennsylvania.— Heiss *v.* Bailey, 20 Lanc. L. Rev. 51.

South Dakota.— Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577.

Texas.— McAnally *v.* Vickry, (Civ. App. 1904) 79 S. W. 857; Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962; Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517.

Utah.— Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934.

England.— Feise *v.* Parkinson, 4 Taunt. 640, 13 Rev. Rep. 710.

Canada.— Molson's Bank *v.* Bates, 7 U. C. C. P. 312; Shipman *v.* Stevens, 6 U. C. C. P. 17; Moore *v.* Gurney, 22 U. C. Q. B. 209.

3. **In criminal prosecutions** see CRIMINAL LAW, 12 Cyc. 755.

New trial after reversal of judgment on appeal see APPEAL AND ERROR, 3 Cyc. 494 *et seq.*

Rehearing in suits in equity see EQUITY, 16 Cyc. 426 *et seq.*

Statutory new trial as of right see *infra*, VI, D.

Waiver of right to appeal by submission to new trial see APPEAL AND ERROR, 2 Cyc. 647.

4. State *v.* Blackman, 110 La. 266, 34 So. 438; San Antonio *v.* Dickman, 34 Tex. 647.

Proceedings for reargument of motion do not suspend the right to proceed under the order. See also Van Gelder *v.* Hallenbeck, 2 N. Y. Suppl. 252, 15 N. Y. Civ. Proc. 233.

Where a statute provides for new entry of the action, without naming at what term, it shall be intended as restricted to the next term of the court at which an entry is admissible. Pearl *v.* Allen, 2 Tyler (Vt.) 311.

ceed to try it again and give a judgment different from the first.[5] Where the cause is set for hearing regularly, it may be heard in the absence of either party.[6] Notice of the allowance and of the time of the new trial is required in some jurisdictions.[7] Where the order has been made in open court, and written exceptions filed, the case may be noticed for trial without serving on the excepting party a copy of the order.[8] Where plaintiff's motion for new trial is decided in his favor and the rule is entered on the last day on which he can give notice of trial for the ensuing term, it is his duty to take notice of the rule and give the notice or he will be liable for the default in omitting to bring his cause to trial.[9]

B. Amendment of Pleadings and Proceedings. Where a new trial has been granted, the court may, in its discretion, allow either party to amend his pleadings in any proper matter,[10] and may permit new parties to be added.[11] It may permit the withdrawing of a demurrer which was overruled before the trial,[12] or may rule on a demurrer which was overlooked.[13]

C. Scope of Inquiry. Generally on a new trial the issues of fact of the former trial will be tried,[14] the whole case being opened for trial[15] unless limited to particular parties[16] or issues.[17] A defense not submitted to the jury at the former trial may be insisted upon where it has not been withdrawn of record, or abandoned by agreement of the parties.[18] A party may not, however, take a ground inconsistent with that taken by him at a former trial or trials.[19] In some jurisdictions matters covered by exceptions taken at the former trial will not be considered.[20]

D. Conduct of Trial — 1. BURDEN OF PROOF. The fact that a verdict has

5. State *v.* Blackman, 110 La. 266, 34 So. 438.

6. Peychaud *v.* U. S., 16 Ct. Cl. 601.

7. Barr *v.* White, 2 Port. (Ala.) 342, but may be waived by appearance. *Compare* Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588, 13 S. D. 618, 84 N. W. 191, holding that under a statute which provides that there need be but one notice of trial and one note of issue from either party and the action must then remain on the calendar until disposed of, the granting of the new trial does not render it necessary to serve a second notice of trial, the effect being to restore the cause to the calendar as it stood before the first trial.

8. Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

9. Mottram *v.* Mills, 1 Sandf. (N. Y.) 671.

10. *Georgia.*— Kimbro *v.* Fulton Bank, 49 Ga. 419.

Illinois.— Brown *v.* Smith, 24 Ill. 196, on terms.

Kentucky.— Calk *v.* Daniel, 4 Litt. 239.

Nebraska.— Wallingford *v.* Burr, 17 Nebr. 137, 22 N. W. 350, without costs.

New York.— Getty *v.* Spaulding, 58 N. Y. 636; Martin *v.* Lake, 3 Hill 475; Spawn *v.* Veeder, 4 Cow. 503, 15 Am. Dec. 401, on terms.

North Carolina.— Murphy *v.* Guion, 3 N. C. 162, 2 Am. Dec. 623.

South Carolina.— Bradley *v.* Long, 2 Strobh. 160.

Utah.— Collet *v.* Beutler, 27 Utah 540, 76 Pac. 707.

West Virginia.— Hutchinson *v.* Parkersburg, 25 W. Va. 226.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

United States.— Clark *v.* Sohier, 5 Fed. Cas. No. 2,835, 1 Woodb. & M. 368.

See 37 Cent. Dig. tit. "New Trial," § 338.

Amendments properly ordered during the previous stages of the case are not affected by the order granting a new trial. Price *v.* Brown, 5 N. Y. St. 7.

Waiver of exceptions.— If plaintiff amends his declaration and changes the nature of his demand, he waives all exceptions to the new trial. Carrico *v.* Lilly, 3 A. K. Marsh. (Ky.) 398.

11. Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154; Martin *v.* Lake, 3 Hill (N. Y.) 475.

12. Brush *v.* Seguin, 24 Ill. 254.

13. Portis *v.* Cole, 11 Tex. 157.

14. Zaleski *v.* Clark, 45 Conn. 397; Gott *v.* Judge Super. Ct., 42 Mich. 625, 4 N. W. 529.

15. See *infra*, IV, O, 8, b.

16. Lavender *v.* Hudgens, 32 Ark. 763; Sprague *v.* Childs, 16 Ohio St. 107.

17. Duff *v.* Duff, 101 Cal. 1, 35 Pac. 437; Pratt *v.* Boston Heel, etc., Co., 134 Mass. 300; Seccomb *v.* Provincial Ins. Co., 4 Allen (Mass.) 152, where limitation waived by prevailing party changing his ground. See also Russell *v.* Dufresne, 1 Alaska 575.

18. Moulor *v.* American L. Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. ed. 447. See also Portis *v.* Cole, 11 Tex. 157.

19. Williams *v.* Henshaw, 12 Pick. (Mass.) 378, 23 Am. Dec. 614; Hamilton *v.* Frothingham, 71 Mich. 616, 40 N. W. 15. And see ESTOPPEL, 16 Cyc. 796.

20. Ashhurst *v.* Atlanta Coast Electric R. Co., 66 N. J. L. 16, 48 Atl. 999.

been rendered for one of the parties does not change the burden of proof or the *quantum* of evidence required upon a new trial.[21]

2. ADMISSIONS ON FORMER TRIAL. Generally a party is not bound by admissions made by him for the purpose of the former trial.[22]

3. RECEPTION OF EVIDENCE. Facts cannot be established by evidence thereof given on a former trial unless a sufficient reason is shown for not producing the original witness,[23] or unless the court made consent to the use of a transcript of such evidence a condition of the allowance of the new trial.[24] Incompetent or irrelevant evidence should be excluded, on proper objection, although it was admitted at the former trial.[25] *Ex parte* affidavits used on the hearing of the motion for a new trial are generally inadmissible.[26] So it is not proper for counsel, while examining witnesses, to read to them the stenographer's notes of their testimony in the former trial, the accuracy of such notes not having been first established.[27] Where the defense of fraudulent alteration of a note in suit is set up for the first time on a new trial, the affidavit of defendant on which the default in the former trial was set aside, and the plea then put in is admissible to show that the new defense was an afterthought and purely fictitious.[28]

4. INSTRUCTIONS. The court, in instructing the jury that they are the judges of the amount of damages to be assessed, cannot be required to add a qualification that their verdict must not be for a sum materially in excess of former verdicts.[29] Where plaintiff's right to recover depends entirely on testimony which was not given on the first trial, it is error to refuse to charge that such testimony is "the only evidence in this case upon which they can find a verdict against defendants."[30]

VI. STATUTORY NEW TRIAL AS OF RIGHT.[31]

A. Causes in Which Authorized — 1. IN GENERAL. New trials without cause are demandable under statutes in a few jurisdictions in some actions other than those affecting the title or possession of real property.[32]

2. ACTIONS FOR THE RECOVERY OF REAL PROPERTY. In many jurisdictions, by virtue of statutory provisions in statutory actions for the recovery of real prop-

21. Snow *v.* Vandeveer, 33 Nebr. 735, 51 N. W. 127; Earl *v.* Reid, 32 Nebr. 45, 48 N. W. 894; McCorkle *v.* Everett, 16 Tex. Civ. App. 552, 41 S. W. 136.

22. Murphy *v.* Gillum, 79 Mo. App. 564. *Compare* Gunter *v.* Laffan, 7 Cal. 588, as to stipulation of facts. And see EVIDENCE, 16 Cyc. 964.

23. See EVIDENCE, 16 Cyc. 1088.

Erroneous conclusions of law and fact.— Where a new trial is granted because wrong findings of fact and conclusions of law were drawn from the testimony, it is not necessary or proper to require or permit the evidence to be taken *de novo*, but the court should make correct findings and conclusions from the evidence already taken, and render judgment thereon. Russell *v.* Dufresne, 1 Alaska 575.

24. See *supra*, III, O, 6, d.

25. Deuterman *v.* Pollock, 172 N. Y. 595, 64 N. E. 1120 [*affirming* 54 N. Y. App. Div. 575, 66 N. Y. Suppl. 1009], as to effect of order providing for reading evidence taken on first trial. Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825; Riggs *v.* Tayloe, 20 Fed. Cas. No. 11,832, 2 Cranch C. C. 687 [*reversed* in 1 Pet. 591, 7 L. ed. 275].

26. Murry *v.* Webber, 103 Iowa 477, 72 N. W. 759.

27. Rehberg *v.* New York, 99 N. Y. 652, 2 N. E. 11.

28. See also Tupper *v.* Kilduff, 26 Mich. 394.

29. Illinois Cent. R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627.

30. Carroll *v.* Tucker, 7 Misc. (N. Y.) 482, 27 N. Y. Suppl. 985 [*reversing* 6 Misc. 612, 26 N. Y. Suppl. 86].

31. Adoption of practice of state courts by federal courts see COURTS, 11 Cyc. 884 *et seq.*

32. Reeves *v.* Skipper, 94 Ala. 407, 10 So. 309 (on finding of lost written release, provided secondary evidence was not introduced); Morgan *v.* Morgan, 50 Ala. 89 (applicant prevented from making defense by surprise, accident, mistake, or fraud): Brown *v.* Macfarland, 19 App. Cas. (D. C.) 525 (condemnation proceedings); Reed *v.* Reed, 25 Ohio St. 422 (action for recovery of money only); State *v.* Kelley, 25 Ohio St. 29 (in civil action in court of common pleas); Cooke *v.* Altvater, 21 Ohio St. 628; Reber *v.* Columbus Mach. Mfg. Co., 12 Ohio St. 175; Robertson *v.* Burk, 5 U. C. Q. B. O. S. 75 (where no defense made by absent debtor).

erty, the unsuccessful party may demand a new trial without cause.[33] These statutes do not apply, however, to actions commenced before they went into effect.[34]

3. Actions to Try Title. Special statutory actions to try titles to unoccupied lands,[35] or to test the validity of devises,[36] are not actions for the recovery of real property in which new trials as of right may be had. But some statutes provide for new trials without cause in actions to try title.[37]

4. Actions For Damages to Real Property. Generally a new trial without cause is not demandable in an action for damages to real property which does not involve directly the title thereto.[38]

5. Actions For Forcible Entry and Detainer. Ordinarily a new trial as of right will not be granted in a summary action for forcible entry or detainer,[39] or ejectment for the non-payment of rent;[40] but in one jurisdiction where such an action is certified to a superior court for the trial of a question of title, a new trial may be granted without cause.[41]

6. Suits to Quiet Title, Annul Conveyances, and Enforce Trusts. An action by the party in possession to quiet his title as against an adverse title or encumbrance,[42] or to set aside a deed for fraud or mistake,[43] or to establish and enforce

33. *Illinois.*— Emmons *v.* Bishop, 14 Ill. 152.

Indiana.— Truitt *v.* Truitt, 37 Ind. 514.

Kansas.— Beckman *v.* Richardson, 28 Kan. 648; Cheesebrough *v.* Parker, 25 Kan. 566; Blackford *v.* Loveridge, 10 Kan. 101; McManamy *v.* Ewing, McCahon 171.

Michigan.— Van den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

Minnesota.— Finnegan *v.* Brown, 81 Minn. 508, 84 N. W. 343 (the substance and not the form of the action determining the right); Gahre *v.* Berry, 79 Minn. 20, 81 N. W. 537; Kremer *v.* Chicago, etc., R. Co., 54 Minn. 157, 55 N. W. 928; St. Paul *v.* Chicago, etc., R. Co., 49 Minn. 88, 51 N. W. 662.

New York.— Bucher *v.* Carroll, 19 Hun 618 (for breach of condition in lease); Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338; Rogers *v.* Wing, 5 How. Pr. 50; Cook *v.* Passage, 4 How. Pr. 360, 3 Code Rep. 88.

Ohio.— Troutman *v.* Duhere, 2 Ohio Dec. (Reprint) 23, 1 West. L. Month. 101.

South Carolina.— Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 20 S. E. 378; Tompkins *v.* Augusta, etc., R. Co., 30 S. C. 479, 9 S. E. 521.

Texas.— Dangerfield *v.* Paschal, 20 Tex. 536, as to effect of failure to indorse on petition that action was brought to try title.

See 37 Cent. Dig. tit. "New Trial," § 343.

Leasehold interest.— Under the Indiana statutes, a new trial may be had in an action to recover a leasehold interest in land. Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879.

34. Jackson *v.* Coe, 5 Wend. (N. Y.) 101. See also Bay *v.* Gage, 36 Barb. (N. Y.) 447; Singer *v.* Belt, 8 Ohio St. 291.

35. Buffalo Land, etc., Co. *v.* Strong, 101 Minn. 27, 111 N. W. 728; McRoberts *v.* McArthur, 69 Minn. 506, 72 N. W. 796 (not being in the nature of ejectment); Schons *v.* Kellogg, 61 Minn. 128, 63 N. W. 257; Godfrey *v.* Valentine, 50 Minn. 284, 52 N. W. 643; Knight *v.* Valentine, 35 Minn. 367, 29 N. W. 3.

36. Marvin *v.* Marvin, 11 Abb. Pr. N. S. (N. Y.) 102.

37. Atchison *v.* Owen, 58 Tex. 610 (action to set aside sheriff's sale); Dangerfield *v.* Paschal, 20 Tex. 536.

38. Atkinson *v.* Williams, 151 Ind. 431, 51 N. E. 721; Midland R. Co. *v.* Galey, 141 Ind. 483, 39 N. E. 940, 40 N. E. 801 (damages for occupation by railroad company); Jonsson *v.* Lindstrom, 114 Ind. 152, 16 N. E. 400 (damages for removing and withholding house); Hofferbert *v.* Williams, 32 Ind. App. 593, 70 N. E. 405; Tompkins *v.* Augusta, etc., R. Co., 30 S. C. 479, 9 S. E. 521.

39. Cambridge Lodge No. 9 K. P. *v.* Routh, 163 Ind. 1, 71 N. E. 148 (although on appeal to district court); Thompson *v.* Kreisher, 148 Ind. 573, 47 N. E. 1059; Over *v.* Moss, 41 Ind. 463 (although tried on appeal in circuit court).

Writ of assistance.— A petition for a writ of assistance to be put in possession of land, claimed by plaintiffs as heirs of the purchaser at mortgage foreclosure sale, is not such an action as entitled a party to a new trial as a matter of right. Gilliland *v.* Milligan, 114 Ind. 154, 42 N. E. 1010.

40. Whitaker *v.* McClung, 14 Minn. 170; Christie *v.* Bloomingdale, 18 How. Pr. (N. Y.) 12.

41. Ferguson *v.* Kumler, 25 Minn. 183.

42. Russell *v.* Nelson, 32 Iowa 215; Moorehead *v.* Robinson, 68 Kan. 634, 75 Pac. 503; Larkin *v.* Wilson, 28 Kan. 513; Blackford *v.* Loveridge, 10 Kan. 101; Northrup *v.* Romary, 6 Kan. 240; Cunningham *v.* Smith, 10 Kan. App. 407, 61 Pac. 458; Mollie *v.* Peters, 28 Nebr. 670, 44 N. W. 872; Malin *v.* Rose, 12 Wend. (N. Y.) 258.

43. Somerville *v.* Donaldson, 26 Minn. 75, 1 N. W. 808; Shumway *v.* Shumway, 42 N. Y. 143 [*affirming* 1 Lans. 474]; Butts *v.* Fillmore, 18 N. Y. Suppl. 648 [*affirmed* in 142 N. Y. 630, 37 N. E. 565].

a trust,[44] is not an action for the recovery of real property within the meaning of the statutes. But under the language of the statutes in a few states, a new trial as of right may be had in an action to quiet title as against an adverse claim of any title in the land.[45] An action to establish a trust and compel a conveyance of the trust property or quiet the title in plaintiff is within the scope of such statutes.[46] So is an action by a grantor or his heirs, devisees, or assignees to annul his conveyance,[47] but an action by creditors to set aside a conveyance for fraud is not.[48]

7. Suits For Specific Performance. A new trial is not demandable of right in an action for the specific performance of a contract to convey real property.[49]

8. Suits For Partition. Ordinarily a new trial as of right is not demandable in an action for the partition of real property,[50] but it may be when the title and right to possession are directly involved.[51]

9. Suits Involving Easements. The unsuccessful party is not entitled to a new trial without cause in an action to prevent the obstruction of an easement and for damages;[52] but he may demand a new trial of right in an action to quiet title to an easement, under those statutes which give the right in actions to quiet title generally.[53]

10. Suits Involving Mortgages and Liens. Actions to foreclose mortgages,[54] or to enforce other liens,[55] or to redeem from,[56] or to quiet title against

44. McConnell *v.* McCullough, 47 Hun (N. Y.) 405.

45. Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549; Woodward *v.* Mitchell, 140 Ind. 406, 39 N. E. 437 (action to annul lease); Bisel *v.* Tucker, 121 Ind. 249, 23 N. E. 81; Stanley *v.* Dailey, 112 Ind. 489, 14 N. E. 375; Hammann *v.* Mink, 99 Ind. 279; Physio-Medical College *v.* Wilkinson, 89 Ind. 23 (action to set aside deed by ancestor); Earle *v.* Peterson, 67 Ind. 503 (as to necessity for direct attack on original order); Truitt *v.* Truitt, 37 Ind. 514; Zimmerman *v.* Marchland, 23 Ind. 474; Shuman *v.* Gavin, 15 Ind. 93; Krise *v.* Wilson, 31 Ind. App. 590, 68 N. E. 693 (form of action does not necessarily determine right); Buena Vista County *v.* Iowa Falls, etc., R. Co., 49 Iowa 657.

46. Comegys *v.* Emerick, 134 Ind. 148, 33 N. E. 899, 39 Am. St. Rep. 245; Hunter *v.* Chrisman, 70 Ind. 439. *Compare* Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531.

47. Tomlinson *v.* Tomlinson, 162 Ind. 530, 70 N. E. 881; Anderson *v.* Anderson, 128 Ind. 254, 27 N. E. 724; McKittrick *v.* Glenn, 116 Ind. 27, 18 N. E. 388; Warburton *v.* Crouch, 108 Ind. 83, 8 N. E. 634; Adams *v.* Wilson, 60 Ind. 560; Krise *v.* Wilson, 31 Ind. App. 590, 68 N. E. 693.

48. Searles *v.* Little, 153 Ind. 432, 55 N. E. 93; Anderson *v.* Anderson, 128 Ind. 254, 27 N. E. 724; Liggett *v.* Hinkley, 120 Ind. 387, 22 N. E. 256; Warburton *v.* Couch, 108 Ind. 83, 8 N. E. 634; Shular *v.* Shular, 56 Ind. 30; Truitt *v.* Truitt, 37 Ind. 514.

49. McFerran *v.* McFerran, 69 Ind. 29; Truitt *v.* Truitt, 37 Ind. 514; Walker *v.* Cox, 25 Ind. 271; Allen *v.* Davidson, 16 Ind. 416; Benner *v.* Benner, 10 Ind. 256; Blackford *v.* Loveridge, 10 Kan. 101.

50. Hawkins *v.* Heinzman, 126 Ind. 551, 25 N. E. 708; Gullett *v.* Miller, 106 Ind. 75, 5 N. E. 741; Pipes *v.* Hobbs, 83 Ind. 43; McFerran *v.* McFerran, 69 Ind. 29; Harness *v.* Harness, 49 Ind. 384; Schlichter *v.* Taylor, 31 Ind. App. 164, 67 N. E. 556; Fordice *v.* Lloyd, 27 Ind. App. 414, 60 N. E. 367; Moorehead *v.* Robinson, 68 Kan. 534, 75 Pac. 503; Saville *v.* Saville, 63 Kan. 861, 66 Pac. 1043; Swartzel *v.* Rogers, 3 Kan. 374; Elmore *v.* Davis, 49 S. C. 1, 26 S. E. 898.

51. Powers *v.* Nesbit, 127 Ind. 497, 27 N. E. 501; Kreitline *v.* Franz, 106 Ind. 359, 6 N. E. 912; Hammann *v.* Mink, 99 Ind. 279 (although question raised by cross petition); Earle *v.* Peterson, 67 Ind. 503; McNulty *v.* Stockton Exch. Bank, 69 Kan. 51, 76 Pac. 395; Kennedy *v.* Haskell, 67 Kan. 612, 73 Pac. 913. *Compare* Moorehead *v.* Robinson, 68 Kan. 534, 75 Pac. 503.

52. Seisler *v.* Smith, 150 Ind. 88, 46 N. E. 993; Davis *v.* Cleveland, etc., R. Co., 140 Ind. 468, 39 N. E. 495; Hall *v.* Hedrick, 125 Ind. 326, 25 N. E. 350; Larrimore *v.* Williams, 30 Ind. 18; Maurer *v.* Stiner, 82 Wis. 99, 51 N. W. 1101.

53. Corns *v.* Clouser, 137 Ind. 201, 36 N. E. 848; McAllister *v.* Henderson, 134 Ind. 453, 34 N. E. 221.

54. Bennett *v.* Closson, 138 Ind. 542, 38 N. E. 46; Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130; Sterne *v.* Vert, 111 Ind. 408, 12 N. E. 719; Butler University *v.* Conard, 94 Ind. 353; Shular *v.* Shular, 56 Ind. 30.

55. Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014 (judgment lien); Williams *v.* Thames L. & T. Co., 105 Ind. 420, 5 N. E. 17; Butler University *v.* Conard, 94 Ind. 353.

In an action to set aside a sale of property under a mortgage a second trial may be had. Bender *v.* Sherwood, 21 Ind. 167.

56. Bennett *v.* Closson, 138 Ind. 542, 38 N. E. 46; Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74; Germley *v.* Kirkland, 29 Ind. App. 440, 61 N. E. 1138, 62 N. E. 499 (tax lien); Jones *v.* Peters, 28 Ind. App. 383, 62 N. E. 1019.

mortgages,[57] are not within the scope of the statutes providing for new trials as of right.

11. ADMINISTRATIVE ACTIONS TO SELL REAL ESTATE. A new trial as of right is not demandable in a proceeding by an administrator to sell land to pay debts or legacies.[58]

12. ACTIONS OR PROCEEDINGS TO ESTABLISH BOUNDARIES. An action or proceeding to settle boundaries is not within the scope of the statutes giving a new trial without cause.[59]

13. JOINDER OF CAUSES OF ACTION. In one state at least a new trial as of right will not be granted in an action which has proceeded to judgment upon a complaint which contains any substantial cause as to which such new trial is not demandable.[60] In other jurisdictions a new trial may be granted without cause in such an action.[61] A claim for incidental relief does not so affect the character of the action as to deprive the unsuccessful party of the right to a new trial without cause.[62] Ordinarily the new trial should be limited to the causes or issues as to which it is properly demandable.[63] Where one of two defendants is entitled to a new trial as of right, a motion to vacate an order granting a new trial as to both defendants should be limited to defendant not entitled to it.[64] Where defendants, who had not demanded a second trial, claimed and were allowed the advantages of a second trial granted on the demand of a co-defendant, they were estopped to object to the regularity of the steps taken to obtain it.[65]

14. NATURE OF CROSS ACTION OR DEFENSE. The right to a new trial without cause in an action for the recovery of real property is not affected by the fact that the answer asks for equitable relief.[66] So also the right to a new trial without cause

57. Rariden *v.* Rariden, 129 Ind. 288, 28 N. E. 701; Sterne *v.* Vert, 111 Ind. 408, 12 N. E. 719.

58. Fralich *v.* Moore, 123 Ind. 75, 24 N. E. 232.

59. Russell *v.* Senior, 118 Ind. 520, 21 N. E. 292; Tierney *v.* Gondereau, 99 Minn. 421, 109 N. W. 821; Bird *v.* Montgomery, 34 Tex. 713; Strunz *v.* Hood, 44 Wash. 99, 87 Pac. 45.

60. Cambridge Lodge No. 9 K. P. *v.* Routh, 163 Ind. 1, 71 N. E. 148; Nutter *v.* Hendricks, 150 Ind. 605, 50 N. E. 748 (where one cause of action asked damages for trespass and an injunction); Bennett *v.* Closson, 138 Ind. 542, 38 N. E. 46; Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014; Richwine *v.* Noblesville Presb. Church, 135 Ind. 80, 34 N. E. 737 (whether joinder proper or improper); Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; Bradford *v.* Marion School Town, 107 Ind. 280, 7 N. E. 256; Butler University *v.* Conard, 94 Ind. 353 (where joinder improper); Schlichter *v.* Taylor, 31 Ind. App. 164, 67 N. E. 556; Jones *v.* Peters, 28 Ind. App. 383, 62 N. E. 1019. See also Williams *v.* Thames L. & T. Co., 105 Ind. 420, 5 N. E. 17.

Effect of objection for misjoinder.— The fact that the defeated party unsuccessfully objected to the misjoinder of causes of action by demurrer will not entitle him to a new trial since he could have prevented the misjoinder by standing on his demurrer. Richwine *v.* Noblesville Presb. Church, 135 Ind. 80, 34 N. E. 737.

If the statement of the additional cause of action is fatally defective, a new trial of the cause for the recovery of real property should be granted. Barber *v.* Barber, 156 Ind. 45, 59 N. E. 171.

61. Gray Cloud Land Co. *v.* Security Trust Co., 93 Minn. 369, 101 N. W. 605; Schmitt *v.* Schmitt, 32 Minn. 130, 19 N. W. 649; Compton *v.* The Chelsea, 139 N. Y. 538, 34 N. E. 1090 [*reversing* 70 Hun 361, 24 N. Y. Suppl. 241]. See also Kennedy *v.* Haskell, 67 Kan. 612, 73 Pac. 913.

62. *Indiana.*— Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549. *Compare* Hofferbert *v.* Williams, 32 Ind. App. 593, 70 N. E. 405.

Iowa.— Buena Vista County *v.* Iowa Falls, etc., R. Co., 49 Iowa 657.

Kansas.—Kennedy *v.* Haskell, 67 Kan. 612, 73 Pac. 913, as partition.

Minnesota.— Gray Cloud Land Co. *v.* Security Trust Co., 93 Minn. 369, 101 N. W. 605; St. Paul *v.* Chicago, etc., R. Co., 49 Minn. 88, 51 N. W. 662.

New York.— Compton *v.* The Chelsea, 139 N. Y. 538, 34 N. E. 1090 [*reversing* 70 Hun 361, 24 N. Y. Suppl. 241].

Oklahoma.— Keller *v.* Hawk, 13 Okla. 261, 74 Pac. 106.

See 37 Cent. Dig. tit. "New Trial," § 354.

63. Gray Cloud Land Co. *v.* Security Trust Co., 93 Minn. 369, 101 N. W. 605; Schmitt *v.* Schmitt, 32 Minn. 130, 19 N. W. 649; Post *v.* Moran, 10 Daly (N. Y.) 502; Sprague *v.* Childs, 16 Ohio St. 107. *Compare* Kremer *v.* Chicago, etc., R. Co., 54 Minn. 157, 55 N. W. 928.

64. Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457.

65. Cooke *v.* Altvater, 21 Ohio St. 628.

66. Butterfield *v.* Walsh, 25 Iowa 263; Cheesebrough *v.* Parker, 25 Kan. 566, Keller *v.* Hawk, 13 Okla. 261, 74 Pac. 106; Newland

in an action to quiet title is not barred by a cross complaint setting up a cause of action as to which such right is not demandable.[67] A judgment for defendant on a cross complaint claiming a lien on the land is no bar to a new trial of the issue joined on the complaint, existence of a lien in favor of defendant being put in issue by the complaint.[68] On the other hand it has been held that where the unsuccessful party would not be entitled to demand a new trial as of right on the cause of action stated in the petition or complaint, he is not entitled to do so because the answer seeks to quiet defendant's title to the real property involved.[69] The right to a new trial without cause in an action in which the recovery of real property is demanded in the answer only has been affirmed[70] and denied.[71] Where either party admits the title to real property claimed by his adversary, a new trial without cause is not demandable as to remaining issues.[72]

B. Right to New Trial — 1. Where No Trial Has Been Had. A new trial without cause will not be granted after judgment on a default,[73] nor on a demurrer,[74] nor after judgment by consent.[75]

2. Effect of Other Proceedings. A new trial as of right is not barred by an adverse ruling on a motion for a new trial for cause,[76] nor by a prior erroneous refusal to grant a new trial without cause,[77] nor by a motion in arrest of judgment,[78] nor by the pendency of an appeal,[79] nor by the affirmance of the judgment on appeal,[80] nor by a previous new trial granted for cause,[81] nor under a stipulation of the parties.[82] A new trial may, it has been held, be demanded

v. Morris, 115 Wis. 207, 91 N. W. 664. *Contra,* Miller *v.* Evansville Nat. Bank, 99 Ind. 272.

67. Bisel *v.* Tucker, 121 Ind. 249, 23 N. E. 81.

68. Bisel *v.* Tucker, 121 Ind. 249, 23 N. E. 81.

69. Searles *v.* Little, 153 Ind. 432, 55 N. E. 93 (at least where there is no finding on the counter-claim); Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Moor *v.* Seaton, 31 Ind. 11; Schlichter *v.* Taylor, 31 Ind. App. 164, 67 N. E. 556; Moorehead *v.* Robinson, 68 Kan. 534, 75 Pac. 503. *Compare* Island Coal Co. *v.* Streitlemier, 139 Ind. 83, 37 N. E. 340.

70. Gahre *v.* Berry, 79 Minn. 20, 81 N. W. 537 (the substance and not the form of the action determining the right); Eastman *v.* Linn, 20 Minn. 433.

71. Larkin *v.* Wilson, 28 Kan. 513. See also Schlichter *v.* Taylor, 31 Ind. App. 164, 67 N. E. 556.

72. Thompson *v.* Kreisher, 148 Ind. 573, 47 N. E. 1059 (action to quiet title and for forcible detention); Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014 (cross complaint to quiet title); Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130 (action to quiet title and cross complaint to enforce lien); Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662 (action for cancellation of lease and rent); Wafer *v.* Hamill, 44 Kan. 447, 24 Pac. 950 (action to recover real property and rents and profits).

73. *Indiana.*— Fisk *v.* Baker, 47 Ind. 534, rule applicable only where there has been a trial on the merits.

Kansas.— Hall *v.* Sanders, 25 Kan. 538.

Michigan.—Hoffman *v.* St. Clair Cir. Judge, 37 Mich. 131.

Minnesota.— Hallam *v.* Doyle, 35 Minn. 337, 29 N. W. 130.

Oklahoma.— Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476.

See 37 Cent. Dig. tit. "New Trial," § 357.

74. Koile *v.* Ellis, 16 Ind. 301; Whiteman *v.* Perkins, 56 Nebr. 181, 76 N. W. 547; Christie *v.* Bloomingdale, 18 How. Pr. (N. Y.) 12.

75. Sacia *v.* O'Connor, 79 N. Y. 260 [*affirming* 45 N. Y. Super. Ct. 633].

76. Cheney *v.* Crandell, 28 Colo. 383, 65 Pac. 56; Scranton *v.* Stewart, 52 Ind. 68; Shuman *v.* Gavin, 15 Ind. 93.

Conversely, however, the filing of a motion for a new trial as of right is a waiver of a pending motion for cause. Johnson *v.* Ballard, 148 Ind. 181, 46 N. E. 674.

77. Warburton *v.* Crouch, 108 Ind. 83, 8 N. E. 634.

78. Anderson *v.* Anderson, 128 Ind. 254, 27 N. E. 724, even though a motion for a new trial for cause is barred by such motion. See also *supra,* I, D, 1, a.

79. Gibson *v.* Manly, 15 Ill. 140; Indiana, etc., R. Co. *v.* McBroom, 103 Ind. 310, 2 N. E. 760; Landon *v.* Townshend, 18 N. Y. Suppl. 552 [*affirmed* in 133 N. Y. 674, 31 N. E. 625].

All errors committed in the first trial are waived, where a new trial is taken as of right. Laughery Turnpike Co. *v.* McCreary, 147 Ind. 526, 46 N. E. 906.

80. Butterfield *v.* Walsh, 25 Iowa 263; New York Cent., etc., R. Co. *v.* Brennan, 163 N. Y. 584, 57 N. E. 1119 [*affirming* 24 N. Y. App. Div. 343, 48 N. Y. Suppl. 675]; Jordan *v.* Hardin, 58 Fed. 140, 7 C. C. A. 111. *Compare* Lowe *v.* Foulke, 103 Ill. 58, not applicable to judgments entered in supreme court.

81. Emmons *v.* Bishop, 14 Ill. 152; Iron Silver Min. Co. *v.* Campbell, 61 Fed. 932, 10 C. C. A. 172 [*affirming* 56 Fed. 133].

82. Jordan *v.* Hardin, 58 Fed. 140, 7 C. C. A. 111.

as of right, in an appropriate action, after a trial *de novo* on appeal from an inferior court.[83]

3. Sale of Property Involved. A new trial as of right is not barred by a sale of the property involved under execution,[84] nor by a conveyance thereof by the prevailing party without notice of the other party's intention to demand a new trial.[85]

4. Waiver by Agreement — a. In General. The right to a new trial without cause may be waived by a prior agreement of the parties.[86] A new trial of right is waived by a stipulation for a judgment absolute entered into for the purpose of obtaining an appeal.[87]

b. Stipulation of Facts. That a new trial without cause cannot be demanded in a case tried on a stipulation of facts has been affirmed in some states,[88] and denied in others.[89]

5. Number of New Trials. Under some statutes each party may demand one new trial without cause.[90] Under other statutes only one new trial in an action is demandable as of right.[91] And this, although new parties were added, at their own request, after the first trial, who were unsuccessful on the second trial.[92] The judgment rendered in the new trial as of right is not final in the sense that it may not be reversed on appeal.[93] In some states the granting of a second new trial without specific cause is a matter of discretion.[94] A judgment reversed on appeal or error should not be counted in determining whether another new trial is demandable as of right.[95] It has been held proper to so count a new trial granted without cause in the action while pending in another court,[96] although there is authority to the contrary.[97]

C. Proceedings to Procure New Trial — 1. Parties to Application. Ordinarily the unsuccessful party, whether plaintiff or defendant, may claim a new trial without cause in a proper action.[98] A new trial is demandable only by such party or persons claiming title under him as heirs, devisees, or assignees.[99] The appli-

83. Marietta *v.* Emerson, 5 Ohio St. 288.

84. Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9; Cook *v.* Kent Cir. Judge, 70 Mich. 94, 37 N. W. 906; Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338.

85. Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9.

86. Bray *v.* Doheny, 39 Minn. 355, 40 N. W. 262 (stipulation by attorney); Ladd *v.* Hilderbrant, 27 Wis. 135, 9 Am. Rep. 445.

87. Roberts *v.* Baumgarten, 126 N. Y. 336, 27 N. E. 470 [*affirming* 58 N. Y. Super. Ct. 407, 11 N. Y. Suppl. 699].

88. Lang *v.* Ropke, 1 Duer (N. Y.) 701.

89. Hewitt *v.* Wisconsin River Land Co., 81 Wis. 546, 51 N. W. 1016 [*distinguishing* Roberts *v.* Baumgarten, 126 N. Y. 336, 27 N. E. 470].

90. Chamberlin *v.* McCarty, 63 Ill. 262; Equator Min., etc., Co. *v.* Hall, 106 U. S. 86, 1 S. Ct. 128, 27 L. ed. 114. See also Beckan *v.* Richardson, 28 Kan. 648, as to what amounts to a trial.

Dismissal of a second action for failure to pay costs of the first precludes plaintiff from bringing another action for the recovery of land. Columbia Water-Power Co. *v.* Columbia Land, etc., Co., 47 S. C. 117, 25 S. E. 48.

91. Crews *v.* Ross, 44 Ind. 481 (although plaintiff amended complaint after vacation of first judgment and claimed additional lands); Ewing *v.* Gray, 12 Ind. 64; Lewis *v.* Hogan, 51 Minn. 221, 53 N. W. 367; Doorley *v.* O'Gorman, 52 N. Y. Suppl. 536; Boland *v.* Gillett, 44 Wis. 329.

92. Bitting *v.* Ten Eyck, 85 Ind. 357; Crews *v.* Ross, 44 Ind. 481.

93. Baze *v.* Arper, 6 Minn. 220.

94. Laflin *v.* Herrington, 17 Ill. 399; Vance *v.* Schuyler, 6 Ill. 160; Doorley *v.* O'Gorman, 31 N. Y. App. Div. 216, 52 N. Y. Suppl. 536; Harris *v.* Waite, 54 How. Pr. (N. Y.) 113 (and only two new trials for any cause); Bellinger *v.* Martindale, 8 How. Pr. (N. Y.) 113 (and only two new trials for any cause).

The mere filing of a petition, withdrawn without further proceeding, does not bar the right to a second trial. Dangerfield *v.* Paschal, 20 Tex. 536.

95. People *v.* Judge Wayne Cir. Ct., 21 Mich. 372; Campbell *v.* Iron Silver Min. Co., 56 Fed. 133 [*affirmed* in 61 Fed. 932, 10 C. C. A. 172].

96. Brown *v.* Crim, 1 Den. (N. Y.) 665.

97. Marietta *v.* Emerson, 5 Ohio St. 288.

98. Shucraft *v.* Davidson, 19 Ind. 98; Davidson *v.* Lamprey, 16 Minn. 445. *Contra*, Howes *v.* Gillett, 10 Minn. 397, under former statute.

Where plaintiff has judgment for only part of the land sued for, he is entitled to a second trial. Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916.

Under the Texas statute only an unsuccessful plaintiff may maintain a second action to try title. Fisk *v.* Miller, 20 Tex. 572.

99. Forsyth *v.* Van Winkle, 9 Fed. 247, 11 Biss. 108. See also Higgins *v.* New York, 18

cant need not have been a party to the record, if he sustains any such relation to the unsuccessful party.[1]

2. Time For Application and Order — a. In General. An application for a new trial without cause must be made within the time limited by statute.[2] The payment of costs alone within such time is not sufficient.[3] But it is generally sufficient to pay the costs and file the application, or at least to submit it to the court, in due time, although it is not acted upon until later.[4] In a few states a demand for a new trial must be ruled upon at the time it is made.[5] In the absence of statutory authority, a new trial cannot be ordered in vacation.[6]

b. In Relation to Entry of Judgment. In a number of jurisdictions it is held that an application for a new trial must be made within a certain time after the rendition or entry of the judgment.[7] An application which is made before the entry of judgment has been held premature and a nullity;[8] but, it has also been held permissible, by another court, to make the application and order a new trial before judgment has been perfected.[9] It is generally held,[10] but not

N. Y. Suppl. 553 [*affirmed* in 136 N. Y. 214, 32 N. E. 772] (that a devisee is concluded by the action of the devisor); Sacia *v.* O'Connor, 58 How. Pr. (N. Y.) 420 (as to want of authority of attorney).

1. White *v.* Poorman, 24 Iowa 108; Stocking *v.* Hanson, 22 Minn. 542; Howell *v.* Leavitt, 90 N. Y. 238 (purchaser of property at foreclosure sale); Purdy *v.* Bennett, 68 Hun (N. Y.) 227, 22 N. Y. Suppl. 817 (mortgagee in possession); Williams *v.* Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856 (vendee).

A purchaser of the land in suit should, on her motion, be substituted as plaintiff on the new trial. Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9.

2. *Colorado.*— Snider *v.* Rinehart, 20 Colo. 448, 30 Pac. 408.

Illinois.— Pugh *v.* Reat, 107 Ill. 440; Goodhue *v.* Baker, 22 Ill. 262; Riggs *v.* Savage, 7 Ill. 400.

Indiana.— Kreitline *v.* Franz, 106 Ind. 359, 6 N. E. 912; Crews *v.* Ross, 44 Ind. 481 [*overruling* Falls *v.* Hawthorn, 30 Ind. 444]; Hays *v.* May, 35 Ind. 427; Ferger *v.* Wesler, 35 Ind. 53.

Iowa.— See White *v.* Poorman, 24 Iowa 108, as to new trial in court's discretion.

Michigan.— People *v.* Judge Wayne Cir. Ct., 24 Mich. 42, although delay due to conflicting decisions of court as to right.

South Carolina.— Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 20 S. E. 378, 540.

United States.— Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 56 Fed. 956, 6 C. C. A. 180.

See 37 Cent. Dig. tit. "New Trial," § 361.

Application within "a reasonable time," under the Colorado code, must be made early in the succeeding term. Snider *v.* Rinehart, 18 Colo. 18, 31 Pac. 716.

Effect of delay of clerk in issuing citation. — Where a petition in a second suit is filed within the time provided by statute, the delay of the clerk in issuing the citation will not affect the applicant's right to a new trial. Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170.

3. Snider *v.* Rinehart, 20 Colo. 448, 39 Pac. 408 (although such practice was generally supposed to be proper); Snider *v.* Rinehart, 18 Colo. 18, 31 Pac. 716; Riggs *v.* Savage, 7 Ill. 400.

4. Stolz *v.* Drury, 74 Ill. 107; Rodman *v.* Reynolds, 114 Ind. 148, 16 N. E. 516; Townshend *v.* Keenan, 54 N. Y. Suppl. 287 (motion argued and submitted in due time); Keener *v.* Union Pac. R. Co., 34 Fed. 871 (under Colorado statute). The rule was otherwise under the former Indiana statute. Crews *v.* Ross, 44 Ind. 481 [*overruling* Falls *v.* Hawthorn, 30 Ind. 444]; Hays *v.* May, 35 Ind. 427; Ferger *v.* Wesler, 35 Ind. 53.

5. Keller *v.* Hawk, 13 Okl. 261, 74 Pac. 106; Mosebach *v.* Reis, 2 Ohio Dec. (Reprint) 295, 2 West. L. Month. 321, and order entered of record.

6. Ferger *v.* Wesler, 35 Ind. 53.

7. Haseltine *v.* Simpson, 61 Wis. 427, 21 N. W. 299, 302, holding that a judgment is not "rendered" until the costs are taxed and inserted therein.

Partition.— In an action in partition, a new trial must be demanded within one year from the entry of the final judgment settling the title, and not from the order confirming the sale. Kreitline *v.* Franz, 106 Ind. 359, 6 N. E. 912.

Computation of time.— In computing the time the day on which the judgment is entered should be excluded and the last day of the time included. Pugh *v.* Reat, 107 Ill. 440.

8. Davis *v.* Kendall, 161 Ind. 412, 68 N. E. 894; Boyd *v.* Schott, 152 Ind. 161, 52 N. E. 752; Boyd *v.* Schott, (Ind. 1898) 50 N. E. 379; Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59.

As to waiver by proceeding with the new trial without objection see Hutchinson *v.* Lemcke, 107 Ind. 121, 8 N. E. 71.

9. Post *v.* Moran, 61 How. Pr. (N. Y.) 122.

10. Chautauqua County Bank *v.* White, 23 N. Y. 347; Landon *v.* Townshend, 18 N. Y. Suppl. 552 [*affirmed* in 133 N. Y. 674, 31 N. E. 625]; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 56 Fed. 956, 6 C. C. A. 180.

always,[11] that the time limited begins to run from the entry of a judgment which is afterward affirmed on appeal. In some states the time runs from the giving of written notice of the entry of judgment.[12] Such written notice may be waived by the unsuccessful party taking steps without it indicating his intention to demand a new trial.[13]

3. Notice of Application. Notice of an application for a new trial as of right is not necessary,[14] except as provided by statute.[15]

4. Payment of Costs and Damages — a. In General. The payment of costs by the applicant is generally a condition precedent to the granting of a new trial without cause.[16] A second action may be stayed until the costs of the first action are paid.[17] The payment of damages is sometimes made a condition precedent.[18] Costs or damages must be paid within the time limited by statute,[19] unless such

11. Boyce *v.* Osceola County Cir. Judge, 79 Mich. 154, 44 N. W. 343.

12. Maurin *v.* Carnes, 80 Minn. 524, 83 N. W. 415, and delivery to the judgment debtor of a satisfaction of the judgment upon payment thereof is not such notice.

13. Maurin *v.* Carnes, 80 Minn. 524, 83 N. W. 415, but mere payment of costs is not a waiver.

14. Steeple *v.* Downing, 60 Ind. 478; Whitlock *v.* Vancleave, 39 Ind. 511; Murray *v.* Kelly, 27 Ind. 42; Haseltine *v.* Simpson, 61 Wis. 427, 21 N. W. 299, 302. See also Harvey *v.* Fink, 111 Ind. 249, 12 N. E. 396, as to granting new trial while attorneys for the prevailing party were present.

15. McManamy *v.* Ewing, McCahon (Kan.) 171 (notice on the journal entered by the clerk); Davidson *v.* Lamprey, 16 Minn. 445; Markward *v.* Doriat, 21 Ohio St. 637.

Sufficiency of notice.— A notice made in the applicant's name by an agent authorized by him to make demand is sufficient. West *v.* St. Paul, etc., R. Co., 40 Minn. 189, 41 N. W. 1031. A motion for a new trial for cause, regularly filed by the losing party after verdict and before entry of judgment against him or on the verdict, was held a compliance with the statute requiring notice on the journal. Marietta *v.* Emerson, 5 Ohio St. 288.

Curing defects.— An omission of the record of notice of demand for a second trial, prescribed by statute, cannot be remedied by a finding of the court at a subsequent term that a minute thereof was entered on the docket by the court at the previous term. Markward *v.* Doriat, 21 Ohio St. 637.

16. *Colorado.*— Hiwassee Gold Min. Co. *v.* Hotchkiss Mountain Min., etc., Co., 16 Colo. App. 22, 63 Pac. 708, taxed costs only.

Illinois.— Cook County *v.* Calumet, etc., Canal, etc., Co., (1888) 19 N. E. 46; Oetgen *v.* Ross, 36 Ill. 335.

Indiana.— Vernia *v.* Laeson, 54 Ind. 485; Golden *v.* Snellen, 54 Ind. 282; Montgomery *v.* Hays, 44 Ind. 433; Blizzard *v.* Blizzard, 40 Ind. 344; McSheely *v.* Bentley, 31 Ind. 235; Zimmerman *v.* Marchland, 23 Ind. 474 (and court may not order otherwise); Galletley *v.* Williams, 15 Ind. 468.

Minnesota.— Dawson *v.* Shillock, 29 Minn. 189, 12 N. W. 526; Davidson *v.* Lamprey, 16 Minn. 445, costs and damages.

New York.— Barson *v.* Mulligan, 40 Misc. 470, 82 N. Y. Suppl. 667 [*affirmed* in 83 N. Y. App. Div. 643, 82 N. Y. Suppl. 1093], but not damages for use and occupation.

South Carolina.— Columbia Water-Power Co. *v.* Columbia Land, etc., Co., 47 S. C. 117, 25 S. E. 48, second action.

Wisconsin.— Newland *v.* Morris, 115 Wis. 207, 91 N. W. 664 (but not interest on costs); Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916.

United States.— Shreve *v.* Cheesman, 69 Fed. 785, 16 C. C. A. 413, including costs of a mistrial.

See 37 Cent. Dig. tit. "New Trial," § 365.

Payment of costs and damages into court to the clerk in national bank-notes has been held sufficient. People *v.* Genesee County Cir. Judge, 37 Mich. 281. *Contra*, Davidson *v.* Lamprey, 16 Minn. 445, if unauthorized by any order of court.

The collection of costs by execution, although it be by sale of any interest of defendant in the premises from which he was ejected, is a payment of the costs by him. Townshend *v.* Keenan, 117 N. Y. App. Div. 484, 102 N. Y. Suppl. 792.

17. *Ex p.* Shear, 92 Ala. 596, 8 So. 792, 11 L. R. A. 620, notwithstanding the applicant's poverty. And where defendant in the second action pleads the non-payment of the costs of the first, he is entitled to the benefit of the statute without moving to stay the second action. Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 20 S. E. 378, 540.

18. People *v.* Genesee County Cir. Judge, 37 Mich. 281; Davidson *v.* Lamprey, 16 Minn. 445; Risley *v.* Rice, 11 N. Y. Civ. Proc. 367, but under the code not including rents and profits. See also Western Land Assoc. *v.* Thompson, 79 Minn. 423, 82 N. W. 677, as to damages "recovered" where set-off allowed.

Failure to pay one cent damages will not deprive a party of his right to new trial where he has paid costs and otherwise substantially complied with the statute. Myers *v.* Phillips, 68 Ill. 269.

19. Setzke *v.* Setzke, 121 Ill. 30, 11 N. E. 915; Pugh *v.* Reat, 107 Ill. 440 (including costs made after a payment); Stolz *v.* Drury, 74 Ill. 107; Goodhue *v.* Baker, 22 Ill. 262; Aholtz *v.* Durfee, 21 Ill. App. 144 [*affirmed* in 122 Ill. 286, 13 N. E. 645]; Whitlock *v.* Vancleave, 39 Ind. 511; Dawson *v.* Shillock, 29 Minn. 189, 12 N. W. 526.

payment is prevented by circumstances not within the control of the applicant.[20] It is not competent for the court to restrict the time allowed by statute for the payment of costs or damages.[21] An order for a new trial made conditional on the future payment of costs has been held sufficient by some courts[22] and erroneous by others.[23]

b. Waiver of Objection or Condition. The acceptance by the prevailing party of costs to which he would be otherwise entitled does not estop him to object to the granting of a new trial without cause.[24] The payment of costs as a condition precedent may be waived by proceeding with the action at subsequent terms without objection.[25] The failure of the prevailing party to have the costs taxed and demand payment of the same from the applicant is not a waiver of non-payment,[26] unless the erroneous order has been duly excepted to.[27]

5. Bond For Costs and Damages. In some states the giving of a bond for costs and damages that may be recovered against the applicant is a condition precedent to the granting of a new trial without cause,[28] and cannot be furnished out of time on the hearing of a motion to vacate the order.[29] The undertaking need not necessarily be executed by the applicant himself.[30] And defects in the bond may be waived by failure to object.[31]

6. The Application. In the absence of a statute or rule of court requiring it, a motion or demand for a new trial, made at the trial or trial term, need not be in writing;[32] and the failure of the clerk to make entry of a motion made orally in open court will not defeat the right to a new trial.[33] A demand in open court, at the close of the trial, is a sufficient compliance with a statute authorizing the party against whom the judgment is rendered to demand another trial by notice on the journal, and the clerk should immediately enter such request on the journal.[34] The application, if made in writing, need not recite those matters which are of record,[35] nor show that no prior new trial has been granted without cause.[36] It has been held improper to grant a new trial as of right upon a motion for a new trial for cause.[37]

20. Aholtz *v.* Durfee, 21 Ill. App. 144 [*affirmed* in 122 Ill. 286, 13 N. E. 645], inability of clerk to compute amount because of absence of files. See also Cook County *v.* Calumet, etc., Canal, etc., Co., (Ill. 1888) 19 N. E. 46, as to what is insufficient excuse for failure to pay part costs.

21. Schrodt *v.* Bradley, 29 Ind. 352; Townshend *v.* Keenan, 54 N. Y. Suppl. 287.

22. Rountree *v.* Talbot, 89 Ill. 246. See also Oetgen *v.* Ross, 36 Ill. 335.

23. Vernia *v.* Lawson, 54 Ind. 485; Montgomery *v.* Hays, 44 Ind. 433.

24. Whitaker *v.* McClung, 14 Minn. 170, even if such costs were paid with the avowed purpose of obtaining such trial.

25. Vernia *v.* Lawson, 54 Ind. 485; Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 30 S. E. 378, 540, but not where pleaded in second action. *Compare* Dawson *v.* Shillock, 29 Minn. 189, 12 N. W. 526.

26. Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 20 S. E. 378, 540.

27. Boyd *v.* Schott, (Ind. 1898) 50 N. E. 379.

28. Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763; Newland *v.* Morris, 113 Wis. 394, 89 N. W. 179 (where justification of sureties insufficient); Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916; Haseltine *v.* Metcalf, 66 Wis. 209, 28 N. W. 337; Conan *v.* Follis, 61 Wis. 224, 20 N. W. 912. See also Newland *v.* Morris, 115 Wis. 207, 91 N. W. 664, as to form of undertaking.

Where the order is granted without a bond having been approved by the court, a second order may be granted after the approval of a bond in due time without a formal vacation of the first order. Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763.

29. Haseltine *v.* Metcalf, 66 Wis. 209, 28 N. W. 337.

30. Negley *v.* Jeffers, 28 Ohio St. 90; Conan *v.* Follis, 61 Wis. 224, 20 N. W. 912.

31. Stanley *v.* Dailey, 112 Ind. 489, 14 N. E. 375.

32. Physio-Medical College *v.* Wilkinson, 89 Ind. 23 [*overruling* Crews *v.* Ross, 44 Ind. 481]; Stout *v.* Duncan, 87 Ind. 383; Zimmerman *v.* Marchland, 23 Ind. 474; Doster *v.* Sterling, 33 Kan. 381, 6 Pac. 556.

33. Doster *v.* Sterling, 33 Kan. 381, 6 Pac. 556.

34. Keller *v.* Hawk, 13 Okla. 261, 74 Pac. 106.

35. Shuman *v.* Gavin, 15 Ind. 93.

36. Shuman *v.* Gavin, 15 Ind. 93.

37. Scranton *v.* Stewart, 52 Ind. 68. See also Galletley *v.* Williams, 15 Ind. 468; West *v.* Cameron, 39 Kan. 736, 18 Pac. 894, where neither party asked for a new trial. *Contra*, Marietta *v.* Emerson, 5 Ohio St. 288, but the order should show that the new trial was awarded as of right.

7. Hearing and Determination — a. Matters Considered. On the hearing of the application no other evidence than the record is usually necessary.[38] The statute does not contemplate a trial of the application or an answer thereto.[39]

b. Right to New Trial. Where the applicant has complied with the statute, a new trial is generally a matter of right and not of discretion.[40] But in some states the allowance of a second new trial without specific cause is a matter of discretion.[41] And in one state at least there is statutory authority for a new trial, without specific cause, in the discretion of the court in the first instance.[42]

c. Order For New Trial — (I) *Requisites and Effect.* The order for a new trial vacates the verdict and proceedings based upon the trial.[43] Properly it should recite the performance of conditions precedent,[44] and should vacate expressly the previous judgment.[45]

(II) *Vacation.* Where a new trial as a matter of right is erroneously granted in an action in which it is not demandable, the court has a right, before entry on such trial, to set aside the order awarding it.[46] The right to attack an order granting a new trial on this ground may, however, be lost by a failure to seasonably urge the objection.[47] Since a party is in no case entitled to a statutory new trial as of right except upon the payment of all costs within a certain time, an order granting such a new trial may be vacated at a subsequent term of court for failure to pay the costs within the time limited.[48] The same rule applies where the court grants a new trial without first requiring the giving of a bond required by statute in such cases.[49] Where, however, the order recites the payment of costs, it has been held that it cannot be set aside, since such an order is a final judgment.[50]

D. Proceedings on New Trial — 1. Notice of Allowance. Notice of the granting of a new trial is sometimes required by statute.[51]

2. Amendment of Pleadings. After the granting of a new trial as of right, the court may permit the amendment of a pleading.[52]

3. Conduct of Trial. While, on a statutory new trial, the case must be tried *de novo*, and disposed of as if no trial had been previously had,[53] yet if, in the

38. Setzke *v.* Setzke, 121 Ill. 30, 11 N. E. 915.

39. Buena Vista County *v.* Iowa Falls, etc., R. Co., 55 Iowa 157, 7 N. W. 474.

40. *Indiana.*—Tomlinson *v.* Tomlinson, 162 Ind. 530, 70 N. E. 881; Murray *v.* Kelly, 27 Ind. 42.

Kansas.— McManamy *v.* Ewing, McCahon 171.

Michigan.— Van den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

New York.— Rogers *v.* Wing, 5 How. Pr. 50; Ford *v.* Walsworth, 22 Wend. 657, and costs for opposing motion not allowed.

Oklahoma.— Keller *v.* Hawk, 13 Okla. 261, 74 Pac. 106.

Wisconsin.— Hewitt *v.* Wisconsin River Land Co., 81 Wis. 546, 51 N. W. 1016; Haseltine *v.* Simpson, 61 Wis. 427, 21 N. W. 299, 302.

See 37 Cent. Dig. tit. "New Trial," § 356.

41. See *supra*, IV, B, 5.

42. Coleman *v.* Case, 66 Iowa 534, 24 N. W. 31; Russell *v.* Nelson, 32 Iowa 215; White *v.* Poorman, 24 Iowa 108.

43. Edwards *v.* Edwards, 22 Ill. 121; Stebbins *v.* Field, 41 Mich. 373, 2 N. W. 190.

44. Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916, at least where the motion does not recite performance of such conditions.

45. Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916, but an order sustaining a motion properly drawn is probably sufficient.

46. Hofferbert *v.* Williams, 32 Ind. App. 593, 70 N. E. 405.

47. Barber *v.* Barber, 156 Ind. 45, 59 N. E. 171. See also Earle *v.* Peterson, 67 Ind. 503.

48. Setzke *v.* Setzke, 121 Ill. 30, 11 N. E. 915; Dawson *v.* Shillock, 29 Minn. 189, 12 N. W. 526.

49. Haseltine *v.* Metcalf, 66 Wis. 209, 28 N. W. 337.

50. Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629.

51. A statute providing that "the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application" does not authorize the court to set aside the previous order granting a new trial, that provision being intended only to prevent the bringing of the case on for trial at the same term at which the new trial is granted. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749; Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9; Stanley *v.* Holliday, 113 Ind. 525, 16 N. E. 513.

52. Martin *v.* Lake, 3 Hill (N. Y.) 475; Green Bay, etc., Canal Co. *v.* Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

53. Donahue *v.* Klassner, 22 Mich. 252 (holding that the burden of proof is not

new trial, the essential facts are the same as on the former one, the former judgment should be regarded as conclusive,[54] unless there was error in admitting or excluding evidence, or unless a question of fact was overlooked on the former trial.[55]

NEW YORK FUNDS. A term which may embrace stocks, bank-notes, specie, and every description of currency which is used in commercial transaction.[1] (See FUNDS.)

NEXT. NEAREST,[2] *q. v.*; nearest or nighest.[3] (Next: Day, see NEXT DAY. Friend, see INFANTS; INSANE PERSONS. Of Kin, see NEXT OF KIN.)

NEXT DAY. In a legal sense, next business day.[4] (See DAY.)

NEXT FRIEND. See INFANTS; INSANE PERSONS.

NEXT OF KIN.[5] Nearest in relationship according to the degrees of consan-

changed on a second trial in ejectment by the fact that restitution of the premises was obtained by plaintiff below); Silliman *v.* Paine, 70 Hun (N. Y.) 459, 24 N. Y. Suppl. 344.

Evidence introduced on the first trial is admissible on the new trial (Atchison *v.* Owen, 58 Tex. 610), but the parties are not bound by the evidence offered by them on the former trial (Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170).

54. New York Cent., etc., R. Co. *v.* Brennan, 24 N. Y. App. Div. 343, 48 N. Y. Suppl. 675 [*affirmed* in 163 N. Y. 584, 57 N. E. 1119]; Silliman *v.* Paine, 70 Hun (N. Y.) 459, 24 N. Y. Suppl. 344.

55. New York Cent., etc., R. Co. *v.* Brennan, 24 N. Y. App. Div. 343, 48 N. Y. Suppl. 675 [*affirmed* in 163 N. Y. 584, 57 N. E. 1119].

1. Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10, 13.

2. State *v.* Asbell, 57 Kan. 398, 404, 46 Pac. 770.

3. Hogaboom *v.* Lunt, 14 Ont. Pr. 480, 482.

The word imports something which has preceded it. Green *v.* McLaren, 7 Ga. 107, 109. See also Findley *v.* Ritchie, 8 Port. (Ala.) 452, 455; Mobile Bank *v.* State, Minor (Ala.) 290, 291; Gibson *v.* Laughlin, Minor (Ala.) 182; Wallace *v.* Hill, Minor (Ala.) 70; Daly *v.* Concordia F. Ins. Co., 16 Colo. App. 349, 65 Pac. 416, 417; Green *v.* McLaren, 7 Ga. 107, 108; Nettleton *v.* Billings, 13 N. H. 446, 447; Osgood *v.* Hutchins, 6 N. H. 374, 384; Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255, 258; Bunn *v.* Thomas, 2 Johns. (N. Y.) 190; Weeks *v.* Weeks, 40 N. C. 111, 115, 47 Am. Dec. 358; Fosdick *v.* Perrysburg, 14 Ohio St. 472, 480; Tallon's Bond, 7 Pa. Co. Ct. 636.

Used in connection with other words.— "Next after judgment." New Hampshire Strafford Bank *v.* Cornell, 2 N. H. 324, 331; French *v.* Wilkins, 17 Vt. 341, 346. "Next annual assessment." *In re* Cranston, 18 R. I. 417, 423, 28 Atl. 608. "Next before." Clayton *v.* Corby, 2 Q. B. 813, 824, 2 G. & D. 174, 42 E. C. L. 926. "Next court." Green *v.* McLaren, 7 Ga. 107, 109; Lanier *v.* Stone, 8 N. C. 329, 332. "Next day." See NEXT DAY. "Next devisee." Den *v.* Robinson, 5 N. J. L. 689, 710. "Next election." People *v.* Budd, 114 Cal. 168, 170, 45 Pac. 1060, 34 L. R. A. 46; State *v.* Kiewel, 86 Minn. 136, 137, 90 N. W. 160. "Next friend." See NEXT FRIEND. "Next general election." People *v.* Col, 132 Cal. 334, 336, 64 Pac. 477; State *v.* Gardner, 3 S. D. 553, 557, 54 N. W. 606. "Next justice." Cheesborough *v.* Clark, 1 Root (Conn.) 141. "Next living relative." Mattison *v.* Sovereign Camp W. W., 25 Tex. Civ. App. 214, 216, 60 S. W. 897. "Next of kin." See NEXT OF KIN. "Next port reached." Bullock *v.* White Star Steamship Co., 30 Wash. 448, 456, 70 Pac. 1106. "Next quarter sessions." Reg. *v.* Trafford, 15 Q. B. 200, 203, 69 E. C. L. 200; Rex *v.* Essex, 1 B. & Ald. 210, 211; Rex *v.* Yorkshire, Dougl. (3d ed.) 193. "Next regular meeting." State *v.* Williams, 6 S. D. 119, 124, 60 N. W. 410. "Next regular session." People *v.* Lippincott, 64 Ill. 256, 259. "Next regular term." U. S. *v.* Keiver, 56 Fed. 422, 424. "Next session." State *v.* Williams, 20 S. C. 12, 15. "Next spring term." Anderson *v.* Pearce, 36 Ark. 293, 295, 38 Am. Rep. 39. "Next succeeding grand jury." People *v.* Hill, 3 Utah 334, 360, 3 Pac. 75. "Next succeeding year." Tanner *v.* Rosser, 89 Ga. 811, 812, 15 S. E. 750. "Next Supreme Court." Russell *v.* Monson, 33 Conn. 506, 507. "Next term." People *v.* O'Brien, 41 Ill. 303, 305; Gallup *v.* Schmidt, 154 Ind. 196, 203, 56 N. E. 443; Butcher *v.* Brand, 6 Iowa 235, 236; Wilkie *v.* Jones, Morr. (Iowa) 97, 98; State *v.* Asbell, 57 Kan. 398, 403, 46 Pac. 770; French *v.* Barnard, 9 Cush. (Mass.) 403, 404; Sondley *v.* Asheville, 110 N. C. 84, 89, 14 S. E. 514; Godfrey *v.* Douglas County, 28 Oreg. 446, 450, 43 Pac. 171; Tompkins *v.* Clackamas County, 11 Oreg. 364, 366, 4 Pac. 1210; Moodie *v.* Vandyke, 4 Yeates (Pa.) 512, 513; Shelburn *v.* Eldridge, 10 Vt. 123, 125; Coda *v.* Thompson, 39 W. Va. 67, 68, 19 S. E. 548; State *v.* Sasse, 72 Wis. 3, 5, 38 N. W. 343; *In re* McEwen, 4 Fed. 13, 15, 9 Biss. 368. "Next thing to an impossibility." Sadlier *v.* New York, 104 N. Y. App. Div. 82, 88, 93 N. Y. Suppl. 579.

4. German Security Bank *v.* McGarry, 100 Ala. 633, 635, 17 So. 704; Davis *v.* Hanley, 12 Ark. 645, 650. See also Howard *v.* Ives, 1 Hill (N. Y.) 263, 265.

5. **A legal and technical phrase** see Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338, 346.

guinity as regards the sharing in the estate of the intestate;[6] all persons, legitimate or otherwise, of the same blood;[7] nearest in blood relationship;[8] next or nearest in blood;[9] nearest of blood;[10] nearest of kin in blood;[11] the next of blood who are not attainted of treason, felony, or have any other lawful disability;[12] relatives in blood;[13] those related by blood who take the personal estate of one who dies intestate;[14] nearest of kin;[15] nearest relatives;[16] all relatives of the testator to whom any assets shall have been paid;[17] next in relationship;[18] those who stand in the nearest relationship to the intestate according to the civil law for computing degrees of kinship;[19] the relations of a party who has died intestate;[20] all distributees of the deceased intestate;[21] such persons as may be entitled to receive the funds to be distributed of an intestate;[22] those capable of inheriting, or who would be entitled to distribution if there were no nearer kindred;[23] sometimes equivalent to "HEIR,"[24] *q. v.*, or "HEIR AT LAW,"[25] *q. v.* Under the provisions of statutes relating to the distribution of a decedent's estate,[26] all of those entitled under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband and wife;[27] persons appointed by law to succeed to the personal property of an intestate;[28] persons who take under the intestate laws;[29] those of the kindred or relations by blood, who, in cases of

But see Talbot *v.* Tipperary Men Nat., etc., Benev. Assoc., 23 Misc. (N. Y.) 486, 488, 52 N. Y. Suppl. 633.

6. Perry *v.* Scaife, 126 Wis. 405, 408, 105 N. W. 920. See also Swasey *v.* Jaques, 144 Mass. 135, 138, 10 N. E. 758, 39 Am. Rep. 65.

7. Rogers *v.* Weller, 20 Fed. Cas. No. 12,022, 5 Biss. 166, 170.

8. Pinkston *v.* Semple, 92 Ala. 564, 568, 9 So. 329; Fargo *v.* Miller, 150 Mass. 225, 231, 22 N. E. 1003, 5 L. R. A. 690; Swasey *v.* Jaques, 144 Mass. 135, 137, 10 N. E. 758, 59 Am. Rep. 65; Pinkham *v.* Blair, 57 N. H. 226, 234. See also Blagge *v.* Balch, 162 U. S. 439, 465, 16 S. Ct. 853, 40 L. ed. 1039.

9. Helms *v.* Elliott, 89 Tenn. 446, 450, 14 S. W. 930, 10 L. R. A. 535.

10. Burrill L. Dict. [*quoted* in Slosson *v.* Lynch, 43 Barb. (N. Y.) 147, 162].

11. Doody *v.* Higgins, 2 Kay & J. 729, 734, 25 L. J. Ch. 773, 4 Wkly. Rep. 737, 69 Eng. Reprint 976.

12. *In re* Everitt, 195 Pa. St. 450, 454, 46 Atl. 1.

13. Betsinger *v.* Chapman, 88 N. Y. 487, 497 [*affirming* 24 Hun 15].

14. Tillman *v.* Davis, 95 N. Y. 17, 24, 47 Am. Rep. 1.

15. Duffy *v.* Hargan, 62 N. J. Eq. 588, 590, 50 Atl. 678; Redmond *v.* Burroughs, 63 N. C. 242, 246; Henry *v.* Henry, 31 N. C. 278, 279.

16. Withy *v.* Mangles, 10 Cl. & F. 215, 240, 8 Jur. 69, 8 Eng. Reprint 724.

17. Merchants' Ins. Co. *v.* Hinman, 15 How. Pr. (N. Y.) 182, 184.

18. David *v.* Waters, 11 Oreg. 448, 449, 5 Pac. 748.

19. Van Cleve *v.* Van Fossen, 73 Mich. 342, 345, 41 N. W. 258.

The rule of civil law in regard to the mode of reckoning degrees of kindred has always prevailed so far as relates to the personal estate of the intestate. Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495, 497.

The common law of England, where the common law in that regard was enforced in the state at the time of the enactment of the statute, determines the meaning of the term as used in the statute. Hutchinson Inv. Co. *v.* Caldwell, 152 U. S. 65, 70, 14 S. Ct. 504, 38 L. ed. 356. Under a statute providing that where there is no wife or children there shall be made a just and equal distribution of the next of kindred of the intestate, in an equal degree or legally representing their stock, it is held that the terms "next of kindred" and "stock" are common-law words and not civil. Davis *v.* Vanderveer, 23 N. J. Eq. 558, 567. See also DESCENT AND DISTRIBUTION, 14 Cyc. 25.

20. Warren *v.* Englehart, 13 Nebr. 283, 284, 13 N. W. 401; Steel *v.* Kurtz, 28 Ohio St. 191, 197; Bouvier L. Dict. [*quoted* in Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 250, 55 N. W. 913].

21. Seabright *v.* Seabright, 28 W. Va. 412, 465.

22. Armstrong *v.* Grandin, 39 Ohio St. 368, 374.

23. Anderson *v.* Potter, 5 Cal. 63, 64.

24. Leavitt *v.* Dunn, 56 N. J. L. 309, 310, 28 Atl. 590, 44 Am. St. Rep. 402; New York L. Ins., etc., Co. *v.* Hoyt, 31 N. Y. App. Div. 84, 92, 52 N. Y. Suppl. 819 [*affirmed* in 161 N. Y. 1, 9, 55 N. E. 299]. See also HEIR.

Applied to real property or personal property, the term has been held to mean the same thing. Hillhouse *v.* Chester, 3 Day (Conn.) 166, 212, 3 Am. Dec. 265.

25. Martling *v.* Martling, 55 N. J. Eq. 771, 790, 39 Atl. 203; Serfass *v.* Serfass, 190 Pa. St. 484, 485, 42 Atl. 888.

26. **Common law or civil law as determining meaning of term** see *supra*, note 19.

27. Alfson *v.* Bush Co., 182 N. Y. 393, 397, 75 N. E. 230, 108 Am. St. Rep. 815.

28. Leavitt *v.* Dunn, 56 N. J. L. 309, 310, 28 Atl. 590, 44 Am. St. Rep. 402.

29. *In re* Kane, 185 Pa. St. 544, 547, 40 Atl. 90.

intestacy, by the statute of distributions succeed to the share of the intestate's personal property;[30] those to whom, under the statute of distributions, the personal estate of the deceased would pass.[31] (Next of Kin: In General, see DESCENT AND DISTRIBUTION. Privity Between Decedent and, as Affecting Conclusiveness of Judgment, see JUDGMENTS. Right and Duty of as to Possession or Disposition of Dead Body, see DEAD BODIES. Right of — To Administer Upon Decedent's Estate, see EXECUTORS AND ADMINISTRATORS; To Exemptions, see EXEMPTIONS; To Sue For Death, see DEATH.)

NICE. Characterized by discrimination and judgment; acute; discerning; exactly fitted or adjusted; accurate; apt; delicately constructed; hence easily disarranged or injured; fragile; tender; agreeable or pleasant in any way; pleasing to the senses.[32]

NICKEL. The word representing our five-cent coin.[33] (See COIN; CURRENCY; MONEY.)

NICKER-PECKER. See NICKLE.

NICKLE. The European green woodpecker, or gaffle; called also nicker-pecker.[34]

NICKNAME. A short name, one nicked or cut off for the sake of brevity.[35] (Nickname: In General, see NAMES. Designation of Parties by in Criminal Prosecution, see INDICTMENTS AND INFORMATIONS.)

NIECE. The daughter of a brother or sister.[36] (See NEPHEW.)

30. Slosson *v.* Lynch, 28 How. Pr. (N. Y.) 417, 419. See also May *v.* Lewis, 132 N. C. 115, 117, 43 S. E. 550.

31. Merchants' Ins. Co. *v.* Hinman, 34 Barb. (N. Y.) 410, 413.

The term has been held to include: Brothers and sisters of the half blood. Edwards *v.* Barksdale, 2 Hill Eq. (S. C.) 416, 417; Brown *v.* Brown, 1 D. Chipm. (Vt.) 360. Nephews and nieces. Leavitt *v.* Dunn, 56 N. J. L. 309, 311, 28 Atl. 590, 44 Am. St. Rep. 402; *In re* Everitt, 195 Pa. St. 450, 454, 46 Atl. 1. Surviving husbands. O'Donnell *v.* Slack, 123 Cal. 285, 289, 55 Pac. 906, 43 L. R. A. 388; Seabright *v.* Seabright, 28 W. Va. 412, 465. Wife or widow. O'Donnell *v.* Slack, 123 Cal. 285, 289, 55 Pac. 906, 43 L. R. A. 388; Knickerbacker *v.* Seymour, 46 Barb. (N. Y.) 198, 207; Merchants' Ins. Co. *v.* Hinman, 15 How. Pr. (N. Y.) 182, 184; Seabright *v.* Seabright, 28 W. Va. 412, 465; Vetaloro *v.* Perkins, 101 Fed. 393, 397.

The term has been held not to include: Adopted son. Ivin's Appeal, 106 Pa. St. 176, 182, 51 Am. Rep. 516; Helms *v.* Elliott, 89 Tenn. 446, 450, 14 S. W. 930, 10 L. R. A. 535. Husband and daughter. Ivin's Appeal, 106 Pa. St. 176, 184, 51 Am. Rep. 516. Nephew. Matter of Haug, 29 Misc. (N. Y.) 36, 38, 60 N. Y. Suppl. 382. Surviving husband. Swasey *v.* Jaques, 144 Mass. 135, 138, 10 N. E. 758, 59 Am. Rep. 65; Haraden *v.* Larrabee, 113 Mass. 430, 431; Watson *v.* St. Paul City R. Co., 70 Minn. 514, 516, 73 N. W. 400; Warren *v.* Englehart, 13 Nebr. 283, 287, 13 N. W. 401; Supreme Council O. C. F. *v.* Bennett, 47 N. J. Eq. 39, 43, 19 Atl. 785; Alfson *v.* Bush Co., 182 N. Y. 393, 394, 75 N. E. 230, 108 Am. St. Rep. 815; Drake *v.* Gilmore, 52 N. Y. 389, 393; Dickins *v.* New York Cent. R. Co., 23 N. Y. 158, 159; Mundt *v.* Glockner, 26 N. Y. App. Div. 123, 124, 50 N. Y. Suppl. 190; Green *v.* Hudson River R. Co., 32 Barb. (N. Y.) 25, 28; Peterson *v.* Webb, 39 N. C. 56, 58; Western Union Tel. Co. *v.* McGill, 57 Fed. 699, 705, 6 C. C. A. 521, 21 L. R. A. 818. Wife or widow. Swasey *v.* Jaques, 144 Mass. 135, 138, 10 N. E. 758, 59 Am. Rep. 65; Haraden *v.* Larrabee, 113 Mass. 430, 431; Supreme Council O. C. F. *v.* Bennett, 47 N. J. Eq. 39, 43, 19 Atl. 785; Alfson *v.* Bush Co., 182 N. Y. 393, 397, 75 N. E. 230, 108 Am. St. Rep. 815; *In re* Devoe, 171 N. Y. 281, 284, 63 N. E. 1102, 57 L. R. A. 536; Lathrop *v.* Smith, 24 N. Y. 417, 420; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310, 316; Mundt *v.* Glockner, 26 N. Y. App. Div. 123, 124, 50 N. Y. Suppl. 190; Snyder *v.* Snyder, 60 How. Pr. (N. Y.) 368, 370; Peterson *v.* Webb, 39 N. C. 56, 58; Storer *v.* Wheatley, 1 Pa. St. 506; Wilson *v.* Frazier, 2 Humphr. (Tenn.) 30, 31.

32. Standard Dict. [*quoted* in Brophy *v.* Idaho Produce, etc., Co., 31 Mont. 279, 287, 78 Pac. 493].

"Nicely located" see People *v.* Jacobs, 35 Mich. 36, 38.

33. Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 221, 46 S. W. 1128.

34. Webster Int. Dict. [*quoted* in Duke *v.* Cleaver, 19 Tex. Civ. App. 218, 221, 46 S. W. 1128, where it is said: "The name represents . . . a rare species of the bird kingdom — *rara avis*"].

35. North Carolina Inst. for Education of Deaf, etc. *v.* Norwood, 45 N. C. 65, 74.

36. Goddard *v.* Amory, 147 Mass. 71, 74, 16 N. E. 725; Johnson Dict. [*quoted* in Grieves *v.* Rawley, 10 Hare 63, 64, 22 L. J. Ch. 625, 44 Eng. Ch. 61, 68 Eng. Reprint 840].

The term has been held to include: Grand niece (Shepard *v.* Shepard, 57 Conn. 24, 39, 17 Atl. 173; Benton *v.* Benton, 66 N. H. 169, 170, 20 Atl. 365), although it may not (Matter of Woodward, 53 Hun (N. Y.) 466, 471, 6 N. Y. Suppl. 186 [*affirmed* in 117 N. Y.

NIGHT or **NIGHT-TIME.**[37] That portion of the twenty-four hours from sunset to sunrise;[38] the period from the termination of daylight in the evening until earliest dawn of next morning;[39] the time between the darkness after sundown and dawn of daylight in the morning;[40] the time between one hour after sunset on one day and one hour before sunrise on the next day;[41] all of the twenty-four hours from thirty minutes after sunset until thirty minutes before sunrise;[42] that portion of the twenty-four hours where there is insufficient daylight to discern a man's features;[43] that space of time during which the sun is below the horizon of the earth, except that space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned.[44] (See, generally, ARSON; BURGLARY; TIME.)

NIGHT SOIL. A term said to include and mean the contents of privy vaults, cesspools, dry wells, and sinks.[45]

NIGHT-WALKER. The name applied to one who roams at night for evil purposes;[46] one whose habit it is to be abroad at night for some wicked purpose;[47] a woman who strolls the streets at night for the unlawful purpose of picking up men for lewd purposes;[48] persons who eavesdrop men's houses "to hearken after discourse, and thereupon to frame slanderous and mischievous tales, to cast men's gates, earts, and the like;"[49] those who are abroad during the night and sleep by day.[50] (See, generally, LEWDNESS; PROSTITUTION. See also COMMON NIGHT-WALKERS.)

NIGRUM NUNQUAM EXCEDERE DEBET RUBRUM. A maxim meaning "The black should never go beyond the red (i. e. the text of a statute should never be read in a sense more comprehensive than the rubric, or title)."[51]

NIHIL AGITUR SI QUID AGENDUM SUPEREST. A maxim meaning "Nothing is done if anything remains to be done."[52]

522, 23 N. E. 120, 7 L. R. A. 367]; Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475) as employed in particular instances.

The term has been held not to include: "'Nieces' of the half blood." State *v.* Guiton, 51 La. Ann. 155, 157, 24 So. 784. "Wives or widows of nephews." Goddard *v.* Amory, 147 Mass. 71, 74, 16 N. E. 725.

37. "Nights," as used in fire insurance policy on a factory, in which the insured represented that a watchman was kept nights, means through the hours of every night in the week from eight P. M. to the usual hour of commencing work in the morning, eight o'clock P. M., being the time when the work for the day ceased. Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 36, 54 Am. Dec. 309.

38. Taylor *v.* Territory, (Ariz. 1901) 64 Pac. 423; State *v.* Gray, 23 Nev. 301, 303, 46 Pac. 801; State *v.* Richards, 29 Utah 310, 312, 81 Pac. 142; State *v.* Miller, 24 Utah 312, 313, 67 Pac. 790; Jones *v.* Southern Ins. Co., 38 Fed. 19, 21; Webster Dict.; Worcester Dict. [*both* quoted in People *v.* Husted, 52 Mich. 624, 626, 18 N. W. 388].

39. State *v.* Bancroft, 10 N. H. 105, 106; State *v.* McKnight, 111 N. C. 690, 691, 16 S. E. 319.

40. State *v.* Mecum, 95 Iowa 433, 436, 64 N. W. 286.

41. Com. *v.* Lamb, 1 Gray (Mass.) 493, 495; Com. *v.* Williams, 2 Cush. (Mass.) 582, 589.

"Night" as used in an indictment for burglary means in the night, after sundown of that day. Shelton *v.* Com., 89 Va. 450, 451, 16 S. E. 355.

"Night-time" in an information charging the commission of an offense has been said to embrace the period of one hour after sunset to fifty-nine minutes past eleven o'clock. Com. *v.* Flynn, 3 Cush. (Mass.) 525, 527.

42. Jackson *v.* State, (Tex. Cr. App. 1897) 38 S. W. 990; Laws *v.* State, 26 Tex. App. 643, 655, 10 S. W. 220.

43. People *v.* Griffin, 19 Cal. 578; State *v.* Morris, 47 Conn. 179, 182; People *v.* Nagle, 137 Mich. 88, 93, 100 N. W. 273; Klieforth *v.* State, 88 Wis. 163, 165, 59 N. W. 507, 43 Am. St. Rep. 875. See also Thomas *v.* State, 5 How. (Miss.) 20, 23.

44. Bouvier L. Dict. [*quoted* in Petit *v.* Colmery, 4 Pennew. (Del.) 266, 271, 55 Atl. 344].

45. *In re* Zhizhuzza, 147 Cal. 328, 330, 81 Pac. 955.

46. State *v.* Clemons, 78 Iowa 123, 124, 42 N. W. 562; State *v.* Dowers, 45 N. H. 543, 544.

47. Watson *v.* Carr, 1 Lew. C. C. 6, 7.

By the old English law a "night-walker" seems to have been held simply as a suspicious person rather than a criminal. Thomas *v.* State, 55 Ala. 260, 261.

48. Stokes *v.* State, 92 Ala. 73, 75, 9 So. 400, 25 Am. St. Rep. 22; Thomas *v.* State, 55 Ala. 260, 261; Lawrence *v.* Hedger, 3 Taunt. 14, 15, 12 Rev. Rep. 571.

49. State *v.* Dowers, 45 N. H. 543, 544; Burns Justice [*quoted* in Stokes *v.* State, 92 Ala. 73, 75, 9 So. 400, 25 Am. St. Rep. 22].

50. Bouvier L. Dict. [*quoted* in State *v.* Dowers, 45 N. H. 543, 549].

51. Bouvier L. Dict.

52. Morgan Leg. Max.

NIHIL ALIUD POTEST REX QUAM QUOD DE JURE POTEST. A maxim meaning "The king can do nothing but what he can do by law." [53]

NIHIL CALLIDATE STULTUS. A maxim meaning "Nothing is more foolish than cunning." [54]

NIHIL CAPIAT PER BREVE. Literally "That he take nothing by his writ." The form of judgment against plaintiff in an action, either in bar or in abatement.[55] (See, generally, DISMISSAL AND NONSUIT; JUDGMENTS.)

NIHIL CONSENSUI TAM CONTRARIUM EST QUAM VIS ATQUE METUS. A maxim meaning "Nothing is so opposed to consent as force and fear." [56]

NIHIL CUIQUAM EXPEDIT QUOD PER LEGES NON LICET. A maxim meaning "That which is contrary to law cannot be profitable to any one." [57]

NIHIL DAT QUI NON HABET. A maxim meaning "He gives nothing who has nothing." [58]

NIHIL DE RE ACCRESCIT EI QUI NIHIL IN RE QUANDO JUS ACCRESCERET HABET. A maxim meaning "Nothing of a matter accrues to him who, when the right accrues, has nothing in that matter." [59]

NIHIL DICIT or **NIL DICIT.** Literally "He says nothing." [60] A form of judgment by default;[61] a judgment rendered against a defendant for want of a plea;[62] a species of judgment by confession.[63] (See, generally, JUDGMENTS.)

NIHIL DICTUM QUOD NON DICTUM PRIUS. A maxim meaning "Nothing is said which was not said before." [64]

NIHIL EST. Literally "There is nothing." A form of return made by a sheriff when he has been unable to serve the writ.[65]

NIHIL EST AD CONCILIANDUM GRATIUS VERECUNDIA. A maxim meaning "There is nothing more agreeable to conciliation than mutual respect." [66]

NIHIL EST ENIM LIBERALE QUOD NON IDEM JUSTUM. A maxim meaning "For there is nothing generous which is not at the same time just." [67]

NIHIL EST MAGIS RATIONI CONSENTANEUM QUAM EODEM MODO QUODQUE DISSOLVERE QUO CONFLATUM EST. A maxim meaning "Nothing is more consonant to reason than that a thing should be dissolved or discharged in the same way in which it was created." [68]

NIHIL FACIT ERROR NOMINIS CUM DE CORPORE CONSTAT. A maxim meaning "An error of name is nothing when there is certainty as to the person." [69]

NIHIL FIT A TEMPORE; QUAMQUAM NIHIL NON FIT IN TEMPORE. A maxim meaning "Nothing is done by time; although every thing is done in time." [70]

NIHIL HABET. Literally "He has nothing." A return to a scire facias or other writ.[71] (See, generally, EXECUTIONS; PROCESS; SCIRE FACIAS.)

53. Peloubet Leg. Max.
54. Morgan Leg. Max.
55. Black L. Dict.
56. Black L. Dict.
57. Morgan Leg. Max.
58. Bouvier L. Dict.
59. Black L. Dict.
60. Black L. Dict.
61. Hutchinson *v.* Manchester St. R. Co., 73 N. H. 271, 277, 60 Atl. 1011; Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 654, 12 S. E. 817. See also Falken *v.* Housatonic R. Co., 63 Conn. 258, 259, 27 Atl. 1117.
62. Bouvier L. Dict. [*quoted* in Wilbur *v.* Maynard, 6 Colo. 483, 485].
63. Graves *v.* Cameron, 77 Tex. 273, 275, 14 S. W. 59; Gilder *v.* McIntyre, 29 Tex. 89, 91.

Judgment by default: Compared see Wilbur *v.* Maynard, 6 Colo. 482, 485. Distinguished see Gilder *v.* McIntyre, 29 Tex. 89, 91 [*quoted* in Graves *v.* Cameron, 77 Tex. 273, 275, 14 S. W. 59].

64. Black L. Dict.
65. Black L. Dict.

"**Non est inventus**" return distinguished see Sherer *v.* Easton Bank, 33 Pa. St. 134, 139. See, generally, PROCESS.

66. Peloubet Leg. Max.
67. Bouvier L. Dict.
68. Black L. Dict.
69. Peloubet Leg. Max.

Applied in: Brewster *v.* McCall, 15 Conn. 274, 293; King's College *v.* McDonald, 3 Nova Scotia 106, 113; *Re* Whitty, 30 Ont. 300, 301.

70. Morgan Leg. Max.
71. Black L. Dict.

It imports not only an inability to make personal service upon defendant, but that he had no residence in the county at which a copy of the summons could have been left with an adult member of his family, or the family with which he was residing at the time. Hains *v.* Viereck, 2 Phila. (Pa.) 40. See also Philadelphia *v.* Cooper, 212 Pa. St.

NIHIL HABET FORUM EX SCENA. A maxim meaning "The court has nothing to do with what is not before it." [72]

NIHIL HONESTUM AMICO EST OPPORTUNO AMICUS. A maxim meaning "Nothing can be honest which is destitute of justice." [73]

NIHIL INFRA REGNUM SUBDITOS MAGIS CONSERVAT IN TRANQUILITATE ET CONCORDIA QUAM DEBITA LEGUM ADMINISTRATIO. A maxim meaning "Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws." [74]

NIHIL INIQUIUS QUAM ÆQUITATEM NIMIS INTENDERE. A maxim meaning "Nothing is so unjust as to extend equity too far." [75]

NIHIL IN LEGE INTOLERABILIUS EST EANDEM REM DIVERSO JURE CENSERI. A maxim meaning "Nothing is more intolerable in law than that the same thing be judged by different rules." [76]

NIHIL INTEREST IPSO JURE QUIS ACTIONEM NON HABEAT AN PER EXCEPTIONEM INFIRMETUR. A maxim meaning "The law does not concern itself as to who may not have the right to an action, or who may be injured by an exception." [77]

NIHIL MAGIS JUSTUM EST QUAM QUOD NECESSARIUM EST. A maxim meaning "Nothing is more just than that which is necessary." [78]

NIHIL NEQUAM EST PRÆSUMENDUM. A maxim meaning "Nothing wicked is to be presumed." [79]

NIHIL PERFECTUM EST DUM ALIQUID RESTAT AGENDUM. A maxim meaning "Nothing is perfect while something remains to be done." [80]

NIHIL PETI POTEST ANTE ID TEMPUS, QUO PER RERUM NATURAM PERSOLVI POSSIT. A maxim meaning "Nothing can be demanded before that time when, in the nature of things, it can be paid." [81]

NIHIL POSSUMUS CONTRA VERITATEM. A maxim meaning "We can do nothing against truth." [82]

NIHIL PRÆSCRIBITUR NISI QUOD POSSIDETUR. A maxim meaning "There is no prescription for that which is not possessed." [83]

NIHIL QUOD EST CONTRA RATIONEM EST LICITUM. A maxim meaning "Nothing that is against reason is lawful." [84]

NIHIL QUOD EST INCONVENIENS EST LICITUM. A maxim meaning "Nothing inconvenient is lawful." [85]

NIHIL SIMILE EST IDEM. A maxim meaning "Nothing similar is identical." [86]

NIHIL SIMUL INVENTUM EST ET PERFECTUM. A maxim meaning "Nothing is invented and perfected at the same moment." [87]

NIHIL TAM ABSURDUM DICI POTEST UT NON DICATUR A PHILOSOPHO. A maxim meaning "There is nothing so absurd but that it may, at some time, have been uttered by a philosopher." [88]

NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI QUAM UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST. A maxim meaning "Nothing is so consonant to natural equity as that every contract should be dissolved by the means which rendered it binding." [89]

306, 308, 61 Atl. 926; Brundred *v.* Egbert, 164 Pa. St. 615, 621, 30 Atl. 503.

"Non est" returu distinguished see Brundred *v.* Egbert, 164 Pa. St. 615, 620, 30 Atl. 503.

72. Bouvier L. Dict.
73. Morgan Leg. Max.
74. Black L. Dict.
75. Peloubet Leg. Max.
76. Morgan Leg. Max.
77. Peloubet Leg. Max.
78. Black L. Dict.
79. Bouvier L. Dict.
80. Morgan Leg. Max.
81. Peloubet Leg. Max.
82. Black L. Dict.
83. Bouvier L. Dict.

Applied in Blundell *v.* Catterall, 5 B. & Ald. 268, 276, 24 Rev. Rep. 353, 7 E. C. L. 152.

84. Black L. Dict.
85. Bouvier L. Dict.

Applied in: Harris *v.* Willard, Smith (N. H.) 63, 71; Egerton *v.* Brownlow, 4 H. L. Cas. 1, 195, 18 Jur. 71, 23 L. J. Ch. 348, 10 Eng. Reprint 359; Bonisteel *v.* Saylor, 17 Ont. App. 505, 518.

86. Peloubet Leg. Max.
87. Black L. Dict.
88. Morgan Leg. Max.
89. Broom Leg. Max.

Applied in: Woodworth *v.* Woodworth,

NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI, QUAM VOLUNTATEM DOMINI REM SUAM IN ALIUM TRANSFERRE, RATUM HABERE. A maxim meaning "Nothing is so consonant to natural equity as to regard the wish of the owner in transferring his own property to another." [90]

NIHIL TAM NATURALE EST QUAM EO GENERE QUIDQUE DISSOLVERE, QUO COLLIGATUM EST. A maxim meaning "Nothing is so natural as that an obligation should be dissolved by the same principles which were observed in contracting it." [91]

NIHIL TAM PROPRIUM EST IMPERIO QUAM LEGIBUS VIVERE. A maxim meaning "Nothing is so becoming to authority, as to live according to the law." [92]

NIL AGIT EXEMPLUM LITEM QUOD LITE RESOLVIT. A maxim meaning "An example does no good which settles one question by another." [93]

NIL CONSENSUI TAM CONTRARIUM EST QUAM VIS ATQUE METUS. A maxim meaning "There can be no consent when under duress of force or fear." [94]

NIL DEBET. Literally "He owes nothing." The form of the general issue in all actions of debt on simple contract.[95] (Nil Debet: Plea of — In Action of Debt, see DEBT, ACTION OF; On Bill or Note, see COMMERCIAL PAPER; On Bond, see BONDS; On Judgment, see JUDGMENTS.)

NIL DICIT. See NIHIL DICIT.

NIL FACIT ERROR NOMINIS CUM DE CORPORE VEL PERSONA CONSTAT. A maxim meaning "A mistake in the name does not matter when the body or person is manifest." [96]

NIL HABUIT IN TENEMENTIS. A maxim meaning "He had nothing (no interest) in the tenements." A plea in debt on a lease indented, by which the defendant sets up that the person claiming to be landlord had no title or interest.[97]

NIL SIMILIUS INSANO QUAM INEBRIUS. A maxim meaning "Nothing more strongly resembles a madman than a drunken man." [98]

NIL SINE PRUDENTI FECIT RATIONE VETUSTAS. A maxim meaning "Antiquity did nothing without a good reason." [99]

NIL TAM PROPRIUM IMPERII AC LIBERTATIS QUAM LEGIBUS VIVERE. A maxim meaning "Nothing is so peculiar to empire and liberty as to live in accordance with law." [1]

NIL TEMERE NOVANDUM. A maxim meaning "Nothing should be rashly changed." [2]

NIL UTILE AUT HONESTUM QUOD LEGIBUS CONTRARIUM. A maxim meaning "Nothing is useful or honorable that is contrary to law." [3]

NIMIA CERTITUDO CERTITUDINEM IPSAM DESTRUIT. A maxim meaning "Too great certainty destroys certainty itself." [4]

NIMIA SUBTILITAS IN JURE REPROBATUR. A maxim meaning "Too much subtlety in law is discountenanced." [5]

NIMIA SUBTILITAS IN JURE REPROBATUR, ET TALIS CERTITUDO CERTITUDINEM CONFUNDIT. A maxim meaning "Too great subtlety is disapproved of in law, and such certainty confounds certainty." [6]

Ritch. Eq. Cas. (Nova Scotia) 337, 340 (per Ritchie, E. J.); *Ex p.* Banks, 1 Newfoundl. 349, 355.

Another form of this maxim, "*Nihil tam naturale, quam quidlibet dissolvi eo modo, quo ligatur,*" is found in Hahn *v.* Kelly, 34 Cal. 391, 423, 94 Am. Dec. 742; Morris *v.* Galbraith, 8 Watts (Pa.) 166, 167.

90. Peloubet Leg. Max.
91. Bouvier L. Dict.
92. Peloubet Leg. Max.
93. Bouvier L. Dict.
94. Morgan Leg. Max.
95. Black L. Dict.
96. Black L. Dict.

Applied in: Schenck *v.* Voorhees, 7 N. J. L. 383, 390; Langdon *v.* Astor, 3 Duer (N. Y.) 477, 610; Stuber *v.* Schuartz, 1 N. Y. City Ct. 110.

97. Black L. Dict.

Applied in: Steele *v.* Adams, 1 Me. 1, 4; Croade *v.* Ingraham, 13 Pick. (Mass.) 33, 35; Moffat *v.* Strong, 9 Bosw. (N. Y.) 57, 65; Cormack *v.* Bergen, 5 U. C. Q. B. O. S. 561, 566.

98. Morgan Leg. Max.
99. Peloubet Leg. Max.
1. Morgan Leg. Max.
2. Black L. Dict.
3. Peloubet Leg. Max.
4. Bouvier L. Dict.
5. Black L. Dict.
6. Bouvier L. Dict.

Applied in Vander Donckt *v.* Thellusson, 8

NIMIUM ALTERCANDO VERITAS AMITTITUR. A maxim meaning "By too much altercation truth is lost."[7]

NISI. Literally "Unless."[8] (Nisi: Decree or Judgment — In General, see EQUITY; JUDGMENTS; In Divorce Suit, see DIVORCE. Rule or Order, see ORDERS.)

NISI PRIUS COURT. A court held for the trial of issues of fact, before a jury and a single presiding judge.[9] (See, generally, COURTS.)

NISI PRIUS WRIT. The old name of the writ of venire, which originally, in pursuance of the statute of Westminster II, contained the nisi prius clause.[10] (See, generally, JURIES.)

NITRATE. A term sometimes erroneously employed for "nitrite."[11]

NITRATE OF LEAD. A chemical combination of lead and nitric acid.[12] (See LEAD.)

NITROGLYCERIN. A term used to designate an explosive acid derived from nitric acid and glycerin.[13] (See GUN COTTON; GUNPOWDER; and, generally, EXPLOSIVES.)

NIXE. A letter addressed to a fictitious person or to a place where there is no post-office; a decoy letter used by the post-office inspectors for the purpose of discovering any meddling or interference with the mails.[14] (See DECOY LETTERS; and, generally, POST-OFFICE.)

NIXE BASKET. A receptacle for unmailable matter.[15] (See, generally, POST-OFFICE.)

NO. Not any; not one; none; not at all; not in any respect or degree — a word expressing negation, denial, or refusal.[16] Also used as an abbreviation of the word "number."[17] (No: Award, see NO AWARD. Bill, see NO BILL. Funds, see NO FUNDS. Go, see NO GO. Goods, see NO GOODS.)

C. B. 812, 821, 19 L. J. C. P. 12, 65 E. C. L. 812.

7. Black L. Dict.

8. Black L. Dict., where it is said: "The word is often affixed, as a kind of elliptical expression, to the words 'rule,' 'order,' 'decree,' 'judgment,' or 'confirmation,' to indicate that the adjudication spoken of is one which is to stand as valid and operative unless the party affected by it shall appear and show cause against it, or take some other appropriate step to avoid it or procure its revocation."

Judgment "nisi" is nothing more than a rule to show cause why judgment should not be rendered. Young *v.* McPherson, 3 N. J. L. 895, 897.

9. Burrill L. Dict.

10. Black L. Dict.

11. Matheson *v.* Campbell, 69 Fed. 597, 601, where in a patent "nitrate of sodium" was used for "nitrite of sodium."

12. Meyer *v.* Arthur, 91 U. S. 570, 571, 23 L. ed. 455.

13. Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234, 237.

14. U. S. *v.* Denicke, 35 Fed. 407, 408.

15. U. S. *v.* Denicke, 35 Fed. 407, 408.

16. Webster Dict. See also Columbian Exposition Salvage Co. *v.* Union Casualty, etc., Co., 220 Ill. 172, 174, 77 N. E. 128.

17. Burr *v.* Broadway Ins. Co., 16 N. Y. 267, 271, where it was held not to be an abbreviation of "north."

Used in connection with other words see the following phrases: "No action shall be brought." Wolf *v.* Burke, 18 Colo. 264, 269, 32 Pac. 427, 19 L. R. A. 792; Leroux *v.* Brown, 12 C. B. 801, 824, 16 Jur. 1021, 22 L. J. C. P. 1, 1 Wkly. Rep. 22, 74 E. C. L. 801. "No attorney at law." *Ex p.* Hunter, 2 W. Va. 122, 175. "No case." Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 491, 6 S. Ct. 1150, 30 L. ed. 134. "No election." Parks *v.* State, 100 Ala. 634, 648, 13 So. 756. "No equity in the bill." McGuire *v.* Van Pelt, 55 Ala. 344, 349. "No evidence." Cassidy *v.* Uhlmann, 170 N. Y. 505, 534, 63 N. E. 554. "No grace." Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483, 485. "No intention." Sioux City, etc., R. Co. *v.* Singer, 49 Minn. 301, 306, 51 N. W. 905, 32 Am. St. Rep. 554, 15 L. R. A. 751. "No knowledge or information." Dickinson *v.* Gray, 8 S. W. 876, 9 S. W. 281, 282, 10 Ky. L. Rep. 292. No "liquors, except." Com. *v.* Fredericks, 119 Mass. 199, 205. "No mechanic." Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484, 491. "No misrepresentation." Mason *v.* Moore, 73 Ohio St. 275, 291, 76 N. E. 932, 4 L. R. A. N. S. 597. "No more." Martin *v.* Murphy, 129 Ind. 464, 467, 28 N. E. 1118; Kentucky Cent. R. Co. *v.* Bourbon County, 82 Ky. 497, 502; Kentucky Cent. R. Co. *v.* Pendleton County, (Ky. 1886) 2 S. W. 176; Kendall *v.* Mondell, 67 Md. 444, 445, 10 Atl. 240; Stewart *v.* Pattison, 8 Gill (Md.) 46, 57; Wells *v.* Anderson, 69 N. H. 561, 44 Atl. 103. "No more and no less." Leitensdorfer *v.* King, 7 Colo. 436, 439, 4 Pac. 37. "No one." Reg. *v.* Toronto R. Co., 2 Can. Cr. Cas. 471, 480. "No others." People *v.* Oyer & Terminer Ct., 101 N. Y. 245, 250, 4 N. E. 259, 54 Am. Rep. 691; Matter of Arnold, 114 N. Y. App. Div. 244, 245, 99 N. Y. Suppl. 740. "No other duty." *In re* Gardiner, 53 Fed. 1013, 1014, 4 C. C. A. 155. "No other

NO AWARD. The name of a plea in an action on an award, by which the defendant traverses the allegation that an award was made.[18] (See, generally, ARBITRATION AND AWARD.)

NOBILES MAGIS PLECTUNTUR PECUNIA; PLEBES VERO IN CORPORE. A maxim meaning "The higher classes are more punished in money; but the lower in person."[19]

NOBILES SUNT QUI ARMA GENTILITIA ANTECESSORUM SUORUM PROFERRE POSSUNT. A maxim meaning "The gentry are those who are able to produce armorial bearings derived by descent from their own ancestors."[20]

NOBILIORES ET BENIGNIORES PRÆSUMPTIONES IN DUBIIS SUNT PRÆFERENDÆ. A maxim meaning "In cases of doubt, the more generous and more benign presumptions are to be preferred."[21]

NOBILITAS EST DUPLEX, SUPERIOR ET INFERIOR. A maxim meaning "There are two sorts of nobility, the higher and the lower."[22]

NO BILL. A phrase, when indorsed by a grand jury on an indictment, is equivalent to "not found," "not a true bill," or "*ignoramus*."[23] (See, generally, INDICTMENTS AND INFORMATIONS.)

NOCENT EXPRESSA; NON EXPRESSA NON NOCENT. A maxim meaning "That which is expressed may injure; but that which is not expressed cannot injure."[24]

NOCUMENTUM. Anything that worketh hurt, inconvenience, or damage.[25] (See, generally, NUISANCES.)

NO FUNDS. A term which denotes a lack of assets or money for a specific use.[26] (No Funds: In Bank, see BANKS AND BANKING. In Hands of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.)

NO GO. A term which may be a substantial translation of the technical words "ne exeat."[27] (See, generally, NE EXEAT.)

NO GOODS. The English equivalent of the Latin term "*nulla bona*."[28] (See NULLA BONA; and, generally, EXECUTIONS.)

NOIL. The short hair of a camel or sheep obtained by combing.[29]

NOISE. Loud, confused, or senseless sound; clamor, din.[30] (Noise: As Disorderly Conduct, see DISORDERLY CONDUCT. As Nuisance, see NUISANCE.)

NO LICENSE TERRITORY. All parts of the state except the premises actually occupied by licensees.[31]

NOLLE PROSEQUI. Literally "Will not prosecute."[32] A voluntary withdrawal by the prosecuting attorney of present proceedings on a particular bill;[33] a declaration on the part of the prosecuting attorney that he will not at that time prosecute a suit any further;[34] a proceeding by which plaintiff or the attorney for the state voluntarily declares that he will not further prosecute a suit or indict-

manner." Geise *v.* Greene, 49 Wis. 334, 340, 5 N. W. 869. "No reason to doubt." Peagler *v.* State, 110 Ala. 11, 13, 20 So. 363. "No scholar." Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484, 492. "No tract of land." Paxton, etc., Irr. Canal, etc., Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 834, 899, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853. "No workman." Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484, 491.

18. Black L. Dict.
19. Peloubet Leg. Max.
20. Bouvier L. Dict.
21. Black L. Dict.
22. Peloubet Leg. Max.
23. Black L. Dict.
24. Morgan Leg. Max.
25. 3 Blackstone Comm. 215 [*quoted* in Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278, 285].
26. Black L. Dict.
27. Ammerman *v.* Crosby, 26 Ind. 451, 453, where, however, it is said: "But we are not inclined to sanction such eccentric innovations," etc.
28. Black L. Dict.
29. Lobsitz *v.* U. S., 75 Fed. 834.
30. Webster Int. Dict.

"Unnecessary noise" see Keck *v.* Gainesville, 98 Ga. 423, 424, 25 S. E. 559; Beopple *v.* Illinois Cent. R. Co., 104 Tenn. 420, 423, 58 S. W. 231.

31. State *v.* Langdon, (N. H. 1906) 64 Atl. 1099, 1101.
32. Burrill L. Dict.
33. State *v.* Primm, 61 Mo. 166, 177; Moulton *v.* Beecher, 1 Abb. N. Cas. (N. Y.) 193, 203.
34. Com. *v.* Evans, 26 Pa. Co. Ct. 90, 91, opinion of Little, P. J.

ment, or a particular count in either.[35] (Nolle Prosequi: In General, see CRIMINAL LAW; DISMISSAL AND NONSUIT. Discharge of Surety on Bail Bond by, see BAIL. Distinction Between and Retraxit, see DISMISSAL AND NONSUIT. Effect of Nolle—Of One Count on Other Counts Referring Thereto, see INDICTMENTS AND INFORMATIONS; On Former Jeopardy, see CRIMINAL LAW. Liability For Malicious Prosecution as Determined by Entry of Discharge on, see MALICIOUS PROSECUTION. Subsequent Indictment For Invalidity of, see INDICTMENTS AND INFORMATIONS.)

NOLO CONTENDERE. Literally "I will not contest it." The name of a plea in a criminal action, upon which defendant may be sentenced.[36] (See, generally, CRIMINAL LAW.)

NOL. PROS. An abbreviation of NOLLE PROSEQUI,[37] *q. v.*

NO-MAN'S LAND. The district ceded to the United States by Texas in 1850;[38] a space on a ship belonging to no one in particular to care for.[39]

NOMEN DICITUR A NOSCENDO, QUIA NOTITIAM FACIT. A maxim meaning "A name is called from the word to know, because it makes recognition."[40] (See, generally, NAMES.)

NOMEN EST QUASI REI NOTAMEN. A maxim meaning "A name is, as it were, the note of a thing."[41] (See, generally, NAMES.)

NOMEN NON SUFFICIT SI RES NON SIT DE JURE AUT DE FACTO. A maxim meaning "A name does not suffice if the thing do not exist by law or by fact."[42] (See, generally, NAMES.)

NOMINAL. Existing in name only; apparent; formal; not real or substantial.[43] (Nominal: Damages, see DAMAGES. Defendant, see PARTIES. Partner, see PARTNERSHIP. Party, see PARTIES. Plaintiff, see PARTIES.)

NOMINAL DAMAGES. See DAMAGES.

NOMINAL DEFENDANT. See PARTIES.

NOMINAL PAR. That par of exchange which has been fixed by law or custom, and, for the sake of uniformity, is not altered.[44] (See PAR.)

NOMINAL PARTNER. See PARTNERSHIP.

NOMINAL PARTY. See PARTIES.

NOMINAL PLAINTIFF. See PARTIES.

NOMINA SI NESCIS PERIT, COGNITO RERUM; ET NOMINA SI PERDAS, CERTE DISTINCTO RERUM PERDITUR. A maxim meaning "If you know not the names of things, the knowledge of things themselves perishes; and if you lose the names of things, the distinction between the things is certainly lost."[45]

35. Com. *v.* Casey, 12 Allen (Mass.) 214, 218.

It has no greater effect than to annul or make void an indictment, and it does not mean that the indictment was either quashed or reversed (State *v.* Brackin, 113 La. 879, 37 So. 863; State *v.* Primm, 61 Mo. 166, 171), and puts defendant without day on the indictment (Bowden *v.* State, 1 Tex. App. 137, 145).

36. Black L. Dict.

This plea has the same legal effect as the plea of guilty to the crime charged in the indictment. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. *v.* Horton, 9 Pick. (Mass.) 206, 207; Buck *v.* Com., 107 Pa. St. 486, 489; Doughty *v.* De Amoreel, 22 R. I. 158, 159, 46 Atl. 838; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221, 223.

37. Webster Int. Dict.

38. Century Dict., where it is said: "It lies between longitude 100° and 103° west, north of Texas. It was not included under any government, though often wrongly represented as in the Indian Territory. It now constitutes Beaver County in Oklahoma." See also *In re* Jackson, 40 Fed. 372.

39. Webster Int. Dict.

40. Peloubet Leg. Max.

41. Morgan Leg. Max.

42. Bouvier L. Dict.

43. Anderson L. Dict. [*quoted* in Mulliner *v.* Schumake, (Tex. Civ. App. 1900) 55 S. W. 983, 984].

Used in connection with other words.—"Nominal": "Conditions." Barrie *v.* Smith, 47 Mich. 130, 134, 10 N. W. 168; Monroe *v.* Bowen, 26 Mich. 523, 532. "Considerations." Boyd *v.* Watson, 101 Iowa 214, 224, 70 N. W. 120, and, generally, CONTRACTS. "Horse power." Heine Safety-Boiler Co. *v.* Francis, 117 Fed. 235, 236, 54 C. C. A. 267. "Partner." *In re* Swift, 118 Fed. 348, 350; and, generally, PARTNERSHIP. "Parties." Wing *v.* Andrews, 59 Me. 505, 508; and, generally, PARTIES. "Value." Hutchinson *v.* Brown, 33 Wis. 465, 468.

44. Bouvier L. Dict. [*quoted* in Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507, 510].

45. Morgan Leg. Max.

NOMINA SUNT MUTABILIA, RES AUTEM IMMOBILIS. A maxim meaning "Names are mutable, but things immutable."[46]

NOMINA SUNT NOTÆ RERUM. A maxim meaning "Names are the marks of things."[47]

NOMINA SUNT SYMBOLA RERUM. A maxim meaning "Names are the symbols of things."[48]

NOMINATE. To name; to select a candidate to be voted for a public office;[49] to recommend for confirmation.[50] (See CANDIDATE; NOMINATING; NOMINATION; and, generally, ELECTIONS.)

NOMINATING. Naming — mentioning by name.[51] (See CANDIDATE; NOMINATE; NOMINATION; and, generally, ELECTIONS.)

NOMINATION. Appointment;[52] a resolution submitted to the electors that the party named is a candidate for their suffrage for an office named;[53] a power to appoint a clerk to a patron of a benefice.[54] (Nomination: Of Candidate, see ELECTIONS. Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. Of Officer For Appointment — Generally, see OFFICERS; Municipal Officer, see MUNICIPAL CORPORATIONS; State Officer, see STATES; United States Officer, see UNITED STATES. See also, generally, ELECTIONS.)

NOMINEE. A person selected as candidate for office;[55] a person who has been selected by a party as its candidate for a public office.[56] (See CANDIDATE; NOMINATE; NOMINATING; NOMINATION; and, generally, ELECTIONS.)

NON. Literally "Not." The common particle of negation.[57]

NON-ACCESS. In legal parlance, a term which denotes the absence of opportunities for sexual intercourse between husband and wife, or the absence of such intercourse.[58] (Non-Access: Of Husband Affecting — Bastardy, see BASTARDS; Competency of Spouse as Witness, see WITNESSES; Marriage Contract or Relation, see DIVORCE; MARRIAGE.)

NON ACCIPI DEBENT VERBA IN DEMONSTRATIONEM FALSAM, QUÆ COMPETUNT IN LIMITATIONEM VERAM. A maxim meaning "Words ought not to be accepted to import a false description, which may have effect by way of true limitation."[59]

NON ACCREVIT INFRA SEX ANNOS. Literally "It did not accrue within six years." The name of a plea by which defendant sets up the statute of limitations against a cause of action which is barred after six years.[60] (See, generally, LIMITATIONS OF ACTIONS.)

NONAGE. Lack of requisite legal age.[61] (See, generally, INFANTS.)

NON ALIENAT QUI DUMTAXAT OMITTIT POSSESSIONEM. A maxim meaning "He does not alienate who merely gives up possession."[62]

NON ALIO MODO PUNIATUR ALIQUIS QUAM SECUNDUM QUOD SE HABET CONDEMNATIO. A maxim meaning "A person may not be punished differently than according to what the sentence enjoins."[63]

46. Peloubet Leg. Max.
47. Bouvier L. Dict.
48. Peloubet Leg. Max.
49. Keyser *v.* Upshur, 92 Md. 726, 732, 48 Atl. 399.
In a will the words "I nominate" may be used as the equivalent of the more formal and usual words, "I bequeath." Wyman *v.* Woodbury, 86 Hun (N. Y.) 277, 282, 33 N. Y. Suppl. 217.
50. Territory *v.* Rodgers, 1 Mont. 252, 259.
51. Keyser *v.* Upshur, 92 Md. 726, 731, 48 Atl. 399.
52. People *v.* Fitzsimmons, 68 N. Y. 514, 519.
53. Reg. *v.* Jull, 5 Ont. Pr. 41, 47.
54. Godwin *v.* Lunan, Jeff. (Va.) 96, 106.
55. Century Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].
56. State *v.* Drexel, (Nebr. 1905) 105 N. W. 174, 177, not used in reference to one who is desirous of becoming candidate and whose name is submitted to the choice of the voters.
57. Black L. Dict.
58. Black L. Dict.
59. Bouvier L. Dict.
Applied in: Evens *v.* Griscom, 42 N. J. L. 579, 588, 36 Am. Rep. 542; Brantford Electric, etc., Co. *v.* Brantford Starch Works, 3 Ont. L. Rep. 118, 119; Buchner *v.* Buchner, 6 U. C. C. P. 314, 317.
60. Black. L. Dict.
Applied in Williams *v.* Lee, 2 U. C. C. P. 175, 185.
61. Black L. Dict.
62. Peloubet Leg. Max.
63. Black L. Dict.

NON ALITER A SIGNIFICATIONE VERBORUM RECEDI OPORTET QUAM CUM MANIFESTUM EST ALIUD SENSISSE TESTATOREM. A maxim meaning "We must never depart from the signification of words, unless it is evident that they are not conformable to the will of the testator." [64]

NON-ANCESTRAL PROPERTY. Realty which comes to one in any other way than by descent or devise from a now dead ancestor, or by deed or actual gift from a living one.[65]

NON-APPARENT EASEMENT. See EASEMENTS.

NON-ARRIVAL. A word in a charter which has been held to mean a failure to arrive within such time as may answer the purposes of the charter.[66] (See, generally, SHIPPING.)

NON ASSESSABLE. A word whose legal effect is a stipulation against liability to further assessment or taxation after the holder shall have fulfilled his contract to pay the entire subscription of one hundred per cent indicated.[67] (See, generally, CORPORATIONS; TAXATION.)

NON ASSUMPSIT. Literally "He did not undertake." The general issue in the action of assumpsit.[68] (See, generally, ASSUMPSIT, ACTION OF.)

NON AUDITUR PERIRE VOLENS. A maxim meaning "One who wishes to perish ought not to be heard." [69]

NON AUTEM DEPERDITÆ DICUNTUR, SI POSTEA RECUPERANTUR. A maxim meaning "Nothing may be said to be lost which is afterwards recovered." [70]

NON BENE CONDUCTI VENDUNT PERJURA TESTES. A maxim meaning "The perjuries of witnesses hired dishonestly are dangerous, since they are for sale to the highest bidder." [71]

NON CAPITUR QUI JUS PUBLICUM SEQUITUR. A maxim meaning "He is not snared who follows public right." [72]

NON CEPIT. Literally "He did not take." [73] The general issue in replevin. (See, generally, REPLEVIN.)

NON-CLAIM, STATUTES OF. See EXECUTORS AND ADMINISTRATORS.

NON COMPOS MENTIS. Literally "Not sound of mind." [74] (See, generally, INSANE PERSONS.)

NON CONCEDANTUR CITATIONES PRIUSQUAM EXPRIMATUR SUPER QUA RE FIERI DEBET CITATIO. A maxim meaning "Summonses should not be granted before it is expressed on what matter the summons ought to be made." [75]

NON CONSENTIT QUI ERRAT. A maxim meaning "He who errs does not consent." [76]

NON CONSTAT. Literally "It does not appear." It is not clear or evident.[77]

NON-CONTINUOUS EASEMENT. See EASEMENTS.

NON CREDITUR REFERENTI, NISI CONSTET DERELATO. A maxim meaning "The reference is not to be credited, unless the thing referred to be proved." [78]

NON CRIMEN PER SE NEQUE PRIVATUM DAMNUM, SED PUBLICUM MALUM, LEGES SPECTANT. A maxim meaning "The law regards a crime as working a public evil; not merely as a wrong by itself or as a private loss." [79]

NON-CULTIVATION. Leaving the land to go to waste.[80] (See, generally, WASTE.)

64. Bouvier L. Dict.

65. Brown *v.* Whaley, 58 Ohio St. 654, 665, 49 N. E. 479, 69 Am. St. Rep. 793.

66. Soames *v.* Lonergan, 2 B. & C. 564, 571, 4 D. & R. 74, 2 L. J. K. B. O. S. 106, 26 Rev. Rep. 460, 9 E. C. L. 248.

67. Upton *v.* Tribilcock, 91 U. S. 45, 49, 23 L. ed. 203. See also Omo *v.* Bernart, 108 Mich. 43, 46, 65 N. W. 622, where it is said that the word is susceptible of a construction which includes liability for and above the subscription price.

"Non-assessable interest" see Maloney *v.* Love, 11 Colo. App. 288, 52 Pac. 1029, 1030, opinion by Thomson, P. J.

68. Black L. Dict. See also Taylor *v.* Coryell, 12 Serg. & R. (Pa.) 243, 250.

69. Bouvier L. Dict.

70. Peloubet Leg. Max.

71. Morgan Leg. Max.

72. Morgan Leg. Max.

73. Black L. Dict. See also Lewis *v.* Buck, 7 Minn. 104, 116, 82 Am. Dec. 73.

74. Black L. Dict.

75. Black L. Dict.

76. Bouvier L. Dict.

77. Black L. Dict.

78. Peloubet Leg. Max.

79. Morgan Leg. Max.

80. Doe *v.* Broad, Drinkw. 113, 115, 10

NON DAMNIFICATUS. Literally "Not injured." A plea in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," etc.[81] (See, generally, INDEMNITY.)

NON DAT QUI CONTRA LEGES DAT. A maxim meaning "He gives nothing who gives contrary to law."[82]

NON DAT QUI NON HABET. A maxim meaning "He who has not does not give."[83]

NON DEBEO MELIORIS CONDITIONIS ESSE, QUAM AUCTOR MEUS A QUO JUS IN ME TRANSIT. A maxim meaning "I ought not to be in better condition than he to whose rights I succeed."[84]

NON DEBERET ALII NOCERE QUOD INTER ALIOS ACTUM ESSET. A maxim meaning "No one ought to be injured by that which has taken place between other parties."[85]

NON DEBET ACTORI LICERE QUOD REO NON PERMITTITUR. A maxim meaning "A plaintiff ought not to be allowed what is not permitted to a defendant."[86]

NON DEBET ADDUCI EXCEPTIO EJUS REI CUJUS PETITUR DISSOLUTIO. A maxim meaning "An exception of the thing whose abolition is sought, ought not to be adduced."[87]

NON DEBET ALTERI PER ALTERUM INIQUA CONDITIO INFERRI. A maxim meaning "No one ought to be put in an unfair position by the act of another."[88]

NON DEBET, CUI PLUS LICET, QUOD MINUS EST NON LICERE. A maxim meaning "He who is permitted to do the greater may with greater reason do the less."[89]

NON DEBET DICI TENDERE IN PRÆJUDICIUM ECCLESIASTICÆ LIBERATATIS QUOD PRO REGE ET REPUBLICA NECESSARIUM VIDETUR. A maxim meaning "That which seems necessary for the king and the state ought not to be said to tend to the prejudice of spiritual liberty."[90]

NON DEBET MELIORIS CONDITIONIS ESSE QUAM AUCTOR MEUS A QUO JUS IN ME TRANSIT. A maxim meaning "One can not be in a better condition as to his title than the grantor whose title he takes."[91]

NON DECEPITUR QUI SCIT SE DECIPI. A maxim meaning "He is not deceived who knows himself to be deceived."[92]

NON DECET HOMINES DEDERE CAUSA NON COGNITA. A maxim meaning "It is unbecoming to surrender men when no cause is shown."[93]

NON DEFENDERE VIDETUR QUI, PRÆSENS, NEGAT SE DEFENDERE. A maxim meaning "He who, when present, refuses to defend himself is regarded as submitting."[94]

NON DEFINITUR IN JURE QUID SIT CONATUS. A maxim meaning "What an attempt is, is not defined in law."[95]

NON DETINET. Literally "He does not detain." The name of the general issue in the action of detinue.[96] (See, generally, DETINUE.)

L. J. C. P. 80, 2 M. & G. 523, 2 Scott N. R. 685, 40 E. C. L. 725.

81. Black L. Dict. See also State Bank *v.* Chetwood, 8 N. J. L. 1, 25.

82. Peloubet Leg. Max.

83. Black L. Dict.

Applied in: Holland *v.* Cruft, 3 Gray (Mass.) 162, 178; Bingham *v.* Kirkland, 34 N. J. Eq. 229, 234; State *v.* Jackson, 56 W. Va. 558, 576, 49 S. E. 465.

84. Bouvier L. Dict.

85. Bouvier L. Dict.

86. Black L. Dict.

Applied in Boyse *v.* Rossborough, 18 Jur. 205, 219, 23 L. J. Ch. 305, 23 L. T. Rep. N. S. 30, 2 Wkly. Rep. 290.

87. Peloubet Leg. Max.

88. Morgan Leg. Max.

89. Bouvier L. Dict.

Applied in Scottish American Invest. Co. *v.* Elora, 6 Ont. App. 628, 635, where the opinion of the court was delivered by Spragge, C. J. O.

90 Black L. Dict.

91. Morgan Leg. Max.

92. Peloubet Leg. Max.

93. Black L. Dict.

94. Morgan Leg. Max.

95. Bouvier L. Dict.

96. Black L. Dict. See also Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 490, 20 So. 418, opinion of the court by Coleman, J.

NON DIFFERUNT QUÆ CONCORDANT RE, TAMETSI NON IN VERBIS IISDEM. A maxim meaning "Those things which agree in substance, though not in the same words, do not differ." [97]

NON DUBITANTUR, ETSI SPECIALITUR VENDITOR EVICTIONEM NON PROMISERIT, RE EVICTA EX EXMPTO COMPETERE ACTIONEM. A maxim meaning "A warranty of title is implied on the part of a vendor; so that, in case of eviction, an action for damages lies against him by the vendee." [98]

NON EFFICIT AFFECTUS NISI SEQUATUR EFFECTUS. A maxim meaning "The intention amounts to nothing unless some effect follows." [99]

NON ENIM TAM AUCTORITATIS IN DISPUTANDO, RATIONIS MOMENTA QUÆRENDA SUNT. A maxim meaning "In every argument, more respect is to be had to reason than to authority." [1]

NON-ENUMERATED MOTION. See MOTIONS.

NONES. In the Roman calendar, the fifth and, in March, May, July, and October, the seventh day of the month.[2] (See, generally, TIME.)

NON EST. A proper return to a writ of summons.[3] (See NIHIL HABET; NON EST INVENTUS.)

NON EST ARCTIUS VINCULUM INTER HOMINES QUAM JUSJURANDUM. A maxim meaning "There is no stronger link among men than an oath." [4]

NON EST CERTANDUM DE REGULIS JURIS. A maxim meaning "There is no disputing about rules of law." [5]

NON EST DELEGANDA REIPUBLICÆ CURA PERSONÆ NON IDIONEÆ. A maxim meaning "The affairs of the republic should not be delegated to improper persons." [6]

NON EST DISPUTANDUM CONTRA PRINCIPIA NEGANTEM. A maxim meaning "There is no disputing against a man denying principles." [7]

NON EST FACTUM. Literally "Is not [his] deed." [8] A plea by way of traverse, which occurs in debt on bond or other specialty, and also in covenant.[9] (Non Est Factum: Plea in Action of Debt — Generally, see DEBT, ACTION OF; On Negotiable Instrument, see COMMERCIAL PAPER; On Bond, see BONDS. In Assumpsit, see ASSUMPSIT, ACTION OF.)

NON EST INVENTUS. Literally "He is not found." The sheriff's return to process requiring him to arrest the body of defendant, when the latter is not found within his jurisdiction.[10] (See, generally, EXECUTIONS.)

NON EST JUSTUM ALIQUEM ANTENATUM POST MORTEM FACERE BASTARDUM, QUI TOTO TEMPORE VITÆ SUÆ PRO LEGITIMO HABEBATUR. A maxim meaning "It is not just to make an elder-born a bastard after his death, who during his lifetime was accounted legitimate." [11]

NON EST LEX SED SERVITUS, AD EA TENERI QUIBUS NON CONSENSERIS. A maxim meaning "It is not law but servitude to be held by what we have not consented to." [12]

NON EST NOVUM UT PRIORES LEGES AD POSTERIORES TRAHANTUR. A maxim meaning "It is no new thing that prior statutes should give place to later ones." [13]

NON EST RECEDENDUM A COMMUNI OBSERVANTIA. A maxim meaning "There should be no departure from a common observance." [14]

97. Peloubet Leg. Max.
98. Morgan Leg. Max.
99. Bouvier L. Dict.
1. Morgan Leg. Max.
2. Black L. Dict. See also Rives *v.* Guthrie, 46 N. C. 84, 87.
3. Brundred *v.* Egbert, 164 Pa. St. 615, 62], 30 Atl. 503.
4. Peloubet Leg. Max.
5. Bouvier L. Dict.
6. Peloubet Leg. Max.
7. Peloubet Leg. Max.
8. Burrill L. Dict.
9. Black L. Dict. See also Evans *v.* Southern Turnpike Co., 18 Ind. 101, 102; Haggart *v.* Morgan, 5 N. Y. 422, 427, 55 Am. Dec. 350; Galbreath *v.* Knoxville, (Tenn. Ch. App. 1900) 59 S. W. 178, 181; Scribner *v.* Gibbon, 9 N. Brunsw. 182, 185.
10. Black L. Dict. See also Rees *v.* Clark, 213 Pa. St. 617, 618, 63 Atl. 364; The Bremena *v.* Card, 38 Fed. 144, 147.
11. Bouvier L. Dict.
12. Peloubet Leg. Max.
13. Black L. Dict.
14. Bouvier L. Dict.

NON EST REGULA QUIN FALLET. A maxim meaning "There is no rule but what may fail." [15]

NON EST REUS NISI MENS SIT REA. A maxim meaning "One is not guilty unless his intention be guilty." [16]

NON EST SINGULIS CONCEDENDUM, QUOD PER MAGISTRATUM PUBLICE POSSIT FIERI, NE OCCASIO SIT MAJORIS TUMULTUS FACIENDI. A maxim meaning "That is not to be conceded to private persons which can be publicly done by the magistrate, lest it be the occasion of greater tumults." [17]

NON EXEMPLIS SED LEGIBUS JUDICANDUM EST. A maxim meaning "Not by the facts of the case, but by the law must judgment be made." [18]

NON EX OPINIONIBUS SINGULORUM, SED EX COMMUNI USU, NOMINI EXAUDIRI DEBENT. A maxim meaning "Names of things should be understood according to common usage, not according to the opinions of individuals." [19]

NON-EXPERT. One who testifies as to conclusions which may be verified by the adjudicating tribunal, and gives the result of a process of reasoning familiar to every-day life.[20] (See, generally, WITNESSES.)

NON FACIAS MALUM UT INDE VENIAT BONUM. A maxim meaning "You are not to do evil that good may come of it." [21]

NONFEASANCE. The omission of a duty;[22] the omission of an act which a person ought to do;[23] total omission to do an act which one promises to do;[24] an omission to perform the required duty at or a total neglect of duty.[25] (Nonfeasance: By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Officer of Corporation, see CORPORATIONS. By Public Officer, see OFFICERS. By Trustee, see TRUSTS. See also MISFEASANCE.)

NON FECIT VASTUM CONTRA PROHIBITIONEM. Literally "He did not commit waste against the prohibition." [26]

NON-FORFEITING POLICY. See LIFE INSURANCE.

NON HÆC IN FŒDERA VENI. A phrase meaning "I did not agree to these terms." [27]

NON IMPEDIT CLAUSULA DEROGATORIA, QUO MINUS AB EADEM POTESTATE RES DISSOLVANTUR A QUA CONSTITUUNTUR. A maxim meaning "A derogatory clause does not prevent acts from being dissolved by the same power which constituted them." [28]

15. Black L. Dict.

16. Bouvier L. Dict. See Reg. *v.* Dias, 1 Can. Cr. Cas. 534, 537, where the court said that this maxim was not only liable to mislead, but was absolutely misleading.

17. Black L. Dict.

18. Bouvier L. Dict.

19. Peloubet Leg. Max.

20. Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 46, 15 Atl. 833; Powers *v.* McKenzie, 90 Tenn. 167, 181, 16 S. W. 559.

21. Peloubet Leg. Max.

22. Ellis *v.* McNaughton, 76 Mich. 237, 240, 42 N. W. 1113, 15 Am. St. Rep. 308.

23. Dudley *v.* Flemingsburg, 115 Ky. 5, 9, 72 S. W. 327, 24 Ky. L. Rep. 1804, 103 Am. St. Rep. 253, 60 L. R. A. 575; Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741; Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 443, 27 N. Y. Suppl. 499; Greenburg *v.* Whitcomb Lumber Co., 90 Wis. 225, 231, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439; Bouvier L. Dict. [*quoted* in Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 69, 60 N. E. 890].

24. Gregor *v.* Cady, 82 Me. 131, 136, 19 Atl. 108, 17 Am. St. Rep. 466.

25. Minkler *v.* State, 14 Nebr. 181, 183, 15 N. W. 330; Bouvier L. Dict. [*quoted* in Coite *v.* Lynes, 33 Conn. 109, 115, Butler, J., delivering the opinion of the court].

Failure of a servant told to do an act which results in an injury to a third person is called a "non-feasance." Cincinnati, etc., R. Co. *v.* Robertson, 115 Ky. 858, 861, 74 S. W. 1061, 25 Ky. L. Rep. 265.

Failure of a city to repair a sidewalk after knowledge of its defective condition may be described as "non-feasance." Carr *v.* Kansas City, 87 Fed. 1, 2.

26. Black L. Dict., where it is said to be a plea to an action founded on a writ of estrepement for waste.

27. Black L. Dict.

Applied in: Grew *v.* Breed, 10 Metc. (Mass.) 569, 575; Banorgee *v.* Hovey, 5 Mass. 11, 36, 4 Am. Dec. 71; Osgood *v.* Toole, 1 Hun (N. Y.) 167, 171; Ritchie *v.* Summers, 3 Yeates (Pa.) 531, 540; Thorn *v.* London, 1 App. Cas. 120, 127, 45 L. J. Exch. 487, 34 L. T. Rep. N. S. 545, 24 Wkly. Rep. 932.

28. Peloubet Leg. Max.

Applied in Com. *v.* Lancaster, 5 Watts (Pa.) 152, 155.

NON IN LEGENDO SED IN INTELLIGENDO LEGES CONSISTUNT. A maxim meaning "The laws consist, not in not being read, but in being understood." [29]

NON-INTERCOURSE LAWS. See WAR.

NON-INTERVENTION WILL. One which authorizes the executor or executrix to settle and distribute the estate without intervention of the court and without the giving of bonds.[30] (See, generally, WILLS.)

NON-JOINDER. The omission to join some person as party to a suit, whether as plaintiff or defendant, who ought to have been so joined, according to the rules of pleading and practice.[31] (See JOINDER; MISJOINDER; and, generally, JOINDER AND SPLITTING OF ACTIONS; PARTIES; PLEADING.)

NON-JUDICIAL DAY. One on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit.[32] (See DIES DOMINICUS NON EST JURIDICUS; DIES NON JURIDICUS; and, generally, HOLIDAYS; SUNDAY.)

NON-JUDICIAL OATH. See OATHS AND AFFIRMATIONS.

NON JUS EX REGULA, SED REGULA EX JURE. A maxim meaning "The law does not arise from the rule, but the rule from the law." [33]

NON JUS, SED SEISINA FACIT STIPITEM. A maxim meaning "Not right, but seisin, makes a stock (from which the inheritance must descend)." [34]

NON-LEVIABLE ASSETS. Assets on which an execution would not be levied.[35]

NON LICET QUOD DISPENDIO LICET. A maxim meaning "That which is permitted only at a loss is not permitted to be done." [36]

NON-MAILABLE MATTER. See POST-OFFICE.

NON MULTUM DISTANT A BRUTIS QUI RATIONE CARENT. A maxim meaning "Not far removed from brutes are those who are wanting in reason." [37]

NON NASCI, ET NATUM MORI, PARIA SUNT. A maxim meaning "Not to be born, and to be dead-born, are the same." [38]

NON-NAVIGABLE. See NAVIGABLE WATERS.

NON-NEGOTIABLE. Not negotiable; not capable of passing title or property by indorsement and delivery.[39] (See, generally, ASSIGNMENTS; COMMERCIAL PAPER. See also NEGOTIABLE.)

NON OBLIGAT LEX NISI PROMULGATA. A maxim meaning "A law is not obligatory unless it be promulgated." [40]

NON OBSERVATA FORMA, INFERTUR ADNULLATIO ACTUS. A maxim meaning "When the form is not observed, it is inferred that the act is annulled." [41]

NON OBSTANTE VEREDICTO. Literally "Notwithstanding the verdict." [42] (See, generally, JUDGMENTS; TRIAL.)

NON OFFICIT CONATUS NISI SEQUATUR EFFECTUS. A maxim meaning "An attempt does not harm unless a consequence follow." [43]

NON OMNE DAMNUM INDUCIT INJURIAM. A maxim meaning "It is not every loss that produces an injury." [44]

NON OMNE QUOD LICET HONESTUM EST. A maxim meaning "Not everything which is permitted by law is honorable." [45]

NON OMNIUM QUÆ A MAJORIBUS NOSTRIS CONSTITUTA SUNT RATIO REDDI POTEST. A maxim meaning "A reason cannot always be given for the institutions of our ancestors." [46]

NON-PECUNIARY DAMAGES. Damages, the amount of which cannot be deter-

29. Bouvier L. Dict.
30. *In re* Macdonald, 29 Wash. 422, 423, 69 Pac. 1111.
31. Black L. Dict. See also Mader *v.* Piano Mfg. Co., 17 S. D. 553, 556, 97 N. W. 843.
32. Whitney *v.* Blackburn, 17 Oreg. 564, 570, 21 Pac. 874, 11 Am. St. Rep. 857.
33. Peloubet Leg. Max.
34. Bouvier L. Dict.
35. Farmers' F. Ins. Co. *v.* Conrad, 102 Wis. 387, 388, 78 N. W. 582.
36. Bouvier L. Dict.
37. Peloubet Leg. Max.
38. Bouvier L. Dict.
39. Black L. Dict.
40. Black L. Dict.
41. Bouvier L. Dict.
42. Burrill L. Dict.
43. Bouvier L. Dict.
44. Black L. Dict.
45. Peloubet Leg. Max.
46. Bouvier L. Dict.

mined by any known rule, but depend upon the enlightened judgment of an impartial court or jury.[47] (See, generally, Damages.)

NON-PECUNIARY INJURY. See Injury.[48]

NON PERTINET AD JUDICEM SECULAREM COGNOSCERE DE IIS QUÆ SUNT MERE SPIRITUALIA ANNEXA. A maxim meaning "It pertains not to the secular judge to take cognizance of things purely spiritual."[49]

NON POSSESSORI INCUMBIT NECESSITAS PROBANDI POSSESSIONES AD SE PERTINERE. A maxim meaning "A person in possession is not bound to prove that the possession belong to him."[50]

NON POTEST ADDUCI EXCEPTIO EJUSDEM REI CUJUS PETITUR DISSOLUTIO. A maxim meaning "A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto."[51]

NON POTEST PROBARI QUOD PROBATUM NON RELEVAT. A maxim meaning "That cannot be proved which, if proved, is immaterial."[52]

NON POTEST QUIS SINE BREVI AGERE. A maxim meaning "No one can sue without a writ."[53]

NON POTEST REX GRATIAM FACERE CUM INJURIA ET DAMNO ALIORUM. A maxim meaning "The king cannot confer a favour on one subject to the injury and damage of others."[54]

NON POTEST REX SUBITUM RENITENTEM ONERARE IMPOSITIONIBUS. A maxim meaning "The king cannot load a subject with imposition against his consent."[55]

NON POTEST VIDERI DESISSE HABERE, QUI NUNQUAM HABUIT. A maxim meaning "He cannot be considered as having ceased to have a thing, who never had it."[56]

NON PRÆSTAT IMPEDIMENTUM QUOD DE JURE NON SORTITUR EFFECTUM. A maxim meaning "An impediment which does not by law produce a consequence, avails nothing."[57]

NON PROSEQUITUR. Literally "He does not prosecute."[58] (See, generally, Dismissal and Nonsuit; Judgments.)

NON QUOD DICTUM EST, SED QUOD FACTUM EST INSPICITUR. A maxim meaning "Not what is said, but what is done, is regarded."[59]

NON RECUSAT AD MINORA DIMITTERE LEX. A maxim meaning "The law does not refuse to descend to the smallest details."[60]

NON REFERT AN QUIS ASSENSUM SUUM PRÆFERT VERBIS, AUT REBUS IPSIS ET FACTIS. A maxim meaning "It matters not whether a man gives his assent by his words or by his acts and deeds."[61]

NON REFERT QUID EX ÆQUIPOLLENTIBUS FIAT. A maxim meaning "That which is gathered from equivalent expressions is of no consequence."[62]

NON REFERT QUID NOTUM SIT JUDICI, SI NOTUM NON SIT IN FORMA JUDICII. A maxim meaning "It matters not what is known to the judge, if it is not known to him judicially."[63]

47. L. W. Pomerene Co. *v.* White, 70 Nebr. 171, 97 N. W. 232, among which are included damages for pain, suffering, loss of reputation, impairment of faculties, etc.

Pecuniary damages, or those which can be accurately estimated, as loss of wages, cost of medical attendance, etc. L. W. Pomerene Co. *v.* White, 70 Nebr. 171, 97 N. W. 232.

48. See 22 Cyc. 1064 note 16.

49. Peloubet Leg. Max.

50. Black L. Dict.

51. Broom Leg. Max.

Applied in Strother *v.* Hutchinson, 4 Bing. N. Cas. 83, 89, 91, 33 E. C. L. 608.

52. Black L. Dict.

53. Bouvier L. Dict.

54. Broom Leg. Max.

55. Black L. Dict.

56. Bouvier L. Dict.

57. Peloubet Leg. Max.

58. Burrill L. Dict.

59. Black L. Dict.

Applied in: Osborn *v.* Cook, 11 Cush. (Mass.) 532, 536, 59 Am. Dec. 155; Franklin's Estate, 9 Pa. Co. Ct. 484, 488, 27 Wkly. Notes Cas. 545; Smith's Estate, 26 Wkly. Notes Cas. (Pa.) 231, 233; White *v.* British Museum, 6 Bing. 310, 319, 19 E. C. L. 145; Ilott *v.* Genge, 3 Curt. Eccl. 160, 179; Croft *v.* Lumley, 6 H. L. Cas. 672, 722, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459.

60. Peloubet Leg. Max.

61. Black L. Dict.

62. Peloubet Leg. Max.

63. Bouvier L. Dict.

NON REFERT VERBIS AN FACTIS FIT REVOCATIO. A maxim meaning "It matters not whether a revocation be by words or by acts." [64]

NON REMOTA CAUSA SED PROXIMA SPECTATUR. See CAUSA PROXIMA NON REMOTA SPECTATUR.

NON-REPAIR. Applied to a highway, a term said to mean any defect in a highway which renders it unsafe for ordinary travel.[65] (See, generally, MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.)

NON-RESIDENCE. Residence beyond the limits of the particular jurisdiction.[66] (Non-Residence: Generally, see ABSENTEES; DOMICILE. Affecting Eligibility or Qualification of — Corporate Officer, see CORPORATIONS; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Grand Juror, see GRAND JURY; Guardian, see GUARDIAN AND WARD; Judge, see JUDGES; Juror, see JURY; Officer in General, see OFFICERS. Affecting Limitation of Time — To Bring Suit, see LIMITATIONS OF ACTIONS; To Present Negotiable Instrument For Payment, see COMMERCIAL PAPER. Affecting Right to — Claim Allowance to Surviving Wife, Husband, or Children, see EXECUTORS AND ADMINISTRATORS; Creditor's Suit, Without Judgment, see CREDITORS' SUITS; Legislative Divorce, see DIVORCE; Vote, see ELECTIONS. Excuse For Laches, see EQUITY. Ground For — Arrest, see ARREST; Equitable Set-Off, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM; Removal of Cause, see REMOVAL OF CAUSES; Requiring Security For Costs, see COSTS; Revocation of Letters of Administration, see EXECUTORS AND ADMINISTRATORS. Of Debtor as Affecting — Diligence of Assignee of Claim, see ASSIGNMENTS; Right to Creditor's Suit, see CREDITORS' SUITS. Of Executor as Affecting Bond, see EXECUTORS AND ADMINISTRATORS. Of Grantor of Land as Affecting Champertous Nature of Conveyance, see CHAMPERTY AND MAINTENANCE. Of Maker or Indorser of Negotiable Instrument as Excuse For Failure to Give Notice, see COMMERCIAL PAPER. Of Pauper, see PAUPERS. Of Witness as Ground For Deposition, see DEPOSITIONS. See also NON-RESIDENT.)

NON-RESIDENT. One who does not reside in, or is not a resident of, a particular place;[67] or one who does reside at a particular place named;[68] one who has his abode in another state;[69] one who resides out of the state.[70] (Non-Resident: Generally, see ABSENTEES; DOMICILE. Action Against, see ATTACHMENT; COURTS. Action By — Generally, see COURTS; For Death, see DEATH. Appeal By, see APPEAL AND ERROR. Appearance By, see APPEARANCE. Arrest of in Civil Actions, see ARREST. Assignment, see ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. Attachment Against, see ATTACHMENT. Competency as Surety on Bond, see BONDS. Discharge of Insolvent, Effect on Non-Resident, see INSOLVENCY. Discrimination Against — As Affecting Validity of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; In Regard to License, see LICENSES. Garnishment of, see GARNISHMENT. Insolvency of, see INSOLVENCY. Judgment Against, see JUDGMENTS. Jurisdiction Over — Generally, see COURTS; To Render Personal Judgment see JUDGMENTS. Priorities as Between Resident and Non-Resident Creditors, see ATTACHMENT; EXECUTORS AND ADMINISTRATORS. Proceedings Affecting Absentees, see ABSENTEES. Representation of Non-Resident Infant by Guardian Ad Litem, see INFANTS. Right of in Property Assigned, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Right of to Benefit of Exemption, see EXEMPTIONS; HOMESTEADS. Service of Process and Notice on — In General, see PROCESS; Against Non-Resident Infant, see INFANTS; In Proceeding to Establish Highways, see STREETS AND HIGHWAYS; On Appeal, see APPEAL AND

64. Bouvier L. Dict.

65. Howard *v.* St. Thomas, 19 Ont. 719, 725.

66. Black L. Dict.

The term is distinguished from the word "absence" in Webster *v.* Citizen's Bank, 2 Nebr. (Unoff.) 353, 96 N. W. 118, 120, where the opinion was delivered by Pound, C.

67. Gardner *v.* Meeker, 169 Ill. 40, 42, 48 N. E. 307.

68. Pacific R. Co. *v.* Perkins, 36 Nebr. 456, 460, 54 N. W. 845.

69. Thomson *v.* Ogden, 23 Ohio Cir. Ct. 185, 188.

70. Erwin *v.* Allen, 99 S. W. 322, 323, 30 Ky. L. Rep. 607.

ERROR; To Sustain Judgment Against, see JUDGMENTS. Taxation of, see TAXATION. Time For Presentation of Claims Against Estate, see EXECUTORS AND ADMINISTRATORS. Venue of Action Against, see VENUE. See also NON-RESIDENCE.)

NON-RESIDENT ALIEN. One who is neither a citizen of the United States nor a resident of the state;[71] an alien not residing in the state.[72] (See, generally, ALIENS; CITIZENS; DOMICILE.)

NON-RESIDENTOR. A term formerly used in the assessor's returns to distinguish between improved and vacant lots.[73] (See, generally, TAXATION.)

NON-RESIDENT WITNESS. One not within the jurisdiction of the court;[74] one not residing in the county in which the action is pending for which the deposition is to be taken.[75] (See, generally, DEPOSITIONS; WITNESSES.)

NON RESPONDEBIT MINOR, NISI IN CAUSA DOTIS, ET HOC PRO FAVORE DOTI. A maxim meaning "A minor shall not answer unless in a case of dower, and this in favor of dower."[76]

NON-SANE. When applied to the mind, not whole, not sound, not in a healthful state; broken, impaired, shattered, weak, diseased, unable either from nature or accident to perform the functions common to man upon the objects presented to it;[77] actual incapacity of mind.[78] (See, generally, INSANE PERSONS; WILLS.)

NON SEQUITUR. Literally "It does not follow."[79]

NON SOLENT QUÆ ABUNDANT VITIARE SCRIPTURAS. A maxim meaning "Superfluity does not usually vitiate writings."[80]

NON SOLET DETERIOR CONDITIO FIERI EORUM QUI LITEM CONTESTATI SUNT QUAM SI NON, SED PLERUMQUE MELIOR. A maxim meaning "Those who contest a suit, do not make their condition worse than if they had not, but rather better."[81]

NON SOLUM QUID LICET, SED QUID EST CONVENIENS, EST CONSIDERANDUM; QUIA NIHIL QUOD EST INCONVENIENS EST LICITUM. A maxim meaning "Not only what is lawful, but what is proper or convenient, is to be considered; because nothing that is inconvenient is lawful."[82]

NON SUI JURIS. Literally "Not his own master."[83]

NONSUIT. See DISMISSAL AND NONSUIT; TRIAL.

NON SUM INFORMATUS. A judgment which is rendered when, instead of entering a plea, defendant's attorney says he is not informed of any answer to be given to the action.[84] (See, generally, JUDGMENTS.)

NON SUNT LONGA UBI NIHIL EST QUOD DEMERE POSSIS. A maxim meaning "There is no prolixity where there is nothing that can be omitted."[85]

NON-SUPPORT. See DIVORCE.

NON-TAXABLE. Not taxable at all.[86] (See, generally, TAXATION.)

NON-TAXABILITY. See TAXATION.

NON TEMERE CREDERE, EST NERVUS SAPIENTIÆ. A maxim meaning "Not to believe rashly is the nerve of wisdom."[87]

71. State *v.* Smith, 70 Cal. 153, 156, 12 Pac. 121.

72. *In re* Gill, 79 Iowa 296, 299, 44 N. W. 553, 9 L. R. A. 126.

73. Commercial Bank *v.* Woodside, 14 Pa. St. 404, 411.

74. Baltimore Consol. R. Co. *v.* State, 91 Md. 506, 514, 46 Atl. 1000.

75. Gardner *v.* Meeker, 169 Ill. 40, 42, 48 N. E. 307.

76. Bouvier L. Dict.

77. Den *v.* Vancleve, 5 N. J. L. 589, 661.

78. McKnight *v.* Wright, 12 Rich. (S. C.) 232, 245.

"Non sane memory," as applied to a person means one who is *non compos mentis*. *In re* Beaumont, 1 Whart. (Pa.) 52, 54, 29 Am. Dec. 33 [*citing* Coke Litt. 246*b*, 247*a*]. See also *In re* Forman, 54 Barb. (N. Y.) 274, 286.

79. Black L. Dict.

80. Peloubet Leg. Max.

81. Peloubet Leg. Max.

82. Black L. Dict.

83. Black L. Dict.

84. Black L. Dict. [*citing* Stephens Pl. 130].

85. Bouvier L. Dict.

Applied in: Fitz-Patrick *v.* Strong, Gilb. 251, 254, 25 Eng. Reprint 173; Bushel's Case, T. Jones 13, 15.

86. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 292, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; People *v.* Barker, 22 N. Y. App. Div. 120, 122, 47 N. Y. Suppl. 958.

87. Peloubet Leg. Max.

NON-TEXTILE FACTORY. A term defined as meaning, among other things, any works, warehouses, furnaces, mills, foundries, or places named in Part I of Schedule IV of the Factory and Workshop Act of 1878.[88] (See, generally, MANUFACTURES.)

NON-USER. Literally "Neglect to use." Neglect to use a franchise; neglect to exercise an office.[89] (Non-User: Of Corporate Franchise, see CORPORATIONS; RAILROADS. Of Dedicated Property, see DEDICATION. Of Easement, see EASEMENTS. Of Ferry Franchise, see FERRIES. Of Homestead, see HOMESTEADS. Of Incorporeal Hereditament, see ABANDONMENT. Of Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. See also MISUSER.)

NON VALEBIT FELONIS GENERATIO, NEC AD HÆREDITATEM PATERNAM VEL MATERNAM; SI AUTEM ANTE FELONIAM GENERATIONEM FECERIT, TALIS GENERATIO SUCCEDIT IN HÆREDITATE PATRIS VEL MATRIS A QUO NON FUERIT FELONIA PERPETRATA. A maxim meaning "The offspring of a felon cannot succeed either to a maternal or paternal inheritance; but, if he had offspring before the felony, such offspring may succeed as to the inheritance of the father or mother by whom the felony was not committed."[90]

NON VALET CONFIRMATIO, NISI ILLE, QUI CONFIRMAT, SIT IN POSSESSIONE REI VEL JURIS UNDE FIERI DEBET CONFIRMATIO; ET EODEM MODO, NISI ILLE CUI CONFIRMATIO FIT SIT IN POSSESSIONE. A maxim meaning "Confirmation is not valid unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made, and, in like manner, unless he to whom confirmation is made is in possession."[91]

NON VALET EXCEPTIO EJUSDEM REI CUJUS PETITUR DISSOLUTIO. A maxim meaning "A plea of the same matter the dissolution of which is sought, is not valid."[92]

NON VALET IMPEDIMENTUM QUOD DE JURE NON SORTITUR EFFECTUM. A maxim meaning "An impediment is of no consequence, which by law has no effect."[93]

NON VERBIS, SED IPSIS REBUS, LEGES IMPONIMUS. A maxim meaning "We impose laws, not upon words, but upon things themselves."[94]

NON VIDENTUR QUI ERRANT CONSENTIRE. A maxim meaning "He who errs is not considered as consenting."[95]

NON VIDENTUR REM AMITTERE QUIBUS PROPRIA NON FUIT. A maxim meaning "They cannot be said to lose a thing whose own it was not."[96]

NON VIDETUR CEPISSE QUI, PER EXCEPTIONEM, A PETITIONE REMOVETUR. A maxim meaning "He is not regarded as having obtained his right who, by exception, is removed from making his request."[97]

NON VIDETUR CONSENSUM RETINUISSE SI QUIS EX PRÆSCRIPTO MINANTIS ALIQUID IMMUTAVIT. A maxim meaning "He does not appear to have retained consent, who has changed anything through menaces."[98]

88. Rogers *v.* Manchester Packing Co., [1898] 1 Q. B. 344, 347, 18 Cox C. C. 698, 62 J. P. 166, 67 L. J. Q. B. 310, 78 L. T. Rep. N. S. 17, 46 Wkly. Rep. 350. See 41 & 42 Vict. c. 16, § 93. See also Spencer *v.* Livett, [1900] 1 Q. B. 498, 64 J. P. 196, 69 L. J. Q. B. 338, 82 L. T. Rep. N. S. 75, 48 Wkly. Rep. 323; Hennessey *v.* McCabe, [1900] 1 Q. B. 491, 64 J. P. 4, 69 L. J. Q. B. 173, 81 L. T. Rep. N. S. 575, 48 Wkly. Rep. 231.

Part I of Schedule IV, section 2, chapter 16, of the act above referred to includes bleaching and dyeing works; that is to say, "any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing, any yarn or cloth of any material, or the dressing or finishing of lace, or one or more of such processes, or any process incidental thereto, are or is carried on." Rogers *v.* Manchester Packing Co., [1898] 1 Q. B. 344, 347, 18 Cox C. C. 698, 62 J. P. 166, 67 L. J. Q. B. 310, 78 L. T. Rep. N. S. 17, 46 Wkly. Rep. 350.

89. Black L. Dict.

90. Black L. Dict.

91. Bouvier L. Dict.

92. Black L. Dict.

Applied in Ryhott *v.* Barrell, 2 Eden 131, 134, 28 Eng. Reprint 846.

93. Peloubet Leg. Max.

94. Black L. Dict.

95. Bouvier L. Dict.

Applied in Griffith *v.* Townley, 69 Mo. 13, 19, 33 Am. Rep. 476.

96. Peloubet Leg. Max.

97. Morgan Leg. Max.

98. Black L. Dict.

NON VIDETUR PERFECTE CUJUSQUE ID ESSE, QUOD EX CASU AUFERRI POTEST. A maxim meaning "That does not truly belong to any one which can be taken from him upon occasion." [99]

NON VIDETUR QUISQUAM ID CAPERE QUOD EI NECESSE EST ALII RESTITUERE, AUT QUOD EX CASU AUFERRI POTEST. A maxim meaning "One will not be considered as acquiring any property in a thing which he is bound to restore, or which can be taken from him on occasion." [1]

NON VIDETUR VIM FACERE, QUI JURE SUO UTITUR ET ORDINARIA ACTIONE EXPERITUR. A maxim meaning "He is not deemed to use force who exercises his own right and proceeds by ordinary action." [2]

NOON. The middle of the day; midday; the time when the sun is in the meridian; twelve o'clock in the daytime; [3] midday, and in exact use, twelve o'clock.[4] (See, generally, TIME.)

NOON HOUR. From twelve o'clock noon to one o'clock P. M.[5]

NOR. A negative connective or particle, introducing a second member or clause of a negative proposition, following neither, or not, in the first, as or in affirmative propositions follows either; sometimes, also, used with the first member for neither; and sometimes the neither is omitted and implied by the use of "nor." [6] (See ALSO; AND; OR.)

NORMAL OUTAGE OR WANTAGE. The difference between the capacity of a cask or bottle and the quantity of wine or liquor which is usually placed in it according to the custom of trade.[7]

NORMAL SCHOOL. See SCHOOLS AND SCHOOL-DISTRICTS.

NORTH. It has been said that this word may mean northerly, northeasterly, or northwesterly, according to the context.[8] (See, generally, BOUNDARIES.)

NORTHAMPTON TABLES. See EVIDENCE.[9]

NORTHERLY. North;[10] due north.[11] (See NORTH; and, generally, BOUNDARIES.)

NORTHERN PASSAGE. Course from Gibraltar north of the Azores, if possible; if not, just south of the islands, thence to the southern point or tail of the Great Banks, and thence direct to port.[12]

NORTH RIVER. The Hudson river, especially near New York.[13]

99. Bouvier L. Dict.

1. Morgan Leg. Max.

2. Black L. Dict.

3. Webster Dict. [*quoted* in Jones *v.* German Ins. Co., 110 Iowa 75, 79, 81 N. W. 188, 46 L. R. A. 860].

In an insurance policy "noon" means noon by sun time. Meier *v.* Phœnix Ins. Co., 32 Ins. L. J. 192, case affirmed by divided court.

4. Century Dict. [*quoted* in Andrecsik *v.* New Jersey Tube Co., 73 N. J. L. 664, 667, 63 Atl. 719, 4 L. R. A. N. S. 913].

5. Andrecsik *v.* New Jersey Tube Co., 73 N. J. L. 664, 667, 63 Atl. 719, 4 L. R. A. N. S. 913. See, generally, TIME.

6. Meacham *v.* Robertson, 2 Hasz. & W. (Pr. Edw. Isl.) 411.

7. U. S. *v.* Shaw, 144 Fed. 329, 331, 75 C. C. A. 291.

8. Currier *v.* Nelson, 96 Cal. 505, 508, 31 Pac. 531, 746, 31 Am. St. Rep. 239.

"**North half**" see Au Gres Boom Co. *v.* Whitney, 26 Mich. 42, 44; Grandy *v.* Casey, 93 Mo. 595, 600, 6 S. W. 376.

"**North one-third**" see La Selle *v.* Nicholls, 56 Nebr. 458, 459, 76 N. W. 870.

"**North part**" see Langohr *v.* Smith, 81 Ind. 495, 500.

"**North side**" see Winslow *v.* Cooper, 104 Ill. 235, 243; Parker *v.* Wallis, 60 Md. 15, 22, 45 Am. Rep. 703.

"**Northward**" see Jackson *v.* Reeves, 3 Cai. (N. Y.) 293, 299.

"**Northwest**" see Swearingen *v.* Smith, 1 Bibb (Ky.) 92, 94.

9. See also CARLISLE TABLES, 6 Cyc. 351; MORTALITY TABLES, 27 Cyc. 914.

10. Currier *v.* Nelson, 96 Cal. 505, 508, 31 Pac. 531, 746, 31 Am. St. Rep. 239.

11. Irwin *v.* Towne, 42 Cal. 326, 334; Proctor *v.* Andover, 42 N. H. 348, 353; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156, 158. See also Scraper *v.* Pipes, 59 Ind. 158, 164.

Does not mean due north where the boundaries are also described by monuments in reference to which the line would not be due north. Garvin *v.* Dean, 115 Mass. 577, 578. To the same effect see Riggs *v.* Winterode, 100 Md. 439, 446, 59 Atl. 762; Book *v.* Justice Min. Co., 58 Fed. 106, 115.

12. The John H. Pearson, 33 Fed. 845, 846, so used in the Mediterranean fruit trade and incorporated in a charter-party to ship fruit from Sicily to Boston.

13. Standard Dict., so called to distinguish it from the Delaware, "the South River."

As used in a marine policy the words cannot be extended to include tributaries of the Hudson river in New York state, such as Rondout creek, and the like. Hastorf *v.* Greenwich Ins. Co., 132 Fed. 122, 124.

NORTHWARDLY. Due north;[14] towards or approaching towards the north, rather than towards any of the other cardinal points.[15] (See NORTH; and, generally, BOUNDARIES.)

NOSCITUR A SOCIIS. A maxim meaning "The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."[16]

14. Seaman *v.* Hogeboom, 21 Barb. (N. Y.) 398, 404.

15. Craig *v.* Hawkins, 1 Bibb (Ky.) 53, 54.

16. Broom Leg. Max.

Applied in: Bell *v.* Wyman, 147 Cal. 514, 517, 82 Pac. 39; Wall *v.* Deaf & Dumb Asylum, 145 Cal. 468, 472, 78 Pac. 951; Arroyo Ditch, etc., Co. *v.* Superior Court, 92 Cal. 47, 50, 28 Pac. 54, 27 Am. St. Rep. 91; National Bank *v.* Los Angeles Iron, etc., Co., 2 Cal. App. 659, 661, 84 Pac. 466, 468; Grissell *v.* Housatonic R. Co., 54 Conn. 447, 467, 9 Atl. 472, 1 Am. St. Rep. 123; Boon *v.* Ætna Ins. Co., 40 Conn. 575, 585; State *v.* Lowry, 166 Ind. 372, 392, 77 N. E. 728, 4 L. R. A. N. S. 528; Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563, 567; Hutchinson's Succession, 112 La. 656, 706, 36 So. 639; Andrews *v.* Schoppe, 84 Me. 170, 174, 24 Atl. 805; Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 566, 15 Atl. 785, 1 L. R. A. 388; State *v.* McCanu, 67 Me. 372, 374; Eastabrook *v.* Union Mut. Ins. Co., 54 Me. 224, 228, 89 Am. Dec. 743; Opinion of Judges, 46 Me. 579, 590; Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 47, 1 N. E. 737, 54 Am. Rep. 445; Leavitt *v.* Leavitt, 135 Mass. 191, 193; *In re* Schouler, 134 Mass. 426, 427; Lovewell *v.* Westchester F. Ins. Co., 124 Mass. 418, 421, 26 Am. Rep. 671; Boston Gaslight Co. *v.* Old Colony, etc., R. Co., 14 Allen (Mass.) 444, 447; Cluff *v.* Mutual Ben. L. Ins. Co., 13 Allen (Mass.) 308, 316; Com. *v.* Lowell Gaslight Co., 12 Allen (Mass.) 75, 77; Dean *v.* American Mut. L. Ins. Co., 4 Allen (Mass.) 96, 104; Dole *v.* Johnson, 3 Allen (Mass.) 364, 366; Com. *v.* Whitney, 5 Gray (Mass.) 85, 88; Welles *v.* Castles, 3 Gray (Mass.) 323, 325; Goodrich *v.* Longley, 1 Gray (Mass.) 615, 618; Com. *v.* Porter, 1 Gray (Mass.) 476, 477; Coolidge *v.* Choate, 11 Metc. (Mass.) 79, 82; Bullard *v.* Goffe, 20 Pick. (Mass.) 252, 258; Valentine *v.* Boston, 20 Pick. (Mass.) 201, 203; Scanlon *v.* Wright, 13 Pick. (Mass.) 523, 528, 25 Am. Dec. 344; Wood *v.* Michigan Air-Line R. Co., 81 Mich. 358, 362, 45 N. W. 980; Dike *v.* State, 38 Minn. 366, 367, 38 N. W. 95; Isaacs *v.* Silverberg, 87 Miss. 185, 191, 39 So. 420; Dickerson *v.* Askew, 82 Miss. 436, 442, 34 So. 157; Grace *v.* Perry, 197 Mo. 550, 566, 95 S. W. 875; State *v.* Guild, 149 Mo. 370, 381, 50 S. W. 909, 73 Am. St. Rep. 395; State *v.* Bryant, 93 Mo. 273, 283, 6 S. W. 102; McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457, 463; Knoop *v.* Nelson Distilling Co., 26 Mo. App. 303, 317; State *v.* Herring, 70 N. J. L. 34, 35, 56 Atl. 670; Morris County *v.* Freeman, 44 N. J. L. 631, 633; State *v.* Gedicke, 43 N. J. L. 86, 89; Territory *v.* Gutierrez, 12 N. M. 254, 290, 78 Pac. 139; *In re* Tilden, 98 N. Y. 434, 442; McGaffin *v.* Cohoes, 74 N. Y. 387, 389, 30 Am. Rep. 307; Coffin *v.* Reynolds, 37 N. Y. 640, 644; Aikin *v.* Wasson, 24 N. Y. 482, 484; Matter of White, 52 N. Y. App. Div. 225, 227, 65 N. Y. Suppl. 1068; Matter of Soule, 72 Hun (N. Y.) 594, 597, 25 N. Y. Suppl. 270; People *v.* Cothran, 27 Hun (N. Y.) 344, 346; Whitaker *v.* Chapman, 3 Lans. (N. 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A. 579; State *v.* Cunningham, 83 Wis. 90, 127, 53 N. W. 35, 35 Am. St. Rep. 67, 17 L. R. A. 145; Blake *v.* Blake, 75 Wis. 339, 343, 43 N. W. 144; Green Bay, etc., Canal Co. *v.* Kaukauna Water-Power Co., 70 Wis. 635, 650, 35 N. W. 529, 36 N. W. 828; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 38, 21 N. W. 828; Wicker *v.* Comstock, 52 Wis. 315, 319, 9 N. W. 25; Gibson *v.* Gibson, 43 Wis. 23, 33, 28 Am. Rep. 527; Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503, 523; Morse *v.* Buffalo F. & M. Ins. Co., 30 Wis. 534, 537, 11 Am. Rep. 587; St. Paul F. & M. Ins. Co. *v.* Penman, 151 Fed. 691, 693, 81 C. C. A. 151; American Bonding Co. *v.* Pueblo Inv. Co., 150 Fed. 17, 28, 80 C. C. A. 97; Harris *v.* Rosenberger, 145 Fed. 449, 455, 76 C. C. A. 225; Young *v.* Bohn, 141 Fed. 471, 472; Ramsey *v.* Phœnix Ins. Co., 2 Fed. 429, 431; Boon *v.* Ætna Ins. Co., 3 Fed. Cas. No. 1,639, 12 Blatchf. 24, 34; Whiting *v.* Baucroft, 29 Fed. Cas. 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(See Construction; Ejusdem Generis; Interpretation; and, generally, Statutes.)

NOSCITUR EX SOCIO QUI NON COGNOSCITUR EX SE. A maxim meaning "He who can not be known from himself may be known from his associates."[17]

NOSTRUM. A medicine, the ingredients of which are kept secret, for the purpose of restricting the profits of sale to the inventor or proprietor — a quack medicine.[18] (See Medicine; and, generally, Druggists.)

NOT. A word expressing negation, denial, or refusal.[19] (See Non.)

17 L. J. C. P. 2; Hoare *v.* Byng, 10 Cl. & F. 508, 518, 8 Jur. 563, 8 Eng. Reprint 835; Bloxam *v.* Elsie, 1 C. & P. 558, 566, 9 D. & R. 215, 5 L. J. K. B. O. S. 104, R. & M. 187, 30 Rev. Rep. 275, 12 E. C. L. 320; Right *v.* Compton, 9 East 267, 272; *In re* Birch, 30 Eng. L. & Eq. 519, 526; O'Toole *v.* Browne, 25 Eng. L. & Eq. 210, 212; Bishop *v.* Elliott, 11 Exch. 113, 117, 1 Jur. N. S. 662, 24 L. J. Exch. 229, 3 Wkly. Rep. 454; Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 4 Jur. N. S. 933, 28 L. J Ch. 396, 6 Wkly. Rep. 813, 11 Eng. Reprint 50; Archbold *v.* Charitable Donations, etc., Com'rs, 2 H. L. Cas. 440, 461, 9 Eng. Reprint 1159; Borradaile *v.* Hunter, 7 Jur. 443, 447, 12 L. J. C. P. 225, 5 M. & G. 639, 5 Scott N. R. 418, 44 E. C. L. 335; Canadian Pac. R. Co. *v.* Grand Trunk R. Co., 30 Can. Sup. Ct. 73, 78; Churchill *v.* McKay, 20 Can. Sup. Ct. 472, 480; Copp *v.* Glasgow, etc., Ins. Co., 30 N. Brunsw. 197, 208; Welch *v.* Ellis, 22 Ont. App. 255, 259; Halton County *v.* Grand Trunk R. Co., 19 Ont. App. 252, 260; May *v.* Standard F. Ins. Co., 5 Ont. App. 605, 618; McKay *v.* McFarlane, 19 Grant Ch. (U. C.) 345, 346; Scott *v.* Cox, Hodg. El. Rep. (U. C.) 274, 278; Reg. *v.* Taylor, 36 U. C. Q. B. 183, 197; Reg. *v.* Frasee, 7 Quebec Q. B. 83, 94.

17. Morgan Leg. Max.

18. Webster Dict. [*quoted* in Com. *v.* Fuller, 2 Walk. (Pa.) 550, 551].

19. Cowen *r.* Alsop, 51 Miss. 158, 163.

Used in connection with other words see the following cases construing the several phrases: "Not able to work." Matter of Morten, 5 Q. B. 590, 592, 48 E. C. L. 590. "Not accepted." Schlosser *r.* Grand Lodge B. R. T., 94 Md. 362, 369, 50 Atl. 1048. "Not accountable for contents." Russell *r.* Erie R. Co., 70 N. J. L. 808, 814, 59 Atl. 150, 67 L. R. A. 433. "Not administered." Chamberlin's Appeal, 70 Conn. 363, 374, 39 Atl. 734, 41 L. R. A. 204. "Not admit." Cowen *v.* Alsop, 51 Miss. 158, 164. "Not affirmatively authorized by Congress." Maine Water Co. *r.* Knickerbocker Steam Towage Co., 99 Me. 473, 476, 59 Atl. 953. "Not be good." Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 510, 518, 27 L. J. Exch. 401, 6 Wkly. Rep. 725. "Not doing a thing." Pennington *v.* Com., 68 S. W. 451, 452, 24 Ky. L. Rep. 321. "Not doubting." Major *r.* Herndon, 78 Ky. 123, 128. "Not exceeding." David *r.* David, 56 Ala. 49, 51; Scott *r.* Baltimore, etc., R. Co., 93 Md. 475, 505, 49 Atl. 327; Dearborn *v.* Brookline, 97 Mass. 466, 469. "Not executed." Hollandsworth *v.* Stone, 47 W. Va. 773, 774, 35 S. E. 864. "Not given." Manhattan L. Ins. Co. *r.* Doll, 80 Ind. 113, 116. "'Not good for passage after' a certain . . . date." Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 166, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471. "Not good to stop off." Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106, 109. "Not home." Peters *v.* Stewart, 2 Misc. (N. Y.) 357, 359, 21 N. Y. Suppl. 993. "Not known or used before the application." Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 18, 7 L. ed. 327. "Not known or used by others before his or their discovery or invention thereof." Bartholomew *r.* Sawyer, 2 Fed. Cas. No. 1,070, 4 Blatchf. 347, 349. "Not less than." Hankins *r.* People, 106 Ill. 628, 630; Rusch *r.* Davenport, 6 Iowa 443, 445; Stewart *r.* Griswold, 134 Mass. 391, 392; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505, 518; Com. *v.* Brown, 210 Pa. St. 29, 34, 59 Atl. 479; North *v.* Peck, 7 Pa. St. 268, 272; Stimpson *r.* Pond, 23 Fed. Cas. No. 13,455, 2 Curt. 502, 504; Chambers *v.* Smith, 12 M. & W. 2, 4. "Not more hazardous." Faust *r.* American F. Ins. Co., 91 Wis. 158, 164, 64 N. W. 883, 51 Am. St. Rep. 876, 30 L. R. A. 783. "Not navigable." Wood *r.* Hustis, 17 Wis. 416, 417. "Not negotiable." Bristol Nat. Bank *r.* Baltimore, etc., R. Co., 99 Md. 661, 672, 59 Atl. 134. "Not otherwise." Higgins *r.* Ormsby, 156 Ind. 82, 85, 59 N. E. 321; Seavey *v.* Cloudman, 90 Me. 536, 538, 38 Atl. 540. "Not residents of the state." Nagel *v.* Loomis, 33 Nebr. 499, 502, 50 N. W. 441. "Not served for want of property." Reed *r.* Lowe, 163 Mo. 519, 532, 63 S. W. 687, 85 Am. St. Rep. 578. "Not sufficient." Cooper *r.* Mills County, 69 Iowa 350, 355, 28 N. W. 633. "Not to be paid within one year." Dryden *r.* Kellogg, 2 Mo. App. 87, 95. "Not to be performed." Durfee *v.* O'Brien, 16 R. I. 213, 215, 14 Atl. 857. "Not unbribed." Woolley *r.* Louisville Southern R. Co., 93 Ky. 223, 230, 19 S. W. 595, 15 Ky. L. Rep. 13.

NOTARIES

By Charles B. Seymour
Professor of Mercantile Law and Equity, Law Department of the University of Louisville, Kentucky

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CROSS-REFERENCES

For Matters Relating to:

Bank's Liability For Default of Notary, see BANKS AND BANKING.
Judicial Notice of Notaries and Their Seals, see EVIDENCE.
Public Officers Generally, see OFFICERS.

I. DEFINITION, HISTORY, AND NATURE OF OFFICE.

A. Definition. A notary or notary public[1] is a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.[2]

B. History and Nature of Office. The office of notary has long been known both to the civil and to the common law.[3] It exists and is recognized

1. The word "notary" is equivalent to the words "notary public." Va. Code (1904), § 5; W. Va. Code (1906), § 293.

2. Black L. Dict.

Other definitions are: "A public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions." Gharst *v.* St. Louis Transit Co., 115 Mo. App. 403, 408, 91 S. W. 453 [*quoting* Black L. Dict.].

"An officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained." Nolan *v.* Labatut, 117 La. 431, 445, 41 So. 713; Schmitt *v.* Drouet, 42 La. Ann. 1064, 1066, 8 So. 396, 21 Am. St. Rep. 408 [both *citing* Abbott L. Dict. 182]. See also Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277, 283.

"A public functionary, authorized to receive all acts and contracts to which parties wish to give the character of authenticity, attached to the acts of public authority, to secure their date, their preservation and the delivery of copies." Nolan *v.* Labatut, 117 La. 431, 445, 41 So. 713; Schmitt *v.* Drouet, 42 La. Ann. 1064, 1067, 8 So. 396, 21 Am. St. Rep. 408 [both *citing* 5 Dict. Droit Civ. p. 27].

"A notary public is an officer long known to the civil law, and designated as *registrarius*, *actuarius*, or *scrivarius*. Anciently, he was a scribe, who only took notes or minutes, and made short drafts of writings and instruments, both public and private. At this day, in most countries a notary public is one who publicly attests deeds or writings, to make them authentic in another country; but principally in business relating to merchants." Kirksey *v.* Bates, 7 Port. (Ala.) 529, 531, 31 Am. Dec. 722.

3. Carroll *v.* State, 58 Ala. 396, 400 (where the court said: "Notaries are of ancient origin, long known to the civil and common law"); Kirksey *v.* Bates, 7 Port. (Ala.) 529, 531, 31 Am. Dec. 722; Ohio Nat. Bank *v.* Hopkins, 8 App. Cas. (D. C.) 146, 152. Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842 (where the court said:

throughout the commercial world,[4] and has been said to be "known to the law of nations."[5] It is a public office;[6] being in most of the states a state office,[7]

"The office is of ancient origin, and for many centuries has been known to most, if not all, Christian nations"); Gharst *v.* St. Louis Transit Co., 115 Mo. App. 403, 408, 91 S. W. 453; Vandewater *v.* Williamson, 13 Phila. (Pa.) 140, 141. "The office originated in the early Roman jurisprudence, and was known in England before the conquest." Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 853, 65 Am. St. Rep. 419.

4. *Alabama.*— Carroll *v.* State, 58 Ala. 396.
Arkansas.— Sonfield *v.* Thompson, 42 Ark. 46, 48 Am. Rep. 49.
Massachusetts.— Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842.
Pennsylvania.— Griffith *v.* Black, 10 Serg. & R. 160.
United States.— The Gallego, 30 Fed. 271.

5. Carroll *v.* State, 58 Ala. 396; Kirksey *v.* Bates, 7 Port. (Ala.) 529, 31 Am. Dec. 722; Ohio Nat. Bank *v.* Hopkins, 8 App. Cas. (D. C.) 146. "All acts done by a notary public, which fall within the rules of the law merchant, have always been respected under the law of nations." Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 853, 65 Am. St. Rep. 419.

6. *Alabama.*— Governor *v.* Gordon, 15 Ala. 72; Kirksey *v.* Bates, 7 Port. 529, 31 Am. Dec. 722.
Arkansas.— Sonfield *v.* Thompson, 42 Ark. 46, 48 Am. Rep. 49.
Connecticut.—Ashcraft *v.* Chapman, 38 Conn. 230.
District of Columbia.— Ohio Nat. Bank *v.* Hopkins, 8 App. Cas. 146.
Georgia.— Smith *v.* Meador, 74 Ga. 416, 58 Am. Rep. 438.
Indiana.— Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.
Iowa.— Manning First Nat. Bank *v.* German Bank, 107 Iowa 543, 78 N. W. 195, 70 Am. St. Rep. 216, 44 L. R. A. 133; Keeney *v.* Leas, 14 Iowa 464.
Louisiana.— State *v.* Theard, 45 La. Ann. 680, 12 So. 892; Emmerling *v.* Graham, 14 La. Ann. 389.
Massachusetts.— Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842.
Nebraska.— Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.
Nevada.— State *v.* Clarke, 21 Nev. 333, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L. R. A. 313.
New Hampshire.— Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415.
New York.— People *v.* Wadhams, 176 N. Y. 9, 68 N. E. 65; People *v.* Rathbone, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384 [*affirming* 85 Hun 503, 33 N. Y. Suppl. 132 (*affirming* 11 Misc. 98, 32 N. Y. Suppl. 108)].
Ohio.— State *v.* Adams, 58 Ohio St. 612, 51 N. E. 135, 65 Am. St. Rep. 792, 11 L. R. A. 727.
Pennsylvania.— Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805; Browne *v.* Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463; Bellemire *v.* U. S. Bank, 1 Miles 173; Vandewater *v.* Williamson, 13 Phila. 140.
Tennessee.— State *v.* Davidson, 92 Tenn. 531, 22 S. W. 203, 20 L. R. A. 311; Golladay *v.* Union Bank, 2 Head 57, 59, where the court said: "The notary is a public officer, and when he certifies that he has done an official act, it must be presumed that he has done it correctly unless some statute or rule of law prescribes a particular mode, until the contrary appears." Stokes *v.* Acklen, (Ch. App. 1898) 46 S. W. 316.
United States.— Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917; Bettman *v.* Warwick, 108 Fed. 46, 47 C. C. A. 185.
Canada.— Gervais *v.* McCarthy, 35 Can. Sup. Ct. 14; Gervais *v.* Nadeau, 3 Quebec Pr. 18; Choquette *v.* McDonald, 19 Quebec Super. Ct. 408; Lasnier *v.* Dozois, 15 Quebec Super. Ct. 604.

See 37 Cent. Dig. tit. "Notaries," § 1 *et seq.*

Prohibition against use of free pass, etc.— A notary public is a public officer, within the meaning of N. Y. Const. art. 13, § 5, which prohibits public officers from asking, accepting, or receiving, for their own use or benefit, or for the use or benefit of another, and from using themselves, or in conjunction with another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates from any person or corporation, and making a violation of the provision a misdemeanor and ground for forfeiture of office. People *v.* Rathbone, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384 [*affirming* 85 Hun 503, 33 N. Y. Suppl. 132 (*affirming* 11 Misc. 98, 32 N. Y. Suppl. 108)]. And see People *v.* Wadhams, 176 N. Y. 9, 68 N. E. 65.

The office of city notary of the city of New Orleans, not being created or recognized by the charter, was not a municipal office, and the provisions of the Act of 1868, No. 156, usually termed the Intrusion Act, could not be invoked in a contest between two notaries for the position. The court said: "The City Council, for its convenience and for the facility of business, selects a notary public, specially to draw up such deeds and instruments as may be required, and he is called city notary. We regard his office as one merely incidental and subordinate, and not to be considered as of that character of public office contemplated by the Intrusion Act." State *v.* Castell, 22 La. Ann. 15.

A notary is not a magistrate within the meaning of a fire insurance policy requiring a magistrate's certificate to proofs of loss. Cayon *v.* Dwelling-House Ins. Co., 68 Wis. 510, 32 N. W. 540.

7. New Orleans *v.* Bienvenu, 23 La. Ann. 710 (holding that a notary public was a state officer who held his appointment from the governor by and with the consent of the

although in a few states it has been regarded as a county office.[8] The office has grown from that of a mere scribe to a public office,[9] and its functions, once simply commercial,[10] have now a wider scope.[11] In general the office is ministerial and not judicial;[12] but in some jurisdictions it has been held with respect to particular acts that notaries act judicially,[13] and in the absence of constitutional restriction the legislature may, as has been done in Alabama, expressly confer

senate, and therefore the city of New Orleans had no right or authority to impose a license-tax on such officer in his official character; and that authority to impose such tax was not conferred by authority given to the city to impose a license-tax on trades, occupations, and professions); Com. *v.* Shindle, 19 Pa. Co. Ct. 258; Davey *v.* Ruffel, 14 Pa. Co. Ct. 272; Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103; Bettman *v.* Warwick, 108 Fed. 46, 47 C. C. A. 185 (holding that since a notary public, appointed under the laws of a state by the governor, was a state officer employed in the exercise of functions belonging to it in its governmental capacity, a bond which he was required to execute for the faithful discharge of the duties of his office, as a condition to his qualification, was an instrument exempt from the stamp tax imposed by the act of congress of 1898, within the meaning of the proviso to schedule A, exempting the states in the exercise of functions belonging to them in their ordinary governmental capacity); U. S. *v.* Bixby, 9 Fed. 8, 10 Biss. 520.

8. A notary public who receives his appointment and commission from the governor of the state, on the recommendation of the judge from a county court, is a public officer of the county. Governor *v.* Gordon, 15 Ala. 72. "A notary public, while holding his office by the appointment of the governor, can exercise the functions thereof only in the county for which he is appointed. In this sense he is a county officer." Matter of House Bill No. 166, 9 Colo. 628, 629, 21 Pac. 473.

Not county officers.— "As to notaries public, another confusion has been caused by the Act of 1893, seeming to treat them as county officers, when they are in fact and in law state officers, appointed by the governor and confirmed by the senate, but required 'to reside within such place or places within this state, as the governor shall, in and by the respective commissions, direct.' . . . This is done that they may have a known place, where they may be found when wanted. But they are as much state officers as judges of the Supreme Court or common pleas." Davey *v.* Ruffel, 14 Pa. Co. Ct. 272, 275. The office of notary is not a county office, within the meaning of a constitutional provision that none but electors shall hold county offices, where the statute declares that the jurisdiction of a notary public shall be coextensive with the limits of the state. U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520.

9. Carroll *v.* State, 58 Ala. 396; Ashcraft *v.* Chapman, 38 Conn. 230, 232, where it is said: "Notaries were originally mere commercial scriveners. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers — Notaries Public — and their certificates were received as evidence of their official acts. Afterward, as they were authorized or came to use seals, the impressions made by them were received as evidence of their official character. And when as matter of convenience they have since been deputed or authorized to perform acts not commercial in their character, courts have continued to receive their certificates and seals as sufficient evidence of those facts."

10. Ashcraft *v.* Chapman, 38 Conn. 230.

11. Carroll *v.* State, 58 Ala. 396; Kirksey *v.* Bates, 7 Port. (Ala.) 529, 31 Am. Dec. 722; Ashcraft *v.* Chapman, 38 Conn. 230. See *infra*, VI.

12. *Alabama.*— Carroll *v.* State, 58 Ala. 396.

California.— Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070.

Illinois.— Hill *v.* Bacon, 43 Ill. 477.

Kansas.— *In re* Huron, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822; Ferguson *v.* Smith, 10 Kan. 396, 404.

Louisiana.— Montgomery's Succession, 44 La. Ann. 373, 10 So. 772; State *v.* Buchanan, 12 La. 409.

Massachusetts.— Opinion of Justices, 150 Mass. 586, 589, 23 N. E. 850, 6 L. R. A. 842 (where the court said: "Notaries . . . are not judicial officers"); Learned *v.* Riley, 14 Allen 109, 113.

Michigan.— Chandler *v.* Nash, 5 Mich. 409.

Missouri.— State *v.* Plass, 58 Mo. App. 148.

Nebraska.—*In re* Butler, (1906) 107 N. W. 572; Horbach *v.* Tyrrill, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

Ohio.— De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

United States.— U. S. *v.* Bixby, 9 Fed. 78, 80, 10 Biss. 520 (where the court said the office of notary public "is ministerial and does not concern the administration of justice"); Fredericksburg Nat. Bank *v.* Conway, 17 Fed. Cas. No. 10,037, 1 Hughes 37.

Renunciation by married woman.— A notary public is a ministerial officer in taking the renunciation of a married woman of her rights against her husband and her property, under the Louisiana statute. Montgomery's Succession, 44 La. Ann. 373, 10 So. 772.

13. *Ex p.* McKee, 18 Mo. 599; Gharst *v.* St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453; Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272; Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805; Stirneman *v.* Smith, 100 Fed. 600, 40 C. C. A. 581.

judicial functions upon them.[14] In the absence of a statute a notary public is unknown to the criminal law.[15]

II. ELIGIBILITY AND QUALIFICATION.

A. In General.[16] The eligibility of notaries is largely a matter of legislation or constitutional provision.[17] A constitutional or statutory ineligibility nullifies the appointment or election;[18] but where the statute merely forbids a person to take office during a certain disqualification, his election or appointment may be valid.[19] A constitutional prohibition may be either express[20] or implied.[21]

B. Special Disqualifications — 1. Sex. At common law a woman cannot be a notary;[22] but women may be made eligible by statute in the absence of any constitutional prohibition,[23] or where the office is created by statute and not by the constitution.[24] Under the constitution of some states, however, the legislature cannot make women eligible to the office of notary.[25]

14. Harper *v.* State, 109 Ala. 66, 19 So. 901. See also People *v.* Rathbone, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384, where it is said that the statute placed notaries in the class of judicial officers. And see *infra*, VI, C, 7.

Constitutional prohibition see *infra*, VI, C, 7.

15. Richards *v.* State, 22 Nebr. 145, 34 N. W. 346. *Compare infra*, VI, C, 6, text and note 34; VI, C, 7.

16. De facto notary see *infra*, V.

17. See the constitutions and statutes of the several jurisdictions.

18. Com. *v.* Pyle, 18 Pa. St. 519, 521, holding that "where the constitution or a statute declares that certain disqualifications shall render a person ineligible to an office, he must get rid of his disqualification before he is appointed or elected."

19. Com. *v.* Pyle, 18 Pa. St. 519, 521, where the court said of a person under a statutory disqualification: "But if the law merely forbids him to hold or enjoy the office, or exercise its duties, it is sufficient if he qualifies himself before he is sworn."

20. State *v.* Adams, 58 Ohio St. 612, 51 N. E. 135, 65 Am. St. Rep. 792, 11 L. R. A. 727.

21. Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350, holding that a constitution providing for the office of notary public and silent as to disqualification by sex was to be interpreted according to usage and the common law as excluding women from the office, so that the legislature had no power to make them eligible.

Eligibility of women see *infra*, II, B, 1.

22. Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350; Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842 (where the justices failing to find any precedent for a woman's appointment in Massachusetts or in England held that such appointment was not authorized); Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415; State *v.* Davidson, 92 Tenn. 531, 534, 22 S. W. 203, 20 L. R. A. 311 (where the court so held, saying: "By the English or common law, no woman, under the dignity of a queen, could take part in the government of the State and they could hold no office except parish offices"); Stokes *v.* Acklen, (Tenn. Ch. App. 1898) 46 S. W. 316.

De facto notary see *infra*, V.

23. Von Dorn *v.* Mengedoht, 41 Nebr. 525, 535, 59 N. W. 800 (where the court, refusing to try collaterally the title of a woman to the office, said: "The word 'persons' in this statute is broad enough to include women, and we know of no constitutional provision or law that prohibits a woman in this state from holding the office of notary public"); State *v.* Davidson, 92 Tenn. 531, 22 S. W. 203, 20 L. R. A. 311; Chattanooga Third Nat. Bank *v.* Smith, (Tenn. Ch. App. 1898) 37 S. W. 1102 (where the court said: "All that is needed to enable one to be a *de jure* female notary public is an enabling act of the legislature"). See also Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415.

24. Harbour-Pitt Shoe Co. *v.* Dixon, 60 S. W. 186, 22 Ky. L. Rep. 1169. See also Opinion of Justices, 62 Me. 596; Opinion of Justices, 165 Mass. 599, 601, 43 N. E. 927, 32 L. R. A. 350, where the court said: "Where an office is created by statute . . . the qualifications required . . . are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution."

25. Matter of House Bill No. 166, 9 Colo. 628, 21 Pac. 473 (holding that under the Colorado constitution qualified electors only were eligible to the office of notary public, and that an act providing for the appointment of women to such office was unconstitutional); Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350 (holding that the constitution of the commonwealth, because of the nature of the office and the usage that had always prevailed, could not have contemplated the appointment of women as notaries); State *v.* Adams, 58 Ohio St. 612, 51 N. E. 135, 65 Am. St. Rep. 792, 11 L. R. A. 727 (holding that a woman could not be a notary public under a constitution requiring that every office holder shall have the qualifications of an elector, and that an elector shall be a male citizen); State *v.* McKinley, 57 Ohio St. 627, 50 N. E. 1134.

2. MINORITY. While infants may or may not be disqualified by the constitution or by statute from holding the office of notary,[26] a minor has been held eligible to the office at common law.[27]

3. LACK OF CITIZENSHIP. Ineligibility from lack of citizenship is a matter of constitutional and legislative provision.[28]

4. HOLDING OTHER OFFICE. By statute, in some jurisdictions, other public offices are incompatible with that of notary, so that one cannot hold both.[29]

5. CONFLICTING INTEREST. In Pennsylvania it is provided by statute that no person who is a stock-holder, director, cashier, teller, clerk, or other officer in any bank or banking institution, or in the employment thereof, shall at the same time hold, exercise, or enjoy the office of notary public.[30] And in Indiana, by statute, no officer in any bank, corporation, or association possessed of banking power can be a notary public.[31]

III. APPOINTMENT.[32]

A. In General. The appointment of notaries public is regulated by constitution or statute;[33] and an appointment not in the mode so prescribed is

26. See the statutes and constitutions of the several states.

27. U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520, holding that an infant may be a notary at common law, since the office is ministerial; that therefore an infant might be a notary in Indiana in the absence of any statutory prohibition; also, that a notary was not a county officer within the meaning of the constitution of Indiana requiring such officers to be of age.

28. See the constitutions and statutes of the various states. See also Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24, holding that under the Missouri constitution an alien cannot be a notary *de jure*, although he may be one *de facto*.

De facto notary see *infra*, V.

29. State *v.* Clarke, 21 Nev. 333, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L. R. A. 313 (holding that the office of notary public is a "civil office," within the meaning of the constitutional provision that no person holding a lucrative office under the government of the United States or any other power shall be eligible to any civil office of profit under this state); Biencourt *v.* Parker, 27 Tex. 558 (holding that the offices of notary public and county clerk were incompatible, and that when a notary was elected county clerk and qualified as such, his office as notary was thereby determined); Building, etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222 (holding that the office of notary public is incompatible with that of judge, under a constitutional provision that no judge, during his term of office, shall hold any other office or appointment). The offices of justice of the peace and notary public are state offices and are incompatible, but the office of notary public is not incompatible with the office of chief burgess of a borough. Com. *v.* Shindle, 19 Pa. Co. Ct. 258. The office of notary public is not incompatible with the position of messenger or librarian in the office of the district attorney of the city and county of New York. Merzbach *v.* New York, 163 N. Y. 16, 57 N. E. 96 [*reversing* 19 N. Y. App. Div. 186, 45 N. Y. Suppl. 1018].

De facto notary see *infra*, V.

30. Pa. Act, April 14, 1840; 3 Purdon Dig. (13th ed.) p. 3323. Construing this statute it has been held that the executor or devisee under the will of a stock-holder in a bank cannot be a notary, even though the estate is solvent without recourse to the stock (Com. *v.* Pyle, 18 Pa. St. 519), and that the statute renders ineligible to the office of notary the cashier of a savings bank (Rupert's Case, 16 Pa. Co. Ct. 333), or a typewriter and stenographer employed by a trust company (Dunlap's Case, 16 Pa. Co. Ct. 588). But a stock-holder in a bank may be a notary *de facto*. Fisher *v.* Kutztown Sav. Bank, 3 Walk. (Pa.) 477. See *infra*, V.

Partial repeal.— In so far as this act applies to a clerk or teller in any bank, it has been repealed as to certain counties of the state by later acts. See 3 Purdon Dig. (13th ed.) p. 3323.

31. Burns Rev. St. Ind. (1894) § 8041. But he may be a notary *de facto*. See Spegal *v.* Krag-Reynolds Co., 21 Ind. App. 205, 51 N. E. 959. And see *infra*, V.

32. Judicial notice of notaries see EVIDENCE, 16 Cyc. 900.

33. See the constitutions and statutes of the several states.

"In England notaries public were appointed by the authority of the Pope of Rome until the Statute of 25 Hen. VIII, c. 21, and since the passage of this statute they have been appointed by the Court of Faculties of the Archbishop of Canterbury." Opinion of Justices, 150 Mass. 586, 587, 23 N. E. 850, 6 L. R. A. 842. And see Vandewater *v.* Williamson, 13 Phila. (Pa.) 140. The master of the faculties has a discretion as to the number of notaries public to be appointed in a town in England (Graham *v.* Smart, 9 Jur. N. S. 387; Eaton *v.* Watson, [1904] W. N. 24; Tunbridge *v.* Mathews, [1903] W. N. 158); or in a city or town in an English colony (Bailleau *v.* Victorian Soc. of Notaries, [1904] P. 180, 20 T. L. R. 251). In deciding upon an application for appointment as a notary the master of the faculties has to consider not only the fitness of the applicant

inoperative.[34] Generally the appointment is by the governor,[35] sometimes with the advice and consent of the senate,[36] or of the council.[37]

B. Notaries Ex Officio. By statute certain other public offices frequently include that of notary, so that one holding the same is *ex officio* a notary.[38]

IV. TERM OF OFFICE AND REMOVAL.

A. In General. The length of a notary's term of office is regulated by constitution or by statute.[39] Under some statutes a notary public continues in office after expiration of his term until he is removed or his successor is appointed.[40] Under a statute requiring notaries to renew their bonds every five years and pro-

(Eaton *v.* Watson, [1904] W. N. 24), but also and especially the need of notaries in the place (Graham *v.* Smart, 9 Jur. N. S. 387; Eaton *v.* Watson, [1904] W. N. 24; Tunbridge *v.* Mathews, [1903] W. N. 158) with regard to the convenience of the town, as shown by its business, and the wishes of those who are mainly interested in the appointment, as bankers and shop owners (Graham *v.* Smart, 9 Jur. N. S. 387).

In London, by statute, notaries are admitted to practice by the company of Scriveners of the City of London (Rex *v.* Scriveners' Co., 10 B. & C. 511, 8 L. J. K. B. O. S. 199, 21 E. C. L. 219), and mandamus will lie to compel the company to admit an applicant in a proper case (Rex *v.* Scriveners' Co., *supra*; Reg. *v.* Scriveners' Co., 3 Q. B. 959, 3 G. & D. 272, 12 L. J. Exch. 492, 43 E. C. L. 1046).

City notary.— The employment of a notary by a city with the title "City Notary" does not create a new office recoverable by legal proceedings. State *v.* Castell, 22 La. Ann. 15.

34. Brown *v.* State, 43 Tex. 478; and other cases cited in the notes following.

35. Carroll *v.* State, 58 Ala. 396.

36. Brown *v.* State, 43 Tex. 478. And see New Orleans *v.* Bienvenu, 23 La. Ann. 710.

37. Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415.

38. Wilson *v.* Simpson, 68 Tex. 306, 312, 4 S. W. 839, where the court said: "The authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample as if he were notary by direct appointment."

United States consul.— The statutes of the United States authorizing United States consuls abroad to perform any notarial act that may be required to be done by any notary in any of the United States do not merely add a function to the office of consul, but make the consul *ex officio a* notary public. Bruce *v.* Gibson, 8 Ohio Dec. (Reprint) 31, 5 Cinc. L. Bul. 101. An affidavit administered by such consul is not signed officially in his capacity as a notary unless he affix to his name the words "Notary Public" or else write after the word consul the addition "and *ex officio* notary public." Bruce *v.* Gibson, *supra*.

A recorder of Louisiana was recognized as a notary *ex officio* in Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839.

Justices of the peace.— In Mississippi justices of the peace are authorized by statute to perform the duties of notaries in particular instances, including protest of commercial paper, taking acknowledgments, etc. Dennistoun *v.* Potts, 26 Miss. 13; Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181. The constitution of Texas has recognized domestic justices of the peace as notaries *ex officio*, but it is said that such justices are not recognized as notaries by foreign governments. Gilleland *v.* Drake, 36 Tex. 676. See also Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712.

Judge.— In Texas a power of attorney acknowledged before a domestic judge who was by statute *ex officio* a notary public was held duly authenticated. Butler *v.* Dunagan, 19 Tex. 559.

39. See the constitutions and statutes of the several states.

A notary appointed to fill a vacancy holds for the full term of four years prescribed by the statute, and not merely for the remainder of his predecessor's term. Kelly *v.* Gilly, 5 La. Ann. 534.

40. See the statutes of the several states.

In Alabama, of the two classes of notaries public whom the governor is authorized to appoint, those having the jurisdiction of justices of the peace hold their office three years from the date of their commission, while those authorized to administer oaths, take acknowledgments, protest bills of exchange, etc., hold after the expiration of the three years, until their successors are qualified. Cary *v.* State, 76 Ala. 78. Under Code (1886), § 1102, providing that a competent number of notaries shall be appointed for each county, who shall hold office for three years and until their successors are qualified, a notary, on the expiration of his term, is only entitled to continue the discharge of his duties pending reappointment for a reasonable time. Sandlin *v.* Dowdell, 143 Ala. 518, 39 So. 279.

In Georgia, under Code, §§ 132, 1499, providing that notaries public for commercial purposes are public officers and that a public officer holds until a successor has been appointed or he has been removed, a commercial notary public after his term of office of four years is an officer *de jure*, in the absence of removal or the appointment of a successor. Smith *v.* Meador, 74 Ga. 416, 58 Am. Rep. 438.

Notary holding over as a notary de facto see *infra*, V.

viding that they shall "continue in the discharge of their duties so long as they renew and file their bonds," a notary who has failed to renew his bond remains a notary *de jure* until the court suspends him.[41]

B. Vacation of Office and Suspension, Removal, and Forfeiture — **1. Vacation by New Constitution or Statute.** A notary's office may be vacated by constitution or statute,[42] but it will not be held by implication that a new constitutional or statutory provision abolishes the office of those previously appointed.[43]

2. Suspension, Removal, and Forfeiture. A vacancy may result from the suspension or removal of a notary for cause, which is a matter of constitutional or statutory provision.[44] So a statute may provide for forfeiture of the office of a notary under certain circumstances.[45] In the absence of a constitutional or statutory provision the governor cannot remove a duly appointed notary from office before the expiration of his term, where the constitution gives to the appointing power the right of removing at pleasure all incumbents the duration of whose term is not provided for by the constitution or declared by law, as this must be construed to deny the right of removal in those cases where the tenure is defined.[46]

41. Davenport *v.* Davenport, 116 La. 1009, 41 So. 240, 114 Am. St. Rep. 575; Monroe *v.* Liebman, 47 La. Ann. 155, 16 So. 734.

Notary de facto after failure to give bond see *infra*, V.

42. Cragg *v.* Westmore, 13 La. Ann. 344, holding that by an act declaring the office of every notary in the parish of New Orleans to be vacated, and authorizing the governor to appoint a limited number of successors, a notary's office was vacated, although no successor was appointed.

43. Buckley *v.* Seymour, 30 La. Ann. 1341 (holding that existing notarial offices were not vacated by a new constitution); Guzman *v.* Walker, 11 La. Ann. 693 (holding that a new act, "Relative to Notaries Public," which was merely a digest, with some slight alterations, of preëxisting laws, did not abolish the notarial offices then existing); Denistoun *v.* Potts, 26 Miss. 13 (holding that a constitution making no mention of notaries, but providing that office should not be granted for life or during good behavior, but during good behavior for a limited term, also that all officers then holding commissions should continue to hold and exercise their offices until superseded "pursuant to the provisions of this constitution," and until their successors were duly qualified, did not abolish the office of notary public); Gilleland *v.* Drake, 36 Tex. 676 (holding that a new constitution recognizing justices of the peace as notaries *ex officio* did not do away with the office of notary as previously existing).

Term of existing notary shortened by constitution.— Where a constitution made no limitation as to duration of the term of office of notaries, and a subsequent constitution fixed the term of all offices not otherwise provided for at four years, it was held that the term of office of notaries public who were appointed prior to the adoption of the last constitution were limited to four years after this adoption. State *v.* Percy, 5 La. Ann. 282.

44. See the constitutions and statutes of the several states. See also State *v.* Laresche, 28 La. Ann. 26 (holding that Rev. St. § 2520, providing that recorders, notaries public, etc., shall be liable to certain fines for breaches of official duty, does not abolish or conflict with section 2505, providing that a notary may be suspended for just cause; and that a notary may be fined under the first named section and suspended from office under the second); *In re* Hayman, 5 Ohio S. & C. Pl. Dec. 550, 7 Ohio N. P. 515 (holding that a notary public who certifies in blank to receipts for salary of a public officer or employee is guilty of such misconduct in office as justifies his removal).

In Louisiana the general statute providing that notaries "may be suspended by any judge of the Supreme Court or District Courts of the State, for failure to pay over any money intrusted to them in their professional character, for failure to satisfy a final judgment rendered against them in such capacity, or for other just cause" applies to notaries of New Orleans as well as to others. State *v.* Laresche, 28 La. Ann. 26.

45. See the statutes of the several states.

Receiving or using free pass, etc.—A notary public is a public officer within the meaning of N. Y. Const. art. 13, § 5, prohibiting a public officer or a person elected or appointed to a public office under the laws of this state from receiving from any person or corporation or making use of any free pass, free transportation, etc. People *v.* Rathbone, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384 [*affirming* 85 Hun 503, 33 N. Y. Suppl. 132 (*affirming* 11 Misc. 98, 32 N. Y. Suppl. 108)]. See also People *v.* Wadhams, 176 N. Y. 9, 60 N. E. 65; and *supra*, I, B, text and note 6. A notary public who, before the constitution went into effect, had rightfully received a free pass over a railroad, was by this provision prohibited from thereafter using it while he continued to hold the office. People *v.* Rathbone, *supra*. For a violation of this provision by a notary public an action by the people is maintainable against him to have his office adjudged to be forfeited. People *v.* Rathbone, *supra*.

46. People *v.* Jewett, 6 Cal. 291.

V. NOTARIES DE FACTO.

Generally a person acting as a notary under color of authority with public acquiescence is held to be a notary *de facto*, and as to the public and third persons his acts are valid and cannot be attacked collaterally.[47] This principle has been applied, for example, to one who is appointed and acts as notary, but who is ineligible or disqualified to act as such by reason of alienage,[48] sex,[49] or interest,[50] or by acceptance of another office, even though his office as notary is thereby "vacated" under the statute,[51] or by reason of being an officer or stock holder in a corporation in violation of a statute;[52] or one whose commission is defective,[53] or who is holding over after expiration of his term,[54] or who has failed to file his bond,[55] take the oath of office,[56] or otherwise comply with directory provisions of the statute.[57] It is well settled, however, that a mere usurper is not an officer *de*

47. *Alabama.*— Cary *v.* State, 76 Ala. 78.
Georgia.— Smith *v.* Meador, 74 Ga. 416, 58 Am. Rep. 438.
Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; McNulty *v.* State, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344; Spegal *v.* Kragg-Reynolds Co., 21 Ind. App. 205, 51 N. E. 959.
Iowa.— Keeney *v.* Leas, 14 Iowa 464.
Louisiana.— Buckley *v.* Seymour, 30 La. Ann. 1341.
Missouri.— Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24; Hamilton *v.* Pitcher, 53 Mo. 334.
Nebraska.— Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800.
New York.— Schiff *v.* Leipziger Bank, 65 N. Y. App. Div. 33, 72 N. Y. Suppl. 513; Findlay *v.* Thorn, 1 How. Pr. N. S. 76.
Pennsylvania.— Fisher *v.* Kutztown Sav. Bank, 3 Walk. 477.
Tennessee.— Chattanooga Third Nat. Bank *v.* Smith, (Ch. App. 1898) 47 S. W. 1102; Stokes *v.* Acklen, (Ch. App. 1898) 46 S. W. 316.
Texas.— Titus *v.* Johnson, 50 Tex. 224.
Washington.— Bullene *v.* Garrison, 1 Wash. Terr. 587.
West Virginia.— Building, etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.
See 37 Cent. Dig. "Notaries," §§ 6, 12½.
Non-residence sufficient to rebut presumption of appointment.— Evidence that an alleged notary is a non-resident has been held sufficient to rebut the presumption of appointment raised by evidence that he had acted as a notary for some years, and the production of a book from the county clerk's office, containing a list of notaries and the times of their appointments, in which his name appeared. Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293.
Notaries in Confederate states.— In Todd *v.* Neal, 49 Ala. 266, and Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275, it was held that protests of commercial papers by notaries acting under one of the Confederate states were void. These cases, however, were overruled in later decisions based upon analogous decisions of the supreme court of the United States. Tyree *v.* Rives, 57 Ala. 173; Parks *v.* Coffey, 52 Ala. 32.

48. Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24.

49. Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800, holding that, even if a woman is not eligible to the office of notary public, yet where she has been appointed and commissioned to such office by the governor and is acting as such her right to such office can only be inquired into in a suit or proceeding brought against her for that purpose, and her acts as such officer are the acts of an officer *de facto* and not subject to collateral attack. To the same effect see Findlay *v.* Thorn, 1 How. Pr. N. S. (N. Y.) 76; Chattanooga Third Nat. Bank *v.* Smith, (Tenn. Ch. App. 1898) 47 S. W. 1102; Stokes *v.* Acklen, (Tenn. Ch. App. 1898) 46 S. W. 316.

50. Titus *v.* Johnson, 50 Tex. 224; Bullene *v.* Garrison, 1 Wash. Terr. 587.

51. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; McNulty *v.* State, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344; Spegal *v.* Krag-Reynolds Co., 21 Ind. App. 205, 51 N. E. 959; Titus *v.* Johnson, 50 Tex. 224; Building, etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222. But *compare* Biencourt *v.* Parker, 27 Tex. 558, holding that a deposition purporting to have been taken by a notary, but shown by evidence to have been taken by one who had ceased to be notary by accepting another office, was properly rejected, it not appearing that he had, since acceptance of the other office, otherwise acted or held himself out as a duly qualified notary.

52. Fisher *v.* Kutztown Sav. Bank, 3 Walk. (Pa.) 477.

53. Hamilton *v.* Pitcher, 53 Mo. 334.

54. Smith *v.* Meador, 74 Ga. 416, 58 Am. Rep. 438. *Compare infra*, this section, text and note 59. And see Bernier *v.* Becker, 37 Ohio St. 72, holding that the statute providing that any act done by a notary public after the expiration of his term of office should be as valid as if done during such term was not retroactive so as to cover acts done before its passage.
May be a notary de jure see *supra*, IV, A.

55. Keeney *v.* Lees, 14 Iowa 464.
Notary de jure until suspension by court see *supra*, IV, A.

56. Buckley *v.* Seymour, 30 La. Ann. 1341.

57. Keeney *v.* Lees, 14 Iowa 464; Schiff *v.* Leipziger Bank, 65 N. Y. App. Div. 33, 72 N. Y. Suppl. 513, where a notary who had

facto;[58] and the position depends upon continuing exercise of the office, a single official act not being enough.[59]

VI. FUNCTION AND POWERS.

A. In General. The principal function of a notary is the authentication of documents. This power is used in specified cases for the perpetuation of facts as evidence.[60] Notaries may also have power to take affidavits,[61] depositions,[62] and acknowledgments,[63] and to administer oaths,[64] and in some jurisdictions their powers are far more extensive.[65]

B. Authentication — 1. In General. A notary, by setting the marks of his official sanction upon certain kinds of documents, gives them the force of evidence.[66] These marks are his certificate[67] and official seal,[68] which in some instances are proof of their own authenticity,[69] while in others they require further authentication.[70] It is well settled that a notary's certificate is *prima facie* evidence of such matters only as the notary is authorized by law to certify,[71] and it is also

duly qualified in Kings county, but who had failed to set forth in his certificate, which he was required to do in order to practice in another county, certain essential details, was held to be a notary *de facto* in the latter county.

58. Cary *v.* State, 76 Ala. 78, 85 (where the court said in regard to the office of notary: "It is sometimes very difficult to determine whether one claiming to exercise the duties of an office, is an officer *de facto*, or a mere usurper"); Hughes *v.* Long, 119 N. C. 52, 58 S. E. 743.

59. Sandlin *v.* Dowdell, 143 Ala. 518, 39 So. 279 (holding that the act of one whose appointment as notary has expired, and who for seven months since has not acted, or held himself out as a duly qualified notary, is not the act of a notary *de facto*); Cary *v.* State, 76 Ala. 78; Hughes *v.* Long, 119 N. C. 52, 25 S. E. 743 (where it was held that the act of one whose notary's commission had expired two years before, and who was not shown to have acted as a notary in the interim, was not the act of a notary *de facto*); Bernier *v.* Becker, 37 Ohio St. 72 (holding that an acknowledgment taken by a notary ten months after the expiration of his term of office was not the act of a notary *de facto*, where the record showed no color of authority); Biencourt *v.* Parker, 27 Tex. 558.

60. See *infra*, VI, B.

61. See *infra*, VI, C, 3.

62. See *infra*, VI, C, 4.

63. See *infra*, VI, C, 5.

64. See *infra*, VI, C, 6.

65. See *infra*, VI, C, 7.

66. Sonfield *v.* Thompson, 42 Ark. 46, 50, 48 Am. Rep. 49 (where it is said that notaries' "acts duly authenticated are valid everywhere, and prove themselves by comity of nations"); Vandewater *v.* Williamson, 13 Phila. (Pa.) 140, 142, 6 Wkly. Notes Cas. 350 (where it is said that the official act of a notary is "the attestation of something done which makes it legal evidence"); Hutcheon *v.* Mannington, 6 Ves. Jr. 823, 824, 2 Rev. Rep. 115, 31 Eng. Reprint 1327, where the court said: "A Notary Public by the Law of Nations has credit every where").

In **Louisiana** the supreme court has said: "The law attaches full credit to their official acts. . . . The act passed before a notary, under the formalities prescribed for its execution, constitutes a record and a certified copy, under the hand and seal of the officer, is received as full proof of the original. . . . The authentic act is full proof of the agreement contained in it against the contracting parties, their heirs and assigns, unless it is declared a forgery." Tete's Succession, 7 La. Ann. 95, 96. The authentic act as relates to contracts must be executed in the presence of two witnesses, free, male, and at least fourteen years of age, or of three witnesses, if the party be blind. Tete's Succession, *supra*.

In **Lower Canada**, "according to art. 1203, of the Civil Code, the acts of notaries are authentic acts." Choquette *v.* McDonald, 19 Quebec Super. Ct. 408, 409. Notarial acts are those taken by one or more notaries. Léveillé *v.* Kauntz, 4 Quebec Pr. 358, 359.

Instead of consular official.— In places where the English law requires affidavits to be taken by consular officials in order to admit them as evidence in English courts, where there is no such official within a reasonable distance an affidavit sworn before a notary is admissible. Cooke *v.* Wilby, 25 Ch. D. 769, 53 L. J. Ch. 592, 50 L. T. Rep. N. S. 152, 32 Wkly. Rep. 379. But in order that a notary's affidavit made in such a place may be admitted, the absence of the authorized British official must be made to appear. *In re* Bernard, 31 L. J. P. & M. 89, 6 L. T. Rep. N. S. 726, 2 Swab. & Tr. 489.

67. See *infra*, VII, A.

68. See *infra*, VII, B.

69. See *infra*, VI, B, 2.

70. See *infra*, VI, B, 3.

The best evidence of a notary's official character is the record of his appointment, or a certificate under seal of the power from which he derives his authority. Ashcraft *v.* Chapman, 38 Conn. 230.

71. *Louisiana.*— Gordon *v.* Dreux, 6 Rob. 399 (holding that the certificate of protest of a notary acting where he has no capacity to act as a notary is not evidence); Las Caygas *v.* Larionda's Syndics, 4 Mart. 283.

New York.—Rochester Bank *v.* Gray, 2 Hill 227.

Pennsylvania.— Coleman *v.* Smith, 26 Pa. St. 255, 257, where, considering a foreign

prima facie evidence of those facts only as to which the notary would be competent to testify.[72]

2. Self-Proving Certificates — a. At Common Law. At common law notaries' certificates, under their official seal, of marine protests and protests of foreign bills of exchange, are "self-proving," that is, they need no other authentication;[73] but

notary's certificate of notice stating that he had served the notice on C, an agent of the drawer, the court said: "The utmost effect that can be claimed for this certificate is, that it proved notice to the party named; but it is not the slightest evidence of the agency of that party."

Tennessee.—McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209 (where it was held that in the absence of statutory authority a notary had no power to take proof of subscribing witnesses); Colms *v.* State Bank, 4 Baxt. 422 (holding that a notary's certificate of protest is *prima facie* evidence of the facts stated therein).

Texas.— Wood *v.* St. Louis Southwestern R. Co., (Civ. App. 1906) 97 S. W. 323, holding that an affidavit of inability to pay costs taken before a notary was not valid under a statute requiring proof to be made before a county judge or before the court.

United States.— Sims *v.* Hundley, 6 How. 1, 12 L. ed. 319; Nicholls *v.* Webb, 8 Wheat. 326, 5 L. ed. 628; Schofield *v.* Palmer, 134 Fed. 753.

72. Gessner *v.* Smith, 2 N. Y. Suppl. 655 (holding that a notary's certificate stating presentment when it appears the presentment was made by another person is void); Adams *v.* Wright, 14 Wis. 408, 414 (where, referring to a statute which made a notary's certificate of protest presumptive evidence, the court said: "It seems obvious from the nature of his duties and the provisions of the statute, that his official oath is substituted for the ordinary judicial oath taken in the presence of the court and jury, and that he cannot lawfully and conscientiously certify or record as matters of fact, things which he would be incompetent to testify to as a witness if called to the stand in the trial of a cause, and which would be excluded as mere hearsay"). *Compare* Stewart *v.* Allison, 6 Serg. & R. (Pa.) 324, 9 Am. Dec. 433, where a notary who certified that he had given notice testified in court that he had so certified upon hearsay only, and it was held that the jury must consider both statements.

Exception.— It has been held that a notary may certify acts of authorized delegates. See *infra*, VI, E.

73. Opinion of Justices, 150 Mass. 586, 588, 23 N. E. 850, 6 L. R. A. 842 (where it was said: "The principal acts which are now recognized in this Commonwealth . . . independently of the provisions of statute, are the presentment and protest of foreign bills of exchange, and the noting and extending of marine protests. In some courts of admiralty, it may be that whenever the law of the place, whether customary or statutory, requires or authorizes an act to be done by or before a notary public, and requires that he officially make and keep a record of it, a copy of the record certified under his hand and seal is admissible as evidence that the act certified to was done. But courts of common law to only a limited extent take judicial cognizance of the seals of notaries public, and admit notarial certificates as evidence"); Commercial Bank *v.* Barksdale, 36 Mo. 563; Grafton Bank *v.* More, 14 N. H. 142; Stainback *v.* Commonwealth Bank, 11 Gratt. (Va.) 260 (holding the protest of a notary in a foreign country to a foreign bill sufficient to bind the indorser).

Marine protest.— A court of admiralty will recognize a notary's seal upon a marine protest. The Gallego, 30 Fed. 271.

Foreign bill of exchange.— The certificate and seal of a foreign notary will be recognized upon the protest of a foreign bill.

Alabama.— Bradley *v.* Northern Bank, 60 Ala. 252; Phillips *v.* Poindexter, 18 Ala. 579; Decatur Branch State Bank *v.* Rhodes, 11 Ala. 283.

Kentucky.— Harmon *v.* Wilson, 1 Duv. 322; Commonwealth Bank *v.* Garey, 6 B. Mon. 626; McClane *v.* Fitch, 4 B. Mon. 599; Lail *v.* Kelly, 3 B. Mon. 10; Tyler *v.* Commonwealth Bank, 7 T. B. Mon. 555.

Louisiana.— Schneider *v.* Cochrane, 9 La. Ann. 235, 61 Am. Dec. 204; Phillips *v.* Flint, 3 La. 146; Las Caygas *v.* Larionda, 4 Mart. 283.

Maine.— Ticonic Bank *v.* Stackpole, 41 Me. 302; Beckwith *v.* St. Croix Mfg. Co., 23 Me. 284; Freeman's Bank *v.* Perkins, 18 Me. 292; Warren *v.* Warren, 16 Me. 259; Clark *v.* Bigelow, 16 Me. 246; Green *v.* Jackson, 15 Me. 136.

Maryland.—Bryden *v.* Taylor, 2 Harr. & J. 396, 3 Am. Dec. 554.

Massachusetts.— Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994.

Mississippi.— Chew *v.* Read, 11 Sm. & M. 182; White *v.* Englehard, 2 Sm. & M. 38.

New Hampshire.— Grafton Bank *v.* Moore, 14 N. H. 142; Carter *v.* Burley, 9 N. H. 558.

New York.— Halliday *v.* McDougall, 20 Wend. 81 [*reversed* on other grounds in 22 Wend. 264].

Pennsylvania.— Starr *v.* Sanford, 45 Pa. St. 193; Coleman *v.* Smith, 26 Pa. St. 255; Lloyd *v.* McGarr, 3 Pa. St. 474; Mullen *v.* Morris, 2 Pa. St. 85; Fitler *v.* Morris, 6 Whart. 406.

Tennessee.— Carter *v.* Union Bank, 7 Humphr. 548, 46 Am. Dec. 89.

Virginia.— Stainback *v.* Commonwealth Bank, 11 Gratt. 260; Nelson *v.* Fotterall, 7 Leigh 179.

United States.— Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254 [*affirming* 13 Fed. Cas. No. 7,026]; Townsley *v.* Sumrall, 2 Pet. 170, 7 L. ed. 386.

in most jurisdictions they are not evidence in other cases unless made so by statute.[74]

b. By Statute. In many jurisdictions certificates of notaries as to certain matters other than marine protests and protests of foreign bills, as well as to such protests, are made evidence by statute without further authentication than the notarial seal;[75] as in the case of a certificate of a domestic[76] or foreign notary as to the administration of an oath;[77] a foreign notary's certificate of the acknowl-

England.— Anonymous, 12 Mod. 345. *Compare* Chesmer *v.* Noyes, 4 Campb. 129.

See COMMERCIAL PAPER, 8 Cyc. 276.

74. Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; White *v.* Englehard, 2 Sm. & M. (Miss.) 38.

Affidavits see AFFIDAVITS, 2 Cyc. 10, 14–16.

Certificates of acknowledgment see, generally, ACKNOWLEDGMENTS.

Protest of promissory notes and inland bills see COMMERCIAL PAPER, 8 Cyc. 274 *et seq.*

75. See the statutes of the United States and of the several states. And see the following cases:

Alabama.—Alabama Nat. Bank *v.* Chattanooga Door, etc., Co., 106 Ala. 663, 18 So. 74; Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712; Bradley *v.* Northern Bank, 60 Ala. 252; State Bank *v.* Whitlow, 6 Ala. 135.

District of Columbia.— Denmead *v.* Maack, 2 MacArthur 475.

Illinois.— Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Goldie *v.* McDonald, 78 Ill. 605; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Rowley *v.* Berrian, 12 Ill. 198; Stout *v.* Slattery, 12 Ill. 162.

Iowa.— Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882.

Louisiana.— Schorr *v.* Woodlief, 23 La. Ann. 473.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863.

Missouri.— Commercial Bank *v.* Barksdale, 36 Mo. 563.

Nebraska.— Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217.

New Jersey.— Feuchtwanger *v.* McCool, 29 N. J. Eq. 151.

New York.— Lawson *v.* Pinckney, 40 N. Y. Super. Ct. 187.

Ohio.— Muskingum County Fund Com'rs *v.* Glass, 17 Ohio 542.

Pennsylvania.— Hastings *v.* Barrington, 4 Whart. 486 (holding that under an act declaring that all protests of notaries public if certified according to law under their hands and seals of office may be read in evidence of the facts therein certified, provided that any party may be permitted to contradict the certificate by other evidence, the questions whether the facts are insufficiently or defectively stated do not affect the admissibility of the certificate but arise after it has been read to the jury); Browne *v.* Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463.

England.—Armstrong *v.* Stockhan, 3 Eq. Rep. 130, 24 L. J. Ch. 176 (holding that by statute (15 & 16 Vict. c. 86), the English court of chancery is required to take judicial notice of a seal of a notary public executed in a British colony); *Re* Goss, 12 Jur. N. S. 595, 14 L. T. Rep. N. S. 727; Hayward *v.* Stephens, 36 L. J. Ch. 135, 15 L. T. Rep. N. S. 173.

Canada.— Merchants Express Co. *v.* Morton, 15 Grant Ch. (U. C.) 274.

76. Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217, holding that by statute the certificate of a domestic notary, before whom an affidavit is taken, is presumptive evidence of the genuineness of the signature.

77. Affidavits generally.— *Alabama.*— Alabama Nat. Bank *v.* Chattanooga Door, etc., Co., 106 Ala. 663, 18 So. 74.

District of Columbia.— Denmead *v.* Maack, 2 MacArthur 475, holding that the courts of the District of Columbia would admit an affidavit verifying a declaration certified by a notary of Maryland, under his seal, without a certificate of his authority to take the affidavit.

Illinois.— Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Smith *v.* Lyons, 80 Ill. 600; Goldie *v.* McDonald, 78 Ill. 605.

Indiana.— Shanklin *v.* Cooper, 8 Blackf. 41.

Iowa.— Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912.

Missouri.— Barhydt *v.* Alexander, 59 Mo. App. 188 (stating broadly that, under the rule of the United States supreme court, courts will take official notice of seals of notaries public, for they are officers recognized throughout the commercial world, a Missouri court may take judicial notice of a seal of an Iowa notary on the jurat of an affidavit taken in Iowa, although the jurat contains no statement of his authority to administer an oath. Where, however, it appeared that the seal conformed to the Iowa statute which was put in evidence, the affidavit was rejected on the ground that there is nothing to show that the notary administered the oath in his own county).

Canada.— Merchants Express Co. *v.* Morton, 15 Grant Ch. (U. C.) 274, holding that by statute an affidavit sworn in the United States before a notary public and having the signature and official seal of the notary as the official administering the oath was receivable without proof *aliunde* in the courts of Upper Canada.

See also AFFIDAVITS, 2 Cyc. 1.

Verification of pleadings.— Feuchtwanger *v.* McCool, 29 N. J. Eq. 151, holding that, where a rule of court requires an oath to an answer sworn without the state to be certified under seal, and a statute provides that an oath to be used in a suit or legal proceeding in New Jersey taken without the state may be taken before a notary, and a re-

edgment of an instrument;[78] or a certificate of the protest, and notice thereof, of an inland bill or "other protestable security,"[79] or of a promissory note,[80] by a domestic[81] or a foreign[82] notary. Some of the statutes relate exclusively to domestic notaries,[83] and do not apply to foreign notaries.[84] Under some statutes a foreign notary must certify under his seal as to his authority.[85]

3. Further Authentication. In the absence of contrary provisions a foreign notary's jurat must be authenticated by another official;[86] but it seems judicial

cital in the jurat that the person before whom it is taken is such notary and his official designation annexed to his signature and attested under his official seal, shall be sufficient proof that he is such notary, a certificate in which the official designation is not added to any signature, although the jurat state that he is a notary, is good on the ground that the rule requires only a certificate under seal.

78. Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712. *Compare* Muskingum County Fund Com'rs *v.* Glass, 17 Ohio 542, holding that a statute requiring each notary to authenticate his official acts with his personal seal, and providing that "due faith and credit shall be given to his protestations, attestations," or other instruments of publication, does not include acknowledgments, which are otherwise provided for. And see, generally, Acknowledgments, 1 Cyc. 506.

79. Under a statute which provides that the protest of a notary public which shall set forth an admission notice for non-payment of any inland bill of exchange or "other protestable security," the protest of a promissory note by a foreign notary is not evidence without proof that it is a protestable security under the law of the state where the note was made; the presumption in the absence of such proof being that the common law prevails in the foreign state. Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

80. Shanklin *v.* Cooper, 8 Blackf. (Ind.) 41; Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863; Lawson *v.* Pinckney, 40 N. Y. Super. Ct. 187. See Commercial Paper, 8 Cyc. 274 *et seq.*

81. State Bank *v.* Whitlow, 6 Ala. 135 (holding that a protest "apparently subscribed and sealed" by the notary commissioned and resident in this state was evidence under a statute declaring that the protest of a notary of an inland bill of exchange or other protestable security setting forth demand, refusal, non-acceptance, or non-payment and that notice thereof was given either personally or otherwise to the parties entitled thereto shall be evidence of such facts); Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863. See Commercial Paper, 8 Cyc. 274 *et seq.*

82. Bradley *v.* Northern Bank, 60 Ala. 252 (holding that a statute declaring protest of notary's evidence of presentment, non-payment, and notice of dishonor applies to foreign as well as domestic notaries, and admitting in evidence a certificate of protest by a foreign notary; there being proof, however, of circumstances showing that such certificate would have been evidence in the state where it was executed); Shanklin *v.* Cooper, 8 Blackf. (Ind.) 41; Schorr *v.* Woodlief, 23 La. Ann. 473 (where it appears that a foreign notary's certificate of protest proves itself, but a notary's certificate of notice does not, since the Louisiana statute making a notary's certificate notice of evidence applies only to those of domestic notaries); Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863 (holding that since a notary's certificate of protest of a bill or promissory note of Minnesota or any other state is made *prima facie* evidence by the statute of the facts therein certified, such certificates are properly received as evidence of the fact of the notice stated therein); Lawson *v.* Pinckney, 40 N. Y. Super. Ct. 187. See Commercial Paper, 8 Cyc. 274 *et seq.*

83. Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484, 486, 9 Am. Dec. 463, where it was held that a domestic notary's certificate under his official seal was sufficient to prove his own official character, and the court said: "Public convenience requires that a certificate, under a seal of this kind, should be *prima facie* evidence, without proving that the person who used it . . . was a notary commissioned by the governor. It ought to be presumed, till the contrary is proved, that no man would dare to assume the office without proper authority."

84. Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 295, holding that a statute which declared that the official acts, protests, and attestation of notaries in Pennsylvania certified under their hands and seals had been made evidence by statute in that state is confined to those of domestic notaries.

85. Trevor *v.* Colgate, 181 Ill. 129, 131, 54 N. E. 909, where it was urged by counsel that under the provision that "when any oath authorized or required by law to be made is made out of the State, it may be administered by any officer authorized by the laws of the State in which it is so administered, and if such officer have a seal, his certificate under his official seal shall be received as *prima facie* evidence, without further proof of his authority to administer oaths," the jurat and official seal of a foreign notary established *prima facie* his authority to administer oaths, but it was held that the meaning of the section was that if the notary should certify under his seal that he had such authority in his own state, such certificate should be *prima facie* evidence of such fact. See also Smith *v.* Lyons, 80 Ill. 600.

86. Phillips *v.* Flint, 3 La. 146 (holding that a foreign notary's certificate, other than the protest of a bill, requires authentication

discretion has been exercised in some cases,[87] as where the value affected is very small.[88] An affidavit before a foreign notary, although his certificate lack proper authentication, may be admitted by consent.[89] Some of the states have expressly provided by statute for the authentication of a foreign notary's certificate.[90]

by proof of his official capacity and rejecting an act of partition made before a notary in Alabama, on the ground that neither the certificate of a notary, nor that of the governor of Alabama to his official capacity, had a seal); Berkery *v.* Wayne Cir. Judge, 82 Mich. 160, 46 N. W. 436 (holding that an affidavit taken by a foreign notary for use in Michigan should have been certified as to the authority of the notary to administer oaths according to the Michigan statute, the power to take an oath being statutory, and not pertaining to the office by custom); Bohn *v.* Zeigler, 44 W. Va. 402, 403, 29 S. E. 983 (where the court said: "The seal of a notary out of the State does not, alone, verify and authenticate his act, as regards bills of exchange, under § 7, c. 51, Code, and deeds, under § 3, c. 73. His signature, alone is enough as to depositions under c. 130, § 33, Code. . . . And, as to affidavits, our statute requires certain further authentication," and rejected an affidavit for attachment made in another state, for lack of a certificate by a proper officer to the notary's authority to take oaths and the genuineness of the signature).

In England see *In re* Davis, L. R. 8 Eq. 98, 21 L. T. Rep. N. S. 137; Haggitt *v.* Iniff, 5 De G. M. & G. 910, 3 Eq. Rep. 144, 1 Jur. N. S. 49, 24 L. J. Ch. 120, 3 Wkly. Rep. 141, 54 Eng. Ch. 714, 43 Eng. Reprint 1124 (holding that an affidavit taken for a notary, whose official character was duly authenticated by certificate of the British consul of New York under the official seal of the latter, might be filed with the clerk of records of writs); Chicot *v.* Lequesne, Dick. 150, 21 Eng. Reprint 226 (where, in a decree for an accounting, it was ordered that an affidavit by a person in Amsterdam, there made, should be made before a notary with the assistance of a magistrate, if necessary under the laws of Holland); *In re* Earle Trust, 4 Kay & J. 300, 70 Eng. Reprint 126 (holding that the official seal of a notary public of a country not under the dominion of the British sovereign was one of which the court could not take judicial notice; that an affidavit could not be admitted in evidence in virtue of such seal unverified); Kinnaird *v.* Saltoun, 1 Madd. 227, 56 Eng. Reprint 84. *Compare* Cole *v.* Sherard, 11 Exch. 482; Hutcheson *v.* Mannington, 6 Ves. Jr. 823, 2 Rev. Rep. 115, 31 Eng. Reprint 1327. A foreign notary's certificate and seal attesting a power of attorney needs no authentication because the affidavit is unnecessary. *Ex p.* Myers, 2 Deac. & C. 406; Hayward *v.* Stephens, 36 L. J. Ch. 135, 15 L. T. Rep. N. S. 173.

In Canada see Laurendean *v.* De Montlord, 7 Quebec Pr. 37, holding that an affidavit taken before a notary public in a foreign country, and not in England, could not be used in a court in the province of Quebec, as the provision in relation to affidavits taken before notaries referred only to notaries in England.

Need of showing official character of officer authenticating affidavit see AFFIDAVITS, 2 Cyc. 14.

87. In Smith *v.* Davis, 19 L. T. Rep. N. S. 376, 17 Wkly. Rep. 69, on a petition for payment of a sum of money to which the petitioners were entitled on the death of a lifetenant, where the facts on which the petition was supported were shown by affidavit made before a notary in America, where the petitioner resided, without evidence of his professional capacity, the vice-chancellor, having regard to the nature of the case, was of opinion that the affidavit ought to be filed nevertheless.

88. Mayne *v.* Butler, 11 L. T. Rep. N. S. 410, 13 Wkly. Rep. 128, where, in a matter involving only £35, an affidavit before an American notary was received as evidence of title to a share in the funds, although his signature was not verified. *Compare In re* Davis, L. R. 8 Eq. 98, 21 L. T. Rep. N. S. 137, holding that a notary's signature should be verified unless, where the amount involved is very small, the court can dispense with such verification, and holding that an amount between £4,000 and £5,000 in the suit was too large to permit an affidavit certified before an American notary without authentication of his seal and signature to be received as evidence.

89. Lyle *v.* Ellwood, L. R. 15 Eq. 67, 42 L J. Ch. 80, 27 L. T. Rep. N. S. 671, 21 Wkly. Rep. 69; *In re* Davis, L. R. 8 Eq. 98, 21 L. T. Rep. N. S. 137; *In re* Earl, 4 Kay & J. 300, 70 Eng. Reprint 126.

90. See the statutes of the several states. And see *supra*, VI, B, 2, b, text and note 75.

Under particular statutes see Ferris *v.* Commercial Nat. Bank, 153 Ill. 237, 41 N. E. 1118 (rejecting affidavits taken in Canada, for lack of certificates of the notary's authority to administer oaths in Canada); Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210 (holding that a notary's protest to a promissory note is not evidence in another state without further proof of his official capacity and authority); Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Williams *v.* Waddell, 5 N. Y. Civ. Proc. 191, each holding that under a code provision the jurat of a notary in another state to an affidavit for use in a New York court must be authenticated by a certificate of an official character and genuineness of signature, and that the notary's authority to take acknowledgments and proof of deeds must also appear.

Sufficiency of clerk's certificate.— Under a statute requiring a foreign notary's identity to be authenticated by a certificate verifying

The omission of a proper authentication of a notary's certificate may be cured by amendment.[91]

C. Particular Powers and Duties — 1. Marine Protests. A notary may note and extend marine protests.[92] The power exists at common law.[93] The notary's practice in taking a marine protest is to enter in his book the fact of the protest and the reasons given for making it.[94]

2. As to Commercial Paper.[95] Independently of statute a notary public may present foreign bills of exchange and protest them.[96] A protest of commercial paper other than a foreign bill of exchange is not a notarial act at common law,[97] but it may be and often is made so by statute.[98] Giving notice of dishonor is not

the genuineness of his signature, the certificate of a clerk of court stating "it is believed to be genuine" is a sufficient verification. Heffernan *v.* Harvey, 41 W. Va. 766, 24 S. E. 592.

In Louisiana a domestic notary's certificate of protest as well as the protest itself must be signed by two witnesses. Gas Light, etc., Co. *v.* Nuttall, 19 La. 447. Such certificate must be sworn to before the two witnesses. State Bank *v.* Watson, 15 La. 38. The statute which makes a notary's certificate sworn by himself and two witnesses evidence of notice does not exclude other modes of proof. McDonough *v.* Thompson, 11 La. 566. Where a notary's protest showed on its face that it was protested before two witnesses, but that they did not sign that part of the instrument which merely certifies denial and refusal to pay, but did sign the certificate in the original, and the notary certified a copy from the record, it was held sufficient evidence of the facts stated. State Bank *v.* Black, 10 Rob. (La.) 59.

91. Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983, holding that lack of further authentication might be cured by appending to the notary's certificate the certificate of a clerk of court or other authorized official as to the notary's official capacity and the genuineness of his signature. See *infra*, VII, A, 1.

92. Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842; The Gallego, 30 Fed. 271.

93. Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842.

94. The Gallego, 30 Fed. 271.

95. See, generally, Commercial Paper.

96. Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628. See Commercial Paper, 7 Cyc. 1004, 1054, 1080; 8 Cyc. 276.

Duty with regard to commercial paper see *infra*, IX, B.

97. *California.*— Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547.

Iowa.— Bernard *v.* Barry, 1 Greene 388, holding that a foreign notary's certificate is not admissible to prove the protest of a foreign promissory note, for, while the same reason applies to such note as to a foreign bill of exchange, "an arbitrary difference is made."

Louisiana.— Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210, rejecting a foreign notary's protest where it did not appear that, by the laws of the state where it was executed, a notary's protest to a note was evidence.

Maryland.— Whittington *v.* Farmers' Bank, 6 Harr. & J. 548, holding that, prior to the passage of the act of 1837, a notary's protest of a promissory note was not in itself evidence in chief of demand and should not go to the jury as such.

Mississippi.— Smith *v.* Gibbs, 2 Sm. & M. 479; White *v.* Englehard, 2 Sm. & M. 38, holding that the notarial protest of a promissory note, by a foreign notary, was not evidence in Mississippi.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558, holding that the certificate by a notary of another state of the protest of a note or inland bill if the note could be so regarded was not evidence.

Pennsylvania.— See Bennett *v.* Young, 18 Pa. St. 261, where it was said that the act of Jan. 2, 1815, declaring the official acts, protest, and attestations of domestic notaries *prima facie* was not intended to enlarge their official duties, but merely to furnish the means of authenticating such acts as were within their authority before.

Tennessee.— See Wheeler *v.* State, 9 Heisk. 393.

Virginia.— Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673, holding that a notary's certificate is not evidence of a protest of a note or inland bill.

United States.— Burke *v.* McKay, 2 How. 66, 11 L. ed. 181; Nicholls *v.* Webb, 8 Wheat. 326, 5 L. ed. 628.

England.— Leftley *v.* Mills, 4 T. R. 170, holding that there could be no protest of an inland bill except by St. 9 & 10 Wm. III, c. 17, which applied only where a remedy was sought against the drawer, and that there could be no protest as against the accepter.

See Commercial Paper, 8 Cyc. 274.

98. *Alabama.*— Rives *v.* Parmley, 18 Ala. 256.

California.— Tevis *v.* Randall, 6 Cal. 632, 75 Am. Dec. 547 (where the court said of promissory notes that they were made protestable by statute, therefore "the protest of them must be attended with all the incidents belonging to foreign bills of exchange"); Connolly *v.* Goodwin, 5 Cal. 220.

Georgia.— Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252, holding that two sets of certificates of protest, the one supplementary to the other, showing notice, may be received in evidence. *Compare* Allen *v.* Georgia Nat. Bank, 60 Ga. 347, where certificate of

a notarial function at common law.[99] By the law merchant the notary to whom a bill is given for presentment may, as agent of the holder, give notice, but it is no part of his duty.[1] It may, however, be made an official act by statute;[2] and

service of notice of protest of a note was admitted in connection with the notary's testimony that he was satisfied of the truth of his certificate, although he could not recall the facts.

Indiana.— Turner *v.* Rogers, 8 Ind. 139.

Kentucky.— Harmon *v.* Wilson, 1 Duv. 322.

Maine.— Fales *v.* Wadsworth, 23 Me. 553.

Maryland.— Moses *v.* Franklin Bank, 34 Md. 574; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640, holding that the act of 1837 in that state extended the credit given by the courtesy of commercial relations to a notary public to include his protest of inland bills and notes.

Minnesota.— Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

Mississippi.— White *v.* Englehard, 2 Sm. & M. 38, holding that a statute making notaries' certificates of protest evidence applies only to domestic notaries, and rejecting a certificate of protest of a promissory note by a Louisiana notary, although the court said that such certificate of protest of a foreign bill would be evidence.

New Hampshire.— Rushworth *v.* Moore, 36 N. H. 188.

New York.— Gawtry *v.* Doane, 51 N. Y. 84 [*affirming* 48 Barb. 148] (holding that by statute the certificate of a notary, under his hand and seal, of presentment and protest of a note, is made presumptive evidence of the facts it contains unless an affidavit denying notice is filed ten days by the party charged); Kellam *v.* McKoon, 31 Hun 519 (holding that under a provision of the code of civil procedure permitting notaries to make certificates of protest for the purpose of evidence, a second protest to take the place of the one which is lost is admissible in evidence); Kirtland *v.* Wanzer, 2 Duer 278 (holding that the provisions of the New York statute relating to protests applied only to those made within the state by New York notaries, therefore the protests and certificates of a notary of New Orleans as to promissory notes were not evidence in New York); Pierson *v.* Boyd, 2 Duer 33; Gessner *v.* Smith, 2 N. Y. Suppl. 655; Dutchess County Bank *v.* Ibbotson, 5 Den. 110. The affidavit denying notice, necessary under the code to exclude a notary's certificate, is not supplied by a statement in a sworn answer. Gawtry *v.* Doane, 51 N. Y. 84 [*affirming* 48 Barb. 148].

Ohio.— Daniel *v.* Downing, 26 Ohio St. 578.

Pennsylvania.— Hastings *v.* Barrington, 4 Whart. 486.

South Carolina.— Aiken *v.* Cathcart, 2 Speers 642.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874 (holding that the code provision that the attestation, protestations, and other instruments of publication made or done by any notary public under his seal shall be received as evidence applied to notaries of foreign states and countries as well as domestic notaries); Winchester *v.* Winchester, 4 Humphr. 51.

Virginia.— Slaughter *v.* Farland, 31 Gratt. 134; Walker *v.* Turner, 2 Gratt. 534.

United States.— Sims *v.* Hundley, 6 How. 1, 12 L. ed. 319; Brandon *v.* Loftus, 4 How. 127, 11 L. ed. 905.

See COMMERCIAL PAPER, 7 Cyc. 1054; 8 Cyc. 274.

Compare Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346, where a notary's certificate of protest, with his oral testimony, was received in evidence.

In Louisiana the statute requiring two witnesses to attest the notary's record does not apply to protest, but only to notice, and in order to be evidence of protest the certificate needs no witnesses. Lallande *v.* Hope, 18 La. Ann. 188; Crawford *v.* Read, 9 Rob. 243; Wagner *v.* Hall, 16 La. 563. But *compare* Gas Light, etc., Co. *v.* Nuttall, 19 La. 447 (where it is said that under the act of 1821, two witnesses are required not only to the protest, but also to the record of the certificate); State Bank *v.* Watson, 15 La. 38 (holding that an original protest by a notary signed by two witnesses is properly admitted in evidence). A notary need not make demand, protest, and service of notice in the presence of witnesses; they are only to attest the fact that the entry was made by the notary in his book. Gale *v.* Kemper, 10 La. 205.

99. *Alabama.*— Rives *v.* Parmley, 18 Ala. 256.

Kansas.— Swayze *v.* Britton, 17 Kan. 625.

Mississippi.— Bowling *v.* Arthur, 34 Miss. 41.

New York.— Morgan *v.* Van Ingen, 2 Johns. 204.

Pennsylvania.— Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205.

Virginia.— Walker *v.* Turner, 2 Gratt. 534.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Burke *v.* McKay, 2 How. 66, 11 L. ed. 181; Schofield *v.* Palmer, 134 Fed. 753.

Canada.— Ewing *v.* Cameron, 6 U. C. Q. B. O. S. 541.

See COMMERCIAL PAPER, 7 Cyc. 1080; 8 Cyc. 274.

Foreign bill of exchange.— A notary's certificate does not prove notice of dishonor in a foreign bill of exchange. Whitman *v.* Farmers' Bank, 8 Port. (Ala.) 258; Schorr *v.* Woodlief, 23 La. Ann. 473, holding that while a foreign notary's certificate of protest to a foreign bill proves itself, the certificate of notice does not, since the Louisiana statute making a notary's certificate of protest evidence applies only to domestic notices.

1. Swayze *v.* Britton, 17 Kan. 625; and other cases above cited.

2. Mulholland *v.* Samuels, 8 Bush (Ky.)

in a number of jurisdictions there are statutes by which a notary's certificate of notice is made evidence.[3]

3. AFFIDAVITS. The power to take affidavits has been conferred on notaries generally by statute;[4] but in the absence of a statute a notary has no such power.[5] The courts of any one state cannot take judicial notice of the statute of another state conferring this power;[6] and, in the absence of proof, lack of authority in a sister state will be presumed.[7] In several cases affidavits in criminal cases,

63; Fitler *v.* Morris, 6 Whart. (Pa.) 406, 415; Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484 9 Am. Dec. 463.

3. *Alabama.*— Rives *v.* Parmley, 18 Ala. 256; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42; Roberts *v.* State Bank, 9 Port. 312.

Connecticut.— Union Bank *v.* Middlebrook, 33 Conn. 95.

Georgia.— Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252. *Compare* Allen *v.* Georgia Nat. Bank, 60 Ga. 347.

Kentucky.—Mulholland *v.* Samuels, 8 Bush 63.

Louisiana.— Schorr *v.* Woodlief, 23 La. Ann. 473; Union Bank *v.* Penn., 7 Rob. 79; Marsoudet *v.* Jacobs, 6 Rob. 276.

Maine.— Fales *v.* Wadsworth, 23 Me. 553; Beckwith *v.* St. Croix Mfg. Co., 23 Me. 284.

Maryland.— Moses *v.* Franklin Bank, 34 Md. 574.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863; Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

New Hampshire.— Rushworth *v.* Moore, 36 N. H. 188.

New York.— Gawtry *v.* Doane, 48 Barb. 148 [*affirmed* in 51 N. Y. 84]; Union Bank *v.* Gregory, 46 Barb. 98; Pierson *v.* Boyd, 2 Duer 33; Gessner *v.* Smith, 2 N. Y. Suppl. 655; Dutchess County Bank *v.* Ibbotson, 5 Den. 110; Cayuga County Bank *v.* Hunt, 2 Hill 635.

Pennsylvania.— Starr *v.* Sanford, 45 Pa. St. 193; Browne *v.* Philadelphia Bank, 6 Serg. & R. 484, 9 Am. Dec. 463. *Compare* Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205.

South Carolina.— Aiken *v.* Cathcart, 2 Speers 642.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Caruthers *v.* Harbert, 5 Coldw. 362, 98 Am. Dec. 421; Golladay *v.* Union Bank, 2 Head 57; Winchester *v.* Winchester, 4 Humphr. 51.

Virginia.— Walker *v.* Turner, 2 Gratt. 534.

United States.— Sims *v.* Hundley, 6 How. 1, 12 L. ed. 319; Brandon *v.* Loftus, 4 How. 127, 11 L. ed. 905.

See, generally, COMMERCIAL PAPER.

Statute applies to foreign and domestic notaries and paper.— A statute making a protest of any bill of exchange, note, or order, duly certified by any notary public, competent evidence of the facts stated therein, including notice, applies to foreign and domestic bills and foreign and domestic notaries. Rushworth *v.* Moore, 36 N. H. 188. See also Starr *v.* Sanford, 45 Pa. St. 193.

Statute does not apply to previous transactions.— The provision of Rev. St. (1842) making the protest of a note evidence of notice of dishonor cannot apply to transactions which took place before the enactment. Williams *v.* Putnam, 14 N. H. 540, 40 Am. Dec. 204.

4. Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Young *v.* Young, 18 Minn. 90 (holding that, under a statute empowering each notary to administer all oaths required or authorized by law to be administered in the state, a notary may take an affidavit of service, although he be one of plaintiff's attorneys); Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549. See AFFIDAVITS, 2 Cyc. 10.

5. Chandler *v.* Hanna, 73 Ala. 390; Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Reynolds *v.* Williamson, 25 U. C. C. P. 49, where a notary public in Quebec was held to have no power to take an affidavit upon renewal of a chattel mortgage for use in the province of Ontario. And see AFFIDAVITS, 2 Cyc. 10.

In Lower Canada no authority has been given to Canadian notaries of Quebec or any other province to take affidavits for use in the courts of Quebec. As to the authority of foreign notaries to take affidavits for use in the courts of Lower Canada, there are two directly conflicting decisions, namely, Laurendeau *v.* De Montford, 7 Quebec Pr. 37, where the court rejected the affidavit of a New York notary on the ground that the provision applied only to notaries in England, and Schwob *v.* Baker, 5 Quebec Pr. 441, where the court received an affidavit from a New York notary on the theory that the same provision applies to notaries in foreign countries generally.

6. Keefer *v.* Mason, 36 Ill. 406; Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419. See EVIDENCE, 16 Cyc. 893.

7. Chandler *v.* Hanna, 73 Ala. 390. See AFFIDAVITS, 2 Cyc. 15. But see Stroheim *v.* Pack, etc., Mfg. Co., 10 Pa. Dist. 668.

A certificate that the officer taking an affidavit outside or beyond the limits of the state was a notary public duly commissioned and sworn is insufficient, as it does not indicate what official acts he was authorized to perform, and it will not be assumed that such officer had the same powers as an officer of that name has within the state. Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277.

Certificate of authority of notary in foreign state to take affidavit for use in the courts of New York held insufficient. See Stanton

affidavits for an attachment, and other special kinds of affidavits have been held properly or improperly taken before notaries.[8]

4. DEPOSITIONS.[9] At common law notaries have no power to take depositions.[10] The power and the extent and manner of its exercise depend upon the statute.[11]

v. U. S. Pipe Line Co., 90 Hun (N. Y.) 35, 35 N. Y. Suppl. 629, 25 N. Y. Civ. Proc. 180.

8. *Georgia.*— Mitchell *v.* State, 126 Ga. 84, 54 S. E. 931; Shuler *v.* State, 125 Ga. 778, 54 S. E. 689, both holding that under a statute by which notaries are authorized to "administer oaths in all matters incident to them as commercial officers, and all other oaths which are not by law required to be administered by a particular officer," a criminal accusation may be framed on an affidavit attested by a commercial notary.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124, where an affidavit made before a notary in another state, with his statement in his certificate that he was authorized to administer oaths, was held good.

Kentucky.— Harbour-Pitt Shoe Co. *v.* Dixon, 60 S. W. 186, 22 Ky. L. Rep. 1169, where it was held that an affidavit for attachment might be made before a notary.

Maine.— Duncan *v.* Grant, 86 Me. 212, 29 Atl. 987, holding that a creditor desiring to arrest his creditor upon mesne process in an action of assumpsit, as provided by Rev. St. c. 113, may make the oath and have it certified as therein required before a notary public instead of before a justice of the peace, although section 2 of said chapter requires the oath to be taken before and be certified by a justice of the peace, since, by Rev. St. c. 32, § 3, a notary public is authorized to administer oaths in all cases where a justice of the peace can act.

Minnesota.— State *v.* Scatena, 84 Minn. 281, 87 N. W. 764, where it was held that under a statute providing that notaries public should have power to administer all oaths required or authorized by law a notary might take an oath required by local ordinance of an applicant for a liquor license.

Nebraska.— Browne *v.* Palmer, 66 Nebr. 287, 290, 92 N. W. 315, where the court said: "An affidavit taken before a notary public either in or out of the state of Nebraska may be used in support of a motion or other procedure in court where necessary."

Ohio.— Williams, etc., Co. *v.* Raitze, 8 Ohio S. & C. Pl. Dec. 695, 7 Ohio N. P. 614, holding that the affidavit for arrest of a debtor before judgment, under Ohio Rev. St. § 5481 *et seq.*, on the ground that the debtor contracted the debt with the intent to defraud, or is about to leave the state, sworn to before a notary public, is insufficient, since the statute requires that it must be sworn to before a judge or clerk of court or justice of the peace.

Tennessee.— Fawcett *v.* Chicago, etc., R. Co., 113 Tenn. 246, 81 S. W. 839, holding that a pauper oath, administered by a foreign notary for the purpose of an action in Tennessee *in forma pauperis*, is void for lack of statutory authority.

Texas.— Wood *v.* St. Louis Southwestern R. Co., (Civ. App. 1906) 97 S. W. 323, holding that an affidavit of inability to pay costs, taken before a notary, was not valid where proof was required by statute to be made before a county judge or before the court.

United States.— U. S. *v.* Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. ed. 534 (holding that, prior to the act of congress of 1881, a notary appointed by a state could not take an affidavit to verify the report of an officer of a national bank); U. S. *v.* Hardison, 135 Fed. 419 (holding that a notary may take the affidavit of a proposed surety on a warehouse bond of a distiller as to the sufficiency of the latter); U. S. *v.* Manion, 44 Fed. 800 (holding that a notary cannot take the affidavits required by the rules prescribed by the commissioner of the land-office).

In Alabama notaries public are given the powers of justices of the peace and are judicial officers, within the real meaning of the statute (Sess. Acts (1894–1895), p. 1088, § 3) authorizing prosecutions in the county court of Shelby county to be instituted or commenced "by affidavit made before any judicial officers of said county." Harper *v.* State, 109 Ala. 66, 19 So. 901. See *infra*, VI, C, 7.

9. See, generally, DEPOSITIONS, 13 Cyc. 846.

10. Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; and cases in the note following.

11. *California.*— McCann *v.* Beach, 2 Cal. 32; McCann *v.* Beach, 2 Cal. 25, both holding that a notary may take a deposition only where the witness resides in a county other than that where the deposition is intended to be used, and on commission, directed to the notary.

Indiana.— Burtt *v.* Pyle, 89 Ind. 398; Dumont *v.* McCracken, 6 Blackf. 355 (where a deposition taken before a notary of another state for use in an Indiana court was rejected on the ground that the Indiana statute gave no authority for a dedimus to a notary); Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290.

Missouri.— *Ex p.* Mallinkrodt, 20 Mo. 493.

Montana.— McCormick *v.* Largey, 1 Mont. 158, holding that a notary of another state had no power to take a deposition to be used in Montana.

Nebraska.— *In re* Butler, (1906) 107 N. W. 572.

South Carolina.— Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779 (holding that, where it appeared that certain statutory requirements had been complied with, and it did not appear that any others had not, a deposition taken by a notary in another state should be re-

The courts of one state cannot presume, in the absence of proof, that a notary of another has power to take depositions;[12] but under a statute providing that depositions within and without the state may be taken by notaries, a deposition taken by a foreign notary may be received without proof of his authority under the laws of his own state to take depositions.[13] The power to take depositions does not of itself include the power to punish for contempt, but by the weight of authority the legislature may authorize a notary taking a deposition to punish a recusant witness.[14] In some states, however, it has been held that the legislature

ceived); Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837 (holding that a deposition taken by a notary public under the act of 1883 was on the same footing as one taken by a regular commission).

Tennessee.— Carter *v.* Ewing, 1 Tenn. Ch. 212, holding that only domestic notaries may take depositions for use in Tennessee.

Texas.— Biencourt *v.* Parker, 27 Tex. 558; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588, holding that a deposition out of the state in a criminal case cannot be taken by a notary.

Vermont.— Patterson *v.* Patterson, 1 D. Chipm. 200.

Washington.— Phelps *v.* The City of Panama, 1 Wash. Terr. 615, holding that under the United States statutes a notary may properly take depositions for use in an admiralty court, but that the statutes must be strictly followed.

United States.— Dinsmore *v.* Maroney, 7 Fed. Cas. No. 3,920, 4 Blatchf. 416, 4 Wkly. L. Gaz. 283, holding that notaries by the act of July 29, 1854, were authorized to take depositions under the act of Sept. 24, 1789.

See 16 Cent. Dig. tit. "Depositions," § 77.

Appointment by stipulation of parties see DEPOSITIONS, 13 Cyc. 849 note 66.

Failure to state official title has been held to invalidate a deposition taken by a notary public. Argentine Falls Silver Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190. *Compare* DEPOSITIONS, 13 Cyc. 848 note 60.

Disqualification see DEPOSITIONS, 13 Cyc. 852 note 79. And see *supra*, II, B, 5.

Taking deposition of adverse party.— Under Hill Annot. Laws Oreg. § 814, subd. 1, and § 823, authorizing the taking of the deposition of an adverse party before an officer authorized to administer oath on the giving of a three days' notice, unless the court prescribes a shorter time, it is not necessary that the officer taking the deposition shall be commissioned by the court, and such deposition may be taken by a notary public, since a notary public is a person who is authorized to administer oaths under Hill Annot. Laws Oreg. § 2325. Wheeler *v.* Burckhardt, 34 Oreg. 504, 56 Pac. 644.

12. Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Patterson *v.* Patterson, 1 D. Chipm. (Vt.) 200, rejecting a deposition taken by a notary in New York because it did not appear that notaries were among the officers authorized by the laws of New York to take depositions to be used in other states.

13. Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290.

14. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84, notary public having jurisdiction of justice of the peace.

Indiana.— Burtt *v.* Pyle, 89 Ind. 398, holding that in the absence of statutory authority a notary taking a deposition may not punish for contempt.

Kansas.— *In re* Huron, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822, holding that a notary could not punish for contempt a witness who attended the taking of a deposition, in obedience to a subpœna, but refused to testify. The contrary had been held in this state (*In re* Abeles, 12 Kan. 451 [*followed* by *In re* Merkle, 40 Kan. 27, 19 Pac. 401; *In re* Beardsley, 37 Kan. 666, 16 Pac. 153]), but *In re* Huron, *supra*, expressly overrules *In re* Abeles, *supra*, on this point. In two other Kansas cases (Davis' Petition, 38 Kan. 408, 16 Pac. 790; *In re* Cubberly, 39 Kan. 291, 18 Pac. 173) recusant witnesses who had been imprisoned for contempt by notaries taking depositions were released on the ground that their testimony had been improperly required for the purpose merely of ascertaining what they would testify at subsequent trials. In the case of Davis' Petition, *supra*, the authority of the notary, apart from its abuse, was disputed by counsel, but not passed on by the court. In *In re* Cubberly, *supra*, the authority seems not to have been questioned.

Missouri.—*Ex p.* McKee, 18 Mo. 599, where it was held under a statute providing that a witness summoned and attending and refusing to testify may be committed to prison by the court or other person authorized to take his deposition or testimony, the notary being authorized to take a deposition might in such case so commit a witness. The question of constitutionality was not raised. See also *Ex p.* Munford, 57 Mo. 603. In *Ex p.* Krieger, 7 Mo. App. 367, 370, the court said: "A notary, as a notary, has no power to commit for contempt; and contempt of court is a recognized offence, but there is no such thing known to the law as contempt of a notary-public." But *compare Ex p.* Livingston, 12 Mo. App. 80, 83, where a notary was sustained in committing as for contempt a witness who refused to answer proper questions, the court saying: "If the question be foreign to the subject-matter of the suit pending, and be evidently asked for a purpose not contemplated by the litigation, the officer will not be sustained in any attempt to enforce an answer by proceedings as for a contempt. This is the doctrine of *Ex p.* Krieger, *supra*. . . . But if these objections do not

has no power to confer on a notary authority to punish for contempt.[15] The presumption of jurisdiction that attaches to the act of a court in committing for contempt does not attach to a notary.[16] If the question for refusing to answer which a witness has been committed by a notary be improper or irrelevant, the witness will be released on habeas corpus.[17] A statute authorizing a notary taking a deposition to commit for contempt "any person summoned as a witness and attending, who shall refuse to give evidence" does not empower him to commit for refusing to produce books and papers under a subpœna *duces tecum*.[18] A notary taking a deposition is an officer of the court assuming to take testimony for the court.[19] It has been held in some jurisdictions that a notary in taking depositions acts judicially,[20] while in others the contrary has been held.[21]

appear, some latitude must be allowed to the notarial discretion."

Nebraska.—*In re* Butler, (1906) 107 N. W. 572 (holding that under the code of civil procedure a notary may fine, not more than fifty dollars, a witness failing to attend when duly served with subpœna, but that he may not commit to hail for that contempt. The question of constitutionality was not raised); Courtnay *v.* Knox, 31 Nebr. 652, 48 N. W. 763 (holding that a notary has no power to punish for contempt consisting of misconduct at the taking of a deposition, such as vulgar and profane language, his power being limited to statutory authority); Dogge *v.* State, 21 Nebr. 272, 31 N. W. 929 (where it was held that the constitutional provision vesting the judicial power in courts did not exclude notaries, and imprisonment by a notary for refusal to testify was upheld).

New York.— People *v.* Leubischer, 34 N. Y. App. Div. 577, 54 N. Y. Suppl. 869, 28 N. Y. Civ. Proc. 265 [*affirming* 23 Misc. 495, 51 N. Y. Suppl. 735, appeal *dismissed* in 157 N. Y. 721, 53 N. E. 1130, motion for reargument *denied* in 158 N. Y. 676, 53 N. E. 1130], holding that the power to take a deposition does not authorize the notary appointed to take evidence in his own state by a commission from another state, to punish for contempt a witness who refuses testimony.

Ohio.— *Ex p.* Jennings, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720; De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315.

Necessity for dedimus from other state.— A commitment of a witness for refusal to testify issued by a notary public taking depositions in a cause pending in another state, without a dedimus from such state, is void. *In re* Nitsche, 14 Mo. App. 213.

Necessity for order to answer.— A mere refusal to answer a question put by an attorney in an examination before a notary is not contempt. The order to answer must be given by the notary. Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

15. Burns *v.* San Francisco Super. Ct., 140 Cal. 1, 73 Pac. 597 (holding that the legislature cannot invest a notary with power to punish for contempt, because that is a judicial function, and the constitution has vested judicial power of the state in certain specified courts, and stating, as a further reason of expediency, that the notary cannot, in the nature of the proceeding, act advisedly in such matters as he has not the means of determining the propriety of the question); *In re* Huron, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822 (where the court intimated that the statute of Kansas, providing for the punishment of witnesses for refusal to attend or testify, would be unconstitutional if it were held to confer that power on notaries).

16. *Ex p.* Krieger, 7 Mo. App. 367.

17. *In re* Cubberly, 39 Kan. 291, 18 Pac. 173; Davis' Petition, 38 Kan. 408, 16 Pac. 790; *Ex p.* Krieger, 7 Mo. App. 367; *Ex p.* Jennings, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720. See CONTEMPT, 9 Cyc. 29.

18. *Ex p.* Mallinkrodt, 20 Mo. 493.

19. *Ex p.* Krieger, 7 Mo. App. 367.

20. Gharst *v.* St. Louis Transit Co., 115 Mo. 403, 91 S. W. 453; *Ex p.* McKee, 18 Mo. 599; Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272; Stirneman *v.* Smith, 100 Fed. 600, 603, 40 C. C. A. 581, where the court said: "A notary public, when engaged in taking depositions to be used as evidence before some judicial tribunal, is a judicial officer, his duty being to assist the court under whose commission he acts in administering justice." *Compare* Dogge *v.* State, 21 Nebr. 272, 31 N. W. 929, where a court was in doubt whether a notary taking a deposition might not be regarded as a "court."

21. *In re* Huron, 58 Kan. 152, 155, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822, where the court in holding that a notary's function was not judicial said: "The notary, in taking the deposition, is not required to determine the relevancy and competency of testimony, but simply writes and authenticates the testimony given, with such objections as the parties desire to make. He is not designated as a court, nor clothed with the usual paraphernalia of such a tribunal." *In re* Butler, (Nebr. 1906) 107 N. W. 572; Courtnay *v.* Knox, 31 Nebr. 652, 48 N. W. 763 (both holding that, in taking depositions, notaries public are not exercising judicial functions and do not constitute a law court); People *v* Leubischer, 34 N. Y. App. Div. 577, 54 N. Y. Suppl. 869, 28 N. Y. Civ.

5. ACKNOWLEDGMENTS.[22] The power to take acknowledgments is purely statutory.[23] The power to take an effective acknowledgment relating to real property must be granted by the law of the state or country where the property is.[24] By statute the acknowledgment of a deed before a notary public in another state is presumed to be made in compliance with the laws of the place of execution.[25] The effectiveness of an acknowledgment depends upon compliance with the statutory provisions.[26] Authority to take acknowledgments of deeds covers acknowledgments of deeds conveying land lying in the same state in a county other than the one for which the notary is commissioned.[27] By statute a state

Proc. 265 [*affirming* 23 Misc. 495, 51 N. Y. Suppl. 735, appeal *dismissed* in 157 N. Y. 721, 53 N. E. 1130, 158 N. Y. 676, 53 N. E. 1130].

22. See, generally, ACKNOWLEDGMENTS, 1 Cyc. 506.

23. *Alabama.*—Loyd *v.* Oates, 143 Ala. 231, 38 So. 1022, 11 Am. St. Rep. 39; Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712; Hill *v.* Norris, 2 Ala. 640; Toulmin *v.* Austin, 5 Stew. & P. 410.

California.— Mott *v.* Smith, 16 Cal. 533.

Georgia.— Austin *v.* Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 S. E. 382 (holding that a notary may take acknowledgments of land situated out of his own county); Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026.

Illinois.— Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602 (where the court said that acknowledgments of instruments affecting title to or interests in realty were unknown to the common law and purely of statutory origin); Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Holbrook *v.* Nichol, 36 Ill. 161; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153; Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Indiana.— Woods *v.* Polhemus, 8 Ind. 60.

Missouri.—Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24; Dunlap *v.* Henry, 76 Mo. 106; Cravens *v.* Moore, 61 Mo. 178; Siemers *v.* Kluburg, 56 Mo. 196; Mitchell *v.* People, 46 Mo. 203 [*overruling* West *v.* Best, 28 Mo. 551]; Lamarque *v.* Langlais, 8 Mo. 328.

Nebraska.— Galley *v.* Galley, 14 Nebr. 174, 15 N. W. 318.

New Hampshire.—Bellows *v.* Copp, 20 N. H. 492; Southerin *v.* Mendum, 5 N. H. 420.

New York.— Utica, etc., R. Co. *v.* Stewart, 33 How. Pr. 312 (where it is said that notaries were first authorized to take acknowledgments in New York by the statute of 1859); People *v.* Hascall, 18 How. Pr. 118.

Ohio.— State *v.* Lee, 21 Ohio St. 662.

Pennsylvania.— Griffith *v.* Black, 10 Serg. & R. 160. In Pennsylvania notaries public were authorized to take acknowledgments of deeds for lands in any part of the state by the act of Aug. 10, 1864, and this act is not repealed by the act of 1893, or any other of the acts appointing officers to take acknowledgments. Davey *v.* Ruffel, 14 Pa. Co. Ct. 272.

South Carolina.— Wingo *v.* Parker, 19 S. C. 9.

Tennessee.—McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209; Daly *v.* Hamilton Perpetual Bldg., etc., Assoc., (Ch. App. 1897) 48 S. W. 114.

Texas.— Birdseye *v.* Rogers, (Civ. App. 1894) 26 S. W. 841.

West Virginia.— Randolph *v.* Adams, 2 W. Va. 519.

See also ACKNOWLEDGMENTS, 1 Cyc. 546, 550, 551, 552.

Duty in taking and certifying acknowledgments see *infra*, IX, C.

Liability for false certificate of acknowledgment see *infra*, X, B.

Judge acting as notary ex officio.— Butler *v.* Dunagan, 19 Tex. 559.

24. Griffith *v.* Black, 10 Serg. & R. (Pa.) 160; Birdseye *v.* Rogers, (Tex. Civ. App. 1894) 26 S. W. 841; Nye *v.* Macdonald, L. R. 3 P. C. 331, 39 L. J. P. C. 34, 23 L. T. Rep. N. S. 220, 18 Wkly. Rep. 1075.

25. Hoadley *v.* Stephens, 4 Nebr. 431. And see Omaha Real Estate, etc., Co. *v.* Kragscow, 47 Nebr. 592, 66 N. W. 658.

26. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201 (holding that a mortgage of personal property not acknowledged in the manner required for a chattel mortgage, but in the different manner provided for a mortgage of realty, is void as to creditors and purchasers); Oppenheimer *v.* Giershofer, 54 Ill. App. 38 (holding that, when notaries may only take acknowledgments relating solely to land, a power of attorney attached to a judgment note so acknowledged is not provable and judgment entered thereon is void).

27. *Alabama.*—Johnson *v.* McGehee, 1 Ala. 186, holding, under a statute authorizing a notary to take acknowledgments in any county for which the notary is commissioned, that limit of location did not apply to the *situs* of the land conveyed but to the place in which the notary might so act, so that a notary commissioned for any county might take acknowledgments of deeds of land situate in any other county within the state.

Georgia.— Austin *v.* Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 S. E. 382.

Indiana.— Doe *v.* Vandewater, 7 Blackf. 6.

Michigan.— Lamb *v.* Lamb, 139 Mich. 166, 102 N. W. 645.

New York.— Utica, etc., R. Co. *v.* Stewart, 33 How. Pr. 312, where, under the statutes in force in New York in 1867, it was held that a notary might take acknowledgments anywhere within the county for which he was appointed and in which he resided, and that when thus taken and the signature and official character of the notary attested by the county clerk's certificate, such acknowledg-

may authorize acknowledgments of instruments relating to land situated within its boundaries to be taken abroad by notaries of foreign countries,[28] or in sister states.[29] The authority of notaries to take acknowledgments does not extend to the taking of such as are by statute expressly or impliedly required to be taken before some other officer.[30] The taking of acknowledgments is, by the weight of authority, a ministerial act[31] An acknowledgment taken before a *de facto* notary is good.[32]

6. Administration of Oaths in General. The power to administer oaths is not incidental to the office of notary,[33] but such power may be given and regulated by

ments might be recorded in any other county in the state); People *v.* Hascall, 18 How. Pr. 118 (where a statute authorizing notaries to take acknowledgments "in all the cases where the same may now be taken and administered by commissioners of deeds," was construed to extend to all counties whether there were commissioners of deeds in them or not).

28. Mott *v.* Smith, 16 Cal. 533, where it appears that the California act of 1850 authorized acknowledgments of instruments conveying land to be taken by any notary public in the place where such instrument was acknowledged. *Compare* Birdseye *v.* Rogers, (Tex. Civ. App. 1894) 26 S. W. 841, holding that a deed of land in Texas acknowledged by a notary in Mexico in 1847, when the Texas law did not acknowledge acknowledgments taken by notaries, is not cured by the Texas statute of 1874, legalizing acts of notaries, which applies only to notaries in the United States.

29. Brownson *v.* Scanlan, 59 Tex. 222.

30. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602 (holding that, when it was expressly provided that town plats should be acknowledged before a justice of the supreme court, a statute conferring on notaries power to take acknowledgments of conveyances did not authorize them so to do in a case of town plats; but it is there said that a later revision of the Illinois law has authorized notaries to take such acknowledgments); Clink *v.* Muskegon Cir. Judge, 58 Mich. 242, 25 N. W. 175 (holding that a recognizance of special bail acknowledged before a notary was void where the power to take such acknowledgment is not conferred on the notary but upon another officer); Dunlap *v.* Henry, 76 Mo. 106 (holding that, under a statute requiring tax deeds to be acknowledged before the county clerk, a tax deed acknowledged before a notary was void); Cravens *v.* Moore, 61 Mo. 178 (holding that a statute authorizing a notary to take acknowledgments of deeds, conveyances, powers of attorney, and other instruments in writing, in like cases, and in the same manner and with like effect as clerks of courts of record are authorized, did not empower a notary to take the acknowledgment of a railroad preëmption claim required by statute to be made before a justice of the peace); State *v.* Lee, 21 Ohio St. 662 (holding that authority to "take and certify to all acknowledgments or deeds, mortgages, liens, powers of attorney, and other instruments of writing" does not empower a notary to take the acknowledgment of a certificate of incorporation required by statute to be acknowledged before a justice of the peace and certified by the clerk of the court of common pleas).

31. *California.*— Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070. And see Joost *v.* Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374, where the court regarded the contention that a notary in taking an acknowledgment acted judicially and therefore was not liable in damages for mere negligence as set at rest by the provision that a notary and sureties on his bond are liable for his neglect. *Compare Ex p.* Carpenter, 64 Cal. 267, 30 Pac. 816, where it was held that a notary under the California code had power to administer oaths and take testimony for the purpose of taking acknowledgments, so that a person falsely swearing before a notary that he was the person who had signed the deed he wished to acknowledge, was guilty of perjury.

Illinois.— Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Hill *v.* Bacon, 43 Ill. 477.

Massachusetts.— Learned *v.* Riley, 14 Allen 109, 113.

Missouri.— State *v.* Plass, 58 Mo. App. 148.

Nebraska.— Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 37 L. R. A. 434.

United States.—Fredericksburg Nat. Bank *v.* Conway, 17 Fed. Cas. No. 10,037, 1 Hughes 37.

Contra.— Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805. And see Harris *v.* Burton, 4 Harr. (Del.) 66 (where the court said the taking of an acknowledgment of a deed is an official, perhaps a judicial, act); Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139 (holding that where the acknowledgment is that of a married woman privately examined as required by statute, the notary acts judicially).

Whether a public officer's act in taking acknowledgments is ministerial or judicial see Acknowledgments, 1 Cyc. 557.

32. Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24, where the notary was an alien and therefore not eligible. See *supra*, V.

33. Chandler *v.* Hanna, 73 Ala. 390; Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Keefer *v.* Mason, 36 Ill. 406; Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 449; Berkery *v.* Wayne Cir. Judge, 82 Mich. 160, 46 N. W. 436.

statute.[34] The authority of a foreign notary to administer oaths is not to be presumed without proof.[35] Power to take affidavits does not authorize the administration of an official oath.[36]

7. Extraordinary Powers.[37] In some jurisdictions the notarial function is very much more extensive. Thus in Alabama the governor has been authorized by statute to appoint a limited number of notaries who are *ex-officio* justices of the peace in the wards for which they are appointed.[38] And in states or countries the foundation of whose jurisprudence is the Roman law, the duties of a notary public are often of great variety and importance, as in Louisiana[39] and in Lower

34. *Illinois.*— Edwards *v.* McKay, 73 Ill. 570 (holding that a statute conferring on notaries public power to administer all oaths of office and other oaths required to be taken by any person before entering upon the discharge of any official business, or any other lawful occasion, and to take affidavits and depositions gives power to administer oaths on any lawful occasion); Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

Indiana.— Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353.

Kansas.— Ferguson *v.* Smith, 10 Kan. 396.

Maine.— Under Rev. St. c. 32, § 3, a notary public is authorized to administer oaths in all cases where a justice of the peace can act. Duncan *v.* Grant, 86 Me. 212, 29 Atl. 987.

Missouri.— State *v.* Boland, 12 Mo. App. 74.

New York.— People *v.* Hascall, 18 How. Pr. 118, where the statute authorizing notaries to take oaths and affirmations "in all cases where the same may now be administered by commissioners of deeds" was construed as extending to notaries in all counties whether there were commissioners of deeds in such counties or not.

Ohio.— State *v.* Jackson, 36 Ohio St. 281, holding, however, that a general statute empowering notaries to "administer all oaths required or authorized to be administered in this state" did not affect the requirement of an older statute concerning arbitration, and providing that oaths in arbitration proceedings should be administered by a judge or justice of the peace.

Oregon.— Wheeler *v.* Burckhardt, 34 Oreg. 504, 56 Pac. 644.

Texas.— Campbell *v.* State, 43 Tex. Cr. 602, 68 S. W. 513.

United States.— U. S. *v.* Law, 50 Fed. 915, holding that the most general power conferred by the statutes of the United States on a notary to administer an oath, given by Rev. St. § 1778, namely, in all cases in which under the laws of the United States a justice of the peace may do so, does not include an oath required by the post-office department in an investigation as to the loss of a registered letter.

Schedule in insolvency proceedings.—Under a statute providing that in insolvency proceedings the schedule filed by the petitioner must be sworn to before "the judge having jurisdiction," the schedule must be sworn to before the judge of the court in which the application is made, and if it is sworn to before a notary public the court has no jurisdiction to decree a discharge. Baker *v.* Everhart, 65 Cal. 27, 2 Pac. 495.

Information in criminal case.— A notary public has no authority to administer an oath to the complainant in a criminal case, and therefore an information sworn to before a notary is invalid. State *v.* Lauver, 26 Nebr. 757, 42 N. W. 762; Richards *v.* State, 22 Nebr. 145, 34 N. W. 346.

35. Chandler *v.* Hanna, 73 Ala. 390; Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118; Smith *v.* Lyons, 80 Ill. 600; Keefer *v.* Mason, 36 Ill. 406; Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

36. Tompert *v.* Lithgow, 1 Bush (Ky.) 176, where the removal of a mayor from office was held void on a collateral attack because the members of the court of impeachment had taken the oath of office before a notary; since affidavits as defined by the Kentucky civil code empowering notaries to take them did not include oaths of office.

37. Notarial act on adoption of child see Adoption of Children, 1 Cyc. 923 note 58.

38. Douglass *v.* State, 117 Ala. 185, 23 So. 142; Harper *v.* State, 109 Ala. 66, 19 So. 901. Notaries public who are *ex-officio* justices of the peace are judicial officers. Carroll *v.* State, 58 Ala. 396. A statute conferring on such notaries criminal jurisdiction concurrent with certain courts is constitutional. Carroll *v.* State, *supra*. The Alabama courts will take judicial notice of the ward of a city for which such notary is appointed. Russell *v.* Huntsville R., etc., Co., 137 Ala. 627, 34 So. 855. Such a judicial notary may issue a warrant for arrest (Harper *v.* State, 109 Ala. 66, 19 So. 901), and he may punish a contempt committed at a trial before him (Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84); but such a notary cannot issue a warrant of attachment returnable to the circuit court (Nordlinger *v.* Gordon, 72 Ala. 239; Vann *v.* Adams, 71 Ala. 475). A notary public with *ex-officio* powers of a justice of the peace has the same jurisdiction in bastardy proceedings as a justice. Bell *v.* State, 124 Ala. 94, 27 So. 414; Douglass *v.* State, 117 Ala. 185, 23 So. 142.

39. In Louisiana the courts have said that the enumeration of a notary's duties, in Rev. St. § 2492, does not include them all. Stork

Canada.[40] In some states statutes conferring judicial powers on notaries public are unconstitutional.[41]

D. Place in Which Notary May Act. In general a notary, although appointed by the governor, can act as such only within the county or other political division for which he is appointed;[42] but in some jurisdictions the territorial limit of jurisdiction has been extended, so that a notary may act anywhere in the

v. American Surety Co., 109 La. 713, 33 So. 742; Schmitt *v.* Drouet, 42 La. Ann. 1064, 8 So. 396, 21 Am. St. Rep. 408. Among the duties not mentioned in the statute are that of receiving the renunciation of married women of their rights over the property of their husbands, the duty of attending to the registry of acts of sale, of paraphing notes secured by privilege or mortgage with acts before them and other duties. Schmitt *v.* Drouet, *supra*. Notaries are "authorized to receive all acts and contracts to which parties wish to give the character of authenticity attached to the act of public authority, to secure their date, their preservation and the delivery of copies." Schmitt *v.* Drouet, *supra*. The supreme court has said of notaries: "Courts of justice, by means of these officers, are relieved from a large mass of business, which would otherwise impede and embarrass their ordinary proceedings. Meetings of creditors are held before notaries; a large portion of the business in suits in partitions, is accomplished before them. They make wills; they hold and conduct meetings of families, in which the interest of minors are concerned, they receive acknowledgments of the condition of persons, acts of emancipation, donation, and every species of conventional obligation." Tete's Succession, 7 La. Ann. 95, 96.

Authentic acts.— An authentic act, if in the nature of a contract, must be executed before a notary public in the presence of two witnesses, free, male, and at least fourteen years of age, or three witnesses if the party be blind. Tete's Succession, 7 La. Ann. 95.

40. In Lower Canada notaries are appointed to receive all acts to which the parties ought, or wish, to give authenticity. Léveillé *v.* Kauntz, 4 Quebec Pr. 358.

To give effect to a will is a notarial power in Lower Canada. Evanturel *v.* Evanturel, 38 L. J. P. C. 41, 21 L. T. Rep. N. S. 4, 6 Moore P. C. N. S. 75, 17 Wkly. Rep. 541, 16 Eng. Reprint 655, holding that the provision of French law in force in Lower Canada, which requires that a will made before two notaries, or a notary and priest, be dictated ("*dict et nomme*") to such notaries, etc., does not mean that the will must be dictated verbatim, or written at the time when the provisions are stated to officials. A notary may take down the provisions in brief and embody them in testamentary form, elsewhere, and they may be afterward signed by the testator.

The clerk of a notary who passes an instrument other than a will may witness the mark of the party who cannot write. Crebassa *v.* Crepeau, 1 Rev. Lég. 667.

A notary employed in the execution of a mortgage and having the instrument in his custody is not authorized thereby and has thereby no ostensible authority to receive moneys due on mortgage, and the mortgagee is not bound by payment to him of moneys which such mortgagee has not received. Gervais *v.* McCarthy, 35 Can. Sup. Ct. 14.

The only method of attacking the validity of an authentic notarial act is by a direct process for that purpose known as *inscription de faux*. Choquette *v.* McDonald, 19 Quebec Super. Ct. 408. But it would seem that there may be other methods of attack upon the validity of an instrument which is bad without fault of the notary. Clement *v.* Catafard, 8 Rev. Lég. 624.

An antenuptial agreement under Quebec law was held in Upper Canada sufficiently executed when signed by two notaries in their own names only, they certifying that they had signed at the request of the parties, who could not do so. Taillifer *v.* Taillifer, 21 Ont. 337.

Notarial acts are those which are taken by a notary or notaries public. Léveillé *v.* Kauntz, 4 Quebec Pr. 358.

41. See CONSTITUTIONAL LAW, 8 Cyc. 860. And see *supra*, VI, C, 4, 5. Under the Louisiana act of March 25, 1831, providing that in cases where the parish or probate judge is interested or disqualified for acting, the district court shall have jurisdiction thereof, and appoint notaries or other persons to make inventories, etc., of successions, the persons thus designated by the district judge can perform only ministerial duties; and the confirmation of a natural tutor or under-tutor, together with the homologation of proceedings in the settlement of successions, are judicial acts to be performed by the district judge, and not by a notary. State *v.* Buchanan, 12 La. 409. Since the constitution of Michigan vests the whole judicial power of the state in certain specified courts and officers, and provides for the election of all judicial officers by the people, the legislature cannot confer any portion of such judicial power upon any officer not elective and not so specified; and therefore the act to provide for the discharge of certain duties required to be performed by circuit court commissioners, approved Feb. 24, 1853, in so far as it undertook to confer judicial powers with respect to attachments upon notaries public in certain cases, was held unconstitutional and void. Chandler *v.* Nash, 5 Mich. 409.

42. *Colorado.*— Matter of House Bill No. 166, 9 Colo. 628, 21 Pac. 473.

Delaware.— Harris *v.* Burton, 4 Harr. 66, holding that a notarial act done beyond the bounds of the notary's authority is void.

state.[43] He cannot act beyond the limits of the state.[44] In the absence of a showing to the contrary a notary public will generally be presumed to have acted within his jurisdiction.[45]

E. Delegation of Authority. In the absence of a statute or valid custom, a notary public cannot delegate his official authority.[46] The certificate of a notary

Georgia.— Allgood *v.* State, 87 Ga. 668, 13 S. E. 569.

Kentucky.— Com. *v.* Schwieters, 93 S. W. 592, 29 Ky. L. Rep. 417.

Missouri.— Barhydt *v.* Alexander, 59 Mo. App. 188 (holding that under the Missouri statute a notary could act officially only in the county for which he was appointed and in which he resided); Silver *v.* Kansas City, etc., R. Co., 21 Mo. App. 5.

Nebraska.— Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127, where an affidavit showing on its face that the notary took it without his territory was rejected.

New York.— Mutual L. Ins. Co. *v.* Corey, 54 Hun 493, 7 N. Y. Suppl. 939 [*reversed* in 135 N. Y. 326, 31 N. E. 1095, not on the ground that the notary had power to act outside his county, but on the ground that plaintiff was estopped to deny the validity of a deed which was outwardly perfect]; Matter of Booth, 11 Abb. N. Cas. 145; People *v.* Globe Mut. L. Ins. Co., 65 How. Pr. 239.

Tennessee.— Neely *v.* Morris, 2 Head 595, 75 Am. Dec. 753; Bostick *v.* Haynie, (Ch. App. 1896) 36 S. W. 856.

United States.— Evans *v.* Dickenson, 114 Fed. 284, 52 C. C. A. 170, under Florida statute.

See 37 Cent. Dig. tit. "Notaries," § 12.

Contra.— Titus *v.* Johnson, 50 Tex. 224, where counsel objected without success to an acknowledgment, on the ground that it was taken in a county for which the notary was not commissioned.

43. *Illinois.*— Guertin *v.* Momblean, 144 Ill. 32, 33 N. E. 49 (holding that by the statute of 1872 notaries were authorized to take acknowledgments throughout the state); Hill *v.* Bacon, 43 Ill. 477 (holding under an earlier law that a notary public, although appointed in a town or city, may act throughout the county in which it lay).

Michigan.— Lamb *v.* Lamb, 139 Mich. 166, 102 N. W. 645 (holding that under the statute a notary public of one county may take acknowledgments in another); Sullivan *v.* Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556.

New York.— Mutual L. Ins. Co. *v.* Corey, 54 Hun 493, 497, 7 N. Y. Suppl. 939 [*reversed* on other grounds in 135 N. Y. 326, 31 N. E. 1095].

Wisconsin.— Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103, holding that under the Wisconsin statute expressly empowering notaries throughout the state and designating them as such officers, the county of a notary's residence and appointment is immaterial in determining his right to take an acknowledgment.

United States.— U. S. *v.* Bixby, 9 Fed. 78, 79, 10 Biss. 520, where the court holding that a notary is not a county officer, remarked that the Indiana statute declared that "the jurisdiction of a notary public shall be coextensive with the limits of states, but no notary shall be compelled to act beyond the limits of the county in which he resides."

44. Harris *v.* Burton, 4 Harr. (Del.) 66, acknowledgment of deed.

45. *Illinois.*— Cox *v.* Stern, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

Indiana.— Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Iowa.— Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882.

Missouri.— Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528.

New York.— Mosher *v.* Heydrick, 45 Barb. 549; Crosier *v.* Cornell Steamboat Co., 15 N. Y. Wkly. Dig. 34.

West Virginia.— Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289; Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

And see *infra*, VII, A, 2. But *compare* Com. *v.* Schwieters, 93 S. W. 592, 29 Ky. L. Rep. 417, holding that in order to prove perjury before a notary the burden is on the state to show that the notary was a notary in the place where the perjury was charged to have been committed.

46. *Kentucky.*— Chenowith *v.* Chamberlin, 6 B. Mon. 60, 43 Am. Dec. 145, holding that the presentation of a bill must be made by the notary who protests it.

Massachusetts.— Ocean Nat. Bank *v.* Williams, 102 Mass. 141, holding that in the absence of statutory authority the duties of a notary must be performed by himself and not by a clerk or deputy.

Mississippi.— Smith *v.* Gibbs, 2 Sm. & M. 479 (holding that in the absence of statutory authority a notary cannot act officially through a clerk); Ellis *v.* Commercial Bank, 7 How. 294, 40 Am. Dec. 63 (holding that it was error to refuse, in the case of a foreign bill, an instruction that the demand must be proven to have been made by the notary, and that proof of the demand made by his clerk was not sufficient); Carmichael *v.* Pennsylvania Bank, 4 How. 567, 35 Am. Dec. 408 (holding that a notary cannot present a bill by deputy).

Missouri.— Commercial Bank *v.* Barksdale, 36 Mo. 563, holding that the protest of a bill of exchange must be made by the same notary who protests the bill; it cannot be made by another person although he be also a notary. See also Miltenberger *v.* Spaulding, 33 Mo. 421.

New York.— Gawtry *v.* Doane, 51 N. Y.

to an act done by another is hearsay and not evidence.[47] Notaries are public officers and as such cannot act as partners.[48] In certain places, however, by statute or usage notaries may act to some extent through other persons;[49] and the certificate of a notary that his duly authorized delegate has done the necessary acts in regard to commercial paper has been held to be evidence.[50]

F. Disabling Interest. The general rule is that a notary cannot certify to or act in a matter in which he has a personal interest.[51] This rule has been

84 (holding that a notary's certificate of protest of a promissory note was void because the note was presented by his clerk); Hunt *v.* Maybee, 7 N. Y. 266; Onondaga County Bank *v.* Bates, 3 Hill 53 (where a notary's certificate of protest of a promissory note stating that he caused the same to be presented was held insufficient, especially since the statute making notaries' protests evidence read "presentment by him"). See also Sheldon *v.* Benham, 4 Hill 129, 40 Am. Dec. 271.

Tennessee.— Carter *v.* Union Bank, 7 Humphr. 548, 46 Am. Dec. 89, where the court said that as a general rule a bill must be presented by the notary who makes the protest.

Wisconsin.— See Adams *v.* Wright, 14 Wis. 408, where it was held that giving a notice of protest to a boy who was in the yard of the person to be served, who said he was the son of that person, and asking him to leave it with his father, was not the personal service required by the statute.

United States.— Sacrider *v.* Brown, 21 Fed. Cas. No. 12,205, 3 McLean 481, holding that a notary's clerk cannot make the protest of the bill, although he does so in the notary's name, even where by custom he may make the demand.

See also COMMERCIAL PAPER, 7 Cyc. 1004, 1054.

47. Marsoudet *v.* Jacobs, 6 Rob. (La.) 276 (holding that a notary's certificate of protest is not evidence of demand unless the notary makes the demand in person); Shepherd *v.* Jonte, 14 La. 246 (holding that a notary's certificate that notices of protest were served on the indorsers by letters delivered to them personally by another than the notary is not evidence, as the notary cannot certify what is done out of his presence); Smith *v.* Gibbs, 2 Sm. & M. (Miss.) 479; Commercial Bank *v.* Barksdale, 36 Mo. 563 (holding that a protest made by a notary on presentment by another is hearsay); Hunt *v.* Maybee, 7 N. Y. 266.

False certificate.— Where a notary certifies that he gave notice when in fact it was done by his clerk, the certificate is false. Vandewall *v.* Tyrrell, M. & M. 87, 22 E. C. L. 480 [*cited* in Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53]. And see Smith *v.* Gibbs, 2 Sm. & M. (Miss.) 479.

48. Commercial Bank *v.* Barksdale, 36 Mo. 563.

49. **Deputies in New Orleans.**— By statute notaries of New Orleans have been authorized to appoint deputies to assist in service relating to negotiable paper. Buckley *v.* Seymour, 30 La. Ann. 1341; Kock *v.* Bringier, 19 La. Ann. 183.

Local custom.— It was shown by a notary's deposition that it was the custom of notaries in Baltimore to present bills by their clerks in Miltenberger *v.* Spaulding, 33 Mo. 421. Evidence that it was the universal usage in New York city for notaries' clerks to present and demand payment of negotiable paper was held admissible in Commercial Bank *v.* Varnum, 49 N. Y. 269, 276. "The practice in England is to present and demand by a clerk of the notary." Commercial Bank *v.* Varnum, *supra.* It appeared by the evidence that it was the usage of notaries in Liverpool to present bills by their clerks in Nelson *v.* Fotterall, 7 Leigh (Va.) 179.

The custom must be proved to admit the certificate. The court will not take judicial notice of a custom allowing a notary to act by deputy. Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145. But *compare* Commonwealth Bank *v.* Garey, 6 B. Mon. (Ky.) 626, holding that a New Orleans notary's certificate of protest under seal, stating that he had presented his bill by a deputy, was evidence of such presentment, as affording in itself the presumption that the presentation was made in accordance with the law or usage of New Orleans. See also COMMERCIAL PAPER, 7 Cyc. 1004, 1054.

50. Lee *v.* Buford, 4 Metc. (Ky.) 7 (holding that under the Louisiana statute authorizing notaries in that state to appoint deputies to assist them in protesting bills and notes, for whose acts the notary shall be personally responsible, a Louisiana notary may properly certify to a demand of payment as made by his deputy and that such certificate is evidence in a Kentucky court); McClane *v.* Fitch, 4 B. Mon. (Ky.) 599 (holding, on evidence that the well established custom of notaries in New Orleans was to certify protests of bills presented by their clerks, that such certificate was evidence); Chew *v.* Read, 11 Sm. & M. (Miss.) 182 (holding that a Louisiana notary's certificate of protest of a bill of exchange stating that presentment and demand were made by his deputy was sufficient under the Louisiana statute); Miltenberger *v.* Spaulding, 33 Mo. 421 (holding that a protest of a notary at Baltimore on a demand by his clerk was good where it was shown by a notary's deposition that it was the custom of notaries in Baltimore to present bills by their clerks); Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89.

51. Green *v.* Abraham, 43 Ark. 420; Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485,

applied in some cases, although not generally, to disqualify a notary to protest commercial paper in which he is interested;[52] and it has often been applied to invalidate the acknowledgment of a deed, mortgage, or other instrument taken before a notary who is a party thereto or beneficially interested therein.[53] Generally, however, employment as agent or attorney in a matter gives a notary no such interest as to invalidate an official act done by him therein;[54] and a notary who is an officer, but not a stock-holder, in a corporation is not disqualified from certifying a document in its favor.[55]

G. Unofficial Acts. In doing that which is no part of his official function, a notary acts, not as a notary, but as the agent of the party who employs him.[56]

489, 37 L. R. A. 434; Cardinal *v.* Boileau, 11 Quebec Super. Ct. 431; and other cases cited *infra*, this note, and in the notes following.

Kind of interest which disqualifies.— No general rule can be laid down as to what interest will disqualify a notary from acting, but the question depends upon the facts and circumstances of the case in which the question is presented. Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 37 L. R. A. 434.

52. Interest of notary protesting commercial paper see COMMERCIAL PAPER, 7 Cyc. 1055.

53. *Alabama.*— Monroe *v.* Arthur, 126 Ala. 362, 28 So. 476, 85 Am. St. Rep. 36; Hayes *v.* Southern Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527, 82 Am. St. Rep. 216.

Arkansas.— Green *v.* Abraham, 43 Ark. 420.

Iowa.— Wilson *v.* Traer, 20 Iowa 231.

Michigan.— Groesbeck *v.* Seeley, 13 Mich. 329.

Mississippi.— Wasson *v.* Connor, 54 Miss. 351.

Texas.— Brown *v.* Moore, 38 Tex. 645.

Virginia.— Corey *v.* Moore, 86 Va. 721, 11 S. E. 114; Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873; Davis *v.* Beazley, 75 Va. 491.

Canada.— Cardinal *v.* Boileau, 11 Quebec Super. Ct. 431.

Disqualification to take acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 553 *et seq.*

54. *Arkansas.*— Penn *v.* Garvin, 56 Ark. 511, 20 S. W. 410, holding that the fact that a notary is the agent of a mortgagor in obtaining a loan does not disqualify him from taking the acknowledgment to the mortgage.

California.— Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070; Reavis *v.* Cowell, 56 Cal. 588. See also Kuhland *v.* Sedgwick, 17 Cal. 123.

Georgia.— Austin *v.* Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 S. E. 382 (holding that acknowledgments taken by a notary public acting as agent of the lender in negotiating a loan are valid); Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231 (holding that a notary employed as attorney of a creditor to prepare a mortgage and agent to receive it when executed is competent to attest it in his official capacity). *Compare* Shuler *v.* State, 125 Ga. 778, 54 S. E. 689.

Indiana.— Yeagley *v.* Webb, 86 Ind. 424, 425 (where the court said: "We know of no law in force in this State which forbids an attorney, who is also a notary public, from administering an oath to his client. The propriety of such an act may possibly be questioned, but the act is not illegal. The oath thus administered is a legal oath, and, if untrue, the affiant might, doubtless, be convicted of perjury therefor"); McNulty *v.* State, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 278 (holding that the fact that the notary who administered the oath in an affidavit upon which an information was founded was employed to procure evidence on which to base the prosecution and act as the attorney in the prosecution did not constitute such an interest in the cause on his part as to invalidate the affidavit).

Michigan.—Lynch Co. *v.* Carpenter, (1901) 88 N. W. 387, where under a statute prohibiting notaries who are attorneys and counselors at law from administering oaths in causes in which they are personally engaged, it was held that a notary who, after conducting a case in a justice's court, took an affidavit as a basis of a transcript from a judgment, was not thereby shown to be still engaged in the cause so as to be within the prohibition.

Minnesota.— Young *v.* Young, 18 Minn. 90.

See ACKNOWLEDGMENTS, 1 Cyc. 555.

As to taking affidavits, however, see AFFIDAVITS, 2 Cyc. 12.

As to taking depositions see DEPOSITIONS, 13 Cyc. 851.

55. Florida Sav. Bank, etc. *v.* Rivers, 36 Fla. 575, 18 So. 850 (holding that a notary, although an officer of the corporation, might take the acknowledgment of a mortgage in its favor, as it did not appear that he was a stock-holder); Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434 (to the same effect). See ACKNOWLEDGMENTS, 1 Cyc. 555.

56. Parke *v.* Lowrie, 6 Watts & S. (Pa.) 507; Crebassa *v.* Crepeau, 1 Rev. Lég. 667 (holding that a notary may accept the transfer of a debt for the transferee without authority at the time provided such act be afterward ratified by the transferee); St. Germain *v.* Birtz, 10 Quebec Super. Ct. 185 (holding that a unilateral instrument which does not require acceptance, as an acknowledgment of indebtedness without pledging security, is not invalidated by the fact that the notary stipulates and accepts for the creditor, although it may be otherwise in the case of a mortgage to which the notary would be a necessary party); Morin *v.* Brodeur, 9 Quebec Super. Ct. 352 (holding that it is not

VII. CERTIFICATES AND SEALS.

A. Certificates[57]—**1. As Evidence.** The certificates of notaries duly authenticated are evidence of those things to which the notary is authorized to certify.[58] It has been held that a notary may not contradict his own certificate,[59] but there are decisions in some jurisdictions to the contrary.[60] It may be contradicted or impeached by other competent evidence.[61] A notary's certificate of protest may be supplemented by other evidence;[62] and in a proper case, by leave of court, it may be amended or an additional certificate may be made.[63]

2. Requisites and Sufficiency. In passing on certificates, the courts are strict to insist on adherence to legal requirements;[64] but they are not needlessly exact-

the duty of a notary, without the order of his client, to look to the registration of an instrument executed before him; it is one of those acts which, although they may be customarily done, do not result from the duties of the profession).

Liability of principal for default of notary as agent.— A notary acting as agent and not in his official capacity renders his principal liable for his default. Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489. But loss that results from the wrong-doing of a notary is chargeable to his client only so far as he is actually the agent of the client in the particular transaction through which the loss occurs. Latulippe *v.* Grenier, 13 Quebec Super. Ct. 157, in which it was held that the filing or registration of a forged discharge of a mortgage by a notary, falsely authenticated by him, does not affect the mortgagee's rights, although the mortgagor has paid the debt upon the faith of such registration to the notary who had no authority from the mortgagee to receive payment.

57. Certificate of acknowledgment see Acknowledgments, 1 Cyc. 571.

Certificate of protest see Commercial Paper, 7 Cyc. 1061; 8 Cyc. 274.

Certificate to deposition see Depositions, 13 Cyc. 943.

Jurat to affidavit see Affidavits, 2 Cyc. 26.

58. See *supra*, VI, B.

Notary's certificate as evidence in relation to commercial paper see Commercial Paper, 8 Cyc. 274 *et seq.*

59. Garthwaite *v.* Seip, 23 La. Ann. 218; Peet *v.* Dougherty, 7 Rob. (La.) 85; Mathews *v.* Boland, 5 Rob. (La.) 200; Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484.

60. Craig *v.* Shallcross, 10 Serg. & R. (Pa.) 377, 378 (where the court said: "There is no pretence to say, that the notary-public was not a competent witness to explain, or even contradict his own certificate"); Stewart *v.* Allison, 6 Serg. & R. (Pa.) 324, 9 Am. Dec. 433; Adams *v.* Wright, 14 Wis. 408, 412 (where the court said: "The certificate and record are but presumptive evidence by statute . . . and being so, are liable to be rebutted or disproved by the testimony of other witnesses. And if by other witnesses, then why not by the notary? . . . If in thus endeavoring . . . to fortify the case made by the record, the plaintiff should . . . call forth facts which tend to disprove it and to falsify the certificate, it would become a question of veracity between the notary as a witness upon the stand, and as a public officer acting under the sanctity of an official oath, to be settled by the jury").

61. Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484.

62. Dickerson *v.* Turner, 12 Ind. 223; Saul *v.* Brand, 1 La. Ann. 95 (holding that a defect in a certificate may be cured by evidence); Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 1 Am. Dec. 235. And see Dutchess County Bank *v.* Ibbotson, 5 Den. (N. Y.) 110 (holding that where a notarial certificate of protest cannot be produced proof must be made by evidence); Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727 (holding that a notary cannot prove notice of non-payment by testifying to his mere impression, but admitting that he may prove such fact by his testimony if corroborated by a certificate and knowledge of his own business habits). See also Commercial Paper, 8 Cyc. 278.

63. Goldie *v.* McDonald, 78 Ill. 605, 606 (where a notary of another state was permitted to amend his certificate; the court said: "The amendment to the certificate of the notary to the affidavit of claim, it being under his official seal, made it *prima facie* evidence, under the statute, that the oath required by law to be made was taken before such officer"); Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983 (holding that an affidavit for an attachment, made before a notary of another state, without a certificate from a clerk or other officer of a court of record of that state under official seal verifying the genuineness of the notary's signature and his authority to administer an oath, as required by Code, c. 130, § 31, was bad and subject to be quashed, but that it might be amended, by leave of court, by appending to it such further certificate).

64. O'Connell *v.* Walker, 1 Port. (Ala.) 263, 265 (where under a statute providing that "the protest of a notary public, which shall set forth a demand, refusal, non-acceptance, or non-payment of any inland bill of exchange, or protestable security for money or other things, and that legal notice, expressing in the said protest, the time when given of such fact or facts, was personally

ing as to points of form, and frequently indulge in presumptions of regularity in aid of certificates.[65] Notaries are only to be held to reasonable certainty in the

or through the postoffice, given to any of the parties entitled by law to notice, shall be evidence of the facts it purports to contain," it was held that a protest stating notice to H, agent of O C, was not evidence of notice without proof *aliunde* of the agency); Walker *v.* Turner, 2 Gratt. (Va.) 534 (where under a statute providing that a protest made by a notary public stating the time, place, and manner of presenting the paper and of giving notice of the protest thereof, proved by the affidavit or solemn affirmation of such notary public made before a justice, may be read as evidence, it was held that the protest must contain all the requisite facts, and no fact which is not there contained can be proved by the affidavit); Wetmore *v.* Laird, 29 Fed. Cas. No. 17,467, 5 Biss. 160 (where, under a statute requiring a notary's certificate of acknowledgment to be authenticated by the official seal, a certified copy of a deed was rejected as evidence on the ground that such copy did not show what kind of seal was affixed, and the certificate was attested "Witness my hand and seal," which might have meant a private seal).

"Nothing should be presumed in favor of a notary public's certificate of acknowledgment to a deed of conveyance; he must state all the facts necessary to show a valid official act on his part." Wetmore *v.* Laird, 29 Fed. Cas. No. 17,467, 5 Biss. 160.

65. *Alabama.*— Curry *v.* Mobile Bank, 8 Port. 360, holding that a notary, protesting a note, may describe in his certificate the place of business of a person living in the same town on whom he has served notice as "the office" of such person without more particular description, although if the notice were sent to a distant post-office a description of the place would be required.

California.— Reavis *v.* Cowell, 56 Cal. 588, holding that the absence of a venue is not necessarily fatal to a notary's certificate.

Illinois.— Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73 (holding that, where the name of the county appeared in the caption, the notary was assumed to be a notary of that county, and that what purported to be a description of the seal attested by the clerk and naming another county was no part of the record); Rowley *v.* Berrian, 12 Ill. 198 (holding that the court will take judicial notice that the letters "N. P." mean notary public).

Indiana.— Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353 (holding that the omission of the month from the jurat of an affidavit does not vitiate it); Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Iowa.—Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882, holding that where it appeared by the jurat that the notary was of a county other than that named in the caption of the affidavit, it would be presumed that the notary acted in his own county. A jurat whereon the notary's signature was followed by the words, "notary public, Kings county, — certificate filed in New York county," with a seal containing his name and the names of the two counties, was sufficiently authenticated. Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912.

Kentucky.— Harbour-Pitt Shoe Co. *v.* Dixon, 60 S. W. 186, 22 Ky. L. Rep. 1169, holding that the failure of a notary to state the date of expiration of his commission, a statement required by the Kentucky statute, does not vitiate the certificate.

Louisiana.— Pogne *v.* Hickman, 9 Rob. 158 (holding that in the absence of proof that a certificate of protest produced in evidence was not recorded by the notary, it will be presumed that he has complied with the law); Union Bank *v.* Penn, 7 Rob. 79 (holding that the lack of a date in a notary's certificate of protest does not prevent the certificate from being legal evidence of the authorized facts which it states); Marsoudet *v.* Jacobs, 6 Rob. 276.

Michigan.— Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375, holding that the failure of a notary to append the name of the county from which he was appointed to his signature upon the jurat of an affidavit, when the name of the county appears in the caption, does not make the affidavit defective.

Missouri.— Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528, holding that where a notary omits his venue from the jurat he will be presumed to be of the place named in the caption.

New York.— Crosier *v.* Cornell, 15 N. Y. Wkly. Dig. 34, holding that where a petition verified before a notary bore the name of the county in the caption and the notary's county did not otherwise appear, he would be presumed to have acted rightly within his proper county.

Tennessee.—James *v.* Ocoee Bank, 2 Coldw. 57, holding that a notary's certificate of notice of dishonor need not state the time when the notice was given, the post-office from which it was sent, and other particulars, where the statute does not expressly require it. When he certifies that he has done an official act it is to be presumed, until the contrary is shown, that he has done it correctly.

Texas.— Williams *v.* Cessna, (Civ. App. 1906) 95 S. W. 1106 (holding that "Notary Public, W. C. S. T.," showed the official character of the person subscribing a certificate, clearly intimating that he was a notary public of Walker county, Texas); Kane *v.* Sholars, (Civ. App. 1905) 90 S. W. 937 (holding that venue is sufficiently stated when it appears only in the body of the certificate).

Wisconsin.—Adams *v.* Wright, 14 Wis. 408, holding that the expression "left at his house" in a certificate of notice of protest was sufficient to show compliance with a statutory requirement that such notice should

use of language.[66] It has been held, against conflicting decisions, that the lapse of time between a protest and the making of the certificate is no ground of objection to the latter as evidence.[67] A certificate of protest altered after action brought is not evidence.[68] The effect of a notarial certificate is determined by the law of the place where it is made, and not by that of another place where the act is brought in question.[69]

B. Seals[70] **— 1. Purpose and Effect.** The purpose of the notarial seal is to authenticate the document to which it is duly affixed.[71] It has been said to be *prima facie* evidence of the notary's official character,[72] and "to prove itself,"[73] but this is not always true of a foreign notary's seal.[74] Where it appears that the proper seal has been duly affixed, although the impression is faint and in part obliterated, it is effective nevertheless to authenticate the instrument.[75]

be left at the dwelling-house of the party to be served.

United States.— *In re* Henschel, 113 Fed. 443, 51 C. C. A. 277, holding that a certificate of protest and notice need not state particulars of service of notice.

England.— Gates *v.* Ruckland, 5 New Rep. 32, 13 Wkly. Rep. 67, holding that a certificate reading in form "Sworn to, and subscribed before me, A. B. Notary Public," was good, against the objection that it did not certify in the usual form that the deponents by name appeared personally before the notary and swore.

Canada.— Commercial Bank *v.* Brega, 17 U. C. C. P. 473, holding that a notary by writing his name before the printed words "Notary Public" adopts them, and there is no necessity for his writing them in manuscript.

66. Adams *v.* Wright, 14 Wis. 408.

67. Billingsley *v.* State Bank, 3 Ind. 375, 378 (where the court said: "The law appears to be settled that though the bill ought to be noted for non-payment on the day of the refusal to pay, still the protest may be drawn up at any time before the trial, and antedated accordingly"); Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635, 648 (holding that it is immaterial how long after notice was given a notary's certificate of protest is made. The court said: "It is no objection that the certificate of notice was drawn up by the notary two years, or any other length of time after notice was given. The statute gives it as a substitute for his personal testimony at the trial. It is properly called for and may be drawn up when it happens to be wanted as evidence); Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 388 (holding that when a bill has been duly noted for non-acceptance, the protest may be drawn up afterward at any time before trial). *Contra,* Chatham Bank *v.* Allison, 15 Iowa 357 (holding that a notary's certificate, unless it consists in authenticated copies of the notarial record, must be made at the time of the protest); Winchester *v.* Winchester, 4 Humphr. (Tenn.) 51 (holding that a certificate of a notary written a year after the protest does not constitute any part of the protest and therefore is not evidence under an act declaring a notary's protest *prima facie* evidence of the fact of notice).

Evidence of delay.— Delay between the protest and making of the certificate must appear affirmatively in order to be considered by the court. Fleming *v.* Fulton, 6 How. (Miss.) 473.

68. Aiken *v.* Cathcart, 2 Speers (S. C.) 642. But *compare* Marsoudet *v.* Jacobs, 6 Rob. (La.) 276, holding that corrections in a notary's protest do not render it void.

69. Nye *v.* Macdonald, L. R. 3 P. C. 331, 39 L. J. P. C. 34, 23 L. T. Rep. N. S. 220, 18 Wkly. Rep. 1075.

70. **Judicial notice of seal** see Evidence, 16 Cyc. 888.

Seal to certificate of acknowledgment see Acknowledgments, 1 Cyc. 578.

Seal to certificate of protest see Commercial Paper, 7 Cyc. 1061.

Seal to certificate to depositions see Depositions, 13 Cyc. 957.

Seal to jurat of affidavit see Affidavits, 2 Cyc. 32.

71. Bradley *v.* Northern Bank, 60 Ala. 252 (holding that an impression on paper of a form of seal was sufficient to establish the authenticity of a protest in the absence of any evidence to create suspicion of its genuineness); The Gallego, 30 Fed. 271 (where the court said: "The seal of a notary is judicially taken notice of, he being an officer long recognized throughout the commercial world"); Rex *v.* Scriveners' Co., 10 B. & C. 511, 518, 8 L. J. K. B. O. S. 199, 21 E. C. L. 219 (where the court said: "Many documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign courts, though certainly not in our courts of common law").

72. Ashcraft *v.* Chapman, 38 Conn. 230.

73. Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 Pac. 812; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243, 247 (where the court said that a notary's seal "proves itself in all countries where the law merchant prevails," and "is an authentication of his acts, more generally acknowledged throughout the commercial world than that of any other officer"); *In re* Phillips, 19 Fed. Cas. No. 11,098.

74. See *supra,* VI, B, 3.

75. Stearns *v.* Chenault, 23 S. W. 351, 15 Ky. L. Rep. 347, where it was held that a faint impression eleven years recorded, of a

2. When Required. The official acts of a notary must generally, by express statutory provision, be authenticated by his official seal,[76] and the seal was necessary under the common law,[77] but not under the civil law.[78] Where, however, a

seal required by the Ohio statute to be one inch and one quarter in diameter, surrounded by the words "notarial seal, county Ohio," and to contain so much of the state coat of arms as to show the mountain range, the rising sun, the bundle of arrows, and the sheaf of wheat, which impression by the aid of a magnifying glass showed all the emblems except the arrows, and all the words except that O was used instead of Ohio; bore upon its face the evidence of a genuine certificate and was sufficient to admit in evidence the deed to the certificate of acknowledgment of which it was attached.

76. *Alabama.*— Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Alabama Nat. Bank *v.* Chattanooga Door, etc., Co., 106 Ala. 663, 18 So. 74; Hart *v.* Ross, 57 Ala. 518; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

Arkansas.— Little *v.* Dodge, 32 Ark. 453.

Illinois.— Holbrook *v.* Nichol, 36 Ill. 161; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490, both holding that, where the statute imperatively requires a certificate to be under seal, the certificate is void without the seal. And see Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Stout *v.* Slattery, 12 Ill. 162.

Indiana.— Miller *v.* State, 122 Ind. 355, 24 N. E. 156; Watson *v.* Clendenin, 6 Blackf. 477; Dumont *v.* McCracken, 6 Blackf. 355 (holding that under a statute requiring all authentications made by domestic or foreign notaries to be under official seals, such authentication lacking a seal is ineffectual); Hinckley *v.* O'Farrel, 4 Blackf. 185 (where an attachment founded on an affidavit to which the attesting notary had not really attached his seal was dismissed, under a statute providing that a notary's certificate and attestation with his official seal shall be taken and received in all cases to be of equal verity and validity with the seal of the clerk of the circuit court).

Iowa.— Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480; Neese *v.* Farmers' Ins. Co., 55 Iowa 604, 8 N. W. 450; Stephens *v.* Williams, 46 Iowa 540; Chase *v.* Street, 10 Iowa 593; Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117.

Kansas.— Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Kentucky.— Herd *v.* Cist, (1889) 12 S. W. 466.

Louisiana.— Phillips *v.* Flint, 3 La. 146.

Maine.— Homes *v.* Smith, 16 Me. 181.

Massachusetts.— Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842, where it was said that by custom, if not by positive law, everywhere a notary must have an official seal, and copies of his record must be certified under his seal.

Michigan.— Grand Rapids *v.* Hastings, 36 Mich. 122; Pope *v.* Cutler, 34 Mich. 150.

Minnesota.— Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619; De Graw *v.* King, 28 Minn. 118, 9 N. W. 636, where, under a statute requiring each notary to authenticate his official acts with his official seal, an assignment for the benefit of creditors, bearing a certificate of its acknowledgment signed by a notary without his seal, was held void, although the certificate was followed by another certificate on the same page, by the same notary, bearing his seal, of the acknowledgment by the assignees of the execution of the bankrupt assignments.

Missouri.— Gharst *v.* St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453.

Nebraska.— Welton *v.* Atkinson, 55 Nebr. 674, 76 N. W. 473, 70 Am. St. Rep. 416; Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127.

Pennsylvania.— Horstman *v.* Kaufman, 7 Wkly. Notes Cas. 487.

South Carolina.— Bratton *v.* Burris, 51 S. C. 45, 28 S. E. 13.

Texas.— McKellar *v.* Peck, 39 Tex. 381; Ballard *v.* Perry, 28 Tex. 347; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682.

Washington.— Stetson, etc., Mill Co. *v.* McDonald, 5 Wash. 496, 32 Pac. 108; Gates *v.* Brown, 1 Wash. 470, 25 Pac. 914.

United States.— Wetmore *v.* Laird, 29 Fed. Cas. No. 17,467, 5 Biss. 160, rejecting the certificate of acknowledgment of an Illinois notary reading, "witness my hand and seal," where the record contained nothing to show in what the original seal consisted. And see Paul *v.* Lowry, 18 Fed. Cas. No. 10,844, 2 Cranch C. C. 628.

Canada.— Boyd *v.* Spriggins, 17 Ont. Pr. 331, holding that an affidavit sworn before a notary should not be received for filing in the office of the accountant of the supreme court of judicature for Ontario unless authenticated by the notarial seal.

See 37 Cent. Dig. tit. "Notaries," § 14 *et seq.*

Question for court or jury.— Whether or not the right seal has been affixed to a notarial certificate has been held a question for the jury. Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963 [*affirming* (Civ. App. 1893) 21 S. W. 694]. But see Stearns *v.* Chenault, 23 S. W. 351, 15 Ky. L. Rep. 347.

Waiver of objection.— Where no objection was made by counsel to the absence or insufficiency of a notary's seal on a certificate of protest, the court refused to entertain the objection on appeal, on the theory that it had been waived. Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275.

77. Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227; Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 1 Am. Dec. 235; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243; Merchants' Bank *v.* Spinney, 13 Nova Scotia 87. But *compare* Commonwealth Bank *v.* Pursley, 3 T. B. Mon. (Ky.) 238.

78. Rochester Bank *v.* Gray, 2 Hill (N. Y.)

statute provides for authentication of notarial acts without requiring a seal, the seal is not necessary.[79] The need of a notary's seal for the purpose of admitting documents in evidence depends upon the *lex fori*;[80] but the validity of a protest of a bill of exchange depends on the *lex loci contractus*, and when the law of the place where such bill is made requires that a protest be under seal its validity elsewhere will depend upon the seal.[81]

3. Requisites and Sufficiency.[82] It is the seal itself, not the name or device upon it, that gives authenticity.[83] At common law notaries may provide their own seals.[84] The requisites of a notary's seal are fixed by the law of the locality from which he derives his authority.[85] In the absence of proof the courts of one

227 [*citing* Dom. B. 2, tit. 1, art. 29, tit. 5, § 5; Postleth. Dict. tit. Notary]; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243.

79. *Alabama.*—Harrison *v.* Simons, 55 Ala. 510.

California.— Mills *v.* Dunlap, 3 Cal. 94.

Connecticut.—Ashcraft *v.* Chapman, 38 Conn. 230, where the lack of notary public's seal in a certificate of a deposition was supplemented by a certificate of the secretary of the state as to the notary's appointment and signature.

Georgia.— Jowers *v.* Blandy, 58 Ga. 379; Nichols *v.* Hampton, 46 Ga. 253.

Illinois.— Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Thielmann *v.* Burg, 73 Ill. 293; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Rowley *v.* Berrian, 12 Ill. 198; Stout *v.* Slattery, 12 Ill. 162. In this state, if a notary public administer an oath, his signature to the jurat, without his seal of office, is sufficient within the county of his residence, but if it is to be used out of the county, his seal of office, or some other evidence of his official character, is necessary. Stout *v.* Slattery, *supra*; and other cases above cited. See also Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490.

Indiana.— Curtis *v.* Curtis, 131 Ind. 489, 30 N. E. 18; Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459, both holding that, where the notary's certificate upon a deposition lacked the official seal, a proper certificate of the county clerk to the notary's office and signature supplied the want.

Kentucky.— Huffaker *v.* Monticello Nat. Bank, 12 Bush 287; Commonwealth Bank *v.* Pursley, 3 T. B. Mon. 238.

Louisiana.— Lambeth *v.* Caldwell, 1 Rob. 61.

Massachusetts.— Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173; Farnum *v.* Buffum, 4 Cush. 260.

Minnesota.— Thompson *v.* Morgan, 6 Minn. 292.

Nevada.— State *v.* Van Patten, 26 Nev. 273, 66 Pac. 822.

Ohio.—Ashley *v.* Wright, 19 Ohio St. 291; Muskingum County Fund Com'rs *v.* Glass, 17 Ohio 542.

West Virginia.— Bohn *v.* Zeigler, 43 W. Va. 402, 29 S. E. 983 (holding that under the Code, c. 130, § 23, the signature of a notary of another state without the seal is enough to authenticate a deposition if the notary's official character is duly authenticated); Parkersburg Second Nat. Bank *v.* Chancellor, 9 W. Va. 69.

United States.— Brown *v.* Ellis, 103 Fed. 834.

Canada.— Commercial Bank *v.* Brega, 17 U. C. C. P. 473; Russell *v.* Crofton, 1 U. C. C. P. 428; Ross *v.* McKindsay, 1 U. C. Q. B. 507; Goldie *v.* Maxwell, 1 U. C. Q. B. 424.

In Georgia, by statute, only "notarial acts of notaries public in relation to bills of exchange, drafts and promissory notes, required to be done by the laws of this State," require a seal (Code, § 5235); and a seal is not necessary to other acts, such as attestation of an affidavit (Jowers *v.* Blandy, 58 Ga. 379).

80. Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227.

81. Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227.

82. See also Acknowledgments, 1 Cyc. 579; Commercial Paper, 7 Cyc. 1061 note 71; Depositions, 13 Cyc. 957.

83. *In re* Phillips, 19 Fed. Cas. No. 11,098, where the court said: "We venture to affirm that the presumption in favor of an official seal does not arise from the name impressed on the paper; on the contrary, it is the seal which authenticates, not the particular name, word, or device upon it."

84. Kirksey *v.* Bates, 7 Port. (Ala.) 529, 31 Am. Dec. 722, holding that when a statute prescribing the particulars of notaries' seals is void or obsolete, the notary has the right at common law to provide his own seal.

85. Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243, 247 (where it is said that it is only necessary that the notary's seal "should conform to the law of the place where [it is made] . . . An impression on the parchment or paper, with an intent to make a seal, is good at common law"); *In re* Phillips, 19 Fed. Cas. No. 11,098.

Statute held merely directory.— In Sonfield *v.* Thompson, 42 Ark. 46, 48 Am. Rep. 49, where one statute required that notaries should certify under their official seals the truth of all matters and things done by virtue of their office, and another prescribed certain emblems, devices, and legends which the impression of the seal should present, and it was held that the latter provision was merely directory and that a seal obviously designed as an official seal, although not complying with the prescribed requirements, did not invalidate the certificate of acknowledgment on which it was impressed.

state will presume the requirements of another state concerning notarial seals to be the same as in their own jurisdiction.[86] Where a notarial seal is required, one which is not notarial is ineffective.[87] The use by one notary of the seal of another is not necessarily fatal.[88] Slight variations from the legal requirements as to form of a seal may not invalidate the notarial certificate.[89] It seems that an impossible requirement may invalidate a whole statutory provision prescribing various requisites of notarial seals.[90] In the absence of any statutory requirement to the contrary, it seems that no device or words indicative of the notary's official character are essential to the seal.[91] In the absence of a statutory provision the notary's name need not be a part of his seal,[92] but the name may be a statutory requisite.[93] The seal may consist in an impression on paper or some other sub-

86. Hewitt *v.* Morgan, 88 Iowa 468, 53 N. W. 478 (where under the Iowa statute requiring the notary's seal to bear his name and the words "Notarial Seal," it was assumed, in the absence of proof, that the requirements of another state were identical); Neese *v.* Farmers Ins. Co., 55 Iowa 604, 8 N. W. 450; Stephens *v.* Williams, 46 Iowa 540; Welton *v.* Atkinson, 55 Nebr. 674, 76 N. W. 473, 70 Am. St. Rep. 416; Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127. But *compare* Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227, where a protest made in Massachusetts was rejected because the seal was a mere impression upon the paper and it was not shown that any law of Massachusetts authorized a seal so made.

87. McKellar *v.* Peck, 39 Tex. 381, where, under a statute declaring that no official act should be valid without the notary's seal of office, it was held that an acknowledgment to which the notary inadvertently affixed the seal of the county court was invalid.

88. Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358, where it was held that the use by a notary of a seal borrowed from another, and somewhat different from his own, did not invalidate the certificate of acknowledgment to which it was affixed, where both were mere general seals without marks or names peculiar to either notary. But *compare In re* Nebe, 17 Fed. Cas. No. 10,073, where the court, in holding that a notary's seal which did not bear his name did not fulfil the requirement that his act be authenticated by his official seal, said: "If it be admitted that the seal in this case is the seal of a notary public, it is just as clearly the seal of every other of the notaries public, in number about one thousand, who hold office in the county of Wayne; and what then becomes of the provisions of the law which require the notary's act to be attested by 'his official seal'"?

89. Lange *v.* State, 95 Ind. 114 (holding that when it is not required by statute that the notary's seal shall bear the name of his county, a seal bearing the words, "Notary Public, Seal," and the name of the state, sufficiently indicates the character of the office); Stringfellow *v.* Thomson, 1 Tex. App. Civ. Cas. § 1008 (holding that the seal of a Texas notary which had the letters "Texas" placed between the several points of the star instead of around the extreme margin was a substantial compliance with the statute).

90. Kirksey *v.* Bates, 7 Port. (Ala.) 529, 31 Am. Dec. 722, where it was held that, under a statute of the territory which became the state of Alabama, and where there is still in force a provision prescribing various requirements for notaries' acts, an impossible requirement that such seal shall bear the arms of the territory, when neither the territory nor state had any legally authorized arms, was therefore obsolete, so that the further requirement that the seal should bear the notary's name or initials was also of no effect, and the notary was at liberty, at common law, to provide his own seal.

91. *In re* Phillips, 19 Fed. Cas. No. 11,098 (where the court said: "We even think that any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, would be equally entitled to judicial sanction as evidence of the notarial or official character of the individual signing his name as 'Notary Public, Lucas Co., Ohio'"); Commercial Bank *v.* Brega, 17 U. C. C. P. 473 (where it was said that any seal which the notary designates was sufficient under the statutes of Upper Canada, and the protest of a note signed with the name of a notary opposite an ordinary but not official seal with the printed words, "Notary Public," under the same was held good).

92. Deans *v.* Pate, 114 N. C. 194, 19 S. E. 146; *In re* Phillips, 19 Fed. Cas. No. 11,098. But see *In re* Nebe, 18 Fed. Cas. No. 10,073, where it was held that a seal not bearing the notary's name was insufficient as not complying with a statute requiring "his official seal."

93. Neese *v.* Farmers Ins. Co., 55 Iowa 604, 8 N. W. 450 (where it was held that a notary's seal not bearing his name, on a deposition taken in Nebraska, was insufficient, on the assumption, in the absence of proof to the contrary, that the Nebraska law was the same as that of Iowa); Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145 (where it was held that a notary's seal must bear and impress the notary's name; and that writing the name upon the impression was not sufficient); *In re* Nebe, 17 Fed. Cas. No. 10,073. But *compare* Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797, where a statute providing that each notary public and board performing any of the duties of his office shall provide himself with an official seal, on which

stance affixed thereto;[94] and even a private scrawl has been held sufficient where no particular kind of seal was required by statute.[95]

VIII. RECORDS.

A notary's official record is a public record,[96] and a certified copy is evidence of the facts officially recorded.[97] A notary's records, not treated as official, are admitted on due proof, as original memoranda made in regular course,[98] and it has

shall be engraved the words "notarial seal," the name of the county for which he was appointed and commissioned, and the word "Nebraska" and in addition, at his option, his name or the initial letters of his name, was interpreted as meaning that the option was not a mere choice between the name and the initials, but an option as to whether or not he should use the name or initials at all; therefore the lack of such name or initials on the seal did not vitiate a certificate of acknowledgment.

94. Stooksberry *v.* Swan, (Tex. Civ. App. 1893) 21 S. W. 694; *In re* Phillips, 19 Fed. Cas. No. 11,098.

Impression on paper.— Bradley *v.* Northern Bank, 60 Ala. 252; Connolly *v.* Goodwin, 5 Cal. 220; Meyers *v.* Russell, 52 Mo. 26; Carter *v.* Burley, 9 N. H. 558; Manchester Bank *v.* Slason, 13 Vt. 334; The Gallego, 30 Fed. 271; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243.

Impression on wax affixed to paper.— Stooksberry *v.* Swan, (Tex. Civ. App. 1893) 21 S. W. 694; *In re* Phillips, 17 Fed. Cas. No. 11,097; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243.

Impression in ink in form of seal.— The Gallego, 30 Fed. 271.

95. Flemming *v.* Richardson, 13 La. Ann. 414. But to the contrary see Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490 (where the statute demanded an official seal without further particulars); Hinckley *v.* O'Farell, 4 Blackf. (Ind.) 185. And see Carter *v.* Burley, 9 N. H. 558, 569, where the court said that "whether a mere scrawl could be regarded here as a sufficient seal to authenticate a protest, without evidence of the official character of the notary, and evidence of the laws of the state, may perhaps be doubted."

Private seal not an official seal.— Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490.

96. Phillips *v.* Poindexter, 18 Ala. 579 (holding that the entry of protest of a foreign bill of exchange in a notary's book is the true and only original protest); Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 399, 3 Am. Dec. 554 (holding, in the matter of a foreign bill, that "the minutes of the proceedings of a notary public are to be considered as records under the curtesy of nations"); The Gallego, 30 Fed. 271, 274 (where the court said of a notary's record of a marine protest "the notary's book is never given out. That is a record of the notary's office, made there for the benefit of all whom it may concern."

New Orleans — Custody of records.— Under a statute providing that the custodian of notarial records shall hold the records of every notary, in the parish of Orleans, *functus officio*, it was held that a notary, son of a deceased notary, had no right to the notarial records of his father either as his son or as a notary (State *v.* Theard, 45 La. Ann. 680, 12 So. 892; State *v.* Laresche, 24 La. Ann. 148), even as surviving partner in the notarial business (State *v.* Theard, *supra*). Before the act providing for the custodian of notarial records in the parish of Orleans, the governor on the death or resignation of a notary was accustomed to appoint another notary to fill the vacancy and hold the records. State *v.* Theard, *supra*; Ledoux *v.* Jamieson, 18 La. Ann. 130. When a notary of the parish of Orleans certified that he had in his custody the record of a former notary of the parish, the courts were bound to presume that he had been duly designated by the governor as custodian thereof. Ledoux *v.* Jamieson, *supra*.

97. Phillips *v.* Poindexter, 18 Ala. 579; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554 (where a copy from the record of a foreign notary, certified by another in whose custody the record was, was received); Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63 (where the record of an absent foreign notary proved by deposition of a person in whose custody it had been left during his absence was admitted in evidence); The Gallego, 30 Fed. 271, 275 (where the court said: "The benefit of this record is secured to those concerned by issuing a transcript from the hook, certified by the notary to be correct"). And see McAfee *v.* Doremus, 5 How. (U. S.) 53, 62, 12 L. ed. 46 (where the court said: "By the Louisiana Acts of 1821 and 1827, the notary is required to record, in a hook kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers; a certified copy of which record is made evidence"); Brandon *v.* Loftus, 4 How. (U. S.) 127, 11 L. ed. 905 (holding that a Mississippi notary's certificate objected to because it purported to be an original record, whereas it was claimed that it could only be a certified copy, was admissible in consideration of the peculiar statutes of Mississippi).

Notary's records as evidence of demand, notice, and protest of commercial paper see COMMERCIAL PAPER, 8 Cyc. 277.

98. Halliday *v.* McDougall, 20 Wend. (N. Y.) 81 [*reversed* on other grounds in 22 Wend. 264] (where a deposition of a deceased notary's son that he was his father's clerk and the two writings transmitted by him therewith were copies made by him of two records of protest from his father's book

been held that they may be used to refresh the memory of the notary when he testifies as a witness.[99]

IX. DUTY.

A. In General. A notary owes his clients the general duty of integrity, diligence, and skill,[1] and it is the notary's duty to inform himself of the facts to which he intends to certify, and not rely on hearsay.[2] The official duty of a notary does not extend beyond the limits of the place for which he is appointed.[3]

B. In Regard to Commercial Paper. When protest and accompanying acts are not part of the notarial function, the notary's duty is not that of notary, but of agent.[4] In either capacity, however, it is his duty to use reasonable diligence to act effectively.[5]

of records of protest then held by a certain bank as such records was admitted in evidence as proof of an original memorandum of the deceased); Porter *v.* Judson, 1 Gray (Mass.) 175 (holding that any domestic protest founded on a deceased notary's papers after his death, under his hand and seal, is evidence when proved by testimony to be a part of his record regularly kept by him); McNeill *v.* Elam, Peck (Tenn.) 268 (where an entry made in a notary's record by his daughter, who acted as his clerk, was admitted in evidence on her testimony after his decease); Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628 (holding that entries in the official books of a notary, shown to have been regularly kept, are evidence, after his death, of his acts); Gray *v.* McMillan, 5 U. C. C. P. 400 (where a copy of a power of attorney certified under the corporate seal of the board of notaries in and for the district of Montreal, signed by the secretary of the board as a true copy of the original power of attorney found in the notarial records of a deceased notary of Lower Canada there named — his records being deposited in the archives of said board — was admitted in evidence in Lower Canada, and the inference was that it must have been acted on and come officially into his hands, although there was no proof that any act or conveyance was passed under it before said notary). And see COMMERCIAL PAPER, 8 Cyc. 278.

Entries made by a clerk cannot be proved without the clerk's testimony if there is a possibility that he may be examined even on commission. Wilbur *v.* Selden, 6 Cow. (N. Y.) 162.

99. Lindenberger *v.* Bell, 6 Wheat. (U. S.) 104, 5 L. ed. 216.

1. Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714 (where it was said that a notary holds himself out to the world as a person competent to perform the business connected with the office, and that by accepting the office he contracts with those who employ him that he will perform it with integrity, diligence, and skill); Stork *v.* American Surety Co., 109 La. 713, 716, 33 So. 742 (where the court said: "In accepting the office" a notary "contracts the obligation to fill it intelligently and honestly").

Ulterior motive.— "[If a notary takes a deposition] to accomplish the private purposes of parties he violates his duties, and is amenable to the courts for such violation." *Ex p.* Krieger, 7 Mo. App. 367, 377.

2. Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145, holding that a notary's certificate that he had been told that parties to a note had moved their office to parts unknown and that he had made diligent search for the same and could not find it was bad, since, if the office was closed, he should have found the fact himself and recited it of his knowledge and not as hearsay. And see *supra*, VI, E.

3. Stork *v.* American Surety Co., 109 La. 713, 716, 33 So. 742 (where the court said: "They are public officers, whose duties are confined to a particular locality"); U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520 (under an Indiana statute declaring that no notary should be compelled to act beyond the limits of the county in which he resided). And see *supra*, VI, D.

4. Parke *v.* Lowrie, 6 Watts & S. (Pa.) 507, so holding of a notary demanding payment of a promissory note, under a statute which permitted, but did not enjoin, the performance of such act by a notary. And see Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105, 33 Am. Dec. 46.

5. See the cases cited *infra*, this note.

Protests generally.— Marston *v.* Mobile Bank, 10 Ala. 284; Mobile Bank *v.* Marston, 7 Ala. 108 (holding that a notary who receives commercial paper for demand and protest should inform the holder with all reasonable despatch of what he has done); Tevis *v.* Randall, 6 Cal. 632, 23 Am. Dec. 547 (holding that where promissory notes are made protestable by statute, their protest must be attended with all the incidents belonging to that of foreign bills of exchange).

Presentment and notice of dishonor.— "By virtue of his office it is no part of the duty of a notary to present a note for payment or serve notice of its dishonor." Vandewater *v.* Williamson, 13 Phila. (Pa.) 140, 142, 6 Wkly. Notes Cas. 350. "A notary, though bound to possess a competent share of skill, is not bound to know the residence of those on whom he is to call." Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105, 113, 33 Am. Dec. 46. But *compare* Haly *v.* Brown, 5 Pa. St. 178, holding that if the holder of negotiable paper does not inform the notary to whom

C. In Taking and Certifying Acknowledgments. In certifying an acknowledgment a notary must either have personal knowledge of the individual who makes it, or be satisfied of his identity by thorough precautions.[6]

he hands the paper of the indorser's place of residence, it is the notary's duty to apply to all the parties for information and especially to the holder himself. When the notary knows the residence of a party in his own town, on whom demand is to be made, he should present the note instead of sending it by mail, if there is no statutory provision to the contrary. Todd *v.* Edwards, 7 Bush (Ky.) 89. A notary who goes with a bill to the office of the accepter during business hours, finds it closed, and makes no further effort to demand payment, does his whole duty in the matter. Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828. A notary must present a foreign bill of exchange in person; and presentment by deputy is not sufficient, by commercial law, in the absence of any statute to the contrary. Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275. See *supra*, VI, E. It is a notary's duty to present a bill and note it for acceptance or non-payment. Ewing *v.* Cameron, 6 U. C. Q. B. O. S. 541. Where a notary by statute may protest a note it is his duty to give notice of dishonor, and he is liable in assumpsit to the holder, although he be employed by a bank collecting for the holder. Bowling *v.* Arthur, 34 Miss. 41. Giving notice of dishonor is a notary's duty, for neglect of which he is liable in an action on his bond, under a statute which expressly authorizes him not only to protest, but to give notice and allow a fee for notice. Williams *v.* Parks, 63 Nebr. 747, 89 N. W. 395 [*distinguishing* Swayze *v.* Britton, 17 Kan. 625, decided under a statute which authorized protest only, and not notice]. To send notice of protest of a bill from abroad to a drawer is no part of a notary's official duty. Ewing *v.* Cameron, *supra*. A notary who undertakes to give notice, although that is not under the statute his official duty, "should state the person notified; the manner of notification, and when not served on the party in person, it should specify distinctly whether it was delivered at his house or place of business; or if sent by mail, that it was addressed to the post-office nearest to him, or at which he usually received his business letters." Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 550, 2 S. E. 888.

Record of proceedings, including demand and notice, an official duty by statute see Hyde *v.* Planter's Bank, 17 La. 560, 36 Am. Dec. 731.

Duty to give notice of dishonor see COMMERCIAL PAPER, 7 Cyc. 1078 *et seq.*

Presentment for payment and demand see COMMERCIAL PAPER, 7 Cyc. 959 *et seq.*

Protest see COMMERCIAL PAPER, 7 Cyc. 1051 *et seq.*

6. Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131 (holding that under a statute providing that the acknowledgment of an instrument must not be taken unless the officer taking it knows, or has satisfactory evidence on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the deed, a notary has no right to certify that he knows a person whom he does not know on the mere introduction of a third party); State *v.* Meyer, 2 Mo. App. 413, 420 (where the court said: "It is not easy to give a definition of what will constitute 'personal knowledge.' Every one knows that two intimate friends, who have known each other from childhood to mature age, living in the same neighborhood all that time, may, in the fullest and most unreserved sense, be said to have such 'personal knowledge' of each other. But, if a stranger be introduced by a respectable person into any company, it is generally safe to assume that he is what he professes to be, although the person making the assumption has nothing for it but his reliance in the habits of accuracy of the introducer, who, in his turn, may be relying on similar habits in someone else, on whose information he has made the last introduction. It is obvious that, when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. The very lowest of these observances is proof by two witnesses who possess such personal knowledge of the identity of the cognizor with the grantor; for the statute says, cautiously, 'at least two credible witnesses.' Hence we see that, in a case of any doubt, it is not only permissible, but imperative, that the number of witnesses should be increased; that, not only their number, but their credit, must be looked to by the officer; that, as their testimony is to be taken, they must be sworn; and that, to secure them for future reference, their names and places of residence must be stated in the certificate. An officer taking all these precautions may, of course, be still deceived, and so be led to make a certificate that is calculated to mislead. But such a certificate is infinitely less likely to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clue for conducting it; and it complies with the law. If, after all, the party making the acknowledgment proves to be an imposter, the officer would, we think, if acting in good faith, stand excused"). But *compare* Overacre *v.* Blake, 82 Cal. 77, 22 Pac. 979, where it was held that the fact that the person was introduced to the notary as bearing the name of the real owner of the property and as the signer of the deed ex-

D. In Taking an Authentic Act. It is the notary's duty in giving authenticity to an instrument to see that it is valid in form.[7] He must fairly protect the interests of illiterate persons.[8] A notary may not alter a notarial act after its execution.[9]

X. LIABILITY.

A. On Bond. In some jurisdictions every notary is required by statute to give a bond with sureties to the effect that he shall well and faithfully perform

onerated the notary of negligence in failing to identify him further. See also ACKNOWLEDGMENTS, 1 Cyc. 562 *et seq.*, 628.

Proof of identity.— It has been held, pursuant to statute, that a notary who relies on the mere introduction of a friend or acquaintance of the person who makes an acknowledgment certifies at his own risk. He should require at least two witnesses to identify a party personally unknown to him. State *v.* Grundon, 90 Mo. App. 266; State *v.* Balmer, 77 Mo. App. 463. Where there is a description of the person in the deed it is the notary's duty to identify him by that description so far as it goes. State *v.* Thompson, 81 Mo. App. 549. Under statute it was held the duty of a notary, if he did not know the identity of the party before him, to take evidence respecting it in a prescribed form, and to preserve that evidence in the name of a witness in a particular mode. State *v.* Plass, 58 Mo. App. 148. Under a statute requiring either knowledge or satisfactory evidence of the party acknowledging the conveyance, it was held that, while evidence must of course be on oath, knowledge, within the meaning of the act, might be acquired through the introduction of a trusted acquaintance. Wood *v.* Bach, 54 Barb. (N. Y.) 134 [*reversing* 48 Barb. 568]. See also ACKNOWLEDGMENTS, 2 Cyc. 562, 566.

7. Tete's Succession, 7 La. Ann. 95 (where the court said that it is the duty of a notary at the execution of an authentic act, if a party does not know how to sign, to cause him to affix his mark); Léveillé *v.* Kauntz, 4 Quebec Pr. 358, 360 (where the court said that considering that notaries are bound to receive all the acts to which the parties ought, or may wish, to give authenticity, it follows that they ought necessarily to be present at the entire execution (confection) of the act); Morin *v.* Brodeur, 9 Quebec Super. Ct. 352 (holding that a notary is bound to invest the instrument passed by him with all the intrinsic formalities required by law).

Must state house in which contract was passed.— A statute in force in Quebec, providing that notaries "shall be bound to state in their contracts . . the house where the contracts were passed," if it applies to a case where the acknowledgment or signature of some of the parties has been taken at one house, and the acknowledgment and signature of other parties at another house, and where the notary signs and passes the act, so far as his signature is the mode of passing it, after the last acknowledgment or signature, meaning that the proper place to be served is the house where the contracts are passed, is that in which the notary completes the contract by affixing his own signature. Such has been the custom of notaries in Quebec. Hamel *v.* Panet, 2 App. Cas. 121, 149, 46 L. J. P. C. 5, 35 L. T. Rep. N. S. 741.

In stating the date of a notarial act the notary may state the date of the last signature by a party as the date of the act. To affix any other date, save to indicate, if he thinks proper, the date of his own signature as well, is illegal and the act so wrongly dated is not authentic. Ordway *v.* Veilleux, 22 Quebec Super. Ct. 197.

To be present at the performance of every requisite formality of the act is a notary's duty. Léveillé *v.* Kauntz, 4 Quebec Pr. 358.

Need not look to registration.— It is not the duty of a notary, without the order of his client, to look to the registration of an instrument executed before him; it is one of those acts which, although they may be customarily done, do not result from the duties themselves of the profession. Morin *v.* Brodeur, 9 Quebec Super. Ct. 352.

8. It is the duty of a notary to explain to an illiterate grantor, if he has reason to believe that he does not understand the legal and equitable obligations imposed by a deed and consequent upon its execution, its nature and effect; particularly when the deed is prepared at the instance and by the instruction of the vendee who will be benefited by its indirect effect. Ayotte *v.* Boucher, 9 Can. Sup. Ct. 460. And see Cloutier *v.* Dulac, 24 Quebec Super. Ct. 153 (holding that in a case where the parties to a deed cannot sign their names and a witness signs for them, the act, in order to be authentic, must make it appear that it was read to the parties before the witness or must show clearly that the consent of the parties was given in the presence of the witness who has signed); Morin *v.* Brodeur, 9 Quebec Super. Ct. 352 (holding that a notary owes his counsel to the parties more especially to such as are illiterate). And see Tete's Succession, 7 La. Ann. 95, where it is said that it is a notary's duty to cause a person who cannot write to make his mark.

9. Morin *v.* Brodeur, 9 Quebec Super. Ct. 352, holding that a notary after having received the signature of the parties has no right to fill in blanks which has been left in the document, although the parties have furnished him with particulars for that purpose, and that to do so would be a serious irregularity.

his official duties;[10] and for any breach of the conditions of the bond he and his sureties will be liable to an action.[11] It has been said that any one injured by a

10. See the statutes in the several jurisdictions. And see the cases cited *infra*, this note.

Form of bond.—Where the statute provided that the notary's bond should be made payable to "the State of California" a bond made payable to "the People of the State of California" was held good. Tevis *v.* Randall, 6 Cal. 632, 633, 65 Am. Dec. 547. See, generally, OFFICERS.

Seal on bond.— A bond without a seal is held not to be a notary's bond within the meaning of the statute. Van de Casteele *v.* Cornwall, 5 Cal. 419.

Condition of bond.— Under a statute which prescribed no condition for the notarial bond, but declared that a notary should be liable on his bond for any misconduct or neglect of duty, it was held that the only condition that should be inserted in such bond was the faithful performance of duty. Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 537. A condition that the notary shall "well and truly perform and discharge the duties of a Notary Public according to law" embraces every act which he is authorized or required by law to do in virtue of his office. Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

Joint and several bond.—Where the statute provides that the bond shall be joint and several, and a bond is given which is joint and not several, the sureties cannot defend themselves from liability on the ground that the bond does not comply with the statute. Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547. The surety on a joint and several notary's bond may be sued independently of the principal. People *v.* Butler, 74 Mich. 643, 43 N. W. 273.

11. *California.*— Heidt *v.* Minor, 113 Cal. 385, 45 Pac. 700 (false certificate of acknowledgment); Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714 (defective certificate of acknowledgment); Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547 (failure to give notice of protest to indorsers).

Kentucky.—Mulholland *v.* Samuels, 8 Bush 63, holding, however, that under a statute requiring a notary to give or send notice of dishonor to parties providing that if any notary public shall falsely state in such protest that notices were given or sent by him he shall be liable to the party or parties injured for such damages as they may sustain by such false statement, a notary is not liable either under said statutes or otherwise for sending the notices instead of delivering them to persons living in the city of his residence when he was not aware that they lived there.

Louisiana.— Stork *v.* American Surety Co., 109 La. 713, 33 So. 742 (neglecting to attend to the cancellation of notes delivered to a notary for that purpose, which notes he fraudulently negotiated); Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416 (neglect in the taking of a will in nuncupative form by public act); Rochereau *v.* Jones, 29 La. Ann. 82 (fixing his official certificate to notes of his own forging). When a notary who had represented to a client that he would loan money for her on a mortgage and had received money from her for that purpose showed her a forged mortgage under mark of his official paraph or certificate to persuade her that he had passed such a mortgage, he was held liable on his bond for having undertaken to do an official act, that is to pass a mortgage. It was a breach of official duty to do so. Nolan *v.* Labatut, 117 La. 431, 41 So. 713.

Michigan.— People *v.* Butler, 74 Mich. 643, 42 N. W. 273 (false certificate of acknowledgment); Curtiss *v.* Colby, 39 Mich. 456 (false certificate of acknowledgment).

Missouri.— State *v.* Plass, 58 Mo. App. 148, false certificate of acknowledgment.

Nebraska.— Williams *v.* Parks, 63 Nebr. 747, 89 N. W. 395, failure to give notice of dishonor.

Tennessee.— Wheeler *v.* State, 9 Heisk. 393, failure to give notice of protest.

"Before a notary and his surety can be held, it is necessary therefore to determine whether the act done or not done, committed or omitted, was or not authorized by law, was or not incumbent upon him, was or was not required of him, whether he was directed to do it, whether he has failed to discharge the duty, and whether injury has been sustained." Schmitt *v.* Drouet, 42 La. Ann. 1064, 1067, 8 So. 396, 21 Am. St. Rep. 408 [*quoted* in Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416].

For good faith and competency.—In Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416, it was held that a bond with the condition that the notary "shall well and faithfully discharge and perform" his official duties, undertakes not only his good faith, but also, by force of the word "well," his competency. But *compare* Browne *v.* Dolan, 68 Iowa 645, 27 N. W. 795; Scotten *v.* Fegan, 62 Iowa 236, 17 N. W. 491 (in both of which cases, under a statute imposing liability on an official in case of knowingly making a false certificate of acknowledgment, it was held that a notary was not liable where knowledge of falsity was shown); Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139 (both holding that a notary who made erroneous certificates of acknowledgment in good faith was not liable for loss caused thereby on the ground that the act was judicial).

Liability for making false certificate of acknowledgment see ACKNOWLEDGMENTS, 2 Cyc. 628.

Unofficial acts not covered.— A notary's sureties are not liable for money which he has fraudulently obtained and withheld, since receiving money for his client is not his official duty. Heidt *v.* Minor, 89 Cal. 115, 26 Pac. 627. So a notary's surety is not liable for money received from his client for invest-

notary's official negligence or misconduct may recover on the bond,[12] but this statement is too broad.[13] The measure of damages is the loss sustained by the notary's wrongful act or omission.[14] A surety upon a joint and several notary public's bond may be sued for a breach of its conditions without a prior adjudication against the principal, nor need the principal be joined as a defendant in the suit.[15]

B. Actions Against Notaries. For breach of an official duty a notary and his sureties are liable on his bond;[16] and for injury accruing through his fault in undertakings which are no part of his official function a notary is liable to an

ment or payment to others and appropriated by the notary, for receiving money for investments is not a part of the notary's function. Nolan *v.* Labatut, 117 La. 431, 41 So. 713; Monrose *v.* Brocard, 20 La. Ann. 78; Lescouzeve *v.* Ducatel, 18 La. Ann. 470. The sureties on a notary's bond executed in 1884 were held not liable for his act in falsely indorsing in 1888 upon mortgage notes forged by himself in 1883, a statement that payment had been prolonged by an act to him. Schmitt *v.* Drouet, 42 La. Ann. 1064, 8 So. 396, 21 Am. St. Rep. 408. Where a notary, employed to loan money for for his client, authorized fictitious securities for the money which he embezzled, it was held that his trustees were not liable for the loss, since the employment as a loan agent was unofficial. His only official misconduct was the certifying false indorsements to fictitious mortgages, and that, it was held, was not the direct cause of the loss. State *v.* Boughton, 58 Mo. App. 155. See also Vandewater *v.* Williamson, 13 Phila. (Pa.) 140, 6 Wkly. Notes Cas. 350, holding that a notary is not liable on his bond for neglect of an extra-official act in which he is merely the agent of the party employing him.

12. State *v.* Thompson, 81 Mo. App. 549, where it appears that by statute in Missouri it has been provided that a notary's bond "may be sued on by any person injured."

13. See State *v.* Plass, 58 Mo. App. 148 (where the court said of the statute providing that the bond may be sued on by any person injured that, while it did not limit the right of action to one who had sustained pecuniary injury, it did limit it to one directly affected by the notary's act, although he might stand in no contractual relation with the notary); Ware *v.* Brown, 29 Fed. Cas. No. 17,170, 2 Bond 267 (holding that the second assignee of a leasehold, injured by the fact that his assignor had taken a fraudulent assignment, could not recover from a notary alleged to have knowingly certified the false acknowledgment on the ground of remoteness of interest).

No action without injury.— A person who is not injured by a notary's act of omission has no right of action on the bond. Coffin *v.* Bruton, 78 Ark. 162, 95 S. W. 462 (holding that no action lies upon a notary's bond for falsely certifying the execution of the assignment of a mere pretended right); Smith *v.* Maginnis, 75 Ark. 472, 89 S. W. 91 (holding that one who purchased pretended homestead rights from persons who did not own them had no right of action on a notary's bond for falsely certifying that those persons swore to affidavits preliminary to the allowance of such rights by the federal government); Dwyer *v.* Woulfe, 40 La. Ann. 46, 3 So. 360; Warren Bank *v.* Parker, 8 Gray (Mass.) 221.

Other existing remedies.— A mortgagee suing on a notary's bond for injury through negligence in certifying the acknowledgment of the mortgage must show substantial damage, and, unless the remedy on a mortgage note has been exhausted, can recover only nominal damages. State *v.* Thompson, 81 Mo. App. 549. But *compare* Curtiss *v.* Colby, 39 Mich. 456, holding that damages for injury caused by a false certificate are not to be reduced by the fact that plaintiff might have protected himself by redeeming a prior mortgage.

Who may recover for false certificate of acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 629.

14. *Alabama.*— Mobile Bank *v.* Marston, 7 Ala. 108.

California.— McAllister *v.* Clement, 75 Cal. 182, 16 Pac. 775; Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

Louisiana.—Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416.

Michigan.— Curtiss *v.* Colby, 39 Mich. 456.

Missouri.— State *v.* Plass, 58 Mo. App. 148; State *v.* Meyer, 2 Mo. App. 413.

Montana.— Mahoney *v.* Dixon, 31 Mont. 107, 77 Pac. 519.

Bond of indemnity only.— State *v.* Thompson, 81 Mo. App. 549, holding that a notary's bond is strictly a bond of indemnity, that substantial damages cannot be recovered thereon if not suffered. And see Heidt *v* Minor, 113 Cal. 385, 45 Pac. 700; Heidt *v.* Minor, 89 Cal. 115, 26 Pac. 627; McAllister *v.* Clement, 75 Cal. 182, 16 Pac. 775; State *v.* Plass, 58 Mo. App. 148. And see ACKNOWLEDGMENTS, 1 Cyc. 628.

Nominal damages.— It has been held that nominal damages may be recovered in an action on a notary's bond for negligence, although substantial damage is not shown. State *v.* Thompson, 81 Mo. App. 549; State *v.* Plass, 58 Mo. App. 148. *Contra*, McAllister *v.* Clement, 75 Cal. 182, 16 Pac. 775.

False certificate of acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 628.

15. Doran *v.* Butler, 74 Mich. 643, 42 N. W. 273.

16. See *supra*, X, A.

action as an agent to his principal.[17] A notary is not liable for a mere mistake of law where he has exercised due diligence to ascertain what the law is;[18] and a notary acting in good faith and officially is not liable for not doing that which he had no instructions to do.[19]

C. Limitations of Actions. Actions against notaries as such or as public officers are often subject to special statutes of limitations.[20]

17. Parke *v.* Lowrie, 6 Watts & S. (Pa.) 507; and other cases cited *infra*, this note.

Commercial paper.— Thus where the presentment, demand, or notice of dishonor of negotiable paper other than foreign bills is not a notarial function, an action on the case may be brought against a notary for negligence in such act. Marston *v.* Mobile Bank, 10 Ala. 284; Mobile Bank *v.* Marston, 7 Ala. 108; Hyde *v.* Planters' Bank, 17 La. 560, 36 Am. Dec. 621; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Parke *v.* Lowrie, 6 Watts & S. (Pa.) 507; Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105, 33 Am. Dec. 46 [*affirming* 1 Miles 173]. And an action of assumpsit has been sustained against a notary for negligence in an unofficial duty relating to protest of commercial paper. Bowling *v.* Arthur, 34 Miss. 41.

No action without injury.—A holder has no cause of action where he has sustained no injury. Warren Bank *v.* Parker, 8 Gray (Mass.) 221. If the holder is fully advised independently of his notice of a ground of sustaining his action against an indorser he cannot recover for negligence as to notice. Franklin *v.* Smith, 21 Wend. (N. Y.) 624.

No action lies against a notary where the holder is in fault, as where the holder has allowed the statute of limitations to run. Emmerling *v.* Graham, 14 La. Ann. 389.

Nor where the holder gives erroneous instructions.— "The notary is not presumed to be a lawyer who is to revise or reverse the decision of his employer as to the character of the bill, and whether it is entitled to grace or not." Commercial Bank *v.* Varnum, 49 N. Y. 269, 279.

Nor in default of instructions.— Vandewater *v.* Williamson, 13 Phila. (Pa.) 140, 6 Wkly. Notes Cas. 350.

In Lower Canada a notary is not properly made defendant in an action to set aside a fraudulent conveyance which he has merely been instrumental in making, when it does not appear that he has anything to do with the fraud. Clement *v.* Catafard, 8 Rev. Lég. 624. When a notary passes a deed lacking a detail requisite to registration, good nevertheless as an instrument between the parties, believing that the latter use is intended he is not liable for negligence for such omission. Morin *v.* Brodeur, 9 Quebec Super. Ct. 352. The notary is not liable for an omission which the client has refused to allow him to correct. Bourdeau *v.* Dupuis, 7 L. C. Jur. 34.

False or defective certificate of acknowledgments see Ware *v.* Brown, 29 Fed. Cas. No. 17,170, 2 Bond 267; and ACKNOWLEDGMENTS, 1 Cyc. 628.

18. Neal *v.* Taylor, 9 Bush (Ky.) 380, where a statute declaring the duties of notaries was too vague to be understood without judicial construction, and it was held that a notary who did not construe it right and thus failed to comply with it was not liable for the damages caused by this error.

19. McCoy *v.* Weber, 38 La. Ann. 418.

20. See the statutes of the several jurisdictions.

Accrual of cause of action and running of statute.—Where a notary public fails to give to the indorser of a negotiable note the notice requisite to charge him, the statute of limitations of six years commences to run in favor of the sureties on his official bond from the date of the default, and not from the time of its discovery or the ascertainment of the damage by the injured party. Governor *v.* Gordon, 15 Ala. 72. Limitation on a cause of action on a bond for fraudulent certification of an acknowledgment begins to run from the making of the false certificate. Bartlett *v.* Bullene, 23 Kan. 606. Where a false certificate is the result of a notary's own fraud, and he has concealed his fraudulent conduct, the statute does not begin to run until plaintiff can with reasonable diligence discover the fraud. State *v.* Hawkins, 103 Mo. App. 251, 77 S. W. 98. Where a notary of a bank negligently omitted to charge a prior indorser by giving notice of non-payment, and the bank was afterward sued, and compelled to pay damages by a subsequent indorser, it was held in an action against the notary that the cause of action arose on the omission, and the bank, not having sued till more than six years after, was barred by the statute of limitations, although it had paid the damages within six years before suit brought. Utica Bank *v.* Childs, 6 Cow. (N. Y.) 238.

Against sureties.— Where an action was brought against the sureties only, and it was alleged that the statute of limitations, of which the notary had lost the benefit by concealing the cause of action, would never therefore have run in favor of the innocent sureties, the contrary was held. People *v.* Butler, 74 Mich. 643, 32 N. W. 273.

In Louisiana the one-year limitation as to actions against public officers does not apply to actions on a notary's bond. Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416. An earlier case holds that in Louisiana a notary as a public officer has the benefit of the limitation of one year on actions brought against him. Emmerling *v.* Graham, 14 La. Ann. 389.

In Lower Canada a notary as a public officer is entitled to one month's notice of an action against him arising from an act done in his official capacity, provided his good

D. Penal Provisions. Notaries are subject to certain penal or criminal provisions.[21]

E. License. Where a notary is an officer appointed by the governor with the advice and consent of the senate, a city cannot, in the absence of express authority, impose a license-tax on the office; nor is permission to impose a license-tax on trades, occupations, and professions such express authority.[22]

XI. COMPENSATION.

The fees of notaries are fixed by statute;[23] and their charges for official services must be limited to the prescribed fees.[24] But they may make further charges for unofficial services.[25] It has been held that a notary cannot recover this sttutory compensation when he has agreed to charge less;[26] but this is doubt-

faith in such act be shown. Gervais *v.* Nadeau, 3 Quebec Pr. 18; Lasnier *v.* Dozois, 15 Quebec Super. Ct. 604. Also such action is barred by a six months' statute of limitations. Lasnier *v.* Dozois, *supra*.

21. See statutes of the several states relating to notaries and public officers generally. And see Maxwell *v.* Hartmann, 50 Wis. 660, 665, 8 N. W. 103. It has been held that two statutes, the one imposing fine for breach of official duty, the other providing for the suspension of a notary for just cause, do not conflict, and the notary may be punished under either or both. State *v.* Laresche, 28 La. Ann. 26.

False notarial act.— It has been said that the offense of making a false act was punishable as a misdemeanor in office. Tete's Succession, 7 La. Ann. 95.

False certificate of protest.— It appears that, by statute, a notary making a false statement in a certificate of protest that notices were given or sent by him is to be deemed guilty of violating his official oath, and be subjected to the penalties prescribed by law at the time of enactment for false swearing. Mulholland *v.* Samuels, 8 Bush (Ky.) 63.

False assumption of office.— The statutory offense of falsely assuming and pretending to be a notary public cannot be committed by one acting in good faith. Brown *v.* State, 43 Tex. 478.

Discipline — Quebec.— The board of notaries of the province of Quebec has power to try and discipline a notary on a charge of wrong-doing amounting to felony, although it has not been legally proved and followed by final sentence of a competent court. Its decision is not a conviction of felony. Tremblay *v.* Bernier, 21 Can. Sup. Ct. 409.

22. New Orleans *v.* Bienvenu, 23 La. Ann. 710.

23. See the statutes of the several jurisdictions.

24. Roubouam *v.* Roubouam, 12 La. 73, 79 (where, concerning a notary's overcharge, the court said: "Public officers must refrain not only from demanding, but even from receiving greater fees than are allowed by law. The excess is an ill-gotten prey, which they are legally and morally bound to return; and courts of justice must frown on those who seek it. The heart of an officer cannot be supposed to be long pure, when his hands have ceased to be clean"); Harris' Succession, 29 La. Ann. 743; Hawford *v.* Adler, 12 La. Ann. 241; State *v.* Atchafalaya R., etc., Co., 7 Rob. (La.) 198; Walton *v.* His Creditors, 3 Rob. (La.) 438; Cider, etc., Co. *v.* Carrall, 124 N. C. 555, 32 S. E. 959 (holding also that Code, § 3308, authorizing a charge of fifty cents for certain services, does not apply to protest service for which the fee is fixed by section 3749 at twenty-five cents).

In Lower Canada a notary cannot hold his clients to the statutory fees, where, by uniformly charging a lower and legally customary rate, he has permitted them to engage him in reliance on the lower rate. Hebert *v.* Matte, 10 Quebec Super. Ct. 4. A notary has no action for compensation for useless services which he had no occasion to perform. Hart *v.* Pacaud, 19 L. C. Jur. 135. A notary's right to fees may be proved by the instrument for which the charge is made, signed, and executed by the parties, where such instrument is an "authentic act." Trudeau *v.* De Lanaudière, 7 L. C. Jur. 118.

Parties jointly and severally liable.— A provision in force in Lower Canada that parties to acts executed before notaries are jointly and severally liable for disbursements and fees does not apply to other than notarial services performed in regard to those instruments to which they are parties. Lemieux *v.* La Banque Nationale, 6 Quebec 84.

25. Reuscher *v.* Atty.-Gen., 97 S. W. 397, 30 Ky. L. Rep. 109 (where a notary at the demand of counsel took depositions in shorthand which were subscribed in that form, and afterward he was obliged to copy them in long hand for use, and it was held that he was entitled to the statutory fees for completing the original depositions and was further entitled for making the copies, to the amount allowed, by another statute, to clerks for transcribing); Ostrom *v.* Benjamin, 20 Ont. App. 336 (holding that a notary who is also a solicitor is not confined, in acting as a notary, to a solicitor's statutory charges).

26. Second Bank *v.* Ferguson, 114 Ky. 516, 71 S. W. 429, 24 Ky. L. Rep. 1298; Leach *v.* Hannibal, etc., R. Co., 86 Mo. 27, 56 Am. Rep. 408, both holding that a notary who had entered into employment at a fixed salary and performed notarial services as part of

ful, and there is at least one decision to the contrary.[27] A notary is not entitled to a fee for an act done for him by a person not duly authorized.[28] A notary cannot recover for services in taking depositions in a case in which he was attorney for defendant, and this, even though his law partner was present representing defendant.[29]

NOT ASSIGNABLE. Not the subject of an assignment; not assignable so as to invest in the assignee a right of action.[1] (See, generally, ASSIGNMENTS.)

NOTE.[2] As a noun, annotation; commentary; a short remark; a passage or explanation in the margin of a book; a MINUTE, *q. v.*; a MEMORANDUM, *q. v.*; a short writing to assist the memory;[3] in commercial law, a written promise made by one to pay another a certain sum of money at a certain time.[4] As a verb, to indorse;[5] to peruse, read, and consider.[6] (Note: As Negotiable Instrument, see COMMERCIAL PAPER. Of Issue, see TRIAL. Of Judge, see NEW TRIAL. Required by Statute of Frauds, see FRAUDS, STATUTE OF.)

NOTE BROKER. A broker who negotiates the purchase and sale of bills of exchange and promissory notes.[7] (See, generally, FACTORS AND BROKERS.)

NOTE OF HAND. A name given generally by the unlearned in common to all those evidences of debts which are verified under the hand of the debtor, and which the creditor keeps.[8]

that employment and during his regular hours of service therein could not recover notarial fees.

27. An agreement between a bank and a notary public by which it is agreed that in consideration of the notary's employment by the bank he will accept in full payment for his services in protesting the bank's negotiable paper, and that held by it for collection, one half of the usual legal fees charged for such services, is void for want of consideration, and also upon the ground that it is against public policy; and such an agreement therefore is no defense in favor of the bank when sued by the notary to recover one half of his fees retained by it. Ohio Nat. Bank *v.* Hopkins, 8 App. Cas. (D. C.) 146.

Ordinances to deprive employees of statutory fee is void.—A notary, employed by a city, under an ordinance providing that his fixed salary for the full compensation of all notarial fees earned by him shall belong to the city, can recover from the city the fees so appropriated. Wood *v.* Kansas City, 162 Mo. 303, 62 S. W. 433.

28. Leftly *v.* Mills, 4 T. R. 170 [*explained* in Nelson *v.* Fotterall, 7 Leigh (Va.) 179, 197], where it appears that when a notary may demand a fee from the party to whom he presents a bill, but a bill is presented by a person not duly authorized, to whom the party offers to pay the amount of the bill, but refuses to pay the fee, the notary is not then entitled to his fee, and his protest is void, although it seems that if the bill were presented by himself or someone duly authorized he would be entitled to the fee and might protest the bill for a failure to pay.

29. Stewart *v.* Emerson, 70 Mo. App. 482.

1. Thacker *v.* Henderson, 63 Barb. (N. Y.) 271, 279.

2. **"Note shavers"** see Mace *v.* Buchanan, (Tenn. Ch. App. 1899) 52 S. W. 505.

3. Webster Dict. [*quoted* in Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 180, where it is said: "The word 'note' has many significations. Among the fifteen definitions given to it by Webster, the greatest lexicographer of the English language that has yet appeared" are those given in the text.

4. See COMMERCIAL PAPER, 8 Cyc. 532.

As a nomen collectivum (Cowan *v.* Lowry, 7 Lea (Tenn.) 620, 625) the term may include: A promissory note (Du Bois *v.* State, 50 Ala. 139, 140; Owen *v.* Owen, 3 Humphr. (Tenn.) 325, 326); a bill (Da Costa *v.* Guieu, 7 Serg. & R. (Pa.) 462, 465; Owen *v.* Owen, *supra*); a check (Montgomery First Nat. Bank *v.* Nelson, 105 Ala. 180, 192, 16 So. 707; Riverside Bank *v.* Shenandoah First Nat. Bank, 74 Fed. 276, 277, 20 C. C. A. 181); or a due-bill or like paper (Nashville *v.* Fisher, 1 Tenn. Cas. 345, 351).

Corporation check or order not considered as a note see Martin-Alexander Lumber Co. *v.* Johnson, 70 Ark. 215, 219, 66 S. W. 924; Nashville *v.* Fisher, 1 Tenn. Cas. 345, 351.

A draft not payable by its terms to order or bearer not included within the meaning of the term see Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309, 341.

An order to ship property to the party signing the order, the same to remain the property of the person shipping, not considered as a note see Morris *v.* Lynde, 73 Me. 88, 90.

5. Bartley *v.* People, 156 Ill. 234, 236, 40 N. E. 831.

6. Wildes *v.* Fessenden, 4 Metc. (Mass.) 12, 18.

7. Little Rock *v.* Barton, 33 Ark. 436, 446; Gast *v.* Buckley, 64 S. W. 632, 633, 23 Ky. L. Rep. 992.

8. Perry *v.* Maxwell, 17 N. C. 488, 490.

It is not an apt legal term to describe a

NOT FOUND. Words, indorsed on a bill of indictment by a grand jury, which have the same effect as the indorsement "Not a true bill" or "*Ignoramus.*"[9] (See, generally, INDICTMENTS AND INFORMATIONS.)

NOT GUILTY. A plea in the general issue in an action of trespass and in criminal prosecutions.[10] (See CRIMINAL LAW; EJECTMENT; TRESPASS.)

NOTHUS NULLIUS EST FILIUS. A maxim meaning "A bastard is nobody's son."[11] (See, generally, BASTARDS.)

debt by judgment, nor is it ever used in that sense as its popular one. Perry *v.* Maxwell, 17 N. C. 488, 496.

"Notes of hand" and "book-accounts" mean only such debts as were evidenced by notes of hand, or book-accounts, and do not embrace a debt due from a devisee to the testator, evidenced by a bond and a mortgage. Hopkins *v.* Holt, 9 Wis. 228, 230.

An unconditional acceptance is a note of hand within Tenn. Code, § 4123. Powers *v.* Nahm, 7 Heisk. (Tenn.) 583, 585.

9. Black L. Dict.

10. Black L. Dict. See also Etowah Min. Co. *v.* Doe, 127 Ala. 663, 669, 29 So. 7; Bynum *v.* Gold, 106 Ala. 427, 432, 17 So. 667; Peters *v.* Johnson, 50 W. Va. 644, 646, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

11. Peloubet Leg. Max.

NOTICE

By Ernest G. Chilton*

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I. DEFINITIONS.

A. Notice Generally. Notice, in its legal sense, may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge.[1]

B. Actual and Constructive Notice. Notice is actual, when it is directly and personally given to the party to be notified.[2] As to whether actual notice is synonymous with knowledge the authorities are in conflict, the affirmative view prevailing in some jurisdictions;[3] but the view obtaining in other jurisdictions is that the terms "knowledge" and "actual notice" are not synonymous or interchangeable, and should not be confounded one with the other.[4] Notice is constructive when a party by circumstances is put upon inquiry, and must be presumed to have had notice; or, by judgment of law, is held to have had notice.[5]

1. Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 146, 1 So. 773 [*quoting* 2 Pomeroy Eq. Jur. § 594].

Other definitions are: "The legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge." Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 589, 63 Pac. 915.

"Information given of some act done, or the interpellation by which some act is required to be done." Bouvier L. Dict.

The term "notice" in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of the fact. Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

In its popular sense notice is equivalent to information, intelligence, or knowledge. Wile *v.* Southbury, 43 Conn. 53.

2. Jordan *v.* Pollock, 14 Ga. 145, 146.

Other definitions are: "When there is positive information of a fact." Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 145, 1 So. 773.

"Actual knowledge by the party of the very matter or thing, of which he is said to have notice." French *v.* Loyal Co., 5 Leigh (Va.) 627, 655.

"When it consists in express information of a fact." Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 587, 63 Pac. 915; Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132, 1134.

"Knowledge brought directly home to the party." Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 504, 54 Pac. 710; McCray *v.* Clark, 82 Pa. St. 457, 461.

3. *New York.*— Parker Mills *v.* Jacot, 8 Bosw. 161.

Oklahoma.— Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 54 Pac. 710.

Texas.— Wethered *v.* Boon, 17 Tex. 143.

United States.— Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934; Driskill *v.* Parrish, 7 Fed. Cas. No. 4,089, 3 McLean 631; U. S. *v.* Foote, 25 Fed. Cas. No. 15,128, 13 Blatchf. 418.

England.— Bird *v.* Bass, 6 M. & G. 143, 6 Scott N. R. 928, 46 E. C. L. 143. But *compare* Le Neve *v.* Le Neve, Ambl. 436, 27 Eng. Reprint 291, 3 Atk. 646, 26 Eng. Reprint 1172, 1 Ves. 64, 27 Eng. Reprint 893, 2 White & T. Lead. Cas. Eq. 26.

In cases where it is not required to be in writing, knowledge is equivalent to notice. Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,502, 2 McLean 611.

However closely actual notice may in many instances approximate knowledge, there may be actual notice without knowledge. Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 1 So. 773.

Where the same persons are officers of a corporation and trustees for the benefit of its creditors, actual notice to them as such officers is not notice to them as trustees. Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; New York Security, etc., Co. *v.* Lombard Inv. Co., 65 Fed. 271.

4. *California.*— Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915.

Georgia.— Clarke *v.* Ingram, 107 Ga. 565, 33 S. E. 802.

Iowa.— Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

Maryland.— Baltimore *v.* Whittington, 78 Md. 231, 27 Atl. 984.

Tennessee.— Levins *v.* W. O. Peeples Grocery Co., (Ch. App. 1896) 38 S. W. 733.

5. Jordan *v.* Pollock, 14 Ga. 145, 146.

Other definitions are: "Legal inference from established facts." Claflin *v.* Lenheim, 66 N. Y. 301, 306; Birdsall *v.* Russell, 29 N. Y. 220, 249; Williamson *v.* Brown, 15 N. Y. 354, 359; Parker Mills *v.* Jacot, 8 Bosw. (N. Y.) 161, 175.

II. MATTERS IMPOSING CONSTRUCTIVE NOTICE.

A. Facts Putting on Inquiry — 1. IN GENERAL. It is a general rule that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.[6] Wherever facts put a party

"Imputed by the law to a person not having actual notice." Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132, 1134.

"Knowledge of any fact which would put a prudent man upon inquiry." Smith *v.* Miller, 63 Tex. 72, 74.

"Knowledge of such facts as should induce inquiry, and as would lead to inquiry in the case of an ordinarily prudent man and which can not be neglected without a voluntary closing of the eyes, and conduct inconsistent with good faith." Hill *v.* Tissier, 15 Mo. App. 299, 306.

Constructive notice differs from implied notice, with which it is frequently confounded, and which it greatly resembles, in respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, resting upon strictly legal presumptions which are not allowed to be controverted, while implied notice which is one of the two kinds of actual notice arises from inference of fact. Hayward *v.* Mayse, 1 App. Cas. (D. C.) 133; Jordan *v.* Pollock, 14 Ga. 145; Baltimore *v.* Whittington, 78 Md. 231, 27 Atl. 984; Thomas *v.* Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499; Prewitt *v.* Prewitt, 188 Mo. 675, 87 S. W. 1000; Rogers *v.* Jones, 8 N. H. 264; Cambridge Valley Bank *v.* Delano, 48 N. Y. 326; Williamson *v.* Brown, 15 N. Y. 354; McCray *v.* Clark, 82 Pa. St. 457; Nelson *v.* Allen, 1 Yerg. (Tenn.) 360; Kirklin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. App. 1900) 60 S. W. 149; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063; Townsend *v.* Little, 109 U. S. 511, 3 S. Ct. 357, 27 L. ed. 1012; Le Neve *v.* Le Neve, Ambl. 436, 27 Eng. Reprint 291, 3 Atk. 646, 26 Eng. Reprint 1172, 1 Ves. 64, 27 Eng. Reprint 893, 2 White & T. Lead. Cas. Eq. 26; Plumb *v.* Fluitt, Anstr. 432, 3 Rev. Rep. 605; Hewitt *v.* Loosemore, 9 Hare 449, 15 Jur. 1097, 21 L. J. Ch. 69, 41 Eng. Ch. 449, 68 Eng. Reprint 586; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699, 40 Eng. Reprint 266.

Notice by construction of law is not only not actual notice, but the reverse of it. Masterson *v.* West-End Narrow-Gauge R. Co., 5 Mo. App. 64.

6. *Alabama.*— Mobile, etc., R. Co. *v.* Felrath, 67 Ala. 189; Boggs *v.* Price, 64 Ala. 514.

California.— Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915.

Colorado.— Filmore *v.* Reithman, 6 Colo. 120.

Connecticut.— Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339; Bolles *v.* Chauncey, 8 Conn. 389; Sigourney *v.* Munn, 7 Conn. 324; Peters *v.* Goodrich, 3 Conn. 146.

Georgia.— Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387; Jordan *v.* Pollock, 14 Ga. 145.

Illinois.— Parker *v.* Merritt, 105 Ill. 293; Bent *v.* Coleman, 89 Ill. 364; Russell *v.* Ranson, 76 Ill. 167; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350; Harper *v.* Ely, 56 Ill. 179; White *v.* Kibby, 42 Ill. 510; Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Cox *v.* Milner, 23 Ill. 476; Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169; Merrick *v.* Wallace, 19 Ill. 486; Rupert *v.* Mark, 15 Ill. 540; Doe *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124; Chicago Sanitary Dist. *v.* Alderman, 113 Ill. App. 23; Clark *v.* Plumstead, 11 Ill. App. 57.

Indiana.— Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Perrine *v.* Barnard, 142 Ind. 448, 41 N. E. 820; Hawes *v.* Chaille, 129 Ind. 435, 28 N. E. 848; Smith *v.* Schweigerer, 129 Ind. 363, 28 N. E. 696; Kuhns *v.* Gates, 92 Ind. 66; Wilson *v.* Hunter, 30 Ind. 466; Case *v.* Bumstead, 24 Ind. 429; Moreland *v.* Lemasters, 4 Blackf. 383; Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182.

Kentucky.—Willis *v.* Vallette, 4 Metc. 186; Russell *v.* Petree, 10 B. Mon. 184.

Michigan.— Thomas *v.* Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499.

Mississippi.— Parker *v.* Foy, 43 Miss. 260, 55 Am. Rep. 484.

Missouri.— Rupe *v.* Alkire, 77 Mo. 641; Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473.

Nebraska.— Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954.

New Hampshire.— Janvrin *v.* Janvrin, 60 N. H. 169; Scripture *v.* Francestown Soapstone Co., 50 N. H. 571; Warren *v.* Swett, 31 N. H. 332.

New Jersey.—Parker *v.* Parker, (Ch. 1904) 56 Atl. 1094; U. S. Steel Corp. *v.* Hodge, 64 N. J. Eq. 807, 54 Atl. 1; Haslett *v.* Stephany, 55 N. J. Eq. 68, 36 Atl. 498; Vredenburgh *v.* Burnet, 31 N. J. Eq. 229 [*affirmed* in 34 N. J. Eq. 252]; Gale *v.* Morris, 30 N. J. Eq. 285; Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Smallwood *v.* Lewin, 15 N. J. Eq. 60; Lee *v.* Woodworth, 3 N. J. Eq. 36. See also Perry *v.* Smith, 29 N. J. L. 74.

New York.— Fassett *v.* Smith, 23 N. Y. 252; Troup *v.* Hurlbut, 10 Barb. 354; Hawley *v.* Cramer, 4 Cow. 717; Pendleton *v.* Fay, 2 Paige 201; Pitney *v.* Leonard, 1 Paige 461; Green *v.* Slayter, 4 Johns. Ch. 38.

North Carolina.—Collins *v.* Davis, 132 N. C. 106, 43 S. E. 579; Ijames *v.* Gaither, 93 N. C. 358; May *v.* Hanks, 62 N. C. 310; Blackwood *v.* Jones, 57 N. C. 54.

North Dakota.— Johnson *v.* Erlandson, 14 N. D. 518, 105 N. W. 722.

Oregon.— Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

on inquiry, constructive notice will be imputed to him if he designedly abstains from inquiry for the purpose of avoiding notice.[7]

2. Nature of Facts — a. In General. To charge a party with constructive notice of a fact which could have been ascertained by inquiry, the circumstances known to him must have been such as ought reasonably to have excited his suspicion and led him to inquire.[8] The general rule that constructive notice arises from facts placing on inquiry does not impute notice of every conceivable fact and circumstance however remote which might come to light by exhausting all possible means of knowledge.[9]

b. Equally as Well Referable to Different Matter. Where the circumstances relied on as sufficient to charge a party with notice may be equally as well referred to a different matter as to the one with notice of which he is sought to be charged, they will not be deemed sufficient.[10]

c. Rumors. Mere rumors of the fact in the neighborhood are not notice, rendering it obligatory upon the party to investigate them.[11]

d. Possession. Possession of movable property of a kind usually protected by title papers, which is not inconsistent with the ownership of another person having

Pennsylvania.— Hottenstein *v.* Lerch, 104 Pa. St. 454; Leonard's Appeal, 94 Pa. St. 168; Maul *v.* Rider, 59 Pa. St. 167; Hill *v.* Epley, 31 Pa. St. 331; Wilson *v.* McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Hood *v.* Fahnestock, 1 Pa. St. 470, 44 Am. Dec. 147; Jaques *v.* Weeks, 7 Watts 261; Lodge *v.* Simonton, 2 Penr. & W. 439, 23 Am. Dec. 36; *In re* Tabor St., 26 Pa. Super. Ct. 167.

Texas.— Wilson *v.* Williams, 25 Tex. 54; Wethered *v.* Boon, 17 Tex. 143; Shultz *v.* State, 13 Tex. 401; Parks *v.* Willard, 1 Tex. 350; Briscoe *v.* Bronaugh, 1 Tex. 326, 46 Am. Dec. 108.

Vermont.— Stafford *v.* Ballou, 17 Vt. 329.

United States.— Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807; Hazlehurst *v.* The Lulu, 10 Wall. 192, 19 L. ed. 906; Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934; Yancy *v.* Cothran, 32 Fed. 687; Brooke *v.* McCracken, 4 Fed. Cas. No. 1,932; Carr *v.* Hilton, 5 Fed. Cas. No. 2,437, 1 Curt. 390; Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531; Hamlin *v.* Pettibone, 11 Fed. Cas. No. 5,995, 6 Biss. 167, 10 Alb. L. J. 141; Pickert *v.* The Independence, 19 Fed. Cas. No. 11,124, 9 Ben. 395, 55 How. Pr. (N. Y.) 205; The Ploughboy, 19 Fed. Cas. No. 11,230, 1 Gall. 41; Scammon *v.* Cole, 21 Fed. Cas. No. 12,433, 1 Hask. 214.

England.— Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699, 40 Eng. Reprint 266.

See 37 Cent. Dig. tit. "Notice," § 4.

Inquiry useless.—Where a party could not have learned the facts by inquiry, he is not prejudiced because he did not inquire. Lower's Appeal, 1 Walk. (Pa.) 404.

Party's failure to make inquiry attributed to his own negligence.—Where a party having knowledge of facts sufficient to put him on inquiry neglects to make that inquiry, and thereby suffers loss, such loss must be attributed to his own negligence (Henneberry *v.* Morse, 56 Ill. 394; Clark *v.* Plumstead, 11 Ill. App. 57; Warren *v.* Swett, 31 N. H. 332); and he will not be relieved in a court of equity (Clark *v.* Plumstead, *supra*).

Proper inquiry made.—Although a party has notice of circumstances putting him upon inquiry, yet if he, with due diligence, inquires and becomes satisfied by evidence upon which a person may reasonably rely, that a fact does not exist, then he is to be regarded as acting without notice of such fact. Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267.

Rebutting presumption.— Where circumstances are brought directly home to the knowledge of the party, which would have been sufficient in themselves to put him on inquiry, and thus amount to notice, he will be entitled to rebut the presumption of notice by showing the existence of other attendant circumstances of a nature to satisfy the mind that future inquiry was unnecessary. Chadwick *v.* Clapp, 69 Ill. 119.

7. Mackey *v.* Fullerton, 7 Colo. 556, 4 Pac. 1198; Henneberry *v.* Morse, 56 Ill. 394; Wilson *v.* Miller, 16 Iowa 111; Willis *v.* Vallette, 4 Metc. (Ky.) 186; Maupin *v.* Emmons, 47 Mo. 304.

8. Baker *v.* Bliss, 39 N. Y. 70; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157. See also Meier *v.* Blume, 80 Mo. 179; and cases cited *supra*, II, A, 1. *Compare* College Park Electric Belt Line *v.* Ide, 15 Tex. Civ. App. 273, 40 S. W. 64, holding that it is not sufficient that the circumstances brought to the knowledge of a party are such as to cause a reasonably prudent man to suspect the existence of a particular fact, but they must be such as to put him on inquiry which, if diligently pursued, would lead to a discovery of the fact.

9. Johnson *v.* Erlandson, 14 N. D. 518, 105 N. W. 722.

10. Chadwick *v.* Clapp, 69 Ill. 119.

11. *Georgia.*— Jordan *v.* Pollock, 14 Ga. 145.

Maine.— Butler *v.* Stevens, 26 Me. 484.

Michigan.— Larzelere *v.* Starkweather, 38 Mich. 96.

Pennsylvania.— Maul *v.* Rider, 59 Pa. St. 167; Wilson *v.* McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Hood *v.* Fahnestock, 1 Pa. St. 470, 44 Am. Dec. 147; Jaques *v.* Weeks, 7 Watts 261; Epley *v.* Witherow, 7 Watts 163;

record title, is not *per se* sufficient to put a third party upon inquiry and thus charge him with constructive notice of the ownership of the one in possession.[12]

3. Time For Making Inquiry. A party put on inquiry by facts is to be allowed a reasonable time in which to make such inquiry before being affected with notice.[13]

B. Judicial Proceedings.[14] A party properly brought into court is chargeable with notice of all subsequent steps taken in the cause down to and including the judgment,[15] although he does not in fact appear and has no actual notice thereof.[16]

C. Acts of Authorized Agents of Government. Third parties are not chargeable with constructive notice of facts contained in public documents merely because they were the acts of authorized agents of the government.[17]

D. Publication or Posting of Notice.[18] Unless it may be a notice or advertisement published in obedience to some positive law or legal order,[19] the publication of a notice or advertisement, if not seen or read by the party, does not charge him with constructive notice of its contents;[20] and this rule applies even where the person sought to be affected by the notice is a subscriber to the newspaper in which the publication is made.[21] Constructive notice may be imputed to a party by posting a notice or advertisement in obedience to some positive law or legal order.[22]

E. Mailing of Notice. Constructive notice may be imputed to a party where notice is mailed to him in obedience to some positive law or legal order.[23]

III. Necessity of Notice.

A. In General. Whenever by statute or ordinance a duty is imposed on an individual, for the neglect of which he is subject to a penalty, notice is required

Kerns *v.* Swope, 2 Watts 75; Peebles *v.* Reading, 8 Serg. & R. 484. See also People's Bank *v.* Etting, 17 Phila. 233.

Texas.— Wethered *v.* Boon, 17 Tex. 143.

England.— Le Neve *v.* Le Neve, Ambl. 436, 27 Eng. Reprint 291, 3 Atk. 646, 26 Eng. Reprint 1172, 1 Ves. 64, 27 Eng. Reprint 893, 2 White & T. Lead. Cas. Eq. 26; Jones *v.* Smith, 1 Hare 43, 6 Jur. 8, 11 L. J. Ch. 83, 23 Eng. Ch. 43, 66 Eng. Reprint 943 [*affirmed* in 7 Jur. 431, 12 L. J. Ch. 381, 1 Phil. 244, 19 Eng. Ch. 244, 41 Eng. Reprint 624].

See 37 Cent. Dig. tit. "Notice," § 5.

12. Dize *v.* Beacham, 81 Md. 603, 32 Atl. 243, where the court, applying the principle, held that possession of a vessel by one as master is not notice to persons dealing with the vessel of a prior parol purchase by him of a one-half interest in the vessel. See, generally, Sales.

13. Carr *v.* Hoxie, 5 Fed. Cas. No. 2,438, 5 Mason 60.

14. **Doctrine of lis pendens** see Lis Pendens.

15. Butler *v.* Thompson, 2 Fla. 9; Sharpe *v.* Fowler, Litt. Sel. Cas. (Ky.) 446; Delaplaine *v.* Hitchcock, 6 Hill (N. Y.) 14; Governor *v.* Lassiter, 83 N. C. 38; Sparrow *v.* Davidson College, 77 N. C. 35; Clayton *v.* Jones, 68 N. C. 497. See also Collier *v.* Newbern Bank, 21 N. C. 328, holding that parties are chargeable with notice of all orders made in the cause without service of a copy, unless specifically directed.

After issue joined, suitors are presumed to be always in court, attending to their business either in person or by counsel, and so are bound to notice the steps taken in their cases. Kohn *v.* Wagner, 1 Rob. (La.) 275.

16. Butler *v.* Thompson, 2 Fla. 9; Delaplaine *v.* Hitchcock, 6 Hill (N. Y.) 14.

17. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621.

Presumption as to knowledge of law see Evidence, 16 Cyc. 1083.

18. **Service of process by publication** see Process.

Posting of notices in reference to particular proceedings see Chattel Mortgages; Executions; and other special titles.

19. See *infra*, V, C, 3.

20. Yocum *v.* Morice, 4 Phila. (Pa.) 106. See also King *v.* Paterson, etc., R. Co., 29 N. J. L. 82 [*affirmed* in 29 N. J. L. 504], holding that a person is not bound to know, at the peril of his legal rights, all that is in any one of the newspapers published in his vicinity, unless it may be some notice or advertisement that is published in obedience to some positive law or legal order, and which the law has made conclusive of his rights, whether he ever knows it or not.

21. Clark *v.* Ricker, 14 N. H. 44; Watkins *v* Peck, 13 N. H. 360, 40 Am. Dec. 156; Lincoln *v.* Wright, 23 Pa. St. 76, 62 Am. Dec. 316; Beltzhoover *v.* Blackstock, 3 Watts (Pa.) 20, 27 Am. Dec. 330; Rowley *v.* Horne, 3 Bing. 2, 3 L. J. C. P. O. S. 118, 10 Moore C. P. 247, 28 Rev. Rep. 551, 11 E. C. L. 12.

22. See *infra*, V, C, 5.

23. See *infra*, V, C, 4.

before liability arises unless the contrary is expressly provided by law,[24] and proceedings have been adjudged void for want of notice, even where none was expressly directed by the statute under which they were had.[25] If it be impossible to give a notice prescribed by law such notice has been held to be unnecessary.[26]

B. Facts Within Knowledge of Party. Where a fact as to which notice might otherwise be required is one which the party has means of ascertaining from a definite known source,[27] or which is equally known to both parties,[28] no notice thereof need be given. But a party may be required to give notice where the fact is to be considered as lying more properly or exclusively within his knowledge than of the opposite party.[29]

C. Waiver of. A waiver by the party for whose benefit or protection notice should be given is equivalent to notice, and dispenses with its necessity.[30]

IV. REQUISITES OF FORMAL NOTICE.

A. In General. The general rule in respect to notices is that mere informalities do not vitiate them so long as they do not mislead, and give the necessary information to the proper parties.[31]

B. Necessity and Sufficiency of Writing. Where a notice is required by contract, and nothing is said as to the manner of notification, it may be by parol;[32] but wherever notice is required or authorized by statute, written notice is understood.[33] A statute requiring a notice to be in writing, but not requiring it to be

Presumption of receipt of mail matter see EVIDENCE, 16 Cyc. 1065 *et seq.*

24. Brewster *v.* Newark, 11 N. J. Eq. 114.

25. Corliss *v.* Corliss, 8 Vt. 373; *Ex p.* Robinson, 1 D. Chipm. (Vt.) 357. See also Chase *v.* Hathaway, 14 Mass. 222.

26. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Wells *v.* Burbank, 17 N. H. 393, holding that when a notice of sale for taxes is required to be posted in a public place where the land is situated, such posting is not necessary if it appears that the place where the land is situated is absolutely uninhabited.

Actual notice.— A statutory requirement that notice be given of a proceeding, without any express provision as to the form of the notice, is satisfied only by the giving of actual notice. Moore *v.* Given, 39 Ohio St. 661.

27. *Connecticut.*—Hammond *v.* Gilmore, 14 Conn. 479.

Kentucky.— Muldrow *v.* McCleland, 1 Litt. 1; Keys *v.* Powell, 2 A. K. Marsh. 253.

New York.— Woolner *v.* Hill, 47 N. Y. Super. Ct. 470.

Vermont.— Lamphere *v.* Cowen, 42 Vt. 175.

England.—Vyse *v.* Wakefield, 8 Dowl. P. C 377, 4 Jur. 509, 6 M. & W. 442; Smith *v.* Goff, 2 Salk. 457.

See 37 Cent. Dig. tit. "Notice," § 14.

28. *Connecticut.*—Hammond *v.* Gilmore, 14 Conn. 479; Spalding *v.* Spalding, 2 Root 271; Bulkley *v.* Elderkin, Kirby 188.

Massachusetts.— Hatch *v.* White, 22 Pick. 518.

New York.— Humphreys *v.* Gardner, 11 Johns. 61.

Ohio.— Bush *v.* Critchfield, 4 Ohio 103.

England.— Hodsden *v.* Harridge, 2 Saund. 61*h*, note 4; Rex *v.* Hollond, 5 T. R. 607, 2 Rev. Rep. 678.

See 37 Cent. Dig. tit. "Notice," § 14.

29. *Connecticut.*— Ladd *v.* Abel, 18 Conn. 513; Hammond *v.* Gilmore, 14 Conn. 479; Craft *v.* Isham, 13 Conn. 28.

Massachusetts.— Hatch *v.* White, 22 Pick. 518; Farwell *v.* Smith, 12 Pick. 83.

New Hampshire.— Dix *v.* Flanders, 1 N. H. 246.

New York.— Woolner *v.* Hill, 47 N. Y. Super. Ct. 470.

Vermont.— Lamphere *v.* Cowen, 42 Vt. 175.

England.— Vyse *v.* Wakefield, 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 442.

See 37 Cent. Dig. tit. "Notice," § 14.

30. Smyser *v.* Fair, 73 Kan. 773, 85 Pac. 408; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; People *v.* Albright, 23 How. Pr. (N. Y.) 306; Wood *v.* Stewart, 7 Vt. 149. See also Bryant *v.* Goodnow, 5 Pick. (Mass.) 228.

31. La Crosse *v.* Melrose, 22 Wis. 459; Black *v.* Chicago, etc., R. Co., 18 Wis. 208. See also Falker *v.* New York, etc., R. Co., 100 N. Y. 86, 2 N. E. 628, holding that a mere inaccuracy in the notice of entry of judgment, which violates no rule of practice and is in itself immaterial, does not vitiate it.

32. McEwen *v.* Montgomery County Mut. Ins. Soc., 5 Hill (N. Y.) 101.

33. Foley *v.* Mayer, 1 N. Y. App. Div. 586, 37 N. Y. Suppl. 465; Jenkins *v.* Wild, 14 Wend. (N. Y.) 539; Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107; St. Michael's Church *v.* Philadelphia County, Brightly (Pa.) 121. *Compare* Rex *v.* Surry, 5 B. & Ald. 539, 7 E. C. L. 295, holding that where a statute requires reasonable notice to be given, it does not necessarily mean that

served by any designated person, is satisfied by notice served by telegraph.[34] A notice by telephone is verbal and therefore insufficient under a statute requiring all notices to be in writing.[35]

C. Length of Time — 1. IN GENERAL. Where a statute requires notice to be given, but does not specify the length of time, it will be construed to mean a reasonable time.[36]

2. WAIVER REGARDING. Merely acknowledging service of a written notice is not a waiver of the objection that it was not served in time;[37] but the rule is otherwise where the acknowledgment admits due service,[38] or due service on a certain day.[39]

D. Authority to Give. Notice required by law must be given or caused to be given by the person authorized so to do, and by none other.[40] However, where the notice is required to emanate from a given person, the fact that others joined with him in giving such notice does not vitiate it.[41]

E. Signature. Where the statute directs notice to be given in writing, a signature to the notice is essential, except perhaps where it is delivered in person by the one who should have signed it.[42]

F. Indorsement of Post-Office Address. A rule of court that all papers served must be indorsed with the name and address of the attorney does not require the address to be stated more than once upon a notice.[43] And even the failure to indorse the name and address on a notice at all is a mere irregularity, and may be waived by the attorney receiving it without objection.[44]

V. SERVICE.[45]

A. Persons to Be Served — 1. IN GENERAL.[46] Whenever notice is necessary, it must appear that it was served on the proper person.[47]

2. ATTORNEY OF PARTY TO SUIT. The general rule is that all notices in pending

the notice shall be in writing, but only that as to the time or number of days it shall be reasonable.

Notice required by statute in legal proceedings.— The rule is well settled that where a notice is required or authorized by statute in any legal proceedings, the notice must be in writing. Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407, 35 How. Pr. 193; McEwen *v.* Montgomery County Mut. Ins. Co., 5 Hill (N. Y.) 101; *In re* Cooper, 15 Johns. (N. Y.) 533. See also Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107. *Compare* Miner *v.* Clark, 15 Wend. (N. Y.) 425.

Notice to be filed.—Where the law requires a notice to be filed, the implication is that it shall be in writing, and oral notice is insufficient. Norton *v.* New York, 16 Misc. (N. Y.) 303, 38 N. Y. Suppl. 90; State *v.* Elba, 34 Wis. 169.

34. Western Union Tel. Co. *v.* Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 33.

35. *Ex p.* Apeler, 35 S. C. 417, 14 S. E. 931.

36. Burden *v.* Stein, 25 Ala. 455; People *v.* Frost, 32 Ill. App. 242.

Where the statute requires reasonable notice to be given by one party to a proceeding to the other, ten days generally is sufficient. Com. *v.* Fisher, 1 Penr. & W. (Pa.) 462.

Computation of time.— Statutes regulating the general subject of notice are always to be construed, as respects the computation of time, most liberally in favor of the party who is to be affected by the notice. Hill *v.* Faison, 27 Tex. 428.

37. Shearvouse *v.* Morgan, 111 Ga. 858, 36 S. E. 927.

38. Struver *v.* Ocean Ins. Co., 9 Abb. Pr. (N. Y.) 23; Talman *v.* Barnes, 12 Wend. (N. Y.) 227.

39. Towdy *v.* Ellis, 22 Cal. 650.

40. Dumesnil *v.* Louisville, 4 Ky. L. Rep. 14.

41. Crawford *v.* State Bank, 5 Ala. 679.

42. Eaton *v.* Manitowoc County, 42 Wis. 317.

Under a rule of court requiring notices in actions to be signed by the attorney giving them, a paper served by an attorney in a suit, and which is not signed by him, is not effective as a notice, although it purports to be such. Demelt *v.* Leonard, 19 How. Pr. (N. Y.) 182; Yorks *v.* Peck, 17 How. Pr. (N. Y.) 192.

43. Falker *v.* New York, etc., R. Co., 100 N. Y. 86, 2 N. E. 628.

44. Evans *v.* Backer, 101 N. Y. 289, 4 N. E. 516, where the court takes the view that the irregularity may be waived by the attorney, because the rule is intended for his benefit, and not that of a party.

45. Service of process in general see PROCESS.

46. Effect of notice as to persons jointly liable see *infra*, VI, B, 1.

47. Watson *v.* Walker, 23 N. H. 471.

judicial proceedings, wherein the party has an attorney, must be given to that attorney or his agent, and not to the party himself.[48] The service of a notice on an attorney after the death of a party is invalid.[49] Where the attorney for a party to a suit has died and due notice has been given to such party to appoint a new attorney, which he neglects to do, notice of any proceeding in the cause is then properly given to the party personally.[50]

3. Persons Engaged in Joint Act. If notice is required to be given to persons engaged in a joint act it seems that service upon one of such persons is sufficient.[51]

B. Timeliness.[52] When notice is deemed to be essentially necessary, it must appear that it was given in due time.[53]

C. Mode of Service — 1. In General. A statute directing the manner of serving a notice must be strictly complied with,[54] especially where the notice is to form the basis of a suit.[55]

2. Personal Service[56] **— a. In General.** Where a statute directing notice to be given is silent as to the manner of giving it, personal service is necessary.[57]

b. Delivery of Original or Copy. And where the statute requires that a notice be given in writing it must be served by delivery of the original,[58] or a true copy.[59]

c. Proof of.[60] A statute requiring the personal service of a notice to be proved in a particular mode must be strictly pursued.[61]

3. By Publication[62] **— a. In General.** Where a statute directs the publication of a notice having reference to personal rights or to property, the requirements of the statute are to be strictly pursued.[63]

48. Dunkin *v.* Calbraith, 1 Browne (Pa.) 15; Lee *v.* Bradford, 1 Barn. 219.

Under a practice act, requiring all notices to be served on the attorney where the party has appeared by attorney, service of notice on such party personally is insufficient. Griffith *v.* Gruner, 47 Cal. 644.

Representation of client by attorney in general see Attorney and Client.

49. Cisna *v.* Beach, 15 Ohio 300, 45 Am. Rep. 576.

50. Hoffman *v.* Rowley, 13 Abb. Pr. (N. Y.) 399.

51. Hepburn *v.* McDowell, 17 Serg. & R. (Pa.) 383, 17 Am. Dec. 677.

52. Service of process see Process.

Notices in particular proceedings see special titles relating thereto.

53. Watson *v.* Walker, 23 N. H. 471.

54. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572; Smith *v.* Smith, 4 Greene (Iowa) 266; Abbot *v.* Banfield, 43 N. H. 152.

Waiver of formal service by attorney see Attorney and Client, 4 Cyc. 940 text and note 39.

55. O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572.

Service of process see Process.

56. Personal service of process see Process.

57. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Ellis *v.* Carpenter, 89 Iowa 521, 56 N. W. 678; Meyer *v.* Christian, 64 Mo. App. 203; Sedalia *v.* Gallie, 49 Mo. App. 392; Ryan *v.* Kelly, 9 Mo. App. 396; Corneli *v.* Partridge, 3 Mo. App. 575; People *v.* Lockport, etc., R. Co., 13 Hun (N. Y.) 211; McDermott *v.* Metropolitan Police Dist., 25 Barb. (N. Y.) 635; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393.

What constitutes personal service.— Personal service is properly service directly upon the person to be served. Dalton *v.* St. Louis, etc., R. Co., 113 Mo. App. 71, 87 S. W. 610; Ryan *v.* Kelly, 9 Mo. App. 396. A person chargeable with the duty of giving a notice does not perform that duty by handing the party entitled to the notice a paper containing such notice, especially if the person to whom it is handed is directed to use it in a particular way and for a particular purpose which does not require him to examine or read it. U. S. *v.* Pinover, 3 Fed. 305.

58. Deimel *v.* Obert, 20 Ill. App. 557.

59. Williams *v.* Brummel, 4 Ark. 129 (holding further, that a notice cannot be served by reading); Deimel *v.* Obert, 20 Ill. App. 567.

60. Proof of personal service of process see Process.

61. Newby *v.* Perkins, 1 Dana (Ky.) 440, 25 Am. Dec. 160, holding further that where a statute expressly requires a service to be proved by affidavit, a sheriff's return of "executed" will not suffice.

62. Service of process in general see Process.

Publication of notice with reference to particular proceedings see special titles relating to such proceedings.

63. Magoffin *v.* Mandaville, 28 Miss. 354; Abbot *v.* Banfield, 43 N. H. 152.

Thus a publication for part of the time in one newspaper and part of the time in another does not satisfy a requirement of publication for a given period. Townsend *v.* Tallant, 32 Cal. 45, 95 Am. Dec. 617; Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162, holding further that the fact that both

b. Character of Newspapers[64]—(i) *In General.* Where by statute[65] or an order of the court[66] an advertisement is required to be published in a given newspaper, publication in a newspaper printed at the same place and bearing substantially the same name will be deemed sufficient, in the absence of evidence tending to show that a newspaper is published at that place bearing the precise name of the one designated. And so long as the identity of the newspaper remains unchanged, a change of name between the time of designation and the time of publication does not render the publication invalid.[67]

(ii) *Secularity.* A newspaper published periodically and in general circulation, and its contents, although devoted largely to legal matters,[68] or to commerce and finance,[69] embracing things of a general and secular character, is within the meaning of the statute requiring an advertisement to be published in a secular newspaper of general circulation. And when a newspaper is issued and circulated on a secular day, the insertion therein of an advertisement required to be published in a secular newspaper suffices, although the name of the newspaper employed would indicate that it is a Sunday paper.[70]

(iii) *Language.* While the rule supported by the weight of authority is that where the statute is silent as to the language in which either advertisement or newspaper is to be published, the advertisement must be printed in English in a newspaper printed in the same tongue,[71] it has been held in at least one jurisdiction that publication in a German newspaper, but in the English language, is sufficient.[72]

(iv) *Circulation.* In order to satisfy the requirement that an advertisement shall be published in the newspaper having the largest number of *bona fide* yearly subscribers, it is not necessary that a subscriber shall, in order to be counted, have taken the paper for a year, so long as his subscription is *bona fide* and for a year.[73] Whenever an advertisement is required by statute to be published in a newspaper having the largest daily circulation, and such advertisement relates to the affairs of the municipality, the entire circulation of the newspaper,

newspapers are published by the same publishing company does not cure the defect.

64. Selection and designation of newspaper see NEWSPAPERS.

65. Franklin Dist. Tp. *v.* Wiggins, 110 Iowa 702, 80 N. W. 432.

66. Soule *v.* Chase, 1 Abb. Pr. N. S. (N. Y.) 48; Melms *v.* Pfister, 59 Wis. 186, 18 N. W. 255.

67. Sage *v.* Central R. Co., 99 U. S. 334, 25 L. ed. 394.

68. Pentzel *v.* Squire, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373; Kerr *v.* Hitt, 75 Ill. 51; Railton *v.* Lauder, 26 Ill. App. 655 [*affirmed* in 126 Ill. 219, 18 N. E. 555]; Lynch *v.* Durfee, 101 Mich. 171, 59 N. W. 409, 45 Am. St. Rep. 404, 24 L. R. A. 793; Hanscom *v.* Meyer, 60 Nebr. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409. See also Benkendorf *v.* Vincenz, 52 Mo. 441.

69. Maass *v.* Hess, 140 Ill. 576, 29 N. E. 887.

70. U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

71. *Michigan.*— Turner *v.* Hutchinson, 113 Mich. 245, 71 N. W. 514; Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317.

Missouri.— Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401.

New Jersey.— Wilson *v.* Trenton, 56 N. J. L. 469, 23 Atl. 183 (publication of proceedings of municipal authority); State *v.* Jersey City, 54 N. J. L. 437, 24 Atl. 571; North Baptist Church *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

Ohio.— Cincinnati *v.* Bickett, 26 Ohio St. 49.

Pennsylvania.— *In re* Upper Hanover Road, 44 Pa. St. 277; Kratz' Appeal, 2 Pittsb. 452; Tyler *v.* Bowen, 1 Pittsb. 225.

Publication in both English and German papers.— The provision of a statute that notice of the sittings of a city council, when acting as a board of equalization, shall be published in three daily papers for a specified period, is satisfied by publication in two daily papers in the English language, and one paper in the German language, when these are all the daily papers published in the city. John *v.* Connell, 71 Nebr. 10, 98 N. W. 457.

72. Richardson *v.* Tobin, 45 Cal. 30.

Discretion vested by statute. — Where a statute provides for the publication of a summons in the newspaper most likely to give notice to the person to be served, the statute vests in the court the discretion to direct publication in a German newspaper, but in the English language. Wakeley *v.* Nicholas, 16 Wis. 588; Kellogg *v.* Oshkosh, 14 Wis. 623.

73. Young *v.* Rann, 111 Iowa 253, 82 N. W. 785.

within and without the municipality limits, is that which is contemplated by the statute.[74]

(v) *Frequency of Issue.* The requirement that an advertisement shall be published in a daily newspaper is satisfied by publication in a newspaper issued every day in the week except one, whether the omitted day be Sunday or one of the week days.[75]

(vi) *Place of Publication.* The place of publication of a newspaper is that indicated on its face, and such paper is printed in the place so designated, within the meaning of a statute requiring the publication of a certain advertisement, and it matters not that part[76] or even all[77] of its issue is printed elsewhere, or that part of its issue is mailed elsewhere.[78] The whole of a city, village, or township in which a newspaper is published is its place of publication within the meaning of a statute requiring an advertisement to be published in a newspaper.[79]

(vii) *Supplement.* The publication of an advertisement in the supplement to a newspaper which in all respects conforms to the definition of a newspaper satisfies the statute requiring such advertisement to be published in a newspaper.[80]

c. Frequency of Publication. Where one week's publication of an advertisement is required, one insertion in a weekly newspaper is sufficient;[81] but where one week's advertisement in a daily newspaper is directed, an insertion in each issue thereof for a week is necessary.[82]

d. Period of Publication — (i) *No Period Prescribed.* Where an advertisement of sale is ordered to be made in a daily newspaper, the presumption is that the advertisement is intended to be published until the day of sale in each edition of the paper.[83]

(ii) *Given Number of Successive Weeks.* As to whether a requirement that a legal notice be published for a given number of successive weeks is satisfied by merely publishing it in that number of successive weeks, there is a conflict of authority, the affirmative view prevailing in some jurisdictions,[84] while in other jurisdictions it is held that the full required term must intervene between the first

74. People *v.* Brennan, 39 Barb. (N. Y.) 651, municipal advertisements.

75. Richardson *v.* Tobin, 45 Cal. 30.

76. Ricketts *v.* Hyde Park, 85 Ill. 110. See also State *v.* Hoboken, 44 N. J. L. 131 [*affirmed* in 45 N. J. L. 185], holding that a newspaper must be deemed to be both printed and published in the place indicated on its face, notwithstanding the fact that all the press work is done elsewhere.

77. Brown *v.* West Seattle, 43 Wash. 26, 85 Pac. 854; Hart *v.* Smith, 44 Wis. 213.

78. Ricketts *v.* Hyde Park, 85 Ill. 110.

79. Greenlee *v.* Marks, 62 Ind. 418 (holding further that the ward in which the office of a newspaper is situated is not its place of publication within the meaning of a statute requiring a notice to be published in a particular locality); Hinchman *v.* Barns, 21 Mich. 556 (holding further, that in determining the newspaper "nearest to the real estate" for publication of a notice of a judicial sale, its local habitation is not to be considered the particular building in which it is published).

Newspaper nearest realty.—Where the several newspapers in a county are all printed in the same town or city, a notice of a sheriff's sale of realty by publication in a newspaper may be given by him in any one of such newspapers, regardless of the fact that the building in which it is printed is situated at a greater distance from such realty than the building in which another newspaper is printed. Rutenfranz *v.* Stacer, 58 Ind. 467. See also Hinchman *v.* Barns, 21 Mich. 556.

80. Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. 392.

81. State *v.* Hardy, 7 Nebr. 377. See also Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619.

82. Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619. See also Perine *v.* Lewis, 128 Cal. 236, 60 Pac. 422, 772.

Five successive days. — A requirement of publication for five successive days is not satisfied by publication "for five times." Toberg *v.* Chicago, 164 Ill. 572, 45 N. E. 1010.

83. Allen *v.* Kerr, 13 Lea (Tenn.) 256.

84. *Illinois.*— Ricketts *v.* Hyde Park, 85 Ill. 110 (holding that a publication of a legal notice for "two successive weeks" is fully complied with by its publication in a newspaper on the seventh and fourteenth days of the same month); Madden *v.* Cooper, 47 Ill. 359. See also Fry *v.* Bidwell, 74 Ill. 381; Garrett *v.* Moss, 20 Ill. 549.

Maine.— Swett *v.* Sprague, 55 Me. 190.

Massachusetts.— Bachelor *v.* Bachelor, 1 Mass. 256, holding that an order to give notice by publishing three weeks successively in a newspaper is complied with by publishing in such paper three successive weeks, although there be not an interval of a week

publication of a legal notice and the day appointed for the performance of the act designated in the notice.[85]

(III) *How Computed.* In the absence of statute, the rule for computing time for the publication of an advertisement is not to reckon the first and last days inclusive, but to include one and exclude the other.[86]

e. Illegibility. The fact that a portion of an advertisement was blurred, or otherwise illegible, does not operate to vitiate the publication, where due proof of publication as required by law is made.[87]

f. Naming a Party to Whom Notice Directed. The general rule is that when notice is required by publication, it must be directed to the person, by name, who is required to be notified.[88]

g. Proof of Publication. If the affidavit or proof of publication shows that the statute requiring the publication of an advertisement was substantially complied with, such affidavit or proof is sufficient.[89] But when it is sought to conclude a party by constructive notice by publication, a strict compliance with the statute is required, and every act necessary to the exercise of a court's jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by statute.[90] The certificate of the publication of an advertisement required by law to

between the first and second, or the second and third, publications.

New Hampshire.— Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347.

New York.— Olcott *v.* Robinson, 21 N. Y. 150, 78 Am. Dec. 126 [*overruling* Anonymous, 1 Wend. 90]. See also Sheldon *v.* Wright, 7 Barb. 39 [*affirmed* in 5 N. Y. 497].

Pennsylvania.— Stoever's Appeal, 3 Watts & S. 154.

See 37 Cent. Dig. tit. "Notice," § 29.

85. *California.*— Savings, etc., Soc. *v.* Thompson, 32 Cal. 347.

Indiana.— Loughridge *v.* Huntington, 56 Ind. 253.

Mississippi.— Mitchell *v.* Woodson, 37 Miss. 567.

Nevada.— State *v.* Yellow Jacket Silver Min. Co., 5 Nev. 415.

United States.— Early *v.* Homans, 16 How. 610, 14 L. ed. 1079.

See 37 Cent. Dig. tit. "Notice," § 29.

86. Harper *v.* Ely, 56 Ill. 179; Mitchell *v.* Woodson, 37 Miss. 567; Hall *v.* Cassidy, 25 Miss. 48; State *v.* Yellow Jacket Silver Min. Co., 5 Nev. 415; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260. *Contra*, Early *v.* Homans, 16 How. (U. S.) 610, 14 L. ed. 1079.

Computation of time generally see TIME.

Sundays included for enumeration, but not for publication.—Where one section of an act provides that a certain legal notice shall be published for ten days in succession, and another section that all notices under this act shall be published daily, Sundays excepted, these two sections must be read together, and mean that Sunday shall be included for enumeration, but not for publication. Taylor *v.* Palmer, 31 Cal. 240.

87. Thompson *v.* Higginbotham, 18 Kan. 42.

88. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

However, under a statute providing in general terms for notice by publication to non-resident landowners, a notice addressed to the "non-resident owners of the following lands," describing the lands, without addressing the owners by name, is sufficient. Miller *v.* Graham, 17 Ohio St. 1.

89. Prince George County Com'rs *v.* Clarke, 36 Md. 206.

When affidavit or proof insufficient.— An affidavit not made by the person specified in the statute requiring the publication of the advertisement (Kearney *v.* Chicago, 163 Ill. 293, 45 N. E. 224; Ullman *v.* Lion, 8 Minn. 381, 83 Am. Dec. 783), or not stating the venue (Ullman *v.* Lion, *supra*), or not stating that the notice was published for the successive weeks required by the statute (Ullman *v.* Lion, *supra*) is insufficient.

When affidavit or proof sufficient.— Under a statute which declares that publication of legal notices in newspapers may be proved by the certificate of the publisher stating the number of times the same has been published, and giving the dates of the first and last papers containing the notice, a certificate stating that the notice "has been published five successive days in the Chicago Mail, a daily newspaper," sufficiently states the number of times the notice was published. McChesney *v.* People, 145 Ill. 614, 34 N. E. 431. Where notice was required by statute to be given by an officer in a public newspaper, the omission in the officer's return of the word "public" is not fatal, a newspaper being necessarily public. Bailey *v.* Myrick, 50 Me. 171.

90. Gibney *v.* Crawford, 51 Ark. 34, 9 S. W. 309; Payne *v.* Young, 8 N. Y. 158; Staples *v.* Fairchild, 3 N. Y. 41; Hill *v.* Hoover, 5 Wis. 354; Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 446 (holding further that the affidavit must show that the newspaper was one authorized to publish the notice and that affiant sustains the relation to the paper required by the statute); Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638.

be published is inadmissible as evidence of the publication, where such certificate was given after the publisher had ceased to be such.[91]

4. By Mail — a. In General. A party relying upon the service of a notice by mail must show a strict compliance with the requirements of the statute.[92]

b. Deposit in Street Letter-Box. Depositing a duly addressed and post-paid letter, containing a notice, in a street letter-box established by the post-office department, is equivalent to depositing it in the post-office.[93]

c. Delivery to Letter-Carrier. A properly addressed and post-paid letter containing a notice is duly mailed when delivered to a letter-carrier on his route.[94]

d. Payment of Postage. Service of a notice by mail is ineffectual, unless the entire postage legally chargeable be paid.[95]

e. Proof of. It is a general rule that when service of a notice is sought to be made by mail it should appear that the conditions on which the validity of such service depends had existence; otherwise the evidence is insufficient to establish the fact of service.[96]

5. By Posting — a. In General. The term "public place" within the meaning of a statute requiring the posting of a notice therein is relative.[97] Thus it has

Parol evidence.— When the jurisdiction of the court depends upon the publication of a notice in the mode prescribed, an omission in the proof of publication cannot be supplied by parol. Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628; Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 446; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638.

Person making certificate.— Under a statute providing that when any notice shall be required by law to be published in any newspaper, and no other mode of proving the same is provided, a certificate of the publisher, by himself or his authorized agent, shall be sufficient evidence of publication, a certificate executed in the name of the corporation publishing the newspaper by one who was duly authorized to do so by the board of directors, and who signed the same as the authorized agent of the corporation, and attached the corporate seal thereto, is sufficient, although it was not countersigned by the secretary. Pentzel *v.* Squire, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373.

91. Smith *v.* Chicago, etc., R. Co., 67 Ill. 191, holding further, however, that in such a case the publisher can verify the fact of publication by his testimony as a witness.

92. Reed *v.* Allison, 61 Cal. 461; Moore *v.* Besse, 35 Cal. 184; People *v.* Alameda Turnpike Road Co., 30 Cal. 182; Smith *v.* Smith, 4 Greene (Iowa) 266.

93. Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994; Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; Greenwich Bank *v.* De Groot, 7 Hun (N. Y.) 210.

Depositing in private letter-box, however, is not a deposit in the post-office. Townsend *v.* Auld, 10 Misc. (N. Y.) 343, 31 N. Y. Suppl. 29.

94. Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 55 How. Pr. 156; Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737.

95. Woods *v.* Hartshorn, 2 How. Pr. (N. Y.) 71; Bross *v.* Nicholson, 1 How. Pr. (N. Y.) 158; Anonymous, 1 Hill (N. Y.) 217.

96. Clark *v.* Adams, 33 Mich. 159.

Regular communication by mail.—An affidavit of service of a notice by mail must state that there is a regular communication by mail between the place of residence of the person making the service and the residence of the person on whom service is to be made, when such fact is a statutory requisite. People *v.* Alameda Turnpike Road Co., 30 Cal. 182.

Failure to show proper direction of notice or payment of postage.— It has been held under a statute forbidding suit without notice, but declaring that such notice may be served by depositing it in the post-office directed to defendant at his place of residence and paying full postage thereon, that an offer to prove that plaintiffs on the day named caused to be mailed to defendant a notice in words and figures following, is not an offer to show such service by mail, in that it does not include a proposal to show that the notice was directed to defendant at his place of residence or that full postage was paid, and such defect in the proof of service is fatal. Clark *v.* Adams, 33 Mich. 159.

Return to sender. — Where, besides the proof of mailing of a notice to a person, it is shown that he returned it by mail to the sender, it will be deemed sufficient to show that such person received it. Missouri Pac. R. Co. *v.* Kuthman, 2 Tex. App. Civ. Cas. § 463.

Action to recover penalty.— The rule that if a letter is sent by the post it is presumed from the known course in that department of public service that it reached its destination at the regular time and was received by the person to whom it was addressed, if living at the place and usually receiving letters there, is applicable even in an action to recover a penalty where the right of action is dependent upon giving notice of a fact. Missouri Pac. R. Co. *v.* Kuthman, 2 Tex. App. Civ. Cas. § 463.

97. Cahoon *v.* Coe, 57 N. H. 556.

A shoemaker's shop is not, as a matter of law, a public place, where it appears that

been held that, in the absence of any place more public, a dwelling-house in a sparsely inhabited community must be deemed to be a public place for the posting of a notice.[98] But there are places, such as houses of worship,[99] inns,[1] and post-offices,[2] which will be *prima facie* taken to be public places for the posting of a notice, so that the party claiming otherwise must show the grounds of his objection.

b. Proof of. Where a notice is required to be posted in a conspicuous public place, it is not sufficient to prove that it was posted in a public place.[3] But when a statute requires an affidavit to show that the notice was posted in a public place, it is not necessary to specify the place, if the affidavit states that the notice was posted and that the place was conspicuous.[4] Testimony of a witness that the certificate of the posting of a notice is in his handwriting, although he does not recollect the fact of posting, is sufficient proof of such posting.[5]

VI. CONSTRUCTION AND EFFECT.

A. Construction — 1. In General. If there is any ambiguity in the terms of a notice, rendering its meaning doubtful, the doubt must be resolved against the party giving the notice.[6]

2. Notice Pursuant to Terms of Contract. A notice given under a contract must be construed according to the intention of the contract.[7]

B. Effect — 1. As to Persons Jointly Liable. Where other special notice is not made necessary by statute or by contract, a notice given to one of two parties jointly liable is binding upon both.[8]

2. Time of Making. Although a notice bears an earlier date than that of its publication, yet it becomes effective as a notice only from the latter date.[9] Where a party is entitled to notice to perform his contract, and has not stipulated or consented to have it sent by mail, a notice so served does not take effect until it is actually received.[10]

VII. PLEADING, EVIDENCE, AND QUESTIONS FOR COURT AND JURY.

A. Pleading[11] — 1. Necessity of Alleging Notice. The general rule with respect to the necessity of alleging notice is that when the matter alleged in the pleading lies peculiarly within the knowledge of the party pleading it, notice thereof should be averred.[12] But it is held that notice need not be alleged where

there are other places in the community that are more public. Tidd *v.* Smith, 3 N. H. 178.

98. Cahoon *v.* Coe, 57 N. H. 556.

99. Scammon *v.* Scammon, 28 N. H. 419; Tidd *v.* Smith, 3 N. H. 178.

1. Hoitt *v.* Burnham, 61 N. H. 620.

2. Hoitt *v.* Burnham, 61 N. H. 620.

3. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, 77 Am. Dec. 236; Bearce *v.* Fossett, 34 Me. 575.

4. *In re* Albany St., 6 Abb. Pr. (N. Y.) 273.

5. Alvord *v.* Collin, 20 Pick. (Mass.) 418.

6. Carpentier *v.* Thurston, 30 Cal. 123.

7. Green *v.* Wilson, 21 N. J. Eq. 211, holding further that where the notice is in terms to revoke a contract, but its evident object is to revoke only an authority or license thereunder, the authority or license only will be regarded as revoked by the notice.

8. Holbrook *v.* Holbrook, 15 Me. 9; Knight *v.* Fifield, 7 Cush. (Mass.) 263; Morse *v.* Aldrich, 1 Metc. (Mass.) 544; Ellis *v.* Lull, 45 N. H. 419; Watson *v.* Walker, 23 N. H. 471.

9. Riche *v.* Bar Harbor Water Co., 75 Me. 91.

10. Burhans *v.* Corey, 17 Mich. 282.

11. Pleading generally see PLEADING.

12. *Alabama.*— Huff *v.* Campbell, 1 Stew. 543.

Connecticut.— Hammond *v.* Gilmore, 14 Conn. 479.

Kentucky.— Keys *v.* Powell, 2 A. K. Marsh. 253.

Massachusetts.— Hobart *v.* Hilliard, 11 Pick. 143.

New Hampshire.— Watson *v.* Walker, 23 N. H. 471.

New York.— Cole *v.* Jessup, 2 Barb. 309.

Texas.— See Cooper *v.* Loughlin, 75 Tex. 524, 13 S. W. 37, holding that a party defendant cannot be held to be affected with notice, although there is evidence from which it may be inferred, where there are no corresponding allegations in the pleadings.

See 37 Cent. Dig. tit. "Notice," § 37.

the opposite party has means of ascertaining the fact,[13] or where it lies as much within the knowledge of one party as of the other.[14]

2. Sufficiency of Averments. Where notice is by law necessary, a general averment of notice is not sufficient, but the notice must be particularly set forth that the court may judge of its sufficiency.[15] Notice must also be so alleged as to make it clearly appear that it was given in due time and to the proper person.[16]

3. Aider by Verdict. In an action where the right of plaintiff to recover depends upon notice, the want of averment of notice in the declaration is cured by a verdict.[17]

4. Issues and Proof — a. In General. When the allegations of the complaint clearly indicate that plaintiff relies on constructive notice, no issue as to actual notice is made.[18]

b. Variance. Evidence tending to show either actual or constructive notice is admissible under a general allegation of notice,[19] and such an allegation is sustained by proof of either;[20] but evidence of actual notice is inadmissible under a plea of constructive notice.[21] An averment of due notice is not sustained by evidence of facts excusing the notice,[22] although an allegation of actual notice is supported by proof of waiver of notice, since the latter is equivalent to the former.[23]

B. Evidence. The rules governing evidence in civil actions generally apply in actions involving the question of notice, actual or constructive.[24]

13. Hammond *v.* Gilmore, 14 Conn. 479; Peck *v.* McMurty, 2 A. K. Marsh. (Ky.) 358; Keys *v.* Powell, 2 A. K. Marsh. (Ky.) 253.

14. *Alabama.*— Huff *v.* Campbell, 1 Stew. 543.

California.— People *v.* Edwards, 9 Cal. 286.

Connecticut.— Hammond *v.* Gilmore, 14 Conn. 479; Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119; Spalding *v.* Spalding, 2 Root 271.

Kentucky.— Peck *v.* McMurtry, 2 A. K. Marsh. 358.

Massachusetts.— Hobart *v.* Hilliard, 11 Pick. 143; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

New Hampshire.— Watson *v.* Walker, 23 N. H. 471.

Ohio.— Bush *v.* Critchfield, 4 Ohio 103.

England.— Hodsden *v.* Harridge, 2 Saund. 61*h*, note 4.

See 37 Cent. Dig. tit. "Notice," § 37.

Act to be done to or by a third person.— If the obligation of defendant depends on the performance of an act by plaintiff to a third person, or by a third person to plaintiff, plaintiff's right of action is complete whenever the act is done or the injury sustained, and it is unnecessary to aver notice to defendant of such act or injury, it not being regarded as lying more properly within the knowledge of plaintiff than of defendant. Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Hodsden *v.* Harridge, 2 Saund. 61*h* note 4; Cutler *v.* Southern, 1 Saund. 116. See also Hammond *v.* Gilmore, 14 Conn. 479; Dix *v.* Flanders, 1 N. H. 246.

15. Rapelye *v.* Bailey, 3 Conn. 438, 8 Am. Dec. 199; Wallis *v.* Scott, Str. 88.

Allegations in the alternative.—Where a petition, in an action for injuries to a pedestrian by defect in a city sidewalk, alleged that the condition of the walk and the defects therein were known to defendant, or by the exercise of ordinary care it ought to have had such knowledge, in time to have caused the walk to be repaired before the injury occurred, this was not objectionable as an allegation of notice because it was stated in the alternative. Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545.

16. Lawson *v.* Townes, 2 Ala. 373.

17. Colt *v.* Root, 17 Mass. 229.

18. Barrett *v.* Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. Rep. 238.

19. Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

20. Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

21. King *v.* Howell, 94 Iowa 208, 62 N. W. 738; Barrett *v.* Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. Rep. 238.

22. Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665.

23. Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436.

Waiver of notice as equivalent to notice see *supra*, III, C.

24. See, generally, Evidence.

Burden of proof.— The burden of proving notice rests with the party asserting its existence. Bartlett *v.* Varner, 56 Ala. 580; Carroll *v.* Malone, 28 Ala. 521; Walker *v.* Palmer, 24 Ala. 358; Larzelere *v.* Starkweather, 38 Mich. 96; Bossard *v.* White, 9 Rich. Eq. (S. C.) 483.

Admissibility.— Either direct or circumstantial evidence is admissible to establish actual notice. Drey *v.* Doyle, 99 Mo. 459, 12 S. W. 287; Lemay *v.* Poupenez, 35 Mo.

C. Questions For Court and Jury. The question of actual notice is one of fact for the jury;[25] but whether constructive notice is imputable to a party from particular facts is a question of law for the court,[26] especially where the facts are not controverted.[27] The question of whether a particular place is a public one within the meaning of a statute requiring the posting of a notice is generally regarded as a mixed question of fact and law.[28]

VIII. DEFACING, DESTROYING, OR REMOVING PUBLIC NOTICE.

The defacing or destruction of a notice posted under a public law is indictable at common law;[29] and by statute it is usually made an offense to deface or destroy

71; McNally *v.* Cohoes, 127 N. Y. 350, 27 N. E. 1043; Parker *v.* Conner, 93 N. Y. 118, 45 Am. Rep. 178; Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133; French *v.* Loyal Co., 5 Leigh (Va.) 627. See also College Park Electric Belt Line Co. *v.* Ide, 15 Tex. Civ. App. 273, 40 S. W. 64. Where a person is sought to be charged with notice of a certain fact, notoriety of the fact in the neighborhood of the party to be affected thereby is admissible. Bush *v.* McCarty Co., 127 Ga. 308, 56 S. E. 430; Berry *v.* House, 1 Tex. Civ. App. 562, 21 S. W. 711; Wright *v.* Stewart, 130 Fed. 905 [*affirmed* in 147 Fed. 321, 77 C. C. A. 499]. As to whether persons having prior dealings with a firm had notice of change of proprietorship, notoriety among the business men and the trade is not evidence of actual notice, and is therefore inadmissible on that issue. Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325; Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Goddard *v.* Pratt, 16 Pick. (Mass.) 412; Henry C. Werner Co. *v.* Calhoun, 55 W. Va. 246, 46 S. E. 1024. A paper not signed or binding on a party, but examined and rejected by him, is admissible in evidence to establish notice of a claim made apparent thereby. Epley *v.* Lowell, 5 Nebr. (Unoff.) 251, 97 N. W. 1027. Where notice of the injury by overflow of plaintiff's land by reason of a dam is required, a remark by plaintiff that he wanted defendant to keep the water from his dam out of his field, and an answer by defendant that he would do so, is not admissible in evidence to establish such notice. Pickett *v.* Condon, 18 Md. 412.

Weight and sufficiency.— Evidence that before the retirement of a retail dealer from business he had paid his debts by checks given in his own name, and after the sale the checks were made in the name under which the business was carried on, is insufficient to establish actual notice of change of proprietorship to persons having prior dealings with the firm. Henry C. Werner Co. *v.* Calhoun, 55 W. Va. 246, 46 S. E. 1024. Where the question is whether a creditor had notice, before or after the creation of the debt, of a claim of adverse possession against certain property of the debtor, evidence by one that he was not sure whether such notice was before or after, but he thought it was before, should not prevail to fasten notice upon the creditor, when the debtor had held the property over thirty years and the law vested it in him absolutely after five years. Kaye *v.* Tydings, 3 Metc. (Ky.) 527.

Proof of service: Personal service see *supra*, V, C, 2, c. By publication see *supra*, V, C, 3, g. By mail see *supra*, V, C, 4, e. By posting see *supra*, V, C, 5, b.

25. *Alabama.*—Saltmarsh *v.* Bower, 22 Ala. 221.

California.— Biggerstaff *v.* Briggs, (1884) 4 Pac. 371.

Georgia.— Rogers *v.* Burr, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50; Montgomery *v.* Hunt, 99 Ga. 499, 27 S. E. 701.

Maine.— Bradbury *v.* Falmouth, 18 Me. 64.

Massachusetts.— Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536.

Missouri.— Muldrow *v.* Robison, 58 Mo. 331; Hill *v.* Tissier, 15 Mo. App. 299; Eyerman *v.* Second Nat. Bank, 13 Mo. App. 289; Masterson *v.* West-End Narrow-Gauge R. Co., 5 Mo. App. 64.

New York.— McCoy *v.* New York, 46 Hun 268; Coddington *v.* Hunt, 6 Hill. 595.

Virginia.— French *v.* Loyal Co., 5 Leigh 627.

Washington.— See Rattelmiller *v.* Stone, 28 Wash. 104, 68 Pac. 168, holding that the law presumes in the absence of evidence to the contrary that a managing director of a bank has knowledge of its doings and transactions, whenever by ordinary diligence he could have acquired the same, and whether or not the evidence overcomes that presumption in any case is a question for the jury.

West Virginia.— Henry C. Werner Co. *v.* Calhoun, 55 W. Va. 246, 46 S. E. 1024.

See 37 Cent. Dig. tit. "Notice," § 41.

Fact of service and authority of person served.— If the fact of service of a notice or the authority of the person upon whom it is served is in issue, the question is for the jury. Cole *v.* Chicago, etc., R. Co., 38 Iowa 311.

26. Gonzalus *v.* Hoover, 6 Serg. & R. (Pa.) 118. But see Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27.

The sufficiency of the service of a notice is a question of law for the court, where the proof of the service is in writing or the facts are uncontroverted. Cole *v.* Chicago, etc., R. Co., 38 Iowa 311.

27. Birdsall *v.* Russell, 29 N. Y. 220.

28. Hoitt *v.* Burnham, 61 N. H. 620; Cahoon *v.* Coe, 57 N. H. 556; Tidd *v.* Smith, 3 N. H. 178.

29. State *v.* Gillespie, Add. (Pa.) 267.

a public notice.[30] Under such statutes the existence of a bad intent or evil mind is a constituent of the offense.[31] It is no defense to one accused of tearing down a legal advertisement of property for taxes, before the expiration of the day of sale, that he had replevied the property from the officer seizing it for taxes.[32]

NOTICE TO ALL THE WORLD. A phrase which has been construed to mean notice to all persons within the jurisdiction or state where the suit is pending.[1] (See, generally, NOTICE.)

NOTIFICATION. Applied to blockades, a communication of a blockade by the government of a belligerent to the representatives of foreign courts in a belligerent country, or by the ministers of the belligerent country resident abroad to the respective governments to which they were accredited.[2] (See BLOCKADE; and, generally, WAR.)

NOTIFY.[3] To inform;[4] to make known;[5] to give notice to;[6] to give notice to, to inform by words or writings, in person or by message, or by any signs which are understood.[7] (See NOTICE.)

NOTING. A technical term in commercial law, meaning a kind of initial protest.[8]

NOTIONS. A technical term applied to merchandise meaning small ware or trifles.[9]

NOTITIA DICITUR A NOSCENDO; ET NOTITIA NON DEBET CLAUDICARE. A maxim meaning "Notice is named from knowledge; and notice ought not to halt (*i. e.* be imperfect)."[10]

NOTORIETY. The state of being notorious or universally well known.[11] (Notoriety: In General, see NOTICE. Evidence of Knowledge, see EVIDENCE. Of Cohabitation, see MARRIAGE. Of Lewd and Lascivious Conduct, see LEWDNESS. Of Possession, see ADVERSE POSSESSION. See also NOTORIOUS.)

30. See the statutes of the several states. And see Territory *v.* Lannon, 9 Mont. 1, 22 Pac. 495, holding that, on a trial for defacing a notice of presentation of a petition for laying out a road, it was not necessary for the prosecution to establish that all the steps essential to the laying out of the road had been taken, and holding further that a notice posted upon a railroad depot some six hundred or seven hundred feet from the proposed road was not illegally posted so that the destruction thereof was no offense.

31. Folwell *v.* State, 49 N. J. L. 31, 6 Atl. 619.

On the question of evil intent, one who picks up a notice of sale on execution, which has been blown down by the wind, and carries it away with the design of frustrating the purpose of the notice, is liable under the statute making it an offense to take down and deface a notice of that description, just as much as if he, with evil intent, takes down and carries away a material part of the notice. Murphy *v.* Tripp, 44 Barb. (N. Y.) 189.

32. Faulds *v.* People, 66 Ill. 210.

1. Shelton *v.* Johnson, 4 Sneed (Tenn.) 672, 683, 70 Am. Dec. 265.

2. Dr. Twiss [*quoted* in The Franciska, 2 Spinks 113, 139].

3. **Notification of taxes due** see Eastman *v.* Little, 5 N. H. 290, 293.

4. Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 277, 15 N. W. 452.

"Notified" used as implying a "notice given" by some person whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it. Potwine's Appeal, 31 Conn. 381, 384.

"Notified importer" see Merritt *v.* Cameron, 137 U. S. 542, 544, 11 S. Ct. 174, 34 L. ed. 772.

5. Vinton *v.* Builders, etc., Assoc., 109 Ind. 351, 353, 9 N. E. 177, where it is said: "[This word] never imports or implies, of necessity, a notice in writing."

6. Worcester Dict. [*quoted* in Vinton *v.* Builders, etc., Assoc., 109 Ind. 351, 353, 9 N. E. 177].

7. Webster Dict. [*quoted* in Vinton *v.* Builders, etc., Assoc., 109 Ind. 351, 353, 9 N. E. 177].

Equivalent to "summons," as used with respect to procuring the attendance of a juror. N. Y. Code Civ. Proc. (1899) § 3343, subd. 19.

8. Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 432, 31 Am. Rep. 768, where it is said: "As to the formality of making protest and preparing the certificate thereof it seems, it generally comprises three distinct steps: 1. Making the presentment and demand of payment. 2. Noting the dishonor; and 3, extending the protest."

9. Coates *v.* Hurst, 65 Mo. App. 256, 260, including needles.

10. Bouvier L. Dict.

11. Black L. Dict.

NOTORIOUS. Generally or commonly known, acknowledged, or spoken of;[12] publicly or generally known and spoken of;[13] generally known and talked of by the public; universally believed to be true; manifest to the world; evident; etc.;[14] well and generally understood.[15] (See NOTORIETY.)

NOT PROVEN. A verdict in a Scotch criminal trial, to the effect that the guilt of the accused is not made out, although his innocence is not clear.[16]

NOT TRANSFERABLE. Words, which when written across the face of a negotiable instrument, operate to destroy its negotiability.[17] (See, generally, COMMERCIAL PAPER.)

NOURISHING. A mere English word denoting quality.[18]

NOVA CONSTITUTIO FUTURIS FORMAM IMPONERE DEBET, NON PRÆTERITIS. A maxim meaning "A new law ought to be prospective, not retrospective, in its operation."[19]

12. McCorkendale *v.* McCorkendale, 111 Iowa 314, 316, 82 N. W. 754.

13. Wyandot Club *v.* Sells, 9 Ohio S. & C. Pl. Dec. 106, 111.

14. Webster Dict. [*quoted* in Duffy *v.* Duffy, 114 Iowa 581, 585, 87 N. W. 500; Chase *v.* Lowell, 151 Mass. 422, 426, 24 N. E. 212; Straus *v.* Imperial F. Ins. Co., 94 Mo. 182, 188, 6 S. W. 698, 4 Am. St. Rep. 368; Leader *v.* State, 4 Tex. App. 162, 164].

15. Martinez *v.* Moll, 46 Fed. 724, 726.

This word may be properly used in an innocent and even laudatory sense, as being synonymous with distinguished, remarkable, conspicuous, noted, celebrated, famous, renowned. Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 209, 36 S. W. 765. See also U. S. *v.* Jarvis, 59 Fed. 357, 358.

Used in relation to entries of land, the word means well known to a majority of all those conversant in the neighborhood. Seay *v.* Walton, 5 T. B. Mon. (Ky.) 368, 370.

Notorious in connection with other words.— "Notorious character." Leader *v.* State, 4 Tex. App. 162, 164. "Notorious liar." Jones *v.* Cecil, 10 Ark. 592, 596. "Notorious" possession. Watrous *v.* Morrison, 33 Fla. 261, 278, 14 So. 805, 39 Am. St. Rep. 139. "Notorious reputation." Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 209, 36 S. W. 765. "Notorious resistance to lawful authority." Straus *v.* Imperial F. Ins. Co., 94 Mo. 182, 189, 6 S. W. 698, 4 Am. St. Rep. 368. "Notorious" survey. Seay *v.* Walton, 5 T. B. Mon. (Ky.) 370.

Notoriously as employed or used in connection with other words see the following phrases: "Notoriously against public decency and good manners." Grisham *v.* State, 2 Yerg. (Tenn.) 589, 596. "Notoriously insane." Phelps *v.* Reinach, 38 La. Ann. 547, 549; Laloire *v.* Lacoste, 4 La. 114, 115; Martinez *v.* Moll, 46 Fed. 724, 726.

16. Black L. Dict.

17. Durr *v.* State, 59 Ala. 24, 29.

18. Raggett *v.* Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. 64, 29 L. T. Rep. N. S. 448, 22 Wkly. Rep. 53, as used in the phrase "nourishing stout" or "nourishing London stout."

19. Broom Leg. Max.

Applied in: State *v.* Smith, 38 Conn. 397, 398; Williams *v.* Johnson, 30 Md. 500, 508, 96 Am. Dec. 613; McGovern *v.* Connell, 43 N. J. L. 106, 109; Elizabeth *v.* Hill, 39 N. J. L. 555, 558; People *v.* Ulster County, 65 N. Y. 300, 306; Isola *v.* Weber, 13 Misc. (N. Y.) 97, 101, 34 N. Y. Suppl. 77; Braddee *v.* Brownfield, 2 Watts & S. (Pa.) 271, 279; Wright *v.* Greenroyd, 1 B. & S. 758, 762, 8 Jur. N. S. 98, 31 L. J. Q. B. 4, 5 L. T. Rep. N. S. 347, 101 E. C. L. 758; Marsh *v.* Higgins, 9 C. B. 551, 564, 19 L. J. C. P. 297, 1 L. M. & P. 253, 67 E. C. L. 551; Vansittart *v.* Taylor, 30 Eng. L. & Eq. 320, 322; Williams *v.* Smith, 4 H. & N. 558, 564, 5 Jur. N. S. 1107, 28 L. J. Exch. 286, 7 Wkly. Rep. 503; Matter of Lord, 1 Kay & J. 90, 94, 24 L. J. Ch. 145, 24 L. T. Rep. N. S. 129, 3 Wkly. Rep. 86, 69 Eng. Reprint 382; Towler *v.* Chatterton, 8 L. J. C. P. O. S. 30, 31; Williamson *v.* Montreal Bank, 6 Brit. Col. 480, 484; Hickman *v.* Trites, 26 N. Brunsw. 53, 55; Brown *v.* Black, 21 Nova Scotia 349, 353; Anderson *v.* Taylor, 12 Nova Scotia 526, 536; *In re* Ritchie, 11 Nova Scotia 450, 468; *In re* Simpson, 5 Nova Scotia 317, 319; Walker *v.* Walton, 1 Ont. App. 579, 586; Reg. *v.* Lynch, 12 Ont. 372, 373; Caughill *v.* Clarke, 3 Ont. 269, 272; McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 133, 136; Montreal Bank *v.* Scott, 17 U. C. C. P. 358, 363; Beaulieu *v.* Allaire, 1 Quebec Super. Ct. 275, 281.

NOVATION

By Edward C. Ellsbree *

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* Author of "Inspection," 22 Cyc. 1363.

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I. DEFINITION.

Novation is the substitution by mutual agreement of one debtor[1] or of one creditor[2] for another whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.[3] It is a mode of extinguishing one obligation by another — the substitution, not of a new paper or note, but of a new obligation in lieu of an old one — the effect of which is to pay, dissolve, or otherwise discharge it.[4] The doctrine is of civil law origin,[5] but early found its way into the common law.

II. NATURE AND REQUISITES.

A. In General. In every novation there are four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one.[6] A novation is a new contractual relation. It is based upon a new contract by all the parties interested;[7] and in some states it is specifically provided by statute that a novation shall be made by contract and be subject to the rules concerning contracts in general.[8]

B. Valid Existing Obligation — 1. IN GENERAL. In order that a contract of novation may be effected there must be a previous obligation to be released.[9]

1. Kelso *v.* Fleming, 104 Ind. 180, 182, 3 N. E. 830; Chenoweth *v.* National Bldg. Assoc., 59 W. Va. 653, 657, 53 S. E. 559; Guichard *v.* Brande, 57 Wis. 534, 536, 15 N. W. 764; Lynch *v.* Austin, 51 Wis. 287, 289, 8 N. W. 129.

2. Price *v.* Barnes, (Ind. App. 1892) 31 N. E. 809, 810.

3. *California.*— Stanley *v.* McElrath, 22 Pac. 673, 675.
Illinois.— Stow *v.* Russell, 36 Ill. 18.
Indiana.— Rhodes *v.* Thomas, 2 Ind. 638.
Missouri.— Munford *v.* Wilson, 15 Mo. 540.
Pennsylvania.— McCartney *v.* Kipp, 171 Pa. St. 644, 648, 33 Atl. 233.
Tennessee.— Sharp *v.* Fly, 9 Baxt. 4, 10; Workingman's Bldg., etc., Assoc. *v.* Williams, (Ch. App. 1896) 37 S. W. 1019, 1022; Henry *v.* Nubert, (Ch. App. 1895) 35 S. W. 444, 448.
Wisconsin.— Guichard *v.* Brande, 57 Wis. 534, 536, 15 N. W. 764.
See also Black L. Dict.; Bouvier L. Dict.

4. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 414, 5 So. 120.

5. See Adams *v.* Power, 48 Miss. 450; Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436.
Similar to merger.— The doctrine of novation in the civil law is but the doctrine of merger at common law. Sharp *v.* Fly, 9 Baxt. (Tenn.) 4.
The common-law doctrine of novation mainly agrees with that of the civil law. Adams *v.* Power, 48 Miss. 450.

6. *Indiana.*— Pope *v.* Vajen, 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688; McClellan *v.* Robe, 93 Ind. 298; Bristol Milling, etc., Co. *v.* Probasco, 64 Ind. 406; Clark *v.* Billings, 59 Ind. 508; Hill *v.* Warner, 20 Ind. App. 309, 50 N. E. 582; Horn *v.* McKinney, 5 Ind. App. 348, 32 N. E. 334.
Michigan.— Piehl *v.* Piehl, 138 Mich. 515, 101 N. W. 628.
New Hampshire.— Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.
Ohio.— Jarmusch *v.* Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122.
Pennsylvania.— Wright *v.* Hanna, 210 Pa. St. 349, 59 Atl. 1097.
Washington.— Sutter *v.* Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

7. Izzo *v.* Ludington, 79 N. Y. App. Div. 272, 79 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 621, 70 N. E. 1100]; Sutter *v.* Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

8. See the statutes of the several states. And see Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

9. Linneman *v.* Moross, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528.

This previous obligation, which is to be released, to be within the rule, must be a valid one.[10]

2. WHEN CONDITIONAL. If the original debt is conditional, and the condition is not performed, there can be no novation, because there is no original debt for which the new one can be substituted. Also, if the conditional debt is a specific thing which has been destroyed or perishes before the condition is performed, there will be no novation even if the condition should finally be performed.[11]

C. Agreement of Parties — 1. In General — a. Novation by Substitution of New Obligation Between Same Parties. To constitute a novation by the substitution of a new obligation between the same parties, there must appear the consent of both contracting parties.[12] The intention of the obligor that the existing debt should be discharged by the new obligation he enters into does not suffice. The creditor must concur in this.[13]

b. Novation by Substitution of New Debtor or Creditor — (I) *In General.* To constitute a novation by substitution of creditors or debtors there must be a mutual agreement among three or more parties, whereby a debtor, in consideration of being discharged from his liability to his original creditor, contracts a new obligation in favor of a new creditor.[14]

Third person in novation contract must be indebted to first.— Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436; Gaston *v.* Owen, 43 Wis. 103; Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 198, 3 C. & P. 103, 14 E. C. L. 472, 2 M. & R. 353.

10. Bristol Milling, etc., Co. *v.* Probasco, 64 Ind. 406; Clark *v.* Billings, 59 Ind. 508; San Antonio Light Pub. Co. *v.* Moore, (Tex. Civ. App. 1907) 101 S. W. 867; Spycher *v.* Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414.

In civil law.— If the old debt be void, as being, for example, *contra bonos mores*, then the new debt is likewise void. But if the old contract is only voidable, in some cases the new one may be good, operating as a ratification of the old. 2 Bouvier L. Dict. (Rawle's ed.) 521.

11. Edgell *v.* Tucker, 40 Mo. 523. See 1 Pothier Obl. 382.

12. Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489.

13. Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489.

14. *Alaska.*— Seattle First Nat. Bank *v.* Fish, 2 Alaska 344.

Florida.— Tysen *v.* Somerville, 35 Fla. 219, 17 So. 567.

Illinois.— Walker *v.* Wood, 170 Ill. 463, 48 N. E. 919 [*affirming* 69 Ill. App. 542]; Netterstrom *v.* Gallistel, 110 Ill. App. 352.

Indiana.— Davis *v.* Hardy, 76 Ind. 272; Clark *v.* Billings, 59 Ind. 508; Hancock *v.* Morgan, 34 Ind. 524; Decker *v.* Shaffer, 3 Ind. 187; Mount *v.* Dehaven, 29 Ind. App. 127, 63 N. E. 330; Hill *v.* Warner, 20 Ind. App. 309, 50 N. E. 582; Horn *v.* McKinney, 5 Ind. App. 348, 32 N. E. 334 [*citing* Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830].

Iowa.— Kirchman *v.* Standard Coal Co., 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318.

Massachusetts.— Stowell *v.* Gram, 184 Mass. 562, 69 N. E. 342.

Michigan.— Dean *v.* Ellis, 108 Mich. 240, 65 N. W. 971; Glover *v.* Dowagiac First Universalist Parish, 48 Mich. 595, 12 N. W. 867.

Minnesota.— Hanson *v.* Nelson, 82 Minn. 220, 84 N. W. 742.

Missouri.— Lee *v.* Porter, 18 Mo. App. 377.

New York.— Izzo *v.* Ludington, 79 N. Y. App. Div. 272, 79 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 621, 70 N. E. 1100]; Leggat *v.* Leggat, 79 N. Y. App. Div. 141, 80 N. Y. Suppl. 327 [*affirmed* in 176 N. Y. 590, 68 N. E. 1119]; Ryan *v.* Pistone, 89 Hun 78, 35 N. Y. Suppl. 81.

Oklahoma.— Lowe *v.* Blum, 4 Okla. 260, 43 Pac. 1063.

Pennsylvania.— Trunick *v.* Gilchrist, 81* Pa. St. 160.

Texas.— Scott *v.* Atchison, 38 Tex. 384; Gimbell *v.* King, (Civ. App. 1906) 95 S. W. 7.

Washington.— Hemrich Bros. Brewing Co. *v.* Kitsap County, 88 Pac. 838.

Wisconsin.— Lane *v.* Magdeburg, 81 Wis. 344, 51 N. W. 562; Lynch *v.* Austin, 51 Wis. 287, 8 N. W. 129.

United States.— Jackson Iron Co. *v.* Negaunee Concentrating Co., 65 Fed. 298, 12 C. C. A. 636.

England.— Noble *v.* National Discount Co., 5 H. & H. 224, 29 L. J. Exch. 210.

Canada.— Wilson *v.* Land Securities Co., 26 Can. Sup. Ct. 149.

See 37 Cent. Dig. tit. "Novation," § 7.

Contemporaneous agreement unnecessary. — To constitute novation it is not necessary that all three parties be personally present at the time. It is enough to show a mutual agreement by which the creditor assents, at the debtor's request, to accept another person as his debtor. Lewis *v.* D'Entremont, 29 Nova Scotia 546. See also Warren *v.* Batchelder, 16 N. H. 580.

(II) *ASSENT OF DEBTOR.* There can be no novation to which the original debtor does not consent, and to which he is not a party.[15] Hence without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity between them.[16] This assent on the debtor's part is also essential for the reason that he may have a valid set-off against his original creditor of which he cannot be deprived.[17]

(III) *ASSENT OF CREDITOR.* To constitute a novation, the creditor must have consented to the discharge of the original debtor and have accepted the promise of the new debtor.[18]

2. HOW SHOWN. It is not essential that the assent to and acceptance of the terms of novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction, and the conduct of the parties thereafter.[19] Such consent is not to be implied merely from

15. *Illinois.*— Reid *v.* Degener, 82 Ill. 508.
Iowa.— Osborne *v.* West, (1905) 103 N. W. 118.
Michigan.— Dean *v.* Ellis, 108 Mich. 240, 65 N. W. 971; Glover *v.* First Universalist Parish, 48 Mich. 595, 12 N. W. 867.
Mississippi.— Adams *v.* Power, 52 Miss. 828.
Ohio.— Gill *v.* Fawcett, Wright 218.
See 37 Cent. Dig. tit. "Novation," § 7.
In delegatio in the civil law, no new creditor could be substituted without the debtor's consent. See Bouvier L. Dict. (Rawle's ed.).

16. Reid *v.* Degener, 82 Ill. 508.

17. Reid *v.* Degener, 82 Ill. 508.

18. *California.*— Chapin *v.* Brown, 101 Cal. 500, 35 Pac. 1051; Haubert *v.* Mausshardt, 89 Cal. 433, 26 Pac. 899.
Colorado.— Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417.
Indiana.— Bristol Mill, etc., Co. *v.* Probasco, 64 Ind. 406.
Kansas.— Cannon *v.* Kreipe, 14 Kan. 324.
Louisiana.— Sucker State Drill Co. *v.* Henry Loewer, etc., Co., 114 La. 403, 38 So. 399; Berges *v.* Daverede, (1898) 23 So. 891; Short *v.* New Orleans, 4 La. Ann. 281.
Michigan.— Piehl *v.* Piehl, 138 Mich. 515, 101 N. W. 628; Darling *v.* Rutherford, 125 Mich. 70, 83 N. W. 999; Hayes *v.* Knox, 41 Mich. 529, 2 N. W. 670; Blanchard *v.* Tittabawassee Boom Co., 40 Mich. 566; Lewis *v.* Westover, 29 Mich. 14.
Missouri.— Snyder *v.* Kirtley, 35 Mo. 423.
Nebraska.— Mercer *v.* Miles, 28 Nebr. 211, 44 N. W. 109.
New Hampshire.— Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.
Oklahoma.— Lowe *v.* Blum, 4 Okla. 260, 43 Pac. 1063.
South Carolina.— Bowen *v.* Carolina, etc., R. Co., 34 S. C. 217, 13 S. E. 421.
Tennessee.— Haynes *v.* Delius, (Ch. App. 1900) 59 S. W. 158.
Washington.— Osburn *v.* Dolan, 7 Wash. 62, 34 Pac. 433.
United States.— Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688.
Canada.— Legault *v.* Desaulniers, 5 Quebec Pr. 444.
See 37 Cent. Dig. tit. "Novation," § 7.

Exception to rule.— Where a corporation transfers all its property, rights, and franchises to a new company incorporated with the same stock-holders and directors as the old, and the new corporation adopts the contracts and assumes the liabilities of the old, the merger of the old into the new corporation creates a novation of the debts of the old company, although the creditors have not assented to the change. Friedenwald Co. *v.* Asheville Tobacco Works, etc., Co., 117 N. C. 544, 23 S. E. 490.

A married woman is not bound by an agreement of her husband that an indebtedness due her should be transferred to others without authority from or ratification by her. Argyle Co. *v.* McNeill, 46 Ill. App. 564 [*affirmed* in 153 Ill. 669, 39 N. E. 1102].

19. Walker *v.* Wood, 170 Ill. 463, 48 N. E. 919 [*affirming* 69 Ill. App. 542]; Warren *v.* Batchelder, 15 N. H. 129; Lane *v.* United Oil Cloth Co., 103 N. Y. App. Div. 378, 92 N. Y. Suppl. 1061; Union Cent. L. Ins. Co. *v.* Hoyer, 66 Ohio St. 344, 64 N. E. 435.
There may be a complete verbal novation; neither the discharge of the original debtor on the one side, nor the assumption of the new debt on the other, need be evidenced in writing. Union Cent. L. Ins. Co. *v.* Hoyer, 66 Ohio St. 344, 64 N. E. 435; Strong *v.* Hesson, 5 Brit. Col. 217. See, generally, FRAUDS, STATUTE OF, 20 Cyc. 188.
In the civil law novation took place only when the contracting parties expressly disclosed that their object in making the new contract was to extinguish the old contract. Under our law novation may be inferred from circumstances without proof of an express agreement. Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082; Hard *v.* Burton, 62 Vt. 314, 20 Atl. 269; *In re* Dixon, 13 Fed. 109, 2 McCrary 556.
In Louisiana the code requires that the assent of the parties to the novation must be shown by express declarations, or by acts tantamount to such a declaration. Rachel *v.* Rachel, 11 La. Ann. 687; Jackson *v.* Williams, 11 La. Ann. 93; Short *v.* New Orleans, 4 La. Ann. 281.
To prove the assent of the creditor it is not necessary that express knowledge of the transaction be brought home to him, but that assent may be proved by circumstantial evi-

the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor.[20] So it has been held that a suit brought by the creditor against the delegated debtor is not evidence of intention to discharge the original debtor,[21] unless a demand of payment preceded the institution of the suit.[22]

D. Extinguishment of Original Obligation. A novation, like other valid contracts, must be supported by a consideration, which in this case is the discharge of the original debt.[23] If the agreement does not, or was not intended to, operate

dence precisely as other facts may be similarly proved. De Witt *v.* Monjo, 46 N. Y. App. Div. 533, 61 N. Y. Suppl. 1046.

20. Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

21. Jackson *v.* Williams, 11 La. Ann. 93 [*disapproving* Walton *v.* Beauregard, 1 Rob. (La.) 301]; Butterfield *v.* Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Ramsdale *v.* Horton, 3 Pa. St. 330. But see Tysen *v.* Somerville, 35 Fla. 219, 17 So. 567; Johnson *v.* Watt, 15 La. Ann. 428; Walton *v.* Beauregard, 1 Rob. (La.) 301; Rawle *v.* Skipwith, 19 La. 207.

22. Warren *v.* Batchelder, 16 N. H. 580. See also Lyon *v.* Clochessy, 43 Misc. (N. Y.) 67, 86 N. Y. Suppl. 245.

23. *Alabama.*— Carpenter *v.* Murphree, 49 Ala. 84.

Arkansas.— Brewer *v.* Winston, 46 Ark. 163.

California.— Ferguson *v.* McBean, (1894) 35 Pac. 559.

Colorado.— Richardson Drug Co. *v.* Dunagan, 8 Colo. App. 308, 46 Pac. 227.

Connecticut.— Allen *v.* Rundle, 45 Conn. 528.

Indiana.— Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830; Mount *v.* Dehaven, 29 Ind. App. 127, 63 N. E. 330; Hill *v.* Warner, 20 Ind. App. 309, 50 N. E. 582.

Louisiana.— Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489; Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; McRae *v.* His Creditors, 16 La. Ann. 305; Carrière *v.* Labiche, 14 La. Ann. 211, 74 Am. Dec. 428; Gails *v.* Osceola, 14 La. Ann. 54; Choppin *v.* Gobbold, 13 La. Ann. 238; Bonnemer *v.* Negrete, 16 La. 474, 35 Am. Dec. 217; Exchange, etc., Co. *v.* Walden, 15 La. 431; Morgan *v.* Their Creditors, 1 La. 527, 20 Am. Dec. 285.

Maryland.— André *v.* Bodman, 13 Md. 241, 71 Am. Dec. 628.

Michigan.— Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75; Fuller, etc., Lumber, etc., Co. *v.* Houseman, 117 Mich. 553, 76 N. W. 77.

Minnesota.— Hanson *v.* Nelson, 82 Minn. 220, 84 N. W. 742; Nelson *v.* Larson, 57 Minn. 133, 58 N. W. 687; Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; Cornwell *v.* Megins, 39 Minn. 407, 40 N. W. 610.

Mississippi.— Adams *v.* Power, 52 Miss. 828; Adams *v.* Power, 48 Miss. 450.

Missouri.— Badger Lumber Co. *v.* Meffert, 59 Mo. App. 437.

Montana.—Aldritt *v.* Panton, 17 Mont. 187, 42 Pac. 767.

Nebraska.— Western White Bronze Co. *v.* Portrey, 50 Nebr. 801, 70 N. W. 383.

New York.—Fairchild *v.* Feltman, 32 Hun 398; Jaudon *v.* Randall, 47 N. Y. Super. Ct. 374; McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Suppl. 22.

Oklahoma.— Lowe *v.* Blum, 4 Okla. 260, 43 Pac. 1063.

Oregon.— Miles *v.* Bowers, (1907) 90 Pac. 905.

Pennsylvania.— Brackenbridge *v.* Cummings, 18 Pa. Super. Ct. 64; Stone *v.* Justice, 9 Phila. 22.

Rhode Island.— See H. Midwod's Sons Co. *v.* Alaska-Portland Packers' Assoc., 28 R. I. 303, 67 Atl. 61.

Texas.— Scott *v.* Atchison, 36 Tex. 76; Gimbell *v.* King, (Civ. App. 1906) 95 S. W. 7.

Virginia.— State Bank *v.* Domestic Sewing-Mach. Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. Rep. 891; Smith *v.* Blackwell, 31 Gratt. 291.

England.— Cuxon *v.* Chadley, 3 B. & C. 591, 10 E. C. L. 270, 1 C. & P. 174, 485, 12 E. C. L. 110, 282, 5 D. & R. 417.

See 37 Cent. Dig. tit. "Novation," § 3.

If the debtor's liability to his original creditor is not discharged by his promise to pay the new creditor, then there is no consideration for his promise and no action can be maintained on it. Woodruff *v.* Hensel, 5 Colo. App. 103, 37 Pac. 948.

Where assent or consideration is wanting, the novation operates only as a species of collateral security. Adams *v.* Power, 48 Miss. 450.

Discharge of original debt, sufficient consideration.— A discharge of the existing obligation of a party to a contract is a sufficient consideration for a contract of novation. Underwood *v.* Lovelace, 61 Ala. 155; Barringer *v.* Warden, 12 Cal. 311; Millard *v.* Porter, 18 Ind. 503; Brush *v.* Carpenter, 6 Ind. 78; Mulcrone *v.* American Lumber Co., 55 Mich. 622, 22 N. W. 67; Bacon *v.* Daniels, 37 Ohio St. 279; Corbett *v.* Cochran, 3 Hill (S. C.) 41, 30 Am. Dec. 348; Z. C. Miles Co. *v.* Robertson, 5 Wash. 352, 31 Pac. 970.

See 37 Cent. Dig. tit. "Novation," § 3.

If the contract of substitution be established, then there is a consideration. Ceballos *v.* Munson Steamship Line, 93 N. Y. App. Div. 593, 87 N. Y. Suppl. 811, Jenks, J., delivering the opinion of the court.

as a release of the original debt, it is not a novation.[24] The discharge of the old debt must be contemporaneous with, and result from, the consummation of an arrangement with the new debtor.[25]

E. Valid New Obligation — 1. In General. Where there is a novation by the substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy.[26]

2. **When Conditional.** If the first debt does not depend on any condition, but the second agreement, intended as a novation, is conditional, the novation can only take effect by the performance of the condition before the debt is extinct. Therefore a novation will be prevented from taking place, not only by failure of the condition, but also by the extinction of the original debt before the condition is performed.[27]

III. Subject-Matter.

Any obligation which can be destroyed at all may be destroyed by novation. Thus legacies, judgments, mortgages, guarantees, and similar accessories are as much the subjects of novation as simple contract debts.[28] So the rules of novation apply as completely to debts evidenced by mercantile paper as to other obligations.[29]

IV. Forms.

A. In General. Novation may be effected in three ways: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) by the substitution of a new debtor in the place of the old one, with intent to release the latter; (3) by the substitution of a new creditor in the place of the old one, with intent to transfer the rights of the latter to the former.[30]

B. Substitution of New Obligation Between Same Parties. Novation may take place by the substitution of a new obligation between the same parties with intent to extinguish the old obligation.[31] The question is always one of

24. *California.*— Carpy *v.* Dowdell, 131 Cal. 495, 63 Pac. 778.

Indiana.— Horn *v.* McKinney, 5 Ind. App. 348, 32 N. E. 334.

Iowa.—Black *v.* De Camp, 78 Iowa 718, 43 N. W. 625.

Louisiana.— Spiro *v.* Leibenguth, 51 La. Ann. 152, 24 So. 785; Muggah *v.* Rogers, 11 Rob. 511; Locke *v.* Mackinson, 14 La. Ann. 361; Patrick *v.* Murphy, 9 La. Ann. 497.

Minnesota.—Johnson *v.* Rumsey, 28 Minn. 531, 11 N. W. 69.

Missouri.— Davis *v.* Dunn, 121 Mo. App. 490, 97 S. W. 226.

United States.— American Paper-Bag Co. *v.* Van Nortwick, 52 Fed. 752, 3 C. C. A. 274; Dexter, etc., Co. *v.* Sayward, 51 Fed. 729.

England.— Cuxon *v.* Chadley, 3 B. & C. 591, 10 E. C. L. 270, 1 C. & P. 174, 485, 12 E. C. L. 110, 282, 5 D. & R. 417.

Canada.— Gravel *v.* Charbonneau, 11 Quebec Super. Ct. 408.

See 37 Cent. Dig. tit. "Novation," § 3.

If the original debt be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation under La. Civ. Code, art. 2187. Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489; Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; Rosenda *v.* Zabriskie, 4 Rob. (La.) 493.

Giving an order on a particular fund for the amount of a debt, when the original debtor is not discharged, does not operate a novation of the debt. Baird *v.* Livingston, 1 Rob. (La.) 182; Bonnemer *v.* Negrete, 16 La. 474, 35 Am. Dec. 217.

25. Kelso *v.* Fleming, 104 Ind. 480, 3 N. E. 830; Horn *v.* McKinney, 5 Ind. App. 348, 32 N. E. 334; Cornwell *v.* Megins, 39 Minn. 407, 40 N. W. 610; Bowen *v.* Young, 37 Misc. (N. Y.) 547, 75 N. Y. Suppl. 1027.

26. Clark *v.* Billings, 59 Ind. 508; Scott *v.* Atchison, 36 Tex. 76; Spycher *v.* Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414; Guichard *v.* Brande, 57 Wis. 534, 15 N. W. 764.

A contract of novation made under a mutual mistake is invalid. See Haubert *v.* Mausshardt, 89 Cal. 433, 26 Pac. 899.

27. Edgell *v.* Tucker, 40 Mo. 523. See 1 Pothier Obl. 382.

28. Bouvier L. Dict.

29. Bouvier L. Dict.

30. Parsons *v.* Tillman, 95 Ind. 452; Hill *v.* Warner, 20 Ind. App. 309, 50 N. E. 582; Adams *v.* Power, 48 Miss. 450; Gimbell *v.* King, (Tex. Civ. App. 1906) 95 S. W. 7; Sutter *v.* Moore Invest. Co., 30 Wash. 333, 70 Pac. 746.

31. Epps *v.* Story, 109 Ga. 302, 34 S. E. 662; Pennsylvania Min. Co. *v.* Brady, 16 Mich. 332; Holmes *v.* Leadbetter, 95 Mo. App. 419, 69 S. W. 23; Bandman *v.* Finn, 103 N. Y. App. Div. 322, 92 N. Y. Suppl. 1096

intention, and a mere change in the amount of the debt, the terms and mode of payment, the rate of interest, or the nature of the securities does not effect a novation, unless the intention of the parties to novate the obligation is clearly shown.[32] Thus it is well settled that no mere change in the form of the evidence of a debt will work a novation unless so intended by the parties.[33] At the same time it is equally well settled that, where one security is accepted by the creditor in satisfaction of another, the debt is novated.[34] A simple renewal of the original contract for the same consideration is not a novation,[35] but if a new consideration enters into the new contract, a novation takes place.[36] Where a contract of higher dignity is entered into by the parties to a former contract, the transaction amounts to a novation.[37]

[*reversed* on other grounds in 185 N. Y. 508, 78 N. E. 175].

A new contract with reference to a collateral matter, not intended to take the place of the original one, is not a novation. Tilden *v.* Gordon, 34 Wash. 92, 74 Pac. 1016.

32. Baker *v.* Frellsen, 32 La. Ann. 822. See also Green *v.* Wallis Iron Works, 49 N. J. Eq. 48, 23 Atl. 498.

33. Spiro *v.* Leibenguth, 51 La. Ann. 152, 24 So. 785; Bergeron *v.* Patin, 34 La. Ann. 534; Jordan *v.* Anderson, 29 La. Ann. 749; McCartney *v.* Kipp, 171 Pa. St. 644, 33 Atl. 233; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; Coles *v.* Withers, 33 Gratt. (Va.) 186.

The debtor's note, given for an open account or other debt, does not novate it, unless the parties so agree. Lane *v.* Collier, 46 Ga. 580; Fox *v.* Barksdale, 118 La. 339, 42 So. 957; Hughes *v.* Mattes, 104 La. 218, 28 So. 1006; Chambers *v.* Knapp, 48 La. Ann. 1156, 20 So. 677; Neilson *v.* Neilson, 25 La. Ann. 528; Marmillon *v.* Archinard, 24 La. Ann. 610; Austin *v.* Da Rocha, 23 La. Ann. 44; Walton *v.* Bemiss, 16 La. 140; Cox *v.* Baldwin, 1 La. 401; Cormier *v.* Richard, 7 Mart. N. S. (La.) 177; Glasgow *v.* Stevenson, 6 Mart. N. S. (La.) 567.

The mere credit of the proceeds of a note and subsequent debit of the amount does not *per se* operate a novation. Lanata *v.* Bayhi, 31 La. Ann. 229; Yard *v.* Srodes, 9 La. 479.

Receiving other notes at a longer credit than the first does not, if between the same parties, produce a novation of the debt. Frank *v.* Hardee, 22 La. Ann. 184; Hobson *v.* Davidson, 8 Mart. (La.) 422, 13 Am. Dec. 294.

A debt is not novated by a check on a bank given in payment of it. Bordelon *v.* Weymouth, 14 La. Ann. 93.

The execution of a second mortgage on a different piece of property to secure a debt already secured by mortgage does not novate the first mortgage. Levy *v.* Pointe Coupee Police Jury, 24 La. Ann. 292.

Receipt of draft.— Unless it is expressly agreed that a draft is received in payment of an account, it does not operate a novation of the debt. Graham *v.* Sykes, 15 La. Ann. 49; Helme *v.* Middleton, 14 La. Ann. 484; Kercheval's Succession, 14 La. Ann. 457; Penn *v.* Poumeirat, 2 Mart. N. S. (La.) 541. Where drafts given in payment of a debt were not to discharge the debt unless paid, there is no novation if the amount is never paid. Phifer *v.* Maxwell, 28 La. Ann. 862; Drew *v.* Turner, 9 Rob. (La.) 187; Howard *v.* Thomas, 3 La. 109.

Where a party receives back a draft given by him in payment, upon an agreement to replace it by an equivalent, no novation takes place if he fails to do so. Taylor *v.* Simon, 14 La. Ann. 351.

34. Fidelity Ins. Trust, etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858.

Receipt of a note of the debtor in payment of an account novates the debt. Stanley *v.* McElrath, (Cal. 1889) 22 Pac. 673; White *v.* McDowell, 4 La. Ann. 543; Cammack *v.* Griffin, 2 La. Ann. 175; Walton *v.* Bemiss, 16 La. 140; Hunt *v.* Boyd, 2 La. 109; Abat *v.* Nolte, 6 Mart. N. S. (La.) 636; Barrow *v.* How, 2 Mart. N. S. (La.) 144.

The taking of new notes for different amounts constitutes a novation if such was the intent of the parties. *In re* Dixon, 13 Fed. 109, 2 McCrary 556.

The surrender of a note to the maker, who gives another with different security, novates the first and discharges the indorser thereon. Coco *v.* Lacour, 4 La. 507.

The execution and interchange of a deed and a contract to return the deed on the payment of a debt, intended to take the place of a mortgage securing the debt, is a novation of the mortgage. Kyle *v.* Hamilton, (Cal. 1902) 68 Pac. 484.

35. Davis *v.* Dunn, 74 Ga. 36; Bonner *v.* Woodall, 51 Ga. 177; Brinkhaus *v.* Pavy, 51 La. Ann. 1327, 26 So. 176; Aillet *v.* Woods, 24 La. Ann. 193; Citizens' Bank *v.* Tucker, 6 Rob. (La.) 443; Rosenda *v.* Zabriskie, 4 Rob. (La.) 493; Bowman *v.* Miller, 25 Gratt. (Va.) 331, 18 Am. Rep. 686.

The renewal of a note secured by mortgage does not novate the original note and debt, when a renewal is provided for in the mortgage, even if it be renewed in a different name. Palfrey *v.* His Creditors, 8 La. 276.

Issuance of paid-up policy of insurance.— The canceling of the original policy of insurance, and the issuance of a paid-up policy in its stead, pursuant to an express agreement to do so, is a continuation of the former contract of insurance, and not a novation. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

36. Carmichael *v.* Foster, 69 Ga. 372.

37. Patterson *v.* Evans, 91 Ga. 799, 18

C. Substitution of New Debtor. The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties, the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt.[38] Thus the receipt of a note of a third person in payment of an account,[39] the execution of a new note by a part of the makers of the old, and its acceptance by the holder in lieu thereof;[40] the substitution of a new lessee for the old one, accompanied by the discharge of the latter,[41] an assignment of wages to become due, accepted by the employer,[42] constitute complete novations. So turning a joint contract by two par-

S. E. 31, holding that an absolute deed conveying land as security for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied, and surrendered up because of the execution of such a deed, the transaction operates as a novation.

38. *Alabama.*— Milhous *v.* Dunham, 78 Ala. 48.

California.— Wolters *v.* Thomas, (1893) 32 Pac. 565.

Colorado.— J. B. Wheeler Banking Co. *v.* Holden, 11 Colo. App. 292, 52 Pac. 1032; Wallace *v.* Axtell, 5 Colo. App. 432, 39 Pac. 594.

Georgia.— Palmetto Mfg. Co. *v.* Parker, 123 Ga. 798, 51 S. E. 714; Dillard *v.* Dillard, 118 Ga. 97, 44 S. E. 885; Brown *v.* Harris, 20 Ga. 403.

Idaho.— Casey *v.* Miller, 3 Ida. 567, 32 Pac. 195.

Illinois.— Leihy *v.* Briggs, 33 Ill. App. 534; Seymour *v.* Seymour, 31 Ill. App. 227.

Indiana.— Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830; McClellan *v.* Robe, 93 Ind. 298; Hoffa *v.* Hoffman, 33 Ind. 172.

Iowa.— Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699.

Louisiana.—Skannel *v.* Taylor, 12 La. Ann. 773.

Massachusetts.— Stowell *v.* Gram, 184 Mass. 562, 69 N. E. 342.

Michigan.— Fitzgerald *v.* Thompson Towing, etc., Assoc., 143 Mich. 171, 106 N. W. 853; Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75; Martin *v.* Curtis, 119 Mich. 169, 77 N. W. 690; Gleason *v.* Fitzgerald, 105 Mich. 516, 63 N. W. 512; Grieb *v.* Comstock, 99 Mich. 520, 58 N. W. 497; Green *v.* Solomon, 80 Mich. 234, 45 N. W. 87.

Mississippi.— Adams *v.* Power, 48 Miss. 450.

Missouri.— Nickerson *v.* Leader Mercantile Co., 90 Mo. App. 336; Brown *v.* Croy, 74 Mo. App. 462; Benham *v.* Banker-Edwards Bldg. Co., 60 Mo. App. 34.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 66 N. W. 541.

New Hampshire.— Morse *v.* Allen, 44 N. H. 33; Head *v.* Richardson, 16 N. H. 454; Heaton *v.* Angier, 7 N. H. 397, 28 Am. Dec. 353.

New Jersey.— Simmons *v.* Lima Oil Co., (Ch. 1906) 63 Atl. 258.

New York.— Lane *v.* United Oil Cloth Co., 103 N. Y. App. Div. 378, 92 N. Y. Suppl. 1061; Bowen *v.* Young, 37 Misc. 547, 75 N. Y. Suppl. 1027; McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Suppl. 22.

North Carolina.— Clark *v.* Delaware, etc., R. Co., 138 N. C. 25, 50 S. E. 446.

Ohio.— Globe Ins. Co. *v.* Wayne, 75 Ohio St. 451, 80 N. E. 13; Union Cent. L. Ins. Co. *v.* Hoyer, 66 Ohio St. 344, 64 N. E. 435; Bacon *v.* Daniels, 37 Ohio St. 279.

Pennsylvania.— Wyss-Thalman *v.* Beaver Valley Brewing Co., 216 Pa. St. 435, 65 Atl. 811; Bamberger's Estate, 14 Lanc. Bar 110.

Texas.— Scott *v.* Atchison, 36 Tex. 76.

Vermont.— Bacon *v.* Bates, 53 Vt. 30.

Washington.— Silsby *v.* Frost, 3 Wash. Terr. 388, 17 Pac. 887.

Wisconsin.— York *v.* Orton, 65 Wis. 6, 26 N. W. 166.

England.— Tatlock *v.* Harris, 3 T. R. 174.

Canada.— Strong *v.* Hesson, 5 Brit. Col. 217.

See 37 Cent. Dig. tit. "Novation," § 5.

Sale of agent's services.— Where B agreed to work for C, the amount of B's wages to be paid to A, who was to credit the amount against B's indebtedness to A, it was held not to be a contract of novation, but that B was the agent of A, who virtually sold B's services to C. Dwyer *v.* Gaylord, 12 R. I. 263.

39. McCan *v.* Fulkerson, 26 La. Ann. 344; Mailhouse *v.* Frazier, 25 Md. 96; Security Warehousing Co. *v.* American Exch. Nat. Bank, 118 N. Y. App. Div. 350, 103 N. Y. Suppl. 399; Underwriters' Wrecking Co. *v.* The Katie, 24 Fed. Cas. No. 14,342, 3 Woods 182.

If not received in payment of the debt, however, taking the note of a third person does not effect novation. Gurney *v.* Braden, 3 Brit. Col. 474.

Where a creditor of an estate accepts from the administrator his personal note in payment of his debt, it is a novation. White *v.* McDowell, 4 La. Ann. 543; Tilson *v.* Davis, 32 Gratt. (Va.) 92. See also Relf *v.* McDonogh, 19 La. 100. But see Smith *v.* Brown, 12 La. Ann. 299.

Where the payee of a note accepts it from the maker in satisfaction of the debt of another, and then assigns the debt to him without recourse, there is a complete novation of the debt. Morse *v.* Wilcoxson, 30 S. W. 612, 17 Ky. L. Rep. 29.

40. Smith *v.* Young, 11 Bush (Ky.) 393.

41. Vignié *v.* Gouaux, 14 La. Ann. 344.

42. Clough *v.* Giles, 64 N. H. 73, 5 Atl.

ties into a separate liability of one of them,[43] or *vice versa*,[44] works a novation of the original contract.

D. Substitution of New Creditor. To constitute a novation whereby a new creditor is substituted for the original one, there must be a mutual agreement among three or more parties whereby a debtor, in consideration of being discharged from his liability to his original creditor, contracts a new obligation in favor of a new creditor.[45] Thus the substitution of a second note payable to different payees in place of the first is a novation.[46] So a verbal assignment of a chose in action, not evidenced by any note or other writing, assented to by the debtor, who promises to pay the debt to the assignee, constitutes a complete novation.[47]

V. WHO MAY MAKE.

The consent which the creditor gives to the novation of the debt being equivalent, so far as regards the extinction of the debt, to a payment of it, it follows that only those to whom a valid payment may be made can make a novation of a debt.[48] For this reason persons who are under legal disability, minors, married women, etc., cannot make a novation;[49] and applying the principle of the common law that guardians, trustees, administrators, and executors cannot change the character of the trust funds held by them, without an order from a court of chancery jurisdiction, they too, it would seem, should not be allowed to make a novation.[50] This rule is, however, subject to the rules governing commercial paper, and it has been held that an administrator, holding a note payable to himself, may accept in lieu thereof the obligation of another, who is ignorant of the fiduciary nature of the debt.[51]

VI. OPERATION AND EFFECT.

A. In General. A novation will, if it be absolute and unconditional, amount to a direct extinguishment of the original debt,[52] with all rights and liens apper-

835; McPeck *v.* Moore, 51 Vt. 269. See also *In re* Becken, 93 Mich. 342, 53 N. W. 522; Jacoby *v.* O'Hearn, 32 Mo. App. 566.

43. Hosack *v.* Rogers, 8 Paige (N. Y.) 229.

44. See Snow *v.* Lucier, 60 N. H. 32.

Where a debtor forms a partnership, which assumes his debts with the consent of his creditors, it is a novation of the debt. Snow *v.* Lucier, 60 N. H. 32.

45. *Idaho.*— Sherer *v.* Rubedew, 11 Ida. 536, 83 Pac. 512.

Indiana.— Parsons *v.* Tillman, 95 Ind. 452; Crosby *v.* Jeroloman, 37 Ind. 264.

Louisiana.— Cavanaugh *v.* Coleman, 23 La. Ann. 300.

Mississippi.— Adams *v.* Power, 52 Miss. 828.

New Hampshire.— Warren *v.* Batchelder, 16 N. H. 580.

New York.— Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120; Ryan *v.* Pistone, 89 Hun 78, 34 N. Y. Suppl. 81 [*affirmed* in 157 N. Y. 705, 52 N. E. 1126].

Pennsylvania.— Shafer's Appeal, 99 Pa. St. 246.

South Carolina.— Martin *v.* Maner, 10 Rich. 271, 70 Am. Dec. 223.

See 37 Cent. Dig. tit. "Novation," § 6.

46. Wellington *v.* Scott, 2 Rob. (La.) 59.

47. Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133

48. Scott *v.* Atchison, 38 Tex. 384, 36 Tex. 76.

Persons to whom payment may be made see, generally, PAYMENT.

49. Scott *v.* Atchison, 36 Tex. 76; Spycher *v.* Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414.

50. Scott *v.* Atchison, 38 Tex. 384, 36 Tex. 76. *Contra*, Turnbull *v.* Freret, 5 Mart. N. S. (La.) 703, holding that any one having a general authority to receive payment may make a novation, and consequently an executor may novate a debt of the estate.

An attorney has no power to change the securities of his client unless he be the attorney in fact specially authorized to do so. Scott *v.* Atchison, 38 Tex. 384.

51. Atcheson *v.* Scott, 51 Tex. 213.

52. *Alabama.*— Jolley *v.* Walker, 26 Ala. 690.

Arkansas.— Logan *v.* Williamson, 3 Ark. 216.

Florida.— Tysen *v.* Somerville, 35 Fla. 219, 17 So. 567.

Georgia.— Anderson *v.* Whitehead, 55 Ga. 277; Dever *v.* Akin, 40 Ga. 423; Brown *v.* Harris, 20 Ga. 403.

Indiana.— Dick *v.* Flanagan, 122 Ind. 277, 23 N. E. 765, 7 L. R. A. 590; Porter *v.* Dearinger, 33 Ind. 155; Smoot *v.* Dye, 3 Ind. 517; Grover *v.* Sims, 5 Blackf. 498.

Iowa.— Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699; Lester *v.* Bowman, 39 Iowa 611.

taining thereto,[53] although nothing is realized on the new security.[54] The substituted debtor becomes directly liable to the creditor,[55] who is privy to the novation so as to entitle him to sue the substituted debtor thereon,[56] and the state of accounts between the creditor and the original debtor is of no concern.[57]

B. When Conditional. But no extinguishment is wrought, if the arrangement is conditional, and the conditions are not fully complied with.[58]

VII. RESCISSION.

A debt once extinguished by novation cannot be again revived, unless by the consent of the parties to the original contract.[59] Such consent may be shown as well by an express abandonment of the novation as by an explicit second novation.[60]

VIII. PLEADING.

In a declaration in which plaintiff relies upon a novation, all the essential ele-

Maryland.— Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66.

New Hampshire.— Heaton *v.* Angier, 7 N. H. 397, 28 Am. Dec. 353.

New Jersey.— Schlicher *v.* Vogel, 61 N. J. Eq. 158, 47 Atl. 448 [*affirmed* in 65 N. J. Eq. 404, 54 Atl. 1125].

New York.— Munson *v.* Magee, 161 N. Y. 182, 55 N. E. 916 [*affirming* 22 N. Y. App. Div. 333, 47 N. Y. Suppl. 942].

Vermont.— Nelson *v.* Wells, 51 Vt. 52.

Wisconsin.— Abbott *v.* Johnson, 47 Wis. 239, 2 N. W. 332.

United States.— Hyde *v.* Booraem, 16 Pet. 169, 10 L. ed. 925; Swift *v.* Hathaway, 23 Fed. Cas. No. 13,698, 1 Gall. 417; Underwriters' Wrecking Co. *v.* The Katie, 24 Fed. Cas. No. 14,342, 3 Woods 182.

See 37 Cent. Dig. tit. "Novation," § 10.

Rights merged in new contract.— Whatever rights there may be to the parties to the original contract are merged in the new, which, in and of itself, destroys the old, and thereafter the remedy of either party, in case of a breach, is upon the new contract according to its terms. Bandman *v.* Finn, 103 N. Y. App. Div. 322, 92 N. Y. Suppl. 1096 [*reversed* on other grounds in 185 N. Y. 508, 78 N. E. 175].

Novation is a good defense to claim against original debtor.— Lane *v.* United Oil Cloth Co., 103 N. Y. App. Div. 378, 92 N. Y. Suppl. 1061.

Agreement to look to new debtor enforceable.— Porter *v.* Webb, 59 S. W. 1, 22 Ky. L. Rep. 917.

53. Washington *v.* Cartwright, 65 Ga. 177; Adams *v.* Power, 48 Miss. 450; Underwriters' Wrecking Co. *v.* The Katie, 24 Fed. Cas. No. 14,342, 3 Woods 182. But see Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699; Kausler *v.* Ford, 47 Miss. 289, holding that the novation of a debt by giving a new note will not discharge a lien by which the former note was secured.

If any hypothecations be attached to the old contract, they will be canceled by the new one, unless express words retain them. Adams *v.* Power, 48 Miss. 450, Tarbell, J., dissenting.

Discharge of sureties see PRINCIPAL AND SURETY.

54. Kerr *v.* Topping, 109 Iowa 150, 80 N. W. 321. See also Porter *v.* Dearinger, 33 Ind. 155.

Knowledge of worthlessness of new security.—After a novation the original debtor is only liable on proof of knowledge of the worthlessness of the new security. Murdock *v.* Coleman, 1 La. Ann. 410.

55. Pugh *v.* Barnes, 108 Ala. 167, 19 So. 370.

Priorities.— The creditor is entitled to payment from the substituted debtor as against another creditor of the original debtor who afterward garnishees the new debtor. Commercial Nat. Bank *v.* Kirkwood, 85 Ill. App. 235 [*affirmed* in 184 Ill. 139, 56 N. E. 405].

56. Karr *v.* Porter, 4 Houst. (Del.) 297; Griffin *v.* Cunningham, 183 Mass. 505, 67 N. E. 660.

Action of book-account.—Pangborn *v.* Saxton, 11 Vt. 79.

Action for money had and received.— Grover *v.* Sims, 5 Blackf. (Ind.) 498; Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555; King *v.* Hutchins, 28 N. H. 561; Israel *v.* Douglas, 1 H. Bl. 239.

57. Keller *v.* Beaty, 80 Ga. 815, 6 S. E. 598.

Defenses to old contract not available.— The new parties cannot avail themselves of defenses, claims, and set-offs, which would have prevailed between the old parties. Adams *v.* Power, 48 Miss. 450.

58. Edgell *v.* Tucker, 40 Mo. 523; Hyde *v.* Booraem, 16 Pet. (U. S.) 169, 10 L. ed. 925.

59. See Cox *v.* Williams, 7 Mart. N. S. (La.) 301.

The creditor cannot abandon the new contract and revive the old. Chapman *v.* Hardesty, 10 Rob. (La.) 34.

The substituted debtor cannot release himself from liability to the creditor by rescinding the contract without his consent. Hume *v.* Brower, 25 Ill. App. 130; Raum *v.* Kaltwasser, 4 Mo. App. 574.

60. Compton *v.* Blair, 27 Mich. 397.

ments of a contract of novation must be alleged.[61] Where it is not necessary to plaintiff's right to recover that there should have been a formal novation and release of the original debtor from liability, such novation and release need not be alleged.[62]

IX. EVIDENCE.

A. Burden of Proof. The burden of proof rests upon him who asserts that there has been a novation to establish it.[63]

B. Admissibility.[64] The contract of novation is to be determined by the written contract when in writing, and by the declarations of the parties when resting in parol.[65] Any competent testimony tending to show the understanding of the parties is admissible.[66]

C. Weight and Sufficiency. A contract of novation must be proven as other contracts are.[67] Novation is never presumed, and must be clearly established by evidence of a discharge of the original debt and of an express agreement or acts of the parties, clearly showing the intention to work a novation.[68]

61. See cases cited *infra*, this note.

Assent of parties.— The declaration must show privity between the parties to the suit. Pfeiffer *v.* Hunt, 75 Ga. 513. The petition must show that the creditor was a party to the agreement and that the substituted debtor promised to pay him. Palmetto Mfg. Co. *v.* Parker, 123 Ga. 798, 51 S. E. 714.

Allegations held sufficient to show novation see Sutter *v.* Moore Invest. Co., 30 Wash. 333, 70 Pac. 746.

62. Mitrovich *v.* Fresno Fruit Packing Co., 123 Cal. 379, 55 Pac. 1064.

63. Netterstrom *v.* Gallistel, 110 Ill. App. 352; Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098; Woodward *v.* Miles, 24 N. H. 289; Henry *v.* Nubert, (Tenn. Ch. App. 1895) 35 S. W. 444; State Bank *v.* Domestic Sewing-Mach. Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. Rep. 891.

Receipt of new security not payment per se.— The extinguishment of the original obligation is not to be inferred from the execution and acceptance of the new obligation alone. See PAYMENT.

Discharge cannot be presumed, and must be established by clear and positive proof of such intention on the part of the creditor. Latiolais *v.* Louisiana Citizens' Bank, 33 La. Ann. 1444. In default of sufficient evidence to the contrary, it will be presumed that the creditor retained the old debtor at the same time that he accepted the new one. Latiolais *v.* Louisiana Citizens' Bank, *supra*; Fidelity Loan, etc., Co. *v.* Engleby, 99 Va. 168, 37 S. E. 957.

64. See, generally, EVIDENCE.

65. Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75.

An offer to prove by parol testimony that a contract for a novation was drawn is properly rejected where such contract is not produced or its execution proved. Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, 70 C. C. A. 171.

Subsequent declarations of creditor.— A contract of novation cannot be shown by declarations of the creditor, after the contract is alleged to have been made, that he looked to another than the original debtor for his pay. Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75.

66. See cases cited *infra*, this note.

Conversations between the parties are admissible. Sutter *v.* Moore Invest. Co., 30 Wash. 333, 70 Pac. 746.

A demand by the original debtor is admissible to show an acceptance. Trudeau *v.* Poutre, 165 Mass. 81, 42 N. E. 508.

67. Haubert *v.* Mausshardt, 89 Cal. 433, 26 Pac. 899. See, generally, CONTRACTS.

68. *Arkansas.*— Cockrill *v.* Johnson, 28 Ark. 193.

California.— Haubert *v.* Mausshardt, 89 Cal. 433, 26 Pac. 899.

Louisiana.— Sucker State Drill Co. *v.* Loewer, 114 La. 403, 38 So. 399; Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489; Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; Meyer *v.* Atkins, 29 La. Ann. 586; Smith *v.* Brown, 12 La. Ann. 299; Rachel *v.* Rachel, 11 La. Ann. 687; Patrick *v.* Murphy, 9 La. Ann. 497; Parker *v.* Alexander, 2 La. Ann. 188; Gillet *v.* Rachal, 9 Rob. 276; Kemple *v.* Hunt, 4 La. 477; Nolte *v.* His Creditors, 6 Mart. N. S. 168; Mark *v.* Bowers, 4 Mart. N. S. 95; Crain *v.* Robert, 3 Mart. N. S. 145; Barron *v.* How, 2 Mart. N. S. 144.

Maine.— Hamlin *v.* Drummond, 91 Me. 175, 39 Atl. 551.

New Hampshire.— Howland *v.* Gates, 62 N. H. 293.

New York.— McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Suppl. 22.

Pennsylvania.— McCartney *v.* Kipp, 171 Pa. St. 644, 33 Atl. 233.

Tennessee.— Sharp *v.* Fly, 9 Baxt. 4; Henry *v.* Nubert, (Ch. App. 1895) 35 S. W. 444.

Canada.— Cowan *v.* Vezina, 26 Quebec Super. Ct. 7.

See 37 Cent. Dig. tit. "Novation," § 12. See also *supra*, II, C, 2.

Evidence held sufficient to establish novation see Garrison *v.* O'Donald, 73 Mo. App. 621; Culbertson Irr., etc., Co. *v.* Wildman, 45 Nebr. 663, 63 N. W. 947; Held *v.* Caldwell-Easton Co., 97 N. Y. App. Div. 301, 89

X. QUESTIONS FOR JURY.

Whether or not a debt has been novated is ordinarily a question of fact, and depends entirely upon the intention of the parties to the particular transaction claimed to be a novation.[69] Where there is no doubt as to the terms of the agreement it is a question of law for the court whether a novation has been effected.[70] But if the terms of the agreement are equivocal or uncertain, then it becomes a question of fact for the jury, under suitable instructions.[71]

NOVATIO NON PRÆSUMITUR. A maxim meaning "A novation is not presumed."[1]

NOVEL ASSIGNMENT. See NEW ASSIGNMENT.

NOVEL DESIGN. In patent law, a phrase used to indicate a thing of distinct and fixed individuality of appearance, a representation, a picture, a delineation, a device which addresses itself to the senses and taste, and produces pleasure or admiration in its contemplation.[2] (See, generally, PATENTS.)

NOVELTY. See PATENTS.

NOVITAS NON TAM UTILITATE PRODEST QUAM NOVITATE PERTURBAT. A maxim meaning "Novelty benefits not so much by its utility as it disturbs by its novelty."[3]

NOVUM JUDICIUM NON DAT NOVUM JUS, SED DECLARAT ANTIQUUM; QUIA JUDICIUM EST JURIS DICTUM, ET PER JUDICIUM JUS EST NOVITER QUOD DIU FIAT VELATUM. A maxim meaning "A new adjudication does not lay down a new law, but declares the ancient law; for a trial is a declaring of the law, and by a judgment the law is revealed anew which for a season has been veiled."[4]

NOW. At the present time;[5] at this time, or at the present moment, or at a time contemporaneous with something done.[6]

N. Y. Suppl. 954; De Witt *v.* Monjo, 46 N. Y. App. Div. 533, 61 N. Y. Suppl. 1046; Jarmusch *v.* Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122; Holloway *v.* White-Dunham Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. N. S. 704.

Evidence held insufficient to establish novation see Crowell *v.* Moley, 188 Mass. 116, 74 N. E. 329; Draggo *v.* West Bay City Sugar Co., 144 Mich. 195, 107 N. W. 911; J. I. Case Threshing-Mach. Co. *v.* Olson, 10 N. D. 170, 86 N. W. 718; Deaton Grocery Co. *v.* Pepper, 98 Va. 587, 36 S. E. 988.

Evidence held sufficient to justify submission to jury.— Bullock *v.* Tompkins, 125 Mich. 17, 83 N. W. 1029; Brown *v.* Neidhold, 108 Mich. 485, 66 N. W. 349; Mulgrew *v.* Cocharen, 96 Mich. 422, 56 N. W. 70, 98 Mich. 532, 57 N. W. 739; Ceballos *v.* Munson Steamship Line, 93 N. Y. App. Div. 593, 87 N. Y. Suppl. 811 [*reversing* 42 Misc. 22, 85 N. Y. Suppl. 530]; Sutter *v.* Moore Invest. Co., 30 Wash. 333, 70 Pac. 746.

69. *Illinois.*— Walker *v.* Wood, 170 Ill. 463, 48 N. E. 919 [*affirming* 69 Ill. App. 542].

New Hampshire.— Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.

New York.— Ceballos *v.* Munson Steamship Line, 93 N. Y. App. Div. 593, 87 N. Y. Suppl. 811 [*reversing* 42 Misc. 22, 85 N. Y. Suppl. 530]; McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Suppl. 22.

North Carolina.— Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663.

Virginia.— State Bank *v.* Domestic Sewing-Mach. Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. Rep. 891; Fidelity Loan, etc., Co. *v.* Englehy, 99 Va. 168, 37 S. E. 957.

See 37 Cent. Dig. tit. "Novation," § 13.

70. Trudeau *v.* Poutre, 165 Mass. 81, 42 N. E. 508.

71. Trudeau *v.* Poutre, 165 Mass. 81, 42 N. E. 508; Sinclair *v.* Richardson, 12 Vt. 33.

1. Morgan Leg. Max.

Applied in Relfe *v.* Columbia L. Ins. Co., 10 Mo. App. 150, 169.

2. New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 137 U. S. 445, 450, 11 S. Ct. 193, 34 L. ed. 741.

3. Bouvier L. Dict.

4. Morgan Leg. Max.

5. Jeffery *v.* Hursh, 58 Mich. 246, 254, 25 N. W. 176, 27 N. W. 7; Chapman *v.* Holmes, 10 N. J. L. 20, 26; Nutt *v.* U. S., 26 Ct. Cl. 15, 17; Waugh *v.* Middleton, 8 Exch. 352, 357, 22 L. J. Exch. 109, 18 Eng. L. & Eq. 545; Webster Dict. [*quoted* in Fletcher *v.* State, 49 Ind. 124, 135, 19 Am. Rep. 673]. But see St. Louis *v.* Dorr, 145 Mo. 466, 493, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

6. Pike *v.* Kennedy, 15 Oreg. 420, 426, 15 Pac. 637.

The intent with which this word is used must be gathered from its peculiar signifi-

NOXA SEQUITUR CAPUT. A maxim meaning "Blame follows the person."[7]

NOXIOUS. Hurtful, harmful, baneful, pernicious, destructive.[8]

N. P. An abbreviation for the words "neither party";[9] also for "NISI PRIUS,"[10] *q. v.*, and "notary public."[11]

N. R. An abbreviation for "New Reports"; also for "not reported," and for "non-resident."[12]

N. S. An abbreviation for "New Series"; also for "New Style."[13]

NUDA PACTIO OBLIGATIONEM NON PARIT. A maxim meaning "A naked promise does not make an obligation."[14]

NUDA RATIO ET NUDA PACTIO NON LIGANT ALIQUEM DEBITOREM. A maxim meaning "Naked reason and naked promise do not bind any debtor."[15]

NUDE PACT. An agreement without consideration.[16] (See NUDUM PACTUM; and, generally, CONTRACTS.)

NUDUM PACTUM. Literally, "A NUDE PACT," *q. v.* A promise that cannot be enforced, either at law or in equity;[17] an executory contract without a consideration, or a naked promise;[18] a voluntary promise, without any other consideration than mere good-will or natural affection.[19] (See NUDE PACT; and, generally, CONTRACTS.)

NUDUM PACTUM EST UBI NULLA SUBEST CAUSA PRÆTER CONVENTIONEM; SED UBI SUBEST CAUSA, FIT OBLIGATIO ET PARIT ACTIONEM. A maxim meaning "Where there is no other consideration than the agreement itself, the contract

cance in each case. See Ferriss *v.* Knowles, 41 Conn. 308, 312; Beeler *v.* Clarke, 90 Md. 221, 228, 44 Atl. 1038, 78 Am. St. Rep. 439; Varick *v.* Crane, 4 N. J. Eq. 128, 131; Quinn *v.* Hardenbrook, 54 N. Y. 83, 87; Allen's Appeal, 125 Pa. St. 544, 547, 17 Atl. 453; Fidelity Ins., Trust, etc., Co.'s Appeal, 108 Pa. St. 492, 502, 1 Atl. 233; Jones *v.* Hunt, 96 Tenn. 369, 374, 34 S. W. 693; White *v.* Nicholson, 11 L. J. C. P. 264, 265, 4 M. & G. 95, 4 Scott N. R. 707, 43 E. C. L. 58; All Souls College *v.* Coddrington, 1 P. Wms. 597, 598, 24 Eng. Reprint 533; Cole *v.* Scott, 16 Sim. 259, 264, 39 Eng. Ch. 259, 60 Eng. Reprint 873.

Used in connection with other words.— "Now attaches" see Lincoln *v.* Boston Mar. Ins. Co., 159 Mass. 337, 343, 34 N. E. 456. "Now belonging to" see Bayonne *v.* Ford, 43 N. J. L. 292, 294. "Now bequeathed" see Myers *v.* Myers, 2 McCord Eq. (S. C.) 214, 259, 16 Am. Dec. 648. "Now constructed" see Macon, etc., R. Co. *v.* Macon, etc., R. Co., 86 Ga. 83, 84, 13 S. E. 157. "Now due and payable" see Provident Mut. Bldg.-Loan Assoc. *v.* Davis, 143 Cal. 253, 255, 256, 76 Pac. 1034. "Now existing" see Beard *v.* Smith, 6 T. B. Mon. (Ky.) 430, 453. "Now in and upon" see Donnelly *v.* Hall, 7 Ont. 581, 586. "Now last past" see U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129, 139. "Now living" see Heard *v.* Horton, 1 Den. (N. Y.) 165, 168, 43 Am. Dec. 659; Whitehead *v.* Lassiter, 57 N. C. 79, 80. "Now occupied" see Methodist Episcopal Church Missionary Soc. *v.* Dalles City, 107 U. S. 336, 343, 2 S. Ct. 672, 27 L. ed. 545. "Now occupy" see Campbell *v.* Morgan, 68 Hun (N. Y.) 490, 493, 22 N. Y. Suppl. 1001. "Now on passage" see Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 697, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681. "Now past" see Com. *v.* Griffin, 3 Cush. (Mass.) 523, 525. "Now pending" see Shaw *v.* Caughell, 10 U. C. Q. B. 117, 120. "Now provided by law" see State *v.* Bossa, 69 Conn. 335, 340, 37 Atl. 977. "Now reside" see Pike *v.* Kennedy, 15 Oreg. 420, 426, 15 Pac. 637. "Now resides" see Lochnane *v.* Lochnane, 78 Ky. 467, 468.

7. Peloubet Leg. Max.

8. Webster Dict. [*quoted* in Runnels *v.* State, 45 Tex. Cr. 446, 448, 77 S. W. 458].

This word includes the complex idea both of insalubrity and offensiveness. Rex *v.* White, 1 Burr. 333, 337.

Used in connection with other words.— "Noxious or dangerous trade or business" see Atlantic Dock Co. *v.* Libby, 45 N. Y. 499, 502; Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, 135, 72 N. Y. Suppl. 483. "Noxious potion or substance" see Runnels *v.* State, 45 Tex. Cr. 446, 448, 77 S. W. 458. "Noxious or destructive substance or liquid" see People *v.* Van Deleer, 53 Cal. 147, 148. "Noxious thing" see State *v.* Gedicke, 43 N. J. L. 86, 90; Reg. *v.* Stitt, 30 U. C. C. P. 30, 34.

9. Curtis *v.* Egan, 53 N. H. 511, 513.

10. Black L. Dict.

11. Rowley *v.* Berrian, 12 Ill. 198, 200.

12. Black L. Dict.

13. Black L. Dict.

14. Peloubet Leg. Max.

Applied in Campbell *v.* McIsaac, 9 Nova Scotia 287, 289.

15. Black L. Dict.

16. Wilmington, etc., R. Co. *v.* Alsbrook, 110 N. C. 137, 162, 14 S. E. 652.

17. Wardell *v.* Williams, 62 Mich. 50, 59, 28 N. W. 796, 4 Am. St. Rep. 814.

18. Ga. Civ. Code (1895), § 3656.

19. Justice *v.* Lang, 42 N. Y. 493, 497, 1 Am. Rep. 576.

A contract which a court will not enforce or even recognize, because it is against the policy of the law, cannot be termed a "*nudum*

is naked, and obligeth not; only where there is a consideration, is there an obligation which will give a right of action."[20]

NUDUM PACTUM EX QUO NON ORITUR ACTIO. A maxim meaning "Nudum pactum is that upon which no action arises."[21]

NUDUM PACTUM INEFFICAX AD AGENDUM. A maxim meaning "A naked agreement is insufficient for an action."[22]

NUGÆ IN SERIA MALA DUCUNT. A maxim meaning "Trifles lead to serious mischief."[23]

pactum." People *v.* James, 110 Cal. 155, 158, 42 Pac. 479.

20. Morgan Leg. Max.

21. Black L. Dict.

Applied in Sumner *v.* Williams, 8 Mass. 162, 188. 5 Am. Dec. 83.

22. Peloubet Leg. Max.

23. Morgan Leg. Max.

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* Author of "Infants," 22 Cyc. 503; "Parent and Child," *post*, p. 1576; and joint author of "Evidence," 16 Cyc. 821; "Mechanics' Liens," 27 Cyc. 1.

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I. DEFINITIONS AND DISTINCTIONS.

A. Definition. The term "nuisance" means literally annoyance; anything which works hurt, inconvenience, or damage,[1] or which essentially interferes with the enjoyment of life or property.[2]

B. Public and Private Nuisances. A nuisance is public where it affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled,[3] whereas a private nuisance is anything done to the hurt, annoyance, or detriment of the lands, tenements, or hereditaments of another,[4]

1. Miller *v.* Burch, 32 Tex. 208, 210, 5 Am. Rep. 242. See also Melker *v.* New York, 190 N. Y. 481, 83 N. E. 565.

2. Percival *v.* Yousling, 120 Iowa 451, 94 N. W. 913.

3. *Delaware.*— State *v.* Luce, 9 Houst. 396, 32 Atl. 1076.

Illinois.— Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

New Jersey.— King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

New York.— Knox *v.* New York, 55 Barb. 404, 38 How. Pr. 67; Johnson *v.* New York, 109 N. Y. App. Div. 821, 96 N. Y. Suppl. 754.

Pennsylvania.—Warren *v.* Hunter, 1 Phila. 414.

See 37 Cent. Dig. tit. "Nuisance," § 135 *et seq.*

A nuisance affecting a place where the public has a legal right to go, and where the members thereof congregate, or where they are likely to come within its influence, is a public nuisance. Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988.

4. *Georgia.*— Coker *v.* Birge, 9 Ga. 425, 54 Am. Dec. 347.

Illinois.— Chicago North Shore St. R. Co. *v.* Payne, 192 Ill. 239, 61 N. E. 467; Calef *v.* Thomas, 81 Ill. 478; Lazarus *v.* Parmly, 113 Ill. App. 624.

Maine.— Veazie *v.* Dwinel, 50 Me. 479.

Minnesota.— Dorman *v.* Ames, 12 Minn. 451.

New York.—Swords *v.* Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109];

and not amounting to a trespass;[5] thus any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another constitutes a private nuisance.[6] It will thus be observed that the difference between public and private nuisances does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals,[7] and so the same act or structure may be a public nuisance and also a private nuisance as to a person who is thereby caused a special injury other than that inflicted upon the general public;[8] while on the other hand, the fact that a nuisance injures a great many persons does not make it a public nuisance, where the injury is to the individual property of each person and not to the general public as such.[9]

C. Nuisances Per Se and Per Accidens. A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.[10] The number of things

Cropsey *v.* Murphy, 1 Hilt. 126; Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89.

Tennessee.— Caldwell *v.* Knott, 10 Yerg. 209.

Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

United States.— Payne *v.* Kansas, etc., R. Co., 46 Fed. 546.

5. See Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583; Galbraith *v.* Oliver, 3 Pittsb. (Pa.) 78.

6. Heeg *v.* Licht, 80 N. Y. 579, 36 Am. Rep. 654; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]; Lee *v.* Vacuum Oil Co., 54 Hun (N. Y.) 156, 7 N. Y. Suppl. 426; Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766; McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Stokes *v.* Pennsylvania R. Co., 214 Pa. St. 415, 63 Atl. 1028.

7. *Illinois.*— Parker *v.* People, 111 Ill. 581, 53 Am. Rep. 643.

New York.— Kelley *v.* New York, 6 Misc. 516, 27 N. Y. Suppl. 164 [*affirmed* in 89 Hun 246, 35 N. Y. Suppl. 1109]; Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89.

Pennsylvania.—Brunner *v.* Schaffer, 11 Pa. Co. Ct. 550.

South Carolina.— Baltzeger *v.* Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; State *v.* Charleston Neck Cross Roads Com'rs, 3 Hill 149, Riley 146.

Tennessee.— Willcox *v.* Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

Noise of street cars.— The discomfort and injury sustained by adjoining owners from the noise produced by taking street cars in and out of a car barn of the company, over the switches and curves, up to one o'clock A M., does not constitute a private nuisance. Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455.

Discharge of sewerage.— Where a city empties its sewerage into a stream, thereby damaging the property of a person outside the city limits, it is a private, and not a public, nuisance. Matheny *v.* Aiken, 68 S. C. 163, 47 S. E. 56.

8. *Indiana.*— Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Richmond *v.* Smith, 148 Ind. 294, 47 N. E. 630; Haggart *v.* Steblin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626.

Iowa.— Platt *v.* Chicago, etc., R. Co., 74 Iowa 127, 37 N. W. 107.

Kentucky.— Corley *v.* Lancaster, 81 Ky. 171.

Michigan.— Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

Nevada.— Fogg *v.* Nevada-California-Oregon R. Co., 20 Nev. 429, 23 Pac. 840.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156; Cronin *v.* Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605.

New York.— Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629; Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Ohio.— McCormick Harvesting Mach. Co. *v.* Kauffman-Lattimer Co., 5 Ohio S. & C. Pl. Dec. 468, 5 Ohio N. P. 505.

Pennsylvania.— Hughes *v.* Heiser, 1 Binn. 463, 2 Am. Dec. 459.

England.— Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.

See 37 Cent. Dig. tit. "Nuisance," § 34.

Right of private individual to relief against public nuisance see *infra*, VI.

The term "mixed nuisances" has been suggested as appropriate to nuisances which may be both public and private in their effects. Wood Nuisances (3d ed.), § 16.

9. Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

10. Hundley *v.* Harrison, 123 Ala. 292, 26 So. 294; Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381; Whitmore *v.* Orono Pulp, etc., Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377; Melker *v.* New York, 190 N. Y. 481, 83 N. E. 565.

which are nuisances *per se* is limited, and by far the larger class of nuisances is that which may be termed nuisances in fact or nuisances *per accidens*, and consists of those acts, occupations, or structures which are not nuisances *per se* but may become nuisances by reason of the circumstances or the location and surroundings.[11] It has, however, been said of certain acts, occupations, or structures that they are nuisances *per se* in certain localities, whereas in other localities they would not be nuisances.[12]

D. Permanent, Continuing, Recurrent, and Temporary Nuisances. A permanent nuisance is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely,[13] and as a rule consists of some building or structure. Nuisances consisting of acts done, or particular uses of property, may be properly termed continuing when they are of such a character that they may continue indefinitely, or on the other hand may be discontinued at any time;[14] recurrent when they occur from time to time but are not continuous or uninterrupted; and temporary when from their nature they will not be continued or repeated.

II. NATURE AND ELEMENTS.

A. In General. To constitute the condition or use of premises a nuisance some legal right, public or private, must be violated, and some material annoyance, inconvenience, or injury, either actual or implied, must result from the invasion of the right;[15] there must be, not merely a nominal, but such a sensible and real damage as a sensible person, if subjected to it, would find injurious, regard being had to the situation and mode of occupation of the property injured.[16]

B. Intent or Malice. The intent or motive of a person who erects or maintains a structure, carries on an occupation on, or makes certain uses of, his property is not material in determining whether there is a nuisance.[17] So where there is in fact a nuisance the person causing the same is liable, although he did not act maliciously or with the intent of annoying his neighbor;[18] and conversely, if a structure is lawful and not of itself a nuisance it cannot be complained of as such on the ground that it was erected and is maintained with the object of annoying a neighbor.[19] Under some statutes, however, unnecessary structures erected or

11. See Geiger *v.* Filor, 8 Fla. 325; Dargan *v.* Waddill, 31 N. C. 244, 49 Am. Dec. 421. Thus a house which from the purposes for which it is used or the situation in which it is placed may not be a nuisance may become so from the negligent and filthy state in which it is kept. State *v.* Purse, 4 McCord (S. C.) 472. See, generally, *infra*, III.

12. See *infra*, III, B, 26, 39, 48, 49, 53, 93.

13. Bischof *v.* Merchants' Nat. Bank, (Nebr. 1906) 106 N. W. 996, holding that a structure on a street constituting a nuisance, maintained in violation of a positive statute, not necessary to any lawful business, and which is not an inseparable part of the unfinished building to which it is attached, will not be presumed to continue indefinitely, and is not a permanent nuisance.

14. If the subsequent use, in the course of business, of a lime-kiln which has once been erected and used, constitutes a nuisance, it must be regarded as a continuing nuisance, and each successive burning of lime therein cannot be regarded as an original nuisance. Slight *v.* Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

15. Lazarus *v.* Parmly, 113 Ill. App. 624.

16. Scott *v.* Firth, 4 F. & F. 349, 10 L. T. Rep. N. S. 240.

17. *Connecticut.*— Gallagher *v.* Dodge, 48 Conn. 387, 40 Am. Rep. 182.

Iowa.— Bonnell *v.* Smith, 53 Iowa 281, 5 N. W. 128.

Michigan.— See Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863.

Montana.— Bordeaux *v.* Green, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

New York.— Olmstead *v.* Rich, 3 Silv. Sup. 447, 6 N. Y. Suppl. 826.

See 37 Cent. Dig. tit. "Nuisance," § 2.

Intent not material in criminal prosecution. — Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279].

18. Brady *v.* Detroit Steel, etc., Co., 102 Mich. 277, 60 N. W. 687, 26 L. R. A. 175.

19. *Indiana.*— Russell *v.* State, 32 Ind. App. 243, 69 N. E. 482, fence cutting off light, air, and view of neighbor.

Kansas.—Falloon *v.* Schilling, 29 Kan. 292, 44 Am. Rep. 642.

Montana.— Bordeaux *v.* Green, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600, high fence cutting off light, air, and view.

New York.— Pickard *v.* Collins, 23 Barb. 444; Mahan *v.* Brown, 13 Wend. 261, 28 Am. Dec. 461.

Ohio.— Letts *v.* Kessler, 54 Ohio St. 703, 42 N. E. 765, 40 L. R. A. 177 [*overruling*, by

maintained by persons for the purpose of annoying their neighbors are declared to be nuisances;[20] and it has been held that, while certain acts done by a person in the use of his premises as a dwelling-house might not in themselves amount to a private nuisance, when the same acts are done wantonly and maliciously, for the purpose of annoying a neighbor and destroying the peace and quiet of his home, and they have such effect, they may amount to a nuisance which a court of equity will restrain.[21]

C. Negligence.[22] The question of negligence is not involved in an action for the creation or maintenance of a nuisance, and hence no negligence need be shown in order to establish defendant's liability in damages or plaintiff's right to an injunction, nor can a showing that there is no negligence defeat a recovery.[23]

necessary implication, Kessler *v.* Letts, 7 Ohio Cir. Ct. 108, 3 Ohio Cir. Dec. 687; Peck *v.* Bowman, 10 Ohio Dec. (Reprint) 567, 22 Cinc. L. Bul. 111].

Wisconsin.— Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305.

See 37 Cent. Dig. tit. "Nuisance," § 2.

In Michigan the rule is that a structure which serves no useful purpose but is erected maliciously for the sole purpose of annoying a neighbor is a nuisance (Flaherty *v.* Moran, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183 [*following* Burke *v.* Smith, 69 Mich. 380, 37 N. W. 838, and *followed* in Peek *v.* Roe, 110 Mich. 52, 67 N. W. 1080; Kirkwood *v.* Finegan, 95 Mich. 543, 55 N. W. 457]); but a structure erected for a useful purpose is not a nuisance, although malice was displayed in placing it so as to annoy a neighbor (Kuzniak *v.* Kozminski, 107 Mich. 444, 65 N. W. 275, 61 Am. St. Rep. 344 [*distinguishing* Flaherty *v.* Moran, *supra*]).

20. Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81, holding that, under St. (1887) c. 348, declaring that any fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying adjoining owners or occupants, is a private nuisance, the purpose of annoyance must be the dominant motive for erecting or maintaining the fence, without which it would not have been built or maintained.

Maintaining structure erected before enactment of statute.— Under Mass. St. (1887) c. 348, defendant may be liable, although the fence for which action is brought was erected prior to the passage of the act, if the motives for allowing it to stand are malicious. Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81, holding, however, that help given by a person in building a fence on his wife's land before the passage of the statute does not make him liable, and is not evidence that he maintains the fence.

Fence on opposite side of street.—A person cannot recover under Mass. St. (1887) c. 348, where it is shown that the fence complained of is on the opposite side of the street from his land and twenty-one feet from the nearest part of such land, counting from the center of the highway. Spaulding *v.* Smith, 162 Mass. 543, 39 N. E. 189.

Useful structure.—A shed thirty-two feet long, by ten feet wide and fifteen feet high, erected by an owner of land entirely on his own premises, used for storing carriages, but erected for the purpose of annoying an adjoining owner, is not a nuisance, within N. H. Pub. St. c. 143, §§ 28, 29, declaring that any fence, or other structure in the nature of a fence, exceeding five feet in height, erected for the purpose of annoying an adjoining owner, shall be deemed a private nuisance. Lovell *v.* Noyes, 69 N. H. 263, 46 Atl. 25.

Controlling motive.— In an action under N. H. Laws (1887), c. 91, for maintaining a structure in the nature of a fence unnecessarily exceeding five feet in height for the purpose of annoying plaintiffs, owners of adjacent property, plaintiffs could not complain of a charge that defendant was liable if he was actuated by two motives, one of annoyance, and the other of utility, if the former was the controlling one. Hunt *v.* Coggin, 66 N. H. 140, 20 Atl. 250, where the court said further that the question whether defendant was entitled to a more favorable charge did not arise.

21. Medford *v.* Levy, 31 W. Va. 649, 8 S. E. 302, 13 Am. St. Rep. 887, 2 L. R. A. 368.

22. See, generally, NEGLIGENCE.

23. *Alabama.*— Vernon *v.* Edgeworth, (1906) 42 So. 749.

Illinois.— Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262 [*affirming* 30 Ill. App. 321].

Kentucky.— Snider Preserve Co. *v.* Beemon, 60 S. W. 849, 22 Ky. L. Rep. 1527.

Maine.— State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

Massachusetts.— Boston Ferrule Co. *v.* Hills, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844.

Minnesota.— Berger *v.* Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. 336.

Missouri.— Schaub *v.* Perkinson Bros. Constr. Co., 108 Mo. App. 122, 82 S. W. 1094.

New York.— Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Tremain *v.* Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Pach *v.* Geoffroy, 67 Hun 401, 22 N. Y. Suppl. 275 [*affirmed* in 143 N. Y. 661, 39 N. E. 21]; American Ice Co. *v.* Catskill Cement Co., 43 Misc. 221, 88 N. Y. Suppl. 455 [*affirmed* in 99 N. Y. App. Div. 31, 90 N. Y. Suppl. 801];

D. Injuries From Natural Causes. In order to constitute a legal nuisance the act of man must have contributed to its existence, and so ill results, however extensive or serious, which flow from natural causes, cannot become a nuisance, in a legal sense, even though the person upon whose premises the causes exist could remove them with little trouble or expense.[24] But a person whose acts have contributed to a nuisance is liable, although natural causes may also have contributed.[25]

III. WHAT CONSTITUTES A NUISANCE.

A. General Considerations — 1. ANNOYANCE, DISCOMFORT, ETC. As a general rule every unlawful use by a person of his own property in such a way as to cause material annoyance, discomfort, or hurt to other persons or the public generally, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes a nuisance.[26]

2. REASONABLENESS OF BUSINESS OR USE OF PROPERTY. A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case,[27] and where the use made of his property

Finegan *v.* Eckerson, 26 Misc. 574, 57 N. Y. Suppl. 605.

Pennsylvania.— Stokes *v.* Pennsylvania R. Co., 214 Pa. St. 415, 63 Atl. 1028; Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834; Hauck *v.* Tidewater Pipe Line Co., 153 Pa. St. 366, 26 Atl. 644, 34 Am. St. Rep. 710, 20 L. R. A. 642; Pottsdown Gas Co. *v.* Murphy, 39 Pa. St. 257; Green *v.* Sun Co., 32 Pa. Super. Ct. 521.

West Virginia.— Wilson *v.* Phœnix Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

United States.— Exley *v.* Soutbern Cotton Oil Co., 151 Fed. 101.

See 37 Cent. Dig. tit. "Nuisance," § 3. And see *infra*, III, A, 9.

24. *Georgia.*—Brimberry *v.* Savannah, etc., R. Co., 78 Ga. 641, 3 S. E. 274 [*followed* in Roberts *v.* Harrison, 101 Ga. 773, 28 S. E. 995, 65 Am. St. Rep. 342].

Illinois.— Peck *v.* Herrington, 109 Ill. 611, 50 Am. Rep. 627.

New York.— Hartwell *v.* Armstrong, 19 Barb. 166; Woodruff *v.* Fisher, 17 Barb. 224.

South Carolina.— State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737.

Wisconsin.— Mohr *v.* Gault, 10 Wis. 513, 78 Am. Dec. 687.

England.— Giles *v.* Walker, 24 Q. B. D. 656, 54 J. P. 599, 59 L. J. Q. B. 416, 62 L. T. Rep. N. S. 933, 38 Wkly. Rep. 782.

Accumulation of water.— Where, from natural causes only, water accumulates upon land in such quantities as that, in the process of evaporation, noxious and deleterious gases, injurious to the public health, and to the health of persons residing in the community, are emitted, the owner cannot be held answerable for the creation or continuance of such nuisance, nor be compelled by order of the magistrates, under Ga. Civ. Code, § 4760, to abate it. Roberts *v.* Harrison, 101 Ga. 773, 28 S. E. 995, 65 Am. St. Rep. 342.

25. Thomas *v.* Concordia Cannery Co., 68 Mo. App. 350; Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; Dunsbach *v.* Hollister, 49 Hun (N. Y.) 352, 2 N. Y. Suppl. 94 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152].

26. *Louisiana.*—Froelicher *v.* Southern Mar. Works, 118 La. 1077, 43 So. 882.

Massachusetts.—Davis *v.* Sawyer, 133 Mass. 289, 43 Am. Rep. 519.

Pennsylvania.— Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117; Middlestadt *v.* Waupaca Starch, etc., Co., 93 Wis. 1, 66 N. W. 713; Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

England.— Hurdman *v.* North Eastern R. Co., 3 C. P. D. 168, 47 L. J. C. P. 368, 38 L. T. Rep. N. S. 339, 26 Wkly. Rep. 489; Turner *v.* Mirfield, 34 Beav. 390, 55 Eng. Reprint 685.

Anything constructed on a person's premises which of itself or by its intended use directly injures a neighbor in the proper use and enjoyment of his property is a nuisance. Grady *v.* Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

27. *District of Columbia.*—Akers *v.* Marsh, 19 App. Cas. 28.

Kansas.— Phillips *v.* Lawrence Vitrified Brick, etc., Co., 72 Kan. 643, 82 Pac. 787, 2 L. R. A. N. S. 92.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

New Hampshire.— Ladd *v.* Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Leonard *v.* Hotel Majestic Co., 17 Misc. 229, 40 N. Y. Suppl. 1044.

Pennsylvania.—Dallas *v.* Ladies' Decorative Art Club, 4 Pa. Co. Ct. 340.

by the person complained of is not unreasonable it will not as a rule be enjoined,[28] nor can a person complaining thereof recover damages.[29] But when it is established that a person is creating a nuisance the mere fact that he is doing what is reasonable from his point of view constitutes no defense.[30]

3. Locality — a. In General. The locality is to be considered in determining whether there is a nuisance, for what might be a nuisance in one locality might not be so in another.[31] Thus a business which might be perfectly proper in a business or manufacturing neighborhood may be a nuisance when carried on in a residential district;[32] and conversely a business which with its incidents might well be considered a nuisance in a residential portion of a city or village may be proof against complaint where conducted in a business or manufacturing locality.[33]

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117.

United States.— Exley *v.* Southern Oil Co., 151 Fed. 101; U. S. *v.* Luce, 141 Fed. 385.

England.— Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282; Christie *v.* Davey, [1893] 1 Ch. 316, 62 L. J. Ch. 439, 3 Reports 210.

Canada.— Carpentier *v.* Maisonneuve, 11 Quebec Super. Ct. 242 [*followed* in Cusson *v.* Galibert, 22 Quebec Super. Ct. 493].

28. Lambeau *v.* Lewinski, 47 Ill. App. 656; Faucher *v.* Trudel, 71 N. H. 621, 52 Atl. 443; Ladd *v.* Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041 (manufacturing bricks); Bowden *v.* Edison Electric Illuminating Co., 29 Misc. (N. Y.) 171, 60 N. Y. Suppl. 835; Leonard *v.* Hotel Majestic Co., 17 Misc. (N. Y.) 229, 40 N. Y. Suppl. 1044 (the use of a driveway in the rear of a hotel for the purpose of carrying in supplies). But *compare* Reiuhardt *v.* Mentasti, 42 Ch. D. 685, 58 L. J. Ch. 787, 61 L. T. Rep. N. S. 328, 38 Wkly. Rep. 10 [*following* Broder *v.* Saillard, 2 Ch. D. 692, 45 L. J. Ch. 414, 24 Wkly. Rep. 1011], holding that where defendant, a hotel proprietor, placed in his kitchen and used in his business a large cooking range, with a shaft for hot air, which interfered with the comfort of plaintiff's house, by overheating his wine cellar, although the use by defendant of the range and shaft was perfectly reasonable, plaintiff was entitled to an injunction to restrain the nuisance thereby caused to him.

29. Davis *v.* Whitney, 68 N. H. 66, 44 Atl. 78 [*following* Rindge *v.* Sargent, 64 N. H. 294, 9 Atl. 723; Green *v.* Gilbert, 60 N. H. 144; Haley *v.* Colcord, 59 N. H. 7, 47 Am. Rep. 176; Brown *v.* Collins, 53 N. H. 442, 16 Am. Rep. 372; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 72 Am. Rep. 147; Swett *v.* Cutts, 50 N. H. 439, 9 Am. Rep. 276; Hayes *v.* Waldron, 44 N. H. 580, 84 Am. Dec. 105; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179].

30. Atty.-Gen. *v.* Cole, [1901] 1 Ch. 205, 65 J. P. 88, 70 L. J. Ch. 148, 83 L. T. Rep. N. S. 725.

31. *Connecticut.*—Whitney *v.* Bartholomew, 21 Conn. 213.

Indiana.— Owen *v.* Phillips, 73 Ind. 284.

Massachusetts.—Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

Michigan.— Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

New York.— Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259.

Ohio.— Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

Pennsylvania.— Hafer *v.* Guynan, 7 Pa. Dist. 21.

England.— Struges *v.* Bridgman, 11 Ch. D. 852, 48 L. J. Ch. 785, 41 L. T. Rep. N. S. 219, 28 Wkly. Rep. 200.

See 37 Cent. Dig. tit. "Nuisance," §§ 9, 143.

The owners of property in the vicinity of a railroad necessarily suffer inconvenience, such as detention by trains upon the track, the noise of passing trains, the smoke emitted from the engine, and the like, which do not give them a right to recover as for a nuisance.

Iowa.— Dunsmore *v.* Central Iowa R. Co., 72 Iowa 182, 33 N. W. 456.

Kentucky.— Cosby *v.* Owensboro, etc., R. Co., 10 Bush 288.

Missouri.— Randle *v.* Pacific R. Co., 65 Mo. 325.

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624.

Pennsylvania.— Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282.

See 37 Cent. Dig. tit. "Nuisance," § 9. And see, generally, Railroads.

The existence of two fish fertilizer factories in a neighborhood of the quarantine station on Delaware bay, between Lewes and Cape Henlopen, does not constitute such an industrial or manufacturing neighborhood as to disentitle the government to relief from a nuisance thereby created. U. S. *v.* Luce, 141 Fed. 385.

32. Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; McMorran *v.* Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511; Hennessy *v.* Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Wallace *v.* Auer, 10 Phila. (Pa.) 356.

33. *Michigan.*— Robinson *v.* Baugh, 31 Mich. 290; Gilbert *v.* Showerman, 23 Mich. 448.

Ohio.— Culver *v.* Ragan, 15 Ohio Cir. Ct. 228, 8 Ohio Cir. Dec. 125.

Pennsylvania.— Straus *v.* Barnett, 140 Pa. St. 111, 21 Atl. 253; Huckenstein's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Hafer *v.* Guynan, 7 Pa. Dist. 21.

United States.— Tuttle *v.* Church, 53 Fed. 422.

The fact that a place is a manufacturing locality does not, however, justify an extraordinary use of property, introducing a serious annoyance in addition to those arising from the ordinary uses of property there;[34] and no matter how lawful a business may be in itself or how suitable in the abstract the location may be, these things cannot avail to authorize the carrying on of a business in a way which directly, palpably, and substantially damages the property of another,[35] or causes unnecessary annoyance to persons in the vicinity,[36] at least in the absence of anything conferring a prescriptive right,[37] or of any grant, covenant, license, or privilege.[38]

b. Change in Character of Locality. It is the character of the locality at the time of the annoyance complained of that governs,[39] so that, although a locality was originally residential, if it has lost that character or become a business or manufacturing neighborhood, the annoyances incident to such a locality cannot be complained of;[40] while on the other hand the fact that an offensive trade or use of property was originally established in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and to persons passing along which it is a nuisance,[41] where such business or use has not been maintained long enough to establish a prescriptive right;[42] but as the city extends such nuisances should be removed to the vacant ground beyond the immediate vicinity of the residences of the citizens.[43]

4. Circumstances and Surroundings. While it may be easy to draw the line between what is and what is not a nuisance it is by no means so easy to determine whether the circumstances of any particular case ought to place it on one side or the other of that line.[44] In fact no definite rule can be given to govern all cases, but each must depend upon the particular circumstances which characterize it; and the nature of the trade or kind of annoyance, the location, the surroundings, and all the attending circumstances must be taken into consideration.[45] It has

England.— Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608, 116 E. C. L. 608.

Canada.— Jones *v.* McCleary Mfg. Co., 18 Quebec Super. Ct. 130.

See 37 Cent. Dig. tit. "Nuisance," §§ 9, 143.

34. Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Mulligan *v.* Elias, 12 Abb. Pr. N. S. (N. Y.) 259.

35. Hurlbut *v.* McKane, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Robinson *v.* Baugh, 31 Mich. 290; Bamford *v.* Turnley, 3 B. & S. 62, 66, 9 Jur. N. S. 377, 31 L. J. Q. B. 286, 10 Wkly. Rep. 803, 113 E. C. L. 62 [*disapproving* Hole *v.* Barlow, 4 C. B. N. S. 334, 4 Jur. N. S. 1019, 27 L. J. C. P. 207, 6 Wkly. Rep. 619, 93 E. C. L. 334].

36. Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255.

37. Robinson *v.* Baugh, 31 Mich. 290.

Prescriptive right see *infra*, V.

38. Robinson *v.* Baugh, 31 Mich. 290.

Statutory or municipal authority see *infra*, III. G.

39. See Mercer County *v.* Harrodsburg, 114 Ky. 851, 71 S. W. 928, 24 Ky. L. Rep. 1651, 66 S. W. 10, 23 Ky. L. Rep. 1744, 56 L. R. A. 583.

40. Gilbert *v.* Showerman, 2 Mich. N. P. 158; Bredeman *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 23, 67 N. Y. Suppl. 391; Doellner *v.* Tynan, 38 How. Pr. (N. Y.) 176.

41. *Iowa.*— Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

Kentucky.—Ashbrook *v.* Com., 1 Bush 139, 89 Am. Dec. 616.

Maryland.— Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494 [*approving* Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737].

Massachusetts.— Com. *v.* Upton, 6 Gray 473.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

New Jersey.— North Brunswick Tp. Bd. of Health *v.* Lederer, 52 N. J. Eq. 675, 29 Atl. 444.

New York.— Brady *v.* Weeks, 3 Barb. 157.

Pennsylvania.— Wier's Appeal, 74 Pa. St. 230; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92.

See 37 Cent. Dig. tit. "Nuisance," §§ 9, 143.

Contra.— Rex *v.* Cross, 2 C. & P. 483, 31 Rev. Rep. 684, 12 E. C. L. 689.

42. Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494.

Prescriptive right see *infra*, V.

43. Brady *v.* Weeks, 3 Barb. (N. Y.) 157; Wier's Appeal, 74 Pa. St. 230.

44. Wier's Appeal, 74 Pa. St. 230.

45. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

been said, however, that there is a distinction between an action for a nuisance in respect of an act producing a material injury to property and one brought in respect of an act producing personal discomfort, for while as to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around, as to the former the same rule would not apply.[46]

5. Incidents of City or Village Life. A person who lives in a city, town, or village must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefit of the inhabitants of the place,[47] and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or village life cannot be complained of as nuisances.[48] But although people live in cities they are entitled to enjoy their homes free from damaging results by smoke, soot, and cinders, sufficient to depreciate the value of their property, in addition to rendering their occupancy uncomfortable.[49]

6. Lawfulness of Act or Business. One who uses his property in a lawful and proper manner is not guilty of a nuisance merely because the particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor,[50] and nothing which is legal in its erection can be a nuisance *per*

District of Columbia.— Akers *v.* Marsh, 19 App. Cas. 28.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Campbell *v.* Surman, 63 N. Y. 568, 20 Am. Rep. 567; Catlin *v.* Patterson, 10 N. Y. St. 724.

Pennsylvania.— Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170; Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117; Middlestadt *v.* Waupaca Starch, etc., Co., 93 Wis. 1, 66 N. W. 713; Price *v.* Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333; Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808; Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

England.— Sturges *v.* Bridgman, 11 Ch. D. 852, 48 L. J. Ch. 785, 41 L. T. Rep. N. S. 219, 28 Wkly. Rep. 200.

See 37 Cent. Dig. tit. "Nuisance," §§ 9, 143.

Matters proper for consideration.— Where defendants are charged with maintaining a public and common nuisance by operating an oil refinery, in a city, which emitted noxious and offensive vapors, and in which are stored and used inflammable, explosive, and dangerous oils and gases, it being denied that the business is a public and common nuisance, the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, are proper matters for consideration by the jury in determining whether it is a public nuisance. Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

46. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642, 11 Jur. N. S. 785, 35 L. J. Q. B. 66, 12 L. T. Rep. N. S. 776, 13 Wkly. Rep. 1083, 11 Eng. Reprint 1483.

47. *Missouri.*— Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

New York.— McGuire *v.* Bloomingdale, 8 Misc. 478, 29 N. Y. Suppl. 580, 31 Abb. N. Cas. 337; Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259.

Pennsylvania.— Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Hafer *v.* Guynan, 7 Pa. Dist. 21.

United States.— Tuttle *v.* Church, 53 Fed. 422.

England.— Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608, 116 E. C. L. 608.

Canada.— Robins *v.* Dominion Coal Co., 16 Quebec Super. Ct. 195.

See 37 Cent. Dig. tit. "Nuisance," §§ 9, 143.

48. Miller *v.* Webster City, 94 Iowa 162, 62 N. W. 648; Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; Gilbert *v.* Showerman, 23 Mich. 448.

49. King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

50. *Georgia.*— Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

Illinois.— Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659; Flood *v.* Consumers Co., 105 Ill. App. 559, holding that the erection by an owner of any species of structure on his land, however rude, cheap, or unsightly, is not of itself a nuisance.

se,[51] nor can any lawful business be spoken of as a nuisance *per se*,[52] nor will such a business be enjoined merely because it cannot be carried on without some degree of offense and annoyance to those living near it.[53] But the inherent lawfulness of the act or use or business complained of is not the sole test,[54] for the mere fact that a person is the owner of the land will not justify his use of it in a way to annoy and injure others,[55] nor has any one a right to erect or maintain a nuisance to the injury of his neighbors even in the pursuit of a lawful trade,[56] or to carry on an offensive occupation to the great annoyance of one dwelling immediately near;[57] and any business, however lawful in itself, which causes annoyance to those residing in the neighborhood, materially interfering with the ordinary physical comfort of human life, may be adjudged a nuisance.[58] So an act or business which is lawful in itself may be a nuisance where it is done or conducted in a place where it necessarily tends to the damage of another's property,[59] and a business which, properly conducted, would give no legal ground of complaint may

Indiana.— Owen *v.* Phillips, 73 Ind. 284.
Iowa.— Quinn *v.* Chicago, etc., R. Co., 63 Iowa 510, 19 N. W. 336.
Maine.— Gerrish *v.* Proprietors Union Wharf, 26 Me. 384, 46 Am. Dec. 568.
New York.— Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Friedman *v.* New York, etc., R. Co., 89 N. Y. App. Div. 38, 85 N. Y. Suppl. 404 [*affirmed* in 180 N. Y. 550, 73 N. E. 1123]; Lester *v.* New York, 79 Hun 479, 29 N. Y. Suppl. 1000 [*affirmed* in 150 N. Y. 578, 44 N. E. 1125]; Gardner *v.* Heartt, 2 Barb. 165 [*reversed* on other grounds in 1 N. Y. 528]; Masterson *v.* Short, 3 Abb. Pr. N. S. 154, 33 How. Pr. 481.
Tennessee.— Harvey *v.* Consumers' Ice Co., 104 Tenn. 583, 58 S. W. 316.
Texas.— St. Louis, etc., R. Co. *v.* Shaw, (1906) 92 S. W. 30; Rainey *v.* Red River, etc., R. Co., (Civ. App. 1904) 80 S. W. 95.
England.— Hurdman *v.* North Eastern R. Co., 3 C. P. D. 168, 47 L. J. C. P. 368, 38 L. T. Rep. N. S. 339, 26 Wkly. Rep. 489.
Canada.— Jones *v.* McCleary Mfg. Co., 18 Quebec Super. Ct. 130.
See 37 Cent. Dig. tit. "Nuisance," §§ 6, 138.

51. Bacon *v.* Walker, 77 Ga. 336; Corey *v.* Edgewood Borough, 18 Pa. Super. Ct. 216.

52. Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215.

53. Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

54. Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. St. Rep. 728.

55. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

56. *Maryland.*— Scott *v.* Bay, 3 Md. 431.
New Jersey.— Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.
New York.— Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Barrick *v.* Schifferdecker, 48 Hun 355, 1 N. Y. Suppl. 21 [*reversed* on other grounds in 123 N. Y. 52, 25 N. E. 365]; Catlin *v.* Patterson, 10 N. Y. St. 724; Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259.
Ohio.—Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.
Pennsylvania.—Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306.
Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 593.
Texas.— Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579.
Utah.— People *v.* Burtleson, 14 Utah 258, 47 Pac. 87.
England.— Baxendale *v.* McMurray, L. R. 2 Ch. 790, 16 Wkly. Rep. 32; Scott *v.* Firth, 4 F. & F. 349, 10 L. T. Rep. N. S. 240.
See 37 Cent. Dig. tit. "Nuisance," §§ 6, 138.

57. Froelicher *v.* Oswald Ironworks, 111 La. 705, 35 So. 821, 64 L. R. A. 228.

58. Jung Brewing Co. *v.* Com., 96 S. W. 595, 29 Ky. L. Rep. 939; Atty.-Gen. *v.* Steward, 20 N. J. Eq. 415; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

59. *Connecticut.*— Whitney *v.* Bartholomew, 21 Conn. 213.
Georgia.— Coker *v.* Birge, 9 Ga. 425, 54 Am. Dec. 347.
Illinois.— Deaconess Home, etc. *v.* Bontjes, 104 Ill. App. 484.
Indiana.— Haggart *v.* Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 557; Owen *v.* Phillips, 73 Ind. 284.
Michigan.— McMorran *v.* Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511.
Missouri.— Bielman *v.* Chicago, etc., R. Co., 50 Mo. App. 151.
New York.— Booth *v.* Rome, etc., Terminal R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. 79; Fish *v.* Dodge, 4 Den. 311, 47 Am. Dec. 254.
Pennsylvania.— Wier's Appeal, 74 Pa. St. 230.
Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665; Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

become a nuisance through being conducted in an improper manner or carried on at unreasonable hours, so as to cause unnecessary or unusual annoyance or discomfort.[60]

7. Public Utility.[61] A public nuisance cannot be tolerated on the ground that the community may realize some advantages from it;[62] and one who maintains a public nuisance cannot justify the same, or escape liability therefor, on the ground that the business which he conducts and out of which the nuisance arises is beneficial to the public.[63]

8. Necessity of Person Causing Nuisance. The plea of his own necessity cannot avail to excuse one who causes or maintains a nuisance;[64] and where a nuisance causing irreparable injury to one's health or home is shown to exist it may be enjoined notwithstanding its profitableness to the person maintaining it.[65] Neither will it serve as an excuse that the nuisance cannot be obviated without great expense on the part of defendant or that plaintiff himself could obviate the injury at a trifling expense.[66]

9. Care and Precautions Against Annoyance or Injury. If a particular use of property causes a nuisance this fact is sufficient to entitle a person injured thereby

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117.

See 37 Cent. Dig. tit. "Nuisance," §§ 6, 138.

60. *California.*— Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51.

Connecticut.— Hurlbut *v.* McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17.

Georgia.— Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

Illinois.— Deaconess Home, etc. *v.* Bontjes, 104 Ill. App. 484.

Indiana.— Owen *v.* Phillips, 73 Ind. 284.

Kentucky.—Palestine Bldg. Assoc. *v.* Minor, 86 S. W. 695, 27 Ky. L. Rep. 781.

Louisiana.— Kuhl *v.* St. Bernard Rendering, etc., Co., 117 La. 86, 41 So. 361.

Maryland.— Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

Michigan.— Robinson *v.* Baugh, 31 Mich. 290.

New Jersey.— Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Dunsbach *v.* Hollister, 49 Hun 352, 2 N. Y. Suppl. 94 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152]; Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. 79; McKeon *v.* See, 4 Rob. 449 [*affirmed* in 51 N. Y. 300, 10 Am. Rep. 659]; Catlin *v.* Patterson, 10 N. Y. St. 724.

Ohio.— Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.

Pennsylvania.— Dennis *v.* Eckhardt, 3 Grant 390; Warwick *v.* Wah Lee, 10 Phila. 160.

Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117.

Canada.— Montreal St. R. Co. *v.* Gareau, 10 Quebec Q. B. 417.

See 37 Cent. Dig. tit. "Nuisance," §§ 6, 138.

61. Rule where individual seeking relief against private nuisance see *supra*, VII, C, 2, k.

62. Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425.

63. Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279] (where the business, that of rendering dead animals, was of great public convenience); State *v.* Kaster, 35 Iowa 221 (where the public benefit resulting from defendant's acts was equal to the public inconvenience); People *v.* Horton, 5 Hun (N. Y.) 516 [*affirmed* in 64 N. Y. 610] (where the inconvenience to the public was counterbalanced by the benefit afforded by it); Respublica *v.* Caldwell, 1 Dall. (Pa.) 150, 1 L. ed. 77 (where the erection of a wharf upon public property was beneficial to the public); Green *v.* Sun Co., 32 Pa. Super. Ct. 521. But *compare* People *v.* Horton, 64 N. Y. 610 [*affirming* 5 Hun 516], holding that in an action to restrain the obstruction of a ship canal by a floating elevator, defendants' evidence that the use of their elevator lowered the price for transferring the grain, and induced trade which would otherwise have gone to foreign ports, was admissible, the issue being whether the slight obstruction resulting from the use of the elevator was not more than balanced by the public benefit.

64. Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193; Dallas *v.* Ladies Decorative Art Club, 4 Pa. Co. Ct. 340; Jacobs *v.* Worrell, 15 Leg. Int. (Pa.) 139; Ducktown Sulphur, etc., Co. *v.* Barnes, (Tenn. 1900) 60 S. W. 593; Munson *v.* Metz, 1 Tex. App. Civ. Cas. § 245, holding that a person is not justified in obstructing a public sewer, so as to overflow and damage the property of others, although his purpose is to prevent the sewer from becoming a nuisance.

65. Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

66. T. A. Snider Preserve Co. *v.* Beemon, 60 S. W. 849, 22 Ky. L. Rep. 1527; Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

to relief;[67] and it need not be shown that defendant neglected to exercise due care or take precautions against annoyance or injury to others;[68] nor is the fact that such care was exercised or such precautions taken any excuse.[69] But although a business may be *prima facie* a nuisance it may be shown that it is not a nuisance in fact because it is carried on in such a manner that neither the health, comfort, nor property of any one is injured thereby.[70]

10. Similar Annoyances or Injuries From Other Causes. A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of.[71] Thus a person cannot escape liability for a nuisance by reason of the fact that other persons are engaged in similar acts,[72] that there are other similar establishments in

67. People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

68. Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579. And see *supra*, II, C.

69. *Illinois.*— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194; Winslow *v.* Bloomington, 24 Ill. App. 647.

Indiana.— Moses *v.* State, 58 Ind. 185.

Kansas.— Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988.

Maine.— State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

Maryland.— Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Scott *v.* Bay, 3 Md. 431.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

Missouri.— Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646; Bielman *v.* Chicago, etc., R. Co., 50 Mo. App. 151.

New Jersey.— McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.— Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192; Filson *v.* Crawford, 5 N. Y. Suppl. 882; Catlin *v.* Valentine, 9 Paige 575, 38 Am. Dec. 567.

Pennsylvania.— Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Whaley *v.* Citizens' Nat. Bank, 28 Pa. Super. Ct. 531; Jacobs *v.* Worrell, 15 Leg. Int. 139.

South Carolina.— Frost *v.* Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 593.

Utah.— People *v.* Burtleson, 14 Utah 258, 47 Pac. 87.

Wisconsin.— Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

United States.—Chicago Great Western R. Co. *v.* Leavenworth City First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488.

England.— Rapier *v.* London Tramways Co., [1893] 2 Ch. 588, 63 L. J. Ch. 36, 69 L. T. Rep. N. S. 361, 2 Reports 448.

See 37 Cent. Dig. tit. "Nuisance," §§ 7, 140. And see *supra*, II, C.

The ineffectual exercise of care to prevent or reduce the effect of a nuisance does not affect defendant's liability therefor. Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

Where the nuisance is a public one no degree of care will relieve the person maintaining it from liability for injuries caused by it. McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

70. Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215; Du Bois *v.* Budlong, 10 Bosw. (N. Y.) 700; Tiede *v.* Schneidt, 105 Wis. 470, 81 N. W. 826.

71. Crossley *v.* Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584, 16 L. T. Rep. N. S. 438, 15 Wkly. Rep. 801.

The fact that large sums of money have been expended in the neighborhood in the erection of fertilizer factories similar to that of defendant cannot affect a neighboring landowner's right to recover for the injuries caused by the operation of defendant's factory. Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

Claim that plaintiffs contributed to nuisance.—An objection, in a proceeding against a city to compel the abatement of a nuisance, that plaintiffs themselves contributed thereto, and hence could not obtain relief, cannot prevail where the testimony tends only in a remote degree to connect no more than two of the six plaintiffs with the alleged contribution. Rand Lumber Co. *v.* Burlington, 122 Iowa 203, 97 N. W. 1096.

Custom.— In an action for an encroachment by erecting a bay window extending over plaintiff's line, defendant cannot justify by showing a custom so to erect bay windows. Codman *v.* Evans, 5 Allen (Mass.) 308, 81 Am. Dec. 748.

72. *Maryland.*— Baltimore *v.* Warren Mfg. Co., 59 Md. 96.

Michigan.— Robinson *v.* Baugh, 31 Mich. 290.

New Jersey.— Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201, holding that the fact that the neighborhood to be affected by the odors that will be caused by a business,

the neighborhood,[73] or that other acts or structures than the one complained of contributed to or increased the injury.[74] But defendant is liable only for the consequences which his own acts or establishments have produced.[75]

11. DISTINCTION BETWEEN ESTABLISHED AND CONTEMPLATED BUSINESS OR USE. There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection or business threatened in such vicinity;[76] and it requires a much clearer case to justify a court of equity in interfering by injunction to compel a person to remove an establishment in which he has invested his capital and been carrying on business for a long period of time than would be required to prevent the establishment of an objectionable business by one who comes into the neighborhood proposing to establish such a business for the first time, and is met at the threshold of his enterprise by a remonstrance of the inhabitants.[77] So if a person moves into a town or neighborhood where by reason of the industries established certain annoyances prevail, he will not be permitted to restrain the continuance of such industries.[78] But the mere fact that the alleged nuisance existed before the person complaining thereof erected his house or building or moved into the neighborhood does not deprive him of the right to relief or release the person maintaining the nuisance from liability,[79] at least unless continuance long

which defendant is about to establish, and which complainant seeks to enjoin as a nuisance, already contains establishments devoted to noxious or disagreeable trades, is not enough to defeat the right to an injunction, unless such neighborhood has been by their continuance for years so wholly given up to such establishments that the addition of the one contemplated by defendant will not add sensibly to the discomfort.

Virginia.— Jeremy Imp. Co. *v.* Com., 106 Va. 482, 56 S. E. 224.

United States.— Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000.

See 37 Cent. Dig. tit. "Nuisance," §§ 8, 141.

A householder who himself deposited garbage and filth near his house, which aided in causing bad and noxious odors and vapors, which were calculated to produce sickness, did not contribute to sickness and annoyance chiefly caused by the maintenance of a similar nuisance at another near-by place by a city; it not having been shown that his acts did, in fact, interfere with his enjoyment or use of his premises. New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626.

73. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Crothersville, 159 Ind. 330, 64 N. E. 914.

Kansas.— Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938.

Maryland.—Woodyear *v.* Schaefer, 57 Md. 1, 40 Am. Rep. 419.

New York.—People *v.* Mallory, 4 Thomps. & C. 567.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 593, even though they were established before he moved there.

Texas.— Austin *v.* Austin City Cemetery Assoc., (Civ. App. 1895) 28 S. W. 1023.

See 37 Cent. Dig. tit. "Nuisance," §§ 8, 141.

74. *Alabama.*— Richards *v.* Daugherty, 133 Ala. 569, 31 So. 934.

Illinois.— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194.

Indiana.— Dennis *v.* State, 91 Ind. 291.

Iowa.— Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

Maryland.— Euler *v.* Sullivan, 75 Md. 616, 23 Atl. 845, 32 Am. St. Rep. 420.

New York.— Filson *v.* Crawford, 5 N. Y. Suppl. 882.

North Carolina.— Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529.

Pennsylvania.— New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

South Carolina.— Frost *v.* Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693.

Texas.— Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579; Ft. Worth, etc., R. Co. *v.* Scott, 2 Tex. App. Civ. Cas. § 140.

Wisconsin.— Douglass *v.* State, 4 Wis. 387.

See 37 Cent. Dig. tit. "Nuisance," §§ 8, 141.

75. Gay *v.* State, 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707; Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579. And see *infra*, IV, H.

76. Wier's Appeal, 74 Pa. St. 230.

77. Wier's Appeal, 74 Pa. St. 230. See also Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381.

78. Tuttle *v.* Church, 53 Fed. 422. See also Eason *v.* Perkins, 17 N. C. 38.

Public use.— Where one buys a city lot bordering upon ground set apart for or dedicated to any public use, he takes it subject to all the annoyances incident to the purposes of the dedication. Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515.

79. *Alabama.*—Vernon *v.* Edgeworth, (1906) 42 So. 749.

enough to establish a prescriptive right be shown,[80] for no one has the right to erect near the land of another any nuisance which will prevent the use of such land for a lawful purpose,[81] and a person purchasing property with knowledge of a nuisance in the neighborhood is not bound to assume that such nuisance will continue after notice to abate it,[82] nor is a person purchasing property near to a thing which is not a nuisance *per se* presumed to know that it is a nuisance in fact.[83]

12. Property in Control of Complaining Party. The maintenance of an unsafe

Illinois.— Baker *v.* Leka, 48 Ill. App. 353; Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552; Ohio, etc., R. Co. *v.* Singletary, 34 Ill. App. 425.

Iowa.— Van Fossen *v.* Clark, 113 Iowa 86, 84 N. W. 989, 52 L. R. A. 279; Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

Maryland.— Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

New Jersey.— King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

New York.— Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Brady *v.* Weeks, 3 Barb. 157; Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259; Taylor *v.* People, 6 Park. Cr. 347. See also Filson *v.* Crawford, 5 N. Y. Suppl. 882.

Pennsylvania.— Dallas *v.* Ladies' Decorative Art Club, 4 Pa. Co. Ct. 340; Smith *v.* Phillips, 8 Phila. 10.

Texas.— Galveston, etc., R. Co. *v.* Miller, (Civ. App. 1906) 93 S. W. 177.

Wisconsin.— Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601; Douglass *v.* State, 4 Wis. 387.

United States.— U. S. *v.* Luce, 141 Fed. 385.

England.— Bliss *v.* Hall, Arn. 19, 4 Bing. N. Cas. 183, 6 Dowl. P. C. 442, 2 Jur. 110, 7 L. J. C. P. 122, 5 Scott 500, 33 E. C. L. 660.

Canada.—Reg. *v.* Brewster, 8 U. C. C. P. 208.

But *compare* Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515 (holding that one who buys land adjoining that on which defendant is carrying on a lawful business, properly conducted, cannot recover damages for the continuance of such business as a nuisance); Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; Youngstown Tp. *v.* Youngstown, 25 Ohio Cir. Ct. 518 (holding that where township trustees have erected a school-house, with notice that the city maintained a pest-house in the vicinity, they cannot have such pest-house abolished as a nuisance).

Increase of existing nuisance.—A purchaser of land near an existing cemetery, although aware that the same is a nuisance, is not bound to submit to the nuisance created by an enlargement of the cemetery. Payne v. Wayland, 131 Iowa 659, 109 N. W. 203.

No presumption of easement.— The fact that the nuisance existed when plaintiff purchased from a third person the premises injuriously affected does not raise any presumption that he purchased subject to an easement in favor of defendant, or affect the right to recover for damages accruing to the land from the subsequent maintenance of the nuisance. Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601.

Action for injuries from explosion.— In an action for injuries to adjoining property caused by the explosion of a powder magazine, maintained contrary to law, it is no defense that plaintiff knew of the existence of the magazine when he bought his property, and that he was interested in some similar magazines in the same neighborhood. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262 [*affirming* 30 Ill. App. 321].

Purchase from person complained of with knowledge of contemplated use.—Where complainant purchased of defendant the land upon which his house was built, and at the time of the purchase he was notified by defendant that it was defendant's purpose to erect a barn, complainant could not in equity abridge defendant's exercise of his lawful right to erect the barn, on the ground of a nuisance. Curtis *v.* Winslow, 38 Vt. 690.

Purchase subject to reserved right.—Where plaintiff's grantor purchased a block with reference to a map showing that part of the street on which it was situated was reserved for railroad purposes, and sold a half interest in part of it to plaintiff, who, after the railroad had been built, purchased the other half interest and the balance of the block, the reserved right was the only interest essential to be acquired by defendant railroad company as against plaintiff, and plaintiff could not complain of the construction of a necessary embankment by defendant as a nuisance. Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758.

Lease of property with knowledge of nuisance.— Where a tenant knows of the existence of a nuisance affecting the value of the use of property when he leases it, and the injury is not increased during his term, he cannot recover damages therefor. Yoos *v.* Rochester, 92 Hun (N. Y.) 481, 36 N. Y. Suppl. 1072. *Contra*, Smith *v.* Phillips, 8 Phila. (Pa.) 10.

80. Susquenanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Mulligan *v.* Elias, 12 Abb. Pr. N. S. (N. Y.) 259.

Prescriptive right see *infra*, V.

81. King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

82. Ohio, etc., R. Co. *v.* Singletary, 34 Ill. App. 425.

83. Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203, so holding in the case of one who purchased land near an existing cemetery.

ceiling in an apartment house owned by defendant, but which had been leased to plaintiff, and was in his exclusive possession, presents no element of a nuisance which would justify a recovery.[84]

13. Violation of Law. The mere fact that an act is prohibited by law does not render the doing of such act a nuisance;[85] and where a building or structure is not in itself noxious or dangerous, the fact that it is constructed in violation of a city ordinance does not render it a nuisance, entitling the owner of adjoining property to an injunction.[86] Neither does the fact that structures about to be erected and maintained on one's own land are to be so erected without a license required by law make them outlaws to be lawfully destroyed by any one or abated at the private suit of any person.[87] But where the legislature has declared a certain thing to be a nuisance it cannot be shown in justification that it is not a nuisance in fact.[88] Where the legislature has recognized that a certain kind of structure may be a nuisance, this will be taken into consideration in determining whether it is or will be a nuisance in a particular case;[89] and where, in addition to the likelihood of a structure being a nuisance, its erection in the place contemplated is a violation of a municipal ordinance, such erection will be enjoined,[90] and a structure which is in itself dangerous, and also violates a city ordinance, may be abated.[91]

B. Particular Acts, Occupations, and Structures — 1. In General. While it can seldom, if ever, be said of a particular thing that it is always and under all circumstances a nuisance, or on the other hand that it is never and can never become such, it is deemed useful to set out the views of the courts with respect to some particular matters which have been specifically passed upon.[92]

84. Kushes *v.* Ginsberg, 99 N. Y. App. Div. 417, 91 N. Y. Suppl. 216 [*affirmed* in 188 N. Y. 630, 81 N. E. 1168].

85. Eastern District *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242; St. Johns *v.* McFarlan, 33 Mich. 72, 20 Am. Rep. 671; Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Campbell *v.* Schofield, 29 Leg. Int. (Pa.) 325.

86. *Illinois.*— Sheldon *v.* Weeks, 51 Ill. App. 314.

Massachusetts.— Hagerty *v.* McGovern, 187 Mass. 479, 73 N. E. 536, where the court refused to enjoin the erection of a wooden wall of a building which violated the city ordinance requiring walls to be made of brick under certain circumstances.

Michigan.— St. Johns *v.* McFarlan, 33 Mich. 72, 20 Am. Rep 671.

Missouri.— Rice *v.* Jefferson, 50 Mo. App. 464; Warren *v.* Cavanaugh, 33 Mo. App. 102.

New Hampshire.— Manchester *v.* Smyth, 64 N. H. 380, 10 Atl. 700.

New York.— Young *v.* Scheu, 56 Hun 307, 9 N. Y Suppl. 349.

Pennsylvania.— Cambridge Springs *v.* Moses, 22 Pa. Co. Ct. 637; Williamsport *v.* McFadden, 15 Wkly. Notes Cas. 269.

Canada.— McBean *v.* Wyllie, 14 Manitoba 135.

See 37 Cent. Dig. tit. "Nuisance," §§ 38, 171.

Wooden buildings irrespective of ordinance see *infra*, III, E, 1.

87. Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868.

88. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

Legislative power as to nuisances see *infra*, III, F.

89. Wier's Appeal, 74 Pa. St. 230, holding that where the legislature has recognized that the storing of gunpowder in large quantities in thickly settled places is a nuisance to be guarded against by public authority, a court of equity will take such recognition into consideration in determining whether the location of the powder magazine near the dwellings of the complainants should be restrained as a nuisance.

90. *Illinois.*— Rand *v.* Wilber, 19 Ill. App. 395.

Indiana.— Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

Louisiana.— Blanc *v.* Murray, 36 La. Ann. 162, 51 Am. Rep. 7.

Nebraska.— Bangs *v.* Dworak, (1906) 106 N. W. 780.

Pennsylvania.— Horstman *v.* Young, 13 Phila. 19.

See 37 Cent. Dig. tit. "Nuisance," §§ 38, 171.

91. People *v.* Wing, 147 Cal. 382, 81 Pac. 1104. See also Porth *v.* Manhattan R. Co., 58 N. Y. Super. Ct. 366, 11 N. Y. Suppl. 633 [*affirmed* in 134 N. Y. 615, 32 N. E. 649].

92. See *infra*, III, B, 2–126.

Abortionist.—A house kept for the purpose of practising there the vocation of an abortionist is a public nuisance. People *v.* Hoffman, 118 N. Y. App. Div. 862, 103 N. Y. Suppl. 1000.

2. Advertisements.[93] The publication of an advertisement calculated to alarm the public mind unnecessarily has been held to be a public nuisance, and indictable as such.[94]

3. Bakeries. A bakery is not of itself a nuisance.[95]

4. Ball Games. The game of base-ball is not *per se* a nuisance to the owner of property adjoining the place where it is played,[96] but it may be so conducted as to become a nuisance against which relief may be obtained.[97]

5. Banking.[98] The carrying on of banking operations contrary to law is not such a public nuisance as to require the immediate and extraordinary process of a court of chancery to abate it.[99]

6. Barking of Dogs. The constant barking and howling of dogs may be a nuisance.[1]

7. Barns.[2] A barn is not necessarily a nuisance,[3] but it may become such by its location and the manner in which it is maintained[4] or used,[5] or through being so constructed as to injure the safety of persons passing by along the street.[6]

8. Bawdy-Houses. A bawdy-house is a nuisance *per se*.[7]

9. Bees. The keeping of bees in a locality where they are a source of annoyance to others may be a nuisance.[8]

10. Bells. The ringing of church bells may be enjoined as a nuisance,[9] as may also the habitual ringing of a heavy factory bell early in the morning, for

A crematory may be a nuisance. Laird *v.* Atlantic Coast Sanitary Co., (N. J. Ch. 1907) 67 Atl. 387.

An oil refinery may be a nuisance by reason of the fumes given off. Green *v.* Sun Co., 32 Pa. Super. Ct. 521.

Laborers quartered on a railroad right of way may be a nuisance. Southern R. Co. *v.* Com., 101 S. W. 882, 31 Ky. L. Rep. 122.

The transmission of electricity at a high voltage over a right of way, under authority of law, is not a nuisance *per se*. Mull *v.* Indianapolis, etc., Traction Co., (Ind. 1907) 81 N. E. 657.

93. See also *infra*, III, B, 102.

94. Com. *v.* Cassidy, 6 Phila. (Pa.) 82.

95. Alexander *v.* Stewart Bread Co., 21 Pa. Super. Ct. 526, holding that the operation of a bakery in a residential neighborhood will not be restrained on account of discomfort to near-by residents from odors and sounds, where it appears that the business is conducted in a reasonable and proper manner.

96. Alexander *v.* Tebeau, 71 S. W. 427, 24 Ky. L. Rep. 1305.

97. Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532 (games played on Sunday); Gilbough *v.* West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289 (games on Sunday causing annoyance); Cronin *v.* Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605 (holding that one residing upon his premises, adjoining a ball park, is entitled to a preliminary injunction protecting his property from injury, and himself and family from annoyance, where, in the playing of games in such park, the balls are dropped upon his premises, the players and spectators trespass thereon, and profane and indecent language, audible at his residence, is used on the grounds, and disorderly persons, attracted to the games, collect in the streets near his house.

98. See, generally, Banks and Banking.

99. Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

1. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Force *v.* Dahn, 10 N. J. L. J. 252; Herring *v.* Wilton, 106 Va. 171, 55 S. E. 546, 117 Am. St. Rep. 997, 7 L. R. A. N. S. 349.

2. **Car barns** see *infra*, III, B, 22.

3. Cook *v.* Benson, 62 Iowa 170, 17 N. W. 470.

4. Cook *v.* Benson, 62 Iowa 170, 17 N. W. 470.

5. Hockaday *v.* Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094, holding that where a barn and barnyard on a city lot adjoining plaintiff's residence are used by defendant as a breeding ground for live stock and for dairy purposes, so that the enjoyment of plaintiff's home is materially interfered with, an injunction will lie to restrain further such use of them.

6. Holroyd *v.* Sheridan, 53 N. Y. App. Div. 14, 65 N. Y. Suppl. 442.

7. See Disorderly Houses, 14 Cyc. 484, 485.

8. Olmsted *v.* Rich, 3 Silv. Sup. (N. Y.) 826, 6 N. Y. Suppl. 826, holding that where defendants had maintained, and were still maintaining, a large number of hives of bees, kept in an open lot immediately adjoining plaintiff's dwelling-house, and at certain seasons they were a source of constant annoyance and discomfort to plaintiff and his family, greatly impairing the comfortable enjoyment of the property, and the bees could be removed, without material injury, to a locality where neighbors would not be disturbed by them, it was a proper case for a permanent injunction.

9. Harrison *v.* St. Mark's Church, 12 Phila. (Pa.) 259, where they are hung at such a level as to cause annoyance and injury to the occupants of neighboring buildings.

the purpose of arousing the operators, which disturbs the sleep of other residents in the neighborhood.[10]

11. Billiard or Pool Rooms. A billiard or pool room is not of itself a nuisance,[11] but may become such where it causes annoyance and disturbance and injuriously affects property interests in the vicinity.[12]

12. Bituminous Coal. An injunction may be issued to prevent a party from burning bituminous coal for generating steam in his mill so near to dwellings as to cover them with soot and noxious vapors.[13]

13. Blacksmith Shops. A blacksmith's shop is not a nuisance *per se*;[14] and where it is near the business portion of a village it cannot be held to be a nuisance, although it is close to a residence;[15] but it may be a nuisance where erected or conducted in an improper place or manner.[16]

14. Blast Furnaces. A blast furnace may be a nuisance where it injures neighboring property.[17]

15. Blasting. The carrying on of blasting may be a nuisance where it is injurious to neighboring property-owners;[18] and a landowner may be enjoined from blasting rock off his own premises for purposes of improvement, unless he proceeds with the usual safeguards which prudent men adopt to prevent injury to adjacent owners.[19] But a railroad company which blasts rock on its own land in order to lay out its track, and exercises due care in doing so, and uses charges of no greater force than is necessary for the purpose, is not liable for damages as for maintaining a nuisance for injury to adjoining property arising merely from the incidental jarring.[20]

16. Bone or Fat Boiling Establishments. The business of steaming bones is not a nuisance where properly carried on so as not to cause offensive odors;[21] but a fat-boiling establishment which infects the air about a person's residence with noisome smells and gases injurious to health is a nuisance,[22] and an action will lie against the owner of a bone-boiling establishment for damages due to the

10. Davis *v.* Sawyer, 133 Mass. 289, 43 Am. Rep. 519.

11. People *v.* Sergeant, 8 Cow. (N. Y.) 139, no noise or gaming being allowed.

12. Cella *v.* People, 112 Ill. App. 376; Huber *v.* Com., 102 S. W. 291, 31 Ky. L. Rep. 320.

13. Galbraith *v.* Oliver, 3 Pittsb. (Pa.) 78.

14. *Alabama.*— Ray *v.* Lynes, 10 Ala. 63.
Connecticut.— Whitney *v.* Bartholomew, 21 Conn. 213.
Georgia.— Whitaker *v.* Hudson, 65 Ga. 43.
Iowa.— Faucher *v.* Grass, 60 Iowa 505, 15 N. W. 302.
Kentucky.—Marrs *v.* Fiddler, 69 S. W. 953, 24 Ky. L. Rep. 722.
New Hampshire.— Faucher *v.* Trudel, 71 N. H. 621, 52 Atl. 443.
See 37 Cent. Dig. tit. "Nuisance," § 12.

15. Culver *v.* Ragan, 15 Ohio Cir. Ct. 228, 8 Ohio Cir. Dec. 125.

16. *Connecticut.*— Whitney *v.* Bartholomew, 21 Conn. 213.
Georgia.— Whitaker *v.* Hudson, 65 Ga. 43.
Kentucky.— Peacock *v.* Spitzelberger, 29 S. W. 877, 16 Ky. L. Rep. 803.
Maine.— Norcross *v.* Thoms, 51 Me. 503, 81 Am. Dec. 588.
Michigan.— McMorran *v.* Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511.
See 37 Cent. Dig. tit. "Nuisance." § 12.

17. Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712.

18. *Maryland.*— Scott *v.* Bay, 3 Md. 431.
Montana.— Longtin *v.* Persell, 30 Mont. 306, 76 Pac. 699, 104 Am. St. Rep. 723, 65 L. R. A. 655.
New York.— Wilsey *v.* Callanan, 21 N. Y. Suppl. 165; Morgan *v.* Bowes, 17 N. Y. Suppl. 22.
Pennsylvania.— Sayen *v.* Johnson, 4 Pa. Co. Ct. 360, 3 Del. Co. 323.
Washington.—Graetz *v.* McKenzie, 9 Wash. 696, 35 Pac. 377.
See 37 Cent. Dig. tit. "Nuisance," § 15.

19. Rafter *v.* Tagliabue, 21 N. Y. Suppl. 107, 29 Abb. N. Cas. 1; Sayen *v.* Johnson, 4 Pa. Co. Ct. 360, 3 Del. Co. 323, holding that the lessee of a stone quarry near the dwelling-house of plaintiff will be restrained from so operating it, by blasting, etc., that pieces of rock are constantly thrown into the public road and on the premises of plaintiff, to the great danger of plaintiff and his family.

20. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 277, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105, where it is said: "There is a manifest distinction between acts and uses which are permanent and continuous and temporary acts which are resorted to in the course of adapting premises to some lawful use."

21. Cardiff Manure Co. *v.* Cardiff Union, 54 J. P. 661.

22. Cropsey *v.* Murphy, 1 Hilt. (N. Y.) 126.

depreciation in price of adjoining lands because of the noxious smells and gases escaping from such establishment.[23]

17. **Booms.** A boom across a river or stream may be a nuisance.[24]

18. **Bowling Alleys.** A bowling alley is not a nuisance *per se*,[25] but it may be or become such when it creates a disturbance to the annoyance and discomfort of the neighbors.[26]

19. **Breweries.** A brewery or brew house is not a nuisance *per se*;[27] but where, in addition to the noise made by the operation of machinery in a brewery, an adjoining dwelling is shaken by the vibrations so as to render it unfit for habitation, such state of facts constitutes a nuisance which will be restrained.[28]

20. **Brickmaking.** The business of brickmaking is not necessarily a nuisance,[29] but the operation of a brick-kiln near a residence,[30] or under such circumstances as to cause damage to a neighboring property,[31] may be a nuisance.

21. **Bridges.**[32] A bridge is not a nuisance *per se*,[33] but it may be a nuisance under some circumstances.[34]

22. **Car Barns.** The construction and use of a car barn in a populous portion of a city, where business houses and private dwellings are situated, is not so unreasonable a location as to constitute it a nuisance.[35]

23. Ruckman *v.* Green, 9 Hun (N. Y.) 225.

24. Pascagoula Boom Co. *v.* Dixon, 77 Miss. 587, 28 So. 724, 78 Am. St. Rep. 537, holding that a boom for logs constructed across a navigable river by the owners of the banks, without legislative authority, as required by Const. § 81, is a public nuisance, although there is a swinging boom in the center of the stream, five hundred feet long, which is usually kept open, and only closed in cases of necessity, and also a swinging boom at one end, which can be opened and closed.

25. Harrison *v.* People, 101 Ill. App. 224; State *v.* Hall, 32 N. J. L. 158.

26. Harrison *v.* People, 101 Ill. App. 224; Hackney *v.* State, 8 Ind. 494; Bloomhuff *v.* State, 8 Blackf. (Ind.) 205; State *v.* Haines, 30 Me. 65; Tanner *v.* Albion, 5 Hill (N. Y.) 121, 40 Am. Dec. 337.

27. O'Reilly *v.* Perkins, 22 R. I. 364, 48 Atl. 6; Gorton *v.* Smart, 1 L. J. Ch. O. S. 36, 1 Sim. & St. 66, 1 Eng. Ch. 66, 57 Eng. Reprint 26.

28. Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325.

29. Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381 (holding that a plant for the manufacture of brick and tiling, even with a gas well on the property for supplying fuel, is not a nuisance *per se*); Phillips *v.* Lawrence Vitrified Brick, etc., Co., 72 Kan. 643, 82 Pac. 787, 2 L. R. A. N. S. 92; State *v.* St. Louis Bd. of Health, 16 Mo. App. 8.

The burning of brick, an essential part of the business of brickmaking, is not a nuisance *per se*. Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669.

30. Fuselier *v.* Spalding, 2 La. Ann. 773; Bamford *v.* Turnley, 3 B. & S. 62, 9 Jur. N. S. 377, 31 L. J. Q. B. 286, 10 Wkly. Rep. 803, 113 E. C. L. 62 [*disapproving* Hole *v.* Barlow, 4 C. B. N. S. 334, 4 Jur. N. S. 1019, 27 L. J. C. P. 207, 6 Wkly. Rep. 619, 93 E. C. L. 334]; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 64 Eng. Reprint 849; Pollock *v.* Lester, 11 Hare 266, 45 Eng. Ch. 263, 68 Eng. Reprint 1274; Bareham *v.* Hall, 22 L. T. Rep. N. S. 116; Roberts *v.* Clarke, 18 L. T. Rep. N. S. 49. But *compare* Wanstead Local Bd. of Health *v.* Hill, 13 C. B. N. S. 479, 9 Jur. N. S. 972, 32 L. J. M. C. 135, 7 L. T. Rep. N. S. 744, 11 Wkly. Rep. 368, 106 E. C. L. 479.

31. Fogarty *v.* Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756; Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646; Kirchgraber *v.* Lloyd, 59 Mo. App. 59; Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231].

32. See, generally, Bridges.

33. Neff *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 394, 30 N. Y. Suppl. 232 (holding that a bridge maintained across a railroad track, with the consent of the company, of insufficient height to allow a man standing on a freight car to pass thereunder, is not *per se* a nuisance); Miller *v.* New York, 29 Alb. L. J. (N. Y.) 30.

34. Rex *v.* West Riding of Yorkshire, 2 East 342, 6 Rev. Rep. 439, holding that a bridge built in a public way, without public utility, is a nuisance, if built colorably in an imperfect or an inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.

Neglect to repair.— It is a nuisance for the owner of a mill property and a raceway connected therewith, which runs across a highway, to permit a highway bridge over such raceway to remain out of repair. Clay *v.* Hart, 25 Misc. (N. Y.) 110, 55 N. Y. Suppl. 43 [*affirmed* in 41 N. Y. App. Div. 625, 58 N. Y. Suppl. 1150].

35. Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455.

23. Carcasses of Dead Animals. Carcasses of dead animals are not *per se* nuisances;[36] but they are liable to become nuisances,[37] and a person who leaves the carcass of an animal insufficiently buried on his premises creates a nuisance as to adjoining premises.[38]

24. Carpet Cleaning. A carpet-cleaning establishment in a thickly settled neighborhood of private residences is a nuisance when the dust and moths from it permeate the neighboring houses.[39]

25. Carriage Making. Carriage making is a lawful and useful trade and not a nuisance *per se*,[40] but it may be a nuisance where conducted in an improper place or manner.[41]

26. Cattle-Pens or Hog-Pens and Stock-Yards. A stock-yard, cattle-pen, hog-pen, or pig-sty in proximity to dwelling-houses is considered to be a nuisance *per se*.[42]

27. Cellar Doors on Sidewalks. Cellar doors within the stoop line on a sidewalk, where maintained in the same position and condition for many years without any complaint from the city authorities, will be presumed to have been maintained with the city's consent, so as not to constitute a nuisance.[43]

28. Cement Works. Cement works, the operation of which injures neighboring property, have been held to be a nuisance.[44]

29. Cemeteries and Burial-Grounds.[45] A cemetery[46] or burial-ground[47] is not a nuisance *per se*, even though it be near to residential property;[48] but it may be

36. Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

37. Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

38. Louisville, etc., R. Co. *v.* Bolton, 38 S. W. 498, 18 Ky. L. Rep. 824; Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253.

39. Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306.

40. Whitney *v.* Bartholomew, 21 Conn. 213.

41. Whitney *v.* Bartholomew, 21 Conn. 213.

42. *Indiana.*— Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278, holding that it is a sufficient cause of action that plaintiff is proprietor of a hotel, and that adjoining his buildings defendant maintains cattle-pens, containing cattle and hogs, which by their noises, and the filthy condition of the pens, and the sickening and fetid matter therein, and the unhealthy effluvium therefrom, are annoying to the senses, and injurious to the health of plaintiff and his family and his guests, and destroy his business and the use and enjoyment of his property.

Massachusetts.— Com. *v.* Perry, 139 Mass. 198, 29 N. E. 656.

Missouri.— Smiths *v.* McConathy, 11 Mo. 517 (holding that a distillery, with sties in which a large number of hogs are kept, the offal from which renders the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance); Whipple *v.* McIntyre, 69 Mo. App. 397; Kirchgraber *v.* Lloyd, 59 Mo. App. 59; Bielman *v.* Chicago, etc., R. Co., 50 Mo. App. 151 (holding that stock-yards erected and maintained on land adjoining a dwelling-house are an actionable nuisance to the owner thereof, although they are well kept and cared for).

Pennsylvania.— Com. *v.* Armstrong, 24 Pa. Co. Ct. 442; Com. *v.* Wescott, 4 C. Pl. 58; Com. *v.* Van Sickle, Brightly (Pa.) 69, 7 Pa. L. J. 82.

England.— Reinhardt *v.* Mentasti, 42 Ch. D. 685, 58 L. J. Ch. 787, 61 L. T. Rep. N. S. 328, 38 Wkly. Rep. 10; Broder *v.* Saillard, 2 Ch. D. 692, 45 L. J. Ch. 414, 24 Wkly. Rep. 1011.

See 37 Cent. Dig. tit. "Nuisance," §§ 13, 152.

43. Sandmann *v.* Baylies, 26 Misc. (N. Y.) 692, 56 N. Y. Suppl. 1070 [*affirming* 21 Misc. 523, 47 N. Y. Suppl. 783], holding that a person injured by slipping on the doors can sue the owner for negligence but not for maintaining a nuisance. See also Ewing *v.* Hewitt, 27 Ont. App. 296.

44. Bentley *v.* Empire Portland Cement Co., 48 Misc. (N. Y.) 457, 96 N. Y. Suppl. 831.

45. See, generally, Cemeteries.

46. *Illinois.*— Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

Indiana.— Begein *v.* Anderson, 28 Ind. 79.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203.

Louisiana.— Musgrove *v.* St. Louis Catholic Church, 10 La. Ann. 431.

North Carolina.— Ellison *v.* Washington, 58 N. C. 57, 75 Am. Dec. 430.

Ohio.— Henry *v.* Perry Tp., 48 Ohio St. 671, 30 N. E. 1122.

Texas.— Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125; Elliott *v.* Ferguson, (Civ. App. 1904) 83 S. W. 56.

See 37 Cent. Dig. tit. "Nuisance," §§ 16, 150. And see Cemeteries, 6 Cyc. 713 note 32.

47. Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14; Monk *v.* Packard, 71 Me. 309, 36 Am. Rep. 315.

48. Elliott *v.* Ferguson, (Tex. Civ. App. 1904) 83 S. W. 56.

or become a nuisance against which relief will be granted at the instance of those injured thereby.[49]

30. **Cesspools.**[50] A cesspool is not a nuisance *per se*,[51] but it may become a nuisance.[52]

31. **Coal Sheds or Yards.** A coal shed or yard is not even *prima facie* a nuisance,[53] although it may be so located or used as to become a nuisance.[54]

32. **Coke-Ovens.** The operation of coke-ovens may be a nuisance against which the owners of adjoining residence property may have relief.[55]

33. **Collection of Surface Water.**[56] It is an actionable nuisance to wrongfully cause the surface water of a street to collect and remain in front of another's premises, so as to injure him in the use and enjoyment thereof.[57]

34. **Contagious Diseases.** While an indictment for a nuisance will lie against one who conveys through or exposes in the public street a person infected with a contagious disease,[58] it cannot be held that a person sick of an infectious or contagious disease in his own house, or in suitable apartments at a public hotel or boarding-house, is a nuisance.[59]

35. **Convict Labor.** The working of a city's streets by hired convicts is not a nuisance.[60]

36. **Cooking.** Cooking is not a nuisance *per se*,[61] nor is the cooking of onions and cabbage necessarily a nuisance;[62] but a person may under proper circumstances be prevented from permitting odors and vapors from a kitchen to escape into an adjoining building or room,[63] and a cooking stove or range erected so near the partition wall of two houses as to injure by its ordinary use the goods of the adjacent proprietor, and render his house uncomfortable and disagreeable, is a nuisance.[64]

37. **Cotton-Gins.** A cotton-gin may be a nuisance where it is located near to a residence and interferes with the comfortable enjoyment thereof.[65]

38. **Dairies.** A dairy is not necessarily a nuisance.[66]

49. *Alabama.*— Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203.

Louisiana.— Musgrove *v.* St. Louis Catholic Church, 10 La. Ann. 431.

Nebraska.— Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

North Carolina.— Clark *v.* Lawrence, 59 N. C. 83, 78 Am. Dec. 241.

Texas.— Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125; Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 344, holding that an injunction against laying out and using a cemetery near the homes of plaintiffs will be granted when it appears that they have occupied their lands for very many years, and that the proposed cemetery will give forth odors which will injure plaintiffs' health, and thus render their homes uninhabitable.

See 37 Cent. Dig. tit. "Nuisance," §§ 16, 150.

A tomb erected on defendant's own land may become a nuisance from its locality and from extrinsic facts. Barnes *v.* Hathorn, 54 Me. 124.

50. Water-closets and privies see *infra*, III, B, 122.

51. Victoria *v.* Victoria County, (Tex. Civ. App. 1906) 94 S. W. 368.

52. Lind *v.* San Luis Obispo, 109 Cal. 340, 42 Pac. 437.

53. Russell *v.* Popham, 3 N. Y. Leg. Obs. 272.

54. Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726 (holding that the maintenance by a railroad company of a coal shed on its right of way in a thickly settled part of a city, whereby the inhabitants of houses near by are disturbed by the noise and the coal-dust, is a public nuisance); Russell *v.* Popham, 3 N. Y. Leg. Obs. 272.

55. McClung *v.* North Bend Coal, etc., Co., 18 Ohio Cir. Ct. 864, 6 Ohio Cir. Dec. 243.

56. Overflow of water see *infra*, III, B, 81.

57. Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351; Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326; Houston, etc. R. Co., *v.* Reasonover, 36 Tex. Civ. App. 274, 81 S. W. 329.

58. Rex *v.* Vantandillo, 4 M. & S. 73, 16 Rev. Rep. 389.

59. Boom *v.* Utica, 2 Barb. (N. Y.) 104.

60. Ward *v.* Little Rock, 41 Ark. 526, 48 Am. Rep. 46.

61. Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

62. Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

63. See Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

64. Grady *v.* Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

65. Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327.

66. Spring Valley Waterworks *v.* Fifield, 136 Cal. 14, 68 Pac. 108, holding that findings by the court that the act of defendants

39. Dams. A dam is not necessarily [67] or even *prima facie* [68] a nuisance, but it may be or become such; [69] and it has been held that a dam erected and maintained without authority across a stream, the title to the bed of which is in the state, is *per se* a public nuisance, and may be abated by the state.[70]

40. Dangerous Animals.[71] It is a nuisance to keep a dangerous, ferocious, or biting animal, and to allow it to go at large.[72]

41. Dangerous Structures.[73] A structure which is so used or has been allowed to become so ruined and dilapidated as to be dangerous to passers-by or to the public is a nuisance.[74]

42. Discharge of Sewage, Filth, and Refuse. Where a person causes or allows sewage, garbage, filth, refuse, or other noxious matter to be discharged or to penetrate or drain from his premises into or on to the premises of another, there is a nuisance which entitles the latter to relief.[75]

in conducting a dairy polluted a stream at the point where the dairy was situated, and if continued, "may pollute the waters" of plaintiff's reservoir, did not show a nuisance within Civ. Code, § 3479, defining a nuisance as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property," and did not support a judgment abating the dairy as a public nuisance.

67. Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231 (holding that the maintenance of dams for the purpose of diverting waters for irrigation, and the diversion thereof for such purpose, so as to materially diminish the amount, or even consume the entire quantity, flowing in a stream, is not of itself a nuisance, where such diversion has been continued for a great number of years under claim of right); Rogers *v.* Barker, 31 Barb. (N. Y.) 447 (holding that a dam thrown across a stream, and the water collected thereby in a reservoir, is not a public nuisance *per se*); Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674 (holding that a dam erected in a stream to furnish power to operate a mill useful to the public, under authority of the county court, is not a public nuisance). See also Beach *v.* People, 11 Mich. 106, holding that a person maintaining a dam, creating a nuisance no greater nor of any different character from what would have existed without it, is not punishable therefor.

Obstructing passage of fish.— An indictment does not lie for obstructing the passage of fish by a dam across an unnavigable river. Com. *v.* Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386 (at common law); People *v.* Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382 (either at common law or under a statute for preservation of fish).

The erection of the frame of a mill-dam, which when completed will pond the water back, and thereby create a nuisance, does not of itself constitute a nuisance. State *v.* Suttle, 115 N. C. 784, 20 S. E. 725.

68. Jeremy Imp. Co. *v.* Com., 106 Va. 482, 56 S. E. 224.

69. *Indiana.*— State *v.* Phipps, 4 Ind. 515.
Iowa.— State *v.* Close, 35 Iowa 570.
Massachusetts.— Com. *v.* Gloucester, 110 Mass. 491.
Pennsylvania.— New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.
South Carolina.— State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737, holding that to cause a neighborhood to become sickly by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, is a public nuisance for which an indictment lies.
Wisconsin.— Douglass *v.* State, 4 Wis. 387, holding that a mill-dam becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country, and stagnates, whereby the air along the highways and around the dwellings is infected with noxious and unwholesome vapors, and the health of the surrounding country is sensibly impaired.
See 37 Cent. Dig. tit. "Nuisance," § 147.

A dam erected across a non-navigable river by the owner of one bank of the stream, in such a manner as to injure other owners of the banks and tenants in common of the stream, is a private, and not a public, nuisance. Moffett *v.* Brewer, 1 Greene (Iowa) 348.

70. People *v.* Page, 39 N. Y. App. Div. 110, 56 N. Y. Suppl. 834, 58 N. Y. Suppl. 239. See also People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129].

71. See, generally, Animals.

72. Com. *v.* McClung, 3 Pa. L. J. Rep. 413. See also Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387.

73. See also *infra*, III, E, 1.

74. Uggla *v.* Brokaw, 117 N. Y. App. Div. 586, 102 N. Y. Suppl. 857; Fisher *v.* Prowse, 2 B. & S. 770, 8 Jur. N. S. 1208, 30 L. J. Q. B. 212, 6 L. T. Rep. N. S. 711, 110 E. C. L. 770; London *v.* Bolt, 5 Ves. Jr. 129, 31 Eng. Reprint 507.

75. *Georgia.*— Lowe *v.* Holbrook, 71 Ga. 563.
Kentucky.— Livezey *v.* Schmidt, 96 Ky. 441, 29 S. W. 25, 16 Ky. L. Rep. 596; Snider Preserve Co. *v.* Beemon, 60 S. W. 849, 22 Ky. L. Rep. 1527.
Massachusetts.— Ball *v.* Nye, 99 Mass. 582, 97 Am. Dec. 56.
Missouri.— Beckley *v.* Skroh, 19 Mo. App.

43. Diversion of Water. The diversion of the waters of a navigable stream may be both a public and a private nuisance.[76]

44. Dyeing Establishments. A dyeing establishment, not erected in a factory district and so operated as to injure the neighboring dwellings, is a nuisance.[77]

45. Effigies. It has been held an indictable nuisance for a person having a house in a street to exhibit effigies at his windows, attracting a crowd, which causes the footway to be obstructed so that the public cannot pass as they ought to do.[78]

46. Electric Light Plants.[79] The court will not enjoin the operation of an electric light plant in a manufacturing district,[80] but the operation of such a plant in a residential district may be a nuisance;[81] and where an electric light company operates its works so as to create a nuisance resulting in injury to the building of an adjoining owner it is liable therefor.[82]

47. Encroachments on Franchises. Continuous encroachments upon a ferry franchise are a private nuisance, properly abatable by injunction;[83] and where one has a grant of a bridge, with the exclusive right of taking toll, the erection of another bridge so near it as to materially affect it or take away its custom is a nuisance.[84]

48. Excavations. An excavation adjoining a public highway, or so near thereto that a person, lawfully and with ordinary care using the way, might by accident fall into it is *per se* a nuisance, unless proper means are adopted to guard against the occurrence of such accidents.[85]

49. Explosives.[86] The manufacture, storing, or keeping of explosive substances in large quantities in the vicinity of dwelling-houses or places of business is ordinarily regarded as a nuisance,[87] whether such business is so or not being,

75, holding that the throwing of bad smelling slops and filth by defendant on to plaintiff's premises gives a cause of action.

Montana.— Bordeaux *v.* Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600, holding that percolating sewer waters may constitute a nuisance.

North Carolina.— Vickers *v.* Durham, 132 N. C. 880, 44 S. E. 685; Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529.

Oregon.— Fleischner *v.* Citizens' Real Estate, etc., Co., 25 Oreg. 119, 35 Pac. 174.

South Carolina.— Matheny *v.* Aiken, 68 S. C. 163, 47 S. E. 56.

Wisconsin.— Price *v.* Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333, holding that a creamery company will be enjoined from causing its waste matter to flow into another's pasture so as to injure the pasture and cattle therein.

United States.— Exley *v.* Southern Cotton Oil Co., 151 Fed. 101.

England.— Humphries *v.* Cousins, 2 C. P. D. 239, 46 L. J. C. P. 438, 36 L. T. Rep. N. S. 180, 25 Wkly. Rep. 371; Turner *v.* Mirfield, 34 Beav. 390, 55 Eng. Reprint 685.

See 37 Cent. Dig. tit. "Nuisance," § 25.

Discharge of sewage not a nuisance per se. — Vickers *v.* Durhen, 132 N. C. 880, 44 S. E. 685; Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529.

76. Yolo County *v.* Sacramento, 36 Cal. 193. See, generally, Navigable Waters.

77. Hennessy *v.* Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

78 Rex *v.* Carlile, 6 C. & P. 636, 25 E. C. L. 614, holding that it is not at all essential that the effigies should be libelous.

79. See, generally, Electricity.

80. McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117.

81. Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243].

82. Ganster *v.* Metropolitan Electric Co., 214 Pa. St. 628, 64 Atl. 91. See also Colwell *v.* S. D. Pancras Borough Council, [1904] 1 Ch. 707, 68 J. P. 286, 73 L. J. Ch. 275, 2 Loc. Gov. 518, 90 L. T. Rep. N. S. 153, 20 T. L. R. 236, 52 Wkly. Rep. 523.

83. Walker *v.* Armstrong, 2 Kan. 198. See, generally, Ferries.

84. Newburgh, etc., Turnpike Road *v.* Miller, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274. See, generally, Bridges.

85. State *v.* Useful Manufactures, etc., Soc., 42 N. J. L. 504.

86. See, generally, Explosives.

Discharge of fireworks see *infra*, III, B, 56.

87. *Alabama.*— Cook *v.* Anderson, 85 Ala. 99, 4 So. 713.

California.— Kleebauer *v.* Western Fuse, etc., Co., (1902) 69 Pac. 246.

Illinois.— Chicago, etc., Coal Co. *v.* Glass, 34 Ill. App. 364.

Indiana.— Tyner *v.* People's Gas Co., 131 Ind. 408, 31 N. E. 61.

Massachusetts.— Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep.

however, dependent upon the location, the quantity, and the surrounding circumstances.[88]

50. Factories.[89] A factory may be a nuisance where it is so operated as to injuriously affect the neighbors or the public at large,[90] but it is not a nuisance *per se*.[91]

51. Fairs. A fair on a public street may be a nuisance.[92]

52. Falling of Ice. A structure of such size and shape that in the winter ice collects thereon and falls therefrom on adjoining property, causing damage, is a nuisance.[93]

53. Fences.[94] A barbed wire fence is not a nuisance *per se*,[95] and such a fence constructed by a railway company upon an ordinary country road cannot be treated as a nuisance.[96] But a barbed wire fence negligently constructed and maintained by a railroad along its right of way through a pasture, dangerous through its location and construction and the probability of its causing injury to stock running in

552, 24 L. R. A. 105; Heeg *v.* Licht, 80 N. Y. 579, 36 Am. Rep. 654 [*reversing* 16 Hun 257]; Ricker *v.* McDonald, 89 N. Y. App. Div. 300, 85 N. Y. Suppl. 825 (both at common law and under the New York city charter); Bradley *v.* People, 56 Barb. 72; Myers *v.* Malcolm, 6 Hill 292, 41 Am. Dec. 744.

Pennsylvania.— Wier's Appeal, 74 Pa. St. 230.

South Carolina.— Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

Tennessee.— Cheatham *v.* Shearon, 1 Swan 213, 55 Am. Dec. 734.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890 [*followed* in Huntington, etc., Land Development Co. *v.* Phœnix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037], holding that a mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of a navigable river, and near two railroads and a public road, is a public nuisance *per se*.

England.— See Bliss *v.* Lilley, 3 B. & S. 128, 9 Jur. N. S. 410, 32 L. J. M. C. 3, 7 L. T. Rep. N. S. 319, 113 E. C. L. 128.

See 37 Cent. Dig. tit. "Nuisance," §§ 15, 145.

Danger to plaintiff only.— A powder magazine may be a nuisance, although it is so located with reference to habitations in its vicinity that it endangers the household of plaintiff only. Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

Storage and use of gasoline.— An injunction will issue to restrain the introduction of gasoline into tanks of automobiles inside of a frame building adjacent to other frame buildings on three sides, and the storing of automobiles with gasoline in their tanks inside of the building, although the owner is licensed to store one barrel of gasoline in the building. O'Hara *v.* Nelson, (N. J. Ch. 1906) 63 Atl. 842.

88. Cook *v.* Anderson, 85 Ala. 99, 4 So. 713; Heeg *v.* Licht, 80 N. Y. 579, 36 Am. Rep. 654 [*reversing* 16 Hun 257]; Lounsbury *v.* Foss, 80 Hun (N. Y.) 296, 30 N. Y. Suppl. 89 [*affirmed* in 145 N. Y. 600, 40 N. E. 164]; People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; Dilworth's Appeal, 91 Pa. St. 247; Wier's Appeal, 74 Pa. St. 230. But *compare* Cheatham *v.* Shearon, 1 Swan (Tenn.) 213, 216, 55 Am. Dec. 734, holding that a powder magazine erected in a populous part of a city and in which large quantities of gunpowder are stored is a nuisance *per se*.

The mere keeping of a large quantity of gunpowder in a house near dwelling-houses and a public street does not constitute a nuisance; but keeping it negligently and improvidently does. People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296.

Question for jury.— Whether the storing of dynamite, conceded to be lawful, is a nuisance *per se* by reason of its inappropriate location, is a question of fact as to whether persons on property in proximity thereto would be exposed to danger inherent to the business when properly conducted. Remsberg *v.* Iola Portland Cement Co., 73 Kan. 66, 84 Pac. 548.

89. See, generally, Manufactures.

Fertilizer factories see *infra*, III, B, 54.

Tallow factories see *infra*, III, B, 114.

90. Paragon Paper Co. *v.* State, 19 Ind. App. 314, 49 N. E. 600 (factory discharging offal into a river); U. S. *v.* Luce, 141 Fed. 385.

91. New Orleans *v.* Lagasse, 114 La. 1055, 38 So. 828.

92. Augusta *v.* Reynolds, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564, holding that a fair occupying about eighty feet in width and four blocks in length of an important street, and consisting of numerous tents, inclosing shows and exhibitions in front of which are men talking through megaphones to attract attention, with other stands, booths, etc., which fair a company of the state militia is permitted to station on the street for a week, is a public nuisance.

93. Davis *v.* Niagara Falls Tower Co., 171 N. Y. 336, 64 N. E. 4, 89 Am. St. Rep. 817, 57 L. R. A. 545 [*affirming* 57 N. Y. App. Div. 620, 67 N. Y. Suppl. 1131], 25 N. Y. App. Div. 321, 49 N. Y. Suppl. 554.

94. See, generally, Fences.

95. Presnall *v.* Raley, (Tex. Civ. App. 1894) 27 S. W. 200.

96. Hillyard *v.* Grand Trunk R. Co., 8 Ont. 583.

such pasture, constitutes a nuisance;[97] and such a fence along the main street of a populous borough has been held to be a nuisance *per se*.[98]

54. Fertilizer Factories. A fertilizer factory is not a nuisance *per se*,[99] but may be a nuisance where so situated as to injuriously affect the health or comfort of the community by its odors.[1]

55. Fire-Engine Houses. A fire-engine house erected within a city under authority of the charter is not a nuisance,[2] although it may become such by improper use.[3]

56. Fireworks.[4] A display of fireworks in a city park[5] or a city street[6] is not a nuisance *per se*.

57. Foundries and Other Metal Works. A foundry is not a nuisance *per se*,[7] or even *prima facie*;[8] but iron works so operated as to materially interfere with the enjoyment of neighboring residence property have been held to be a nuisance.[9]

58. Frightening Horses. The placing on or near a highway of objects calculated to frighten horses may be a nuisance.[10]

59. Gambling Houses or Devices.[11] A gaming house is considered to be a nuisance,[12] and under some statutes gambling devices are nuisances.[13]

60. Garbage Plants. A garbage plant which casts noxious odors, vapors, and gases on the premises and in and about the dwelling of a property-owner in the vicinity is a nuisance and may be abated by injunction;[14] but a plant or furnace for the burning of garbage, erected in a suitable place under municipal authority, and properly conducted, is not a nuisance.[15]

97. Winkler *v.* Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663.

98. Bower *v.* Watsontown Borough, 11 Pa. Co. Ct. 110, there being no sidewalk and the whole width of the roadway being used by the general public.

99. Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 S. E. 460, although it may largely use undeodorized decayed fish in its processes.

1. State *v.* Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938; Laird *v.* Atlantic Coast Sanitary Co., (N. J. Ch. 1907) 67 Atl. 387; Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 N. E. 460.

2. Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

3. Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

4. Keeping explosives see *supra*, III, B, 49.

5. De Agramonte *v.* Mt. Vernon, 112 N. Y. App. Div. 291, 98 N. Y. Suppl. 454.

6. Melker *v.* New York, 190 N. Y. 481, 83 N. E. 565. *Contra*, Cameron *v.* Heister, 10 Ohio Dec. (Reprint) 651, 22 Cinc. L. Bul. 384.

7. Finegan *v.* Allen, 46 Ill. App. 553, iron foundry.

8. McMenomy *v.* Baud, 87 Cal. 134, 26 Pac. 795, brass foundry.

9. Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129.

10. Cincinnati R. Co. *v.* Com., 80 Ky. 137 (holding that the leaving of a hand-car on a public road at a railroad crossing, and hanging buckets and clothing thereon, whereby horses are frightened, constitutes a public nuisance); State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009 (set out *infra*, III, B, 77). It is a nuisance for a person to erect on land not owned or controlled by him and on which he has no legal right to enter, immediately adjacent to a traveled highway, machinery or objects which are calculated to, and which do, frighten horses. Illinois Cent. R. Co. *v.* Com., 96 S. W. 467, 29 Ky. L. Rep. 754, where the court said that it was unnecessary to decide whether such structures on premises owned or controlled by defendant would be a nuisance.

11. See, generally, Gaming.

12. *Delaware.*— State *v.* Layman, 5 Harr. 510.

Georgia.— State *v.* Doon, R. M. Charlt. 1.

Kentucky.— Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553, 17 Ky. L. Rep. 1122; Ehrlick *v.* Com., 102 S. W. 289, 31 Ky. L. Rep. 401, 10 L. R. A. N. S. 995.

Nebraska.— Hill *v.* Pierson, 45 Nebr. 503, 63 N. W. 835.

New York.— *In re* Butler, 1 City Hall Rec. 66.

See 37 Cent. Dig. tit. "Nuisance," § 148. And see Disorderly Houses, 14 Cyc. 485, 486.

Gambling itself was a nuisance at common law.— Mullen *v.* Mosley, 13 Ida. 457, 90 Pac. 986.

13. Lang *v.* Merwin, 99 Me. 486, 59 Atl. 1021, 105 Am. St. Rep. 293, holding that a cigar store where a slot machine is set up for the use of customers, and is used by them, being a gambling device, is a nuisance under Rev. St. (1903) c. 22, § 1, and may be enjoined as such. See also Mullen *v.* Mosley, 13 Ida. 457, 90 Pac. 986.

14. Munk *v.* Columbus Sanitary Works Co., 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 542.

15. So where a plant for the burning of garbage is erected in a city under the pro-

61. GAS-WORKS.[16] Whenever the erection of gas-works creates a special injury they constitute a private nuisance for which an action will lie,[17] or which may be abated or enjoined.[18]

62. GIPSY ENCAMPMENTS. An injunction has been granted to restrain the owner of a piece of land from allowing the same to be occupied by gipsies and others in such manner as to cause a nuisance.[19]

63. GOLD OR SILVER BEATING. The business of a gold or silver beater, set up in a quiet, residential neighborhood, and by its noise and concussion unreasonably interfering with the quiet enjoyment, and perhaps safety, of neighboring property, is a nuisance which equity will restrain.[20]

64. HITCHING-POSTS. Hitching-posts, although not in themselves nuisances,[21] may become such from the dropping of filth by the horses hitched to them.[22]

65. HOSPITALS.[23] A hospital is not a nuisance *per se*,[24] or even *prima facie*;[25] but it may be so located and conducted as to be a nuisance to people living close to it.[26] Even a pest-house is not a nuisance *per se*,[27] although it may be a nuisance where it is carelessly and negligently used or kept,[28] or where it is situated near to property used or suitable for residence purposes,[29] or so near to the highway as to be dangerous to the public.[30]

visions of an ordinance thereof, and the site is the most unobjectionable place that could be selected within the city limits and has been approved by the director of the department of public works, and the plant is of the most approved kind and constructed on the most scientific principles, and no offensive odors come from the burning of the garbage but only from its collection there before burning, such plant cannot be declared a nuisance because it may be an annoyance to some of the persons living in its vicinity. Fisher *v.* American Reduction Co., 189 Pa. St. 419, 42 Atl. 36; Fisher *v.* Flinn, 28 Pittsb. Leg. J. N. S. (Pa.) 237.

16. See, generally, GAS.

Gas wells see *infra*, III, B, 79.

17. Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598; Carhart *v.* Auburn Gas Light Co., 22 Barb. (N. Y.) 297.

18. Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330; McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

19. Atty.-Gen. *v.* Stone, 60 J. P. 168.

20. Wallace *v.* Auer, 10 Phila. (Pa.) 356.

21. Mercer County *v.* Harrodsburg, 66 S. W. 10, 23 Ky. L. Rep. 1744, 56 L. R. A. 583.

22. Mercer County *v.* Harrodsburg, 66 S. W. 10, 23 Ky. L. Rep. 1744, 56 L. R. A. 583, holding that where a city made an order condemning as a nuisance hitching-posts erected by the county, and caused them to be removed, the city was entitled to an injunction restraining the county from replacing them.

23. See, generally, HOSPITALS.

24. Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484]; Bessonies *v.* Indianapolis, 71 Ind. 189; Withington Local Bd. of Health *v.* Manchester, [1893] 2 Ch. 19, 57 J. P. 340, 62 L. J. Ch. 393, 68 L. T. Rep. N. S. 330, 2 Reports 367, 41 Wkly. Rep. 306.

25. Bessonies *v.* Indianapolis, 71 Ind. 189.

26. Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484]; Bessonies *v.* Indianapolis, 71 Ind. 189; Gilford *v.* Babies' Hospital, 1 N. Y. Suppl. 448, 21 Abb. N. Cas. 159; Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617.

27. State *v.* Trenton, (N. J. Ch. 1906) 63 Atl. 897 (holding that where buildings used as a hospital for contagious diseases were located in a sparsely settled neighborhood upon land entirely surrounded by highways and on which there were no other buildings, and with ordinary caution there was no probability of the communication of contagious diseases from the hospital, unless by transmission through the air, and the buildings were at a greater distance from the highways than smallpox is transmissible in the open air, these facts did not show a nuisance, or justify apprehension that the buildings would become a nuisance, so as to authorize restraint of such use by equity); Lorain *v.* Rolling, 24 Ohio Cir. Ct. 82; Atty.-Gen. *v.* Rathmines, etc., Hospital Bd., [1904] 1 Ir. 161.

The location of a pest-house by a city will not be enjoined unless there has been a clear abuse of discretion. Paducah *v.* Allen, 49 S. W. 343, 20 Ky. L. Rep. 1342.

28. Lorain *v.* Rolling, 24 Ohio Cir. Ct. 82.

29. Anable *v.* Montgomery County, 34 Ind. App. 72, 71 N. E. 272, 107 Am. St. Rep. 173; Hill *v.* Metropolitan Asylum Dist., 4 Q. B. D. 433; Bendelow *v.* Wortley Union, 57 L. J. Ch. 762, 57 L. T. Rep. N. S. 849, 36 Wkly. Rep. 168; Elizabethtown Tp. *v.* Brockville, 10 Ont. 372. See also Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494.

30. Youngstown Tp. *v.* Youngstown, 25 Ohio Cir. Ct. 518 holding that a municipal corporation will be enjoined from attempting to erect additional buildings for a pest-house so near a highway as to be dangerous

66. Jails.[31] A jail, being a public necessity, indispensable to the administration of justice, and therefore required to be built, is not a nuisance *per se*.[32]

67. Laundries. A laundry is not a nuisance *per se*.[33]

68. Livery Stables.[34] A livery stable in a city or town is not necessarily and of itself a nuisance,[35] even though it be erected in a residential section;[36] but it may be a nuisance where it is constructed[37] or conducted[38] in a manner which causes annoyance, or where it is so located as to be unreasonably detrimental to neighboring property.[39]

69. Machinery. Machinery properly stationed for a legitimate purpose is not a nuisance, although it may be dangerous if left unguarded and interfered with;[40] but the operation of machinery may cause such injury to the owner of adjoining property as to entitle him to relief.[41]

70. Marble Works. The business of cutting and polishing marble, by machinery or otherwise, in a neighborhood more or less given up to business enterprises, although also occupied by some dwellings, is not a nuisance *per se*.[42]

71. Markets. A market-house is not of itself a nuisance.[43]

72. Merry-Go-Rounds. A merry-go-round may cause such disturbance as to amount to a public nuisance.[44]

to the public, and against the protests of the township trustees, who have erected a schoolhouse near the highway, although a pesthouse a considerable distance from the highway had been established on the premises before the school-house was erected, and before the neighborhood was thickly populated.

31. See, generally, Prisons.

32. Bacon *v.* Walker, 77 Ga. 336; Burwell *v.* Yana County Com'rs, 93 N. C. 73, 53 Am. Rep. 454.

33. *In re* Hong Wah, 82 Fed. 623, holding that a public laundry cannot be made a nuisance by the legislative declaration of a city council.

34. See, generally, Livery-Stable Keepers.

Private stables see *infra*, III, B, 107.

35. *Colorado.*—Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

Florida.— Shivery *v.* Streeper, 24 Fla. 103, 3 So. 865.

Iowa.— Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138.

Maryland.— Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90.

Missouri.— St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

New York.— Stilwell *v.* Buffalo Riding Academy, 4 N. Y. Suppl. 414, 21 Abb. N. Cas. 472.

Pennsylvania.— Fischer *v.* Sanford, 12 Pa. Super. Ct. 435.

Tennessee.— Kirkman *v.* Handy, 11 Humphr. 406, 54 Am. Dec. 45.

Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

United States.— Flint *v.* Russell, 9 Fed. Cas. No. 4,876, 5 Dill. 151.

See 37 Cent. Dig. tit. "Nuisance," § 14.

Rebuilding with modifications.— Where a livery stable has been burned down, its rebuilding will not be enjoined, if it can be so modified as not to become a nuisance. Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138.

36. Flint *v.* Russell, 9 Fed. Cas. No. 4,876, 5 Dill. 151.

37. Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Kirkman *v.* Handy, 11 Humphr. (Tenn.) 406, 54 Am. Dec. 45; Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

38. *Colorado.*—Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

New York.— Robinson *v.* Smith, 3 Silv. Sup. 490, 7 N. Y. Suppl. 38.

Ohio.— Collins *v.* Cleveland, 2 Ohio S. & C. Pl. Dec. 380.

Rhode Island.— Aldrich *v.* Howard, 8 R. I. 246.

Tennessee.—Kirkman *v.* Handy, 11 Humphr. 406, 54 Am. Dec. 45.

Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

See 37 Cent. Dig. tit. "Nuisance," § 14.

39. *Georgia.*— Coker *v.* Birge, 10 Ga. 336, 9 Ga. 425, 54 Am. Dec. 347.

Iowa.— Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138.

New York.— Filson *v.* Crawford, 5 N. Y. Suppl. 882.

Texas.— Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

Canada.— Drysdale *v.* Dugas, 26 Can. Sup. Ct. 20.

See 37 Cent. Dig. tit. "Nuisance," § 14.

40. Wood *v.* Mitchell Independent School Dist., 44 Iowa 27.

41. Bowden *v.* Edison Electric Illuminating Co., 29 Misc. (N. Y.) 171, 60 N. Y. Suppl. 835; Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12.

Machine shops may be a nuisance. Froelicher *v.* Southern Mar. Works, 118 La. 1077, 43 So. 882.

42. Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255.

43. See Higgins *v.* Princeton, 8 N. J. Eq. 309.

44. Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906, holding that a merry-go-round run by a steam engine, the whistle of which blew every few minutes, accompanied by a band and attended by a large, noisy, and boisterous crowd until after ten o'clock at night,

73. Mills.[45] A mill is not of itself a nuisance.[46]

74. Mortar Beds. It is not a nuisance for a city or an abutting lot owner to permit a contractor to make mortar beds in the street for the erection of a building.[47]

75. Obscenity and Ribaldry.[48] The singing of a ribald song in a loud and boisterous manner on the public streets in the presence of divers persons has been held to be a nuisance.[49]

76. Obstruction of Private Ways.[50] The obstruction of a private way is a private nuisance.[51]

77. Obstruction of Streets and Highways.[52] Any obstruction upon a street or highway is a public nuisance.[53]

78. Obstruction of Waters.[54] The obstruction of navigable waters constitutes a nuisance,[55] and so also may the obstruction of non-navigable waters.[56]

79. Oil and Gas Wells. Oil and gas wells are not nuisances *per se*;[57] but whether they are nuisances to a dwelling-house and its appurtenances depends upon their location, capacity, and management.[58]

80. Oil-Tanks.[59] The storage of gasoline and coal-oil in suitable tanks does not constitute a nuisance *per se*,[60] although it may be a nuisance against which

disturbing some of the people living near it, was a public nuisance.

45. See, generally, Mills.

46. Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378, holding that a flouring and corn mill is not *per se* a nuisance in a city.

47. Strauss *v.* Louisville, 108 Ky. 155, 55 S. W. 1075.

48. See, generally, Obscenity.

49. State *v.* Toole, 106 N. C. 736, 11 S. E. 168 [*following* State *v.* Chrisp, 85 N. C. 528, 39 Am. Rep. 713].

50. See, generally, Easements.

51. Holmes *v.* Jones, 80 Ga. 659, 7 S. E. 168; Salter *v.* Taylor, 55 Ga. 310.

52. See, generally, Municipal Corporations; Streets and Highways.

Purprestures see *infra*, III, B, 93.

53. Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418.

An unlawful interference with the highway is *per se* a nuisance. Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605.

Logs piled in a highway near the traveled track constitute a public nuisance. Lawton *v.* Olmstead, 40 N. Y. App. Div. 544, 58 N. Y. Suppl. 36, holding further that an unexplained delay of five days by an owner in removing ten logs placed in a highway by another was unreasonable, so as to make him liable for special injury therefrom.

Temporary obstruction.— It is not a nuisance to unload or temporarily pile lumber in a street adjoining a private owner until it can be removed on to the premises. Johnson Chair Co. *v.* Agresto, 73 Ill. App. 384.

The occupation of a portion of a main street by a platform and shed sixty feet long, thirty-five feet wide, and twenty feet high, on which platform are large farm scales, a corn-sheller operated by steam, and other machinery, which machinery raises dust and is noisy when operated and which annoys the public and is likely to frighten horses, is a public nuisance. State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

Platform within stoop limits.—A platform built along the side of a wholesale grocery, seventy feet in length, two feet high, and five feet wide, within the stoop limits, with steps at each end, and used in connection with the business, in loading and unloading wagons, was not a nuisance *per se*. Murphy *v.* Leggett, 164 N. Y. 121, 58 N. E. 42 [*affirming* 29 N. Y. App. Div. 309, 51 N. Y. Suppl. 472].

54. Pollution of water see *infra*, III, B, 86.

55. Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418. See, generally, Navigable Waters.

The erection of obstructions below ordinary high water mark in front of the land of a littoral proprietor, whose lands abut on the ocean, which obstructions interfere with and prevent access to and use of the ocean highway by the littoral proprietor, constitutes a private nuisance, as to him, and he may maintain an action to abate it. San Francisco Sav. Union *v.* R. G. R. Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242.

56. See Waters.

57. McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

58. McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

The drilling and operation of an oil well upon a city lot in close proximity to a dwelling-house on an adjoining lot is a nuisance which may be restrained, for such use is dangerous and annoying, practically destroying the use of the adjoining property for residence purposes so long as the well is operated. Cline *v.* Kirkbride, 22 Ohio Cir. Ct. 527, 12 Ohio Cir. Dec. 517.

59. Explosives generally see *supra*, III, B, 49.

60. Harper *v.* Standard Oil Co., 78 Mo. App. 338, holding that the mere fact that defendant located its gasoline and coal-oil tanks seventy-five feet from plaintiff's dwelling did not render it liable for maintaining

relief will be granted where the tanks are not properly constructed or located and damage results therefrom.[61]

81. Overflow of Water.[62] One who wrongfully causes water to flow upon another's land, which water would not flow there naturally, creates a nuisance.[63]

82. Overhanging Structures. A wall which overhangs or projects over adjoining property may be a nuisance,[64] and so also may be the erection of a building so close to the line between two lots that the eaves and gutters project over the adjoining lot.[65]

83. Pipe-Lines. A pipe-line for the transportation of oil is not a nuisance.[66]

84. Placards.[67] A placard paraded or posted in a public street before the door of an auctioneer, cautioning strangers to beware of mock auctions, has been held to constitute a nuisance, remediable by injunction.[68]

85. Planing-Mills. A planing-mill and other wood-working machines are not public nuisances.[69]

86. Pollution of Waters.[70] The pollution of water used for irrigation and for culinary and domestic purposes,[71] the discharge into a stream of refuse and filth which is offensive in odor and hazardous to public health,[72] or the deposit of filth and poisonous matter on land, thereby causing the pollution of percolating waters,[73]

a nuisance, there being no evidence that, in constructing such tanks, it did anything calculated to excite just apprehension of fire (that being the only ground of complaint alleged) in the minds of persons of normal nervous sensibility, and that the mere fact that injury to the rental value of plaintiff's property was caused by the location by defendant of gasoline and coal-oil tanks near his premises did not render defendant liable as for maintaining a nuisance, in the absence of any showing of negligence in the manner or locality of the use of such tanks.

61. Harper *v.* Standard Oil Co., 78 Mo. App. 338.

62. Collection of surface water see *supra*, III, B, 33.

63. *California.*— Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, nuisance *per se*.

Kentucky.— Ecton *v.* Lexington, etc., R. Co., 53 S. W. 523, 21 Ky. L. Rep. 921.

Massachusetts.— Shaw *v.* Cummiskey, 7 Pick. 76.

Michigan.— Merritt Tp. *v.* Harp, 131 Mich. 174, 91 N. W. 156.

Minnesota.— Mueller *v.* Fruen, 36 Minn. 273, 30 N. W. 886; O'Brien *v.* St. Paul, 18 Minn. 176; Dorman *v.* Ames, 12 Minn. 451.

Missouri.— Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351.

New Hampshire.— Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53.

Ohio.— Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

Tennessee.— Philips *v.* Stocket, 1 Overt. 200.

64. Meyer *v.* Metzler, 51 Cal. 142; Langfeldt *v.* McGrath, 33 Ill. App. 158.

65. Aiken *v.* Benedict, 39 Barb. (N. Y.) 400, holding that this is an encroachment for which nuisance and not ejectment is the proper remedy.

66. Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906 [*affirmed* in 61 N. J. L. 693, 40 Atl. 1132], holding that it is not rendered a nuisance by the mere fact that its presence increases the rates of insurance on neighboring property.

67. Signs see *infra*, III, B, 102.

68. Gilbert *v.* Mickle, 4 Sandf. Ch. (N. Y.) 357, holding that, although the placard might be a libel, it was none the less a private nuisance.

69. New Orleans *v.* Lagasse, 114 La. 1055, 38 So. 828.

70. See, generally, Navigable Waters; Waters.

Obstruction of water see *supra*, III, B, 78.

71. Nolan *v.* New Britain, 69 Conn. 668, 38 Atl. 703; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851; People *v.* Burtleson, 14 Utah 258, 47 Pac. 87; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. 970.

Urinating in a spring which is near a public highway and from which travelers are accustomed to drink is a public offense within the definition of "nuisance" in 2 Gay & H. St. Ind. § 628. State *v.* Taylor, 29 Ind. 517.

72. Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247]; State *v.* Smith, 82 Iowa 423, 48 N. W. 727; Butterfoss *v.* Lambertville Bd. of Health, 40 N. J. Eq. 325; New Brighton Bd. of Health *v.* Casey, 3 N. Y. Suppl. 339. See also Birmingham *v.* Land, 137 Ala. 538, 34 So. 613.

73. Ballard *v.* Tomlinson, 29 Ch. D. 115, 49 J. P. 692, 54 L. J. Ch. 454, 52 L. T. Rep. N. S. 942, 33 Wkly. Rep. 533.

Percolations of a privy which contaminate the sources of a city's water-supply constitute a nuisance *per se*, not justifiable on the ground of necessity. Com. *v.* Yost, 11 Pa. Super. Ct. 323.

Pollution of wells and springs by cemetery. — Where land to be used as a cemetery is so situated that the burial of the dead therein will injure life or health by corrupting the water of adjacent wells or springs with dis-

is a nuisance. And poisoning the waters of a river stocked with fish, thereby killing the fish, has also been held to be a nuisance.[74]

87. PONDS. A pond is not in itself a nuisance,[75] although it may become such.[76]

88. POOL SELLING. The sale of pools at the race-course of a private corporation where the general public assembles constitutes a public nuisance.[77]

89. PRIZE-FIGHTS.[78] The holding of a prize-fight may be enjoined as a public nuisance.[79]

90. PUBLIC IMPROVEMENTS. Works of internal improvement, erected by the state for the benefit of the citizens at large, do not become a public nuisance because they may render the neighborhood unhealthy by reason of the obstruction of running water and the consequent overflowing of the adjacent lands.[80] A person having a judgment against another for consequential damages to his lands, resulting from the erection of a public work, not touching his lands, which was carefully and skilfully erected in accordance with authority duly conferred by the sovereign, cannot have such work declared a nuisance subject to abatement.[81]

91. PUBLIC PICNICS AND DANCES. Public picnics and public dances are not in their nature nuisances.[82]

92. PUMPING STATIONS. A pumping station near a highway is not a nuisance.[83]

93. PURPRESTURES.[84] A purpresture or appropriation of what should be common or public[85] may be a nuisance,[86] but every purpresture is not necessarily such;[87] and the question whether it is so or not is one of fact to be determined by the jury or by the court sitting as a jury.[88] It has been held, however,

ease germs, injunctive relief will be granted, on the ground that the act will be a nuisance likely to produce irretrievable mischief, and one which cannot be adequately redressed at law. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

74. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581, under Civ. Code, §§ 3479, 3480.

75. Holke *v.* Herman, 87 Mo. App. 125, holding that a petition to restrain an excavation for a pond, alleging that such pond, if permitted to be completed, will be a nuisance, and that the water therein will become stagnant and putrid, and will breed disease and destroy the usefulness and beauty of plaintiff's home, fails to state a cause of action, as it complains neither of a *prima facie* nuisance nor of something which is likely to become a nuisance.

76. Yonkers Bd. of Health *v.* Copcutt, 71 Hun (N. Y.) 149, 24 N. Y. Suppl. 625 [*affirmed* in 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485], holding that a mill pond which, by the collection of foul matter, becomes a nuisance endangering the health of the public, may be ordered to be discontinued. See also Rochester *v.* Simpson, 134 N. Y. 414, 31 N. E. 871, 47 N. Y. St. 645 [*reversing* 57 Hun 26, 10 N. Y. Suppl. 499].

77. State *v.* Ayers, (Oreg. 1907) 88 Pac. 653. 10 L. R. A. N. S. 992.

78. See, generally, PRIZE-FIGHTING.

79. Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280.

80. Com. *v.* Reed, 34 Pa. St. 275, 75 Am. Dec. 661, holding further that their character is not changed by a transfer into the hands of a private corporation, with a requirement that the works shall be kept up for the purposes of their creation.

81. New Albany, etc., R. Co. *v.* Higman, 18 Ind. 77.

82. Des Plaines *v.* Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524 [*affirming* 22 Ill. App. 574], holding that a village ordinance, in so far as it seeks to declare them to be nuisances, regardless of their character, is void.

83. Pettit *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 86, 29 N. Y. Suppl. 1137, holding that this is true, although the smoke from the engine used in pumping sometimes settles down on the highway and frightens horses.

84. Encroachment on: Highway see STREETS AND HIGHWAYS. Streets see MUNICIPAL CORPORATIONS.

85. See PURPRESTURE.

86. *California.*— People *v.* Park, etc., R. Co., 76 Cal. 156, 18 Pac. 141; People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 4 App. Cas. 491.

Massachusetts.— Com. *v.* Tucker, 2 Pick. 44.

Missouri.—State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

Pennsylvania.— Com. *v.* Rush, 14 Pa. St. 186.

United States.— The Idlewild, 64 Fed. 603, 12 C. C. A. 328.

See 37 Cent. Dig. tit. "Nuisance," § 152.

87. People *v.* Park, etc., R. Co., 76 Cal. 156, 18 Pac. 141; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462; People *v.* Vanderbilt, 26 N. Y. 287; The Idlewild, 64 Fed. 603, 12 C. C. A. 328.

88. People *v.* Park, etc., R. Co., 76 Cal. 156, 18 Pac. 141.

that a permanent structure encroaching upon a public street is *per se* a public nuisance.[89]

94. Quicklime. Quicklime, in barrels, placed on a street for the use of a builder, is not a nuisance, although some of it escape through cracks in the barrels.[90]

95. Railroads. A railroad is not a nuisance *per se*, but it may become a nuisance by reason of the manner in which it is operated or the location, condition, and use of its appurtenant structures.[91]

96. Regattas. The holding of a regatta with aquatic sports on a reservoir, thereby creating a concourse of persons who trespass upon and injure adjoining property, has been enjoined as a nuisance.[92]

97. Rendering Plants. Although the business of rendering the bodies of dead animals and other matter for the purpose of manufacturing a fertilizer and the like is lawful in itself, it may be enjoined if it becomes injurious to health and comfort by reason of the unhealthy and noisome odors which arise therefrom.[93]

98. Roller Coasters. A roller coaster or gravity railroad, which causes unusual noise and deprives persons of ordinary sensibilities of peace, quiet, and rest on Sunday, located at a public resort in a quiet neighborhood which has been occupied for years by dwellings, is a private nuisance, which will be restrained.[94]

99. Saloons.[95] A place where intoxicating liquor is sold is not a nuisance *per se*;[96] but a liquor saloon located in a quiet residential portion of a city, thereby depreciating the value of adjoining property, may be a nuisance,[97] and a disorderly liquor saloon may be a public nuisance.[98]

100. Sewers. A sewer may constitute a nuisance,[99] and a court of equity will restrain a municipal corporation from constructing a sewer in such a manner as to create a nuisance on the lands of a private individual.[1]

101. Shanty Boats. A shanty boat or Jo-boat located on the bank of a navigable river, below high water mark, and used as a place of residence, is an obstruction constituting a public nuisance.[2]

102. Signs.[3] A large and heavy sign over a sidewalk is not a nuisance

89. Valparaiso *v.* Bozarth, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487.

90. Beetz *v.* Brooklyn, 10 N. Y. App. Div. 382, 41 N. Y. Suppl. 1009.

91. See Railroads, X, A, 3, b.

92. Bostock *v.* North Staffordshire R. Co., 5 De G. & Sm. 584, 2 Jur. N. S. 248, 25 L. J. Ch. 325, 4 Wkly. Rep. 326, 64 Eng. Reprint 1253.

93. Rhoades *v.* Cook, 122 Iowa 336, 98 N. W. 122; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702.

94. Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

95. See, generally, Intoxicating Liquors.

96. See Disorderly Houses, 14 Cyc. 486, 487.

97. Haggart *v.* Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

98. State *v.* Mullikin, 8 Blackf. (Ind.) 260; State *v.* Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442.

99. Adams *v.* Modesto, 131 Cal. 501, 63 Pac. 1083, (1900) 61 Pac. 957; Dierks *v.* Addison Tp. Highway Com'rs, 142 Ill. 197, 31 N. E. 496 (holding that where a sewer which drains the greater part of a village flows in an unnatural course and empties upon a farm, creating such a stench that a person cannot work upon the farm in that locality without vomiting, such sewer constitutes a nuisance, which a court of equity will enjoin without a previous adjudication in an action at law); Kankakee *v.* Illinois Eastern Hospital, 66 Ill. App. 112; Adams Hotel Co. *v.* Cobb, 3 Ind. Terr. 50, 53 S. W. 478; State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

1. Adams *v.* Modesto, 131 Cal. 501, 63 Pac. 1083, (1900) 61 Pac. 957 (holding that under Civ. Code, § 3479, declaring that anything injurious to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life and property, etc., is a nuisance, an open wooden trough, passing about three hundred yards from plaintiff's house, and constituting part of the sewerage system of the city, through which, for a distance of about four hundred and fifty yards, the city sewage passed, constituted a nuisance, entitling plaintiff to its abatement); Morton *v.* Chester, 2 Del. Co. (Pa.) 459; Carmichael *v.* Texarkana, 94 Fed. 561. But *compare* Sayre *v.* Newark, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L. R. A. 722 [*reversing* 58 N. J. Eq. 136, 42 Atl. 1068]. See, generally, Municipal Corporations.

2. Dzik *v.* Bigelow, 27 Pittsb. Leg. J. N. S. (Pa.) 360.

3. Advertisements see *supra*, III, B, 1. Placards see *supra*, III, B, 84.

per se,[4] nor can exterior advertising signs on public vehicles be condemned as public nuisances.[5]

103. Skating-Rinks. A skating-rink which has been erected within a short distance from a dwelling-house may be enjoined as a nuisance where the noise from the skating and attending it is of such a character as to materially interfere with the comfort and enjoyment of the inmates of such dwelling.[6]

104. Slaughter-Houses. A slaughter-house is not a nuisance *per se*,[7] nor is a properly conducted slaughter-house in a proper locality a nuisance in fact;[8] but a slaughter-house may be,[9] and *prima facie* is,[10] a nuisance where located near an inhabited locality.[10]

105. Smelting-Works. Smelting-works may be a nuisance to adjoining landowners.[11]

106. Spring-Guns. In England the mere act of placing spring-guns upon a person's own land has been held not to be unlawful, apart from statute;[12] but it has been prohibited and made punishable by statute.[13] In the United States it has been held that spring-guns, although justifiably placed to protect life or property, may constitute a nuisance, if they cause actual danger to passers-by in the street, and if this annoyance to the public is shown to be of a real and substantial nature.[14]

107. Stables.[15] A stable is not a nuisance *per se*,[16] although it may be or

4. Loth *v.* Columbia Theater Co., 197 Mo. 328, 94 S. W. 847, holding that an electric light sign, twelve to fourteen feet long, and five feet ten inches wide, weighing from two hundred to three hundred and fifty pounds, placed on the side of a theater balcony, fourteen feet above the sidewalk, was not unlawful so as to constitute a nuisance *per se*.

5. Fifth Ave. Coach Co. *v.* New York, 38 N. Y. L. J. No. 95, although they are crude, inartistic, and unsightly.

6. Snyder *v.* Cabell, 29 W. Va. 48, 1 S. E. 241. See also Cape May First M. E. Church *v.* Cape May Grain, etc., Co., (N. J. Ch. 1907) 67 Atl. 613.

7. Pruner *v.* Pendleton, 75 Va. 516, 40 Am. Rep. 738.

8. Beckham *v.* Brown, 40 S. W. 684, 19 Ky. L. Rep. 519; Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. A. 321.

Offense to persons passing.— A properly conducted slaughter-house near a public road but not near enough to any dwelling-house to be offensive to persons therein is not a public nuisance because the smell thereof may be in some degree offensive to persons passing along the road, it not appearing that it causes any material obstruction or inconvenience in the free and safe use of the road. Phillips *v.* State, 7 Baxt. (Tenn.) 151.

9. State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495.

10. *Colorado.*—Wright *v.* Ulrich, (1907) 91 Pac. 43.

Connecticut.— Bishop *v.* Banks, 33 Conn. 118, 87 Am. Dec. 197.

Illinois.— Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63.

Indiana.— Reichert *v.* Geers, 98 Ind. 73, 49 Am. Rep. 736; Moses *v.* State, 58 Ind. 185.

Iowa.— Rhoades *v.* Cook, 122 Iowa 336, 98 N. W. 122; Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

Kentucky.— Seifried *v.* Hays, 81 Ky. 377, 50 Am. Rep. 167.

Maryland.— Woodyear *v.* Schaefer, 57 Md. 1, 40 Am. Rep. 419.

Missouri.— Zugg *v.* Arnold, 75 Mo. App. 68.

New York.— Brady *v.* Weeks, 3 Barb. 157; Dubois *v.* Budlong, 10 Bosw. 700, 15 Abb. Pr. 445; Peck *v.* Elder, 3 Sandf. 126; Catlin *v.* Valentine, 9 Paige 575, 38 Am. Dec. 567.

Oregon.— Portland *v.* Cook, (1906) 87 Pac. 772, 9 L. R. A. N. S. 733.

Pennsylvania.— Com. *v.* Wescott, 4 C. Pl. 58; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92.

Virginia.— Pruner *v.* Pendleton, 75 Va. 516, 40 Am. Rep. 738.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055.

See 37 Cent. Dig. tit. "Nuisance," §§ 13, 151.

11. Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; Ducktown, Sulphur, etc., Co. *v.* Barnes, (Tenn. 1900) 60 S. W. 593.

12. Ilott *v.* Wilkes, 3 B. & Ald. 304, 22 Rev. Rep. 400, 5 E. C. L. 181. But *compare* Bird *v.* Holbrook, 4 Bing. 628, 6 L. J. C. P. O. S. 146, 1 M. & P. 607, 29 Rev. Rep. 657, 13 E. C. L. 667.

13. St. 24 & 25 Vict. c. 100, § 31.

14. State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

15. **Livery stables** see *supra*, III, B, 68.

16. *Alabama.*— St. James' Church *v.* Arrington, 36 Ala. 546, 76 Am. Dec. 332.

Georgia.— Rounsaville *v.* Kohlheim, 68 Ga. 668, 45 Am. Rep. 505.

Indiana.— Keiser *v.* Lovett, 85 Ind. 240, 44 Am. Rep. 10.

Kentucky.—Albany Christian Church *v.* Wilborn, 112 Ky. 507, 66 S. W. 285, 23 Ky. L. Rep. 1820.

Louisiana.— Dubos *v.* Dreyfous, 52 La. Ann. 1117, 27 So. 663.

become a nuisance[17] by reason of the manner in which it is constructed,[18] kept,[19] or used,[20] or by reason of the location being improper or necessarily injurious to a neighbor.[21]

108. Stairways Fronting on Streets. A stairway furnishing an entrance from the sidewalk into the basement of a house, having a railing on either side, but not at the entrance, and being wholly on private ground, is not a nuisance *per se*, unless constructed contrary to law.[22]

109. Stallions and Jacks. The keeping of jacks and stallions, and standing them to mares, within full view of a dwelling-house, is a nuisance,[23] and will be enjoined by a court of equity at the suit of the occupant of such house, although he purchased it after the nuisance was established.[24] Showing or exhibiting stud-horses in a town is a public nuisance.[25]

110. Steam-Boilers. The use of a properly constructed steam-boiler will not be restrained as a nuisance by injunction, although it is situated in the dense part of a city.[26]

111. Steam-Engines. The use of a steam-engine is not *prima facie* a nuisance on account of the danger to life from explosion,[27] but the operation of a steam-engine which injures adjoining buildings may constitute a nuisance.[28]

112. Steam-Hammers. The operation of a steam-hammer of such size as to interfere with the use of the adjoining premises is a nuisance which will be enjoined.[29]

113. Street-Railroads.[30] The construction of a street-railroad which is authorized by competent authority cannot be treated as a public nuisance.[31]

Maryland.— Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

North Carolina.— Dargan *v.* Waddill, 31 N. C. 244, 49 Am. Dec. 421.

Tennessee.— Harvey *v.* Consumers' Ice Co., 104 Tenn. 583, 58 S. W. 316.

Vermont.— Curtis *v.* Winslow, 38 Vt. 690.

Canada.— Lawrason *v.* Paul, 11 U. C. Q. B. 534.

See 37 Cent. Dig. tit. "Nuisance," § 17.

A private stable on the building line of a city street is not a nuisance *per se*. King *v.* Hamill, 97 Md. 103, 54 Atl. 625.

17. Albany Christian Church *v.* Wilborn, 112 Ky. 507, 66 S. W. 285, 23 Ky. L. Rep. 1820.

18. Rounsaville *v.* Kohlheim, 68 Ga. 668, 45 Am. Rep. 505; Dargan *v.* Waddill, 31 N. C. 244, 49 Am. Dec. 421.

19. Rounsaville *v.* Kohlheim, 68 Ga. 668, 45 Am. Rep. 505; Dargan *v.* Waddill, 31 N. C. 244, 49 Am. Dec. 421; Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306; Gifford *v.* Hulett, 62 Vt. 342, 19 Atl. 230.

20. Dargan *v.* Waddill, 31 N. C. 244, 49 Am. Dec. 421.

21. B. Stroth Brewing Co. *v.* Schmitt, 25 Ohio Cir. Ct. 231; Gifford *v.* Hulett, 62 Vt. 342, 19 Atl. 230.

22. Williams *v.* Hynes, 55 N. Y. Super. Ct. 86, 18 N. Y. St. 316, holding further that even if such stairway occupied a part of the sidewalk within the stoop line, it would not necessarily be a nuisance *per se*. See also Sheehan *v.* Bailey Bldg. Co., 42 Wash. 535, 85 Pac. 44.

23. Hayden *v.* Tucker, 37 Mo. 214; Farrell *v.* Cook, 16 Nebr. 483, 20 N. W. 720, 49 Am. Rep. 721.

24. Hayden *v.* Tucker, 37 Mo. 214. See, generally, *supra*, III, A, 11.

25. Nolin *v.* Franklin, 4 Yerg. (Tenn.) 163.

26. Carpenter *v.* Cummings, 2 Phila. (Pa.) 74.

27. Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239; Davidson *v.* Isham, 9 N. J. Eq. 186.

28. Tuebner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162 (holding that the maintenance and use of a steam-engine for propelling cars by a cable, so that plaintiff's adjoining building is constantly shaken, its plaster cracked, and his premises are covered with soot, this being accompanied with a loud continuous noise, constitutes a nuisance); Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. (N. Y.) 340 (holding that an electric light engine, which might be so arranged as to confine its noise and jar to the premises of the person maintaining it, may be enjoined as a nuisance by the occupant of a neighboring house — the noise and jar interfering with conversation and sleep and making some of the occupants sick); McKeon *v.* Lee, 28 How. Pr. (N. Y.) 238 (holding that an injunction may be issued to restrain defendant from running his steam-engine in marble works, which he had built so closely adjoining plaintiff's premises that the movement of the engine jarred and injured plaintiff's building).

29. Smith *v.* Ingersoll-Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 27 N. Y. Suppl. 907 [*reversed* on other grounds in 12 Misc. 5, 33 N. Y. Suppl. 70].

30. See, generally, Street Railroads.

31. Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069.

114. Tallow Factories.[32] A tallow factory, if erected in a town or city, or a thickly settled neighborhood, or on a public highway, is a nuisance which may be abated.[33]

115. Theaters and Shows.[34] A theater or show is not a nuisance *per se*;[35] but it may be a nuisance where it collects a disorderly crowd,[36] and the noise and shouting are a serious annoyance to the neighbors.[37]

116. Threshing-Machines. The operation of a threshing-machine near a dwelling-house, to the annoyance of the owner and the injury of the furniture, is a nuisance.[38]

117. Tobacco Drying-Houses. A tobacco drying-house may be a nuisance.[39]

118. Toll-Houses. An abandoned toll-house has been held to be a nuisance.[40]

119. Trees. Trees near the boundary line of property and overhanging or encroaching on the property of an adjoining owner are not necessarily a nuisance,[41] although they may be or become such if they cause damage.[42] Trees in a street are not necessarily a nuisance where they do not obstruct traffic and it is in accordance with public policy to preserve them.[43]

120. Undertaking Establishments. An undertaking establishment in a populous city is not a nuisance *per se*, and the burden of showing it to be a nuisance in fact is upon the person complaining of it as such.[44]

121. Watching and Besetting Premises. It is a nuisance which is actionable at common law to watch or beset a man's house with a view of compelling him to do or not to do that which it is lawful for him to omit or to do at his pleasure.[45]

122. Water-Closets, Privies, and Urinals. A water-closet in a building is not a nuisance where properly constructed,[46] but may be a nuisance if defective.[47] So also a privy is not necessarily a nuisance,[48] but may become such by its location

32. Factories generally see *supra*, III, B, 50.

33. Allen *v.* State, 34 Tex. 230.

34. Indianapolis *v.* Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. N. S. 822. And see, generally, Theaters and Shows.

35. See Disorderly Houses, 14 Cyc. 488.

36. Walker *v.* Brewster, L. R. 5 Eq. 25, 37 L. J. Ch. 33, 17 L. T. Rep. N. S. 135, 16 Wkly. Rep. 59, holding that the collection of a crowd of noisy and disorderly people to the annoyance of the neighborhood, outside of grounds in which entertainments with music and fireworks are being given for profit, is a nuisance which may be enjoined, although the proprietor has excluded all improper characters from the grounds and the amusements within have been conducted in an orderly way to the satisfaction of the police.

37. Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951 (holding that under Wilson St. (1903) §§ 2340, 2650, defining a public nuisance as performing any act which annoys a considerable number of people or offends public decency or disturbs the public peace and is injurious to public morals, the keeping of a theater in connection with a saloon where drunken, noisy, and boisterous people are accustomed to meet and sing far into the night to the disturbance of their neighbors will be enjoined); Inchbald *v.* Robinson, L. R. 4 Ch. 388, 20 L. T. Rep. N. S. 259, 17 Wkly. Rep. 459.

38. Winters *v.* Winters, 78 Ill. App. 417.

39. Hundley *v.* Harrison, 123 Ala. 292, 26 So. 294, where the odors emanating therefrom render neighboring premises unpleasant and unhealthy.

40. Lancaster Turnpike Co. *v.* Rogers, 2 Pa. St. 114, 44 Am. Dec. 179, holding that where a turnpike company, having erected a toll-house partly on land of another under license, in consideration of the user of such road by the owner, abandoned the house as a toll-house, and removed the gate, the house became a public nuisance, both on the road and on the land.

41. Grandona *v.* Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Tanner *v.* Wallbrunn, 77 Mo. App. 262; Countryman *v.* Lighthill, 24 Hun (N. Y.) 405.

42. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623 (only to the extent that the branches overhung); Brock *v.* Connecticut, etc., R. Co., 35 Vt. 373; Smith *v.* Giddy, [1904] 2 K. B. 448, 73 L. J. K. B. 894, 91 L. T. Rep. N. S. 296, 20 T. L. R. 596.

43. Burget *v.* Greenfield, 120 Iowa 432, 94 N. W. 933.

44. Westcott *v.* Middleton, 43 N. J. Eq. 478, 11 Atl. 490 [*affirmed* in 44 N. J. Eq. 297, 18 Atl. 80].

45. Lyons *v.* Wilkins, [1899] 1 Ch. 255, 63 J. P. 339, 68 L. J. Ch. 146, 79 L. T. Rep. N. S. 709, 47 Wkly. Rep. 291.

46. Allen *v.* Smith, 76 Me. 335.

47. Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130], holding that the maintenance of a defective closet and cesspool in a building adjoining plaintiff's property, by which a part of plaintiff's wall has been destroyed and his premises rendered untenantable, constitutes a nuisance.

48. Iliff *v.* School Directors, 45 Ill. App. 419; Cook *v.* Benson, 62 Iowa 170, 17 N. W. 470.

and the manner in which it is maintained;[49] and the use of a privy in such a way as to create a nuisance will be restrained upon suit brought by the owner of the adjoining estate.[50] A urinal is not necessarily a nuisance,[51] although it may become such.[52]

123. Wells.[53] A well may cause such annoyance and injury as to warrant its being treated as a nuisance.[54]

124. Wharves.[55] A wharf is not a nuisance *per se*.[56]

125. Whistles. The blowing of whistles at a factory is not a nuisance *per se*,[57] but may be a nuisance where results injurious to others are produced thereby.[58]

126. Wrecks.[59] If a vessel sink in a river by accident and without negligent fault chargeable to the owner and is abandoned by him, he is not bound to remove it as a nuisance;[60] but an abandoned vessel which was sunk through the fault of the person in possession is a nuisance which he may be compelled to abate.[61]

C. Particular Kinds of Annoyance — 1. Cinders and Ashes. The invasion of one's premises by cinders[62] or ashes[63] may constitute a nuisance.

2. Dust, Sand, Dirt, Etc. Dust,[64] sand,[65] dirt,[66] coal-dust,[67] sawdust,[68] or chaff[69] blown from a person's land on to a neighbor's premises may be a nuisance.

49. Vernon *v.* Edgeworth, (Ala. 1906) 42 So. 749; Cook *v.* Benson, 62 Iowa 170, 17 N. W. 470; Com. *v.* Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400; Threadgill *v.* Anson County Com'rs, 99 N. C. 352, 6 S. E. 189.

A privy or privy vault near to an adjoining landowner's dwelling-house may be a nuisance (Radican *v.* Buckley, 138 Ind. 582, 38 N. E. 53; Miley *v.* O'Hearn, 18 S. W. 529, 13 Ky. L. Rep. 834; Park *v.* White, 23 Ont. 611), especially if it is poorly constructed (Perrine *v.* Taylor, 43 N. J. Eq. 128, 12 Atl. 769).

50. Perrine *v.* Taylor, (N. J. Ch. 1886) 3 Atl. 149.

51. Biddulph *v.* St. George Parish, 3 De G. J. & S. 493, 9 Jur. N. S. 953, 33 L. J. Ch. 411, 8 L. T. Rep. N. S. 558, 11 Wkly. Rep. 739, 68 Eng. Ch. 373, 46 Eng. Reprint 726; Vernon *v.* St. James' Vestry, 16 Ch. D. 449, 50 L. J. Ch. 81, 44 L. T. Rep. N. S. 229, 29 Wkly. Rep. 222.

52. Chibnall *v.* Paul, 29 Wkly. Rep. 536.

53. Oil and gas wells see *supra*, III, B, 79.

54. Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361, holding that an information will lie to restrain a quasi-public corporation from sinking wells on its land for the purpose of intercepting water, and thereby lowering the water in a great pond below the depth to which, by its charter, the corporation has the right to draw the water from the pond, and thereby leaving on the shore slime and offensive vegetation detrimental to public health.

55. See, generally, Wharves.

56. Geiger *v.* Filor, 8 Fla. 325.

57. Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

58. Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255; Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

59. See, generally, Shipping.

60. Winpenny *v.* Philadelphia, 65 Pa. St. 135.

61. Detroit Water Com'rs *v.* Detroit, 116 Mich. 458, 76 N. W. 70.

62. *Connecticut.*— Hurlbut *v.* McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Whitney *v.* Bartholomew, 21 Conn. 213.

Kentucky.— Peacock *v.* Spitzelberger, 29 S. W. 877, 16 Ky. L. Rep. 803.

Maine.— Norcross *v.* Thoms, 51 Me. 503, 81 Am. Dec. 588.

Mississippi.— King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1096.

New Jersey.— Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Pritchard *v.* Edison Electric Illuminating Co., 179 N. Y. 364, 72 N. E. 243 [*affirming* 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225].

United States.— Chicago Great Western R. Co. *v.* First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Tuttle *v.* Church, 53 Fed. 422.

63. Whitney *v.* Bartholomew, 21 Conn. 213; Norcross *v.* Thoms, 51 Me. 503, 81 Am. Dec. 588.

64. *Georgia.*— Ponder *v.* Quitman Ginnery, 122 Ga. 29, 49 S. E. 443.

Illinois.— Winters *v.* Winters, 78 Ill. App. 417; Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443.

Maine.— Norcross *v.* Thoms, 51 Me. 503, 81 Am. Dec. 588.

New York.— Catlin *v.* Patterson, 10 N. Y. St. 724.

Pennsylvania.— Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306.

65. Ponder *v.* Quitman Ginnery, 122 Ga. 29, 49 S. E. 746; Dunsbach *v.* Hollister, 49 Hun (N. Y.) 252, 2 N. Y. Suppl. 955 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152].

66. Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243].

67. Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726.

68. Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103.

69. Cooper *v.* Randall, 53 Ill. 24; Winters *v.* Winters, 78 Ill. App. 417.

3. Fumes, Vapors, and Gases. A nuisance may consist in the causing of noxious fumes,[70] vapors,[71] or gases[72] which escape on to the premises of a neighboring landowner, or are offensive to the general public; and it is not an answer to a complaint against offensive fumes that they act as a disinfectant and are thus beneficial because the district is malarious.[73] A person is liable for causing noxious vapors to arise on and from a neighbor's lot the same as though they arose on and from his own lot.[74]

4. Heat. A structure which so heats the property of another as to render it untenantable may be a nuisance.[75]

5. Noise. Mere noise may be a nuisance,[76] if it be of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary

70. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 1095; Mulligan *v.* Elias, 12 Abb. Pr. N. S. (N. Y.) 259; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; Green *v.* Sun Co., 32 Pa. Super. Ct. 521; Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

71. Smiths *v.* McConathy, 11 Mo. 517; Kirchgraber *v.* Lloyd, 59 Mo. App. 59; Munk *v.* Columbus Sanitary Works Co., 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 542; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; Galbraith *v.* Oliver, 3 Pittsb. (Pa.) 78.

72. *California.*— Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82.

Illinois.— Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443.

Kansas.—Fogarty *v.* Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756.

Maryland.— Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

New Jersey.— Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; Ruckman *v.* Green, 9 Hun 225; Cropsey *v.* Murphy, 1 Hilt. 126.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Munk *v.* Columbus Sanitary Works Co., 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 542.

South Carolina.— Frost *v.* Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 593.

Texas.—Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781; Waters-Pierce Oil Co. *v.* Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

United States.— Tuttle *v.* Church, 53 Fed. 422.

See 37 Cent. Dig. tit. "Nuisance," §§ 24, 146.

73. Mulligan *v.* Ellis, 12 Abb. Pr. N. S. (N. Y.) 259.

74. Garland *v.* Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 699, 48 L. R. A. 862.

75. St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474 (holding that where defendants constructed a building on the line of a private alley separating it from plaintiff's building, and constructed a sheet-iron smokestack emerging into the alley, and the heat which radiated therefrom made it necessary in the summer time to close the windows of the offices in plaintiff's building on that side, which made them untenantable, and also diminished the light and air which would otherwise have come to plaintiff's building from the alley, plaintiff was entitled to enjoin the maintenance of such smokestack as a continuous nuisance); McKinney *v.* McCullough, 42 Leg. Int. (Pa.) 414. See also Vaughan *v.* Bridgham, 193 Mass. 392, 79 N. E. 739.

76. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

California.— Tuebner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162.

Connecticut.— Bishop *v.* Banks, 33 Conn. 118, 87 Am. Dec. 197.

Illinois.— Chicago, etc., R. Co. *v.* Darke, 148 Ill. 226, 35 N. E. 750; Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323; Curran *v.* McGrath, 67 Ill. App. 566.

Louisiana.— Froelicher *v.* Oswald Ironworks, 111 La. 705, 35 So. 821, 64 L. R. A. 228.

Maryland.— Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325.

Massachusetts.— Davis *v.* Sawyer, 133 Mass. 289, 43 Am. Rep. 519.

Minnesota.—State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Missouri.—Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

New Jersey.— Seligman *v.* Victor Talking Mach. Co., (Ch. 1906) 63 Atl. 1093; Gilbough *v.* West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289; Leeds *v.* Bohemian Art Glass Works, 63 N. J. Eq. 619, 52 Atl. 375 [*affirmed* in 65 N. J. Eq. 402, 54 Atl. 1124]; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Davidson *v.* Isham, 9 N. J. Eq. 186.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep.

sensibilities,[77] and this, although such noise may result from the carrying on of a trade or business in a town or city.[78] But as many useful acts are necessarily attended with more or less noise, reasonable noises in an appropriate locality are not necessarily nuisances, even though they are disagreeable and annoying.[79]

6. Obstruction of Access. Obstruction of access to a person's property is such an injury as may give him a right of action as for a nuisance.[80]

552, 24 L. R. A. 105; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Pach *v.* Geoffroy, 67 Hun 401, 22 N. Y. Suppl. 275 [*affirmed* in 143 N. Y. 661, 39 N. E. 21]; Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. 313; McKeon *v.* See, 4 Rob. 449 [*affirmed* in 51 N. Y. 300]; Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. 340; Patten *v.* New York El. R. Co., 3 Abb. N. Cas. 306.

North Carolina.— Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

Ohio.— Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

Pennsylvania.—Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306; Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Ladies' Decorative Art Club's Appeal, 10 Pa. Cas. 150, 13 Atl. 537 [*affirming* 4 Pa. Co. Ct. 340]; Harrison *v.* St. Mark's Church, 12 Phila. 259; Wallace *v.* Auer, 10 Phila. 356.

Rhode Island.— Aldrich *v.* Howard, 8 R. I. 246.

Texas.—Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

Vermont.— Gifford *v.* Hulett, 62 Vt. 342, 19 Atl. 230.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; Snyder *v.* Cabell, 29 W. Va. 48, 1 S. E. 241.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; Chicago, etc., R. Co. *v.* Leavenworth City First M. E. Church, 102 Fed. 85, 50 L. R. A. 488.

England.— Shelfer *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287, 64 L. J. Ch. 216, 72 L. T. Rep. N. S. 34, 12 Reports 112, 43 Wkly. Rep. 238; Sturges *v.* Bridgman, 11 Ch. D. 852, 48 L. J. Ch. 785, 41 L. T. Rep. N. S. 219, 28 Wkly. Rep. 200; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Dewar *v.* City, etc., Racecourse Co., [1899] 1 Ir. 345; Scott *v.* Firth, 4 F. & F. 349, 10 L. T. Rep. N. S. 240; Knight *v.* Isle of Wight Electric Light, etc., Co., 68 J. P. 266, 73 L. J. Ch. 299, 2 Loc. Gov. 390, 90 L. T. Rep. N. S. 410, 20 T. L. R. 173; Bartlett *v.* Marshall, 60 J. P. 104, 44 Wkly. Rep. 251; Bellamy *v.* Wells, 60 L. J. Ch. 156, 63 L. T. Rep. N. S. 635, 39 Wkly. Rep. 158; Lipman *v.* Pulman, 91 L. T. Rep. N. S. 132; Gort *v.* Clark, 18 L. T. Rep. N. S. 343, 16 Wkly. Rep. 569.

Canada.— Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12.

See 37 Cent. Dig. tit. "Nuisance," § 23.

77. Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Annoyance to person of normal or average sensibilities see *infra*, III, D, 2.

78. Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Incidents of city or village life see *supra*, III, A, 5.

79. Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202 (holding that plaintiff could not recover damages for the usual and ordinary noise incident to the careful operation of an electric power plant); Williams *v.* New York Cent. R. Co., 18 Barb. (N. Y.) 222 [*reversed* on other grounds in 16 N. Y. 97, 69 Am. Dec. 651]; Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255; Straus *v.* Barnett, 140 Pa. St. 111, 21 Atl. 253.

Locality as a consideration see *supra*, III, A, 3.

80. *Maryland.*— Garitee *v.* Baltimore, 53 Md. 422.

Missouri.— Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351, holding that where a city sewer contractor, in an unreasonable and oppressive manner, wantonly piled dirt from the sewer excavation in the street and on a vacant lot adjoining plaintiff's property, so as to entirely deprive her of ingress and egress, and so as to precipitate surface water in large volumes on to her property and into her cellar, and failed to remove the same with reasonable diligence, such acts constituted a private nuisance, for which plaintiff was entitled to recover.

Ohio.— McCormick Harvesting Mach. Co. *v.* Kauffman-Lattimer Co., 5 Ohio S. & C. Pl. Dec. 468, 5 Ohio N. P. 505. But *compare* Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703.

Washington.— Smith *v.* Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

England.— Barber *v.* Penley, [1893] 2 Ch. 447, 62 L. J. Ch. 623, 68 L. T. Rep. N. S. 662, 3 Reports 489, holding that the lessee of a theater is liable for the obstruction of access to adjacent premises by reason of the assembling of a crowd previous to the opening of the doors of the theater. See also Mott *v.* Shoolbred, L. R. 20 Eq. 22, 44 L. J. Ch. 380, 23 Wkly. Rep. 545. But *compare* Benjamin *v.* Storr, L. R. 9 C. P. 400, 43 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631.

See 37 Cent. Dig. tit. "Nuisance," § 22.

7. Obstruction of Light, Air, and View. As the doctrine of ancient lights does not obtain in the United States,[81] a building or structure cannot be complained of as a nuisance merely because it interferes with the access of light and air to adjoining premises.[82] Neither does the mere fact that a building or structure obstructs the view of neighboring property constitute it a nuisance.[83]

8. Offense to Public Decency. A matter which is an offense to public decency is a public nuisance.[84]

9. Smells. It is well established that noxious smells may constitute a nuisance,[85] although they are not unwholesome or injurious to the health but merely offensive

81. Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192 [*followed* in Ingwersen *v.* Barry, 118 Cal. 342, 50 Pac. 536]. And see Easements, 14 Cyc. 1158 note 40.

82. *California.*— Ingwersen *v.* Barry, 118 Cal. 342, 50 Pac. 536 [*following* Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192].

Illinois.— Honsel *v.* Conant, 12 Ill. App. 259.

Kansas.— Lapere *v.* Luckey, 23 Kan. 534, 33 Am. Rep. 196.

Louisiana.— Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928.

New York.— Lavery *v.* Hannigan, 52 N. Y. Super. Ct. 463; Levy *v.* Brothers, 4 Misc. 48, 23 N. Y. Suppl. 825, holding that one may, without being guilty of a nuisance, erect a structure on his own lot for the purpose of preventing a view of his premises by a neighbor, although it obstructs the light of the latter's windows.

Ohio.— Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

See 37 Cent. Dig. tit. "Nuisance," § 22.

But *compare* Clawson *v.* Primrose, 4 Del. Ch. 643; Gwin *v.* Melmoth, Freem. (Miss.) 505; Robeson *v.* Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412, holding that chancery may interfere to prevent the obstruction of ancient lights which have existed for upward of twenty years.

Damages for obstruction by railroad, etc., see Eminent Domain, 15 Cyc. 747–750.

83. *Delaware.*— Gray *v.* Baynard, 5 Del. Ch. 499.

Illinois.— Honsel *v.* Conant, 12 Ill. App. 259.

Louisiana.— Taylor *v.* Boulware, 35 La. Ann. 469.

Maine.— Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399.

New Jersey.— Tompkins *v.* Harwood, 24 N. J. L. 425.

New York.— Levy *v.* Brothers, 4 Misc. 48, 23 N. Y. Suppl. 825.

Wisconsin.— Hay *v.* Weber, 79 Wis. 587, 48 N. W. 859, 24 Am. St. Rep. 737.

England.— Butt *v.* Imperial Gas Co., L. R. 2 Ch. 158, 16 L. T. Rep. N. S. 820, 15 Wkly. Rep. 92.

Canada.— McBean *v.* Wyllie, 14 Manitoba 135.

See 37 Cent. Dig. tit. "Nuisance," § 22.

84. Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

85. *Alabama.*— Hundley *v.* Harrison, 123 Ala. 292, 26 So. 294; Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

California.— Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82.

Colorado.— Wright *v.* Ulrich, (1907) 91 Pac. 43.

Connecticut.— Bishop *v.* Banks, 33 Conn. 118, 87 Am. Dec. 197.

Delaware.— State *v.* Wetherall, 5 Harr. 487.

Illinois.— N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 322; Dierks *v.* Addison Tp. Highway Com'rs, 142 Ill. 197, 31 N. E. 496; Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63; Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598.

Indiana.—Smith *v.* Fitzgerald, 24 Ind. 316; Pittsburgh, etc., R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650.

Iowa.— Rhoades *v.* Cook, 122 Iowa 336, 98 N. W. 122; Percival *v.* Yousling, 120 Iowa 451, 94 N. W. 913; Cook *v.* Benson, 62 Iowa 170, 17 N. W. 470.

Kentucky.— Ashbrook *v.* Com., 1 Bush 139, 89 Am. Dec. 616; Louisville, etc., R. Co. *v.* Bolton, 38 S. W. 498, 18 Ky. L. Rep. 824.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938.

Massachusetts.—Vaughan *v.* Bridgham, 193 Mass. 392, 79 N. E. 739; Com. *v.* Perry, 139 Mass. 198, 29 N. E. 656.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

Mississippi.— Yazoo, etc., R. Co. *v.* Sanders, 87 Miss. 607, 40 So. 163, 3 L. R. A. N. S. 1119.

Missouri.— Zugg *v.* Arnold, 75 Mo. App. 68.

Montana.— Bordeaux *v.* Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

New Jersey.— Laird *v.* Atlantic Coast Sanitary Co., (Ch. 1907) 67 Atl. 387; Sayre *v.* Newark, 58 N. J. Eq. 136, 42 Atl. 1068 [*reversed* on other grounds in 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L. R. A. 722]; Meigs *v.* Lister, 23 N. J. Eq. 199; Atty.-Gen. *v.* Steward, 20 N. J. Eq. 415; Babcock *v.* New Jersey Stock Yard Co., 20 N. J. Eq. 296; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Ruckman *v.* Green, 9 Hun

and unpleasant.[86] But every disagreeable smell is not an actionable nuisance,[87] for considerations as to the extent of the injury or annoyance arise in connection therewith.[88]

10. Smoke and Soot. A nuisance may be committed by causing the invasion of premises in the neighborhood or the annoyance of the general public by smoke[89]

225; Robinson *v.* Smith, 3 Silv. Sup. 490, 7 N. Y. Suppl. 38; Cropsey *v.* Murphy, 1 Hilt. 126; Filson *v.* Crawford, 5 N. Y. Suppl. 882; Catlin *v.* Patterson, 10 N. Y. St. 724.

North Carolina.— Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 S. E. 460.

Ohio.— Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66; Munk *v.* Columbus Sanitary Works Co., 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 667.

Pennsylvania.— Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702; Rodenhausen *v.* Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306; McKinney *v.* McCullough, 17 Phila. 395.

Rhode Island.— Aldrich *v.* Howard, 8 R. I. 246.

Texas.—Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 344; Houston, etc., R. Co. *v.* Reasonover, 36 Tex. Civ. App. 274, 81 S. W. 329.

Vermont.— State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495; Gifford *v.* Hulett, 62 Vt. 342, 19 Atl. 230.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; U. S. *v.* Luce, 141 Fed. 385; Chicago Great Western R. Co. *v.* Leavenworth First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Tuttle *v.* Church, 53 Fed. 422.

England.— Banbury Urban Sanitary Authority *v.* Page, 8 Q. B. D. 97, 46 J. P. 184, 51 L. J. M. C. 21, 45 L. T. Rep. N. S. 759, 30 Wkly. Rep. 415; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Malton Local Bd. of Health *v.* Malton Farmers Manure, etc., Co., 4 Ex. D. 302, 44 J. P. 155, 49 L. J. M. C. 90; Rex *v.* Neil, 2 C. & P. 485, 31 Rev. Rep. 685, 12 E. C. L. 690; Knight *v.* Isle of Wight Electric Light, etc., Co., 68 J. P. 266, 73 L. J. Ch. 299, 2 Loc. Gov. 390, 90 L. T. Rep. N. S. 410, 20 T. L. R. 173.

Canada.— Cartwright *v.* Gray, 12 Grant Ch. (U. C.) 399.

See 37 Cent. Dig. tit. "Nuisance," §§ 24, 146.

The natural odors of swine kept in large numbers constitute a nuisance, if they annoy people in the vicinity. Com. *v.* Perry, 139 Mass. 198, 29 N. E. 656.

Collection of impure water.— A person in front of whose residence impure water from a brewery flows, causing offensive odors, is entitled to an injunction to stop such flowing. Smith *v.* Fitzgerald, 24 Ind. 316.

Odors not annoying to persons inured thereto.— The fact that odors from fish factories may not be annoying to those employed there or to others inured to the odors does not show that such odors may not constitute a nuisance to inmates of a neighboring quarantine station, many of whom are there but temporarily, and have never been subjected to such a tainted atmosphere. U. S. *v.* Luce, 141 Fed. 385. As to annoyance to persons of normal or average sensibilities see, generally, *infra*, III, D, 3.

86. *Delaware.*—State *v.* Wetherall, 5 Harr. 487.

Kentucky.— Ashbrook *v.* Com., 1 Bush 139, 89 Am. Dec. 616.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938.

New Jersey.— Meigs *v.* Lister, 23 N. J. Eq. 199; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

Vermont.— State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495.

United States.— U. S. *v.* Luce, 141 Fed. 385.

England.— Rex *v.* Neil, 2 C. & P. 485, 31 Rev. Rep. 685, 12 E. C. L. 690.

See 37 Cent. Dig. tit. "Nuisance," §§ 24, 146, 156.

Injury to health see *infra*, III, E, 4.

87. Ridge *v.* Midland R. Co., 53 J. P. 55.

88. Ridge *v.* Midland R. Co., 53 J. P. 55.

Extent of injury or annoyance see *infra*, III, D.

89. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

Connecticut.—Hurlbut *v.* McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Whitney *v.* Bartholomew, 21 Conn. 213.

Illinois.— Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598; Winters *v.* Winters, 78 Ill. App. 417; Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443. See Curran *v.* McGrath, 67 Ill. App. 566.

Kentucky.— Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Peacock *v.* Spitzelberger, 29 S. W. 877, 16 Ky. L. Rep. 803.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

Mississippi.— King *v.* Vicksburg, etc., R. Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1096.

Missouri.— Whalen *v.* Keith, 35 Mo. 87; Kirchgraber *v.* Lloyd, 59 Mo. App. 59.

New Jersey.— Leeds *v.* Bohemian Art Glass Works, 63 N. J. Eq. 619, 52 Atl. 375 [*affirmed* in 65 N. J. Eq. 402, 54 Atl. 1124]; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— McCarty *v.* Natural Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549 [*modifying* 114 N. Y. App. Div. 908, 100 N. Y. Suppl. 1127]; Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y.

or soot,[90] but smoke does not always or necessarily amount to a legal nuisance against which relief may be granted.[91]

11. Vibration, Jarring, and Atmospheric Concussion. The jarring of a person's premises,[92] or the causing of vibration therein,[93] may be a nuisance, even though

Suppl. 129; Catlin *v.* Patterson, 10 N. Y. St. 724; Patten *v.* New York El. R. Co., 3 Abb. N. Cas. 306.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Cincinnati *v.* Miller, 11 Ohio Dec. (Reprint) 788, 29 Cinc. L. Bul. 364.

Pennsylvania.— Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579; McKinney *v.* McCullough, 17 Phila. 395.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 593.

Texas.— Missouri, etc., R. Co. *v.* Anderson, (Civ. App. 1904) 81 S. W. 781.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; Chicago Great Western R. Co. *v.* Leavenworth First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Tuttle *v.* Church, 53 Fed. 422.

England.— Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Rich *v.* Basterfield, 4 C. B. 783, 56 E. C. L. 783, 2 C. & K. 257, 61 E. C. L. 257, 11 Jur. 696, 16 L. J. C. P. 273; Chester *v.* Smelting Corp., 85 L. T. Rep. N. S. 67; Gaskell *v.* Bayley, 30 L. T. Rep. N. S. 516; Bareham *v.* Hall, 22 L. T. Rep. N. S. 116.

Canada.— Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12; Montreal St. R. Co. *v.* Gareau, 10 Quebec Q. B. 417.

See 37 Cent. Dig. tit. "Nuisance," §§ 24, 146.

90. *California.*— Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Tuetner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162.

Illinois.— Cooper *v.* Randall, 53 Ill. 24.

Kentucky.— Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756.

Michigan.— People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

Mississippi.— King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. 1096.

New York.— Pritchard *v.* Edison Electric Illuminating Co., 179 N. Y. 364, 72 N. E. 243 [*affirming* 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225]; Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Catlin *v.* Patterson, 10 N. Y. St. 724.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243.

Pennsylvania.— Galbraith *v.* Oliver, 3 Pittsb. 78.

Canada.— Montreal St. R. Co. *v.* Gareau, 10 Quebec Q. B. 417.

See 37 Cent. Dig. tit. "Nuisance," §§ 24, 146.

91. St. Louis *v.* Heitzeberg Packing, etc., Co., 141 Mo. 375, 42 S. W. 954, 64 Am. St. Rep. 516, 39 L. R. A. 551 (holding that smoke is not a nuisance *per se* unless so declared by statute); Cleveland *v.* Malm, 7 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 203 (holding that the emission of smoke becomes a public nuisance only when it becomes injurious to health, damaging to property, or annoying to the inhabitants of a locality); Tuttle *v.* Church, 53 Fed. 422.

92. Hurlbut *v.* McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129; Pach *v.* Geoffroy, 67 Hun (N. Y.) 401, 22 N. Y. Suppl. 275 [*affirmed* in 143 N. Y. 661, 39 N. E. 21]; Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. (N. Y.) 340; McKeon *v.* Lee, 28 How. Pr. (N. Y.) 238.

93. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

California.— Tuebner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162.

Illinois.— See Curran *v.* McGrath, 67 Ill. App. 566.

Louisiana.— Froelicher *v.* Southern Mar. Works, 118 La. 1077, 43 So. 882.

Maryland.— Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325.

New Jersey.—Seligman *v.* Victor Talking Mach. Co., (Ch. 1906) 63 Atl. 1093; Hennessy *v.* Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Demarest *v.* Hardham, 34 N. J. Eq. 469.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Pach *v.* Geoffroy, 67 Hun 401, 22 N. Y. Suppl. 275 [*affirmed* in 143 N. Y. 661, 39 N. E. 21]; McKeon *v.* See, 4 Rob. 449 [*affirmed* in 51 N. Y. 300, 10 Am. Rep. 659].

Pennsylvania.— Farvey *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

Texas.—Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

England.— Colwell *v.* St. Pancras Borough Council, [1904] 1 Ch. 707, 68 J. P. 286, 73 L. J. Ch. 275, 2 Loc. Gov. 518, 90 L. T. Rep. N. S. 153, 20 T. L. R. 236, 52 Wkly. Rep. 523; Shelfer *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287, 64 L. J. Ch. 216, 72 L. T. Rep. N. S. 34, 12 Reports 112, 43 Wkly. Rep. 238; Sturges *v.* Bridgman, 11 Ch. D. 852, 48 L. J. Ch. 785, 41 L. T. Rep. N. S. 219, 28 Wkly. Rep. 200; Scott *v.* Firth,

it causes no actual structural injury;[94] and mere atmospherical concussion may cause such injury as to amount to a nuisance.[95] But vibration from proper acts done in an appropriate locality is not necessarily a nuisance, entitling an adjoining property-owner to relief.[96]

D. Extent of Injury or Annoyance — 1. In General. It is not every annoyance or inconvenience suffered by a property holder from what is done in his vicinity which constitutes a nuisance against which he is entitled to relief,[97] for what may amount to a serious nuisance in one locality by reason of the density of population or the residential character of the neighborhood affected, or the nature of the specific act, may, in another place, and under different surroundings, be deemed proper and unobjectionable.[98] What amount of annoyance or inconvenience caused by others in the lawful use of their property will constitute a nuisance is a question of degree, depending on varying circumstances, and cannot be precisely defined.[99] It is not necessary in order to constitute a thing a public nuisance that it should be an annoyance or injury to all citizens of the state or the municipality, but it is sufficient that it is annoying or injurious to all persons generally who are in the neighborhood.[1]

2. Substantial Character of Injury or Annoyance.[2] The injury or annoyance which will warrant relief against an alleged nuisance must be of a real and substantial character,[3] and such as impairs the ordinary enjoyment, physically, of the

4 F. & F. 349, 10 L. T. Rep. N. S. 240; Knight *v.* Isle of Wight Electric Light, etc., Co., 68 J. P. 266, 73 L. J. Ch. 299, 2 Loc. Gov. 390, 90 L. T. Rep. N. S. 410, 20 T. L. R. 173; Lipman *v.* Pulman, 91 L. T. Rep. N. S. 132; Gort *v.* Clark, 18 L. T. Rep. N. S. 343, 16 Wkly. Rep. 569.

Canada.— Hopkin *v.* Hamilton Electric Light, etc., Co., 4 Ont. L. Rep. 258 [*affirming* 2 Ont. L. Rep. 240]; Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12; Montreal St. R. Co. *v.* Gareau, 10 Quebec Q. B. 417.

See 37 Cent. Dig. tit. "Nuisance," § 23.

94. Hopkin *v.* Hamilton Electric Light, etc., Co., 4 Ont. L. Rep. 258 [*affirming* 2 Ont. L. Rep. 240].

95. Morgan *v.* Bowes, 17 N. Y. Suppl. 22.

96. Straus *v.* Barnett, 140 Pa. St. 111, 21 Atl. 253, holding that the vibration of machinery, necessarily caused in conducting a lawful business in a neighborhood exclusively devoted to manufacturing purposes, will not be enjoined because it disturbs the occupant of an adjoining building, where it is not shown that the latter's business has been injured.

Locality as a consideration see *supra*, III, A, 3.

97. Williams *v.* New York Cent. R. Co., 18 Barb. (N. Y.) 222 [*reversed* on other grounds in 16 N. Y. 97, 69 Am. Dec. 651]; Straus *v.* Barnett, 140 Pa. St. 111, 21 Atl. 253; Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

98. Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

Locality as an element see *supra*, III, A, 3.

99. Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820; Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392.

Consideration of circumstances and surroundings see *supra*, III, A, 4.

1. Moses *v.* State, 58 Ind. 185. See also State *v.* Luce, 9 Houst. (Del.) 396, 32 Atl. 1076.

It is not a question of the number of persons annoyed but of the possibility of annoyance to the public by the invasion of its rights. Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988.

2. Substantial character of special injury necessary for relief against public nuisance see *infra*, VI, B, 2.

3. *Alaska.*— Lindeberg *v.* Doverspike, 2 Alaska 177.

Connecticut.— State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

Illinois.— Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Cooper *v.* Randall, 53 Ill. 24; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215; Chicago, etc., R. Co. *v.* Gardner, 66 Ill. App. 44.

Indiana.— Owen *v.* Phillips, 73 Ind. 284.

Kansas.— Phillips *v.* Lawrence Vitrified Brick, etc., Co., 72 Kan. 643, 82 Pac. 787, 2 L. R. A. N. S. 92.

Minnesota.— Dorman *v.* Ames, 12 Minn. 451.

New Jersey.— Shreve *v.* Voorhees, 3 N. J. Eq. 25.

New York.— Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; Cropsey *v.* Murphy, 1 Hilt. 126; Farrell *v.* New York Steam Co., 23 Misc. 726, 53 N. Y. Suppl. 55; Martin *v.* New York, 77 N. Y. Suppl. 1013.

North Carolina.— Vickers *v.* Durham, 132 N. C. 880, 48 S. E. 685; Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 S. E. 460.

Ohio.— Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Neuhs *v.* Grasselli Chemical Co., 8 Ohio S. & C. Pl. Dec. 203, 5 Ohio N. P. 359.

Pennsylvania.— Price *v.* Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; McCaffrey's Appeal, 105 Pa. St. 263; Miller *v.* Schindle, 15 Pa. Co. Ct. 341; Scott *v.* Haupt, 8 Kulp 42.

property within its sphere;[4] for if the injury or inconvenience be merely theoretical,[5] or if it be slight or trivial,[6] or fanciful,[7] or one of mere delicacy or fastidiousness,[8] there is no nuisance in a legal sense. Thus the law will not declare a thing a nuisance because it is unsightly or disfigured,[9] because it is not in a proper and suitable condition,[10] or because it is unpleasant to the eye and a violation of the rules of propriety and good taste,[11] for the law does not cater to men's tastes or consult their convenience merely, but only guards and upholds their material rights, and shields them from unwarrantable invasion.[12] The question in all cases is whether the annoyance produced is such as to materially interfere with the ordinary comfort of human existence.[13] It is not of course necessary that the annoyance and discomfort should be so great as to actually drive the person complaining thereof from his dwelling;[14] but if the alleged injury be a plain interference with ordinary comforts and enjoyment, there is a nuisance, no matter how slight the damage, provided the inconvenience be actual and not fanciful.[15]

Wisconsin.— Tiede *v.* Schneidt, 105 Wis. 470, 81 N. W. 826.

See 37 Cent. Dig. tit. "Nuisance," §§ 28, 154.

Tangible injury.— In order to create a nuisance from a use of property the use must be such as to work a tangible injury to the person or property of another, or such as to render the enjoyment of property essentially uncomfortable. Flood *v.* Consumers Co., 105 Ill. App. 559.

Plaintiff need not show both injury to property and interference with enjoyment thereof.— Owen *v.* Phillips, 73 Ind. 284.

4. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

5. Dorman *v.* Ames, 12 Minn. 451.

6. *Alabama.*— Clifton Iron Co. *v.* Dye, 87 Ala. 468, 6 So. 192.

Alaska.— Lindeberg *v.* Doverspike, 2 Alaska 177.

Illinois.— Nelson *v.* Mulligan, 151 Ill. 462, 38 N. E. 239; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215.

Kansas.— Phillips *v.* Lawrence Vitrified Brick, etc., Co., 72 Kan. 643, 82 Pac. 787, 2 L. R. A. N. S. 92.

New York.— Smith *v.* Ingersoll-Sergeant Rock Drill Co., 12 Misc. 5, 33 N. Y. Suppl. 70 [*reversing* 7 Misc. 374, 27 N. Y. Suppl. 907].

See 37 Cent. Dig. tit. "Nuisance," §§ 28, 154.

7. Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820; Com. *v.* Packard, 185 Mass. 64, 69 N. E. 1067; Com. *v.* Perry, 139 Mass. 198, 29 N. E. 656; Davis *v.* Sawyer, 133 Mass. 289, 43 Am. Rep. 519.

8. Duncan *v.* Hayes, 22 N. J. Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; Tuttle *v.* Church, 53 Fed. 422; Cooke *v.* Forbes, L. R. 5 Eq. 166, 37 L. J. Ch. 178, 17 L. T. Rep. N. S. 371; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 64 Eng. Reprint 849; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104. See 37 Cent. Dig. tit. "Nuisance," §§ 28, 154.

9. Flood *v.* Consumers Co., 105 Ill. App. 559; Trulock *v.* Merte, 72 Iowa 510, 34 N. W. 307; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Woodstock Burying Ground Assoc. *v.* Hager, 68 Vt. 488, 35 Atl. 431.

10. Woodstock Burying Ground Assoc. *v.* Hager, 68 Vt. 488, 35 Atl. 431.

11. Woodstock Burying Ground Assoc. *v.* Hager, 68 Vt. 488, 35 Atl. 431.

12. Woodstock Burying Ground Assoc. *v.* Hager, 68 Vt. 488, 35 Atl. 431.

13. *New Jersey.*— Duncan *v.* Hayes, 22 N. J. Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259.

Ohio.— Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392.

Wisconsin.— Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629, holding that a nuisance, to be actionable, must materially affect or impair the comfort or enjoyment of individuals, or the use or value of property.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; Tuttle *v.* Church, 53 Fed. 422.

England.— Cooke *v.* Forbes, L. R. 5 Eq. 166, 37 L. J. Ch. 178, 17 L. T. Rep. N. S. 371; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 64 Eng. Reprint 849; Ridge *v.* Midland R. Co., 53 J. P. 55; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.

See 37 Cent. Dig. tit. "Nuisance," §§ 28, 154.

14. Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938; Bohan *v.* Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Fish *v.* Dodge, 4 Den. (N. Y.) 311, 47 Am. Dec. 254; Campbell *v.* Seaman, 2 Thomps. & C. (N. Y.) 231; Aldrich *v.* Howard, 8 R. I. 246.

15. Cooper *v.* Randall, 53 Ill. 24.

3. Annoyance to Persons of Normal or Average Sensibilities. In determining whether an annoyance is such as to constitute a nuisance, the question is as to the effect which the matters complained of would have upon persons of ordinary health,[16] normal or average sensibilities,[17] and ordinary tastes and habits[18] and mode of living,[19] and not as to its effect upon persons of delicate or dainty habits of living[20] or fanciful or fastidious tastes,[21] or upon persons who are delicate,[22] afflicted with disease,[23] bodily ills,[24] or abnormal physical conditions,[25] of nervous temperament,[26] or peculiarly sensitive to annoyance or disturbance[27] of the character complained of.[28] Neither, on the other hand, can the notions of comfort entertained by persons whose habits, tastes, or condition are such that they are not sensible of any annoyance be adopted as a standard.[29]

4. Occasional Injury. It has been held that a matter complained of may be a nuisance, although the injury caused thereby is not continuous but only occasional,[30]

Amount of damage see *infra*, III, D, 5.

16. Akers *v.* Marsh, 19 App. Cas. (D. C.) 28; Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

17. *District of Columbia.*—Akers *v.* Marsh, 19 App. Cas. 28.

Georgia.— Ruff *v.* Phillips, 50 Ga. 130.

Kansas.— Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988.

Maryland.— Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325.

Massachusetts.—Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820; Rogers *v.* Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316.

New Jersey.— Duncan *v.* Hayes, 22 N. J. Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Butterfield *v.* Klaber, 52 How. Pr. 255.

Ohio.— Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Texas.— Waters-Pierce Oil Co. *v.* Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

Wisconsin.— McCann *v.* Strang, 97 Wis. 551, 72 N. W. 1117.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; U. S. *v.* Luce, 141 Fed. 385; Tuttle *v.* Church, 53 Fed. 422.

England.— Cooke *v.* Forbes, L. R. 5 Eq. 166, 37 L. J. Ch. 178, 17 L. T. Rep. N. S. 371; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 64 Eng. Reprint 849; Ridge *v.* Midland R. Co., 53 J. P. 55; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.

See 37 Cent. Dig. tit. "Nuisance," § 31.

18. Dittman *v.* Repp, 50 Md. 516, 33 Am. Rep. 325.

19. Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

20. Duncan *v.* Hayes, 22 N. J. Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739; Tuttle *v.* Church, 53 Fed. 422; Cooke *v.* Forbes, L. R. 5 Eq. 166, 37 L. J. Ch. 178, 17 L. T. Rep. N. S. 371; Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133]; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 64 Eng. Reprint 849; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.

See 37 Cent. Dig. tit. "Nuisance," § 31.

21. Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

22. Ruff *v.* Phillips, 50 Ga. 130.

23. Akers *v.* Marsh, 19 App. Cas. (D. C.) 28; Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820; Lord *v.* De Witt, 116 Fed. 713. But *compare* Malton Local Bd. of Health *v.* Malton Farmers Manure, etc., Co., 4 Ex. D. 302, 44 J. P. 155, 49 L. J. M. C. 690.

24. Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255.

25. Akers *v.* Marsh, 19 App. Cas. (D. C.) 28; Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

26. Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255.

27. Ruff *v.* Phillips, 50 Ga. 130; Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255; Lord *v.* De Witt, 116 Fed. 713.

28. Rogers *v.* Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Westcott *v.* Middleton, 43 N. J. Eq. 478, 11 Atl. 490 [*affirmed* in 44 N. J. Eq. 299, 18 Atl. 80]; Price *v.* Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601.

29. Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

30. Hundley *v.* Harrison, 123 Ala. 292, 26 So. 294 (noxious odors emanating from drying house two or three days of each week); Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055; Knight *v.* Isle of Wight Electric Light, etc., Co., 68 J. P. 266, 73 L. J. Ch.

as in a case where injury results only when the wind is blowing in a certain direction.[31]

5. Amount of Damages. The right to relief against a nuisance does not depend upon the extent of damages measured by a money standard;[32] but where the nuisance complained of involves the violation of a right, the person injured thereby may have relief, although the damages are small,[33] or merely nominal,[34] or even though no appreciable[35] or actual[36] damages are shown. The fact that the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude is sufficient to justify an injunction irrespective of damages.[37]

E. Effect of Matters Complained of — 1. Danger. Continual danger of loss of life or personal injury, and resulting fear of persons on or about plaintiff's premises, by reason of what is done on defendant's premises, is such injury as forms a ground of action;[38] but danger from fire is not a sufficient injury to call for an injunction to prevent the erection of a lawful structure or the carrying on of a lawful business in a proper manner,[39] nor is a structure rendered a nuisance by the mere fact that its presence enhances the rates of insurance on neighboring property.[40] A structure which is dangerous to persons using the public street is a public nuisance.[41]

2. Destruction of Means of Subsistence. One whose means of subsistence are

299, 2 Loc. Gov. 390, 90 L. T. Rep. N. S. 410, 20 T. L. R. 173. But *compare* Tuttle *v.* Church, 53 Fed. 422, 425, where it is said: "It is not sufficient that the injury is accidental and occasional, but it must be permanent and repeated."

31. Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; American Ice Co. *v.* Catskill Cement Co., 43 Misc. (N. Y.) 221, 88 N. Y. Suppl. 455 [*reversed* on other grounds in 99 N. Y. App. Div. 31, 90 N. Y. Suppl. 801]; Mulligan *v.* Elias, 12 Abb. Pr. N. S. (N. Y.) 259. But *compare* Louisville Coffin Co. *v.* Warren, 78 Ky. 400.

32. Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

33. Cooper *v.* Randall, 53 Ill. 24; Philips *v.* Stocket, 1 Overt. (Tenn.) 200.

34. Dorman *v.* Ames, 12 Minn. 451.

35. Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766.

36. Froudenstein *v.* Heine, 6 Mo. App. 287; Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Hacke's Appeal, 101 Pa. St. 245 (holding that if the right to restrain a nuisance is clear, special damage need not be proved); Wier's Appeal, 74 Pa. St. 230 (holding that the erection of a powder-house within such distance of dwelling-houses that injury would result in case of the explosion of the powder will be restrained, although no actual damage has yet occurred).

37. Learned *v.* Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

38. Tyner *v.* People's Gas Co., 131 Ind. 408, 31 N. E. 61 ("shooting" gas well with nitro-glycerin); Scott *v.* Bay, 3 Md. 431 (blasting of rocks); Cheatham *v.* Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734 (powder-house).

Real and apparent danger. — While idle and imaginary fear of injury from an existing structure is no ground for its abatement as a nuisance, it will be enjoined where there is a real and apparent danger, based on previous experience in like cases. Cheatham *v.* Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734.

39. Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118; Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; St. Johns *v.* McFarlan, 33 Mich. 72, 20 Am. Rep. 671; McKinney *v.* McCullough, 17 Phila. (Pa.) 395, holding this to be true even though a former building of the same kind and in the same place was destroyed by fire. *Contra*, Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368, holding that an injunction lies to prevent the removal of a wooden building to a place within the fire limits of a city, within ten feet of plaintiff's house, making the danger thereto from fire imminent.

Building in violation of municipal ordinance see *supra*, III, A, 13.

40. Benton *v.* Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906 [*affirmed* in 61 N. J. L. 693, 40 Atl. 1132].

It is not ground for equitable relief against the erection of a proposed building that such building will increase the rates of insurance on neighboring buildings. Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118; Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221 [*reversing* 13 Pittsb. Leg. J. 590]. *Contra*, Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368.

41. Uggla *v.* Brokaw, 117 N. Y. App. Div. 586, 102 N. Y. Suppl. 857; McDonough *v.* Roat, 8 Kulp (Pa.) 433; Keeler *v.* Lederer Realty Corp., 26 R. I. 524, 59 Atl. 855.

Failure to safeguard street. — The failure of persons erecting a brick building to safeguard, by barricades or other means, a street rendered unsafe by the danger of bricks falling from the wall of the building, is a nuisance. Young *v.* Trapp, 118 Ky. 813, 82 S. W. 429, 26 Ky. L. Rep. 752.

destroyed by reason of a private nuisance sustains such an injury as entitles him relief.[42]

3. Injury to Business. The fact that the acts or erections of one person injure or seriously interfere with the business of another gives the latter a right to relief,[43] and, as the good name of a boarding or lodging house, hotel, or other place of entertainment is of vital importance to the success of the proprietor, an injury to such good name is actionable.[44]

4. Injury to Health. Injury to health resulting from the acts or structures complained of is such damage as warrants relief against them as a nuisance,[45] and even danger to health may be such damage as calls for relief.[46] But it is not necessary, in order to constitute noxious or offensive acts, occupations, or structures nuisances, that the matters complained of should affect or injure the health of the neighbors or of the general public.[47]

42. Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

43. *Georgia.*— Bonner *v.* Welborn, 7 Ga. 296, holding that the owner of medicinal springs, who uses them as a source of revenue, by furnishing houses, board, lodgings, and entertainment to those who resort to them, is entitled to sue for damage done to him in the construction of a nuisance, by which the public are deterred from visiting his springs and his profits are thereby reduced, although he has not procured a license as a tavern keeper.

Indiana.— Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278.

Missouri.— Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

New Jersey.— Leeds *v.* Bohemian Art Glass Works, 63 N. J. Eq. 619, 52 Atl. 375 [*affirmed* in 65 N. J. Eq. 402, 54 Atl. 1124]; Demarest *v.* Hardham, 34 N. J. Eq. 469; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

Tennessee.— Wall *v.* Cloud, 3 Humphr. 181.

A loss of trade resulting from the maintenance of a nuisance is such an injury as entitles the person damaged to relief. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

44. Sullivan *v.* Waterman, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773, holding that one who wrongfully injures the good name of a boarding or lodging-house, by using rooms hired as lodging rooms for purposes of assignation and debauchery, is guilty of an actionable nuisance.

45. *Alabama.*— Hundley *v.* Harrison, 123 Ala. 292, 26 So. 294.

Illinois.— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247].

Indiana.— Moses *v.* State, 58 Ind. 185; Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Iowa.— Percival *v.* Yousling, 120 Iowa 451, 94 N. W. 913; Shiras *v.* Olinger, 50 Iowa, 571, 33 Am. Rep. 138.

Missouri.— Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

Nevada.— Fogg *v.* Nevada-California-Oregon R. Co., 20 Nev. 429, 23 Pac. 840.

New Jersey.— Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— Cropsey *v.* Murphy, 1 Hilt. 126; Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. 340; Westheimer *v.* Schultz, 33 How. Pr. 11.

North Carolina.— Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983; Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 S. E. 460.

Ohio.— Story *v.* Hammond, 4 Ohio 376; McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (1900) 60 S. W. 539; Wall *v.* Cloud, 3 Humphr. 181.

Vermont.— Gifford *v.* Hulett, 62 Vt. 342, 19 Atl. 230.

See 37 Cent. Dig. tit. "Nuisance," §§ 32, 156.

46. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237; Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

House calculated to breed disease.—A dwelling-house, divided into small apartments and thickly inhabited and in a filthy condition, during the prevalence of cholera, is a public nuisance. Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397.

47. *Delaware.*—State *v.* Wetherall, 5 Harr. 487.

Kentucky.— Ashbrook *v.* Com., 1 Bush 139, 89 Am. Dec. 616.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938.

New Jersey.— Meigs *v.* Lister, 23 N. J. Eq. 199; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Heeg *v.* Licht, 80 N. Y. 579, 36 Am. Rep. 654, 8 Abb. N. Cas. 355 [*reversing* 16 Hun 257]; Brady *v.* Weeks, 3 Barb. 157; Howard *v.* Lee, 3 Sandf. 281; Mulligan *v.*

5. Injury to Property. Injury to adjoining property by reason of the alleged nuisance entitles the owner of such property to relief,[48] and so *a fortiori* does the permanent destruction or ruin of such property.[49] So a person is entitled to relief against acts or structures which injure or destroy his buildings,[50] crops,[51] trees,[52] or vegetation.[53] A depreciation in the value of property[54] or the owner's inability to find tenants for the same, because of the nuisance complained of,[55] is an injury for which he may recover. It is not, however, necessary, to constitute a nuisance, that the matter complained of should do injury to material property;[56] while, on the other hand, a use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable.[57]

6. Injury to Public Morals. The fact that certain things are injurious to public morals is sufficient to render them public nuisances.[58]

Elias, 12 Abb. Pr. N. S. 259; Catlin *v.* Valentine, 9 Paige 575, 38 Am. Dec. 567.

Texas.— Waters-Pierce Oil Co. *v.* Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

Vermont.— State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495.

United States.— U. S. *v.* Luce, 141 Fed. 385.

England.— Malton Local Bd. of Health *v.* Malton Farmers Manure, etc., Co., 4 Ex. D. 302, 44 J. P. 155, 49 L. J. M. C. 690; Rex *v.* Neil, 2 C. & P. 485, 31 Rev. Rep. 685, 12 E. C. L. 690; Gaskell *v.* Bayley, 30 L. T. Rep. N. S. 516.

See 37 Cent. Dig. tit. "Nuisance," §§ 32, 156.

48. Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; Wall *v.* Cloud, 3 Humphr. (Tenn.) 181; Luscombe *v.* Steer, 17 L. T. Rep. N. S. 229, 15 Wkly. Rep. 1191.

49. Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

50. McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712.

51. Fogarty *v.* Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756; Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646; Imperial Gas Light, etc., Co. *v.* Broadbent, 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377, 11 Eng. Reprint 239; Chester *v.* Smelting Corp., 85 L. T. Rep. N. S. 67.

52. Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Chester *v.* Smelting Corp., 85 L. T. Rep. N. S. 67.

53. Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567 [*affirming* 2 Thomps. & C. 231]; McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712.

54. *Kentucky.*— Peacock *v.* Spitzelberger, 29 S. W. 877, 16 Ky. L. Rep. 803.

New York.— Ruckman *v.* Green, 9 Hun 225.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243.

Pennsylvania.— Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702.

West Virginia.— McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

England.— Goldsmid *v.* Tunbridge Wells Imp. Com'rs, L. R. 1 Ch. 349, 12 Jur. N. S. 308, 35 L. J. Ch. 382, 14 L. T. Rep. N. S. 154, 14 Wkly. Rep. 562.

A decrease in the rental value of premises is such an injury as gives a right to relief. Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243].

A nuisance which annoys the occupants of a dwelling and renders it less valuable as a habitation is an injury to property. Roessley, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156.

55. Cropsey *v.* Murphy, 1 Hilt. (N. Y.) 126.

56. Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654. And see *supra*, III, E, 1, 4; *infra*, III, E, 6, 7, 8.

57. *California.*— Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118.

Illinois.— Flood *v.* Consumers Co., 105 Ill. App. 559.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868.

Maryland.— Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

New Jersey.— Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Bowden *v.* Edison Electric Illuminating Co., 29 Misc. 171, 60 N. Y. Suppl. 835; Stilwell *v.* Buffalo Riding Academy, 4 N. Y. Suppl. 414, 21 Abb. N. Cas. 472.

Texas.— Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125; Elliott *v.* Ferguson, (Civ. App. 1904) 83 S. W. 56.

Vermont.— Woodstock Burying Ground Assoc. *v.* Hager, 68 Vt. 488, 35 Atl. 431.

58. See Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

7. Interference With Comfort. It is not necessary, in order that a matter may be a nuisance to an adjoining landowner, that it should cause him any pecuniary loss;[59] but a matter which amounts to an unreasonable interference with the comfort of persons in the neighborhood may be a nuisance.[60]

8. Interference With Religious Devotion. It has been held that disturbing religious devotion by noises and the like, in the neighborhood of the place of worship on the Sabbath, is an actionable nuisance,[61] but there is also authority to the contrary.[62]

F. Legislative Power as to Nuisances.[63] It is within the province of the legislature to prescribe what shall constitute a nuisance,[64] and within constitutional

59. Kirchgraber *v.* Lloyd, 59 Mo. App. 59. And see *supra*, III, E, 5.

60. *Alabama.*— Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

Illinois.— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247]; Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598.

Indian Territory.— Adams Hotel Co. *v.* Gobb, 3 Indian Terr. 50, 53 S. W. 478.

Iowa.— Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138.

Kentucky.— Southern R. Co. *v.* Com., 101 S. W. 882, 31 Ky. L. Rep. 122.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938.

Nebraska.— Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

New Jersey.— Laird *v.* Atlantic Coast Sanitary Co., (Ch. 1907) 67 Atl. 387.

New York.—Robinson *v.* Smith, 3 Silv. Sup. 490, 7 N. Y. Suppl. 38.

North Carolina.— Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983; Duffy *v.* E. H. & J. A. Meadows Co., 131 N. C. 31, 42 S. E. 460.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 9 Ohio Cir. Ct. 259, 6 Ohio Cir. Dec. 243; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Cleveland *v.* Mahn, 7 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 203.

Pennsylvania.—Ladies' Decorative Art Club's Appeal, 10 Pa. Cas. 150, 13 Atl. 537.

Texas.— Faulkenbury *v.* Wells, (Civ. App. 1902) 68 S. W. 327.

Utah.—Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

West Virginia.— McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936; Snyder *v.* Cabell, 29 W. Va. 48, 1 S. E. 241.

United States.— U. S. *v.* Luce, 141 Fed. 385.

England.— Luscombe *v.* Steer, 17 L. T. Rep. N. S. 229, 15 Wkly. Rep. 1191.

The disturbance of repose and deprivation of rest by acts done or occupations carried on at unreasonable hours or in an unreasonable manner is an injury for which relief may be granted. Davis *v.* Sawyer, 133 Mass. 289, 43 Am. Rep. 519; Seligman *v.* Victor Talking Mach. Co., (N. J. Ch. 1906) 63 Atl. 1093; Yocum *v.* Hotel St. George Co., 18 Abb. N. Cas. (N. Y.) 340; Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

61. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79 (the injury being such as to greatly depreciate the value of the house and render it unfit for a place of religious worship); Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739 (holding that a use of property which renders a neighboring church uncomfortable and almost unendurable as a place of worship is an actionable nuisance); Dewar *v.* City, etc., Racecourse Co., [1899] 1 Ir. 345; St. Margaret Church *v.* Stephens, 29 Ont. 185 (holding, in an action by the churchwardens and trustees of a church, wherein week-day services were held, to restrain the playing of a band in an adjoining skating-rink, which had the effect of disturbing the services, that the use by plaintiffs of the church in the way mentioned was an ordinary, reasonable, and lawful use of their property, and the inconvenience to them and the congregation by defendants' mode of using their property was such as to materially interfere with the use and enjoyment of plaintiffs' property, and to constitute a nuisance).

An action is properly brought in the name of the church and it is not necessary that it should be brought by individuals affected by the nuisance. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79.

62. Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313 (holding that the noise caused no such injury to the property as would sustain an action); Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401 (holding that the interruption of the worship of God by complainants in their accustomed places of public worship or in their own residences on the Sabbath day is not such a nuisance as will be restrained by injunction); Owen *v.* Henman, 1 Watts & S. (Pa.) 548, 37 Am. Dec. 481 (holding that the disturbance of a member of a religious congregation, while engaged in religious exercises in the church, by making loud noises in singing, reading, and talking, is an injury for which no action will lie).

63. Power of municipality see Municipal Corporations.

64. State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138.

limits[65] the legislature may change the common law as to nuisances so as to make things nuisances which were not so or to make things lawful which were nuisances at common law, although by so doing it affects the use or value of property[66]

G. Statutory or Municipal Authority — 1. In General. Where the legislature directs or authorizes a particular thing to be done, the doing thereof cannot be charged or complained of as a nuisance, although apart from such authority it might be a nuisance;[67] and where the legislature has delegated to municipal authorities the power to authorize or license the doing of certain things which but for such authority would be a nuisance, a person or corporation having such

65. **Statutes held constitutional** see Moses *v.* U. S., 16 App. Cas. (D. C.) 428, 50 L. R. A. 532; State *v.* Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402.

A thing not per se a nuisance cannot be made such by legislative declaration. Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

66. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Brown, 67 Ind. 45, 33 Am. Rep. 73.

Maine.— Houlton *v.* Titcomb, 102 Me. 272, 66 Atl. 733, 10 L. R. A. N. S. 580.

Massachusetts.— Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174; Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27.

Pennsylvania.— Pittsburg *v.* W. H. Keech Co., 21 Pa. Super. Ct. 548.

Rhode Island.— State *v.* Barnes, 20 R. I. 525, 40 Atl. 374.

See 37 Cent. Dig. tit. "Nuisance," § 158.

Repeal of statute legalizing nuisance.—An act of assembly, legalizing for the time being erections already existing in a borough, and being then nuisances, may be afterward repealed by the assembly in the exercise of its legislative discretion. Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534.

67. *Colorado.*— Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515.

Georgia.— Vason *v.* South Carolina R. Co., 42 Ga. 631.

Indiana.— Sopher *v.* State, (1907) 81 N. E. 913; New Albany, etc., R. Co. *v.* Higman, 18 Ind. 77; Butler *v.* State, 6 Ind. 165.

Iowa.— Miller *v.* Webster City, 94 Iowa 162, 62 N. W. 648.

Louisiana.— Irwin *v.* Great Southern Tel. Co., 37 La. Ann. 63.

Massachusetts.— Murtha *v.* Lovewell, 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410; Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27, 133 Mass. 289, 43 Am. Rep. 519.

Michigan.— People *v.* Detroit, etc., Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512.

Minnesota.— Patterson *v.* Duluth, 21 Minn. 493.

Missouri.— Randle *v.* Pacific R. Co., 65 Mo. 325.

New Jersey.— Simmons *v.* Paterson, 60 N. J. L. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L. R. A. 717; Beideman *v.* Atlantic City R. Co., (Ch. 1890) 19 Atl. 731; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

New York.— Lee *v.* Vacuum Oil Co., 54 Hun 156, 7 N. Y. Suppl. 426; People *v.* New York Gas Light Co., 6 Lans. 467, 64 Barb. 55; People *v.* Law, 34 Barb. 494, 22 How. Pr. 109; Williams *v.* New York Cent. R. Co., 18 Barb. 222 [*reversed* on other grounds in 16 N. Y. 97, 69 Am. Dec. 651].

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624.

Pennsylvania.— Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29; York Tel. Co. *v.* Keesey, 5 Pa. Dist. 366; Faust *v.* Passenger R. Co., 3 Phila. 164.

Wisconsin.— Dolan *v.* Chicago, etc., R. Co., 118 Wis. 362, 95 N. W. 385; Stoughton *v.* State, 5 Wis. 291.

United States.— Currier *v.* West Side El. Patent R. Co., 6 Fed. Cas. No. 3,493, 6 Blatchf. 487; Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*.

England.— London, etc., R. Co. *v.* Truman, 11 App. Cas. 45, 50 J. P. 388, 55 L. J. Ch. 354, 54 L. T. Rep. N. S. 250, 34 Wkly. Rep. 657 [*distinguishing* Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617]; National Tel. Co. *v.* Baker, (1893) 2 Ch. 186, 57 J. P. 373, 62 L. J. Ch. 699, 68 L. T. Rep. N. S. 283, 3 Reports 318; Glossop *v.* Heston, etc., Local Bd., 12 Ch. D. 102, 49 L. J. Ch. 89, 40 L. T. Rep. N. S. 736.

Canada.— See Hiscox *v.* Lander, 24 Grant Ch. (U. C.) 250.

See 37 Cent. Dig. tit. "Nuisance," §§ 35, 158.

A statute which ratifies and confirms the location of a railroad, and the railroad as actually laid out and constructed, such statute being passed after the completion of an embankment complained of as a nuisance, does not exempt the railroad company from liability on account of such embankment. Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

The state cannot prosecute as a nuisance that which it has authorized. People *v.* Detroit, etc., Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512.

Change in circumstances.— When statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impracticable without causing one, the persons so exercising them are liable to an indictment. Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 11 Jur. N. S. 769, 34 L. J. Q. B. 191, 13 Wkly. Rep. 892, 118 E. C. L. 631.

authority is not chargeable with creating a nuisance by what is done pursuant thereto.[68]

2. Authority Must Be Express or Necessarily Implied. A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made,[69] or by the plainest and most necessary implication from the powers expressly conferred,[70] so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.[71] So in an action for a nuisance consisting of smoke enter-

68. *Colorado.*— Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154.

Indiana.— Dwenger *v.* Chicago, etc., R. Co., 98 Ind. 153.

Iowa.— Milburn *v.* Cedar Rapids, 12 Iowa 246.

Louisiana.—Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239; Lewis *v.* Behan, 28 La. Ann. 130.

Massachusetts.— Levin *v.* Goodwin, 191 Mass. 341, 77 N. E. 718, 114 Am. St. Rep. 616; Com. *v.* Packard, 185 Mass. 64, 69 N. E. 1067; Murtha *v.* Lovewell, 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410; Saltonstall *v.* Banker, 8 Gray 195.

Missouri.— Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Casey *v.* Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

New York.— Crowley *v.* Rochester Fireworks Co., 95 N. Y. App. Div. 13, 88 N. Y. Suppl. 483 [*reversed* on other grounds in 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. N. S. 330]; Coleman *v.* New York, 70 N. Y. App. Div. 218, 75 N. Y. Suppl. 342 [*reversing* 35 Misc. 664, 72 N. Y. Suppl. 359, and *affirmed* in 173 N. Y. 612, 66 N. E. 1106]; Hodgkinson *v.* Long Island R. Co., 4 Edw. 411.

See 37 Cent. Dig. tit. "Nuisance," §§ 36, 158, 159.

Reasonableness of ordinance.— In an action to enjoin the use of a square for a market and weighing place as being a nuisance, it is immaterial that the ordinance establishing the place is unreasonable in requiring the entire weighing of the city to be done on one set of scales. Miller *v.* Webster City, 94 Iowa 162, 62 N. W. 648.

Construction of ordinance.—An ordinance making the firing of rockets weighing more than one pound a misdemeanor cannot be regarded as a license to discharge a rocket of less weight than one pound without rendering any party liable as at common law for the commission of a nuisance and the consequence thereof. Cameron *v.* Heister, 10 Ohio Dec. (Reprint) 651, 22 Cinc. L. Bul. 384.

Where a waiting room is erected in the streets of a city by the authority of the council thereof, it cannot be abated as a nuisance, on the complaint of an abutting lot owner, for the reason that said building partially obstructs the view of his business house by persons passing over a particular portion of the street. Cummins *v.* Summunduwot Lodge, 9 Kan. App. 153, 58 Pac. 486.

Excess of authority of city.— Permission obtained from a city council to build a privy on a private alley by one of the several owners thereof will not affect the right of the other owners to have it abated as a nuisance. De Give *v.* Seltzer, 64 Ga. 423, 425, where it is said: "The alley belongs to the proprietors of the lots on the block. Its joint use is theirs. Every foot of it each is entitled to use, and the city has no power to give the use to one foot of it to one to the exclusion of another."

A license which was not complied with by defendant cannot protect him. Murtha *v.* Lovewell, 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410.

A statute giving to cities the power to establish and regulate public markets contemplates the use by the city of its own lands for the location of such markets and does not authorize a city to set off the residence portion of a street for a public market, over the protest of the owners of the adjoining property, thereby permitting a nuisance caused by impeding the traffic, attracting crowds, and befouling the street. Richmond *v.* Smith, 148 Ind. 294, 47 N. E. 630.

A contract between a county and a city authorizing the county to erect posts does not estop the city from abating the nuisance, where population has increased since the contract was made, as the contract did not contemplate a nuisance, and, even if it had done so, the city could not legalize a nuisance. Mercer County *v.* Harrodsburg, 66 S. W. 10, 23 Ky. L. Rep. 1744, 56 L. R. A. 583.

69. Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711 [*affirming* 45 Hun 257]; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

70. Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711 [*affirming* 45 Hun 257]; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

71. McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508 (holding that legislative authority to do work for one's own profit does not carry with it authority to use, at the risk of others, dangerous materials, even

ing plaintiff's house from defendant's chimneys, it is no defense that the chimneys are as high as the city regulations for chimneys require, if in fact they are not high enough to keep the smoke out.[72]

3. Unnecessary Interference With Rights of Others. It is a condition always implied by law that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons,[73] and so the fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance.[74] Thus the fact that a railroad is constructed and operated

though they be necessary for conveniently prosecuting the work; and if the licensee cause injury through such dangerous materials he will be liable in damages, even though the work was performed in the most careful manner); Morton *v.* New York, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241; Hill *v.* New York, 139 N. Y. 495, 34 N. E. 1090; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

Authority to manufacture gas.— The fact that a corporation is authorized by charter to manufacture gas does not authorize it to commit a nuisance in its manufacture, although such business cannot be otherwise conducted. Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

Regulating business.— Mass. St. (1866) c. 285, prescribing the thickness of walls of buildings used for manufacturing or storing petroleum, does not justify the refining of petroleum at any place where a necessary consequence of the manufacture is the emission of vapors which, by their offensive nature, constitute a nuisance at common law. Com. *v.* Kidder, 107 Mass. 188.

A municipality's adoption of a natural watercourse as a common sewer does not authorize the connection of a nuisance *per se* therewith, where such nuisance is likely to induce death and disease to lower riparian owners using the waters so polluted. Com. *v.* Yost, 11 Pa. Super. Ct. 323 [*reversing* 12 York Leg. Rec. 149].

72. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

73. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441. A municipal corporation, given the right to discharge its refuse matter into an adjacent navigable body of water, must exercise it so as not to create a nuisance interfering with navigation or the enjoyment of private docks used for loading and unloading merchandise. Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

74. *California.*— Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51 (holding that a license to erect and maintain a steam-engine did not justify the creation of a nuisance by the issuance of soot from the smokestack of such engine); Tuebner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162 (holding that a license granted by a city to a company to run a line of cable cars along the streets did not authorize the company to construct and operate a stationary engine on its land, so as to interfere with the enjoyment of adjoining premises).

Colorado.— Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203; Rand Lumber Co. *v.* Burlington, 122 Iowa 203, 97 N. W. 1096; Churchill *v.* Burlington Water Co., 94 Iowa 89, 62 N. W. 646.

Louisiana.— Koehl *v.* Schoenhausen, 47 La. Ann. 1316, 17 So. 809.

Minnesota.— Pine City *v.* Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763.

Mississippi.— King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

Missouri.— Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Sultan *v.* Parker-Washington Co., 117 Mo. App. 636, 93 S. W. 289; State *v.* St. Louis Bd. of Health, 16 Mo. App. 8.

New Jersey.— Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Laird *v.* Atlantic Coast Sanitary Co., (Ch. 1907) 67 Atl. 387.

New York.— Kobbe *v.* New Brighton, 23 N. Y. App. Div. 243, 48 N. Y. Suppl. 990; Morton *v.* New York, 65 Hun 32, 19 N. Y. Suppl. 603 [*affirmed* in 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241]; Bohan *v.* Port Jervis Gas-Light Co., 45 Hun 257, 10 N. Y. St. 374 [*affirmed* in 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711] (holding that the fact that a corporation had power and authority from the legislature to purchase and hold real estate and manufacture illuminating gas did not exempt it from liability for damages caused by its maintaining a nuisance in conducting its works, so as to injure private property); Bohnsack *v.* McDonald, 26 Misc. 493, 56 N. Y. Suppl. 347 (holding that by authorizing the construction of a reservoir on the site of an old park the legislature did not contemplate the carrying away of excavated material by an abandoned railroad track which had formerly run to the park, and a temporary track which the contractor built on his own land, or intend to subordinate private interests so as to give the contractor the right to carry away such material in a manner injurious to private property, and also that the fact that the contractor had the permission of the railroad company to use the abandoned track did not

under statutory authority does not deprive neighboring property-owners of their remedy for annoyances and injuries not necessarily incident to the operation of the road in the vicinity.[73] Neither can defendant's possession of the right of eminent domain legalize a nuisance, but until defendant has exercised such power and by the authority thereof acquired plaintiff's property, defendant's illegal acts

entitle him to use it so as to injure private property along the route); Renwick *v.* Morris, 7 Hill 575.

Oklahoma.— Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

Pennsylvania.— See Com. *v.* Greybill, 17 Pa. Super. Ct. 514.

Rhode Island.— State *v.* Barnes, 20 R. I. 525, 40 Atl. 374.

South Carolina.—Ryan *v.* Copes, 11 Rich. 217, 73 Am. Dec. 106.

Texas.— Belton *v.* Baylor Female College, (Civ. App. 1896) 33 S. W. 680.

Virginia.— Townsend *v.* Norfolk R., etc., Co., 105 Va. 22, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L. R. A. N. S. 87.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

United States.— Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

England.— Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617; Atty.-Gen. *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146, 38 L. J. Ch. 265, 19 L. T. Rep. N. S. 708, 17 Wkly. Rep. 240; Sellors *v.* Matlock Bath Local Bd. of Health, 14 Q. B. D. 928, 52 L. T. Rep. N. S. 762; Vernon *v.* St. James' Vestry, 16 Ch. D. 449, 50 L. J. Ch. 81, 44 L. T. Rep. N. S. 229, 29 Wkly. Rep. 222; Smith *v.* Midland R. Co., 37 L. T. Rep. N. S. 224, 25 Wkly. Rep. 861.

Canada.— Weber *v.* Berlin, 8 Ont. L. Rep. 302; Montreal St. R. Co. *v.* Gareau, 10 Quebec K. B. 417 [*following* Canadian Pac. R. Co. *v.* Roy, 9 Quebec K. B. 551]; Adami *v.* Montreal, 25 Quebec Super. Ct. 1; Davie *v.* Montreal Water, etc., Co., 23 Quebec Super. Ct. 141 (holding that the fact that a waterworks company was authorized by its charter to carry on the business of supplying water to certain municipalities, and to use steam and electricity for such purpose, did not relieve it from liability for damages to adjoining owners from smoke, vibration, and noise from the electric motor plant installed by it, where its charter did not fix the location for such plant.

See 37 Cent. Dig. tit. "Nuisance," §§ 35, 158.

A liquor license does not justify maintaining a saloon in a locality where it constitutes a nuisance. Haggart *v.* Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

A contract between a city and a corporation by which the latter is to pave one of the streets with asphalt does not amount to a license to the company to conduct its plant near a principal residence street, where its operation would expel people from their homes and constitute a nuisance. Sultan *v.* Parker-Washington Co., 117 Mo. App. 636, 93 S. W. 289.

75. *Illinois.*— Cleveland, etc., R. Co. *v.* Pattison, 67 Ill. App. 351.

Minnesota.— Anderson *v.* Chicago, etc., R. Co., 85 Minn. 337, 88 N. W. 1001, holding that the provision of Gen. St. (1894) § 2710, requiring railroad companies to furnish shippers of live stock, horses, cattle, sheep, etc., with proper facilities to convey and transport the same, does not authorize such companies to maintain stock-yards in an improper manner, so as to constitute a nuisance, to the injury of adjacent property-owners.

New York.— Garvey *v.* Long Island R. Co., 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550 [*affirming* 9 N. Y. App. Div. 254, 41 N. Y. Suppl. 397]; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 (holding that the fact that a railroad company is authorized by an act of the legislature to construct its road does not relieve it from liability as for a nuisance for injuries to adjoining property caused by an improper method of blasting in constructing its road-bed); Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Spring *v.* Delaware, etc., R. Co., 88 Hun 385, 34 N. Y. Suppl. 810 [*affirmed* in 157 N. Y. 692, 51 N. E. 1094] (holding that authority conferred on a railroad company to construct and operate its road does not authorize it to maintain, in the neighborhood of property used for residence purposes, large coal bins, with an incline trestle leading thereto, up which cars loaded with coal are drawn for the purpose of depositing the coal in the bins, in doing which the engines emit noxious, offensive gases, smoke, sparks, soot, and cinders, and dust arises from the coal put in and taken from the bin; and the owner of property affected may sue the railroad company to enjoin the nuisance, and for damages).

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703, holding that if a railroad company, under its charter and by permission of its local government, uses a street in the operation of its road beyond what is necessary for the proper running of its trains, and so substantially destroys an easement of way and of ingress and egress appurtenant of an abutting lot, the owner of such lot may recover damages as for a nuisance.

Wisconsin.— See Dolan *v.* Chicago, etc., R. Co., 118 Wis. 362, 95 N. W. 385.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

See 37 Cent. Dig. tit. "Nuisance," § 35. And see, generally, RAILROADS.

resulting in the substantial impairment or destruction of the property constitute an actionable nuisance.[76]

4. Redress in Damages. The English rule is that if an injury is caused by the doing of an act authorized by parliament there is no redress whatever.[77] But it has been laid down in the United States that the full extent of legislative power to legalize and shield a nuisance is to exempt it from public prosecution,[78] for under the constitutional prohibitions against depriving persons of property without due process of law,[79] and taking property for public purposes without compensation,[80] the legislature has no power to authorize injury to private property without compensation to the owner,[81] and so the rule that what the legislature has authorized cannot be a nuisance applies only to the question of abatement,[82] and a person is entitled to recover damages for an injury to his property even though the act or structure causing the injury be expressly authorized by the legislature,[83] or by municipal license.[84] On the other hand, however, it has been held that a railroad company authorized by municipal law to operate its road through or across a street is not liable in a common-law action except for injuries done wantonly or without reasonable care,[85] and that where the acts complained of were done pursuant to a contract with the government and defendant kept within the authority given by such contract, there can be no recovery as for a nuisance.[86]

IV. Persons Liable.[87]

A. Person Creating or Causing Nuisance. The person primarily liable for a nuisance is he who actually creates it,[88] whether on his own property or

76. Ganster *v.* Metropolitan Electric Co., 214 Pa. St. 628, 64 Atl. 91.

77. See Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617.

78. Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Sadlier *v.* New York, 40 Misc. (N. Y.) 78, 81 N. Y. Suppl. 308 [*affirmed* as to this point but *reversed* on other grounds in 104 N. Y. App. Div. 82, 93 N. Y. Suppl. 579 (*affirmed* in 185 N. Y. 408, 78 N. E. 272)].

79. See Constitutional Law.

80. See Eminent Domain.

81. Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Sadlier *v.* New York, 40 Misc. (N. Y.) 78, 81 N. Y. Suppl. 308 [*affirmed* as to this point but *reversed* on other grounds in 104 N. Y. App. Div. 82, 93 N. Y. Suppl. 579 (*affirmed* in 185 N. Y. 408, 78 N. E. 272)]; Kobbe *v.* New Brighton, 20 Misc. (N. Y.) 477, 45 N. Y. Suppl. 777 [*affirmed* in 23 N. Y. App. Div. 243, 48 N. Y. Suppl. 990]; Chicago Great Western R. Co. *v.* Leavenworth City First M. E. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, holding that this cannot be done either by legislative enactment or city ordinance.

82. Kobbe *v.* New Brighton, 20 Misc. (N. Y.) 477, 45 N. Y. Suppl. 777 [*affirmed* in 23 N. Y. App. Div. 243, 48 N. Y. Suppl. 990].

83. Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Sadlier *v.* New York, 40 Misc. (N. Y.) 78, 81 N. Y. Suppl. 308 [*affirmed* as to this point but *reversed* on other grounds in 104 N. Y. App. Div. 82, 93 N. Y. Suppl. 579 (*affirmed* in 185 N. Y. 408, 78 N. E. 272)]; Kobbe *v.* New Brighton, 20 Misc. (N. Y.) 477, 45 N. Y. Suppl. 777 [*affirmed* in 23 N. Y. App. Div. 243, 48 N. Y. Suppl. 990].

84. Nichols *v.* Pixly, 1 Root (Conn.) 129 (holding that while a municipal license may estop the town from proceeding against a dam as a common nuisance, it can be no excuse or justification for an injury done to private property); Jordan *v.* Helwig, Wils. (Ind.) 447. See also Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239.

85. Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154, holding that an action will not lie by an abutting botel keeper to recover for damage from smoke, jarring, and noise.

86. Benner *v.* Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220 [*reversing* 58 Hun 359, 12 N. Y. Suppl. 181].

87. Liability of: Municipal corporation see Municipal Corporations. Railroad see Railroads.

88. *Alabama.*— Grady *v.* Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

Indiana.— Jordan *v.* Helwig, Wils. 447.

Massachusetts.— Staple *v.* Spring, 10 Mass. 72.

New Hampshire.— Plumer *v.* Harper, 3 N. H. 88, 14 Am. Dec. 333.

New Jersey.— East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201, 38 Atl. 631.

New York.— Anderson *v.* Dickie, 26 How. Pr. 105.

Canada.— Bryce *v.* Loutit, 21 Ind. App. 100; Davie *v.* Montreal Water, etc., Co., 23 Quebec Super. Ct. 141.

See 37 Cent. Dig. tit. "Nuisance," §§ 40, 161.

not;[89] but one who, either by negligence or design, furnishes means and facilities for the commission of an injury to another which could not have been done without them is equally responsible with the immediate wrong-doer,[90] as all are regarded as principals in maintaining a nuisance.[91] So one who merely contributes to the creation of a nuisance is liable therefor,[92] although it has been held that such a person is liable in damages only for that injury or loss which is the direct and proximate result of his acts.[93] And one who permits the establishment of a public nuisance upon property under his control is liable therefor.[94] To warrant an injunction against the continuance of a lawful business on the ground that it is a nuisance, it must be shown that the annoyance or injury alleged to result to plaintiff therefrom is caused by the acts of defendant, and does not flow from other sources over which he has no control.[95] A person cannot escape liability for the maintenance of a nuisance on the ground that in so doing he only acted as the agent of another.[96]

B. Person Continuing Nuisance. One who actively continues a nuisance is as much answerable therefor as he who first created it.[97] Thus where the owner

Failure to repair sewer.— Where a sewer connecting with a city main sewer is built at the expense of the landowner, and under the city ordinance it is his duty to repair the same at his expense on consent of the city, he is liable for a nuisance created by its want of proper repair, in the absence of evidence to show that the city refused to allow him to repair. Cohen *v.* Bellenot, (Va. 1899) 32 S. E. 455.

Liability of "manager."— One who is the secretary and purchasing agent of a company, and who has charge of its manufacturing department, and exercises supervision over the engine room, and is regarded by other employees and officers as *de facto* president, is "manager" of the concern within Mo. Laws (1901), p. 73, providing that the manager, etc., of any building or establishment from which dense smoke is emitted shall be deemed guilty of a misdemeanor. State *v.* Hemenover, 188 Mo. 381, 87 S. W. 482.

89. State *v.* Haines, 30 Me. 65; East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201, 38 Atl. 631. And see *infra*, IV, C.

Manager of another's business.— Where a person, in managing a business for another, creates and maintains a nuisance, within the prohibition of Ohio Rev. St. § 6921, he will be liable therefor, although he is only an employee of the proprietor, and has no interest in the business. Terry *v.* State, 24 Ohio Cir. Ct. 111.

90. Anderson *v.* Dickie, 26 How. Pr. (N. Y.) 105. See also Olmstead *v.* Rich, 3 Silv. Sup. (N. Y.) 477, 6 N. Y. Suppl. 826, where a person who aided and abetted in maintaining a nuisance was included in an injunction against its continuance. But *compare* State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737, holding that one is not guilty of a public nuisance unless the injurious consequences complained of are the direct result of his own act; and it is not sufficient that the consequences are caused by the acts of others operating on his acts.

A landowner who permits another to create a nuisance on the land is liable to the one injured thereby. Hudson County *v.* Woodcliffe Land Imp. Co., (N. J. Sup. 1907) 65 Atl. 844.

A person may be liable for a nuisance created by his employee in doing that which he was employed to do. Sullivan *v.* McManus, 19 N. Y. App. Div. 167, 45 N. Y. Suppl. 1079; Reg. *v.* Stephens, L. R. 1 Q. B. 702, 7 Q. B. 710, 10 Cox C. C. 340, 12 Jur. N. S. 961, 14 L. T. Rep. N. S. 593, 14 Wkly. Rep. 859; Ellis *v.* Sheffield Gas Consumers Co., 2 C. L. R. 294, 2 E. & B. 767, 18 Jur. 146, 23 L. J. Q. B. 42, 2 Wkly. Rep. 19, 75 E. C. L. 767. But the employer is not liable for a nuisance unnecessarily committed by the employee. Peachey *v.* Rowland, 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. 81, 76 E. C. L. 182, 16 Eng. L. & Eq. 442.

91. Murray *v.* Archer, 1 Silv. Sup. (N. Y.) 366, 5 N. Y. Suppl. 326.

92. State *v.* Smith, 82 Iowa 423, 48 N. W. 727.

93. Moore *v.* Langdon, 2 Mackey (D. C.) 127, 47 Am. Rep. 262; Schuck *v.* Main, 39 Misc. (N. Y.) 251, 79 N. Y. Suppl. 399; Carmichael *v.* Texarkana, 94 Fed. 561, holding that individual residents of a city who, in compliance with law, have connected their premises with a sewer system constructed by the city, and deposit sewage therein, cannot be held liable for damages for the discharge of such sewage by the operation of the sewer system on or near the premises of a complainant, thereby creating a nuisance. And see *infra*, IV, H.

94. Davie *v.* Levy, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225.

95. Warren *v.* Hunter, 1 Phila. (Pa.) 414.

96. State *v.* Bell, 5 Port. (Ala.) 365.

97. *California.*— Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851.

Maine.— Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91.

Massachusetts.—Staple *v.* Spring, 10 Mass. 72.

Missouri.— Beckley *v.* Skroh, 19 Mo. App. 75.

New Hampshire.— Plumer *v.* Harper, 3 N. H. 88, 14 Am. Dec. 333.

or person in possession of land continues a nuisance originated by his predecessor in title or possession, he is liable therefor,[98] where the continuance of the nuisance is caused by what he does.[99] A mere failure to remove a nuisance erected by another does not, however, constitute a continuance of it, but there must be some positive act done evidencing its adoption.[1]

C. Ownership of Land. The bare fact of ownership of real property imposes no responsibility for a nuisance on it;[2] and so where a nuisance is created on land by a person other than the owner, and the owner was not instrumental in causing the nuisance, he is not indictable therefor,[3] nor can an injunction be issued against him.[4] Neither is he liable for the damage caused by the nuisance,[5] although it is otherwise as to a nuisance created by an independent contractor for the owner or occupant of the property.[6] Conversely, it is not necessary to charge a person with

New York.— Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486.

See 37 Cent. Dig. tit. "Nuisance," §§ 41, 162.

Notice to abate see *infra*, VII, B, 1, d; VII, C, 3; VII, D, 4.

98. *California.*— Pierce *v.* German Sav., etc., Soc., 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45.

Kentucky.— West *v.* Louisville, etc., R. Co., 8 Bush 404.

Mississippi.— King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

Missouri.— Grogan *v.* Broadway Foundry Co., 87 Mo. 321; Hulett *v.* Missouri, etc., R. Co., 80 Mo. App. 87, holding that the rule that the successor to the erector of a nuisance will be liable for injuries resulting from the continuation thereof applies to a railroad lessee.

New York.— Conhocton Stone Co. *v.* Buffalo, etc., R. Co., 52 Barb. 390 [*reversed* on other grounds in 51 N. Y. 573, 10 Am. Rep. 646]; Hubbard *v.* Russell, 24 Barb. 404.

South Carolina.— Townes *v.* Augusta, 52 S. C. 396, 29 S. E. 851.

England.— Broder *v.* Saillard, 2 Ch. D. 692, 45 L. J. Ch. 414, 24 Wkly. Rep. 1011; Thompson *v.* Gibson, 9 Dowl. P. C. 717, 10 L. J. Exch. 330, 7 M. & W. 456.

See 37 Cent. Dig. tit. "Nuisance," §§ 41, 162.

Damages caused by predecessor.—A person continuing a nuisance is not liable for damages caused by the operation of the nuisance by his predecessors in interest. Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 513, 79 Pac. 14.

99. Central Consumers Co. *v.* Pinkert, 92 S. W. 957, 29 Ky. L. Rep. 273, the nuisance resulting from the purchaser's use of a pumping apparatus erected by the vendor rather than from the apparatus itself. See also *infra*, IV, D.

1. Walter *v.* Wicomico County Com'rs, 35 Md. 385.

The inheritors of a public nuisance are not liable in the absence of evidence showing any act of theirs in relation to or connection therewith. Bruce *v.* State, 87 Ind. 450.

2. Schmidt *v.* Cook, 4 Misc. (N. Y.) 85, 23 N. Y. Suppl. 799, 30 Abb. N. Cas. 285 [*modifying* 1 Misc. 227, 20 N. Y. Suppl. 889, and *affirmed* in 12 Misc. 449, 33 N. Y. Suppl. 624].

Cotenant of person creating nuisance not liable therefor.— Simpson *v.* Seavey, 8 Me. 138, 22 Am. Dec. 228.

3. Barring *v.* Com., 2 Duv. (Ky.) 95; People *v.* Townsend, 3 Hill (N. Y.) 479.

4. Spiker *v.* Eikenberry, (Iowa 1907) 110 N. W. 457, 11 L. R. A. N. S. 463.

5. *California.*— Brown *v.* McAllister, 39 Cal. 573, holding that where the owner of a lot on a declivity had no control over property lying above his, on the same declivity, nor over the person occupying it, and foul and offensive water was, without any fault of his, thrown upon the upper lot, which flowed naturally across his premises on to the lot below, he was not responsible to the owner of the lower lot for the damage resulting therefrom.

District of Columbia.— Moore *v.* Langdon, 2 Mackey 127, 47 Am. Rep. 262, holding that where the owner of land laid it off into lots and streets, sewered the streets, and sold the lots with an easement in the sewers, retaining no control, and the grantees and others connected their premises with the sewers, and thus created a nuisance, the grantor was not liable therefor, although he still retained the technical ownership of the soil of the streets.

Georgia.— Brimberry *v.* Savannah, etc., R. Co., 78 Ga. 641, 3 S. E. 274, holding that, although a nuisance is created on defendant's land, he is not liable for injuries caused to other land in the vicinity, where the act of a third person is instrumental in causing plaintiff's injury, without which no damage would have been inflicted.

Illinois.— Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241.

Missouri.— Grogan *v.* Broadway Foundry Co., 87 Mo. 321, holding that the owner of land is not liable for a nuisance created or maintained thereon by a person having the right of possession.

Vermont.—Pettibone *v.* Burton, 20 Vt. 302, holding that where the purchaser of land permits a third person, who was in possession at the time of the purchase, to retain the exclusive possession of the land, no rent being paid or claimed, the purchaser will not be liable for the act of such third person in subsequently permitting a nuisance to exist on the land without the knowledge of such purchaser.

6. Skelton *v.* Fenton Electric Light, etc.,

liability for a nuisance that he should be the owner of the property on which it is created, but it is sufficient that he created the nuisance.[7] An action will not, however, lie for annoyance or injury suffered by plaintiff by reason of acts of third persons on adjoining lands, which the owner himself might have done lawfully in the exercise of dominion over his land.[8]

D. Vendor and Purchaser.[9] One who erects a nuisance on his land cannot escape liability for damages caused thereby by a conveyance of the property,[10] and his liability extends to a continuance of the nuisance subsequent to his conveyance[11] where he is shown to derive some benefit from its continuance[12] or where he sold with a warranty of the continued use of the property as enjoyed while the nuisance existed.[13] While the purchaser of land may become responsible for the continuance of a nuisance created or erected by his guarantor,[14] the mere transfer does not make him liable;[15] but it must appear that he had notice or knowledge of such nuisance,[16] or that he did something after his purchase to constitute a fresh nuisance[17] or to increase the injurious effects of the one existing on the land at the time of his purchase,[18] and he is not liable for injuries caused solely by acts of his grantor.[19]

E. Landlord and Tenant.[20] One who erects a nuisance on his premises cannot escape liability by leasing the same,[21] and his liability extends to the continuance of the nuisance after the lease goes into effect.[22] A tenant in possession is

Co., 100 Mich. 87, 58 N. W. 609 (holding that in an action for injuries to marble monuments, resulting from iron rust and soot falling from a smokestack on defendant's land, the fact that the stack was erected for defendant by an independent contractor, and had not been accepted at the time of the alleged injuries, does not relieve defendant from liability in the absence of evidence that the stack was improperly built); Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880; Gulf, etc., R. Co. *v.* Chenault, 31 Tex. Civ. App. 558, 72 S. W. 868 (holding that a railroad company contracting with a local butcher to remove cattle killed in a railroad accident, in consideration of the hides, to a place where they will not bother any one, is liable for damages for a nuisance created by the butcher's depositing the carcasses in proximity to a third person's premises).

7. Dorman *v.* Ames, 12 Minn. 451; Smith *v.* Elliott, 9 Pa. St. 345, holding that persons who cause a nuisance by acts done on the land of a stranger are liable for its continuance, and it is no defense that they cannot lawfully enter to abate the nuisance without rendering themselves liable to an action by the owner of the land.

8. McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583.

9. See, generally, VENDOR AND PURCHASER.

10. *Indiana.*—Jordan *v.* Helwig, Wils. 447.

Kentucky.—West *v.* Louisville, etc., R. Co., 8 Bush 404.

Minnesota.—Dorman *v.* Ames, 12 Minn. 451.

New Hampshire.—Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Curtice *v.* Thompson, 19 N. H. 471.

New York.—Waggoner *v.* Jermaine, 3 Den. 306, 45 Am. Dec. 474.

Wisconsin.—Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601.

Condemnation for public use.—A landowner cannot avoid liability for continuing a nuisance on his premises on the ground that a city has condemned his land for public purposes, where the actual possession of the property has not yet passed from him. Sellick *v.* Hall, 47 Conn. 260.

11. Waggoner *v.* Jermaine, 3 Den. (N. Y.) 306, 45 Am. Dec. 474.

12. Hanse *v.* Cowing, 1 Lans. (N. Y.) 288.

13. Jordan *v.* Helwig, Wils. (Ind.) 447; East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201, 38 Atl. 631; Hanse *v.* Cowing, 1 Lans. (N. Y.) 288; Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601.

14. See *supra*, IV, B.

15. West *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 404; King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

16. See *infra*, VII, C, 3; VII, D, 4.

17. Fenter *v.* Toledo, etc., R. Co., 29 Ill. App. 250.

18. Fenter *v.* Toledo, etc., R. Co., 29 Ill. App. 250.

19. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414.

20. See, generally, LANDLORD AND TENANT.

21. Grady *v.* Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

22. Uggla *v.* Brokaw, 117 N. Y. App. Div. 586, 102 N. Y. Suppl. 857; New Rochelle Bd. of Health *v.* Valentine, 11 N. Y. Suppl. 112; Rex *v.* Pedley, 1 A. & E. 822, 3 L. J. M. C. 119, 3 N. & M. 627, 28 E. C. L. 380; Park *v.* White, 23 Ont. 611. See LANDLORD AND TENANT, 24 Cyc. 1126 note 94.

Notwithstanding a recovery for the erection, an action may afterward be maintained against the lessor for the continuance, as he has rent as a consideration for the continuance, and therefore ought to answer the damages it occasions. Grady *v.* Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

liable for a nuisance on the premises which is due to his act or failure of duty,[23] and the landlord is not liable for damage resulting from a nuisance which it was the tenant's duty to remove or repair[24] unless he authorized the continuance of the nuisance.[25] Neither is the landlord liable for a new nuisance created by the tenant during the term.[26] One who leases property for a purpose which must prove injurious or offensive to others is liable for the injury resulting therefrom.[27] Where the declaration alleges that both the landlord and the tenant are in possession and there is no plea traversing the possession, which is thus admitted, both landlord and tenant are liable.[28]

F. Trustees.[29] Persons in possession of premises as trustees are liable for a nuisance thereon.[30]

G. Charitable Institutions.[31] A charitable institution, even when not suable at law, is subject to an injunction against the continuance of a nuisance.[32]

H. Joint and Several Liability. All persons concerned in the creation or commission of a nuisance are liable for the damage caused thereby;[33] and where a nuisance is created by the joint act of several persons an action for the entire damage may be brought against either[34] or against all.[35] Where the damage is the result of the acts of several persons acting independently, each is liable for his proportion of the damage only if the nuisance is private;[36] but one who creates a public nuisance is responsible to individuals specially damaged not only for the actual loss he alone has occasioned but also for the damages caused by similar acts to other persons acting independently which contribute to the injury complained of.[37]

Receiving rent for nuisance equivalent to maintaining it.— New Rochelle Bd. of Health *v.* Valentine, 11 N. Y. Suppl. 112; Rosewell *v.* Prior, 1 Ld. Raym. 392, 713, 2 Salk. 459, 460.

Purchase of property on which nuisance exists.— One who, with full knowledge of the existence of a nuisance upon real estate for which the owner would be liable, purchases the reversionary interest in such real estate, and receives the rent thereof from the tenant in possession, voluntarily assumes the responsibility of such nuisance, and becomes liable for the damages sustained in consequence thereof subsequent to his purchase. Pierce *v.* German Sav., etc., Soc., 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45.

23. Murray *v.* Archer, 1 Silv. Sup. (N. Y.) 366, 5 N. Y. Suppl. 326.

Restoring a structure which was a nuisance to a right of way, and which has been abated, will render a tenant for years liable, notwithstanding the fact that the structure existed before the commencement of his tenancy. McDonough *v.* Gilman, 3 Allen (Mass.) 264, 80 Am. Dec. 72.

24. Uggla *v.* Brokaw, 117 N. Y. App. Div. 586, 102 N. Y. Suppl. 857; Pretty *v.* Bickmore, L. R. 8 C. P. 401, 28 L. T. Rep. N. S. 704, 21 Wkly. Rep. 733.

25. Jordan *v.* Helwig, Wils. (Ind.) 447; Pretty *v.* Bickmore, L. R. 8 C. P. 401, 28 L. T. Rep. N. S. 704, 21 Wkly. Rep. 733. See also Peacock Distilling Co. *v.* Com., 78 S. W. 893, 25 Ky. L. Rep. 1778, holding that where a distillery company furnished the slop from its distillery to a cattleman, to be fed on its premises, which it rented to him, liability for a nuisance created thereby is not avoided by the duty which it put upon feeders to prevent the same, or by an agreement that the tenant should be liable if any was created, where the means which the company provided to avoid the nuisance were inadequate.

26. Rex *v.* Pedley, 1 A. & E. 822, 3 L. J. M. C. 119, 3 N. & M. 627, 28 E. C. L. 380.

27. Jordan *v.* Helwig, Wils. (Ind.) 447.

28. McCallum *v.* Hutchinson, 7 U. C. C. P. 508.

29. See, generally, TRUSTS.

30. Murray *v.* Archer, 1 Silv. Sup. (N. Y.) 366, 5 N. Y. Suppl. 326.

31. See, generally, CHARITIES.

32. Deaconess Home, etc. *v.* Bontjes, 104 Ill. App. 484.

33. Cameron *v.* Heister, 10 Ohio Dec. (Reprint) 651, 22 Cinc. L. Bul. 384; Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; Houston, etc., R. Co. *v.* Lackay, 12 Tex. Civ. App. 229, 33 S. W. 768.

34. Hyde Park Thomson-Houston Light Co. *v.* Porter, 167 Ill. 276, 47 N. E. 206 [*affirming* 64 Ill. App. 152]; New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626; Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

35. Hyde Park Thomson-Houston Light Co. *v.* Porter, 167 Ill. 276, 47 N. E. 206 [*affirming* 64 Ill. App. 152].

36. Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566 [*affirming* 9 Hun 517]; Southern Salt Co. *v.* Roberson, (Tex. Civ. App. 1906) 97 S. W. 107; McFadden *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1906) 92 S. W. 989.

37. West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 25, 72 N. E. 879.

V. PRESCRIPTIVE RIGHT.

A. As to Private Nuisance — 1. Acquisition in General. It is well established that a person may acquire by prescription the right to maintain a private nuisance;[38] but it has been said that, while this is theoretically true, practically there are very few cases in which such prescriptive right can be established.[39]

2. Character of Use. In order to establish a prescriptive right to maintain a private nuisance the use must be adverse[40] under a claim of right,[41] and with the knowledge and acquiescence of the person whose right is invaded,[42] and the nuisance must be continued in substantially the same way and with equally injurious results for the entire prescriptive period.[43]

3. Duration and Continuity of Use. In order to give rise to a prescriptive right the use must be uninterrupted and continuous[44] for the full prescriptive

38. *California.*— Drew *v.* Hicks, (1894) 35 Pac. 563 [*approving* Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Richards *v.* Dower, 64 Cal. 62, 28 Pac. 113].

Georgia.— Phinizy *v.* Augusta, 47 Ga. 260.

Maryland.—Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494. See Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

Massachusetts.—Dana *v.* Valentine, 5 Metc. 8.

Minnesota.— Matthews *v.* Stillwater Gas etc., Co., 63 Minn. 493, 65 N. W. 947.

Missouri.—Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414.

New Mexico.—Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973.

New York.—Rochester *v.* Erickson, 46 Barb. 92. See also Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259. *Contra,* Campbell *v.* Seaman, 2 Thomps. & C. 231.

Utah.— North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co, 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851.

United States.—Tuttle *v.* Brightman, 53 Fed. 429; Tuttle *v.* Church, 53 Fed. 422.

England.—Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282; Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608, 116 E. C. L. 608.

Canada.—Weir *v.* Claude, 16 Can. Sup. Ct. 575 [*affirming* 4 Montreal Q. B. 197 (*reversing* 2 Montreal Super. Ct. 326)].

See 37 Cent. Dig. tit. "Nuisance," § 42.

Unlawful erection.— No grant, license, or authority to erect or continue a nuisance can be presumed from length of time, in opposition to repeated intermediate expressions of the legislative will prohibiting its erection. Lewis *v.* Stein, 16 Ala. 214, 50 Am. Dec. 177.

39. Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973.

40. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851.

41. North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851.

42. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851.

Bringing suits for damages for the use complained of shows sufficiently the want of acquiescence. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414.

43. *Indiana.*— Postlethwaite *v.* Payne, 8 Ind. 104; Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

Maine.— Crosby *v.* Bessey, 49 Me. 539, 77 Am. Dec. 271.

Minnesota.—Matthews *v.* Stillwater Gas, etc., Co., 63 Minn. 493, 65 N. W. 947.

New Mexico.— Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973.

England.— Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282; Goldsmid *v.* Tunsbridge Wells Imp. Com'rs, L. R. 1 Eq. 161, 13 L. T. Rep. N. S. 332, 14 Wkly. Rep. 92 [*affirmed* in L. R. 1 Ch. 349, 12 Jur. N. S. 308, 35 L. J. Ch. 382, 14 L. T. Rep. N. S. 154, 14 Wkly. Rep. 562]; Flight *v.* Thomas, 10 A. & E. 590, 7 Dowl. P. C. 741, 3 Jur. 822, 8 L. J. Q. B. 337, 2 P. & D. 531, 37 E. C. L. 316.

See 37 Cent. Dig. tit. "Nuisance," § 47.

But *compare* Dana *v.* Valentine, 5 Metc. (Mass.) 8 [*following* Bolivar Mfg. Co. *v.* Neponset Mfg. Co., 16 Pick. 241], holding that it is no objection to a claim of prescriptive right that, until recently, plaintiffs suffered no damage from defendant's works, for, where a person's right is invaded, he may bring an action for such invasion, without proof of actual damage.

New machinery in ancient mill.— If, in an ancient mill, a new and different machine, of another description, is erected, the operation of which is a nuisance to the mills below, the antiquity of the mill itself affords no protection to the new machine erected within it, but the latter is to be regarded as an original and independent mill. Simpson *v.* Seavey, 8 Me. 138, 22 Am. Dec. 228.

44. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; Ducktown Sulphur, etc., Co. *v.* Barnes, (Tenn. 1900) 60 S. W. 593; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851; Roberts *v.* Clarke, 18 L. T. Rep. N. S. 49.

period.[45] But continuous use does not necessarily mean constant use,[46] and a temporary cessation of the use without any intention to abandon it does not destroy the prescriptive right or require that the period shall start anew when the use is recommenced.[47] Where, however, the business or use has been discontinued and abandoned and afterward resumed, the period prior to such abandonment cannot have any effect toward the acquirement of a prescriptive right.[48]

4. Prescriptive Right as to Similar Nuisance. Where a brick-kiln is complained of as a nuisance, the owner's prescriptive right to another kiln nearer to the house and almost in line with the kiln complained of cannot be urged as a reason for not granting an injunction.[49]

5. Burden of Proof. A person claiming a prescriptive right to maintain or commit a nuisance has the burden of proof as to the prescription.[50]

B. As to Public Nuisance. There is no such thing as a prescriptive right to maintain a public nuisance,[51] and hence prescription is no defense to a proceeding to abate a nuisance either by public authorities[52] or by a private individual,[53] or

45. *Minnesota.*— Mueller *v.* Fruen, 36 Minn. 273, 30 N. W. 886, twenty years.

Missouri.— Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414, ten years.

Utah.— North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851, twenty years.

England.— Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282, twenty years.

Canada.— Radenhurst *v.* Coate, 6 Grant Ch. (U. C.) 139, twenty years.

See 37 Cent. Dig. tit. "Nuisance," § 46.

46. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414, holding that where the injury done to the servient estate is periodical, with no abandonment or discontinuance of the claim of right, it is sufficient.

47. Dana *v.* Valentine, 5 Metc. (Mass.) 8, cessation of offensive trade for two years in course of period required to give prescriptive right.

48. Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494.

49. Bareham *v.* Hall, 22 L. T. Rep. N. S. 116.

50. Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973; Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282, holding that he must prove affirmatively that a legal nuisance has been in fact committed during twenty years before the filing of the bill.

51. *Alabama.*— Birmingham *v.* Land, 137 Ala. 538, 34 So. 613; Wright *v.* Moore, 38 Ala. 593, 82 Am. Dec. 731.

California.— Drew *v.* Hicks, (1894) 35 Pac. 563; People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

Connecticut.—Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691.

Georgia.— Phinizy *v.* Augusta, 47 Ga. 260.

Illinois.— Bloomington *v.* Costello, 65 Ill. App. 407.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Pettis *v.* Johnson, 56 Ind. 139; Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134.

Iowa.— Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268.

Maryland.— Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Philadelphia, etc., R. Co. *v.* State, 20 Md. 157.

Massachusetts.— Hynes *v.* Brewer, (1907) 80 N. E. 503, 9 L. R. A. N. S. 598.

Minnesota.— Isham *v.* Broderick, 89 Minn. 397, 95 N. W. 224.

Missouri.—State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

New York.— People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129]; Rochester *v.* Erickson, 46 Barb. 92; Mills *v.* Hall, 9 Wend. 315, 24 Am. Dec. 160.

Pennsylvania.— Com. *v.* Yost, 11 Pa. Super. Ct. 323 [*reversing* 12 York Leg. Rec. 149]; New Castle City *v.* Raney, 6 Pa. Co. Ct. 87; Com. *v.* Van Sickle, 7 Pa. L. J. 82, 4 Pa. L. J. Rep. 104.

South Carolina.— State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737.

Texas.— Rhodes *v.* Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

United States.— Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

Canada.— Reg. *v.* Brewster, 8 U. C. C. P. 208.

See 37 Cent. Dig. tit. "Nuisance," § 139.

A city cannot acquire a prescriptive right to maintain a public nuisance. Litchfield *v.* Whitenack, 78 Ill. App. 364; Bloomington *v.* Costello, 65 Ill. App. 407.

52. State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009; Mills *v.* Hall, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; State *v.* Holman, 104 N. C. 861, 10 S. E. 758; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

53. Birmingham *v.* Land, 137 Ala. 538, 34 So. 613; Bowen *v.* Wendt, 103 Cal. 236, 37 Pac. 149; Meiners *v.* Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

to an action by a private individual for damages for the injury which he has received,[54] or to an indictment against the person maintaining the nuisance.[55]

VI. RIGHT OF PRIVATE INDIVIDUAL TO RELIEF AGAINST PUBLIC NUISANCE.

A. General Rule. A public nuisance does not furnish grounds for an action either at law or in equity by an individual who merely suffers an injury which is common to the general public;[56] but an individual who sustains an injury peculiar to himself may have relief against a public nuisance,[57] and is entitled

54. Mills *v.* Hall, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; Rhodes *v.* Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

55. State *v.* Phipps, 4 Ind. 515; People *v.* Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; Com. *v.* Yost, 12 York Leg. Rec. (Pa.) 149 [*reversed* on other grounds in 11 Pa. Super. Ct. 323].

56. *Arkansas.*— Martin *v.* Hornor, (1907) 103 S. W. 1134.

California.—Spring Valley Waterworks *v.* Fifield, 136 Cal. 14, 68 Pac. 108; Yolo County *v.* Sacramento, 36 Cal. 193.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 4 App. Cas. 491.

Georgia.— Cannon *v.* Merry, 116 Ga. 291, 42 S. E. 274, except in a case falling within the act of Dec. 19, 1889, providing for abating or enjoining any place commonly known as a "blind tiger."

Idaho.— Redway *v.* Moore, 3 Ida. 312, 29 Pac. 104.

Illinois.— Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Grant *v.* Defenbaugh, 91 Ill. App. 618.

Kentucky.— Dulaney *v.* Louisville, etc., R. Co., 100 Ky. 628, 38 S. W. 1050, 18 Ky. L. Rep. 1088; Seifried *v.* Hays, 81 Ky. 377, 50 Am. Rep. 167.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868; Taylor *v.* Portsmouth, etc., St. R. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216.

Maryland.— King *v.* Hamill, 97 Md. 103, 54 Atl. 625.

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Quincy Canal *v.* Newcomb, 7 Metc. 276, 39 Am. Dec. 778.

Michigan.— Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

Minnesota.— Long *v.* Minneapolis, 61 Minn. 46, 63 N. W. 174.

Nebraska.— George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664; Hill *v.* Pierson, 45 Nebr. 503, 63 N. W. 835.

New Jersey.— Humpbreys *v.* Eastlack, 63 N. J. Eq. 136, 51 Atl. 775; Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

New York.— Gallagher *v.* Keating, 40 N. Y. App. Div. 81, 57 N. Y. Suppl. 632, 1123; Young *v.* Scheu, 56 Hun 307, 9 N. Y. Suppl. 349; Anderson *v.* Doty, 33 Hun 160; Groat *v.* Moak, 26 Hun 380 [*affirmed* in 94 N. Y. 115]; Smith *v.* Lockwood, 13 Barb. 209; Manhattan Gas Light Co. *v.* Barker, 7 Rob. 523; Dougherty *v.* Bunting, 1 Sandf. 1; Old Forge Co. *v.* Webb, 31 Misc. 316, 65 N. Y. Suppl. 503 [*affirmed* in 57 N. Y. App. Div. 636, 68 N. Y. Suppl. 1145]; Stilwell *v.* Buffalo Riding Academy, 4 N. Y. Suppl. 414, 21 Abb. N. Cas. 472.

North Carolina.— Frizzle *v.* Patrick, 59 N. C. 354.

Ohio.— Ett *v.* Snyder, 5 Ohio Dec. (Reprint) 523, 6 Am. L. Rec. 415.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Mechling *v.* Kittanning Bridge Co., 1 Grant 416; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. 85; Thompson *v.* Pittsburg Charity Hospital, 31 Pittsb. Leg. J. N. S. 15; Mason *v.* Presbyterian Hospital, 30 Pittsb. Leg. J. N. S. 359.

Rhode Island.—O'Reilly *v.* Perkins, 22 R. I. 364, 48 Atl. 6; Clark *v.* Peckham, 9 R. I. 455.

Virginia.— Beveridge *v.* Lacey, 3 Rand. 63.

West Virginia.—Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

Wisconsin.— Kuehn *v.* Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553.

Wyoming.— Anthony Wilkinson Live Stock Co. *v.* Mellquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. N. S. 733.

United States.— Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*.

England.— Reg. *v.* Stephens, L. R. 1 Q. B. 702, 7 B. & S. 710, 10 Cox C. C. 340, 12 Jur. N. S. 961, 14 L. T. Rep. N. S. 593, 14 Wkly. Rep. 859.

See 37 Cent. Dig. tit. "Nuisance," § 163.

The reason for the rule that equity will not abate a public nuisance at the instance of a private person who has sustained no special damage is that if one individual may interpose for an infringement upon public right, or for a public injury, any other person may, and, as a discharge in any case would be no bar to any other, there would be no end to litigation. Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

Under Ga. Code, § 3002, providing that, "where the consequences of a nuisance about to be erected or commenced will be irreparable in damages . . . a court of equity may interfere to arrest a nuisance before it is completed," an individual is entitled to relief by injunction against a nuisance which will injuriously affect his health, whether it is a public or private nuisance, and without regard to whether, from the location of his house or other circumstances peculiar to him, he suffers from it more than the public generally. De Vaughn *v.* Minor, 77 Ga. 809, 1 S. E. 433.

57. *California.*— Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82; Lind *v.* San Luis

to proceed in equity for the abatement of or an injunction against the nuisance,[58]

Obispo, 109 Cal. 340, 42 Pac. 437; Yolo County *v.* Sacramento, 36 Cal. 193; Blanc *v.* Klumpke, 29 Cal. 156.

Georgia.— Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280.

Illinois.— Ottawa Gaslight, etc., Co. *v.* Thompson, 39 Ill. 598; Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

Iowa.— Millhiser *v.* Willard, 96 Iowa 327, 65 N. W. 325; Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

Louisiana.— Kuhl *v.* St. Bernard Rendering, etc., Co., 117 La. 86, 41 So. 361; New Orleans *v.* Lagasse, 114 La. 1055, 38 So. 828.

Maine.— Brown *v.* Watson, 47 Me. 161, 74 Am. Dec. 482.

Maryland.— Baltimore *v.* Marriott, 9 Md. 160.

Massachusetts.—Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Wesson *v.* Washburn Iron Co., 13 Allen 95, 90 Am. Dec. 181.

Michigan.— McCormick *v.* Weaver, 144 Mich. 6, 107 N. W. 314.

Minnesota.—Viehahn *v.* Crow Wing County, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. N. S. 1126.

Missouri.— Schoen *v.* Kansas City, 65 Mo. App. 134.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156; Lippincott *v.* Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York.— Cranford *v.* Tyrrell, 128 N. Y. 341, 28 N. E. 514; Francis *v.* Schoellkopf, 53 N. Y. 152; Holroyd *v.* Sheridan, 53 N. Y. App. Div. 14, 65 N. Y. Suppl. 442; De Laney *v.* Blizzard, 7 Hun 7; Carhart *v.* Auburn Gas Light Co., 22 Barb. 297; Hudson River R. Co. *v.* Loeb, 7 Rob. 418; Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89.

North Carolina.— Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

Ohio.— Story *v.* Hammond, 4 Ohio 376.

Pennsylvania.— Wier's Appeal, 74 Pa. St. 230; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92.

Tennessee.— Richi *v.* Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646.

Virginia.— Miller *v.* Truehart, 4 Leigh 569.

Washington.— Smith *v.* Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

United States.— Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

England.— Benjamin *v.* Storr, L. R. 9 C. P. 400, 43 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631; Greasley *v.* Codling, 2 Bing. 263, 3 L. J. C. P. O. S. 262, 9 Moore C. C. 489, 9 E. C. L. 572; Rose *v.* Groves, 1 D. & L. 61, 7 Jur. 951, 12 L. J. C. P. 251, 5 M. & G. 613, 6 Scott N. R. 645, 44 E. C. L. 323; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104; Sampson *v.* Smith, 2 Jur. 563, 7 L. J. Ch. 260, 8 Sim. 272, 8 Eng. Ch. 272, 59 Eng. Reprint 108; Spencer *v.* London, etc., R. Co., 7 L. J. Ch. 281, 1 R. & Can. Cas. 159, 8 Sim. 193, 8 Eng. Ch. 193, 59 Eng. Reprint 77; Knight *v.* Gardner, 19 L. T. Rep. N. S. 673.

Canada.— Watson *v.* City of Toronto Gaslight, etc., Co., 4 U. C. Q. B. 158; Drew *v.* Baby, 1 U. C. Q. B. 438.

See 37 Cent. Dig. tit. "Nuisance," § 164 *et seq.*

58. *Alabama.*— Montgomery First Nat. Bank *v.* Tyson, 144 Ala. 457, 39 So. 560; Richards *v.* Daugherty, 133 Ala. 569, 31 So. 934; Whaley *v.* Wilson, 112 Ala. 627, 20 So. 922; Columbus *v.* Rodgers, 10 Ala. 37; Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

California.— Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82; Lind *v.* San Luis Obispo, 109 Cal. 340, 42 Pac. 437.

Connecticut.— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

Florida.— Lutterloh *v.* Cedar Keys, 15 Fla. 306.

Georgia.— Savannah, etc., R. Co. *v.* Gill, 118 Ga. 737, 45 S. E. 623; Georgia Chemical, etc., Co. *v.* Colquitt, 72 Ga. 172.

Indiana.— Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249; Adams *v.* Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57.

Iowa.— Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

Kansas.— Douglass *v.* Leavenworth, 6 Kan. App. 96, 49 Pac. 676.

Louisiana.— Blanc *v.* Murray, 36 La. Ann. 162, 51 Am. Rep. 7; Musgrove *v.* St. Louis Catholic Church, 10 La. Ann. 431.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868; Whitmore *v.* Brown, 100 Me. 410, 61 Atl. 410; Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Maryland.— Garitee *v.* Baltimore, 53 Md. 422; Hamilton *v.* Whitridge, 11 Md. 128, 69 Am. Dec. 184.

Massachusetts.— Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730.

Michigan.— Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

Mississippi.— Pascagoula Boom Co. *v.* Dixon, 77 Miss. 587, 28 So. 724, 73 Am. St. Rep. 537; Whitfield *v.* Rogers, 26 Miss. 84, 59 Am. Dec. 244.

Nebraska.— Bischof *v.* Merchants' Nat. Bank, (1906) 106 N. W. 996.

New Jersey.— Gilbough *v.* West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289; Humphreys *v.* Eastlack, 63 N. J. Eq. 136, 51 Atl. 775; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314.

New York.— Cranford *v.* Tyrrell, 128 N. Y. 341, 28 N. E. 514 [*affirming* 13 N. Y. Suppl. 951]; Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Buskirk *v.* O. J. Gude Co., 115 N. Y. App. Div. 330, 100 N. Y. Suppl. 777; Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122]; De Laney

or to maintain an action at law for damages on account of the special injury which he has received.[59]

B. Nature and Extent of Special Injury — 1. In General. It is absolutely essential to the right of an individual to relief against a public nuisance that he

v. Blizzard, 7 Hun 7; Milhau *v.* Sharp, 28 Barb. 228, 7 Abb. Pr. 220 [*affirmed* in 27 N. Y. 611, 84 Am. Dec. 314]; Forty-Second St., etc., R. Co. *v.* Thirty-Fourth St. R. Co., 52 N. Y. Super. Ct. 252; Close *v.* Witbeck, 52 Misc. 224, 102 N. Y. Suppl. 904; Van Siclen *v.* New York, 32 Misc. 403, 66 N. Y. Suppl. 555; Jencks *v.* Miller, 17 Misc. 461, 40 N. Y. Suppl. 1088; Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188; Penniman *v.* New York Balance Co., 13 How. Pr. 40; Corning *v.* Lowerre, 6 Johns. Ch. 439.

North Carolina.— Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

Ohio.— Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.

Oregon.— Blagen *v.* Smith, 34 Oreg. 394, 56 Pac. 292, 44 L. R. A. 522; Parrish *v.* Stephens, 1 Oreg. 73.

Pennsylvania.— Pittsburgh *v.* Scott, 1 Pa. St. 309; Biddle *v.* Ash, 2 Ashm. 211; Norris *v.* Roat, 8 Kulp 346; Horstman *v.* Young, 13 Phila. 19.

Tennessee.— Weakley *v.* Page, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552.

Texas.— Marsan *v.* French, 61 Tex. 173, 48 Am. Rep. 272.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055; Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513.

Wisconsin.— Rogers *v.* John Week Lumber Co., 117 Wis. 5, 93 N. W. 821; Meiners *v.* Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Pettibone *v.* Hamilton, 40 Wis. 402; Walker *v.* Shepardson, 2 Wis. 384, 60 Am. Dec. 423.

United States.— Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. ed. 311; Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000; Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628.

England.—Roskell *v.* Whitworth, 19 Wkly. Rep. 804.

Canada.— Cline *v.* Cornwall, 21 Grant Ch. (U. C.) 129.

See 37 Cent. Dig. tit. "Nuisance," § 164 *et seq.*

Statute authorizing suit by private individual constitutional.— Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19; *Ex p.* Allison, (Tex. 1906) 90 S. W. 870.

A county as the owner of property injured by the deposit of mining *débris* in the tributary of the Yuba river may maintain an action and enjoin the deposit therein of such *débris* by a mining company engaged in sluice mining upon such tributary, as a public nuisance in such case is also a private nuisance to the county. Yuba County *v.* Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

Relief may be granted on the ground of public benefit as well as of preventing special injury to plaintiff, where plaintiff shows such special injury as gives him a standing in court. Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000.

Necessity for irreparable injury.— It is not enough to confer jurisdiction on equity to enjoin a public nuisance at the suit of a private citizen that plaintiff has suffered damages special and peculiar to himself in which the public do not share, but it is also necessary that the injury should be such that it is incapable of being measured and compensated in damages, so that an action at law will afford plaintiff no adequate remedy or redress. George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664. See also Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012. See, generally, *infra*. VII, C, 2, b, i.

59. *Alabama.*— Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120.

Arkansas.— Little Rock, etc., R. Co. *v.* Brooks, 39 Ark. 403, 43 Am. Rep. 277.

California.— Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82; Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; Yolo County *v.* Sacramento, 36 Cal. 193.

Connecticut.— Seeley *v.* Bishop, 19 Conn. 128; Burrows *v.* Pixley, 1 Root 362, 1 Am. Dec. 56.

Georgia.— Hamilton *v.* Columbus, 52 Ga. 435.

Illinois.— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247]; Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726 [*affirming* 34 Ill. App. 244]; Crane Co. *v.* Stammers, 83 Ill. App. 329.

Indiana.— West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; Dwenger *v.* Chicago, etc., R. Co., 98 Ind. 153; Waltman *v.* Rund, 94 Ind. 225; Scheible *v.* Law, 65 Ind. 332; Haller *v.* Pine, 8 Blackf. 175, 44 Am. Dec. 762.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Kansas.— Clay County School Dist. No. 1 *v.* Neil, 36 Kan. 617, 14 Pac. 253, 59 Am. Rep. 575; Venard *v.* Cross, 8 Kan. 248.

Louisiana.—Bruning *v.* New Orleans Canal, etc., Co., 12 La. Ann. 541.

Maine.— Washburn *v.* Gilman, 64 Me. 163, 18 Am. Rep. 246; Dudley *v.* Kennedy, 63 Me. 465; Low *v.* Knowlton, 26 Me. 128, 45 Am. Dec. 100.

Maryland.— Harrison *v.* Sterett, 4 Harr. & M. 540.

Massachusetts.—Stetson *v.* Faxon, 19 Pick. 147, 31 Am. Dec. 123; Barden *v.* Crocker, 10 Pick. 383.

Minnesota.— Thelen *v.* Farmer, 36 Minn. 225, 30 N. W. 670.

Missouri.— Givens *v.* Van Studdiford, 72

should show that he has suffered or will suffer some special injury other than that in which all the general public share alike,[60] and the difference between the

Mo. 129 [*affirming* 4 Mo. App. 498]; Schoen *v.* Kansas City, 65 Mo. App. 134, holding that the right to damages on account of a public nuisance is not affected by the fact that the property injured does not abut on the place of the nuisance.

New Jersey.— Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12.

New York.— Cranford *v.* Tyrrell, 128 N. Y. 341, 28 N. E. 514 [*affirming* 13 N. Y. Suppl. 951]; Harris *v.* Thompson, 9 Barb. 350; Manhattan Gas Light Co. *v.* Barker, 7 Rob. 523; Ninth Ave. R. Co. *v.* New York El. R. Co., 7 Daly 174; Van Siclen *v.* New York, 32 Misc. 403, 66 N. Y. Suppl. 555.

North Carolina.— Hickory *v.* Southern R. Co., 141 N. C. 716, 53 S. E. 955; Downs *v.* High Point, 115 N. C. 182, 20 S. E. 385; Gordon *v.* Baxter, 74 N. C. 470.

Pennsylvania.— Mechlin *v.* Kittanning Bridge Co., 1 Grant 416.

Rhode Island.— Clark *v.* Peckham, 10 R. I. 35, 14 Am. Rep. 654; Clark *v.* Peckham, 9 R. I. 455; Aldrich *v.* Howard, 7 R. I. 199.

Texas.— Marsan *v.* French, 61 Tex. 173, 48 Am. Rep. 272; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278; Allen *v.* Paris, 1 Tex. App. Civ. Cas. § 885.

Vermont.— Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142; Abbot *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

Wisconsin.— Clark *v.* Chicago, etc., R. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187; Greene *v.* Nunnemacher, 36 Wis. 50.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012.

England.— Fritz *v.* Hobson, 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. Rep. N. S. 225, 28 Wkly. Rep. 459.

See 37 Cent. Dig. tit. "Nuisance," § 164 *et seq.*

60. *Arkansas.*— Martin *v.* Hornor, (1907) 103 S. W. 1134.

California.— Parrott *v.* Floyd, 54 Cal. 534; Payne *v.* McKinley, 54 Cal. 532; Jarvis *v.* Santa Clara Valley R. Co., 52 Cal. 438. *Contra*, Gunter *v.* Geary, 1 Cal. 462.

Connecticut.— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274; O'Brien *v.* Norwich, etc., R. Co., 17 Conn. 372; Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

District of Columbia.— Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. 356.

Idaho.— Redway *v.* Moore, 3 Ida. 312, 29 Pac. 104.

Illinois.— Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Vail *v.* Mix, 74 Ill. 127; Grant *v.* Defenbaugh, 91 Ill. App. 618.

Indiana.— Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 566, 58 N. E. 851.

Kansas.— Clay County School Dist. No. 1 *v.* Neil, 36 Kan. 617, 14 Pac. 253, 59 Am. Rep. 575.

Kentucky.— Beckham *v.* Brown, 40 S. W. 684, 19 Ky. L. Rep. 519. *Contra*, Gates *v.* Blincoe, 2 Dana 158, 26 Am. Dec. 440.

Louisiana.— Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641.

Maine.— Whitmore *v.* Brown, 100 Me. 410, 61 Atl. 985; Low *v.* Knowlton, 26 Me. 128, 45 Am. Dec. 100. See Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466.

Michigan.— Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

Minnesota.—Viebahn *v.* Crow Wing County, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. N. S. 1126.

Mississippi.— Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378.

Missouri.— Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531.

Nebraska.— Letherman *v.* Hauser, (1906) 110 N. W. 745; Bischof *v.* Merchants' Nat. Bank, (1906) 106 N. W. 996; Shed *v.* Hawthorne, 3 Nebr. 179.

Nevada.— Fogg *v.* Nevada-California-Oregon R. Co., 20 Nev. 429, 23 Pac. 840.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156; Humphreys *v.* Eastlack, 63 N. J. Eq. 136, 51 Atl. 775; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314; Allen *v.* Monmouth County, 13 N. J. Eq. 68.

New York.— Hill *v.* New York, 139 N. Y. 495, 34 N. E. 1090; Milhau *v.* Sharp, 28 Barb. 228, 7 Abb. Pr. 220 [*affirmed* in 27 N. Y. 611, 84 Am. Dec. 314]; Smith *v.* Lockwood, 13 Barb. 209; Manhattan Gas Light Co. *v.* Barker, 7 Rob. 523; Wolf *v.* Manhattan R. Co., 51 Misc. 426, 101 N. Y. Suppl. 493; Hill *v.* New York, 18 N. Y. Suppl. 399; Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188.

North Carolina.— Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. N. S. 554.

Ohio.— Ett *v.* Snyder, 5 Ohio Dec. (Reprint) 523, 6 Am. L. Rec. 415.

Oklahoma.— U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729.

Pennsylvania.— Rhymer *v.* Fritz, 206 Pa. St. 230, 55 Atl. 959, 98 Am. St. Rep. 777; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Mechling *v.* Kittanning Bridge Co., 1 Grant 416; Christian *v.* Dunn, 8 Kulp 320; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. 85; Peterson *v.* Navy Yard, etc., R. Co., 5 Phila. 199.

Rhode Island.— Clark *v.* Peckham, 9 R. I. 455.

South Carolina.— Hellams *v.* Switzer, 24 S. C. 39.

injury to him and the injury to the general public must be one of kind and not merely of degree.[61]

2. Substantial Character of Injury.[62] The special injury which will entitle an individual to relief against a public nuisance must be of a substantial character,[63] but it is not necessary that the damage therefrom should be considerable.[64]

Vermont.— Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84.

Virginia.— Beveridge *v.* Lacey, 3 Rand. 63, holding that equity will not interfere to prevent a public nuisance, unless the complainant shows some injury to himself actually sustained or justly apprehended.

West Virginia.—Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

Wisconsin.— Tiede *v.* Schneidt, 105 Wis. 470, 81 N. W. 826.

Wyoming.— Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. N. S. 733.

United States.— Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. ed. 686 [*affirming* 3 Wash. Terr. 452, 17 Pac. 890]; Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. ed. 311; Georgetown *v.* Alexandria Coal Co., 12 Pet. 91, 9 L. ed. 1012; Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000; St. Louis *v.* Knapp, etc., Co., 6 Fed. 221; Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

England.—Benjamin *v.* Storr, L. R. 9 C. P. 400, 43 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631.

See 37 Cent. Dig. tit. "Nuisance," § 164 *et seq.*

A municipal corporation, simply as a property-owner, stands upon the same footing as other individual property-owners, and can maintain a bill to abate a public nuisance only by the averment of a special grievance, not similarly affecting the public at large. Dover *v.* Portsmouth Bridge, 17 N. H. 200.

Mere apprehension not sufficient.—A resolution of a municipal board of health granting a permit to a corporation as night scavenger, and designating certain lands of said corporation within the city limits as the place for the deposit and final disposition, by manufacture, of the night soil, if otherwise lawful, will not be annulled at the instance of owners of property situated near such land, on the ground that a nuisance is thereby created, where there is merely an apprehension by the prosecutors that their property will be injured. State *v.* Newark Bd. of Health, 54 N. J. L. 325, 23 Atl. 949.

61. *California.*— Harniss *v.* Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

District of Columbia.— Nottingham *v.* Baltimore, etc., R. Co., 3 MacArthur 517.

Kansas.— Clay County School Dist. No. 1 *v.* Neil, 36 Kan. 617, 14 Pac. 253, 59 Am. Rep. 575.

Maryland.—Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572.

Michigan.— Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

Nebraska.— George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664.

New Jersey.— Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156.

North Carolina.— Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. N. S. 554.

Pennsylvania.— Brunner *v.* Schaffer, 11 Pa. Co. Ct. 550.

South Carolina.— Baltzeger *v.* Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789 [*following* South Carolina Steamboat Co. *v.* Wilmington, etc., R. Co., 46 S. C. 327, 24 S. E. 337, 57 Am. St. Rep. 688, 33 L. R. A. 541; South Carolina Steam-Boat Co. *v.* South Carolina R. Co., 30 S. C. 539, 9 S. E. 650, 14 Am. St. Rep. 923, 4 L. R. A. 209].

Wyoming.—Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. N. S. 733.

See 37 Cent. Dig. tit. "Nuisance," § 168.

But *compare* Harley *v.* Merrill Brick Co., 83 Iowa 73, 76, 48 N. W. 1000 [*followed* in Millhiser *v.* Willard, 96 Iowa 327, 65 N. W. 325], where it is said: "It is not strictly true that a person damaged by a nuisance cannot recover, if his damages be of the same character as those sustained by the public. If the health or property of a person be injured from such a cause, he may recover, although the health and property of the general public affected by the nuisance be affected in the same manner. The character of the injury would be the same in each case, but the damages sustained by each individual would be distinct from that suffered by the public, and a recovery therefor would be permitted. . . . Section 3331 of the Code [Iowa Code 1897, § 4302] authorizes a recovery by any person injured by a nuisance."

62. See also *supra*, III, D, 2.

63. *New Jersey.*— Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530.

New York.— Wolf *v.* Manhattan R. Co., 51 Misc. 426, 101 N. Y. Suppl. 493.

Pennsylvania.— Price *v.* Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401, holding that to make out a case of special injury to property from a nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown.

West Virginia.— Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

England.— Benjamin *v.* Storr, L. R. 9 C. P. 400, 43 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631.

See 37 Cent. Dig. tit. "Nuisance," § 166. And see, generally, *supra*, III, D, 2.

64. Brown *v.* Watson, 47 Me. 161, 74 Am. Dec. 482; De Laney *v.* Blizzard, 7 Hun

3. Direct or Consequential Injury. It has been held that the injury must be direct,[65] but there is also authority for the view that this is not necessary but consequential damage is sufficient to support the action.[66]

4. Number of Persons Affected. The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance;[67] and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.[68]

5. Particular Injuries. Whether the individual seeking relief has sustained special injury of such a character and to such an extent as to support his action is a matter which depends entirely upon the facts appearing in each particular case.[69]

(N. Y.) 7 (holding that it is enough that plaintiff has sustained special damage and no definite amount of damage need be shown); Forty-second St., etc., R. Co. *v.* Thirty-Fourth St. R. Co., 52 N. Y. Super. Ct. 252.

65. Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Baltzeyer *v.* Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789 [*following* South Carolina Steamboat Co. *v.* Wilmington, etc., R. Co., 46 S. C. 327, 24 S. E. 337, 57 Am. St. Rep. 688, 33 L. R. A. 541; South Carolina Steam-Boat Co. *v.* South Carolina R. Co., 30 S. C. 539, 9 S. E. 650, 14 Am. St. Rep. 923, 4 L. R. A. 209]; Benjamin *v.* Storr, L. R. 9 C. P. 400, 45 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631.

66. Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323; Lansing *v.* Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; Pittsburgh *v.* Scott, 1 Pa. St. 309; Hughes *v.* Heiser, 1 Binn. (Pa.) 463, 2 Am. Dec. 459, action on the case for damages.

67. O'Brien *v.* Central Iron, etc., Co., 158 Ind. 218, 63 N. E. 302; Percival *v.* Yousling, 120 Iowa 451, 94 N. W. 913; Roessler, etc., Chemical Co. *v.* Doyle, 73 N. J. L. 521, 64 Atl. 156; Francis *v.* Schoellkopf, 53 N. Y. 152.

68. Seifried *v.* Hays, 81 Ky. 377, 50 Am. Rep. 167.

69. Injuries sufficient to support action by individual see the following cases:

Alabama.— Richards *v.* Daugherty, 133 Ala. 569, 31 So. 934, dam across stream, producing malaria, and affecting health of plaintiff and his family.

California.— Lind *v.* San Luis Obispo, 109 Cal. 340, 42 Pac. 437, cesspool causing offensive sewage matter to be deposited on plaintiff's lot.

Georgia.— Hamilton *v.* Columbus, 52 Ga. 435, ditch causing stagnant water to accumulate and thereby generating malaria and causing sickness in plaintiff's family and rendering his premises unfit for habitation.

Illinois.— Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. 878 [*affirming* 48 Ill. App. 247]; Wylie *v.* Elwood, 34 Ill. App. 244 [*affirmed* in 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726].

Indiana.— O'Brien *v.* Central Iron, etc., Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305; Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Adams *v.* Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57.

Iowa.— Platt *v.* Chicago, etc., R. Co., 74 Iowa 127, 37 N. W. 107.

Kentucky.— Bannon *v.* Murphy, 38 S. W. 889, 18 Ky. L. Rep. 989.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868, unlicensed wharf obstructing right of access to and departure from land by way of tide-waters.

Maryland.— Garitee *v.* Baltimore, 53 Md. 422, deposit of material dredged from river basin or flats obstructing access to plaintiff's land.

Michigan.— McCormick *v.* Weaver, 144 Mich. 6, 107 N. W. 314.

Missouri.— Edmondson *v.* Moberly, 98 Mo. 523, 11 S. W. 990.

Nebraska.— Bischof *v.* Merchants' Nat. Bank, (1906) 106 N. W. 996.

New Jersey.— Gilbaugh *v.* West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289, Sunday ball games causing noise appreciably disturbing rest and quiet of neighbors.

New York.— Hill *v.* New York, 139 N. Y. 495, 34 N. E. 1090 [*reversing* 18 N. Y. Suppl. 399]; Buskirk *v.* O. J. Gude Co., 115 N. Y. App. Div. 330, 100 N. Y. Suppl. 777; Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122]; Ninth Ave. R. Co. *v.* New York El. R. Co., 7 Daly 174; Close *v.* Witbeck, 52 Misc. 224, 102 N. Y. Suppl. 904 (projecting front of building encroaching on street and decreasing value of plaintiff's building); Jencks *v.* Miller, 17 Misc. 461, 40 N. Y. Suppl. 1088.

Ohio.— Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.

Pennsylvania.— Norris *v.* Roat, 8 Kulp 346.

Tennessee.— Weakley *v.* Page, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055 (slaughter-house and cattle pens causing offensive smells, corrupting the atmosphere and food in and about plaintiff's dwelling); Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513 (bawdy-house caus-

VII. REMEDIES.

A. Ancient and Modern Remedies. The old common-law remedies by action for nuisance were two: (1) A writ of quod permittat prosternere, which was in the nature of a writ of right and commanded defendant to permit plaintiff to abate the nuisance or show cause against the same, and plaintiff could have judgment to abate the nuisance and for damages against defendant; and (2) an assize of nuisance in which the sheriff was commanded to summon a jury to view the premises and if they found for plaintiff he had judgment to have the nuisance abated and for damages. Both these remedies, however, have been long out of use.[70] The modern remedies are the right to abate the nuisance without any legal process,[71] a suit in equity for the abatement of or an injunction against the nuisance,[72] an action at law for damages,[73] or a criminal prosecution of the person responsible for the nuisance.[74] It has been held that where concurrent remedies exist for the abatement of a nuisance, the choice and prosecution of one excludes a resort to the other.[75]

B. Summary Abatement — 1. By Private Individual — a. Right to Abate — (I) *Private Nuisance.* It is well established that a person who is aggrieved by a private nuisance has the right to abate the same by his own act,[76] upon his own

ing adjoining proprietor to witness indecent conduct and to hear loud, boisterous, and indecent noises); Smith *v.* Kitchell, 21 Wash. 556, 58 Pac. 667, 75 Am. St. Rep. 858 (obstruction of public highway forming only means of access to plaintiff's land).

Wisconsin.— Rogers *v.* John Week Lumber Co., 117 Wis. 5, 93 N. W. 821.

See 37 Cent. Dig. tit. "Nuisance," § 169.

Injuries not sufficient to support action by individual see the following cases:

Maryland.— Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572, railroad switch interfering with use of road.

New Jersey.— Higgins *v.* Princeton, 8 N. J. Eq. 309, holding that the fact that a dwelling-house in the neighborhood of the proposed site for a market-house would be less eligible as a dwelling-house is not that kind of private injury to grow out of a public nuisance which would authorize the interposition of a court of equity.

New York.— Coleman *v.* New York, 70 N. Y. App. Div. 218, 75 N. Y. Suppl. 342 [*reversing* 35 Misc. 664, 72 N. Y. Suppl. 359, and *affirmed* in 173 N. Y. 612, 66 N. E. 1106]; Wolf *v.* Manhattan R. Co., 51 Misc. 426, 101 N. Y. Suppl. 493 (running more trains at increased speed on elevated road in front of plaintiff's premises, the right to maintain which had been acquired by release and conveyance); Old Forge Co. *v.* Webb, 31 Misc. 316, 65 N. Y. Suppl. 503 [*affirmed* in 57 N. Y. App. Div. 636, 68 N. Y. Suppl. 1145].

Ohio.— Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624.

South Carolina.— Baltzeger *v.* Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789.

Wisconsin.— Kuehn *v.* Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553.

Wyoming.—Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. N. S. 733.

See 37 Cent. Dig. tit. "Nuisance," § 169.

70. Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

The writ of nuisance is an obsolete proceeding, and is not encouraged; and the court will not therefore in such a proceeding relax the strictness of the ancient practice. Kintz *v.* McNeal, 1 Den. (N. Y.) 436.

Assize of nuisance is not abolished, but adapted to modern usage, and exceptions purely technical are not regarded. Barnet *v.* Ihrie, 17 Serg. & R. (Pa.) 174.

71. See *infra*, VII, B.

72. See *infra*, VII, C.

73. See *infra*, VII, D.

74. See *infra*, VII, E.

75. American Furniture Co. *v.* Batesville, 139 Ind. 77, 38 N. E. 408.

76. *Arkansas.*— Harvey *v.* Dewoody, 18 Ark. 252.

Connecticut.— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Iowa.— Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444; Moffett *v.* Brewer, 1 Greene 348; State *v.* Moffett, 1 Greene 247.

Kentucky.— Gates *v.* Blincoe, 2 Dana 158, 26 Am. Dec. 440.

Missouri.— Chillicothe *v.* Bryan, 103 Mo. App. 409, 77 S. W. 465.

New Hampshire.—Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Great Falls Co. *v.* Worster, 15 N. H. 412.

New Jersey.— Lawrence *v.* Hough, 35 N. J. Eq. 371.

New York.— Lyle *v.* Little, 83 Hun 532, 33 N. Y. Suppl. 8; Harrower *v.* Ritson, 37 Barb. 301.

Oregon.— Twiner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

Pennsylvania.— Philiber *v.* Matson, 14 Pa. St. 306; Lancaster Turnpike Co. *v.* Rogers, 2 Pa. St. 114, 44 Am. Dec. 179.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

motion,[77] without instituting any legal proceedings.[78] So the person aggrieved may kill a dog which haunts his premises, and by barking and howling becomes a nuisance,[79] cut off branches of a neighbor's trees overhanging his land,[80] remove a part of an adjoining owner's wall which overhangs his premises,[81] or cut off the eaves of a building overhanging his property.[82]

(II) *PUBLIC NUISANCE.* It is also well settled that any person may by his own act abate a public nuisance,[83] although, according to the weight of both reason and authority, in order that a person may have the right to do this he must have suffered some special injury from the nuisance.[84]

England.— Roberts *v.* Rose, L. R. 1 Exch. 82, 4 H. & C. 103, 12 Jur. N. S. 78, 35 L. J. Exch. 62, 13 L. T. Rep. N. S. 471, 14 Wkly. Rep. 225; Raikes *v.* Townsend, 2 Smith K. B. 9, 7 Rev. Rep. 776.

See 37 Cent. Dig. tit. "Nuisance," § 51.

A person in lawful possession of premises has the right to abate a nuisance on adjoining premises, although his possession is only for a term. Great Falls Co. *v.* Worster, 15 N. H. 412.

A statute making it a penal offense to injure a mill-dam does not take away the common-law right to abate a mill-dam which is a nuisance. State *v.* Moffett, 1 Greene (Iowa) 427.

A person's assent to the erection of a nuisance will not take away his right afterward to abate it, if he thinks proper. Pilcher *v.* Hart, 1 Humphr. (Tenn.) 524.

Estoppel.—A person who has permitted a city to construct the outlet of a sewer on his land, and who has represented to the purchasers of his lots in the vicinity of the sewer that they would have the benefit of connection with the sewer, is estopped from obstructing the outlet. Chillicothe *v.* Bryan, 103 Mo. App. 409, 77 S. W. 465.

Limitation of right.—A person erecting a nuisance does not put himself or his property beyond the protection of the law, and if a member of the community can, with reasonable care, notwithstanding the act complained of, enjoy his right or franchise, he is not at liberty to destroy or interfere with the property of the wrong-doer. Harrower *v.* Ritson, 37 Barb. (N. Y.) 301.

77. Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342. And see *supra*, note 76.

78. Great Falls Co. *v.* Worster, 15 N. H. 412. And see *supra*, note 76.

79. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

80. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623; Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729; Lemmon *v.* Webb, (1895) A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116 [*affirming* (1894) 3 Ch. 1]. See also Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

81. Lyle *v.* Little, 83 Hun (N. Y.) 532, 33 N. Y. Suppl. 8.

82. Lawrence *v.* Hough, 35 N. J. Eq. 371, if it does the adjoining owner no irreparable injury.

83. *Arkansas.*— Harvey *v.* Dewoody, 18 Ark. 252.

California.— Gunter *v.* Geary, 1 Cal. 462.

Colorado.— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Kentucky.— Gates *v.* Lincoe, 2 Dana 158, 26 Am. Dec. 440.

Maine.— Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715.

Massachusetts.—Brown *v.* Perkins, 12 Gray 89.

Michigan.— People *v.* Severance, 125 Mich. 556, 84 N. W. 1089.

New Jersey.— Brown *v.* De Groff, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794; Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251.

New York.— U. S. Illuminating Co. *v.* Grant, 55 Hun 222, 7 N. Y. Suppl. 788; Renwick *v.* Morris, 7 Hill 575; Meeker *v.* Van Rensselaer, 15 Wend. 397; Wetmore *v.* Tracy, 14 Wend. 250, 28 Am. Dec. 525.

Pennsylvania.— Lancaster Turnpike Co. *v.* Rogers, 2 Pa. St. 114, 44 Am. Dec. 179; Rung *v.* Shoneberger, 2 Watts 23, 26 Am. Dec. 95; Reed *v.* Seely, 13 Pa. Co. Ct. 529.

Wisconsin.— Larson *v.* Furlong, 63 Wis. 323, 23 N. W. 584.

England.— Dimes *v.* Petley, 15 Q. B. 276, 14 Jur. 1132, 19 L. J. Q. B. 449, 69 E. C. L. 276.

See 37 Cent. Dig. tit. "Nuisance," § 173.

Only nuisances per se may be removed or abated summarily by the acts of individuals. Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

When a public nuisance has become the subject of judicial investigation, the power of a private citizen to remove it is gone, and the court has the power to allow such time for its removal as it shall deem reasonable. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Public property.— The neglect of the state to keep a public dam in good preservation does not take away its public character, or authorize its destruction by individuals as being a public nuisance. Harris *v.* Thompson, 9 Barb. (N. Y.) 350.

84. *Colorado.*— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Maine.— Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715.

Massachusetts.—Brown *v.* Perkins, 12 Gray 89.

Michigan.— People *v.* Severance, 125 Mich. 556, 84 N. W. 1089.

New Jersey.— Brown *v.* De Groff, 50 N. J.

b. Extent of Injury. In order to justify a person in abating a nuisance by his own act, the nuisance must cause a particular injury to his person or property[85] at the time when he undertakes to abate it;[86] but if the nuisance is such that he could maintain an action therefor, this is sufficient, and he may enter and abate it, although at the time the damage resulting to him therefrom is merely nominal.[87]

c. Time For Abatement. The remedy of abatement by act of the person injured should be resorted to within a reasonable time,[88] as the right to so abate may be lost by acquiescence in the injury for a considerable time.[89]

d. Notice to Abate.[90] Where a nuisance can only be abated by going on the land of another person, from which the nuisance proceeds, the person desiring to abate must give previous notice to the owner of the land to remove or abate the nuisance,[91] unless it appear that the owner of the land was the original wrong-doer by placing the nuisance there,[92] that it arises from his default in the performance of some duty or obligation cast upon him by law,[93] or that the nuisance is immediately dangerous to health, life, or property and the necessity for its prompt removal urgent.[94] Where one proposes to abate a nuisance exclusively by doing

L. 409, 14 Atl. 219, 7 Am. St. Rep. 794; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21.

New York.— Renwick *v.* Morris, 7 Hill 575; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

Pennsylvania.—Lancaster Turnpike Co. *v.* Rogers, 2 Pa. St. 114, 44 Am. Dec. 179; Rung *v.* Shoneberger, 2 Watts 23, 26 Am. Dec. 95.

Rhode Island.—Bowden *v.* Lewis, 13 R. I. 189, 43 Am. Rep. 21.

Washington.—Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

Wisconsin.— Larson *v.* Furlong, 63 Wis. 323, 23 N. W. 584, 50 Wis. 681, 8 N. W. 1.

England.—Dimes *v.* Petley, 15 Q. B. 276, 14 Jur. 1132, 19 L. J. Q. B. 449, 69 E. C. L. 276; Colchester *v.* Brooke, 7 Q. B. 339, 15 L. J. Q. B. 59, 53 E. C. L. 339.

See 37 Cent. Dig. tit. "Nuisance," § 173.

85. Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440, holding this to be true as to a private, but not as to a public, nuisance. See *supra*, VII, B, 1, a, (II).

86. Moffett *v.* Brewer, 1 Greene (Iowa) 348; Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

A mere prospect of future injury will not justify a person in abating a nuisance. Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

Where there is no right of action to restrain or obtain damages in respect to a nuisance created by another, there is no right to remove such nuisance without judicial proceedings. Priewe *v.* Fitzsimmons, etc., Co., 117 Wis. 497, 94 N. W. 317.

It is a question for the jury whether the nuisance was an injury to the party abating it at the time of the abatement. Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

87. Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Great Falls Co. *v.* Worster, 15 N. H. 412; Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342; Adams *v.* Barney, 25 Vt. 225; Greenslade *v.* Halliday, 6 Bing. 379, 8 L. J. C. P. O. S. 124, 4 M. & P. 71, 19 E. C. L. 176.

88. Moffett *v.* Brewer, 1 Greene (Iowa) 348.

89. Caverhill *v.* Robillard, 2 Can. Sup. Ct. 575.

90. Notice before: Action for damages see *infra*, VII, D, 4. Criminal prosecution or penal action see *infra*, VII, E, 4. Proceeding for equitable relief see *infra*, VII, C, 3.

91. Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729; Lemmon *v.* Webb, [1895] A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116 [*affirming* [1894] 3 Ch. 1]; Jones *v.* Williams, 12 L. J. Exch. 249, 11 M. & W. 176.

As going upon one's neighbor's land is prima facie a trespass, it is reasonable that a person intending to do this should be bound to give notice of his intention. Lemmon *v.* Webb, [1895] A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116 [*affirming* [1894] 3 Ch. 1].

92. Jones *v.* Williams, 12 L. J. Exch. 249, 11 M. & W. 176.

93. Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729; Jones *v.* Williams, 12 L. J. Exch. 249, 11 M. & W. 176.

94. Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729; Lemmon *v.* Webb, [1895] A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116 [*affirming* [1894] 3 Ch. 1]; Jones *v.* Williams, 12 L. J. Exch. 249, 11 M. & W. 176.

Offer of money to remove nuisance.— The fact that a railroad company has offered the owner of property adjoining the right of way money to remove trees whose branches overhang the right of way and endanger its operation by obstructing the view of engineers does not give him the right to further notice before abatement of the nuisance by the company. Hickey *v.* Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729.

acts upon his own land, without going on the land of his neighbor from which the nuisance proceeds, no previous notice to abate is necessary.[95]

e. Mode and Extent of Abatement.[96] A person may for the purpose of abating a nuisance enter upon the premises where the nuisance is maintained,[97] and use whatever force is necessary to protect and defend his own property from injury,[98] but he must not be guilty of a breach of the peace.[99] A person abating a nuisance must not in so doing be guilty of any excess,[1] or inflict any unnecessary injury ;[2] and he can remove only so much of the objectionable thing as actually causes the nuisance.[3] Neither has he any right to appropriate the materials of the demolished structure for his own use.[4] Where there are alternate ways of abating a nuisance, of which one involves interference with the property of an innocent person and the other interference with the property of a wrong-doer, the latter must be adopted.[5]

f. Liability of Person Abating. While a person can be the judge in the first instance as to the existence of a nuisance,[6] when he undertakes to abate the same without legal proceedings he acts at his peril and assumes all liability for exceeding his legal right.[7] He may subject himself to criminal prosecution,[8] or he may be compelled to respond in damages to the person injured, if it be made to appear that what he destroyed was not a legal nuisance [9] so injuring him as to give him the right to abate it,[10] or if he did unnecessary injury in abating what did amount

95. Lemmon *v.* Webb, [1895] A. C. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116 [*affirming* [1894] 3 Ch. 1], cutting off overhanging branches of trees.

96. Mode and extent of abatement in: Action for damages see *infra*, VII, D, 14. Criminal prosecution or penal action see *infra*, VII, E, 11. Proceeding for equitable relief see *infra*, VII, C, 14, a.

97. Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Great Falls Co. *v.* Worster, 15 N. H. 412; Lancaster Turnpike Co. *v.* Rogers, 2 Pa. St. 114, 44 Am. Dec. 179; Jones *v.* Williams, 12 L. J. Exch. 249, 11 M. & W. 176; Raikes *v.* Townsend, 2 Smith K. B. 9, 7 Rev. Rep. 776.

98. Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

99. Day *v.* Day, 4 Md. 262; People *v.* Severance, 125 Mich. 556, 84 N. W. 1089; Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

1. Chillicothe *v.* Bryan, 103 Mo. App. 409, 77 S. W. 465.

2. *Illinois.*— Calef *v.* Thomas, 81 Ill. 478.

Iowa.— Moffett *v.* Brewer, 1 Greene 348.

New York.— Harrower *v.* Ritson, 37 Barb. 301.

Oregon.— Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

England.— Roberts *v.* Rose, L. R. 1 Exch. 82, 4 H. & C. 103, 12 Jur. N. S. 78, 35 L. J. Exch. 62, 13 L. T. Rep. N. S. 471, 14 Wkly. Rep. 225; Raikes *v.* Townsend, 2 Smith K. B. 9, 7 Rev. Rep. 776.

See 37 Cent. Dig. tit. "Nuisance," §§ 53, 174.

The property must not be destroyed unless this is absolutely necessary.— Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444. So a building cannot be demolished because an unlawful or immoral business is conducted therein. Earp *v.* Lee, 71 Ill. 193; Welch *v.* Stowell, 2 Dougl. (Mich.) 332.

Least possible injury.—An instruction that care should be taken to do the least possible injury goes further than is warranted, as this is looking at the case from the side of the other party, whereas it is the interest of the party menaced that should govern. McKeesport Sawmill Co. *v.* Pennsylvania Co., 122 Fed. 184.

Manner most convenient for wrong-doer.— One whose land is unlawfully flooded by his neighbor is not bound, while abating the nuisance, to do it in the manner most convenient for the other party. Great Falls Co. *v.* Worster, 15 N. H. 412.

3. Finley *v.* Hershey, 41 Iowa 389; Moffett *v.* Brewer, 1 Greene (Iowa) 348; Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

4. Larson *v.* Furlong, 50 Wis. 681, 8 N. W. 1.

5. Raikes *v.* Townsend, 2 Smith K. B. 9, 7 Rev. Rep. 776.

6. State *v.* Moffett, 1 Greene (Iowa) 247.

7. State *v.* Moffett, 1 Greene (Iowa) 247; Tissot *v.* Great Southern Tel., etc., Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.

8. State *v.* Moffett, 1 Greene (Iowa) 247.

9. Bliss *v.* Ball, 99 Mass. 597.

10. Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

Extent of injury see *supra*, VII, B, 1, b.

In a plea of justification or excuse for an entry to abate a nuisance, caused by the flooding of certain land by plaintiff's dam, it is sufficient if defendant allege that he was possessed of an undivided moiety of such land, without stating more particularly what title he had. Great Falls Co. *v.* Worster, 15 N. H. 412.

Evidence.—Where defendant, the proprietor of a mining claim on a stream, destroyed plaintiff's dams, situated below defendant's, on the ground that they constituted a private nuisance to defendant's prior right of appropriation of the water, defendant is not

to a legal nuisance,[11] or he may be compelled to restore a building which he has illegally destroyed.[12]

2. By Public Authorities.[13] A public nuisance may be summarily abated by the public authorities,[14] but this power must be reasonably exercised,[15] without doing unnecessary damage or injury to property,[16] and is limited to a removal of that in which the nuisance consists.[17] The right is derived from necessity, and the necessity must exist to justify its exercise.[18] It has been held that the power of municipal officers to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen.[19] The person responsible for a nuisance may be held liable for the expense of removing or abating it.[20]

entitled, in an action for injury to plaintiff's dams, to show the length of time he and his predecessors had used the water of the stream to carry off tailings from his mine or for flushing the stream, in the absence of evidence that defendant had been injured in any manner by the construction of plaintiff's dam, either by the backwater flooding defendant's premises, or by obstruction to the stream. Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

Instructions asked by defendant, justifying his acts complained of in a suit against him for destroying the dams of a lower proprietor of a mining claim on a non-navigable stream, on the ground that they constituted a private nuisance to him, as an upper proprietor of a mining claim, are properly refused, where not predicated on the assumption that defendant sustained even nominal damages by the maintenance of the dams. Turner *v.* Locy, 37 Oreg. 158, 61 Pac. 342.

Question for jury.— In an action for damages for the destruction of property, where the defense is that the property constituted a nuisance, it is for the jury to decide whether the nuisance was a public or a private one, and, if a private nuisance, whether it injured defendant, so that he might abate it. Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

11. Indianapolis *v.* Miller, 27 Ind. 394; Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440; Truesdale *v.* McDonald, Taylor (U. C.) 121.

Mode and extent of abatement see *supra*, VII, B, 1, e.

12. Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444.

13. Abatement by: Health Officers see Health. Highway officers see Streets and Highways. Municipal authorities see Municipal Corporations.

14. Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251 (holding that a public nuisance may be abated by a citizen, acting as a public officer under the orders of local authorities, whether or not such orders are in pursuance of special legislation or charter provisions); U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788; Coe *v.* Schultz, 47 Barb. (N. Y.) 64, 2 Abb. Pr. N. S. 193; Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

The state may, in the exercise of its police power, authorize its officers to summarily abate and destroy nuisances. Mullen *v.* Moseley, 13 Ida. 457, 90 Pac. 986.

Action by wrong department.— Equity will not intervene by injunction to restrain the abatement of a nuisance by the public authorities simply because the proper department of the city government is not acting. U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788.

15. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 [*affirmed* in 156 N. Y. 658, 50 N. E. 1116].

16. Hicks *v.* Dorn, 42 N. Y. 47, 9 Abb. Pr. N. S. 47 [*affirming* 1 Lans. 81, 54 Barb. 172].

17. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 [*affirmed* in 156 N. Y. 658, 50 N. E. 1116].

18. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 [*affirmed* in 165 N. Y. 658, 50 N. E. 1116].

Only nuisances per se may be removed or abated summarily. Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

By whom question of expediency determined.— Where an act of the legislature made it "lawful for the inhabitants of Upper and Lower Rahway," etc., "their trustees, agent or agents, by this act hereinafter appointed . . . whenever it shall be deemed expedient by them so to do, to pull down and remove" certain dams, the maintenance of which was detrimental to public health, the question of expediency was to be determined by the trustees, and not by the inhabitants. Miller *v.* Craig, 11 N. J. Eq. 175.

19. Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 [*affirmed* in 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657]. See *supra*, VII, B, 1.

20. See Board of Health *v.* Gloria Dei Church, 23 Pa. St. 259.

Expense of abatement under order of court of equity see *infra*, VII, C, 21.

Liability of owner of land occupied by another.— Under Me. Rev. St. c. 14, § 16, providing that the "owner or occupant" of private property, upon which any source of filth is found, shall, after notice, cause the removal thereof, or, in default, be fined, and pay the expenses of the removal of such source of filth, the owner of land is liable for the expenses of removing a nuisance from his land, although a tenant for a term of years occupied the land, and caused the nuisance, and continued to occupy such land when the nuisance was removed. Bangor *v.* Rowe, 57 Me. 436.

C. Equitable Relief — 1. Power of Courts. Courts of equity have power to give relief against either public or private nuisances[21] by compelling the abate-

Denial of ownership.— Notwithstanding the fact that the statute of March 11, 1846, providing for the recovery of the expense of removing nuisances from the owner, or reputed owner, prohibits "any plea touching the question of ownership" of the premises, it is competent for defendants, in an action under this statute to recover for the cost of curbing and paving an alley which had become a nuisance on account of its defective condition, to deny that they were the owners of the premises, and to allege that the soil had been dedicated to the public for over seventy years. Board of Health *v.* Gloria Dei Church, 23 Pa. St. 259.

Notice to owner.— Under the Pennsylvania act of March 29, 1867, requiring all deeds and title papers to be registered, and providing that no property so registered shall thereafter be subject to sale for taxes or other municipal claims, except in the name of the registered owner and after service of a writ on him, a notice by the city to remove a nuisance, required by law to be given "to the owner," must be given to the registered owner, if there be one, and the city is bound to put on record every averment necessary to sustain its lien for the removal of the nuisance, and, if the owner's deed was not registered at the time the notice was given, the claim must so allege. Philadelphia *v.* Dungan, 124 Pa. St. 52, 16 Atl. 524. Where a lien for the removal of a nuisance correctly names the registered owner of the property, but recites notice to the agent of the property, and not to the owner, an amendment of such recital of notice by the substitution of the owner's name will be allowed. Philadelphia *v.* O'Reilly, 32 Wkly. Notes Cas. (Pa.) 166.

Nuisance caused by city.— The cost of filling lots in a city for the purpose of abating a nuisance thereon cannot be recovered by the city from the owner, where the raising of an embankment by the city itself was a substantial cause creating such nuisance, although other causes may have contributed thereto. Hannibal *v.* Richards, 35 Mo. App. 15.

21. *Alabama.*— Nixon *v.* Bolling, 145 Ala. 277, 40 So. 210; Weiss *v.* Taylor, 144 Ala. 440, 39 So. 519.

California.— Ramsay *v.* Chandler, 3 Cal. 90.

Georgia.— Ruff *v.* Phillips, 50 Ga. 130; Columbus *v.* Jaques, 30 Ga. 506.

Illinois.— People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

Kansas.— State *v.* Crawford, 28 Kan. 726, 42 Am. Rep. 182.

Maryland.— Powell *v.* Wilson, 85 Md. 347, 37 Atl. 216.

Massachusetts.— Cadigan *v.* Brown, 120 Mass. 493; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221; Rowe *v.* Granite Bridge Corp., 21 Pick. 344.

Michigan.— Wilmarth *v.* Woodcock, 66 Mich. 331, 33 N. W. 400.

Missouri.— McDonough *v.* Robbens, 60 Mo. App. 156.

New Jersey.— Carlisle *v.* Cooper, 18 N. J. Eq. 241; Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

New York.— McCarty *v.* Natural Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549 [*modifying* 114 N. Y. App. Div. 908, 100 N. Y. Suppl. 1127]; Bowden *v.* Edison Electric Illuminating Co., 29 Misc. 171, 60 N. Y. Suppl. 835; Peck *v.* Elder, 3 Sandf. 126, 6 Ch. Sent. 38; Van Bergen *v.* Van Bergen, 2 Johns. Ch. 272.

North Carolina.— Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

Pennsylvania.— Philadelphia *v.* Thirteenth, etc., Sts. Pass. R. Co., 8 Phila. 648.

Texas.— State *v.* Goodnight, 70 Tex. 682, 11 S. W. 119; State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; Belton *v.* Central Hotel Co., (Civ. App. 1895) 33 S. W. 297.

Vermont.— Royce *v.* Carpenter, 80 Vt. 37, 66 Atl. 888; Curtis *v.* Winslow, 37 Vt. 690.

Virginia.—Masonic Temple Assoc. *v.* Banks, 94 Va. 695, 27 S. E. 490.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Carmichael *v.* Texarkana, 94 Fed. 561; U. S. *v.* Debs, 64 Fed. 724.

See 37 Cent. Dig. tit. "Nuisance," §§ 49, 176, 189.

The ground of jurisdiction of courts of equity in cases of purpresture and nuisance is their ability to give a more complete and perfect remedy than is obtainable at law, in order to prevent irreparable mischief and to suppress oppressive and vexatious litigation. Moyamensing *v.* Long, 1 Pars. Eq. Cas. (Pa.) 143. See also Philadelphia *v.* Thirteenth, etc., Sts. Pass. R. Co., 8 Phila. (Pa.) 648.

Where plaintiff could obtain substantial damages at law he is entitled to an injunction to restrain the nuisance. Crump *v.* Lambert, L. R. 3 Eq. 409, 15 L. T. Rep. N. S. 600, 15 Wkly. Rep. 417 [*affirmed* in 17 L. T. Rep. N. S. 133].

Circumstances not warranting interposition of equity.— A court of equity has no jurisdiction of a bill alleging that complainant owned premises adjoining those of defendant; that the latter permitted certain machinery to remain on complainant's land, which he refused to remove after notice, claiming the right to have it there; and that complainant was apprehensive that he would be involved in litigation, there being no such continuing

ment or restraining the continuance of an existing nuisance,[22] or enjoining the commission or establishment of a contemplated nuisance,[23] where its nature is such that it cannot be adequately compensated for in damages[24] and it would occasion a constantly recurring grievance.[25] In cases of private nuisance the jurisdiction of courts of equity and of law is often concurrent,[26] although in many cases an

nuisance as equity would interpose to abate. Barclay's Appeal, 93 Pa. St. 50.

Where injury in nature of trespass.—Where a city, in accordance with an ordinance duly adopted, builds a temporary open sewer on streets running through a plat which it had never accepted, an abutting property-owner has an action at law for damages for the trespass, but the maintenance of such sewer cannot be enjoined, since the granting of an injunction to abate the nuisance presupposes defendant's right to do work on the street to abate the nuisance, which it did not have. Cooper *v.* Cedar Rapids, 112 Iowa 367, 83 N. W. 1050.

Chancery has properly no jurisdiction of public nuisances not violating property rights. — See Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

22. *Alabama.*— Nixon *v.* Bolling, 145 Ala. 277, 40 So. 210; State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

California.— Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300.

Colorado.— Wright *v.* Ulrich, (1907) 91 Pac. 43.

Georgia.— Waycross *v.* Houk, 113 Ga. 963, 39 S. E. 577.

Maryland.—Lamborn *v.* Covington Co., 2 Md. Ch. 409.

New Jersey.— Carlisle *v.* Cooper, 18 N. J. Eq. 241, holding that a suit in equity may be sustained to abate or remove a nuisance, and also to determine the rights between the parties in the case. But *compare* Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

New York.— Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130]; Jackson *v.* Rochester, 7 N. Y. St. 853; People *v.* Metropolitan Tel., etc., Co., 11 Abb. N. Cas. 304; Van Bergen *v.* Van Bergen, 2 Johns. Ch. 272.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 18 Ohio Cir. Ct. 864, 6 Ohio Cir. Dec. 243.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Morris *v.* Remington, 1 Pars. Eq. Cas. 387.

Texas.— Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327.

Utah.— Stockdale *v.* Rio Grande Western R. Co., 28 Utah 201, 77 Pac. 849.

Virginia.— Herring *v.* Wilton, 106 Va. 171, 55 S. E. 546, 117 Am. St. Rep. 997, 7 L. R. A. N. S. 349; Masonic Temple Assoc. *v.* Banks, 94 Va. 695, 27 S. E. 490.

Washington.— Ingersoll *v.* Rousseau, 35 Wash. 92. 76 Pac. 513.

England.— Colwell *v.* St. Pancras Borough Council, [1904] 1 Ch. 707, 68 J. P. 286, 73 L. J. Ch. 275, 2 Loc. Gov. 518, 90 L. T. Rep. N. S. 153, 20 T. L. R. 236, 52 Wkly. Rep. 523; Coulson *v.* White, 3 Atk. 21, 26 Eng. Reprint 816; East-India Co. *v.* Vincent, 2 Atk. 83, 26 Eng. Reprint 451.

See 37 Cent. Dig. tit. "Nuisance," §§ 49, 176, 189.

Where question of boundary involved.—A court of equity is not ousted of its jurisdiction of a bill making out a clear case for its intervention, to abate a private nuisance, by the facts that the controlling question in the suit is the proper location of a boundary line, and that, as such location is a question of fact rather than of law, defendant would be entitled in ejectment to three trials before as many juries. Wilmarth *v.* Woodcock, 66 Mich. 331, 33 N. W. 400.

23. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

Georgia.— Augusta *v.* Reynolds, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564.

Idaho.— Sand Point *v.* Doyle, 11 Ida. 642, 83 Pac. 598, 4 L. R. A. N. S. 810.

Illinois.— Dunning *v.* Aurora, 40 Ill. 481.

Maine.— Houlton *v.* Titcomb, 102 Me. 272, 66 Atl. 733, 10 L. R. A. N. S. 580.

Missouri.— Holke *v.* Herman, 87 Mo. App. 125.

Nebraska.— Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

New Jersey.— Sayre *v.* Newark, 58 N. J. Eq. 136, 42 Atl. 1068 [*reversed* on other grounds in 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L. R. A. 722].

New York.— Van Bergen *v.* Van Bergen, 2 Johns. Ch. 272.

North Carolina.— Bradsher *v.* Lea, 38 N. C. 301; Atty.-Gen. *v.* Blount, 11 N. C. 384, 15 Am. Dec. 526.

Ohio.— Collins *v.* Cleveland, 2 Ohio S. & C. Pl. Dec. 377.

Oregon.— Blagen *v.* Smith, 34 Oreg. 394, 56 Pac. 292, 44 L. R. A. 522.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Morris *v.* Remington, 1 Pars. Eq. Cas. 387.

Virginia.— Miller *v.* Truehart, 4 Leigh 569.

England.— London *v.* Bolt, 5 Ves. Jr. 129, 31 Eng. Reprint 507.

See 37 Cent. Dig. tit. "Nuisance," §§ 49, 176, 189.

24. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237. And see *infra*, VII, C, 2, i.

25. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237. And see *infra*, VII, C, 2, c.

26. Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Miller *v.* Edison Electric Illuminating Co., 78 N. Y. App. Div. 390, 80 N. Y. Suppl. 319; Fisk *v.* Wilber, 7 Barb. (N. Y.) 395; Gardner *v.* Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Parker *v.*

action at law may be sustained where the facts would not justify relief in equity in the first instance.[27] The jurisdiction of courts of equity over the subject of nuisances is not an original jurisdiction[28] and is of comparatively recent origin.[29] It is exercised sparingly,[30] reluctantly,[31] with great caution,[32] and only in extreme cases,[33] at least until after the right and question of nuisance has been first settled at law;[34] and while in modern times the strictness of this rule has been sometimes relaxed,[35] there is still a substantial agreement among the authorities that to entitle a party to equitable relief before resorting to a court of law his case must be clear and free from all substantial doubt as to his right to relief,[36] and there must be a strong and mischievous case of pressing necessity.[37] There must be both injury and damage to justify an injunction.[38] The jurisdiction of equity in regard to nuisances is not taken away by statutes providing remedies in courts of law,[39] and may be exercised notwithstanding the fact that the nuisance is an indictable offense.[40]

Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black (U. S.) 545, 17 L. ed. 333.

27. Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black. (U. S.) 545, 17 L. ed. 333. And see *infra*, VII, C, 2, i; VII, D, 1.

Combination of courts.— The fact that courts of equity and law have been combined in the superior court does not give the latter jurisdiction which the two courts did not have, and does not affect the rule that injunction will not lie for the abatement of a nuisance, in the absence of the allegation of special facts showing that the statutory remedy is inadequate. Broomhead *v.* Grant, 83 Ga. 451, 10 S. E. 116.

28. Flood *v.* Consumers Co., 105 Ill. App. 559; Carlisle *v.* Cooper, 21 N. J. Eq. 576.

The jurisdiction does not arise from the fact that a nuisance exists, but results from the circumstances that the equitable power of the court is necessary to protect against an injury for which no adequate redress can be obtained by an action at law, or to suppress interminable litigation. Carlisle *v.* Cooper, 21 N. J. Eq. 576.

29. Simpson *v.* Justice, 43 N. C. 115.

30. Rosser *v.* Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; Flood *v.* Consumers Co., 105 Ill. App. 559; Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376; Simpson *v.* Justice, 43 N. C. 115.

31. Rosser *v.* Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; Nelson *v.* Mulligan, 151 Ill. 462, 38 N. E. 239; Wahle *v.* Reinbach, 76 Ill. 322; Dunning *v.* Aurora, 40 Ill. 481; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215; Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

32. Rosser *v.* Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; Dunning *v.* Aurora, 40 Ill. 481; Simpson *v.* Justice, 43 N. C. 115; Atty.-Gen. *v.* Cleaver, 18 Ves. Jr. 211, 34 Eng. Reprint 297.

33. Flood *v.* Consumers Co., 105 Ill. App. 559.

A court of equity will discourage a resort to its aid for the purpose of interfering in mere domestic broils, and hence where two families are occupying rooms in the same house, using in common the halls and stairways, the court will not restrain the one from committing a nuisance against the other unless the proof of the existence of such nuisance is clear and strong. Medford *v.* Levy, 31 W. Va. 649, 8 S. E. 302, 13 Am. St. Rep. 887, 2 L. R. A. 368.

34. Rosser *v.* Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Flood *v.* Consumers Co., 105 Ill. App. 559; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215. And see *infra*, VII, C, 2, j.

35. Flood *v.* Consumers Co., 105 Ill. App. 559.

36. Flood *v.* Consumers Co., 105 Ill. App. 559. And see *infra*, VII, C, 2, f.

37. Flood *v.* Consumers Co., 105 Ill. App. 559. And see *infra*, VII, C, 2, g.

38. Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221.

39. *California.*—Stiles *v.* Laird, 5 Cal. 120, 63 Am. Dec. 110.

Massachusetts.— Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221.

Tennessee.— Lassater *v.* Garrett, 4 Baxt. 368.

Vermont.— State *v.* Martin, 68 Vt. 91, 34 Atl. 40.

Virginia.— Herring *v.* Wilton, 106 Va. 171, 55 S. E. 546, 117 Am. St. Rep. 997, 7 L. R. A. N. S. 349, town ordinance.

United States.— Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. 970 [*affirmed* in 57 Fed. 1000].

See 37 Cent. Dig. tit. "Nuisance," §§ 49, 176, 189.

Statutory remedy as ground for denial of equitable relief see *infra*, VII, C, 2, n.

40. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

California.— People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581; Yolo County *v.* Sacramento, 36 Cal. 193, holding that where irreparable injury would be inflicted on a private person by a nuisance which is subject to indictment, before relief could be afforded by a resort to the criminal law equity will restrain the nuisance upon the information of the attorney-general.

Illinois.— Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63, holding that the fact that

2. Considerations Affecting Right to Equitable Relief[41] **— a. Certainty of Annoyance or Injury.** The general rule is that an injunction will be granted only to restrain actually existing nuisances,[42] and not to restrain an intended act on the ground that it may become a nuisance;[43] and, although where an act or structure will necessarily be a nuisance for which there can be no adequate remedy at law, a court of equity may interfere by injunction to prevent the threatened injury,[44] a mere prospect of future annoyance or injury from a structure or instrumentality which is not a nuisance *per se* is not ground for an injunction,[45] and equity will not interfere where the apprehended injury or annoyance is doubtful, uncertain, or contingent.[46] So the erection or alteration of a building for a lawful pur-

one indicted for maintaining a nuisance has been tried and acquitted will not deprive a court of equity of power to enjoin his continuing the nuisance.

Maine.— Davis *v.* Auld, 96 Me. 559, 53 Atl. 118.

England.— Crowder *v.* Tinkler, 19 Ves. Jr. 617, 13 Rev. Rep. 267, 34 Eng. Reprint 645.

See 37 Cent. Dig. tit. "Nuisance," § 192.

Except for special and urgent reasons, equity will not enjoin the erection of a public nuisance where its maintenance is a misdemeanor, subject to indictment, even though its intervention be sought by the attorney-general. Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

A court of equity will stay proceedings for an injunction to restrain the continuance of a nuisance until a criminal prosecution for the same offense has been tried. Com. *v.* Snyder, 2 Pa. Co. Ct. 260.

41. See, generally, Equity.

42. Adams *v.* Michael, 38 Md. 123, 17 Am. Rep. 516; McDonough *v.* Robbens, 60 Mo. App. 156.

43. McDonough *v.* Robbens, 60 Mo. App. 156.

44. *Georgia.*— De Give *v.* Seltzer, 64 Ga. 423.

Illinois.— Lake View *v.* Letz, 44 Ill. 81; Flood *v.* Consumers Co., 105 Ill. App. 559.

Maryland.— Adams *v.* Michael, 38 Md. 123, 17 Am. Rep. 516.

Missouri.— Holke *v.* Herman, 87 Mo. App. 125; McDonough *v.* Robbens, 60 Mo. App. 156.

New Jersey.— Duncan *v.* Hayes, 22 N. J. Eq. 25; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

Pennsylvania.— Wier's Appeal, 74 Pa. St. 230; New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

See 37 Cent. Dig. tit. "Nuisance," § 27.

If the injury apprehended is great and the danger imminent an injunction will not be refused on the ground that there is a bare possibility that the injury anticipated may not result from the erection complained of. Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554.

45. *Georgia.*— Harrison *v.* Brooks, 20 Ga. 537.

Illinois.— Thornton *v.* Roll, 118 Ill. 350, 8 N. E. 145.

Kentucky.— Pfingst *v.* Senn, 94 Ky. 556, 23 S. W. 358, 15 Ky. L. Rep. 325, 21 L. R. A. 569.

Louisiana.— Bell *v.* Riggs, 38 La. Ann. 555.

Mississippi.— Gwin *v.* Melmoth, Freem. 505.

New Jersey.— Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— Morgan *v.* Binghamton, 102 N. Y. 500, 7 N. E. 424.

Oklahoma.— West *v.* Ponca City Milling Co., 14 Okla. 646, 79 Pac. 100.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Carpenter *v.* Cummings, 2 Phila. 74.

England.— Atty.-Gen. *v.* Kingston-upon-Thames, 11 Jur. N. S. 596, 34 J. J. Ch. 481, 12 L. T. Rep. N. S. 665, 13 Wkly. Rep. 888.

See 37 Cent. Dig. tit. "Nuisance," § 30.

46. *Alabama.*— Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

California.— Middleton *v.* Franklin, 3 Cal. 238.

Florida.—Thebaut *v.* Canova, 11 Fla. 143.

Georgia.—Harrison *v.* Brooks, 20 Ga. 537.

Illinois.— Thornton *v.* Roll, 118 Ill. 350, 8 N. E. 145; Wahle *v.* Reinbach, 76 Ill. 322; Lake View *v.* Letz, 44 Ill. 81; Flood *v.* Consumers Co., 105 Ill. App. 559; Iliff *v.* School Directors, 45 Ill. App. 419.

Indiana.— Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381; Laughlin *v.* Lamasco City, 6 Ind. 223.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203.

Kentucky.— Albany Christian Church *v.* Wilborn, 112 Ky. 507, 66 S. W. 285, 23 Ky. L. Rep. 1820; Dumesnil *v.* Dupont, 18 B. Mon. 800, 68 Am. Dec. 750.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868; Varney *v.* Pope, 60 Me. 192.

Mississippi.— Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378; Gwin *v.* Melmoth, Freem. 505.

Missouri.— McDonough *v.* Robbens, 60 Mo. App. 156.

Nebraska.—Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

New Hampshire.— Burnham *v.* Kempton, 44 N. H. 78; Coe *v.* Winnepisiogee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

New Jersey.— Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55]; McNeal *v.* Assiscunk Creek Meadow Co., 37 N. J. Eq. 204; Duncan *v.* Hayes, 22 N. J. Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am.

pose will not be restrained where it is not shown that it will necessarily be a nuisance,[47] nor will the erection of a building not in itself a nuisance be enjoined on the ground that certain uses to which it is alleged that it is to be devoted will constitute it a nuisance where it is neither alleged nor proved that the building could not be devoted to other uses which would not constitute it a nuisance.[48] So also an injunction against a legitimate business will not be granted because it is feared that it may become a nuisance,[49] for the presumption is that it will be conducted in a proper manner;[50] but in order to warrant an injunction it must appear that the operation of the business will necessarily be a nuisance.[51]

b. Irreparable Injury. A court of equity will not interfere to prevent or abate as a nuisance everything which may work hurt, inconvenience, or damage;[52] but in order to call for such interference it must appear that the injury resulting

Dec. 654; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Butler *v.* Rogers, 9 N. J. Eq. 487; Tichenor *v.* Wilson, 8 N. J. Eq. 197; Vanwinkle *v.* Curtis, 3 N. J. Eq. 422.

New York.— Davis *v.* Lambertson, 56 Barb. 480.

North Carolina.— Brown *v.* Carolina Cent. R. Co., 83 N. C. 128; Ellison *v.* Washington Com'rs, 58 N. C. 57, 75 Am. Dec. 430; Bradsher *v.* Lea, 38 N. C. 301; Barnes *v.* Calhoun, 37 N. C. 199; Atty.-Gen. *v.* Blount, 11 N. C. 384, 15 Am. Dec. 526.

Ohio.— McElroy *v.* Goble, 6 Ohio St. 187; Fisher *v.* Lakeside Park Hotel, etc., Co., 7 Ohio S. & C. Pl. Dec. 67, 4 Ohio N. P. 329.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Hough *v.* Doylestown Borough, 4 Brewst. 333; McKinney *v.* McCullough, 17 Phila. 395; Campbell *v.* Schofield, 29 Leg. Int. 325.

Tennessee.— Clack *v.* White, 2 Swan 540; Caldwell *v.* Knott, 10 Yerg. 209.

Texas.— Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125.

Virginia.— Wingfield *v.* Crenshaw, 4 Hen. & M. 474.

West Viriginia.— Pope *v.* Bridgewater Gas Co., 52 W. Va. 252, 43 S. E. 87.

United States.— Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 18 Fed. Cas. No. 10,752, 1 Cliff. 247 [*affirmed* in 2 Black 545, 17 L. ed. 333].

See 37 Cent. Dig. tit "Nuisance," §§ 27, 30, 177, 192.

47. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

Florida.— Thebaut *v.* Canova, 11 Fla. 143.

Illinois.— Flood *v.* Consumers Co., 105 Ill. App. 559; Iliff *v.* School Directors, 45 Ill. App. 419.

Iowa.— Shiras *v.* Olinger, 50 Iowa 571, 33 Am. Rep. 138, holding that, where a livery stable had been burned down, its rebuilding should not be enjoined, if it could be so modified as not to become a nuisance.

Kentucky.— Albany Christian Church *v.* Wilborn, 112 Ky. 507, 66 S. W. 285, 23 Ky. L. Rep. 1820; Dumesnil *v.* Dupont, 18 B. Mon. 800, 68 Am. Dec. 750; Marrs *v.* Fiddler, 69 S. W. 953, 24 Ky. L. Rep. 722; Davis *v.* Adkins, 35 S. W. 271, 18 Ky. L. Rep. 73.

Louisiana.— Bell *v.* Riggs, 38 La. Ann. 555.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868.

New Jersey.— Duncan *v.* Hayes, 22 N. J. Eq. 25; Atty.-Gen. *v.* Steward, 20 N. J. Eq. 415; Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201; Thompson *v.* Paterson, 9 N. J. Eq. 624.

New York.— Depierris *v.* Mattern, 10 N. Y. Suppl. 626.

North Carolina.— Dorsey *v.* Allen, 85 N. C. 358, 39 Am. Rep. 704.

Pennsylvania.— Sellers *v.* Pennsylvania R. Co., 10 Phila. 319.

United States.— Ramsay *v.* Riddle, 20 Fed. Cas. No. 11,544, 1 Cranch C. C. 399.

See 37 Cent. Dig. tit. "Nuisance," § 27.

It must be a very strong case to justify an injunction against the erection of a building for manufacturing purposes as a nuisance to an adjoining dwelling-house. Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

Defendant proceeds at his peril, although the injunction is denied, and if the structure, when completed, proves to be a nuisance, he cannot complain if its use for the purpose for which it is designed is perpetually enjoined. Flint *v.* Russell, 9 Fed. Cas. No. 4,876, 5 Dill. 151. See also Myatt *v.* Goetchins, 20 Ga. 350 [*followed* in Cunningham *v.* Rice, 28 Ga. 30].

48. Dalton *v.* Cleveland, etc., R. Co., 144 Ind. 121, 43 N. E. 130.

49. Pfingst *v.* Senn, 94 Ky. 556, 23 S. W. 358, 15 Ky. L. Rep. 225, 21 L. R. A. 569; Beckham *v.* Brown, 40 S. W. 684, 19 Ky. L. Rep. 519.

50. Pfingst *v.* Senn, 94 Ky. 556, 23 S. W. 358, 15 Ky. L. Rep. 325, 21 L. R. A. 569; Alexander *v.* Tebeau, 71 S. W. 427, 24 Ky. L. Rep. 1305; Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221.

51. Alexander *v.* Tebeau, 71 S. W. 427, 24 Ky. L. Rep. 1305.

52. *Alabama.*—Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 4 App. Cas. 491.

New Jersey.— Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.— Rochester *v.* Curtiss, Clarke 336.

England.— Atty.-Gen. *v.* Nichol, 16 Ves. Jr. 338, 10 Rev. Rep. 186, 33 Eng. Reprint 1012.

See 37 Cent. Dig. tit. "Nuisance," §§ 27, 177, 192.

from the alleged nuisance is or will be irreparable.[53] So, a mere diminution of the value of property by a nuisance, without irreparable mischief, will not furnish sufficient ground for equitable relief by injunction.[54] Where, however, the injury from the erection or continuance of a nuisance would be irreparable, it will be restrained;[55] and in this connection irreparable injury does not mean such injury as is beyond the possibility of repair or beyond possible compensation in damages, or necessarily great injury or damage, but that species of injury, whether great

53. *Alabama.*—Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

California.— Middleton *v.* Franklin, 3 Cal. 238.

Connecticut.— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

Florida.— Thebaut *v.* Canova, 11 Fla. 143.

Illinois.— Nelson *v* Milligan, 151 Ill. 462, 38 N. E. 239; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Wahle *v.* Reinbach, 76 Ill. 322; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215.

Indiana.— Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

Iowa.— Perry *v.* Howe Co-operative Creamery Co., 125 Iowa 415, 101 N. W. 150.

Maine.— Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108; Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399; Varney *v.* Pope, 60 Me. 192.

Maryland.— King *v.* Hamill, 97 Md. 103, 54 Atl. 625.

Massachusetts.— Ingraham *v.* Dunnell, 5 Metc. 118; Dana *v.* Valentine, 5 Metc. 8.

Mississippi.— Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378; Gwin *v.* Melmoth, Freem. 505.

Missouri.—Scheurich *v.* Southwest Missouri Light Co., 109 Mo. App. 406, 84 S. W. 1003.

Nebraska.— George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664.

New Hampshire.— Burnham *v.* Kempton, 44 N. H. 78; Coe *v.* Winnepisiogee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

New Jersey.— Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55]; McNeal *v.* Assiscunk Creek Meadow Co., 37 N. J. Eq. 204; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Babcock *v.* New Jersey Stock Yard Co., 20 N. J. Eq. 296; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Tichenor *v.* Wilson, 8 N. J. Eq. 197; Vanwinkle *v.* Curtis, 3 N. J. Eq. 422; Shreve *v.* Voorhees, 3 N. J. Eq. 25.

New York.—Davis *v.* Lambertson, 56 Barb. 480.

North Carolina.— Vickers *v.* Durham, 132 N. C. 880, 44 S. E. 685; Brown *v.* Carolina Cent. R. Co., 83 N. C. 128; Bradsher *v.* Lea, 38 N. C. 301; Barnes *v.* Calhoun, 37 N. C. 199; Atty.-Gen. *v.* Blount, 11 N. C. 384, 15 Am. Dec. 526.

Ohio.— Goodall *v.* Crofton, 33 Ohio St. 271, 31 Am. Rep. 535; McElroy *v.* Goble, 6 Ohio St. 187.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Campbell *v.* Schofield, 29 Leg. Int. 325.

Tennessee.— Clack *v.* White, 2 Swan 540; Caldwell *v.* Knott, 10 Yerg. 209.

Virginia.—Masonic Temple Assoc. *v.* Banks, 94 Va. 695, 27 S. E. 490; Wingfield *v.* Crenshaw, 4 Hen. & M. 474.

West Virginia.— Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,009, 2 Dill. 70; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 18 Fed. Cas. No. 10,752, 1 Cliff. 274 [*affirmed* in 2 Black 545, 17 L. ed. 333].

See 37 Cent. Dig. tit. "Nuisance," §§ 27, 177, 192.

But *compare* International, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 29 S. W. 483.

54. *Illinois.*— Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Canal Melting Co. *v.* Columbia Park Co., 99 Ill. App. 215.

Michigan.— Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

New Jersey.— Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314.

Pennsylvania.— Rhodes *v.* Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Neill *v.* Gallagher, 10 Phila. 172.

United States.— Sellers *v.* Parvis, etc., Co., 30 Fed. 164.

See 37 Cent. Dig. tit. "Nuisance," §§ 27, 166, 177, 192.

55. *California.*— Yolo County *v.* Sacramento, 36 Cal. 193.

Illinois.— Wahle *v.* Reinbach, 76 Ill. 322.

Maryland.— Reese *v.* Wright, 98 Md. 272, 56 Atl. 976.

New York.—Davis *v.* Lambertson, 56 Barb. 480.

North Carolina.— Bradsher *v.* Lea, 38 N. C. 301; Atty.-Gen. *v.* Blount, 11 N. C. 384, 15 Am. Dec. 526.

Ohio.—Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.

Oregon.— Parrish *v.* Stephens, 1 Oreg. 73.

Pennsylvania.— Campbell *v.* Schofield, 29 Leg. Int. 325.

Tennessee.—Wall *v.* Cloud, 3 Humphr. 181.

United States.— Robinson *v.* Baltimore, etc., R. Co., 129 Fed. 753, 64 C. C. A. 281; Sellers *v.* Parvis, etc., Co., 30 Fed. 164.

England.— Crowder *v.* Tinkler, 19 Ves. Jr. 617, 13 Rev. Rep. 267, 34 Eng. Reprint 645.

See 37 Cent. Dig. tit. "Nuisance," §§ 27, 55, 177, 192.

or small, which ought not to be submitted to on the one hand or inflicted on the other, and which, because it is so large on the one hand or so small on the other, is of such constant and frequent recurrence that no reasonable redress can be had therefor in a court of law.[56]

c. Continuous or Recurring Injury. An essential fact to be averred and proved when an abatement of a nuisance is sought is that the annoyance and loss complained of will be continuous or recurrent,[57] for the occurrences of nuisances, if temporary and occasional only, are not grounds for interference by injunction except in extreme cases.[58] But where complainant invokes the aid of equity to prevent the occurrence from day to day of injuries for which he asks damages, caused by an alleged nuisance maintained by defendant, and the existence of the nuisance is established by the verdict of a jury, the relief will be granted.[59]

d. Direct Injury. It has been held that equity will interfere only where the injury complained of is direct and not where it is merely consequential.[60]

e. Unnecessary Injury. Where a business can be conducted so as not to injure another in the use of his property, the latter is entitled to an injunction against operation otherwise.[61]

f. Clear Case of Right. In order to obtain an injunction against or the abatement of an alleged nuisance the complaining party must show a clear and strong case supporting his right to such relief;[62] and so, where injury to com-

56. Wahle *v.* Reinbach, 76 Ill. 322, 326 [*quoting* Wood Nuisances, § 770 (Wood Nuisances (2d ed.), § 778)]. And see *infra*, VII, C, 2, i.

The insolvency of defendant, so that a recovery would be of no avail and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant. Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

57. *Alabama.*— Dennis *v.* Mobile, etc., R. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69.

Iowa.— Perry *v.* Howe Co-operative Creamery Co., 125 Iowa 415, 101 N. W. 150.

Missouri.— Scheurich *v.* Southwest Missouri Light Co., 109 Mo. App. 406, 84 S. W. 1003.

New Jersey.— King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335.

Vermont.— Royce *v.* Carpenter, 80 Vt. 37, 66 Atl. 888.

Wisconsin.— Wendlandt *v.* Cavanaugh, 85 Wis. 256, 55 N. W. 408.

See 37 Cent. Dig. tit. "Nuisance," §§ 55, 177, 192.

58. Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige (N. Y.) 323; Atty.-Gen. *v.* Cambridge Consumers Gas Co., L. R. 4 Ch. 71, 38 L. J. Ch. 94, 19 L. T. Rep. N. S. 508, 17 Wkly. Rep. 145; Coulson *v.* White, 3 Atk. 21, 26 Eng. Reprint 816; Swaine *v.* R. Co., 4 De G. J. & S. 211, 10 Jur. N. S. 191, 33 L. J. Ch. 399, 9 L. T. Rep. N. S. 745, 3 New Rep. 399, 12 Wkly. Rep. 391, 69 Eng. Ch. 164, 46 Eng. Reprint 899; Atty.-Gen. *v.* Metropolitan Bd. of Works, 1 Hen. & M. 298, 9 L. T. Rep. N. S. 139, 2 New Rep. 312, 11 Wkly. Rep. 820, 71 Eng. Reprint 130.

59. Threatt *v.* Brewer Min. Co., 49 S. C. 95, 26 S. E. 970; Lassater *v.* Garrett, 4 Baxt. (Tenn.) 368.

60. Gwin *v.* Melmoth, Freem. (Miss.) 505; Jeremy Imp. Co. *v.* Com., 106 Va. 482, 56 S. E. 224.

61. Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330.

62. *Alabama.*— Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

Illinois.— Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Oswald *v.* Wolf, 129 Ill. 200, 21 N. E. 839; Flood *v.* Consumers Co., 105 Ill. App. 559.

Indiana.— Winfall Mfg. Co. *v.* Patterson, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203.

Kentucky.— Dumesnil *v.* Dupont, 18 B. Mon. 800, 68 Am. Dec. 750.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868; Varney *v.* Pope, 60 Me. 192.

Massachusetts.— Charles River Bridge *v.* Warren Bridge, 6 Pick. 376.

Mississippi.— Gwin *v.* Melmoth, Freem. 505.

New Hampshire.— Dover *v.* Portsmouth Bridge, 17 N. H. 200.

New Jersey.— Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55]; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Davidson *v.* Isham, 9 N. J. Eq. 186 (holding that a court of equity will not interfere to grant an injunction in a case of alleged nuisance, where the testimony as to the facts relied upon to establish the allegation is conflicting, and an issue at law thereon has been twice found in favor of defendants); Robeson *v.* Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412.

New York.— Fisk *v.* Wilber, 7 Barb. 395.

plainant would result irrespective of the existence of the alleged nuisance, the court will not decree its abatement.[63]

g. Pressing Necessity. In order to call for equitable relief it must appear that the danger of injury is impending and imminent,[64] and that the case is one of pressing necessity.[65]

h. Multiplicity of Suits. Equity will grant relief where the right is clear and the injury certain and an injunction is necessary to prevent multiplicity of suits or suppress interminable or oppressive litigation.[66]

i. Adequate Remedy at Law. A court of equity will not interfere to give

Ohio.—Goodall *v.* Crofton, 33 Ohio St. 271, 31 Am. Rep. 535.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

South Carolina.— State *v.* Charleston, 11 Rich. Eq. 432.

Tennessee.— Lassater *v.* Garrett, 4 Baxt. 368; Caldwell *v.* Knott, 10 Yerg. 209.

West Virginia.— Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

United States.— Sellers *v.* Parvis, etc., Co., 30 Fed. 164; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 18 Fed. Cas. No. 10,752, 1 Cliff. 247 [*affirmed* in 2 Black 545, 17 L. ed. 333].

See 37 Cent. Dig. tit. "Nuisance," §§ 55, 177, 192.

Opposition to enterprise from inception.— Upon an application for an injunction to prevent a bleaching company from polluting a stream which was used by complainant for domestic purposes, while the facts that defendants were notified, before establishing their mill, that complainant would permit no pollution of the stream, and that complainant opposed the incorporation of the company, on the ground that the stream would be injured for his use by the establishment of their works, and that consequently a proviso was inserted in the company's charter, forbidding them to injure the water on the complainant's land, do not affect the legal rights of the parties, they constitute a strong claim for the exercise of the extraordinary power of a court of chancery to prevent the nuisance. Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335.

Defective proofs not supplied by alleged infraction of penal laws.— Campbell *v.* Schofield, 29 Leg. Int. (Pa.) 325.

Injury avoidable by act of complainant.— The court will not enjoin the erection of a mill, on the ground that the structure will destroy a spring belonging to complainant, and on which he relies for water, where it appears that, notwithstanding the mill, the spring may be preserved by digging a ditch two hundred and fifty yards in length. Rosser *v.* Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

63. Langdon *v.* Chicago, etc., R. Co., 48 Iowa 437.

64. *Maine.*— Sterling *v.* Littlefield, 97 Me. 497, 54 Atl. 1108; Varney *v.* Pope, 60 Me. 192.

New Jersey.— Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55].

New York.— Rochester *v.* Curtiss, Clarke 336.

North Carolina.— Vickers *v.* Durham, 132 N. C. 880, 44 S. E. 685.

Tennessee.— Caldwell *v.* Knott, 10 Yerg. 209.

West Virginia.— Pope *v.* Bridgewater Gas Co., 52 W. Va. 252, 43 S. E. 87.

See 37 Cent. Dig. tit. "Nuisance," §§ 55, 177, 192.

65. *Alabama.*— Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

Alaska.— Lindeberg *v.* Doverspike, 2 Alaska 177.

Maine.— Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399.

Massachusetts.— Dana *v.* Valentine, 5 Metc. 8.

New Jersey.— Robeson *v.* Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412.

New York.— Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511.

North Carolina.— Barnes *v.* Calhoun, 37 N. C. 199.

See 37 Cent. Dig. tit. "Nuisance," §§ 55, 177, 192.

The danger of explosion is not adequate cause for enjoining the erection of a gas manufactory, where the danger does not appear very great, and the complainant's buildings are not sufficiently near to be seriously endangered by one should it take place. Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

66. *Maine.*— Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108.

Maryland.— Reese *v.* Wright, 98 Md. 272, 56 Atl. 976.

Massachusetts.— Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203.

New Hampshire.— Burnham *v.* Kempton, 44 N. H. 78.

New Jersey.— Carlisle *v.* Cooper, 21 N. J. Eq. 576.

New York.—Davis *v.* Lambertson, 56 Barb. 480.

Oregon.— Parrish *v.* Stephens, 1 Oreg. 73.

United States.— Sellers *v.* Parvis, etc., Co., 30 Fed. 164; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 18 Fed. Cas. No. 10,752, 1 Cliff. 247 [*affirmed* in 2 Black 545, 17 L. ed. 333].

See 37 Cent. Dig. tit. "Nuisance," §§ 55, 177, 192.

relief against an alleged nuisance where the complaining party has an adequate remedy at law,[67] as where sufficient redress can be obtained by an action for damages.[68] But on the other hand the fact that the complainant has no adequate

67. *Connecticut.*— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

Illinois.— Nelson *v.* Milligan, 151 Ill. 462, 38 N. E. 239; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Chicago, etc., R. Co. *v.* Gardner, 66 Ill. App. 44.

Indiana.— New Albany, etc., R. Co. *v.* Higman, 18 Ind. 77.

Iowa.—Perry *v.* Howe Co-operative Creamery Co., 125 Iowa 415, 101 N. W. 150.

Maryland.— Bartlett *v.* Moyers, 88 Md. 715, 42 Atl. 204.

Massachusetts.— Dana *v.* Valentine, 5 Metc. 8.

New Jersey.— Carlisle *v.* Cooper, 21 N. J. Eq. 576; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Babcock *v.* New Jersey Stock Yard Co., 20 N. J. Eq. 296; Jersey City Water Com'rs *v.* Hudson, 13 N. J. Eq. 420; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314; Atty.-Gen. *v.* New Jersey R., etc., R. Co., 3 N. J. Eq. 136.

Ohio.—Goodall *v.* Crofton, 33 Ohio St. 271, 31 Am. Rep. 535.

Tennessee.— Lassater *v.* Garrett, 4 Baxt. 368.

Vermont.— Royce *v.* Carpenter, 80 Vt. 37, 66 Atl. 888; White *v.* Booth, 7 Vt. 131.

West Virginia.— Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

Wisconsin.— Denner *v.* Chicago, etc., R. Co., 57 Wis. 218, 15 N. W. 158.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Mountain Copper Co. *v.* U. S., 142 Fed. 625, 73 C. C. A. 621; Illinois, etc., R., etc., Co. *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70.

See 37 Cent. Dig. tit. "Nuisance," §§ 56, 177, 192.

But *compare* International, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 29 S. W. 483.

Remedy not adequate.— Where the use of land as a cemetery would probably poison the water in the wells of adjoining owners with disease germs, there cannot be said to be an adequate remedy at law because such owners might abandon their wells and procure water from the city waterworks. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94. 78 N. W. 488, 46 L. R. A. 237.

Remedy by ejectment.—A complaint which alleged that plaintiffs owned certain lots, that they platted a street on them, that the plat had been recorded, but the street had not been formally accepted by the village, that defendants maintained a house partly on a lot owned by them, but which encroached eleven feet on such street, that defendants threatened also to build a sidewalk on said street next to such house, and that such house and sidewalk were obstructions to the street and obstructed the view along such street, and thereby damaged plaintiff's property, stated a cause of action for the abatement of a private nuisance, although ejectment would lie, since ejectment would not afford an adequate remedy. Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178.

The fact that a placard constituting a nuisance is libelous does not affect the jurisdiction of equity to enjoin its continuance. Gilbert *v.* Mickle, 4 Sandf. Ch. (N. Y.) 357.

68. *Alabama.*— Dennis *v.* Mobile, etc., R. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; Rosser *v.* Randolph, 7 Port. 238, 31 Am. Dec. 712.

California.— Middleton *v.* Franklin, 3 Cal. 238.

Connecticut.— Frink *v.* Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

District of Columbia.— Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. 356; Johnson *v.* Baltimore, etc., R. Co., 4 App. Cas. 491.

Illinois.— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

Massachusetts.— Ingraham *v.* Dunnell, 5 Metc. 118.

Mississippi.— Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378.

Nebraska.— George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664.

New Hampshire.— Coe *v.* Winnepisiogee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

New Jersey.— Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314; Vanwinkle *v.* Curtis, 3 N. J. Eq. 422.

New York.— Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige 323.

North Carolina.— Brown *v.* Carolina Cent. R. Co., 83 N. C. 128.

Ohio.— Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342.

Pennsylvania.— Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; Grey *v.* Ohio, etc., R. Co., 1 Grant 412.

Tennessee.— Clack *v.* White, 2 Swan 540.

West Virginia.—Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Illinois, etc., R., etc., Co., *v.* St. Louis, 12 Fed. Cas. No. 7,007, 2 Dill. 70.

See 37 Cent. Dig. tit. "Nuisance," §§ 57, 177, 192.

Where an action for damages is pending an injunction will not be granted. Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

Public nuisance.— It is not enough to confer jurisdiction in equity to abate a public nuisance, at suit of a private person, that plaintiff has suffered special damages, but they must be of such a character as to be incapable of being measured in damages. George *v.* Peckham, 73 Nebr. 794, 103 N. W. 664.

remedy at law is a strong ground for granting equitable relief.[69] The fact that the person causing the nuisance is amply able to respond in damages does not establish that there is an adequate remedy at law,[70] for a recovery of damages is not in all cases a sufficient redress.[71] Neither is a statutory power to issue a warrant to abate the nuisance, should plaintiff prevail in an action, a remedy equally adequate and beneficial with the remedy in equity.[72] But where an adequate remedy may be had by resorting to a criminal prosecution, an injunction will not be granted.[73]

j. Determination of Right at Law. Where it is not clear that the matter complained of is a nuisance against which plaintiff is entitled to relief by abatement or injunction, a court of equity will not usually interfere until the complainant's right and the existence of a nuisance have been established at law [74] or by the verdict

69. *Alabama.*— Whaley *v.* Wilson, 112 Ala. 627, 20 So. 922.

Illinois.— Wahle *v.* Reinbach, 76 Ill. 322.

Kentucky.— Palestine Bldg. Assoc. *v.* Minor, 86 S. W. 695, 27 Ky. L. Rep. 781.

Maryland.— Reese *v.* Wright, 98 Md. 272, 56 Atl. 976.

Massachusetts.— Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. 512; Charles River Bridge Proprietors *v.* Warren Bridge, 6 Pick. 376.

Michigan.— Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; Wilmarth *v.* Woodcock, 58 Mich. 482, 25 N. W. 475; Robinson *v.* Baugh, 31 Mich. 290.

Nebraska.— Bischop *v.* Merchants' Nat. Bank, (1906) 106 N. W. 996.

New Jersey.— Carlisle *v.* Cooper, 21 N. J. Eq. 576.

New York.— Davis *v.* Lambertson, 56 Barb. 480; Milhau *v.* Sharp, 28 Barb. 228, 7 Abb. Pr. 220 [*affirmed* in 27 N. Y. 611, 84 Am. Dec. 314]; Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138.

Ohio.— Cline *v.* Kirkbride, 22 Ohio Cir. Ct. 527, 12 Ohio Cir. Dec. 517.

Oregon.— Parrish *v.* Stephens, 1 Oreg. 73.

Pennsylvania.— Dallas *v.* Ladies' Decorative Art Club, 4 Pa. Co. Ct. 340.

Tennessee.— Vaughn *v.* Law, 1 Humphr. 123.

United States.— Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000; Sellers *v.* Parvis, etc., Co., 30 Fed. 164; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

See 37 Cent. Dig. tit. "Nuisance," §§ 56, 177, 192.

Where a substantial nuisance results from the acts of several persons, and an action at law cannot be maintained against them jointly, an injunction may be granted, although the damage caused by each individual taken alone is nominal or inappreciable. Warren *v.* Parkhurst, 45 Misc. (N. Y.) 466, 92 N. Y. Suppl. 725 [*affirmed* in 105 N. Y. App. Div. 239, 93 N. Y. Suppl. 1009]; Thorpe *v.* Brumfitt, L. R. 8 Ch. 650; Lambton *v.* Mellish, [1894] 3 Ch. 163, 58 J. P. 835, 63 L. J. Ch. 929, 71 L. T. Rep. N. S. 385, 8 Reports 307, 43 Wkly. Rep. 5; Nixon *v.* Tynemouth Rural Sanitary Authority, 52 J. P. 504; Blair *v.* Deakin, 52 J. P. 327, 57 L. T. Rep. N. S. 522.

The difficulty of ascertaining the damage resulting from a nuisance is a reason for granting an injunction. Abendroth *v.* Manhattan R. Co., 7 N. Y. St. 43.

Where a nuisance is not permanent, and the damages caused thereby are not recoverable in one action, the injured party has no adequate remedy at law. Bischof *v.* Merchants' Nat. Bank (Nebr. 1906) 106 N. W. 996.

70. Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129.

71. Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888 (holding that injunction will lie to abate a nuisance, under Miller Code Iowa, § 3386, which provides that "an injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this Code," notwithstanding section 3331 giving an action at law for damages); Bemis *v.* Upham, 13 Pick. (Mass.) 169 (holding that St. (1828) c. 137, § 6, providing that an action for damages may be brought for the maintenance of a nuisance, and that in such action an order for the removal or abatement of the nuisance may be made by the court after judgment for plaintiff, does not give such an adequate remedy for the abatement of a nuisance as will preclude resort to injunction to accomplish the same purpose); Friedman *v.* Columbia Mach. Works, 99 N. Y. App. Div. 504, 91 N. Y. Suppl. 129.

72. Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. (Mass.) 512.

73. Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401. A court of equity cannot entertain a bill by the state's attorney to enjoin a public nuisance, on the ground that the criminal laws, as administered, are inadequate to suppress such nuisance, without a clear and adequate showing of injury resulting therefrom to public civil rights or to public property. People *v.* Condon, 102 Ill. App. 449.

74. *Alabama.*— St. James' Church *v.* Arrington, 36 Ala. 546, 76 Am. Dec. 332.

Florida.— Shivery *v.* Streeper, 24 Fla. 103, 3 So. 865.

Illinois.—Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484]; Robb *v.* La Grange, 158 Ill. 21, 42 N. E. 77; Lake View *v.* Letz, 44 Ill. 81; Flood *v.* Consumers Co., 105 Ill. App. 559; Deaconess Home, etc. *v.*

of a jury.[75] But where complainant's right is clear and undoubted and the injury is of such a nature and extent as to call for equitable interposition, an injunction may be granted without requiring a previous resort to an action at law.[76] So no

Bontjes, 104 Ill. App. 484 [*affirmed* in 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215].

Maine.— Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108; Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399; Varney *v.* Pope, 60 Me. 192; Porter *v.* Witham, 17 Me. 292.

Massachusetts.— Ingraham *v.* Dunnell, 5 Metc. 118.

Mississippi.— Gwin *v.* Melmoth, Freem. 505.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71; Burnham *v.* Kempton, 44 N. H. 78; Coe *v.* Winnepisiogee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

New Jersey.— Atty.-Gen. *v.* Steward, 20 N. J. Eq. 415; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Robeson *v.* Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412.

New York.— Russell *v.* Popham, 3 N. Y. Leg. Obs. 272; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige 554 (holding that the court will not interfere by injunction to restrain an erection not in itself noxious, until a trial of the right at law, except where an action could not be framed to meet the question, when the court may direct an issue); Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511; Hodgkinson *v.* Long Island R. Co., 4 Edw. 411.

North Carolina.— Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983; Frizzle *v.* Patrick, 59 N. C. 354; Atty.-Gen. *v.* Blount, 11 N. C. 384, 15 Am. Dec. 526, where the alleged nuisance is already in existence.

Ohio.— Goodall *v.* Crofton, 33 Ohio St. 271, 31 Am. Rep. 535.

Pennsylvania.— Wood *v.* McGrath, 150 Pa. St. 451, 24 Atl. 682, 16 L. R. A. 715; New Castle City *v.* Raney, 130 Pa. St. 546, 18 Atl. 1066, 6 L. R. A. 737 [*reversing* 6 Pa. Co. Ct. 87]; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Grey *v.* Ohio, etc., R. Co., 1 Grant 412; Crawford *v.* Atglen Axle, etc., Mfg. Co., 1 Chest. Co. Rep. 412.

South Carolina.— Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607.

Tennessee.— Caldwell *v.* Knott, 10 Yerg. 209.

Vermont.— White *v.* Booth, 7 Vt. 131.

England.— Sultan *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.

See 37 Cent. Dig. tit. "Nuisance," §§ 58, 177.

Where defendant shows a doubtful title to carry on the trade alleged to be a nuisance, such as a claim of prescriptive right, the court will not issue an injunction until defendant's title has been impeached in an action at law. Dana *v.* Valentine, 5 Metc. (Mass.) 8.

Acquiescence in erection of building.— Where a party does not take an injunction in the first instance, but permits the other party to go on erecting the building and fixtures from which a nuisance is anticipated, if, at the hearing, he prays for a perpetual injunction, he must do so on the ground that, in the meantime, the fact of nuisance has been established by an action at law, or at all events he must support his application by strong and unanswerable proof of nuisance. Simpson *v.* Justice, 43 N. C. 115. See also Foster *v.* Norton, 2 Ohio Dec. (Reprint) 390, 2 West. L. Month. 584.

A consent to a trial by the court of the merits waives the objection that the continuance of a nuisance ordinarily will not be enjoined until its existence is established by a suit at law. Ladd *v.* Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041.

Where there has been a verdict against defendants in an action at law, an injunction is properly denied. Durant *v.* Williamson, 7 N. J. Eq. 547.

75. *Illinois.*— Lake View *v.* Letz, 44 Ill. 81; Dunning *v.* Aurora, 40 Ill. 481.

North Carolina.— Redd *v.* Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

Ohio.— Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

Pennsylvania.— Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687 [*affirming* 1 Grant 105]; Frankford *v.* Lennig, 1 Am. L. Reg. 357, holding that equity will not enjoin the continuance of an alleged nuisance, where there exists a doubt as to the character or legality of the act, but will leave the parties to a remedy by indictment or direct an issue.

Tennessee.— Kirkman *v.* Handy, 11 Humphr. 406, 54 Am. Dec. 45.

See 37 Cent. Dig. tit. "Nuisance," § 58. And see *infra*, VII, C, 13.

Estoppel to claim jury trial.— One who erects a building upon his lot so that an unsightly cornice projects over on his neighbor's lot, and thus depreciates the value of the neighbor's property, is estopped to set up, as a defense to a bill by such neighbor to abate the nuisance created by the cornice, that the entertainment of the bill by a court of equity will deprive him of his statutory right of three trials by jury in ejectment, when, at the time he bought his lot, the neighbor's fence was on the line asserted by the hill, and it was pointed out to him as the line claimed to be the true boundary. Wilmarth *v.* Woodcock, 66 Mich. 331, 33 N. W. 400.

76. *Alabama.*— Ogletree *v.* McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

Illinois.— Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484]; Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367 [*affirming* 49 Ill. App. 530];

such resort is required where a thing is a nuisance *per se*,[77] where its contemplated use will necessarily make it a nuisance,[78] where the injury is manifest and continuous,[79] where the fact of its existence is undoubted,[80] or where from the nature of the case an action at law cannot afford adequate redress,[81] and the danger of injury is imminent.[82] And equity will enjoin without first requiring the existence of the nuisance to be found at law where the injury resulting therefrom is in its nature irreparable,[83] or not capable of compensation in damages,[84] as where loss of health,[85] loss of trade,[86] destruction of the means of subsistence,[87] the permanent ruin of property,[88] or the destruction of the comfortable enjoyment of dwelling-houses[89] will ensue from the wrongful act or erection complained of. In the case of a private nuisance causing injury to a prescriptive right relief may be granted without the right being established at law.[90] Where the existence of a nuisance has been established at law, a court of equity will as a matter of course grant an injunction against its continuance if it is of a constantly recurring character,[91] especially if the damages recovered are purely nominal and therefore inadequate to prevent a repetition of the injury.[92]

Dierks *v.* Addison Tp. Highway Com'rs, 142 Ill. 197, 31 N. E. 496.

Maine.— Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108.

Michigan.— White *v.* Forbes, Walk. 112.

New Jersey.— Stanford *v.* Lyon, 37 N. J. Eq. 94; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

Ohio.— Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Pennsylvania.— Hacke's Appeal, 101 Pa. St. 245; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92.

See 37 Cent. Dig. tit. "Nuisance," §§ 58, 177.

77. *Illinois.*— Iliff *v.* School Directors, 45 Ill. App. 419.

Mississippi.— Gwin *v.* Melmoth, Freem. 505.

Ohio.— Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

Pennsylvania.— Grey *v.* Ohio, etc., R. Co., 1 Grant 412.

South Carolina.— Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607.

See 37 Cent. Dig. tit. "Nuisance," § 58. And see *supra*, I, C.

78. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

79. Learned *v.* Hunt, 63 Miss. 373. And see *supra*, VII, C, 2, c, f.

80. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

81. Robinson *v.* Baugh, 31 Mich. 290; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254. And see *supra*, VII, C, 2, i.

82. Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63. And see *supra*, VII, C, 2, g.

83. Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Grey *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 412. And see *supra*, VII, C, 2, h.

84. Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607. And see *supra*, VII, C, 2, i.

85. Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Smith *v.* Cummings, 2 Pars. Eq. Cas. (Pa.) 92. And see *supra*, III, E, 4.

86. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254. And see *supra*, III, E, 3.

87. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254. And see *supra*, III, E, 2.

88. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254. And see *supra*, III, E, 5.

89. Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Beach *v.* Elmira, 22 Hun (N. Y.) 158; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254; Smith *v.* Cummings, 2 Pars. Eq. Cas. (Pa.) 92. And see *supra*, III, E, 7.

90. Porter *v.* Witham, 17 Me. 292; Van Bergen *v.* Van Bergen, 3 Johns. Ch. (N. Y.) 282, 8 Am. Dec. 511; Gardner *v.* Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

91. Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; People *v.* Third Ave. R. Co., 45 Barb. (N. Y.) 63. See also Reese *v.* Wright, 98 Md. 272, 56 Atl. 976.

Where plaintiff has recovered damages against defendant for the maintenance of a nuisance, and thereafter such nuisance has been destroyed by natural causes, a court of equity will enjoin the reërection of the same, unless it should be made to appear that precautions had been taken to avoid the same injury to plaintiff in the future. Miller *v.* Truehart, 4 Leigh (Va.) 569.

Pendency of writ of review.— The right to an injunction against a nuisance is not sufficiently established by a judgment declaring the existence of the nuisance if a writ of review is pending. Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71.

92. Paddock *v.* Somers, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254. But *compare*

k. Relative Injury From Continuance or Abatement.[93] The court will consider the equities presented in the particular case in which its interference is asked,[94] and the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by complainant if it be refused.[95] So an injunction will not ordinarily be granted where the erection complained of has a tendency to promote the public convenience,[96] to an extent outweighing the private inconvenience resulting therefrom;[97] where it is necessary to the welfare of the community generally;[98] or where an injunction would cause serious injury to an individual or the community at large, and a relatively slight benefit to the party seeking such relief;[99] but under such circumstances the person complaining will be left to his remedy at law or merely awarded damages.[1] Even a structure promoting public convenience may, however, be enjoined where the private injury is disproportionate to the public benefit.[2]

l. Acquiescence.[3] One who has slept upon his rights for a considerable time by acquiescing in the alleged nuisance will be denied equitable relief and left to his remedy at law;[4] but the fact that a person knows that a structure is being

Neuhs *v.* Grasselli Chemical Co., 8 Ohio S. & C. Pl. Dec. 203, 5 Ohio N. P. 359, holding that the fact that nominal damages have been awarded property-owners for damages from a factory alleged to be a nuisance is not sufficient to require the issuance of an injunction restraining the further operation of such factory.

93. See also *supra*, III, A, 7.

94. Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601, holding that in a suit for the abatement of an alleged nuisance facts showing that the relief demanded would be inequitable may be set up in the answer.

95. Clifton Iron Co. *v.* Dye, 87 Ala. 468, 6 So. 192; Brown *v.* Carolina Cent. R. Co., 83 N. C. 128.

The court should exercise great caution in enjoining acts alleged to constitute public nuisances at the suit of a private person, lest in protecting the latter much greater injury be done to the public. Wees *v.* Coal, etc., R. Co., 54 W. Va. 421, 46 S. E. 166.

96. Clifton Iron Co. *v.* Dye, 87 Ala. 468, 6 So. 192; Harrison *v.* Brooks, 20 Ga. 537; Thornton *v.* Roll, 118 Ill. 350, 8 N. E. 145; Daughtry *v.* Warren, 85 N. C. 136; Bradsher *v.* Lea, 38 N. C. 301; Barnes *v.* Calhoun, 37 N. C. 199; Eason *v.* Perkins, 17 N. C. 38.

97. Daniels *v.* Keokuk Water Works, 61 Iowa 549, 16 N. W. 705; Riedeman *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 23, 67 N. Y. Suppl. 391; Brown *v.* Carolina Cent. R. Co., 83 N. C. 128. See also Pilcher *v.* Hart, 1 Humphr. (Tenn.) 524.

98. Bacon *v.* Walker, 77 Ga. 336; Meigs *v.* Lister, 23 N. J. Eq. 199; Burwell *v.* Vance County Com'rs, 93 N. C. 73, 53 Am. Rep. 454.

99. *Massachusetts.*— Downing *v.* Elliott, 182 Mass. 28, 64 N. E. 201, holding that an injunction should be refused where the damage from the cause complained of is insignificant as compared with that resulting from other causes, and the injunction would be very injurious to defendant.

New York.— Riedeman *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 23, 67 N. Y. Suppl. 391 [*followed* in Bentley *v.* Empire Portland Cement Co., 48 Misc. 457, 96 N. Y. Suppl. 831].

Ohio.— Foster *v.* Norton, 2 Ohio Dec. (Reprint) 390, 2 West. L. Month. 583. But *compare* Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254, where it is said that in the invasion of a substantial legal right by the unlawful exercise of a trade or the use of property by another, the smallness of the damage on one side or its magnitude on the other is not ordinarily a fact of any special weight, and if the right and its violation are clear, an injunction will issue regardless of consequences. And see Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

Tennessee.— Madison *v.* Ducktown Sulphur, etc., Co., 113 Tenn. 331, 83 S. W. 658.

United States.— Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. ed. 311; Mountain Copper Co. *v.* U. S., 142 Fed. 625, 73 C. C. A. 621; Sellers *v.* Parvis, etc., Co., 30 Fed. 164; Miller *v.* Long Island R. Co., 17 Fed. Cas. No. 9,580*a*.

1. Riedeman *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 23, 67 N. Y. Suppl. 391; Daughtry *v.* Warren, 85 N. C. 136. And see *supra*, notes 96–99.

2. Bradsher *v.* Lea, 38 N. C. 301; Morton *v.* Chester, 2 Del. Co. (Pa.) 459. See also Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783.

3. As affecting right to recover damages see *infra*, VII, D, 6, b.

4. *Alabama.*— Clifton Iron Co. *v.* Dye, 87 Ala. 468, 6 So. 192.

Maine.— Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868.

Michigan.— Washington Lodge No. 54 I. O. O. F. *v.* Frelinghuysen, 138 Mich. 350, 101 N. W. 569.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 47 N. H. 426.

New Jersey.— Cronin *v.* Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605 (holding that on seeking an injunction to restrain the playing of base-ball in a park near his house, where complainant has, by securing the privilege of witnessing the games from his premises,

built and the purpose for which it is to be operated and makes no objection thereto does not estop him to afterward sue to abate it as a nuisance because of injuries arising from its use,[5] unless he encouraged or influenced the person complained of to build the structure and establish his business in the locality.[6] The acquiescence of plaintiff's grantor in an act or erection of defendant constituting a nuisance is no defense to plaintiff's cause of action for an injunction against a continuance of the nuisance.[7]

and by delaying a year or more in applying for an injunction, acquiesced in noises on the grounds which are incident to the playing of games in an orderly manner, the preliminary injunction should not extend to such noises); Tichenor *v.* Wilson, 8 N. J. Eq. 197.

Pennsylvania.—Hieskell *v.* Gross, 3 Brewst. 430. See Warren *v.* Hunter, 1 Phila. 414.

Rhode Island.— Sprague *v.* Steere, 1 R. I. 247.

Tennessee.—Madison *v.* Ducktown Sulphur, etc., Co., 113 Tenn. 331, 82 S. W. 658; Baldwell *v.* Knott, 10 Yerg. 209.

England.— Gaunt *v.* Tynney, L. R. 8 Ch. 8, 42 L. J. Ch. 122, 27 L. T. Rep. N. S. 569, 21 Wkly. Rep. 129.

Canada.— Swan *v.* Adams, 23 Grant. Ch. (U. C.) 220.

See 37 Cent. Dig. tit. "Nuisance," § 62.

Acquiescence in a slight nuisance for several years is not such laches as to deprive one of the right to equitable relief when the nuisance is greatly increased. Laird *v.* Atlantic Coast Sanitary Co., (N. J. Ch. 1907) 67 Atl. 387; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

Facts not amounting to acquiescence.— Where defendant erected a dam on his own premises near plaintiff's, whereby the latter were depreciated by the odors of stagnant water in the pond caused by the dam, plaintiff could maintain an equitable action to abate the nuisance, although by suggesting improvements and otherwise she had made efforts to render the pond innocuous and also had taken ice therefrom by defendant's permission. Adams *v.* Popham, 76 N. Y. 410.

Delay without acquiescence.— When the legal right of one who is injuriously affected by a private nuisance is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay in applying to the court for such relief is no ground for a denial thereof, unless coupled with such acquiescence in the nuisance as deprives the complainant of all right to equitable relief. Carlisle *v.* Cooper, 21 N. J. Eq. 576.

Delay or acquiescence not amounting to estoppel.— Mere delay in commencing a suit to abate a nuisance, or even acquiescence in the act of defendant, unless under circumstances which would create an equitable estoppel, short of the period necessary to give defendant a prescriptive right, would not bar plaintiff's right of action to abate a dam causing an overflow of water as an existing nuisance. Mueller *v.* Fruen, 36 Minn. 273, 30 N. W. 886.

Denial of right in previous action.— Although an injunction will not be granted, when plaintiff has remained inactive, knowing that defendant in good faith was incurring great expense in prosecuting the work complained of as injurious, this rule does not apply to an application to restrain a city from committing a nuisance by certain sewage improvements, the right to do which has been denied by a judgment in a former action by one of the parties against the city, as in such case the city, being advised of the illegality of its action, is not acting in good faith. Vick *v.* Rochester, 46 Hun (N. Y.) 607.

The illegal use of property as a house of ill fame constitutes a continuing injury to an adjoining property-owner, which is therefore unaffected by lapse of time. Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513.

5. *Iowa.*— Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

Kentucky.— Corley *v.* Lancaster, 81 Ky. 171.

Minnesota.— Matthews *v.* Stillwater Gas, etc., Co., 63 Minn. 493, 65 N. W. 947.

New York.— Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Leonard *v.* Spencer, 108 N. Y. 338, 15 N. E. 397; Carter *v.* New York El. R. Co., 14 N. Y. St. 859.

Ohio.— Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224; Barkau *v.* Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Cilly *v.* Cincinnati, 7 Ohio Dec. (Reprint) 344, 2 Cinc. L. Bul. 135.

Pennsylvania.—Burt *v.* Smith, 3 Phila. 363.

Texas.— Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327; Richardson *v.* Lone Star Salt Co., 20 Tex. Civ. App. 486, 49 S. W. 647.

See 37 Cent. Dig. tit. "Nuisance," § 62.

An abutting owner who expressly consents to the occupancy of a street by a railroad cannot afterward ask a court of equity to enjoin the use of the street or award him damages. Burkam *v.* Ohio, etc., R. Co., 122 Ind. 344, 23 N. E. 799.

Where the injury consisted of an encroachment of defendant's building on a private alley the court refused to order its removal, saying that as the necessary steps to restrain its erection had not been taken the relief was sought too late. Foster *v.* Norton, 2 Ohio Dec. (Reprint) 390, 2 West. L. Month. 583.

6. Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000; Huntington, etc., Land Development Co. *v.* Phœnix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037; Heenan *v.* Dewar, 17 Grant Ch. (U. C.) 638 [*affirmed* in 18 Grant Ch. 438]. See also Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296.

7. Learned *v.* Castle, 78 Cal. 454, 18 Pac.

m. Negligence or Wrong-Doing of Complainant.[8] A complainant is not entitled to relief in equity where the injury is largely due to his own negligence,[9] or where he is himself a wrong-doer in respect to the matter as to which he seeks relief.[10]

n. Statutory Remedy. It has been held that an injunction is properly denied where the statute furnishes a summary remedy for the abatement by the municipal authorities of nuisances such as that complained of.[11]

3. Notice to Person Maintaining Nuisance.[12] No notice to remove is necessary before bringing a suit for relief against the author or creator of the nuisance,[13] or against one who actively maintains and uses a nuisance originally erected by another;[14] but one who merely passively continues a nuisance created by another is entitled to a notice to abate it before a suit for its abatement can be brought.[15] Where a notice has once been given by a person authorized to give it, it will inure

872, 21 Pac. 11; O'Brien *v.* St. Paul, 18 Minn. 176; Alexander *v.* Kerr, 2 Rawle (Pa.) 83, 19 Am. Dec. 616.

8. Negligence of defendant as element of nuisance see *supra*, II, C.

9. Mowday *v.* Moore, 133 Pa. St. 598, 19 Atl. 626, holding that where the owner of one land which he knows to be wet and spongy, and which is situated within a few feet of a mill-race, puts in a cellar, the floor of which is below the level of the water in the race, and uses no cement for the cellar walls, although the water percolates into the cellar while it is being built, he is guilty of inexcusable negligence, which deprives him of the right to resort to equity for the purpose of compelling the adjoining owner to reconstruct his foundation walls so as to prevent the water in the race from passing into the cellar.

10. Topeka Water Supply Co. *v.* Potwin, 43 Kan. 404, 23 Pac. 578, holding that a private corporation cannot maintain a bill to restrain the discharge of sewage into a river within three miles of the point whence it procures the water furnished by it to a city, under Kan. Sess. Laws (1889), c. 232, § 3, prohibiting such discharge, where it is itself a wrong-doer, in that the ordinance under which it conducts its business requires it to furnish clear and healthful water, while the source from which it draws its water is so polluted that it could not comply with the terms of the ordinance, even if the discharge of the sewage complained of were restrained.

11. Powell *v.* Foster, 59 Ga. 790, 791, where it is said: "To anticipate the inefficiency of a statutory remedy exactly adapted to the case . . . is warranted neither by precedent nor any general principle. Should the remedy be tried, and obstacles to its speedy success actually arise, it may then be in order to invoke the interposition of chancery by injunction."

12. Notice before: Abatement by person aggrieved see *supra*, VII, B, 1, d. Action for damages, see *infra*, VII, D, 4. Criminal prosecution, see *infra*, VII, E, 4.

13. *Georgia.*— Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306.

Indiana.— Valparaiso *v.* Bozarth, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487.

Michigan.— Caldwell *v.* Gale, 11 Mich. 77.

New York.—Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130]; Dunsbach *v.* Hollister, 49 Hun 352, 2 N. Y. Suppl. 94 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152].

England.— Sellors *v.* Matlock Bath Local Bd. of Health, 14 Q. B. D. 928, 52 L. T. Rep. N. S. 762.

See 37 Cent. Dig. tit. "Nuisance," § 59.

Where there is no evidence that the nuisance existed before defendant became the owner of the premises, proof of notice to defendant of the existence of the nuisance is not required. Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130].

14. People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129].

Liability of person continuing nuisance see *supra*, IV, B.

15. Bartlett *v.* Siman, 24 Minn. 448; Thornton *v.* Smith, 11 Minn. 15. But *compare* Caldwell *v.* Gale, 11 Mich. 77, where the court, although expressly refusing to decide the question, intimated its opinion that no notice to a grantee of the creator of the nuisance was necessary.

Waiver of right to notice.—A continuer of a nuisance waives his right to insist upon notice to abate it as a condition precedent to a suit against him, where upon being sued together with the creator of the nuisance he joins in an answer with his co-defendant, distinctly basing his defense solely upon grounds other than want of notice, and proceeds until after the proofs are closed to try the cause upon such grounds of defense without any reference to the question of notice. Bartlett *v.* Siman, 24 Minn. 448.

Answer admitting demand for abatement.— Where in an action to enjoin the maintenance of a ditch, whereby surface waters were collected from defendants' land, and carried to the streets of plaintiff, the complaint alleged that plaintiff demanded of defendants that they fill up said ditch, but that defendants had failed to do so, and still maintained the same, and the answer denied that plaintiff ever demanded the removal of the ditch, or that defendants ever failed to comply with any legal or lawful demand made by

to the benefit of his grantee or of any one claiming title under or through him, and such person may sue without giving a new notice.[16]

4. Persons Entitled to Sue[17] **— a. Private Individuals.** An application for the abatement of a private nuisance must be made by the person injured thereby,[18] and any person injured in the enjoyment of his private rights by the continuance of a nuisance may maintain an action to abate the same.[19] The owner of the property injuriously affected by a nuisance has the right and is the proper person to bring a suit for relief,[20] even though he is not in possession of the property, where there is an injury to the fee.[21] On a conveyance of the property the right passes to the grantee,[22] and the grantor cannot afterward maintain a suit for relief.[23] A life-tenant may sue to enjoin a private nuisance affecting his reasonable use and

plaintiff, or that they maintained the ditch, such answer was an admission of plaintiff's demand to fill up the ditch, and, such demand being sufficient to put defendants on inquiry as to the effect of same, their refusal to comply with the demand obviated the necessity of further notice. Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851.

16. Caldwell *v.* Gale, 11 Mich. 77.

17. **Parties** see *infra*, VII, C, 9.

Persons entitled to sue for damages see *infra*, VII, D, 5.

18. Ruff *v.* Phillips, 50 Ga. 130.

19. Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82; Pettis *v.* Johnson, 56 Ind. 139.

One adjoining whose home a house of prostitution is conducted is entitled to an injunction to restrain the continuance of the nuisance. Tedescki *v.* Berger, (Ala. 1907) 43 So. 960, 11 L. R. A. N. S. 1060.

One who himself abates a private nuisance cannot afterward maintain an assize of nuisance, but he may bring an action on the case for damages sustained. Tate *v.* Parrish, 7 T. B. Mon. (Ky.) 325.

The easement to which the owner of lands under tide-water is entitled in the shore in front of his property will be protected in equity against any encroachment or appropriation, although such owner has not actually reclaimed the lands from the sea. Stockham *v.* Browning, 18 N. J. Eq. 390.

The United States has a right to insist that the efficiency and usefulness of a quarantine station be not impaired by nuisances wrongfully created or continued in the vicinity. U. S. *v.* Luce, 141 Fed. 385.

20. Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Leonard *v.* Spencer, 34 Hun (N. Y.) 341 [*affirmed* in 108 N. Y. 338, 15 N. E. 397]; Hutchins *v.* Smith, 63 Barb. (N. Y.) 251; Clark *v.* Peckham, 9 R. I. 455; Hathaway *v.* Doig, 6 Ont. App. 264, holding that a suit by the husband of the owner was improperly brought.

Plaintiff must have been owner of freehold affected by nuisance when acts complained of committed.— Hutchins *v.* Smith, 63 Barb. (N. Y.) 251.

Actual possession of land is prima facie evidence of ownership, and one in possession may maintain an action to abate a nuisance which injuriously affects his enjoyment of the possession. Learned *v.* Castle, (Cal. 1884) 4 Pac. 191.

21. Peck *v.* Elder, 3 Sandf. (N. Y.) 126, 6 Ch. Sent. 38; Weakley *v.* Page, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552, holding that where a house of ill fame injures plaintiff by causing the value and rents of his adjoining properties to decline, the fact that he does not live in his adjoining properties does not affect his right to the abatement of the nuisance.

Leased premises.— Where a nuisance is such as will injure the fee of neighboring property the owner may sue to restrain it, although he has leased the property and is not in possession. Tilson *v.* Crawford, 5 N. Y. Suppl. 882; Peck *v.* Elder, 3 Sandf. (N. Y.) 126, 6 Ch. Sent. 38; Park *v.* White, 23 Ont. 611. See also Dieringer *v.* Wehrman, 9 Ohio Dec. (Reprint) 355, 12 Cinc. L. Bul. 222.

Where plaintiff not in possession and title disputed.—A court of equity will not entertain a suit by a private individual to abate a public nuisance consisting of an alleged unlawful obstruction of a navigable stream, where the only special injury claimed by plaintiff is incidental to his ownership of land on the stream, which he does not occupy, and his title to which is disputed. Lownsdale *v.* Gray's Harbor Boom Co., 117 Fed. 983.

22. Nickerson *v.* Crawford, 11 N. Y. Suppl. 503, 25 Abb. N. Cas. 91 (holding that on the transfer of plaintiff's premises, alleged to be affected by the nuisance, after the commencement of a suit to restrain the nuisance and for damages, the right of action passes to the transferee, who is entitled to be substituted as plaintiff); Ingersoll *v.* Roussean, 35 Wash. 92, 76 Pac. 513 (holding that the right of a landowner to restrain an adjoining property-owner from permitting his property to be used as a house of ill fame is a property right running with the land, and it is therefore immaterial that defendant's premises were so used before plaintiffs purchased their property).

Where a structure is not of a permanent character and is in the nature of a continuing nuisance, a person who acquired title to the land injured after its erection can maintain a suit for the abatement of the nuisance. Costello *v.* Pomeroy, 120 Iowa 213, 94 N. W. 490. tile drain.

23. Filson *v.* Crawford, 5 N. Y. Suppl. 882.

occupation of the property,[24] and a mere lessee in possession may sue to restrain a nuisance injuring the demised premises,[25] or interfering with his reasonable use and comfortable enjoyment of the same.[26] A person having nothing more than the mere naked possession of land, without any title or vested interest therein, cannot maintain a suit to restrain a nuisance injuring the land.[27]

b. Public Officials. The attorney-general of a state or the prosecuting attorney of the county or municipality in which a public nuisance exists may proceed in equity in behalf of the people for its abatement,[28] but such a proceeding cannot be brought where the nuisance is a private one.[29]

c. Citizens of Town Where Nuisance Exists. The legislature may authorize a suit to restrain a public nuisance to be brought by a designated number of legal voters of the town where the nuisance exists.[30]

5. DEFENSES.[31] The fact that the person complaining licensed the erection of

24. Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

25. De Laney *v.* Blizzard, 7 Hun (N. Y.) 7; Hudson River R. Co. *v.* Loeb, 7 Rob. (N. Y.) 418.

26. *Louisiana.*— State *v.* King, 46 La. Ann. 78, 14 So. 423.

Missouri.— Clarke *v.* Thatcher, 9 Mo. App. 436.

Nebraska.— Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237.

New York.— Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 [*reversing* 54 N. Y. App. Div. 427, 66 N. Y. Suppl. 737].

Washington.— Grantham *v.* Gibson, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. N. S. 447.

England.—Shelfer *v.* City of London Lighting Co., [1895] 1 Ch. 287, 64 L. J. Ch. 216, 72 L. T. Rep. N. S. 34, 12 Reports 112, 43 Wkly. Rep. 238.

See 37 Cent. Dig. tit. "Nuisance," § 66.

After the expiration of the term and his removal from the premises the tenant has no right to the interposition of the court by injunction but is confined to his remedy at law for damages. Ingraham *v.* Dunnell, 5 Metc. (Mass.) 118; Bly *v.* Edison Electric Illuminating Co., 54 N. Y. App. Div. 427, 66 N. Y. Suppl. 737.

27. Denner *v.* Chicago, etc., R. Co., 57 Wis. 218, 15 N. W. 158.

28. *California.*—People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581; People *v.* Beaudry, 91 Cal. 213, 27 Pac. 610; Yolo County *v.* Sacramento, 36 Cal. 193.

Georgia.— Augusta *v.* Reynolds, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep.. 147, 69 L. R. A. 564.

Idaho.— Sand Point *v.* Doyle, 11 Ida. 642, 83 Pac. 598, 4 L. R. A. N. S. 810.

Illinois.— Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339; Chicago, etc., R. Co. *v.* People, 120 Ill. App. 306.

Indiana.— State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

Massachusetts.— Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361.

Missouri.—State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

New Jersey.— Belleville Tp. *v.* Orange, 70 N. J. Eq. 244, 62 Atl. 331; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 [*affirmed* in 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657].

New York.— People *v.* Metropolitan Tel., etc., Co., 11 Abb. N. Cas. 304, 64 How. Pr. 120.

North Carolina.— See Hickory *v.* Southern R. Co., 141 N. C. 716, 53 S. E. 955, holding that where a freight depot in a town constituted a public nuisance, the town, acting through its official board, was a proper party to sue for an injunction.

Ohio.— State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

Pennsylvania.— Biddle *v.* Ash, 2 Ashm. 211.

United States.— U. S. *v.* Luce, 141 Fed. 385; U. S. *v.* Debs, 64 Fed. 724.

England.— Atty.-Gen. *v.* Heatley, [1897] 1 Ch. 560, 66 L. J. Ch. 275, 76 L. T. Rep. N. S. 174, 45 Wkly. Rep. 394.

Canada.— Atty.-Gen. *v.* Niagara Falls International Bridge Co., 20 Grant Ch. (U. C.) 34.

See 37 Cent. Dig. tit. "Nuisance," § 195.

No bond is required, under Wilson St. Okla. (1903) § 4440, in an action by the state to enjoin the keeping of a common nuisance. Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

Where a public corporation is charged with the care of a park, and authorized to receive donations for ornamenting it, it has the right to compel the abating of a nuisance located opposite the park in a river on which the park abuts. Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70.

29. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462.

30. Davis *v.* Auld, 96 Me. 559, 53 Atl. 118, there being no provision in either the state or federal constitution requiring an equity suit in behalf of the state or the people to be carried on by the official public prosecutor.

31. See also *supra*, VII, C, 2.

the structure complained of as a nuisance is a good defense to a suit for its abatement.[32] The fact that it will be expensive for defendant to remove the nuisance[33] or that plaintiff could have prevented damage to his property from the matters complained of[34] is no defense. The fact that municipal authorities have tolerated a public nuisance is no defense to a suit by a private individual to enjoin the maintenance thereof.[35] In a suit against a municipal corporation to restrain the maintenance of a nuisance in the form of a sewer, defendant cannot set up the defense that it cannot lawfully enter upon the premises of persons using the sewer for the purpose of abating the nuisance.[36] The fact that the trustees of a hospital did not know that it was being conducted in a manner offensive to complainant and that they would have minimized the evil so far as possible had they known of the condition of affairs is no answer to a suit for an injunction to restrain the maintenance of the hospital.[37] Where plaintiff, owning land on which his residence stood, bought land adjoining subject to certain order easements, he is not estopped to sue to abate a nuisance to his health and comfort in the use of his residence produced by the exercise of those easements.[38] Owners of land adjoining an inclosed ground, to which admission is charged to see ball games, are not estopped to seek injunction against Sunday ball games thereon as a nuisance because for several years before the inclosure persons taking possession of the grounds without let or hindrance played Sunday ball games in the presence of all choosing to look, and the same class of noises had been made, without attempt at relief against the same, by such onlookers and persons alighting at the same place from electric cars and going for amusement to the river and the woods in the vicinity.[39]

6. JURISDICTION OF COURTS.[40] The exercise of jurisdiction by particular courts to abate or restrain nuisances depends upon the judicial system and statutory provisions of the state where the relief is sought.[41] In determining whether the

In action for damages see *infra*, VII, D, 6.
In criminal prosecution or penal action see *infra*, VII, E, 2.

32. Dorrance *v.* Simons, 2 Root (Conn.) 208; Woodard *v.* West Side Mill Co., 43 Wash. 308, 86 Pac. 579, implied license.

33. Faulkenburg *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327.

34. T. A. Snider Preserve Co. *v.* Beemon, 60 S. W. 849, 22 Ky. L. Rep. 1527.

35. Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513.

36. Demby *v.* Kingston, 60 Hun (N. Y.) 294, 298, 14 N. Y. Suppl. 601 [*affirming* 133 N. Y. 538, 30 N. E. 1148], where it is said: "Its powers for the protection of health and its own property are probably ample to enable it to sever any improper connection with the sewer, if it really should desire to do so to promote the public welfare. However this may be, the defendant can abate the nuisance by extending the sewer along the open stream or by embracing it within it." See also Rand Lumber Co. *v.* Burlington, 122 Iowa 203, 97 N. W. 1096, holding that it is no objection to a peremptory writ ordering the abatement of a nuisance created by the construction of sewers whose main artery is a creek running through the city into the river, that the creek, at the place complained of, runs on private property, there being nothing to show objection on the part of any of the property-owners to be affected by the writ.

37. Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484].

38. Leonard *v.* Spencer, 108 N. Y. 338, 15 N. E. 397.

39. Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532.

40. See, generally, COURTS.
In action for damages see *infra*, VII, D, 7.
In criminal prosecution or penal action see *infra*, VII, E, 3.

41. See the following cases:

California.— McCarthy *v.* Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7 (superior court); Yolo County *v.* Sacramento, 36 Cal. 193 (district court); Courtwright *v.* Bear River, etc., Water, etc., Co., 30 Cal. 573 (district court); People *v.* Moore, 29 Cal. 427 (county court).

Georgia.— Savannah, etc., R. Co. *v.* Gill, 118 Ga. 737, 45 S. E. 623 [*overruling* Macon, etc., R. Co. *v.* State, 50 Ga. 156] (jurisdiction of two justices of the peace); Strong *v.* La Grange Mills, 112 Ga. 117, 37 S. E. 117 (limits of jurisdiction of ordinary); Holmes *v.* Jones, 80 Ga. 659, 7 S. E. 168 (magistrates or ordinary); Salter *v.* Taylor, 55 Ga. 310 (two justices of the peace and a jury).

Massachusetts.— Cadigan *v.* Brown, 120 Mass. 493; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen 221; Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. 512, all as to supreme judicial court.

New Hampshire.— Dover *v.* Portsmouth

amount in controversy is such as to give a particular court jurisdiction, the value of the structure which it is sought to have removed, and not the amount of damage sustained therefrom, governs.[42]

7. Venue.[43] A suit to abate or restrain a nuisance must be brought in the county or district where the nuisance is situated,[44] and must be tried there,[45] unless a change of venue is granted by the court.[46]

8. Time For Commencing Suit.[47] A suit to abate or restrain a nuisance must be promptly brought[48] or the right to equitable relief may be lost.[49] A proceeding to abate a private nuisance cannot be brought after the expiration of the time limited by statute for such proceedings,[50] but the statute of limitations is not a defense to a bill filed for the abatement of a public nuisance.[51]

9. Parties[52] **— a. Plaintiffs.**[53] A proceeding for equitable relief against a private nuisance is properly brought in the name of the person injured,[54] and one specially injured by a public nuisance is entitled to sue for relief in his own name.[55] It is not necessary that all persons who are or may be injured should be joined as plaintiffs.[56] Several persons injured by a nuisance common to all may

Bridge, 17 N. H. 200, as to power of superior court of judicature.

New York.— Knox *v.* New York, 55 Barb. 404, 38 How. Pr. 67, supreme court sitting as court of equity.

See 37 Cent. Dig. tit. "Nuisance," §§ 67, 179, 196.

42. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

43. See, generally, Venue.

In criminal prosecution or penal action see *infra*, VII, E, 3.

44. Morris *v.* Remington, 1 Pars. Eq. Cas. (Pa.) 387; Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

A suit by the state to enjoin a nuisance should be commenced in the county of its locality. People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

45. Marysville *v.* North Bloomfield Gravel Min. Co., 66 Cal. 343, 5 Pac. 507; Horne *v.* Buffalo, 49 Hun (N. Y.) 76, 1 N. Y. Suppl. 801, 15 N. Y. Civ. Proc. 81.

46. Marysville *v.* North Bloomfield Gravel Min. Co., 66 Cal. 343, 5 Pac. 507.

47. See, generally, Limitations of Actions.

Action for damages see *infra*, VII, D, 8.

48. Mondle *v.* Toledo Plow Co., 9 Ohio S. & C. Pl. Dec. 281, 6 Ohio N. P. 294, holding that suit must be brought with the utmost promptness and diligence.

When suit in time.— An owner of an automobile garage cannot complain of delay in the commencement of a suit to enjoin its operation, where the building was commenced in the middle of October and the bill was filed on the fifth of November. O'Hara *v.* Nelson, (N. J. Ch. 1096) 63 Atl. 836.

Evidence insufficient to show laches see Desberger *v.* University Heights Realty, etc., Co., 126 Mo. App. 206, 102 S. W. 260.

49. See *supra*, VII, C, 2, l.

50. See Eastman *v.* St. Anthony Falls Water-Power Co., 12 Minn. 137.

51. Weiss *v.* Taylor, 144 Ala. 440, 39 So. 519 [*citing* Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Wright *v.* Moore, 38 Ala. 593, 82 Am. Dec. 731].

Under Cal. Civ. Code, § 3490, providing that "no lapse of time can legalize a public nuisance amounting to an actual obstruction of public right," limitations cannot be pleaded against an action to enjoin as a nuisance the maintenance of a ditch whereby surface waters are collected and conducted on to the streets of a town. Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851.

52. See, generally, Parties.

In action for damages see *infra*, VII, D, 9.

53. **Persons entitled to sue** see *supra*, VII, C, 4.

54. King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397.

55. Savannah, etc., R. Co. *v.* Gill, 118 Ga. 737, 45 S. E. 623; Richi *v.* Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646.

Right of private individual to relief against public nuisance see *supra*, VI.

56. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311 (holding that a private individual suing to abate a public nuisance need not join as complainants other persons who have sustained injury); Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628 (holding that one tenant in common of land injured by a private nuisance may sue to enjoin the nuisance without making his cotenant a party, either as complainant or defendant).

Plaintiff's partners in the business affected by the nuisance complained of need not be joined. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

In a suit by a landlord for relief against a nuisance injuring the demised premises, the tenant must be joined as a co-plaintiff, and an averment that the tenant threatens to abandon his lease and refuses to pay rent will not support a bill brought by the landlord alone, for the tenant has no right to do so. Ingraham *v.* Dunnell, 5 Metc. (Mass.) 118, holding further that the landlord cannot be permitted to amend his bill by joining the tenant after a hearing upon the merits and after the expiration of the tenant's term.

unite in seeking equitable relief,[57] and so neighboring property-owners may join as complainants in a suit to enjoin or restrain a nuisance, although they own distinct property interests and the injury is not joint but merely common;[58] but they cannot so join when the object of the suit is to restrain that which is a distinct and special injury to each of their properties.[59] Life-tenants and remainder-men of the property injured are properly joined as plaintiffs.[60] An action by an attorney-general or local prosecuting officer on behalf of the state or the people may be brought on the relation of a private person,[61] but the intervention of a private relator is not necessary.[62] A court has no power to authorize a private relator to maintain a suit in the name of the attorney-general to enjoin the maintenance of a public nuisance, on refusal of such leave by the attorney-general.[63] A bill to restrain a purprestnre can be maintained by a municipal corporation, or by a private individual, without joinder of the state.[64]

b. Defendants.[65] A suit to abate or restrain a nuisance must be against the owner of the fee,[66] unless the nuisance complained of is of such a character that

57. Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 344; Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628.

58. *Indiana.*— Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. 300 [*explaining* Heagy *v.* Black, 90 Ind. 534].

Iowa.— Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

Massachusetts.— Cadigan *v.* Brown, 120 Mass. 493.

Minnesota.— Grant *v.* Schmidt, 22 Minn. 1.

New Jersey.—Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532; Rowbotham *v.* Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663 [*affirmed* in 48 N. J. Eq. 311, 24 Atl. 131, 19 L. R. A. 663]; Demarest *v.* Hardham, 34 N. J. Eq. 469; Davidson *v.* Isham, 9 N. J. Eq. 186.

New York.— Brady *v.* Weeks, 3 Barb. 157; Peck *v.* Elder, 3 Sandf. 126, 6 Ch. Sent. 38; Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188; Murray *v.* Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773.

Ohio.— Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

West Virginia.—Snyder *v.* Cabell, 29 W. Va. 48, 1 S. E. 241.

Wisconsin.— Pettibone *v.* Hamilton, 40 Wis. 402.

See 37 Cent. Dig. tit. "Nuisance," §§ 70, 180.

Contra.—Fogg *v.* Nevada-California-Oregon R. Co., 20 Nev. 429, 23 Pac. 840; Hudson *v.* Maddison, 5 Jur. 1194, 11 L. J. Ch. 55, 12 Sim. 416, 35 Eng. Ch. 352, 59 Eng. Reprint 1192; Appleton *v.* Chapel Town Paper Co., 45 L. J. Ch. 276.

Plaintiffs in such action cannot have judgment for damage done property of each.— Grant *v.* Schmidt, 22 Minn. 1.

A nuisance is common to several persons when it affects all of them at the same period of time and in a similar way, although not precisely at the same instant or in the same degree. Rowbotham *v.* Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663 [*affirmed* in 48 N. J. Eq. 311, 24 Atl. 131, 19 L. R. A. 663].

59. Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532; Rowbotham *v.* Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663 [*affirmed* in 48 N. J. Eq. 311, 24 Atl. 131, 19 L. R. A. 663]; Demarest *v.* Hardham, 34 N. J. Eq. 469; Davidson *v.* Isham, 9 N. J. Eq. 186.

60. Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183.

61. Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Eastern Dist. Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242.

62. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581; Eastern Dist. Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242; Newark Aqueduct Bd. *v.* Passaic, 45 N. J. Eq. 393, 18 Atl. 106 [*affirmed* in 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55], holding that the proceeding in equity to restrain a public nuisance is by information by the attorney-general. But *compare* Atty.-Gen. *v.* Hane, 50 Mich. 447, 15 N. W. 549, holding that the attorney-general has no authority, unless in extraordinary cases, to proceed at his own instance as relator for the state to sue a private person by information in chancery to abate a mill-dam, on the ground of its being hurtful to health, but such a case should be prosecuted, if at all, by the public, and submitted to a jury.

The state is the proper party to complain of wrong done to its citizens by a public nuisance. Pedrick *v.* Raleigh, etc., R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. N. S. 554.

An action may be maintained in the name of the territory under the direct provisions of Wilson St. Okla. (1903) § 4440, to enjoin and suppress the keeping and maintaining of a common nuisance. Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

63. State *v.* Milwaukee, 102 Wis. 509, 78 N. W. 756.

64. Philadelphia *v.* Crump, 1 Brewst. (Pa.) 320.

65. Persons liable see *supra*, IV.

66. Hutchins *v.* Smith, 63 Barb. (N. Y.) 251.

his presence in the suit is not necessary to a complete determination of the controversy.[67] All persons whose right, title, or interest may be affected by the granting of the relief sought are proper parties defendant,[68] and so where the property on which the nuisance is situated is owned by tenants in common all must be joined.[69] And persons who own in severalty separate portions of a burying-ground may be joined as defendants to a bill to restrain other interments as a nuisance.[70] Where a person after erecting a nuisance conveys the property to another, both the grantor and the grantee must be made defendants to a suit to restrain or abate the nuisance.[71] So also where after the erection of a nuisance the premises are leased, both landlord and tenant should be made parties defendant,[72] and the same is true where the objectionable structure was erected and is maintained by the lessee with the knowledge and consent of the lessor;[73] but where the nuisance complained of consists simply of acts or movable structures of a lessee in which the lessor is not concerned, the lessor is not a necessary party.[74] Where several persons contribute to the creation of a nuisance they may be joined in a suit to abate the same, although each transacts his business, from which the nuisance flows, separately and without any connection with the others, and there is no joint intent or joint action;[75] but under such circumstances it is not necessary that all persons contributing to the nuisance should be joined as defendants.[76] Individual residents of a city who, in compliance with the law, have connected their premises with a sewer system constructed by the city and deposited sewage therein, are not proper parties to a suit against the city for the abatement of the nuisance.[77]

10. Preliminary Injunction. Where there is danger of irreparable injury the court may order a preliminary or temporary injunction, restraining defendant

67. Olmsted *v.* Rich, 3 Silv. Sup. (N. Y.) 447, 6 N. Y. Suppl. 826.

68. Danner *v.* Hotz, 74 Iowa 389, 37 N. W. 969; Eastman *v.* St. Anthony Falls Water-Power Co., 12 Minn. 137 (holding that in an action to remove a dam a defendant as to whom it was averred that he had, or pretended to have, some title or interest in the land on one side of the river, at the point where the dam abutted upon the shore, was a proper party defendant, as it might be necessary, in order to remove such dam, to enter upon his land, and as his title to the land might also give him title to or control over the dam to the thread of the stream); Mazza *v.* Heister, 5 Ohio Dec. (Reprint) 430, 5 Am. L. Rec. 526, 1 Cinc. L. Bul. 375.

Where a railroad company agreed to construct a switch at the expense of a gravel company, the latter being the party having the substantial interest involved and most responsible for the construction of the switch, and being the directing agency in such construction, the railroad company, although a proper party to a suit by an adjoining property-owner to restrain such construction, was not a necessary party. Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572.

69. Glass *v.* Clark, 53 Ga. 380.

Where a private way is obstructed by one of several persons claiming the land over which the way is situated, a proceeding to remove the obstruction as a nuisance may be brought against the person who erected it, without joining the other claimants as co-defendants. Connor *v.* Hall, 89 Ga. 257, 15 S. E. 308.

70. Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14, holding further that, one of the owners having died before the bill was filed and his widow having a right of sepulture in the burying ground, she and her second husband were properly made defendants with the survivor, and that heirs of the deceased should also be made defendants, but not his personal representatives.

71. Brown *v.* Woodworth, 5 Barb. (N. Y.) 550, holding that such an action against the purchaser alone is not authorized by the Revised Statutes.

72. Brady *v.* Weeks, 3 Barb. (N. Y.) 157; O'Sullivan *v.* New York El. R. Co., 7 N. Y. Suppl. 51; Mazza *v.* Heister, 5 Ohio Dec. (Reprint) 430, 5 Am. L. Rec. 526, 1 Cinc. L. Bul. 375, holding that the heirs of a deceased landlord should be joined.

Where the lessee has assigned his lease he is not a proper party, but his assignee should be made a party. Brady *v.* Weeks, 3 Barb. (N. Y.) 157.

Where the lessee has sublet the property, both he and his sublessee should be made parties. Brady *v.* Weeks, 3 Barb. (N. Y.) 157.

73. Robinson *v.* Smith, 3 Silv. Sup. (N. Y.) 490, 7 N. Y. Suppl. 38.

74. Olmsted *v.* Rich, 3 Silv. Sup. (N. Y.) 447, 6 N. Y. Suppl. 826, action to enjoin keeping of bees, the hives being movable.

75. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628. But *compare* Anderson *v.* Lehigh Coal, etc., Co., 10 Pa. Dist. 14.

76. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

77. Carmichael *v.* Texarkana, 94 Fed. 561.

until the issue as to complainant's right to relief can be tried and disposed of.[78] The granting of such an injunction is a matter of discretion,[79] and it is not an abuse of discretion to refuse a preliminary injunction where the evidence as to damage to plaintiff is conflicting.[80] The fact that the answer denies that the act or structure complained of is or will be a nuisance is not alone sufficient to require the dissolution of a preliminary injunction;[81] but where, taking the bill and answer, a structure complained of as a nuisance will not be *prima facie* a nuisance, the injunction will be dissolved,[82] and the dissolution of a preliminary injunction will not be disturbed on rule to continue such injunction, where plaintiff's affidavits as to the dangerous character of the structure complained of are positively denied by defendant's affidavits, which also allege that there are other structures of the same kind in the same borough.[83] An injunction which does not order the closing up of defendant's business but simply restrains him from carrying it on in such

78. *District of Columbia.*— Standard Oil Co. *v.* Oeser, 11 App. Cas. 80.

Iowa.— Hughes *v.* Eckerson, 55 Iowa 641, 8 N. W. 484.

Louisiana.— Violett *v.* King, 46 La. Ann. 78, 14 So. 423.

Massachusetts.— Ingraham *v.* Dunnell, 5 Metc. 118.

New Jersey.— Cronin *v.* Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605; Feeney *v.* Bartoldo, (Ch. 1895) 30 Atl. 1101.

New York.— Wilsey *v.* Callanan, 21 N. Y. Suppl. 165.

North Carolina.— Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529.

Pennsylvania.— Dennis *v.* Eckhardt, 3 Grant 390; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92.

Washington.— Grantham *v.* Gibson, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. N. S. 447.

West Virginia.— McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

See 37 Cent. Dig. tit. "Nuisance," §§ 72, 199.

Notice to defendant.— A preliminary injunction to restrain a nuisance can, under Miller Code Iowa, § 3391, be properly granted only upon notice; and error in granting it without notice is not waived by answering and moving to dissolve. Hughes *v.* Eckerson, 55 Iowa 641, 8 N. W. 484.

Misjoinder of parties.— Any misjoinder in a suit for injunction against Sunday ball games as a nuisance because of some of the complaints alleging injury from the noises on the ball grounds and others from the noise of those in the street may not be urged against a preliminary injunction, as this may be remedied later by requiring an election, and striking from the record the names of complainants not affected by the kind of injury on which it is elected to rely. Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532.

79. Barfield *v.* Putzel, 92 Ga. 442, 17 S. E. 616.

Circumstances warranting preliminary injunction see Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532; Evans *v.* Wilmington, etc., R. Co., 96 N. C. 45, 1 S. E. 529; Grantham *v.* Gibson, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. N. S. 447; McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

Circumstances under which refusal of preliminary injunction proper see the following cases:

Georgia.— East Tennessee, etc., R. Co. *v.* Sellers, 85 Ga. 853, 11 S. E. 543.

New York.— McGuire *v.* Bloomingdale, 8 Misc. 478, 29 N. Y. Suppl. 580, 31 Abb. N. Cas. 337.

Pennsylvania.— Dickson City *v.* Enterprise Powder Mfg. Co., 160 Pa. St. 479, 28 Atl. 841 (dissolution of preliminary injunction); Penrose *v.* Nixon, 140 Pa. St. 45, 21 Atl. 364; Connor *v.* Fisher, 8 Kulp 262 (refusal to continue preliminary injunction).

United States.— Sellers *v.* Parvis, etc., Co., 30 Fed. 164.

Canada.— Swan *v.* Adams, 23 Grant Ch. (U. C.) 220; Radenhurst *v.* Coate, 6 Grant Ch. (U. C.) 139.

See 37 Cent. Dig. tit. "Nuisance," § 72.

Where the answer denies the facts stated in the bill, showing that the erection and use of a livery stable will be a nuisance to the adjoining property, a preliminary injunction will be refused. Flint *v.* Russell, 9 Fed. Cas. No. 4,876, 5 Dill. 151.

When dissolution properly denied.—Where, on motion to dissolve an injunction *pendente lite,* prohibiting defendant from throwing stones by blasting in a quarry, it appears that stones have been thus thrown by defendant several times on plaintiff's premises, sometimes crashing into her dwelling, the motion is properly denied. Wilsey *v.* Callanan, 21 N. Y. Suppl. 165, holding further that the fact that defendant can conduct his business without casting stones on plaintiff's premises is no reason for dissolving such injunction, since it does not prohibit defendant from so doing.

80. Barfield *v.* Putzel, 92 Ga. 442, 17 S. E. 616; Born *v.* Loflin, etc., Powder Co., 84 Ga. 217, 10 S. E. 738.

81. Coker *v.* Birge, 10 Ga. 336, 9 Ga. 425, 54 Am. Dec. 347; Peck *v.* Elder, 3 Sandf. (N. Y.) 126, the thing complained of being *prima facie* a nuisance.

82. Mygatt *v.* Goetchins, 20 Ga. 350 [*followed* in Cunningham *v.* Rice, 28 Ga. 30].

83. Daw *v.* Enterprise Powder Mfg. Co., 160 Pa. St. 479, 28 Atl. 841.

a manner as to be a nuisance to plaintiff and his family should not be set aside on bond.[84]

11. Pleadings[85] — a. Bill, Complaint, or Petition[86] — (i) *In General.* The bill, complaint, or petition must make it appear that plaintiff has a clear right to the relief sought.[87] It must charge that the acts complained of are a nuisance,[88] show all matters requisite to complainant's right to the relief asked,[89] and defendant's liability for the injury,[90] and state facts sufficient to show that the apprehension of injury is well founded[91] and to enable the court to judge whether the injury will be material or irreparable.[92] Averments of mere conclusions are insufficient,[93] and so where the thing complained of is not a *per se* nuisance the

84. State *v.* King, 46 La. Ann. 78, 14 So. 423.

85. See, generally, Pleading.

86. **In action for damages** see *infra*, VII, D, 10, a.

In penal action see *infra*, VII, E, 6.

87. Biddle *v.* Ash, 2 Ashm. (Pa.) 211.

It must be shown that there is danger of irreparable injury to plaintiff's property (Biddle *v.* Ash, 2 Ashm. (Pa.) 211. But *compare* International, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 29 S. W. 483); that the act or structure complained of will unavoidably and of itself be a nuisance (Thebaut *v.* Canova, 11 Fla. 143); or that it is reasonably certain that injury will result (Elliott *v.* Ferguson, (Tex. Civ. App. 1904) 83 S. W. 56, holding that a petition alleging that the land of a proposed cemetery is higher than the lands of plaintiffs is too indefinite without some further allegation showing that plaintiffs' lands are in such close proximity to the proposed cemetery as makes it reasonably certain that injury will accrue to them).

Where the bill shows an adverse claim to the land in dispute, and possession in defendant, the complainant states himself out of court. Biddle *v.* Ash, 2 Ashm. (Pa.) 211.

Construction.— In a suit to restrain defendant from operating his foundry so as to interfere with the enjoyment of plaintiff's premises, an allegation that defendant could so arrange and operate his cupola that sparks, etc., would not be carried upon plaintiff's house, warranted an inference that a more careful method of operation would prevent the nuisance, although the particular precautions which ought to have been taken were not pointed out. Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

88. Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

89. Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. (D. C.) 356 (holding that it must appear that plaintiff will sustain an injury for which he cannot be compensated in damages); Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108 (holding that, where there is no allegation that complainant's rights have been determined at law, or of anything from which it can be inferred that there is any imperious necessity for invoking the aid of equity, an injunction will not be granted); Ellsworth *v.* Putnam, 16 Barb. (N. Y.) 565; Threadgill *v.* Anson County, 99 N. C. 352, 6 S. E. 189 (holding that under Code, § 707, subs. 5, providing that the board of commissioners is authorized "to make such orders respecting the corporate property of the county as may be deemed expedient," a complaint in an action against the board as a corporation, to abate an offensive privy on such property as a nuisance, should allege that the board had neglected to raise and appropriate money to employ agents to prevent the nuisance).

Bill, complaint, or declaration held sufficient see Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; Boston Ferrule Co. *v.* Hills, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844; Parrot *v.* Cincinnati, etc., R. Co., 3 Ohio St. 330; Aldrich *v.* Howard, 7 R. I. 87, 80 Am. Dec. 636.

Complaint or petition held insufficient see Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572; Holke *v.* Herman, 87 Mo. App. 125; Denner *v.* Chicago, etc., R. Co., 57 Wis. 218, 15 N. W. 158.

90. State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 35 Atl. 835 [*affirmed* in 55 N. J. Eq. 591, 39 Atl. 1114], allegations sufficient to hold defendant in part liable.

Uncertainty.— An information to restrain a nuisance caused by the erection of a fence on a public highway, alleging that "the defendants or some or one of them" had put up such fence was bad on demurrer, as being too uncertain an allegation as to who had committed the act complained of. Atty.-Gen. *v.* Boulton, 20 Grant Ch. (U. C.) 402.

91. Payne *v.* McKinley, 54 Cal. 532. See also Remsberg *v.* Iola Portland Cement Co., 73 Kan. 66, 84 Pac. 548.

92. Thebaut *v.* Canova, 11 Fla. 143; Adams *v.* Michael, 38 Md. 123, 17 Am. Rep. 516.

Situation of property.— In a private action to abate a public nuisance, the complaint should show the relative situations of the nuisance and plaintiff's property. Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118. A bill to restrain the erection of a brewery on the ground that it will constitute a nuisance is demurrable where it does not set out the location of complainants' residences with sufficient definiteness to show that the threatened annoyances will be appreciable to them. O'Reilly *v.* Perkins, 22 R. I. 364, 48 Atl. 6.

Allegations as to injuries to persons not parties are relevant in a suit to restrain a public nuisance. Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188.

93. Bowen *v.* Manzy, 117 Ind. 258, 19 N. E. 526; Bordeaux *v.* Greene, 22 Mont. 254, 56

facts which make it such must be averred, and a mere averment that it is or will be a nuisance is not sufficient.[94] It must clearly appear that plaintiff has personal knowledge of the material facts charged, or he must produce supplemental proof.[95] Matters not material to plaintiff's right to relief need not be set forth.[96]

(II) *Special Injury.*[97] Where the alleged nuisance is public as well as private, the complaint must show that plaintiff has sustained some injury different in kind from that suffered by the general public,[98] but such special injury need not be alleged where the nuisance is solely a private one.[99]

(III) *Title and Possession of Complainant.* In the old common-law action by writ of nuisance, it was necessary that the declaration should show that plaintiff had a freehold estate in the premises affected by the nuisance.[1] The title and

Pac. 218, 74 Am. St. Rep. 600, averment that fence complained of is liable to be blown over on buildings and may injure them.

94. Thebaut *v.* Canova, 11 Fla. 143 (so holding on the ground that such an averment amounts to a mere expression of opinion); Begein *v.* Anderson, 28 Ind. 79; Adams *v.* Michael, 38 Md. 123, 17 Am. Rep. 516; Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125.

The attaching of a map to the petition as an exhibit in a suit to enjoin as a threatened nuisance the location of a public cemetery adjacent to plaintiffs' lands does not relieve the pleader from the necessity of alleging the facts to which the exhibit relates, even if a map is an exhibit authorized by rule of court. Elliott *v.* Ferguson, (Tex. Civ. App. 1904) 83 S. W. 56.

95. Perkins *v.* Collins, 3 N. J. Eq. 482.

96. Schaub *v.* Perkinson Bros. Constr. Co., 108 Mo. App. 122, 82 S. W. 1094 (holding that it is sufficient to state facts showing that defendant has created and is maintaining a nuisance, without stating whether the nuisance is due to negligence or to the nature of the work done); Stamm *v.* Albuquerque, 10 N. M. 491, 62 Pac. 973 (holding that in a suit to abate a private nuisance, which is also a public nuisance, it is immaterial to show the injury to the public or to individuals similarly situated to plaintiff); Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188 (holding that where plaintiff does not sue on behalf of the municipality to abate a public nuisance, allegations as to the amount of taxes paid to the city are irrelevant).

97. In action for damages see *infra*, VII, D, 10, a, (III).

98. *California.* — Spring Valley Waterworks *v.* Fifield, 136 Cal. 14, 68 Pac. 108; Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118; Hargro *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1106; Payne *v.* McKinley, 54 Cal. 532; Harniss *v.* Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

Colorado.—People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850.

Connecticut.—Stowe *v.* Miles, 39 Conn. 426.

Illinois.— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

Indiana.— Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 566, 58 N. E. 851.

Massachusetts.— Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969 [*following* Needham *v.* New York, etc., R. Co., 152 Mass. 61, 25 N. E. 20].

Missouri.— Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531 [*following* Smiths *v.* McConathy, 11 Mo. 517].

New York.— Young *v.* Scheu, 56 Hun 307, 9 N. Y. Suppl. 349; Astor *v.* New York Arcade R. Co., 3 N. Y. St. 188.

Pennsylvania.— Rhymer *v.* Fritz, 206 Pa. St. 230, 55 Atl. 959, 98 Am. St. Rep. 777; Smith *v.* Cummings, 2 Pars. Eq. Cas. 92; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. 85.

South Carolina.— Hellams *v.* Switzer, 24 S. C. 39.

See 37 Cent. Dig. tit. "Nuisance," §§ 77, 181.

When such injury appears by inference it is proper to overrule a motion for judgment on the pleadings at the commencement of the trial. Hargro *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1106.

Construction.— Where, in a private action to abate a nuisance, it is necessary to aver the existence or non-existence of other property-owners than plaintiff, an averment that the premises alleged to be injured are in a certain town gives rise to the presumption that there are other property-owners therein. Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118.

In a suit by a town against a manufacturing company to restrain such company from carrying on a certain business in a certain building, no relief can be granted plaintiff on the ground that the business was a public nuisance, where there is no allegation to show that plaintiff in its corporate capacity received any damages of a special nature. Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969.

99. Silva *v.* Spangler, (Cal. 1896) 43 Pac. 617 (holding that in an action to abate an embankment, which throws surface water over plaintiff's right of way, where there is no allegation that the right of way is a public one, it is unnecessary for plaintiff to allege that he has suffered any special injury differing from that resulting to the public); Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531 [*following* Smiths *v.* McConathy, 11 Mo. 517].

1. Cornes *v.* Harris, 1 N. Y. 223.

estate of plaintiff are set out with sufficient certainty where he alleges himself to be the owner of the premises in fee simple by purchase and to be in possession;[2] but it cannot be presumed that he has any legal or equitable title to the land where the complaint alleges that he is in possession under a contract for the sale thereof to him, but does not state whether the other party to the contract had any title to the land.[3] A bill to enjoin a nuisance which avers plaintiff to be a "tenant and occupier" of the land implies a tenancy from month to month.[4]

(IV) *Nature of Injury.* In a suit to enjoin the operation of a factory near plaintiff's property, and for damages, allegations that the health of plaintiff's family has been injured by the noise and smoke are proper, as being descriptive of the character of the nuisance.[5] In an action for a private nuisance from a steam cotton press, allegations of increased danger from fire and liability to explode, thereby rendering plaintiff's dwelling unfit for residence and impairing the value of his property, are sufficient.[6]

b. Demurrer. A bill or complaint in a suit to abate or enjoin a nuisance is not demurrable because it does not state that the rights of the parties, in support of the bill, have been settled by a judgment at law,[7] nor can a demurrer be based on the ground that the work, being authorized by the legislature, cannot be abated as a nuisance, where the existence of such authority is not alleged.[8] It has been held that the failure of the complaint to allege any damage to plaintiff different or peculiar from that resulting to the common public, is not ground of demurrer, although in a proper case the objection may be urged under a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.[9]

c. Plea or Answer.[10] Where the complaint charges defendant with a crime defendant may omit a verification of his answer.[11] Averments in the answer which are immaterial to plaintiff's right to relief are properly stricken out.[12]

d. Amendment.[13] The bill, petition, or complaint may be amended by striking out the names of plaintiffs who are not entitled to the relief prayed for,[14] or by adding averments as to special injury to plaintiff.[15] An amendment of the complaint changing the action from one in equity to one at law is not permissible unless made by consent;[16] but it has been held that plaintiff may amend so as to pray for an abatement of the nuisance, although the petition as originally filed merely asked damages to date.[17]

e. Issues, Proof, and Variance.[18] The proofs must accord with the case pre-

2. Vanwinkle *v.* Curtis, 3 N. J. Eq. 422.
3. Denner *v.* R. Co., 57 Wis. 218, 15 N. W. 158.
4. Clarke *v.* Thatcher, 9 Mo. App. 436.
5. Hoadley *v.* Seward, etc., Co., 71 Conn. 640, 42 Atl. 997.
6. Ryan *v.* Copes, 11 Rich. (S. C.) 217, 73 Am. Dec. 106.
7. Aldrich *v.* Howard, 7 R. I. 87, 80 Am. Dec. 636; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, 9 Eng. L. & Eq. 104.
8. Davis *v.* Sacramento, 59 Cal. 596.
9. Silva *v.* Spangler, (Cal. 1896) 43 Pac. 617. under Code Civ. Proc. § 430.
10. **In action for damages** see *infra*, VII, D, 10, b.
11. Anderson *v.* Doty, 33 Hun (N. Y.) 238, holding also that it is unnecessary for defendant to serve with his answer an affidavit stating why he claims the right to serve an unverified answer.
12. Crammer *v.* Atlantic City Gas, etc., Co., 39 N. J. Eq. 76 (averment as to cost of works in answer to a bill charging certain gas-works to be a nuisance); Angel *v.* Pennsylvania R. Co., 38 N. J. Eq. 58 (averment in answer in an action to abate a nuisance caused by defendant allowing its cars to remain an unreasonable time on a public street where plaintiff's house was located that the track was built before the house).
13. **In action for damages** see *infra*, VII, D, 10, a, (VI).
14. Dana *v.* Valentine, 5 Metc. (Mass.) 8, holding that this may be done after a hearing of the cause.
15. Stowe *v.* Miles, 39 Conn. 426.
16. Fraedrich *v.* Flieth, 64 Wis. 184, 25 N. W. 28, holding that, in an action to abate a nuisance, in which damages are claimed and an injunction asked, it is not error to refuse to allow the complaint to be amended by striking out from the demand for judgment every demand except for damages and costs.
17. Ennis *v.* Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.
18. **In action for damages** see *infra*, VII, D, 10, c.

sented by the pleadings[19] or the variance will be fatal.[20] But a variance between the allegations of the complaint and the proof may be disregarded as immaterial where it is not such as to render the allegations unproved in their entire scope and meaning, and defendant was not misled.[21]

12. Evidence[22] — a. Presumptions. In a suit to enjoin the erection of a structure not *per se* a nuisance, it will not be presumed that it will be so maintained as to become a nuisance;[23] nor will it be presumed in an action to abate a nuisance that defendant, a grantee of the land on which the nuisance was erected by the grantor, knows that it was erected without the consent of persons affected thereby.[24] Where the information in a suit on behalf of the state to abate a structure in a street as a nuisance alleges that the peculiar damage to relator is incidental to the public nuisance, and that the general public suffers and will suffer damage and inconvenience, the presumption is that the prosecuting attorney brought the suit in the exercise of an official duty and not to subserve the peculiar interest of the relator.[25]

b. Burden of Proof. Where the thing complained of is not a nuisance *per se* or *prima facie*, the burden is upon plaintiff to show that it is a nuisance in fact;[26] but where the thing complained of is *prima facie* a nuisance, although not such *per se*, the burden is upon defendant to show that it is not a nuisance in fact.[27] A private individual seeking to enjoin a public nuisance must show special damage,[28] but such proof is not necessary where the nuisance is a private one.[29] Where the state, through its proper officer, seeks the jurisdiction of a court of equity to abate by injunction a public nuisance, it must show that such nuisance is an injury to the property or civil rights of the public at large, which it is the prosecuting officer's duty, as the agent of the public, to prevent.[30]

In criminal prosecution or penal action see *infra*, VII, E, 7.

19. See Butterfield *v.* Klaber, 52 How. Pr. (N. Y.) 255, holding that in an action to abate marble works as a nuisance, an allegation in the complaint that such works caused loud, dissonant, and offensive noises was sufficient to admit proof that the blowing of a steam whistle connected with the works caused great annoyance and was unnecessary to the successful prosecution of the business.

20. Brown *v.* Woodworth, 5 Barb. (N. Y.) 550, holding that where the count, in an action of nuisance, alleged that the nuisance was below plaintiff's land, and the proof was that it was adjoining and on plaintiff's land, the variance was fatal.

21. Smith *v.* Ingersoll-Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 27 N. Y. Suppl. 907.

22. See, generally, Evidence.

In action for damages see *infra*, VII, D, 11.

In criminal prosecution or penal action see *infra*, VII, E, 8.

23. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

24. Castle *v.* Smith, (Cal. 1894) 36 Pac. 859.

25. State *v.* Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

26. Pittsburgh, etc., R. Co. *v.* Crothersville, 159 Ind. 330, 64 N. E. 914; Fischer *v.* Sanford, 12 Pa. Super. Ct. 435; Ball *v.* Ray, L. R. 8 Ch. 467, 28 L. T. Rep. N. S. 346, 21 Wkly. Rep. 282; Oldaker *v.* Hunt, 19 Beav. 485, 52 Eng. Reprint 439 [*affirmed* in 6 De G. M. & G. 376, 3 Eq. Rep. 671, 1 Jur. N. S. 578, 3 Wkly. Rep. 296, 55 Eng. Ch. 294, 43 Eng. Reprint 1279].

The existence of the nuisance must be clearly proven.— Eastern Dist. Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242.

Proof of non-compliance with municipal regulation.— If the use of steam engines and furnaces has been regulated by an order of the municipal authorities, duly made and recorded, under Mass. St. (1845) c. 197, the burden is on a party who complains of the works as a nuisance to prove a non-compliance with the terms of the order or an unlawful or improper use of the works. Call *v.* Allen, 1 Allen (Mass.) 137.

Degree of certainty required.— A charge that the burden of proof is on plaintiffs to show beyond a reasonable doubt that the use of adjacent grounds for cemetery purposes will probably result in poisoning the water-supply and will contaminate the atmosphere of their homes is erroneous as imposing a greater degree of certainty than is required in civil cases. Elliott *v.* Ferguson, (Tex. Civ. App. 1904) 83 S. W. 56.

27. Pruner *v.* Pendleton, 75 Va. 516, 40 Am. Rep. 738. See also Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888.

28. Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531 [*following* Smiths *v.* McConathy, 11 Mo. 517]; Black *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 468, 53 N. Y. Suppl. 312.

29. Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531 [*following* Smiths *v.* McConathy, 11 Mo. 517].

30. State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478.

c. Admissibility. Subject to the general rules of evidence,[31] any evidence bearing upon the question whether the matter complained of is a nuisance and whether the relief asked should be granted is admissible.[32] So evidence is admissible which tends to show the nature and extent of the injury or annoyance,[33] the results thereof,[34] and the manner in which defendant conducted the business complained of during the time complained of.[35] But evidence which is immate-

31. See EVIDENCE.

32. Bear River, etc., Water, etc., Co. *v.* Boles, 24 Cal. 359 (holding that in a suit to abate a nuisance arising from defendant's reservoirs intercepting the water of plaintiff's ditch, evidence is admissible as to plaintiff's ditch being out of order and incapable of carrying water, as in that case the reservoir could not be a present nuisance); Friburk *v.* Standard Oil Co., 66 Minn. 277, 68 N. W. 1090 (holding that in an action by a wife to abate a nuisance caused by the manner in which defendant handled oil in the vicinity of plaintiff's dwelling, and to recover damages, it was proper to permit plaintiff to testify, for the purpose of showing the use to which she was putting her property, that her family consisted of her husband and six children, and that it was error to exclude evidence as to whether plaintiff had complained to defendant of the alleged nuisance); Neuhs *v.* Grasselli Chemical Co., 8 Ohio S. & C. Pl. Dec. 203, 5 Ohio N. P. 359 (holding that, in determining whether a lawful business shall be enjoined, evidence of the value of the plant, of the number of men employed, of the influence of other factories in that neighborhood upon the atmosphere and property, and of the appliances used by defendant is properly admitted).

The record of defendant's indictment and conviction of the offense of erecting a nuisance in connection with the business complained of is admissible without any supplemental bill setting it forth. Peck *v.* Elder, 3 Sandf. (N. Y.) 126.

Affidavits may be received and read.— Philadelphia *v.* Crump, 1 Brewst. (Pa.) 320; Smith *v.* Cummings, 2 Pars. Eq. Cas. (Pa.) 92.

Evidence of matters subsequent to verification of petition admissible.— State *v.* Williams, 90 Iowa 513, 58 N. W. 904.

Hypothetical question.— There was no error in admitting answers to hypothetical questions as to the effect of the proximity of defendant's place on the value of plaintiff's property and its desirability as a residence, in some of which questions it was assumed that another disorderly establishment was in the neighborhood, as it was necessary and proper to consider all of the surroundings. Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478.

33. Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193, holding that in a suit by the proprietors of a store against the tenants of neighboring rooms to enjoin and abate a nuisance, consisting of a stairway which blocked plaintiff's doorway and the creation of offensive odors, it was not error to permit one of the complainants to testify that the odors were the subject of remarks by their customers.

Plaintiff can show damages suffered after the commencement of the suit for the purpose of showing a continuing injury. Hayden *v.* Albee, 20 Minn. 159.

The presence and extent of deleterious gases may be shown by the effects on the human senses and the conditions of the human system, and it is not necessary that it should be shown by chemical analysis of the atmosphere. McClung *v.* North Bend Coal, etc., Co., 1 Ohio S. & C. Pl. Dec. 247, 31 Cinc. L. Bul. 9.

34. Hoadley *v.* M. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997 (holding that on an issue as to whether the operation of a factory near plaintiff's house should be enjoined, evidence was admissible that the noise and smoke incident to such operation injured the health of plaintiff's family, and that the maintenance of the nuisance increased the illness of a member of plaintiff's family, although the illness might not have been originally caused by the nuisance); Wing *v.* Rochester, 9 N. Y. St. 473.

Remoteness in time.— In a suit for the abatement of certain nuisances and for damages, evidence concerning the health of the neighborhood, or of particular persons residing therein, at a period some fifteen years or more before trial, is too remote for comparison to disprove evidence as to the health of plaintiff and his family, alleged to have been affected by the nuisance complained of. Astill *v.* South Yuba Water Co., 146 Cal. 55, 79 Pac. 594.

Effect on others.— On the issue as to the right to an injunction plaintiff may show the effect of the matter complained of upon other persons or other property similarly situated. Hoadley *v.* N. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997; McClung *v.* North Bend Coal, etc., Co., 1 Ohio S. & C. Pl. Dec. 247, 31 Cinc. L. Bul. 9. *Contra*, Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000; Fay *v.* Whitman, 100 Mass. 76. And evidence is also admissible to show the effect on vegetation and physical comfort of smoke, soot, and gases emitted by similar works in other and distant localities. McClung *v.* North Bend Coal, etc., Co., *supra*.

35. Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300, holding that in an action to abate a nuisance consisting of a factory, it was not error to permit several witnesses to testify that after complaint had been made defendant caused a longer smokestack to be used and that thereafter the evils were not so great.

Reputation and newspaper reports.—Where the complaint in a suit to restrain the main-

rial,[36] purely speculative,[37] or not within the issues[38] cannot be admitted. Matters not proper for consideration on the question of whether the thing complained of is a nuisance may, however, be considered in determining whether the relief asked should be granted.[39] Defendant may introduce evidence to show that the annoyance complained of may have proceeded from structures other than that maintained by him and which it is sought to enjoin,[40] or that he is not the person whose acts caused the injury;[41] and where the defense is estoppel in that plaintiff knowingly permitted the structure complained of to be built without objection, evidence of the cost of the structure is properly admitted.[42] If a business which is *prima facie* a nuisance can be conducted so that it will not be a nuisance, its owner should be allowed to offer proof thereof and his rights should be then protected.[43] Where complaint is made of odors from a barn it is proper to receive testimony of experienced persons as to the extent to which odors could arise from a barn kept in the condition of the one in question.[44]

d. Weight and Sufficiency. In order to authorize an injunction against the erection or continuance of a nuisance, the evidence must be determinate and satisfactory,[45] and should establish at least a *prima facie* necessity for the

tenance of a disorderly saloon and beer garden near plaintiff's residence alleged that such place had become notorious and the subject of newspaper comment, and that such evil reputation had affected the value of plaintiff's property, together with other property in the neighborhood, evidence of such reputation and as to newspaper reports concerning it was properly admitted. Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478.

36. Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82 (holding that in an action to abate a nuisance caused by odors arising from refuse of a creamery, it was not error to exclude defendant's testimony as to how the management of his creamery and the premises about it compared with the management of other creameries and the premises about them); Baker *v.* Bohannan, 69 Iowa 60, 28 N. W. 435 (holding that in an action to abate a nuisance created by maintaining a yard for feeding cattle and hogs evidence that plaintiff used his own lot for a similar purpose, and that it was in as bad a condition as defendant's, was not admissible in the absence of an offer to prove that plaintiff's lot was a nuisance to defendant); Sultan *v.* Parker-Washington Co., 117 Mo. App. 636, 93 S. W. 289 (holding that, in a suit to enjoin the maintenance of a nuisance in the form of a plant for the manufacture of asphalt, evidence that the city in which the plant was located had made contracts for the improvement and repair of its streets with asphalt had no tendency to prove that the city had licensed the operation of the plant).

37. Wing *v.* Rochester, 9 N. Y. St. 473, holding that, in an action to restrain defendant from continuing a nuisance created by the discharge of sewage into a stream flowing through plaintiff's premises, it was error to allow witnesses to state that in their opinion sewage from cholera patients passing into the stream would not have become disinfected when it reached plaintiff's premises.

38. Astill *v.* South Yuba Water Co., 146 Cal. 55, 79 Pac. 594 (holding that where, in an action for the abatement of certain nuisances and for damages, plaintiff's claim was based solely on the negligent use of an easement by defendant, which it was alleged caused the nuisances, evidence showing an adverse use of a part of the land on which the alleged nuisance existed, to show title thereto in defendant was not admissible); Hoadley *v.* M. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997 (holding that in a suit to enjoin the operation of a factory the smoke from which was claimed to injure plaintiff's property, evidence for defendant as to whether a witness living on property differently situated had ever noticed any effect on his premises from smoke from other sources than the factory was properly excluded); Finch *v.* Green, 16 Minn. 355 (holding that where there was no claim made that a nuisance was wilfully maintained, it was not error to reject evidence offered on behalf of defendant that the same was not wilful).

39. Mackay-Smith *v.* Crawford, 56 N. Y. App. Div. 136, 67 N. Y. Suppl. 541 [*affirmed* in 171 N. Y. 662, 64 N. E. 1123], holding that while the presence in the immediate locality of several stables, a blacksmith shop, and a vinegar factory could not be considered on the question of whether the storing of cheese on defendant's premises constituted a nuisance, it might be considered in determining whether such storing should be enjoined at the suit of one owning an adjoining dwelling.

40. Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 98.

41. Page *v.* Dempsey, 99 N. Y. App. Div. 152, 90 N. Y. Suppl. 1019 [*reversed* on the facts in 184 N. Y. 245, 77 N. E. 9].

42. Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

43. Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888, slaughter-house. And see *infra*, VII, C, 14, a, b.

44. Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78.

45. Hahn *v.* Thornberry, 7 Bush (Ky.) 403.

writ.[46] The general rules as to the weight and sufficiency of evidence[47] govern in determining whether the evidence is sufficient to establish or disprove the existence of a nuisance and plaintiff's right to the relief claimed.[48]

13. Trial or Hearing.[49] The court will not order the abatement of a nuisance until defendant has been heard,[50] and in order to lay a proper foundation for a judgment of abatement or injunction there should be a specific finding as to how much of the structure must be abated or enjoined in order to prevent the injury complained of.[51] Where plaintiff proves a public nuisance with special damage to himself, his motives in suing cannot be inquired into.[52] Where the relief sought is purely equitable the court is not bound to submit the issues to a jury,[53] and it has been held that an action to abate a nuisance and for damages is an action in equity and not an action at law,[54] and a party is not entitled as a matter of right to have the issues tried by a jury;[55] but on the other hand it has also been held that, a claim for damages being a purely legal demand, the fact that with such demand there is united an equitable demand for an injunction, cannot deprive the action of its nature as an action at law triable by a jury.[56] In any event it is

46. Chatard *v.* New Orleans, 10 La. Ann. 752.

47. See Evidence.

48. See the following cases:

Alabama.— English *v.* Progress Electric Light, etc., Co., 95 Ala. 259, 10 So. 134.

California.— Carson *v.* Central R. Co., 35 Cal. 325.

Connecticut.— Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78.

Indiana.—Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

Iowa.— Payne *v.* Wayland, 131 Iowa 659, 109 N. W. 203; Bennett *v.* National Starch Mfg. Co., 103 Iowa 207, 72 N. W. 507.

Louisiana.— Perrin *v.* Crescent City Stockyard, etc., Co., 119 La. 83, 43 So. 938; Froelicher *v.* Southern Mar. Works, 118 La. 1077, 43 So. 882.

Maryland.— Davis *v.* Baltimore, etc., R. Co., 102 Md. 371, 62 Atl. 572.

Michigan.— Peek *v.* Roe, 110 Mich. 52, 67 N. W. 1080; Flaherty *v.* Moran, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183.

New Jersey.— Seligman *v.* Victor Talking Mach. Co., (Ch. 1906) 63 Atl. 1093; State *v.* Trenton, (Ch. 1906) 63 Atl. 897; O'Hara *v.* Nelson, (Ch. 1906) 63 Atl. 836.

New York.— Paige *v.* Dempsey, 99 N. Y. App. Div. 152, 90 N. Y. Suppl. 1019 [*reversed* on other grounds in 184 N. Y. 245, 77 N. E. 9]; Coleman *v.* New York, 70 N. Y. App. Div. 218, 75 N. Y. Suppl. 342 [*reversing* 35 Misc. 664, 72 N. Y. Suppl. 359, and *affirmed* in 173 N. Y. 612, 66 N. E. 1106]; McGuire *v.* Bloomingdale, 33 Misc. 337, 68 N. Y. Suppl. 477; Filson *v.* Crawford, 5 N. Y. Suppl. 882; Butterfield *v.* Klaber, 52 How. Pr. 255.

North Carolina.— Vickers *v.* Durham, 132 N. C. 880, 44 S. E. 685.

Texas.— Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; Galveston, etc., R. Co. *v.* Miller, (Civ. App. 1906) 93 S. W. 177; Ennis *v.* Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585; Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327; Belton *v.* Baylor Female College, (Civ. App. 1896) 33 S. W. 680.

Virginia.— Jeremy Imp. Co. *v.* Com., 106 Va. 482, 56 S. E. 224.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055.

See 37 Cent. Dig. tit. "Nuisance," §§ 89, 182, 198½.

49. See, generally, Trial.

In action for damages see *infra*, VII, D, 12.

In criminal prosecution or penal action see *infra*, VII, E, 9.

50. Van Bergen *v.* Van Bergen, 2 Johns. Ch. (N. Y.) 272.

51. Finch *v.* Green, 16 Minn. 355, where it is said: "As no question of this kind was, so far as the record shows, submitted to the jury, it must be determined by the court."

52. Lippincott *v.* Lasher, 44 N. J. Eq. 120, 14 Atl. 103.

53. Richards *v.* Daugherty, 133 Ala. 569, 31 So. 934; Robinson *v.* Baugh, 31 Mich. 290; Carlisle *v.* Cooper, 21 N. J. Eq. 576, holding that when the right of the complainant to the relief sought is admitted by the answer, having also been previously established in a court of law, and the sole question of fact in controversy is whether defendant has effected an abatement of the admitted nuisance, the court has full jurisdiction to determine that question without ordering an issue to be tried by a jury.

54. Fraedrich *v.* Flieth, 64 Wis. 184, 25 N. W. 28.

55. McCarthy *v.* Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7; Miller *v.* Edison Electric Illuminating Co., 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. N. S. 1060 [*reversing* 97 N. Y. App. Div. 638, 89 N. Y. Suppl. 1059].

56. Threatt *v.* Brewer Min. Co., 42 S. C. 92, 19 S. E. 1009, holding that therefore the cause should be placed on the calendar on which jury cases are placed, as the question of damage should be settled before the right to injunction exists. See also Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567, holding that under Miller Code Iowa, § 3331, by which damages may be recovered for a nuisance, and an injunction had in the same

within the power of the court to direct any or all of the issues to be tried by a jury,[57] and where all the issues are ordered to be tried by a jury plaintiff does not waive his right to equitable relief by proceeding to trial under the order.[58] Where the court directs all the issues to be tried by a jury the verdict must determine all the issues so as to enable the court to give judgment upon the entire case and as to all the relief demanded;[59] and while such an order remains in force the court has no authority to make additional findings of fact, upon which, together with the verdict, to render judgment.[60] The instructions to the jury should state the law as applicable to the facts of the case and conform to the general rules governing the matter of instructions.[61] A finding that the nuisance complained of causes injury[62] and should be abated,[63] or a verdict for damages in an action for abatement and damages,[64] is sufficient to support an order of abatement. A finding that plaintiff is not entitled to recover is in effect a finding that the alleged nuisance does not exist.[65]

14. Relief Awarded[66] — a. In General. The relief to be awarded rests largely in the discretion of the court,[67] and so, in an action for abatement or injunction and damages, the abatement does not follow as of course upon the recovery of damages.[68] The rights of defendant as well as those of plaintiff are entitled to

action, plaintiff is entitled to have his damages assessed by a jury in such action, although he prays an injunction as well.

57. Robinson *v.* Baugh, 31 Mich. 290; Parker *v.* Laney, 58 N. Y. 469 [*reversing* 1 Thomps. & C. 590]; Dillon *v.* Acme Oil Co., 49 Hun (N. Y.) 565, 2 N. Y. Suppl. 289; Miller *v.* Truehart, 4 Leigh (Va.) 569, holding that where plaintiff had recovered damages for the maintenance of a nuisance, and the erection constituting the nuisance was afterward destroyed by natural causes, and plaintiff sought to enjoin the rebuilding thereof, the question as to whether precautions were being taken by defendant to prevent injury to plaintiff in the future should be submitted to a jury, the erection being one lawful in its character.

Assize of nuisance.— The judges of the supreme court, in an assize of nuisance removed from the common pleas by certiorari, may, if necessary, summon the same jury who viewed the nuisance by command of the court below. Livezey *v.* Gorgas, 2 Binn. (Pa.) 192. But if the recognitors who are sworn on an assize of nuisance cannot agree and are discharged, the panel cannot be afterward resummoned and the whole of them sworn to afforce the assize. Maris *v.* Parry, 3 Rawle (Pa.) 413.

58. Parker *v.* Laney, 58 N. Y. 469 [*reversing* 1 Thomps. & C. 590].

59. Parker *v.* Laney, 58 N. Y. 469 [*reversing* 1 Thomps. & C. 590], holding that if the verdict does not do so it is defective and should be set aside.

60. Parker *v.* Laney, 58 N. Y. 469 [*reversing* 1 Thomps. & C. 590].

61. See the following cases:

California.— Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65, requested instruction properly refused where one proposition therein inaccurate.

Georgia.— Farley *v.* Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193, inaccuracy in charge held not sufficient to call for new trial.

New York.—Dunsbach *v.* Hollister, 49 Hun 352, 2 N. Y. Suppl. 94 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152], remark held not improper as leaving jury to imagine uncharged and unproved negligence.

Ohio.— Columbus Gaslight, etc., Co. *v.* Freeland, 12 Ohio St. 392, charge held misleading.

Pennsylvania.— Prince *v.* Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601, instructions properly and improperly denied.

Texas.— Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; League *v.* Journeay, 25 Tex. 172, charge held proper and sufficiently full, although no instruction given to consider effect of nuisance on value of property.

Virginia.— Jeremy Imp. Co. *v.* Com., 106 Va. 482, 56 S. E. 224.

See 37 Cent. Dig. tit. "Nuisance," §§ 92, 183. And see, generally, Trial.

62. See Williamson *v.* Yingling, 93 Ind. 42.

63. Cromwell *v.* Lowe, 14 Ind. 234, holding that a special finding by the jury that a nuisance should be abated is ground for an order to abate, provided the complaint contains an appropriate prayer, although the jury were not required to find thereon specially.

64. Learned *v.* Castle, (Cal. 1884) 4 Pac. 191 (holding that a general verdict for damages includes a finding in favor of plaintiff on all the issues); Platt *v.* Chicago, etc., R. Co., 74 Iowa 127, 37 N. W. 107 (the continued existence of the obstruction complained of being conceded).

65. Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531.

66. Abatement on: Recovery of damages see *infra*, VII, D, 14. Conviction in criminal prosecution see *infra*, VII, E, 11.

67. Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193; Mountain Copper Co. *v.* U. S., 142 Fed. 625, 73 C. C. A. 621.

68. Cromwell *v.* Lowe, 14 Ind. 234; Downing *v.* Oskaloosa, 86 Iowa 352, 53 N. W. 256; Fuller *v.* Chicago, etc., R. Co., 61 Iowa 125,

consideration, and the court will not interfere with defendant's use and enjoyment of his property or compel the destruction thereof further than is necessary to give plaintiff the protection to which he is entitled.[69] Where the business or use of property alleged to be a nuisance is lawful and can be carried on without causing the injuries complained of, defendant should not be restrained from carrying it on at all;[70] but the injunction should go merely against carrying it on so as to prove injurious or offensive,[71] leaving defendant the right to carry it on

15 N. W. 861 (holding that a verdict for plaintiff does not necessarily involve a finding that the matter complained of is a nuisance at the time of the trial); Finch *v.* Green, 16 Minn. 355. See also *infra*, VII, D, 14.

The discretion is a legal discretion to be exercised affirmatively whenever the interests or happiness of individuals or of the community may require it. Maxwell *v.* Boyne, 36 Ind. 120.

69. *District of Columbia.*— Standard Oil Co. *v.* Oeser, 11 App. Cas. 80, holding that in a suit by property-owners to enjoin an oil company from increasing its plant in a certain neighborhood on the ground that it would aggravate a nuisance which had existed for five years or more, an order temporarily enjoining defendant from erecting a proposed new oil tank should not also enjoin it from using any of the previously existing tanks, storehouses, etc.

Iowa.— Faucher *v.* Grass, 60 Iowa 505, 15 N. W. 302 (holding that a decree declaring a blacksmith shop a nuisance and restraining its further use should not restrain the further use for that purpose of the lot on which the shop is situated); State *v.* Moffett, 1 Greene 247.

Michigan.— Washington Lodge No. 54 I. O. O. F. *v.* Frelinghuysen, 138 Mich. 350, 101 N. W. 569 (holding that a court will not compel a structure to be taken down, thereby causing irreparable injury to defendant, where the annoyance complained of can be easily prevented by other means); Shepard *v.* People, 40 Mich. 487 (holding that it is not imperative on the court to order the destruction of property decreed to be a nuisance).

New Jersey.—Williams *v.* Osborne, 40 N. J. Eq. 235 (holding that where residents of a certain neighborhood complained of a nuisance one and one-half miles away, the injunction should restrain defendant from so conducting his business as to cause a nuisance at the place where the complainants lived, and not restrain the maintenance of a nuisance generally); Babcock *v.* New Jersey Stock Yard Co., 20 N. J. Eq. 296.

New York.— New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416 [*modifying* 1 N. Y. Suppl. 456], holding that where an action was brought to restrain a city from discharging more sewage on a licensor's land than he had consented to receive, a judgment restraining the city from connecting another sewer with the one discharging on the licensor's land was too broad, since the city should be left free to make the connection, provided it did not discharge the contents of the sewer so connected on the licensor's land.

Ohio.— Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

Pennsylvania.— New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

Texas.— Ennis *v.* Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

United States.— Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183 [*affirming* 54 Fed. 248].

England.— Fleming *v.* Hislop, 11 App. Cas. 686, holding that an interdict or injunction against causing a nuisance ought not to be so drawn as to shut out all scientific attempts to attain the desired end without causing a nuisance.

See 37 Cent. Dig. tit. "Nuisance," §§ 93, 199.

70. *California.*— McMenomy *v.* Baud, 87 Cal. 134, 26 Pac. 795.

Georgia.— Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

Mississippi.— Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378.

New Jersey.— Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

New York.— Chamberlain *v.* Douglas, 24 N. Y. App. Div. 582, 48 N. Y. Suppl. 710.

Oklahoma.— Weaver *v.* Kuchler, 17 Okla. 189, 87 Pac. 600.

Washington.— Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055.

See 37 Cent. Dig. tit. "Nuisance," §§ 93, 184.

Decree held proper.— A decree restraining defendant from conducting a slaughter-house and rendering plant, and from permitting others to conduct the same, "to the injury of the plaintiff and other residents" of surrounding property, was not objectionable as in effect suppressing defendant's entire business, since it did not prevent the operation of defendant's plant in such a manner as not to injure or annoy complainant. Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055.

71. *Georgia.*— Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

Illinois.— Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63.

Iowa.— Richards *v.* Holt, 61 Iowa 529, 16 N. W. 595.

Massachusetts.— See Sawyer *v.* State Bd. of Health, 125 Mass. 182.

Missouri.— Schaub *v.* Perkinson Bros. Constr. Co., 108 Mo. App. 122, 82 S. W. 1094.

New Jersey.— Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

New York.— Chamberlain *v.* Douglas, 24 N. Y. App. Div. 582, 48 N. Y. Suppl. 710; Campbell *v.* Seaman, 2 Thomps. & C. 231

in a proper manner,[72] and the court may require defendant to use such appliances as will remedy the nuisance.[73] But where the premises are such that, from their nature and location, they cannot be put to the use complained of without creating a nuisance, the court will grant an injunction restraining absolutely the use found to be a nuisance, and will not confine the remedy to restraining the particular mode of use theretofore employed.[74] An injunction against a noisy business may restrain the carrying on of it only at certain times when it is shown to be a nuisance.[75] Where a structure itself constitutes a nuisance it may be destroyed for the purpose of abatement;[76] but where the nuisance consists in the use of a structure which is lawful and not of itself a nuisance, the relief should be by enjoining such use,[77] and the structure cannot be destroyed.[78] So also where it is sought to restrain the erection of a building for a business or use which it is claimed will be a nuisance, the injunction should be limited to such business or use,[79] and should not restrain the erection of the building where it is not of itself a nuisance;[80] but it is proper, where a building is being erected which can only be used for a purpose which is unlawful, to restrain the erection.[81]

b. Allowance of Time to Remodel or Remove Plant. Where a use of property is found to be a nuisance it is proper to allow defendant a reasonable time to rearrange or remodel his appliances so that they will not further operate as a nuisance,[82] or to remove his plant[83] before an injunction against the business or use is allowed to take effect.

c. Effect of Abatement by Defendant.[84] An injunction should not be granted where the alleged nuisance, although it existed when the suit was commenced, has been abated in good faith before the time of trial;[85] but when one who is entitled

[*affirmed* in 63 N. Y. 568, 20 Am. Rep. 567]; Miller *v.* Edison Electric Illuminating Co., 33 Misc. 664, 68 N. Y. Suppl. 90 [*reversed* on other grounds in 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376]; Catlin *v.* Patterson, 10 N. Y. St. 724.

Ohio.— Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

West Virginia.— McGregor *v.* Camden, 47 W. Va. 193, 34 S. E. 936.

See 37 Cent. Dig. tit. "Nuisance," §§ 93, 184.

A decree enjoining defendant from maintaining a manure heap, and commanding its removal daily, is not, as a matter of law, an unnecessary or unlawful invasion of his right to keep his stable in an ordinary manner, it being a question of fact what protection is needful. Kasper *v.* Dawson, 71 Conn. 405, 42 Atl. 78.

72. Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63.

Modification of injunction.— Where a slaughter-house has been enjoined as a nuisance, and on the hearing of a motion to dissolve the evidence shows that it is not a nuisance *per se*, and that it can be carried on so as not to constitute a nuisance, the injunction will be modified so as to permit its use in an unobjectionable manner. Weaver *v.* Kuchler, 17 Okla. 139, 87 Pac. 600.

73. Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378.

74. Baker *v.* Bohannan, 69 Iowa 60, 28 N. W. 435.

75. Schlueter *v.* Billingheimer, 9 Ohio Dec. (Reprint) 513, 14 Cinc. L. Bul. 224.

76. Berkshire Woolen Co. *v.* Day, 12 Cush. (Mass.) 128; Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407.

Removal compelled only in extreme cases.— The court will not, except in extreme cases, compel the removal of an existing structure alleged to be a nuisance, but will remit plaintiff to his remedies at law. Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 9 L. R. A. N. S. 868.

77. Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407; Barclay *v.* Com., 25 Pa. St. 503, 64 Am. Dec. 715.

78. Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407; Ely *v.* Niagara County, 36 N. Y. 297; Barclay *v.* Com., 25 Pa. St. 503, 64 Am. Dec. 715; Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242.

79. Czarniecki *v.* Bollman, 9 Pa. Cas. 32, 11 Atl. 660.

80. Czarniecki *v.* Bollman, 9 Pa. Cas. 32, 11 Atl. 660.

81. Cleveland *v.* Citizens' Gaslight Co., 20 N. J. Eq. 201.

82. Shaw *v.* Queen City Forging Co., 10 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 254.

83. Braender *v.* Harlem Lighting Co., 2 N. Y. Suppl. 245. See also Grand Rapids *v.* Weiden, 97 Mich. 82, 56 N. W. 233.

84. In action for damages see *infra*, VII, D, 6, c.

In criminal prosecution see *infra*, VII, E, 2.

85. *California.*—McCarthy *v.* Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7.

Iowa.— Perry *v.* Howe Co-operative Creamery Co., 125 Iowa 415, 101 N. W. 150; Trulock *v.* Merte, 72 Iowa 510, 34 N. W. 307, holding that an injunction should be limited

to relief in equity against a private nuisance files a bill to enjoin the same, defendant cannot, by partially abating the nuisance pending the suit, defeat plaintiff's right to that complete redress to which he was entitled when he sought his remedy.[86] Where plaintiff has asked for damages as well as abatement it is proper for the court, although the nuisance has been abated, to retain the action for the purpose of awarding the damages which plaintiff shows he has suffered.[87]

d. Damages.[88] It is proper, in connection with the granting of equitable relief against a nuisance, to award to plaintiff damages for the injuries already suffered;[89]

to so much of the nuisance as had not already ceased.

New York.— Miller *v.* Edison Electric Illuminating Co., 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376 [*reversing* 68 N. Y. Suppl. 900]; Moon *v.* National Wall-Plaster Co., 31 Misc. 631, 66 N. Y. Suppl. 33 [*affirmed* in 57 N. Y. App. Div. 621, 67 N. Y. Suppl. 1140]. *Contra,* Peck *v.* Elder, 3 Sandf. 126; Heather *v.* Hearn, 5 N. Y. Suppl. 85.

Pennsylvania.— Eppley *v.* Naumann, 5 Pa. Dist. 471. *Contra,* Sberer *v.* Hodgson, 3 Rawle 211.

England.— Barber *v.* Penley, [1893] 2 Ch. 447, 62 L. J. Ch. 623, 68 L. T. Rep. N. S. 662, 3 Reports 489, cessation of nuisance by reason of action of police. Batcheller *v.* Tunbridge Wells Gas Co., 65 J. P. 680, 84 L. T. Rep. N. S. 765, holding that the act complained of having ceased there would be no injunction but a declaration as to the rights of the parties in the matter. *Contra,* Chester *v.* Smelting, 85 L. T. Rep. N. S. 63.

See 37 Cent. Dig. tit. "Nuisance," § 94.

Nuisance in course of abatement.— When defendant shows to the satisfaction of the court an intention to abate the nuisance and is proceeding with all possible haste and diligence to abate it, the court will refuse an injunction. King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397. See also Hadcock *v.* Gloversville, 96 N. Y. App. Div. 130, 89 N. Y. Suppl. 74.

Intention to discontinue use complained of. — Where, in a suit to restrain an alleged improper use of a street by a railroad company, defendant pleaded that in a short time, by reason of the erection of a union passenger depot, the remedy sought by the injunction would be given without its aid, the railroad company could not object to a decree suspending its operation as to the acts which the railroad so promised to desist from doing until a date when the passenger depot would probably be completed. Galveston, etc., R. Co. *v.* Miller, (Tex. Civ. App. 1906) 93 S. W. 177.

86. Carlisle *v.* Cooper, 21 N. J. Eq. 576.

In an action under Mass. Laws (1887), c. 348, for maintaining unnecessarily a fence over six feet high, for the purpose of annoying plaintiff, a reduction, after suit brought and before trial, of the fence from sixteen to seven and one-half feet does not take away the power given the court by chapter 180, section 1, to order the nuisance abated. Rice *v.* Moorehouse, 150 Mass. 482, 23 N. E. 229.

Where the evidence is conflicting as to whether at the time of hearing the business complained of is so conducted as to be a nuisance, its more objectionable features having been voluntarily suppressed, the injunction prayed for may be granted. Thompson *v.* Behrmann, 37 N. J. Eq. 345.

87. McCarthy *v.* Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7; Miller *v.* Edison Electric Illuminating Co., 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. N. S. 1060 [*reversing* 97 N. Y. App. Div. 638, 89 N. Y. Suppl. 1059]; Miller *v.* Edison Electric Illuminating Co., 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376 [*reversing* 33 Misc. 664, 68 N. Y. Suppl. 900]; Moon *v.* National Wall-Plaster Co., 31 Misc. (N. Y.) 631, 66 N. Y. Suppl. 33 [*affirmed* in 57 N. Y. App. Div. 621, 67 N. Y. Suppl. 1140]; Eppley *v.* Naumann, 5 Pa. Dist. 471. And see EQUITY, 16 Cyc. 113, 114.

88. See, generally, *infra,* VII, D.

89. Whaley *v.* Wilson, 112 Ala. 623, 20 So. 922; Farris *v.* Dudley, 78 Ala. 124, 56 Am. Rep. 24; Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330; Davis *v.* Lambertson, 56 Barb. (N. Y.) 480; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533. And see EQUITY, 16 Cyc. 110 note 79; INJUNCTIONS, 22 Cyc. 967 note 13, 968 note 14.

A petition asking both an injunction and damages states but a single cause of action for which double relief is asked and it is error to ignore the allegations of damages. Whipple *v.* McIntyre, 69 Mo. App. 397.

Damages may be awarded, although not prayed for in the bill where the nuisance is proved but plaintiff is willing to take damages instead of an injunction. Crawford *v.* Hornsea Steam Brick, etc., Co., 34 L. T. Rep. N. S. 923.

Transfer from chancery to common-law branch of court.— In a suit for the abatement of a nuisance and for damages for the injury sustained therefrom, the chancery division may decree and enforce an abatement thereof, and transfer the question of damages to the common-law branch. Bourbon Stock Yard Co. *v.* Wooley, 76 S. W. 28, 25 Ky. L. Rep. 477.

Injunction and nominal damages.— In a suit for an injunction and damages for a nuisance a judgment granting the injunction and awarding six cents damage is fatally defective, because if the sum awarded to plaintiff is sufficient he has sustained no substantial injury entitling him to an injunc-

but a party cannot recover damages for the depreciation in value of his property, based on the structure complained of being permanent, and in addition thereto have the structure removed by injunction.[90]

15. Allowing Cause to Stand Without Final Decree. In a case where the proofs were insufficient to justify a decree putting an end to a business, the court has ordered the cause to stand without final decree, with permission for either party to apply for leave to produce additional proofs or to be heard anew.[91]

16. Dismissal.[92] Where a bill to enjoin the construction of a sewer brought before the sewer is completed, although while it is in use, is dismissed for complainant's failure to prove the sewer a nuisance, the dismissal should be without prejudice, since the sewer, when completed, may become a nuisance.[93] And where the testimony is conflicting as to whether or not the matter complained of has become a nuisance, the bill should be dismissed without prejudice to the right of the complainant to proceed by indictment or action at law.[94]

17. Judgment, Decree, or Order.[95] The abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable to the facts of the case,[96] or by directing defendant[97] or an officer of court[98] to abate it. The decree or order should be consistent with the case made by the pleadings and

tion; while, on the other hand, if plaintiff has suffered substantial loss the compensation awarded him is insufficient. Smith *v.* Ingersoll-Sergeant Rock Drill Co., 12 Misc. (N. Y.) 5, 33 N. Y. Suppl. 70 [*reversing* 7 Misc. 374, 27 N. Y. Suppl. 907]. But *compare* Lipman *v.* Pulman, 91 L. T. Rep. N. S. 132, holding that where a plaintiff in an action for nuisance by noise and vibration claims an injunction which, or its equivalent undertaking, is granted by the court, and also asks for general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something, not as compensation, but as acknowledgment of the wrong he has suffered.

90. Hockaday *v.* Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

91. Meigs *v.* Lister, 25 N. J. Eq. 489.

92. See, generally, Dismissal and Nonsuit.

93. Robb *v.* La Grange, 158 Ill. 21, 42 N. E. 77 [*modifying* 57 Ill. App. 386].

94. New Castle *v.* Raney, 130 Pa. St. 546, 18 Atl. 1066, 6 L. R. A. 737 [*reversing* 6 Pa. Co. Ct. 87].

95. See, generally, Judgments.

In action for damages see *infra*, VII, D, 13.

In criminal prosecution see *infra*, VII, E, 10.

Form of decree or order see Atty.-Gen. *v.* Halifax, 39 L. J. Ch. 129, 21 L. T. Rep. N. S. 52, 17 Wkly. Rep. 1088; Goose *v.* Bedford, 21 Wkly. Rep. 449.

96. Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51.

Restraining continuance.— When an action seeking both legal and equitable relief is tried at circuit, and the jury pass upon the questions of fact, it is competent for the circuit judge to render judgment, not only for the abatement of the nuisance and for damages, but also restraining the continuance of the nuisance. People *v.* Metropolitan Tel., etc., Co., 11 Abb. N. Cas. (N. Y.) 304, 64 How. Pr. 120.

Provision for annulling decree.— A court is not to make provision in its final judgment for a reopening or renewal of a controversy closed by its judgment, and having adjudged plaintiff entitled to a perpetual injunction restraining acts of defendant which amounted to a nuisance, it should not provide for annulling the decree when it should appear that defendant had provided means for abating such nuisance. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 155, 4 Pac. 1150.

97. Llano County *v.* Llano, 9 Tex. Civ. App. 372, 28 S. W. 926, holding that when a nuisance is maintained by a county, the district court may, by its decree of abatement, require the county commissioners' court to remove it.

The injunction may be mandatory and direct the abatement. Learned *v.* Castle, (Cal. 1884) 4 Pac. 191.

98. Berkshire Woollen Co. *v.* Day, 12 Cush. (Mass.) 128 (holding that where several actions for nuisances caused by defendant's dam were referred under a rule of court, accompanied by an agreement that the referees might assess the damages since the date of the last writ and prior to the first action, and decide how much, if any, the dam should be cut down, and that the same should be done "under their direction," and the award assessed the whole damage and fixed the height of the dam, the abatement provided for in the judgment entered need not be made under the supervision of the referees, but could be made by the sheriff in the usual way); Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787 (holding that in an action by a riparian owner to abate a dam, by which water was set back on his land, the court might direct the sheriff to cut down the dam).

It is error to order the sheriff to abate a nuisance in the first instance, but, if defendant fails to comply with the judgment against him, the sheriff may be commanded to abate it at his costs. Barclay *v.* Com., 25 Pa. St. 503, 64 Am. Dec. 715.

the relief asked for,[99] and should be definite and certain as to what defendant is required to do or to refrain from doing.[1]

18. Execution.[2] Where a decree has been rendered against the corporate authorities of a city for the abatement of a public nuisance, on information in the name of the state on the relation of certain citizens, any citizen may interfere as relator by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution.[3] A writ of habere facias seisinam is not the proper form of execution in an assize of nuisance,[4] but it seems that the proper writ is a distringas to compel defendant himself to abate the nuisance.[5]

19. Violation of Injunction. Where an injunction has been issued a violation thereof by defendant is punishable as a contempt.[6]

20. Appeal.[7] The granting or refusal of relief against an alleged nuisance is subject to appeal,[8] but a party cannot appeal from a decree in his favor.[9] Unless abuse or discretion be clearly shown the appellate court will not interfere with the decision of the trial court.[10]

99. Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51 (holding that where the complaint asks "that such nuisance be abated," an injunction is consistent with the case made by the complaint, although not expressly asked for, and is therefor proper); Deaconess Home, etc. *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 [*affirming* 104 Ill. App. 484] (holding that a decree restraining defendant from carrying on a hospital in the building which it occupies during the continuance of the relative proximity of complainant's residence and the building of defendant used as a hospital, and the present internal and external construction of defendant's said building, is not inconsistent with the prayer of the bill that defendant be restrained and enjoined from further operating and carrying on said hospital).

1. Ballentine *v.* Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321, holding that a decree adjudging that defendant shall so conduct his business as not to be offensive is not sufficient, as it gives him no rule of conduct which the law has not before prescribed.

Decree held sufficiently definite and certain. — In a suit by a private citizen to abate, as a nuisance, a dam constructed by a city to provide a reservoir for its waterworks, a decree that the city alter the dam's construction, or the sluices or wasteways, in such manner and to such extent that it will not cause back-water to stand on plaintiff's land, is not objectionable as indefinite or as not instructing defendant what it should do. Ennis *v.* Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

2. See, generally, Executions.

3. State *v.* Mobile, 24 Ala. 701.

4. Barnet *v.* Ihrie, 1 Rawle (Pa.) 44.

5. Barnet *v.* Ihrie, 1 Rawle (Pa.) 44.

6. *Connecticut.*— Baldwin *v.* Miles, 58 Conn. 496, 20 Atl. 618.

Kansas.— State *v.* Durein, 46 Kan. 695, 27 Pac. 148.

New Jersey.— Reed *v.* Philadelphia, etc., R. Co., (Ch. 1892) 24 Atl. 922.

Pennsylvania.— Bowers *v.* Creighton, 1 Wkly. Notes Cas. 13.

United States.— *In re* North Bloomfield Gravel Min. Co., 27 Fed. 795.

See 37 Cent. Dig. tit. "Nuisance," §§ 96½, 200½. And see, generally, Injunctions.

Liability for acts of employees.— Where an injunction has been granted to restrain blasting in a certain stone quarry adjacent to complainant's property, the owner of the quarry is liable for contempt for the acts of his employees in violation of the injunction. Reed *v.* Philadelphia, etc., R. Co., (N. J. Ch. 1892) 24 Atl. 922.

Acts constituting violation see *In re* North Bloomfield Gravel Min. Co., 27 Fed. 795.

Acts not constituting violation see Baldwin *v.* Miles, 58 Conn. 496, 20 Atl. 618; Bannon *v.* Rohmeiser, 9 S. W. 293, 9 Ky. L. Rep. 395.

Evidence sufficient to show violation see Reed *v.* Philadelphia, etc., R. Co., (N. J. Ch. 1892) 24 Atl. 922.

Statute legalizing enjoined structure.— Where a decree of the supreme court declared a bridge over the Ohio river a nuisance, and a subsequent act of congress made it a lawful structure, an attachment for contempt should not issue against the proprietors of the bridge for disobeying an injunction enforcing the decree of the court, issued after the passage of the act and before it had been decided invalid. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435.

7. See, generally, Appeal and Error.

In action for damages see *infra*, VII, D, 15.

In criminal prosecution see *infra*, VII, E, 12.

8. See Barker *v.* Hartman Steel Co., 23 Wkly. Notes Cas. (Pa.) 109.

Supersedeas.— In a suit for the abatement of a nuisance, an appeal to the supreme court will not, without further order, operate as a supersedeas, although a bond has been given under the Pennsylvania acts of March 7, 1845, and Feb. 11, 1857, but the court may order the appeal to operate as a supersedeas on bond being given. Barker *v.* Hartman Steel Co., 23 Wkly. Notes Cas. (Pa.) 109.

9. Haydon *v.* Brown, 21 Nev. 322, 31 Pac. 56.

10. Parrott *v.* Floyd, 54 Cal. 534; Payne *v.* McKinley, 54 Cal. 532; Powell *v.* Macon, etc., R. Co., 92 Ga. 209, 17 S. E. 1027; Whit-

21. Costs,[11] and Expense of Abatement.[12] The allowance of costs in proceedings for the abatement of nuisances is governed by the statutory provisions on the subject.[13] The person responsible for the nuisance may be held liable for the expense of removing or abating it;[14] but in a case where a mill-dam situated in a city had become a public nuisance, not on account of its original construction but by the growth of the city about it, it was held that the expense of the removal of the dam, as decreed in an action to restrain its continuance, was properly placed upon plaintiff, unless defendants preferred to remove the dam themselves.[15]

D. Recovery of Damages — 1. Right of Action. A person who is injured by the maintenance of a nuisance is entitled to recover damages therefor.[16] Where he is entitled to equitable relief such relief is additional to the recovery of damages,[17] and the person injured cannot be required to elect between the two remedies;[18] but a person may be entitled to recover damages for a nuisance, although the circumstances are such that he is not entitled to any equitable relief against it.[19]

2. Nature and Form of Action. The person injured may bring an action for the recovery of damages solely,[20] or he may seek equitable relief and damages for injuries sustained in the same action.[21]

3. Successive Recoveries. Where a nuisance is of such a permanent character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery;[22] but where the nuisance is

aker *v.* Hudson, 65 Ga. 43; Mackay-Smith *v.* Crawford, 56 N. Y. App. Div. 136, 67 N. Y. Suppl. 541 [*affirmed* in 171 N. Y. 662, 64 N. E. 1123].

11. See, generally, Costs.

In criminal prosecution see *infra*, VII, E, 13.

12. Where nuisance summarily abated see *supra*, VII, B, 2.

13. McCarthy *v.* Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7, holding that a suit for the abatement of a nuisance and for damages is an action not mentioned in Cal. Code Civ. Proc. § 1022, prescribing actions in which costs are allowed of course to a successful plaintiff, and hence costs may be allowed therein in the discretion of the court, as authorized by section 1025.

14. Barclay *v.* Com., 25 Pa. St. 503, 24 Am. Dec. 715, holding that if defendant in a proceeding to abate a nuisance fails to comply with the judgment against him, the sheriff may be commanded to abate it at defendant's costs.

15. New Castle City *v.* Raney, 6 Pa. Co. Ct. 87.

16. *Illinois.*— Winters *v.* Winters, 78 Ill. App. 417.

Kentucky.—Central Consumers Co. *v.* Pinkert, 92 S. W. 957, 29 Ky. L. Rep. 273; Louisville, etc., R. Co. *v.* Botton, 38 S. W. 498, 18 Ky. L. Rep. 824.

Missouri.— Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646.

New York.—Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130].

Pennsylvania.— Gavigan *v.* Atlantic Refining Co., 2 Lack. Leg. N. 239.

See 37 Cent. Dig. tit. "Nuisance," § 98.

17. Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 548, 71 N. E. 1130]. And see *supra*, VII, C, 1.

18. Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

19. Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329.

20. Coates *v.* Atchison, etc., R. Co., 1 Cal. App. 441, 82 Pac. 640; Crawford *v.* Atglen Axle, etc., Mfg. Co., 1 Chest. Co. Rep. (Pa.) 412.

Action properly styled "in tort."—Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12.

21. *California.*— Astill *v.* South Yuba Water Co., 146 Cal. 55, 79 Pac. 594.

Kansas.— Drinkwater *v.* Sauble, 46 Kan. 170, 26 Pac. 433.

Missouri.— Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

New York.— Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157.

South Carolina.— Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

See 37 Cent. Dig. tit. "Nuisance," § 99. And see *supra*, VII, C, 14, d.

Such an action may be prosecuted either at law or in equity; and, if brought in equity, it is to be tried in the manner prescribed by the statute for the trial of equitable actions, and plaintiff cannot be compelled to try it as an ordinary action. Gribbin *v.* Hansen, 69 Iowa 255, 28 N. W. 584.

22. *Colorado.*— Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582.

Georgia.— Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524. See also Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Illinois.—Chicago Forge, etc., Co. *v.* Sanche, 35 Ill. App. 174.

Ohio.— Wolf *v.* Cincinnati Edison Electric

of a continuing nature, each continuance gives rise to a new cause of action and successive actions may be maintained for the damages accruing from time to time.[23]

4. Notice to Person Maintaining Nuisance[24] — a. Necessity. An action for damages may be brought against the person creating a nuisance without his being notified of the injurious effects of his acts;[25] but it is a prerequisite to an action against a person who merely passively continues a nuisance created by another that he should have notice of the fact that he is maintaining a nuisance and be

Co., 6 Ohio S. & C. Pl. Dec. 159, 5 Ohio N. P. 393.

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703.

Texas.— Umscheid *v.* San Antonio, (Civ. App. 1902) 69 S. W. 496.

West Virginia.— Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

See 37 Cent. Dig. tit. "Nuisance," § 100; and Judgments, 23 Cyc. 1188 note 46.

23. *Georgia.*— Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524. See also Langley *v.* Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

Illinois.— N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 1090; Schlitz Brewing Co. *v.* Compton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390; Cleveland, etc., R. Co. *v.* Pattison, 67 Ill. App. 351; Allen *v.* Michel, 38 Ill. App. 313; Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552; Mellor *v.* Pilgrim, 3 Ill. App. 476.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Valparaiso *v.* Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

Maine.— Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466; Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140.

Massachusetts.— Staple *v.* Spring, 10 Mass. 72.

Missouri.— Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145; Scott *v.* Nevada, 56 Mo. App. 189.

New York.— Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Beckwith *v.* Griswold, 29 Barb. 291.

North Carolina.— Bradley *v.* Amis, 3 N. C. 399.

Ohio.— Shepherd *v.* Willis, 19 Ohio 142; Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Pennsylvania.— Ganster *v.* Metropolitan Electric Co., 214 Pa. St. 628, 64 Atl. 91; Bare *v.* Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42; Smith *v.* Elliott, 9 Pa. St. 345.

Tennessee.— Chattanooga *v.* Dowling, 101 Tenn. 342, 47 S. W. 700.

West Virginia.— Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

Wisconsin.— Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784.

See 37 Cent. Dig. tit. "Nuisance," § 100; and Judgments, 23 Cyc. 1187 notes 42–45.

The fact that defendant is a quasi-public corporation, invested with the right of eminent domain, is not of itself conclusive against the right of an adjacent landowner to maintain a second or third action for what, if maintained by a private person, would be a continuing nuisance. Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

24. Notice before: Abatement by person injured see *supra*, VII, B, 1, d. Criminal prosecution or penal action see *infra*, VII, E, 4. Suit for equitable relief see *supra*, VII, C, 3.

25. *California.*— Coates *v.* Atchison, etc., R. Co., 1 Cal. App. 441, 82 Pac. 640.

Georgia.— Charleston, etc., R. Co. *v.* Johnson, 73 Ga. 306; Bonner *v.* Welborn, 7 Ga. 296.

Indiana.— Kelsey *v.* Chicago, etc., R. Co., (App. 1907) 81 N. E. 522.

Kentucky.— Ray *v.* Sellers, 1 Duv. 254.

Montana.— Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 513, 79 Pac. 14.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

New York.— Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646; Finkelstein *v.* Huner, 77 N. Y. App. Div. 424, 79 N. Y. Suppl. 334 [*affirmed* in 179 N. Y. 598, 71 N. E. 1130]; Dunsbach *v.* Hollister, 49 Hun 352, 2 N. Y. Suppl. 94 [*affirmed* in 132 N. Y. 602, 30 N. E. 1152].

Wisconsin.— Slight *v.* Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

United States.— Exley *v.* Southern Cotton Oil Co., 151 Fed. 101; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281.

See 37 Cent. Dig. tit. "Nuisance," § 102.

A grantee of land may sue a person who created a nuisance before the conveyance to plaintiff, without notice or request to abate the same. Bonner *v.* Welborn, 7 Ga. 296; Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

Notice of withdrawal of consent.— Where one knowing that vegetable matter collects in a dam near his premises, from which noxious gases arise, and that the collection will be increased by the enlargement of the dam, aids another, whom he knows is going to enlarge the old dam, in procuring a sale to him of the site on which it is located, his consent to the maintenance by such other of the enlarged dam, with its increased unwholesomeness, will be presumed until withdrawn by notice, so that such other will not be liable to him for sickness caused by noxious gases therefrom unless prior to its inception he gave such notice. Louisville, etc., R. Co. *v.* Daugherty, 36 S. W. 5, 18 Ky. L. Rep. 273.

requested to remove or abate it,[26] or at least that he should have knowledge of the existence of the nuisance.[27] The rule that one purchasing land with the nuisance already upon it is not liable therefor until requested to remove it does not, however, apply to a purchaser who was an actor in creating the nuisance,[28] or who actively maintains it,[29] or so changes the form or use of the structure created by his grantor that it causes damage which did not previously occur.[30] So also where

26. *Alabama.*—Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120.

California.— Castle *v.* Smith, (1894) 36 Pac. 859; Grigsby *v.* Clear Lake Water Co., 40 Cal. 396.

Connecticut.— Johnson *v.* Lewis, 13 Conn. 303, 33 Am. Dec. 405.

Illinois.— Loudon *v.* Mullins, 52 Ill. App. 410; Rouse *v.* Chicago, etc., R. Co., 42 Ill. App. 421; Fenter *v.* Toledo, etc., R. Co., 29 Ill. App. 250; Groff *v.* Ankenbrandt, 19 Ill. App. 148 [*affirmed* in 124 Ill. 54, 15 N. E. 40, 7 Am. St. Rep. 342].

Indiana.— Graham *v.* Chicago, etc., R. Co., (App. 1905) 74 N. E. 541.

Kentucky.— West *v.* Louisville, etc., R. Co., 8 Bush 404; Ray *v.* Sellers, 1 Duv. 254.

Maine.— Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168; Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91.

Massachusetts.— McDonough *v.* Gilman, 3 Allen 264, 80 Am. Dec. 72.

Minnesota.— Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

Missouri.— Rychlicki *v.* St. Louis, 115 Mo. 662, 22 S. W 908; Pinney *v.* Berry, 61 Mo. 359; McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Snow *v.* Cowles, 22 N. H. 296; Carleton *v.* Redington, 21 N. H. 291; Woodman *v.* Tufts, 9 N. H. 88; Plumer *v.* Harper, 3 N. H. 88, 14 Am. Dec. 333.

New Jersey.— Norris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; Beavers *v.* Trimmer, 25 N. J. L. 97; Pierson *v.* Glean, 14 N. J. L. 36, 25 Am. Dec. 497.

New York.— Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390]; Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Haggerty *v.* Thomson, 45 Hun 398; Hubbard *v.* Russell, 24 Barb. 404; Schrieber *v.* New York Driving Club, 17 Misc. 131, 39 N. Y. Suppl. 348.

South Carolina.— Townes *v.* Augusta, 52 S. C. 396, 29 S. E. 851.

Vermont.— Dodge *v.* Stacy, 39 Vt. 558.

Wisconsin.— Slight *v.* Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

United States.—Philadelphia, etc., R. Co. *v.* Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281.

England.—Penruddock's Case, 5 Coke 100*b*, 77 Eng. Reprint 210; Brent *v.* Haddon, Cro. Jac. 555, 79 Eng. Reprint 476; Winsmore *v.* Greenbank, Willes 577.

See 37 Cent. Dig. tit. "Nuisance," § 103.

Aliter under Mont. Civ. Code, § 4554. Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 513, 79 Pac. 14, where, however, the court recognized the rule of the text as the correct one in the absence of statute.

There can be no injury in holding this doctrine, as the original wrong-doer continues liable notwithstanding his alienation. Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201. And see *supra*, IV, D.

This rule is very reasonable, for the purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant and for damages which he never intended to occasion. Johnson *v.* Lewis, 13 Conn. 303, 33 Am. Dec. 405.

The heirs or personal representatives of the originator of a nuisance are not liable for damages resulting from its continuance after his death, except on neglect to abate it after notice. Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

Such notice is not dispensed with by Cal. Civ. Code, § 3483, making a grantee liable "in the same manner as the one who first created the nuisance," as the liability of the creator is based on the presumption that he has notice that it is a nuisance, which presumption does not arise against the grantee. Castle *v.* Smith, (Cal. 1894) 36 Pac. 859.

The rule is not applicable to the case of an obstruction to a navigable river or other public highway. Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 2 Fed. 285, 1 McCrary 281. See, generally, NAVIGABLE WATERS; STREETS AND HIGHWAYS.

An act in defiance of a statute is essentially unlawful, and is not within the principle requiring notice to purchasers of land on which a private nuisance exists. Graham *v.* Chicago, etc., R. Co., 39 Ind. App. 294, 77 N. E. 57, 1055.

27. Pinney *v.* Berry, 61 Mo. 359; Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390].

Defendant's knowledge of the nuisance is sufficient without any notice being given him. McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

The grantee's knowledge of a judgment obtained against the grantor for a nuisance, the year before the conveyance, has no tendency to show knowledge in him that the nuisance continued to exist when he acquired his title. Nichols *v.* Boston, 98 Mass. 39, 93 Am. Dec. 132.

28. Steinke *v.* Bentley, 6 Ind. App. 663, 34 N. E. 97.

29. Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; Whitenack *v.* Philadelphia, etc., R. Co., 57 Fed. 901.

30. Middlebrooks *v.* Mayne, 96 Ga. 449, 23

a person discovers that he is maintaining a nuisance and abates it, but suffers it to arise again, he is liable for damages without notice from the person injured, although the nuisance was originally created by his grantor.[31]

b. Mode and Form of Notice. No particular form of notice or request is required.[32] It may be either written or oral,[33] or it may be by acts done.[34] It is only necessary that it shall clearly inform the person affected by it of the existence of the nuisance [35] and of the desire of the person injured to have it removed,[36] so that the person to whom it is addressed shall fully understand the ground of complaint and that the person giving the notice is unwilling to have the nuisance continued.[37] Where a railroad company erected a nuisance and the road was subsequently leased to another company which continued to maintain the nuisance, notice to the president and officers and the section master of the lessee company was sufficient.[38]

5. Persons Entitled to Sue.[39] Every person injured by a nuisance is entitled to maintain an action therefor, although this results in a multitude of actions.[40] The owner of property affected by a nuisance may recover for injuries to the property,[41] although he does not occupy the premises;[42] but where he does not occupy the property he cannot recover for a nuisance not causing any injury to the property itself.[43] In order to entitle a person to maintain a private action for

S. E. 398; Snow *v.* Cowles, 22 N. H. 296; Carleton *v.* Redington, 21 N. H. 291.

31. Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746.

32. Carleton *v.* Redington, 21 N. H. 291; Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390].

Notice need not be in form of request to abate nuisance.— Pinney *v.* Berry, 61 Mo. 359; Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barh. 390].

33. Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390].

34. Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 546 [*reversing* 52 Barb. 390].

35. Snow *v.* Cowles, 26 N. H. 275; Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390].

36. Snow *v.* Cowles, 26 N. H. 275; Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646 [*reversing* 52 Barb. 390].

37. Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 10 Am. Rep. 646.

Notice must be distinct and unequivocal.— McDonough *v.* Gilman, 3 Allen (Mass.) 264, 80 Am. Dec. 72.

38. Central R. Co. *v.* English, 73 Ga. 366.

39. Suit for equitable relief see *supra*, VII, C, 4.

40. Fisher *v.* Zumwall, 128 Cal. 493, 61 Pac. 82; Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300; Exley *v.* Southern Cotton Oil Co., 151 Fed. 101.

41. Bonner *v.* Welborn, 7 Ga. 296; Ruckman *v.* Green, 9 Hun (N. Y.) 225; Busch *v.* New York, etc., R. Co., 12 N. Y. Suppl. 85.

Existence of vendor's lien.— The fact that the evidence discloses that ten years prior to the suit there was a vendor's lien on plaintiff's land, amounting to half its value, without any showing as to whether the lien was paid, will not defeat a recovery on the ground that the lien-holder is the proper plaintiff. Denison, etc., R. Co. *v.* O'Malley, 18 Tex. Civ. App. 200, 45 S. W. 225.

42. Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393, holding that it is not necessary to the right of action given by St. (1887) c. 348, for maliciously erecting a fence more than six feet high for the purpose of annoyance that the owner should be in actual occupation.

The owner of vacant lots may recover damages for injuries to them through a private nuisance, the vacancy affecting only the extent of the damages. Ruckman *v.* Green, 9 Hun (N. Y.) 225; Busch *v.* New York, etc., R. Co., 12 N. Y. Suppl. 85.

The owner of leased property may maintain an action for a permanent injury thereto arising from a nuisance, although it is occupied by the tenants. Park *v.* White, 23 Ont. 611.

43. Miller *v.* Edison Electric Illuminating Co., 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. N. S. 1060 [*reversing* 97 N. Y. App. Div. 638, 89 N. Y. Suppl. 1059]; Dieringer *v.* Wehrman, 9 Ohio Dec. (Reprint) 355, 12 Cinc. L. Bul. 222, holding that the owners of property not occupied by them cannot recover damages for a nuisance maintained by an adjoining property-owner, where there has been no diminution of the rents, or failure to rent, caused by such nuisance, nor any injury to the property necessitating its repair by plaintiffs. See also Cohen *v.* Bellenot, (Va. 1899) 32 S. E. 455, holding that where plaintiff sues in her own right as trustee of the property, and not as an occupant, she cannot recover damages resulting to her as an occupant by reason of offensive odors, or other causes which do not affect the value of the property.

The owner of leased property cannot re-

damages caused by a nuisance he must have some interest in realty the enjoyment of which is affected by the nuisance;[44] but a lawful possession, although unaccompanied by any title, is sufficient to support an action.[45] The right of action for permanent injuries caused by a nuisance is personal and cannot be assigned by deeding the land to another,[46] and hence a purchaser cannot recover damages for injuries occasioned prior to his purchase;[47] but where the nuisance is of a continuing character one who purchases the property affected thereby after its erection may recover damages for injuries subsequent to his purchase,[48] and the same rule applies to one who acquires the property by descent.[49] A lessee is entitled to recover damages sustained by him during his tenancy from the maintenance of a nuisance on adjoining property,[50] although he leased the property or

cover for a nuisance not affecting the property but merely the enjoyment thereof (Jones *v.* Chappell, L. R. 20 Eq. 539, 44 L. J. Ch. 658, holding that the owner of houses occupied by weekly tenants is within the rule that a reversioner cannot maintain an action in respect to a temporary nuisance), or at best he cannot in such case recover more than nominal damages (Dieringer *v.* Wehrman, 9 Ohio Dec. (Reprint) 355, 12 Cinc. L. Bul. 222).

44. Eilis *v.* Kansas City, etc., R. Co., 63 Mo. 131, 21 Am. Rep. 436; Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 513, 79 Pac. 14 (holding that landowners cannot recover for a destruction of crops by a nuisance, prior to the date when they acquired title, unless they were then in the possession of the property or entitled to the possession); Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636 [*reversing* 21 N. Y. App. Div. 311, 47 N. Y. Suppl. 235]; Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689 [*reversing* 59 Hun 60, 12 N. Y. Suppl. 603]. But *compare* Ft. Worth, etc., R. Co. *v.* Glenn, 97 Tex. 586, 80 S. W. 992, 104 Am. St. Rep. 894, 65 L. R. A. 818 [*distinguishing* Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564], holding that where a railway company permitted an old well upon its right of way, near land owned and occupied by plaintiff's father and his family, to become a nuisance, whereby plaintiff was made sick and suffered discomfort and pain, plaintiff was entitled to recover damages therefor, although he had no interest in the property of his father with whom he resided.

One who is in undisputed possession of property, and introduces evidence tending to show title, may recover for a nuisance interfering with the enjoyment of the property. Roth *v.* Conley, 55 S. W. 881, 21 Ky. L. Rep. 1623.

The fact that plaintiff's property has been sold under a mortgage will not prevent plaintiff, if still in possession, from maintaining an action for damages for a nuisance. Lurssen *v.* Lloyd, 76 Md. 360, 25 Atl. 394.

The owner of the reversion cannot maintain an action in respect to an engine shed near the dwelling-house, which causes much noise and smoke and amounts to a nuisance. Mountford *v.* Oxford, etc., R. Co., 4 Wkly. Rep. 457.

45. Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120; Bonner *v.* Welborn, 7 Ga. 296; Cornes *v.* Harris, 1 N. Y. 223, holding that in an action on the case for damages merely sustained in consequence of the erection of a nuisance, it is enough that plaintiff is in possession of the premises affected thereby, although it seems that, in the common-law action by writ of nuisance as retained and regulated by the Revised Statutes, the declaration must show that plaintiff has a freehold estate in the premises affected by the nuisance. See also Hough *v.* Patrick, 26 Vt. 435, holding that one who has an equitable title to land and is in actual possession and occupancy can maintain an action for injuries to his possession caused by the maintenance of a nuisance against one holding a subservient equity.

46. Mallott *v.* Johnston, 106 Ill. App. 545; Demby *v.* Kingston, 60 Hun (N. Y.) 294, 14 N. Y. Suppl. 601 [*affirmed* in 133 N. Y. 538, 30 N. E. 1148]. *Aliter*, as to action to restrain nuisance and for damages. Nickerson *v.* Crawford, 11 N. Y. Suppl. 503, 25 Abb. N. Cas. 91; Filson *v.* Crawford, 5 N. Y. Suppl. 882.

Ownership when nuisance commenced.— Where plaintiff was the owner of the land injured at the time the nuisance was created, it is not a valid objection that he was not the owner at the time the thing which became the nuisance was constructed. Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567.

47. Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202; Springfield *v.* Spence, 39 Ohio St. 665.

48. *Alabama.*— Birmingham *v.* Land, 137 Ala. 538, 34 So. 613; Loftin *v.* McLemore, 1 Stew. 133.

Illinois.— Baker *v.* Leka, 48 Ill. App. 353.

Indiana.— Steinke *v.* Bentley, 6 Ind. App. 663, 34 N. E. 97.

Massachusetts.— Staple *v.* Spring, 10 Mass. 72.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

See 37 Cent. Dig. tit. "Nuisance," §§ 109, 186.

49. Cain *v.* Chicago, etc., R. Co., 54 Iowa 255, 3 N. W. 736, 6 N. W. 268.

50. Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y.

renewed his lease thereof after the creation of the nuisance;[51] and with knowledge of its existence,[52] for a tenant who "comes to a nuisance" should be accorded the same degree of protection as one who purchases property near an existing nuisance.[53]

6. Defenses[54] — a. In General. In an action for damages for a nuisance there can be no balancing and setting off the benefit and injury resulting from separate and distinct acts,[55] and hence one who creates a private nuisance cannot show, in defense to an action for damages caused thereby, that his prior conduct in regard to the same matter resulted in a benefit to plaintiff;[56] but where plaintiff limits his claim for damages to the diminished value of his land because of the erection complained of he cannot recover if such erection has increased the value of his land by an amount in excess of the damage done.[57] It is no defense that it is necessary to carry on the business complained of and that the same is useful to the public,[58] or that others in the same vicinity are incommoded in the same manner as plaintiff.[59] It is no defense to an action for a nuisance which caused disease and sickness that defendant has been indicted for the nuisance and convicted.[60] The fact that plaintiff maintains a separate and independent nuisance affecting his premises does not defeat his right to recover for the nuisance maintained by defendant, although it should be considered in determining the extent of defendant's liability.[61] In an action for damages to plaintiff's mill from a nuisance caused by defendant, it is no defense that such mill stands in part on a public street, where it appears that this is owing to plaintiff's being misled by an inaccurate survey of the street, unless the location of his mill contributed to the injury.[62] A charter right of a corporation to acquire and hold at such place as it shall find expedient all necessary property on which to construct and maintain terminal railroad facilities and accommodations is no defense to an action for damages from a nuisance consisting of a round-house erected by it.[63] One who is sued for damages for a private nuisance cannot defend on the ground that he has only injured and obstructed plaintiff in a right which he had no authority to exercise.[64] In an action for maintaining a stagnant pool the fact that the pool might have been drained by the city will not relieve defendant from liability for special damages caused thereby.[65]

b. Acquiescence or Consent.[66] Plaintiff's acquiescence in or consent to the matters complained of may defeat his right to recover damages therefor;[67] but a

Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Dumois *v.* New York, 37 Misc. (N. Y.) 614, 76 N. Y. Suppl. 161; Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564.

51. Central R. Co. *v.* English, 73 Ga. 366; Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437.

52. Central R. Co. *v.* English, 73 Ga. 366 (where the injurious effects of the nuisance were increased during the tenancy); Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 [*reversing* 54 N. Y. App. Div. 427, 66 N. Y. Suppl. 737, and *distinguishing* Kernochan *v.* New York El. R. Co., 128 N. Y. 568]; Smith *v.* Phillips, 8 Phila. (Pa.) 10.

53. Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 [*reversing* 54 N. Y. App. Div. 427, 66 N. Y. Suppl. 737].

Rule as to "coming to a nuisance" see *supra*, III, A, 3, b; III, A, 11.

54. In criminal prosecution or penal action see *infra*, VII, E, 2.

In suit for equitable relief see *supra*, VII, C, 5.

55. Talbot *v.* Whipple, 7 Gray (Mass.) 122.

56. Talbot *v.* Whipple, 7 Gray (Mass.) 122.

57. Chicago Forge, etc., Co. *v.* Sanche, 35 Ill. App. 174 [*distinguishing* Chicago Forge, etc., Co. *v.* Major, 30 Ill. App. 276].

58. Smith *v.* Phillips, 8 Phila. (Pa.) 10.

59. Curran *v.* McGrath, 67 Ill. App. 566.

60. Story *v.* Hammond, 4 Ohio 376.

61. Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268.

62. Houston, etc., R. Co. *v.* Parker, 50 Tex. 330.

63. Louisville, etc., Terminal Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

64. Hendrick *v.* Johnson, 5 Port. (Ala.) 208.

65. Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280.

66. As affecting right to equitable relief see *supra*, VII, C, 2, l.

67. Chaffee *v.* Telephone, etc., Constr. Co., 77 Mich. 625, 43 N. W. 1064, 18 Am. St.

mere failure to complain,[68] or delay in bringing suit for damages,[69] does not necessarily show such acquiescence as to defeat a recovery. The fact that a person knows that a structure is being built and the purpose for which it is to be operated, and makes no objection thereto, does not estop him to afterward sue to recover for damages caused by its use,[70] unless his conduct influenced the owner in building the structure.[71] A person is not precluded from recovering damages for a nuisance injuring his property by the fact that his grantor brought no action for it and made no complaint against it;[72] but, if the owner of property has charged it with a servitude as to the matter complained of, a subsequent grantee cannot recover damages therefor.[73]

c. Abatement by Defendant.[74] The fact that defendant has abated the nuisance does not deprive plaintiff of his right to recover damages for injuries prior to such abatement;[75] but it has been held that defendant may for the purpose of confining the proof to the damages accruing up to the institution of the suit plead and prove that he intends within a short time to remove a structure alleged to create a nuisance.[76]

d. Abatement by Plaintiff.[77] The fact that plaintiff has himself abated the nuisance does not defeat his right to recover for injuries previously caused thereby.[78]

e. Neglect of Plaintiff. Want of ordinary care in avoiding an injury from a nuisance created by another has been held to be a full defense to an action against the latter for such injury;[79] but the fact that plaintiff might by his own act have abated the nuisance and did not do so is no defense.[80]

7. Jurisdiction of Courts.[81] The jurisdiction of particular courts in an action for damages for a nuisance depends upon the statutes and judicial system of the state where the action is brought.[82]

8. Limitations of Actions.[83] Statutes limiting the time within which actions

Rep. 424, 6 L. R. A. 455; Casselberry *v.* Ames, 13 Mo. App. 575.

68. Aldrich *v.* Wetmore, 56 Minn. 20, 57 N. W. 221.

69. Water Lot Co. *v.* Jones, 30 Ga. 944; West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879.

70. Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

71. Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

72. Troy *v.* Coleman, 58 Ala. 570; Alexander *v.* Kerr, 2 Rawle (Pa.) 83, 19 Am. Dec. 616.

73. Troy *v.* Coleman, 58 Ala. 570 [*followed* in Union Springs *v.* Jones, 58 Ala. 654].

74. As affecting right to equitable relief see *supra*, VII, C, 14, c.

As defense to criminal prosecution or penal action see *infra*, VII, E, 2.

75. Miller *v.* Edison Electric Illuminating Co., 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376 [*reversing* 33 Misc. 664, 68 N. Y. Suppl. 900]; Moon *v.* National Wall-Plaster, etc., Co., 31 Misc. (N. Y.) 631, 66 N. Y. Suppl. 33 [*affirmed* in 57 N. Y. App. Div. 621, 67 N. Y. Suppl. 1140]; Eppley *v.* Naumann, 5 Pa. Dist. 471; Chester *v.* Smelting Corp., 85 L. T. Rep. N. S. 67.

76. Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202.

77. See, generally, *supra*, VII, B, 1.

78. Tate *v.* Parrish, 7 T. B. Mon. (Ky.) 325; Call *v.* Buttrick, 4 Cush. (Mass.) 345, holding that an action on the case for nuisance is not abated by a subsequent abatement of the nuisance by plaintiff.

79. Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120. But *compare* Snider Preserve Co. *v.* Beemon, 60 S. W. 849, 22 Ky. L. Rep. 1527.

80. Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120; Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253; Missouri, etc., R. Co. *v.* Burt, (Tex. Civ. App. 1894) 27 S. W. 948; Gulf, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1893) 22 S. W. 283; Philadelphia, etc., R. Co. *v.* Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131.

81. See, generally, Courts.

In suit for equitable relief see *supra*, VII, C, 6.

In criminal prosecution or penal action see *infra*, VII, E, 3.

82. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396 (holding that in an action to abate a nuisance and to recover damages, the county court has no jurisdiction of the action for damages, except as an incident to its power to abate the nuisance); Wilmington *v.* Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 65 Am. St. Rep. 256, 25 L. R. A. 538 (holding that the municipal court of Wilmington, established by charter (sections 14, 15), pursuant to Const. art. 6, § 15, has jurisdiction of actions for damages for common nuisances in such city).

83. See, generally, Limitations of Actions.

may be brought apply to actions for damages for nuisances,[84] and where the nuisance is of a permanent character the period runs from the time when the injury was done[85] or the structure complained of erected;[86] but where the nuisance is a continuing one an action for injuries from the continuance may be brought after the lapse of more than the statutory period since the creation of the nuisance, although in such case the recovery is limited to damages for the statutory period preceding the commencement of the action.[87]

9. PARTIES.[88] Persons owning distinct property interests cannot bring a joint action to recover damages for a nuisance.[89] Where several persons are jointly concerned in the creation or continuance of a nuisance, they may be sued jointly for damages;[90] but where the separate acts of several persons acting independently

Suit for equitable relief see *supra*, VII, C, 8.

84. Augusta *v.* Marks, 124 Ga. 365, 52 S. E. 539; West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

85. Cass *v.* Pennsylvania Co., 159 Pa. St. 273, 28 Atl. 161 (holding that in an action for damages for maintaining a nuisance, consisting of a bridge on the street in front of plaintiff's property, erected by defendant under decree of court permitting it, the limitation to plaintiff's right of action for damages commences to run not later than the time when the work commenced had progressed to such an extent as to obstruct ingress and egress to and from his property); Pickens *v.* Coal River Boom, etc., Co., 58 W. Va. 11, 50 S. E. 872 (holding that in an action for damage to real property from a private continuous nuisance, not permanent in character, limitations for five years do not begin to run from the beginning of the nuisance, but on the actual occurrence of damage from it).

86. Baldwin *v.* Oskaloosa Gaslight Co., 57 Iowa 51, 10 N. W. 317; Powers *v.* St. Louis, etc., R. Co., 158 Mo. 87, 57 S. W. 1090 (holding that the period ran from the time the canal complained of was completed); Virginia Hot Springs Co. *v.* McCray, 106 Va. 461, 56 S. E. 216.

Construction of pleading as to nature of nuisance. — Where plaintiff complains of noises, jars, smoke, and cinders from the operation of a railroad, without any averment that these things were unnecessary in the prudent operation of the road, the action will be regarded as one for damages resulting from the prudent operation of the road, and hence the period of limitation runs from the time when the road was built. Roulstone *v.* Chesapeake, etc., R. Co., 54 S. W. 2, 21 Ky. L. Rep. 1507.

Finding of jury.— Where, in an action for damages for injury to plaintiff's property caused by the erection and maintenance of gas-works in the vicinity, the jury found that the works were permanent, but stated that they were not competent to decide whether the injury would be permanent, as ways and means might possibly be devised to operate them whereby they might cease to be a nuisance, this was equivalent to a finding that the injury complained of would be permanent. Baldwin *v.* Oskaloosa Gaslight Co., 57 Iowa 51, 10 N. W. 317.

87. *Alabama.*—Whaley *v.* Wilson, 112 Ala. 627, 20 So. 922.

Georgia.— Augusta *v.* Marks, 124 Ga. 365, 52 S. E. 539; Smith *v.* Atlanta, 75 Ga. 110 [*recognized* but *distinguished* in Atkinson *v.* Atlanta, 81 Ga. 625, 7 S. E. 692]; Reid *v.* Atlanta, 73 Ga. 523.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

Missouri.— McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

Ohio.— Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Pennsylvania.— Stokes *v.* Pennsylvania R. Co., 214 Pa. St. 415, 63 Atl. 1028.

Washington.— Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 70 Pac. 266.

See 37 Cent. Dig. tit. "Nuisance," § 111.

88. See, generally, PARTIES.

In suit for equitable relief see *supra*, VII, C, 9.

89. Paducah *v.* Allen, 49 S. W. 343, 20 Ky. L. Rep. 1342. See also Grant *v.* Schmidt, 22 Minn. 1, holding that in a joint action for the abatement of a nuisance plaintiffs cannot have judgments for damage done to the property of each.

Joint action should be dismissed without prejudice and not absolutely.— Paducah *v.* Allen, 49 S. W. 343, 20 Ky. L. Rep. 1342.

A father and his minor children cannot join in an action for damages for sickness caused by a nuisance maintained near their dwelling-house. Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564.

90. Rogers *v.* Stewart, 5 Vt. 215, 26 Am. Dec. 296.

Joinder of landlord and tenant.— Where a stable was erected and carried on by a tenant so as to constitute a nuisance, with the knowledge and consent of his landlord, and the latter was informed of the nuisance and requested to abate it, both are proper parties defendant to the action for damages. Robison *v.* Smith, 3 Silv. Sup. (N. Y.) 490, 7 N. Y. Suppl. 38.

Joinder of grantees of land.— In an action for damages resulting from the maintenance of a nuisance, persons who acquired title, after the creation of the nuisance, to the land on which it is situate, and by whose authority it has been continued, are proper parties defendant. Cobb *v.* Smith, 38 Wis. 21.

produce the injury complained of, they must be sued separately, and a single action cannot be brought against them all jointly.[91] An action for a nuisance caused by the noise of trains is properly brought against the railroad company as a corporation, and not against its agents, who caused the noise to be made.[92] Where a wife held possession and enjoyed real property purchased by her husband in his own name prior to his death with funds inherited by her from her father's estate, as she alleged, the heirs of her deceased husband were not necessary parties to a suit by her to recover damages to the land from an alleged nuisance maintained by defendant.[93]

10. Pleadings[94] — a. Complaint or Declaration — (1) *In General.* The complaint or declaration must charge the existence of a nuisance,[95] and defendant's liability therefor,[96] and show the nature and extent of the injury complained of,[97]

91. Martinowsky *v.* Hannibal, 35 Mo. App. 70.

92. Schenectady First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79.

93. Houston, etc., R. Co. *v.* Charwaine, (Tex. Civ. App. 1902) 71 S. W. 401.

94. See, generally, Pleading.

In criminal prosecution or penal action see *infra*, VII, E, 6.

In suit for equitable relief see *supra*, VII, C, 11.

95. Kern *v.* Myll, 80 Mich. 525, 45 N. W. 587, 8 L. R. A. 682 (holding that a declaration by a tenant, in an action against his landlord, alleging that prior to his lease the latter had built an addition to the house extending over a well, partly filling it with rubbish, and making no provision for drainage, whereby it became filled with dead vermin and filth, sending bad odors and disease through the house, the source of which was unknown to plaintiff, and was concealed from him by defendant, alleges the construction and continuance of a nuisance, and discloses a cause of action); Bianki *v.* Greater American Exposition Co., (Nebr. 1902) 92 N. W. 615 (holding that a petition by which it is sought to make one liable in damages for doing an unlawful act or maintaining a public nuisance must state sufficient facts to overcome the presumption that the act complained of was lawful, or show that the doing of the act itself amounted to a public nuisance).

It is not necessary to use the word "nuisance" or to expressly allege that the matter complained of constitutes a nuisance, but a complaint stating facts showing that the matter complained of is actually a nuisance is sufficient. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262 [*affirming* 30 Ill. App. 321]; Campbell *v.* U. S. Foundry Co., 73 Hun (N. Y.) 576, 26 N. Y. Suppl. 165; Sullivan *v.* Waterman, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773.

The complaint must be explicit as to the description of the particular nuisance complained of. O'Brien *v.* St. Paul, 18 Minn. 176.

The unreasonableness of a use of property need not be alleged in terms in an action by an adjoining owner who is injured by such use, where the facts alleged, taken in connection with what may naturally and proximately be deduced therefrom, justify the conclusion that such use is unreasonable. Exley *v.* Southern Cotton Oil Co., 151 Fed. 101.

Complaints held sufficient see Weston Paper Co. *v.* Comstock, (Ind. 1900) 58 N. E. 79; New Albany *v.* Armstrong, 22 Ind. App. 15, 53 N. E. 185; Harman *v.* St. Louis, 137 Mo. 494, 38 S. W. 1102; Uggla *v.* Brokaw, 117 N. Y. App. Div. 586, 102 N. Y. Suppl. 857.

96. Vernon *v.* Edgeworth, (Ala. 1906) 42 So. 749 (holding that in an action for damages caused by the maintenance of a privy by a city, allegations that the privy was erected by defendant under the power in its charter authorizing it to erect and maintain privies, are sufficient to show that the privy was erected by authority of defendant); Missouri Pac. R. Co. *v.* Webster, 3 Kan. App. 106, 42 Pac. 845 (holding that the petition should allege that defendant either erected the nuisance or had actual knowledge that it was maintaining a nuisance); Beavers *v.* Trimmer, 25 N. J. L. 97 (holding that the declaration must allege that defendant erected or continued the nuisance); Russell *v.* Shenton, 3 Q. B. 449, 2 G. & D. 573, 6 Jur. 1059, 11 L. J. Q. B. 289, 43 E. C. L. 814 (holding that in an action for a nuisance, occasioned by drains on the premises belonging to defendant and adjoining the premises of plaintiff, a declaration alleging that defendant was the owner and proprietor of the drains, and that he ought to have kept them cleansed and have prevented the accumulation of filth from running into the dwelling-house of plaintiff, but neglected to do so, was bad, as it did not show that defendant was the occupier of the drains, and the nuisance was not shown to be of a permanent or continuing character.

97. Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579, holding that plaintiff, in an action to recover for medical expenses incurred for his wife and children in the treatment of sickness resulting from a nuisance, should allege the sums expended for the wife and for the children respectively, and that such expenses were necessary and reasonable.

Claim for cost of abatement merely.—A complaint alleging that plaintiff is the owner of a lot, that defendant without right

and that the alleged nuisance is the cause thereof.[98] But it is not necessary to allege that the acts complained of were unlawfully[99] or negligently[1] done, or that the nuisance was unknown to plaintiff at the time the injury was sustained.[2] The complainant should show plaintiff's interest in the premises injuriously affected,[3] and defendant's interest in the premises on which the nuisance exists.[4]

(II) *Notice to Defendant.*[5] In order to maintain an action for a nuisance which has been erected by defendant's predecessor in title it is necessary to allege that defendant was given notice of the nuisance[6] or had knowledge of its existence;[7] but no averment of notice or request to abate is necessary where the action is against the person who created the nuisance,[8] or where the nuisance complained of is not the original erection but the wrongful use of it by defendant.[9]

(III) *Special Injury.*[10] Where the nuisance is a public one, some special damage to plaintiff must be alleged in the complaint or declaration,[11] but such an

constructed a sewer over it, and permitted it to get and remain out of repair, so that nauseous gases escaped, preventing plaintiff's use of the property, that defendant failed to repair it when asked by plaintiff to do so, and that thereupon plaintiff repaired it at a certain cost, which amount defendant refused to pay and for which plaintiff asks judgment, states a cause of action for damages from a private nuisance, although seeking to recover part only thereof, the cost of abating it. Murray *v.* Butte, 35 Mont. 161, 88 Pac. 789.

That an alleged nuisance may be abated, and that there is no threat on the part of those creating it to continue the conditions giving rise to it, are facts going to the measure of damages the injured person would be entitled to receive for the damages already sustained and not to the sufficiency of a complaint for injuries caused thereby. Baltimore, etc., R. Co. *v.* Quillen, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. Rep. 183.

98. Russell *v.* Bancroft, 79 Tex. 377, 15 S. W. 282.

A declaration need not, in terms, allege that defendant's wrongful acts were the natural and proximate cause of plaintiff's sickness, but it is enough to allege that defendant's wrongful creation of a stagnant pond caused plaintiff's ill health. Garland *v.* Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 682, 56 L. R. A. 316.

Statement held sufficient.—A declaration alleging that the substances deposited by defendant, and the odors emitted therefrom, had caused the death of a large number of horses, and that plaintiff and her family had been sick and disabled as a result of the presence of such substances, raised a fair inference that the noxious odors came unto and into plaintiff's premises, although such fact was not expressly alleged, and was sufficient to withstand a motion in arrest of judgment. N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 322.

99. Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646.

1. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262.

2. Morford *v.* Woodworth, 7 Ind. 83.

3. Cornes *v.* Harris, 1 N. Y. 223, holding that in an action for damages merely, it is not necessary that the declaration should show that plaintiff has a freehold estate in the premises affected by the nuisance, as it is enough that plaintiff is in possession of such premises.

4. Horton *v.* Brownsey, 10 N. Y. St. 800, holding that it is necessary to allege that the person maintaining the nuisance is a tenant or a freeholder interested in the land upon which it is maintained.

5. **Requirement of notice** see *supra*, VII, D, 4, a.

6. McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

7. McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203, holding that it is not necessary to allege or prove that notice of the nuisance has been given, provided knowledge of its continuing existence be alleged and proved.

Complaint must allege either that defendant created nuisance or that he had knowledge thereof.— Wabash R. Co. *v.* Sanders, 47 Ill. App. 436; Missouri Pac. R. Co. *v.* Webster, 3 Kan. App. 106, 42 Pac. 845.

8. Bonner *v.* Welborn, 7 Ga. 296.

9. Beavers *v.* Trimmer, 25 N. J. L. 97.

10. **Special injury necessary to right of action for public nuisance** see *supra*, VI.

Allegation of special injury in suit for equitable relief see *supra*, VII, C, 11, a, (II).

11. *Colorado.*— Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515 [*followed* in Walley *v.* Platte, etc., Ditch Co., 15 Colo. 579, 26 Pac. 129].

Indiana.— Waltman *v.* Rund, 94 Ind. 225.

Minnesota.— Thelan *v.* Farmer, 36 Minn. 225, 30 N. W. 670.

Missouri.— Smiths *v.* McConathy, 11 Mo. 517.

Ohio.— Farrelly *v.* Cincinnati, 2 Disn. 516.

Oregon.— Rosehurg *v.* Abraham, 8 Oreg. 509.

South Carolina.— Baltzeger *v.* Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; Hellams *v.* Switzer, 24 S. C. 39.

Wisconsin.— Hall *v.* Kitson, 3 Pinn. 296, 4 Chandl. 20.

United States.—Roessler-Hasslacher Chemi-

allegation is not necessary to support the action where the nuisance complained of is a private one.[12]

(IV) *DAMAGES.*[13] Damages for depreciated market value of the property injured can be allowed only when specifically pleaded,[14] and in order to warrant a recovery of future damages it must specifically and certainly appear that such damages will result from the nuisance.[15]

(V) *VERIFICATION.* It has been held that the petition or complaint need not be verified.[16]

(VI) *AMENDMENT.* A count for the continuance of a nuisance may be added to the declaration after the testimony on each side is given.[17] In an action for damages because of the erection of an alleged nuisance maintained by defendant, it is not error to refuse to allow plaintiff to amend his petition by striking out an allegation as to the erection of the nuisance and alleging notice to defendant of the nuisance and request for an abatement and refusal of defendant to comply with the request.[18]

b. Plea or Answer. The plea or answer should conform to the general rules applicable to such pleadings in actions for damages.[19]

c. Issues, Proof, and Variance.[20] The proofs must accord with the case presented and the issues made by the pleadings.[21]

cal Co. *v.* Doyle, 142 Fed. 118, 73 C. C. A. 174.

See 37 Cent. Dig. tit. "Nuisance," §§ 113, 187.

The character of the injury must be particularly alleged so that the court may determine whether it is different from that sustained by the public generally. Waltman *v.* Rund, 94 Ind. 225; Thelan *v.* Farmer, 36 Minn. 225, 30 N. W. 670. See also Farrelly *v.* Cincinnati, 2 Disn. (Ohio) 516.

The declaration is sufficient where after describing the acts and practices complained of it avers that thereby plaintiff has been and is greatly annoyed and incommoded in the use, occupation, and enjoyment of his dwelling-house, and that the same has been rendered uncomfortable, unhealthy, and unfit for habitation. Roessler-Hasslacher Chemical Co. *v.* Doyle, 142 Fed. 118, 73 C. C. A. 174. A complaint for a nuisance consisting in the dumping of street cleanings by a city near plaintiff's house, so as to annoy him by the noxious and unhealthy odors and vapors arising, whereby he and his family were made sick, and his property depreciated, states a special injury to plaintiff. New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626.

Failure to allege special injury not cured by verdict.— Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515. *Contra*, Hall *v.* Kitson, 3 Pinn. (Wis.) 296, 4 Chandl. 20.

12. Smiths *v.* McConathy, 11 Mo. 517; Sullivan *v.* Waterman, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773; Exley *v.* Southern Cotton Oil Co., 151 Fed. 101.

Where special damages are alleged the allegations should be sufficiently specific to apprise defendant of the items thereof. Exley *v.* Southern Cotton Oil Co., 151 Fed. 101.

13. **Measure and elements of damages** see *infra*, VII, D, 14.

14. Wolf *v.* Cincinnati Edison Electric Co., 6 Ohio S. & C. Pl. Dec. 159, 5 Ohio N. P. 393, holding that such depreciation must be pleaded and all claim for future damages by the same kind and degree of nuisance waived.

15. Mineral Wells *v.* Russell, 30 Tex. Civ. App. 232, 70 S. W. 453, holding that in an action for a nuisance in depositing sewage on plaintiff's land, a complaint charging that the land would be absolutely unfit for use, even should the nuisance be abated, until the deposit was removed, and that, unless such deposit was removed, the land could not be cultivated for the succeeding year, and plaintiff would lose the rental value of the land for that year, without any allegation that the deposit could not be removed in time to use the land, or that a considerable time would be required for removal, was insufficient to justify a recovery for loss of the rental value for the succeeding year.

16. Ray *v.* Sellers, 1 Duv. (Ky.) 254, holding that an action for creating a private nuisance is an action for an injury to the person, within the meaning of Civ. Code Pr. § 143, and no verification of the petition is necessary.

17. Miller *v.* Frazier, 3 Watts (Pa.) 456.

18. Blackstock *v.* Southern R. Co., 120 Ga. 414, 47 S. E. 902.

19. See DAMAGES, 13 Cyc. 182.

20. **In suit for equitable relief** see *supra*, VII, C, 11, e.

In criminal prosecution or penal action see *infra*, VII, E, 7.

21. Smiths *v.* McConathy, 11 Mo. 517. See also Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.

Evidence admissible under pleadings.— Where a complaint alleges that noxious vapors pervading plaintiff's land are "a nuisance seriously interfering with the comfortable use and enjoyment of said building by plaintiff as a place of abode, and with the proper use thereof by him in the conduct of his business," evidence of the discomfort suffered by him, and its effect, is admissible.

11. Evidence[22] **— a. Burden of Proof.** The burden is on plaintiff to show all matters essential to his recovery.[23] He must show that he has suffered substantial injury,[24] that the injury complained of was caused by the alleged nuisance,[25] and that he exercised reasonable and ordinary care and diligence to avoid the injury.[26] Plaintiff must also show special damage where the nuisance is a public one,[27] and notice to defendant where defendant did not create the nuisance.[28] Defendant has the burden of proving affirmative matters of defense.[29]

b. Admissibility. Subject to the general rules of evidence,[30] any evidence which tends to establish or refute the right of plaintiff to the relief demanded is admissible.[31] So plaintiff may introduce evidence to show the existence of the

Aldrich *v.* Wetmore, 56 Minn. 20, 57 N. W. 221. An allegation that defendant acted with the consent of the owner of the land on which the nuisance existed was sufficient to admit proof of the interest held. Horton *v.* Brownsey, 10 N. Y. St. 800.

Matters amounting to variance.—Under an allegation that a nuisance had been erected by defendant, a recovery cannot be had, where the evidence shows that it was erected by a predecessor in title of defendant. Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585. An allegation that defendant caused "an unhealthy pond of standing water" is not sufficient to authorize the introduction of testimony showing injury sustained by plaintiff in consequence of sickness caused by the pond. Morris *v.* McCamey, 9 Ga. 160. Where, in an action for nuisance in carrying on a flour mill, plaintiff does not claim vindictive damages or allege gross carelessness, evidence by defendant of the proper management of the business is inadmissible. Cooper *v.* Randall, 53 Ill. 24. In an action by the owner of an adjacent building against the keeper of a disorderly house for the maintenance of a nuisance, evidence that plaintiff kept a saloon in his building, in violation of law, during a period for which he claims no damages in his complaint, is not admissible under the general issue. Miller *v.* Blue, 43 Kan. 441, 23 Pac. 588. It is not permissible to prove a nuisance of a character essentially different from that charged. O'Brien *v.* St. Paul, 18 Minn. 176. An allegation that defendant originated the nuisance will not support proof that he continued it only. Rychlicki *v.* St. Louis, 115 Mo. 662, 22 S. W. 908. In an action for a private nuisance, where there is no allegation of title in plaintiff, evidence of an agreement between plaintiff and his wife, under which he was to occupy the premises as a home, is properly refused. Kavanagh *v.* Barber, 68 Hun (N. Y.) 183, 22 N. Y. Suppl. 874 [*affirmed* in 149 N. Y. 608, 44 N. E. 1125]. In an action for personal injuries plaintiff cannot recover as for a nuisance. Fisher *v.* Rankin, 7 N. Y. Suppl. 837, 25 Abb. N. Cas. 191 [*reversing* 1 Silv. Sup. 466, 5 N. Y. Suppl. 627].

Recovery broader than petition.— Under a petition charging that defendant knowingly maintained a nuisance, and negligently permitted it to remain, damages for a period prior to defendant's knowledge of the existence of the nuisance are not recoverable. Griffith *v.* Lewis, 17 Mo. App. 605.

Where a declaration prays for damages for permanent injury to land and for general relief, plaintiff may recover for either permanent or temporary injuries. Umscheid *v.* San Antonio, (Tex. Civ. App. 1902) 69 S. W. 496.

Plaintiff may recover for occasional nuisances, although the complaint alleges a continuing nuisance if the nuisances were caused in the manner alleged. Cohen *v.* Bellenot, (Va. 1899) 32 S. E. 455.

22. See, generally, Evidence.

In criminal prosecution or penal action see *infra*, VII, E, 8.

In suit for equitable relief see *supra*, VII, C, 12.

23. See Keiser *v.* Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759.

24. Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834.

Plaintiff must show amount of his loss.— Keiser *v.* Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759.

Where it appears, to a reasonable certainty, that injury has resulted directly from the maintenance of the nuisance complained of, damages may be recovered notwithstanding uncertainty as to the amount. Bates *v.* Holbrook, 89 N. Y. App. Div. 548, 85 N. Y. Suppl. 673.

25. Munson *v.* Metz, 1 Tex. App. Civ. Cas. § 245; Chesapeake, etc., R. Co. *v.* Whitlow, 104 Va. 90, 51 S. E. 182.

26. Baltimore *v.* Marriott, 9 Md. 160, 66 Am. Dec. 326.

27. Roseburg *v.* Abraham, 8 Oreg. 509. See, generally, *supra*, VI.

28. Castle *v.* Smith, (Cal. 1894) 36 Pac. 859. See, generally, *supra*, VII, D, 4, a.

29. Kewanee *v.* Guilford, 81 Ill. App. 490, license.

30. See, generally, Evidence.

31. Evidence held admissible see the following cases:

Kentucky.— Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103.

Massachusetts.— Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Shepard *v.* Hill, 151 Mass. 540, 24 N. E. 1025.

New York.— Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243].

Texas.— Missouri, etc., R. Co. *v.* Dennis, (Civ. App. 1905) 84 S. W. 860.

Washington.—Rowe *v.* Northport Smelting, etc., Co., 35 Wash. 107, 76 Pac. 529.

alleged nuisance,[32] the nature and extent of the annoyance, discomfort, or injury,[33]

Wisconsin.— Dolan *v.* Chicago, etc., R. Co., 118 Wis. 362, 95 N. W. 385.

See 37 Cent. Dig. tit. "Nuisance," § 115½.

A judgment in an action for maintaining a nuisance is, as to the matters adjudicated, admissible in a subsequent action between the same parties for continuing the nuisance. Kilheffer *v.* Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658. See also Miles *v.* Wingate, 6 Ind. 458.

Harmless error.— In a suit for damages to property caused by a nuisance, the rejection of testimony that it was not desirable residence property before it was damaged was harmless, where the witness had testified fully as to the surroundings of the property. Denison, etc., R. Co. *v.* O'Malley, 18 Tex. Civ. App. 200, 45 S. W. 225.

32. Fay *v.* Whitman, 100 Mass. 76, holding that, in an action for disturbing the use of plaintiff's dwelling-house by stenches arising from defendant's slaughter-house, the testimony of the occupants of other dwelling-houses, situated at a greater distance from the slaughter-house, that they were disturbed in their houses from the same cause, is competent to show the existence of the nuisance, although incompetent on the question of damages.

33. *Alabama.*—Vernon *v.* Edgeworth, (1906) 42 So. 749, holding that, in an action for the maintenance of a privy, alleged to be a nuisance, evidence is admissible to show that the odor arising therefrom caused plaintiff and his family physical discomfort, and that he could, while sitting in his dining room, see paper and droppings fall therefrom.

Georgia.— Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280.

Illinois.— Cunningham *v.* Stein, 109 Ill. 375 (holding that where a manufacturer of beer sues to recover damages from one who has maintained a nuisance, evidence of the difference in the sales of beer before and after the maintenance of the nuisance is competent); N. K. Fairbank Co. *v.* Bahre, 112 Ill. App. 290 (holding that for the purpose of proving that odors were capable of producing discomfort and sickness, it is competent to permit persons other than plaintiff to testify that they were severally nauseated and made sick by such odors, the court instructing the jury that plaintiff is not entitled to recover for any discomfort or sickness caused to others by such odors); Belvidere Gaslight, etc., Co. *v.* Jackson, 81 Ill. App. 424 (holding that in an action for injuries to the water in a well occasioned by the erection and operation of a gas plant, testimony concerning the condition of water in wells on other premises in the neighborhood is admissible to show the extent and character of the injury sustained by plaintiff, as tending to prove that the operation of the gas plant could produce the injury complained of); Gempp *v.* Bassham, 60 Ill. App. 84; Wenona Zinc Co. *v.* Dunham, 56 Ill. App. 351.

Massachusetts.— Call *v.* Allen, 1 Allen 137.

Missouri.— Chamberlain *v.* Missouri Electric Light, etc., Co., 158 Mo. 1, 57 S. W. 1021, holding that where, in an action for injury to plaintiff's houses, certain real estate agents testified that they were familiar with the condition of the houses, it was error to refuse to permit them to state their opinion as to whether the houses could have been rented and kept rented during the period for which damages were sought.

New Jersey.— Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457, holding that, in an action for a continuing nuisance, evidence may be received of the condition of the premises injured, as they exist at or about the time of the trial, not for the purpose of recovering damages for injuries sustained after the commencement of the suit, but for the purpose of furnishing the most precise and reliable information as to the nature and extent of the injury, and thus enabling the jury by comparison to judge of the amount of damages resulting from the alleged nuisance prior to the commencement of the action.

New York.— Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243] (holding that it was proper to admit evidence as to the obstruction of the street by defendant by ashes and dirt in front of plaintiff's premises); Bates *v.* Holbrook, 89 N. Y. App. Div. 548, 85 N. Y. Suppl. 673 (holding that to determine the injury to the lessee of a hotel from a structure in the street, constituting a nuisance, the amount of business done before its erection is competent evidence of what loss was caused by the nuisance); Robinson *v.* Smith, 3 Silv. Sup. 490, 7 N. Y. Suppl. 38; Murray *v.* Archer, 1 Silv. Sup. 366, 5 N. Y. Suppl. 326 (holding that evidence of the rental value of plaintiff's premises with and without the existence of the nuisance is admissible on the question of damages); Wing *v.* Rochester, 9 N. Y. St. 473.

Pennsylvania.— Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834 (holding that evidence is admissible as to the character of the alleged nuisance after the suit was commenced, where it was precisely the same as in the years before the suit, and the evidence is offered for, and carefully confined by the court to, the sole purpose of showing the nature of the nuisance); Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579 (holding that evidence that members of plaintiff's family were made ill by and could not sleep because of the nuisance is admissible).

Texas.— Brennan *v.* Corsicana Cotton-Oil Co., (Civ. App. 1898) 44 S. W. 588, holding that, on the question of the impairment in value of property caused by the maintenance of a nuisance, evidence of the changed condition of the neighborhood, due to the nuisance, is admissible.

See 37 Cent. Dig. tit. "Nuisance," § 115½.

that such annoyance, discomfort, or injury was caused by the matter complained of as a nuisance,[34] that defendant knew of the existence of the nuisance,[35] and the depreciation in the rental value of plaintiff's property on account of the nuisance may also be shown.[36] Defendant may introduce evidence legitimately tending to show that the injury complained of was not caused by his acts or operations.[37] But evidence which is irrelevant,[38] which relates to immaterial matters,[39]

Where plaintiff sues as trustee of property to recover for nuisance, she can show sickness and suffering in her family caused thereby for the purpose only of proving the unhealthy condition of the premises. Cohen *v.* Bellenot, (Va. 1899) 32 S. E. 455.

34. Cooper *v.* Randall, 59 Ill. 317; Belvidere Gaslight, etc., Co. *v.* Jackson, 81 Ill. App. 424, set out *supra*, note 33.

Testimony tending to show that others were annoyed and injured by smoke and cinders is competent, as tending to prove that the nuisance objected to was capable of inflicting the injury complained of. Crane Co. *v.* Stammers, 83 Ill. App. 329.

35. Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120, holding that the fact that defendant was notified by the authorities of the town of the existence of the nuisance is admissible in evidence to prove his knowledge thereof.

36. Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280.

37. Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172 (holding that in an action for damages for maintaining a nuisance near plaintiff's residence, causing foul gases and noxious smells, evidence on behalf of defendant of another source of such gases and odors near plaintiff's residence is competent); Eller *v.* Koehler, 68 Ohio St. 51, 67 N. E. 89 (holding that where it appeared, in a suit by plaintiff for injuries caused by defendant's machinery, that four railroad tracks ran along the premises of both plaintiff and defendant, defendant was entitled to show that repeated observations had been taken as to the noises and vibrations in defendant's shops, and observations as to the noises and vibrations made by railroad trains passing, and that those from the railroad trains were many times greater than those from defendant's machinery, as tending to show that the injuries might have been caused solely by the railroad trains, and not by the machinery); Alexander *v.* Stewart Bread Co., 21 Pa. Super. Ct. 526 (holding that, in an action to recover damages for injuries caused by the operation of a bakery in a residential neighborhood, defendants may show the manner in which the machinery was constructed, and that no noise resulted from its operation, and may also show the thickness of the wall and the manner in which it is constructed, and that horses kept on the lower floor of the building were necessary to use in connection with the business); Shain Packing Co. *v.* Burrus, (Tex. Civ. App. 1903) 75 S. W. 838 (holding that where plaintiff sought to recover from defendant for so negligently conducting its packery as to pollute a stream on plaintiff's premises, and cause a disagreeable and unhealthy stench about his residence, it was error to exclude evidence by defendant that the stench complained of originated wholly or in part from another stream on plaintiff's premises, polluted by others).

38. *Alabama.*—Vernon *v.* Edgeworth, (1906) 42 So. 749, holding that, in an action for the maintenance of a privy, proof that, when plaintiff bought his property, there was a public privy at or near the place of the one in controversy, in the absence of any offer to show how the privy was maintained, is irrelevant.

California.— Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300, holding that evidence as to the depreciation in the value of plaintiff's property is not admissible to show the actual existence and gravity of the nuisance.

Kansas.— Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058, holding that, in an action to recover damages to property by the maintenance of a creamery, comparisons with respect to the operations of defendant's creamery and other creameries are inadmissible.

Missouri.— Chamberlain *v.* Missouri Electric Light, etc., Co., 158 Mo. 1, 57 S. W. 1021 (holding that in an action for injuries to plaintiff's houses from vibrations of the ground caused by the operation of defendant's machinery, evidence that a certain house near to plaintiff's had been rented all the time was irrelevant); Kirchgraber *v.* Lloyd, 59 Mo. App. 59 (holding that evidence of the effect of smoke, vapors, and fumes produced by other brick-kilns on premises adjacent thereto is irrelevant on an issue as to whether a particular brick-kiln is a nuisance to an adjoining property-owner and his family, on account of smoke and vapors arising therefrom).

New York.— Cibulski *v.* Hutton, 47 N. Y. App. Div. 107, 62 N. Y. Suppl. 166, holding that where the issue was whether a powder house was a nuisance, it was proper to exclude evidence that gunpowder was a necessity in conducting the chief industries in the city where it was located.

See 37 Cent. Dig. tit. "Nuisance," § 115½.

39. *California.*— Meek *v.* De Latour, 2 Cal. App. 261, 83 Pac. 300, holding that in an action for damages from a nuisance and to abate the same, evidence as to the depreciation in the value of plaintiff's property is not admissible on the question of damages.

Iowa.— Pettit *v.* Grand Junction, 119 Iowa 352, 93 N. W. 381.

Kansas.— Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058, holding that in an action to recover damages to property occasioned by the maintenance of a creamery, evidence that plaintiff had made

or which is otherwise incompetent under the general rules of evidence[40] cannot be admitted.[41]

c. Weight and Sufficiency. The general rules as to the weight and sufficiency of evidence[42] govern in determining whether the evidence in a particular case is sufficient to warrant the relief claimed or awarded.[43]

12. Trial.[44] The question as to what constitutes a nuisance is one of law for

no objection to the building of the creamery, or the pond in connection therewith, is inadmissible.

Maryland.— Baltimore Belt R. Co. *v.* Sattler, (1907) 65 Atl. 752 (holding that in an action for damages for interference with the enjoyment of property caused by smoke from defendant's passing trains, city ordinances making certain requirements for the disposition of smoke produced by the engines, and testimony as to what would have been the effect upon plaintiff's property had the ordinances been observed, were inadmissible); Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90 (holding that letters of plaintiff to defendant, intended as notice to the latter to abate the nuisance, are immaterial evidence).

New York.— Myers *v.* Malcolm, 6 Hill 292, 41 Am. Dec. 744, holding that evidence of the wealth of defendant is inadmissible.

Pennsylvania.— Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329, holding that in an action for damages against a coke company for an injury to adjoining land from smoke and sterilizing gases, a question as to where the coke company obtained the material from which they make coke, what price they paid for it, or what the miners who brought it to the surface were paid for mining it, should have been excluded.

Texas.— Corsicana Cotton Oil Co. *v.* Valley, 14 Tex. Civ. App. 250, 36 S. W. 999, holding that in an action for damages for maintaining a nuisance in a city, evidence that the municipal authorities have not taken action for the abatement of the nuisance is immaterial on the issue as to whether the matters complained of constitute a nuisance.

See 37 Cent. Dig. tit. "Nuisance," § 115½.

40. Hoadley *v.* M. Seward, etc., Co., 71 Conn. 640, 42 Atl. 997 (holding that in a suit to enjoin the operation of a factory near plaintiff's house, and to recover damages for such operation, evidence of the effect of the operation on others similarly situated was incompetent on the issue of damages); Holbrook *v.* Griffis, 127 Iowa 505, 103 N. W. 479 (holding that, in an action to recover damages for a nuisance, a resolution passed by the city board of health declaring defendant's buildings in controversy a nuisance was inadmissible).

41. Evidence held not admissible see the following cases:

Connecticut.— Johnson *v.* Porter, 42 Conn. 234.

Illinois.— N. K. Fairbank Co. *v.* Nicolai, 167 Ill. 242, 47 N. E. 360 [*reversing* 66 Ill. App. 637].

Indiana.— Hudson *v.* Densmore, 68 Ind. 391; Huntington *v.* Stemen, 37 Ind. App. 553, 77 N. E. 407.

Iowa.— Holbrook *v.* Griffis, 127 Iowa 505, 103 N. W. 479; Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268.

Massachusetts.— Quinn *v.* Lowell Electric Light Corp., 144 Mass. 476, 11 N. E. 732; Codman *v.* Evans, 5 Allen 308, 81 Am. Dec. 748.

Missouri.— Chamberlain *v.* Missouri Electric Light, etc., Co., 158 Mo. 1, 57 S. W. 1021; Danker *v.* Goodwin Mfg. Co., 102 Mo. App. 723, 77 S. W. 338.

New York.— Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437; Cibulski *v.* Hutton, 47 N. Y. App. Div. 107, 62 N. Y. Suppl. 166.

Pennsylvania.— Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329; Keiser *v.* Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759.

See 37 Cent. Dig. tit. "Nuisance," § 115½.

42. See, generally, Evidence.

43. See the following cases:

California.— Adams *v.* Modesto, 131 Cal. 501, 63 Pac. 1083, (1900) 61 Pac. 957.

Indiana.— New Albany *v.* Armstrong, 22 Ind. App. 15, 53 N. E. 185.

Iowa.— Van Fossen *v.* Clark, 113 Iowa 86, 84 N. W. 989, 52 L. R. A. 279; Podhaisky *v.* Cedar Rapids, 106 Iowa 543, 76 N. W. 847.

Kentucky.— Central Consumers Co. *v.* Pinkert, 92 S. W. 957, 29 Ky. L. Rep. 273; Barrett *v.* Henderson, 69 S. W. 1101, 24 Ky. L. Rep. 771.

Massachusetts.— Murphy *v.* Lally, 173 Mass. 365, 53 N. E. 859.

Minnesota.— Anderson *v.* Chicago, etc., R. Co., 85 Minn. 337, 88 N. W. 1001.

New York.— Rock *v.* Acker Process Co., 112 N. Y. App. Div. 695, 98 N. Y. Suppl. 997 [*affirmed* in 188 N. Y. 604, 81 N. E. 1174]; Bates *v.* Holbrook, 89 N. Y. App. Div. 548, 85 N. Y. Suppl. 673; Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437; Wilmot *v.* Bell, 76 N. Y. App. Div. 252, 78 N. Y. Suppl. 591; Butterfield *v.* Klaber, 52 How. Pr. 255.

Pennsylvania.— Green *v.* Sun Co., 32 Pa. Super. Ct. 521.

Texas.— Gulf, etc., R. Co. *v.* Craft, (Civ. App. 1907) 102 S. W. 170; Mineral Wells *v.* Russell, 30 Tex. Civ. App. 232, 70 S. W. 453; Daniel *v.* Ft. Worth, etc., R. Co., (Civ. App. 1902) 69 S. W. 198 [*reversed* on other grounds in 96 Tex. 327, 72 S. W. 578]; Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

44. See, generally, Trial.

In suit for equitable relief see *supra*, VII, C, 13.

In criminal prosecution or penal action see *infra*, VII, E, 9.

the court;[45] but it is for the jury to decide whether a particular act or structure or use of property, which is not a nuisance *per se*, is a nuisance in fact.[46] It is for the jury to decide whether the alleged nuisance is the cause of the losses or injuries complained of,[47] and to what extent such losses or injuries are attributable to the nuisance,[48] whether the injury from the alleged nuisance is substantial,[49] whether plaintiff's injury is distinguishable from that suffered by others in the same neighborhood,[50] and whether the notice to remove the nuisance given before suit was reasonable.[51] The amount and items of damages are also a question for the jury.[52] The instructions should conform to the general rules on the subject of instructions,[53] and properly state to the jury the questions upon which they are to pass,[54] and clearly explain to them the rules of law applicable to the case,[55]

45. Smiths *v.* McConathy, 11 Mo. 517. Whether or not the location of a factory alleged to be a nuisance is convenient for carrying on the business, and whether or not such use of the property is reasonable, are not questions for the jury, as, in law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another, nor can any use of one's own land be reasonable which deprives an adjoining owner of the lawful enjoyment of his property. Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

46. Hochstrasser *v.* Martin, 74 Hun (N. Y.) 338, 26 N. Y. Suppl. 410; Van Fleet *v.* New York Cent., etc., R. Co., 7 N. Y. Suppl. 636; Rowland *v.* Baird, 18 Abb. N. Cas. (N. Y.) 256; Stokes *v.* Pennsylvania R. Co., 214 Pa. St. 415, 63 Atl. 1028; Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834; Kemmerer *v.* Edelman, 23 Pa. St. 143; Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

47. Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280; Aldrich *v.* Wetmore, 56 Minn. 20, 57 N. W. 221; King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

48. Aldrich *v.* Wetmore, 56 Minn. 20, 57 N. W. 221; King *v.* Vicksburg R., etc., Co., 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. N. S. 1036.

49. Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834.

50. Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834.

51. Kemmerer *v.* Edelman, 23 Pa. St. 143.

52. Hockaday *v.* Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

53. See, generally, TRIAL.

54. Frost *v.* Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693, holding that a charge that defendant must have so used his property as not to unlawfully injure his neighbors, and that if he so used it as to injure his neighbors, "in an unlawful and unreasonable manner," he is liable, is objectionable as submitting to the jury a question of law.

Submission of query.— When the court formulated a query for the jury as to whether defendant "caused" the nuisance, it was error to refuse an amendment proposed by plaintiff that the query be as to whether defendant "caused or permitted" it. Hochstrasser *v.* Martin, 62 Hun (N. Y.) 165, 16 N. Y. Suppl. 558.

55. **Propriety of particular instructions** see the following cases:

Iowa.— Holbrook *v.* Griffis, 127 Iowa 505, 103 N. W. 479 (holding that in an action to recover damages for a nuisance whereby plaintiff's well was polluted, an instruction that proof that plaintiff had established a nuisance on his own premises, rendering the water in his well unfit for drinking purposes, would not defeat his right of recovery from defendant if plaintiff had suffered damage from defendant's acts, on the ground that the doctrine of contributory negligence did not apply to such case, was erroneous); Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000 (holding that an instruction that plaintiff, to recover, must prove every allegation of her petition, was erroneous, since it would lead the jury to believe that there could be no recovery on any one of the distinct elements of damage alleged, unless all were proved).

Maryland.— Euler *v.* Sullivan, 75 Md. 616, 23 Atl. 845, 32 Am. St. Rep. 420, holding that an instruction that, if defendant erected a boiler and engine near to the house and lot of plaintiff, and smoke, steam, and cinders escaped from the chimneys of defendant and entered the premises of plaintiff so as "to render her house and premises less comfortable, enjoyable, or useful than they otherwise would have been, then the plaintiff is entitled to their verdict," was too broad, and was misleading.

Missouri.— Chamberlain *v.* Missouri Electric Light, etc., Co., 158 Mo. 1, 57 S. W. 1021; Long *v.* Kansas City, 107 Mo. App. 533, 81 S. W. 909; Gibson *v.* Donk, 7 Mo. App. 37, holding that in an action for damages occasioned by the establishment of a coal yard near plaintiff's house, it was error to instruct the jury to find for plaintiff, if the rental value of his property was materially injured.

New York.— Cibulski *v.* Hutton, 47 N. Y. App. Div. 107, 62 N. Y. Suppl. 166, holding that it was not error in charging the jury to state to them, by way of illustrating the court's definition of a "nuisance," that a powder house located near the court-house would be a nuisance, and that one located in

the measure[56] and elements[57] of damages, and the period as to which a recovery may be had.[58] It is error for the court to refuse on the trial to give its opinion on a legal point relevant to the issue.[59] An instruction which, taken alone, might be imperfect, may be unobjectionable where taken in connection with other portions of the charge it states the law fully and correctly,[60] or where the omission is not such as to mislead the jury.[61] Requested instructions are properly refused where they do not correctly state the law as applicable to the case,[62]

a wilderness would not be a nuisance, where they were also told that the illustration was extreme.

Ohio.— Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451, holding that it was error, in an action for injuries caused by filling streets in such manner as to cause water to set back on adjacent property, to refuse to charge that the property-owner was bound to use all reasonable care to protect himself and to avoid damages, and to submit to the jury whether there was any known or reasonable way in which he could have lessened the injury.

Pennsylvania.— Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. 834; Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329.

Texas.— Umscheid *v.* San Antonio, (Civ. App. 1902) 69 S. W. 496 (holding that where, in an action for injury to land, it appeared that defendant had the right to remove the source of the injury, and there was evidence that it intended to do so, but no evidence of any temporary injury, an instruction that the jury must find for defendant if they believed that the source of injury would be removed and the land be restored to its former condition was not erroneous); Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327; Brennan *v.* Corsicana Cotton-Oil Co., (Civ. App. 1898) 44 S. W. 588 (holding that an instruction that defendant was liable only for his own acts in maintaining a nuisance, and not for a nuisance resulting from the condition of other property adjacent to plaintiff's property, was proper, where there was evidence that such other property was kept in an offensive condition).

Virginia.— Chesapeake, etc., R. Co. *v.* Whitlow, 104 Va. 90, 51 S. E. 182; Cohen *v.* Bellenot, (1899) 32 S. E. 455, holding that where a complaint for nuisance alleged that the private sewer of defendant had an insufficient fall, whereby the sewage was collected and thrown upon plaintiff's property, to his great injury, and the only evidence showed that the fall was sufficient, an instruction that, if the sewer was so badly constructed as to affect plaintiff's property, he was entitled to recover, was improper.

See 37 Cent. Dig. tit. "Nuisance," § 130.

56. Learned *v.* Castle, (Cal. 1884) 4 Pac. 191 (holding that under Code Civ. Proc. § 625, authorizing the court to instruct the jury, if they render a general verdict, to find upon particular questions of fact, in an action for damages for a nuisance, it was proper to charge, where the jury found the existence of the nuisance, that they should award compensatory damages); Holbrook *v.* Griffis, 127 Iowa 505, 103 N. W. 479 (holding that in an action for damages for a temporary nuisance instructions authorizing a recovery of the difference between the fair and reasonable value of the use of plaintiff's property as it existed prior to the establishment of the alleged nuisance and after such establishment, etc., were proper); Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. 448, 14 Am. St. Rep. 319 (holding that an instruction that the measure of plaintiff's recovery was the difference between the "value of the use" of his premises as they would have been without the alleged nuisance and the "value of said premises" with such nuisance was erroneous).

57. Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478; Umscheid *v.* San Antonio, (Tex. Civ. App. 1902) 69 S. W. 496 (holding that where the pleadings in an action for injury to land are sufficient to authorize proof of temporary injury, but there is no evidence of any such injury, an instruction excluding damages for such injury is not erroneous); Neville *v.* Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579 (holding that where there is evidence in an action for sickness caused by a nuisance that the sickness was not caused, but only prolonged, thereby, the instructions should clearly state that under such facts plaintiff is not entitled to damages for the entire sickness, but only for the continuance thereof caused by the nuisance).

Rules of law as to measure and elements of damages see *infra*, VII, D, 14.

58. Rowe *v.* Northport Smelting, etc., Co., 35 Wash. 101, 76 Pac. 529.

59. Shaeffer *v.* Landis, 1 Serg. & R. (Pa.) 449.

60. Farley *v.* Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193; Pottstown Gas Co. *v.* Murphy, 39 Pa. St. 257.

61. Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556, holding that an instruction that "a nuisance is anything that works hurt, inconvenience, or damage to another, either in his person or property," is not erroneous as ignoring the legal ingredient of a "violation of a right," as the jury would doubtless understand that to authorize a verdict for damages they must believe that the injury was inflicted in violation of plaintiff's right.

62. Shirely *v.* Cedar Rapids, etc., R. Co., 74 Iowa 169, 37 N. W. 133, 7 Am. St. Rep.

where they relate to matters not in issue,[63] or where they are argumentative in form;[64] and it is also proper to refuse requested instructions which are necessarily embodied in those already given.[65] Where an action for damages and the abatement of a nuisance is considered an action at law, the findings of the jury are not merely advisory.[66] Where the case has been tried on the theory that the injury complained of was caused by a nuisance there cannot be a recovery on the ground of defendant's negligence, although the evidence is sufficient to show negligence.[67]

13. JUDGMENT.[68] A judgment establishing the existence of a nuisance cannot be collaterally attacked in another action for the continuance of the same nuisance.[69]

14. DAMAGES[70] **— a. Elements.** In assessing damages for a nuisance it is proper to take into consideration all the injuries and losses caused thereby,[71] such as the depreciation in the market[72] or rental[73] value of plaintiff's property, discomfort and annoyance in the use thereof,[74] injury to health or sickness of plain

471; Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270 (holding that, in an action against the owners of a factory for maintaining a nuisance, it is not error to refuse to instruct that, where expensive works have been constructed, which are useful to the public, persons must submit to the reasonable consequences of the carrying on of the trade in the immediate neighborhood); Sullivan *v.* McManus, 19 N. Y. App. Div. 167, 45 N. Y. Suppl. 1079.

63. Gerow *v.* Liberty, 106 N. Y. App. Div. 357, 94 N. Y. Suppl. 949, holding that where, in an action for a nuisance, plaintiff did not seek damages resulting from physical discomfort or sickness suffered by himself and family, a request to charge that plaintiff could not recover on account of such matters was properly refused.

64. N. K. Fairbank Co. *v.* Nicolai, 167 Ill. 242, 47 N. E. 360 [*reversing* 66 Ill. App. 637], holding that an instruction in argumentative form is properly refused, although it embodies a correct statement of the law.

65. Downs *v.* High Point, 115 N. C. 182, 20 S. E. 385.

66. Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

67. Opper *v.* Davega, 116 N. Y. App. Div. 268, 101 N. Y. Suppl. 621.

68. See, generally, JUDGMENTS.

In suit for equitable relief see *supra*, VII, C, 17.

In criminal prosecution or penal action see *infra*, VII, E, 10.

69. Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254, holding that where defendant admits the continuance, the only question for the jury is as to the *quantum* of damages to be recovered by plaintiff.

70. See, generally, DAMAGES.

Award of damages in suit for equitable relief see *supra*, VII, C, 14, d.

71. Berger *v.* Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. 336; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

72. Ottawa Gas Light, etc., Co. *v.* Graham, 28 Ill. 73, 81 Am. Dec. 263; Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Babb *v.* State University, 40 Mo. App. 173; Daniel *v.* Ft. Worth, etc., R. Co., 96 Tex. 327, 72 S. W. 578; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

Depreciation in market value as measure of damages see *infra*, VII, D, 14, f, (I).

73. *Georgia.*— Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390.

Iowa.— Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. 448, 14 Am. St. Rep. 319; Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

New York.— Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Miller *v.* Edison Electric Illuminating Co., 33 Misc. 664, 68 N. Y. Suppl. 900 [*reversed* on other grounds in 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376], loss of rental value caused by such of defendant's acts as constituted an excess of its privileges.

Pennsylvania.— Fischer *v.* Sanford, 12 Pa. Super. Ct. 435.

Texas.— San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33.

See 37 Cent. Dig. tit. "Nuisance," §§ 118, *et seq.*, 188.

Depreciation in rental value as measure of damages see *infra*, VII, D, 14, f, (I).

An allowance for loss of rent in an action brought to recover for a nuisance to adjoining premises is erroneous, the true measure of damages being the depreciation in rental value by reason of the nuisance. Garrett *v.* Wood, 55 N. Y. App. Div. 281, 67 N. Y. Suppl. 122.

Voluntary remission of rent.— The owners of a leased hotel cannot recover for loss of rental during a period while they had the lawful right to compel the tenant to pay the full amount, and while he was the sufferer from loss of custom by reason of defendant's unlawful use of its plant. Miller *v.* Edison Electric Illuminating Co., 33 Misc. (N. Y.) 664, 68 N. Y. Suppl. 900 [*reversed* on other grounds in 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376].

74. *Georgia.*— Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390.

tiff[75] and resulting loss of time,[76] loss of income from business,[77] loss of rents from the property,[78] and expenses incurred by reason of the injury from the nuisance.[79] Plaintiff may recover for injuries to the health of his family,[80] and

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Iowa.— Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. 448, 14 Am. St. Rep. 319; Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268.

Maryland.— Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533.

Missouri.— Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253.

Ohio.— Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567.

Pennsylvania.— Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

Tennessee.— Louisville, etc., Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

Texas.— Daniel *v.* Ft. Worth, etc., R. Co., 96 Tex. 327, 72 S. W. 578; Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

United States.— Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

Plaintiff is entitled to recover for all discomforts caused by the nuisance, whether mental suffering, bodily pain, or both. Houston, etc., R. Co. *v.* Reasonover, 36 Tex. Civ. App. 274, 81 S. W. 329.

Personal annoyance and discomfort willingly endured by staying at a hotel as a boarder is not an element of damages. Miller *v.* Edison Electric Illuminating Co., 33 Misc. (N. Y.) 664, 68 N. Y. Suppl. 900 [*reversed* on other grounds in 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376], where plaintiffs owned the hotel but leased it to another.

75. *Delaware.*— Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Iowa.— Churchill *v.* Burlington Water Co., 94 Iowa 89, 62 N. W. 646; Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. 448, 14 Am. St. Rep. 319.

Minnesota.— Berger *v.* Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. 336.

Missouri.— Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253.

New York.—Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

Ohio.— Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Pennsylvania.— Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

See 37 Cent. Dig. tit. "Nuisance," §§ 118 *et seq.*, 188.

76. Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567; Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

77. Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243] (loss to hotel-keeper in consequence of the failure to supply refreshments to those whose presence was prevented by the nuisance); Bates *v.* Holbrook, 89 N. Y. App. Div. 548, 85 N. Y. Suppl. 673 (holding that, although the lessee of a hotel cannot recover rents and profits, as such, of which he is deprived by the erection of a building which constitutes a nuisance, the loss of these may be considered in determining the injury to the usable value of the premises); Fritz *v.* Hobson, 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. Rep. N. S. 225, 28 Wkly. Rep. 459 (loss of custom in business).

78. Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421.

79. Fischer *v.* Sanford, 12 Pa. Super. Ct. 435 (expense of moving from premises); San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 55 S. W. 33 (cost of taking care of premises when not rented because of nuisance).

Expense incurred in abating the nuisance may be considered. Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; Shaw *v.* Cummiskey, 7 Pick. (Mass.) 76; Murray *v.* Butte, 35 Mont. 161, 88 Pac. 789; San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33.

Expenses incurred by reason of sickness caused by the nuisance may be considered. Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567; Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

Repairs not necessitated by the nuisance but made necessary by the age of the house and natural wear and tear are not an element of damages. Baltimore Belt R. Co. *v.* Sattler, (Md. 1907) 65 Atl. 752.

Repairs made by plaintiff's husband at his own expense are not an element of damages. Baltimore Belt R. Co. *v.* Sattler, (Md. 1907) 65 Atl. 752.

80. *Delaware.*— Benson *v.* Wilmington, 9 Houst. 359, 32 Atl. 1047.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Minnesota.— Pierce *v.* Wagner, 29 Minn. 355, 13 N. W. 170.

Missouri.— Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253.

Ohio.— Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567.

Pennsylvania.— Fischer *v.* Sanford, 12 Pa. Super. Ct. 435.

Texas.— Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96, holding that in an action for damages for maintaining a nuisance, sickness in plaintiff's family resulting therefrom is a pertinent fact on the

discomfort suffered by them[81] as well as for what he himself has suffered. There can be no recovery for injuries not shown to have been caused by the nuisance complained of,[82] nor is it proper to consider injuries which would not of themselves constitute the structure complained of a nuisance.[83] Neither can plaintiff be allowed damages for injuries which he might by reasonable diligence have prevented.[84]

b. Consequential Damages. It has been held that consequential as well as direct damages may be recovered in an action for a nuisance.[85]

c. Period For Which Damages Recoverable. Where the injury is permanent plaintiff may recover future or prospective as well as past damages;[86] but where the nuisance is of a temporary, recurrent, or removable character, prospective or future damages are not recoverable;[87] but plaintiff can recover damages only to the time of the commencement of the action,[88] unless he seeks in one action both equitable relief by an abatement of the nuisance and damages therefor, in which

question of the amount of damages. But *compare* Gulf, etc., R. Co. *v.* Reed, (Civ. App. 1893) 22 S. W. 283, holding that, in an action for damages arising from the maintenance of a nuisance near plaintiff's residence, plaintiff can recover only for injury to himself, and not for the mental or bodily suffering of his wife and children, nor for his own mental anguish caused by their suffering.

See 37 Cent. Dig. tit. "Nuisance," §§ 118 *et seq.*, 188.

In an action by a widow to recover damages for her own separate use on account of a nuisance rendering the occupancy of her homestead uncomfortable, she is not entitled to prove injuries sustained by her deceased husband nor her minor child, it not being shown that such injuries resulted in personal damages to herself. Corsicana Cotton Oil Co. *v.* Valley, 14 Tex. Civ. App. 250, 36 S. W. 999.

81. *Indian Territory.*—Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Kentucky.— Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103.

Minnesota.— Pierce *v.* Wagner, 29 Minn. 355, 13 N. W. 170.

Missouri.—Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253.

Texas.— Daniel *v.* Ft. Worth, etc., R. Co., 96 Tex. 327, 72 S. W. 578; Missouri, etc., R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

82. Murphy *v.* Lally, 173 Mass. 365, 53 N. E. 859.

83. Houston, etc., R. Co. *v.* Reasonover, 36 Tex. Civ. App. 274, 81 S. W. 329, unsightly appearance or marring of view in front of plaintiff's home.

84. Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626.

85. Colstrum *v.* Minneapolis, etc., R. Co., 33 Minn. 516, 24 N. W. 255 (under statute giving the right to recover damages generally); Pottstown Gas Co. *v.* Murphy, 39 Pa. St. 257 (defendant not being clothed with the power of eminent domain).

Aliter, as to consequential damages from the grading and paving of a street in a proper manner. Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582.

Such damages must be specially alleged and proved.—Comminge *v.* Stevenson, 76 Tex. 642, 18 S. W. 556.

86. *Illinois.*— Joseph Schlitz Brewing Co. *v.* Compton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390 [*reversing* 46 Ill. App. 34]; Belvidere Gaslight, etc., Co. *v.* Jackson, 81 Ill. App. 424.

Iowa.— Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush 382, 19 Am. Rep. 67; Madisonville *v.* Hardman, 92 S. W. 930, 29 Ky. L. Rep. 253.

Missouri.— Scott *v.* Nevada, 56 Mo. App. 189.

Nebraska.— Beatrice Gas Co. *v.* Thomas, 41 Nebr. 662, 59 N. W. 925, 43 Am. St. Rep. 711.

New Hampshire.— Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

North Carolina.— Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

Texas.— Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

West Virginia.— Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 451.

England.— Drew *v.* Baby, 1 U. C. Q. B. 438.

See 37 Cent. Dig. tit. "Nuisance," § 124.

Election as to theory of case.— Where plaintiff replied to the court's question as to whether she was seeking to recover for a permanent injury to property, or for a continuous wrong, that the theory of the complaint was for permanent damages to her property, and thereupon defendant withdrew objection to her testimony, she will be held to the theory elected. Cleveland, etc., R. Co. *v.* King, 23 Ind. App. 573, 55 N. E. 875.

87. De Costa *v.* Massachusetts Flat Water, etc., Co., 17 Cal. 613; Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268; Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121. And see *infra*, note 88.

88. *Illinois.*— N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 322; Joseph Schlitz Brewing Co. *v.* Compton, 142 Ill. 511, 32

case damages may be awarded to the time of trial.[89] In a second action for a continuing nuisance[90] damages should be assessed for the period between the commencement of the first and the commencement of the second action.[91] Damages to the owner or occupant of land by reason of a diminution of the value of the use thereof caused by a neighboring nuisance must be confined to the time during which the nuisance existed.[92]

d. Effect of Abatement Before Trial.[93] Where the nuisance has been abated before trial there can be no recovery of prospective damages[94] or of damages as for a permanent nuisance.[95]

e. Mitigation of Damages. The fact that plaintiff might have removed the nuisance but did not do so is not a ground for mitigation of damages,[96] and where there have been previous recoveries for maintaining a nuisance for definite periods the amounts thereof cannot be taken into consideration for the purpose of reducing the damages in a new action covering a subsequent period.[97] It has also been

N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390 [*reversing* 46 Ill. App. 34]; Cleveland, etc., R. Co. *v.* Pattison, 67 Ill. App. 351; Allen *v.* Michael, 38 Ill. App. 313.

Indiana.— Cleveland, etc., R. Co. *v.* King, 23 Ind. App. 573, 55 N. E. 875.

Iowa.— Shirely *v.* Cedar Rapids, etc., R. Co., 74 Iowa 169, 37 N. W. 133, 7 Am. St. Rep. 471.

Maine.— Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140.

Minnesota.— Dorman *v.* Ames, 12 Minn. 451.

Missouri.— Pinney *v.* Berry, 61 Mo. 359; Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351; Ivie *v.* McMunigal, 66 Mo. App. 437; Freudenstein *v.* Heine, 6 Mo. App. 287.

New Hampshire.— Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

New York.—Van Veghten *v.* Hudson River Power Transmission Co., 103 N. Y. App. Div. 130, 92 N. Y. Suppl. 956; Morgan *v.* Bowes, 17 N. Y. Suppl. 22.

North Carolina.— Bradley *v.* Amis, 3 N. C. 399.

Ohio.— Thayer *v.* Brooks, 17 Ohio 489, 49 Am. Dec. 474.

Pennsylvania.—Alexander *v.* Steward Bread Co., 21 Pa. Super. Ct. 526.

South Carolina.—Markley *v.* Duncan, Harp. 276.

Texas.— San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

Wisconsin.— Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

See 37 Cent. Dig. tit. "Nuisance," §§ 121, 188.

Where plaintiff filed an amended petition just before the trial was actually commenced, setting forth the injury and damage sustained, including that occurring down to the time of such filing, it was error to permit proof of damages subsequent to the filing of the original petition and down to the date of the trial. Bowman *v.* Humphrey, 124 Iowa 744, 100 N. W. 854.

Where wood and grass were injured before the commencement of an action for damages for the nuisance causing the injury, it is not material that the wood and grass did not die until after the action had been commenced. Hayden *v.* Albee, 20 Minn. 159.

Under the Pennsylvania act of May 2, 1876 (Pamphl. Laws 95), where plaintiff in an action of trespass on the case for a continuing nuisance gives fifteen days' notice, he is entitled to recover such damages, not barred by the statute of limitations, as he has suffered up to the time of trial, as the purpose of the act is to avoid a multiplicity of suits, and the damages suffered between the bringing of the suit and the trial do not constitute a new cause of action. Humphrey *v.* Irvin, 3 Pa. Cas. 272, 6 Atl. 479.

89. Gerow *v.* Liberty, 106 N. Y. App. Div. 357, 94 N. Y. Suppl. 949; Barrick *v.* Schifferdecker, 48 Hun (N. Y.) 355, 1 N. Y. Suppl. 21 [*reversed* on other grounds in 123 N. Y. 52, 25 N. E. 365]; Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; Carmichael *v.* Texarkana, 94 Fed. 561.

Assessment of damages after trial.—Where the court assessed plaintiff's damages not only to the time of the trial, but also for seven months thereafter, to the date of the decision, and there is no means of determining the amount allowed for the time since the trial, a new trial should be awarded. Miller *v.* Edison Electric Illuminating Co., 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376 [*reversing* 33 Misc. 664, 68 N. Y. Suppl. 900].

90. **Right to bring successive actions** see *supra*, VII, D, 111.

91. Beckwith *v.* Griswold, 29 Barb. (N. Y.) 291 (recovery limited to injuries since commencement of former action); Bradley *v.* Amis, 3 N. C. 399.

92. Quinn *v.* Chicago, etc., R. Co., 63 Iowa 510, 19 N. W. 336.

93. **In suit for equitable relief** see *supra*, VII, C, 14, c.

Right to recover past damages see *supra*, VII, D, 6, c.

94. Advance Elevator, etc., Co. *v.* Eddy, 23 Ill. App. 352.

95. Foote *v.* Burlington Water Co., 94 Iowa 200, 62 N. W. 648.

96. White *v.* Chapin, 102 Mass. 138; Jarvis *v.* St. Louis, etc., R. Co., 26 Mo. App. 253; Gulf, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1893) 22 S. W. 283.

97. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784.

held that incidental benefits to plaintiff cannot be considered in assessing the damages.[98] But the prompt abatement of an alleged nuisance on complaint being made is a fact to be considered in mitigation of damages for its maintenance.[99]

f. Amount of Recovery — (1) *ACTUAL DAMAGES.* The measure of damages is compensation for the injury or loss sustained by plaintiff.[1] As a general rule the damages are measured by the depreciation in the market value of the property injured, where the injury caused by the nuisance is of a permanent nature,[2] and the decrease of the rental or usable value in case the injury is of a temporary or

98. Ducktown Sulphur, etc., Co. *v.* Barnes, (Tenn. 1900) 60 S. W. 593, holding that where the operation of smelting-works was injurious to the property of a neighboring landowner, such owner was entitled to recover all the damages sustained, without reference to incidental benefits or advantages to the land by reason of the market afforded for his timber and garden products.

99. Gloystein *v.* Com., 33 S. W. 824, 17 Ky. L. Rep. 1187.

1. *Kentucky.*— Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103; Louisville, etc., R. Co. *v.* Simpson, 33 S. W. 395, 17 Ky. L. Rep. 989, holding that a requested instruction that plaintiff could only recover the actual cost of removing the nuisance, so as to prevent the wrong complained of, was properly refused.

Louisiana.— Keay *v.* New Orleans Canal, etc., Co., 7 La. Ann. 259.

Missouri.— Pinney *v.* Berry, 61 Mo. 359; Laird *v.* Chicago, etc., R. Co., 78 Mo. App. 273; Ivie *v.* McMunigal, 66 Mo. App. 437; Biehman *v.* Chicago, etc., R. Co., 50 Mo. App. 151.

Ohio.— Harsh *v.* Butler, Wright 99.

Pennsylvania.— Robb *v.* Carnegie, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329; Ward *v.* Gardner, 1 Pa. Cas. 339, 2 Atl. 867 (holding that in an action for damages caused by a nuisance on defendant's land, whereby plaintiff's adjoining property has been injured, the measure of damages is the cost of putting plaintiff's property in its former condition, together with compensation for loss of enjoyment of the same during the continuance of the nuisance); Farver *v.* American Car, etc., Co., 24 Pa. Super. Ct. 579.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

In an action by the owner of rented premises for the maintenance of a nuisance by an adjoining owner the measure of damages is whatever loss has been sustained in the diminution of rents, failure to rent the property, injury thereto, and the cost of repair. Dieringer *v.* Wehrman, 9 Ohio Dec. (Reprint) 355, 12 Cinc. L. Bul. 222.

When the injury is to physical comfort and results in the deprivation of the wholesome and comfortable enjoyment of a home, the measure of damages is compensation for such physicial discomfort and deprivation. Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443; Cleveland, etc., R. Co. *v.* Pattison, 67 Ill. App. 351.

2. *Colorado.*— Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582.

Illinois.— Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241; Langfeldt *v.* McGrath, 33 Ill. App. 158.

Indiana.— Huntington *v.* Stemen, 37 Ind. App. 553, 77 N. E. 407.

Kentucky.— Central Consumers Co. *v.* Pinkert, 92 S. W. 957, 29 Ky. L. Rep. 273; Madisonville, etc., R. Co. *v.* Hardman, 92 S. W. 930, 29 Ky. L. Rep. 253, holding that a sewer was a permanent nuisance, although an extension of it would remove the injury complained of.

Missouri.— Givens *v.* Van Studdiford, 4 Mo. App. 498.

Texas.— Daniel *v.* Ft. Worth, etc., R. Co., 96 Tex. 327, 72 S. W. 578; Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268; Missouri, etc., R. Co. *v.* McGehee, (Civ. App. 1903) 75 S. W. 841; Denison, etc., R. Co. *v.* O'Maley, (Civ. App. 1898) 45 S. W. 227; Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

Canada.— Drew *v.* Baby, 1 U. C. Q. B. 438.

See 37 Cent. Dig. tit. "Nuisance," § 119.

Nuisance properly treated as permanent.— Where a railroad company has constructed its embankment in front of plaintiff's house in such a way that upon the occasion of each considerable rainfall the water accumulates in pools, and remains through a period of stagnation, until it dries up, and has refused, upon application, to put in a culvert to drain the water off, it is not error to treat the nuisance as a permanent one, and give damages for the depreciation of the property. Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268.

Time as to which difference to be estimated.— Where defendant's construction and maintenance of a pool of water near plaintiff's land creates a nuisance, damaging the land, the measure of damages is the difference in the value of the property before the injury and immediately thereafter, and not at the time of the erection of the pool — the injury not having occurred till the waters stored therein receded, allowing the vegetation killed thereby to decay and give off offensive odors — or at the time of the trial; so that an instruction to find the damages at the difference in the value of the land with the pool and without it is erroneous, as authorizing the jury to find as the damages the difference in the value of the land with and without the pool at the time of the trial. Missouri, etc., R. Co. *v.* Dennis, (Tex. Civ. App. 1905) 84 S. W. 860.

recurrent character,[3] in addition to which plaintiff may recover such special or incidental damages as he may be able to prove, such as sickness, expense incurred, specific losses, and the like, whether the injury be permanent or temporary.[4] In order to recover damages as for a permanent injury to land such injury must have

3. *Alabama.*— Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

Illinois.—Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558 (holding that in an action for damages to a farm between certain dates, owing to a discharge of sewage over the land, the damages recovered cannot exceed the rental value); Pettit *v.* Grand Junction, 119 Iowa 352, 93 N. W. 381; Shirely *v.* Cedar Rapids, etc., R. Co., 74 Iowa 169, 37 N. W. 133, 7 Am. St. Rep. 471.

Kansas.— Kansas Zinc Min. etc., Co. *v.* Brown, 8 Kan. App. 802, 57 Pac. 304.

Kentucky.— Madisonville *v.* Hardman, 92 S. W. 930, 29 Ky. L. Rep. 253.

Missouri.— Pinney *v.* Berry, 61 Mo. 359.

New York.— Gerow *v.* Liberty, 106 N. Y. App. Div. 357, 94 N. Y. Suppl. 949; Van Veghten *v.* Hudson River Power Transmission Co., 103 N. Y. App. Div. 130, 92 N. Y. Suppl. 956; Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192; Beir *v.* Cooke, 37 Hun 38; Wiel *v.* Stewart, 19 Hun 272 (holding that in an action by the keeper of a summer boarding house, the rule of damages is the difference in the rental value free from the nuisance and subject to it, and the rule is not to be affected by the circumstance of the departure of boarders); Van Siclen *v.* New York, 32 Misc. 403, 66 N. Y. Suppl. 555.

Ohio.— Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Pennsylvania.— Herbert *v.* Rainey, 162 Pa. St. 525, 29 Atl. 725.

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703.

Texas.— San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33; San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

See 37 Cent. Dig. tit. "Nuisance," §§ 119, 126, 188.

The fact that plaintiff himself occupied the premises injured by a nuisance maintained by defendant does not prevent the depreciation of the rental value from affording the proper measure of damages. Michel *v.* Monroe County, 39 Hun (N. Y.) 47.

Loss of use.— The measure of damages to plaintiff's land because of a continuing nuisance is not the depreciation of market value, but the loss in its use, and such damages as may result therefrom. Vogt *v.* Grinnell, 123 Iowa 332, 98 N. W. 782.

Interest on diminution of value.— In an action for the diminished enjoyment of land caused by the discharge on it of filth from sewers, interest on the difference of values with and without the nuisance cannot be taken as the measure of damages, unless a sale was actually defeated. Moore *v.* Langdon, 6 Mackey (D. C.) 6.

The damages to a lessee of the property injured are measured by the usable value — the value of the use of the premises to the occupant — rather than by the rental value or the rent reserved in the lease. Bly *v.* Edison Electric Illuminating Co., 111 N. Y. App. Div. 170, 97 N. Y. Suppl. 592; Pritchard *v.* Edison Electric Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Suppl. 225 [*affirmed* in 179 N. Y. 364, 72 N. E. 243]; Bates *v.* Holbrook, 89 N. Y. App. Div. 548, 85 N. Y. Suppl. 673. But *compare* Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437; Yoos *v.* Rochester, 92 Hun (N. Y.) 481, 36 N. Y. Suppl. 1072. The damages to be recovered by a lessee for the maintenance of a nuisance affecting the demised premises are not to be measured by the amount of rent paid by the lessee, but by the actual amount of the injuries sustained. Smith *v.* Phillips, 8 Phila. (Pa.) 10.

Nuisance properly assumed not permanent. —In an action for damages resulting from the use of plaintiff's land and the land adjacent thereto as a dumping ground, where the jury are confined to the determination of the damage resulting from the nuisance arising from the noisome odors, it should be assumed that such damage will not be permanent, since it may be abated by the removal of the deposits or by the action of the elements. San Antonio *v.* Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760.

4. *Illinois.*—Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241; Gempp *v.* Bassham, 60 Ill. App. 84, holding that in an action for injury to a dwelling-house from the stenches and noises of a livery stable on an adjoining lot, the depreciation in rental value, although proper to be shown, is not the measure of damages, but rather the physical discomfort and deprivation of the uses and comforts of the home.

Iowa.— Van Fossen *v.* Clark, 113 Iowa 86, 84 N. W. 989, 52 L. R. A. 279.

Kentucky.— Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103.

Missouri.— Frick *v.* Kansas City, 117 Mo. App. 488, 93 S. W. 351; Givens *v.* Van Studdiford, 4 Mo. App. 498.

New York.—Rosenheimer *v.* Standard Gas Light Co., 36 N. Y. App. Div. 1, 55 N. Y. Suppl. 192.

Ohio.— Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588, 9 Ohio Cir. Dec. 451.

Pennsylvania.— Herbert *v.* Rainey, 162 Pa. St. 525, 29 Atl. 725.

Texas.— Daniel *v.* Ft. Worth, etc., R. Co., 96 Tex. 327, 72 S. W. 578 [*reversing* (Civ. App. 1902) 69 S. W. 198]; San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W.

been completed before suit brought,[5] and damages as for a permanent injury cannot be allowed where the injury is temporary or the nuisance removable.[6] The specific amount of damages to be awarded in a particular case depends upon the facts involved.[7]

(II) *Punitive or Exemplary Damages.* Punitive or exemplary damages may be allowed where the conduct of defendant has been wanton, malicious, or reckless;[8] but in the absence of any such matters of aggravation the recovery should be limited to the actual damages sustained.[9]

(III) *Nominal Damages.* Where plaintiff has shown an invasion of his rights but no substantial injury resulting therefrom, an award of nominal damages is proper.[10]

15. Order of Warrant For Abatement.[11] Under some statutes, in an action on the case for a nuisance, the court may in its discretion, if plaintiff prevails,

33; San Antonio *v.* Mackey, 14 Tex Civ. App. 210, 36 S. W. 760.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

5. Watson *v.* Colusa-Parrot Min., etc., Co., 31 Mont. 516, 79 Pac. 14.

6. *Connecticut.*— Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78.

Illinois.— N. K. Fairbank Co. *v.* Nicolai, 167 Ill. 242, 47 N. E. 360 [*reversing* 66 Ill. App. 637].

Indiana.— Cleveland, etc., R. Co. *v.* King, 23 Ind. App. 573, 55 N. E. 875.

Maine.— Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466; Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140.

Missouri.— Ivie *v.* McMunigal, 66 Mo. App. 437; Schoen *v.* Kansas City, 65 Mo. App. 134; Paddock *v.* Somes, 51 Mo. App. 320; Bielman *v.* Chicago, etc., R. Co., 50 Mo. App. 151; Markt *v.* Davis, 46 Mo. App. 272.

New York.— Barrick *v.* Schifferdecker, 123 N. Y. 52, 25 N. E. 365 [*reversing* 48 Hun 355, 1 N. Y. Suppl. 21]; Van Veghten *v.* Hudson River Power Transmission Co., 103 N. Y. App. Div. 130, 92 N. Y. Suppl. 956.

Ohio.— Stroth Brewing Co. *v.* Schmitt, 25 Ohio Cir. Ct. 231; Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567.

Pennsylvania.— See Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

Tennessee.— Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614, 11 S. W. 703.

Texas.— San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33.

West Virginia.— Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

Where plaintiff obtains an injunction he is not entitled to a judgment for damages which he will suffer only on a continuance of the acts enjoined. Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78, holding that a finding that the effect of odors from manure from a stable "renders the said property of the plaintiff less valuable to the extent of $500" does not show that a pecuniary injury of that amount has been already sustained, but that such will be the effect if the piling of manure continues.

7. Damages held excessive.—Cleveland, etc., R. Co. *v.* King, 23 Ind. App. 573, 55 N. E. 875; Friburk *v.* Standard Oil Co., 66 Minn. 277, 68 N. W. 1090.

Damages held not excessive.— Madisonville *v.* Hardman, 92 S. W. 930, 29 Ky. L. Rep. 253; Louisville, etc., R. Co. *v.* Bolton, 38 S. W. 498, 18 Ky. L. Rep. 824; Anderson *v.* Chicago, etc., R. Co., 85 Minn. 337, 88 N. W. 1001; Pierce *v.* Wagner, 29 Minn. 355, 13 N. W. 170; Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774.

8. *Kentucky.*— Louisville, etc., R. Co. *v.* Bolton, 38 S. W. 498, 18 Ky. L. Rep. 824.

Mississippi.— Yazoo, etc., R. Co. *v.* Sanders, 87 Miss. 607, 40 So. 163, 3 L. R. A. N. S. 1119, refusal to remove decaying carcasses on request.

Pennsylvania.— Ganster *v.* Metropolitan Electric Co., 214 Pa. St. 628, 64 Atl. 91, second action for continuance after recovery of judgment in first action.

West Virginia.— Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819, continuance of nuisance after judgment in favor of plaintiff.

Canada.— Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

9. Laird *v.* Chicago, etc., R. Co., 78 Mo. App. 273.

10. *Georgia.*— Farley *v.* Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193.

Iowa.—Perry *v.* Howe Co-operative Creamery Co., 125 Iowa 415, 101 N. W. 150.

Missouri.— Smiths *v.* McConathy, 11 Mo. 517.

Pennsylvania.—Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Kemmerer *v.* Edelman, 23 Pa. St. 143; Hutchinson *v.* Schimmelfeder, 4 Pa. St. 396, 80 Am. Dec. 582.

Canada.— Montreal St. R. Co. *v.* Gareau, 13 Quebec K. B. 12.

See 37 Cent. Dig. tit. "Nuisance," § 118 *et seq.*

11. Abatement in: Criminal prosecution or penal action see *infra*, VII, E, 11. Suit for equitable relief see *supra*, VII, C, 14.

order the abatement of a nuisance;[12] but an order or the issuance of a warrant for such abatement does not follow as a matter of course upon the recovery of damages.[13]

16. Appeal.[14] Objections not raised at the trial are not available on appeal,[15] nor will the judgment be reversed for harmless error.[16] Where, in an action for a nuisance, tried before a referee, it was stipulated that if plaintiff was entitled to recover he should recover the difference in the market value of his property with and without the nuisance, and that the referee might visit the property, view the same, and that his view might be taken into consideration in determining the case not only as to the obstructions, but as to the lay of the land and as to its character, in the absence of evidence that the referee proceeded in assessing damages on an erroneous theory of the law, the question of the amount of damages assessed under such stipulation was not reviewable.[17]

E. Criminal Prosecution or Penal Action — 1. Criminal Liability — a. Public Nuisance. The creation or maintenance of a public nuisance is an indictable offense both at common law and under the statutes of the various states,[18] and an

12. Codman *v.* Evans, 7 Allen (Mass.) 431 (holding that no exception lies to the exercise of the power by the court, nor can an appeal be taken from the judgment if the record shows that the action is one which may properly be designated as an action of tort for a nuisance); Colstrum *v.* Minneapolis, etc., R. Co., 33 Minn. 516, 24 N. W. 255; Finch *v.* Green, 16 Minn. 355; Kothenberthal *v.* Salem Co., 13 Oreg. 604, 11 Pac. 287; Ankeny *v.* Fairview Milling Co., 10 Oreg. 390.

Statute so providing constitutional.—Bemis *v.* Clark, 11 Pick. (Mass.) 452.

The sheriff must abate the nuisance with as little injury as possible to defendant and is liable for any unnecessary damage. Ankeny *v.* Fairview Milling Co., 10 Oreg. 390.

Where complaint demands legal relief only. —An action for a nuisance, brought pursuant to N. Y. Code Civ. Proc. c. 14, tit. 1, art. 7, is an action at law, and where the complaint demands legal relief only, and the decision directs judgment in accordance with said article, the inclusion in the judgment of a perpetual injunction is error. Wilmot *v.* Bell, 76 N. Y. App. Div. 252, 78 N. Y. Suppl. 591.

13. Bemis *v.* Clark, 11 Pick. (Mass.) 452; Kothenberthal *v.* Salem Co., 13 Oreg. 604, 11 Pac. 287. But *compare* Ankeny *v.* Fairview Milling Co., 10 Oreg. 390.

14. See, generally, Appeal and Error.

In criminal prosecution or penal action see *infra*, VII, E, 12.

In suit for equitable relief see *supra*, VII, C, 20.

15. Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679; Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486.

16. Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679.

17. Hentz *v.* Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Suppl. 774.

18. *Arkansas.*— Harvey *v.* Dewoody, 18 Ark. 252.

Delaware.— State *v.* Wetherall, 5 Harr. 487.

Illinois.— Earp *v.* Lee, 71 Ill. 193; Kuhn *v.* Illinois Cent. R. Co., 111 Ill. App. 323.

Indiana.— State *v.* Phipps, 4 Ind. 515; Indianapolis *v.* Blythe, 2 Ind. 75; Paragon Paper Co. *v.* State, 19 Ind. App. 314, 49 N. E. 600.

Kentucky.— Southern R. Co. *v.* Com., 101 S. W. 882, 31 Ky. L. Rep. 122; Georgetown *v.* Com., 115 Ky. 382, 73 S. W. 1011, 24 Ky. L. Rep. 2285, 61 L. R. A. 673; Seifried *v.* Hays, 81 Ky. 377, 50 Am. Rep. 167; Com. *v.* Clarke, 1 A. K. Marsh. 323, holding that, where by the erection of a mill-dam the health of the neighborhood is threatened in a manner not foreseen by the jury on the inquest *ad quod damnum*, the commonwealth may issue an indictment for the nuisance.

Maine.— State *v.* Haines, 30 Me. 65; State *v.* Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38.

Massachusetts.— Rowe *v.* Granite Bridge Corp., 21 Pick. 344.

Missouri.— Rice *v.* Jefferson, 50 Mo. App. 464.

Nebraska.— State *v.* De Wolfe, 67 Nebr. 321, 93 N. W. 746.

New Jersey.— Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

New York.— Hudson River R. Co. *v.* Loeb, 7 Rob. 418.

North Carolina.— Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

South Carolina.— Hellams *v.* Switzer, 24 S. C. 39; State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737; State *v.* Charleston Neck Cross Roads Com'rs, 3 Hill 149.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Hickerson *v.* U. S., 30 Fed. Cas. No. 18,301, 2 Hayw. & H. 228.

England.— Reg. *v.* Stephens, L. R. 1 Q. B. 702, 7 B. & S. 710, 10 Cox C. C. 340, 12 Jur.

indictment is the usual or proper remedy in the absence of any special injury to an individual.[19]

b. Private Nuisance. The erection or maintenance of a private nuisance is not an indictable offense.[20]

c. Statutory Provisions. In the various states there are found numerous statutes providing for the punishment of or the imposition of penalties on persons creating or maintaining nuisances,[21] which do not, however, supersede the common law,[22] where they do not attempt to cover all cases of public nuisance.[23] Such statutes are construed according to the general rules for the construction of penal statutes.[24]

N. S. 961, 14 L. T. Rep. N. S. 593, 14 Wkly. Rep. 859; Banbury Urban Sanitary Authority *v.* Page, 8 Q. B. D. 97, 46 J. P. 184, 51 L. J. M. C. 21, 45 L. T. Rep. N. S. 759, 30 Wkly. Rep. 415; Reg. *v.* Crawshaw, Bell C. C. 303, 8 Cox C. C. 375, 30 L. J. M. C. 58, 3 L. T. Rep. N. S. 510, 9 Wkly. Rep. 38; Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 11 Jur. N. S. 769, 34 L. J. Q. B. 191, 13 Wkly. Rep. 892, 118 E. C. L. 631; Rex *v.* White, 1 Burr. 333; Rex *v.* Neil, 2 C. & P. 485, 31 Rev. Rep. 685, 12 E. C. L. 690.

Canada.—Reg. *v.* London, 32 Ont. 326; Reg. *v.* Grover, 23 Ont. 92; Watson *v.* Toronto Gas-Light, etc., Co., 4 U. C. Q. B. 158.

A foreign corporation may be indicted for causing a common nuisance. State *v.* Paggett, 8 Wash. 579, 36 Pac. 487.

Actual disturbance of peace not necessary. — State *v.* Ayers, (Oreg. 1907) 88 Pac. 653, 10 L. R. A. N. S. 992; State *v.* Nease, 46 Oreg. 443, 80 Pac. 897.

An intent to maintain a nuisance in the future is not a misdemeanor. State *v.* Schaffer, 31 Wash. 305, 71 Pac. 1088.

Period covered by offense.—A prosecution for creating and maintaining a nuisance is not affected by Ohio Rev. St. § 6920, providing that "the continuance of any nuisance for five days after prosecution commenced therefor, shall be deemed an additional offense," where it is not charged that there has been a prior prosecution, or that the offense charged is an additional offense. Terry *v.* State, 24 Ohio Cir. Ct. 111.

19. *Kentucky.*— Seifried *v.* Hays, 81 Ky. 377, 50 Am. Rep. 167.

Massachusetts.— Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332.

North Carolina.— Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

United States.— Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012.

Canada.— Reg. *v.* London, 32 Ont. 326.

20. Com. *v.* Low, 3 Pick. (Mass.) 408, holding that, although a town may acquire a right of way by grant, such way will be a private way, and a nuisance on it will not be indictable.

21. Holden *v.* U. S., 24 App. Cas. (D. C.) 318; Burk *v.* State, 27 Ind. 430, 442 (holding that a statute making "any public nuisance" a misdemeanor sufficiently defines the offense); Com. *v.* Ruggles, 10 Mass. 391; Com. *v.* Yost, 11 Pa. Super. Ct. 323 (holding that the maintenance of a privy so that disease-producing germs drain into a natural stream forming part of a city's water-supply is an indictable nuisance, under Crimes Act, March 31, 1860 (Pamphl. Laws 382), prohibiting the maintenance of a public nuisance, and Act, June 3, 1885 (Pamphl. Laws 56), empowering the state board of health to enforce regulations to prevent the spread of contagious diseases, etc.).

Prosecution under repealed statute.— Under Mo. Rev. St. (1879) § 3151, providing that no offense committed prior to the repeal of any statute should be affected by such repeal, but the trial and punishment of such offense should be had in all respects as if the statute remained in full force, one charged with maintaining a public nuisance might be proceeded against by indictment under a repealed statute where the offense was committed before the repeal. State *v.* Proctor, 90 Mo. 334, 2 S. W. 472.

22. State *v.* Boll, 59 Mo. 321; Renwick *v.* Morris, 7 Hill (N. Y.) 575 (holding that the right of abating or indicting a public nuisance is not affected by a statute imposing a penalty for the offense, unless negative words are added, evincing an intent to exclude common-law remedies); Com. *v.* Van Sickle, Brightly 69, 4 Pa. L. J. Rep. 104, 7 Pa. L. J. 82.

Where the statute does not define a public nuisance the common law must be looked to in order to determine whether an act complained of is a public nuisance. Sopher *v.* State, (Ind. 1907) 81 N. E. 913.

23. State *v.* Boll, 59 Mo. 321.

24. See the following cases:

District of Columbia.— Waggaman *v.* District of Columbia, 16 App. Cas. 207, holding that the failure of the owner of property to remove the contents of foul and filthy privies on premises occupied by tenants under a lease is not made a misdemeanor or penal offense by Act Cong. Jan. 25, 1898 (30 St. 231), § 16, in express terms; and such offense cannot be implied from the possible or probable intention of congress so to make it.

Massachusetts.— Com. *v.* Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400 (holding that Acts (1885), c. 382, § 2, as amended by Acts (1889), c. 450, § 2, requiring every building used as a dwelling, or in which persons are employed, if situated on a street in which there is a public sewer, to "have sufficient water-closets connected with

2. DEFENSES.[25] It is no defense to an indictment for a public nuisance that the corporation through whose neglect of duty it exists is pecuniarily unable to abate it,[26] that the alleged nuisance is connected with a large and flourishing manufactory,[27] that the public authorities have failed to assign a place for carrying on the trade complained of,[28] that the municipality might have prevented the nuisance but did not,[29] that the premises of some of the state's witnesses contributed to the filth which the pond complained of contained,[30] or that the persons named in the indictment as having been prejudiced by the nuisance, or some of them, have voluntarily contributed to the support and increase of the business of which complaint is made;[31] and where a nuisance is public, annoying the members of a community generally by the careless and incautious exercise of a hazardous and dangerous business in their midst the contributory negligence of any or all of them furnishes no excuse or defense to a prosecution for any injury to the public generally.[32] It is not a complete defense that defendant acted as the agent of another in the matter complained of,[33] although this may be urged in mitigation of a discretionary penalty or fine.[34] It is a defense that the acts complained of were done as the best means known of preventing the spread of a contagious disease,[35]

the sewer," applies to houses built before its passage); Call *v.* Allen, 1 Allen 137 (holding that St. (1845) c. 197, § 2, regulating the use of steam-engines and furnaces, applies to works subsequently erected, as well as to those existing at the time of its passage).

Missouri.— State *v.* Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402, holding that Laws (1901), p. 73, making the emission of dense smoke within the limits of cities "which now have or may hereafter have a population of one hundred thousand" a public nuisance, applies to cities having more than one hundred thousand inhabitants, and is not limited to those having exactly that number.

Nebraska.— State *v.* De Wolfe, 67 Nebr. 321, 93 N. W. 746, holding that a statute declaring all common nuisances indictable prohibits every act which was indictable as a nuisance under the common law.

New York.— People *v.* Rosenberg, 138 N. Y. 410, 34 N. E. 285 [*reversing* 67 Hun 52, 22 N. Y. Suppl. 56], holding that Laws (1892), c. 646, declaring that "it shall not be lawful for any person or persons to engage in or carry on the business of fat rendering, bone boiling, or the manufacture of fertilizers, or any business as a public nuisance," within the corporate limits of any city, or within three miles therefrom, did not intend to prohibit the carrying on of the business of fat rendering in a city, irrespective of the manner in which it was conducted, but only the carrying on of such business "as a public nuisance"; and therefore a judgment convicting defendant of carrying on such business, rendered under an indictment containing no allegation that he was conducting it as a public nuisance, was erroneous.

Oregon.— State *v.* Ayers, (1907) 88 Pac. 653, 10 L. R. A. N. S. 992; State *v.* Nease, 46 Oreg. 433, 80 Pac. 897, holding that any immoral or criminal act which disturbs the quiet and tranquillity of society, to the injury of public order and decorum, or disturbs or threatens the public peace, and which would constitute a nuisance at common law is within Bellinger & C. Comp. St. § 1930, providing for the punishment of persons who wilfully and wrongfully commit any act which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals.

See 37 Cent. Dig. tit. "Nuisance," § 137. And see, generally, STATUTES.

25. In action for damages see *supra*, VII, D, 6.

In suit for equitable relief see *supra*, VII, C, 5.

26. Baltimore, etc., Turnpike Road *v.* State, 63 Md. 573, 1 Atl. 285.

27. Com. *v.* Van Sickle, Brightly 69, 4 Pa. L. J. Rep. 104, 7 Pa. L. J. 82.

28. State *v.* Hart, 34 Me. 36.

29. Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568 (holding that it is no defense to a prosecution for creating a nuisance by discharging offensive substances into an artificial watercourse that a municipal corporation had failed to provide adequate drainage); People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129] (holding that under Pen. Code, § 385, defining a public nuisance as unlawfully doing an act or omitting to perform a duty, thereby injuring, annoying, or endangering the repose, health, or safety of any considerable number of persons; and section 387, making the maintenance of such nuisance a misdemeanor, a person who lawfully maintains a dam across a common watercourse within a city in such manner as to cause a public nuisance is liable, notwithstanding the municipality has the control of the watercourse and the dam, and is bound to keep the watercourse clean).

30. West *v.* State, 71 Ark. 144, 71 S. W. 483.

31. Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279].

32. Louisville, etc., R. Co. *v.* Com., 80 Ky. 143, 44 Am. Rep. 468.

33. State *v.* Bell, 5 Port. (Ala.) 365.

34. State *v.* Bell, 5 Port. (Ala.) 365.

35. State *v.* Knoxville, 12 Lea (Tenn.) 146, 47 Am. Rep. 331, burning infected bedding during smallpox epidemic.

and the fact that the nuisance has been abated, although not a perfect defense, may lead to a discharge of the indictment with a merely nominal fine or an acquittal by consent of the prosecutor.[36]

3. Jurisdiction and Venue.[37] The jurisdiction of courts in prosecutions or penal actions for public nuisances is governed by the statutes and judicial system of the state where the prosecution is brought.[38] The prosecution may be in the county in which the nuisance is committed,[39] or the inhabitants of which are aggrieved or injured thereby.[40]

4. Notice to Abate.[41] A notice to abate the nuisance is not a prerequisite to an indictment against a person creating or actively maintaining a nuisance[42] unless required by statute.[43]

5. Service of Summons. Under a statute providing that the summons on an indictment shall be issued and served in the same manner as a summons in civil actions, it is proper to serve the summons on the agent of non-residents, in charge of the property on which the nuisance is maintained.[44]

6. Indictment, Information,[45] or Complaint[46] — a. In General. An indictment, information, or complaint for a public nuisance must set forth the essential ingredients of the offense,[47] and describe and identify the alleged nuisance sufficiently to put defendant on notice as to what he is required to defend.[48] But it is not

36. See Reg. *v.* Macmichael, 8 C. & P. 755, 34 E. C. L. 1002; Reg. *v.* Paget, 3 F. & F. 29; Rex *v.* Dunraven, W. W. & D. 577.

37. **In action for damages** see *supra*, VII, D, 7.

In suit for equitable relief see *supra*, VII, C, 6, 7.

38. State *v.* Bell, 5 Port. (Ala.) 365 (holding that where the judge of a county court is vested by a private act of the legislature with power to abate a mill as a nuisance, on the happening of a contingency, this does not take from another court its ordinary jurisdiction to abate the nuisance by indictment); Johnson *v.* State, 2 Marv. (Del.) 372, 43 Atl. 256 (holding that under Rev. Code (1893), p. 300, authorizing any justice of the peace, on application, under oath, showing cause thereof, to issue his warrant to abate a nuisance, in order to give the justice jurisdiction the complaint must be made by an authorized member of the board of health); Wilson *v.* Com., 12 B. Mon. (Ky.) 2 (holding that the city court of Lexington has the same jurisdiction of cases of nuisance which the circuit court had before the jurisdiction was changed to the city court, where no ordinance had been passed by the city); State *v.* Schaffer, 31 Wash. 305, 71 Pac. 1088 (holding that prosecutions for maintaining a nuisance are not actions for the abatement of a nuisance, so as to be within the exclusive jurisdiction of the superior courts, under Const. art. 4, §§ 6, 10).

39. Com. *v.* Lyons, 3 Pittsb. Leg. J. (Pa.) 167, holding that an indictment for a nuisance erected on the waters of a stream in one county, which corrupts the waters in an adjoining county, can be tried in the county where the nuisance is erected.

40. State *v.* De Wolfe, 67 Nebr. 321, 93 N. W. 746, under Cr. Code, § 232.

41. Notice before: Abatement by person injured see *supra*, VII, B, 1, d. Action for damages see *supra*, VII, D, 4. Suit for equitable relief see *supra*, VII, C, 3.

42. State *v.* Lehigh, etc., R. Co., 73 N. J. L. 347, 63 Atl. 857.

43. Vason *v.* Augusta, 38 Ga. 542, holding that under Rev. Code, § 4478, providing that any person who shall erect or continue, after notice to abate, any nuisance which tends to annoy the community, etc., shall be indicted and punished, the indictable offense is complete on notice to abate.

The filing of a notice with the justice before whom proceedings are brought under Nev. Gen. St. § 290 *et seq.*, is the very foundation of the proceeding. Wiggins *v.* Henderson, 22 Nev. 103, 36 Pac. 459, holding the notice filed to be insufficient.

44. Com. *v.* Bullock, 58 S. W. 429, 22 Ky. L. Rep. 528.

45. See, generally, Indictments and Informations.

46. Complaint in: Action for damages see *infra*, VII, D, 10, a. Suit for equitable relief see *supra*, VII, C, 11, a.

47. St. Paul *v.* Hennessey, 38 Minn. 94, 35 N. W. 576 (holding that a complaint in a criminal proceeding alleging a building to be "dangerous, having been heretofore damaged by fire," is not sufficient under a criminal statute relating to buildings which are unsafe "so as to endanger life," or under a statute relating to buildings which are "specially dangerous in case of fire"); State *v.* Uralde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299.

Continuance.— In an indictment for causing a nuisance under Me. Rev. St. c. 164, § 7, it is not necessary to allege that the nuisance was continued. State *v.* Hull, 21 Me. 84.

48. Lippman *v.* South Bend, 84 Ind. 276 (holding that a complaint in a suit for a penalty for keeping a public nuisance, which charged that defendant kept a large quantity of hides, tallow, and other substances which emitted a disagreeable odor, did not show sufficient facts); State *v.* Sturdivant, 21 Me. 9; State *v.* Purse, 4 McCord (S. C.) 472

necessary that it should set out matters not pertinent to defendant's liability,[49] or negative matters of defense.[50] An indictment which is uncertain in its allegations as to the nuisance is bad.[51] The indictment need not be laid with such a *continuando* as will warrant an order of abatement in case of conviction, such order not being a necessary part of the judgment.[52] An indictment under a statute for maintaining a nuisance may charge all the various acts enumerated in the statute as constituting a nuisance.[53] A single count alleging a nuisance and describing the place of its existence does not charge two offenses.[54]

b. Public Character of Nuisance. It must be averred in the indictment or information that the nuisance maintained by defendant is public in its character,[55]

(holding that since a house is not in itself a public nuisance, an indictment for erecting or keeping a house which gives forth offensive odors must state in what respect it constitutes a nuisance, with respect to its location and the circumstances connected with its use).

In an information for the continuance of a nuisance previously erected by another person, the facts ought to be set forth circumstantially. State *v.* Brown, 16 Conn. 54.

Indictments, informations, or complaints held sufficient in form and substance see the following cases:

Alabama.— Schwartz *v.* State, 37 Ala. 460.

Arkansas.— West *v.* State, 71 Ark. 144, 71 S. W. 483.

Indiana.—Crane *v.* State, 3 Ind. 193; Acme Fertilizer Co. *v.* State, 34 Ind. App. 346, 72 N. E. 1037, 107 Am. St. Rep. 198; Lipschitz *v.* State, 33 Ind. App. 648, 72 N. E. 145.

Iowa.— State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414; State *v.* Close, 35 Iowa 570.

Kentucky.— Ehrlick *v.* Com., 102 S. W. 289, 21 Ky. L. Rep. 401, 10 L. R. A. N. S. 995; Illinois Cent. R. Co. *v.* Com., 96 S. W. 467, 29 Ky. L. Rep. 754; Com. *v.* Camden Interstate R. Co., 68 S. W. 628, 24 Ky. L. Rep. 411.

Maine.— State *v.* Hart, 34 Me. 36; State *v.* Haines, 30 Me. 65.

Massachusetts.— Com. *v.* Baker, 155 Mass. 287, 29 N. E. 512; Com. *v.* Rumford Chemical Works, 16 Gray 231.

Minnesota.— State *v.* Boehm, 92 Minn. 374, 100 N. W. 95.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

Rhode Island.— State *v.* Towler, 13 R. I. 661.

See 37 Cent. Dig. tit. "Nuisance," § 206 *et seq.*

Defects cured by plea of guilty.—A complaint in a prosecution for maintaining a nuisance, which states the annoyance caused merely in general terms, instead of by alleging specific facts, is cured by a plea of guilty. State *v.* Knowles, 34 Kan. 393, 8 Pac. 861.

49. State *v.* Eyermann, 115 Mo. App. 660, 90 S. W. 1168, holding that under Laws (1901), p. 73, § 1, declaring "the owners, lessees, occupants, managers or agents of any building" from which dense smoke is emitted to be guilty of a misdemeanor, an indictment which alleges that defendant is the "manager of certain buildings or premises for A & B," need not further allege, and the state need not prove, whether A & B is a corporation or a copartnership.

The ownership of the property defiled need not be alleged in an indictment for depositing noxious substances in the Providence river in violation of R. I. Gen. Laws (1896), c. 118, § 6. State *v.* Providence Gas Co., 27 R. I. 142, 61 Atl. 44.

50. Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568, holding that an indictment for creating a nuisance is not bad for failing to aver that the acts done by the accused were not authorized by a city ordinance passed under the proviso in Rev. St. § 2066.

51. Com. *v.* Louisville, etc., R. Co., 86 S. W. 517, 27 Ky. L. Rep. 692, 82 S. W. 231, 26 Ky. L. Rep. 493, holding that where an indictment against a railroad for maintaining a nuisance by the erection of a bridge and approaches thereto was uncertain in its allegations as to whether the bridge complained of was erected across a turnpike for cars to pass over, or across the railroad for public travel, it was demurrable.

52. State *v.* Barnes, 20 R. I. 525, 40 Atl. 374. And see *infra*, VII, E, 11.

53. State *v.* Spurbeck, 44 Iowa 667.

54. State *v.* Payson, 37 Me. 361, count that swine were kept in a pen near the highway and that they were fed with offal.

55. State *v.* Houck, 73 Ind. 37; Messersmidt *v.* People, 46 Mich. 437, 9 N. W. 485, holding that an information alleging that defendant polluted an ancient stream, thereby rendering the water unfit to drink, "to the common nuisance of the people," but failing to allege that the stream is one in which the public has rights, is insufficient.

Acts constituting misdemeanor at common law.— A count charging a person with "openly and publicly speaking with a loud voice, in the hearing of the citizens, &c., wicked, scandalous, and infamous words, representing men and women in obscene and indecent positions and attitudes," with the intention "to debauch, debase, and corrupt the morals of the youth as well as others," without averring that the offense is a common nuisance, is good, such offense being a misdemeanor at common law; and the precise words and attitudes need not be described. Barker *v.* Com., 19 Pa. St. 412.

A general conclusion in the indictment that the nuisance is "to the great injury," etc., "of all the citizens of the state," will not

and that its noisome effects reach the public highways or the dwelling-houses of the citizens.[56]

c. Time of Offense. The time when the offense was committed should be stated with certainty,[57] and it should appear that the offense was committed before the indictment was laid,[58] and within the time limited by statute for the commencement of a prosecution therefor.[59]

d. Location of Nuisance. It is not necessary to specify the location of the nuisance,[60] further than to show that it is within the jurisdiction of the

supply the want of an allegation as to injury to some part of the citizens of the state. State *v.* Houck, 73 Ind. 37. See also Morris, etc., R. Co. *v.* State, 36 N. J. L. 553.

Indictment sufficiently showing public character of nuisance see the following cases:

Iowa.— State *v.* Smith, 82 Iowa 423, 48 N. W. 727.

Kentucky.— Illinois Cent. R. Co. *v.* Com., 96 S. W. 467, 29 Ky. L. Rep. 754.

Maine.— State *v.* Haines, 30 Me. 65.

Massachusetts.— Com. *v.* Sweeney, 131 Mass. 579.

Missouri.— State *v.* Brown, 66 Mo. App. 280.

New Jersey.— State *v.* Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299.

See 37 Cent. Dig. tit. "Nuisance," § 209.

56. Com. *v.* Webb, 6 Rand. (Va.) 726, holding that to maintain a public prosecution for a nuisance for damming up and stagnating the waters of a creek, it is necessary to allege and prove that the obstructions placed in the creek produced the nuisance "in or near a public highway," or in some other place in which "the public" have a special interest.

Sufficiency.— Where it is charged that by reason of the noxious exhalations emitted from a building within the city, and carried by the wind over the city, the air was rendered corrupt and unhealthful, it will be assumed that the nuisance existed near the highways and dwellings of the city. State *v.* Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299.

"Roads and streets."—An indictment which alleges that defendant carried on an offensive trade "near unto divers roads and streets, and also near unto the dwelling houses of divers liege inhabitants of the State, there situate and being," sufficiently charges a public nuisance, as the words "roads" and "streets" are equivalent to public roads and highways. Horner *v.* State, 49 Md. 277.

Where the alleged nuisance is committed in carrying on a lawful trade which may or may not be a nuisance according to its location, an indictment which concludes merely "to the common nuisance of all good citizens," is not good, and therefore an indictment for a nuisance in keeping cattle-pens must conclude, "to the common nuisance of all persons there living and abiding, or of all there passing and repassing, and having the right to pass," or the indictment itself must show proximity to human habitations or highways, and the use of streams which would be damaged by their pollution. Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291.

Description of road.—An indictment for maintaining a nuisance so near a public road as to annoy the passengers thereon need only locate the nuisance and allege its proximity to the road, without describing the road by its name and termini. Com. *v.* McCormick, 5 Pa. Dist. 535.

57. Com. *v.* Louisville, etc., R. Co., 82 S. W. 231, 26 Ky. L. Rep. 493; State *v.* Davis, 80 Me. 488, 15 Atl. 41.

The clear meaning of an allegation in a complaint that defendant kept and maintained a common nuisance "on the first day of August, 1886, and on divers other days and times between that day and the third day of September," is that defendant kept the nuisance on the 1st day of August, and on divers other days and times between said day and the 3d day of September, including said 3d day of September; and the complaint charges but one offense, committed during a single period of time, and is not bad for duplicity. Com. *v.* Sheehan, 143 Mass. 468, 9 N. E. 839.

Inclusion of day of verification.— Where an information charges the keeping of a common nuisance, and the day the information was verified and filed is included within the time of charging the offense, a motion to quash is properly overruled. State *v.* Youngberg, 70 Kan. 296, 78 Pac. 421 [*following* Manhattan *v.* Holbert, (Kan. 1902) 70 Pac. 1130].

Continuous nuisance.—A charge that defendant, on, etc., erected, and from thence hitherto continually maintained, etc., well charges a continuous nuisance. Baugh *v.* State, 14 Ind. 29. An indictment for a nuisance which alleges that the offense continued from a given day to the day before the day the indictment was returned is sufficient. Ashbrook *v.* Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616.

58. State *v.* Schaffer, 31 Wash. 305, 71 Pac. 1088, holding that a complaint for the maintenance of a nuisance, under Ballinger Codes & St. Wash. §§ 3084, 3085, is insufficient if it alleges the commission of the acts constituting the offense in words of the present tense, without showing that any of the acts were committed prior to the time of filing the complaint.

59. State *v.* Schaffer, 31 Wash. 305, 71 Pac. 1088.

60. *Illinois.*— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279].

court,[61] unless it is desired to obtain an order of abatement,[62] or the locality is an essential ingredient of the offense.[63]

e. Unlawfulness or Lack of Proper Precautions. It need not be directly alleged that the act or business complained of is conducted unlawfully or without proper care and precautions.[64]

f. Intent.[65] It has been held that an indictment for keeping a common nuisance need contain no allegation of evil intent.[66]

g. Formal Conclusion. It has been held that an indictment for a nuisance, which concludes, "to the common nuisance of divers of the Commonwealth's citizens," is insufficient, but it should be laid to the common nuisance "of all citizens of the Commonwealth residing in the neighbourhood," or "of all citizens," etc., "residing," etc., "and passing thereby."[67] But later authorities hold

Indiana.— Dronberger *v.* State, 112 Ind. 105, 13 N. E. 259; Dennis *v.* State, 91 Ind. 291; Wertz *v.* State, 42 Ind. 161.

Iowa.— Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134 [*following* McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171], holding that an indictment for maintaining a nuisance need not specifically describe the premises to subject them to a lien for the amount of the fine imposed for the maintenance of such nuisance.

Kentucky.— Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291.

Massachusetts.— Com. *v.* Gallagher, 1 Allen 592, holding that an indictment alleging that defendants kept and maintained a common nuisance, to wit, a tenement, in a town which is designated, contains a sufficient averment of place.

New Jersey.— State *v.* Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299.

North Dakota.— State *v.* Wisneuski, 13 N. D. 649, 102 N. W. 883 [*following* State *v.* Thoemke, 11 N. D. 386, 92 N. W. 480].

Pennsylvania.— Com. *v.* McCormick, 5 Pa. Dist. 535.

Wisconsin.— Jenks *v.* State, 17 Wis. 665, holding that where the facts alleged in an indictment for a nuisance constitute an offense against the statute wherever committed, no greater particularity is required in stating the place than is required in respect to other offenses.

See 37 Cent. Dig. tit. "Nuisance," § 208.

The premises on which a nuisance is maintained may be identified by evidence aliunde, when not specifically described in the indictment for the maintenance of such nuisance. Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134 [*following* State *v.* Manatt, 84 Iowa 64, 51 N. W. 73].

In the case of an obstruction or nuisance in a highway the road should be described by its name and termini. Com. *v.* McCormick, 5 Pa. Dist. 535.

61. Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279]; State *v.* Sturdivant, 21 Me. 9; State *v.* Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299; Jenks *v.* State, 17 Wis. 665.

62. *Illinois.*— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279].

Indiana.— Dronberger *v.* State, 112 Ind. 105, 13 N. E. 259; Wertz *v.* State, 42 Ind. 161; Wood *v.* State, 5 Ind. 433.

Kentucky.— Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291.

North Dakota.— State *v.* Wisnewski, 13 N. D. 649, 102 N. W. 883.

Ohio.— State *v.* Jackson, 2 Ohio Dec. (Reprint) 250, 2 West. L. Month. 150, holding that an indictment for a nuisance must, if possible, so describe the nuisance that an order for its abatement, following the description in the indictment, will sufficiently inform the sheriff what it is that is to be abated.

See 37 Cent. Dig. tit. "Nuisance," § 208.

But *compare* Com. *v.* McCormick, 5 Pa. Dist. 535.

Abatement on conviction see *infra*, VII, E, 11.

Insufficient description.— Where an indictment for a nuisance charged that defendant maintained "a certain mill-dam in, about and across a certain stream of water in said county called Elkbart river," the locality of the mill-dam was not stated with sufficient certainty to enable the sheriff to execute the order of abatement with certainty and without mistake. Wood *v.* State, 5 Ind. 433.

63. Seacord *v.* People, 121 Ill. 623, 13 N. E. 194 [*affirming* 22 Ill. App. 279]. See also State *v.* Davis, 80 Me. 488, 15 Atl. 41.

Sufficient description.— An indictment against a city for suffering a nuisance upon a vacant lot, which describes the lot as being "at the foot of Twelfth street and near the Licking river," is sufficiently specific as to the place of the nuisance. Newport *v.* Com., 108 Ky. 151, 55 S. W. 914, 21 Ky. L. Rep. 1591.

64. Paris *v.* Com., 93 S. W. 907, 29 Ky. L. Rep. 483.

65. Intent as element of nuisance see *supra*, II, B.

66. State *v.* Towler, 13 R. I. 661. But *compare* Stein *v.* State, 37 Ala. 123, holding that an indictment charging defendant with committing a nuisance in furnishing unwholesome and poisonous water to all the citizens and visitors of a city is bad, unless it shows that defendant knowingly or intentionally supplied water of such unwholesome quality.

67. Com. *v.* Faris, 5 Rand. (Va.) 691.

that an indictment need not conclude formally "to the common nuisance of all the people," etc., if it contain averments substantially equivalent thereto.[68]

7. ISSUES, PROOF, AND VARIANCE.[69] On the trial the proof must accord with the charges of the indictment, information, or complaint, and the issues in the case,[70] and a material variance between the allegations and the proof adduced in support thereof is fatal.[71] So, one who is indicted for creating a public nuisance cannot be convicted for continuing the nuisance, since these are distinct offenses.[72] On the trial of an indictment for establishing a noxious trade near certain dwellings, defendant may prove, in bar of the prosecution, under the general issue, that the dwelling-houses in the vicinity of the place were built after the establishment of the alleged nuisance.[73] In determining whether defendant is guilty the jury cannot consider annoyance emanating from parts of defendant's premises other than the building complained of.[74]

8. EVIDENCE.[75] The prosecution must prove all the elements of the offense,[76]

68. Com. *v.* Enright, 98 Ky. 635, 33 S. W. 1111, 17 Ky. L. Rep. 1183; State *v.* Middlesex, etc., Traction Co., 67 N. J. L. 14, 50 Atl. 354.

69. In action for damages see *supra*, VII, D, 10, c.

In suit for equitable relief see *supra*, VII, C, 11, e.

70. Dennis *v.* State, 91 Ind. 291.

Proof held to accord with indictment.— Evidence under an indictment for committing a nuisance in a "public place" is sufficient where it shows pollution of a navigable river, which is a public highway, as a public highway is *prima facie* a "public place." State *v.* Wabash Paper Co., 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949. An indictment under Mass. Gen. Sts. c. 87, § 6, for keeping and maintaining a common nuisance, is supported by proof that the nuisance was kept and maintained for the space of two hours. Com. *v.* Gallagher, 1 Allen (Mass.) 592. An indictment for unlawfully keeping a tenement as a common nuisance, in violation of Mass. St. (1855) c. 405, § 1, is supported by proof of the use of any part of the tenement for the purpose, although it consists of several rooms. Com. *v.* Howe, 13 Gray (Mass.) 26. On an indictment for erecting a dam, whereby animal and vegetable substances were collected, and became offensive, and corrupted the water, it was sufficient to prove that the injury was caused by the rise and fall of the water in the pond, or from the action of the sun upon the vegetable substances growing on the margin, although the stream was not a public highway. People *v.* Townsend, 3 Hill (N. Y.) 479. Where the indictment charges that the acts complained of "became, were, and still are" a public nuisance, evidence of the existence of the nuisance at any time within two years prior to the date in the indictment is admissible. State *v.* Holman, 104 N. C. 861, 10 S. E. 758. Where an indictment for maintaining a nuisance charged that defendants fed a large number of hogs with "slop, fermented grain . . . and other filth," by means whereof a nuisance was created, and the evidence showed that the hogs were fed exclusively on slop, there was no variance. Com. *v.* Van Sickle, Brightly 69, 4 Pa. L. J. Rep. 104, 7 Pa. L. J. 104. Under an indictment charging that defendant did burn and melt crude arsenic for the purpose of making arsenic, whereby noisome and unwholesome smells did arise so that the air was greatly corrupted, evidence that cattle and trees in the neighborhood were poisoned by the particles of white arsenic which fell on the ground from the noisome vapor is admissible, although the white arsenic itself was free from smell. Reg. *v.* Garland, 5 Cox C. C. 165.

Redundancy of proof.— Where an indictment for maintaining a nuisance in the form of an unsafe building charged that the same was maintained on lots one and two, and the evidence showed that it extended over on to lot three, this was not a variance, but a mere redundancy of proof. Chute *v.* State, 19 Minn. 271.

71. Dennis *v.* State, 91 Ind. 291; Reg *v.* Botfield, C. & M. 151, 41 E. C. L. 88; Reg. *v.* Meyers, 3 U. C. C. P. 305.

A failure to prove the allegations to the extent charged is not a fatal variance. State *v.* Beal, 94 Me. 520, 48 Atl. 124, where the indictment charged that the whole of a piazza erected and maintained by defendant, and described by metes and bounds, was a nuisance, as obstructing a street, and the proof showed that only portions of the piazza were within the street.

72. Lowe *v.* People, 28 Ill. 518.

73. Ellis *v.* State, 7 Blackf. (Ind.) 534.

74. Com. *v.* Brown, 13 Metc. (Mass.) 365.

75. See, generally, EVIDENCE.

In suit for equitable relief see *supra*, VII, C, 12.

In action for damages see *supra*, VII, D, 11.

76. State *v.* Wolf, 112 N. C. 889, 17 S. E. 528, holding that on a trial for keeping a slaughter-pen producing offensive odors, alleged to constitute a common nuisance to all citizens passing along an adjacent public highway, it is necessary to prove that the road upon which the citizens were annoyed is a public highway.

Extent of proof.—Where an indictment for a nuisance established near a town charged that the nuisance endangered the health, and was to the detriment and annoyance "of the

and introduce evidence to support all averments of the indictment or information even though such averments are not material,[77] or not necessary to the sufficiency of the indictment;[78] but the proof need not go beyond the indictment.[79] Subject to the general rules of evidence,[80] any evidence legitimately tending to establish the existence or injurious effects of the alleged nuisance is admissible;[81] but evidence which is immaterial,[82] which is not pertinent to the charge,[83] or which does not tend to establish the charge against defendant[84] cannot be admitted. The general rules as to the weight and sufficiency of evidence[85] govern in determining

entire community," it was not necessary to show that everyone in the town had been personally inconvenienced. West *v.* State, 71 Ark. 144, 71 S. W. 483.

Proof of corporate capacity of defendant.— In an information under Burns Annot. St. Ind. (1901) § 1970, providing that corporations may be prosecuted by indictment or information for maintaining a public nuisance, the burden of proof that defendant is a corporation is on the state. Acme Fertilizer Co. *v.* State, 34 Ind. App. 346, 72 N. E. 1037, 107 Am. St. Rep. 190.

77. Fulk *v.* State, 19 Ind. App. 356, 49 N. E. 465, holding that in a prosecution for maintaining a public nuisance, by the use of a smoke-stack of insufficient height to carry away the smoke, soot, and gases produced in the furnace of defendant's mill, it was necessary for the state to prove that the alleged nuisance was the result of the insufficient height of the smoke-stack, in order to obtain a conviction on an affidavit containing such allegation, although such averment was not material.

78. Dennis *v.* State, 91 Ind. 291 [*following* Wertz *v.* State, 42 Ind. 161; Ball *v.* State, 26 Ind. 155].

79. West *v.* State, 71 Ark. 144, 71 S. W. 483, holding that where an indictment for the nuisance charges that the nuisance endangers the health of the community, it is not necessary to prove that it has already injured the health of the community.

80. See, generally, EVIDENCE.

Hearsay.— It is error to permit witnesses to state what other persons, while professing to smell the obnoxious stench complained of, said to them on the subject. Gloystein *v.* Com., 33 S. W. 824, 17 Ky. L. Rep. 1187.

Hypothetical question.— It is no objection to a hypothetical question propounded by the state on a prosecution for nuisance in maintaining a slaughter-house, as to the effect the condition of the house would have on the public health, that it is framed without reference to whether noxious odors were emitted from the premises, although there is evidence that such odors were emitted therefrom. State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495.

81. See the following cases:

Illinois.— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194.

Iowa.— State *v.* Kaster, 35 Iowa 221.

Massachusetts.— Com *v.* Mann, 4 Gray 213.

Ohio.— Terry *v.* State, 24 Ohio Cir. Ct. 111.

Pennsylvania.— Com. *v.* Greybill, 17 Pa. Super. Ct. 514; Com. *v.* Yost, 11 Pa. Super. Ct. 323.

Washington.—State *v.* Schaefer, (1906) 87 Pac. 949.

See 37 Cent. Dig. tit. "Nuisance," § 212.

A bond given by a defendant, acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance in carrying on the same business in another place. Rex *v.* Neville, Peake 91, 3 Rev. Rep. 662.

82. See the following cases:

District of Columbia.— Moses *v.* U. S., 16 App. Cas. 428, 50 L. R. A. 532.

Kentucky.—Louisville, etc., R. Co. *v.* Com., 80 Ky. 143, 44 Am. Rep. 468.

Massachusetts.— Com. *v.* Perry, 139 Mass. 198, 29 N. E. 656, holding that on the trial of an indictment for maintaining a nuisance in the shape of a piggery containing five hundred or more pigs, evidence that such establishments are customary throughout the state in populous neighborhoods is inadmissible.

Michigan.— Beach *v.* People, 11 Mich. 106, holding that on trial under an information for nuisance in damming a stream, a question whether the neighborhood is as healthy as it would be if the mill-pond was drawn down, the river channel ditched, the water drained from the low lands, and these converted into a beautiful meadow, is not admissible.

England.— Reg. *v.* Train, 9 Cox C. C. 180, 3 F. & F. 22, 8 Jur. N. S. 1151, 31 L. J. M. C. 169, 6 L. T. Rep. N. S. 380, 10 Wkly. Rep. 539, holding that evidence offered on behalf of defendant that the tramway complained of was used by a number of persons, and that it afforded a cheaper and an easier mode of traveling than by the ordinary conveyance, was immaterial and inadmissible.

See 37 Cent. Dig. tit. "Nuisance," § 212.

83. Ehrlick *v.* Com., 102 S. W. 289, 31 Ky. L. Rep. 401, 10 L. R. A. N. S. 995; State *v.* Paggett, 8 Wash. 579, 36 Pac. 487.

84. Terry *v.* State, 24 Ohio Cir. Ct. 111, holding that in a prosecution for creating and maintaining a nuisance by carrying on a business producing "noisome and offensive smells," as prohibited by Rev. St. § 6921, evidence of the existence of the odor at times other than that charged in the information is inadmissible, especially when, if such evidence was admitted, it would not tend to prove that the odors complained of were produced during the time charged.

85. See, generally, EVIDENCE.

whether or not the evidence adduced is sufficient to support the charge against defendant.[86]

9. Trial.[87] The question as to whether the matters complained of amount to a nuisance is for the jury,[88] and should be submitted to them under proper instructions.[89] The jury may and perhaps should look to the evidence of the acts done, and the probable consequences thereof, rather than to the testimony of particular witnesses as to the effects of such acts upon them.[90] The matter of ordering a view by the jury is discretionary with the court.[91] It has been held that after a verdict of not guilty a new trial will not be granted on the ground that the verdict was against evidence, although the judge who tried the case reports that he is dissatisfied with the verdict.[92]

10. Sentence and Punishment. At common law the erection or maintenance of a nuisance is punishable by fine and imprisonment,[93] but as a general rule the punishment or penalty is regulated by express statutory provisions.[94] If several are

86. Evidence held sufficient see West *v.* State, 71 Ark. 144, 71 S. W. 483; State *v.* Eyermann, 115 Mo. App. 660, 11 S. W. 1168; Huber *v.* Com., 102 S. W. 291, 31 Ky. L. Rep. 320; Ehrlick *v.* Com., 102 S. W. 289, 31 Ky. L. Rep. 401, 10 L. R. A. N. S. 995; New York *v.* H. W. Johns-Manville Co., 89 N. Y. App. Div. 449, 85 N. Y. Suppl. 757; People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129].

Evidence held insufficient see State *v.* Wolf, 112 N. C. 889, 17 S. E. 528, holding that evidence that a single person living in the vicinity of a slaughter-pen was annoyed by offensive odors emanating therefrom is insufficient in a criminal prosecution to show a public nuisance.

87. See, generally, Trial.

In action for damages see *supra*, VII, D, 12.

In suit for equitable relief see *supra*, VII, C, 13.

88. Com. *v.* Colby, 128 Mass. 91; Com. *v.* Yost, 11 Pa. Super. Ct. 323 (where the uncontradicted evidence does not establish a nuisance *per se*); Hickerson *v.* U. S., 30 Fed. Cas. No. 18,301, 2 Hayw. & H. 228; Reg. *v.* Burt, 11 Cox C. C. 399.

Nuisance per se.— Where the act complained of is the taking of property dedicated to the use of the public and appropriating it to private use, thereby wholly excluding the public from the enjoyment of it, the respondent is not entitled to have the question whether the act is a nuisance submitted to the jury, as such act is, in law, a nuisance, for the commission of which there can be no justification. State *v.* Woodward, 23 Vt. 92.

Reasonableness of obstruction.— A second-story bay window projected beyond the building line over and into the street of a city, and erected in disregard of notice by the proper municipal authorities, in the absence of any municipal ordinance on the subject, constitutes a public nuisance *per se*; and the reasonableness or unreasonableness of such an obstruction, and its necessity, convenience, or ornament, are not matters to be submitted to the jury, from which to determine the fact of a public nuisance. Com. *v.* Kembel, 30 Pa. Super. Ct. 199.

89. See the following cases as to the propriety of instructions:

Arkansas.— West *v.* State, 71 Ark. 144, 71 S. W. 483.

District of Columbia.— Moses *v.* U. S., 16 App. Cas. 428, 50 L. R. A. 532.

Illinois.— Seacord *v.* People, 121 Ill. 623, 13 N. E. 194.

Kentucky.— Illinois Cent. R. Co. *v.* Com., 96 S. W. 467, 29 Ky. L. Rep. 754.

New York.— People *v.* Pelton, 36 N. Y. App. Div. 450, 55 N. Y. Suppl. 815 [*affirmed* in 159 N. Y. 537, 53 N. E. 1129].

North Carolina.— State *v.* Holman, 104 N. C. 861, 10 S. E. 758; State *v.* Willis, 44 N. C. 223.

See 37 Cent. Dig. tit. "Nuisance," § 215.

90. Garrison *v.* State, 14 Ind. 287.

91. Chute *v.* State, 19 Minn. 271, under Gen. Sts. (1866) c. 114, § 10.

Instructions as to view.— Where the jury were instructed to examine and view the building complained of, but the proper purpose of such view was not stated, it would be presumed the jury knew their duty, and, if more definite instructions were required by defendant, he should have so requested the court. Chute *v.* State, 19 Minn. 271.

92. Reg. *v.* Johnson, 2 E. & E. 613, 6 Jur. N. S. 553, 29 L. J. M. C. 133, 8 Wkly. Rep. 236, 105 E. C. L. 613.

93. State *v.* Noyes, 30 N. H. 279.

94. State *v.* Munzenmaier, 24 Iowa 87 (holding that the fine, under an indictment other than the first for nuisance, may exceed twenty dollars, since Iowa Rev. § 1564, applies, and not section 1562); State *v.* Seventh Judicial Dist. Ct., 14 Mont. 452, 37 Pac. 9 (holding that a penalty of fine and imprisonment cannot be imposed for maintaining a common-law nuisance, under Cr. Laws, § 278 (Comp. St. p. 583), providing that on conviction of a misdemeanor not provided for in the criminal laws punishment may be by fine and imprisonment, since section 162 provides that a person who does certain things, or who shall maintain any other thing, which at common law would be a nuisance, shall be fined).

indicted and the jury find one guilty and say nothing as to the others, judgment may be rendered against the one found guilty.[95] In a case where the whole fine imposed was less than the costs incurred by the prosecutors the court ordered that one third of the fine should go to them, and suggested that the government might, on application, order the remaining two thirds to be paid to them.[96]

11. ABATEMENT ON CONVICTION.[97] On conviction under an indictment for maintaining a public nuisance, the nuisance may be abated as part of the judgment, and the thing with which the nuisance is done may be destroyed;[98] but a warrant or order of abatement does not necessarily follow upon a conviction.[99] A judgment that a nuisance be abated can be recovered only where it appears that the nuisance is continued to the finding of the indictment.[1] Where the building or structure complained of is of itself a nuisance, the court will, if necessary, order its removal;[2] but a destruction of the structure complained of should not be ordered until it is conclusively established that no other measure is equally efficacious for the abatement of the nuisance,[3] and a building not in itself a nuisance cannot be destroyed because a nuisance is created therein.[4] Where the nuisance is a business, an order of court absolutely prohibiting its continuance, regardless of whether the objectionable features can be removed, is too broad;[5] and it has been held that where the use of a building constitutes a nuisance whose effects are merely immoral and intangible, such nuisance can be abated only by the administration of such punishment as will be likely to cause the guilty party to desist.[6] Upon conviction of a nuisance the court will not order the nuisance to be abated when such abatement might affect the interests of strangers to the proceedings.[7] Nor will an abatement be ordered when for any reason it cannot be lawfully carried into effect.[8] So an abatement cannot be ordered on the con-

In a proceeding under Nev. Gen. St. § 290 et seq., there can be but one fine which cannot exceed one hundred dollars no matter how many persons are proceeded against. Wiggins *v.* Henderson, 22 Nev. 103, 36 Pac. 459.

95. Bloomhuff *v.* State, 8 Blackf. (Ind.) 205.

96. Reg. *v.* Jackson, 40 U. C. Q. B. 290.

97. Abatement in: Suit for equitable relief see *supra*, VII, C, 14. Action for damages see *supra*, VII, D, 14.

98. Respass *v.* Com., 102 S. W. 800, 332, 31 Ky. L. Rep. 443, 371; Enright *v.* Com., 102 S. W. 799, 31 Ky. L. Rep. 442, 444; Gormley *v.* Com., 102 S. W. 332, 31 Ky. L. Rep. 372; Huber *v.* Com., 102 S. W. 291, 31 Ky. L. Rep. 320; Ehrlick *v.* Com., 102 S. W. 289, 31 Ky. L. Rep. 401, 10 L. R. A. N. S. 995; Ashbrook *v.* Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; State *v.* Haines, 30 Me. 65; Coffer *v.* Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296; Woods *v.* Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

Court may order moral as well as physical nuisance abated.— Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553, 17 Ky. L. Rep. 1122.

The fact that the nuisance is on the land of a stranger is no reason for not abating it. Delaware Div. Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570.

99. State *v.* Barnes, 20 R. I. 525, 40 Atl. 374; Coffer *v.* Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296; Rex *v.* West Riding of Yorkshire, 7 T. R. 467. *Secus* where the indictment states the nuisance to be existing. Rex *v.* Stead, 8 T. R. 142.

If the court is satisfied that the nuisance is already effectually abated before judgment is prayed upon the indictment, it will not in its discretion give judgment to abate it. Rex *v.* Incledon, 13 East 164, 12 Rev. Rep. 313.

1. State *v.* Noyes, 30 N. H. 279; Rex *v.* Stead, 8 T. R. 142.

Upon an indictment for erecting and maintaining a personal judgment only can be inflicted. Munson *v.* People, 5 Park. Cr. (N. Y.) 16. See also Taylor *v.* People, 6 Park. Cr. (N. Y.) 347.

2. Coffer *v.* Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296.

3. Shepard *v.* People, 40 Mich. 487.

4. Earp *v.* Lee, 71 Ill. 193; Bloomhuff *v.* State, 8 Blackf. (Ind.) 205.

5. State *v.* Schaefer, (Wash. 1906) 87 Pac. 949.

6. Coffer *v.* Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296.

7. State *v.* Haines, 30 Me. 65.

8. As when a building is described as wholly a nuisance but not all of it is such. State *v.* Beal, 94 Me. 520, 48 Atl. 124, holding, however, that where, on an indictment for a nuisance consisting of the maintenance of a piazza in the street, the proof shows only a portion of such piazza to be situated in the street, the county attorney may properly enter a *nolle prosequi* as to so much of the building as is not a nuisance, and thus make the record of conviction the correct basis for an order of abatement, if such order is in other respects deemed proper and advisable.

viction of a mere employee[9] or lessee.[10] It has been asserted that the power to order a removal of the nuisance must be exercised at the time of imposing the punishment by fine and imprisonment and form part of such judgment,[11] but it has also been held that the order of abatement may be made at any time during the term at which defendant was convicted.[12] Where a defendant indicted for a nuisance allows judgment to go by default and is under no recognizance to appear for judgment, the court will not, in his absence, give judgment that the nuisance be abated, although notice has been left at his residence of the intention of the crown to pray for judgment.[13] In ordering the abatement of an immoral nuisance the court has no power to direct that defendant be committed to jail until the order is obeyed, but should first merely order the nuisance to be abated and then, on defendant's failure to obey the order, subject him to fine and imprisonment without further intervention of the jury.[14] In Canada it has been held that the proper judgment is that the nuisance be abated by defendant, and the court cannot issue an order directing the sheriff to abate the nuisance, but the only authority which can be given to the sheriff, commanding him to abate the nuisance, is by the writ de nocumento amovendo.[15]

12. Appeal.[16] It has been held that in cases of nuisance the state as well as defendant has the right to except to the decision of the trial court.[17] A record of a summary conviction, reciting that defendant had been convicted of a nuisance in keeping his premises in a certain ward in a city in such condition as to be offensive and a nuisance, contrary to statute, and adjudging him guilty of the offense charged, has been held insufficient on appeal, in not setting out with sufficient precision the facts on which defendant was convicted.[18] The judgment will not be reversed because the fine imposed may perhaps be larger than the facts warrant, where it is not obviously excessive or unreasonable.[19]

13. Costs.[20] Where defendant is acquitted it is improper to subject him to any part of the costs.[21] In Canada where the indictment is removed into the court of queens bench by the prosecutors, defendant is not liable for the costs, although he is convicted;[22] but where it is removed into such court on defendant's application, and he is convicted, costs are properly charged against him.[23] The prosecutor must show himself to be a party aggrieved in order to be entitled to costs.[24]

NUL DISSEISIN. Literally "No disseisin."[1]

NULL. Of no legal force or effect; void;[2] of no legal or binding force or validity, of no efficacy; invalid; void; nugatory; useless; of no account or

9. State *v.* Paggett, 8 Wash. 579, 36 Pac. 487.

10. Coffer *v.* Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296.

11. Crippen *v.* People, 8 Mich. 117, holding that where no such punishment was imposed the order to remove was erroneous.

12. Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553, 17 Ky. L. Rep. 1122.

13. Reg. *v.* Chichester, 17 Q. B. 504, 2 Den. C. C. 458, 15 Jur. 1131 note, 79 E. C. L. 504.

14. Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553, 17 Ky. L. Rep. 1122.

15. Reg. *v.* Grover, 23 Ont. 92.

16. See, generally, Appeal and Error.

In action for damages see *supra*, VII, D, 15.

In suit for equitable relief see *supra*, VII, C, 20.

17. Com. *v.* Cassel, 1 Pa. Super. Ct. 476, 38 Wkly. Notes Cas. 213.

18. Laverty *v.* Com., 4 Pa. Co. Ct. 137.

19. Illinois Cent. R. Co. *v.* Com., 96 S. W. 467, 29 Ky. L. Rep. 754, so holding in the case of a fine of two hundred dollars imposed by the jury on a railroad company for obstructing a street by permitting water to escape from a water tank and flow on the street.

20. See, generally, Costs.

In suit for equitable relief see *supra*, VII, C, 21.

21. Com. *v.* Weaver, 2 Pa. Co. Ct. 455.

22. Reg. *v.* Jackson, 40 U. C. Q. B. 290.

23. Reg. *v.* Cooper, 40 U. C. Q. B. 294.

24. Reg. *v.* Williams, 1 Cox C. C. 77; Rex *v.* Incledon, 1 M. & S. 268; Reg. *v.* Cooper, 40 U. C. Q. B. 294.

1. Burrill L. Dict.

It is a plea of the general issue, in a real action, by which defendant denies that there was any disseisin. Black L. Dict.

2. Standard Dict. [*quoted* in Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co.,

significance;[3] void; of no legal or binding force or validity; of no efficacy, invalid.[4] (See Void; Voidable.)

NULLA BONA. Literally "No goods."[5] (See, generally, Executions.)

NULLA CURIA QUÆ RECORDUM NON HABET POTEST IMPONERE FINEM NEQUE ALIQUEM MANDARE CARCERI; QUIA ISTA SPECTANT TANTUMMODO AD CURIAS DE RECORDO. A maxim meaning "No court which has not a record, can impose a fine, or commit any person to prison; because those powers belong only to courts of record."[6]

NULLA EMPTIO SINE PRETIO ESSE POTEST. A maxim meaning "There can be no sale without a price."[7]

NULLA FALSA DOCTRINA EST QUÆ NON PERMISCEAT ALIQUID VERITAS. A maxim meaning "No doctrine is so false but it may be mixed up with some truth."[8]

NULLA IMPOSSIBILIA AUT INHONESTA SUNT PRÆSUMENDA; VERA AUTEM ET HONESTA ET POSSIBILIA. A maxim meaning "No things that are impossible or dishonorable are to be presumed; but things that are true and honorable and possible."[9]

NULL AND VOID. A term which according to the context may sometimes mean void,[10] and sometimes voidable.[11] (See Void; Voidable.)

NULLA PACTIONE EFFICI POTEST UT DOLOS PRÆSTETUR. A maxim meaning "It cannot be effected by any agreement, that there is no accountability for fraud."[12]

NULLA PŒNA CAPITIS NULLA QUÆ HOMINUM REMVE EJUS DESTRUAT ESSE POTEST NISI LEGIBUS PRÆFINITA. A maxim meaning "There can be no capital punishment, or form of punishment destructive either to the individual or his property, which is not established by law before the fact."[13]

NULLA RES VEHEMENTIUS REMPUBLICAM CONTINET QUAM FIDES. A maxim meaning "Nothing binds the Republic more closely than the fidelity of its citizens."[14]

NULLA SASINA, NULLA TERRA. A maxim meaning "No fee, no land."[15]

NULLA UNQUAM DE MORTE HOMINIS CUNCTATIO LONGA EST. A maxim meaning "There should be no long delay in matters involving human life."[16]

NULLA VIRTUS, NULLA SCIENTIA, LOCUM SUUM ET DIGNITATEM CONSERVARE POTEST SINE MODESTIA. A maxim meaning "Without modesty, no virtue, no knowledge, can preserve its place and dignity."[17]

NULLE RÉGLE SANS FAUTE. A maxim meaning "There is no rule without a fault."[18]

NULLE TERRE SANS SEIGNEUR. A maxim meaning "No land without a lord."[19]

29 Mont. 397, 403, 74 Pac. 1088, 76 Pac. 211].

3. Webster Dict. [*quoted* in Forrester *v.* Boston, etc.. Consol. Copper, etc., Min. Co., 29 Mont. 397, 403, 74 Pac. 1088, 76 Pac. 211].

4. Century Dict. [*quoted* in Forrester *v.* Boston, etc.. Consol. Copper, etc., Min. Co., 29 Mont. 397, 403, 74 Pac. 1088, 76 Pac. 211].

5. Burrill L. Dict.

In a return on an execution, this phrase imports that defendant had no goods which could be subjected to its satisfaction. Woodward *v.* Harbin, 1 Ala. 104, 108; Reed *v.* Lowe, 163 Mo. 519, 533, 63 S. W. 687, 85 Am. St. Rep. 578; Langford *v.* Few, 146 Mo. 142, 152, 47 S. W. 927, 69 Am. St. Rep. 606.

The words "not satisfied," upon the return of an execution, are not synonymous with "*nulla bona*." Merrick *v.* Carter, 205 Ill. 73, 76, 68 N. E. 750.

6. Peloubet Leg. Max.

7. Bouvier L. Dict.

8. Morgan Leg. Max.

9. Black L. Dict.

10. Hume *v.* Eagon, 73 Mo. App. 271, 276; Pearse *v.* Morrice, 2 A. & E. 84, 94, 4 L. J. K. B. 21, 4 N. & M. 48, 29 E. C. L. 59, per Lord Denman, C. J.

11. Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 140, 56 S. W. 862; Hume *v.* Eagon, 73 Mo. App. 271, 276; Franklin *v.* Kelley, 2 Nebr. 79, 88.

12. Peloubet Leg. Max.

Applied in Bridger *v.* Goldsmith, 3 Misc. (N. Y.) 535, 539, 23 N. Y. Suppl. 9.

13. Morgan Leg. Max.

14. Peloubet Leg. Max.

15. Morgan Leg. Max.

16. Morgan Leg. Max.

17. Black L. Dict.

18. Bouvier L. Dict.

19. Peloubet Leg. Max.

NULLI ENIM RES SUA SERVIT JURE SERVITUTIS. A maxim meaning "No one can have a servitude over his own property." [20]

NULLITY. An error in litigation which is incurable; [21] a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a "nullity" by a statute.[22] In Spanish law this word is defined in the absolute and relative.[23] (Nullity: Action to Annul Written Instrument, see CANCELLATION OF INSTRUMENTS. Of Assessment, see MUNICIPAL CORPORATIONS. Of Insurance Policy, see INSURANCE; and Insurance Titles. Of Judgment, see JUDGMENTS. Of Marriage, see DIVORCE; MARRIAGE. Of Sale Under Process, Decree, or Order of Court, see EXECUTIONS; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES. Of Satisfaction of — Judgment, see JUDGMENTS; Mortgage, see MORTGAGES. Of Tax-Sale, see TAXATION. Of Will, see WILLS. See also IRREGULARITY.)

NULLITY SUIT. A term used in reference to a suit to annul a pretended marriage, which has for its purpose a decree that a marriage that is void or voidable shall be judicially declared to be void.[24] (See, generally, MARRIAGE.)

NULLIUS CHARTA LEGIBUS POTEST DEROGARE. A maxim meaning "No one's written deed can derogate from the laws." [25]

NULLIUS FILIUS. Literally "The son of nobody." [26] A bastard.[27] (See, generally, BASTARDS.)

NULLIUS HOMINIS AUCTORITAS APUD NOS VALERE DEBET, UT MELIORA NON SEQUEREMUR SI QUIS ATTULERIT. A maxim meaning "The authority of no man ought to prevail with us, so that we should not follow better opinions, should another present them." [28]

NULLI VENDEMUS, NULLI NEGABIMUS, AUT DIFFERIMUS JUSTITIAM VEL RECTUM. A maxim meaning "Justice and right shall be sold, denied, or delayed to no one." [29]

NULLUM ANARCHIA MAJUS EST MALUM. A maxim meaning "There is no evil greater than anarchy." [30]

NULLUM ARBITRIUM. Literally "No award." [31] (See, generally, ARBITRATION AND AWARD.)

NULLUM CRIMEN MAJUS EST INOBEDIENTIA. A maxim meaning "No crime is greater than disobedience." [32]

NULLUM CRIMEN PATITUR IS QUI NON PROHIBET CUM PROHIBERE NON POTEST. A maxim meaning "He who fails to prevent what it is not possible for him to prevent is guilty of no crime." [33]

NULLUM DAMNUM SINE REMEDIO. A maxim meaning "There is no loss without a remedy." [34]

20. Black L. Dict.

21. Wharton L. Lex. [*quoted* in Hoffman *v.* Crerar, 18 Ont. Pr. 473, 479].

22. McNamara Null. & Irreg. 3 [*quoted* in Herr *v.* Douglass, 4 Ont. Pr. 102, 105]. See also Salter *v.* Hilgen, 40 Wis. 363, 365.

23. The former is that which arises from the law, whether civil or criminal, the principal motive for which is the public interest, and the latter is that which affects one certain individual. Sunol *v.* Hepburn, 1 Cal. 254, 281.

Distinguished from: "Irregularity" see Johnson *v.* Hines, 61 Md. 122, 130; Jenness *v.* Lapeer County Cir. Judge, 42 Mich. 469, 471, 4 N. W. 220; Hoffman *v.* Crerar, 18 Ont. Pr. 473, 479; Herr *v.* Douglass, 4 Ont. Pr. 102, 105. "Rescission" see Sunol *v.* Hepburn, 1 Cal. 254, 281.

24. It differs essentially from a "divorce suit."— A divorce suit is for the purpose of dissolving a marriage which the parties thereto had legal capacity to enter into and contract. Pyott *v.* Pyott, 191 Ill. 280, 288, 61 N. E. 88.

25. Morgan Leg. Max.

26. Burrill L. Dict.

27. Black L. Dict.

28. Peloubet Leg. Max.

29. Morgan Leg. Max.

Applied in Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324, 325.

30. Morgan Leg. Max.

31. Burrill L. Dict.

It is the name of a plea in an action on an arbitration bond, for not fulfilling the award by which the defendant traverses the allegation that there was an award made. Black L. Dict.

32. Bouvier L. Dict.

33. Morgan Leg. Max.

34. Peloubet Leg. Max. [*citing* Halkerstone Max. 110].

NULLUM EXEMPLUM EST IDEM OMNIBUS. A maxim meaning "No example is the same for all purposes." [35]

NULLUM INIQUUM EST PRÆSUMENDUM IN JURE. A maxim meaning "No iniquity is to be presumed in law." [36]

NULLUM MATRIMONIUM, IBI NULLA DOS. A maxim meaning "No marriage, no dower." [37]

NULLUM MEDICAMENTUM EST IDEM OMNIBUS. A maxim meaning "No medicine is equally effective upon all." [38]

NULLUM SIMILE EST IDEM. A maxim meaning "Nothing which is like another is the same, *i. e.* no likeness is exact identity." [39]

NULLUM SIMILE EST IDEM, NISI QUATUOR PEDIBUS CURRIT. A maxim meaning "No like is identical, unless it runs on all fours (and then it is not like, but identical)." [40]

NULLUM TEMPUS AUT LOCUS OCCURRIT REIPUBLICÆ. A maxim meaning "No time or place affects the state." [41] (See, generally, LIMITATIONS OF ACTIONS.)

NULLUM TEMPUS OCCURRIT REGI. [42] A maxim meaning "No time bars (or runs against) the King." [43] (See, generally, LIMITATIONS OF ACTIONS.)

NULLUM TEMPUS OCCURRIT REIPUBLICÆ. A maxim meaning "Lapse of time does not bar the commonwealth." [44] (See, generally, LIMITATIONS OF ACTIONS.)

NULLUS ALIUS QUAM REX POSSIT EPISCOPO DEMANDARE INQUISITIONEM FACIENDAM or **NULLUS ALIUS PRÆTER REGEM POTEST EPISCOPO DEMANDARE**

35. Bouvier L. Dict.

36. Black L. Dict.

Applied in Gardiner *v.* Gardiner, 2 U. C. Q. B. O. S. 554, 585.

37. Bouvier L. Dict.

38. Morgan Leg. Max.

39. Bouvier L. Dict.

Applied in: Sandusky City Bank *v.* Wilbor, 7 Ohio St. 481, 496; Morrison *v.* Bailey, 5 Ohio St. 13, 17, 64 Am. Dec. 632; Sweitzer *v.* Meese, 6 Binn. (Pa.) 500, 505; Brooks *v.* Byam, 4 Fed. Cas. No. 1,948, 2 Story 525, 551; Gregory *v.* Connolly, 7 U. C. Q. B. 500, 503.

40. Morgan Leg. Max. [*citing* Coke Litt. 3*a*, where the "*nisi quatuor pedibus currit*" is added].

Applied in Sweitzer *v.* Meese, 6 Binn. (Pa.) 500, 505.

41. Morgan Leg. Max.

42. St. 3 Geo. III, c. 16, was called the "*nullum tempus*" act because it was in contravention of this maxim, and limited the crown's right to sue to the period of sixty years. Black L. Dict.

43. Burrill L. Dict.

Applied in: Calloway *v.* Cossart, 45 Ark. 81, 88; State *v.* Leatherman, 38 Ark. 81, 88; Hill *v.* State, 23 Ark. 604, 610; McNamee *v.* U. S., 11 Ark. 148, 150; Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 622, 53 S. E. 251; Elmore, etc., Counties *v.* Alturas County, 4 Ida. 145, 150, 151, 37 Pac. 349, 95 Am. St. Rep. 53; State *v.* Stock, 38 Kan. 154, 187, 16 Pac. 106; Charlotte *v.* Pembroke Iron Works, 82 Me. 391, 393, 19 Atl. 902, 8 L. R. A. 828; Topsham *v.* Blondell, 82 Me. 152, 154, 19 Atl. 93; Atty.-Gen. *v.* Revere Copper Co., 152 Mass. 444, 449, 25 N. E. 605, 9 L. R. A. 510; Hannibal, etc., R. Co. *v.* Totman, 149 Mo. 657, 661, 51 S. W. 412; St. Charles Tp. School Directors *v.* Goerges, 50 Mo. 194, 196; St. Charles County *v.* Powell, 22 Mo. 525, 527, 66 Am. Dec. 637; Hammond *v.* Coleman, 4 Mo. App. 307, 316; May *v.* School Dist. No. 22, 22 Nebr. 205, 34 N. W. 377, 3 Am. St. Rep. 266; Blazier *v.* Johnson, 11 Nebr. 404, 409, 9 N. W. 543; State *v.* Yellow Jacket Silver Min. Co., 14 Nev. 220, 229; Givin *v.* Wright, 41 N. J. L. 478, 483; Price *v.* Plainfield, 40 N. J. L. 608, 614; Cornelius *v.* Giberson, 25 N. J. L. 1, 28; Den *v.* O'Hanlon, 21 N. J. L. 582, 588; Newark, etc., R. Co. *v.* Newark, 23 N. J. Eq. 515, 523; Greer *v.* New York, 4 Roh. (N. Y.) 675, 680; Furman *v.* Timberlake, 93 N. C. 66, 67; Hartman *v.* Hunter, 56 Ohio St. 175, 179, 46 N. E. 577; Oxford Tp. *v.* Columbia, 38 Ohio St. 87, 96; Fox *v.* Hart, 11 Ohio 414, 416; Woodburn *v.* Farmers', etc., Bank, 5 Watts & S. (Pa.) 447, 450; Com. *v.* Moorehead, 20 Wkly. Notes Cas. (Pa.) 485, 487; Searle *v.* Laraway, 27 R. I. 557, 65 Atl. 269, 270; Johnson *v.* Black, 103 Va. 477, 492, 49 S. E. 633, 106 Am. St. Rep. 890, 68 L. R. A. 264; Birch *v.* Alexander, 1 Wash. (Va.) 34, 49; State *v.* Mines, 38 W. Va. 125, 128, 18 S. E. 470; Hoge *v.* Brookover, 28 W. Va. 304, 309; National Exch. Bank *v.* U. S., 151 Fed. 402, 409, 80 C. C. A. 632; U. S. *v.* Houston, 48 Fed. 207, 209; U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 436; Rex *v.* Whaley, 1 Barn. 34, 36; Wensleydale *v.* Peerage, 5 H. L. Cas. 958, 961, 2 Macq. H. L. 479, 10 Eng. Reprint 1181; Rex *v.* Lee How, 4 Can. Cr. Cas. 551, 552; Murray *v.* Duff, 33 N. Brunsw. 351, 360; Bowlby *v.* Woodley, 8 U. C. Q. B. 318, 320; Public Works Com'rs *v.* Daly, 6 U. C. Q. B. 33, 54.

44. Bouvier L. Dict.

Applied in: Ogdensburg *v.* Lovejoy, 2 Thomps. & C. (N. Y.) 83, 86; People *v.* Bristol, etc., Turnpike Road, 23 Wend. (N. Y.) 222, 248; Wheeling *v.* Campbell, 12 W. Va. 36, 53, 57, 66.

INQUISITIONEM FACIENDAM. A maxim meaning "No other than the king can command the bishop to make inquisition." [45]

NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA. A maxim meaning "No man can take advantage of his own wrong." [46]

NULLUS DEBET AGERE DE DOLO, UBI ALIA ACTIO SUBEST. A maxim meaning "Where another form of action is given, no one ought to sue in the action *de dolo*." [47]

NULLUS DICITUR ACCESSORIUS POST FELONIAM SED ILLE QUI NOVIT PRINCIPALEM FELONIAM FECISSE, ET ILLUM RECEPTAVIT ET COMFORTAVIT. A maxim meaning "No one is called an accessory after the fact, but he who knew the principal to have committed a felony, and received and comforted him." [48]

NULLUS DICITUR FELO PRINCIPALIS NISI ACTOR, AUT QUI PRÆSENS EST, ABBETTANS AUT AUXILIANS AD FELONIAM FACIENDAM. A maxim meaning "No one is called a principal felon except the party actually committing the felony, or the party present, aiding and abetting in its commission." [49]

NULLUS IDONEUS TESTIS IN RE SUA INTELLIGITUR. A maxim meaning "No person is understood to be a competent witness in his own cause." [50]

NULLUS JUS ALIENUM FORISFACERE POTEST. A maxim meaning "No man can forfeit another's right." [51]

NULLUS LIBER HOMO CAPIATUR, VEL IMPRISONETUR, AUT EXULET, AUT ALIQUO ALIO MODO DESTRUATUR, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ. A maxim meaning "No freeman shall be taken, imprisoned, or exiled, or in any other manner destroyed, save by the lawful judgment of his peers, or by the law of the land." [52]

NULLUS LIBER HOMO DISSEISIETUR DE LIBERO TENEMENTO SUO, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ. [53] A maxim meaning "No freeman shall be dispossessed of his freehold, save by the lawful judgment of his peers, or by the law of the land." [54]

NULLUS RECEDAT E CURIA CANCELLARIA SINE REMEDIO. A maxim meaning "No one ought to depart out of the court of chancery without a remedy." [55]

NULLUS VIDETUR DOLO FACERE QUI SUO JURE UTITUR. A maxim meaning "No man is to be esteemed a wrong-doer who avails himself of his legal right." [56]

NUL PRENDRA ADVANTAGE DE SON TORT DEMESNE. A maxim meaning "No one shall take advantage of his own wrong." [57]

NUL SANS DAMAGE AVERA ERROR OU ATTAINT. A maxim meaning "No one shall have error or attaint without loss." [58]

NUL TIEL CORPORATION. Literally "No such corporation." [59] (See, generally, CORPORATIONS.)

NUL TIEL RECORD. Literally "No such record." [60] (Nul Tiel Record:

45. Black L. Dict. [*citing* Coke Litt. 148*c*].

46. Broom Leg. Max.

Applied in: Seibert *v.* Louisville, 101 S. W. 325, 326, 30 Ky. L. Rep. 1317; Cook *v.* Fiske, 12 Gray (Mass.) 491, 493; Newark *v.* Dickerson, 45 N. J. L. 38, 39; Hamilton *v.* Graybill, 19 Misc. (N. Y.) 521, 523, 43 N. Y. Suppl. 1079, 26 N. Y. Civ. Proc. 184; O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 223, 240; Reed *v.* Allerton, 3 Rob. (N. Y.) 551, 570; State *v.* Costin, 89 N. C. 511, 516; Lundy *v.* Lundy, 24 Can. Sup. Ct. 650, 653.

47. Black L. Dict.

48. Peloubet Leg. Max.

49. Morgan Leg. Max.

50. Black L. Dict.

Applied in Clarke *v.* Dodge Healy, 5 Fed. Cas. No. 2,849, 4 Wash. 651, 656.

51. Morgan Leg. Max.

52. Morgan Leg. Max.

53. Applied in Barter *v.* Com., 3 Penr. & W. (Pa.) 253, 260.

54. Morgan Leg. Max.

55. Bouvier L. Dict.

56. Bouvier L. Dict.

Applied in Fisher *v.* Fielding, 67 Conn. 91, 106, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

57. Morgan Leg. Max.

Applied in Whitworth *v.* Shreveport Belt R. Co., 112 La. 363, 381, 36 So. 414, 65 L. R. A. 129.

58. Peloubet Leg. Max.

59. Black L. Dict.

It is the form of a plea denying the existence of an alleged corporation. Black L. Dict.

60. Burrill L. Dict.

It is a plea denying the existence of any such record as that alleged by plaintiff. Black L. Dict.

Plea in Action on — Bond, see Bonds; Judgment, see Judgments. Right to Trial by Jury of Issue on Plea, see Jury.)

NUL TORT. Literally "No wrong."[61]

NUL WASTE. Literally "No waste."[62] (See, generally, Waste.)

NUMB. Enfeebled in, or destitute of the power of sensation and motion; rendered torpid, etc.[63]

NUMBER. A collection of units.[64]

NUMERUS CERTUS PRO INCERTO PONITUR. A maxim meaning "A certain number is to be substituted for one which is uncertain."[65]

NUMMUS EST MENSURA RERUM COMMUTANDARUM. A maxim meaning "Money is the measure of things that are to be changed."[66]

NUNCIO. The permanent official representative of the pope at a foreign court or seat of government.[67] (See, generally, Ambassadors and Consuls.)

NUNC PRO TUNC. Literally "Now for then."[68] (Nunc Pro Tunc: Allowance and Filing of Bill of Exceptions, see Appeal and Error; Criminal Law. Amendment of Judgment or Decree, see Equity; Judgments. Entry — In Court Records, see Courts; Of Judgment or Decree, see Appeal and Error; Equity; Judgments; Of Motion, see Motions; Of Order, see Orders. Filing — Exceptions, see Appeal and Error; Note of Issue, see Trial; Pleading, see Pleading.)

NUNCUPATIVE WILL. See Wills.

NUNQUAM CONCLUDITUR IN FALSO. A maxim meaning "It is never too late in an action to show falsehood or forgery."[69]

NUNQUAM CRESCIT EX POST FACTO PRÆTERITI DELICTI ÆSTIMATIO. A maxim meaning "The quality of a past offense is never aggravated by that which happens subsequently."[70]

NUNQUAM DECURRITUR AD EXTRAORDINARIUM SED UBI DEFICIT ORDINARIUM. A maxim meaning "We are never to resort to what is extraordinary, but [until] what is ordinary fails."[71]

NUNQUAM FICTIO SINE LEGE. A maxim meaning "There is no fiction without law."[72]

NUNQUAM INDEBITATUS. Literally "Never indebted."[73] (See, generally, Assumpsit, Action of.)

This plea created an issue which was tried by the court by inspection of the record, and was fully met by production of the record, properly authenticated. Hoffheimer *v.* Stiefel, 17 Misc. (N. Y.) 236, 238, 39 N. Y. Suppl. 714.

61. Black L. Dict.

It is a plea of the general issue to a real action by which the defendant denies that he committed any wrong. Black L. Dict.

62. Burrill L. Dict.

It is the name of a plea, in an action of waste, denying committing of waste, and forming the general issue. Black L. Dict.

63. Webster Dict. [*quoted* in Will *v.* Mendon, 108 Mich. 251, 258, 66 N. W. 58].

64. Bouvier L. Dict.

Construed as meaning merely "number" see Duvall *v.* State, 63 Ala. 12, 17; *In re* Hadley, 11 Fed. Cas. No. 5,894 [*cited* in *In re* Currier, 6 Fed. Cas. No. 3,492, 2 Lowell 436].

Construed as meaning "number" and "amount" see *In re* Hymes, 12 Fed. Cas. No. 6,986, 7 Ben. 427, 431 [*cited* in *In re* Currier, 6 Fed. Cas. No. 3,492, 2 Lowell 436].

"Number of days" see Chase *v.* Cleveland, 44 Ohio St. 505, 513, 9 N. E. 225, 58 Am. Rep. 843.

"Number one white wheat" see Berry *v.* Kowalsky, 95 Cal. 134, 141, 30 Pac. 202, 29 Am. St. Rep. 101.

65. Morgan Leg. Max.

66. Peloubet Leg. Max.

67. Black L. Dict.

They are "ordinary" or "extraordinary" according as they are sent for general purposes, or on a special mission. Black L. Dict.

68. Burrill L. Dict.

This phrase signifies a thing done now that shall have the same legal force and effect if done at the time it ought to have been done. Secou *v.* Laroux, 1 N. M. 388, 389. See also Mayer *v.* Haggerty, 138 Ind. 628, 631, 38 N. E. 42; Perkins *v.* Hayward, 132 Ind. 95, 101, 31 N. E. 670.

The entry of judgment *nunc pro tunc* is retrospective, except as to the rights of third parties. Burns *v.* Skelton, 29 Tex. Civ. App. 453, 454, 68 S. W. 527.

69. Morgan Leg. Max.

70. Bouvier L. Dict.

71. Black L. Dict.

72. Bouvier L. Dict.

73. Burrill L. Dict.

It is the name of a plea in action of *indebitatus assumpsit,* by which defendant al-

NUNQUAM NIMIS DICITUR QUOD NUNQUAM SATIS DICITUR. A maxim meaning "What is never sufficiently said is never said too much." [74]

NUNQUAM PRÆSCRIBITUR IN FALSO. A maxim meaning "Prescription is never founded in falsehood." [75]

NUNQUAM RES HUMANÆ PROSPERE SUCCEDUNT UBI NEGLIGUNTUR DIVINÆ. A maxim meaning "Human affairs never prosper where things divine are neglected." [76]

NUPER OBIT. In practice, the name of a writ (now abolished) which, in the English law, lay for a sister co-heiress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor dies seised of an estate in fee-simple.[77]

NUPTIAS NON CONCUBITUS SED CONSENSUS FACIT. A maxim meaning "Not cohabitation but consent makes the marriage." [78]

NURSE. The verb, used with reference to an adult, conveys the idea that the object of care is sick or is an invalid.[79] (See NURSING.)

NURSE CHILDREN. Children until they reach eight years of age.[80]

NURSERY. As used in respect to horticulture, a place where young trees are propagated, for the purpose of being transplanted into orchards, plantations, etc.[81] (Nursery: Stock of as Fixture, see FIXTURES.)

NURSING. Aid rendered in sickness.[82] (See NURSE.)

NURTURE. To educate; to train; to bring up.[83]

NUT LOCK. A device for fastening a bolt nut in place and prevent its becoming loose by the jarring or tremulous motion of machinery.[84]

N. W. An abbreviation for "north-west" or "north-western." [85]

O/A or **OUR A/** or **OUR A/C** or **OUR ACC'T.** Words or abbreviations meaning "our account." [86]

OATH OF ALLEGIANCE. Synonymous with the words "oath of enlistment." [87] (See, generally, ALIENS; ARMY AND NAVY; MILITIA.)

leges that he is not indebted to plaintiff. Black L. Dict.

74. Black L. Dict.

75. Morgan Leg. Max.

76. Peloubet Leg. Max.

77. Black L. Dict.

78. Bouvier L. Dict.

Applied in: Davis *v.* Davis, 1 Abb. N. Cas. (N. Y.) 140, 149; Hall *v.* Wright, E. B. & E. 746, 761, 6 Jur. N. S. 193, 29 L. J. Q. B. 43, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 160, 96 E. C. L. 746.

79. Van Hook *v.* Young, 29 Ind. App. 471, 64 N. E. 670, 671, where it is said that it means more than general watchfulness.

80. Dumbelton *v.* Beckford, 2 Salk. 470.

81. Atty.-Gen. *v.* State Bd. of Judges, 38 Cal. 291, 296.

82. Peterborough *v.* Lancaster, 14 N. H. 382, 391.

83. Reg. *v.* Clarke, 7 E. & B. 186, 193, 3 Jur. N. S. 335, 26 L. J. Q. B. 169, 5 Wkly. Rep. 222, 90 E. C. L. 186.

84. Chicago R. Equipment Co. *v.* Interchangeable Brake-Beam Co., 99 Fed. 777, 779.

85. Webster Int. Dict. See Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 587, 74 N. W. 881; Harrington *v.* Fish, 10 Mich. 415.

86. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311, 338.

87. *In re* Ferrens, 8 Fed. Cas. No. 4,746, 3 Ben. 442, 447.

OATHS AND AFFIRMATIONS

By John Thornley

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I. TERMINOLOGY.

A. Oath — 1. GENERAL DEFINITION. An oath may be defined as an avowal of truth before God,[1] or more exactly, an appeal to God to regard the truth of the words of him who swears,[2] and punish him if he utter falsehood.[3] In its broadest

1. State *v.* Washington, 49 La. Ann. 1602, 1603, 22 So. 841, 42 L. R. A. 553 (where an oath is defined as "an appeal to God by the witness affirming that he will speak the truth on the witness stand"); Blair *v.* Seaver, 26 Pa. St. 274, 277 (where an oath is called "a solemn appeal to the Creator of the Universe that the truth only shall be witnessed").

2. Cubbison *v.* McCreary, 2 Watts & S. (Pa.) 262, 263, defining an oath as "an appeal to the Supreme Being for the truth of what the party declares." And see the cases cited in the note following.

3. Blocker *v.* Burness, 2 Ala. 354, 355, where the court said: "An oath is a solemn adjuration to God, to punish the affiant if he swears falsely." *Compare*, however, Clin-

sense it includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully.[4]

2. Corporal Oath. The term corporal oath must be construed as applying to any bodily assent to the oath by the witness.[5]

3. Judicial and Extrajudicial Oath. A judicial oath is one that is taken in some judicial proceeding.[6] An extrajudicial oath or non-judicial oath is one that is taken outside of a judicial proceeding without special authority of law, but taken formally before a person having authority to administer an oath or affirmation.[7]

B. Affirmation. An affirmation is a solemn and formal declaration or assertion that an affidavit is true, that the witness will tell the truth, etc., this being substituted for an oath in certain cases.[8]

II. Essence of Oath.

A. At Common Law. The essential requisite of an oath at common law is belief by the witness or affiant in the existence of a God, who will punish him if he swears falsely,[9] and an appeal to such God as the rewarder of truth and the

ton *v.* State, 33 Ohio St. 27, 33, where it is said: "The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon him to punish the false-swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability, the law best insures the utterance of truth."

Other definitions are: "An appeal to God, by the witness, for the truth of what he declares, and an imprecation of divine vengeance upon him, if his testimony shall be false." Atwood *v.* Welton, 7 Conn. 66, 73.

"The calling upon God to witness, that what is said by the person sworn is true, and invoking the Divine vengeance upon his head, if what he says is false." Brock *v.* Milligan, 10 Ohio 121, 123.

"An outward pledge given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God." Bouvier L. Dict. [*quoted* in Priest *v.* State, 10 Nebr. 393, 399, 6. N. W. 468].

"A declaration or promise made by calling on God to witness what is said." *In re* Heath, 40 Kan. 333, 335, 19 Pac. 926.

"A religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith." Bouvier L. Dict. [*quoted* in Arnold *v.* Middletown, 41 Conn. 206, 209]. "A religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth." Rex *v.* White, Leach C. C. 482. All oaths spoken of in the scriptures, both of the old and new testaments, are obviously regarded as religious ceremonies. Arnold *v.* Arnold, 13 Vt. 362, 367.

4. Bouvier L. Dict. [*quoted* in State *v.* Gay, 59 Minn. 6, 21, 60 N. W. 676, 50 Am. St. Rep. 389].

By statutory provision in many jurisdictions the term "oath" includes "affirmation." See the statutes of the several states. And see Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. L. Rep. 344; State *v.* Welch, 79 Me. 99, 8 Atl. 348.

A lawfully administered oath is "one administered pursuant to, or as required or authorized by, some law." State *v.* McCarthy, 41 Minn. 59, 60, 42 N. W. 599.

"Oath" included in the term "affidavit" see Affidavits, 2 Cyc. 4.

"Official oath" not included in "affidavit" see Tompert *v.* Lithgow, 1 Bush (Ky.) 176.

5. State *v.* Norris, 9 N. H. 96, 102. See Corporal Oath, 9 Cyc. 997.

Now synonymous with solemn oath.—Jackson *v.* State, 1 Ind. 184; Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. L. Rep. 344. See Corporal Oath, 9 Cyc. 997.

May stand for lifting up an arm or bodily member.— Respublica *v.* Newell, 3 Yeates (Pa.) 407, 412, 2 Am. Dec. 381.

6. State *v.* Scatena, 84 Minn. 281, 87 N. W. 764. See, generally, Perjury.

Before an officer in open court.— State *v.* Dreifus, 38 La. Ann. 877.

7. State *v.* Scatena, 84 Minn. 281, 87 N. W. 764.

Taken before an officer ex parte or out of court.— State *v.* Dreifus, 38 La. Ann. 877.

8. Black L. Dict.

Other definitions are: "A mere promise to tell the truth." Perry *v.* Com., 3 Gratt. (Va.) 602, 608.

"A solemn religious asseveration in the nature of an oath." Bouvier L. Dict.

Sworn complaint.—A complaint for search and seizure of intoxicating liquors, made on affirmation by one who has conscientious scruples against taking an oath, is a sworn complaint, under statutes containing various provisions making an affirmation equivalent to an oath in the case of such persons. State *v.* Welch, 79 Me. 99, 8 Atl. 348.

9. Blocker *v.* Burness, 2 Ala. 354; Cubbison *v.* McCreary, 2 Watts & S. (Pa.) 262; Miller *v.* Salomons, 7 Exch. 475 [*affirmed* in 8 Exch. 778, 17 Jur. 463, 22 L. J. Exch. 169, 21

avenger of falsehood.[10] But the belief need not be, inevitably, that of the religion of the bible,[11] and the oath of any person who holds this essential belief, whatever his sect or creed, is sufficient.[12]

B. Effect of Constitutional and Statutory Provisions. The tendency of modern constitutions and statutes is to abolish the religious test of the common law.[13] The religious belief of a person taking an oath may, however, be shown to impeach his credibility.[14]

III. WHO MAY ADMINISTER.

A. In General. If no particular officer is designated to administer an oath or affirmation in a particular case or for a particular purpose, any officer authorized to administer oaths or affirmations generally may do so;[15] but an officer cannot administer an oath to himself.[16] A statutory provision that certain officers may "administer oaths necessary in the performance of their duties" relates to matters filed with or business transacted before the officer in which an oath is required and in reference to which some duty is enjoined upon him.[17] Where an act of congress requires an oath to be administered, such oath, under the usage of the proper department of government, may be administered by a state officer

L. T. Rep. N. S. 198, 1 Wkly. Rep. 360]. See also *supra*, I, A.

The sanction of the oath is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood. Blocker *v.* Burness, 2 Ala. 354, 355. The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being and this is the sanction which the law requires upon the conscience of a person, before it admits him to testify. Wakefield *v.* Ross, 28 Fed. Cas. No. 17,050, 5 Mason 16, 19 note.

Where a person has no belief in a Supreme Being he can do nothing which would be binding on his conscience as an oath. Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667, 49 J. P. 500, 54 L. J. Q. B. 205, 52 L. T. Rep. N. S. 589, 33 Wkly. Rep. 673.

10. "All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falsehood." Sanderson de Jusjuramentis Obligatio [*quoted* in Omychund *v.* Barker, 1 Atk. 21, 48, 26 Eng. Reprint 15, 2 Eq. Cas. Abr. 397, 22 Eng. Reprint 339, Willes 538]. And see *supra*, I, A.

11. Clinton *v.* State, 33 Ohio St. 27, where it is said that "an oath is no more a part of christianity than of every other religion in the world," and that belief in a Superior Being who will punish false swearing is sufficient.

"**Oaths are as old as the creation.** . . . The nature of an oath is not at all altered by Christianity, but only made more solemn from the sanction of rewards and punishments being more openly declared." Omychund *v.* Barker, 1 Atk. 21, 45, 2 Eq. Cas. Abr. 397, 22 Eng. Reprint 339, Willes 538, in which case it was held that the depositions of persons of the gentoo religion were to be received.

12. Arnold *v.* Arnold, 13 Vt. 362; Reg. *v.* Pah-Mah-Gay, 20 U. C. Q. B. 195.

Competency of witnesses as affected by religious belief see, generally, WITNESSES.

13. Fuller *v.* Fuller, 17 Cal. 605; Hronek *v.* People, 134 Ill. 139, 152, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837; Bush *v.* Com., 80 Ky. 244, 249 (where it is said: "We are of the opinion that the constitution changes the common law rule, and makes competent as witnesses all persons so far as any religious test is concerned"); Perry *v.* Com., 3 Gratt. (Va.) 632. But *compare* Clinton *v.* State, 33 Ohio St. 27, 33, where it is said: "Under our constitution the character of a man's religious belief is not permitted to affect his competency as a witness; yet, to render him competent to take an oath as a witness, his moral nature must be strengthened, and his conscientiousness be quickened, by a belief in a supreme being, who will certainly, either in this life or the life to come, punish perjury."

Competency of witnesses see, generally, WITNESSES.

14. Searcy *v.* Miller, 57 Iowa 613, 10 N. W. 912; Hunscom *v.* Hunscom, 15 Mass. 184; Stanbro *v.* Hopkins, 28 Barb. (N. Y.) 265. See, generally, WITNESSES.

15. Dunn *v.* Ketchum, 38 Cal. 93; Allen *v.* People, 77 Ill. 484.

Implied authority.— The authority to administer an oath may be implied. Bucher *v.* Thompson, 7 N. M. 115, 32 Pac. 498. And see People *v.* Wright, 3 Hun (N. Y.) 306.

A woman may be authorized by the legislature to administer an oath or affirmation. Opinion of Justices, 62 Me. 596; Warwick *v.* State, 25 Ohio St. 21.

16. *In re* South Beaver Tp. Road, 8 Kulp (Pa.) 75.

17. Wheat *v.* Ragsdale, 27 Ind. 191.

having authority to administer oaths.[18] The administration of an oath by an officer is a ministerial and not a judicial act.[19]

B. The Court. A court has inherent authority to administer an oath or affirmation;[20] and an oath administered by an officer in open court under the direction of the court is administered by the court,[21] as is also an oath administered out of the presence of the court by its delegate.[22]

C. Various Officers. Except as above stated,[23] officers, as such, have authority to administer oaths and affirmations only when and as authorized by the constitution or by statute;[24] but such authority has been so conferred, either generally or in particular cases, upon various officers, such as clerks of court[25] and their

18. U. S. *v.* Winchester, 28 Fed. Cas. No. 16,739, 2 McLean 135.

19. Betts *v.* Dimon, 3 Conn. 107 (so holding as to the administration of the oath provided for poor imprisoned debtors); Ferguson *v.* Smith, 10 Kan. 396 (so holding as to the power to administer oaths given to clerks of the district court, notaries public, county clerks, and registers of deeds); Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38; *In re* Golding, 57 N. H. 146, 149, 24 Am. Rep. 66.

Disqualification by interest.— A magistrate is not precluded from taking the oath of a creditor as to charges of fraud against the debtor by the fact that he is the attorney of record of the creditor, since the administration of the oath is purely ministerial. Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38.

20. State *v.* Caywood, 96 Iowa 367, 65 N. W. 385; State *v.* Townley, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636.

Authority incidental to every court.— "The power to administer oaths is, however, an incident to all courts. It belongs to all courts. Whenever a court is created, that power is also necessarily created as being a necessary incident to the court." Ferguson *v.* Smith, 10 Kan. 396, 404.

Judicial notice of a court's authority.— "We must know judicially that the court had authority to administer the oath, either by the judge or by the clerk or deputy." Keator *v.* People, 32 Mich. 484, 487.

A referee has no inherent authority to administer an oath. His power is derived from statute or the order of the court appointing him, which order must be either formal or at least appear on the record. A mere note on the judge's calendar is not enough. Bonner *v.* McPhail, 31 Barb. (N. Y.) 106. A referee cannot delegate this authority, and therefore it is error for him to receive in evidence an affidavit taken before a commissioner of deeds. Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. (N. Y.) 479. See, generally, REFERENCES.

21. *California.*— Oaks *v.* Rodgers, 48 Cal. 197.

Indiana.—Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Louisiana.— State *v.* Dreifus, 38 La. Ann. 877.

Michigan.— Keator *v.* People, 32 Mich. 484.

North Carolina.— State *v.* Knight, 84 N. C. 789, where the oath was administered at an inquest at request of the coroner.

Tennessee.— Ayrs *v.* State, 5 Coldw. 26.

Although the officer be incompetent.— Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; State *v.* Knight, 84 N. C. 789.

The oath may be administered by any one in the presence and by the direction of the court, and the person acting in behalf of the court in such case is a mere instrument, the mouthpiece of the court, and is so regarded, and must be so alleged in all legal proceedings. State *v.* Knight, 84 N. C. 789, 793. And see Phillipi *v.* Bowen, 2 Pa. St. 20.

Out of court the court cannot cause an oath to be taken without statutory authority. Frye *v.* Barker, 2 Pick. (Mass.) 65.

An oath administered by an unofficial person, acting for the clerk, at his request, in open court, has been held good. Stephens *v.* State, 1 Swan (Tenn.) 157.

Interpreter.— The court may administer an oath through an interpreter. Com. *v.* Jongrass, 181 Pa. St. 172, 174, 37 Atl. 207, where it is said: "It was done in the presence and under the immediate direction of the court. Under such circumstances if it had been administered by a bystander it would have bound the conscience of the witness both in law and in morals as a valid oath."

Administration of oath a ministerial act.— State *v.* Knight, 84 N. C. 789, 793.

22. Phillipi *v.* Bowen, 2 Pa. St. 20.

An officer of the court, as such, has authority to administer an oath only when acting in the presence and at the request of a judge. Roberts *v.* Central Pass. R. Co., 1 Brewst. (Pa.) 538.

23. See *supra*, III, B.

24. Albee *v.* May, 8 Blackf. (Ind.) 310; Tompert *v.* Lithgow, 1 Bush (Ky.) 176 (holding that the clerk of the board of aldermen of the city of Louisville had no authority to administer oaths); State *v.* Isaac, 3 La. Ann. 359; Carlee *v.* Smith, 8 Tex. 134. And see the other cases cited in the notes following.

Master in chancery.— An answer in equity must, if made by a person out of the state, be sworn to before a judge of some court having a seal. A master extraordinary, in the English court of chancery, has no authority to administer such oath. Lahens *v.* Fielden, 1 Barb. (N. Y.) 22.

25. *Illinois.*— Fergus *v.* Hoard, 15 Ill. 357, holding that the clerk of the circuit court was authorized to administer an oath in

deputies;[26] attorneys at law;[27] county auditors;[28] commissioners of one state in

proceedings to obtain a capias ad respondendum.

Kentucky.— Laha *v.* Daly, 1 Bush 221, holding that under a statute giving clerks of courts authority to administer oaths pertaining to any matter concerning their office or pending in the court, a clerk had authority to administer oaths of claimants to demands against decedents' estates.

New Mexico.—Bucher *v.* Thompson, 7 N. M. 115, 32 Pac. 498, holding that the clerks of the probate courts had authority by implication to administer the oath required in the verification of a claim for a mechanic's lien, as the legislature in various acts, without expressly conferring such power, assumed its existence as incident to the office and provided compensation for its exercise.

Texas.—Smith *v.* Wilson, 15 Tex. 132, holding that under the statute the clerk of the district court had authority to administer all requisite oaths in proceedings appertaining to that court.

West Virginia.— Parker *v.* Clark, 7 W. Va. 467 (holding that the clerk of the district court of the United States for the district of West Virginia was authorized to administer an oath, under Code (1860), c. 176, § 27, in any case therein provided, as he was embraced within the words "or the clerk of any court"); Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234 (holding that under the code provision that "a clerk of a court or his deputy may administer an oath in any case wherein an affidavit is necessary or proper," a bill for an injunction might be sworn to before the clerk of the circuit court of one county, although the suit was brought in another county).

See 37 Cent. Dig. tit. "Oath," § 3½. And see CLERKS OF COURTS, 7 Cyc. 224.

When unauthorized.— Constitutional or statutory authority is essential. Clerks, except in cases specially provided for by law, are authorized to administer oaths only in open court. State *v.* Isaacs, 3 La. Ann. 359; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498. The clerk of the circuit court in vacation is not, in the absence of a statute, authorized to administer an oath to an affidavit in verification of a statement of the cause of contesting the election of a county officer before the board of county commissioners. Albee *v.* May, 8 Blackf. (Ind.) 310. Under a statute authorizing the clerks of district courts to administer oaths "in all cases required in the discharge of the duties of their office," the administration of the oath by a clerk of the district court on petition for a writ of certiorari was held to be unauthorized, since that did not pertain to his official duties. Carlee *v.* Smith, 8 Tex. 134.

Oaths administered in court see *supra*, III, B.

Affidavits see AFFIDAVITS, 2 Cyc. 11.

26. *Georgia.*— Graves *v.* Warner, 26 Ga. 620, holding that the deputy clerk had power to administer to a party for an appeal an oath that he was unable from his poverty to pay costs or give an appeal-bond.

Kansas.— Ferguson *v.* Smith, 10 Kan. 396, holding that under a statute authorizing clerks of the district courts to administer oaths and to appoint deputies a deputy clerk of the district court had authority to administer oaths.

Kentucky.— Ellison *v.* Stevenson, 6 T. B. Mon. 271, holding that a deputy clerk had authority to take claims of witnesses for their attendance.

Ohio.— Warwick *v.* State, 25 Ohio St. 21, holding that the deputy clerk of the probate court was authorized to administer the necessary oaths pertaining to applications for marriage licenses.

Pennsylvania.— Reigart *v.* McGrath, 16 Serg. & R. 65, holding that on appeal to the mayor's court the deputy of the clerk of that court might administer the oath.

Tennessee.— Campbell *v.* Boulton, 3 Baxt. 354, holding that, in all cases where the clerk of court is authorized to administer oaths, such act may be performed by deputy.

See 37 Cent. Dig. tit. "Oath," § 9. And see CLERKS OF COURTS, 7 Cyc. 249.

Title to office and qualification.— One cannot as deputy clerk administer an oath, unless he has been duly appointed in writing and taken the oath of office, as required by statute. Muir *v.* State, 8 Blackf. (Ind.) 154. So where a clerk made a verbal request to an individual to attend to all the duties of his office in his absence, but did not appoint him his deputy, and no oath was administered to such person, it was held that he had no power to administer an oath or issue a writ. Atkinson *v.* Micheaux, 1 Humphr. (Tenn.) 312. *Compare*, however, Izer *v.* State, 77 Md. 110, 26 Atl. 282, holding that where a person had been in undisputed possession of the office of deputy clerk for several years, and had openly and notoriously discharged the functions appertaining thereto, the mere fact that he had not been legally appointed did not operate to invalidate any of his acts done in an official capacity, and that he could legally administer an oath to a witness.

27. Attorneys were given authority to administer oaths in foreclosure proceedings by the Michigan act of 1877, but they had no such authority prior thereto. Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381. A creditor's attorney could administer the oath required by Me. Rev. St. c. 113, § 2, to authorize the arrest of a debtor about to leave the state. McLean *v.* Weeks, 61 Me. 277.

Power to take affidavits see AFFIDAVITS, 2 Cyc. 12.

28. Wheat *v.* Ragsdale, 27 Ind. 191 (as clerk of the board of county commissioners in an election contest); Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463. See COUNTIES, 11 Cyc. 439.

another;[29] special commissioners, including special commissioners to make a special assessment;[30] consuls;[31] county clerks,[32] and their deputies;[33] county treasurers;[34] election officers;[35] judges;[36] justices of the peace;[37] mayors;[38] notaries

29. Sugar *v.* Sackett, 13 Ga. 462; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169 [*distinguishing* Draper *v.* Williams, 8 Blackf. (Ind.) 574]; Com. *v.* Smith, 11 Allen (Mass.) 243.

Commissioners of deeds authorized to take evidence without the state see AFFIDAVITS, 2 Cyc. 14 note 61.

30. Peck *v.* People, 153 Ill. 454, 39 N. E. 117.

Omission to take statutory oath.—A special commissioner has no authority to administer oaths to appraisers of property about to be sold unless he has taken the oath required of special commissioners. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818.

31. The act of congress concerning consuls empowered them to administer oaths only in particular cases of a maritime and commercial character. Herman *v.* Herman, 12 Fed. Cas. No. 6,407, 4 Wash. 555. But under an act authorizing any "representative of the United States" abroad to administer an oath or affirmation to hold to bail, it was held that a consul might administer such an oath. Seidel *v.* Paschkow, 27 N. J. L. 427. A foreign consul residing in another county has no authority, except as authorized by act of congress, to administer an oath required by the laws of the United States. Otterbourg *v.* U. S., 5 Ct. Cl. 440.

32. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Tabor *v.* People, 84 Ill. 202; Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389. See COUNTIES, 11 Cyc. 436.

33. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Finn *v.* Rose, 12 Iowa 565; Wood *v.* Bailey, 12 Iowa 46; Torrans *v.* Hicks, 32 Mich. 307; Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389.

Temporary absence of clerk.— But where a statute authorized a deputy to perform the duties of the clerk when the latter should be absent from his office, it was held that a mere temporary absence was not enough to give the deputy authority to act, but that the clerk must have withdrawn from the exercise of the duties of his office, or removed so far away from his office as to render it impossible or inconvenient to communicate with him. Lucas *v.* Ensign, 4 N. Y. Leg. Obs. 143.

Power as to affidavits see AFFIDAVITS, 2 Cyc. 12.

34. Maloney *v.* Mahar, 1 Mich. 26. See COUNTIES, 11 Cyc. 437.

35. People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451 (holding that an oath administered by an inspector of election to a challenged voter was binding, although the inspectors were never sworn, in that they took the oath on a book called "Watts' Psalms and Hymns"); Campbell *v.* People, 8 Wend. (N. Y.) 636. See ELECTIONS, 15 Cyc. 367.

36. Collins *v.* Rutherford, 38 Ga. 29; Alexander *v.* Polk, 39 Miss. 737; Lahens *v.* Fielden, 1 Barb. (N. Y.) 22; Wood *v.* Williams, 1 N. Y. Leg. Obs. 154; U. S. *v.* Ambrose, 2 Fed. 556. And see JUDGES, 23 Cyc. 538.

Affidavits see AFFIDAVITS, 2 Cyc. 9.

Courts see *supra*, III, B.

37. *Alabama.*— Bloodgood *v.* Smith, 14 Ala. 423.

Arkansas.— Humphries *v.* McCraw, 5 Ark. 61, holding that, although a justice of the peace is not authorized to act judicially beyond his township, he may administer oaths anywhere within the limits of the county for which he was appointed.

Connecticut.—Betts *v.* Dimon, 3 Conn. 107, holding that a justice of the peace is a county officer having powers coextensive with the county limits, and hence is authorized to administer oaths only within the county.

Dakota.— St. Paul, etc., R. Co. *v.* Covell, 2 Dak. 483, 11 N. W. 106, holding that a justice of the peace may administer the oath to a witness testifying before commissioners to estimate damages in railroad condemnation proceedings.

Georgia.— Collins *v.* Rutherford, 38 Ga. 29.

Iowa.— Snell *v.* Eckerson, 8 Iowa 284.

Maine.— McLean *v.* Weeks, 61 Me. 277; Bamford *v.* Melvin, 7 Me. 14.

New York.— People *v.* Brooks, 1 Den. 457, 43 Am. Dec. 704. Under a statute empowering judges of courts of record to administer oaths, it was held that such authority was not conferred upon an assistant justice of the peace of a ward court. Wood *v.* Williams, 1 N. Y. Leg. Obs. 154.

North Carolina.— Colbert *v.* Piercy, 25 N. C. 77.

Pennsylvania.— Wagner *v.* Baker, 2 Am. L. J. 224; Kettler's Case, 1 Ashm. 131.

Tennessee.— Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925. *Compare* Graham *v.* Caldwell, 8 Baxt. 69.

See 37 Cent. Dig. tit. "Oath," § 4.

At common law a justice of the peace had no authority to administer oaths of a civil nature. Perry *v.* Thompson, 16 N. J. L. 72; Munn *v.* Merry, 14 N. J. L. 183; Kettler's Case, 1 Ashm. (Pa.) 131. And see Trabue *v.* Holt, 2 Bibb (Ky.) 393.

The certificate of a foreign justice of the peace that an oath was taken before him is not credited, except upon an answer in chancery. Ramy *v.* Kirk, 9 Dana (Ky.) 267. Authority of the justice must be shown in order that an oath administered by him may be credited in a foreign state. Den *v.* Thompson, 16 N. J. L. 72.

Power as to affidavits: Generally see AFFIDAVITS, 2 Cyc. 11. Without the state see AFFIDAVITS, 2 Cyc. 14.

38. Drew *v.* Morrill, 62 N. H. 23. A mayor has authority to administer an oath only when and as authorized by statute. Payne *v.* San Francisco, 3 Cal. 122.

public;[39] prothonotaries and their deputies;[40] town-clerks;[41] recorders;[42] and sheriffs and their deputies.[43]

D. De Facto Officers. An oath or affirmation administered by a *de facto* officer is as valid and binding as if he were an officer *de jure*.[44]

IV. FORM AND SUFFICIENCY.

Oaths are to be administered to all persons according to their own opinions and as it most affects their consciences.[45] The uplifting of the hand is formal enough

39. See NOTARIES.

40. Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1; Com. *v.* Jermon, 29 Leg. Int. (Pa.) 165.

41. Wright *v.* Taplin, 65 Vt. 448, 26 Atl. 1105, holding that Rev. Laws, § 8689, providing that town-clerks may administer oaths when the instrument sworn to is "returnable" to their office, includes chattel mortgages which are to be filed in their office.

42. Arrington *v.* Wittenberg, 12 Nev. 99, holding that under 2 Comp. Laws, § 2995, providing that the county recorders of the several counties within the state are empowered to take and certify the acknowledgment and proof of all conveyances affecting any real estate or of any other written instrument, and 1 Comp. Laws, §§ 239, 243, providing that no proofs shall be granted, except on the oath or affirmation of a competent and credible witness, the county recorder is authorized to administer oaths and take and certify the proofs and proceedings to foreclose mechanics' liens.

43. Conable *v.* Hylton, 10 Iowa 593 (holding that a deputy sheriff has the same power as his principal to administer an oath to his garnishee, when required to do so by plaintiff); Dunlap *v.* McFarland, 25 Kan. 488 (holding that where a deputy sheriff serves an order of attachment he may administer the oath to the appraisers of the property attached, as he has the same power as the sheriff therein); Lambert *v.* De Santos, 10 La. Ann. 725 (holding that under Code Prac. art. 771, providing that the deputy sheriff may represent the sheriff in all duties confided by law to the latter, a deputy sheriff may administer an oath to the appraisers of property sold under a writ of seizure and sale). See, generally, SHERIFFS AND CONSTABLES.

44. Walker *v.* State, 107 Ala. 5, 18 So. 393; Izer *v.* State, 77 Md. 110, 26 Atl. 282. And see, generally, OFFICERS.

Whether perjury may be predicated on such oath see PERJURY.

45. Gill *v.* Caldwell, 1 Ill. 53; Com. *v.* Buzzell, 16 Pick. (Mass.) 153, 157 (where the court said: "It was also a rule of law, now adopted in practice, that a witness is to be sworn, according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs"); Riddles *v.* State, (Tex. Cr. App. 1898) 46 S. W. 1058 (so holding as to a juror's oath, under the constitution); Edmonds *v.* Rowe, R. & M. 77, 21 E. C. L. 705.

On the bible.—It has been held that Roman catholic witnesses were properly required to swear by laying the hand on the bible while the oath was administered, and kissing the book afterward, while protestant witnesses swore in the usual form by holding up the hand, since it was due to no invidious distinction, but because the oath on the book was deemed more binding on the catholic conscience. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

Hebrew oath.—It was ordered that the oath of a Jew to an injunction bill be sworn according to the form and solemnities of the Jewish religion (Newman *v.* Newman, 7 N. J. Eq. 26), upon the Pentateuch (Anonymous, 1 Vern. Ch. 263, 23 Eng. Reprint 459), with hat on head (Sessenwein *v.* Palmer, 3 Quebec Pr. 110).

Gentoo oath.—Depositions sworn according to the form of the gentoo religion have been held good. Omychund *v.* Barker, 1 Atk. 21, 26 Eng. Reprint 15, 2 Eq. Cas. Abr. 397, 22 Eng. Reprint 339, Willes 538.

Mahometan oath.—Upon the alcoran, with ceremony. Rex *v.* Morgan, Leach C. C. 64.

Chinese oaths.—Although a Chinaman stated that he believed in the christian God, it was held error to swear him by holding up the hand with the usual formula, when it appeared that he still held his native religion, especially as he further stated that the joss-stick burning was the true form of oath among the Chinese. State *v.* Chyo Chiagk, 92 Mo. 395, 4 S. W. 704. Chinese witnesses were sworn each by blowing out a lighted candle, and declaring that if he did not tell the truth he would be blown out in like manner. State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961. Chicken oath administered see Bow *v.* People, 160 Ill. 438, 43 N. E. 593. A Chinese witness knelt and broke a saucer, then the oath was administered as follows: "You shall tell the truth and the whole truth; the saucer is cracked and if you do not tell the truth, your soul will be cracked like the saucer." Reg. *v.* Entrehman, C. & M. 248, 41 E. C. L. 139.

Affirmation is not permitted, unless religious scruples of the witness against swearing are shown. Williamson *v.* Carroll, 16 N. J. L. 217; State *v.* Putnam, 1 N. J. L. 260; Reg. *v.* Moore, 17 Cox C. C. 458, 56 J. P. 345, 61 L. J. M. C. 80, 66 L. T. Rep. N. S. 125, 40 Wkly. Rep. 304. The oath required by N. C. Act (1903), c. 453, of an assignor for benefit of creditors, to a schedule of preferred debts, is not sufficient, no bible being used, as required by Code, § 3309, and it not appearing that the assignor had any con-

to make an oath legal and binding.[46] In swearing an affidavit, a solemn or corporal oath has been held not essential.[47] If a statute lays down a particular form of oath or affirmation that form must be followed.[48] In many cases, however, it

scientious scruples about taking an oath with a bible, but merely that he had no bible. Pearre *v.* Folb, 123 N. C. 239, 31 S. E. 475. Under Tex. Bill of Rights, § 5, providing that "all oaths or affirmations shall be administered in the mode most binding upon the consciences," and Rev. Civ. St. art. 370, providing that, unless a different meaning is apparent from the context, the word "swear," or "sworn," includes "affirm," one called as a juryman who refused to make oath touching his qualifications on account of conscience, but offered to affirm, should be allowed to affirm. Riddles *v.* State, (Tex. Cr. App. 1898) 46 S. W. 1058.

Quakers.—But as early as Lord Mansfield's time quakers were allowed to make solemn affirmation instead of taking an oath. Atcheson *v.* Everitt, Cowp. 382. And see Clarke *v.* Bradlaugh, 7 Q. B. D. 38, 45 J. P. 484, 50 L. J. Q. B. 342, 44 L. T. Rep. N. S. 667, 29 Wkly. Rep. 516. In Canada an order to hold to bail was held to have been properly granted on an affirmation made by a quaker in New York properly verified before the city recorder. Smith *v.* Lawrence, 3 U. C. Q. B. O. S. 18. Where it appeared that the witness had a religion, he was not allowed to affirm. Nash *v.* Ali Khan, 8 T. L. R. 444.

Two forms of oath may be administered to the same witness. Bow *v.* People, 160 Ill. 438, 439, 43 N. E. 593 (holding that where, in addition to the usual oath, defendant's counsel moved that the "chicken oath" be also administered to the Chinese witnesses and the trial judge allowed those witnesses who were willing to take this form of oath to do so, on appeal it was held that defendant could not complain of a witness having thus been sworn in two ways as it was at his request that the extra oath was administered); State *v.* Gin Pon, 16 Wash. 425, 426, 47 Pac. 961.

In the absence of express statute, a witness is to be sworn in such form as he considers binding on his conscience. Gill *v.* Caldwell, 1 Ill. 53; Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. L. Rep. 344.

46. Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. L. Rep. 344 (holding that an oath by the uplifted hand without the bible was good at common law as well as by statute); State *v.* Whisenhurst, 9 N. C. 458, Looper *v.* Bell, 1 Head (Tenn.) 373; Doss *v.* Birks, 11 Humphr. (Tenn.) 431. But *compare* Pearre *v.* Folb, 123 N. C. 239, 31 S. E. 475; State *v.* Davis, 69 N. C. 383, both holding that the oath must be in the statutory form, namely, by laying the hand on the book of the holy evangelists, and with the words "so help me God," kissing the book, unless the witness be shown to have religious scruples against that form.

47. McCain *v.* Bonner, 122 Ga. 842, 846, 51 S. E. 36 [*quoting* 2 Cyc. 16: "It is not essential . . . that affiant should hold up his hand and swear in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing"]. See also AFFIDAVITS, 2 Cyc. 17 note 73.

Informality.— Where a person prepares the necessary papers to sue out a distress warrant, and takes them to a magistrate, and reads to him the affidavit which he has signed, and states to the magistrate that he will swear to the facts therein recited, and the magistrate signs it with the understanding that affiant's intention is to swear to the truth of the facts as stated in the affidavit, and returns the papers to the affiant properly attested, neither the affiant nor any third person can assert that the distress warrant is void because not based on an affidavit made by a person to whom an oath was legally administered. McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36.

Some unequivocal form of oath is always requisite. The mere delivery of an affidavit signed by the person delivering it to the officer for his certification, neither one saying a word, was held not such an unequivocal and present act in the presence of the officer as to bind the conscience and there was no oath; the court saying: "Some form of an oath has always been required, for the double reason that only by some unequivocal form could the sworn be distinguished from the unsworn averment," referring to statutory requirements, continuing, "A wide scope, a large liberty, is thus given to the form of the oath, but some form remains essential. . . . To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath." O'Reilly *v.* People, 86 N. Y. 154, 157, 40 Am. Rep. 525.

Oath over telephone.— The administration of an oath over the telephone was held not to be good, although the officer purporting to administer it knew and recognized the voice of the person purporting to take the oath, under a statute requiring the mode most binding on the conscience of the individual, and another providing that affidavits "may be made before" certain officers. Sullivan *v.* Flatonia First Nat. Bank, (Tex. Civ. App. 1904) 83 S. W. 421.

48. *Maine.*— Dresden *v.* Goud, 75 Me. 298, holding that where the statute requires selectmen, who act as assessors, to be sworn as such, their official oath as selectmen does not meet that requirement.

New Jersey.— Perry *v.* Thompson, 16 N. J. L. 72.

New York.— Shattuck *v.* Bascom, 105

is held that a substantial compliance with the form prescribed by the statute is all that is necessary.[49] Whatever is not necessary may be regarded as surplusage.[50] An oral oath is sufficient unless a written oath is prescribed.[51] An oath is not sufficient unless administered with due authority.[52] An oath or affirmation on knowledge and belief has been held equivalent to swearing or affirming absolutely.[53]

V. EVIDENCE OF ADMINISTRATION.

The presumption is that, where an oath or affirmation was administered by a proper officer, it was properly administered.[54] Indeed a magistrate's certificate

N. Y. 39, 12 N. E. 283; Merritt *v.* Portchester, 71 N. Y. 309, 27 Am. Rep. 47; Matter of Gilroy, 85 Hun 424, 32 N. Y. Suppl. 891, where the court expressed the opinion that the omission from an official oath of the word "faithfully" was material and invalidated the oath.

Pennsylvania.— *In re* Cambria St., 75 Pa. St. 357; Thompson *v.* White, 4 Serg. & R. 135.

Texas.— Arthur *v.* State, 3 Tex. 403; Davidson *v.* State, 16 Tex. App. 336.

But *compare* Lancaster, etc., R. Co. *v.* Heaton, 8 E. & B. 952, 955, 4 Jur. N. S. 707, 27 L. J. Q. B. 195, 6 Wkly. Rep. 293, 92 E. C. L. 952 [*distinguishing* Salomons *v.* Miller, 8 Exch. 778, 17 Jur. 463, 22 L. J. Exch. 169, 1 Wkly. Rep. 360, on the ground that in that case the words in question were regarded as part of the oath], holding that the omission of the words "So help me God," although those words were contained in a form of oath prescribed by statute, did not vitiate an oath under that statute, since such words were not a part of the oath, but only pointed out the manner of administering it.

A commissioner to take testimony without the state must follow the form of oath prescribed by the court out of which it is issued, although the statute of the state in which the oath is administered prescribes a different form of oath. Com. *v.* Smith, 11 Allen (Mass.) 243.

49. Bassett *v.* Denn, 17 N. J. L. 432; Parish *v.* Golden, 35 N. Y. 462.

Where no particular form is prescribed, there need be only a substantial compliance with the requirements of the statute. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

50. State *v.* Shreve, 4 N. J. L. 297. See also Den *v.* Thompson, 16 N. J. L. 72, where the principle was admitted, although not applied. And see Burns *v.* Doyle, 28 Wis. 460, holding that where the statute requires an oath merely, and an affidavit is made and filed, the oath, included in the affidavit, is available.

The words "and swear," in an affirmation, may be rejected as surplusage, where the rest is correct. State *v.* Shreve, 4 N. J. L. 297.

51. Outlaw *v.* Davis, 27 Ill. 467 (holding that under a statute providing that if, previous to commencing a suit, plaintiff shall make oath that there is danger of losing his claim unless defendant be held to bail, the justice shall issue a warrant, a written affidavit is not required; and where the justice administered an oath, the presumption is that he required all the averments prescribed by law); Ewing *v.* State, (Tex. Cr. App. 1897) 38 S. W. 618.

52. Orneville *v.* Palmer, 79 Me. 472, 10 Atl. 451; Frye *v.* Barker, 2 Pick. (Mass.) 65; Reg. *v.* McIntosh, 12 N. Brunsw. 372.

Sufficiency as foundation for charge of perjury.— "It is not enough that the officer has general authority to administer oaths, nor that his administering the particular oath was not unlawful in the sense of incurring a penalty by administering it," to make such oath a foundation of perjury if false. State *v.* McCarthy, 41 Minn. 59, 42 N. W. 599. The oath of assessors, to render a tax assessment valid, must be such as to furnish grounds for an indictment for perjury, if it is false. Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283. Under the rule that an oath, to be sufficient, must be in such form as to furnish a foundation for an indictment for perjury if it is false, the test is whether it would authorize an indictment, not whether it would warrant a conviction. Ward *v.* Brooklyn, 32 N. Y. App. Div. 430, 53 N. Y. Suppl. 41 [*affirmed* in 164 N. Y. 591, 58 N. E. 1093]. See, generally, PERJURY.

Affirmation, sufficient to constitute perjury, if false see State *v.* Shreve, 4 N. J. L. 297, 344.

53. Because of the word "knowledge" the phrase detracts nothing from the force of the oath. Stoker *v.* Leavenworth, 7 La. 390. And see Simpkins *v.* Malatt, 9 Ind. 543, 544 (where it is said: "It was formerly thought that an oath was not perjury unless sworn to in absolute and direct terms; and that if he swear according to his belief, he could not be convicted of perjury. But the modern doctrine is otherwise. Belief is to be considered an absolute term; hence, to swear that he believes a thing to be true, is equivalent to swearing that it is true"); Jewell *v.* Jewell, 1 Rob. (La.) 316.

54. Snell *v.* Eckerson, 8 Iowa 284; Loney *v.* Bailey, 43 Md. 10; Crowell *v.* Johnson, 2 Nebr. 146; Clark *v.* Collins, 15 N. J. L. 473; Coxe *v.* Field, 13 N. J. L. 215.

The letters "J. P." following the signature of one before whom an oath is subscribed is sufficient to show his authority to administer oaths. Sieckman *v.* Arwein, 10 Mo. App. 259. And see CRIMINAL LAW, 12 Cyc. 293 note 56.

has been held conclusive evidence of the proper administration of an oath or affirmation.[55] If the record shows that an official oath has been taken, it is enough without showing before what officer it was taken or in what official capacity he administered the oath.[56] Where the statute does not require a written oath or written evidence thereof, the taking of the oath may be shown by parol evidence.[57]

VI. OATHS OF QUALIFICATION.

Certain oaths are prescribed by constitution or statute by way of qualification for public office,[58] and for citizenship,[59] and such oaths must be taken as prescribed.[60]

OBEDIENT. Submissive to authority, yielding compliance with commands, orders or injunctions; performing what is required, or abstaining from what is forbid.[1] (See COMPLIANCE.)

OBEDIENTIA EST LEGIS ESSENTIA. A maxim meaning "Obedience is the essence of the law."[2]

OB INFAMIAM, NON SOLET JUXTA LEGEM TERRÆ, ALIQUIS PER LEGEM APPARENTEM SE PURGARE, NISI PRIUS CONVICTUS, VEL CONFESSUS IN CURIA. A maxim meaning "On account of evil report it is not usual, according to the law of the land, for any person to purge himself, unless he have been previously convicted, or confessed in open court."[3]

OBITER DICTA. Made "by the way," and without argument or consideration.[4] (See DICTUM.)

OBJECT. As a noun, the end aimed at; the thing sought to be accomplished;[5] the aim or purpose;[6] the thing sought to be attained.[7] As a verb, the term has

55. State *v.* Welch, 79 Me. 99, 8 Atl. 348, holding that the certificate of the magistrate to whom a complaint is made, which recites the fact that the complainant made solemn affirmation to the complaint is conclusive, not only that the complainant was "conscientiously scrupulous of taking an oath," but that he formally "affirmed under the pains and penalties of perjury," as required by statute.

56. Drew *v.* Morrill, 62 N. H. 23; Mason *v.* Thomas, 36 N. H. 302.

57. Ewing *v.* State, (Tex. Cr. App. 1897) 38 S. W. 618. And see *supra*, IV.

58. See the constitutions and statutes of the several states.

Officers generally see OFFICERS.

Particular officers: Arbitrators see ARBITRATION AND AWARD, 3 Cyc. 622. Attorneys see ATTORNEY AND CLIENT, 4 Cyc. 902. City officers see MUNICIPAL CORPORATIONS, 28 Cyc. 418. Commissioners or processioners to establish boundary see BOUNDARIES, 5 Cyc. 946. Constables see SHERIFFS AND CONSTABLES. Consuls see AMBASSADORS AND CONSULS, 2 Cyc. 262. Coroner see CORONERS, 9 Cyc. 983. County commissioners see COUNTIES, 11 Cyc. 383. County officers generally see COUNTIES, 11 Cyc. 423. Diplomatic appointees see AMBASSADORS AND CONSULS, 2 Cyc. 262. Grand jurors see GRAND JURIES, 20 Cyc. 1319. Judges see JUDGES, 23 Cyc. 512. Jurors see JURIES, 24 Cyc. 321, 369–374. Jury commissioners see JURIES, 24 Cyc. 211. Justices of the peace see JUSTICES OF THE PEACE, 24 Cyc. 411. Master in chancery see EQUITY, 16 Cyc. 431. Notaries see NOTARIES, *ante*, p. 1067. Officer summoning jurors see JURIES, 24 Cyc. 246. Officer to make judicial sale see JUDICIAL SALES, 24 Cyc. 113. Receiver see RECEIVERS. Referee in bankruptcy see BANKRUPTCY, 5 Cyc. 273. Referees generally see REFERENCES. Sheriffs see SHERIFFS AND CONSTABLES. State officers generally see STATES. Town and village officers see MUNICIPAL CORPORATIONS, 28 Cyc. 418. United States commissioners see UNITED STATES COMMISSIONERS. United States marshals see UNITED STATES MARSHALS. United States officers generally see CONSTITUTIONAL LAW, 8 Cyc. 761 note 19; UNITED STATES.

59. **Oath on naturalization of alien** see 2 Cyc. 114.

60. See the references given in the preceding notes.

1. Miller *v.* Com., 1 Duv. (Ky.) 14, 17. *Compare* Claflin *v.* Ball, 43 N. Y. 481, 486.

2. Bouvier L. Dict. [*citing* Bagg's Case, 11 Coke 93*b*, 100*a*, 77 Eng. Reprint 1271].

3. Morgan Leg. Max. [*quoting* Glanville l. 14, c. 2].

4. Com *v.* Paine, 207 Pa. St. 45, 50, 56 Atl. 317.

5. Paxton *v.* Baum, 59 Miss. 531, 536.

In lexicography, the word "object" includes whatever is presented to the mind, as well as whatever may be presented to the senses; whatever, also, is acted upon, or operated upon, affirmatively, or intentionally influenced by anything done, moved or applied thereto. Wells *v.* Shook, 29 Fed. Cas. No. 17,406, 8 Blatchf. 254, 257.

6. State *v.* De Hart, 109 La. 570, 574, 33 So. 605.

7. Scarborough *v.* Smith, 18 Kan. 399, 407.

Used in connection with other words.— Object not authorized by law. Paxton *v.*

been defined as meaning to vote against;[8] to make exception.[9] (See EXCEPTIONS; OBJECTION.)

OBJECTION. That which is, or may be, presented in opposition;[10] EXCEPTION,[11] *q. v.* (Objection: Before Master in Chancery, see EQUITY. In Admiralty, see ADMIRALTY. In Arbitration, see ARBITRATION AND AWARD. In Civil Action, see JUSTICES OF THE PEACE; TRIAL. In Condemnation Proceeding, see EMINENT DOMAIN. In Criminal Prosecution, see CONTINUANCES IN CRIMINAL CASES; CRIMINAL LAW. In Election Contest, see ELECTIONS. In Equitable Action or Proceeding, see EQUITY. In Justice's Court, see JUSTICES OF THE PEACE. In Taking Deposition, see DEPOSITIONS. On Appeal, see APPEAL AND ERROR. To Account, see EXECUTORS AND ADMINISTRATORS; INSOLVENCY. To Alimony, see DIVORCE. To Assessment of Damages, see DAMAGES. To Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES. To Deposition, see DEPOSITIONS. To Dismissal or Nonsuit, see DISMISSAL AND NONSUIT. To Examination of Adverse Party Before Trial, see DISCOVERY. To Findings or Conclusions, see APPEAL AND ERROR; TRIAL. To Indictment or Information, see INDICTMENTS AND INFORMATIONS. To Injunction, see INJUNCTIONS. To Inspection of Document Before Trial, see DISCOVERY. To Judgment, see JUDGMENTS. To Jurisdiction, see APPEAL AND ERROR; COURTS; EQUITY; JUSTICES OF THE PEACE. To Juror or Jurors, see GRAND JURIES; JURIES. To Master's Report, see EQUITY. To Motion, see MOTIONS. To Nomination, see ELECTIONS. To Order, see ORDERS. To Party or Parties, see ABATEMENT AND REVIVAL; APPEAL AND ERROR; EQUITY; JUSTICES OF THE PEACE; PARTIES; PLEADING. To Process, see APPEAL AND ERROR; PROCESS. To Revival of Action, see ABATEMENT AND REVIVAL. To Sureties on Bond — For Appeal, see APPEAL AND ERROR; For Bail, see BAIL. To Tender, see TENDER. To Venue, see VENUE. To Verdict, see CRIMINAL LAW; TRIAL. To Vote, see ELECTION. Waiver by Appearance, see APPEARANCES. See also EXCEPTIONS, and Cross-References Thereunder.)

OBLIGATE. To bring or place under obligation; to bring or firmly hold to an act.[12] (See OBLIGATION.)

Baum, 59 Miss. 531, 536. Object of an abstract. Fagan *v.* Hook, (Iowa 1905) 105 N. W. 155, 157. And see 1 Cyc. 213. Object of the action. Scarborough *v.* Smith, 18 Kan. 399, 407. Object of a law. State *v.* De Hart, 109 La. 570, 574, 33 So. 605; State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 1367, 24 So. 809; State *v.* Ferguson, 104 La. 249, 250, 28 So. 917, 81 Am. St. Rep. 123; State *v.* Morgan, 2 S. D. 32, 42, 48 N. W. 314; Tadlock *v.* Eccles, 20 Tex. 782, 792, 73 Am. Dec. 213 [*quoted* in Stone *v.* Brown, 54 Tex. 330, 344]; Seattle *v.* Barto, 31 Wash. 141, 143, 71 Pac. 735; McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 641, 44 S. E. 508, 62 L. R. A. 562. See STATUTES. Object of a license. Chilvers *v.* People, 11 Mich. 43, 49 [*quoted* in Youngblood *v.* Sexton, 32 Mich. 406, 419, 20 Am. Rep. 654]. Object of a tax. People *v.* Orange County, 27 Barb. (N. Y.) 575, 590; State *v.* Leaphart, 11 S. C. 458, 470; Wells *v.* Shook, 29 Fed. Cas. No. 17,406, 8 Blatchf. 254, 257.

Distinguished from "subject" see *In re* House Bill No. 168, 21 Colo. 46, 53, 39 Pac. 1096; Scarborough *v.* Smith, 18 Kan. 399, 407; State *v.* Ferguson, 104 La. 249, 251, 28 So. 917, 81 Am. St. Rep. 123; State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 1367, 24 So. 809; State *v.* Morgan, 2 S. D. 32, 42, 48 N. W. 314; Day Land, etc., Co. *v.* State, 68 Tex. 526, 542, 4 S. W. 865; Stone *v.* Brown, 54 Tex. 330, 341; McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 641, 44 S. E. 508, 62 L. R. A. 562.

Synonymous with "subject."— So held in Ingles *v.* Straus, 91 Va. 209, 215, 21 S. E. 490; Harland *v.* Territory, 3 Wash. Terr. 131, 146, 13 Pac. 453.

Natural object see BOUNDARIES; MINES AND MINERALS.

8. Norton *v.* Perry, 65 Me. 183, 185.

9. See 17 Cyc. 827 text and note 60.

10. Webster Int. Dict.

11. See 17 Cyc. 827. See also Ranahan *v.* Gibbons, 23 Wash. 255, 261, 62 Pac. 773; Webster Int. Dict.

"An objection to the admissibility of evidence" see Gibbs *v.* Gale, 7 Md. 76, 87.

"Objection" used in contradistinction to "defense," in a statute relating to pleadings, refers only to objections to form. Elfrank *v.* Seiler, 54 Mo. 134, 136.

"Objectionable purpose" (see Gannett *v.* Albree, 103 Mass. 372, 374); **"thing"** (see Freemont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 389, 58 N. W. 959).

12. Webster Int. Dict. See also Cover *v.* Stem, 67 Md. 449, 451, 10 Atl. 231, 1 Am. St. Rep. 406.

"Obligated" is a participle from obligate and has the same root as the noun obligation. Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 425, 462, 34 So. 255. Strictly, and in

OBLIGATIO. A Latin substantive derived from the verb OBLIGO — OBLIGARE,[13] *q. v.*; tying up;[14] or according to the admirable definition in the Institutes, *vinculum juris quo necessitate astringimur alicujus rei solvendæ*,[15] — a bond of law by which we are necessarily bound to pay something according to the laws of our country.[16] (See OBLIGATION.)

OBLIGATIO EX CONTRACTU. Literally "The obligation of a contract." A term of the Roman law with a well-defined meaning.[17] (See OBLIGATION; OBLIGATION OF A CONTRACT.)

OBLIGATION.[18] A binding or state of being bound in law;[19] an act by which a person becomes bound to another or for another, or to forbear something;[20] the act of obliging or binding;[21] the act which binds another man to some perform-

common parlance, the term means to be bound. Wachter *v.* Famachon, 62 Wis. 117, 121, 22 N. W. 160.

13. Blair *v.* Williams, 4 Litt. (Ky.) 34, 36; Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 53.

14. Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 65 [*quoted* in Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

15. The Halley, L. R. 2 A. & E. 3, 15.

16. Justinian [*translated* and *quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

It is "lien de droit" as the French say. Institutes [*quoted* in The Halley, L. R. 2 A. & E. 3, 15].

17. Wachter *v.* Famachon, 62 Wis. 117, 121, 22 N. W. 160.

18. **Derived from the Latin** word *obligatio* (see *ante*, this page), and that from the word *obligo-obligare* (see *post*, p. 1312). Lapsley *v.* Brasheans, 4 Litt. (Ky.) 47, 65 [*quoted* in Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793]; Blair *v.* Williams, 4 Litt. (Ky.) 34, 36 [*quoted* in Edwards *v.* Kearzey, *supra*].

A term correlative with "right" see Holland *v.* Dickerson, 41 Iowa 367, 370, where it is said: "Obligation rests upon one party, right belongs to the other."

"All obligations" see Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 770, 34 Pac. 805, 39 Am. St. Rep. 371, as including "all claims, debts or other pecuniary demands of each of the original companies."

Alternative obligation see 2 Cyc. 276 note 5; La. Civ. Code (1900), art. 2066.

Conditional obligation see 8 Cyc. 557 note 3.

Express or implied obligation see 19 Cyc. 28; Bloomfield *v.* New York, etc., Tel. Co., 68 N. J. L. 207, 52 Atl. 240. "Obligation or liability express or implied" does not include liability for tort but only upon contract, as used in a city charter provision fixing a period of limitation for actions against the city. McGaffin *v.* Cohoes, 74 N. Y. 387, 388, 30 Am. Rep. 307.

Imperfect obligation see 21 Cyc. 1738 note 22.

Joint obligation see 23 Cyc. 464. See also Groves *v.* Sentell, 153 U. S. 465, 476, 14 S. Ct. 898, 38 L. ed. 785, distinguishing a "solidary obligation."

"Marital rights, duties, or obligations" see Sharon *v.* Sharon, 75 Cal. 1, 10, 16 Pac. 345.

Maritime obligation see MARITIME CONTRACT, 26 Cyc. 741.

Moral obligation see CONTRACTS, 9 Cyc. 361. See also Minnesota Sugar Co. *v.* Iverson, 91 Minn. 30, 40, 97 N. W. 454; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379, 382; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 317, 6 L. ed. 606. Compared with "legal" (Herriott *v.* Potter, 115 Iowa 648, 652, 89 N. W. 91; Moore *v.* Holland, 16 S. C. 15, 29), and "natural obligation" (Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 54; Goulding *v.* Davidson, 25 How. Pr. (N. Y.) 483, 484; 2 Bouvier L. Dict. 200 [*quoted* in Goulding *v.* Davidson, 25 How. Pr. (N. Y.) 483, 484; Bailey *v.* Philadelphia, 167 Pa. St. 569, 573, 31 Atl. 925, 46 Am. St. Rep. 691]).

Natural obligation see Factors, etc., Ins. Co. *v.* New Orleans, 25 La. Ann. 454, 455; Goulding *v.* Davidson, 25 How. Pr. (N. Y.) 483, 484; Evans Pothier, pt. 2, c. 1 [*quoted* in Blair *v.* Williams, 4 Litt. (Ky.) 34, 39].

Obligation in solido see 22 Cyc. 1248 note 16.

"Obligation of the instrument" as used in a court rule see Vandergrift *v.* Hollis, 6 Houst. (Del.) 90, 102.

Other obligation see Smith *v.* Ellington, 14 Ga. 379, 382; U. S. *v.* Sprague, 48 Fed. 828, 830; U. S. *v.* Williams, 14 Fed. 550, 552.

Pecuniary obligation see Estudillo *v.* Meyerstein, 72 Cal. 317, 320, 13 Pac. 869; Dooley *v.* State, 21 Tex. App. 549, 550, 2 S. W. 884; Bromberger *v.* U. S., 128 Fed. 346, 351, 63 C. C. A. 76.

Perfect and imperfect obligations see 21 Cyc. 1738 note 22.

Personal obligation see Bullock *v.* Bullock, 52 N. J. Eq. 561, 569, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213.

Primary obligation see Hilton *v.* Providence Tool Co., 22 R. I. 605, 611, 48 Atl. 1039.

Principal obligation see London, etc., Bank *v.* Bandmann, 120 Cal. 220, 222, 52 Pac. 583, 65 Am. St. Rep. 179.

Simple obligation see La. Civ. Code (1900), art. 2020.

Solidary obligation see Groves *v.* Sentell, 153 U. S. 465, 476, 14 S. Ct. 898, 38 L. ed. 785, distinguishing a "joint obligation."

19. Burrill L. Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

20. Webster Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

21. Webster Dict. [*quoted* in Blakemore *v.* Cooper, (N. D. 1906) 106 N. W. 566, 569].

ance;[22] something which binds or obliges us to do or not to do some act;[23] that to which one is bound; that which one is bound or obliged to do, especially moral or legal claims;[24] that which obligates[25] or constrains;[26] a bond of law by which we are necessarily bound to give or to do something;[27] a violent motive, resulting from the command of another, which obliges the party to perform his contract;[28] binding force or efficacy; binding force in law;[29] the binding force of civility, kindness or gratitude, when the performance of a duty cannot be enforced by law;[30] the binding power of any oath, vow, duty, promise, or contract,[31] or a law, civil, political or moral, and independent of a promise;[32] the constraining power or authoritative character of a duty, a moral precept, a civil law, or a promise or contract voluntarily made;[33] *juris vinculum*[34] or *vinculum legis*,— the chain of the law;[35] the chain of the law by which we are necessarily bound to make some payment according to the law of the land;[36] a legal tie;[37] a ligament or tie;[38] a tie which binds us to pay or do something agreeable to the laws of the country where the obligation is made;[39] a duty,[40] arising either from contract or by operation of law;[41] a duty imposed by law for the fulfilment of which one party is bound to another;[42] a duty that may be enforced by law to perform a contract according to its terms;[43] a duty which the law imposes;[44] an

22. Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 65; Blair *v.* Williams, 4 Litt. (Ky.) 34, 65.

23. Blair *v.* Williams, 4 Litt. (Ky.) 34, 36, both etymologically and in common acceptation.

24. Century Dict. [*quoted* in Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576].

25. Webster Dict. [*quoted* in Blakemore *v.* Cooper, (N. D. 1906) 106 N. W. 566, 569].

26. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 771, 34 Pac. 805, 32 Am. Rep. 371.

27. Bracton [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

28. Adapted from Paley in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 317, 325, 6 L. ed. 606.

29. Burrill L. Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

30. Webster Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

31. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 771, 34 Pac. 805, 32 Am. St. Rep. 371; Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 65; Blair *v.* Williams, 4 Litt. (Ky.) 34, 65 (where it is said that our foremost approved lexicographers, Johnson, Sheridan, Walker, and Jones, all in substance so define the word); Webster Dict. [*quoted* in Blakemore *v.* Cooper, (N. D. 1906) 106 N. W. 566, 569].

32. Webster Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624; Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 168, 15 How. Pr. 48.

33. Century Dict. [*quoted* in Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576].

34. Wachter *v.* Famachon, 62 Wis. 117, 121, 22 N. W. 160 (a term of the Roman law); Evans Pothier, pt. 2, c. 1 [*quoted* in Blair *v.* Williams, 4 Litt. (Ky.) 34, 39].

35. Pothier Obl. [*quoted* in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 216, 6 L. ed. 606].

"Imports compulsion," in its origin. Wood *v.* Wood, 14 Rich. (S. C.) 148, 154.

36. Inst. (Cooper Transl. lib. 3, tit. 4) [*quoted* in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 317, 6 L. ed. 606].

37. Evans Pothier, pt. 2, c. 1 [*quoted* in Blair *v.* Williams, 4 Litt. (Ky.) 34, 39]. See also State *v.* Carew, 13 Rich. (S. C.) 498, 508, 91 Am. Dec. 245.

38. Blair *v.* Williams, 4 Litt. (Ky.) 34, 36.

39. Bouvier L. Dict. [*quoted* in McRae *v.* Cochise County, 5 Ariz. 26, 31, 44 Pac. 299; Morrison *v.* Lovejoy, 6 Minn. 319; Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 168, 15 How. Pr. 48].

40. Sharon *v.* Sharon, 75 Cal. 1, 10, 16 Pac. 345; Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449; Matter of Nicholls, 2 Connoly Surr. (N. Y.) 156, 158, 8 N. Y. Suppl. 7; Bouvier L. Dict. [*quoted* in Morrison *v.* Lovejoy, 6 Minn. 319; Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 168, 15 How. Pr. 48]; Century Dict. [*quoted* in Colter *v.* State, 37 Tex. Cr. 284, 293, 39 S. W. 576]. See also Sibilrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58, 60, 11 N. W. 146.

"The definitions given by Bouvier and Webster are quite broad enough to cover the duty of an administrator to account." Matter of Nicholls, 8 N. Y. Suppl. 7, 8, 2 Connoly Surr. 156.

41. Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465, 468.

42. Burrill L. Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624]).

In its common acceptation, it will embrace every duty imposed by law, whether such be the creature of a statute, of a record, of a recognizance, of a sealed instrument or of a simple contract. Elsasser *v.* Haines, 52 N. J. L. 10, 21, 18 Atl. 1905.

More than duty.— "Duty and obligation, though the terms, in one of the senses of the latter, are often used interchangeably, are not the same thing. 'Obligation,' says Lord Coke, 'is a word of large extent,' and, although it sometimes means only duty, and always includes this meaning, it here imports more besides." Wood *v.* Wood, 14 Rich. (S. C.) 148, 156.

43. Wachter *v.* Famachon, 62 Wis. 117, 121, 22 N. W. 160.

44. Pierce's Appeal, 103 Pa. St. 27, 31.

acknowledgment of a duty to pay a certain sum or do a certain thing, responsibility, accountableness, bond of duty;[45] that which constitutes legal or moral duty, and which renders a person liable to coercion and punishment for neglecting it;[46] a legal duty or liability;[47] liability generally,[48] whether such liability be founded in contract[49] or tort.[50] In law, most technically, a bond;[51] a bond or other writing in the nature of a bond, such as statutes merchant and staple, recognizances, etc.;[52] a bond containing a penalty with a condition annexed for the payment of money, performance of covenants, or the like;[53] a bond with a condition annexed or attached and a penalty for non-fulfilment;[54] a deed whereby a man binds himself, under a penalty, to do a thing;[55] a deed in writing whereby one does bind himself to another to pay a sum of money or do some other thing;[56] an instrument in writing whereby a party is bound in law or bond, commonly called a writing obligatory;[57] any memorandum or writing under seal whereby a debt is acknowledged to be owing;[58] but the legal definition has been extended to include all written instruments whereby a contract is witnessed;[59] a writing sealed or unsealed;[60] a note or instrument by which the maker thereof binds himself to pay money;[61] and in its generic sense, a contract of any kind.[62] As defined by

45. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 771, 34 Pac. 805, 39 Am. St. Rep. 371.

46. Webster Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624; Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 166, 15 How. Pr. 48].

47. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449 [*quoted* in Sawyer *v.* Armstrong, 23 Colo. 287, 293, 47 Pac. 391].

In reference to payment of taxes, the obligation of the sovereign to impose and the obligation of the individual to pay contrasted and distinguished see Spratt *v.* Price, 18 Fla. 289, 305.

48. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449 [*quoted* in Sawyer *v.* Armstrong, 23 Colo. 287, 293, 47 Pac. 391].

49. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449 [*quoted* in Sawyer *v.* Armstrong, 23 Colo. 287, 293, 47 Pac. 391].

"Evidences of debt" compared and distinguished see Hill *v.* Bloom, 41 N. J. Eq. 276, 278, 8 Atl. 438.

"Incurred obligation" as synonymous with "contracted debt" see Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 130, 58 N. W. 659.

50. Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 169, 15 How. Pr. 48 [*quoted* in Denver Exch. Bank *v.* Ford, 7 Colo. 314, 317, 3 Pac. 449].

51. Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 65, 48 N. Y. Suppl. 604.

Sealed instrument.— In its most technical signification "the word obligation, *ex vi termini*, imports a sealed instrument, that is, means a bond." Hargroves *v.* Cooke, 15 Ga. 321, 330; State *v.* Campbell, 103 N. C. 344, 347, 9 S. E. 410. See also Kemmerer *v.* Wilson, 31 Pa. St. 110, 113. "The use of the word 'obligation,' under the common law, was originally confined to sealed instruments of a certain kind." Denver Exch. Bank *v.* Ford, 7 Colo. 314, 319, 3 Pac. 449.

Sealed instrument, for payment of money. — "The term has in law a secondary and limited signification, whereby it is made to express but a single class of instruments, those which are under seal and stipulate for the payment of money." Elsasser *v.* Haines, 52 N. J. L. 10, 21, 18 Atl. 1095.

52. Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624. See also Matter of Nicholls, 8 N. Y. Suppl. 7, 8, 2 Connoly Surr. 156.

53. Bouvier L. Dict. [*quoted* in Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 425, 463, 34 So. 255]. See also Munzinger *v.* United Press, 52 N. Y. App. Div. 338, 341, 65 N. Y. Suppl. 194.

54. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 771, 34 Pac. 805, 39 Am. St. Rep. 371; Burrill L. Dict. [*quoted* in Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 65, 48 N. Y. Suppl. 604; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624; Elsasser *v.* Haines, 52 N. J. L. 10, 21, 18 Atl. 1095]; Webster Dict. [*quoted* in Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 425, 463, 34 So. 255; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

55. Comyns Dig. [*quoted* in Hargroves *v.* Cooke, 15 Ga. 321, 330].

56. Sheppard Touchst. [*quoted* in Jeffery *v.* Underwood, 1 Ark. 108, 112; Cover *v.* Stem, 67 Md. 449, 451, 10 Atl. 231, 1 Am. St. Rep. 406].

57. Burrill L. Dict. [*quoted* in Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 624].

58. Cover *v.* Stem, 67 Md. 449, 451, 10 Atl. 231, 1 Am. St. Rep. 406.

59. Hargroves *v.* Cooke, 15 Ga. 321, 330; Stone *v.* Bradbury, 14 Me. 185, 193; Munzinger *v.* United Press, 52 N. Y. App. Div. 338, 341, 65 N. Y. Suppl. 194; Thorn *v.* Hall, 10 N. Y. App. Div. 412, 415, 41 N. Y. Suppl. 1054; State *v.* Campbell, 103 N. C. 344, 347, 9 S. E. 410.

60. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449 [*quoted* in Sawyer *v.* Armstrong, 23 Colo. 287, 293, 37 Pac. 391].

61. Hill *v.* Bloom, 41 N. J. Eq. 276, 278, 7 Atl. 438.

62. Sawyer *v.* Armstrong, 23 Colo. 287, 290, 47 Pac. 391; Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449; Sinton *v.* Carter County, 23 Fed. 535, 538.

Contract distinguished.— "The contract is the agreement of the parties; the obligation

statute,[63] a legal duty by which a person is bound to do or not to do a certain thing; an obligation arising either from (1) the contract of the parties, or (2) the operation of law.[64] (Obligation: Particular Kinds, see BAIL; BONDS; COMMERCIAL PAPER; CONTRACTS; RECOGNIZANCES; UNDERTAKINGS. Of Contract, Impairment of, see CONSTITUTIONAL LAW.)

OBLIGATION OF A CONTRACT. Its binding power;[65] the law of the contract.[66] (Obligation of Contract: Impairment of, see CONSTITUTIONAL LAW.)

OBLIGATION OF RECORD. An authorized bond taken by an officer of the court, when returned into court and placed upon the files.[67]

OBLIGATION OR OTHER SECURITY. Words employed in a statute[68] as meaning all bonds, certificates of indebtedness, national currency, coupons, United States notes, treasury notes, fractional notes, certificates of deposit, bills, checks, drafts for money drawn by or upon authorized officers of the United States, and other representations of value, of whatever denomination, which have been or may be issued under any act of congress.[69]

is the remedy which the law affords for its enforcement." Moore *v.* Holland, 16 S. C. 15, 29. And see 8 Cyc. 931. The essence of the legal obligation is the legal remedy. State *v.* Carew, 13 Rich. (S. C.) 498, 508, 91 Am. Dec. 245. See also Bloomfield *v.* New York, etc., Tel. Co., 68 N. J. L. 207, 208, 52 Atl. 240.

63. The purpose and context of the enactment must govern the significance to be given to the term. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 318, 3 Pac. 449 [*quoted* in Sawyer *v.* Armstrong, 23 Colo. 287, 290, 47 Pac. 391]. See also *In re* Nicholls, 8 N. Y. Suppl. 7, 8, 2 Connoly Surr. 156.

64. Wood *v.* Franks, 56 Cal. 217, 218; Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465, 468 (where it is said that "these statutory provisions contain nothing new. They are but the enactment of the common law"); Sonnesyn *v.* Akin, 12 N. D. 227, 235, 97 N. W. 557.

Used in a statute.— *Held to mean*: A bond. Pelham *v.* Grigg, 4 Ark. 141, 143. A contract. Morrison *v.* Lovejoy, 6 Minn. 319. A debt or duty. Platt *v.* Platt, 50 Fla. 594, 600, 39 So. 536. Legal liability or legal duty. Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 168, 15 How. Pr. 48. Liability. Sturdevant *v.* Tuttle, 22 Ohio St. 111, 114.

Held to include: A certificate of a deposit of the United States. Neall *v.* U. S., 118 Fed. 699, 706, 56 C. C. A. 31. A debt arising from savings bank account. *Re* Ging, 20 Ont. 1, 5. A due-bill. State *v.* Campbell, 103 N. C. 344, 347, 9 S. E. 410. All cases "where the action would not rest upon the contract, but would rest upon the legal duty." Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 169, 15 How. Pr. 48 [*quoted* in Denver Exch. Bank *v.* Ford, 7 Colo. 314, 317, 3 Pac. 449]. "All causes of action arising *ex contractu*," as distinguished from causes arising *ex delicto*. Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456; Morrison *v.* Lovejoy, 6 Minn. 319. All debts, "obligation" being the broader term; "debt" the narrower. Sonnesyn *v.* Akin, 12 N. D. 227, 236, 97 N. W. 557. Coupon bonds payable to bearer. Sinton *v.* Carter County, 23 Fed. 535, 538. Long-term bonds. Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 65, 48 N. Y. Suppl. 604. National currency. U. S. *v.* Rossvally, 27 Fed. Cas. No. 16,197, 3 Ben. 157, 158. Partnership indebtedness. Sawyer *v.* Armstrong, 23 Colo. 287, 291, 47 Pac. 391.

Held not to include: Bills of exchange. Owen *v.* Owen, 3 Humphr. (Tenn.) 325, 326. Cause of action not evidenced by writing. Strong *v.* Wheaton, 38 Barb. (N. Y.) 616, 626. Checks or orders of the treasurer of the United States. Hibernia Sav., etc., Soc. *v.* San Francisco, 139 Cal. 205, 209, 72 Pac. 920, 96 Am. St. Rep. 100, 5 L. R. A. N. S. 608. Debt on open account not secured by written instrument. Munzinger *v.* United Press, 52 N. Y. App. Div. 338, 341, 65 N. Y. Suppl. 194. Draft, drawn by bank and protested. Basehore *v.* Rhodes, 85 Pa. St. 44, 46. Judgment. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 169, 13 S. Ct. 54, 36 L. ed. 925 [*affirming* O'Brien *v.* Young, 95 N. Y. 428, 435, 47 Am. Rep. 64; Prouty *v.* Lake Shore, etc., R. Co., 95 N. Y. 667 (*reversing* 26 Hun 546, on authority of O'Brien *v.* Young, *supra*)]. Oral contracts. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 316, 3 Pac. 449. Prohibition to corporation. Griesa *v.* Massachusetts Benev. Assoc., 15 N. Y. Suppl. 71, 74. Promissory notes. Rippon *v.* Townsend, 1 Bay (S. C.) 445, 448. See also Gale *v.* Myers, 4 Houst. (Del.) 546, *quære*. Recognizance. Elsasser *v.* Haines, 52 N. J. L. 10, 21, 18 Atl. 1095.

65. Blair *v.* Williams, 4 Litt. (Ky.) 34, 65.

66. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 197, 4 L. ed. 529.

67. Lawton *v.* State, 5 Tex. 270, 271.

A recognizance is "an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act." Bacon Abr. [*quoted* in Lawton *v.* State, 5 Tex. 270, 271]; 3 Tomlin L. Dict. 297. But "Littleton employs the terms 'recognizance' and 'obligation' by way of antithesis, his language being: 'A judge or justice may take a recognizance of the party, but the sheriff cannot take anything more than an obligation.'" Elsasser *v.* Haines, 52 N. J. L. 10, 21, 18 Atl. 1095.

68. U. S. Rev. St. (1878) § 5414 [U. S. Comp. St. (1901) p. 3662].

69. U. S. Rev. St. (1878) § 5413 [U. S. Comp. St. (1901) p. 3662] [*quoted* in Neall

OBLIGATORY BILL. See Bill Obligatory.

OBLIGATORY WRITING. See Writing Obligatory.

OBLIGE. To constrain by physical, moral, or legal force.[70]

OBLIGEE. The party, in an obligation, to whom the obligor[71] is bound.[72] (See Obligation; and, generally, Bonds.)

OBLIGO — OBLIGARE.[73] A Latin verb literally meaning "To tie, to bind, to Oblige,[74] *q. v.*; to bind or tie up, to engage or oblige by the ties of promise, oath or form of law.[75]

OBLIGOR. In its more technical sense, the maker of a bond or writing obligatory;[76] in its more general signification it designates persons obligated, in whatever manner it may be, to the doing or forbearing of an act;[77] the person who has engaged to perform some obligation.[78] (See Obligation; and, generally, Bonds.)

OBLITERATE. In legal effect, to deface, efface, to blot out, to destroy.[79] (See Alter; Cancel; Destroy; Obliteration, and Cross-References Thereunder.)

OBLITERATION. By some means covering over words originally written so as to render them no longer legible;[80] cancellation.[81] (Obliteration: Of or Affecting — Ballot, see Elections; Bill or Note, see Commercial Paper; Bond, see Bonds; Brand or Mark, see Animals; Deed, see Deeds; Instrument in General, see Alterations of Instruments; Landmark, see Boundaries; Negotiable Instrument, see Commercial Paper; Record, see Records; Will, see Wills. See also Alteration; Cancellation; Destruction; Obliterate.)

OBLITTERARE. Literally to Obliterate, *q. v.*; *aliquid literis superducere*,[82] to place something over letters.

v. U. S., 118 Fed. 699, 706, 56 C. C. A. 31]. See also U. S. *v.* Sprague, 48 Fed. 828, 830; U. S. *v.* Williams, 14 Fed. 550, 552.

70. Webster Int. Dict. See also U. S. *v.* New Orleans, 17 Fed. 483, 487.

"To be obliged" is to be urged by violent motives resulting from command of another. Paley 56 [*quoted* in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 318, 6 L. ed. 606].

71. See Obligor, *post*, this page.

72. See 5 Cyc. 731 note 19.

"Applicable only to one of the parties to an obligation or simple contract," not to a party to a lease. Dunbar *v.* Bonesteel, 4 Ill. 32, 34.

In a statute relating to action brought by the "obligee or payee" upon any note, bond, bill, or other instrument in writing, "the terms 'obligee or payee' have a technical and definite meaning . . and apply only to notes, bonds, and bills, whether . . given for the payment of money or property, or the performance of covenants or conditions, and not to mortgages." Hall *v.* Byrne, 2 Ill. 140, 142.

73. **"Obligo" is compounded** of the verb "*ligo*," to bind or tie fast, and the preposition "*ob*," which is affixed to increase its meaning. Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 65 [*quoted* in Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

74. Blair *v.* Williams, 4 Litt. (Ky.) 34, 36. See also Wachter *v.* Famachon, 62 Wis. 117, 121, 22 N. W. 160.

75. Lapsley *v.* Brashears, 4 Litt. (Ky.) 47, 65 [*quoted* in Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

76. Thompson *v.* Johnson, 40 N. J. L. 220, 222. And see 5 Cyc. 731 note 19.

77. Thompson *v.* Johnson, 40 N. J. L. 220, 223.

78. La. Civ. Code (1900), art. 3556.

79. State *v.* Knippa, 29 Tex. 295, 298.

"Cancel" distinguished see Townshend *v.* Howard, 86 Me. 285, 288, 29 Atl. 1077.

Not merely to alter see State *v.* Knippa, 29 Tex. 295, 298.

Obliterating the signature of a will see Baptist Church *v.* Robbarts, 2 Pa. St. 110, 111.

80. Ffinch *v.* Combe, [1894] P. 191, 199, 63 L. J. P. D. & Adm. 113, 70 L. T. Rep. N. S. 695, 6 Reports 545.

Pasting a piece of paper over writing is an obliteration. Ffinch *v.* Combe, [1894] P. 191, 201, 63 L. J. P. D. & Adm. 113, 70 L. T. Rep. N. S. 695, 6 Reports 545.

81. Glass *v.* Scott, 14 Colo. App. 377, 60 Pac. 186, 188.

As statutory means of revoking will see Evans' Appeal, 58 Pa. St. 238, 242.

A careful interlineation not an obliteration see Dixon's Appeal, 55 Pa. St. 424, 427.

A strong black line drawn over and along the whole name is said to obliterate it. Baptist Church *v.* Robbarts, 2 Pa. St. 110, 111.

Writing the word "obsolete" on the margin of an instrument does not "obliterate" it. Lewis *v.* Lewis, 2 Watts & S. (Pa.) 455, 457.

82. Ffinch *v.* Combe, [1894] P. 191, 201, 63 L. J. P. D. & Adm. 113, 70 L. T. Rep. N. S. 695, 6 Reports 545, a Latin word, so defined in Facciolati's Lexicon.

OBLOQUY. A term which has been defined as meaning blame; reprehension;[83] censure; reproach.[84] (See, generally, LIBEL AND SLANDER.)

OBNOXIOUS. Offensive, odious, hateful.[85]

OB REVERENTIAM PERSONARIUM ET METUM PERJURII. A maxim meaning "The embarrassment of a witness proceeds from his respect for an oath and his dread of perjury."[86]

83. Webster Dict. [*quoted* in Tonini *v.* Cevasco, 114 Cal. 266, 273, 46 Pac. 103]. See also Bettner *v.* Holt, 70 Cal. 275, 11 Pac. 713.

84. Bettner *v.* Holt, 70 Cal. 270, 275, 11 Pac. 713 [*quoted* in Tonini *v.* Cevasco, 114 Cal. 266, 273, 46 Pac. 103].

85. Webster Int. Dict.

When it is applied to a juror by way of objection, the term does not deny his legal fitness. State *v.* Fourchy, 51 La. Ann. 228, 248, 25 So. 109.

86. Morgan Leg. Max. [*citing* Halkerstone Max. 113].

OBSCENITY

By Edward C. Ellsbree*

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CROSS-REFERENCES

For Matters Relating to:

Disorderly Conduct Generally, see DISORDERLY CONDUCT.
Indecent Assault, see ASSAULT AND BATTERY.
Indecent Exposure of Person at Trial, see EVIDENCE.
Lewdness, see LEWDNESS.
Mailing Obscene Matter, see POST-OFFICE.

I. DEFINITIONS.

The term "obscene" may be defined as something offensive to chastity, decency, or delicacy;[1] expressing or presenting to the mind or view something that delicacy and purity forbid to be exposed.[2] Indecency is an act against good behavior and a just delicacy.[3] Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals.[4]

II. NATURE AND ELEMENTS OF OFFENSES.

A. In General — 1. AT COMMON LAW. Whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law, and is indictable as such.[5]

2. UNDER STATUTES. The statutes enacted upon the subject only operate as an enlargement of the scope of the term, and define it more specifically. They create no new offense.[6] Statutes against obscenity should receive reasonable construction, having regard to the manifest object had in view in their enactment.[7]

1. State *v.* Hazle, 20 Ark. 156, 159; U. S. *v.* Martin, 50 Fed. 918, 921; U. S. *v.* Harmon, 45 Fed. 414, 417; U. S. *v.* Behout, 28 Fed. 522, 524; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 364; Standard Dict.; Webster Dict.

2. U. S. *v.* Bebout, 28 Fed. 522, 524; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 364; Standard Dict.; Webster Dict.

Other definitions are: "Impure, foul, filthy, offensive, disgusting." State *v.* Hazle, 20 Ark. 156, 159.

"Lewd; impure; indecent; calculated to shock the moral sense of man by a disregard of chastity or modesty." Black L. Dict.

"Offensive to chastity, something that is foul, or filthy, and for that reason is offensive to pure-minded persons." U. S. *v.* Clarke, 38 Fed. 732, 733; Bouvier L. Dict.

It includes on the one hand what is merely inauspicious, foul, or indecent, and on the other hand what is immodest and calculated to excite impure emotions or desires. U. S. *v.* Smith, 45 Fed. 476, 477; U. S. *v.* Loftis, 12 Fed. 671, 673, 8 Sawy. 194 [*citing* Worcester Dict.]; Anderson L. Dict.

3. McJunkins *v.* State, 10 Ind. 140, 144; Black L. Dict.; Bouvier L. Dict.

Indecent signifies something more than indelicate and less than immodest — something unfit for the eye and ear. U. S. *v.* Loftis, 12 Fed. 671, 673, 8 Sawy. 194 [*citing* Worcester Dict.].

4. State *v.* Pfenninger, 76 Mo. App. 313, 317; U. S. *v.* Males, 51 Fed. 41, 42; Bouvier L. Dict.

Another definition is "the character or quality of being obscene; conduct tending to corrupt the public morals by its indecency or lewdness." Black L. Dict.

Scope of term.— Obscenity is applied to language spoken, written, or printed, and to pictorial productions, and includes what is foul, and indecent, as well as immodest, or calculated to excite impure desires. State *v.* Pfenninger, 76 Mo. App. 313; U. S. *v.* Loftis, 12 Fed. 671, 8 Sawy. 194.

5. *Delaware.*—State *v.* Walter, 2 Marv. 444, 43 Atl. 253.

Massachusetts.— Com. *v.* Holmes, 17 Mass. 336.

Missouri.— State *v.* Rose, 32 Mo. 560; State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469.

Pennsylvania.— Com. *v.* Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632.

Tennessee.— Grisham *v.* State, 2 Yerg. 589.

6. U. S. *v.* Males, 51 Fed. 41.

Constitutionality of statutes see CONSTITUTIONAL LAW, 8 Cyc. 892 text and note 27. See also State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

7. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; U. S. *v.* Males, 51 Fed. 41.

The obvious purpose of their enactment is to guard and protect the public morals, by erecting barriers which the evil-minded and lascivious may not overpass with impunity. Henderson *v.* State, 63 Ala. 193; Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; U. S. *v.* Males, 51 Fed. 41.

As such a statute is highly penal, it ought not to be held to embrace language unless it is fairly within its letter and spirit. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; U. S. *v.* Males, 51 Fed. 41.

B. Indecent Exposure[8] — 1. IN GENERAL. Indecent exposure in a public place in such a manner that the act is seen or is likely to be seen by casual observers is an offense at common law.[9]

2. PUBLIC PLACE. The place where the exposure is made must be public.[10] What constitutes a public place within the meaning of this offense depends upon the circumstances of the case.[11] It is not necessary that the exposure should be made in a place open to the public; if the act is done where a number of persons can and do see it that is sufficient.[12] The offense is complete if it is committed in any place where an assembly of the public is collected,[13] although they have no legal right of access thereto.[14]

3. INTENT. It should appear that the exposure was not merely accidental, but intentional, at such time and place, and in such a manner as to offend against public decency;[15] but intent may be inferred from recklessness.[16]

4. OBSERVERS. An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offense at common law. It is otherwise, however, if there are other persons in such a situation that they may be witnesses of the exposure.[17] In fact it has been held that it is not essential to the crime

8. By an "obscene exhibition of the person" is meant any offensive, disgusting, and indelicate presenting to view, show, or display of the person. State *v.* Hazle, 20 Ark. 156, 159.

9. State *v.* Walter, 2 Marv. (Del.) 444, 43 Atl. 253; Hilmore *v.* State, 118 Ga. 299, 45 S. E. 226; Morris *v.* State, 109 Ga. 351, 34 S. E. 577; Le Roy *v.* Sidley, Sid. 168. See also cases cited *infra*, this note and notes 10–19.

Bathing near a frequented road or inhabited houses, from which the person may be distinctly seen, is an indictable offense at common law, and punishable as such. Rex *v.* Crunden, 2 Campb. 89, 11 Rev. Rep. 671; Reg. *v.* Reed, 12 Cox C. C. 1. It is no defense to such an indictment that there has been, as long as living memory extends, a usage to bathe at the place, and that there has been no exposure beyond what is necessarily incident to bathing. Rex *v.* Crunden, *supra*; Reg. *v.* Reed, *supra*.

Tumultuous and offensive carriage see BREACH OF THE PEACE, 5 Cyc. 1026.

10. State *v.* Hazle, 20 Ark. 156; Morris *v.* State, 109 Ga. 351, 34 S. E. 577; Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135; Van Houten *v.* State, 46 N. J. L. 16, 50 Am. Rep. 397.

11. See cases cited *infra*, this note.

A place is public, if it is so situated that what passes on there can be seen by any considerable number of persons. Van Houten *v.* State, 46 N. J. L. 16, 50 Am. Rep. 397; State *v.* Van Houten, 5 N. J. L. J. 311; Reg. *v.* Holmes, 3 C. & K. 360, 6 Cox C. C. 216, Dears. C. C. 207, 17 Jur. 562, 22 L. J. M. C. 122, 1 Wkly. Rep. 416.

A public highway is a public place. State *v.* Walter, 2 Marv. (Del.) 444, 43 Atl. 253. But see Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135. Exposing the dead body of a child on a public highway where many people are certain to pass and repass is an offense at common law. Reg. *v.* Clark, 15 Cox C. C. 171.

An omnibus is sufficiently a public place to sustain an indictment for an indecent exposure therein. Reg. *v.* Holmes, 3 C. & K. 360, 6 Cox C. C. 216, Dears. C. C. 207, 17 Jur. 562, 22 L. J. M. C. 122, 1 Wkly. Rep. 416.

A urinal has been held to be a public place within the meaning of this offense. Reg. *v.* Orchard, 3 Cox C. C. 248.

12. Reg. *v.* Thallman, 9 Cox C. C. 388, L. & C. 326, 33 L. J. M. C. 58, 9 L. T. Rep. N. S. 425, 12 Wkly. Rep. 88, holding that where a man exposed himself indecently on a roof at the back of a house in London, so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, the conviction was good.

The publicity contemplated has reference to persons who may witness the act rather than to locality. Moffit *v.* State, 43 Tex. 346.

13. People *v.* Bixby, 67 Barb. (N. Y.) 221, 4 Hun 636 (holding that where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in a house of prostitution, the doors, windows, and shutters being closed, the room where it occurred was a "public place"); Reg. *v.* Wellard, 14 Q. B. D. 63, 15 Cox C. C. 559, 49 J. P. 296, 54 L. J. M. C. 14, 51 L. T. Rep. N. S. 604, 33 Wkly. Rep. 156.

14. Reg. *v.* Wellard, 14 Q. B. D. 63, 15 Cox C. C. 559, 49 J. P. 296, 54 L. J. M. C. 14, 51 L. T. Rep. N. S. 604, 33 Wkly. Rep. 156.

15. State *v.* Hazle, 20 Ark. 156; Van Houten *v.* State, 46 N. J. L. 16, 50 Am. Rep. 397. See also Reg. *v.* Holmes, 3 C. & K. 360, 6 Cox C. C. 216, Dears. C. C. 207, 17 Jur. 562, 22 L. J. M. C. 122, 1 Wkly. Rep. 416.

16. Van Houten *v.* State, 46 N. J. L. 16, 50 Am. Rep. 397.

17. Lockhart *v.* State, 116 Ga. 557, 42 S. E. 787; Morris *v.* State, 109 Ga. 351, 34 S. E. 577; Reg. *v.* Webb, 2 C. & K. 933, 3 Cox C. C. 183, 1 Den. C. C. 338, 13 Jur. 42, 18 L. J. M. C. 39, T. & M. 23, 61 E. C. L. 933; Reg. *v.* Farrell, 9 Cox C. C. 446; Reg. *v.*

that anybody should have seen the exposure, provided it was intentionally made in a public place, and persons were present who could have seen if they had looked.[18]

5. Consent of Observer. The fact that an indecent exposure is made with the consent of the person in whose presence it is made does not affect the criminality of the act.[19]

C. Obscene Language — 1. At Common Law. The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable at common law.[20]

2. Under Statutes — a. In General. In some states it has been made a statutory offense to use abusive, insulting, or obscene language in or near a dwelling, or in the presence of females.[21]

b. Language Used. As a general rule words are obscene, vulgar, or profane, or not, according to the sense in which they are used; and it is necessary to show by other words coupled with them the sense in which they are used, to make a valid charge of using such language.[22]

c. Place of Uttering. The statutes usually provide that the language in question must be uttered in or near a dwelling-house, or upon the curtilage thereof, or in the presence of a female.[23]

d. Presence of Females. Since it is the protection of the persons who are particularly mentioned from insult that the statute is intended to secure, their pres-

Watson, 2 Cox C. C. 376; Reg. *v.* Elliot, L. & C. 103.

18. State *v.* Hazle, 20 Ark. 156; State *v.* Martin, 125 Iowa 715, 101 N. W. 637; State *v.* Banguess, 106 Iowa 107, 76 N. W. 508; Van Houten *v.* State, 46 N. J. L. 16, 50 Am. Rep. 397; State *v.* Roper, 18 N. C. 208.

19. State *v.* Martin, 125 Iowa 715, 101 N. W. 637, where it is said: "The offense charged is not against the woman merely, but against organized society — the State — and is none the less heinous because of the consent of the observer."

20. State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469; State *v.* Toole, 106 N. C. 736, 11 S. E. 168; Bell *v.* State, 1 Swan (Tenn.) 42.

21. See Finch *v.* State, 124 Ga. 657, 52 S. E. 890; and cases cited *infra*, this note, and notes 22–25.

Abusive and insulting language see Breach of the Peace, 5 Cyc. 1025.

Disturbing inmates of dwelling see Breach of the Peace, 5 Cyc. 1025.

Offensive language in or near dwelling see Disorderly Conduct, 14 Cyc. 469 *et seq.*

Offensive language in presence of female see Disorderly Conduct, 14 Cyc. 470.

Object of statute.— This statute does not stand upon the footing of statutes against public indecency. Its object is not to keep pure the public morals. It is intended to protect females from insult; to furnish to the friends of the female whose modesty has been unlawfully shocked, or whose feelings have been wounded, by the use in her presence of obscene and vulgar language, some other remedy than that which nature dictates, to wit, club law. And the statute is to be construed and understood in the light of its object. Dillard *v.* State, 41 Ga. 278.

Joint commission of offense.— The offense of using obscene language cannot be jointly committed. Cox *v.* State, 76 Ala. 66.

22. Roberts *v.* State, 120 Ga. 177, 47 S. E. 511.

Blasphemy generally see Blasphemy.

Profanity generally see Profanity.

Language held abusive, insulting, or obscene: "I'll go where I dam please, and it don't make a dam bit of difference where it is." Weaver *v.* State, 79 Ala. 279, 280. "Will you go to bed with me"? spoken to a female, without provocation. Dillard *v.* State, 41 Ga. 278, 281.

Language held not abusive, insulting, or obscene: "I want to stay here awhile," addressed by a man to a woman. Stamps *v.* State, 95 Ga. 475, 476, 20 S. E. 241. "Look me in the eye: Are you satisfied with the man you married? I can whip any damn Groover of the name." Roberts *v.* State, 120 Ga. 177, 179, 47 S. E. 511. "You are a God damn low down son of a bitch," although profane, coarse, opprobrious, and abusive, inasmuch as the word "bitch," applied to a woman, does not, in its ordinary sense, import prostitution. Shields *v.* State, 89 Ga. 549, 16 S. E. 66.

23. Bragg *v.* State, 69 Ala. 204, holding that when a husband had left the house which had been his dwelling, with no intention of returning, but had not removed his goods, and his wife spent her days there, but her nights elsewhere, intending to remove, the house was the dwelling of the husband under an indictment for using vulgar language near a dwelling in the presence of females.

The "**curtilage,**" within the meaning of this statute, includes the yard, garden, or field, which is near to and used in connection with the dwelling, although not inclosed. Ivey *v.* State, 61 Ala. 58.

ence, or the presence of some one of them, is as material to constitute the offense, as the use of the language, or the place at which it is used.[24] It need not be shown that the language was heard by the female in whose presence it was uttered.[25]

D. Obscene Publications, Prints, and Pictures — 1. At Common Law. The publication of an obscene book or print,[26] or the exhibition of an obscene picture,[27] is an indictable offense at common law.

2. Under Statutes — a. Newspapers. Statutes exist in many states prohibiting the publication and sale of newspapers devoted largely to the publication of scandals and accounts of lecherous and immoral conduct.[28] The gist of the offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or largely devoted to the publication of such matter.[29]

b. Pictures, Letters, and Communications.[30] It is frequently made an offense by statute to send an obscene letter or communication to a woman,[31] to sell obscene pictures and photographs,[32] or to make any indecent or obscene written composition designed to corrupt the morals of youth.[33]

24. Henderson *v.* State, 63 Ala. 193 (holding that abusive, insulting, or vulgar language uttered in a public highway, near enough to the prosecutor's premises to be distinctly heard, and actually heard by a member of his family, is uttered in her presence); Yancy *v.* State, 63 Ala. 141; Ivey *v.* State, 61 Ala. 58.

25. Yancy *v.* State, 63 Ala. 141.

26. Com. *v.* Holmes, 17 Mass. 336; Rex *v.* Curl, Str. 788.

What is sufficient publication.—The private sale of an obscene print to a person, he having in the first instance requested that such prints should be shown to him, his object being to prosecute the seller, is a sufficient publication to sustain the charge. Reg. *v.* Carlile, 1 Cox C. C. 229.

Procuring with intent to publish.— It is a misdemeanor to procure indecent prints with intent to publish them (Dugdale *v.* Reg., Dears. C. C. 64, 1 E. & B. 435, 17 Jur. 546, 22 L. J. M. C. 50, 72 E. C. L. 435); but to preserve and keep them in possession with such intent is not (Dugdale *v.* Reg., *supra*).

Report of trial.— The publication of the report of a trial of one indicted for selling an obscene book, setting out the book, is a misdemeanor, such report not being privileged as being a fair report of a trial in a court of competent jurisdiction. Steele *v.* Brannan, L. R. 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. Rep. N. S. 509, 20 Wkly. Rep. 607.

27. State *v.* Pfenninger, 76 Mo. App. 313 (holding that a picture that cannot be reproduced in the opinion, and cannot be described, except by the use of obscene language, is an obscene picture); Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632.

28. *Connecticut.*—State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

Kansas.— *In re* Banks, 56 Kan. 242, 42 Pac. 693.

New York.— People *v.* Danihy, 63 Hun 579, 18 N. Y. Suppl. 467.

Ohio.— O'Brien *v.* State, 37 Ohio St. 113.

Pennsylvania.— Com. *v.* Dowling, 14 Pa. Co. Ct. 607.

29. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542. *Compare* Com. *v.* Havens, 6 Pa. Co. Ct. 545, holding that if only one item in a publication is indecent, that makes the publication an obscene paper within the act.

The words "largely devoted" do not necessarily imply that any certain percentage of the columns of the paper shall be filled with the prohibited matter, but they do imply that this shall be a prominent feature of the publication; that special attention shall be paid to the publication of scandalous items. *In re* Banks, 56 Kan. 242, 42 Pac. 693.

30. **Having in possession** (Fuller *v.* People, 92 Ill. 182), or having in possession with intent to sell, etc. (State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282; State *v.* Pennington, 5 Lea (Tenn.) 506), any obscene picture or other obscene matter may be made an offense by statute.

31. See cases cited *infra*, this note.

An obscene communication is "sent," within the meaning of the statute, when it is put in the course of transmission by the accused with intent that it should reach the person to whom it is charged in the indictment to have been sent, provided that in fact it reaches such person (Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606); and the means of transmission are immaterial (Larison *v.* State, *supra*).

Mailing obscene letters see Post-Office.

32. State *v.* Doty, 103 Iowa 699, 73 N. W. 352, 64 Am. St. Rep. 205 (holding that one who takes a photograph of a nude woman, and delivers it to her, on receipt of the price, violates a statute prohibiting the sale of obscene photographs); People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635.

A negative is a picture within the meaning of the statute. People *v.* Ketchum, 103 Mich. 443, 61 N. W. 776, 50 Am. St. Rep. 383, 27 L. R. A. 448.

33. Edwards *v.* State, (Tex. Cr. App. 1905) 85 S. W. 797, holding that a writing

3. Test of Obscenity. The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such a publication may fall.[34] The question does not depend upon its being true or false.[35] So a proper test of obscenity in a painting or statue is whether its motive, as indicated by it, is pure or impure, whether it is calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, are merely accessory to this as the primary or main purpose of the representation.[36]

4. Motive of Publication. As a general rule the character of a publication as obscene or otherwise is not to be determined by the motive of the owner in making the publication.[37] In the case of scientific and medical publications, however, the motive of the publication seems to enter into the offense. If spread broadcast among the community, such publications will be held obscene, although they may be perfectly proper for the use of members and students of the profession.[38]

E. Obscene Exhibitions.[39] An information will lie at common law for any public show or exhibition which outrages decency, shocks humanity, or is contrary to good morals.[40] An offensive and disgusting exhibition will constitute the offense, although there is nothing immoral or indecent in it, and the motive is innocent.[41] An exhibition offending against public decency is indictable under a statute making it a misdemeanor to maintain a public nuisance.[42]

III. Prosecution and Punishment.

A. Indictment and Information[43] **— 1. In General — a. Indecent Exposure.** When indecent exposure is made a statutory offense, an indictment charging the

as follows: "Stay with me after school. I have secured a powder through the mail that will make you safe," is not manifestly designed to corrupt the morals of youth.

Age of youth.— The exhibition of an alleged indecent and obscene composition to a female twenty-one years of age is not an offense, as she is not a youth, within the meaning of the statute. Edwards *v.* State, (Tex. Cr. App. 1905) 85 S. W. 797.

34. People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635; People *v.* Doris, 14 N. Y. App. Div. 117, 43 N. Y. Suppl. 571, 12 N. Y. Cr. 100; Com. *v.* Havens, 6 Pa. Co. Ct. 545; U. S. *v.* Males, 51 Fed. 41; U. S. *v.* Smith, 45 Fed. 476; U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 732; U. S. *v.* Wightman, 29 Fed. 636; U. S. *v.* Bebout, 28 Fed. 522; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338; Reg. *v.* Hicklin, L. R. 3 Q. B. 360, 11 Cox C. C. 19, 37 L. J. M. C. 89, 18 L. T. Rep. N. S. 395, 16 Wkly. Rep. 801; Steele *v.* Brannan, L. R. 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. Rep. N. S. 509, 20 Wkly. Rep. 607.

Words obscene per se unnecessary.— The writing need not use words which are in themselves obscene, in order to be obscene. Courts have regard to the idea conveyed by the words used in the writing, and not simply to the words themselves. U. S. *v.* Males, 51 Fed. 41.

35. Com. *v.* Landis, 8 Phila. (Pa.) 453.

36. People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635.

37. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635; U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 500; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338; Reg. *v.* Hicklin, L. R. 3 Q. B. 360, 11 Cox C. C. 19, 37 L. J. M. C. 89, 18 L. T. Rep. N. S. 395, 16 Wkly. Rep. 801; Steele *v.* Brannan, L. R. 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. Rep. N. S. 509, 20 Wkly. Rep. 607.

38. Com. *v.* Landis, 8 Phila. (Pa.) 453; U. S. *v.* Smith, 45 Fed. 476; U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 500; U. S. *v.* Chesman, 19 Fed. 497.

39. "Exhibition" means "a showing or presenting to view; the act of exhibiting for inspection, display," etc. State *v.* Hazle, 20 Ark. 156, 159. See also 18 Cyc. 1498.

Exhibition of obscene picture see *supra*, II, D.

40. Knowles *v.* State, 3 Day (Conn.) 103; Reg. *v.* Saunders, 1 Q. B. D. 15, 13 Cox C. C. 116, 45 L. J. M. C. 11, 33 L. T. Rep. N. S. 677, 24 Wkly. Rep. 348.

Permitting slaves to appear indecently clothed.— If a master cause and permit his slaves to pass about in public view and observation indecently clothed, he is guilty of lewdness, and indictable therefor. Britain *v.* State, 3 Humphr. (Tenn.) 203.

41. Reg. *v.* Grey, 4 F. & F. 73.

42. People *v.* Doris, 14 N. Y. App. Div. 117, 43 N. Y. Suppl. 571, 12 N. Y. Cr. 100.

43. **Criminal complaint** see Criminal Law, 12 Cyc. 290 *et seq.*

offense in the language of the statute is sufficient in all cases where the statutory definition states the material facts constituting the unlawful act.[44] Every word essential to the description of the offense must, however, be charged.[45] The indictment need not conclude "to the common nuisance of all the citizens," etc.[46] If the indictment fails to charge the statutory offense, it may nevertheless be good at common law.[47]

b. Obscene Language. Where the offense of using obscene language is statutory, an indictment therefor must aver every fact which the statute declares a constituent of it.[48] An indictment for using obscene language in the presence of a female need not show that it was heard by the female.[49] If the words charged are not obscene *per se*, the indictment must show by extrinsic averments that they were used in that sense and so understood by the female.[50]

c. Obscene Publications or Pictures — (i) *At Common Law.* In an indictment at common law for exhibiting an obscene picture, it need not be averred that the exhibition was public or that the house where the picture was exhibited is a nuisance; a statement that it was shown to sundry persons for money being sufficient.[51]

(ii) *Under Statutes.* An indictment under a statute for publishing, selling, or sending obscene books, papers, or letters is sufficient if it charges the offense in the words of the statute.[52] This is not so, however, where the statute does not

Indictment or information generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157 *et seq.*

44. *Arkansas.*—State *v.* Hazle, 20 Ark. 156.

California.— *Ex p.* Hutchings, (1887) 16 Pac. 234.

Iowa.— State *v.* Martin, 125 Iowa 715, 101 N. W. 637; State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508.

Missouri.— State *v.* Gardner, 28 Mo. 90.

Texas.— Moffit *v.* State, 43 Tex. 346.

See 37 Cent. Dig. tit. "Obscenity," § 10.

Public place.— Where the statute requires the offense to have been committed "in public" or "in a public place," an indictment substituting the words "public road" or "public highway" is insufficient. Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135; Moffit *v.* State, 43 Tex. 346. An allegation that an act of indecent exposure was done "in a public place, to wit, at the blacksmith shop . . then and there a public place," is sufficient. Lorimer *v.* State, 76 Ind. 495.

Persons to whom exposure made need not be alleged. State *v.* Martin, 125 Iowa 715, 101 N. W. 637; State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508. Nor is it necessary to aver that the act was seen by any one. State *v.* Roper, 18 N. C. 208.

Part of body exposed need not be alleged. State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508.

Intent.— An indictment for indecent exposure which alleges that defendant, devising and intending the morals of the people to debauch and corrupt, at a time and place named, in the presence of divers citizens, unlawfully, scandalously, and wantonly did expose to the view of said persons present, his body, sufficiently alleges the intent with which the act was committed. Com. *v.* Haynes, 2 Gray (Mass.) 72, 61 Am. Dec. 437.

Tending to debauch the morals.— Since the tendency to corrupt or subvert the morals was merely descriptive of the act necessary to constitute the offense at common law, and was no part of the offense itself, the addition of the words "tending to debauch the morals" in the statute under which the conviction is sought adds nothing to the common-law offense, and the omission of such words in the indictment is immaterial. Gilmore *v.* State, 118 Ga. 299, 45 S. E. 226.

45. Lockhart *v.* State, 116 Ga. 557, 42 S. E. 787 (holding that an averment of exposure in a place where it could have been seen by more than one person is necessary); Stark *v.* State, 81 Miss. 397, 33 So. 175 (holding that an indictment under a statute providing that "a person who willfully and lewdly exposes his person in a public place is guilty of a misdemeanor," which charges that the exposure "was unlawfully and willfully" made, but does not charge that it was "lewdly" made is fatally defective).

46. Com. *v.* Haynes, 2 Gray (Mass.) 72, 61 Am. Dec. 437. See also Reg. *v.* Holmes, 3 C. & K. 360, 6 Cox C. C. 216, Dears. C. C. 207, 17 Jur. 562, 22 L. J. M. C. 122, 1 Wkly. Rep. 416, holding that an indictment for this offense which does not conclude *ad commune nocumentum* is aided by 14 & 15 Vict. c. 100, § 25.

47. State *v.* Rose, 32 Mo. 560.

48. Ivey *v.* State, 61 Ala. 58, holding that an indictment for using obscene language "in or near a dwelling in the presence of the owner thereof, or his family, or some member of it, or of any female," must aver such presence.

49. Yancy *v.* State, 63 Ala. 141.

50. State *v.* Cone, 16 Ind. App. 350, 45 N. E. 345.

51. Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632.

52. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

so far individuate the offense as to give defendant certain information of what he is accused.[53] It is not necessary to aver or prove that defendant knew that the matter was indecent.[54]

d. Obscene Exhibitions.[55] Since an information will lie, at common law, for any public show or exhibition which outrages decency, shocks humanity, or is contrary to good morals, an averment in such information that it is an offense contrary to the statute may be rejected as surplusage, and will not vitiate.[56]

2. Description, Setting Out, or Filing Obscene Matter — a. Obscene Language. While it has been held that an indictment for using obscene language in the presence of females need not set out the language used,[57] the better rule is that enough of the language used should be set forth as is necessary to show that a crime has been committed.[58] An averment that the language is "unfit for allegation herein" may, however, excuse failure to set forth every word of the language used.[59] If, however, the language charged is not such as to convey a meaning in its nature obscene, extrinsic averments showing in what connection the words were uttered, or that they have a local or provincial meaning, must be made.[60]

b. Obscene Pictures. An indictment for having in possession or exhibiting an obscene drawing or picture need not particularly describe in what the obscenity consists.[61]

c. Obscene Publications. In framing an indictment for publishing or distributing an obscene publication, the obscene matter must be set out,[62] unless the publication is in the hands of defendant, or out of the power of the prosecution,[63] or the matter is too gross and obscene to be spread upon the records of the court,[64]

Absence of lawful purpose in sending an obscene communication is an ingredient of the offense, and the omission of the words "without lawful purpose," in the indictment, renders the same bad. State *v.* Smith, 46 N. J. L. 491.

The manner, mode, and circumstances attending the making and publication need not be alleged. Smith *v.* State, 24 Tex. App. 1, 5 S. W. 510.

Averment of age of offender.— An indictment under a statute prohibiting the publication of obscene matter, and providing a greater penalty for offenders over twenty-one years of age than for those under that age, need not allege the age of the accused. People *v.* Justices Ct. Special Sess., 10 Hun (N. Y.) 224.

53. State *v.* Smith, 17 R. I. 371, 22 Atl. 282.

54. Com. *v.* Havens, 6 Pa. Co. Ct. 545.

Knowledge will be presumed from the fact of composing or circulating the publication or picture. State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800; State *v.* Holedger, 15 Wash. 443, 46 Pac. 652.

55. **Charging exhibition of obscene picture** see *supra*, III, A, 1, c, (I).

56. Knowles *v.* State, 3 Day (Conn.) 103.

57. Weaver *v.* State, 79 Ala. 279; Yancy *v.* State, 63 Ala. 141.

58. Hummel *v.* State, 10 Ohio S. & C. Pl. Dec. 492, 8 Ohio N. P. 48.

59. Hummel *v.* State, 10 Ohio S. & C. Pl. Dec. 492, 8 Ohio N. P. 48.

60. State *v.* Coffing, 3 Ind. App. 304, 29 N. E. 615.

61. Fuller *v.* People, 92 Ill. 182; Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; State *v.* Pennington, 5 Lea (Tenn.) 506.

62. *Illinois.*— McNair *v.* People, 89 Ill. 441.

Massachusetts.— Com. *v.* Dejardin, 126 Mass. 46, 30 Am. Rep. 652; Com. *v.* Tarbox, 1 Cush. 66.

Missouri.— State *v.* Hayward, 83 Mo. 299.

New York.—People *v.* Danihy, 63 Hun 579, 18 N. Y. Suppl. 467.

Texas.— State *v.* Hanson, 23 Tex. 232.

England.— Bradlaugh *v.* Reg., 3 Q. B. D. 607, 14 Cox C. C. 68, 38 L. T. Rep. N. S. 118, 26 Wkly. Rep. 410 [*reversing* 46 L. J. M. C. 286].

See 37 Cent. Dig. tit. "Obscenity," § 11.

The principle that the record must be kept pure does not justify the absence of what would otherwise be a necessary averment in the indictment on the ground that it is gross and impure. The duty of the court is to administer justice, and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter which is necessary in order to enable the court to do justice according to the rules laid down for its guidance. State *v.* Hayward, 83 Mo. 299; *Ex p.* Bradlaugh, 3 Q. B. D. 509, 47 L. J. M. C. 105, 38 L. T. Rep. N. S. 680, 26 Wkly. Rep. 758.

63. McNair *v.* People, 89 Ill. 441.

64. *Illinois.*— McNair *v.* People, 89 Ill. 441.

Massachusetts.— Com. *v.* McCance, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61; Com. *v.* Dejardin, 126 Mass. 46, 30 Am. Rep. 652; Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Holmes, 17 Mass. 336.

Michigan.— People *v.* Girardin, 1 Mich. 90.

Rhode Island.— State *v.* Smith, 17 R. I. 371, 22 Atl. 282.

Vermont.— State *v.* Brown, 27 Vt. 619.

either of which facts, if existing, should be averred as an excuse for failure to set out the same.[65] Such a description of the obscene matter should be made, however, as to identify the publication in which it appeared.[66]

d. Obscene Exhibitions. The information for an obscene exhibition must state particularly the circumstances in which the indecency exists, that the court may judge whether it is an offense within the statute or at common law.[67]

B. Evidence. The general rules as to presumptions and burden of proof,[68] the admissibility,[69] and the weight and sufficiency of the evidence[70] are applicable to this class of cases.

C. Variance. Every essential allegation in the indictment or information must be substantially sustained by the evidence adduced, or the variance will be fatal.[71]

United States.— U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

See 37 Cent. Dig. tit. "Obscenity," § 11.

Refusal to set out discretionary.— The refusal of the court to require the prosecutor to file a copy of the matter on which the prosecution is based, where the indictment alleges that it is too obscene and indecent to be set out in the record, is within its discretion, and its action is not reviewable. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

65. McNair *v.* People, 89 Ill. 441; Com. *v.* Tarbox, 1 Cush. (Mass.) 66; State *v.* Smith, 17 R. I. 371, 22 Atl. 282; State *v.* Brown, 27 Vt. 619.

66. Reyes *v.* State, 34 Fla. 181, 15 So. 875; Com. *v.* McCance, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61; Com. *v.* Wright, 139 Mass. 382, 1 N. E. 411; People *v.* Hallenbeck, 2 Abb. N. Cas. (N. Y.) 66, 52 How. Pr. 502; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

67. Knowles *v.* State, 3 Day (Conn.) 103.

68. See CRIMINAL LAW, 12 Cyc. 379 *et seq.*; EVIDENCE, 16 Cyc. 926 *et seq.*; 1050 *et seq.*

Causing slave to appear indecently clothed. — To sustain an indictment for causing and permitting the slave to appear indecently clothed, it is not necessary to prove that the slave was exhibited in such state by any command of the master. That the master caused and permitted it may be inferred from circumstances. Britain *v.* State, 3 Humphr. (Tenn.) 203.

Presumption of knowledge of obscenity see *supra*, note 54.

69. See CRIMINAL LAW, 12 Cyc. 390 *et seq.*; EVIDENCE, 16 Cyc. 847 *et seq.*; 17 Cyc. 25 *et seq.*

Obscene pictures — Use and circulation by others.— Evidence as to the use of similar pictures in commerce or trade is inadmissible on behalf of defendant in a prosecution for circulating an indecent picture, since the use of such pictures by others does not palliate defendant's offense. Montross *v.* State, 72 Ga. 261, 53 Am. Rep. 840; State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800.

Obscene language — Evidence of hearing by others.— On the trial of a person charged with using abusive, insulting, or obscene language in the presence of a female, a witness who was present, or near enough to hear what was said, may testify that he did not hear defendant use the language charged. Cox *v.* State, 76 Ala. 66.

Obscene publications — Explanation of language used.—Parol evidence is not admissible to explain the language used in the matter complained of. It must be judged on its face and the context. Com. *v.* Havens, 6 Pa. Co. Ct. 545; Com. *v.* Landis, 8 Phila. (Pa.) 453.

Authorship of communication.— Where the authorship of an obscene communication is in dispute, a conversation between the accused and third persons, tending to connect the accused with the contents of the communication, is competent evidence to connect him with the authorship of it. But a charge made against the accused in the same conversation, having no relation to the subject-matter of the communication, is incompetent. Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606.

70. See CRIMINAL LAW, 12 Cyc. 485 *et seq.*; EVIDENCE, 17 Cyc. 753 *et seq.*

Publishing or exhibiting indecent pictures. — Evidence of either publishing or exhibiting indecent pictures will support a general verdict of guilty upon a count charging both. State *v.* Hill, 73 N. J. L. 77, 62 Atl. 936.

Evidence held sufficient to support a charge of exhibiting indecent pictures, but not a charge of publishing. State *v.* Hill, 73 N. J. L. 77, 62 Atl. 936.

71. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 450 *et seq.*

Indecent exposure.— An allegation that the exposure was made in the presence of divers persons is satisfied by proof that it took place in their vicinity, and so that it might have been seen. State *v.* Roper, 18 N. C. 208. An indictment charging the exposure to have been committed on a highway is not sustained by evidence that it was committed in a place near the highway, although in full view of it. Reg. *v.* Farrell, 9 Cox C. C. 446. An indictment that defendant made an obscene exhibition of the person of another is not sustained by proof that he placed an obscene writing upon the clothes worn by another. Tucker *v.* State, 28 Tex. App. 541, 13 S. W. 1004.

Obscene language.— In a prosecution for the utterance of obscene language in public, it is not necessary that the words be proven

D. Questions For Jury — 1. Obscene Language. In a trial for using insulting or obscene language in the presence of a female, it is for the jury to determine whether the language was of the character charged.[72]

2. Obscene Pictures. Whether the pictures are obscene is a question for the jury, to whom they shall be exhibited.[73]

3. Obscene Publications. While it has been held that the question whether or not a particular publication is obscene is for the court,[74] the better rule undoubtedly is that it is for the jury, under instructions from the court as to the meaning of the words.[75]

E. Instructions. The general rules covering the giving of instructions to the jury[76] are applicable in prosecutions for obscenity. A charge omitting an ingredient of the offense,[77] withdrawing a question of fact from the jury,[78] or assuming a fact not established by the evidence[79] is erroneous and should not be given. If, however, an erroneous instruction could not have prejudiced defendant, it affords no ground of exception.[80] A request to charge, correct in point of law, applicable to the case made by the evidence, and not covered by any charge given, is improperly refused.[81]

IV. Forfeiture and Destruction of Obscene Matter.

Obscene pictures and publications are a common nuisance,[82] and may be destroyed when the offense of publication or exhibition has been established.[83]

precisely as alleged in the indictment, since to do so would in most cases insure impunity to the offender, because almost everyone not abandoned to all sense of decency would instinctively turn away his ear from hearing such revolting indecency. Bell *v.* State, 1 Swan (Tenn.) 42.

Obscene pictures and publications.— There is a fatal variance between an indictment charging the posting of obscene pictures on a dwelling and evidence that they were posted on an out-house near it. Gober *v.* State, 140 Ala. 153, 37 So. 78. An indictment alleging that defendant printed and published obscene pictures of nude women is not sustained by proof of only partial nudity. Com. *v.* Dejardin, 126 Mass. 46, 30 Am. Rep. 652. An information charging one with having procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation is not sustained by evidence tending to show merely that she sat for such a negative, there being nothing to show her purpose in doing so. People *v.* Ketchum, 103 Mich. 443, 61 N. W. 776, 50 Am. St. Rep. 383, 27 L. R. A. 448.

72. Carter *v.* State, 107 Ala. 146, 18 So. 232.

Provocation.— Under a statute providing a penalty for any person who shall, without provocation, use obscene language in the presence of a female, it is a question for the jury whether the provocation was sufficient to excuse the language used. Collins *v.* State, 78 Ga. 87.

73. People *v.* Muller, 32 Hun (N. Y.) 209, 2 N. Y. Cr. 279 [*affirmed* in 96 N. Y. 408, 48 Am. Rep. 635, 2 N. Y. Cr. 375], holding further that the fact that they are copies of pictures publicly exhibited in other countries is immaterial as matter of defense.

74. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; McNair *v.* People, 89 Ill. 441; Smith *v.* State, 24 Tex. App. 1, 5 S. W. 510.

75. Com. *v.* Landis, 8 Phila. (Pa.) 453; U. S. *v.* Smith, 45 Fed. 476 (holding, however, that it is within the province of the court to construe the objectionable document so far as necessary to decide whether a verdict establishing its obscenity would be set aside as against evidence and reason); U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 500; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

Sending obscene communication to female against her consent.— Where a statute makes the offense of sending an obscene communication to a female indictable only when done against her consent, the question of consent is one for the jury. Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606.

76. See Criminal Law, 12 Cyc. 611 *et seq.*

What constitutes obscenity, instruction as to, held not misleading see Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

In prosecution for circulating indecent picture instruction held sufficiently specific see State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800.

77. Stark *v.* State, 81 Miss. 397, 33 So. 175.

78. Miller *v.* People, 5 Barb. (N. Y.) 203.

79. State *v.* Andrews, 35 Oreg. 388, 58 Pac. 765.

80. Montross *v.* State, 72 Ga. 261, 53 Am. Rep. 840.

81. Lorimer *v.* State, 76 Ind. 495.

82. Nuisances generally see Nuisances, *ante*, p. 1143 *et seq.*

83. Willis *v.* Warren, 1 Hilt. (N. Y.) 590.

Standard literature.— Rare and costly editions of the Arabian Nights, the works of Rabelais, Ovid's Art of Love, the Decameron

The fact that the publisher was not actuated by any bad intent or motive will not prevent such destruction.[84]

OBSERVE. To take notice of by appropriate conduct; to conform one's action or practice to; to keep; to heed; to obey; to comply with.[1]

OBSOLETE. No longer in use.[2] (Obsolete: Statute, see STATUTES.)

OBSOLETE STATUTE. See STATUTES.

OBSTACLE. An obstruction, physical or moral.[3]

OBSTA PRINCIPIIS. A phrase meaning "Withstand beginnings."[4]

OBSTINATE DESERTION. See DIVORCE.

OBSTRUCT.[5] Strictly, to build or set up something in the way.[6] Commonly, to hinder, prevent, frustrate, or retard;[7] oppose;[8] resist;[9] to place an obstacle in the way, or an impediment.[10] (See OBSTRUCTION.)

of Boccaccio, The Heptameron of Queen Margaret of Navarre, The Confessions of Rousseau, and Aladdin will not be ordered destroyed as obscene. *In re* Worthington Co., 30 N. Y. Suppl. 361, 24 L. R. A. 110.

An order for the destruction of books, under Lord Campbell's Act (20 & 21 Vict. c. 83, § 1), must state that the magistrate making it is satisfied, not only that the books are obscene, but also that their publication would amount to a misdemeanor proper to be prosecuted. *Ex p.* Bradlaugh, 3 Q. B. D. 509, 47 L. J. M. C. 105, 38 L. T. Rep. N. S. 680, 26 Wkly. Rep. 758.

84. Reg. *v.* Hicklin, L. R. 3 Q. B. 360, 11 Cox C. C. 19, 37 L. J. M. C. 89, 18 L. T. Rep. N. S. 395, 16 Wkly. Rep. 801; Steele *v.* Brannan, L. R. 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. Rep. N. S. 509, 20 Wkly. Rep. 607.

1. Marshall County *v.* Knoll, 102 Iowa 573, 580, 69 N. W. 1146, 71 N. W. 571.

"Observed" was misleading in a judge's charge where it was not clear whether it meant "seen," or "obeyed." Western R. Co. *v.* Williamson, 114 Ala. 131, 145, 21 Pac. 827.

Regarded as ambiguous, in the expression "observed that litigation was imminent." Anderson *v.* Bank of British Columbia, 2 Ch. D. 644, 647, 45 L. J. Ch. 449, 35 L. T. Rep. N. S. 76, 24 Wkly. Rep. 624.

2. Webster Int. Dict.

Writing the word in the margin of his will is not a cancellation or destruction of the will by the testator. Lewis *v.* Lewis, 2 Watts & S. (Pa.) 455, 457 [*cited* in Jack *v.* Shoenberger, 22 Pa. St. 416, 420].

3. Webster Int. Dict.

In a statute declaring it a misdemeanor "to cut or place any tree, brush, or other obstacle across a public road so as to impede travel, and not remove the same within six hours"; the term refers to obstructions of a temporary character. Georgia Cent. R. Co. *v.* State, 145 Ala. 99, 101, 40 So. 991.

4. Bouvier L. Dict.

Applied in: Boyd *v.* U. S., 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. ed. 746; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 32, 8 L. ed. 25.

5. **Derived from ob-struo.**— U. S. *v.* Williams, 28 Fed. Cas. No. 16,705.

6. U. S. *v.* Williams, 28 Fed. Cas. No. 16,705.

"Implies opposition without active force." — U. S. *v.* Williams, 28 Fed. Cas. No. 16,705.

Does not imply final effectiveness.— State *v.* Kilty, 28 Minn. 421, 423, 10 N. W. 475; U. S. *v.* Williams, 28 Fed. Cas. No. 16,705, where it was said: "In a more critical acceptation, 'obstruct' . . . does not imply that the opposition was in the end effective."

7. U. S. *v.* Williams, 28 Fed. Cas. No. 16,705. See also Anderson *v.* Maloy, 32 Minn. 76, 77, 19 N. W. 387.

Term is distinguished from "hinder" and "prevent" by etymology, and by showing that the act of "obstructing" in the more critical sense may take place without either "preventing" or "hindering." U. S. *v.* Williams, 28 Fed. Cas. No. 16,705.

8. Webster Dict. [*cited* in Davis *v.* State, 76 Ga. 721, 722].

9. Davis *v.* State, 76 Ga. 721, 722.

Distinguished from "impede" see Keeler *v.* Green, 21 N. J. Eq. 27, 30.

10. Overhouser *v.* American Cereal Co., 118 Iowa 417, 421, 92 N. W. 74.

Does not necessarily mean render impassable, when used of a public way. Overhouser *v.* American Cereal Co., 118 Iowa 417, 421, 92 N. W. 74; Patterson *v.* Vail, 43 Iowa 142, 145. For "a road may be obstructed more or less." Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 355, 67 Am. Dec. 471. And see OBSTRUCTION, *post*, 1339, and cases there cited. *Contra*, Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326, 328, holding that "obstruct" applied to a road, in its ordinary sense, means to stop up and wholly prevent travel.

OBSTRUCTING JUSTICE

EDITED BY MALCOLM GRAEME CAMERON, K. C.*

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* Author of "A Treatise on the Law of Dower;" "Ditches and Watercourses," Etc. For three years one of the Examiners of the Law Society of Upper Canada, and one of the Commissioners appointed by the Dominion Government to consolidate the Statute Laws of Canada.

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For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

The phrase "obstructing justice" means impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein.[1]

1. U. S. *v.* McLeod, 119 Fed. 416.
"Oppose an officer."— As used in a statute declaring it an offense to "obstruct, resist, or oppose" an officer in the discharge of his duty, the term "oppose" imports force; resistance to the officer himself, and has practically the same meaning as "obstruct" or "resist." It does not apply to mere opposition to the process to defeat its execution. Davis *v.* State, 76 Ga. 721, 722. But *compare* State *v.* Morrison, 46 Kan. 679, 689, 27 Pac. 133, substantially approving, as it seems, a charge to the jury, concerning a like statute and, in part, as follows: "Opposing: That might be done in various ways; by ordering away bidders; giving notice to the bidders that the title was not good; that the sheriff had no right to sell, and various things of that sort, would be within the meaning of this clause, opposing the sale or resisting an

II. OFFENSES REGARDED AS FORMS OF OBSTRUCTING JUSTICE.

A. Resisting or Obstructing Execution of Process — 1. INDICTABLE AT COMMON LAW. Any obstruction of legal process by active means, or by the omission of legal duty is, at common law, indictable as a misdemeanor.[2]

2. ELEMENTS OF OFFENSE — a. Officers or Persons Resisted. To constitute the offense, the officer[3] or person[4] resisted or obstructed must, at the time and place, be authorized to execute the process in the execution of which he is resisted or obstructed.

officer in the execution of a writ." Of the whole charge it was said: "Some portions of these instructions may not be technically correct, and yet, taking the whole of the instructions together, we do not think that they were misleading or erroneous as to anything material in the case, and certainly not so misleading or erroneous as to require a reversal of the judgment." But there had been acts on the part of defendants tending to provoke a quarrel with the officer, as well as acts tending to obstruct the sale.

2. State *v.* Hailey, 2 Strobh. (S. C.) 73; State *v.* Lovett, 3 Vt. 110; Rex *v.* Steventon, 2 East 362.

In Canada it is a criminal offense under Cr. Code, § 169 (a), to resist or wilfully obstruct any public officer, that is, any inland revenue or customs officer, officer of the army, navy, marine, militia, royal northwest mounted police, or other officer engaged in enforcing the laws relating to the revenue customs trade or navigation of Canada, section 2 (29), in the execution of his duty, or any person aiding him; or, (b) any peace officer, that is, mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, justice of the peace, warden keeper or guard of a penitentiary, the gaoler or keeper of any prison, any police officer, police constable, bailiff or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process, section 2 (26); or (c) any person engaged in the lawful execution of any lawful distress or seizure.

3. Vince *v.* State, 113 Ga. 1068, 39 S. E. 313; Bowers *v.* People, 17 Ill. 373; People *v.* McLean, 68 Mich. 480, 36 N. W. 231.

Officers held authorized.— The deputy marshal is an officer of the United States within the purview of Rev. St. § 5398, making it an offense for a person knowingly and wilfully to obstruct, resist, or oppose any officer of the United States in the service of process. U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90. The keeper of a state jail in which a person bound over by a United States commissioner to await the action of the federal grand jury is confined, with the consent of the state, is, with respect to the keeping and custody of such person, an officer of the United States, within the meaning of a statute making it an offense to resist or oppose any officer of the United States in the execution of process. U. S. *v.* Martin, *supra*. A person who knowingly and wilfully resists a receiver, acting under an order of a court of competent jurisdiction, and having in his possession a properly certified copy of the order, is guilty, under Iowa Code, § 3960, of resisting an officer authorized by law to execute a legal order. State *v.* Rivers, 64 Iowa 729, 12 N. W. 792. A special deputy employed and authorized by the sheriff to execute a particular process is "an officer of the State" within the meaning of Ala. Code, § 4137, making it an offense to resist such officer in the execution of process. Andrews *v.* State, 78 Ala. 483. Although the statute requires the sheriff's appointments to be approved and recorded, yet the sheriff has a common-law right to appoint a special deputy to serve a warrant, of which he has not been deprived by such statute, and resistance to such deputy in serving the warrant constitutes the offense of resisting an officer in the execution of process. Putman *v.* State, 49 Ark. 449, 5 S. W. 715.

Officers held to be unauthorized.— A sheriff cannot authorize his under sheriff to arrest one for whom a warrant for a misdeameanor has been issued, so as to make the person charged liable for resisting arrest, where the sheriff keeps the warrant in his own possession and is out of sight and hearing at the time of the attempted arrest. People *v.* McLean, 68 Mich. 480, 36 N. W. 231. Under a special act creating a city court and providing for the appointment of a sheriff thereof, such officer cannot legally execute process issued from other courts or by a judicial officer other than the judge of the city court, and hence an accusation for obstructing the execution by such sheriff of a warrant from a justice of the peace cannot be sustained. Vince *v.* State, 113 Ga. 1068, 39 S. E. 313. A road supervisor is not such an officer as is referred to in a statute against resisting officers in the service of process, the statute contemplating only such officers as are authorized to execute legal process. State *v.* Putnam, 35 Iowa 561.

4. Bowers *v.* People, 17 Ill. 373.

Persons authorized.— When a *posse comitatus* has been duly called out by the sheriff, resistance to any member thereof, acting under his authority, is resistance to the sheriff, and constitutes the offense of resisting an officer in the execution of process. Bonneville *v.* State, 53 Wis. 680, 4 N. W. 427. A member of the Indian police, although not an officer of the United States, is included among the other persons who may be authorized to serve writs of process, within the last clause of Rev. St. § 5398, making it an

b. Knowledge and Intent. Where the statute, in defining the offense, employs the words "knowingly" and "wilfully," it must appear that defendant knew the contents of the process and resisted its execution with an evil intent.[5]

c. Process Resisted. An indictment will not lie where it appears that the alleged act or acts of resistance were done after the process had spent its force and was *functus officio*.[6] And resisting or obstructing the execution of process can only take place where the officer was actually armed with process for execution at the time of the alleged resistance or obstruction.[7] Where the statute makes it an offense to resist or obstruct the execution of any process or warrant, it embraces every species of process, legal and judicial, whether issued by the court in session, or by a judge or magistrate acting in his judicial capacity out of court.[8] Where the process or warrant appears on its face to have issued from competent authority and with legal regularity, it is an indictable offense to interfere with or obstruct the officer executing it,[9] notwithstanding any error or irregularity in the previous issuing of the same,[10] or any imposition practised upon the court or magistrate in obtaining it.[11] But where the process or warrant shows the illegality upon its face it affords no protection to the officer executing it, and it is not an offense to

offense to resist the execution of legal process. U. S. *v.* Mullin, 71 Fed. 682. A resistance to a special custodian of attached property, who is employed by a marshal for such custodian, although not a regularly appointed sworn deputy, is resistance to the marshal within the meaning of a statute relative to the resistance to an officer while executing process. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

5. State *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

6. McGehee *v.* State, 26 Ala. 154.

7. Jones *v.* State, 60 Ala. 99; State *v.* Lovell, 23 Iowa 304.

8. U. S. *v.* Lukins, 26 Fed. Cas. No. 15,639, 3 Wash. 335; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,250, 2 Curt. 637.

An oral order of the court to remove from the court-room a person who has disturbed the proceedings of the court comes within the meaning of a statute making it an offense to resist an officer in the execution of process. U. S. *v.* Terry, 41 Fed. 771.

A commitment issued by the commissioners of the circuit court is a legal process within the meaning of Rev. St. § 5398, prescribing a penalty for obstructing an officer while serving or executing a legal process. U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90.

A written order by an Indian agent, acting in pursuance of instructions from the interior department, for the purpose of fulfilling the duty of the government to protect the Indians in the use and occupancy of their reservations, is a legal writ or process within the meaning of Rev. St. § 5398, imposing a penalty for resisting the service of such a writ or process. U. S. *v.* Mullin, 71 Fed. 682.

A distress warrant, issued for the purpose of collecting taxes under the internal revenue law, is not a legal process within the meaning of the act of April 30, 1790, section 22, in relation to resisting officers in the service of process, such act protecting nothing but process issued by courts, magistrates, or commissioners of the United States. U. S. *v.* Myers, 27 Fed. Cas. No. 15,847.

A landlord's warrant is not legal process within the act of March 31, 1860, section 8, providing for an indictment for resisting legal process. Com. *v.* Nichols, 4 Pa. Dist. 318.

An order to open or work a road, not in writing, does not rise to the dignity of a legal writ of process, so as to make one interfering with an overseer of a public road, when working on a road, guilty of resisting an officer in the execution of legal process. Maverty *v.* State, 10 Lea (Tenn.) 729.

9. Bowers *v.* People, 17 Ill. 373; State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; State *v.* Dula, 100 N. C. 423, 6 S. E. 89; Meador *v.* State, 44 Tex. Cr. 468, 72 S. W. 186; Witherspoon *v.* State, 42 Tex. Cr. 532, 61 S. W. 396, 96 Am. St. Rep. 812. See also Nolty *v.* State, 17 Wis. 668.

Oral order.— Under Pen. Code (1895), § 306, it is a misdemeanor to obstruct an officer in executing any legal order of the court, whether the same has been reduced to writing or not. Gibson *v.* State, 118 Ga. 29, 44 S. E. 811.

10. State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; State *v.* Dula, 100 N. C. 423, 6 S. E. 89; Meador *v.* State, 44 Tex. Cr. 468, 72 S. W. 186. See also State *v.* Curtis, 2 N. C. 471.

Instances.— Thus the person resisting or obstructing an officer is none the less indictable because the warrant recited that a complaint had been made, but none was annexed to, or accompanied, the warrant (State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188), or because the libel may not have been sufficient to authorize the warrant of attachment against a vessel (U. S. *v.* Tinklepaugh, 28 Fed. Cas. No. 16,526, 3 Blatchf. 425).

11. State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188.

Instances.— Thus it is indictable to resist or obstruct an officer, although the warrant being executed by him was obtained by the complainant to accomplish improper and illegal objects. State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188.

interfere with or obstruct him while so doing.[12] And it has been held that the retaking of possession by the vendor under a contract for the conditional sale of chattels is not within the term "lawful distress or seizure" as used in a statute making it an offense to resist or wilfully obstruct any person in making any lawful distress or seizure, and that an obstruction of the vendor's bailiff in regaining possession is not an offense within such provision.[12a]

d. Time of Resistance. The alleged acts of resistance or of obstruction must have been done while the officer was executing, or attempting to execute, the process.[13]

e. Mode of Resistance — (I) *Whether Forcible.* Where the statute limits the offense to resistance alone, it must appear that the accused was personally present and resisted the officer's execution of process by more or less forcible means.[14] Hence, while it is enough that the officer was prevented by the exercise of personal violence on the part of the accused,[15] yet mere threats,[16] unless accompanied by a present ability and apparent intention to execute them,[17] do not constitute the offense. But where the statute denounces wilful acts of obstruction, as well as of resistance, its violation is established by proof that the accused caused any impediment or hindrance to be interposed to the execution of the process,[18] although not personally present and actually coöperating in the act of obstructing.[19] It must appear, however, that the accused in some manner and at some stage aided or abetted the act of obstructing.[20]

(II) *Direct or Indirect.* If the statute denounces resistance alone, it contemplates that execution of the process shall be prevented by the exercise of direct means,[21] and it is not violated by indirectly defeating and circumventing the officer in the execution of process,[22] as where property is concealed or removed.[23]

12. State *v.* Curtis, 2 N. C. 471; Toliver *v.* State, 32 Tex. Cr. 444, 24 S. W. 286. See also State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188.

Instances.— Thus the absence of a seal essential to the validity of process (State *v.* Curtis, 2 N. C. 471), or the failure in a warrant to state an offense (Fulkerson *v.* State, 43 Tex. Cr. 587, 67 S. W. 502), justifies resistance to or obstruction of an officer executing such process or warrant.

12a. Rex *v.* Shand, 8 Can. Cr. Cas. 45.

13. Rome *v.* Omburg, 22 Ga. 67; Farris *v.* State, 14 Lea (Tenn.) 295, holding further that where an officer has, by virtue of a writ of execution, obtained possession of the property sought, a subsequent rescue of the property levied upon does not constitute a resistance to the execution of process.

14. Farris *v.* State, 14 Lea (Tenn.) 295 (holding that there must be a forcible resistance to the execution of the process, and that a mere trespass upon property after levy, without violence, does not constitute the offense of resisting the execution of process); State *v.* Welch, 37 Wis. 196. See also U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439. But see U. S. *v.* Lukins, 26 Fed. Cas. No. 15,639, 3 Wash. 335, where there is a *dictum* that refusal to obey an officer attempting to execute process constitutes the offense.

15. State *v.* Welch, 37 Wis. 196; U. S. *v.* Lowry, 26 Fed. Cas. No. 15,636, 2 Wash. 169. See also Parish *v.* State, 130 Ala. 92, 30 So. 474.

16. State *v.* Welch, 37 Wis. 196; U. S. *v.* Lowry, 26 Fed. Cas. No. 15,636, 2 Wash. 169.

17. Williams *v.* State, 70 Ark. 393, 68 S. W. 241; State *v.* Russell, (Iowa 1898) 76 N. W. 653; State *v.* Seery, 95 Iowa 652, 64 N. W. 631; State *v.* Welch, 37 Wis. 196; U. S. *v.* Lowry, 26 Fed. Cas. No. 15,636, 2 Wash. 169. See also Pierce *v.* State, 17 Tex. App. 232 (holding that one is properly found guilty of resisting an officer in his attempt to execute a warrant against another, where both were armed with guns when arrest was attempted, and although defendant did not threaten to shoot, his companion did, and both rode away together); State *v.* Caldwell, 2 Tyler (Vt.) 212; U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

18. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,250, 2 Curt. 637.

19. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

20. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 6 Biss. 439.

Where a bystander states to other bystanders, in the hearing of a police officer making an arrest for drunkenness, that the person being arrested is not drunk, such does not constitute the offense of obstructing a peace officer, if the statement was made *bona fide* and in the belief of its truth. Rex *v.* Cook, 11 Can. Cr. Cas. 32.

21. State *v.* Welch, 37 Wis. 196. See also U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

22. State *v.* Welch, 37 Wis. 196; U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

23. State *v.* Welch, 37 Wis. 196.

But where the statute denounces also wilful acts of obstruction, the employment of direct means is not necessarily implied,[24] and it is violated whenever execution of process is prevented by interposing indirect or circuitous impediments.[25]

f. Services or Execution Resisted — (i) *In General.* Holding attached property after seizure,[26] or delivering property to purchaser at a sale under execution,[27] is a part of the execution of process, and a person who resists or obstructs an officer thus holding or delivering property commits the statutory offense.

(ii) *Arrest Being Made in Unlawful Manner.* Although the offense of resisting the execution of process is not committed by resisting an arrest being made in an unlawful manner,[28] yet, even where an arrest is being made in an unlawful manner, one who forcibly attacks, from motives of revenge and not of self-defense, the officer making such arrest, is guilty of resisting him.[29]

(iii) *Levy on Exempt Property.* A debtor may, without rendering himself liable for resisting or obstructing the execution of process, use reasonable force to resist the attempt of an officer to a levy, by virtue of an attachment, on exempt property.[30] So too where exempt property, the attachment of which is forbidden by statute, is taken by an officer, the owner may use reasonable force to retake the same.[31]

(iv) *Levy on Property of Third Person.* Although the view obtains in some jurisdictions that the owner of personal property may maintain his possession, using no more force than is necessary, as against an officer who attempts to seize the property by virtue of process directed against another, and not make himself amenable to prosecution for resisting or obstructing the execution of process,[32] yet the view, supported by the weight of authority, is that the owner of property who maintains his possession by force against an officer attempting to seize it under lawful process against another, where the officer is acting in good faith,[33] and on reasonable grounds to believe the property to be that of the debtor,[34] commits the offense of resisting or obstructing the execution of process.

(v) *Levy on Sunday.* A writ of replevin conveys no authority to an officer to seize property on Sunday, and a recapture on the same day of the property so seized does not constitute the offense of resisting or obstructing the execution of process.[35]

3. Persons Liable. As a general rule any person who interferes or obstructs

24. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

25. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

26. U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

27. Mitchell *v.* State, 101 Ga. 578, 28 S. E. 916.

28. State *v.* Dennis, 2 Marv. (Del.) 433, 43 Atl. 261; Lee *v.* State, 45 Tex. Cr. 94, 74 S. W. 28; State *v.* Hooker, 17 Vt. 658; U. S. *v.* Terry, 42 Fed. 317.

29. State *v.* Dennis, 2 Marv. (Del.) 433, 43 Atl. 261.

30. People *v.* Clements, 68 Mich. 655, 36 N. W. 792, 13 Am. St. Rep. 373.

31. State *v.* Hartley, 75 Conn. 104, 52 Atl. 615.

32. Wentworth *v.* People, 4 Ill. 550; Com. *v.* Kennard, 8 Pick. (Mass.) 133. See also Oliver *v.* State, 17 Ark. 508; State *v.* Perry, Dudley (S. C.) 215, holding that a garnishee claiming goods in his hands, either on behalf of himself or another, is not guilty of resisting the execution of process, where he prevents the sheriff from seizing such goods by virtue of a writ of attachment.

33. State *v.* Richardson, 38 N. H. 208, 75 Am. Dec. 173 (where the court says that there is no such sacredness attached to personal property as can justify, in defense of its possession, resistance to an authorized officer of the law acting in good faith under lawful process; that if the property of one person is taken upon a writ of execution against another, the law affords ample means of redress by writ of replevin, an injunction, or other proceedings, without the owner taking the law into his own hands); State *v.* Fifield, 18 N. H. 34; People *v.* Hall, 31 Hun (N. Y.) 404; State *v.* Buchanan, 17 Vt. 573; Merritt *v.* Miller, 13 Vt. 416; State *v.* Miller, 12 Vt. 437; State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482 (where it is said that if the owner of property may maintain his possession by force against an officer attempting to seize it under process against another, so may any one who believes himself to be the owner, since it will not do to predicate crime upon as subtle a distinction as an abstract right of property).

34. Faris *v.* State, 3 Ohio St. 159; U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

35. Bryant *v.* State, 16 Nebr. 651, 21 N. W. 406.

an officer while executing, or attempting to execute, legal process is indictable therefor.[36] Thus where an officer wilfully levies on personalty by process against the party in whose possession it is, interference with such officer by a third person claiming to own the property renders him guilty of the offense.[37]

B. Refusal to Assist in Execution of Process. A private person duly summoned by an officer having legal authority to assist him in the execution of process is indictable for refusing to obey the summons,[38] unless it appears, from all the circumstances, that an attempt to execute the process, or to aid therein, would have been futile, as well as dangerous, to the life and limb of such private person.[39]

C. Obstructing or Interfering With Officer in the Performance of His Duty — 1. Person Resisted Must Be Officer. To make out the offense of resisting or obstructing an officer in the discharge of his duty, it must be shown that the person so resisted was an officer.[40]

2. Person Resisted Must Be Performing Official Duty. To constitute the offense, it must appear that the officer at the time of the alleged resistance or obstruction was actually performing a duty pertaining to his office,[41] and an act which may, in its remote consequences only, prevent the officer from performing his official duty does not constitute the offense.[42] If he was attempting to perform a duty not enjoined by law upon him and peculiar to his office,[43] or was acting, in the given case, without the necessary legal process,[44] one who opposes him therein is not guilty of the offense. But when it clearly appears that the officer was, when obstructed, in the performance of a duty enjoined on him by law, the person who so obstructed him is guilty of the offense.[45]

36. Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383.

37. People *v.* Smith, 131 Mich. 70, 90 N. W. 666.

38. Dougherty *v.* State, 106 Ala. 63, 17 So. 393; Comfort *v.* Com., 5 Whart. (Pa.) 437; Reg. *v.* Brown, C. & M. 314, 41 E. C. L. 175; Reg. *v.* Sherlock, L. R. 1 C. C. 20, 10 Cox C. C. 170, 12 Jur. N. S. 126, 35 L. J. M. C. 92, 13 L. T. Rep. N. S. 623, 14 Wkly. Rep. 288; Can. Cr. Code, § 167.

Validity of warrant of arrest.— Where a notary public, who acted also as justice of the peace, authorized a special constable to execute a warrant, by his indorsement on the warrant, signed by him as "notary public," his failure to add "*ex officio* justice of the peace" was no excuse for a party who refused to aid such constable in making an arrest, as such party was bound to know that he was a justice. Coleman *v.* State, 63 Ala. 93.

Summons in foreign county to assist.— Ala. Code, § 4656, provides that an officer having any warrant of arrest to execute may pursue defendant into another county, and may there summon persons to assist in making the arrest. It was held that to authorize an officer to call upon another to assist in making an arrest in a foreign county, it is not necessary that the call be made in the execution of a warrant, the service of which was begun by the officer in his own county when defendant was there, and from whence the officer has followed him; but it is sufficient if the warrant was issued after defendant fled to the foreign county, where the officer has followed within a reasonable time. Coleman *v.* State, 63 Ala. 93.

39. Dougherty *v.* State, 106 Ala. 63, 17 So. 393.

40. Merritt *v.* State, (Miss. 1889) 5 So. 386.

A supervisor of roads is an officer within the meaning of a statute which punishes resisting or obstructing any sheriff, constable, or other officer in the discharge of his duty. Woodworth *v.* State, 26 Ohio St. 196.

41. People *v.* Hubbard, 141 Mich. 96, 104 N. W. 386; People *v.* Hockstim, 36 Misc. (N. Y.) 562, 73 N. Y. Suppl. 626; Matthews *v.* Schmidt, 8 Kulp (Pa.) 471; State *v.* Lovett, 3 Vt. 110; U. S. *v.* McLeod, 119 Fed. 416; U. S. *v.* Baird, 48 Fed. 554.

42. State *v.* Lovett, 3 Vt. 110.

43. U. S. *v.* Kelly, 108 Fed. 538; U. S. *v.* Baird, 48 Fed. 554.

44. State *v.* Hartley, 74 Conn. 64, 49 Atl. 860; Ryan *v.* Chicago, 124 Ill. App. 188; People *v.* Rounds, 67 Mich. 482, 35 N. W. 77; People *v.* Hockstim, 36 Misc. (N. Y.) 562, 73 N. Y. Suppl. 626; U. S. *v.* Goure, 25 Fed. Cas. No. 15,240, 4 Cranch C. C. 488.

45. Brown *v.* State, 81 Miss. 137, 32 So. 952; State *v.* Bowen, 17 S. C. 58; Rex *v.* Kearney, 12 Can. Cr. Cas. 349.

Obstruction by arrest of officer.— S, having attempted to vote in the presence of a deputy marshal, under circumstances sufficient to justify the belief that he was not entitled to vote, was arrested by the latter. The escape of the prisoner having been subsequently effected through the intervention of a crowd which surrounded the marshal and the latter, having been forcibly deprived of his cane, drew his pistol, when he was at once arrested by certain members of the municipal police. It was held that such an

3. Mode of Resisting. To constitute the offense it is not necessary that the officer should be assaulted, beaten, or bruised.[46]

D. Obstructing or Impeding Administration of Justice. In the United States it is made an offense by statute to impede or obstruct, by threats of violence, the due administration of justice in any court of the United States.[47] If the unlawful act, done with reference to a particular cause pending or contemplated to be brought before a United States court, does not obstruct the administration of justice therein, no offense is committed, although the evil intent of the unlawful act may militate against the administration of justice in some other cause.[48] In Canada it is made an offense by statute to influence or attempt to influence, by threats or bribes, or other corrupt means, any juryman, whether sworn as such or not, or for a juryman to accept any corrupt consideration on account of his conduct as a juryman, or to wilfully attempt in any other way to obstruct or pervert or defeat the course of justice.[48a]

E. Dissuading or Preventing Witness From Attending or Testifying — 1. Indictable at Common Law. It is an indictable offense, at common law, to dissuade or prevent,[49] or to attempt to dissuade or prevent,[50] a witness from attending or testifying upon the trial of a cause.

2. Elements of Offense. The gist of the offense is the wilful and corrupt attempt to interfere with and obstruct the administration of justice.[51] An attempt, whether successful or not, to dissuade or prevent a witness from attending or testifying upon the trial of a cause, evidenced by distinct and unequivocal acts, is indictable.[52] It is immaterial that the person dissuaded by defendant had not been regularly summoned to attend as a witness, if defendant knew that such person was a material witness and under obligation to attend.[53] The materiality of the testimony of the person dissuaded from attending as a witness is not essential to the offense.[54] No physical act of intervention is necessary to constitute the offense, but it may be committed by persuasion, advice, or threats.[55] Intentionally and designedly to get a witness intoxicated, for the express purpose of preventing him from attending and testifying, is an indictable offense.[56] The mere giving of money by defendant to another for the use of a third person, and to

arrest was an obstruction of the marshal in the performance of his duty, within the meaning of Rev. St. § 5522. U. S. *v.* Conway, 6 Fed. 49, 18 Blatchf. 566.

Resisting inspection of premises where liquors are sold.— Under Liquor Tax Law (Laws 1896) c. 112, § 37), providing that all officers authorized to make arrests in any city may, in the performance of their duties, enter on any "premises" where liquors are sold at any time when such premises are open, when the outer door of a hotel building where liquors are sold is open, a police officer has a right to go into every part of the building to search for violations of the law, and forcible exclusion from any room constitutes resistance of an officer. People *v.* Miller, 79 N. Y. Suppl. 1122.

46. Woodworth *v.* State, 26 Ohio St. 196.

47. U. S. *v.* McLeod, 119 Fed. 416.

48. U. S. *v.* McLeod, 119 Fed. 416.

48a. Can. Cr. Code, § 180 (b), (c), (d).

By Can. Cr. Code, § 180 (a), it is an indictable offense to dissuade or attempt to dissuade any person, by threats or bribes, or other corrupt means, from giving evidence in any matter, civil or criminal; and by subsection (c) for a witness to accept any corrupt consideration to abstain from giving evidence.

49. State *v.* Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; State *v.* Holt, 84 Me. 509, 24 Atl. 951; State *v.* Ames, 64 Me. 386; Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

50. State *v.* Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; State *v.* Ames, 64 Me. 386; State *v.* Carpenter, 20 Vt. 9; State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450; State *v.* Baller, 26 W. Va. 90, 53 Am. Rep. 66.

51. State *v.* Holt, 84 Me. 509, 24 Atl. 951.

52. State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811; State *v.* Ames, 64 Me. 386; State *v.* Carpenter, 20 Vt. 9; State *v.* Keyes, 8 Vt. 74 Am. Dec. 665.

53. State *v.* Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811; State *v.* Holt, 84 Me. 509, 24 Atl. 951; State *v.* Carpenter, 20 Vt. 9; State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450; State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132.

54. Tedford *v.* People, 219 Ill. 23, 76 N. E. 60. See also State *v.* Early, 3 Harr. (Del.) 562; Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

55. State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132.

56. State *v.* Holt, 84 Me. 509, 24 Atl. 951, opinion of the court by Walton, J.

induce him to absent himself as a witness from the trial, has been held not to constitute the offense, unless it appears that there was some communication between such third person and the person to whom the money was given.[57]

F. Refusal of Witness to Answer Questions. A refusal by a witness to answer a pertinent and proper question in a judicial investigation might be a serious obstruction of public justice, and, where it is charged that it impeded and obstructed the officer conducting the investigation in the due and legal execution of his office, it seems that it is indictable.[58]

G. Procuring False Evidence. To constitute the crime of procuring false evidence there must be an intent to procure false evidence for a fraudulent and deceitful purpose, and hence allowing it to be done through carelessness, however gross, without such intent cannot constitute the offense.[59]

III. PROSECUTION AND PUNISHMENT.

A. Prosecution — 1. Indictment, Information, or Complaint — a. Resisting or Obstructing Execution of Process — (I) *In General.* Where the words of the statute are descriptive of the offense of resisting or obstructing the execution of process, the indictment must expressly charge the facts that constitute[60] and the omission of any fact necessary to constitute the offense is fatal.[61]

(II) *Particular Averments* — (A) *Knowledge of Capacity in Which Officer Acted.* Unless the statute defining the offense of resisting or obstructing the execution of process contains the word "knowingly," or some equivalent term,[62] it is not necessary for the indictment to allege that defendant knew the capacity in which the officer acted, or pretended to act, in the execution of the process mentioned in the indictment.[63]

(B) *Process* — (1) In General. The indictment must show what the process was,[64] so identifying it by description as to inform the accused of what he is called upon to answer;[65] but it is not necessary to set out the process *in hæc verba.*[66]

(2) Legality. The indictment in a prosecution for obstructing the execution of process must, to be sufficient, show by proper averments that the process was legal,[67]

57. State *v.* Baller, 26 W. Va. 90, 53 Am. Rep. 66.

One who bribes a duly subpœnaed witness to absent himself from a trial cannot be convicted, under Gen. St. § 6385, which makes it a felony to bribe a witness to give false testimony, or to withhold true testimony, but only under section 6383, which makes it a misdemeanor to bribe a witness to absent himself. State *v.* Sargent, 71 Minn. 28, 73 N. W. 626.

58. People *v.* Higgins, 5 Kulp (Pa.) 269.

59. People *v.* Brown, 74 Cal. 306, 16 Pac. 1.

60. State *v.* Beasom, 40 N. H. 367.

61. State *v.* Beasom, 40 N. H. 367.

62. Horan *v.* State, 7 Tex. App. 183.

Knowledge insufficiently alleged.— An indictment charging that one did "unlawfully and wilfully" resist an officer in serving process is not sufficient, under Iowa Code, § 4899, declaring a punishment if one "knowingly and wilfully" makes such resistance; "knowingly" not being synonymous with "wilfully," and its omission not being supplied. State *v.* Perry, 109 Iowa 353, 80 N. W. 401.

63. Putnam *v.* State, 49 Ark. 449, 5 S. W. 715.

64. State *v.* Henderson, 15 Mo. 486; State *v.* Hailey, 2 Strobh. (S. C.) 73. But see State *v.* Dunn, 109 N. C. 839, 13 S. E. 881.

Warrant of arrest.— Under a statute making it an offense for one against whom a legal warrant of arrest is directed in a criminal case to resist arrest, an information charging the offense must aver the warrant to have been a warrant of arrest. McGrew *v.* State, 17 Tex. App. 613.

65. State *v.* Moore, 125 Iowa 749, 101 N. W. 732; State *v.* Roberts, 52 N. H. 492; U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

66. McQuoid *v.* People, 8 Ill. 76; State *v.* Roberts, 52 N. H. 492; U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

67. *Illinois.*— Cantrill *v.* People, 8 Ill. 356.

Indiana.— State *v.* Tuell, 6 Blackf. 344.

New Hampshire.— State *v.* Flagg, 50 N. H. 321; State *v.* Beasom, 40 N. H. 367.

South Carolina.—State *v.* Hailey, 2 Strobh. 73.

Texas.— Toliver *v.* State, 32 Tex. Cr. 444, 24 S. W. 286.

Vermont.— See State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482.

Washington.— State *v.* Brown, 6 Wash. 609, 34 Pac. 133.

United States.— U. S. *v.* Stowell, 27 Fed. Cas. No. 6,409, 2 Curt. 153.

not only in form and purpose,[68] but as emanating from some court or officer empowered to issue it.[69]

(3) Date of Issuance and Against Whom Issued. If the statute provides that the process may be described generally, the indictment need not state the date of its issuance[70] or against whom issued.[71]

(4) Indorsement. If, to enable the officer to execute it, the writ must be indorsed, an allegation of indorsement which is part of the writ which the officer was executing is sufficient.[72]

(5) Return. It is not necessary to allege that the writ has been duly returned.[73]

(6) Authority of Officer to Execute. It seems that an averment that the officer resisted or obstructed was duly authorized to serve and execute the process suffices as an allegation of authority to serve such process.[74]

(7) In Officer's Hands to Be Executed. It is not necessary that there should be an express averment that process was in the hands of the officer for the purpose of being executed.[75]

(c) *Resistance.* An indictment which omits to charge that the officer was resisted in attempting to execute legal process is bad.[76] There is a conflict of authority as to whether the indictment must allege the particular manner and method by which the officer was resisted or obstructed, some cases holding that it suffices to allege the offense substantially in the words of the statute,[77] and others holding that an indictment is bad which does not charge by proper averments the particular manner and method of resistance or obstruction.[78]

Compare Slicker *v.* State, 13 Ark. 397; State *v.* Perkins, 43 La. Ann. 186, 8 So. 439.

Averments held sufficient.— An averment that the officer who "was attempting to serve a legal process" sufficiently describes the validity of the process. Bowers *v.* People, 17 Ill. 373.

Averments held insufficient.— An averment that the officer was "in the due and lawful execution of his office" is insufficient. State *v.* Beasom, 40 N. H. 367.

68. U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153.

69. Bowers *v.* People, 17 Ill. 373; Cantrill *v.* People, 8 Ill. 356; U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153.

Sufficiency of averment.— What particular averments are necessary to show this authority to issue the process alleged to have been obstructed depends upon the character of the tribunal or officer issuing it. U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153. If the officer who granted the process had by law only a limited and special authority, depending, for its existence, on particular facts, every fact necessary to the existence of that authority must either be averred in the indictment (People *v.* McLean, 68 Mich. 480, 36 N. W. 231; U. S. *v.* Stowell, *supra*) or appear on the face of the process therein set forth (U. S. *v.* Stowell, *supra*).

Aiding want of averment.— In an indictment under the act of April 30, 1790, section 22, for obstructing, etc., an officer of the United States in the discharge of process, the want of an averment of the facts showing that the commissioners were authorized to issue the warrant cannot be aided by referring to the records of the court where the indictment is brought; it appearing that such court appointed the commissioners whose authority is in question. U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153.

70. Howard *v.* State, 121 Ala. 21, 25 So. 1000.

71. Howard *v.* State, 121 Ala. 21, 25 So. 1000.

72. State *v.* Fifield, 18 N. H. 34.

73. State *v.* Fifield, 18 N. H. 34 (assigning as a reason therefor that the offense is necessarily committed before the return-day and it does not appear necessary to wait for the return-day before the indictment can be found); State *v.* Ferry, 61 Vt. 624, 18 Atl. 451.

74. Com. *v.* Armstrong, 4 Pa. Co. Ct. 5.

75. State *v.* Bushey, 96 Me. 151, 51 Atl. 872 (holding further that it is sufficient if a fair inference from all the language used is that the process was in the officer's possession for the purpose of being executed); State *v.* Estis, 70 Mo. 427.

An averment that the officer was engaged in the service of the writ described involves the fact that the writ was in his hands for the purpose of being served. State *v.* Fifield, 18 N. H. 34.

76. Hill *v.* State, 43 Tex. 329.

77. State *v.* Fifield, 18 N. H. 34; Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427; U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15; U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

Averment held sufficient.— An averment that defendant "did knowingly, wilfully and unlawfully obstruct, resist and oppose" an officer sufficiently states the manner and method of resistance. U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

78. State *v.* Hailey, 2 Strobh. (S. C.) 73;

b. Refusal to Assist in Execution of Process. An indictment charging defendant with refusing to assist an officer in his service of process must allege that defendant was informed of the official character of the person requesting his assistance.[79] Likewise the authority of the person requesting defendant's assistance to execute the process must be set forth in the indictment.[80] But if the information alleges that defendant knew that the officer was serving process and that the persons with him were his assistants, it is unnecessary to allege that the officer had asked such persons to assist him or that he needed assistance.[81]

c. Resisting or Obstructing Officer in Performance of Official Duty — (I) *In General.* An indictment for resisting or obstructing an officer in the performance of his duty must set forth all the facts necessary to constitute the offense.[82] It has been held insufficient to charge the offense in the language of the statute.[83]

(II) *Particular Allegations.* Where the statute defining the offense does not use the word "knowingly," or its equivalent, it is not necessary to allege knowledge that the person resisted or obstructed was an officer;[84] but where knowledge is a part of the statutory description of the offense, the indictment must allege that the accused knew the person to be an officer when resisting or obstructing him.[85] As to whether the particular official act or acts obstructed must be specifically averred, there is a conflict of authority, it being held in one jurisdiction that such an averment is unnecessary,[86] and in other jurisdictions that, unless the statute defining the offense is full and explicit, an indictment is defective, in this regard, which charges the offense simply in the language of the statute.[87] In some jurisdictions the view obtains that, unless the statute defining the offense is full and explicit,[88] the indictment must set forth the act or acts of resistance or obstruction,[89] while in other jurisdictions it is held that, in this regard, charging the offense substantially in the language of the statute is sufficient.[90]

(III) *Variance.* An erroneous allegation in the indictment respecting the name of the officer resisted does not constitute a fatal variance.[91] So too an erroneous allegation respecting the official title of the officer is immaterial, if it appears that he was authorized to perform the duty in which he was resisted.[92]

d. Dissuading or Preventing Witness From Attending or Testifying. Where the statute makes it an offense to attempt to bribe a witness to absent himself from a trial, it is not necessary to charge in the indictment that the attempt to

Horan *v.* State, 7 Tex. App. 183. See also Gibson *v.* State, 118 Ga. 29, 44 S. E. 811.

79. State *v.* Deniston, 6 Blackf. (Ind.) 277.

80. State *v.* Shaw, 25 N. C. 20.

81. State *v.* Emery, 65 Vt. 464, 27 Atl. 167.

82. People *v.* Hamilton, 71 Mich. 340, 38 N. W. 921; Lamberton *v.* State, 11 Ohio 282; Aylmore *v.* State, 11 Ohio Dec. (Reprint) 900, 30 Cinc. L. Bul. 376.

83. Aylmore *v.* State, 11 Ohio Dec. (Reprint) 900, 30 Cinc. L. Bul. 376.

84. State *v.* Perkins, 43 La. Ann. 186, 8 So. 439.

Where the indictment alleges that the offense was committed on a certain date, a subsequent allegation that defendants "then and there well knew" the person assaulted to be a deputy sheriff refers to that date, although a writ containing a different date is set out *in hæc verba* in the indictment. State *v.* Ferry, 61 Vt. 624, 18 Atl. 451.

Averment waived.— Where an information distinctly charges unlawful resistance to an officer, the omission of the words "knowingly and wilfully," used by the statute in defining the offense, does not constitute a fatal defect, especially when defendant made no objection in the lower court. People *v.* Haley, 48 Mich. 495, 12 N. W. 671.

85. State *v.* Maloney, 12 R. I. 251; State *v.* Burt, 25 Vt. 373; State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482.

86. U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15.

87. People *v.* Hamilton, 71 Mich. 340, 38 N. W. 921; State *v.* Maloney, 12 R. I. 251; U. S. *v.* Wardell, 49 Fed. 914.

88. State *v.* Maloney, 12 R. I. 251.

89. People *v.* Hamilton, 71 Mich. 340, 38 N. W. 921; State *v.* Burt, 25 Vt. 373; State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482.

Sufficiency as to direct mode.—An information for resisting an officer in the discharge of his duty charges that he was resisted in a direct manner, by alleging that he was impeded and hindered by an assault on his assistants. State *v.* Emery, 65 Vt. 464, 27 Atl. 167.

90. People *v.* Hunt, 120 Cal. 281, 52 Pac. 658; U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15.

91. State *v.* Flynn, 42 Iowa 164.

92. State *v.* Pickett, 118 N. C. 1231, 24 S. E. 350.

bribe was with intent to impede and obstruct the due course of justice.[93] It is necessary to allege in the indictment that a cause was pending requiring the person dissuaded to attend as a witness.[94] The indictment must affirmatively designate the witness dissuaded or prevented from attending or testifying.[95] It need not allege that the person dissuaded or prevented from attending as a witness had been regularly summoned as such,[96] or that a subpœna or other process for that purpose had been issued.[97] Nor need it allege in whose behalf the person dissuaded or prevented from appearing before the court as a witness was summoned.[98] So it is not necessary to aver the materiality of the testimony of the person dissuaded from appearing before the court as a witness.[99] And the means used for the purpose of dissuading a witness from attending or testifying at a trial need not be averred.[1] The offense being indictable at common law, the concluding words of the indictment, "contrary to the form of the statute," are to be rejected as surplusage, where the offense is not punishable by any statute.[2] Where the facts alleged show an obstruction and hindrance of public justice, in the legal sense and meaning of those words, it is no objection to the indictment that it does not conclude "to the obstruction and hindrance of public justice."[3]

e. Refusal to Obey Subpœna or Other Process to Testify. An indictment for the offense of failing or refusing to attend and testify in obedience to a subpœna or other process must contain a substantial description of such subpoena or other process,[4] and of the manner of service of the subpœna or other process disobeyed,[5] so that the court may determine, as a matter of law, whether defendant was legally summoned or not.[6] And it must allege that there was a cause pending in some court in which defendant was required to testify.[7]

f. Furnishing False Certificate to Obtain Continuance of Trial of Cause. An information for attempting to obstruct justice by furnishing a certificate to one charged with a criminal offense, to enable him to obtain an adjournment, is bad, if it charges the making of such certificate by inference only, and fails to charge that it was furnished by defendant with a corrupt intent.[8] Where there is no evidence to show that defendant made the specific certificate set forth in the information, although there is evidence tending to show that he made and furnished a certificate similar to a part of the certificate set forth in the information, the variance is fatal.[9]

2. TRIAL. The rules governing in the trial of criminal cases generally,[10] including the rules governing the giving or refusing to give instructions to the jury,[11]

93. State *v.* Biebusch, 32 Mo. 276.

94. Brown *v.* State, 13 Tex. App. 358; Armstrong *v.* Van de Vanter, 21 Wash. 682, 59 Pac. 510. *Contra*, State *v.* Holt, 84 Me. 509, 24 Atl. 951.

95. Brown *v.* State, 13 Tex. App. 358.

96. State *v.* Holt, 84 Me. 509, 24 Atl. 951; State *v.* Biebusch, 32 Mo. 276; Chrisman *v.* State, 18 Nebr. 107, 24 N. W. 434. But see Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665, holding that the summoning of the witness, being alleged only by way of inducement to the substance of the proper charge against defendant, need not be alleged with the same certainty of time and place as the substance of the charge.

97. State *v.* Holt, 84 Me. 509, 24 Atl. 951; Jackson *v.* State, 43 Tex. 421.

Bribing witness to avoid service of or disobey subpœna.— An indictment for attempting to bribe a witness to avoid the service of a subpœna need not allege its issuance and existence (Scoggins *v.* State, 18 Tex. App. 298; Brown *v.* State, 13 Tex. App. 358); but the rule is otherwise where the crime charged is an attempt to bribe a witness to disobey a subpœna (Brown *v.* State, *supra*).

98. Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

99. Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665; State *v.* Biebusch, 32 Mo. 276.

1. State *v.* Ames, 64 Me. 386.

2. Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

3. Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

4. Drake *v.* State, 60 Ala. 62. See also Batie *v.* State, 18 Ala. 119.

5. Drake *v.* State, 60 Ala. 62; State *v.* Clancy, 56 Vt. 698.

6. State *v.* Clancy, 56 Vt. 698.

7. State *v.* Clancy, 56 Vt. 698.

8. Johnston *v.* U. S., 87 Fed. 187, 30 C. C. A. 612.

9. Johnston *v.* U. S., 87 Fed. 187, 30 C. C. A. 612.

10. See CRIMINAL LAW, 12 Cyc. 504 *et seq.*

11. See CRIMINAL LAW, 12 Cyc. 611 *et seq.*

Erroneous instructions.— In a prosecution

and the rules governing the questions of law and of fact,[12] control the trial in prosecutions of this character.

3. Evidence. The rules of evidence applicable to criminal prosecutions generally, in respect of presumptions,[13] burden of proof,[14] admissibility,[15] and weight

for resisting an officer in arresting a person for a misdemeanor, without a warrant, the court charged the jury that the penalty in case of conviction would be "any sum not less than $500." It was held error, under the act of April 4, 1881, amending Pen. Code, art. 220, so as to make the penalty in such cases a fine of not less than twenty-five dollars, nor more than five hundred dollars. Holmes *v.* State, (Tex. App. 1891) 17 S. W. 1089.

Instruction held proper.— In an indictment for resisting an officer, a charge that if defendant was too intoxicated to be capable of forming the statutory intent he would be free from the statutory guilt, but not otherwise, is as much as defendant had a right to ask. People *v.* Haley, 48 Mich. 495, 12 N. W. 671.

Instructions properly refused.— In a prosecution for failure to obey the summons of an officer to assist him in the execution of process, when it does not appear that the officer requested defendant to make an arrest alone, or take the initiative in so doing, a request implying that such was the case, and, if so, to acquit, was properly refused. Dougherty *v.* State, 106 Ala. 63, 17 So. 393. In a prosecution for resisting an officer in the execution of process, where it appears that defendant snatched the warrant for his arrest from the hands of the officer attempting to serve it, and refused to go before the justice issuing it, it was proper to refuse an instruction that, if the jury were in reasonable doubt as to whether defendant assaulted the officer from any other motive than resisting the legal process, they must find for defendant. King *v.* State, 89 Ala. 43, 8 So. 120, 18 Am. St. Rep. 89. In a prosecution for resisting an officer who was attempting to seize property under a writ of sequestration, it was not error to refuse to instruct that, if the jury believed that the officer was attempting to execute a writ which was not valid and legal they should acquit, as such instruction relegated to the jury the question of the validity of the writ, which was for the court to determine. Witherspoon *v.* State, 42 Tex. Cr. 532, 61 S. W. 396, 96 Am. St. Rep. 812.

Instructions improperly refused.— In a prosecution for failing to obey the summons of an officer to assist him in the execution of a warrant of arrest, it was held improper for the court to refuse a request to instruct the jury that if they believed from all the circumstances that at the time of the summoning of defendant attempt to make the arrest, or to aid therein, would have been both fatal and dangerous, then defendant must be acquitted, is error. Dougherty *v.* State, 106 Ala. 63, 17 So. 393.

12. See Criminal Law, 12 Cyc. 587 *et seq.*

Questions for jury.— The prosecuting witness, a deputy constable, testified that he went to defendant's residence about daylight, knocked at the front door, and, on defendant's inquiry, made known his name, and that he was an officer with a warrant for his arrest; that defendant attempted to escape through the back door, and, when witness came around, defendant ordered him to throw up his hands, and fired almost instantly. Defendant testified that the prosecuting witness fired the first shot, and that it was dark, and he did not know the witness, or that he was an officer, and only shot in self-defense. It was held proper to submit to the jury the question whether defendant knew the official character of the witness. State *v.* Bateswell, 105 Mo. 609, 16 S. W. 953.

13. See Criminal Law, 12 Cyc. 384 *et seq.*

Presumption of innocence.— A defendant in a prosecution for resisting an officer in executing, or attempting to execute, process, like defendant in every criminal case, is presumed to be innocent of the offense charged against him. U. S. *v.* Terry, 42 Fed. 317.

Presumption as to officer's authority.— In a prosecution for resisting the execution of process by an officer, proof that such officer at the time of the alleged offense was in the performance of the duties of his office raises the presumption that he had been duly appointed thereto, until the contrary appears. Allen *v.* State, 21 Ga. 217, 16 Am. Dec. 457.

Officer taking prerequisite oath.— The production of a deputy marshal's commission and proof that he was in the performance of the duties of his office raises a presumption that he had taken all prerequisite oaths required by statute. U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

Presumption that officer performed his duty.— On a prosecution for resisting the execution of a warrant of arrest the presumption is that the officer performed the duties imposed upon him by statute, by informing the person to be arrested of his purpose, and if required, by exhibiting his warrant. Putman *v.* State, 49 Ark. 449, 5 S. W. 715; State *v.* Freeman, 8 Iowa 428, 74 Am. Dec. 317. And see Criminal Law, 12 Cyc. 379 *et seq.*

14. The general rule that the burden is on the state to prove every fact and circumstance which is essential to the guilt of the accused applies to prosecutions of this character. U. S. *v.* Terry, 42 Fed. 317.

15. See Criminal Law, 12 Cyc. 390 *et seq.*

Evidence held admissible.— On a prosecution for resisting the levy of an execution upon which the officer has made a return of "no property found," it is not contradictory of the return to prove acts of defendant preventing the levy of an execution, and evidence for that purpose is admissible. Oliver *v.* State, 17 Ark. 508. It was proper, on a prosecution for attempting by persuasion to prevent a witness from testifying before the

and sufficiency[16] are applicable in prosecutions for the offense of obstructing justice.

grand jury, to prove that defendant falsely represented that he had been sent to request witness not to testify. State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811. On a prosecution for attempting by persuasion to prevent a witness from testifying before the grand jury, it was not error to permit the state's witness to testify that in conversations in which the persuasion was used the character of the grand jury proceeding was discussed by accused. State *v.* Desforges, *supra*. On a prosecution for attempting by persuasion to prevent a witness from testifying before the grand jury, it was proper to prove that when the persuasion was used defendant knew of the investigation, and that the party sought to be persuaded was a material witness and that the investigation resulted in indictment. State *v.* Desforges, *supra*. In a prosecution in the superior court for preventing a person from appearing as a witness, evidence that defendant formerly pleaded guilty to the same offense in the justice's court, and afterward withdrew the plea, is admissible. State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132. On the trial of an information for obstructing an indifferent person deputed to serve a writ of attachment, under a statute prohibiting any person from obstructing any sheriff, etc., the original process was admissible in evidence to prove the offense, although it had not been returned to court; the offense being complete when the service of process was obstructed, and it not being a question of the justification of the indifferent person for his doings under the writ. State *v.* Moore, 39 Conn. 244. On a prosecution for dissuading a witness from attending or testifying, evidence that defendant falsely stated to such witness that he had been sent to request him not to testify is admissible. State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811. In a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, the writ was properly received in evidence on behalf of the state, over defendant's objections that the same was invalid as not describing the property sufficiently, and because such description did not comply with that in the affidavit, since such objections, although valid in a civil suit, are without merit as a defense on a criminal prosecution. Witherspoon *v.* State, 42 Tex. Cr. 532, 61 S. W. 396, 96 Am. St. Rep. 612. On the trial of indictment for dissuading a witness from testifying on an investigation by a grand jury, evidence is admissible that when the persuasion was used the contemplated investigation was known to defendant, and that he also knew the person persuaded not to testify was a material witness in that investigation. State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811.

Evidence held inadmissible.— In a prosecution for resisting arrest, it appeared that defendant snatched the warrant for his arrest from the hands of the officer holding it, and refused to go before the justice who issued it. It was held proper to exclude evidence offered by defendant for the purpose of showing that the next morning he proposed to go with the officer before some justice other than the one who issued the warrant. King *v.* State, 89 Ala. 43, 8 So. 120, 18 Am. St. Rep. 89. On the trial of an indictment for obstructing an officer in the service of process, evidence that the goods, in the attachment of which the obstruction was interposed, belonged to defendant, and not to the party to the process, is not admissible. State *v.* Fifield, 18 N. H. 34. *Contra*, Oliver *v.* State, 17 Ark. 508. Since a warrant of arrest is the best evidence of its own legality in the prosecution for resisting arrest, it should be produced, and secondary evidence of it is not admissible until its non-production is accounted for. Scott *v.* State, 3 Tex. App. 103. Where on the trial of one charged with resisting an officer in the execution of a mortgage fieri facias it appeared that it was issued on a proceeding under the act of Dec. 16, 1899, to foreclose a bill of sale which was absolute on its face, and that the affidavit on which the fieri facias was based failed to show that the bill of sale was given to secure a debt, the fieri facias was not legal process, and, on proper objection made by the accused, should not have been admitted in evidence. Searcy *v.* State, 114 Ga. 270, 40 S. E. 235.

16. See CRIMINAL LAW, 12 Cyc. 485 *et seq.*

Evidence held sufficient.— When an offer to bribe a witness with money is shown on the trial of one charged, under a statute making it an offense to offer to bribe any witness in any case, either criminal or civil, it is not necessary to a conviction that the state should prove that the money was either actually tendered or produced. Jackson *v.* State, 43 Tex. 421. On a prosecution for resisting an officer in the execution of a warrant of arrest, evidence showing that the marshal was taking his prisoner to jail when defendant came up, and objected, and then assaulted the marshal, rendering him incapable of detaining the prisoner, who thereupon escaped, warranted the conviction. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748. On a trial for obstructing a constable in serving a possessory warrant on S, the evidence for the state was that S refused to surrender the property; that a scuffle ensued; that someone pulled the constable away from S, and immediately afterward defendant came between them, and the constable shot him. The testimony for defendant was that the latter heard the trouble, and came to get his small child who was present, and that defendant took no part in the conflict. It was held that a judgment of conviction should not be disturbed. Bunkley *v.* State, 91 Ga. 44, 16 S. E. 256. In a prosecution for resisting an officer, it is sufficient to show that

4. Defenses. It is no defense to a prosecution for resisting the execution of process by a *de facto* officer that he was not such *de jure*.[17] Nor is it a defense to an indictment for resisting or obstructing an officer in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if defendant knew the officer to be so engaged.[18] But it is a good defense that the alleged resistance was made while the officer was attempting to take possession of defendant's property without the necessary legal process.[19]

B. Punishment. The punishment for an offense of this character is usually fixed by a provision in the particular statute defining the offense.[20]

OBSTRUCTING MAIL. See Post-Office.

OBSTRUCTING PROCESS. See Obstructing Justice.

OBSTRUCTION. An obstacle, an impediment, a hindrance, that which impedes progress.[1] (Obstruction: As a Nuisance, see Nuisances. As a Tort, see Negligence; Torts. Of Bridge, see Bridges. Of Canal, see Canals. Of Creditors' Rights, see Bankruptcy; Insolvency. Of Easement, see Easements. Of Ferry, see Navigable Waters. Of Flowage, see Waters. Of Franchise, see Franchises. Of Highway or Street, see Municipal Corporations; Streets and Highways. Of Justice, see Obstructing Justice. Of Light, Air, or View — In General, see Easements; By Adjoining Landowners, see Adjoining Landowners. Of Mail, see Post-Office. Of Navigable Waters, see Navigable Waters. Of Navigation, see Navigable Waters. Of Process, see Obstructing Justice. Of Public Assemblage or Worship, see Disturbance of Public Meetings. Of Railroad Track, see Carriers; Master and Servant; Railroads. Of Remedy at Law as Ground For Jurisdiction of Equity, see Accounts and Accounting; Equity; Municipal Corporations. Of Sewer, see Municipal Corporations. Of Water, see Waters. Remedies For, see Equity; Injunction; Municipal Corporations; Negligence; Nuisances.)

OBTAIN. To get hold of by effort, to gain possession of, to acquire;[2] to get hold of, to obtain possession of, to acquire, to maintain a hold upon, to keep, to

the warrant was issued by an acting justice without producing his commission. State *v.* Wallahan, Tapp. (Ohio) 80.

Insufficiency.— A conviction for the offense of obstructing or resisting an officer in an attempt to execute a warrant of arrest will be set aside, when the evidence fails to show that the accused had notice of the official character of the person attempting to make the arrest, and it is shown that such person did not have a warrant for the arrest of the accused, although the accused knew that a warrant had been issued and was in possession of the sheriff in a distant part of the county. Jones *v.* State, 114 Ga. 73, 39 S. E. 861.

17. Floyd *v.* State, 79 Ala. 39; Heath *v.* State, 36 Ala. 273; State *v.* Quint, 65 Kan. 144, 69 Pac. 171. See also Stephens *v.* State, 106 Ga. 116, 32 S. E. 13; People *v.* Hobson, 1 Den. (N. Y.) 574.

18. U. S. *v.* Keen, 26 Fed. Cas. No. 15,511, 5 Mason 453.

19. Neifeld *v.* State, 23 Ohio Cir. Ct. 246.

20. State *v.* Moore, 125 Iowa 749, 101 N. W. 732.

Punishment held not excessive.— The sentence of four months' imprisonment in the county jail upon conviction for resisting an officer in the service of a search warrant is not excessive, where it appears that such resistance was violent. State *v.* Moore, 125 Iowa 749, 101 N. W. 732. Likewise a fine of five hundred dollars is not excessive where it appears that the statutory maximum is a thousand dollars, and that defendant, when attempt was made to arrest him, drew a revolver and said that he would shoot the officer before he would submit to an arrest. State *v.* Seery, 95 Iowa 652, 64 N. W. 631.

1. Patterson *v.* Vail, 43 Iowa 142, 145.

Distinguished from "encroachment" see Grand Rapids *v.* Hughes, 15 Mich. 54, 57 [*quoted* in Gorham *v.* Withey, 52 Mich. 50, 51, 17 N. W. 272]; Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

Distinguished from "impediment" see Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 355, 67 Am. Dec. 471.

"Hindrance or obstruction" see Anderson *v.* Maloy, 32 Minn. 76, 77, 19 N. W. 387.

2. Webster Dict. [*quoted* in Connor *v.* State, 29 Fla. 455, 479, 10 So. 891, 30 Am. St. Rep. 126; State *v.* Miller, 53 Kan. 324, 327, 36 Pac. 751].

possess;[3] to take hold of, to get possession of, to acquire;[4] to acquire possession of;[5] to get, in the sense of to acquire;[6] to secure.[7] The context often governs in determining the meaning to be given to the term.[8] (Obtain: Under False Pretenses, see FALSE PRETENSES.)

OBTAINING GOODS UNDER FALSE PRETENSES. See FALSE PRETENSES.

OBTEMPERANDUM EST CONSUETUDINI RATIONABILI TANQUAM LEGI. A maxim meaning "A reasonable custom is to be obeyed as law."[9]

OBVIOUS. Readily perceived by the eye,[10] or intellect;[11] apparent in the exercise of ordinary observation and which is disclosed by the use of the eyes and other senses;[12] patent; readily seen.[13] (Obvious: Danger, see MASTER AND SERVANT. Risk, see ACCIDENT INSURANCE.)

OCCASION. As a noun, that which immediately brings to pass an event, without being its efficient cause or sufficient reason;[14] necessity or need;[15] a particular time.[16] As a verb, to give occasion to; to cause incidentally, or casually; to

The primary definition of the word as given by Webster is "to get hold of by effort." *Ex p.* Parker, 11 Nebr. 309, 313, 9 N. W. 33.

3. Webster Dict. [*quoted* in Sundmacher *v.* Block, 39 Ill. App. 553, 562].

In its ordinary and popular signification it is "an active verb meaning to acquire." Watson *v.* People, 27 Ill. App. 493, 497.

Cannot mean "contract for."—Sundmacher *v.* Block, 39 Ill. App. 553, 562.

Not synonymous with "retain."—Retaining money collected, and employing false pretenses to protect the position, is not obtaining money under false pretenses. Watson *v.* People, 27 Ill. App. 493.

4. State *v.* McGinnis, 71 Iowa 685, 687, 33 N. W. 338 [*quoted* in People *v.* Kinney, 110 Mich. 97, 101, 67 N. W. 1089].

"Obtained" held equivalent to "taken" see State *v.* Miller, 53 Kan. 324, 327, 36 Pac. 751.

5. So construed in the phrase "obtain the property with intent to steal it" used in a charge to the jury. State *v.* Reese, 49 La. Ann. 1337, 1339, 22 So. 378.

6. Reg. *v.* Garrett, 6 Cox C. C. 260, 264, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607 [*quoted* in People *v.* New York Ct. Gen. Sessions, 13 Hun (N. Y.) 395, 400], per Maule, J.

7. Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 432, 12 S. E. 913, where "obtained" in the statutory phrase "soil which may have been condemned or otherwise obtained for its use as a right-of-way" was held to have been "used in the sense of 'secured' or 'acquired.'"

8. See cases cited *infra*, this note.

Extraordinary construction based on context.—As to an information charging that defendants conspired to prevent a person "then and there . . . in the employment of" a certain company "from obtaining work or employment, or continuing in his said work and employment, at his said trade or occupation, in the said shops" of the said company, it was said "as it is alleged that McClure was in the employment of that corporation when the conspiracy was formed, 'obtaining' employment in its shops and 'continuing' employment there are synonymous terms. The two words convey a conjunctive and not a disjunctive meaning." On that ground it was held that the information was not in the alternative. State *v.* Dyer, 67 Vt. 690, 691, 700; 32 Atl. 814.

"Is obtained" construed as "is hereafter obtained," as used in a statute providing for an *alias* or *pluries* execution, and in which all the other phrases point to the future see McGovern *v.* Connell, 43 N. J. L. 106, 108, 110.

The lien of an execution is not "obtained" against a judgment debtor, upon property, until that property is acquired by the debtor, even where, as a general rule, the lien relates back to the first day of the term when judgment was rendered. So held under Bankr. Act (1898), § 67. See *In re* Darwin, 117 Fed. 407, 409, 54 C. C. A. 581.

"Obtain letters-patent" see Spilsbury *v.* Clough, 2 Q. B. 466, 474, 475, 2 G. & D. 17, 6 Jur. 579, 11 L. J. Q. B. 109, 42 E. C. L. 763; Russell *v.* Ledsam, 14 L. J. Exch. 353, 357, 14 M. & W. 574.

9. Pelouhet Leg. Max.

Applied (without translation) in Tyrringham's Case, 4 Coke 36*b*, 38*b*, 76 Eng. Reprint 973.

10. Webster Dict. [*quoted* in Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769, 771].

11. Small *v.* Travelers', etc., Assoc., 118 Ga. 900, 904, 45 S. E. 706, 63 L. R. A. 510, as an obvious risk.

12. Dillenberger *v.* Weingartner, 64 N. J. L. 292, 299, 45 Atl. 638, as "an obvious danger."

13. See Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769, 771.

"Obvious to the jury" see Stone *v.* Stevens, 12 Conn. 219, 229, 30 Am. Dec. 611.

"Some obvious part of the house" see Bowers *v.* Alston, 1 Nott. & M. (S. C.) 458, 459.

14. Webster Dict. [*quoted* in Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 230, 33 N. E. 795, 39 Am. St. Rep. 251].

Distinguished from "direct cause" see Meysenburg *v.* Schlieper, 48 Mo. 426, 434.

15. Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282, 301. See also *In re* Pocopson Road, 16 Pa. St. 15, 17.

16. Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282, 301.

cause.[17] (See CAUSA; CAUSE, and Cross-References Thereunder; EFFICIENT CAUSE; NECESSITY; NEED.)

OCCASIONAL. Occurring at times, but not constant, regular, or systematic.[18]

OCCULTATIO THESAURI INVENTI FRAUDULOSA. A maxim meaning "The concealment of discovered treasure is fraudulent."[19]

OCCUPANCY. POSSESSION,[20] *q. v.*; the act of taking[21] or holding possession;[22] the taking possession of those things corporeal, which are without an owner, with the intention of appropriating them to one's own use;[23] the taking possession of those things which before belonged to nobody.[24] Applied to land, possession;[25]

Alternative construction.— The word "occasion" may mean either "necessity or need," or "a particular time," as used in the expression "reasonable for the occasion," in a charge to the jury. Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282, 301.

17. Curry *v.* Chicago, etc., R. Co., 43 Wis. 665, 676, where it is said: "The want of a fence cannot, of itself, cause injury, but it gives occasion to injury; causes it incidentally."

"Dr. Johnson's first definition of the verb, to occasion, is, to cause casually; his second, simply, to cause." Curry *v.* Chicago, etc., R. Co., 43 Wis. 665, 676.

"Dr. Webster's definition is not substantially different: to give occasion to, to cause follows incidentally.'" Curry *v.* Chicago, etc., R. Co., 43 Wis. 665, 676.

"Mr. Crabb appears to give the like construction to the word: 'What is caused seems to follow naturally; what is occasioned follows incidentally.'" Curry *v.* Chicago, etc., R. Co., 43 Wis. 665, 676.

"Occasioned" used as a synonym of "caused" see Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 519, 69 Pac. 600. "Occasioned" as used in a statute providing for damages occasioned by the taking of land for the locating and laying out of a railroad "points to any damage, which may be directly or indirectly caused by the railroad." Parker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 107, 113, 50 Am. Dec. 709 [*quoted* in Rand *v.* Boston, 164 Mass. 354, 361, 41 N. E. 484]. "Occasioned by payment or pledge of the property of the husband," applied to transfers to the wife, is broad enough to cover any transfer by the husband, of his property, to the wife for her separate use, by any means direct or indirect. Dogt *v.* Ticknor, 48 N. H. 242, 249.

18. Webster Int. Dict.

An "occasional weigher," expressly employed as such by the collector of customs, is thereby distinguished from the official "custom house weighers" provided for by statute, his employment being temporary and not regular or permanent. Pray's Case, 14 Ct. Cl. 256, 262.

19. Peloubet Leg. Max. [*citing* 3 Inst. 133].

20. Webster Dict. [*quoted* in Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170].

21. Webster Dict. [*quoted* in Wait *v.* Agricultural Ins. Co., 13 Hun (N. Y.) 371, 373; Twiggs *v.* State Land Com'rs, 27 Utah 241, 246, 75 Pac. 729].

22. Davis *v.* Baker, 72 Cal. 494, 496, 14 Pac. 102.

23. Bouvier L. Dict. [*quoted* in part in Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170].

24. Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19. Fed. Cas. No. 10,869; Blackstone Comm. [*quoted* in Goddard *v.* Winchell, 86 Iowa 71, 82, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788].

25. Taylor *v.* Wright, 121 Ill. 455, 466, 13 N. E. 529 [*quoted* in Walker *v.* Converse, 148 Ill. 622, 630, 36 N. E. 202] (terms used as clearly convertible); Walters *v.* People, 21 Ill. 178 (terms nearly synonymous).

Compared with and distinguished from: Adverse possession see Crocker *v.* Dougherty, 139 Cal. 521, 525, 73 Pac. 429; Williams *v.* Bernstein, 51 La. Ann. 115, 124, 25 So. 411. Residence see Chiles *v.* Jones, 4 Dana (Ky.) 479, 484.

In its usual sense occupancy is when a person exercises control over land. Rapalje & L. L. Dict. [*quoted* in Twiggs *v.* State Land Com'rs, 27 Utah 241, 246, 75 Pac. 729].

May imply exclusion see Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54, 58; Encyclopedic L. Dict. [*quoted* in Chezum *v.* Campbell, 42 Wash. 560, 563, 85 Pac. 48].

May be through other persons see Hammel *v.* Zobelein, 51 Cal. 532, 533 (through servants); Hardwick *v.* Laderoot, 39 Mich. 419, 421 (through grantees).

Residence is not essential. Chiles *v.* Jones, 4 Dana (Ky.) 479, 484; Jones *v.* Merrill, 113 Mich. 433, 436, 71 N. W. 838, 67 Am. St. Rep. 475; People *v.* Gaylord, 52 Hun (N. Y.) 335, 5 N. Y. Suppl. 348. See also Twiggs *v.* State Land Com'rs, 27 Utah 241, 246, 75 Pac. 729. It is not necessary to have one's home on the premises. Tweed *v.* Metcalf, 4 Mich. 578, 586 [*followed* in Burroughs *v.* Goff, 64 Mich. 464, 468, 31 N. W. 273]. "A person may have a constructive possession or occupancy, and he may have a *possessio pedis* by tenants, or actual inclosures, and in contemplation and within the meaning of law, he may have actual possession, actual occupation without residence." Walters *v.* People, 18 Ill. 194, 199, 65 Am. Dec. 730 [*quoted* in Tumlinson *v.* Swinney, 22 Ark. 400, 405, 76 Am. Dec. 432]. Occupancy of land may be constructive, as well as actual. Farlin *v.* Sook, 26 Kan. 397, 403. "The words 'actual occupancy' are themselves indefinite in their meaning, for although they are usually applied to a case of residence on the land, or to an occupation by fences or buildings, they are not necessarily restricted to such marks of occupation, but may be

actual possession;[26] possession as owner.[27] Of beasts *feræ naturæ*, the actual, corporal possession of them.[28] (See Occupation, and Cross-References Thereunder.)

OCCUPANT. One who occupies, or takes possession; one who has the actual use or possession, or is in the possession of a thing;[29] one who takes possession or

applied to other acts of ownership which are known to the true owner." Leeper *v.* Baker, 68 Mo. 400, 405.

Descriptive words of occupancy create no rights. Fetters *v.* Humphreys, 19 N. J. Eq. 471, 475.

Devise of occupancy of a house for life entitles the devisee either to reside in the house or to let it, at pleasure. Mannox *v.* Greener, L. R. 14 Eq. 456, 461, 27 L. T. Rep. N. S. 408.

26. Quehl *v.* Peterson, 47 Minn. 13, 15, 49 N. W. 390; Gill *v.* Wallis, 11 N. M. 481, 492, 70 Pac. 575; Hussey *v.* Smith, 1 Utah 129; Dalles City *v.* Methodist Episcopal Missionary Soc., 6 Fed. 356, 370.

Constant access to and control of a house, and dwelling therein, is actual occupancy such as is essential to a settlement in parish, though the occupant lets beds in the house for short periods to other persons. Rex *v.* St. Giles-in-the-Fields, 4 A. & E. 495, 31 E. C. L. 225.

Cutting trails and building boat landings in a forest game preserve, though it be done by the owner of the land, does not constitute such occupancy as is within the provision of the tax law requiring the person in such occupancy to be notified of a tax-sale. People *v.* Miller, 90 N. Y. App. Div. 596, 598, 86 N. Y. Suppl. 189.

Occupancy sufficient for protection from eminent domain is not constituted by the mere temporary removal of a tenant and use of the house as a dwelling-house with the purpose of preventing its condemnation. Hagner *v.* Pennsylvania Schuylkill Valley R. Co., 154 Pa. St. 475, 480, 25 Atl. 1082.

"The actual inclosure of part carries with it the occupancy of the balance, which is used, or intended to be used, as part of one farm." Harris *v.* Creveling, 80 Mich. 249, 253, 45 N. W. 85.

27. Crocker *v.* Dougherty, 139 Cal. 521, 525, 73 Pac. 429. *Compare* Browning *v.* Camden, etc., R., etc., Co., 4 N. J. Eq. 47, 54 [*cited* in Mettler *v.* Easton, etc., R. Co., 25 N. J. Eq. 214].

28. Puffendorf, lib. 4, § 2, 10 [*quoted* in Pierson *v.* Post, 3 Cai. (N. Y.) 175, 177, 178, 2 Am. Dec. 264, where it is added: "Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. . . Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. . . . the mortal wounding of such beasts by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control"]. There is required, however, a certain bodily possession to the extent of achieving dominion; and therefore to have wounded is not enough. Grotius, lib. 2, c. 8, § 3, p. 309 [*quoted* in Pierson *v.* Post, 3 Cai. (N. Y.) 175, 179, 2 Am. Dec. 264]. See Animals, 2 Cyc. 306 *et seq.*

29. Webster Dict. [*quoted* in Walradt *v.* Phœnix Ins. Co., 64 Hun (N. Y.) 129, 135, 19 N. Y. Suppl. 293; Twiggs *v.* State Land Com'rs, 27 Utah 241, 246, 75 Pac. 729].

"The most ordinary meaning of the word," above definition so characterized. Davis *v.* Baker, 72 Cal. 494, 496, 14 Pac. 102.

Other definitions are: "[One who] has the actual use or possession of a thing." Bouvier L. Dict. [*quoted* in Bangor *v.* Rowe, 57 Me. 436, 439; Walradt *v.* Phœnix Ins. Co., 64 Hun (N. Y.) 129, 136, 19 N. Y. Suppl. 293; Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54, 56]; Encyclopedic L. Dict. [*quoted* in Chezum *v.* Campbell, 42 Wash. 560, 563, 85 Pac. 48]; Worcester Dict. [*quoted* in Herman *v.* Katz, 101 Tenn. 118, 123, 47 S. W. 86, 41 L. R. A. 700]. "One who occupies or takes possession; one who has the actual use or possession, or is in possession of a thing." Webster Dict. [*quoted* in Herman *v.* Katz, 101 Tenn. 118, 123, 47 S. W. 86, 41 L. R. A. 700]. "One who has the actual use or possession." Loomis *v.* Semper, 38 Misc. (N. Y.) 567, 570, 78 N. Y. Suppl. 74. "One in actual possession." Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 693, 11 N. W. 433.

Use not confined to cases of real property see Herman *v.* Katz, 101 Tenn. 118, 124, 47 S. W. 86, 41 L. R. A. 700.

Actual possession may not be essential.—Davis *v.* Baker, 72 Cal. 494, 496, 14 Pac. 102; Shelby *v.* Houston, 38 Cal. 410, 422. See also Wright *v.* Mullens, 2 Stew. & P. (Ala.) 219, 222. But *compare* Lechler *v.* Chapin, 12 Nev. 65, 72, where it is said: "To be an occupant, the party must have the actual use or possession of the land. The acts necessary to constitute possession must, in a great measure, always depend upon the character of the land, the locality and object for which it is taken up. But in all cases where a party relies solely upon possession, there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in

controls things actual;[30] a person interested in the land which he possesses;[31] a tenant in possession.[32] (See Occupation, and Cross-References Thereunder; and, generally, Ejectment; Entry, Writ of; Improvements; Trespass to Try Title.)

OCCUPANTIS FIUNT DERELICTA. A maxim meaning "Things abandoned become the property of the (first) occupant."[33]

OCCUPANT STATUTES. Betterment statutes, providing that a *bona fide* occupant making lasting improvements in good faith shall have a lien upon the estate covered by the true owner to the extent that his improvements have increased the

harmony with his title. His possession must, in the language of the authorities, be apparent, open, notorious, unequivocal, *pedis possessio*, carrying with it the evidences and marks of ownership."

"Occupant" and "party in possession" are not strictly synonymous as used in a statute providing for selection and sale of lands granted by the United States to Nevada. Occupant means, as in the United States Preëmption Act, a person who is living upon the quarter section in question, though not necessarily in possession of the whole quarter. O'Neale *v.* Cleaveland, 3 Nev. 485, 492.

Not necessarily owner see Thompson *v.* Berlin, 87 Minn. 7, 9, 91 N. W. 25.

Not necessarily resident see Thompson *v.* Berlin, 87 Minn. 7, 10, 91 N. W. 25; Hagar *v.* Wikoff, 2 Okla. 580, 588, 39 Pac. 281.

Exclusive character.— A man who only enjoys the use of premises in common with the public can, in no just sense, be said to be an occupant. Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54, 58.

"Occupants" used as "tenants" and not "owners," in a deed, limiting the use of a water right to such as "has been the custom of the occupants." Wright *v.* Newton, 130 Mass. 552, 554.

One who uses land only as the bed of underground pipes is not, under a statute providing for notice of a highway, the "occupant" entitled to such notice. People *v.* Allegany County, 36 How. Pr. (N. Y.) 544, 547, 549. But water and gas companies have been held "occupiers" in respect of their pipes under ground, and so ratable for improvements, under 2 Geo. III, c. 12. Reg. *v.* East London Waterworks, 18 Q. B. 705, 83 E. C. L. 705.

30. Abbott L. Dict. [*quoted* in Walradt *v.* Phoenix Ins. Co., 64 Hun (N. Y.) 129, 135, 19 N. Y. Suppl. 293].

31. So defined in holding that a statute providing for assessment upon owners, lessees, "parties and persons respectively, who may be interested in or entitled unto" lands applies not only to owners, but to occupants. Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 506, 509.

By entry and attornment.—One who enters the premises of a mill and to whom the tenant attorns is thereby an occupant within the meaning of a statute provided for an action, for flowage, against such occupant. Abbott *v.* Upham, 13 Metc. (Mass.) 172.

Husband merely living on wife's property, not its occupant.— Within the meaning of the tax law requiring property to be assessed to the owner or occupant, "merely living with the wife on her separate property hardly makes the husband the occupant." Loomis *v.* Semper, 38 Misc. (N. Y.) 567, 570, 78 N. Y. Suppl. 74 [*distinguishing* Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 88, 35 N. Y. Suppl. 265, where it was given as one reason for holding a husband an occupant, that he was living with his wife on the property]. See also Kavanagh *v.* Barber, 59 Hun (N. Y.) 60, 61, 12 N. Y. Suppl. 603; Hamilton *v.* Fond du Lac, 25 Wis. 490, 494. *A fortiori* one who lives apart from his wife without using her land is not its occupant. Smith *v.* Read, 51 Conn. 10.

Volunteer housekeeper not occupant.— The tenant's mother-in-law taking charge of his household, and making his house her own, is not an occupant, so as to be liable in an action for use and occupation. Tinder *v.* Davis, 88 Ind. 99, 101.

Lessor's agent not included see State *v.* Coe, 72 Me. 456.

Under the Election Act, 32 Vict. c. 21, § 5, occupant is defined as a person *bona fide* occupying property otherwise than as owner or tenant, either in his own right or in the right of his wife, but being in possession of such property and enjoying the revenues and profits arising therefrom to his own use, while under the Assessment Law, 32 Vict. c. 36, of the same date, "occupant" is made convertible with householder, and an undefined distinction between "occupant" and "tenant" preserved. Pawling *v.* Rykert, Hodg. El. Rep. 500, 515, 516.

32. Encyclopedic L. Dict. [*quoted* in Chezum *v.* Campbell, 42 Wash. 560, 563, 85 Pac. 48].

A tax statute allowing assessment of land to the occupant, construed to have meant by occupant, "one who occupied the property in his or her own right, as tenant or otherwise, and in the absence of a possession by the real owner." Hamilton *v.* Fond du Lac, 25 Wis. 496, 497.

"Actual occupant" and "tenant in possession" equivalent see People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97, 101.

Occupant such as to be notified of tax-sale see Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; People *v.* Wemple, 144 N. Y. 478, 481, 39 N. E. 397; People *v.* Campbell, 143 N. Y. 335, 338, 38 N. E. 300; Smith *v.* Sanger, 4 N. Y. 577; People *v.* Kelsey, 96 N. Y. App. Div. 148, 149, 89 N. Y. Suppl. 416; Comstock *v.* Beardsley, 15 Wend. (N. Y.) 348, 349; National F. Ins. Co. *v.* McVay, 5 Abb. Pr. N. S. (N. Y.) 445, 449.

33. Bouvier L. Dict. [*citing* Taylor *v.* The Cato, 23 Fed. Cas. No. 13,786, 1 Pet. Adm. 48, 53].

value of the land.[34] (See BETTERMENTS, and Cross-References Thereunder; and, generally, IMPROVEMENTS.)

OCCUPATION. Subjection to the will and control;[35] use or tenure;[36] the principal business of one's life, vocation, calling, trade, the business which a man follows to procure a living or obtain wealth;[37] regular business;[38] that which occupies or engages one's time or attention, the principal business of one's life, vocation, employment, calling, trade;[39] the business in which a man is usually engaged, to the knowledge of his neighbors;[40] a vocation, trade or business in

34. Jones *v.* Great Southern Fireproof Hotel Co., 86 Fed. 370, 386, 30 C. C. A. 108.

35. Topeka *v.* Jones, 74 Kan. 164, 167, 86 Pac. 162, 87 Pac. 1133; Hallock *v.* Rumsey, 22 Hun (N. Y.) 89; U. S. *v.* Rogers, 23 Fed. 658, 666.

"'Occupation,' 'possessio pedis,' 'subjection to the will and control,' are employed as synonymous terms, and as signifying actual possession." Lawrence *v.* Fulton, 19 Cal. 683, 690 [*quoted* in McKenzie *v.* Brandon, 71 Cal. 209, 211, 12 Pac. 428].

"Actual occupation" under preëmption laws see Edwards *v.* Begole, 121 Fed. 1, 7, 57 C. C. A. 245.

"Actual occupation and possession" see Bennett *v.* Burton, 44 Iowa 550, 551.

"For religious purposes" as the basis of exemption from taxation does not require the actual completion of the structure. Trinity Church *v.* Boston, 118 Mass. 164.

Occupation of a pond, for the purpose of artificially cultivating and maintaining fish, under St. (1869) c. 384, § 9, providing for leases of the right of fishery of great ponds, is sufficiently shown by stocking the pond with a new species of fish and closing the outlet with a wire screen. Com. *v.* Weatherhead, 110 Mass. 175, 178.

"Occupation" on completion of work according to the terms of a contract, under a statute providing that occupation shall be conclusive evidence of completion of a structure, as a prerequisite of filing a lien is not effected by occupying the unfinished work in order to complete it; but a release to the contractor under such circumstances is an "acceptance" which is conclusive evidence of completion, under the same statute, of the work actually done. Grant Powder Co. *v.* San Diego Flume Co., 88 Cal. 20, 24, 25 Pac. 976.

Occupation to gain a settlement see Rex *v.* Cheshunt, 1 B. & Ald. 473, 476. See also PAUPERS.

Physical control over land.— In its usual sense it is where a person exercises physical control over land. Rapalje & L. L. Dict. [*quoted* in U. S. *v.* Rogers, 23 Fed. 658, 666].

Under Town Site Preëmption Law see Carson *v.* Smith, 12 Minn. 546. See also Weisberger *v.* Tenny, 8 Minn. 456.

36. "As a house in the occupation of A." Bouvier L. Dict. [*quoted* in Fleming *v.* Maddox, 30 Iowa 239, 242]. But *compare* Merrill *v.* Wilson, [1901] 1 K. B. 35, 43, 65 J. P. 53, 70 L. J. K. B. 97, 83 L. T. Rep. N. S. 490, 49 Wkly. Rep. 161, where it is said that the expression "actual user" seems to mean something more than mere occupancy.

"Actual" distinguished from "constructive." —If land "were consistently worked year after year, if cropped, or if shrubs and trees were planted and cared for, and such attention given as they required, or if fences were built, such an occupancy is actual, rather than constructive." Jones *v.* Merrill, 113 Mich. 433, 437, 71 N. W. 838, 67 Am. St. Rep. 475.

Occupation of a dwelling-house is living in it, not mere supervision over it. It is not necessary that some person should live in it every moment during the life of a policy containing a provision avoiding the policy in case the house should be left unoccupied without notice to the company. Paine *v.* Agricultural Ins. Co., 5 Thomps. & C. (N. Y.) 619, 620 [*quoted* in Cook *v.* Continental Ins. Co., 70 Mo. 610, 612, 35 Am. Rep. 438]. See also Craig *v.* Springfield F. & M. Ins. Co., 34 Mo. App. 481, 484.

Devise of occupation.— Devise of use and occupation of land for life creates a life-estate. Rabbeth *v.* Squire, 4 De G. & J. 406, 412, 28 L. J. Ch. 565, 7 Wkly. Rep. 657, 45 Eng. Reprint 157.

Not synonymous with living and residing see Fillingham *v.* Bromley, Turn. & R. 530, 535, 24 Rev. Rep. 136, 12 Eng. Ch. 530, 37 Eng. Reprint 1204. A person who uses and enjoys premises in carrying on his legitimate calling is in occupation of them, as a mechanic of his shop, a lawyer of his office. He need not reside upon the premises to make his occupation of them complete. Fleming *v.* Maddox, 30 Iowa 239, 242, 243. But it may, in connection with other expressions, mean "actual residence." U. S. *v.* Rogers, 23 Fed. 658, 666.

37. Webster Dict. [*quoted* in Allen *v.* Thomson, 1 H. & N. 15, 18, 2 Jur. N. S. 451, 25 L. J. Exch. 249, 4 Wkly. Rep. 506].

38. Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 709, 22 C. C. A. 499.

39. As used in an accident policy in the phrase injured "in an occupation more hazardous than the one in which he was engaged when insured" is said to be so defined "by lexicographers." Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 234, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383.

A general term.— It embraces business or employment generally without giving it any specific character. Lebanon County *v.* Reynolds, 7 Watts & S. (Pa.) 329, 330.

Tools or implements of; exemption.— "Occupation" within a statute exempting tools, etc., from execution does not include the business of a "contractor." *In re* Whetmore, 29 Fed. Cas. No. 17,508, Deady 585, 586.

40. So held under Bills of Sales Act

which one principally engages to make a living or to obtain wealth;[41] office.[42] (Occupation: As Adverse Possession, see ADVERSE POSSESSION. As Business, Change of, see ACCIDENT INSURANCE; LIFE INSURANCE. As Essential to Burglary, of House, see BURGLARY. Exemption of Tools, etc., of, see EXEMPTIONS. For Charitable Purpose as Basis of Exemption From Taxes, see TAXATION. In Insurance, see FIRE INSURANCE. Injunctions Against, see INJUNCTIONS. Injurious, see HEALTH; MASTER AND SERVANT; NEGLIGENCE; NUISANCES. In Relation to Tenancy, see LANDLORD AND TENANT. License For, see LICENSES. Monopoly, in Relation to, see MONOPOLIES. Of Chattel Lost or Abandoned, see FINDING LOST GOODS. Offensive, see HEALTH; NUISANCE. Of Land — As Affecting Rights in Regard to Fences, see FENCES; Homestead, see HOMESTEADS; Homestead Claim, see PUBLIC LANDS; In Ejectment, see EJECTMENT; Injurious to Health, see HEALTH; NUISANCE; In Relation to Eminent Domain, see EMINENT DOMAIN. Regulation of, see MUNICIPAL CORPORATIONS. Specific Occupations, see AGRICULTURE; ARMY AND NAVY; ATTORNEY AND CLIENT; AUCTIONS AND AUCTIONEERS; BANKS AND BANKING; BRIDGES; BUILDERS AND ARCHITECTS; CANALS; CARRIERS; CLERKS OF COURTS; COMMERCE; DETECTIVES; DRUGGISTS; FACTORS AND BROKERS; FERRIES; HAWKERS AND PEDDLERS; INNKEEPERS; INSURANCE; JUDGES; LIVERY-STABLE KEEPERS; LOGGING; MANUFACTURES, MERCANTILE AGENCIES; MONOPOLIES; NEWSPAPERS; NOTARIES; OFFICERS; PHYSICIANS AND SURGEONS; PILOTS; RAILROADS; REGISTERS OF DEEDS; SCHOOLS AND SCHOOL-DISTRICTS; SEAMEN; SHERIFFS AND CONSTABLES; STREET RAILROADS; TELEGRAPHS AND TELEPHONES; THEATERS AND SHOWS; TOLL-ROADS; TOWAGE; WAREHOUSEMEN; WHARVES; WORK AND LABOR. Taxation of, see INTERNAL REVENUE; LICENSES. Title by, see DEEDS; FINDING LOST GOODS. See also OCCUPANCY; OCCUPANT; OCCUPIER; OCCUPY; and, generally, USE AND OCCUPATION.)

(Luckin *v.* Hamlyn, 21 L. T. Rep. N. S. 366, 18 Wkly. Rep. 43 [*quoted* in *Ex p.* National Mercantile Bank, 15 Ch. D. 42, 54, 44 J. P. 780, 49 L. J. Bankr. 62, 43 L. T. Rep. N. S. 36, 28 Wkly. Rep. 848]); also, as used in an act requiring a description of the occupation of the maker of every bill of sale to be filed with the bill, "married woman" is insufficient where the person is regularly engaged in a business to which she gives her time daily (Kemble *v.* Addison, [1900] 1 Q. B. 430, 433, 69 L. J. Q. B. 299, 82 L. T. Rep. N. S. 91, 7 Manson 156, 48 Wkly. Rep. 331).

Under English Bills of Sales Act, it was held that the employment of a farmer, and the trade of auctioneer are occupations; *quære,* whether ordinary discounting is so within the meaning of the act. *Ex p.* National Mercantile Bank, 15 Ch. D. 42, 54, 44 J. P. 780, 49 L. J. Bankr. 62, 43 L. T. Rep. N. S. 36, 28 Wkly. Rep. 848.

41. Standford *v.* State, 16 Tex. App. 331.

"'Gentleman' is not an occupation."— This was said in holding that the occupation of a clerk in a public office consists in his duties as clerk; and a statute requiring a description of the occupation of the maker of every bill of sale to be filed with the bill is not satisfied by a description as "gentleman" of a person employed as such clerk (Allen *v.* Thomson, 1 H. & N. 15, 19, 2 Jur. N. S. 451, 25 L. J. Exch. 249, 4 Wkly. Rep. 506), but under the Bills of Sales Act "gentleman of no occupation" is sufficient where the person does not sufficiently employ himself in any business, though a partner in certain businesses (Feast *v.* Robinson, 63 L. J. Ch. 321, 70 L. T. Rep. N. S. 168, 8 Reports 531).

Keeping simply for amusement and not for profit, a billiard table, is not an occupation such as to render the owner subject to license. Tarde *v.* Benseman, 31 Tex. 277, 283.

Held a taxable occupation: Manufacturing (Wood *v.* Bresnahan, 63 Mich. 614, 30 N. W. 206); the calling of a parson (Miller *v.* Kirkpatrick, 29 Pa. St. 226, 229).

As used in insurance policies in regard to change of occupation see Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383; Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 354, 59 Pac. 651, 47 L. R. A. 650; Kentucky L., etc., Ins. Co. *v.* Franklin, 102 Ky. 512, 43 S. W. 709, 19 Ky. L. Rep. 1573; Miller *v.* Travellers' Ins. Co., 39 Minn. 548, 550, 40 N. W. 839.

Occupation of selling liquor see State *v.* Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; Merritt *v.* State, 19 Tex. App. 435; Halfin *v.* State, 18 Tex. App. 410; Standford *v.* State, 16 Tex. App. 331, 332 [*quoted* in Williams *v.* State, 23 Tex. App. 499, 5 S. W. 136].

42. "Webster, in defining 'occupation,' mentions 'office' as synonymous with 'avocation,' 'engagement,' 'calling,' 'trade,' etc., and as, hence, being embraced within the definition of 'occupation.' See Unabridged dictionary titles 'occupation' and 'office'; and to the same effect is Rojet's 'Thesaurus of English Words,' 625." Schuchardt *v.* People, 99 Ill. 501, 506, 39 Am. Rep. 34.

OCCUPATION TAX. Not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family.[43]

OCCUPIER. One who is in the use or enjoyment of a thing;[44] person having the actual use or occupation.[45] In the strict legal sense, one who is qualified to maintain an action of trespass.[46] (See OCCUPANT; OCCUPY. See, generally, INTERNAL REVENUE; LICENSES.)

OCCUPY.[47] To subject to the will and control;[48] to take possession of, seize, take up, employ, to take possession of and retain or keep, enter upon possession and use of, hold and use, specially to take possession of (a place as a place of resi-

Occupation "is a generic term, and includes every species of that *genus*,— and holding or discharging the duties of a public office is one species of occupation, just as carpentering, tailoring, farming, etc., are other species of occupation." Schuchardt *v.* People, 99 Ill. 501, 506, 39 Am. Rep. 34.

48. Banger's Appeal, 109 Pa. St. 79, 95; Banger *v.* Williamsport, 2 C. Pl. (Pa.) 108, 116, where it is said: "An 'occupation' tax is peculiar in its character. . . . It is a tax upon income, in the sense only that every other tax is a tax upon income; that is to say, it reduces a man's clear income by the precise amount of the tax. But it is an income-tax in no sense."

On liquor-selling, same principle as license. —"In the one case the right to carry on a lawful business is withheld until the tax is paid; in the other it is not. In either case the tax is on the business, and the principle on which it is imposed is the same — indemnity and protection to the public against evils resulting from the nature and character of the business." Adler *v.* Whitbeck, 44 Ohio St. 539, 566, 9 N. E. 672.

On owning or running cars.— A tax imposed on any person, firm, or association owning or running any car, of any of certain specified kinds, on any railroad in a state, is an occupation tax. Pullman Palace-Car Co. *v.* State, 64 Tex. 274, 276, 53 Am. Rep. 758.

44. Bouvier L. Dict. [*quoted* in Fleming *v.* Maddox, 30 Iowa 239, 242].

45. Statutory definition of occupier as used in certain statutes as of factory, dock, quay, warehouse, etc. Merrill *v.* Wilson, [1901] 1 K. B. 35, 42, 83 L. T. Rep. N. S. 490, 492, 49 Wkly. Rep. 161.

As entitled to notice of highway.—It seems a railroad company is an "occupier" of the right of way it uses within a statute providing for notice of a highway to occupiers of land. The point was not decided since the statute applied expressly to residents when the corporation was foreign. State *v.* Chicago, etc., R. Co., 68 Iowa 135, 26 N. W. 37.

"The occupier of a house," as one definition of "householder." Worcester Dict. [*quoted* in Calhoun *v.* Williams, 32 Gratt. (Va.) 18, 19, 34 Am. Rep. 759].

The occupier of a building, in the general rule that the occupier, and not the owner, is liable for injuries to third persons from defect, means "not merely the person who physically occupies the building, but the person who occupies it as a tenant, having the control of it, and being, as to the public, under the duty of keeping it in repair." Cunningham *v.* Cambridge Sav. Bank, 138 Mass. 480, 481.

In respect to pipes laid under soil, water companies and gas companies are occupiers of land and ratable as such for improvements under 11 Geo. III, c. 124. Reg. *v.* East London Waterworks, 18 Q. B. 705, 715, 16 Jur. 711, 21 L. J. M. C. 174, 83 E. C. L. 705. But *compare* People *v.* Allegany County, 36 How. Pr. (N. Y.) 544, where it was held that a company using the ground for underground pipes was not an occupant of the land within the meaning of a highway law.

In a statute requiring service on the terretenants or persons occupying the real estate in order to preserve the lien of a judgment, the word "tenants" was held to mean the owners of the freehold and "occupiers" those who come in under them. *In re* Dohner, 1 Pa. St. 101, 104.

A guardian in socage, and not the infants, held occupier of the infants' lands so as to be liable for failure to repair a bridge, because the guardian has control. Rex *v.* Sutton, 3 A. & E. 597, 610, 30 E. C. L. 278.

46. Sheppard *v.* Bradford Parish, 16 C. B. N. S. 369, 378, 10 Jur. N. S. 799, 33 L. J. M. C. 182, 10 L. T. Rep. N. S. 421, 12 Wkly. Rep. 867, 111 E. C. L. 369.

47. Derived from *ob*, and *capio*, to lay hold of. Dalles City *v.* Methodist Episcopal Church Missionary Soc., 6 Fed. 356, 370, 6 Sawy. 126.

Occupy and its derivatives.— "In the vernacular these words are used with a shade of meaning of being within the thing spoken of; one is said to occupy a house or a tract of land, but not often to occupy ordinary chattels. In law such a distinction is less noticed; occupy may be used like 'possess' in respect to chattels; especially in the expression, 'title by occupancy.'" Abbott L. Dict. [*quoted* in Walradt *v.* Phœnix Ins. Co., 64 Hun (N. Y.) 129, 135, 19 N. Y. Suppl. 293].

"The meaning . . . may vary according to the occasion or the subject-matter." Rex *v.* St. Nicholas, 5 B. & Ad. 219, 226, 3 L. J. M. C. 45, 3 N. & M. 21, 27 E. C. L. 100 [*quoted* in Lane *v.* Nelson, 7 Kulp (Pa.) 286, 291].

48. So used ordinarily in law. U. S. *v.* Rogers, 23 Fed. 658, 666.

Implies actual use, possession, and cultivation.— Jackson *v.* Sill, 11 Johns. (N. Y.) 201, 214, 6 Am. Dec. 363 [*quoted* in Phillipsburgh *v.* Bruch, 37 N. J. Eq. 482, 486].

Constructive possession only was held to be indicated by "occupied," when used in

dence, or, in warfare, a town or country), and become established in it;[49] to take possession, to keep in possession, to possess, to hold or keep for use;[50] to have in possession or use;[51] to take or seize, to hold or keep possession of, or to

the sense of "held in possession" in a notice to lease premises so that the description of the premises as "now occupied by you" in such notice is not an admission of actual occupancy and does not vitiate the service of the notice when made in the manner prescribed for cases where no one is in actual possession. St. Louis Consol. Coal Co. *v.* Schaefer, 135 Ill. 210, 215, 25 N. E. 788.

Constructively.— "'Occupied,' does not always require an actual occupancy, but it may sometimes permit a constructive occupancy." Ashton *v.* Ingle, 20 Kan. 670, 681, 27 Am. Rep. 197. But *compare* Dalles City *v.* M. E. Church Missionary Soc., 6 Fed. 356, 370, 6 Sawy. 126, where, in construing a statute providing for title to mission stations "occupied," the word was defined "to possess, not 'constructively' but 'actually' . . . to possess by having hold of or being actually upon the thing possessed, continuously and exclusively," the court adding: "Therefore, there can be no such thing as constructive occupancy."

49. Century Dict. [*quoted* in Lyons *v.* Andry, 106 La. 356, 359, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724].

As to house criminally burned.— A dwelling-house is "occupied" within the meaning of the penal code, in regard to arson, when it is the place of residence of a family, though all are temporarily absent when it is burned. Meeks *v.* State, 102 Ga. 572, 27 S. E. 679.

For unlawful purpose.— Buildings are so occupied when used to store liquors for sale without license. Kelly *v.* Worcester Mut. F. Ins. Co., 97 Mass. 284, 287.

"Occupied as a church," in a provision for an exemption from tax, was held to mean "occupied as a church building is usually occupied." Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 374, 34 Atl. 89.

"Occupying land under a forged deed," as an offense, continues to be committed during the whole period of occupancy, so that the statute of limitations does not begin to run in favor of the occupant while he remains in possession. Coker *v.* State, 115 Ga. 210, 211, 41 S. E. 684.

With reference to charitable bodies see Lynn Workingmen's Aid Assoc. *v.* Lynn, 136 Mass. 283, 285; New England Hospital *v.* Boston, 113 Mass. 518, 521; Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 193, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167 [*followed* in Willamette University *v.* Knight, 35 Oreg. 33, 36, 56 Pac. 124].

50. Webster Dict. [*quoted* in Wait *v.* Agricultural Ins. Co., 13 Hun (N. Y.) 371, 373].

Occupied "implies the conception of permanent tenure for a period of greater or less duration." Lacy *v.* Green, 84 Pa. St. 514, 520 [*quoted* in Lane *v.* Nelson, 7 Kulp (Pa.) 286, 290].

Construed as carrying the freehold.— A devise to "use and occupy" during life carries the title, but this construction holds only where there is no language in the will showing that the testator contemplated a personal use. Reeve *v.* Troth, (N. J. Ch. 1899) 42 Atl. 571, 572. A right to "live in, inhabit, dwell in and occupy" premises, "as he heretofore has done and now does, for and during the term of his natural life," reserved in a deed, retains a life-estate, for while the words before it import only a liberty to inhabit, "the word occupy carries the interest reserved still further and shows that the whole estate was intended to be reserved." Rex *v.* Eatington, 4 T. R. 177, 181 [*quoted* in Lane *v.* Nelson, 7 Kulp (Pa.) 286, 291].

As a word of direction merely see Rountree *v.* Dixon, 105 N. C. 350, 354, 11 S. E. 158; Gardener *v.* Wagner, 9 Fed. Cas. No. 5,218, Baldw. 454, 458.

Used to describe land devised, the words "occupied by me" do not create a non-apparent easement, such as a right of way, over premises formerly belonging to the testator and over which he was accustomed to pass. Fetters *v.* Humphreys, 19 N. J. Eq. 471, 473, 474. Which "I now occupy," held to import actual use, possession, and cultivation. "It would be nonsense, in common parlance, to say that a man occupied a farm which was in the tenure, possession and management of another." Jackson *v.* Sill, 11 Johns. (N. Y.) 201, 214, 6 Am. Dec. 363.

Promising quiet enjoyment.— Shall "hold and occupy" premises during the term, used in a lease, held to amount to a general covenant for quiet enjoyment. Ellis *v.* Welch, 6 Mass. 246, 250, 4 Am. Dec. 122.

51. Standard Dict. [*quoted* in Herman *v.* Katz, 101 Tenn. 118, 123, 47 S. W. 86, 41 L. R. A. 700].

In the preëmption acts the term has been held inapplicable to any other state of things than a *bona fide* use and improvement of land. *In re* Selby, 6 Mich. 193, 204.

In connection with fencing.— Occupancy in a provision for compulsory proceedings to render one who occupies, in common with another, lands owned in severalty, liable to share the expense of building a fence at the suit of other such occupant, "means something more than boarding or living upon the premises." One may have his home on a place and still have no right or power to place any fence or other erection upon it. To be an occupant in the sense of this statute one must be in possession and have the use and control of the land. Carpenter *v.* Vail, 36 Mich. 226, 229.

In a general Indian appropriation act "enter upon and occupy" relating to certain lands acquired from Indians is used in the ordinary sense of the word, and has no technical significance. Smith *v.* Townsend, 148 U. S. 490, 500, 13 S. Ct. 634, 37 L. ed. 533.

In connection with voters' qualifications, to "occupy as a tenant," as a qualification under 2 Wm. IV, c. 45, § 27, for voting,

possess;[52] to be in possession or occupation, hold possession, be an occupant, have possession and use;[53] to hold or keep for use, to possess, to cover or fill.[54] (See Occupation, and Cross-References Thereunder.)

cannot consist in occupying a house which one is required to occupy for the purpose of his employment, though such house be used as his home. Clark *v.* St. Mary's Parish, 1 C. B. N. S. 23, 29, 3 Jur. N. S. 645, 87 E. C. L. 23; Dobson *v.* Jones, 13 L. J. C. P. 126, 1 Lutw. Reg. Cas. 105, 5 M. & G. 112, 8 Scott N. R. 80, 44 E. C. L. 68; Hughes *v.* Chatham, 13 L. J. C. P. 44, 1 Lutw. Reg. Cas. 51, 5 M. & G. 54, 7 Scott N. R. 581, 44 E. C. L. 39. Lessees, who have, as such, the right to exclude other persons from the premises and who use such premises for their own purposes as well as for those of an association of which they are members (although the servants of the association have charge of the premises) occupy them as tenants within the meaning of 2 Wm. IV, c. 45 (Luckett *v.* Bright, 2 C. B. 193, 196, 10 Jur. 75, 15 L. J. C. P. 85, 1 Lutw. Reg. Cas. 456, 52 E. C. L. 193).

Occupancy of homestead see Ingels *v.* Ingels, 50 Kan. 755, 760, 32 Pac. 387; Farlin *v.* Sook, 26 Kan. 397, 403; Lyons *v.* Andry, 106 La. 356, 360, 31 So. 38, 87 Am. St. Rep. 289, 55 L. R. A. 724; Tillotson *v.* Millard, 7 Minn. 513, 82 Am. Dec. 112; Weisbrod *v.* Daenicke, 36 Wis. 73, 76. See Homesteads.

52. Richardson Dict. [*quoted* in Herman *v.* Katz, 101 Tenn. 118, 123, 47 S. W. 86, 41 L. R. A. 700]. But *compare* Rex *v.* Great Bolton, 8 B. & C. 71, 72, 15 E. C. L. 43; Rex *v.* Tonbridge, 6 B. & C. 88, 92, 13 E. C. L. 52, where "hold" and "occupy" are differentiated, under 59 Geo. III, c. 30, requiring a building to be "held," but land, "occupied," that the holder or occupant might gain a settlement. Thus, the underletting of part of a parcel of land would prevent the settlement, while that of part of a house would not.

Possess.— "In the primary and most familiar sense of the word 'occupy,' it is the equivalent of the word 'possess.'" Lacy *v.* Green, 84 Pa. St. 514, 520 [*quoted* in Lane *v.* Nelson, 7 Kulp (Pa.) 286, 290].

Denoting actual possession see Herskell *v.* Bushnell, 37 Conn. 36, 42, 9 Am. Rep. 299; Hall *v.* Roberts, 74 S. W. 199, 200, 24 Ky. L. Rep. 2362; Campbell *v.* Machias, 33 Me. 419; Lee *v.* Templeton, 72 Mass. 579, 583. "Occupy," in a statute providing for the building of line fences by adjoining owners who "shall occupy" the land, was held to refer to "such occupation only as will make it necessary or advantageous for the purpose thereof to fence the land, whether its owner reside thereon or not." Maudlin *v.* Hanscombe, 12 Colo. 204, 205, 206, 20 Pac. 619.

"Occupied by Indian tribes" see U. S. *v.* Rogers, 23 Fed. 658, 665, 666.

53. Century Dict. [*quoted* in Lyons *v.* Andry, 106 La. 356, 359, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724].

"Occupied" is held in possession (Webster Dict. [*quoted* in Coleman *v.* Eberly, 76 Pa. St. 197, 201, trial judge's charge]); and is synonymous with "possessed" (Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170).

Does not necessarily preclude absence from place occupied. In discussing the meaning of "occupy or continuing to occupy" in the Homestead Act, it was said: "In common parlance and in reference to housekeeping, we at once attach the idea of actual residence, dwelling, abiding on, the place of bed, board and washing, three acts of constant recurrence, to supply the necessaries of life and renew the physical man. This is the second sense given it by Webster, but it is used also in the sense of possess, generally, and Webster also uses the word possess in the same variety of senses in the main as is given to occupy or occupancy. Turn to 2 Bouvier's Law Dict. 240, 'occupancy'; 336, 'possession,' and we find the words used and understood in the same great variety of senses. If a man go abroad, *animo revertendi*, and reside for temporary purposes of trade or other business, he will not lose his domicile; and yet we know that the party's domicile follows his actual residence. So it is with foreign ministers and diplomatic agents. In contemplation of law, they continue to occupy their mansions or dwellings in their own country, though actually resident abroad for years." Walters *v.* People, 18 Ill. 194, 199, 65 Am. Dec. 730 [*quoted* in Tumlinson *v.* Swinney, 22 Ark. 400, 405, 76 Am. Dec. 432].

In guarantee of rent "as long as said Morris shall occupy said premises" it was held that "the word 'occupy' was used not simply in the narrower sense of actual or personal occupancy, but also in the larger sense of tenancy actually existing under the lease." Morrow *v.* Brady, 12 R. I. 130, 131 [*quoted* in Lane *v.* Nelson, 7 Kulp (Pa.) 286, 291].

In the sense of "reside upon" see Wolfskill *v.* Malajowich, 39 Cal. 276, 279.

Under regulations for assessment see State *v.* Abbott, 42 N. J. L. 111, 113.

"Inhabited" construed as "occupied," when used of a dwelling-house. Smith *v.* Dauney, [1904] 2 K. B. 186, 197, 73 L. J. K. B. 646, 90 L. T. Rep. N. S. 760, 20 T. L. R. 444, 53 Wkly. Rep. 254.

To let to another is not to occupy, under laws exempting premises from taxation while occupied by certain organizations. Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 12 Ky. L. Rep. 397, 9 L. R. A. 629; Pierce *v.* Cambridge, 2 Cush. (Mass.) 611.

"'Unoccupied' and 'vacant' are 'words of the same import,'" as descriptive of land, in a tax statute. Hill *v.* Warrell, 87 Mich. 135, 138, 49 N. W. 479.

54. Webster Dict. [*quoted* in Hall *v.* Roberts, 74 S. W. 199, 200, 24 Ky. L. Rep. 2362]. See also Corporation of Catholic Bishop of Nesqually *v.* Gibbon, 44 Fed. 321, 325.

OCCUR. To befall, to happen.[55] As used in regard to loss in insurance policies, the term has been held equivalent to arise, or accrue.[56]

OCEAN. Open sea, the high sea, that which is the common highway of nations, the common domain, within the body of no country and under the particular right or jurisdiction of no sovereign, but open, free and common to all alike, as a common and equal right;[57] the main sea.[58] (See HIGH SEAS; and, generally, CRIMINAL LAW; NAVIGABLE WATERS; WATERS.)

OCEAN WATERS. As describing waters subject to laws of navigation for the purpose of preventing collisions at sea, all waters opening directly or indirectly into the ocean and navigable by ships, foreign or domestic, coming in from the ocean, of draught as great as is drawn by the larger ships which traverse the open sea.[59] (See OCEAN; and, generally, NAVIGABLE WATERS; WATERS.)

OCTB An abbreviation of "October."[60]

ODD. May refer either to number or singularity.[61]

ODERUNT PECCARE BONI, VIRTUTIS AMORE; ODERUNT PECCARE MALI, FORMIDINE PŒNÆ. A maxim meaning "Good men hate sin through love of virtue; bad men, through fear of punishment"[62]

ODIO ET AMORE JUDEX CAREAT. A maxim meaning "Let a judge be free from hatred and love."[63]

ODIOSA ET INHONESTA NON SUNT IN LEGE PRÆSUMENDA. A maxim meaning "Odious and dishonest things are not to be presumed in law."[64]

ODIOSA NON PRÆSUMUNTUR. A maxim meaning "Odious things are not presumed."[65]

ODIUM. Hatred, dislike.[66]

ŒSTIMATIO FACIT VENDITIONEM. A maxim meaning "A valuation makes a transfer."[67]

55. Worcester Dict. [*quoted* in Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7, 15].

56. Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn. 85, 87, 18 Am. Rep. 385. See also Steen *v.* Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297; Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Hay *v.* Star F. Ins. Co., 19 Alb. L. J. 478 [*quoted* in Steen *v.* Niagara F. Ins. Co., 61 How. Pr. (N. Y.) 144, 146]; Killips *v.* Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506. But see Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47; Fullam *v.* New York Union Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462; Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7, 15.

"Accrue" distinguished.— "The word 'occur' means 'to happen,' in its general and most popular sense, whilst the word 'accrue' is to be added or attached to something else." Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 95, 33 Am. Rep. 47.

"Has no technical import."— Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7, 15.

57. U. S. *v.* Morel, 26 Fed. Cas. No. 15,807; Brunn. Col. Cas. 373, 375.

58. As distinguished from sea within territorial bounds, "that part of the sea which lies not within the body of a county is called the main sea or ocean." Hale De Jure Maris, c. 4 [*quoted* in U. S. *v.* Rodgers, 150 U. S. 249, 254, 14 S. Ct. 109, 37 L. ed. 1071; U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290, 299]. See also Hale De Portibus Maris [*quoted* in opinion by Story, J., in De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398, 426].

In admiralty criminal law, same as "seas" see U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401, 487.

As a boundary of land, in a grant, said to refer to high water mark see Seaman *v.* Smith, 24 Ill. 521, 524.

59. The Victory, 63 Fed. 631, 636.

60. Kearns *v.* State, 3 Blackf. (Ind.) 334, 337, holding it to be a sufficiently explicit abbreviation of October when used in a writ commanding that defendant be summoned to appear at the "Octb. term."

61. "In one reported case . . . 'sixty odd witnesses were introduced'— the phrase 'odd witnesses' in that instance (though not always) referring to number rather than to singularity." St. Louis, etc., R. Co. *v.* Aubuchon, 199 Mo. 352, 362, 97 S. W. 867, 116 Am. St. Rep. 499.

62. Black L. Dict.

63. Peloubet Leg. Max. [*citing* Lofft 59].

64. Peloubet Leg. Max. [*citing* Coke Litt. 78].

65. Bouvier L. Dict. [*citing* Burr. Sett. Cas. 190].

66. Brow *v.* Levy, 3 Ind. App. 464, 29 N. E. 417, 418.

67. The above definition is derived from the application of the maxim in Worthington *v.* Macdonald, 9 Can. Sup. Ct. 327, 338, where it is said to be "a rule which has an extensive application in French law . . particularly applied to cases . . when capital brought into the partnership by one of the partners, not in money but in property, which is handed over in specie, is inventoried and valued (1), in which case, says Troplong, the valuation is taken to show that the intention of the contracting parties

OF. Owned by;[68] CONCERNING[69] (*q. v.*), belonging to;[70] from or out from, proceeding from, as the cause, source, means, author or agent bestowing, belonging to, pertaining or relating to, concerning;[71] resident in.[72]

has been to render the partnership a debtor for the valuation affixed in the inventory instead of for the things themselves."

68. Ohio, etc., R. Co. *v.* Barker, 125 Ill. 303, 306, 17 N. E. 797; State *v.* King, 95 Md. 125, 129, 51 Atl. 1102; Carlisle *v.* Marshall, 36 Pa. St. 397, 401; Segar *v.* Babcock, 18 R. I. 203, 205, 26 Atl. 257.

The word is used to denote possession or ownership. Webster Int. Dict. [*quoted* in State *v.* King, 95 Md. 125, 129, 51 Atl. 1102].

In indictments requiring allegation of property, it is equivalent to "the property of." Jordan *v.* State, 142 Ind. 422, 423, 41 N. E. 817; Davis *v.* State, 38 Ohio St. 505, 506.

Indicating exclusive ownership.— So construed as used in statutes regarding embezzlement of property "of another." State *v.* Kent, 22 Minn. 41, 42, 21 Am. Rep. 764; State *v.* Kusnick, 45 Ohio St. 535, 540, 15 N. E. 481, 4 Am. St. Rep. 564 [*quoted* in State *v.* Reddick, 2 S. D. 124, 127, 48 N. W. 846]. Also under statutes providing for the right of the widow to quarantine, in the house "of" her husband. Such right only exists where plaintiff was the sole owner. Young *v.* Estes, 59 Me. 441, 442.

Beneficial ownership.— "Property of the debtor" does not include property held in trust by the debtor. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515, 517.

Ownership, rather than occupation, of property was held to be the import of the phrase "of another," as a statutory description of property subject of arson. McClaine *v.* Territory, 1 Wash. 345, 349, 353, 26 Pac. 453.

69. Johnson Dict. [*quoted* in Doe *v.* Chichester, 4 Dow. 65, 81, 3 Eng. Reprint 1091].

70. Davis *v.* State, 38 Ohio St. 505, 506; Segar *v.* Babcock, 18 R. I. 203, 205, 26 Atl. 257; Johnson Dict. [*quoted* in Doe *v.* Chichester, 4 Dow. 65, 81, 3 Eng. Reprint 1091]; Webster Int. Dict. [*quoted* in State *v.* King, 95 Md. 125, 129, 51 Atl. 1102].

71. Snell *v.* Scott, 2 Mich. N. P. 108, 110.

In the sense of: "*Among;*" as in a power to appoint "to whom she thinks proper of her heirs" which is a power to select and dispose of it among her legal heirs (Milhollen *v.* Rice, 13 W. Va. 510, 542). "*By;*" as in the phrase "bounded north of" certain land, defining the northern boundary of the premises granted, where "of" was held capable of consideration as "used in its obsolete, but perfectly grammatical, meaning of 'by,' as in the familiar examples — 'seen of men' — 'led of the spirit' — 'tempted of the devil'"; but the court preferred to regard it as a mere clerical error for "on." Hannum *v.* Kingsley, 107 Mass. 355, 361. "*From;*" as in the phrase "collect of." Rives *v.* McLosky, 5 Stew. & P. (Ala.) 330, 338. "Within four rods of the brook," implies measurement from the side of the brook. "The word 'of' as well as the word 'from' is used as a term of exclusion." Haight *v.* Hamor, 83 Me. 453, 460, 22 Atl. 369. "*Manufactured by;*" as in "pork of Scott and Co.," construed "pork of the manufacture of Scott and Co." Powell *v.* Horton, 2 Bing. N. Cas. 668, 675, 2 Hodges 12, 5 L. J. C. P. 204, 3 Scott 110, 29 E. C. L. 710. "*In*" or "*over*"; as in the phrase "court of the district" where "the word 'of,' without any straining, may mean in as well as over the whole district." Betts *v.* Williamsburgh, 15 Barb. (N. Y.) 255, 259. "*Portion or part of;*" as in "lots one and two, of R. 31 E." Wade *v.* Doyle, 18 Fla. 630, 633. "*With;*" as in "of his malice aforethought," equivalent to "with malice aforethought." Rocha *v.* State, 43 Tex. Cr. 169, 171, 63 S. W. 1019.

"Of" and "for" are interchangeable in such use as "courts of [or for] the county," "clerks of the circuit courts of [or for] the county." Slymer *v.* State, 62 Md. 237, 242.

Distinguished from "for" see 19 Cyc. 1103.

Erroneous use.— "Of" has been held a manifest blunder for "off" in the phrase "deduct the tax off the interest paid" (Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 625, 16 Atl. 584, 2 L. R. A. 798]; and construed "if" when known to be used in its stead in a statute (Newgass *v.* New Orleans, 33 Fed. 196, 198).

"Of and concerning," relating to.— The statement in a declaration that a libel was "of and concerning" certain matters did not necessitate proving a libel "relating specifically to every one of these matters," but only to prove "a libel relating to those matters, so far as they are connected with the libel in respect either of the particular defamatory character ascribed to it in the declaration, or of the manner in which it is afterwards set out." May *v.* Brown, 3 B. & C. 113, 127, 4 D. & R. 670, 2 L. J. K. B. O. S. 212, 10 E. C. L. 60.

72. As in "A. of Macon," meaning that A is a resident of, and lives in, Macon. Ivey *v.* State, 112 Ga. 175, 37 S. E. 398. So used "of" denotes "present residence," and "has no appropriate signification but that the person resides there." Lachaise *v.* Marks, 4 E. D. Smith (N. Y.) 610, 617.

Sufficient allegation of abode.— Osborn *v.* Gough, 3 B. & P. 551, 554. "Of" a place held a sufficient allegation of dwelling in it, though it was remarked by one of the judges: "'Of' does not necessarily imply that the party dwells in the place of which he is described to be, according to several instances in Com. Dig. Abatement, (F. 25)." Reg. *v.* Toke, 8 A. & E. 227, 231, 7 L. J. M. C. 74, 3 N. P. 323, 1 W. W. & H. 281, 35 E. C. L. 565. *Compare* Staples *v.* Fairchild, 3 N. Y. 41, 44, where it was held that the mere description "Giles Sanford, of the city of Albany" at the beginning of an application, and, again, of the affidavit verifying it, was not a statement, or positive averment in express terms, that Giles Sanford resided at Albany — that even if it could be held to amount to such positive or express statement, it was not

OF COUNSEL. As used in statutes disqualifying the judge who has been of counsel for either party, from sitting, of counsel for a party in that cause and in that controversy, and if either the cause or the controversy is not identical the disqualification does not exist.[73] (See, generally, ATTORNEY AND CLIENT; JUDGES.)

OF COURSE. Applied to costs, as a matter of right.[74] Applied to motions, those which are granted without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded.[75] Applied to a writ, according to the course and practice of the court from which it issues.[76]

OFF. Written on the margin of the official docket of a term of court by the clerk during vacation, opposite the minute of a motion, the word "off" is not an entry of the overruling of the motion.[77]

OFFAL. That which falls off, as a chip or chips in dressing wood or stone; that which is suffered to fall off as of little value or use; waste meat, the parts of a butchered animal which are rejected as unfit for use; refuse of any kind, rubbish;[78] that which falls off, as fragments or leavings, regarded as of trifling value;[79] waste meat, carrion, refuse, that which is thrown away as of no value or fit only for beasts;[80] refuse animal matter.[81] (Offal: Authority to Remove, see HEALTH. Disposal of, see MUNICIPAL CORPORATIONS. Nuisance, see NUISANCES. See also GARBAGE.)

OFFEND. To transgress the moral or divine law.[82] (See OFFENSE.)

OFFENDER. A term constantly employed in the statutes to indicate persons implicated in the commission of crime.[83] (See OFFEND; OFFENSE.)

OFFENSE. In its legal signification, the transgression of a law;[84] a breach of

verified, as the oath of the affidavit did not apply to it.

Connection of condition of a person with the place where it exists.— "Paupers of your town are here" is equivalent to a statement that the persons were supported by the town described as "your." It does not imply that they have been paupers in the place alluded to as "here." Beacon Falls *v.* Seymour, 46 Conn. 281, 283.

73. The Richmond, 9 Fed. 863, 864.

74. Stoddard *v.* Treadwell, 29 Cal. 281, 282.

75. Merchants' Bank *v.* Crysler, 67 Fed. 388, 390, 14 C. C. A. 444.

76. Yates *v.* People, 6 Johns. (N. Y.) 337, 359.

77. St. Francis Mill Co. *v.* Sugg, 142 Mo. 358, 363, 44 S. W. 247.

78. Century Dict. [*quoted* in St. Louis *v.* Robinson, 135 Mo. 460, 469, 37 S. W. 110].

79. Standard Dict. [*quoted* in State *v.* Robb, 100 Me. 180, 184, 60 Atl. 874].

80. Read *v.* Granberry, 30 N. C. 109, 112.

81. St. Louis *v.* Weitzel, 130 Mo. 600, 617, 31 S. W. 1045.

Does not include trimmed and cleaned bones and hoofs, which are useful articles of commerce. St. Louis *v.* Robinson, 135 Mo. 460, 469, 37 S. W. 110.

"Garbage" includes "offal."— St. Louis *v.* Weitzel, 130 Mo. 600, 617, 31 S. W. 1045.

In a fishing lease the stipulation that the lessor should be entitled to all "offal" embraces fish that are not fit for food originally or through spoiling, cuttings and trimmings, but nothing which is fit for food and is consumed or sold for that purpose. Read *v.* Granberry, 30 N. C. 109, 112.

82. Webster Int. Dict.

"Offending," in the phrase "each and every person offending against the provisions of this act shall for every such offence forfeit," etc., in a statute prohibiting an otherwise legitimate act, is used in the sense of breaking or violating the prohibitory injunction and not as referring to the commission of a crime. Ott *v.* Jordan, 116 Pa. St. 218, 224, 9 Atl. 321.

83. Illies *v.* Knight, 3 Tex. 312, 315.

In a general sense.— "Offender," occurring in a statute defining felony as an offense for which the "offender" shall be liable to death or imprisonment in state prison, held "not used as a word of limitation, making it dependent upon the personal status of the criminal, or his exemption from a particular punishment by reason of age or mental incapacity, where the offense of which he is convicted is a felony; but as a word of general application, in a general sense." People *v.* Park, 41 N. Y. 21, 24, 1 Cow. Cr. 227.

84. Howe *v.* Plainfield, 37 N. J. L. 145, 150; People *v.* Welch, 74 Hun (N. Y.) 474, 480, 26 N. Y. Suppl. 694, 9 N. Y. Cr. 144, 149; Moore *v.* Illinois, 14 How. (U. S.) 13, 19, 14 L. ed. 306 [*quoted* in Wragg *v.* Penn Tp., 94 Ill. 11, 18, 34 Am. Rep. 199; Cruthers *v.* State, 161 Ind. 139, 147, 67 N. E. 930; Neola *v.* Reichart, 131 Iowa 492, 494, 109 N. W. 5; State *v.* Whittemore, 50 N. H. 245, 247, 9 Am. Rep. 196].

The fact rather than the name of any crime.— The word "offenses," as used in the provision "all offenses recognized by the common law as crimes, and not here enumerated, shall be punished," etc., "does not refer specially to the name of crimes. It more properly refers to the acts and intentions, or acts and criminal negligence that make up a crime." Territory *v.* Ye Wan, 2 Mont. 478, 479.

Various kinds of offense — *Continuous.*— While keeping gaming tables may be a "con-

the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, also, sometimes, a crime of the lower grade, a misdemeanor;[85] the doing that which a penal law forbids to be done or omitting to do what it commands.[86] An offense

tinuous offenses," exhibiting one is not, therefore a person charged with the latter, cannot plead a former conviction for exhibiting such table on a different occasion. Each act of exhibition constitutes a separate offense. Kain *v.* State, 16 Tex. App. 282, 293. "A nuisance, which is an offence that may have continuance . . . may therefore be laid with a *continuando*." Wells *v.* Com., 12 Gray (Mass.) 326, 328.

A criminal offense consists in the violation of public law in the commission of which there must be a union or joint operation of act and intention or criminal negligence. Howard *v.* People, 193 Ill. 615, 617, 61 N. E. 1016. So defined by statute in Illinois. Story *v.* People, 79 Ill. App. 562, 565. Conviction of criminal offense may be proved to affect credibility of witness. Such criminal offense may consist in gambling where the latter is defined by statute to be a criminal misdemeanor. Slater *v.* Thornhill, 174 Mo. 364, 370, 74 S. W. 832. "An offence which may be the subject of criminal procedure, is an act committed or omitted in violation of public law." Wharton Cr. L. [*quoted* in U. S. *v.* Chapel, 25 Fed. Cas. No. 14,781]. Although contempt is usually regarded as a criminal offense (see 9 Cyc. 6), it has been held not an offense within the meaning of a statute granting credit for good behavior to prisoners convicted of offenses confined. *In re* Terry, 37 Fed. 649, 650, 13 Sawy. 598.

A cumulative offense is one which can only be committed by a repetition of acts of the same kind, which acts may be on different days, for example, being a common seller. Wells *v.* Com., 12 Gray (Mass.) 326, 329.

A municipal offense, as distinguished from international, is one committed against a particular state (Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544), or separate community (Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533).

Public.— A crime is none the less a public offense when it can only be prosecuted or complained of by the person injured. State *v.* Corliss, 85 Iowa 18, 19, 51 N. W. 1154. "Public offense" as used in a statute authorizing a peace officer to arrest, means no more than "offense" as defined by Bouvier and Abbott. State *v.* Cantieny, 34 Minn. 1, 9, 24 N. W. 458.

"Offense punishable by law."— "Offense" was so construed, as used in a statute providing for venue of an action for damages founded on a crime, "offense," or trespass. Austin *v.* Cameron, 83 Tex. 351, 354, 18 S. W. 437.

May consist in an omission.— State *v.* Hageman, 13 N. J. L. 314, 321.

Offense malum in se is one which is entirely evil as adjudged by the sense of civilized communities, such as murder, arson, theft, and the like. Bouvier L. Dict. [*quoted* in Lewin *v.* Johnson, 32 Hun (N. Y.) 408, 411].

85. Abbott L. Dict. [*quoted* in Cruthers *v.* State, 161 Ind. 139, 147, 67 N. E. 930].

Does not necessarily amount to crime.— Angell *v.* Van Schaick, 56 Hun (N. Y.) 247, 253, 9 N. Y. Suppl. 568 [*reversed* on other grounds in 132 N. Y. 187, 30 N. E. 395]; Ott *v.* Jordan, 116 Pa. St. 218, 224, 9 Atl. 321. The word "has no precise or technical signification, and is used, generally and loosely, in the sense of the matter or transaction which constitutes the subject or cause of the suit." The Idaho, 29 Fed. 187, 192, construing a provision for procedure, against a vessel, by way of libel, in any district court having jurisdiction of "the offense."

Said to be synonymous with misdemeanor, in criminal law. Fetter *v.* Wilt, 46 Pa. St. 457, 460.

86. Bouvier L. Dict. [*quoted* in Dominick *v.* Bowdoin, 44 Ga. 357, 369; Cruthers *v.* State, 161 Ind. 139, 147, 67 N. E. 930; State *v.* Cantieny, 34 Minn. 1, 9, 24 N. W. 458; *In re* Terry, 37 Fed. 649, 650, 13 Sawy. 598].

In this sense it is nearly synonymous with "crime."— In a more confined sense it may be considered as having the same meaning as misdemeanor, but it differs from it in this that it is not indictable but punishable summarily by forfeiture of a penalty. Bouvier L. Dict. [*quoted* in *In re* Terry, 37 Fed. 649, 650, 13 Sawy. 598].

Synonymous with: "Crime" see Cruthers *v.* State, 161 Ind. 139, 147, 67 N. E. 930; People *v.* Hanrahan, 75 Mich. 611, 619, 42 N. W. 1124, 4 L. R. A. 751; State *v.* West, 42 Minn. 147, 152, 43 N. W. 845; People *v.* French, 102 N. Y. 583, 587, 7 N. E. 913; Illies *v.* Knight, 3 Tex. 312, 314. "Criminal offense" see Cruthers *v.* State, *supra*; State *v.* West, *supra*.

"Offense charged" is not confined to the full crime charged in an indictment but applies to any lesser crime included therein and of which the defendant may be convicted on the same charge. State *v.* Smith, 164 Mo. 567, 584, 65 S. W. 270; State *v.* McCormick, 14 Nev. 347, 349.

When completed.— Under a statute declaring it an offense to institute a criminal prosecution maliciously, the offense is completed when the preliminary steps, including the issuance of the warrant, have been taken, and before the arrest, so that where an action is instituted in one county and the arrest made in another, an action for damages based on the offense under a statute providing that said action may be brought in the county where the offense was committed is not properly brought in the county where the arrest was made. Hubbard *v.* Lord, 59 Tex. 384.

Scope confined to felonies.— In the title of "an act to provide for prosecuting offenses on information," the word "offenses" was

as such, is indivisible, but may consist in a series of acts;[87] one act may constitute two offenses.[88] (Offense: Bailable, see Bail. Capital, see Capital. Compound, see Compound Offense. Continuing, see Continuing Offense; Continuous Crime. International, see International Offense. Political, see Extradition (International). See also, generally, Criminal Law.)

OFFENSIVE. Anything that causes displeasure, gives pain or unpleasant sensations, is offensive.[89]

held to embrace all infractions of the criminal code, of the grade of felonies, the body of the act clearly showing such intention. Bolln *v.* State, 51 Nebr. 581, 584, 71 N. W. 444.

Breach of ordinance excluded by context.— As used in a statute authorizing pardons, the term "offenses" was held in the light of the context to mean violations of state laws and not of municipal ordinances. State *v.* Renick, 157 Mo. 292, 300, 57 S. W. 713.

"Incorrigible conduct" of an infant is not "an offense against a law of the state." The latter "is an act punishable as a crime under a statute." State *v.* Schlatterbeck, 39 Ohio St. 268, 270.

Statutory definitions are: "The doing what a penal law forbids to be done, or omitting to do what it commands." Hawaiian Pen. Code [*quoted* in Reg. *v.* Lau Kin Chew, 8 Hawaii 370, 374, dissenting opinion, Dole, J.].

"Any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted." Kan. St. [*quoted* in Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 14]; Mo. St. [*quoted* in State *v.* Blitz, 171 Mo. 530, 540, 71 S. W. 1027].

"Any act or omission for which the laws of this state prescribe a punishment." Kan. St. [*quoted* in Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 14].

"Offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies. All other offenses, whether at common law or made so by statute, are misdemeanors." Ky. St. [*quoted* in Com. *v.* Rowe, 112 Ky. 482, 490, 66 S. W. 29, 23 Ky. L. Rep. 1718].

"Any offense for which any criminal punishment may by law be inflicted." 2 N. Y. Rev. St. p. 886, § 37 [*quoted* in Behan *v.* People, 3 Park. Cr. (N. Y.) 686, 690].

"An act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code." Tex. Pen. Code [*quoted* in Hardin *v.* State, 39 Tex. Cr. 426, 431, 46 S. W. 803].

87. "1. An offense is indivisible. 2. It may consist of a single act, or a series of acts. 3. It may be instantaneous in its consummation, or it may require an interval of time. It is, nevertheless, but one offense." Kain *v.* State, 16 Tex. App. 282, 306.

88. The same act may be an offense (in the sense of crime) against the state, and an offense (in the sense of tort) against a person (Smith *v.* Bagwell, 19 Fla. 117, 123, 45 Am. Rep. 12); or an indictable offense which is also punishable as contempt of court (Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 399, 6 Am. Dec. 290; *In re* Banerjea, L. R. 10 Indian App. 171, 179, judgment delivered by Sir Barnes Peacock).

The same act may be one offense generically, but specifically, another. Thus, generically, stealing live stock running at large unmarked, is larceny but it is also the specific offense. Therefore, under three statutes, one, of the United States, providing that the laws of the United States and the criminal law of Arkansas shall be in force in Indian Territory except where both "have provided for the punishment of the same offense," in which case the laws of the United States shall govern as to such offenses, another, of the United States providing for the punishment of larceny in general, another, part of the criminal law of Arkansas, providing that a person taking or converting certain kinds of live stock at large, unmarked, shall not be deemed guilty of larceny, but that the owner may have his action for the value, it was held that "offenses" as used in the first mentioned statute, meant, "specific offenses." That while the laws of the United States and Arkansas both provided for the punishment of the general offense of larceny, the specific offense of taking unmarked stock was not provided for by the federal statutes, which therefore did not prevail as against the Arkansas statute which expressly excepted that specific offense from punishment. Murray *v.* U. S., 1 Indian Terr. 28, 34, 35, 35 S. W. 240.

May be either tort or crime.— Cooley Torts [*quoted* in Jernigan *v.* Com., 104 Va. 850, 852, 52 S. E. 361].

89. So held of the word as applied to a trade. Rowland *v.* Miller, 15 N. Y. Suppl. 701.

"The disturbing cause must be real, not fanciful; something more than mere delicacy or fastidiousness." Rowland *v.* Miller, 15 N. Y. Suppl. 701. In construing a restrictive covenant against use of premises for an offensive trade, it is to be supposed that the parties had in mind not "any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds and objects not offensive to other people," but "ordinary, normal people"; and that they "meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence." Rowland *v.* Miller, 139 N. Y. 93, 102, 34 N. E. 765, 22 L. R. A. 182 [*quoted* in Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, 136, 72 N. Y. Suppl. 483].

OFFENSIVE WEAPON. A DANGEROUS WEAPON,[90] *q. v.* (See, generally, WEAPONS.)

OFFER. As a noun, a proposition to do a thing;[91] a proposal;[92] a proposal to be accepted or rejected; first advance; the act of bidding, a price or sum bid; attempt, endeavor.[93] As a verb, to bring to or before; to hold out; to present for acceptance or rejection; to exhibit; to present in words; to proffer; to make a proposal to.[94] (Offer: As Element of Contract in General, see CONTRACTS. For Insurance, see ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE. For Purchase, see SALES; VENDOR AND PURCHASER. Of Composition With Creditors, see BANKRUPTCY. Of Evidence, see CRIMINAL LAW; TRIAL. Of Guaranty, see GUARANTY. Of Indemnity, see INDEMNITY. Of Judgment, see JUDGMENTS; JUSTICES OF THE PEACE. Of Lease, see LANDLORD AND TENANT. Of Marriage, see BREACH OF PROMISE TO MARRY. Of Payment, see TENDER. Of Performance, see BREACH OF PROMISE TO MARRY; CONTRACTS; TENDER. Of Proof, see CRIMINAL LAW; TRIAL. Of Reward, see REWARDS. Of Sale, see SALES; VENDOR AND PURCHASER. Of Tenancy, see LANDLORD AND TENANT.)

Held offensive, under restrictive covenants as to use of land.— A coal yard, because of the dust (Barrow *v.* Richard, 8 Paige (N. Y.) 351, 360, 35 Am. Dec. 713); undertaker's shop (Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 [*affirming* 15 N. Y. Suppl. 701, 702].

Held not offensive under restrictive covenants.— A hospital, as not necessarily a business "which may be in any wise noxious or offensive to the neighboring inhabitants" (Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, 137, 72 N. Y. Suppl. 483); a public house, conduct of, not a trade or business that might grow or lead to be offensive" (Jones *v.* Thorne, 1 B. & C. 715, 716, 3 D. & R. 152, 1 L. J. K. B. O. S. 200, 25 Rev. Rep. 546, 8 E. C. L. 302).

90. State *v.* Dineen, 10 Minn. 407.

A thing not originally designed as a weapon may become so by use. Stones capable of inflicting serious injury, if used offensively, and brought and used for that purpose, are offensive weapons within the meaning of a statute relating to night poaching. Rex *v.* Grice, 7 C. & P. 803, 32 E. C. L. 881. "Bats" or hop poles seven feet long used by smugglers to carry tubs may or may not be offensive weapons according to their use, within a statute relating to smuggling. Rex *v.* Noakes, 5 C. & P. 326, 24 E. C. L. 588.

91. Bouvier L. Dict. [*quoted* in People *v.* Ah Fook, 62 Cal. 493, 494].

92. Haskell *v.* Davidson, 91 Me. 488, 490, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Without duration per se.— An offer without more is an offer in the present to be accepted or refused when made. There is no time which a jury may consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it. Until it is accepted it may be withdrawn, although that be at the next instant after it is made and a subsequent acceptance will be of no avail. Vincent *v.* Woodland Oil Co., 165 Pa. St. 402, 408, 30 Atl. 991.

93. Com. *v.* Harris, 1 Leg. Gaz. (Pa.) 455, 457.

94. Webster Dict. [*quoted* in People *v.* Ah Fook, 62 Cal. 493, 494]. "To 'offer' to do a thing is to bring to or before — to present for acceptance or rejection — to exhibit something that may be taken or received or not." Morrison *v.* Springer, 15 Iowa 304, 346.

As mere expression of willingness see Milliken *v.* Skillings, 89 Me. 180, 183, 36 Atl. 77.

Synonymous with tender see Milliken *v.* Skillings, 89 Me. 180, 183, 36 Atl. 77.

Promise distinguished.— "To offer it [a bribe] is to present it for acceptance or rejection; to promise it, is to make a declaration or engagement that it shall be given." State *v.* Harker, 4 Harr. (Del.) 559, 561.

Construed as a promise.— "We offer for" with a statement of subject of offer and price offered, held equivalent to a promise to buy and pay for. Robert E. Lee Silver Min. Co. *v.* Omaha, etc., Smelting, etc., Co., 16 Colo. 118, 131, 26 Pac. 326.

To "offer to vote" by ballot is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. Chase *v.* Miller, 41 Pa. St. 403, 419 [*quoted*, with the addition that it does not necessarily follow that the same would be the meaning of the word "claim" as used in Ky. Const. requiring a voter's residence in the town in which he claims to vote, in Morrison *v.* Springer, 15 Iowa 304, 346].

"Evidence offered" does not mean evidence given; a bill of exceptions stating that certain evidence was "offered" does not show that it was given. Battle Creek Nat. Bank *v.* Lock, 132 Ind. 424, 31 N. E. 1115; Lyon *v.* Davis, 111 Ind. 384, 386, 12 N. E. 714; Garrison *v.* State, 110 Ind. 145, 11 N. E. 2; Peck *v.* Louisville, etc., R. Co., 101 Ind. 366, 369; Fellenzer *v.* Van Valzah, 95 Ind. 128, 133; Baltimore, etc., R. Co. *v.* Barnum, 79 Ind. 261, 263; American Ins. Co. *v.* Gallahan, 75 Ind. 168, 171; Goodwine *v.* Crane, 41 Ind. 335, 337. Where, however, in a record on appeal, evidence was described as "offered" but the judge certified that it was all the evidence "given" in the case, it was held that the two statements together showed substantially that the evidence was given. Rags-

OFFERED LANDS. In the practice of the United States land department, lands which are subject to private cash entry at the minimum price.[95] (See, generally, PUBLIC LANDS.)

OFFICE. See OFFICERS.

OFFICE COPY. A copy made by an authorized officer;[96] a copy made by the officer in custody of the record.[97] (See COPY; and, generally, EVIDENCE; RECORDS.)

OFFICE FOUND. More properly, inquest of office;[98] the proceeding which contains the finding of the fact upon the inquest.[99] (See, generally, ESCHEAT.)

OFFICE OF HONOR. The position of a director of an institution for the education of the deaf and dumb, which, although operated by a private corporation, was a public institution, was held an "office of honor" within the meaning of a constitutional provision forbidding any person holding an office of honor under the United States government, to hold any such office under the state.[1]

OFFICE OF PROFIT. An office to which salary, compensation, or fees are attached, a lucrative office.[2] (See OFFICERS.)

OFFICE PAPER. A written agreement between the parties to a pending case, bearing upon and affecting the disposition to be made of the case.[3]

dale *v.* Barnett, 10 Ind. App. 478, 37 N. E. 1109, 1115. But "offered in evidence" has been construed "introduced in evidence," when obviously used instead of the latter phrase in a bill of exceptions (Harris *v.* Tomlinson, 130 Ind. 426, 427, 30 N. E. 214); and "offer in evidence" as "read in evidence" when used in an exception to alleged error in permitting defendant to "offer in evidence" a copy of certain statutes (Ansley *v.* Meikle, 81 Ind. 260, 261).

"Adduced," broader in meaning than "offered," as applied to evidence. Beatty *v.* O'Connor, 106 Ind. 81, 84, 5 N. E. 880.

Offer for sale.— Under the International Revenue Act, in the definition of retail liquor dealer as "person who shall sell or offer for sale," etc., in order to offer for sale "the license must be first obtained, and then, and not before, the party is at liberty to sell or offer for sale, liquor in less quantities than three gallons. The liquor may be offered for sale without a special or personal solicitation of any particular person to become a purchaser. It may be done by general advertisements in the press, or by the exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale, with intent to dispose of it to any one offering to purchase." U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186, 188 [*quoted* in State *v.* Dunbar, 13 Oreg. 591, 594, 11 Pac. 298, 57 Am. Rep. 33]. In a law under which only such illuminating oils as are "offered for sale" may be inspected, the term does not mean that there must be an actual proffer of sale to any particular person. It applies to a stock of oils kept for sale with intent to sell at any time and to any and all persons as opportunity occurs. Willis *v.* Standard Oil Co., 50 Minn. 290, 296, 52 N. W. 652. Under a statute providing that all of certain lands "offered for sale" by the governor and not sold at the time of offering, shall be subject to private sale after eighteen months, a proclamation by the governor does not constitute an "offering for sale," the land must be regularly proposed for sale at the place and on the day designated by such proclamation. Hardwick *v.* Reardon, 6 Ark. 77, 78. Goods are offered for sale at the place where they are kept for sale and where a sale may be effected. They are not offered for sale elsewhere by sending out an agent with samples or by establishing an office for the purpose of taking orders. U. S. *v.* Chevallier, 107 Fed. 434, 436, 46 C. C. A. 402.

95. U. S. *v.* Budd, 43 Fed. 630, 634.

96. Stamper *v.* Gay, 3 Wyo. 322, 324, 23 Pac. 69.

97. West Jersey Traction Co. *v.* Camden Bd. of Public Works, 57 N. J. L. 313, 316, 30 Atl. 581.

98. Baker *v.* Shy, 9 Heisk. (Tenn.) 85, 89, 90.

It "was a summary inquisition by the king's escheater, either by virtue of his office or by special royal writ, to ascertain whether in the particular case the sovereign has a right to the possession of the lands. . . . This principle we have inherited from the mother country, and we have our own forms of proceeding in lieu of the ancient inquest of office." Baker *v.* Shy, 9 Heisk. (Tenn.) 85, 90.

99. "By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.'" Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. ed. 603 [*quoted* (save that "alienation" stands in place of "alienage") in Strickley *v.* Hill, 22 Utah 257, 266, 62 Pac. 893, 83 Am. St. Rep. 786].

1. Dickson *v.* People, 17 Ill. 191, 192.

2. Baker *v.* Crook County, 9 Wyo. 51, 54, 59 Pac. 797.

3. Watson *v.* Hemphill, 99 Ga. 121, 25 S. E. 262, a copy of which agreement may be established instanter on a motion made by a party and supported by a proper showing.

OFFICERS

By Frank J. Goodnow

Eaton Professor of Administration Law and Municipal Science, Columbia University School of Law*

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* Author of "Goodnow's Comparative Administration Laws;" "Goodnow's Cases on the Law of Officers, including Extraordinary Legal Remedies;" "Goodnow's Cases on Taxation;" etc.

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I. DEFINITIONS AND DISTINCTIONS.

A. Office. An office in the abstract sense may be defined as: A duty, charge or trust;[1] a place of trust;[2] a position to which certain duties are attached;[3] a right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it;[4] a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public, as those

1. Webster Dict. [*quoted* in U. S. *v.* Fisher, 8 Fed. 414, 415].

Primarily and essentially, duty.— "Though the word 'office' may be used in varying senses, the term in any proper sense implies, as indicated by its etymology, a duty or duties to be performed. Other elements, such as the public nature of the duty and its permanence, may be necessary to constitute a public office; but this element — that is, duty or service to be performed — is an essential part of the definition." Reed *v.* Schon, 2 Cal. App. 55, 57, 83 Pac. 77, where status of retired army officer was defined.

Implies a duty and the charge of such duty.— Rex *v.* Burnell, Carth. 478 [*quoted* and *adopted* in *Ex p.* Pool, 2 Va. Cas. 276, 286], argument.

Duty and agency combined.— "In the textbooks it is taught that the word office in its primary signification implies a duty or duties, and, secondarily, the charge of such duties — the agency from the State to perform the duties. The duties of the office are of the first consequence, and the agency from the State to perform those duties is the next step in the creation of an office. It is the union of the two factors, duty and agency, which makes the office." Day's Case, 124 N. C. 362, 368, 32 S. E. 748, 46 L. R. A. 295.

Imports a duty or a trust.— *Ex p.* Faulkner, 1 W. Va. 269, 297.

2. People *v.* Stratton, 28 Cal. 382, 388; Rex *v.* Burrel, 5 Mod. 431 [*cited* in *In re* Poole, 2 Va. Cas. 276, 286]; Burrill L. Dict. [*quoted in* Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 199, 48 N. E. 228].

3. State *v.* Griswold, 73 Conn. 95, 97, 46 Atl. 829.

4. Kent Comm. [*quoted* in Bunn *v.* People, 45 Ill. 397, 414; Ptacek *v.* People, 94 Ill. App. 571, 577 (*affirmed* in 194 Ill. 125, 62 N. E. 530); State *v.* Spaulding, 102 Iowa 639, 643, 72 N. W. 288; People *v.* Howland, 17 N. Y. App. Div. 165, 171, 25 N. Y. Suppl. 347; State *v.* Wilson, 29 Ohio St. 347, 348; Com. *v.* Gamble, 62 Pa. St. 343, 349, 1 Am. Rep. 422; McCornick *v.* Thatcher, 8 Utah 294, 301, 30 Pac. 1091, 17 L. R. A. 243; Blair *v.* Marye, 80 Va. 485, 495].

As "term of office."— "Incident to said office," in connection with the statement of an appointment for the term of three years, was construed, "incident to said term of three years." Baker *v.* Baldwin, 48 Conn. 131, 137.

of magistrates, or private as those of bailiffs, receivers, and the like;[5] a special trust or charge created by competent authority;[6] a function by virtue whereof a man has some employment in the affairs of another;[7] a position or appointment entailing certain rights and duties;[8] place, position, agency;[9] a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance;[10] a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private;[11] a right to exercise a public function or employment, and to take the fees and the emoluments belonging to it;[12] a public

5. Black L. Dict. [*quoted* in State *v.* Spaulding, 102 Iowa 639, 643, 72 N. W. 288]; Blackstone Comm. [*quoted* in State *v.* Spaulding, 102 Iowa 639, 643, 72 N. W. 288; Shelby *v.* Alcorn, 36 Miss. 273, 288, 72 Am. Dec. 169; Opinion of Justices, 73 N. H. 621, 622, 62 Atl. 969, 5 L. R. A. N. S. 415; Com. *v.* Binns, 17 Serg. & R. (Pa.) 219, 233].

A right to exercise a private or public employment and to take the fees and emoluments thereunto belonging. — Blackstone Comm. [*quoted* in Bunn *v.* People, 45 Ill. 397, 414; Ptacek *v.* People, 94 Ill. App. 571, 577 (*affirmed* in 194 Ill. 125, 62 N. E. 530); Conner *v.* New York, 2 Sandf. (N. Y.) 355, 367; State *v.* Wilson, 29 Ohio St. 347, 348; State *v.* Ware, 13 Oreg. 380, 385, 10 Pac. 885; Tanner *v.* Edwards, 31 Utah 80, 85, 86 Pac. 765; Kendall *v.* Raybould, 13 Utah 226, 233, 44 Pac. 1034; McCornick *v.* Thatcher, 8 Utah 294, 301, 30 Pac. 1091, 17 L. R. A. 243]; Comyns Dig. tit. "Franchises," and Cruise Dig. [*quoted* in Faulkner *v.* Upper Boddington, 3 C. B. N. S. 411, 417, 4 Jur. N. S. 692, 27 L. J. C. P. 20, 6 Wkly. Rep. 101, 91 E. C. L. 411].

6. People *v.* Langdon, 40 Mich. 673, 682; State *v.* Shannon, 133 Mo. 139, 164, 33 S. W. 1137; State *v.* Johnson, 123 Mo. 43, 52, 27 S. W. 399; State *v.* Johnson, (Mo. 1894) 25 S. W. 855, 856.

7. *In re* Hathaway, 71 N. Y. 238, 243 [*quoted* in Ricker's Petition, 66 N. H. 207, 233, 29 Atl. 599, 24 L. R. A. 740]; Cowell [*quoted* in Bradford *v.* Justices Inferior Ct., 33 Ga. 332, 336; U. S. *v.* Fisher, 8 Fed. 414, 415]; Jacob L. Dict. [*quoted* in Bradford *v.* Justices Inferior Ct., *supra; Ex p.* Pool, 2 Va. Cas. 276, 286].

The function, not place of performance. — As used in the joint resolution of the 39th congress, regarding payment of certain employees in the "office" of the coast survey, naval observatory, etc., etc., the word has reference to the functions to be performed, not to the place where they are performed. Stone *v.* U. S., 3 Ct. Cl. 260, 262.

8. Cochran L. Lex. [*quoted* in State *v.* Spaulding, 102 Iowa 639, 642, 72 N. W. 288; State *v.* Brennan, 49 Ohio St. 33, 37, 29 N. E. 593]. But *compare* Stewart *v.* Hudson County, 61 N. J. L. 117, 118, 38 Atl. 842, distinguishing "position."

"Appointment is often synonymous with office, but it is by no means always so." Com. *v.* Binns, 17 Serg. & R. (Pa.) 219, 225.

9. Used, not as public office, but in the sense of place, position, agency, in the phrases, "the governor shall declare said office vacant," and "during their continuance in office," concerning the position of a bank as an adjuster of public moneys. Colquitt *v.* Simpson, 72 Ga. 501, 510.

"Place." — "The intrinsic meaning of the word is well expressed by the old English word 'place'; and the figurative terms 'incumbent,' 'swearing in,' 'entering upon,' 'vacating,' constantly applied to offices, have the same radical idea." Burrill L. Dict. [*quoted* in People *v.* Nichols, 52 N. Y. 478, 485, 11 Am. Rep. 734]. But where "office" and "place" (of trust and profit) were used in the alternative, the terms were distinguished. Doyle *v.* Raleigh, 89 N. C. 133, 136, 45 Am. Rep. 677.

10. State *v.* Griswold, 73 Conn. 95, 97, 46 Atl. 829; Century Dict. [*quoted* in State *v.* Spaulding, 102 Iowa 639, 642, 72 N. W. 288; State *v.* Brennan, 49 Ohio St. 33, 37, 29 N. E. 593].

11. Burrill L. Dict. [*quoted* in Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 199, 48 N. E. 228; People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 419, 422]. See also Lamalice *v.* D'Imprimerie Electrique, 4 Quebec Pr. 266, 269.

Technical and popular meanings. — "The word office has two meanings — the one popular, the other legal and technical. Thus. we speak of the office of an executor, guardian, &c. The legal meaning of the term always implies a charge, or trust, conferred by public authority, and for a public purpose." Matter of Dorsey, 7 Port. (Ala.) 293, 371.

12. Bacon Abr. [*quoted* in Mitchell *v.* Nelson, 49 Ala. 88, 89; Miller *v.* Sacramento Co., 25 Cal. 93, 98; Olmstead *v.* New York, 42 N. Y. Super. Ct. 481, 487; State *v.* Wilson, 29 Ohio St. 347, 349; State *v.* Sellers, 7 Rich. (S. C.) 368, 370]; Bouvier L. Dict. [*quoted* in People *v.* Harrington, 63 Cal. 257, 260; Gosman *v.* State, 106 Ind. 203, 204, 6 N. E. 349; State *v.* Spaulding, 102 Iowa 639, 643, 72 N. W. 288; People *v.* Nostrand, 46 N. Y. 375, 381; Matter of Searls, 22 N. Y. App. Div. 140, 144, 48 N. Y. Suppl. 60 [*reversed* on another point in 155 N. Y. 333, 49 N. E. 938]; Olmstead *v.* New York, 42 N. Y. Super. Ct. 481, 487; People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 419, 422; State *v.* Brennan, 49 Ohio St. 33, 37, 29 N. E. 593; Com. *v.* Christian, 9 Phila. (Pa.) 556, 558; People *v.* Hopt, 3 Utah 396, 402, 4 Pac. 250]; Kent Comm. [*quoted* in Quigg *v.* Evans, 121 Cal. 546, 550, 53 Pac. 1093; People *v.* Stratton, 28 Cal. 382, 388; People *v.* Ridgley, 21

charge or employment;[13] a trust conferred by public authority for a definite purpose, and for a definite term;[14] a particular duty, charge, or trust, conferred by public authority and for public purpose.[15] In a stricter legal sense an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental;[16] a public station or employment conferred by the appointment of government;[17] the right and duty conferred on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has fixed to the service;[18] "a public position, to which a portion

Ill. 65, 68; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 462, 4 Ohio N. P. 372; Hamlin *v.* Kassafer, 15 Oreg. 456, 458, 15 Pac. 77, 3 Am. St. Rep. 176].

An office is a right to exercise a public function or employment, and may be classed into civil and military. And civil may be classed into political, judicial, and ministerial. Political are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. Judicial are those which relate to the administration of justice. Ministerial are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. Waldo *v.* Wallace, 12 Ind. 569, 572 [*citing* 2 Bouvier L. Dict. 259; 4 Jacob L. Dict. 433; 2 Tomlinson L. Dict. 665].

"Office" includes "public trust" as those terms are used in § 3, art. 11, of the state constitution. *Ex p.* Yale, 24 Cal. 241, 244, 85 Am. Dec. 62.

13. State *v.* Spaulding, 102 Iowa 639, 644, 72 N. W. 288; People *v.* Brooklyn, 77 N. Y. 503, 508, 33 Am. Rep. 659; People *v.* Hayes, 7 How. Pr. (N. Y.) 248, 250; Wood's Case, 2 Cow. (N. Y.) 29, 30 note (each adding that "the term seems to comprehend any charge or employment in which the public are interested"); Bacon Abr. [*quoted* in Hill *v.* Boyland, 40 Miss. 618, 625]; Johnson Dict. [*quoted* in Faulkner *v.* Upper Boddington, 3 C. B. N. S. 411, 417, 4 Jur. N. S. 692, 27 L. J. C. P. 20, 6 Wkly. Rep. 101, 91 E. C. L. 411]; State *v.* Spaulding, 102 Iowa 639, 645, 72 N. W. 288; Shelby *v.* Alcorn, 36 Miss. 273, 288, 72 Am. Dec. 169; U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96, 102 [*quoted* in Ptacek *v.* People, 94 Ill. App. 571, 577 (*affirmed* in 194 Ill. 125, 62 N. E. 530); Leprohon *v.* Ottawa, 1 Cartw. Cas. (Can.) 592, 648].

Private agency is not office.— Pennock *v.* Fuller, 41 Mich. 153, 155, 2 N. W. 176, 32 Am. Rep. 148; People *v.* McAllister, 19 Mich. 215; Bronson *v.* Newberry, 2 Dougl. (Mich.) 38.

14. State *v.* Rose, 74 Kan. 262, 267, 86 Pac. 296, 6 L. R. A. N. S. 843.

15. Webster Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 572; State *v.* Kennon, 7 Ohio St. 546, 556].

16. "Lexicographers generally define 'office' to mean 'public employment'; and I apprehend its legal meaning to be an employment on behalf of the government, in any station or public trust, not merely transient, occasional or incidental." *In re* Attorneys' Oaths, 20 Johns. (N. Y.) 492, 493 [*quoted* in Adams *v.* McCaughey, 21 R. I. 341, 346, 43 Atl. 646, where, however, "station of" is substituted for "station or"]. The stricter legal definition is also quoted in People *v.* Nichols, 52 N. Y. 478, 484, 11 Am. Rep. 734; State *v.* Kennon, 7 Ohio St. 546, 556, and, in substance, in State *v.* Rose, 74 Kan. 262, 267, 86 Pac. 296, 6 L. R. A. N. S. 843; *In re* Hathaway, 71 N. Y. 238, 244; Warwick *v.* State, 25 Ohio St. 21, 25.

The word "offices" standing unqualified in a constitution or statute refers to state or county offices only, and not to those of corporations. State *v.* Churchman, 3 Pennew. (Del.) 361, 365, 51 Atl. 49.

Constitutional definition; Illinois.— "A public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed." Ill. Const. (1870) [*quoted* in Lasher *v.* People, 183 Ill. 226, 235, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; People *v.* Loeffler, 175 Ill. 585, 600, 51 N. E. 785; Wilcox *v.* People, 90 Ill. 186, 192].

17. Polk *v.* James, 68 Ga. 128, 131; State *v.* Rose, 74 Kan. 262, 267, 86 Pac. 296, 6 L. R. A. N. S. 843; U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 393, 18 L. ed. 830 [*quoted* in State *v.* Spaulding, 102 Iowa 639, 644, 72 N. W. 288; State *v.* Theus, 114 La. 1097, 1103, 38 So. 870; State *v.* Ware, 13 Oreg. 380, 385, 10 Pac. 885].

18. Century Dict. [*quoted* in McArdle *v.* Jersey City, 66 N. J. L. 590, 598, 49 Atl. 1013, 88 Am. St. Rep. 496].

Delegation of function of government.— "An office is defined by good authority as involving a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is distinguished from employment or contract." Mechem Pub. Off. [*quoted* in Barnhill *v.* Thompson, 122 N. C. 493, 495, 29 S. E. 720]. "The term 'office' implies a delegation of . . . sovereign power to, and possession of, it by the person filling the office." State *v.* Hocker, 39 Fla. 477, 485, 22 So. 721, 63 Am. St. Rep. 174; Opinion of Justices, 3 Me. 481, 482 [*quoted* in Montgomery *v.* State, 107 Ala. 372, 381, 18 So. 157; Patton *v.* San Francisco Bd. of Health, 127 Cal. 388, 394, 59 Pac. 702, 78 Am. St. Rep. 66; Lindsey *v.* Atty.-Gen., 33 Miss. 508, 520]; Lamalice *v.* D'Imprimerie Electrique, 4 Quebec Pr. 266, 269. "An office is where, for the time being, a portion of the sovereignty, legislative, executive, or judicial,

of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public;"[19] an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation;[20] a place created, or at least recognized, by the law of the state, and to which certain eminent public duties are assigned by the burden of the law itself, or by regulations abated under authority of law;[21] a special duty, trust, or charge, conferred by authority, and for a public purpose; an employment undertaken by the commission and authority of the government, as civil, judicial, legislative, and other offices;[22] the term embraces the idea of tenure, duration, emoluments, and duties;[23] in legal idea, office is an entity, and may exist in fact, although it be without an incumbent.[24] The word is also used in the abstract sense of function, or purpose, of a thing.[25] Corporate offices are such only as are expressly required by the charter.[26] As place of business, the place where a particular kind of business, or service, for others is transacted; a house or apartment in which public officers and others transact business, as the register's office, a lawyer's office.[27]

B. Officers. One participating in the exercise of the powers or receiving the emoluments of a public office is a public officer.[28] Some jurisdictions confine the

attaches, to be exercised for the public benefit." U. S. *v.* Lockwood, 1 Pinn. (Wis.) 359, 363.

19. High Extr. Rem. [*quoted* in State *v.* Spaulding, 102 Iowa 639, 643, 72 N. W. 288; State *v.* Jennings, 57 Ohio St. 415, 425, 49 N. E. 404, 63 Am. St. Rep. 723].

20. Smith *v.* New York, 37 N. Y. 516, 519, 5 Transcr. App. 228; People *v.* Rathbone, 11 Misc. (N. Y.) 98, 99, 32 N. Y. Suppl. 108.

21. Stewart *v.* Hudson County, 61 N. J. L. 117, 118, 38 Atl. 842.

22. Webster Dict. [*quoted* in Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 199, 48 N. E. 288].

23. Tanner *v.* Edwards, 31 Utah 80, 85, 86 Pac. 765; U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 393, 18 L. ed. 830 [*quoted* in State *v.* Spaulding, 102 Iowa 639, 644, 72 N. W. 288; Ptacek *v.* People, 94 Ill. App. 571, 578; State *v.* Theus, 114 La. 1097, 1103, 38 So. 870; Kendall *v.* Raybould, 13 Utah 226, 233, 44 Pac. 1034; People *v.* Hopt, 3 Utah 396, 402, 4 Pac. 250; Hall *v.* Wisconsin, 103 U. S. 5, 8, 26 L. ed. 302]. "The idea of an office . . . embraces the idea of tenure, duration, fees or emoluments, rights and powers, as well as that of duty." Burrill L. Dict. [*quoted* in People *v.* Nichols, 52 N. Y. 478, 485, 11 Am. Rep. 734; People *v.* Hopt, 3 Utah 396, 402, 4 Pac. 250; U. S. *v.* Fisher, 8 Fed. 414, 415].

24. People *v.* Stratton, 28 Cal. 382, 388 [*quoted* in State *v.* Rose, 74 Kan. 262, 268, 86 Pac. 296, 6 L. R. A. N. S. 843]; Heard *v.* Elliott, 116 Tenn. 150, 154, 92 S. W. 764.

25. For example, "the office of a *nunc pro tunc* entry" (Wilson *v.* Vance, 55 Ind. 394, 395 [*quoted* in Klein *v.* Southern Pac. Co., 140 Fed. 213, 216]); "office of a preliminary injunction" (Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 741, 19 L. R. A. 387 [*quoted* in Bachman *v.* Harrington, 184 N. Y. 458, 464, 77 N. E. 657]); "office of a writ of prohibition" (Appo *v.* People, 20 N. Y. 531, 540 [*quoted* in People *v.* Milliken, 185 N. Y. 35, 39, 77 N. E. 872]); "office of a cross bill" (Koch *v.* Sumner, 145 Mich. 358, 360, 108 N. W. 725, 116 Am. St. Rep. 302).

26. Philips *v.* Com., 98 Pa. St. 394, 402.

The term does not include the position of a professor in a university, elected or appointed by the trustees, and subject to removal by them for cause, although the charter defines, in certain particulars, the powers and duties of the incumbent of such position. Philips *v.* Com., 98 Pa. St. 394.

27. Webster Dict. [*quoted* in Anderson *v.* State, 17 Tex. App. 305, 310].

Best explained by examples of general use. — "The meaning of the term can be better explained by reference to its general and popular use and application, than by any formal definition. Thus we say the clerk's office, register's office, attorney's office, broker's office, and railroad corporations frequently have a place or room denominated the ticket office; all as places of business essentially different from a passenger room or a railroad depot." Com. *v.* White, 6 Cush. (Mass.) 181, 183.

Mayor's office does not include city court-house. A provision that mayor shall keep his office in the city, and hear and determine all cases of violation of all by-laws and ordinances, does not empower him to designate the court-house. Mitchell *v.* Gadsden, 109 Ala. 390, 393, 19 So. 808.

Equivalent to "house" in indictment for breaking and entering. So held in Bigham *v.* State, 31 Tex. Cr. 244, 249, 20 S. W. 577, with the remark that "office," as defined by Webster, is "a house or apartment in which public officers and others transact business; as, a register's office, a lawyer's office."

Office of a corporation. — By statute, in New York, "the term, office of a corporation, means its principal office within the State, or principal place of business within the State, if it has no principal office therein." Revere Rubber Co. *v.* Genesee Valley Blue Stone Co., 20 N. Y. App. Div. 166, 167, 46 N. Y. Suppl. 989.

28. *Alabama.* — Montgomery *v.* State, 107 Ala. 372, 18 So. 157.

California. — Patton *v.* San Francisco Bd.

term "officer" to one who occupies a permanent position in the service of the government and whose duties are not occasional or temporary.[29] On the other hand other states regard as officers those who only temporarily discharge public functions, provided they possess the other qualifications of officers.[30] Furthermore in some jurisdictions no one is regarded as an officer who is not invested with some portion of the sovereignty.[31] On the other hand other jurisdictions do not regard the character of the duties performed as affecting the character of the position.[32] The taking of an official oath is regarded in some instances as a necessary charac-

of Health, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66.

Connecticut.— State *v.* Martin, 46 Conn. 479; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429.

Florida.— State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

Georgia.— Bradford *v.* Justices Inferior Ct., 33 Ga. 332.

Iowa.— State *v.* Spaulding, 102 Iowa 639, 72 N. W. 288.

Kentucky.— Hoke *v.* Com., 79 Ky. 567.

Massachusetts.— Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253.

Missouri.— State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

Montana.— State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

New York.— People *v.* Coler, 158 N. Y. 667, 52 N. E. 1125; People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; Goettman *v.* New York, 6 Hun 132; Smith *v.* New York, 67 Barb. 223; People *v.* Scannel, 22 Misc. 298, 49 N. Y. Suppl. 1096; Porter *v.* Pillsbury, 11 How. Pr. 240.

North Carolina.— See People *v.* Bledsoe, 68 N. C. 457; People *v.* McKee, 68 N. C. 429.

Ohio.— State *v.* Wilson, 29 Ohio St. 347; State *v.* Kennon, 7 Ohio St. 546.

South Carolina.— State *v.* Champlin, 2 Bailey 220. See also State *v.* Jeter, 1 McCord 233.

Texas.— State *v.* De Gress, 53 Tex. 387; Hendricks *v.* State, 20 Tex. Civ. App. 178, 49 S. W. 705.

See 37 Cent. Dig. tit. "Officers," § 4.

A notary public is a public officer. *In re* Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415; People *v.* Rathbone, 11 Misc. (N. Y.) 98, 32 N. Y. Suppl. 108 [*affirmed* in 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384]; Stokes *v.* Acklen, (Tenn. Ch. App. 1898) 46 S. W. 316. See, generally, NOTARIES PUBLIC.

An attorney at law is not an officer within the meaning of the act of Nov. 16, 1863, and is not required to take the oath therein prescribed for officers. *Ex p.* Faulkner, 1 W. Va. 269. See, generally, ATTORNEY AND CLIENT.

A public administrator is not an officer because he is not engaged in the discharge of governmental functions. Mitchell *v.* Nelson, 49 Ala. 88; Dwinelle *v.* Henriquez, 1 Cal. 387. See, generally, EXECUTORS AND ADMINISTRATORS.

An officer of a private corporation is not a public officer. Bates *v.* Worcester Protective Dept., 177 Mass. 130, 52 N. E. 274; Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462.

A member of a political party committee is not a public officer even where the law regulates the election and conduct of political committees, because he is not performing duties which affect the public as a whole. Atty.-Gen. *v.* Drohan, 160 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301.

State and local officers distinguished.— N. Y. Laws (1892), c. 681, § 2, known as the "Public Officers Law," divides public officers into two classes — state officers and local officers — and, after defining state officers, defines the term "local officers" as including every other officer who is elected by the electors of a portion only of the state, every officer of the political subdivisions of municipal corporations of the state, and every officer limited in the execution of his official functions to a portion only of the state. Matter of Lansingburgh Bd. of Health, 43 N. Y. App. Div. 236, 60 N. Y. Suppl. 27. The term includes a commission appointed by the mayor of New York and Brooklyn, in reference to a bridge between the cities, as authorized by N. Y. Laws (1895), c. 789, as amended by N. Y. Laws (1896), c. 612. People *v.* Nixon, 158 N. Y. 221, 52 N. E. 1117.

29. *Illinois.*— Bunn *v.* People, 45 Ill. 397.

Michigan.— Shurbun *v.* Hooper, 40 Mich. 503; Underwood *v.* McDuffee, 15 Mich. 361, 93 Am. Dec. 194.

New York.—*In re* Hathaway, 71 N. Y. 238; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734.

Oklahoma.— Braithwaite *v.* Cameron, 3 Okla. 630, 38 Pac. 1084.

West Virginia.— Shields *v.* McClung, 6 W. Va. 79.

Wisconsin.— State *v.* Myers, 52 Wis. 628, 9 N. W. 777.

30. Clark *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Com. *v.* Evans, 74 Pa. St. 124; Reg. *v.* Simpson, 4 Cox C. C. 276.

31. *Kentucky.*— McArthur *v.* Nelson, 81 Ky. 67.

New Jersey.— Daily *v.* Essex County, 58 N. J. L. 319, 33 Atl. 739.

North Carolina.— State *v.* Thompson, 122 N. C. 493, 29 S. E. 720. See also People *v.* Bledsoe, 68 N. C. 457.

Ohio.— State *v.* Anderson, 57 Ohio St. 429, 49 N. E. 406; State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Shaw *v.* Jones, 6 Ohio S. & C. Pl. Dec. 453, 4 Ohio N. P. 372.

Wisconsin.— U. S. *v.* Hatch, 1 Pinn. 182.

See 37 Cent. Dig. tit. "Officers," § 4.

32. *Alabama.*— Scruggs *v.* State, 111 Ala. 60, 20 So. 642.

teristic of public office,[33] as is also the right to discharge the duties of the office;[34] but the receipt of emoluments is not necessary.[35] Finally, the determination of the question whether a given position is an office is sometimes governed by the wording of the particular statute as evidence of the intention of the legislature at the time the position was established. The most marked example of such an influence is to be found in the case of the positions in the service of the United States national government. It has been held that as a result of the provision in the national constitution regulating the appointment of officers,[36] no person in the United States government service is an officer who has not been appointed by the president and confirmed by the senate, or appointed by the president alone, one of the United States courts, or the head of an executive department.[37] It has, however, been held that one appointed by a collector of customs, whose appointment has been approved by the head of an executive department, is an officer of the United States.[38] The wording of particular statutes may be such that the same position may be held to be an office for one purpose and not for another.[39]

C. Distinction Between Office and Employment. Opposed to the conceptions of office and officer are those of employment and employee. While an office is based upon some provision of law, an employment is based upon a contract entered into by the government with the employee.[40] The importance of the distinction is due, among other things, to the fact that, inasmuch as an employment is a contract, the legislature of a state is not permitted by the con-

California.— People *v.* Woodbury, 14 Cal. 43; Vaughn *v.* English, 8 Cal. 39.

Florida.— State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

New York.—Goettman *v.* New York, 6 Hun 132.

United States.— Sanford *v.* Boyd, 21 Fed. Cas. No. 12,311, 2 Cranch C. C. 78.

See 37 Cent. Dig. tit. "Officers," § 4.

33. State *v.* Gray, 91 Mo. App. 438; Fox *v.* Mohawk, etc., Humane Soc., 25 N. Y. App. Div. 26, 48 N. Y. Suppl. 625 [*affirmed* in 165 N. Y. 517, 59 N. E. 353, 80 Am. St. Rep. 767, 51 L. R. A. 681]; State *v.* Slagle, 115 Tenn. 336, 89 S. W. 326; Reg. *v.* Simpson, 4 Cox C. C. 276. But see Clark *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

34. Reed *v.* Schon, 2 Cal. App. 55, 83 Pac. 77; People *v.* Duane, 121 N. Y. 367, 24 N. E. 845, holding that a retired army officer does not hold a "lucrative office." But *compare* State *v.* De Gress, 53 Tex. 387.

35. Clark *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Hendricks *v.* State, 20 Tex. Civ. App. 178, 49 S. W. 705; Reg. *v.* Simpson, 4 Cox C. C. 276.

36. U. S. Const. art. 2, § 2, par. 2.

37. U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463; U. S. *v.* Germaine, 99 U. S. 508, 25 L. ed. 482.

38. U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830.

39. U. S. *v.* Hendee, 124 U. S. 309, 8 S. Ct. 507, 31 L. ed. 465; U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463.

For example a policeman has been held not to be an officer under a statute authorizing the corporation counsel of the city of New York to defend officers (Donahue *v.* Keeshan, 91 N. Y. App. Div. 602, 87 N. Y. Suppl. 144), and was held to be an officer under a statute punishing resistance to officers (Sanner *v.* State, 2 Tex. App. 458). In other cases notaries public have been held to be officers under a provision of law prohibiting a person elected or appointed to a public office from traveling on a free pass (People *v.* Rathbone, 11 Misc. (N. Y.) 98, 32 N. Y. Suppl. 108 [*affirmed* in 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384]) and not to be officers under a statute punishing refusal to testify before an officer where such notaries were taking testimony under a foreign commission (Matter of Searls, 22 N. Y. App. Div. 140, 48 N. Y. Suppl. 60 [*reversed* on other grounds in 155 N. Y. 333, 49 N. E. 938]. See also State *v.* George, 22 Oreg. 142, 29 Pac. 356, 29 Am. St. Rep. 586, 16 L. R. A. 737 (which holds that the word "office" mentioned in the constitution means a position provided for by the constitution); Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24 (which holds that "office" in the constitution means a position having to do with the general government of the state and that a trustee of a railroad built by a city was not such an officer).

40. *Maryland.*— Baltimore *v.* Lyman, 92 Md. 591, 48 Atl. 145, 84 Am. St. Rep. 524, 52 L. R. A. 406.

New Jersey.— State *v.* Broome, 61 N. J. L. 115, 38 Atl. 841.

New York.— Olmstead *v.* New York, 42 N. Y. Super. Ct. 481.

Ohio.— State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

Washington.— Nelson *v.* Troy, 11 Wash. 435, 39 Pac. 974.

Employment distinguished.— Montgomery *v.* State, 107 Ala. 372, 381, 18 So. 157; Bunn *v.* People, 45 Ill. 397, 403; Moll *v.* Sbisa, 51 La. Ann. 290, 291, 25 So. 141; Opinion of Justice, 3 Me. 481, 482; Shelby *v.* Alcorn, 36 Miss. 273, 288, 72 Am. Dec. 169; Lindsey *v.* Atty.-Gen., 33 Miss. 508, 520; Lewis *v.* Jer-

tract clause of the federal constitution to pass a law impairing the obligation of the contract made with a government employee.[41] An office, however, not being based upon a contract, is not affected by this provision of the federal constitution and the legislature may provide for its termination during the term of the incumbent,[42] and may, during such term, diminish the compensation attached to the office or increase the duties of the office without increasing the compensation.[43] The only jurisdiction in the United States which ever regarded an office as having the characteristics of a property right is North Carolina, which, however, at the present time takes the view of the official relation adopted by the other states.[44] In England, however, as a result of statutory provision, an office has been regarded as partaking of the nature of property, and the courts have, in applying particular statutes, held that one appointed to an office to hold during good behavior is entitled to compensation if removed arbitrarily or if the office is abolished.[45] It is important to distinguish an office from an employment also, because in many respects the rules of law governing the relation of employee and employer do not govern the official relation, which is regulated by that part of the law which may be spoken of as the law of officers. Thus, an officer to whose office no compensation has been attached by law may not bring an action for services rendered.[46] Thus again an officer who has been illegally removed from office is not obliged to deduct from the judgment he may recover from a municipal corporation for the salary he should have received what he may have earned during the period he has been wrongfully excluded from his office.[47] Finally the distinction between an officer and an employee is important because the courts — adopting the principle of strict construction in applying statutes declaring certain acts on the part of an officer to be crimes — will refuse to regard as an officer a person who, while in the public service, does not occupy a position established as a result of the action direct or indirect of the legislature, with a term, duties, and tenure.[48]

sey City, 51 N. J. L. 240, 242, 17 Atl. 112. See also 15 Cyc. 1041 note 3.

41. Hall *v.* Wisconsin, 103 U. S. 5, 26 L. ed. 302. See also Ward *v.* Toledo Bd. of Education, 21 Ohio Cir. Ct. 699, 11 Ohio Cir. Dec. 671, in which it is said that an employee is not within the purview of a constitutional provision prohibiting change of official salary during the term of an official incumbent. But see Abrams *v.* Horton, 18 N. Y. App. Div. 208, 45 N. Y. Suppl. 887, where it is held that, under the law in New York, officers having power to employ subordinates may not make a contract of employment which may not be terminated by the exercise of the power of removal.

Impairment of obligation of contract with officers generally see CONSTITUTIONAL LAW, 8 Cyc. 954 *et seq.*

42. *California.*— Ford *v.* State Harbor Com'rs, 81 Cal. 19, 22 Pac. 278.

Michigan.— Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

Missouri.— State *v.* Davis, 44 Mo. 129.

Nevada.— State *v.* Trousdale, 16 Nev. 357.

North Carolina.— Mial *v.* Ellington, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697.

Ohio.— State *v.* Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

South Carolina.— State *v.* McDaniel, 19 S. C. 114.

United States.— Butler *v.* Pennsylvania, 10 How. 402, 13 L. ed. 472.

See also CONSTITUTIONAL LAW, 8 Cyc. 954 *et seq.*

43. State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; Conner *v.* New York, 2 Sandf. (N. Y.) 355 [*affirmed* in 5 N. Y. 285]. See also *infra*, IV, A, 3.

44. Mial *v.* Ellington, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697 [*overruling* Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 677].

45. Reg. *v.* Lechmere, 12 Q. B. 284, 15 Jur. 558, 20 L. J. Q. B. 169, 71 E. C. L. 284; Reg. *v.* Sandwich, 2 Q. B. 895, 2 D. & G. 28, 6 Jur. 684, 11 L. J. Q. B. 132, 42 E. C. L. 965; Reg. *v.* Cambridge Corporation, 12 A. & E. 702, 10 L. J. Q. B. 25, 4 P. & D. 294, 40 E. C. L. 349; Reg. *v.* Norwich, 8 A. & E. 633, 35 E. C. L. 767; Atty.-Gen. *v.* Poole, 8 Beav. 75, 9 Jur. 318, 14 L. J. Ch. 101, 50 Eng. Reprint 30.

46. White *v.* Levant, 78 Me. 568, 7 Atl. 539. See also Craufurd *v.* Atty.-Gen., 7 Price 1.

47. Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835.

48. State *v.* Spaulding, 102 Iowa 639, 72 N. W. 288; State *v.* Broome, 61 N. J. L. 115, 38 Atl. 841; U. S. *v.* Germaine, 99 U. S. 508, 25 L. ed. 482; U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830. See also State *v.* McOmber, 6 Vt. 215, which holds that a person deputized by a justice of peace to serve process is not an officer under a statute punishing resistance to officers.

II. APPOINTMENT, QUALIFICATION, AND TENURE.[49]

A. Creation and Filling of Offices in General — 1. CREATION OF OFFICE. The power to create an office, unless other provision is made by the constitution, is vested in the legislative department of the government,[50] which may delegate its power to a municipal board or other body.[51] But if the constitution imposes a limitation upon the power of the legislature to create offices this body may not disobey or evade such limitation.[52] In creating an office it is not necessary for the legislature to act in any formal way.[53]

2. ABOLITION OR CONSOLIDATION OF OFFICES. The authority in the government which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority (that is, in the case of a municipal authority, some statutory or constitutional provision; in the case of the legislature, some constitutional provision) the implied power to abolish the office it has created,[54] or to consolidate two or more offices it has created.[55] But if an office has been provided for by the constitution, such an office may not be abolished by an act of the legislature.[56] To abolish an office the intention of the competent authority to abolish such office must be clear.[57]

49. Of particular officers see special titles relating thereto, and cross-references at the head of the article.

50. U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96. *Compare* 10 Op. Atty.-Gen. 11; 4 Op. Atty.-Gen. 248. See People *v.* Lindsley, 37 Colo. 476, 86 Pac. 352.

51. Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; State *v.* Spaulding, 102 Iowa 639, 72 N. W. 288; Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956.

Creation and abolition of municipal offices see MUNICIPAL CORPORATIONS, 28 Cyc. 400.

Home rule provisions.— The purpose of the home rule provisions of the constitution of New York (art. 10, §§ 1, 2) was to preserve to the people of the local divisions of the state the power to select such local officers as they had theretofore selected, but not to give them the right to select new officers even if their duties are local, provided their functions are new and the functions of existing officers are not interfered with. Morgan *v.* Furey, 186 N. Y. 202, 78 N. E. 869 [*affirming* 114 N. Y. App. Div. 127, 99 N. Y. Suppl. 783], holding that Laws (1898), p. 1612, c. 676, as amended by Laws (1905), p. 1846, c. 689, creating the metropolitan elections district for the purpose of all elections for state officers, and providing for the appointment by the governor of a state superintendent of elections for such district, is not in violation of the home rule provisions of the constitution, in that the superintendent is not elected by the people of the district, or appointed by some local authority; the office being not only a new one unknown to the constitution, but also new in the essential powers and duties which belong thereto.

52. Swincher *v.* Com., 72 S. W. 306, 24 Ky. L. Rep. 1897; *In re* Railroad Com'rs, 15 Nebr. 679, 50 N. W. 276; Warner *v.* People, 2 Den. (N. Y.) 272, 43 Am. Dec. 740; Union Pac. R. Co. *v.* Alexander, 113 Fed. 347.

53. State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

By making appropriation for salary.— An office cannot be legally established by an appropriation of public money, by ordinance, as salary for one acting as an officer. Hedrick *v.* People, 221 Ill. 374, 77 N. E. 441.

54. *California.*— Ford *v.* State Harbor Com'rs, 81 Cal. 19, 22 Pac. 278; Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; *In re* Bulger, 45 Cal. 553.

Georgia.— Augusta *v.* Sweeney, 44 Ga. 463, 9 Am. Rep. 172.

New York.— Koch *v.* Mayor, 152 N. Y. 72, 46 N. E. 170; Phillips *v.* New, 88 N. Y. 245; Porter *v.* Howland, 24 Misc. 434, 53 N. Y. Suppl. 683.

Ohio.— State *v.* Covington, 29 Ohio St. 102.

Pennsylvania.— Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199.

South Carolina.— State *v.* McDaniel, 19 S. C. 114.

United States.— See Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187, which holds that, as an office is not a property or vested right, an appeal from the decisions of state courts as to the election of an officer could not be made to the United States courts, on the ground that one is deprived of property without due process of law.

See 37 Cent. Dig. tit. "Officers," § 5.

55. Hall *v.* Burke, 96 Ga. 622, 24 S. E. 349; Troy *v.* Wooten, 32 N. C. 377. And see Noble *v.* Bragaw, 12 Ida. 265, 85 Pac. 903, holding that the abolishment of an appointive office by an act of the legislature, and imposing the duties of such office on another officer without enumerating in detail such duties, in no manner violates a constitutional provision that no act shall be revised or amended by mere reference to its title.

56. Massenburg *v.* Bibb County, 96 Ga. 614, 23 S. E. 998; Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199.

57. Quigg *v.* Evans, 121 Cal. 546, 53 Pac.

3. The Filling of Offices. The method of filling offices is to be determined by the legislature in the absence of constitutional provisions on the subject;[58] and the legislature may, in the absence of such provisions, provide that offices shall be filled by private corporations chartered by authority of the state government,[59] or by voluntary associations of individuals.[60] But where the constitution has provided the method of filling offices the legislature may not provide for filling them in any other manner than that directed by the constitution.[61] When an amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted.[62]

4. Authority to Appoint. It is one of the principles of the law of the United States that, in the absence of a constitutional provision to the contrary, any one of the three departments of the government may, under the authority of a statute, appoint its own subordinates.[63] Although there is some conflict, the better rule would seem to be that in the absence of some constitutional provision the power to appoint may also, if the statutes of the legislature so provide, be exercised for any class of officers by any of the three governmental departments.[64]

1093; Sayer *v.* Douglas County, 119 Ga. 550, 46 S. E. 654; Sayer *v.* Brown, 119 Ga. 539, 46 S. E. 649; Hall *v.* State, 39 Wis. 79. *Compare* Beaman *v.* United States, 19 Ct. Cl. 5.

58. *Florida.*— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Indiana.— Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 609, 33 N. E. 443; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729. In the constitution, art. 15, § 1, declaring that certain officers shall be chosen in such manner as now is, or hereafter may be, prescribed by law, "manner" does not mean necessarily a direction to the governor to appoint, nor is the word intended to permit simply the direction of a particular mental operation in arriving at a choice, nor the qualification of the persons to be chosen, nor the character of commission, nor the duration of the term, nor the duties of the person or position, nor the time nor place of appointing, but should be construed to give the legislature power to name the person or functionary who should make the appointment. French *v.* State, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113.

New York.— Sun Printing, etc., Assoc. *v.* New York, 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607 [*affirmed* in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788]. See People *v.* Draper, 15 N. Y. 532.

North Carolina.— Cherry *v.* Burns, 124 N. C. 761, 33 S. E. 136.

West Virginia.— Bridges *v.* Shallcross, 6 W. Va. 562.

Filling by lot.— Nebr. Const. art. 10, § 4, enacting that the legislature shall provide by law for the election of such county and township officers as may be necessary, does not prevent the legislature when it reduces the number of officers from providing that those already elected shall cast lots to determine whose term of office shall be discontinued; nor does it prevent the legislature from providing for the filling of vacancies provisionally by appointment. Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

59. Overshiner *v.* State, 156 Ind. 187, 59 N. E. 468, 83 Am. St. Rep. 187, 51 L. R. A. 748; State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; Sturgis *v.* Spofford, 45 N. Y. 446.

60. In *In re* Bulger, 45 Cal. 553, it was held that the legislature might confer the power of appointing a city fire commissioner upon a board of fire underwriters, which was a voluntary association of persons and not a corporation. See also State *v.* Finger, 48 Ohio St. 505, 28 N. E. 135, which holds that the legislature may intrust the appointment of officers to committees of political parties. But see State *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

61. *Florida.*—State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

Illinois.— People *v.* Bollam, 182 Ill. 528, 54 N. E. 1032.

Indiana.— Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858.

Kentucky.— Speed *v.* Crawford, 3 Metc. 207.

Missouri.— State *v.* Towns, 153 Mo. 91, 54 S. W. 552.

New York.— People *v.* State Bd. of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; *In re* Brenner, 170 N. Y. 185, 63 N. E. 133; Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People *v.* Albertson, 55 N. Y. 50; Heister *v.* Metropolitan Bd. of Health, 37 N. Y. 661; Warner *v.* People, 2 Den. 272, 43 Am. Dec. 740.

62. State *v.* Winnett, (Nebr. 1907) 110 N. W. 1113, 10 L. R. A. N. S. 149.

63. State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; State *v.* Smith, 15 Mo. App. 412; *In re* Supreme Ct. Janitor, 35 Wis. 410, in all of which cases the courts seem to claim an absolute right to appoint their own subordinates, such as janitors and clerks, of which they may not be deprived by the legislature.

64. *California.*— People *v.* Freeman, 80 Cal. 233, 20 Pac. 173, 13 Am. St. Rep. 122.

Illinois.— People *v.* Hoffman, 116 Ill. 587,

But in a number of states, particularly when constitutional provisions apply, it is regarded as improper for the legislature or the courts to appoint executive or administrative officers not their immediate subordinates.[65] It is, however, clear that the power of appointment is not an executive power in the sense that it belongs to the governor as a result of a grant to him in the constitution of the executive power, and in the absence of any provision of statute giving him power to appoint.[66]

5. Authority to Remove.[67] Sometimes the attempt has been made to treat the power to remove as a judicial power. Thus where the constitution has not expressly or impliedly provided that the power to remove is vested in an executive officer, it has been held that an officer may be declared to have forfeited his office only as the result of a judgment of a court.[68] The grant of the executive power to a governor of a state is furthermore not regarded as giving him power to remove an officer.[69] In the case of the president of the United States, however, it has been held that, by reason of the construction placed by congress upon the constitution, the president is to be regarded as possessing the power to remove an officer appointed by him and confirmed by the senate who by law has a fixed term.[70] And a similar rule has been announced as to the powers of the governor

5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; People *v.* Morgan, 90 Ill. 558.

Maryland.— Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

New Jersey.— Ross *v.* Essex County, 69 N. J. L. 291, 55 Atl. 310.

New York.— See Heister *v.* Metropolitan Bd. of Health, 37 N. Y. 661; People *v.* Draper, 15 N. Y. 532.

Oregon.— Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655; State *v.* George, 22 Oreg. 142, 29 Pac. 356, 29 Am. St. Rep. 586, 16 L. R. A. 737.

65. *Indiana.*— State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; State *v.* Hyde, 121 Ind. 20, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 65.

Michigan.— Houseman *v.* Kent Cir. Judge, 58 Mich. 364, 25 N. W. 369.

Missouri.— State *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

Nebraska.— State *v.* Offill, 74 Nebr. 669, 105 N. W. 1099; State *v.* Offill, (1905) 105 N. W. 1098; State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092.

North Carolina.— People *v.* Bledsoe, 68 N. C. 457; People *v.* McKee, 68 N. C. 429; Clark *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

Ohio.— State *v.* Kennon, 7 Ohio St. 546.

66. *Alabama.*— Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529.

Illinois.— People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; People *v.* Morgan, 90 Ill. 558.

Indiana.— Overshiner *v.* State, 156 Ind. 187, 59 N. E. 468, 83 Am. St. Rep. 187, 51 L. R. A. 748; State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79.

Kentucky.— Sinking Fund Com'rs *v.* George, 104 Ky. 260, 47 S. W. 779, 20 Ky. L. Rep. 938, 84 Am. St. Rep. 454.

Maine.— See Burton *v.* Kennebec County, 44 Me. 388.

Oregon.— State *v.* George, 22 Oreg. 142, 29 Pac. 356, 29 Am. St. Rep. 586, 16 L. R. A. 737.

Contra.— State *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430. See also State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174 (which holds that, under a constitutional provision to the effect that state and county officers shall be elected by the people or appointed by the governor, the legislature may not vest the appointment of state officers in a court); Com. *v.* Bussier, 5 Serg. & R. (Pa.) 451.

In England there is naturally no legal objection to the selection by parliament of public officers. Ostler *v.* Cooke, 18 Q. B. 831, 17 Jur. 370, 22 L. J. Q. B. 71, 83 E. C. L. 831.

67. **Removal in general** see *infra*, II, G, 4.

68. Page *v.* Hardin, 8 B. Mon. (Ky.) 648; State *v.* Pritchard, 36 N. J. L. 101; Honey *v.* Graham, 39 Tex. 1. See Hastings *v.* Young, (Cal. 1888) 17 Pac. 530; Fraser *v.* Alexander, 75 Cal. 147, 16 Pac. 757; Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644; State *v.* Shannon, 7 S. D. 319, 64 N. W. 175.

69. *Illinois.*— Field *v.* People, 3 Ill. 79.

Kentucky.— Page *v.* Hardin, 8 B. Mon. 648.

Mississippi.— Peyton *v.* Cabaniss, 44 Miss. 808.

New Jersey.— State *v.* Pritchard, 36 N. J. L. 101.

New Mexico.— Territory *v.* Armijo, (1907) 89 Pac. 267 (holding that the executive power vested in the governor of New Mexico by the organic act does not include the right to remove an officer elected in accordance with the statute law of the territory); Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879.

Texas.— Collins *v.* Tracy, 36 Tex. 546.

70. Parsons *v.* U. S., 167 U. S. 324, 17 S. Ct. 880, 42 L. ed. 185. See also U. S. *v.* Avery, 24 Fed. Cas. No. 14,481, Deady 204.

under certain state constitutions.[71] But while the power to remove from office is regarded as a power possessed by the courts, in the absence of its express or implied grant to some other authority in the government, the courts hold that this power may be exercised by the legislature by declaring the office to be vacant, or may be delegated by the legislature to some other authority.[72] Furthermore, it is the universal rule that where the duration of an office is not prescribed by law, the power to remove is an incident of the power to appoint.[73]

B. Appointment[74] — **1. What Constitutes an Appointment.** An appointment consists in the choice by the appointing power of the person appointed.[75] The exercise of the appointing power involves the exercise of discretion,[76] and must be accompanied by the intention on the part of the appointing officer to place the person of his choice in the position to be filled.[77] But an intention to appoint will be implied. Thus the continuance in office of a deputy during the second term of the official who originally appointed him is equivalent to a reappoint-

Compare Harman *v.* Harwood, 58 Md. 1, where a similar holding is made under the constitution of Maryland.

71. Harman *v.* Harwood, 58 Md. 1.

72. *Idaho.*— Rankin *v.* Jauman, 4 Ida. 53, 36 Pac. 502.

Illinois.— Donahue *v.* Will County, 100 Ill. 94.

Louisiana.— State *v.* Hufty, 11 La. Ann. 303.

Michigan.—Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

Minnesota.— See State *v.* Peterson, 50 Minn. 239, 52 N. W. 655.

Missouri.— State *v.* Davis, 44 Mo. 129.

Oklahoma.— Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14, holding that the right of the governor to hear and determine evidence against an officer, pass upon it, and remove him from office is not to be regarded as a judicial power.

Texas.— Keenan *v.* Perry, 24 Tex. 253.

Wisconsin.— State *v.* Prince, 45 Wis. 610.

73. *Arkansas.*— Patton *v.* Vaughan, 39 Ark. 211.

California.— People *v.* Hill, 7 Cal. 97. See also People *v.* Jewett, 6 Cal. 291, holding that a constitutional provision to the same effect as the text must be construed to deny the power of removal where the tenure was defined.

Illinois.— People *v.* Higgins, 15 Ill. 110. See Field *v.* People, 3 Ill. 79, holding that when the constitution creates an office and leaves the tenure undefined and unlimited, the officer holds during good behavior and until the legislature by law limits the tenure to a term of years, or authorizes some functionary of the government to remove the officer at will or for good cause.

Louisiana.— Peters *v.* Bell, 51 La. Ann. 1621, 26 So. 442. But *compare* Duhuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526; Nicholson *v.* Thompson, 5 Rob. 220.

Minnesota.— Parish *v.* St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. Rep. 374.

Mississippi.— Newsom *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686.

New York.— People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554; People *v.* New York Bd. Fire Com'rs, 73 N. Y. 437. *Compare* Bergen *v.* Powell, 94 N. Y. 591, holding that this principle is applicable only where the power to appoint is a continuing one.

North Dakota.—State *v.* Archibald, 5 N. D. 359, 66 N. W. 234.

Pennsylvania.— Com. *v.* Bussier, 5 Serg. & R. 451.

Tennessee.— Williams *v.* Boughner, 6 Coldw. 486.

Texas.— Keenan *v.* Perry, 24 Tex. 253.

United States.— *Ex p.* Hennen, 13 Pet. 230, 10 L. ed. 136; Taylor *v.* Kercheval, 82 Fed. 497.

See 37 Cent. Dig. tit. "Officers," § 9.

74. **County officers** see Counties, 11 Cyc. 417.

Election of officers see Elections.

Federal officers see United States.

Mandamus to compel appointment see Mandamus, 26 Cyc. 251.

Municipal officers see Municipal Corporations, 28 Cyc. 402.

Township officers see Towns.

75. Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 50.

76. People *v.* Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552. See also Com. *v.* County Com'rs, 5 Binn. (Pa.) 534, which holds that an appointment made by lot is invalid.

Civil service laws limiting discretion.— Thus if the appointing power has been given to an officer by the constitution, the legislature may not confine his choice so as to oblige him to select some person proposed to him by some other body, as for example one who has obtained the highest mark at a civil service examination. People *v.* Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552. But it would seem that if the power of appointment is not thus given by the constitution, the legislature may provide such a method for the selection of officers. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

77. State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228, holding, where the governor issued a commission to one elected by the legislature, that it was not an appointment by the governor. See also Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; State *v.* Capers, 37 La. Ann. 747, where it is said

ment.[78] After the act of appointment is complete the power of the appointing authority is exhausted. The appointing authority may not revoke its former appointment and make another.[79] The only exception to this statement is to be found in the case of appointments by legislative bodies whose actions in the case of appointments are generally treated like their legislative business and governed by their ordinary rules.[80] Where the appointment of an officer is directed to be made by a legislative body by ballot, the manner of taking the ballot is within the discretion of such body;[81] the appointment does not become absolute until the result of the ballot is ascertained and announced.[82]

2. CONCURRENT ACTION OF DIFFERENT BODIES. Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had,[83] and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.[84] Where an appointment is made by a joint meeting of two bodies the majority required is a majority of all and not a majority of the members of each.[85] Where no provision is contained in the constitution that an officer is to be commissioned by the executive the appointment is complete upon the confirmation by the senate or council of the nomination by the executive.[86] But where provision is made for the exercise of a power to commission, the appointment is not complete until the commission has been signed.[87]

3. THE COMMISSION. Where the appointment is not under the law complete until the officer has been commissioned by the authority to whom the law has given the power to sign commissions, and the power to issue commissions has been intrusted to an authority not the same as the appointing authority, the issue of the commission is regarded as a ministerial act,[88] which may be enforced by mandamus.[89] The appointment, however, is complete in such cases when the commission is signed. Its sending to or receipt by the appointee is not necessary to a

that a commission issued by mistake may be revoked.

78. Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633.

79. *California.*—People *v.* Cazneau, 20 Cal. 503.

Connecticut.— State *v.* Starr, 78 Conn. 636, 63 Atl. 512 (holding that the appointment of an officer once made cannot be revoked by the appointing power unless permissible under the power of removal, whether such appointment is made by a single executive, an executive board, court, or legislative body or board); State *v.* Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65.

Michigan.— Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

New Jersey.— Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234].

United States.— Marbury *v.* Madison, 1 Cranch 137, 2 L. ed. 60.

80. Conger *v.* Gilmer, 32 Cal. 75; Baker *v.* Cushman, 127 Mass. 105; Atty.-Gen. *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574; State *v.* Foster, 7 N. J. L. 101. But see State *v.* Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65.

81. State *v.* Starr, 78 Conn. 636, 63 Atl. 512.

82. State *v.* Starr, 78 Conn. 636, 63 Atl. 512.

83. People *v.* Bissell, 49 Cal. 407; State *v.* Rareshide, 32 La. Ann. 934; Taylor *v.* Hehden, 24 Md. 202, holding that the concurrent act of the state senate must be at a regular session of the legislature. See also Calvert County *v.* Hellen, 72 Md. 603, 20 Atl. 130; Merrill *v.* Garrett County School Com'rs, 70 Md. 269, 16 Atl. 723; Howerton *v.* Tate, 68 N. C. 546; *In re* Southern, etc., Dist. Marshalship, 20 Fed. 379.

Indirect confirmation.— But confirmation of an appointment may be made indirectly, as for example where a city council approves a pay-roll. Larsen *v.* St. Paul, 83 Minn. 473, 86 N. W. 459.

84. Atty.-Gen. *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574.

85. Whiteside *v.* People, 26 Wend. (N. Y.) 634.

86. Com. *v.* Waller, 145 Pa. St. 235, 23 Atl. 382.

87. Conger *v.* Gilmer, 32 Cal. 75; Magruder *v.* Tuck, 25 Md. 217; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60, 4 Op. Atty.-Gen. 217.

88. Hill *v.* State, 1 Ala. 559; State *v.* Towns, 8 Ga. 360.

89. State *v.* Crawford, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253; State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45. See also MANDAMUS, 26 Cyc. 252.

Where the power is vested in the governor it has been held that mandamus will not lie. State *v.* Governor, 25 N. J. L. 331. Mandamus to governor generally see MANDAMUS, 26 Cyc. 229.

valid appointment.[90] Where, however, the issue of a commission is not made by law a necessary part of the appointment, the appointment is complete when the choice of the appointing officer has been made,[91] and no written evidence of the appointment is necessary. An oral appointment is valid.[92] Indeed it has frequently been held that the fact that one has acted as an officer and has generally been recognized as such will create the presumption of a valid appointment.[93] Such presumption may, however, be overcome by evidence to the contrary.[94] The commission is merely *prima facie* evidence of title to the office and is not conclusive.[95] And since it in itself confers no title it may be revoked and another issued in case mistake has been made in the names stated therein.[96]

4. Time of Appointment. An appointment may not be made to an office which is not vacant.[97] It naturally follows from this rule that a prospective appointment to fill a vacancy which has not yet occurred, unless specially provided for by law, is improper,[98] except where the appointment is made to fill a vacancy sure to occur, and is made by an authority which is empowered to fill such vacancy when it arises.[99] But an appointment to a new office to take effect on the establishment of such office may be made before the law establishing such office goes into effect;[1]

90. Jefferson County Justices *v.* Clark, 1 T. B. Mon. (Ky.) 82; State *v.* Billy, 2 Nott & M. (S. C.) 356; U. S. *v.* Le Baron, 19 How. (U. S.) 73, 15 L. ed. 525; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; U. S. *v.* Sykes, 58 Fed. 1000.

91. State *v.* Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

92. Hoke *v.* Field, 10 Bush (Ky.) 144, 19 Am. Rep. 58; Florance *v.* Richardson, 2 La. Ann. 663. See Saunders *v.* Owen, 12 Mod. 200, 2 Salk. 467, where it is said that an officer may be appointed by parol. But *compare* State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367, where it is said that if the title to the office is derived from executive appointment, the commission is the only legal evidence of title.

By statute a written commission may be necessary. Magruder *v.* Tuck, 25 Md. 217; State *v.* Meder, 22 Nev. 264, 38 Pac. 668; People *v.* Murray, 70 N. Y. 521; People *v.* Fitzsimmons, 68 N. Y. 514 (holding that no set form is necessary to make a commission valid); State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45. In State *v.* Fulkerson, 10 Mo. 681, it is intimated that a commission is not void because it does not state the term for which the appointment was made.

Statement of term.— The commission of an officer is not void because it does not state the term for which he was appointed, but such fact may be shown by parol. State *v.* Fulkerson, 10 Mo. 681.

93. *California.*— Delphi School Dist. *v.* Murray, 53 Cal. 29.

Georgia.—Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; Bryan *v.* Walton, 14 Ga. 185.

Kansas.— State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Kentucky.— Carter *v.* Sympson, 8 B. Mon. 155.

Mississippi.— Nelson *v.* Nye, 43 Miss. 124.

New Hampshire.— State *v.* Wilson, 7 N. H. 543.

New York.— Colton *v.* Beardsley, 38 Barb. 29; Dean *v.* Gridley, 10 Wend. 254.

Tennessee.— Tomlinson *v.* Darnall, 2 Head 538.

Virginia.— Callison *v.* Hedrick, 15 Gratt. 244.

England.— Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744; McMahon *v.* Lennard, 6 H. L. Cas. 970, 10 Eng. Reprint 1576.

See 37 Cent. Dig. tit. "Officers," § 21.

But see Allen *v.* McNeel, 1 Mill (S. C.) 459.

94. Hutchings *v.* Van Bokkelen, 34 Me. 126.

95. State *v.* Towns, 8 Ga. 360. But see State *v.* Jackson, 27 La. Ann. 541, holding that a commission issued on a certificate of the returning board is conclusive of the fact of election to office in all cases except where the election is contested within the time of the proceedings allowed by law.

Where two commissions have been issued to two persons to the same office, it will be presumed in the absence of a showing to the contrary that the last commission was issued in error. State *v.* Bankston, 23 La. Ann. 375.

96. State *v.* Capers, 37 La. Ann. 747.

97. State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; Taylor *v.* Hebden, 24 Md. 202; Thomas *v.* Burrus, 23 Miss. 550, 55 Am. Dec. 154; People *v.* McAdoo, 110 N. Y. App. Div. 432, 96 N. Y. Suppl. 362.

Before acceptance of resignation.— Where an officer resigns his office, no vacancy exists until the resignation is accepted formally, or by the appointment of a successor, and one who is elected to fill the vacancy before the resignation is accepted cannot claim the office. State *v.* Kitsap County Super. Ct., (Wash. 1907) 91 Pac. 4.

98. State *v.* Ermston, 14 Ohio Cir. Ct. 614, 8 Ohio Cir. Dec. 83.

99. State *v.* O'Leary, 64 Minn. 207, 66 N. W. 264; Whitney *v.* Van Buskirk, 40 N. J. L. 463; Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234]; Smith *v.* Dyer, 1 Call (Va.) 562. See also People *v.* Blanding, 63 Cal. 333.

1. People *v.* Inglis, 161 Ill. 256, 43 N. E.

and, where the appointing power has the arbitrary power of removal, the appointment of a successor of the present incumbent operates as a removal of the latter.[2]

5. Compliance With Formalities. In accordance with the usual rule that *omnia præsumuntur rite acta* an appointment will be presumed to have been made in accordance with the law.[3] At the same time the appointing power must comply with the formalities prescribed by law in order that an appointment be valid,[4] and the appointment of an ineligible person is an absolute nullity,[5] except that the official acts of such a person are regarded as the acts of an officer *de facto*.[6]

6. Preference of Discharged Soldiers, Sailors, or Marines.[7] Sometimes either the constitution or a statute gives preference in appointment to honorably discharged soldiers and sailors from the army and navy of the United States. The tendency of the courts is to give such provisions a somewhat narrow construction and to hold that the legislature may not, under the ordinary state constitution, exempt such soldiers and sailors from the examinations which are by law required of others for appointment to office.[8] But laws giving soldiers and sailors preference over those having equal qualifications would seem to be proper. Such laws not only limit the discretion of the appointing power but confer rights under the law upon veterans which are enforceable before the courts.[9] In the interpretation of such laws the courts hold that the preference is accorded by them only to such soldiers and sailors as are physically and mentally qualified to perform the duties of the offices to which they apply to be appointed,[10] and that the veteran, to enjoy the preference, must bring the fact that he is entitled to this privilege to the attention of the appointing power.[11]

1103; State *v.* Irwin, 5 Nev. 111. But see State *v.* Meares, 116 N. C. 582, 21 S. E. 973, which holds invalid an appointment made on the ninth day of the month to an office created by an act of the legislature on the eighth day of that month, which act was not signed and ratified by the president of the senate and speaker of the house until the twelfth day.

2. *Louisiana.*— State *v.* Abbott, 41 La. Ann. 1096, 6 So. 805.

Ohio.— State *v.* Craig, 69 Ohio St. 236, 69 N. E. 228.

Texas.— Keenan *v.* Perry, 24 Tex. 253.

United States.— *Ex p.* Hennen, 13 Pet. 230, 10 L. ed. 138.

England.— Smyth *v.* Latham, 9 Bing. 692, 1 Cromp. & M. 547, 2 L. J. Exch. 241, 3 Moore & S. 251, 3 Tyrw. 509, 23 E. C. L. 763.

3. Eldodt *v.* Territory, 10 N. M. 141, 61 Pac. 105; Cherry *v.* Burns, 124 N. C. 761, 33 S. E. 136; Doe *v.* Bodenham, 9 B. & C. 495, 17 E. C. L. 225.

4. Benson *v.* People, 10 Colo. App. 175, 50 Pac. 212; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

5. People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73; People *v.* Platt, 50 Hun (N. Y.) 454, 3 N. Y. Suppl. 367 [*affirmed* in 117 N. Y. 159, 22 N. E. 937]. See also Patterson *v.* Miller, 2 Metc. (Ky.) 493; Spear *v.* Robinson, 29 Me. 531; State *v.* Newman, 91 Mo. 445, 3 S. W. 849.

6. See *infra*, II, D.

7. In municipal offices and employments see Municipal Corporations, 28 Cyc. 404.

8. Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253; Opinion of Justices, 145 Mass. 587, 13 N. E. 15; *In re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; Matter of Sweeley, 12 Misc. (N. Y.) 174, 33 N. Y. Suppl. 369 [*affirmed* in 146 N. Y. 401, 42 N. E. 543]. See Sims *v.* Boston Police Com'r, 193 Mass. 547, 79 N. E. 824.

9. Dever *v.* Humphrey, 68 Kan. 759, 75 Pac. 1037; Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; State *v.* Miller, 66 Minn. 90, 68 N. W. 732; Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420; People *v.* French, 52 Hun (N. Y.) 464, 5 N. Y. Suppl. 712; People *v.* Moore, 39 Hun (N. Y.) 478; Matter of Wortman, 2 N. Y. Suppl. 324, 22 Abb. N. Cas. 137; People *v.* Poillon, 16 Abb. N. Cas. (N. Y.) 119.

10. People *v.* Lyman, 157 N. Y. 368, 52 N. E. 132; Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420.

Preference over those of equal qualifications.— Under a statute providing for the preference of honorably discharged soldiers and sailors of the Civil war, residents of the state, in the public service, over those of equal qualifications, but that neither age nor physical infirmity shall be considered in passing on their qualifications, unless these are such as to render them incompetent to perform the duties required, an honorably discharged soldier or sailor is not entitled to a preference unless his qualifications to discharge the duties exacted are equal to those of his competitors. McBride *v.* Independence, 134 Iowa 501, 110 N. W. 157.

11. Allison *v.* California Bd. of Education, 125 Cal. 72, 57 Pac. 673; People *v.* Simonson, 64 N. Y. App. Div. 312, 72 N. Y. Suppl. 84.

7. Collateral Inquiry Into Validity or Regularity of Appointment. The validity or regularity of the appointment or election of a public officer cannot be inquired into in an action to which he is not a party.[12] The only possible exceptions to this rule are: (1) When the appointment or election of ineligible persons is made by law absolutely void;[13] and (2) where an office, the acts of whose incumbent are in question, has not been legally established.[14] This rule has been applied to criminal as well as to civil actions,[15] and is enforced against the sureties on an official bond.[16] But in an action to which an officer is not a party enough inquiry into the validity of his title may be made to determine whether he is an intruder, since the acts of an intruder may be treated as null and void in any proceeding.[17] Furthermore it is not proper to impeach the title of an officer in all suits to which he may be a party. Thus it is held that in such an action the officer may not deny that he has been legally appointed or elected.[18] Finally it is commonly held that the title to office may not be tried in an action for salary where plaintiff is not the actual incumbent of the office in question.[19]

C. Eligibility and Qualification[20] — 1. In General — a. Right to Prescribe Qualifications. The right to hold office is not a right which has been given to the individual by the constitution, but is a privilege which is conferred by the

12. See *infra*, II, D, 1.

13. Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

14. Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178. But see Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289. And see *infra*, II, D, 2.

15. State *v.* Stone, 40 Iowa 547; State *v.* Sellers, 7 Rich. (S. C.) 368. See Peyton *v.* Brent, 19 Fed. Cas. No. 11,056, 3 Cranch C. C. 424. *Compare* State *v.* Butler, 178 Mo. 272, 79 S. W. 560, where it was held that an officer indicted for accepting a bribe might defend on the ground that the act, which it was alleged he had been bribed to do, was not within his powers.

16. *Alabama.*— Sprowl *v.* Lawrence, 33 Ala. 674.

California.— People *v.* Hammond, 109 Cal. 384, 42 Pac. 36; People *v.* Huson, 78 Cal. 154, 20 Pac. 369; People *v.* Jenkins, 17 Cal. 500.

Indiana.— Lucas *v.* Shepherd, 16 Ind. 368.

Iowa.— Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Kentucky.— Paducah *v.* Cully, 9 Bush 323.

Mississippi.— Taylor *v.* State, 51 Miss. 79; Byrne *v.* State, 50 Miss. 688.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

New York.— Fairport Union Free School *v.* Fonda, 77 N. Y. 350.

Ohio.— Kelly *v.* State, 25 Ohio St. 567.

Texas.— King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

See 37 Cent. Dig. tit. "Officers," § 20.

Recitals of the official character of the officer in the bond will estop the sureties from denying it. People *v.* Hammond, 109 Cal. 384, 42 Pac. 36; People *v.* Huson, 78 Cal. 154, 20 Pac. 369; People *v.* Jenkins, 17 Cal. 500; Lucas *v.* Shepherd, 16 Ind. 368; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; Paducah *v.* Cully, 9 Bush (Ky.) 323; Taylor *v.* State, 51 Miss. 79; Byrne *v.* State, 50 Miss. 688; State *v.* Rhoades, 6 Nev. 352; King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

17. U. S. *v.* Alexander, 46 Fed. 728.

18. *California.*— Crawford *v.* Dunbar, 52 Cal. 36; People *v.* Jenkins, 17 Cal. 500.

Illinois.— Joliet *v.* Tuohey, 1 Ill. App. 483.

Iowa.— Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Mississippi.— Marshal *v.* Hamilton, 41 Miss. 229.

Wisconsin.— Warden *v.* Bayfield County, 87 Wis. 181, 58 N. W. 248.

19. See *infra*, III, C.

20. Eligibility and qualifications of particular officers: Ambassadors and consuls see Ambassadors and Consuls, 2 Cyc. 261; bank officers see Banks and Banking, 5 Cyc. 455; clerks of court see Clerks of Court, 7 Cyc. 200; coroners see Coroners, 9 Cyc. 982; corporate officers see Corporations, 10 Cyc. 903; county officers see Counties, 11 Cyc. 419; court commissioners see Court Commissioners, 11 Cyc. 625; court officers see Courts, 11 Cyc. 719; election officers see Elections, 15 Cyc. 310; eminent domain commissioners see Eminent Domain, 15 Cyc. 885; executors and administrators see Executors and Administrators, 18 Cyc. 74 *et seq.*; highway officers see Streets and Highways; immigration officers see Aliens, 2 Cyc. 120; judges see Judges, 23 Cyc. 510; jury commissioners see Juries, 24 Cyc. 210; justices of the peace see Justices of the Peace, 24 Cyc. 409; land officers see Public Lands; militia officers see Militia, 27 Cyc. 492; notaries see Notaries, *ante*, p. 1071; officers of municipal corporations see Municipal Corporations, 28 Cyc. 412; officers of prisons see Prisons; overseers of the poor see Paupers; pension officers see Pensions; postmaster see Post-Office; prosecuting attorneys see Prosecuting Attorneys; registers of deeds see Registers of Deeds; revenue officers see Internal Revenue, 22 Cyc. 1656; school officers see Schools and School-

legislature,[21] or the body competent under the constitution to regulate the official relation, and the legislature is not precluded from requiring qualifications for an office additional to those required of an elector, by a constitutional provision to the effect that no person shall be elected or appointed to any office in a state unless he possesses the qualifications of an elector.[22] But where the constitution itself prescribes in detail the qualifications for office the legislature may not add to or diminish them.[23]

b. When Qualifications Must Be Present. The question as to when the qualifications necessary for legal appointment or election to office shall exist is one to which different answers have been given. Most of the cases hold that the term "eligible" as used in a constitution or statute means capacity to be chosen, and that therefore the qualifications must exist at the time of election or appointment.[24] Indeed some cases go so far as to hold that, where suit is brought to oust one from office who is alleged to be ineligible, defendant may become eligible by taking the required oath or by resigning an incompatible office even after the beginning of the suit.[25] A constitutional requirement that officers shall be registered voters does not become operative until a registration law has been enacted.[26]

DISTRICTS; sheriffs and constables see SHERIFFS AND CONSTABLES; state officers see STATES; taxing officers see TAXATION; territorial officers see TERRITORIES; town officers see TOWNS; United States officers see UNITED STATES, UNITED STATES COMMISSIONERS, UNITED STATES MARSHALS.

21. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; State *v.* Wilson, 121 N. C. 425, 28 S. E. 554; State *v.* Dunn, 73 N. C. 595. See State *v.* Huegle, (Iowa 1907) 112 N. W. 234; People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508 [*reversing* 63 Barb. 356 (*reversing* 12 Abb. Pr. N. S. 399)].

22. Sheehan *v.* Scott, 145 Cal. 684, 79 Pac. 350; Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; People *v.* Barker, 2 Wheel. Cr. (N. Y.) 19; State *v.* Covington, 29 Ohio St. 102; State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. But *compare* State *v.* Williams, 20 S. C. 12.

Imposition of qualification as ex post facto law see CONSTITUTIONAL LAW, 8 Cyc. 1034 text and note 49.

Qualifications of electors see ELECTIONS, 15 Cyc. 268.

23. *California.*—Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395.

Iowa.— See State *v.* Huegle, (1907) 112 N. W. 234.

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Minnesota.— State *v.* Holman, 58 Minn. 219, 59 N. W. 1006.

New York.— Stryker *v.* Churchill, 39 Misc. 578, 80 N. Y. Suppl. 588; Barker *v.* People, 20 Johns. 457 [*affirmed* in 3 Cow. 686, 15 Am. Dec. 322].

Virginia.— Black *v.* Trower, 79 Va. 123.

Construction of statutes.— Statutes providing qualifications for office are not given a broad construction. State *v.* Blanchard, 6 La. Ann. 515.

24. *California.*— Searcy *v.* Grow, 15 Cal. 117.

Minnesota.— Taylor *v.* Sullivan, 45 Minn. 309, 47 N. W. 802, 22 Am. St. Rep. 729, 11 L. R. A. 272; Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

Mississippi.— Roane *v.* Matthews, 75 Miss. 94, 21 So. 665.

Nebraska.— State *v.* Moores, 52 Nebr. 770, 73 N. W. 299; State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602; State *v.* McMillen, 23 Nebr. 385, 36 N. W. 587.

New Hampshire.— See State *v.* Lake, 16 R. I. 511, 17 Atl. 552.

New Jersey.— See Chandler *v.* Wartman, 6 N. J. L. J. 301.

Pennsylvania.— Com. *v.* Pyle, 18 Pa. St. 519.

Rhode Island.— State *v.* Lake, 16 R. I. 511, 17 Atl. 552; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

England.— Reg. *v.* Eddowes, 1 E. & E. 330, 5 Jur. N. S. 469, 28 L. J. Q. B. 84, 7 Wkly. Rep. 63, 102 E. C. L. 330.

Contra.— *Indiana.*— Shuck *v.* State, 136 Ind. 63, 35 N. E. 993; Brown *v.* Cohen, 122 Ind. 113, 23 N. E. 519; Vogel *v.* State, 107 Ind. 374, 8 N. E. 164; Smith *v.* Moore, 90 Ind. 294.

Iowa.— State *v.* Huegle, (1907) 112 N. W. 234; State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

Kansas.— Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97; Privett *v.* Bickford, 26 Kan. 52, 40 Am. Rep. 301.

Kentucky.— Kirkpatrick *v.* Brownfield, 97 Ky. 558, 31 S. W. 137, 53 Am. St. Rep. 422, 29 L. R. A. 703.

Wisconsin.— State *v.* Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489.

25. Morgan *v.* Vance, 4 Bush (Ky.) 323; De Turk *v.* Com., 129 Pa. St. 151, 18 Atl. 757, 15 Am. St. Rep. 705, 5 L. R. A. 853. *Contra*, State *v.* Collister, 27 Ohio Cir. Ct. 529; Com. *v.* Hatter, 1 Leg. Rec. (Pa.) 86.

26. State *v.* Gleason, 12 Fla. 190.

e. Sex.[27] The question of the eligibility of women to hold office is often determined by the constitution as that is interpreted by the courts. Thus where the constitution confines the holding of office to qualified electors who are elsewhere defined as "male citizens" women may not be made eligible to hold office by statute.[28] But in the absence of a constitutional inhibition women may be made eligible to office by statute even if such statute is retrospective in its operation.[29] Statutes will not, however, be liberally construed so as to authorize the eligibility of women.[30]

d. Citizenship and Residence.[31] Citizenship, although usually expressly required either by the constitution or statutes, would not seem in the absence of such requirement to be an absolutely necessary qualification for office,[32] particularly in the case of officers having jurisdiction outside the territorial limits of the state, such as commissioners to take acknowledgments.[33] But it has sometimes been held that it is a necessary qualification for elective office even in the absence of a constitutional or statutory provision to that effect.[34] Residence within the district over which the jurisdiction of the office extends is often also made a necessary qualification by statute. In the absence of such an express provision, however, there would seem to be no reason for holding that residence within the district is necessary to eligibility, provided the other qualifications mentioned in the statute are present. But a provision of statute requiring residence must be observed.[35] Further it is usually held that the legislative authority may provide the qualification of residence for a certain number of years.[36] Residence is not lost by absence from the district on official business.[37] The question of what is residence is one of law to be determined by the consideration of the intention and overt acts of the person whose acts are being examined.[38]

e. Property.[39] The legislature may in the absence of a constitutional inhibition

27. Particular offices see cross-references *supra*, note 20.

28. Matter of House Bill No. 166, 9 Colo. 628, 21 Pac. 473; Atchison *v.* Lucas, 83 Ky. 451; State *v.* Rust, 4 Ohio Cir. Ct. 329, 2 Ohio Cir. Dec. 577; State *v.* Stevens, 29 Oreg. 464, 44 Pac. 898.

29. Huff *v.* Cook, 44 Iowa 639; State *v.* Gorton, 33 Minn. 345, 23 N. W. 529; State *v.* Hostetter, 137 Mo. 636, 39 S. W. 270, 59 Am. St. Rep. 515, 38 L. R. A. 208; Von Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800. But see *In re* Opinions of Justices, 62 Me. 596; *In re* Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350 (holding women may not constitutionally be made notaries public); *In re* Opinion of Justices, 107 Mass. 604.

Married women see HUSBAND AND WIFE, 21 Cyc. 1306.

30. *Illinois.*— Matter of Bradwell, 55 Ill. 535. But see Schuchardt *v.* People, 99 Ill. 501, 39 Am. Rep. 34, which holds that even in the absence of a statute conferring eligibility a woman is eligible as a master in chancery.

Kentucky.— Atchison *v.* Lucas, 83 Ky. 451.

Massachusetts.— *In re* Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842; Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239.

New Hampshire.— *In re* Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. N. S. 415, which holds that inasmuch as women are by common law incapable of holding offices, a woman may not be appointed a notary public.

Tennessee.— State *v.* Davidson, 92 Tenn. 531, 22 S. W. 203, 20 L. R. A. 311.

See 37 Cent. Dig. tit. "Officers," §§ 24, 25.

Contra.— Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505; *In re* Hall, 50 Conn. 131, 47 Am. Rep. 625; Wright *v.* Noell, 16 Kan. 601; Wilson *v.* Genesee Cir. Judge, 87 Mich. 493, 49 N. W. 869, 24 Am. St. Rep. 173.

31. Particular offices see cross-references *supra*, note 20.

32. State *v.* Abbott, 41 La. Ann. 1096, 6 So. 805; State *v.* Fowler, 41 La. Ann. 380, 6 So. 602; State *v.* Wilson, 29 Ohio St. 347.

33. Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55.

34. State *v.* Van Bleek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622; State *v.* Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; State *v.* Smith, 14 Wis. 497.

35. Patterson *v.* Miller, 2 Metc. (Ky.) 493; State *v.* Newman, 91 Mo. 445, 3 S. W. 849.

36. Sheehan *v.* Scott, 145 Cal. 684, 79 Pac. 350. But see Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, which holds improper a qualification of five years' residence under a constitution prohibiting the grant of privileges to a class of citizens.

37. Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161.

38. See DOMICILE, 14 Cyc. 865.

39. Particular offices see cross-references *supra*, note 20.

provide a property qualification for office.[40] In a number of the states, however, such property qualifications are not permitted by the constitution,[41] but in England they are quite common.[42]

f. Religious or Political Belief. The general provisions in the state constitutions prohibiting "tests" for holding office are usually so construed as to prevent the requirement by the legislature of religious and political qualifications.[43] But a statute which provides for a board or commission of a certain number, no more than a certain proportion of whose members shall belong to the same political party, is not regarded as providing a political qualification.[44] It is doubtful if such a provision would be enforced by courts.[45]

g. Age.[46] It would appear to be the rule of the common law that minors may not hold offices, the performance of whose duties requires the exercise of judgment and discretion; but that they are qualified for ministerial offices.[47] But it is frequently the case that either the constitution or a statute provides that to be qualified for office one must have attained his majority or even a greater age.[48] Finally, either the constitution or a statute sometimes provides that no one may hold specific offices, such as judicial offices, after he has attained a certain age, such as seventy years. Such provisions do not usually affect the lower judicial offices, such as surrogates,[49] and justices of the peace.[50]

h. Civil Service Laws.[51] In both the United States national government and in some of the state governments, and particularly in certain of the city governments, provision has been made for the establishment of what are known as civil

40. Darrow *v.* People, 8 Colo. 417, 8 Pac. 661; Spear *v.* Robinson, 29 Me. 531; State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. See People *v.* Grand Rapids Bd. of Education, 38 Mich. 95, holding the beneficiary of a trust absolute in an undivided interest in fee a freeholder.

41. See the constitutions of the several states. And see State *v.* Scott, 99 Minn. 145, 108 N. W. 828 (holding that Rev. Laws (1905), § 184, requiring payment of fees on filing for nomination at the primary election, is not a violation of Const. art. 1, § 17, providing that no amount of property shall ever be required as a qualification for any office of public trust); Black *v.* Trower, 79 Va. 123.

42. See cases cited *infra*, this note.

Nature of requirement.— The qualification is usually the ownership or occupation of real property of a certain annual ratable value (Easton *v.* Alce, 7 H. & N. 452, 8 Jur. N. S. 156, 31 L. J. Exch. 115, 5 L. T. Rep. N. S. 323, 10 Wkly. Rep. 110) free and clear of all encumbrances, on the qualifying property (Dumelow *v.* Lees, 1 C. & K. 408, 47 E. C. L. 408). In some cases, however, such qualification is in the alternative with a specified amount of personal property. Dumelow *v.* Lees, *supra*; Reg. *v.* Eddowes, 1 E. & E. 330, 5 Jur. N. S. 469, 28 L. J. Q. B. 84, 7 Wkly. Rep. 63, 102 E. C. L. 330.

43. Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Atty.-Gen. *v.* Detroit, 58 Mich. 213, 24 N. W. 887, 55 Am. Rep. 675; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; Patterson *v.* Barlow, 60 Pa. St. 54; Brown *v.* Haywood, 4 Heisk. (Tenn.) 357. And see Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

44. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *In re* Election Sup'rs, 9 Fed. 14, 20 Blatchf. 13.

45. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573. See also People *v.* Hurlbut, 24 Mich. 44, 74, 9 Am. Rep. 103, where Judge Christiancy intimates that all provisions requiring political qualifications are merely directory even if they can be considered as enforceable. But see *In re* Election Sup'rs, 9 Fed. 14, 20 Blatchf. 13.

46. **Particular offices** see cross-references, *supra*, note 20.

47. See INFANTS, 22 Cyc. 515.

48. See United States constitution which provides that no one shall be eligible to be president who is not thirty-five years of age (art. 2, § 1, subd. 5) nor to be senator (art. 1, § 3, subd. 3) who is not thirty years of age, nor to be representative (art. 1, § 2, subd. 2) who is not twenty-five years of age. And see the constitutions and statutes of the several states.

49. People *v.* Carr, 100 N. Y. 236, 3 N. E. 82, 53 Am. Rep. 161.

50. Keniston *v.* State, 63 N. H. 37, 56 Am. Rep. 486; People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556. See also People *v.* Brundage, 78 N. Y. 403; People *v.* Gardner, 45 N. Y. 812, both holding that the limitation as to age applies to the office of county judge.

Eligibility to office of justice of the peace generally see JUSTICES OF THE PEACE, 24 Cyc. 409.

51. **Particular offices** see cross-references, *supra*, note 20.

service commissions. The duties of these bodies are to enforce the civil service laws which have provided qualifications of capacity, either physical or intellectual, for public offices. Where the power of appointment has been vested by the constitution in some officer or body such laws have generally been regarded as unconstitutional so far as they attempt to restrict the discretion of the appointing authority,[52] particularly where they attempt so to restrict such discretion as to make the act of appointment a mere ministerial one, such as the selection of the person standing highest on the list of persons eligible to appointment.[53] But where the power of appointment is not vested in an authority by the constitution there would seem to be no question with regard to the power of the legislature to impose limitations upon the discretion of the appointing officer, or to authorize some other body, such as a state or local civil service commission, to impose such limitations.[54] It would also seem proper under such conditions for the legislature to provide that the appointment should be made as a result of the selection of the one standing highest on a list made up of the successful contestants at competitive examinations.[55] Finally, if provision is made in the constitution for civil service examinations, such provision is held to be in large measure self-executing.[56] Certainly the attempt on the part of the legislature to exempt certain classes in the community and certain positions in the service will be reviewed by the courts and may be declared unconstitutional.[57] Furthermore, in a proper proceeding the regulations of the proper authorities intrusted with the exercise of the constitutional or statutory provisions as to the civil service, although unassailable in collateral proceedings,[58] may in a proper proceeding be reviewed by the

52. People *v.* Angle, 109 N. Y. 564, 17 N. E. 413.

53. People *v.* Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552. See also 13 Op. Atty.-Gen. 516.

Federal laws.— The question has never been raised in the courts in the case of the United States civil service law. The heads of the executive departments of the United States government are regarded as having a power of appointment vested in them by the constitution, and therefore it has not been attempted to oblige them to appoint the one standing highest on an eligible list. See 13 Op. Atty.-Gen. 516. While the courts have not as yet been called upon to determine the constitutionality of the provision that appointments shall be made from a number of nominees, the attorney-general has given a favorable opinion (4 Op. Atty.-Gen. 164), and it would seem that the supreme court if called upon would take the same view. See U. S. *v.* Perkins, 116 U. S. 483, 6 S. Ct. 449, 29 L. ed. 700. In this case it was held that congress may limit the power of removal when it vests the power of appointment in heads of departments.

54. People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Opinion of Justices, 138 Mass. 601; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.

55. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775. See Hale *v.* Worstell, 185 N. Y. 247, 77 N. E. 1177, 113 Am. St. Rep. 895 [*affirming* 48 Misc. 339, 95 N. Y. Suppl. 485], holding that Const. (1894) art. 5, § 9, providing that appointments and promotions in the civil service of the state and the civil divisions thereof shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations, contemplates that all appointments and promotions shall be made according to merit and fitness, to be ascertained by competitive examinations, unless it is in good faith found that it is impracticable so to determine the relative merit and fitness of persons for a particular position, and any statute or rule contrary to the provision is void.

Application for examination.— Properly construed, the clause of the second section of the civil service act of congress of Jan. 16, 1883 (22 U. S. St. at L. 403, c. 27 [U. S. Comp. St. (1901) p. 1217]), providing that every application for examination shall contain, among other things, a statement, under oath, setting forth the *bona fide* residence of the applicant at the time the application is made, as well as how long the applicant has been a resident of such place, requires an applicant to make oath, not only to an inquiry in regard to his or her residence, but also to other inquiries that may be considered relevant and proper by the civil service commission, with the approval of the president. Johnson *v.* U. S., 26 App. Cas. (D. C.) 128.

56. People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399.

57. Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. Rep. 357, 32 L. R. A. 253; *In re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

58. Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809, 153 N. Y. 664, 47 N. E. 273; Matter of Agar, 21 Misc. (N. Y.) 145, 47 N. Y. Suppl. 477. But see People *v.* Tobey, 153 N. Y. 381, 47 N. E.

courts.[59] Such civil service laws, and regulations adopted pursuant thereto, are regarded not merely as limitations upon the appointing power, but also as conferring rights upon those who have passed the required examinations, of which rights they may not be deprived by the action of administrative officers taken in violation of such laws and regulations.[60]

i. Collateral Inquiry Into Eligibility. The same rules are true with regard to the collateral inquiry into the eligibility of an incumbent of an office as are true of the election or appointment. Eligibility may be questioned only in a direct proceeding to which the officer is a party,[61] and both the officer himself and the sureties upon his bond are estopped from raising the question even in a proceeding to which he or they are parties.[62]

j. Loss of Qualifications. The loss of the qualifications necessary to make one eligible for a public office will generally result in the forfeiture of the office.[63] Thus, where an incumbent of a public office who, to be qualified for the office, must reside in the district, moves out of the district with the intention of remaining permanently out of the district, the office which he holds is regarded as vacant.[64] But if the absence from the district is only temporary such absence is not to be regarded as a removal, as where a county officer in a state was elected to congress and went to Washington, but left his family within the county and the affairs of the county office in the hands of a deputy whom he was authorized by law to appoint.[65] Again an office may become vacant by the loss of the age qualification provided for it by statute.[66] Finally the loss of the qualification of good character as evidenced by conviction of a crime will result in the loss of the office.[67]

2. Disqualification — a. In General. The legislature has, in the absence of constitutional inhibition, the same right to provide disqualifications that it has to provide qualifications for office.[68] But the legislature may not add disqualifications, where the constitution has provided them in such a way as to indicate the intention of its makers that the disqualifications provided shall embrace all that are to be permitted.[69] Furthermore disqualifications provided by the legislature

800; People *v.* Hamilton, 98 N. Y. App. Div. 59, 90 N. Y. Suppl. 547.

59. Hale *v.* Worstell, 185 N. Y. 247, 77 N. E. 1177, 113 Am. St. Rep. 895 [*affirming* 48 Misc. 339, 95 N. Y. Suppl. 485] (holding that whether a statute or rule is a valid exercise of the power to determine what employees or class of employees it is not practicable to select from lists after a competitive examination, contemplated by Const. (1894) art. 5, § 9, providing that, when practicable, appointments and promotions in the civil service shall be made according to merit and fitness, ascertained by examinations, is for the courts); People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800; People *v.* Knox, 45 N. Y. App. Div. 518; 61 N. Y. Suppl. 469; People *v.* Palmer, 9 N. Y. App. Div. 58, 41 N. Y. Suppl. 81 [*reversed* on other grounds in 152 N. Y. 217, 46 N. E. 328]; People *v.* Knauber, 27 Misc. (N. Y.) 253, 57 N. Y. Suppl. 782.

60. People *v.* New York City Civil Service Bd., 13 N. Y. App. Div. 309, 43 N. Y. Suppl. 191; People *v.* Cobb, 13 N. Y. App. Div. 56, 43 N. Y. Suppl. 120; People *v.* Knox, 31 Misc. (N. Y.) 440, 65 N. Y. Suppl. 635. See also Chicago *v.* Bullis, 124 Ill. App. 7.

61. Satterlee *v.* San Francisco, 23 Cal. 314; Van Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800; McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231.

62. Jones *v.* Gallatin County, 78 Ky. 491; State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522; Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792; Horn *v.* Whittier, 6 N. H. 88. See *infra*, II, C, 3, d.

63. See the cases cited in the following notes. But see Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777; McPherson *v.* State, 3 W. Va. 564.

64. State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367 (where an officer who enlisted in the United States army for service outside the state and for a period longer than his term of office was held to have vacated his office); State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403; Prather *v.* Hart, 17 Nebr. 598, 24 N. W. 282 (where one who had removed permanently outside the state was held to have vacated his office).

65. Yonkey *v.* State, 27 Ind. 236; Curry *v.* Stewart, 8 Bush (Ky.) 560; McGregor *v.* Allen, 33 La. Ann. 870.

66. See *supra*, II, C, 1, g.

67. Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322. See also *infra*, II, C, 2, f.

68. Gray *v.* Seitz, 162 Ind. 1, 69 N. E. 456; Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; People *v.* Barker, 2 Wheel. Cr. (N. Y.) 19.

69. Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395; People *v.* Kipley, 171 Ill. 44, 49 N. E.

are construed strictly and will not be extended to cases not clearly within their scope.[70]

b. Membership in Body Making Appointment, Creating the Office, or Increasing the Emoluments Thereof. It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.[71] The constitutions of a number of the states have applied the same rule to the offices which have been created or whose emoluments have been increased by bodies of which the persons seeking appointment were members at the time the office was created, or the emoluments increased.[72] Such provisions are, however, narrowly construed so as to uphold the eligibility of the appointee wherever possible.[73]

c. Holding Other Office or Employment. It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question.[74] But at common law two offices whose functions are inconsistent are regarded as incompatible.[75]

229, 41 L. R. A. 775; State *v.* Williams, 20 S. C. 12.

70. Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72; State *v.* Cosgrove, 34 Nebr. 386, 51 N. W. 974; State *v.* Humphries, 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217; Dryden *v.* Swinburne, 20 W. Va. 89.

71. People *v.* Thomas, 33 Barb. (N. Y.) 287; State *v.* Taylor, 12 Ohio St. 130; State *v.* Newark, 8 Ohio S. & C. Pl. Dec. 344, 6 Ohio N. P. 523; State *v.* Hoyt, 2 Oreg. 246; Com. *v.* Douglass, 1 Binn. (Pa.) 77.

72. State *v.* Porter, 1 Ala. 688; Brady *v.* West, 50 Miss. 68; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

73. People *v.* Burns, 53 Cal. 660; State *v.* Coombs, 32 Me. 526; State *v.* George, 22 Oreg. 142, 29 Pac. 356, 29 Am. St. Rep. 586, 16 L. R. A. 737; State *v.* Boyd, 21 Wis. 208.

74. *Arkansas.*— State *v.* Feibleman, 28 Ark. 424.

Georgia.— *In re* Grand Jury, R. M. Charlt. 149.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Kansas.— Abry *v.* Gray, 58 Kan. 148, 48 Pac. 577.

Louisiana.—Dorsey *v.* Vaughan, 5 La. Ann. 155.

Massachusetts.— Com. *v.* Kirby, 2 Cush. 577.

Minnesota.— Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210.

Missouri.— State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; State *v.* Lusk, 48 Mo. 242.

Nebraska.— State *v.* Weston, 4 Nebr. 234.

New Hampshire.—Andover School Dist. No. 6 *v.* Carr, 55 N. H. 452.

New York.— Merzbach *v.* New York, 163 N. Y. 16, 57 N. E. 96; People *v.* Green, 58 N. Y. 205.

Ohio.— State *v.* Wagar, 19 Ohio Cir. Ct. 149, 10 Ohio Cir. Dec. 160.

Pennsylvania.— Matter of Dauphin County Dist.-Atty., 11 Phila. 645.

Texas.— Gaal *v.* Townsend, 77 Tex. 464, 14 S. W. 365.

United States.— U. S. *v.* Saunders, 120 U. S. 126, 7 S. Ct. 467, 30 L. ed. 594; Preston *v.* U. S., 37 Fed. 417; Crosthwaite *v.* U. S., 30 Ct. Cl. 300.

England.— Rex *v.* Jones, 1 B. & Ad. 677, 9 L. J. K. B. O. S. 103, 20 E. C. L. 647.

See 37 Cent. Dig. tit. "Officers," § 37 *et seq.*

Illustrations of compatible offices.— Crier and messenger of the district and circuit courts (Preston *v.* U. S., 37 Fed. 417); justice of the peace and constable (Com. *v.* Kirby, 2 Cush. (Mass.) 577); county supervisor and circuit clerk (State *v.* Feiblema.. 28 Ark. 424); clerk of the district court and court commissioner (Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210); county and circuit clerk (State *v.* Lusk, 48 Mo. 242); member of the assembly and deputy clerk of court of special sessions (People *v.* Green, 58 N. Y. 295); deputy sheriff and school director (State *v.* Bus, 135 Mo. 325, 36 S. W. 639, 33 L. R. A. 616); selectmen and school committee men (Andover School Dist. No. 6 *v.* Carr, 55 N. H. 452); school director and judge of election (McPherson's Case, 2 Leg. Rec. (Pa.) 145; Matter of Dauphin County Dist.-Atty., 11 Phila. (Pa.) 645); district attorney and captain in the service of the United States (Bryan *v.* Cattell, 15 Iowa 538); secretary of state and adjutant-general (State *v.* Weston, 4 Nebr. 234).

75. *Maine.*— Pooler *v.* Reed, 73 Me. 129; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251.

Michigan.— Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

Minnesota.— Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210.

New Hampshire.— Cotton *v.* Phillips, 56 N. H. 220.

New Jersey.— State *v.* Thompson, 20 N. J. L. 689.

Rhode Island.— State *v.* Goff, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921; State *v.* Brown, 5 R. I. 1.

South Carolina.— State *v.* Buttz, 9 S. C. 156.

See 37 Cent. Dig. tit. "Officers," § 37 *et seq.*

The inconsistency which at common law makes offices incompatible does not consist in the physical impossibility to discharge the duties of both offices;[76] but rather in a conflict of interest, as where the incumbent of one office has the power to remove the incumbent of another,[77] or to audit the accounts of another,[78] or to exercise a supervision over another as in the case of a judicial officer and his subordinate ministerial officer.[79] The constitution or a statute often expressly provides that certain offices shall be incompatible. Such a statutory incompatibility is often inferred from the common provisions in the state constitutions intended to secure the distribution of the three powers of government among the three departments of government.[80] The acceptance of an incompatible office by the incumbent of another office is regarded as a resignation or vacation of the first office.[81] This rule is applied even where the second office is inferior to the

Illustrations of incompatible offices.— Paymaster in United States army and clerk of county court (Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401); prudential committee and auditor of a school-district (Cotton *v.* Phillips, 56 N. H. 220); attorney-general and prosecutor of pleas (State *v.* Thompson, 20 N. J. L. 689); chief justice of the supreme court and trustee of the state library (People *v.* Sanderson, 30 Cal. 160); sheriff and justice of the peace (State Bank *v.* Curran, 10 Ark. 142); justice of the peace and sheriff, deputy sheriff, or coroner (Bamford *v.* Melvin, 7 Me. 14).

76. Yonkey *v.* State, 27 Ind. 236; Bryan *v.* Cattell, 15 Iowa 538; State *v.* Lusk, 48 Mo. 242; People *v.* Green, 58 N. Y. 295. But see State *v.* Buttz, 9 S. C. 156, which holds that where an officer, who is not authorized by law to appoint a deputy, such as county solicitor, accepts the position of representative in the United States congress, he accepts an incompatible office because it is physically impossible for him to perform the duties of both offices.

77. Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

78. Cotton *v.* Phillips, 56 N. H. 220; State *v.* Taylor, 12 Ohio St. 130; Rex *v.* Patteson, 4 B. & Ad. 9, 2 L. J. K. B. 33, 1 N. & M. 612, 24 E. C. L. 15.

79. Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; State *v.* Taylor, 12 Ohio St. 130; Rex *v.* Pateman, 2 T. R. 777, 1 Rev. Rep. 621.

80. *Alabama.*— Scott *v.* Strobach, 49 Ala. 477.

Arkansas.— State Bank *v.* Curran, 10 Ark. 142; State *v.* Hutt, 2 Ark. 282.

California.— People *v.* Sanderson, 30 Cal. 160 [*overruled* on the facts by People *v.* Provines, 34 Cal. 520].

Connecticut.— Magil *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375.

Maine.— See State *v.* Coombs, 32 Me. 526.

Michigan.—Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

Montana.— See State *v.* Jackson, 9 Mont. 508, 24 Pac. 213, holding, however, that a person may at the same time be county attorney and notary public.

New York.— Matter of Gilroy, 11 N. Y. App. Div. 65, 42 N. Y. Suppl. 640.

81. *Arkansas.*— State *v.* Hutt, 2 Ark. 282.

California.— People *v.* Leonard, 73 Cal. 230, 14 Pac. 853.

Connecticut.— Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375.

Illinois.— People *v.* Hanifan, 96 Ill. 420; Dickson *v.* People, 17 Ill. 191; Packingham *v.* Harper, 66 Ill. App. 96.

Indiana.— Mehringer *v.* State, 20 Ind. 103; Kerr *v.* Jones, 19 Ind. 351; Dailey *v.* State, 8 Blackf. 329.

Kentucky.— Taylor *v.* Com., 3 J. J. Marsh. 401.

Louisiana.— State *v.* Dellwood, 33 La. Ann. 1229; State *v.* Arata, 32 La. Ann. 193; State *v.* Newhouse, 29 La. Ann. 824. See State *v.* Nockum, 41 La. Ann. 689, 6 So. 729.

Maine.— Pooler *v.* Reed, 73 Me. 129; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251.

Michigan.— Atty.-Gen. *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574; Northway *v.* Sheridan, 111 Mich. 18, 69 N. W. 82.

Missouri.— State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

New Hampshire.— Cotton *v.* Phillips, 56 N. H. 220.

New Jersey.— Oliver *v.* Jersey City, 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412; State *v.* Thompson, 20 N. J. L. 689.

New York.— Davenport *v.* New York, 67 N. Y. 456; People *v.* Saratoga Springs, 76 Hun 146, 27 N. Y. Suppl. 548; People *v.* Carrique, 2 Hill 93.

North Carolina.— State *v.* Thompson, 122 N. C. 493, 29 S. E. 720.

Ohio.— State *v.* Mason, 61 Ohio St. 513, 56 N. E. 468; State *v.* Heddleston, 8 Ohio Dec. (Reprint) 77, 5 Cinc. L. Bul. 502.

Pennsylvania.—*Ex p.* Carey, 3 Leg. Gaz. 78.

Rhode Island.— State *v.* Goff, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

South Carolina.— State *v.* Buttz, 9 S. C. 156.

Tennessee.— Calloway *v.* Sturm, 1 Heisk. 764.

Texas.— Biencourt *v.* Parker, 27 Tex. 558.

Virginia.— Shell *v.* Cousins, 77 Va. 328.

Wisconsin.— State *v.* Jones, 130 Wis. 572, 110 N. W. 431, 8 L. R. A. N. S. 1107.

England.— Rex *v.* Hughes, 5 B. & C. 886, 5 D. & R. 708, 5 L. J. M. C. O. S. 20, 29

first.[82] But the acceptance of a nomination is not regarded as a resignation,[83] even where the person so nominated is actually elected.[84] But incompatible offices must be distinguished from forbidden offices, that is, offices for which the incumbents of certain offices are disqualified by statute. In such case the incumbent of the first office cannot accept the second office and the attempted acceptance of the second office will not be treated as a resignation of the first.[85] It is often provided by the constitution or a statute that the same person shall not hold two lucrative offices.[86] In such case if the two offices are in the same state government the second office is treated as an incompatible office.[87] But if the first office is in the United States government and the second office in a state government, the second office is treated as a forbidden office.[88] The effect of these provisions is largely dependent upon the way in which they are framed. It may, however, be said that the courts construe them in such a way as, where possible, not to deprive parties before them of the privilege of holding offices or positions in the service of the government.[89] Thus they commonly hold that provisions prohibiting the

Rev. Rep. 458, 11 E. C. L. 724; Milward *v.* Thatcher, 2 T. R. 81, 1 Rev. Rep. 432.

See 37 Cent. Dig. tit. "Officers," § 79.

Election between offices.— If one holds two offices made incompatible after the beginning of his term, he may elect which he will hold. U. S. *v.* Harsha, 172 U. S. 567, 19 S. Ct. 294, 43 L. ed. 556.

82. People *v.* Saratoga Springs, 76 Hun (N. Y.) 146, 27 N. Y. Suppl. 548. See also Milward *v.* Thatcher, 2 T. R. 81, 1 Rev. Rep. 432.

83. Smith *v.* Moore, 90 Ind. 294; Bird *v.* Johnson, 59 N. J. L. 59, 34 Atl. 929. But *compare* State *v.* Clark, 1 Head (Tenn.) 369.

84. Smith *v.* Moore, 90 Ind. 294; Bird *v.* Johnson, 59 N. J. L. 59, 34 Atl. 929. See also State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

85. Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; State *v.* De Gress, 53 Tex. 387; Rex *v.* Patteson, 4 B. & Ad. 9, 2 L. J. K. B. 33, 1 N. & M. 612, 24 E. C. L. 15.

86. See the constitutions and statutes of the several states. And see Crawford *v.* Dunbar, 52 Cal. 36; People *v.* Turner, 20 Cal. 142; People *v.* Whitman, 10 Cal. 38; Fyfe *v.* Kent County Clerk, 149 Mich. 349, 112 N. W. 725; State *v.* Slagle, 115 Tenn. 336, 89 S. W. 326; Biencourt *v.* Parker, 27 Tex. 558; Figures *v.* State, (Tex. Civ. App. 1907) 99 S. W. 412. See also cases cited in following notes.

Constitutionality of statutes.— When contained in a statute such a provision is usually regarded as constitutional. People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508. But see State *v.* Williams, 20 S. C. 12.

Retired army officers.— The term "lucrative office," in Tex. Const. arts. 6, 16, prohibiting persons who hold lucrative offices under authority of the United States from being candidates for any elective office, includes officers of the United States on the retired list, as they constitute a part of the army of the United States, retain the actual rank held by them at the date of their retirement, receive seventy-five per cent of the pay of such rank, are subject to trials by court-martial, and may be assigned to duty at the Soldiers' Home. State *v.* De Gress, 53 Tex. 387. But see Reed *v.* Schon, 2 Cal. App. 55, 83 Pac. 77; People *v.* Duane, 121 N. Y. 367, 24 N. E. 845, both holding that a retired United States army officer does not hold a "lucrative office" within the meaning of constitutional provisions.

87. Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278; Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613; Kerr *v.* Jones, 19 Ind. 351; Creighton *v.* Riper, 14 Ind. 182; Daily *v.* State, 8 Blackf. (Ind.) 329; State *v.* Thompson, 122 N. C. 493, 29 S. E. 720; State *v.* Mason, 61 Ohio St. 513, 56 N. E. 468.

88. *California.*— People *v.* Leonard, 73 Cal. 230, 14 Pac. 853; Crawford *v.* Dunbar, 52 Cal. 36; Searcy *v.* Grow, 15 Cal. 117.

Illinois.— Packingham *v.* Harper, 66 Ill. App. 96.

Indiana.— Foltz *v.* Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197.

Kentucky.— Spencer County Ct. *v.* Harcourt, 4 B. Mon. 499; Rodman *v.* Harcourt, 4 B. Mon. 224.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 584, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; State *v.* Clarke, 21 Nev. 333, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L. R. A. 313; State *v.* Clarke, 3 Nev. 566.

New Jersey.— Oliver *v.* Jersey City, 63 N. J. L. 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, 634.

Pennsylvania.— De Turk *v.* Com., 129 Pa. St. 151, 18 Atl. 757, 15 Am. St. Rep. 705, 5 L. R. A. 853.

Texas.— State *v.* De Gress, 53 Tex. 387.

Vermont.— McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231. But see State *v.* Fisher, 28 Vt. 714.

Virginia.— Bunting *v.* Willis, 27 Gratt. 144, 21 Am. Rep. 338.

Washington.— Hill *v.* Territory, 2 Wash. Terr. 147, 7 Pac. 63.

See 37 Cent. Dig. tit. "Officers," § 37 *et seq.*

But *compare* Calloway *v.* Sturm, 1 Heisk. (Tenn.) 764.

89. People *v.* Green, 58 N. Y. 295 [*affirming* 5 Daly 254, 46 How. Pr. 169]. See also

holding of two lucrative offices do not affect positions which are not strictly speaking offices.[90] Thus again it is held that such provisions do not prevent the assignment to one officer of the duties of another where there is no inconsistency between the two classes of duties.[91] But under such a provision the incumbent of one office may not be made *ex officio* the incumbent of a second office.[92] Furthermore a provision that no one shall be "appointed" to two offices will not prevent his election thereto.[93] The question has often arisen as to whether a provision prohibiting one holding a lucrative office in the United States or a state government from holding another lucrative office "under the state" applies to municipal offices, or other offices popularly considered to be local offices. There are a number of cases which hold that municipal offices are not affected by such a prohibition.[94] But if an officer who is mainly municipal has duties to perform under state laws he is regarded as holding an office "under the state,"[95] and frequently, because of the application of this rule, offices commonly considered to be local, such as town offices, are held to be within the prohibition.[96] A statute prescribing that no candidate for office shall be a superintendent of registration does not render the candidate ineligible to office by reason of the fact that he is a registration officer.[97] A constitutional provision by which certain officers are debarred from holding other offices during their terms is not violated by a statute conferring on such officers new powers and duties.[98] An officer's resignation of a second office after, by its acceptance, he has vacated the first, cannot restore him or otherwise affect the first.[99]

d. Continuous Office Holding. A constitutional provision limiting the time for which office may be held by one person continuously has been held to apply to an officer elected before the adoption of the constitution.[1] But a statute providing that sheriffs shall hold no other office and shall be ineligible for two years next

People *v.* Turner, 20 Cal. 142; People *v.* Whitman, 10 Cal. 38.

90. *Georgia.*—McLain *v.* State, 71 Ga. 279.
Indiana.— Branham *v.* Lange, 16 Ind. 497.
Mississippi.— Lindsey *v.* Atty.-Gen., 33 Miss. 508.
New York.— Goettman *v.* New York, 6 Hun 132; Olmstead *v.* New York, 42 N. Y. Super. Ct. 481; Munally *v.* New York Bd. of Education, 46 Misc. 477, 92 N. Y. Suppl. 286.
Ohio.— State *v.* Mason, 61 Ohio St. 62, 55 N. E. 167.
Pennsylvania.— Com. *v.* Shindle, 19 Pa. Co. Ct. 258.

91. Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7; State *v.* Somnier, 33 La. Ann. 237; Powell *v.* Wilson, 16 Tex. 59.

92. Bouanchaud *v.* D'Hebert, 21 La. Ann. 138; Willis *v.* Owen, 43 Tex. 41. *Contra*, Bridges *v.* Shallcross, 6 W. Va. 562.

93. State *v.* Somers, 96 N. C. 467, 2 S. E. 161; State *v.* McCollister, 11 Ohio 46; State *v.* Southwick, 13 Wis. 365. See also State *v.* Clendenin, 24 Ark. 78; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

94. *Arkansas.*— Peterson *v.* Culpepper, 72 Ark. 230, 79 S. W. 783.
California.— People *v.* Provines, 34 Cal. 520.
Delaware.— State *v.* Wilmington, 3 Harr. 294.
Florida.— Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7.
Indiana.— State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239; Waldo *v.* Wallace, 12 Ind. 569.
Kansas.— Abry *v.* Gray, 58 Kan. 148, 48 Pac. 577.
Louisiana.— State *v.* Taylor, 44 La. Ann. 783, 11 So. 132; Dorsey *v.* Vaughan, 5 La. Ann. 155.
Missouri.— See State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, which holds a deputy sheriff to be a "county" and not a "state" officer.
Contra.— State *v.* Kelly, 80 Miss. 803, 31 So. 901.

95. Howard *v.* Shoemaker, 35 Ind. 111.

96. *Indiana.*— Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613; Foltz *v.* Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197.
Kentucky.— Taylor *v.* Com., 3 J. J. Marsh. 401.
Michigan.— Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.
Mississippi.— Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.
Texas.— Biencourt *v.* Parker, 27 Tex. 558.
Contra.— State *v.* Townsend, 72 Ark. 180, 79 S. W. 782; State *v.* Montgomery, 25 La. Ann. 138; Voorhies *v.* Fournet, 15 La. Ann. 597.

97. State *v.* Cosgrove, 34 Nebr. 386, 51 N. W. 974.

98. Bridges *v.* Shallcross, 6 W. Va. 562.

99. Shell *v.* Cousins, 77 Va. 328. See also *infra*, II, G, 1.

1. Carson *v.* McPhetridge, 15 Ind. 327, holding, however, that such a period did not embrace time served in the office under a *pro tem* appointment or a simple holding over to fill a vacancy.

succeeding the termination of their office does not render them ineligible to offices other than sheriff for such period after their term.[2]

e. Default in Payment of Public Funds. Statutes frequently disqualify for public office those who, having in their possession public funds, are in default.[3] Such statutes disqualify only those who have been determined by legal authority to be in default,[4] or admit that they are in such default,[5] and appear generally to be liberally construed in favor of eligibility to office.[6] Thus "default" is said to mean a wilful and corrupt omission to pay over funds.[7]

f. Conviction of Crime, Participation in Rebellion, Etc. The constitution or a statute frequently disqualifies for office one who has been convicted of a felony or a crime generally.[8] Where the constitution contains such a provision it applies to crimes committed under the jurisdiction of the state providing the disqualification and not to crimes against another government.[9] It would seem to be the rule that the pardon of the executive will not remove disqualification resulting from conviction of crime.[10] A disqualification akin to that for conviction of crime is that provided by the fourteenth amendment of the United States constitution which disqualifies for all offices in the federal or state governments those persons who may have engaged in insurrection or rebellion against the United States. Such disqualification is held to disqualify only those whose action was voluntary.[11] Holding a civil office in one of the states in rebellion is not regarded as engaging in rebellion.[12] Such disqualification will be enforced by the state courts.[13]

3. Acceptance of Office and Qualifications[14] **— a. In General.** It is fre-

2. State *v.* Southwick, 13 Wis. 365.

3. See the statutes of the several states. And see Taylor *v.* Governor, 1 Ark. 21; State *v.* Reid, 118 La. 106, 42 So. 662.

4. Cawley *v.* People, 95 Ill. 249.

5. State *v.* Echeveria, 33 La. Ann. 709.

6. State *v.* Reid, 45 La. Ann. 162, 12 So. 189; State *v.* Dunn, 11 La. Ann. 549. *Compare* Hoskins *v.* Brantley, 57 Miss. 814, which holds that such statutes apply as well to private citizens as to public officers.

7. State *v.* Sheriff, 45 La. Ann. 162, 12 So. 189; State *v.* Moores, 52 Nebr. 770, 73 N. W. 299.

8. See the constitutions and statutes of the several states. And see Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019; State *v.* Dustin, 5 Oreg. 375, 20 Am. Rep. 746; Leonard *v.* Com., 112 Pa. St. 607, 4 Atl. 220; State *v.* Du Bose, 88 Tenn. 753, 13 S. W. 1088. *Compare* Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

Bribery.— It is often provided that bribery will disqualify. In Carroll *v.* Green, 148 Ind. 362, 47 N. E. 223, it was held that proof in an election contest that the candidate had offered a bribe to secure a vote in favor of his election disqualified such candidate. See also Leonard *v.* Com., 112 Pa. St. 607, 4 Atl. 220 (where it was held that a candidate who was guilty of bribery in securing his nomination was guilty of a crime against the election laws); Rex *v.* Watson, 11 Ont. L. Rep. 336. But see Com. *v.* Shaver, 3 Watts & S. (Pa.) 338.

Where charge dismissed.— Where a constable was arrested for a felony, but the charge was subsequently dismissed without any hearing, neither the arrest nor his incarceration operated as a disqualification so as to operate to create a vacancy in his office. Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248.

9. Hildreth *v.* Heath, 1 Ill. App. 82.

10. Com. *v.* Fugate, 2 Leigh (Va.) 724. But see Hildreth *v.* Heath, 1 Ill. App. 82; Morgan *v.* Vance, 4 Bush (Ky.) 323.

11. Privett *v.* Stevens, 25 Kan. 275; Hudspeth *v.* Garrigues, 21 La. Ann. 684.

Criminal responsibility.—By the act of congress of May 31, 1870, section 15, it was provided that a person who should accept or hold any office under the United States or any state, to which he was ineligible under the third section of the fourteenth amendment of the United States constitution, should be deemed guilty of a misdemeanor. See U. S. *v.* Powell, 27 Fed. Cas. No. 16,079, 65 N. C. 709, holding that one who as constable of a county in North Carolina took an oath to support the constitution of the United States, and afterward engaged in the rebellion, was disqualified by the fourteenth amendment, unless relieved in the manner provided, to hold any office, state or national, and was therefore indictable for accepting the office of sheriff.

12. U. S. *v.* Powell, 27 Fed. Cas. 16,079, 65 N. C. 709. But see Worthy *v.* Barrett, 63 N. C. 199, which holds that one who held a civil office, under one of the states in rebellion, is disqualified.

13. State *v.* Watkins, 21 La. Ann. 631. See also State *v.* Lewis, 22 La. Ann. 33.

Oath of loyalty.— Under Mo. Const. art. 2, § 8, a candidate to be eligible must have taken and filed an oath of loyalty. State *v.* McAdoo, 36 Mo. 452.

14. **Duty to accept office** see Elections, 15 Cyc. 392.

quently provided by statute that persons elected or appointed to office shall qualify within a prescribed time.[15] Such statutory provisions are usually liberally construed in favor of the intending incumbent. Thus they are not regarded as binding upon candidates for office who are ignorant of their appointment or election.[16] Thus again the time within which qualification for office may be made does not begin to run, in the case of a contested election, until the termination of the contest.[17] Finally the law presumes that one who is in actual occupation of an office has duly qualified.[18]

b. Oath.[19] One of the usual necessary formalities for the qualification of an officer is the taking of the official oath. One who is appointed or elected to office and does not take the required official oath does not possess the legal title to the office.[20] The fact that the legislature imposes new duties upon an officer will not require him to take a new oath of office.[21] Official records will be so construed as to uphold the validity of the oath which may have been taken.[22]

c. Bond[23]—(i) *DEFINITION.* An official bond is an obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office,[24] or, as the term is used in statutes, the bond of a public officer.[25]

15. See the statutes of the several states. And see Harwood *v.* Marshall, 9 Md. 83; Cassin *v.* Zavalla County, 70 Tex. 419, 8 S. W. 97.

Payment of fee.— Kirby Dig. §§ 647, 648, requiring county assessors to apply for and pay a fee for their commissions within sixty days after their election, was not unconstitutional, the legislature being entitled to fix a fee to pay for the commissions. Boyett *v.* Cowling, 78 Ark. 494, 94 S. W. 682.

Where there is no express statutory provision, a newly elected officer may qualify and enter upon the duties of his office as soon as he receives his certificate of election. McGee *v.* Gill, 79 Ky. 106; Cordiell *v.* Frizell, 1 Nev. 130.

16. *California.*— People *v.* Perkins, 85 Cal. 509, 26 Pac. 245.

New Hampshire.— Glidden *v.* Towle, 31 N. H. 147.

New York.— People *v.* McManus, 34 Barb. 620.

Ohio.— State *v.* Douglass, 1 Ohio Dec. (Reprint) 102, 2 West. L. J. 248.

Washington.— Bean *v.* Territory, 3 Wash. Terr. 129, 13 Pac. 711.

Wisconsin.— State *v.* Southwick, 13 Wis. 365.

17. People *v.* Potter, 63 Cal. 127; Farwell *v.* Adams, 112 Ill. 57, 1 N. E. 272; State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622; Pearson *v.* Wilson, 57 Miss. 848. *Contra,* State *v.* Tucker, 54 Ala. 205.

18. People *v.* Clingan, 5 Cal. 389; St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838; Panton Turnpike Co. *v.* Bishop, 11 Vt. 198.

19. In case of particular officers see special titles relating thereto, and cross-references at the head of the article.

20. *Louisiana.*— State *v.* McClendon, 118 La. 792, 43 So. 417 [*followed* in State *v.* Aikens, 118 La. 805, 43 So. 421; State *v.* Plunkett, 118 La. 804, 43 So. 421; State *v.* Favrot, 118 La. 804, 43 So. 421].

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Minnesota.— State *v.* Schram, 82 Minn. 420, 85 N. W. 155.

New Hampshire.— Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 50. See Ainsworth *v.* Dean, 21 N. H. 400.

United States.— Otterbourg *v.* U. S., 5 Ct. Cl. 430.

See 37 Cent. Dig. tit. "Officers," § 53.

Compare Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213, holding a turnpike commissioner not an officer within a constitutional provision requiring an oath. But see Taylor *v.* Nichols, 29 Vt. 104. See *contra,* Morgan *v.* Vance, 4 Bush (Ky.) 323, holding that the neglect to take the oath required by law that the candidate had not fought a duel did not *ipso facto* vacate the office.

21. People *v.* Metropolitan Police Dist., 19 N. Y. 188.

22. Scammon *v.* Scammon, 28 N. H. 419.

Absence of official seal.— Where the notary who administered the official oath to an officer failed to authenticate the jurat with his official seal, the officer may show by oral evidence that the oath was in fact taken. State *v.* Van Patten, 26 Nev. 273, 66 Pac. 822.

23. Of particular officers see special titles relating thereto, and cross-references at the head of the article.

24. Anderson L. Dict.

25. Bissell *v.* Probate Judge, 58 Mich. 237, 24 N. W. 886. See Wild Cat Branch *v.* Ball, 45 Ind. 213. But *compare* Faurote *v.* State, 110 Ind. 463, 466, 11 N. E. 472, where a bond required of any bidder for a contract to construct a gravel road for a county was held to fall "under the description of an official bond," because it was "taken in pursuance of a public statute."

Does not include executor's bond.— Bissell *v.* Probate Judge, 58 Mich. 237, 24 N. W. 886.

Several bonds of the same officer may be official.— Where an officer is required by law to give several bonds for the performance of his duties, no one of them is "the" official bond to the exclusion of the others. Each is an official bond. Anderson *v.* Thompson,

(II) *Necessity.*[26] Generally the filing of the official bond is like the taking of the official oath regarded as a necessary prerequisite to the full legal title to the office.[27] In the absence of a contrary statutory provision a person holding two separate offices must give two separate official bonds.[28]

(III) *Form and Sufficiency.*[29] A bond will not as a general rule be invalidated by technical objections.[30] The sureties must be such as are required by the statute under which the bond is given.[31]

(IV) *Approval and Record.* Generally before an official bond may be regarded as legally filed it must have been approved by the competent authority. Because of their desire to uphold official bonds courts hold that no express delivery, acceptance, or approval of the bond need be proved, but that if the bond is found in the possession of the proper authorities and the officer enters upon the performance of his duties, the delivery, acceptance, or approval will be regarded as *prima facie* proven.[32] Where an officer has done all that he can to comply with the law with respect to the giving of a bond, he cannot be deprived of his rights by the unlawful act or wilful refusal upon the part of another officer to perform a duty imposed upon him with regard to such bond.[33] The approval of a bond may be enforced by mandamus in case the duty is ministerial, but the discretion of an officer as to approval cannot be so controlled.[34] It is important to apply for a mandamus, for if no application is made the matter may not be brought up in a collateral proceeding.[35] An authority is justified in refusing to approve an official bond if the sureties are absent so much from the state as to leave their domicile in doubt,[36] or when questioned refuse to answer with regard to their pecuniary condition.[37] Under some statutes the decision of the officer empowered to pass upon the sufficiency of sureties is final.[38] A declaration in an action for damages brought against officers for their failure to approve an official

10 Bush (Ky.) 132; Com. *v.* Adams, 3 Bush (Ky.) 41.

26. As qualification to particular office see cross-references *supra*, II, C, note 20.

27. Rounds *v.* Bangor, 46 Me. 541, 74 Am. Dec. 469; Rounds *v.* Mansfield, 38 Me. 586; Andrews *v.* State, 69 Miss. 740, 13 So. 853; *Ex p.* Craig, 130 Mo. 590, 32 S. W. 1121, which held that the refusal of an authority to approve a bond was no excuse for the one whose bond was not approved to refuse to give up the office to the lawful incumbent. But see Houston *v.* Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Houston *v.* Clark, (Tex. Civ. App. 1904) 80 S. W. 1198 (holding that a bond not conforming in all respects to the statute, but approved, was sufficient to give legal title to the office); Glavey *v.* U. S., 182 U. S. 595, 21 S. Ct. 891, 45 L. ed. 1247 (holding that under the statutes of the United States the filing of a bond is not a necessary prerequisite to the legal title).

Effect of failure to file bond within the stautory time see *infra*, II, C, 3, d.

28. People *v.* Ross, 38 Cal. 76.

29. In case of particular offices see cross-references *supra*, II, C, note 20.

30. See People *v.* Smyth, 28 Cal. 21 (so holding when the affidavit of the sureties stated that they were worth the amount for which they became sureties, over and above all their "just" debts and liabilities, instead of over and above all their debts and liabilities); State *v.* Minton, 49 Iowa 591 (holding that the acknowledgment before the township clerk of the bond of a public officer, subsequently approved by the proper officers, was not such an informality as to entitle his predecessor to retain the office or perform its duties).

Objections affecting liabilities upon bonds see *infra*, V, A, 2.

31. See the statutes of the several states. And see the cases cited in the following notes.

Residence.— Under some statutes it is not necessary that the sureties reside in the same county or parish in which the officer is to exercise his duties. State *v.* Cahen, 28 La. Ann. 645.

32. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177 [*affirming* 97 Ill. App. 283]; Portland *v.* Besser, 10 Oreg. 242; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

33. State *v.* Dahl, 65 Wis. 510, 27 N. W. 343.

34. See Mandamus, 26 Cyc. 252.

35. *Ex p.* Craig, 130 Mo. 590, 32 S. W. 1121. But see People *v.* Scannell, 7 Cal. 432, which holds that the refusal of the proper authority to approve a new bond of a person already in office may be attacked in a collateral proceeding, as for example one to forfeit the office.

36. *Ex p.* Buckley, 53 Ala. 42, which also holds that determinations that sureties are insufficient may be reviewed on certiorari.

37. Thomason *v.* Justices, 3 Humphr. (Tenn.) 233, which seems to imply that mandamus will lie to force approval of an official bond.

38. See State *v.* Le Bourgeois, 45 La. Ann. 249, 12 So. 360.

bond must distinctly allege the facts which make the bond good and sufficient.[39] Where no separate book is kept for the recording of official bonds it has been held sufficient that they be recorded in the book of mortgages.[40]

(v) *New or Additional Bonds.* Where the bond given is insufficient or defective, provision is made, under some statutes, for the requiring of an additional or new bond.[41] The legislature has power to change the law with regard to official bonds and to exact new and additional bonds variant in condition, penalty, obligation, and surety, from those executed under the existing law under which the officer was inducted into and held office.[42] A statute providing that, where certain of the sureties of the bond have removed or become insolvent, or some of the sureties petition for a release, the place of such insufficient or released sureties may be supplied by new sureties does not authorize the taking of a new surety merely because one of the sureties has died.[43]

d. Effect of Failure to Qualify. In many cases the statute provides that one who does not take the oath within a prescribed time vacates or forfeits the office.[44] A similar provision is often made with regard to the official bond.[45] The courts have taken different views with regard to the effect of such provisions. Many of the decisions may be reconciled if we clearly distinguish the classes of cases which may arise. In the first place we have the cases in which an officer has failed to take the oath or file the bond within the specified time but does so after the time. Under these conditions the courts usually decide that there is a vacancy even where there is no judicial determination to that effect, and if the authority having the power to fill a vacancy has made an appointment, they regard such appointee as the incumbent of the office.[46] There are a number of cases also which hold

39. Kilgore *v.* Ferguson, 77 Ill. 213, holding a declaration defective which failed to aver that the bond was such a bond as the statute required, or that it was executed and filed in the time required after the service of notice on plaintiff.

40. Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792.

41. See *Ex p.* Plowman, 53 Ala. 440 (holding that where the circuit judge, acting upon the recommendation of a grand jury that the bond of a county official was for an insufficient penalty, required him to give another bond, the bond so given should show by its recitals that it was a new security for the penalty of the former bond); *Ex p.* Buckley, 53 Ala. 42.

42. *Ex p.* Buckley, 53 Ala. 42.

43. Faust *v.* Murphy, 71 Mo. 120, 13 So. 862.

44. See the statutes of the several states.

45. See the statutes of the several states. And see State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

Validity of statute.—A constitutional provision that officers shall be removed for wilful neglect of duty or misdemeanor only upon conviction does not prevent the legislature from providing that the failure to execute a bond shall work a forfeiture of the office. Hyde *v.* State, 52 Miss. 665. See also Schuff *v.* Pflanz, 99 Ky. 97, 35 S. W. 132, 18 Ky. L. Rep. 25.

46. *Alabama.*— State *v.* Tucker, 54 Ala. 205.

Arkansas.— Falconer *v.* Shores, 37 Ark. 386.

California.— People *v.* Taylor, 57 Cal. 620.

Florida.— *In re* Opinion of Justices, 14 Fla. 277.

Indiana.— State *v.* Johnson, 100 Ind. 489.

Kansas.— State *v.* Matheny, 7 Kan. 327. But a bond given within the proper time and approved by the proper officer, who at the time he approved the bond informed the officer that he must procure an additional bond, is good as a bond within the statute. Beeler *v.* Fenn, 58 Kan. 818, 51 Pac. 284.

Louisiana.— State *v.* Beard, 34 La. Ann. 273.

Nebraska.— State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124; State *v.* Cosgrove, 34 Nebr. 386, 51 N. W. 974.

See 37 Cent. Dig. tit. "Officers," § 77.

Contra.— *Missouri.*— State *v.* Churchill, 41 Mo. 41, which holds that an authority which has approved a bond presented a few days after the proper time may not rescind its action and declare the office vacant.

New York.— Cronin *v.* Stoddard, 97 N. Y. 271; People *v.* Watts, 73 Hun 404, 26 N. Y. Suppl. 280. In these cases it is held that under these conditions there must be a judicial determination that there is a vacancy. See also Cronin *v.* Gundy, 16 Hun 520.

North Carolina.— Worley *v.* Smith, 81 N. C. 304.

Ohio.— State *v.* Tool, 4 Ohio St. 553. And see State *v.* Nash, 65 Ohio St. 549, 63 N. E. 83.

Washington.— State *v.* Ruff, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140.

Compare Pickering *v.* Day, 2 Del. Ch. 333; People *v.* Benfield, 80 Mich. 265, 45 N. W. 135; Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655.

that statutes providing that offices shall be vacant if the bond is not filed within a certain time are applicable only where the failure to file such bond is due to the negligence of the officer.[47] Finally, it is universally held, in order to uphold the validity of official action, that the rule with regard to *de facto* officers will be applied in case an official incumbent discharges official duties before taking the official oath or filing the bond,[48] and that the sureties on his official bond are not discharged as the result of any irregularity in his qualification.[49] Indeed a liberal rule of construction is usually applied in these cases in order to uphold the validity of the title to office.[50]

D. De Facto Officers[51] — **1. In General.** One of the rules of the English common law was to the effect that the acts of one who, although not the holder of a legal office, was actually in possession of it under some color of title or under such conditions as indicated the acquiescence of the public in his action, could not be impeached in any suit to which such person was not a party. Such a person was called an officer *de facto*.[52] This principle has been incorporated into the common law of the United States.[53]

47. *Georgia.*— Ross *v.* Williamson, 44 Ga. 501.

Indiana.— State *v.* Hadley, 27 Ind. 496. See also Albaugh *v.* State, 145 Ind. 356, 44 N. E. 355, where it was held that, if the failure of the officer to file his bond was due to his own and others' honest mistake as to the time his office began, he did not lose title.

Missouri.— State *v.* Texas County Ct., 44 Mo. 230, where mandamus was issued to force a board to approve a bond which they had arbitrarily refused to approve, and where they had declared the office vacant and appointed one to fill the vacancy.

Nebraska.— Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264; State *v.* Frantz, 55 Nebr. 167, 75 N. W. 546.

Pennsylvania.— See *In re* Nether Providence Tp., 215 Pa. St. 119, 64 Atl. 443.

Wisconsin.— State *v.* Dahl, 65 Wis. 510, 27 N. W. 343.

See 37 Cent. Dig. tit. "Officers," § 77.

But see Andrews *v.* State, 69 Miss. 740, 13 So. 853.

48. See *infra*, II, D, 4.

49. *Alabama.*— Sprowl *v.* Lawrence, 33 Ala. 674.

Illinois.— Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182.

Indiana.— Lucas *v.* Shepherd, 16 Ind. 368.

New Jersey.— Rosell *v.* Neptune City Bd. of Education, 68 N. J. L. 498, 53 Atl. 398 [*affirmed* in 70 N. J. L. 336, 57 Atl. 1132].

Ohio.— State *v.* Findley, 10 Ohio 51.

South Carolina.— State *v.* Toomer, 7 Rich. 216.

See *infra*, V, A.

50. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869 (holding that a claimant for office need not qualify in order to bring a quo warranto); People *v.* Benfield, 80 Mich. 265, 45 N. W. 135 (holding that the fact that the sureties on a bond have not justified will not vacate the office).

51. Particular de facto officers see special titles relating thereto, and cross-references at the head of the article.

52. Rex *v.* Bedford Level, 6 East 359, 2 Smith K. B. 535; Parker *v.* Kett, 1 Ld. Raym. 658.

53. *Alaska.*— Monahan *v.* Lynch, 2 Alaska 132.

Arizona.— Jeffords *v.* Hine, 2 Ariz. 162, 11 Pac. 351.

Arkansas.— Murphy *v.* Shepard, 52 Ark. 356, 12 S. W. 707.

California.— Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554, 34 Pac. 239; People *v.* Roberts, 6 Cal. 214.

Colorado.—Pueblo County *v.* Gould, 6 Colo. App. 44, 39 Pac. 895.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; State *v.* Brennan, 25 Conn. 278; Smith *v.* State, 19 Conn. 493; Douglass *v.* Wickwire, 19 Conn. 489; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

Delaware.—Lee *v.* Wilmington, 1 Marv. 65, 40 Atl. 663.

Florida.— Gregory *v.* Woodbery, 53 Fla. 566, 43 So. 504; Kissimmee City *v.* Cannon, 26 Fla. 3, 7 So. 523; State *v.* Gleason, 12 Fla. 190.

Georgia.— Argo *v.* Flake, 102 Ga. 531, 29 S. E. 268; Brown *v.* Flake, 102 Ga. 528, 29 S. E. 267.

Illinois.— People *v.* Nelson, 133 Ill. 565, 27 N. E. 217; Samuels *v.* Drainage Com'rs, 125 Ill. 536, 17 N. E. 829; Leach *v.* People, 122 Ill. 420, 12 N. E. 726; Golder *v.* Bressler, 105 Ill. 419; School Directors Dist. No. 7 *v.* Tingley, 73 Ill. App. 471; Mapes *v.* People, 69 Ill. 523.

Indiana.— State *v.* Crowe, 150 Ind. 455, 50 N. E. 471; Case *v.* State, 69 Ind. 46; Gumberts *v.* Adams Express Co., 28 Ind. 181.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; State *v.* Powell, 101 Iowa 382, 70 N. W. 592; Stickney *v.* Stickney, 77 Iowa 699, 42 N. W. 518.

Kentucky.— Elliott *v.* Burke, 113 Ky. 479, 68 S. W. 445, 24 Ky. L. Rep. 292; Chambers *v.* Adair, 110 Ky. 942, 62 S. W. 1128, 23 Ky. L. Rep. 373; Rice *v.* Com., 3 Bush 14; Stokes *v.* Kirkpatrick, 1 Metc. 138.

Louisiana.— Watson *v.* McGrath, 111 La.

2. De Facto Offices. Considerable difficulty has, however, arisen in the United States in the application of this rule by reason of the fact that an unconstitutional statute is treated by the courts as void *ab initio*. An office founded upon such

1097, 36 So. 204; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498; Lambeth *v.* De Bellevue, 24 La. Ann. 394.

Maine.— Bliss *v.* Day, 68 Me. 201; Hooper *v.* Goodwin, 48 Me. 79.

Massachusetts.— Atty.-Gen. *v.* Crocker, 138 Mass. 214; Fitchburg R. Co. *v.* Grand Junction R., etc., Co., 1 Allen 552; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62.

Michigan.— Tower *v.* Welker, 93 Mich. 332, 53 N. W. 527; Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408; Jhons *v.* People, 25 Mich. 499; Ballou *v.* O'Brien, 20 Mich. 304; Carleton *v.* People, 10 Mich. 250.

Minnesota.— Fulton *v.* Andrea, 70 Minn. 445, 73 N. W. 256; Carli *v.* Rhener, 27 Minn. 292, 7 N. W. 139; McCormick *v.* Fitch, 14 Minn. 252.

Mississippi.— Bell *v.* State, (1905) 38 So. 795; Vicksburg *v.* Groome, (1898) 24 So. 306; Cooper *v.* Moore, 44 Miss. 386; Rhodes *v.* McDonald, 24 Miss. 418; Moore *v.* Caldwell, Freem. 222.

Missouri.— State *v.* Douglass, 50 Mo. 593; Harbaugh *v.* Winsor, 38 Mo. 327; Powers *v.* Braley, 41 Mo. App. 556. See also State *v.* Cartwright, 122 Mo. App. 257, 99 S. W. 48.

Montana.— Carland *v.* Custer, 5 Mont. 579, 6 Pac. 24.

Nebraska.— Haskell *v.* Dutton, 65 Nebr. 274, 91 N. W. 395; Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916; *Ex p.* Johnson, 15 Nebr. 512, 19 N. W. 594.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437; Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

New Hampshire.— Atty.-Gen. *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; Jewell *v.* Gilbert, 64 N. H. 13, 5 Atl. 80, 10 Am. St. Rep. 357; Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154; Merrill *v.* Palmer, 13 N. H. 184; Lisbon *v.* Bow, 10 N. H. 167; Morse *v.* Calley, 5 N. H. 222.

New Jersey.— Ross *v.* Essex County, 69 N. J. L. 143, 53 Atl. 1042 [*affirmed* in 69 N. J. L. 291, 55 Atl. 1042]; Brinkerhoff *v.* Jersey City, 64 N. J. L. 225, 46 Atl. 170; Oliver *v.* Jersey City, 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412; Mitchell *v.* Tolan, 33 N. J. L. 195; Hoagland *v.* Culvert, 20 N. J. L. 387; Savage *v.* Ball, 17 N. J. Eq. 142.

New Mexico.— Hubbell *v.* Armijo, (1906) 85 Pac. 1046.

New York.—People *v.* McDowell, 70 Hun 1, 23 N. Y. Suppl. 950; People *v.* Orleans County Ct., 28 Hun 14; Crosier *v.* Cornell Steamboat Co., 27 Hun 215 [*affirmed* in 92 N. Y. 626]; New York *v.* Tucker, 1 Daly 107; Snyder *v.* Schram, 59 How. Pr. 404; Hamlin *v.* Dingman, 41 How. Pr. 132 [*reversed* on other grounds in 5 Lans. 61]; People *v.* White, 24 Wend. 520; People *v.* Collins, 7 Johns. 549; Parker *v.* Baker, 8 Paige 428. See Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841 [*reversing* 114 N. Y. App. Div. 890, 101 N. Y. Suppl. 858]; Tully *v.* Lewitz, 50 Misc. 350, 98 N. Y. Suppl. 829.

North Carolina.— Swindell *v.* Warden, 52 N. C. 575; Gilliam *v.* Reddick, 26 N. C. 368; Burke *v.* Elliott, 26 N. C. 355, 42 Am. Dec. 142.

North Dakota.— Cleveland *v.* McCanna, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852.

Ohio.— State *v.* Gardner, 54 Ohio St. 24 42 N. E. 999, 31 L. R. A. 660; *Ex p.* Strang, 21 Ohio St. 610; State *v.* Jacobs, 17 Ohio 143; State *v.* Alling, 12 Ohio 16; Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442; Gates *v.* Beckwith, 2 Ohio Dec. (Reprint) 394, 2 West. L. Month. 590.

Oklahoma.— Morford *v.* Territory, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513.

Oregon.—Hamlin *v.* Kassafer, 15 Oreg. 456, 15 Pac. 778, 3 Am. St. Rep. 176.

Pennsylvania.— Com. *v.* McCombs, 56 Pa. St. 436; Clark *v.* Com., 29 Pa. St. 129; Com. *v.* Burrell, 7 Pa. St. 34; McKim *v.* Somers, 1 Penr. & W. 297.

Rhode Island.— Angell *v.* Steere, 16 R. I. 200, 14 Atl. 81.

South Carolina.—State *v.* Coleman, 54 S. C. 282, 32 S. E. 406; Kottman *v.* Ayer, 3 Strobh. 92; McBee *v.* Hoke, 2 Speers 138; Taylor *v.* Skrine, 2 Treadw. 696, 3 Brev. 516.

South Dakota.— Fylpaa *v.* Brown County, 6 S. D. 634, 62 N. W. 962.

Tennessee.—Heard *v.* Elliott, 116 Tenn. 150, 92 S. W. 764; State *v.* Hart, 106 Tenn. 269, 61 S. W. 780; Turney *v.* Dibrell, 3 Baxt. 235; Venable *v.* Curd, 2 Head 582; Pearce *v.* Hawkins, 2 Swan 87, 57 Am. Dec. 54; Bates *v.* Dyer, 9 Humphr. 162; Farmers', etc., Bank *v.* Chester, 6 Humphr. 458, 44 Am. Dec. 318; Stokes *v.* Acklen, (Ch. 1898) 46 S. W. 316.

Texas.— Lopez *v.* State, 42 Tex. 298; Aulanier *v.* Governor, 1 Tex. 653; Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954; Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661.

Utah.— State *v.* Elliott, 13 Utah 471, 45 Pac. 346.

Vermont.— *In re* Powers, 65 Vt. 399, 26 Atl. 640.

Washington.— North Western Lumber Co. *v.* Chehalis County, 25 Wash. 95, 64 Pac. 909, 87 Am. St. Rep. 747, 54 L. R. A. 212.

West Virginia.— Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222; Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163.

Wisconsin.— Chicago, etc., R. Co. *v.* Langlade Co., 56 Wis. 614, 14 N. W. 844; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

United States.—*Ex p.* Ward, 173 U. S. 452, 19 S. Ct. 459, 43 L. ed. 765; Waite *v.* Santa

an unconstitutional statute is regarded by some of the courts as not legally in existence and as therefore not forming any basis for the application of this rule as to *de facto* officers. It is therefore laid down as a general proposition that there can be no *de facto* officer where there is no office *de jure*.[54] Other courts have, however, refused to recognize the rule that there can be no *de facto* office, but have held that an unconstitutional law establishing an office may, until such law has been declared unconstitutional, be regarded as conferring color of title and that the incumbent of such an office should be treated as a *de facto* officer.[55] Furthermore it is in general held that the legality of a *de facto* municipal corporation cannot be attacked except in a direct action generally in the nature of a quo warranto. Therefore officers of a *de facto* municipal corporation are regarded as *de facto* officers.[56] If, however, the office is legally in existence it is almost universally held that one who holds such office under a title derived from an unconstitutional statute is to be treated as a *de facto* officer.[57]

3. Possession of the Office. One of the fundamental prerequisites to the existence of a *de facto* officer is the possession of the office and the performance of the duties attached to it.[58] But such possession need not be physically continuous. Thus, where an office is in dispute, and the one in actual possession steps out with no intention of abandoning the office, and the other claimant with full knowledge of the facts steps in and proceeds to do business, the one who previously had possession of the office is considered to be the officer *de facto*.[59] It follows as a necessary consequence that there cannot be a *de facto* officer if a *de jure* officer is discharging the functions of the office in question.[60] There

Cruz, 89 Fed. 619; Pack *v.* U. S., 41 Ct. Cl. 414.

See 37 Cent. Dig. tit. "Officers," § 61 *et seq.*

54. *California.*— Reddy *v.* Tinkum, 60 Cal. 458.

Ilinois.— People *v.* Knopf, 183 Ill. 410, 56 N. E. 155; Ward *v.* Cook, 78 Ill. App. 111.

Iowa.— Decorah *v.* Bullis, 25 Iowa 12.

Kansas.— *In re* Hinkle, 31 Kan. 712, 3 Pac. 531.

Kentucky.— Hildreth *v.* McIntire, 1 J. J. Marsh. 206, 19 Am. Dec. 61.

Louisiana.— State *v.* McFarland, 25 La. Ann. 547.

Michigan.— Carleton *v.* People, 10 Mich. 250.

Missouri.— State *v.* O'Brian, 68 Mo. 153; *Ex p.* Snyder, 64 Mo. 58.

New York.— *In re* Quinn, 152 N. Y. 89, 46 N. E. 175.

United States.— Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178.

See 37 Cent. Dig. tit. "Officers," § 62.

55. Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289; Lang *v.* Bayonne, (N. J. 1907) 68 Atl. 90 [*overruling* Flaucher *v.* Camden, 56 N. J. L. 244, 28 Atl. 82]; State *v.* Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; Heck *v.* Findlay Window Glass Co., 16 Ohio Cir. Ct. 111, 8 Ohio Cir. Dec. 757; State *v.* Bingham, 14 Ohio Cir. Ct. 245, 7 Ohio Cir. Dec. 522.

56. *California.*— Fraser *v.* Freelon, 53 Cal. 644.

Illinois.— Leach *v.* People, 122 Ill. 420, 12 N. E. 726; Trumbo *v.* People, 75 Ill. 561; Coles County *v.* Allison, 23 Ill. 437.

Missouri.— State *v.* Rich, 20 Mo. 393.

Nebraska.— Pender State Bank *v.* Frey, 3 Nebr. (Unoff.) 83, 91 N. W. 239.

New Jersey.— State *v.* Vickers, 51 N. J. L. 180, 17 Atl. 153, 14 Am. St. Rep. 675; Harvey *v.* Philbrick, 49 N. J. L. 374, 8 Atl. 122.

South Dakota.— Merchants Nat. Bank *v.* McKinney, 2 S. D. 106, 48 N. W. 841.

See also Municipal Corporations, 28 Cyc. 420.

De facto municipal corporations see Municipal Corporations, 28 Cyc. 171.

57. *Connecticut.*— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Illinois.—Samuels *v.* Central Special Drainage Dist. Com'rs, 125 Ill. 536, 17 N. E. 829; Leach *v.* People, 122 Ill. 420, 12 N. E. 726; People *v.* Bangs, 24 Ill. 184.

Louisiana.— Watson *v.* McGrath, 111 La. 1097, 36 So. 204.

Ohio.— *Ex p.* Strang, 21 Ohio St. 610.

Wisconsin.— Chicago, etc., R. Co., *v.* Langlade County, 56 Wis. 614, 14 N. W. 844.

United States.— *In re* Ah Lee, 5 Fed. 899, 6 Sawy. 410.

Contra.— Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; People *v.* Albertson, 55 N. Y. 50; People *v.* Albertson, 8 How. Pr. (N. Y.) 363.

58. Biencourt *v.* Parker, 27 Tex. 558; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

59. Braidy *v.* Theritt, 17 Kan. 468; Conover *v.* Devlin, 24 Barb. (N. Y.) 587.

60. *Kansas.*— McCahon *v.* Leavenworth County Com'rs, 8 Kan. 437.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245.

cannot be two different officers *de facto* in possession of an office for which one incumbent only is provided by law.[61]

4. Color of Title. But the mere fact of the possession of the office is not sufficient to make the incumbent a *de facto* officer. Either he must have color of title or his possession must be acquiesced in by the public. The mere possessor of an office without these other conditions is an intruder whose acts have legally no effect.[62] Color of title to the office may be defined as apparent right to the office. Such apparent right is usually to be found in a certificate of election or a commission of appointment, which certificate or commission is void because some other person is entitled thereto,[63] because the election is irregular,[64] or because the incumbent has been irregularly appointed,[65] or appointed by an authority not competent under the law to make the appointment.[66] One who holds over after the expiration of his legal term is also commonly regarded as a *de facto* officer.[67] So also is one a *de facto* officer who performs official duties before taking the official oath or filing the official bond.[68] Persons having color of title are regarded as

Michigan.— Hallgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L. R. A. 408; People *v.* Ingham County, 36 Mich. 416.

Mississippi.— Cohn *v.* Beal, 61 Miss. 398.

Nevada.— State *v.* Blossom, 19 Nev. 312, 10 Pac. 430.

New Jersey.— Dienstag *v.* Fagan, (1907) 65 Atl. 1011.

New York.— Montgomery *v.* O'Dell, 67 Hun 169, 22 N. Y. Suppl. 412 [*affirmed* in 142 N. Y. 665, 37 N. E. 570]; Boardman *v.* Halliday, 10 Paige 223.

North Carolina.— Baker *v.* Hobgood, 126 N. C. 149, 35 S. E. 253.

Rhode Island.— Murphy *v.* Moies, 18 R. I. 100, 25 Atl. 977; State *v.* Lane, 16 R. I. 620, 18 Atl. 1035.

South Carolina.— *Ex p.* Norris, 8 S. C. 408.

Vermont.— St. Johnsbury School Dist. No. 13 *v.* Smith, 67 Vt. 566, 32 Atl. 484.

See 37 Cent. Dig. tit. "Officers," § 61.

61. Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412 [*affirmed* in 142 N. Y. 665, 37 N. E. 570].

62. *Iowa.*— Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

Kansas.— Olson *v.* Trego County, 8 Kan. App. 414, 54 Pac. 805.

Maine.— Woods *v.* Bristol, 84 Me. 358, 24 Atl. 865.

New Jersey.— Hugg *v.* Ivins, 59 N. J. L. 139, 36 Atl. 685.

New York.— People *v.* Dike, 37 Misc. 401, 75 N. Y. Suppl. 801; Matter of Howard, 26 Misc. 233, 56 N. Y. Suppl. 318.

North Carolina.— State *v.* Taylor, 108 N. C. 196, 12 S. E. 1005, 23 Am. St. Rep. 51, 12 L. R. A. 202.

Texas.— Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743.

England.— Rex *v.* Lisle, Andr. 163, 2 Str. 1090.

See 37 Cent. Dig. tit. "Officers," § 63.

63. Rice *v.* Com., 3 Bush (Ky.) 14; Carleton *v.* People, 10 Mich. 250; Aulanier *v.* Governor, 1 Tex. 653.

64. *Georgia.*— Waller *v.* Perkins, 52 Ga. 233.

Kentucky.— Henry *v.* Com., 103 S. W. 371, 31 Ky. L. Rep. 760; Scholl *v.* Bell, 102 S. W. 248, 31 Ky. L. Rep. 335.

Michigan.— Carleton *v.* People, 10 Mich. 250.

New Hampshire.— Tucker *v.* Aiken, 7 N. H. 113.

North Carolina.— Trenton *v.* McDaniel, 52 N. C. 107.

See 37 Cent. Dig. tit. "Officers," § 64.

65. *Michigan.*— Atty.-Gen. *v.* Parsell, 99 Mich. 381, 58 N. W. 335.

Mississippi.— Vicksburg *v.* Lombard, 51 Miss. 111.

Nebraska.— Haskell *v.* Dutton, 65 Nebr. 274, 91 N. W. 395.

New Jersey.— Dugan *v.* Farrier, 47 N. J. L. 383, 1 Atl. 751 [*affirmed* in 48 N. J. L. 613, 7 Atl. 881].

New York.— Hamlin *v.* Dingman, 5 Lans. 61.

66. *California.*— People *v.* Roberts, 6 Cal. 214.

Mississippi.— Ray *v.* Murdock, 36 Miss. 692.

Nevada.— Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

United States.— *In re* Ah Lee, 5 Fed. 899, 6 Sawy. 410.

See 37 Cent. Dig. tit. "Officers," § 64.

Contra.— People *v.* Albertson, 55 N. Y. 50, which holds that one appointed contrary to the provisions of the constitution is not even an officer *de facto*.

Color of title under statute where appointment made under void ordinance.— Where a city oil inspector claimed title to his office under a void municipal ordinance, and there never had been an attempt to appoint him an inspector under a state statute making provision for a similar office, his acts could not be treated as valid as those of a *de facto* officer under the statute. Chicago *v.* Burke, 226 Ill. 191, 80 N. E. 720 [*reversing* 127 Ill. App. 161].

67. People *v.* Beach, 77 Ill. 52; Morton *v.* Lee, 28 Kan. 286; Williams *v.* Boynton, 147 N. Y. 426, 42 N. E. 184; State *v.* McJunkin, 7 S. C. 21. See also *infra*, II, F, 2.

68. *Arkansas.*— Murphy *v.* Shepard, 52 Ark. 356, 12 S. W. 707.

de facto officers even though legally they are not eligible for the position which they desire to hold.[69] But color of title ceases to exist after a court has passed unfavorably upon the claim of the one actually in possession of the office,[70] or where the defect in title is such that persons dealing with the officer must have had notice of it.[71] It would seem also that persons in actual possession of an office, whose possession is acquiesced in for a considerable time by the public, are *de facto* officers, although they do not possess color of title.[72]

5. Rights and Duties. As the rule regarding *de facto* officers has been adopted merely with the idea of protecting the public, the *de facto* officer is not permitted to benefit personally from what is legally a usurpation of the office. He thus has no claim to the emoluments of the office.[73] As a necessary consequence the *de facto* officer is liable to the *de jure* officer for the emoluments of the office

Connecticut.— State *v.* Brennan's Liquors, 25 Conn. 278.

Iowa.— Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370.

Nebraska.— Holt County *v.* Scott, 53 Nebr. 176, 73 N. W. 681.

New Jersey.— Rosell *v.* Neptune City Bd. of Education, 68 N. J. L. 498, 53 Atl. 398; State *v.* Perkins, 24 N. J. L. 409.

Pennsylvania.— Gregg Tp. *v.* Jamison, 55 Pa. St. 468.

See 37 Cent. Dig. tit. "Officers," § 65.

69. Lockhart *v.* Troy, 48 Ala. 579; Hooper *v.* Goodwin, 48 Me. 79; Farrier *v.* Dugan, 48 N. J. L. 613, 7 Atl. 881 [*affirming* 47 N. J. L. 383, 1 Atl. 751]; Matter of Collins, 75 N. Y. App. Div. 87, 77 N. Y. Suppl. 702.

70. Hugg *v.* Ivins, 59 N. J. L. 139, 36 Atl. 685.

71. Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412 [*affirmed* in 142 N. Y. 665, 37 N. E. 570].

72. Burton *v.* Patton, 47 N. C. 124, 62 Am. Dec. 194; *Ex p.* Ward, 173 U. S. 452, 19 S. Ct. 459, 43 L. ed. 765; Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314; Cocke *v.* Halsey, 16 Pet. (U. S.) 71, 10 L. ed. 891; Waite *v.* Santa Cruz, 89 Fed. 619; Northwestern Mut. L. Ins. Co. *v.* Seaman, 80 Fed. 357.

73. *Arkansas.*— Cobb *v.* Hammock, (1907) 102 S. W. 382.

California.— People *v.* Potter, 63 Cal. 127; People *v.* Smyth, 28 Cal. 21. But by statute, Pol. Code, § 936, as amended by Laws (1891), p. 28, c. 44, it is provided that when the title of an incumbent to any office is contested in any court no warrant can be drawn or paid for any part of the salary unless such proceedings have been finally determined, except that the section shall not apply to any party to a contest who holds the certificate of election or commission of office and discharges the duties of the office, but that he shall receive the salary as if no contest was pending. See Chubbuck *v.* Wilson, 151 Cal. 162, 90 Pac. 524; Sweeney *v.* Doyle, (App. 1906) 86 Pac. 819, 84 Pac. 1017.

Connecticut.— Coughlin *v.* McElroy, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224.

Illinois.— Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736.

Iowa.— McCue *v.* Wapello County, 56 Iowa 698, 10 N. W. 248, 41 Am. Rep. 134.

Massachusetts.— Phelon *v.* Granville, 140 Mass. 386, 5 N. E. 269; Dolliver *v.* Parks, 136 Mass. 499.

Minnesota.— State *v.* Schram, 82 Minn. 420, 85 N. W. 155.

Mississippi.— Vicksburg *v.* Groome, (1898) 24 So. 306; Christian *v.* Gibbs, 53 Miss. 314.

Nevada.— Meagher *v.* Storey County, 5 Nev. 244.

New York.— Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168; People *v.* Tieman, 30 Barb. 193.

Ohio.— Ermston *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 657, 7 Ohio N. P. 635; State *v.* Newark, 8 Ohio S. & C. Pl. Dec. 344, 6 Ohio N. P. 523.

Pennsylvania.— Luzerne County *v.* Trimmer, 95 Pa. St. 97; Com. *v.* Slifer, 25 Pa. St. 23, 64 Am. Dec. 680; Riddle *v.* Bedford County, 7 Serg. & R. 386.

South Dakota.— Fylpaa *v.* Brown County, 6 S. D. 634, 62 N. W. 962.

United States.— Pack *v.* U. S., 41 Ct. Cl. 414; Romero *v.* U. S., 24 Ct. Cl. 331, 5 L. R. A. 69.

Contra.— Adams *v.* State Insane Asylum, 4 Ariz. 327, 40 Pac. 185 (holding that the *de facto* officer is entitled to the compensation where there was no *de jure* officer in existence); Dickerson *v.* Butler, 27 Mo. App. 9; Brinkerhoff *v.* Jersey City, 64 N. J. L. 225, 46 Atl. 170; Erwin *v.* Jersey City, 60 N. J. L. 141, 37 Atl. 732, 64 Am. St. Rep. 584 (which holds that when one without fraud or dishonesty on his part acts as officer, although not possessed of the legal title, he may recover the compensation); Seymour *v.* Bennett, 2 Atk. 483. And see Atchison *v.* Lucas, 83 Ky. 451. But *compare* Blore *v.* Union County, 64 N. J. L. 262, 45 Atl. 633, 81 Am. St. Rep. 495 (where it was held that a mere intruder could not recover); Meehem *v.* Hudson County, 46 N. J. L. 276, 50 Am. Rep. 421. See Stuhr *v.* Curren, 44 N. J. L. 181, 43 Am. Rep. 353, for the general rule in New Jersey.

Statutory provisions.— The general rule is sometimes changed by statute. See Wilson *v.* Fisher, 140 Cal. 188, 73 Pac. 850, where it was held that the California statute provided that in case of a contest for office the claim-

obtained during the time he has wrongfully occupied the office.[74] Furthermore a *de facto* officer may not shield himself through his *de facto* character from the responsibility for acts which may be justified only because of the fact that he is an officer. That is, an officer may be called upon to prove that he has the *de jure* title when he brings a suit in his official character,[75] or when he is sued.[76] The only exception to the rule that the question of official title may be raised in a suit to which the officer is a party is to be found in cases where the interests of the public are alone concerned when it is held that the title must be tried in direct proceedings to try title to office.[77] Furthermore, while the general theory is that the *de facto* officer can build up no rights he is still, because of the rule that he may not impeach his own title to office,[78] liable for damages caused by his negligence in the performance of the duties of the office of which he is the *de facto* incumbent,[79] and may be forced by mandamus or other appropriate proceeding to perform these duties,[80] or punished criminally for the performance of acts

ant having the election certificate should receive the compensation.

74. *California.*— Stoddard *v.* Williams, 65 Cal. 472, 4 Pac. 452; People *v.* Smyth, 28 Cal. 21. But under Pol. Code, § 936, as amended by Laws (1891), p. 28, c. 44, a successful contestant cannot recover the salary of the office from one who has performed its duties under a commission or certificate of election pending a contest. Chubbuck *v.* Wilson, 151 Cal. 162, 90 Pac. 524.

Connecticut.— Coughlin *v.* McElroy, 74 Conn. 297, 50 Atl. 1025, 92 Am. St. Rep. 224.

Illinois.— Kreitz *v.* Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 22.

Indiana.— Douglass *v.* State, 31 Ind. 429; Glascock *v.* Lyons, 20 Ind. 1, 83 Am. Dec. 299.

Kansas.— Fenn *v.* Beeler, 64 Kan. 67, 67 Pac. 461.

Louisiana.— State *v.* Holmes, 43 La. Ann. 1185, 10 So. 172; Petit *v.* Rousseau, 15 La. Ann. 239; Sigur *v.* Crenshaw, 10 La. Ann. 297.

Michigan.— Comstock *v.* Grand Rapids, 40 Mich. 397; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

New York.— Kessel *v.* Zeiser, 102 N. Y. 114, 6 N. E. 574, 55 Am. Rep. 769; Nichols *v.* MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Platt *v.* Stout, 14 Abb. Pr. 178.

Tennessee.— Curry *v.* Wright, 9 Lea 247.

Texas.— State *v.* McAllister, (Civ. App. 1895) 31 S. W. 679.

Utah.— Wenner *v.* Smith, 4 Utah 238, 9 Pac. 293.

Virginia.— Booker *v.* Donohoe, 95 Va. 359, 28 S. E. 584.

West Virginia.— Bier *v.* Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17.

United States.— U. S. *v.* Addison, 6 Wall. 291, 18 L. ed. 919.

England.—Arris *v.* Stukely, 2 Mod. 260; Lawlar *v.* Alton, Ir. R. 8 C. L. 160.

See 37 Cent. Dig. tit. "Officers," § 67.

Contra.— Stuhr *v.* Curran, 44 N. J. L. 181, 43 Am. Rep. 353.

Tendency to favor the de facto officer where possible.— It is sometimes held that the *de jure* officer shall be held to strict proof that he has the legal title to the office in question (Hunter *v.* Chandler, 45 Mo. 452; Richards *v.* McMillin, 36 Nebr. 352, 54 N. W. 566), and an officer whose bond has not been approved will not be permitted to recover (McMillin *v.* Richards, 45 Nebr. 786, 64 N. W. 242). See also Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270 (holding that it must be clearly shown that the *de facto* officer received the emoluments); Nichols *v.* Branham, 84 Va. 923, 6 S. E. 463, holding that plaintiff must not sleep on his rights).

Where a newly elected officer failed for some months to qualify and the previous incumbent continued in office in the meantime, he, and not the newly elected officer, was entitled to the compensation of the office under a provision to the effect that officers shall hold over until their successors are qualified. Hubbard *v.* Crawford, 19 Kan. 570.

Liability of sureties upon de facto officer's bond.— The *de jure* officer may not recover from the sureties on the bond of the *de facto* officer. Curry *v.* Wright, 86 Tenn. 636, 8 S. W. 593.

75. People *v.* Weber, 86 Ill. 283; Kimball *v.* Alcorn, 45 Miss. 151.

76. *Arkansas.*—Miller *v.* Callaway, 32 Ark. 666.

Illinois.— Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

Kentucky.— Patterson *v.* Miller, 2 Metc. 493.

New York.— Green *v.* Burke, 23 Wend. 490.

Tennessee.— Pearce *v.* Hawkins, 2 Swan 87, 57 Am. Dec. 54.

Vermont.— Cummings *v.* Clark, 15 Vt. 653.

77. Creighton *v.* Piper, 14 Ind. 182.

78. See *supra*, II, B, 7.

79. Longacre *v.* State, 3 Miss. 637; Neale *v.* Allegheny Tp. Overseers of Poor, 5 Watts (Pa.) 538.

Penalty.— A *de facto* officer is not, however, liable to a penalty for not performing his duties. Bentley *v.* Phelps, 27 Barb. (N. Y.) 524.

80. Kelly *v.* Wimberly, 61 Miss. 548.

Mandamus to compel performance of duty see MANDAMUS.

which when done by an officer are crimes.[81] But resistance to a *de facto* officer is punishable under a statute punishing resistance to officers,[82] and an officer *de facto* is not guilty of murder if he kills one under circumstances which would justify his act had he the *de jure* title.[83] Finally, it has been held that public funds expended by a *de facto* officer for a lawful purpose may not be recovered from him.[84]

E. Deputies and Assistants[85] — **1. In General.** At common law public officers may appoint deputies for the discharge of ministerial duties.[86] In addition to the deputies permitted by the common law, deputies are often provided by statute, when they may perform any act which may be performed by the principal officer unless their powers are expressly limited.[87] Where provision is made by statute for the position of deputy, such deputy is regarded as a public officer;[88] but a deputy for whom no provision is made in the law and who is appointed by his officer to suit his own convenience is regarded as the agent or servant of such officer.[89]

2. Rights and Duties. Deputies, whether common law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power,[90] and their deputation expires with the office on which it depends.[91] Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law.[92] The ordinary rules as to *de facto* officers apply to deputies.[93]

F. Term of Office, Vacancies, and Holding Over[94] — **1. Term of Office — a. In General.** The phrase "term of office" means the fixed period of time for

81. Diggs *v.* State, 49 Ala. 311; State *v.* Goss, 69 Me. 22; State *v.* Maberry, 3 Strobh. (S. C.) 144; Rex *v.* Borrett, 6 C. & P. 124, 25 E. C. L. 353.

82. See Obstructing Justice, *ante*, p. 1331.

83. State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; State *v.* Dierberger, 90 Mo. 369, 2 S. W. 286.

Justifiable or excusable homicide by officer generally see Homicide, 21 Cyc. 795.

84. McCracken *v.* Soucy, 29 Ill. App. 619.

85. **Of particular officers** see special titles relating thereto, and cross-references at the head of the article.

86. Abrams *v.* Ervin, 9 Iowa 87; Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Com. *v.* Arnold, 3 Litt. (Ky.) 309; Hunter *v.* Hemphill, 6 Mo. 106; St. Margaret's Parish Burial Bd. *v.* Thompson, L. R. 6 C. P. 445, 40 L. J. C. P. 213, 24 L. T. Rep. N. S. 673, 19 Wkly. Rep. 892; Jones *v.* Williams, 2 Dowl. N. S. 938, 7 Jur. 581, 12 L. J. Q. B. 295; Parker *v.* Kett, 1 Ld. Raym. 658. See also Merlette *v.* State, 100 Ala. 42, 14 So. 562.

87. *Illinois.*— Hope *v.* Sawyer, 14 Ill. 254.

Iowa.—Abrams *v.* Ervin, 9 Iowa 87.

Michigan.—Tower *v.* Welker, 93 Mich. 332, 53 N. W. 527.

Mississippi.— McRaven *v.* McGuire, 9 Sm. & M. 34.

Montana.— Fredericks *v.* Davis, 3 Mont. 251.

Evidence of facts authorizing action.— Record evidence should be kept of the fact that on account of the absence of an executive officer his chief clerk or deputy acted in his place. State *v.* Briede, 117 La. 183, 41 So. 487.

Taking of affidavits see Affidavits, 2 Cyc. 12.

88. *Connecticut.*— Dayton *v.* Lynes, 30 Conn. 351, where it is said that a deputy sheriff is an independent officer.

South Carolina.— Bolan *v.* Williamson, 1 Brev. 181.

Tennessee.— State *v.* Slagle, 115 Tenn. 336, 89 S. W. 326.

Texas.— Towns *v.* Harris, 13 Tex. 507, where a return signed by a deputy sheriff was held good.

Vermont.— Eastman *v.* Curtis, 4 Vt. 616.

United States.— U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90; U. S. *v.* Finklepaugh, 28 Fed. Cas. No. 16,526, 3 Blatchf. 425, holding one who resisted a deputy marshal guilty of resistance to an officer.

89. Bell *v.* Drummond, 1 Peake N. P. 45, where a deputy was permitted to recover from his principal because of increase in his duties.

90. Gibbs *v.* Morgan, 39 N. J. Eq. 126; Somers *v.* State, 5 S. D. 321, 58 N. W. 804. See also Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633, holding the liability of sureties upon the bond of the deputy limited by the term of the principal.

91. Hord *v.* State, 167 Ind. 622, 79 N. E. 916; State *v.* Barrows, 71 Minn. 178, 73 N. W. 704; Banner *v.* McMurray, 12 N. C. 218; Brady *v.* French, 9 Ohio S. & C. Pl. Dec. 195, 6 Ohio N. P. 122.

92. Smith *v.* Coulter, 113 Ky. 74, 67 S. W. 1, 23 Ky. L. Rep. 2384; Long *v.* Coulter, 67 S. W. 272, 23 Ky. L. Rep. 2389; Sweeney *v.* Coulter, 67 S. W. 264, 23 Ky. L. Rep. 2391.

93. Murphy *v.* Lentz, 131 Iowa 328, 108 N. W. 530; Wheeler, etc., Mfg. Co. *v.* Sterrett, 94 Iowa 158, 62 N. W. 675; Ramsey County *v.* Sullivan, 94 Minn. 201, 102 N. W. 723; Wittmer *v.* New York, 50 N. Y. App. Div. 482, 64 N. Y. Suppl. 170; Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661. See also Maley *v.* Tipton, 2 Head (Tenn.) 403.

94. **Of particular officers** see special titles relating thereto, and cross-references at the head of this article.

which the office may be held.[95] The duration of the term of office is usually fixed by express constitutional or statutory provisions.[96] Where the statute fixing the term is uncertain, that interpretation should be followed which limits the term to the shortest period.[97] Where, however, the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power on the theory that the power of removal is incident to the power of appointment.[98] Such appointments at pleasure, if made by a board, are unaffected by a change in the *personnel* of the board.[99] A constitutional provision that terms of office not fixed by the constitution shall not exceed a specified time does not enlarge the duration of an office held at the pleasure of the executive.[1] Where an office is created by a statute, the term of which is fixed by the constitution to be during good behavior, the officer holds only so long as the statute remains in force.[2] Where a law providing for the appointment of officers by the governor and limited to a period of years is continued by a subsequent law for a further period, in the absence of an indication to the contrary the commissions of officers continue only for the time to which the law was originally limited.[3] Where the office is to be filled by one authority and the duration of the term is to be determined by another, the declaration of such duration must be made before the office is filled, so that each authority may have its legitimate exercise.[4]

b. Power of Legislature.[5] The power to fix the term of an office is, unless otherwise provided, possessed by the body which under the law may create the office, ordinarily the legislature.[6] But if the constitution fixes the term of office such term may not be changed by the legislature.[7] In case the legislature provides for a longer term than is permitted by the constitution, the act is good as to the term permitted by the constitution, and is void only as to the excess;[8] and an officer appointed for a fixed term who, as provided by the constitution, should have been appointed for a shorter term and one whose term is not fixed holds at the will of the appointing power.[9] Such constitutional provisions are usually so worded that they are construed as affecting offices established by the legislature as well as

95. State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895.

A constitutional provision relating to the election of officers for such "terms" as prescribed by law has been held not applicable to officers which are removable at the pleasure of another officer, or who must be removed upon the occurrence of an uncertain event. Speed *v.* Crawford, 3 Metc. (Ky.) 207.

96. See the constitutions and statutes of the several states.

Construction of provisions.—For cases in which particular constitutional and statutory provisions have been construed see Barton *v.* Kalloch, 56 Cal. 95; *In re* Stuart 53 Cal. 745; State *v.* Dubuc, 9 La. Ann. 237; State *v.* Frizzell, 31 Minn. 460, 18 N. W. 316; State *v.* Hastings, 10 Wis. 525.

97. People *v.* Palmer, 154 N. Y. 133, 47 N. E. 1084; Wright *v.* Adams, 45 Tex. 134; Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652.

98. See *supra*, II, A, 5.

99. State *v.* Public Lands, etc., Bd., 7 Nebr. 42.

1. State *v.* Crozat, 8 La. Ann. 295.

2. Bruce *v.* Fox, 1 Dana (Ky.) 447.

3. Com. *v.* Sutherland, 3 Serg. & R. (Pa.) 145.

4. People *v.* Foley, 148 N. Y. 677, 43 N. E. 171.

5. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 763.

6. Scott *v.* State, 151 Ind. 556, 52 N. E. 163; Andrews *v.* State, 69 Miss. 740, 13 So. 853; State *v.* Williford, 104 Tenn. 694, 58 S. W. 295.

7. *Indiana.*— Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 48 N. E. 228.

Kansas.— Lewis *v.* Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510.

Kentucky.— Sinking Fund Com'rs *v.* George, 104 Ky. 260, 47 S. W. 779, 20 Ky. L. Rep. 938, 84 Am. St. Rep. 454; Speed *v.* Crawford, 3 Metc. 207; Bruce *v.* Fox, 1 Dana 447.

Nebraska.— State *v.* Galusha, 74 Nebr. 188, 104 N. W. 197.

New York.— Matter of Burger, 21 Misc. 370, 47 N. Y. Suppl. 292.

Ohio.— State *v.* Harvey, 8 Ohio Cir. Ct. 599, 4 Ohio Cir. Dec. 227.

See 37 Cent. Dig. tit. "Officers," § 70.

8. People *v.* Perry, 79 Cal. 105, 21 Pac. 423; Sinking Fund Com'rs *v.* George, 104 Ky. 260, 47 S. W. 779, 20 Ky. L. Rep. 938, 84 Am. St. Rep. 454. See Lewis *v.* Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510, holding that when a statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared by law and the office is held only during the pleasure of the appointing power. *Contra*, Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 48 N. E. 228.

9. Lewis *v.* Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510; White *v.* Mears, 44 Oreg. 215, 74 Pac. 931.

those established by the constitution.[10] In case the constitution providing for an office fixes no time for the commencement of the term, the authority to fix the term is vested in the legislature.[11]

e. Change of Term. The legislature may change the term of an office even during the term of the incumbent,[12] except where the constitution fixes the duration of the term;[13] and when the constitution provides for elective offices the legislature may not extend the term of the official incumbent of an elective office.[14] But legislation, which to secure uniformity in official terms, postpones the date of an election for a reasonable time is not usually regarded as violating the constitution. The incumbents of such offices are regarded as holding over, under the general provisions providing for holding over, until a successor is duly qualified.[15] A term fixed by statute may be changed only by statute.[16] An incorrect statement as to the term in a ballot[17] or commission of appointment[18] or an official

10. People *v.* Perry, 79 Cal. 105, 21 Pac. 423; Aycock *v.* Aven, 25 Ga. 694; Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 48 N. E. 228. *Contra*, People *v.* Scheu, 167 N. Y. 292, 60 N. E. 650.

11. State *v.* McCracken, 51 Ohio St. 123, 36 N. E. 941.

12. *California.*— *In re* Bulger, 45 Cal. 553; People *v.* Haskell, 5 Cal. 357.

Colorado.—Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236.

Georgia.— Waters *v.* McDowell, 126 Ga. 807, 56 S. E. 95.

Indiana.— Walker *v.* Peelle, 18 Ind. 264.

Iowa.— State *v.* Huegle, (1907) 112 N. W. 234.

Maryland.— Brown *v.* Brooke, 95 Md. 738, 54 Atl. 516.

Massachusetts.— Taft *v.* Adams, 3 Gray 126.

Michigan.—Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699; Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.

Minnesota.— State *v.* Peterson, 50 Minn. 239, 52 N. W. 655.

Missouri.— State *v.* Davis, 44 Mo. 129.

Nebraska.— State *v.* Stewart, 52 Nebr. 243, 71 N. W. 998; Douglas County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

New York.— People *v.* Sturges, 21 Misc. 605, 47 N. Y. Suppl. 999 [*affirmed* in 27 N. Y. App. Div. 387, 50 N. Y. Suppl. 5 (*affirmed* in 156 N. Y. 580, 51 N. E. 295)].

Ohio.— State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

Pennsylvania.— Com. *v.* Benfield, 5 Pa. Dist. 382.

Wisconsin.— State *v.* Douglas, 26 Wis. 428, 7 Am. Rep. 87.

See 37 Cent. Dig. tit. "Officers," § 71.

13. *Delaware.*— State *v.* Burris, 4 Pennew. 3, 49 Atl. 930.

Illinois.— People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

Indiana.— Howard *v.* State, 10 Ind. 99.

Kansas.— Peters *v.* State Bd. of Canvassers, 17 Kan. 365.

Ohio.— State *v.* Brewster, 44 Ohio St. 589, 9 N. E. 849; State *v.* Harvey, 8 Ohio Cir. Ct. 599, 4 Ohio Cir. Dec. 227.

But *compare* Treadwell *v.* Yolo County, 62 Cal. 563.

14. State *v.* Offill, 74 Nebr. 670, 105 N. W. 1099; State *v.* Offill, (Nebr. 1905) 105 N. W. 1098; State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092; People *v.* Palmer, 154 N. Y. 133, 47 N. E. 1084; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302. And see State *v.* Silver Bow County, 34 Mont. 426, 87 Pac. 450, holding that the amendment (House Bill No. 55, Mont. Sess. Laws (1901), p. 208) to Const. art. 16, § 4, changing the tenure of county commissioners from four years to six years, and extending the tenure of then incumbents, is not violative of Const. art. 5, § 31, providing that no law shall extend the term of office of any public officer after his election, that section having reference to legislative enactments only. *Contra*, Christy *v.* Sacramento County, 39 Cal. 3.

In the case, however, of an appointed officer the term may be extended by statute, although the power to appoint is given by the constitution to a local authority. People *v.* Batchelor, 22 N. Y. 128.

15. *Colorado.*— Sipe *v.* People, 26 Colo. 127, 56 Pac. 571.

Illinois.— People *v.* La Salle County, 100 Ill. 495; People *v.* Wall, 88 Ill. 75.

Indiana.— Larned *v.* Elliott, 155 Ind. 702, 57 N. E. 901; Scott *v.* State, 151 Ind. 556, 52 N. E. 163; State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418.

Kansas.— State *v.* Andrews, 64 Kan. 474, 67 Pac. 870; Wilson *v.* Clark, 63 Kan. 505, 65 Pac. 705.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

Missouri.— State *v.* McGovney, 92 Mo. 428, 3 S. W. 867; State *v.* Ranson, 73 Mo. 78.

Oregon.— State *v.* Compson, 34 Oreg. 25, 54 Pac. 349.

Washington.— State *v.* Tallman, 24 Wash. 426, 64 Pac. 759.

But see State *v.* Galusha, 74 Nebr. 188, 104 N. W. 197 (which holds that the legislature may not, in order to provide biennial elections, change the terms of office which have been fixed in the constitution); State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092 (which holds that the legislature even with this end in view may not extend the terms of county officers).

16. See cases cited *infra*, notes 17–19.

17. People *v.* Case, 19 N. Y. Suppl. 625.

18. State *v.* Chapin, 110 Ind. 272, 11 N. E.

bond[19] will not change the term from that which has been prescribed by statute with reference to the office.

d. Beginning of Term. The term of office, when not provided by statute, begins in the case of elective offices on the date of election,[20] and in the case of appointive offices on the date of the appointment,[21] except where under the statute the appointee has a certain time within which to qualify, in which case the term begins at the time of qualification.[22] In the case of appointive offices the beginning of the term of the first appointee determines the limits of the terms of successive appointees, so that one appointed in the middle of the term, because of the vacation of an office during the term of an incumbent, or because of his holding over, is not appointed for longer than the unexpired term.[23] This rule is not, however, usually applied in the case of elective officers, where the law provides that they shall be elected for a term of a specified number of years.[24] In some cases by the constitution or statute one appointed to fill a vacancy in an elective office is appointed to hold until the next election.[25] Where, on expiration of the term of the incumbent, one is appointed to an office by the governor during a recess of the senate and is afterward confirmed by the senate, the term begins at the time of the governor's appointment and is subject only to the approval of the senate.[26] But if the appointment may by law be made only until the end of the next session of the senate, the appointment made during the recess and afterward confirmed is revoked by the confirmation, which marks the beginning of a new term.[27]

317; State *v.* Jeter, 1 McCord (S. C.) 233. See Lease *v.* Clark, 55 Kan. 621, 40 Pac. 1002, holding that where several persons were nominated by the governor and confirmed by the senate as members of the state board of charities, and the terms to be filled were not of the same duration and did not begin or end at the same time, and the nominating message was ambiguous as to tenure and succession, the records in the office of the governor and secretary of state, as to such appointment, and the commissions issued to the appointees, were competent evidence in determining the succession and terms of the appointees.

19. Shaw *v.* Macon, 21 Ga. 280.

20. Prowell *v.* State, 142 Ala. 80, 39 So. 164; State *v.* Constable, 7 Ohio 7; State *v.* Pollner, 18 Ohio Cir. Ct. 304, 10 Ohio Cir. Dec. 141.

21. State *v.* Wentworth, 55 Kan. 298, 40 Pac. 648; Verner *v.* Seibels, 60 S. C. 572, 39 S. E. 274. But see State *v.* Parker, 30 La. Ann. 1182, where it is said that, in the absence of a provision to the contrary, the term of an office begins with its existence, and not with the appointment of an incumbent.

22. Brodie *v.* Campbell, 17 Cal. 11; Haight *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234].

23. *Kentucky.*— Jackson *v.* Richmond, 108 Ky. 374, 56 S. W. 501, 22 Ky. L. Rep. 94; Hoke *v.* Riehie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132, 18 Ky. L. Rep. 546.

Missouri.—State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895.

New Jersey.— Haigbt *v.* Love, 39 N. J. L. 14 [*affirmed* in 39 N. J. L. 476, 23 Am. Rep. 234].

New York.— People *v.* McClave, 99 N. Y. 83, 1 N. E. 235.

Ohio.— State *v.* Spiedel, 62 Ohio St. 156, 56 N. E. 871.

South Dakota.— State *v.* Vincent, (1905) 104 N. W. 914.

Tennessee.— State *v.* Manson, 105 Tenn. 232, 58 S. W. 319.

Vermont.— Smith *v.* Cosgrove, 71 Vt. 196, 44 Atl. 73.

24. *California.*— People *v.* Burbank, 12 Cal. 378.

Maryland.— Sansbury *v.* Middleton, 11 Md. 296.

Minnesota.— Crowell *v.* Lambert, 9 Minn. 283.

Mississippi.— Hughes *v.* Buckingham, 5 Sm. & M. 632.

New York.— People *v.* Townsend, 102 N. Y. 430, 7 N. E. 360; People *v.* Green, 2 Wend. 266.

Texas.— Banton *v.* Wilson, 4 Tex. 400.

Where continuity of terms has been broken.— Where the constitution provides the term for which offices shall be held, and that officers shall hold until their successors have been elected and qualified, it has been held that where there has been an unbroken succession of terms from the adoption of the constitution, and no general acquiescence in a different day or time, the commencement of the officer's term is governed by the time at which the term of the officer in office, when the constitution took effect, expired; but where the regular succession of terms has been broken, either by intervening vacancies or other incidental causes, the term of a newly elected officer begins when the regular term or the provisional term, as the case may be, of his predecessor expires. Griebel *v.* State, 111 Ind. 369, 12 N. E. 700.

25. See *infra*, II, F, 3, b.

26. People *v.* Mizner, 7 Cal. 519; Shepherd *v.* Haralson, 16 La. Ann. 134; Dyer *v.* Bayne, 54 Md. 87.

27. U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, 733, 6 L. ed. 199.

2. Holding Over. An officer elected for a specific term and until his successor is elected and qualified may hold over for an indefinite period, if no successor is elected and qualified.[28] One who holds over after the expiration of his term, where no provision is made by statute for holding over, is, although not regarded as in most respects a *de jure* officer,[29] entitled to the salary appended to the office.[30] Nor may one holding over be punished as an intruder.[31] Where, however, provision is made by statute for holding over, the hold-over is regarded as in all respects a *de jure* officer, and the expiration of the term does not produce a vacancy which may be filled by the authority having the power to appoint to fill vacancies.[32] Such provisions do not, however, give a tenure of office which may

28. State *v.* Spears, Smith (Ind.) 360. See State *v.* Smith, 94 Iowa 616, 63 N. W. 453.

Where officer appointed or chosen for specific term.— It has been said that there is no common-law rule by which a public officer appointed or chosen for a specified term can hold office beyond that term upon the failure of the proper body to appoint or elect a successor. People *v.* Tieman, 30 Barb. (N. Y.) 193, 8 Abb. Pr. 359.

Termination of office.— Where the constitution provides for the creation of an office by the legislature, and the office is created with the provision that the incumbent shall be appointed and commissioned for a specified period, the office does not expire at the expiration of such period, but the appointee holds over until his successor is qualified. Walker *v.* Ferrill, 58 Ga. 512.

Under constitutional or statutory provision.— Where one is lawfully in possession of an office under a constitutional or statutory provision to the effect that he shall hold over until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral party as that to which such incumbent owes his election, or which by law is entitled to elect a successor. Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858. Under a statute providing that the officer shall hold until his successor is legally elected and qualified, the right accrues to the incumbent, whether he is appointed or elected. People *v.* Hardy, 8 Utah 68, 29 Pac. 1118. The word "elected," in Oreg. Const. art. 15, § 1, providing that public officers shall remain in office until their successors are "elected and qualified," does not refer solely to a selection by the people, but includes a choice by the legislative assembly. State *v.* Compson, 34 Oreg. 25, 54 Pac. 349. A constitutional provision that officers shall hold until their successors shall be duly qualified has been held to apply only to officers elected under the provisions of the constitution. Andrews *v.* State, 69 Miss. 740, 13 So. 853, holding that the terms of persons already in office were not affected.

Requalification.— Under some statutes express provision is made for the requalification of the incumbent of an office in case of the non-election of a successor. See Carter *v.* McFarland, 75 Iowa 196, 39 N. W. 268 (holding that a statute providing that an officer may qualify anew when he holds over by reason of the non-election of a successor or for the neglect or refusal of the successor to qualify does not authorize an incumbent to requalify where the board entitled to elect his successor has chosen a successor and taken an adjournment for the purpose of ascertaining whether such successor will accept and has elected another officer at the adjourned meeting, where the person first elected has refused to accept); State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

29. State *v.* O'Leary, 64 Minn. 207, 66 N. W. 264; Hawkins *v.* Cook, 62 N. J. L. 84, 40 Atl. 781; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; People *v.* Tieman, 30 Barb. (N. Y.) 193, 8 Abb. Pr. 359; State *v.* Sheldon, 8 S. D. 525, 67 N. W. 613. See Richmond Mayoralty Case, 19 Gratt. (Va.) 673. See also *supra*, II, D, 4.

30. People *v.* Oulton, 28 Cal. 44; Central *v.* Sears, 2 Colo. 588; Robb *v.* Carter, 65 Md. 321, 4 Atl. 282. *Contra*, Romero *v.* U. S., 24 Ct. Cl. 331, 5 L. R. A. 69.

31. Kreidler *v.* State, 24 Ohio St. 22. See, generally, *infra*, III, C, 4.

32. *Arkansas.*— Boyett *v.* Cowling, 78 Ark. 494, 94 S. W. 682.

California.— People *v.* Edwards, 93 Cal. 153, 28 Pac. 831; People *v.* Bissell, 49 Cal. 407; People *v.* Tilton, 37 Cal. 614.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Illinois.— Soucy *v.* People, 21 Ill. App. 370.

Indiana.— Koerner *v.* State, 148 Ind. 158, 47 N. E. 323; State *v.* Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

Iowa.— State *v.* Smith, 94 Iowa 616, 63 N. W. 453.

Missouri.— State *v.* Lusk, 18 Mo. 333.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602. This case holds also that a provision of statute, that one holding over on account of the non-election of his successor, must requalify within ten days, does not prevent such a one from qualifying after it has been judicially ascertained that there has been no election even if the decision is rendered after the expiration of the ten days.

Ohio.— State *v.* Howe, 25 Ohio St. 588, 18 Am. Rep. 321; State *v.* Darby, 12 Ohio Cir. Ct. 235, 4 Ohio Cir. Dec. 124.

not be forfeited by proper proceedings, as for removal for cause.[33] Nor do they give a claim to office to one whose term has been terminated by the qualification of a successor, if such successor dies before his term begins. In such case there is a vacancy in the office which should be filled in the proper way.[34] In some cases such provisions are regarded as imposing upon the incumbent of the office the duty of continuing in the office after the expiration of his term.[35] But where the right to resign is recognized such provisions are sometimes not regarded as taking it away.[36] Finally in case one holds over under such a statute in an elective office, statutes are, if possible, so construed as to provide for an election to fill the office at the election next succeeding the expiration of the term.[37] One who has accepted and exercised an office under a new appointment cannot claim that his tenure is a continuation of that under his original appointment.[38] So, although an officer may be entitled to hold when the legislature declares the office vacant, yet if he becomes a candidate for reëlection and is reëlected, his accepting and holding the office amounts to a surrender of his former title and he holds by virtue of his last election only.[39]

3. Vacancies in Office — a. Existence of Vacancy. A vacancy in office exists only where there is no person authorized by law to discharge the duties of the office. Therefore there is no vacancy in the office where there is a *de jure* incumbent of such office actually in possession of it.[40] The reasons for which an office will become vacant are to be fixed by the legislature, whose powers are liberally construed. Thus, it may, unless inhibited by the constitution, add new causes producing vacancy in office to those already provided in the constitution.[41]

Oregon.— State *v.* Compson, 34 Oreg. 25, 54 Pac. 349.

Pennsylvania.— Com. *v.* Hanley, 9 Pa. St. 513.

Wisconsin.— State *v.* Meilike, 81 Wis. 574, 51 N. W. 875.

See 37 Cent. Dig. tit. "Officers," § 74.

Contra.— Kline *v.* McKelvey, 57 W. Va. 29, 49 S. E. 896. See also People *v.* Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, holding that there was a vacancy, which might be filled by appointment, where one having the right to hold over had surrendered the office to another who was afterward judicially declared not to have been elected.

33. Hyde *v.* State, 52 Miss. 665.

34. Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395; People *v.* Ward, 107 Cal. 236, 40 Pac. 538; State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206; State *v.* Hopkins, 10 Ohio St. 509, which holds that the death of one who is appointed but did not qualify causes a vacancy.

35. Pell *v.* Ulmar, 21 Barb. (N. Y.) 500 [*reversed* on other grounds in 18 N. Y. 139]; Keen *v.* Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983; Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991. See also Scholl *v.* Bell, 102 S. W. 248, 31 Ky. L. Rep. 335.

36. State *v.* Page, 20 Mont. 238, 50 Pac. 719; Olmsted *v.* Dennis, 77 N. Y. 378, holding that a statute providing that an officer shall continue to discharge the duties of his office, although his office shall have expired, until a successor in such office shall have been duly qualified, applies only where a term of office has expired, not to a case of vacancy caused by resignation.

37. Dyer *v.* Bagwell, 54 Iowa 487, 6 N. W. 712; People *v.* Randall, 151 N. Y. 497, 45 N. E. 841.

38. Farrell *v.* Bridgeport, 45 Conn. 191.

39. Handy *v.* Hopkins, 59 Md. 157 (holding that officers who are candidates for reëlection, who are returned as reëlected and who qualified, cannot, upon the reëlection being declared invalid, claim to be entitled to hold over under their original election); *Ex p.* Gray, Bailey Eq. (S. C.) 77.

40. *California.*— People *v.* Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684; People *v.* Bissell, 49 Cal. 407; People *v.* Tilton, 37 Cal. 614; People *v.* Sanderson, 30 Cal. 160.

Colorado.— People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074.

Indiana.— State *v.* Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663. See also State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

Maryland.— Ijams *v.* Duvall, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127; Munroe *v.* Wells, 83 Md. 505, 35 Atl. 142; Smoot *v.* Somerville, 59 Md. 84.

Mississippi.— See Thomas *v.* Burrus, 23 Miss. 550, 55 Am. Dec. 154.

Missouri.— State *v.* Ralls County Ct., 45 Mo. 58.

New York.— People *v.* McAdoo, 110 N. Y. App. Div. 432, 96 N. Y. Suppl. 362; Tappan *v.* Gray, 9 Paige 507 [*affirmed* in 7 Hill 259].

Oregon.— State *v.* Compson, 34 Oreg. 25, 54 Pac. 349.

Wyoming.— State *v.* Henderson, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751.

See 37 Cent. Dig. tit. "Officers," § 76.

41. Schuff *v.* Pflanz, 99 Ky. 97, 35 S. W. 132, 18 Ky. L. Rep. 25; State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124. *Contra,* People *v.* Blair, 21 N. Y. App. Div.

The courts have, however, laid down the rule that, even in the absence of legislative provision, an office becomes vacant, when its incumbent accepts an incompatible office in the same state government or in the government of the United States.[42] But acceptance of a state office will not, under a state statute, vacate an office in the United States government, nor does the acceptance by an officer of a nomination for an election to an incompatible office vacate the office.[43] A vacancy in office, for any of the causes enumerated in the statute, occurs usually at the time of the happening of the event whose occurrence is by the statute the cause of the vacancy, and no judicial determination that a vacancy has occurred is necessary.[44] The only exception to this rule is to be found in the case that the vacancy is caused by misconduct on the part of the officer.[45] An office becomes vacant also by the death of the incumbent during his term of office.[46] But a vacancy in an office is not deemed to occur as a result of the death of one elected to office before the beginning of the new term, where the deceased has not qualified and where the term of the incumbent is until his successor has qualified.[47] There is no such vacancy, however, where there is no provision for holding over,[48] or, if there is such a provision, where the deceased qualified before his death.[49] In the case of an office held jointly by two or more persons the death of one of the incumbents will not vacate the office as to the others.[50]

b. Power to Fill Vacancies. In the absence of any constitutional or statutory provision, power to elect or appoint to office is to be regarded as including the power to fill vacancies.[51] The power to fill vacancies is not, however, a part of the executive power granted to the governor by the constitution.[52] But, in order to escape the inconvenience resulting from an interregnum, the power to fill vacancies is usually granted to some executive or administrative authority which is always capable of acting.[53] This authority in the United States government is the president,[54] and in the state governments is often the governor.[55] Where such a power is contained in a statute and the constitution provides for elective offices,

213, 47 N. Y. Suppl. 495 [*affirmed* in 154 N. Y. 734, 49 N. E. 1102].

42. See *supra*, II, C, 2, c.

43. See *supra*, II, C, 2, c.

44. *California.*— People *v.* Brite, 55 Cal. 79.

Indiana.— Osborne *v.* State, 128 Ind. 129, 27 N. E. 345; State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403. But *compare* State *v.* Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

Kentucky.— Long *v.* Bowen, 94 Ky. 540, 23 S. W. 343, 15 Ky. L. Rep. 276; Bowen *v.* Long, 44 S. W. 647, 19 Ky. L. Rep. 1881.

Louisiana.— State *v.* Beard, 34 La. Ann. 273.

Nebraska.— State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

New Jersey.— Oliver *v.* Jersey City, 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412.

New York.— People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People *v.* Glass, 19 N. Y. App. Div. 454, 46 N. Y. Suppl. 572.

Virginia.— Shell *v.* Cousins, 77 Va. 328.

See 37 Cent. Dig. tit. "Officers," § 84.

45. Page *v.* Hardin, 8 B. Mon. (Ky.) 648; State *v.* Baird, 47 Mo. 301. See also *supra*, II, A, 5.

46. State *v.* Vincent, (S. D. 1905) 104 N. W. 914; State *v.* Elliott, 13 Utah 471, 45 Pac. 346. But see State *v.* Hopkins, 10 Ohio St. 509.

47. State *v.* Benedict, 15 Minn. 198; State *v.* Dahl, 55 Ohio St. 195, 45 N. E. 56; Com. *v.* Hanley, 9 Pa. St. 513.

48. State *v.* Hunt, 54 N. H. 431. See also *In re* Supreme Ct. Vacancy, 4 S. D. 532, 57 N. W. 495.

49. People *v.* Ward, 107 Cal. 236, 40 Pac. 538; State *v.* Bemenderfer, 96 Ind. 374; State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

50. People *v.* Palmer, 52 N. Y. 83; Reg. *v.* Wake, 8 E. & B. 384, 4 Jur. N. S. 68, 27 L. J. Q. B. 11, 6 Wkly. Rep. 36, 92 E. C. L. 384.

51. People *v.* Campbell, 2 Cal. 135; People *v.* Fitch, 1 Cal. 519.

52. Peyton *v.* Cabaniss, 44 Miss. 808.

53. See the constitutions and statutes of the several states. And see Scholl *v.* Bell, 102 S. W. 248, 31 Ky. L. Rep. 335.

54. U. S. Const. art. 2, § 2, par. 3.

55. *Florida.*—*In re* Executive Communication, 25 Fla. 436, 5 So. 613.

Indiana.— State *v.* Hyde, 121 Ind. 20, 22 N. E. 644.

Louisiana.— State *v.* Lamantia, 33 La. Ann. 446; State *v.* Van Tromp, 27 La. Ann. 569.

Mississippi.— State *v.* Lovell, 70 Miss. 309, 12 So. 341; Sam *v.* State, 31 Miss. 480.

Nevada.— Sawyer *v.* Haydon, 1 Nev. 75.

New York.—See Matter of Bartlett, 9 How. Pr. 414.

North Carolina.— Nichols *v.* McKee, 68 N. C. 429.

North Dakota.— State *v.* Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

such provision is regarded as unconstitutional if it provides for appointment for a term extending beyond the next election.[56] In these cases, as well as in others specially provided in the statutes, the vacancy, if occurring more than a certain number of days before an election, is to be filled by election.[57] Where this is the rule the kind of election, as for example election for "local" or "state" officers, is prescribed in the statutes. Such a provision is mandatory, and an election held contrary to it is void.[58] *De facto* officers may make a good appointment to fill a vacancy.[59] Inasmuch as the power to fill the office for the full term is not usually possessed by the authority having power to fill vacancies, nice questions often arise as to whether a vacancy exists which may be filled by the latter authority. The power to fill vacancies is narrowly construed.[60] This principle of narrow construction is applied where the power to fill vacancies given to the executive is limited to vacancies occurring during the recess of the senate. Thus the executive may not appoint to a vacancy occurring during the session.[61] The usual rule is that a vacancy exists which may be filled by the authority having power to fill vacancies, where the authority having power to fill the office permanently has adjourned without filling the office. This rule applies also to newly created offices.[62] But where the power to fill vacancies is limited to the recess of the senate, the creation of a new office during the session does not create a vacancy.[63] And vacancies do not exist on the expiration of the fixed term of the incumbent, where under the law he is to hold over.[64] The term of one appointed to fill a vacancy depends for its length upon the constitution or statute which regulates the power to fill vacancies. Thus, in the United States national government, the term of such an officer cannot be extended beyond the end of the next session of congress and may be cut short by a permanent appointment.[65] In many of the

Pennsylvania.—Com. *v.* Maxwell, 27 Pa. St. 444.

See 37 Cent. Dig. tit. "Officers," § 85.

56. Atty.-Gen. *v.* Trombly, 89 Mich. 50, 50 N. W. 744.

57. Cobb *v.* Hammock, (Ark. 1907) 102 S. W. 382; Boyett *v.* Cowling, 78 Ark. 494, 94 S. W. 682; Robinson *v.* McCandless, 96 S. W. 877, 29 Ky. L. Rep. 1088.

58. Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823.

59. Brinkerhoff *v.* Jersey City, 64 N. J. L. 225, 46 Atl. 170; State *v.* Jacobs, 17 Ohio 143. See Farrier *v.* Dugan, 48 N. J. L. 613, 7 Atl. 881 [*affirming* 47 N. J. L. 383, 1 Atl. 751]. But see Matter of Smith, 116 N. Y. App. Div. 665, 101 N. Y. Suppl. 992 [*affirming* 49 Misc. 567, 100 N. Y. Suppl. 179], holding that under Public Officers Law (Laws (1892), p. 1657, c. 681), providing that certain officers shall hold over until their successors are chosen and qualified, but making the office vacant at the expiration of their term for the purpose of choosing their successors, a supervisor of a town had no right to vote upon a resolution of the town board to appoint his successor.

Legal title.— It has been held, however, that one appointed to office by a *de facto* officer is not possessed of the legal title to the office and therefore may not recover in a suit for the official compensation. Jersey City *v.* Erwin, 59 N. J. L. 282, 35 Atl. 948. But see State *v.* Alling, 12 Ohio 16, where it was held that one appointed by a *de facto* authority had the legal title to the office.

60. Berry *v.* McCollough, 94 Ky. 247, 22 S. W. 78, 15 Ky. L. Rep. 117.

61. *In re* U. S. Dist.-Atty., 7 Fed. Cas. No. 3,924.

The contrary doctrine is, however, laid down in the very well considered case of Fritts *v.* Kuhl, 51 N. J. L. 191, 17 Atl. 102.

62. *Arkansas.*— Smith *v.* Askew, 48 Ark. 82, 2 S. W. 349.

Georgia.— Gormley *v.* Taylor, 44 Ga. 76.

Indiana.— State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; Stocking *v.* State, 7 Ind. 326.

Missouri.— State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

Nevada.— State *v.* Irwin, 5 Nev. 111.

Pennsylvania.— Walsh *v.* Com., 89 Pa. St. 419, 33 Am. Rep. 771.

Wyoming.— *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

But *compare* Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

63. People *v.* Opel, 188 Ill. 194, 58 N. E. 996; People *v.* Forquer, 1 Ill. 104; Collins *v.* State, 8 Ind. 344; O'Leary *v.* Adler, 51 Miss. 28.

64. See *supra*, II, F, 2.

65. U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. ed. 199; *In re* Alabama Southern, etc., Dist. Marshalship, 20 Fed. 379.

The same provision is found in some of the states.— People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684; People *v.* Langdon, 8 Cal. 1; People *v.* Mizner, 7 Cal. 519; Kroh *v.* Smoot, 62 Md. 172. Such a constitutional provision does not apply to statutory offices, where the statute, in accord with the constitution, provides for appointment to fill vacancies by the governor alone. Ash *v.* McVey, 85 Md. 119, 36 Atl. 440.

states, however, as a result either of a statute or of judicial decision, the term expires in the case of elective offices, on the qualification of the successor of the person filling the vacancy, who is chosen at the first general election after the vacancy occurs.[66] In the case of appointive offices it is not uncommonly provided that the term of one appointed to fill a vacancy shall expire at the expiration of the term of the preceding incumbent.[67] One elected or appointed to fill a vacancy is also, in the absence of statutory provision, presumed to be elected or appointed for the unexpired term.[68] One elected or appointed to fill a vacancy holds over in the same way as would the person whose place he takes.[69]

G. Resignation, Suspension, or Removal[70] — **1. Resignation.** The recognition of a right to resign office may result in an interregnum. Therefore the courts, when not governed in their decisions by statutory provisions, recognize no such right to resign if its exercise will result in a vacancy.[71] Where, however, the exercise of the right to resign will not produce an interregnum which will be productive of injury to private rights, the right to resign is recognized.[72] As a general rule the acceptance of the resignation by the proper authority is necessary to its validity.[73] Acceptance of the resignation would not seem, however, to be

66. *Arkansas.*— Cobb *v.* Hammock, (1907) 102 S. W. 382.

California.— People *v.* Mathewson, 47 Cal. 442.

Colorado.— Mannix *v.* Selbach, 31 Colo. 502, 74 Pac. 460.

Florida.— *In re* Executive Communication, 25 Fla. 426, 5 So. 613; State *v.* Gamble, 13 Fla. 9.

Indiana.— See Beale *v.* State, 49 Ind. 41. *Contra,* Carson *v.* State, 145 Ind. 348, 44 N. E. 360, construing § 7583, Burns Rev. St., and holding that the general rule in Indiana is that one elected to fill a vacancy shall hold for the unexpired term.

Iowa.— See Dyer *v.* Bagwell, 54 Iowa 487, 6 N. W. 712.

Kansas.— State *v.* Mechem, 31 Kan. 435, 2 Pac. 816.

Kentucky.—Jones *v.* Sizemore, 117 Ky. 810, 79 S. W. 229, 25 Ky. L. Rep. 1957.

New Jersey.— Hawkins *v.* Cook, 62 N. J. L. 84, 40 Atl. 781.

New York.— People *v.* Fitchie, 76 Hun 80, 28 N. Y. Suppl. 600.

Ohio.— State *v.* Slough, 12 Ohio Cir. Ct. 105, 5 Ohio Cir. Dec. 697.

Oregon.— State *v.* Johns, 3 Oreg. 533.

Pennsylvania.—See Stern's Case, 29 Pa. Co. Ct. 363, 7 Dauph. Co. Rep. 285.

South Dakota.— State *v.* Vincent, (1905) 104 N. W. 914.

Wisconsin.—State *v.* Bunnell, 131 Wis. 198, 110 N. W. 177.

See 37 Cent. Dig. tit. "Officers," § 88.

In the case of officers appointed by the governor and senate the same rule is applied. People *v.* Cazneau, 20 Cal. 503.

67. *Arizona.*— Sheen *v.* Hughes, 4 Ariz. 337, 40 Pac. 679.

California.— People *v.* Addison, 10 Cal. 1.

Florida.— *In re* Advisory Opinion to Governor, 31 Fla. 1, 12 So. 114, 18 L. R. A. 594.

Indiana.— Carson *v.* State, 145 Ind. 348, 44 N. E. 360.

New York.— People *v.* Comisky, 9 N. Y. App. Div. 263, 41 N. Y. Suppl. 238.

North Carolina.—Worley *v.* Smith, 81 N. C. 304; Cloud *v.* Wilson, 72 N. C. 155.

See 37 Cent. Dig. tit. "Officers," § 88.

68. Hoke *v.* Richie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132, 18 Ky. L. Rep. 546; Brooke *v.* Com., 86 Pa. St. 163. See *supra,* II, F, 1, d.

69. People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074; People *v.* Lord, 9 Mich. 227.

70. Of particular officers see special titles relating thereto, and cross-references at the head of this article.

71. Thus, where by law the term of an officer is until his successor has qualified, the resignation of the office, even if accepted by the authority provided by law for the acceptance of resignations, will be treated as of no effect until a successor has duly qualified. U. S. *v.* Green, 53 Fed. 769; Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991.

72. Gates *v.* Delaware County, 12 Iowa 405; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; Jennings' Case, 12 Mod. 402; Taylor's Case, Poph. 133, 79 Eng. Reprint 1236; Le Roy *v.* Tidderley, 1 Sid. 14, 82 Eng. Reprint 941.

Pending removal proceedings an officer may resign. State *v.* Dart, 57 Minn. 261, 59 N. W. 190; Roberts *v.* Paull, 50 W. Va. 528, 40 S. E. 470.

73. *Kentucky.*— Patrick *v.* Hagins, 41 S. W. 31, 19 Ky. L. Rep. 482.

Michigan.— Clark *v.* Detroit Bd. of Education, 112 Mich. 656, 71 N. W. 177.

New Jersey.— Fryer *v.* Norton, 67 N. J. L. 537, 52 Atl. 476; State *v.* Ferguson, 31 N. J. L. 107.

New York.— Van Orsdall *v.* Hazard, 3 Hill 243.

United States.— Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314. The attempted revocation of such acceptance will not restore to office one who has resigned. Mimmack *v.* U. S., 97 U. S. 426, 24 L. ed. 1067.

The authority competent to accept the resignation is, in the absence of statutory provision regulating the matter, the author-

necessary in the case of offices which take all of the time of the incumbent, particularly offices in the federal government.[74] Where the resignation to be valid must be accepted, no formal method of acceptance is necessary.[75] Where the absolute right to resign is recognized, resignation will be deemed to be complete when the office is relinquished and no formal method of resignation is necessary. In the absence of statute to the contrary office may be resigned by parol.[76] So a resignation may be either express or by implication,[77] as for example, from the acceptance of an incompatible office,[78] except in those cases in which the right to resign is not recognized,[79] or by removal from the state or district where residence in the state or district is one of the necessary qualifications for office;[80] but the intention to resign must be present.[81] An unconditional resignation which has been transmitted to the authority entitled to receive it,[82] and a resignation implied from the acceptance of an incompatible office, may not be withdrawn.[83] But a resignation conditional in character or to take effect in the future may be withdrawn.[84]

2. Abandonment. Office may also be terminated by abandonment. Abandonment means failure to perform the duties of the office.[85] But a mere partial neglect or non-user is not regarded as evidence of its abandonment.[86] Nor will failure on the part of a superseded incumbent to keep up a clamor for reinstatement or

ity which by law has the right to fill the vacancy occasioned by the resignation. Fryer *v.* Norton, 67 N. J. L. 537, 52 Atl. 476.

74. State *v.* Clarke, 3 Nev. 566; U. S. *v.* Wright, 28 Fed. Cas. No. 16,775, 1 McLean 509.

75. Pace *v.* People, 50 Ill. 432 (holding that filing without objection of a resignation will be deemed to be valid); McGee *v.* State, 103 Ind. 444, 3 N. E. 139 (holding that the appointment of a successor will be deemed to be an acceptance of the resignation); Gates *v.* Delaware County, 12 Iowa 405. But see State *v.* Pollner, 18 Ohio Cir. Ct. 304, 10 Ohio Cir. Dec. 141, holding, that to be valid, a resignation must be sent to the person authorized to fill the vacancy.

76. Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; Barbour *v.* U. S., 17 Ct. Cl. 149; Jenning's Case, 12 Mod. 402. See also *supra*, II, C, 2, c.

77. Barbour *v.* U. S., 17 Ct. Cl. 149. See State *v.* Clark, 1 Head (Tenn.) 369.

78. See *supra*, II, C, 2, c.

79. State *v.* Newark, 8 Ohio S. & C. Pl. Dec. 344, 6 Ohio N. P. 523; Rex *v.* Patteson, 4 B. & Ad. 9, 2 L. J. K. B. 33, 1 N. & M. 612, 24 E. C. L. 15; Worth *v.* Newton, 2 C. L. R. 1471, 10 Exch. 247, 23 L. J. Exch. 338, 2 Wkly. Rep. 628.

80. People *v.* Brite, 55 Cal. 79; Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Matter of Buhler, 43 Misc. (N. Y.) 140, 88 N. Y. Suppl. 195.

But the temporary absence of a public officer from the district will not be regarded as a resignation. McGregor *v.* Allen, 33 La. Ann. 870. See *supra*, II, C, 1, j.

81. Atty.-Gen. *v.* Poole, 8 Beav. 75, 9 Jur. 318, 14 L. J. Ch. 101, 50 Eng. Reprint 30.

82. *Alabama.*— State *v.* Fitts, 49 Ala. 402.

Indiana.— State *v.* Hauss, 43 Ind. 105, 13 Am. Rep. 384.

Michigan.— Pariseau *v.* Escanaba Bd. of Education, 96 Mich. 302, 55 N. W. 799.

Missouri.— State *v.* Augustine, 113 Mo. 21, 20 S. W. 651, 35 Am. St. Rep. 696.

Tennessee.— Murray *v.* State, 115 Tenn. 303, 89 S. W. 101.

See 37 Cent. Dig. tit. "Officers," § 93.

83. Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278; State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; State *v.* Goff, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921. See also Shell *v.* Cousins, 77 Va. 328.

84. People *v.* Porter, 6 Cal. 26; Biddle *v.* Willard, 10 Ind. 62; State *v.* McGrath, 64 Mo. 139; State *v.* Beck, 24 Nev. 92, 49 Pac. 1035.

A resignation made before qualification for office is void and one who withdraws such attempted resignation may subsequently qualify for the office. Miller *v.* Sacramento County, 25 Cal. 93.

85. *California.*— People *v.* Hartwell, 67 Cal. 11, 6 Pac. 873.

Illinois.—People *v.* Spencer, 101 Ill. App. 61.

Indiana.— State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367.

New York.— Colton *v.* Beardsley, 38 Barb. 29.

United States.— Barbour *v.* U. S., 17 Ct. Cl. 149.

86. Page *v.* Hardin, 8 B. Mon. (Ky.) 648; State *v.* Peck, 30 La. Ann. 280, where an officer arranged with a deputy to perform the duties of the office.

Involuntary abandonment.— It has been held that a statute providing that an office becomes vacant by the ceasing of the incumbent to discharge the duties of the office for a period of three consecutive months, except when prevented by sickness or when absent from the state by permission of the legislature, contemplates a "voluntary" abandonment or nonuser of the office for three consecutive months, and an involuntary failure on the part of the incumbent to perform the duties of his office, caused by his incarceration for a felony during the statutory period, does not operate as an abandonment of the office. Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248.

to take legal proceedings therefor,[87] or the fact that the officer does not compel a forcible ouster from the possession of the office room, books, records, etc.,[88] be regarded as an abandonment. The determination of the question whether an officer has abandoned his office is dependent upon his overt acts rather than upon his declared intentions. Thus one who, disclaiming any intention to abandon his office, left it for seventeen months was held to have abandoned it.[89] It need not be determined judicially that an office has been abandoned in order that in a collateral proceeding the office be deemed to have been abandoned;[90] and in subsequent proceedings, either to regain possession of the office or otherwise, one who has abandoned an office is estopped from asserting a claim to such office.[91]

3. Suspension. The power to suspend an officer pending charges may be given by statute in the absence of a constitutional inhibition, and its exercise by the competent authority under the statute does not violate any constitutional right of officers.[92] Where no express power to suspend has been granted the courts do not recognize that the power is included within the arbitrary power to remove, for the exercise of the power to suspend will produce an interregnum in office. The ends of discipline in such a case may be sufficiently subserved by the exercise of the power of removal and do not require the recognition of a power to suspend.[93] But where the power of removal is limited to cause, the power to suspend, made use of as a disciplinary power pending charges, is regarded as included within the power of removal.[94] Power to suspend may be exercised without notice to the person suspended,[95] and the suspension, when made in the exercise of a legal power to suspend, is irreviewable by the courts,[96] and takes effect from the time that the order of suspension is issued and served.[97] But where the power to suspend pending decision on charges to remove is given to one authority and the power to remove is given to another the acquittal on the removal charges acts as a reinstatement of the one suspended.[98] A suspension from office will not make the one suspended ineligible for a succeeding term of the same office;[99] but does make him ineligible for the remainder of the same term until his reinstatement, or the

87. State *v.* Frantz, 55 Nebr. 167, 75 N. W. 546; Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307.

One who being suspended from office treats his suspension as a removal and makes no effort whatever to obtain possession of the office will, however, be regarded as having abandoned it. Wardlaw *v.* New York, 137 N. Y. 194, 33 N. E. 140; Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19.

88. Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989.

89. Atty.-Gen. *v.* Maybury, 141 Mich. 31, 104 N. W. 324, 113 Am. St. Rep. 512. See also Barbour *v.* U. S., 17 Ct. Cl. 149, holding that resignation by one insane is good.

90. Osborne *v.* State, 128 Ind. 129, 27 N. E. 345; Atty.-Gen. *v.* Maybury, 141 Mich. 31, 104 N. W. 324, 113 Am. St. Rep. 512; Colton *v.* Beardsley, 38 Barb. (N. Y.) 29. But see *supra*, II, A, 5.

91. State *v.* Moores, 52 Nebr. 634, 72 N. W. 1056; Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

92. Sumpter *v.* State, 81 Ark. 60, 98 S. W. 719; Allen *v.* State, 32 Ark. 241. See also *Ex p.* Wiley, 54 Ala. 226.

93. Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854. See also Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269 (which holds that a mayor having no power to remove has no power to suspend); State *v.* Jersey City, 25 N. J. L. 536 (in which it is held that the power of a city council to expel a member does not give the power to suspend him, since suspension creates no vacancy which can be filled but deprives the council of the services of one of its members); U. S. *v.* Wickersham, 201 U. S. 390, 26 S. Ct. 469, 50 L. ed. 798 (which gave judgment for his salary during the time he was suspended to an officer suspended without a hearing by his superior, where his superior had only a power to remove after giving a hearing). *Contra*, State *v.* Peterson, 50 Minn. 239, 52 N. W. 655; Shannon *v.* Portsmouth, 54 N. H. 183. See also State *v.* Lingo, 26 Mo. 496, in which it is held that a power given to a city council to "provide for removing any officer" of the city authorizes the council to provide for the suspension of such officers by the mayor.

94. State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534; State *v.* Police Com'rs, 16 Mo. App. 48; Slingsby's Case, 3 Swanst. 178, 36 Eng. Reprint 821.

95. State *v.* Johnson, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410.

96. *In re* Alabama Southern, etc., Dist. Marshalship, 20 Fed. 379.

97. State *v.* Peterson, 50 Minn. 239, 52 N. W. 655.

98. State *v.* Heinmiller, 38 Ohio St. 101.

99. *In re* Advisory Opinion to Governor, 31 Fla. 1, 12 So. 114, 18 L. R. A. 594.

withdrawal of the charges.[1] During suspension the officer is not entitled, in the absence of statutory provision, to the salary attached to the office.[2] Nor is he entitled in case of reinstatement to the reimbursement of the expenses to which he may have been put in defending himself against any charges made against him.[3] The powers of a federal officer suspended by the president are not revived by the failure of the senate to confirm the permanent appointment of the person appointed to fill the vacancy.[4]

4. REMOVAL FROM OFFICE — a. In General. As the right to hold office is not a vested right the legislature may within the limits of the constitution provide methods by which the incumbents of office may be removed from office before the expiration of their terms.[5] But the legislature may not provide methods of removing officers inconsistent with the provisions of the constitution.[6] If we consider the methods thus provided from the view point of the removing authority, we may distinguish three methods of removal, namely, judicial, executive, legislative.

b. Removal by Courts. The powers of removal from office possessed by the courts may be distinguished as the power to forfeit an office for one of the causes specified by law,[7] the power on quo warranto or similar proceedings[8] to oust one from office who has illegally taken possession thereof, and the power by special judicial proceedings to remove from office as a disciplinary power. As these special judicial proceedings are based upon a statute,[9] the provisions of the statute must be followed.[10] Such methods of removal are often treated as partaking of

1. State *v.* Dart, 57 Minn. 261, 59 N. W. 190.

2. See *infra*, IV, A, 1, a.

3. *In re* Simmers, 12 Pa. Dist. 285, 27 Pa. Co. Ct. 658.

4. *In re* Alabama Southern, etc., Dist. Marshalship, 20 Fed. 379.

5. *Colorado.*— Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236.

Kentucky.— Hoke *v.* Richie, 100 Ky. 66, 37 S. W. 83, 38 S. W. 132, 18 Ky. L. Rep. 523.

Michigan.—Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644.

Minnesota.— State *v.* Thompson, 91 Minn. 279, 97 N. W. 887.

North Carolina.— State *v.* Wilson, 121 N. C. 480, 28 S. E. 554.

Vested rights in office see, generally, CONSTITUTIONAL LAW, 8 Cyc. 908.

Delegation of authority to remove see *supra*, II, A, 5.

6. Brown *v.* Grover, 6 Bush (Ky.) 1; Lowe *v.* Com., 3 Metc. (Ky.) 237; *Ex p.* Lehman, 60 Miss. 967; State *v.* McLain, 58 Ohio St. 313, 50 N. E. 907. See State *v.* Wiltz, 11 La. Ann. 439.

Authority to remove officer see *supra*, II, A, 5.

7. See *supra*, II, A, 5.

8. See QUO WARRANTO.

9. See the statutes of the several states.

10. *Alabama.*— State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426; State *v.* Seawell, 64 Ala. 225.

California.— See *In re* Marks, 45 Cal. 199, holding that jurisdiction was vested in the district court.

Indiana.— See Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613.

Louisiana.— State *v.* Cannon, 45 La. Ann. 1231, 14 So. 130.

Massachusetts.— Bullock *v.* Aldrich, 11 Gray 206.

North Dakota.— Wishek *v.* Becker, 10 N. D. 63, 84 N. W. 590.

See 37 Cent. Dig. tit. "Officers," § 101.

Right to trial by jury in proceeding to remove see JURIES, 24 Cyc. 134.

Are judicial proceedings.— The origination and trial of the impeachment of a public officer is a judicial proceeding. Beall *v.* Beall, 8 Ga. 210, 228.

Persons who may institute.— It is sometimes held that the proceedings may not be initiated by a private person. Wishek *v.* Becker, 10 N. D. 63, 84 N. W. 590; Com. *v.* Sutherland, 3 Serg. & R. (Pa.) 145; Minnehaha County *v.* Thorne, 6 S. D. 449, 61 N. W. 688. *Contra*, Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843; Hays *v.* Simmons, 6 Ida. 651, 59 Pac. 182; Skeen *v.* Paine, (Utah 1907) 90 Pac. 440. See Corker *v.* Pence, 12 Ida. 152, 85 Pac. 388, holding that under Rev. St. (1887) § 7459, a corrupt official may be prosecuted by a private person for acts therein specified, while, under section 7445, the accusation must be by prosecuting attorney or presented by grand jury for other wilful or corrupt misconduct. In other cases the proceedings may be initiated by a private person with the consent of the court. Smith *v.* Brennan, 49 Tex. 681; State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982. *Contra*, State *v.* Whitlock, 41 Ark. 403. But it has been held that even if under the statute the accusation is to be made by a private person such person is not a party plaintiff so as to entitle him to judgment for such sum as the court may authorize to be awarded to the prosecuting officer (Pugh *v.* Miller, 27 Ind. App. 522, 61 N. E. 739); nor is he responsi-

the nature of a criminal action.[11] At the same time the strictness which has to be observed in criminal proceedings is not usually required. Thus, it is quite common not to require that the accusation shall, like an indictment, have reference only to a single offense.[12] In these cases of removals by courts the courts

ble for costs (Rowe *v.* Bateman, 153 Ind. 633, 54 N. E. 1065, 55 N. E. 754).

Who may be proceeded against.— Under Utah Rev. St. (1898) § 4580, authorizing proceedings to remove from office officials guilty of charging and collecting illegal fees for services rendered, an officer who is not paid by fee, but who receives a fixed salary, may be proceeded against. Skeen *v.* Craig, 31 Utah 20, 86 Pac. 487.

Abatement.— The resignation of an officer pending proceedings to remove him for malfeasance does not abate the proceedings, but they may be continued for the purpose of determining his eligibility for the remainder of the term, or a succeeding term (State *v.* Dart, 57 Minn. 261, 59 N. W. 190), but otherwise resignation may take place pending proceedings to remove and will cause such proceedings to abate (Roberts *v.* Paul, 50 W. Va. 528, 40 S. E. 470).

11. *Alabama.*— State *v.* Tally, 102 Ala. 25, 15 So. 722, holding that guilt of respondent must be established beyond a reasonable doubt.

California.— Kilburn *v.* Law, 111 Cal. 237, 43 Pac. 615; *In re* Stow, 98 Cal. 587, 33 Pac. 490, applying the principle of strict construction which is so uniformly applied in criminal proceedings. But see *In re* Curtis, 108 Cal. 661, 41 Pac. 793.

Georgia.— Cobb *v.* Smith, 102 Ga. 585, 27 S. E. 763.

Idaho.— Smith *v.* Ellis, 7 Ida. 196, 61 Pac. 695, holding that the state is a proper party plaintiff. But *compare* Rankin *v.* Jauman, 4 Ida. 53, 36 Pac. 502, holding that Rev. St. (1887) § 7459, providing for a summary hearing and removal of an officer for misdemeanors or corruption in office, and a judgment in favor of the informer, with costs, does not violate the constitutional provision which requires an information or indictment in criminal cases.

South Dakota.— Minnehaha County *v.* Thorne, 6 S. D. 449, 61 N. W. 688, in which it is held that because of the principle adopted in these cases, which requires the strictest possible construction, a complaint under the statute which does not allege that the county commissioners have brought the action in their official capacity is demurrable.

But see Skeen *v.* Paine, (Utah 1907) 90 Pac. 440, holding that the proceedings specified by Rev. St. (1898) § 4580, for the removal of public officers for misconduct, are civil, and not criminal, so that, where the facts are not in dispute, the trial court may direct a verdict of guilty on the law applicable to the facts, but holding that in such a prosecution, however, the rules governing the introduction of evidence in criminal cases must be followed, and the guilt of defendant must be established with the same degree of positive proof as is required in criminal prosecutions generally.

Necessity of indictment on removal because of crime see INDICTMENTS AND INFORMATIONS, 22 Cyc. 183 note 71.

Presentment by grand jury.— Accusations for removal from office for malfeasance must be presented by a grand jury. State *v.* Richardson, (N. D. 1906) 109 N. W. 1026.

12. *In re* Burleigh, 145 Cal. 35, 78 Pac. 242; Ponting *v.* Isaman, 7 Ida. 283, 62 Pac. 680; Bland *v.* State, (Tex. Civ. App. 1896) 38 S. W. 252. See also Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507, holding that a formal arraignment of defendant is not necessary.

Requisites of information.— An information under Ida. Rev. St. (1887) § 7459, for the purpose of removal of a public officer from office, must contain language sufficient to charge defendant with being guilty of charging and collecting illegal fees for services rendered, or sufficient to charge him with refusing or neglecting to perform official duties pertaining to his office, and should be made positively when the facts are of record or within the personal knowledge of defendant, and otherwise on information and belief. Corker *v.* Ward, 12 Ida. 165, 85 Pac. 392; Corker *v.* Pence, 12 Ida. 152, 85 Pac. 388.

Objections to complaint.— In proceedings under N. D. Rev. Code (1905), § 9646, or N. D. Rev. Code (1899), § 7838, for the removal of public officials, it is proper to object to the accusation on any ground one might assign by way of demurrer to a complaint, and, if objections are overruled, an answer must be filed and trial had in a summary manner. State *v.* Richardson, (N. D. 1906) 109 N. W. 1026. Objections to an information for the removal of an officer under Ida. Rev. St. (1887) § 7459, are sufficient if the grounds are intelligibly presented in writing whether in the form of a demurrer or motion to dismiss. Rankin *v.* Jauman, 4 Ida. 53, 36 Pac. 502.

Delay.— It has been held under Cal. Pen. Code, § 772, providing for the removal of public officers, and declaring that on the filing of the petition the court must cite the party charged to appear at a time not more than ten nor less than five days from the time the accusation is presented, and on that day, or a subsequent day not more than twenty days after the accused was to appear, must proceed to hear the accusation in a summary manner; that the limitation of time within which the proceedings should be heard was merely intended to guarantee to accused a speedy hearing, and hence, where he appeared on the day set for trial and proceeded to trial without objection on account of delay, he could not thereafter object that the court lost jurisdiction to try the cause

may remove one for an offense which is punishable criminally, even where such person has not been convicted on an indictment for such offense, and constitutional provisions that one shall not be answerable for a criminal offense except on indictment do not apply.[13] Inasmuch, however, as the court is authorized in most cases to remove for specified causes only, an attempted removal for a cause not specified is improper.[14] Such proceedings to remove are not commonly regarded as judicial in character. Thus an appeal will not, in the absence of statutory provision, lie from the determination to remove,[15] and the dismissal by the court of an application to remove is no bar to its renewal when the grounds of such dismissal are shown to be unfounded.[16] The reversal of a judgment removing an officer from an office removes the only impediment to his office, and he is in law the only lawful holder of the same, and an order of court is not necessary to restore him thereto.[17]

e. **Removal by Executive and Administrative Officers.** The powers of removal of the executive authorities are defined by the statutes upon which they depend,[18] except that the power of removal is by the common law regarded as incident to the power of appointment.[19] The executive power of removal is either an arbitrary or a conditional one. In case the power is an arbitrary one — and it is arbitrary when incident to the power of appointment — no formalities such as the presentment of charges or the granting of a hearing to the person removed are necessary to its lawful exercise.[20] The appointment of a successor even is

by reason of delay. Folsom *v.* Conklin, 3 Cal. App. 480, 86 Pac. 724.

13. Bland *v.* State, (Tex. Civ. App. 1896) 38 S. W. 252; Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335. But see Haskins *v.* State, 47 Ark. 243, 1 S. W. 242, holding that under Const. (1874) Bill of Rights, § 8, providing that "no person shall be held to answer a criminal charge, unless on the presentment or indictment of a grand jury," and art. 7, § 27, providing that "the circuit court shall have jurisdiction, upon information, presentment, or indictment, to remove any county or township officer from office, for incompetency . . . criminal conduct, malfeasance, misfeasance, or nonfeasance in office," the circuit court had no jurisdiction to remove a sheriff from office on information by the prosecuting attorney simply, for voluntarily allowing a prisoner in his custody to escape, as that is a criminal charge. *Contra*, Com. *v.* Jones, 10 Bush (Ky.) 725.

Constitutional provisions requiring indictment see INDICTMENTS AND INFORMATIONS, 22 Cyc. 178.

14. State *v.* Jaquis, 11 Ohio Cir. Dec. 91.

15. *In re* Curtis, 108 Cal. 661, 41 Pac. 793; Myrick *v.* McCabe, 5 N. D. 422, 67 N. W. 143.

In California it has been held that on summary civil procedure to remove an officer an appeal operates as a supersedeas (Morton *v.* Broderick, 118 Cal. 474, 50 Pac. 344; Covarrubias *v.* Santa Barbara County, 52 Cal. 622); but that such rule is not applicable to proceedings under the penal code (Woods *v.* Varnum, 83 Cal. 46, 23 Pac. 137).

Saving questions for review.—The supreme court will not review the evidence in a special proceeding instituted under the provisions of Wash. Laws (1895), c. 65, p. 114, unless settled in a statement of facts or bill of exceptions, and certified by the judge of the trial court, in accordance with Laws (1893), p. 115, § 11, as containing all the material facts. Taylor *v.* Tacoma, 15 Wash. 92, 45 Pac. 641.

16. People *v.* Eddy, 3 Lans. (N. Y.) 80.

17. Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

18. State *v.* Thompson, 91 Minn. 279, 97 N. W. 887; People *v.* McGuire, 27 N. Y. App. Div. 593, 50 N. Y. Suppl. 520.

Joint action of legislature.— Where the removal of a public officer is, by statute, given to two distinct bodies, and a request to assemble in joint meeting is made by one body to the other, and the two bodies do assemble in joint meeting, although not for the purpose of making the removal, but for the transaction of other business, and whilst in joint meeting it be agreed by a majority of voices to proceed to the removal of the officer, and a ballot be taken, removing him, such removal is valid, although all the members of one of the bodies refuse to act in the matter, leave the joint meeting, and are not present during the balloting, provided that a majority of the whole number of both bodies concur in the removal. Whiteside *v.* People, 26 Wend. (N. Y.) 634.

19. See *supra*, II, A, 5.

20. *California.*— Sponogle *v.* Curnow, 136 Cal. 580, 69 Pac. 255; Patton *v.* San Francisco Bd. of Health, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66; Farrell *v.* San Francisco Police Com'rs, 1 Cal. App. 5, 81 Pac. 674.

Florida.— State *v.* Ledwith, 14 Fla. 220.

Louisiana.— State *v.* Rost, 47 La. Ann. 53, 16 So. 776.

Massachusetts.— O'Dowd *v.* Boston, 149 Mass. 443, 21 N. E. 949.

Michigan.— Trainor *v.* Wayne County, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

regarded as a removal of the prior incumbent.[21] It is not necessary that the cause assigned for removal should be stated in the precise language of the statute.[22] The investigation by a board, under statutory authority, of charges against an appointee will not be enjoined by reason of the fact that separate committees of each house of the legislature have investigated the charges and reported in favor of the incumbent, since such reports are not conclusive upon the board.[23]

d. Removal For Cause. A conditional or limited power of removal, as for cause, may, however, be exercised only after charges have been made against and a hearing accorded the person to be removed.[24] But if the power to remove is for a specified cause or other cause satisfactory to the removing authority no hearing need be given.[25] Where charges must be made and a hearing given in order

Minnesota.— State *v.* Schram, 82 Minn. 420, 85 N. W. 155.

Missouri.— State *v.* Hawes, 177 Mo. 360, 76 S. W. 653.

New Jersey.— Sweeney *v.* Stevens, 46 N. J. L. 344.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— People *v.* Whitlock, 92 N. Y. 191; People *v.* McFadden, 75 N. Y. App. Div. 264, 78 N. Y. Suppl. 87; People *v.* Henry, 47 N. Y. App. Div. 133, 62 N. Y. Suppl. 102; People *v.* Dalton, 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1112.

North Dakota.— State *v.* Archibald, 5 N. D. 359, 66 N. W. 234.

Ohio.— Sc^ Littleton *v.* Board of Infirmary Directors, 18 Ohio Cir. Ct. 891, 9 Ohio Cir. Dec. 850.

Pennsylvania.— Field *v.* Com., 32 Pa. St. 478.

Texas.— See Keenan *v.* Perry, 24 Tex. 253.

Washington.— State *v.* Burke, 8 Wash. 412, 36 Pac. 281.

Wisconsin.— State *v.* McGarry, 21 Wis. 496.

United States.— Shurtleff *v.* U. S., 189 U. S. 311, 23 S. Ct. 535, 47 L. ed. 828; Reagan *v.* U. S., 182 U. S. 419, 21 S. Ct. 842, 45 L. ed. 1162; *Ex p.* Hennen, 13 Pet. 230, 10 L. ed. 138.

England.— Reg. *v.* Darlington Free Grammar School, 6 Q. B. 682, 9 Jur. 21, 14 L. J. Q. B. 67, 51 E. C. L. 682; Matter of Teather, 19 L. J. M. C. 70.

See 37 Cent. Dig. tit. "Officers," § 102.

21. Parish *v.* St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. Rep. 374; Daily *v.* Essex County, 58 N. J. L. 319, 33 Atl. 739; Keenan *v.* Perry, 24 Tex. 253; Smyth *v.* Latham, 9 Bing. 692, 1 Cromp. & M. 547, 2 L. J. Exch. 241, 3 M. & Scott 251, 23 E. C. L. 763.

Invalid appointment.— But where an officer attempts to remove an officer by the appointment of a successor, an invalid appointment does not remove the prior incumbent. Territory Bd. of Education *v.* Territory, 12 Okla. 286, 70 Pac. 792.

22. People *v.* Higgins, 15 Ill. 110, holding that where the statute authorizes the removal of an officer upon the ground of incompetency, a resolution removing such officer because he "does not possess the kind of qualifications which are necessary to the discharge of the duties of said office" shows a removal for the statutory cause.

23. Miller *v.* Longview Asylum, 7 Ohio Dec. (Reprint) 650, 4 Cinc. L. Bul. 690.

24. *Colorado.*— Benson *v.* People, 10 Colo. App. 175, 50 Pac. 212.

Indiana.— Madison *v.* Korbly, 32 Ind. 74.

Massachusetts.— Ham *v.* Boston Police Bd., 142 Mass. 90, 7 N. E. 540.

Michigan.— People *v.* Therrien, 80 Mich. 187, 45 N. W. 78; Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.

Missouri.— State *v.* St. Louis, 90 Mo. 19, 1 S. W. 757.

Nebraska.— State *v.* Smith, 35 Nebr. 13, 52 N. W. 700, 16 L. R. A. 791.

New York.— *In re* Gudeu, 171 N. Y. 529, 64 N. E. 451; People *v.* Brooklyn Fire, etc., Dept. Com'rs, 106 N. Y. 64, 12 N. E. 641.

Ohio.— State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627.

Oregon.— Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.

Pennsylvania.— Field *v.* Com., 32 Pa. St. 478; Com. *v.* Slifer, 25 Pa. St. 23, 64 Am. Dec. 680.

South Carolina.— Singleton *v.* Charleston Tobacco Inspection Com'rs, 2 Bay 105; Geter *v.* Campbell-Town Warehouse Tobacco Inspection Com'rs, 1 Bay 354, 1 Am. Dec. 621.

England.— Osgood *v.* Nelson, L. R. 5 H. L. 636, 41 L. J. Q. B. 329 [*affirming* 10 B. & S. 119, 20 L. T. Rep. N. S. 958, 17 Wkly. Rep. 895]; Willis *v.* Gipps, 5 Moore P. C. 379, 13 Eng. Reprint 536.

Contra.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

Citation.— It has been held that a constitutional provision requiring all process to run in the name of the state does not apply to a citation by the governor to an officer to answer charges in proceedings for removal. Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

25. O'Dowd *v.* Boston, 149 Mass. 443, 21 N. E. 949; State *v.* McGarry, 21 Wis. 496. But see Osgood *v.* Nelson, L. R. 5 H. L. 636, 41 L. J. Q. B. 329, where it is stated that even under such a power a hearing must be accorded the person removed.

Presumptions.— It will be presumed that a removal by the governor was for proper cause. Evans *v.* Populus, 22 La. Ann. 121; Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

that the removal may be legal, such a hearing is not governed by rules applicable to strictly judicial proceedings.[26] Where the power of removal is limited to cause, the causes are sometimes specified in the law. If this is the case the removing authority may not remove for any cause not so specified.[27] Nor, where the causes are specified in the constitution, may the legislature add to these causes.[28] But such constitutional provisions are liberally construed in favor of the legislature's power,[29] and where the constitution is silent as to the causes for removal such causes may be fixed by the legislature.[30] If the cause specified in the law is "official misconduct," misconduct sufficient to justify a removal must be misconduct in the conduct of the office and not mere personal misbehavior.[31] Sometimes the law does not specify causes for removal but merely provides for removal for cause or for wilful maladministration. The determination of what is cause under such a provision may be reviewed by the courts.[32] Where removal may be made

26. Burt *v.* Iron County, 108 Mich. 523, 66 N. W. 387 (holding that the notice to the officer in removal proceedings need not set out the specific charges); Fuller *v.* Ellis, 98 Mich. 96, 57 N. W. 33 (holding that charges are sufficient if they contain a specific statement of infractions of the law and the facts depended upon to show incompetency). See also Rockford *v.* Compton, 115 Ill. App. 406 (holding that charges must specify some dereliction of duty); Conant *v.* Grogan, 6 N. Y. St. 322 (holding that charges are not sufficient to put an officer on trial which are only verified by an affidavit of the informer that they are true to the best of his knowledge and belief, and which are denied by the affidavits of respondents and other persons); Nehrling *v.* State, 112 Wis. 637, 88 N. W. 610 (holding that, where the law does not require the production of witnesses, the witnesses cited in the investigation resulting in removal need not be sworn).

27. Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128. See also Corker *v.* Pence, 12 Ida. 152, 85 Pac. 388; People *v.* Lord, 9 Mich. 227; People *v.* Burnside, 3 Lans. (N. Y.) 74; McMillan *v.* Bullock, 53 S. C. 161, 31 S. E. 860.

28. Com. *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204; Brown *v.* Grover, 6 Bush (Ky.) 1; State *v.* Shannon, 7 S. D. 319, 64 N. W. 175.

29. McComas *v.* Krug, 81 Ind. 327, 42 Am. Rep. 135, holding that, under a constitution providing for the removal of public officers for crime, incapacity, or negligence, a statute providing for removal for intoxication was valid.

30. *Ex p.* Wiley, 54 Ala. 226. See State *v.* Sheppard, 192 Mo. 497, 91 S. W. 477.

31. *Kentucky.*— Com. *v.* Barry, Hard. 229.

Louisiana.—State *v.* Bourgeois, 45 La. Ann. 1350, 14 So. 28.

Missouri.— State *v.* Sheppard, 192 Mo. 497, 91 S. W. 477.

Texas.— Craig *v.* State, 31 Tex. Cr. 29, 19 S. W. 504.

Wisconsin.— State *v.* Kuehn, 34 Wis. 229.

In case, however, the cause for removal is "misconduct" simply, the removal may be made for misconduct not connected with the office. *In re* Grant, 7 Moore C. P. 141, 13 Eng. Reprint 833.

Malfeasance.— Malfeasance in office as cause for removal is the doing of an act wholly unlawful and wrongful. Colburn *v.* Neufarth, Ohio Prob. 24 [*reversing* 9 Ohio Dec. (Reprint) 638, 16 Cinc. L. Bul. 54]. "Wilful misconduct and violation of the statutory duties of office is maladministration in office." Bradford *v.* Territory, 2 Okla. 228, 233, 37 Pac. 1061. Maladministration signifies wrong administration. Minkler *v.* State, 14 Nebr. 181, 15 N. W. 330.

Misfeasance — Misfeasance as a cause for removal from office is a default in not doing a lawful thing in a proper manner. Colburn *v.* Neufarth, Ohio Prob. 24 [*reversing* 9 Ohio Dec. (Reprint) 638, 16 Cinc. L. Bul. 54].

Misdemeanor in office as a ground for removal is held to mean misconduct in office. Yoe *v.* Hoffman, 61 Kan. 265, 286, 59 Pac. 351 [*citing* Falloon *v.* Clark, 61 Kan. 121, 58 Pac. 990].

The phrase "misconduct in office" is broad enough to embrace any wilful malfeasance, misfeasance, or nonfeasance in office. State *v.* Slover, 113 Mo. 202, 208, 20 S. W. 788.

32. See cases cited *infra*, this note.

A technical disregard of law honestly made where the law is uncertain is not a ground for removal from office. Ponting *v.* Isaman, 7 Ida. 581, 65 Pac. 434; State *v.* Pidgeon, 8 Blackf. (Ind.) 132; State *v.* Scates, 43 Kan. 330, 23 Pac. 479; Com. *v.* Barry, Hard. (Ky.) 229; State *v.* Bourgeois, 47 La. Ann. 184, 16 So. 655. See People *v.* Therrien, 80 Mich. 287, 45 N. W. 78; State *v.* Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; State *v.* Walbridge, 69 Mo. App. 657; People *v.* New York Fire Com'rs, 96 N. Y. 672; State *v.* Hoglan, 64 Ohio St. 532, 60 N. E. 627.

Negligence or persistent, wilful disobedience of the law without malice or corruption is official misconduct sufficient to justify a removal. Shaw *v.* Macon, 21 Ga. 280; State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172 (which upheld on this ground an indictment for misconduct in office); Minkler *v.* State, 14 Nebr. 181, 15 N. W. 330. See also Coffey *v.* Sacramento County Super. Ct., 147 Cal. 525, 82 Pac. 75, where it was held that failure to prosecute gamblers of whom the officer has knowledge is "wilful misconduct."

Intoxication.— There is considerable con-

for cause only, the cause must have occurred during the present term of the officer. Misconduct prior to the present term even during a preceding term will not justify a removal.[33] Limitations upon the power of removal are often contained in civil service rules and laws.[34] Such laws may not amend or modify any provision of the constitution.[35] The usual limitations provided by such rules and laws are so formulated as to prevent the removal of all officers appointed under them or of honorably discharged soldiers and sailors, without a hearing. They are, however, so con-

flict as to whether intoxication is sufficient ground for removal from office. The following states hold it to be sufficient, particularly if it occurs in office hours: State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426 (holding the evidence of intoxication such as to warrant a removal under Const. art. 7, §§ 1–4); McComas *v.* Krug, 81 Ind. 327, 42 Am. Rep. 135 (holding a law making intoxication a ground for removal from office to be constitutional); State *v.* Welsh, 109 Iowa 19, 79 N. W. 369 (in this case like the Alabama case *infra*, a distinction is made between intoxication while on duty and intoxication when off duty); People *v.* French, 102 N. Y. 583, 7 N. E. 913 [*affirming* 39 Hun 507]; Trigg *v.* State, 49 Tex. 645 (holding that habitual drunkenness as a ground for removal under Const. (1876) art. 5, § 24, could not be inferred as a legal consequence from four acts of drunkenness in as many months). *Contra*, Ledbetter *v.* State, 10 Ala. 241 (holding that proof that defendant was intoxicated when not discharging his duties was not sufficient to justify removal); Com. *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204 (holding that under a constitution providing for removal for "malfeasance or misfeasance in office" the legislature could not make intoxication misfeasance and provide for the removal of one from office for this offense); Craig *v.* State, 31 Tex. Cr. 29, 19 S. W. 504.

33. *California.*— Thurston *v.* Clark, 107 Cal. 285, 40 Pac. 435.

Michigan.— Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842.

New York.— Conant *v.* Grogan, 6 N. Y. St. 322. *Contra, In re* Guden, 171 N. Y. 529, 64 N. E. 451, holding that misconduct prior to the beginning of the term by which the officer secured the appointment will justify his removal.

Pennsylvania.— Com. *v.* Shaver, 3 Watts & S. 338.

Wisconsin.— State *v.* Watertown, 9 Wis. 254, holding that the reappointment of an officer with knowledge of his previous misconduct in matters involving no moral delinquency is a condonation thereof so far as it affects the right to remove him therefor.

Contra.— State *v.* Welsh, 109 Iowa 19, 79 N. W. 369; State *v.* Bourgeois, 45 La. Ann. 1350, 14 So. 28, holding that officers who are their own successors may be punished for acts done in their prior terms of office.

34. See the statutes of the several states.

Municipal civil service see MUNICIPAL CORPORATIONS, 28 Cyc. 444.

35. People *v.* Scannell, 62 N. Y. App. Div. 249, 70 N. Y. Suppl. 983; People *v.* Henry, 47 N. Y. App. Div. 133, 62 N. Y. Suppl. 102; People *v.* Kane, 70 N. Y. Suppl. 982; Brower *v.* Kantner, 190 Pa. St. 182, 43 Atl. 7. See Seeley *v.* Franchot, 52 Misc. (N. Y.) 302, 102 N. Y. Suppl. 220 [*affirmed* in 119 N. Y. App. Div. 910, 104 N. Y. Suppl. 1145], holding that Const. art. 5, § 9, providing that all appointments in the civil service of the state shall be made according to merit, ascertained by a competitive examination, does not limit section 3, providing that subordinates under the superintendent of public works "shall be subject to suspension and removal by him," and the superintendent may dismiss an honorably discharged soldier occupying a subordinate position under him, without presenting charges and holding a hearing thereon, notwithstanding the civil service law (Laws (1899), p. 809, c. 370, § 21), providing that no person holding a position in the civil service of the state, who is an honorably discharged soldier, shall be removed, except after a hearing on charges.

Trial by commission.— The fact that a civil service commission, after an investigation of an accused official, furnished him with the testimony taken and gave him an opportunity to present his defense, was not an assumption of the right to try such person for any offense, but simply gave him an opportunity, if he elected to do so, to rebut any reflections upon him. People *v.* Milliken, 185 N. Y. 35, 77 N. E. 872 [*affirming* 110 N. Y. App. Div. 579, 97 N. Y. Suppl. 223], holding further that rule No. 2 of the civil service commission, providing that the violation of any provisions of the civil service law or rules, by any person in the civil service of the state, shall be considered a good cause for dismissal of such person from the service does not assume possession by the commission itself of the power to remove any official or employee, but is simply an expression of what shall be considered a sufficient ground for dismissal.

Criminal responsibility for removal.— Under Laws (1892), c. 577, prohibiting the removal of a veteran from public office except for cause shown after a hearing, but imposing no penalty, and Pen. Code, § 155, providing that if an act is prohibited by statute, and no penalty is fixed, the act is a misdemeanor, a public officer removing a veteran without cause shown and a hearing is guilty of a misdemeanor. Matter of Vanderhoff, 15 Misc. (N. Y.) 434, 36 N. Y. Suppl. 833 [*affirmed* in 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651].

strued by the courts as not to prevent summary removals for reasons of economy,[36] provided the action of the removing officer is taken in good faith;[37] nor do they affect probationary appointments,[38] persons improperly appointed,[39] or not appointed as a result of a competitive examination,[40] or hold-overs who have not passed the civil service examinations.[41] Inasmuch as such laws have been passed to confer a privilege on specific classes of persons, any one protected by them may waive the rights which he has under them by accepting an appointment for a specified time.[42] The exact degree to which such provisions as have been mentioned limit the power of removal is dependent upon the attitude of the courts. The principle of the unlimited power of removal has been for so long a time made the basis of the national administrative system of the United States that the federal courts are not inclined to regard statutes providing a power of removal for cause as imposing a limitation of any great force on the otherwise unlimited power of removal possessed by the president, and hold that a provision of this character makes it necessary for the president to accord to the officer removed

Action for damages.— Under N. Y. Laws (1896), p. 753, c. 821, § 1 (Civil Service Laws, Laws (1899), p. 809, c. 370, § 21), making it a misdemeanor to reduce the compensation of an honorably discharged Union soldier holding a position by appointment or employment in the state to bring about his resignation, and giving him a right of action therefor for damages and also a remedy by mandamus, an action for damages cannot be maintained without first resorting to the remedy by mandamus. Hilton *v.* Cram, 112 N. Y. App. Div. 35, 97 N. Y. Suppl. 1123.

36. Beirne *v.* Jersey City St., etc., Com'rs, 60 N. J. L. 109, 36 Atl. 778; Newark *v.* Lyon, 53 N. J. L. 632, 23 Atl. 274; People *v.* Van Wart, 36 N. Y. App. Div. 518, 55 N. Y. Suppl. 522 [*affirmed* in 158 N. Y. 720, 53 N. E. 1130]; People *v.* Dalton, 32 Misc. 109, 66 N. Y. Suppl. 229 [*affirmed* in 57 N. Y. App. Div. 626, 68 N. Y. Suppl. 1146].

Positions protected.—A statute or rule protecting a veteran holding "an office" or "a position" does not protect persons paid daily wages. Peterson *v.* Salem County, 63 N. J. L. 57, 42 Atl. 844; Kreigh *v.* Hudson County, 62 N. J. L. 178, 40 Atl. 625; State *v.* Hudson County, 53 N. J. L. 585, 22 Atl. 56. But see Matter of Murray, 17 Misc. (N. Y.) 185, 40 N. Y. Suppl. 1041, holding one protected by these provisions who received pay of so much per day payable monthly. Such laws are sometimes so framed as not to affect officers whose terms are "fixed by law," in which case only those by law removable at the pleasure of some authority are protected (Cavenaugh *v.* Essex County, 58 N. J. L. 531, 33 Atl. 943; Townsend *v.* Boughner, 55 N. J. L. 380, 26 Atl. 808; Stockton *v.* Regan, 54 N. J. L. 167, 23 Atl. 1012), or positions strictly confidential (People *v.* Gardiner, 157 N. Y. 520, 52 N. E. 564 [*reversing* 33 N. Y. App. Div. 204, 53 N. Y. Suppl. 451]; People *v.* Palmer, 152 N. Y. 217, 46 N. E. 328; People *v.* McFadden, 75 N. Y. App. Div. 264, 78 N. Y. Suppl. 87; People *v.* Clarke, 54 N. Y. App. Div. 588, 66 N. Y. Suppl. 1068. The New York Law of 1894, chapter 716, permitted the removal of a veteran for incompetency. Under this law it was held that a veteran might be removed without a hearing (People *v.* Brookfield, 2 N. Y. App. Div. 299, 37 N. Y. Suppl. 718 [*following* People *v.* Morton, 148 N. Y. 156, 42 N. E. 538]), provided the ground for removal was incompetency (People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285 [*affirmed* in 150 N. Y. 444, 44 N. E. 1036]).

37. Stivers *v.* Jersey City, 70 N. J. L. 606, 57 Atl. 143 [*affirmed* in 70 N. J. L. 827, 59 Atl. 1118]; Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420; People *v.* Morton, 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760 [*reversed* on other grounds in 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231]; U. S. *v.* Wickersham, 201 U. S. 390, 26 S. Ct. 469, 50 L. ed. 798, which would seem to hold that the United States will enforce executive orders of the president intended to protect officers and employees from arbitrary removal.

Under a law giving preference to veterans as employees and officers, whenever economy requires a reduction of the number of officers, the veteran must be the last to be discharged. People *v.* Morton, 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760 [*reversed* on other grounds in 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231].

38. Fish *v.* McGann, 107 Ill. App. 538 [*affirmed* in 205 Ill. 179, 68 N. E. 761]; Sweet *v.* Lyman, 30 N. Y. App. Div. 135, 50 N. Y. Suppl. 444, 51 N. Y. Suppl. 641 [*affirmed* in 157 N. Y. 368, 52 N. E. 132]; People *v.* Lyman, 20 Misc. (N. Y.) 80, 44 N. Y. Suppl. 1084 [*affirmed* in 30 N. Y. App. Div. 135, 50 N. Y. Suppl. 444, 51 N. Y. Suppl. 641].

39. Heaviland *v.* Burlington County, 64 N. J. L. 176, 44 Atl. 963; People *v.* Troy Bd. of Health, 153 N. Y. 513, 47 N. E. 785 [*reversing* 15 N. Y. App. Div. 272, 44 N. Y. Suppl. 597].

40. People *v.* Hamilton, 98 N. Y. App. Div. 59, 90 N. Y. Suppl. 547.

41. People *v.* Chicago, 104 Ill. App. 250 [*affirmed* in 210 Ill. 479, 71 N. E. 400].

42. Hardy *v.* Orange, 61 N. J. L. 620, 42 Atl. 581.

a hearing only when the removal purports to be for cause and does not authorize the court to review the action of the president.[43] Where the power of removal is arbitrary the rule is the same as to the power of the courts to review the action of the removing officer.[44] In some cases the law, while not limiting the removing power to specified causes, provides that the power may be exercised only after charges have been preferred against the offending officer and an opportunity has been accorded to him to defend himself. Under these conditions it is held that the law has been complied with if an opportunity is given to the officer to defend himself against charges which if true would justify removal, and the courts have no right to review the determination ordering the removal.[45] Sometimes the same view is taken as to the power of the courts where the removal may be made for cause.[46] This rule is particularly applicable where the power to remove is for cause satisfactory to the removing authority.[47] In determining whether the formalities required by law have been complied with, the courts do not require the same strictness of procedure on the part of the removing officer as is required in an ordinary judicial proceeding.[48]

5. IMPEACHMENT. The method of removal by impeachment means historically removal by the legislature after proceedings in the nature of judicial proceedings. At the present time, however, the word is used in the statutes of a number of the states to mean as well the removal of officers by special judicial proceedings, had, not before the legislature, but before some court to which jurisdiction has been given by statute.[49] The method of impeachment which will now be considered is the proceeding before the legislature to which reference has been made.[50] As the power to remove by impeachment is given expressly by the constitution, it may be exercised with regard to officers whose tenure is fixed by the constitution, and

43. Shurtleff *v.* U. S., 189 U. S. 311, 23 S. Ct. 535, 47 L. ed. 828.

44. Territory *v.* Cox, 6 Dak. 501.

45. Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; People *v.* Wells, 176 N. Y. 462, 68 N. E. 883; *In re* Guden, 171 N. Y. 529, 64 N. E. 451; People *v.* Brady, 166 N. Y. 44, 59 N. E. 701.

46. *Arkansas.*— Patton *v.* Vaughan, 39 Ark. 211.

Georgia.— State *v.* Frazier, 48 Ga. 137.

Illinois.— Donahue *v.* Will County, 100 Ill. 94; Wilcox *v.* People, 90 Ill. 186.

Louisiana.— State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; Evans *v.* Populus, 22 La. Ann. 121.

Nebraska.— State *v.* Hay, 45 Nebr. 321, 63 N. W. 821.

New York.— People *v.* Stout, 11 Abb. Pr. 17, 19 How. Pr. 171.

North Carolina.— State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

Ohio.— State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

Texas.— Keenan *v.* Perry, 24 Tex. 253.

Virginia.— Burch *v.* Hardwicke, 23 Gratt. 51.

In New York, however, because the power of removal for cause is regarded as a judicial power, and a determination made in its exercise is therefore reviewable on certiorari (People *v.* Nichols, 79 N. Y. 582), and because under section 2140 of the code of civil procedure, the courts may on certiorari quash a determination if it is contrary to the evidence, at the present time the courts may review as to the facts the determinations to remove from office made by officers having power to remove for cause and after a hearing (People *v.* French, 119 N. Y. 502, 23 N. E. 1061; People *v.* French, 119 N. Y. 493, 23 N. E. 1058; People *v.* French, 110 N. Y. 494, 18 N. E. 183; People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285 [*affirmed* in 150 N. Y. 444, 44 N. E. 1036]. The tendency of the courts, however, is not to make use of the certiorari except where the power of removal is for cause and in this way not to extend their powers of reviewing determinations to remove. People *v.* Brady, 166 N. Y. 44, 59 N. E. 701. See Lawrence, "Police Removals and the Courts," Pol. Sci. Quart. vol. 20, p. 68.

47. People *v.* Bearfield, 35 Barb. (N. Y.) 254; State *v.* Prince, 45 Wis. 610; State *v.* McGarry, 21 Wis. 496.

48. People *v.* Partridge, 180 N. Y. 237, 73 N. E. 4 [*reversing* 95 N. Y. App. Div. 633, 89 N. Y. Suppl. 1113], 181 N. Y. 530, 73 N. E. 1130.

While in New York in the case of removals for cause and after hearing, the person removed is entitled to the right to cross-examine the witnesses produced to support the charges against him (People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285 [*affirmed* in 150 N. Y. 444, 44 N. E. 1036]). The rule that no witness shall be compelled to testify against himself is not applied in such cases, and it is not improper to place the person accused on the stand and ask him questions under oath (People *v.* McClave, 123 N. Y. 512, 25 N. E. 1047).

49. See *supra*, II, G, 4, b.

50. Power of legislature to declare office vacant see *supra*, II, A, 5.

who on that account may not be disturbed by the legislature except through the constitutional method of impeachment. The method of impeachment commonly provided is that the lower house of the legislature draws up articles of impeachment and presents them to the upper house, the senate, which sometimes with the judges of the highest court, or acting under the presidency of the chief justice,[51] may, generally only with a greater than ordinary majority,[52] convict the person impeached. The causes for impeachment are generally crimes and misdemeanors,[53] and the punishment which may be inflicted is expulsion from office and ineligibility to office in the future, but a person so convicted may be tried afterward by the ordinary criminal courts.[54] As impeachment proceedings are provided for in the constitution, it has been unnecessary to decide the question whether, in the absence of a constitutional provision of this sort, the legislature itself possesses the power to provide such a method of removal of officers, whose terms are fixed by the constitution. It has, however, been held that if the constitution provides a method for impeachment of officers, that method is exclusive and the power which the legislature might otherwise be regarded as possessing is taken away.[55] Impeachment proceedings are regarded by the courts as criminal proceedings and, if provided for in the constitution, are to be governed by any constitutional provisions which regulate criminal proceedings.[56] The constitution commonly confines impeachment proceedings to officers of the state. Where such a limitation exists, neither local officers[57] nor members of the legislature are regarded as liable to impeachment.[58] The senate as a court of impeachment is a court of limited jurisdiction. At the same time the ordinary judicial courts show, whenever an attempt has been made to obtain from them a review of its action in impeachment matters, a great disinclination to exercise any such power.[59] At the same time the courts will interfere in a proper proceeding as by habeas corpus to relieve from imprisonment decreed because of the failure of a witness to testify where the legislature has clearly exceeded its jurisdiction.[60]

51. Such is the case when the president of the United States is impeached. U. S. Const. art. 1, § 3, par. 6. Sometimes it is the supreme court of the state which has jurisdiction. See State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774.

52. See U. S. Const. art. 1, § 3, par. 6.

53. See U. S. Const. art. 2, § 4.

"Crimes and misdemeanors" are said, in State *v.* Hastings, 37 Nebr. 96, 116, 55 N. W. 774, to exist "where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt." Mere negligence or mere excess of power with corrupt intention is not a "crime or misdemeanor" for which the officer should be impeached.

54. See U. S. Const. art. 1, § 3, par. 7.

55. State *v.* Buckley, 54 Ala. 599; State *v.* Hillyer, 2 Kan. 17.

56. Thus, where by the constitution the accused is entitled to be confronted with the witnesses against him, a law providing for impeachment proceedings which enacts that the trial in such cases shall be upon depositions taken before examiners appointed by the supreme court is unconstitutional. State *v.* Buckley, 54 Ala. 599. See also State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774, holding that impeachment is a criminal action and that therefore the charges must be proved beyond a reasonable doubt.

57. *In re* Opinion of Justices, 167 Mass. 599, 46 N. E. 118.

58. *In re* Speakership of House of Representatives, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241; State *v.* Gilmore, 20 Kan. 551, 27 Am. Rep. 189.

In the case of legislative officers the legislature has itself such complete powers of expulsion (Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768), that the recognition of a power to impeach them is unnecessary. The senate of the United States decided in the case of Senator Blount that members of the legislature are not "civil officers" of the United States, and as such liable to impeachment.

59. *In re* Opinion of Justices, 14 Fla. 289 (holding that, when an officer has been impeached by the assembly, the adjournment of the senate and its failure to discharge or to act on a motion to discharge the prisoner is not an acquittal within the meaning of the constitution, although the term of office may expire with the meeting of the next regular session); State *v.* O'Driscoll, 3 Brev. (S. C.) 526, 2 Treadw. 713.

60. *Ex p.* Caldwell, 138 Fed. 487 [*reversed* on other grounds in Carter *v.* Caldwell, 200 U. S. 293, 26 S. Ct. 264, 50 L. ed. 483], which holds that the legislature may not impeach one whose term expires before judg-

III. TITLE TO AND POSSESSION OF OFFICE.

A. Nature of Right to Office. It has been shown that an office is not property.[61] At the same time the right to office is a substantial right recognized by law, and may be enforced by the proper remedy if the one possessing the right is wrongfully deprived of the office. Conflicting claims to office are to be decided in the manner provided by law,[62] and the law which the courts are to apply in determining the right is that existing at the time the action is brought to enforce it.[63] The best evidence of a right to the office is the commission or certificate of election for the issue of which the law usually makes provision.[64] One to whom such certificate or commission has been issued is regarded as *prima facie* entitled to the office.[65] The commission, however, is merely evidence. Its possession by the would-be incumbent is not a necessary qualification for office, and the term of office, where the issue of the commission is a necessary prerequisite to the appointment, dates from the time of its issue and not from the time of its receipt by the incumbent.[66] Furthermore, under many statutes the title to office is based in final resort, not on the commission, but on the fact that the one claiming the office has been chosen by the appointing officer,[67] or has been elected by the people in case the office is an elective one.[68] A certificate of election is, like a commission, only evidence of title, which in last analysis is based on the fact that the person claiming the office has received the largest number of votes cast at the election.[69]

ment can be had on articles of impeachment, since under the constitution the only punishment to be inflicted in case of conviction was removal from office.

61. See *supra*, I, B.

Vested right in office generally see CONSTITUTIONAL LAW, 8 Cyc. 906.

62. Wammack *v.* Holloway, 2 Ala. 31; State *v.* Sams, (Ark. 1906) 98 S. W. 955 (holding that the remedy for usurpation of the office of road commissioner is by action by the state or by the person entitled to the office); State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403; Bumsted *v.* Blair, 73 N. J. L. 378, 64 Atl. 691 (holding that the supreme court will not pass on title to a municipal office except in quo warranto proceedings against the incumbent of the office himself). See Banton *v.* Wilson, 4 Tex. 400, holding that the right to an office may be litigated between parties who claim adversely, although proceedings may be instituted by the government to oust an intruder.

Exclusiveness of remedy by contest of election see ELECTIONS, 15 Cyc. 394.

63. People *v.* Dalton, 23 Misc. (N. Y.) 294, 50 N. Y. Suppl. 1028 [*affirmed* in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1112].

64. See, generally, EVIDENCE, 17 Cyc. 496.

65. *Alabama.*— Thompson *v.* Holt, 52 Ala. 491.

Indiana.— De Armond *v.* State, 40 Ind. 469.

Louisiana.— State *v.* Rost, 47 La. Ann. 53, 16 So. 776; Hughes *v.* Pipkin, 25 La. Ann. 127.

Minnesota.— State *v.* Churchill, 15 Minn. 455; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Nebraska.— State *v.* Frantz, 55 Nebr. 167, 75 N. W. 546.

New Mexico.— Baca *v.* Parker, (1906) 87 Pac. 465, holding that, where the governor has power of appointment to an office, a commission therefor issued by him must be recognized till title to the office has been tried by quo warranto proceedings, so that writ of prohibition will not lie against the appointee.

New York.— Morgan *v.* Quackenbush, 22 Barb. 72; *In re* Foley, 8 Misc. 196, 28 N. Y. Suppl. 611 [*affirmed* in 86 Hun 621, 33 N. Y. Suppl. 1132].

Pennsylvania.— Com. *v.* Baxter, 35 Pa. St. 263.

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

See 37 Cent. Dig. tit. "Officers," § 110.

66. See *supra*, II, B, 3.

Where there are two commissions from the appointing authority of different dates the court may determine which is the legal one. State *v.* Jackson, 27 La. Ann. 541; State *v.* Bankston, 23 La. Ann. 375.

67. See *supra*, II, B, 1.

68. Shuck *v.* State, 136 Ind. 63, 35 N. E. 993; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36; State *v.* Capers, 37 La. Ann. 747.

When issued to person not entitled.— A commission will not therefore confer title if it is issued to a person not entitled to the office. Plowman *v.* Thornton, 52 Ala. 559; Wammack *v.* Holloway, 2 Ala. 31; State *v.* Towns, 8 Ga. 360; State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; State *v.* McNeely, 24 La. Ann. 19.

69. *Alabama.*— Moulton *v.* Reid, 54 Ala. 320.

New York.— People *v.* Vail, 20 Wend. 12.

South Carolina.— *Ex p.* Smith, 8 S. C. 495.

Tennessee.— State *v.* Wright, 10 Heisk. 237.

B. Injunction to Restrain Occupancy, or Exercise of Office, or Interference Therewith. It is a general rule of law applied in almost all jurisdictions that an injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto.[70] This rule is always applied as to incumbents of offices,[71] and is applied as well where the petition is made by the attorney of the state [72] as where the application is made by a private citizen.[73] But an injunction will be granted at the instance of an incumbent of office to restrain a claimant for the office from interfering therewith until he has established his claim to the office.[74]

C. Actions and Other Proceedings For Recovery of Office or to Determine Title Thereto — 1. In General. The ordinary method for deter-

Wisconsin.— Atty.-Gen. *v.* Elderkin, 5 Wis. 300.

See 37 Cent. Dig. tit. "Officers," § 110.

Eligibility.— The certificate which the examining board issues to a candidate that he is elected to the office of sheriff — although conclusive evidence that he was elected thereto, unless his election be contested before the proper board — is not even *prima facie* evidence that he was eligible to the office. Patterson *v.* Miller, 2 Metc. (Ky.) 493.

A judgment rendered in a contested election case by the authority authorized by law to try the same is conclusive as to the right of the party to whom the office has been adjudged. Davidson *v.* State, 63 Ala. 432. See also ELECTIONS, 15 Cyc. 433.

70. *Alabama.*— Moulton *v.* Reid, 54 Ala. 320; Beebe *v.* Robinson, 52 Ala. 66.

Alaska.— Monahan *v.* Lynch, 2 Alaska 132.

Florida.— MacDonald *v.* Rehrer, 22 Fla. 198.

Georgia.— Davis *v.* Dawson, 90 Ga. 817, 17 S. E. 110.

Illinois.— Heffran *v.* Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353.

Indiana.— Markle *v.* Wright, 13 Ind. 548.

Iowa.— State *v.* Alexander, 107 Iowa 177, 77 N. W. 841.

Kansas.— State *v.* Durkee, 12 Kan. 308.

Louisiana.— State *v.* Judge Eleventh Judicial Dist. Ct., 48 La. Ann. 1501, 21 So. 94; Guillotte *v.* Poincy, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403; Cramer *v.* Brown, 26 La. Ann. 272. But *compare* State *v.* Rost, 47 La. Ann. 53, 16 So. 776.

Michigan.— Detroit *v.* Board of Public Works, 23 Mich. 546.

Minnesota.— Burke *v.* Leland, 51 Minn. 355, 53 N. W. 716.

Nebraska.— School Dist. No. 77 *v.* Cowgill, (1906) 107 N. W. 584; State *v.* Kearney, 28 Nebr. 103, 44 N. W. 90.

New York.— People *v.* Draper, 24 Barb. 265, 4 Abb. Pr. 333, 14 How. Pr. 233 [*affirmed* in 25 Barb. 344]; Breslin *v.* Quinn, 2 N. Y. Suppl. 577; Coulter *v.* Murray, 15 Abb. Pr. N. S. 129. See also Hartt *v.* Harvey, 32 Barb. 55.

Pennsylvania.— Gilroy's Appeal, 100 Pa. St. 5; Updegraff *v.* Crans, 47 Pa. St. 103; Hangner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220.

Virginia.— Johnson *v.* Barham, 99 Va. 305, 38 S. E. 136.

Washington.— Mullen *v.* Tacoma, 16 Wash. 82, 47 Pac. 215.

West Virginia.— Swinburn *v.* Smith, 15 W. Va. 483.

See 37 Cent. Dig. tit. "Officers," § 114.

71. *Louisiana.*— Terry *v.* Stauffer, 17 La. Ann. 306.

Maryland.— See State *v.* Jarrett, 17 Md. 309.

Minnesota.— Burke *v.* Leland, 51 Minn. 355, 53 N. W. 716.

Mississippi.— Moore *v.* Caldwell, Freem. 222.

New York.— Morris *v.* Whelan, 11 Abb. N. Cas. 64, 64 How. Pr. 109; Tappan *v.* Gray, 7 Hill 259 [*affirming* 9 Paige 507].

North Carolina.— Patterson *v.* Hubbs, 65 N. C. 119.

Ohio.— Harding *v.* Eichinger, 57 Ohio St. 371, 49 N. E. 306.

Pennsylvania.— Rink *v.* Barr, 14 Phila. 154 [*affirmed* in 3 Walk. 337]. See also Campbell *v.* Taggart, 10 Phila. 443, 2 Wkly. Notes Cas. 93. But see Hayes *v.* Sturges, 215 Pa. St. 605, 64 Atl. 828, holding that title to a public office cannot properly be determined on a bill in equity, the proper remedy being a writ of quo warranto; but if the parties on such bill waive the question of jurisdiction, and the court considers the case as if it had been brought before it by a writ of quo warranto, the appellate court will consider a decree awarding an injunction as equivalent to a judgment of ouster.

South Carolina.— State *v.* Rice, 66 S. C. 1, 44 S. E. 80.

Virginia.— Kilpatrick *v.* Smith, 77 Va. 347.

See 37 Cent. Dig. tit. "Officers," § 114.

72. State *v.* Duffel, 32 La. Ann. 649.

73. Voisin *v.* Leche, 23 La. Ann. 25; McAllen *v.* Rhodes, 65 Tex. 348; Brumby *v.* Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

74. *Indiana.*—Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025.

Kansas.— Brady *v.* Sweetland, 13 Kan. 41.

Louisiana.— Jackson *v.* Powell, 119 La. 882, 44 So. 689; Sanders *v.* Emmer, 115 La. 590, 39 So. 631; Goldman *v.* Gillespie, 43 La. Ann. 83, 8 So. 880; Guillotte *v.* Poincy, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403.

Michigan.— Blain *v.* Chippewa Cir. Judge, 145 Mich. 59, 108 N. W. 440; Stenglein *v.*

mining the title to office and for securing possession of it is an information in the nature of a quo warranto,[75] or its statutory substitute. But inasmuch as its statutory substitute is in many cases unsatisfactory, because of the fact that the tribunal which has jurisdiction is apt to be governed by political rather than legal considerations, as in the case of elections to the legislature[76] or city council,[77] where the legislature or city council is by law to judge of the qualifications of its members, it is necessary to provide some means by which a claimant, without finally determining his title to office, may secure from a proper authority his certificate of election, which will give him, as has been pointed out, a *prima facie* title to the office. This certificate a claimant for office is ordinarily entitled to obtain by the writ of mandamus.[78] Furthermore where one is illegally excluded from an office to which he is entitled, the mandamus is regarded as the proper remedy by which to secure the possession of such office.[79] The technical character of the common-law remedies for securing the possession of an office has brought it about that special remedies have been provided by statute in the nature of an ordinary action by means of which either one entitled to the office may enforce his rights, or one wrongfully occupying an office may be ousted therefrom, and in some cases punished for his wrongful action, and by either of which the title to the office may be determined.[80] The action provided by statute for trying title to office is ordinarily regarded as exclusive.[81] Title to a public office cannot be tried

Saginaw Cir. Judge, 128 Mich. 440, 87 N. W. 449.

Minnesota.— Waseca County School Dist. No. 47 *v.* Weise, 77 Minn. 167, 79 N. W. 668.

New Mexico.— Armijo *v.* Baca, 3 N. M. 294, 6 Pac. 938.

New York— See Morse *v.* Crofoot, 4 N. Y. 114.

Ohio.— Reemelin *v.* Mosby, 47 Ohio St. 570, 26 N. E. 717.

Pennsylvania.— Kerr *v.* Trego, 47 Pa. St. 292; Ewing *v.* Thompson, 43 Pa. St. 372.

Texas.— Ehlinger *v.* Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240.

Washington.— State *v.* Snohomish County Super. Ct., 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893.

See 37 Cent. Dig. tit. "Officers," § 127.

Contra.— Scott *v.* Sheehan, 145 Cal. 691, 79 Pac. 353; Jones *v.* Granville, 77 N. C. 280.

75. See QUO WARRANTO.

76. See STATES.

77. See MUNICIPAL CORPORATIONS, 28 Cyc. 324.

78. See MANDAMUS, 26 Cyc. 251 *et seq.*

79. See MANDAMUS, 26 Cyc. 255.

Trial of title.— Mandamus may not be made use of to try the title to office. To make use of it the relator must show that his title is clear and that he is being wrongfully excluded. Thus, where one has been removed from office without being accorded a hearing, where by law a removal is improper without such a hearing, mandamus is the proper remedy to secure reinstatement. People *v.* Scannell, 172 N. Y. 316, 65 N. E. 165; People *v.* Scannell, 158 N. Y. 686, 53 N. E. 1129 [*reversing* 36 N. Y. App. Div. 629, 54 N. Y. Suppl. 1112]; People *v.* Keller, 158 N. Y. 187, 52 N. E. 1107 [*affirming* 35 N. Y. App. Div. 493, 54 N. Y. Suppl. 1011]; People *v.* Brady, 49 N. Y. App. Div. 238, 63 N. Y. Suppl. 145. But if one removable for cause has been accorded a hearing prior to the removal, mandamus is not the proper remedy. For the determination of removal stands, until overturned in the way, and must be set aside before reinstatement may be secured. People *v.* Woodbury, 88 N. Y. App. Div. 593, 85 N. Y. Suppl. 161 [*affirmed* in 179 N. Y. 525, 71 N. E. 1137]. For the review of such determinations the certiorari is the proper remedy. People *v.* Wright, 150 N. Y. 444, 44 N. E. 1036. But see People *v.* Brady, 166 N. Y. 44, 59 N. E. 701. By the common law the certiorari may be used only to review determinations made in excess of the jurisdiction of the authority making them or irregularly made or in the making of which there has been a mistake of law. See CERTIORARI. In New York, however, section 2140 of the code of civil procedure has been so interpreted by the courts as to permit a determination of removal to be quashed where such determination is not supported by a preponderance of evidence. Inasmuch, however, as the New York law confines the use of the writ of certiorari to the review of judicial acts, a determination of removal made after a hearing where the removal is not for cause only, not being considered a judicial act, is not reviewable on certiorari. People *v.* Brady, *supra.*

80. *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110 (holding that on such actions the court may incidentally determine whether the office called in question exists); People *v.* Carpenter, 24 N. Y. 86. *Contra,* Richman *v.* Adams, 59 N. J. L. 280, 36 Atl. 699.

81. Palmer *v.* Foley, 36 N. Y. Super. Ct. 14, 45 How. Pr. 110; Tappan *v.* Gray, 9 Paige (N. Y.) 507 [*affirmed* in 7 Hill 259]. But see McAllen *v.* Rhodes, 65 Tex. 348, which holds that under the Texas statute the information in the nature of a quo warranto is cumulative of existing remedies, and that therefore the title to the office may be tried in an action for its emoluments.

by motion,[82] or by a feigned issue or amicable action between individuals,[83] or in an action for salary brought by one who is not the incumbent of the office,[84] nor in an action by the incumbent for his salary.[85]

2. ACTION TO TRY TITLE TO OR FOR RECOVERY OF OFFICE. The actions by which one entitled to an office may enforce his rights are of two kinds. The first is usually spoken of as an action to try title to or for recovery of office.[86] The actions thus provided are regarded as in the nature of ordinary actions and as not calling for the extraordinary remedial powers of the supreme court of the state,[87] and a contesting candidate may resort to them where the competent authority refuses to canvass a vote, without first proceeding against such an authority by mandamus.[88] The action is begun by an ordinary complaint,[89] and when permitted against any person unlawfully holding any public office in the state may be used to test the title to a municipal office.[90] These actions may be brought by private parties either with the consent of the attorney-general,[91] or without such consent, in case of his refusal after application duly made.[92] But a private party entitled to bring such an action who voluntarily turns his office over to defendant cannot bring the action.[93] When these actions are brought by a private party such party must show *prima facie* title in himself, and his complaint or petition must contain allegations setting forth facts necessary to show such *prima facie* title.[94] Where defendant in an action to determine the title to an office alleges fraud in

82. Sneed *v.* Bullock, 77 N. C. 282.

83. Fahnestock *v.* Clark, 24 Pa. St. 501.

84. *Colorado.*— Pueblo County *v.* Gould, 6 Colo. App. 44, 39 Pac. 895.

Delaware.— Lee *v.* Wilmington, 1 Marv. 65, 40 Atl. 663.

Missouri.— Hunter *v.* Chandler, 45 Mo. 452.

Nebraska.— State *v.* Moores, 70 Nebr. 48, 56, 96 N. W. 1011, 99 N. W. 504.

New York.— Hagan *v.* Brooklyn, 126 N. Y. 643, 27 N. E. 265; Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412.

Oregon.— Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307.

85. Montezuma County *v.* Wheeler, 39 Colo. 207, 89 Pac. 50.

86. See the statutes of the several states. And see the cases cited in the following notes.

Defendant not in possession.— Under a statutory provision that, where several persons claim to be entitled to the same office, a petition may be filed against all or any portion thereof in order to try their respective rights thereto, the right of office may be tried between two persons claiming to be elected thereto, although defendant is not yet in possession of the office. State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

87. Vail *v.* Dinning, 44 Mo. 210.

88. Dean *v.* State, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185.

89. State *v.* Rice, 66 S. C. 1, 44 S. E. 80.

Actions by several claimants may often be united in one action. People *v.* Prewett, 124 Cal. 7, 56 Pac. 619; State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

90. State *v.* Alexander, 107 Iowa 177, 77 N. W. 841.

91. State *v.* Reid, 45 La. Ann. 162, 12 So. 189.

92. State *v.* Anderson, 26 Fla. 240, 8 So. 1; State *v.* Withers, 121 N. C. 376, 28 S. E. 522, in which it is said that the attorney-general may not refuse to give his consent. *Contra*, People *v.* Fairchild, 67 N. Y. 334, which holds that the attorney-general may not be forced by mandamus to bring the action.

Constitutionality of statute.— A statute authorizing the individual claiming title to the office to bring such action is constitutional. State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Necessity that commission shall have issued.— Neither the refusal of the state board to give a certificate of election, nor the refusal of the governor to give a commission to one entitled thereto, will deprive such person of the right to sue for and recover the office to which he has been elected. Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

93. State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; State *v.* Moores, 52 Nebr. 634, 72 N. W. 1056; State *v.* Boyd, 34 Nebr. 435, 51 N. W. 964.

No demand for the office need be made before bringing suit. State *v.* Withers, 121 N. C. 376, 28 S. E. 522.

94. Dyer *v.* Bagwell, 54 Iowa 487, 6 N. W. 712; State *v.* Miltenberger, 33 La. Ann. 263; People *v.* Gray, 23 Misc (N. Y.) 602, 51 N. Y. Suppl. 1087 [*reversed* on other grounds in 32 N. Y. App. Div. 458, 53 N. Y. Suppl. 274].

Names of persons casting illegal votes.— In an action to try title to an office on the ground of illegal votes, it is sufficient if the complaint state the number of votes thus cast without giving the names of the persons casting them. State *v.* Hilmantel, 21 Wis. 566.

Sufficiency of complaint.— In a complaint showing that defendant was not eligible to enter into the office to which he was elected, and that he claims the office, a *prima facie*

the election and prays for affirmative relief in his answer, he must aver that he is qualified to hold the office.[95] As between the incumbent of an office and one trying to oust him, the burden of proof is on the latter.[96] A judgment, if in favor of plaintiff, may order the respondent immediately to vacate the office,[97] and is ordinarily appealable on motion of one asserting claim to the office.[98]

3. Action For Recovery of Books and Papers. The second kind of action for obtaining possession of an office is often entitled an action for the recovery of books and papers. This action differs from the action just considered in that its object is to obtain temporary possession of the office rather than finally to determine the title to the office.[99] The action resembles therefore the common-law mandamus.[1] But plaintiff in such an action must show *prima facie* title, since he must prevail on his own title and not on the fact that the incumbent has no color of title to the office, and if he does show such *prima facie* title he is entitled to an order.[2] While the court will not try the title to the office in these pro-

cause of action is stated. Foltz *v.* Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197.

95. Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16. See also Weir *v.* State, 96 Ind. 311, holding that a person seeking to obtain admission to an office must aver such facts as show him to be eligible to the office claimed. But see State *v.* Crowe, 150 Ind. 455, 50 N. E. 471; Wylie *v.* Thornton, 50 S. W. 550, 20 Ky. L. Rep. 1938, both holding that an allegation that plaintiff is eligible to the office is sufficient without reciting the qualifications constituting eligibility.

96. Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 14 Ky. L. Rep. 586, 29 L. R. A. 110.

But where the action is brought on behalf of the state the burden of proof is as in ordinary quo warranto proceedings upon the incumbent of the office. State *v.* Miltenberger, 33 La. Ann. 263.

Admissibility of evidence.— In an action for usurpation of office a petition of numerous persons for the appointment of defendant, stating the relator to have ceased to be an inhabitant of the state, is inadmissible in evidence. People *v.* Brite, 55 Cal. 79. Where the legislature in contravention of the constitution takes from the executive the power of appointment to an office, and itself elects an incumbent and certifies the election to the governor, the records in the executive office are competent evidence in a contest between such appointee and a subsequent appointee of the governor to show that the former was appointed only on account of his election by the legislature. State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

97. People *v.* Banvard, 27 Cal. 470.

The refusal of the county court to approve the bond of one whom the circuit court in an election contest case adjudged entitled to the office will not excuse the incumbent from refusing to surrender possession of the office in obedience to the judgment of ouster. *Ex p.* Craig, 130 Mo. 590, 32 S. W. 1121.

98. Bruce *v.* Fox, 1 Dana (Ky.) 447.

Time for appeal.—An appeal must be taken within the time prescribed by statute. State *v.* Hall, 26 La. Ann. 58; State *v.* Blandin, 22 La. Ann. 467.

Supersedeas.—Although there is no statute entitling a party to a supersedeas, or stay of proceedings on a judgment of ouster from office, yet it is within the province of the trial court, in its discretion, to grant it. But the refusal of that court to do so cannot be reviewed by proceedings in error. Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019.

Advancement of appeal see Appeal and Error, 3 Cyc. 206.

Amount in controversy as determining appellate jurisdiction see Appeal and Error, 2 Cyc. 547.

99. Chambers *v.* Stringer, 62 Ala. 596; McGee *v.* State, 103 Ind. 444, 3 N. E. 139; *In re* Brenner, 170 N. Y. 185, 63 N. E. 133; *In re* Bradley, 141 N. Y. 527, 36 N. E. 598; Matter of Freeman, 23 Misc. (N. Y.) 752, 53 N. Y. Suppl. 171; McMillan *v.* Bullock, 53 S. C. 161, 31 S. E. 860.

Replevin.— The right to an office cannot be determined in an action of replevin to obtain possession of the books and papers. Desmond *v.* McCarthy, 17 Iowa 525, holding that such an issue can only be tried in the proper action in the nature of a writ of quo warranto or by an information, or, possibly, by mandamus.

1. Thompson *v.* Holt, 52 Ala. 491.

2. *Alabama.*— Thompson *v.* Holt, 52 Ala. 491; *Ex p.* Scott, 47 Ala. 609.

California.— Doane *v.* Scannell, 7 Cal. 393.

New Mexico.— Eldodt *v.* Territory, 10 N. M. 141, 61 Pac. 105.

New York.— *In re* Brenner, 170 N. Y. 185, 63 N. E. 133; *In re* Bradley, 141 N. Y. 527, 36 N. E. 598; Matter of Sells, 15 N. Y. App. Div. 571, 44 N. Y. Suppl. 570; Matter of Brearton, 44 Misc. 247, 89 N. Y. Suppl. 893; Conover *v.* Devlin, 24 Barb. 587, 5 Abb. Pr. 73, 14 How. Pr. 315.

South Carolina.— Verner *v.* Seibels, 60 S. C. 572, 39 S. E. 274; McMillan *v.* Bullock, 53 S. C. 161, 31 S. E. 860; *Ex p.* Whipper, 32 S. C. 5, 10 S. E. 579.

Texas.— Honey *v.* Davis, 38 Tex. 63.

See 37 Cent. Dig. tit. "Officers," § 125.

Under the New York statute, Code Civ. Proc. § 2741*a*, which substantially reënacts 1 Rev. St. 125, §§ 50–54, it is provided that if any person shall neglect or refuse to deliver over to his successor any books or papers, such successor may make complaint thereof

ceedings, if the claim of plaintiff is void beyond substantial doubt the court will decide that fact.[3] This proceeding being based on the statute is governed strictly by the provisions of the statute,[4] and an order of the court in such a proceeding is defective if it does not state definitely what books shall be given up,[5] or where, if the person to whom it is directed denies he has possession of the books in question, such order is issued before evidence has been taken upon such issues of fact.[6] The statute providing such action may make the judge the sole trier of the facts without violating a constitutional guaranty that the trial by jury shall remain inviolate.[7] An appeal from the judgment of the court does not prevent the successful party from proceeding to compel the delivery to him of the books and papers.[8]

4. Action For Usurpation of Office. Finally, it is sometimes provided by statute that an action for usurpation may be brought against the usurper.[9] These actions may be brought only where permitted by the statute providing them.[10] Actions of this sort are sometimes ordinary civil actions.[11] But in the case of civil actions, the court is often authorized, where it renders judgment of ouster, to impose a fine upon the usurper.[12] It is also often provided that usurpation of office may be punished by indictment as a crime. The effect of one's *bona fides* in exculpating him from criminal motive depends upon the wording of the

to any justice of the supreme court and an order may be granted committing the person withholding the books and papers to jail until delivery is made. See Matter of Smith, 116 N. Y. App. Div. 665, 101 N. Y. Suppl. 992 [*affirming* 49 Misc. 567, 100 N. Y. Suppl. 179]; People *v.* Allen, 42 Barb. 203. Under this statute the justice may examine the question of title so far as to enable him to determine properly the question to be submitted, but if the right of the applicant is not free from any reasonable doubt the summary relief should be denied. In case the title of the applicant to office is free from reasonable doubt he is absolutely entitled to the assistance which the statute contemplates. See People *v.* Allen, *supra*; Conover *v.* Devlin, 24 Barb. 587, 5 Abb. Pr. 73, 14 How. Pr. 315; *In re* Welch, 14 Barb. 396; *In re* Whiting, 2 Barb. 513; People *v.* Holcomb, 5 Misc. 469, 26 N. Y. Suppl. 230; Bridgman *v.* Hall, 16 Abb. N. Cas. 272; Case *v.* Campbell, 16 Abb. N. Cas. 269; Devlin's Case, 5 Abb. Pr. 281; Matter of Davis, 19 How. Pr. 323; Cobee *v.* Davis, 8 How. Pr. 367; Welch *v.* Cook, 7 How. Pr. 173; Matter of Whiting, 1 Edm. Sel. Cas. 498.

3. *In re* Guden, 171 N. Y. 529, 64 N. E. 451.

4. Beebe *v.* Robinson, 64 Ala. 171; Thompson *v.* Holt, 52 Ala. 491; Hull *v.* Shasta County Super. Ct., 63 Cal. 174; McGrory *v.* Henderson, 43 Hun (N. Y.) 438.

5. People *v.* Van Bergen, 40 Misc. (N. Y.) 139, 81 N. Y. Suppl. 274; Devlin's Case, 5 Abb. Pr. (N. Y.) 281.

6. Matter of Gill, 95 N. Y. App. Div. 174, 88 N. Y. Suppl. 466.

7. Chambers *v.* Stringer, 62 Ala. 596. See, generally, JURIES.

8. Welch *v.* Cook, 7 How. Pr. (N. Y.) 282.

Arrest of defendant.— In some instances the statute provides summary proceedings by the issue of a warrant for the arrest of the person unlawfully detaining the books and papers of an office. *In re* Whiting, 2 Barb. (N. Y.) 513.

9. See the statutes of the several states.

10. State *v.* Hawley, 25 La. Ann. 487, holding that where the office has ceased to exist the action for intruding into office may not be brought if this is not one of the cases specified by the statute.

11. Stack *v.* Com., 118 Ky. 481, 81 S. W. 917, 26 Ky. L. Rep. 343. See Smith *v.* Cochran, 7 Bush (Ky.) 154, holding that the Jefferson court of common pleas has jurisdiction of a proceeding by the commissioner of the Louisville chancery court against one improperly appointed to his office when it was not vacant, for the usurpation of his office.

12. People *v.* Miller, 16 Mich. 205. See also Davis *v.* Davis, 57 N. J. L. 203, 31 Atl. 218; Adams *v.* Haines, 48 N. J. L. 25, 8 Atl. 723. But see State *v.* Morgan, 130 Wis. 293, 110 N. W. 245, holding that a magistrate in a proceeding under Rev. St. (1898) §§ 978–980, relating to proceedings before a judge of a court of record to compel the delivery of books and papers of public officers to their successors, has no authority to imprison an officer until he pays a specified sum in addition to turning over the books of his office to his successor, the penalty prescribed by section 977 being recoverable in the courts under section 3924.

Necessity of criminality.— In New York such a fine may be imposed only where the usurper has been guilty of some act in taking or holding the office which is criminal or at least grossly improper. People *v.* Bates, 79 Hun (N. Y.) 584, 29 N. Y. Suppl. 894, 9 N. Y. Cr. 234, People *v.* Nolan, 65 How. Pr. (N. Y.) 468. See also Kreidler *v.* State, 24 Ohio St. 22, holding that a fine may not be imposed on one holding over even where the statute does not provide for holding over.

statute.[13] Who are the proper parties to the suit as plaintiffs is determined by the statute giving the action. The statute commonly provides that the attorney-general,[14] or his local representative,[15] may bring the action either on his own motion or on the relation of some private person interested.[16] Such actions, when permitted, may be brought against one holding over after the expiration of his term of office, who as against the one entitled to the office is regarded as an intruder.[17] In these actions to oust an intruder from office it is sufficient to allege that defendant intruded into the office,[18] or to state facts sufficient to show a forfeiture of the office.[19] Where the actions are brought at the instance of private

13. See the statutes of the several states. And see Wayman *v.* Com., 14 Bush (Ky.) 466 (holding that a usurpation is punishable without regard to the usurper's motives); Com. *v.* Adams, 3 Metc. (Ky.) 6; Eubank *v.* Com., 103 S. W. 368, 31 Ky. L. Rep. 746; Palmer *v.* Com., 92 S. W. 588, 29 Ky. L. Rep. 219; People *v.* Bates, 79 Hun (N. Y.) 584, 29 N. Y. Suppl. 894 (holding that under the New York statute one cannot be punished who entered office under a *bona fide* claim of right after taking the advice of counsel).

Indictment.— In criminal proceedings to punish officers for refusal to turn over property, the indictment must state the facts which disclose the right of the demandant. State *v.* Bartholomew, 67 N. J. L. 382, 51 Atl. 455.

14. Wheeler *v.* Com., 98 Ky. 59, 32 S. W. 259, 17 Ky. L. Rep. 636; State *v.* Grandjean, 51 La. Ann. 1099, 25 So. 940.

15. State *v.* Peterson, 74 Ind. 174; State *v.* Delassize, 21 La. Ann. 710; Hayes *v.* Thompson, 21 La. Ann. 655.

16. Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; People *v.* Ryder, 16 Barb. (N. Y.) 370. See Wilson *v.* Tye, 102 S. W. 856, 31 Ky. L. Rep. 491, holding that under Civ. Code Pr. § 483, authorizing the commonwealth or a person entitled to an office to prevent usurpation by an action, section 484, requiring the commonwealth's attorney to bring the action against a usurper of a county office, if no other person be entitled thereto, etc., and section 487, providing that on the removal of a usurper the person adjudged entitled thereto shall be placed in possession, if the action be instituted by him — one in possession of an office, although a usurper, may not be removed at the suit of another claimant, unless such claimant shows himself entitled to the office.

In **Louisiana** under Rev. St. § 2593 *et seq.*, the proper party plaintiff in the action provided for usurpation of office is the party claiming the office as entitled *de jure*, and the necessary defendant is the officer *de facto* who holds and possesses it and who is claimed to be a usurper and intruder. Guillotte *v.* Poincy, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403.

Amendment adding party.— Where, under the statute, it is provided that upon a complaint in the name of the people upon the relation of an individual to test the right to an office the name of the relator must be joined with the people as plaintiff, an omission to join the relator as a party may be cured by amendent without cost. People *v.* Walker, 23 Barb. (N. Y.) 304, 2 Abb. Pr. 421.

17. Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161. Where the courts have no power to revise the returns, one who has been returned by the proper returning board as elected to the office and who has received a commission based on such return is not regarded as an intruder. State *v.* Lynch, 25 La. Ann. 267. Nor is one an intruder under a statute authorizing a suit to prevent intrusion into public office, who, while indisputably holding one office, is performing the duties of another office, where it is claimed that such office has been abolished and its duties transferred to one holding another office. State *v.* Ward, 27 La. Ann. 659.

18. State *v.* Dahl, 65 Wis. 510, 27 N. W. 343.

19. Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613. A statutory action to oust an intruder because he has forfeited the office is not proper where the candidate alleges that the one who was elected and has qualified was elected by fraudulent and illegal votes. Stine *v.* Berry, 96 Ky. 63, 27 S. W. 809, 16 Ky. L. Rep. 279.

Election of relator.— In an action in the name of the people against a person for intruding into an office, the time of the election at which the claimant claims to have been elected to the office should be stated in the complaint. People *v.* Ryder, 12 N. Y. 433 [*reversing* 16 Barb. 370], holding a complaint sufficient.

Estoppel by allegations.— The complaint in this action alleged that defendant had been elected to the office of town-clerk of the town of Hillsdale, and that he had entered upon the discharge of the duties of his office, but that he was not eligible to the office because he had not been an inhabitant of the town for the next year preceding the election; that by reason of his ineligibility a vacancy in the office of town-clerk existed, to fill which the relator had been lawfully elected. It was held that, although the people need not have alleged defendant's election and his inability to hold the office, but might have simply alleged that he had intruded into the office unlawfully, and have called upon him to show by what authority he claimed to hold it, yet, as these allegations were in fact made, defendant by not denying them admitted them to be true and thereby estab-

individuals claiming they have been unlawfully kept out of offices the measure of damages is the compensation received by the person who wrongfully occupied the office.[20] The successful party is not entitled to recover sums expended in the employment of counsel either from a public corporation, from one of whose offices he was removed,[21] or from the officer who removed him.[22] The effect of a judgment of ouster under some statutes is to vest the title to the office *eo instante* in the claimant.[23] The right to an appeal is governed by the statutes under which the proceedings are brought.[24]

D. Possession of Office Pending Contest. Where there are two claimants to an office, the one who has *prima facie* title to it has the right to the possession of it pending the contest. This rule is applied both where the one having *prima facie* title is the incumbent,[25] and where he is merely a claimant to the office.[26]

IV. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

A. Compensation and Fees[27] — 1. Right to Compensation — a. In General. An office, as has been shown, is not a contract.[28] The rules of law relative to contracts do not therefore apply to the official relation.[29] But the powers, duties, rights, and liabilities of officers are to be governed by that branch of the law spoken of as the law of officers. One of the rights which, by that law, is commonly accorded to officers is the right to compensation, fees, or emoluments, where provision is made by law for such compensation.[30] It follows from this rule that

lished his own incapacity to hold the office. People *v.* Knox, 38 Hun (N. Y.) 236.

20. Douglass *v.* State, 31 Ind. 429 (holding that one who usurps a public office and is afterward sued by the true incumbent for the fees collected by the usurper cannot claim a deduction for expenses defrayed by him in employing clerks to carry on the office); People *v.* Nolan, 101 N. Y. 539, 5 N. E. 446 [*affirming* 32 Hun 612]; Currey *v.* Wright, 9 Lea (Tenn.) 247.

Recovery of fees.— Where the state brings suit on the relation of one claiming title to the office it is permissible for the relator at the same time to sue the intruder for fees. George *v.* Tucker, 27 La. Ann. 67; People *v.* Nolan, 101 N. Y. 539, 5 N. E. 446.

21. Hugg *v.* Ivins, 59 N. J. L. 139, 36 Atl. 685.

Nor may the legislature, under a constitution prohibiting the grant of public money to an individual, provide by statute for the reimbursement of such expenses. Chapman *v.* New York, 168 N. Y. 80, 61 N. E. 108, 85 Am. St. Rep. 661, 56 L. R. A. 846.

22. Fallon *v.* Wright, 82 N. Y. App. Div. 193, 81 N. Y. Suppl. 758.

23. People *v.* Conover, 6 Abb. Pr. (N. Y.) 220; Welch *v.* Cook, 7 How. Pr. (N. Y.) 282.

24. See the statutes of the several states.

Failure of attorney-general to appeal.— In proceedings under the Intrusion Into Office Act for recovery of the office, although the attorney-general will not be compelled by mandamus to appeal in behalf of the state from an adverse decision, he cannot nevertheless bind the state by acquiescence in an adverse judgment. State *v.* Echeveria, 33 La. Ann. 709.

25. *Indiana.*— Leach *v.* Cassidy, 23 Ind. 449.

Kentucky.— Wilson *v.* Brown, 109 Ky. 229, 58 S. W. 595, 22 Ky. L. Rep. 708, (1900) 59 S. W. 513.

Michigan.— Blain *v.* Chippewa Cir. Judge, 145 Mich. 59, 108 N. W. 440.

Ohio.— Sullivan *v.* Haacke, 7 Ohio S. & C. Pl. Dec. 113, 5 Ohio N. P. 26.

West Virginia.— Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

See 37 Cent. Dig. tit. "Officers," § 124.

26. *Illinois.*— People *v.* Head, 25 Ill. 325.

Minnesota.— Allen *v.* Robinson, 17 Minn. 113; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Missouri.— State *v.* Woodson, 128 Mo. 497, 31 S. W. 105.

Nebraska.— State *v.* Meeker, 19 Nebr. 444, 27 N. W. 427 [*following* State *v.* Judges Dist. Ct., 19 Nebr. 149, 26 N. W. 723].

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

See 37 Cent. Dig. tit. "Officers," § 124.

27. **Of particular officer** see special titles relating thereto, and cross-references at the head of this article.

Assignment of salary or fees see Assignments, 4 Cyc. 19.

Garnishment of salary or fees see Garnishment, 20 Cyc. 1030.

Right of officer to reward see Rewards.

28. See *supra*, I, C.

29. *Kentucky.*— Wheatly *v.* Covington, 11 Bush 18.

New Jersey.— Hoboken *v.* Gear, 27 N. J. L. 265.

New York.— Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835.

Ohio.— Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417.

Virginia.— Frazier *v.* Virginia Military Inst., 81 Va. 59.

30. *Alabama.*— Troup *v.* Morgan County, 109 Ala. 162, 19 So. 503; State *v.* Brewer,

officers have no claim for official services rendered, either against the government, a local corporation, or an individual, where no provision has been made by law for compensation for such services,[31] and that the performance of the duties gives the *de facto* incumbent of an office no claim to the official compensation,[32] while the fact that officers have not performed the duties of the office does not deprive them of the right to the legal compensation,[33] provided their conduct does not amount

59 Ala. 130; Tillman *v.* Wood, 58 Ala. 578, holding that a party to whom services have been rendered by an officer is responsible for the legal compensation, which "may be recovered in an ordinary action for work and labor done and performed."

Arkansas.— Crittenden County *v.* Crump, 25 Ark. 235.

Indiana.— Carroll County *v.* Gresham, 101 Ind. 53; Jay County *v.* Templer, 34 Ind. 322.

Kentucky.— Wortham *v.* Grayson County Ct., 13 Bush 53.

United States.— The Antonio Zambrana, 88 Fed. 546. See also Fisher *v.* U. S., 15 Ct. Cl. 323; Muirhead *v.* U. S., 15 Ct. Cl. 116; Collins *v.* U. S., 15 Ct. Cl. 22.

See 37 Cent. Dig. tit. "Officers," § 132.

Medium of payment.— Under the acts of July 23, 1868, March 16, 1869, and March 24, 1869, making treasury certificates of the state receivable in payment of state taxes, and Ark. Const. art. 15, § 9, providing that all salaries and fees of state, county, town, or other officers shall be payable in such funds as may by law be receivable for state taxes, the clerk of the supreme court will be required to receive such treasury certificates in payment of fees of his office. Ramsey *v.* Cox, 28 Ark. 366.

31. *Alabama.*— State *v.* Brewer, 59 Ala. 130.

Colorado.— Locke *v.* Central, 4 Colo. 65, 34 Am. Rep. 66.

Georgia.— Price *v.* Cutts, 29 Ga. 142, 74 Am. Dec. 52.

Illinois.— Decatur *v.* Vermillion, 77 Ill. 315; People *v.* Campbell, 8 Ill. 466.

Indiana.— Tippecanoe County *v.* Barnes, 123 Ind. 403, 24 N. E. 137; Miami County *v.* Blake, 21 Ind. 32.

Iowa.— Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259. But *compare* Ripley *v.* Gifford, 11 Iowa 367.

Louisiana.— Bosworth *v.* New Orleans, 26 La. Ann. 494.

Maine.— Stephens *v.* Old Town, 102 Me. 21, 65 Atl. 115; White *v.* Levant, 78 Me. 568, 7 Atl. 539.

Massachusetts.— Sikes *v.* Hatfield, 13 Gray 347.

Michigan.— Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333.

Mississippi.— Myers *v.* Marshall County, 55 Miss. 344.

Missouri.— Williams *v.* Chariton County, 85 Mo. 645; Garnier *v.* St. Louis, 37 Mo. 554.

Nebraska.— Power *v.* Douglas County, 75 Nebr. 734, 106 N. W. 782.

New Hampshire.— Burnham *v.* Stafford County Sav. Bank, 5 N. H. 446.

New Jersey.— Anonymous, 22 N. J. L. 211.

New York.— Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213; Gibson *v.* Roach, 2 N. Y. App. Div. 86, 37 N. Y. Suppl. 567. But *compare* Smith *v.* Birdsall, 9 Johns. 328.

Ohio.— Somerset Bank *v.* Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. N. S. 1170; Deboll *v.* Cincinnati Tp., 7 Ohio St. 237; Halpin *v.* Cincinnati, 3 Ohio Dec. (Reprint) 58, 2 Wkly. L. Gaz. 386; Stokes *v.* Logan County, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448.

Pennsylvania.— Will *v.* Eberly, 8 Lanc. Bar 105.

South Carolina.— See Fitzsimmons *v.* Guanahani Co., 16 S. C. 192.

Tennessee.— State *v.* Henderson, 15 Lea 274.

Texas.— Hallman *v.* Campbell, 57 Tex. 54.

Vermont.— Boyden *v.* Brookline, 8 Vt. 284.

Wisconsin.— Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

United States.— Dunwoody *v.* U. S., 23 Ct. Cl. 82. And see Kinney *v.* U. S., 60 Fed. 883.

England.—Craufurd *v.* Atty.-Gen., 7 Price 1.

See 37 Cent. Dig. tit. "Officers," § 132.

But *compare* Territory *v.* Norris, 1 Oreg. 107.

Right based on custom.— In England the right to fees is sometimes based on a usage. *In re* Ince, Longf. & T. 584. This is not the rule in the United States. Albright *v.* Bedford County, 106 Pa. St. 582; Ogden *v.* Maxwell, 18 Fed. Cas. No. 10,458, 3 Blatchf. 319.

32. See *supra*, II, D, 5.

33. *California.*— Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248.

Georgia.— Adams *v.* Justices Dougherty County Inferior Ct., 21 Ga. 206.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Kansas.— Whitaker *v.* Topeka, 9 Kan. App. 213, 59 Pac. 668.

Michigan.— Comstock *v.* Grand Rapids, 40 Mich. 397; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

Minnesota.— Larsen *v.* St. Paul, 83 Minn. 473, 86 N. W. 459.

Nevada.— Meagher *v.* Storey County, 5 Nev. 244.

New York.— Gregory *v.* New York, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854; O'Leary *v.* New York Bd. of Education, 93 N. Y. 1, 45 Am. Rep. 156; Dolan *v.* New York, 8 Hun 440 [*affirmed* in 68 N. Y. 274, 23 Am. Rep. 168].

Pennsylvania.— Troutman *v.* Chambers, 9 Pa. Dist. 533.

Utah.— Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

United States.— Sleigh *v.* U. S., 9 Ct. Cl. 369.

See 37 Cent. Dig. tit. "Officers," § 136.

to an abandonment of the office.[34] But one lawfully suspended pending investigation is not entitled to compensation during the period of suspension.[35] Nor can an officer recover salary after removal.[36] Finally, when the office is abolished, the incumbent has no right to compensation.[37] Officers have a claim to reimbursement of necessary office expenses.[38]

b. Occupancy of Two Offices. Where an officer by law may, and as a matter of fact does, hold two offices, he is to receive the compensation attached to both offices.[39]

c. Additional or Extrinsic Duties. A change in the duties of an office during the term of the incumbent does not affect the compensation.[40] But officers may recover for services not connected with their official duties.[41] But in such cases

But *compare* Farrell *v.* Bridgeport, 45 Conn. 191; Wiley *v.* Worth, 61 N. C. 171.

34. Cote *v.* Biddeford, 96 Me. 491, 52 Atl. 1019, 90 Am. St. Rep. 417; Phillips *v.* Boston, 150 Mass. 491, 23 N. E. 202; Wardlaw *v.* New York, 137 N. Y. 194, 33 N. E. 140; Emmitt *v.* New York, 128 N. Y. 117, 28 N. E. 19; Barbour *v.* U. S., 17 Ct. Cl. 149.

35. Loper *v.* State, 48 Kan. 540, 29 Pac. 687 (in which it is stated that one suspended during proceedings for removal has claim for salary if reinstated but not if removed); Howard *v.* St. Louis, 88 Mo. 656; Westberg *v.* Kansas City, 64 Mo. 493; Blackwell *v.* Thayer, 101 Mo. App. 661, 74 S. W. 375; Shannon *v.* Portsmouth, 54 N. H. 183; Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417; *In re* Simmers, 12 Pa. Dist. 285, 27 Pa. Co. Ct. 658; Barbour *v.* U. S., 17 Ct. Cl. 149 (which holds that under the statutes of the United States a suspended officer has no claim to salary during the period of suspension). But see Slingsby's Case, 3 Swanst. 178, 36 Eng. Reprint 821.

36. Fassey *v.* New Orleans, 17 La. Ann. 299; U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 68.

Where removal has been wrongful see *infra*, IV, A, 4.

37. Bryon *v.* Jumel, 32 La. Ann. 442; Jones *v.* Shaw, 15 Tex. 577. See also Hall *v.* State, 39 Wis. 79.

Exception.— Where the duties of an officer entitled to an annual salary are of such a nature that all his duties for the year may be performed and completed within less time than the year, the compensation for the entire year will be payable, in case the duties required by law for the year are performed, although the office might be abolished before the end of the year; and, in such case, where there is only a partial performance before the abolition of the office, the compensation should be apportioned to the duties performed, and not to the lapse of time. *Ex p.* Lawrence, 1 Ohio St. 431.

Effect of payment of compensation to de facto officer see *infra*, IV, A, 5.

38. *Kentucky.*— Rice *v.* Tevis, 50 S. W. 1101, 21 Ky. L. Rep. 110.

New Hampshire.— Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446.

New York.— Smith *v.* Birdsall, 9 Johns. 328.

Ohio.— Kloeb *v.* Mercer County Com'rs, 26 Ohio Cir. Ct. 152.

Pennsylvania.— Hulsizer *v.* Northampton County, 19 Pa. Co. Ct. 385.

United States.— U. S. *v.* Flanders, 112 U. S. 88, 5 S. Ct. 67, 28 L. ed. 630.

The same rule is applied where the expenses have been incurred at the instance and for the benefit of an individual. Maitland *v.* Martin, 86 Pa. St. 120.

39. U. S. *v.* Saunders, 120 U. S. 126, 7 S. Ct. 467, 30 L. ed. 594; U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286; *In re* Conrad, 15 Fed. 641; Donovan *v.* U. S., 21 Ct. Cl. 120; Collins *v.* U. S., 15 Ct. Cl. 22.

But this may be prohibited by statute.— Cox *v.* U. S., 14 Ct. Cl. 512; Talbot *v.* U. S., 10 Ct. Cl. 426.

40. *California.*— Marquis *v.* Santa Ana, 103 Cal. 661, 37 Pac. 650.

Colorado.— Locke *v.* Central, 4 Colo. 65, 34 Am. Rep. 66.

Illinois.— Sidway *v.* South Park Com'rs, 120 Ill. 496, 11 N. E. 852.

Massachusetts.— Brophy *v.* Marble, 118 Mass. 548.

Michigan.— People *v.* Calhoun County Sup'rs, 36 Mich. 10.

Minnesota.— Gerken *v.* Sibley County, 39 Minn. 433, 40 N. W. 508.

Montana.— Raymond *v.* Madison County, 5 Mont. 103, 2 Pac. 306.

Nebraska.— State *v.* Eskew, 64 Nebr. 600, 90 N. W. 629; Bayha *v.* Webster County, 18 Nebr. 131, 24 N. W. 457 [*following* State *v.* Silver, 9 Nebr. 85, 2 N. W. 215].

New Jersey.— Bennett *v.* Orange, 69 N. J. L. 176, 54 Atl. 249 [*affirmed* in 69 N. J. L. 675, 56 Atl. 1131].

New York.—People *v.* White, 54 Barb. 622; Palmer *v.* New York, 2 Sandf. 318. See also Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. 1111, which holds that officers have no claim to compensation for extra services.

Oklahoma.— Broaddus *v.* Pawnee County, 16 Okla. 473, 88 Pac. 250; Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273.

United States.— Andrews *v.* U. S., 1 Fed. Cas. No. 381, 2 Story 202; U. S. *v.* White, 28 Fed. Cas. No. 16,684, Taney 152; Burr *v.* District of Columbia, 17 Ct. Cl. 383. *Contra*, U. S. *v.* Brodhead, 24 Fed. Cas. No. 14,654, intimating that officers are entitled to extra compensation where extra services are rendered upon a matter of a permanent character.

41. Niles *v.* Muzzy, 33 Mich. 61, 20 Am.

there must have been a promise to pay,[42] except in those cases in which the law implies a promise to pay.[43]

d. Interest Upon Public Funds. In the absence of a statute giving them the right, officers have no claim to interest on public funds in their hands,[44] except in certain states where it is held that the officer occupies under the law the relation of debtor to the state. Under such conditions he has a claim to the interest on public funds in his hands.[45] This matter is usually decided against the officer's claim by statute.[46]

e. Excessive or Illegal Compensation and Recovery Back. If an officer receives more than his legal compensation, he is liable to an action for the recovery of the excess.[47] But money paid by the government or by a municipal corporation for compensation in excess of that provided by law, when the payment was made as a result of a mistake of law, is regarded as a voluntary payment and may not be recovered.[48] In some cases the exaction of higher fees than are permitted by law is punishable criminally, or is subject to a statutory penalty.[49] Indeed, by the common law, the corrupt taking of illegal fees is regarded as extortion.[50]

Rep. 670 (where a mayor of a city who was a lawyer was permitted to recover for legal services rendered to the city); Evans *v.* Trenton, 24 N. J. L. 764 (where it was recognized that a city treasurer had a just claim against it for purely personal services); U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286; Converse *v.* U. S., 21 How. (U. S.) 463, 16 L. ed. 192.

42. Sidway *v.* South Park Com'rs, 120 Ill. 496, 11 N. E. 852.

43. Detroit *v.* Redfield, 19 Mich. 376.

44. *Illinois.*— Dreyer *v.* People, 176 Ill. 590, 52 N. E. 372; Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

New York.— Richmond County *v.* Wandel, 6 Lans. 33 [*affirmed* in 59 N. Y. 645].

Ohio.— Eshelby *v.* Cincinnati School Dist. Bd. of Education, 66 Ohio St. 71, 63 N. E. 586.

Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

United States.— U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625.

England.— Atty.-Gen. *v.* Edmunds, L. R. 6 Eq. 381, 37 L. J. Ch. 706, 18 L. T. Rep. N. S. 505; Craufurd *v.* Atty.-Gen., 7 Price 1.

45. State *v.* Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Shelton *v.* State, 53 Ind. 331, 21 Am. Rep. 197; Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. L. Rep. 572.

46. See the statutes of the several states. And see Vansant *v.* State, 96 Md. 110, 53 Atl. 711; Hughes *v.* People, 82 Ill. 78, where it is held that if the law provides that "all fees, perquisites and emoluments" above the compensation fixed by law shall be paid into the public treasury, an officer may not retain a commission received for leaving the public moneys in a bank.

47. *Arkansas.*— Weeks *v.* Texarkana, 50 Ark. 81, 6 S. W. 504.

Indiana.— State *v.* Flynn, 161 Ind. 554, 69 N. E. 159; Huntington County *v.* Heaston, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; Comer *v.* Morgan County, 22 Ind. App. 477, 70 N. E. 179; Eley *v.* Miller, 7 Ind. App. 529, 34 N. E. 836.

Maine.— Marcotts *v.* Allen, 91 Me. 74, 39 Atl. 346, 40 L. R. A. 185.

Michigan.— Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577.

New Hampshire.— Benton *v.* Goodale, 66 N. H. 424, 30 Atl. 1121.

New York.— American Exch. F. Ins. Co. *v.* Britton, 8 Bosw. 148; Clinton *v.* Strong, 9 Johns. 370; Ripley *v.* Gelston, 9 Johns. 201, 6 Am. Dec. 271, which holds that it is no defense to the action that the officer has paid the money illegally exacted to another person.

North Carolina.— Robinson *v.* Ezzell, 72 N. C. 231.

Pennsylvania.— Allegheny County *v.* Grier, 179 Pa. St. 639, 36 Atl. 353; American Steamship Co. *v.* Young, 89 Pa. St. 186, 33 Am. Rep. 748 [*affirmed* in 105 U. S. 41, 26 L. ed. 966].

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— Ogden *v.* Maxwell, 18 Fed. Cas. No. 10,458, 3 Blatchf. 319, 323, in which it is said that "the suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection, without warrant of law."

England.— Stevenson *v.* Mortimer, Cowp. 805.

48. Snelson *v.* State, 16 Ind. 29; McGinniss *v.* New York, 6 Daly (N. Y.) 416; Hillborn *v.* U. S., 27 Ct. Cl. 547. *Contra*, Ellis *v.* State Auditors, 107 Mich. 528, 65 N. W. 577.

49. See the statutes of the several states. And see the following cases:

Alabama.— Lee *v.* Lide, 111 Ala. 126, 20 So. 410; Chenault *v.* Walker, 15 Ala. 605.

Connecticut.— Stoddard *v.* Couch, 23 Conn. 238.

Nebraska.—Sheibley *v.* Cooper, (1907) 112 N. W. 363, 113 N. W. 626.

New Hampshire.— Walker *v.* Ham, 2 N. H. 238.

Pennsylvania.— Bartolett *v.* Achey, 38 Pa. St. 273; Miller *v.* Lockwood, 17 Pa. St. 248.

50. People *v.* Whaley, 6 Cow. (N. Y.)

f. Pensions. Sometimes the compensation of officers includes the right to a pension. Where this is the case the claim to such pension is not a vested right.[51] The appropriation of public funds to provide pensions for those already in the service of the government is perfectly proper, even under a constitutional provision forbidding the grant of money to individuals.[52] Deductions from the pay of officers to provide pensions may not be made except when authorized by the legislature,[53] which itself may not provide for such deductions where the constitution requires uniformity of taxation, since such deductions are regarded as imposing a tax on a class in the community.[54]

2. Amount of Compensation. The amount of compensation is, in the absence of other provision, to be fixed by the legislature,[55] which may, however, delegate its power,[56] and which of course must observe all constitutional limitations.[57] A common limitation is that the compensation of officers must be fixed by general law.[58] Where the provision of law fixing the compensation is not clear, it should be given the construction most favorable to the government.[59] The amount of the compensation, as fixed by the law, may not be changed by agreement. Contracts attempted to be made either with a local corporation or an individual which provide for a compensation different from that provided by law are void as against public policy.[60] Where one office is created, the duties of which are to be per-

661; Irons *v.* Allen, 169 Pa. St. 633, 32 Atl. 655. See, generally, Extortion.

51. Pennie *v.* Reis, 80 Cal. 266, 22 Pac. 176 [*affirmed* in 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426]; People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205 [*affirmed* in 173 N. Y. 103, 65 N. E. 956]; U. S. *v.* Teller, 107 U. S. 64, 2 S. Ct. 39, 27 L. ed. 352; Marchant *v.* Lee Conservancy Bd., L. R. 9 Exch. 60, 43 L. J. Exch. 44, 30 L. T. Rep. N. S. 367.

52. Com. *v.* Walton, 182 Pa. St. 373, 38 Atl. 790, 61 Am. St. Rep. 712. But see State *v.* Ziegenhein, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420, which holds that such appropriations can have prospective operation only. See also Mahon *v.* New York Bd. of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810, which regards as improper the use of public funds to grant pensions for those who have retired from public service.

53. State *v.* Rogers, 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663.

54. Hibbard *v.* State, 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654.

55. Bugg *v.* Sebastian County, 64 Ark. 515, 43 S. W. 506; Green *v.* Fresno County, 95 Cal. 329, 30 Pac. 544; Longan *v.* Solano County, 65 Cal. 122, 3 Pac. 463; Airy *v.* People, 21 Colo. 144, 40 Pac. 362.

56. People *v.* Crissey, 91 N. Y. 616; Cricket *v.* State, 18 Ohio St. 9.

57. Bugg *v.* Sebastian County, 64 Ark. 515, 43 S. W. 506 (in which it is said that the legislature may not fix the compensation of a constitutional office so low as practically to abolish the office); Airy *v.* People, 21 Colo. 144, 40 Pac. 362; People *v.* Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; Reid *v.* Smoulter, 128 Pa. St. 324, 18 Atl. 445, 5 L. R. A. 517 (holding that the legislature may not take away the salary from constitutional offices).

58. Flynn *v.* Winnebago County, 66 Ill. 60; Chance *v.* Marion County, 64 Ill. 66; Hyland *v.* Indianapolis Water Works Co., 37 Ind. 523; Wallace *v.* Marion County, 37 Ind. 383.

59. *Arkansas.*— Cole *v.* White County, 32 Ark. 45.

Kentucky.— Bramlage *v.* Com., 113 Ky. 332, 68 S. W. 406, 24 Ky. L. Rep. 213; Gilbert *v.* Marshall County Justices, 18 B. Mon. 427.

Minnesota.— State *v.* Frizzell, 31 Minn. 460, 18 N. W. 316.

New Jersey.— Morris *v.* Ocean Tp., 61 N. J. L. 12, 38 Atl. 760.

New York.— Tyrrell *v.* New York, 159 N. Y. 239, 53 N. E. 1111.

South Carolina.— State *v.* Comptroller-Gen., 9 S. C. 259.

United States.— U. S. *v.* Clough, 55 Fed. 373, 5 C. C. A. 140 [*reversing* 47 Fed. 791]. See also U. S. *v.* Babbit, 1 Black 55, 17 L. ed. 94; Bradshaw *v.* U. S., 14 Ct. Cl. 78. But *compare* U. S. *v.* Morse, 27 Fed. Cas. No. 15,820, 3 Story 87; Butler *v.* U. S., 23 Ct. Cl. 162.

60. *California.*— Power *v.* May, 114 Cal. 207, 46 Pac. 6.

Illinois.— Decatur *v.* Vermillion, 77 Ill. 315.

Indiana.— Williams *v.* Segur, 106 Ind. 368, 1 N. E. 707.

Iowa.—Adams County *v.* Hunter, 78 Iowa 328, 43 N. W. 208, 6 L. R. A. 615; Fawcett *v.* Eberly, 58 Iowa 544, 12 N. W. 580; Fawcett *v.* Woodbury County, 55 Iowa 154, 7 N. W. 483.

Kentucky.— Owens *v.* Gatewood, 4 Bibb 494.

Massachusetts.— Com. *v.* Cony, 2 Mass. 523.

New York.— Hatch *v.* Mann, 15 Wend. 44.

Pennsylvania.— Lancaster County *v.* Fulton, 128 Pa. St. 48, 18 Atl. 384, 5 L. R. A. 436.

England.— Dublin *v.* Hayes, Ir. R. 10 C. L. 226; Liverpool Corporation *v.* Wright,

formed by several, the emoluments of the office, consisting of fees, should in the absence of contrary provision be equally divided.[61]

3. Change of Compensation — a. In General. In the absence of constitutional inhibition the compensation of officers may be changed even during their term of office,[62] but after the official services have been rendered a contract to pay for them at the legal rate exists which cannot be impaired even by the legislature.[63] The intention to change the compensation must, however, be clear.[64] A mere appropriation for payment of salary is not generally regarded as changing the salary.[65]

b. Constitutional Restrictions. But where the compensation is fixed by the constitution, or where there is a constitutional provision prohibiting such change during the term of an incumbent, no change of salary during such term is permissible, and, where a similar provision is contained in a statute, the powers of municipal corporations are subject to the same limitation.[66] But such a provision

Johns. 359, 5 Jur. N. S. 1156, 28 L. J. Ch. 868, 7 Wkly. Rep. 728, 70 Eng. Reprint 461.

Contra.— Kay *v.* Moncton, 36 N. Brunsw. 377.

61. Clarke *v.* Waters, 35 La. Ann. 451.

62. *California.*— Pierpont *v.* Crouch, 10 Cal. 315.

Maine.— Farwell *v.* Rockland, 62 Me. 296.

Michigan.— Knappen *v.* Barry County Sup'rs, 46 Mich. 22, 8 N. W. 579.

Minnesota.— Hennepin County Com'rs *v.* Jones, 18 Minn. 199.

Nebraska.— Douglas County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

New Hampshire.— Marden *v.* Portsmouth, 59 N. H. 18.

New York.— Young *v.* Rochester, 73 N. Y. App. Div. 81, 76 N. Y. Suppl. 224; Matter of New York, 33 N. Y. App. Div. 365, 53 N. Y. Suppl. 875 [*affirmed* in 158 N. Y. 668, 52 N. E. 1125]; Conner *v.* New York, 2 Sandf. 355 [*affirmed* in 5 N. Y. 285].

North Carolina.— Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950 (which applies this rule even to constitutional offices); Cotten *v.* Ellis, 52 N. C. 545. See also New Hanover County *v.* Steadman, 141 N. C. 448, 54 S. E. 269.

Pennsylvania.— Crawford County *v.* Nash, 99 Pa. St. 253.

Tennessee.— Haynes *v.* State, 3 Humphr. 480, 39 Am. Dec. 189.

Wisconsin.— State *v.* Kalb, 50 Wis. 178, 6 N. W. 557; Milwaukee County *v.* Hackett, 21 Wis. 613.

Wyoming.—Castle *v.* Uinta County Com'rs, 2 Wyo. 126.

United States.— Butler *v.* Pennsylvania, 10 How. 402, 13 L. ed. 472.

See 37 Cent. Dig. tit. "Officers," § 152.

63. *Missouri.*— Givens *v.* Daviess County, 107 Mo. 603, 17 S. W. 998.

New York.— People *v.* McCall, 65 How. Pr. 442.

Ohio.— *Ex p.* Lawrence, 1 Ohio St. 431.

Utah.— Toronto *v.* Salt Lake County, 10 Utah 410, 37 Pac. 587.

United States.— Stewart *v.* Jefferson Police Jury, 116 U. S. 135, 6 S. Ct. 332, 29 L. ed. 588; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 6 S. Ct. 329, 29 L. ed. 587.

See also Constitutional Law, 8 Cyc. 959.

64. Kinsey *v.* Sherman, 46 Iowa 463; Chatfield *v.* Washington County, 3 Oreg. 318; State *v.* Ferriss, (Tenn. Ch. App. 1899) 56 S. W. 1039.

65. Riggs *v.* Brewer, 64 Ala. 282; State *v.* Cook, 57 Tex. 205; State *v.* Steele, 57 Tex. 200; U. S. *v.* Langston, 118 U. S. 389, 6 S. Ct. 1185, 30 L. ed. 164.

66. *Arkansas.*— Weeks *v.* Texarkana, 50 Ark. 81, 6 S. W. 504.

California.— Welsh *v.* Bramlet, 98 Cal. 219, 33 Pac. 66.

Dakota.— Polk *v.* Minnehaha County, 5 Dak. 129, 37 N. W. 93.

Florida.— State *v.* Bloxham, 26 Fla. 407, 7 So. 873.

Illinois.— Purcell *v.* Parks, 82 Ill. 346.

Iowa.— Goetzman *v.* Whitaker, 81 Iowa 527, 46 N. W. 1058.

Kentucky.— Com. *v.* Addams, 95 Ky. 588, 26 S. W. 581, 16 Ky. L. Rep. 135; McNew *v.* Com., 93 S. W. 1047, 29 Ky. L. Rep. 540; Com. *v.* Carter, 55 S. W. 701, 21 Ky. L. Rep. 1509.

Maryland.— Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773.

New Mexico.— Torrez *v.* Socorro County, 10 N. M. 670, 65 Pac. 181.

New York.— Seneca County *v.* Allen, 99 N. Y. 532, 2 N. E. 459; Kehn *v.* State, 93 N. Y. 291; Rowland *v.* New York, 83 N. Y. 372; Kerrigan *v.* Force, 68 N. Y. 381. See Moser *v.* New York, 21 Hun 163; Ricketts *v.* New York, 67 How. Pr. 320.

Ohio.— State *v.* Raine, 49 Ohio St. 580, 31 N. E. 741.

Oregon.— Territory *v.* King, 1 Oreg. 106.

Pennsylvania.— Lancaster County *v.* Fulton, 128 Pa. St. 48, 18 Atl. 384, 5 L. R. A. 436; Wren *v.* Luzerne County, 9 Pa. Co. Ct. 22; Lloyd *v.* Smith, 8 Kulp 128; Shiffert *v.* Montgomery County, 12 Montg. Co. Rep. 21.

Wyoming.— Guthrie *v.* Converse County, 7 Wyo. 95, 50 Pac. 229; Converse County *v.* Burns, 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415.

United States.— Jacobs *v.* U. S., 41 Ct. Cl. 452; Whiting *v.* U. S., 35 Ct. Cl. 291; Dyer *v.* U. S., 20 Ct. Cl. 166. These constitutional

does not prevent the passage of a statute abolishing the office or shortening the term.[67] Such a limitation may not be avoided by the resignation of an incumbent and his reappointment at an increased salary.[68] If contained in a constitution such a limitation is sometimes construed so as to affect only offices provided for in the constitution,[69] or payable out of the public treasury of the state.[70] The exact meaning of such a limitation depends on the words used. Thus if the prohibition is as to "salary" it does not affect one whose compensation is not definite and fixed but is uncertain in amount or consists in fees or percentages.[71] Where, however, the term "emoluments" or "compensation" is used the limitation is wider in its effect, embracing all kinds of compensation, such as fees, *per diem* allowances and allowances to a sheriff for board of prisoners.[72] Limitations which

provisions prevent a change of the compensation during the term, even though the compensation is dependent in amount on something independent of the action of any authority, as for example, the amount of the assessed property in the district. Dyer *v.* U. S., *supra*.

See 37 Cent. Dig. tit. "Officers," § 153.

Change before qualification of officer.— Where the provision prohibits the change of compensation after the election or appointment of an officer, a change made after an officer was elected but before the beginning of the term is improper. People *v.* Manistee County, 40 Mich. 585. But where the change is forbidden during the term of the incumbent it may be made before the officer qualifies (Rice *v.* National City, 132 Cal. 354, 64 Pac. 580; Stone *v.* Mayo, 55 S. W. 700, 21 Ky. L. Rep. 1559), but not afterward (Polk *v.* Minnehaha County, 5 Dak. 129, 37 N. W. 93; Louisville *v.* Wilson, 99 Ky. 603, 36 S. W. 944, 18 Ky. L. Rep. 427. But see Marion County Fiscal Ct. *v.* Kelly, 56 S. W. 815, 22 Ky. L. Rep. 174, holding that a failure on the part of an authority to fix the salary before qualification will not preclude it from acting afterward. Where there is no salary attached to the office a salary may be provided. Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285; Purcell *v.* Parks, 82 Ill. 346. See also Lloyd *v.* Silver Bow County, 11 Mont. 408, 28 Pac. 453; Peeling *v.* York County, 113 Pa. St. 108, 5 Atl. 67. The same rule is applied where an office has been reorganized by the constitution. Although the incumbents may be continued in office by that instrument with the same compensation, the legislature may fix their salary, if authorized so to do by the constitution, and a change made through the exercise of such a power is not forbidden. Stone *v.* Pryor, 103 Ky. 645, 45 S. W. 1053, 1136, 20 Ky. L. Rep. 312.

67. Bogue *v.* Seattle, 19 Wash. 396, 53 Pac. 548.

68. Greene *v.* Hudson County, 44 N. J. L. 388.

69. Douglas County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

70. State *v.* Cincinnati Bd. of Education, 21 Ohio Cir. Ct. 785, 12 Ohio Cir. Dec. 333; Weaver *v.* Schuylkill County, 23 Pa. Co. Ct. 507 (holding that a village policeman is not within the constitutional protection); State *v.* Kalb, 50 Wis. 178, 6 N. W. 557; Milwaukee County *v.* Hackett, 21 Wis. 613.

71. *Illinois.*— Purcell *v.* Parks, 82 Ill. 346. See also People *v.* Gaulter, 149 Ill. 39, 36 N. E. 576.

Ohio.— Thompson *v.* Phillips, 12 Ohio St. 617.

Pennsylvania.—Bigley *v.* Bellevue Borough, 158 Pa. St. 495, 28 Atl. 23.

Washington.— State *v.* Grimes, 7 Wash. 445, 35 Pac. 361.

West Virginia.— Rucker *v.* Pocahontas County, 7 W. Va. 661.

Contra.— Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773. *Compare* Collingsworth County *v.* Myers, (Tex. Civ. App. 1896) 35 S. W. 414, holding that such a prohibition affects only officers whose terms are fixed by law and does not apply to orders of the commissioners' courts fixing the amount to be paid to county officers for *ex-officio* services.

72. Com. *v.* Carter, 55 S. W. 701, 21 Ky. L. Rep. 1509; Griffith *v.* Newark, 8 Ohio S. & C. Pl. Dec. 326, 6 Ohio N. P. 521; Peeling *v.* York County, 113 Pa. St. 108, 5 Atl. 67; Apple *v.* Crawford County, 105 Pa. St. 300; 51 Am. Rep. 205; Strock *v.* Cumberland County, 4 Pa. Dist. 321; Rupert *v.* Chester County, 2 Pa. Dist. 688, 13 Pa. Co. Ct. 342; Fox *v.* Lebanon County, 4 Pa. Co. Ct. 393.

The term "emoluments" means the profit "which is annexed to the possession of office, as salary, fees, and perquisites" (Bruce *v.* Dickey, 116 Ill. 527, 535, 6 N. E. 435), pecuniary in character (Reals *v.* Smith, 8 Wyo. 159, 168, 56 Pac. 690), and embraces "all other proper receipts of the office not included within the term 'fees' or 'commissions'" (Arapahoe County *v.* Hall, 9 Colo. App. 538, 49 Pac. 370, 372; Vansant *v.* State, 96 Md. 110, 128, 53 Atl. 711; Hoyt *v.* U. S., 10 How. (U. S.) 109, 135, 646, 13 L. ed. 348, 576). It includes "fees" or "compensation," as used in a statute which renders it a misdemeanor for an officer to receive any emoluments not provided by law for doing an official act. The words "compensation, perquisite, or benefit" mean, however, an official "compensation," etc., and do not include payment for non-official services. Bruce *v.* Dickey, *supra*. Action making an official compensation payable in a depreciated legal tender where such compensation had been payable in gold is not prevented by such a limitation. State *v.* Rhodes, 3 Nev. 240.

by their terms prevent a change of compensation during the term of office of an incumbent do not affect officers who have no fixed term,[73] nor persons not officers,[74] but do affect hold-overs,[75] or one appointed to fill a vacancy.[76] Such limitations do not affect provision for expenses,[77] except that use may not be made of a power to increase an allowance for expenses so as to increase the compensation received by an officer;[78] nor do they prevent the legislature or its delegate from providing that a change in the duties of the incumbent of an office shall be accompanied by a change of his compensation,[79] or from granting him clerical aid or an allowance for clerk hire,[80] or from abolishing an office or consolidating it with another, or dividing the duties of one office and distributing them among several offices.[81] Finally a constitutional provision preventing a change of compensation during an official term does not change the rule of law that the *de jure* officer must sue the *de facto* officer in order to recover salary paid such *de facto* officer but by law payable to the *de jure* officer.[82] If an officer accepts an office, whose compensation it has been attempted illegally to reduce, and receives the compensation at a reduced rate, he is not estopped from claiming the balance as fixed by law.[83]

4. Payment and Collection. If the compensation is in the form of a salary its payment may be enforced by suit where the officer is to be paid by a public corporation, since the right to payment for services rendered is regarded as in the nature of a contract right. The same rule is applied where the officer is to be paid by the United States or a state government, if such government has provided a forum in which suits on contract may be brought against it. In the United States government such suits may be bronght in the court of claims, or if they involve no more than one thousand dollars and ten thousand dollars in the district and circuit courts respectively acting as courts of claims.[84] In the states sometimes similar bodies have been provided.[85] Sometimes the ordinary courts have jurisdiction under a special provision of statute.[86] In case no such provision is made, the ordinary remedy by means of which the payment of accrued salary may be enforced is the writ of mandamus.[87] The action to enforce the right to compensation may be bronght only by an officer who has qualified as required by law,[88]

73. Gibbs *v.* Morgan, 39 N. J. Eq. 126; Somers *v.* State, 5 S. D. 321, 58 N. W. 804, 5 S. D. 584, 59 N. W. 962.

74. Smith *v.* New York, 67 Barb. (N. Y.) 223; State *v.* Massillon, 24 Ohio Cir. Ct. 249.

75. State *v.* Moores, 61 Nebr. 9, 84 N. W. 399.

76. Storke *v.* Goux, 129 Cal. 526, 62 Pac. 68.

77. Kirkwood *v.* Soto, 87 Cal. 394, 25 Pac. 488; People *v.* Fitch, 11 Misc. (N. Y.) 257, 32 N. Y. Suppl. 218 [*affirmed* in 145 N. Y. 261, 39 N. E. 972].

78. Cullom *v.* Dolloff, 94 Ill. 330.

79. *California.*— San Luis Obispo County *v.* Felts, 104 Cal. 60, 37 Pac. 780.

Kentucky.— Purnell *v.* Mann, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264, 20 Ky. L. Rep. 1146, 1396, 21 Ky. L. Rep. 1129.

Montana.— State *v.* Granite County, 23 Mont. 250, 58 Pac. 439.

Ohio.— Lewis *v.* State, 21 Ohio Cir. Ct. 410, 11 Ohio Cir. Dec. 647.

Pennsylvania.— Shiffert *v.* Montgomery County, 17 Pa. Co. Ct. 241.

Washington.— State *v.* Cheetham, 21 Wash. 437, 58 Pac. 771; State *v.* Carson, 6 Wash. 250, 33 Pac. 428.

80. Tulare County *v.* May, 118 Cal. 303, 50 Pac. 427; People *v.* Adams, 65 Ill. App. 283.

81. Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

82. Nall *v.* Coulter, 117 Ky. 747, 78 S. W. 1110, 25 Ky. L. Rep. 1891.

83. *Minnesota.*— Bowe *v.* St. Paul, 70 Minn. 341, 73 N. W. 184.

New York.— People *v.* New York Bd. of Police, 75 N. Y. 38.

Tennessee.— State *v.* Ferriss, (Ch. App. 1899) 56 S. W. 1039.

Texas.— State *v.* Cook, 57 Tex. 205; State *v.* Steele, 57 Tex. 200.

United States.— Glavey *v.* U. S., 182 U. S. 595, 21 S. Ct. 891, 45 L. ed. 1247 [*reversing* 35 Ct. Cl. 242]; Whiting *v.* U. S., 35 Ct. Cl. 291.

Contra.— Love *v.* Jersey City, 40 N. J. L. 456.

84. U. S. *v.* Langston, 118 U. S. 389, 6 S. Ct. 1185, 30 L. ed. 164. See 24 U. S. St. at L. 505, c. 359 [U. S. Comp. St. (1901) p. 752].

85. See the statutes of the several states. And see N. Y. Laws (1883), c. 205; N. Y. Laws (1870), c. 321.

86. See the statutes of the several states. And see Higginbotham *v.* Com., 25 Gratt. (Va.) 627.

87. See Mandamus, 26 Cyc. 266.

88. Albaugh *v.* State, 145 Ind. 356, 44 N. E. 355; Wiley *v.* Worth, 61 N. C. 171;

and one even wrongfully removed from office cannot bring an action to enforce the payment of his salary until he shall have established his right to the office.[89] In actions for compensation the pleadings should set forth clearly all facts necessary to establish the claim, and a petition or complaint which does not do so is demurrable for evasiveness and uncertainty.[90] If the compensation is fixed by permanent statute and the time of payment is prescribed by law, no special annual appropriation is necessary to justify an issue of a warrant for its payment.[91] But where the law prescribes that the controller shall not draw his warrant for the payment of the salary of any person until the civil service commissioners shall have certified that such person has been appointed in pursuance of law, no payment may be made except upon such certification.[92] A claim for salary carries interest from the time a demand is made on the auditor for the proper warrant for the amount thereof.[93] Injunction will not be issued to restrain the payment of the salary to the incumbent at the instance of one who claims the office pending the trial of the contest as to the right to the office.[94] Nor will a receiver of the fees be appointed.[95] In case the compensation consists of fees, such fees are payable by the person to whom the service is rendered at the time the service is rendered unless some other provision is made by statute,[96] and officers are protected in refusing to deliver official papers, such as exemplifications, until their fees have been paid.[97]

5. Payment to De Facto Officer.[98] The payment of the official salary to a *de facto* officer is, however, a defense to a claim against the public corporation or disbursing officer making such payment in an action brought against it or him by the *de jure* officer.[99] But payment of the salary to a person who is merely an

State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592. See Halbeck *v.* New York, 10 Abb. Pr. (N. Y.) 439; Com. *v.* Slifer, 25 Pa. St. 23, 64 Am. Dec. 680.

89. *California.*— Meredith *v.* Sacramento County, 50 Cal. 433.

Delaware.— Lee *v.* Wilmington, 1 Marv. 65, 40 Atl. 663.

Kentucky.— Stone *v.* Caufield, 55 S. W. 924, 21 Ky. L. Rep. 1641. But see Gorley *v.* Louisville, 108 Ky. 789, 55 S. W. 886, 21 Ky. L. Rep. 1606, in which it is said that where there is no *de facto* incumbent of the office from which plaintiff has unlawfully been removed plaintiff may bring an action for salary but must not sleep on his rights.

New York.— Hagan *v.* Brooklyn, 126 N. Y. 643, 27 N. E. 265.

Oregon.— Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307.

90. Eastman *v.* Cameron, 111 Ga. 110, 36 S. E. 462.

91. Riggs *v.* Brewer, 64 Ala. 282; Reynolds *v.* Taylor, 43 Ala. 420; Nichols *v.* Comptroller, 4 Stew. & P. (Ala.) 154.

92. People *v.* Roberts, 10 Misc. (N. Y.) 764, 32 N. Y. Suppl. 711.

93. Swann *v.* Turner, 23 Miss. 565.

94. Colton *v.* Price, 50 Ala. 424; Stone *v.* Wetmore, 42 Ga. 601; Keating *v.* Fitch, 14 Misc. (N. Y.) 128, 35 N. Y. Suppl. 641; Tappan *v.* Gray, 9 Paige (N. Y.) 507 [*affirmed* in 7 Hill 259, and *reversing* 3 Edw. 450].

95. Stone *v.* Wetmore, 42 Ga. 601; Tappan *v.* Gray, 7 Hill (N. Y.) 259 [*affirming* 9 Paige 507 (*reversing* 3 Edw. 450)].

96. Baldwin *v.* Kouns, 81 Ala. 272, 2 So. 638; Ripley *v.* Gifford, 11 Iowa 367.

97. People *v.* Rockwell, 3 Ill. 3.

98. Right of de facto officer to compensation see *supra*, II, D, 5.

99. *Arizona.*— Shaw *v.* Pima County, 2 Ariz. 399, 18 Pac. 273.

California.— Under Pol. Code, § 936, as amended by St. (1891) p. 28, c. 44, providing that the salary of an office may be paid pending a contest, to one who holds a certificate of election or commission of office and discharges the duties thereof, a successful contestant cannot recover the salary paid to the incumbent pending the contest. Merkley *v.* Williams, 3 Cal. App. 268, 84 Pac. 1015; Tout *v.* Blair, 3 Cal. App. 180, 84 Pac. 671. Prior to this statute a rule contrary to that stated in the text was followed in California. Carroll *v.* Siebenthaler, 37 Cal. 193; People *v.* Smyth, 28 Cal. 21.

Connecticut.— Coughlin *v.* McElroy, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224.

Idaho.— Gorman *v.* Boise County, 1 Ida. 655.

Iowa.— Brown *v.* Tama County, 122 Iowa 745, 98 N. W. 562, 101 Am. St. Rep. 296, applying the rule to *per diem* allowances.

Kansas.— Saline County Com'rs *v.* Anderson, 20 Kan. 298, 27 Am. Rep. 171.

Kentucky.— Nall *v.* Coulter, 117 Ky. 747, 78 S. W. 1110, 25 Ky. L. Rep. 1891.

Michigan.— Wayne County *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382.

Minnesota.— Parker *v.* Dakota County, 4 Minn. 59.

Mississippi.— See McAffee *v.* Russell, 29 Miss. 84, where the reason of the opinion is that the *de jure* officer did not do the work of the office.

Missouri.— State *v.* Clark, 52 Mo. 508.

intruder,[1] or to a *de facto* officer who has been judicially determined not to be the *de jure* officer,[2] will not be a defense in an action brought by the *de jure* officer for his salary.

B. Powers and Duties[3] — **1. In General.** The authority and powers of officers are determined by the law. In most cases this law is to be found in statutes passed by the legislature and ordinances adopted by municipal corporations, since the legislature has the right under the constitution, either directly or indirectly, as a result of a delegation of its power to a municipal corporation, to regulate the duties and powers of public officers.[4] Furthermore, there are a few officers whose position and powers have been worked out through the decisions of the courts. Such officers are known as common-law officers. The most noted examples of them are the constable,[5] the coroner, and the sheriff.[6] Where mention is made of such officers in the constitution it has been held that they thus acquire a constitutional right, of which the legislature may not deprive them, to the exercise of the powers which have immemorially been attached to the offices,[7] although the legislature is not prevented from conferring upon them and taking from them new powers which have not been traditionally associated with the office.[8] The authority and powers of officers are determined by the law, considered as a whole, and a mistaken conception on the part of an officer as to the statute under which he has acted will not affect the validity of his action, provided he actually had legal authority.[9] But acts which are within the apparent but in excess of the actual authority of officers will not bind the government which they represent,[10]

New Jersey.— McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384.

New York.— Demarest *v.* New York, 147 N. Y. 203, 41 N. E. 405; McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. 106; Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168.

South Dakota.— Fuller *v.* Roberts County, 9 S. D. 216, 68 N. W. 308; Chandler *v.* Hughes County, 9 S. D. 24, 67 N. W. 946.

Washington.— Samuels *v.* Harrington, 43 Wash. 603, 86 Pac. 1071, 117 Am. St. Rep. 1075.

England.— Reg. *v.* Cambridge, 12 A. & E. 702, 10 L. J. Q. B. 25, 4 P. & D. 294, 40 E. C. L. 349.

See 37 Cent. Dig. tit. "Officers," § 159.

Contra.— State *v.* Carr, 129 Ind. 44, 28 N. E. 88, 28 Am. St. Rep. 163, 13 L. R. A. 177; Andrews *v.* Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Memphis *v.* Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; Tanner *v.* Edwards, 31 Utah 80, 86 Pac. 765.

1. Meehan *v.* Hudson County, 46 N. J. L. 276, 50 Am. Rep. 421; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; Warden *v.* Bayfield County, 87 Wis. 181, 58 N. W. 248.

2. Scott *v.* Crump, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; Fylpaa *v.* Brown County, 6 S. D. 634, 62 N. W. 962; Blydenburgh *v.* Carbon County, 8 Wyo. 303, 56 Pac. 1106; Rasmussen *v.* Carbon County, 8 Wyo. 277, 56 Pac. 1098, 45 L. R. A. 295.

3. Powers and duties of particular officers see special titles relating thereto.

4. *California.*— People *v.* Squires, 14 Cal. 12.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Michigan.— Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492. See also Matter of Head-Notes, 43 Mich. 641, 8 N. W. 552.

New York.— People *v.* Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; Warner *v.* People, 2 Den. 272, 43 Am. Dec. 740.

North Carolina.— See Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950, which holds that the legislature may within reasonable limits change the statutory duties of a constitutional office.

Wisconsin.— State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84.

Legislative control of officers of municipal corporations see Municipal Corporations, 28 Cyc. 291.

5. Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

Powers and duties of constable see Sheriffs and Constables.

6. State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84.

Powers and duties of coroner see Coroners.

Powers and duties of sheriff see Sheriffs and Constables.

7. State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84.

8. People *v.* Squires, 14 Cal. 12, holding that a sheriff who by law is *ex-officio* collector of certain taxes may be deprived by the legislature of the office of tax-collector. See also Warner *v.* People, 2 Den. (N. Y.) 272, 43 Am. Dec. 740, laying down the same rule. See, generally, Sheriffs and Constables.

9. Davis *v.* Brace, 82 Ill. 542; Hartshorn *v.* Schoff, 51 N. H. 316; Matter of Rockaway Park Imp. Co., 83 Hun (N. Y.) 263, 31 N. Y. Suppl. 386; Starin *v.* U. S., 31 Ct. Cl. 65. See Pope *v.* Davenport, 52 Tex. 206.

10. Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Baltimore *v.* Eschbach, 18 Md. 276; State *v.* Lake Shore, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 300, 1 Ohio N. P. 292; Jones *v.* Muisbach, 26 Tex. 235; Whiteside *v.* U. S., 93 U. S. 247, 23 L. ed. 882; Pierce *v.* U. S.,

unless ratified by it.[11] Officers are, however, presumed to have acted within their authority,[12] and all persons dealing with officers are presumed to know what is the extent of the powers of such officers.[13] Finally officers need not, in the absence of a provision of law to that effect, devote all their time to the performance of their official duties but may engage in other occupations.[14]

2. Mandatory and Permissive or Directory Statutes. Statutes imposing duties and conferring powers on officers are either mandatory or directory. Permissive words in a statute are construed as mandatory where the exercise of the power granted is necessary to protect the public interest or the rights of third persons.[15] But statutes, unless clearly mandatory, are regarded as directory, where the purpose of their passage is merely to secure regularity in official procedure.[16] Particularly are statutes construed as directory in character which provide that official acts shall be done within a given time.[17] Whereas the failure of an officer to observe a mandatory provision will result in the invalidity of all action taken subsequent to such failure,[18] and such failure may in a proper case be overcome by mandamus,[19] the failure to obey a directory provision will not result in the invalidity of his subsequent action.[20]

3. Ministerial and Discretionary Duties. From another point of view the

7 Wall. (U. S.) 666, 19 L. ed. 169; Lee *v.* Munroe, 7 Cranch (U. S.) 366, 3 L. ed. 373; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332; Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502; Child *v.* Adams, 5 Fed. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20.

11. Delafield *v.* State, 26 Wend. (N. Y.) 192; U. S. *v.* Buchanan, 24 Fed. Cas. No. 14,678, Crabbe 563.

12. *California.*— Den *v.* Den, 6 Cal. 81.

Kentucky.— Combs *v.* Breathitt County, 38 S. W. 138, 39 S. W. 33, 18 Ky. L. Rep. 809.

Mississippi.— Davany *v.* Koon, 45 Miss. 71.

Texas.— Jones *v.* Garza, 11 Tex. 186.

Wisconsin.— State *v.* Prince, 45 Wis. 610; Tainter *v.* Lucas, 29 Wis. 375.

Presumption of regularity of official acts generally see Evidence, 16 Cyc. 1076.

13. *Arkansas.*— Woodward *v.* Campbell, 39 Ark. 580.

Indiana.— Schaw *v.* Dietrichs, Wils. 153.

Minnesota.— Mitchell *v.* St. Louis County, 24 Minn. 459.

Missouri.— State *v.* Hays, 52 Mo. 578.

New York.— Delafield *v.* State, 26 Wend. 192.

United States.—Whiteside *v.* U. S., 93 U. S. 247, 23 L. ed. 882; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332; Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

See 37 Cent. Dig. tit. "Officers," § 165.

14. Fairley *v.* Western Union Tel. Co., 73 Miss. 6, 18 So. 796, which holds that even under a constitutional provision that no one shall hold an office of profit "without personally devoting his time to the performance of the duties thereof" a physician, who was the superintendent of a state institution, might at the same time carry on his private business.

15. *Alabama.*— *Ex p.* Banks, 28 Ala. 28; Gould *v.* Hayes, 19 Ala. 438; *Ex p.* Simonton, 9 Port. 390, 33 Am. Dec. 320.

Kansas.— Smith *v.* State, 1 Kan. 365.

New Jersey.— Hugg *v.* Camden, 39 N. J. L. 620.

New York.— People *v.* Brooks, 1 Den. 457, 43 Am. Dec. 704; New York *v.* Farze, 3 Hill 612.

United States.— Supervisors *v.* U. S., 4 Wall. 435, 18 L. ed. 419; Mason *v.* Fearson, 9 How. 248, 13 L. ed. 125.

England.— Rex *v.* Hastings, 5 B. & Ald. 692 note, 7 E. C. L. 377, 1 D. & R. 148, 16 E. C. L. 23, 24 Rev. Rep. 657; Rex *v.* Havering Atte Bower, 5 B. & Ald. 691, 2 D. & R. 176 note, 24 Rev. Rep. 532, 7 E. C. L. 376; Rex *v.* Barlow, 2 Salk. 609; Backwell's Case, Vern. Ch. 152, 23 Eng. Reprint 381.

Must show absolute right.— But in order that a private individual may force the exercise of a power granted in permissive words he must show an absolute right and not a mere interest. Thus where trustees may lay out streets, one whose land would be taken, were the power exercised, may not compel the completion of proceedings begun. *In re* Washington Park Com'rs, 56 N. Y. 144; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545.

16. Hart *v.* Plum, 14 Cal. 148; People *v.* Cook, 14 Barb. (N. Y.) 259 [*affirmed* in 8 N. Y. 67, 59 Am. Dec. 451].

17. *Alabama.*—Limestone County *v.* Rather, 48 Ala. 433; Walker *v.* Chapman, 22 Ala. 116.

California.—People *v.* Murray, 15 Cal. 221; Hart *v.* Plum, 14 Cal. 148.

New Jersey.— Hugg *v.* Camden, 39 N. J. L. 620.

New York.— People *v.* Cook, 14 Barb. 259 [*affirmed* in 8 N. Y. 67, 59 Am. Dec. 451]; People *v.* Allen, 6 Wend. 486.

Ohio.— Gates *v.* Beckwith, 2 Ohio Dec. (Reprint) 394, 2 West. L. Month. 590.

See 37 Cent. Dig. tit. "Officers," § 178.

18. French *v.* Edwards, 13 Wall. (U. S.) 506, 20 L. ed. 702.

19. See Mandamus.

20. Hart *v.* Plum, 14 Cal. 148.

powers of officers are classified as discretionary or ministerial. Over the former the courts have no control except where the discretion has been abused. Thus, if the power has by law been given to an officer to determine a question of fact, his determination is final, in the absence of any controlling provisions of statute,[21] provided he has not been guilty of an abuse of discretion.[22] Such a determination is ordinarily not open to collateral attack in a court,[23] and is binding upon the successors in office of the officer who made it.[24] But the exercise of ministerial powers is subject to the control of the courts, which may enforce their exercise through the issue of a mandamus,[25] may restrain their improper exercise in a proper case, through the issue of an injunction,[26] and may review it in a collateral proceeding, as for example, where an action for damages is brought against an officer for negligence in the performance of a ministerial duty.[27] Discretionary or judicial powers, finally, may not in the absence of statutory authority be delegated;[28] but ministerial duties, except where there is a statutory prohibition, may be delegated.[29]

4. Powers of Boards.[30] Where official authority is conferred upon a board

21. *California.* — Colusa County *v.* De Jarnett, 55 Cal. 373; Arapahoe County *v.* Graham, 4 Cal. 201.

Illinois.— People *v.* State Bd. of Dental Examiners, 110 Ill. 180.

Indiana.— Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366.

Massachusetts.— Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

Michigan.— Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622.

Ohio.— State *v.* Hamilton County Com'rs, 49 Ohio St. 301, 30 N. E. 785; Alter *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 368, 4 Ohio N. P. 427.

Utah.— Eureka *v.* Wilson, 15 Utah 67, 48 Pac. 150, 62 Am. St. Rep. 904 [*affirmed* in 173 U. S. 32, 19 S. Ct. 317, 43 L. ed. 603]; Eureka *v.* Wilson, 15 Utah 53, 48 Pac. 41.

Washington.— State *v.* Forrest, 13 Wash. 268, 43 Pac. 51.

Wisconsin.—State *v.* McGarry, 21 Wis. 496.

United States.— U. S. *v.* Ju Toy, 198 U. S. 253, 25 S. Ct. 644, 49 L. ed. 1040; Bates, etc., Co. *v.* Payne, 194 U. S. 106, 24 S. Ct. 595, 48 L. ed. 894; Allen *v.* Blunt, 1 Fed. Cas. No. 216, 2 Robb. Pat. Cas. 288, 3 Story 742; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

Canada.— Pepin *v.* Pepin, 14 Quebec K. B. 371.

Distinction between ministerial and discretionary duties see *infra*, IV, D, 3.

Mandamus to control discretion see MANDAMUS, 26 Cyc. 158 *et seq.*

22. State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220; U. S. *v.* Thurber, 28 Fed. 56.

23. People *v.* Hagar, 52 Cal. 171; Merchant *v.* Bothwell, 60 Mo. App. 341; Brown *v.* Otoe County Com'rs, 6 Nebr. 111; Martin *v.* Greene County, 29 N. Y. 645.

24. People *v.* Preston, 62 Hun (N. Y.) 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866]; Cotton *v.* U. S., 29 Ct. Cl. 207.

25. See MANDAMUS.

26. See INJUNCTIONS, 22 Cyc. 879 *et seq.*

27. See *infra*, IV, D, 3.

Right to assert unconstitutionality of statute as defense for disobedience see CONSTITUTIONAL LAW, 8 Cyc. 789.

28. *California.*— Stockton *v.* Creanor, 45 Cal. 643.

Iowa.— Young *v.* Black Hawk, 66 Iowa 460, 23 N. W. 923, which holds that the exercise of a delegated power may be ratified.

Kansas.— Morrow *v.* State, 5 Kan. 563, holding that a recognizance signed by a clerk of court and not showing that it was accepted by the judge was void.

Kentucky.— Hydes *v.* Joyes, 4 Bush 464, 96 Am. Dec. 311, holding that subsequent ratification of the exercise of a delegated power has no effect.

Michigan.— Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639.

Minnesota.— Darling *v.* St. Paul, 19 Minn. 389.

Missouri.— Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

New Jersey.— State *v.* Paterson, 34 N. J. L. 163, holding that the appointment by a city council of a committee to purchase a site and build a market thereon was void as an attempt to delegate a discretionary power.

New York.— Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105.

Ohio.— State *v.* Bell, 34 Ohio St. 194.

Rhode Island.— State *v.* Fiske, 9 R. I. 94.

Tennessee.— Whyte *v.* Nashville, 2 Swan 364.

Wisconsin.— Lord *v.* Oconto, 47 Wis. 386, 2 N. W. 785.

United States.— Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544.

29. People *v.* Bank of North America, 75 N. Y. 547 (holding that the state treasurer might authorize a clerk in his office to indorse a draft); Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659. See also *supra*, II, E, 1.

30. Powers of particular boards see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; STREETS AND HIGHWAYS; and other special titles.

or commission, composed of three or more persons, such authority may be exercised by a majority of the members of such board;[31] but it may not be exercised by a single member of such body,[32] or by a minority,[33] unless ratified by a majority,[34] except that under some statutes a minority present at the regular time of meeting after waiting a reasonable time may lawfully adjourn the meeting.[35] This rule is applied in many cases, only where all the members of such board are present when the action is taken,[36] and is frequently applied also, when all have been notified in a legal manner of the meeting.[37] But in no case is the action of a

31. *Alabama.*— Caldwell *v.* Harrison, 11 Ala. 755.

California.— People *v.* Coghill, 47 Cal. 361.

Connecticut.— Gallup *v.* Tracy, 25 Conn. 10.

Georgia.— Beall *v.* State, 9 Ga. 367.

Illinois.— Louk *v.* Woods, 15 Ill. 256.

Massachusetts.—Kingsbury *v.* Centre School Dist., 12 Metc. 99; Jones *v.* Andover, 9 Pick. 146.

Minnesota.— State *v.* Smith, 22 Minn. 218.

Mississippi.— Petrie *v.* Doe, 30 Miss. 698.

Nebraska.— *In re* State Treasurer's Settlement, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746.

New Hampshire.— Glidden *v.* Towle, 31 N. H. 147.

New York.— People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Woolsey *v.* Tompkins, 23 Wend. 324.

North Carolina.— Austin *v.* Helms, 65 N. C. 560.

North Dakota.—State *v.* Archibald, 5 N. D. 359, 66 N. W. 234.

Ohio.— State *v.* Wilkesville Tp., 20 Ohio St. 288; Slicer *v.* Elder, 2 Ohio Dec. (Reprint) 218, 2 West. L. Month. 90.

Pennsylvania.—Allegheny County *v.* Lecky, 6 Serg. & R. 166, 9 Am. Dec. 418; *In re* Turnpike Road, 5 Binn. 481.

Vermont.— North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734.

Wisconsin.— Walker *v.* Rogan, 1 Wis. 597.

United States.— Cooley *v.* O'Connor, 12 Wall. 391, 20 L. ed. 446.

England.— Blacket *v.* Blizard, 9 B. & C. 851, 8 L. J. M. C. O. S. 103, 4 M. & R. 641, 17 E. C. L. 377; Rex *v.* Whitaker, 9 B. & C. 648, 7 L. J. K. B. O. S. 332, 17 E. C. L. 291; Cook *v.* Loveland, 2 B. & P. 31, 5 Rev. Rep. 533; Grindley *v.* Bark, 1 B. & P. 229, 4 Rev. Rep. 787; Rex *v.* Beeston, 3 T. R. 592.

See 37 Cent. Dig. tit. "Officers," § 184.

Contra.— Geter *v.* Campbell-Town Warehouse Tobacco Inspection Com'rs, 1 Bay (S. C.) 354, 1 Am. Dec. 621.

Statutory provisions.— Sometimes, however, it is specifically provided by statute that a majority may take valid action. See Jefferson County *v.* Slagle, 66 Pa. St. 202.

Where there are only two to whom authority is delegated both must consent. Perry *v.* Tynen, 22 Barb. (N. Y.) 137. See also New York L. Ins., etc., Co. *v.* Staats, 21 Barb. (N. Y.) 570.

32. Martin *v.* Lemon, 26 Conn. 192; Pell *v.* Ulmar, 21 Barb. (N. Y.) 500 [*reversed* on other grounds in 18 N. Y. 139].

33. State *v.* Porter, 113 Ind. 79, 14 N. E. 883; State *v.* King, 20 N. C. 661; Blacket *v.* Blizard, 9 B. & C. 851, 8 L. J. M. C. O. S. 103, 4 M. & R. 641, 17 E. C. L. 377; Cook *v.* Loveland, 2 B. & P. 31, 5 Rev. Rep. 533.

34. Hanson *v.* Dexter, 36 Me. 516.

35. Matter of Light, 21 Misc. (N. Y.) 737, 49 N. Y. Suppl. 345 [*reversed* on other grounds in 30 N. Y. App. Div. 50, 51 N. Y. Suppl. 743], where adjournment after waiting seven minutes was sustained.

36. *California.*— People *v.* Coghill, 47 Cal. 361.

Illinois.— Louk *v.* Woods, 15 Ill. 256.

Indiana.— State *v.* Porter, 113 Ind. 79, 81, 14 N. E. 883, where it is said: "It is a general rule, unless there is some provision to the contrary, that, where several persons are authorized to exercise a power, all the persons authorized must be present in order that the power may be exercised."

Michigan.— Scott *v.* Detroit Young Men's Soc., 1 Dougl. 119.

New Hampshire.— Palmer *v.* Conway, 22 N. H. 144, holding that if one of three dies the remaining two cannot take valid action.

New York.— Parrott *v.* Knickerbocker Ice Co., 8 Abb. Pr. N. S. 234, 38 How. Pr. 508. This case is based on a statute which, however, is believed to be declaratory of the common law. Pell *v.* Ulmar, 21 Barb. 500 [*reversed* on other grounds in 18 N. Y. 139]; Woolsey *v.* Tompkins, 23 Wend. 324; Crocker *v.* Crane, 21 Wend. 211, 34 Am. Dec. 228.

England.— Doe *v.* Middleton, 3 B. & B. 214, 7 E. C. L. 692, holding that two or three commissioners may not act after the death of a third until the appointment of his successor.

See 37 Cent. Dig. tit. "Officers," § 184.

Some of the cases attempt to distinguish between judicial and ministerial duties, holding that all must be present in the case of the former but not in the case of the latter. See Martin *v.* Lemon, 26 Conn. 192. But see Gallup *v.* Tracy, 25 Conn. 10.

37. Jones *v.* Andover, 9 Pick. (Mass.) 146; State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; People *v.* Batchelor, 28 Barb. (N. Y.) 310 [*affirmed* in 22 N. Y. 128]; Horton *v.* Garrison, 23 Barb. (N. Y.) 176; People *v.* Board of Sup'rs, 10 Abb. Pr. (N. Y.) 233, 18 How. Pr. 152; Merchant *v.* North, 10 Ohio St. 251. See also Gallup *v.* Tracy, 25 Conn. 10 (which holds that, where no provision is made in the law for a meeting, action may be taken by each officer separately and is valid when approved in this way by a majority of those qualified to act); Hopkins *v.*

majority regarded as valid where all are not present or have not been notified.[38] The majority rule is always the rule as to the actions of the legislative body of a public corporation where the number of such body is defined in the law. Where the members of the body have been duly notified of the meeting, a majority of the members of such body may take valid action at any such meeting.[39] This rule as to the validity of the action of a majority is not, however, applied where the evident purpose of the legislature was that the act must be the act of all. Thus, where power is conferred upon three commissioners and provision is made for filling vacancies whenever the number is reduced below three, two commissioners may not act while the office of the third is vacant.[40] In a number of instances the rule to be applied in the case of a joint authority is contained in a statute. In such a case, while the exact meaning of the rule is to be obtained from a consideration of the wording of the statute,[41] at the same time the courts are influenced by the common law in their construction of such statutes.[42]

5. Disqualification For Interest.[43] It is a rule of the common law that judicial and discretionary officers are disqualified to act in a matter in which they are personally interested. This principle is often incorporated into the statutes.[44] An exception to the general rule is made to the effect "that where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by constitution or by statute as that his refusal to act will prevent any proceeding in it, then he may act so far as that there may not be a failure of

Scott, 38 Nebr. 661, 57 N. W. 391 (holding that the presence of a quorum of a board of supervisors is all that is necessary for the valid removal of a county officer).

38. *Kansas.*— Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302.

Minnesota.— State *v.* Guiney, 26 Minn. 313, 3 N. W. 977.

Nebraska.— People *v.* Peters, 4 Nebr. 254.

New York.— Keeler *v.* Frost, 22 Barb. 400.

Pennsylvania.— Nason *v.* Directors of Poor, 126 Pa. St. 445, 17 Atl. 616.

Vermont.— See Hodges *v.* Thacher, 23 Vt. 455.

United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175.

See 37 Cent. Dig. tit. "Officers," § 184.

But see State *v.* Wilkesville Tp., 20 Ohio St. 288, where it was held that under a statute providing that the majority of the members of a board should be a quorum a meeting of two when the third was out of the state was a valid meeting and the action taken by the two members was a valid action.

39. See Municipal Corporations, 28 Cyc. 335.

40. People *v.* Nostrand, 46 N. Y. 375; Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175 (holding that two in a commission of three may not act where the third does not qualify); Doe *v.* Middleton, 3 B. & B. 214, 7 E. C. L. 692. See also Lyon *v.* Mason, etc., Co., 102 Ky. 594, 44 S. W. 135, 19 Ky. L. Rep. 1642 (where it was held, under a statute permitting a majority to act if all cannot be present and participate, the action of a mere majority is not valid in the absence of anything to show that all could not be present); People *v.* Williams, 36 N. Y. 441.

41. Schuerman *v.* Territory, 7 Ariz. 62, 60 Pac. 895 (where it was held that, under a statute providing that all words purporting to give a joint authority to three or more officers shall be construed as giving such authority to a majority of such officers, unless expressly declared otherwise by law, action taken at a meeting at which only two were present was valid, although the third was absent and was not consulted); McLaughlin *v.* Wheeler, 38 S. W. 493, 18 Ky. L. Rep. 860. See also Lyon *v.* Mason, etc., Co., 102 Ky. 594, 44 S. W. 135, 19 Ky. L. Rep. 1642, holding that under a statute providing for action by a majority "if all can not be present and participate," action by a mere majority in the absence of anything to show that all could not be present is invalid.

42. Leavensworth, etc., R. Co. *v.* Meyer, 58 Kan. 305, 49 Pac. 89, holding that such a statutory provision applies only to boards whose membership is full.

43. Disqualification of particular officers see special titles relating thereto.

44. See the statutes of the several states. And see the following cases:

Alabama.— State *v.* Castleberry, 23 Ala. 85.

California.—Edwards *v.* Estell, 48 Cal. 194.

Connecticut.— Hawley *v.* Baldwin, 19 Conn. 584.

Georgia.— Macon *v.* Huff, 60 Ga. 221.

Indiana.— Stropes *v.* Greene County, 72 Ind. 42.

Michigan.— People *v.* Overyssel Tp. Bd., 11 Mich. 222.

New Hampshire.—Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; Russell *v.* Perry, 14 N. H. 152.

Pennsylvania.—Goodyear *v.* Brown, 155 Pa.

remedy, or, as it is sometimes expressed, a failure of justice."[45] The interest which will disqualify is not therefore merely such interest as the ordinary inhabitant of a district has in the settlement of a question affecting the welfare of such a district, but must be such an interest as peculiarly affects the officer personally.[46] It is, however, held that such personal interest peculiar to himself is found, not merely where an officer is peculiarly interested in the action to be taken, but as well where, if a judge, he is related by blood to one of the parties to the suit before him,[47] and where he may be supposed to have a bias in favor of one of the parties as where he has acted as the counsel of one of the parties in the same cause.[48] The rule as to disqualification for interest is applied to make invalid contracts by a board or commission with one of its own members.[49] This rule as to disqualification is applied also so as to prevent an official, like a tax-collector or sheriff, from purchasing directly or indirectly property at a sale which he conducts.[50] The rule as to disqualification of officers for personal interest is not applied as rigorously in the case of ministerial officers.[51] Thus, while a judge may not, as has

St. 514, 26 Atl. 665, 35 Am. St. Rep. 903, 20 L. R. A. 838.

Texas.— Wills *v.* Abbey, 27 Tex. 202.

Wyoming.— Baker *v.* Crook County, 9 Wyo. 51, 59 Pac. 797.

England.— Brookes *v.* Rivers, Hardres 503; Derby's Case, 12 Coke 114, 77 Eng. Reprint 1390; Wright *v.* Crump, 2 Ld. Raym. 766.

45. *In re* Ryers, 72 N. Y. 1, 15, 28 Am. Rep. 88, where it was held that the appointment by a judge of a commissioner to assess lands some of which belonged to the judge was good.

46. Foreman *v.* Marianna, 43 Ark. 324; Northampton *v.* Smith, 11 Metc. (Mass.) 390; Burlington County Justices *v.* Fennimore, 1 N. J. L. 190; Corwein *v.* Hames, 11 Johns. (N. Y.) 76.

47. Foot *v.* Morgan, 1 Hill (N. Y.) 654, holding that a judgment was void which was rendered by a justice whose wife was the sister of the wife of one of the parties to the suit. See Sanborn *v.* Fellows, 22 N. H. 473 (where it is held that the disqualification extends to relationship in the fourth degree and that as a result the determination of fence viewers, one of whom was the uncle of one of the parties affected by their determination, was void and could be treated as void in a collateral proceeding); Becquet *v.* Lempriere, 1 Knapp 376, 12 Eng. Reprint 362 (which applies the rule to a judge whose dead wife's nephew was a party to a suit before him).

Relationship as disqualification: Of judge see JUDGES, 23 Cyc. 583. Of justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 490. Of other particular officers see special titles relating thereto.

48. Smith *v.* Smith, 2 Me. 408; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; Whicher *v.* Whicher, 11 N. H. 348; Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177; Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 11 Eng. Reprint 172; Reg. *v.* Suffolk Justices, 16 Jur. 612, 21 L. J. M. C. 169, 14 Eng. L. & Eq. 93. See, generally, JUDGES, 23 Cyc. 586. The same rule is applied to prosecutions (Reg. *v.* Allan, 4 B. & S. 915, 10 Jur. N. S. 796, 33 L. J. M. C. 98, 9 L. T. Rep. N. S. 761, 12 Wkly. Rep. 423, 116 E. C. L. 915; London *v.* Wood, 12 Mod. 669), but is not so strictly applied to bodies exercising administrative functions of a quasi-judicial character as it is to judges (Leeson *v.* Education, etc., Gen. Council, 43 Ch. D. 366, 59 L. J. Ch. 233, 61 L. T. Rep. N. S. 849, 38 Wkly. Rep. 303; Reg. *v.* London County Council, 15 Reports 66, 71 L. T. Rep. N. S. 638).

49. *Alabama.*—McGehee *v.* Lindsay, 6 Ala. 16.

California.— San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106, where ownership, by an officer making the contract, of stock in a corporation, with which the contract was attempted to be made, was held to disqualify so as to render the contract void.

Indiana.—Waymire *v.* Powell, 105 Ind. 328, 4 N. E. 886, where a contract for services, attempted to be made between a board and one of its members, was declared to be invalid.

Michigan.— Kinyon *v.* Ducheme, 21 Mich. 498.

Minnesota.— Currie *v.* Murray County School-Dist. No. 26, 35 Minn. 163, 27 N. W. 922.

New York.— Smith *v.* Albany, 61 N. Y. 444.

Wisconsin.— Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105.

Contra.— Junkins *v.* Doughty Falls Union School Dist., 39 Me. 220, which holds that where two members of a board of three makes a contract with a third member whose vote was not necessary to make the contract, such contract, if made without fraud, is good.

50. *California.*—Edwards *v.* Estell, 48 Cal. 194.

Iowa.— Ellis *v.* Peck, 45 Iowa 112.

Kansas.— Haxton *v.* Harris, 19 Kan. 511.

Maine.— Knight *v.* Herrin, 48 Me. 533.

Mississippi.— McLeod *v.* Burkhalter, 57 Miss. 65.

Pennsylvania.—Goodyear *v.* Brown, 155 Pa. St. 514, 26 Atl. 665, 35 Am. St. Rep. 903, 20 L. R. A. 838.

See, generally, JUDICIAL SALES, 24 Cyc. 29; TAXATION.

51. See cases cited in the following note.

been seen, act in a case in which he has been counsel, he may execute an order in the case which has been directed to him by a higher court.[52] There is no general rule as to the validity of the action taken by one who is disqualified in any of the ways just mentioned, although it would seem that judicial or quasi-judicial action of one so disqualified is void and may be treated so even in collateral proceeding.[53] Where, however, one has taken advantage of his official position to contract with himself it is at the option of the government or local corporation which he represents, to treat the contract as merely voidable, or to approve it by ratification.[54]

6. PRESUMPTION AS TO DISCHARGE OF DUTIES. It is a presumption of law, until the contrary appears, that officers have done their duty, but the jurisdiction of officers will not be presumed[55]

C. Accounting and Settlement — 1. IN GENERAL. Every officer, even if irregularly elected or appointed, who has charge of public moneys, assumes a liability in respect of such moneys to the government which he serves.[56] This liability extends only to money or its equivalent which he has actually received,[57] and exists irrespective of any bond he may give. The bond given is regarded not as the basis of the liability but as a security for the government.[58] The obligations imposed by law upon an officer may not be waived by his superiors,[59] although the liability which officers and particularly their sureties assume on taking office may be modified by the conditions of the bond. The character of this liability is not as yet settled with absolute uniformity by the courts. Some cases consider it as of the nature of that of an ordinary bailee for hire with the result that an officer not guilty of negligence is not liable for money where it has been stolen,[60] or where the bank, in which it is deposited, fails.[61] Other cases, often because of

52. State *v.* Collins, 5 Wis. 339. See also Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633 (where it is held that a clerk of a court may issue an attachment in a case in which he is plaintiff); Trimmier *v.* Winsmith, 23 S. C. 449 (where it was held that a clerk of a court may take a confession of judgment in his own favor).

53. Sanborn *v.* Fellows, 22 N. H. 473; Foot *v.* Morgan, 1 Hill (N. Y.) 654; Goodyear *v.* Brown, 155 Pa. St. 514, 26 Atl. 665, 35 Am. St. Rep. 903, 20 L. R. A. 838.

54. People *v.* Force, 100 Ill. 549 (where it is held that, if a state treasurer sells land to himself, such sale is only voidable and may be ratified by the state and is so ratified if the state accepts taxes paid on the land by the grantee); People *v.* Overyssel Tp. Bd., 11 Mich. 222; New York L. Ins., etc., Co. *v.* Staats, 21 Barb. (N. Y.) 570 [*affirmed* in 17 N. Y. 469].

It has, however, been held that a tax-sale where the officer having charge of the sale has bought in the property is not void but voidable. Ellis *v.* Peck, 45 Iowa 112.

55. See EVIDENCE, 16 Cyc. 1076 *et seq.*

56. Orrick School Dist. *v.* Dorton, 145 Mo. 304, 46 S. W. 948; U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96.

57. Baker *v.* Bucklin, 43 N. Y. App. Div. 336, 60 N. Y. Suppl. 294.

58. State *v.* Copeland, 96 Tenn. 296, 300, 43 S. W. 427, 54 Am. St. Rep. 840, 31 L. R. A. 844, where it is said: "The main object of the bond, under our law, is not to fix the limit of the officer's liability, but to superadd the security of the boudsmen to that of the principal. The liability of the bondsmen is outlined in the bond, but, after all, the extent of liability of both principal and securities, and the obligations they are under, are fixed and limited by the statutes and laws relating to such officers." See also Ramsay *v.* People, 197 Ill. 572, 585, 64 N. E. 549, 90 Am. St. Rep. 177, where it is said: "The sureties of an officer upon his official bond, conditioned for the faithful performance of the duties of the office are liable for all duties imposed upon him, which come within the scope of his office, whether required by laws enacted before or after the execution of the bond; and the statute in force, when the bond is executed, constitutes a contract between the officer, his sureties and the public."

59. Johnstown *v.* Rodgers, 20 Misc. (N. Y.) 262, 45 N. Y. Suppl. 661.

60. State *v.* Houston, 83 Ala. 361, 3 So. 859; State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; Healdsburg *v.* Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461; Ross *v.* Hatch, 5 Iowa 149 (where the condition of the bond was that the officer should "exercise all reasonable diligence and care in the preservation and lawful disposal of all money . . . appertaining to his . . office"); Cumberland County *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284. But see Union Dist. Tp. *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39, which holds the officer liable for money destroyed by fire without negligence on his part.

61. Livingston *v.* Woods, 20 Mont. 91, 49 Pac. 437 [*overruling* Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462]; York County *v.* Watson, 15 S. C. 1, 40 Am. Rep. 675; State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 54 Am. St. Rep. 840, 31 L. R. A.

the wording of the bond, treat the liability as the same as that of a special bailee, thus making the officer liable where the money is stolen or destroyed by fire for example, and excepting from liability only those cases in which the money has been lost by reason of an act of God or the public enemy.[62] Even an act of God or of the public enemy will not relieve from liability if at the time such act

844; Roberts *v.* Laramie County, 8 Wyo. 177, 56 Pac. 915; State *v.* Gramm, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690. See also Ramsay *v.* People, 97 Ill. App. 283 [*affirmed* in 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177] (holding officer liable because of failure of a bank where he negligently deposited public funds in such bank); Peck *v.* James, 3 Head (Tenn.) 75 (holding that he is not liable for accepting bank-notes which at the time of their receipt are current and good but depreciate in value as a result of the failure of the bank).

62. *Colorado.*— Gartley *v.* People, 24 Colo. 155, 49 Pac. 272.

Dakota.— Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592, holding that the liability exists where the money is destroyed by fire not caused by lightning.

Illinois.— Thompson *v.* Township Sixteen North, 30 Ill. 99; Swift *v.* School Trustees, 91 Ill. App. 221 [*affirmed* in 189 Ill. 584, 60 N. E. 44].

Indiana.— Morbeck *v.* State, 28 Ind. 86; Halbert *v.* State, 22 Ind. 125.

Iowa.— Union Dist. Tp. *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39; Taylor Dist. Tp. *v.* Morton, 37 Iowa 550.

Kansas.— Rose *v.* Douglass Tp., 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354.

Massachusetts.— Hancock *v.* Hazzard, 12 Cush. 112, 59 Am. Dec. 171.

Minnesota.— Northern Pac. R. Co. *v.* Owens, 86 Minn. 188, 90 N. W. 371, 91 Am. St. Rep. 336, 57 L. R. A. 634; Pine Island Bd. of Education *v.* Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586; Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907; McLeod County *v.* Gilbert, 19 Minn. 214; Hennepin County *v.* Jones, 18 Minn. 199.

Mississippi.— State *v.* Lee, 72 Miss. 281, 16 So. 243; Griffin *v.* Mississippi Levee Com'rs, 71 Miss. 767, 15 So. 107.

Missouri.— State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322 (holding that tramps, thieves, and robbers are not public enemies); State *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512.

Nebraska.— Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223.

Nevada.— State *v.* Nevin, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873.

New Jersey.— New Providence Tp. *v.* McEachron, 33 N. J. L. 239.

New Mexico.— U. S. *v.* Watts, 1 N. M. 553, holding that an allegation that the officer was murdered, while defending the depository of public funds, and the depository was robbed without fault on the officer's part and by irresistible force, was demurrable on the ground that it did not allege facts constituting a defense.

New York.— Tillinghast *v.* Merrill, 151 N. Y. 135, 45 N. E. 375, 56 Am. St. Rep. 612, 34 L. R. A. 678 [practically *overruling* Albany County *v.* Dorr, 25 Wend. 440 (*affirmed* in 7 Hill 583)]; Kilby *v.* Carthage First Nat. Bank, 32 Misc. 370, 66 N. Y. Suppl. 579; Johnstown *v.* Rodgers, 20 Misc. 262, 45 N. Y. Suppl. 661; Muzzy *v.* Shattuck, 1 Den. 233 [*affirmed* in 7 Hill 584 note].

North Carolina.— Havens *v.* Lathene, 75 N. C. 505; State *v.* Clarke, 73 N. C. 255.

Ohio.— State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363.

Pennsylvania.— Com. *v.* Baily, 129 Pa. St. 480, 10 Atl. 764; Nason *v.* Directors of Poor, 126 Pa. St. 445, 17 Atl. 616; Com. *v.* Comly, 3 Pa. St. 372.

Texas.— Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67.

Washington.—Fairchild *v.* Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851.

Wisconsin.— Omro *v.* Kaime, 39 Wis. 468.

United States.— Smythe *v.* U. S., 188 U. S. 156, 23 S. Ct. 279, 47 L. ed. 425; U. S. *v.* Thomas, 15 Wall. 337, 21 L. ed. 891 (holding that forcible seizure of public money by armed rebels against the will of public officers and without their fault or negligence will relieve the officers from liability); Boyden *v.* U. S., 13 Wall. 17, 20 L. ed. 527; U. S. *v.* Humason, 26 Fed. Cas. No. 15,421, 8 Reporter 70, 6 Sawy. 199 (holding that officers are not liable for loss of funds by shipwreck which is considered to be an act of God); U. S. *v.* Dashiel, 4 Wall. 182, 18 L. ed. 319; U. S. *v.* Prescott, 3 How. 578, 11 L. ed. 734.

Failure of government to provide safe place of deposit.— In all these cases the fact that the government did not provide a safe place to deposit public funds had no influence upon the decisions, nor had the fact that it did make such provision and that the money was deposited in the safe place provided, if such place was in the control of the officer. Quite a number of cases do not regard an officer who has acted without negligence as liable for the failure of a bank in which he has deposited money belonging to private individuals (Gartley *v.* People, 28 Colo. 227, 64 Pac. 208; Wilson *v.* People, 19 Colo. 199, 34 Pac. 944, 41 Am. St. Rep. 243, 22 L. R. A. 449; People *v.* Faulkner, 107 N. Y. 477, 14 N. E. 415), although they recognize the liability in case of purely public moneys (People *v.* Wilson, 117 Cal. 242, 49 Pac. 135. See also State *v.* Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Tillinghast *v.* Merrill, 151 N. Y. 135, 45 N. E. 375, 56 Am. St. Rep. 612, 34 L. R. A. 678. But see Northern Pac. R. Co. *v.* Owens, 86 Minn. 188, 90 N. W. 371, 91 Am. St. Rep. 336, 57 L. R. A. 634, which adopts the strict rule of liability for private as well as for public funds).

occurred the officer had the funds in his hands owing to a violation of the law.[63] Indeed any violation of law, as the deposit of public funds in the officer's personal account, will make the officer liable.[64] But if the law has designated banks as depositories for public moneys, the deposit by an officer of public moneys in such a depository relieves him from all liability.[65] If the liability is recognized, a claim against an officer is treated like a private claim, in that interest runs on it from the time the claim accrues.[66] The fixing of the amount of the claim by the proper accounting officers is *prima facie* sufficient to warrant a recovery against both the officer and a surety;[67] and, where the statute provides that the accounts of public officers shall be settled by a board of auditors, their settlement unappealed from is conclusive both as to principal and sureties on an official bond and may not be collaterally attacked in an action on said bond.[68] The same rule is not, however, applied to mere settlements of official accounts made by officers and the public corporations which they serve. Such settlements do not prevent subsequent suits, on discovery of the facts within the period of the statute of limitations for public moneys wrongfully retained by such officers, nor do they estop officers from proving in subsequent suits to which they are parties what actually occurred.[69] In the settlement of official accounts the receipt by the officer of checks or other evidences of debt is treated as the receipt of money for which the officer is liable,[70] except that sureties may show in an action against them that certificates of deposit issued to their principal by insolvent banks and treated as cash by a board in settling their principal's account were of no value.[71] In many cases special statutes of limitation have been passed, fixing the time within which an action may be brought to enforce the liability of an officer for public funds. Where such statutes are provided, the usual rule is to the effect that they begin to run from the time when the officer committed the act in violation of law upon which his liability is based. Such act is regarded as having taken place in case the officer fails to do a thing which the law says he shall do, as, for example, when he fails to pay over money at the time named by the law. No special demand on him to do his duty is necessary.[72] Statutes may provide for the summary collection of claims for public funds from delinquent officers by the issuance of a warrant of distress directing a levy on the property of such officers and a

63. Bevans *v.* U. S., 13 Wall. 56, 20 L. ed. 531.

64. Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659; Hill *v.* Alston, 12 Heisk. (Tenn.) 569.

65. Livingston *v.* Weods, 20 Mont. 91, 49 Pac. 437; Hobbs *v.* U. S., 17 Ct. Cl. 189.

66. McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721 (which holds that a demand is unnecessary in order to fix the liability for interest); Cassady *v.* Trustees of Schools, 105 Ill. 560. See Fite *v.* Black, 92 Ga. 363, 17 S. E. 349.

67. Com. *v.* Farrelly, 1 Penr. & W. (Pa.) 52.

68. Com. *v.* Joyce, 3 Pa. Super. Ct. 616; Com. *v.* Joyce, 3 Pa. Super. Ct. 609; Plymouth Borough School Dist. *v.* Honeywell, 15 Pa. Co. Ct. 545.

Generally, however, such settlements are only *prima facie* evidence in an action against sureties. See *infra*, V, F, 5, b.

69. Viola Dist. Tp. *v.* Bickelhaupt, 99 Iowa 659, 68 N. W. 914; Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259; Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524; Boardman Tp. *v.* Flagg, 70 Mich. 372, 38 N. W. 284; Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585; Cady *v.* Bailey, 95 Wis. 370, 70 N. W. 285; Lonsdale *v.* Church, 3 Bro. Ch. 41, 29 Eng. Reprint 396. And see Craufurd *v.* Atty.-Gen., 7 Price 1.

70. *Alabama.*— Parks *v.* Bryant, 142 Ala. 627, 38 So. 180.

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

Minnesota.— Preston Independent School Dist. No. 45 Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374.

Nebraska.— Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223; State *v.* Hill, 47 Nebr. 456, 66 N. W. 541.

New York.— People *v.* Treanor, 15 N. Y. App. Div. 508, 44 N. Y. Suppl. 528, holding that officers who without authority sold town bonds on credit were liable for the par value of the bonds so sold.

71. Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

72. *Alabama.*—McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721.

California.— People *v.* Van Ness, 79 Cal.

sale of their property; and a previous judicial determination of the amount of indebtedness is not necessary.[73] Such summary process may be provided also against the sureties.[74] Where no such proceedings are provided suit may be brought against a delinquent officer to force him to pay the money over to the proper person, usually his successor.[75] In such a suit defendant may not question the regularity of the proceedings by which the money came into his hands.[76] Sometimes the statute provides criminal punishment for the violation by officers having charge of public funds of the law providing for the safekeeping of such funds. Where this is the case the statute is construed strictly. Thus where the officer is criminally liable for the failure to pay over money on the demand of his successor, a demand at the house of the officer by one not authorized to receive the money is not sufficient, since such officer is only required to hold such funds ready for delivery when his successor presents himself ready to receive them.[77] The rule applicable to ordinary trustees that, where they have misappropriated the funds intrusted to them, such funds may be followed into the hands of third parties has no application to public officers, who give a bond to secure a full accounting of the moneys which may come into their management and control.[78]

2. Lien For Amount Settled. The settlement of an account against an officer even when made by an auditing authority creates no lien upon the officer's property in the absence of a statute to that effect.[79] But such a lien is sometimes created by statute and is sometimes by such a statute made to attach to the property both of the officer and of the sureties on his bond.[80] But in order that such a lien may attach all the formalities required by the statute, as, for example, that a certified copy of the account as settled be recorded, must be complied with.[81]

D. Liabilities[82] — 1. In General. The liability of officers is a three-fold char-

84, 21 Pac. 554, 12 Am. St. Rep. 134; People *v.* Van Ness, 76 Cal. 121, 18 Pac. 139. Both these cases hold that under the statute the proper time to pay over the moneys in question was the expiration of the officer's term.

Indiana.— Ware *v.* State, 74 Ind. 181, holding that the fact that the parties bringing the action "had no personal knowledge of the misappropriation of the money" during the statutory period will not relieve them from the operation of the statute.

Kansas.—Cloud County *v.* Hostetler, 6 Kan. App. 286, 51 Pac. 62.

Kentucky.— Shropshire *v.* Pullen, 3 Bush 512, holding that the statute will not begin to run against an action to recover commissions retained by an officer on an unauthorized sale until the sale is set aside.

New York.— Kilbourne *v.* Sullivan County, 137 N. Y. 170, 33 N. E. 159; Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552; Peirson *v.* Wayne County, 87 Hun 605, 34 N. Y. Suppl. 568.

There is considerable conflict as to the time when the statute begins to run in particular instances of official delinquency, as, for example, the failure of a sheriff to turn over moneys coming from a sheriff's sale. In Connecticut and Massachusetts the cause of action for the recovery does not accrue and the statute consequently does not begin to run until the demand for payment has been made. Church *v.* Clark, 1 Root (Conn.) 303; Weston *v.* Ames, 10 Metc. (Mass.) 244. In Georgia, since no demand is necessary, the statute begins to run from the time the money was received (Thompson *v.* Central Bank, 9 Ga. 413), while in Alabama and Missouri the statute runs from the time the return of the sheriff is made (Governor *v.* Stonum, 11 Ala. 679; State *v.* Minor, 44 Mo. 373).

73. Arthur *v.* Gordon County, 67 Ga. 220; Weimer *v.* Bunbury, 30 Mich. 201; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372. But see State *v.* Burnett, 6 Heisk. (Tenn.) 186, holding that the special act of 1868, authorizing a judgment on motion against the administrator of a certain tax-collector for whatever amount the chairman of the county court should find the surety liable, contravenes the constitution in that it deprives one of his property without a judgment of his peers.

74. See *infra*, V, F, 1, b.

75. Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260; Adams *v.* Farnsworth, 15 Gray (Mass.) 423; Mason *v.* Fractional School Dist. No. 1, 34 Mich. 228; Walton *v.* U. S., 9 Wheat. (U. S.) 651, 6 L. ed. 182.

76. Mason *v.* Fractional School Dist. No. 1, 34 Mich. 228.

77. Dreyer *v.* People, 176 Ill. 590, 52 N. E. 372.

78. Linville *v.* Leininger, 72 Ind. 491.

79. Commonwealth's Appeal, 4 Pa. St. 164.

80. Forney *v.* Com., 10 Pa. St. 405 (holding that such a lien extends throughout the state and is paramount the mortgage and other creditors from the date of the settlement); Smith *v.* Nicholson, 4 Yeates (Pa.) 6.

81. *In re* Arnold, 46 Pa. St. 277.

82. Liability of private individual for acts of officer as servant see Master and Servant, 26 Cyc. 1521.

acter. A violation of duty may be punished by removal from office, even where the power to remove is limited to cause,[83] may be punished criminally,[84] and finally may result in a proper case in a civil liability to any person injured thereby. The extent of this civil liability of an officer to persons injured by his violation of official duty differs in accordance with the character of the office held by such officer as well as in accordance with the character of the power through the exercise of which the damage has been caused.

2. ACTS IN EXCESS OF JURISDICTION. An officer, not a judge of a higher court,[85] is, however, liable for every act in excess of jurisdiction. This is such a fundamental principle of the English law that there are few cases which directly discuss it. In the cases, which are legion, applying the principle, the courts devote almost all their attention to answering the question, has there been an excess of jurisdiction, and, in case the answer is in the affirmative, they, as a matter of course and without argument, hold the officer acting in excess of his jurisdiction liable.[86] The excess of jurisdiction which will cause the liability may result from the attempt to enforce a statute which is regarded by the courts as unconstitutional. The liability resulting from such an attempt is also treated by the courts as so axiomatic that the cases which hold officers liable under such conditions assume that the liability exists and are devoted almost exclusively to determining whether the statute in question is constitutional or not.[87] Officers are liable not merely to individuals but as well to the government for their acts in excess of jurisdiction.[88] The only exception to this rule, as to the liability of officers for acts done in excess of jurisdiction, is to be found in the case of purely ministerial officers who are protected in executing orders of superiors fair on their face, even though such orders were issued by such superiors in excess of their jurisdiction.[89]

83. See *supra*, II, G, 4, d.

84. See *infra*, IV, F.

85. **Liability of judge for official acts** see JUDGES, 23 Cyc. 567 *et seq.*

Liability of justice of the peace for official acts see JUSTICES OF THE PEACE, 24 Cyc. 421 *et seq.*

86. See Jones *v.* Com., 1 Bush (Ky.) 34, 89 Am. Dec. 605; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354 (holding that officers who have acted contrary to the law may not offer as a defense the instructions of a superior, who had no authority to issue such instructions); Little *v.* Barreme, 2 Cranch (U. S.) 170, 2 L. ed. 243 (applying the same principle where an officer acted in accordance with a proclamation of the president which was contrary to the law). See also Vanderpool *v.* State, 34 Ark. 174; Barkeloo *v.* Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Miller *v.* Grice, 2 Rich. (S. C.) 27, 44 Am. Dec. 271, all holding judges of inferior courts liable for excess of jurisdiction.

87. Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70; Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105; Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Campbell *v.* Sherman, 35 Wis. 103. *Contra*, Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623; Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; Bohri *v.* Barnett, 144 Fed. 389, 75 C. C. A. 327. In all the cases cited above the question is discussed and it is decided that a judge of an inferior court is not in the absence of malice or corruption liable for a mistaken determination as to the constitutionality of a statute or the legality of a local ordinance which he may have enforced. *Compare* Schloss *v.* McIntyre, 147 Ala. 557, 41 So. 11.

88. Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180. See also Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826, recognizing a similar liability to the municipal corporation whom they serve.

89. *Alabama.*— Lott *v.* Hubbard, 44 Ala. 593.

Arkansas.— Sanders *v.* Simmons, 30 Ark. 274.

Connecticut.— Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

Illinois.— McDonald *v.* Wilkie, 13 Ill. 22, 25, 54 Am. Dec. 423, holding that "a constable is protected in the execution of process issued by a justice of the peace which shows upon its face that the justice had jurisdiction of the subject-matter and nothing appears to apprise him that he had not jurisdiction also of the person."

Indiana.— Noland *v.* Busby, 28 Ind. 154.

Louisiana.— Brainard *v.* Head, 15 La. Ann. 489.

Maine.— Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572.

Massachusetts.— Underwood *v.* Robinson, 106 Mass. 296; Clarke *v.* May, 2 Gray 410, 61 Am. Dec. 470.

Michigan.— Curtiss *v.* Witt, 110 Mich. 131, 67 N. W. 1106.

Missouri.— Ranney *v.* Bader, 67 Mo. 476.

By the greater weight of authority a ministerial officer is protected by his warrant, which he is in duty bound to execute, even if he knows that it has been irregularly or improperly issued.[90]

3. MINISTERIAL DUTIES. In the case of duties not owed solely to the public,[91] officers are liable for misfeasance, malfeasance, or nonfeasance in the performance of a ministerial duty where such misfeasance, malfeasance, or nonfeasance results in damage to an individual to whom a duty is owing.[92] What are ministerial duties is a question which it is difficult to answer. It has been held, however, that a duty is ministerial, so as to cause a claim for damages in case of its nonperformance or negligent performance, where its performance may be compelled by mandamus.[93] In some cases it is said that duties are ministerial where they

New Hampshire.— Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

New York.— Chegaray *v.* Jenkins, 5 N. Y. 376; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181.

North Carolina.— Gore *v.* Mastin, 66 N. C. 371; Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75.

Ohio.— Loomis *v.* Spencer, 1 Ohio St. 153.

Pennsylvania.— Cunningham *v.* Mitchell, 67 Pa. St. 78; Jones *v.* Hughes, 5 Serg. & R. 299, 9 Am. Dec. 364.

Wisconsin.— Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

United States.— Erskine *v.* Hohnbach, 14 Wall. 613, 20 L. ed. 745.

England.— Maravin *v.* Slope, Willes 30, where this rule would seem to have been adopted.

Contra.— Collamer *v.* Drury, 16 Vt. 574, which holds that this rule is not applied in Vermont to tax-collectors who are not protected by the collection warrant.

90. *Connecticut.*— Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

Louisiana.— Brainard *v.* Head, 15 La. Ann. 489.

Massachusetts.— Underwood *v.* Robinson, 106 Mass. 296.

Michigan.— Wall *v.* Trumbull, 16 Mich. 228.

New York.— Webber *v.* Gay, 24 Wend. 485.

Contra.— Leachman *v.* Dougherty, 81 Ill. 324; Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

Liability of sheriff or constable generally see SHERIFFS AND CONSTABLES.

91. *Colorado.*— Miller *v.* Ouray Electric Light, etc., Co., 18 Colo. App. 131, 70 Pac. 447.

Idaho.— Worden *v.* Witt, 4 Ida. 404, 39 Pac. 1114, 95 Am. St. Rep. 70.

Indiana.— State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169.

Massachusetts.— Harrington *v.* Ward, 9 Mass. 251.

Michigan.— Moss *v.* Cummings, 44 Mich. 359, 6 N. W. 843.

Nebraska.— Nemaha County School Dist. No. 80 *v.* Burress, 2 Nebr. (Unoff.) 554, 89 N. W. 609.

New York.— Rome Bank *v.* Mott, 17 Wend. 554. But see Bennett *v.* Whitney, 94 N. Y. 302, which holds street officers liable to individuals for damages caused by their negligence in the care of streets.

United States.— South *v.* Maryland, 18 How. 396, 15 L. ed. 433.

Official acts.— Only such acts of public officers as are done under some authority of law or in pursuance of prescribed duties are official acts. Chase *v.* Cochran, 102 Me. 431, 67 Atl. 320.

92. *Alabama.*— Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

Connecticut.— Hartford County Bank *v.* Waterman, 26 Conn. 324.

Georgia.— Collins *v.* McDaniel, 66 Ga. 203.

Illinois.— Illinois *v.* Dodd, 81 Ill. 162.

Iowa.— Perkins *v.* Evans, 61 Iowa 35, 15 N. W. 584, holding that, where a public officer knowingly makes a false record that a piece of land has been redeemed from a tax-sale and an agent of an intending purchaser, charged with the whole duty of concluding the purchase, is deceived thereby, the law will treat the principal as deceived in the absence of any showing to the contrary, and hold such officer responsible.

Maine.— Hayes *v.* Porter, 22 Me. 371.

Maryland.— Baltimore County Com'rs *v.* Baker, 44 Md. 1.

Massachusetts.— Gates *v.* Neal, 23 Pick. 300, holding that an action will lie whether the officer has been guilty of malice or not.

Michigan.— Raynsford *v.* Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189.

Mississippi.— Brown *v.* Lester, 13 Sm. & M. 392.

Missouri.— St. Joseph F. & M. Ins. Co. *v.* Leland, 90 Mo. 177, 2 S. W. 431, 59 Am. Rep. 9; Steadley *v.* Stuckey, 113 Mo. App. 582, 87 S. W. 1014.

Nebraska.— Brock *v.* Hopkins, 5 Nebr. 231.

New York.— Bennett *v.* Whitney, 94 N. Y. 302; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

South Dakota.— State *v.* Ruth, 9 S. D. 84, 68 N. W. 189, holding that the state may recover damages due to the negligence of its office where the negligence is the proximate cause of the damage.

United States.— Amy *v.* Barkholder, 11 Wall. 136, 20 L. ed. 101.

England.— Brasyer *v.* Maclean, L. R. 6 P. C. 398, 44 L. J. P. C. 79, 33 L. T. Rep. N. S. 1; White *v.* Hislop, 6 Dowl. P. C. 693, 2 Jur. 470, 6 L. J. Exch. 204, 4 M. & W. 73.

93. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Rains *v.* Simpson, 50 Tex. 495, 39

are certain and specific and where there is no room for the exercise of judgment.[94] Furthermore it is held that an act does not cease to be ministerial "because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act."[95] The liability of officers for the performance of ministerial duties is not affected by the fact that in other capacities they may be acting judicially.[96] A public officer, who is a member of a corporate body upon which a duty rests, cannot be held liable for the neglect of duty of that body. If there be refusal to exercise the power of such body, it is the refusal of the body, and not of the individuals composing it.[97]

4. Discretionary Duties. While officers are liable for negligence in the performance of ministerial duties, no such liability is recognized in the case of discretionary or judicial duties. There are in general three classes of officers who are protected by this rule. In the first place are judicial officers, that is, officers holding regular courts for the decision of cases. These officers, when having jurisdiction, are never liable for errors or mistakes of judgment, even if actuated by corrupt or malicious motives. Here again most of the cases which apply the principle take its existence for granted, and are devoted to a determination of the question, whether the act complained of was within the jurisdiction of the officer

Am. Rep. 609. But see Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; Kendall *v.* Stokes, 3 How. (U. S.) 87, 11 L. ed. 506, 833. In the former case mandamus was issued to compel performance of an act for failure to do which the same defendant, namely, the postmaster-general of the United States, was held not liable in the latter case. The former case held an act to be ministerial which was held to be discretionary in the latter case.

Duties which may be enforced by mandamus see MANDAMUS, 26 Cyc. 158 *et seq.*

94. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; General Land Office Com'rs *v.* Smith, 5 Tex. 471.

95. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. See also Crane *v.* Camp, 12 Conn. 464, where it is held that a justice of the peace acted ministerially in appointing freeholders to assess damages, although he had to inquire into the fitness of the persons whom he appointed. But see Grove *v.* Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412, in which the erroneous determination by a justice of the peace was held to be made in the exercise of a discretionary power and not to make him liable.

In the case of quasi-judicial or administrative officers the rule is with few exceptions that they decide jurisdictional questions at their peril. Thus, the determination by sanitary officers that a thing is a nuisance, preparatory to its abatement, is regarded as ministerial and not discretionary, and for such determination such officers are liable in a proper case. See Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Underwood *v.* Greene, 42 N. Y. 140 [both *cited* with approval in People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522, 23 L. R. A. 481]. What is true of sanitary officers is also true of tax assessors who also decide as to their jurisdiction at their peril. Mygatt *v.* Washburn, 15 N. Y. 316. There is, however, a tendency in some of the decisions to regard the determination by quasi-judicial officers even of questions involving their jurisdiction as being discretionary in character, with the result that such officers are not liable for error in deciding as to their jurisdiction. See for example Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3, where it was held that the members of a board of health were not liable for an erroneous determination that certain things were a nuisance. See also Bell *v.* Pierce, 51 N. Y. 12 (where the same rule was applied to a mistaken determination by tax assessors as to a person's domicile for the purposes of taxation); Barhyte *v.* Shepherd, 35 N. Y. 238; Chegaray *v.* Jenkins, 5 N. Y. 376 (where assessors were held not liable for an erroneous determination as to the liability of property to taxation); Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846 (where an action against an officer was not allowed because the decision complained of was made after a hearing); Pruden *v.* Love, 67 Ga. 190 (where a city council which had declared a thing to be a nuisance was held liable because they had not given a hearing). In all these cases provision had been made by the law as construed by the courts for a hearing before quasi-judicial or administrative officers. The courts appear to regard determinations made after such a hearing as in the nature of judicial determinations, error in which, even as to jurisdiction, will not make the officer guilty of negligence, liable in damages.

96. *Alabama.*— Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

Maryland.— State *v.* Carrick, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387.

Massachusetts.— Noxon *v.* Hill, 2 Allen 215.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Houghton *v.* Swarthout, 1 Den. 589.

Ohio.— Fairchild *v.* Keith, 29 Ohio St. 156.

97. Monnier *v.* Godbold, 116 La. 165, 40 So. 604, 5 L. R. A. N. S. 463.

performing it.[98] In the second place are legislative officers, that is, members of congress and the state legislatures and members of local legislative bodies, such as city councils. It may be laid down as a fundamental rule of the law that such officers are not liable to an action by one who believes himself to be injured by the way in which they have performed their legislative duties.[99] The members of state legislative bodies are usually accorded by the constitution a further immunity for all words spoken in the debate in the house to which they belong. This immunity, while broadly construed, does not justify slanderous remarks, whose utterance has no connection with the business before the house.[1] In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for a mistaken exercise of such discretion.[2] In many of the cases on the liability of inferior judicial officers and officers discharging quasi-judicial or administrative functions, the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability.[3] But in most cases what is said in the opinion is merely *dictum*, inasmuch as the actual decision did not recognize the liability. There are, however, a few cases which actually decide that if the act complained of has been done with corrupt motives or malice

98. *Alabama.*— Heard *v.* Harris, 68 Ala. 43.
Connecticut.— Phelps *v.* Sill, 1 Day 315.
Illinois.— Outlaw *v.* Davis, 27 Ill. 467.
Kentucky.— Pepper *v.* Mayes, 81 Ky. 673.
Maine.— Downing *v.* Herrick, 47 Me. 462.
Massachusetts.— White *v.* Morse, 139 Mass. 162, 29 N. E. 539; Pratt *v.* Gardner, 2 Cush. 63, 48 Am. Dec. 652.
Missouri.— Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.
New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.
New York.—Evarts *v.* Kiehl, 102 N. Y. 296, 6 N. E. 592.
Pennsylvania.— Kennedy *v.* Barnett, 64 Pa. St. 141.
Texas.— Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.
Vermont.— Banister *v.* Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.
Virginia.— Johnston *v.* Moorman, 80 Va. 131.
Wisconsin.— Carker *v.* Dow, 16 Wis. 298.
United States.—Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646.
England.— Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911; Fray *v.* Blackburn, 3 B. & S. 576, 113 E. C. L. 576.
Liability of judges generally see JUDGES, 23 Cyc. 567 *et seq.*

99. Baker *v.* State, 27 Ind. 485; Jones *v.* Loving, 55 Miss. 109, 30 Am. Rep. 508. See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 466 *et seq.*; STATES; UNITED STATES.

1. See LIBEL AND SLANDER, 25 Cyc. 376.

2. *Georgia.*—Paulding County *v.* Scroggins, 97 Ga. 253, 23 S. E. 845.
Illinois.— McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.
Indiana.— Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.
Iowa.— Jones *v.* Brown, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185.
Kentucky.— Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735.
Louisiana.— Lecourt *v.* Gaster, 50 La. Ann. 521, 23 So. 463.
Maine.— Waterville *v.* Barton, 64 Me. 321; Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256.
Maryland.— Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618.
Michigan.— Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238; Amperse *v.* Winslow, 75 Mich. 234, 42 N. W. 823; Van Deusen *v.* Newcomer, 40 Mich. 90.
Missouri.— Edwards *v.* Ferguson, 73 Mo. 686; Reed *v.* Conway, 20 Mo. 22; Williams *v.* Elliott, 76 Mo. App. 8.
New Hampshire.— Fawcett *v.* Dole, 67 N. H. 168, 29 Atl. 693; Waldron *v.* Berry, 51 N. H. 136.
New York.— East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557 [*affirming* 25 Hun 614]; Nuttall *v.* Simis, 22 Misc. 19, 47 N. Y. Suppl. 1097; Seaman *v.* Patten, 2 Cai. 312.
North Carolina.— Hannon *v.* Grizzard, 99 N. C. 161, 6 S. E. 93.
Pennsylvania.—Burton *v.* Fulton, 49 Pa. St. 151.
South Carolina.— Fenwicke *v.* Gibbes, 2 Desauss. Eq. 629.
Texas.— Gaines *v.* Newbrough, 12 Tex. Civ. App. 466, 34 S. W. 1048.
Vermont.— Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.
West Virginia.— Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.
Wisconsin.— Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571.
United States.— Kendall *v.* Stokes, 3 How. 87, 789, 11 L. ed. 506, 833; Gould *v.* Hammond, 10 Fed. Cas. No. 5,638, McAllister 235.
England.— Kemp *v.* Neville, 10 C. B. N. S. 523, 7 Jur. N. S. 913, 31 L. J. C. P. 158, 4 L. T. Rep. N. S. 640, 10 Wkly. Rep. 6, 100 E. C. L. 523.

3. See Burton *v.* Fulton, 49 Pa. St. 151.

there is a liability to the person injured.[4] On the other hand, it has been distinctly held that if the officer whose acts are complained of keeps within his powers, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts.[5]

5. Acts of Subordinates and Predecessors. Public officers are not, as a general rule, liable for the acts of subordinates, even where such subordinates are employees rather than officers,[6] except where the negligence of such subordinates is attributable to the superior.[7] But ministerial officers are liable to an individual for the acts of their deputies where such officers owe a duty to such individuals. This rule is applied particularly to such officers as sheriffs, recorders of deeds, and

4. *Connecticut.*— Gregory *v.* Brooks, 37 Conn. 365, in which a new trial was granted because evidence as to malice had been excluded.

Illinois.— McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Bernier *v.* Russell, 89 Ill. 60.

Iowa.— Parkinson *v.* Parker, 48 Iowa 667.

Kentucky.— Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735.

Louisiana.— Patterson *v.* D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564.

Maryland.— Friend *v.* Hamill, 34 Md. 298.

Massachusetts.— Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105.

Missouri.— Pike *v.* Megoun, 44 Mo. 491.

New York.— Goetcheus *v.* Matthewson, 61 N. Y. 420.

Pennsylvania.— Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556; Weckerly *v.* Geyer, 11 Serg. & R. 35.

South Dakota.— Black *v.* Linn, 17 S. D. 335, 96 N. W. 697.

Tennessee.— Rail *v.* Potts, 8 Humphr. 225.

United States.— Bailey *v.* Berkey, 81 Fed. 737.

England.—Ashby *v.* White, 1 Bro. P. C. 62, 2 Ld. Raym. 938, 1 Eng. Reprint 417.

5. Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Moran *v.* McClearns, 4 Lans. (N. Y.) 288; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609; Spalding *v.* Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. ed. 780.

6. *Maine.*— Bowden *v.* Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223.

Maryland.— Anne Arundel County Com'rs *v.* Duvall, 54 Md. 350, 39 Am. Rep. 393.

Massachusetts.— Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 613, holding a postmaster not liable for the negligence of his clerk.

New York.— Walsh *v.* New York, etc., Bridge, 96 N. Y. 427; Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649. In the cases cited above trustees, in the one case of a bridge built by two cities, and in the other of a school, were held not liable for the negligence of employees, where such trustees had employed competent men and exercised reasonable supervision over their work.

Pennsylvania.—Schroyer *v.* Lynch, 8 Watts 453.

Virginia.— Richmond *v.* Long, 17 Gratt. 375, 94 Am. Dec. 461; Sawyer *v.* Corse, 17 Gratt. 230, 94 Am. Dec. 445.

West Virginia.— Tracy *v.* Cloyd, 10 W. Va. 19.

United States.— Robertson *v.* Sichel, 127 U. S. 507, 8 S. Ct. 1286, 32 L. ed. 203; Brissac *v.* Lawrence, 4 Fed. Cas. No. 1,888, 2 Blatchf. 121; U. S. *v.* Brodhead, 24 Fed. Cas. No. 14,654.

England.— Holroyd *v.* Breare, 2 B. & Ald. 473, 21 Rev. Rep. 361; Tinsley *v.* Nassau, 2 C. & P. 582, M. & M. 52, 12 E. C. L. 745; Nicholson *v.* Mouncey, 15 East 384, 13 Rev. Rep. 501; Lane *v.* Cotton, 1 Ld. Raym. 646. See also Hall *v.* Smith, 2 Bing. 156, 2 L. J. C. P. O. S. 113, 9 Moore P. C. 226, 9 E. C. L. 524, where it was held that officers serving gratuitously and intrusted with the conduct of public works were not liable for the negligence of their subordinates. In England what might elsewhere be regarded as departments of state are treated sometimes as corporations, when the officers at the head of the department or corporation are liable in their corporate capacity for the negligence of subordinates. See Gilbert *v.* Trinity House, 17 Q. B. D. 795, 56 L. J. Q. B. 85, 35 Wkly. Rep. 30.

Distinction between officers and employees. — Some of the cases make a distinction between officers and employees and hold officers responsible for the negligence of the former, although they do not hold such officers responsible for the negligence of distinctly official subordinates. Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499 (which is often cited in favor of the liability of officers for the negligence of employees but in which as a matter of fact a judgment for defendant was on appeal affirmed but the opinion of the court recognized the liability); Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250; Robinson *v.* Rohr, 73 Wis. 436, 40 N. W. 668, 9 Am. St. Rep. 810, 2 L. R. A. 366.

7. *Maine.*— Bisbop *v.* Williamson, 11 Me. 495, where a postmaster was held liable for the negligence of a clerk whom he had not required to take the oath prescribed by law.

New York.— Wiggins *v.* Hathaway, 6 Barb. 632.

Ohio.— Ford *v.* Parker, 4 Ohio St. 576, where the judgment of the lower court was reversed because evidence was excluded which tended to show a negligent management of a post-office.

United States.— Dunlop *v.* Munroe, 7 Cranch 242, 3 L. ed. 329.

clerks of courts.[8] This liability extends only to acts which the law compels the officer to perform,[9] and not to acts entirely extra-official and personal to the subordinate complained of, although the superior is responsible for acts done under color of authority which are illegal.[10] Nor does the liability for the acts of subordinates extend to acts which were directed by the complainant.[11] In case an officer has been held liable for an act of a subordinate, he has an action against such subordinate.[12] Public officers finally are not liable for the acts of predecessors.[13]

6. On Contracts. Officers are not personally liable on contracts made by them within the scope of their official authority,[14] unless the contract shows that they clearly intended to assume a personal liability.[15] Action on the part of an officer

England.— Bradley *v.* Carr, 3 M. & G. 221, 3 Scott N. R. 523, 42 E. C. L. 122.

8. *Alabama.*— Wood *v.* Farnell, 50 Ala. 546.

Kentucky.— Forsythe *v.* Ellis, 4 J. J. Marsh. 298, 20 Am. Dec. 218.

Maine.— Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719.

Massachusetts.— Campbell *v.* Phelps, 1 Pick. 62, 11 Am. Dec. 139.

Michigan.— Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448.

Mississippi.— McNutt *v.* Livingston, 7 Sm. & M. 641.

Missouri.— State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

New Hampshire.— Smith *v.* Judkins, 60 N. H. 127.

New York.— Van Schaick *v.* Sigel, 60 How. Pr. 122.

Pennsylvania.— Hazard *v.* Israel, 1 Binn. 240, 2 Am. Dec. 438.

Vermont.— Flanagan *v.* Hoyt, 36 Vt. 565, 86 Am. Dec. 675.

Error in certificate of search see Abstracts of Title, 1 Cyc. 217.

9. Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; Cook *v.* Palmer, 6 B. & C. 739, 9 D. & R. 723, 5 L. J. K. B. O. S. 234, 13 E. C. L. 331.

10. *Indiana.*— Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440.

Massachusetts.— Knowlton *v.* Bartlett, 1 Pick. 271.

Minnesota.— Dorr *v.* Mickley, 16 Minn. 20.

Missouri.— State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

New York.— Moulton *v.* Norton, 5 Barb. 286.

England.— Brown *v.* Copley, 2 D. & L. 332, 8 Jur. 577, 13 L. J. C. P. 164, 7 M. & G. 558, 8 Scott N. R. 350, 49 E. C. L. 558.

But see Case *v.* Hulsebush, 122 Ala. 212, 26 So. 155, where a tax-collector was held liable for an assault committed by his deputy.

11. Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

12. Snedicor *v.* Davis, 17 Ala. 472.

13. Vose *v.* Reed, 54 N. Y. 657.

14. *Connecticut.*— Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429.

Georgia.— Ghent *v.* Adams, 2 Ga. 214.

Indiana.— Newman *v.* Sylvester, 42 Ind. 106.

Maine.— Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Massachusetts.— Dawes *v.* Jackson, 9 Mass. 490; Brown *v.* Austin, 1 Mass. 208, 2 Am. Dec. 11.

Michigan.— Lyon *v.* Irish, 58 Mich. 518, 25 N. W. 517.

Minnesota.—Balcombe *v.* Northup, 9 Minn. 172; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

Mississippi.— Copes *v.* Matthews, 10 Sm. & M. 398.

Missouri.— Tutt *v.* Hobbs, 17 Mo. 486.

New Jersey.— Knight *v.* Clark, 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534.

New York.— Fish *v.* Dodge, 38 Barb. 163; Nichols *v.* Moody, 22 Barb. 611; Walker *v.* Swartwout, 12 Johns. 444, 7 Am. Dec. 334.

North Carolina.—Dey *v.* Lee, 49 N. C. 238; Tucker *v.* Iredell County, 35 N. C. 434.

Pennsylvania.— Heidelberg School Dist. *v.* Horst, 62 Pa. St. 301; Cook *v.* Irwin, 5 Serg. & R. 492, 9 Am. Dec. 397.

South Carolina.— Hammarskold *v.* Bull, 9 Rich. 474; Miller *v.* Ford, 4 Rich. 376, 55 Am. Dec. 687.

Tennessee.— Amison *v.* Ewing, 2 Coldw. 366; Enloe *v.* Hall, 1 Humphr. 303.

Virginia.—Tutt *v.* Lewis, 3 Call 233; Syme *v.* Butler, 1 Call 105.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; Butler *v.* Mitchell, 15 Wis. 355.

United States.— Parks *v.* Ross, 11 How. 362, 13 L. ed. 730; Jones *v.* Le Tombe, 3 Dall. 384, 1 L. ed. 647; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332; Hodgson *v.* Dexter, 12 Fed. Cas. No. 6,565, 1 Cranch C. C. 109 [*affirmed* in 1 Cranch 345, 2 L. ed. 130]; Stone *v.* Mason, 23 Fed. Cas. No. 13,485, 2 Cranch C. C. 431.

England.— Palmer *v.* Hutchinson, 6 App. Cas. 619, 50 L. J. P. C. 62, 45 L. T. Rep. N. S. 180; Dunn *v.* Macdonald, [1897] 1 Q. B. 555, 66 L. J. Q. B. 420, 76 L. T. Rep. N. S. 444, 45 Wkly. Rep. 355; Macbeath *v.* Haldimand, 1 T. R. 172, 1 Rev. Rep. 177.

See 37 Cent. Dig. tit. "Officers," § 191.

Contra.— See Husbands *v.* Smith, 14 B. Mon. (Ky.) 208, which holds that officers who signed a contract in their own names were liable on the contract where, through their negligence, they lost the funds out of which they expected to pay the contractor.

15. *Florida.*— Yulee *v.* Canova, 11 Fla. 9.

in excess of his legal authority will not have the necessary effect of imposing upon him a personal liability on the contract which he has signed, since those with whom he is dealing cannot be deceived by him. For the extent of his authority may be ascertained by an examination of the law.[16] But action in excess of authority is considered an element in the determination of the intention of the officer.[17]

E. Actions By or Against Officers[18] — **1. Capacity to Sue.** Public officers need not be authorized by statute to bring suit, but have an implied authority as incident to their offices to bring all suits which the proper and faithful discharge of their official duties require.[19] But suits in which the government is the party in interest should be brought by officers in the name of the government,[20] or in the manner provided by the statute, as for example, in the name of the officer suing with the title of the office added.[21] Such suits may be for the enforcement of a private right of the public corporation which they represent, as for example a suit on a contract or for damages, or they may be brought to secure the aid of the court in the enforcement of the law, the execution of which has been intrusted to the officer or officers bringing the suit, as for example a mandamus,[22] or an injunction.[23] In suits brought by officers, while the presumption is in favor of the *de jure* character of a *de facto* incumbent,[24] if such *de jure* character is brought in question, the legal title to the office must be shown.[25]

2. Suits Against Officers.[26] Suits may also be brought against officers either on contracts made by them or in their representative capacity,[27] or for their tortious acts,[28] or to force them to obey the law, as through the application to

Iowa.— Wing *v.* Glick, 56 Iowa 473, 9 N. W. 384, 41 Am. Rep. 118.

Maine.— Ross *v.* Brown, 74 Me. 352.

Massachusetts.— Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

Missouri.— Lapsley *v.* McKinstry, 38 Mo. 245, holding that in cases of an officer acting for and on behalf of the government, the presumption that the officer is not bound personally by a contract made in an official capacity may be rebutted by circumstances which clearly establish an intention between the parties to the contract to create and rely upon a personal responsibility on the part of the officer.

New York.— Gill *v.* Brown, 12 Johns. 385.

South Carolina.— Miller *v.* Ford, 4 Strobh. 213.

United States.— New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332.

England.— Cunningham *v.* Collier, 4 Dougl. 233, 26 E. C. L. 445.

See 37 Cent. Dig. tit. "Officers," § 191.

16. *Alabama.*— Schloss *v.* McIntyre, 147 Ala. 557, 41 So. 11.

Indiana.— Newman *v.* Sylvester, 42 Ind. 106.

Minnesota.— Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

New York.— Hall *v.* Lauderdale, 46 N. Y. 70; Olifiers *v.* Belmont, 15 Misc. 120, 36 N. Y. Suppl. 813 [*affirmed* in 159 N. Y. 550, 54 N. E. 1093].

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

See 37 Cent. Dig. tit. "Officers," § 191.

Contra.— Yulee *v.* Canova, 11 Fla. 9.

17. Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Blakely *v.* Bennecke, 59 Mo. 193; McClenticks *v.* Bryant, 1 Mo. 598, 14 Am. Dec. 310.

18. **Against particular officers** see special titles relating thereto, and cross-references at the head of the article.

19. Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730; Rouse *v.* Moore, 18 Johns. (N. Y.) 407; Pennoyer *v.* Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594. See Meridian Nat. Bank *v.* Hauser, 145 Ind. 496, 42 N. E. 753.

20. Balcombe *v.* Northup, 9 Minn. 172.

21. Paige *v.* Fazackerly, 36 Barb. (N. Y.) 392; Galway *v.* Stimson, 4 Hill (N. Y.) 136.

22. See People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. ed. 970. See also Mandamus.

23. See Taunton *v.* Taylor, 116 Mass. 254. See also Injunctions.

24. See *supra*, II, B, 5.

25. People *v.* Weber, 89 Ill. 347. See also *supra*, II, B, 7.

26. **Jurisdiction of justices of the peace** see Justices of the Peace, 24 Cyc. 460.

27. See Neale *v.* Allegheny Tp. Overseers of Poor, 5 Watts (Pa.) 538.

Denial of official title.— In such a case the person actually occupying an office, against whom the suit is brought, may not be heard to allege that he is not the *de jure* incumbent. Neale *v.* Allegheny Tp. Overseers of Poor, 5 Watts (Pa.) 538. See also *supra*, II, B, 7; II, C, 1, i.

28. See *supra*, IV, D, 1–4.

Right to maintain assumpsit see Assumpsit, Action of, 4 Cyc. 331.

them of the extraordinary legal[29] or equitable[30] remedies. In some cases it is provided by statute that notice of a certain period of time must be given an officer before an action for damages may be brought against him. In such cases the commencement of the action before giving the notice, or before the expiration of the legal period, makes the action premature.[31]

3. PARTIES. Suits against officers must, from the point of view of the proper parties plaintiff, be divided into suits the object of which is the maintenance of private rights, and suits in which it is sought to uphold the rights of the public generally. In the former class of suits no one is a proper party plaintiff whose rights are not alleged to have been violated by the officer against whom the action is brought. This rule is particularly applicable to suits for damages against officers, and is sometimes carried so far as to bar such suits where the damages are not peculiar to the party suing but common to all the public.[32] The rule is also applied to cases where it is sought to restrain action by officers,[33] or to force them to act where they illegally refuse to act.[34] There is one important exception to it. This is where an application is made to the court for a writ of habeas corpus. Application for such a writ may be made by one whose rights are not affected by the alleged unlawful imprisonment.[35] Furthermore the general rule may be changed by statute, which may provide for a popular action to be brought by any one regardless of the interest he may have in the suit.[36] In the case of suits of the second class, that is, those in which public interests are involved, the better rule would seem to be, although there is conflict, that any citizen or taxpayer is a proper party plaintiff to an action against an officer. This rule is naturally applicable only to actions like the mandamus[37] or the injunction,[38] where the purpose is either to secure or prevent official action. In a suit against an officer for an act which he had no right to perform, unless as an officer, he may be compelled to show that he has the *prima facie* legal title to the office. It is not sufficient to show that he is the *de facto* incumbent.[39]

4. PLEADING.[40] In suits brought against officers where it is sought to make

29. See MANDAMUS.

30. See INJUNCTIONS.

Remedy at law.— It is held that if an official trust has been violated plaintiff may have an equitable remedy notwithstanding the fact that he has a complete remedy at law by action on the official bond. Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338.

31. White *v.* Hamm, 36 N. Brunsw. 237; Lefebvre *v.* Verdun, 6 Quebec Pr. 437; Milton *v.* Côte St. Paul Parish, 6 Quebec Pr. 407; Carrière *v.* Jobin, 5 Quebec Pr. 305; McDonald *v.* McCaskill, 5 Quebec Pr. 266; Molleur *v.* Faubert, 2 Quebec Pr. 281; Belanger *v.* Mercier, 12 Quebec K. B. 428; Dion *v.* Richard, 23 Quebec Super. Ct. 403. The cases cited above hold that bailiffs, church-wardens, constables, police officers, and school commissioners are protected by the provision, and that the provision relates to suits brought for acts of omission as well as commission.

Sufficiency of notice.— When a public officer is charged with various acts of official wrong-doing, individual and combined, the notice of action must set forth said acts of wrong-doing and the dates, times, and circumstances connected therewith, in a manner sufficient to enable defendant to make tender and amends in respect of one or more or all of the specific acts complained of; otherwise the action will be dismissed on exception to the form. Trudel *v.* Montreal, 8 Quebec Pr. 45.

Limitation of action see LIMITATIONS OF ACTIONS, 25 Cyc. 1148.

32. Butler *v.* Kent, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219. See also *supra*, IV, D, 1.

33. Mayer *v.* McCamant, 8 Pa. Co. Ct. 75. See also INJUNCTIONS, 22 Cyc. 910.

34. See MANDAMUS, 26 Cyc. 401.

35. See HABEAS CORPUS, 21 Cyc. 288.

36. See *In re* Marks, 45 Cal. 199.

37. See MANDAMUS.

38. See INJUNCTIONS.

39. *Arkansas.*—Miller *v.* Callaway, 32 Ark. 666, where a judgment was reversed because plaintiff had not been permitted to show in a replevin suit that the sheriff when elected was not eligible for the office, because not a resident of the county.

Illinois.— Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

Maine.— Pooler *v.* Reed, 73 Me. 129.

Massachusetts.— Short *v.* Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

New Hampshire.— Blake *v.* Sturtevant, 12 N. H. 567.

New York.— Colton *v.* Beardsley, 38 Barb. 29.

Vermont.— Cummings *v.* Clark, 15 Vt. 653, holding that a person appointed to fill a vacancy in office which did not exist could not justify as a public officer in defense to an action for trespass.

40. Pleading generally see PLEADING.

them personally liable, the declaration or complaint should set forth the special circumstances which are relied on to establish the liability,[41] or the duty which, it is alleged, has been neglected,[42] and must aver that the officer had the means to perform the duty.[43] Where reliance is placed on malice, an intent to injure plaintiff should be clearly alleged.[44] In suits brought by officers in their official capacity an averment that plaintiff "duly qualified and entered upon his duties" is sufficient, such averment implying the doing of everything necessary to a proper qualification for office.[45]

5. Costs.[46] In actions to which officers are parties the general rule is that costs are not allowed against such officers. This is so in all cases in which the officer is acting in his representative capacity in the matter as to which the action arose.[47] The same rule is also applied in actions or proceedings relating to their official duties, provided such officers have not acted with gross negligence, in bad faith, or with malice.[48] In some cases, in order to discourage suits against officers, it is provided by statute that, if an officer sued as such succeeds in the action, he shall be entitled to double costs.[49]

F. Criminal Responsibility[50] **— 1. In General.** All officers are liable like ordinary persons for the violation of penal laws affecting all persons in the community. Their official position affords them no immunity from criminal responsibility.[51] In addition to their criminal responsibility as ordinary persons officers are criminally responsible for the violation of official duty. This liability is based either on the common law or upon some statute, and exists where there are no injurious results to any individual from the official misconduct.[52] The only exception to this rule is that judges of the higher courts are not by the common law criminally responsible for the violation of official duty.[53] The remedy in the case of these officers is by impeachment.[54] The criminal responsibility of officers for violation of official duty extends to *de facto* as well as *de jure* officers.[55]

2. By Common Law. It is a rule of the common law that a failure or neglect of an officer to perform a ministerial duty imposed upon him by law renders him guilty of a misdemeanor.[56] It would also seem that, notwithstanding the provisions of statute which have been disobeyed are, as respects the public, merely

41. Smith *v.* Wright, 27 Barb. (N. Y.) 621.

42. Burns *v.* Moragne, 128 Ala. 493, 29 So. 460, which holds that, in an action against an officer for failure to perform duties imposed by statute, a general averment of the officer's duty to perform the service is sufficient, the court taking judicial notice of the statute imposing the duty. Hence the issue that the alleged duty is not imposed by such statute is properly raised by demurrer.

43. Smith *v.* Wright, 27 Barb. (N. Y.) 621, holding that in case of a failure to repair a bridge for which the action is brought it must be averred that the officers sued had a fund from which they might pay for the repairs. But see Merritt *v.* McNally, 14 Mont. 228, 36 Pac. 44, where it is held that a complaint against a public officer for non-performance of duty, which fails to show that the officer had the means to perform the duty, is not demurrable, as the want of means is an affirmative defense to be raised by answer.

44. Ballerino *v.* Mason, 83 Cal. 447, 23 Pac. 530; Billings *v.* Lafferty, 31 Ill. 318.

45. Willenburg *v.* State, 12 Ind. App. 462, 40 N. E. 547.

46. Costs generally see Costs.

47. Houston *v.* Neuse River Nav. Co., 53 N. C. 476.

48. Scrafford *v.* Gladwin County Sup'rs, 42 Mich. 464, 4 N. W. 167; O'Connor *v.* Walsh, 83 N. Y. App. Div. 179, 82 N. Y. Suppl. 499.

49. See N. Y. Code Civ. Proc. § 3258.

50. Of particular officers see special titles relating thereto, and cross-references at the head of this article.

Mutilation, secretion, or destruction of record see Records.

51. State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

52. State *v.* Morse, 52 Iowa 509, 3 N. W. 498; State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629.

53. See Judges, 23 Cyc. 574.

54. See Judges, 23 Cyc. 522.

55. *Alabama.*— Diggs *v.* State, 49 Ala. 311.

Kentucky.— Com. *v.* Pate, 110 Ky. 468, 61 S. W. 1009, 22 Ky. L. Rep. 1890.

North Carolina.— State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216.

South Carolina.— State *v.* Maberry, 3 Strobh. 144.

England.— Rex *v.* Borrett, 6 C. & P. 124, 25 E. C. L. 353; Rex *v.* Hollond, 5 T. R. 607, 2 Rev. Rep. 678.

56. *Kansas.*— State *v.* Gluck, 49 Kan. 533, 31 Pac. 690.

directory, the neglect of the officer to observe them is a misdemeanor.[57] Where, however, the duty which has not been performed is one involving discretion the failure to perform it is not *per se* an indictable offense. The omission must be wilful and due to corrupt motives. This rule is particularly applicable to officers holding courts.[58] This rule of the common law is sometimes changed by statute so as to make indictable wilful neglect of duty without corruption. If this is the case it is unnecessary to allege and prove corruption.[59]

3. By Statute. In addition to the common-law criminal liability of officers the statutes often make it a crime for an officer to do particular things set forth therein.[60] Such statutes are to be construed strictly as ordinary penal statutes.[61] But no corrupt intent, unless corruption is made a necessary element of the crime, is necessary in order that an officer may be indicted under such a statute.[62] The law, however, often specifically provides that the act shall be wilful or malicious. In such case mere neglect not wilful or malicious is not sufficient.[63]

4. Prosecution and Punishment. Prosecutions of officers for offenses are governed by the rules applicable to criminal proceedings in general.[64] An indictment must set forth with clearness the particular facts constituting the illegality and

New Jersey.— State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114.

New York.— People *v.* Meakim, 133 N. Y. 214, 30 N. E. 828; People *v.* Herlihy, 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236.

North Carolina.— State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629. But see State *v.* Bright, 4 N. C. 437, which held that a verdict finding an officer guilty of taking extra fees but not corruptly is a verdict of not guilty.

Pennsylvania.— Com. *v.* Coyle, 160 Pa. St. 36, 28 Atl. 576, 634, 40 Am. St. Rep. 708, 24 L. R. A. 552.

Texas.— State *v.* Baldwin, 39 Tex. 155.

England.— Rex *v.* Bembridge, 3 Dougl. 327, 26 E. C. L. 218; Anonymous, 6 Mod. 96; Rex *v.* Commings, 5 Mod. 179.

57. Case *v.* Dean, 16 Mich. 12. Some of the cases lay emphasis on the rule that neglect to enforce the law does not exist where the officer has no knowledge that the law has been broken. See State *v.* Darling, 89 Me. 400, 36 Atl. 632.

58. *Delaware.*— State *v.* Porter, 4 Harr. 556.

Indiana.— Baker *v.* State, 27 Ind. 485; State *v.* Odell, 8 Blackf. 396.

Massachusetts.— Com. *v.* Shed, 1 Mass. 227.

Minnesota.— State *v.* Wedge, 24 Minn. 150.

Missouri.— State *v.* Gardner, 2 Mo. 23.

New Jersey.— State *v.* Cutter, 36 N. J. L. 125.

North Carolina.— State *v.* Godwin, 123 N. C. 697, 31 S. E. 221; State *v.* Williams, 34 N. C. 172.

Ohio.— Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

South Carolina.— State *v.* Porter, 2 Treadw. 694.

Virginia.— Com. *v.* Willson, 2 Leigh 739.

England.— Rex *v.* Seaford Justices, W. Bl. 432; Rex *v.* Webb, W. Bl. 19.

59. People *v.* Brooks, 1 Den. (N. Y.) 457, 43 Am. Dec. 704.

60. See the statutes of the several states. And see Scruggs *v.* State, 111 Ala. 60, 20 So. 642 (holding that a witness' certificate was a claim within a statute providing for the punishment of any public officer dealing with any claim payable out of the county treasury); Com. *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204 (holding that intoxication could not be deemed malfeasance in office, under the statute).

Power of legislature to enact.— One who has been elected to and who engages to serve the public in an official capacity has no right voluntarily to unfit himself for the faithful and intelligent discharge of his duties, and the law-making power may provide for his punishment in any manner not prohibited by the constitution. Com. *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204.

61. People *v.* Wallace, 55 Hun (N. Y.) 149, 8 N. Y. Suppl. 591; Dutton *v.* Philadelphia, 9 Phila. (Pa.) 597, which holds that under a statute, punishing the taking of fees for services not specified in the law, it is not a misdemeanor in office for an officer to receive a compensation for services which it is not his official duty to perform. See also Com. *v.* Shoener, 30 Pa. Super. Ct. 321 [*affirmed* in 216 Pa. St. 71, 64 Atl. 890]. But see State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172, which holds that under a statute punishing "misconduct in office" by removal, an officer might be indicted for misconduct in issuing a false certificate, although the issue of such a certificate was no part of his official duty.

62. State *v.* Colton, 9 Houst. (Del.) 530, 33 Atl. 259; State *v.* Browne, 4 Ida. 723, 44 Pac. 552; State *v.* Hatch, 116 N. C. 1003, 21 S. E. 430; State *v.* Assmann, 46 S. C. 554, 24 S. E. 673.

Intent to defraud particular person.— Under a statute making it an offense for a public officer to fraudulently give a certificate of receipts, an intent to defraud the person to whom it was given need not be alleged in the indictment. State *v.* Morse, 52 Iowa 509, 3 N. W. 498.

63. State *v.* Hein, 50 Mo. 362; State *v.* Latshaw, 63 Mo. App. 620; State *v.* Green, 52 S. C. 520, 30 S. E. 683. See also State *v.* Boyd, 196 Mo. 52, 94 S. W. 536.

64. See Criminal Law.

allege a violation of official duty or the commission of an official crime.[65] Thus, where the law punishes as a crime the failure of an officer to pay over to his successor official funds in his possession at the expiration of his term, an indictment which fails to allege the expiration of the term is defective.[66] Inasmuch as *de facto* officers are criminally responsible for official crimes, an indictment of an officer need not allege that defendant duly qualified by taking the oath of office.[67] As a general thing the expiration of the term of office is no bar to a prosecution for official misconduct.[68] Where the prosecution is under a statute the punishment imposed must be such as is provided by the statute.[69]

V. LIABILITIES ON OFFICIAL BONDS.[70]

A. Nature and Existence of Liability in General — 1. Unnecessary, Excessive, or Illegal Bonds. The purpose of an official bond being to protect the government from loss due to the improper performance of official duty, as well as to insure the proper performance of such official duty, a bond purporting to be an official bond which is given when not required by the law has no legal effect.[71] The application of this principle results also in making void a bond which contains stipulations or conditions not required by law, if such stipulations cannot be separated from the lawful portion of the bond.[72] But a bond may be

65. *California.*— Smith *v.* Ling, 68 Cal. 324, 9 Pac. 171.

Indiana.— Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127.

Kentucky.— Com. *v.* Kinnaird, 37 S. W. 840, 18 Ky. L. Rep. 647.

Maine.— State *v.* Darling, 89 Me. 400, 36 Atl. 632.

Minnesota.— State *v.* Coon, 14 Minn. 456.

Missouri.— State *v.* Boyd, 196 Mo. 52, 94 S. W. 536; State *v.* Flynn, 119 Mo. App. 712, 94 S. W. 543.

New Jersey.— See State *v.* Hinkley, 9 N. J. L. J. 118.

New York.— People *v.* Castleton, 44 How. Pr. 238. But an indictment against an officer for a wilful neglect of duty in failing to enforce a certain law is not defective for failing to set out the steps which the officer should have taken to enforce the law on knowledge of its violation. People *v.* Murray, 175 N. Y. 479, 67 N. E. 1087.

United States.— U. S. *v.* Scott, 74 Fed. 213.

See 37 Cent. Dig. tit. "Officers," § 212.

Description of officer in indictment see Indictments and Informations, 22 Cyc. 325.

Sufficiency of indictments and informations in general see Indictments and Informations.

66. Dreyer *v.* People, 176 Ill. 590, 52 N. E. 372; State *v.* Hebel, 72 Ind. 361.

67. State *v.* Cansler, 75 N. C. 442, which holds that the fact that a person never took the required oath of office is no defense to an indictment for misconduct in the exercise of the office. See also Edge *v.* Com., 7 Pa. St. 275, where it was held that, in an indictment for a misfeasance against a public officer, it is sufficient to allege that he was duly elected to the office by the qualified electors, etc., and took upon himself that trust.

68. State *v.* Sellers, 7 Rich. (S. C.) 368. But see Stubbs *v.* State, 53 Miss. 437, where it is held that if the only punishment which may be inflicted is removal from office the proceeding will be dismissed on the expiration of the official term of defendant.

69. See the statutes of the several states. And see State *v.* Baldwin, 39 Tex. 155.

70. Bonds of particular officers see special articles relating thereto.

Liabilities upon bond of officer required to search title see Abstracts of Title, 1 Cyc. 217.

Official bonds of Indian officers see Indians, 22 Cyc. 143.

71. Tuskaloosa *v.* Lacy, 3 Ala. 618; State *v.* Heisey, 56 Iowa 404, 9 N. W. 327; Faust *v.* Murphy, 71 Miss. 120, 13 So. 862; State *v.* Bartlett, 30 Miss. 624; Logan County *v.* Harvey, 6 Okla. 629, 52 Pac. 402. *Contra*, Todd *v.* Cowell, 14 Ill. 72; Woolwick Tp. *v.* Forest, 2 N. J. L. 115. See Tyler *v.* Hand, 7 How. (U. S.) 573, 12 L. ed. 824; U. S. *v.* Tingey, 5 Pet. (U. S.) 115, 129, 8 L. ed. 66; U. S. *v.* Humason, 26 Fed. Cas. No. 15,421, 6 Sawy. 199, which confine the application of the rule to cases where the bond was not voluntary but had been extorted. See also Jessup *v.* U. S., 106 U. S. 147, 1 S. Ct. 74, 27 L. ed. 85, applying this rule as thus modified to bonds given to the government by private unofficial persons.

72. Nottingham Tp. *v.* Giles, 2 N. J. L. 120. But see Philadelphia *v.* Shallcross, 14 Phila. (Pa.) 135, which holds that when an official bond imposes greater obligations than the act of assembly requires, both principal and surety will be held to the full extent of its terms, unless such a construction is forbidden by statute, or a contrary intention on the part of the obligors is shown. See also State *v.* Findley, 10 Ohio 51; State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822, both holding that an official bond is a good statutory bond for so much as is prescribed by statute and comprehended in the condition, although it may be void for the residue.

good, although for an excessive penalty.[73] So bonds are good also where the officials under such bonds were officers *de facto* only, since neither the principal nor sureties may be heard to impeach the official title of the principal.[74]

2. INSUFFICIENT, INFORMAL, OR DEFECTIVE BONDS. Inasmuch as the requirement of an official bond is made in the interest of protecting the public, the courts usually uphold the validity of an official bond, although the statutes regulating the form of the bond, or the method of its execution, delivery, approval, and filing have not been exactly complied with. In some cases it is specifically provided by statute that the statutory provisions as to form, etc., of the bond are to be construed as directory rather than mandatory.[75] Thus bonds are good where the principal has failed to sign the bond, if his name is inserted in the body of the

73. *Indiana.*— Graham *v.* State, 66 Ind. 386, which holds that the bond is good up to the amount of the lawful penalty, but not as to the excess.

Mississippi.— Matthews *v.* Lee, 25 Miss. 417.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

Pennsylvania. — McCaraher *v.* Com., 5 Watts & S. 21, 39 Am. Dec. 506.

South Carolina.— Treasurers *v.* Stevens, 2 McCord 107.

South Dakota.— State *v.* Taylor, 10 S. D. 182, 72 N. W. 407, 66 Am. St. Rep. 707, which holds that the bond is good even as to the excess and to the full amount of the penalty.

See 37 Cent. Dig. tit. "Officers," § 219.

Voluntary giving of bond.— Some of the cases lay emphasis upon the fact that the bond was voluntarily given. See Matthews *v.* Lee, 25 Miss. 417; State *v.* Taylor, 10 S. D. 182, 72 N. W. 407, 66 Am. St. Rep. 707.

74. *Illinois.*— Cawley *v.* People, 95 Ill. 249; Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366.

Louisiana.— Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792.

Missouri.— Barada *v.* Carondelet, 8 Mo. 644.

Nebraska.— Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689.

Nevada.—State *v.* Wells, 8 Nev. 105; State *v.* Rhoades, 6 Nev. 352.

New Jersey.— Hoboken *v.* Harrison, 30 N. J. L. 73.

Ohio.— State *v.* Findley, 10 Ohio 51.

Pennsylvania.— Franklin *v.* Hammond, 45 Pa. St. 507.

Tennessee.—Waters *v.* Edmondson, 8 Heisk. 384; State *v.* Clark, 1 Head 369.

Vermont.— State *v.* Bates, 36 Vt. 387.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

United States.— U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96.

Even where the office has not been legally established the sureties are estopped by a recital in the bond to the effect that their principal was appointed to the office. Blaco *v.* State, 58 Nebr. 557, 78 N. W. 1056; Hoboken *v.* Harrison, 30 N. J. L. 73. *Contra,* Tinsley *v.* Kirby, 17 S. C. 1.

75. *Alabama.*— Bromberg *v.* Fidelity, etc., Co., 139 Ala. 338, 36 So. 622; Sprowl *v.* Lawrence, 33 Ala. 674.

California.— People *v.* Huson, 78 Cal. 154, 20 Pac. 369; People *v.* Smyth, 28 Cal. 21; People *v.* Love, 19 Cal. 676; Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547.

Illinois.— Purcell *v.* Bear Creek, 138 Ill. 524, 28 N. E. 1085 [*affirming* 39 Ill. App. 499].

Indiana.— Yeakle *v.* Winters, 60 Ind. 554.

Louisiana.— Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792.

Maine.— Boothbay *v.* Giles, 68 Me. 160.

Minnesota.— Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907.

Mississippi.— State *v.* Smith, 87 Miss. 551, 40 So. 22; Boykin *v.* State, 50 Miss. 375.

Nebraska.— Perkins County *v.* Miller, 55 Nebr. 141, 75 N. W. 577; Holt County *v.* Scott, 53 Nebr. 176, 73 N. W. 681; Huffman *v.* Koppelkom, 8 Nebr. 344, 1 N. W. 243.

New Jersey.— Camden *v.* Greenwald, 65 N. J. L. 458, 47 Atl. 458.

New York.— New York *v.* Goldman, 125 N. Y. 395, 26 N. E. 456; Skellinger *v.* Yendes, 12 Wend. 306.

North Carolina.— State *v.* Sutton, 120 N. C. 298, 26 S. E. 920; State *v.* Baird, 118 N. C. 854, 24 S. E. 668; Wake County *v.* Magnin, 86 N. C. 285; Williams *v.* Ehringhaus, 14 N. C. 297; Branch *v.* Elliott, 14 N. C. 86; Chambers *v.* Witherspoon, 10 N. C. 42.

Ohio.— Creswell *v.* Nesbitt, 16 Ohio St. 35; Rogers *v.* Pugh, 1 Disn. 443, 12 Ohio Dec. (Reprint) 722.

Oregon.— Portland *v.* Besser, 10 Oreg. 242.

Pennsylvania.— Com. *v.* Laub, 1 Watts & S. 261.

South Carolina.—Lee *v.* Waring, 3 Desauss. Eq. 57.

South Dakota.— State *v.* Barnes, 10 S. D. 306, 73 N. W. 80.

Tennessee.— McLean *v.* State, 8 Heisk. 22; Goodrum *v.* Carroll, 2 Humphr. 490, 37 Am. Dec. 564.

Virginia.— Calwell *v.* Com., 17 Gratt. 391.

Washington.— State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

West Virginia.— State *v.* McGuire. 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822.

United States.— Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119; U. S. *v.* Hodson, 10 Wall. 395, 19 L. ed. 937; U. S. *v.* Brown, 24 Fed. Cas. No. 14,663, Gilp. 155.

See 37 Cent. Dig. tit. "Officers," § 220.

Contra.— Hyner *v.* Dickinson, 32 Ark. 776.

bond;[76] where the name of the principal is signed to the bond but does not appear in the body of the bond;[77] where the bonds have not been delivered at the proper time,[78] or in the proper way,[79] or made to the proper person;[80] and where the bond was not approved,[81] or recorded.[82] Where, however, a bond is to be approved by one officer and filed with another it does not go into effect at the time of its approval but only when it is filed,[83] since an official bond does not go into effect until it has been delivered.[84]

3. Bonds Signed Upon Condition. Since official bonds have been provided with the idea of protecting the public, the courts usually lean to the view that the principal is to be regarded, in getting his bond, as the agent, not of the obligee, but of the other obligors, who are therefore bound by his acts.[85] Thus where a surety signs a bond in blank, but it was understood between him and the principal that the bond should not be delivered until the names of a certain number of other sureties had been obtained, such surety is bound where the bond is delivered and

76. *Alabama.*— U. S. Fidelity, etc., Co. *v.* Union Trust, etc., Co., 142 Ala. 532, 38 So. 177.

Arizona.— Pima County *v.* Snyder, 5 Ariz. 45, 44 Pac. 297.

Illinois.— School Trustees *v.* Sheik, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830.

Mississippi.— McLeod *v.* State, 69 Miss. 221, 13 So. 268, holding that where an officer writes his name in the body of an instrument which is delivered and accepted as his official bond, the same is valid as such, notwithstanding the omission of a final signature.

Ohio.— State *v.* Bowman, 10 Ohio 445.

See 37 Cent. Dig. tit. "Officers," § 220.

Contra.— People *v.* Hartley, 21 Cal. 585, 82 Am. Dec. 758; Mayo *v.* Renfroe, 66 Ga. 408; Bunn *v.* Jetmore, 70 Mo. 228, 35 Am. Rep. 425. See also Hall *v.* Parker, 39 Mich. 287, where it is held that such a bond will not bind the sureties without "positive proof that they had delivered [the bond] to become operative as against themselves alone."

77. Rader *v.* Davis, 5 Lea (Tenn.) 536. See also Hodgkin *v.* Holland, 34 Ark. 203, holding that it was proper to approve a bond signed by sureties whose names were not set out in the body of the bond.

78. Sprowl *v.* Lawrence, 33 Ala. 674; State *v.* Cooper, 53 Miss. 615; State *v.* Toomer, 7 Rich. (S. C.) 216, 226.

79. State *v.* McAlpin, 26 N. C. 140.

80. State *v.* Barnes, 10 S. D. 306, 73 N. W. 80 (holding that a bond made to a county is good, although by law it should be made to the state); Platteville *v.* Hooper, 63 Wis. 385, 23 N. W. 583.

81. *California.*— People *v.* Huson, 78 Cal. 154, 20 Pac. 369.

Illinois.— Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366; Ramsay *v.* People, 97 Ill. App. 283 [*affirmed* in 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177].

Michigan.— People *v.* Johr, 22 Mich. 461.

Mississippi.— Marshal *v.* Hamilton, 41 Miss. 229.

Missouri.— Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

Nebraska.— State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983; Holt County *v.* Scott, 53 Nebr. 176, 73 N. W. 681.

Pennsylvania.— See Com. *v.* Laub, 1 Watts & S. 261, holding that where a statute required the approval of an official bond by the judges of the court of quarter sessions, it was sufficient to give it authenticity that it was done actually by the persons designated in the statute, although they style themselves judges of the court of common pleas.

See 37 Cent. Dig. tit. "Officers," § 220.

Where a bond is presented to the proper body for approval and no objection is made within the time limited, and no action taken in ordering a new election, it must be considered that the bond has been approved and a formal approval at a subsequent period cannot affect intermediate acts. Rogers *v.* Pugh, 1 Disn. 443, 12 Ohio Dec. (Reprint) 722, so holding in an action against the sureties upon the bond.

82. Whitehurst *v.* Hickey, 3 Mart. N. S. (La.) 589, 15 Am. Dec. 167.

83. Whitehurst *v.* Hickey, 3 Mart. N. S. (La.) 589, 15 Am. Dec. 167. See also Winneshiek County *v.* Maynard, 44 Iowa 15. Here it was held that, where an officer was elected and secured a bond which was not filed at the proper time and where such office was thereupon declared vacant, and the same person was thereupon appointed to fill the vacancy, and filed such bond, said bond was void as to the sureties.

84. Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689, which holds that the principal in an official bond has an implied agency to deliver the bond as the contract of his sureties.

85. See cases cited in the following notes.

Bond signed in blank.— It has been held that where it appears that one surety has not signed a bond and another has signed it, but no sum is stated for which he is bound, the bond is valid against the signer if there are no conditions by the sureties as to other signatures or as to the amount of their liability. People *v.* Stacy, 74 Cal. 373, 16 Pac. 192. See also Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182, which holds that sureties are bound by a bond signed in blank for the penalty, although the amount of the penalty is made greater than they stipulated for. The rule as laid down in this case is ap-

all the other sureties were not obtained.[86] But the sureties are not liable if the obligees have any notice that the sureties have made conditions.[87]

B. Scope of Liability[88] **— 1. In General.** A general principle which governs the liability on an official bond is that such liability is to be determined by the terms of the bond,[89] even where these do not comply with the statute requiring the bond.[90] The bond so far as it imposes a liability is construed strictly.[91] Thus it does not include liability to a successful contestant for the office for the emoluments of the office received by the principal on the bond when an officer *de facto*,[92]

plied in South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535; State *v.* Young, 23 Minn. 551 (where it was held that the delivery by sureties to the principal of a bond signed by them with a blank space for the penalty authorized such principal to insert the amount of the penalty); Butler *v.* U. S., 21 Wall. (U. S.) 272, 22 L. ed. 614.

Ratification.— Where the sureties upon a bond know that it is blank for the amount of the penalty and that by filing the bond the officer will obtain money, it will be inferred that they ratified his act in filling the blank, rather than that they are intending to aid the officer to perpetrate a fraud, and in such a case, where the sureties after finding that there has been a defalcation by the officer took mortgages and other securities from him, it is evidence from which a jury may infer that authority had been given or that a ratification had been made. Bartlett *v.* Freeport School Dist. Bd. of Education, 59 Ill. 364.

86. *Illinois.*— Smith *v.* Peoria County, 59 Ill. 412.

Indiana.— Mowbray *v.* State, 88 Ind. 324; State *v.* Pepper, 31 Ind. 76.

Iowa.— Taylor County *v.* King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. Rep. 666.

Maine.— State *v.* Peck, 53 Me. 284.

Michigan.— McCormick *v.* Bay City, 23 Mich. 457.

Minnesota.— Preston Independent School Dist. No. 45 Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374.

Nebraska.— Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371.

Tennessee.— Amis *v.* Marks, 3 Lea 568.

Contra.— Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327; Linn County *v.* Farris, 52 Mo. 75, 14 Am. Rep. 389 (where it was held that the forging of the name of the second surety under similar conditions released the first surety); Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601.

87. School Trustees *v.* Sheik, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830; Quarles *v.* Tennessee, 10 Humphr. (Tenn.) 122; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

Knowledge that the penalty was in blank when the sureties signed the bond is not of itself such notice. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182.

88. **Bonds of particular officers** see special titles relating thereto.

89. See cases cited *infra*, this and following notes.

Where an officer holds two distinct offices a bond given for the faithful performance of one office does not cover malfeasance in the other office (People *v.* Gardner, 55 Cal. 304; People *v.* Edwards, 9 Cal. 286; Cooper *v.* People, 85 Ill. 417; Alcorn *v.* State, 57 Miss. 273; North Carolina *v.* Matlock, 12 N. C. 214; State *v.* Medary, 17 Ohio 554; State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034; Territory *v.* Ritter, 1 Wyo. 318; U. S. *v.* White, 28 Fed. Cas. No. 16,686, 4 Wash. 414), except where such offices are not by the law clearly distinct (Coleman *v.* Ormond, 60 Ala. 328, holding that the sureties on the official bond of a register in chancery are responsible for moneys received by him in the capacity of special receiver and not accounted for); State *v.* Wright, 50 Conn. 580; Satterfield *v.* People, 104 Ill. 448; State *v.* Matthews, 57 Miss. 1.

90. State *v.* Hill, 88 Md. 111, 41 Atl. 61; Hoboken *v.* Harrison, 30 N. J. L. 73; Prince *v.* McNeill, 77 N. C. 398; State *v.* Polk, 14 Lea (Tenn.) 1. But *compare* U. S. Fidelity, etc., Co. *v.* Union Trust, etc., Co., 142 Ala. 532, 38 So. 177 (which holds that, under a statute declaring that whenever any person required to give a bond acts under a bond which is not as prescribed by law, such bond stands in the place of the official bond, no operation is to be given to stipulations and conditions contained in the bond and limiting the liability of the principal or sureties); State *v.* Smith, 87 Miss. 551, 40 So. 22 (which holds that under a law providing that failure to observe any formality shall not vitiate any official bond, but the same shall be valid and binding whether made in the proper penalty or without any penalty, or whether correct or incorrect in any of its recitals, when one signs what purports and is intended to be an official bond, whether as principal obligor or surety, the law writes in all necessary recitals including the proper penalties); Coe *v.* Nash, (Tex. Civ. App. 1897) 40 S. W. 235 (which holds that the liability of sureties cannot be varied by a private agreement between surety and principal and not apparent from the bond); State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822 (where it is held that a limitation of the period for which the bond was to run inserted in the bond contrary to the law was to be stricken out as surplusage).

91. St. Louis *v.* Sickles, 52 Mo. 122; Fritch *v.* Douglass, 12 Ohio Cir. Ct. 359, 5 Ohio Cir. Dec. 695.

92. Curry *v.* Wright, 86 Tenn. 636, 8 S. W.

nor liability for penalties imposed on the officer for dereliction of duty.[93] The extent of the liability of the surety is not to be determined by the liability of the principal, which by law is frequently more extensive than that of the surety.[94]

2. Neglect or Malfeasance of Official Duty. It goes without saying that sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done *virtute officii*. Thus they are liable for the loss of official funds by their principal to the same extent as is the principal.[95] The bond providing usually for the faithful discharge by the principal of his official duties, the condition of the bond is considered to have been broken by the mere negligence without corruption of the principal in the performance of a ministerial duty,[96] which performance does involve the exercise of discretion,[97] and where the duty which has not been faithfully discharged was owing to the person injured such person may sue on the bond.[98]

3. Acts Outside of Official Duty. An official bond is not regarded as imposing liability for the purely personal acts of officers not done as a part of or in connection with their official duty, as for example, the receipt of money which it was not the officer's duty to receive, or the arrest of an individual, or the seizure of property without a warrant.[99] But in most states acts done by color of office are

593; Rowlett *v.* White, 18 Tex. Civ. App. 688, 46 S. W. 372.

93. *Alabama.*— Jeffreys *v.* Malone, 105 Ala. 489, 17 So. 21.

Indiana.— State *v.* Flynn, 157 Ind. 52, 60 N. E. 684.

Nebraska.—Sheibley *v.* Cooper, (1907) 112 N. W. 363, 113 N. W. 626; Eccles *v.* Walker, 75 Nebr. 722, 106 N. W. 977.

South Carolina.— South Carolina *v.* Hilliard, 8 Rich. 412.

Virginia.— McDowell *v.* Burwell, 4 Rand. 317.

Statutory provision imposing a liability for such penalties is sometimes made. Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917.

94. Holt *v.* McLean, 75 N. C. 347; Stanton *v.* Shipley, 27 Fed. 498.

95. See *supra*, IV, C, 1.

96. People *v.* Smith, 123 Cal. 70, 55 Pac. 765.

97. State *v.* Chadwick, 10 Oreg. 465; Alexandria *v.* Corse, 1 Fed. Cas. No. 183, 2 Cranch C. C. 363.

98. *Alabama.*— Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841, where the sureties on the bond of a probate judge were held liable for damages caused by his neglect to index a mortgage.

Maine.— Harris *v.* Hanson, 11 Me. 241.

Oklahoma.— Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927, holding sureties of a sheriff responsible for damage caused a prisoner through the sheriff's negligence.

Pennsylvania.— Ziegler *v.* Com., 12 Pa. St. 227.

Texas.— Stephenson *v.* Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137.

United States.— Asher *v.* Cabell, 50 Fed. 818, 1 C. C. A. 693.

99. *Alabama.*— McKee *v.* Griffin, 66 Ala. 211.

California.— San Luis Obispo County *v.* Farnum, 108 Cal. 562, 41 Pac. 445; Schloss *v.* White, 16 Cal. 65.

Colorado.— Allison *v.* People, 6 Colo. App. 80, 39 Pac. 903.

Illinois.— People *v.* Toomey, 25 Ill. App. 46 [*affirmed* in 122 Ill. 308, 13 N. E. 521].

Indiana.— State *v.* Bagby, 160 Ind. 669, 67 N. E. 519; Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

Kansas.— Wilson *v.* State, 67 Kan. 44, 72 Pac. 517.

Kentucky.— Griffith *v.* Com., 10 Bush 281.

Louisiana.— Saltenberry *v.* Loucks, 8 La. Ann. 95.

Massachusetts.— Boston *v.* Moore, 3 Allen 126.

Minnesota.— Cressey *v.* Gierman, 7 Minn. 398.

Mississippi.— Furlong *v.* State, 58 Miss. 717.

Missouri.—State *v.* McDonough, 9 Mo. App. 63.

Nebraska.— State *v.* Porter, 69 Nebr. 203, 95 N. W. 769; State *v.* Moore, 56 Nebr. 82, 76 N. W. 474.

New York.— People *v.* Pennock, 60 N. Y. 421.

North Carolina.— Eaton *v.* Kelly, 72 N. C. 110; State *v.* Brown, 33 N. C. 141.

Ohio.— State *v.* Griffith, 74 Ohio St. 80, 77 N. E. 686.

Pennsylvania.— Com. *v.* Swope, 45 Pa. St. 535, 84 Am. Dec. 518.

South Carolina.— State *v.* White, 10 Rich. 442.

Tennessee.— McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738; Curry *v.* Wright, 86 Tenn. 636, 8 S. W. 593.

Texas.— Thomas *v.* Browder, 33 Tex. 783; Kidd *v.* Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600.

Wisconsin.— Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751.

United States.— Chandler *v.* Rutherford, 101 Fed. 774, 43 C. C. A. 218; Michigan *v.* Hilton, 36 Fed. 172.

Construction of bond.— An official bond

regarded as acts for which sureties on official bonds are liable. Thus where an officer having an execution seizes the goods of one person when the execution is directed to another, or, having a warrant, arrests the wrong person, the sureties on his bond are liable.[1]

4. Acts of Deputies or Agents. The liability of sureties on official bonds extends to the acts of deputies and agents of their principal, the negligence or malfeasance of such deputies and agents being imputed to the principal.[2]

5. Interest and Damages. In all cases of misappropriation by an officer of funds which have legally come into his possession his sureties are liable not only for the amount misappropriated but also for interest, which is sometimes so high as to constitute a penalty from the time of the misappropriation.[3] But in no case are sureties on an official bond liable for exemplary damages in the absence of a statute to that effect. Only damage for the actual injury caused by the default of the officer may be recovered,[4] and in case the government performs work which the principal on an official bond has neglected to perform the sureties are liable

will not be construed more favorably in behalf of sureties than of principals when the question at issue is the construction of a statute regulating official duty. Gilbert *v.* Isham, 16 Conn. 525.

Money illegally raised.— Sureties are responsible for money actually received by an officer, although the resolution under which such money was received was improperly passed by the authority which raised the money. Thus the sureties of a county treasurer were held responsible for his defalcation of moneys borrowed by authority of a board of supervisors even though such board exceeded its powers in borrowing the money. Cheboygan County *v.* Erratt, 110 Mich. 156, 67 N. W. 1117; State *v.* Hobson, 5 Ohio S. & C. Pl. Dec. 442, 5 Ohio N. P. 321.

1. *Alabama.*— McElhaney *v.* Gilleland, 30 Ala. 183.

California.— Van Pelt *v.* Littler, 14 Cal. 194.

Illinois.— Horan *v.* People, 10 Ill. App. 21.

Iowa.— Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

Kentucky.— Com. *v.* Stockton, 5 T. B. Mon. 192.

Maine.—Archer *v.* Noble, 3 Me. 418.

Massachusetts.— Greenfield *v.* Wilson, 13 Gray 384.

Michigan.— People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

Minnesota.— Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219.

Missouri.— State *v.* Fitzpatrick, 64 Mo. 185.

Nebraska.— Turner *v.* Killian, 12 Nebr. 580, 12 N. W. 101; Huffman *v.* Koppelkom, 8 Nebr. 344, 1 N. W. 243; Kane *v.* Union Pac. R. Co., 5 Nebr. 105.

New York.— People *v.* Schuyler, 4 N. Y. 173, 180. In this case the court in distinguishing between acts *colore officii* and acts purely personal says: "The distinction is between a case in which a duty is imposed at law upon an officer as such, which he is bound by his peril faithfully to discharge, and one in which there is no such obligation. Where the duty exists, and it is neglected, or performed in an improper manner, the sureties upon principle should be liable, otherwise not."

Ohio.— State *v.* Jennings, 4 Ohio St. 418.

Pennsylvania.— Brunatt *v.* McKee, 6 Watts & S. 513.

Texas.— Holliman *v.* Carroll, 27 Tex. 23, 84 Am. Dec. 606.

Virginia.— Sangster *v.* Com., 17 Gratt. 124.

Washington.— Mace *v.* Gaddis, 3 Wash. Terr. 125, 13 Pac. 545.

United States.— Lammon *v.* Feusier, 111 U. S. 17, 4 S. Ct. 286, 28 L. ed. 337. See also Redemption Nat. Bank *v.* Rutledge, 84 Fed. 400, where it is held that any act which, if done genuinely and honestly by an officer, would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office, and the sureties on his bond conditioned for the "faithful discharge of the duties of his office" are liable for injuries resulting therefrom.

Contra.— State *v.* Conover, 28 N. J. L. 224, 78 Am. Dec. 54.

2. Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927; Stephenson *v.* Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137; Asher *v.* Cabell, 50 Fed. 818, 1 C. C. A. 693.

3. McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721; Eastin *v.* School Directors, 40 La. Ann. 705, 4 So. 880; Backus *v.* Cleveland F. & M. Ins. Co., 4 Ohio Dec. (Reprint) 518, 2 Clev. L. Rep. 299; State *v.* McDannel, (Tenn. Ch. App. 1900) 59 S. W. 451. But see State *v.* Allen, (Tenn. Ch. App. 1898) 46 S. W. 303, holding that an unauthorized agreement by the state controller and other officials, whereby all state money was deposited in a certain bank, in consideration of a loan to the state and other concessions, unless it is shown to have resulted in damage to the state, creates no liability of the officer or his sureties for interest thereon covering the period of his neglect to turn such moneys into the state treasury.

Inclusion in judgment see *infra*, V, F, 9.

4. Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; Collins *v.* Skillen, 16 Ohio St. 382, 88 Am. Dec. 458; Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927; McMulin *v.* Ellis, (Tex. Civ. App. 1898) 48 S. W. 217.

only for a reasonable compensation and not for an extravagant sum paid by the government for having the work done.[5]

C. Period of Liability — 1. In General. Sureties on an official bond are liable only for acts done during the term of office which the bond was intended to cover.[6] That is, their liability is only as to acts done after the execution of the bond,[7] unless the bond is retrospective in its provisions.[8]

2. After Expiration of Term. Sureties on official bonds are not discharged by the expiration of the term of their principal, where by law he is to hold over and no successor qualifies.[9] But except in the case of officers holding over by law,[10] sureties are not, in cases where officers are their own successors, liable for any defaults of their principal occurring after the expiration of the term covered by the bond, and the bond is presumed to be given for the legal term.[11]

5. U. S. *v.* Wann, 28 Fed. Cas. No. 16,638, 3 McLean 179.

6. Moss *v.* State, 10 Mo. 338, 47 Am. Dec. 116; Oglesby *v.* State, 73 Tex. 658, 11 S. W. 873.

7. *Alabama.*— McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721; Townsend *v.* Everett, 4 Ala. 607.

Arkansas.—State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Illinois.— Stern *v.* People, 96 Ill. 475; Bogardus *v.* People, 52 Ill. App. 179; Potter *v.* Board of Trustees, 11 Ill. App. 280.

Indiana.— Rogers *v.* State, 99 Ind. 218.

Iowa.— Thompson *v.* Dickerson, 22 Iowa 360.

Kentucky.— Jones *v.* Gallatin County, 78 Ky. 491.

Massachusetts.— Rochester *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519.

Michigan.— Paw Paw Tp. *v.* Eggleston, 25 Mich. 36.

Missouri.— State *v.* Alsup, 91 Mo. 172, 4 S. W. 31.

Montana.— Missoula County *v.* McCormick, 4 Mont. 115, 5 Pac. 287.

New Jersey.—Jeffers *v.* Johnson, 18 N. J. L. 382.

New York.— Bissell *v.* Saxton, 77 N. Y. 191 (which holds that the fact that an officer, during his second term, had property out of which he might have provided funds to make good a defalcation occurring during a preceding term, does not render the sureties on his second term bond liable therefor); Bissell *v.* Saxton, 66 N. Y. 55.

North Carolina.— Coffield *v.* McNeill, 74 N. C. 535.

Tennessee.— State *v.* Polk, 14 Lea 1.

Texas.— Hetten *v.* Lane, 43 Tex. 279.

West Virginia.— State *v.* Wade, 15 W. Va. 524.

Wisconsin.— Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

United States.— U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64.

See 37 Cent. Dig. tit. "Officers," § 230.

Necessity of approval or filing see *supra*, V, A, 2.

8. State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654 (which holds that a bond given in lieu of a former bond has a retrospective operation); Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70; State *v.* McDannel, (Tenn. Ch. App. 1900) 59 S. W. 451; U. S. *v.* Brodhead, 24 Fed. Cas. No. 14,654.

9. *Indiana.*— Akers *v.* State, 8 Ind. 484, where the bond provided for the discharge of the duties until a successor was elected and qualified.

Mississippi.— Thompson *v.* State, 37 Miss. 518.

Missouri.— State *v.* Kurtzeborn, 78 Mo. 98.

Nevada.— State *v.* Wells, 8 Nev. 105, applying the rule to a hold over who was a mere *de facto* officer.

North Carolina.— State *v.* Daniel, 51 N. C. 444.

Oregon.— Baker City *v.* Murphy, 30 Oreg. 405, 42 Pac. 133, 35 L. R. A. 88; Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655.

Wisconsin.— Omro *v.* Kaime, 39 Wis. 468.

United States.— U. S. *v.* Jameson, 16 Fed. 331, 3 McCrary 620.

Contra.— *California.*— People *v.* Aikenhead, 5 Cal. 106, which holds that sureties are not liable for acts committed after the expiration of the term of the bond by an officer appointed to fill a vacancy caused by the expiration of his own term and the failure of his successor to qualify.

Delaware.— Wilmington *v.* Horn, 2 Harr. 190.

Louisiana.— State *v.* Lake, 45 La. Ann. 1207, 14 So. 126, holding that the liability of sureties on the bond of an officer continues until his successor in office gives a bond within thirty days from the receipt of his commission or until such thirty days expire.

Maine.— Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. 943.

Massachusetts.—Bigelow *v.* Bridge, 8 Mass. 275.

New Hampshire.— Dover *v.* Twombly, 42 N. H. 59.

New Jersey.—Rahway *v.* Crowell, 40 N. J. L. 207, 29 Am. Rep. 244. These last two cases limit the liability to a reasonable time after the expiration of the term.

10. See *supra*, II, F, 2.

11. *California.*— Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633; People *v.* Aikenhead, 5 Cal. 106. *Compare* Placer County *v.* Dickerson, 45 Cal. 12, which holds that sureties are liable when the officer holds over without right.

Delaware.— Wilmington *v.* Horn, 2 Harr. 190.

3. In Case of Successive Terms. Where an officer serves several successive terms and has a bond with different sureties for each term, the sureties on the bond for the last term are responsible for money in the hands of the officer at the time of the execution of such bond,[12] and it will be presumed that the principal had in his hands as bailee money which he ought to have had at the beginning of the term covered by the bond.[13] In such cases official reports of their principal and public accounts and records are *prima facie* but not conclusive evidence

Illinois.— People *v.* Foster, 133 Ill. 496, 23 N. E. 615; People *v.* Toomey, 122 Ill. 308, 13 N. E. 521.

Iowa.—Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370.

Kansas.— Riddel *v.* Cherokee County School Dist. No. 72, 15 Kan. 168.

Kentucky.— Offutt *v.* Com., 10 Bush 212.

Louisiana.— Board of Administrators *v.* McKowen, 48 La. Ann. 251, 19 So. 553, 55 Am. St. Rep. 275; State *v.* Powell, 40 La. Ann. 241, 4 So. 447.

Maine.—Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. 943.

Massachusetts.—Bigelow *v.* Bridge, 8 Mass. 275.

Mississippi.— Lauderdale County *v.* Alford, 65 Miss. 63, 3 So. 246, 7 Am. St. Rep. 637.

Missouri.— Moss *v.* State, 10 Mo. 338, 47 Am. Dec. 116; State *v.* Dailey, 4 Mo. App. 172.

North Carolina.— Gregory *v.* Morisey, 79 N. C. 559; Prince *v.* McNeill, 77 N. C. 398.

Ohio.— State *v.* Crooks, 7 Ohio, Pt. II, 221.

Oklahoma.—Aultman Taylor Mach. Co. *v.* Burchett, 15 Okla. 490, 83 Pac. 719.

Pennsylvania.— Com. *v.* Baynton, 4 Dall. 282, 1 L. ed. 834.

South Carolina.— Vaughan *v.* Evans, 1 Hill Eq. 414.

Tennessee.— Yoakley *v.* King, 10 Lea 67.

Virginia.— See Com. *v.* Fairfax, 4 Hen. & M. 208.

United States.— Bryan *v.* U. S., 1 Black 140, 17 L. ed. 135; U. S. *v.* Nicholl, 12 Wheat. 505, 6 L. ed. 709.

England.— Peppin *v.* Cooper, 2 B. & Ald. 431; Leadley *v.* Evans, 2 Bing. 32, 2 L. J. C. P. O. S. 108, 9 Moore C. P. 102, 9 E. C. L. 469; Arlington *v.* Merricke, 2 Saund. 403.

See 37 Cent. Dig. tit. "Officers," § 230.

But *compare* Laurium *v.* Mills, 129 Mich. 536, 89 N. W. 362; Dunphy *v.* People, 25 Mich. 10 (which holds that an officer, duly elected, who fails to renew his bond as required by law, but continues in office and remains an officer *de facto*, is in by virtue of his election, and his sureties on the original bond are liable for any breach of the official duty); Camden *v.* Greenwald, 65 N. J. L. 458, 47 Atl. 458 (which holds that the bond may provide for liability during a period longer than the legal term or until a successor qualifies).

12. *Alabama.*—Townsend *v.* Everett, 4 Ala. 607.

California.— See Priet *v.* De la Montanya, (1889) 22 Pac. 171.

District of Columbia.— U. S. *v.* Dudley, 21 D. C. 337.

Illinois.— School Trustees *v.* Arnold, 58 Ill. App. 103, which holds that the fact that the officer made no report at the close of his preceding term will not change the rule. See also Oeltjen *v.* People, 160 Ill. 409, 43 N. E. 610 (which holds that where a new bond is given the sureties are liable if a bank fails in which their principal had deposited money prior to their execution of the bond); People *v.* Shannon, 10 Ill. App. 355 (which holds the sureties on the second bond liable for the failure of their principal to pay over certain moneys which he had been ordered to pay over prior to the beginning of the second term).

Indiana.— State *v.* Van Pelt, 1 Ind. 304.

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

Montana.—Missoula County *v.* McCormick, 4 Mont. 115, 5 Pac. 287.

New York.— Fairport Union Free School Bd. of Education *v.* Fonda, 77 N. Y. 350.

Ohio.— State *v.* Hobson, 5 Ohio S. & C. Pl. Dec. 442, 5 Ohio N. P. 321.

Pennsylvania.— De Hart *v.* McGuire, 10 Phila. 359.

Tennessee.— State *v.* Polk, 14 Lea 1.

United States.— Bruce *v.* U. S., 17 How. 437, 15 L. ed. 129.

See 37 Cent. Dig. tit. "Officers," § 235.

13. *California.*— Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833.

Illinois.— Pape *v.* People, 19 Ill. App. 24. But *compare* School Trustees *v.* Smith, 88 Ill. 181.

Indiana.— State *v.* Van Pelt, 1 Ind. 304.

Iowa.— Fox Dist. Tp. *v.* McCord, 54 Iowa 346, 6 N. W. 536.

Kansas.— Weakley *v.* Cherry Tp., (1901) 63 Pac. 433.

Maine.— Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592, where it was held that the presumption is that a defalcation occurred in the last term where an officer served two successive terms; and defendants in an action on the bond must show, to be relieved from liability, that the defalcation took place during the first term. But *compare* Phipsburg *v.* Dickinson, 78 Me. 457, 7 Atl. 9, which held that where the same person had been a collector of taxes for three successive terms and there had been three different sets of bondsmen, a deficit which could not be proved to have occurred in any particular term was to be divided equally among the three sets of bondsmen.

Minnesota.— State *v.* Bobleter, 83 Minn. 479, 86 N. W. 461; Preston Independent School Dist. No. 45 Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374.

against the sureties.[14] Sureties on the last bond are liable also for moneys paid to their principal during the term covered by the bond, but because of transactions which took place during the preceding term,[15] even if such moneys are used to cover up defalcations occurring during a preceding term.[16] Sureties on the bond for the last term are entitled, however, in the absence of appropriation, to have all payments made by the officer during that term credited to the liability for that term, even if the officer is shown to have been a defaulter during a preceding term.[17] But the principal on the bond has the right to appropriate moneys coming into his hands during the second term to the payment of an indebtedness of the first term, and, where such appropriations are made by him, the sureties on the second bond will be liable for defalcations occurring during the second term due to such defalcation.[18] But if the principal has paid the moneys into a general account, and has made no appropriation, such moneys are applied to the satisfaction of the oldest debts in accordance with common-law rules applicable to private payments.[19]

Missouri.— State *v.* Greer, 101 Mo. App. 669, 74 S. W. 881.

Nebraska.—Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158; Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311.

New Jersey.— Warren County *v.* Wilson, 16 N. J. L. 110.

Ohio.— Kelly *v.* State, 25 Ohio St. 567.

Tennessee.—State *v.* Hays, (1897) 42 S. W. 266.

Texas.— Hetten *v.* Lane, 43 Tex. 279.

West Virginia.— Parsons *v.* Miller, 46 W. Va. 334, 32 S. E. 1017.

Wisconsin.— Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

United States.— U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163.

Contra.— McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721 (which holds there is no presumption, but that it is for the jury to say on the evidence when the defalcation took place); Com. *v.* Piroth, 17 Pa. Super. Ct. 586.

But where there is no duty imposed by law upon an officer to turn over money to his successor, the sureties on an official bond covering the officer's first term are responsible for a misappropriation occurring during the second term of moneys received in the first term. Warren County *v.* Jeffrey, 18 Ill. 329.

14. See *infra*, V, F, 8, b.

15. McLain *v.* People, 85 Ill. 205; State *v.* McCormack, 50 Mo. 568; Miller *v.* Com., 8 Pa. St. 444. But see Colyer *v.* Higgins, 1 Duv. (Ky.) 6, 85 Am. Dec. 601, holding that sureties on the second bond were not liable for the failure of a sheriff to return the amount of an execution placed in his hands during his first term and returnable in his second term. The court based its decision upon the principle that a sheriff who levies thus on property might by common law sell the property on which he had levied after the expiration of his term. See also Larned *v.* Allen, 13 Mass. 295 (which held that a sheriff who had resigned from office might bring suit against a deputy originally appointed by him but afterward reappointed by his successor, where such deputy has, after such resignation, collected certain moneys on warrants of distress issued before such resignation); State *v.* Watts, 23 Ark. 304; Tyler *v.* Nelson, 14 Gratt. (Va.) 214 (applying the same rule to a sheriff who acted also as public administrator).

16. People *v.* Hammond, 109 Cal. 384, 42 Pac. 36; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204; Crawn *v.* Com., 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839; Saunders *v.* Taylor, 9 B. & C. 35, 17 E. C. L. 25.

17. *Alabama.*—Boring *v.* Williams, 17 Ala. 510.

Delaware.— Pickering *v.* Day, 2 Del. Ch. 333, 3 Houst. 474, 95 Am. Dec. 291.

Maine.— Porter *v.* Stanley, 47 Me. 515, 74 Am. Dec. 501.

Missouri.— State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

New York.— Stone *v.* Seymour, 15 Wend. 19.

Pennsylvania.— Com. *v.* Reitzel, 9 Watts & S. 109.

United States.— U. S. *v.* January, 7 Cranch 572, 3 L. ed. 443; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106.

See 37 Cent. Dig. tit. "Officers," § 235.

18. *California.*— People *v.* Hammond, 109 Cal. 384, 42 Pac. 36.

Indiana.— Cook *v.* State, 13 Ind. 154.

Louisiana.— State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522.

Massachusetts.— Egremont *v.* Benjamin, 125 Mass. 15.

Missouri.— State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

New York.— Stone *v.* Seymour, 15 Wend. 19.

Vermont.— Lyndon *v.* Miller, 36 Vt. 329.

Virginia.— Crawn *v.* Com., 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839.

England.— Saunders *v.* Taylor, 9 B. & C. 35, 17 E. C. L. 25; Gwynne *v.* Burnell, 6 Bing. N. Cas. 453, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West 342, 9 Eng. Reprint 522.

See 37 Cent. Dig. tit. "Officers," § 235.

19. Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592; Sandwich *v.* Fish, 2 Gray (Mass.) 298; Speck *v.* Com., 3 Watts & S. (Pa.) 324. *Contra*, U. S. *v.* January, 7 Cranch (U. S.) 572, 575, 3 L. ed. 443, where the court says the ordinary rule as to the appropriation of payments is not applicable, and that "moneys arising due, and collected

D. Discharge of Sureties — 1. CHANGE IN EMOLUMENTS, POWERS, OR TERM OF OFFICE. Sureties on official bonds are not discharged from liability by the passage of a statute changing the emoluments or powers of an office held by their principal, provided the new powers are appropriate to the office,[20] unless the new law provides for a special bond.[21] But the sureties on an official bond are discharged by changes in the office which are so great as to make the office quite a different one from what it was when the bond was executed. Instances of such changes are an extension of the term of the office,[22] and the enlargement of the territorial jurisdiction of the office.[23] Where new duties and powers not appropriate to the office are added to it after the execution of the bonds, the sureties are not responsible for the faithful performance of such duties but remain responsible merely for the performance of the original duties.[24]

2. NEGLIGENCE OR FAILURE ON THE PART OF THE GOVERNMENT. Sureties on official bonds further are not discharged by the negligence of the officers of the government or their failure properly to perform their duties,[25] even if such action is

subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety in the second bond."

Application of payments generally see PAYMENT.

20. *Alabama.*— Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841.

California.— Sacramento County *v.* Bird, 31 Cal. 67.

Illinois.— Prickett *v.* People, 88 Ill. 115; Smith *v.* Peoria County, 59 Ill. 412; Compher *v.* People, 12 Ill. 290; Illinois *v.* Ridgway, 12 Ill. 14.

Indiana.— State *v.* Stevens, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482; Kindle *v.* State, 7 Blackf. 586.

Iowa.—Mahaska County *v.* Ingalls, 14 Iowa 170.

Kentucky.— Colter *v.* Morgan, 12 B. Mon. 278.

Maine.— White *v.* Fox, 22 Me. 341.

Michigan.—Allegan *v.* Chaddock, 119 Mich. 688, 78 N. W. 892.

Missouri.— Marney *v.* State, 13 Mo. 7.

New York.—Auburn Bd. of Education *v.* Quick, 99 N. Y. 138, 1 N. E. 533; Monroe County *v.* Clark, 92 N. Y. 391; People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520.

North Carolina.— State *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

Ohio.— Dawson *v.* State, 38 Ohio St. 1.

Washington.— Spokane County *v.* Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

Wyoming.— Snyder *v.* State, 5 Wyo. 318, 40 Pac. 441, 63 Am. St. Rep. 60.

United States.— U. S. *v.* Gaussen, 25 Fed. Cas. No. 15,192, 2 Woods 92 [*affirmed* in 97 U. S. 584, 24 L. ed. 1009]. See also Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119, where it was held that the fact that the bond had a small penalty would not permit sureties to defend an action on the bond where very large sums of money in fact came into the hands of the officer.

See 37 Cent. Dig. tit. "Officers," § 231.

Contra.— Pybus *v.* Gibb, 6 E. & B. 902, 3 Jur. N. S. 315, 26 L. J. Q. B. 41, 5 Wkly. Rep. 44, 88 E. C. L. 902, where the view is adopted that if "the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided." This case held that an official bond of a court bailiff was made void by a change in the jurisdiction of the court to which he was attached from £20 to £50.

Basis of liability.— While in most of these cases the liability is derived from the general theory as to the obligation assumed by sureties on official bonds, in some, the liability is based either upon a particular covenant in the bond (Mahaska Co. *v.* Ingalls, 14 Iowa 170), or upon a specific provision of statute (State *v.* Stevens, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482). It is perfectly competent for the legislature to pass such a statute. Morrow *v.* Wood, 56 Ala. 1.

21. Morrow *v.* Wood, 56 Ala. 1; Milwaukee County *v.* Ehlers, 45 Wis. 281.

22. Brown *v.* Lattimore, 17 Cal. 93 (which holds that the liability of the sureties cannot be extended by lengthening the term); State *v.* Swinney, 60 Miss. 39, 45 Am. Rep. 405; Prairie *v.* Worth, 78 N. C. 169; King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500. See also Kindle *v.* State, 7 Blackf. (Ind.) 586; Smith *v.* Com., 25 Gratt. (Va.) 780, holding that a surety is not discharged by a statute lengthening the period of accounting.

23. Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189.

24. People *v.* Tompkins, 74 Ill. 482 (where it was held that the sureties of a chief inspector of grain in a city appointed under an act to regulate public warehouses and the warehousing and inspection of grain are not responsible for moneys collected by him for inspecting, where the duty of collecting and taking care of such funds was not imposed upon him before the execution of his bond); Reynolds *v.* Hall, 2 Ill. 35; Com. *v.* Holmes, 25 Gratt. (Va.) 771; Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009; U. S. *v.* Cheeseman, 25 Fed. Cas. No. 14,790, 3 Sawy. 424 (holding that sureties of a treasurer of the United States were not liable for his defaults as a revenue stamp agent where the bond referred only to the duties of treasurer).

25. *Florida.*— State *v.* Smith, 16 Fla. 175, where it was held that the neglect of the

fraudulent in its nature. Thus where obligees of official bonds know that the principal of a proposed bond is a defaulter, their neglect to inform the sureties on the bond of this fact will not discharge the sureties.[26]

3. Alteration in Bond. Sureties are not liable where material alterations by erasure or otherwise are made in the bond after they have signed it.[27]

4. Execution of New Bond. Sureties on official bonds are discharged from liability by the acceptance of a new bond,[28] and sureties who sign a bond without the consent of the original sureties and subsequent to its approval are regarded as signing a new bond, the acceptance of which discharges the old sureties from all liability for acts subsequent to the making of the new bond.[29] But sureties are

governor to remove an officer on demand of his sureties does not relieve them from liability for a subsequent defalcation of their principal, and also that a repeal of the law in existence at the time the bond was executed which imposed penalties upon defaulting collectors did not discharge the sureties

Illinois.— Stern *v.* People, 102 Ill. 540.

Indiana.— Hogue *v.* State, 28 Ind. App. 285, 62 N. E. 656.

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271; Palmer *v.* Woods, 75 Iowa 402, 39 N. W. 668.

Kentucky.— Maryland Fidelity, etc., Co. *v.* Com., 104 Ky. 579, 47 S. W. 579, 49 S. W. 467, 20 Ky. L. Rep. 788.

Louisiana.— State *v.* Lake, 45 La. Ann. 1207, 14 So. 126 (holding that the issuance of a commission for a second term to an officer, who is in arrears on his first term accounts, and the granting him time to make his settlements, do not discharge the sureties on his official bond given for the first term); State *v.* Powell, 40 La. Ann. 241, 4 So. 447.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Michigan.— Detroit Bd. of Education *v.* Andrews, 142 Mich. 484, 105 N. W. 1118; Detroit *v.* Weber, 26 Mich. 284.

Minnesota.— St. Louis County *v.* Duluth Security Bank, 75 Minn. 174, 77 N. W. 815; Waseca County *v.* Sheehan, 42 Minn. 57, 43 N. W. 699, 5 L. R. A. 785.

New York.— Monroe County *v.* Otis, 62 N. Y. 88.

Pennsylvania.— Harrisburg *v.* Guiles, 192 Pa. St. 191, 44 Atl. 48; Bower *v.* Washington County Com'rs, 25 Pa. St. 69.

Tennessee.—Anderson County *v.* Hays, 99 Tenn. 542, 42 S. W. 266.

Virginia.— See American Bonding, etc., Co. *v.* Milstead, 102 Va. 683, 47 S. E. 853.

United States.— U. S. *v.* Hart, 95 U. S. 316, 24 L. ed. 479; Williams *v.* Lyman, 88 Fed. 237, 31 C. C. A. 511.

26. *Indiana.*—Hogue *v.* State, 28 Ind. App. 285, 62 N. E. 656.

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

Kentucky.— Maryland Fidelity, etc., Co. *v.* Com., 104 Ky. 579, 47 S. W. 579, 49 S. W. 467, 20 Ky. L. Rep. 788.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Minnesota.— Pine County *v.* Willard, 39 Minn. 125, 39 N. W. 71, 12 Am. St. Rep. 622, 1 L. R. A. 118.

Texas.— Hallettsville *v.* Long, 11 Tex. Civ. App. 180, 32 S. W. 567.

27. State *v.* Craig, 58 Iowa 238, 12 N. W. 301 (where it was held that the erasure of the name of one of the sureties released the other surety); Doane *v.* Eldridge, 16 Gray (Mass.) 254 (where the alteration was in the amount of the penalty); State *v.* Chick, 146 Mo. 645, 48 S. W. 829 (in which it was held that, if a bond has been manifestly altered, plaintiff must prove that the alteration was made before execution); State *v.* Findley, 101 Mo. 368, 14 S. W. 111; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735 (where it was also held that an alteration in a bond relieved from liability a surety who signed after such alteration without knowledge of it).

28. U. S. *v.* Hillegas, 26 Fed. Cas. No. 15,366, 3 Wash. 70. See also Alvord *v.* U. S., 1 Fed. Cas. No. 269, 13 Blatchf. 279; U. S. *v.* Maurice, 26 Fed. Cas. No. 15,747, 2 Brock. 96, both holding that the provision by statute for a new bond discharges the surety of the old bond as to all subsequent acts.

29. Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311.

Release of portion of sureties.— Sometimes it is provided by statute that one or more of the sureties may apply to be released and that in such case the principal must give a new bond or the office will be declared vacant. Under these conditions it is sometimes held that the application of the sureties discharges them from all further liability. Cochise County *v.* Ritter, 3 Ariz. 208, 73 Pac. 448. In others it is held that the sureties are not relieved from liability until a new bond is given or the office declared vacant. Armstrong *v.* Pugh, 19 Ala. 209. See also Hewes *v.* People, 48 Ill. App. 439. Here it was held that if under the statute sureties have the right to oust an officer from his office, where, in case they desire to withdraw, the officer fails to file a new bond and they do not avail themselves of their right they are liable for his defaults even if they have served a notice that they desire to withdraw as sureties. Unless specific provision is made by statute (Jones *v.* Gallatin County, 78 Ky. 491), not only are the sureties so applying discharged, but as well the other sureties in accordance with the general rule that the release of one of the sureties upon a joint and several bond discharges all (People

not discharged where such new bonds are by law merely cumulative in their effect.[30]

5. Settlement by Principal and Release of Bond. Sureties are discharged by the payment by their principal of all moneys due to his successor in office.[31] But a settlement of the accounts of an officer will not relieve the sureties where the officer has been guilty of concealment.[32] An official bond is not, however, satisfied by its cancellation by an unauthorized officer;[33] and as the officer to whom a bond is given takes no beneficial interest but only a legal interest, he may not, except as prescribed by law, release or discharge the obligation of an official bond.[34]

E. Lien. An official bond, often as a result of statute, creates a lien upon the property of both the principal and sureties which is to be enforced by proceedings in equity.[35] The effect of such a lien depends upon the statute creating it. Thus in some cases it does not take precedence of mortgage and homestead claims.[36] In others it is given the force of a mortgage when recorded in the mortgage as well as in the bond book, but not if recorded in the bond book alone.[37] Such a lien does not apply to land to which the officer has only the legal title and in which he has no beneficial interest;[38] but as to all land to which it applies it takes precedence of all rights and interests acquired by purchasers subsequent to the date at which it attaches, which purchasers are charged by law with notice of.[39]

F. Enforcement[40] — 1. Nature and Form of Action — a. In General. Actions on bonds which subject the obligors to a penalty are penal actions and cannot be

v. Buster, 11 Cal. 215). In such cases, in order to be relieved, sureties must see to it that the law is complied with, and particularly that, if required by statute, a new bond is given. Thus the erasure in the bond of the names of certain sureties and the substitution of others will not discharge those whose names are erased. State *v.* Matthews, 57 Miss. 1; Stevens *v.* Allmen, 19 Ohio St. 485. It has also been held that sureties are not discharged by a new bond given, not on their application, but at the instance of the principal. Hickerson *v.* Price, 2 Heisk. (Tenn.) 623. Unless it is specifically so stated in the law the sureties have no right in such case to be discharged. *Ex p.* Weber, 5 Leg. Gaz. (Pa.) 252. Where provision is made for giving a new bond, one given voluntarily and not as a result of an order by competent authority is a good bond. State *v.* McDaniel, (Tenn. Ch. App. 1900) 59 S. W. 451.

30. Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150; Maryland Fidelity, etc., Co. *v.* Fleming, 132 N. C. 332, 43 S. E. 899; Poole *v.* Cox, 31 N. C. 69, 49 Am. Dec. 410; Maddox *v.* Shacklett, (Tenn. Ch. App. 1895) 36 S. W. 731. The North Carolina and Tennessee cases hold that under the law certain officers whose terms are no longer than one year must give bonds every year, and that bonds given the second year are not in place of the bonds given in the first year but are cumulative thereto, as to the discharge of all duties not performed at the time of their execution.

31. State *v.* Corey, 2 Ohio Dec. (Reprint) 669, 4 West. L. Month. 563.

32. Whitlow *v.* School Trustees, 93 Ill. App. 664 [*affirmed* in 191 Ill. 457, 61 N. E. 386]; Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119.

33. Ford *v.* Jefferson County, 4 Greene (Iowa) 273.

34. *Arkansas.*— Taylor *v.* Auditor, 2 Ark. 134.

Indiana.— Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150.

Montana.— Missouri County *v.* McCormick, 4 Mont. 115, 5 Pac. 287, holding that the acceptance of a new bond in lieu of an old one does not discharge the sureties from liability for acts done prior to the execution of the new bond.

North Carolina.— Maryland Fidelity, etc., Co. *v.* Fleming, 132 N. C. 332, 43 S. E. 899.

Tennessee.— Hickerson *v.* Price, 2 Heisk. 623.

35. Lott *v.* Mobile County, 79 Ala. 69.

Subrogation of sureties.— In case sureties pay judgments in suits obtained on such bonds they may be subrogated to the lien of the state on the property of the principal. Randolph *v.* Brown, 115 Ala. 677, 22 So. 524. But the state in the absence of a provision of law may not enlarge the rights of the surety by agreement. Thus where there were two bonds the state could not by agreement subrogate the sureties on the second bond to the rights of the state under the lien of the first bond, as against an intermediate mortgagee. Randolph *v.* Brown, *supra.*

36. People *v.* Stitt, 7 Ill. App. 294.

37. Gale's Succession, 30 La. Ann. 351; Clements *v.* Biossat, 26 La. Ann. 243.

38. Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568.

39. Randolph *v.* Brown, 115 Ala. 677, 22 So. 524.

40. **Bonds of particular officers** see special titles relating thereto.

Joinder af actions see Joinder and Splitting of Actions, 23 Cyc. 432.

maintained in another state.[41] But, where official bonds are of a strictly civil character, suits may be brought upon them in another state, but the courts of such state will not enforce such bonds in accordance with the statute of the state under which they were made where such statute differs from the common law.[42]

b. Summary Proceedings.[43] In some states summary judicial proceedings are permitted for the enforcement of an official bond.[44] Where this is the case, the remedy, being in derogation of the common law, must be strictly pursued.[45] In other cases bonds are enforced by the issue, in accordance with the statute, of a warrant of distress under which both chattels and lands of the principal and surety may be sold.[46] Here again the statute must be strictly followed, and if it provides that chattels must first be sold a sale of the land before the chattels are sold is void.[47] But in the absence of a statute authorizing such procedure the fact that a judgment has been obtained against the officer will not authorize judgment to be entered against the sureties upon his official bond upon motion.[48]

2. Persons Entitled to Sue. The law distinguishes two classes of bonds, one to protect the government in its corporate capacity, the other to protect the public in their dealings with officers. The government alone has a right of action on the first class of bonds,[49] and if such bonds have been made to a person holding an official position, such as the governor, they are to be regarded as given, not to the person but to the position, and the successors or official, but not personal, representatives may sue on them, even if such successors are not named in the bond.[50] If, however, the bond has been made by mistake to the wrong officer, or, although made to the proper officer, is not good as a statutory official bond, it is regarded as a common-law bond, and as made to the person and not to the position. Consequently suit may not be brought upon it by the official

41. State *v.* John, 5 Ohio 217.

42. Pickering *v.* Fisk, 6 Vt. 102.

43. Jurisdiction of justices of the peace see Justices of the Peace, 24 Cyc. 484.

44. See the statutes of the several states. And see McClure *v.* Colclough, 5 Ala. 65; Lewis *v.* Gordon County, 70 Ga. 486; Smith *v.* Woods, 1 Coldw. (Tenn.) 535; Burroughs *v.* Goodall, 2 Head (Tenn.) 29; Park *v.* Walker, 2 Sneed (Tenn.) 503; Houston *v.* Dougherty, 4 Humphr. (Tenn.) 505.

45. Prowell *v.* Fowlkes, 5 Baxt. (Tenn.) 649.

46. Grove *v.* Little, 11 Leigh (Va.) 180, applying an act of congress of May 15, 1820.

47. Grove *v.* Little, 11 Leigh (Va.) 180.

48. Bitting *v.* More, 53 Iowa 593, 5 N. W. 1101.

49. *Colorado.*— Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

Georgia.—Alexander *v.* Ison, 107 Ga. 745, 33 S. E. 657, holding that a private citizen could not bring an action on the official bond of a chief of police for damages caused by the wrongful arrest and imprisonment of plaintiff where the condition of the bond was that the principal should well and truly demean himself in his office.

Illinois.— People *v.* Harper, 91 Ill. 357.

Indiana.— State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169 (where it was held that a mortgagee could not maintain an action on the official bond of a county treasurer because of his failure to collect taxes from the mortgagor out of personal property owned by him within the county); State *v.* Stout, 26 Ind. App. 446, 59 N. E. 1091.

Massachusetts.— Com. *v.* Hatch, 5 Mass. 191.

Michigan.— Eaton Rapids *v.* Stump, 127 Mich. 1, 86 N. W. 438, 87 Am. St. Rep. 451. This case holds that, where the bond of a city marshal runs to the city and not to the people, an action cannot be maintained for the use and benefit of a third person unless it is expressly authorized by statute.

Mississippi.— Brown *v.* Phipps, 6 Sm. & M. 51, holding that sureties on an official bond were not liable to the publishers of a newspaper for the expense of the publication of official advertisements therein.

Pennsylvania.— Com. *v.* Harmer, 6 Phila. 90, holding that sureties on a bond conditioned for the delivery of "the records and other writings belonging to the said office . . . covers only the public interest but provides for no protection against private injury." But see Ziegler *v.* Com., 12 Pa. St. 227, where sureties on a bond of a prothonotary were held liable for damages caused by the issue of a false certificate.

Tennessee.— State *v.* Nichol, 8 Lea 657, holding that an individual may not sue for a wrong done him on a bond given to account for public moneys.

Texas.— Clough *v.* Worsham, 32 Tex. Civ. App. 187, 74 S. W. 350.

See 37 Cent. Dig. tit. "Officers," § 243.

50. *Alabama.*— Bagby *v.* Baker, 18 Ala. 653.

Arkansas.—Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368.

Georgia.— Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

successor to the person to whom it was made.[51] In some jurisdictions, further, the state is the proper party in actions brought to indemnify individuals for damages suffered from the defaults of officers, or permission of some state officer is required before suit may be brought; and it is generally held that the state is the proper party in such actions where no other method of suit has been provided by statute.[52] In the case of bonds whose purpose is the protection of individual members of the public, plaintiff or person to whose use the suit on the bond is brought must show special damage in order to recover.[53]

3. Defendants.[54] An action on an official undertaking, in form joint and several, may be brought against the sureties alone, without joining the officer.[55] An official bond being a joint and several obligation, plaintiff may make defendants in an action on such bond all or any of the sureties, and is not obliged to sue all.[56] Where official bonds are joint and several, as is usually the case, an action on such bond may be brought against each obligor or all or any obligors, and, in a suit against joint and several obligors in which process is not served on all the defendants, judgment may be taken against those served, and the judgment is no bar to subsequent proceedings against those not served at the rendition of such judgment.[57] It has several times been held that the administrator or executor of a deceased joint obligor is not a proper party to a suit on an official bond, as no such action can be maintained against him.[58]

4. Conditions Precedent. In order to bring an action on an official bond,

New Hampshire.— Pickering *v.* Pearson, 6 N. H. 559.

North Carolina.—Governor *v.* Montfort, 23 N. C. 155.

Tennessee.— Wiley *v.* Cannon, 8 Humphr. 10; Polk *v.* Plummer, 2 Humphr. 500, 37 Am. Dec. 566.

See 37 Cent. Dig. tit. "Officers," § 243.

51. *Alabama.*— Calhoun *v.* Lunsford, 4 Port. 345.

Georgia.— Anderson *v.* Brumby, 115 Ga. 644, 42 S. E. 77.

Kentucky.— Christian Justices *v.* Smith, 2 J. J. Marsh. 472.

Maine.— Lord *v.* Lancey, 21 Me. 468.

Massachusetts.— Stevens *v.* Hay, 6 Cush. 229.

North Carolina.— Williams *v.* Ehringhaus, 14 N. C. 297.

Tennessee.—Jones *v.* Wiley, 4 Humphr. 146.

See 37 Cent. Dig. tit. "Officers," § 243.

52. White *v.* Wilkins, 24 Me. 299; Skinner *v.* Phillips, 4 Mass. 68; *Ex p.* Chester, 5 Hill (N. Y.) 555; Carmichael *v.* Moore, 88 N. C. 29. See also Ulysses *v.* Ingersoll, 182 N. Y. 369, 75 N. E. 225, which holds that under the New York code of civil procedure, section 1888, a town is entitled to leave to prosecute an action on the official bond of the county treasurer running to the county in order to recover money due but not paid the county as school funds. But see Brooks *v.* Miller, 29 W. Va. 499, 2 S. E. 219, holding that this rule does not apply in equitable proceedings in which all that is necessary is that the real party interested be a party to the action.

Where leave must be obtained of the court to sue on an official bond, such leave need not be obtained if suit is brought by state officers to recover state money. Nye *v.* Kelly, 19 Wash. 73, 52 Pac. 528.

Where suits are brought in the name of the state but for the use of some private person no objection can be made by defendant that the suit is brought to the use of the wrong party. Greser *v.* People, 36 Ill. App. 415 [*citing* Atkins *v.* Moore, 82 Ill. 240].

53. Brooks *v.* Governor, 17 Ala. 806; State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393; Todd *v.* McClenahan, Ky. Dec. 304; Barker *v.* Wheeler, 62 Nebr. 150, 87 N. W. 20.

In Pennsylvania a statute, act June 14, 1836, prohibits separate action by different plaintiffs on the same official bond, and requires every person interested to join in a suit commenced, instead of bringing one for himself. The pendency of such a suit is a bar to subsequent action on the same instrument against the same parties and may be so pleaded (Hartz *v.* Com., 1 Grant 359), but such act does not preclude a separate suit in the name of the commonwealth against each obligor in such a bond (Clement *v.* Com., 95 Pa. St. 107).

54. See, generally, Parties.

55. Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777. See also Cassady *v.* School Trustees, 105 Ill. 560.

56. Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; People *v.* Jenkins, 17 Cal. 500 (which holds that it is unnecessary to join the administrator of the principal therein in a suit against the sureties); Jenks *v.* Coffey County School Dist. No. 38, 18 Kan. 356.

57. Lewis *v.* State, 65 Miss. 468, 4 So. 429; Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311, holding that in the case of two bonds, one of which is cumulative to the other, the sureties of both bonds may be made parties defendant in one suit on the bonds. But see Com. *v.* Davis, 9 B. Mon. (Ky.) 128, in which it is said that the nonjoinder of all living sureties is an available ground for demurrer.

58. Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370; Com. *v.* Hughes, 10 B.

plaintiff, unless required by statute, need not first obtain judgment on the default complained of, since the obligation of a surety on an official bond is primary and not secondary;[59] and, in case an officer has rendered it impossible to reach him personally, no demand is necessary before bringing suit on the bond for moneys which such officer has neglected to pay over or to enforce a judgment against him for official misconduct.[60] Where a duty is imposed on an officer to turn over moneys to his successor on the expiration of his term of office, no demand is necessary before bringing suit on the bond.[61]

5. Defenses — a. In General. In an action on the bond the sureties can make no defenses not open to the principal,[62] and in particular are estopped from alleging any irregularities in the appointment or election of their principal,[63] or in the bond itself.[64] Furthermore the sureties on an official bond are not permitted to advance as a defense to an action on the bond the fact that moneys received by their principal in the performance of his official duties were received because of the unlawful or improper or irregular action of some other authority or person.[65] Finally, inasmuch as negligence on the part of public officers does not discharge the sureties on official bonds,[66] such negligence cannot be pleaded as a defense to an action on such bonds, whether such negligence has to do with the qualification of the principal,[67] the supervision to be exercised over their principal by some other official,[68] or the bringing suit for the satisfaction of debts.[69]

b. Effect of Judgment Against Principal. Judgment obtained against a principal in an official bond is generally regarded as *prima facie*, but not conclusive, evidence, in a suit against the sureties to enforce the liability on the bond.[70]

6. Time to Sue and Limitations. Where a public officer admits the loss of public moneys intrusted to him, but insists that he has a good defense, the state

Mon. (Ky.) 160. But see Burroughs *v.* Goodall, 2 Head (Tenn.) 29, where it is said that such an action was allowed by statute.

59. *California.*— Van Pelt *v.* Littler, 14 Cal. 194.

Illinois.— Cassady *v.* School Trustees, 105 Ill. 560; People *v.* Harper, 91 Ill. 357.

Nebraska.— Kane *v.* Union Pac. R. Co., 5 Nebr. 105.

New York.— *Ex p.* Chester, 5 Hill 555.

North Carolina.— Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917.

Tennessee.— Ferrell *v.* Grigsby, (Ch. App. 1899) 51 S. W. 114.

Texas.— Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67.

Wisconsin.— Bartlett *v.* Hunt, 17 Wis. 214. See 37 Cent. Dig. tit. "Officers," § 239.

But statutes have sometimes required such a recovery against the principal before suit may be brought against the sureties in an action on the bond. People *v.* Spraker, 18 Johns. (N. Y.) 390. See also Tute *v.* James, 46 Vt. 60, which holds that death is not "removal from the state" under a statute permitting action on the bond before judgment recovered against the principal only where the principal had removed from the state.

60. Jenks *v.* Coffey County School Dist. No. 38, 18 Kan. 356; Fall River *v.* Riley, 138 Mass. 336.

61. Foster *v.* State, 22 Ind. App. 471, 53 N. E. 1095.

62. Greser *v.* People, 36 Ill. App. 415; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

For example, where an officer is regarded as responsible for moneys lost by the failure of a bank in which they were deposited with due care on his part, the fact that he used reasonable care in depositing such moneys is not a defense to an action on his bond. Swift *v.* School Trustees, 91 Ill. App. 221 [*affirmed* in 189 Ill. 584, 60 N. E. 44].

63. See *supra*, V, A, 1.

64. Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792; Madison Parish School Directors *v.* Brown, 33 La. Ann. 383.

65. Lewis *v.* Lee County, 73 Ala. 148 (holding that where a county treasurer has received in his official capacity and converted certificates or bills of credit issued by the state upon the authority of a legislative act, his sureties in an action on his official bond cannot avoid liability for the conversion on the ground that such act was unconstitutional); Blaco *v.* State, 58 Nebr. 557, 78 N. W. 1056.

66. See *supra*, V, D, 2.

67. Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

68. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177.

69. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177.

70. *Arizona.*— U. S. *v.* Meade, 8 Ariz. 367, 76 Pac. 467, (1905) 80 Pac. 326.

District of Columbia.— Howgate *v.* U. S., 3 App. Cas. 277.

Georgia.— Taylor *v.* Johnson, 17 Ga. 521; Crawford *v.* Word, 7 Ga. 445.

Iowa.— Charles *v.* Hoskins, 14 Iowa 471, 83 Am. Dec. 378. See also Bitting *v.* Moore,

need not wait until the expiration of his term of office before suing on his bond.[71] Statutes of limitations relative to suits or penalties or ordinary actions do not usually apply to actions on official bonds.[72] But actions on official bonds are barred by statutes of limitations relative to actions for official misconduct;[73] and actions on official bonds, when brought by the state, are often held to be barred by the special statutes of limitations affecting actions of the state generally. A period of limitation commonly provided is ten years.[74] Where special statutes of limitations have been provided, the time when the statute begins to run depends on the wording of the statute.[75]

7. Pleading[76] — a. Declaration, Petition, or Complaint. The rules as to pleading in actions on official bonds are not generally very strict from the point of view of plaintiff.[77] Thus an averment that the officer was lawfully appointed and entered on the duties of his office is sufficient. It is not necessary to set out the

53 Iowa 593, 5 N. W. 1101, which holds that a judgment against a principal may not on motion be entered up against the sureties who have a right to a day in court and to insist on being brought in in the regular way.

Kansas.— Fay *v.* Edmiston, 25 Kan. 439; Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249.

Louisiana.— Mullen *v.* Scott, 9 La. Ann. 173.

Maine.— Dane *v.* Gilmore, 51 Me. 544.

Michigan.— Norris *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

Minnesota.— Beauchaine *v.* McKinnon, 55 Minn. 318, 56 N. W. 1065, 43 Am. St. Rep. 506.

Nebraska.— Barker *v.* Wheeler, 60 Nebr. 470, 83 N. W. 678, 83 Am. St. Rep. 541.

New York.— Thomas *v.* Hubbell, 35 N. Y. 120.

North Carolina.— Morgan *v.* Smith, 95 N. C. 396.

Pennsylvania.— Huzzard *v.* Nagle, 40 Pa. St. 178. But *compare* McMicken *v.* Com., 58 Pa. St. 213; Evans *v.* Com., 8 Watts 398, 34 Am. Dec. 477, holding that such a judgment is conclusive evidence against the sureties where they appeared in the suit in which the judgment was had.

Virginia.— Carr *v.* Meade, 77 Va. 142.

Wisconsin.— Stephens *v.* Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793.

See 37 Cent. Dig. tit. "Officers," § 226½.

On the contrary.— Some cases hold such a judgment not obtained by fraud or collusion to be conclusive evidence against the sureties of the breach of the condition and the amount of the damages. Dennie *v.* Smith, 129 Mass. 143; Tracy *v.* Goodwin, 5 Allen (Mass.) 409; Chamberlain *v.* Godfrey, 36 Vt. 380, 84 Am. Dec. 690. And others hold that a judgment against a principal on an official bond is not evidence at all in an action against his sureties. Lucas *v.* Alabama, 6 Ala. 826; Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647; Carmichael *v.* Mississippi, 3 How. (Miss.) 236.

71. State *v.* Nevin, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873.

72. Weisenborn *v.* People, 53 Ill. App. 32; Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603; Texas *v.* Allbright, 21 Tex. 753. See also State *v.* Stevens, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482; Spokane County *v.* Prescott, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733.

Applicability of limitation as to liabilities created by statute see Limitations of Actions, 25 Cyc. 1053.

73. Allen *v.* State, 6 Kan. App. 915, 51 Pac. 572; State *v.* Blake, 2 Ohio St. 147; State *v.* Conway, 18 Ohio 234.

74. Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603; Alexander *v.* Overton, 22 Nebr. 227, 34 N. W. 629; Texas *v.* Allbright, 21 Tex. 753.

75. Pickett *v.* State, 24 Ind. 366 (holding that the time is the expiration of the term of the office); Wilson *v.* Com., 7 Watts & S. (Pa.) 181 (holding that the time is the date of the execution of the bond).

76. **Pleading** generally see Pleading.

77. See the cases cited in the following notes.

Profert.— Where it is required by statute that an official bond shall be deposited in the office of the secretary of state, "where it shall be safely kept and preserved," a profert is not necessary in an action upon the bond. McNutt *v.* Lancaster, 9 Sm. & M. (Miss.) 570.

Averment of discharge of surety.— An answer which alleges an application for discharge of surety, made after due notice as required by law, and which sets out the record of the proceedings upon the hearing of the application, such record containing a recital that the principal was present, has been held sufficient. State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047.

Rejoinder.— Where, in an action upon the bond of a county treasurer, plaintiffs in their replication assign a breach alleging an accounting and a balance found due, a subsequent receipt by the treasurer of a stated sum and the drawing of orders on him in favor of divers individuals for various sums setting forth the orders specially, and a presentment and non-payment of the same, and defendants rejoined denying the accounting and subsequent receipt of money, and yet undertook to answer in reference to each particular order for money set forth in the replication alleging same to be paid, others not presented, etc., it was held that the assignment substantially presented but one breach and that the rejoinder of defendants was bad for duplicity and as presenting

commission,[78] nor to allege that the officer took the oath of office, nor that a certificate of election was issued to him,[79] nor assign breaches in the declaration,[80] nor to aver that the penalty of the bond has not been paid.[81] Furthermore, if an officer's term is for a fixed period and not until his successor has qualified, it is not necessary in an action on his bond for failure to pay money over to his successor to allege that his successor has duly qualified,[82] or that his own term has expired. This fact may appear in the statement of facts.[83] Finally, it is not necessary to aver that the bond was taken by the proper authority,[84] or that it was properly filed, although in such case it should be alleged that the bond was delivered and the principal acted under it,[85] or approved;[86] but it must be alleged that defendants executed the bond,[87] and the entire bond or its condition should be set out in the declaration or complaint.[88] Further, in an action on a bond for conversion of money, the declaration should allege that money came into the hands of the officer after the execution of the bond,[89] and that such money was improperly retained.[90] But defects, such as failure to allege that money came into the hands of the officer after execution of the bond, are cured by the verdict;[91] and where a petition in a joint action against the principal and sureties states a good cause of action against the principal, a recovery may be had against him, without proof of the execution of the bond.[92] A mistake in the name of the former party, it has been held, is amended after judgment by the other parts of the record.[93]

b. Plea or Answer. In the case, however, of answers to the declaration or complaint in suits on official bonds, the rules of pleading would seem to be stricter, applying the principle which the courts always endeavor to apply, of upholding an official bond wherever possible.[94] Thus if the complaint alleges several breaches

immaterial issues. Monroe *v.* Beach, 9 Wend. (N. Y.) 143.

78. People *v.* Pace, 57 Ill. App. 674.

79. Mowbray *v.* State, 88 Ind. 324.

In an action on a bond for two successive terms, although the sureties are the same, each bond should be set out separately, so as to show the contract by which the sureties became bound. Com. *v.* Tate, 89 Ky. 608, 13 S. W. 117, 56 S. W. 1130, 12 Ky. L. Rep. 9.

80. State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137 (holding that in a suit on an official bond it is not necessary to state in the complaint the various items of defalcation separately); State *v.* Votaw, 8 Blackf. (Ind.) 2. See also Adams *v.* Conner, 73 Miss. 425, 19 So. 198, holding that a bill alleging a breach of an official bond by failure "to collect and pay over" money sufficiently alleges a breach for failure to pay over "money collected." But see State *v.* Harvey, 8 Blackf. (Ind.) 527.

Exceptions.— Where the complaint shows as a breach a purely personal act of the officer (Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751), or where it assigns a breach so general as to give no data for the assessment of damages, the complaint is demurrable (People *v.* Russell, 4 Wend. (N. Y.) 570).

81. State *v.* Cross, 6 Ind. 387; State *v.* McClane, 2 Blackf. (Ind.) 192; Smith *v.* Cooper, 6 Munf. (Va.) 401; Sperring *v.* Taylor, 22 Fed. Cas. No. 13,235, 2 McLean 362. *Contra*, Wells *v.* Com., 8 B. Mon. (Ky.) 459.

82. People *v.* Harper, 91 Ill. 357.

83. Hiatt *v.* State, 110 Ind. 472, 11 N. E. 359.

84. Com. *v.* Davis, 9 B. Mon. (Ky.) 128.

85. Sprowl *v.* Lawrence, 33 Ala. 674.

86. *Alabama.*—Sprowl *v.* Lawrence, 33 Ala. 674.

Indiana.— State *v.* Cromwell, 7 Blackf. 70.

Iowa.— State *v.* Fredericks, 8 Iowa 553.

Nebraska.— Philadelphia Fire Assoc. *v.* Ruby, 60 Nebr. 216, 82 N. W. 629.

Ohio.— Place *v.* Taylor, 22 Ohio St. 317.

See 37 Cent. Dig. tit. "Officers," § 245.

87. Jeffree *v.* Walsh, 14 Nev. 143.

88. Prince *v.* State, 42 Ind. 315; Bisack *v.* Pape, 7 Ohio Dec. (Reprint) 115, 1 Cinc. L. Bul. 126; Wiley *v.* Cannon, 8 Humphr. (Tenn.) 10.

Breach of an official undertaking annexed to a complaint is sufficiently pleaded, as against a demurrer, by negativing the language of the condition. Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777.

Variance between complaint and annexed copy of bond is not fatal unless the complaint is demurred to specially. Mendocino County *v.* Morris, 32 Cal. 145.

89. Hamilton *v.* Cook County, 5 Ill. 519; U. S. *v.* Linn, 1 How. (U. S.) 104, 11 L. ed. 64.

90. U. S. *v.* Meade, 8 Ariz. 367, 76 Pac. 467, (1905) 80 Pac. 326.

91. Hamilton *v.* Cook County, 5 Ill. 519.

92. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

93. Alabama *v.* Davis, 9 Ala. 917.

94. See the cases cited in the following notes.

Conclusion.— A plea that a treasurer was not requested before suit brought to pay over the moneys in his hands in answer to a breach that he refused to pay, although par-

the insufficiency of one of the breaches is not a ground for demurrer to the entire complaint.[95] In particular cases the following pleas have been held bad: That the bond was without consideration;[96] that of *non damnificatus*, and that if plaintiff has been damnified it was of his own wrong;[97] that of *nil debet*;[98] that of *nul tiel record*;[99] or that, since the breach assigned in the declaration, the government had accepted another bond from defendant.[1] It is a good plea that the wrong officer of the government is made plaintiff.[2]

c. Demurrer.[3] A mistake in the name of the party plaintiff in the suit cannot be reached by general demurrer,[4] although it has been held that failure to aver non-payment of the penalty of the bond may be so reached.[5] A demurrer to the allegations in the complaint "for the reason that said several allegations or either of them does not entitle the plaintiff to the relief sought" should be overruled since it does not raise any question.[6] A general demurrer to a plea that plaintiff fraudulently neglected to bring suit admits the fraud.[7]

d. Issues and Proof. Proof of the necessary allegations in the complaint is absolutely necessary where they are not admitted by defendant.[8] Thus where the action is brought on a five-thousand-dollar bond and the bond offered in evidence is for ten thousand dollars, no recovery can be had;[9] and where separate allegations are set forth in the complaint, proof of any allegation must be given in order to sustain a recovery upon it,[10] but in such case proof of any one will sustain a recovery.[11] Thus, again, except as to defalcations happening in one of two successive terms, plaintiff must show that the act alleged as a breach occurred after the execution of the bond,[12] while defendant must prove all items of discharge where plaintiff has shown the amount chargeable to him.[13] Because of the rule which estops an officer or sureties on his bond from denying his title to the office, where the bond recites his official character[14] no proof is required of the election or appointment of an officer in an action on his bond.[15]

8. Evidence[16] **— a. Presumptions and Burden of Proof.** The usual rule that the burden of proof is upon him who alleges the fact is applied in these cases.[17]

ticularly requested so to do, is bad if it concludes with a verification. Allegany County *v.* Van Campen, 3 Wend. (N. Y.) 48.

Release.— A plea setting up an agreement by a sheriff that he would release and discharge the sureties of a deputy is bad, unless a consideration is alleged. Barnard *v.* Darling, 11 Wend. (N. Y.) 28.

Suggestion of defect in bond.— Under a statute providing that if an official bond is defective in not containing the conditions required by law a party interested may by action suggest the defect and recover against the officer and his sureties, it is a sufficient suggestion of the defect to attach a copy of the bond to the complaint in an action on bond. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633.

95. Williamson *v.* Woolf, 37 Ala. 298; People *v.* Russell, 4 Wend. (N. Y.) 570.

96. Chandler *v.* Riddle, 119 Ala. 507, 24 So. 498.

97. State *v.* Gresham, Smith (Ind.) 94.

98. Brents *v.* Sthal, 3 Bibb (Ky.) 482; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670, which holds, however, that, if pleaded and not demurred to, the plea of *nil debet* puts in issue every material fact in the declaration. *Compare* U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163, where it is held that if *nil debet* is pleaded it is proper to strike out a notice of special matter to be given in evidence.

99. State *v.* Houston, 1 Harr. (Del.) 230.

1. U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587.

2. Bennett *v.* Giles, 6 Leigh (Va.) 316.

3. See, generally, Pleading.

4. Alabama *v.* Davis, 9 Ala. 917.

5. Wells *v.* Com., 8 B. Mon. (Ky.) 459.

6. Mowbray *v.* State, 88 Ind. 324.

7. Postmaster-Gen. *v.* Ustick, 19 Fed. Cas. No. 11,315, 4 Wash. 347.

8. Great Falls *v.* Hanks, 21 Mont. 83, 52 Pac. 785.

9. People *v.* Kneeland, 31 Cal. 288.

10. O'Marrow *v.* Port Huron, 47 Mich. 585, 11 N. W. 397.

11. Emmett *v.* Crawford, 10 Lea (Tenn.) 21.

12. Smith *v.* Whiteside, (Tex. Civ. App. 1896) 39 S. W. 381. See Priet *v.* De la Montanya, (Cal. 1889) 22 Pac. 171, holding the evidence insufficient to show that an appropriation of funds occurred during the period of office for which defendants were bound.

13. State *v.* Hays, (Tenn. 1897) 42 S. W. 266.

14. See *supra*, II, B, 7.

15. King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

16. See, generally, Evidence.

17. Faulkner *v.* State, 9 Ark. 14 (where

But presumptions in favor of the government are commonly made when suit is brought on the bond. Thus it will be presumed, in case an officer does not have in his possession all the money he should have, that he converted to his own use the missing sum.[18] Further, it will be presumed in the case of two successive terms, where there is a different bond for each term, that a defalcation occurred during the second term and that the sureties on the second bond are liable,[19] unless they can prove that, as a matter of fact, the money reported to be in the principal's hands at the beginning of the term was not there, and that the principal had been guilty of a defalcation, prior to the execution of the bond on which suit is brought, which fact they are permitted to prove.[20]

b. Admissibility and Sufficiency. The general rules of civil actions govern the admissibility and sufficiency of evidence in actions on official bonds.[21] It has been held that the following are admissible as evidence against sureties in actions on official bonds: Statements and documents, such as receipts or reports, made or signed by their principal and official books and accounts kept by him;[22] statements of accounts and books kept by accounting officers, showing amounts of

it was held that when sureties on a bond confess that money was received by an officer but aver that he received it before the date of the bond, the burden was upon them to prove that fact); Howgate *v.* U. S., 3 App. Cas. (D. C.) 277.

18. School Trustees *v.* Smith, 88 Ill. 181; Doolittle *v.* Atchison, etc., R. Co., 20 Kan. 329 (which holds also that where a balance found by a successor was apportioned by such successor to various funds, the apportionment made was proper); State *v.* King, 136 Mo. 309, 36 S. W. 681, 38 S. W. 80; Milwaukee County *v.* Pabst, 70 Wis. 352, 35 N. W. 337.

19. See *supra*, V, C, 3.

20. *Iowa.*— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

Michigan.— Cheboygan County *v.* Erratt, 110 Mich. 156, 67 N. W. 1117.

Montana.— Missoula County Com'rs *v.* McCormick, 4 Mont. 115, 5 Pac. 287.

Nebraska.— Barker *v.* Wheeler, 60 Nebr. 470, 83 N. W. 678, 83 Am. St. Rep. 541; Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689.

New York.—Kellum *v.* Clark, 97 N. Y. 390.

Wisconsin.— Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

United States.— Bruce *v.* U. S., 17 How. 437, 15 L. ed. 129.

Compare Priet *v.* De la Montanya, (Cal. 1889) 22 Pac. 171.

21. See EVIDENCE.

22. *Alabama.*— Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

Arkansas.— State *v.* Newton, 33 Ark. 276.

California.— People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Placer County *v.* Dickerson, 45 Cal. 12.

Illinois.— Stein *v.* People, 102 Ill. 540.

Indiana.— Ohning *v.* Evansville, 66 Ind. 59 [*overruling* State *v.* Prather, 44 Ind. 287; State *v.* Grammer, 29 Ind. 530, and other cases following them].

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271; Mahaska County *v.* Ingalls, 16 Iowa 81. But see Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Kansas.— Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249, which holds that a judgment of amercement against a principal is only *prima facie* evidence against sureties on an official bond.

Kentucky.— Grayham *v.* Washington County Ct., 9 Dana 182.

Massachusetts.— Rochester *v.* Randall, 105 Mass. 295, 7 Am. Rep. 519.

Michigan.— Detroit *v.* Weber, 29 Mich. 24.

Mississippi.—Mann *v.* Yazoo City, 31 Miss. 574.

Missouri.— Pundmann *v.* Schoenich, 144 Mo. 149, 45 S. W. 1112; Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

Nebraska.— Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; Van Siekel *v.* Buffalo County, 13 Nebr. 103, 13 N. W. 19, 42 Am. Rep. 753.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

New Jersey.—Warren County *v.* Wilson, 16 N. J. L. 110.

New York.— Kellum *v.* Clark, 97 N. Y. 390.

South Carolina.— Brown *v.* Brown, 45 S. C. 408, 23 S. E. 137; Sumter *v.* Lewis, 10 Rich. 171; State Treasurers *v.* Bates, 2 Bailey 362, 381, holding that admissions of and judgments against principal, even after leaving office, are *prima facie* evidence against sureties. See also State *v.* Teague, 9 S. C. 149.

Texas.— Broad *v.* Paris, 66 Tex. 119, 18 S. W. 342. But see McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315, which holds that admissions by a treasurer that he was short in his accounts were admissible against him but not against his sureties.

Wisconsin.— Vivian *v.* Otis, 24 Wis. 518, 1 Am. Rep. 199.

United States.— Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536.

See 37 Cent. Dig. tit. "Officers," § 255.

money coming into the hands of the principal during his term of office;[23] and reports by experts who examined his books.[24] But such books, statements, and reports are not generally regarded as conclusive.[25] But evidence as to transactions having no connection with the official life of the office, such as evidence as to his habits and manner of living, is not admissible,[26] except that, where those having control over the officer have permitted him to mingle public money with his own, his pecuniary embarrassments are competent to rebut the presumption that he has not applied public moneys to meet personal liabilities.[27] In all these actions on official bonds the receipt by the principal of checks, drafts, and other evidences of debt is treated as the receipt of money, for which the sureties are liable; but the sureties may show that certificates of deposit given by insolvent banks and treated as cash in the settlement of the accounts of their principal were as a matter of fact of no value.[28] In the absence of fraud a court record showing the execution of the bond is conclusive as to such fact.[29] Evidence of a denial on the part of the officer of any right of the government to money collected by him as the officer of such government is sufficient to establish a conversion of such money.[30] Where the evidence shows a state of facts from which the inference is not deducible that the officer received the money sought to be charged against his surety, it is error to leave the cause to the jury upon the hypothesis that he did receive it.[31] The question of whether a defalcation occurred during the term for which the bond is given is properly submitted to the jury upon conflicting evidence.[32]

9. JUDGMENT. Judgments in proceedings upon official bonds are, in the absence of statute, governed by the rules applicable to judgments in general.[33] Upon the trial of a joint action against the principal and the sureties for official negligence, the judgment may be against any number of the defendants as the testimony warrants.[34] Judgments against sureties are not void for mere irregularities. Thus a judgment for damages instead of the penalty, or one for the "plaintiffs" instead of for the "state" is good.[35] But a separate judgment should be rendered for

23. Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119.

24. Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237.

But it has been held improper to admit as evidence, in suits on official bonds, the report of a committee appointed to examine the accounts of an officer made after the expiration of his term of office. Lewis *v.* Lee County, 73 Ala. 148.

25. Ohning *v.* Evansville, 66 Ind. 59 [*overruling* State *v.* Prather, 44 Ind. 287; State *v.* Grammar, 29 Ind. 530, and other cases following them]; Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237; Nolley *v.* Callaway County Ct., 11 Mo. 447; Salazar *v.* Territory, 8 N. M. 1, 41 Pac. 531; Wilkes Barre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269. *Contra*, Territory *v.* Cook, 2 Ariz. 383, 17 Pac. 10; Doll *v.* People, 145 Ill. 253, 34 N. E. 413 [*affirming* 48 Ill. App. 418]; Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; Baker *v.* Preston, Gilm. (Va.) 235. All these cases hold that the officers' own statements contained in official documents such as reports are conclusive against the sureties.

In Pennsylvania a settlement of the principal's accounts is conclusive against the sureties, when no appeal has been taken from it in a direct proceeding. Com. *v.* Piroth, 17 Pa. Super. Ct. 586; Com. *v.* Sweigart, 9 Pa. Super. Ct. 455. See Spangler *v.* Com., 8 Watts 57, except that it is competent for the surety to prove that the moneys charged in that settlement were received before he became a surety. Com. *v.* Reitzel, 9 Watts & S. 109.

26. Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158; Mahon *v.* Kinney County, (Tex. Civ. App. 1894) 28 S. W. 1024; U. S. *v.* Wood, 28 Fed. Cas. No. 16,752, 13 Blatchf. 252.

27. Nolley *v.* Callaway County Ct., 11 Mo. 447.

28. See *supra*, IV, C, 1.

29. Calwell *v.* Com., 17 Gratt. (Va.) 391.

30. People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554, 12 Am. St. Rep. 134.

31. Bryan *v.* U. S., 1 Black (U. S.) 140, 17 L. ed. 135.

32. Cheboygan County *v.* Erratt, 110 Mich. 156, 67 N. W. 1117.

33. See, generally, JUDGMENTS.

Conformity with evidence.— In case the debt is due in paper which may be depreciated, a judgment for an amount in specie cannot be sustained where there is no evidence of the value of the paper. Canterberry *v.* Com., 1 Dana (Ky.) 415.

34. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

35. State *v.* Cross, 6 Ind. 387. See also State *v.* Luce, 50 Mo. 361, where it was held

each bond in an action on several bonds,[36] with a proviso that no more shall be collected on execution than the sum found to be due from the principal;[37] and, as a judgment can be rendered only against those who have been served with process, a judgment will be considered to be rendered against the principal only, although the names of the sureties are stated in the margin of the entry, where the record shows that the principal alone was served, and pleaded.[38] Inasmuch as official bonds are joint and several obligations, and, as a result, actions may be brought against any of the sureties, it is not a valid objection of sureties to judgment against them that judgment has been previously taken in a case against their cosureties.[39] Judgments on official bonds inure to the benefit of all persons who prove damages on breaches properly assigned;[40] but preference is given to those who first obtain judgment, even over those who first bring suit.[41] Judgments on official bonds for defalcations will include legal interest from the time of the defalcation.[42] But neither principals nor sureties are liable for interest on public funds in their hands until the principals are in default.[43]

OFFICE WITHIN THE GIFT OF THE PEOPLE. A phrase not confined to such offices as are conferred by popular vote; but including those that may be filled by the general assembly.[1]

OFFICIA JUDICIALIA NON CONCEDANTUR ANTEQUAM VACENT. A maxim meaning "Judicial offices should not be granted before they are vacant."[2]

OFFICIAL. As noun, an officer.[3] As adjective, belonging to an office;[4] of a public officer;[5] in relation to the duties of office.[6] The term is sometimes applied to persons holding fiduciary positions, to distingnish their transactions in such relation from purely private business.[7] (See EXECUTIVE; JUDICIAL; LEGISLATIVE; MINISTERIAL; and, generally, OFFICERS.)

OFFICIAL ACT. Any act done by the officer in his official capacity, under color and by virtue of his office.[8] (See JUDICIAL ACT; LEGISLATIVE ACT; MINISTERIAL ACT; and, generally, OFFICERS.)

that in a suit on an official bond, it is not a reversible error for the court to render judgment on the verdict of the jury, with a further judgment that execution issue for damages assessed, instead of on the bond.

36. Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; People *v.* Rooney, 29 Cal. 642; Cassady *v.* Board of Trustees, 93 Ill. 394.

37. People *v.* Love, 25 Cal. 520.

38. Dane *v.* McArthur, 57 Ala. 448.

39. Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51.

40. Mitchell *v.* Laurens, 7 Rich. (S. C.) 109.

41. State *v.* Ford, 5 Blackf. (Ind.) 392. *Contra*, Christman *v.* Com., 17 Serg. & R. (Pa.) 381. See McKean *v.* Shannon, 1 Binn. (Pa.) 370.

42. People *v.* Breyfogle, 17 Cal. 504; Monroe County *v.* Clark, 92 N. Y. 391, which holds that the time from which interest begins to run is the time when the officer should have paid the money to his successor. But see U. S. *v.* Curtis, 100 U. S. 119, 25 L. ed. 571 (which holds that interest runs only from the date of service of the writ in the action against the sureties where neither the principal nor the sureties had notice of the government's claim prior to such service); U. S. *v.* Poulson, 30 Fed. 231.

43. U. S. *v.* Denvir, 106 U. S. 536, 1 S. Ct. 481, 27 L. ed. 264.

1. Black *v.* Trower, 79 Va. 123, 126.

2. Black L. Dict.

Applied in Auditor Curle's Case, 11 Coke 2*b*, 4*a*, 77 Eng. Reprint 1147.

3. See Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645, 648; Duer *v.* Dashiell, 91 Md. 660, 667, 47 Atl. 1040.

"Official who levies," used in statutes, was held to refer to an officer authorized by law to levy on property. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645, 650.

4. See OFFICIAL FUNCTION, *post*, p. 1472.

5. See OFFICIAL CAPACITY, *post*, p. 1472.

6. See Tex. Rev. St. § 3393 [*quoted* in Brackenridge *v.* State, 27 Tex. App. 513, 531, 11 S. W. 630, 4 L. R. A. 360; Craig *v.* State, 31 Tex. Cr. 29, 30, 19 S. W. 504].

7. Bissell *v.* Probate Judge, 58 Mich. 237, 238, 24 N. W. 886.

8. Turner *v.* Sisson, 137 Mass. 191, 192 [*quoted* in Hall *v.* Tierney, 89 Minn. 407, 411, 95 N. W. 219].

Not confined to lawful acts, when used in a bond whereby sureties undertook to be responsible for the official acts of their principal. Turner *v.* Sisson, 137 Mass. 191, 192; Hall *v.* Tierney, 89 Minn. 407, 411, 95 N. W. 219.

"Official acts" and "acts done colore officii" distinguished (Maddox *v.* Hudgeons, 31 Tex. Civ. App. 291, 292, 72 S. W. 414); but it is said that of later years "this re-

OFFICIAL ACTION. Action is not official when taken by officials in their personal or individual capacity, though all be members of a municipal board and all concur.[9] (See JUDICIAL ACTION; and, generally, OFFICERS.)

OFFICIAL BALLOT. See ELECTIONS.

OFFICIAL BOND. See OFFICERS.

OFFICIAL CAPACITY. The capacity in which a person acts, because he is an officer, lawfully appointed and qualified, or because he lawfully performs duties that are of an official character.[10] (See, generally, OFFICERS.)

OFFICIAL CERTIFICATE or DOCUMENT. Applied to a certificate or document subject to a custom-house fee when required by an importing merchant, a term which does not include the certificate on the invoice, or the jurat to the statutory oath (the latter not being required by the merchant), or an order to the storekeeper to deliver packages.[11] (See CERTIFICATE; DOCUMENT.)

OFFICIAL DEED. A term which may include a county auditor's certificate of assignment of the state's right in lands bidden in at a tax-sale.[12] (Official Deed: By Officer For — County, see COUNTIES; State, see STATES; United States, see UNITED STATES. By Receiver, see RECEIVERS. By Sheriff, see EXECUTIONS. Of Land Sold For Taxes, see TAXATION. Under Judicial Decree, see JUDICIAL SALES. See also, generally, DEEDS.)

OFFICIAL DOCUMENT. See EVIDENCE.

OFFICIAL FUNCTION. A function belonging to an office, whether exercised by the officer or by a subordinate acting for him.[13] (See JUDICIAL FUNCTION; and, generally, OFFICERS.)

OFFICIAL NEWSPAPER. See NEWSPAPERS.

OFFICIA MAGISTRATUS NON DEBENT ESSE VENALIA. A maxim meaning "The offices of magistrates ought not to be sold."[14]

OFFICINA BREVIUM. Literally "The shop of writs." The court of chancery was once so called, as the place where the king's writs were framed.[15]

OFFICINA JUSTITIÆ. The shop or mint of justice, wherein all the king's writs are framed.[16] (See HANAPER OFFICE.)

OFFICIT CONATUS SI EFFECTUS SEQUATUR. A maxim meaning "The attempt becomes of consequence, if the effect follows."[17]

OFFICIUM. Literally "OFFICE,"[18] *q. v.* That function by virtue of which a man hath some employment in the affairs of another, as of the king or another person.[19]

fined and fanciful distinction" has been disregarded (Hall *v.* Tierney, 89 Minn. 407, 409, 95 N. W. 219).

A mistake in the performance of an official act, as seizing and selling upon execution property not belonging to the debtor, does not render the act unofficial. Cumming *v.* Brown, 43 N. Y. 514, 516.

9. Burkett *v.* Athens, (Tenn. Ch. App. 1900) 59 S. W. 667, 668.

10. U. S. *v.* Van Leuven, 62 Fed. 62, 66.

Not confined to acts specifically required by statute see Hennepin County *v.* Dickey, 86 Minn. 331, 90 N. W. 775.

It is not necessary to be an officer in order to act in an official capacity see U. S. *v.* Van Leuven, 62 Fed. 62, 65.

"Liability incurred by him by doing an act in his official capacity" refers to the liability incurred by official misfeasance or malfeasance of the officer, and not the liability upon contract entered into by him for his own convenience. Rice *v* Penfield, 49 Hun (N. Y.) 368, 369, 2 N. Y. Suppl. 641.

11. Cochran *v.* Schell, 107 U. S. 617, 624, 2 S. Ct. 301, 27 L. ed. 490.

12. Pfefferle *v.* Wieland, 55 Minn. 202, 210, 56 N. W. 824.

13. U. S. *v.* Ingham, 97 Fed. 935, 936.

14. Peloubet Leg. Max.

15. Burrill L. Dict. [*citing* 2 Wooddes. Lect. 214]. "Now that such Courts [i. e. of equity] are not *officinæ brevium*, it would be difficult to prove, that this maxim [*ubi jus, ibi remedium*] can give to our Courts of equity a power to supply any defect in any law, or remedy, in relation to this case." Peters *v.* Van Lear, 4 Gill (Md.) 249, 254.

16. 2 Blackstone Comm. 273 [*cited* in 2 Burrill L. Dict. 257].

History of the term is given in Yates *v.* People, 6 Johns. (N. Y.) 337, 362.

The New York court of chancery retained this function, only, of the common-law powers of chancery. Yates *v.* People, 6 Johns. (N. Y.) 337, 363.

17. Bouvier L. Dict.

18. Com. *v.* Binns, 17 Serg. & R. (Pa.) 219, 233. See also OFFICERS, 29 Cyc. 1362.

19. Cowell Dict. [*quoted* in U. S. *v.* Trice, 30 Fed. 490, 494].

OFFICIUM NEMINI DEBET ESSE DAMNOSUM. A maxim meaning "An office ought to be injurious to no one." [20]

OFF LARGE. Of a vessel, having the wind free on either tack.[21] (See, generally, COLLISION.)

OFFSET. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

OFFSHORE. Away from and distant from the mainland.[22]

OFFSPRING. ISSUE,[23] *q. v.*; LINEAL DESCENDANTS,[24] *q. v.* (See CHILDREN; HEIR; ISSUE; and, generally, WILLS.)

OF GRACE. Applied to a decree in equity, not of right, by favor.[25]

OF RECORD. As to matter in court, duly enrolled and filed in a court of record.[26] (See DEBT OF RECORD; OBLIGATION; and, generally, APPEAL AND ERROR; COURTS; MORTGAGES; RECOGNIZANCES; RECORDS.)

OF SIMILAR DESCRIPTION. Not a commercial term.[27] As used in the tariff act, it does not require all goods classed under it to be the same.[28]

"**The Word Officium principally implies a Duty**, and in the next Place the Charge of such Duty, and 'tis a Rule, that where one Man hath to do with another Man's Affairs against his Will, and without his Leave, that is an Office, and he who is in it is an Officer." Rex *v.* Burnell, Carth. 478, in argument by counsel [*adopted* in Bunn *v.* People, 45 Ill. 397, 400; U. S. *v.* Trice, 30 Fed. 490, 493].

20. Peloubet Leg. Max.

21. Ward *v.* The Fashion, 29 Fed. Cas. No. 17,154, 6 McLean 152, 170, Newb. Adm. 8, opinion of Wilkins, J.

22. Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87, 91.

"**Loading offshore**" was held not to include loading at the end of a long bridge pier. Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87, 92.

23. Mitchell *v.* Pittsburg, etc., R. Co., 165 Pa. St. 645, 650, 31 Atl. 67; Allen *v.* Markle, 36 Pa. St. 117, 118; Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 101, 17 S. Ct. 488, 41 L. ed. 925; Young *v.* Davies, 2 Dr. & Sm. 167, 172, 9 Jur. N. S. 399, 32 L. J. Ch. 372, 8 L. T. Rep. N. S. 80, 1 New Rep. 419, 11 Wkly. Rep. 452, 62 Eng. Reprint 585.

24. Young *v.* Davies, 2 Dr. & Sm. 167, 172, 9 Jur. N. S. 399, 32 L. J. Ch. 372, 8 L. T. Rep. N. S. 80, 1 New Rep. 419, 11 Wkly. Rep. 452, 62 Eng. Reprint 585.

Capable of use in different senses.— "The word 'offspring,' like the words 'issue' and 'descendants,' may be used in different senses. It may mean children only, or it may include more remote descendants." The term, "in its proper and natural sense, extends to every degree of lineal descendants." Young *v.* Davies, 2 Dr. & Sm. 167, 171, 172, 9 Jur. N. S. 399, 32 L. J. Ch. 372, 8 L. T. Rep. N. S. 80, 1 New Rep. 419, 11 Wkly. Rep. 452, 62 Eng. Reprint 585.

The term is used, in deeds or wills, as the designation of a class of persons, collectively, to take as heirs of the ancestor, rather than as a word of purchase, to designate particular persons, as individuals, to take in their own right, and rather than as a word of limitation unless there is a direct intention plainly and clearly expressed to the contrary. Powell *v.* Brandon, 24 Miss. 343, 365.

"**Offspring**" **may mean** "**children**" (Thompson *v.* Beasley, 3 Drew. 7, 9, 3 Eq. Rep. 59, 18 Jur. 973, 24 L. J. Ch. 327, 61 Eng. Reprint 803; Lister *v.* Tidd, 29 Beav. 618, 619, 54 Eng. Reprint 767); but, in the phrase "children or offspring," it refers to "other offspring beyond children." Thompson *v.* Beasley, 3 Drew. 7, 9.

As a word of limitation see Allen *v.* Markle, 36 Pa. St. 117, 118; Pullen *v.* Mullen, 12 Leigh (Va.) 434, 439. *Compare* Mitchell *v.* Pittsburg, etc., R. Co., 165 Pa. St. 645, 650, 31 Atl. 67; Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 92, 17 S. Ct. 488, 41 L. ed. 925, 69 Fed. 501, 504.

Death "without offspring" as condition of devise over.—A devise to A, with a gift over conditional upon the event of her "dying unmarried, or if married, dying without offspring by her husband, "was held to confer upon A a fee simple, defeasible upon her dying without issue during the testator's life (Mitchell *v.* Pittsburg, etc., R. Co., 165 Pa. St. 645, 650, 31 Atl. 67); but that decision, while supported as to the conclusion that offspring meant issue, was disapproved on the ground that the same provisions in the same will imported an indefinite failure of issue and therefore created not a defeasible fee, but an estate tail (Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 92, 17 S. Ct. 488, 41 L. ed. 925); the latter opinion, so far, upholding that expressed in an earlier stage of the same litigation by the circuit court, which, however, also based its decision that A took at least an estate tail if not a fee simple on the ground that "'offspring' is a word of limitation, not of purchase" (Barber *v.* Pittsburgh, etc., R. Co., 69 Fed. 501, 504).

Offspring of animals, includes increase.— King *v.* Lacrosse, 42 Minn. 488, 489, 44 N. W. 517.

25. Walters *v.* McElroy, 151 Pa. St. 549, 557, 25 Atl. 125.

Days of grace see COMMERCIAL PAPER, 7 Cyc. 865 *et seq.*

26. People *v.* Kane, 4 Den. (N. Y.) 530, 535 [*quoted* in King *v.* State, 18 Nebr. 375, 384, 25 N. W. 519].

27. Greenleaf *v.* Goodrich, 101 U. S. 278, 284, 25 L. ed. 845; Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 56, 97 S. W. 961.

28. Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 56, 97 S. W. 961.

OFTEN. A word which implies repetition.[29] (See HABITUAL.)

OF THE BLOOD. Of the kindred.[30] (See AFFINITY; BLOOD; CONSANGUINITY.)

OF THE BODY. A phrase which is not indispensable to the creation of an estate tail.[31] (See HEIRS OF THE BODY.)

OF THE COUNTY. As applied to jurors, from some part of the given county.[32] (See, generally, JURIES.)

OF THE HALF BLOOD. A phrase which necessarily signifies that the consanguinity is collateral rather than lineal.[33] (See OF THE BLOOD.)

OF THE SUBJECT-MATTER. By jurisdiction "of the subject-matter" is meant jurisdiction of the class of cases to which the particular case belongs.[34]

OF THE VICINAGE. See OF THE COUNTY.

OF UNSOUND MIND. See INSANE PERSONS.

OHIO. A term which when used in deputy surveyor's field-notes, from which notes the plats of townships are required by statute to be made, is a sufficient designation of the Ohio river, when there is no doubt that the river is intended.[35]

OIKEIMANIA. A morbid state of the domestic affections, as an unreasonable dislike of wife or child, without cause or provocation, turning love into hatred.[36]

OIL. A liquid mineral.[37] (Oil: In General, see MINES AND MINERALS. Duty on, see CUSTOMS DUTIES. Inspection of, see INSPECTION. Keeping and Use, see EXPLOSIVES; FIRE INSURANCE; MUNICIPAL CORPORATIONS. Lease, see MINES AND MINERALS. Taking Private Property For, see EMINENT DOMAIN. Working or Leasing Oil-Well by Life-Tenant, see ESTATES. See also BENZINE; COAL-OIL; KEROSENE; PETROLEUM.)

OIL-CLOTH FOUNDATIONS. FLOOR-CLOTH CANVAS,[38] *q. v.*

O. K. All correct;[39] all right; correct;[40] and now commonly used as an

29. Charles *v.* Stickney, 50 Ala. 86, 88.

"Often or daily" in the sense of "habitually" see Ætna L. Ins. Co. *v.* Davey, 123 U. S. 739, 742, 8 S. Ct. 331, 31 L. ed. 315.

30. Leigh *v.* Leigh, 15 Ves. Jr. 92, 107, 10 Rev. Rep. 31, 33 Eng. Reprint 690.

To be of the blood of a person is "to be able to trace descent from some progenitor of that person" (Miller *v.* Speer, 38 N. J. Eq. 567, 572); to be descended from him or from the same common stock or the same couple of common ancestors (Black L. Dict. [*cited* in Den *v.* Searing, 8 N. J. L. 340, 346, and *quoted* in Springer *v.* Fortune, 2 Handy (Ohio) 52, 56, 12 Ohio Dec. (Reprint) 325]); to have any, however small, a portion of the same blood derived from a common ancestor (Gardner *v.* Collins, 2 Pet. (U. S.) 58, 87, 7 L. ed. 347 [*quoted* in Miller *v.* Speer, 38 N. J. Eq. 567, 572]).

Includes the half blood.— Kelly *v.* McGuire, 15 Ark. 555, 589; Cutter *v.* Waddingham, 22 Mo. 206, 264; Beebee *v.* Griffing, 14 N. Y. 235, 241; Baker *v.* Chalfant, 5 Whart. (Pa.) 477, 481; May *v.* Espenshade, 1 Pearson (Pa.) 139, 143; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 87, 7 L. ed. 347.

31. Den *v.* Cox, 9 N. J. L. 10, 12.

32. "The words '*de corpore comitatus*,' 'from the body of the county,' 'of the county,' 'of the vicinage,' as they appear in English statutes and in American constitutions and laws, mean no more, as applied to jurors, than that they must come from some part of the given county." State *v.* Kemp, 34 Minn. 61, 63, 24 N. W. 349.

33. Finley *v.* Abner, 129 Fed. 734, 735, 64 C. C. A. 262.

"Every child is of the full blood of both of its parents."— Finley *v.* Abner, 129 Fed. 734, 735, 64 C. C. A. 262.

34. McCoy *v.* Able, 131 Ind. 417, 420, 30 N. E. 528, 31 N. E. 453; Chicago, etc., R. Co. *v.* Sutton, 130 Ind. 405, 410, 30 N. E. 291; State *v.* Wolever, 127 Ind. 306, 315, 26 N. E. 762.

35. Doe *v.* Hildreth, 2 Ind. 274, 282.

36. Ekin *v.* McCracken, 11 Phila. (Pa.) 534, 540.

37. See MINES AND MINERALS, 27 Cyc. 532, and particularly 534 text and note 44.

"Oil-cake" see FLAXSEED, 19 Cyc. 1078.

"Oil in barrels" is not equivalent to "barrels of oil" and cannot be held to include oil in a cooling and settling tank. Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442, 444, 445.

"Oil refinery" see Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 10, 19, 20 Atl. 867, 869, 9 L. R. A. 863 [*citing* Titusville Iron-Works *v.* Key Stone Oil Co., 130 Pa. St. 211, 214, 18 Atl. 739; Shont *v.* Ames, 121 Pa. St. 530, 534, 15 Atl. 607; Short *v.* Miller, 120 Pa. St. 470, 475, 14 Atl. 374].

Oil-well see MINES AND MINERALS, 27 Cyc. 773, text and note 39.

38. Arthur *v.* Cumming, 91 U. S. 362, 364, 23 L. ed. 438.

39. Webster Int. Dict. [*quoted* in Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 611, 100 N. W. 550].

40. Century Dict. [*quoted* in Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 441, 32 N. E. 722; Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 611, 100 N. W. 550; Humphries *v.* Sorenson, 33 Wash. 563, 566, 74 Pac. 690].

indorsement, as on a bill, being neither more nor less than a brief, but expressive, certificate of the correctness of the bill.[41]

OKOLEHAO. Also written "Okolehoa."[42] A strong intoxicating liquor, distilled from *ti* root.[43]

OLD. A word which is not necessarily to be taken as meaning long-existing, or ancient.[44]

OLEIC ACID. That one of those components, generically termed "fat acids," of ordinary fat, tallow and oil which, in combination with glycerine, forms oleine.[45]

OLEINE. An ingredient of fat or oil, formed by the combination of oleic acid with glycerine.[46]

OLEO. A word used colloquially among merchants to indicate either oleomargarine or oleostearine.[47] (See OLEOMARGARINE.)

OLEOMARGARINE. A product or compound made wholly or partly out of any fat, oil or oleaginous substance;[48] a substance, resembling butter, obtained from the fat of domestic animals.[49] It is sometimes called butterine or imitation butter.[50] (See COTTOLENE; and, generally, ADULTERATION; COMMERCE; FOOD.)

As established by usage in the United States.— "'O. K.' . . . is neither more nor less than a brief, but expressive, certificate of the correctness of the bill or claim on which it is indorsed." Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 611, 100 N. W. 550.

The connection in which it was used must be considered in determining the application intended. Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 441, 32 N. E. 722; Humphries *v.* Sorenson, 33 Wash. 563, 566, 74 Pac. 690.

Used to signify: Assent, to a decree as drafted (Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 441, 23 N. E. 722), to the form only, without waiving the right to except on the merits, of findings, conclusions, and judgments of a trial court (Humphries *v.* Sorenson, 33 Wash. 563, 566, 74 Pac. 690); certification of correctness of bills for payment (Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 611, 100 N. W. 550); approval of a proof (Giles Lith., etc., Co. *v.* Chase, 149 Mass. 459, 462, 21 N. E. 765, 14 Am. St. Rep. 439, 4 L. R. A. 480).

41. Century Dict. [*quoted* in Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 611, 100 N. W. 550].

42. See The Kawailani, 128 Fed. 879, 881, 63 C. C. A. 347.

43. Republic *v.* Akoni, 11 Hawaii 53, 54; The Kawailani, 128 Fed. 879, 881, 63 C. C. A. 347.

Held a "spirituous liquor" within a statute prohibiting sale of such liquors without license (Republic *v.* Akoni, 11 Hawaii 53, 54); and within the United States Internal Revenue Law (The Kawailani, 128 Fed. 879, 881, 63 C. C. A. 347).

44. People *v.* Griswold, 67 N. Y. 59, 61, 62.

"Old Country" is a term in common use to designate a country occupied by civilized man before the American continent was. Allen B. Wrisley Co. *v.* Iowa Soap Co., 122 Fed. 796, 797, 59 C. C. A. 54.

"Old inclosures" see Hornby *v.* Silvester, 20 Q. B. D. 797, 805, 52 J. P. 468, 57 L. J. Q. B. 558, 59 L. T. Rep. N. S. 666, 36 Wkly. Rep. 679.

"Old metals" is a term used in the junk trade, in which it has acquired a broader meaning than belongs to the words as commonly used, and includes various articles such as rubber and glass. Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277 and note.

"Old style roofing tin" is a mercantile term, referring to certain brands of tin manufactured in a certain way. Storck *v.* Mesker, 55 Mo. App. 26, 37.

"Oldest in office" is the one who has held office for the longest time under an election. State *v.* McKee, 20 Oreg. 120, 124, 25 Pac. 292.

"Oldest" may read "youngest" when the context requires it. Tayloe *v.* Johnson, 63 N. C. 381, 384.

45. Tilghman *v.* Proctor, 125 U. S. 136, 138, 8 S. Ct. 894, 31 L. ed. 664, it being thin and fluid.

46. Tilghman *v.* Proctor, 125 U. S. 136, 138, 8 S. Ct. 894, 31 L. ed. 664.

47. N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133, 134.

48. Webster Int. Dict. [*quoted* in Cook *v.* State, 110 Ala. 40, 47, 20 So. 360].

49. Com. *v.* Vandyke, 9 Pa. Dist. 41, 42.

It is usually made of leaf lard, and beef fat churned in milk and cream, or milk, cream, and butter, to give it flavor, and colored with the vegetable dye, annotto. Braun *v.* Coyne, 125 Fed. 331.

50. Com. *v.* Vandyke, 9 Pa. Dist. 41, 42.

It has been described as one of the prevalent compounds resembling butter in appearance and flavor and put in the market as a substitute for it. Butler *v.* Chambers, 36 Minn. 69, 71, 30 N. W. 308, 1 Am. St. Rep. 638.

The term is defined by and within the "Oleomargarine Act" (Act Cong. Aug. 2, 1886, c. 240) as embracing "all substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil and annotto, and other coloring matter, intestinal fat and offal fat made in imitation or semblance of butter, or when so

OLOGRAPHIC WILL. See WILLS.

OLOGY. A suffix used as the termination of the name of the science of the subject indicated by the prefix.[51]

OMISSIO EORUM QUÆ TACITE INSUNT NIHIL OPERATUR. A maxim meaning "The omission of those things which are tacitly implied is of no consequence." [52]

OMISSION. The application, rather than the definition of the word, is apt to be doubtful, and is then to be determined by deriving the intent from the context.[53] (See AMENDMENT; MISTAKE; NEGLECT; OMIT; and, generally, NEGLIGENCE.)

OMIT. A word which does not apply to the non-performance of an impossibility.[54] (See OMISSION.)

OMNE ACCESSORIUM SEQUITUR SUUM PRINCIPALE. A maxim meaning "Every accessory thing follows its principal." [55]

OMNE ACCESSUM SEQUITUR SUUM PRINCIPALE. A maxim meaning "Every increase follows its principal." [56]

OMNE ACTUM AB INTENTIONE AGENTIS EST JUDICANDUM; A VOLUNTATE PROCEDIT CAUSA VITII ATQUE VIRTUTIS. A maxim meaning "Every act is to be estimated by the intention of the doer; the cause of vice and virtue proceeds from the will." [57]

OMNE CRIMEN, EBRIETAS, ET INCENDIT ET DETEGIT. A maxim meaning "Drunkenness excites to and discloses every crime;" [58] "drunkenness both inflames (or aggravates) and reveals every crime." [59]

made, calculated or intended to be sold as butter or for butter" (Com. *v.* Vandyke, 9 Pa. Dist. 41; Braun *v.* Coyne, 125 Fed. 331); and the test, within that act, is held to be this: "Is the product a conscious imitation of butter?" (Braun *v.* Coyne, 125 Fed. 331, 332).

51. Stockman *v.* Western Union Tel. Co., 10 Kan. App. 580, 63 Pac. 658, 659, where the term is said to be derived from a Greek word meaning discourse or treatise.

52. Black L. Dict.

Applied in Roberts *v.* Roberts, 2 Bulstr. 123, 131.

53. See cases cited *infra*, this note.

By official, to discharge duty see State *v.* Norris, 111 N. C. 652, 16 S. E. 2; State *v.* Snuggs, 85 N. C. 541; State *v.* Hawkins, 77 N. C. 494.

In assessment of tax.— In a provision that no error, mistake, or omission of tax-assessors shall render an assessment void "'omission' . . . should be considered in connection with the words 'error' and 'mistake' which precede it, and be interpreted with reference to the rule *ejusdem generis*." Emery *v.* Sanford, 92 Me. 525, 530, 43 Atl. 116. "Omission to name the real owner" of property, within the meaning of a tax law providing that despite such omission the tax shall be valid, does not apply to an omission to name but to mistake in the name or substitution of the wrong name. State *v.* Vanderbilt, 33 N. J. L. 38, 39.

In name of party, as subject to amendment see McLoney *v.* Edgar, 7 Pa. Co. Ct. 27, 29.

Of work under building contract, at request of owner see Shaver *v.* Murdock, 36 Cal. 293, 296; Gallagher *v.* Hirsh, 45 N. Y. App. Div. 467, 473, 61 N. Y. Suppl. 609.

To appoint commissioners to audit claims against estate.— Where, by statute, the right to proceed against an administrator may be cut off by the appointment of commissioners to audit claims against the estate, an "omission" to make such appointment is held to occur when the appointment is not made within the time contemplated by the statute, and such time, although not definitely expressed, may appear from the "spirit of the statute." Wilkinson *v.* Winne, 15 Minn. 159.

"To make known every fact material to the risk."— Such "omission" on the part of an applicant for insurance see Ramsey *v.* Phœnix Ins. Co., 2 Fed. 429, 431. The identical opinion is reported in Rumsey *v.* Phœnix Ins. Co., 1 Fed. 396, 398, 17 Blatchf. 527.

"To provide," in will, for children or issue of deceased children see WILLS.

54. See remark of Maule, J., in Pim *v.* Reid, 6 M. & G. 1, 13, 6 Scott N. R. 982, 46 E. C. L. 1: "To 'omit' to do something, has reference to something that a party could do; how is it shown here that the thing could be done?"

55. **Applied,** as the principle by which, when a statute is repealed, another statute, merely supplementary thereto, also falls, in Upper Canada Bank *v.* Bethune, 4 U. C. Q. B. O. S. 165, 171.

56. **Applied** in Atty.-Gen. *v.* Cavendish, Wightw. 82, 88, 12 Rev. Rep. 716.

57. Peloubet Leg. Max.

Applied in: Reed *v.* Allerton, 3 Rob. (N. Y.) 551, 569; Soames *v.* Spencer, 1 D. & R. 32, 24 Rev. Rep. 631, 16 E. C. L. 14.

58. 4 Blackstone Comm. 26.

59. Black L. Dict. [*citing* Coke Litt. 247*a*].

OMNE JUS AUT CONSENSUS FECIT, AUT NECESSITAS CONSTITUIT AUT FIRMAVIT CONSUETUDO. A maxim meaning "Every right is either made by consent, or is constituted by necessity, or is established by custom." [60]

OMNE JUS ET OMNIS ACTIO INJURIAM TEMPORE FINITA ET CIRCUMSCRIPTA SUNT. A maxim meaning "Every law and every action is finished and circumscribed by the time of the injury." [61]

OMNE MAGNUM EXEMPLUM HABET ALIQUID EX INIQUO, QUOD PUBLICA UTILITATE COMPENSATUR. A maxim meaning "Every great example has something of injustice, which is compensated by its public utility." [62]

OMNE MAJUS CONTINET IN SE MINUS. A maxim meaning: "Every greater contains in itself the less." [63]

OMNE MAJUS DIGNUM CONTINET IN SE MINUS DIGNUM. A maxim meaning "The more worthy contains in itself the less worthy." [64]

OMNE MAJUS MINUS IN SE COMPLECTITUR is another form of the maxim meaning "Every greater embraces in itself the less." [65]

OMNE MAJUS TRAHIT AD SED QUOD EST MINUS. A maxim meaning "Every greater thing attracts to itself that which is less." [66]

OMNE MALUM NOCENS FACILE OPPRIMITUR; INVETERATUM FIT PLERUMQUE ROBUSTIUS. A maxim meaning "Every evil at its birth is easily rooted out; when grown old, it mostly becomes stronger." [67]

OMNE NIMIUM VERTITUR IN VITIUM. A maxim meaning "Every excess becomes a vice." [68]

OMNE PRINCIPALE TRAHIT AD SE ACCESSORIUM. A maxim meaning "Every principal thing draws to itself the accessory." [69]

OMNE QUOD SOLO INÆDIFICATUR SOLO CEDIT. A maxim meaning "Everything which is built upon the soil belongs to the soil." [70]

OMNE SACRAMENTUM DEBET ESSE DE CERTA SCIENTIA. A maxim meaning "Every oath ought to be founded on certain knowledge." [71]

60. Black L. Dict.

61. Morgan Leg. Max.

62. Peloubet Leg. Max.

63. Black L. Dict.

Applied in: Croswell *v.* Allis, 25 Conn. 301, 312; Treat *v.* Peck, 5 Conn. 280, 285; Hitchcock *v.* Hotchkiss, 1 Conn. 470, 472; Blake *v.* Sanderson, 1 Gray (Mass.) 332, 336; Brown *v.* Thorndike, 15 Pick. (Mass.) 388, 397; State *v.* Crowell, 4 N. J. L. 390, 421; Reilly *v.* Sabater, 43 N. Y. Suppl. 383, 26 N. Y. Civ. Proc. 34, 38; Wilson *v.* American Academy of Music, 2 Pa. Co. Ct. 280, 284; Com. *v.* Lewis, 4 C. Pl. (Pa.) 142, 145; King's Estate, 18 Phila. (Pa.) 81, 83; Phillips' Estate, 28 Wkly. Notes Cas. (Pa.) 229, 230; Reg. *v.* West, [1898] 1 Q. B. 174, 178, 18 Cox C. C. 675, 67 L. J. Q. B. 62, 77 L. T. Rep. N. S. 536, 46 Wkly. Rep. 316 [*quoted* in Reg. *v.* Edwards, 2 Can. Cr. Cas. 96, 101 note]; Beddow *v.* Beddow, 9 Ch. D. 89, 93, 47 L. J. Ch. 588, 26 Wkly. Rep. 570; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275, 287, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3; Standard Bank *v.* Stokes, 9 Ch. D. 68, 75, 47 L. J. Ch. 554, 38 L. T. Rep. N. S. 672, 26 Wkly. Rep. 492; Wade's Case, 5 Coke 114*a*, 115*a*, 77 Eng. Reprint 232.

This maxim does not apply to embrace, within the power to exclude certain vehicles from a turnpike road, the further power, not expressly granted, to permit them to use it upon payment (Geiger *v.* Perkiomen, etc., Turnpike Road, 4 Pa. Dist. 111, 113, 11 Montg. Co. Rep. 25, 28); nor to include, in the demand of a greater sum, such demand of a smaller sum, once tendered and refused, as to destroy the effect of the tender (Spybey *v.* Hide, 1 Campb. 181, 183); nor to include, in the effect of a statement in an affidavit, omitted terms required by statute to be expressed (Fraser *v.* Toronto Bank, 19 U. C. Q. B. 381, 385).

64. Black L. Dict.

65. Black L. Dict.

66. See Coke Litt. 43*b*.

Similar maxims are: *Omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius*, meaning "Every worthier thing draws to it the less worthy, though the less worthy be the more ancient." Black L. Dict.

Omne majus dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius et à digniori debet fieri denominatio, meaning "Every more worthy thing draws to itself the less worthy, although the less worthy be more ancient, and from the worthier ought the denomination to be derived." See Coke Litt. 355*b*.

67. Morgan Leg. Max.

68. Morgan Leg. Max.

69. Bouvier L. Dict.

Applied in: Holly *v.* Brown, 14 Conn. 255, 266 [*quoted* in Southworth *v.* Isham, 3 Sandf. (N. Y.) 448, 450]; Parsons *v.* Welles, 17 Mass. 419, 425; Kingsland, etc., Mfg. Co. *v.* Chrisman, 28 Mo. App. 308, 311, opinion of Philips, P. J.

70. Black L. Dict. [*citing* Brown Leg. Max. 305].

71. Peloubet Leg. Max.

OMNES ACTIONES IN MUNDO INFRA CERTA TEMPORA HABENT LIMITATIONEM. A maxim meaning "All actions in the world are limited with certain periods." [72]

OMNES BONOS ACCUSARE ADDOCET SUSPICIONEM. A maxim meaning "It behooves all good men to avoid suspicion." [73]

OMNES HOMINES AUT LIBERI SUNT AUT SERVI. A maxim meaning "All men are freemen or slaves." [74]

OMNES IN DEFENSIONEM REIPUBLICÆ VITA BONISQUE OMNIBUS CIVES TENENTUR. A maxim meaning "All subjects are bound to defend the State with all their lives and all their possessions." [75]

OMNES LICENTIAM HABERE HIS QUÆ PRO SE INDULTA SUNT, RENUNCIARE. A maxim meaning "[It is a rule of the ancient law that] all persons shall have liberty to renounce those privileges which have been conferred for their benefit." [76]

OMNES PRUDENTES ILLA ADMITTERE SOLENT QUÆ PROBANTUR IIS QUI IN ARTE SUA BENE VERSATI SUNT. A maxim meaning "All prudent men are accustomed to admit those things which are approved by those who are well versed in the art." [77]

OMNES SOLVITUR EO LIGAMINE QUO LIGATUR. A maxim meaning "Every thing is loosed by that binding power by which it is bound." [78]

OMNES SORORES SUNT QUASI UNUS HÆRES DE UNA HÆREDITATE. A maxim meaning "All sisters are as it were, one heir to one inheritance." [79]

OMNES SUBDITI SUNT REGIS SERVI. A maxim meaning "All subjects are the king's servants." [80]

OMNE TESTAMENTUM MORTE CONSUMMATUM EST. A maxim meaning "Every will is consummated by death." [81]

OMNE VERBUM DE ORE FIDELI CADIT IN DEBITUM. A maxim meaning "Every word sincerely spoken constitutes an obligation." [82]

OMNIA DELICTA IN APERTO LEVIORA SUNT. A maxim meaning "All crimes that are committed openly are lighter, [or have a less odious appearance than those committed secretly.]" [83]

OMNIA DEO GRATA, HOMINIBUS UTILIA, REIPUBLICÆ HONESTA, PRIVATIS JUSTA ET COMMODA PROBANT LEGES, ET PRO VIRIBUS CUIQUE IMPONUNT. A maxim meaning "The laws approve all things agreeable to God, useful to men, honorable to the State, just and advantageous to private persons, and impose themselves upon every one according to his faculties." [84]

OMNIA HONESTE ET ORDINE FIANT. A maxim meaning "Let all things be done honestly and in order." [85]

OMNIA LASCIVIA LEGIBUS VETITA. A maxim meaning "All wantonness is contrary to law." [86]

OMNIA LIBERE ET LEGALITER FACIENDA. A maxim meaning "All things should be done freely and legally." [87]

72. Black L. Dict.
73. Morgan Leg. Max.
74. Black L. Dict.
75. Morgan Leg. Max.
76. Black L. Dict.
77. Bouvier L. Dict.
Applied in Calvin's Case, 7 Coke 1*a*, 19*a*, 77 Eng. Reprint 377.
78. Applied in support of the proposition, "A principle of the artificial system of the law gave the lien, and the law may think proper to dissolve it." Bank of North America *v.* Fitzsimons, 3 Binn. (Pa.) 342, 363, opinion by Brackenridge, J.
79. Peloubet Leg. Max. [*citing* Coke Litt. 67*a*].
80. Morgan Leg. Max.
81. Bouvier L. Dict.
Applied in: Curson's Case, 6 Coke 75*b*, 76*a*, 77 Eng. Reprint 369; Forse's Case, 4 Coke 60*b*, 61*b*, 76 Eng. Reprint 1022; Butler's Case, 3 Coke 25*a*, 29*b*, 32*a*, 34*a*, 76 Eng. Reprint 684.
Found in: Broom Leg. Max. 374; Coke Litt. 322*b*; Sheppard Touchst. 402.
82. Peloubet Leg. Max.
83. Black L. Dict.
Applied in London's Case, 8 Coke 121*b*, 127*a*, 77 Eng. Reprint 658.
84. Morgan Leg. Max.
85. Peloubet Leg. Max.
Found in Lofft Max. No. 128.
86. Morgan Leg. Max.
87. Tayler L. Gloss [*quoted* in Morgan Leg. Max.; Peloubet Leg. Max.].

OMNIA MALA EXEMPLA BONIS PRINCIPIIS ORTA SUNT. A maxim meaning "All bad precedents have their origin in good principles." [88]

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM. A maxim meaning "All things are presumed against a wrong-doer," [89] or "despoiler," in the sense that every presumption will be made against a person who destroys or suppresses that which might be evidence against him.[90]

OMNIA PRÆSUMUNTUR IN ODIUM SPOLIATORIS. A maxim meaning "All things are presumed in hatred of the spoliator." [91]

OMNIA PRÆSUMUNTUR LEGITIME ESSE FACTA. A maxim meaning "All things are presumed to have been done according to law." [92]

OMNIA PRÆSUMUNTUR LEGITIME FACTA DONEC PROBETUR IN CONTRARIUM. A maxim meaning "All things are presumed to be lawfully done, until proof be made to the contrary." [93]

OMNIA PRIUS VERBIS EXPERIRI QUAM ARMIS SAPIENTEM DECET. A maxim meaning "It is the part of wisdom to exhaust negotiation before resorting to arms." [94]

OMNIA PRO MATRIMONIO PRÆSUMUNTUR. A maxim meaning "All things are presumed in favor of marriage." [95]

OMNIA QUÆCUNQUE CAUSÆ COGNITIONEM DESIDERANT PER LIBELLUM EXPEDIRE NON POSSUNT. A maxim meaning "All things which require cognizance cannot be explained in a memorial." [96]

OMNIA QUÆ JURE CONTRAHUNTUR CONTRARIO JURE PEREUNT. A maxim meaning "All things which are contracted by law perish by a contrary law." [97]

88. Morgan Leg. Max.

89. Bouvier L. Dict.

Applied in: Joannes *v.* Bennett, 5 Allen (Mass.) 160, 172, 81 Am. Dec. 738; Lippincott *v.* Snowden, 48 N. J. Eq. 257, 265, 22 Atl. 194; McGill *v.* O'Connell, 33 N. J. Eq. 256, 257; Outhouse *v.* Outhouse, 13 Hun (N. Y.) 130, 132; Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27, 36; Yarborough *v.* Hughes, 139 N. C. 199, 208, 51 S. E. 904; Blood *v.* Erie Dime Sav., etc., Co., 164 Pa. St. 95, 108, 30 Atl. 362; Orr *v.* Clark, 62 Vt. 136, 143, 19 Atl. 929; Escallier *v.* Baines, 40 Wash. 176, 182, 82 Pac. 181; Dimond *v.* Henderson, 47 Wis. 172, 175, 2 N. W. 73; North British, etc., Ins. Co. *v.* Tourville, 25 Can. Sup. Ct. 177, 190; Ockley *v.* Masson, 6 Ont. App. 108, 114; Prentiss *v.* Brennan, 1 Grant Ch. (U. C.) 484, 495.

Application discussed and explained in: Harris *v.* Rosenberg, 43 Conn. 227, 232, 233; Bethel *v.* Linn, 63 Mich. 464, 475, 30 N. W. 84.

Application limited in: Hance *v.* Tittabawassee Boom Co., 70 Mich. 227, 231, 38 N. W. 228; Bleecker *v.* Johnston, 69 N. Y. 309, 311; Milliman *v.* Rochester R. Co., 3 N. Y. App. Div. 109, 115, 39 N. Y. Suppl. 274; Gudger *v.* Hensley, 82 N. C. 481, 486; Knapp *v.* Edwards, 57 Wis. 191, 196, 15 N. W. 140; Wentworth *v.* Lloyd, 10 H. L. Cas. 589, 591, 10 Jur. N. S. 961, 33 L. J. Ch. 688, 10 L. T. Rep. N. S. 767, 11 Eng. Reprint 1154; St. Louis *v.* Reg., 25 Can. Sup. Ct. 649, 665; Smith *v.* Lunt, 15 N. Brunsw. 64, 65.

90. Allamong *v.* Peoples, 75 Mo. App. 276, 280.

For a discussion of this presumption and its application see EVIDENCE, 16 Cyc. 1058–1061.

91. Morgan Leg. Max.

Applied in: Campbell *v.* Hastings, 29 Ark. 512, 534; *In re* Lambie, 97 Mich. 49, 55, 56 N. W. 223; Pomeroy *v.* Benton, 77 Mo. 64, 86; Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312, 316; Cowper *v.* Cowper, 2 P. Wms. 720, 748, 24 Eng. Reprint 930.

Application limited in: Bott *v.* Wood, 56 Miss. 136, 140; Ferneau *v.* Whitford, 39 Mo. App. 311, 317.

For a discussion of this presumption and its application see EVIDENCE, 16 Cyc. 1058, 1061.

92. Applied in this sense in Thompson *v.* Hall, 2 Rob. Eccl. 426, 433.

For a discussion of this presumption and its application see EVIDENCE, 16 Cyc. 1075–1080.

93. Black L. Dict.

Applied in: Coggill *v.* Botsford, 29 Conn. 439, 447; Matthews *v.* Coalter, 9 Mo. 705, 713; Sweitzer *v.* Allen Banking Co., 76 Mo. App. 1, 5; New York *v.* Streeter, 91 N. Y. App. Div. 206, 210, 86 N. Y. Suppl. 665; D'André *v.* Zimmerman, 17 Misc. (N. Y.) 357, 359, 39 N. Y. Suppl. 1086; Miller *v.* Hershey, 59 Pa. St. 64, 68; Doe *v.* Henderson, 18 N. Brunsw. 16, 19; Hastings Peerage, 8 Cl. & F. 144, 162, 8 Eng. Reprint 58, West. 621, 9 Eng. Reprint 621.

Application limited in Matter of Barber, 10 Phila. (Pa.) 579, 591.

Found in Coke Litt. 232b.

For a discussion of this presumption and its application see EVIDENCE, 16 Cyc. 1075–1080.

94. Morgan Leg. Max.

95. Applied in this sense in Sichell *v.* Lambert, 3 New Rep. 385, 386, in the opinion of Willes, J.

96. Morgan Leg. Max.

97. Black L. Dict.

OMNIA QUÆ MOVENT AD MORTEM SUNT DEODANDA. A maxim meaning "All things which cause death while they are in motion become Deodands."[98]

OMNIA QUÆ NUNC VETUSTISSIMA CREDUNTUR NOVA FUERE; ET QUOD HODIE EXEMPLIS TUEMUR INTER EXEMPLA ERIT. A maxim meaning "All that we now consider as ancient was at one time new; and what we respect as examples, to-day, will in the future be received as precedents."[99]

OMNIA QUÆ SUNT UXORIS SUNT IPSIUS VIRI. A maxim meaning "All things which are the wife's belong to the husband."[1]

OMNIA UXORIS DURANTE CONJUGIO MARITI SUNT. A maxim meaning "All things belonging to the wife are also the husband's while the marriage continues."[2]

OMNIA RITE ACTA PRÆSUMUNTUR. A maxim meaning "All things are presumed to have been rightly done."[3] A longer form of this maxim is *Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*, meaning "All things are presumed to have been done regularly and with due formality until the contrary is proved."[4] The same maxim appears in various other forms[5]: as *Omnia præsumuntur*, followed — by *esse rite acta*;[6] by *rite acta*;[7] by *esse rite et solemnitur acta donec probetur in contrarium*;[8] by *rite acta donec probetur in contrarium*;[9] by *rite acta esse*;[10] by *rite acta*

98. Tayler L. Gloss.

99. Morgan Leg. Max.

1. Bouvier L. Dict. [*citing* Coke Litt. 112*a*].

Applied in Hicks' Estate, 20 Pa. Co. Ct. 386, 387.

2. Peloubet Leg. Max.

3. Black L. Dict.

Applied in: State *v.* Burke, 2 Gill (Md.) 79, 82; Com. *v.* Sholes, 13 Allen (Mass.) 396, 397; Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217, 223; Com. *v.* Hall, 9 Gray (Mass.) 262, 267, 69 Am. Dec. 285; Williams *v.* Cheney, 3 Gray (Mass.) 215, 220; Flagg *v.* Worcester, 8 Cush. (Mass.) 69, 72; Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 177, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586; Blinn *v.* Chessman, 49 Minn. 140, 147, 51 N. W. 666, 32 Am. St. Rep. 536; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 555, 55 S. E. 854, 9 L. R. A. N. S. 606; Wilson *v.* Giddings, 28 Ohio St. 554, 561; Sheehan *v.* Davis, 17 Ohio St. 571, 580; Landgrove *v.* Plymouth, 52 Vt. 503, 514; Fitzpatrick *v.* Peabody, 51 Vt. 195, 197; Harrison *v.* Southampton, 4 De G. M. & G. 137, 153, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422, 53 Eng. Ch. 108, 43 Eng. Reprint 459.

Application limited in Winter *v.* Keown, 22 U. C. Q. B. 341, 347.

For a discussion of this presumption and its application see EVIDENCE, 16 Cyc. 1075–1080.

4. Bouvier L. Dict.

Applied in: Hershy *v.* Baer, 45 Ark. 240, 242; Fishback *v.* Weaver, 34 Ark. 569, 578; Thompson *v.* State, 26 Ark. 323, 326; Kupfer *v.* Sponhorst, 1 Kan. 75, 87; Slattery *v.* Heilperin, 110 La. 86, 95, 34 So. 139; Hicks *v.* Ellis, 65 Mo. 176, 184; Rice *v.* McClure, 74 Mo. App. 383, 385; Riffe *v.* Wabash R. Co., 72 Mo. App. 222, 225; Byrne *v.* Carson, 70 Mo. App. 126, 129; Ensor *v.* Smith, 57 Mo. App. 584, 589; Bigelow *v.* Bigelow, 4 Ohio 138, 149, 19 Am. Dec. 591; Somerset *v.* Glastenbury, 61 Vt. 449, 452, 17 Atl. 748; Willard *v.* Pike, 59 Vt. 202, 207, 9 Atl. 907; Peyton *v.* Carr, 85 Va. 456, 458, 7 S. E. 848; Kimball *v.* Spokane County School Dist. No. 122, 23 Wash. 520, 526, 63 Pac. 213; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, 70, 6 L. ed. 552; Canadian Pac. R. Co. *v.* Edmonds, 1 Brit. Col. 295, 297; Kandick *v.* Arthur, 17 Nova Scotia 289, 291; Berlin *v.* Granger, 5 U. C. C. P. 211, 221.

Application limited in McKenney *v.* Minahan, 119 Wis. 651, 657, 97 N. W. 489.

5. **Omnia presumpta rite et solemniter acta** see O'Brien *v.* Reg., 3 Cox C. C. 360, 399.

Omnia solemniter esse acta see Wolley *v.* Brownhill, McClell. 317, 331, 13 Price 500.

6. Applied in: Stephens *v.* State, 53 N. J. L. 245, 250, 21 Atl. 1038; Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90, 98; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 479, 2 Am. Dec. 462; Fink's Appeal, 2 Kulp (Pa.) 122, 126; Coxe *v.* Deringer, 1 Wkly. Notes Cas. (Pa.) 397, 399; Reg. *v.* Ashburton, 8 Q. B. 871, 876, 55 E. C. L. 871; Reg. *v.* Broadhempston, 1 E. & E. 154, 161, 5 Jur. N. S. 267, 28 L. J. M. C. 18, 7 Wkly. Rep. 56, 102 E. C. L. 154; Reg. *v.* Excell, 20 Ont. 633, 637.

7. Applied in: Walton *v.* Greenwood, 60 Me. 356, 370; Smith *v.* Porter, 10 Gray (Mass.) 66, 68; Paulison *v.* Halsey, 38 N. J. L. 488, 494; State *v.* Morristown, 33 N. J. L. 57, 67; State *v.* Newark, 32 N. J. L. 453, 458; *In re* Plum Tp. Road, 2 Pittsb. (Pa.) 184, 186; Paul *v.* Slason, 22 Vt. 231, 237, 54 Am. Dec. 75; Lauderdale Peerage, 10 App. Cas. 692, 742; Crow *v.* Ramsey, T. Jones 10, 11; Le Messurier *v.* Carter, 3 Newfoundl. 300, 325.

Application limited in: Braden *v.* Hoffman, 46 Ohio St. 639, 642, 22 N. E. 930; Read *v.* Goodyear, 17 Serg. & R. (Pa.) 350, 351.

8. Doe *v.* Lindsay, Draper (U. C.) 123, 127.

9. Applied in: Oconto Co. *v.* Jerrard, 46 Wis. 317, 322, 50 N. W. 591; Leonard *v.* Lent, 43 Wis. 83, 86; MacDonald *v.* Abbott, 3 Can. Sup. Ct. 278, 294.

10. Applied in State *v.* Turner, 72 N. J. L. 404, 60 Atl. 1112.

fuisse;[11] by *rite esse acta*;[12] by *rite et solemniter acta*;[13] by *rite et solemniter esse acta*;[14] or by *solemniter esse acta*.[15] So too the maxim sometimes appears in these words: *Omnia rite*, followed — by *acta*;[16] by *acta esse præsumuntur*;[17] by *esse acta*;[18] by *esse acta præsumuntur*;[19] by *et solemniter acta præsumuntur*;[20]

Application limited in Winslow *v.* Dalling, 1 N. Brunsw. Eq. 608, 615.

11. Applied in Stewart *v.* Lees, 24 Grant Ch. (U. C.) 433, 435.

12. Applied in: Bethel *v.* Oxford County Com'rs, 60 Me. 535, 539; Kane *v.* State, 70 Md. 546, 551, 17 Atl. 557; Com. *v.* Kane, 108 Mass. 423, 425, 11 Am. Rep. 373; Shackford *v.* Newington, 46 N. H. 415, 420; Schomp *v.* Tompkins, 46 N. J. L. 608, 612; Plume *v.* Howard Sav. Inst., 46 N. J. L. 211, 230; Sheridan *v.* Langstaff, 45 N. J. L. 42, 45; Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 151, 32 N. E. 1066; New York *v.* Streeter, 91 N. Y. App. Div. 206, 213, 86 N. Y. Suppl. 665; Clute *v.* Emmerich, 21 Hun (N. Y.) 122, 128; French *v.* Willet, 4 Bosw. (N. Y.) 649, 652; Brennan *v.* Lowry, 4 Daly (N. Y.) 253, 255; Merritt *v.* Cornell, 1 E. D. Smith (N. Y.) 335, 337, 5 N. Y. Leg. Obs. 300; Divver *v.* Hall, 21 Misc. (N. Y.) 452, 454, 47 N. Y. Suppl. 630; Reilly *v.* Poerschke, 19 Misc. (N. Y.) 612, 614, 44 N. Y. Suppl. 422; Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 491, 33 N. Y. Suppl. 664; Rhodes *v.* Gunn, 35 Ohio St. 387, 395; Mink *v.* Shaffer, 124 Pa. St. 280, 291, 16 Atl. 805; Hershberger *v.* Pittsburg, 115 Pa. St. 78, 87, 8 Atl. 381; *In re* South Abington Tp. Road, 109 Pa. St. 118, 121; Dolan's Appeal, 108 Pa. St. 564, 566; Cuttle *v.* Brockway, 24 Pa. St. 145, 147; Mitton's Appeal, 2 Pennyp. (Pa.) 380, 381; Ripple *v.* Ripple, 1 Rawle (Pa.) 386, 389; Smith *v.* Higby, 2 Pa. Dist. 311, 315; Motter *v.* Welty, 2 Pa. Dist. 39; Close *v.* Lehigh, etc., Coal Co., 17 Phila. (Pa.) 642, 648; State Hospital for Insane *v.* Bellefonte Borough Overseers of Poor, 34 Wkly. Notes Cas. (Pa.) 509, 512; Fox *v.* Com., 1 Wkly. Notes Cas. (Pa.) 243, 244; Westminster *v.* Warren, 55 Vt. 522, 525; Durrett *v.* Davis, 24 Gratt. (Va.) 302, 311; Ramsey *v.* McCue, 21 Gratt. (Va.) 349, 353; Hull *v.* Hull, 26 W. Va. 1, 26; Bremner *v.* Hull, L. R. 1 C. P. 748, 759, Harr. & R. 800, 12 Jur. N. S. 648, 35 L. J. C. P. 332, 15 L. T. Rep. N. S. 352, 14 Wkly. Rep. 964; *In re* Peverett, [1902] P. 205, 207; Lyttleton *v.* Cross, 3 B. & C. 317, 327, 10 E. C. L. 150, 154; Reg. *v.* Davies, 8 Cox C. C. 486, L. & C. 64, 72, 30 L. J. M. C. 159, 4 L. T. Rep. N. S. 559, 9 Wkly. Rep. 711; Fanshaw *v.* Rotheram, 1 Eden 276, 284, 28 Eng. Reprint 691; Saroda Prosaud Mullick *v.* Luchmerput Sing Doogur, 14 Moore Indian App. 529, 541, 20 Eng. Reprint 883, 888; Hamilton *v.* Grant, 30 Can. Sup. Ct. 566, 573; Ashdown *v.* Manitoba Free Press Co., 20 Can. Sup. Ct. 43, 48; Megantic Election Case, 8 Can. Sup. Ct. 169, 190; Reg. *v.* The Ainoko, 4 Can. Exch. 195, 200; Reg. *v.* The Minnie, 4 Can. Exch. 151, 159; Credit Foncier Franco Canadien *v.* Schultz, 15 Can. L. T. Occ. Notes 76, 78; Palmatier *v.* McKibbon, 21 Ont. App. 441, 449; Hunter *v.* Vanstone, 7 Ont. App. 750, 755; Northwood *v.* Keating, 18 Grant Ch. (U. C.) 643, 670; McIntyre *v.* Atty.-Gen., 14 Grant Ch. (U. C.) 86, 89; Rogers *v.* Shortis, 10 Grant Ch. (U. C.) 243, 248; Baher *v.* Morgan, Hodg. El. Rep. (U. C.) 519, 521; Reg. *v.* Atkinson, 17 U. C. C. P. 295, 302, 303; Stebbins *v.* Anderson, 20 U. C. Q. B. 239, 241.

Application limited in: Kane *v.* State, 70 Md. 546, 552, 17 Atl. 557; Carron *v.* Martin, 26 N. J. L. 594, 600, 69 Am. Dec. 584; Graham *v.* Whitely, 26 N. J. L. 254, 262; Fell *v.* Philadelphia, 81 Pa. St. 58, 75; Reg. *v.* Mainwaring, 7 Cox C. C. 192, 195, Dears. & B. 132, 2 Jur. N. S. 1236, 26 L. J. M. C. 10, 5 Wkly. Rep. 119; Alloway *v.* Campbell, 7 Manitoba 506; Corbet *v.* McCracken, 18 N. Brunsw. 157, 159; Pickett *v.* Perkins, 12 N. Brunsw. 131, 137; Reg. *v.* Fee, 3 Ont. 107, 110; Walsh *v.* Montague, 1 Ont. El. Cas. 529, 567; *Re* Higgins, 19 Grant Ch. (U. C.) 303, 312.

13. Applied in Phipps *v.* Moore, 5 U. C. Q. B. 16, 28.

14. Applied in: Booth *v.* Booth, 7 Conn. 350, 368; Anthony *v.* Rice, 110 Mo. 223, 229, 19 S. W. 423; Lethbridge *v.* New York, 59 N. Y. Super. Ct. 486, 487, 15 N. Y. Suppl. 562; Felch *v.* Hodgman Mfg. Co., 62 Ohio St. 312, 317, 56 N. E. 1018; English *v.* English, 19 Pa. Super. Ct. 586, 595; Barton *v.* Pittsburgh, 3 Pittsb. (Pa.) 242, 251; Davidson *v.* Garrett, 5 Can. Cr. Cas. 200, 207; McDonald *v.* McDonald, 10 Nova Scotia 420, 423; Davidson *v.* Garrett, 30 Ont. 653, 660.

15. Applied in: Leach *v.* Smith, 25 Ark. 246, 257; Sanford *v.* Sanford, 28 Conn. 6, 16; Fowler *v.* Savage, 3 Conn. 90, 98; Nuckolls *v.* Irwin, 2 Nebr. 60, 68; Devereux *v.* McMahon, 102 N. C. 284, 287, 9 S. E. 635; Com. *v.* Sheriff, 7 Phila. (Pa.) 84, 85; Doe *v.* Lewis, 2 Ld. Ken. 320, 323; Lloyd *v.* Roberts, 12 Moore P. C. 158, 165, 14 Eng. Reprint 871.

16. Applied in: Brown *v.* Bocquin, 57 Ark. 97, 106, 20 S. W. 813; Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1, 19; Griffin *v.* Rising, 11 Metc. (Mass.) 339, 347; Waters *v.* School Dist. No. 4, 59 Mo. App. 580, 589; Doolittle *v.* Holton, 28 Vt. 819, 823, 67 Am. Dec. 745; Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648, 661; *In re* Fraser, 13 Nova Scotia 354, 365.

Application limited in Junkin *v.* Davis, 6 U. C. C. P. 408, 420.

17. Application limited in Fitzgerald *v.* Dressler, 5 C. B. N. S. 885, 895, 94 E. C. L. 885.

18. Applied in: Scott *v.* Bennett, L. R. 5 H. L. 234, 248, 20 Wkly. Rep. 686; *In re* Clarke, 9 Can. L. T. Occ. Notes 444, 445; Doe *v.* Betts, 1 Hasz. & W. (Pr. Edw. Isl.) 116, 123.

19. Applied in: Horner *v.* O'Laughlin, 29 Md. 465, 471; Crouch *v.* Smith, 1 Md. Ch. 401, 404; Ketline *v.* State, 59 N. J. L. 468, 471, 36 Atl. 1033.

20. Shaller *v.* Brand, 6 Binn. (Pa.) 435, 447, 6 Am. Dec. 482.

or as *omnia rite*, followed — by *fieri præsumuntur*;[21] or as *omnia rite*, followed — by *præsumuntur*.[22]

OMNIBUS. A very large kind of coach which serves to carry passengers, newspapers and furniture.[23] (Omnibus: Bill, see STATUTES. Count, see PLEADING. Legislation, see STATUTES. License of, see LICENSES; MUNICIPAL CORPORATIONS. See also CARRIAGE; COACH; and, generally, CARRIERS.)

OMNIBUS AD QUOS PRÆSENTES LITERÆ PERVENERINT, SALUTEM. A form of address with which charters and deeds were anciently commenced, meaning "To all to whom the present letters shall come, greeting."[24]

OMNIBUS BILL. See STATUTES.

OMNIBUS COUNT. See PLEADING.

OMNIBUS INFRA REGNUM ORANTIBUS LEGIS REMEDIUM PATET. A maxim meaning "The remedy of the law lies open to all within the kingdom who ask it."[25]

OMNI EXCEPTIONE MAJUS. Literally "Above all exception."[26]

OMNIS ACTIO EST LOQUELLA. A maxim meaning "Every action is a complaint."[27]

OMNIS CONCLUSIO BONI ET VERI JUDICII SEQUITUR EX BONIS ET VERIS PRÆMISSIS ET DICTIS JURATORUM. A maxim meaning "Every conclusion of a good and true judgment follows from good and true premises and the verdicts of jurors."[28]

OMNIS CONSENSUS TOLLIT ERROREM. A maxim meaning "Every consent removes error,"[29] or, "Consent always removes the effect of error."[30]

OMNIS CONTRACTUS TURPITUDINIS LEGIBUS INVISUS. A maxim meaning "Every dishonorable contract is odious to the laws."[31]

OMNIS DEFINITIO IN JURE PERICULOSA EST, PARUM EST ENIM UT NON SUBVERTI POSSIT. A maxim meaning "Every definition in law is dangerous, for there is but little that cannot be overthrown."[32]

OMNIS DEFINITIO IN LEGE PERICULOSA. A maxim meaning "All definition in law is hazardous."[33]

OMNIS EXCEPTIO EST IPSA QUOQUE REGULA. A maxim meaning "Every exception is itself also a rule."[34]

OMNIS INDEMNATUS PRO INNOXIO LEGIBUS HABETUR. A maxim meaning "Every uncondemned person is held by the law as innocent."[35]

OMNIS INNOVATIO PLUS NOVITATE PERTURBAT QUAM UTILITATE PRODEST. A maxim meaning "Every innovation disturbs more by its novelty than it benefits by its utility."[36]

21. Morris *v.* Ogden, L. R. 4 C. P. 687, 699, 38 L. J. C. P. 329, 20 L. T. Rep. N. S. 978, 17 Wkly. Rep. 1103.

22. Applied in: Polk *v.* Rose, 25 Md. 153, 162, 89 Am. Dec. 773; Mercer *v.* Watson, 1 Watts (Pa.) 330, 358.

Application limited in Huston *v.* Foster, 1 Watts (Pa.) 477, 478.

23. Cincinnati, etc., Tp. Co. *v.* Neil, 9 Ohio 11, 12.

The term may include street railroad cars (New York *v.* Third Ave. R. Co., 3 N. Y. St. 181, 184), of which it has been held that "they are omnibuses, or if not, they are vehicles in the nature of omnibuses" (Frankford, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 125, 98 Am. Dec. 242). "A city railroad," it has been said, "is a mere omnibus upon rails. Like an omnibus it stops everywhere along its route, to enable passengers to come in or go out." Hoyt *v.* Sixth Ave. R. Co., 1 Daly (N. Y.) 528, 530.

"Omnibus line, means a line of coaches for the carriage of passengers and their baggage." Parmelee *v.* McNulty, 19 Ill. 556, 558.

24. Black L. Dict.

25. Peloubet Leg. Max.

26. Black L. Dict.

Applied (in the plural form "— *majores*") in: State *v.* McClear, 11 Nev. 39, 50; Whelan *v.* Reg., 28 U. C. Q. B. 2, 70.

27. Morgan Leg. Max. [*citing* Coke Litt. 292*a*].

28. Black L. Dict. [*citing* Coke Litt. 226*b*].

29. Bouvier L. Dict.

30. Black L. Dict.

Applied in Coleman *v.* Moody, 4 Hen. & M. (Va.) 1, 22.

31. Peloubet Leg. Max.

32. Peloubet Leg. Max.

33. Black L. Dict.

Applied (in the abbreviated form "*Omnis definitio periculosa*") in Hall *v.* Ionia, 38 Mich. 493, 498.

34. Black L. Dict.

35. Peloubet Leg. Max.

36. Bouvier L. Dict.

OMNIS INTERPRETATIO SI FIERI POTEST ITA FIENDA EST IN INSTRUMENTIS, UT OMNES CONTRARIETATES AMOVEANTUR. A maxim meaning "Every interpretation, if it can be done, is to be so made in instruments that all contradictions may be removed." [37]

OMNIS INTERPRETATIO VEL DECLARAT, VEL EXTENDIT, VEL RESTRINGIT. A maxim meaning "Every interpretation either declares, extends, or restrains." [38]

OMNIS NOVA CONSTITUTIO FUTURIS TEMPORIBUS FORMAM IMPONERE DEBET, NON PRÆTERITIS. A maxim meaning "Every new statute should give a form to future times, not to past." [39]

OMNIS PERSONA EST HOMO, SED NON VICISSIM. A maxim meaning "Every person is a man, but not every man a person." [40]

OMNIS PRIVATIO PRÆSUPPONIT HABITUM. A maxim meaning "Every privation presupposes former enjoyment." [41]

OMNIS PROHIBITIO MANDATO EQUIPARATUR. A maxim meaning "Every prohibition is equivalent to a command." [42]

OMNIS QUERELA ET OMNIS ACTIO INJURIARUM LIMITATA EST INFRA CERTA TEMPORA. A maxim meaning "Every plaint and every action for injuries is limited within certain times." [43]

OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI ÆQUIPARATUR. A maxim meaning "Every subsequent ratification has a retrospective effect, and is equivalent to a prior command." [44]

Applied in: Edwards *v.* Tracy, 62 Pa. St. 374, 381; Foorde *v.* Hoskins, 2 Bulstr. 336, 338; Ashby *v.* White, 1 Salk. 19, 20.

37. Black L. Dict.

38. Black L. Dict.; Bouvier L. Dict.

39. Peloubet Leg. Max.

Applied in: Hough *v.* Windus, 12 Q. B. D. 224, 227, 53 L. J. Q. B. 165, 50 L. T. Rep. N. S. 312, 1 Morr. Bankr. Cas. 22, 32 Wkly. Rep. 452.

Explained as importing "that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights." Schmidt *v.* Ritz, 31 Can. Sup. Ct. 602, 605 note.

40. Black L. Dict.

41. Bouvier L. Dict.

Applied in Coke Litt. 339*b*.

42. Morgan Leg. Max.

43. Bouvier L. Dict.

"**Limita est**" is the form given in Coke Litt. 114*b*, and followed in Black L. Dict. and Peloubet Leg. Max.

44. Bouvier L. Dict.

Applied in: Thompson *v.* Stewart, 3 Conn. 171, 182, 8 Am. Dec. 168; Shurtleff *v.* Wiscasset, 74 Me. 130, 140; Mason *v.* York, etc., R. Co., 52 Me. 82, 113; Conrad *v.* Abbott, 132 Mass. 330, 331; Bless *v.* Jenkins, 129 Mo. 647, 658, 31 S. W. 938; Ahern *v.* Goodspeed, 72 N. Y. 108, 117; McSwegan *v.* Pennsylvania R. Co., 7 N. Y. App. Div. 301, 304, 40 N. Y. Suppl. 51 [*reversing* 16 Misc. 157, 37 N. Y. Suppl. 943, and denying the application of the doctrine to the case]; Lansing *v.* Caswell, 4 Paige (N. Y.) 519, 524; Livingston *v.* Gibbons, 5 Johns. Ch. (N. Y.) 250, 256; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 555, 55 S. E. 854, 9 L. R. A. N. S. 606; James *v.* Russell, 92 N. C. 194, 198; Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 438, 98 Am. Dec. 237; Stephens *v.* Cowan, 6 Watts (Pa.) 511, 515; Matter of Dauphin County Dist.-Atty., 11 Phila. (Pa.) 645, 649; Philadelphia *v.* Strawbridge, 4 Wkly. Notes Cas. (Pa.) 215; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637, 697; Kickland *v.* Menasha Wooden Ware Co., 68 Wis. 34, 40, 31 N. W. 471, 60 Am. Rep. 831; Kimball *v.* Rosendale, 42 Wis. 407, 414, 24 Am. Rep. 421; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 363, 5 L. ed. 631; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441; Brook *v.* Hook, L. R. 6 Exch. 89, 96, 40 L. J. Exch. 50, 24 L. T. Rep. N. S. 34, 19 Wkly. Rep. 508; Hull *v.* Pickersgill, 1 B. & B. 282, 286, 3 Moore C. P. 612, 21 Rev. Rep. 598, 5 E. C. L. 636; Maclean *v.* Dunn, 4 Bing. 722, 727, 6 L. J. C. P. O. S. 184, 1 M. & P. 761, 29 Rev. Rep. 714, 13 E. C. L. 710; Robinson *v.* Gleadow, 2 Bing. N. Cas. 156, 161, 1 Hodges 245, 249, 2 Scott 250, 29 E. C. L. 480, 483; Buron *v.* Denman, 2 Exch. 167, 188; Wolff *v.* Horncastle, 1 B. & P. 316, 323, 4 Rev. Rep. 808; Podger's Case, 9 Coke 104*a*, 106*a*, 77 Eng. Reprint 883; Ridgway *v.* Wharton, 6 H. L. Cas. 238, 296, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 Wkly. Rep. 804, 10 Eng. Reprint 1287; Sweeny *v.* Montreal Bank, 12 Can. Sup. Ct. 661, 667; Dalton *v.* Hamilton, 12 N. Brunsw. 422, 428; Union Bank *v.* Farnsworth, 19 Nova Scotia 82, 85; Dafoe *v.* Johnstown Dist. Mut. Ins. Co., 7 U. C. C. P. 55, 59; Coke Litt. 207*a*, 245*a*. For the application of this maxim see, generally, PRINCIPAL AND AGENT.

Application limited in: State *v.* Curtiss, 69 Conn. 86, 89, 36 Atl. 1014; Morse *v.* State, 6 Conn. 913; Fiske *v.* Holmes, 41 Me. 441, 444; Gwinn *v.* Simes, 61 Mo. 335, 338; Bick *v.* Seal, 45 Mo. App. 475, 480; Reeves *v.* Butcher, 31 N. J. L. 224, 227; Workman *v.* Wright, 33 Ohio St. 405, 407, 31 Am. Rep. 546; Schultz's Appeal, 2 Wkly. Notes Cas. (Pa.) 309, 311; McKenzie *v.* British Linen Co., 6 App. Cas. 82, 99, 44 L. T. Rep. N. S. 431, 29 Wkly. Rep. 477; Bird *v.* Brown, 4 Exch. 786, 798, 14 Jur. 132, 19 L. J. Exch.

OMNIS REGULA SUAS PATITUR EXCEPTIONES ET OMNIS EXCEPTIO EST REGULA. A maxim meaning "Every rule is subject to its own exceptions, and every exception is a rule."[45]

OMNIUM ALIARUM CORRIGERE INJURIAS ET ERRORES. A Latin phrase, which translated, means "To right the unjust acts and errors of all other [courts]."[46]

OMNIUM CONTRIBUTIONE SARCIATUR QUOD PRO OMNIBUS DATUM EST. A maxim meaning "What is given for all shall be compensated for by the contribution of all."[47]

OMNIUM RERUM QUARUM USUS EST, POTEST ESSE ABUSUS, VIRTUTE SOLO EXCEPTA. A maxim meaning "There may be an abuse of everything of which there is a use, virtue only excepted."[48]

ON or UPON.[49] Used to designate place, AT, *q. v.*; NEAR, *q. v.*; adjacent to;[50] on top of, resting upon, or contiguous to;[51] at or near, indicating situation, place or position;[52] expressing the relation of nearness in place, contiguous to, near, at;[53] conforming to, or, agreeing with;[54] bordering on;[55] not necessarily implying actual contact.[56] Used to denote or to designate the time at which anything hap-

154; Hutchings *v.* Nunes, 9 L. T. Rep. N. S. 125, 127, 1 Moore P. C. N. S. 243, 15 Eng. Reprint 692; Garr *v.* Fletcher, 2 Stark. 71, 3 E. C. L. 321; Merchants Bank *v.* Lucas, 13 Ont. 520, 542; Matthews *v.* Lloyd, 36 U. C. Q. B. 381, 389.

"Seu licentia" ("or license") is sometimes added to "*mandato.*" Lady Superior Cong. Nunnery *v.* McNamara, 3 Barb. Ch. (N. Y.) 375, 378, 49 Am. Dec. 184; Marsh *v.* Pier, 4 Rawle (Pa.) 273, 286, 26 Am. Dec. 131; Jenkins *v.* Plombe, 6 Mod. 92, 93.

Shorter forms are: *Omnis ratihibitio mandato aequiparatur.* State *v.* Hill, 50 Ark. 458, 466, 8 S. W. 401; Burroughs *v.* Bunnell, 70 Md. 18, 28, 16 Atl. 447; Levering *v.* Levering, 64 Md. 399, 412, 2 Atl. 1; National Mechanics' Bank *v.* Baltimore Nat. Bank, 36 Md. 5, 28; Baltimore *v.* Bouldin, 23 Md. 328, 374; Dukes *v.* Spangler, 35 Ohio St. 119, 126.

Omnis ratihabitio retrotrahitur. Johnson *v.* Smith, 21 Conn. 627, 635, 637; Jean *v.* Spurrier, 35 Md. 110, 114; Matter of Metzger, 1 Edm. Sel. Cas. (N. Y.) 399, 421, 5 N. Y. Leg. Obs. 83.

45. Peloubet Leg. Max.

46. Applied, in this sense, to describe the power of a court of highest jurisdiction, in Hunter *v.* Hernaman, 1 Newfoundl. 285, 294.

47. Bouvier L. Dict.

Applied in Brown *v.* Stapyleton, 4 Bing. 119, 121, 5 L. J. C. P. O. S. 121, 12 Moore C. P. 334, 29 Rev. Rep. 524, 13 E. C. L. 428.

48. Black L. Dict.

49. The two terms are interchangeable.—Webster Dict. [*cited* in Sutton *v.* Com., 85 Va. 128, 132, 7 S. E. 323].

50. Hempstead *v.* Des Moines, 52 Iowa 303, 305, 3 N. W. 123.

Does not mean "for."—Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 818, 14 C. C. A. 116.

51. London Assur. Corp. *v.* Thompson, 170 N. Y. 94, 102, 62 N. E. 1066.

"'On' does not always mean on top of, or resting upon, for sometimes, but less frequently, it means contiguous to. See London Assur. Corp. *v.* Thompson, 170 N. Y. 94, 102, 62 N. E. 1066; Jenney *v.* Brook, 6 Q. B. 323, 342, 8 Jur. 782, 13 L. J. Q. B. 376, 1 New Sess. Cas. 323, 51 E. C. L. 323.

"Over" and "upon" said to be synonymous see Milburn *v.* Cedar Rapids, 12 Iowa 246, 259 [*quoted* in Gear *v.* C. C. & D. R. Co., 43 Iowa 83, 84; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455, 472].

A railroad is "upon" the street that it crosses. People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, 97, 26 N. E. 25, 10 L. R. A. 728; Osborne *v.* Jersey City, etc., R. Co., 27 Hun (N. Y.) 589, 590; Matter of Syracuse, etc., R. Co., 33 Misc. (N. Y.) 510, 512, 68 N. Y. Suppl. 881; New York, etc., R. Co. *v.* Roll, 32 Misc. (N. Y.) 321, 326, 66 N. Y. Suppl. 748.

"On," "over," and "along" may be used synonymously, in the sense of directly "upon" and not "by the side of," as "on, over, and along" a certain alley. Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 N. W. 573.

52. Webster Dict. [*quoted* in Burnam *v.* Banks, 45 Mo. 349, 351].

53. Worcester Dict. [*quoted* in Burnam *v.* Banks, 45 Mo. 349, 351].

54. Century Dict. [*quoted* in Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 516, 32 So. 87, in construing the phrase "on the section line"].

55. Illinois Cent. R. Co. *v.* Baldwin, 77 Miss. 788, 28 So. 948.

In description of boundary see BOUNDARIES, 5 Cyc. 861.

"Upon" and "along" as synonymous see Ryan *v.* Preston, 32 Misc. (N. Y.) 92, 93, 66 N. Y. Suppl. 162.

"Along" distinguished in American Fisheries Co. *v.* Lennen, 118 Fed. 869, 873.

"Adjacent" or "along the side of" may be expressed, sufficiently for the purposes of a declaration, by the phrase "in and on," though such is not its meaning in the strictest sense of the words. Niblett *v.* Nashville, 12 Heisk. (Tenn.) 684, 686, 27 Am. Rep. 755.

56. Banks *v.* Highland St. R. Co., 136 Mass. 485, 486; Bevel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 546, 12 S. E. 532.

pens,[57] it may mean before, after, or simultaneously with, the fact to which it relates,[58] and often employed in the sense of AFTER,[59] *q. v.*, "contemporaneously with" or "shortly after,"[60] "as soon as,"[61] AT (*q. v.*) or "at the time of,"[62] "at the time of or after,"[63] or "when."[64] Used to connect the descriptions of two possible acts or facts, it may imply that the one to which it relates is a condition upon which the other depends,[65] or the contrary may be held;[66] and in a contract where one party promises to do a thing "on" or "upon" the performance of a given act by the other, it has been held, as a general rule, that the word, so used, imports mutually dependent covenants to do, respectively, the acts so connected in description,[67] but this rule does not hold against the intent of the parties themselves as

"Near to" (not necessarily "at" or "bounded by") is the meaning of "on" in the phrase "on the line of" a railroad, in a deed, describing land. Burnam *v.* Banks, 45 Mo. 349, 351.

"Over" may be its meaning when it relates to water; so, "on said river" applies to the location of a crime committed on a bridge over the river. Com. *v.* Shaw, 22 Pa. Co. Ct. 414, 416.

"Upon" a street "does not necessarily mean upon the common grade of the street." Arbenz *v.* Wheeling, etc., R. Co., 33 W. Va. 1, 9, 10 S. E. 14, 5 L. R. A. 371 [*cited* in Cleveland, etc., R. Co. *v.* Cincinnati, Ohio Prob. 269, 276].

In "upon, along, or off the Atlantic seaboard" in the construction of a contract not to fish in the waters so described, "'upon' and 'along' clearly refer to the waters adjacent to and easily reached from the coast line." American Fisheries Co. *v.* Lennen, 118 Fed. 869, 873.

57. Johnson Dict. [*cited* in Doe *v.* Smith, 1 B. & B. 97, 113, 5 E. C. L. 525].

58. *In re* Hofmann, 14 Wkly. Notes Cas. (Pa.) 563, 565; Reg. *v.* Arkwright, 12 Q. B. 960, 969, 13 Jur. 300, 18 L. J. Q. B. 26, 64 E. C. L. 959; Scott *v.* Parker, 1 Q. B. 809, 813, 1 G. & D. 258, 10 L. J. Q. B. 244, 41 E. C. L. 787; Paynter *v.* James, L. R. 2 C. P. 348, 385, 15 L. T. Rep. N. S. 660, 15 Wkly. Rep. 493; Reg. *v.* Humpherey, 10 A. & E. 335, 369, 37 E. C. L. 193.

Ambiguity of the word in denoting time see Gouldey's Estate, 11 Pa. Dist. 415, 18 Montg. Co. Rep. 216.

Not necessarily "immediately on" see Masters *v.* McHolland, 12 Kan. 17, 25.

59. Reg. *v.* Arkwright, 12 Q. B. 960, 969, 13 Jur. 300, 18 L. J. Q. B. 26, 64 E. C. L. 960; Scott *v.* Parker, 1 Q. B. 809, 813, 1 G. & D. 258, 10 L. J. Q. B. 244, 41 E. C. L. 787; Folkard *v.* Metropolitan R. Co., L. R. 8 C. P. 470, 473, 42 L. J. C. P. 162, 29 L. T. Rep. N. S. 101, 21 Wkly. Rep. 736.

60. Robertson *v.* Robertson, 8 P. D. 94, 96, 48 L. T. Rep. N. S. 590, 31 Wkly. Rep. 652; Bradley *v.* Bradley, 3 P. D. 47, 50, 47 L. J. P. D. & Adm. 53, 39 L. T. Rep. N. S. 203, 26 Wkly. Rep. 831.

61. Smith *v.* Nesbitt, 2 C. B. 286, 287, 15 L. J. C. P. 9, 52 E. C. L. 286.

62. As in the phrases, "on the death" (Cromwell *v.* Cromwell, 55 N. Y. App. Div. 103, 105, 66 N. Y. Suppl. 1063; *In re* Melcher, 24 R. I. 575, 578, 54 Atl. 379); "on the expiration of said lease" (Reed *v.* Snowhill, 51 N. J. L. 162, 164, 16 Atl. 679); "on or before it shall expire" (Sheerer *v.* Manhattan L. Ins. Co., 16 Fed. 720, 723). "Upon her decease" means "when she comes to die." Weed *v.* Knorr, 77 Ga. 636, 646, 1 S. E. 167. In a provision that an alderman shall do a certain thing within a month before, or "upon," his admission to office, "upon" does not extend to a reasonable time after, but means "at the time of." Reg. *v.* Humpherey, 10 A. & E. 335, 368, 369, 37 E. C. L. 193.

63. Lee *v.* Cook, 1 Wyo. 413, 419.

64. Hooker *v.* Bryan, 140 N. C. 402, 404, 53 S. E. 130; Womrath *v.* McCormick, 51 Pa. St. 504, 507.

65. Little *v.* Wilcox, 119 Pa. St. 439, 447, 13 Atl. 468, as of a trust declared "upon" performance of continuing covenants.

"In case of."— So construed, in a provision by will, to take effect "upon the death" of either of testator's children leaving issue. Conrow's Appeal, (Pa. 1886) 3 Atl. 13, 14.

"For" has been said to be synonymous with "on" or nearly so, where, connecting the descriptions of two possible facts, it may be taken to imply that the one must come into existence, if ever, at the same time as the other, as in the phrase "power of reentry, 'for' non-payment of rent." Doe *v.* Smith, 1 B. & B. 97, 113, 5 E. C. L. 525.

Held to introduce a condition precedent, where it was ordered that a thing might be done "on payment of costs." Sloan *v.* Somers, 18 N. J. L. 46, 48, 35 Am. Dec. 526; Sands *v.* McClelan, 6 Cow. (N. Y.) 582. *Contra*, Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 243, 20 Am. Dec. 255.

66. As where it was ordered that a nonsuit be entered "upon payment of costs" and held that the order was not conditional, that the effect of the phrase was merely "to impose an obligation upon the plaintiff to pay the costs occasioned by his default," the breach of which obligation might be actionable (Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 243, 20 Am. Dec. 255); or where, in a promissory note, the phrase "on the return of this receipt" followed the promise to pay (Frank *v.* Wessels, 64 N. Y. 155, 158); or in construing an agreement that, after adjustment of an account, six months' credit be given the defendant, "on . . paying interest on the amount" (Dodd *v.* Ponsford, 6 C. B. N. S. 324, 333, 95 E. C. L. 324).

67. Courtwright *v.* Deeds, 37 Iowa 503, 508; West *v.* Emmons, 5 Johns. (N. Y.) 179,

gathered from a consideration of all the terms of the contract.[68] Sometimes the words are used as denoting "in reference or relative to";[69] or "secured by the pledge of."[70] "On" and "upon" have been employed as parts of many phrases, which have received judicial interpretation; for example see the following: "On account of;"[71] "on a certain day;"[72] "on advances;"[73] "on a journey;"[74] "on all or either;"[75] "on and from;"[76] "on an equal footing with the original States;"[77] "on a passage;"[78] "on application for Canadian register;"[79] "on approval;"[80] "on arrival;"[81] "on a voyage;"[82] "on behalf of;"[83]

180; Halloway *v.* Davis, Wright (Ohio) 129; Powell *v.* Dayton, etc., R. Co., 14 Oreg. 356, 359, 2 Pac. 665; Paynter *v.* James, L. R. 2 C. P. 348, 353, 15 L. T. Rep. N. S. 660, 15 Wkly. Rep. 493. But *compare* cases cited *infra*, note 68.

68. Champion *v.* White, 5 Cow. (N. Y.) 509, 510; Adams *v.* Williams, 2 Watts & S. (Pa.) 227, 228.

For dependent or independent covenants see 11 Cyc. 1053.

69. Webster Dict. [*quoted* in Smith *v.* Molleson, 74 Hun (N. Y.) 606, 610, 26 N. Y. Suppl. 653].

70. Selden *v.* Equitable Trust Co., 94 U. S. 419, 421, 24 L. ed. 249, as in the phrase "On stocks, bonds, bullion, bills of exchange, or promissory notes."

71. See ON ACCOUNT OF.

72. See 13 Cyc. 262 note 2.

73. British American Assur. Co. *v.* Law, 21 Can. Sup. Ct. 325, 327, 329.

74. Carr *v.* State, 34 Ark. 448, 449, 36 Am. Rep. 15. See also JOURNEY, 23 Cyc. 497.

75. Com. *v.* Hide, etc., Ins. Co., 112 Mass. 136, 141, 17 Am. Rep. 72.

76. "On and from."— In this phrase, connecting with a given date the statement that a railroad ticket, on which it occurs, is "good for one continuous passage," the word "on" signifies that such ticket is good for passage on the day named, and "from" covers the whole time to be consumed in the trip (Texas, etc., R. Co. *v.* Powell, 13 Tex. Civ. App. 212, 213, 35 S. W. 841), and the passage authorized by such ticket must begin on the day named (Demilley *v.* Texas, etc., R. Co., 91 Tex. 215, 216, 42 S. W. 540; Texas, etc., R. Co. *v.* Demilley, (Tex. Civ. App. 1897) 41 S. W. 147, 148; Texas, etc., R. Co. *v.* Powell, 13 Tex. Civ. App. 212, 213, 35 S. W. 841).

77. Boyd *v.* Nebraska, 143 U. S. 135, 170, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* on the point of citizenship State *v.* Boyd, 31 Nebr. 682, 725, 48 N. W. 739, 51 N. W. 602]. See also CITIZENS, 7 Cyc. 143 note 34.

78. "On a passage" is a phrase applied in marine insurance to a vessel, and equivalent to "at sea" or "not having arrived at her port of destination" (Washington Ins. Co. *v.* White, 103 Mass. 238, 241, 4 Am. Rep. 543; Wales *v.* China Mut. Ins. Co., 8 Allen (Mass.) 380, 383. See also MARINE INSURANCE, 26 Cyc. 596), "on a voyage" (Wales *v.* China Mut. Ins. Co., 8 Allen (Mass.) 380, 383).

A vessel is on a passage after she has left her port of lading, fully prepared to proceed to her port of destination, and with a real intent to do so, although she comes to anchor again on account of bad winds, and the intention of proceeding as soon as wind and weather will permit is not relinquished. Bowen *v.* Hope Ins. Co., 20 Pick. (Mass.) 275, 279, 32 Am. Dec. 213.

On the same voyage, used to qualify the description of causes of loss, in a statute limiting the liability of ship-owners for such loss, this phrase is intended to confine the participation, in the apportionment therein authorized, to the freighters for a single voyage, and not to permit the ship-owners to bring into the compensation losses sustained on prior or other voyages. Wright *v.* Norwich, etc., Transp. Co., 30 Fed. Cas. No. 18,087, 8 Blatchf. 14, 23.

79. Algoma Cent. R. Co. *v.* Rex, [1903] A. C. 478, 481, 9 Aspin. 431, 72 L. J. P. C. 108, 89 L. T. Rep. N. S. 109.

80. Smith *v.* Claws, 114 N. Y. 190, 196, 21 N. E. 160, 11 Am. St. Rep. 627, 4 L. R. A. 392.

81. "On arrival" is a phrase which, when qualifying an order to a factor to sell, is to be taken in its literal meaning and authorizes no delay. So held, even though an immediate sale must be below market price, in Evans *v.* Root, 7 N. Y. 186, 189, 57 Am. Dec. 512. But see Burnard *v.* Voss, 8 Ohio Dec. (Reprint) 221, 6 Cinc. L. Bul. 339.

"On arrival . . . to be delivered . . . with all convenient speed, but not to exceed" a given day does not warrant the arrival of goods in question in time for delivery on such day, but means that in case of failure to arrive in such time the buyer need not accept them. Alewyn *v.* Pryor, R. & M. 406, 27 Rev. Rep. 763, 21 E. C. L. 781.

82. See *supra*, note 78.

83. "On behalf of" is a phrase which, when connecting the name of a person, described as acting in a contract, with that of another, raises the question which of the two is a principal in the contract, the conclusion depending upon the circumstances of the case. Lewis *v.* Nicholson, 18 Q. B. 503, 16 Jur. 1041, 21 L. J. Q. B. 311, 83 E. C. L. 503; Downman *v.* Williams, 7 Q. B. 103, 9 Jur. 454, 14 L. J. Q. B. 226, 53 E. C. L. 103; Lucas *v.* Beale, 10 C. B. 739, 20 L. J. C. P. 134, 70 E. C. L. 739; Cooke *v.* Wilson, 1 C. B. N. S. 153, 2 Jur. N. S. 1094, 26 L. J. C. P. 15, 5 Wkly. Rep. 24, 87 E. C. L. 153.

Prima facie presumption that subscriber is principal.— Watson *v.* Murrel, 1 C. & P. 307, 28 Rev. Rep. 779, 12 E. C. L. 184; Cooke *v.* Wilson, 1 C. B. N. S. 153, 162, 164, 2 Jur. N. S. 1094, 26 L. J. C. P. 15, 5 Wkly. Rep. 24, 87 E. C. L. 153 [*distinguishing* Downman

"on board;"[84] "on both sides of its road;"[85] "on call;"[86] "on condition;"[87] "on contract;"[88] "on demand;"[89] "on demand after date;"[90] "on deposit;"[91] "on each entry;"[92] "on each side of such road;"[93] "on expense;"[94] "on failure of issue;"[95] "on file;"[96] "on foot;"[97] "on freight;"[98] "on hand;"[99] "on her own account;"[1] "on her own responsibility;"[2] "on, in, or about;"[3] "upon its face;"[4] "on moderate terms;"[5] "on or about;"[6] "on or before;"[7] "on purpose;"[8] "on reasonable request;"[9] "on shares;"[10] "on shore;"[11] "on store;"[12] "on

v. Williams, 7 Q. B. 103, 109, 9 Jur. 454, 14 L. J. Q. B. 226, 53 E. C. L. 103]; Hall *v.* Ashurst, 3 Tyrw. 420.

Test of intent.— "There is no doubt that a person, acting for and on behalf of another, may contract in such terms as to bind himself personally. In each case the question is whether the intention that he should do so appears. One test is, to see who is by the provisions of the contract to act in the performance of it." Tanner *v.* Christian, 4 E. & B. 591, 597, 1 Jur. N. S. 519, 24 L. J. Q. B. 91, 3 Wkly. Rep. 204, 82 E. C. L. 591.

84. Moore *v.* Michigan Cent. R. Co., 3 Mich. 23, 35, where it is said that as applied to delivery of goods for shipping, the words mean on some vessel or vehicle suitable for the transportation of such goods to their agreed destination. See also F. Q. B., 19 Cyc. 1082.

Does not apply to marine "freight," which is money earned or to be earned, and so was held to have no effect in a policy of marine insurance on "freight on board." Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143, 146.

"To be taken on board" as a stipulation concerning shipment of goods means by the use of the word "taken," as distinguished from "put," that whatever care is to be taken to ship the goods safely and securely was understood and intended to be taken by, and at the expense of, those parties to the contract who have control of the vessel. Cooke *v.* Wilson, 1 C. B. N. S. 153, 163, 2 Jur. N. S. 1094, 26 L. J. C. P. 15, 5 Wkly. Rep. 24, 87 E. C. L. 153.

85. People *v.* Ohio, etc., R. Co., 21 Ill. App. 23, 27.

86. "On call" means "on demand" (Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 598, 4 So. 346; Meador *v.* Dollar Sav. Bank, 56 Ga. 605, 608; Territory *v.* Hopkins, 9 Okla. 133, 153, 59 Pac. 976; Bowman *v.* McChesney, 22 Gratt. (Va.) 609, 612); "when demanded" (Territory *v.* Hopkins, 9 Okla. 133, 153, 59 Pac. 976; Bowman *v.* McChesney, 22 Gratt. (Va.) 609, 612); "at any time called for" (Bowman *v.* McChesney, 22 Gratt. (Va.) 609, 612).

87. See CONDITION, 8 Cyc. 555.

88. Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 464, 59 Atl. 499, where it is said that this phrase has been shown by testimony to have, as used in the business of furnishing printers' supplies, "a well-defined meaning . . . always denoting a conditional lease or sale."

89. See ON DEMAND, *post*, p. 1488.

90. See ON DEMAND, *post*, p. 1488.

91. See ON DEPOSIT, *post*, p. 1489.

92. Ullman *v.* Murphy, 24 Fed. Cas. No. 14,325, 11 Blatchf. 354, 359.

93. Gould *v.* Great Northern R. Co., 63 Minn. 37, 39, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590.

94. On expense when applied to a person and connected, as by "of" or "in," with the name of a town, a term which imports that such person is a pauper. Bethlehem *v.* Watertown, 51 Conn. 490, 492; Hamden *v.* Bethany, 43 Conn. 212; Middletown *v.* Berlin, 18 Conn. 189. See, generally, PAUPERS. See also EXPENSE.

95. See WILLS.

96. Snider *v.* Methvin, 60 Tex. 487, 494. See FILE, 19 Cyc. 528; FILED, 19 Cyc. 529.

Construed "to mean deposited, as distinguished from a technical filing," with the remark that such use was inaccurate, when applied in a will to a document for filing which there was no statutory provision. Slosson *v.* Hall, 17 Minn. 95.

97. See Byous *v.* Mount, 89 Tenn. 361, 363, 17 S. W. 1037, where the term, as applied to live stock, was said to mean "not slaughtered."

98. Dawson *v.* Kittle, 4 Hill (N. Y.) 107, 108, where it is said that the term describing a delivery of merchandise, and unexplained, imports a bailment merely, and not a sale.

But evidence to show a peculiar meaning, by usage, is admissible. Outwater *v.* Nelson, 20 Barb. (N. Y.) 29, 31; Dawson *v.* Kittle, 4 Hill (N. Y.) 107, 108.

99. See ON HAND, *post*, p. 1491.

1. Manton *v.* Tyler, 4 Mont. 364, 366, 1 Pac. 743, where it is said to be a statutory phrase descriptive of a married woman's separate business.

2. Sherman *v.* Sherman, 36 N. J. Eq. 125, 126, where these words are said to mean "without giving security."

3. St. 60 & 61 Vict. c. 37, § 7, (1). See also Lowth *v.* Ibbotson, [1899] 1 Q. B. 1003, 68 L. J. Q. B. 465, 80 L. T. Rep. N. S. 341, 47 Wkly. Rep. 506.

4. See Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 607, 21 S. W. 629.

5. Ashcroft *v.* Morrin, 4 M. & G. 450, 451, 43 E. C. L. 236.

6. See ON OR ABOUT, *post*, p. 1492.

7. See ON OR BEFORE, *post*, p. 1492.

8. As meaning "intentionally, not accidentally" see State *v.* Tate, 156 Mo. 119, 124, 56 S. W. 1099; State *v.* Musick, 101 Mo. 260, 267, 14 S. W. 212.

9. Illinois Land, etc., Co. *v.* Beem, 2 Ill. App. 390, 392, 393.

10. See ON SHARES, *post*, p. 1493.

11. Rex *v.* Brady, 1 B. & P. 187, 188, meaning "on land" in contradistinction to "on board a ship."

12. See ON STORE, *post*, p. 1493.

the bank, margin or neighborhood of any stream;"[13] "on the boundary;"[14] "on the door;"[15] "on the lakes or rivers;"[16] "on the line of;"[17] "on the merits;"[18] "on the part of;"[19] "on the premises;"[20] "on the report and samples;"[21] "on the same street;"[22] "on the section line;"[23] "on the track;"[24] "on trial."[25]

ON ACCOUNT OF. Because of;[26] by reason of;[27] toward payment of;[28] out of;[29] for, denoting interest or ownership.[30]

ONCE. For one time; at some one period of time.[31]

ONCE IN JEOPARDY. See CRIMINAL LAW.

ON DEMAND. When demanded.[32] This phrase, when applied to payment,

13. Coffin *v.* Left Hand Ditch Co., 6 Colo. 443, 450, in a statute providing for irrigation.

14. Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 347, 23 L. ed. 428.

15. Hoskins *v.* Iowa Land Co., 121 Iowa 299, 300, 96 N. W. 977.

16. St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302, 308, applied to loss or damage to merchandise in the hands of a common carrier, as meaning "occurring in the navigation of the lakes or rivers."

17. See ON THE LINE OF, *post*, p. 1493.

18. See MERITS, 27 Cyc. 483.

19. See ON THE PART OF, *post*, p. 1493.

20. "On the premises" is a term which usually denotes actual presence. Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 542, 12 Pac. 530; Brooke *v.* Warwick, 2 De G. & Sm. 425, 12 Jur. 912, 64 Eng. Reprint 191. *Compare* Rockland First Cong. Church *v.* Holyoke F. Ins. Co., 158 Mass. 475, 479, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587.

Temporary absence.— However, when such presence has become established, an absence merely temporary and for ordinary purposes does not destroy their applicability. Mills *v.* Farmers' Ins. Co., 37 Iowa 400, 402 [*distinguished* in Lakings *v.* Phœnix Ins. Co., 94 Iowa 476, 62 N. W. 783, 28 L. R. A. 70, where a different result was reached from a policy reading "confined to premises," etc.]. *Compare* Brooke *v.* Warwick, 2 De G. & Sm. 425, 12 Jur. 912, 64 Eng. Reprint 191, for meaning of "in, upon, or about" premises.

21. Russell *v.* Nicolopulo, 8 C. B. N. S. 362, 363, 2 L. T. Rep. N. S. 185, 8 Wkly. Rep. 415, 98 E. C. L. 362.

22. **"On the same street,"** as used in a statute prohibiting the sale of intoxicating liquors in a building on the same street within four hundred feet of a building occupied by a public school, means on a street from which each of the buildings in question has an entrance. Com. *v.* Heaganey, 137 Mass. 574, 575; Com. *v.* Jenkins, 137 Mass. 572, 573. See also Com. *v.* McDonald, 160 Mass. 528, 530, 36 N. E. 483; Com. *v.* Whelan, 134 Mass. 206.

23. See ON THE LINE OF, *post*, p. 1493.

24. East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429, 434, 54 Am. Rep. 69.

A locomotive is not on a railroad track, within the meaning of an act contemplating danger from an engine or train as a body in motion, when it is standing for the purpose of repair in a pit in the round house. Perry *v.* Old Colony R. Co., 164 Mass. 296, 301, 41 N. E. 289, where it is said: "The case would be different, perhaps, if it had been standing on a track, waiting to be coupled to a train, or for some temporary purpose."

25. See ON TRIAL, *post*, p. 1493.

26. Century Dict. [*cited* in Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 461, 34 Atl. 335].

"On account of color" is a phrase applied to mark discrimination between the black and white races. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

27. Century Dict. [*cited* in Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 461, 34 Atl. 335]; Dunbar *v.* Montreal River Lumber Co., 127 Wis. 130, 132, 106 N. W. 389.

28. As "account of freight." Hall *v.* Janson, 4 E. & B. 500, 507, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500; Wilson *v.* Martin, 11 Exch. 684, 695, 25 L. J. Exch. 217.

29. As "on account of" a particular fund or debt. Rice *v.* Porter, 16 N. J. L. 440, 445; Banbury *v.* Lisset, Str. 1211.

30. As in a policy of insurance "on account of ——" (Burrows *v.* Turner, 24 Wend. (N. Y.) 276, 279, 35 Am. Dec. 622); or in a commission-merchant's receipt for goods "on account of" a given person (McKinstry *v.* Pearsall, 3 Johns. (N. Y.) 319, 320); or in a policy of insurance "on account of whom it may concern" (Hooper *v.* Robinson, 98 U. S. 528, 532, 25 L. ed. 219).

Does not always denote absolute interest or ownership see Pearl *v.* Clark, 2 Pa. St. 350, 354.

31. Webster Int. Dict.

"Once a mortgage, always a mortgage" see MORTGAGES, 27 Cyc. 974.

"Once a thief, always a thief" see St. Louis *v.* Roche, 128 Mo. 541, 548, 31 S. W. 915 [*quoting* St. Louis *v.* Fitz, 53 Mo. 582, which it overrules in a different connection].

"Once in a week" means once at any time within the week. Ratliff *v.* Magee, 165 Mo. 461, 466, 65 S. W. 713.

"Once in a while."— A provision by will to the effect that flowers were so to be placed on certain graves was held "so uncertain in its terms as not even to amount to a precatory trust." Angus *v.* Noble, 73 Conn. 56, 67, 46 Atl. 278.

"Once in every six months" means at times not more than six months apart. Virginia, etc., Nav. Co. *v.* U. S., 28 Fed. Cas. No. 16,973, Taney 418.

Once in jeopardy see CRIMINAL LAW.

32. Young *v.* Weston, 39 Me. 492, 495;

usually denotes a debt already due and actionable;[33] but may be used to signify that demand is a condition precedent to the right to payment.[34] (See DEMAND; ON CALL.)

ON DEPOSIT. As applied to money, placed where the owner can command it at any time.[35] This phrase, when it qualifies an acknowledgment of money received, imports a contract, as part of which the law implies that, on reasonable demand, the depositor is entitled to receive back that which belongs to him.[36] (See DEPOSIT.)

ONE. As an adjective, being a single unit, or entire being or thing, and no more,[37] and does not apply to an undivided half of two.[38] As a noun, a single person or thing.[39] The phrases in which "one" is used have often received judicial interpretation, as for example the following: "After one year from date;"[40] "one building risk;"[41] "one carriage;"[42] "one continuous emigrant passage;"[43] "one class or kind of business;"[44] "one day additional for every

Bowman *v.* McChesney, 22 Gratt. (Va.) 609, 642; Kingsbury *v.* Butler, 4 Vt. 458, 460.

Equivalent to "on call" or "at any time called for," as applied to payment of an obligation. Bowman *v.* McChesney, 22 Gratt. (Va.) 609, 612.

33. Howland *v.* Edmonds, 24 N. Y. 307, 309 [*quoted* in Brown *v.* Brown, 28 Minn. 501, 11 N. W. 64]. See also COMMERCIAL PAPER, 7 Cyc. 848–851.

"The rule ought not to be extended to cases which do not fall precisely within it." Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297, 300.

"On demand after date" has been diversely defined (Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 429, 39 Atl. 650), as equivalent to "on demand," rendering a note so payable immediately due (Hitchings *v.* Edmonds, 132 Mass. 338, 339), or "on demand after date" precluding a demand on that day (Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 430, 39 Atl. 650; Crim *v.* Starkweather, 88 N. Y. 339, 342, 42 Am. Rep. 250).

34. So in a contract whereby it appears that such is the intention of the parties. Portner *v.* Wilfahrt, 85 Minn. 73, 75, 88 N. W. 418; Horton *v.* Seymour, 82 Minn. 535, 541, 85 N. W. 551; Branch *v.* Dawson, 33 Minn. 399, 400, 23 N. W. 552; Brown *v.* Brown, 28 Minn. 501, 11 N. W. 64.

Deposits, being payable on demand, are not actionable until demand is made. See ON DEPOSIT.

For cases in which actual demand has been held a prerequisite to maturity of negotiable instruments see COMMERCIAL PAPER, 7 Cyc. 847–851.

In a condition of discharge of a mortgage, "if on demand there shall be paid," etc., refers to "payment by the mortgagor upon a demand made upon him, rather than payment by a stranger to the deed with or without a demand." Popple *v.* Day, 123 Mass. 520, 522.

An agreement to furnish coal "on demand," the daily demand not to exceed a certain quantity, does not require such demand to be made daily, it "may be made for the future." Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 191, 33 N. W. 622.

35. Curtis *v.* Leavitt, 15 N. Y. 9, 265 [*quoted* in Long *v.* Straus, 107 Ind. 94, 97, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87].

36. Long *v.* Straus, 107 Ind. 94, 95, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

That which is on deposit is not due in the sense of affording a cause of action until demand is made. Smiley *v.* Fry, 100 N. Y. 262, 265, 3 N. E. 186; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580, 587; Boughton *v.* Flint, 74 N. Y. 476, 482; Howell *v.* Adams, 68 N. Y. 314, 321; Payne *v.* Gardiner, 29 N. Y. 146, 152; Barnes *v.* Arnold, 45 N. Y. App. Div. 314, 322, 61 N. Y. Suppl. 85 [*affirming* 23 Misc. 197, 51 N. Y. Suppl. 1109]; Dorman *v.* Gannon, 4 N. Y. App. Div. 458, 38 N. Y. Suppl. 659; Wiltsie *v.* Wiltsie, 12 N. Y. St. 144, 6 Dem. Surr. 255.

A bank deposit was held to constitute "debts payable within two years," within the meaning of a statute limiting, to debts so payable, the liability of stock-holders for debts due to the company. Barnes *v.* Arnold, 45 N. Y. App. Div. 314, 322, 61 N. Y. Suppl. 85 [*affirming* 23 Misc. 197, 51 N. Y. Suppl. 1109].

Supposed, in a particular case, to have been used to preclude interest see Wright *v.* Paine, 62 Ala. 340, 344, 34 Am. Rep. 24.

37. Webster Int. Dict.

Applied to a thing bequeathed it may be specific, describing a certain definite thing or an indefinite one. Everitt *v.* Lane, 37 N. C. 548, 551.

38. Kirksey *v.* Rowe, 114 Ga. 892, 893, 40 S. E. 990, 88 Am. St. Rep. 65; Ward *v.* Huhn, 16 Minn. 159.

39. Webster Int. Dict.

40. Vorwerk *v.* Nodte, (Cal. 1890) 24 Pac. 840, as fixing the time of performance, in a contract to deliver a deed means on the same day of the same month of the next year.

41. **"One building or risk"** in an insurance policy see German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 469, 472, 473, 11 So. 117, 16 L. R. A. 291.

42. **"One carriage"** in a will see Everitt *v.* Lane, 37 N. C. 548, 551.

43. **"One continuous emigrant passage"** see Cody *v.* Central Pac. R. Co., 5 Fed. Cas. No. 2,940, 4 Sawy. 114, 118.

44. **"One class or kind of business"** as used in a statute limiting the powers of for-

twenty-four miles' travel;"[45] "one day after;"[46] "one day's service;"[47] "one divided fourth;"[48] "one foot high;"[49] "one full year;"[50] "one general contract;"[51] "one half-penny per pound upon all lands liable to assessment;"[52] "one-horse cart;"[53] "one-horse wagon;"[54] "one league square;"[55] "one lot;"[56] "one pair of working cattle;"[57] "one place in each county;"[58] "one shall not do indirectly, what he has no right to do directly;"[59] "one sitting;"[60] "one taking;"[61] "one third new for old;"[62] "one third of the capital sum or balance then remaining;"[63] "one thousand;"[64] "one time;"[65] "one town or city lot;"[66] "one voyage only;"[67] "one whole year;"[68] "one whole year at the least;"[69] "one year;"[70] "one year, and an indefinite period thereafter;"[71] "one year's provisions;"[72] "one year's rent;"[73] "one or more years."[74]

ONEROUS. Burdensome; oppressive.[75] (Onerous: Contract, see CONTRACTS.)

ONEROUS CONTRACT. See CONTRACTS.

eign insurance companies within the commonwealth see Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 406, 410, 29 N. E. 529.

45. "One day additional for every twenty-four miles travel" see Stewart *v.* Griswold, 134 Mass. 391, 392.

46. "One day after" as equivalent to "one day after date" see White *v.* Word, 22 Ala. 442, 445.

47. "One day's service" of copy of special venire facias see Speer *v.* State, 2 Tex. App. 246, 253.

48. "One divided fourth" see Ford *v.* Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561.

49. "One foot high" see Barton *v.* McKelway, 22 N. J. L. 165, 174.

50. "One full year" see FULL, 20 Cyc. 855 note 87.

51. See MECHANICS' LIENS, 27 Cyc. 129 note 99.

52. Hawkins *v.* United Counties, etc., Municipal Council, 2 U. C. C. P. 72, 85.

53. "One-horse cart" distinguished from a one-horse pleasure wagon for toll purposes see Pardee *v.* Blanchard, 19 Johns. (N. Y.) 442, 444.

54. "One-horse wagon" see Kirksey *v.* Rowe, 114 Ga. 893, 895, 40 S. E. 990, 88 Am. St. Rep. 65.

55. "One league square" used in the description of land refers only to contents and not to shape. Muse *v.* Arlington Hotel Co., 68 Fed. 637, 643.

"One square league" as a descriptive term suggests no boundary. Muse *v.* Arlington Hotel Co., 68 Fed. 637, 643.

56. "One lot" see Ward *v.* Huhn, 16 Minn. 159. See also LOT.

57. "One pair of working cattle" as exempt from attachment see Bowzey *v.* Newbegin, 48 Me. 410.

58. "One place in each county" for holding courts see Lytle *v.* Halff, 75 Tex. 128, 136, 12 S. W. 610.

59. Applied in Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 494.

60. "One time or sitting" in gaming is a course of play, where the company never parts. Bones *v.* Booth, W. Bl. 1226, 1227 [*quoted* in Trumbo *v.* Finley, 18 S. C. 305, 311].

61. "One taking" in larceny see State *v.* Newton, 42 Vt. 537, 539.

62. "One third new for old" see MARINE INSURANCE, 26 Cyc. 676.

63. As one third of the whole residue see Forsyth *v.* Forsyth, 46 N. J. Eq. 400, 406, 407, 19 Atl. 119.

64. See ONE THOUSAND.

65. "One time" in gaming implies the losing of a sum at one time by a single stake or bet. Bones *v.* Booth, W. Bl. 1226, 1227 [*quoted* in Trumbo *v.* Finley, 18 S. C. 305, 311].

66. "One town or city lot" as a homestead see Wassell *v.* Tunnah, 25 Ark. 101, 104. See also HOMESTEADS, 21 Cyc. 448.

67. "One voyage only" in a ship's license see Everth *v.* Tunno, 1 B. & Ald. 142, 145.

68. Rex *v.* Sandhurst, 7 B. & C. 557, 561, 14 E. C. L. 251; Rex *v.* Herstmonceaux, 7 B. & C. 551, 6 L. J. M. C. O. S. 35, 1 M. & R. 426, 14 E. C. L. 249.

69. Reg. *v.* St. Mary's Parish, 1 E. & B. 816, 828, 17 Jur. 551, 22 L. J. M. C. 109, 72 E. C. L. 816, as meaning a calendar year.

70. Shaffer *v.* Sutton, 5 Binn. (Pa.) 228, 230, as not excluding the idea of a lesser term. See also Notman *v.* Anchor Assur. Co., 4 C. B. N. S. 476, 481, 4 Jur. N. S. 712, 27 L. J. C. P. 275, 6 Wkly. Rep. 688, 93 E. C. L. 476.

71. Pugsley *v.* Aikin, 11 N. Y. 494, 496, as a term of lease.

72. Everitt *v.* Lane, 37 N. C. 548, 551.

73. "One year's rent," as a statement of the limit of a landlord's lien and distress upon goods, refers to the amount, being a definite portion of the rent arising under the tenancy during the term and not the specific rent of any particular year or period of time. Wades *v.* Figgatt, 75 Va. 575, 582.

74. "One or more years" as the duration of a tenancy is equivalent to years or at will. Shaffer *v.* Sutton, 5 Binn. (Pa.) 228, 231.

75. Webster Int. Dict.

"Burthened with onerous covenants" see *In re* Gee, 24 Q. B. D. 65, 67, 59 L. J. Q. B. 16, 61 L. T. Rep. N. S. 645, 6 Morr. Bankr. Cas. 267, 38 Wkly. Rep. 143; *In re* Cock, 20 Q. B. D. 343, 57 L. J. Q. B. 169, 58 L. T. Rep. N. S. 586, 5 Morr. Bankr. Cas. 14, 36 Wkly. Rep. 187; *In re* Manghan, 14 Q. B. D. 956, 959, 54 L. J. Q. B. 128, 2 Morr. Bankr. Cas. 25, 33 Wkly. Rep. 308.

ONE THOUSAND. A numeral whose meaning, when employed in certain connections, may be controlled by usage or custom.[76]

ON HAND. A phrase which has been held ineffective, through vagueness, as a descriptive term for the purposes of identification of property by third persons.[77] As used between parties to a transaction, with reference to a given class of articles of commerce affected thereby, a term which would seem to relate to those, of that class, which are not merely in possession, but are also stock in trade in the regular course of business of a given person or concern.[78] Used in a will to describe the money which was the subject of a legacy, a term which may include a sum in the hands of an agent, in gross, without deducting his commissions.[79] (See CASH ON HAND.)

ONLY. A word of restriction or exclusion,[80] that is, of restriction, as to that which it qualifies,[81] of exclusion as to other things;[82] but it does not exclude that which is not within the contemplation of the provision in which it occurs.[83] It is also employed as meaning exclusively,[84] (and) in no other mode;[85] wholly.[86] Again may be used in the sense of "merely";[87] and has been substituted (inaccurately) for "except."[88]

"Onerous donation" is a gift burdened with charges imposed by the donor. Ackerman *v.* Larner, 116 La. 101, 116, 40 So. 581.

"Onerous title" is that title which is created by valuable consideration as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject (Noe *v.* Card, 14 Cal. 576, 597; Scott *v.* Ward, 13 Cal. 458, 471; Kircher *v.* Murray, 54 Fed. 617, 624); "the cause, in virtue of which we acquire a thing by payment of its value in money, in another thing, or in services, or by means of certain charges and conditions, to which we subject ourselves, as purchase, exchange, renting and dowry" (Escriche Dict. [*quoted* in Noe *v.* Card, 14 Cal. 576, 597; Yates *v.* Houston, 3 Tex. 433, 453]).

76. Soutier *v.* Kellerman, 18 Mo. 509, 511 ("two sacks . . . of certain dimensions" irrespective of number, when applied to shingles); Smith *v.* Wilson, 3 B. & Ad. 728, 731, 1 L. J. K. B. 194, 23 E. C. L. 319 ("twelve hundred" of rabbits).

"One thousand dollars a year," stating the consideration of one year's employment, the phrase, unexplained, means one thousand dollars in gross, and not in instalments. Liddell *v.* Chidester, 84 Ala. 508, 509, 4 So. 426, 5 Am. St. Rep. 387.

77. Rocheleau *v.* Boyle, 11 Mont. 451, 471, 28 Pac. 872.

78. Crouch *v.* Parker, 56 N. Y. 597, 598; Cumpston *v.* Haigh, 2 Bing. N. Cas. 449, 453, 1 Hodges 373, 5 L. J. C. P. 99, 2 Scott 684, 29 E. C. L. 613.

79. Copia's Estate, 5 Phila. (Pa.) 214, 215.

80. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165, 175.

81. Hopper *v.* Hopper, 125 N. Y. 400, 405, 26 N. E. 457, 12 L. R. A. 237; Chambers *v.* Feron, etc., Co., 56 N. Y. Suppl. 338.

"Pay to J. S. only" is a restrictive indorsement. Lee *v.* Chillicothe Branch Ohio State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325.

82. People *v.* Fair, 43 Cal. 137, 146; Wynn *v.* Bartlett, 167 Mass. 292, 45 N. E. 752 ("the income only"); Alder *v.* Schmidt, 10 N. Y. Leg. Obs. 363, 364 ("instrument for the payment of money only"); Germania Ins. Co. *v.* Sherlock, 25 Ohio St. 33, 46 ("against loss by fire only"); McFarland *v.* Lyon, 4 Tex. Civ. App. 586, 589, 23 S. W. 554 ("'each subscriber' should 'be liable only'"); Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136 ("treason against the United States, shall consist only").

Application.—The supreme court shall have appellate jurisdiction only does not mean "the supreme court only shall have appellate jurisdiction." People *v.* Richmond, 16 Colo. 274, 284, 26 Pac. 929.

Insidious tendency, in a request to charge. — Of a request to charge that the fact that defendant employed a watchman is "only" evidence as to the additional care exercised by it to avoid inflicting injury, it was said: "The significance of the word 'only' would in effect render the conduct of the flagman immaterial." Ayers *v.* Pittsburg, etc., R. Co., 201 Pa. St. 124, 128, 50 Atl. 958.

Used in creating a separate estate for a married woman, to the exclusion of the husband, as in the phrase "to her use only" (Ozley *v.* Ikelheimer, 26 Ala. 332, 336); "to and for the only use and benefit" of (Cuthbert *v.* Wolfe, 19 Ala. 373, 377); "only for the use and benefit of" (Nixon *v.* Rose, 12 Gratt. (Va.) 425, 428).

83. Schroeder *v.* King, 38 Conn. 78, 79; Harmon *v.* Osgood, 151 Mass. 501, 503, 24 N. E. 401; New York Real Estate, etc., Co. *v.* Motley, 143 N. Y. 156, 159, 38 N. E. 103; Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 143, 10 N. W. 91.

84. Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793, 794.

85. Fisher *v.* Essex Bank, 5 Gray (Mass.) 373, 381; Uncas Nat. Bank *v.* Superior, 115 Wis. 340, 347, 91 N. W. 1004.

86. Hilson Co. *v.* Foster, 80 Fed. 896, 900, where the terms are said to be synonymous.

87. Com. *v.* Lewis, 140 Pa. St. 561, 564, 21 Atl. 501.

88. Lott *v.* Thompson, 36 S. C. 38, 43, 15 S. E. 278.

ONLY PROPER USE. Own (or peculiar) exclusive use.[89]

ON OR ABOUT. With regard to time, a relative term, sufficiently definite in certain connections,[90] but rendering the statement which it modifies insufficient for purposes to which definite accuracy is requisite.[91] With regard to place, anywhere or everywhere upon, but not outside of.[92]

ON OR BEFORE. With relation to a specified time or event, immediately at or at any time in advance of, the instant of such time or event;[93] that is to say

89. Caldwell *v.* Pickens, 39 Ala. 514, 520, where it is said: "These words are much stronger than 'own' and 'proper,' when found separately. Whether we attach to the word 'proper' the meaning of 'own,' or of 'peculiar' . . . the word 'only' remains, which is strictly a word of exclusion."

90. Cohn *v.* Wright, 89 Cal. 86, 88, 26 Pac. 643.

Commission of a crime "on or about" a given date see INDICTMENTS AND INFORMATIONS, 22 Cyc. 317; INTOXICATING LIQUORS, 23 Cyc. 225 note 44,

91. Cohn *v.* Wright, 89 Cal. 86, 88, 26 Pac. 643; Lee *v.* Greenwich, 48 N. Y. App. Div. 391, 63 N. Y. Suppl. 160. *Compare* Santa Monica Lumber, etc., Co. *v.* Hege, (Cal. 1897) 48 Pac. 69, 71; Paine *v.* State Land-Office Com'r, 66 Mich. 245, 248, 33 N. W. 491. But see Mitchell *v.* Penfield, 8 Kan. 186.

"Sailed on or about."—No warranty can be predicated on language so indefinite as "sailed on or about" a given day, when applied to a ship, in a contract for the sale of goods to arrive by such vessel, and it is doubted if a like expression in an application for a policy of marine insurance could be held a warranty. Hawes *v.* Lawrence, 4 N. Y. 345, 346, 348.

An averment that a fact occurred "on or about" a certain day is not an averment that it took place on any distinct day or time. Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 73, 10 Sawy. 630. But the defect may be cured, or rendered immaterial, by a sufficient and definite statement elsewhere. People *v.* Flock, 100 Mich. 512, 59 N. W. 237; National Wall Paper Co. *v.* Associated Manufacturers' Mut. F. Ins. Co., 60 N. Y. App. Div. 222, 70 N. Y. Suppl. 124.

Whether or not the statute of limitations has run cannot be ascertained from such an averment of the date of a cause of action (Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 73, 10 Sawy. 630), or of an offense (U. S. *v.* Winslow, 28 Fed. Cas. No. 16,742, 3 Sawy. 337, 342), and when the date of a cause of action is so alleged in the complaint, the defense of such statute is only available by answer (Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 74, 10 Sawy. 630).

Effectiveness, if any, of statement of time so modified.— It has been said that such averment "amounts to nothing, so far as time is concerned" (Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 73, 10 Sawy. 630); but there are slight indications that it may, under some circumstances, be regarded as expressing a period within a reasonable limit. For example: Of a statement in a claim of lien that the contract on which it was based was made "on or about the 1st day of July" it was said: "The words 'on or about' leave the time when the contract was made somewhat indefinite and uncertain, but we think the language used cannot be held to extend back to the 24th of May, and that it should be limited to time alleged in the complaint," namely, July 1st (Santa Monica Lumber, etc., Co. *v.* Hege, (Cal. 1897) 48 Pac. 69, 71); and the reason given for holding too indefinite, under a statute requiring claims for land to be filed within six months after it should take effect, a bill to secure title, which stated that such a claim was filed "on or about" the day named, with which the six months ended, was, that "on or about" said date "is just as consistent with a day or two after as before" (Paine *v.* State Land-Office Com'r, 66 Mich. 245, 248, 33 N. W. 491).

92. Thompson *v.* Banks, 43 N. H. 540, 541, as to a right to lay lumber "on or about" a mill privilege.

"On or about the premises."—As used in a statute prohibiting sale, without license, of liquor to be drunk in the locality so described, the phrase, through the force of "about" as distinct from "on," includes "places over which the seller has no legal right to exercise authority or control, but which are yet so near to his premises, and so situated in relation thereto, that to permit the liquor sold by him to be drunk at them would produce the very evil in kind, though not in degree, which the prohibition to drinking it on his premises was intended to prevent." Brown *v.* State, 31 Ala. 353, 358; Easterling *v.* State, 30 Ala. 46, 48. For examples showing the scope of this phrase see Whaley *v.* State, 87 Ala. 83, 6 So. 380; Powell *v.* State, 63 Ala. 177; Pearce *v.* State, 40 Ala. 720; Christian *v.* State, 40 Ala. 376; Patterson *v.* State, 36 Ala. 297. It has been held to include a place beyond the state line. Patterson *v.* State, 36 Ala. 297, 298 [*doubted* by Byrd, J., in Christian *v.* State, 40 Ala. 376, 378].

93. Sheerer *v.* Manhattan L. Ins. Co., 20 Fed. 886, 888.

Defined as "between the date" when the expression is used "and" the day specified.—*In re* Public Road in Middlesex, etc., 4 N. J. L. 290.

Said to be equivalent to "'within' a certain period," or "at or before," and subject to like application of the rules of construction. Leader *v.* Plante, 95 Me. 339, 341, 50 Atl. 54, 85 Am. St. Rep. 415.

A contract to convey land whenever the whole consideration, the last instalment of which is due on or before a certain date, is paid, entitles the proposed grantee, if he pays the whole before that date, to an imme-

to the exclusion of any time after that to which the proposition has relation, not after.[94]

ONROERENDE. Literally "Immoveable." As applied to property, land; real estate; and so to be construed, as well as its equivalent, "*vaste staat*," when found in Dutch wills, deeds, and antenuptial contracts, relating to property in New York.[95]

ON SHARES. A term which, when describing the relative rights of parties to proceeds accruing under an agreement between them, means that they are to share equally.[96] (On Shares: Cultivation of Crops, see CROPS. Renting, see LANDLORD AND TENANT.)

ON STORE. As used of the delivery of grain at a warehouse, in a receipt for such grain, a phrase, interpreted according to a certain local custom, meaning that the grain is sold to the warehouseman, and that the price is to be lifted at such time as suits the person leaving the grain, and at such rate as it is then bringing in the market.[97]

ON THE LINE OF. Along, or parallel to, the general direction of;[98] near the line of;[99] but not necessarily touching or bounded by.[1]

ON THE PART OF. As against.[2] When used in describing an inheritance, as "on the part of" a specified parent, words which embrace not only the parent named, but all the ancestors of that parent paternal and maternal, and exclude the line of the other; an inheritance on the part of the father, or of the mother, remains in the line from which it was derived, to the exclusion of the heirs of the other as such.[3]

ON TRIAL. Actually in progress before the court (and jury, if any).[4] When used adverbially to indicate time, the phrase may refer to the trial in court,[5] or it

diate conveyance. Wall *v.* Simpson, 6 J. J. Marsh. (Ky.) 155, 22 Am. Dec. 72.

A notice from landlord to tenant to move out "on or before" a day named see Koehler *v.* Scheider, 16 Daly (N. Y.) 235, 237, 10 N. Y. Suppl. 101.

As a stipulation for delay until the date specified see Geddes *v.* Thomastown Tp., 46 Mich. 316, 319, 9 N. W. 431.

Payable on or before a certain date see COMMERCIAL PAPER, 17 Cyc. 601. The use of the phrase in this connection does not imply that payment is due before that date. People *v.* Walker, 17 N. Y. 502 [*reversing* 21 Barb. 630].

94. Koehler *v.* Scheider, 16 Daly (N. Y.) 235, 237, 10 N. Y. Suppl. 101.

95. N. Y. Colon. Act, Oct. 30, 1710 [*cited* in Spraker *v.* Van Alstyne, 18 Wend. (N. Y.) 200, 208].

96. Connell *v.* Richmond, 55 Conn. 401, 402, 11 Atl. 852 (letting "on shares"); Crittenden *v.* Johnston, 7 N. Y. App. Div. 258, 261, 40 N. Y. Suppl. 87 (conducting boarding-house "on shares").

97. By custom, in Lebanon Co., Pa., "and perhaps in several other neighboring counties." Light *v.* Heilman, 1 Pearson (Pa.) 537, where it is said, however, that although the natural import is otherwise, the actual intent of the parties in using them may be shown by parol, as that storage, and not a sale, was intended by both parties.

98. U. S. *v.* Burlington, etc., R. Co., 24 Fed. Cas. No. 14,688, 4 Dill. 297, as when describing the position of land with reference to a railroad.

"On the section line," when it describes a boundary that cannot coincide with that line, means "parallel with" the same. Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 516, 32 So. 87.

99. Burnam *v.* Banks, 45 Mo. 349, 350, 351.

1. Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 32 So. 87; Burnam *v.* Banks, 45 Mo. 349; U. S. *v.* Burlington, etc., R. Co., 24 Fed. Cas. No. 14,688, 4 Dill. 297.

"All parties resident upon the line of the Illinois and Michigan Canal" see Card *v.* McCaleb, 69 Ill. 314, 316, 317.

2. *In re* Coal Economising Gas Co., 1 Ch. D. 182, 189, 45 L. J. Ch. 83, 33 L. T. Rep. N. S. 619, 24 Wkly. Rep. 125, where used in a provision that a company prospectus shall be deemed fraudulent on the part of a person wilfully making an omission as against a shareholder having no notice of the matter omitted.

3. Kelly *v.* McGuire, 15 Ark. 555, 586. See also Maffit *v.* Clark, 6 Watts & S. (Pa.) 258, 260.

But the phrase has not the effect of including in the line of inheritance the collateral (if any) of the kindred of the mother of an illegitimate. Croan *v.* Phelps, 94 Ky. 213, 215, 21 S. W. 874, 14 Ky. L. Rep. 915, 23 L. R. A. 753. *Compare* Stevenson *v.* Sullivant, 5 Wheat. (U. S.) 207, 260, 5 L. ed. 70.

4. Com. *v.* MacLellan, 121 Mass. 31, 32.

In this sense, "upon the trial of the above-entitled action," applies to any trial of the case mentioned. Herbst *v.* Vacuum Oil Co., 68 Hun (N. Y.) 222, 223, 22 N. Y. Suppl. 807.

5. Yohe *v.* Robertson, 2 Whart. (Pa.) 155, 159.

may include the whole course of prosecution.[6] (See, generally, CRIMINAL LAW; TRIAL.)

ONUS PROBANDI. See CRIMINAL LAW; EVIDENCE.

ONYX. A mineral known and spoken of as among the gems and precious stones, and usually classed with agates, carnelians, and chalcedonys. The word, however, is sometimes used, among dealers in marble, for brevity instead of ONYX MARBLE,[7] *q. v.*

ONYX MARBLE. A very beautiful translucent limestone of stalagmitic formation.[8] Sometimes known, among dealers in marble, for brevity, as ONYX, *q. v.* (See MARBLE.)

OONTZ. CRAPS,[9] *q. v.*

OPEN. As an adjective, not closed;[10] not concealed, not hidden, exposed to view, apparent;[11] free from concealment, reserve, or disguise, not secret or secretive, plain and above-board;[12] so public as to be practically avowed.[13] As a verb, simply, to clear of obstructions.[14] When used in connection with other words, the phrases have often received judicial interpretation; as for example the following: "Open and notorious" defect in the sidewalk;[15] "open and notorious insolvency;"[16] "open and peaceable entry;"[17] "open bar" or "open saloon;"[18] "open bulk;"[19] "open confession;"[20] open corporation;"[21] "open court;"[22] open estate;[23] "open for business;"[24] "open for the purpose of traffic" or public

"On or before trial" means "at any time on the trial; that is before the close of it" and includes the period during argument of counsel. Franklin F. Ins. Co. *v.* Findlay, 6 Whart. (Pa.) 483, 497, 37 Am. Dec. 430; Yohe *v.* Robertson, 2 Whart. (Pa.) 155, 159.

6. Hirschfelder *v.* State, 19 Ala. 534, 539.

7. Mandel *v.* Seeberger, 39 Fed. 760, 761.

8. Imperial Dict. [*quoted* in Mandel *v.* Seeberger, 39 Fed. 760, 761].

9. Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777.

10. Tucker *v.* Quimby, 37 Iowa 17, 19.

11. Kelleher *v.* Keokuk, 60 Iowa 473, 475, 476, 15 N. W. 280.

As describing the kind of change of possession requisite to a sale good against creditors, it has been said: "'Outward,' 'open,' 'actual,' 'visible,' 'substantial,' and 'exclusive' mean, in the connection that they are employed . . . substantially the same thing. They mean 'not concealed,' 'not hidden, exposed to view,' 'free from concealment, dissimulation, reserve or disguise;' 'in full existence; denoting that which not merely can be, but is, opposed to potential, apparent, constructive and imaginary;' 'veritable, genuine, certain, absolute;' 'real, at present time, as a matter of fact;' 'not merely nominal, opposed to form,' 'actually existing, true;' 'not including, admitting or pertaining to any others; undivided, sole;' 'opposed to inclusive.'" Bass *v.* Pease, 79 Ill. App. 308, 318 [*referring* to Anderson L. Dict.; Century Dict.].

As applied, in a criminal statute to lewdness, "open" has no reference to place, nor to number of people within view. It simply means "open" as opposed to "secret." State *v.* Juneau, 88 Wis. 180, 184, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

12. Jahraus' Succession, 114 La. 456, 458, 38 So. 417.

13. So used of an illicit state of living. Jahraus' Succession, 114 La. 456, 462, 38 So. 417.

14. Lowell *v.* Moscow, 12 Me. 300, 302.

15. Kelleher *v.* Keokuk, 60 Iowa 473, 475, 15 N. W. 280.

16. Somerby *v.* Brown, 73 Ind. 353, 356; Hardesty *v.* Kinworthy, 8 Blackf. (Ind.) 304, 305.

17. Thompson *v.* Kenyon, 100 Mass. 108, 111, for the purpose of foreclosing a mortgage.

18. Baldwin *v.* Chicago, 68 Ill. 418; People *v.* Cox, 70 Mich. 247, 38 N. W. 235.

19. *In re* Sanders, 52 Fed. 802, 806, 18 L. R. A. 549, where it is said that preceded by "in," and applied to merchandise, these words mean "in the mass; exposed to view; not tied or sealed up."

20. Schradi *v.* Dornfeld, 52 Minn. 465, 469, 55 N. W. 49.

21. Brantley's note (e) upon McKim *v.* Odom, 3 Bland (Md.) 407, 416, 417.

22. Open court is a court formally opened and engaged in the transaction of judicial affairs, to which all persons who conduct themselves in an orderly manner are admitted. Suesemilch *v.* Suesemilch, 43 Ill. App. 573, 574 [*citing* Bouvier L. Dict., which, however, employs the words "all judicial functions" instead of "judicial affairs"]. See also COURTS, 11 Cyc. 654 note 3. Or it may be the court in public session, as distinguished from one or more of its judges exercising judicial functions in chambers (Conover *v.* Bird, 56 N. J. L. 228, 230, 28 Atl. 428), or the time when the court can properly exercise its functions (*Ex p.* Branch, 63 Ala. 383, 387, as used in certain chancery rules, one, that the court of chancery should be always open, the other that a register's report of sale must be made in open court).

23. Martin *v.* Jones, 87 Md. 43, 45, 39 Atl. 102.

24. Jones *v.* Southern Ins. Co., 38 Fed. 19, 23.

But the phrase may be doubtful in its application to particular circumstances. Phœnix Ins. Co. *v.* Schwartz, 115 Ga. 113, 115,

amusement;[25] "open house;"[26] open park;[27] "open policy;"[28] "open store;"[29] "open to occupation and purchase;"[30] "open venire;"[31] "open visible risk."[32] (Open: Account, see ACCOUNTS AND ACCOUNTING. And Close, see CRIMINAL LAW; TRIAL. Commission, see DEPOSITIONS. Policy, see FIRE INSURANCE; MARINE INSURANCE. Possession, see ADVERSE POSSESSION. See also OPENING.)

OPEN ACCOUNT. See ACCOUNTS AND ACCOUNTING.

OPEN AND CLOSE. See CRIMINAL LAW; TRIAL.

OPEN COMMISSION. See DEPOSITIONS.

OPENING. The act or process of opening;[33] a place which is open; a breach; an aperture; a gap, cleft, or hole.[34] (Opening: Account — Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Of Guardian, see GUARDIAN AND WARD; Of Trustee, see TRUSTS; Settlement Between Parties, see ACCOUNTS AND ACCOUNTING; Stated, see ACCOUNTS AND ACCOUNTING. At Trial, see CRIMINAL LAW; TRIAL. Default, see JUDGMENTS. Discovery Opening, see MINES AND MINERALS. Highway, see STREETS AND HIGHWAYS. Indian Reservation, see INDIANS. Judgment or Decree, see EQUITY; JUDGMENTS; JUSTICES OF THE PEACE; MANDAMUS. Judicial Sale — In General, see JUDICIAL SALES; Foreclosure Sale, see MORTGAGES; Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS; Of Ward's Property, see GUARDIAN AND WARD. Report — Of Master in Chancery, see EQUITY; Of Referee, see REFERENCES; On Accounting and Settlement of Executor and Administrator, see EXECUTORS AND ADMINISTRATORS. Street, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. See also OPEN.)

OPENLY OUTRAGES PUBLIC DECENCY. A phrase applicable to the teachings of the doctrine of anarchy.[35]

OPEN POLICY. See FIRE INSURANCE; MARINE INSURANCE.

OPEN POSSESSION. See ADVERSE POSSESSION.

OPERA. A musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations, and representing some passionate action;[36] a composition of a dramatic kind, but set to

41 S. E. 240, 90 Am. St. Rep. 98, 57 L. R. A. 752.

Instances of ordinary occasions when a store is "not open for business" are Sundays, holidays, and after closing at night. Phœnix Ins. Co. *v.* Schwartz, 115 Ga. 113, 115, 41 S. E. 240, 90 Am. St. Rep. 98, 57 L. R. A. 752.

25. Whitcomb *v.* State, 30 Tex. App. 269, 272, 17 S. W. 258.

26. 2 Sayles' Civ. St. art. 3226*a*, § 4 [*quoted* in State *v.* Austin Club, 89 Tex. 20, 25, 33 S. W. 113, 30 L. R. A. 500; State *v.* Drake, 86 Tex. 329, 335, 24 S. W. 790; State *v.* Andrews, 82 Tex. 73, 75, 18 S. W. 554].

27. Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 336, 67 N. Y. Suppl. 1054.

28. See FIRE INSURANCE, 19 Cyc. 670; MARINE INSURANCE, 26 Cyc. 573.

29. Jebeles *v.* State, 131 Ala. 41, 43, 31 So. 377. To the same effect see Dixon *v.* State, 76 Ala. 89; Sparrenberger *v.* State, 53 Ala. 481, 483, 25 Am. Rep. 643. *Compare* Snider *v.* State, 59 Ala. 64; Kroer *v.* People, 78 Ill. 294; Com. *v.* Harrison, 11 Gray (Mass.) 308.

30. Within the purview of U. S. Rev. St. (1878) § 2319 [U. S. Comp. St. (1901) p. 1424]; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 412, 5 Pac. 570, meaning that the absolute title may be acquired in mining lands.

31. **"Open venire"** is a judicial writ by virtue of which jurors are selected and summoned by the officer as at common law. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505, 507. See also JURIES, 24 Cyc. 222.

32. **"Open, visible risk"** is such risk as would, in an instant, appeal to the senses of an intelligent person. Johnston *v.* Oregon Short Line R. Co., 23 Oreg. 94, 105, 31 Pac. 283. See also MASTER AND SERVANT, 26 Cyc. 1176, 1180 note 53.

33. Webster Int. Dict. See Andrews *v.* Scotton, 2 Bland (Md.) 629, 644, as to "opening the biddings."

34. Webster Int. Dict.

"'Opening' in a fence" is literally an unobstructed way through a fence. In common parlance, however, the term has not always such significance, it is sometimes used to indicate a way through that is capable of being used as a mode of ingress and egress to and from the inclosure. Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 486, 60 S. W. 55.

35. People *v.* Most, 36 Misc. (N. Y.) 139, 141, 73 N. Y. Suppl. 220.

36. Webster Dict. [*quoted* in Bell *v.* Mahn, 121 Pa. St. 225, 228, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364].

"Opera-company" is a company of persons who sing compositions set to music, as distinguished from a company of actors, who speak or recite drama or plays. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

An opera glass may be included in the term

music and sung, accompanied with musical instruments, and enriched with appropriate costumes, scenery, etc.[37] (Opera: Subject of — Copyright, see COPYRIGHT; Literary Property, see LITERARY PROPERTY. See also DRAMA; and, generally, THEATERS AND SHOWS.)

OPERATE. To put in action and supervise the working of;[38] to put into, or to continue in operation and activity; to work;[39] to perform a work or labor;[40] to effect any result; exert agency, act, to bring about a specified result; to produce the proper or intended effect.[41] It should be observed that the word may

"haggage." Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 382, 5 Am. Rep. 221.

"Opera-house" is a house in which operas are represented. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71. The opera house and the theatre alike comprehended the stage, proscenium, boxes, orchestra, pit or parquet, and the galleries. Bell *v.* Mahn, 121 Pa. St. 225, 229, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364.

37. Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71.

The performance of an opera is a "theatrical exhibition" within the meaning of a statute imposing, on such exhibitions, a license-fee. Bell *v.* Mahn, 121 Pa. St. 225, 228, 230, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364. But *compare* Rowland *v.* Kleber, 1 Pittsb. (Pa.) 68, 71, holding that an opera company is not subject to license as a "theatre," on account of the nature of the performance [*cited* in Com. *v.* Fox, 10 Phila. (Pa.) 204, 205, stating, *obiter*, that there was conflict on this point. But the case there cited as in conflict — namely, Society for Reformation of Juvenile Delinquents *v.* Diers, 60 Barb. (N. Y.) 152, is not in point, the question as to opera did not arise there, and the *dictum* that it was subject to license (p. 158) was based on a statute in which it was specifically named (p. 155)].

"Spoken drama" compared with "opera" see Bell *v.* Mahn, 121 Pa. St. 225, 228, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364.

38. Standard Dict. [*quoted* in Gallenkamp *v.* Garvin Mach. Co., 91 N. Y. App. Div. 141, 149, 86 N. Y. Suppl. 378 (*reversed* on other grounds in 179 N. Y. 588, 72 N. E. 1142)].

39. Perez *v.* San Antonio, etc., R. Co., 28 Tex. Civ. App. 255, 257, 67 S. W. 137; Webster Dict. [*quoted* in McChesney *v.* Hyde Park, 151 Ill. 634, 647, 37 N. E. 858, where the term is distinguished from "construct," "maintain," and "keep in repair." An almost identical definition is found in Imperial Dict. [*quoted* in Gallenkamp *v.* Garvin Mach. Co., 91 N. Y. App. Div. 141, 149, 86 N. Y. Suppl. 378].

Applied to railroads see Missouri Pac. R. Co *v.* Cady, 44 Kan. 633, 635, 24 Pac. 1088; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 407, 19 Pac. 793; Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269, 272; Cumming *v.* Brooklyn City R. Co., 104 N. Y. 669, 672, 673, 10 N. E. 855. See also Connors *v.* Chicago, etc., R. Co., 111 Iowa 384, 386, 82 N. W. 953; and MASTER AND SERVANT, 26 Cyc. 1371–1375; RAILROADS. "Operated in this state" applies to a railroad which has passenger and freight depots, round-house, switch-yards, side-tracks and terminal facilities within the state in question although its terminus, to which they belong, is theoretically in another, and it reaches them from such theoretical terminus, over a leased line of road. Quincy, etc., R. Co. *v.* People, 156 Ill. 437, 441, 41 N. E. 162. "'Lands used in operating a railroad' is tantamount to the expression, land used 'about' the operation of the road. Depot buildings, water-houses, and other buildings, and the lots on which they are built, which are in any manner used about the railroad and its operation, are necessarily included within the meaning of the statute." So held in construing a provision by which such lands were exempt from state and county taxes. Vicksburg, etc., R. Co. *v.* Bradley, 66 Miss. 518, 519, 6 So. 321. See also Burlington, etc., R. Co. *v.* Lancaster Co., 15 Nebr. 251, 18 N. W. 71.

An agreement to "operate and manage" a drawbridge and pay all the expenses of the same, the party so promising to be reimbursed for the expense of "operating and managing of the draw" includes "the opening and closing of the same, as well as the diligence to be used in protecting and preserving it from injury and doing injury," but "was never intended to cover or include the necessary repairing or replacing of any parts of the bridge," provided for by another clause in the same contract. Portage Lake Bridge Co. *v.* Wright, 78 Mich. 426, 431, 44 N. W. 498.

To "cease to be operated" referring, in an insurance policy, to a mill or manufactory, and indicating a condition of avoidance, means "something more than a temporary suspension. It must mean a closing with the intention of ceasing operation, not a shutting down for a few days or weeks because of the happening of events incident to the conducting of a mill in that locality, and which might be reasonably expected." City Planing, etc., Co. *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 654, 658, 40 N. W. 777, 16 Am. St. Rep. 552.

"Used and operated" indicates control sufficiently to amount to an allegation thereof for the purpose of charging a defendant in negligence with responsibility as one in control of the apparatus which was the means of injury. Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 660, 42 Am. Rep. 418.

40. Perez *v.* San Antonio, etc., R. Co., 28 Tex. Civ. App. 255, 257, 67 S. W. 137.

41. Office Standard Dict. [*quoted* in Texas, etc., R. Co. *v.* Webb, 31 Tex. Civ. App. 498, 500, 72 S. W. 1044].

"Upon which the will may operate," describing property excepted from the effect of

be used either intransitively or actively.[42] (See Operating; Operation; and, generally, Manufactures; Mills.)

Operating. Acting; exerting some agency or power.[43] (See Operate; Operation.)

Operation. The exertion of power, physical, mechanical or moral — action, as of an army or fleet — movement of machinery;[44] exertion of power; method of working; process of operating; mode of action;[45] an effect brought about in accordance with a definite plan.[46] Of a law, the practical working and effect;[47] the obligation of a law.[48] (Operation: By Surgeon, see Abortion; Physicians and Surgeons. Of Accord and Satisfaction, see Accord and Satisfaction. Of

a statutory provision that "when a testator has affected to give property not his own, and has given a benefit to a person to whom that property belongs, the devisee or legatee must elect either to take under or against the instrument," means, "full operation according to the whole intention of the testator, and not a partial or limited operation which would execute this intention in part and leave it in part unexecuted." Lamar *v.* McLaren, 107 Ga. 591, 598, 599, 34 S. E. 116.

To "operate on" timber land includes the selling of growing timber, or stumpage, as a means, along with surveying and selling lots, of converting such land to profitable use. Eaton *v.* Smith, 20 Pick. (Mass.) 150, 151, 159.

42. As "the mill operates" or "the miller operates the mill." Rhodes *v.* Matthews, 67 Ind. 131, 140.

43. Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269, 272.

"Operating expenses" includes damages for injury caused, in operating, to the property of others (Smith *v.* Eastern R. Co., 124 Mass. 154, 155); interest on cost of equipment (Com. *v.* Philadelphia, etc., R. Co., 164 Pa. St. 252, 260, 30 Atl. 145); but does not include interest on bonds of another company from which the company by which such expenses are payable has taken a road on lease (Eastern R. Co. *v.* Rogers, 124 Mass. 527, 532, 533).

"Operating in the grain fields" does not include the condition of a harvesting machine when it is awaiting repairs in a shop after being in storage since the preceding harvest, when it was last in the fields. Mawhinney *v.* Southern Ins. Co., 98 Cal. 184, 186, 32 Pac. 945, 20 L. R. A. 87.

"Operating supplies," as distinguished from "constructing supplies," mean those used in active operation when the construction necessary to that purpose is complete. Reyburn *v.* Consumers' Gas, etc., Co., 29 Fed. 561, 563.

44. Webster Dict. [*quoted* in Allen *v.* Savannah, 9 Ga. 286, 294].

45. Webster Dict. [*quoted* in Little Rock *v.* Parish, 36 Ark. 166, 174].

"Kept in operation" was construed as referring to beneficial operation for the reasonable accommodation of certain persons, when it occurred in a contract that a party interested in the construction and success of a railroad should pay interest on damages for land taken therefor on condition that the road should be "kept in operation." Jepherson *v.* Hunt, 2 Allen (Mass.) 417, 423.

"In use in or about the . . . operation of the railroad" does not necessarily include, or exclude, rolling stock, when applied to "works, materials, and plants." Central Trust Co. *v.* Condon, 67 Fed. 84, 91, 14 C. C. A. 314.

Operation by one does not necessarily extend to exclusion of another from operating. New Bedford, etc., R. Co. *v.* Achushnet St. R. Co., 143 Mass. 200, 201, 9 N. E. 536.

Operation of a saw-mill dam means controlling the water by means of the dam and opening the sluiceway for the passage of logs when wanted. Anderson *v.* Munch, 29 Minn. 414, 417, 13 N. W. 192.

Used of surgical work the term does not apply exclusively to the cutting of the body and removing the afflicted parts, but may properly embrace auxiliary details, such as the use and handling of sponges placed temporarily in the incision. Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78.

"Operation pertaining to the business of the insured" see Central Acc. Ins. Co. *v.* Rembe, 220 Ill. 151, 161, 77 N. E. 123, 101 Am. St. Rep. 235, 5 L. R. A. N. S. 933.

"Criminal operation" may be construed, by force of its context, as "abortion." Miller *v.* Bayer, 94 Wis. 123, 126, 68 N. W. 869.

46. Webster Dict. [*quoted* in Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 653, 17 S. E. 203].

To "commence operations" see Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 653, 17 S. E. 203.

47. Geebrick *v.* State, 5 Iowa 489, 496.

"In operation," in a statute giving vitality to the tax ordinances, means "working for the city" and does not apply to an ordinance declared a nullity by a court of competent jurisdiction. Allen *v.* Savannah, 9 Ga. 286, 294.

"Prevention by operation of law," as an excuse for failure to perform a contract, cannot be brought about by the mere employment of legal process by a private litigant. Klauber *v.* San Diego St. Car Co., 95 Cal. 353, 357, 358, 30 Pac. 555.

"Suspend the operation" of a law are words which have no technical meaning. An act which "paralyzes" in certain respects "the force" of another suspends its operation. Little Rock *v.* Parish, 36 Ark. 166, 174.

48. U. S. *v.* Hammond, 26 Fed. Cas. No. 15,293, 1 Cranch C. C. 15.

Appeal, see APPEAL AND ERROR. Of Appearance, see APPEARANCES. Of Assignment, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. Of Award, see ARBITRATION AND AWARD. Of Bail, see BAIL. Of Bridge, see BRIDGES. Of Canal, see CANALS. Of Chattel Mortgage, see CHATTEL MORTGAGES. Of Composition With Creditors, see COMPOSITIONS WITH CREDITORS. Of Compromise, see COMPROMISE. Of Constitutional Provision, see CONSTITUTIONAL LAW. Of Contract, see CONTRACTS. Of Copyright, see COPYRIGHT. Of Custom or Usage, see CUSTOMS AND USAGES. Of Dedication, see DEDICATION. Of Deed, see DEEDS. Of Electrical Plant, see ELECTRICITY. Of Estoppel, see ESTOPPEL. Of Ferry, see FERRIES. Of Gas Plant, see GAS. Of International Law, see INTERNATIONAL LAW. Of Judgment, see JUDGMENTS. Of Lis Pendens, see LIS PENDENS. Of Mine, see MINES AND MINERALS. Of Mortgage, see MORTGAGES. Of Municipal Plants or Works, see MUNICIPAL CORPORATIONS. Of Patent, see PATENTS. Of Railroad, see RAILROADS. Of Recognizance, see RECOGNIZANCES. Of Release, see RELEASE. Of Statute, see STATUTES. Of Statute of Limitations, see LIMITATIONS OF ACTIONS. Of Street Railroad, see STREET RAILROADS. Of Supersedeas, see SUPERSEDEAS. Of Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES. Of Toll-Road, see TOLL-ROADS. Of Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES. Of Treaty, see TREATIES. Of Trust, see TRUSTS. Of Undertaking, see UNDERTAKINGS. Of Vessel, see COLLISION; SHIPPING. Of Warehouse, see WAREHOUSEMEN. Of Wharf, see WHARVES. Of Will, see WILLS. Of Writ of Certiorari, see CERTIORARI. Of Writ of Error, see APPEAL AND ERROR. Of Writ of Injunction, see INJUNCTIONS. Of Writ of Mandamus, see MANDAMUS. See also OPERATE; OPERATING.)

OPERATIVE. A laboring man, a LABORER, *q. v.*; a skilled workman, an artisan, especially those who operate a machine in a mill or manufactory;[49] a laboring man, one employed in manufactories, an artisan;[50] a workman, one employed to perform labor for another;[51] a manufacturer, or artisan, who performs the manual labor necessary to cause a mill or factory to operate;[52] a workman, one employed to perform work for another, an artisan;[53] an EMPLOYEE, *q. v.*; a servant.[54] Some authorities distinguish the word from "laborer"[55] and "workman."[56] Also used in the adjective sense, as in "operative words."[57] (See EMPLOYEE; LABORER; and, generally, MANUFACTURES; MASTER AND SERVANT.)

49. Webster Int. Dict. [*quoted* in Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (Reprint) 192, 194, 25 Cinc. L. Bul. 203].

As used in statutes: Making stock-holders individually liable see CORPORATIONS, 10 Cyc. 688 *et seq.* Relating to liens see MECHANICS' LIENS, 27 Cyc. 82. Relating to preferences in insolvency see INSOLVENCY, 22 Cyc. 1320. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 173; BANKRUPTCY, 5 Cyc. 385.

"Other operatives" used, in a charge to the jury, of a class to which brakemen may belong does not include officers and agents, that is, immediate representatives, of a railroad, but may include an inspector. Little Miami R. Co. *v.* Fitzpatrick, 42 Ohio St. 318, 324.

50. Worcester Dict. [*quoted* in Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (Reprint) 192, 194, 25 Cinc. L. Bul. 203].

51. Bouvier L. Dict. [*quoted* in Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (Reprint) 192, 194, 25 Cinc. L. Bul. 203].

52. Rhodes *v.* Matthews, 67 Ind. 131, 140.

53. *In re* Lowry, 7 Ohio S. & C. Pl. Dec. 282, 284, 4 Ohio N. P. 395.

54. Anderson L. Dict. [*quoted* in Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (Reprint) 192, 194, 25 Cinc. L. Bul. 203].

55. Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 392; Krakauer *v.* Locke, 6 Tex. Civ. App. 446, 448, 25 S. W. 700; *In re* City Trust Co., 121 Fed. 706, 708, 58 C. C. A. 126.

56. Cocking *v.* Ward, (Tenn. Ch. App. 1898) 48 S. W. 287, 289, where it is said: "This word is defined . . . p. 214, as being synonymous with 'workman.' We think a closer definition would be, 'A workman who performs manual labor in and about machinery.'"

57. The "operative words" of a release, "according to Littleton, § 445, are remise, release and quit claim; to which Lord Coke has added renounce and acquit, intimating at the same time that some others may have the same effect, as where the lessor grants to the lessee for life, that he shall be discharged of the rent. 1 Inst. 264." Agnew *v.* Dorr, 5 Whart. (Pa.) 131, 136, 34 Am. Dec. 539.

OPHTHALMOSCOPE. An instrument intended for practical use in the profession of an oculist, not used for the discovery or contemplation of natural objects for the purpose of attaining or communicating general instruction but as an implement for carrying on a profession or art; and therefore not to be classed as a philosophical instrument.[58]

OPINION. Of court, judge or judicial body, the reasons given by a court for its judgment;[59] the statement by a judge or court of the decision reached in regard to a cause tried or agreed before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based;[60] a statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case;[61] a written statement by the court of its reasons for the conclusion reached from an examination of the law and of the facts in controversy;[62] the expression of views of the judge;[63] in its usual sense distinguished from "decision,"[64] or "judgment,"[65] but sometimes construed to be embraced in those terms where the "opinion," so called, is mentioned as the object of dissent,[66] and when coupled with "judicial" as meaning "decision."[67] Of an affiant, as applied to the basis of an affidavit, practically synonymous with belief.[68] (Opinion: Evidence, see CRIMINAL LAW; EVIDENCE. Expressed Operating As — Fraud, see CONTRACTS; FALSE PRETENSES; FRAUD; Libel or Slander, see LIBEL AND SLANDER. Expression of Disqualifying — Grand Juror, see GRAND JURIES; Judge, see JUDGES; Juror, see JURIES. In Dying Declaration, see HOMICIDE. Of Court — Generally, see COURTS; On Appeal or Error, see APPEAL AND ERROR; Reported, see REPORTS; Required to Be Written, see CONSTITUTIONAL LAW. See also BELIEF.)

OPINIONUM COMMENTA DELET DIES, NATURÆ JUDICIA CONFIRMAT. A maxim meaning "The day destroys the comments of opinions, confirms the judgments of nature."[69]

OPINIO QUÆ FAVET TESTAMENTO EST TENENDA. A maxim meaning "That opinion is to be followed which favors the will."[70]

OPIUM. See POISONS.

OPIUM JOINT. Supposedly, in police jargon, a house or place kept for the purpose of smoking opium.[71] (See, generally, DISORDERLY HOUSES.)

OPORTET LEGEM BREVEM ESSE, QUO FACILIUS AB IMPERITIS TENEATUR. A maxim meaning "Laws ought to be short, that they may be more readily comprehended by the unlearned."[72]

OPORTET QUOD CERTÆ PERSONÆ, CERTÆ TERRÆ, ET CERTI STATUS, COMPREHENDANTUR IN DECLARATIONE USUUM. A maxim meaning "It is right that

58. Robertson *v.* Oelschlaeger, 137 U. S. 436, 440, 442, 11 S. Ct. 148, 34 L. ed. 744.

59. Houston *v.* Williams, 13 Cal. 24, 27, 73 Am. Dec. 565.

Not a decree or order.— So held as to a paper filed by a judge, inasmuch as it was only "the 'opinion' of the Judge, to be followed by an order or decree, finally determining the rights of all the parties." Phillips *v.* Pearson, 27 Md. 242, 253.

60. Black L. Dict. [*quoted* in Craig *v.* Bennett, 158 Ind. 9, 13, 62 N. E. 273].

Of commissioners — Preliminary or conclusive.— Under a statute providing that if commissioners shall be of a certain opinion notice shall be given for a hearing, and if upon hearing they are of a certain opinion they shall apportion such part thereof as they deem reasonable and make report, the opinion preliminary to notice cannot conclude any of the parties; it is not, as is that upon which the report is to be founded, "the conclusive judgment opinion." Weybridge *v.* Addison, 57 Vt. 569, 575.

61. Bouvier L. Dict. [*quoted* in Craig *v.* Bennett, 158 Ind. 9, 13, 62 N. E. 273].

62. State *v.* Gray, 42 Oreg. 261, 268, 70 Pac. 904, 71 Pac. 978.

63. Webster Int. Dict. [*quoted* in Craig *v.* Bennett, 158 Ind. 9, 13, 62 N. E. 273].

64. See 13 Cyc. 427 note 36.

65. State *v.* Ramsburg, 43 Md. 325, 333 [*quoted* in Martin *v.* Evans, 85 Md. 8, 13, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218].

66. Viau *v.* Reg., 2 Can. Cr. Cas. 540, 544.

67. See 23 Cyc. 1619.

68. Day *v.* Southwell, 3 Wis. 657, 661, where it was held too nearly synonymous with "belief," to vitiate, when used therein instead of the latter word, an affidavit required to be founded on "belief."

69. Insurance Co. of North America *v.* Jones, 2 Binn. (Pa.) 547, 570.

70. Bouvier L. Dict.

71. *Ex p.* Ah Lit, 26 Fed. 512, 513.

72. Morgan Leg. Max.

certain persons, lands, and certain estates should be comprehended in a declaration of uses." [73]

OPORTET QUOD CERTA RES DEDUCATUR IN DONATIONEM. A maxim meaning "It is necessary that a certain thing be brought into the gift, or made the subject of the conveyance." [74]

OPORTET QUOD CERTA RES DEDUCATUR IN JUDICIUM. A maxim meaning "A thing, to be brought to judgment, must be certain or definite." [75]

OPORTET QUOD CERTA SIT RES QUÆ VENDITUR. A maxim meaning "A thing, to be sold, must be certain or definite." [76]

OPPORTUNITY. Fit or convenient time, suitable occasion; time or place favorable for executing the purpose or doing the thing in question; [77] a fit or convenient time; a time favorable for the purpose; a convenience or fitness of time and place. [78]

OPPOSE. To OBSTRUCT, [79] *q. v.*

OPPOSITA JUXTA SE POSITA MAGIS ELUCESCUNT. A maxim meaning "Things opposite when placed together appear in a clearer light;" [80] "things opposite are more conspicuous when placed together." [81]

OPPOSITE. Over against, standing in front, or facing. [82] (See OPPOSE; OPPOSITION.)

73. Peloubet Leg. Max.

Applied in Dowman's Case, 9 Coke 7*b*, 9*a*, 77 Eng. Reprint 743.

74. Black L. Dict.

75. Bouvier L. Dict. [*cited* in Green *v.* Watrous, 17 Serg. & R. (Pa.) 393, 400; Daniel *v.* Gracie, 1 U. C. Q. B. O. S. 132, 135].

76. Bouvier L. Dict.

77. Webster Dict. [*quoted* in Lane *v.* Fidelity Mut. L. Ins. Co., 142 N. C. 55, 60, 54 S. E. 854, 115 Am. St. Rep. 729].

78. Webster Dict. [*cited* in *In re* Hause, 32 Minn. 155, 157, 19 N. W. 973].

Opportunity to be heard.—A lack of actual notice of a proceeding does not constitute a lack of "opportunity to be heard," when "a fit and proper time and place have been fixed, and notice thereof given which the law declares sufficient,—in short, if all the opportunity is given which the law provides for." *In re* Hause, 32 Minn. 155, 157, 19 N. W. 973. Accorded by statute to a defendant in disbarment proceedings, "opportunity to be heard" means "reasonable opportunity . . . to answer or otherwise plead. . . . 'Opportunity' means, 'fit or convenient time; a time or place favorable for executing a purpose; a suitable occasion.' (Webster.) This language is opposed to the idea that a fixed and arbitrary time must be given in each case which might arise." *In re* Brown, 2 Okla. 590, 595, 39 Pac. 469.

79. Webster Dict. [*quoted* in Davis *v.* State, 76 Ga. 721, 722].

"Oppose an officer" see Davis *v.* State, 76 Ga. 721, 722; State *v.* Morrison, 46 Kan. 679, 689, 27 Pac. 133. See also OBSTRUCTING JUSTICE.

"Opposing interest" to appointment, by the register, of an assignee in bankruptcy means "not merely an interest contending by vote for the election of a particular person, but an interest in opposition to the exercise of the power of appointment by the Register." *In re* Jackson, 13 Fed. Cas. No. 7,123, 7 Biss. 280, 287, construing U. S. Rev. St. § 5083.

"Opposing party" within a provision that a county court is always open for the transaction of business for which no notice is required to be given to an opposing party means an active litigant. Such is the meaning obviously intended by the opinion in Brown *v.* Snell, 57 N. Y. 286, 300, 301, 305, holding that a guardian in a case where the infant was a ward of court and the guardian an officer of the court was not included in the term, and where it is said: "This section of the Code does not refer merely to an opposite party, but to an opposing party. There must be a contest, a litigation to bring this clause into operation. It points to a well recognized distinction between contested and non-contested business." Reynolds, C., dissenting, remarked that he thought an "opposing party" was "not necessarily one who, when summoned into court, must come attended with martial music or any warlike preparations." That "the question does not at all depend upon how disagreeable a person may make himself when he is once fairly in court, or how much or little contention may thereafter ensue."

80. Peloubet Leg Max.

81. Morgan Leg. Max.

82. Bradley *v.* Wilson, 58 Me. 357, 360.

"Any point opposite" a given borough, upon a river, has been held to signify any point that would be touched by moving the borough straight across the river. Sunbury Steam Ferry, etc., Co. *v.* Grant, (Pa. 1888) 15 Atl. 706, 707.

In the broad literal sense "everything in this world is opposite something else and . . . the whole western hemisphere is opposite to the town of Sunbury." Sunbury Steam Ferry, etc., Co. *v.* Grant, (Pa. 1888) 15 Atl. 706, 707.

"Opposite party," within the meaning of a rule permitting a party to interrogate an opposite party, does not mean a party having

OPPOSITION. Technically, under the Civil Law, an act by which the execution of a judgment by default is resisted, having for its object the prevention of a sale, till the interests of the opposing party are secured.[83]

OPPRESSION. An act of cruelty, severity, unlawful exaction, domination, or excessive use of authority.[84]

OPPROBRIOUS. Reproachful; scurrilous; INFAMOUS,[85] *q. v.* (Opprobrious: Words As — Constituting Libel or Slander, see LIBEL AND SLANDER; Disorderly Conduct, see DISORDERLY CONDUCT; OBSCENITY; Justification For Assault, see ASSAULT AND BATTERY. See also BLASPHEMY; PROFANITY.)

OPTANDUM EST UT II QUI PRÆSUNT REIPUBLICÆ LEGUM SIMILES SINT, QUÆ, AD PUNIENDUM, NON IRACUNDIA, SED ÆQUITATE DUCUNTUR. A maxim meaning "It is desirable that those set in authority over the state shall be like the laws of the state, which, in inflicting punishment, are influenced not by anger, but by justice."[86]

OPTICAL INSTRUMENTS. The term does not include toy magic lanterns, small, slightly made and not substantial enough to be considered optical instruments for mature persons.[87]

OPTIMA EST LEGIS INTERPRES CONSUETUDO. A maxim meaning "Custom is the best interpreter of the law."[88]

OPTIMA EST LEX QUÆ MINIMUM RELINQUIT ARBITRIO JUDICIS, OPTIMUS JUDEX QUI MINIMUM SIBI. A maxim meaning "That system of law is best which leaves least to the discretion of the judge — that judge the best, who relies least on his own opinion."[89]

OPTIMA EVIDENTIA REI PRÆVALEBIT. A maxim meaning "The best evidence of the matter will prevail" (or "be more efficacious").[90]

OPTIMAM ESSE LEGEM, QUÆ MINIMUM RELINQUIT ARBITRIO JUDICIS; ID QUOD CERTITUDO EJUS PRÆSTAT. A maxim meaning "That law is the best which leaves the least discretion to the judge; and this is an advantage which results from its certainty."[91]

OPTIMA STATUTI INTERPRETATRIX EST (OMNIBUS PARTICULIS EJUSDEM INSPECTIS) IPSUM STATUTUM. A maxim meaning "The best interpretress of a statute is (all the separate parts being considered) the statute itself."[92]

OPTIMI CONSILIARII MORTUI. A maxim meaning "The dead are the best counsellors."[93]

OPTIMUS INTERPRES RERUM USUS. A maxim meaning "Usage is the best interpreter of things."[94]

OPTIMUS INTERPRETANDI MODUS EST SIC LEGES INTERPRETARI UT LEGES LEGIBUS CONCORDANT. A maxim meaning "The best mode of interpretation is so to interpret laws that they may accord with each other."[95]

an adverse interest, but one between whom and the applicant an issue is joined. Molloy *v.* Kilby, 15 Ch. D. 162, 164, 29 Wkly. Rep. 127.

83. Denisart Collect. de Jurisp. [*quoted* in Poor Ministers Relief Corp. *v.* Wallace, 3 Rawle (Pa.) 109, 125].

Under the Bankruptcy Act of 1867, opposition to the discharge of a bankrupt did not include any objection filed or raised to any proceeding before the application under section 29 for discharge. *In re* Hill, 12 Fed. Cas. No. 6,481, 1 Ben. 321, 324. See also BANKRUPTCY, 5 Cyc. 391.

84. U. S. *v.* Deaver, 14 Fed. 595, 597, where the term is said to have a more extensive meaning than "extortion," and embraces many other acts of official misfeasance and malfeasance.

85. Webster Int. Dict. See also Behling *v.* State, 110 Ga. 754, 755, 36 S. E. 85.

86. Morgan Leg. Max.

87. Borgfeldt *v.* U. S., 124 Fed. 457, within the meaning of U. S. Tariff Act of Aug. 27, 1894, c. 349, § 1, sched. B, par. 98.

88. Black L. Dict.

89. Broom Leg. Max. (7 Eng. ed.) p. 66.

Applied in: Miller *v.* Wallace, 76 Ga. 479, 485, 2 Am. St. Rep. 48; Harris *v.* Harris, 31 Gratt. (Va.) 13, 16.

90. Tayler L. Gloss.

91. Black L. Dict.

92. Bouvier L. Dict.

Applied in Bonham's Case, 8 Coke 107*a*, 117*b*, 77 Eng. Reprint 638.

93. Morgan Leg. Max.

94. Broom Leg. Max.

Applied in: Northrop *v.* Curtis, 5 Conn. 246, 255; Thompson *v.* Hurdman, 4 Quebec Super. Ct. 219, 236.

95. Black L. Dict. *Compare* Paris Stoughter's Case, 8 Coke 168*a*, 169*a*.

OPTIMUS JUDEX, QUI MINIMUM SIBI. A maxim meaning "He is the best judge who relies least upon his own opinion."[96]

OPTIMUS LEGUM INTERPRES CONSUETUDO. A maxim meaning "Usage is the best interpreter of laws."[97]

OPTION. A wish; power or right of election, a choice, election, preference;[98] CHOICE, *q. v.*; preference.[99] (Option: Affecting Validity of Contract, see CONTRACTS. As Consideration For Contract, see CONTRACTS. Between Modes of Transportation, see CARRIERS. Dealing in, see GAMING. Discharge of by Death of Party, see CONTRACTS. Enforcing, see SPECIFIC PERFORMANCE. For Mining Lease, see MINES AND MINERALS. In Payment of Negotiable Instrument, see COMMERCIAL PAPER. Levy on Interest Acquired by, see EXECUTIONS. Time For Exercising, see CONTRACTS. To Declare Debt Due, see CHATTEL MORTGAGES; MORTGAGES. To Extend or Renew Lease, see LANDLORD AND TENANT. To Purchase — As Affecting Conversion, see CONVERSION; Leased Premises, see LANDLORD AND TENANT; Mining Property, see MINES AND MINERALS; Personalty, see SALES; Realty, see VENDOR AND PURCHASER. To Rescind Contract, see CONTRACTS. To Terminate Contract, see CONTRACTS.)

OR. A. In Its Proper, Distributive Sense — 1. IN GENERAL. The word "or" is a disjunctive particle that marks an alternative, generally corresponding to "either," as, "either this or that,"[1] a connective that marks an alternative, as "you may read or may write — that is, you may do one of the things at your pleasure, but not both."[2] A conjunction marking distribution, an alternative, or apposition.[3]

2. DENOTING SUBSTITUTION. In this sense, in a legacy to "A, or his issue," "A, or his legal representatives,"[4] "or his personal representatives," "or his heirs,"[5] the word "or" usually implies a substitution,[6] and, so used, prevents a

96. Peloubet Leg. Max.

97. Bouvier L. Dict.

Applied in: Parsons Contr. 541; Barber Asphalt Paving Co. *v.* Meservey, 103 Mo. App. 186, 194, 77 S. W. 137; also (in form "*Optimus legis*," etc.) in Wallace *v.* Bradshaw, 54 N. J. L. 175, 179, 23 Atl. 759; also (in form "*Optima*," etc.) in Ogilvie *v.* Wingate, 6 Bro. P. C. 498, 518, 2 Eng. Reprint 1225.

98. Worcester Dict. [*quoted* in Harper *v.* Bibb, 47 Ala. 547, 551].

99. Century Dict. [*quoted* in Levy *v.* Rothe, 17 Misc. (N. Y.) 402, 404, 39 N. Y. Suppl. 1057].

"Option is spoken of only as it regards one's freedom from external restraint in the act of choosing. It is left to a person's option, and he may make his choice." Worcester Dict. [*quoted* in Harper *v.* Bibb, 47 Ala. 547, 551].

The choice not limited to one of several objects named.— Under a provision that a motion might be made upon affidavits, or the minutes of the court, or exceptions, at the option of the moving party, it was held that such motion might be made upon any or all of those grounds. Gamer *v.* Glenn, 8 Mont. 371, 375, 20 Pac. 654.

"Option account" has been used to describe an account of fictitious, as distinguished from an account of actual, sales. So interpreted as it occurred in a letter between private persons. Dows *v.* Glaspel, 4 N. D. 251, 264, 60 N. W. 60.

"Option deal" is a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made. Third Nat. Bank *v.* Harrison, 10 Fed. 243, 248, 3 McCrary 316. See also Kent *v.* Miltenberger, 13 Mo. App. 503, 506; and CORNER, 9 Cyc. 978.

1. Worcester Dict. [*cited* in Austin *v.* Oakes, 48 Hun (N. Y.) 492, 498, 1 N. Y. Suppl. 307].

"Webster speaks of the word 'or' as indicating an 'alternative generally corresponding to either, as "either this or that," that is to say, "'either' one thing 'or' another thing."'" Shepard *v.* New Orleans, 51 La. Ann. 847, 851, 25 So. 542.

It imports "one or the other" but not "both," in its ordinary disjunctive sense. Kuehner *v.* Freeport, 143 Ill. 92, 100, 32 N. E. 372, 17 L. R. A. 774; Caster *v.* McClellan, 132 Iowa 502, 503, 109 N. W. 1020; Koch *v.* Fox, 71 N. Y. App. Div. 288, 292, 75 N. Y. Suppl. 913; Douglass *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147.

Defined as "either."— Brown *v.* Rushing, 70 Ark. 111, 122, 66 S. W. 442; Gabriel *v.* U. S., 121 Fed. 208.

2. Webster Dict. [*cited* in Austin *v.* Oakes, 48 Hun (N. Y.) 492, 498, 1 N. Y. Suppl. 307].

A connective that marks as alternative one of two, either, other.— "In strict accuracy, such is its signification (Webster's and Worcester's Dictionaries) and it would be so understood in demurrers to pleadings." Harris *v.* Parker, 41 Ala. 604, 615.

3. State *v.* St. Louis, 174 Mo. 125, 145, 73 S. W. 623, 61 L. R. A. 593; Coxson *v.* Doland, 2 Daly (N. Y.) 66, 67.

4. Phyfe *v.* Phyfe, 3 Bradf. Surr. (N. Y.) 45, 52.

5. Williams Ex. [*quoted* in Kerrigan *v.* Tabb, (N. J. Ch. 1898) 39 Atl. 701, 702].

6. Reiff *v.* State, 54 Md. 298, 304; Bartine *v.* Davis, 60 N. J. Eq. 202, 204, 46 Atl. 577;

lapse.[7] A substitutional use of the word has been found likewise in an application for insurance.[8]

3. Implying Discretion or Choice. It may imply discretion, when used between two terms which describe different subjects of a power,[9] or choice between two alternatives, when it occurs in a directory provision.[10]

4. Construed as "To Wit," or Other Like Phrase, When Used to Distribute, Merely, Words. The alternative need not be of fact, and the word "or" is often used to express an alternative of terms, definitions or explanations of the same thing in different words,[11] introducing a synonym for,[12] or an explanation of, the preceding term;[13] in which case it has been held equivalent to "to-wit";[14]

Kerrigan *v.* Tabb, (N. J. Ch. 1898) 39 Atl. 701, 702; *In re* Paton, 111 N. Y. 480, 487, 18 N. E. 625; Phyfe *v.* Phyfe, 3 Bradf. Surr. (N. Y.) 45, 52; Congreve *v.* Palmer, 16 Beav. 435, 437, 23 L. J. Ch. 54, 1 Wkly. Rep. 156, 51 Eng. Reprint 846; Gittings *v.* McDermott, 2 Myl. & K. 69, 73, 7 Eng. Ch. 69, 39 Eng. Reprint 870. See also Brent *v.* Washington, 18 Gratt. (Va.) 526, 532.

Where words of inheritance are not necessary to carry the absolute title the more likely construction is that "or" makes a substituted gift. O'Rourke *v.* Beard, 151 Mass. 9, 10, 23 N. E. 576.

7. Phyfe *v.* Phyfe, 3 Bradf. Surr. (N. Y.) 45, 52; Williams Ex. [*quoted* in Kerrigan *v.* Tabb, (N. J. Ch. 1898) 39 Atl. 701, 702; McCormick *v.* Burke, 2 Dem. Surr. (N. Y.) 137, 139].

8. "Wife or daughters" by way of answer to a question upon an application for insurance of relationship of persons to whom insurance was payable means in substance "The person or persons to whom it is payable are my wife or my daughters," that is, "to his widow or, if he left no widow, to his surviving daughters." Addison *v.* New England Commercial Travellers' Assoc., 144 Mass. 591, 593, 12 N. E. 407.

9. As in a direction that income "be applied by the proper authorities for the purchase of books for the Young Men's Institute, or any public library which," etc. (New Haven Young Men's Inst. *v.* New Haven, 60 Conn. 32, 36, 39, 22 Atl. 447); a power to sell "all or any," etc. (Condit *v.* Bigalow, 64 N. J. Eq. 504, 507, 54 Atl. 160). Where the power is given by statute to do two things connected by "or," it may "be used in such a sense as indicating that the power is to do one only of two things; but quite as frequently the use of the word 'or' denotes that the power granted is to do either; that is to say, both." Pollock *v.* Laura, 5 Fed. 133, 137. But *compare* Den *v.* Young, 23 N. J. L. 478, 483, where, in a power to sell or dispose of and divide "or" was held equivalent to "and."

Discretionary, as distinguished from substitutional, use.— In a power of appointment to all or any or either of three sisters named, "or" to all or any or either of their lawful issue, the word "or" following the names of the sisters "was apparently used in a discretionary rather than a substitutional sense." Drake *v.* Drake, 134 N. Y. 220, 229, 32 N. E. 114, 17 L. R. A. 664.

"A bequest to A. or B. is void but a bequest to A. or B. at the discretion of C. is good."— Longmore *v.* Broom, 7 Ves. Jr. 124, 128, 32 Eng. Reprint 51.

10. Thus, in construing a provision for the recording of chattel mortgages, it was said: "The disjunctive conjunction 'or' is here used in its ordinary and generally accepted sense; it expresses the alternative, and gives to the mortgagee his choice of depositing the mortgage either in the county where the mortgaged property shall at the time be kept or in the county where the mortgagor shall at the time reside, if he be a resident of the state" (Springfield Third Nat. Bank *v.* Bond, 64 Kan. 346, 349, 67 Pac. 818); the construction of "or" as "and" was refused when the effect would have been to require a seed-grain note to be filed in two places instead of one of two (Minnesota Agricultural Co. *v.* Northwestern Elevator Co., 58 Minn. 536, 539, 60 N. W. 671); and as to another statute in relation to filing chattel mortgages it was said: "The disjunctive conjunction 'or' as here used is purely and strictly alternative in its effect and expresses that a choice may be made of one of the two places in which the registration of a mortgage may be had" (Oxsheer *v.* Watt, 91 Tex. 402, 404, 44 S. W. 67). Change in a penal provision from "fine 'and' imprisonment" to "fine 'or' imprisonment" "tended to obviate controversy as to the range of discretion" (Carter *v.* McClaughry, 183 U. S. 365, 393, 22 S. Ct. 181, 46 L. ed. 236).

11. Webster Dict. [*quoted* in Downs *v.* Allen, 22 Fed. 805, 809, 23 Blatchf. 54].

Distinction, in this sense, from "and."— The change from "willful and malicious desertion" to "willful or malicious desertion," in describing a ground of divorce, has the effect of subsituting wilful, or legally malicious desertion, as a cause, for a desertion both wilful and actually malicious. McBride *v.* McBride, 111 Tenn. 616, 618, 69 S. W. 781.

12. Arthur *v.* Cumming, 91 U. S. 362, 364, 23 L. ed. 438.

13. Com. *v.* Grey, 2 Gray (Mass.) 501, 502, 61 Am. Dec. 476.

Used by way of explanation of the preceding word, in an allegation of the sale of "intoxicating 'or' malt liquors" so that evidence of sale of intoxicants other than malt liquors could not be introduced thereunder. State *v.* Boncher, 59 Wis. 477, 480, 18 N. W. 335.

14. People *v.* Nordheim, 99 Ill. 553, 560; Bleneer *v.* People, 76 Ill. 265, 271; Blumenthal *v.* Berkshire L. Ins. Co., 134 Mich. 216, 219, 96 N. W. 17, 104 Am. St. Rep. 604.

or such other like expression as "that is to say;"[15] "otherwise called;"[16] "being."[17]

5. Possible Doubt, as to What Alternatives Are Indicated. The question may arise, to be settled by considering the sense of the context under the circumstances, what, exactly, is the alternative which "or" introduces,[18] or follows.[19]

6. In Negative Statement, Equivalent to "Nor." Following a negative, it has the same effect as "nor."[20]

7. Frequent Attacks Upon Disjunctive Construction. The proper alternative or disjunctive meaning is often attacked, even where it would seem to be obvious and can be upheld without hesitation by the courts,[21] for the word is not always employed disjunctively.[22]

"The word 'or' in a statute is often used in the sense of 'to-wit,' that is, in explanation of what precedes, and gives to that which precedes the same signification as that which follows it." Bouvier L. Dict. [*quoted* in People *v.* Latham, 203 Ill. 9, 18, 67 N. E. 403]. "'Or' may be used in the sense of 'to wit,' explaining what precedes." Anderson L. Dict. [*quoted* in People *v.* Latham, 203 Ill. 9, 18, 67 N. E. 403].

15. People *v.* Latham, 203 Ill. 9, 18, 67 N. E. 403; People *v.* Nordheim, 99 Ill. 553, 560; Blumenthal *v.* Berkshire L. Ins. Co., 134 Mich. 216, 219, 96 N. W. 17, 104 Am. St. Rep. 604.

16. So, "soft 'or' organzine" silk when "soft" and "organzine" describe the same kind of silk, is equivalent to "soft, 'otherwise called' organzine, silk." Elliott *v.* Turner, 2 C. B. 446, 461, 15 L. J. C. P. 49, 52 E. C. L. 446.

17. As in the phrase, "all of the reserve money or fifteen per cent held by the state," in an assignment. People *v.* Syracuse Third Nat. Bank, 159 N. Y. 382, 389, 54 N. E. 35.

18. As where a bequest of one tenth of the whole estate was followed by a bequest of "the rest or nine tenths of my available stocks." There it was claimed that the latter bequest included only stocks [that is to say, in effect, though not in the language of the report, that the descriptive alternative introduced by "or" and corresponding to or explaining "the rest" was the whole phrase "nine tenths of my available stocks"]. But it was pointed out, by the court, that such construction would produce an intestacy as to property other than stocks, and held that the bequest included the rest of the whole estate, except certain unavailable stocks, to exclude which, the words "of my available stocks" were intended, and that "or" was not to be construed as "consisting of" [that is, in grammatical effect and not in the language of the opinion, the true alternative description, introduced by "or" to explain "the rest" was, simply, "nine tenths," referring to that remaining fraction of the whole estate]. See Sweitzer's Estate, 142 Pa. St. 541, 545, 21 Atl. 885.

19. A note payable to a branch of an association, "or their treasurer," is not by such language made "payable to one or the other of two persons. The words 'or their treasurer' are either surplusage or declarative of the agent by whom the payee will receive payment." Wells *v.* Monihan, 13 N. Y. Suppl. 156, 158.

20. Maylone *v.* St. Paul, 40 Minn. 406, 407, 42 N. W. 88; Coxson *v.* Doland, 2 Daly (N. Y.) 66, 67 [*quoted* in State *v.* St. Louis, 174 Mo. 125, 144, 73 S. W. 623, 61 L. R. A. 593]; Adams *v.* East River Sav. Inst., 20 N. Y. Suppl. 12, 16.

"And," or "nor."— So construed as used in a statute providing that a street grade shall not be changed except upon petition "or" unless compensation be made, in Folmsbee *v.* Amsterdam, 142 N. Y. 118, 123, 36 N. E. 821.

21. Brown *v.* Rushing, 70 Ark. 111, 122, 66 S. W. 442; Vance *v.* Gray, 9 Bush (Ky.) 656, 658; Com. *v.* Keenan, 139 Mass. 193, 194, 29 N. E. 477; Schneewind *v.* Niles, 103 Mich. 301, 306, 61 N. W. 498; White *v.* Hunt, 6 N. J. L. 415, 418; Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 186, 21 N. Y. Suppl. 147; Moody *v.* Levy, 58 Tex. 532, 534; Heymann *v.* Cunningham, 51 Wis. 506, 517, 8 N. W. 401; Slaymaker *v.* Phillips, 5 Wyo. 453, 461, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842; Dumont *v.* U. S., 98 U. S. 142, 143, 25 L. ed. 65; Rex *v.* Marsack, 6 T. R. 771, 775.

22. See the cases cited *infra*, this note, and notes 23–36.

Disjunctive and other uses distinguished.— In rejecting, as being in the alternative, an affidavit for attachment stating that defendant "is about to transfer, or secrete, or has transferred or secreted, his property," it was said: "It is true, as is contended by the appellant, that the conjunction 'or' is not always disjunctive in its signification. There are familiar instances given in the law books, in which the conjunction 'or' is held to be equivalent in meaning to the copulative conjunction 'and'; and such meaning is often given to the word 'or' in deeds, and in wills, for the purpose of carrying out the intention of the party. There are also cases in which the word 'or' may be permitted to retain its primary signification, as a disjunctive conjunction, and yet the use of it will not vitiate an affidavit for an attachment. There are cases where the word 'or' is used, in the statement of two or more phases of the same general fact, and not to connect two distinct facts. For illustration, where the statute says that, if the debtor 'absconds or secretes himself,' so that process cannot be served on him, an attachment may issue: here, the general fact (so to speak) is, that the party cannot be found by the officer, so that process may be served. This may be either because he has absconded, or because he secretes himself." But to

B. Used, or Construed, as "And"[23] — **1. In Statutes.** The word "or" is often used, and has been often construed, as if it were "and," in statutes.[24]

2. In Rules of Court. It has been so used in a rule of court.[25]

3. In Wills and Other Private Writings. It is likewise often so construed in different kinds of private writings,[26] most frequently in wills,[27] and also with

"transfer" and to "secrete" property "can, in no sense, be considered as phases of the same general fact." Hopkins *v.* Nicholas, 22 Tex. 206, 208, 210.

It is often used in the sense of "both," in common parlance and in written instruments, for example, "my friend is liable to take smallpox or yellow fever"; meaning that there is exposure and liability to both. Harris *v.* Parker, 41 Ala. 604, 615.

23. "And" construed as meaning "or" see 2 Cyc. text and note 31.

24. *California.*— California, etc., R. Co. *v.* Mecartney, 104 Cal. 616, 620, 38 Pac. 448; McConky *v.* Alameda County Super. Ct., 56 Cal. 83.

Georgia.— Smith *v.* Hatcher, 102 Ga. 158, 160, 29 S. E. 162; Clay *v.* Central R., etc., Co., 84 Ga. 345, 348, 10 S. E. 967.

Illinois.— People *v.* Van Cleave, 187 Ill. 125, 133, 58 N. E. 422.

Indiana.— Burgett *v.* Bothwell, 86 Ind. 149, 151; O'Connell *v.* Gillespie, 17 Ind. 459, 460.

Iowa.— State *v.* Brandt, 41 Iowa 593, 615.

Kansas.— Kennedy *v.* Haskell, 67 Kan. 612, 616, 73 Pac. 913.

Louisiana.— Vicksburg, etc., R. Co. *v.* Goodenough, 108 La. 442, 458, 32 So. 404, 66 L. R. A. 314.

Minnesota.— Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 422, 23 N. W. 854; Weston *v.* Loyhed, 30 Minn. 221, 225, 14 N. W. 892.

Missouri.— State *v.* Bulling, 100 Mo. 87, 93, 12 S. W. 356.

New Jersey.— Price *v.* Forrest, 54 N. J. Eq. 669, 683, 35 Atl. 1075.

New York.— Jewell *v.* Ithaca, 36 Misc. 499, 500, 73 N. Y. Suppl. 953.

North Carolina.— Sparrow *v.* Davidson College, 77 N. C. 35, 36; State *v.* Pool, 74 N. C. 402, 404; State *v.* Custer, 65 N. C. 339, 342.

Pennsylvania.— Rolland *v.* Com., 82 Pa. St. 306, 327, 22 Am. Rep. 758; Murray *v.* Keyes, 35 Pa. St. 384, 391; Bollin *v.* Shiner, 12 Pa. St. 205, 206; Foster *v.* Com., 8 Watts & S. 77, 79, 80; Diehl *v.* Perie, 2 Miles 47, 49.

West Virginia.— State *v.* Davis, 31 W. Va. 390, 406, 7 S. E. 24.

Wisconsin.— Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466, 486; Winterfield *v.* Stauss, 24 Wis. 394, 406, 407; Ferrell *v.* Lamar, 1 Wis. 8, 25.

England.— Fowler *v.* Padget, 7 T. R. 509, 514, 4 Rev. Rep. 511.

"Particularly in permissive affirmative sentences" the use as "and" is frequent. Vicksburg, etc., R. Co. *v.* Goodenough, 108 La. 442, 458, 32 So. 404, 66 L. R. A. 314.

25. Toomey *v.* Hughes, 25 Wkly. Notes Cas. (Pa.) 66, 67.

26. "Often construed 'and,' and, 'and,' construed 'or,' to further the intent of the parties in legacies, devises, deeds, bonds and writings." Bouvier L. Dict. [*quoted* in State *v.* Cain, 9 W. Va. 559, 569].

27. *Georgia.*— Tennell *v.* Ford, 30 Ga. 707, 710.

Illinois.— Kindig *v.* Smith, 39 Ill. 300, 305.

Indiana.— Conklin *v.* State, 8 Ind. 458.

Kentucky.— Williams *v.* Williams, 91 Ky. 547, 556, 16 S. W. 361, 13 Ky. L. Rep. 293.

Maryland.—Slingluff *v.* Johns, 87 Md. 273, 280, 39 Atl. 872; Neal *v.* Cosden, 34 Md. 421, 427.

Massachusetts.— Hunt *v.* Hunt, 11 Metc. 88, 98; Parker *v.* Parker, 5 Metc. 134, 137; Carpenter *v.* Heard, 14 Pick. 449, 453.

Michigan.— *In re* Lamb, 122 Mich. 239, 242, 80 N. W. 1081.

New Jersey.— Holcomb *v.* Lake, 25 N. J. L. 605, 608; Den *v.* English, 17 N. J. L. 280, 288; Den *v.* Mugway, 15 N. J. L. 330, 331; Nevison *v.* Taylor, 8 N. J. L. 43, 45; Den *v.* Taylor, 5 N. J. L. 413, 420; Shreve *v.* MacCrellish, 60 N. J. Eq. 198, 202, 46 Atl. 581.

New York.— Roome *v.* Phillips, 24 N. Y. 463, 469; Jackson *v.* Blanshan, 6 Johns. 54, 57, 5 Am. Dec. 188; Van Vechten *v.* Parson, 5 Paige 512, 514.

North Carolina.— Turner *v.* Whitted, 9 N. C. 613, 618.

Pennsylvania.— *In re* Tripp, 202 Pa. St. 260, 265, 51 Atl. 983; Doebler's Appeal, 64 Pa. St. 9, 14; Sorver *v.* Berndt, 10 Pa. St. 213, 214; Beltzhoover *v.* Costen, 7 Pa. St. 13, 18; Shoofstall *v.* Powell, 1 Grant 19, 21; Kelso *v.* Dickey, 7 Watts & S. 279, 283; Hauer *v.* Sheetz, 2 Binn. 532, 544; Boyd's Estate, 9 Phila. 337, 338; Conway's Estate, 40 Wkly. Notes Cas. 193, 194.

South Carolina.— Massey *v.* Davenport, 23 S. C. 453, 455; Waller *v.* Ward, 2 Speers 786, 798; Bostick *v.* Lawton, 1 Speers 258, 262.

Tennessee.— Massie *v.* Jordan, 1 Lea 646, 648.

West Virginia.— Toothman *v.* Barrett, 14 W. Va. 301, 309, 312.

United States.— Arnold *v.* Buffum, 1 Fed. Cas. No. 554, 2 Mason 208, 222. See also Lippett *v.* Hopkins, 15 Fed. Cas. No. 8,380, 1 Gall. 454, 461.

England.— Read *v.* Snell, 2 Atk. 642, 643, 645, 26 Eng. Reprint 784; Fairfield *v.* Morgan, 2 B. & P. N. R. 38, 55, 56, 9 Rev. Rep. 609; Right *v.* Day, 16 East 67, 69, 14 Rev. Rep. 294; Denn *v.* Kemeys, 9 East 366, 376, 9 Rev. Rep. 581; Sowell *v.* Garrett, Moore K. B. 422, 423, 72 Eng. Reprint 671; Miles *v.* Dyer, 8 Sim. 330, 332; Miles *v.* Dyer, 5 Sim. 435, 440, 9 Eng. Ch. 435, 58 Eng. Reprint 400; Weddell *v.* Mundy, 6 Ves. Jr. 341, 343, 31 Eng. Reprint 1083. See also Grimshawe *v.* Pickup, 3 Jur. 286, 9 Sim. 591, 59 Eng. Reprint 486.

considerably less frequency in others such as deeds,[28] bonds,[29] a lease,[30] or a company's by-law.[31]

4. Between Names of Promisees: Dubious Construction. It has been construed "and" when used between the names of two promisees,[32] a construction which seems open to doubt.[33]

5. Said to Be Synonymous With "And." It has been said that "or" and "and" are sometimes synonymous[34] or convertible;[35] that in such a case, "or" is used in its copulative, and not in its disjunctive, sense.[36]

6. Strictly, Mere Error and Substitution. Strictly, the word, in itself, has no such meaning; the true rule is that when "or" is used by mistake, instead of "and," the latter may be substituted.[37]

7. When "And" May Be Substituted. The construction, or substitution, of "and" for "or" is never judicially authorized except where it is needed to conform to the clear intent of the legislative body[38] or individual, using the word,

"Before he attains the age of twenty-one years or marriage," construed "before twenty-one, unmarried" (as if it had been "and before marriage"). Barker *v.* Suretees, Str. 1175.

28. White *v.* Crawford, 10 Mass. 183, 188; Shoofstall *v.* Powell, 1 Grant (Pa.) 19, 21.

The same rule applies to the use of the word in a deed as in a will, when the question of intent is under consideration.—Wright *v.* Kemp, 3 T. R. 470, 473. See also cases cited *supra*, note 27.

29. Brittin *v.* Mitchell, 4 Ark. 92, 93; Parker *v.* Carson, 64 N. C. 563, 564.

30. Furnival *v.* Crew, 3 Atk. 83, 86, 26 Eng. Reprint 851.

31. Chemical Nat. Bank *v.* Colwell, 14 Daly (N. Y.) 361, 365, 14 N. Y. St. 682.

32. Willoughby *v.* Willoughby, 5 N. H. 244, 245, where it was held that a note in which the promise was to pay A "or" B, was "evidence of a contract with" A and B, "and that 'or' in the note must be understood to mean 'and.'" See also Quinby *v.* Merritt, 11 Humphr. (Tenn.) 439. But *compare* Blanckenhagen *v.* Blundell, 2 B. & Ald. 417, 419 [*cited* in Willoughby *v.* Willoughby, *supra*, this note, as authority for the ruling that action on such a promise could not be maintained by one party alone, but opposed to that case so far as the meaning of the word "or" is concerned, for it obviously regards the use as alternative, holding that "if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not having been paid to the other"].

33. See *supra*, note 32.

34. People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189, 200.

35. "In the construction of statutes, as well as in wills and contracts, where the sense demands it, or the intention is evident, the words 'or' and 'and' may be exchanged and used convertibly." Kennedy *v.* Haskell, 67 Kan. 612, 616, 73 Pac. 913.

36. Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 277, 19 Atl. 733, 19 Am. St. Rep. 394.

37. "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context." Sutherland St. Constr. (1st ed.) § 252 [*quoted* in Rocky Mountain Oil Co. *v.* Central Nat. Bank, 29 Colo. 129, 135, 67 Pac. 153; Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665, 667; Starr *v.* Flynn, 62 Kan. 845, 849, 62 Pac. 659; North Springs Water Co. *v.* Tacoma, 21 Wash. 517, 527, 58 Pac. 773, 47 L. R. A. 214; Geiger *v.* Kobilka, 26 Wash. 171, 174, 66 Pac. 423, 90 Am. St. Rep. 733]. "It is true that this word has sometimes been construed to mean 'and,' when this was clearly necessary to give effect to some clause in a will or some legislative provision. In such cases it has been forced out of its proper meaning to effect these purposes; but never to change a contract at pleasure. Indeed it seems to be an inaccurate expression to say that 'or' can ever mean 'and.' It should rather be said, that, for strong reasons, and in conformity with a clear intention, 'or' has been changed or removed, and 'and' substituted in its place." Douglass *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147. "You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and'; unless there is a context which shews it is used for 'and' by mistake. . . . Suppose a testator said, 'I give the black cow on which I usually ride to A. B.,' and he usually rode on a black horse; of course the horse would pass, but I do not think that any annotator of cases would put in the marginal note that 'cow' means 'horse.'" Morgan *v.* Thomas, 9 Q. B. D. 643, 645, 51 L. J. Q. B. 556, 47 L. T. Rep. N. S. 281, 31 Wkly. Rep. 106 [*quoted* in Taylor *v.* Taylor, 118 Iowa 407, 410, 92 N. W. 71; Gilmor's Estate, 154 Pa. St. 523, 532, 26 Atl. 614, 35 Am. St. Rep. 855, and *cited* in Warren Co. *v.* Booth, 81 Miss. 267, 275, 32 So. 1000].

Amendment permitted substituting "and" for "or" in a warrant. Rothschild *v.* Mooney, 13 N. Y. Suppl. 125.

38. People *v.* Monroe County Ct., 105 N. Y. App. Div. 1, 5, 93 N. Y. Suppl. 452; Williams *v.* U. S., 17 Okla. 28, 31, 87 Pac. 647; State *v.* Tiffany, 44 Wash. 602, 604, 87 Pac.

as in a will;[39] and never where such construction would be inconsistent with the intent as shown by the whole context and the circumstances,[40] nor unless its literal meaning renders the sense dubious.[41]

8. Strict Construction in Penal Statutes. In penal statutes "or" cannot be interpreted "and" when the effect would be to aggravate the offense or increase the punishment;[42] but this rule does not extend to the admission of the conjunctive construction where the word is used between the descriptions of different offenses.[43]

C. Clerical Errors. Other substitutions have been made for "or" where it has been found erroneously used for "on,"[44] or for "to."[45]

932; U. S. *v.* Fisk, 3 Wall. (U. S.) 445, 447, 18 L. ed. 243. *Compare* Charleston *v.* Van Roven, 2 McCord (S. C.) 465, 466.

Only where used by mistake.— "'Or' has been construed to mean 'and,' and *vice versa*. And the power of the courts to do this in a proper case has never been questioned. But a proper case can arise only when from a reading of the act as a whole it becomes apparent that the word used was mistakenly used." Carter *v.* McClellan, 132 Iowa 502, 505, 109 N. W. 1020.

39. *Alabama.*— McGraw *v.* Davenport, 6 Port. 319, 332.

Indiana.— Shimer *v.* Mann, 99 Ind. 190, 195, 50 Am. Rep. 82.

Massachusetts.— Sawyer *v.* Baldwin, 20 Pick. 378, 385.

New Jersey.— Holcomb *v.* Lake, 24 N. J. L. 686, 689; Cody *v.* Bunn, 46 N. J. Eq. 131, 133, 18 Atl. 857.

New York.— Miller *v.* Philip, 5 Paige 573, 574.

North Carolina.— Harrison *v.* Bowe, 56 N. C. 478, 481; Den *v.* Burfoot, 5 N. C. 494, 495.

Pennsylvania.—Denn *v.* Woodward, 1 Yeates 316, 318.

West Virginia.— Schaeffer *v.* Schaeffer, 54 W. Va. 681, 684, 46 S. E. 150.

Compare Robb *v.* Belt, 12 B. Mon. (Ky.) 643, 647; Anderson *v.* Smoot, Speers Eq. (S. C.) 312, 319.

40. "The word 'or' is sometimes made to signify 'and,' when it appears to be consistent with the meaning implied by the context and in order to carry out the manifest intent of the contracting parties," but not where such interpretation "would be inconsistent with any intent which can reasonably be gathered from the connection in which the word is used, from the whole contract, or from the light of the surrounding circumstances." Merriam *v.* U. S., 14 Ct. Cl. 289, 300.

41. Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 56, 58 N. E. 318. "And" is not to be substituted where the will as it stands will admit of a sensible construction (McGraw *v.* Davenport, 6 Port. (Ala.) 319, 332); nor where "or" has a distinct, clear, and definite meaning (Congreve *v.* Palmer, 16 Beav. 435, 437, 23 L. J. Ch. 54, 1 Wkly. Rep. 156, 51 Eng. Reprint 846).

42. Buck *v.* Danzenbacker, 37 N. J. L. 359, 361; State *v.* Walters, 97 N. C. 489, 490, 2 S. E. 539, 2 Am. St. Rep. 310; State *v.* Kearney, 8 N. C. 53, 55.

43. So under a statute providing for a penal action if any one shall cut down, carry away "or" destroy trees, the disjunctive shows that either act, separately, constitutes the offense (Givens *v.* Kendrick, 15 Ala. 648, 651); under a statute declaring it a crime to advise, plot, or consult for a certain purpose, to "advise" is one offense, to "consult," another, to "plot," a third (State *v.* McDonald, 4 Port. (Ala.) 449, 460); a statute declaring it a misdemeanor to keep, or exhibit for use, a billiard table, makes a separate offense of either of the two acts named (Germania *v.* State, 7 Md. 1, 6); a statute providing for the punishment of any who shall "assault by willfully shooting at" him or "assault with intent to commit murder, rape, or robbery," describes thereby four distinct and separate crimes of which "willfully shooting at" another is one (State *v.* Fairbanks, 115 La. 457, 460, 39 So. 443; State *v.* Brady, 39 La. Ann. 687, 688, 2 So. 556); with reference to a provision for a forfeiture "if any minister . . . or justice . . . shall join any persons in marriage, without a certificate as aforesaid" (namely, that intention has been duly published) "or before such minister or justice is certified of the consent of the parents," etc., "if either party be a minor," it was urged in behalf of a defendant that "or," connecting the two clauses, "being taken in its appropriate disjunctive sense," the marriage might proceed upon either the certificate of intent or the consent of parents, without the other; but it was held that to perform a marriage with one and without the other constituted the offense, the disjunctive sense being taken to separate, not the descriptions of the two prerequisites to performance of the ceremony, but the two clauses describing the two offenses of performing it, on the one hand, without certificate of publication of intent, or, on the other hand, without being certified of the consent of parents, etc. (Ellis *v.* Hull, 2 Aik. (Vt.) 41, 43, 44, 45).

44. "The word 'or' is substituted for 'on' in the printed copy of the Constitution of California" in the provision conferring on the supreme court jurisdiction "in criminal cases amounting to felony 'on' questions of law alone" (People *v.* Applegate, 5 Cal. 295); also in section 15 of the act of Feb. 17, 1831, incorporating the Phila. G. & M. R. Co. (Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. (Pa.) 459, 463).

45. U. S. Rev. St. (1878) § 5480; Brand *v.* U. S., 4 Fed. 394, 395, 18 Blatchf. 384, 385.

D. Dubious Use. Care must be taken to avoid such use of this particle as to create uncertainty where certainty is requisite.[46]

ORAL AGREEMENT. See ORAL CONTRACT.

ORAL CONTRACT. "A contract partly in writing and partly oral is, in legal effect, an oral contract."[47] (See PAROL AGREEMENT, and Cross-References Thereunder.)

ORANGE LEAD. See ORANGE MINERAL.

ORANGE MINERAL. Orange, or red, lead; a substance made by roasting dry white lead in a furnace and exposing it to the air when admitted to the heated receptacle. Used by paper-stainers, manufacturers of wall-paper and for highly colored cards. Classed under the U. S. tariff acts as a paint, and not as a manufacture of metal.[48]

OR ANY OTHER CAUSE. General words, which, by a familiar rule of construction expressed by the maxim *noscitur a sociis*, do not enlarge the scope of the particular words in the midst of which they appear.[49]

ORCHARD. An enclosure or assemblage of fruit or nut-bearing trees;[50] a collection of fruit trees set out for the use of the farm or for any other purpose.[51] (See, generally, STREETS AND HIGHWAYS.)

ORCHITIS. Inflammation of the secreting structure of the testicle.[52]

ORDAIN. According to the etymology and general use of the term, to appoint, to institute, to clothe with authority.[53] Of a clergyman or minister, to invest with

46. See *infra*, this note.

A plea is defective which presents several issuable facts disjunctively by connecting them by the word "or." State *v.* Ward, 60 Vt. 142, 153, 14 Atl. 187.

Indictments and informations see INDICTMENTS AND INFORMATIONS, 22 Cyc. 297. In charging an offense under a statute which makes it a crime to do any of certain things therein mentioned disjunctively, the use of the word "or" between the words descriptive of those things is not, as a rule, permissible, but this rule does not apply where "or" in the statute is used in the sense of "to wit," that is, to introduce an explanation or synonym of the preceding term, in which case the words of the statute may be adopted. Com. *v.* Grey, 2 Gray (Mass.) 501, 502, 61 Am. Dec. 476; State *v.* Lonne, 15 N. D. 275, 107 N. W. 524, 525; Clifford *v.* State, 29 Wis. 327, 329. See also Brown *v.* Com., 8 Mass. 59, 64. "Though the use of the word 'or' in charging an offence is fatal, its effect being to render the statement of the offence uncertain, it is, nevertheless, a proper connective in pleading negative averments." State *v.* Carver, 12 R. I. 285, 286. It does not render a charge alternative by connecting words used therein synonymously. State *v.* Gilbert, 13 Vt. 647, 651.

47. Bishop Contr. § 164 [*quoted* in Railway Pass., etc., Conductors Mut. Aid, etc., Assoc. *v.* Loomis, 142 Ill. 560, 567, 32 N. E. 424; Snow *v.* Nelson, 113 Fed. 353, 357]; Smith *v.* O'Donnell, 8 Lea (Tenn.) 468, 474.

"It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterward it is changed orally." Bishop Contr. § 164 [*quoted* in Snow *v.* Nelson, 113 Fed. 353, 357]. So where an offer is in writing and the acceptance verbal see Hulbert *v.* Atherton, 59 Iowa 91, 93, 12 N. W. 780.

The alteration, by word of mouth, of a written contract makes it an oral contract, for "a contract cannot rest partly in writing and partly in parol," parol being here used in the sense of "oral." Vicary *v.* Moore, 2 Watts (Pa.) 451, 457, 27 Am. Dec. 323.

48. Meyer *v.* Arthur, 91 U. S. 570, 571, 573. 577, 23 L. ed. 455.

49. So held in construing the following provision of the specifications issued for certain public work: "If . . . it is found that the pavement is defective from over-burning or improper mixing of material, or any other cause, or that the work has been done in an unskillful manner," the contractor shall, etc. Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329, 345, 73 C. C. A. 439.

50. Atty.-Gen. *v.* State Bd. of Judges, 38 Cal. 291, 296.

Number of trees.—"It is not necessary that there should be 50 or 100 trees. The owner may not have land enough to justify an orchard of more than 15 or 20 trees; still it is an orchard." So held under an act for the protection of orchards from encroachment by roads. Nischen *v.* Hawes, 21 S. W. 1049, 15 Ky. L. Rep. 40.

Not constituted by mere presence of fruit-trees without care or cultivation see Wilson *v.* Creekmore, 27 S. W. 809, 16 Ky. L. Rep. 261.

Distinguished from "plantation" and "nursery."—Atty.-Gen. *v.* State Bd. of Judges, 38 Cal. 291, 295, 296.

51. Nischen *v.* Hawes, 21 S. W. 1049, 15 Ky. L. Rep. 40.

52. Wood Household Pr. [*quoted* in The Wanderer, 20 Fed. 140, 142].

53. Kibbe *v.* Antram, 4 Conn. 134, 139.

"Such inferior courts as congress may from time to time ordain and establish."—"They are to be 'ordained' and established; instituted, formed, modeled, set in office, settled firmly, by congress." U. S. *v.* Smith, 4 N. J. L. 33, 38.

ministerial functions or sacerdotal power.[54] Used with reference to the making of municipal ordinances, to make, ordain, constitute, establish, pass.[55] (See ORDINATION.)

ORDAINED MINISTER. Within the meaning of provisions for exemption from taxation a minister not only ordained[56] but settled over some particular congregation or society, to which he is bound to preach, and which is bound to support him.[57]

OR DAMAGED. As used in the provision "The property of no person shall be taken or damaged for public use without just compensation therefor"; the phrase includes all actual damages, resulting from the exercise of the right of eminent domain, which diminish the market value of private property.[58]

ORDER. A. As a Noun — 1. In General. As a noun, a MANDATE, *q. v.*, exacting obedience, a COMMAND,[59] *q. v.*; a request;[60] a species of writing, embodying a request, or direction, to deliver money or goods to a third person,[61] in which sense it includes bills of exchange,[62] but is applied more distinctively to written requests, which are not bills of exchange, whether for the payment of money[63] or for the delivery of goods;[64] and when used upon commercial paper, a word of negotiability.[65]

54. Kibbe *v.* Antram, 4 Conn. 134, 139.

55. Kepner *v.* Com., 40 Pa. St. 124, 129.

56. For meaning of "ordained" see ORDAIN.

57. Ruggles *v.* Kimball, 12 Mass. 337, 338; Kidder *v.* French, Smith (N. H.) 155, 162.

58. So construed, as found in Nebr. Const. art. 1, § 21, in Omaha *v.* Kramer, 25 Nebr. 489, 492, 493, 41 N. W. 295, 13 Am. St. Rep. 504 [*quoted* in McGavock *v.* Omaha, 40 Nebr. 64, 73, 58 N. W. 543].

59. See Mills *v.* Martin, 19 Johns. (N. Y.) 7, 26, 27.

"To obey an order, and to comply with a requisition, is a phraseology which exhibits a correct discrimination in the use of language." Mills *v.* Martin, 19 Johns. (N. Y.) 7, 27.

An order of sale is a written command. See ORDER OF SALE.

As the mandate of a court or other judicial body see ORDERS.

Mandatory quality said not to depend on form.— "A rude 'request' may be more mandatory in its form than a courteous 'order.'" Evans *v.* State, 8 Ohio St. 196, 199, 70 Am. Dec. 98.

60. "The word 'order,' is in daily use all over the land, and its meaning well understood. We send 'orders' to tradesmen, by our children, servants and neighbors, and through the mails, for merchandise, without ever supposing for a moment, that we possess the power to compel their compliance. It is a mere 'request,' and nothing more." Hoskins *v.* State, 11 Ga. 92, 102.

In the trade of book-canvassing, the term, applied to requests to purchase books, as the basis of an agent's commission, has, as explained by testimony, a certain, settled meaning, namely, an "order that proves good." Newhall *v.* Appleton, 57 N. Y. Super. Ct. 343, 345, 9 N. Y. Suppl. 306. [The text of the reports of this case omits the witness' statement describing what was meant by a "good order," and supply its place by "etc.," but, according to the "syllabus" of the report in 57 N. Y. Super. Ct. 343, 345, 9 N. Y. Suppl. 306, that phrase signified "that the orders should be *bona fide* signatures unconditionally for the complete work, and should prove good by the delivery of from one-quarter to one-third of the whole number of parts to, and the payment therefor by the subscribers."]

Necessity of writing.— Expressing a statutory requirement, the term may demand a writing (Cricket *v.* State, 18 Ohio St. 9, 23); but, when inartificially used, may be satisfied by a verbal expression (Treat *v.* Stanton, 14 Conn. 445, 456).

61. See State *v.* Nevins, 23 Vt. 519, 521; Rogers *v.* Durant, 140 U. S. 298, 303, 11 S. Ct. 754, 35 L. ed. 481.

A will may be an "order" for the payment of money, if executed in compliance with the terms of a contract by which such order is required (Dennett *v.* Kirk, 59 N. H. 10, 12) but not otherwise (Mellows *v.* Mellows, 61 N. H. 137, 139).

62. Auerbach *v.* Pritchett, 58 Ala. 451, 457.

Checks included within the meaning of a statute of limitations see Rogers *v.* Durant, 140 U. S. 298, 303, 11 S. Ct. 754, 35 L. ed. 481.

63. See Brownlee *v.* Madison County, 81 Ind. 186, 187 [*quoted* in Noble School Furniture Co. *v.* Washington School Tp., 4 Ind. App. 270, 29 N. E. 935, 937]; Emery *v.* Mariaville, 56 Me. 315, 317; Sturtevant *v.* Liberty, 46 Me. 457, 459; Willey *v.* Greenfield, 30 Me. 452; Varner *v.* Nobleborough, 2 Me. 121, 126, 11 Am. Dec. 48; Dakin *v.* Graves, 48 N. H. 45, 47.

64. See Auerbach *v.* Pritchett, 58 Ala. 451; Coyle *v.* Satterwhite, 4 T. B. Mon. (Ky.) 124, 125; Sears *v.* Lawrence, 15 Gray (Mass.) 267, 269 [*quoted* in Hyland *v.* Blodgett, 9 Oreg. 166, 167, 42 Am. Rep. 799].

65. Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 270, 3 Keyes 365, 1 Transcr. App. 201, 5 Abb. Pr. N. S. 11, 36 How. Pr. 190. See also COMMERCIAL PAPER, 7 Cyc. 606, 609.

As used in a bill of exchange, it has "a positive and fixed meaning" and "means, generally, an order endorsed on the bill, and

2. **In Parliamentary Phrase.** Not a law, but merely the form in which the legislative body expresses an opinion.[66]

3. **As the Name of a Quality.** Used with reference to a state of existence, a proper state or condition.[67] Used with reference to a state of action, established or settled mode of proceeding.[68]

4. **"In order to,"** imports intent, or purpose.[69]

B. As a Verb. The perfect participle, "ordered," has been judicially construed as "required,"[70] and as "authorized."[71] (Order: For Election, see Elections. For Goods — In General, see Sales; Within Statute of Frauds, see Frauds, Statute of. For Payment of Money — In General, see Commercial Paper; As Accord and Satisfaction, see Accord and Satisfaction; As Assignment, see Assignments; As Consideration, see Contracts; Forgery of, see Forgery; Liability on, see Commercial Paper; Contracts; Mandamus to Compel Issue, see Mandamus; Negotiability of, see Commercial Paper; Of County, see Counties; Of Drainage District, see Drains; Of Municipality, see Municipal Corporations; Of School-District, see Schools and School-Districts; Of Town, see Towns; Payment by, see Payment; Store Order, see Constitutional Law; Master and Servant. For Public Improvement, see Municipal Corporations. Judicial Notice of, see Evidence. Of Army, see Army and Navy. Of Board of Health, see Health. Of County Board, see Counties. Of Court, see Orders and Cross-References Thereunder. Of Master, see Master and Servant. Of Municipal Board or Body, see Municipal Corporations. Of Navy, see Army and Navy. Of Superior as Defense, see False Imprisonment. Postal, see Post-Office. To Perform Militia Duty, see Militia.)

Orderly, Law-Abiding House. Under a statute which prohibits the granting of a license to sell liquor, by a county court, to any person who does not keep a house so described, it is within the discretion of such court to refuse such license on the ground that the applicant has sold liquor without one, although the house which he keeps is conducted in a peaceable and generally orderly manner.[72]

Order of Proof. See Criminal Law; Trial.

Order of Sale. A written command, under seal of the court authorizing and directing the officer to execute its judgment.[73] (See, generally, Attachment; Executions; Judicial Sales; Mortgages.)

can mean nothing else." Buckner *v.* Real Estate Bank, 5 Ark. 536, 541, 41 Am. Dec. 105.

66. Chicago, etc., R. Co. *v.* Chicago, 174 Ill. 439, 445, 51 N. E. 596 [*quoted* in Altamont *v.* Baltimore, etc., R. Co., 184 Ill. 47, 51, 56 N. E. 340].

67. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 281.

"Good order"; "good order and condition"; "good order and well conditioned" see Good, 20 Cyc. 1259 notes 36, 37.

"In shipping order" held to apply to ore when mined, riddled, and screened, and placed at a point where it could be reached and hauled away by wagons. Nunnelly *v.* Warner Iron Co., 94 Tenn. 282, 290, 29 S. W. 124.

"Sound order" applied to the state of tobacco as preserved by the manner of packing, and to be construed with a view to the intention of the parties as manifested by the acts, declarations, and circumstances accompanying the transaction, to mean "such order as would, with ordinary care, insure the sound condition of the tobacco on its arrival." Reynolds *v.* Palmer, 21 Fed. 433, 437.

68. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 281.

69. State *v.* Waite, 101 Iowa 377, 379, 70 N. W. 596.

This phrase, in a will, introducing the mention of the specified purpose of a power of sale, was held not to limit the power by excluding unspecified purposes, when no alternative disposition was made of the property subject to the power, and an intestacy would have resulted from confining its scope to the specified purpose. *In re* Adams, 148 Pa. St. 394, 398, 23 Atl. 1072, 24 Atl. 189.

70. See Cunningham's Estate, 73 Cal. 558, 559, 15 Pac. 136.

71. Weimar *v.* Fath, 43 N. J. L. 1, 9. *Compare* Christ Church *v.* Burlington, 39 Iowa 224, 225, 226, holding that an improvement was not "ordered" by a resolution which simply authorized the proper committee to advertise for bids for certain public work, and indicated the manner of payment, but did not authorize or direct the letting or making of the contract.

72. Caudill *v.* Com., 66 S. W. 723, 23 Ky. L. Rep. 2139, under St. § 4203.

73. Burkett *v.* Clark, 46 Nebr. 466, 472, 64 N. W. 1113.

Used interchangeably with "execution" in this sense. Burkett *v.* Clark, 46 Nebr. 466, 471, 64 N. W. 1113.

ORDERS

By Ernest G. Chilton *

I. **Definition**, 1514

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* Author of "Livery-Stable Keepers," 25 Cyc. 1504; "Marshaling Assets and Securities," 26 Cyc. 927; "Motions," 28 Cyc. 1; and joint author of "Licenses," 25 Cyc. 593.

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I. DEFINITION.

In the practice of courts the term "order" means a decision made during the progress of the case, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment.[1]

II. FORM AND REQUISITES.

A. In General. Where an order expresses the clear intent of the law in regard to the matter to which it relates, it is not void because the precise language of the statute is not employed.[2]

B. Caption — 1. JUDGE'S ORDER. The body of the order may be looked into for the purpose of determining whether it was made by a court or a judge.[3] It follows that a judge's order is not vitiated,[4] or made an order of the court,[5] because it contains a caption reciting the time, place, and term of court at which it was entered, which is required only of court orders.

2. ORDER OF COURT — a. In General. The caption of an order of court must truly state when and where the order was made.[6]

b. Effect of Absence of Caption. While an order of the court should be styled as such, and not as an order of the justice directing its entry,[7] yet when it appears from the notice of motion and the body of the order that it was made by the court, the absence of a caption does not prevent the order from being regarded as one made by the court.[8]

1. Loring *v.* Illsley, 1 Cal. 24, 27.
Other definitions are: "The judgment, or conclusion of the Court, upon any motion or proceeding." Gilman *v.* Contra Costa County, 8 Cal. 52, 57, 68 Am. Dec. 290.
"Any direction of a court, other than a judgment or decree, made in a cause." Anderson L. Dict.
"A direction in writing, granted by a court or judge, requiring or authorizing some act to be done." Burrill L. Dict.
Statutory definition is, "Every direction of a court or judge made or entered in writing and not included in a judgment." Dahlstrom *v.* Portland Min. Co., 12 Ida. 87, 85 Pac. 916, 917; De Lendrecie *v.* Peck, 1 N. D. 422, 423, 48 N. W. 322.
An order is interlocutory "when the cause is retained for future action." Smith *v.* Sahler, 1 Nebr. 310.
An order is final "when it affects a substantial right and determines the action." Smith *v.* Sahler, 1 Nebr. 310.

2. Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446.

3. Phinney *v.* Broschell, 80 N. Y. 544; Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509; Borthwick *v.* Howe, 27 Hun (N. Y.) 505; Merriman *v.* McCormick Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743.

4. Phinney *v.* Broschell, 80 N. Y. 544; Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509; Albrecht *v.* Canfield, 92 Hun (N. Y.) 240, 36 N. Y. Suppl. 940; Lachenmeyer *v.* Lachenmeyer, 26 Hun (N. Y.) 542; *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602; Caldwell's Case, 13 Abb. Pr. (N. Y.) 405; Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19; Wicker *v.* Dresser, 13 How. Pr. (N. Y.) 331.

5. People *v.* Kelly, 35 Barb. (N. Y.) 444.

6. Matter of Myers, 3 How. Pr. (N. Y.) 234; Whitney *v.* Belden, 4 Paige (N. Y.) 140.

7. Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509; Roncoroni *v.* Gross, 92 N. Y. App. Div. 366, 86 N. Y. Suppl. 1113.
If an order which is required to be made by the court is entitled and filed in the court and bears the seal of the court, it will not be considered as an order of the judge at chambers, because the words "it appearing to me" are used in it, and the testatum clause says, "In witness whereof, I have hereunto set my hand." Oaks *v.* Rodgers, 48 Cal. 197.

8. Lawson *v.* Speer, 91 N. Y. App. Div.

c. Presumption Arising From Regular Caption. An order of court, with a regular caption, is presumed, in the absence of proof to the contrary, to have been made at a term of court regularly called and held.[9]

C. Recitals — 1. As to Preliminary Objections. While preliminary or other formal objections taken upon the argument should ordinarily be recited in an order for purposes of review, an omission of such a recital is not fatal to the order if it appears that the party complaining is in no wise aggrieved thereby.[10]

2. As to Papers Used. When a rule of practice requires that all the papers used or read on the motion shall be specified in the order, the recital must be so definite and certain as to enable the court to determine what papers were before and considered by it on the hearing.[11]

3. As to Waiver of Jurisdiction. If the question of jurisdiction is waived it should appear by recitals in the order or in a stipulation to that effect.[12]

4. Conclusiveness of. The rule is that recitals in an order, although not conclusive, are presumptive evidence of their truth.[13]

D. Signature of Judge. An order made in open court and entered by the clerk on his minutes is valid without a formal order signed by the judge.[14]

III. SETTLEMENT.

On settling an order a judge may lawfully modify or add to the decision announced by him.[15]

IV. ENTRY.

A. Generally — 1. Necessity — a. In General. Where an order is granted upon notice of motion to the adverse party, it does not become complete or effective for any purpose until entered.[16]

b. Within Given Time. Under a rule of practice, requiring an order granted upon a motion to be entered within a given period of time after the decision, such order is invalid and ineffectual unless so entered.[17]

2. Who Entitled. Where a motion is made to a justice out of term on notice,

411, 86 N. Y. Suppl. 915; Kelly *v.* Thayer, 34 How. Pr. (N. Y.) 163.

9. People *v.* Ulster County, 19 N. Y. Wkly. Dig. 208; Dallas County *v.* McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. ed. 285. See also Fisher *v.* Hepburn, 48 N. Y. 41.

10. Matter of National Gramophone Corp., 82 N. Y. App. Div. 593, 81 N. Y. Suppl. 853.

11. Hobart *v.* Hobart, 85 N. Y. 637; Southack *v.* Southack, 61 N. Y. App. Div. 105, 70 N. Y. Suppl. 331 (holding that an order is defective which recites that it was made upon certain papers, and "upon all the pleadings and proceedings in this action"); Faxon *v.* Mason, 87 Hun (N. Y.) 139, 33 N. Y. Suppl. 802 (holding further that an order is defective where it recites that it was made on the reading of certain papers, "and on all the papers and proceedings herein").

After using a deposition in defeating a motion, plaintiff cannot contend that it was superfluous, in order to defeat defendant's right to have it recited in the order denying the motion. Farmers' Nat. Bank *v.* Underwood, 12 N. Y. App. Div. 269, 42 N. Y. Suppl. 500.

Except that the court may strike out scandalous matter, the party is entitled to have recited in an order all papers used on a motion from which it resulted. Deutermann *v.* Pollock, 36 N. Y. App. Div. 522, 55 N. Y. Suppl. 829.

12. Newhall *v.* Appleton, 46 N. Y. Super. Ct. 6. See also Whittaker *v.* Desfosse, 7 Bosw. (N. Y.) 687.

13. Smith *v.* Grant, 3 N. Y. St. 255. See also Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

14. State *v.* Judge Fifth Dist. Ct., 12 La. Ann. 455; Morgan *v.* Whitesides, 14 La. 277; Leyde *v.* Martin, 16 Minn. 38; Harris *v.* Baltimore Mach., etc., Co., 112 N. Y. App. Div. 389, 98 N. Y. Suppl. 440 [*affirmed* in 188 N. Y. 141, 80 N. E. 1028].

15. Post *v.* Cobb, 13 N. Y. St. 555.

16. Redhead *v.* Iowa Nat. Bank, 123 Iowa 336, 98 N. W. 806; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135; Whitney *v.* Belden, 4 Paige (N. Y.) 140. See also Bronner *v.* Loomis, 17 Hun (N. Y.) 439.

Although the statute merely directs that an order shall be entered, and contains no provision nullifying it unless so entered, the order is nevertheless void unless entered. Blackwood *v.* Blackwood, (Tex. Civ. App. 1898) 47 S. W. 483 [*affirmed* in 92 Tex. 478, 49 S. W. 1045].

Ex parte orders need not be entered with the clerk. Savage *v.* Relyea, 3 How. Pr. (N. Y.) 276.

17. Bronner *v.* Loomis, 17 Hun (N. Y.) 439; Scudder *v.* Snow, 29 How. Pr. (N. Y.)

it is the duty of the prevailing party to see that an order conformably to the decision is entered.[18] And the rule in one jurisdiction at least is, that if the party, whose duty it is so to do, fails to enter an order within twenty-four hours after the decision is made, any party interested may enter it.[19]

3. Manner. The order made by a justice, on a motion made out of term upon notice, must be entered with the clerk of the county where the papers are filed.[20] An order is deemed to be entered, if formally prepared, signed by the judge, and filed with the clerk.[21]

4. Remedy For Irregular Entry. Where an order in favor of defendant is entered irregularly by plaintiff, the proper practice is for defendant to move to vacate plaintiff's order and substitute his own.[22]

B. Orders Nunc Pro Tunc — 1. In General. An order can be entered *nunc pro tunc* to make a record of what was previously done by the court, although not then entered;[23] but where the court has wholly omitted to make an order, which it might or ought to have made, it cannot afterward be entered *nunc pro tunc*.[24]

2. Foundation For. There are authorities which hold that an order *nunc pro tunc* can be entered on parol evidence if it is clear and sufficient.[25] But the view

95; Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367. See also Curtis *v.* Greene, 28 Hun (N. Y.) 294.

18. Savage *v.* Relyea, 3 How. Pr. (N. Y.) 276.

Effect of failure to perform duty of entering.— When it is the duty of a clerk to speedily enter an order, his omission to perform that duty will not be allowed to prejudice the substantial rights of the parties. People *v.* Central City Bank, 53 Barb. (N. Y.) 412, 35 How. Pr. 428.

19. *In re* Rhinebeck, etc., R. Co., 8 Hun (N. Y.) 34 [*affirmed* in 67 N. Y. 242]; Losee *v.* Dolan, 74 N. Y. Suppl. 685; Stafford *v.* Ambs, 8 Abb. N. Cas. (N. Y.) 237; Whitney *v.* Belden, 4 Paige (N. Y.) 140.

How time computed.— Time, for the purpose of determining whether twenty-four hours have elapsed since the decision was made, so as to authorize any interested party to enter the order, must be figured by the hour, and not by the day. Losee *v.* Dolan, 74 N. Y. Suppl. 684.

20. Savage *v.* Relyea, 3 How. Pr. (N. Y.) 276.

21. Von Schmidt *v.* Widber, 99 Cal. 511, 34 Pac. 109, holding further, that if the order is signed by the judge and filed with the clerk, it is valid and in force, although not entered in the minutes by the clerk. See also Niles *v.* Edwards, 95 Cal. 41, 30 Pac. 134.

Under the statute providing that the judge shall enter an order on the minutes, it is not necessary that the judge shall make the entry with his own hand, but it is sufficient if the order is entered on the minutes by the clerk at the direction of the judge, and the minutes subsequently approved and signed by him. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811.

Not entered on daily journal.— An order on a motion will be presumed to have been made in court, and not out of court, although not entered on the daily journal, where the judge appends to the motion in the motion docket the memoranda: "Granted. B. F. Graves, Cir. Judge," this practice being recognized as having long prevailed. Merrill *v.* Montgomery, 25 Mich. 73.

Effect of withdrawal of order.— Where an order is marked filed, and entered and recorded on the journal the day when made, but is immediately taken out of the clerk's possession by the attorney, and kept by him in his office, it is not on file while so kept. Dunton *v.* Harper, 64 S. C. 338, 42 S. E. 153.

22. Allen *v.* Becket, 84 N. Y. Suppl. 1012.

23. *Illinois.*— Lindauer *v.* Pease, 192 Ill. 456, 61 N. E. 454; Mertz *v.* Mehlhop, 117 Ill. App. 77; Finch *v.* Finch, 111 Ill. App. 481.

Indiana.— Wilson *v.* Vance, 55 Ind. 394.

Kansas.— Aydelotte *v.* Brittain, 29 Kan. 98.

Missouri.— Hansbrough *v.* Fudge, 80 Mo. 307; State *v.* Jeffors, 64 Mo. 376; Priest *v.* McMaster, 52 Mo. 60; Turner *v.* Christy, 50 Mo. 145.

West Virginia.—Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461.

See 35 Cent. Dig. tit. "Motions," § 65.

24. *California.*— Hegeler *v.* Henckell, 27 Cal. 491.

Illinois.— Lindauer *v.* Pease, 192 Ill. 456, 61 N. E. 454; Finch *v.* Finch, 111 Ill. App. 481.

Indiana.— Wilson *v.* Vance, 55 Ind. 394.

Missouri.— State *v.* Jeffors, 64 Mo. 376; Priest *v.* McMaster, 52 Mo. 60; Turner *v.* Christy, 50 Mo. 145; Hyde *v.* Curling, 10 Mo. 359.

Oregon.— Lombard *v.* Wade, 37 Oreg. 426, 61 Pac. 856.

United States.— Klein *v.* Southern Pac. Co., 140 Fed. 213.

See 35 Cent. Dig. tit. "Motions," § 65.

Compare Hirshfeld *v.* Kalischer, 81 Hun (N. Y.) 606, 30 N. Y. Suppl. 1027; De la Fleur *v.* Barney, 45 Misc. (N. Y.) 515, 92 N. Y. Suppl. 926.

25. Liddell *v.* Bodenheimer, 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42; Shea *v.* Mabry, 1 Lea (Tenn.) 319.

sustained by the weight of authority is that an order *nunc pro tunc* should be entered on written evidence only.[26]

3. Limitations. An application for the *nunc pro tunc* entry of an order is not barred by the statute of limitations.[27]

4. Laches. An order will not be entered *nunc pro tunc*, even in an otherwise proper case, if the delay in entering it was due to some fault or omission by the party entitled to enter the order.[28]

5. Effect of Entry. It is not within the purview of an order *nunc pro tunc* to operate *ex post facto* so as to give force to an order void for want of jurisdiction.[29]

V. SERVICE OF.

A. Necessity. In some jurisdictions the rule prevails that parties to a cause are chargeable with knowledge of all proper and legal orders made therein;[30] but in other jurisdictions the rule is that only the moving party is chargeable with notice of an order made in a cause,[31] and that such order must be served upon the adverse party in all cases where his rights may be affected or prejudiced by any proceedings taken under it.[32]

B. Sufficiency — 1. Copy or Original. Where the court renders a written decision requiring service of an order, the order must be entered and a copy thereof served,[33] unless the object be to bring the party into contempt, in which case the original order must be shown.[34]

2. As to Persons Upon Whom Service Made. Where an order granted in a cause does not require that it be personally served upon a party who has appeared by an attorney, service upon the attorney, instead of the party, is sufficient, unless the object is to bring the party into contempt.[35]

26. Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014; State *v.* Jeffors, 64 Mo. 376; Turner *v.* Christy, 50 Mo. 145; Hyde *v.* Curling, 10 Mo. 359; Blum *v.* Neilson, 59 Tex. 378. See also Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461, referring to note in 4 Am. St. Rep. 828.

27. Liddell *v.* Bodenheimer, 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42.

28. Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014; State *v.* Langley, 13 Wash. 636, 43 Pac. 875. See also State *v.* Kinkade, 25 Ohio Cir. Ct. 657.

29. Eslow *v.* Albion Tp., 32 Mich. 193.

30. Yonge *v.* Broxson, 23 Ala. 684; Smith *v.* Anderson, 18 Md. 520; Seidel *v.* Hurley, 1 Woodw. (Pa.) 352; Williams *v.* Miller, 1 Wash. Terr. 88.

31. Mottram *v.* Mills, 1 Sandf. (N. Y.) 671; Willink *v.* Renwick, 22 Wend. (N. Y.) 608.

32. Johnston *v.* Green, 3 Abb. Pr. N. S. (N. Y.) 342; Spaulding *v.* Milwaukee, etc., R. Co., 11 Wis. 157.

33. Cheetham *v.* Lewis, 2 Johns. (N. Y.) 104; Boker *v.* Bronson, 27 Fed. Cas. No. 1,606, 5 Blatchf. 5.

A defective copy of an order cannot be treated as a nullity, if its sense and object can be ascertained from its terms and the affidavit served. Osgoodby *v.* Seifert, 22 Alb. L. J. (N. Y.) 135.

Copy not certified.— Where a copy of an order of court has been served at the office of an attorney, he will not be justified in returning the same for the reason that it is not a certified copy. Gross *v.* Clark, 1 N. Y. Civ. Proc. 17.

Failure to recite paper used on motion.— Where a copy of an order of court has been served at the office of an attorney as directed therein, he will not be justified in returning the same for the reason that it does not recite a paper used on the motion. Gross *v.* Clark, 1 N. Y. Civ. Proc. 17.

Orders staying proceedings.— Although an order to stay proceedings with a view to a motion is not operative unless a notice of motion is also served (Lucas *v.* Albee, 1 Den. (N. Y.) 666; Rosevelt *v.* Fulton, 5 Cow. (N. Y.) 438), yet, where such an order served upon a party recites that a motion is intended, and it is followed by a notice of motion served on his attorney the following day, the order will be held operative on the party from the time of service on him (Lucas *v.* Albee, 1 Den. (N. Y.) 666; Mallory *v.* East River Ins. Co., 7 Hill (N. Y.) 192).

34. Gross *v.* Clark, 1 N. Y. Civ. Proc. 17; Bridgman *v.* Gregory, 19 Wend. (N. Y.) 9; Utica Bank *v.* Kibby, 7 Cow. (N. Y.) 148.

35. Flynn *v.* Bailey, 50 Barh. (N. Y.) 73.

When service sufficient.— Where a person employed to serve an order on an attorney delivered it to an individual found in charge of the attorney's office, the service was regular and effectual, although the attorney was in an adjacent room at the time. Gross *v.* Clark, 1 N. Y. Civ. Proc. 17. In case of a motion for an extension of the time for filing an answer, copies of the orders and affidavits are properly served by depositing them in the post-office, postpaid, properly addressed to plaintiff's attorney at his place of residence. Wallace *v.* Wallace, 13 Wis. 224.

When service insufficient.— Service of an

3. By Publication. Where the statute requires the publication of an order for a given period of time, and the order itself directs publication for a shorter period, publication for the period contemplated by the statute is sufficient.[36]

VI. AMENDMENT OF.

A. Orders Entered on Motion — 1. Power of Court. Every court has the power to amend its own order entered on motion, so as to express the meaning of the court at the time when the order was made,[37] provided the amendment be made without injustice, or on terms which preclude injustice.[38] But no court has power to amend its order so as to pass upon a question that was not actually presented to it, or as to which no ruling was made.[39]

2. Manner. When an order has been passed and entered, the proper practice for the party desiring its amendment is to make a motion on notice for that purpose,[40] which motion, in one jurisdiction at least, is denominated a motion for resettlement.[41] According to strictly regular practice a motion to amend an order, so as to express the meaning of the court at the time of the decision, should be made before the court or judge granting the order.[42]

3. Effect. Where an order is amended by leave of the court so as to make it bear date as of the day on which it should have been dated, such amendment does not render it necessary to reënter or re-serve the order.[43]

B. Orders Entered on Consent. Although an order by consent cannot be modified in any essential part without the assent of both parties to the same, yet the court on application of either party may give such further directions as shall be necessary to carry into effect the spirit and intent of the order.[44]

VII. VACATING AND SETTING ASIDE.

A. Jurisdiction or Authority — 1. Orders Entered on Motion — a. In General. The common-law rule is that the court has entire control over its own orders, and may vacate them at any time during the term at which they are made.[45]

order, by leaving it in the office of the adverse party's attorney, after the office is closed, instead of leaving it at his residence, as required by Code Civ. Proc. § 979, is insufficient. Asinari *v.* Volkening, 2 Abb. N. Cas. (N. Y.) 454. Service of an order on an attorney by affixing it on the door of his office before office hours, no one being within, is not good service, where it is not actually received. Oshiel *v.* De Graw, 6 Cow. (N. Y.) 63.

36. Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

37. Wingrove *v.* German Sav. Bank, 2 N. Y. App. Div. 479, 37 N. Y. Suppl. 1092; American Hosiery Co. *v.* Riley, 12 Abb. N. Cas. (N. Y.) 329; *In re* Swire, 30 Ch. D. 239, 53 L. T. Rep. N. S. 205, 33 Wkly. Rep. 785; McDougald *v.* Mullins, 30 Nova Scotia 313. See also Freeze *v.* Marston, 5 N. H. 220.

38. *In re* Swire, 30 Ch. D. 239, 53 L. T. Rep. N. S. 205, 33 Wkly. Rep. 785; McDougald *v.* Mullins, 30 Nova Scotia 313.

39. Schmidt *v.* New York El. R. Co., 2 N. Y. App. Div. 481, 37 N. Y. Suppl. 1100.

40. *In re* Swire, 30 Ch. D. 239, 53 L. T. Rep. N. S. 205, 33 Wkly. Rep. 785; McLellan *v.* Morrison, 23 Nova Scotia 235.

A judge, on his own motion, and without notice to the party affected, has no power to amend an order made by him. Simmons *v.* Simmons, 32 Hun (N. Y.) 551.

41. Thousand Island Park Assoc. *v.* Gridley, 25 N. Y. App. Div. 499, 49 N. Y. Suppl. 722; Mooney *v.* Ryerson, 8 N. Y. Civ. Proc. 435.

Remedy by appeal.— Where an order denying a motion to resettle an order by adding recitals of certain papers, used on the motion pursuant to which it was made, fails to recite the papers used on the second motion, which are the same as those omitted from the first order, the remedy is by appeal from the second order and not by motion for its resettlement. Deutermann *v.* Pollock, 36 N. Y. App. Div. 522, 55 N. Y. Suppl. 829.

Grounds for resettlement.— A litigant cannot be deprived of his right to appeal by the arbitrary refusal of the court to resettle its order so as to show the fact that it was not made upon his default or consent. Wollowitz *v.* New York City R. Co., 116 N. Y. App. Div. 361, 101 N. Y. Suppl. 830; Raymond *v.* Tiffany, 115 N. Y. App. Div. 350, 100 N. Y. Suppl. 807.

42. Dinkelspiel *v.* Levy, 12 Hun (N. Y.) 130.

43. *In re* Beckwith, 87 N. Y. 503.

44. Leitch *v.* Cumpston, 4 Paige (N. Y.) 476.

45. *Arkansas.*— Killian *v.* State, 72 Ark. 137, 78 S. W. 766.

Illinois.— Seiter *v.* Mowe, 182 Ill. 351, 55 N. E. 526, holding, however, that the court may vacate its own order at the next en-

But in the absence of statutory authority,[46] it is beyond the power of the court to vacate its own order after the lapse of the term at which such order was made.[47] And it is not correct practice to ask one court to set aside an order made by another court of coördinate authority,[48] except where the order has been obtained by collusion,[49] or there is an absence of jurisdiction in the tribunal directing the order.[50]

b. By Default. An order taken by default after notice of motion may be vacated by the court granting the same, upon sufficient excuse being shown for the default.[51]

2. Ex Parte Orders — a. In General. Where a judge or officer has granted an order *ex parte*, no other judge or officer can set it aside.[52] That can only be done by the court,[53] or the judge or officer who made the order.[54]

b. By Consent. Parties acquire rights to the benefits of consent orders; and an order made by consent can never be vacated without the consent of all the parties, unless it affirmatively appears that its rendition was procured by fraud,[55]

suing term, where the motion for that purpose is filed during the same term at which the order was made, and the motion is continued by operation of law.

Missouri.— State *v.* Gabriel, 88 Mo. 631; Colvin *v.* Six, 79 Mo. 198; State *v.* Webb, 74 Mo. 333; State *v.* Bragg, 63 Mo. App. 22; Leise *v.* Mitchell, 53 Mo. App. 563.

Wisconsin.— Servatius *v.* Pickel, 30 Wis. 507.

United States.— Born *v.* Schneider, 128 Fed. 179.

46. Weiser *v.* St. Paul, 86 Minn. 26, 90 N. W. 8; Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923. See also Huffman *v.* Rhodes, 72 Nebr. 57, 100 N. W. 159.

47. McCandless *v.* Conley, 115 Ga. 48, 41 S. E. 256; State *v.* Fort, 178 Mo. 518, 77 S. W. 741; Born *v.* Schneider, 128 Fed. 179. See also Fisher *v.* Savannah Guano Co., 97 Ga. 473, 25 S. E. 477; Servatius *v.* Pickel, 30 Wis. 507.

Void orders.— The rule that the court may not, after the lapse of the term, set aside its final judgment, except motion to that end be entered at the judgment term, has no application to the vacating of void orders. Peterson *v.* Metropolitan Nat. Bank, 88 Ill. App. 190.

An interlocutory order may be vacated at a subsequent term by the same court, without compliance with the act of Nebr. Civ. Proc. § 602 *et seq.*, relating to the vacation and modification of judgments and final orders at a term subsequent to that at which they were rendered. Huffman *v.* Rhodes, 72 Nebr. 57, 100 N. W. 159.

48. People *v.* National Trust Co., 31 Hun (N. Y.) 20; *In re* National Trust Co., 4 N. Y. Civ. Proc. 203; Furman *v.* Greenville, etc., R. Co., 3 S. C. 427.

49. Wilson *v.* Barney, 5 Hun (N. Y.) 257. See also Corbin *v.* Casina Land Co., 26 N. Y. App. Div. 408, 49 N. Y. Suppl. 929.

50. Kamp *v.* Kamp, 59 N. Y. 212.

51. Matter of Peekamose Fishing Club, 5 N. Y. App. Div. 284, 39 N. Y. Suppl. 124 (holding, however, that an order taken by default will not be vacated at the instance of the moving party, where the only excuse given is that he supposed the other parties would ask for an adjournment, and that he had other pressing engagements on that day, but without stating what his engagements were); Bolles *v.* Duff, 56 Barb. (N. Y.) 567; Bolles *v.* Duff, 55 Barb. (N. Y.) 313; Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233; Van Alstrand *v.* House, 3 Abb. Pr. (N. Y.) 226 (holding, however, that a default taken on a motion for a change of venue will not be vacated on the ground that plaintiff was absent, so that his affidavit in opposition could not be obtained, where no postponement of the hearing was asked); Matter of New York, etc., Midland R. Co., 40 How. Pr. (N. Y.) 335; People *v.* Freer, 1 Cai. (N. Y.) 394.

Papers on which motion heard.— Where an order taken by default is vacated on excusing the default, it must be heard as to the party who took it on the same papers upon which he originally moved. Knowlton *v.* Bowrason, 8 Cow. (N. Y.) 135.

52. Cayuga County Bank *v.* Warfield, 13 How. Pr. (N. Y.) 439; Hart *v.* Butterfield, 3 Hill (N. Y.) 455.

Orders absolute in first instance.—The rule against one judge vacating an order made by another judge does not apply to orders made absolute in the first instance. Chambers *v.* Hunter, 2 Nova Scotia Dec. 144.

53. People *v.* Cooper, 57 How. Pr. (N. Y.) 463; Cayuga County Bank *v.* Warfield, 13 How. Pr. (N. Y.) 439; Lindsay *v.* Sherman, 5 How. Pr. (N. Y.) 308; Hart *v.* Butterfield, 3 Hill (N. Y.) 455.

54. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Levy *v.* Loeb, 5 Abb. N. Cas. (N. Y.) 157 [*affirmed* in 75 N. Y. 609]; Van Kleeck *v.* Nichols, 63 How. Pr. (N. Y.) 403; Cayuga County Bank *v.* Warfield, 13 How. Pr. (N. Y.) 439; Bigelow *v.* Heaton, 2 How. Pr. (N. Y.) 207; Hart *v.* Butterfield, 3 Hill (N. Y.) 455; Moore *v.* Merritt, 9 Wend. (N. Y.) 482.

Until the order of a circuit judge shall be reversed, by proper authority, it cannot be directly or indirectly changed by another circuit judge. Devereux *v.* McCrady, 53 S. C. 387, 31 S. E. 294.

55. Hammond *v.* Place, Harr. (Mich.)

or mutual mistake,[56] the two essential prerequisites to the exercise of the power to annul or vacate such an order.

B. Proceedings For — 1. Notice — a. Necessity. As a matter of regular practice notice should be given of a motion to vacate an order.[57] But where according to the ordinary course of proceedings cause cannot well be shown against the motion, or where the order is not conformable to the practice of the court, it may be revoked without notice.[58]

b. Consent Equivalent. The consent of counsel to an order rescinding a previous order is equivalent to notice of application therefor.[59]

2. Time. In some jurisdictions the time within which the proceedings to vacate an order must be commenced is fixed by statute,[60] and it cannot be extended by the fact that subsequent proceedings have been based on such order.[61] In the absence of statute fixing the time within which proceedings for the vacation of an order must be commenced, such proceedings, if not commenced within a reasonable time after the entry of the order, will not be entertained because of laches.[62]

3. At Whose Instance. In a proper case the court may, of its own motion,[63] or on the application of a party interested,[64] vacate or set aside an erroneous order.

4. Grounds. That an order was made without jurisdiction and therefore void is ground for setting it aside;[65] but it is discretionary with the court to grant that relief, or to leave the party to set up the invalidity of the order whenever an attempt shall be made to enforce it against him, or to obtain a benefit thereunder.[66] That an order is irregular, because made without notice to the adverse party, is sufficient ground for setting it aside.[67]

5. Relief Awarded. Where a motion, made to vacate and set aside an order, also contains an alternative prayer for general relief, the court may modify the order in question.[68]

438; Deaver *v.* Jones, 114 N. C. 649, 19 S. E. 637.

56. Deaver *v.* Jones, 114 N. C. 649, 19 S. E. 637.

57. Coburn *v.* Pacific Lumber, etc., Co., 46 Cal. 31 (holding, however, that an order made without notice to the adverse party may be set aside without notice to the party who obtained it); Moore *v.* Merritt, 9 Wend. (N. Y.) 482. See also State *v.* Bragg, 63 Mo. App. 22.

Notice necessary.— The rule in Pennsylvania is that an order of the court cannot be set aside without due notice of application therefor. Garver *v.* Ward, 9 Wkly. Notes Cas. (Pa.) 192.

58. Moore *v.* Merritt, 9 Wend. (N. Y.) 482.

59. State *v.* Bragg, 63 Mo. App. 22.

60. Kerns *v.* Morgan, 11 Ida. 572, 83 Pac. 954 (holding, however, that a statute limiting the time within which application may be made to vacate an order taken through mistake, surprise, or excusable neglect does not apply to orders showing on their faces that they are nullities); Griffin *v.* Jorgenson, 22 Minn. 92; State *v.* Second Judicial Dist. Ct., 32 Mont. 20, 79 Pac. 410; Greene *v.* Williams, 13 Wash. 674, 43 Pac. 938 (holding further that the statute requiring a motion for vacation of an order to be served on the adverse party within a year applies to a motion to vacate an order denying the confirmation of a sheriff's sale).

61. Griffin *v.* Jorgenson, 22 Minn. 92.

62. Matter of Peekamose Fishing Club, 8 N. Y. App. Div. 617, 40 N. Y. Suppl. 959, holding further, that laches in commencing proceedings to vacate an order, eight months after the order was entered, is not excused because it occurred during a period which was utilized in the making of motions and taking of appeals which were futile in themselves, and which proceeded upon a recognition of regularity and the desire to be relieved as matter of favor.

Waiver by delay.— There can be no waiver by delay in moving to set aside an order which is a nullity, for nothing can make it valid. Johnston *v.* Bloomer, 3 Edw. (N. Y.) 329. See also Kerns *v.* Morgan, 11 Ida. 572, 83 Pac. 954. But it is otherwise if the order is merely irregular. Johnston *v.* Bloomer, *supra*.

63. Killian *v.* State, 72 Ark. 137, 78 S. W. 766; *Ex p.* Hartman, 44 Cal. 32; Hall *v.* Polack, 42 Cal. 218.

64. *Ex p.* Hartman, 44 Cal. 32.

65. People *v.* Brown, 103 N. Y. 684, 9 N. E. 327; Genesee Bank *v.* Spencer, 15 How. Pr. (N. Y.) 14.

66. People *v.* Brown, 103 N. Y. 684, 9 N. E. 327. See also Rogers *v.* Durant, 56 N. Y. 669.

67. San Jose *v.* Fulton, 45 Cal. 316; Brady *v.* Lovell, 29 Misc. (N. Y.) 775, 61 N. Y. Suppl. 504; State *v.* Parker, 7 S. C. 235; Hungerford *v.* Cushing, 2 Wis. 416.

68. Ives *v.* Ives, 80 Hun (N. Y.) 136, 29 N. Y. Suppl. 1053.

C. Operation and Effect. Where the court, in the exercise of its discretion, directs an order previously made by it to be stricken out, it is the same as if such order had never existed.[69]

D. Reinstatement of Orders Vacating — 1. Power of Court. An order vacating a formal order may itself be vacated at the same term if the parties are still before the court, in which case the original order is reinstated.[70]

2. Effect. If a judge at chambers makes an order which he has no power to make, and afterward sets the order aside, and then at chambers by a subsequent order, reinstates the first order, the order reinstating is also without authority and void.[71]

VIII. COLLATERAL ATTACK.

An order which is merely erroneous, and not void, cannot be questioned in a collateral attack on the proceedings which resulted in the order.[72] But where it appears on the face of the record that an order is void for want of jurisdiction over the subject-matter, it may be collaterally attacked by any person who is not, for any reason, estopped from questioning its validity.[73]

IX. CONSTRUCTION AND OPERATION.

A. Construction. The court speaks by its order, and effect must be given to it according to its terms.[74] The order cannot be qualified in its operation and effect by reference to the opinion of the court granting it,[75] unless the order expresses the ground on which it was based and such expression is coupled with phrases that make doubt.[76]

B. Operation — 1. Generally — a. Retrospective and Prospective. An order made in pursuance of a decision on a motion relates back and operates as of the date when the decision was made;[77] and when it directs a thing to be done without regulating the time within which it must be performed, it continues to speak so long as the cause for making it exists and the thing directed remains unperformed.[78]

b. Conclusiveness of Adjudication — (I) *In General.* The familiar doctrine of *res adjudicata*, or the rule as to the conclusiveness of an adjudication, is not applicable generally to the decision of a motion in the course of practice,[79] except,

69. Williams *v.* Floyd, 27 N. C. 649.

An order denying a motion to vacate a void order does not validate the latter. Smith *v.* Los Angeles, etc., R. Co., (Cal. 1893) 34 Pac. 242.

70. People *v.* Colvin, 165 Ill. 67, 46 N. E. 14.

71. Loomis *v.* Andrews, 49 Cal. 239.

72. Rowe *v.* Blake, 112 Cal. 637, 44 Pac. 1084; Clark *v.* Sawyer, 48 Cal. 133; Randolph *v.* Simon, 29 Kan. 406; Baker *v.* Stephens, 10 Abb. Pr. N. S. (N. Y.) 1.

73. Smith *v.* Los Angeles, etc., R. Co., (Cal. 1893) 34 Pac. 242; Callaway *v.* Irvin, 123 Ga. 344, 51 S. E. 477.

74. Fisher *v.* Gould, 81 N. Y. 228; Hewlett *v.* Wood, 67 N. Y. 394. See also Neill *v.* Wuest, 17 Abb. Pr. (N. Y.) 319 note, holding that an order granting the moving party a favor is not imperative upon him, unless so expressed.

Construing particular words.— A direction in an order to deposit a paper forthwith does not mean within twenty-four hours, according to the technical meaning of the word "instanter," as used at common law, but means immediately or within a reasonable time after notice of the order. People *v.* Brower, 4 Paige (N. Y.) 405. An order requiring a "bond" is satisfied by an undertaking equally effective for the same purpose. People *v.* Lowber, 7 Abb. Pr. (N. Y.) 158.

Supplying by intendment.— The omission of the word "dollars" in an order made on a motion may be supplied by intendment. Gregory *v.* Gregory, 10 Mo. App. 589.

75. People *v.* Lawrence, 81 N. Y. 644; Fisher *v.* Gould, 81 N. Y. 228; Hewlett *v.* Wood, 67 N. Y. 394.

76. Fisher *v.* Gould, 81 N. Y. 228; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337.

77. May *v.* Cooper, 24 Hun (N. Y.) 7.

78. State *v.* Cross, 2 Humphr. (Tenn.) 301.

79. *California.*— Bowers *v.* Cherokee Bob, 46 Cal. 279; Ford *v.* Doyle, 44 Cal. 635.

Colorado.— Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985.

Kansas.— Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594.

New York.— Easton *v.* Pickersgill, 75 N. Y. 599; Belmont *v.* Erie R. Co., 52 Barb. 637; Dawson *v.* Parsons, 16 Misc. 190, 38 N. Y. Suppl. 1000; Snyder *v.* White, 6 How. Pr. 321; Van Rensselaer *v.* Albany County, 1 Cow. 501; Simson *v.* Hart, 14 Johns. 63;

perhaps, as to any other application on the same state of facts for a similar order and for similar relief.[80]

(II) *Recitals.* Recitals in an order, although not conclusive, are presumptive evidence of their truth, and when uncontradicted are conclusive.[81]

(III) *Persons Concluded*—(A) *Parties Benefited.* The parties to a suit, who have availed themselves of the benefit granted to them by an order therein, are bound by it,[82] and cannot be heard to complain of conditions imposed by it.[83]

(B) *Strangers.* An order of court does not conclude persons who are not parties or privies to the proceedings.[84]

2. Irregular or Fraudulent Orders. An order irregularly obtained,[85] or obtained by fraud,[86] is operative until vacated.

3. Void Orders. A void order is not made valid by lapse of time and ever remains without effect as completely as if never entered.[87]

X. ENFORCEMENT.

Proceedings to enforce the performance of an order are proceedings in the action in which the order is made, and all the papers are entitled in the action.[88]

ORDINANCE. See Municipal Corporations. (Ordinance: Appended to Constitution, see Constitutional Law. As Color of Title, see Adverse Possession. Estoppel by, see Estoppel. Evidence, see Evidence; Municipal Corporations. Injunction Against Enforcement, see Injunctions. Invalidity as Ground For Relief by Habeas Corpus, see Habeas Corpus. Liability For Failure to Enforce, see Municipal Corporations. Of Board of Health, see Health. Of County Board, see Counties. Pleading, see Municipal Corporations. Relating to Particular Subject, see Animals; Cemeteries; Dedication; Explosives; Fer-

Banks *v.* American Tract Soc., 4 Sandf. Ch. 438.

South Carolina.— Gregory *v.* Perry, 66 S. C. 455, 45 S. E. 4.

United States.— Akerly *v.* Vilas, 1 Fed. Cas. No. 120, 3 Biss. 332.

Orders made on motions affecting substantial rights from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments. Halvorsen *v.* Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320; Fitterling *v.* Welch, 76 Minn. 441, 79 N. W. 500; Truesdale *v.* Farmers' L. & T. Co., 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430; Tracy *v.* Falvey, 102 N. Y. App. Div. 585, 92 N. Y. Suppl. 625; Matter of Randall, 87 N. Y. App. Div. 245, 84 N. Y. Suppl. 294; Oppenheim *v.* Lewis, 20 N. Y. App. Div. 332, 46 N. Y. Suppl. 765.

But as to points of law involved in its decision, whether arising in the same case or in another, an order made on motion does not conclude the court. Banks *v.* American Tract Soc., 4 Sandf. Ch. (N. Y.) 438.

80. Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594.

81. Smith *v.* Grant, 11 N. Y. Civ. Proc. 354.

82. Weichsel *v.* Spear, 47 N. Y. Super. Ct. 223.

83. *In re* Waverly Waterworks Co., 85 N. Y. 478; Simmons *v.* Simmons, 32 Hun (N. Y.) 551; Strong *v.* Jones, 25 Hun (N. Y.) 319; Claflin *v.* Frenkel, 3 N. Y. Civ. Proc. 109; Bright *v.* Milwaukee, etc., R. Co., 1 Abb. N. Cas. (N. Y.) 14.

84. Acker *v.* Ledyard, 8 Barb. (N. Y.) 514; Clark's Case, 15 Abb. Pr. (N. Y.) 227.

Where one, not a party in an action, appears and is permitted to take part in the hearing of a motion therein, it renders him an actual party to the motion and he is bound by the result thereof. Jay *v.* De Groot, 2 Hun (N. Y.) 205; Schrauth *v.* Dry Dock Sav. Bank, 8 Daly (N. Y.) 109; National Park Bank *v.* Whitmore, 7 N. Y. St. 456. *Contra*, Acker *v.* Ledyard, 8 Barb. (N. Y.) 514.

An ex parte order, directing an auditor to audit certain sums of money, due or to become due to a certain claimant, does not bind another claimant having a superior right to it. Owens *v.* Barroll, 88 Md. 204, 40 Atl. 880.

85. Harris *v.* Clark, 10 How. Pr. (N. Y.) 415; Blackmar *v.* Van Inwager, 5 How. Pr. (N. Y.) 367; Spencer *v.* Barber, 5 Hill (N. Y.) 568; Gould *v.* Root, 4 Hill (N. Y.) 554; Starr *v.* Francis, 22 Wend. (N. Y.) 633; Roosevelt *v.* Gardinier, 2 Cow. (N. Y.) 463; Studwell *v.* Palmer, 5 Paige (N. Y.) 166; Osgood *v.* Joslin, 3 Paige (N. Y.) 195; Earle *v.* Stokes, 5 S. C. 336.

An order in part erroneous is operative so far as it relates to matters properly contained in it. Howard *v.* Palmer, Walk. (Mich.) 391.

86. Harris *v.* Clark, 10 How. Pr. (N. Y.) 415; Spencer *v.* Barber, 5 Hill (N. Y.) 568.

87. Kelner *v.* Cowden, 60 W. Va. 600, 55 S. E. 649.

88. Pitt *v.* Davison, 37 N. Y. 235.

RIES; FOOD; GAS; HAWKERS AND PEDDLERS; HEALTH; INTOXICATING LIQUORS; LICENSES; LIVERY-STABLE KEEPERS; MUNICIPAL CORPORATIONS; NUISANCES; PARTY-WALLS; PAWNBROKERS; RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES; THEATERS AND SHOWS; TOLL-ROADS; WAREHOUSEMEN. Right of Taxpayer to Contest Validity, see MUNICIPAL CORPORATIONS. Violation and Prosecution Therefor, see MUNICIPAL CORPORATIONS.)

ORDINARILY. Commonly, usually.[1]

ORDINARY. As an adjective, established, regular, common, usual;[2] common, usual, often recurring;[3] methodical, regular, according to established order;[4] established, settled, accustomed, conforming to general order;[5] that which has been established, and is customary;[6] and sometimes used in the sense of fair; reasonable.[7] As a noun, a judicial officer;[8] a tavern;[9] a place of eating, where the prices are settled.[10] When used in connection with other words the phrases have often received judicial interpretation, for example the following: "Ordinary baggage;"[11] "ordinary business;"[12] "ordinary business

1. See Shaw *v.* State, 34 Tex. Cr. 435, 443, 31 S. W. 361, where the court gave as the definition of "ordinarily" Webster's definition of ordinary, that is, "According to established order; methodical; regular; customary, as the ordinary forms of law or justice; common, usual," but in application used "commonly, usually" as synonyms for "ordinarily."

Erroneously quoted, in the sentence: "The word 'ordinarily' means specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all." The quotation marks that distinguish "ordinarily" are obviously a misprint — the definition is that of "rentals" for patent devices. See Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 349, 60 C. C. A. 220.

"Ordinarily cautious person" is a reasonable person. Billingsley *v.* Maas, 93 Wis. 176, 180, 67 N. W. 49.

"Ordinarily prudent man."— This expression, as it occurs in description of the degree of care to be exercised in order to avoid liability for negligence, "suggests merely the care that should be bestowed in cases of 'ordinary' danger. [It is] inappropriate, where the danger is extraordinary, unless . . . explained and applied to the subject." In certain cases it may require a very high degree of care. Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 590, 13 Pac. 367. See NEGLIGENCE.

"Ordinarily resident."— To say that one is "ordinarily resident out of" a given place means that he is habitually present in some other. Denier *v.* Marks, 18 Ont. Pr. 465, 467. See RESIDENCE, and Cross-References Thereunder.

2. Johnson Dict. [*quoted* in Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245, 263].

"Common" or "usual" as applied to labor or employment forbidden on Sunday by statute see O'Donnell *v.* Sweeney, 5 Ala. 467, 470, 39 Am. Dec. 336.

Distinguished from "average."— "A man may make his dam according to the ordinary, but not according to the average stage of the stream." McCoy *v.* Danley, 20 Pa. St. 85, 91, 57 Am. Dec. 680.

3. Webster Dict. [*quoted* in Chicago, etc., R. Co. *v.* House, 172 Ill. 601, 605, 50 N. E. 151 (*quoted* in Swisher *v.* Illinois Cent. R. Co., 182 Ill. 533, 541, 55 N. E. 555)].

4. Zulich *v.* Bowman, 42 Pa. St. 83, 87.

5. Worcester Dict. [*quoted* in State *v.* O'Conner, 49 Me. 594, 598].

6. Bell *v.* Yates, 33 Barb. (N. Y.) 627, 629.

7. Jones *v.* Angell, 95 Ind. 376, 382. See also Kendall *v.* Brown, 74 Ill. 232, 237.

8. **At civil law** "any judge who hath authority to take cognizance of causes in his own right, and not by deputation" see Hays *v.* Harley, 1 Mill (S. C.) 267, 269.

At common law "Hee that hath ordinarie jurisdiction in causes ecclesiasticall, immediate to the King and his courts of common law, for the better execution of justice, as the bishop or any other that hath exempt and immediate jurisdiction in causes ecclesiasticall." See Coke Litt. 344*a* [*cited* in Hays *v.* Harley, 1 Mill (S. C.) 267, 269].

9. Wortham *v.* Com., 5 Rand. (Va.) 669, 675.

10. Webster Dict. [*quoted* in Werner *v.* Washington, 29 Fed. Cas. No. 17,416*a*, 2 Hayw. & H. 175, 180].

11. State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 390; Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612, 620, 40 L. J. Q. B. 300, 24 L. T. Rep. N. S. 618, 19 Wkly. Rep. 873 [*quoted* in Yazoo, etc., R. Co. *v.* Georgia Home Ins. Co., 85 Miss. 7, 11, 37 So. 500, 107 Am. St. Rep. 265, 67 L. R. A. 646; State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 390]; Hudston *v.* Midland R. Co., L. R. 4 Q. B. 366, 370, 38 L. J. Q. B. 213, 20 L. T. Rep. N. S. 526, 17 Wkly. Rep. 705, 706, 5 Can. L. J. N. S. 186. See also CARRIERS, 6 Cyc. 666.

12. **"Ordinary business"** is: One which is "established, settled, accustomed, conforming to general order." State *v.* O'Conner, 49 Me. 594, 598. Common business, such as does usually require attention, either at frequent intervals, at the return of the different seasons, or upon such occasions of necessity as do commouly, though perhaps unfrequently, occur. Green Mountain Turnpike Co. *v.* Hemmingway, 2 Vt. 512, 516.

"Ordinary business:" Of cashier of bank see U. S. *v.* Columbus City Bank, 21 How.

man;"[13] "ordinary calling;"[14] "ordinary care;"[15] "ordinary cattle;"[16] "ordinary caution;"[17] "ordinary circumstances;"[18] "ordinary course of business;"[19] "ordinary course of law;"[20] "ordinary course of practice;"[21] "ordinary courts of law;"[22] "ordinary current expenses;"[23] "ordinary dangers and perils of the seas;"[24] "ordinary domestic business of family concerns;"[25] "ordinary expenditures;"[26] "ordinary expenses;"[27] "ordinary fences;"[28] "ordinary floods;"[29] "ordinary form;"[30] "ordinary grant;"[31] "ordinary knowledge and skill;"[32] "ordinary jurisdictions;"[33] "ordinary low water;"[34] "ordinary luggage;"[35] "ordinary man;"[36]

(U. S.) 356, 364, 16 L. ed. 130 [*quoted* in Bank of Commerce *v.* Hart, 37 Nebr. 197, 200, 55 N. W. 631, 40 Am. St. Rep. 479, 20 L. R. A. 780]. Of municipal corporation see Wingert *v.* Snouffer, 134 Iowa 97, 103, 108 N. W. 1035. Of the company see Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267, 290, 291. Prevention from attending to see Taylor *v.* Monroe, 43 Conn. 36, 46; Tomlinson *v.* Derby, 43 Conn. 562, 567.

13. See *infra*, text and note 36.

14. See SUNDAY.

15. See NEGLIGENCE.

16. Clarendon Land, etc., Co. *v.* McClelland, (Tex. Civ. App. 1895) 31 S. W. 1088, 1089.

17. **"Ordinary caution"** is: Such caution as is usually exercised by prudent men in the particular transactions in which they are engaged. U. S. *v.* Hopkins, 26 Fed. 443, 444. A state of mind very difficult of definition and certainly of very different meaning under the various circumstances that may surround the person proposed to exercise it. Bowen *v.* State, 9 Baxt. (Tenn.) 45, 49, 50, 40 Am. Rep. 71.

18. Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 662, 14 C. C. A. 609, not equivalent to "similar circumstances."

19. **"Ordinary course of business."**— The term may refer either to the business of a particular person, as conducted by him (Nary *v.* Merrill, 8 Allen (Mass.) 451, 453 [*quoted* in Rison *v.* Knapp, 20 Fed. Cas. No. 11,861, 1 Dill. 187, 193]), or to business in general, as usually conducted (Christianson *v.* Farmers' Warehouse Assoc., 5 N. D. 438, 449, 67 N. W. 300, 32 L. R. A. 730 [*quoted* in St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 285, 86 N. W. 867]). See also Kellogg *v.* Curtis, 69 Me. 212, 31 Am. Rep. 273; Chelsea Nat. Bank *v.* Isham, 48 Vt. 590, 592.

20. Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; State *v.* Rockefellow, 20 Ohio St. 625, 628 [*criticized* in Dewey *v.* W. B. Clark Inv. Co., 48 Minn. 130, 133, 50 N. W. 1032, 31 Am. St. Rep. 623].

21. Hart *v.* Nixon, 25 La. Ann. 136, 137.

22. See COURTS, 11 Cyc. 633.

23. Rome *v.* McWilliams, 67 Ga. 106, 114.

24. Law *v.* Goddard, 12 Mass. 112, 114.

"Perils of the sea" see MARINE INSURANCE, 26 Cyc. 552, 665.

25. **"Ordinary domestic business of family concerns,"** as used in describing a cause of travel exempting the wayfarer from toll, means: The common and ordinary business pertaining primarily and directly to the maintenance and support of the family of the person claiming the exemption. Centre Turnpike Co. *v.* Smith, 12 Vt. 212, 216.

All terms of the phrase have weight, and the business, so described, must be not only "the ordinary business" of the person who claims the exemption, but also "domestic business," and "must relate to family concerns." Centre Turnpike Co. *v.* Smith, 12 Vt. 212, 216; Green Mountain Turnpike Co. *v.* Hemmingway, 2 Vt. 512, 516.

26. Arverne-by-the-Sea *v.* Shepard, 20 N. Y. App. Div. 12, 14, 46 N. Y. Suppl. 653; Cross *v.* Ottawa, 23 U. C. Q. B. 288, 292; Scott *v.* Peterborough, 19 U. C. Q. B. 469, 472.

27. Livingstone *v.* Pippin, 31 Ala. 542, 550; Mills *v.* Richland Tp., 72 Mich. 100, 106, 107, 40 N. W. 183; Brown *v.* Corry, 175 Pa. St. 528, 531, 34 Atl. 854; Com. *v.* Gregg, 161 Pa. St. 582, 29 Atl. 297; State *v.* Leaphart, 11 S. C. 458, 469; *In re* Limitation of Taxation, 3 S. D. 456, 460, 54 N. W. 417. See also MUNICIPAL CORPORATIONS, 28 Cyc. 687 *et seq.*; 1534 text and note 45.

28. Hine *v.* Wooding, 37 Conn. 123, 126.

29. Gulf, etc., R. Co. *v.* Pool, 70 Tex. 713, 717, 8 S. W. 535.

30. Sessions *v.* Peay, 21 Ark. 100, 105.

31. Western Electric Co. *v.* Sperry Electric Co., 59 Fed. 295, 296, 8 C. C. A. 129, distinguishing "letters patent."

32. Jones *v.* Angell, 95 Ind. 376, 382.

33. U. S. *v.* Church of Jesus Christ, 8 Utah 310, 334, 31 Pac. 436.

34. Howard *v.* Ingersoll, 13 How. (U. S.) 380, 425, 14 L. ed. 189.

35. See *supra*, text and note 11; and CARRIERS, 6 Cyc. 666.

36. Kinsley *v.* Morse, 40 Kan. 577, 583, 20 Pac. 217; Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 181, 13 S. W. 972; Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 593, 11 S. W. 853; Austin *v.* Ritz, 72 Tex. 391, 402, 9 S. W. 884.

This term has been held not to be a proper description of the hypothetical person of ordinary prudence, the degree of whose care, under given circumstances, is the standard of comparison with reference to which the question of due care, or negligence, is to be determined. Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 181, 13 S. W. 972; Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 593, 11 S. W. 858; Austin *v.* Ritz, 72 Tex. 391, 402, 9 S. W. 884. The law imputes no particular degree of care to an ordinary man. Austin, etc., R. Co. *v.* Beatty, 73 Tex. 592, 593, 11 S. W. 858. The term "ordinary business man" is likewise condemned. Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, 181, 13 S. W.

"ordinary meetings;"[37] "ordinary navigation;"[38] "ordinary negligence;"[39] "ordinary person;"[40] "ordinary precautions;"[41] "ordinary proceedings;"[42] "ordinary process of law;"[43] "ordinary purchaser;"[44] "ordinary purposes;"[45] "ordinary rainfalls;"[46] "ordinary repairs;"[47] "ordinary residence;"[48] "ordinary risk;"[49] "ordinary service;"[50] "ordinary services;"[51] "ordinary skill;"[52] "ordinary stage of water;"[53] "ordinary stock;"[54] "ordinary taxes;"[55] "ordinary tides;"[56] "ordinary towage;"[57] "ordinary trains;"[58] "ordinary uses;"[59] "ordinary wear and tear;"[60] "ordinary work;"[61] and

972; Austin *v.* Ritz, 72 Tex. 391, 402, 9 S. W. 884. In conflict with these decisions is one which holds that the term "ordinary persons" is properly used in such connection, as equivalent to "men of ordinary care and diligence." Kinsley *v.* Morse, 40 Kan. 577, 583, 20 Pac. 217.

37. Brice Ultra Vires [*quoted* in Austin Min. Co. *v.* Gemmill, 10 Ont. 696, 706], distinguishing "special meetings."

38. Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245, 263.

39. See NEGLIGENCE. See also Waugh *v.* Shunk, 20 Pa. St. 130, 133.

40. See *supra*, text and note 36.

41. See MINES AND MINERALS, 27 Cyc. 790, 791 note 54.

42. Bouvier L. Dict. [*quoted* in Erwin *v.* U. S., 37 Fed. 470, 488, 2 L. R. A. 229], to the effect that these words intend the regular and usual mode of carrying on a suit by due course at common law.

43. Neenan *v.* Smith, 50 Mo. 525, 529 [*approving* St. Louis *v.* Clemens, 49 Mo. 552, 572. 36 Mo. 467]. See also Fowler *v.* St. Joseph, 37 Mo. 228, 238.

44. Britton *v.* White Mfg. Co., 61 Fed. 93, 98.

45. Graves *v.* Key City Gas Co., 93 Iowa 470, 473, 61 N. W. 937, a term which is used in describing the basis of measure of supply, and which may limit both manner of use and quantity used in such manner.

46. Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. 129, 133, 25 L. R. A. 527. See also Cornish *v.* Chicago, etc., R. Co., 49 Iowa 378, 380; Gould Waters [*quoted* in Cairo, etc., R. Co. *v.* Brevoort, *supra*].

47. The term does not include alterations or improvements. Brenn *v.* Troy, 60 Barb. (N. Y.) 417, 420. As items of account, for repairs upon buildings, it may mean expenses reasonably incurred in keeping the property in good condition and order. Abell *v.* Brady, 79 Md. 94, 101, 25 Atl. 817.

48. Denier *v.* Marks, 18 Ont. Pr. 465, 467, where it is said that the term means something more than temporary presence in a place, although exactly what amount of presence it demands is a matter which scarcely admits of definition.

49. See MASTER AND SERVANT, 26 Cyc. 1177 *et seq.*

50. Smith *v.* Colloty, 69 N. J. L. 365, 372, 55 Atl. 805.

51. "Ordinary services," as used in contradistinction to the constitutional phrase "particular services" (the latter describing those services which are not to be taken without recompense), mean such as may be required of all citizens, or officials, by general or valid special laws. Henley *v.* State, 98 Tenn. 665, 684, 41 S. W. 352, 1104, 39 L. R. A. 126.

52. "Ordinary skill" means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only of extraordinary endowments and capacities. Waugh *v.* Shunk, 20 Pa. St. 130, 133 [*quoted* in Baltimore Base Ball Club, etc., Co. *v.* Pickett, 78 Md. 375, 385, 28 Atl. 279, 44 Am. St. Rep. 344, 22 L. R. A. 690].

The want of ordinary skill is ordinary negligence.— Waugh *v.* Shunk, 20 Pa. St. 130, 133.

Required of professional base-ball player, defined as above. Baltimore Base Ball Club, etc., Co. *v.* Pickett, 78 Md. 375, 385, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690.

53. Moore *v.* Sanborne, 2 Mich. 520, 526, 59 Am. Dec. 209; Ames *v.* Cannon River Mfg. Co., 27 Minn. 245, 247, 7 N. W. 687; McCoy *v.* Danley, 20 Pa. St. 85, 86, 91, 57 Am. Dec. 680.

54. Chicago, etc., R. Co. *v.* Utley, 38 Ill. 410, 413; Albright *v.* Bruner, 14 Ill. App. 319, 322; Usher *v.* Hiatt, 21 Kan. 548, 551. See FENCES, 19 Cyc. 468.

55. See *infra*, text and note 62.

56. "Ordinary tides" commonly means: Nepe [neap] tides, which happen between the full and change of the moon. Hale De Jure Maris [*quoted* in Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 217, 18 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159, 43 Eng. Reprint 486, 27 Eng. L. & Eq. 242]. As the inner bound of the right of the British crown in the seashore, the words mean the middle line between the neap and the spring or equinoctial tides, not including extraordinary overflows caused by extraordinary operation of wind and tide. Hale De Jure Maris [*quoted* in Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 217, 18 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159, 43 Eng. Reprint 486, 27 Eng. L. & Eq. 242].

57. The Kingaloch, 1 Spinks 263, 265, 26 Eng. L. & Eq. 596.

58. Turner *v.* London, etc., R. Co., L. R. 17 Eq. 561, 572, 43 L. J. Ch. 430.

59. Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 417, 15 Pac. 714 (of street); Low *v.* Schaffer, 24 Oreg. 239, 245, 23 Pac. 678 (of water).

60. The term includes any usual deterioration from use in the lapse of time. Waddell *v.* De Jet, 76 Miss. 104, 109, 22 So. 437.

Does not include such injury as ploughing up young apple trees or barking them. Thompson *v.* Cummings, 39 Mo. App. 537, 539.

61. O'Donnell *v.* Sweeney, 5 Ala. 467, 470,

"ordinary yearly taxes."[62] (Ordinary: Care, see ATTORNEY AND CLIENT; NEGLIGENCE; PHYSICIANS AND SURGEONS. Court, see COURTS. Negligence, see NEGLIGENCE. Skill, see ATTORNEY AND CLIENT; PHYSICIANS AND SURGEONS. See also ORDINARILY.)

ORDINARY CARE. See ATTORNEY AND CLIENT; NEGLIGENCE; PHYSICIANS AND SURGEONS.

ORDINARY, COURTS OF. See COURTS.

ORDINARY NEGLIGENCE. See ATTORNEY AND CLIENT; NEGLIGENCE; PHYSICIANS AND SURGEONS.

ORDINARY SKILL. See ATTORNEY AND CLIENT; PHYSICIANS AND SURGEONS.

ORDINATION.[63] Of a clergyman or minister, investiture of authority;[64] the act or rite of admitting and setting apart to the christian ministry or to holy orders; specifically in the Roman Catholic, Anglican, and Greek churches, consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod or council of ministers.[65] (See ORDAIN.)

ORDINE PLACITANDI SERVATO, SERVATUR ET JUS. A maxim meaning "The order of pleading being preserved, the law is preserved."[66]

ORDONNANCE. A term understood to mean, in general, a compilation of prize law as recognized among civilized nations.[67]

ORE. See MINES AND MINERALS.[68]

ORE LEAVE. The right to dig and take ore.[69] (See, generally, MINES AND MINERALS.)

ORGAN. An instrument or medium by which an act is performed or accomplished.[70]

ORGANIC. A term which when employed with reference to the characteristics of a system of law has been held to import a scientific fitness and congruity.[71]

39 Am. Dec. 336 [*quoted* in Tucker *v.* West, 29 Ark. 386, 390]. See also SUNDAY.

62. Garner *v.* Hannah, 6 Duer (N. Y.) 262, 269, including a water rate which, by statute, becomes a tax if not duly paid.

63. Oddly used in a will, to describe the expression of a wish therein, the word "has no specific legal meaning" and does not render mandatory the precatory effect of the language so described. See Surrogate's opinion [*quoted* and *affirmed* in Ruppel *v.* Schlegel, 7 N. Y. Suppl. 936, 937, 28 N. Y. St. 382; also reported, but without the text of the affirmed opinion, in 55 Hun 183].

64. Kibbe *v.* Antram, 4 Conn. 134, 139.

65. Standard Dict. [*quoted* in *In re* Reinhart, 9 Ohio S. & C. Pl. Dec. 441, 445, 6 Ohio N. P. 438, where, however, the word "especially" is used instead of "specifically"].

Distinguished from contractual appointment see Kibbe *v.* Antram, 4 Conn. 134, 139.

In the congregational church.— The "essential virtue and public benefit of an ordination" is "nothing but setting apart, installing or inaugurating, one who has been chosen to the office, and tendering to him the fellowship of the churches who assist in the ceremony. It will not now be contended that any spiritual or temporal power is conferred by the imposition of hands. Ordination, according to the Platform, is nothing else but the solemn putting a man into his place and office in the church, whereunto he had a right before by election; being like the installation of a magistrate in the commonwealth. 'Ordination is therefore not to go before, but to follow election.' Again; — 'Ordination doth not constitute an officer, nor give him the essentials of his office.' Cambridge Platform, ch. IX — Sec. 2. It is true, that the election here spoken of is an election by the church; but whenever, by change of law or usage, the right of election come to the congregation, the principles in regard to ordination are applicable." So the congregation may ordain. "And the Cambridge Platform recognizes the principle; for in sec. 4, ch. 9, it is said, if the people may elect officers, which is the greater, and wherein the substance of the office doth consist, they may much more (need so requiring) impose hands in ordination, which is the less, and but the accomplishment of the other." Baker *v.* Fales, 16 Mass. 488, 512, 513.

66. Pelonbet Leg. Max. [*citing* Coke Litt. 303*a*].

67. Coolidge *v.* Inglee, 13 Mass. 26, 43.

68. Particularly 27 Cyc. 533 note 38.

69. Fulmer's Appeal, 128 Pa. St. 24, 40, 18 Atl. 493, 15 Am. St. Rep. 662; Ege *v.* Kille, 84 Pa. St. 333, 340.

70. Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 70, 24 Atl. 601.

71. See Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 654, 44 Atl. 762, where it is said: "It is to be remembered that when we are examining a body of systematic law in order to determine whether certain characteristics are substantial or merely accidental, we use language according to the subject-matter. In such a connection the words 'organic,' 'inherent,' 'essential' and the like do not import a physical, moral or mathe-

(Organic: Act, see States; Territories.[72] See also, generally, Constitutional Law.[73])

ORGANIC LAW. See Constitutional Law; Territories.[74]

ORGANIZATION. Formation;[75] an arrangement of parties; the act of organizing;[76] the connection of parts in and for a whole, so that each part is at once end and means.[77] (Organization: Of Association, see Associations. Of Club, see Clubs. Of Conventions For Nomination of Candidates, see Elections. Of Council, see Municipal Corporations. Of Court, see Courts. Of Court-Martial, see Militia. Of Grand Jury, see Grand Juries. Of Joint Stock Company, see Joint Stock Companies. Of Labor, see Labor Unions. Of Militia, see Militia. Of Municipality, see Municipal Corporations. Of Political Parties, see Elections. Of Private Corporation, see Corporations. Of Town, see Towns. Tax,[78] see Taxation. See also Organize.)

ORGANIZE. To form with suitable organs;[79] to furnish with organs;[80] to incorporate;[81] practically synonymous, and used interchangeably, with the words Establish, *q. v.*, Create, *q. v.*, and "form."[82] (See Organization.)

ORIGINAL. As a noun, origin; source; first copy.[83] As an adjective, per-

matical necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development and the nature of legal things."

72. "**Organic act**" is an act of congress conferring powers of government on a territory (U. S. *v.* Ensign, 2 Mont. 396, 400; *In re* Lane, 135 U. S. 443, 447, 10 S. Ct. 760, 34 L. ed. 219); and it takes the place of a constitution as the fundamental law of the local government (Brunswick Nat. Bank *v.* Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046, using the term "organic law," in the sense of "organic act").

73. "**Organic law**" is a term usually applied to constitutional law only. It certainly imports a high degree of authority. St. Louis *v.* Dorr, 145 Mo. 466, 478, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

Applied by statute to the scheme and charter for reorganization of the city and county of St. Louis see St. Louis *v.* Dorr, 145 Mo. 466, 478, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

74. See also *ante*, note 73.

75. State *v.* Blue Earth County School Dist. No. 152, 54 Minn. 213, 215, 55 N. W. 1122, as of a school-district.

76. *In re* Sanders, 53 Kan. 191, 197, 36 Pac. 348, 23 L. R. A. 603, as "the organization of a government, or of flocks, or of a railroad or other corporation, or of an army, or of an expedition."

77. *In re* Sanders, 53 Kan. 191, 197, 36 Pac. 348, 23 L. R. A. 603.

Implying legal organization.— It has been said that the word "generally implies legal organization" (Dodge *v.* Williams, 46 Wis. 70, 101, 1 N. W. 92, 50 N. W. 1103); and that, in the case of a political "organization," the very word "implies a recognition of order and an obedience to duly constituted authority" (Matter of Redmond, 5 Misc. (N. Y.) 369, 374, 25 N. Y. Suppl. 381 [*quoted* in State *v.* Houser, 122 Wis. 534, 584, 100 N. W. 964]).

78. "**Organization tax**" is a tax exacted for the privilege of becoming a corporation, payable to the state and imposed but once, and being in the nature of a license-fee. People *v.* Knight, 174 N. Y. 475, 478, 17 N. E. 65, 63 L. R. A. 87.

79. Webster Dict. [*quoted* in Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 577, 22 S. W. 490].

80. Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 70, 24 Atl. 601.

"**Organized capital**" may consist either of property or labor. "A corporation is organized capital; it is capital consisting of money and property. Organized labor is organized capital; it is capital consisting of brains and muscle." Ames *v.* Union Pac. R. Co., 62 Fed. 7, 14.

81. See State *v.* Power, 5 S. D. 627, 633, 59 N. W. 1090.

Also used in this sense see New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56, 66; Tucker *v.* Lincoln County, 90 Minn. 406, 408, 97 N. W. 103; Flynn *v.* Little Falls Electric, etc., Co., 74 Minn. 180, 192, 77 N. W. 38, 78 N. W. 106; Capps *v.* Hastings Prospecting Co., 40 Nebr. 470, 473, 58 N. W. 956, 42 Am. St. Rep. 677, 24 L. R. A. 259 (as implying *de jure* existence); Dodge *v.* Williams, 46 Wis. 70, 100, 101, 1 N. W. 92, 50 N. W. 1103. But see White *v.* Manistee County, 105 Mich. 608, 63 N. W. 653.

May be limited by words denoting place see Employers' Liability Assur. Co. *v.* Insurance Com'rs, 64 Mich. 614, 615, 617, 31 N. W. 542; Warren *v.* Barber Asphalt Paving Co., 115 Mo. 572, 576, 22 S. W. 490.

82. State *v.* Blue Earth County School Dist. No. 152, 54 Minn. 213, 215, 55 N. W. 1122.

Distinguished from "establish" in Detroit First Nat. Bank *v.* Beltrami County, 77 Minn. 43, 79 N. W. 591; State *v.* Honerud, 66 Minn. 32, 37, 68 N. W. 323; State *v.* Parker, 25 Minn. 215, 220; State *v.* McFadden, 23 Minn. 40.

83. Distinguished from "copy" in Com. *v.* Corkery, 175 Mass. 460, 461, 56 N. E. 711. See Copy, 9 Cyc. 886.

"**Duplicate originals**" see Rex *v.* Watson, 2 Stark. 115, 131, 3 E. C. L. 341.

taining to the beginning or origin, the first or primitive form of a thing;[84] pertaining to the origin or beginning; initial; primal; first in order; preceding all others.[85] Phrases in which this term is employed have often received judicial interpretation; for example see the following: "Original amount in controversy;"[86] "original attachment;"[87] "original bill;"[88] "original capital stock;"[89] "original construction;"[90] "original contract;"[91] "original contractor;"[92] "original cost;"[93] "original inventor;"[94] "original location;"[95] "original machine;"[96]

84. Haley *v.* State, 42 Nebr. 556, 561, 60 N. W. 962, 47 Am. St. Rep. 718; Com. *v.* Schollenberger, 156 Pa. St. 201, 213, 27 Atl. 30, 36 Am. St. Rep. 32, 22 L. R. A. 155. It is to be noted that the punctuation adopted in the text is that of the Pennsylvania case above cited. In the Nebraska case, a semicolon appears after the word "origin," the effect of which would be to make the phrase "the first or primitive form of a thing," a complete definition or synonym, by itself. It would then define the "noun" original, instead of the "adjective," to which the opinion relates. By the use of the comma, the phrase does not lose its connection with "pertaining to," and so constitutes an adjective synonym, that is, "pertaining to the first or primitive form of a thing."

"Duplicate" has the same legal effect as "original" when stamped upon a bill of lading. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608, 27 Am. St. Rep. 861. See DUPLICATE, 14 Cyc. 1122.

85. State *v.* Southard, 60 Ark. 247, 249, 29 S. W. 751.

When the "origin" to which the term refers is in doubt, that is, when the word may have reference to any one of several conditions previously existing and each capable of being described as the "origin" of some part of the history of the thing described as "original" or phase of the transaction with relation to which it is so called. The courts solve such doubt by considering the application of the adjective with reference to the circumstances of the particular case. See for example Foster *v.* McGraw, 64 Pa. St. 464, 467, 469. For further instances see the cases cited *infra*, note 86 *et seq.*

Distinguished from: "Exclusive" in Crowell *v.* Lambert, 10 Minn. 369. See COURTS, 11 Cyc. 661 note 49. "Substitutional" in Acken *v.* Osborn, 45 N. J. Eq. 377, 383, 17 Atl. 767.

86. Bleecker *v.* Satsop R. Co., 3 Wash. 77, 79, 27 Pac. 1073, meaning the amount originally in controversy; the amount sued for.

87. Martindale *v.* Whitehead, 46 N. C. 64, where the term is defined as being a process given by statute to compel a defendant to appear. It is a continuation of a "*distringas*," a common-law process, and a garnishment according to the custom of London.

88. Story Eq. Pl. [*quoted* in Butler *v.* Cunningham, 1 Barb. (N. Y.) 85, 87; Longworth *v.* Sturges, 4 Ohio St. 690, 707; Hatch *v.* Dorr, 11 Fed. Cas. No. 6,206, 4 McLean 112]. See also EQUITY, 16 Cyc. 216, 218.

At law it is an ancient mode of commencing an action at law, particularly in the court of King's Bench, sometimes termed a "plaint." See Anderson L. Dict.

89. Bank Lick Turnpike Co. *v.* Phelps, 81 Ky. 613, 615, where these words were said to mean "the amount of stock subscribed, or issued and sold, which has been actually expended for the accomplishment of the object of the charter."

90. Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73, 76, applied to a railroad.

Of a city street, may consist in a radical improvement. Catlettsburg *v.* Self, 115 Ky. 669, 678, 74 S. W. 1064, 25 Ky. L. Rep. 161 [*overruling* Louisville *v.* Tyler, 111 Ky. 588, 594, 64 S. W. 415, 65 S. W. 125, 23 Ky. L. Rep. 827, 1609]; McHenry *v.* Selvage, 99 Ky. 232, 234, 35 S. W. 645, 18 Ky. L. Rep. 473; Mackin *v.* Wilson, 45 S. W. 663, 20 Ky. L. Rep. 218.

91. See *infra*, text and note 92.

92. See Lane, etc., Co. *v.* Jones, 79 Ala. 156, 160; Geiger *v.* Hussey, 63 Ala. 338, 342; La Grill *v.* Mallard, 90 Cal. 373, 376, 27 Pac. 294; Schwartz *v.* Knight, 74 Cal. 432, 433, 16 Pac. 235; Sparks *v.* Butte County Gravel Min. Co., 55 Cal. 389, 390; Colorado Iron Works *v.* Riekenberg, 4 Ida. 262, 266, 38 Pac. 651; Hearne *v.* Chillicothe, etc., R. Co., 53 Mo. 324, 325; Ambrose Mfg. Co. *v.* Gapan, 22 Mo. App. 397, 401; Inman *v.* Henderson, 29 Oreg. 116, 120, 45 Pac. 300; Matthews *v.* Wagenhaeuser Brewing Assoc., 83 Tex. 604, 606, 19 S. W. 150; Baxter Lumber Co. *v.* Nickell, 24 Tex. Civ. App. 519, 521, 60 S. W. 450; Whiteselle *v.* Texas Loan Agency, (Tex. Civ. App. 1894) 27 S. W. 309, 312; Wisconsin Planing-Mill Co. *v.* Grams, 72 Wis. 275, 39 N. W. 531. See also MECHANICS' LIENS, 27 Cyc. 84, 92.

93. "Original cost" is a term which designates the valuation adopted in some past transaction to be identified by considering the circumstances under which the words are used. Holloway *v.* Frick, 149 Pa. St. 178, 181, 24 Atl. 201 (where "at the original or wholesale cost thereof" was distinguished from "cost to the firm" or "actual cost" or some equivalent phrase); Eagan *v.* Clasbey, 5 Utah 154, 160, 13 Pac. 430. See COST, 10 Cyc. 1370.

Not equivalent to "present value" see Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 214, 54 Atl. 6, 60 L. R. A. 856; National New York Waterworks Co. *v.* Kansas City, 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827.

94. Norton *v.* Jensen, 90 Fed. 415, 422, 33 C. C. A. 141; Reg. *v.* La Force, 4 Can. Exch. 14, 40. See PATENTS.

95. Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 47, 64 N. E. 577, of a street railroad.

96. Evans *v.* Eaton, 8 Fed. Cas. No. 4,560, 3 Wash. 443, 451. See PATENTS.

"original nominations;"[97] "original notice;"[98] "original outfit;"[99] "original owners;"[1] "original papers;"[2] "original party to a contract or cause of action;"[3] "original and ultimate property;"[4] "original process;"[5] "original receptacle;"[6] "original stock;"[7] "original suit;"[8] "original writ."[9] (Original: Bill, see EQUITY. Domicile, see DOMICILE. Entry, see EVIDENCE. Jurisdiction, see COURTS. Package, see COMMERCE. Process, see PROCESS. Promise, see FRAUDS, STATUTE OF. See also ORIGINALLY.)

ORIGINAL BILL. See EQUITY.

ORIGINAL DOMICILE. See DOMICILE.

ORIGINAL ENTRY. See EVIDENCE.

ORIGINAL JURISDICTION. See COURTS.

ORIGINALLY. In the original time or in an original manner; primarily; from the beginning or origin.[10] (See ORIGINAL.)

ORIGINAL PACKAGE. See COMMERCE.

ORIGINAL PROCESS. See PROCESS.

ORIGINAL PROMISE. See FRAUDS, STATUTE OF.

97. Gillespie *v.* McDonough, 39 Misc. (N. Y.) 147, 153, 79 N. Y. Suppl. 182, distinguished from those made to fill vacancies caused by death, resignation, or otherwise; but held to include those made by committee as well as those made in party convention.

98. Phinney *v.* Donahue, 67 Iowa 192, 194, 25 N. W. 126.

99. U. S. *v.* Guinet, 26 Fed. Cas. No. 15,270, 2 Dall. 321, 1 L. ed. 398, of a vessel.

1. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 220, 100 Am. Dec. 628, used in a prospectus by promoters.

2. Bright *v.* State, 90 Ind. 343, 345, relating to a change of venue in criminal cases.

3. Wright *v.* Gilbert, 51 Md. 146, 157, relating to exclusion of testimony.

4. People *v.* Trinity Church, 22 N. Y. 44, 47, where these words are said to refer to a theoretical title in the state to land, which title is of a nature still higher than the highest title of an individual known to our laws, and to which the right of possession and enjoyment become annexed on the failure of the inheritance.

5. Hotchkiss's Appeal, 32 Conn. 353, 355; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 586, 10 L. ed. 579, 618; Oglesby *v.* Attrill, 12 Fed. 227, 230. See, generally, PROCESS.

6. Raffetto *v.* Mott, 60 N. J. L. 413, 415, 38 Atl. 857, where the term is defined as "the box, can or other receptacle in which the merchandise originally came to the hands of the dealer."

7. Gettysburg Nat. Bank *v.* Brown, 95 Md. 367, 386, 52 Atl. 975, 93 Am. St. Rep. 339; Baltimore City Pass. R. Co. *v.* Hambleton, 77 Md. 341, 346, 26 Atl. 279.

8. Lockhart *v.* Locke, 42 Ark. 17, 21; Freeman *v.* Howe, 24 How. (U. S.) 450, 460, 16 L. ed. 749; Ward *v.* Seabring, 29 Fed. Cas. No. 17,160, 4 Wash. 472, 473.

The term is used in contradistinction to "ancillary," "dependent" or "supplementary" suit; and hence it is not applicable to the substitution of a plaintiff (Lockhart *v.* Locke, 42 Ark. 17, 21); nor to "a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice" (Freeman *v.* Howe, 24 How. (U. S.) 450, 460, 16 L. ed. 749); neither to injunctions to stay proceedings at law nor to cross bills (Ward *v.* Seabring, 29 Fed. Cas. No. 17,160, 4 Wash. 472, 473). See EQUITY, 16 Cyc. 218.

9. Pressey *v.* Snow, 81 Me. 288, 291, 17 Atl. 71; Converse *v.* Damariscotta Bank, 15 Me. 431, 433; Walsh *v.* Haswell, 11 Vt. 85, 86; Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790, 793. See 3 Blackstone Comm. 274. See also, generally, PROCESS.

10. Webster Int. Dict.

"Originally commenced in a court," with a designation of the class of court to which it has reference, applies to an action commenced in such a court but discontinued there and heard in a court of another class (Camacho *v.* Hamilton Banknote Engraving, etc., Co., 158 N. Y. 663, 52 N. E. 1123; Sidwell *v.* Greig, 157 N. Y. 30, 32, 51 N. E. 267; La Rue *v.* Smith, 153 N. Y. 428, 431, 47 N. E. 796; Cook *v.* Nellis, 18 N. Y. 126, 127; Brown *v.* Brown, 6 N. Y. 106; Rundle *v.* Gordon, 27 N. Y. App. Div. 452, 454, 50 N. Y. Suppl. 353), even when improperly dismissed by the lower court, when plaintiff acquiesces in such dismissal (La Rue *v.* Smith, 153 N. Y. 428, 431, 47 N. E. 796), or although the record fails to show the identity of the action discontinued and the action recommenced (Pugsley *v.* Kesselburgh, 7 How. Pr. (N. Y.) 402).

"Originally exceeding," as used in statutes prescribing a certain amount as a jurisdictional requisite, do not exclude a debt reduced, by subsequent payments, below the prescribed amount, which it originally exceeded (Elsely *v.* Kirby, 1 Dowl. P. C. N. S. 946, 950, 12 L. J. Exch. 96, 9 M. & W. 536), but do exclude the balance of an account upon which an excess of the sum prescribed has never at any one time been due, although the total of its items exceed such amount (Pope *v.* Banyard, 3 M. & W. 424).

"Originally granted" does not apply to administration when the latter is auxiliary. So held under a statute providing that "administration shall not be originally granted

ORIGINE PROPRIA NEMINEM POSSE VOLUNTATE SUA EXIMI MANIFESTUM EST. A maxim meaning "It is manifest that no one by his own will can renounce his origin (put off or discharge his natural allegiance)." [11]

ORIGO REI INSPICI DEBET. A maxim meaning "The origin of a thing ought to be inquired into." [12]

ORNAMENT. A term derived from the Latin *ornamentum*,[13] and defined as meaning, embellishment, decoration, that which adorns or beautifies;[14] that which embellishes; that which adds grace or beauty; embellishment; decoration.[15] (See JEWELRY; ORNAMENTAL.)

ORNAMENTAL. Serving to ornament; giving additional beauty; embellishing.[16] (See ORNAMENT.)

ORNERY. A term which does not, in some of its uses, differ from the words "common" or "mean." [17]

after the lapse of five years from the death, and also requiring that the original letters testamentary or of administration" be filed as a basis for an application for auxiliary letters. Dolton *v.* Nelson, 7 Fed. Cas. No. 3,976, 3 Dill. 469, 471.

"Originally liable" as applied to stockholders, with reference to a debt of the company, in a provision for contribution means liable for the debt before it was paid by the stock-holder suing for contribution. Sayles *v.* Bates, 15 R. I. 342, 344, 5 Atl. 497. See CORPORATIONS, 10 Cyc. 649.

11. Bouvier L. Dict. [*citing* Broom Leg. Max. 61].

12. Bouvier L. Dict. [*citing* Coke Litt. 248*b*].

13. **Ornamentum means:** "(1) Apparatus, accoutrement, equipment, furniture, trappings, etc. . . . (2) An ornamental equipment, ornament, decoration, embellishment, jewel, trinket; . . . a dress, costume . . . *ornamenta triumphalia consularia*, the insignia of triumphing generals, etc." Andrews Lat.-Eng. Lex. [*quoted* in Traylor's Estate, Coff. Prob. (Cal.) 284, 286]. The term is used "for any given apparatus or instrument." Forcellini Dict. [*quoted* in White *v.* Bowron, L. R. 4 A. & E. 207, 217, 43 L. J. Eccl. 7, 11; Kensit *v.* St. Ethelburga, [1900] P. 80, 97].

14. Worcester Dict. [*quoted* in Traylor's Estate, Coff. Prob. (Cal.) 284, 286].

"Includes 'jewelry' worn by women for the purpose of adding grace or beauty to their persons, or for the purpose of complying with the usages of society," when the term is taken "in its general signification, and freed from any modification that might come from association in particular instances with other language." Traylor's Estate, 75 Cal. 189, 190, 16 Pac. 774.

15. Webster Dict. [*quoted* in Traylor's Estate, Coff. Prob. (Cal.) 284, 286]. See also People *v.* Carpenter, 1 Mich. 273, 283, as to use of space bordering upon streets for purposes of "utility or ornament."

In ecclesiastical law the term is not confined as by modern usage, to articles of decoration or embellishment, but is used in the larger sense of *ornamentum*. Westerton *v.* Liddell, Moore Spec. Rep. 156 [*quoted* in Kensit *v.* St. Ethelburga, [1900] P. 80, 97; White *v.* Bowron, L. R. 4 A. & E. 207, 217, 43 L. J. Eccl. 7]. Ornaments of the church consisting in certain church furnishings are authorized, prescribed, and regulated by the rubrics. See Kensit *v.* St. Ethelburga, Bishopsgate Within. [1900] P. 80, 97; White *v.* Bowron, L. R. 4 A. & E. 207, 217, 43 L. J. Eccl. 7; Martin *v.* Mackonochie, L. R. 2 P. C. 365, 390, 38 L. J. Eccl. 1, 19 L. T. Rep. N. S. 503, 17 Wkly. Rep. 187; Westerton *v.* Liddell, Moore Spec. Rep. [*cited* in Martin *v.* Mackonochie, *supra*; White *v.* Bowron, L. R. 4 A. & E. 207, 217, 43 L. J. Eccl. 7].

In fine arts the term includes any accessory part of a work which has the merit of adding to its beauty or effect. Worcester Dict. [*quoted* in Traylor's Estate, Coff. Prob. (Cal.) 284, 286].

16. Webster Dict. [*quoted* in Traylor's Estate, Coff. Prob. (Cal.) 284, 286].

"Ornamental plastering" see Woodruff *v.* Klee, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 350.

"Ornamental purposes" has been held to exclude a purpose which, although it might contemplate ornament as a secondary consideration, or incidentally result therein, was directed primarily toward usefulness. Church *v.* Portland, 18 Oreg. 73, 80, 81, 22 Pac. 528, 6 L. R. A. 259.

"Ornamental structure" may include a porch, if handsome. Garrett *v.* Jones, 65 Md. 260, 270, 3 Atl. 597.

"Ornamental tree" may embrace any shade tree. Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136, 139. Injunction to protect see INJUNCTIONS, 22 Cyc. 832, 833 note 39.

17. Wimer *v.* Allbaugh, 78 Iowa 79, 80, 42 N. W. 587, 16 Am. St. Rep. 422, where it is said that the expression has much of the impress of a provincialism.

"Ornrier than two hells" is an ambiguous expression.— It does not in itself impute professional unchastity; the intent with which it is used, and the understanding of the hearers, must be established by proof. Wimer *v.* Allbaugh, 78 Iowa 79, 80, 81, 42 N. W. 587, 16 Am. St. Rep. 422.

Recently recognized and defined.— It has been said that the word has not such a place in the English language that any lexicographer has ventured to define it, or give it authoritative recognition (Wimer *v.* Allbaugh, 78 Iowa 79, 80, 42 N. W. 587, 16 Am. St. Rep. 422); but this is no longer true (see Standard Dict. (20th Cent. ed.), where

ORPHAN. In legal parlance, a fatherless child,[18] or an illegitimate child of a deceased mother.[19] According to more general usage a minor who has lost both of his or her parents.[20] Other definitions insisting upon the loss of the father at all events, if not both parents, define the term as one that is fatherless, or that has neither father nor mother;[21] a fatherless child or minor, or one deprived of both father and mother.[22] While others admitting of the survival of the father define it as a minor who has lost one or both of his parents;[23] a child who has lost father or mother, or both;[24] a child who has lost one or both of his parents.[25] The term has been held to include minors only;[26] but this doctrine is not without contradiction.[27] The question whether or not it includes stepchildren has been diversely decided.[28] In charitable provisions by will, the term has been variously construed as including fatherless minors only, without regard to the decease or survival of the mother;[29] as limited by intent implied from circumstances, to

the expression is classified and defined as follows: "[Dial., U. S.] Mean; low: a corruption of 'ordinary,' used in depreciatory sense").

18. Poston *v.* Young, 7 J. J. Marsh. (Ky.) 501; Jacob L. Dict. [*quoted* in Soohan *v.* Philadelphia, 33 Pa. St. 9, 30, 1 Grant 494]; Tomlin L. Dict. [*quoted* in Stewart *v.* Morrison, 38 Miss. 417, 419; Soohan *v.* Philadelphia, 33 Pa. St. 9, 30, 1 Grant 494].

Immaterial whether mother is living or not, as used in the certificate of incorporation of a beneficial association (Jackman *v.* Nelson, 147 Mass. 300, 302, 17 N. E. 529); and also within the meaning of the testamentary provision for the Girard College for Orphans (Soohan *v.* Philadelphia, 33 Pa. St. 9, 1 Grant 494).

19. Friesner *v.* Symonds, 46 N. J. Eq. 521, 528, 20 Atl. 257, under statutes which recognize a tie of blood between illegitimate offspring and the mother thereof.

20. Bouvier L. Dict. [*quoted* in Chicago Guaranty Fund Life Soc. *v.* Wheeler, 79 Ill. App. 241, 244]; Century Dict. [*quoted* in Chicago Guaranty Fund Life Soc. *v.* Wheeler, 79 Ill. App. 241, 244].

"The word is originally Greek, and in Liddell and Scott's Greek Lexicon, it is translated 'orphaned, without parents, fatherless,' and in the same work, it is said, at Athens, the *orphanophulakes* were guardians of orphans who had lost their fathers in war." Soohan *v.* Philadelphia, 33 Pa. St. 9, 31, 1 Grant 494.

21. Rees Cycl. (Am. ed.) [*cited* in Soohan *v.* Philadelphia, 33 Pa. St. 9, 31, 1 Grant 494].

22. Rapalje & L. L. Dict. [*quoted* in Hammerstein *v.* Parsons, 29 Mo. App. 509, 511]; Wharton L. Lex. [*quoted* in Soohan *v.* Philadelphia, 33 Pa. St. 9, 30, 1 Grant 494].

23. Bouvier L. Dict.; Webster Dict. [*quoted* in Friesner *v.* Symonds, 46 N. J. Eq. 521, 527, 20 Atl. 257].

24. Johnson Quarto Dict. [*quoted* in Soohan *v.* Philadelphia, 33 Pa. St. 9, 31, 1 Grant 494]. "In Allison's Dictionary . . . the same definition is given, and Webster's definition is substantially the same." Soohan *v.* Philadelphia, *supra*.

25. Beardsley *v.* Bridgeport, 53 Conn. 489, 493, 3 Atl. 557, 55 Am. Rep. 152. See also Heiss *v.* Murphey, 40 Wis. 276, 291.

Not necessarily included in the term "family" see Klee *v.* Klee, 47 Misc. (N. Y.) 101, 102, 103, 93 N. Y. Suppl. 588.

26. Hammerstein *v.* Parsons, 29 Mo. App. 509, 511; Soohan *v.* Philadelphia, 33 Pa. St. 9, 32, 1 Grant 494 [*criticizing*, and, so far as it may be to the contrary *overruling*, as "extra judicial and entirely inapplicable," a *dictum* in Downing *v.* Schoenberger, 9 Watts (Pa.) 298, 299, that "an orphan is one bereft of parents, a minor is one under twenty-one years of age"]. See also *supra*, definitions given in the text, in which minority is treated as an essential.

Held to designate "a minor whose parents are dead" when used in a statute relating to "any guardian, executor, or administrator, chargeable with the estate of any 'orphan' or deceased person" see Ragland *v.* Justices Inferior Ct., 10 Ga. 65, 70, 71.

Used interchangeably with "minors" in a statute conferring on probate courts jurisdiction to appoint guardians, in passing which statute it was to be presumed that the legislature acted with knowledge of the established custom, of courts charged with orphans' business, to appoint guardians for minors whose fathers were living. Hall *v.* Wells, 54 Miss. 289, 298.

"A child might cease to be an orphan, within the strict meaning of the law, on arriving at his majority or on becoming married." Fischer *v.* Malchow, 93 Minn. 396, 398, 101 N. W. 602.

27. Fischer *v.* Malchow, 93 Minn. 396, 398, 101 N. W. 602, holding that, within the rules of a mutual benefit association whereby an orphan may be designated as a beneficiary the term may include one who has attained majority.

28. See cases cited *infra*, this note.

Held not to include stepchildren of a deceased member of a benefit association, but only his "children in the proper sense of the word." Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 331, 45 Atl. 111.

Held to include a stepchild, as used in the charter of a benefit society, to "give pecuniary aid to the widows and orphans of deceased members." Renner *v.* Supreme Lodge Bohemian Slavonian Ben. Soc., 89 Wis. 401, 404, 62 N. W. 80.

29. Soohan *v.* Philadelphia, 33 Pa. St. 9, 27, 1 Grant 494.

"poor" orphans;[30] and held uncertain in meaning.[31] (Orphan: Adoption of, see Adoption of Children. Asylum For, see Orphanage. Guardianship of, see Guardian and Ward. Validity of Gifts For Benefit of, see Charities. See also Orphans' Business.)

Orphanage. An institution or house for orphans; orphan asylum; an asylum or home for destitute orphan children;[32] an institution for the care of destitute orphans, orphan asylum;[33] an institution or asylum for the care of orphans.[34] (See, generally, Asylums.)

Orphans' Business. A term which, as used in a grant of jurisdiction, includes the function of allotting distributive shares of personalty to members of a decedent's family.[35]

Orphans' Court. See Courts.

Oscillate. To vibrate as a pendulum; to move backward and forward; to swing.[36]

Oscillatory. Moving alternately one way and another, as a pendulum; swinging, vibrating.[37]

Ostensible Agency. See Principal and Agent.

Ostensible Authority. See Principal and Agent.

Ostensible Partner. See Partnership.

Osteopathy. See Physicians and Surgeons.

Ostracised. A word which has been said to have no place in the vocabulary of American jurisprudence.[38]

Other. A. Definitions. The word has been defined as meaning different from that which has been specified;[39] not the same; not this or these; different.[40]

B. Description of Term in General. The word "other," in combination with various words, has called forth a mass of judicial comment and decisions in the construction of expressions containing it, among which may be noted the phrases

30. Atty.-Gen. *v.* Comber, 2 Sim. & St. 93, 94, 25 Rev. Rep. 163, 1 Eng. Ch. 93, 57 Eng. Reprint 281.

31. Heiss *v.* Murphy, 40 Wis. 276, 290, 292, where a devise for the benefit of "the Roman Catholic orphans of the diocese" was held void for uncertainty, one of the grounds stated therefor being that "it is uncertain whether the word 'orphan' applies to those children who have lost both parents, or whether it does not include as well those who have only lost one."

32. Century Dict. [*quoted* in Baker *v.* State, 120 Wis. 135, 143, 97 N. W. 566].

"Orphan asylum" is a place of refuge for orphan children, a home. *In re* Pearsons, 113 Cal. 577, 584, 45 Pac. 849. But is not a "common school." People *v.* Brooklyn Bd. of Education, 13 Barb. (N. Y.) 400, 411 [*followed* in St. Patrick's Orphan Asylum *v.* Rochester Bd. of Education, 34 How. Pr. (N. Y.) 227, 229].

33. Standard Dict. [*quoted* in Baker *v.* State, 120 Wis. 135, 143, 97 N. W. 566].

34. Webster Dict. [*quoted* in Baker *v.* State, 120 Wis. 135, 143, 97 N. W. 566].

The term affords the suggestion of a charity, and was held to have been used with the intent to do so by one who collected money, ostensibly for an alleged "orphanage," the court remarking, "Lexicographers are not unanimous, but lean toward a meaning for 'orphanage' or 'orphan asylum' suggesting destitution of those relieved, rather than a profit-seeking enterprise." Baker *v.* State, 120 Wis. 135, 143, 97 N. W. 566.

35. Turner *v.* Whitten, 40 Ala. 530, 533.

36. Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110, where "oscillating" is distinguished from "rotary" as applied to motion.

37. Taylor *v.* Wood, 23 Fed. Cas. No. 13,808, 1 Ban. & A. 270, 12 Blatchf. 110.

38. U. S. *v.* Greene, 146 Fed. 803, 895, where it is also stated that the term is derived from the Greek *ostrakon*, meaning a shell; and that when the fickle populace of Athens desired to get rid even of their bravest and best, they voted with the *ostrakon*, and expelled him from the borders of the city.

39. Brooks *v.* Kip, 54 N. J. Eq. 462, 471, 35 Atl. 658; Worcester Dict. [*quoted* in Hyatt *v.* Allen, 54 Cal. 353, 357; *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 567].

Examples of use in this sense see Bowen *v.* Ratcliff, 140 Ind. 393, 397, 39 N. E. 860, 49 Am. St. Rep. 203; Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 150, 31 Atl. 484; Wolf *v.* Schoeffner, 51 Wis. 53, 60, 8 N. W. 8; U. S. *v.* Coppersmith, 4 Fed. 198, 199, 2 Flipp. 546.

40. Webster Dict. [*quoted* in Hyatt *v.* Allen, 54 Cal. 353, 357; *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 567].

"Different."— So construed in Mulcahy *v.* Newark, 57 N. J. L. 513, 514, 31 Atl. 226.

"No other" construed "the same" in *In re* Gardiner, 53 Fed. 1013, 1014, 4 C. C. A. 155.

"other party;"[41] "other perils;"[42] "other purposes;"[43] "other state;"[44] "other than;"[45] and very many more.[46] The word "other," because of its vague and

41. As excluded from testifying see WITNESSES.

42. See MARINE INSURANCE, 26 Cyc. 659.

43. See Kansas City, etc., R. Co. *v.* Scammon, 45 Kan. 481, 482, 483, 25 Pac. 858; New Orleans Commercial Bank *v.* New Orleans, 17 La. Ann. 190, 198; Eyerman *v.* Blaksley, 78 Mo. 145, 151; Phillips Exeter Academy *v.* Exeter New Parish, 68 N. H. 10, 11, 36 Atl. 548; Hyde *v.* Hyde, 64 N. J. Eq. 6, 9, 10, 53 Atl. 593; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 242, 2 Connoly Surr. 319; *In re* Barre Water Co., 62 Vt. 27, 29, 20 Atl. 109, 9 L. R. A. 195; U. S. *v.* Garretson, 42 Fed. 22, 23.

In the title of a statute see STATUTES.

"Other public purposes" see New Orleans Commercial Bank *v.* New Orleans, 17 La. Ann. 190, 195–198.

44. Warren *v.* Pim, 66 N. J. Eq. 353, 359, 59 Atl. 773, as referring to a state of the Union and not to a foreign state.

"Other state, government or country" see Cooke *v.* Boston State Nat. Bank, 50 Barb. (N. Y.) 339, 341.

45. *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 732, 6 Am. Rep. 722, as making an exception. *Compare* Jenney *v.* Brook, 6 Q. B. 323, 325, 338, 8 Jur. 782, 13 L. J. Q. B. 376, 1 New Sess. Cas. 323, 51 E. C. L. 323.

Not necessarily importing identity in kind see Lyman *v.* People, 198 Ill. 544, 547, 64 N. E. 974.

"It is not a reasonable substitute for 'contrary to' or 'at variance with';" therefore an instruction, that "one of the modes for impeaching a witness is by showing that he has made statements out of court other than what he has made in court" is erroneous. So held in Elrod *v.* Ashton, 14 S. D. 350, 351, 85 N. W. 599.

"Other than for a sum of money" see Weaver *v.* Haviland, 142 N. Y. 534, 537, 37 N. E. 641, 40 Am. St. Rep. 631.

46. Illustrations are: "Other action" (Ellis *v.* Murray, 28 Miss. 129, 142); "other actionable injury" (Lasche *v.* Dearing, 23 Misc. (N. Y.) 722, 723, 53 N. Y. Suppl. 58); "other acts" (Erwin *v.* St. Joseph Public Schools, 12 Fed. 680, 682, 2 McCrary 608; Gause *v.* Clarksville, 10 Fed. Cas. No. 5,276, 5 Dill. 165); "other agricultural product" (Murray *v.* State, 21 Tex. App. 620, 628, 2 S. W. 757, 57 Am. Rep. 623); "other alienation" (Schermerhorn *v.* Mahaffie, 34 Kan. 108, 112, 8 Pac. 199); "other amounts due" (New York State Bank *v.* Waterhouse, 70 Conn. 76, 86, 38 Atl. 904, 66 Am. St. Rep. 82); "other animals" (Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605, 607; Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 502, 23 S. E. 935, 44 L. R. A. 449; U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480, 482); "other article" (Rosenbach *v.* Dreyfuss, 2 Fed. 217, 220); "other articles" (State *v.* Solomon, 33 Ind. 450, 452; Warren *v.* Geer, 117 Pa. St. 207, 212, 11 Atl. 415; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 64); "other articles and necessaries" (Matter of Ludlow, 15 Fed. Cas. No. 8,599, 1 N. Y. Leg. Obs. 322, 323; *In re* Thiell, 23 Fed. Cas. No. 13,882, 4 Biss. 241, 243; *In re* Williams, 29 Fed. Cas. No. 17,701); "other articles of traffic" (Riggs *v.* State, 7 Lea (Tenn.) 475, 476); "other articles of wood" (Carre *v.* New Orleans, 41 La. Ann. 996, 998, 6 So. 893); "other articles or things not prohibited by law" (Greenville Ice, etc., Co. *v.* Greenville, 69 Miss. 86, 90, 10 So. 574); "other bailee" (State *v.* Broderick, 7 Mo. App. 19, 20 [*affirmed* in 70 Mo. 622]); "other bank" (Campbell *v.* Farmers' Bank, 10 Bush (Ky.) 152, 155); "other beasts" (U. S. *v.* Gideon, 1 Minn. 292, 296 [*cited* in Patton *v.* State, 93 Ga. 111, 113, 19 S. E. 734, 24 L. R. A. 732]); "other beverages" (State *v.* Dinnisse, 109 Mo. 434, 438, 19 S. W. 92); "other building" (Gillock *v.* People, 171 Ill. 307, 312, 49 N. E. 712; State *v.* Rogers, 54 Kan. 683, 685, 39 Pac. 219; State *v.* Schuchmann, 133 Mo. 111, 116, 33 S. W. 35, 34 S. W. 842); "other business, trades, avocations or professions" (St. Louis *v.* Laughlin, 49 Mo. 559, 564; St. Joseph *v.* Porter, 29 Mo. App. 605, 608); "other business where clerks, miners or mechanics are employed" (Sproul *v.* Murray, 156 Pa. St. 293, 296, 27 Atl. 302; Pardee's Appeal, 100 Pa. St. 408, 412; Merriman *v.* Mullett, 2 Pa. Co. Ct. 360, 362); "other cases" (Backus *v.* Wayne County Cir. Judge, 89 Mich. 209, 221, 50 N. W. 646; Wilson *v.* Sandford, 10 How. (U. S.) 99, 101, 13 L. ed. 344); "other casualty" (Crystal Springs Distillery Co. *v.* Cox, 49 Fed. 555, 559, 1 C. C. A. 365); "other cause" (King *v.* Thompson, 87 Pa. St. 365, 369, 30 Am. Rep. 364; State *v.* McGarry, 21 Wis. 496, 498); "other causes" (Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 73, 49 Pac. 588, 53 Pac. 498); "other children" (Lee *v.* Welch, 163 Mass. 312, 313, 39 N. E. 1112; Brooks *v.* Kip, 54 N. J. Eq. 462, 469, 471, 35 Atl. 658); "other chose in action" (Corbin *v.* Black Hawk County, 105 U. S. 659, 666, 26 L. ed. 1136); "other civil proceeding" (Kramer *v.* Rebman, 9 Iowa 114, 118); "other conditions" (Smith *v.* Sieveking, 4 E. & B. 945, 951, 82 E. C. L. 945); "other contracts" (Ins. Co. of North America *v.* Forcheimer, 86 Ala. 541, 550, 5 So. 870); "other corporation" (*In re* La Société Francaise d'Epargnes, etc., 123 Cal. 525, 530, 56 Pac. 458; Ripley *v.* Evans, 87 Mich. 217, 228, 49 N. W. 504); "other corporations" (Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 42, 29 C. C. A. 1; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372, 377); "other corporations or institutions" (Joplin *v.* Leckie, 78 Mo. App. 8, 12); "other costs" (Johnson *v.* Schar, 9 S. D. 536, 539, 70 N. W. 838); "other counsel" (People *v.* Biles, 2 (Ida.) Hasb. 114, 116, 6 Pac. 120); "other court" (People *v.* Curley, 5 Colo. 412, 415); "other craft" (Reg. *v.* Reed, 28 Eng. L. & Eq. 133, 135; Tisdell *v.* Combe, 7 A. & E. 788, 792, 2 Jur. 32, 7 L. J. M. C. 48, 3 N. P. 29, 1 W. W. & H. 5, 34 E. C. L. 412); "other

indefinite nature, and frequently obscure relation to words and phrases by which

creditors" (Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 290, 72 N. W. 122); "other crime" (Anderson *v.* State, 72 Ala. 187, 189; *In re* Brown, 112 Mass. 409, 411, 17 Am. Rep. 114; *In re* Greenough, 31 Vt. 279, 286, 287); "other dangerous, noxious, unwholesome or offensive establishment, trade or calling or business" (Flanagan *v.* Hollingsworth, 2 How. Pr. N. S. (N. Y.) 391, 392, 393 [*affirmed* in 108 N. Y. 621, 15 N. E. 74]); "other noxious or dangerous trade or business" (Atlantic Dock Co. *v.* Leavitt, 50 Barb. (N. Y.) 135, 141 [*affirmed* in 54 N. Y. 35, 13 Am. Rep. 556]); "other deadly weapons" (Sprague *v.* Com., 58 S. W. 430, 431, 22 Ky. L. Rep. 519); "other deadly weapons of like kind" (State *v.* Erwin, 91 N. C. 545, 547); "other dependents" (Grand Lodge Order of Hermann-Loehne *v.* Elsner, 26 Mo. App. 108, 116); "other depositories of filth" (Sprigg *v.* Garrett Park, 89 Md. 406, 410, 43 Atl. 813); "other device" (Eubanks *v.* State, 5 Mo. 450, 451); "other disability" (Turnipseed *v.* Hudson, 50 Miss. 429, 446, 19 Am. Rep. 15; Western Dredging, etc., Co. *v.* Heldmaier, 111 Fed. 123, 125, 49 C. C. A. 264); "other disposal" (Reg. *v.* Walsh, 29 Ont. 36, 37); "other domestic purposes" (U. S. *v.* Edgar, 140 Fed. 655, 658); "other dwellers" (Cullinan *v.* Clark, 46 Misc. (N. Y.) 188, 191, 93 N. Y. Suppl. 256); "other easement" (Webb *v.* Bird, 10 C. B. N. S. 268, 286, 30 L. J. C. P. 384, 4 L. T. Rep. N. S. 445, 9 Wkly. Rep. 899, 100 E. C. L. 268); "other effects" (People *v.* Stone, 9 Wend. (N. Y.) 182, 189; Hodgson *v.* Jex, 2 Ch. D. 122, 123, 45 L. J. Ch. 388, 24 Wkly. Rep. 575; Ivison *v.* Gassiot, 3 De G. M. & G. 958, 964, 52 Eng. Ch. 744, 43 Eng. Reprint 375, 27 Eng. L. & Eq. 483; Hotham *v.* Sutton, 15 Ves. Jr. 319, 326, 10 Rev. Rep. 83, 33 Eng. Reprint 774 [*cited* in Tefft *v.* Tillinghast, 7 R. I. 434, 436]); "other emergency" (People *v.* Bell, 3 N. Y. Suppl. 812, 813); "other employés" (Denman *v.* Webster, (Cal. 1902) 70 Pac. 1063, 1064); "other erection" (People *v.* Block, 15 N. Y. Suppl. 229, 230); "other erection or inclosure" (People *v.* Richards, 108 N. Y. 137, 150, 15 N. E. 371, 2 Am. St. Rep. 373); "other error" (Hermance *v.* Ulster County, 71 N. Y. 481, 486); "other estate" (Atwater *v.* Woodbridge, 6 Conn. 223, 227, 16 Am. Dec. 46); "other evidence" (People *v.* Green, 103 N. Y. App. Div 79, 84, 92 N. Y. Suppl. 508); "other evidences of indebtedness" (Wood *v.* Williams, 142 Ill. 269, 275, 31 N. E. 681, 34 Am. St. Rep. 79); "other false and fraudulent means" (Langston *v.* State, 109 Ga. 153, 156, 35 S. E. 166, 779); "other false pretense" (Higler *v.* People, 44 Mich. 299, 302, 6 N. W. 664, 38 Am. Rep. 267), "other fees" (Levant *v.* Varney, 32 Me. 180); "other felony" (Kelly *v.* People, 132 Ill. 363, 368, 24 N. E. 56; Pooler *v.* State, 97 Wis. 627, 631, 73 N. W. 336; Hall *v.* State, 48 Wis. 688, 689, 4 N. W. 1068); "other final process" (Armsby *v.* People, 20 Ill. 155, 159; Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570, 571); "other fixtures for manufacturing purposes" (Hughes *v.* Lambertville Electric Light, etc., Co., 53 N. J. Eq. 435, 437, 32 Atl. 69); "other forms of indebtedness" (Burt *v.* Butterworth, 19 R. I. 127, 128, 32 Atl. 167); "other future election" (Berwick upon Tweed *v.* Oswald, 3 E. & B. 653, 671, 77 E. C. L. 653); "other gambling device" (State *v.* Bryant, 90 Mo. 534, 536, 2 S. W. 836; Randolph *v.* State, 9 Tex. 521, 523; U. S. *v.* Speeden, 27 Fed. Cas. No. 16,366, 1 Cranch C. C. 535); "other gaming-table, bank, or gambling device" (Remmington *v.* State, 1 Oreg. 281, 282; Estes *v.* State, 10 Tex. 300, 307); "other good and sufficient cause" (State *v.* Hay, 45 Nebr. 321, 331, 63 N. W. 821); "other good cause" (*In re* Jackson, 13 Fed. Cas. No. 7,123, 7 Biss. 280, 286); "other governing body" (Doyle *v.* Duluth, 74 Minn. 157, 161, 76 N. W. 1029); "other grain" (Warren *v.* Peabody, 8 C. B. 800, 810, 14 Jur. 150, 19 L. J. C. P. 43, 65 E. C. L. 800); "other grievances" (Kalman *v.* Cox, 46 Misc. (N. Y.) 589, 590, 92 N. Y. Suppl. 816); "other house" (Watt *v.* State, 61 Ga. 66, 67; State *v.* McDonald, 9 W. Va. 456, 463); "other improvements" (Eastern Arkansas Hedge-Fence Co. *v.* Tanner, 67 Ark. 156, 159, 53 S. W. 886); "other incidental expenses" (U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 68, 78); "other inclosure" (State *v.* Barge, 82 Minn. 256, 261, 84 N. W. 911, 53 L. R. A. 428 [*followed* in State *v.* McGregor, 88 Minn. 74, 75, 92 N. W. 509]); "other indebtedness" (Bowen *v.* Ratcliff, 140 Ind. 393, 397, 39 N. E. 860, 49 Am. St. Rep. 203); "other instrument" (People *v.* Chretien, 137 Cal. 450, 452, 70 Pac. 305); "other instrument, device or thing for the purpose of gaming" (Marquis *v.* Chicago, 27 Ill. App. 251, 253); "other instrument in writing" (Shirk *v.* People, 121 Ill. 61, 65, 11 N. E. 888); "other instruments for the payment of money" (Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 601, 44 N. Y. Suppl. 369); "other interest" (Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 431, 3 Am. Rep. 149); "other intoxicating beverage" (Smith *v.* State, 19 Conn. 493, 500); "other joint-stock companies" (State *v.* Simmons, 70 Miss. 485, 504, 12 So. 477); "other jurisdiction" (Pitner *v.* State, 23 Tex. App. 366, 377, 5 S. W. 210); "other kind of wilful, deliberate and premeditated killing" (Com. *v.* Jones, 1 Leigh (Va.) 598, 611); "other laborer" (Edgecomb *v.* His Creditors, 19 Nev. 149, 153, 7 Pac. 533; *In re* Hindman, 104 Fed. 331, 333, 43 C. C. A. 558); "other lands" (Berkley *v.* Lamb, 8 Nebr. 392, 401, 1 N. W. 320); "other lands and real estate devised" (Stark *v.* Hunton, 1 N. J. Eq. 216, 229); "other lawful business" (Brown *v.* Corbin, 40 Minn. 508, 509, 42 N. W. 481); "other legal disabilities" (Smith *v.* Bryan, 74 Ind. 515, 518); "other legal merchandise" (Cockburn *v.* Alexander, 6 C. B. 791, 817, 13 Jur. 13, 18 L. J. C. P. 74, 60 E. C. L. 791); "other legitimate causes" (Castle *v.* Logan, 140 Fed. 707, 709, 72 C. C. A. 201); "other lien" (Danziger *v.* Simonson, 116 N. Y. 329, 333, 334, 22 N. E.

it is accompanied, is likely, unless used with the utmost caution, to cause great

570); "other machine or contrivance used in betting" (Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777); "other manifest impediments" (*In re* Davison, 4 Fed. 507, 510); "other matters" (Erwin *v.* Jersey City, 60 N. J. L. 141, 147, 37 Atl. 732, 64 Am. St. Rep. 584); "other means" (McDade *v.* People, 29 Mich. 50, 54); "other means as the General Assembly may provide" (Dubuque Dist. Tp. *v.* Dubuque County Judge, 13 Iowa 250, 252); "other means as the legislature may provide" (Crosby *v.* Lyon, 37 Cal. 242, 245; State *v.* Walsh, 31 Nebr. 469, 476, 48 N. W. 263); "other means, instrument or device" (Maxwell *v.* People, 158 Ill. 248, 254, 41 N. E. 995); "other memoranda" (Cary *v.* Herrin, 59 Me. 361, 364); "other merchandise" (Standard Oil Co. *v.* Swanson, 121 Ga. 412, 414, 49 S. E. 262); "other moneyed capital" (Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 549, 551, 48 Atl. 582; Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 457, 17 S. Ct. 629, 41 L. ed. 1069; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 155, 7 S. Ct. 826, 30 L. ed. 895; Wilmington First Nat. Bank *v.* Herbert, 44 Fed. 158, 159); "other moneys" (People *v.* Dolan, 5 Wyo. 245, 252, 39 Pac. 752); "other municipal board or body" (Doyle *v.* Bayonne Bd. of Education, 54 N. J. L. 313, 314, 23 Atl. 670); "other necessaries" (The W. L. White, 25 Fed. 503, 505); "other necessary officers" (State *v.* Clarke, 21 Nev. 333, 338, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L. R. A. 313; State *v.* Arrington, 18 Nev. 412, 417, 4 Pac. 735); "other necessary town charges" (Opinion of Justices, 52 Me. 595, 598); "other object" (Seibert *v.* Cavender, 3 Mo. App. 421, 423); "other obligations" (Smith *v.* Ellington, 14 Ga. 379, 381); "other occupation" (Albert *v.* Order of Chosen Friends, 34 Fed. 721, 722); "other officer" (State *v.* Moore, 39 Conn. 244, 249; Spalding *v.* People, 172 Ill. 40, 49, 49 N. E. 993; Kelley *v.* Gage County, 67 Nebr. 6, 10, 93 N. W. 194, 99 N. W. 524; Stryker *v.* Skillman, 14 N. J. L. 189, 191; Sprague *v.* Rochester, 159 N. Y. 20, 27, 53 N. E. 697); "other officers" (Matter of Whiting, 1 Edm. Sel. Cas. (N. Y.) 498, 502); "other of the fresh waters of the state" (People *v.* Gillette, 11 N. Y. Suppl. 461); "other operations" (People *v.* Parks, 58 Cal. 624, 638); "other person" (Mitchell *v.* Gibson, 14 Ark. 224, 227; Martin *v.* Bond, 14 Colo. 466, 469, 24 Pac. 326; Guptil *v.* McFee, 9 Kan. 30, 34; Mulligan *v.* Mulligan, 18 La. Ann. 20, 22; Brockway *v.* Patterson, 72 Mich. 122, 126, 40 N. W. 192, 1 L. R. A. 708; Flower *v.* Witkovsky, 69 Mich. 371, 373, 37 N. W. 364; Brooks *v.* Cook, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282; Grimes *v.* Bryne, 2 Minn. 89, 103, 105; State *v.* Krueger, 134 Mo. 262, 270, 35 S. W. 604; Russell *v.* Taylor, 4 Mo. 550, 551; Raeder *v.* Bensberg, 6 Mo. App. 445, 446–450; U. S. *v.* Crookshank, 1 Edw. (N. Y.) 233, 238; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 204, 73 Pac. 954; Bucher *v.* Com., 103 Pa. St. 528, 533, 534; Warner Elevator Mfg. Co. *v.* Houston, (Tex. Civ. App. 1894) 28 S. W. 405, 408; Jensen *v.* State, 60 Wis. 577, 582, 19 N. W. 374; Wicker *v.* Comstock, 52 Wis. 315, 316, 9 N. W. 25; Chase *v.* Whiting, 30 Wis. 544, 547; Bevitt *v.* Crandall, 19 Wis. 581, 583; U. S. *v.* 1150½ Pounds of Celluloid, 82 Fed. 627, 636, 27 C. C. A. 231; *In re* Jones, 13 Fed. Cas. No. 7,445, 2 Dill. 343; Harris *v.* Jenns, 9 C. B. N. S. 152, 158, 30 L. J. M. C. 183, 3 L. T. Rep. N. S. 408, 9 Wkly. Rep. 36, 99 E. C. L. 150); "other personal effects" (Welman *v.* Neufville, 75 Ga. 124, 127); "other personal property" (Dietz *v.* Mission Transfer Co., 95 Cal. 92, 102, 30 Pac. 380; Wall *v.* Platt, 169 Mass. 398, 406, 48 N. E. 270; Berg *v.* Baldwin, 31 Minn. 541, 542, 18 N. W. 821; State *v.* Switzer, 59 S. C. 225, 226, 37 S. E. 818); "other person or employment" (Lynchburg *v.* Norfolk, etc., R. Co., 80 Va. 237, 246, 56 Am. Rep. 592); "other person or persons" (Whitfield *v.* Terrell Compress Co., 26 Tex. Civ. App. 235, 237, 238, 62 S. W. 116; Sandiman *v.* Breach, 7 B. & C. 96, 100, 9 D. & R. 796, 5 L. J. K. B. O. S. 298, 31 Wkly. Rep. 169, 14 E. C. L. 52); "other persons" (Tyler *v.* Tyler, 126 Ill. 525, 536, 21 N. E. 616, 9 Am. St. Rep. 642; Day *v.* Lown, 51 Iowa 364, 369, 1 N. W. 786; State *v.* Martindale, 47 Kan. 147, 150, 27 Pac. 852 [*quoted* in Billingsley *v.* Marshall County, 5 Kan. App. 435, 49 Pac. 329]; State *v.* Longfellow, 93 Mo. App. 364, 372, 67 S. W. 665 [*followed* in State *v.* Longfellow, 95 Mo. App. 660, 667, 69 S. W. 596]; Munger *v.* Perkins, 62 Wis. 499, 505, 22 N. W. 511; Melms *v.* Pfister, 59 Wis. 186, 196, 18 N. W. 255); "other place of amusement" (Matter of Hastings, 15 Phila. (Pa.) 420, 421, 422); "other place of business" (Bethune *v.* State, 48 Ga. 505, 510; St. Joseph *v.* Elliott, 47 Mo. App. 418, 420); "other places" (Rhone *v.* Loomis, 74 Minn. 200, 204, 77 N. W. 31; Jones *v.* Gibson, 1 N. H. 266, 272; Bevans *v.* U. S., 3 Wheat. (U. S.) 336, 390, 4 L. ed. 404; *In re* Kelly, 71 Fed. 545, 550); "other pleading" (Robinson *v.* Dix, 18 W. Va. 528, 542); "other power" (Hudson River Tel. Co. *v.* Watervliet, etc., R. Co., 56 Hun (N. Y.) 67, 70, 9 N. Y. Suppl. 177; Taggart *v.* Newport St. R. Co., 16 R. I. 668, 684, 19 Atl. 326, 7 L. R. A. 205); "other premises" (Hilton's Appeal, 116 Pa. St. 351, 358, 9 Atl. 342); "other proceeding" (Booraem *v.* North Hudson County R. Co., 44 N. J. Eq. 70, 74, 14 Atl. 106; Solomon *v.* Granam, 5 E. & B. 309, 323, 1 Jur. N. S. 1070, 24 L. J. Q. B. 332, 85 E. C. L. 309); "other proceedings" (Reed *v.* Lyon, 96 Cal. 501, 504, 31 Pac. 619; Lloyd *v.* Matthews, 92 Ky. 300, 303, 17 S. W. 795, 13 Ky. L. Rep. 537); "other process" (Richardson *v.* Clements, 89 Pa. St. 503, 506, 33 Am. Rep. 784); "other products" (Roberts *v.* Savannah, etc., R. Co., 75 Ga. 225, 227); "other projections" (Cushing *v.* Boston, 128 Mass. 330, 331, 35 Am. Rep. 383); "other proper person" (Den *v.* Shupe, 13 N. J. L. 66 [*followed* in Den *v.* Fen, 14 N. J. L. 497, 499]); "other property" (People *v.* Cummings, 114 Cal. 437,

difficulty in construction[47] or to vitiate a proceeding.[48] It is a word of addition;[49] a correlative and specifying word.[50]

C. Relation to Antecedent. The word must have an antecedent — without one it has no meaning[51] — which may be implied;[52] and which, if dubiously expressed,[53] is to be ascertained by reference to the object of the statute in which

441, 46 Pac. 284; Martin *v.* New York, etc., R. Co., 62 Conn. 331, 335, 25 Atl. 239; Grissell *v.* Housatonic R. Co., 54 Conn. 447, 451, 9 Atl. 137, 1 Am. St. Rep. 138; Whiting *v.* Beckwith, 31 Conn. 596, 597; White *v.* Ivey, 34 Ga. 186, 199; Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 500, 28 N. E. 955; Brailey *v.* Southborough, 6 Cush. (Mass.) 141, 142; Roberts *v.* Detroit, 102 Mich. 64, 67, 60 N. W. 450, 27 L. R. A. 572; Alt *v.* California Fig Syrup Co., 19 Nev. 118, 120, 7 Pac. 174; Livermore *v.* Camden County, 29 N. J. L. 245, 247; Hudson Valley R. Co. *v.* Boston, etc., R. Co., 45 Misc. (N. Y.) 520, 526, 92 N. Y. Suppl. 928 [*affirmed* in 106 N. Y. App. Div. 375, 94 N. Y. Suppl. 545]; Edwards *v.* Warren, 90 N. C. 604, 606; Renick *v.* Boyd, 99 Pa. St. 555, 559, 44 Am. Rep. 124 [*affirming* 1 Chest. Co. Rep. 267]; State *v.* Marshall, 13 Tex. 55, 58; State *v.* Switzer, 63 Vt. 604, 607, 22 Atl. 724, 25 Am. St. Rep. 789; State *v.* White, 12 Wash. 417, 419, 41 Pac. 182; Clawson *v.* State, 129 Wis. 650, 654, 655, 109 N. W. 578, 116 Am. St. Rep. 972; State *v.* Black, 75 Wis. 490, 493, 44 N. W. 635; Hall *v.* Baker, 74 Wis. 118, 127, 42 N. W. 104); "other provision" (Van Steenwyck *v.* Washburn, 59 Wis. 483, 497, 17 N. W. 289, 48 Am. Rep. 532); "other publication of an indecent character" (U. S. *v.* Clark, 43 Fed. 574; U. S. *v.* Williams, 3 Fed. 484, 486); "other public building" (State *v.* Troth, 34 N. J. L. 377, 383); "other public grounds" (Winters *v.* Duluth, 82 Minn. 127, 129, 84 N. W. 788); "other public measure" (Union County *v.* Ussery, 147 Ill. 204, 208, 35 N. E. 618); "other public officer" (U. S. *v.* Holtzhauer, 40 Fed. 76, 80); "other public, official proceedings" (Sanford *v.* Bennett, 24 N. Y. 20, 24); "other public or private property" (Patton *v.* State, 93 Ga. 111, 116, 19 S. E. 734, 24 L. R. A. 732); "other public schools" (Willard *v.* Pike, 59 Vt. 202, 216, 9 Atl. 907); "other public uses" (Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 91 Iowa 470, 472, 59 N. W. 292); "other question" (Evans *v.* Williston Tp., 168 Pa. St. 578, 581, 32 Atl. 87); "other railroads held by the State" (Park *v.* Candler, 113 Ga. 647, 660, 39 S. E. 89); "other reasonable cause" (Brown *v.* Congdon, 50 Conn. 302, 309); "other remedial writs" (Jones *v.* Little Rock, 25 Ark. 284, 287; *Ex p.* Woods, 3 Ark. 532, 538; *Ex p.* Jones, 2 Ark. 93, 97; State *v.* Ashley, 1 Ark. 279, 310, 311); "other remedy" (State *v.* Wilson, 123 Ala. 259, 279, 26 So. 482, 45 L. R. A. 772; State *v.* Rose, 4 N. D. 319, 332, 58 N. W. 514); "other security" (U. S. *v.* Sprague, 48 Fed. 828, 830); "other small craft of light character" (U. S. *v.* Mollie, 26 Fed. Cas. No. 15,795, 2 Woods 318, 322); "other street railways" (Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 276, 63 S. W. 814); "other structure" (Pennsylvania Steel Co. *v.* J. E. Potts Salt, etc., Co., 63 Fed. 11, 15, 11 C. C. A. 11); "other structures connected therewith" (Collins *v.* Drew, 67 N. Y. 149, 151); "other sufficient cause" (*In re* Tilden, 98 N. Y. 434, 442; Matter of Soule, 72 Hun (N. Y.) 594, 597, 25 N. Y. Suppl. 270; Matter of Monteith, 27 Misc. (N. Y.) 163, 164, 58 N. Y. Suppl. 379); "other table of like character" (Mims *v.* State, 88 Ga. 458, 460, 14 S. E. 712); "other things" (Alt *v.* California Fig Syrup Co., 19 Nev. 118, 120, 7 Pac. 174; Tefft *v.* Tillinghast, 7 R. I. 434, 436; Trafford *v.* Berrige, 1 Eq. Cas. Abr. 201, 21 Eng. Reprint 989); "other things being equal" (Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 453, 22 N. W. 740); "other things necessary" (Herman *v.* Perkins, 52 Miss. 813, 816); "other trains, engines or cars" (Benson *v.* Chicago, etc., R. Co., 75 Minn. 163, 165, 77 N. W. 798, 74 Am. St. Rep. 444); "other valuable thing" (Shinn *v.* Cotton, 52 Ark. 90, 12 S. W. 157; State *v.* Gillespie, 80 N. C. 396, 397); "other waters" (State *v.* Sears, 115 Iowa 28, 29, 87 N. W. 735); "other writing for the payment of money" (Commercial Union Assur. Co. *v.* Everhart, 88 Va. 952, 955, 14 S. E. 836); "other writings" (U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,572, 13 Blatchf. 211, 212); "other writing to prevent equity and justice" (State *v.* Cooper, 5 Day (Conn.) 250, 255).

47. See Allgood *v.* Blake, L. R. 8 Exch. 160, 168, 169, 170, for an example of extraordinary confusion caused by the vague use of the phrase "other the issue of my body" in a will. See also the various theories, as to the use of the word, expressed in three concurring opinions in Bowes *v.* Ravensworth, 15 C. B. 512, 522, 523, 24 L. J. C. P. 73, 3 Wkly. Rep. 241, 80 E. C. L. 512.

48. See Farr *v.* Farr, 113 Ga. 577, 38 S. E. 962; U. S. *v.* Speeden, 27 Fed. Cas. No. 16,366, 1 Cranch C. C. 535.

49. Harmon *v.* Jennings, 22 Me. 240, 241, 242; Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 92, 44 N. Y. Suppl. 832; Ayrton *v.* Abbott, 14 Q. B. 1, 17, 14 Jur. 314, 18 L. J. Q. B. 314, 68 E. C. L. 1, *dictum* of Erle, J.

50. *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 567.

51. See Sloan *v.* Whitman, 5 Cush. (Mass.) 532, 533.

52. Georgia Home Ins. Co. *v.* Campbell, 102 Ga. 106, 107, 29 S. E. 148, antecedent implied for the word as used in the phrase "other insurance."

53. See Fleener *v.* State, 58 Ark. 98, 101, 102, 23 S. W. 1; State *v.* Kent, 22 Minn. 41, 42, 21 Am. Rep. 764; State *v.* Porter, 26 Mo. 201, 206; People *v.* Hennessey, 15 Wend. (N. Y.) 147, 150.

the language occurs;[54] or the intent with which it is used.[55] It must always mark a difference between that which it qualifies or represents and such antecedent;[56] where the antecedent has a double meaning, it is to be considered from which of those meanings the word marks a distinction;[57] and where the word and its antecedent stand apart in separate and different provisions, that which the antecedent expresses is excluded thereby from the effect of the provision in which "other" occurs.[58] The word, with those which it qualifies, may limit the meaning of its antecedent,[59] or the contrary.[60]

D. Scope. The scope of the word and of those which it qualifies is often limited to that which is of the same kind as its antecedent, by the principle "*ejusdem generis*," [61] in statutes or other documents;[62] but "*ejusdem generis*" does not apply where the contrary intent is clear;[63] as where such construction would con-

54. Coburn *v.* Rogers, 32 N. H. 372, 374. See cases cited *supra*, note 53.

55. Niles *v.* Almy, 161 Mass. 29, 30, 36 N. E. 582, in a will.

56. Smith *v.* Ellington, 14 Ga. 379, 383.

57. Welch *v.* Seymour, 28 Conn. 387, 391, holding that in a provision to the effect that "officers" shall hold over until "others" be elected in their stead, the word does not necessarily mean "other persons" but "successors" in office, whether the same persons or not.

58. For example when one section of a statute contained mention of a certain class of cases and a provision concerning them, and the succeeding section, containing a different provision, began with the words, "In all other cases," the use of the words last quoted excluded, from the operation of the latter section, the class of cases specified in the former. So held in People *v.* Connors, 13 Misc. (N. Y.) 582, 586, 35 N. Y. Suppl. 472.

59. Thus, in the phrase, "for the celebration of holidays, and for other public purposes," the word implies that the celebration of holidays is a public purpose within the meaning of the act in which it occurs (Hubbard *v.* Taunton, 140 Mass. 467, 468, 5 N. E. 157); in construing a city charter which conferred authority to establish markets and other public buildings it was said: "The use of the word 'other' shows that markets was used in a restricted sense, to designate public buildings erected and devoted to the use of receiving, for sale and purchase, such marketable articles for daily use and consumption as might be wanted to supply the inhabitants of the city" (St. Paul *v.* Traeger, 25 Minn. 248, 253, 33 Am. Rep. 462); and, in the phrase, "other unappropriated lands," the word was held to import that lands previously mentioned were also unappropriated (Alexander *v.* Greenup, 1 Munf. (Va.) 134, 144, 4 Am. Dec. 541).

60. Thus, in construing the phrase, "larceny or any other felony," it was held that, larceny being either a felony or misdemeanor, the words "any other felony" were used not to limit the preceding larceny to such as amounts to felony, but to add felonies other than larceny to the category of crimes, the intent to commit which is an element of burglary. Kelly *v.* People, 132 Ill. 363, 369, 24 N. E. 56; Hall *v.* State, 48 Wis. 688, 689, 4 N. W. 1068 [*followed* in State *v.* Hows, 31 Utah 168, 170, 87 Pac. 163; Pooler *v.* State, 97 Wis. 627, 631, 73 N. W. 336].

61. See EJUSDEM GENERIS, 15 Cyc. 247, and the cross-references thereunder. See also the kindred rule *noscitur a sociis*, *ante*, p. 1065, and the cross-references thereunder.

62. Rhone *v.* Loomis, 74 Minn. 200, 204, 77 N. W. 31, where it is said that where a statute or document specifically enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces "'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* 'with' and not of a quality superior to, or different from, those specifically enumerated."

In a contract see Whicker *v.* Hushaw, 159 Ind. 1, 6, 64 N. E. 460; Castle *v.* Logan, 140 Fed. 707, 709, 72 C. C. A. 201.

In a deed see Dietz *v.* Mission Transfer Co., 95 Cal. 92, 100, 30 Pac. 380.

In an insurance policy see Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573, 575; Ellery *v.* New England Ins. Co., 8 Pick. (Mass.) 14, 20; Bamyer *v.* Albany Ins. Co., 85 N. Y. App. Div. 122, 124, 83 N. Y. Suppl. 65 [*affirmed* in 179 N. Y. 554, 71 N. E. 1140]; Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 92, 44 N. Y. Suppl. 832; Phillips *v.* Barber, 5 B. & Ald. 161, 163, 24 Rev. Rep. 317, 7 E. C. L. 96.

In a lease see Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 499, 28 N. E. 955.

In a mortgage see Pennock *v.* Coe, 23 How. (U. S.) 117, 126, 16 L. ed. 436.

In a power of attorney see Solomon *v.* Graham, 5 E. & B. 309, 323, 1 Jur. N. S. 1070, 24 L. J. Q. B. 332, 85 E. C. L. 309.

In a release see Halsey *v.* Fairbanks, 11 Fed. Cas. No. 5,964, 4 Mason 206, 226.

In statutes see STATUTES.

In wills see WILLS.

63. St. Joseph *v.* Elliott, 47 Mo. App. 418, 421; Hilton's Appeal, 116 Pa. St. 351, 358, 9 Atl. 342; Albert *v.* Order of Chosen Friends, 34 Fed. 721, 722; Cockburn *v.* Alexander, 6 C. B. 791, 807, 13 Jur. 13, 18 L. J. C. P. 74, 60 E. C. L. 790. See also STATUTES; WILLS.

Contrary intent shown by use of word "any" see Danziger *v.* Simonson, 116 N. Y. 329, 334, 22 N. E. 570.

flict with the obvious purpose of the statute,[64] or other document construed;[65] or where the preceding description is exhaustive, so that there can be nothing more of the same kind.[66] The attempt has been made in certain cases to show that the application of the word was confined to things extant at the time of its use, but the contrary has been held.[67]

E. Comprehensive, Supplemental Use. The word, or the phrase containing it, may be added — to quote a most expressive judicial description — "as a sort of catch all,"[68] after a mention, or enumeration, to include all that has not been expressed therein, whether of the same kind,[69] or of any and every kind.[70] See OTHERWISE.)

OTHER INSURANCE. See FIRE INSURANCE; LIFE INSURANCE; and the Insurance Titles.

OTHERWISE. By other like means;[71] contrarily;[72] different from that to which it relates;[73] in a different manner; in another way, differently in other respects;[74] in a different manner; in any other way; or in any other ways; differently;[75] in a different manner or way; differently in other respects;[76] in a different manner; in different respects;[77] in some other like capacity.[78] (See OTHER.)

64. Union County *v.* Ussery, 147 Ill. 204, 208, 35 N. E. 618; Winters *v.* Duluth, 82 Minn. 127, 129, 84 N. W. 788; Mitchell *v.* Plover, 53 Wis. 548, 555, 11 N. W. 27. See also State *v.* Passaic, 36 N. J. L. 382, 386, 387.

65. Warren *v.* Peabody, 8 C. B. 800, 808, 14 Jur. 150, 19 L. J. C. P.. 43, 65 E. C. L. 798.

66. National Surety Co. *v.* Morris, 111 Ga. 307, 308, 36 S. E. 690; Ellis *v.* Murray, 28 Miss. 129, 142.

Illustrations.— In the phrase, "sanitary or other purposes" in a city charter, "'sanitary' embraces everything pertaining to the health of the inhabitants, and, if the words 'other purposes' have no other meaning, they are superfluous. They have a broader significance." Eyerman *v.* Blaksley, 78 Mo. 145, 151. In the phrase "or other purposes," following the words "religious, charitable or educational," the words "or other" cannot be "read 'other such' or 'other like' or 'other of the same kind,' for such a construction would make them mere surplusage and deprive the clause of meaning. If so construed, the words simply repeat the idea 'charitable' previously expressed. . . . The clause, looked at by itself, clearly expresses the intent to permit the trustees to devote the fund, if they choose to do so, to purposes other than those which are educational or religious or charitable." Hyde *v.* Hyde, 64 N. J. Eq. 6, 9, 10, 53 Atl. 593.

67. Thus the word and those which it qualifies may include: After-acquired property (Park *v.* Candler, 113 Ga. 647, 660, 39 S. E. 89); future inventions (Hudson River Tel. Co. *v.* Watervliet, etc., R. Co., 56 Hun (N. Y.) 67, 70, 9 N. Y. Suppl. 177; Richardson *v.* Clements, 89 Pa. St. 503, 506, 33 Am. Rep. 784; Taggart *v.* Newport St. R. Co., 16 R. I. 668, 684, 19 Atl. 326, 7 L. R. A. 205); future indebtedness (Burt *v.* Butterworth, 19 R. I. 127, 128, 32 Atl. 167); and appliances not yet in existence (Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 169, 87 N. W. 1085, 89 N. W. 180).

68. So described in Brown *v.* Corbin, 40 Minn. 508, 510, 42 N. W. 481.

69. Brown *v.* Corbin, 40 Minn. 508, 510, 42 N. W. 481; U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 68, 79.

70. Seibert *v.* Cavender, 3 Mo. App. 421, 423; Kenney *v.* Sweeney, 14 R. I. 581, 582.

71. Galveston County *v.* Gorham, 49 Tex. 279, 290.

72. Contra Costa Water Co. *v.* Breed, 139 Cal. 432, 441, 73 Pac. 189; Webster Dict. [*quoted* in Lynch *v.* Murphy, 119 Mo. 163, 167, 24 S. W. 774, 775].

73. Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 400 [*quoted* in People *v.* Feitner, 71 N. Y. App. Div. 479, 481, 75 N. Y. Suppl. 738].

74. Standard Dict. [*quoted* in Thompson *v.* Highland Park, 187 Ill. 265, 268, 58 N. E. 328].

75. Webster Dict. [*quoted* in Lynch *v.* Murphy, 119 Mo. 163, 167, 24 S. W. 774].

76. Century Dict. [*quoted* in Thompson *v.* Highland Park, 187 Ill. 265, 268, 58 N. E. 328].

77. Webster Dict. [*quoted* in Thompson *v.* Highland Park, 187 Ill. 265, 268, 58 N. E. 328].

78. Lewis *v.* Smith, 9 N. Y. 502, 520, 61 Am. Dec. 706.

Construed as a denial see King *v.* De Coursey, 8 Colo. 463, 466, 9 Pac. 31.

Not construed to mean "another" see People *v.* Greenwall, 115 N. Y. 520, 523, 22 N. E. 180. See also People *v.* Miles, 143 N. Y. 383, 389, 38 N. E. 456.

Not being an adverb of place, it cannot be held to mean "otherwhere." Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455, 475.

Used in connection with other words.— "Accidentally or otherwise" see Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474, 477. "Accident or otherwise" see West Chicago St. R. Co. *v.* Morrison, 160 Ill. 288, 305, 43 N. E. 393. "Agent or otherwise" see Rawson *v.* State, 19 Conn. 292, 298. "Assignment or otherwise" see Carpenter *v.* Romer, etc., Steamboat Co., 48 N. Y. App. Div. 363,

OTITIS. An inflammation of the middle ear.[79]

OTTER BANKS. The localities where sea otters are found, along the Alaskan coast from Cook's inlet to the Semidi islands.[80]

OTTOMAN CAHVEY. A substance the ingredients of which are known only

370, 63 N. Y. Suppl. 274. "Barred by the statute of limitations or otherwise" see Bosworth *v.* Smith, 9 R. I. 67, 75. "Caption or otherwise" see Memphis St. R. Co. *v.* State, 110 Tenn. 598, 609, 75 S. W. 730; Shelton *v.* State, 96 Tenn. 521, 525, 32 S. W. 967; State *v.* Yardley, 95 Tenn. 546, 558, 32 S. W. 481, 34 L. R. A. 656; State *v.* Runnels, 92 Tenn. 320, 325, 21 S. W. 665; Ransome *v.* State, 91 Tenn. 716, 718, 20 S. W. 310. "Collusion or otherwise" see Wallace *v.* Jones, 83 N. Y. App. Div. 152, 154, 82 N. Y. Suppl. 449; Foeller *v.* Voight, 5 Ohio Dec. (Reprint) 349, 2 Am. L. Rec. 1; U. S. *v.* Bettilini, 24 Fed. Cas. No. 14,587, 1 Woods 654, 659. "Composition real or otherwise" see Fellowes *v.* Clay, 4 Q. B. 311, 340, 45 E. C. L. 311. "Contiguous property, or otherwise" see Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 463, 468, 27 N. E. 203. "Death, absence from the state, or otherwise" see Atty.-Gen. *v.* Taggart, 66 N. H. 362, 364, 29 Atl. 1027, 25 L. R. A. 613. "Death, resignation, or otherwise" see State *v.* Moores, 58 Nebr. 285, 291, 78 N. W. 529. "Descent, devise, or otherwise" see Carpenter *v.* Mitchell, 54 Ill. 126, 131. "Divided or otherwise" see Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 16, 20 L. ed. 272. "Expiration of the term of office or otherwise" see Com. *v.* Dickert, 195 Pa. St. 234, 240, 45 Atl. 1058. "Fees, clerk hire, or otherwise" see State *v.* Kelly, 32 Ohio St. 421, 429. "Feloniously or otherwise" see Riley *v.* Hartford L., etc., Ins. Co., 25 Fed. 315, 316. "Gift, grant, purchase, devise, bequest or otherwise" see Smith *v.* Minneapolis Library Bd., 58 Minn. 108, 110, 59 N. W. 979, 25 L. R. A. 280. "In trust or otherwise" see New York State Loan, etc., Co. *v.* Helmer, 77 N. Y. 64, 67. "Mode of proving claims, or otherwise" see Marbury *v.* Kentucky Union Land Co., 62 Fed. 335, 353, 10 C. C. A. 393. "Negligence or otherwise" see Pittsburgh, etc., R. Co. *v.* Mahoney, 148 Ind. 196, 205, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101. "Nonsuit, default or otherwise" see Loring *v.* Proctor, 26 Me. 18, 27. "Original packages or otherwise" see Lynch *v.* Murphy, 119 Mo. 163, 166, 24 S. W. 774. "Otherwise acquired" see Hoover *v.* Gregory, 10 Yerg. (Tenn.) 444, 451; Roberts *v.* Jackson, 4 Yerg. (Tenn.) 308, 322. "Otherwise appropriated" see People *v.* State Land Office, 23 Mich. 270, 277; Burlington, etc., R. Co. *v.* Fremont County, 9 Wall. (U. S.) 89, 94, 19 L. ed. 563. "Otherwise controlled" see Myers *v.* Seaberger, 45 Ohio St. 232, 236, 12 N. E. 796. "Otherwise defective or invalid" see Daniels *v.* Gualala Mill Co., 77 Cal. 300, 303, 19 Pac. 519. "Otherwise disabled" see McCaffrey *v.* Shields, 54 Wis. 645, 651, 12 N. W. 54. "Otherwise dispose of" see Conley *v.* State, 85 Ga. 348, 365, 11 S. E. 659; Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, 560, 55 Pac. 229, 353. "Otherwise disposing of" see Roberson *v.* State, 100 Ala. 37, 39, 14 So. 554; Robberson *v.* State, 3 Tex. App. 502, 505; Ham *v.* Missouri, 18 How. (U. S.) 126, 133, 15 L. ed. 334. "Otherwise disqualified to sit" see Peyton's Appeal, 12 Kan. 398, 407. "Otherwise do or put away" see Crusoe *v.* Bugby, W. Bl. 766, 767, 3 Wis. C. P. 234. "Otherwise greatly hurt and wounded" see Chesapeake, etc., R. Co. *v.* Hanmer, 66 S. W. 375, 376, 23 Ky. L. Rep. 1846. "Otherwise improve" see Methodist Episcopal Church *v.* Wyandotte, 31 Kan. 721, 726, 3 Pac. 527. "Otherwise improving" see Thompson *v.* Highland Park, 187 Ill. 265, 268, 58 N. E. 328; Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 574, 54 Atl. 366. "Otherwise improving such highways" see State *v.* Wood County, 72 Wis. 629, 637, 40 N. W. 381. "Otherwise occupied" see Meredith Mechanic Assoc. *v.* American Twist Drill Co., 66 N. H. 267, 269, 20 Atl. 330. "Otherwise produced" see People *v.* Elfenbein, 65 Hun (N. Y.) 434, 437, 20 N. Y. Suppl. 364. "Otherwise provided" see State *v.* Meehan, 62 Conn. 126, 127, 25 Atl. 476; *In re* Board of Rapid Transit R. Com'rs, 147 N. Y. 260, 266, 41 N. E. 575. "Otherwise secured" see Fuller *v.* Aylesworth, 75 Fed. 694, 701, 21 C. C. A. 505. "Otherwise than in current coin" see Archer *v.* James, 2 B. & S. 67, 76, 8 Jur. N. S. 166, 31 L. J. Q. B. 153, 6 L. T. Rep. N. S. 167, 10 Wkly. Rep. 489, 110 E. C. L. 67. "Otherwise used" see Ramsey County *v.* Stryker, 52 Minn. 144, 147, 53 N. W. 1133. "Otherwise used and practised" see Backus *v.* Lebanon, 11 N. H. 19, 27, 35 Am. Dec. 466. "Owner, or otherwise" see State *v.* Dennison, 60 Nebr. 157, 162, 82 N. W. 383. "Purposes of their road, or otherwise" see Delaware, etc., R. Co. *v.* Fuller, 40 N. J. L. 328, 330. "Rents, accounts, bonds and mortgages, or, otherwise" see Sims *v.* U. S. Trust Co., 103 N. Y. 472, 478, 9 N. E. 605. "Sickness or otherwise" see Nesbitt *v.* Drew, 17 Ala. 379, 383. "Stocks or otherwise" see Whelen's Appeal, 70 Pa. St. 410, 429; Pope *v.* Mathews, 18 S. C. 444, 453. "Wagon, cart, sleigh, boat or otherwise" see U. S. *v.* Sheldon, 2 Wheat. (U. S.) 119, 120, 4 L. ed. 199. "Waylaying or otherwise" see State *v.* Shade, 115 N. C. 757, 758, 20 S. E. 537.

Whenever used following specific terms no authority can be found that will give it its broad significance when used by itself, but that they restrict it to the meaning of the specific words and terms preceding it. Territory *v.* Albright, 12 N. M. 293, 326, 78 Pac. 204.

79. McQuade *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 637, 638, 82 N. Y. Suppl. 720.

80. The Alexander, 60 Fed. 914, 919, sometimes designated "otter-killing grounds."

to the manufacturer, but which contains a certain proportion of coffee, and is used to mix with pure coffee in the proportion of about one half of each, which mixture produces a substitute for coffee.[81]

OUGHT. MUST,[82] *q. v.*; to be held or bound in duty or moral obligation.[83]

OUR. Of or pertaining to us, belonging to us.[84] (See MY.)

OUSTER. An actual deprivation of the possession of a part of the land, or, what is equivalent, a title which is capable of being used to deprive the grantee of his possession;[85] the actual turning out or keeping excluded the party entitled to the possession of any real property;[86] a wrongful entry upon the property of another, accompanied by a removal of the owner from possession;[87] an entry by one man upon the land of another under claim and color of title;[88] the wrongful dispossession or exclusion of a party from real property who is entitled to possession;[89] a wrong or injury that carries with it the amotion of possession.[90] (Ouster: Basis of Adverse Possession, see ADVERSE POSSESSION. Breach of Covenant, see COVENANTS. Injunction Against, see INJUNCTIONS. Of Cotenant, see TENANCY IN COMMON. Of Joint Tenant, see JOINT TENANCY. Of Landlord by Tenant, see LANDLORD AND TENANT. Of Public Officer, see OFFICERS; QUO WARRANTO. Of Tenant — Generally, see LANDLORD AND TENANT; Under Oil, Gas, or General Mining Lease, see MINES AND MINERALS. Reëntry and Recovery of Possession by Landlord, see LANDLORD AND TENANT. Remedies For, see EJECTMENT; ENTRY, WRIT OF; TRESPASS TO TRY TITLE.)

OUT. 66. In tax duplicate stands for "out-lot 66."[91]

81. Ottoman Cahvey Co. *v.* Philadelphia, 1 Pa. Cas. 443, 445, 4 Atl. 745.

82. Jackson *v.* State, 32 Tex. Cr. 192, 211, 22 S. W. 831, so used in an instruction in a prosecution for murder that the jury "ought" to consider the circumstances of the case from the standpoint of defendant as it appeared at the time of the killing.

Mandatory, and not directory as used in Bill of Rights, providing that all property subject to taxation "ought" to be taxed in proportion to its value. Life Assoc. of America *v.* St. Louis County, 49 Mo. 512, 519.

83. Otmer *v.* People, 76 Ill. 149, 152.

The equivalent of "would" see Curran *v.* A. H. Stange Co., 98 Wis. 598, 611, 74 N. W. 377.

"'Ought reasonably' must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances." Taylor *v.* London, etc., Co., [1901] 2 Ch. 231, 258, 70 L. J. Ch. 477, 84 L. T. Rep. N. S. 397, 49 Wkly. Rep. 451.

84. Webster Dict.

Sometimes used to denote the singular number see Mitchell *v.* O'Neale, 4 Nev. 504, 517.

"Our a/" and "our a/c," when used in mercantile accounts, mean "our account." Ogden *v.* Astor, 4 Sandf. (N. Y.) 311, 338.

"Our children" as used by testator in making devises or bequests to his wife and his children mean substantially the same as "her children" and "my children." Vaughan *v.* Vaughan, 97 Va. 322, 327, 33 S. E. 603.

Used in connection with other words.— "Our child" see Beck *v.* Metz, 25 Mo. 70, 72. "Our company" see New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85, 92. 'Our farm' see Koch *v.* Streuter, 218 Ill. 546, 557, 75 N. E. 1049, 2 L. R. A. N. S. 210; Guyer *v.* Warren, 175 Ill. 328, 339, 51 N. E. 580. "Our property" see Cowley *v.* Knapp, 42 N. J. L. 297, 301.

85. McMullin *v.* Wooley, 2 Lans. (N. Y.) 394, 395.

86. Zwicker *v.* Morash, 34 Nova Scotia 555, 562; Bouvier L. Dict. [*quoted* in Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 435, 23 S. W. 373].

87. Worcester *v.* Lord, 56 Me. 265, 269, 96 Am. Dec. 456.

88. Copeland *v.* Murphey, 2 Coldw. (Tenn.) 64, 70; Hacker *v.* Horlemus, 74 Wis. 21, 25, 41 N. W. 965; Probst *v.* Presbyterian Church Domestic Missions, 129 U. S. 182, 191, 9 S. Ct. 263, 32 L. ed. 642; Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 52, 9 L. ed. 624.

89. Winterburn *v.* Chambers, 91 Cal. 170, 180, 27 Pac. 658; Bath *v.* Valdez, 70 Cal. 350, 357, 11 Pac. 724; Clark *v.* Beard, 59 W. Va. 669, 672, 53 S. E. 597.

90. 3 Blackstone Comm. 167 [*quoted* in Dobbins *v.* Dobbins, 141 N. C. 210, 214, 53 S. E. 870, 115 Am. St. Rep. 682].

Depends upon the intent of the party taking and holding possession. Bath *v.* Valdez, 70 Cal. 350, 357, 11 Pac. 724.

Disseizor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn him out of possession. Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 299, 34 N. W. 128, 2 Am. St. Rep. 740; McCourt *v.* Eckstein, 22 Wis. 153, 157, 94 Am. Dec. 594. But see Mason *v.* Kellogg, 38 Mich. 132, 143, where it was held that physical expulsion is not necessary, but the compulsory surrender of a part of an estate by reason of a judgment in ejectment is sufficient.

91. Barton *v.* Anderson, 104 Ind. 578, 582, 4 N. E. 420.

OUTAGE. A charge payable on withdrawing hogsheads from inspectors, under an act providing that it should not be lawful to carry tobacco out of the state in hogsheads which had not been inspected and marked.[92]

OUT-AND-OUT. Completely, entirely, without reservation.[93]

OUT-BOUNDARIES. A term used in early Mexican land laws to designate certain boundaries within which grants of a smaller tract, which designated such out-boundaries, might be located by the grantee.[94] (See, generally, BOUNDARIES.)

OUTBUILDING or OUTHOUSE. A building adjacent to a dwelling-house, and subservient thereto, but distinct from the mansion itself;[95] a building appurtenant to some main building or mansion house;[96] a building contributory to the habitation separate from the main structure, either within or without the curtilage;[97] a building without the mansion house, intended for the accommodation of the owner or occupant;[98] a house belonging to or used with the dwelling-house, or "contributory to habitation";[99] a house contiguous to and used in connection with a hotel, the two belonging to and being controlled by the same person;[1] any house necessary for the purposes of life, in which the owner does not make his constant or principal residence;[2] any house not occupied as a dwelling-house or business house;[3] any house standing out and apart from the houses used as dwellings or business houses;[4] any house separated from the main building, but useful to it as a dwelling;[5] one not used for dwelling or business purposes;[6] one that belongs to a dwelling, and is in some respects a parcel of such dwelling-house, and situated within the curtilage;[7] something annexed to an in-house;[8] something which is used in connection with the main building.[9] (Outbuilding or Outhouse: As Resort For Gambling, see GAMING. Breaking and Entering, see BURGLARY. Burning, see ARSON. Nuisance, see NUISANCES.)

92. Turner *v.* Maryland, 107 U. S. 38, 58, 2 S. Ct. 44, 27 L. ed. 370.

The term was used in Maryland to include a charge made to reimburse the state for the expense of requiring the delivery of export tobacco at one of the state tobacco warehouses in order that the inspector could ascertain whether it conformed to the requirements of the law, whether it was the true growth of the state, and packed by the grower or purchaser in the county or neighborhood where it was grown, and is in the nature of an inspection duly within the meaning of the constitution of the United States. Turner *v.* S., 55 Md. 240, 264.

93. Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204, 210.

As used in a deed of trust containing a power to sell the trust property for a price or consideration to be paid "out and out" in money, the term means a sale for cash. Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204, 210.

94. U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 369, 7 S. Ct. 1015, 30 L. ed. 949.

95. Carter *v.* State, 106 Ga. 372, 375, 32 S. E. 345, 71 Am. St. Rep. 262.

96. State *v.* Bailey, 10 Conn. 144, 145.

97. State *v.* Randall, 36 Wash. 438, 78 Pac. 998.

98. State *v.* Brooks, 4 Conn. 446, 448.

99. Price *v.* Com., 25 S. W. 1062, 15 Ky. L. Rep. 837.

1. Shotwell *v.* State, 43 Ark. 345, 349.

2. State *v.* O'Brien, 2 Root (Conn.) 516.

3. Wheelock *v.* State, 15 Tex. 257.

4. Pickens *v.* State, 100 Ala. 127, 129, 14 So. 672. *Compare* Camerson *v.* State, 15 Ala. 383, 384.

5. State *v.* Powers, 36 Conn. 77, 79.

6. Downey *v.* State, 115 Ala. 108, 112, 22 So. 479.

7. State *v.* Roper, 88 N. C. 656, 658.

8. Reg. *v.* Hammond, 1 Cox C. C. 60, 61.

9. Com. *v.* Intoxicating Liquors, 140 Mass. 287, 289, 3 N. E. 4.

These terms include: Barn. Woodman *v.* Smith, 53 Me. 79, 80; Com. *v.* Intoxicating Liquors, 140 Mass. 287, 289, 3 N. E. 4. Car used as freight-house. Carter *v.* State, 106 Ga. 372, 374, 32 S. E. 345, 71 Am. St. Rep. 262. Chicken-house. Price *v.* Com., 25 S. W. 1062, 15 Ky. L. Rep. 837. Distillery. State *v.* Faulkener, 2 McCord (S. C.) 438, 439. Pigsty. Reg. *v.* Janes, 1 C. & K. 303, 2 Moody C. C. 308, 47 E. C. L. 303. Schoolhouse. State *v.* O'Brien, 2 Root (Conn.) 516; Jones *v.* Hungerford, 4 Gill & J. (Md.) 402, 406. Shed. Com. *v.* Intoxicating Liquors, 140 Mass. 287, 289, 3 N. E. 4. Sleeping apartment. Sisk *v.* State, 28 Tex. App. 432, 436, 13 S. W. 647, no other room in the house being occupied. Spring-house. Willoughby *v.* Shipman, 28 Mo. 50, 52. Unoccupied house. Wheelock *v.* State, 15 Tex. 253, 255. Vacant storehouse. Swallow *v.* State, 20 Ala. 30, 32. Woodhouse. Com. *v.* Intoxicating Liquors, 140 Mass. 287, 289, 3 N. E. 4.

But they have been held not to include: Cart hovel. Rex *v.* Parrot, 6 C. & P. 402, 25 E. C. L. 495. Cart or implement shed. Elsmore *v.* St. Briavells, 8 B. & C. 461, 465, 6 L. J. K. B. O. S. 372, 2 M. & A. 514, 15 E. C. L. 229. Cowshed. Rex *v.* Haughton, 5 C. & P. 555, 556, 24 E. C. L. 705. District school-house. State *v.* Bailey, 10 Conn. 144, 145. Stable. Blakemore *v.* Stanley, (Mass.

OUTCROP. A presentation of the mineral to the naked eye on the surface of the earth;[10] that portion of a vein appearing at the surface;[11] the edges of strata which appear at the surface of the ground;[12] the portion of a vein or strata emerging at the surface or appearing immediately under the soil and surface *débris*.[13] (See, generally, MINES AND MINERALS.)

OUTCRY. See AUCTIONS AND AUCTIONEERS.

OUTFITS. Those objects connected with a ship which were necessary for the sailing of her, and without which she would not in fact be navigable.[14] (Outfits: Of Vessels — In General, see SHIPPING; Lien Therefor, see MARITIME LIENS.)

OUTFITTER. One who furnishes outfits.[15]

OUTGOING. Something that has gone out, an expense which some one has been at;[16] generally, some payment which must be made to secure the income of the property.[17] The word is not highly definite, but has upon several occasions

1893) 33 N. E. 689, 690; Reg. *v.* Hammond, 1 Cox C. C. 60, 61. Storehouse. State *v.* Roper, 88 N. C. 656, 658; Stockton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 509, 510. *Contra*, Swallow *v.* State, 20 Ala. 30, 32. Tobacco barn. White *v.* Com., 87 Ky. 454, 457, 9 S. W. 303, 10 Ky. L. Rep. 422.

10. Stevens *v.* Williams, 23 Fed. Cas. No. 13,413, 1 McCrary 480.

11. Van Cotta [*quoted* in Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 896].

12. Geike [*quoted* in Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 896].

13. Dr. Raymond in his Glossary [*quoted* in Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 896].

14. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354, 356, where it is said that it includes the sails and rigging, boats, and provisions for the ship's crew, and in ships engaged in whaling voyages, not only the ordinary tackle and apparel of the ship, and the provisions of a common voyage from port to port, but the casks and staves, the fishing gear, and the stores and clothing necessary for the successful prosecution of such voyages.

Neither ship nor cargo is included, although a distinct subject of insurance. Macy *v.* China Mut. Ins. Co., 135 Mass. 328, 330.

15. Webster Int. Dict.

"Ladies' outfitter" see Stuart *v.* Diplock, 43 Ch. D. 343, 345, 59 L. J. Ch. 142, 62 L. T. Rep. N. S. 333, 38 Wkly. Rep. 223.

16. Crosse *v.* Raw, 43 L. J. Exch. 144, 146, 23 Wkly. Rep. 6. *Compare*, however, the report of the same case in L. R. 9 Exch. 209, 212, where the language is different and the term is not directly defined.

"Proper outgoings in respect of the undertaking" as used in Railway Companies Act, § 4, may mean more than "working expenses" (see *In re* Eastern, etc., R. Co., 45 Ch. D. 367, 386, 63 L. T. Rep. N. S. 604, where the opinion is expressed that even if certain arrears do not come within the term "working expenses," they do within the words "proper outgoings"); and includes due instalments in payment of property bought by the company and necessary to carry on the working of the railroad (*In re* Eastern, etc., R. Co., *supra*); but does not include costs of defending an action in respect of the undertaking (*In re* Wrexham, etc., R. Co., [1900] 1 Ch. 261, 270, 69 L. J. Ch. 291, 82 L. T. Rep. N. S. 33, 48 Wkly. Rep. 311); the expense of promoting a bill to empower a railroad company to substitute electricity for steam (*In re* Mersey R. Co., 64 L. J. Ch. 623, 72 L. T. Rep. N. S. 535); or dividends on shares and debentures of a separate undertaking of the same company (*In re* Eastern, etc., R. Co., 45 Ch. D. 367, 63 L. T. Rep. N. S. 604).

17. *In re* Bennett, [1896] 1 Ch. 778, 784, 65 L. J. Ch. 422, 74 L. T. Rep. N. S. 157, 44 Wkly. Rep. 419.

"Outgoings of the hereditaments" as mentioned in a certain will included "every expense relating to the estate which, in the ordinary course of management, would require to be made in order to maintain the estate in a fit state to earn rent, or would be a proper deduction before ascertaining the net rent receivable as income." *In re* Cleveland, [1894] 1 Ch. 164, 174, 63 L. J. Ch. 115, 69 L. T. Rep. N. S. 807, 7 Reports 328.

"Necessary outgoings" for which, under the Succession Duty Act, 16 & 17 Vict. c. 51, § 22, allowance is to be made in estimating annual value, "would appear to be 'permanent' charges, made on the occupiers of the land, or falling entirely on the land, such as repairs, poor-rates, highway, sewer, and county rates, town rates, drainage-rates, and the like; some of which may be payable occasionally, still they are permanent charges, and capable of valuation, so as to render it possible to calculate the annual amount." Matter of Elwes, 3 H. & N. 719, 726, 4 Jur. N. S. 1153, 28 L. J. Exch. 46 [*followed* in Matter of Cowley, L. R. 1 Exch. 288, 4 H. & C. 476, 12 Jur. N. S. 607, 35 L. J. Exch. 177. 14 L. T. Rep. N. S. 663, 14 Wkly. Rep. 836].

As between landlord and tenant.— Where tenants, by one covenant, agreed to pay outgoings in respect of the premises, and in another to pay a fair proportion of all costs or expenses which the lessors in respect of being the owners might be obliged to pay, it was held that the tenants need not pay the cost of providing facilities for escape in case of fire, required by a statute which cast the liability upon the owner, since, if such an expense were an outgoing (which was doubted, one of the judges inclining to the theory that the word meant "the ordinary charges

been characterized by the courts as large in scope;[18] and with reference, always to context and circumstances, the term has been held to include expenditure for such things as abating a nuisance, under statutory notice from local authorities;[19] improvements in drainage, required by statute;[20] rent;[21] rates

and outgoings which they knew would be imposed in respect to the premises"), the mention in the latter clause, of costs or expenses in respect of being the owner, as apportionable, showed that such were not included in the former clause. Arding *v.* Economic Printing, etc., Co., 79 L. T. Rep. N. S. 420, 421. Land tax and rent charge on title, for which, by statute, the tenant is made primarily liable, although he has the right, after paying them, to deduct the amounts from rent, are outgoings of the tenant, therefore when he covenants to pay rent "free from all outgoings" he deprives himself of the right to make such deduction. Parish *v.* Sleeman, 1 De G. F. & J. 326, 331, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385 [*reversing* 1 L. T. Rep. N. S. 24].

As between estate and legatee.—A devise in trust to pay income to a legatee after payment of all incidental expenses and outgoings did not necessarily require the deduction of an expenditure made by trustees for structural drainage works. In the absence of an application to the court prior to such expenditure, the question whether estate or income should bear it was within the discretion of the court, which charged it to capital, and it was said that capital should have borne it had such prior application been made. *In re* Thomas, [1900] 1 Ch. 319, 69 L. J. Ch. 198, 48 Wkly. Rep. 409. Under the devise of a leasehold "free of all outgoings," those due up to the death of the testator must be borne by the estate, the legatee takes subject to liability to pay subsequent rents and subsequently to perform the covenants. *In re* Taber, 51 L. J. Ch. 721, 724, 46 L. T. Rep. N. S. 805, 30 Wkly. Rep. 883.

In respect of what property.—A provision, in a contract for the sale of part of a tract of land, that "'all rates and other outgoings' should 'be adjusted as usual,'" was held to apply to "outgoings in respect of the property contracted to be purchased, not in respect of the larger property of which, in the hands of the vendors, it formed part . . . outgoings which would enure to the benefit of the purchaser when he became owner; not outgoings the benefit of which and the liability to which would be necessarily determined when once the purchase was completed." Country Estates Co. *v.* Graves, [1895] A. C. 113, 115, 116, 64 L. J. P. C. 44, 72 L. T. Rep. N. S. 31, 11 Reports 381.

The devise of a leasehold "free of all outgoings" refers to outgoings due up to the time of testator's death, such as rent or taxes that might then be due. *In re* Taber, 51 L. J. Ch. 721, 724, 46 L. T. Rep. N. S. 805, 30 Wkly. Rep. 883.

18. See Reg. *v.* Shaw, 12 Q. B. 419, 427, 12 Jur. 651, 17 L. J. M. C. 137, 3 New Sess. Cas. 170, 64 E. C. L. 419.

"The largest word which can be used," as compared with others expressing expense attached to ownership. Said to be established as such in Tubbs *v.* Wynne, [1897] 1 Q. B. 74, 78, 66 L. J. Q. B. 116. *Compare* the two *dicta*, one in dissenting opinion of Brett, L. J., in Budd *v.* Marshall, 5 C. P. D. 481, 483, 485, 44 J. P. 584, 50 L. J. Q. B. 24, 42 L. T. Rep. N. S. 793, 29 Wkly. Rep. 148, that the word had been "held to be a word of the largest possible signification" and would, if added to the words "taxes, rates, duties and assessments," have enlarged the scope of the provision in which they occurred, and the other in the opinion of Bramwell, L. J. (of the majority) to the effect that the other words were equally comprehensive, and adding: "The word is an awkward one, and I do not know that it would make this case clearer."

"Outgoings of every description payable by landlord or tenant in respect of the premises." That he could conceive no larger words than these was said by Kay, J., in Batchelor *v.* Bigger, 60 L. T. Rep. N. S. 416, 417.

Broader than "taxes and assessments," as including a rent-charge, which the phrase quoted was held not to do. Jeffrey *v.* Neale, L. R. 6 C. P. 240, 243, 40 L. J. C. P. 191, 24 L. T. Rep. N. S. 362, 19 Wkly. Rep. 700.

"At least as strong as 'duties.'"—Aldridge *v.* Ferne, 17 Q. B. D. 212, 214, 55 L. J. Q. B. 587, 34 Wkly. Rep. 578.

19. Barsht *v.* Tagg, [1900] 1 Ch. 231, 69 L. J. Ch. 91, 81 L. T. Rep. N. S. 777, 48 Wkly. Rep. 220.

20. Crosse *v.* Raw, L. R. 9 Exch. 209, 212, 43 L. J. Exch. 144, 23 Wkly. Rep. 6; Budd *v.* Marshall, 5 C. P. D. 481, 44 J. P. 584, 50 L. J. Q. B. 24, 42 L. T. Rep. N. S. 793, 29 Wkly. Rep. 148; Antil *v.* Godwin, 15 T. L. R. 462.

"Ordinary outgoings," as deducted from income payable by trustees to a legatee, would seem to include the cost of drainage work required by statute; it certainly does so when the phrase is followed by a list of specified kinds of outgoing concluding "or otherwise." *In re* Crawley, 28 Ch. D. 431, 435, 49 J. P. 598, 54 L. J. Ch. 652, 52 L. T. Rep. N. S. 460, 33 Wkly. Rep. 611.

21. As in Lawes *v.* Gibson, L. R. 1 Eq. 135, 11 Jur. N. S. 873, 35 L. J. Ch. 148, 13 L. T. Rep. N. S. 316, 14 Wkly. Rep. 25.

Rent-charge, on title.—Parish *v.* Sleeman, 1 De G. F. & J. 326, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385 [*reversing* 1 L. T. Rep. N. S. 24].

Outgoings of a leasehold up to the completion of its sale include so much of the rent of the period then current as is proportionate to the part of that period preceding such completion. Lawes *v.* Gibson, L. R. 1 Eq. 135, 11 Jur. N. S. 873, 35 L. J. Ch. 148, 13 L. T. Rep. N. S. 316, 14 Wkly. Rep. 25.

and taxes, generally;[22] work upon streets;[23] an expenditure which the person liable thereto has never paid may be an outgoing of that person, because of his liability.[24] The date of an outgoing is not necessarily that of actual expenditure, it may be the date upon which liability accrues,[25] but not prior thereto.[26]

OUTLAW. One who is put out of the law, deprived of its benefits and protection.[27]

OUTLAWED. Barred by the statute of limitations.[28] (Outlawed: Debts, see LIMITATIONS OF ACTIONS.)

OUTLAWRY. A punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before them.[29]

OUTLINE. A sketch of any scheme.[30]

OUTLOT. Common field lots.[31] (See LOT.)

OUT OF. Beyond the limits; from or beyond the inside of; not in or included in.[32]

22. Reg. *v.* Shaw, 12 Q. B. 419, 427, 12 Jur. 651, 1 L. J. M. C. 137, 3 New Sess. Cas. 170, 64 E. C. L. 419.

Poor-rate.— Reg. *v.* Shaw, 12 Q. B. 419, 12 Jur. 651, 17 L. J. M. C. 137, 3 New Sess. Cas. 170, 64 E. C. L. 419.

But a rate of a new kind is not included by a general agreement to pay "all outgoings," that is, a rate which has been created by statute since the date of the agreement. Mile End Old Town *v.* Whithy, 78 L. T. Rep. N. S. 80.

Land-tax.— Parish *v.* Sleeman, 1 De G. F. & J. 326, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385 [*reversing* 1 L. T. Rep. N. S. 24].

"Clear of all taxes and outgoings" includes legacy duty, where it appears that the intent of the testatrix using the phrase was to have a clear yearly sum of the amount so described. Louch *v.* Peters, 3 L. J. Ch. 167, 168, 1 Myl. & K. 489, 7 Eng. Ch. 489, 39 Eng. Reprint 766.

23. Aldridge *v.* Ferne, 17 Q. B. D. 212, 214, 55 L. J. Q. B. 587, 34 Wkly. Rep. 578; Stock *v.* Meakin, [1900] 1 Ch. 683, 694, 69 L. J. Ch. 401, 82 L. T. Rep. N. S. 248, 48 Wkly. Rep. 420; Midgley *v.* Coppock, 4 Ex. D. 309, 313, 48 L. J. Exch. 674, 40 L. T. Rep. N. S. 870; Batchelor *v.* Bigger, 60 L. T. Rep. N. S. 416.

24. See *infra*, this note.

An outgoing of a party without expenditure on his part has occurred where a magistrate's order to take down dangerous structures has been neglected by the owner, carried out by the county council, and the cost collected from a purchaser of the property. Such expenditure was an outgoing of the vendor, although he has expended nothing (Tubbs *v.* Wynne, [1897] 1 Q. B. 74, 66 L. J. Q. B. 116); likewise where street improvements rendering the owner of property liable for the cost thereof have been made by a municipal corporation, without his knowledge, and the cost collected of a subsequent purchaser of the property (Midgley *v.* Coppock, 4 Ex. D. 309, 313, 48 L. J. Exch. 674, 40 L. T. Rep. N. S. 870).

25. Tubbs *v.* Wynne, [1897] 1 Q. B. 74, 66 L. J. Q. B. 116; Midgley *v.* Coppock, 4 Ex. D. 309, 313, 48 L. J. Exch. 674, 40 L. T. Rep. N. S. 870.

26. See *In re* Boor, 40 Ch. D. 572, 577, 53 J. P. 467, 58 L. J. Ch. 285, 60 L. T. Rep. N. S. 412, 37 Wkly. Rep. 349 [*distinguished* in Tubbs *v.* Wynne, [1897] 1 Q. B. 74, 79, 66 L. J. Q. B. 116].

27. Burrill L. Dict. [*quoted* in Drew *v.* Drew, 37 Me. 389, 391].

As used in Alabama Act, Dec. 28, 1868, § 1, it included the lawless and disorderly persons then addicted to roving through the state in disguise and committing habitually acts of violence and outrage. Dale County *v.* Gunter, 46 Ala. 118, 138.

28. Drew *v.* Drew, 37 Me. 389, 391.

29. See CRIMINAL LAW, 12 Cyc. 792.

Process for see Respublica *v.* Steele, 2 Dall. (Pa.) 92, 93, 1 L. ed. 303.

For form of judgment see Respublica *v.* Doan, 1 Dall. (Pa.) 86, 91, 1 L. ed. 47.

In civil actions outlawry was in the nature of civil process to compel an appearance to the suit, or after judgment to procure satisfaction. Hepburn's Case, 3 Bland (Md.) 95, 118.

30. Webster Int. Dict.

Outline of testimony in a case see Buckmaster *v.* Cool, 12 Ill. 74, 76.

31. Trotter *v.* St. Louis Public School, 9 Mo. 69, 76.

May properly include vacant land contiguous to the town of St. Louis, bounded on all sides except the one fronting on the river. Kissell *v.* St. Louis Public Schools, 16 Mo. 553, 592.

Not necessary that a lot should touch the town to make it an outlot. St. Louis *v.* Toney, 21 Mo. 243, 256.

32. Standard Dict.

Used in connection with the other words.— "Out of any further moneys" see Cochrane *v.* Green, 9 C. B. N. S. 448, 469, 7 Jur. N. S. 548, 30 L. J. C. P. 97, 9 Wkly. Rep. 124, 99 E. C. L. 448. "Out of . . . Confederate States bonds" see Gilmer *v.* Gilmer, 42 Ala. 9, 16. "Out of court" see Welsh *v.* Blackwell, 14 N. J. L. 344, 345. "Out of repair" see Alger *v.* Kennedy, 49 Vt. 109, 120, 24 Am. Rep. 117. "Out of term" see McNeill *v.* Hodges, 99 N. C. 248, 249, 6 S. E. 127. "Out of the land" see Den *v.* Cook, 7 N. J. L. 41, 45. "Out of the order named" see Davin *v.* Davin, 114 N. Y. App. Div. 396, 399, 99 N. Y. Suppl. 1012. "Out of the proceeds of the first

OUT OF DOORS. Not in a house;[33] not indoors.[34]

OUT OF THE COMMONWEALTH. A phrase said to imply permanently out, as nonresident or noninhabitant.[35]

OUT OF THE COUNTRY. Abroad, beyond the sea.[36]

OUT OF THE JURISDICTION. Without the state.[37]

OUT OF THE REALM. Beyond the seas.[38]

OUT OF THE STATE. An expression analogous to "beyond sea."[39]

OUT OF USE. Not in employment.[40]

OUTRAGE. A bold or wanton injury to person or property; wanton mischief; gross injury; an aggravated wrong.[41] (Outrage: As Element of Damages, see DAMAGES. As Ground For Divorce, see DIVORCE. Of Female, see ASSAULT AND BATTERY; RAPE.)

OUTSIDE THE BAR. Outside the harbor limits.[42]

OUTSTANDING ACCOUNTS. In its general sense, such accounts as are due, unpaid, and uncollectible.[43] In its mercantile sense, such accounts as are deemed good and collectible, and from which accounts deemed to be bad and uncollectible have been segregated and charged to profit and loss.[44] (See, generally, ACCOUNTS AND ACCOUNTING.)

OUTSTANDING CROP. A crop in the field, not gathered thence and housed.[45] (See, generally, CROPS.)

OUTSTANDING LIABILITIES. Such debts and liabilities as created some legal or equitable right or lien on the property.[46]

OUTSTANDING TITLE. Such a title as a stranger could recover on in ejectment against either of the contending parties.[47] (Outstanding Title: Acquisition of — As Interruption of Adverse Possession, see ADVERSE POSSESSION; By Cotenant, see TENANCY IN COMMON; By Joint Tenant, see JOINT TENANCY; By Life-Tenant, see LIFE-ESTATES; By Party to Mortgage, see MORTGAGES. Liability For Purchase of, as Affecting Homestead, see HOMESTEADS.)

cotton ginned" see White *v.* Chaffin, 32 Ark. 59, 67. "Out of the profits" see Bond *v.* Pittard, 1 H. & H. 82, 83, 2 Jur. 183, 7 L. J. Exch. 78, 3 M. & W. 357.

33. State *v.* Avery, 109 N. C. 798, 801, 13 S. E. 931.

34. State *v.* Huskins, 126 N. C. 1070, 1071, 35 S. E. 608.

35. Foster *v.* Givens, 67 Fed. 684, 694, 14 C. C. A. 625.

36. Graves *v.* Graves, 2 Bibb (Ky.) 207, 208. 4 Am. Dec. 697.

37. Meyer *v.* Roth, 51 Cal. 582, 583.

38. Prior to the union of the crowns of England and Scotland, out of the realm of England, and subsequent to such union signified out of the realm of Great Britain, including England and Scotland. Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 353, 2 Am. Dec. 520.

39. West *v.* Pickesimer, 7 Ohio, Pt. II, 235; Faw *v.* Roberdeau, 3 Cranch (U. S.) 174, 177, 2 L. ed. 402.

Includes: Creditors whose residence was continuously in a place outside the state. Yoast *v.* Willis, 9 Ind. 548, 550. Foreign corporation. Larson *v.* Aultman, 86 Wis. 281, 286, 56 N. W. 915, 39 Am. St. Rep. 893. One who has commenced a journey leading out of the state, and has progressed thereon at the commencement of suit so far as to rebut any presumption of notice, although not yet actually over the line. Marvin *v.* Wilkins, 1 Aik. (Vt.) 107, 110. Persons who have always resided abroad as well as those who have resided within the state and returned after an absence therefrom. Jordon *v.* Secombe, 33 Minn. 220, 223, 22 N. W. 383.

40. Astor *v.* Merritt, 111 U. S. 202, 213, 4 S. Ct. 413, 28 L. ed. 401.

41. Mosnat *v.* Snyder, 105 Iowa 500, 504, 75 N. W. 356.

The term implies something more than mere inconvenience of annoyance or injury. It implies excess, violence, as well as injury and wrong, intended and designed; and when applied to the feelings it implies not merely a physical pain, but mental. Aldrich *v.* Howard, 8 R. I. 246, 250.

42. Olsen *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. 320, 321.

43. McClusky *v.* Klosterman, 20 Oreg. 108, 112, 25 Pac. 366, 10 L. R. A. 785.

44. McClusky *v.* Klosterman, 20 Oreg. 108, 112, 25 Pac. 366, 10 L. R. A. 785.

45. Sullins *v.* State, 53 Ala. 474, 476.

46. Perret *v.* King, 30 La. Ann. 1368, 1370, 31 Am. Rep. 240, so used in a stipulation by the vendee of a newspaper to pay all the outstanding liabilities of the paper, and does not include liability for damages for libel subsequently recovered in a suit pending when the stipulation was made.

47. Waltemeyer *v.* Baughman, 63 Md. 200, 203.

Does not include a mere right of redemption in a third person after foreclosure. Lanier *v.* McIntosh, 117 Mo. 508, 520, 23 S. W. 787, 38 Am. St. Rep. 676.

OUTWARD. A term which is used synonymous with "open," "actual," "visible," "substantial," or "exclusive."[48]

OUT WEST. In the western states.[49]

OVER. ABOVE,[50] *q. v.*; an elevation above;[51] at a higher level;[52] above, or higher than, in place or position; synonymous with ACROSS,[53] *q. v.*; from one to another by passing;[54] across; on the surface of; synonymous with upon.[55]

OVERCHARGE. A charge of more than is permitted by law.[56] (Overcharge: By Carrier, see CARRIERS.)

OVERDRAFT. A loan;[57] the act of checking out more money than one has on deposit in a bank;[58] an act by reason whereof the drawer unlawfully obtains money from the bank upon his check.[59] (Overdraft: By Depositor, see BANKS AND BANKING. Liability of Bank Officer For Permitting, see BANKS AND BANKING.)

OVERDUE. As applied to negotiable paper, a term which may mean that a bill has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor;[60] or that the period has elapsed in which it should have been presented.[61] (Overdue: Bill, Note, or Check, see COMMERCIAL PAPER. Bond, see BONDS.)

OVER-EXERTION. An exertion which is the voluntary and unnecessary act of the insured; one from which injury might reasonably be anticipated, and which might, in the exercise of reasonable care, have been avoided.[62]

OVERFLOW. To fill beyond the brim or margin, to deluge, to submerge, to drown.[63] (Overflow: Of Land — In General, see WATERS; On Taking by Right of Eminent Domain, see EMINENT DOMAIN. Swamp and Overflowed Lands, see PUBLIC LANDS.)

OVERFLOWED LANDS. Those lands which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation;[64] water-covered lands.[65] (See, generally, PUBLIC LANDS.)

48. Bass *v.* Pease, 79 Ill. App. 308, 318 [*citing* Anderson L. Dict.; Century Dict.], where these terms are said to mean not concealed, not hidden, exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable, genuine, certain, absolute, real at present time, as a matter of fact, not merely nominal, opposed to form, actually existing true; not including, admitting, or pertaining to any others; undivided, sole, opposed to inclusive.

49. Adams *v.* Leland, 30 N. Y. 309, 312.

50. Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 236, 4 Atl. 868.

51. Milburn *v.* Cedar Rapids, 12 Iowa 246, 258.

52. Boston, etc., R. Co. *v.* Lawrence, 2 Allen (Mass.) 107, 110.

53. Webster Dict. [*quoted* in Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 598, 30 N. E. 1044, 17 L. R. A. 530].

54. *In re* Miller, 2 Lea (Tenn.) 54, 70.

55. Webster Dict. [*quoted* in Milburn *v.* Cedar Rapids, 12 Iowa 246, 258]. See Gear *v.* C. C. & D. R. Co., 43 Iowa 83, 84. But see Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 235, 4 Atl. 868.

Equivalent to "across."— Com. *v.* Warwick, 185 Pa. St. 623, 637, 40 Atl. 93.

Not precisely opposite of "under."— Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. (Mass.) 326, 329.

Used in connection with other words.— "Over and above all discounts" see Solinger *v.* Patrick, 7 Daly (N. Y.) 408, 409. "Over and above the capital stock" see Hannibal, etc., R. Co. *v.* Shacklett, 30 Mo. 550, 558. "Over and across the ferry, to East Boston" see The Maverick, 16 Fed. Cas. No. 9,316, 1 Sprague 23, 26. "Over thirty years of age" see Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633, 648. "Pay over" see Lippincott *v.* Pancoast, 47 N. J. Eq. 21, 27, 20 Atl. 360.

56. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 418, 3 S. W. 323.

57. Payne *v.* Freer, 91 N. Y. 43, 48, 43 Am. Rep. 640, so held as between a banking firm and a depositor not a member of the firm.

58. Bacon *v.* U. S., 97 Fed. 35, 43, 38 C. C. A. 37; U. S. *v.* Allis, 73 Fed. 165, 178.

59. State *v.* Stimson, 24 N. J. L. 478, 484.

60. La Due *v.* Kasson First Nat. Bank, 31 Minn. 33, 38, 16 N. W. 426.

61. Camp *v.* Scott, 14 Vt. 387, 390.

62. Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 14, 1 N. Y. Suppl. 738, so used in an accident insurance policy.

63. Webster Dict. [*quoted* in Pierce Mill Co. *v.* Koltermann, 26 Nebr. 722, 728, 42 N. W. 877].

64. San Francisco Sav. Union *v.* Irwin, 28 Fed. 708, 712.

65. McDade *v.* Bossier Levee Bd., 109 La. 625, 633, 33 So. 628; Heath *v.* Wallace, 138 U. S. 573, 584, 11 S. Ct. 380, 34 L. ed. 1063.

OVER INSURANCE. See Fire Insurance; Marine Insurance.

OVERISSUED STOCK. Stock issued in excess of the amount limited and prescribed by the act of incorporation.[66] (See, generally, Corporations; Municipal Corporations.)

OVERPAYMENT. See Payment.

OVER-PERSUASION. A term at least equivalent to Artifice, *q. v.*; Deception, *q. v.*; Inducement; Promise,[67] *q. v.* (See, generally, Fraud; Seduction.)

OVERPLUS. Surplus,[68] *q. v.* In a distress proceeding, that which remains after payment of the rent and of the reasonable charges.[69]

OVERRATING. Rating for more than ought to be.[70]

OVERRULED CASES. See Courts.

OVERSEA. Beyond the seas.[71]

OVERSEE. To superintend.[72] (See, generally, Master and Servant.)

OVERSEER. An agent;[73] a superintendent; a sort of *alter ego*;[74] one who is employed, not to labor himself, but to overlook and direct the labor of those who are employed to do the manual work of planting, cultivating, and gathering the crop.[75] With reference to slaves, a person who, as the agent or employee of another, has a right to command the obedience, and of course is entitled to the services, of the slave placed under his charge;[76] a person who superintends and manages the slaves of others, and directs their labors.[77] (Overseer: In General, see Master and Servant. Of Highway, see Highways. Of the Poor, see Paupers.)

OVERSIGHT. A casual overlooking of something that should have been seen.[78]

OVERT ACT. See Criminal Law; Conspiracy; Homicide; Treason.

OVERTAKING VESSEL. See Collision.

OVERTIME. Applied to trainmen, the time which they are delayed on their runs beyond that fixed by the schedule.[79]

OVERVALUATION. Valuation in excess of the market value of the property;[80] a valuation which would not ordinarily arise from a difference of opinion, whether fraudulent or otherwise.[81]

OVERWHELMING PROOF. A term which has been said to mean in effect

66. Hayden *v.* Charter Oak Driving Park, 63 Conn. 142, 146, 27 Atl. 232.

67. Graham *v.* McReynolds, 90 Tenn. 673, 677, 18 S. W. 272, where the term is employed in connection with the words "false or fraudulent persuasion."

68. Black L. Dict. See also Beverley *v.* Atty.-Gen., 6 H. L. Cas. 310, 326, 330, 336, 10 Eng. Reprint 1315, 3 Jur. N. S. 871, 27 L. J. Ch. 66.

"Overplus of my estate" see Shaw *v.* Bull, 12 Mod. 593, 596.

69. Lyon *v.* Tomkies, 1 M. & W. 603, 608, Tyrw. & G. 810, construing 2 Wm. & M., sess. 1, c. 5, § 2.

"Overplus monies" as used in a will see Page *v.* Leapingwell, 18 Ves. Jr. 463, 465, 466, 11 Rev. Rep. 234, 34 Eng. Reprint 392. See Crooke *v.* De Vandes, 11 Ves. Jr. 330, 332, 32 Eng. Reprint 1115.

70. Allen *v.* Sharp, 2 Exch. 352, 365, 17 L. J. Exch. 209, where it is said that it may also mean rating when the party ought not to have been rated at all.

71. Gustin *v.* Brattle, Kirby (Conn.) 299, 300.

72. Treat *v.* Peck, 5 Conn. 280, 284; Webster Int. Dict. [*quoted* in Bylow *v.* Union Casualty, etc., Co., 72 Vt. 325, 326, 47 Atl. 1066].

73. Faircloth *v.* Borden, 130 N. C. 263, 266, 41 S. E. 381; Whitaker *v.* Smith, 81 N. C. 340, 341, 31 Am. Rep. 503.

74. Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503.

75. Isbell *v.* Dunlap, 17 S. C. 581, 583.

Embraced in term "laborer" see Caraker *v.* Matthews, 25 Ga. 571, 576; Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316, 320 (where it was held that overseers of mines and railroad construction crews are within the term "laborer"); Isbell *v.* Dunlap, 17 S. C. 581, 583. But see Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454, 456.

"Overseer of a public road" is the overseer of common roads, upon which overseers are annually appointed by the county courts. Louisville, etc., Turnpike Co. *v.* State, 3 Heisk. (Tenn.) 129, 130.

76. Scott *v.* State, 31 Miss. 473, 479.

77. *In re* State, 39 Ala. 367, 374.

78. Russell *v.* Colyar, 4 Heisk. (Tenn.) 154, 190.

79. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 17, 21.

80. People *v.* Feitner, 27 Misc. (N. Y.) 384, 386, 58 N. Y. Suppl. 869.

81. Boutelle *v.* Westchester F. Ins. Co., 51 Vt. 4, 13, 31 Am. Rep. 666, where the term implied "a substantial overvaluation."

proof sufficient to remove every doubt from the mind.[82] (See, generally, CRIMINAL LAW; EVIDENCE.)

OWE. To be obliged or bound to pay.[83] (See OWING.)

OWELTY. The difference which is paid or secured by one coparcener or cotenant to another for the purpose of equalizing a partition.[84] (See, generally, PARTITION.)

OWING. Had or held under obligation of paying; due;[85] absolutely and unconditionally bound to pay.[86] (See OWE.)

OWN.[87] To have a good legal title;[88] to hold as property; to have a legal or rightful title to; to have; to possess;[89] synonymous with POSSESS,[90] *q. v.*

82. Bond *v.* Dorsey, 65 Md. 310, 314, 4 Atl. 279.

83. Musselman *v.* Wise, 84 Ind. 248, 250.

As used in the provision of the code that children owe alimony to their father and mother and other ascendants who are in need "implies a debt imposed upon them by law in that respect, for the satisfaction of which a civil action lies." Guidry's Succession, 40 La. Ann. 671, 673, 4 So. 893

"I owe him that" as used in a statement in a will implies a debt. Kellogg *v.* Ogden, 27 N. Y. App. Div. 214, 216, 50 N. Y. Suppl. 650.

Liability may be expressed by "owes," although required to be enforced in action of tort. Hamer *v* Eldridge, 171 Mass. 250, 251, 50 N. E. 611.

"Owes and is indebted" as used in a recognizance is said to be synonymous with "is held and firmly bound to pay." Shattuck *v.* People, 5 Ill. 477, 480.

84. Bouvier L. Dict. See Smith *v.* Hall, 20 R. I. 170, 174, 37 Atl. 698, where it is said that this term is usually, if not universally, applied to partition of lands.

85. Webster Int. Dict.

Synonymous with "due" or "remaining unpaid" see Fowler *v.* Hoffman, 31 Mich. 215, 219.

Money not due.— The term may properly be used to designate money which is not due. Coquard *v.* Kansas City Bank, 12 Mo. App. 261, 265. "Debts owing or accruing" includes all debts, although not presently payable. Jones *v.* Thompson, E. B. & E. 63, 64, 4 Jur. N. S. 338, 27 L. J. Q. B. 234, 6 Wkly. Rep. 443, 96 E. C. L. 63.

"Due and owing," as used in an assignment for benefit of creditors, does not apply to a debt for rent under a lease after the voluntary retaking of possession by the landlord. Matter of Willis, 18 N. Y. Suppl. 412, 413.

Wholly owing and unpaid is equivalent to an allegation of due and unpaid. Tomlinson *v.* Ayres, 117 Cal. 568, 571, 49 Pac. 717.

86. Doolittle *v.* Southworth, 3 Barb. (N. Y.) 79, 85.

Enforceable obligation.—As used in a will remitting certain debts which shall be owing and unpaid at the time of the death of testator, the term does not necessarily imply an enforceable obligation. *In re* Tompkins, 132 Cal. 173, 177, 64 Pac. 268.

Future advances.—As used in a deed the term was construed not to mean money that may be owing in the future, so as to secure future advances. Swedish-American Nat. Bank *v.* Germania Bank, 76 Minn. 409, 412, 79 N. W. 399.

87. **The definition of the word "own" in the Century Dictionary** is, "Belonging to one's self; peculiar; particular; individual; following the possessive (usually a possessive pronoun) as an intensive to express ownership, interest, or individual peculiarity with emphasis, or to indicate the exclusion of others; as my own house, his own idea." State *v.* Rhyne, 119 N. C. 905, 906, 26 S. E. 126.

88. State *v.* Lowry, 166 Ind. 372, 391, 77 N. E. 728, 4 L. R. A. N. S. 528.

89. Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 585, 16 N. E. 475.

90. Thomas *v.* Blair, 111 La. 678, 684, 35 So. 811.

As used in the description of a deed conveying all the land "which I own in the said town" means all the lands claimed and possessed by the grantor. Field *v.* Huston, 21 Me. 69, 73, 74.

Not strictly to be regarded as a technical term, but both in legal and common use it implies estate, and applies only to things subject to sale and transfer. Gibson *v.* Gibson, 43 Wis. 23, 34. 28 Am. Rep. 527.

"I own" means present possession or ownership. Weare *v.* Williams, 85 Iowa 253, 263, 52 N. W. 328.

Used in connection with other words.— "At her own disposal" see Prichard *v.* Ames, Turn. & R. 222, 223, 24 Rev. Rep. 31, 12 Eng. Ch. 222. 37 Eng. Reprint 1083. "Carpenters in their own shops" see Delonguemare *v.* Tradesmens' Ins. Co., 2 Hall (N. Y.) 629, 674. "For her own use" see Heck *v.* Clippenger, 5 Pa. St. 385, 388; Jamison *v.* Brady, 6 Serg. & R. (Pa.) 466, 467, 9 Am. Dec. 460; Roundtree *v.* Roundtree, 26 S. C. 450, 467, 2 S. E. 474. "For his own" see Sanborn *v.* Clough, 64 N. H. 315, 320, 10 Atl. 678. "For their own use" see Algonquin Coal Co. *v.* Northern Coal, etc., Co., 162 Pa. St. 114, 117, 29 Atl. 402. "For their own use and benefit" see Hames *v.* Hames, 2 Keen 646, 652, 7 L. J. Ch. 123, 15 Eng. Ch. 646, 48 Eng. Reprint 777. "Her own proper" see Hykes *v.* White, 7 J. J. Marsh. (Ky.) 134, 135. "In her own name" see Peaks *v.* Hutchinson, 96 Me. 530, 533, 53 Atl. 38, 59 L. R. A. 279; Haggett *v.* Hurley, 91 Me. 542, 546, 40 Atl. 561, 41 L. R. A. 362; Manton *v.* Tyler, 4 Mont. 364, 365, 1 Pac. 743. "In her own right" see Merrill *v.* Bullock, 105 Mass. 486, 489; Grand Gulf Bank *v.* Barnes, 2 Sm. & M. (Miss.) 165, 185. "In his own name" see Hamblet *v.*

OWNER. One who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with it as he pleases — either to spoil or destroy it as far as the law permits — unless he be prevented by some agreement or covenant which restrains his right;[91] one who has dominion over a thing, which he may use as he pleases, except as restricted by law or by agreement;[92] one who owns; the rightful proprietor; one who has the legal or rightful title whether he is the possessor or not;[93] a person in whom is vested the ownership, dominion, or title of property;[94] the person in whom property is for the time being beneficially vested, and who has the occupation or control or usufruct of it;[95] synonymous with PROPRIETOR,[96] *q. v.* As applied to real estate one who owns; a rightful proprietor;[97] one who owns in fee;[98] the person owning the fee;[99] a person who has an estate in fee simple;[1] the legal owner;[2] or who owns the legal estate in lands;[3] the person entitled to the legal estate in the land;[4] the person having the legal title;[5] any person who has an equitable right

Steen, 65 Miss. 474, 478, 4 So. 431; *In re* Quan Gin, 61 Fed. 395, 397; Bollin *v.* Blythe, 46 Fed. 181, 183. "In his own right" see *In re* Marston, 79 Me. 25, 36, 8 Atl. 87; *In re* Horgan, 16 R. I. 542, 549, 18 Atl. 279; Teal *v.* Terrell, 58 Tex. 257, 262; Weston *v.* Landgrove, 53 Vt. 375, 377; Newfane *v.* Somerset, 49 Vt. 411, 414. "In their own rights" see Hart *v.* Leete, 104 Mo. 315, 328, 15 S. W. 976. "Own establishment" see Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 799, 19 L. ed. 566. "Own manufacture" see State *v.* Rhyne, 119 N. C. 905, 906, 26 S. E. 126. "Own members" see Garside *r.* Cohoes, 12 N. Y. Suppl. 192, 196. "Own private dwelling" see State *v.* Camp, 64 Vt. 295, 297, 24 Atl. 1114. "Own right heirs" see Guerard *v.* Guerard, 73 Ga. 506, 510. "Own use or benefit" see Matter of Bd. of Railroad Com'rs, 11 Misc. (N. Y.) 103, 104, 32 N. Y. Suppl. 1115. "To her own use during her life, independent of her husband" see Clark *v.* Maguire, 16 Mo. 302, 314. "Upon his own premises" see Clark *v.* State, 49 Ark. 174, 175, 4 S. W. 658; Zallner *r.* State, 15 Tex. App. 23, 24.

"Owned" used in connection with other words.— "Owned and occupied" see Herskell *v.* Bushnell, 37 Conn. 36, 41, 9 Am. Rep. 299; Brokaw *v.* Ogle, 170 Ill. 115, 127, 48 N. E. 394; Dreutzer *v.* Bell, 11 Wis. 114, 118; *In re* Owings, 140 Fed. 739, 741. "Owned by the said company" see Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13, 18. "Owned by them" see Champion *v.* White, 5 Cow. (N. Y.) 509, 512. "Owned by them in their own right" see Provident Life, etc., Co. *v.* Durham, 212 Pa. St. 68, 79, 61 Atl. 636. "Owned by the town" see McHugh *v.* Boston, 173 Mass. 408, 410, 53 N. E. 905. "Owned within this State" see People *v.* Barker, 84 N. Y. App. Div. 469, 475, 83 N. Y. Suppl. 33. "Stock owned by me" see Norris *r.* Thomson, 16 N. J. Eq. 218, 222.

"Owned," as used in a mortgage of land, describing the land conveyed as "all the land by me owned," must be construed as meaning "all the land now owned by me," which is equivalent to "all the land which I have not heretofore conveyed." Fitzgerald *v.* Libby, 142 Mass. 235, 239, 7 N. E. 917.

91. Bouvier L. Dict. [*quoted* in Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 204, 28 N. W. 555; McLain *v.* Maricle, 60 Nebr. 353, 358, 83 N. W. 85; Territory *v.* Young, 2 N. M. 93, 95 (brief); Harrison *v.* Sabina, 1 Ohio Cir. Ct. 49, 53, 1 Ohio Cir. Dec. 30; Johnson *r.* Crookshanks, 21 Oreg. 339, 340, 28 Pac. 78; Turner *r.* Cross, 83 Tex. 218, 219, 18 S. W. 578, 15 L. R. A. 262; Brigham City *v.* Chase, 30 Utah 410, 419, 85 Pac. 436; Allen *v.* Dillingham, 60 Fed. 176, 181, 8 C. C. A. 544].

92. Anderson L. Dict. [*quoted* in Fallbrook Irr. Dist. *r.* Abila, 106 Cal. 355, 363, 39 Pac. 793; Johnson *v.* Crookshanks, 21 Oreg. 339, 340, 28 Pac. 78].

93. Century Dict. [*quoted* in Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 620, 86 N. W. 994]; Webster Dict. [*quoted* in Atwater *r.* Spalding, 86 Minn. 101, 102, 90 N. W. 370, 91 Am. St. Rep. 331; Turner *r.* Cross, 83 Tex. 218, 225, 18 S. W. 578, 15 L. R. A. 262; Allen *v.* Dillingham, 60 Fed. 176, 181, 8 C. C. A. 544]; Webster Int. Dict. [*quoted* in Louisville, etc., R. Co. *v.* Murphree, 129 Ala. 432, 434, 29 So. 592].

94. Black L. Dict. [*quoted* in Atwater *r.* Spalding, 86 Minn. 101, 102, 90 N. W. 370, 91 Am. St. Rep. 331].

95. Stroud Jud. Dict. [*quoted* in York *v.* Osgoode, 24 Ont. 12, 25].

96. Abbott L. Dict.; Bouvier L. Dict.; Webster Dict. [all *quoted* in Turner *r.* Cross, 83 Tex. 218, 219, 18 S. W. 578, 15 L. R. A. 262].

97. Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 585, 16 N. E. 475.

98. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

99. Page *v.* W. W. Chase Co., 145 Cal. 578, 583, 79 Pac. 278.

1. Bowen *r.* John, 201 Ill. 292, 295, 66 N. E. 357; Coombs *r.* People, 198 Ill. 586, 588, 64 N. E. 1056; Merritt *v.* Kewanee, 175 Ill. 537, 551, 51 N. E. 867; Wright *v.* Bennett, 4 Ill. 258, 259.

2. Warren *v.* Pim, 66 N. J. Eq. 353, 417, 59 Atl. 773.

3. Gravlee *v.* Williams, 112 Ala. 539, 544, 20 So. 952.

4. Smith *v.* Ferris, 6 Hun (N. Y.) 553, 554.

5. Hardin *v.* Chattanooga Southern R. Co., 113 Ga. 357, 359, 38 S. E. 839.

to or interest in land;[6] one who has any right which, in law or equity, amounts to ownership in the land — any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it;[7] any person having a claim or interest in real property, though less than an absolute fee;[8] one having an interest in or claim upon property much less than absolute and unqualified title;[9] any person having an interest in the estate;[10] any person having any estate, interest or easement in property;[11] one who has complete dominion of the property owned;[12] one who has dominion over that which is the subject of the ownership;[13] one who has the right to own; the exclusive right of possession; the legal or just claim of title; the proprietorship;[14] any person who has the usufruct, control, or occupation of the land, whether his interest in it be less than a fee;[15] any one who has the right of possession to property;[16] occupier;[17] the occupant in possession;[18] any person occupying or cultivating lands;[19] the person or persons who represent a particular piece of property, where there is a unity of possession;[20] a person in receipt of the rack rents;[21] a person who receives beneficial returns from the land;[22] every person in possession or receipt either of the whole or any part of the rents and profits of any land or tenement or the occupation of such land or tenement, other than as tenant from year to year, or for any less term, or as tenant at will;[23] any corporation or person enabled to sell and convey land;[24] any one owning real estate whose interest is subject to payment of judgment.[25] As applied to personal property, the person who has the possession and control of a chattel;[26] the person in possession and control of any article of personalty;[27] the person in control of a vehicle, either mediately or immediately, and not the literal and technical owner.[28] (See, generally, PROPERTY. See also POSSESSION, and Cross-References Thereunder; TITLE.)

6. Severin *v.* Cole, 38 Iowa 463, 464.

7. Mixon *v.* Stanley, 100 Ga. 372, 377, 28 S. E. 440.

8. Higgins *v.* San Diego, 131 Cal. 294, 308, 63 Pac. 470; Larimer County Ditch Co. *v.* Zimmermann, 4 Colo. App. 78, 34 Pac. 1111, 1112.

9. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 606, 100 N. W. 550.

10. State *v.* Missouri Pac. R. Co., (Nebr. 1905) 105 N. W. 983, 985; Dodge *v.* Omaha, etc., R. Co., 20 Nebr. 276, 282, 29 N. W. 936; Gerrard *v.* Omaha, etc., R. Co., 14 Nebr. 270, 271, 15 N. W. 231.

11. New Union Tel. Co. *v.* Marsh, 96 N. Y. App. Div. 122, 126, 89 N. Y. Suppl. 79.

12. McFeters *v.* Pierson, 15 Colo. 201, 203, 24 Pac. 1076, 22 Am. St. Rep. 388.

13. Florman *v.* El Paso County School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469, 470.

14. Woodward *v.* Republic F. Ins. Co., 32 Hun (N. Y.) 365, 369.

15. Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 39, 37 N. E. 1071; Parker *v.* Minneapolis, etc., R. Co., 79 Minn. 372, 373, 82 N. W. 673; McKee *v.* McCardell, 22 R. I. 71, 46 Atl. 181.

16. Price *v.* Ward, 25 Nev. 203, 215, 58 Pac. 849, 46 L. R. A. 459.

17. Georgia, etc., R. Co. *v.* Scott, 38 S. C. 34, 38, 16 S. E. 185, 839.

18. Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201, so used with reference to factories.

19. Crary *v.* Chicago, etc., R. Co., 18 S. D. 237, 241, 100 N. W. 18.

20. Dyckman *v.* New York, 7 Barb. (N. Y.) 498, 506.

21. Tendring Union *v.* Dowton, 45 Ch. D. 583, 588, 59 L. J. Ch. 528, 62 L. T. Rep. N. S. 805, 38 Wkly. Rep. 653.

22. Lister *v.* Lobley, 7 A. & E. 124, 128, 34 E. C. L. 86, 2 Harr. & W. 12, 6 L. J. K. B. 200, 6 N. & M. 340, 36 E. C. L. 641.

23. Reg. *v.* Swalwell, 12 Ont. 391, 399.

24. Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350, 354.

25. Lemmon *v.* Osborn, 153 Ind. 172, 178, 54 N. E. 1058.

26. Keith *v.* Maguire, 170 Mass. 210, 212, 48 N. E. 1090.

27. Hornbein *v.* Blanchard, 4 Colo. App. 92, 35 Pac. 187, 188.

28. Camp *v.* Rogers, 44 Conn. 291, 298.

The term has been held to include: Agent. St. Paul *v.* Clark, 84 Minn. 138, 139, 86 N. W. 893. Agister. Goff *v.* Byers, 70 Nebr. 1, 4, 96 N. W. 1037. Corporation. State *v.* St. Joseph, etc., R. Co., 46 Mo. App. 466, 469; People *v.* Brunell, 48 How. Pr. (N. Y.) 435, 447. Depasturer. Laflin *v.* Svoboda, 37 Nebr. 368, 370, 55 N. W. 1049. Equitable owner. Carey-Lombard Lumber Co. *v.* Bierbauer, 76 Minn. 434, 437, 79 N. W. 541. Holder of contingent interests in land. Lane *v.* Wright, 121 Iowa 376, 379, 96 N. W. 902, 100 Am. St. Rep. 362. Judgment creditor. Lane *v.* Wright, 121 Iowa 376, 379, 96 N. W. 902, 100 Am. St. Rep. 362. Lessee. Arms *v.* Ayer, 192 Ill. 601, 616, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277; State *v.* Corbett, 57 Minn. 345, 353, 59 N. W. 317, 24 L. R. A. 498; Gilligan *v.* Providence, 11 R. I. 258. Mortgagee. Lane *v.* Wright, 121 Iowa 376, 379, 96 N. W. 902, 100 Am. St. Rep. 362; Severin *v.* Cole, 38 Iowa 463, 464; Morey *v.* Duluth, 75 Minn. 221, 227, 77 N. W. 829;

OX. A word in popular use used to designate a castrated taurine male which has been brought under the yoke.[29] (See BULL; COW; and, generally, ANIMALS.)

OYER. In old practice, hearing; the hearing a deed read, which a party sued on a bond, etc., might pray or demand, and it was then "read" to him by the other party; the entry on the record being, "*et ei legitur in hæc verba*," (and it is read to him in these words.) In modern practice, a "copy" of a bond or specialty sued upon, given to the opposite party, in lieu of the old practice of "reading" it.[30] (See, generally, PLEADING.)

OYER AND TERMINER. See COURTS.

OYSTER. Any marine bivalve mollusk of the genus Ostrea.[31] (Oyster: In General, see FISH AND GAME. Subject of Larceny, see LARCENY.)

OYSTER SPAT. The spawn or young brood of oysters.[32]

OYSTERY. A particular species of fishing, and of course includes the common right of fishery.[33]

P. An abbreviation for PAGE, *q. v.*; also for "*Paschalis*," (Easter term,) in the Year Books, and for numerous other words of which it is the initial.[34]

PA. An abbreviation of Pennsylvania.[35]

Omaha Bridge, etc., R. Co. *v.* Reed, 69 Nebr. 514, 515, 99 N. W. 276; The Cargo ex Port Victor, [1901] P. 243, 250, 9 Aspin. 182, 70 L. J. P. D. & Adm. 52, 84 L. T. Rep. N. S. 677, 49 Wkly. Rep. 578. One in possession of a dwelling-house under a valid and subsisting contract of purchase. Ætna F. Ins. Co. *v.* Tayler, 16 Wend. (N. Y.) 385, 396, 30 Am. Dec. 90. One who has an equitable ownership. Martin *v.* State Ins. Co., 44 N. J. L. 485, 490, 43 Am. Rep. 397. One who has an interest in land for years, for life, or any greater estate, freehold, in reversion or remainder. Johnson *v.* Richardson, 33 Miss. 462, 465. One who has entered into contract to sell land until the deed has actually been delivered and recorded. Miller *v.* Mead, 127 N. Y. 544, 548, 28 N. E. 387, 13 L. R. A. 701. Owner in equity as well as at law. Springer *v.* Kroeschell, 161 Ill. 358, 364, 43 N. E. 1084. Owner of leasehold estate. Choteau *v.* Thompson, 2 Ohio St. 114, 123. Receiver. State *v.* Corbett, 57 Minn. 345, 353, 59 N. W. 317, 24 L. R. A. 498. Remainder-man. State *v.* Wheeler, 23 Nev. 143, 150, 44 Pac. 430; Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201; Cureton *v.* South Bound R. Co., 59 S. C. 371, 375, 37 S. E. 914. Tenant for life. State *v.* Wheeler, 23 Nev. 143, 150, 44 Pac. 430; Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201. Tenant for term of years. Parker *v.* Minneapolis, etc., R. Co., 79 Minn. 372, 373, 82 N. W. 673; State *v.* Wheeler, 23 Nev. 143, 150, 44 Pac. 430; Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201. Tenant in common. Green *v.* Root, 62 Fed. 191, 196. The person in whom is the general property in animals as well as those in possession of them under a special title or by virtue of any lien. Keith *v.* Maguire, 170 Mass. 210, 212, 48 N. E. 1090.

The term has been held not to include: Administrator. Price *v.* Ward, 25 Nev. 203, 215, 58 Pac. 849, 46 L. R. A. 459. Agent. State *v.* Coe, 72 Me. 456, 459. Corporation. Boston Invest. Co. *v.* Boston, 158 Mass. 461, 462, 33 N. E. 580; Benson *v.* Monson, etc., Mfg. Co., 9 Metc. (Mass.) 562, 563. Factor. U. S. *v.* Villalonga, 23 Wall. (U. S.) 35, 43, 23 L. ed. 64. Incumbrancer. Leigh *v.* Green, 64 Nebr. 533, 541, 90 N. W. 255, 101 Am. St. Rep. 592. Lessee. Matter of Sherry, 25 Misc. (N. Y.) 361, 362, 55 N. Y. Suppl. 421. Lien-holder. Smith *v.* Race, 76 Ill. 490, 491; Leigh *v.* Green, 64 Nebr. 533, 541, 90 N. W. 255, 101 Am. St. Rep. 592. Mortgagee. Cornell *v.* Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912, 914; Mixon *v.* Stanley, 100 Ga. 372, 377, 28 S. E. 440; Chicago, etc., R. Co. *v.* Need, 2 Kan. App. 492, 43 Pac. 997, 998; Crane *v.* Elizabeth, 36 N. J. Eq. 339, 341; Put-in-Bay *v.* Stimmel, 18 Ohio Cir. Ct. 644, 645, 7 Ohio Cir. Dec. 380. One with merely an equitable estate in or lien on premises. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425, 429. Receiver. Turner *v.* Cross, 83 Tex. 218, 221, 18 S. W. 578, 15 L. R. A. 262; Florman *v.* El Paso County School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469, 470. Tenant for life. Baltimore *v.* Boyd, 64 Md. 10, 14, 20 Atl. 1028. Tenant in common. Lindley *v.* Davis, 7 Mont. 206, 214, 14 Pac. 717. Wife of a person owning a homestead on which the family reside. McLain *v.* Maricle, 60 Nebr. 353, 358, 83 N. W. 85.

29. Watson *v.* State, 55 Ala. 150, being equivalent to "steer."

While the term is not an exact synonym of "cattle," which has such an inclusive meaning as to include various different species of animals and goods (Henry *v.* State, 45 Tex. 84, 87), still the word is included in the term "cattle," as used in a statute providing for damages for killing cattle (Randall *v.* Richmond, etc., R. Co., 107 N. C. 748, 749, 12 S. E. 605, 11 L. R. A. 460).

30. Black L. Dict.

31. Webster Int. Dict.

32. Maldon *v.* Woolvet, 12 A. & E. 12, 15, 9 L. J. Q. B. 370, 4 P. & D. 26, 40 E. C. L. 17.

33. Moulton *v.* Libbey, 37 Me. 472, 492, 59 Am. Dec. 57.

34. Black L. Dict.

35. Gillman *v.* Sheets, 78 Iowa 499, 501, 43 N. W. 299.

P. A. Sometimes used as an abbreviation of PER ANNUM,[36] *q. v.*

PACI SUNT MAXIME CONTRARIA, VIS ET INJURIA. A maxim meaning "Violence and injury are especially contrary to peace."[37]

PACK. To place together and prepare for transportation;[38] to put goods in a box, or clothing in a bundle.[39] (See PACKAGE; PARCEL.)

PACKAGE.[40] A number of things bound together convenient for handling and conveyance;[41] a bundle; a quantity pressed or packed together;[42] a bundle or bale made up for transportation;[43] a bundle or PARCEL (*q. v.*) made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package;[44] a bundle put up for transportation or commercial handling;[45] a small parcel or bundle whose appearance would give no adequate information of its value to the carrier.[46] (Package: Of Goods Imported, see CUSTOMS DUTIES. Original, see COMMERCE. See also PACK; PARCEL.)

PACKAGE FREIGHT. Freight that is consigned to different consignees and shipped in the same car.[47] (See also FREIGHT.)

PACKET. Two or more letters under one cover.[48] (See, generally, POST-OFFICE.)

PACKING HOUSE. A house in which meats are packed.[49]

PACKING JURY. An expression importing the improper and corrupt selection of a jury sworn and impaneled for the trial of a cause.[50] (Packing Jury: Contempt For, see CONTEMPT.)

36. Belford *v.* Beatty, 145 Ill. 414, 418, 34 N. E. 254.

37. Peloubet Leg. Max. [*citing* Coke Litt. 161b].

38. Keith *v.* State, 91 Ala. 2, 7, 8 So. 353, 10 L. R. A. 430; State *v.* Parsons, 124 Mo. 436, 442, 27 S. W. 1102, 46 Am. St. Rep. 457.

39. Henderson *v.* Ortte, 114 La. 523, 526, 38 So. 440.

40. It is a derivative of "pack" and includes several things. Henderson *v.* Ortte, 114 La. 523, 526, 38 So. 440.

41. State *v.* Board of Assessors, 46 La. Ann. 145, 147, 15 So. 10, 49 Am. St. Rep. 318 [*cited* in May *v.* New Orleans, 51 La. Ann. 1064, 1067, 25 So. 959].

42. State *v.* Southard, 60 Ark. 247, 249, 29 S. W. 751.

43. Keith *v.* State, 91 Ala. 2, 8, 8 So. 353, 10 L. R. A. 430; State *v.* Parsons, 124 Mo. 436, 442, 27 S. W. 1102, 46 Am. St. Rep. 457.

Merchandise for transportation.—It is a thing in form to become as such an article of merchandise or for transportation or delivery from hand to hand. U. S. *v.* Goldback, 25 Fed. Cas. No. 15,222, 1 Hughes 529, 530.

It usually consists of a single article; but, when separate articles are placed together and prepared for transportation in a bundle, bale, box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped separately. Keith *v.* State, 91 Ala. 2, 8, 8 So. 353, 10 L. R. A. 430; State *v.* Parsons, 124 Mo. 436, 442, 27 S. W. 1102, 46 Am. St. Rep. 457.

44. Haley *v.* State, 42 Nebr. 556, 561, 60 N. W. 962, 47 Am. St. Rep. 718; Com. *v.* Schollenberger, 156 Pa. St. 201, 213, 27 Atl. 30, 36 Am. St. Rep. 32, 22 L. R. A. 155.

45. State *v.* Board of Assessors, 46 La. Ann. 145, 147, 15 So. 10, 49 Am. St. Rep. 318; Rosenstein *v.* Missouri, etc., R. Co., 16 Mo. App. 225, 230.

46. Southern Express Co. *v.* Crook, 44 Ala. 468, 475, 4 Am. Rep. 140.

The term has been held to include: Barrels, casks, and small tanks. State *v.* Baggott, 96 Mo. 63, 69, 8 S. W. 737. Cotton bales. Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454, 480. *Contra*, Southern Express Co. *v.* Crook, 44 Ala. 468, 475, 4 Am. St. Rep. 140. Every box, barrel, or other receptacle into which distilled spirits have been placed for shipment or removal, either in quantity or in separate small packages, as bottles or jugs. U. S. *v.* One Hundred Thirty-Two Packages of Spirituous Liquors, etc., 76 Fed. 364, 368, 22 C. C. A. 228. Milk-cans. Cronin *v.* Philadelphia Fire Assoc., 112 Mich. 106, 111, 70 N. W. 448.

The term has been held not to include: Corn in bulk. McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498, 509; Rosenstien *v.* Missouri Pac. R. Co., 16 Mo. App. 225, 230. Cotton bales. Southern Express Co. *v.* Crook, 44 Ala. 468, 475, 4 Am. Rep. 140. *Contra*, Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454, 480. Match-box. U. S. *v.* Goldback, 25 Fed. Cas. No. 15,222, 1 Hughes 529, 530. Oil in a storage tank. Willis *v.* Standard Oil Co., 50 Minn. 290, 295, 52 N. W. 652.

47. Davies *v.* Michigan Cent. R. Co., 131 Ill. App. 649, 651.

48. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 56, 11 Am. Dec. 133; Chouteau *v.* The St. Anthony, 11 Mo. 226, 230.

Merchandise may also be included in the term as used in the postal laws relating to mailable matter. U. S. *v.* Blackman, 17 Fed. 837, 838, 5 McCrary 438.

49. Ford *v.* State, 112 Ind. 373, 378, 14 N. E. 241.

Packing-house business is a business which consists in the sale of products prepared for this purpose. Stewart *v.* Kehrer, 115 Ga. 184, 188, 41 S. E. 680.

50. Mix *v.* Woodward, 12 Conn. 262, 289.

PACT. An agreement,[51] *q. v.* (See, generally, CONTRACTS.)

PACTA CONVENTA QUÆ NEQUE CONTRA LEGES, NEQUE DOLO MALO INITA SUNT, OMNI MODO OBSERVANDA SUNT. A maxim meaning "Contracts which are not illegal, and do not originate in fraud, must in all respects be observed."[52]

PACTA DANT LEGEM CONTRACTUI. A maxim meaning "The stipulations of parties constitute the law of the contract."[53]

PACTA PRIVATA JURI PUBLICO DEROGARE NON POSSUNT. A maxim meaning "By the bargain of private persons nothing can be derogated from public law."[54]

PACTA PRIVATA NON DEROGANT JURI COMMUNI. A maxim meaning "Private agreements cannot derogate from common right (or law)."[55]

PACTA QUÆ CONTRA LEGES CONSTITUTIONESQUE VEL CONTRA BONOS MORES FIUNT, NULLAM VIM HABERE, INDUBITATI JURIS EST. A maxim meaning "That contracts which are made against law or against good morals, have no force, is a principle of undoubted law."[56]

PACTA QUÆ TURPEM CAUSAM CONTINENT NON SUNT OBSERVANDA. A maxim meaning "Agreements founded upon an immoral consideration are not to be observed."[57]

PACTA RECIPROCA VEL UTROSQUE LIGANT VEL NEUTRUM. A maxim meaning "Mutual bargains bind both parties or neither."[58]

PACTA TRADITIONE FIRMANTUR. A maxim meaning "Agreements are confirmed by delivery."[59]

PACTIS PRIVATORUM JURI PUBLICO NON DEROGATUR. A maxim meaning "Private contracts do not derogate from public law."[60]

PACTO ALIQUOD LICITUM EST, QUOD SINE PACTO NON ADMITTITUR. A maxim meaning "By special agreement things are allowed which are not otherwise permitted."[61]

PACTUM DE ASSEDATIONE FACIENDA ET IPSA ASSEDATIONE ÆQUIPARANTUR. A maxim meaning "An agreement to grant a lease is equivalent to the lease itself."[62]

PAGANISM. The religion of those who have not the knowledge of the true God, but worship idols.[63] (See CHRISTIANITY.)

PAGE. In printing when used as a measure of computation, a term which may mean two hundred and twenty-four words.[64] (See FOLIO; PRINTING.)

PAID.[65] Applied;[66] settled;[67] satisfied.[68] (See PAY, and Cross-References Thereunder.)

51. Burrill L. Dict.

52. Bouvier L. Dict. [*citing* Broom Leg. Max. 698, 732].

53. Black L. Dict.

54. Morgan Leg. Max. [*citing* Butt's Case, 7 Coke 23*a*, 23*b*, 77 Eng. Reprint 445].

55. Burrill L. Dict.

56. Peloubet Leg. Max. [*citing* Code 2, 3, 6].

57. Black L. Dict.

Applied in Mass *v.* Cohen, 11 Misc. (N. Y.) 184, 187, 32 N. Y. Suppl. 1078.

58. Morgan Leg. Max. [*citing* Halk. 119].

59. Morgan Leg. Max. [*citing* Halk. 175].

60. Black L. Dict. [*citing* Broom Leg. Max. 695].

61. Black L. Dict. [*citing* Coke Litt. 166].

62. Peloubet Leg. Max. [*citing* Tray. 417].

63. Hale *v.* Everett, 53 N. H. 9, 54, 16 Am. Rep. 82.

64. Mass. Rev. Laws (1902), p. 1736, c. 204, § 35.

65. **Distinguished from "obtained"** in State *v.* Lewis, 26 Kan. 123, 129.

The word is often loosely used and always liberally construed. *In re* Sheets, 52 Pa. St. 257, 268.

66. Salisbury *v.* Slade, 22 N. Y. App. Div. 346, 350, 48 N. Y. Suppl. 55.

67. Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410, 414.

68. *Ex p.* Krouse, 148 Cal. 232, 233, 82 Pac. 1043; *Ex p.* Henshaw, 73 Cal. 486, 495, 15 Pac. 110; State *v.* Towner, 26 Mont. 339, 346, 67 Pac. 1004 [*citing* Century Dict.; Webster Int. Dict.]. See also Milwaukee Mechanics' Ins. Co. *v.* Russell, 65 Ohio St. 230, 260, 62 N. E. 338, 56 L. R. A. 159.

A debt is paid when the contract is performed pursuant to the stipulation made; but if, on an agreement, something collateral is received in satisfaction, although the demand is extinguished, the debt, technically speaking, is not paid. Lockwood *v.* Sturdevant, 6 Conn. 373, 390.

In shipping it has been used in the popular and ordinary sense as meaning "contracted for." Gether *v.* Capper, 15 C. B. 696, 701, 80 E. C. L. 696.

Prior payment may be the meaning in-

PAIN. Some bodily suffering or corporeal infliction;[69] mental distress, anxiety, grief, ANGUISH,[70] *q. v.*

PAINS AND PENALTIES. See BILL OF PAINS AND PENALTIES; PENALTIES.

PAINTER. One who represents the appearance of natural or other objects on a surface by the means of colors.[71] (See PAINTING.)

PAINTING. A likeness, image or scene depicted with paints.[72] (Painting: As Literary Property, see LITERARY PROPERTY. Customs Duties on, see CUSTOMS DUTIES.)

PAINTS. See CUSTOMS DUTIES.

PAIR. Two things of a kind, similar in form, identical in purpose, and matched or used together.[73]

PAIS. A French word, signifying country.[74] (Pais: Estoppel in, see ESTOPPEL.)

PALACE CAR. See CARRIERS.

PALACE STOCK-CARS. Cars which occupy to the shipment of stock the same place that palace sleeping-cars do to passengers traveling over a railroad.[75] (See CAR; and, generally, CARRIERS.)

PALMISTRY. A crafty science — that is, one by which the simple minded are apt to be deceived.[76]

PALM OFF. To impose by fraud; to put off by unfair means.[77] (See, generally, FRAUD.)

tended. Conyers *v.* Postal Tel. Cable Co., 92 Ga. 619, 623, 19 S. E. 253, 44 Am. St. Rep. 100.

When stamped on a draft, "paid" does not indicate a promise. It implies none of the elements of an agreement, and does not amount to an acceptance of the agreement. Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 566, 54 Pac. 434.

Used in connection with other words see the following phrases: "Paid, by checks" see Doe *v.* Pontifex, 9 C. B. 229, 248, 67 E. C. L. 229. "Paid in" see Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 356, 40 N. E. 974. "Paid in advance" see Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 248, 53 S. W. 260, 21 Ky. L. Rep. 916. "Paid or collected" see Floyd *v.* State, 32 Ark. 200, 202. "Paid to us annually to our satisfaction" see Gage *v.* Hoyt, 58 Vt. 536, 538, 3 Atl. 318. "Paid-up capital" see Iowa State Sav. Bank *v.* Burlington, 98 Iowa 737, 739, 740, 61 N. W. 851. "Paid up in full" see Bonnell *v.* Griswold, 89 N. Y. 122, 125. "Paid-up insurance" see Nichols *v.* Mutual L. Ins. Co., 176 Mo. 355, 373, 75 S. W. 664, 62 L. R. A. 657. "Paid up nonassessable stock" see San Antonio St. R. Co. *v.* Adams, 87 Tex. 125, 131, 26 S. W. 1040. "Paid-up policy" see Planters' State Bank *v.* Willingham, 111 Ky. 64, 71, 63 S. W. 12, 23 Ky. L. Rep. 445; McQuitty *v.* Continental L. Ins. Co., 15 R. I. 573, 576, 10 Atl. 635. "Paid up stock" see Cashen *v.* Southern Mut. Bldg., etc., Assoc., 114 Ga. 983, 990, 41 S. E. 51. "To be paid" see Cook *v.* Cook, (N. J. Ch. 1900) 47 Atl. 732, 733.

69. Anglea *v.* Com., 10 Gratt. (Va.) 696, 700 [*citing* Tomlin L. Dict., where it is distinguished from the terms "penalty" and "forfeiture"].

70. Webster Dict. [*quoted* in Robertson *v.* Craver, 88 Iowa 381, 386, 55 N. W. 492.

71. New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141, distinguishing "photographer."

72. Century Dict. [*quoted* in Bouvier L. Dict.].

73. Century Dict. See also Taylor *v.* Wells, 1 Mod. 46, 47, where it is said: "The word 'pair' in the present case is as uncertain as may be, though a 'pair of gloves,' 'a pair of cards,' 'a pair of tongs,' is certain; for the word applied to some things signifies more, to others less."

"One pair of boots" means two boots paired, matched, or suited to be used together. State *v.* Harris, 3 Harr. (Del.) 559.

The words "a pair of horses" will ordinarily be understood to mean a match pair, or at least a pair mated and used together. Golden *v.* Cockrill, 1 Kan. 259, 266, 81 Am. Dec. 510. *Compare* Conway *v.* Roberts, 38 Nebr. 456, 458, 56 N. W. 980, holding that it does not mean a team.

"Pair of shoes" means a covering for the human foot; footwear used by mankind. Palmer *v.* State, 136 Ind. 393, 394, 36 N. E. 130.

74. Bouvier L. Dict.

In law, matter *in pais* is matter of fact, in opposition to matter of record; a trial *per pais* is a trial by the country,— that is, by a jury. Bouvier L. Dict.

75. Louisville, etc., R. Co. *v.* Dies, 91 Tenn. 177, 181, 18 S. W. 266, 30 Am. St. Rep. 871.

76. State *v.* Kenilworth, 69 N. J. L. 114, 115, 54 Atl. 244, where it is said that the term "was so used by the prosecutor, when, from the lines on the palm of the complaining witness, he foretold the age at which the witness would marry and the duration of his life." See also Monck *v.* Hilton, 3 Ex. D. 268, 278, 46 L. J. M. C. 163, 36 L. T. Rep. N. S. 66, 25 Wkly. Rep. 373.

77. Hobart *v.* Young, 63 Vt. 363, 368, 21 Atl. 612, 12 L. R. A. 693.

PALPABLE. Easily perceived; plain; OBVIOUS,[78] *q. v.*

PAMPHLET. A PUBLICATION,[79] *q. v.*; usually a small book, bound in paper covers, ordinarily printed in the octavo form, and stitched.[80] (See BOOK.)

PANDECTS. See CORPUS JURIS.

PANEL. A LIST, *q. v.*; catalogue; INVENTORY, *q. v.*; schedule; register.[81] (Panel: Of Jurors — Generally, see JURIES; Grand Jurors, see GRAND JURIES.)

PANNAGE. A right granted to an owner of pigs — the grant was usually to an owner of land of some kind who kept pigs — to go into the wood of the grantor of the right and to allow the pigs to eat the acorns or beech-mast which fell upon the ground.[82]

PANNAGIUM EST PASTUS PORCURUM, IN NEMORIBUS ET IN SILVIS, UT PUTA, DE GLANDIBUS, ETC. A maxim meaning "A pannagium is a pasture of hogs, in woods and forests, upon acorns, and so forth."[83]

PANTOMIME. A species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words.[84] (Pantomime: Subject of Copyright, see COPYRIGHT. See also PLAY; and, generally, THEATERS AND SHOWS.)

PANTS. A word which in common parlance has completely superseded the word "pantaloons."[85]

PAPER or PAPERS. A manufactured substance composed of fibers adhering together, in form consisting of sheets of various sizes and different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable;[86] a substance used for writing and printing on;[87] a written instrument or document;[88] any written paper or instrument; a writing; a printed sheet;[89] a printed or written instrument; a document, essay, or the like; a writing.[90] (Paper or Papers: As Evidence, see EVIDENCE. Book, see APPEAL AND ERROR. Customs Duties on, see CUSTOMS DUTIES. Lien of Attorney on, see ATTORNEY AND

78. Webster Int. Dict. But see People *v.* Mays, 17 Ill. App. 361, 366, where it is said: "The finding that through intoxication he has at various times been guilty of neglecting his duties is tantamount to a finding of 'palpable' omission of duty. We quite agree with counsel that the word 'palpable,' as here used in the statute, embraces the idea of an intentional and substantial failure to perform the duties imposed by law, partaking of the nature of a willful or gross neglect of the officer to attend to his duties. It would be a too restricted use of the word to give it the sense only of 'easily perceived,' 'plain,' or 'obvious.'"

79. U. S. *v.* Chase, 135 U. S. 255, 258, 259, 10 S. Ct. 756, 34 L. ed. 117; U. S. *v.* Warner, 59 Fed. 355, 356.

80. Black L. Dict.

"Pamphlet laws" is the name given in Pennsylvania to the publication, in pamphlet or book form, containing the acts passed by the state legislature at each of its biennial sessions. Black L. Dict.

81. Roget Thesaurus [*quoted* in Beasley *v.* People, 89 Ill. 571, 575].

With reference to juries the term is used to designate a schedule containing the names of persons whom the sheriff returns to serve on trials. Blackstone Comm. [*quoted* in Beasley *v.* People, 89 Ill. 571, 575]. And may include the jurors returned on a special venire to fill out a deficiency after the regular panel has been exhausted. People *v.* Coyodo, 40 Cal. 586, 592.

82. Chilton *v.* London Corp., 7 Ch. D. 562, 565, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 627.

83. Black L. Dict.

84. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256, 264.

85. State *v.* Johnson, 30 La. Ann. 904, 905.

86. Atty.-Gen. *v.* Barry, 4 H. & N. 470, 476, 477, 28 L. J. Exch. 211, 7 Wkly. Rep. 488.

87. Thomas *v.* State, 103 Ind. 419, 422, 2 N. E. 808.

Includes pasteboard see Patteson *v.* Garret, 7 J. J. Marsh. (Ky.) 112, 115.

88. State *v.* Jackson, 9 Mont. 508, 521, 24 Pac. 213.

89. Worcester Dict. [*quoted* in Thomas *v.* State, 103 Ind. 419, 423, 2 N. E. 808].

90. Webster Dict. [*quoted* in Thomas *v.* State, 103 Ind. 419, 423, 2 N. E. 808].

The word is of very extensive meaning, and may comprehend anything that has on it what is obscene, lewd, or lascivious. U. S. *v.* Gaylord, 17 Fed. 438, 441.

"Depositions," in legal parlance, are not known as "papers." State *v.* Cain, 20 W. Va. 679, 707.

Does not include an envelope with certain inclosures. See State *v.* Griswold, 67 Conn. 299, 306, 34 Atl. 1046, 33 L. R. A. 227.

In commercial usage the term may include all such securities as notes, bonds, certificates, bills of exchange, drafts, etc. Perkins *v.* Mathes, 49 N. H. 107, 110.

Paper in the cause.— A bill of exceptions, including the long-hand manuscript of the evidence, made a part of it, when filed, is a "paper in the cause." Hull *v.* Louth, 109 Ind. 315, 336, 10 N. E. 270, 58 Am. Rep. 405. See also Williams *v.* State Bank, 1 Coldw. (Tenn.) 43, 46.

"Paper or writing, or written instrument, or book or other document," should be construed to include only documentary evidence,

CLIENT. Lost, see LOST INSTRUMENTS. Newspapers, see NEWSPAPERS. On Appeal, see APPEAL AND ERROR.)

PAPER BOOK. See APPEAL AND ERROR.

PAPER CURRENCY. See CURRENCY; MONEY.

PAPER MONEY. See MONEY.

PAPERS ON APPEAL. See APPEAL AND ERROR.

PAPER TITLE. A title to land evidenced by a conveyance or chain of conveyances; the term generally implying that such title, while it has color or plausibility, is without substantial validity.[91] (Paper Title: Adverse Possession Based Thereon, see ADVERSE POSSESSION. As Cloud on Title and Removal Thereof, see QUIETING TITLE. Deed and Conveyances in General, see DEEDS. To Support — Ejectment, see EJECTMENT; Trespass to Try Title, see TRESPASS TO TRY TITLE; Writ of Entry, see WRIT OF ENTRY.)

PAR. EQUAL,[92] *q. v.* Applied to commercial paper, without discount or premium.[93] Applied to currency, equal to gold.[94] Applied to stock, the term has been construed to mean an amount equal to the amount subscribed for the same.[95] (See PAR OF EXCHANGE; PAR VALUE.)

PARADE-GROUNDS. See MILITIA.

PARADES. See MUNICIPAL CORPORATIONS.

PARADOX. A proposition seemingly absurd, yet true in fact.[96]

PARAGRAPH. A distinct part of a discourse or writing; any section or subdivision of a writing or chapter which relates to a particular point, whether consisting of one or many sentences;[97] a term synonymous with the word "section,"[98] and sometimes with "sentence."[99] (Paragraph: In Pleading, see PLEADING. See also ITEM.)

PARALLEL. Extending in the same direction, and in all parts equally distant; having the same direction or tendency; like; similar.[1] (See RAILROADS; STREET RAILROADS; TELEPHONES AND TELEGRAPHS.)

PARAMOUNT. ABOVE, *q. v.*; upwards, that which is superior.[2]

PARANOIA. The technical name of the form of insanity commonly known as "monomania";[3] a form of mental distress known as "delusional insanity";[4] the

and not to include patterns for a stove. *In re* Shephard, 3 Fed. 12, 13, 18 Blatchf. 225.

91. Black L. Dict.

92. Castle *v.* Kapena, 5 Hawaii 27, 32; Ft. Edward *v.* Fish, 156 N. Y. 363, 370, 50 N. E. 973; Bouvier L. Dict. [*quoted* in Evans *v.* Tillman, 38 S. C. 238, 246, 17 S. E. 49].

93. Smith *v.* Elder, 7 Sm. & M. (Miss.) 507, 512.

94. Crim *v.* Sellars, 37 Ga. 324, 326.

Sometimes it is construed to mean equal to gold and silver, or the legal tender notes of the United States. Galloway *v.* Jenkins, 63 N. C. 147, 160.

95. Newark *v.* Elliott, 5 Ohio St. 113, 120.

According to the context it may mean a nominal value. Evans *v.* Tillman, 38 S. C. 238, 246, 17 S. E. 49 [*quoting* Bouvier L. Dict.], where the court said: "'Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; above par or below par when they sell for more or less.' Under this definition . . . the par or face value of a bond . . . is not merely the principal sum originally due, but it is that sum, with the accrued interest added."

96. Bell *v.* State, 48 Ala. 684, 691, 17 Am. Rep. 40.

97. Webster Int. Dict. [*quoted* in McClellan *v.* Hein, 56 Nebr. 600, 607, 77 N. W. 120].

"The division is sometimes noted by the mark [¶], but usually, by beginning the first sentence of the paragraph on a new line and at more than the usual distance from the margin." McClellan *v.* Hein, 56 Nebr. 600, 607, 77 N. W. 120.

98. Marine *v.* Packham, 52 Fed. 579, 581, 3 C. C. A. 210.

99. Marine *v.* Packham, 52 Fed. 579, 581, 3 C. C. A. 210.

1. Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 920, 926, 14 S. E. 803.

"Along and parallel to" as meaning "conforming to" see Postal Tel. Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 665, 32 S. E. 468.

"Parallel lines" are straight lines. Fratt *v.* Woodward, 32 Cal. 219, 230, 91 Am. Dec. 573. But see Clark *v.* Adie, 2 App. Cas. 423, 46 L. J. Ch. 598, 37 L. T. Rep. N. S. 1, 25 Wkly. Rep. 45, where the word was construed in its popular sense and not in its purely mathematical sense.

2. Black L. Dict. [*citing* Fitzhugh Nat. Brev. 135]. See also Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 488, 37 Atl. 379, 37 L. R. A. 533; Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 919, 14 C. C. A. 183.

"Paramount title" is a term which is applied to eviction proceedings when the tenant is evicted by one having the right of possession. Hoopes *v.* Meyer, 1 Nev. 433, 434.

3. People *v.* Braun, 158 N. Y. 558, 564, 53 N. E. 529.

4. Flanagan *v.* State, 103 Ga. 619, 623, 30 S. E. 550.

name given to a group of mental conceits, of which the most characteristic is a sense of injury or unjust persecution, and consequently justifiable resentment or redress.[5] (See DELUSION; MONOMANIA; and, generally, INSANE PERSONS.)

PARAPHERNALIA. See HUSBAND AND WIFE.

PARCEL. In its primary signification a number or quantity of things put up together;[6] a bundle or package; a quantity pressed or packed together;[7] a small bundle;[8] a small package.[9] In law, a part, a portion, a piece;[10] a PIECE,[11] *q. v.*; a PORTION,[12] *q. v.*; a part of the whole taken separately;[13] a part taken either separately or belonging to the whole, a share, a portion, a constituent or integral part, an indefinite quantity or measure; a separate or separable part;[14] a portion of anything taken separately, a fragment of a whole.[15] As used with reference to land, a contiguous quantity of land in possession of, or owned by, or recorded as the property of, the same claimant, person, or company;[16] part of an estate;[17] and may be synonymous with LOT,[18] *q. v.* (Parcel: Sale by — On Execution, see EXECUTION; On Judicial Sale, see JUDICIAL SALES; On Mortgage Foreclosure, see MORTAGES; On Tax-Sale, see TAXATION. See also PACKAGE.)

PARCEL SALE. As relating to the trade in grain, a term which means that a definite quantity of grain has been placed in an ocean vessel with any other freight, to be delivered at a definite port, to which the vessel is bound by its charter.[19] (See PARCEL.)

PARCENARY. An estate in equal shares.[20] (See, generally, JOINT TENANCY; TENANCY IN COMMON.)

PARCENER. A term which has a well-defined meaning at common law, and applies only to lands descended by inheritance.[21] In English law, the daughter of a man or woman seized of lands or tenements in fee simple or fee tail, on whom, after the death of such ancestor, such lands and tenements descend.[22] (See JOINT TENANCY; TENANCY IN COMMON.)

PARCHEESI or PATCHEESI. The name of a game introduced into this country from India.[23]

PARCHMENT. Sheep-skins dressed for writing.[24] (See PAPER.)

PAR DELICTUM. See IN PARI DELICTO.

5. Winters *v.* State, 61 N. J. L. 613, 619, 41 Atl. 220.

6. Webster Dict. [*cited* in Miller *v.* Burke, 6 Daly (N. Y.) 171, 173].

7. State *v.* Southard, 60 Ark. 247, 249, 29 S. W. 751.

It may include a match-box (U. S. *v.* Goldback, 25 Fed. Cas. No. 15,222, 1 Hughes 529, 530), or a quantity of wheat (Rex *v.* Judd, East P. C. 1018, Leach C. C. 484, 2 T. R. 255, 1 Rev. Rep. 477).

8. Johnston Dict. [*quoted* in State *v.* Brown, 12 N. C. 137, 138, 17 Am. Dec. 562].

9. U. S. *v.* Goldback, 25 Fed. Cas. No. 15,222, 1 Hughes 529, 530.

"Parcel advertised" see Martin *v.* Cole, 38 Iowa 141, 147.

10. People *v.* Chase, 70 Ill. App. 42, 44.

11. State *v.* Baldwin University, 97 Tenn. 358, 362, 37 S. W. 1, where the court said that "piece" and "parcel" are important words.

12. Johnson *v.* Sirret, 83 Hun (N. Y.) 317, 319, 31 N. Y. Suppl. 917.

13. State *v.* Brown, 12 N. C. 137, 138, 17 Am. Dec. 562.

14. Century Dict. [*quoted* in Johnson *v.* Sirret, 153 N. Y. 51, 59, 46 N. E. 1035].

15. People *v.* Chase, 70 Ill. App. 42, 44.

16. State *v.* Jordan, 36 Fla. 1, 10, 17 So. 742.

Within the law of burglary it means a house which is somehow connected with or contributory to a mansion house, such as a kitchen, smokehouse, or other building which is usually considered a necessary appendage of a dwelling-house. Palmer *v.* State, 7 Coldw. (Tenn.) 82, 89.

Within the law of arson it would not include a barn which is some eighteen rods from the mansion house, and entirely disconnected and separated from the same by a highway. State *v.* Stewart, 6 Conn. 47, 48.

17. People *v.* Chase, 70 Ill. App. 42, 44; Bouvier L. Dict. [*quoted* in Johnson *v.* Sirret, 153 N. Y. 51, 59, 46 N. E. 1035].

Distinguished from "cock, mow, or stack" see Rex *v.* Judd, East P. C. 1018, Leach C. C. 484, 2 T. R. 255, 1 Rev. Rep. 477.

18. Terre Haute *v.* Mack, 139 Ind. 99, 104, 38 N. E. 468.

19. Heyworth *v.* Miller Grain, etc., Co., 174 Mo. 171, 176, 73 S. W. 498.

20. Davis *v.* Rowe, 6 Rand. (Va.) 355, 417, where it is distinguished from tenancy in common and joint tenancy.

21. 2 Blackstone Comm. 187 [*quoted* in Elliott *v.* Wilson, 27 Mo. App. 218, 225, 226].

22. Bouvier L. Dict. [*quoted* in Logan *v.* Logan, 13 Ala. 653, 658].

23. Selchow *v.* Chaffee, etc., Mfg. Co., 132 Fed. 996, 997.

24. Black L. Dict.

PARDONS

By Archibald C. Boyd
Professor of Law, Boston University School of Law *

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I. TERMINOLOGY.

A. Pardon. A pardon is an act of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.[1]

1. Per Marshall, C. J., in U. S. *v.* Wilson, 7 Pet. (U. S.) 150, 160, 8 L. ed. 640 [*quoted* in Dominick *v.* Bowdoin, 44 Ga. 357, 370; George *v.* Lillard, 106 Ky. 820, 823, 51 S. W. 793, 21 Ky. L. Rep. 483; Rich *v.* Chamberlain, 104 Mich. 436, 441, 62 N. W. 584, 27 L. R. A. 573; People *v.* Cummings, 88 Mich. 249, 265, 50 N. W. 310, 14 L. R. A. 285; *Ex p.* Campion, (Nebr. 1907) 112 N. W. 585, 588, 11 L. R. A. N. S. 865; Roberts *v.* State, 30 N. Y. App. Div. 106, 108, 51 N. Y. Suppl. 691; People *v.* Monroe County Ct. of Sess., 8 N. Y. Cr. 355, 359; State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81; Territory *v.* Richardson, 9 Okla. 579, 584, 60 Pac. 244, 49 L. R. A. 440; Young *v.* Young, 61 Tex. 191, 193; *In re* De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307, 319; *In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 394, 4 Sawy. 487; U. S. *v.* Cullenton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 171].

Other definitions are: "A remission of guilt." State *v.* Lewis, 111 La. 693, 695, 35 So. 816; Edwards *v.* Com., 78 Va. 39, 41, 49 Am. Rep. 377; Anderson L. Dict. [*quoted* in Miller *v.* State, 149 Ind. 607, 623, 49 N. E. 894, 40 L. R. A. 109]; 1 Bishop Cr. L. § 898 [*quoted* in Moore *v.* State, 43 N. J. L. 203, 241, 39 Am. Rep. 558; Territory *v.* Richardson, 9 Okla. 579, 584, 60 Pac. 244, 49 L. R. A. 440; Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395; Hunnicutt *v.* State, 18 Tex. App. 498, 519, 51 Am. Rep. 330; U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 170].

"The remission of guilt; amnesty, oblivion, or forgetfulness." Anderson L. Dict. [*quoted* in Miller *v.* State, 149 Ind. 607, 623, 49 N. E. 894, 40 L. R. A. 109; State *v.* Page, 60 Kan. 664, 669, 57 Pac. 514, opinion of the court by Doster, C. J.].

"The remitting or forgiving of an offence committed against the king." Jacob L. Dict. [*quoted* in Cook *v.* Middlesex County, 26

There are several kinds of pardons; thus a pardon may be full and unconditional,[2] partial,[3] or conditional.[4]

B. Amnesty. Amnesty is an act of oblivion; a general pardon of the offenses of subjects against the government, or the proclamation of such pardon.[5]

N. J. L. 326, 328 (*affirmed* in 27 N. J. L. 637)].

"An act of grace, or governmental forgiveness of an offense, by which the penalty or crime is legally remitted." *Ex p.* Powell, 73 Ala. 517, 519, 49 Am. Rep. 71.

"An act of grace, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." 7 Bacon Abr. tit. "Pardon" [*quoted* in Moore *v.* State, 43 N. J. L. 203, 241, 39 Am. Rep. 558].

"A declaration of record by a sovereign that a particular individual is to be relieved from the legal consequences of a particular crime." Wharton Cr. L. § 591 [*quoted* in Territory *v.* Richardson, 9 Okla. 579, 584, 60 Pac. 244, 49 L. R. A. 440].

"An exercise of sovereign or executive clemency toward the guilty . . . a suspension of the just sentence of the law, induced by the facts and circumstances of the crime or by the character and condition of the criminal." Cook *v.* Middlesex County, 26 N. J. L. 326, 333 [*affirmed* in 27 N. J. L. 637].

"A work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical." 3 Coke Inst. 233 D [*quoted* in U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344, 362; U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 171].

Distinguished from "commission" in *In re* De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307.

Restoration to citizenship.— An executive act restoring a convicted criminal to the rights of citizenship is not a pardon. People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148.

2. State *v.* Lewis, 111 La. 693, 694, 35 So. 816 ("full and complete"); People *v.* Potter, 4 N. Y. Leg. Obs. 177, 179; State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81; Bishop Cr. L. § 914 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395].

It is full when it freely and unconditionally absolves the party from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided. Bishop Cr. L. § 916 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395, in the opinion of Willson, J.].

3. State *v.* Lewis, 111 La. 693, 35 So. 816 ("limited and partial"); People *v.* Potter, 4 N. Y. Leg. Obs. 177, 179; State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81; Bishop Cr. L. § 914 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395].

It is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. Bishop Cr. L. § 914 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395].

4. State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81; Bishop Cr. L. § 914 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395, in the opinion of Willson, J.].

Conditional pardon defined see *infra*, I, C.

The power to grant pardons carries with it the power to make the pardon full, partial, or conditional. Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

5. Webster Dict. [*quoted* in State *v.* Eby, 170 Mo. 497, 523, 71 S. W. 52]. See also AMNESTY, 2 Cyc. 284.

Amnesty is a general pardon granted to those guilty of some crime or offense. Worcester Dict. [*quoted* in State *v.* Eby, 170 Mo. 497, 523, 71 S. W. 52].

Amnesty is a sovereign act of pardon and forgetfulness for past acts of a criminal nature. Black L. Dict. [*quoted* in *In re* Briggs, 135 N. C. 118, 145, 47 S. E. 403].

Compared with and distinguished from "pardon."— The word "pardon" in its generic sense embracing every character of pardon, includes amnesty. State *v.* Eby, 170 Mo. 497, 523, 71 S. W. 52; Davies *v.* McKeeby, 5 Nev. 369, 373. Pardon and amnesty are not, however, precisely the same. State *v.* Eby, *supra*. Pardons are granted to individual criminals by name; amnesty to classes of offenders or communities. They differ not in kind, but solely in the number they severally affect. Davies *v.* McKeeby, *supra*; U. S. *v.* Hall, 53 Fed. 352, 354. Amnesty is at least coextensive in its meaning with the word "pardon" so far as its effect is concerned, because it effaces or wipes out the offense which has been committed. *In re* Briggs, 135 N. C. 118, 145, 47 S. E. 403. In the United States the word "pardon" includes amnesty. State *v.* Eby, *supra*. See also AMNESTY, 2 Cyc. 284 note 4.

Power to grant.— The constitutional power of the president to pardon includes the power to grant amnesty. Davies *v.* McKeeby, 5 Nev. 369, 373.

Particular proclamations or acts of general amnesty.— Kentucky act of 1867 see Haddix *v.* Wilson, 3 Bush (Ky.) 523. North Carolina acts of 1872 and 1874 see State *v.* Applewhite, 75 N. C. 229. North Carolina act of 1866 see Franklin *v.* Vannoy, 66 N. C. 145; State *v.* Cook, 61 N. C. 535; State *v.* Blalock, 61 N. C. 242. Proclamation of Dec. 8, 1863, see U. S. *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519; U. S. *v.* Padelford, 9 Wall. (U. S.) 531, 19 L. ed. 788; The Gray Jacket, 5 Wall. (U. S.) 342, 18 L. ed. 646; *In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487; U. S. *v.* Hughes, 26 Fed. Cas. No. 15,418, 1

C. Conditional Pardon. A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires.[6]

D. Commutation. Commutation of sentence or punishment is the change of a punishment to which a person has been condemned to a less severe one.[7]

E. Reprieve. A reprieve is the withdrawing of a sentence for an interval of time whereby the execution is suspended.[8] Reprieves have been classified as being of three kinds: (1) *Ex mandatio regis*;[9] (2) *ex arbitrio judicis*;[10] and

Bond 574; Scott *v.* U. S., 8 Ct. Cl. 457. Proclamation of May 29, 1865, see Backer *v.* U. S., 7 Ct. Cl. 551; Hamilton *v.* U. S., 7 Ct. Cl. 444. Proclamation of Dec. 25, 1868, see Dunnington *v.* U. S., 146 U. S. 338, 13 S. Ct. 79, 36 L. ed. 996; Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442; Wallach *v.* Van Riswick, 92 U. S. 202, 23 L. ed. 473; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Pargoud *v.* U. S., 13 Wall. (U. S.) 156, 20 L. ed. 646; Armstrong *v.* U. S., 13 Wall. (U. S.) 154, 20 L. ed. 614; *Ex p.* Mudd, 17 Fed. Cas. No. 9,899; U. S. *v.* Crozier, 25 Fed. Cas. No. 14,896; Waring *v.* U. S., 7 Ct. Cl. 501; Witkowski *v.* U. S., 7 Ct. Cl. 393; Armstrong *v.* U. S., 7 Ct. Cl. 280. Proclamation of July 4, 1868, see Bragg *v.* Lorio, 4 Fed. Cas. No. 1,800, 1 Woods 209.

6. 1 Bishop Cr. L. § 914 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 663, 53 Am. Rep. 395]. See also *infra*, VII.

An indefinite suspension of the sentence of a prisoner, on conditions, amounts to a conditional pardon. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361.

Form of pardon with conditions is set out in Arthur *v.* Craig, 48 Iowa 264, 265, 30 Am. Rep. 395.

Distinguished from commutation of punishment.— There is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected there is no power to force it upon him. A commutation is the substitution of a less for a greater punishment by authority of law and may be imposed upon the convict without his acceptance and against his consent. Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

7. Bouvier L. Dict. [*quoted* in Rich *v.* Chamberlain, 107 Mich. 381, 383, 65 N. W. 235; *Ex p.* Parker, 106 Mo. 551, 555, 17 S. W. 658; *Ex p.* Collins, 94 Mo. 22, 24, 6 S. W. 345; State *v.* Peters, 43 Ohio St. 629, 651, 4 N. E. 81; Young *v.* Young, 61 Tex. 191, 193; State *v.* State Bd. of Corrections, 16 Utah 478, 482, 52 Pac. 1090; *In re* Conditional Discharge of Convicts, 73 Vt. 414, 426, 51 Atl. 10, 56 L. R. A. 658].

Other definitions are: "Substitution of a less for a greater punishment by authority of law." Lee *v.* Murphy, 22 Gratt. (Va.) 789, 798, 12 Am. Rep. 563.

"Substitution of a less for a greater penalty or punishment." Anderson L. Dict. [*quoted* in Rice *v.* Chamberlain, 107 Mich. 381, 383, 65 N. W. 235].

"Substitution of a lesser grade of punishment for that inflicted by the sentence pronounced upon conviction." Rapalje & L. L. Dict. [*quoted* in State *v.* State Bd. of Corrections, 16 Utah 478, 482, 52 Pac. 1090].

"Change from a higher to a lower punishment." Ogletree *v.* Dozier, 59 Ga. 800, 802.

"Change of one punishment known to the law for another and different punishment also known to the law." *Ex p.* James, 1 Nev. 319, 321; State *v.* State Bd. of Corrections, 16 Utah 478, 482, 52 Pac. 1090.

"Change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law." *In re* Victor, 31 Ohio St. 206, 207.

It is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit. State *v.* Peters, 43 Ohio St. 629, 651, 4 N. E. 81 [*citing In re* Victor, 31 Ohio St. 206].

8. 4 Blackstone Comm. 394 [*quoted* in *In re* Buchanan, 146 N. Y. 264, 273, 40 N. E. 883; Sterling *v.* Drake, 29 Ohio St. 457, 460, 23 Am. Rep. 762, in both of which cases it was held that it operates only in capital cases]; Bouvier L. Dict. [*quoted* in George *v.* Lillard, 106 Ky. 829, 827, 51 S. W. 793, 21 Ky. L. Rep. 483].

Other definitions are: "A suspension of sentence." Clifford *v.* Heller, 63 N. J. L. 105, 116, 42 Atl. 155, 57 L. R. A. 312.

"Suspension, for a time, of the execution of a sentence which has been pronounced." Bishop Cr. Proc. [*quoted* in Butler *v.* State, 97 Ind. 373, 374].

"The temporary suspension of the execution of sentence, especially the sentence of death." Webster Dict. [*quoted* in Butler *v.* State, 97 Ind. 373, 374.

Distinguished from "suspension" in Carnal *v.* People, 1 Park. Cr. (N. Y.) 262, 266.

Does not include stay of execution of death sentence, power to grant which is conferred by statute on the supreme court. Parker *v.* State, 135 Ind. 534, 536, 35 N. E. 179, 23 L. R. A. 859.

"Pardon" distinguished from "reprieve on condition" see Sterling *v.* Drake, 29 Ohio St. 457, 460, 23 Am. Rep. 762.

9. "*Ex mandatio regis*, from the mere pleasure of the crown." Sterling *v.* Drake, 29 Ohio St. 457, 461, 23 Am. Rep. 762.

10. "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment defective; and sometimes af-

(3) *ex necessitate legis*, as where the person convicted is pregnant with a quick child or has become insane.[11]

F. Parole. A parole is a form of conditional pardon,[12] by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole.[13]

II. NATURE, GROUND, AND EXTENT OF POWER TO PARDON.

A. Offenses Subject to Pardon. A pardon extends to every offense known to the law.[14] But under a constitutional provision giving the governor power to grant pardons for all offenses, the power extends only to offenses in violation of state laws.[15]

B. Authority to Pardon — 1. In England. The king may pardon any offense

ter judgment, if it be a small felony, though out of clergy, or in order to a pardon or transportation. The power of granting this respite belongs of common right to every tribunal which is invested with authority to award execution. The justices of assize may, by long practice, either grant arbitrary reprieves, or take them away, after the termination of their sessions; though this seems rather to stand on ancient usage than any express authority or recognized principle. 2 Hale 412; 1 Ch. Cr. L. 758, 759." Sterling *v.* Drake, 29 Ohio St. 457, 461, 23 Am. Rep. 762.

11. "There are some cases in which the judge is bound to reprieve. Thus: 1. When a woman is convicted either of treason or felony she may allege pregnancy of a quick child in delay of execution. 2. When a prisoner has become insane between the time of sentence and the time fixed for execution. 1 Chitty Cr. L. 761." Sterling *v.* Drake, 29 Ohio St. 457, 461, 23 Am. Rep. 762.

Form of reprieve is set out in Sterling *v.* Drake, 29 Ohio St. 457, 458, 23 Am. Rep. 762.

12. Fuller *v.* State, 122 Ala. 32, 37, 26 So. 146, 82 Am. St. Rep. 17, 45 L. R. A. 502.

Conditional pardon defined see *supra*, I, C.

The power to pardon includes the power to parole. *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

13. Cyclopedic L. Dict.

Distinguished from "commutation" in State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81; *In re* Conditional Discharge of Convicts, 73 Vt. 414, 426, 51 Atl. 10, 56 L. R. A. 658.

Distinguished from "pardon" in State *v.* Peters, 43 Ohio St. 629, 650, 4 N. E. 81, where it is said that a parole of a convict who remains in the legal custody and under the control of the prison board, and subject at any time to be taken back within the inclosure of the penitentiary — such board having full power to enforce such rules and regulations, and to retake and imprison any convict so on parole — is not a pardon. The prisoner is not discharged, nor is his term of service shortened, he only being allowed to go outside the building and inclosure of the penitentiary, and remaining in the legal custody and under the control of the board of managers of the penitentiary.

In military law a parole has been defined to be an agreement by a prisoner of war, upon being set at liberty, that he will not again take up arms against the government by whose forces he was captured, either for a limited period or while hostilities continue; also, as a promise given by a prisoner of war, when he has leave to depart from custody, that he will return at the time appointed unless discharged. Black L. Dict.

14. **Territory** *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440; *Ex p.* Garland, 4 Wall. (U. S.) 333, 380, 18 L. ed. 366 [*quoted* in U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 171].

Contempt as subject to pardon see CONTEMPT, 9 Cyc. 61.

The power of pardon is general and unqualified, reaching from the highest to the lowest offenses. The power of remission of fines, penalties, and forfeitures is also included in it. Story Const. § 1504 [*quoted* in U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,479, 4 Biss. 336].

The power of pardon conferred by the constitution upon the president is unlimited, except in cases of impeachment. *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

15. State *v.* Renick, 157 Mo. 292, 57 S. W. 713, holding that the governor has no authority to remit the penalty imposed for violation of a city ordinance.

The power given to the governor to grant pardons does not authorize him to vacate an order disbarring an attorney at law for failure to pay money over to his client (Matter of Browne, 2 Colo. 553), nor to pardon one found guilty of bastardy (*Ex p.* Campion, (Nebr. 1907) 112 N. W. 585, 11 L. R. A. N. S. 865). Nor can he order a sheriff to release a prisoner committed to his custody by a judgment of court. *Ex p.* Campion, *supra*.

The president is not authorized to pardon for disobedience of a mandamus ordering certain county officers to levy taxes to pay a judgment recovered against the county. *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622.

whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over.[16]

2. In United States. The constitution of the United States gives to the president the "Power to grant reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[17] By the constitutions of some of the states, the power of pardoning is vested in the governor alone; in others, the consent of the legislature is required;[18] and not infrequently the power of pardon is delegated to a board.[19] The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times.[20]

C. Nature of Power. The pardoning power is not naturally nor necessarily an executive function; and, where the constitution is silent, vests no more in one branch of the government than in the other.[21]

D. Ground For Exercise of Power. The power of pardoning is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence.[22]

16. Bacon Abr. tit. "Pardon."

The power of pardoning offenses is inseparably incident to the crown; and this high prerogative the king is intrusted with upon a special confidence that he will spare those only whose case, could it be foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case. Bacon Abr. tit. "Pardon."

It seems that the king cannot wholly pardon a public nuisance while it continues such, because such pardon would take away the only means of compelling a redress of it. Bacon Abr. tit. "Pardon."

Anciently the right of pardoning offenses within certain districts was claimed by the lords of marches and others, who had *jura regalia* by ancient grants from the crown, or by prescription. Bacon Abr. tit. "Pardon."

17. U. S. Const. art. 2, § 2.

There can be no offense against the United States, except cases of impeachment over which the president has not an absolute pardoning power. U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,479, 4 Biss. 336.

The president, under a grant to him of power to issue reprieves and pardons for offenses against the United States, has no power to relieve from imprisonment judges of a county court who have been committed for disobedience of a mandamus requiring them to levy a tax to pay a judgment against the county. *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622.

18. See the constitutions of the several states.

In Massachusetts, the governor, with the advice of the council, has the sole power of granting pardons, but he cannot have this power until after conviction. Com. *v.* Wheeler, 2 Mass. 172. The governor is not required, as a matter of law, on the presentation of a petition for pardon or for commutation of sentence to refer such petition to the executive council, or to submit the same to the council, unless the governor consider it his duty to exercise the pardoning power. *In re* Opinion of Justices, 190 Mass. 616, 78 N. E. 311.

In Missouri the pardoning power belongs exclusively to the executive department of the government and cannot be exercised by the legislative department. State *v.* Sloss, 25 Mo. 291, 69 Am. Dec. 467.

19. See State *v.* Mehojovich, 119 La. 791, 44 So. 481; *In re* Opinion of Justices, 85 Me. 547, 27 Atl. 463; People *v.* Cook, 147 Mich. 127, 110 N. W. 514.

20. People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148. See also *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

In Louisiana the pardoning power is viewed and interpreted as in England. State *v.* Lewis, 111 La. 693, 35 So. 816.

21. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600, holding that the power to pardon, after conviction, vested in the governor by the constitution, is not prohibitory of the exercise of that power by the legislature before conviction. See also U. S. *v.* Hall, 53 Fed. 352, holding that while pardons are usually granted by the executive, the pardoning power is by no means confined to that branch of government.

In England pardons by act of parliament were not infrequent, and they are placed on a higher level than the king's. U. S. *v.* Hall, 53 Fed. 352.

22. Cook *v.* Middlesex County, 26 N. J. L. 326, 331 [*affirmed* in 27 N. J. L. 637], where it is said: "Pardon implies guilt. If there be no guilt there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party is acquitted on the ground of innocence, but is pardoned through favor."

A pardon proceeds not upon the theory of innocence, but implies guilt. It is granted not as a matter of right, but of grace. Roberts *v.* State, 160 N. Y. 217, 54 N. E. 678.

III. APPLICATION, ISSUANCE, REQUISITES, AND VALIDITY.

A. Application. The business of attending to applications for a pardon is not restricted to attorneys at law.[23] The justice of the sentence cannot be examined into and determined upon an application for pardon;[24] nor can the propriety of a conviction be questioned.[25] Upon a rehearing on an application for a pardon it is not mandatory upon the executive or other pardoning power to fix the case for trial and hear witnesses.[26]

B. Time of Granting Pardon. Unless restricted by the constitution,[27] the power to pardon may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.[28] An offender may also be pardoned after he has suffered the punishment adjudged for his crime.[29]

C. Requisites of Pardon — 1. In General. No technical words or terms are

23. Bird *v.* Breedlove, 24 Ga. 623.

No previous notice of intention to make application for a pardon is required where the application is made after the term of imprisonment is ended. State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

In Maine the governor and council have authority to consider an application for, or to grant, a pardon to one convicted of murder in the first degree, and sentenced to imprisonment for life, without application first made to the justices of the supreme judicial court, as provided by Pub. Laws (1876), c. 114. *In re* Opinion of Justices, 85 Me. 547, 27 Atl. 463.

24. People *v.* Cook, 147 Mich. 127, 110 N. W. 514.

25. People *v.* Cook, 147 Mich. 127, 110 N. W. 514.

26. State *v.* Mehojovich, 119 La. 791, 44 So. 481, holding that where the board of pardons had before it a statement of what the applicant for pardon expected to prove upon rehearing, it had the necessary data to pass upon the question submitted, without hearing witnesses at a trial.

The ruling of the board of pardons upon an application for rehearing is not subject to revision by the judiciary. State *v.* Mehojovich, 119 La. 791, 44 So. 481.

27. Under a constitutional provision providing that the governor may grant pardons after conviction, a pardon granted after a verdict of guilty has been rendered and pending a hearing in the supreme court on a bill of exceptions, but prior to the entry of sentence on the verdict, is valid, since its acceptance by the accused admits the crime and waives the bill of exceptions and hence the verdict was a final conviction. People *v.* Marsh, 125 Mich. 410, 84 N. W. 472, 84 Am. St. Rep. 584, 51 L. R. A. 461. *Compare* State *v.* Alexander, 76 N. C. 231, 22 Am. Rep. 675, holding that a constitutional power to pardon offenses, after conviction, enables the governor to pardon after a verdict of guilty and sentence thereon, although the prisoner has taken an appeal not yet determined.

The word "offenses" being equivalent to "crimes" in the constitutional provision giving the power to grant reprieves, commutations, and pardons, after convictions for all offenses, the government cannot pardon an offense until after conviction and judgment by the court. *Ex p.* Campion, (Nebr. 1907) 112 N. W. 585, 11 L. R. A. N. S. 865.

28. *Arkansas.*— State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

Georgia.— Grubb *v.* Bullock, 44 Ga. 379; Dominick *v.* Bowdoin, 44 Ga. 357.

Kentucky.— Com. *v.* Bush, 2 Duv. 264.

Michigan.— Spafford *v.* Benzie Cir. Judge, 136 Mich. 25, 98 N. W. 741.

Missouri.— State *v.* Woolery, 29 Mo. 300; State *v.* Sloss, 25 Mo. 291, 69 Am. Dec. 467.

Oklahoma.— Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.

United States.— *Ex p.* Garland, 4 Wall. 333, 18 L. ed. 366 [*quoted* in U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166].

See 37 Cent. Dig. tit. "Pardon," § 11 *et seq.*

In Massachusetts the governor with the advice of the counsel may grant a pardon of an offense after verdict of guilty and before sentence, and while exceptions allowed by the judge who presided at the trial are pending in the supreme court for argument. Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

In Tennessee, under Const. art. 3, § 6, empowering the governor to grant pardons after conviction, pardon may issue after judgment on a verdict, in form a final one, and without necessity of a formal sentence, the conviction being one not requiring a sentence of infamy to be passed; and this, although defendant on his motion was thereafter allowed to enter into bond to appear from day to day pending filing and hearing of motion for new trial, which motion he did not make. Parker *v.* State, 103 Tenn. 547, 53 S. W. 1092.

In Virginia the governor has authority to pardon a person convicted of a felony, by the verdict of a jury, before sentence is passed upon him by the court. Blair *v.* Com., 25 Gratt. 850.

29. *California.*— People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148.

Louisiana.— State *v.* Baptiste, 26 La. Ann. 134.

Nevada.— State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

necessary to constitute a pardon.[30] If it is possible to show that the pardon was intended to cover and does cover the offense of which defendant was convicted, the pardon, if in other respects valid, is sufficient.[31] A proviso inserted in a deed of pardon that the disability annexed to the offense shall remain notwithstanding the pardon of the offense itself is void.[32]

2. Delivery and Acceptance — a. Necessity. A pardon is a deed to the validity of which delivery is essential,[33] and delivery is not complete without acceptance.[34]

b. Sufficiency of Delivery. Delivery of a pardon by the governor to one suing for the release of a prisoner is constructive delivery to the prisoner.[35]

Texas.— Missouri, etc., R. Co. *v.* Howell, (Civ. App. 1894) 30 S. W. 98; Miller *v.* State, 46 Tex. Cr. 59, 79 S. W. 567; Locklin *v.* State, (Cr. App. 1903) 75 S. W. 305; Easterwood *v.* State, 34 Tex. Cr. 400, 31 S. W. 294; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

United States.— Stetter's Case, 22 Fed. Cas. No. 13,380, 1 Phila. 302.

See 37 Cent. Dig. tit. "Pardon," § 13.

30. Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

Entry in office of secretary of state.— A pardon is not void because there is no entry made of it in the office of the secretary of state, although he is required by law to keep a register of the official acts of the governor. *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337.

Form of pardon in whole, in part, or in substance is set out in Redd *v.* State, 65 Ark. 475, 480, 47 S. W. 119; People *v.* Marsh, 125 Mich. 410, 411, 84 N. W. 472, 84 Am. St. Rep. 584, 51 L. R. A. 461; State *v.* Wolfer, 53 Minn. 135, 136, 54 N. W. 1065, 59 Am. St. Rep. 582, 19 L. R. A. 783; State *v.* Foley, 15 Nev. 64, 66, 37 Am. Rep. 458; State *v.* McIntire, 46 N. C. 1, 2, 59 Am. Dec. 566; Com. *v.* Ahl, 43 Pa. St. 53, 54; Flavell's Case, 8 Watts & S. (Pa.) 197; Hoffman *v.* Coster, 2 Whart. (Pa.) 453, 454; Jones *v.* Harris, 1 Strobh. (S. C.) 160, 162; Miller *v.* State, 46 Tex. Cr. 59, 60, 79 S. W. 567; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 799, 12 Am. Rep. 563; Boyd *v.* U. S., 142 U. S. 450, 453, 12 S. Ct. 292, 35 L. ed. 1077; Matter of De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307, 312.

31. Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

32. People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148. See also Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637], holding that a proviso in a pardon that it is not to be construed to relieve the party pardoned from the legal disabilities arising from his conviction and sentence is incongruous and repugnant to the pardon itself.

33. Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431; *In re* De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307.

34. *Alabama.*— *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; Michael *v.* State, 40 Ala. 361.

Arkansas.— Redd *v.* State, 65 Ark. 475, 47 S. W. 119; *Ex p.* Hunt, 10 Ark. 284.

New York.— People *v.* Potter, 1 Park. Cr. 47.

Pennsylvania.— Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

Texas.— Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

Vermont.— *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

United States.— U. S. *v.* Wilson, 7 Pet. 150, 8 L. ed. 640.

See 37 Cent. Dig. tit. "Pardon," § 15.

Acceptance of conditional pardon see *infra*, VII, C.

The completed act is the charter of pardon and delivery. This is the one and only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor and may be canceled to accord with a change of intention. *In re* De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307.

Effect of acceptance.— Where one, pending appeal from a judgment of conviction, accepts the governor's pardon, he is not entitled to review that part of the judgment assessing a fine and costs against him, the acceptance of a pardon being an admission that he was rightly convicted. Manlove *v.* State, 153 Ind. 80, 53 N. E. 385.

35. *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337, where it was held that simple intention on the part of the executive to bestow a pardon confers no right and is perfectly nugatory until the intention may be said to be fully completed. This intention may be said to be fully completed when the pardon is signed by the executives, properly attested, authenticated by the great seal of the state and delivered either to the person who is the subject of the favor or to someone acting for him or on his behalf.

Delivery to person pardoned.— The fact that a pardon was delivered directly to the person pardoned does not affect its validity. Spafford *v.* Benzie Cir. Judge, 136 Mich. 25, 98 N. W. 741.

The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control of dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it either by himself or agent. Rosson *v.* State, 23 Tex. App. 287, 4 S. W. 897.

Where a pardon was sent by the governor to the prosecuting attorney, and was by him used as a predicate for the examination of the pardoned criminal as a witness, and not then repudiated by the witness, but he exercised his right to testify by virtue of the pardon, a sufficient delivery and acceptance of the pardon were shown. Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

c. Presumption of Acceptance. An acceptance of a pardon will be presumed in the absence of any proof to the contrary.[36]

D. Fraud. A pardon procured by false and fraudulent representations is void,[37] and this is true even though the person pardoned had no part in perpetrating the fraud.[38]

E. Mistake of Fact. A mistake as to fact may render a pardon void.[39]

IV. CONSTRUCTION AND OPERATION.

A. Construction. A pardon should be construed most strictly against the state.[40]

B. Operation — 1. In General. When a full and absolute pardon is granted it exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the crime which he has committed. The crime is forgiven and remitted, and the individual is relieved from all of its legal consequences.[41]

36. Redd *v.* State, 65 Ark. 475, 47 S. W. 119. See also *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71, holding that the law will presume that a pardon was accepted in the absence of evidence showing the prisoner's dissent.

A plea of pardon will be taken as evidence of the acceptance of the pardon in the absence of any other evidence thereof. Michael *v.* State, 40 Ala. 361.

37. *California.*— *Ex p.* Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684.

Georgia.— Dominick *v.* Bowdoin, 44 Ga. 357.

New York.— People *v.* Potter, 1 Park. Cr. 47.

Pennsylvania.— Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

Texas.— Rosson *v.* State, 23 Tex. App. 287, 4 S. W. 897.

See 37 Cent. Dig. tit. "Pardon," § 14.

In order to impeach a pardon for fraud it must be done in a direct and not in a collateral manner. Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 9 L. R. A. 440.

Cannot be raised on habeas corpus.— Whether a pardon was obtained on false and fraudulent pretenses cannot be raised on habeas corpus. *In re* Edymoin, 8 How. Pr. (N. Y.) 478.

38. Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

39. State *v.* McIntire, 46 N. C. 1, 59 Am. Dec. 566, holding that where upon the face of the pardon it appears that the governor supposed defendant had been fined as well as imprisoned, and the imprisonment is remitted provided the fine be first paid, this mistake as to fact renders the pardon void.

40. Redd *v.* State, 65 Ark. 475, 47 S. W. 119; *Ex p.* Hunt, 10 Ark. 284. See also Osborn *v.* U. S., 91 U. S. 474, 23 L. ed. 388, holding that, as a pardon is an act of grace, limitations upon its operation should be strictly construed.

Liberal construction.— A pardon is entitled to liberality of construction. Jones *v.* Harris, 1 Strobh. (S. C.) 160. Where reference is made in a conditional pardon to the sentence to be affected by the pardon, the sentence is to be taken in its legal and proper aspect, without reference to the words. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714.

41. *Arkansas.*— State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600; Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; *Ex p.* Hunt, 10 Ark. 284.

California.— People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148.

Florida.— Singleton *v.* State, 38 Fla. 297, 21 So. 21, 56 Am. St. Rep. 117, 34 L. R. A. 251.

Georgia.— *In re* Flournoy, 1 Ga. 606.

Kansas.— State *v.* Page, 60 Kan. 664, 57 Pac. 514.

Kentucky.— George *v.* Lillard, 106 Ky. 820, 51 S. W. 793, 1011, 21 Ky. L. Rep. 483.

Louisiana.— State *v.* Lewis, 111 La. 693, 35 So. 816; State *v.* Baptiste, 26 La. Ann. 134.

Michigan.— People *v.* Moore, 62 Mich. 496, 29 N. W. 80.

Mississippi.— Jones *v.* Alcorn County, 56 Miss. 766, 31 Am. Rep. 385.

Nevada.— State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

New Jersey.— Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637].

New York.— Roberts *v.* State, 160 N. Y. 217, 54 N. E. 678; *In re* Deming, 10 Johns. 232.

Ohio.— State *v.* Peters, 43 Ohio St. 629, 4 N. E. 81; Whitcomb *v.* State, 14 Ohio 282; Blanchard *v.* State, Wright 377. See also Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462.

Oklahoma.— Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.

Oregon.— Wood *v.* Fitzgerald, 3 Oreg. 568.

Pennsylvania.— Diehl *v.* Rodgers, 169 Pa. St. 316, 32 Atl. 424, 47 Am. St. Rep. 908; Cope *v.* Com., 28 Pa. St. 297.

Texas.— Bennett *v.* State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875; Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

Vermont.— *In re* Conditional Discharge of Convicts, 51 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

Virginia.— Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

United States.— Jenkins *v.* Collard, 145

The effect of a full pardon is to make the offender a new man.[42] It blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he had never committed the offense.[43]

2. Retrospective Operation. A pardon affords no relief to what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise.[44]

3. Rights of Third Persons. A pardon does not affect any rights which have vested in others directly by execution of the judgment for the offense, or which have been acquired by others while that judgment was in force.[45] Thus a

U. S. 546, 12 S. Ct. 868, 36 L. ed. 812; Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442; Carlisle *v.* U. S., 16 Wall. 147, 21 L. ed. 426; *In re* Monroe, 46 Fed. 52; *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285; U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 3 Abb. 129, 35 Ga. 344.

England.— Rex *v.* Greenvelt, 12 Mod. 119.

See 37 Cent. Dig. tit. "Pardon," § 16.

A pardon by the president relieves the recipient from all disability or responsibility on account of the commission of the offense for which he was pardoned. Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

"**A pardon reaches** both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all the civil rights." *Ex p.* Garland, 4 Wall. (U. S.) 333, 380, 18 L. ed. 366 [*quoted* in *Ex p.* Weimer, 29 Fed. Cas. No. 17,362, 8 Biss. 321, 324, 7 Reporter 38. See also 1 Bishop Cr. L. 916 [*quoted* in U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166].

42. 4 Blackstone Comm. 402 [*quoted* in People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148; Cowan *v.* Prowse, 93 Ky. 156, 171, 19 S. W. 407, 14 Ky. L. Rep. 273; State *v.* Lewis, 111 La. 693, 35 So. 816; State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458; U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166]. See also Knapp *v.* Thomas, 39 Ohio St. 377, 395, 48 Am. Rep. 462; Young *v.* Young, 61 Tex. 191, 193; *In re* Spencer, 22 Fed. Cas. No. 13,234.

It gives him a new credit and capacity.— 4 Blackstone Comm. 402 [*quoted* in U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166].

43. *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366 [*quoted* in Carr *v.* State, 19 Tex. App. 635, 661, 53 Am. Rep. 395; U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344, 363]. The offender is purged of his guilt and is thenceforth an innocent man; but the past is not obliterated nor the fact that he had committed the crime wiped out. *In re* Spencer, 22 Fed. Cas. No. 13,234. But see Baum *v.* Clause, 5 Hill (N. Y.) 196, wherein the doctrine that a pardon takes away the guilt as well as the punishment of the offense is criticized.

If a second offense is by statute more heavily punishable than the first, the pardon of the first obliterates it. It cannot be considered in the determination of the punishment for the second. State *v.* Martin, 59 Ohio St. 212, 52 N. E. 188, 60 Am. St. Rep. 762, 43 L. R. A. 94; Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377.

If granted after conviction it removes the penalties and disabilities and restores the person to his civil rights. U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166.

If granted before conviction, a pardon prevents any of the penalties and disabilities consequent upon conviction from attaching. U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166.

44. Illinois Cent. R. Co. *v.* Bosworth, 133 U. S. 92, 10 S. Ct. 131, 33 L. ed. 550; Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442.

A pardon has no retrospective operation.— It takes effect and puts a period to all further infliction of punishment from the time it is granted. It has no operation upon that part of the sentence already inflicted. Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637]; Roberts *v.* State, 160 N. Y. 217, 54 N. E. 678 [*affirming* 30 N. Y. App. Div. 106, 51 N. Y. Suppl. 691]; *In re* Spencer, 22 Fed. Cas. No. 13,234.

The right to sue for damages is not given by a pardon. Roberts *v.* State, 30 N. Y. App. Div. 106, 51 N. Y. Suppl. 691 [*affirmed* in 160 N. Y. 217, 54 N. E. 678].

There is only this limitation to its operation: It does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment. *Ex p.* Garland, 4 Wall. (U. S.) 333, 380, 18 L. ed. 366.

45. *Florida.*— *In re* Opinion of Justices, 14 Fla. 318.

Georgia.— *In re* Flournoy, 1 Ga. 606.

New Jersey.— Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637].

New York.— *In re* Deming, 10 Johns. 232.

North Carolina.—State *v.* Mooney, 74 N. C. 98, 21 Am. Rep. 487.

Oregon.— Wood *v.* Fitzgerald, 3 Oreg. 568.

Virginia.— Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377.

United States.— Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442; *Ex p.* Garland, 4 Wall. 333, 18 L. ed. 366; *In re* Nevitt, 117 Fed. 448, 460, 54 C. C. A. 622; Kirk *v.* Lewis, 9 Fed. 645, 4 Woods 100; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,557, 4 Wash. 64.

See 37 Cent. Dig. tit. "Pardon," § 16.

pardon cannot take away the right of an informer to his part of a fine or penalty fixed by the law upon the commission of the offense.[46]

4. OFFENSES COVERED. The recital of a specific distinct offense in a pardon limits its operation to that offense, and that pardon does not embrace any other offense for which separate penalties and punishment are prescribed.[47]

5. RELEASE FROM PAYMENT OF COSTS. A pardon cannot release defendant from the costs of the prosecution that accrued in favor of third persons as incident to the conviction, although it in terms purports to do so.[48]

6. RESTITUTION OF FINE. The granting of a general pardon to a party convicted, or a partial pardon, by remitting his fine, will not entitle the party to a restitution of the fine, or to indemnity for any part of the penalty which he may have paid or suffered.[49]

A pardon cannot divest any person of any right or interest which the law has permitted to be acquired and vested in consequence of the judgment. Cope *v.* Com., 28 Pa. St. 297.

A pardon for a public offense will not defeat or affect the right of private redress for the act committed. Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507.

A pardon by the president restores to its recipient all rights and property lost by the offense pardoned, unless the property has by judicial process become vested in other persons. Osborn *v.* U. S., 91 U. S. 474, 23 L. ed. 388.

46. Holliday *v.* People, 10 Ill. 214; Roberts *v.* State, 30 N. Y. App. Div. 106, 51 N. Y. Suppl. 691 [*affirmed* in 160 N. Y. 217, 54 N. E. 678].

The governor has the right to remit the moiety of a penalty that goes to the state, but not of the part given to the informer. State *v.* Williams, 1 Nott & M. (S. C.) 26. See also State *v.* Rowe, 2 Bay (S. C.) 565.

47. *Alabama.*— Hawkins *v.* State, 1 Port. 475, 27 Am. Dec. 641.

Missouri.— State *v.* Creech, 1 Mo. App. 370.

Nevada.— State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

South Carolina.— State *v.* McCarty, 1 Bay 334.

Texas.— Miller *v.* State, 46 Tex. Cr. 59, 79 S. W. 567.

United States.— *Ex p.* Weimer, 29 Fed. Cas. No. 17,362, 8 Biss. 321.

England.— Reg. *v.* Harrod, 2 C. & K. 294, 2 Cox C. C. 242, 61 E. C. L. 294.

See 37 Cent. Dig. tit. "Pardon," § 16.

A pardon is a grant or deed and cannot convey that which the grantor never had. *In re* Nevitt, 117 Fed. 448, 460, 54 C. C. A. 622.

A pardon will not constitute a defense to a civil action. *In re* ——, 86 N. Y. 563.

A pardon of an assault, which afterward becomes the offense of murder by the death of the party assaulted, does not operate as a pardon of the murder. Com. *v.* Roby, 12 Pick. (Mass.) 496.

The pardon of an attorney for official misconduct, while it wipes out the offense against the public, does not annul the act, nor affect the right of the court to punish him for professional misconduct. *In re* ——, 86 N. Y. 563.

Where a prisoner has been convicted of two distinct felonies and a pardon is granted reciting only one, the pardon does not apply to any offense except the one which it recites. State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

48. *Alabama.*— Chisholm *v.* State, 42 Ala. 527.

Arkansas.— Edwards *v.* State, 12 Ark. 122.

Illinois.— Holliday *v.* People, 10 Ill. 214.

Indiana.— State *v.* Farley, 8 Blackf. 229.

Iowa.— Estep *v.* Lacy, 35 Iowa 419, 14 Am. Rep. 498.

Kansas.— *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

Mississippi.— The pardon of an appellant in a criminal case does not discharge the supersedeas bond, and, upon a failure to prosecute the appeal, judgment may be had upon the bond for costs in both courts. Phillips *v.* State, 58 Miss. 578. But a pardon before conviction is a bar to a judgment against the accused for court costs and witness' fees. White *v.* State, 42 Miss. 635. See also *Ex p.* Gregory, 56 Miss. 164.

Missouri.— State *v.* McO'Blenis, 21 Mo. 272.

New Jersey.— Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637].

North Carolina.— State *v.* Mooney, 74 N. C. 98, 21 Am. Rep. 487.

Ohio.— See Libby *v.* Nicola, 21 Ohio St. 414.

Pennsylvania.—Schuylkill *v.* Reifsnyder, 46 Pa. St. 446; Cope *v.* Com., 28 Pa. St. 297; *Ex p.* McDonald, 2 Whart. 440.

Tennessee.— Smith *v.* State, 6 Lea 637. See also State *v.* Spellings, (1897) 41 S. W. 444.

Texas.— *Ex p.* Mann, 39 Tex. Cr. 491, 46 S. W. 828, 73 Am. St. Rep. 961.

Virginia.— See Anglea *v.* Com., 10 Gratt. 696.

See 37 Cent. Dig. tit. "Pardon," § 19.

Fees due officers of the court are vested rights of law; and are not discharged when a defendant receives an unconditional pardon, after conviction and sentence. State *v.* Mooney, 74 N. C. 98, 21 Am. Rep. 487.

Restitution of costs paid.— A pardon will not entitle the person to a restitution of whatever costs he has paid under his sentence. Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637].

49. Ruckner *v.* Bosworth, 7 J. J. Marsh. (Ky.) 645; Cook *v.* Middlesex County, 26

7. Restoration of Offices Forfeited. A pardon does not operate to restore offices forfeited.[50]

8. Time of Taking Effect. A pardon like a deed takes effect from its delivery.[51]

V. Revocation.

A pardon which is not void in its inception cannot be revoked for any cause after its delivery and acceptance are complete.[52]

VI. Commutation of Sentence and Reprieve.

A. Power to Commute. The general power to pardon necessarily contains in it the lesser power of remission and commutation. If the whole offense may be pardoned *a fortiori*, a part of the punishment may be remitted or the sentence commuted.[53]

B. Power to Reprieve. The power to pardon necessarily includes the power to reprieve.[54]

N. J. L. 326 [*affirmed* in 27 N. J. L. 637]. But see *In re* Flournoy, 1 Ga. 606.

Where fine has not been paid.— The word "pardon" includes the idea of release; and a pardon by the governor of one convicted of conspiracy, even after sentence, will release all fines imposed for the offense, although these fines were due, not to the commonwealth but to the county. Cope *v.* Com., 28 Pa. St. 297. But when a defendant convicted of a misdemeanor is sentenced to pay a certain fine and to be imprisoned until the fine is discharged, a release by the governor from the imprisonment alone is not a release or satisfaction of the fine. State *v.* Richardson, 18 Ala. 109. So too where the governor has no authority to remit a fine imposed on one convicted of a misdemeanor, his discharge from prison will not relieve him from liability for the fine, and he may be taken in execution by a capias pro fine. Wilkerson *v.* Allan, 23 Gratt. (Va.) 10.

50. State *v.* Carson, 27 Ark. 469; Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377; Com. *v.* Fugate, 2 Leigh (Va.) 724; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

51. *Ex p.* Hunt, 10 Ark. 284.

52. *Alabama.*— *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

Arkansas.— State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

Florida.— Alvarez *v.* State, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102.

Missouri.— *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337.

Ohio.— Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462.

Texas.— Rosson *v.* State, 23 Tex. App. 287, 4 S. W. 897.

United States.— *In re* De Puy, 7 Fed. Cas. No. 3,814, 6 Ben. 307.

See 37 Cent. Dig. tit. "Pardon," § 23.

Revocation of conditional pardon for breach of condition see *infra*, VII, E.

53. *Illinois.*— Holliday *v.* People, 10 Ill. 214.

Louisiana.— See State *v.* Rose, 29 La. Ann. 755, holding that a commutation of a sentence, substituting a milder punishment, is in the nature of a pardon, and hence not within the power of the governor independent of the consent of the senate.

Massachusetts.— Perkins *v.* Stevens, 24 Pick. 277.

Nevada.— See *Ex p.* Janes, 1 Nev. 319, holding that, although the governor of the territory has the right to pardon absolutely or conditionally, he has no right to commute a sentence of death to one of imprisonment for life.

New Jersey.— Cook *v.* Middlesex County, 26 N. J. L. 326 [*affirmed* in 27 N. J. L. 637].

North Carolina.— See State *v.* Twitty, 11 N. C. 193, holding that under the constitution the governor has no power to commute a punishment.

Virginia.— Lee *v.* Murphy, 22 Gratt. 789, 12 Am. Rep. 563.

West Virginia.— State *v.* Hawk, 47 W. Va. 434, 34 S. E. 918.

See 37 Cent. Dig. tit. "Pardon," § 6½.

But see Com. *v.* Hatsfield, 2 Pa. L. J. 37, 40, holding that the word "pardon," as used in the constitution authorizing the executive to grant pardons, does not authorize the executive to commute punishment by nullifying it, except by a pardon of the crime.

Ministerial power.—The power to commute or shorten the term of imprisonment is a ministerial or administrative, not a judicial, power. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

The president has the right to commute punishment for a capital offense by directing imprisonment in the United States penitentiary, although there is no law directing imprisonment therein for such offenses. *In re* Wells, 29 Fed. Cas. No. 17,387*a*, 2 Hayw. & H. 187 [*affirmed* in 18 How. 307, 15 L. ed. 421].

54. State *v.* Rose, 29 La. Ann. 755; *Ex p.* Fleming, 60 Miss. 910; Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762; State *v.* Hawk, 47 W. Va. 434, 34 S. E. 918. But see Clifford *v.* Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312, holding that the granting of a reprieve and the fixing of a day for the execution of a convicted criminal is, by the common law, a judicial power and

C. Assent to Reprieve. The assent of a prisoner to a reprieve is not necessary.[55]

D. Effect of Reprieve. A reprieve does not annul the sentence, but merely delays or keeps back the execution of it for the time specified.[56]

VII. CONDITIONAL PARDON.

A. Power to Grant. The power to grant a pardon includes the power to grant a conditional pardon, the condition to be either precedent or subsequent.[57]

B. Nature of Condition. The condition may be of any nature, so long as it is not illegal, immoral, or impossible of performance.[58] Thus, among other con-

cannot be exercised by the governor except in so far as it is expressly permitted by the constitution.

At common law the power to reprieve was lodged in the courts as the representatives of the king, he being considered the very fountain of justice, and he was never called upon to exercise it except in capital cases of necessity. State *v.* Hawk, 47 W. Va. 434, 34 S. E. 918. At common law a reprieve might be granted either by the king under his power to pardon, or by the court; and every court which had power to award execution had power to grant a reprieve. Clifford *v.* Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312.

Ministerial power.— The power to grant a reprieve is a ministerial or ministrative power, not a judicial power. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

In New Hampshire the power of pardon, granted by the constitution to the governor and council, does not include the power to reprieve; but the latter is vested in the governor alone, as chief executive magistrate. *Ex p.* Howard, 17 N. H. 545.

55. Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

56. In other words it substitutes a day other than that fixed by the court for the execution, and, when that day arrives, it is by virtue of the sentence of the court, and not the command of the governor, that the execution takes place. Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

57. *Alabama.*— Fuller *v.* State, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 17, 45 L. R. A. 502.

Arkansas.— *Ex p.* Hawkins, 61 Ark. 321, 33 S. W. 106, 54 Am. St. Rep. 209, 30 L. R. A. 736; *Ex p.* Hunt, 10 Ark. 284.

Iowa.— State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361; Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395.

Massachusetts.— Perkins *v.* Stevens, 24 Pick. 277.

Michigan.— People *v.* Marsh, 125 Mich. 410, 84 N. W. 472, 84 Am. St. Rep. 584, 51 L. R. A. 461.

Minnesota.—State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

Missouri.— *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337.

New York.— People *v.* Potter, 1 Park. Cr. 47. See also *In re* Whalen, 19 N. Y. Suppl. 915.

Pennsylvania.— Flavell's Case, 8 Watts & S. 197; Com. *v.* Haggerty, 4 Brewst. 326.

South Carolina.— State *v.* Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 6 L. R. A. 743; State *v.* Fuller, 1 McCord 178.

Texas.— Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

Vermont.— *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

Virginia.— Lee *v.* Murphy, 22 Gratt. 789. 12 Am. Rep. 563.

United States.— U. S. *v.* Klein, 13 Wall. 128, 20 L. ed. 519; *Ex p.* Wells, 18 How. 307, 15 L. ed. 421; U. S. *v.* Wilson, 7 Pet. 150, 8 L. ed. 640.

See 37 Cent. Dig. tit. "Pardon," § 6.

The power to pardon includes the power to grant a conditional discharge. *In re* Conditional Discharge of Convicts, 73 Vt. 414. 51 Atl. 10, 56 L. R. A. 658.

58. *Alabama.*— Fuller *v.* State, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 17, 45 L. R. A. 502.

Arkansas.— *Ex p.* Hawkins, 61 Ark. 321, 33 S. W. 106, 54 Am. St. Rep. 209, 30 L. R. A. 736.

California.— *Ex p.* Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684.

Florida.— State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714.

Idaho.— *In re* Prout, 12 Ida. 494, 86 Pac. 275, 5 L. R. A. N. S. 1064.

Iowa.— State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361; Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395.

Michigan.— People *v.* Marsh, 125 Mich. 410, 84 N. W. 472, 84 Am. St. Rep. 584, 51 L. R. A. 461.

Minnesota.—State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

New York.— People *v.* Pease, 3 Johns. Cas. 333. See also People *v.* Potter, 1 Park. Cr. 47.

Ohio.— Huff *v.* Dyer, 4 Ohio Cir. Ct. 595, 2 Ohio Cir. Dec. 727.

Oregon.— *Ex p.* Houghton, (1907) 89 Pac. 801, 9 L. R. A. N. S. 737.

Pennsylvania.— Flavell's Case, 8 Watts & S. 197; Com. *v.* Haggerty, 4 Brewst. 326.

South Carolina.— State *v.* Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 6

ditions,[59] a pardon may be granted on condition that the person pardoned depart from and remain without the state,[60] and this is true, even though the constitution provides that under no circumstances shall any person be exiled from the state.[61] So a pardon may provide that for a violation of any of its conditions the recipient may be liable to summary arrest upon the governor's warrant.[62] Again, a pardon may be granted upon the condition that the convicted person shall pay a certain sum of money to the state to reimburse it for the expenses incurred in his trial,[63]

L. R. A. 743; State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679.

Texas.— Taylor *v.* State, 41 Tex. Cr. 148, 51 S. W. 1106; Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

Virginia.— Lee *v.* Murphy, 22 Gratt. 789, 12 Am. Rep. 563; Com. *v.* Fowler, 4 Call 35.

United States.— U. S. *v.* Six Lots of Ground, 27 Fed. Cas. No. 16,299, 1 Woods 234.

England.— *In re* Canadian Prisoners, 1 Dowl. P. C. 208, 2 H. & H. 45, 5 M. & W. 32.

See 37 Cent. Dig. tit. "Pardon," § 28.

A pardon granted upon a condition which is illegal, immoral, or impossible to be performed, becomes an absolute pardon, as such a condition is void. See cases cited *supra*, this note.

59. Proper conditions.— The governor may annex to a pardon the conditions that the recipient shall refrain from the use of intoxicating liquors as a beverage during the remainder of the term of sentence; that he shall use proper exertions for the support of his mother and sister; and that he shall not, during the same time, be convicted of any criminal offense in the state. Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395. See also People *v.* Burns, 77 Hun (N. Y.) 92, 28 N. Y. Suppl. 300 [*affirmed* in 143 N. Y. 665, 39 N. E. 21]. The condition of a pardon that requires reimprisonment for the original sentence of imprisonment after the expiration of the particular period of time fixed by the court within which the sentence imposed should be executed is not immoral or impossible of performance during the life of the convict, nor is it illegal, since the particular period of time within which the sentence is to be suffered by the convict as specified in the sentence is not a part of the legal sentence, except so far as it fixes the *quantum* of time he must suffer such penalty. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714.

60. *Arkansas.*— *Ex p.* Hawkins, 61 Ark. 321, 33 S. W. 106, 54 Am. St. Rep. 209, 30 L. R. A. 736.

Minnesota.—State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

New York.— People *v.* James, 2 Cai. 57; People *v.* Potter, 1 Park. Cr. 47.

Pennsylvania.— Com. *v.* Haggerty, 4 Brewst. 326. But see Com. *v.* Hatsfield, 1 Pa. L. J. Rep. 177, 2 Pa. L. J. 37, 40, holding that the executive, under the constitution, cannot impose a condition in a pardon to the effect that the convict shall leave the state and never return.

South Carolina.— State *v.* Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 6 L. R. A. 743; State *v.* Addington, 2 Bailey 516, 23 Am. Dec. 150; State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679; State *v.* Fuller, 1 McCord 178.

See 37 Cent. Dig. tit. "Pardon," § 28.

Banishment from United States.— A condition of banishment from the United States may be imposed on the granting of a pardon. People *v.* Potter, 1 Park. Cr. (N. Y.) 47.

To leave state forthwith.— Where a prisoner has been granted a pardon on condition that he forthwith leave the state and never return to it, he is not entitled to a discharge from rearrest on habeas corpus, it appearing that he did not accept the pardon in good faith, and that after his release from prison and before his rearrest ample opportunities were given him to leave the state, of which he did not avail himself. *Ex p.* Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684.

History of banishment as a condition.— "Banishment was first known in England as abjuration, where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom and not return without permission (4 Bl. Com. 333; 3 P. Williams, 37). This was not as a punishment, but as a condition of pardon. After abjuration was abolished, and about the reign of Charles II, it became usual to grant pardons on condition of banishment, and that the original sentence should be revived on a violation of the stipulations of its remission (Kel. pre. 4; Williams, J. Felony, VI; 1 Ch. Cr. L. 789). And it was usual to bind the criminal as an apprentice, and both he and his master were liable to severe penalties on his return. Afterwards the performance of the stipulation of banishment was enforced by requiring security from him that he would leave the country; and finally the practice settled down to that adopted in this case, namely, that of granting pardons on condition, and enforcing the condition by inflicting the original sentence upon the party in case of violation." People *v.* Potter, 1 Park. Cr. (N. Y.) 47, 54.

61. *Ex p.* Hawkins, 61 Ark. 321, 33 S. W. 106, 54 Am. St. Rep. 209, 30 L. R. A. 736.

62. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714; Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395.

63. People *v.* Marsh, 125 Mich. 410, 84 N. W. 472, 84 Am. St. Rep. 584, 51 L. R. A. 461.

or that he shall be and remain a law-abiding citizen.[64] But no conditions can be attached to a pardon that are to extend after the expiration of the term for which the prisoner was sentenced.[65]

C. Acceptance. A conditional pardon is a grant to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected there is no power to force it upon him.[66]

D. Fulfilment of Condition. Where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect is the same as though the pardon were by its terms absolute.[67]

E. Breach of Condition — 1. In General. A breach of the condition of a pardon avoids and annuls the pardon.[68] Execution of the original sentence may then be enforced.[69]

64. *Ex p.* Houghton, (Oreg. 1907) 89 Pac. 801, 7 L. R. A. N. S. 737, holding that under Const. art. 5, § 14, providing that the governor shall have power to grant reprieves, commutations, and pardons after conviction for all offenses, except treason, subject to such regulations as may be provided by law, and Bellinger & C. Comp. § 1572, providing that reprieves, commutations, and pardons may be granted by the governor upon such conditions and with such restrictions as he may think proper, the governor had authority in granting a pardon to impose such a condition.

65. *Ex p.* Prout, 12 Ida. 494, 86 Pac. 275, 5 L. R. A. N. S. 1064.

66. Fuller *v.* State, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 17, 45 L. R. A. 502; State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714; People *v.* Potter, 1 Park. Cr. (N. Y.) 47; State *v.* Smith 1 Bailey (S. C.) 283, 19 Am. Dec. 679; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

Duress in acceptance.— Where a pardon is granted with a condition annexed, the fact that the person pardoned is in prison and must accept the condition before receiving the benefit of the pardon does not constitute such duress as will make his acceptance of the condition of no effect. Greathouse's Case, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487.

67. Alvarez *v.* State, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102

68. *Alabama.*— Fuller *v.* State, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 17, 45 L. R. A. 502.

Arkansas.— See *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34.

Florida.— Alvarez *v.* State, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102.

Iowa.— McKay *v.* Woodruff, 77 Iowa 413, 42 N. W. 428.

Minnesota.— State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

New York.— People *v.* Potter, 1 Park. Cr. 47.

Pennsylvania.— Com. *v.* Haggerty, 4 Brewst. 326.

South Carolina.— State *v.* Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 6 L. R. A. 743; State *v.* Addington, 2 Bailey 516, 23 Am. Dec. 150; State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679.

Vermont.— *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

United States.— Waring *v.* U. S., 7 Ct. Cl. 501.

See 37 Cent. Dig. tit. "Pardon," § 30.

He who seeks to avail himself of the benefits of a pardon granted conditionally must show a compliance with the conditions which it imposed. Scott *v.* U. S., 8 Ct. Cl. 457; Haym *v.* U. S., 7 Ct. Cl. 443.

It lies upon the grantee to perform the condition. If he does not, in case of a condition precedent, the pardon does not take effect. In case of a condition subsequent, the pardon becomes null; and if the condition is not performed the original sentence remains in full vigor and may be carried into effect. Flavell's Case, 8 Watts & S. (Pa.) 197.

69. *Florida.*— State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714; Alvarez *v.* State, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102.

Indiana.— See Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

Minnesota.— State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

New York.— People *v.* Potter, 1 Park. Cr. 47.

Ohio.— *Ex p.* Lockhart, 1 Disn. 105, 12 Ohio Dec. (Reprint) 515.

Pennsylvania.— Com. *v.* Haggerty, 4 Brewst. 326.

South Carolina.— State *v.* Chancellor, 1 Strobh. 347, 47 Am. Dec. 557; State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679.

Vermont.— *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

See 37 Cent. Dig. tit. "Pardon," § 30.

On forfeiture of a pardon by breach of the conditions, a convict becomes liable to serve that part which he has not already served of the term of imprisonment for which he was sentenced, although the original term has long since expired. State *v.* Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 6 L. R. A. 743.

Where the governor pardoned a married woman upon condition that she should leave

2. As an Offense. At common law the non-performance of the conditions of a pardon is not an offense.[70]

3. Procedure on Breach. There is some conflict among the authorities as to the method of procedure to be pursued when a prisoner who has availed himself of a conditional pardon has been guilty of a breach of the conditions imposed. It has been held by some courts that there must be a judicial determination of the facts amounting to a breach of the condition.[71] It has been said, however, in other cases that the determination of the facts constituting a breach of condition need not be on indictment, nor on trial by jury.[72] And in some jurisdictions it has been held that the authority to determine whether the conditions of the pardon have been broken may be conferred upon the governor who can finally determine the question of fact and remand for further imprisonment without judicial proceedings.[73]

the state in two weeks, and she neglected to do so, the court will consider such pardon void after the two weeks, and upon motion of the prosecuting attorney will pass sentence upon her. State *v.* Fuller, 1 McCord (S. C.) 178.

70. State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783; *In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658. See also *Ex p.* Alvarez, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102, holding that in the absence of statute, and unless the act constituting the violation of a condition of a pardon is itself a criminal offense, the violation of the condition is no ground for prosecution by indictment.

71. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714 (holding that where a convict has been released on a conditional pardon, his rearrest and recommitment cannot be had on the mere order of the governor alone, unless such course is provided by statute or by the express terms of the pardon, but the convict is entitled to a hearing before a court of general criminal jurisdiction, that he may show, if he can, that he has performed the conditions of the pardon, or that he has a legal excuse for not having done so, or that he was not the same person who was convicted); People *v.* Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285; People *v.* Moore, 62 Mich. 496, 29 N. W. 80; State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783, holding that after a conditional pardon, if it is claimed that the person pardoned has not complied with the condition, he must be brought before the court to show cause why execution should not be awarded on his original sentence, and then the court has jurisdiction to inquire and determine whether he is the same person who has been pardoned, and if so, whether he has violated the condition of the pardon. See also People *v.* Burns, 77 Hun (N. Y.) 92, 28 N. Y. Suppl. 300 [*affirmed* in 143 N. Y. 665, 39 N. E. 21], holding that where a convict is charged with violating a conditional pardon, the question of fact is properly tried by a jury on return of an order to show cause why he should not be remanded to prison for such violation under his original sentence.

The established practice to test the question whether there has been a violation of the condition of a pardon, in the absence of statutory regulations, is for some court of general criminal jurisdiction, on having its attention called to the fact, to issue a rule reciting the conviction and sentence, the pardon and its conditions, and the alleged violation, and requiring the sheriff to arrest the convict and serve a copy of the rule on the convict, and, if the prisoner denies that he is the person who was convicted and sentenced and pardoned, he is entitled to a jury to try such issue, but all other facts and issues can be tried by the judge, and if the facts are found for the convict he should be discharged; otherwise he should be remanded to custody and ordered to have the original sentence imposed upon him duly executed. *Ex p.* Alvarez, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102. But where a convict, on violation of a conditional pardon, has been rearrested, on a hearing before a court of general jurisdiction, he is not entitled to a jury trial as a matter of right, except on the question as to whether he is the same person who was convicted. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714. Similarly where a conditional pardon provided that the governor might summarily determine whether the conditions had been complied with, and that, if he found they had not, he might revoke the pardon and order the reconfinement of the person pardoned without the intervention of any court, such stipulations became binding upon the person pardoned upon his acceptance of the pardon, and authorized his reconfinement as provided without a judicial determination as to whether the conditions of the pardon had been violated. *Ex p.* Houghton, (Oreg. 1907) 89 Pac. 801, 9 L. R. A. N. S. 737.

Insanity as cause for breach.—If a prisoner who has been pardoned on condition of leaving the country within a limited time does not depart and is afterward taken up for not so doing, he may, on its appearing to the court that he was insane, be discharged on condition of departing within the same period from the day of discharge. People *v.* James, 2 Cai. (N. Y.) 57.

72. State *v.* Chancellor, 1 Strobh. (S. C.) 347, 47 Am. Dec. 557.

73. Fuller *v.* State, 122 Ala. 32, 26 So.

4. STATUS AFTER BREACH. Upon the revocation of a pardon for a breach of one of its conditions, the legal status of the person pardoned must be regarded the same as it was before the pardon was granted.[74]

VIII. PLEADING AND PROOF OF PARDON.

A. Pleading Pardon — 1. NECESSITY OF PLEADING. The court takes no notice of a pardon unless it is pleaded or in some way claimed by the person pardoned.[75]

2. MANNER OF PLEADING. There is no hard-and-fast rule as to how a pardon shall be brought to the attention of the court.[76] All that is requisite is that the attention of the court be called to the fact that a pardon has been granted.[77]

B. Proof of Pardon. The best evidence of a pardon is either the original or a certified copy.[78]

146, 82 Am. St. Rep. 1, 45 L. R. A. 502; Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047; *In re* Kennedy, 135 Mass. 48. See also State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361, holding that where an order suspending the sentence of a prisoner provided that the governor might revoke it at his pleasure, no determination of any fact is essential to the authority of the governor to terminate the suspension and cause the prisoner to be returned to the penitentiary.

74. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714; Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395.

Period of reimprisonment.— Where a conditional pardon provides that on breach of the condition on which the pardon is granted it shall be the duty of any sheriff to immediately arrest the criminal and return him to the penitentiary to serve out the remainder of his term, the reference is to the length of imprisonment fixed by the sentence, and not to the particular period of time mentioned in the sentence during which it was to be executed, since the latter is not an effective part of the sentence. State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. N. S. 719, 52 Fla. 143, 42 So. 714.

75. *Alabama.*— Michael *v.* State, 40 Ala. 361.

Georgia.— Dominick *v.* Bowdoin, 44 Ga. 357.

Kentucky.— See Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 23 Ky. L. Rep. 146, 53 L. R. A. 245, holding that the production of a full pardon of the offense whereof defendant is accused puts an end to the proceedings, no plea of pardon being necessary.

Massachusetts.— Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

New York.— Merritt's Case, 4 City Hall Rec. 58.

North Carolina.— State *v.* Blalock, 61 N. C. 242.

United States.— U. S. *v.* Wilson, 7 Pet. 150, 8 L. ed. 640; Fries' Case, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5,126.

See 37 Cent. Dig. tit. "Pardon," § 32; and 12 Cyc. 778.

Plea of pardon see CRIMINAL LAW, 12 Cyc. 363.

General pardon.— Courts will take judicial notice of a general pardon by proclamation or act of the legislature. State *v.* Blalock, 61 N. C. 242; Armstrong *v.* U. S., 13 Wall. (U. S.) 155, 20 L. ed. 614; *In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487. See also State *v.* Eby, 170 Mo. 497, 71 S. W. 52.

Time of pleading.—The plea of pardon may be made after conviction in response to the question whether the accused has anything to say why the sentence should not be pronounced. Blair *v.* Com., 25 Gratt. (Va.) 850. A pardon may even be called to the attention of the appellate court where the case is pending on appeal. Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699. A pardon may also be alleged as an answer to a return of habeas corpus. *In re* Edymoin, 8 How. Pr. (N. Y.) 478.

76. Spafford *v.* Benzie Cir. Judge, 136 Mich. 25, 98 N. W. 741, holding that a formal motion made to the court having custody of a prisoner, to discharge him on the ground that he has been granted a pardon, is a proper method of bringing the pardon to the attention of the court.

77. Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.

78. Redd *v.* State, 65 Ark. 475, 47 S. W. 119; Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

A pardon is properly proved by the production of the charter or pardon itself under the great seal of the state. Dominick *v.* Bowdoin, 14 Ga. 357; State *v.* Blaisdell, 33 N. H. 388; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. A pardon cannot be proved by a copy of the executive minutes certified by the secretary of state. Either the pardon or a certified copy should be produced. Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

Parol evidence.— A pardon cannot be proved by oral testimony where it is not shown that the original was lost, or if it was, that a certified copy could not be produced. Redd *v.* State, 65 Ark. 475, 47 S. W. 119. So, where the testimony of a witness convicted of felony is objected to, the testimony of a third person that he procured a pardon for such witness and had read the same and that it restored the witness to all the rights of citizenship is inadmissible as

PARENS EST NOMEN GENERALE AD OMNE GENUS COGNATIONIS. A maxim meaning "Parent is a general name for every kind of relationship."[1]

PARENS PATRIÆ. Literally "Parent of the country."[2] (See, generally, STATES; UNITED STATES.)

PARENTAL AUTHORITY. A term which implies restraint, not imprisonment.[3] (See PARENT AND CHILD.)

PARENTAL INFLUENCE. An influence based on kindness and affection, which may bias the child's mind and induce the child to do that which may be imprudent, and which, if the child were properly protected, it would never do.[4] (See PARENT AND CHILD.)

it is not the best evidence of the character and extent of the pardon. Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468.

Secondary evidence.— A showing that a pardon has been mislaid or lost, and that a diligent search has been made for the same, establishes sufficient predicate to admit secondary evidence of its contents. Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330. Best and secondary evidence see EVIDENCE, 17 Cyc. 465 *et seq.*

1. Peloubet Leg. Max. [*citing* Coke Litt. 80*b*].

2. Burrill L. Dict. [*citing* 3 Blackstone Comm. 427]. See also Louisville, etc., R. Co. *v.* Blythe, 69 Miss. 939, 947, 11 So. 111, 30 Am. St. Rep. 599, 16 L. R. A. 251.

3. Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 338, 22 Am. Rep. 702, where it was held that the commitment of a child to an industrial school, as authorized by statute, is not an imprisonment.

4. Worrall's Appeal, 110 Pa. St. 349, 364, 1 Atl. 380, 765 [*citing* Turner *v.* Collins, L. R. 7 Ch. 329, 340, 41 L. J. Ch. 558, 25 L. T. Rep. N. S. 779, 20 Wkly. Rep. 305].

PARENT AND CHILD

By Joseph Walker Magrath*

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* Author of "Infants," 22 Cyc. 503; "Nuisances," *ante*, p. 1143; and joint author of "Evidence," 16 Cyc. 821; "Mechanics' Liens," 27 Cyc. 1.

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Debt of Parent, see FRAUDS, STATUTE OF.
Support of Pauper Parent, see PAUPERS.
Parent For:
Debt of Child, see FRAUDS, STATUTE OF.
Support of Pauper Child, see PAUPERS.
Love and Affection as Consideration For Contract Between Parent and Child, see CONTRACTS.
Marriage of Daughter Pending Suit For Libel as Affecting Right by Parent to Represent Her on Appeal, see APPEAL AND ERROR.
Mortgage by Parent Induced by Threat to Arrest Son, see MORTGAGES.
Mutuality of Contract Made by Parent on Behalf of Child, see CONTRACTS.
Parent as Guardian by Nature, see GUARDIAN AND WARD.
Partition of Property Held by Parent and Child in Common, see PARTITION.
Payment:
Of Legacy to Parent of Legatee, see EXECUTORS AND ADMINISTRATORS.
To Parent as Payment to Child, see PAYMENT.
Power of Parent to Appoint Guardian For Child, see GUARDIAN AND WARD.
Preference of Relatives as Affecting Validity of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Presumption as to Survivorship Between Parent and Child, see DEATH.
Privity Between Parent and Child as Affecting Conclusiveness of Adjudication, see JUDGMENTS.
Promise by Parent to Answer For Debt of Child, see FRAUDS, STATUTE OF.
Promissory Note by Child to Parent For Advancement, see COMMERCIAL PAPER.
Property Rights of Child Independent of Relation, see INFANTS.
Punishment of Child as Assault and Battery, see ASSAULT AND BATTERY.
Purchase by Child of Parent's Land at Tax-Sale, see TAXATION.
Recovery of Damages by Parent or Child For Sale of Intoxicants to the Other, see INTOXICATING LIQUORS.
Reformation of Child, see REFORMATORIES.
Relationship as Element in Creation of Resulting Trust, see TRUSTS.
Release of Child's Claim on Father's Estate as Consideration For Note From Father to Child, see CONTRACTS.
Right of:
Adopted Child to Proceeds of Insurance, see LIFE INSURANCE.
Appeal of Parent in Proceedings Relating to Inheritance of Child, see APPEAL AND ERROR.
Child to:
Benefit of Antenuptial Contract between Parents, see HUSBAND AND WIFE.
Homestead, see HOMESTEAD.
Rely on Limitations Against Parent, see LIMITATIONS OF ACTIONS.
Specific Enforcement of Contract by Parent, see SPECIFIC PERFORMANCE.

For Matters Relating to — (*continued*)
Right of — (*continued*)
Mother to Maintain Bastardy Proceedings, see BASTARDS.
Parent to:
Enforce Liability on Administration Bond, see EXECUTORS AND ADMINISTRATORS.
Rely on Limitations Against Child, see LIMITATIONS OF ACTIONS.
Persons in Family Relations to Exemptions, see EXEMPTIONS.
Seduction of Daughter, see SEDUCTION.
Separate Actions of Parent and Child, see ACTIONS.
Services and Earnings of Pauper Child, see PAUPERS.
Settlement by Parent For Injuries to Child Subsequently Deceased, see COMPROMISE AND SETTLEMENT.
Settlement of Child, see PAUPERS.
Specific Performance of Promise by Parent to Convey to Child, see SPECIFIC PERFORMANCE.
Status of Child of White Father and Indian Mother, see INDIANS.
Submission to Arbitration of Child's Controversy by Parent, see ARBITRATION AND AWARD.
Support of:
Child Pending Divorce Proceedings, see DIVORCE.
Pauper Child by Parent, see PAUPERS.
Pauper Parent by Child, see PAUPERS.
Testimony of Parent as to Legitimacy of Child, see WITNESSES.
Transaction Between Parent and Child in Fraud of Creditors, see FRAUDULENT CONVEYANCES.
Undue Influence as:
Affecting Validity of Deed Between Parent and Child, see DEEDS.
Ground For Rescission of Contract Between Parent and Child, see CONTRACTS.
Validity of:
Conveyance Between Parent and Child as Against Creditors, see FRAUDULENT CONVEYANCES.
Lease Between Parent and Child, see LANDLORD AND TENANT.
Release Given by Child Under Parent's Advice as Against Third Person, see RELEASE.
Sale Between Parent and Child as Against Creditors, see FRAUDULENT CONVEYANCES.

I. THE RELATION IN GENERAL.

The term "parent and child" is used to indicate the relation existing between husband and wife, or either of them, on the one hand, and their legitimate offspring on the other.[1] The existence of the relation is a question of fact,[2] and is established *prima facie* where it is shown that the parties lived together, and recognized by their acts the existence of that relation.[3] The rights and obligations growing out of the relation do not necessarily continue until or terminate upon the child's attainment of majority,[4] but by the consent of the parties may be terminated before[5] or continue in full force after[6] such time; and indeed some of the

1. See Landry *v.* American Creosote Works, 119 La. 231, 43 So. 1016, 11 L. R. A. N. S. 387, defining "child" as "a legitimate offspring." And see, generally, CHILDREN, 7 Cyc. 123–127.
Illegitimate child see BASTARDS.
2. See Neilson *v.* Ray, 17 N. Y. Suppl. 500 (evidence sufficient to establish relation of parent and child); *In re* Turnbull, 4 N. Y. Suppl. 607 (evidence warranting a finding that natural relation of parent and child did not exist).
3. Dalton *v.* Bethlehem, 20 N. H. 505.
4. Brown *v.* Ramsay, 29 N. J. L. 117.
5. Brown *v.* Ramsay, 29 N. J. L. 117.
6. Emery-Bird-Thayer Dry Goods Co. *v.*

rights and obligations growing out of the relation continue throughout the entire lives of the parties.[7] The right of a parent to the service and control of his child is subordinate to the right of the government to his services,[8] and may be enlarged, restrained, and limited as wisdom or policy may dictate, unless the legislative power is limited by some constitutional prohibition.[9] The child has the right, subject to such regulations as the parent may adopt, to use the family property in a careful and proper manner;[10] but the fact that the occupant of land is the son of the owner is not sufficient to raise the legal conclusion that it was to be held free of rent, although slight additional evidence might warrant such a conclusion.[11]

II. CUSTODY AND CONTROL OF CHILDREN.

A. Authority and Duty of Parents — 1. IN GENERAL. The authority which a parent has over a child is not limited, except that it must not be so exercised as to endanger the child's safety or morals,[12] and the law recognizes no distinctions of color or race in the parental relation, but all parents, whatever may be their standing in society, have precisely the same legal authority and control over their children.[13] While both parents are living, the father is bound to protect his children in their persons and rights,[14] and the house of the father being the proper residence of the family he may compel the children to remain there.[15] In the absence of the father, the mother may direct the child's conduct, residence, education, occupation, and associates,[16] and upon the death of the father it is the duty of the mother to exercise authority over her children,[17] and the children have no legal right to quit the mother's home without her consent.[18] While it is admitted to be a delicate thing for the court to interfere against paternal authority, it is well established that it may do so when it becomes necessary for the safety and protection of the child.[19]

Coomer, 87 Mo. App. 404; Brown *v.* Ramsay, 29 N. J. L. 117.

7. See *infra*, III, A, 7; IV, A, 2.

8. Lanahan *v.* Birge, 30 Conn. 438.

9. U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71.

Commitment of pauper, disorderly, and vagrant children.— Wis. Laws (1875), c. 325, and (1876), c. 142, authorizing sending specified classes of pauper, disorderly, and vagrant children to public industrial schools, do not involve any improper interference with the relation of parent and child. Milwaukee Industrial School *v.* Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

10. Bennett *v.* Gillette, 3 Minn. 423, 74 Am. Dec. 774.

Lending goods of parent.— Without proof of authority from the father, a son has no more right than a stranger to lend his father's goods. Johnson *v.* Stone, 40 N. H. 197, 75 Am. Dec. 706.

11. Oakes *v.* Oakes, 16 Ill. 106.

12. Com. *v.* Armstrong, 1 Pa. L. J. 393.

A father cannot by contract permanently divest himself of any portion of the paternal power, although he may delegate part of it to teachers employed to educate the child. Gates *v.* Renfroe, 7 La. Ann. 569.

Punishment of parent for cruelty.— Where a parent imprisoned his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in midwinter, giving as an excuse that the boy was covered with vermin and had been anointed by the father with kerosene, this was needless cruelty, which rendered the father subject to indictment and punishment. Fletcher *v.* People, 52 Ill. 395.

13. People *v.* Cooper, 8 How. Pr. (N. Y.) 288.

14. Gates *v.* Renfroe, 7 La. Ann. 569.

15. Bermudez *v.* Bermudez, 2 Mart. (La.) 180, when the mother leaves without cause.

Guardianship for nurture continues until a child attains the age of fourteen, and until that age a child cannot exercise his own choice as to quitting or remaining with his father. Hyde *v.* Hyde, 29 L. J. P. & M. 150.

16. Matter of Barre, 5 Redf. Surr. (N. Y.) 64.

17. Osborn *v.* Allen, 26 N. J. L. 388. But *compare* Com. *v.* Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412.

18. Prieto *v.* St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 So. 153, 47 L. R. A. 656.

19. Faulk *v.* Faulk, 23 Tex. 653. And see *infra*, II, B, 2.

The California statute provides for judicial cognizance of the abuse of parental authority and authorizes the courts when such abuse is shown to free the child from the parental dominion, while enforcing the duty of support and education, and in a proceeding under such statute the welfare of the child is the first consideration. See Hutchinson *v.* Hutchinson, 124 Cal. 677, 57 Pac. 674, holding the evidence sufficient to show an abuse of parental authority.

2. Chastisement of Child.[20] Either parent[21] has the right to chastise the child for the punishment of faults or disobedience and the enforcement of parental authority,[22] but is amenable to a criminal law for the abuse of such right.[23] The authority of a parent to chastise the child may be delegated to another.[24]

3. Right of Access to Child. A parent who is a proper person is entitled, when the custody of the child is given to another person, to have access to and be allowed to visit or be visited by the child at reasonable times.[25] It is also proper that grandparents should be allowed to visit and be visited by the child,[26] and that where children of the same parents are given into the custody of different persons the children should be allowed to visit each other.[27] But access may be denied even to the parent where it would be detrimental to the child.[28]

4. Religious Education and Affiliations of Child. The general rule is that an infant is to be brought up in the religion of the father,[29] and an antenuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity;[30] although it will have weight with the

20. Chastisement by step-parent see *infra*, XIV, A.

21. Rowe *v.* Rugg, 117 Iowa 606, 91 N. W. 903, 94 Am. St. Rep. 318, holding that the mother is equally entitled with the father to discipline the children. See also Harris *v.* State, 115 Ga. 578, 41 S. E. 983.

22. State *v.* Jones, 95 N. C. 588, 59 Am. Rep. 282; Winterburn *v.* Brooks, 2 C. & K. 16, 61 E. C. L. 16.

23. Neal *v.* State, 54 Ga. 281. See Assault and Battery, 3 Cyc. 1051, 1052.

24. Harris *v.* State, 115 Ga. 578, 41 S. E. 983; Rowe *v.* Rugg, 117 Iowa 606, 91 N. W. 903, 94 Am. St. Rep. 318.

25. *Louisiana.*— State *v.* Jones, 113 La. 298, 36 So. 973.

Minnesota.— State *v.* Flint, 63 Minn. 187, 65 N. W. 272.

Missouri.— *In re* Redmond, 113 Mo. App. 351, 88 S. W. 129.

New Jersey.— See Rossell *v.* Rossell, 64 N. J. Eq. 21, 53 Atl. 821.

Pennsylvania.— Com. *v.* Strickland, 27 Pa. Super. Ct. 309; Com. *v.* Wise, 3 Pa. Dist. 289; Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Dixon, 2 Pa. Co. Ct. 125; Com. *v.* Smith, 1 Brewst. 547; Com. *v.* Devine, 3 Lack. Leg. N. 202.

England.— *In re* Halliday, 17 Jur. 50, 1 Wkly. Rep. 59; Fermor *v.* Pomfret, 1 Jur. 150; *Ex p.* Hopkins, 3 P. Wms. 152, 24 Eng. Reprint 1009.

Canada.— *In re* Mathieu, 29 Ont. 546.

See 37 Cent. Dig. tit. "Parent and Child," § 11½.

The court may direct that security shall be entered by a mother, where the custody of the children is given to the father, to insure their return to the father at the expiration of the several periods during which they are permitted to visit and be with their mother. Com. *v.* Strickland, 27 Pa. Super. Ct. 309.

Bill not properly invoking jurisdiction to award access.— A bill filed by the father of a child against the mother, the parents living in a state of separation without being divorced, not seeking a decree fixing its custody, or making the child a party, but only asking a mandatory injunction requiring the mother to permit the father to have access to the child, does not properly invoke the jurisdiction of the chancellor. Rossell *v.* Rossell, 64 N. J. Eq. 21, 53 Atl. 821.

26. Com. *v.* Perry, 20 Pa. Co. Ct. 245. But *compare* Reiss' Succession, 46 La. Ann. 347, 15 So. 151, 25 L. R. A. 798, where the court refused to interfere on behalf of the grandmother.

27. Com. *v.* Perry, 20 Pa. Co. Ct. 245; Symington *v.* Symington, L. R. 2 H. L. Sc. 415.

28. *Re* Winscom, 2 Hem. & M. 540, 11 Jur. N. S. 297, 13 L. T. Rep. N. S. 14, 13 Wkly. Rep. 425, 71 Eng. Reprint 573. See also *In re* Agar-Ellis, 24 Ch. D. 317, 53 L. J. Ch. 10, 50 L. T. Rep. N. S. 161, 32 Wkly. Rep. 1.

Misconduct of wife.—Where a husband and wife had been separated through the misconduct of the wife only, her petition for access to her infant child was dismissed. *In re* W——, 5 New Rep. 363.

Unnatural crime.— If it is established that the father is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children. Anonymous, 2 Sim. N. S. 54, 42 Eng. Ch. 54, 61 Eng. Reprint 260.

29. Andrews *v.* Salt, L. R. 8 Ch. 622, 28 L. T. Rep. N. S. 686, 21 Wkly. Rep. 616; Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539, 40 L. J. Ch. 534, 25 L. T. Rep. N. S. 115, 19 Wkly. Rep. 735; *In re* Newbery, L. R. 1 Ch. 263, 12 Jur. N. S. 154, 35 L. J. Ch. 330, 13 L. T. Rep. N. S. 781, 14 Wkly. Rep. 360; Skinner *v.* Orde, L. R. 4 P. C. 60, 8 Moore P. C. N. S. 261, 17 Eng. Reprint 310; *In re* Agar-Ellis, 10 Ch. D. 49, 48 L. J. Ch. 1, 39 L. T. Rep. N. S. 380, 27 Wkly. Rep. 117; *In re* Hunt, 2 C. & L. 373; D'Alton *v.* D'Alton, 4 P. D. 87, 47 L. J. P. D. & Adm. 59. See also Austin *v.* Austin, 4 De G. J. & S. 716, 11 Jur. N. S. 536, 13 Wkly. Rep. 761, 69 Eng. Ch. 548, 46 Eng. Reprint 1098.

Where the father has not left nor expressed any direction or instruction as to the religion in which his infant children are to be educated, the court will assume that his wishes were that they should be educated in his own religion. Matter of North, 11 Jur. 7.

30. Andrews *v.* Salt, L. R. 8 Ch. 622, 28

court in considering whether the father has abandoned his right to educate his children in his own religion.[31] A father has a right to direct and regulate the religious faith in which his child shall be brought up,[32] provided the tenets of such religion do not inculcate violation of the laws of the land,[33] and the court will not interfere with the right unless there is an abuse of parental authority.[34] But a father has no right to control or interfere with the rights of conscience of his minor child who has arrived at the age of discretion,[35] and the court has jurisdiction to protect the conscientious convictions of a minor, although adverse to the religion or even to the declared wishes of a living father who has not forfeited his parental authority,[36] although such jurisdiction is only exercised with extreme caution.[37] The court has also jurisdiction to prevent parents preaching irreligious doctrines in the presence of their children.[38] If a father has forfeited or abandoned his right to have his children educated in his own religion, the court will consider only the happiness and benefit of the child.[39] And where a parent has surrendered the control, maintenance, and education of the child to the state as *parens patriæ* the parent is not entitled to prescribe its religious education or form of worship.[40]

B. Custody of Children[41] **—1. Legal Rights — a. Rights of Parents Generally.** The parents have the natural right to the custody and control of their

L. T. Rep. N. S. 686, 21 Wkly. Rep. 616; *In re* Browne, 2 Ir. Ch. 151.

31. Andrews *v.* Salt, L. R. 8 Ch. 622, 28 L. T. Rep. N. S. 686, 21 Wkly. Rep. 616.

32. Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203; *In re* Doyle, 16 Mo. App. 159; *In re* Scanlan, 40 Ch. D. 200, 57 L. J. Ch. 718, 59 L. T. Rep. N. S. 599, 36 Wkly. Rep. 842; *In re* Brown, 2 Ir. Ch. 156.

Where a parent surrenders the control, maintenance, and education of a child to the state as *parens patriæ*, the parent is not entitled to prescribe its religious education or form of worship. Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593.

33. Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

34. *In re* Browne, 2 Ir. Ch. 156, holding that for the father to insist on bringing up the child in his own religion, notwithstanding a verbal agreement to the contrary, entered into before marriage with his wife, is not an abuse of parental authority which will induce the court to interfere.

That it will be more for the pecuniary interest of a child to be educated in one religious faith than in another will not induce the court to interfere with his religious education. Doyle *v.* Wright, 4 Jur. 380, 9 L. J. Ch. 125, 4 Myl. & C. 672, 18 Eng. Ch. 672, 41 Eng. Reprint 259.

35. Com. *v.* Sigman, 3 Pa. L. J. 252.

Extent of authority.— Although a father may not compel his child, against the child's convictions of right, to become a member of any religious denomination, he may lawfully restrain the child from violating the religious obligations which he has taken. Thus, where the child has become a member of any denomination, the father may restrain him from severing his connection with that denomination and joining another. Com. *v.* Armstrong, 1 Pa. L. J. 393.

36. *In re* Newton, [1896] 1 Ch. 740, 65 L. J. Ch. 641, 73 L. T. Rep. N. S. 692, 44 Wkly. Rep. 470; Stourton *v.* Stourton, 8 De G. M. & G. 760, 3 Jur. N. S. 527, 26 L. J. Ch. 354, 5 Wkly. Rep. 418, 57 Eng. Ch. 587, 44 Eng. Reprint 583; Shelley *v.* Westbrooke, Jac. 266, 23 Rev. Rep. 47, 4 Eng. Ch. 266, 37 Eng. Reprint 850; *In re* O'Malley, 8 Ir. Ch. 291; *In re* Browne, 8 Ir. Ch. 172; *In re* Grimes, Ir. R. 11 Eq. 465 (holding, however, that if the case for interference is rested solely on the ground of the child's religious convictions, it must be established that they have some root, and are entertained by a mind of intelligence adequate to understand their importance, and with stability capable of adhering to them; and, in order to inform itself on these points, the court may, by a personal interview, test the opinions and wishes of the child, if it deems such a cause proper); Witty *v.* Marshall, 5 Jur. 1079, 1 Y. & Coll. 68, 20 Eng. Ch. 68, 68 Eng. Reprint 794; Hill *v.* Hill, 8 Jur. N. S. 609, 31 L. J. Ch. 505, 6 L. T. Rep. N. S. 99, 10 Wkly. Rep. 400; *In re* Garnett, 20 Wkly. Rep. 222; *In re* Marshall, 33 Nova Scotia 104.

37. *In re* Browne, 8 Ir. Ch. 172; *In re* Meade, Ir. R. 5 Eq. 98, 19 Wkly. Rep. 313; Davis *v.* Davis, 10 Wkly. Rep. 245.

38. De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 7 Rev. Rep. 340, 32 Eng. Reprint 762.

39. Andrews *v.* Salt, L. R. 8 Ch. 622, 28 L. T. Rep. N. S. 686, 21 Wkly. Rep. 616; *In re* Clarke, 21 Ch. D. 817, 51 L. J. Ch. 762, 41 L. T. Rep. N. S. 84, 31 Wkly. Rep. 37.

40. Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593.

41. Award of custody on divorce of parents see Divorce.

Custody of infants generally see Infants.

Guardian's custody of person of ward see Guardian and Ward.

children,[42] and in the case of the death of one parent the surviving parent has the *prima facie* right to the custody of the children.[43] The parents' right to the custody of the child is, however, not absolute;[44] but is subject to judicial control

42. *Colorado.*— Foulke *v.* People, 4 Colo. App. 519, 36 Pac. 640.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Illinois.— Cormack *v.* Marshall, 122 Ill. App. 208.

Indiana.— Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545.

Iowa.— Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464; Hadley *v.* Forrest, 112 Iowa 125, 83 N. W. 822; Lally *v.* Sullivan, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.

Massachusetts.— Purinton *v.* Jamrock, (1907) 80 N. E. 802.

Minnesota.— State *v.* Martin, 95 Minn. 121, 103 N. W. 888.

Nebraska.—Terry *v.* Johnson, 73 Nebr. 653, 103 N. W. 319; Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

New York.— Matter of Cuneen, 17 How. Pr. 516.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418.

South Carolina.— Hutson *v.* Townsend, 6 Rich. Eq. 249.

Tennessee.— Baskette *v.* Streight, 106 Tenn. 549, 62 S. W. 142; State *v.* Kilvington, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284.

Texas.— State *v.* Deaton, 93 Tex. 243, 54 S. W. 901; Faulk *v.* Faulk, 23 Tex. 653.

United States.— Wadleigh *v.* Newhall, 136 Fed. 941.

England.— *In re* Hakewill, 12 C. B. 223, 74 E. C. L. 223.

See 37 Cent. Dig. tit. "Parent and Child," § 13.

Upon the death of an adoptive parent the right of the natural parent revives. Baskette *v.* Streight, 106 Tenn. 549, 62 S. W. 142.

43. *Alabama.*— Striplin *v.* Ware, 36 Ala. 87.

District of Columbia.— Beall *v.* Bibb, 19 App. Cas. 311.

Georgia.— Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

Indiana.— Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545.

Iowa.— Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464; Lally *v.* Sullivan, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.

Louisiana.— Prieto *v.* St. Alphonsus Convent, 52 La. Ann. 631, 27 So. 153, 4 L. R. A. 656.

Massachusetts.— Dedham *v.* Natick, 16 Mass. 135.

Mississippi.— Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375.

New Jersey.— *In re* Wilson, (Ch. 1903) 55 Atl. 160.

New York.— Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; People *v.* Brugman, 3 N. Y. App. Div. 155, 38 N. Y. Suppl. 193; Lind *v.* Sullestadt, 21 Hun 364; People *v.* Boice, 39 Barb. 307; People *v.* Wilcox, 22 Barb. 178 [*affirmed* in 14 N. Y. 575].

North Carolina.— Ashby *v.* Page, 106 N. C. 328, 11 S. E. 283.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

Texas.— Parker *v.* Wiggins, (Civ. App. 1905) 86 S. W. 788; Sancho *v.* Martin, (Civ. App. 1901) 64 S. W. 1015.

Virginia.— Armstrong *v.* Stone, 9 Gratt. 102.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

England.— *In re* Moore, 11 Ir. C. L. 1.

See 37 Cent. Dig. tit. "Parent and Child," § 13.

Remarriage of mother.— It has been held that the natural right of a surviving mother to the custody of the child is wholly lost or disappears where she has by a second marriage surrendered the legal discretion which is necessary to render the parental control of benefit to the child. Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344; State *v.* Scott, 30 N. H. 274; Spears *v.* Snell, 74 N. C. 210. See also Worcester *v.* Marchant, 14 Pick. (Mass.) 510; Com. *v.* Hamilton, 6 Mass. 273. But in a few cases in other states this has been expressly denied (Beall *v.* Bibb, 19 App. Cas. (D. C.) 311; Armstrong *v.* Stone, 9 Gratt. (Va.) 102), and in addition many cases are to be found where a mother who has remarried has been held to be the proper custodian of her children by a former marriage (Striplin *v.* Ware, 36 Ala. 87; Ashby *v.* Page, 106 N. C. 328, 11 S. E. 283; Casanover *v.* Massengale, (Tex. Civ. App. 1899) 54 S. W. 317. And see cases cited *passim*, II, B).

44. *Georgia.*— Smith *v.* Bragg, 68 Ga. 650.

Indiana.— Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Schleuter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825.

Iowa.— Hadley *v.* Forrest, 112 Iowa 125, 83 N. W. 822; Lally *v.* Sullivan, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.

Massachusetts.— Purinton *v.* Jamrock, (1907) 80 N. E. 802.

Minnesota.— State *v.* Greenwood, 84 Minn. 203, 87 N. W. 489.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

Canada.— Noel *v.* Chevrefils, 15 Quebec Super. Ct. 530.

See 37 Cent. Dig. tit. "Parent and Child," § 13.

when the safety or interest of the child demands it,[45] and must yield where the real and permanent interest of the child demands a different disposition.[46] The rights of the parents are, however, entitled to great consideration and the courts should not deprive them of the custody of their children without good cause.[47]

b. Rights of Parents Inter Sese. Where the father and mother are living together they are jointly entitled to the custody of their children.[48] But the primary right to the custody of the children is in the father,[49] and at common law, in case the parents are living apart and there is a dispute as to the custody,

45. *Georgia.*— Matter of Mitchell, R. M. Charlt. 489.

Illinois.— *In re* Brown, 117 Ill. App. 332.

Ohio.— Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418.

Texas.— Faulk *v.* Faulk, 23 Tex. 653.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

United States.— Wadleigh *v.* Newhall, 136 Fed. 941.

See 37 Cent. Dig. tit. "Parent and Child," § 13.

46. *Arkansas.*— Coulter *v.* Sypert, 78 Ark. 193, 95 S. W. 457.

California.— *In re* Gates, 95 Cal. 461, 30 Pac. 596.

Colorado.— McKercker *v.* Green, 13 Colo. App. 270, 58 Pac. 406.

Connecticut.— Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Indiana.— Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Schleuter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220.

Iowa.— McDonald *v.* Stitt, 118 Iowa 199, 91 N. W. 1031; Hadley *v.* Forest, 112 Iowa 125, 83 N. W. 822.

Massachusetts.— Purinton *v.* Jamrock, (1907) 80 N. E. 802.

Michigan.— Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213.

Minnesota.— State *v.* Anderson, 89 Minn. 198, 94 N. W. 681.

Nebraska.— State *v.* Schroeder, 37 Nebr. 571, 56 N. W. 307; Sturtevant *v.* State, 15 Nebr. 459, 19 N. W. 617, 48 Am. Rep. 349.

New Hampshire.— State *v.* Scott, 30 N. H. 274.

New Jersey.— *In re* Wilson, (Ch. 1903) 55 Atl. 160; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726.

New York.— People *v.* Olmstead, 27 Barb. 9; People *v.* Trafford, 12 N. Y. Suppl. 43; Paddock *v.* Eager, 10 N. Y. Suppl. 710 [*affirmed* in 128 N. Y. 616, 28 N. E. 252]; *In re* Riemann, 10 N. Y. Suppl. 516; *In re* Reynolds, 8 N. Y. Suppl. 172; Matter of Cuneen, 17 How. Pr. 516.

Pennsylvania.— Com. *v.* Wise, 3 Pa. Dist. 289; Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Nutt, 1 Browne 143.

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

Texas.— Pittman *v.* Byars, (Civ. App. 1907) 99 S. W. 1032.

Virginia.— Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273; Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623; Coffee *v.* Black, 82 Va. 567.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

Canada.— Reg. *v.* Ridner, 6 Brit. Col. 73.

See 37 Cent. Dig. tit. "Parent and Child," § 13; and *infra*, II, B, 2, a.

47. *Florida.*— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Georgia.— Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

Iowa.— Shaw *v.* Nachtwey, 43 Iowa 653.

Kentucky.— Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784.

Nebraska.— Terry *v.* Johnson, 73 Nebr. 653, 103, N. W. 319; Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

Ohio.— Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418.

Tennessee.—State *v.* Paine, 4 Humphr. 523, holding that a court of common law will not deprive a father of his right to the custody and control of his children, except for an abuse of trust, either by improper violence or improper restraint, and such as would justify the issuance of a writ of habeas corpus for their protection.

England.— *In re* Fynn, 2 De G. & Sm. 457, 13 Jur. 483, 64 Eng. Reprint 205; Curtis *v.* Curtis, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474.

See 37 Cent. Dig. tit. "Parent and Child," § 13.

48. Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

49. *Connecticut.*— Johnson *v.* Terry, 34 Conn. 259.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Georgia.— Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Franklin *v.* Carswell, 103 Ga. 553, 29 S. E. 476; Pascal *v.* Jones, 41 Ga. 220.

Illinois.— Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385.

Indiana.— Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; McGlennan *v.* Margowski, 90 Ind. 150; Henson *v.* Walts, 40 Ind. 170.

Iowa.— Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558; Everitt *v.* Sherfey, 1 Iowa 356.

Louisiana.— Gates *v.* Renfroe, 7 La. Ann. 569.

Massachusetts.— Benson *v.* Remington, 2 Mass. 113.

the right of the father is superior to that of the mother.[50] This common-law rule, however, has been much modified by statutes under which the rights of the parents as against each other are equal, and the custody of the children is to be determined according to the exigencies of the particular case,[51] and even in the

Minnesota.— State *v.* Anderson, 89 Minn. 198, 94 N. W. 681.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— *In re* Wilson, (Ch. 1903) 55 Atl. 160; Giffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25; Baird *v.* Baird, 18 N. J. Eq. 194 [*reversed* on the facts in 21 N. J. Eq. 384]; Bennet *v.* Bennet, 13 N. J. Eq. 114.

New York.— People *v.* Olmstead, 27 Barb. 9; People *v.* Humphreys, 24 Barb. 521; People *v.* Rubens, 92 N. Y. Suppl. 121; Ahrenfeldt *v.* Ahrenfeldt, Hoffm. 497.

Ohio.— Matter of Coons, 20 Ohio Cir. Ct. 47, 11 Ohio Cir. Dec. 208.

Pennsylvania.— Com. *v.* Nutt, 1 Browne 143; Com. *v.* Womelsdorf, 10 Kulp 62.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277; *In re* Kottman, 2 Hill 363, 27 Am. Dec. 390.

Tennessee.— State *v.* Paine, 4 Humphr. 523.

Texas.— Faulk *v.* Faulk, 23 Tex. 653; Parker *v.* Wiggins, (Civ. App. 1905) 86 S. W. 788; Watts *v.* Lively, (Civ. App. 1901) 60 S. W. 676.

Vermont.— Sequin *v.* Peterson, 45 Vt. 255, 12 Am. Rep. 194.

Virginia.— Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273.

Washington.— Carey *v.* Hertel, 37 Wash. 27, 79 Pac. 482; *In re* Neff, 20 Wash. 652, 56 Pac. 383.

West Virginia.— Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371, 88 Am. St. Rep. 862, 55 L. R. A. 896; Rust *v.* Vanvaeter, 9 W. Va. 600.

Wisconsin.— Markwell *v.* Pereles, 95 Wis. 406, 69 N. W. 798.

England.— Matter of Andrews, L. R. 8 Q. B. 153, 28 L. T. Rep. N. S. 353, 21 Wkly. Rep. 480; *In re* A. & B., [1897] 1 Ch. 786, 66 L. J. Ch. 592; *In re* Hakewill, 12 C. B. 223, 74 E. C. L. 223; Reg. *v.* Howes, 3 E. & E. 332, 7 Jur. N. S. 22, 30 L. J. M. C. 47, 107 E. C. L. 332, 8 Cox C. C. 405, 3 L. T. Rep. N. S. 467, 9 Wkly. Rep. 99.

See 37 Cent. Dig. tit. "Parent and Child," § 14.

50. *Alabama.*— *Ex p.* Boaz, 31 Ala. 425.

Connecticut.— Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; Johnson *v.* Terry, 34 Conn. 259.

Illinois.— Pierce *v.* Millay, 62 Ill. 133; Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385.

Indiana.— Tarkington *v.* State, 1 Ind. 171, Smith 168.

Kentucky.— Bonney *v.* Bonney, 3 S. W. 171, 8 Ky. L. Rep. 774.

Louisiana.— Gates *v.* Renfroe, 7 La. Ann. 569; Bermudez *v.* Bermudez, 2 Mart. 180.

Massachusetts.— Com. *v.* Briggs, 16 Pick. 203.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286.

New York.— People *v.* Olmstead, 27 Barb. 9; People *v.* Sinclair, 47 Misc. 230, 95 N. Y. Suppl. 861; Matter of Watson, 10 Abb. N. Cas. 215; People *v.* Mercein, 3 Hill 399, 38 Am. Dec. 644; People *v.* Chegaray, 18 Wend. 637.

North Carolina.— Harris *v.* Harris, 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396; Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474. See Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

Pennsylvania.— Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Smith, 1 Brewst. 547; Hinkle *v.* Passmore, 11 Lanc. Bar 107; Com. *v.* Snyder, 11 Lanc. Bar 62.

Rhode Island.— State *v.* Barney, 14 R. I. 62.

Tennessee.—State *v.* Paine, 4 Humphr. 523.

Virginia.— Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273.

England.— Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278; *Ex p.* McClellan, 1 Dowl. P. C. 81; Westmeath *v.* Westmeath, Jac. 251 note, 4 Eng. Ch. 251, 37 Eng. Reprint 848; *In re* Halliday, 17 Jur. 56, 1 Wkly. Rep. 59; Curtis *v.* Curtis, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474; Constable *v.* Constable, 34 Wkly. Rep. 649.

Canada.— *Re* A. B., 9 Can. Cr. Cas. 390; *In re* Mathieu, 29 Ont. 546.

See 37 Cent. Dig. tit. "Parent and Child," § 15.

It requires a strong case to induce the court to interfere with the common-law rights of the husband on a petition by a wife to remove children from the custody and control of her husband, although, independent of statutory provisions, the chancery court has jurisdiction over the custody of minor children, to be exercised for their welfare and benefit. Bryan *v.* Bryan, 34 Ala. 516.

When a child is of years of discretion, although under age, the court will not interfere to place him under the restraint of his father. Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278.

51. *Alabama.*— Anonymous, 55 Ala. 428.

Iowa.— Lally *v.* Sullivan, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681; State *v.* Kirkpatrick, 54 Iowa 373, 6 N. W. 588.

New Jersey.— Carson *v.* Carson, (Ch. 1903) 54 Atl. 149.

New York.— People *v.* Sternberger, 12 N. Y. App. Div. 398, 42 N. Y. Suppl. 423; People *v.* Brugman, 3 N. Y. App. Div. 155, 38 N. Y. Suppl. 193; People *v.* Boice, 39 Barb. 307;

absence of statute the father has only a primary and not an absolute right,[52] which is subject to the general rule that the welfare of the child is the paramount consideration,[53] in pursuance of which the mother may be given preference over the father where her custody appears most beneficial to the child.[54]

c. Rights of Parents as Against Third Persons. A parent who is of good character and a proper person to have the custody of the child and reasonably able to provide for it is entitled to the custody as against other persons,[55] although such

People *v.* Brooks, 35 Barb. 85; Matter of Watson, 10 Abb. N. Cas. 215.

Ohio.— Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

Pennsylvania.— O'Brien *v.* Philadelphia, 215 Pa. St. 407, 64 Atl. 551; Com. *v.* Strickland, 27 Pa. Super. Ct. 309; Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Myers, 18 Pa. Co. Ct. 385.

England.— *In re* A. & B., [1897] 1 Ch. 786, 66 L. J. Ch. 592.

See 37 Cent. Dig. tit. "Parent and Child," § 15.

Wife living apart from husband without cause.— Under the New York Act of 1860, § 9, declaring that every married woman is hereby constituted and declared to be the joint guardian of her children with her husband, with equal powers, rights, and duties in regard to them with her husband, a wife, while living in a state of voluntary separation from her husband, has no claims as to the custody of the children, where her husband has given no provocation for such separation People *v.* Brooks, 35 Barb. (N. Y.) 85. But *compare* Com. *v.* Hart, 14 Phila. (Pa.) 352.

Statute permissive merely.— 2 N. Y. Rev. St. p. 148, §§ 1, 2, providing that where the parents have separated the mother may have habeas corpus for minor children, and that the court may award her custody of them, are only permissive, and do not give an absolute right to either parent. *In re* Reynolds, 8 N. Y. Suppl. 172.

Construction of statute.— Under Rev. St. p. 148, §§ 1–3, providing that, where a husband and wife live in a state of separation without being divorced, the wife may apply for a writ of habeas corpus to have the custody of the infant children awarded to her, it is sufficient for a wife to show that she is justified, on moral grounds, in living separate from her husband, although these grounds would not support a decree of divorce. People *v.* Sternberger, 12 N. Y. App. Div. 398, 42 N. Y. Suppl. 423.

52. Com. *v.* Myers, 18 Pa. Co. Ct. 385; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

53. State *v.* Greenwood, 84 Minn. 203, 87 N. W. 489; Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273. See *infra*, II, B, 2, a.

54. *Minnesota.*— State *v.* Flint, 63 Minn. 187, 65 N. W. 272.

Missouri.— Campbell *v.* Campbell, 76 Mo. App. 396.

New York.— People *v.* Olmstead, 27 Barb. 9; Matter of Watson, 10 Abb. N. Cas. 215; People *v.* Mercein, 8 Paige 47.

Ohio.— State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Pennsylvania.— Com. *v.* Snyder, 11 Lanc. Bar 62.

England.— Smart *v.* Smart, [1892] A. C. 425, 56 J. P. 676, 61 L. J. P. C. 38, 67 L. T. Rep. N. S. 510; *In re* Elderton, 25 Ch. D. 220, 48 J. P. 341, 53 L. J. Ch. 258, 50 L. T. Rep. N. S. 26, 32 Wkly. Rep. 227; *Ex p.* Bailey, 6 Dowl. P. C. 311.

See 37 Cent. Dig. tit. "Parent and Child," § 15.

55. *Alabama.*— Striplin *v.* Ware, 36 Ala. 87.

California.— *In re* Linden, Myr. Prob. 215.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203; Miller *v.* Miller, 38 Fla. 227, 20 So. 989, 56 Am. St. Rep. 166.

Georgia.— Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

Indiana.— Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083; McGlennan *v.* Margowski, 90 Ind. 150.

Iowa.— Van Aukin *v.* Wieman, 128 Iowa 476, 104 N. W. 464; Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558.

Kentucky.— Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784.

Minnesota.—State *v.* Martin, 95 Minn. 121, 103 N. W. 888.

Missouri.— Edwards *v.* Edwards, 84 Mo. App. 552.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— Titus *v.* McGloskey, 67 N. J. Eq. 709, 63 Atl. 244; Giffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25; Baird *v.* Baird, 18 N. J. Eq. 194 [*reversed* on other grounds in 21 N. J. Eq. 384].

New York.— People *v.* Gates, 57 Barb. 291 [*reversed* on other grounds in 43 N. Y. 40].

North Carolina.— Latham *v.* Ellis, 116 N. C. 30, 20 S. E. 1012 [*followed* in Newsome *v.* Bunch, 144 N. C. 15, 56 S. E. 509].

Ohio.— Matter of Coons, 20 Ohio Cir. Ct. 47, 11 Ohio Cir. Dec. 208.

Pennsylvania.— Com. *v.* Branyan, 8 Pa. Co. Ct. 80; Com. *v.* Cool, 2 Chest. Co. Rep. 304.

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269; *Ex p.* Williams, 11 Rich. 452.

Texas.— State *v.* Deaton, 93 Tex. 243, 54 S. W. 901; Parker *v.* Wiggins, (Civ. App. 1905) 86 S. W. 788; Sancho *v.* Martin, (Civ. App. 1901) 64 S. W. 1015; Casanover *v.* Massengale, (Civ. App. 1899) 54 S. W. 317.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

others are much attached to the child,[56] and the child is attached to them,[57] and prefers to remain with them,[58] and they are in all respects suitable to have the custody of the child[59] and able to support and care for it,[60] and even though they are of larger fortune or able to provide for the child more comfortably than the parent,[61] or to care for it better,[62] or to give it a better education than the parent can afford.[63] This rule has been applied in favor of a father, as against maternal grandparents,[64] a maternal aunt,[65] a paternal aunt,[66] and a statutory or official guardian,[67] and in favor of a mother as against paternal grandparents,[68] and a maternal grandmother, uncle, and aunt.[69]

d. Agreements or Directions as to Custody.[70] There is a great deal of authority in support of the view that a contract by which a parent surrenders or transfers the custody and control of the child to another person is invalid,[71]

Wisconsin.— Johnston *v.* Johnston, 89 Wis. 416, 62 N. W. 181.

England.— *Ex p.* Hopkins, 3 P. Wms. 152, 24 Eng. Reprint 1009.

See 37 Cent. Dig. tit. "Parent and Child," §§ 13, 14.

Right of grandparent.— Under the Pennsylvania statutes which, on the death of the parents, place the grandfather *in loco parentis* and require him to support the children, the grandfather is entitled to their custody. Com. *v.* Fitzpatrick, 5 Pa. Dist. 309.

56. Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464; Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 93 Am. St. Rep. 411, 53 L. R. A. 784; State *v.* Deaton, 93 Tex. 243, 54 S. W. 901 [*reversing* (Civ. App. 1899) 52 S. W. 591]; Parker *v.* Wiggins, (Tex. Civ. App. 1905) 86 S. W. 788; Sancho *v.* Martin, (Tex. Civ. App. 1901) 64 S. W. 1015.

57. Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784; State *v.* Deaton, 93 Tex. 243, 54 S. W. 901 [*reversing* (Civ. App. 1899) 52 S. W. 591]; Parker *v.* Wiggins, (Tex. Civ. App. 1905) 86 S. W. 788, unless the child has reached the age when it may be presumed to have formed a lasting affection for its foster parents.

58. See *infra*, II, B, 2, c.

59. State *v.* Deaton, 93 Tex. 243, 54 S. W. 901 [*reversing* (Civ. App. 1899) 52 S. W. 591].

60. Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464; Sancho *v.* Martin, (Tex. Civ. App. 1901) 64 S. W. 1015.

61. *Florida.*— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Illinois.— Cormack *v.* Marshall, 122 Ill. App. 208.

Indiana.— Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083.

Iowa.— Dunkin *v.* Seifert, 122 Iowa 64, 98 N. W. 558. See also Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464.

Kentucky.— Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784.

Mississippi.— Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375.

New Jersey.— Giffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25.

Texas.— Watts *v.* Lively, (Civ. App. 1901) 60 S. W. 676.

Wisconsin.— Johnston *v.* Johnston, 89 Wis. 416, 62 N. W. 181.

See 37 Cent. Dig. tit. "Parent and Child," §§ 13, 14.

62. *In re* Neff, 20 Wash. 652, 56 Pac. 383.

63. Dunkin *v.* Seifert, 122 Iowa 64, 98 N. W. 558; *In re* Neff, 20 Wash. 652, 56 Pac. 383.

64. *Iowa.*— Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558.

New Jersey.— Titus *v.* McCloskey, 67 N. J. Eq. 709, 63 Atl. 244.

North Carolina.— Latham *v.* Ellis, 116 N. C. 30, 20 S. E. 1012 [*followed* in Newsome *v.* Bunch, 144 N. C. 15, 56 S. E. 509].

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

Texas.— Watts *v.* Lively, (Civ. App. 1901) 60 S. W. 676.

See 37 Cent. Dig. tit. "Parent and Child," §§ 13, 14.

65. Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083; Hutson *v.* Townsend, 6 Rich. Eq. (S. C.) 249.

66. Van Auken *v.* Wieman, 128 Iowa 476, 104 N. W. 464.

67. Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083; Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

68. Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784; Edwards *v.* Edwards, 84 Mo. App. 552; Armstrong *v.* Stone, 9 Gratt. (Va.) 102.

69. Com. *v.* Cool, 2 Chest. Co. Rep. (Pa.) 304.

70. Adoption see ADOPTION.

Apprenticeship see APPRENTICES.

Consideration of agreement in connection with welfare of child see *infra*, II, B, 2, i.

71. Johnson *v.* Terry, 34 Conn. 259, 263 (where it is said: "It is not in the power of a father to divest himself by contract, even with the mother, of the custody of his children"); Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203; Chapsky *v.* Wood, 26 Kan. 650, 40 Am. Rep. 321; Swift *v.* Swift, 34 Beav. 266, 11 Jur. N. S. 148, 34 L. J. Ch. 209, 11 L. T. Rep. N. S. 697, 13 Wkly. Rep. 378, 55 Eng. Reprint 637 [*affirmed* in 4 De G. J. & S.

as being contrary to public policy,[72] and is not binding upon,[73] and cannot be enforced against, the parent,[74] who may at any time revoke the consent so given to such other persons having the custody[75] and recover possession of the child.[76] But, on the other hand, contracts or agreements by parents giving or surrendering to other persons the custody of their children have often been sustained as valid;[77] and it has been held that the parent cannot revoke his release of the

710, 11 Jur. N. S. 458, 34 L. J. Ch. 394, 12 L. T. Rep. N. S. 435, 13 Wkly. Rep. 731, 69 Eng. Ch. 543, 46 Eng. Reprint 1095]; *In re* Hatfield, 1 Truem. Eq. Rep. (N. Brunsw.) 142.

A parol contract by which the father of a child confers the permanent custody of such child on another is not binding. Cormack *v.* Marshall, 122 Ill. App. 208 [*following* Weir *v.* Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672].

72. *Arkansas.*— Washaw *v.* Gimble, 50 Ark. 351, 7 S. W. 389.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203.

Kansas.— Chapsky *v.* Wood, 26 Kan. 650, 40 Am. Rep. 321.

Michigan.— Carpenter *v.* Carpenter, 149 Mich. 138, 112 N. W. 748.

England.— Swift *v.* Swift, 34 Beav. 266, 11 Jur. N. S. 148, 34 L. J. Ch. 209, 11 L. T. Rep. N. S. 697, 13 Wkly. Rep. 378, 55 Eng. Reprint 637 [*affirmed* in 4 De G. J. & S. 710, 11 Jur. N. S. 458, 34 L. J. Ch. 394, 13 Wkly. Rep. 731, 69 Eng. Ch. 543, 46 Eng. Reprint 1095].

See 37 Cent. Dig. tit. "Parent and Child," §§ 6, 7, 23.

73. Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203; Weir *v.* Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; Parker *v.* Wiggins, (Tex. Civ. App. 1905) 86 S. W. 788; Casanover *v.* Massengale, (Tex. Civ. App. 1899) 54 S. W. 317.

74. Weir *v.* Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; Kennedy *v.* May, 7 L. T. Rep. N. S. 819, holding the contract bad for want of mutuality. But *compare* Hamilton *v.* Hector, L. R. 6 Ch. 701, 40 L. J. Ch. 692, 19 Wkly. Rep. 990, holding that where a wife intended to proceed in the divorce court for a separation, but by a deed of compromise it was agreed that the proceedings should be stayed, that two of the children should remain at such schools as the husband should direct, and that their holidays should be passed at such places as the trustees should direct, the agreement as to where the holidays of the children should be passed was reasonable, and would be enforced by the court.

75. *In re* Galleher, 2 Cal. App. 364, 84 Pac. 352; Foulke *v.* People, 4 Colo. App. 519, 36 Pac. 640; Reg. *v.* Smith, 17 Jur. 24, 22 L. J. Q. B. 116, L. & M. 132, 1 Wkly. Rep. 130, although such consent was given in consideration of an agreement by such third person to take charge of the child. See also Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500, holding that the right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement.

Expenses incurred under contract.— If, in consequence of an agreement by a father to give up the custody of his child to a third person, the latter has incurred pecuniary liability, the court will, it seems, protect him. *In re* Hatfield, 1 Truem. Eq. Rep. (N. Brunsw.) 142.

76. *Indiana.*— Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Brooke *v.* Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

Minnesota.— State *v.* Anderson, 89 Minn. 198, 94 N. W. 681.

New Jersey.— State *v.* Clover, 16 N. J. L. 419.

Washington.— Carey *v.* Hertel, 37 Wash. 27, 79 Pac. 482; Lovell *v.* House of Good Shepherd, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839.

England.— Reg *v.* Smith, 17 Jur. 24, L. & M. 132, 22 L. J. Q. B. 116, 1 Wkly. Rep. 130.

See 37 Cent. Dig. tit. "Parent and Child," §§ 8, 23.

77. *Delaware.*— State *v.* Bratton, 15 Am. L. Reg. N. S. 359.

Georgia.— Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Carter *v.* Brett, 116 Ga. 114, 42 S. E. 348; Bently *v.* Terry, 59 Ga. 555, 27 Am. Rep. 399; Janes *v.* Cleghorn, 54 Ga. 9. See also Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

Iowa.— Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631; Bonnett *v.* Bonnett, 61 Iowa 199, 16 N. W. 91, 47 Am. Rep. 810.

Maine.— State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324, agreement between parents.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270; Curtis *v.* Curtis, 5 Gray 535.

New Hampshire.— State *v.* Barrett, 45 N. H. 15; State *v.* Libbey, 44 N. H. 321, 82 Am. Dec. 223; State *v.* Richardson, 40 N. H. 272.

New York.— Fitzgerald *v.* Fitzgerald, 24 Hun 370 (holding that Laws (1871), c. 32, authorizing a father to dispose of the custody of his child, repeals Laws (1862), c. 172, § 6, under which the assent of the mother is necessary); Lind *v.* Sullestadt, 21 Hun 364; People *v.* Lohman, 17 Abb. Pr. 395 note. But *compare* People *v.* Mercein, 3 Hill 399, 38 Am. Dec. 644.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Pennsylvania.— Com. *v.* Dixon, 2 Pa. Co. Ct. 125; Com. *v.* Barney, 4 Brewst. 408.

right to the custody of[78] or recover possession of the child.[79] Even though it be conceded that a parent may release his right to the custody of the children, he will not be held to have done so unless it clearly appears that such was his intention;[80] and it will be presumed that the surrender of the custody of a minor child by its parent is intended to be temporary unless the contrary clearly appears.[81]

Rhode Island.— State *v.* Barney, 14 R. I. 62.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277.

Tennessee.— State *v.* Kilvington, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284.

West Virginia.— Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371, 88 Am. St. Rep. 862, 55 L. R. A. 896 [*following* Cunningham *v.* Barnes, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; Green *v.* Camphell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843].

Wisconsin.— *In re* Goodenough, 19 Wis. 274.

See 37 Cent. Dig. tit. "Parent and Child," §§ 6–8, 23.

Requisites and sufficiency of contract.—The right of a father to the custody of his child cannot be assigned or transferred by a parol agreement, but a father may by deed part with his parental rights to the custody of his infant child, although such deed is not in the form required by the statute for indentures of apprenticeship, and the child is consequently not bound. State *v.* Barrett, 45 N. H. 15. A parent may confer on some other person the legal right to the custody of his minor child without the execution of adoption papers. Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631.

Where a father abandons his wife and child, the mother has power to make a valid agreement, binding on both parents, parting with the parental right of custody of such child. Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

78. Janes *v.* Cleghorn, 54 Ga. 9; Matter of Murphy, 12 How. Pr. (N. Y.) 513; Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

79. *Connecticut.*— Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593.

Iowa.— Bonnett *v.* Bonnett, 61 Iowa 199, 16 N. W. 91, 47 Am. Rep. 810.

Massachusetts.— Curtis *v.* Curtis, 5 Gray 535.

Pennsylvania.— Com. *v.* Gilkeson, 1 Phila. 194.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277.

West Virginia.— Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371, 88 Am. St. Rep. 862, 55 L. R. A. 896 [*following* Cunningham *v.* Barnes, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; Green *v.* Campbell, 35 W. Va. 678, 14 S. E. 212, 29 Am. St. Rep. 843].

See 37 Cent. Dig. tit. "Parent and Child," §§ 8, 23.

Agreement between parents.— Where the mother of a child voluntarily yields the control to the father, and he takes the child away with him, she cannot afterward resume the control without the assent of the father; no reason being shown why the father should not retain the custody of the child. Mitchell *v.* McElvin, 45 Ga. 558.

80. Monk *v.* McDaniel, 116 Ga. 108, 42 S. E. 360 (holding that where a father in a letter to his sister-in-law requested that in the event of his death she would take and keep his child, and she in response wrote him that in case of his death she would take the child and care for it until she could get it a good home, this correspondence did not, in the absence of an acceptance by the father of the sister-in-law's offer, give her, after his death, the legal custody and control of the child); *In re* Scarritt, 76 Mo. 565, 43 Am. Rep. 768 (holding that a letter written by a husband to the parents of his wife, at the time of his wife's death, stating that he intrusts his child to their custody for a certain time, did not constitute a contract divesting himself of the right to custody of the child); People *v.* Paschal, 68 Hun (N. Y.) 344, 22 N. Y. Suppl. 881 (holding that where a woman employed in an orphan asylum placed her child in the asylum, and applied a portion of her wages, equivalent to one dollar per week, to the child's support, the child was not absolutely surrendered to the care of the asylum); Markwell *v.* Pereles, 95 Wis. 406, 69 N. W. 798 (holding that where a father, at his wife's funeral, requested that he be left alone with her remains, and the two brothers of the wife remained in the room, and one of them requested the father to consent, in the name of his wife, that they should have the custody of the infant child, and the father remained silent, and one of the brothers said to him that, if he would not speak, to shake hands, and the father took their hands, and after the funeral left the child in their care, where it remained for twenty-one months, the father, during such time, constantly claiming the right to its custody, he had not surrendered his right to the custody of the child).

The understanding of persons having temporary custody of a child that the father had given to them the right to permanent custody does not confer upon them that right, unless there was a corresponding understanding on the part of the father, so clearly shown as to be enforceable against him. Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631.

81. Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631. See also Wishard *v.* Medaris, 34 Ind. 168, holding that an instrument by which a parent surrenders the child to an orphan's institution, specifying no particular time for which it shall be retained, is a mere temporary arrangement, and the parent may reclaim the child at any time.

One parent, even though entitled to the custody of the child as against the other parent, cannot, by testamentary disposition or otherwise, dispose of the custody of the child after his or her death so as to defeat the right of the surviving parent;[82] and it has been held that a wife living apart from her husband is entitled to the custody of the child as against a person in whose care the husband placed it.[83] But persons to whom parents have intrusted or surrendered the custody of their children are entitled to such custody as against third persons.[84]

2. Considerations Affecting Custody — a. Welfare of Child. It is well established as a general rule that the welfare and best interests of the child are the controlling elements in the determination of all disputes as to the custody.[85] But nevertheless the court should always give the custody to the person having the

82. *Indiana.*— Gilmore *v.* Kitson, 165 Ind. 402, 74 N. E. 1083.

Mississippi.— Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375.

New York.— People *v.* Brugman, 3 N. Y. App. Div. 155, 38 N. Y. Suppl. 193; People *v.* Boice, 39 Barb. 307.

Texas.— Parker *v.* Wiggins, (Civ. App. 1905) 86 S. W. 788.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

See 37 Cent. Dig. tit. "Parent and Child," §§ 7, 23.

But *compare* Doyle *v.* Wright, 4 Jur. 380, 9 L. J. Ch. 125, 4 Myl. & C. 672, 18 Eng. Ch. 672, 41 Eng. Reprint 259, holding that where a father has, by will, appointed a guardian of his children, the mother has no right to their custody, although the court may leave them under her care.

83. Thompson *v.* Thompson, 72 N. C. 32. *Contra*, State *v.* Barney, 14 R. I. 62; *Re* A B, 9 Can. Cr. Cas. 390.

84. Jones *v.* Harmon, 27 Fla. 238, 9 So. 245; Stroup *v.* Chase, 94 Ga. 410, 20 S. E. 418; Com. *v.* St. John's Orphan Asylum, 9 Phila. (Pa.) 571; Knott *v.* Cotter, 2 Phil. 192, 22 Eng. Ch. 192, 41 Eng. Reprint 915; Hartley *v.* Smith, 10 Wkly. Rep. 763.

Custody pending application for directions. —If a father residing abroad has directed his child to be in custody of a person, not a relative, the child will not, pending an application to him for directions, be removed from the care of her near relatives. *In re* Suttor, 2 F. & F. 267.

85. *Alabama.*— Pearce *v.* Pearce, 136 Ala. 188, 33 So. 883; Brinster *v.* Compton, 68 Ala. 299; Woodruff *v.* Conley, 50 Ala. 304. See also Bryan *v.* Bryan, 34 Ala. 516.

California.— Hutchinson *v.* Hutchinson, 124 Cal. 677, 57 Pac. 674; *In re* Gates, 95 Cal. 461, 30 Pac. 596; *In re* Linden, Myr. Prob. 215.

Colorado.— McKercher *v.* Green, 13 Colo. App. 270, 58 Pac. 406; Foulke *v.* People, 4 Colo. App. 519, 36 Pac. 640.

Connecticut.— Kelsey *v.* Green, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471; Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593. See also Nickols *v.* Giles, 2 Root 461.

District of Columbia.— Beall *v.* Bibb, 19 App. Cas. 311.

Florida.— Hernandez *v.* Thomas, 50 Fla. 522, 39 So. 641, 111 Am. St. Rep. 137, 2 L. R. A. N. S. 203; Marshall *v.* Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118.

Georgia.— Smith *v.* Bragg, 68 Ga. 650; State *v.* King, Ga. Dec. 93; *Ex p.* Ralston, R. M. Charlt. 119.

Illinois.— Umlauf *v.* Umlauf, 128 Ill. 378, 21 N. E. 600; *In re* Smith, 13 Ill. 138.

Indiana.— Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Schlenter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 54 Am. St. Rep. 220; Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545; Garner *v.* Gordon, 41 Ind. 92; Young *v.* State, 15 Ind. 480.

Iowa.— McDonald *v.* Stitt, 118 Iowa 199, 91 N. W. 1031; Hadley *v.* Forrest, 112 Iowa 125, 83 N. W. 822; Kuhn *v.* Breen, 101 Iowa 665, 70 N. W. 722; Lally *v.* Sullivan, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681; Farrar *v.* Farrar, 75 Iowa 125, 39 N. W. 226; Bonnett *v.* Bonnett, 61 Iowa 199, 16 N. W. 91, 47 Am. Rep. 810; Shaw *v.* Nachtwey, 43 Iowa 653.

Kansas.— *In re* Snook, 54 Kan. 219, 38 Pac. 272; *In re* Beckwith, 43 Kan. 159, 23 Pac. 164; *In re* Bullen, 28 Kan. 781; *In re* Bort, 25 Kan. 308, 37 Am. Rep. 255.

Kentucky.— Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784; Ellis *v.* Jesup, 11 Bush 403.

Louisiana.— State *v.* Jones, 113 La. 298, 36 So. 973.

Maine.— Stetson *v.* Stetson, 80 Me. 483, 15 Atl. 60; State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324.

Massachusetts.— Purinton *v.* Jamrock, (1907) 80 N. E. 802.

Michigan.— Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213.

Minnesota.— State *v.* Anderson, 89 Minn. 198, 94 N. W. 681; State *v.* Greenwood, 84 Minn. 203, 87 N. W. 489; State *v.* Flint, 63 Minn. 187, 65 N. W. 272.

Mississippi.— McShan *v.* McShan, 56 Miss. 413; Maples *v.* Maples, 49 Miss. 393; Foster *v.* Alston, 6 How. 406.

Missouri.— *In re* Redmond, 113 Mo. App. 351, 88 S. W. 129; Home of Friendless *v.* Berry, 79 Mo. App. 566; *In re* Delano, 37 Mo. App. 185; *In re* Doyle, 16 Mo. App. 159.

Nebraska.— Schroeder *v.* Filbert, 41 Nebr.

legal right thereto,[86] unless the circumstances of the case justify it, acting for the welfare of the child, in decreeing the custody elsewhere,[87] and cannot interfere with the rights of a parent unless he so conducts himself as to render it essential to the safety and welfare of the child in some serious and important respect, either physically, intellectually, or morally, that it should be removed from his custody.[88]

b. Age, Sex, or Health of Child. It is a doctrine very generally adopted, and

745, 60 N. W. 89; State *v.* Schroeder, 37 Nebr. 571, 56 N. W. 307; Giles *v.* Giles, 30 Nebr. 624, 46 N. W. 916; Sturtevant *v.* State, 15 Nebr. 459, 19 N. W. 617, 48 Am. St. Rep. 349.

New Hampshire.— State *v.* Libbey, 44 N. H. 321, 82 Am. Dec. 223.

New Jersey.— *In re* Wilson, (Ch. 1903) 55 Atl. 160; Carson *v.* Carson, (Ch. 1903) 54 Atl. 149; State *v.* Stigall, 22 N. J. L. 286; Griffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Baird *v.* Baird, 21 N. J. Eq. 384 [*reversing* 18 N. J. Eq. 194]; Bennet *v.* Bennet, 13 N. J. Eq. 114; Mayne *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397.

New Mexico.— Bustamento *v.* Analla, 1 N. M. 255.

New York.— People *v.* Brown, 35 Hun 324; People *v.* Brooks, 35 Barb. 85; People *v.* Olmstead, 27 Barb. 9; People *v.* Kling, 6 Barb. 366; People *v.* Pillow, 1 Sandf. 672; Day *v.* Day, 4 Misc. 235, 24 N. Y. Suppl. 873; People *v.* Trafford, 12 N. Y. Suppl. 43; Paddock *v.* Eager, 10 N. Y. Suppl. 710 [*affirmed* in 128 N. Y. 616, 28 N. E. 252]; *In re* Lundergan, 8 N. Y. Suppl. 924; Matter of Raborg, 3 N. Y. St. 323; Matter of Watson, 10 Abb. N. Cas. 215; Matter of Lesslier, 17 Abb. Pr. 397; Matter of Schroeder, 65 How. Pr. 194; Matter of Holmes, 19 How. Pr. 329; Matter of Cuneen, 17 How. Pr. 516; People *v.* Cooper, 8 How. Pr. 288; Matter of Hansen, 1 Edm. Sel. Cas. 9; *In re* Waldron, 13 Johns. 418; People *v.* Mercein, 8 Paige 47.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Gishwiler *v.* Dodez, 4 Ohio St. 615; *In re* Barnes, 11 Ohio Dec. (Reprint) 848, 30 Cinc. L. Bul. 164; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Pennsylvania.— Com. *v.* Addicks, 5 Binn. 520; Com. *v.* Strickland, 27 Pa. Super. Ct. 309; Com. *v.* Wise, 3 Pa. Dist. 289; Com. *v.* Dixon, 2 Pa. Co. Ct. 125; Com. *v.* Barney, 4 Brewst. 408; Com. *v.* Smith, 1 Brewst. 547; Com. *v.* Kenney, 1 Chest. Co. Rep. 322; Com. *v.* Higgins, 7 Kulp 398; Com. *v.* Devine, 3 Lack. Leg. N. 202; Hinkle *v.* Passmore, 11 Lanc. Bar 107; Com. *v.* Muir, 1 Leg. Rec. 153; Com. *v.* De Giglio, 6 Phila. 304; Com. *v.* Moore, 1 Pittsb. 312.

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269; Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277; *In re* Schumpert, 6 Rich. 344; *In re* Kottman, 2 Hill 363, 27 Am. Dec. 390.

Tennessee.—Baskette *v.* Streight, 106 Tenn. 549, 62 S. W. 142; State *v.* Kilvington, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284; State *v.* Paine, 4 Humphr. 523.

Texas.— State *v.* Deaton, 93 Tex. 243, 54 S. W. 901 [*reversing* (Civ. App. 1899) 52 S. W. 591]; Pittman *v.* Byars, (Civ. App. 1907) 99 S. W. 1032; Parker *v.* Wiggins, (Civ. App. 1905) 86 S. W. 788; Watts *v.* Lively, (Civ. App. 1901) 60 S. W. 676.

Virginia.— Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623; Slater *v.* Slater, 90 Va. 845, 20 S. E. 780; Coffee *v.* Black, 82 Va. 567; Merritt *v.* Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Armstrong *v.* Stone, 9 Gratt. 102.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

West Virginia.— Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371, 88 Am. St. Rep. 862, 55 L. R. A. 896; Rust *v.* Vanvacter, 9 W. Va. 600.

Wisconsin.— Lemmin *v.* Lorfeld, 107 Wis. 264, 83 N. W. 359.

Wyoming.— Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

United States.— Wadleigh *v.* Newhall, 136 Fed. 941; U. S. *v.* Savage, 91 Fed. 490; U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482.

England.— *In re* A. & B., [1897] 1 Ch. 786, 66 L. J. Ch. 592; De Manneville *v.* De Manneville, 10 Ves. 52, 7 Rev. Rep. 340, 32 Eng. Reprint 762; *In re* Taylor, 25 Wkly. Rep. 69.

Canada.— *In re* Quai Shing, 6 Brit. Col. 86; Reg. *v.* Redner, 6 Brit. Col. 73; *In re* Marshall, 33 Nova Scotia 104.

See 37 Cent. Dig. tit. "Parent and Child," § 17; DIVORCE, 14 Cyc. 805 note 86; INFANTS, 22 Cyc. 519 note 70.

Three interests are involved in all questions touching the custody of children—those of the parents, of the state, and of the child—and of these the consideration which is most controlling on the court is the latter, because upon its proper determination the other two are in a great degree dependent. Com. *v.* Kenney, 1 Chest. Co. Rep. (Pa.) 322.

Not only the immediate safety, but the future welfare of the child, should be considered in determining the question of custody. People *v.* Mercein, 8 Paige (N. Y.) 47.

86. Legal rights as to custody see *supra*, II, B, 1.

87. Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; *In re* Nofsinger, 25 Mo. App. 116; People *v.* Mercein, 8 Paige (N. Y.) 47.

88. *In re* Hatfield, 1 Truem. Eq. Rep. (N. Brunsw.) 142; Curtis *v.* ——, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474.

in some jurisdictions established by statute, that where a child is of tender age so as to require the care and attention that a mother is especially fitted to bestow upon it, the mother, rather than the father, is the proper custodian,[89] unless, of course, she is for some reason unfit for the trust;[90] and the fact that the infant, in addition to being of tender age, is sickly or delicate furnishes a still stronger reason for leaving it with the mother instead of the father.[91] Even a grandmother has been awarded the custody of a very young or delicate child as against the father, on the ground that she was better fitted to care for its wants.[92] The sex of the child may also be a question materially affecting the question of custody; a male child being more properly given to the father and a female to the mother.[93]

c. Preference of Child. The preference of a child who is of sufficient age to exercise discretion in choosing its custodian is entitled to much weight,[94] especially

89. *Connecticut.*— Nickols *v.* Giles, 2 Root 461.

Minnesota.— State *v.* Greenwood, 84 Minn. 203, 87 N. W. 489.

New Jersey.— Landis *v.* Landis, 39 N. J. L. 274; State *v.* Stigall, 22 N. J. L. 286; Baird *v.* Baird, 18 N. J. Eq. 194 [*reversed* on the facts in 21 N. J. Eq. 384]; Bennet *v.* Bennet, 13 N. J. Eq. 114.

New York.— Matter of Pray, 60 How. Pr. 194; Mercein *v.* People, 25 Wend. 64, 35 Am. Dec. 653; People *v.* Mercein, 8 Paige 47.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 592; State *v.* Niles, 11 Ohio Dec. (Reprint) 248, 25 Cinc. L. Bul. 327; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396; Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

Pennsylvania.— Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Myers, 18 Pa. Co. Ct. 385; Com. *v.* Smith, 1 Brewst. 547; Com. *v.* Hart, 14 Phila. 352.

Rhode Island.— McKim *v.* McKim, 12 R. I. 462, 34 Am. Rep. 694.

South Carolina.— *Ex p.* Schumpert, 6 Rich. 344.

Wisconsin.— See McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

United States.— *In re* Barry, 42 Fed. 113, 34 L. ed. 503 note [*affirmed* in 5 How. 103, 12 L. ed. 70], under New York statute.

England.— Reg *v.* Birmingham, 5 Q. B. 210, 48 E. C. L. 210; *Re* Tomlinson, 3 De G. & Sm. 371, 64 Eng. Reprint 520. See also Austin *v.* Austin, 34 Beav. 257, 11 Jur. N. S. 101, 34 L. J. Ch. 192, 11 L. T. Rep. N. S. 616, 13 Wkly. Rep. 332, 55 Eng. Reprint 634. But *compare* Rex *v.* De Manneville, 5 East 221, 1 Smith K. B. 358, 7 Rev. Rep. 693; Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278.

See 37 Cent. Dig. tit. "Parent and Child," § 18.

90. Landis *v.* Landis, 39 N. J. L. 274. See, generally, *infra*, II, B, 2, d.

Under exceptional circumstances, such as dangerous lunacy and improbable recovery of the mother, the court will order the removal of a child within the age of nurture from her care. Reg. *v.* Barnet-Uniou, 52 J. P. 611, 57 L. J. M. C. 39, 58 L. T. Rep. N. S. 947.

Mother of religion different from that of father.— The court will not take from the custody of its mother a child which is of tender years so as to require a mother's care on the ground that the mother's religion differs from that of the deceased father, and that such change of custody is requisite to the training of the child in the father's religion. Austin *v.* Austin, 34 Beav. 257, 11 Jur. N. S. 101, 34 L. J. Ch. 192, 11 L. T. Rep. N. S. 616, 13 Wkly. Rep. 332, 55 Eng. Reprint 634.

91. Mercein *v.* People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396; McKim *v.* McKim, 12 R. I. 462, 34 Am. Rep. 694.

92. Sturtevant *v.* State, 15 Nebr. 459, 19 N. W. 617, 48 Am. Rep. 349; *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269 (where, however, the court gave the father leave to renew his application for the custody of such child when he might be advised that the change could be made without peril to the child, provided such application was not made earlier than one year from the date of the decree); Gardenhire *v.* Hinds, 1 Head (Tenn.) 402.

93. State *v.* Schroeder, 37 Nebr. 571, 56 N. W. 307; Symington *v.* Symington, L. R. 2 H. L. Sc. 415. See also Heyward *v.* Cuthbert, 4 Desauss. Eq. (S. C.) 445.

94. *Indiana.*— Bounell *v.* Berryhill, 2 Ind. 613.

Iowa.— Shaw *v.* Nachtwey, 43 Iowa 653.

Kentucky.— Ellis *v.* Jesup, 11 Bush 403.

Massachusetts.— Curtis *v.* Curtis, 5 Gray 535; Com. *v.* Hamilton, 6 Mass. 273.

Mississippi.— Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375; Foster *v.* Alston, 6 How. 406.

New Hampshire.— State *v.* Scott, 30 N. H. 274.

New Jersey.— Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Baird *v.* Baird, 18 N. J. Eq. 194.

New York.—People *v.* Pillow, 1 Sandf. 672; *In re* McDowle, 8 Johns. 328; Matter of Wollstonecraft, 4 Johns. Ch. 80.

Ohio.— Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

Pennsylvania.— Com. *v.* Bane, 21 Pa. Co. Ct. 662; Com. *v.* Kenney, 1 Chest. Co. Rep. 322.

England.— Rex *v.* Greenhill, 4 A. & E. 624,

where the dispute is between the parents [95] or between third persons.[96] Where, however, the dispute is between the person legally entitled to the custody on the one hand, and a person having no legal right on the other, the mere preference of the child will not as a rule be allowed to prevail over the legal right,[97] although even in such case it may be considered on the question of welfare,[98] and in connection with other circumstances may outweigh the legal right.[99] Where the child is too young to choose with discretion, its preferences have little or no weight,[1] and in any event the welfare of the child is a consideration paramount to its preference.[2]

d. Competency, Character, and Conduct of Parent. In determining the question as to who should have the custody of the child it is proper that the character, competency, and conduct of the parents should be considered.[3] A parent may be deprived of or refused the custody of the children where his right has been relinquished [4] or forfeited,[5] as by abandonment or failure to provide for the child,[6]

6 N. & M. 244, 31 E. C. L. 278; Anonymous, 2 Ves. 374, 28 Eng. Reprint 240.

Canada.— Reg. *v.* Redner, 6 Brit. Col. 73.

See 37 Cent. Dig. tit. "Parent and Child," § 20.

There is no fixed age which capacitates for such choice, but it depends upon the extent of mental development. Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726. See also Com. *v.* Hammond, 10 Pick. (Mass.) 274; People *v.* Chegaray, 18 Wend. (N. Y.) 637; *In re* McDowle, 8 Johns. (N. Y.) 328.

95. Matter of Watson, 10 Abb. N. Cas. (N. Y.) 215; Matter of Hansen, 1 Edm. Sel. Cas. (N. Y.) 9; People *v.* Chegaray, 18 Wend. (N. Y.) 637; Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

96. Woodruff *v.* Conley, 50 Ala. 304.

97. *Florida.*— Jones *v.* Harmon, 27 Fla. 238, 9 So. 245.

Iowa.— Shaw *v.* Nachtwey, 43 Iowa 653.

Kentucky.— Stapleton *v.* Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. L. Rep. 76, 98 Am. St. Rep. 411, 53 L. R. A. 784.

Mississippi.— Moore *v.* Christian, 56 Miss. 408, 31 Am. Rep. 375.

New Jersey.— State *v.* Clover, 16 N. J. L. 419.

New York.— People *v.* Gates, 57 Barb. 291 [*reversed* on other grounds in 43 N. Y. 40].

See 37 Cent. Dig. tit. "Parent and Child," § 20.

98. State *v.* Scott, 30 N. H. 274.

99. Ellis *v.* Jesup, 11 Bush (Ky.) 403; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Com. *v.* Kenney, 1 Chest. Co. Rep. (Pa.) 322. See also *supra*, note 94.

1. *District of Columbia.*— Beall *v.* Bibb, 19 App. Cas. 311.

Florida.— Jones *v.* Harmon, 27 Fla. 238, 9 So. 245.

Indiana.— Bounell *v.* Berryhill, 2 Ind. 613.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286; Baird *v.* Baird, 18 N. J. Eq. 194 [*reversed* on other grounds in 21 N. J. Eq. 384].

Ohio.— Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

England.— Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278.

Canada.— *In re* Quai Shing, 6 Brit. Col. 86, holding that in the case of a female child under sixteen, the age of consent or election as to custody, her choice should not be considered.

See 37 Cent. Dig. tit. "Parent and Child," § 20.

2. Shaw *v.* Nachtwey, 43 Iowa 653; Matter of Rahorg, 3 N. Y. St. 323; Com. *v.* Kenney, 1 Chest. Co. Rep. (Pa.) 322. And see *supra*, II, B, 2, a.

Child held in peonage.— Where a mother alleges that her child is held by defendant as a peon or servant, the testimony of the child that she is willing to remain in defendant's service is properly excluded. Bustamento *v.* Analla, 1 N. M. 255.

3. Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; People *v.* Brooks, 35 Barb. (N. Y.) 85 (holding that where parents are living apart voluntarily, their respective merits with regard to the separation will be considered in granting the custody of their children to either parent); Matter of Watson, 10 Abb. N. Cas. (N. Y.) 215 (holding that in determining as to the custody of children, as between their father and mother, the opportunities that will be afforded for their education and support and the promotion of their well-being must be considered).

4. State *v.* Bratton, (Del. 1876) 15 Am. L. Reg. N. S. 359; Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Franklin *v.* Carswell, 103 Ga. 553, 29 S. E. 476. And see *supra*, II, B, 1, d.

5. State *v.* Bratton, (Del. 1876) 15 Am. L. Reg. N. S. 359; Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Franklin *v.* Carswell, 103 Ga. 553, 29 S. E. 476; Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418.

6. *Alabama.*— Brinster *v.* Compton, 68 Ala. 299.

Arkansas.— Coulter *v.* Sypert, 78 Ark. 193, 95 S. W. 457.

California.— *In re* Vance, 92 Cal. 195, 28 Pac. 229.

Georgia.— Tuggle *v.* Tuggle, 97 Ga. 658, 25 S. E. 489; Smith *v.* Bragg, 68 Ga. 650.

misconduct,[7] or misuse of or cruelty to the child.[8] So the custody is properly refused to a parent who is shown to be unworthy,[9] unsuitable,[10] unfit,[11] of bad moral

Nebraska.— Schroeder *v.* State, 41 Nebr. 745, 60 N. W. 89.

New York.—People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

Pennsylvania.— Com. *v.* Davison, 4 Pa. Dist. 103; Com. *v.* Dougherty, 1 Leg. Gaz. 63.

Rhode Island.— Hoxie *v.* Potter, 16 R. I. 374, 17 Atl. 129.

See 37 Cent. Dig. tit. "Parent and Child," § 24.

But *compare* Johnson *v.* Terry, 34 Conn. 259.

Circumstances not amounting to abandonment.— Where children were left in their grandmother's care at their mother's death, remaining with her for ten years, during which time their father regularly contributed to their needs and visited them, there was no such abandonment by him as would deprive him of his right to their custody; and hence he was entitled to reclaim them by habeas corpus proceedings against their aunts, who claimed their custody by virtue of adoption proceedings begun without the father's knowledge, and also by virtue of the father's consent, given at the request of his dying wife. Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

7. State *v.* Bratton, (Del. 1876) 15 Am. L. Reg. N. S. 359; People *v.* Olmstead, 27 Barb. (N. Y.) 9; People *v.* ——, 19 Wend. (N. Y.) 16; People *v.* Chegaray, 18 Wend. (N. Y.) 637; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396; Com. *v.* Snyder, 11 Lanc. Bar (Pa.) 62.

Where a father has been convicted of felony, the court will grant a habeas corpus in order to give the mother the custody of an infant. *Ex p.* Bailey, 6 Dowl. P. C. 311.

Facts not amounting to misconduct in mother.— The fact that a wife, who left her husband's house because he ordered her to do so, and who had not been asked to return, remained separated from him, does not show such misconduct on her part as to deprive her of the custody of their children of tender years, where, in the opinion of the chancellor, their happiness and welfare would be promoted by awarding the custody to her. Carson *v.* Carson, (N. J. Ch. 1903) 54 Atl. 149.

It is only in cases of very gross misconduct that the court will interfere with paternal rights. *In re* Pulbrook, 11 Jur. 185.

A decree for judicial separation on the ground of cruelty is not in itself sufficient to render the father unfit to have the management of the children. Curtis *v.* Curtis, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474. *Compare* People *v.* Mercein, 8 Paige (N. Y.) 47.

Where a husband drove his wife from his house, the court, upon granting her separate maintenance, ordered that she be allowed the care and custody of her infant child. Prather *v.* Prather, 4 Desauss. Eq. (S. C.) 33.

8. People *v.* Olmstead, 27 Barb. (N. Y.) 9; Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418; Com. *v.* Snyder, 11 Lanc. Bar (Pa.) 62; Whitfield *v.* Hales, 12 Ves. Jr. 492, 33 Eng. Reprint 186.

Mere acts of harshness by a father, not such as would be injurious to the health of the children, or the fact of a somewhat passionate temper, will not form grounds for removing the children. Curtis *v.* Curtis, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474.

Cruelty of stepmother.— A father cannot be deprived of the custody of his child on account of cruel and unlawful punishment inflicted by a stepmother in his absence, unless it appears that the father countenanced or encouraged such ill treatment. Matter of Muench, 20 Ohio Cir. Ct. 350, 11 Ohio Cir. Dec. 124.

9. Coulter *v.* Sypert, 78 Ark. 193, 95 S. W. 457; State *v.* Stigall, 22 N. J. L. 286; *In re* Fynn, 2 De G. & Sm. 457, 13 Jur. 483, 64 Eng. Reprint 205.

10. *Georgia.*— Tuggle *v.* Tuggle, 97 Ga. 658, 25 S. E. 489.

Michigan.— Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213.

Minnesota.— State *v.* Anderson, 89 Minn. 198, 94 N. W. 681; State *v.* Greenwood, 84 Minn. 203, 87 N. W. 489.

New Jersey.— *In re* Wilson, (Ch. 1903) 55 Atl. 160.

Pennsylvania.— Com. *v.* Myers, 18 Pa. Co. Ct. 385; Com. *v.* Devine, 3 Lack. Leg. N. 202.

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 15 S. E. 269.

Texas.— Pittman *v.* Byars, (Civ. App. 1907) 99 S. W. 1032.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

Wisconsin.— Lemmin *v.* Lorfeld, 107 Wis. 264, 83 N. W. 359.

See 37 Cent. Dig. tit. "Parent and Child," § 21.

Facts not amounting to unsuitability.— A father is not "unsuitable" so as to authorize the court to deny him the custody of his child, because he is reserved by nature, and, on account of his business, is absent from his home a great part of his time, and during his absence the child would be in the care of his second wife, the only objection to whom is that she is young, and without much experience in the care of children. Markwell *v.* Pereles, 95 Wis. 406, 69 N. W. 798.

11. *Iowa.*— Hadley *v.* Forrest, 112 Iowa 125, 83 N. W. 822.

Minnesota.—State *v.* Martin, 95 Minn. 121, 103 N. W. 888.

Nebraska.—Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

character[12] or reputation,[13] intemperate,[14] unable to afford the child the necessary care, support, and education,[15] or in any way incompetent for the trust.[16] But a parent who is at the time when the question arises a suitable and competent person to have the custody of the child will not be refused such custody because at some time in the past his habits or circumstances were such that he would not then have been a proper custodian.[17] The right to the custody of the child may be forfeited by the want of good faith in the application to the

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— Giffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25.

Ohio.— State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Pennsylvania.— Com. *v.* Snyder, 11 Lanc. Bar 62.

Texas.— Plahn *v.* Dribred, (Civ. App. 1904) 83 S. W. 867.

Washington.— *In re* Neff, 20 Wash. 652, 56 Pac. 383.

England.— *In re* Moore, 11 Ir. C. L. 1.

See 37 Cent. Dig. tit. "Parent and Child," § 21.

12. *Georgia.*— Hunter *v.* Dowdy, 100 Ga. 644, 28 S. E. 387. See also Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110.

Indiana.— Tarkington *v.* State, 1 Ind. 171.

Missouri.— Friendless Home *v.* Berry, 79 Mo. App. 566.

New Jersey.— Baird *v.* Baird, 18 N. J. Eq. 194 [*reversed* on other grounds in 21 N. J. Eq. 384].

New York.— Matter of McKain, 17 Abb. Pr. 399 note.

Ohio.— State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396; Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

Pennsylvania.— Com. *v.* Nutt, 1 Browne 143; Com. *v.* Snyder, 11 Lanc. Bar 62.

England.— *In re* G., [1899] 1 Ch. 719, 68 L. J. Ch. 374, 80 L. T. Rep. N. S. 470, 47 Wkly. Rep. 491; Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278. But *compare* Ball *v.* Ball, 2 Sim. 35, 2 Eng. Ch. 35, 57 Eng. Reprint 703, holding that the court has no jurisdiction to deprive a father, although living in adultery, of the custody of his child, unless he brings the child in contact with the woman.

See 37 Cent. Dig. tit. "Parent and Child," § 21.

But *compare* Lovell *v.* House of Good Shepherd, 9 Wash. 419, 423, 37 Pac. 660, 43 Am. St. Rep. 839, where it is said: "Even immorality of the mother is not always a sufficient reason for depriving her of the custody of her child."

The immorality must be of so gross a character that the morals of the child would be seriously endangered. *In re* Moore, 11 Ir. C. L. 1.

Proof of acts of adultery on the part of a father during the subsistence of the marriage relation does not of itself forfeit the father's right to the custody and control of his child. Ely *v.* Gammel, 52 Ala. 584.

The father having formed an adulterous connection away from home is not sufficient to warrant the court in refusing to enforce his right to the custody of his children. Rex *v.* Greenhill, 4 A. & E. 624, 6 N. & M. 244, 31 E. C. L. 278.

13. Tuggle *v.* Tuggle, 97 Ga. 658, 25 S. E. 489; Plahn *v.* Dribred, (Tex. Civ. App. 1904) 83 S. W. 867; Ward *v.* Ward, (Tex. Civ. App. 1903) 77 S. W. 829.

14. *Alabama.*— *Ex p.* Murphy, 75 Ala. 409.

Iowa.— Lally *v.* Fitz Henry, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.

New York.— Matter of Raborg, 3 N. Y. St. 323.

Ohio.— Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

Virginia.— Coffee *v.* Black, 82 Va. 567.

See 37 Cent. Dig. tit. "Parent and Child," § 21.

15. *Delaware.*— People *v.* Bratton, 15 Am. L. Reg. N. S. 359.

Georgia.— See Tuggle *v.* Tuggle, 97 Ga. 658, 25 S. E. 489.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

Pennsylvania.— See Van Billiard *v.* Van Billiard, 6 Pa. Co. Ct. 333.

Texas.— Pittman *v.* Byars, (Civ. App. 1907) 99 S. W. 1032.

Virginia.— Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273.

See 37 Cent. Dig. tit. "Parent and Child," § 21.

That the father is a bad manager and provider is not sufficient ground for decreeing the custody of their minor children to the mother, there being no evidence against the father's moral character. Tarkington *v.* State, 1 Ind. 171, Smith 168.

16. State *v.* Anderson, 89 Minn. 198, 94 N. W. 681; *In re* Wilson, (N. J. Ch. 1903) 55 Atl. 160; Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474; Parker *v.* Wiggins, (Tex. Civ. App. 1905) 86 S. W. 788.

17. Com. *v.* Womelsdorf, 10 Kulp (Pa.) 62; *In re* Halliday, 17 Jur. 56.

A person sentenced to prison for life, and afterward pardoned, is restored to his rights and duties as a parent, and becomes entitled to the custody of his children, who had been placed under the care of a guardian, appointed during his civil death. *In re* Deming, 10 Johns. (N. Y.) 232, 483.

Revocation of order depriving parent of custody.— Where the father, by continued maintenance of habits of strict sobriety, can show that no further danger exists of a relapse on his part to his former evil habits

court to obtain the custody, and upon its being shown that the parent has an illegal object in view in obtaining the custody.[18]

e. Financial Benefit or Detriment to Child. Where there is no objection to a child's remaining with his father, except that this would deprive him of the benefit of a legacy sufficient for his education and maintenance when away from the father, the court will not direct the child to be taken from the father without his consent and placed at school.[19]

f. Religious Convictions. The peculiar religious convictions of a father form no ground for removing the child from his custody,[20] nor does a father forfeit his right to custody of his child by being or becoming an atheist.[21] But where a father belongs to a sect which entertains opinions obnoxious to society, adverse to civilization, opposed to the usages of christendom, and in some respects contrary to the express commands of the bible, the court will not award him the custody of the child.[22] In determining the custody of a child as between persons other than parents the court regards its temporal welfare as paramount to questions of religious doctrine;[23] but the child will be delivered to the custody of persons of its father's faith if its temporal interests will be as well conserved by the custody of such persons as by that of others of a different faith or indifferent in religious matters.[24]

g. Intention to Remove Child From State. While the court might, in the interest of children, refuse to permit their removal or allow it only on terms,[25] it must be a very extreme or special case which would induce a court to interfere with the natural rights of a parent in this respect,[26] and ordinarily a father will not be refused the custody of his child because he intends to take it to another state.[27]

h. Present Possession of Child. As between the parents the actual possession of the child may have weight in determining the question of custody, for it has been said that the power to change the custody of the child between contending parents living apart is a delicate discretion not to be exercised except in cases in which its necessities clearly demand it, or where one or the other of the parties has obtained the custody by fraud, force, or strategy.[28]

i. Agreement of Parent Giving Custody to Another. Whether or not an agreement by a parent to give the custody of the child to a third person is legally bind-

of intemperance, the court will, on application, revoke an order committing the care and custody of his children to another, made on account of such habits. Matter of Raborg, 3 N. Y. St. 323.

Duration of reformation.—Where a mother has been addicted to the habit of intoxication, the court will not commit the custody of the children to her, although she has abandoned the habit, until her abandonment is tested by time and found complete. Com. *v.* Smith, 1 Brewst. (Pa.) 547.

A promise to reform is not sufficient to entitle a father who is a habitual drunkard to the custody of the child. Lally *v.* Fitz Henry, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.

18. *In re* Moore, 11 Ir. C. L. 1.

19. Jones *v.* Stockett, 2 Bland (Md.) 409.

20 Curtis *v.* Curtis, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474.

21. *In re* Doyle, 16 Mo. App. 159.

22. Thomas *v.* Roberts, 3 De G. & Sm. 758, 14 Jur. 639, 19 L. J. Ch. 506, 64 Eng. Reprint 693.

Shaker faith.— Where children are deserted by their father, and are cared for by their maternal grandmother, she is afterward entitled to their custody as against their father, who has become a shaker, and who seeks to proselyte them to that faith, which does not recognize the relation of parent and child, but in which all the children are cared for by the community. State *v.* Hand, 1 Ohio Dec. (Reprint) 238, 5 West. L. J. 361. *Compare*, as to shaker societies, Curtis *v.* Curtis, 5 Gray (Mass.) 535.

23. *In re* Doyle, 16 Mo. App. 159.

24. *In re* Doyle, 16 Mo. App. 159.

25. *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

26. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

27. *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

28. State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 373, 8 West. L. J. 396. But *compare* People *v.* Brooks, 35 Barb. (N. Y.) 85.

Pendency of suit for divorce.— The custody of a child should not be changed on habeas corpus during pendency before another tribunal of a divorce suit, which incidentally involves the question of such custody, unless it clearly appears that the child will sustain serious prejudice in its health or morals during the pendency of such suit. *In re* Delano, 37 Mo. App. 185.

ing,[29] it may be considered by the court in determining the question of custody as shedding light upon the relations of the parties and their feelings for the child and thus assisting the court in the exercise of its discretion,[30] and the court may well refuse to allow the parent to reclaim the child from those to whom it has been surrendered where the latter have had the custody for a considerable time and there has grown up a reciprocal affection between them and the child which should be respected and not interfered with by a forced separation which would not be for the child's welfare.[31] On the other hand such an agreement will not be enforced to the detriment of the child, but the court will take the child away from the person to whom the parent has surrendered it and restore the custody to the parent, where it clearly appears that such a course will be most beneficial to the child.[32]

29. As to legal effect of agreement for custody of child see *supra*, II, B, 1, d.

30. Fullilove *v.* Banks, 62 Miss. 11; Weir *v.* Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672.

31. *Arkansas.*—Washaw *v.* Gimble, 50 Ark. 351, 7 S. W. 389; Verser *v.* Ford, 37 Ark. 27.

Connecticut.— Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593.

Illinois.—People *v.* Porter, 23 Ill. App. 196.

Iowa.— Drumb *v.* Keen, 47 Iowa 435.

Kansas.— Chapsky *v.* Wood, 26 Kan. 650, 40 Am. Rep. 321.

Kentucky.— Ellis *v.* Jessup, 11 Bush 403.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270; Curtis *v.* Curtis, 5 Gray 535.

New Jersey.— See Richard *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726.

New York.— People *v.* Lohman, 17 Abb. Pr. 395.

Ohio.— Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

Pennsylvania.— Com. *v.* Berkheimer, 4 Pa. Dist. 712; Com. *v.* Airey, 5 Kulp 83; Hinkle *v.* Passmore, 11 Lanc. Bar 107; Com. *v.* Dougherty, 1 Leg. Gaz 63; Loutsch's Estate, 25 Pittsb. L. J. N. S. 128.

Rhode Island.— Hoxsie *v.* Potter, 16 R. I. 374, 17 Atl. 129.

Texas.— Legate *v.* Legate, 87 Tex. 248, 28 S. W. 281, (Civ. App. 1894) 29 S. W. 212; Plahn *v.* Dribred, 36 Tex. Civ. App. 600, 83 S. W. 867; State *v.* Deaton, (Civ. App. 1899) 52 S. W. 591.

Virginia.— Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623; Merritt *v.* Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Armstrong *v.* Stone, 9 Gratt. 102.

Washington.— Lovell *v.* House of Good Shepherd, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839.

West Virginia.— Cunningham *v.* Barnes, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843.

Wisconsin.— *In re* Goodenough, 19 Wis. 274.

England.— See Swift *v.* Swift, 34 Beav. 266, 11 Jur. N. S. 148, 34 L. J. Ch. 209, 11 L. T. Rep. N. S. 697, 13 Wkly. Rep. 378, 55 Eng. Reprint 637 [*affirmed* in 4 De G. J. & S. 710, 11 Jur. N. S. 458, 34 L. J. Ch. 394, 12 L. T. Rep. N. S. 435, 13 Wkly. Rep. 731, 69 Eng. Ch. 543, 46 Eng. Reprint 1095].

See 37 Cent. Dig. tit. "Parent and Child," §§ 8, 17, 23.

Where the child was surrendered to a corporation this rule has no application. Lovell *v.* House of Good Shepherd, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839.

Effect of break in continuity of custody.— Where a mother, at her death, with her husband's consent left her children to their grandmother's custody for life, and after her death the custody of one child to each of her sisters, then aged sixteen and seventeen years, respectively, and the children remained with their grandmother for ten years, when she died, and the children's aunts had married, and left their mother's home and the children, two and three years, respectively, before the grandmother's death, the aunts had not stood *in loco parentis* to the children, so as to give them a right to their custody over the father's right thereto. Hibbette *v.* Baines, 78 Misc. 695, 29 So. 80, 51 L. R. A. 839.

Commitment to shaker society.— Where a mother, after the death of the father, commits a child to the care and custody of a trustee of a society of shakers, to be brought up and instructed according to their principles and usages, she will not be allowed to reclaim the child, if it is well provided for by the shakers and, being of sufficient mind and capacity to judge, desires to remain with them. Curtis *v.* Curtis, 5 Gray (Mass.) 535. *Compare*, as to shaker faith, State *v.* Hand, 1 Ohio Dec. (Reprint) 238, 5 West. L. J. 361.

32. *Iowa.*— Kuhn *v.* Breen, 101 Iowa 665, 70 N. W. 722.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270.

Ohio.— Gray *v.* Field, 10 Ohio Dec. (Reprint) 170, 19 Cinc. L. Bul. 121.

Pennsylvania.— Com. *v.* Berkheimer, 4 Pa. Dist. 712; Com. *v.* Airey, 5 Kulp 83; Hinkle *v.* Passmore, 11 Lanc. Bar 107; Loutsch's Estate, 25 Pittsb. Leg. J. N. S. 128.

Texas.— Legate *v.* Legate, 87 Tex. 248, 28 S. W. 281, (Civ. App. 1894) 29 S. W. 212.

Virginia.— Amstrong *v.* Stone, 9 Gratt. 102.

West Virginia.— Cunningham *v.* Barnes, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep.

3. Proceedings to Determine Custody — a. Form of Remedy. Habeas corpus is the proper remedy to recover possession of a child by a person claiming the right to its custody.[33]

b. Jurisdiction. While the jurisdiction of the courts in matters relating to the custody of children is often provided for and regulated by statute,[34] a court of chancery has, independent of statute, jurisdiction over the custody of minor children, to be exercised for their benefit, welfare, and protection,[35] and such jurisdiction is not taken away by a statute conferring like power on another court.[36] Apart from statute a probate court has no jurisdiction of proceedings by a father to recover possession of a child alleged to be wrongfully withheld from his custody.[37] The courts of the state wherein the parent having the custody of the child and the child reside should determine conflicting claims as to its custody,[38] and the courts of

57; Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843.

Wisconsin.— *In re* Goodenough, 19 Wis. 274.

See 37 Cent. Dig. tit. "Parent and Child," § 17.

Right of mother to remove child.— If the place selected by the father for the care and support of the children is not suitable, and the children are too young to act for themselves, the mother has the right to remove them to a proper place. Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

33. See Habeas Corpus, 21 Cyc. 290 note 45. And see the following cases:

Georgia.— Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270.

Missouri.— *In re* Delano, 37 Mo. App. 185.

New Jersey.— Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054 [*reversed* on other grounds in 55 N. J. Eq. 514, 36 Atl. 1088]; Baird *v.* Baird, 21 N. J. Eq. 384.

New York.— *In re* Lundergan, 8 N. Y. Suppl. 924; People *v.* Mercein, 8 Paige 47.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

Pennsylvania.— Com. *v.* Kenney, 1 Chest. Co. Rep. 322.

Texas.— Lanning *v.* Gregory, (1907) 99 S. W. 542, 10 L. R. A. N. S. 690; Pittman *v.* Byars, (Civ. App. 1907) 99 S. W. 1032.

England.— Rex *v.* Clerke, 1 Burr. 606; *Ex p.* Witte, 13 C. B. 680, 76 E. C. L. 680; *Ex p.* Bailey, 6 Dowl. P. C. 311; *In re* Matthews, 12 Ir. C. L. 233; Reg. *v.* Smith, 17 Jur. 24, 22 L. J. Q. B. 116, L. & M. 132, 1 Wkly. Rep. 130; *In re* Pearson, 4 Moore C. P. 366, 16 E. C. L. 379; Rex *v.* Ward, W. Bl. 386.

34. See the following cases:

Alabama.— Anonymous, 55 Ala. 428; Bryan *v.* Bryan, 34 Ala. 516.

Arkansas.— State *v.* Grisby, 38 Ark. 406.

Georgia.— Moore *v.* Moore, 66 Ga. 336.

Louisiana.— State *v.* Thompson, 117 La. 102, 41 So. 367.

New York.— People *v.* Parr, 121 N. Y. 679, 24 N. E. 481 [*affirming* 49 Hun 473, 2 N. Y. Suppl. 263].

See 37 Cent. Dig. tit. "Parent and Child," § 25½.

A justice of the supreme court, upon a statutory writ of habeas corpus returnable before him at chambers, possesses no other powers than such as are possessed by the supreme court commissioner under the statute, and he cannot exercise that species of jurisdiction which belongs exclusively to a court of equity, but can only relieve the infant from any unlawful restraint. People *v.* Wilcox, 22 Barb. (N. Y.) 178 [*affirmed* in 14 N. Y. 575].

Since the passing of the Judicature Act of 1873, the courts of common law have concurrent jurisdiction with the courts of equity with regard to the care and custody of infants; but, in the exercise of that jurisdiction, the rules of equity are to prevail. *In re* Goldsworthy, 2 Q. B. D. 75, 46 L. J. Q. B. 187.

Jurisdiction of vice-chancellor.— N. J. Act, May 9, 1889 (Pamphl. Laws, p. 426), providing that vice-chancellors shall have the same power to grant all writs of habeas corpus, and to hear and determine the same, that the chancellor has, does not confer upon them the chancellor's general jurisdiction, as public guardian of infants, to determine who is entitled to the permanent custody of such infants. Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054 [*reversed* on other grounds in 55 N. J. Eq. 514, 36 Atl. 1088]. The vice-chancellor has jurisdiction, under 2 & 3 Vict. c. 54, to make orders as to the custody of infants, although the lord chancellor and master of the rolls are alone mentioned in the act. *In re* Taylor, 10 Sim. 291, 4 Jur. 983, 9 L. J. Ch. 399, 16 Eng. Ch. 291, 59 Eng. Reprint 626.

35. Bryan *v.* Bryan, 34 Ala. 516; State *v.* Grisby, 38 Ark. 406; Rossell *v.* Rossell, 64 N. J. Eq. 21, 53 Atl. 821; Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054 [*reversed* on other grounds in 55 N. J. Eq. 514, 36 Atl. 1088]; Baird *v.* Baird, 21 N. J. Eq. 384; *Ex p.* Warner, 4 Bro. Ch. 101, 29 Eng. Reprint 799.

The special term of the supreme court, as successor to the powers of the court of chancery, has power to dispose of the custody of an infant brought before it on habeas corpus, although neither claimant has any legal right to such custody. *In re* Lundergan, 8 N. Y. Suppl. 924.

36. State *v.* Grisby, 38 Ark. 406.

37. Lowry *v.* Holden, 41 Miss. 410.

38. Lanning *v.* Gregory, (Tex. 1907) 99 S. W. 542, 10 L. R. A. N. S. 690.

another state are without power in the premises,[39] and cannot obtain jurisdiction for such purpose over persons temporarily within the state.[40] In England, however, it is held that the court of chancery has jurisdiction over the custody of children of an English subject, although such children were born and reside abroad.[41]

c. Parties.[42] A petition by a wife, after a voluntary separation from her husband, for custody of the children, should be filed in her own name and not by next friend,[43] and the mother of a child whose father is dead may sue for its custody without being joined by her present husband.[44]

d. Evidence[45]—(I) *Presumptions and Burden of Proof.* The existence of circumstances which would deprive the parent of the right to custody of the child, such as unfitness,[46] inability to care for it,[47] or relinquishment of the parental right of custody,[48] will not be presumed but must be proved by the person opposing the parent's right. So also it is presumed that the place selected by a father for the care and support of his children is suitable and a person claiming otherwise has the burden of proof.[49] But under a statute giving the custody of children to the mother, without a jury trial, if the father from drunkenness neglects to provide for them, it has been held that, where the drunkenness is satisfactorily shown and the father is without property, the burden is on him to show that he has performed his duty in providing for his family.[50] And where the wife has chosen to absent herself from the husband without giving any reason, the court will presume that none exists,[51] and the burden is on the wife to show that she did not desert the husband until after further living with him became intolerable through his tyranny, oppression, or abuse.[52]

(II) *Admissibility.* Evidence tending to show that the person claiming the custody is unfit or unable to care for the children is admissible,[53] and such person's moral character[54] or reputation[55] may be shown. Evidence is admissible as to the past treatment of the child by the person having the custody,[56] and as to

39. People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013.

40. People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013; Lanning *v.* Gregory, (Tex. 1907) 99 S. W. 542, 10 L. R. A. N. S. 690.

41. Hope *v.* Hope, 4 De G. M. & G. 328, 3 Eq. Rep. 1047, 32 L. J. Ch. 682, 2 Wkly. Rep. 698, 53 Eng. Ch. 256, 43 Eng. Reprint 534.

42. See, generally, Parties.

43. McGough *v.* McGough, 136 Ala. 170, 33 So. 860 [*followed* in Pearce *v.* Pearce, 136 Ala. 188, 33 So. 883].

44. Sancho *v.* Martin, (Tex. Civ. App. 1901) 64 S. W. 1015.

45. See, generally, Evidence.

46. *Florida.*— Miller *v.* Miller, 38 Fla. 227, 20 So. 989, 56 Am. St. Rep. 166.

Minnesota.—State *v.* Martin, 95 Minn. 121, 103 N. W. 888.

Nebraska.—Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— Giffin *v.* Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25.

Ohio.— Vincent *v.* Vincent, 8 Ohio S. & C. Pl. Dec. 160, 6 Ohio N. P. 474.

See 37 Cent. Dig. tit. "Parent and Child," § 28.

47. Miller *v.* Miller, 38 Fla. 227, 20 So. 989, 56 Am. St. Rep. 166.

48. Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631.

49. Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

50. Van Billiard *v.* Van Billiard, 6 Pa. Co. Ct. 333.

51. Bermudez *v.* Bermudez, 2 Mart. (La.) 180.

52. State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396, children being in the custody of the husband, and the wife seeking to obtain them.

53. People *v.* Brown, 35 Hun (N. Y.) 324, holding that it was error to refuse to admit evidence tending to show that the father's present wife was very intemperate, and evidence tending to show what the home was in respect to assemblages and practices in spiritualism.

Where child held in peonage.— On habeas corpus by a mother to obtain the custody of her minor child, illegally detained by respondent as a peon, evidence of the mother's unfitness to have charge of such child is irrelevant. Bustamento *v.* Analla, 1 N. M. 255.

54. Garner *v.* Gordon, 41 Ind. 92.

55. Garner *v.* Gordon, 41 Ind. 92 (the proof not being confined to two years as in cases of divorce); Ward *v.* Ward, 34 Tex. Civ. App. 104, 77 S. W. 829 (holding that in a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity, truth, veracity, and honesty).

56. Garner *v.* Gordon, 41 Ind. 92.

how it would be likely to be treated and cared for by the person seeking to obtain the custody.[57] In a contest between parents who have separated evidence as to the cause of separation and the relative merits and demerits of the parties should be received.[58]

(III) *Weight and Sufficiency.* The general rules as to the weight and sufficiency of evidence[59] govern in respect to evidence introduced to support or defeat a claim to the custody of a child.[60]

e. Trial or Hearing. The court which hears the case should satisfy itself whether the child is improperly restrained,[61] and whether its comfort and education are properly attended to.[62] The court is not restricted to the ordinary modes of trial,[63] or bound down by any particular form of proceeding;[64] but it may direct that the child be brought before it[65] and may examine it privately,[66] and may also avail itself of affidavits or other reasonable and proper sources of information.[67] The matter may be referred to a master to inquire and report as to who will be a fit person to have custody of the child,[68] or that may be inquired of in open court,[69] or the court may determine from its own knowledge alone.[70] In contests between parents over the custody of the children neither party is entitled to a jury trial as a matter of right.[71]

f. Disposition of Cause. The custody of the child rests in the discretion of the court;[72] and the exercise of this discretion will not be disturbed on appeal,

57. Garner *v.* Gordon, 41 Ind. 92.

58. People *v.* Brooks, 35 Barb. (N. Y.) 85. In a contest between husband and wife over the custody of young children an inquiry as to the father's ill treatment of his wife is pertinent as bearing on the father's right to take the children from their mother. Matter of Pray, 60 How. Pr. (N. Y.) 194.

59. See EVIDENCE.

60. See the following cases:

Georgia.— Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Townsend *v.* Warren, 99 Ga. 105, 24 S. E. 960.

Iowa.— Smiley *v.* McIntosh, 129 Iowa 337, 105 N. W. 577; Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631.

Michigan.— *In re* Stockman, 71 Mich. 180, 38 N. W. 876.

Missouri.— Edwards *v.* Edwards, 84 Mo. App. 552.

New York.— Matter of Raborg, 3 N. Y. St. 323; Matter of Clifton, 47 How. Pr. 172.

South Carolina.— *Ex p.* Davidge, 72 S. C. 16, 51 S. E. 269.

Wisconsin.— Lemmin *v.* Lorfeld, 107 Wis. 264, 83 N. W. 359.

See 37 Cent. Dig. tit. "Parent and Child," § 30.

61. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

62. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

63. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

64. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

65. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

The parents are not entitled to have the children produced in court or to be informed where they are when they were surrendered to a charitable institution by a contract under which they were to be placed out or adopted in a good family and the parents were not to seek to discover them or to deprive such family of them. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

66. Ellis *v.* Jesup, 11 Bush (Ky.) 403; Dumain *v.* Gwynne, 10 Allen (Mass.) 270; *In re* McDowle, 8 Johns. (N. Y.) 328; Reg. *v.* Redner, 6 Brit. Col. 73.

67. Dumain *v.* Gwynne, 10 Allen (Mass.) 270.

A judgment of divorce alleged but not offered in evidence cannot be considered in determining the issues. State *v.* Thompson, 117 La. 102, 41 So. 367.

68. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

69. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

70. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

71. Van Billiard *v.* Van Billiard, 6 Pa. Co. Ct. 333, holding that therefore a statute giving the custody of the children to the mother without a jury trial if the father from drunkenness neglects to provide for them is not unconstitutional as violating the right of trial by jury.

72. *District of Columbia.*— Beall *v.* Bibb, 19 App. Cas. 311.

Georgia.— Smith *v.* Bragg, 68 Ga. 650.

Indiana.— McKenzie *v.* State, 80 Ind. 547.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286; Baird *v.* Baird, 21 N. J. Eq. 384.

New York.— People *v.* Sternberger, 12 N. Y. App. Div. 398, 42 N. Y. Suppl. 423; People *v.* Brooks, 35 Barb. 85; People *v.* Mercein, 8 Paige 47.

Pennsylvania.— Com. *v.* Strickland, 27 Pa. Super. Ct. 309; Com. *v.* Bane, 21 Pa. Co. Ct. 662, 15 Montg. Co. Rep. 50; Com. *v.* Perry, 20 Pa. Co. Ct. 245; Com. *v.* Kenney, 1 Chest. Co. Rep. 322.

Virginia.— Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623.

England.— Symington *v.* Symington, L. R.

except in case of its manifest abuse.[73] The chancellor, by virtue of his general jurisdiction over infants, may order an infant not only to be relieved from illegal restraint, but to be surrendered to its parents.[74] The decree, in awarding the custody of the children, while final in determining the present rights of the parties,[75] should not be permanent but temporary in its nature and effect,[76] and should be left open to future control and modification by the court as subsequent conditions may require for the good of the children.[77] And the court may by its decrees change the custody of the child from one parent to the other as in its judgment the interest and care of the child require.[78] It is the duty of the court to preserve its control over the infant, so as to enforce its future decrees,[79] and therefore it has power to make an order that security be given that the child shall not be taken out of the state.[80] It is also proper that the court should qualify its award by such limitations and restrictions as may seem expedient to preserve the natural rights of the unsuccessful parent, if this can be done without jeopardizing the welfare of the children.[81] A change of the custody of the child from one parent to the other changes its domestic status accordingly.[82]

III. SUPPORT AND EDUCATION[83] OF CHILD.

A. Duty and Liability of Parents — 1. IN GENERAL. That it is the duty of parents to support and maintain their children is well established;[84] and although

2 H. L. Sc. 415; *In re* Brown, 13 Q. B. D. 614, 51 L. T. Rep. N. S. 793, 33 Wkly. Rep. 79; *In re* A. & B., [1897] 1 Ch. 786, 66 L. J. Ch. 592; Rex *v.* Delaval, 3 Burr. 1434, W. Bl. 410, 439; Blissets' Case, Lofft 748; Warde *v.* Warde, 2 Phil. 786, 22 Eng. Ch. 786, 41 Eng. Reprint 1147; *In re* Taylor, 25 Wkly. Rep. 69; Shilleto *v.* Collett, 8 Wkly. Rep. 696.

Canada.— *Re* Mathieu, 29 Ont. 546.

See 37 Cent. Dig. tit. "Parent and Child," § 27.

Statute curtailing discretion.— The discretion given to courts under the rule of common law as to the custody of children is curtailed by N. J. Act, March 20, 1860, which gives the custody of children under seven years of age to the mother, where the parents live apart without being divorced and the mother is a proper person. Bennet *v.* Bennet, 13 N. J. Eq. 114.

73. Washaw *v.* Gimble, 50 Ark. 351, 7 S. W. 389; Beall *v.* Bibb, 19 App. Cas. (D. C.) 311.

Facts showing abuse of discretion.—Where, on habeas corpus for the custody of a minor child, it appeared that the mother abandoned both the child and its father; that her general reputation was bad; and that she had no means of her own, was not in any employment, and was dependent on her parents, who were in moderate circumstances; and that the father was an industrious, well-to-do man of fairly good habits, who had always provided well for his family, and was taking good care of the child, it was an abuse of discretion for the court to award the child to the mother. Tuggle *v.* Tuggle, 97 Ga. 658, 25 S. E. 489.

74. Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726, holding this to be true even where the preliminary proceedings show that the statutory remedy is sought, if the subsequent pleadings and proof touch the right to permanent custody of the infant.

75. McGough *v.* McGough, 136 Ala. 170, 33 So. 860.

76. McGough *v.* McGough, 136 Ala. 170, 33 So. 860; State *v.* Anderson, 89 Minn. 198, 94 N. W. 681. See also Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; State *v.* Thompson, 117 La. 102, 41 So. 367. *Compare* Lanning *v.* Gregory, (Tex. 1907) 99 S. W. 542, 10 L. R. A. N. S. 690, where the decree gave the custody to the mother until the child reached the age of twelve years, and to the father after such time.

77. McGough *v.* McGough, 136 Ala. 170, 33 So. 860.

78. Pearce *v.* Pearce, 136 Ala. 188, 33 So. 883 (holding that a demurrer was properly sustained to a plea of *res adjudicata* based on the dismissal of a former petition by the same parent); Bonney *v.* Bonney, 9 S. W. 404, 9 Ky. L. Rep. 454 (holding that after a judgment of the court of appeals awarding the custody of an infant child to its father, the mother was properly allowed to show in the trial court, before obeying the judgment, such immoral conduct on the part of the husband, after the judgment on appeal, as to render him unfit for the custody of the child, and on sufficient proof the court properly awarded her the custody).

79. Deringer *v.* Deringer, 5 Leg. Gaz. (Pa.) 329, 30 Leg. Int. 336.

80. Deringer *v.* Deringer, 10 Phila. (Pa.) 190, holding that such a condition does not contravene a constitutional provision that emigration from the state shall not be prohibited.

81. Campbell *v.* Campbell, 76 Mo. App. 396.

Access to child see *supra*, II, A, 3.

82. Lanning *v.* Gregory, (Tex. 1907) 99 S. W. 542, 10 L. R. A. N. S. 690.

83. Religious education of child see *supra*, I, A, 4.

84. *Alabama.*—Owen *v.* White, 5 Port. 435, 30 Am. Dec. 572.

there has been some difference of opinion as to whether, in the absence of statute, this is a legal or merely a moral obligation,[85] the better view undoubtedly is that the obligation is a legal one.[86] At the present time the duty is very generally expressly imposed by statute, and under such statutes is necessarily a legal one.[87]

2. **Respective Duty of Father and Mother — a. General Rule.** Primarily the duty to support, maintain, and educate the children rests upon the father;[88] and during the lifetime of the father the mother is not bound to support the chil-

Arkansas.— St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222; Holt *v.* Holt, 42 Ark. 495.

California.— Paxton *v.* Paxton, 150 Cal. 667, 89 Pac. 1083; Hutchinson *v.* Hutchinson, 124 Cal. 677, 57 Pac. 674.

Colorado.— Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Connecticut.— Finch *v.* Finch, 22 Conn. 411.

District of Columbia.— Holtzman *v.* Castleman, 2 MacArthur 555.

Georgia.— Brown *v.* State, 122 Ga. 568, 50 S. E. 378; Burns *v.* Hill, 19 Ga. 22; Keaton *v.* Davis, 18 Ga. 457.

Illinois.— Plaster *v.* Plaster, 47 Ill. 290.

Indiana.— Conn *v.* Conn, 57 Ind. 323.

Iowa.— Guthrie County *v.* Conrad, 133 Iowa 171, 110 N. W. 454; Cooper *v.* McNamara, 92 Iowa 243, 60 N. W. 522; Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

Kentucky.—Louisville, etc., R. Co. *v.* Willis, 83 Ky. 57, 4 Am. St. Rep. 124; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Maine.— Weeks *v.* Merrow, 40 Me. 151.

Massachusetts.— Reynolds *v.* Sweetser, 15 Gray 78.

Michigan.— Finn *v.* Adams, 138 Mich. 258, 101 N. W. 533; Courtright *v.* Courtright, 40 Mich. 633.

Missouri.— Rankin *v.* Rankin, 83 Mo. App. 335.

New Hampshire.— Jenness *v.* Emerson, 15 N. H. 486; Pidgin *v.* Crane, 8 N. H. 350; Hillsborough *v.* Deering, 4 N. H. 86.

New Jersey.— Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

New York.— Van Valkinburgh *v.* Watson, 13 Johns. 480, 7 Am. Dec. 395; Voessing *v.* Voessing, 4 Redf. Surr. 360.

Ohio.— Pretzinger *v.* Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542.

Pennsylvania.— Titler *v.* Titler, 33 Pa. St. 50; Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151; Hippert's Estate, 12 Lanc. Bar 68.

Tennessee.— Maguinay *v.* Saudek, 5 Sneed 146.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652; Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

Virginia.— Evans *v.* Pearce, 15 Gratt. 513, 78 Am. Dec. 635.

Wisconsin.— McGood *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

England.— Butler *v.* Butler, 3 Atk. 58, 26 Eng. Reprint 836; Mortimore *v.* Wright, 4 Jur. 465, 9 L. J. Exch. 158, 6 M. & W. 482.

Canada.— Ouellet *v.* Gauvin, 13 Quebec Super. Ct. 542.

See 37 Cent. Dig. tit. "Parent and Child," § 33.

Posthumous children.— A parent's duty to provide for all his children will extend to posthumous ones. Wallis *v.* Hodson, 2 Atk. 116, 26 Eng. Reprint 472.

Education is a duty of imperfect obligation, for the reason that it is not capable of practical enforcement. Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151.

85. Tiffany Pers. & Dom. Rel. §§ 114, 115.

86. Tiffany Pers. & Dom. Rel. §§ 114, 115.

87. See the various statutes on the subject, and cases cited *supra*, note 84.

Under 18 Del. Laws, c. 230, § 2, providing that a deserted wife shall be a competent witness in any proceedings to compel a father to support his minor children, to prove the fact of desertion, or neglect to maintain any minor children under the age of ten years, the obligation of the father to support his children is not limited to such age, but only the competency of the wife to give such testimony. State *v.* Miller, 3 Pennew. (Del.) 518, 52 Atl. 262.

88. *Alabama.*— Englehardt *v.* Yung, 76 Ala. 534; Stovall *v.* Johnson, 17 Ala. 14.

Connecticut.— Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49.

Delaware.— State *v.* Miller, 3 Pennew. 518, 52 Atl. 262.

District of Columbia.— Holtzman *v.* Castleman, 2 MacArthur 555.

Illinois.— McMillin *v.* Lee, 78 Ill. 443; Barrett *v.* Riley, 42 Ill. App. 258.

Indiana.— Leibold *v.* Leibold, 158 Ind. 60, 62 N. E. 627; Haase *v.* Roehrscheid, 6 Ind. 66.

Iowa.— Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176; Dawson *v.* Dawson, 12 Iowa 512; Everett *v.* Sherfey, 1 Iowa 356.

Kentucky.— Tanner *v.* Skinner, 11 Bush 120.

Louisiana.— Gates *v.* Renfroe, 7 La. Ann. 569.

Maine.— Gilley *v.* Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307.

Maryland.— Alvey *v.* Hartwig, (1907) 67 Atl. 132, 11 L. R. A. N. S. 678; Thompson *v.* Dorsey, 4 Md. Ch. 149.

Massachusetts.— Brow *v.* Brightman, 136 Mass. 187; Benson *v.* Remington, 2 Mass. 113.

New Hampshire.— Litchfield *v.* Londonderry, 39 N. H. 247; Rumney *v.* Keyes, 7 N. H. 571; Hillsborough *v.* Deering, 4 N. H. 86.

New York.— Cromwell *v.* Benjamin, 41

dren.[89] But on the death of the father the duty of supporting the children devolves upon the mother,[90] subject, however, to certain limitations not applicable in the case of the father.[91]

b. Separation of Parents.[92] The husband remains liable for the support of his minor children where he and his wife voluntarily separate,[93] and he consents to the children living with the mother,[94] or where the wife leaves him for good cause;[95] but it is otherwise where the wife leaves without cause, taking the children with her;[96] and where the custody of the mother is unlawful as against the father, she

Barb. 558; People *v.* Brooks, 35 Barb. 85; People *v.* Rubens, 92 N. Y. Suppl. 121.

Ohio.— State *v.* Stoaffer, 65 Ohio St. 47, 60 N. E. 985; Bowen *v.* State, 56 Ohio St. 235, 46 N. E. 708; Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 6 Ohio N. P. 124. See also Frauken *v.* Frauken, 7 Ohio S. & C. Pl. Dec. 425, 5 Ohio N. P. 315.

Pennsylvania.— Henkel's Estate, 13 Pa. Super. Ct. 337; Dull's Estate, 1 Leg. Op. 125.

Rhode Island.— Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

South Carolina.— Exchange Banking, etc., Co. *v.* Finley, 73 S. C. 423, 53 S. E. 649; Dupont *v.* Johnson, Bailey Eq. 279.

Texas.— Linskie *v.* Kerr, (Civ. App. 1896) 34 S. W. 765.

Vermont.— Sequin *v.* Peterson, 45 Vt. 255, 12 Am. Rep. 194.

Wisconsin.— McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

See 37 Cent. Dig. tit. "Parent and Child," § 33.

The wife can compel the husband to provide for the children to the relief of herself. Alvey *v.* Hartwig, (Md. 1902) 67 Atl. 132, 11 L. R. A. N. S. 678.

An agreement by the wife to support the children of herself and husband without expense to the husband, in consideration of an assignment of the interest in a trust fund to the wife, does not relieve the husband, as between himself and his children, of the parental duty of supporting the children. Wright *v.* Leupp, 70 N. J. Eq. 130, 62 Atl. 464.

A petition by a father to be relieved from the support of his daughter on the ground of pecuniary disability, advanced age, etc., or that she be ordered to live with him and contribute to his support, is properly denied where there is not sufficient evidence to show pecuniary disability and the house of the father appears to be an improper residence for the daughter. Snover *v.* Snover, 17 N. J. Eq. 85.

89. Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; Finch *v.* Finch, 22 Conn. 411; Gilley *v.* Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; Gladding *v.* Follett, 2 Dem. Surr. (N. Y.) 58 [*affirmed* in 30 Hun 219 (*affirmed* in 95 N. Y. 652)]; Hippert's Estate, 12 Lanc. Bar (Pa.) 68. See also Harcourt *v.* Ennis, 57 N. Y. Super. Ct. 423, 8 N. Y. Suppl. 194.

90. *Alabama.*— Englehardt *v.* Yung, 76 Ala. 534.

Illinois.— Mowbry *v.* Mowbry, 64 Ill. 383.

Massachusetts.— Dedham *v.* Natick, 16 Mass. 135; Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

Missouri.— Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344.

Nebraska.— Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

Ohio.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 6 Ohio N. P. 124.

See 37 Cent. Dig. tit. "Parent and Child," § 33½.

But *compare* E. B. *v.* E. C. B., 28 Barb. (N. Y.) 299.

An insane mother, who is herself a pauper, is under no obligation to support a minor child. Jenness *v.* Emerson, 15 N. H. 486.

91. See Mowbry *v.* Mowbry, 64 Ill. 383; Osborn *v.* Allen, 26 N. J. L. 388. And see, generally, *infra*, III, A, 3; III, C, 1.

92. **Implied promise of father to pay mother for support** see *infra*, III, A, 4, c.

93. McMillen *v.* Lee, 78 Ill. 443; Walker *v.* Laighton, 31 N. H. 111; Rumney *v.* Keyes, 7 N. H. 571; Grunhut *v.* Rosenstein, 7 Daly (N. Y.) 164; Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

94. McMillen *v.* Lee, 78 Ill. 443; Rumney *v.* Keyes, 7 N. H. 571; Henkel's Estate, 13 Pa. Super. Ct. 337; Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

Consent to status quo pending habeas corpus.— Where a husband, separated from his wife and children, brings habeas corpus for the latter, if he consents that the *status quo* shall be preserved during the pendency of the proceedings, he will be liable for necessaries furnished the children in the meantime. Grunhut *v.* Rosenstein, 7 Daly (N. Y.) 164.

Agreement to pay for support.— That part of an agreement between husband and wife, on separating, that he will pay a certain amount per year for support of their child during its minority, the wife to have custody of the child, is enforceable, although the wife has got a divorce and has remarried and has removed from the state with the child. Marwell *v.* Boyd, 123 Mo. App. 334, 100 S. W. 540.

95. Foss *v.* Hartwell, 168 Mass. 66, 46 N. E. 411, 60 Am. St. Rep. 364, 36 L. R. A. 493; Reynolds *v.* Sweetser, 15 Gray (Mass.) 78; Hyde *v.* Leisenring, 107 Mich. 490, 65 N. W. 536; Bazeley *v.* Forder, L. R. 3 Q. B. 559, 9 B. & S. 599, 37 L. J. Q. B. 237, 18 L. T. Rep. N. S. 756.

96. Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; Foss *v.* Hartwell, 168 Mass. 66, 46 N. E. 411, 60 Am. St. Rep. 364, 36 L. R. A.

cannot pledge the father's credit for the support of the child to a person with knowledge of the facts.[97]

3. Where Children Have Independent Means.[98] A father who is able to do so is bound to maintain and educate his children at his own expense, although the children may have property of their own sufficient for the purpose;[99] but a mother is not liable for the support of the children where their own property is sufficient for the purpose,[1] where ample provision is otherwise made for their support,[2] or even, it has been held, where they are able to earn their own support.[3]

4. Liability of Parent For Necessaries Furnished Child — a. In General. It is a necessary consequence of the duty to support the child that the parent may in a proper case be held liable for necessaries furnished to the child by a third person;[4] but in order to hold the parent liable there must be either an express

493; Baldwin *v.* Foster, 138 Mass. 449; Hyde *v.* Leisenring, 107 Mich. 490, 65 N. W. 536.

97. Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; Baldwin *v.* Foster, 138 Mass. 449 (although the father makes no effort to regain custody of the child); Hyde *v.* Leisinring, 107 Mich. 490, 65 N. W. 536; Fitler *v.* Fitler, 2 Phila. (Pa.) 372.

The tortious acts of a mother in detaining the children from their father do not prejudice her subsequent husband's right to recover from such father for their support and maintenance, if there is nothing to show that they were with the mother at the time of her marriage without the consent of the father. McGoon *v.* Irvine, 1 Pinn. (Wis.) 526, 44 Am. Dec. 409.

98. Charging support on child's estate see *infra*, III, C.

99. *Alabama.*— Englehardt *v.* Yung, 76 Ala. 534; Alston *v.* Alston, 34 Ala. 15.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Georgia.— Hines *v.* Mullins, 25 Ga. 696.

Illinois.— Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

Indiana.— Kinsey *v.* State, 98 Ind. 351.

Maryland.—Addison *v.* Bowie, 2 Bland 606.

Massachusetts.— Dawes *v.* Howard, 4 Mass. 97; Whipple *v.* Dow, 2 Mass. 415.

New Jersey.— *In re* Walling, 35 N. J. Eq. 105; Tompkins *v.* Tompkins, 18 N. J. Eq. 303; Morris *v.* Morris, 15 N. J. Eq. 239.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201; Matter of Davis, 98 N. Y. App. Div. 546, 90 N. Y. Suppl. 244 [*reversed* on other grounds in 184 N. Y. 299, 77 N. E. 259]; Matter of Wilber, 27 Misc. 53, 57 N. Y. Suppl. 942; Matter of Kane, 2 Barb. Ch. 375. *Contra*, Matter of Marx, 5 Abb. N. Cas. 224.

North Carolina.— Burke *v.* Turner, 85 N. C. 500.

Ohio.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124; *In re* Gould, 2 Ohio S. & C. Pl. Dec. 398.

Pennsylvania.—Matter of Harland, 5 Rawle 323; Wood's Estate, 13 Phila. 391.

Rhode Island.— Pearce *v.* Olney, 5 R. I. 269.

South Carolina.— Presley *v.* Davis, 1 Rich. Eq. 105, 62 Am. Dec. 396; Myers *v.* Myers, 2 McCord Eq. 214, 16 Am. Dec. 648; Cruger *v.* Heyward, 2 Desauss. Eq. 94.

Texas.— Buckley *v.* Howard, 35 Tex. 565; Linskie *v.* Kerr, (Civ. App. 1896) 34 S. W. 765; Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532.

Virginia.— Myers *v.* Wade, 6 Rand. 444.

United States.— Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724.

See 37 Cent. Dig. tit. "Parent and Child," § 34.

Funeral expenses of the child are not a charge against his estate when he leaves surviving him a father able to pay them. Rowe *v.* Raper, 23 Ind. App. 27, 54 N. E. 770, 77 Am. St. Rep. 411.

Under Ky. St. (1903) § 2032, requiring a guardian to provide out of the estate for the necessary and proper maintenance and education of his ward, a father cannot be compelled to support and educate his child from his own means where the child's estate is abundantly sufficient for that purpose. Clay *v.* Clay, 87 S. W. 807, 27 Ky. L. Rep. 1020.

1. *Alabama.*— Englehardt *v.* Yung, 76 Ala. 534; Stewart *v.* Lewis, 16 Ala. 734.

Colorado.— Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Illinois.— Mowbry *v.* Mowbry, 64 Ill. 383; Bond *v.* Lockwood, 33 Ill. 212.

Massachusetts.— Dawes *v.* Howard, 4 Mass. 97; Whipple *v.* Dow, 2 Mass. 415.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

New Jersey.— Osborn *v.* Allen, 26 N. J. L. 388.

United States.— Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531.

See 37 Cent. Dig. tit. "Parent and Child," § 34.

Contra.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

2. Mowbry *v.* Mowbry, 64 Ill. 383.

3. Mowbry *v.* Mowbry, 64 Ill. 383.

4. *Illinois.*— Bedford *v.* Bedford, 32 Ill. App. 460 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

Maryland.— Thompson *v.* Dorsey, 4 Md. Ch. 149.

Missouri.— Huke *v.* Huke, 44 Mo. App. 308.

Nebraska.—Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

New Jersey.— Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

New York.— Van Valkinburgh *v.* Watson, 13 Johns. 480, 7 Am. Dec. 395.

promise to pay or circumstances from which a promise can be implied,[5] some clear and palpable omission of duty on the part of the parent in not furnishing necessaries to the child,[6] or some special exigency rendering the interference of such person reasonable and proper.[7] Where the child lives with the parent and is provided for by him, the parent is not liable to third persons for necessaries furnished to the child.[8]

b. Child Living Away From Parents.[9] The mere fact that a child is living away from home with the consent of the parent does not relieve the latter from liability for necessaries furnished to the child,[10] and the parent is liable where his

Ohio.— Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

See 37 Cent. Dig. tit. "Parent and Child," § 36.

The fact that the parent makes a weekly allowance to the child does not exempt him from liability for necessaries furnished to the child if such allowance is not sufficient for his maintenance. Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176; Hardy *v.* Eagle, 25 Misc. (N. Y.) 471, 54 N. Y. Suppl. 1045 [*affirming* 23 Misc. 441, 51 N. Y. Suppl. 501]; Parkis *v.* Tillinghast, 19 Abb. N. Cas. (N. Y.) 190; Baker *v.* Keen, 2 Stark. 501, 3 E. C. L. 505.

5. *Alabama.*— Owen *v.* White, 5 Port. 435, 30 Am. Dec. 572.

Georgia.— Keaton *v.* Davis, 18 Ga. 457.

Illinois.— McMillen *v.* Lee, 78 Ill. 443; Gotts *v.* Clark, 78 Ill. 229; Hunt *v.* Thompson, 4 Ill. 179, 36 Am. Dec. 538; Allen *v.* Jacobi, 14 Ill. App. 277; Clark *v.* Gotts, 1 Ill. App. 154.

Iowa.— Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

Missouri.— Rogers *v.* Turner, 59 Mo. 116.

New Hampshire.—Kelley *v.* Davis, 49 N. H. 187, 6 Am. Rep. 499.

New Jersey.— Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

New York.— Raymond *v.* Loyl, 10 Barb. 483.

Oregon.— Carney *v.* Barrett, 4 Oreg. 171.

Vermont.— Gordon *v.* Potter, 17 Vt. 348; Varney *v.* Young, 11 Vt. 258.

Wisconsin.— Judge *v.* Barrows, 59 Wis. 115, 17 N. W. 540.

Wyoming.— Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

England.— Shelton *v.* Springett, 11 C. B. 452, 73 E. C. L. 452; Seaborne *v.* Maddy, 9 C. & P. 497, 38 E. C. L. 293; Rolfe *v.* Abbott, 6 C. & P. 286, 25 E. C. L. 436; Fluck *v.* Tollemache, 1 C. & P. 5, 28 Rev. Rep. 765, 12 E. C. L. 15; Blackburn *v.* Mackey, 1 C. & P. 1, 12 E. C. L. 13; Mortimore *v.* Wright, 4 Jur. 465, 9 L. J. Exch. 158, 6 M. & W. 482.

See 37 Cent. Dig. tit. "Parent and Child," § 36; and *infra*, III, A, 4, c.

A person who voluntarily supports an orphan, under no contract with the deceased parent, cannot recover from the latter's executor. Burns *v.* Madigan, 60 N. H. 197.

Allowance to child.— No such contract will be implied, when the father has allowed the son a sufficiently reasonable sum for his expenses. Crantz *v.* Gill, 2 Esp. 471, 5 Rev. Rep. 746.

Credit extended to child alone.— One who trades with an infant, and gives credit to him alone, knowing all the facts in the case, cannot sustain an action against the father of the infant for the necessaries thus delivered. Gordon *v.* Potter, 17 Vt. 348.

6. *Arkansas.*— Smith *v.* Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. N. S. 1098.

Georgia.—Brown *v.* Deloach, 28 Ga. 486.

Illinois.— Dumser *v.* Underwood, 68 Ill. App. 121; Miller *v.* Davis, 45 Ill. App. 447.

Missouri.— Rogers *v.* Turner, 59 Mo. 116.

New Hampshire.— Farmington *v.* Jones, 36 N. H. 271; Townsend *v.* Burnham, 33 N. H. 270; Pidgin *v.* Cram, 8 N. H. 350.

New Jersey.—Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

New York.— Clinton *v.* Rowland, 24 Barb. 634; Van Valkinburgh *v.* Watson, 13 Johns. 480, 7 Am. Dec. 395; Eitel *v.* Walter, 2 Bradf. Surr. 287.

See 37 Cent. Dig. tit. "Parent and Child," § 36.

7. Keaton *v.* Davis, 18 Ga. 457. *Compare* Farmington *v.* Jones, 36 N. H. 271, holding that where the minor daughter of defendant was residing, with his consent, at the house of another, and was there taken with the smallpox, and the health officers of the town established the house where she was as a pest-house, and detained her there with other patients, the town could not maintain an action against defendant for the support furnished his daughter while thus detained, since he had not neglected to support her, and no act of his rendered necessary the support furnished by the town.

Dental work.— A person with whom an infant is temporarily residing cannot pledge the parent's credit for a dentist's services in filling and regulating the infant's teeth, since such services are not required by any immediate necessity. Ketchem *v.* Marsland, 18 Misc. (N. Y.) 450, 42 N. Y. Suppl. 7.

8. Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Van Valkinburgh *v.* Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395.

9. **Deprivation of custody** see *infra*, III, A, 5.

Separation of parents see *supra*, III, A, 2, b.

10. *Illinois.*— De Wane *v.* Hansow, 56 Ill. App. 575.

Iowa.— Cooper *v.* McNamara, 92 Iowa 243, 60 N. W. 522; Porter *v.* Powell, 79 Iowa 151,

misconduct or abuse has driven the child to leave home;[11] but ordinarily, where there is no fault upon the part of the parent, a child who voluntarily abandons the parent's home for the purpose of seeking its fortune in the world, or to avoid parental discipline and restraint, forfeits the claim to support, and the parent is under no obligation to pay therefor,[12] especially where the child has left home or remains away against the will of the parent,[13] or is emancipated or receiving the benefit of its own labor.[14] And in general a parent willing to support his children in his own home will not be compelled to support them elsewhere.[15] Where a child has resided with relatives who have voluntarily supported it, and demanded neither payment for its support nor that the parent take it back or provide for it elsewhere, such persons cannot recover from the parent for past support of the child.[16]

e. **Implied Contracts and Ratification.** It has been held that a promise to pay for necessaries furnished to a child may be implied from the parent's duty to

44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

New York.— Gay *v.* Ballou, 4 Wend. 403, 21 Am. Dec. 158; Edwards *v.* Davis, 16 Johns. 281; Van Valkinburgh *v.* Watson, 13 Johns. 480, 7 Am. Dec. 395.

Ohio.— Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

Wisconsin.— McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

England.— Cooper *v.* Martin, 4 East 76; Simpson *v.* Robertson, 1 Esp. 17.

Canada.— Hughes *v.* Rees, 10 Ont. Pr. 301.

See 37 Cent. Dig. tit. "Parent and Child," §§ 39, 41.

Agreement to pay fixed amount for child's support.— Where defendant arranged with his sister-in-law to take care of his infant son, defendant to furnish a certain stipend therefor, and the sister-in-law engaged board and lodging for the boy of plaintiff, plaintiff not being aware of the arrangement between defendant and the sister-in-law, such arrangement did not relieve defendant from liability for necessaries furnished his son. Hazard *v.* Taylor, 38 Misc. (N. Y.) 774, 78 N. Y. Suppl. 828.

The incarceration of a minor child in a state hospital for the insane without his father's consent is not an emancipation of the child, and does not relieve the father from liability for its care, he being otherwise liable. Guthrie County *v.* Conrad, 133 Iowa 171, 110 N. W. 454.

11. Owen *v.* White, 5 Port. (Ala.) 435, 30 Am. Dec. 572; Stanton *v.* Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255; Manning *v.* Wells, 85 Hun (N. Y.) 27, 32 N. Y. Suppl. 601, 1 N. Y. Annot. Cas. 293 [*affirming* 8 Misc. 646, 29 N. Y. Suppl. 1044]. See also People *v.* Strickland, 13 Abb. N. Cas. (N. Y.) 473.

12. *Alabama.*— Owen *v.* White, 5 Port. 435, 30 Am. Dec. 572.

Illinois.— Hunt *v.* Thompson, 4 Ill. 179, 36 Am. Dec. 538.

Indiana.— Ramsey *v.* Ramsey, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682, even though the parent consents to the child leaving.

Maine.— Glynn *v.* Glynn, 94 Me. 465, 48 Atl. 105; Weeks *v.* Merrow, 40 Me. 151.

Massachusetts.— Foss *v.* Hartwell, 168 Mass. 66, 46 N. E. 411, 60 Am. St. Rep. 366, 37 L. R. A. 589; Angel *v.* McLellan, 16 Mass. 28, 8 Am. Dec. 118.

New York.— Raymond *v.* Loyl, 10 Barb. 483; Johnson *v.* Gibson, 4 E. D. Smith 231, where son left home against father's wishes but with his consent.

Canada.— Ouellet *v.* Gauvin, 13 Quebec Super. Ct. 542.

See 37 Cent. Dig. tit. "Parent and Child," §§ 39, 42.

Contra.— Cooper *v.* McNamara, 92 Iowa 243, 60 N. W. 522; Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

Fugitive from justice.— Where the child, having arrived at years of discretion, although not of manhood, violates the laws and becomes a fugitive from justice, the father is under no obligation for his support. Angel *v.* McLellan, 16 Mass. 28, 8 Am. Dec. 118.

13. Hunt *v.* Thompson, 4 Ill. 179, 36 Am. Dec. 538; Raymond *v.* Loyl, 10 Barb. (N. Y.) 483.

Lack of knowledge of the circumstances.— It is no excuse that persons giving credit were not aware that the child was acting contrary to the will of the father, for it is the duty of those who give credit to an infant to know his precise situation at their peril. Hunt *v.* Thompson, 4 Ill. 179, 36 Am. Dec. 538.

A child of tender age (in the case at bar eight years) does not forfeit its claim to support by voluntarily remaining away from its father's house against his will. Bradley *v.* Keen, 101 Ill. App. 519.

14. Gotts *v.* Clark, 78 Ill. 229; Johnson *v.* Gibson, 4 E. D. Smith (N. Y.) 231; Varney *v.* Young, 11 Vt. 258. See also Tyler *v.* Arnold, 47 Mich. 564, 11 N. W. 387. *Contra,* Cooper *v.* McNamara, 92 Iowa 243, 60 N. W. 522; Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

15. Glynn *v.* Glynn, 94 Me. 465, 48 Atl. 105. See also Sparr's Case, 22 Pa. Co. Ct. 406.

16. *New York.*— Chilcott *v.* Trimble, 13 Barb. 502; Eitel *v.* Walter, 2 Bradf. Surr. 287.

North Carolina.— Everitt *v.* Walker, 109 N. C. 129, 13 S. E. 860.

support the child,[17] and the knowledge of the parent that another person is boarding the child with the expectation of being paid therefor imports an obligation to pay.[18] So where a person supports a child at the parent's request a promise to pay therefor will be implied,[19] unless there was an understanding that the child shall be taken care of without charge.[20] A promise to pay is implied where the parent, without objection, allows the child, who is a member of his household, to receive[21] or retain[22] necessaries furnished by another person, although they are purchased by the child without authority;[23] and a father whose minor child lives with him and who has paid for necessary clothing furnished to the child without his request is *prima facie* liable to pay for clothing subsequently furnished to such child.[24] Where the mother keeps the children away from the father there is no implied obligation on his part to pay her for their support,[25] and it has been held that, even though a husband deserts his wife and child, no promise on his part to reimburse the wife for the support of the child can be implied,[26] and she cannot recover for the support of the child without proving an express promise by the husband to pay therefor.[27]

d. What Are Necessaries. The rules as to what are necessaries governing in cases where it is sought to charge an infant's estate for things furnished him[28] are applicable where it is sought to charge the parent.[29]

North Dakota.— Flugel *v.* Henschel, 6 N. D. 205, 69 N. W. 195.

South Carolina.— Riddle *v.* Riddle, 5 Rich. Eq. 31.

Wyoming.— Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

Agreement for compensation.— N. D. Rev. Codes, § 2789, declaring that a parent is not bound to compensate a relative for support of the child, without an agreement for compensation, does not require the agreement, in order to bind the parent, to state the specific amount of compensation which shall be paid. Flugel *v.* Henschel, 6 N. D. 205, 69 N. W. 195.

Agreement for support of child by relative. — Where a father after the death of his wife agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance, and education of his children, in consideration of his renouncing his rights thereto and of other considerations, she was not entitled to recover from him for their maintenance, and evidence of an oral promise by him before the execution of such agreement that he would pay for the maintenance of the children was inadmissible. Wright *v.* McCabe, 30 Ont. 390.

17. Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176. But *compare* Kelley *v.* Davis, 49 N. H. 187, 6 Am. Rep. 499.

18. Clark *v.* Clark, 46 Conn. 586; McGoon *v.* Irvin, 1 Pinn. (Wis.) 526, 44 Am. Dec. 409.

19. Jordan *v.* Wright, 45 Ark. 237; Carroll *v.* McCoy, 40 Iowa 38; Goetschius *v.* Hunt, 1 Silv. Sup. (N. Y.) 294, 5 N. Y. Suppl. 307 [*affirmed* in 127 N. Y. 682, 28 N. E. 256]. See also Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296.

20. Young *v.* Heater, 63 Iowa 668, 19 N. W. 827; Carroll *v.* McCoy, 40 Iowa 38.

Revocation of agreement to allow adoption. — Where a father leaves his infant child with one who wishes to adopt her, and agrees to let him do so, although no legal adoption takes place, and afterward takes the child away from such person, the latter is entitled to recover compensation for the child's maintenance while he kept her, even though he intended to make no charge therefor when he took the child. Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008.

21. Deane *v.* Annis, 14 Me. 26 (where a father was held liable to a physician for medical attendance upon his minor son, at the house of the father, with his knowledge and assent, on an implied promise, although the son had left his house against his will, and refused to return on his request, but on being taken sick, returned and was received); Swain *v.* Tyler, 26 Vt. 9.

22. Johnson *v.* Smallwood, 88 Ill. 73.

23. Johnson *v.* Smallwood, 88 Ill. 73.

24. Plotts *v.* Rosebury, 28 N. J. L. 146.

25. Rankin *v.* Rankin, 83 Mo. App. 335.

26. Johnson *v.* Barnes, 69 Iowa 641, 29 N. W. 759. But *compare* Rankin *v.* Rankin, 83 Mo. App. 335.

27. Lapworth *v.* Leach, 79 Mich. 16, 44 N. W. 338.

Separation of parents see, generally, *supra*, III, A, 2, b.

28. See INFANTS, 22 Cyc. 492–595.

29. See Streitwolf *v.* Streitwolf, 58 N. J. Eq. 570, 43 Atl. 904, 45 L. R. A. 842.

What is necessary depends upon the precise situation of the child with which the person giving credit must be acquainted at his peril. Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Van Valkinburgh *v.* Watson, 13 Johns. (N. Y.) 480, 9 Am. Dec. 395; Ford *v.* Fothergill, 1 Esp. 211, 1 Peake N. P. 229, 3 Rev. Rep. 695; Simpson *v.* Robertson, 1 Esp. 17; Bainbridge *v.* Pickering, W. Bl. 1325.

Illustrative cases.—It will not be presumed, in the absence of evidence to the contrary, that kid gloves, cologne, fiddle strings, bridles and spurs, walking canes, powder flasks and

5. DEPRIVATION OF CUSTODY.[30] While the parent's duty to support the child and his right to the custody and services of the child are usually reciprocal,[31] the parent remains liable for the support of the child where he is deprived of custody on account of his own misconduct or wrong-doing;[32] and the fact that as between the parents the custody of the children has been awarded to the mother does not relieve the father of the duty of support.[33]

6. MARRIAGE OF CHILD. Upon the marriage of a female child the obligation of the parent to support her ceases, as the husband then becomes liable.[34]

7. ADULT CHILDREN. In the absence of statute a parent is under no legal obligation to support an adult child;[35] but the legal liability for the support of the child ceases when it reaches the age of majority,[36] unless the child is in such a feeble and dependent condition physically or mentally as to be unable to support itself,[37] and the parent's liability having once determined will not be restored by a

caps, a silk cravat, and a silk and linen coat, which constitute the bulk of a bill of particulars, are such articles as will bind a parent upon any implied or express contract to pay for necessaries furnished to his minor children. Lefils *v.* Sugg, 15 Ark. 137. The maintenance and care of a minor child include necessary medical attendance. Leach *v.* Williams, 30 Ind. App. 413, 66 N. E. 172. Where a husband and wife were living apart, and the children, aged twelve, nine, and eight years, respectively, were in ordinary health and attended school daily, and defendant's wife was able to take care of them, had she chosen to do so, and it was shown that defendant was a man of small means, there was no necessity of a nurse for the children; and plaintiff, who paid the wages of such nurse, could not recover from defendant therefor on the ground that such services were necessaries. Grunhut *v.* Rosenstein, 7 Daly (N. Y.) 164. A surgical operation of doubtful advantage is not a necessity for a child, for which a non-assenting father is liable, upon an order given to the surgeon by the wife. Detwiler *v.* Bowers, 9 Pa. Super. Ct. 473. A parent is not bound to employ counsel to defend the suits of his minor children, and an express contract is necessary to enable an attorney to recover compensation from the father for services rendered the son in such case. Hill *v.* Childress, 10 Yerg. (Tenn.) 514.

Question for jury.— The question whether a commercial education in bookkeeping, etc., furnished an infant, is a necessary, for which the father is liable, is, where there is evidence as to the father's means, one for the jury. Cory *v.* Cook, 24 R. I. 421, 53 Atl. 315.

If a tradesman colludes with an infant, and furnishes him with clothes to an extravagant degree, he cannot recover his demand from the father. Simpson *v.* Robertson, 1 Esp. 17.

30. **Child living away from parent** see *supra*, III, A, 4, b.

Separation of parents see *supra*, III, A, 2, b.

31. Leibold *v.* Leibold, 158 Ind. 60, 62 N. E. 627; Ramsey *v.* Ramsey, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; Husband *v.* Husband, 67 Ind. 583, 33 Am. Rep. 107.

32. Leibold *v.* Leibold, 158 Ind. 60, 62 N. E. 627; Rankin *v.* Rankin, 83 Mo. App. 335.

Circumstances showing abuse of parental authority see Hutchinson *v.* Hutchinson, 124 Cal. 677, 57 Pac. 674.

A father who lives in concubinage with a negro woman may be compelled to support his children while living away from him without requiring their return. Heno *v.* Heno, 9 Mart. (La.) 643.

33. Shields *v.* O'Reilly, 68 Conn. 256, 36 Atl. 49; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708; Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391. And see, generally, DIVORCE, 14 Cyc. 812. *Contra*, Finch *v.* Finch, 22 Conn. 411; Foss *v.* Hartwell, 168 Mass. 66, 46 N. E. 411, 60 Am. St. Rep. 366, 37 L. R. A. 589; Brow *v.* Brightman, 136 Mass. 187.

Under the California statute, the parent who is entitled to the custody of the child has the duty of supporting and educating him, and a parent who is legally deprived of the custody is relieved from the liability for maintenance either to the other parent or to other persons furnishing necessaries. Selfridge *v.* Paxton, 145 Cal. 713, 79 Pac. 425; McKay *v.* McKay, 125 Cal. 65, 57 Pac. 677; *Ex p.* Miller, 109 Cal. 643, 42 Pac. 428.

34. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

35. Mercer *v.* Jackson, 54 Ill. 397; Haynes *v.* Waggoner, 25 Ind. 174; Simard *v.* Baller, 18 Quebec Super. Ct. 287. See also Matter of St. Lawrence State Hospital, 13 N. Y. App. Div. 436, 43 N. Y. Suppl. 608 [*affirming* 15 Misc. 165, 37 N. Y. Suppl. 16].

36. Ellebarger *v.* Swiggett, 1 Ind. App. 598, 28 N. E. 110; Brown *v.* Ramsay, 29 N. J. L. 117, 120 (where it is said, however: "Arriving at the age of twenty-one is not *ipso facto* emancipation. The child may elect still to remain the servant of its father, to abide under his roof, and receive sustenance and support from him. In such a case . . . the father is liable for his support"); Mt. Pleasant Overseers of Poor *v.* Wilcox, 2 Pa. Dist. 628, 12 Pa. Co. Ct. 447.

37. Paxton *v.* Paxton, 150 Cal. 667, 89 Pac. 1083; Mt. Pleasant Overseers of Poor *v.* Wilcox, 2 Pa. Dist. 628, 12 Pa. Co. Ct. 447;

subsequent change in the condition of the child.[38] But the obligation of a parent to support a helpless adult child ceases when the child becomes entitled to property in its own right, and the parent may then charge the child's estate for its support.[39] The parent is not bound to pay for necessaries furnished to an adult child,[40] in the absence of any express or implied contract to pay;[41] but the parent may of course become liable by contract to pay for the support of or necessaries furnished to an adult child.[42] Where it is sought to impose a statutory liability upon the parents for the support of an adult child, the case must be brought within the terms of the statute,[43] and the liability does not accrue until proceedings have been had pursuant to the statute to impose it.[44] Where an adult or emancipated child stays at the parent's house no contract to pay for support will be implied.[45]

8. Husband or Wife of Child. The parent is not bound to support the husband or wife of the child.[46]

9. Duty of Grandparents. In the absence of statute a grandparent is not bound to support his grandchildren,[47] but such a duty is sometimes imposed by statute.[48] Such a statute does not, however, apply to illegitimate offspring of a child.[49]

Simard *v.* Baller, 18 Quebec Super. Ct. 287. See also Cromwell *v.* Benjamin, 41 Barb. (N. Y.) 558.

The burden of showing such condition rests upon him who alleges it. Mt. Pleasant Overseers of Poor *v.* Wilcox, 2 Pa. Dist. 628, 12 Pa. Co. Ct. 447.

Support of pauper children see, generally, PAUPERS.

38. Mt. Pleasant Overseers of Poor *v.* Wilcox, 2 Pa. Dist. 628, 12 Pa. Co. Ct. 447, holding that where a child after reaching its majority was self-supporting, the father was not liable for its support, although it subsequently became dependent upon charity.

39. Fruitt *v.* Anderson, 12 Ill. App. 421, holding, however, that the parent had no claim against the child's estate for support furnished without the intention of charging therefor before the child's claim for accrued and future pension money was ascertained.

40. *Illinois.*— Vorass *v.* Rosenberry, 85 Ill. App. 623.

Iowa.— Blackley *v.* Laba, 63 Iowa 22, 18 N. W. 658, 50 Am. Rep. 724.

Michigan.— McCrady *v.* Pratt, 138 Mich. 203, 101 N. W. 227.

New Hampshire.— Townsend *v.* Burnham, 33 N. H. 270, unless there is authority given the child to obtain the supplies on the parent's credit.

New Jersey.— Wood *v.* Gill, 1 N. J. L. 449.

Pennsylvania.— Boyd *v.* Sappington, 4 Watts 247.

Vermont.— Hawkins *v.* Hyde, 55 Vt. 55.

41. Vorass *v.* Rosenberry, 85 Ill. App. 623; Wood *v.* Gill, 1 N. J. L. 449; Hawkins *v.* Hyde, 55 Vt. 55.

42. Kernodle *v.* Caldwell, 46 Ind. 153 (holding that a father is liable for board furnished to his adult daughter at his request, although no promise to pay is made in writing); Ellebarger *v.* Swiggett, 1 Ind. App. 598, 28 N. E. 110.

Services by child to person furnishing board.— Where board is furnished to a daughter, over twenty-one years of age, at the special instance and request of her father, the fact that the daughter takes up her home with the person furnishing such board, and renders services for him, without expectation of charging such services or being charged for board, will not relieve the father from his obligation to pay for such board. Kernodle *v.* Caldwell, 46 Ind. 153.

43. Mt. Pleasant Overseers of Poor *v.* Wilcox, 2 Pa. Dist. 628, 12 Pa. Co. Ct. 447.

44. Loomis *v.* Newhall, 15 Pick. (Mass.) 159; Mills *v.* Wyman, 3 Pick. (Mass.) 207.

45. *Colorado.*—Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Delaware.— Cantine *v.* Phillips, 5 Harr. 428, holding that the law will not imply a contract on the part of a husband to pay his wife's board while staying at her father's house.

Illinois.— Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.

Indiana.— See Haynes *v.* Waggoner, 25 Ind. 174, holding that where a father supported a widowed daughter and her offspring, whether or not the support was a gratuity was to be determined from the circumstances surrounding the case.

Kentucky.— Terry *v.* Harder, 78 S. W. 154, 25 Ky. L. Rep. 1486.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201.

Rhode Island.— Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791, holding that a parent cannot recover from the estate of a deceased daughter expenses incurred for medical attendance and in nursing her during her last illness at their home, although the daughter was of age.

No implied promise of infant children to pay for support see *infra*, III, C, 4.

46. Friend *v.* Thompson, Wright (Ohio) 636; Rex *v.* Dempson, Str. 955.

47. Haynes *v.* Waggoner, 25 Ind. 174. See also Arrington *v.* Cheatham, 2 Rob. (Va.) 492.

48. See Hillsborough *v.* Deering, 4 N. H. 86; Leiby's Appeal, 49 Pa. St. 182; Com. *v.* Spaar, 8 Pa. Dist. 380; Com. *v.* Fitzpatrick, 5 Pa. Dist. 309. And see, generally, PAUPERS.

49. Hillsborough *v.* Deering, 4 N. H. 86.

B. Actions to Compel Support or Payment For Necessaries — 1. Jurisdiction. Equity has general jurisdiction of a suit by a wife to compel her husband to support their infant children,[50] but it has been held that a minor child has no right of action in equity against its father to compel him to maintain or educate it during its minority.[51] In Illinois the county court is the proper forum under the statute for proceedings to compel a parent to support his infant child.[52]

2. Limitation of Actions.[53] Where there is a continuing contract by the parent to pay the amount expended by another person for necessaries for the child, limitations do not run against specific items of the account but the statute runs only from the time the last item was furnished;[54] but where the parent has merely assented to retain a liability for the support of his child so that no other person could support it and recover therefor unless he omitted such duty, no item furnished by another person would have any relation to any other and the statute would run as to each item from the time it was furnished.[55]

3. Parties. Under a statute providing that societies for the prevention of cruelty to children may prefer complaints under any law relating to or affecting the children, such a society or the president thereof may institute a complaint under a statute which designates one neglecting to provide for his children as a disorderly person, and provides for compelling him to give indemnity for their support.[56]

4. Pleading.[57] The complaint in an action against a father for articles furnished to the child must state that such articles were necessary,[58] and that the child stood in need thereof at the time of their purchase and delivery.[59] So also a complaint in an action against a father to recover for the support of a child which fails to state that the father had abandoned or neglected the child, or that he knew of or promised to pay for the services of plaintiff, does not state a cause of action.[60] A complaint for money as due plaintiff for the support of defendant's child, alleging that the support was estimated at a certain rate per week but not that plaintiff agreed to pay or that the support was reasonably worth such sum, is sufficiently answered by an affidavit of defense alleging that defendant never agreed to pay any board nor did plaintiff demand it, but on the contrary refused to charge any, wherefore defendant, recognizing his obligation, made presents to plaintiff's wife far exceeding the value of the board as charged, and that while the child was with plaintiff defendant paid for its clothes and other necessaries.[61] In a petition against a father for failure to support his child, defendant must take advantage of failure of the petition to show that the child was under twenty-one years of age by plea and not by special demurrer.[62] Where an action to recover for necessaries is based upon an express agreement to pay therefor, there can be no recovery except on proof of such an agreement.[63]

5. Evidence.[64] Where an infant having no guardian and living with his mother attends a school, it will be presumed that he was sent by the mother, and she is

50. Leibold *v.* Leibold, 158 Ind. 60, 62 N. E. 627.

In a suit by an adult invalid child against his parents for maintenance, as authorized by Cal. Civ Code, § 206, the court has power to make preliminary orders requiring the parents to pay suit money, counsel fees, and maintenance *pendente lite*. Paxton *v.* Paxton, 150 Cal. 667, 89 Pac. 1083.

51. Huke *v.* Huke, 44 Mo. App. 308.

52. Steele *v.* People, 88 Ill. App. 186.

53. See, generally, Limitations of Actions.

54. Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

55. Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

56. People *v.* Strickland, 13 Abb. N. Cas. (N. Y.) 473.

57. See, generally, Pleading.

58. Cousins *v.* Boyer, 114 N. Y. App. Div. 787, 100 N. Y. Suppl. 290.

59. Cousins *v.* Boyer, 114 N. Y. App. Div. 787, 100 N. Y. Suppl. 290, where the complaint was held insufficient.

60. Everitt *v.* Walker, 109 N. C. 129, 13 S. E. 860.

61. McLaughlin *v.* McLaughlin, 159 Pa. St. 489, 28 Atl. 302.

62. Humphreys *v.* Bush, 118 Ga. 628, 45 S. E. 911.

63. Harcourt *v.* Ennis, 57 N. Y. Super. Ct. 423, 8 N. Y. Suppl. 194.

64. See, generally, Evidence.

liable for the tuition.[65] One claiming to recover against the parent as for necessaries furnished to the child, in the absence of the parent's authority or consent, must show that the articles were in the nature of necessaries,[66] and that the parent failed to supply them.[67] A person attempting to hold the father liable for necessaries furnished his child while in the custody of the mother who had abandoned the father's house must show that the mother was justified in taking the child away.[68] In an action for boarding defendant's son the burden is on plaintiff to prove by a preponderance of evidence that when the son came to him to board he was authorized to procure board upon the father's credit and that plaintiff boarded the son relying solely upon such credit.[69] In an action to recover from a father for necessaries furnished to his minor child, evidence as to the circumstances of the father is admissible to determine whether the articles furnished corresponded with his position in life and his duty to his children;[70] but evidence of the standing of the father and the expectancy of the child is not admissible on the question of the value of board and care furnished to the child, payment for which is sought to be enforced against the father.[71] Evidence that defendant permitted his son to bring home some of the articles purchased from plaintiff may be considered on the question of ratification by defendant of his son's purchase.[72] In an action to recover for the support of defendant's child, where it is charged by the court that the law imposes a legal obligation on defendant to pay for the keeping of his child, evidence as to what the claimant said as to whether he expected compensation for the support of the child is immaterial.[73] Slight evidence will support an allegation of a promise by a parent to pay for the support of his child or for necessaries furnished to it;[74] and the fact that a father had made a conditional promise to pay a debt contracted by his minor child is evidence of a previous authority to the child to contract the debt.[75] Where in an action against a father for necessaries furnished his infant son it is shown that plaintiff gave receipts to the infant in his own name and made out bills for the balance against the infant, such facts, if not explained, are conclusive that the credit was given to the infant and not to the parent.[76]

6. Trial.[77] In an action against a parent for the support of or necessaries furnished to the child, the question of the parent's liability is for the jury, under proper instructions.[78]

7. Judgment or Decree.[79] In a suit by an invalid adult child against his parents

65. Tilton *v.* Russell, 11 Ala. 497.

66. Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35; Henry *v.* Betts, 1 Hilt. (N. Y.) 156; Poock *v.* Miller, 1 Hilt. (N. Y.) 108.

67. Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35, holding that, until this is shown, evidence of the pecuniary condition of defendant is not admissible.

68. Hyde *v.* Leisenring, 107 Mich. 490, 65 N. W. 536.

69. McCrady *v.* Pratt, 138 Mich. 203, 101 N. W. 227.

70. McGoon *v.* Irvin, 1 Pinn. (Wis.) 526, 44 Am. Dec. 409.

71. Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999.

72. Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35, holding, however, that such evidence is not conclusive.

73. Dutton *v.* Seevers, 89 Iowa 302, 56 N. W. 398.

74. Jordan *v.* Wright, 45 Ark. 237.

Evidence sufficient to warrant recovery see Crane *v.* Baudouine, 55 N. Y. 256 [*reversing* 65 Barb. 260]; Henry *v.* Betts, 1 Hilt. (N. Y.) 156; Neilson *v.* Ray, 17 N. Y. Suppl. 500.

Evidence insufficient to warrant recovery see Croxton *v.* Foreman, 13 Ind. App. 442, 41 N. E. 838.

75. Brown *v.* Deloach, 28 Ga. 486.

76. Bartels *v.* Moore, 9 Daly (N. Y.) 235.

77. See, generally, Trial.

78. *Alabama.*— Owen *v.* White, 5 Port. 435, 30 Am. Dec. 572.

Iowa.— Kubic *v.* Zemke, 105 Iowa 269, 74 N. W. 748.

New York.— Parker *v.* Tillinghast, 19 Abb. N. Cas. 190.

Ohio.— Quigley *v.* Murphy, 5 Ohio S. & C. Pl. Dec. 680, 4 Ohio N. P. 1.

England.— Law *v.* Wilkins, 6 A. & E. 718, 6 L. J. K. B. 166, 1 N. & P. 697, W. W. & D. 235, 33 E. C. L. 378; Baker *v.* Keen, 2 Stark. 501, 3 E. C. L. 505.

See 37 Cent. Dig. tit. "Parent and Child," § 61½.

As to propriety of particular instructions see Bradley *v.* Keen, 101 Ill. App. 519; Miller *v.* Davis, 49 Ill. App. 377; Lapworth *v.* Leach, 79 Mich. 16, 44 N. W. 338.

79. See, generally, Judgments.

for maintenance, it is competent for the court to reserve power in the decree to alter the same as the subsequent changes in the circumstances of the parties may require.[80]

C. Charging Support on Child's Estate — 1. General Rule. While in a proper case the support and education of a child may be made a charge against its estate,[81] the father cannot be allowed to use the property of the child for its support and education,[82] unless this is absolutely necessary,[83] or to charge the estate of the child for its support and education,[84] save under exceptional circumstances.[85] Where, however, the duty of support has developed upon the mother, she is entitled to be allowed a reasonable amount out of the property of the children for their maintenance and education,[86] without reference to her own ability to support and educate them,[87] and such allowance may be made not only to provide for the future,[88] but also to reimburse her for past expenditures.[89]

80. Paxton *v.* Paxton, 150 Cal. 667, 89 Pac. 1083.

81. Glidewell *v.* Snyder, 72 Ind. 528; Gerdes *v.* Weiser, 54 Iowa 591, 7 N. W. 42, 37 Am. Rep. 229; Stigler *v.* Stigler, 77 Va. 163; *In re* Naish, 9 L. J. Ch. 252. See also Infants, 22 Cyc. 563.

When charge or allowance proper see *infra*, III, C, 2.

82. *Illinois.*— Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

Maryland.—Addison *v.* Bowie, 2 Bland 606.

New Jersey.— *In re* Walling, 35 N. J. Eq. 105; Morris *v.* Morris, 15 N. J. Eq. 239.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201; Matter of Davis, 98 N. Y. App. Div. 546, 90 N. Y. Suppl. 244 [*reversed* on other grounds in 184 N. Y. 299, 77 N. E. 259]; Matter of Kane, 2 Barb. Ch. 375. See also Matter of Wells, 3 Dem. Surr. 556.

North Carolina.— Burke *v.* Turner, 85 N. C. 500.

Ohio.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124; *In re* Gould, 2 Ohio S. & C. Pl. Dec. 196.

Pennsylvania.—*In re* Harland, 5 Rawle 323; *In re* Wood, 13 Phila. 391.

South Carolina.— Dupont *v.* Johnson, Bailey Eq. 279; Myers *v.* Myers, 2 McCord Eq. 214, 16 Am. Dec. 648; Cruger *v.* Heyward, 2 Desauss. Eq. 94.

Texas.— Linskie *v.* Kerr, (Civ. App. 1896) 34 S. W. 765; Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— Myers *v.* Wade, 6 Rand. 444.

See 37 Cent. Dig. tit. "Parent and Child," § 52.

83. Linskie *v.* Kerr, (Tex. Civ. App. 1896) 34 S. W. 765.

84. Tanner *v.* Skinner, 11 Bush (Ky.) 120; Matter of Wilber, 27 Misc. (N. Y.) 53, 57 N. Y. Suppl. 942; Presley *v.* Davis, 7 Rich. Eq. (S. C.) 105, 62 Am. Dec. 396; Dupont *v.* Johnson, Bailey Eq. (S. C.) 279; Andrews *v.* Partington, 3 Bro. Ch. 60, 29 Eng. Reprint 408, 2 Cox Ch. 223, 30 Eng. Reprint 103; Hill *v.* Chapman, 2 Bro. Ch. 231, 29 Eng. Reprint 129; Simon *v.* Barber, Taml. 22, 12 Eng. Ch. 22, 48 Eng. Reprint 10.

Failure to exercise authority to use child's estate.—Where a father was appointed guardian of his child, and was authorized by the court to apply to the child's maintenance the interest of the fund, but instead of so doing supported the child himself, it was held that, after the guardianship had terminated, no allowance should be made for such maintenance. Stigler *v.* Stigler, 77 Va. 163.

85. Tanner *v.* Skinner, 11 Bush (Ky.) 120.

86. *Alabama.*—Englehardt *v.* Yung, 76 Ala. 534.

California.— *In re* Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

Colorado.— Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

New York.— Wilkes *v.* Rogers, 6 Johns. 566; Gladding *v.* Follett, 2 Dem. Surr. 58 [*affirmed* in 30 Hun 219 (*affirmed* in 95 N. Y. 652)].

Wisconsin.— Pierce *v.* Pierce, 64 Wis. 73, 24 N. W. 498, 54 Am. Rep. 581.

United States.— Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531, holding that the children's estate in remainder in lands in which the mother had a life-estate could be sold for their maintenance.

See 37 Cent. Dig. tit. "Parent and Child," § 53.

Interest of children in recovery for wrongful killing of father.— Where a mother, without any estate of her minor children, and having simply a right of action for the negligence and wrongful killing of her husband, the recovery of which under a decree of a court unappealed from inures partly to the minors, voluntarily, under the natural promptings of a mother's love, labors and expends from her earnings what is needed for their support, she cannot in a suit by the minors to recover from her their part of the joint recovery, reimburse herself out of their part of the fund for her labor and expenditures thus made for them. Hollingsworth *v.* Beaver, (Tenn. Ch. App. 1900) 59 S. W. 464.

87. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139. And see cases cited *supra*, note 86.

88. Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566.

89. *Alabama.*—Englehardt *v.* Yung, 76 Ala. 534; Stewart *v.* Lewis, 16 Ala. 734.

2. WHEN CHARGE OR ALLOWANCE PROPER — a. In General. An allowance to the father for maintenance of the child is proper where the father has been obliged to contract debts in supporting the child.[90] But it has been held that even a mother should not be allowed for maintenance and support of the child where she has received all the income of the child's land,[91] and the child's labor while at home and its wages while away,[92] and where the value of the child's labor for the mother was equal to the value of his maintenance.[93]

b. Existence of Trust Fund. A trust fund created or bequeathed for the purpose of supporting or educating the child may be applied for that purpose,[94] notwithstanding the liability of the father,[95] and the fact that he is able to support or educate the child out of his own means.[96]

c. Inability of Parent. Where the situation and circumstances of a parent are such that he is not financially able to properly support and educate the child, an allowance may be made to him from the child's estate for this purpose,[97]

California.— *In re* Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

Indiana.— Jessup *v.* Jessup, 17 Ind. App. 177, 46 N. E. 550.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

New Jersey.— Pyatt *v.* Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048 [*reversing* 44 N. J. Eq. 491, 15 Atl. 421].

New York.— Hill *v.* Hanford, 11 Hun 536; Wilkes *v.* Rogers, 6 Johns. 566; Matter of Winsor, 5 Dem. Surr. 340; Gladding *v.* Follett, 2 Dem. Surr. 58 [*affirmed* in 30 Hun 219 (*affirmed* in 95 N. Y. 652)].

See 37 Cent. Dig. tit. "Parent and Child," § 53.

Contra.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124. And see Seitz' Appeal, 87 Pa. St. 159.

A mother is not necessarily entitled to full indemnity out of the principal of the child's estate. Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

Accounting.— Where a father died intestate, leaving a large real and personal estate, and his infant children were maintained by their mother, it was held that the mother was to be charged with interest on two thirds of the money which she had received in managing the estate, and to be allowed interest on all sums expended by her. Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566.

90. *Ex p.* Darlington, 1 Ball & B. 240, 12 Rev. Rep. 21; Parsons *v.* Peters, 11 Jur. N. S. 150, 11 L. T. Rep. N. S. 501, 13 Wkly. Rep. 214; Carmichael *v.* Hughes, 20 L. J. Ch. 396.

91. *In re* Livernois, 78 Mich. 330, 44 N. W. 279.

92. *In re* Livernois, 78 Mich. 330, 44 N. W. 279.

93. Com. *v.* Lee, 120 Ky. 433, 86 S. W. 990, 89 S. W. 931, 27 Ky. L. Rep. 806, 28 Ky. L. Rep. 596; Leake *v.* Goode, 96 S. W. 565, 29 Ky. L. Rep. 793.

94. Kendall *v.* Kendall, 60 N. H. 527; Freeman *v.* Coit, 27 Hun (N. Y.) 447; Myers *v.* Myers, 2 McCord Eq. (S. C.) 214, 16 Am. Dec. 648, where a father who was directed by the will, under which the children took the property, to educate the children out of the profits of the trust estate, was allowed to charge them with the cost of their education, although a charge for maintenance was denied.

95. Freeman *v.* Coit, 27 Hun (N. Y.) 447.

96. Myers *v.* Myers, 2 McCord Eq. (S. C.) 214, 16 Am. Dec. 648.

97. *Alabama.*— Waldron *v.* Waldron, 76 Ala. 285; Beasley *v.* Watson, 41 Ala. 234; Alston *v.* Alston, 34 Ala. 15; Watts *v.* Steele, 19 Ala. 656, 54 Am. Dec. 207; Stewart *v.* Lewis, 16 Ala. 734.

Colorado.— Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

District of Columbia.— Holtzman *v.* Castleman, 2 MacArthur 555.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Illinois.— Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

Indiana.— Haase *v.* Roehrscheid, 6 Ind. 66.

Kentucky.— Com. *v.* Lee, 120 Ky. 433, 86 S. W. 990, 89 S. W. 731, 27 Ky. L. Rep. 806, 28 Ky. L. Rep. 596.

Louisiana.— Mercier *v.* Canonge, 12 Rob. 385.

Massachusetts.— Dawes *v.* Howard, 4 Mass. 97.

Missouri.— Otte *v.* Becton, 55 Mo. 99.

New Jersey.— McKnight *v.* Walsh, 23 N. J. Eq. 136; Tompkins *v.* Tompkins, 18 N. J. Eq. 303, even though the property was bequeathed to the children with directions that it be accumulated during minority.

New York.— Matter of Wright, 4 N. Y. Suppl. 343, 1 Connoly Surr. 281; Matter of Burke, 4 Sandf. Ch. 617; Harring *v.* Coles, 2 Bradf. Surr. 349.

North Carolina.— Walker *v.* Crowder, 37 N. C. 478.

Pennsylvania.— Wall's Estate, 2 Pa. Dist. 580; Newport *v.* Cook, 2 Ashm. 332; Pennock's Estate, 11 Phila. 75; Kinike's Case, 29 Wkly. Notes Cas. 163.

Rhode Island.— Pearce *v.* Olney, 5 R. I. 269.

South Carolina.— Rhode *v.* Tuten, 34 S. C. 496, 13 S. E. 676; Bailey *v.* Wagner, 2 Strobh. Eq. 1; Dupont *v.* Johnson, Bailey Eq. 279; Myers *v.* Myers, 2 McCord Eq. 214, 16 Am. Dec. 648; Heyward *v.* Cuthbert, 4 Desauss. Eq. 445.

Tennessee.— Trimble *v.* Dodd, 2 Tenn. Ch. 500.

either as a provision for the future,[98] or as a reimbursement for past expenditures;[99] and such allowance may be either for the entire support of the child or to supplement the father's contribution thereto, according to the circumstances of each case.[1]

3. AMOUNT OF ALLOWANCE. The amount of the allowance necessarily depends upon the circumstances of each case.[2] When an allowance for past support of an infant is asked for on behalf of a parent, the court will make such an allowance only as it would have made if it had been asked for in advance,[3] and will not be influenced by any subsequent fortuitous increase of the infant's fortune,[4] neither will it more than reimburse the parent for actual and reasonable disbursements.[5] A father is not entitled to the whole of the income of his minor child's estate on the ground that it is necessary to enable him to support an establishment suitable for such child as a member of his family.[6]

4. CONTRACTS BETWEEN PARENT AND CHILD AS TO SUPPORT. Where an infant resides with his parent, who supplies him with necessaries, there is no implied promise on his part to pay for his support,[7] and he will not be bound even by an express promise to pay therefor.[8] So also a promise by an adult or emancipated child to pay the parent for support during infancy and before emancipation is void for lack of consideration.[9] But it has been held that where a mother, in consideration of occupying her child's estate, agrees to board such child, and the child, upon coming of age, demands and receives rent for such occupation, the mother will be entitled to a compensation for the board of such child.[10]

Texas.— Freybe *v.* Tiernan, 76 Tex. 286, 13 S. W. 370 (expenditures a charge on estate, although made without order of court); Buckley *v.* Howard, 35 Tex. 565; Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

England.— *Ex p.* Darlington, 1 Ball & B. 240, 12 Rev. Rep. 21; Parsons *v.* Peters, 11 Jur. N. S. 150, 11 L. T. Rep. N. S. 501, 13 Wkly. Rep. 214; Carmichael *v.* Hughes, 20 L. J. Ch. 396.

See 37 Cent. Dig. tit. "Parent and Child," § 55.

The father cannot, to the detriment of creditors, charge himself with the expenses of his children's support and education, for which they have a sufficient income. Mercier *v.* Canonge, 12 Rob. (La.) 385. See also Newman *v.* Cooper, 48 La. Ann. 1206, 20 So. 722.

Where a father has made no charge for maintaining his infant children, the court will not make it for him, in order that his creditors may thereby be benefited. Beardsley *v.* Hotchkiss, 96 N. Y. 201.

98. Beasley *v.* Watson, 41 Ala. 234; Alston *v.* Alston, 34 Ala. 15; Trimble *v.* Dodd, 2 Tenn. Ch. 500.

99. Alston *v.* Alston, 34 Ala. 15; Trimble *v.* Dodd, 2 Tenn. Ch. 500.

Change in parent's circumstances.— Where a patient applies for allowance for past maintenance, the court will generally consider his means at the time the support is furnished. Where, however, at the time a parent had used the child's means in supporting her, his own means were not then such as to require him, in view of her estate, to contribute to her support, but subsequently thereto, and before the application by him for an order allowing such use of her means, or the institution by her of a suit for an account of her estate, there had been, pending her infancy, such an increase in the value of his estate as would enable him to reimburse her estate in part or wholly without affecting his own support, such reimbursement should be required. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426. But *compare* Pearce *v.* Olney, 5 R. I. 269.

1. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426; Mercier *v.* Canonge, 12 Rob. (La.) 385.

2. See Voëssing *v.* Voëssing, 4 Redf. Surr. (N. Y.) 360.

Circumstances to be considered.— Where the mother and her infant child live together and the mother is unable to support the child and the land is used for the common support of the family, such fact should be considered in estimating the amount of the infant's board which the mother is to be allowed, and the fact that the mother has elected to take a homestead interest instead of dower in the husband's estate is also to be considered. Com. *v.* Lee, 120 Ky. 433, 86 S. W. 990, 89 S. W. 731, 27 Ky. L. Rep. 806, 28 Ky. L. Rep. 596.

3. Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

4. Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

5. Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

6. McKnight *v.* Walsh, 23 N. J. Eq. 136 [*affirmed* in 24 N. J. Eq. 498].

7. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139; Cummings *v.* Cummings, 8 Watts (Pa.) 366; McDonald's Estate, 14 Phila. (Pa.) 253.

8. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Contracts of infants generally see INFANTS.

9. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

10. Whipple *v.* Dow, 2 Mass. 415.

5. Contracts of Parent as Affecting Child. A parent cannot, without the authority of the court, make a contract for the support or education of the child which is binding on the child or enforceable against its property.[11]

6. Proceedings For Allowance. A father is not entitled to have the income of the estate of his infant children appropriated for their support without an order of some proper court based upon his inability to support them properly;[12] but application should be made in advance for an allowance from the child's estate,[13] and while an allowance for past maintenance may be granted,[14] an inquiry as to granting an allowance for past maintenance will not be directed as a matter of course, but only upon a special case showing good grounds therefor.[15] A proceeding to have the child's estate applied to its maintenance must be in the court having jurisdiction of the estate[16] and during the time it has such jurisdiction.[17] The infant is not an indispensable party to a bill filed by its father against the trustee of its estate to have an allowance for its support and education decreed to be paid by the trustee out of its annual income.[18] Where the estate of a child consists solely of property devised and bequeathed to him by his mother, a petition by the father for an order directing the application of the income of the child's real estate for his support and education should show the amount of net annual income of the child, the circumstances in life, and the style of living to which the family of the mother have been accustomed, and the circumstances of the petitioner as to whether he is able to support the child.[19] Where the father claims contribution from the child's estate for its support, the burden is upon him to show the necessity therefor,[20] and he will be charged with the child's support during periods as to which he does not establish such necessity.[21] The allowance is within the discretion of the court,[22] which should consider the circumstances of the father,[23] the necessary and proper expense of maintaining his family,[24] and the amount of the child's fortune.[25]

IV. Support of Parent by Child.

A. Duty and Liability of Child — 1. At Common Law. At common law a

11. Gerdes *v.* Weiser, 54 Iowa 591, 7 N. W. 42, 37 Am. Rep. 229; Cox *v.* Storts, 14 Bush (Ky.) 502; Michie *v.* Armat, 15 La. Ann. 225.

12. McKnight *v.* Walsh, 23 N. J. Eq. 136 [*affirmed* in 24 N. J. Eq. 498]; Burke *v.* Turner, 85 N. C. 500. See also Evans *v.* Pearce, 15 Gratt. (Va.) 513, 78 Am. Dec. 635, holding that where no application was ever made for authority to apply the income of the children's estate to their maintenance, and no charges were made by the father against them, the court, in settling the accounts, will not allow such application without the clearest proof that justice requires it.

13. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

14. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426 (holding that such an allowance may be directed in a suit for an account against the father in possession of and managing the child's estate, where the pleadings justify it); Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

15. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426; Matter ot Kane, 2 Barb. Ch. (N. Y.) 375; Smith *v.* Geortner, 40 How. Pr. (N. Y.) 185.

16. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

17. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

18. Watts *v.* Steele, 19 Ala. 656, 54 Am. Dec. 207.

19. Norton *v.* Sillcocks, 4 Dem. Surr. (N. Y.) 145.

20. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426; Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

21. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426; Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662.]

22. Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724.

23. Alston *v.* Alston, 34 Ala. 15; Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Where a part of the father's estate is nonproductive and is not used for his maintenance, and the value of such part is so large as to make it seem, in view of his and the child's relative circumstances, unjust to the child that he should hold it free from liability for her support, it should not be ignored in deciding upon his ability to contribute thereto. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

24. Alston *v.* Alston, 34 Ala. 15.

Expenses arising from an incurable sickness of the father's wife should be considered in fixing the allowance. Alston *v.* Alston, 34 Ala. 15.

25. Alston *v.* Alston, 34 Ala. 15; Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

child is not bound to support its parents,[26] and no promise on the part of the child to pay for necessaries furnished to the parent will be implied from the mere existence of the relation.[27]

2. Under Statutes. Under statute, however, it is very generally made the duty of a child who is able to do so to support its parents when the latter are helpless and indigent.[28] But the statutory liability can be enforced only in the mode pointed out by the statute.[29]

B. Right of Child to Recover For Support, Etc., Furnished. Where a parent lives with a child as a member of the latter's family and is supported by the child, this fact of itself gives rise to no implication of a promise on the part of the parent to pay for support, and the child cannot recover for what has been done or furnished,[30] unless of course there was an express contract of the parent

26. *Connecticut.*—Stone *v.* Stone, 32 Conn. 142; Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79; Gilbert *v.* Lynes, 2 Root 168; Waterbury *v.* Hurlburt, 1 Root 60.

Indiana.— Becker *v.* Gibson, 70 Ind. 239.

Iowa.— Dawson *v.* Dawson, 12 Iowa 512.

New Hampshire.— Gray *v.* Spalding, 58 N. H. 345; Lebanon *v.* Griffin, 45 N. H. 558.

New York.— Edwards *v.* Davis, 16 Johns. 281.

Oregon.— Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

See 37 Cent. Dig. tit. "Parent and Child," § 63.

27. *Connecticut.*—Condon *v.* Pomroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696; Stone *v.* Stone, 32 Conn. 142.

Indiana.— Becker *v.* Gibson, 70 Ind. 239.

Iowa.— Dawson *v.* Dawson, 12 Iowa 512.

New Hampshire.— Lebanon *v.* Griffin, 45 N. H. 558.

New York.— Edwards *v.* Davis, 16 Johns. 281.

Oregon.— Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

Pennsylvania.— Darlington *v.* Darlington, 5 Pa. Co. Ct. 132.

England.— Rex *v.* Munden, Str. 190.

See 37 Cent. Dig. tit. "Parent and Child," § 63.

28. *California.*— Duffy *v.* Yordi, 149 Cal. 140, 84 Pac. 838, 117 Am. St. Rep. 125, 4 L. R. A. N. S. 1159.

Connecticut.—Stone *v.* Stone, 32 Conn. 142.

Illinois.— Mercer *v.* Jackson, 54 Ill. 397.

Iowa.— Jasper County *v.* Osborn, 59 Iowa 208, 13 N. W. 104; Dawson *v.* Dawson, 12 Iowa 512.

Louisiana.— Guidry's Succession, 40 La. Ann. 671, 4 So. 893.

Michigan.— Howe *v.* Hyde, 88 Mich. 91, 50 N. W. 102.

New Hampshire.— Lebanon *v.* Griffin, 45 N. H. 558.

New York.— Edwards *v.* Davis, 16 Johns. 281.

Oregon.— Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

Pennsylvania.— *In re* O'Donnell, 126 Pa. St. 155, 19 Atl. 42; Darlington *v.* Darlington, 5 Pa. Co. Ct. 132; Directors *v.* Shultz, 2 Lanc. L. Rev. 405.

Vermont.— Tinmouth *v.* Warren, 17 Vt. 606.

England.— Allen *v.* Coster, 1 Beav. 202, 9 L. J. Ch. 131, 17 Eng. Ch. 202, 48 Eng. Reprint 917; Rex *v.* Munden, Str. 190.

See 37 Cent. Dig. tit. "Parent and Child," § 63. And see, generally, Paupers.

Conn. Gen. St. § 3318, declaring that children able to support indigent parents shall provide support for them, and if they neglect to do so the superior court may order them to contribute to such support such sum as may be reasonable and necessary, does not impose on a daughter an absolute legal duty to support her mother, but the duty imposed does not come into force till the court has found the necessity for aid and the ability to aid, and prescribed to what extent aid shall be furnished, and hence the obligation does not carry with it the right to determine the place where such support shall be furnished, and the court is empowered to order the daughter to contribute to her mother's support in the place of the latter's residence. Condon *v.* Pomroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696, holding further that a daughter's willingness to provide for her mother a comfortable bed and sufficient food, coupled with much harsh treatment, is not decisive of the question of neglect, within the statute, and the court's finding of the fact of such neglect will not be disturbed on appeal because of such willingness.

29. Gilbert *v.* Lynes, 2 Root (Conn.) 168; Waterbury *v.* Hurlburt, 1 Root (Conn.) 60; Edwards *v.* Davis, 16 Johns. (N. Y.) 281; Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589; Rex *v.* Munden, Str. 190. And see, generally, Paupers.

30. *Alabama.*— Borum *v.* Bell, 132 Ala. 85, 31 So. 454.

Delaware.— Bradley *v.* Kent, 7 Houst. 372, 32 Atl. 286.

Illinois.— Switzer *v.* Kee, 146 Ill. 577, 35 N. E. 160 [*affirming* 48 Ill. App. 375]; Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.

Indiana.— Smith *v.* Denman, 48 Ind. 65; Niehaus *v.* Cooper, 22 Ind. App. 610, 52 N. E. 761.

Iowa.— McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488; Traver *v.* Shiner, 65 Iowa 57, 21 N. W. 159.

Kansas.— Greenwell *v.* Greenwell, 28 Kan. 675.

to pay,[31] or a mutual understanding of the parties that the child is to be paid for the support and care of the parent,[32] which understanding may be implied from the circumstances of the case and the conduct of the parties.[33] So also where a child remains a member of the parent's household the law will not imply any contract on the part of the parent to compensate the child for or repay his contributions toward the maintenance of the household.[34]

Michigan.— Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

Missouri.— Falls *v.* Jones, 107 Mo. App. 357, 81 S. W. 455.

Nebraska.— Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25.

New Jersey.— Fennimore *v.* Wagner, (N. J. Ch. 1906) 64 Atl. 698.

New York.— Matter of Skelly, 18 Misc. 719, 43 N. Y. Suppl. 964.

Pennsylvania.—Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720; Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394; Lynn *v.* Lynn, 29 Pa. St. 369; Dettenmaier's Estate, 13 Pa. Super. Ct. 170; Prizer's Estate, 12 Montg. Co. Rep. 186.

Virginia.— Nicholas *v.* Nicholas, 100 Va. 660, 42 S. E. 669, 866.

West Virginia.— Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815.

Wisconsin.— Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

See 37 Cent. Dig. tit. "Parent and Child," § 63½.

But *compare In re* Olivier, 18 La. Ann. 594.

Maintenance out of property given to child. — Where a father delivered to his son possession of land, which he afterward devised to such son, but of which he gave no conveyance, and the father became a lunatic and the son was appointed guardian and supported his father during his life, the father must be presumed to have intended to reserve a right to a maintenance out of his property in the possession of the son, and the son is not entitled to compensation for such maintenance out of other property of his father. Spack *v.* Long, 36 N. C. 426.

31. *Alabama.*— Borum *v.* Bell, 132 Ala. 85, 31 So. 454.

Illinois.— Falloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.

Indiana.— Smith *v.* Denman, 48 Ind. 65.

Michigan.— Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

Mississippi.— Hutcheson *v.* Tucker, (1894) 15 So. 132.

Missouri.— Falls *v.* Jones, 107 Mo. App. 357, 81 S. W. 455.

Pennsylvania.— Lynn *v.* Lynn, 29 Pa. St. 369; *In re* Dettenmaier, 13 Pa. Super. Ct. 170; Prizer's Estate, 12 Montg. Co. Rep. 186.

West Virginia.— Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815.

Wisconsin.— Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

See 37 Cent. Dig. tit. "Parent and Child," § 63½.

The burden of proof as to such a contract is on the child. Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

An express contract may be established by circumstantial evidence, provided the circumstances are clearly proved and are equivalent to direct and positive proof. Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

Declarations.— Repeated declarations of the parent that he is to pay board may, in connection with the attendant circumstances, be evidence of an express contract. Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394. But evidence of loose declarations made by the father in his old age that if the son would take care of him he should be well paid is entirely insufficient to prove a contract to pay for the services naturally due from a child to its parent. Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720.

Evidence insufficient to establish agreement to pay see Hutcheson *v.* Tucker, (Miss. 1894) 15 So. 132.

Evidence insufficient to establish agreement to pay see Traver *v.* Shiner, 65 Iowa 57, 21 N. W. 159.

32. Switzer *v.* Kee, 146 Ill. 577, 35 N. E. 160 [*affirming* 48 Ill. App. 375]; McGarvey *v.* Roods, 73 Iowa 363, 35 N. W. 488; Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25. See also Gillam *v.* Gillam, 8 Rich. Eq. (S. C.) 67.

The burden of proof as to such understanding is on the child. McGarvey *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Sufficiency of evidence.— Where the evidence tends to prove that a mother residing with her daughter expected to pay for her board, and the daughter expected that she would, and is not clearly insufficient, a verdict allowing the claim against the estate of the mother will not be set aside. McGarvey *v.* Roods, 73 Iowa 363, 35 N. W. 488.

A promise by a parent to give his child certain property in consideration of care and nursing is sufficient to rebut the presumption that the services of the child were gratuitous. Stewart *v.* Small, 11 Ind. App. 100, 38 N. E. 826.

A son may recover for services performed by his wife in caring for his mother under an agreement for payment, where such services were rendered by the wife as his assistant and not with a view to a charge therefor in her own name. Switzer *v.* Kee, 146 Ill. 577, 35 N. E. 160 [*affirming* 48 Ill. App. 375].

33. Falls *v.* Jones, 107 Mo. App. 357, 81 S. W. 455.

34. Matter of Delaney, 27 Misc. (N. Y.) 398, 58 N. Y. Suppl. 924; Matter of Skelly, 18 Misc. (N. Y.) 719, 43 N. Y. Suppl. 964.

Declarations of a deceased mother that her

C. Contracts Between Parent and Child For Support. Contracts between parent and child by which the parent conveys or agrees to convey or to devise property to the child, in consideration of which the child agrees to support the parent, are upheld and enforced if free from fraud.[35]

D. Contracts of Child to Pay For Support of Parent. A child is liable for support or necessaries furnished to the parent at his instance or request, or upon his undertaking to pay therefor, the same as upon any other contract,[36] and the contract need not be express and may be implied from the conduct of the child in reference to what is being done or furnished.[37] It has been held, however, that the statutory liability of the child to support the parent is not a sufficient consideration for a promise by the child to pay for past expenditures made by a third person for such purpose.[38]

E. Support of Wife's Parents by Husband. A husband is under no obligation to support his wife's parents;[39] but it has been held that, where the son-in-law supports a parent-in-law in his family, an obligation to pay for such support is not implied and there can be no recovery therefor,[40] unless there is an express

son was good to her and had given her nearly all his wages and was her main support are evidence that the wages were paid to her to help maintain the home, and not that she understood them to be loans for which she or her estate would be liable. Matter of Delaney, 27 Misc. (N. Y.) 398, 58 N. Y. Suppl. 924.

Building house for parent.— Money expended by a son at his father's request, and with his knowledge and assent, in building a house for the father is not, as a matter of law, a voluntary contribution to the support of the father's household in which the son is living; and the son may recover such money from the father's estate, in the absence of evidence showing an understanding that he was not to be reimbursed. Hillebrands *v.* Nibbelink, 44 Mich. 413, 6 N. W. 861.

35. Van Donge *v.* Van Donge, 23 Mich. 321 (where parents agreed with a son to exchange their homestead for a less valuable farm of his, he to support them for life, but the scrivener in writing the conveyance inadvertently omitted to provide any proper security for the parents, and the court, on a bill filed to set aside the conveyance, declined to rescind the bargain but gave relief as for a mistake and decreed the execution of such securities as would insure the performance of all the conditions which the parents were entitled to have carried out); Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Kelsey *v.* Kelley, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640.

Contract must be definitely established.— When a child seeks to enforce an agreement that if he remains with a parent and works his farm and provides for his declining years the parent will bestow the farm on him, the agreement must be established by the clearest evidence and a certain and definite contract for a valuable consideration proved. In the absence of such evidence the parent will be entitled to change his views and the disposition of the property. Smith *v.* Smith, 29 Ont. 309, holding further that the child, who had made certain improvements on the property, was not entitled to a lien for them.

Place of support see Miner *v.* Miner, 91 Mich. 44, 51 N. W. 702; Sweeney *v.* Sweeney, 16 Ont. 92.

Facts amounting to breach of condition for support see Millette *v.* Sabourin, 12 Ont. 248.

Pleading in action to enforce contract.— Where a person owning a farm agreed in writing with his son to convey the land to him in consideration of his support and maintenance, and the land was afterward traded for other land, the conveyance of which was taken in the name of the father to secure the performance of the agreement, it was held in an action by the son, alleging performance of the agreement and the death of his father, to procure a conveyance of the property, which his father had by law devised to others, that the action was not founded upon the written agreement and it was not necessary to file a copy of it with the complaint. Blasingame *v.* Blasingame, 24 Ind. 86.

36. Worth *v.* Daniel, 1 Ga. App. 15, 57 S. E. 898; Becker *v.* Gibson, 70 Ind. 239; Lebanon *v.* Griffin, 45 N. H. 558; Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

37. Stone *v.* Stone, 32 Conn. 142, holding that where one of several children supports the parent at the request of the others they are liable upon their implied promise to pay for the support.

Evidence.— In an action against a son to recover for necessary medical treatment of his parents alleged to have been performed at his request, the fact that third persons had furnished his parents other necessaries at his request is not competent evidence to establish his liability for the services upon which the suit is based. Becker *v.* Gibson, 70 Ind. 239.

38. Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79; Dawson *v.* Dawson, 12 Iowa 512; Lebanon *v.* Griffin, 45 N. H. 558; Belknap *v.* Whitmire, 43 Oreg. 75, 72 Pac. 589.

39. Nichols *v.* Sherman, 1 Root (Conn.) 361; Sherman *v.* Nichols, 1 Root (Conn.) 250; Mack *v.* Parsons, Kirby (Conn.) 155, 1 Am. Dec. 17; Rex *v.* Munden, Str. 190.

40. King *v.* Kelly, 28 Ind. 89 [*following* Cauble *v.* Ryman, 26 Ind. 207, and *followed* in Daubenspeck *v.* Powers, 32 Ind. 42]; Van Sandt *v.* Cramer, 60 Iowa 424, 15 N. W. 259;

contract to pay,[41] or the circumstances show that the parties respectively recognized an obligation to pay and expected to receive payment.[42]

V. SERVICES AND EARNINGS OF CHILD.

A. Right of Parents — 1. General Rule. The father, as the head of the family, is entitled to the services and earnings of the child so long as the latter is legally under his custody or control and not emancipated.[43] While the parents are living together the mother is not entitled to the services or earnings of the

Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529. But *compare* Franklin *v.* McGuire, 10 Ala. 557 (holding that the mere fact that a mother-in-law was the surety of her son-in-law in a note given by him for supplies purchased for the use of his family, of which she was a member, will not repel the inference that she was chargeable to the son-in-law for board, nor is such inference repelled by the payment of the note after her death by her administrator); Hutman's Estate, 13 Pittsb. Leg. J. N. S. (Pa.) 385 (holding that where a mother-in-law sold a house and lot to her son-in-law, reserving a room therein for herself for life, and then moved into such room and boarded with him until her death, doing some work about the house, while the relationship was not of itself sufficient to rebut the presumption that she was to pay him for her board, yet it made it more easily rebuttable, and as she did work about the house which was probably worth her boarding it was sufficiently rebutted).

Support of father-in-law by widow.—Where a father who had lived in a son's family for many years without paying or agreeing to pay board continued, after the son's death, to live with the widow under the same circumstances, there was no implied contract to pay board to the widow. Porter's Estate, 15 Pa. Co. Ct. 607.

41. Cauble *v.* Ryman, 26 Ind. 207 [*followed* in King *v.* Kelly, 28 Ind. 89]; Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529.

A promise to pay for past support and services is void for want of consideration. Van Sandt *v.* Cramer, 60 Iowa 424, 15 N. W. 259.

42. Cauble *v.* Ryman, 26 Ind. 207 [*followed* in King *v.* Kelly, 28 Ind. 89]; Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529.

43. *Alabama.*— Donegan *v.* Davis, 66 Ala. 362; Stovall *v.* Johnson, 17 Ala. 14; Durden *v.* Barnett, 7 Ala. 169; Godfrey *v.* Hays, 6 Ala. 501, 41 Am. Dec. 58.

Arkansas.— Kansas City, etc., R. Co. *v.* Moore, 66 Ark. 409, 50 S. W. 996; St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222; Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.

District of Columbia.—Holtzman *v.* Castleman, 2 MacArthur 555.

Georgia.— Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160; Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407.

Indiana.— Hollingsworth *v.* Swedenborg, 49 Ind. 378, 19 Am. Rep. 687; Bundy *v.* Dodson, 28 Ind. 295; Jenison *v.* Graves, 2 Blackf. 440; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 42 N. E. 1058.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Iowa.— Everett *v.* Sherfey, 1 Iowa 356.

Kentucky.— Louisville, etc., R. Co. *v.* Willis, 83 Ky. 57, 4 Am. St. Rep. 124; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Maine.— Lord *v.* Poor, 23 Me. 569.

Massachusetts.— Stiles *v.* Granville, 6 Cush. 458; Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Benson *v.* Remington, 2 Mass. 113; Purinton *v.* Jamrock, (1907) 80 N. E. 802.

Michigan.— Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702.

Missouri.— Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

New Hampshire.— Frost *v.* Brown, Smith 113.

New York.— Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142; People *v.* Brooks, 35 Barb. 85; Geraghty *v.* New, 7 Misc. 30, 27 N. Y. Suppl. 403; People *v.* Rubens, 92 N. Y. Suppl. 121; Shute *v.* Dorr, 5 Wend. 204.

North Carolina.— Williams *v.* Southern R. Co., 121 N. C. 512, 28 S. E. 367.

Pennsylvania.— Galbraith *v.* Black, 4 Serg. & R. 207.

Rhode Island.— Galligan *v.* Woonsocket St. R. Co., 27 R. I. 363, 62 Atl. 376.

Tennessee.— Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Texas.—Harper *v.* Utsey, (Civ. App. 1906) 97 S. W. 508.

Vermont.— Sequin *v.* Peterson, 45 Vt. 255, 12 Am. Rep. 194; Stone *v.* Pulsipher, 16 Vt. 428.

West Virginia.— Halliday *v.* Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653.

United States.— The Hattie Low, 14 Fed. 880; The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 474; Luscom *v.* Osgood, 15 Fed. Cas. No. 8,608, 1 Sprague 82; Roby *v.* Lyndall, 20 Fed. Cas. No. 11,972, 4 Cranch C. C. 351.

See 37 Cent. Dig. tit. "Parent and Child," § 70.

The duty of service by a child is necessary to the proper exercise of parental authority for the good of the child, and the law takes this view of the duty when enforcing it. Com. *v.* Gilkeson, 8 Leg. Int. (Pa.) 86, 10 Pa. L. J. 505.

child,[44] but by the weight of modern authority a widowed mother is entitled to the services and earnings of her minor child to the same extent as the father would be if living.[45]

2. Notice to Employer. Under some statutes the parent, if he intends to claim the child's earnings, must notify the child's employer, and in the absence of such notice payment to the child is valid and he has good title to the money.[46]

3. Contracts For Child's Services. A parent may contract for the services of the child[47] and transfer to a third person the right to the child's services,[48] in

44. Barrett *v.* Riley, 42 Ill. App. 258; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362; Geraghty *v.* New, 7 Misc. (N. Y.) 30, 27 N. Y. Suppl. 403; McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

Under Pa. Act, May 4, 1855, giving the earnings of children to the mother if the father from drunkenness neglects to provide for them, where the drunkenness is satisfactorily shown and the father is without property, the burden is on him to show that he has performed his duty in providing for his family. Van Billiard *v.* Van Billiard, 6 Pa. Co. Ct. 333.

45. *Connecticut.*— Matthewson *v.* Perry, 37 Conn. 435, 9 Am. Rep. 339.

Illinois.— Bradley *v.* Sattler, 156 Ill. 603, 41 N. E. 171 [*affirming* 54 Ill. App. 504]; Dufield *v.* Cross, 12 Ill. 397.

Indiana.— Hollingsworth *v.* Swedenborg, 49 Ind. 378, 19 Am. Rep. 687; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259.

Massachusetts.—Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

Missouri.— Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; Scamell *v.* St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021; Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60, 67, where it is said: "This much may be conceded under the *dictum* of Judge Scott (in Guion *v.* Guion, 16 Mo. 48, 57 Am. Dec. 223), that, as long as a widow mother charges herself with the support of her children, she is entitled to their services."

New Hampshire.— Hammond *v.* Corbett, 50 N. H. 501, 9 Am. Rep. 288.

New Jersey.— Tuite *v.* Tuite, (Ch. 1907) 66 Atl. 1090.

New York.— Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Kennedy *v.* New York Cent., etc., R. Co., 35 Hun 186; Simpson *v.* Buck, 5 Lans. 337; Gray *v.* Durland, 50 Barb. 100 [*affirmed* in 51 N. Y. 424]. But *compare* E. B. *v.* E. C. B., 28 Barb. 299.

Ohio.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

See 37 Cent. Dig. tit. "Parent and Child," § 70.

Contra.— Pray *v.* Gorham, 31 Me. 240; Fairmount, etc., St. Pass. R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; Com. *v.* Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; Franz *v.* Riehl, 2 Lack. Leg. N. (Pa.) 69, 26 Pittsb. Leg. J. N. S. 401; Schaubel's Estate, 12 Lanc. L. Rev. (Pa.) 166; Hickey *v.* Beatty, 14 Montg. Co. Rep. (Pa.) 76. See also Day *v.* Oglesby, 53 Ga. 646.

A married woman who has been deserted by her husband and is supporting her minor child is entitled to the child's services. O'Brien *v.* Philadelphia, 215 Pa. St. 407, 64 Atl. 551.

46. Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142 [*citing* Stanley *v.* Union Nat. Bank, 115 N. Y. 122, 22 N. E. 29]; Herrick *v.* Fritcher, 47 Barb. (N. Y.) 589, holding that a father, who has never given notice, under the statute, to an employer of his minor son that he claims his son's wages, cannot maintain an action against a creditor of the son, who has drawn the wages upon an order given by the son to discharge an honest debt.

Time of giving notice.—N. Y. Laws (1850), c. 266, § 1, providing that "it shall be necessary for the parents or guardians of such minor children as may be in service, to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claim the wages of said minor, and in default of such notice, payment to such minor shall be valid," was not intended to prevent the parent from collecting any wages if he failed to give notice within the time specified, and a subsequent notice is sufficient to enable the parent to collect the infant's future earnings. McClurg *v.* McKercher, 56 Hun (N. Y.) 305, 306, 9 N. Y. Suppl. 572.

47. Dickinson *v.* Talmage, 138 Mass. 249; Osborn *v.* Allen, 26 N. J. L. 388; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Agency of child.—A father, who authorized his son to make contracts for service, reserving the wages to the father, is bound by the contracts which the son makes, although the father was not apprised of their terms. Henderhen *v.* Cook, 66 Barb. (N. Y.) 21. As to agency of child for parent generally see *infra*, XI.

New contract with child.— If the father, or his agent, hire out the minor son of the former for a stipulated sum, the employer cannot make a new contract with the minor which will have the effect to supersede the first one, without the assent of the party with whom the original contract was made. McDonald *v.* Montague, 30 Vt. 357. See also Ballard *v.* St. Albans Advertiser Co., 52 Vt. 325.

48. Barnes *v.* Barnes, 50 Conn. 572; Graham *v.* Kinder, 11 B. Mon. (Ky.) 60; State *v.* Barrett, 45 N. H. 15 (holding that this may be done by deed, although the deed is not in the form required by statute for

which case the child cannot recover the value of such services as against such third person.[49] But an agreement by the father for the services of his minor child ceases to be binding upon the child at the death of the father.[50] Where a parent makes a claim for the child's services under a contract made by the child, he is so far bound by the contract that his claim depends upon a proper performance thereof.[51]

4. Assignment of Child's Earnings. The parent may assign the child's earnings[52] so as to give the assignee the right to receive and hold the same as against the child.[53]

5. Military Service of Child. When a minor enlists in the army or navy he, and not the parent, is entitled to a bounty offered for enlistment,[54] and also to his pay as a soldier or sailor,[55] for the bounty is in the nature of a gift rather than a payment for services,[56] and the enlistment operates an emancipation.[57]

B. Right of Creditors of Parent. It is a natural consequence of the right of the parent to the earnings of the child that such earnings may be reached by the parent's creditors and subjected to the payment of the parent's debts.[58] But, in the absence of fraud, the creditors have no higher rights than the parent, and if the latter has relinquished his right to the child's earnings his creditors cannot

indentures of apprenticeship); Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

49. Graham *v.* Kinder, 11 B. Mon. (Ky.) 60.

50. Barnes *v.* Barnes, 50 Conn. 572; Campbell *v.* Cooper, 34 N. H. 49, unless made by indentures of apprenticeship in accordance with the provisions of the statute.

The assent of the infant to a contract made by the father for services to be rendered by the infant for a time within which the father dies may be evidence of the infant's agreement to render the service for so much of the time as had not expired at the father's death, and such agreement gives the right to the service until it is avoided by the infant. Campbell *v.* Cooper, 34 N. H. 49.

The act of the infant in leaving the service in violation of the agreement and under circumstances indicating an intention to avoid it constitutes an avoidance, and the master has no right to the service under such agreement from that time. Campbell *v.* Cooper, 34 N. H. 49.

A parol gift of the child by the father gives no right to the services of the child after the father's death. Campbell *v.* Cooper, 34 N. H. 49.

51. Rogers *v.* Steele, 24 Vt. 513, holding, however, that the circumstances of the case at bar showed a mutual relinquishment of the contract, in consequence of which the father could recover for the services rendered.

52. Camerlin *v.* Palmer Co., 10 Allen (Mass.) 539; Roby *v.* Lyndall, 20 Fed. Cas. No. 11,972, 4 Cranch C. C. 351.

53. Roby *v.* Lyndall, 20 Fed. Cas. No. 11,972, 4 Cranch C. C. 351.

54. *Illinois.*— Magee *v.* Magee, 65 Ill. 255.

Maine.— Holt *v.* Holt, 59 Me. 464; Mears *v.* Bickford, 55 Me. 528.

Massachusetts.— Taylor *v.* Mechanics' Sav. Bank, 97 Mass. 345. See also Banks *v.* Conant, 14 Allen 497, holding that the father of a minor who enlisted as a soldier cannot recover from the person through whose agency he enlisted a sum paid to such person by the city as a bounty for the enlistment.

New York.— Brown *v.* Canton, 4 Lans. 409; Caughey *v.* Smith, 50 Barb. 351 [*reversed* on other grounds in 47 N. Y. 244].

Vermont.— Baker *v.* Baker, 41 Vt. 55.

West Virginia.— Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579; Halliday *v.* Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653.

See 37 Cent. Dig. tit. "Parent and Child," § 76.

Contra.— Ginn *v.* Ginn, 38 Ind. 526, 529, where the son was not of an age to be liable to military duty, and the court said: "Had the son been eighteen years of age perhaps the rights of the parties would have been different; we express no opinion upon the point, however."

55. Halliday *v.* Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653. See also Baker *v.* Baker, 41 Vt. 55.

56. Magee *v.* Magee, 65 Ill. 255; Holt *v.* Holt, 59 Me. 464. See also Banks *v.* Conant, 14 Allen (Mass.) 497; Brown *v.* Canton, 4 Lans. (N. Y.) 1409 [*reversed* on other grounds in 49 N. Y. 662]. *Contra*, Ginn *v.* Ginn, 38 Ind. 526.

Title of child to gifts see *infra*, VII, A; IX.

57. Com. *v.* Morris, 1 Phila. (Pa.) 381.

A parent's consent to the child's enlistment is a relinquishment of all claim to service during the term thereof, and of all control of the compensation for the military service rendered thereunder. Baker *v.* Baker, 41 Vt. 55.

58. Donegan *v.* Davis, 66 Ala. 362; Bell *v.* Hallenback, Wright (Ohio) 751; Harper *v.* Utsey, (Tex. Civ. App. 1906) 97 S. W. 508.

Labor on mother's estate.— Where a minor child, with the father's consent, gives his mother the benefit of his labor on her separate estate, profits wrought by the child's labor will not be liable for the father's debts. Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

reach them.[59] And it has been held that the wages of a minor child cannot be held by the employer for the debts of the father without the minor's consent, unless the contract of employment expressly stipulates for such application.[60]

C. Relinquishment of Parent's Right — 1. In General. A parent may relinquish his right to the services and earnings of his child,[61] and it is not necessary that such relinquishment should be express but it may be implied from the circumstances.[62]

2. What Amounts to Relinquishment.[63] The parent's right to the child's earnings is relinquished where he allows the child to make its own contracts[64] and to

59. See *infra*, V, E.

60. Beresford *v.* Susquehanna Coal Co., 10 Pa. Dist. 243, 25 Pa. Co. Ct. 89.

61. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122.

Arkansas.— Vance *v.* Calhoun, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409, 50 S. W. 996; Fairhurst *v.* Lewis, 23 Ark. 435; Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

Colorado.— Burdsall *v.* Waggoner, 4 Colo. 261.

Connecticut.— Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 73.

Delaware.— Farrell *v.* Farrell, 3 Houst. 633.

Indiana.— Jenison *v.* Graves, 2 Blackf. 440.

Iowa.— Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Stiles *v.* Granville, 6 Cush. 458; Jenney *v.* Alden, 12 Mass. 375.

Michigan.— Bell *v.* Bumpus, 63 Mich. 375, 29 N. W. 862.

Mississippi.— Dick *v.* Grissom, Freem. 428.

Missouri.— Dierker *v.* Hess, 54 Mo. 246; Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283; Zongker *v.* People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486.

Nebraska.—Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572.

New Hampshire.— Gale *v.* Parrot, 1 N. H. 28.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

New York.— Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29; Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142.

Pennsylvania.— Torrens *v.* Campbell, 74 Pa. St. 470; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Delaware County Nat. Bank *v.* Headley, 1 Pa. Cas. 499, 4 Atl. 464; Com. *v.* Gilkeson, 1 Phila. 194; Neiman *v.* Gilbert, 1 Woodw. 135.

Rhode Island.— Pardey *v.* American Ship Windlass Co., 19 R. I. 461, 34 Atl. 737.

South Carolina.— King *v.* Johnson, 2 Hill Eq. 624.

Tennessee.— Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Texas.— Turrh *v.* McKnight, 6 Tex. Civ. App. 583, 26 S. W. 95.

Vermont.— Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96; Tillotson *v.* McCrillis, 11 Vt. 477; Chase *v.* Smith, 5 Vt. 556.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

West Virginia.— Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wisconsin.— Monaghan *v.* Randall School Dist. No. 1, 38 Wis. 100.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 462, 474; McGinnis *v.* Grand Turk, 16 Fed. Cas. No. 8,800.

Canada.— Delesdernier *v.* Burton, 12 Grant Ch. (U. C.) 569.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

Parent may verbally sell or give child his time.— Chase *v.* Smith, 5 Vt. 556; Chase *v.* Elkins, 2 Vt. 290.

The parent may give the child a part of his time as well as the whole. Tillotson *v.* McCrillis, 11 Vt. 477.

62. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206.

Colorado.— Burdsall *v.* Waggoner, 4 Colo. 261.

Georgia.— Culberson *v.* Alabama Constr. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. N. S. 411.

Iowa.— Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117.

Massachusetts.— Stiles *v.* Granville, 6 Cush. 458; Manchester *v.* Smith, 12 Pick. 113; Whiting *v.* Earle, 3 Pick. 201, 15 Am. Dec. 207.

Missouri.— Dierker *v.* Hess, 54 Mo. 246; McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728.

New York.— Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142; Maltby *v.* Harwood 12 Barb. 473; Armstrong *v.* McDonald, 10 Barb. 300; Canovar *v.* Cooper, 3 Barb. 115; Shute *v.* Dorr, 5 Wend. 204.

Vermont.— Chase *v.* Smith, 5 Vt. 556.

See 37 Cent. Dig. tit. "Parent and Child," § 72; and *infra*, V, C, 2.

Allowing child to live with another.— It is incompatible with the conclusion that a parent has not waived her right to the remuneration for the services of her minor child that she took her when very young to live in the home of another, and allowed her to live there till grown, without demand on the other person for remuneration. McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728.

63. **Consent to adoption of child** see Adoption.

64. Vance *v.* Calhoun, 77 Ark. 35, 90

receive its wages,[65] consents to its receiving its own earnings[66] or entering into a partnership,[67] authorizes the child to contract with an employer and to receive his wages,[68] confirms and approves an agreement of employment making wages payable to the child,[69] makes no objection to a contract made by the child for his services on his own account,[70] permits the child to leave the parental homestead and labor for his own benefit[71] or shift for himself,[72] or in any other way emancipates the child;[73] or where, by contract, he releases the right to a third person.[74]

3. Resumption of Right. A parent who has relinquished his claim to his child's earnings may subsequently resume his parental authority and right;[75] but a parent who has allowed the child to contract for himself and receive his wages cannot withdraw his consent at his pleasure after the wages have been earned, so as to acquire any right to wages previously earned.[76]

D. Abandonment or Loss of Parent's Right. The right of a parent to the child's earnings arises out of the duty to support the child;[77] and hence it is lost where the parent abandons the child,[78] neglects or refuses to support and

S. W. 619, 113 Am. St. Rep. 111; Perlinau *v.* Phelps, 25 Vt. 478.

65. *Arkansas.*— Vance *v.* Calhoun, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111.

Indiana.— Hollingsworth *v.* Swendenborg, 49 Ind. 378, 19 Am. Rep. 687.

Maine.— Merrill *v.* Hussey, 101 Me. 439, 64 Atl. 819.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

Vermont.— Perlinau *v.* Phelps, 25 Vt. 478.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

66. Johnson *v.* Silsbee, 49 N. H. 543; Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142.

Assisting in recovery for lost earnings.— Where, in an action for injuries to a minor, his sole surviving parent appeared as his next friend, and assisted him to recover for lost earnings based on evidence showing emancipation, such acts constituted an abandonment of her right to such earnings. Zongker *v.* People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486.

67. Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

68. Gale *v.* Parrot, 1 N. H. 28; U. S. *v.* Mertz, 2 Watts (Pa.) 406; Monaghan *v.* Randall School Dist. No. 1, 38 Wis. 100; Delesdernier *v.* Burton, 12 Grant Ch. (U. C.) 569.

69. Taylor *v.* Welsh, 92 Hun (N. Y.) 272, 36 N. Y. Suppl. 952; Pardey *v.* American Ship Windlass Co., 19 R. I. 461, 34 Atl. 737. See also Benson *v.* Remington, 2 Mass. 113; Shute *v.* Dorr, 5 Wend. (N. Y.) 204.

70. *Colorado.*— Burdsall *v.* Waggoner, 4 Colo. 261.

Massachusetts.— Manchester *v.* Smith, 12 Pick. 113; Whiting *v.* Earle, 3 Pick. 201, 15 Am. Dec. 207.

New York.— Armstrong *v.* McDonald, 10 Barb. 300.

Pennsylvania.— Hickey *v.* Beatty, 14 Montg. Co. Rep. 76.

Tennessee.— Cloud *v.* Hamilton, 11 Humphr. 104, 53 Am. Dec. 778.

Vermont.— Atkins *v.* Sherbino, 58 Vt. 248, 4 Atl. 703; Chase *v.* Smith, 5 Vt. 556.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

71. Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122.

72. Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283; McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728.

73. *Illinois.*— Scott *v.* White, 71 Ill. 287; Aulger *v.* Badgely, 29 Ill. App. 336.

Iowa.— Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117.

Maine.— Lowell *v.* Newport, 66 Me. 78.

Mississippi.— Dick *v.* Grissom, Freem. 428.

Missouri.— Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283.

New Hampshire.— Jenness *v.* Emerson, 15 N. H. 486.

New York.— Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142.

Oregon.— See Livesley *v.* Heise, 48 Oreg. 147, 85 Pac. 509.

Tennessee.— Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

74. Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160.

75. Everett *v.* Sherfey, 1 Iowa 356. See also Vance *v.* Calhoun, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; Kooser *v.* Housh, 78 Ill. App. 98; Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283; Tillotson *v.* McCrillis, 11 Vt. 477.

76. Campbell *v.* Campbell, 11 N. J. Eq. 268. See also Torrens *v.* Campbell, 74 Pa. St. 470.

77. Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728; Jenness *v.* Emerson, 15 N. H. 486; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Duty to support child see *supra*, III, A.

78. *Alabama.*— Godfrey *v.* Hays, 6 Ala. 501, 41 Am. Dec. 58.

Georgia.— Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160.

Massachusetts.— Camerlin *v.* Palmer Co., 10 Allen 539.

Missouri.— McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728.

educate it,[79] or forces it to leave the home and labor for its own livelihood.[80] So also a parent loses the right to the value of the child's services by voluntarily releasing his parental control to a third person.[81] A parent's right to the services and earnings of his child ceases when the child arrives at majority,[82] and the marriage of the child also terminates the parent's right,[83] even though the parent did not consent to the marriage.[84] Where the mother is awarded the custody of the child upon being divorced from the father, the father is thereby deprived of all right to the services of the child.[85] A pauper parent who is not supporting the child is not entitled to its earnings.[86] It has been held that a mother's right to her minor child's services ceases when she remarries and the child is supported by its stepfather.[87]

E. Effect of Relinquishment or Loss of Parent's Right. When the parent has relinquished or lost his right to the child's earnings, such earnings belong to the child,[88] and the child may assert his right thereto as against the parent

New Hampshire.— Clay *v.* Shirley, 65 N. H. 644, 23 Atl. 521.

United States.—Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. N. S. 1161; Thompson *v.* Chicago, etc., R. Co., 104 Fed. 845; The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 474; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. 326.

See 37 Cent. Dig. tit. "Parent and Child," § 73.

79. *Alabama.*— Godfrey *v.* Hays, 6 Ala. 501, 41 Am. Dec. 58.

Georgia.— Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160.

Massachusetts.— Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 474; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326.

See 37 Cent. Dig. tit. "Parent and Child," § 73.

80. Farrell *v.* Farrell, 3 Houst. (Del.) 633; Gary *v.* James, 4 Desauss. Eq. (S. C.) 185.

81. Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160.

82. Mercer *v.* Jackson, 54 Ill. 397; State *v.* Shreve, 1 N. J. L. 268.

Adult child supported by father.— Where an adult child elects to remain with his parents, and is supported by them, his father is entitled to his earnings. Brown *v.* Ramsay, 29 N. J. L. 117.

83. Goodwin *v.* Thompson, 2 Greene (Iowa) 329; Com. *v.* Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, 16 L. R. A. 578; Taunton *v.* Plymouth, 15 Mass. 203; Dick *v.* Grissom, Freem. (Miss.) 428; Aldrich *v.* Bennett, 63 N. H. 415, 56 Am. Rep. 529.

84. Com. *v.* Graham, 157 Mass. 73, 76, 31 N. E. 706, 37 Am. St. Rep. 255, 16 L. R. A. 578 (where it is said: "An infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent. . . . Whether sound policy does not require that, in every case in which the marriage is valid, an infant husband should be entitled to all his earnings, need not now be decided"); Aldrich *v.* Bennett, 63 N. H. 415, 56 Am. Rep. 529.

85. Husband *v.* Husband, 67 Ind. 583, 33 Am. Rep. 107.

86. Jenness *v.* Emerson, 15 N. H. 486, holding also that the town which supports the pauper mother is not entitled to the earnings of the child who is not a pauper.

87. Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60.

Rights and duties of stepfather see *infra*, XIV.

88. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206.

Arkansas.— Vance *v.* Calhoun, 47 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; Fairhurst *v.* Lewis, 23 Ark. 435; Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

Colorado.— Burdsall *v.* Waggoner, 4 Colo. 261.

Connecticut.— Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 173.

Delaware.— Farrell *v.* Farrell, 3 Houst. 633.

Indiana.— Jenison *v.* Graves, 2 Blackf. 440.

Iowa.— Wolcott *v.* Rickey, 22 Iowa 171.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Corey *v.* Corey, 19 Pick. 29, 31 Am. Dec. 117; Manchester *v.* Smith, 12 Pick. 113; Whiting *v.* Earle, 3 Pick. 201, 15 Am. Dec. 207; Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Jenney *v.* Alden, 12 Mass. 375.

Michigan.— Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702.

Mississippi.— Dick *v.* Grisson, Freem. 428.

Missouri.— Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283.

Nebraska.—Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572.

New Hampshire.—Clay *v.* Shirley, 65 N. H. 644, 23 Atl. 521; Johnson *v.* Silsbee, 49 N. H. 543.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

New York.— Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142; Armstrong *v.* McDonald, 10 Barb. 300.

himself,[89] and also as against all persons claiming through or under the parent,[90] including his creditors,[91] unless a voluntary relinquishment was made by the parent with the design of defrauding his creditors.[92]

F. Right of Child to Compensation For Services to Parent.[93] As a gen-

Pennsylvania.— Torrens *v.* Campbell, 74 Pa. St. 470; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Delaware County Nat. Bank *v.* Headly, 1 Pa. Cas. 499, 4 Atl. 464; Com. *v.* Gilkerson, 1 Phila. 194; Neiman *v.* Gilbert, 1 Woodw. 135.

Rhode Island.— Pardey *v.* American Ship Windlass Co., 19 R. I. 461, 34 Atl. 737.

Texas.— Furrh *v.* McKnight, 6 Tex. Civ. App. 583, 26 S. W. 95.

Vermont.— Tillotson *v.* McCrillis, 11 Vt. 477; Chase *v.* Smith, 5 Vt. 556; Chase *v.* Elkins, 2 Vt. 290.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

Wisconsin.— Joeckel *v.* Joeckel, 56 Wis. 436, 14 N. W. 598.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 462, 474; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

89. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206.

Arkansas.— Fairhurst *v.* Lewis, 23 Ark. 435; Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

Connecticut.— Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 73.

Delaware.— Farrell *v.* Farrell, 3 Houst. 633.

Indiana.—Jenison *v.* Graves, 2 Blackf. 440.

Iowa.— Wolcott *v.* Rickey, 22 Iowa 171.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Jenney *v.* Alden, 12 Mass. 375.

Mississippi.— Dick *v.* Grissom, Freem. 428.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

New York.— Taylor *v.* Welsh, 92 Hun 272, 36 N. Y. Suppl. 952.

Pennsylvania.— Torrens *v.* Campbell, 74 Pa. St. 470; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Delaware County Nat. Bank *v.* Headley, 1 Pa. Cas. 499, 4 Atl. 464; Com. *v.* Gilkeson, 1 Phila. 194; Neiman *v.* Gilbert, 1 Woodw. 135.

Rhode Island.— Pardey *v.* American Ship Windlass Co., 19 R. I. 461, 34 Atl. 737.

Vermont.— See Ayer *v.* Ayer, 41 Vt. 302.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 462, 474; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

90. *Arkansas.*— Fairhurst *v.* Lewis, 23 Ark. 435; Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

Connecticut.— Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 73.

Indiana.—Jenison *v.* Graves, 2 Blackf. 440.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Jenney *v.* Alden, 12 Mass. 375.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

Pennsylvania.— Torrens *v.* Campbell, 74 Pa. St. 470; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Delaware County Nat. Bank *v.* Headley, 1 Pa. Cas. 499, 4 Atl. 464; Com. *v.* Gilkeson, 1 Phila. 194; Neiman *v.* Gilbert, 1 Woodw. 135.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 462, 474; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

91. *Arkansas.*— Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

Colorado.— Burdsall *v.* Waggoner, 4 Colo. 261.

Indiana.—Jenison *v.* Graves, 2 Blackf. 440.

Iowa.— Wolcott *v.* Rickey, 22 Iowa 171.

Massachusetts.— Jenney *v.* Alden, 12 Mass. 375; Manchester *v.* Smith, 12 Pick. 113; Whiting *v.* Earle, 3 Pick. 201, 15 Am. Dec. 207.

Mississippi.—Dick *v.* Grissom, Freem. 428.

Nebraska.—Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572.

New Hampshire.— Johnson *v.* Silsbee, 49 N. H. 543; Frost *v.* Brown, Smith 113.

New York.— Armstrong *v.* McDonald, 10 Barb. 300.

Texas.— Furrh *v.* McKnight, 6 Tex. Civ. App. 583, 26 S. W. 95, holding that property purchased by the child with its earnings cannot be attached for the father's debt.

Vermont.— Bray *v.* Wheeler, 29 Vt. 514; Tillotson *v.* McCrillis, 11 Vt. 477; Chase *v.* Smith, 5 Vt. 556.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

See 37 Cent. Dig. tit. "Parent and Child," § 72.

Attachment of wages.— Where a minor is emancipated his earnings cannot be attached by a creditor of the father. Frost *v.* Brown, Smith (N. H.) 113; Bray *v.* Wheeler, 29 Vt. 514.

An insolvent parent may emancipate his minor children, and relinquish all claims to their earnings, and thereby put them beyond the reach of his creditors. Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572; Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

92. Burdsall *v.* Waggoner, 4 Colo. 261; Manchester *v.* Smith, 12 Pick. (Mass.) 113; Whiting *v.* Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207; Armstrong *v.* McDonald, 10 Barb. (N. Y.) 300; Chase *v.* Smith, 5 Vt. 556.

93. See also EXECUTORS AND ADMINISTRATORS, 18 Cyc. 412-414.

eral rule a child who is living with its parents is not entitled to compensation for services rendered to the parent,[94] even though the child be an adult[95] or otherwise emancipated,[96] for such services are presumed to be gratuitous,[97] and a promise on the part of the parent to pay for them will not be implied from their mere rendition.[98] But the parent may contract to pay the child for its services,[99]

94. *Illinois.*— Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.
Indiana.— Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857.
Iowa.— Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526.
Kentucky.— Engleman *v.* Engleman, 1 Dana 437; Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.
Louisiana.— Ledbetter *v.* Ledbetter, 2 La. Ann. 215.
Missouri.— Koch *v.* Hehel, 32 Mo. App. 103.
Nebraska.— Kloke *v.* Martin, 55 Nebr. 554, 76 N. W. 168.
New York.— Wamsley *v.* Wamsley, 48 N. Y. App. Div. 330, 62 N. Y. Suppl. 954.
North Carolina.— Avitt *v.* Smith, 120 N. C. 392, 27 S. E. 91.
Oregon.— Albee *v.* Albee, 3 Oreg. 321, although the son had left his father under an agreement that he was to have his time and earnings but afterward returned.
Wisconsin.— Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.
See 37 Cent. Dig. tit. "Parent and Child," § 74.
An acknowledgment by the mother after the father's death of the child's claim for services rendered during his minority is of no effect. Ledbetter *v.* Ledbetter, 2 La. Ann. 215.

95. *Illinois.*— Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127.
Indiana.— Adams *v.* Adams, 23 Ind. 50; Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857.
Kentucky.— Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.
New York.— Matter of Skelly, 18 Misc. 719, 43 N. Y. Suppl. 964.
North Carolina.— Avitt *v.* Smith, 120 N. C. 392, 27 S. E. 91.
Rhode Island.— Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48.
Wisconsin.— Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.
See 37 Cent. Dig. tit. "Parent and Child," § 74.

96. Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.

97. *Indiana.*— Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857.
Iowa.— Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526.
Kentucky.— Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.
Missouri.— Lawrence *v.* Bailey, 84 Mo. App. 107.
Nebraska.— Kloke *v.* Martin, 55 Nebr. 554, 76 N. W. 168.
South Carolina.— Williams *v.* Halford, 73 S. C. 119, 53 S. E. 88.
See 37 Cent. Dig. tit. "Parent and Child," § 74.
The services of illegitimate children while living with and working for their father under the belief that they were legitimate are presumed to be gratuitous. Williams *v.* Halford, 73 S. C. 119, 53 S. E. 88.

98. *Illinois.*— Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315; Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127.
New Hampshire.— Seavey *v.* Seavey, 37 N. H. 125.
New York.— Matter of Skelly, 18 Misc. 719, 43 N. Y. Suppl. 964.
North Carolina.— Avitt *v.* Smith, 120 N. C. 392, 27 S. E. 91.
Wisconsin.— Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.
See 37 Cent. Dig. tit. "Parent and Child," § 74.

99. *Arkansas.*— Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.
District of Columbia.— McDaniel *v.* Parish, 4 App. Cas. 213.
Illinois.— Stock *v.* Stoltz, 137 Ill. 349, 27 N. E. 604.
Indiana.— Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857.
Kentucky.— Engleman *v.* Engleman, 1 Dana 437; Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.
Mississippi.— Dick *v.* Grissom, Freem. 428.
New Hampshire.— Hall *v.* Hall, 44 N. H. 293.
New York.— Wamsley *v.* Wamsley, 48 N. Y. App. Div. 330, 62 N. Y. Suppl. 954.
Pennsylvania.— Titman *v.* Titman, 64 Pa. St. 480; Neiman *v.* Gilbert, 1 Woodw. 135.
South Carolina.— Eubanks *v.* Peak, 2 Bailey 497.
Texas.— Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841.
Wisconsin.— Geary *v.* Geary, 67 Wis. 248, 30 N. W. 601.
See 37 Cent. Dig. tit. "Parent and Child," § 74.
The burden of proof as to the parent's agreement to pay is on the child. Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857; Titman *v.* Titman, 64 Pa. St. 480.
Evidence insufficient to show promise to pay for services see Lawrence *v.* Bailey, 84 Mo. App. 107.
Duration of contract.— A parol contract between a father and son by which the son is to work on the father's farm for an indefinite length of time and to be paid the reasonable value of his services cannot be extended beyond the father's death. *In re* Merchant, 6 N. Y. Suppl. 875.
Agreement as to amount not necessary.— An express promise of a father to pay for the services of his adult daughter residing

and in such case the child's claim for the amount due is good as against the parent,[1] and his creditors.[2] It is not even necessary that there should be an express and definite contract between the parent and child,[3] but a mutual understanding that the services are to be paid for is sufficient to entitle the child to payment;[4] and if from the circumstances a contract by the parent to pay for the services may be inferred, the child is entitled to recover therefor.[5]

G. Actions For Services — 1. Right of Action. As a general rule the right of action for the services or earnings of an unemancipated minor is in the parent.[6]

with him is binding, although no amount or rate of wages was agreed upon. Geary *v.* Geary, 67 Wis. 248, 30 N. W. 601. See also Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.

1. *Illinois.*— Switzer *v.* Kee, 146 Ill. 577, 35 N. E. 160 [*affirming* 48 Ill. App. 375], holding that where a son was entitled by contract to the use of his mother's farm as compensation for his services and he was subsequently compelled to pay for the use of it by persons claiming under the mother, he had a right of action over for the value of his services under the contract. Stock *v.* Stoltz, 137 Ill. 349, 27 N. E. 604; Phelps, etc., Co. *v.* Hopkinson, 61 Ill. App. 400.

Indiana.— Wright *v.* Dean, 79 Ind. 407.

Kentucky.— Engleman *v.* Engleman, 1 Dana 437.

Pennsylvania.— Titman *v.* Titman, 64 Pa. St. 480; Neiman *v.* Gilbert, 1 Woodw. 135.

South Carolina.— Eubanks *v.* Peak, 2 Bailey 497.

Texas.— Duveneck *v.* Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541.

Wisconsin.— Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.

See 37 Cent. Dig. tit. "Parent and Child," § 74.

Limitation of actions.— In an action for domestic services rendered to her father by a daughter while living in his family, it is not error to instruct that if such services were performed under a contract that they were to be paid for, and continued to be performed until within the statutory period before the commencement of the suit, the action would not be barred by limitation. Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573.

2. *Illinois.*— Phelps, etc., Co. *v.* Hopkinson, 61 Ill. App. 400.

Kentucky.— Engleman *v.* Engleman, 1 Dana 437.

Pennsylvania.— Titman *v.* Titman, 64 Pa. St. 480. But *compare* Matter of Cowen, 3 Pittsb. 471; Neiman *v.* Gilbert, 1 Woodw. 135.

South Carolina.— Eubanks *v.* Peak, 2 Bailey 497.

United States.— Graves *v.* Davenport, 50 Fed. 881.

See 37 Cent. Dig. tit. "Parent and Child," § 74.

3. Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857; Engleman *v.* Engleman, 1 Dana (Ky.) 437; Crete Mut. F. Ins. Co. *v.* Patz, 64 Nebr. 676, 90 N. W. 546.

4. McCormick *v.* McCormick, 1 Ind. App. 594, 28 N. E. 122; Sammon *v.* Wood, 107 Mich. 506, 65 N. W. 529; Updike *v.* Ten Broeck, 32 N. J. L. 105; Green *v.* Roberts, 47 Barb. (N. Y.) 521.

5. Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857; Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426; Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573; Kloke *v.* Martin, 55 Nebr. 554, 76 N. W. 168; Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25; Robinson *v.* Raynor, 28 N. Y. 494 [*reversing* 36 Barb. 128].

Existence of agreement to pay a question for jury.— Koch *v.* Hebel, 32 Mo. App. 103.

Evidence insufficient to show agreement to pay see Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526; Engleman *v.* Engleman, 1 Dana (Ky.) 437; Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78.

Promise of wages in future.— Where an infant grandchild while preparing to leave the house of the grandfather by whom he is supported is told by the grandfather that if he will stay he shall receive wages, that fact negatives any presumption that he was to receive pay for services rendered before that time. Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78.

6. *Alabama.*— Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802.

Connecticut.— Smith *v.* Smith, 30 Conn. 111.

Illinois.—Dufield *v.* Cross, 12 Ill. 397; Barrett *v.* Riley, 42 Ill. App. 258.

Iowa.— Darling *v.* Noyes, 32 Iowa 96; Everett *v.* Sherfey, 1 Iowa 356.

Maine.— Keen *v.* Sprague, 3 Me. 77.

Massachusetts.— Benson *v.* Remington, 2 Mass. 113.

New Jersey.— Brown *v.* Ramsay, 29 N. J. L. 117.

New York.— Simpson *v.* Buck, 5 Lans. 337; Letts *v.* Brooks, Lalor 36; Shute *v.* Dorr, 5 Wend. 204.

Pennsylvania.— Kauffelt *v.* Moderwell, 21 Pa. St. 222.

South Carolina.— Volentine *v.* Bladen, Harp. 9.

Tennessee.— Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Vermont.— Mason *v.* Hutchins, 32 Vt. 780; Cahill *v.* Patterson, 30 Vt. 592. See also Rogers *v.* Steele, 24 Vt. 513.

Wisconsin.— Monaghan *v.* Randall School Dist. No. 1, 38 Wis. 100.

United States.— Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326; Plummer *v.* Webb, 19 Fed. Cas. No. 11,233, 4 Mason 380.

See 37 Cent. Dig. tit. "Parent and Child," § 77.

This is invariably true where the contract of employment was made by the parent,[7] but it may also be true where the contract was made by the child.[8] Consequently an action for the work, labor, and services of an unemancipated child must be brought in the name of the parent.[9] As between parents the right of action for the child's earnings is in the father.[10] A father is not precluded from recovering wages for work done by his minor son by the fact that the work was done by the son against his express dissent,[11] or by the fact that the employer, who was informed of the father's dissent, notified him to come and take his son away, which he neglected to do.[12] It has been held that a father has no claim upon a person receiving wages of an infant from his employer, on the order of the infant, to recover the amount so received;[13] but a father has been held entitled to recover in his own name money paid by a young child for fancy articles sold to the child, although without fraud.[14] Where the parent has relinquished or lost his right to the child's earnings or emancipated the child, the right of action for the child's earnings is in the child,[15] and the parent cannot maintain an

The fact that a minor is not dependent upon his mother but contributes to her support does not deprive the mother of the right which the law confers on the parent to recover for the services of the child. Simpson *v.* Buck, 5 Lans. (N. Y.) 337.

A false statement made by a son to his employer that he has been emancipated by his father does not cut off the father's right of action for his wages if such statement does not influence the master in any way. Mason *v.* Hutchins, 32 Vt. 780.

Even after the death of the father an infant cannot recover his wages for services performed in the lifetime of his father under a contract of his employer made with the father. Roby *v.* Lyndall, 20 Fed. Cas. No. 11,972, 4 Cranch C. C. 351.

7. Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802 (where the parent and child were both parties to the contract but the child merely agreed to carry out the obligations of the parent, and it was not stipulated to whom the money should be payable); Dufield *v.* Cross, 12 Ill. 397; Clapp *v.* Green, 10 Metc. (Mass.) 439; Volentine *v.* Bladen, Harp. (S. C.) 9.

8. Smith *v.* Smith, 30 Conn. 111 (so holding, although by the agreement the wages were payable to the child, the father having notified the employer that he objected to the son working for him and should demand the wages); Darling *v.* Noyes, 32 Iowa 96 (so holding on the ground that in making the contract the child acted as agent for the parent).

9. Benson *v.* Remington, 2 Mass. 113; Shute *v.* Dorr, 5 Wend. (N. Y.) 204.

A father may maintain a suit in admiralty for the wages of a minor son earned in maritime service. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326; Plummer *v.* Webb, 19 Fed. Cas. No. 11,233, 4 Mason 380.

10. Barrett *v.* Riley, 42 Ill. App. 258.

Management of family affairs by wife.— The fact that a husband living with and supporting his family turns over all his earnings to his wife, and allows her to manage, pay family expenses, etc., does not constitute her the head of the family in such sense that she may maintain an action in her own name for the wages of a minor son. Barrett *v.* Riley, 42 Ill. App. 258. But *compare* McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

11. Smith *v.* Smith, 30 Conn. 111.

12. Smith *v.* Smith, 30 Conn. 111.

13. Herrick *v.* Fritcher, 47 Barb. (N. Y.) 589, 591.

14. Sequin *v.* Peterson, 45 Vt. 255, 12 Am. Rep. 194.

15. *Illinois.*— Scott *v.* White, 71 Ill. 287; Aulger *v.* Badgely, 29 Ill. App. 336.

Indiana.— Haugh, etc., Iron-Works *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334.

Massachusetts.— Wood *v.* Corcoran, 1 Allen 405; Stiles *v.* Granville, 6 Cush. 458; Corey *v.* Corey, 19 Pick. 29, 31 Am. Dec. 117.

Michigan.— Bell *v.* Bumpus, 63 Mich. 375, 29 N. W. 862; Oshurn *v.* Farr, 42 Mich. 134, 3 N. W. 299.

Missouri.— McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728.

New Hampshire.— Jenness *v.* Emerson, 15 N. H. 486.

New York.— Canovar *v.* Cooper, 3 Barb. 115.

Tennessee.— Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Vermont.— Atkins *v.* Sherbino, 58 Vt. 248, 4 Atl. 703.

Virginia.— Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78.

See 37 Cent. Dig. tit. "Parent and Child," § 77.

Where the father testifies in behalf of his son and treats as belonging to the son a claim upon which a suit is brought by him, after attaining his majority, for services rendered while an infant, the presumption of emancipation arises, and in the absence of rebutting evidence the action will be held to be properly brought in the name of the son. Scott *v.* White, 71 Ill. 287; Aulger *v.* Badgely, 29 Ill. App. 336.

Notice of emancipation.— If a minor is

action therefor.[16] It has also been held that where, by the terms of a contract made by the parent for the employment of the child, the wages are to be paid to the child, the right of action therefor is in the child and not the parent;[17] and a parent who has agreed with the child to relinquish his right to services cannot recover the child's wages from the employer.[18] The mere consent of a father that his son may sue for services rendered before he had obtained majority will not authorize the son to sue if emancipation or waiver of the father's right did not take place until after the services had been performed.[19]

2. Defenses. Emancipation of the child,[20] or payment to a child who is

actually emancipated by his father and an express promise is made to pay him for his labor, with the consent of his father, no other notice of his emancipation is necessary to entitle him to maintain an action upon the promise. Wood *v.* Corcoran, 1 Allen (Mass.) 405.

If there is no express contract between the son and his employer, the law will imply a promise in favor of the son and not of the father. Corey *v.* Corey, 19 Pick. (Mass.) 29, 31 Am. Dec. 117.

Effect of agreement between parent and child for relinquishment of parent's right.— An agreement between the father and son by which the former agrees to relinquish his right to services of the latter during his minority for a certain sum per annum, reserving a claim upon his wages to that amount and the right to treat the agreement as void in case that sum is not paid, and also to have the care of his son and the control of his affairs during his minority so far as to see that he gets his pay from those for whom he works, and that his wages are kept and used for his benefit, is not such an agreement of emancipation as divests the father of his right to sue and collect pay for his son's work. Mason *v.* Hutchins, 32 Vt. 780.

16. Cloud *v.* Hamilton, 11 Humphr. (Tenn.) 104, 53 Am. Dec. 778.

17. Gooden *v.* Rayl, 85 Iowa 592, 52 N. W. 506; Snediker *v.* Everingham, 27 N. J. L. 143; Eubanks *v.* Peak, 2 Bailey (S. C.) 497. See also Benziger *v.* Miller, 50 Ala. 206, holding that the child may sue on such a contract, although the parent also might have sued thereon. *Contra,* Gunter *v.* Mooney, 72 Ga. 205; Marston *v.* Bigelow, 150 Mass. 45, 53, 22 N. E. 71, 5 L. R. A. 43 (where it is said: "While the case of Felton *v.* Dickinson, [10 Mass. 287, ruling in accordance with the text] was rightly decided upon its peculiar circumstances, we think it cannot be fairly regarded as establishing a general rule that a son may sue upon a promise made for his benefit to his father"); Dickinson *v.* Talmage, 138 Mass. 249.

A private arrangement between the father and the son that the wages under a contract made by the father for the services of the son shall be paid to the latter does not give the son a right of action therefor. Kauffelt *v.* Moderwell, 21 Pa. St. 222.

Void contract.— Where an indenture was made between an infant and the father on the one part and another person on the other for the infant's services, the compensation for which was to be paid to him, but the indenture proved to be void, the infant could not maintain an action on a *quantum meruit* for his services but the right of action was in the father. Letts *v.* Brooks, Lalor (N. Y.) 36.

Agreement by father and subsequent divorce giving mother custody.— Where defendant received the minor daughter of A into his family with a promise to provide for and educate her as his own daughter, and subsequently A's wife obtained a divorce *a mensa et thoro* from her husband, and the custody of the daughter was awarded to her, but the daughter continued to reside with defendant two years longer without any new agreement, when he sent her to her mother, having failed to support and educate her according to his contract, it was held that defendant was not liable to an action by the mother in her name for the daughter's services, although the failure of defendant to fulfil his contract was not before known to the mother, the court saying that all the benefits of the contract by way of compensation for services were to inure to the minor herself, and that, there being an express contract by defendant to make compensation for the services of the child, there was no implied contract to pay either father or mother for the same services, and under the circumstances there was no implied promise by defendant to the mother for services performed by the child after the divorce and assignment of the custody to the mother. Farnsworth *v.* Wakefield, 12 Cush. (Mass.) 514.

18. Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 73, although he gave notice to the employer not to pay the wages to the child. But *compare* Kauffelt *v.* Modeswell, 21 Pa. St. 222.

The fact that the child has agreed with his father to buy his time for the remainder of his minority by paying a certain sum therefor, which has not been paid, does not prevent the father from maintaining an action to recover for services performed by the son under a contract made by him without the father's knowledge. Cahill *v.* Patterson, 30 Vt. 592.

19. Stiles *v.* Granville, 6 Cush. (Mass.) 458.

20. Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Estoppel to rely on defense of emancipation.— In an action for the wages of plaintiff's son, where the defense is that the labor

emancipated or entitled to receive his own earnings,[21] is a good defense to an action by the parent therefor; but payment to a child is no defense to a suit by the parent where the child was not entitled to his earnings,[22] and the employer was cognizant of that fact.[23] Where a child entered into a contract of employment without his father's consent, his failure to complete his contract is no defense to a suit by the father for the services actually rendered.[24] Payment to a father is no defense to an emancipated infant's suit for his wages, if the employer knew of the fact of emancipation.[25]

3. PARTIES.[26] A minor who is emancipated and allowed to collect his own earnings is entitled to recover them without joining his father as a party defendant;[27] and where a joint contract has been made by an infant and an adult, under which money has been earned, the father cannot sue the adult in his own name as the infant's substitute in the action, as if he himself had been a joint contractor.[28]

4. PLEADING.[29] The complaint in an action by a parent for the services of the child must set forth the amount claimed or sued for;[30] and when the mother is plaintiff it must be averred that the father is dead,[31] or that the mother is entitled to the services of the child as guardian or otherwise.[32] It has also been held that in an action by the mother an averment that the child is actually living with and

was done under a contract made by the son, with the father's consent, to work on his own account, and it appears that, before the action, defendant paid a portion of the wages to the son, proof that defendant, since the action, made a tender of the residue to plaintiff, who applied it *pro tanto* on the claim, does not prevent him from relying on the defense of a general emancipation by plaintiff of his son. McIntyre *v.* Fuller, 2 Allen (Mass.) 345.

Contract with parent.— Where a father and his minor son have entered into a written agreement with a third person, whereby the son is to work for the latter, until arriving at full age, for a certain compensation, the fact that the father has emancipated the son is no defense to an action by the father against the employer on the contract. Dickinson *v.* Talmage, 138 Mass. 249.

21. Campbell *v.* Campbell, 11 N. J. Eq. 268.

Intention of parent that child receive his pay.— Where plaintiff gave defendant notice to pay the son no more wages, and afterward allowed the son to receive a portion of this balance without objection, it was held to be sufficient to justify defendant in supposing that he still intended to have the son receive his pay. Perlinau *v.* Phelps, 25 Vt. 478.

22. White *v.* Henry, 24 Me. 531; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Implied authority to pay wages to child.— Where plaintiff hired out his minor son to defendant, and, while the son was so hired, remarked to defendant that he (plaintiff) should let his son have half his wages, defendant had no implied authority to pay more than half the son's wages to the son himself. Winn *v.* Sprague, 35 Vt. 243.

Under the Iowa statute payment to a minor under a contract for services made directly with him, but with the knowledge of the parent, is a good defense to an action brought by the parent to recover for such services. Nixon *v.* Spencer, 16 Iowa 214.

Settlement with minor.— Where a minor, at a great distance from his father, entered into a contract to labor for another, which he performed, and the employer afterward refused payment, insisting that he acted only as the agent of a third person, with whom the minor was induced, by his own destitute situation, to settle, taking his negotiable note payable at a distant day for the balance due, the father was not concluded by these proceedings but might instantly maintain an action for the wages of the son against the person with whom he originally contracted. Keen *v.* Sprague, 3 Me. 77.

23. White *v.* Henry, 24 Me. 531; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

24. Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355.

25. Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

Attachment of wages by parent's creditors. — It is no defense to a suit for wages by an infant, to whom his time has been given by his father, and who was hired with a knowledge of this fact on the part of defendant, that the wages had been trusteed in a suit against the father. Bray *v.* Wheeler, 29 Vt. 514.

26. See, generally, PARTIES.

27. Haught, etc., Iron-Works *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334, holding further that the fact that the minor lives with his father is no indication that the latter has an adverse interest in the controversy or is a necessary party, under Ind. Rev. St. (1881) § 268.

28. Osburn *v.* Farr, 42 Mich. 134, 3 N. W. 299.

29. See, generally, PLEADING.

30. Jones *v.* Buckley, 19 Ala. 604.

31. Jones *v.* Buckley, 19 Ala. 604; Burk *v.* Phips, 1 Root (Conn.) 487.

32. Jones *v.* Buckley, 19 Ala. 604; Burk *v.* Phips, 1 Root (Conn.) 487.

supported by her is an essential part of the statement of her cause of action.[33] In a suit for work done by plaintiff during his minority, an answer alleging that plaintiff was hired to defendant by his father for the term of his minority, defendant agreeing to give him certain articles at the close of the term, and that after plaintiff attained his majority an accounting was had between plaintiff, his father, and defendant, when the latter paid and plaintiff received a certain amount in full payment of the demand sued for, is good.[34]

5. ISSUES. In an action by a father for the services of his son, the legitimacy of the son is not in issue and need not be proved[35] unless the relationship is denied by defendant.[36] Where a mother sues to recover the wages of a child under a statute providing that if a father neglects to provide for his children the mother may receive their wages if she be of suitable character to have the custody of the children, her character is in issue, although the question is not raised by the pleadings, and defendant may show that it is not such as to entitle her to the benefit of the statute.[37] Where a minor living with an adult who is neither parent nor guardian is hired by such person to a third person, the latter cannot, in a suit for the amount due for the services, dispute the right of the adult to the custody of the minor.[38]

6. EVIDENCE.[39] Where a minor is allowed by his father to make his own contract for services, the presumption is that he is entitled to recover the wages for himself;[40] and it has been held that a father who sues to recover for work done by his son must prove that in the doing of the work he was the principal and the son the agent, either in fact or in law — either that the son was emancipated and was working under him as his servant, or that he was not emancipated.[41] In assumpsit by a father for the work and labor of his minor son, defendant may show from the practice of the father in other cases the authority of the son to make a special contract, and that such contract was not fulfilled by him;[42] and in order to show the authority of the son to make the contracts it is competent for defendant to prove that the father had previously permitted his son to hire himself out to divers persons to perform the services stipulated for in such contracts and to settle and adjust the claims arising out of such contracts, and that such had been the practice of the father.[43] Where a mother sues for the wages of her son under a statute allowing her to receive the earnings of the children when the father neglects to provide for them, and she testifies that her husband has done nothing for several years to support the family, evidence is admissible to show where the son has been living since he left defendant's employ as bearing on whether the husband has done something toward his support.[44] In an action by a child for wages under a contract made by the father for her services, it is not error to admit in evidence receipts given by the father for money paid him on account of what was due the child, where the child was living with him under his supervision, and the jury might well have found that he was acting as her authorized agent or exercising parental care and authority not at all inconsistent with his relinquishment of the profits of her services.[45] That plaintiff was present and assenting when his minor child entered into a contract of employment

33. Franz *v.* Riehl, 4 Pa. Dist. 627.
34. Hobbs *v.* Godlove, 17 Ind. 359.
35. Haight *v.* Wright, 20 How. Pr. (N. Y.) 91.
36. Armstrong *v.* McDonald, 10 Barb. (N. Y.) 300, holding that a plaintiff who alleges that a minor is his son, and that he is therefore entitled to recover his wages of defendant for work performed for him, must, if defendant deny the relationship, prove that the minor is his legitimate son, and, in order to do this, must offer some evidence of a marriage with the mother of the minor previous to the birth of the minor.
37. Eustice *v.* Plymouth Coal Co., 120 Pa. St. 299, 13 Atl. 975, holding that evidence that the mother is of unchaste character is admissible.
38. Lowry *v.* Button, Wright (Ohio) 330.
39. See, generally, EVIDENCE.
40. House *v.* House, 8 Leg. Gaz. (Pa.) 99, 6 Luz. Leg. Reg. 61.
41. Brown *v.* Ramsay, 29 N. J. L. 117.
42. Chilson *v.* Philips, 1 Vt. 41.
43. Chilson *v.* Philips, 1 Vt. 41.
44. Eustice *v.* Plymouth Coal Co., 120 Pa. St. 299, 13 Atl. 975.
45. Benziger *v.* Miller, 50 Ala. 206.

which was signed by her in her own name and not by him does not alone establish an intention on his part to relinquish his right to the child's wages.[46] Where a minor who has left his father's house in another state sues, upon attaining majority, to recover for services rendered while under age, the jury must be satisfied that the father had emancipated his son or given him his time while he worked for defendant or waived the right to recover for his services generally or in the particular case;[47] and, while proof that the father permitted the son to come into the state for employment and to make a contract for his services authorizes the jury to infer an emancipation or waiver of the right to the child's earnings, it does not require that they should do so.[48] The mere fact that an infant is working and collecting the proceeds of his labor does not show permission of his parent for him to receive for his own that which in law belongs to the parent;[49] but evidence that the parent knew that he was receiving the proceeds of his own labor might be sufficient to authorize an inference that permission had been granted for him to engage in the occupation and receive for his own the proceeds of the labor.[50]

7. TRIAL.[51] Whether a father has relinquished his claim to his child's earnings and recognized the child's right to control them himself is a question of fact to be submitted to the jury.[52] The usual rules as to the propriety of instructions[53] apply in an action for the services or earnings of a child.[54]

8. AMOUNT OF RECOVERY. A parent suing for the services of his minor child is entitled to recover the value of the services[55] to the person to whom they were rendered,[56] regardless of any special contract of the child.[57] The expenditures of defendant in supporting the child are to be deducted from the gross value of its services,[58] unless defendant has been notified that the parent will furnish neces-

46. Monaghan *v.* Randall School Dist., 38 Wis. 100.

47. Stiles *v.* Granville, 6 Cush. (Mass.) 458.

48. Stiles *v.* Granville, 6 Cush. (Mass.) 458.

49. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

50. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

51. See, generally, TRIAL.

52. Baker *v.* Baker, 41 Vt. 55.

53. See TRIAL.

54. **Propriety of particular instructions** see Kooser *v.* Housh, 78 Ill. App. 98; Dodge *v.* Favor, 15 Gray (Mass.) 82.

55. *Georgia.*— Culberson *v.* Alabama Constr. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. N. S. 411.

Massachusetts.— Williams *v.* Williams, 132 Mass. 304; Weeks *v.* Holmes, 12 Cush. 215; Adams *v.* Woonsocket Co., 11 Metc. 327.

Missouri.— Dunn *v.* Altman, 50 Mo. App. 231.

New Hampshire.— Gale *v.* Parrot, 1 N. H. 28.

New York.— Dwyer *v.* Rathbone, 1 Silv. Sup. 418, 5 N. Y. Suppl. 505, where a contract by the parent fixing the wages of the child was void.

See 37 Cent. Dig. tit. "Parent and Child," § 83.

56. Williams *v.* Williams, 132 Mass. 304 (holding that where a father, whose minor son lived with another person for whom he worked and by whom he was taken care of, notified the latter that if the son continued to work for him he should exact payment for his services, the father did not thereby become entitled to recover the value of the son's subsequent services to himself, regardless of their value to the person to whom they were rendered); Weeks *v.* Holmes, 12 Cush. (Mass.) 215 (holding that, in an action by a father for the earnings of his minor son employed without his consent, the measure of damages is not what the son would have earned for the father during that time but what he in fact earned in the service of the employer).

57. Gale *v.* Parrot, 1 N. H. 28.

Option of parent.—Where defendant agreed with plaintiff to hire the latter's son at twenty-five dollars per month for a year, and after more than a year defendant discharged him, and afterward took him back, agreeing with him to pay him fifteen dollars per month and allow him part of his time in which to give music lessons, plaintiff, unless he had knowledge of the latter contract and assented to it, had his option either to adopt the contract and claim what was due under it, or to repudiate it and claim the value of his son's services, and in the latter case he would be entitled to the value of his entire time, less the value of the privilege of giving music lessons. Sherlock *v.* Kimmell, 75 Mo. 77.

58. Culberson *v.* Alabama Constr. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. N. S. 411; Adams *v.* Woonsocket Co., 11 Metc. (Mass.) 327 (where the value of board but not of clothing furnished was deducted); Huntoon *v.* Hazelton, 20 N. H. 388.

Expenditure of wages by child.— One who employs a minor without his father's consent cannot, in an action by the father for the

saries for the child.[59] Where a mother sues to recover the value of her son's services she cannot recover for journeyman's wages, although the boy's work is equal to journeyman's work, where it appears that he has been rendered capable of doing such work by the instructions given him by his employer at the cost of time and material.[60]

VI. ACTIONS FOR INJURIES TO CHILD[61] AND LOSS OF SERVICES.

A. Parent's Right of Action[62] — 1. IN GENERAL. A parent has as a general rule a right of action against a person whose wrongful act or omission has caused an injury to the child.[63] As between the parents this right belongs primarily to the father;[64] but as a general rule it is given to the mother where, by reason of

value of such services, reduce the amount of recovery by showing that the son expended a portion of the wages paid him for clothing and other necessaries, since defendant did not supply them. Dunn *v.* Altman, 50 Mo. App. 231.

59. Miller *v.* Muck, 19 Pa. Co. Ct. 260.

60. Dwyer *v.* Rathbone, 1 Silv. Sup. (N. Y.) 418, 5 N. Y. Suppl. 505.

61. Actions by infants for torts see INFANTS, and the various titles treating of torts.

62. Action by parent for seduction of daughter see SEDUCTION.

Statutory action for causing death of child see DEATH.

63. *Alabama.*— Burden *v.* Barnett, 7 Ala. 169.

California.— Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Karr *v.* Parks, 44 Cal. 46.

Georgia.— Shields *v.* Young, 15 Ga. 349, 60 Am. Dec. 698.

Illinois.— Chicago City R. Co. *v.* Schaefer, 121 Ill. App. 334.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508; Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Boyd *v.* Blaisdell, 15 Ind. 73; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Kentucky.— Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013, 23 Ky. L. Rep. 461, 96 Am. St. Rep. 475, 53 L. R. A. 789; Slaughter *v.* Nashville, etc., R. Co., 90 S. W. 243, 91 S. W. 713, 28 Ky. L. Rep. 665, 1343; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Maine.— Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts.— Wilton *v.* Middlesex R. Co., 125 Mass. 130; Dennis *v.* Clark, 2 Cush. 347, 48 Am. Dec. 671; McCarthy *v.* Guild, 12 Metc. 291.

Minnesota.— Nyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163.

Missouri.— Klingman *v.* Holmes, 54 Mo. 304.

New Jersey.— Van Horn *v.* Freeman, 6 N. J. L. 322.

New York.— Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

Pennsylvania.— Wilt *v.* Vickers, 8 Watts 227; Hippert's Estate, 12 Lanc. Bar 68.

Tennessee.—Tennessee Cent. R. Co. *v.* Doak, 115 Tenn. 720, 92 S. W. 853.

Texas.— Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564; Ft. Worth St. R. Co. *v.* Wilten, 74 Tex. 202, 11 S. W. 1091; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322; Texas, etc., R. Co. *v.* Hervey, (Civ. App. 1905) 89 S. W. 1095.

United States.—Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

Adult child.— A father may recover for loss of services of an adult daughter who, although married, was separated from her husband and a member of such father's family, where such loss of services was the result of an illegal carnal assault. Palmer *v.* Baum, 123 Ill. App. 584.

Injury from defective highway.— Me. St. (1821) § 17, providing that a person receiving an injury through a defect in a highway, either in his person, horses, etc., or "other property," shall have his remedy against the town, does not authorize a father to maintain an action against a town for the loss of services of a minor son in his employ in consequence of an injury from such a defect. Reed *v.* Belfast, 20 Me. 246. But *compare* Bailey *v.* Fairfield, Brayt. (Vt.) 126, holding that under a statute providing that, if any special damages shall happen to any person by means of any defect in a highway, he shall have an action therefor, a father can maintain an action against a town for injuries to his minor child by reason of such defect.

Employers' Liability Act.—Ala. Code (1886), § 2590, authorizing an employee to recover damages for personal injuries sustained in the service of his employer in certain cases, does not authorize a parent of a minor servant to recover such damages. Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455. See, generally, MASTER AND SERVANT.

64. King *v.* Southern R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. N. S. 544; Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App.

the father's death or otherwise, the right to the custody and services of the child has devolved upon her.[65]

2. BASIS OF RIGHT OF ACTION. The parent's right to recover for an injury to the child rests upon the doctrine of compensation.[66] It is generally stated that the basis of the right of action is the resulting loss of the services of the child;[67] and according to some authorities this is the sole basis, so that if there be no actual loss of services, there can be no recovery by the parent;[68] but other authori-

312, 43 N. E. 1058; Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

Death of father while action pending.— Where a father sues in his own right for an injury to his minor son, and as next friend, to recover for injuries not resulting in death, and pending suit the father dies, and the mother is substituted, a judgment for her in her own right cannot be sustained. Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482.

Death of father before action brought.—A mother cannot sue for injuries to her minor child where the father was living at the time of the injury, although he died before the action was brought. King *v.* Southern R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. N. S. 544; Geraghty *v.* New, 7 Misc. (N. Y.) 30, 27 N. Y. Suppl. 403.

An arrangement between the parents of a minor that the mother shall manage the affairs of the household and receive the earnings of the minor amounts to a relinquishment by the father of his right to the minor's services and an assignment thereof to the mother, and the mother is entitled to maintain an action for loss of services prior to the death of the father. McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122. But *compare* Barrett *v.* Riley, 42 Ill. App. 258.

65. *Georgia.*— Savannah, etc., R. Co. *v.* Smith, 93 Ga. 742, 21 S. E. 157.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Kentucky.— Union News Co. *v.* Morrow, 46 S. W. 6, 20 Ky. L. Rep. 302.

Massachusetts.— Horgan *v.* Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504.

Missouri.— Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; Scamell *v.* St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021.

New York.— Sorenson *v.* Balahan, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654.

Pennsylvania.— O'Brien *v.* Philadelphia, 215 Pa. St. 407, 64 Atl. 551 [*distinguishing* Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482]; Stetler *v.* Railroad, 6 Phila. 178, by reason of her statutory liability to care for the child. But *compare* *In re* Hippert, 12 Lanc. Bar 68, holding that a mother cannot maintain an action for the loss of service of her minor child by reason of wilful or negligent injury to his person, except in the single case of the death of a child by negligence under Act, April 26, 1855.

Rhode Island.— McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

Tennessee.—Tennessee Cent. R. Co. *v.* Doak, 115 Tenn. 720, 92 S. W. 853; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

See 37 Cent. Dig. tit. "Parent and Child," § 91.

The mother's right is statutory and did not exist at common law. Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Decree giving mother custody but leaving father liable for support.—A divorce in which the "care and custody" of a child are decreed to the wife, without charging its maintenance to either spouse, does not change the duty of support from the husband to the wife, and hence she is not entitled to maintain an action for loss of the child's services, occasioned by his negligent injury. Keller *v.* St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

Presumption that mother a proper custodian.— Where the mother after the father's death had not been divested of the control and custody of an infant child, the presumption is that she was a fit person to have such control and custody, so as to entitle her to sue for damages for an injury resulting from his employment in a dangerous business. Union News Co. *v.* Morrow, 46 S. W. 6, 20 Ky. L. Rep. 302.

Contract between child and third person.— A mother's right to recover for loss of a minor son's services is not impaired by the fact that the loss occurred pending a contract between him and the one who caused the loss, to which she was a stranger. Scamel *v.* St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021.

66. Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091.

67. *Georgia.*— Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698.

Illinois.— Mercer *v.* Jackson, 54 Ill. 397.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Maine.— Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

New York.—Murray *v.* Gast Lith., etc., Co., 8 Misc. 36, 28 N. Y. Suppl. 271 [*affirmed* in 10 Misc. 365, 31 N. Y. Suppl. 17]; Geraghty *v.* New, 7 Misc. 30, 27 N. Y. Suppl. 403.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

68. Allen *v.* Atlanta St. R. Co., 54 Ga.

ties base the right of action upon the right to services rather than the actual rendition of services.[69] The more reasonable view is that the right of action is based not only upon the right to services but also upon the duty of care and maintenance,[70] so that if the parent is by the wrong of another in injuring the child put to extra expense in fulfilling his duty, he is entitled to recover indemnity from the wrong-doer, without reference to any loss of services resulting from the injury.[71]

3. Where Right to Services Relinquished or Lost. The parent has no right of action where at the time of the injury the child had reached majority,[72] or had been emancipated,[73] or the parent had relinquished or lost the right to the child's services.[74]

4. Where Child Too Young to Render Services. While it has been held that where the child is at the time of the injury too young to perform any services and is cured or dies of the injury before it reaches the age to perform services, there can be no recovery,[75] the better view, and that supported by the weight of authority, is that in such case the parent is entitled to recover for his expenditures in the care and cure of the child.[76]

5. Where Child Living Away From Parent or In Service of Another. The English rule is that, where the child has left home and is in the service of another at the time of the injury, the parent is not entitled to recover as for a loss of service, although he had not voluntarily relinquished his right to such service;[77] but in the United States the courts consider that a parent who retains the right to a child's services may recover for a loss resulting from an injury to the child, although at the time of such injury the child was living with or in the service of

503; Kansz *v.* Ryan, 51 Iowa 232, 1 N. W. 485; Grinnell *v.* Wells, 2 D. & L. 610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033.

Unborn child.—A father cannot recover damages for injury to a child *in ventre sa mere*, brought about by defendant in causing a miscarriage. Kausz *v.* Ryan, 51 Iowa 232, 1 N. W. 485.

69. Geraghty *v.* New, 7 Misc. (N. Y.) 30, 27 N. Y. Suppl. 403. And see *infra*, VI, A, 5.

70. McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122; Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

71. Sykes *v.* Lawlor, 49 Cal. 236; Dennis *v* Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671; Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169. And see *infra*, VI, A, 4.

72. Mercer *v.* Jackson, 54 Ill. 397, although the child helps the parent to support the family.

73. *Massachusetts.*— McCarthy *v.* Boston, etc., R. Co., 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608; Dumain *v.* Gwynne, 10 Allen 270; Wodell *v.* Coggeshall, 2 Metc. 89, 35 Am. Dec. 391.

Pennsylvania.— Stansbury *v.* Bertron, 7 Watts & S. 362.

Texas.— Pecos, etc., R. Co. *v.* Blasengame, (Civ. App. 1906) 93 S. W. 187.

Washington.— See Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

United States.— The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 462, 474.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

74. Southern R. Co. *v.* Flemister, 120 Ga. 524, 48 S. E. 160.

Relinquishment or loss of right to services see *supra*, V, C, D.

75. Allen *v.* Atlanta St. R. Co., 54 Ga. 503; Grinnell *v.* Wells, 2 D. & L. 610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033.

76. *Alabama.*— Durden *v.* Barnett, 7 Ala. 169.

California.— Sykes *v.* Lawlor, 49 Cal. 236.

Massachusetts.— Dennis *v.* Clark, 2 Cush. 347, 48 Am. Dec. 671 [*explaining* Hall *v.* Hollander, 4 B. & C. 133, 7 D. & R. 133, 4 L. J. K. B. O. S. 39, 10 E. C. L. 746].

New York.— Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

United States.— Finley *v.* Richmond, etc., R. Co., 59 Fed. 419; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

77. Davies *v.* Williams, 10 Q. B. 725, 11 Jur. 750, 16 L. J. Q. B. 369, 59 E. C. L. 725; Hedges *v.* Tagg, L. R. 7 Exch. 283, 41 L. J. Exch. 169, 20 Wkly. Rep. 976; Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653; Thompson *v.* Ross, 5 H. & N. 16, 5 Jur. N. S. 1133, 29 L. J. Exch. 1, 1 L. T. Rep. N. S. 43, 8 Wkly. Rep. 44; Blamire *v.* Haley, 4 Jur. 107, 9 L. J. Exch. 147, 6 M. & W. 55.

another person,[78] although the right of a widowed mother to recover for the loss of the services of the child is dependent upon the child having been in her services or residing with and supported by her at the time of the injury.[79] Of course if the child is legally bound out to service to another, so that at the time the parent has no right to the child's service, the parent cannot recover.[80]

6. Consent of Parent to Employment of Child. A parent who consents to the employment of his child in a dangerous service assumes the risks incident to the service and is not entitled to recover if the child is injured in the service,[81] but such consent does not prevent a recovery for an injury resulting, not from the ordinary risks of the service, but from the employer's negligence.[82] And a parent may recover for an injury due merely to the risks of the service where the child was employed therein against the will of his parent,[83] or even without his consent.[84] In such case the parent's recovery is based on his common-law rights and

78. *Illinois.*— White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

Indiana.— Bolton *v.* Miller, 6 Ind. 262; Boyd *v.* Byrd, 8 Blackf. 113, 44 Am. Dec. 740.

Maine.— Emery *v.* Gowen, 4 Me. 33, 16 Am. Dec. 233.

Maryland.— Greenwood *v.* Greenwood, 28 Md. 369; Mercer *v.* Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486.

Massachusetts.— Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584.

Mississippi.— Ellington *v.* Ellington, 47 Miss. 329.

New Jersey.— Van Horn *v.* Freeman, 6 N. J. L. 322.

New York.— Mulvehall *v.* Millward, 11 N. Y. 343; Geraghty *v.* New, 7 Misc. 30, 27 N. Y. Suppl. 403; Clark *v.* Fitch, 2 Wend. 459, 20 Am. Dec. 639; Martin *v.* Payne, 9 Johns. 387, 6 Am. Dec. 288.

Pennsylvania.— Mohry *v.* Hoffman, 86 Pa. St. 358; Wilt *v.* Vickers, 8 Watts 227; Hornketh *v.* Barr, 8 Serg. & R. 36, 11 Am. Dec. 568; Logan *v.* Murray, 6 Serg. & R. 175, 9 Am. Dec. 422.

West Virginia.— Hudkins *v.* Haskins, 22 W. Va. 645.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

79. Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75; Geraghty *v.* New, 7 Misc. (N. Y.) 30, 27 N. Y. Suppl. 403.

80. Bolton *v.* Miller, 6 Ind. 262; Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584; Ellington *v.* Ellington, 47 Miss. 329; Dain *v.* Wyckoff, 7 N. Y. 191. See, generally, APPRENTICES.

81. Dimmick Pipe Works Co. *v.* Wood, 139 Ala. 282, 35 So. 885; Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455; New *v.* Southern R. Co., 116 Ga. 147, 42 S. E. 391, 59 L. R. A. 115 (contract by father hiring out son to railroad company and expressly releasing employer from liability for injuries); Wolf *v.* East Tennessee, etc., R. Co., 88 Ga. 210, 14 S. E. 199; Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49; Pecos, etc., R. Co. *v.* Blasengame, (Tex. Civ. App. 1906) 93 S. W. 187; Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

Acquiescence of the parent in the child's employment may be a sufficient consent. Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. St. Rep. 20, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

The consent of the mother, not ratified by the father, is insufficient, where the parents live together, to relieve the employer from liability. Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. St. Rep. 20, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

Knowledge of risks.— Where a father consents to a son's employment, he is chargeable with having consented and accepted any risks naturally incident to the work, whether the character of the risks is known to him or not. Dimmick Pipe Works *v.* Wood, 139 Ala. 282, 35 So. 885.

Presumption of assent.— In the absence of any allegations to the contrary, it will be presumed that the parent assented to the employment. Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455.

Exemption of employer from liability to child.—A parent cannot, by a contract for the employment of the child, exempt the employer from liability for permanent injury inflicted on the child. International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681.

82. Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455; Pecos, etc., R. Co. *v.* Blasengame, (Tex. Civ. App. 1906) 93 S. W. 187.

Special agreement releasing liability.—A father, who has not only consented to the employment of a minor son by a railroad company, but who has also specially agreed not to trouble the company if the son is injured, can nevertheless recover for injuries received by the son resulting from the company's negligence. Texas, etc., R. Co. *v.* Putman, (Tex. Civ. App. 1901) 63 S. W. 910.

83. Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 6; Grand Rapids, etc., R. Co. *v.* Showers, 71 Ind. 451; Toledo, etc., R. Co. *v.* Trimble, 8 Ind. App. 333, 35 N. E. 716; Taylor *v.* Chesapeake, etc., R. Co., 41 W. Va. 704, 24 S. E. 631.

84. Dimmick Pipe Works *v.* Wood, 139 Ala. 282, 35 So. 885; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298; Union News Co. *v.* Morrow, 46 S. W. 6, 20 Ky. L. Rep. 302; Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Gulf, etc., R. Co. *v.* Redeker, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887, 67

not on the question whether the child could have recovered in a suit for himself,[85] as the father, being a stranger to the contract of employment, is not bound by any of its terms.[86] A general consent of the parent to the son entering into the service of a particular employer does not prevent a recovery by the parent for an injury resulting from the child's being employed, without the consent of the parent, in work more hazardous than that which was in contemplation when the parent consented to the employment.[87]

7. Causing Death of Child. At common law the parent has no right of action for the death of the child,[88] but under the statutes the parent is usually given a right of action for the wrongful killing of the child.[89] Even at common law the death of the child as a result of the injury does not preclude a recovery by the parent for loss of services and expenses up to the time of death.[90]

8. Procuring Marriage of Child. It has been held that a father cannot recover

Tex. 190, 2 S. W. 527, 60 Am. Rep. 20; Hamilton *v.* Galveston, etc., R. Co., 54 Tex. 556; Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095. *Contra*, Toledo, etc., R. Co. *v.* Trimble, 8 Ind. App. 333, 35 N. E. 716, holding that in order to render the employer liable the employment must have been against the will of the parent. And see Texas, etc., R. Co. *v.* Crowder, 61 Tex. 262.

The parent is not bound to notify the employer that he does not consent. Gulf, etc., R. Co. *v.* Redeker, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

Employer's knowledge of minority.— A father cannot maintain an action for the loss of the services and society of his minor son, who perished while on a whaling voyage for which he shipped without the father's knowledge or consent, unless defendant knew that he was a minor. Cutting *v.* Seabury, 6 Fed. Cas. No. 3,521, 1 Sprague 522.

Duty of employer to obtain consent.— "If the employer knows of the minority, it is his duty to ascertain whether the infant have a parent or be an apprentice, and, if so, to obtain the consent of such parent or the master before making the employment." Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 192, 2 S. W. 527, 60 Am. Rep. 20, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

That an infant is receiving the proceeds of his own labor is not sufficient to establish that permission on the part of his parents had been given him to engage in the business in which the amounts secured by him are earned. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

85. Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

The wrong to the parent consists in the unauthorized employment, and he is entitled to compensation for any loss which has resulted from the wrong, without reference to the question whether or not the child contributed to such injury by undertaking the work, provided the injury resulted from the perils of the occupation. Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

86. Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

87. Dimmick Pipe Works *v.* Wood, 139 Ala. 282, 35 So. 885 (holding that the consent of the father to his son being employed in a foundry to shovel sand into molding flasks standing in pits was not a consent to his using a wheelharrow to wheel sand about the pits in dangerous proximity to flasks suspended from cranes and filled with molten metal); Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914 (holding that the consent of the parent to a child's being employed to carry stacker sticks was not consent to his working at the wheel used to set the head block of log carriage in a sawmill, the parent not knowing that he was employed at the wheel); Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887 (holding that the facts that the father had given a general permission to a minor to engage in railroading, and had consented to his employment as a fireman, did not affect the father's right to recover for injuries received while he was employed without the father's actual consent as brakeman).

Duty of parent to inform himself of change in child's duties.— When a minor has entered the service of a railroad company in a capacity not requiring him to board moving trains, the father is not guilty of contributory negligence in failing to inform himself that the scope of the son's employment has been changed so as to require him to board moving trains, and is not precluded from recovering for loss of the son's services owing to an accident caused by the more dangerous character of the son's employment. Texas, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1893) 24 S. W. 569.

88. Sorenson *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654 [*following* Green *v.* Hudson River R. Co., 2 Abb. Dec. 277, 2 Keyes 294]; Gulf, etc., R. Co. *v.* Beall, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807. See also Mercer *v.* Jackson, 54 Ill. 397, adult child.

89. Stafford *v.* Rubens, 115 Ill. 196, 3 N. E. 568; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

90. Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654.

damages for loss of services against a person for procuring the marriage of his daughter, who has in good faith and without force or imposition entered into the marriage contract.[91]

9. Torts Personal to Child. Where the tort is purely personal to the child it seems that the parent cannot recover.[92]

10. Separate Causes of Action of Parent and Child. An injury to a child gives rise to two causes of action, one on behalf of the parent, the other on behalf of the child,[93] and the two causes of action cannot be joined.[94] It follows that a recovery by the parent for the injury and loss which he has suffered does not bar a recovery by the child for the injury personal to himself;[95] and conversely, a recovery by the parent on behalf of the child for the injury personal to the latter does not bar a recovery by the parent for his own loss and damages resulting from the injury.[96] Neither is the commencement of an action by an infant by his father as next friend for personal injuries a waiver of the father's right to recover for loss of services of the infant.[97]

11. Action By Parent on Behalf of Child.[98] Under some statutes the father may bring an action for the benefit of the child for an injury to the latter.[99] In

91. Goodwin *v.* Thompson, 2 Greene (Iowa) 329 (where the daughter was at the time of marriage between twelve and fourteen years of age); Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

92. Pattison *v.* Gulf Bay Co., 116 La. 963, 41 So. 224, 114 Am. St. Rep. 570 (holding that a father cannot individually recover damages for a libel against his daughter, nineteen years old); Murray *v.* Gast Lith., etc., Co., 8 Misc. (N. Y.) 36, 28 N. Y. Suppl. 271, 31 Abb. N. Cas. 266 [*affirmed* in 10 Misc. 365, 31 N. Y. Suppl. 17] (holding that a parent cannot sue to enjoin the publication of portrait of his infant child or for damages caused thereby); Heast *v.* Sybert Cheves (S. C.) 177 (holding that the parents cannot maintain an action for assault and battery of the child).

93. *Alabama.*— Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751.

California.—Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Karr *v.* Parks, 44 Cal. 46.

Indiana.— Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Boyd *v.* Blaisdell, 15 Ind. 73.

Kentucky.— Slaughter *v.* Nashville, etc., R. Co., 90 S. W. 243, 28 Ky. L. Rep. 665, 91 S. W. 713, 28 Ky. L. Rep. 1343.

Minnesota.— Gardner *v.* Kellogg, 23 Minn. 463.

New York.— Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

Tennessee.— Tennessee Cent. R. Co. *v.* Doak, 115 Tenn. 720, 92 S. W. 853; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

Texas.— Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

A father cannot waive, release, or compromise the child's cause of action for personal injuries. Spring Valley Coal Co. *v.* Donaldson, 123 Ill. App. 196; Kimbell *v.* Miller, 54 Ill. App. 665; Kirk *v.* Middlebrook, 201 Mo. 245, 100 S. W. 450. And see *infra*, VII, A.

The emancipation of the child cannot confer upon him the parent's right of action for an injury to him, which the parent had previously released for a consideration paid by the person liable. Cincinnati, etc., Pac. R. Co. *v.* Pemberton, 8 Ky. L. Rep. 769.

Where a minor's disability continues beyond the period of his minority, the parent may recover for the loss of service during minority, and the child for the loss after majority. Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. (N. Y.) 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46.

94. Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564. See, generally, Joinder and Splitting of Actions, 23 Cyc. 425 note 41.

95. See Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59.

96. Karr *v.* Parks, 44 Cal. 46; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

Acquiescence in child's recovery of lost earnings.— Where, in his application for the appointment of a guardian *ad litem* in an action for damages for injuries sustained, an infant claimed his wages as an item of damages, his father, by consenting to act as such guardian, acquiesced in his son's claim for wages, and hence could not subsequently recover for himself. Lieberman *v.* Third Ave. R. Co., 25 Misc. (N. Y.) 296, 54 N. Y. Suppl. 574.

97. Slaughter *v.* Nashville, etc., R. Co., 90 S. W. 243, 28 Ky. L. Rep. 665, 91 S. W. 713, 28 Ky. L. Rep. 1343, where the father's action was commenced before the infant's action.

98. See, generally, Negligence.

99. Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774; Lathrop *v.* Schutte, 61 Minn. 196, 63 N. W. 493; Buechner *v.* Columbia Shoe Co., 60 Minn. 477, 62 N. W. 817; Gardner *v.* Kellogg, 23 Minn. 463.

Statute constitutional.— Minn. Gen. St.

such an action only damages personal to the child and not those personal to the parent can be recovered,[1] and the amount recovered belongs to the child.[2]

B. Persons Liable. If the child is injured in the course of a dangerous service the employer is liable;[3] but the mere fact that a child was injured while in the employ of a person by whom he has been employed without the knowledge of the parent does not render the employer liable in an action by the parent for the loss of the services of the child, where the employment was not hazardous and the injury was not due to the employer's negligence.[4] A parent cannot of course recover against one who was not in person or by his agent the proximate cause of the injury.[5]

C. Defenses[6] — 1. In General. The mere fact that the parent allowed the child to receive his own wages is not a defense to the parent's action,[7] and, although the complete emancipation of the child would be a defense,[8] it must be pleaded and proved by defendant.[9] In an action by the mother, the fact that since the injury she has become unfit to have the custody of the child is not a defense.[10]

2. Contributory Negligence of Parent. The parent is required to exercise reasonable care in regard to the safety of the child,[11] and contributory negligence on the part of the parent will preclude a recovery by him for an injury to or the death of the child.[12] Whether or not the parent has been guilty of such contribu-

(1894) § 5164, authorizing a father to sue for injuries to his child, is not unconstitutional as assuming to transfer a cause of action in favor of the child to the father for the sole use of the latter. Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774.

1. Gardner *v.* Kellogg, 23 Minn. 463. See also Slaughter *v.* Nashville, etc., R. Co., 90 S. W. 243, 28 Ky. L. Rep. 665, 91 S. W. 713, 28 Ky. L. Rep. 1343.

2. Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774; Lathrop *v.* Schutte, 61 Minn. 196, 63 N. W. 493.

3. Soldanels *v.* Missouri Pac. R. Co., 23 Mo. App. 516.

What constitutes employment.—A newsboy on a railroad train, who receives a commission on sales of papers and other articles for a news company, is in the employment of such company, so as to render it liable to his widowed mother for damages for an injury to him resulting from his employment in such dangerous business without her consent. Union News Co. *v.* Morrow, 46 S. W. 6, 20 Ky. L. Rep. 302.

Recital in receipt as to who is employer.—A plaintiff suing for injuries received by his minor son while in the employ of defendant, whereby he lost his son's services, is not bound by a recital in a pay-roll signed by another person at the request of and in the son's name, that a person other than defendant is the employer. Shmit *v.* Day, 27 Oreg. 110, 39 Pac. 870.

4. See Williams *v.* Southern R. Co., 121 N. C. 512, 28 S. E. 367.

5. Mack *v.* Lombard, etc., Pass. R. Co., 8 Pa. Co. Ct. 305.

6. **Child away from parent or in service of another** see *supra*, VI, A, 5.

Child too young to render services see *supra*, VI, A, 4.

Parent's consent to employment of child see *supra*, VI, A, 6.

Relinquishment or loss of parent's right to services see *supra*, VI, A, 3.

7. Soldanels *v.* Missouri Pac. R. Co., 23 Mo. App. 516.

8. See *supra*, VI, A, 3.

9. Singer *v.* St. Louis, etc., R. Co., 119 Mo. App. 112, 95 S. W. 944.

10. Union News Co. *v.* Morrow, 46 S. W. 6, 20 Ky. L. Rep. 302.

11. Louisville, etc., Canal Co. *v.* Murphy, 9 Bush (Ky.) 522; Mattson *v.* Minnesota, etc., R. Co., 98 Minn. 296, 108 N. W. 517; San Antonio, etc., R. Co. *v.* Vaughan, 5 Tex. Civ. App. 195, 23 S. W. 745.

12. *Alabama.*—Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770; Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751.

Arkansas.— St. Louis, etc., R. Co. *v.* Freeman, 36 Ark. 41.

Idaho.— Spokane, etc., R. Co. *v.* Holt, (1895) 40 Pac. 56.

Illinois.— Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206.

Indiana.— Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154.

Iowa.— Albertson *v.* Keokuk, etc., R. Co., 48 Iowa 292.

Minnesota.— Mattson *v.* Minnesota, etc., R. Co., 98 Minn. 296, 108 N. W. 517; Mattson *v.* Minnesota, etc., R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503.

New York.— Honegsberger *v.* Second Ave. R. Co., 2 Abb. Dec. 378, 1 Keyes 570, 33 How. Pr. 193; Foley *v.* New York Cent., etc., R. Co., 78 Hun 248, 28 N. Y. Suppl. 816.

Ohio.— Cincinnati *v.* Gregory, 4 Ohio S. & C. Pl. Dec. 223, 3 Ohio N. P. 142.

Pennsylvania.— Pennsylvania Co. *v.* James, 81* Pa. St. 194; Hampton *v.* Borough, 6 Lanc. L. Rev. 25.

tory negligence as will defeat a recovery in a particular case depends upon the facts,[13] and not only the age but also the intelligence and physical ability of the child are to be considered.[14] It may, however, be laid down as a general rule that parents who permit their children of tender years to wander where they may get upon a railroad track are guilty of such negligence as will prevent them from recovering in case the children are injured or killed on such track,[15] although it is not necessarily negligence to send a child who is beyond the age of tender infancy or who is attended by another child beyond such age on an errand or journey which requires it to cross railroad or street railway tracks.[16] It has been

Tennessee.— Postal Tel. Cable Co. *v.* Zopfi, 93 Tenn. 369, 24 S. W. 633. See also Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

Texas.—San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745.

Virginia.— Richmond, etc., R. Co. *v.* Martin, 102 Va. 201, 45 S. E. 894.

See 37 Cent. Dig. tit. "Parent and Child," § 94.

13. See Mattson *v.* Minnesota, etc., R. Co., 98 Minn. 296, 108 N. W. 517.

Circumstances sufficient to defeat recovery see the following cases:

Alabama.— Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770.

Massachusetts.— Grant *v.* Fitchburg, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449.

Michigan.— Apsey *v.* Detroit, etc., R. Co., 83 Mich. 432, 47 N. W. 319.

New York.— Albert *v.* Albany R. Co., 5 N. Y. App. Div. 544, 39 N. Y. Suppl. 430 [*affirmed* in 154 N. Y. 780, 49 N. E. 1093].

Pennsylvania.— Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49; Johnson *v.* Reading City Pass. R. Co., 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. Rep. 752; Smith *v.* Hestonville, etc., Pass. R. Co., 92 Pa. St. 450, 37 Am. Rep. 705.

See 37 Cent. Dig. tit. "Parent and Child," § 94.

Circumstances not sufficient to defeat recovery see the following cases:

Colorado.— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Illinois.— Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621, 42 N. E. 53 [*affirming* 58 Ill. App. 142].

Kansas.— Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

Massachusetts.— Creed *v.* Kendall, 156 Mass. 291, 31 N. E. 6.

Minnesota.— Cameron *v.* Duluth-Superior Traction Co., 93 Minn. 104, 102 N. W. 208; Strutzel *v.* St. Paul City R. Co., 47 Minn. 543, 50 N. W. 690; Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694.

Missouri.— Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

New York.— Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Prendegast *v.* New York Cent., etc., R. Co., 58 N. Y. 652; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124, 39 N. Y. Suppl. 1098; Ahern *v.* Steele, 48 Hun 517, 1 N. Y. Suppl. 259 [*reversed* on other grounds in 115 N. Y. 203, 23 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449]; Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347 [*affirmed* in 67 N. Y. 379].

Ohio.— Becker *v.* Cincinnati St. R. Co., 2 Ohio S. & C. Pl. Dec. 137, 1 Ohio N. P. 359.

Pennsylvania.— Del Rossi *v.* Cooney, 208 Pa. St. 233, 57 Atl. 514.

Texas.— Gulf, etc., R. Co. *v.* Johnson, (Civ. App. 1899) 51 S. W. 531; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246, 27 S. W. 932; Houston City St. R. Co. *v.* Dillon, 3 Tex. Civ. App. 303, 22 S. W. 1066.

Wisconsin.— Dahl *v.* Milwaukee City R. Co., 62 Wis. 652, 22 N. W. 755; Johnson *v.* Chicago, etc., R. Co., 56 Wis. 274, 14 N. W. 181.

See 37 Cent. Dig. tit. "Parent and Child," § 94.

14. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Powers *v.* Quincy, etc., R. Co., 163 Mass. 5, 39 N. E. 345; McGeary *v.* Eastern R. Co., 135 Mass. 363; Gibbons *v.* Williams, 135 Mass. 333; Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490, 34 N. E. 1101 [*affirming* 1 Misc. 136, 20 N. Y. Suppl. 676]; Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108 [*affirming* 41 Hun 404]; Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49; Oldfield *v.* New York, etc., R. Co., 3 E. D. Smith (N. Y.) 103 [*affirmed* in 14 N. Y. 310]; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257.

15. St. Louis, etc., R. Co. *v.* Colum, 72 Ark. 1, 77 S. W. 596; St. Louis, etc., R. Co. *v.* Freeman, 36 Ark. 41; Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Jeffersonville, etc., R. Co. *v.* Bowen, 49 Ind. 154, 40 Ind. 545; Foley *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 248, 28 N. Y. Suppl. 816; Pollack *v.* Pennsylvania R. Co., 210 Pa. St. 634, 60 Atl. 312, 105 Am. St. Rep. 846; Westerberg *v.* Kinzua Creek, etc., R. Co., 142 Pa. St. 471, 21 Atl. 878, 24 Am. St. Rep. 510. *Compare* Enright *v.* Pittsburg Junction R. Co., 204 Pa. St. 543, 54 Atl. 317, child eleven years old.

16. Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; Illinois Cent. R. Co. *v.* Slater, 28 Ill. App. 73 [*affirmed* in 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418]; Ihl *v.* Forty-Second St., etc., Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Harkins *v.* Pittsburg, etc., Traction Co., 173 Pa. St. 146, 149, 33 Atl. 1045; Pennsylvania R. Co. *v.* Brooks, 2 Walk. (Pa.) 122. See also Texas, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1903) 73 S. W. 420 [*reversed* on other grounds in 96 Tex. 622, 75 S. W. 4].

Very young child.— The fact that a child

asserted that merely allowing a young child to go alone on the public streets is not such negligence as will necessarily preclude a recovery by the parent,[17] although there are cases in which a recovery has been denied under such circumstances.[18] Where, notwithstanding reasonable precautions taken by a parent in view of his circumstances and station in life, a young child strays from home or from the parent's care and is injured or killed, the parent is not ordinarily chargeable with contributory negligence.[19]

3. CONTRIBUTORY NEGLIGENCE OF CHILD. As a general rule a parent can recover for injuries to his child only under the same circumstances of prudence as would be required if the action were on behalf of the infant,[20] and hence the contributory negligence of the child may defeat the parent's recovery.[21] But it has been held that, where the child is employed in a dangerous service without the parent's consent and is injured in the course of such service, the contributory negligence of the child will not defeat a recovery by the parent against the employer.[22]

D. Form of Action. Case,[23] or trespass *per quod servitium amisit*,[24] is a proper form of action by a parent to recover for an injury to the child.

E. Notice of Claim. An action by a father for loss of services and expenses resulting from an injury to his child is not an action to recover damages for an injury to the person, within the meaning of a statute providing that no such action shall be maintained unless within a certain time after the injury a notice of the claim is served on the person against whom it is made.[25]

F. Pleading.[26] The complaint must show a cause of action in plaintiff and contain all averments necessary to support a recovery.[27] Thus it must appear

two years old is passing unattended in a city across a public street traversed by a horse railroad is, in and of itself, necessarily *prima facie* evidence of neglect in those who have it in charge." Wright *v.* Malden, etc., R. Co., 4 Allen (Mass.) 283.

17. *Illinois.*— Stafford *v.* Rubens, 115 Ill. 196, 3 N. E. 568.

Massachusetts.— Collins *v.* South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675.

Missouri.— Boland *v.* Missouri R. Co., 36 Mo. 484.

New York.— Birkett *v.* Knickerbocker Ice Co., 41 Hun 404 [*affirmed* in 110 N. Y. 504, 18 N. E. 108].

Pennsylvania.— Addis *v.* Hess, 29 Pa. Super. Ct. 505.

Utah.— Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681.

See 37 Cent. Dig. tit. "Parent and Child," § 94.

18. Kreig *v.* Wells, 1 E. D. Smith (N. Y.) 74; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172; Hampton *v.* Borough, 6 Lanc. L. Rev. (Pa.) 25. See also Honegsberger *v.* Second Ave. R. Co., 2 Abb. Dec. (N. Y.) 378, 1 Keyes 570, 33 How. Pr. 193.

19. Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Weissner *v.* St. Paul City R. Co., 47 Minn. 468, 50 N. W. 606; Farris *v.* Cass Ave., etc., R. Co., 80 Mo. 325; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542 [*affirming* 5 Mo. App. 435]; Weida *v.* Hanover Tp., 30 Pa. Super. Ct. 424.

20. Burke *v.* Broadway, etc., R. Co., 49 Barb. (N. Y.) 529, 34 How. Pr. 239.

21. Raaden *v.* Georgia R. Co., 78 Ga. 47.

22. Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675.

23. Durden *v.* Barnett, 7 Ala. 169 (where the injury was caused by defendant's dog); Van Horn *v.* Freeman, 6 N. J. L. 322 (when laid with the *per quod servitium amisit*); Hoover *v.* Heim, 7 Watts (Pa.) 62.

24. Hammer *v.* Pierce, 5 Harr. (Del.) 171; Hoover *v.* Heim, 7 Watts (Pa.) 62, holding this to be the more proper form of action where there was actual force. See also Wilt *v.* Vickers, 8 Watts (Pa.) 227, holding that if an injury be inflicted upon a child while living with and in the service of his father, the father may maintain a trespass, or if at the time the child be hired to and in the service of another, trespass on the case is the proper remedy.

25. Wysocki *v.* Wisconsin Lakes Ice, etc., Co., 125 Wis. 638, 104 N. W. 707.

26. See, generally, PLEADING.

27. Chick *v.* Southwestern R. Co., 57 Ga. 357 (holding that where a statement of facts in a declaration by a mother suing for the loss of services of a minor son amounts to a *prima facie* case of felony on the part of defendant's agent, and there is no allegation either that any prosecution had been instituted therefor or that there was a good cause for the failure so to do, a demurrer to the declaration is properly sustained); Poland *v.* Earhart, 70 Iowa 285, 30 N. W. 637 (holding that an allegation that defendant, in violation of the statute, sold to plaintiff's minor son, fifteen years of age, a revolver with which he afterward injured himself, does not show a cause of action in plaintiff to recover for loss of services and expense of caring for the son, as it should be shown that the accident ought to have been anticipated by defendant as a probable result of the sale); Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597 (hold-

that plaintiff was entitled to the child's services,[28] and has been deprived of the same because of the injury.[29] But it is not necessary that all facts constituting defendant's negligence be set out in specific detail.[30] Where the action is brought by the mother she must plead the facts showing her right to recover instead of the father,[31] and that at the time of the injury the child was in her service.[32] Where an action by a parent against an employer of the child for injuries to the child is based upon the employer's negligence, the complaint need not allege that the employment was without the parent's consent.[33] A recovery for prospective future loss of services cannot be had unless claimed in the declaration.[34] Where the pleadings make the loss of services the basis of the action and it appears that the child is too young to render any services, there can be no recovery.[35] Where plaintiff's declaration claims damages for the loss of services of her minor son who was injured on defendant's road, the further allegation, by way of showing the aggravated nature of the tort, that death resulted from such injury, does not change the nature of the action so as to make it a suit for the death of the son, for which she has no right to recover.[36] Where the complaint alleges the child to be of an age when *prima facie* incapable, a special plea setting out contributory negligence of the child is insufficient unless there is also an averment of capacity.[37] Where defendant denies negligence and alleges contributory negligence of the child and others accompanying him, this limits defendant's right to prove contributory negligence to that pleaded, and

ing that under Rev. St. §§ 2121, 2122, giving a right of action to the parent for one who was a minor and unmarried when injured, a petition not stating that the minor was unmarried is defective); Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. St. Rep. 20 (holding that in order that a father may recover from a railroad company for damages resulting to him by loss of services through injuries sustained by his minor son while in defendant's employ, without his consent, it is necessary that he should aver and prove that defendant knew of his son's minority when it employed him).

Action for benefit of child.— Under Minn. Gen. St. (1894) § 5164, providing that a father may maintain an action for injuries to his child, the complaint need not allege expressly that the action is brought for the child's benefit, where it alleges all facts necessary to bring the case within the statute. Buechner *v.* Columbia Shoe Co., 60 Minn. 477, 62 N. W. 817.

Negativing contributory negligence see Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26; Terre Haute St. R. Co. *v.* Tappenbeck, 9 Ind. App. 422, 36 N. E. 915; Pennsylvania Co. *v.* Davis, 4 Ind. App. 51, 29 N. E. 425.

Complaint not showing contributory negligence of parent see Avey *v.* Galveston, etc., R. Co., (Tex. 1891) 17 S. W. 31, where the complaint was upheld against a demurrer.

The legal name of a daughter need not be alleged in a declaration in an action by her father to recover damages for debauching her; it is sufficient if that name by which she is known and which has been adopted by her is employed. Palmer *v.* Baum, 123 Ill. App. 584.

28. Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188.

Sufficiency of averments.—A petition in an action by a father to recover for loss of services of his infant son which alleges the relation of father and son, the infancy of the son, and plaintiff's right to his services, is sufficient to support a recovery, although it fails to allege that the son was plaintiff's servant. Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

29. Burton *v.* Missouri Pac. R. Co., 32 Mo. App. 455, holding the petition sufficient. See also Cincinnati Omnibus Co. *v.* Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Cinc. L. Bul. 189.

30. Ekman *v.* Minneapolis St. R. Co., 34 Minn. 24, 24 N. W. 291.

31. Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058; Louisville, etc., Consol. R. Co. *v.* Longes, 6 Ind. App. 288, 33 N. E. 449.

Failure to affirmatively allege widowhood. — In an action by a mother for loss of services of her minor son, because of defendant's negligence, the complaint will not be held insufficient for not affirmatively alleging that plaintiff is a widow, where that fact can be gathered from the language used therein. Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173.

32. Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75; Geraghty *v.* New, 7 Misc. (N. Y.) 30, 27 N. Y. Suppl. 403.

33. Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472.

34. Gilligan *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 453; Cincinnati Omnibus Co. *v.* Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Cinc. L. Bul. 189.

35. Hall *v.* Hollander, 4 B. & C. 660, 7 D. & R. 133, 4 L. J. K. B. O. S. 39, 10 E. C. L. 746.

36. Chick *v.* Southwestern R. Co., 57 Ga. 357.

37. Pratt Coal, etc., Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751.

defendant cannot prove negligence of the child's mother in allowing him to go on defendant's grounds.[38] Where in an action for personal injuries to the child the alleged trespass is the taking of the child in a buggy and driving off with it, when the horse took fright and ran away, throwing out the child, a plea merely alleging the permission of the mother, without averring any authority or circumstances implying an authority in her to give such permission, is defective.[39]

G. Evidence.[40] The father's right to the services of the child is presumed from the fact of minority unless emancipation appears,[41] and where deceased was a minor and left a father who would have been entitled to his services if he had lived, the law implies a pecuniary loss for which damages may be given.[42] But the burden of proof is upon plaintiff to show the extent of his loss.[43] Where the action is based on the negligence of defendant, the burden of proving such negligence is on plaintiff.[44] It has also been held that he must also show ordinary care,[45] and the absence of contributory negligence on his part;[46] but as the burden of proving an affirmative defense is usually upon defendant,[47] the better view would appear to be that defendant must prove contributory negligence if he relies upon it.[48] Subject to the general rules of relevancy, competency, and materiality,[49] any evidence is admissible which legitimately tends to establish

38. O'Malley *v.* St. Paul, etc., R. Co., 43 Minn. 289, 45 N. W. 440.

39. Pierce *v.* Millay, 62 Ill. 133.

40. See, generally, EVIDENCE.

41. Callaghan *v.* Lake Hopatcong Ice Co., 69 N. J. L. 100, 54 Atl. 223; Noice *v.* Brown, 39 N. J. L. 569; Van Horn *v.* Freeman, 6 N. J. L. 322. But see Dean *v.* Oregon R., etc., Co., 38 Wash. 565, 80 Pac. 842, holding that where, in an action by a father for the death of his eighteen-year-old son, the evidence showed that deceased left his parents' home some years before his death, without their consent, and that he never sent any of his wages home, the facts did not authorize a presumption that deceased would have returned home, or would have turned his wages, or a portion thereof, over to his parents.

42. Stafford *v.* Rubens, 115 Ill. 196, 3 N. E. 568; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378.

Showing of pecuniary advantage.— In an action by a parent for the death of his child through negligence, it is not necessary to show any pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit in the future capable of being estimated. Ricketts *v.* Markdale, 31 Ont. 610.

43. Schmitz *v.* St. Louis, etc., R. Co., 46 Mo. App. 380 (holding that, where a child, injured by the negligence of a third person, is still capable of performing some work, the father, to make out a case in an action for the loss of the services of the child, must prove the probable earning capacity of the child in its injured condition); Fagan *v.* Interurban St. R. Co., 85 N. Y. Suppl. 340 (holding that, in an action for personal injuries to plaintiff's son, there could be no recovery for expenses alleged to have been incurred for the board, lodging, and nursing of the son, where such expenses were not paid by plaintiff, nor their reasonable value shown); Missouri, etc., R. Co. *v.* Edwards, (Tex. Civ. App. 1895) 32 S. W. 815 (holding that a recovery for loss of service of a minor child through injury caused by defendant's negligence cannot be had unless the evidence shows that the injury diminished the capacity of the child to serve its parents).

Proof of value of services sufficient.— Where a father sues for a loss of services of a minor child from an injury caused by the negligence of defendant, and proves the fair value of such services, he need not prove how or where or in what manner the child would probably have been employed. Vanderveer *v.* Moran, (Nebr. 1907) 112 N. W. 581.

44. Spokane, etc., R. Co. *v.* Holt, (Ida. 1895) 40 Pac. 56; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 533.

45. Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 533; Del Rossi *v.* Cooney, 208 Pa. St. 233, 57 Atl. 514.

46. Spokane, etc., R. Co. *v.* Holt, (Ida. 1895) 40 Pac. 56.

47. Shmit *v.* Day, 27 Oreg. 110, 39 Pac. 870, holding that, where defendants in a suit for injuries to plaintiff's minor son, in their employ, alleged that they had previously assigned the contract for the work at which plaintiff was employed, the burden was on them to establish the assignment.

48. Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 2 S. W. 794.

49. See EVIDENCE.

The circumstances under which the injury was committed are properly admitted in evidence as part of the *res gestæ*. Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Evidence not admissible.— Where, with the consent of his father, a boy seeks work in a planing-mill, and is injured while oiling the machinery, directions by the father to the son not to oil machinery are not competent against the master, to whom they were not communicated. Sinclair *v.* Elizabethtown Milling Co., 16 S. W. 450, 13 Ky. L. Rep. 120. Where a father drives his son out of doors,

plaintiff's right to recover[50] and the extent of his loss.[51] Defendant may show facts tending to relieve him of liability to plaintiff,[52] and plaintiff is thereupon entitled to introduce evidence legitimately tending to rebut defendant's claim of

and his acts show an implied emancipation, he cannot afterward testify, in a suit brought by him for damages for loss of his son's wages, that it had not been his intention to emancipate the son. McCarthy *v.* Boston, etc., R. Co., 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608. In an action for damages for injuries to plaintiff's son, occasioned by defendant's negligence, evidence of the judgment and discretion of the boy as to danger is properly excluded, as the only pertinent inquiry is as to the capacity and intelligence of the boy to know and understand danger. Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

Mental status.— In an action by a father for injuries to his son owing to negligence of the son's employer, a question put to plaintiff as to whether he consented that the son might work at defendant's foundry was not objectionable as calling for an uncommunicated mental status. Dimmick Pipe Works *v.* Wood, 139 Ala. 282, 35 So. 885.

Former judgment for child.—A judgment in favor of the child in an action brought on its behalf is not admissible in an action by the parent for loss of service and expenses. Karr *v.* Parks, 44 Cal. 46; Sondheim *v.* Brooklyn Heights R. Co., 36 Misc. (N. Y.) 339, 73 N. Y. Suppl. 543.

50. Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723, holding that, in an action for the killing of a child by a street car, the fact that the mother was sick may be considered on the question of whether she was negligent in sending the child across the street on an errand.

51. Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298 (holding that testimony as to the extent of the boy's injury was admissible to show the extent to which his services had been lost and the trouble and care required in nursing him); Martin *v.* Wood, 1 Silv. Sup. (N. Y.) 212, 5 N. Y. Suppl. 274 [*affirming* 4 N. Y. Suppl. 208] (holding that evidence of the value of the services of plaintiff's wife in caring for the child was properly received, there being no objection that loss in that respect was not specifically stated in the complaint); Hoover *v.* Heim, 7 Watts (Pa.) 62 (holding that, in trespass by a father for injuries to his child, whereby he was deprived of his services, plaintiff may show that the effects of the injury continued after suit brought); Dean *v.* Oregon R., etc., Co., 38 Wash. 565, 80 Pac. 342 (holding that in an action by a father for the death of a minor son, who had left home some years before his death, evidence was admissible that deceased would have been able to earn substantial wages, and had manifested an intention to give, and, as a matter of reasonable certainty, would have given, the same, or some material portion thereof, to his parents).

Opinion of surgeon.— In an action by a father for an injury to his son, resulting in the breaking of his leg, the opinion of the surgeon as to whether the boy will recover the use of his limb is competent evidence. Wilt *v.* Vickers, 8 Watts (Pa.) 227.

Situation of parent.— In an action by a parent to recover for the loss of services of a child, evidence as to plaintiff's pecuniary condition, the amount of his property, his earnings, his physical condition, and the size of his family is not admissible. Gulf, etc., R. Co. *v.* Johnson, (Tex. 1905) 90 S. W. 164 [*reversing* (Civ. App. 1903) 82 S. W. 822]; Holdridge *v.* Mendenhall, 108 Wis. 1, 83 N. W. 1109; Rooney *v.* Milwaukee Chair Co., 65 Wis. 397, 27 N. W. 24. Admissibility of such evidence as affecting right to recover see *infra*, note 53.

Cost of clothing and education.— In an action by a father for personal injuries to his infant son, evidence as to the cost of clothing and educating the child is inadmissible, as the parent's obligation in this respect is the same after the injury as before. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

52. Lake Erie, etc., R. Co. *v.* Pike, 31 Ill. App. 90, holding that, in an action to recover damages for the death of a child, alleged to have been caused by the defect of a railroad crossing, the negligence of the parent, or of those placed in charge of the child by the parent, in permitting it to ride unnecessarily on an unprotected foot-board of a wagon, from which it was jolted and killed, was properly allowed to be shown in evidence by the defense as the proximate cause of the child's death.

Evidence not admissible.— In an action for negligently causing the death of a boy nine years old, while driving across the track, evidence that the boy's father, who sues as administrator, was a man of wealth, and able to procure others to render the services in which the boy was engaged at the time of the accident, is inadmissible in defense where it is not shown that the boy was incapable of taking care of himself. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418 [*affirming* 28 Ill. App. 73]. In an action by a father to recover damages for an assault upon and criminal abuse of his minor child, evidence involving the general character of the child at a time subsequent to the assault complained of is not admissible. Nyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163. In an action by a father for an injury to his son, it is not competent for defendant, in whose service the son was, to show how he had treated him before the accident. Wilt *v.* Vickers, 8 Watts (Pa.) 227. In an action for injuries to plaintiff's minor son, it was proper to exclude evidence that she had another son who contributed to her support. Gulf, etc., R. Co. *v.* Johnson, (Tex. 1905)

non-liability.[53] The general rules as to the weight and sufficiency of evidence[54] govern in actions by the parent for injuries to the child.[55]

H. Trial.[56] It is for the jury to decide whether defendant was guilty of negligence;[57] and whether the parents exercised due care,[58] or whether contributory negligence is attributable to the parents,[59] to the person who had the immediate

90 S. W. 164 [*reversing* (Civ. App. 1903) 82 S. W. 822].

The declarations of the mother who nursed the child, even if made in his presence, are not competent evidence for defendant. Wilt *v.* Vickers, 8 Watts (Pa.) 227.

53. Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838 (holding that where it has been shown, in support of the theory that the child had been emancipated, that she received her semi-weekly wages herself and that the rent of the house which the family occupied was paid from it, it was admissible to show in rebuttal that the girl regularly accounted for and paid her wages to her father); San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745 (holding that in an action for damages against a railroad company for the negligent killing of plaintiff's child, where the contributory negligence of plaintiff is pleaded as a defense, he can show that his wife and son with whom the child was left were accustomed to exercise the greatest watchfulness over it).

It is proper to show the circumstances surrounding the parents' home, such as their pecuniary means, their mode of earning a livelihood, and their ability to employ a nurse for the child, for the purpose of enabling the jury to determine whether the parents used such care in protecting the child from danger as reasonably prudent persons would have done under like circumstances. Aurora *v.* Seidelman, 34 Ill. App. 285; San Antonio, etc., R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745. But *compare* Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793. Admissibility of such evidence as bearing on extent of loss see *supra*, note 51.

54. See EVIDENCE.

55. Evidence sufficient to sustain verdict for plaintiff see Durant *v.* Lipsius, 5 N. Y. St. 841.

Evidence sufficient to show negligence of defendant see Hyde *v.* Union Pac. R. Co., 7 Utah 356, 26 Pac. 979.

Evidence sufficient to support recovery based on loss of services see Brunke *v.* Missouri, etc., Tel. Co., 112 Mo. App. 623, 87 S. W. 84.

Evidence warranting direction of verdict for defendant see Spokane, etc., R. Co. *v.* Holt, (Ida. 1895) 40 Pac. 56.

56. See, generally, TRIAL.

57. Louisville, etc., R. Co. *v.* Red, 154 Ill. 95, 39 N. E. 1086; Ryan *v.* New York Cent., etc., R. Co., 37 Hun (N. Y.) 186.

58. Louisville, etc., R. Co. *v.* Red, 154 Ill. 95, 39 N. E. 1086; Slatterly *v.* O'Connell, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172.

59. *California.*— Bygum *v.* Southern Pac. R. Co., (1894) 36 Pac. 415; Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

Illinois.— Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621, 42 N. E. 53 [*affirming* 58 Ill. App. 142].

Kansas.— Atchison, etc., R. Co. *v.* Calvert, 52 Kan. 547, 34 Pac. 976; Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

Kentucky.— Passamaneck *v.* Louisville R. Co., 98 Ky. 195, 32 S. W. 620, 17 Ky. L. Rep. 763.

Massachusetts.— Powers *v.* Quincy, etc., St. R. Co., 163 Mass. 5, 39 N. E. 345; Creed *v.* Kendall, 156 Mass. 291, 31 N. E. 6; Bliss *v.* South Hadley, 145 Mass. 91, 13 N. E. 352, 1 Am. St. Rep. 441; Collins *v.* South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; McGeary *v.* Eastern R. Co., 135 Mass. 363; Gibbons *v.* Williams, 135 Mass. 333.

Michigan.— Baker *v.* Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154.

Missouri.— Senn *v.* Southern R. Co., 124 Mo. 621, 28 S. W. 66; Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642; Tobin *v.* Missouri Pac. R. Co., (1891) 18 S. W. 996; Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600, 7 S. W. 407; Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Fink *v.* Missouri Furnace Co., 10 Mo. App. 61 [*reversed* on other grounds in 82 Mo. 276. 52 Am. Rep. 376].

New York.— Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490, 34 N. E. 1101 [*affirming* 1 Misc. 136, 20 N. Y. Suppl. 676]; Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108 [*affirming* 41 Hun 404]; Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124, 39 N. Y. Suppl. 1098; Meagher *v.* Cooperstown, etc., R. Co., 75 Hun 455, 27 N. Y. Suppl. 504; Ahern *v.* Steele, 48 Hun 517, 1 N. Y. Suppl. 259 [*reversed* on other grounds in 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449]; Oldfield *v.* New York, etc., R. Co., 3 E. D. Smith 103 [*affirmed* in 14 N. Y. 310].

Oregon.— Hedin *v.* Suburban R. Co., 26 Oreg. 155, 37 Pac. 540.

Pennsylvania.— Herron *v.* Pittsburg, etc., R. Co., 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Evers *v.* Philadelphia Traction Co., 176 Pa. St. 376, 35 Atl. 140, 53 Am. St. Rep. 674; Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644; Ottersbach *v.* Philadelphia, 161 Pa. St. 111, 28 Atl. 991; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257; Pittsburg, etc., R. Co. *v.* Pearson, 72 Pa. St. 169; Reinike *v.*

custody of the child at the time of the accident,[60] or to the child itself;[61] whether the negligence of plaintiff was the proximate or remote cause of the injury;[62] whether the parent knew of and assented to the child's employment in a dangerous service;[63] and whether the parent has relinquished his right to the child's services.[64] The amount of damages to be awarded is also a question for the jury.[65] The general rules as to instructions[66] are applicable in an action by a parent for an injury to the child.[67] The court should instruct the jury as to the burden of proof,[68] and as to the elements necessary to a right of recovery,[69] such as due care on the part of the parent,[70] and the absence of contributory negligence of the parent,[71] the immediate custodian of the child,[72] and the child itself.[73] The elements of recovery and the measure of damages should also be stated to the jury.[74] The court should not give instructions which are inapplicable to the issues,[75] or unwarranted by the evidence,[76]

Philadelphia Traction Co., 2 Pa. Dist. 319, 13 Pa. Co. Ct. 229, 31 Wkly. Notes Cas. 471.

Texas.— Texas Midland R. Co. *v.* Herbeck, 60 Tex. 602.

Wisconsin.— Dahl *v.* Milwaukee City R. Co., 62 Wis. 652, 22 N. W. 755; Parish *v.* Eden, 62 Wis. 272, 22 N. W. 399; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357, 21 N. W. 227.

See 37 Cent. Dig. tit. "Parent and Child," § 98.

60. Parish *v.* Eden, 62 Wis. 272, 22 N. W. 399.

61. Ryan *v.* New York Cent., etc., R. Co., 37 Hun (N. Y.) 186; Ottersbach *v.* Philadelphia, 161 Pa. St. 111, 28 Atl. 991.

62. South, etc., Alabama R. Co. *v.* Donovan, 84 Ala. 141, 4 So. 142.

63. Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49.

64. Arnold *v.* Norton, 25 Conn. 92.

65. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59.

66. See, generally, INSTRUCTIONS.

67. **Propriety of particular instructions** see Baltimore, etc., R. Co. *v.* State, 30 Md. 47; Wright *v.* Malden, etc., R. Co., 4 Allen (Mass.) 283; Schwenk *v.* Kehler, 122 Pa. St. 67, 15 Atl. 694, 9 Am. St. Rep. 70; Pennsylvania R. Co. *v.* Bock, 93 Pa. St. 427; Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

68. Texas, etc., R. Co. *v.* Morin, 66 Tex. 133, 18 S. W. 345.

69. Chicago, etc., R. Co. *v.* Mason, 27 Ill. App. 450, holding an instruction leaving out the requirement of ordinary care on the part of the parent to be erroneous.

70. Baltimore, etc., R. Co. *v.* Pletz, 61 Ill. App. 161, holding that an instruction upon the use of ordinary care which limited the consideration of the jury to "the time of receiving the injury" was erroneous.

71. Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165.

72. Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486, holding that a charge that a custodian of a child was negligent, if she permitted it to stray away from her control, so that in the exercise of ordinary care she could not have prevented it from going into a place of danger, which she might reasonably have apprehended it would do, is not erroneous, as invading the province of the jury.

73. Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914 (holding that, in an action by a parent for damages for setting a minor son at work in a dangerous place, where the defense was plaintiff's consent to employment, and contributory negligence of the son, a charge that if plaintiff consented, and the son was negligent, she could not recover, was erroneous in not stating further that the son's negligence must have proximately contributed to the injury); McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536, 4 S. W. 516.

74. Goodrich *v.* Burlington, etc., R. Co., 97 Iowa 521, 66 N. W. 770, holding that an instruction fixing the measure of damages at the value of the child's services during his minority, instead of the "lessened value," is erroneous); Dollard *v.* Roberts, 5 Silv. Sup. (N. Y.) 435, 8 N. Y. Suppl. 432 (holding that there is no error in an instruction that damages for prospective loss of services are necessarily, to a great extent, speculative or conjectural, and that the jury may estimate them in the light of experience, and of such evidence as may be given).

75. Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298, holding that where there is no plea that the father has emancipated the son, an instruction on that point is properly refused.

Clerical error.—Although the petition alleged only the expenditure of five dollars for medicine, an instruction that the jury might find for "medicine not to exceed twenty-five dollars" was not prejudicial, there being no proof that the medicine cost over five dollars, and the error being plainly a clerical one. Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

76. Blackwell *v.* Hill, 76 Mo. App. 46 (holding that an instruction allowing the jury to find such damages as would compensate a father for the prospective loss of the earnings of an eight-year-old child during his minority is not objectionable, as having no evidence of such damages to support it, since from the nature of the case no direct proof of such earnings can be made, and such damages are left to the judgment, common experience, and enlightened conscience of the jurors, guided by the facts and circumstances in the case); McCool *v.* Coal Co., Wilcox (Pa.) 265 (holding that there being no evi-

or which are or might be misleading,[77] nor should the court instruct on matters which are immaterial.[78] The court should give requested instructions which correctly state the law as applicable to the facts,[79] but an instruction ignoring controverted issues in the case is properly refused.[80]

I. Relief Awarded — 1. Elements of Recovery — a. Loss of Services. The parent is entitled to recover for loss of services[81] both past[82] and prospec-

dence to show for what purpose a boy was employed, and what the scope of his employment was, it was error to charge that his employer was liable for his death, if he was killed by the proximate negligence of the defendant in a service to which he was put outside the scope of the employment for which his father had hired him); San Antonio St. R. Co. *v.* Caillouttе, 79 Tex. 341, 15 S. W. 390.

77. Castanos *v.* Ritter, 3 Duer (N. Y.) 370; Houston, etc., R. Co. *v.* Anglin, (Tex. Civ. App. 1905) 86 S. W. 785 [*reversed* on other grounds in (1905) 89 S. W. 960], holding that in an action by a parent for injury to his minor son, a charge that plaintiff could recover for loss of services of the son while unable to work, and such further sum as would reasonably compensate him for the loss of capacity of the son, if any, to work or earn money, on account of the injuries during the minority of the son, was erroneous as being susceptible of the construction that plaintiff was entitled to double recovery while the son was unable to work.

Conflict of instructions.— Where plaintiff sued to recover expenses incurred by reason of an alleged sickness of his wife and child arising from being compelled to ride in defendant's unwarmed railway coach in inclement weather, an instruction that, if plaintiff's child was made sick by exposure to cold while on defendant's train, plaintiff was entitled to recover expenses incurred in consequence of the child's sickness, did not conflict with an instruction that plaintiff could not recover anything on the ground of the sickness and suffering of the child. St. Louis Southwestern R. Co. *v.* Campbell, 32 Tex. Civ. App. 613, 75 S. W. 564. An instruction "that the rule of law as to negligence in children is, that they are required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally or ordinarily use in the same situation and under the like circumstances, provided that the parents or persons having the control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances," is proper, and does not conflict with an instruction that if the children in question possessed the knowledge or ability of adults, the law would exact the same degree and prudence of them as of older persons. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 99, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418.

78. Chicago City R. Co. *v.* Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126 [*affirming* 27 Ill. App. 26].

79. Wiswell *v.* Doyle, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451.

80. Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

81. *California.*— Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Boyd *v.* Blaisdell, 15 Ind. 73; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Kentucky.— Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013, 23 Ky. L. Rep. 461, 96 Am. St. Rep. 475, 53 L. R. A. 789; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Massachusetts.— McCarthy *v.* Guild, 12 Metc. 291.

Minnesota.— See Gardner *v.* Kellogg, 23 Minn. 463.

New Jersey.— Callaghan *v.* Lake Hopatcong Ice Co., 69 N. J. L. 100, 54 Atl. 223.

New York.— Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654; Murray *v.* Gast Lith., etc., Co., 8 Misc. 36, 28 N. Y. Suppl. 271, 31 Abb. N. Cas. 266 [*affirmed* in 10 Misc. 365, 31 N. Y. Suppl. 17].

Rhode Island.— Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634; McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

Tennessee.— Tennessee Cent. R. Co. *v.* Doak, 115 Tenn. 720, 92 S. W. 853; Forsythe *v.* Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

Texas.— Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564; Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Houston, etc., R. Co. *v.* Miller 49 Tex. 322; Texas, etc., R. Co. *v.* Hervey, (Civ. App. 1905) 89 S. W. 1095; Gulf, etc., R. Co. *v.* Johnson, (Civ. App. 1897) 43 S. W. 583; Missouri, etc., R. Co. *v.* Rodgers, (Civ. App. 1897) 39 S. W. 383.

Vermont.— Bailey *v.* Fairfield, Brayt. 126.

United States.— Netherland - American Steam Nav. Co. *v.* Hollander, 59 Fed. 417 8 C. C. A. 169.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

82. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Netherland-American

tive,[83] during the term of the child's minority.[84] At common law, where the child has died of its injuries, the damages must be confined to the child's lifetime and cannot extend to his expected majority;[85] but, in a statutory action for the death of the child, damages for loss of prospective services may be recovered with respect to the time subsequent to the death.[86]

b. Diminished Earning Capacity of Child. The parent may recover damages for the child's diminished capacity to earn money during his minority because of the injury,[87] and in this connection the jury is entitled to consider the child's earning capacity in any employment for which he is fitted.[88]

c. Expenses. The parent may recover the expenses incident to the care and cure of the child,[89] such as medical or surgical attendance,[90] nursing,[91] and other

Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

83. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Dollard *v.* Roberts, 5 Silv. Sup. (N. Y.) 607, 8 N. Y. Suppl. 432; Gilligan *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 453; Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1897) 43 S. W. 583; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

Loss of prospective services alone does not give a right of action for causing the death of a child too young at the time to render services. Allen *v.* Atlantic St. R. Co., 54 Ga. 503.

84. Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298; Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. (N. Y.) 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322; Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1897) 43 S. W. 583; Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1897) 39 S. W. 383. But *compare* Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

85. Harris *v.* Kentucky Timber, etc., Co., 43 S. W. 462, 45 S. W. 94, 19 Ky. L. Rep. 1731; Callaghan *v.* Lake Hopatcong Ice Co., 69 N. J. L. 100, 53 Atl. 223.

86. Rombough *v.* Balch, 27 Ont. App. 32; Ricketts *v.* Markdale, 31 Ont. 610.

87. Chicago City R. Co. *v.* Schaefer, 121 Ill. App. 334; Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091.

88. Pecos, etc., R. Co. *v.* Blasengame, (Tex. Civ. App. 1906) 93 S. W. 187.

89. *Alabama.*— Durden *v.* Barnett, 7 Ala. 169.

California.— Sykes *v.* Lawlor, 49 Cal. 236.

Indiana.— Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

Kentucky.— Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013, 23 Ky. L. Rep. 461, 96 Am. St. Rep. 475, 53 L. R. A. 789; Illinois Cent. R. Co. *v.* Henon, 68 S. W. 456, 24 Ky. L. Rep. 298.

Massachusetts.— McCarthy *v.* Guild, 12 Metc. 291; Dennis *v.* Clark, 2 Cush. 347, 48 Am. Dec. 671.

New Jersey.— Callaghan *v.* Lake Hopatcong Ice Co., 69 N. J. L. 100, 54 Atl. 223.

New York.— Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654; Murray *v.* Gast Lith., etc., Co., 8 Misc. 36, 28 N. Y. Suppl. 271 [*affirmed* in 10 Misc. 365, 31 N. Y. Suppl. 17].

Rhode Island.— McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

Tennessee.— Tennessee Cent. R. Co. *v.* Doak, 115 Tenn. 720, 92 S. W. 853.

Texas.— Lockett *v.* Ft. Worth, etc., R. Co., 78 Tex. 211, 14 S. W. 564; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Houston, etc., R. Co. *v.* Miller, 49 Tex. 322; St. Louis Southwestern R. Co. *v.* Gregory, (Civ. App. 1903) 73 S. W. 28; Missouri, etc., R. Co. *v.* Rodgers, (Civ. App. 1897) 39 S. W. 383.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652; Bailey *v.* Fairfield, Brayt. 126.

United States.— Netherlands - American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

90. *California.*— Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Karr *v.* Parks, 44 Cal. 46.

Indiana.— Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

Indian Territory.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Texas.— St. Louis Southwestern R. Co. *v.* Gregory, (Civ. App. 1903) 73 S. W. 28; Missouri, etc., R. Co. *v.* Rodgers, (Civ. App. 1897) 39 S. W. 383.

United States.— Honey *v.* Chicago, etc., R. Co., 59 Fed. 423; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169.

See 37 Cent. Dig. tit. "Parent and Child," § 86.

The fact that such medical services were rendered by the parent, who is a physician, and not by a stranger, is immaterial. St. Louis Southwestern R. Co. *v.* Gregory, (Tex. Civ. App. 1903) 73 S. W. 28.

91. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058; Blackwell *v.* Hill, 76 Mo. App. 46; Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1897) 39 S. W. 383.

expenses rendered necessary by the injury.[92] But the parent can recover only for the expenses of restoring the child to health and not for expenses subsequently incurred in attempting to remove a disfigurement of the child, affecting its appearance only, resulting from the injury.[93] The parent can recover for such expenses only as have been actually incurred[94] or are immediately necessary to be incurred,[95] and not for future prospective or contingent expenses.[96] It has been held that in case the death of the child results from the injury, the parent may recover appropriate funeral expenses,[97] but in other jurisdictions this has been denied.[98] The expense of prosecuting an action by a father for an injury to his son has been held to be a proper subject of consideration by the jury in assessing the damages.[99]

d. Mental Suffering, Etc., of Parent. No recovery can be had for the outraged mental sensibility of the parent,[1] his mental anguish by reason of the child's illness,[2] or the loss of the society of the child.[3]

e. Damages Personal to Child. The parent can recover only for such damages as he has sustained,[4] and not for damages personal to the child,[5] such as the child's mental anguish,[6] physical pain and suffering,[7] or disfigurement from the accident or injury.[8]

f. Remote Damages. The parent is entitled to recover only proximate and not remote damages resulting from the injury.[9]

2. Amount of Recovery. A parent's recovery is restricted to compensation for the loss caused by the injury,[10] and hence exemplary damages cannot be

Nursing by members of the family may be recovered for in an action by the father. Blackwell *v.* Hill, 76 Mo. App. 46. *Contra*, Woeckner *v.* Erie Electric Motor Co., 182 Pa. St. 182, 37 Atl. 936.

92. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1897) 39 S. W. 383.

93. Karr *v.* Parks, 44 Cal. 46, so holding on the ground that such expenditures are voluntary.

94. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

95. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

96. Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

97. Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

98. Callaghan *v.* Lake Hopatcong Ice Co., 69 N. J. L. 100, 54 Atl. 233; Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652 [*following* but *criticizing* Sherman *v.* Johnson, 58 Vt. 40, 2 Atl. 707].

99. Wilt *v.* Vickers, 8 Watts (Pa.) 227.

1. Murray *v.* Gast Lith., etc., Co., 8 Misc. (N. Y.) 36, 28 N. Y. Suppl. 271, 31 Abb. N. Cas. 266 [*affirmed* in 10 Misc. 365, 31 N. Y. Suppl. 17].

2. St. Louis Southwestern R. Co. *v.* Gregory, (Tex. Civ. App. 1903) 73 S. W. 28, holding the father not entitled to recover for mental anguish of either himself or his wife.

3. McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122. But *compare* Durden *v.* Barnett, 7 Ala. 169.

4. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Boyd *v.* Blaisdell, 15 Ind. 73.

5. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Boyd *v.* Blaisdell, 15 Ind. 73; Netherland-American Steam Nav. Co. *v.* Hollander, 59 Fed. 417, 8 C. C. A. 169; Barrett *v.* Bourbonniere, 12 Quebec Super. Ct. 271. See also Slaughter *v.* Nashville, etc., R. Co., 90 S. W. 243, 91 S. W. 713, 28 Ky. L. Rep. 665, 1343.

6. St. Louis Southwestern R. Co. *v.* Gregory, (Tex. Civ. App. 1903) 73 S. W. 28.

7. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72; St. Louis Southwestern R. Co. *v.* Gregory, (Tex. Civ. App. 1903) 73 S. W. 28.

Pain of child as affecting service.— In an action by a father for personal injuries to his child, it was not error to charge that the pain suffered by the child, in so far as it prevented her from being of service to the father, was to be considered in estimating the damages. Walker *v.* Second Ave. R. Co., 57 N. Y. Super. Ct. 141, 6 N. Y. Suppl. 536 [*affirmed* in 126 N. Y. 668, 27 N. E. 854].

8. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Karr *v.* Parks, 44 Cal. 46.

9. St. Louis Southwestern R. Co. *v.* Gregory, (Tex. Civ. App. 1903) 73 S. W. 28, holding that where plaintiff's wife and child were injured by reason of a carrier's negligence and plaintiff, who was a physician, treated and cared for them, he was not entitled to recover for loss of patronage in his business as a physician while detained at home on account of the illness of his wife and child.

10. Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Baltimore, etc., R. Co., *v.* Keck, 89 Ill. App. 72.

recovered.[11] But it has been held that a parent may recover double damages for an injury to a child, under a statute allowing such a recovery by "any person injured" by certain causes.[12]

VII. PROPERTY OF CHILD.

A. In General. As a general rule any property acquired by the child in any way except by its own labor or services[13] belongs to the child and not to the parent,[14] and the parental relation gives the parent no right to receive,[15] use,[16] or

Damages held not excessive see Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Scamell *v.* St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021; Meade *v.* Chicago, etc., R. Co., 72 Mo. App. 61; Texas, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1893) 24 S. W. 569.

The measure of damages is the pecuniary value of the child's services during minority, less its support and maintenance, together with the necessary costs and expenses incident to the care of such minor. McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

11. Baltimore, etc., R. Co. *v.* Keck, 89 Ill. App. 72.

12. McCarthy *v.* Guild, 12 Metc. (Mass.) 291.

13. **Right of parent to services and earnings of child** see *supra*, V.

14. *Illinois.*— Magee *v.* Magee, 65 Ill. 255, parent not entitled to gift to child.

Iowa.— Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Banks *v.* Conant, 14 Allen 497.

Nebraska.— Bell *v.* Rice, 50 Neor. 547, 70 N. W. 25.

New York.— Watson *v.* Kemp, 42 N. Y. App. Div. 372, 59 N. Y. Suppl. 142 (holding that the moneys which an infant has gained by the purchase of property and sales at a profit belong to the infant and the father has no title thereto); Ficken *v.* Emigrants' Industrial Sav. Bank, 33 Misc. 92, 67 N. Y. Suppl. 143.

Pennsylvania.— McCloskey *v.* Cyphert, 27 Pa. St. 220; Galbraith *v.* Black, 4 Serg. & R. 207, holding that, if a parent permit his minor child to improve and settle a tract of land, the child acquires a title by such improvements as effectually as if he were of age.

West Virginia.— Lowther *v.* Lowther, 30 W. Va. 103, 3 S. E. 42, property acquired in exchange for gift from parent.

Canada.— See Burns *v.* Burns, 21 Grant Ch. (U. C.) 7; Wilde *v.* Wilde, 20 Grant Ch. (U. C.) 521.

See 37 Cent. Dig. tit. "Parent and Child," § 100 *et seq.*

The parent cannot affect the rights of the child as to property in which it is interested by any concessions he may wish to make. Gaines *v.* Kendall, 176 Ill. 228, 52 N. E. 141.

The father cannot interpose any claim as against third persons who claim title from or possession under the infant. Banks *v.* Conant, 14 Allen (Mass.) 497.

Right as against creditors of parent.— Where the farm of a debtor was sold at sheriff's sale, and the debtor's minor son, who had been emancipated, took a lease of the farm from the purchaser and supported his father thereon, the crops and stock subsequently raised and acquired by the minor could not be taken for the debts of the father. McCloskey *v.* Cyphert, 27 Pa. St. 220.

Possession of child.— Where the legal title to land is in the children, the possession is also in them, although the father, as head of the family, claims the estate in his own right and apparently controls it. Fancher *v.* De Montegre, 1 Head (Tenn.) 40.

Sale and replacement of property.— If, during the infancy of his child, a parent, with the child's assent, sells the child's personal property, engaging to replace it, and the parent buys other property and gives it to the child, the parent, who is insolvent, retaining possession of it all the while, such substituted property belongs to the parent, and is subject to execution under a judgment against him. Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

15. Nelson *v.* Goree, 34 Ala. 565; Alston *v.* Alston, 34 Ala. 15; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; Darlington *v.* Turner, 202 U. S. 195, 26 S. Ct. 630, 50 L. ed. 992, stating law of Virginia.

A father cannot recover in replevin the property of his minor son without disclosing in the pleading that he claims as guardian. Rhoades *v.* McNulty, 52 Mo. App. 301.

Liability of parent receiving property.— The father of an infant who receives her property will be liable to the same extent as if he had been legally constituted her guardian, so far as he has had the benefit of the property. Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

Presumption from entry of father.— When a father has entered upon the estates of his children, the presumption is that he entered as their guardian and bailiff, and therefore the statute of limitations does not begin to run against the children until they attain twenty-one, and from that time at least a child has twenty years within which he may recover possession. Thomas *v.* Thomas, 1 Jur. N. S. 1106, 2 Kay & J. 79, 25 L. J. Ch. 159, 4 Wkly. Rep. 135, 69 Eng. Reprint 701.

16. Nelson *v.* Goree, 34 Ala. 565; Alston *v.* Alston, 34 Ala. 15.

Occupation of house by widow and children.— Where a widow, with the consent of her

dispose of[17] such property. And even property purchased with the earnings of the child belongs to him as against a parent where the parent has relinquished

children's guardian, lives with them in the home formerly occupied by herself and husband, and which after his death belongs to the children, subject to her dower right, she is not liable to the children for rent, in the absence of a promise by her to pay the same. Lamb *v.* Lamb, 146 N. Y. 317, 41 N. E. 26 [*affirming* 76 Hun 186, 27 N. Y. Suppl. 575]. But *compare* Keeney *v.* Henning, 58 N. J. Eq. 74, 42 Atl. 807, holding that where a child while residing with her mother earned and delivered to her wages sufficient for her support, the mother cannot escape an accounting to her for rents of the premises of her deceased husband, in which the child had an interest, because she occupied them with her family, and lived from the rents. Where a widowed mother with her minor daughter occupied a homestead left by the deceased husband, a portion of which had been devised to such daughter, the mother is not chargeable with rent for the period before the daughter's decease for occupying her portion. Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

Revocable gift.— Where a father voluntarily conveyed land to his daughter, reserving the right to occupy the same or to revoke the gift, and did thereafter take and retain possession for fourteen years, it was to be treated as an advance as of the date of the father's death, and the father's estate was not liable to the daughter for the rents and profits for the fourteen years. Hughey *v.* Eichelberger, 11 S. C. 36.

Accounting of parent managing estate under agreement with child.—Where, on account of the weakness of intellect of the son, father and son agreed that the father should have the entire management and control of the estate of the son, should keep a regular account of his receipts and expenditures, and, in case the circumstances of the son should require it, should account with him and pay over all which should remain in his hands, but, should no settlement take place in the lifetime of the father, that he should act as the agent of the son until his death, the son was not entitled to interest on the fund in the hands of his father until after demand thereof upon him, even though the father had made use of the money, unless it appeared that he had actually received interest. Lever *v.* Lever, 2 Hill Eq. (S. C.) 158.

17. *Alabama.*— Suddeth *v.* Knight, (1893) 14 So. 475, holding that a sale of infants' land by their father and natural guardian without an order of court will not be sustained, where it does not appear that the circumstances were such that the court would have ordered a sale of the property on a bill properly filed, and that the proceeds were judiciously expended for the infants' benefit.

Georgia.— Wilson *v.* Wright, Dudley 102.

Kentucky.— Pyle *v.* Cravens, 4 Litt. 17, holding that an assignment by a father of a claim to land belonging to an infant son is void, even if made under a power of attorney from the son to the father.

Mississippi.—Griffing *v.* Hopkins, Walk. 49, holding that a sale of infant's lands by his father is void, both under the common and the Spanish law, unless authorized by a decree of the proper tribunal; and it does not render such sale valid that it was for the benefit of the minor.

Vermont.— Keeler *v.* Fassett, 21 Vt. 539, 52 Am. Dec. 71.

See 37 Cent. Dig. tit. "Parent and Child," § 100 *et seq.*

Lien for improvements under contract with parent.— In a case where plaintiff had made improvements on a lot belonging to an infant without a guardian living with his mother and stepfather, all of whom were destitute and homeless, and such improvements were made under a contract with the mother, to whom plaintiff thought the property belonged, it was held that a court of equity would allow to plaintiff out of the rents the value of the improvements to the premises. Shumate *v.* Harbin, 35 S. C. 521, 15 S. E. 270.

Use of proceeds for support.— Where a settler died, and his widow sold his improvement right, the fact that the proceeds of the land were applied to the education of their minor child does not prevent it from recovering the land in ejectment after it arrives of age, since a sale for that object could only be legally ordered by the orphans' court. Senser *v.* Bower, 1 Penr. & W. (Pa.) 450.

Bill by parent for sale.— Where a mother brought against her infant children a bill to declare her rights in land under a conveyance to her "for the separate use and enjoyment of her and her family," it was held that, as the children probably had an interest in the property, no sale could be made under the bill, as it was not filed in conformity with the provisions of Tenn. Code, § 3324, requiring that a bill for the sale of property in which infants are interested shall be filed by the regular guardian of the infants for and on their behalf. McCall *v.* McCall, 1 Tenn. Ch. 500, holding further that it was doubtful whether in such a bill the court could declare the future right of the children so as to insure purchasers a good title.

A father cannot convey an easement in land of which the record title is in the minor son, although he has exercised acts of general ownership over the land. Farmer *v.* McDonald, 59 Ga. 509.

The mere presence of children, part-owners of land, when their father signs their names to a deed thereof, the consideration for which is all received by the father, does not make it their deed. McLane *v.* Canales, (Tex. Civ. App. 1894) 25 S. W. 29.

Consent of children to sale.— The fact that parents are in straightened circumstances, and that their infant children are possessed of personal property which they might properly part with for the purchase of land and a

the right to the child's earnings.[18] In some states, however, the parent has a usufructuary interest in the child's property,[19] and is entitled to administer it during his minority;[20] although even where such rule exists the parent is accountable to the child for the property,[21] and cannot convey such property without an order of court.[22]

B. Necessaries Furnished to Child by Parent. Things given to the child by the parent by way of support or as necessaries remain the property of the parent and do not belong to the child,[23] notwithstanding his possession of

home, does not constitute a consideration moving to such infants for their consent to the sale of their property for such purpose. Burns *v.* Hill, 19 Ga. 22.

18. Holmes *v.* Holmes, 44 Ill. 168; Wolcott *v.* Rickey, 22 Iowa 171; Francisco *v.* Benepe, 6 Mont. 243, 11 Pac. 637. And see *supra*, V, E.

19. Greenwood *v.* New Orleans, 12 La. Ann. 426; Young *v.* Carl, 6 La. Ann. 412; Handy *v.* Parkison, 10 La. 92; State *v.* Orleans Parish Judge, 6 La. 363.

The usufruct exists only during marriage (Young *v.* Carl, 6 La. Ann. 412; Handy *v.* Parkison, 10 La. 92), and ceases on the death of either parent (Handy *v.* Parkison, *supra*).

Property not subject to usufruct.— The parent cannot retain the usufruct of the estate of the minor, which he may acquire by his own labor and industry, or which is left to him under the express condition that his father and mother shall not enjoy such usufruct. Ouliber *v.* His Creditors, 16 La. Ann. 287.

Sale and replacement of property.— Where a slave belonging to minors is sold by their father, and another purchased with the proceeds, the slave so purchased will, on his insolvency, pass to his creditors. Calmes *v.* Carruth, 12 Rob. (La.) 663.

Under the Spanish laws the father had the usufruct of his child's property, during his minority, and was not accountable for the profits, nor for the hire or wages of his slaves. McHardy *v.* McHardy, 7 Fla. 301.

20. Varnado *v.* Lewis, 113 La. 72, 36 So. 893; Cleveland *v.* Sprowl, 12 Rob. (La.) 172; State *v.* Orleans Parish Judge, 6 La. 363; Darlington *v.* Turner, 202 U. S. 195, 26 S. Ct. 630, 50 L. ed. 992 [*reversing* 24 App. Cas. (D. C.) 573], under Louisiana statute. See also Faulk *v.* Faulk, 23 Tex. 653.

A transfer in the District of Columbia of the property of a testator, there situated, to the father of certain minor legatees residing in Louisiana, who was fully empowered to collect and receive the same by the law of their domicile, is valid and binding on such minors, there being no showing of any creditors in Virginia, which was the domicile of the testator, although, if the property had been administered upon in that jurisdiction, the father would not have been entitled to receive or remove the property therefrom without an order made by a Virginia court, and the giving of satisfactory security. Darlington *v.* Turner, 202 U. S. 195, 26 S. Ct. 630, 50 L. ed. 992 [*reversing* 24 App. Cas. (D. C.) 573].

A child has no mortgage against his father as security for his administration of the child's estate during marriage. The mortgage arising from the tutorship is inapplicable. Cleveland *v.* Sprowl, 12 Rob. (La.) 172.

Parent's administration ceases at children's majority or emancipation.— Cleveland *v.* Sprowl, 12 Rob. (La.) 172.

The court cannot deprive the father of any part of his authority, at the suggestion of creditors, under pretext of guarding the children's interest. State *v.* Orleans Parish Judge, 6 La. 363.

The parent may bind the child by employing counsel to protect and defend its property rights. Richardson *v.* Downs, 23 La. Ann. 641.

21. Cleveland *v.* Sprowl, 12 Rob. (La.) 172, 173, where it is said: "The father is . . . accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him."

22. Hoyt *v.* Hammekin, 14 How. (U. S.) 346, 14 L. ed. 449.

Settlement by parent of child's claim for legacy.— Where a parent contracted with heirs of an ancestor, allowing them a term of years within which to pay a legacy due to his minor children, the children, on coming of age or being emancipated, were not divested of their rights by the settlement, and could exercise their claims against the succession, unless they chose to avail themselves of the settlement. Lewis *v.* Williams, 14 La. Ann. 625.

23. *Illinois.*— Parmelee *v.* Smith, 21 Ill. 620, clothing.

Kansas.— Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Massachusetts.— Dickinson *v.* Winchester, 4 Cush. 114, 50 Am. Dec. 760, clothing.

Mississippi.— Epps *v.* Hinds, 27 Miss. 657, 61 Am. Dec. 528, money furnished by father to son for traveling expenses and general expenses while at college.

New York.— Prentice *v.* Decker, 49 Barb. 21, wearing apparel and jewelry.

See 37 Cent. Dig. tit. "Parent and Child," § 103.

Clothing purchased by the child with money furnished him by the father for general purposes without any specific instructions as to the appropriation or use thereof, is not the property of the father. Dickinson *v.* Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760.

them;[24] and hence the parent has a right of action against a third person who causes or is responsible for the loss or destruction of such property, or deprives the child thereof.[25]

VIII. CONVEYANCES[26] AND CONTRACTS[27] BETWEEN PARENT AND CHILD.

A. In General. Contracts[28] and business dealings between a parent and child are not *per se* fraudulent,[29] but they must be treated just as are transactions between other persons,[30] and where the *bona fides* of their transactions is attacked the fraud must be clearly proved.[31]

B. Conveyances by Parent to Child. A conveyance from a parent to a child is not void merely because of the relationship of the parties,[32] nor is there any presumption from the mere existence of the relation that such conveyance is the result of undue influence;[33] but a strong presumption of undue influence may arise from the circumstances of a particular transfer, which will require close scrutiny of the transaction and cast the burden of proving its fairness upon the grantee.[34]

C. Conveyances by Child to Parent. Although a conveyance from a child to a parent may sometimes be deemed presumptively invalid by reason of the undue influence which the parent is supposed to have over the child while occupying a confidential relation,[35] the mere relationship does not render a conveyance from an adult child to a parent invalid,[36] but on the contrary such a conveyance

If a father makes to a son under age an absolute gift of an article of dress or ornament, he cannot afterward reclaim the gift. Smith *v.* Smith, 7 C. & P. 401, 32 E. C. L. 676. See, generally, *infra*, IX.

24. Prentice *v.* Decker, 49 Barb. (N. Y.) 21.

25. *Illinois.*— Parmelee *v.* Smith, 21 Ill. 620.

Massachusetts.— Dickinson *v.* Winchester, 4 Cush. 114, 50 Am. Dec. 760.

Mississippi.— Epps *v.* Hinds, 27 Miss. 657, 61 Am. Dec. 528.

New York.— Grant *v.* Newton, 1 E. D. Smith 95, loss of son's baggage.

Tennessee.— Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451, 19 Am. Rep. 618.

See 37 Cent. Dig. tit. "Parent and Child," § 104.

26. See, generally, DEEDS.

27. See, generally, CONTRACTS.

28. **What constitutes contract.**— The fact that a parent purchases an article in the nature of a luxury for a minor child at the latter's request does not create an indebtedness from the child to the parent. Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

29. *In re* Coleman, 193 Pa. St. 605, 44 Atl. 1085; Reehling *v.* Byers, 94 Pa. St. 316; Lewis *v.* Jones, 10 Kulp (Pa.) 32.

Where a father forms a partnership with his minor son, the agreement is binding on him and the son is entitled to his share of the profits. Washington *v.* Washington, (Tex. Civ. App. 1895) 31 S. W. 88.

30. *In re* Coleman, 193 Pa. St. 605, 44 Atl. 1085; Reehling *v.* Byers, 94 Pa. St. 316; Lewis *v.* Jones, 10 Kulp (Pa.) 32.

31. *In re* Coleman, 193 Pa. St. 605, 44 Atl. 1085; Reehling *v.* Byers, 94 Pa. St. 316; Lewis *v.* Jones, 10 Kulp (Pa.) 32.

32. Powers *v.* Powers, 46 Oreg. 479, 80 Pac. 1058, although it might demand a closer inspection of the testimony than if the transaction had been between strangers.

33. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500. But *compare* Street *v.* Goss, 62 Mo. 226.

The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence, and gratitude of a parent to a child, which inspires a deed or gift, is a natural and lawful influence, and will not render the deed or gift voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587.

34. Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

Conveyance inequitable as against other children.— Where a conveyance from a parent to one of several children by way of gift is *prima facie* not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of undue influence arising from such circumstances. Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500.

35. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

36. *In re* Coleman, 193 Pa. St. 605, 44 Atl. 1085; Jenkins *v.* Pye, 12 Pet. (U. S.) 241, 9

is *prima facie* valid and should be upheld unless its invalidity is affirmatively established.[37]

D. Actions to Set Aside Conveyances. In an action to set aside a deed from a parent to a child or from a child to a parent, the burden of proving undue influence is on the party asserting it,[38] and the evidence must show that the influence was such as to overcome the will of the grantor and to destroy, to some extent at least, his free agency;[39] and it must appear that the undue influence was exercised at the time the act referred to was done.[40] The mere fact that the distribution made by a parent of his property among his children appears unjust and unreasonable will not alone establish undue influence,[41] and prior declarations of an intention contrary to the subsequent disposition cannot be shown to establish undue influence in respect to the disposition finally made.[42]

IX. GIFTS[43] BETWEEN PARENT AND CHILD.

A. Validity — 1. In General. There is nothing in the relationship of parent and child to preclude the one from accepting a benefit from the other in the way of a gift;[44] but on the contrary the relation is a sufficient consideration to sustain a conveyance or transfer from the parent to the child.[45]

2. Parol Gifts of Land. A parol gift of land from a parent to a child, properly executed by possession and improvements, is valid.[46] But in order to sustain such a gift, the evidence thereof must be positive and unambiguous and the

L. ed. 1070 [*reversing* 20 Fed. Cas. No. 11,487, 4 Cranch C. C. 541].

37. Sullivan *v.* Sullivan, 23 Fed. Cas. No. 13,598, Brunn. Col. Cas. 642, although the conveyance is made shortly after the child reaches majority.

38. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Sullivan *v.* Sullivan, 23 Fed. Cas. No. 13,598, Brunn. Col. Cas. 642.

Evidence sufficient to show undue influence see Eighmy *v.* Brock, 126 Iowa 535, 102 N. W. 444 (conveyance by stepdaughter to stepfather); Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500 (conveyance by parent to child).

Evidence insufficient to establish undue influence see Ripple *v.* Kuehne, 100 Md. 672, 60 Atl. 464 (assignment of stock by children to their mother); Powers *v.* Powers, 46 Oreg. 479, 80 Pac. 1058 (conveyance by parent to child); Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587 (conveyance by parent to child).

Evidence sufficient to support finding that transaction a fair one see Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

39. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587.

40. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452.

41. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452.

42. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452.

43. See, generally, GIFTS.

44. Collins *v.* Collins, 22 Pa. Co. Ct. 596; *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312 (holding that a parent may make gifts to his children, if they be proper and suitable in his circumstances and conditions); Hepworth *v.* Hepworth, L. R. 11 Eq. 10, 40 L. J. Ch. 111, 23 L. T. Rep. N. S. 388, 19 Wkly. Rep. 46. See also Matter of Cowen, 3 Pittsb. (Pa.) 471.

Conveyance to qualify as voter.— A conveyance of property by a father to his son to give him a qualification to vote is not invalid, but is a bounty. May *v.* May, 33 Beav. 81, 55 Eng. Reprint 297.

A voluntary bond given by a father to trustees for the use of his minor child, although it must be postponed until creditors are paid, is good against the father, his heirs and personal representatives; and, although the father afterward made a will bequeathing property to the child in lieu of the bond, the child's guardian may claim the amount thereof, and the executors, paying the same, are entitled to credit therefor. Candor's Appeal, 27 Pa. St. 119.

45. Banks *v.* Marksberry, 3 Litt. (Ky.) 275; Ross' Appeal, 127 Pa. St. 4, 17 Atl. 682.

46. *Illinois.*— Kurtz *v.* Hibner, 55 Ill. 517, 8 Am. Rep. 665; Bright *v.* Bright, 41 Ill. 97.

Maryland.— Hardesty *v.* Richardson, 44 Md. 617, 22 Am. Rep. 57; Shepherd *v.* Bevin, 9 Gill 32.

Montana.— Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep 37.

New York.— Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347.

Pennsylvania.— Sower *v.* Weaver, 84 Pa. St. 262 [*following* Syler *v.* Eckhart, 1 Binn. 378]; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24; Young *v.* Glendenning, 6 Watts 509, 31 Am. Dec. 492; Stewart *v.* Stewart, 3 Watts 253.

Texas.— Murphy *v.* Stell, 43 Tex. 123.

United States.— Neale *v.* Neale, 9 Wall. 1.

England.— Crosbie *v.* McDonal, 3 Ves. Jr. 147, 33 Eng. Reprint, 251.

See 37 Cent. Dig. tit. "Parent and Child," § 124.

terms clearly defined;[47] and a promise by a father to give his son a tract of land cannot be enforced merely because the son made expenditures in improvements, not in execution of the promise nor at the father's request.[48]

3. Preferences Among Children. If preferences are manifested by parents in the disposition of their estates the law has no concern therewith, unless mental incapacity, fraud, or undue influence be shown.[49]

B. What Constitutes Gift — 1. In General. In order to constitute a gift between parent and child there must be an intention on the part of the donor to make a gift,[50] and hence the parent's merely permitting the child to occupy his land does not amount to a gift of such land.[51] Where the father conveys to his children valuable lands in consideration of love and affection and a nominal money consideration, the receipt of which he acknowledges, the transaction is a gift and not a sale.[52]

2. Necessity For Delivery. While the mere fact that the donee is the child of the donor does not dispense with the necessity of a delivery in order to constitute a valid gift,[53] the formal ceremony of a delivery is not essentially necessary, but it is sufficient if it appear that the donor intended an actual gift at the time and evidenced his intention by some act which may be fairly construed into a delivery.[54] And it has been held that delivery may be dispensed with where

47. Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; Erie, etc., R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Sower *v.* Weaver, 78 Pa. St. 443; Miller *v.* Hartle, 53 Pa. St. 108; Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524. See also Collins *v.* Lofftus, 10 Leigh (Va.) 5, 34 Am. Dec. 719, parol gift of slaves.

48. McClure *v.* McClure, 1 Pa. St. 374.

49. Kennedy *v.* McCann, 101 Md. 643, 61 Atl. 625 (holding that the fact that by a gift to a particular child a mother deprives herself of the means of making equally large donations to her other children does not render such gifts invalid); Justice *v.* Justice, (N. J. Ch. 1889) 18 Atl. 674.

50. Roland *v.* Schrack, 29 Pa. St. 125 (holding that where a parent, on letting his son have money, takes from him an obligation to pay the same, the idea that it was a gift is not sustained); Richmond *v.* Yongue, 5 Strobh. (S. C.) 46; Brown *v.* Scott, 7 Vt. 57 (holding that, where the son purchases and stocks a farm as a home for an indigent father, who resides and labors thereon, the products are not the property of the father so as to be subject to attachment for his debts); Dickinson *v.* Dickinson, 2 Gratt. (Va.) 493 (holding that where a father sent a slave to a son upon a loan, but the agent, by whom the slave was sent, did not inform him that the slave was a loan, the neglect of the agent could not affect the right of the father to have the slave considered a loan).

51. Wertz *v.* Merritt, 74 Iowa 683, 39 N. W. 103 (even though the parent had at different times expressed an intention to give the land to the child, he having never fully decided to do so); Shenk *v.* Shenk, 9 Lanc. Bar (Pa.) 29 (where the son paid no rent but made improvements with the rents and profits).

52. Roland *v.* Schrack, 29 Pa. St. 125.

53. *Alabama.*— Ivey *v.* Owens, 28 Ala. 641.
Arkansas.— Prater *v.* Frazier, 11 Ark. 249.
Missouri.—Nasse *v.* Thoman, 39 Mo. App. 178.
New Jersey.— Justice *v.* Justice, (Ch. 1889) 18 Atl. 674.
New York.— Cook *v.* Husted, 12 Johns. 188.
North Carolina.— Medlock *v.* Powell, 96 N. C. 499, 2 S. E. 149; Brewer *v.* Harvy, 72 N. C. 176.
South Carolina.— Richmond *v.* Yongue, 5 Strobh. 46.
See 37 Cent. Dig. tit. "Parent and Child," § 120.
A parol gift of land from a father to a son is as much affected by the statute of frauds as if it were to a stranger, and to take it out of the statute there must be a delivery of possession and the expenditure of money or labor on the land in consequence of the gift. Stewart *v.* Stewart, 3 Watts (Pa.) 253 [*following* Eckert *v.* Mace, 3 Penr. & W. 364 note]. See also Shenk *v.* Shenk, 9 Lanc. Bar (Pa.) 29.
It requires less positive evidence to establish a delivery of a gift from a father to a child than would be necessary if the parties were not related. Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597.

54. Davis *v.* Davis, 1 Brev. (S. C.) 371. See also Negro Hannah *v.* Sparkes, 4 Harr. & J. (Md.) 310.
Presumption of delivery.— Where a father called his children together, and gave to each of them certain slaves, and those who were of age took their slaves into possession; but the youngest, an infant, and the negro given to him, still remained with the father, delivery to such child will be presumed in the absence of proof to the contrary. Young *v.* Young, 25 Miss. 38.
Facts constituting sufficient delivery see Rector *v.* Danley, 14 Ark. 304; Matter of Wachter, 16 Misc. (N. Y.) 137, 38 N. Y. Suppl. 941; Davis *v.* Davis, 1 Brev. (S. C.) 371; Fletcher *v.* Fletcher, 55 Vt. 325.

the child is in the family and under the immediate control of the parent,[55] and in such case the possession is presumed to be in the child, although the property remains in the parent's house,[56] on his premises,[57] or under his control.[58]

3. Necessity For Acceptance. An acceptance by the donee is necessary to the validity of a gift from parent to child.[59]

C. Curing Defects. The courts may cure a defect in an instrument by which a parent has attempted to make provision for the child.[60]

D. Effect of Gift. Gifts by a father to his child not in the way of support and with the understanding that they shall become the property of the child belong to the child.[61]

E. Revocation. A gift by a parent to a child fully executed by delivery, is, like any other gift, irrevocable by the donor.[62]

F. Presumptions — 1. As to Nature of Transaction. Where a parent places personal property in the possession of the child and the child retains possession, the presumption is that a gift was intended;[63] and this rule is especially applicable where, upon the marriage of a child or shortly thereafter, the parent delivers personal property to the child or the child's spouse;[64] but such presumption is sub-

55. Prater *v.* Frazier, 11 Ark. 249.

56. Ross *v.* Draper, 55 Vt. 404, 45 Am. Rep. 624.

57. Frazer *v.* Kimler, 5 Thomps. & C. (N. Y.) 16.

58. Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242 [*adhered* to in Rector *v.* Danley, 14 Ark. 304]; Young *v.* Young, 25 Miss. 38; McCulloch *v.* Renn, 28 Tex. 793. See also Ivey *v.* Owens, 28 Ala. 641; Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115, 37 Am. Rep. 815.

59. Pavis *v.* Duncan, 1 McCord (S. C.) 213.

Presumption of acceptance in case of infants see Infants.

60. Conover *v.* Brown, 49 N. J. Eq. 156, 23 Atl. 507 [*reversed* on other grounds in 50 N. J. Eq. 753, 26 Atl. 915, 35 Am. St. Rep. 789, 21 L. R. A. 321] (holding that, where a father made his note for one thousand dollars in favor of his daughter A, closing with the words, "Witness my hand and seal," and signed it and caused it to be witnessed by a neighbor, but did not, so far as appeared, place upon it any seal or scroll, and delivered it in escrow for his said daughter, the consideration of love, affection, and parental duty was sufficient to authorize a court of equity to supply the seal, and enforce the note against the executors); Thompson *v.* Attfield, 1 Vern. Ch. 40, 23 Eng. Reprint 294 (where it is said: "Generally a defect in a voluntary conveyance shall not be supplied and made good here, yet if a man voluntarily makes a settlement as a provision for his children, and for their maintenance, such a voluntary conveyance shall be supplied and made good here").

61. Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297.

Gift of live stock.—By a gift from a father to an infant daughter of a calf to raise and have as her own, without intention on his part that it will be taken off his farm for many years, if ever, he does not part with his dominion over it, so as to prevent his recovering it in his own name and right from the hands of a wrong-doer. Filley *v.* Norton, 17 Nebr. 472, 23 N. W. 347.

62. James *v.* Aller, 68 N. J. Eq. 666, 62 Atl. 427, 111 Am. St. Rep. 654, 2 L. R. A. N. S. 285 [*reversing* 66 N. J. Eq. 52, 57 Atl. 476]; Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115, 37 Am. Rep. 815; Smith *v.* Smith, 7 C. & P. 401, 32 E. C. L. 676. *Contra*, Cranz *v.* Kroger, 22 Ill. 74, holding that a parent who has given an article of personal property to a minor child may resume the gift without the consent of the child.

63. Pharis *v.* Leachman, 20 Ala. 662 (son-in-law); Gullett *v.* Lamberton, 6 Ark. 109 (delivery to daughter and possession by daughter's husband); Falconer *v.* Holland, 5 Sm. & M. (Miss.) 689; Hollowell *v.* Skinner, 26 N. C. 165, 90 Am. Dec. 431.

64. *Alabama.*—Caldwell *v.* Pickens, 39 Ala. 514; Cole *v.* Varner, 31 Ala. 244; Merriwether *v.* Eames, 17 Ala. 330; Hooe *v.* Harrison, 11 Ala. 499; Hill *v.* Duke, 6 Ala. 259.

Arkansas.— Henry *v.* Harbison, 23 Ark. 25.

Georgia.— Rich *v.* Mobley, 33 Ga. 85; Carter *v.* Buchanan, 9 Ga. 539; Pendleton *v.* Mills, Ga. Dec., Pt. II, 166.

Massachusetts.— Nichols *v.* Edwards, 16 Pick. 62.

Mississippi.— Woods *v.* Sturdevant, 38 Miss. 68.

Missouri.— Jones *v.* Briscoe, 24 Mo. 498; Martin *v.* Martin, 13 Mo. 36; Mulliken *v.* Greer, 5 Mo. 489. See also Beale *v.* Dale, 25 Mo. 301.

New Jersey.— Betts *v.* Francis, 30 N. J. L. 152.

North Carolina.— Green *v.* Harris, 25 N. C. 210; Mardre *v.* Leigh, 16 N. C. 360; Mitchell *v.* Cheeves, 3 N. C. 126; Parker *v.* Phillips, 2 N. C. 451; Carter *v.* Rutland, 2 N. C. 97; Farrel *v.* Perry, 2 N. C. 2; Killingsworth *v.* Zollikoffer, 1 N. C. 88.

South Carolina.— Steedman *v.* McNeill, 1 Hill 194; McCluney *v.* Lockhart, 4 McCord 251; De Graffenreid *v.* Mitchell, 3 McCord 506, 15 Am. Dec. 648; Bell *v.* Strother, 3 McCord 207; Davis *v.* Duncan, 1 McCord

ject to be overcome by proof that the intention of the parent was not to make an absolute gift.[65] The legal inference arising from advances of money by a parent to his child, when unexplained, is that they were by way of gift and not by way of loan;[66] but where a child makes a contract by purchase with a stranger and no conveyance is executed, and all the father does is to join in the bond for the purchase-money, there can be no presumption that the father was to pay the purchase-money as a gift to the child.[67] Possession by a son after his father's death of a note given by him to his father does not give rise to the presumption of a gift by the father to the son,[68] nor is a gift of land from the father to the son to be inferred from the fact that the son goes into possession of such land and makes improvements.[69]

213; Teague *v.* Griffin, 2 Nott & M. 93; Avaunt *v.* Sweet, 2 Bay 528; Edings *v.* Whaley, 1 Rich. Eq. 301; White *v.* Palmer, McMull. Eq. 115; McDonald *v.* Crockett, 2 McCord Eq. 130.

Tennessee.— Wade *v.* Green, 3 Humphr. 547; McKisick *v.* McKisick, Meigs 427; Stewart *v.* Cheatham, 3 Yerg. 60. But see McDonald *v.* McDonald, 8 Yerg. 145, effect of statute requiring gifts of slaves to be in writing.

Texas.— Owen *v.* Tankersley, 12 Tex. 405.

England.— Cox *v.* Bennett, 18 Wkly. Rep. 519.

See 37 Cent. Dig. tit. "Parent and Child," § 129.

This rule is not applicable where a parent sends a slave for a servant to a daughter who has been married and keeping house for several years, although he says at the time that he has given her the slave. Beale *v.* Dale, 25 Mo. 301. *Contra,* Merriwether *v.* Eames, 17 Ala. 330, holding that in such case the law will presume that a gift was intended; but the presumption is not so strong as in case of a recent marriage, and less proof will be required to remove it.

65. Caldwell *v.* Pickens, 39 Ala. 514. And see cases cited *supra,* note 64.

Understanding between parties.— An understanding between a father and son-in-law, then recently married, that certain slaves delivered to the latter were intended for his wife, and would be secured by deed of trust for her and her children, repels the presumption of a gift to the son-in-law. Gunn *v.* Barrow, 17 Ala. 743.

Declarations of the parties inconsistent with the idea of a gift are sufficient to rebut the presumption that a gift was intended. Rich *v.* Mobley, 33 Ga. 85; Stewart *v.* Cheatham, 3 Yerg. (Tenn.) 60. And where a father declares a loan in sending a slave to the home of a newly married daughter, it cannot be converted into a gift by the mere fact that the father had not then determined whether he would or would not allow the slave to remain forever. Cole *v.* Varner, 31 Ala. 244.

Resumption of possession.— Where slaves were transferred by a mother to her son-in-law on his marriage, and possession of the slaves was afterward resumed by her and retained for a number of years, the resumption of the possession by the mother, with the testimony of the donee that the transfer was a loan, sufficiently rebutted the presumption of a gift. Watson *v.* Kennedy, 3 Strobh. Eq. (S. C.) 1.

66. Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597; Johnson *v.* Ghost, 11 Nebr. 414, 8 N. W. 391 (holding that the force of this inference is not weakened by the fact of the child having given to his parent a statement in the form of an account of the several sums so advanced to him); Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48; Hick *v.* Keats, 4 B. & C. 69, 10 E. C. L. 485; Cox *v.* Bennett, 18 Wkly. Rep. 519.

Payment for child's benefit.— Where a father guaranteed the payment of a bond given by his son, which was further secured by a deed of trust of the son's land, and the son failed to pay the bond, and the father made several payments thereon, and after his death his executrix paid the balance due on the bond, took an assignment of it, and filed a bill to subject the land covered by the deed of trust to the payment of the full face of the bond, it was held that she could enforce the deed of trust only to the extent of the payment made by her as executrix; the amounts paid by the testator to be regarded as gifts to the son made to disencumber the latter's land. Scott *v.* Scott, 83 Va. 251, 2 S. E. 431.

67. Smith *v.* Smith, 40 N. C. 34.

68. Grey *v.* Grey, 47 N. Y. 552 [*reversing* 2 Lans. 173].

69. Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432; Hugus *v.* Walker, 12 Pa. St. 173; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

Under Ga. Code (1895), § 3571, the exclusive possession by a child of land belonging originally to the father, without payment of rent, for the space of seven years creates a conclusive presumption of a gift and conveys title to the child, unless there is evidence of a loan, or of a claim of dominion by the father, acknowledged by the child, or of a disclaimer of title on the part of the child. See Burch *v.* Burch, 96 Ga. 133, 22 S. E. 718 (holding that where a son in possession of land belonging to the father conveyed the land, before the expiration of seven years, to his wife and children, who retained possession of the land until the seven years expired, the father was not divested of title, although the son remained in possession with the wife and children until the completion of the seven

2. As to Validity of Gift. The mere existence of the parental relation raises no presumption against the validity of a gift by a parent to a child;[70] and it is not to be presumed that the gift was the result of fraud or undue influence,[71] but the burden is on the donor or those claiming under him to show that the gift was not free and voluntary and intended to be irrevocable.[72] The existence of a fiduciary or confidential relation between a parent and his child in addition to the family relation is not necessarily fatal to a deed or gift from the former to the latter,[73] but it throws upon the donee the burden of proving that the transaction was a fair one.[74] Where a gift is made by a child to a parent before the parental authority or dominion has terminated, it is presumed to have been made under parental influence, and to be therefore invalid;[75] and the burden of proof lies on the parent to rebut this presumption by showing that the child had independent advice or was otherwise placed in a position to exercise an independent judgment as to the gift.[76]

G. Admissibility of Evidence.[77] On the question of whether or not a gift was intended, evidence is admissible as to the acts[78] and declarations[79] of the donor. Evidence is also admissible of similar gifts of the parent to other chil-

years, for after the execution of the deed the son's possession was not legally exclusive and in his own right); Hardman *v.* Nowell, 84 Ga. 46, 10 S. E. 370 (holding that a father, in order to recover land which has been in his child's possession more than seven years, need only show either that the child went into possession of the land under an agreement that it was to be loaned to him, or that the father claimed dominion over the land, and that the claim was acknowledged by the child, or that the child disclaimed title to the land, and the father need not establish more than one of these defenses to his child's claim of ownership); Johnson *v.* Griffin, 80 Ga. 551, 7 S. E. 94 [*disapproving* Jones *v.* Clark, 59 Ga. 136] (holding that the presumption of a gift is not confined to a gift in writing but may arise, although it be certain that the father retained the paper title, and although that fact be admitted by the son, as the retention of dominion of the father which the statute contemplates is over the property and not merely over the paper title); Hughes *v.* Hughes, 72 Ga. 173 (holding that it is for the jury to say whether the evidence be sufficient to show such exclusive possession without disclaimer or loan or dominion of the parent); McKee *v.* McKee, 48 Ga. 332 (holding that it is necessary that the exclusive possession of the child shall have continued seven years during the lifetime of the father, and if the father dies before the seven years is complete the presumption of a gift does not exist).

70. Kennedy *v.* McCann, 101 Md. 643, 61 Atl. 625.

71. Justice *v.* Justice, (N. J. Ch. 1889) 18 Atl. 674; Vaughn *v.* Vaughn, 217 Pa. St. 496, 66 Atl. 745; Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264; Collins *v.* Collins, 22 Pa. Co. Ct. 596, holding that the mere fact that a note of a parent was conferred upon the child as a gift in no way warrants the inference that undue influence was exercised in procuring the same.

72. Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277, especially where it does not appear that the gift was improvident.

Evidence insufficient to show fraud or undue influence see Morris *v.* Harvey, 4 Ala. 300; Hoffman's Estate, 32 Pa. Super. Ct. 646.

73. Sawyer *v.* White, 122 Fed. 223, 58 C. C. A. 587, so holding on the ground that such a deed or gift is natural and reasonable and is sustained by the presumption that it was inspired by parental affection and devotion, which presumption overcomes the ordinary presumption that an unnatural or unreasonable gift procured through a fiduciary relation is voidable.

74. Justice *v.* Justice, (N. J. Ch. 1889) 18 Atl. 674; Trusts, etc., Co. *v.* Hart, 31 Ont. 414 [*following* Rhodes *v.* Bate, L. R. 1 Ch. 252, 35 L. J. Ch. 267, 13 L. T. Rep. N. S. 778, 14 Wkly. Rep. 292; Liles *v.* Terry, [1895] 2 Q. B. 679, 65 L. J. Q. B. 34, 73 L. T. Rep. N. S. 428, 44 Wkly. Rep. 116; Morley *v.* Loughnan, [1893] 1 Ch. 736, 62 L. J. Ch. 515, 68 L. T. Rep. N. S. 619, 3 Reports 592].

75. Wright *v.* Vanderplank, 8 De G. M. & G. 133, 57 Eng. Ch. 104, 44 Eng. Reprint 340, 2 Jur. N. S. 599, 2 Kay & J. 1, 69 Eng. Reprint 669, 25 L. Ch. 753, 27 L. T. Rep. N. S. 91, 4 Wkly. Rep. 410.

76. Wright *v.* Vanderplank, 8 De G. M. & G. 133, 57 Eng. Ch. 104, 44 Eng. Reprint 340, 2 Jur. N. S. 599, 2 Kay & J. 1, 25 L. J. Ch. 753, 27 L. T. Rep. N. S. 91, 4 Wkly. Rep. 410.

77. See, generally, Evidence.

78. Caldwell *v.* Pickens, 39 Ala. 514.

79. Caldwell *v.* Pickens, 39 Ala. 514; Powell *v.* Olds, 9 Ala. 861; Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502, holding that, to repel the presumption that the delivery of a slave by a father to a child was a gift, it would be competent to prove that the father, after making gifts to his other children, declared that he would not again give slaves to his daughters on their marriage, but that whatever advancements he might make should be on loan.

Declarations changing gift to loan.—Where

dren,[80] or of the general plan of the parent to lend and not to give property to his children under similar circumstances;[81] but the donor's habits of business are not admissible to fix the nature of a transaction as a gift to one child, there being no evidence of similar gifts to other children.[82] Where there is no direct evidence of a gift, evidence of a custom among the class to which the parties belonged to make gifts similar to that claimed under similar circumstances is not admissible.[83]

H. Sufficiency of Evidence. The general rules as to the sufficiency of evidence[84] to sustain or defeat alleged gifts[85] are applicable where the gift is between parent and child.[86]

I. Question For Jury. Whether or not a particular transaction amounted to a gift is a question for the jury.[87]

X. ACTIONS BETWEEN PARENT AND CHILD.

Actions by children against their parents are not to be encouraged[88] unless to redress clear and palpable injustice,[89] and a minor child has no right of action against a parent for the tort of the latter.[90]

slaves were transferred by a mother to her son-in-law on his marriage, and the possession of the slaves was afterward resumed by her and retained for a number of years, no evidence of the donor's declarations could be given to change a gift, which was presumed from such a transfer, to a loan, unless they were made in the presence of the donee at the time of the transfer or immediately communicated to the donee. Watson *v.* Kennedy, 3 Strobh. Eq. (S. C.) 1.

Will in connection with other declarations. — If a parent, before sending property to his son-in-law, declares his intention that it is a loan, and not an absolute gift, and about the same time, and while he retains the possession of the property, makes his will, in which the same intent is declared, the will may be given in evidence to prove the intent. Miller *v.* Eatman, 11 Ala. 609.

80. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502; Brock *v.* Brock, 92 Va. 173, 23 S. E. 224.

81. Lockett *v.* Mims, 27 Ga. 207, where the question was whether a parent lent or gave certain property to a married daughter. But *compare* Adams *v.* Hayes, 24 N. C. 361, holding that for the purpose of showing that a loan and not a gift to a married daughter was intended, it was not competent to prove that loans and not gifts had been made to other daughters on their marriage.

82. Parker *v.* Chambers, 24 Ga. 518.

83. Gilman *v.* Riopelle, 18 Mich. 145.

84. See, generally, EVIDENCE.

85. See, generally, GIFTS, 20 Cyc. 1223–1226.

86. Evidence sufficient to show gift see the following cases:

Georgia.— Gill *v.* Strozier, 32 Ga. 688; Lemon *v.* Wright, 31 Ga. 317.

New York.— Fowler *v.* Lockwood, 3 Redf. Surr. 465.

North Carolina.— Medlock *v.* Powell, 96 N. C. 499, 2 S. E. 149.

South Carolina.— McDonald *v.* Crockett, 2 McCord Eq. 130.

Texas.— Rutledge *v.* Mayfield, (Civ. App. 1894) 26 S. W. 910.

See 37 Cent. Dig. tit. "Parent and Child," § 133.

Evidence not sufficient to show gift see the following cases:

Georgia.— Lockett *v.* Mims, 27 Ga. 207.

Iowa.— Huston *v.* Markley, 49 Iowa 162.

Michigan.— Gifford *v.* Gifford, 100 Mich. 258, 58 N. W. 1000; Jones *v.* Tyler, 6 Mich. 364.

New York.— Cambreleng *v.* Graham, 79 Hun 247, 29 N. Y. Suppl. 419.

South Carolina.— De Veaux *v.* De Veaux, 1 Strobh. Eq. 283; Caldwell *v.* Williams, Bailey Eq. 175.

Texas.— Berthlett *v.* Folsom, 21 Tex. 429.

Virginia.— Slaughter *v.* Tutt, 12 Leigh 147.

Canada.— Rhodenhizer *v.* Bolliver, 31 Nova Scotia 236.

See 37 Cent. Dig. tit. "Parent and Child," § 133.

87. *Kentucky.*—Keene *v.* Macey, 4 Bibb 35.

New Jersey.— Betts *v.* Francis, 30 N. J. L. 152.

Pennsylvania.— Sourwine *v.* Claypool, 138 Pa. St. 126, 20 Atl. 840.

South Carolina.— Davis *v.* Davis, 1 Brev. 371.

Virginia.— Hughes *v.* Clayton, 3 Call 554.

See 37 Cent. Dig. tit. "Parent and Child," § 135.

88. Bird *v.* Black, 5 La. Ann. 189.

A court of equity will not countenance the unjust litigation of an undutiful son against his mother, although she is his legal guardian. Myers *v.* Myers, 47 W. Va. 487, 35 S. E. 868.

89. Bird *v.* Black, 5 La. Ann. 189.

90. Foley *v.* Foley, 61 Ill. App. 577; Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (holding that a child cannot recover damages against the mother for false imprisonment); McKelvey *v.* McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787, 64 L. R. A. 991 (holding that a minor child cannot recover from its father and stepmother civil damages for personal injuries inflicted on it by the latter); Roller *v.* Roller, 37 Wash. 242, 79

XI. AGENCY[91] OF CHILD FOR PARENT.

The mere existence of the family relation does not constitute the child the agent of the parent,[92] or render the parent liable for debts contracted by the child,[93] unless he expressly or impliedly authorized the child to incur the debt on his account[94] or promised to pay the debt.[95] But a child may act as agent for the parent, and if the parent constitutes the child his agent he is bound by the child's contracts made pursuant to the agency.[96] The parent's recognition of the child's agency for him in certain transactions will give rise to an implied agency under which the parent is bound by the child's subsequent transactions of the same character,[97] unless the person dealing with the child was put on inquiry as to a

Pac. 788, 107 Am. St. Rep. 805, 68 L. R. A. 893 (holding that a daughter cannot recover damages against her father for a rape committed upon her by him). But *compare* Clasen *v.* Pruhs, 69 Nebr. 278, 95 N. W. 640, where an action by a minor against a person standing *in loco parentis* for damages for cruel and inhuman treatment was sustained.

"The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." Hewlett *v.* George, 68 Miss. 703, 711, 9 So. 885, 13 L. R. A. 682 [*quoted* in McKelvey *v.* McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787, 64 L. R. A. 991; Roller *v.* Roller, 37 Wash. 242, 79 Pac. 788, 107 Am. St. Rep. 805, 68 L. R. A. 893].

Emancipation.— If, by the marriage of a minor daughter, "the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries." Hewlett *v.* George, 68 Miss. 703, 711, 9 So. 885, 13 L. R. A. 682.

91. See, generally, PRINCIPAL AND AGENT.

92. Hickox *v.* Bacon, 17 S. D. 563, 97 N. W. 847.

93. Bushnell *v.* Bishop Hill Colony, 28 Ill. 204; White *v.* Mann, 110 Ind. 74, 10 N. E. 629; Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399; Cousins *v.* Boyer, 114 N. Y. App. Div. 787, 100 N. Y. Suppl. 290, holding the evidence insufficient to show authority of the child to pledge the father's credit.

The duty of the father to support the child may give rise to an implied agency of the child to bind the father for necessaries. Lamson *v.* Varnum, 171 Mass. 237, 50 N. E. 615; Finn *v.* Adams, 138 Mich. 258, 101 N. W. 533. But *compare* Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

Contract for tuition in vacation.— A minor son living with and supported and educated at the expense of his father is not presumed to be his father's agent in procuring tutoring in vacation, although an education is a necessary, and the tutor cannot recover for his services in the absence of any contract with the father. Peacock *v.* Linton, 22 R. I. 328, 47 Atl. 887, 53 L. R. A. 192.

No recovery can be had against a person for money lent to his stepson, in his absence and without his request. Pike *v.* Bright, 29 Ala. 332.

94. White *v.* Mann, 110 Ind. 74, 10 N. E. 629; Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

95. Gotts *v.* Clark, 78 Ill. 229.

96. Harper *v.* Lemon, 38 Ga. 227 (holding that if a father authorizes a merchant or his clerks to let his minor daughter have from their store whatever she wants, he thereby makes her his agent to contract, and he is bound by her acts, although she exceeds what is actually necessary for her comfort); Brown *v.* Deloach, 28 Ga. 486; Center *v.* Rush, 35 Misc. (N. Y.) 294, 71 N. Y. Suppl. 767.

Special agency.— Where a parent sent his minor child to a particular dentist, to have work done at his expense, but the child went to another dentist and had the work performed, the dentist who did the work could not recover, as the minor was the special agent of the parent. Dumser *v.* Underwood, 68 Ill. App. 121.

Scope of authority.— Where a father and son living in different states are principal and agent, although the relationship might imply greater confidence, it does not imply authority to do unusual and undesirable acts. Ritch *v.* Smith, 82 N. Y. 627, 60 How. Pr. 157 [*affirming* 60 How. Pr. 13].

The child is not bound by a contract with one who knew of his agency. Emery-Bird-Thayer Dry Goods Co. *v.* Coomer, 87 Mo. App. 404, holding that a child accustomed to make purchases at a store, which were charged to the parent, does not become liable for such articles as were for his own personal use, although the purchase was made after his majority, since one dealing as a known agent with a third person does not become personally liable.

97. *Alabama.*— McKenzie *v.* Stevens, 19 Ala. 691.

Connecticut.— Bailey *v.* King, 41 Conn. 365 (holding that a father's payment of his son's bills to B without objection, after publishing a notice forbidding all persons to trust the son on his account, was a waiver of his rights under the notice, so far as B was concerned); Bryan *v.* Jackson, 4 Conn. 288 (holding that where a father paid for what his minor son bought on trust, without expressing any dis-

change of circumstances showing that an agency no longer existed.[98] Where a parent has ratified acts done or contracts made by the child on his behalf, he is of course bound.[99] Whether or not the child was the agent of the parent in a particular transaction is a question of fact to be determined from the evidence.[1]

XII. LIABILITY OF PARENT FOR TORTS[2] OF CHILD.

Under the civil law[3] and under the statutes, in a few jurisdictions,[4] a parent is liable for the torts of his minor child. But at common law it is well established that the mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, express or implied;[5] and although where a parent authorizes the child to act as his agent

approbation or giving the tradesmen notice not to trust him further, he was liable for goods subsequently furnished the son, although he had given instructions to the son to contract no more debts, and had placed him under the care of a person who was to furnish him with everything necessary and suitable).

Georgia.— Wilkes *v.* McClung, 32 Ga. 507 [*explaining* Wilkes *v.* McClung, 29 Ga. 371].

Illinois.— Murphy *v.* Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424, holding that where a father permits his minor son to buy goods on his credit, the fact that the son has left the father will not prevent a recovery against the latter for goods sold to the son by a person acting on the faith of the agency of the son, and without notice of the change of relation or circumstances to put him on inquiry.

Massachusetts.— See Thayer *v.* White, 12 Metc. 343.

Texas.— Fowlkes *v.* Baker, 29 Tex. 135, 94 Am. Dec. 270.

See 37 Cent. Dig. tit. "Parent and Child," § 142.

Effect of lapse of time.— When the authority of the son to bind his father for goods furnished is once shown to exist, the lapse of fifteen months will not overcome the presumption of the continuance of that authority, so as to discharge the father from liability for goods subsequently furnished, it being shown that during all that time the son was absent from the place where the two accounts were contracted. McKenzie *v.* Stevens, 19 Ala. 691.

98. Nuckolls *v.* St. Clair, 1 Colo. App. 427, 29 Pac. 284.

99. Hall *v.* Harper, 17 Ill. 82; Booker *v.* Tally, 2 Humphr. (Tenn.) 308. See also Thayer *v.* White, 12 Metc. (Mass.) 343, holding that where a son with his father's consent had at several times bought goods of plaintiff on the credit of his father, and a sale was made to such son and charged to the father, who was notified of the sale and made no reply to the notice, it showed either original authority in the son or an affirmance by the father which bound him to pay for the goods.

1. See cases cited *infra*, this note.

Admissibility of evidence.— A promise by the father to pay the debt in certain events is admissible on the question whether he authorized the son to contract it. Brown *v.* Deloach, 28 Ga. 486.

Evidence sufficient to establish agency see Gannon *v.* Ruffin, 151 Mass. 204, 24 N. E. 37; Ford *v.* Linehan, 146 Mass. 283, 15 N. E. 591; Thayer *v.* White, 12 Mete. (Mass.) 343; Fowlkes *v.* Baker, 29 Tex. 135, 94 Am. Dec. 270.

Evidence not sufficient to establish agency see Walsh *v.* Curley, 16 N. Y. Suppl. 871; Gregory *v.* Herring, 73 N. C. 518.

2. See, generally, TORTS.

3. Tiffany Pers. & Dom. Rel. § 120. See also Hagerty *v.* Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101.

4. **Under Merrick Civ. Code La. § 2318,** the parent is liable for damage occasioned by minor or unemancipated children. See Cleaveland *v.* Mayo, 19 La. 414. Under this statute the father is liable for damages from his minor's son's intentionally or carelessly shooting another boy, not in self-defense. Marionneaux *v.* Brugier, 35 La. Ann. 13. But when a minor is obeying a sheriff's command to serve on a *posse comitatus* he is not subject to the parental authority, and hence his father is not liable for damages resulting from an accidental shooting by the minor while so engaged. Coats *v.* Roberts, 35 La. Ann. 891. In order to hold the father liable for the child's shooting a person with intent to kill, it must be shown that the person who was shot was not himself at fault in the difficulty which resulted in the shooting. Miller *v.* Meche, 111 La. 143, 35 So. 491. The liability of the father for the act of a minor child is not affected by his absence at the time of the act complained of, or by the tender age of the child, as the fault is imputable by law to the father as the result of some want of care, watchfulness, and discipline. Mullins *v.* Blaise, 37 La. Ann. 92. This provision is not applicable to the contracts of minors. Doumeing *v.* Haydel, 9 La. 446.

Under Quebec Civ. Code, § 1054, a father is liable for an injury caused by the act of his minor son unless he shows that it was impossible to prevent the same. See Internoscia *v.* Bonelli, 28 Quebec Super. Ct. 58; Théroux *v.* Carrier, 21 Quebec Super. Ct. 156; Thibault *v.* Blouin, 16 Quebec Super. Ct. 98.

5. *California.*— Hagerty *v.* Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101.

or servant in any matter, he is liable for the torts of the child committed in the course of the employment,[6] this liability does not grow out of the relation of parent and child, but is based upon the relation of principal and agent,[7] or master and servant,[8] and is governed by the rules applicable to such relations. So also while a parent may be liable for an injury which is directly caused by the child, where his negligence has made it possible for the child to cause the injury complained of and probable that the child would do so,[9] this liability is based upon the

Delaware.— Shockley *v.* Shepherd, 9 Houst. 270, 32 Atl. 173.

Georgia.— Chastain *v.* Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958.

Illinois.— Paulin *v.* Howser, 63 Ill. 312; Wilson *v.* Garrard, 59 Ill. 51; Palm *v.* Ivorson, 117 Ill. App. 535; Malmberg *v.* Bartos, 83 Ill. App. 481.

Kansas.— Smith *v.* Davenport, 45 Kan. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429; Baker *v.* Morris, 33 Kan. 580, 7 Pac. 267; Edwards *v.* Crume, 13 Kan. 348.

Maine.— Maddox *v.* Brown, 71 Me. 432, 36 Am. Rep. 336.

Missouri.— Needles *v.* Burk, 81 Mo. 569, 51 Am. Rep. 251; Paul *v.* Hummel, 43 Mo. 119, 97 Am. Dec. 381; Baker *v.* Haldeman, 24 Mo. 219, 69 Am. Dec. 430; Sartin *v.* Saling, 21 Mo. 387.

New Jersey.—McCauley *v.* Wood, 2 N. J. L. 86.

New York.— Muller *v.* Barker, 90 N. Y. Suppl. 388; Schlossberg *v.* Lahr, 60 How. Pr. 450; Phillips *v.* Barnett, 2 N. Y. City Ct. 20; Tifft *v.* Tifft, 4 Den. 175.

Ohio.— Clnthe *v.* Svendsen, 9 Ohio Dec. (Reprint) 458, 13 Cinc. L. Bul. 633, holding that a father is not liable for an assault committed by a demented and dangerous son, seven years old, unless he knew his condition and knowingly permitted him to be at large and unwatched.

Texas.— Chandler *v.* Deaton, 37 Tex. 406; Ritter *v.* Thibodeaux, (Civ. App. 1897) 41 S. W. 492.

Wisconsin.— Taylor *v.* Seil, 120 Wis. 32, 97 N. W. 498; Kumba *v.* Gilham, 103 Wis. 312, 79 N. W. 325.

United States.— Dunks *v.* Grey, 3 Fed. 862.

England.— Moon *v.* Towers, 8 C. B. N. S. 611, 98 E. C. L. 611.

Canada.— See Turner *v.* Snider, 16 Manitoba 79; File *v.* Unger, 27 Ont. App. 468.

See 37 Cent. Dig. tit. "Parent and Child," § 146.

6. Teagarden *v.* McLaughlin, 86 Ind. 476, 44 Am. Rep. 332; Lashbrook *v.* Patten, 1 Duv. (Ky.) 316; Strohl *v.* Levan, 39 Pa. St. 177; Dunks *v.* Grey, 3 Fed. 862.

The presumption is that a minor child, living with his father and using his team and conveyance in and about the business of such father, is acting on his behalf and under his directions, so as to render the father liable for the tort of the son. Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851. See also Schaefer *v.* Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875. But *compare* File *v.* Unger, 27 Ont. App. 468.

Pleading.— In an action against a father for damages from the setting out of a fire by his minor sons, it is not a sufficient allegation of defendant's liability to allege that the sons, while working in the father's business and for his benefit, purposely, carelessly, and negligently set out the fire, but it is necessary to allege, if the act was done in the absence of the father and without his direction, that it was a service rendered for the father or resulting from an act done in such service. Mirick *v.* Suchy, 74 Kan. 715, 87 Pac. 1141.

7. See PRINCIPAL AND AGENT.

8. See MASTER AND SERVANT.

9. *Kentucky.*— Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013, 23 Ky. L. Rep. 461, 96 Am. St. Rep. 475, 53 L. R. A. 789, permitting incompetent child to handle deadly weapon.

New York.— Phillips *v.* Barnett, 2 N. Y. City Ct. 20, holding that a parent is liable if he negligently leaves a loaded revolver in an unlocked bureau drawer in a room in which his minor children are allowed to play, and one of them, not knowing the danger, takes the pistol and inflicts injury on the person or property of another.

Pennsylvania.— See Sample *v.* Stayer, 3 Lanc. L. Rev. 161.

South Dakota.— Johnson *v.* Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795, permitting child to use firearms.

Wisconsin.— Hoverson *v.* Noker, 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381, 2 Del. Co. (Pa.) 217, holding that a father who permits his children to fire pistols and shout on his premises is liable for an injury sustained by a passer-by whose horse is thereby frightened, and that evidence is admissible to show that the father had knowledge that the children had previously done such acts.

See 37 Cent. Dig. tit. "Parent and Child," § 146.

But *compare* Hagerty *v.* Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101.

A toy air-gun is not such an obviously dangerous weapon that it is negligence *per se* for a parent to put it into the hands of his son, nine years old. Chaddock *v.* Plummer, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 283, 14 L. R. A. 675. See also Harris *v.* Cameron, 81 Wis. 239, 51 N. W. 437, 29 Am. St. Rep. 891.

Reasonable anticipation of injury.— In order to render a parent liable for the tort of his infant son, it is essential that it should appear from the evidence that he might reasonably have anticipated the injury as a consequence of permitting such son to employ the agency which produced the injury, and such danger cannot be reasonably anticipated from permitting a boy twelve years old to

rules of negligence[10] rather than the relation of parent and child. A parent who commands or causes a child to commit an act causing damage to another is responsible as having permitted such act, although an irresponsible agent was employed;[11] and if a father knows that his minor child is committing a tort and makes no effort to restrain him, he will be deemed to have authorized or consented to its commission so as to render him liable.[12]

XIII. LIABILITY OF PARENT FOR CRIMES[13] OF CHILD.

The parental relation does not impose upon the parent any criminal liability for acts of his child to which he is in no way a party;[14] but the liability of the parent for such acts arises only when he has counseled, aided, or abetted the child therein, in which case the parent is liable as an aider and abetter of any other criminal would be and not on account of the parental relation.[15]

XIV. STEPCHILDREN.

A. The Relation in General. The relation of step-parent and stepchild is that existing between a husband or wife and the child of the spouse by a former marriage.[16] A stepfather does not merely, by reason of the relation, stand *in loco parentis*[17] to his stepchild;[18] but where the stepfather receives the stepchild into his family and treats it as a member thereof, he stands in the place of the natural parent,[19] and the reciprocal rights, duties, and obligations of parent and child continue as long as such relation continues.[20]

have and use a gun when he is experienced in the use of guns, and acquainted with their construction and the proper mode of carrying, handling, and discharging them, and has been careful in their use. Palm *v.* Ivorson, 117 Ill. App. 535. See also Turner *v.* Snider, 16 Manitoba 79.

10. See NEGLIGENCE.

11. Cleaveland *v.* Mayo, 19 La. 414, distinguishing such liability from the statutory liability.

12. Beedy *v.* Reding, 16 Me. 362.

13. See, generally, CRIMINAL LAW.

Liability of infant for crimes see INFANTS, 22 Cyc. 622–626.

14. Tiffany Pers. & Dom. Rel. § 121.

15. See, generally, CRIMINAL LAW.

16. See Thornburg *v.* American Strawboard Co., 141 Ind. 443, 445, 40 N. E. 1062, 50 Am. St. Rep. 334 [*quoted* in Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319], where it is said: "As generally understood, the husband of one's mother by a subsequent marriage is a stepfather; strictly speaking, therefore, a man who marries the mother of a bastard child does not become the step-father of such child."

17. Persons in loco parentis see *infra*, XV.

18. McMahill *v.* McMahill, 113 Ill. 461, holding that the wife's infant children by a former marriage form no part of the husband's "family," although they may live with him and he may by antenuptial contract have bound himself to support them. See also Davis *v.* Gallagher, 37 N. Y. App. Div. 626, 55 N. Y. Suppl. 1060, holding that a stepfather does not stand *in loco parentis* to a stepson who has reached majority and lives separately from him.

19. *Alabama.*—Englehardt *v.* Yung, 76 Ala. 534.

Illinois.— Mowbry *v.* Mowbry, 64 Ill. 383; Attridge *v.* Billings, 57 Ill. 489; Brush *v.* Blanchard, 18 Ill. 46.

Massachusetts.— Mulhern *v.* McDavitt, 16 Gray 404.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

Missouri.— St. Ferdinand Loretto Academy *v.* Bobb, 52 Mo. 357; Eickhoff *v.* Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966.

Texas.— Gorman *v.* State, 42 Tex. 221.

See 37 Cent. Dig. tit. "Parent and Child," § 152.

Matter of intention.—Whether a stepfather has admitted a stepchild into his family, and treated it as a member, so as to create the reciprocal rights and obligations of natural parent and child, is to a great extent a question of intention, which should not be lightly nor hastily inferred. Englehardt *v.* Yung, 76 Ala. 534.

Presumption as to relation.—Where a stepfather voluntarily assumes the care and custody of a stepchild, the presumption is that he stands *in loco parentis*, and that they deal as parent and child, and not as master and servant; but when it appears that the stepfather qualified as guardian of the stepchild, and as such guardian furnished it with necessaries, and charged for them in his accounts, the presumption that he acted *in loco parentis* is rebutted. Gerber *v.* Bauerline, 17 Oreg. 115, 19 Pac. 849.

20. Englehardt *v.* Yung, 76 Ala. 534; Mowbry *v.* Mowbry, 64 Ill. 383; Brush *v.* Blanchard, 18 Ill. 46.

Chastisement of child.—A stepfather who supports and maintains his stepchild has the same right of reasonable chastisement to enforce his authority as a natural parent. Gor-

B. Custody of Child. A stepfather has, by reason of the relation merely, no right to the custody of his stepchildren,[21] but he may be entitled to the custody if he stands *in loco parentis* to the children.[22]

C. Support and Education of Child — 1. **Duty and Liability of Stepfather.** A stepfather is not, merely by virtue of his marriage, under any obligation to support the children of his wife by a former husband;[23] but if he has assumed the parental relation to the children and holds them out to the world as members of his own family, he incurs the same liability with respect to their support and maintenance as if they were his own children.[24] It has been held, however, that a court of chancery will not make the support of infant children a charge on the property of their stepfather, where ample provision is otherwise made for their support.[25]

2. **Rights of Stepfather.** A stepfather may receive his stepchildren into his family under such circumstances as to raise a presumption that he intends to support them gratuitously,[26] and if he has voluntarily assumed the care and support of his infant stepchildren, he cannot recover any compensation therefor,[27] as in

man *v.* State, 42 Tex. 221. As to right of parent to chastise child see *supra*, II, A, 2.

Termination of marriage.— The relation of stepfather and stepchild, within the meaning of the statute against incest, does not exist after the termination of the marriage relation between the stepfather and the stepdaughter's mother. Noble *v.* State, 22 Ohio St. 541.

21. Englehardt *v.* Yung, 76 Ala. 534; Brush *v.* Blanchard, 18 Ill. 46; Williams *v.* Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301.

22. See *infra*, XV, B.

23. *Alabama.*—Englehardt *v.* Yung, 76 Ala. 534.

Arkansas.— Kempson *v.* Goss, 69 Ark. 451, 64 S. W. 224.

Illinois.— McMahill *v.* McMahill, 113 Ill. 461; Mowbry *v.* Mowbry, 64 Ill. 383; Attridge *v.* Billings, 57 Ill. 489; Bond *v.* Lockwood, 33 Ill. 212; Brush *v.* Blanchard, 18 Ill. 46.

Iowa.— Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038.

Massachusetts.— Brookfield *v.* Warren, 128 Mass. 287; Mulhern *v.* McDavitt, 16 Gray 404; Worcester *v.* Marchant, 14 Pick. 510; Com. *v.* Hamilton, 6 Mass. 273; Freto *v.* Brown, 4 Mass. 675.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

Missouri.—St. Ferdinand Loretto Academy *v.* Bobb, 52 Mo. 357; Eickhoff *v.* Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966; Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60.

New York.— Williams *v.* Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301 [*affirming* 5 Barb. 122]; Gay *v.* Ballou, 4 Wend. 403, 21 Am. Dec. 158.

North Carolina.—Hussey *v.* Roundtree, 44 N. C. 110.

Ohio.— Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

Oregon.— Gerber *v.* Bauerline, 17 Oreg. 115, 19 Pac. 849.

Pennsylvania.— Brown's Appeal, 112 Pa. St. 18, 5 Atl. 13; Rhoads' Estate, 2 Woodw. 181.

Texas.— Schrimpf *v.* Settegast, 36 Tex. 296.

See 37 Cent. Dig. tit. "Parent and Child," § 154.

24. *Arkansas.*— Kempson *v.* Goss, 69 Ark. 451, 64 S. W. 224.

Illinois.— Mowbry *v.* Mowbry, 64 Ill. 383; Attridge *v.* Billings, 57 Ill. 489.

Massachusetts.— Mulhern *v.* McDavitt, 16 Gray 404.

Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.

Missouri.— St. Ferdinand Loretto Academy *v.* Bobb, 52 Mo. 357; Eickhoff *v.* Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966.

Pennsylvania.— Beard's Estate, 1 Pa. Co. Ct. 283.

Texas.— Schrimpf *v.* Settegast, 36 Tex. 296.

See 37 Cent. Dig. tit. "Parent and Child," § 154.

25. Mowbry *v.* Mowbry, 64 Ill. 383.

26. Bond *v.* Lockwood, 33 Ill. 212; Brush *v.* Blanchard, 18 Ill. 46.

27. *Georgia.*— Brown *v.* Sockwell, 26 Ga. 380.

Illinois.— Meyer *v.* Temme, 72 Ill. 574; Mowbry *v.* Mowbry, 64 Ill. 383.

Indiana.— Webster *v.* Wadsworth, 44 Ind. 283.

Iowa.— Gerdes *v.* Weiser, 54 Iowa 591, 7 N. W. 42, 37 Am. Rep. 229.

Kansas.— Smith *v.* Rogers, 24 Kan. 140, 36 Am. Rep. 254.

Kentucky.— Dixon *v.* Hosick, 101 Ky. 231, 41 S. W. 282, 19 Ky. L. Rep. 387.

Massachusetts.— Livingston *v.* Hammond, 162 Mass. 375, 38 N. E. 968.

Missouri.— Gillett *v.* Camp, 27 Mo. 541.

New Hampshire.— Ela *v.* Brand, 63 N. H. 14.

New Jersey.— *In re* Dissenger, 39 N. J. Eq. 227; Haggerty *v.* McCanna, 25 N. J. Eq. 48.

New York.— Sharp *v.* Cropsey, 11 Barb. 224.

North Carolina.— Mull *v.* Walker, 100 N. C. 46, 6 S. E. 685; Barnes *v.* Ward, 45 N. C. 93, 57 Am. Dec. 590; Hussey *v.* Roundtree, 44 N. C. 110.

Ohio.—Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

Pennsylvania.—Brown's Appeal, 112 Pa. St.

such case no contract to pay for the children's support will be presumed or implied.[28] But the mere fact that the stepchildren live with the stepfather is not conclusive against his right to be compensated or reimbursed for the expense of their support, and he is entitled to recover therefor as against the children or their separate property where he has never assumed the parental relation or the obligation to support them.[29]

D. Support of Parent by Child. A stepchild is under no obligation to support the step-parent,[30] and may in a proper case recover for support and necessaries furnished.[31] Where parents have lived with a stepchild, the jury is the proper tribunal to decide, on the facts proved, whether or not they should pay for their board.[32]

E. Services and Earnings of Child. A stepfather is not, by reason of the relation, entitled to the services or earnings of his stepchild;[33] but where he receives the child into his own home and supports it, discharging all the duties of

18, 5 Atl. 13; Douglas' Appeal, 82 Pa. St. 169.

Tennessee.— Norton *v.* Ailor, 11 Lea 563.

See 37 Cent. Dig. tit. "Parent and Child," § 154.

The stepfather cannot contract with the guardian of his stepchildren for compensation for their support and maintenance while inmates of his family. Beard's Estate, 1 Pa. Co. Ct. 283.

Assumption to support children with aid of their means.— Where defendant moved on to his wife's farm, and used the products of it in the support of her children by a former marriage, and after the death of their mother the stepchildren sued defendant for railroad ties which he had sold off the land, it was error to refuse to allow defendant a counterclaim for the support and maintenance of the stepchildren, since he assumed to support them only with the aid of their means. Kempson *v.* Goss, 69 Ark. 235, 62 S. W. 582.

28. *California.*— Larsen *v.* Hansen, 74 Cal. 320, 16 Pac. 5.

Illinois.— Brush *v.* Blanchard, 18 Ill. 46.

New York.— Sharp *v.* Cropsey, 11 Barb. 224 [*overruling* Gay *v.* Ballou, 4 Wend. 403, 21 Am. Dec. 158].

North Carolina.— Mull *v.* Walker, 100 N. C. 46, 6 S. E. 685.

Pennsylvania.—Brown's Appeal, 112 Pa. St. 18, 5 Atl. 13.

See 37 Cent. Dig. tit. "Parent and Child," § 154.

A stepson is not liable upon an express promise made during his minority to pay for necessaries furnished by his stepfather. Sharp *v.* Cropsey, 11 Barb. (N. Y.) 224 [*overruling* Gay *v.* Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158].

Where the family lives on property in which the children are interested, and which furnishes a comfortable home for all, the stepfather is not entitled to an allowance for the support of the children. Springfield *v.* Bethel, 90 Ky. 593, 14 S. W. 592, 12 Ky. L. Rep. 551.

29. *Alabama.*— Martin *v.* Foster, 38 Ala. 688.

Illinois.— Meyer *v.* Teame, 72 Ill. 574; Bond *v.* Lockwood, 33 Ill. 212; Rawson *v.* Corbett, 43 Ill. App. 127.

Indiana.— Glidewell *v.* Snyder, 72 Ind. 528.

Iowa.— Latham *v.* Myers, 57 Iowa 519, 10 N. W. 924.

Massachusetts.— Freto *v.* Brown, 4 Mass. 675.

Michigan.— Ward's Estate, 73 Mich. 220, 41 N. W. 431.

Pennsylvania.— McCormick's Estate, 1 Pa. Co. Ct. 517 (maintenance furnished with expectation of payment); Rhoads' Estate, 2 Woodw. 181.

South Carolina.— Huson *v.* Wallace, 1 Rich. Eq. 1, although the husband received a large property with his wife.

Vermont.— Pratt *v.* Baker, 56 Vt. 70, holding that when the stepfather was appointed guardian for the child he was entitled to charge for its support.

See 37 Cent. Dig. tit. "Parent and Child," § 154.

Presumption as to intent.— Where the stepfather has charge of the family and the mother's children are provided for by both father and mother, there is no presumption that such support is gratuitous on his part. Eiken *v.* Eiken, 79 Minn. 360, 82 N. W. 667.

30. Oliver *v.* Woodfine, 7 Quebec Pr. 444.

31. Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25, holding that, where a stepfather became an imbecile and at the request of those who had charge of his property and business his stepdaughter caused him to be brought to her home where he remained and was cared for until his death, the stepdaughter was entitled to recover against his estate for necessaries furnished, such as board, lodging, medicines, and attendance, although there was no express contract on his part to pay for such necessaries.

32. Myers *v.* Malcom, 20 Ill. 621.

33. *Alabama.*— Englehardt *v.* Yung, 76 Ala. 534.

Illinois.— Brush *v.* Blanchard, 18 Ill. 46.

Kentucky.— Boyd *v.* Jones, 2 S. W. 552, 8 Ky. L. Rep. 602.

Massachusetts.— Worcester *v.* Marchant, 14 Pick. 510; Com. *v.* Hamilton, 6 Mass. 273; Freto *v.* Brown, 4 Mass. 675.

Missouri.— Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60.

New York.— Williams *v.* Hutchinson, 3

a parent, he is entitled to claim the services and earnings of the child,[34] and the child cannot claim from him pay for its services,[35] unless there was an express or implied contract to pay for such services.[36]

F. Actions For Injuries to Child. A stepfather who has assumed the parental relation to a stepchild has a right of action for an injury to the child causing a loss of his services.[37]

G. Property of Child. A stepfather, living with his wife and her children by a former marriage, on property which the children own or are interested in, is not, as against the children, entitled to an allowance or compensation for his expenditures or improvements on the property,[38] and if he continues to occupy the property after the children have left he is liable to them for rent.[39]

H. Gifts and Conveyances Between Parent and Child. Where a stepfather allows his property to go into the possession of a stepchild, the presumption of a gift does not arise as in the case of parent and child;[40] but where land is occupied by a man and his stepchildren, to whom he stands *in loco parentis*, as tenants in common, and he uses money earned in part by them to pay off encumbrances against the joint estate, it will be held that such payments were intended as a gift to the children.[41] A conveyance made by a daughter to her mother and stepfather as a family adjustment of their respective rights in certain property, which conveyance is made upon her coming of age but while under the influence of the grantees, can be upheld in a court of equity only by clear proof that under all the circumstances it was just and equitable.[42]

XV. PERSONS IN LOCO PARENTIS.

A. The Relation in General. A person standing *in loco parentis* to a child is one who has put himself in the situation of a lawful parent by assuming the

N. Y. 312, 53 Am. Dec. 301 [*affirming* 5 Barb. 122].

North Carolina.— Hussey *v.* Roundtree, 44 N. C. 110.

Oregon.— Gerber *v.* Bauerline, 17 Oreg. 115, 19 Pac. 849.

See 37 Cent. Dig. tit. "Parent and Child," § 156.

34. Wessel *v.* Gerken, 36 Misc. (N. Y.) 221, 73 N. Y. Suppl. 192; Wing *v.* Hibbert, 9 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

The stepfather and not the boy's mother is entitled to the proceeds of the boy's labor, and entitled to sue for the loss of his services, where the stepfather has assumed the relation of father by taking the stepson into his family and treating him as a son, notwithstanding the fact that the son was hired out and collected his own wages and his mother furnished him clothes. Eickhoff *v.* Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966.

35. *Illinois.*— Mowbry *v.* Mowbry, 64 Ill. 383; Brush *v.* Blanchard, 18 Ill. 46.

Massachusetts.— Mulhern *v.* McDavitt, 16 Gray 404.

New York.— Williams *v.* Hutchinson, 3 N. Y. 312, 52 Am. Dec. 301 [*affirming* 5 Barb. 122]; Sharp *v.* Cropsey, 11 Barb. 224.

North Carolina.— Hussey *v.* Roundtree, 44 N. C. 110.

Pennsylvania.— Lantz *v.* Frey, 14 Pa. St. 201, 19 Pa. St. 366.

See 37 Cent. Dig. tit. "Parent and Child," § 156.

36. *Illinois.*— Brush *v.* Blanchard, 18 Ill. 46.

Massachusetts.— Mulhern *v.* McDavitt, 16 Gray 404.

Missouri.— Dobbs *v.* Cates, 60 Mo. App. 320.

New York.— Williams *v.* Hutchinson, 3 N. Y. 312, 52 Am. Dec. 301 [*affirming* 5 Barb. 122].

North Carolina.— Hussey *v.* Roundtree, 44 N. C. 110.

See 37 Cent. Dig. tit. "Parent and Child," § 156.

Evidence sufficient to show contract to pay for services see Schwarz *v.* Schwarz, 26 Ill. 81.

A promise to pay will not be implied from an admission by the stepfather that he knew that he owed the stepdaughter and ought to pay her something for her services, accompanied by a declaration that he would not pay anything. Lantz *v.* Frey, 14 Pa. St. 201, 19 Pa. St. 366.

37. Eickhoff *v.* Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966; Wessel *v.* Gerken, 36 Misc. (N. Y.) 221, 73 N. Y. Suppl. 192.

38. Springfield *v.* Bethel, 90 Ky. 593, 14 S. W. 592, 12 Ky. L. Rep. 551; Guckian *v.* Riley, 135 Mass. 71.

39. Springfield *v.* Bethel, 90 Ky. 593, 14 S. W. 592, 12 Ky. L. Rep. 551.

40. Willis *v.* Snelling, 6 Rich. (S. C.) 280.

41. Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836.

42. Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577 [*reversing* 2 Cinc.

obligations incident to the parental relation,[43] without going through the formalities necessary to a legal adoption.[44] The assumption of the relation is a question of intention.[45]

B. Custody and Control of Child. A person standing *in loco parentis* is entitled to the custody of the child,[46] and necessarily acquires such power of control over the person of the child as is incident to the family government.[47]

C. Support of Child. A person standing *in loco parentis* is bound for the maintenance, care, and education of the child,[48] and liable for necessaries furnished to it,[49] and he cannot be allowed to assert a claim for the support of the child to whom he stands in such relation, in the absence of an express or implied understanding that he is to be compensated therefor.[50]

Super. Ct. 390]. See also Bradshaw *v.* Yates, 67 Mo. 221.

43. See Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836; Fortinberry *v.* Holmes, 89 Miss. 373, 42 So. 799; Brinkerhoff *v.* Merselis, 24 N. J. L. 680; Marsh *v.* Taylor, 43 N. J. Eq. 1, 10 Atl. 486; Wetherby *v.* Dixon, Coop. 279, 10 Eng. Ch. 279, 35 Eng. Reprint 558, 19 Ves. Jr. 407, 34 Eng. Reprint 568, 13 Rev. Rep. 228.

44. Dull's Estate, 1 Leg. Op. (Pa.) 125, holding that it is possible, since the Pennsylvania act of May 4, 1855, to create the relation of parent and child between strangers, where there is no moral obligation, without adopting the proceeding pointed out by that act.

45. Von der Horst *v.* Von der Horst, 88 Md. 127, 41 Atl. 124, holding that the mere fact that a legacy has been given by a grandfather to his grandchildren does not create the relation.

Circumstances showing assumption of relation see Dull's Estate, 1 Leg. Op. (Pa.) 125.

Circumstances not showing assumption of relation see Kelly *v.* Illinois Cent. R. Co., 100 S. W. 239, 30 Ky. L. Rep. 1062.

46. Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124; Com. *v.* Fitzpatrick, 5 Pa. Dist. 309; Matter of Andrews, L. R. 8 Q. B. 153, 42 L. J. Q. B. 99, 28 L. T. Rep. N. S. 355, 21 Wkly. Rep. 480.

47. Foley *v.* Foley, 61 Ill. App. 577 (holding that consequently there can be no recovery for injuries inflicted on the child in the exercise of such right); Fortinberry *v.* Holmes, 89 Miss. 373, 42 So. 799 (holding that a person standing *in loco parentis* cannot be sued by the child for a whipping inflicted on it, although the mother stated, when she gave the child, that it was not to be whipped); Snowden *v.* State, 12 Tex. App. 105, 41 Am. Rep. 667 (holding that a girl fifteen years old, living with an older brother, who stands *in loco parentis* to her and by whom she is supported, is subject to moderate restraint and correction by him).

Where a minor is placed on board a ship to learn navigation, the master is not *in loco parentis*, in respect to him so as to be exempt from responsibility, in an action by such minor for a wrongful exercise of power in correcting him, to the same extent that a father might be exempt. Gould *v.* Christianson, 10 Fed. Cas. No. 5,636, Blatchf. & H. 507.

Criminal liability for chastisement.—A person standing *in loco parentis* cannot be held criminally responsible for correcting a child, unless the chastisement inflicted tends to cause permanent injury. State *v.* Alford, 68 N. C. 322.

48. Schrimpf *v.* Settegast, 36 Tex. 296.

Liability for failure to provide.— Where an infant of the age of eleven years resided with defendant, whose duty it was to keep her properly clothed, and she left his house on a very cold day to return to her own house, a mile and a half distant, at the instigation of her parents, and against his wishes, and through defendant's negligence in failing to provide sufficient clothing she was badly frozen, he was liable for such damages as were chargeable to his want of care, as he owed to the child the duty of a parent until she was restored to the care of her natural parents. Nelson *v.* Johansen, 18 Nebr. 180, 24 N. W. 730, 53 Am. Rep. 806.

49. Williams *v.* Hutchinson, 3 N. Y. 312, 52 Am. Dec. 301.

50. *Alabama.*— Mobley *v.* Webb, 83 Ala. 489, 3 So. 812.

California.— Starkie *v.* Perry, 71 Cal. 495, 12 Pac. 508.

Illinois.— Fetrow *v.* Krause, 61 Ill. App. 238; Witzmann *v.* Koerber, 28 Ill. App. 174.

Michigan.— Thorp *v.* Bateman, 37 Mich. 68, 26 Am. Rep. 497.

Missouri.— Williams *v.* Reed, 74 Mo. App. 331.

New Jersey.— Schaedel *v.* Reibolt, 33 N. J. Eq. 534, board and clothing.

New Mexico.— Garcia *v.* Candelaria, 9 N. M. 374, 54 Pac. 342.

New York.— Zent *v.* Fuchs, 14 N. Y. Suppl. 806.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124.

Pennsylvania.—Duffey *v.* Duffey, 44 Pa. St. 399.

Vermont.— Ormsby *v.* Rhoades, 59 Vt. 505, 10 Atl. 722.

Wisconsin.— Judge *v.* Barrows, 59 Wis. 115, 17 N. W. 540 [*distinguishing* McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409].

See 37 Cent. Dig. tit. "Parent and Child," § 161.

Expenses of last illness and funeral.— Where a person took into his own family an

D. Services of Child. A person standing *in loco parentis* is entitled to the services of the child,[51] and the child cannot maintain a claim against such person for services rendered in the absence of an express or implied agreement to pay therefor.[52] But it has been held that where one *in loco parentis* fails to provide for the education and maintenance of the child, there is a resulting liability for the child's services which is enforceable by the child upon attaining its majority.[53]

E. Actions For Injuries to Child. A person *in loco parentis* may recover against a wrong-doer who is responsible for an injury to the child for the resulting expense and loss of services;[54] but one who stands temporarily *in loco parentis*, and who may abandon that relation at any time and upon whom there is no obligation, legal or moral, to maintain and support the infant, cannot, in case of an injury to the infant, recover the value of the infant's services during his minority and thereby defeat the infant's recovery for his diminished capacity to earn money during those years.[55]

XVI. EMANCIPATION.

A. Right to Emancipate. A parent may emancipate his minor child,[56]

orphan, and educated and supported her until she was sixteen years old, when she went elsewhere to work and received her own earnings for a time, but, becoming sick, returned, he was entitled to recover from her estate the expenses of her last illness and funeral. Schaedel *v.* Reibolt, 33 N. J. Eq. 534.

Poverty as rebutting presumption of gratuity.— Where the father and mother of an infant but a few years old died, and left some property, but neither an executor nor any person to take care of their child, and a woman who was poor took the child and supported it for a year, and then administration was taken out on the estate, it was held that the woman's poverty repudiated the presumption of a gift to the child, and that she could recover for expense and trouble in caring for and maintaining it. Sanders *v.* Rutland, 1 McCord (S. C.) 143.

51. Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Wing *v.* Hibbert, 8 Ohio S. & C. Pl. Dec. 65, 7 Ohio N. P. 124; Schrimpf *v.* Settegast, 36 Tex. 296.

52. *Illinois.*— Fetrow *v.* Krause, 61 Ill. App. 238.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Missouri.— Castle *v.* Edwards, 63 Mo. App. 564.

New Hampshire.—Balch *v.* Smith, 12 N. H. 437, holding that where a testator made his sons his residuary legatees, and provided that they should maintain, in sickness and in health, their brother, who was an infant, until he should become of age, in the same manner as fathers or guardians, the infant rendering due subjection as a child by labor and obedience, and, if he should refuse to do so, a deduction was to be made from his legacy, the infant in such case was not entitled both to the full amount of the legacy and to compensation for his labor, but the benefit of his labor went to the residuary legatees.

New Mexico.— Garcia *v.* Candelaria, 9 N. M. 374, 54 Pac. 342.

New York.— Lind *v.* Sullestadt, 21 Hun 364.

North Carolina.— Hudson *v.* Lutz, 50 N. C. 217.

Rhode Island.— Blivin *v.* Wheeler, 25 R. I. 313, 55 Atl. 760, although excessive work is required.

Vermont.— Ormsby *v.* Rhoades, 59 Vt. 505, 10 Atl. 722.

See 37 Cent. Dig. tit. "Parent and Child," § 162.

The relation rebuts the implication of a promise to pay for work and labor done by the child. Hudson *v.* Lutz, 50 N. C. 217.

Where there is an understanding or agreement that the services of the child are to be paid for, such services constitute a valid consideration for a subsequent promise to pay. Sword *v.* Keith, 31 Mich. 247.

Unfulfilled promise as rebutting presumption that payment not intended.— Where a girl came from another state at the request of her uncle, to stay in his family and work for him, under a promise that she should be taught to play the organ and sent to school, and she came and performed, not only the ordinary duties of the household, but other work in addition, and the uncle did not fulfil his promise, she was entitled to recover for her services, since the uncle's promise overcame the usual presumption that where a near relative is taken into a family no compensation for services is intended, beyond that received during the time of such services. Shane *v.* Smith, 37 Kan. 55, 14 Pac. 477. See also Lind *v.* Sullestadt, 21 Hun (N. Y.) 364.

53. Schrimpf *v.* Settegast, 36 Tex. 296.

54. Whitaker *v.* Warren, 60 N. H. 20, 49 Am. Rep. 302, holding that where the injuries resulted in death, the person *in loco parentis* could recover for medical attendance and the loss of services up to the time of the child's death.

55. Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091.

56. *Maine.*— Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104.

Missouri.— Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283.

either entirely or partially,[57] for the whole minority or for a shorter term,[58] or conditionally or unconditionally,[59] and at what age he will emancipate his child rests in the discretion of the parent.[60]

B. What Constitutes Emancipation. Emancipation of a minor occurs by the voluntary act of the parent in surrendering the rights or renouncing the duties of his position, or in some way conducting himself in relation thereto in a manner inconsistent with any further performance of them.[61] The emancipation may be express or implied,[62] or in writing or oral.[63] The test to be applied is that of the preservation or destruction of the parental and filial relations.[64] The child's arrival at the age of majority is *prima facie*,[65] but not necessarily,[66] an emancipation. The marriage of the child is an emancipation from the control and authority of the parent,[67] even though the parent did not consent to the marriage.[68] The remarriage of the mother after the death of the father does not

Montana.— Francisco *v.* Benepe, 6 Mont. 243, 11 Pac. 637.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

New York.— Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29; Johnson *v.* Gibson, 4 E. D. Smith 231.

Vermont.— Varney *v.* Young, 11 Vt. 258.

See 37 Cent. Dig. tit. "Parent and Child," § 165.

The mother, upon the father's death, may emancipate her child. Campbell *v.* Campbell, 11 N. J. Eq. 268. See also Dennysville *v.* Trescott, 30 Me. 470, holding that a mother, after a second marriage, may, with the consent of her husband, emancipate a minor child of the first marriage.

Although the child be imbecile, the parent may emancipate him by turning him out of his house after he has reached the age of twenty-one. Brown *v.* Ramsay, 29 N. J. L. 117.

57. Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

58. Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

59. Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

60. Bray *v.* Wheeler, 29 Vt. 514.

61. Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104; Monroe *v.* Jackson, 55 Me. 55.

62. Jackson *v.* Citizens' Bank, etc., Co., 53 Fla. 265, 44 So. 516; Bristor *v.* Chicago, etc., R. Co., 128 Iowa 479, 104 N. W. 487; Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104; Lowell *v.* Newport, 66 Me. 78; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

63. Bristor *v.* Chicago, etc., R. Co., 128 Iowa 479, 104 N. W. 487; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211.

A contract for the emancipation of a minor need not be in writing. Lowell *v.* Newport, 66 Me. 78.

64. Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104; Sanford *v.* Lebanon, 31 Me. 124.

65. Hardwick *v.* Pawlet, 36 Vt. 320 (holding that if a daughter, after arriving at full age, is out at service the greater part of the time, and is free to go where she pleases and control her wages, she is *prima facie* emancipated, although she continues to have her home at her father's in the ordinary way of unmarried daughters); Poultney *v.* Glover, 23 Vt. 328 (holding that a child, upon arriving at full age, will be held *prima facie* to be emancipated, notwithstanding he continues to be a member of his father's family, unless the presumption be rebutted by showing that he was not in fact emancipated, but that he continued to reside in the family of the parent upon the same terms as during his minority).

66. Tremont *v.* Mt. Desert, 36 Me. 390 (holding that a child who is *non compos mentis*, and continues to live with his father, is not emancipated on arriving at full age); Brown *v.* Ramsay, 29 N. J. L. 117 (holding that the child may elect to remain with the parent, or be incapable by reason of imbecility to be emancipated, in either of which cases emancipation will not take place); Alexandria Overseers of Poor *v.* Bethlehem Overseers of Poor, 16 N. J. L. 119, 31 Am. Dec. 229.

67. *Maine.*—Bucksport *v.* Rockland, 56 Me. 22, marriage with parent's consent.

Massachusetts.— See Tannton *v.* Plymouth, 15 Mass. 203.

Minnesota.— State *v.* Lowell, 78 Minn. 166, 80 N. W. 877, 79 Am. St. Rep. 358, 46 L. R. A. 440.

Mississippi.— Dick *v.* Grissom, Freem. 428.

New Hamphire.— Aldrich *v.* Bennett, 63 N. H. 415, 56 Am. Rep. 529.

Texas.— Burr *v.* Wilson, 18 Tex. 367.

Vermont.— Craftsbury *v.* Greensboro, 66 Vt. 585, 29 Atl. 1024; Northfield *v.* Brookfield, 50 Vt. 62; Sherburne *v.* Hartland, 37 Vt. 528.

See 37 Cent. Dig. tit. "Parent and Child," § 168.

Effect of marriage as removing disability of infancy see INFANTS, 22 Cyc. 517, 518.

68. Com. *v.* Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, 16 L. R. A. 578, Aldrich *v.* Bennett, 63 N. H. 415, 56 Am. Rep. 529. *Contra*, White *v.* Henry, 24 Me. 531 [*recognized* but *distinguished* in Bucksport *v.* Rockland, 56 Me. 22].

The father's consent may be implied from circumstances, showing knowledge of the marriage without disapproval by the father, and a continued residence of all the parties

emancipate the children,[69] nor does a separation agreement between the father and mother by which the father promises to return the child to the mother at her request emancipate the child from the father's control.[70] The father's desertion of a minor child will operate as an emancipation;[71] but the child's desertion of the father's home does not constitute emancipation so long as the father has not relinquished his right of control or consented that the child should act for himself independently of the father.[72] The fact that the child is allowed to live away from the parent does not amount to an emancipation,[73] unless it is the intention of the parent to release all parental authority and control.[74] On the other hand the fact that the son lives in the family of the father does not establish that he is not emancipated.[75] A minor child of pauper parents bound out to service until twenty-one years of age, by written indenture, is not thereby emancipated.[76] The payment of a weekly allowance by the parent to the child does not constitute emancipation.[77] Where a father who is able to support his minor son forces him to leave home and labor abroad for a livelihood, the law implies an emancipation.[78] So also an infant is emancipated where he supports

in the same house. Bucksport *v.* Rockland, 56 Me. 22.

69. Blivin *v.* Wheeler, 25 R. I. 313, 55 Atl. 760. But *compare* Freto *v.* Brown, 4 Mass. 675 [*followed* in Worcester *v.* Marchant, 14 Pick. (Mass.) 510].

70. Lanning *v.* Gregory, (Tex. 1907) 99 S. W. 542, 10 L. R. A. N. S. 690.

71. Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. N. S. 1161; Thompson *v.* Chicago etc., R. Co., 104 Fed. 845.

72. Bangor *v.* Readfield, 32 Me. 60, although such desertion is coupled with vagrancy and crime.

Enlistment.— Where a minor son left his parents' home without their consent and enlisted in the army, if there was any manumission, it was only effective during the time of service, and when he was discharged from the army he became, as a matter of law, subservient to the authority of his parents, who were entitled to his earnings. Dean *v.* Oregon R., etc., Co., (Wash. 1906) 87 Pac. 824.

73. Searsmont *v.* Thorndike, 77 Me. 504, 1 Atl. 448; Sumner *v.* Sebec, 3 Me. 223 (holding that where a parent, on removing to a distant part of the state, left his daughter in the care of an inhabitant of her native town, to live with him till she should be eighteen years old, and be treated as his adopted child, there was no emancipation; the father having still the right to reclaim her); Blivin *v.* Wheeler, 25 R. I. 313, 55 Atl. 760.

74. West Gardiner *v.* Manchester, 72 Me. 509 (holding that where a child at eight years of age, having no mother, commenced living with H and wife, and for four years her father paid something toward her board and furnished a portion of her clothing, when, with her consent and that of her father, H and wife proposed to adopt her, and from that time until she was twenty-one she lived in H's family, assumed his name, was fed, clothed, and sent to school by him, and treated by himself and wife as their own child, and her father never resumed his parental duties and authority, and the child was emancipated from the father, notwithstanding that H and wife had failed to adopt her by proper proceedings in the probate court, as they had promised to do); Sword *v.* Keith, 31 Mich. 247 (holding that where, on the death of his father, a child has been adopted into the family of his uncle, who stood to him *in loco parentis*, and to whom he sustained the relation of an adopted son, till he came of age, it will be presumed, nothing appearing to the contrary, after the lapse of twenty years from his majority, that his mother assented to his arrangement with such uncle, whatever it was, and to his emancipation from any parental control or rights she might have asserted at the time).

An infant may be emancipated by being given away by its parents. Tunbridge *v.* Eden, 39 Vt. 17, holding, however, that to constitute emancipation of an infant by gift, it must appear that its parents have absolutely transferred all their right to the care and control of the infant and all their right to its services, and that the person to whom such rights are transferred has accepted the infant as his own child and agreed to stand *in loco parentis*. But *compare* Salisbury *v.* Orange, 5 N. H. 348.

75. Beresford *v.* Susquehanna Coal Co., 10 Pa. Dist. 243, 25 Pa. Co. Ct. 89.

The emancipation may be as perfect while the parties are living together under the same roof as though they were separated. Beaver *v.* Bare, 104 Pa. St. 58, 49 Am. Rep. 567; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; McCloskey *v.* Cyphert, 27 Pa. St. 220; Beresford *v.* Susquehanna Coal Co., 10 Pa. Dist. 243, 25 Pa. Co. Ct. 89.

76. Frankfort *v.* New Vineyard, 48 Me. 565; Oldtown *v.* Falmouth, 40 Me. 106.

77. Porter *v.* Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176; Hardy *v.* Eagle, 25 Misc. (N. Y.) 471, 54 N. Y. Suppl. 1045 [*affirming* 23 Misc. 441, 51 N. Y. Suppl. 501].

78. *Arkansas.*— Smith *v.* Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. N. S. 1098.

Delaware.— Farrell *v.* Farrell, 3 Houst. 633.

Massachusetts.— Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

Mississippi.— Dick *v.* Grissom, Freem. 428.

himself and pays his board at home,[79] or where the parent allows him to carry on a business for himself and exercises no control over him or his earnings.[80] Where the child contracts for his services and collects and uses his own earnings, emancipation is to be inferred;[81] but a complete emancipation does not necessarily result from the fact that the father allows the child to receive and spend his own wages,[82] or even to contract for his services.[83] If the father gives or sells the child his time the law implies emancipation.[84]

C. Effect of Emancipation.[85] Emancipation of the child is an entire surrender of all the parent's right to the care, custody, and earnings of the child, as well as a renunciation of parental duties, and leaves the child, so far as the parent is concerned, free to act on its own responsibility and in accordance with its own will and pleasure, with the same independence as though it had attained majority.[86]

D. Revocation of Emancipation. The emancipation of a minor child by parol agreement and without consideration is revocable until acted upon.[87] But a contract of employment for a reasonable time made by the child after the act of emancipation and before revocation cannot be disturbed by the parent.[88]

E. Evidence. When an infant becomes of full age its emancipation is presumed;[89] but emancipation of a minor child is not to be presumed in the absence of evidence but must always be proved,[90] although on an issue as to whether an infant is emancipated the jury cannot consider the presumption of non-emancipation as an element of evidence to weigh with testimony of emancipation.[91] Emancipation of the child from the control of the parent may be shown by circumstances,[92] or inferred from the conduct of the parties.[93] Subject to the general rules of relevancy, competency, and materiality,[94] any evidence is admissible which legitimately tends to prove or disprove the fact of emancipation.[95]

New York.— Canovar *v.* Cooper, 3 Barb. 115.

See 37 Cent. Dig. tit. "Parent and Child," § 167.

79. Donegan *v.* Davis, 66 Ala. 362 (the father being insolvent); Berla *v.* Meisel, (N. J. Ch. 1902) 52 Atl. 799.

80. Jacobs *v.* Jacobs, 130 Iowa 10, 104 N. W. 489, 114 Am. St. Rep. 402.

The offer of a parent to give his child a share in the crop he might raise on the parent's farm does not operate as an emancipation of the child. Smith *v.* Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. N. S. 1098.

81. Aulger *v.* Badgely, 29 Ill. App. 336 (holding that where a father testifies in behalf of his son, and treats as belonging to the son a claim on which a suit is brought by the son, after attaining his majority, for services rendered while an infant, the presumption of emancipation arises); Geringer *v.* Heinlein, 29 Cinc. L. Bul. (Ohio) 339, 6 Ohio S. & C. Pl. Dec. 26; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211 (holding that a contract employing a minor, which is signed by both the minor and her father, by which the father authorizes the minor to receive the wages due her, and which contains a stipulation as to the forfeiture of wages in case the minor shall leave without giving two weeks' notice, is a partial emancipation of the child).

82. Searsmont *v.* Thorndike, 77 Me. 504, 1 Atl. 448; Nicolaus *v.* Synder, 56 Nebr. 531, 76 N. W. 1083; Dunks *v.* Grey, 3 Fed. 862.

83. Stiles *v.* Granville, 6 Cush. (Mass.) 458.

84. Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

85. Effect on: Right of child to contract see INFANTS, 22 Cyc. 516–518. Right to earnings see *supra*, V, C–E.

86. Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104; Lowell *v.* Newport, 66 Me. 78; Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190 [*following* Johnson *v.* Silsbee, 49 N. H. 543]; Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29; Sherburne *v.* Hartland, 37 Vt. 528.

87. Abbott *v.* Converse, 4 Allen (Mass.) 530. See also *supra*, V, C, 3.

88. Smith *v.* Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. N. S. 1098.

89. Baldwin *v.* Worcester, 66 Vt. 54, 28 Atl. 633.

90. Sumner *v.* Sebec, 3 Me. 223.

91. Lisbon *v.* Lyman, 49 N. H. 553.

92. Haugh, etc., Iron-Works *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334 (holding that the emancipation of a minor may be proved by the act of the father in allowing him to draw his own wages, as well as by other acts, and no proof of a formal contract is necessary); Bristor *v.* Chicago, etc., R. Co., 128 Iowa 479, 104 N. W. 487; Washington *v.* Washington, (Tex. Civ. App. 1895) 31 S. W. 88.

93. Dennysville *v.* Trescott, 30 Me. 470.

94. See EVIDENCE.

95. *California.*—Lackman *v.* Wood, 25 Cal. 147, holding that evidence that a minor was in the habit of doing business on his own account and in his own name, and that he purchased his own supplies of provisions and became responsible for them, is admissible to prove his emancipation.

The general rules as to the weight and sufficiency of evidence[96] govern in determining whether there has been an emancipation.[97]

F. Question For Jury. Whether or not a child has been emancipated from the control of the parent is a question for the jury.[98]

XVII. ABANDONMENT OR NEGLECT TO SUPPORT.

A. The Statutory Offense. In a number of states the statutes provide for the punishment of a parent or person standing *in loco parentis* who deserts, abandons, or fails to support or provide for a child, leaving it in a destitute or dependent condition.[99]

Maine.— Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1104, holding that in order to determine whether or not a parent has emancipated his child and renounced all future parental duties, it is proper to ascertain the subsequent conduct of parent and child in order to throw light on the intent of the parent at the time of the claimed emancipation.

Missouri.— McMorrow *v.* Dowdell, 116 Mo. App. 289, 90 S. W. 728, holding that it is evidence of the emancipation of a minor and the relinquishment of its wages that the parent, knowing the child is working for stipulated wages, or in expectation of payment, and that the employer and child understand payment is to be made to the child, interposes no objection.

New York.— Canovar *v.* Cooper, 3 Barb. 115, holding that, where the father was absent for several years, leaving his infant son to manage for himself, the father contributing nothing to his education and support, and not interfering with his engagements, and the minor was in the habit of working for others and receiving pay for his labor himself, and another infant son of the same parent had done the same without objection by the parent, these circumstances were admissible in evidence to show emancipation.

Texas.— Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841, holding that a father's contracting with his minor child for her services is evidence against him that he had emancipated her, so that she had a right to so contract.

See 37 Cent. Dig. tit. "Parent and Child," § 173.

96. See EVIDENCE.

97. **Evidence sufficient to show emancipation** see The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253.

Evidence insufficient to show emancipation see Torrington *v.* Norwich, 21 Conn. 543; Clinton *v.* York, 26 Me. 167; Brown *v.* Ramsay, 29 N. J. L. 117; Farrar *v.* Wheeler, 145 Fed. 482, 75 C. C. A. 386.

98. *Florida.*— Jackson *v.* Citizens' Bank, etc., Co., 53 Fla. 265, 44 So. 516.

Iowa.— Bristor *v.* Chicago, etc., R. Co., 128 Iowa 479, 104 N. W. 487.

New Hampshire.— Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190.

New Jersey.— Brown *v.* Ramsay, 29 N. J. L. 117.

Pennsylvania.— Beaver *v.* Bare, 104 Pa. St. 58, 49 Am. Rep. 567; Delaware County Nat. Bank *v.* Headley, 1 Pa. Cas. 499, 4 Atl. 464.

See 37 Cent. Dig. tit. "Parent and Child," § 175.

99. See the following cases:

Connecticut.— State *v.* Beers, (1904) 58 Atl. 745.

Georgia.— Brown *v.* State, 122 Ga. 568, 50 S. E. 378; Jackson *v.* State, 1 Ga. App. 703, 58 S. E. 272; Moore *v.* State, 1 Ga. App. 502, 57 S. E. 723.

Iowa.— State *v.* Sparegrove, 134 Iowa 599, 112 N. W. 83; State *v.* Smith, 46 Iowa 670.

Kentucky.— Richie *v.* Com., 64 S. W. 979, 23 Ky. L. Rep. 1237.

Massachusetts.— Com. *v.* Burlington, 136 Mass. 435.

Michigan.— Shannon *v.* People, 5 Mich. 71.

Missouri.— State *v.* Block, (App. 1904) 82 S. W. 1103.

New Jersey.— State *v.* Dey, 44 N. J. L. 576.

New York.— People *v.* Joyce, 112 N. Y. App. Div. 717, 98 N. Y. Suppl. 863 [*affirmed* in 189 N. Y. 518, 81 N. E. 1171].

North Carolina.— State *v.* Kerby, 110 N. C. 558, 14 S. E. 856.

Ohio.— Bowen *v.* State, 56 Ohio St. 235, 46 N. E. 708.

Pennsylvania.— Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151.

Rhode Island.— State *v.* Peabody, 25 R. I. 178, 55 Atl. 323.

Wisconsin.— Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663.

See 37 Cent. Dig. tit. "Parent and Child," § 177.

Construction of statutes.—Ga. Code, § 4373, relating to the criminal liability of a father who abandons his children, and leaves them in a "dependent or destitute" condition, should read "dependent and destitute." Jemmerson *v.* State, 80 Ga. 111, 5 S. E. 131; McDaniel *v.* Campbell, 78 Ga. 188. Where an earlier statute provided a punishment if the father "or" mother of any child should abandon it, and in a revision this was changed to read, "If the father 'and' mother," etc., this change did not raise a presumption that the legislature intended that the penalty should be inflicted only when both parents concurred in the abandonment; but the court would construe "and" as meaning "or." State *v.* Smith, 46 Iowa 670.

B. Elements of Offense — 1. In General. In order to warrant a conviction under such a statute, all the elements of the offense must be made out.[1]

2. Intention. There must be an intention to wholly abandon the child and entirely sever, so far as possible, the parental relation and to throw off all obligations growing out of the same.[2]

3. Desertion. To constitute an abandonment of a child by a father there must be an actual desertion,[3] but an absolute desertion is not necessary to constitute the offense of neglecting the child.[4] While absence is a necessary element in the crime of abandoning destitute and dependent children,[5] abandonment does not mean merely going away from such children,[6] but where a father lawfully leaves his children and they afterward become destitute and dependent and he then wilfully fails to support them he is guilty of abandonment.[7]

4. Destitution of Child. The destitute condition of the abandoned child is sometimes made an element of the offense,[8] and where it is so a father who merely separates from his children, leaving them in proper care and provided for, is not guilty of the statutory offense.[9]

C. Circumstances of Exposure or Abandonment. If, from the time, place, and manner of leaving the child, its age and dress, the state of the weather, and all circumstances accompanying the transaction, the jury believe that there was reasonable ground to apprehend that injury might thereby happen to the child, then, if the act was accompanied by an intention wholly to abandon, it is an exposure, within a statute providing a punishment for exposure of children with intent to abandon.[10]

Persons liable.— It is not necessary that a party should be a guardian, or one to whom the child may be apprenticed, to bring him within Mich. Comp. Laws, § 5741, providing a punishment for abandonment of children; but any person having the care or custody of the child comes within it. Shannon *v.* People, 5 Mich. 71. One to whom a child is given by its parent to expose is one to whom it had been "intrusted or confided" within Iowa Code, § 4766, declaring a punishment if a parent of a child under six years of age, or a person to whom such child has been intrusted or confided, expose such child with intent to abandon it. State *v.* Sparegrove, 134 Iowa 599, 112 N. W. 83.

1. See People *v.* Joyce, 112 N. Y. App. Div. 717, 98 N. Y. Suppl. 863 [*affirmed* in 189 N. Y. 518, 81 N. E. 1171], holding that in Pen. Code, § 287, which provides that a parent or other person having the care or custody, for nurture or education, of a child under the age of fourteen years, who deserts the child in any place with intent wholly to abandon it, is punishable by imprisonment for not more than seven years, the words "in any place" are not mere surplusage, but are important in construing the statute, and to make out a crime thereunder it is necessary to show that the child is deserted in a place, and so left with an intent wholly to abandon it, and that a father's leaving his children, two and three years of age, respectively, with their own mother, is not such a desertion and abandonment as the section intends to punish.

2. Gay *v.* State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68; People *v.* Joyce, 112 N. Y. App. Div. 717, 98 N. Y. Suppl. 863 [*affirmed* in 189 N. Y. 518, 81 N. E. 1171].

3. Gay *v.* State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68; Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151.

4. Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151.

5. Brown *v.* State, 122 Ga. 568, 50 S. E. 378.

6. Brown *v.* State, 122 Ga. 568, 50 S. E. 378.

7. Brown *v.* State, 122 Ga. 568, 50 S. E. 378. But see Jemmerson *v.* State, 80 Ga. 111, 5 S. E. 131, where the original abandonment was in another state.

8. Mays *v.* State, 123 Ga. 507, 51 S. E. 503.

Child must be not only dependent but in destitute condition.— Williams *v.* State, 121 Ga. 195, 48 S. E. 938; Dalton *v.* State, 118 Ga. 196, 44 S. E. 977. And so if the wants of the child are provided for by others, the statutory crime is not made out. Williams *v.* State, 126 Ga. 637, 55 S. E. 480.

9. Mays *v.* State, 123 Ga. 507, 51 S. E. 503; Brown *v.* State, 122 Ga. 568, 50 S. E. 378; Williams *v.* State, 121 Ga. 195, 48 S. E. 938; Baldwin *v.* State, 118 Ga. 328, 45 S. E. 399; Dalton *v.* State, 118 Ga. 196, 44 S. E. 977; Crow *v.* State, 96 Ga. 297, 22 S. E. 948; Jemmerson *v.* State, 80 Ga. 111, 5 S. E. 131; McDaniel *v.* Campbell, 78 Ga. 188; Richie *v.* Com., 64 S. W. 979, 23 Ky. L. Rep. 1237, holding that St. § 329, providing for the punishment of a parent who wilfully deserts his child, under six years of age, "in a manner showing a reckless disregard to life and health, and with the intention wholly to abandon it," does not authorize the punishment of a father who leaves his child, less than one year old, in the custody and care of its mother, although he fails to provide for the child's support.

10. Shannon *v.* People, 5 Mich. 71.

D. Defenses. It is not a sufficient defense that the child was not born when the father left his wife,[11] or that the child voluntarily left its home.[12] And it has been held that the fact that defendant was willing to support the child and had offered to do so on its surrender to his custody by the wife does not constitute a defense.[13] So also the misconduct of the mother by reason of which the father cannot live with her or the mother's refusal to live with the father is no excuse for his leaving their child dependent and destitute.[14] But where a father has been once convicted and punished for desertion of his child, there can be no new offense of desertion authorizing a second conviction unless he has returned to the discharge of his parental duty to the child and again deserted it.[15]

E. Nature of Proceeding. A proceeding against a person for the non-support of his children, instituted by a private individual, is a criminal proceeding, and can be prosecuted by the town authorities, or the sureties on complainant's bond should complainant die before the final determination of the case.[16]

F. Jurisdiction and Venue.[17] In order to warrant a conviction for abandonment the desertion must have taken place within the state,[18] but the place where the children were and not where the father was at the time or during the period complained of fixes the venue of a prosecution for non-support of the children.[19]

G. Indictment or Information.[20] The indictment must allege all the elements of the offense[21] and show that defendant sustained a relation to the child bringing him within the statute,[22] but it need not negative matters of defense.[23] It has been held that an indictment stating the offense substantially in the language

11. Bull *v.* State, 80 Ga. 704, 6 S. E. 178, holding that this fact was no excuse for the father's subsequently persisting in the abandonment and refusing to support the child.

12. People *v.* Strickland, 13 Abb. N. Cas. (N. Y.) 473.

13. Bowen *v.* State, 56 Ohio St. 235, 41 N. E. 708 (holding that it is no defense to a prosecution of a father, for failure to support his child, that, by an agreement of separation with his wife, she was given the custody of their minor children, she agreeing for a valuable consideration to furnish them all proper support, and that, after she became unable to support them, the accused offered to do so if she would surrender their custody to him, which she refused to do); State *v.* Sutcliffe, 18 R. I. 53, 25 Atl. 654 (holding that this is true even if the children are improperly detained from the husband by the wife, since he can obtain custody of them, if entitled to it, by appropriate legal proceedings). *Contra*, People *v.* Rubens, 92 N. Y. Suppl. 121.

14. Bennefield *v.* State, 80 Ga. 107, 4 S. E. 869 (although, on account of the child's tender age, in order to support it the father would also have to support the adulterous mother); Moore *v.* State, 1 Ga. App. 502, 57 S. E. 1016.

15. Gay *v.* State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68, holding that this is true notwithstanding the fact that the original abandonment is wilfully continued and the child remains dependent and destitute.

16. State *v.* Peabody, 25 R. I. 178, 55 Atl. 323, holding further that, although a private individual instituting a criminal complaint against a person for non-support of the latter's children is required to give security for the costs, this does not render the case any less a state case than if it were brought by a prosecuting officer, and hence the proceeding is not abated by the death of the complainant before its final determination.

17. See, generally, CRIMINAL LAW.

18. Jemmerson *v.* State, 80 Ga. 111, 5 S. E. 131, holding that, where the original abandonment was in Alabama, defendant could not be convicted in Georgia, although the mother moved with the children, in a dependent and destitute condition, into Georgia, and, after said removal, notified defendant, and he still refused to maintain the children.

19. Bennefield *v.* State, 80 Ga. 107, 4 S. E. 869 (holding that if a husband, by his agent, send his wife and infant child to a county other than that in which the husband and wife separated, and the child there becomes dependent and destitute, the father is indictable in the latter county); State *v.* Peabody, 25 R. I. 544, 56 Atl. 1028.

20. See, generally, INDICTMENTS AND INFORMATIONS.

21. McDaniel *v.* Campbell, 78 Ga. 188 (holding that an indictment failing to allege that the abandonment was wilful or that the child was left in a destitute condition is fatally defective); Gedney *v.* Day, 44 N. J. L. 576 (holding that under Rev. p. 305, providing that a husband who deserts or neglects his family shall be adjudged a disorderly person, and that whenever any overseer of the poor believes that a person does so, "and that by reason thereof, such family may become chargeable" to the township, it shall be his duty to make complaint, it must be averred and proved, upon such complaint, that the family may become chargeable to the township).

Form of complaint held sufficient see Com. *v.* Burlington, 136 Mass. 435.

22. Shannon *v.* People, 5 Mich. 71.

23. State *v.* Kerby, 110 N. C. 558, 14 S. E. 856, holding that it was not necessary to

of the statute is sufficient;[24] but this has been denied and the view asserted that it is essential that the particular facts showing the circumstanees of the alleged desertion of the child should be set out in the indictment with sueh detail as to advise the accused of the speeifie offense with which he is eharged.[25]

H. Issues, Proof, and Variance.[26] An indictment alleging that the child had been confided to defendant is supported by proof that it was delivered to another person employed by him and under his control and direction.[27]

I. Evidence.[28] The proof must establish all the neeessary elements of the offense,[29] and that defendant sustained a relation to the child bringing him within the statute.[30] While the legitimacy of the children must be proved, a marriage need not be shown by the record thereof, or by the marriage certificate, but it may be proved by the wife, or admitted by defendant.[31] Statements by defendant to the witness that he would do nothing toward supporting the child, made a few days before the statute punishing non-support went into effect, are admissible to show that the neglect was intentional,[32] and evidence of the father's eonduct toward his family after the time of his alleged abandonment is admissible to show his intent at that time.[33] Irrelevant[34] or immaterial[35] evidence is properly exeluded.

XVIII. ENTICING AWAY OR HARBORING CHILD.

A. Right of Action. A parent[36] or person standing *in loco parentis*[37] has a right of action against one who unlawfully entices away or harbors the child. As between parents the right of action belongs exclusively to the father, and while both parents are living together the mother has no right of action,[38] but after the death of the father the right of aetion is in the mother.[39] A parent's eleetion to

aver in the indictment that no justice of the peace had taken cognizance of the offense for twelve months after it was committed.

24. State *v.* Block, (Mo. App. 1904) 82 S. W. 1103; State *v.* Kerby, 110 N. C. 558, 14 S. E. 856; Com. *v.* Stewart, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151, holding that an indictment using the word "unlawfully" in place of "wilfully" as in the statute is sufficient.

25. Richie *v.* Com., 64 S. W. 979, 23 Ky. L. Rep. 1237.

26. See, generally, INDICTMENTS AND INFORMATIONS.

27. Shannon *v.* People, 5 Mich. 71.

28. See, generally, CRIMINAL LAW.

29. See Gedney *v.* Day, 44 N. J. L. 576, likelihood of family becoming chargeable to the township.

Evidence sufficient to support conviction see State *v.* Beers, (Conn. 1904) 58 Atl. 745.

Evidence not sufficient to support conviction see Baldwin *v.* State, 118 Ga. 328, 45 S. E. 399.

30. Shannon *v.* People, 5 Mich. 71.

31. Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663.

32. Com. *v.* Burlington, 136 Mass. 435.

33. Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663.

34. State *v.* Peabody, 25 R. I. 544, 56 Atl. 1028, holding that in a prosecution of a father for failing to support his children, a question asking him by whose advice he left the place where his children resided was irrelevant.

35. State *v.* Peabody, 25 R. I. 544, 56 Atl. 1028, holding that where, in a prosecution of a father for failing to support his children, it appeared that he was employed, and he did not claim to be in receipt of a lesser income by reason of physical disability, the exclusion of a question calling attention to such physical disability was not error.

36. *Iowa.*— Everett *v.* Sherfey, 1 Iowa 356.

Kentucky.— Jones *v.* Tevis, 4 Litt. 25, 14 Am. Dec. 98; Washburn *v.* Abram, 90 S. W. 997, 18 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

Massachusetts.— Stowe *v.* Heywood, 7 Allen 118.

Missouri.— Arnold *v.* St. Louis, etc., R. Co., 100 Mo. App. 470, 74 S. W. 5.

New York.— Hopf *v.* U. S. Baking Co., 6 Misc. 158, 27 N. Y. Suppl. 217.

See 37 Cent. Dig. tit. "Parent and Child," § 182.

37. Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Moritz *v.* Garnhart, 7 Watts (Pa.) 302, 32 Am. Dec. 762.

38. Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

Under Me. Pub. Laws (1805), c. 43, providing that "fathers and mothers shall jointly have the care and custody of the person of their minor children," both parents of a minor are properly joined as plaintiffs in an action for enticing and persuading a minor child from their custody. Hare *v.* Dean, 90 Me. 308, 38 Atl. 227.

39. Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; Washburn *v.* Abram, 90 S. W.

sue for the child's wages is a waiver of the tort and bars his right to recover for enticing the child away.[40]

B. Persons Liable. A person is liable in an action by a father for illegally abducting his minor child, although he only obeyed the orders of another person who illegally assumed to direct the removal of the child from the father's custody.[41]

C. Basis of Right of Action. Some of the authorities base the parent's right of action upon the loss of services, so that if there be no actual loss of services there can be no recovery;[42] but the better doctrine is that the right of action is based upon the right to services so that the parent may recover, although the child renders no services and there is consequently no loss of services.[43] In either view, however, a parent who has emancipated the child or relinquished or lost his right to the child's services cannot maintain the action.[44]

D. When Action Lies. The essence of the tort of decoying a minor from home, or harboring him after he leaves home, against his parents' will, thus depriving his parents of his services, is the unlawful enticement or harboring of the minor.[45] In order that a parent may maintain an action there must have been some active or affirmative effort by defendant to detract the child from his service,[46] and it is necessary that the enticing and harboring shall have been wilful, with notice or knowledge that the child had parents whose rights were thereby invaded.[47] Employing a minor and affording him shelter against the will of a father able and willing to provide for him is a harboring sufficient to make the party liable in damages to the father.[48]

E. Defenses. The right of a father to the possession of his children being paramount to that of the mother, it is no defense, in an action by the father for taking away his infant child, that defendant acted in conjunction with or in aid of the mother.[49] In an action for unlawfully harboring and concealing plaintiff's

997. 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

40. Thompson *v.* Howard, 31 Mich. 309 (although the suit for wages was discontinued after a disagreement of the jury); Hopf *v.* U. S. Baking Co., 6 Misc. (N. Y.) 158, 27 N. Y. Suppl. 217.

41. Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

42. Kenney *v.* Baltimore, etc., R. Co., 101 Md. 490, 61 Atl. 581, 1 L. R. A. N. S. 205; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Caughey *v.* Smith, 47 N. Y. 244.

43. Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362; Hare *v.* Dean, 90 Me. 308, 38 Atl. 227 (holding that the parents' right of action is not affected by the fact that at the time of the wrongful act the child was not actually a member of their household, provided they had a right to recall her to their custody and service); Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Kirkpatrick *v.* Lockhart, 2 Brev. (S. C.) 276.

44. Wodell *v.* Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; Worcester *v.* Marchant, 14 Pick. (Mass.) 510.

45. Arnold *v.* St. Louis, etc., R. Co., 100 Mo. App. 470, 74 S. W. 5; Caughey *v.* Smith, 47 N. Y. 244, holding that it must appear that the moving cause of the child's desertion of the parent was the inducement held out by defendant.

46. Kenney *v.* Baltimore, etc., R. Co., 101 Md. 490, 61 Atl. 581, 1 L. R. A. N. S. 205 (holding that it is not enough that the son has voluntarily left the parent's services without the latter's consent and has entered into the employment of defendant); Butterfield *v.* Ashley, 2 Gray (Mass.) 254 (holding that an action on the case, brought by a father for the enticing away of his son from his service, is not supported by proof that defendant, knowing that the son had left his father's service without his father's consent, induced him to enter into the service of defendant, and detained him when he wished to return).

47. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187, holding that where the agent of a children's aid society, being deceived by the false representations of a boy eighteen years of age, who gave a false name and pretended that he was an orphan, etc., sent the boy to a home in the west, an action by the boy's parents to compel his return for damages could not be sustained, and the fact that defendant had neglected to make inquiries as to the truth of the boy's story was not material as the inquiries would have been fruitless, and that the enticement to travel and find new homes which is held out by a children's aid society, being necessary to the conduct of the society and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation.

48. Everett *v.* Sherfey, 1 Iowa 356; Sargent *v.* Mathewson, 38 N. H. 54.

49. Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

minor son and inducing him to enlist in the service of the United States as a substitute for defendant, defendant is not liable if he believed that the son had left the father's service with his father's consent;[50] but the recovery or receipt by plaintiff, as administrator, of the bounty money of defendant, and of the son's back pay from the government, is not tantamount to a consent by plaintiff that his son might enter into the military service of the government as a substitute for defendant, and does not constitute a defense to the action.[51] If the original receiving and harboring of the child was wrongful, it is no defense that on the parent's demand defendant attempted to return the child but was unsuccessful because he ran away.[52]

F. Form of Action. It has been held that trespass *vi et armis* is the proper remedy of a parent for the taking away of his child,[53] but this has been denied and the view asserted that trespass on the case is the proper remedy.[54] It has also been held that a parent may maintain a suit in admiralty for the wrongful abduction of the child and carrying him beyond the seas.[55]

G. Pleading.[56] It is necessary to aver knowledge on the part of defendant that the minor owed service to plaintiff and wrongfully deserted that service;[57] and where the action is brought by the mother, the petition must show the death of the father or other facts authorizing the mother to maintain the action.[58] A declaration for enticing away a minor child from his father's family may be amended by adding a count for harboring and secreting him and persuading him to remain absent from his father's family and service without his consent.[59]

H. Evidence.[60] Plaintiff must prove that defendant had knowledge that the minor owed service to plaintiff and wrongfully deserted that service,[61] and evidence on behalf of defendant to show that he had not notice of such facts is admissible.[62] But evidence that the child was well cared for after its removal from the father's possession is not admissible.[63] The general rules as to the suffi-

50. Caughey *v.* Smith, 47 N. Y. 244.

51. Caughey *v.* Smith, 47 N. Y. 244, 50 Barb. 351.

52. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187.

53. Vaughan *v.* Rhodes, 2 McCord (S. C.) 227, 229, 13 Am. Dec. 713 (where it is said: "The child is not able to consent, and the law therefore implies force as the taking is unlawful"); Kirkpatrick *v.* Lockhart, 2 Brev. (S. C.) 276 (although there is no evidence of a forcible taking). See also Somboy *v.* Loring, 22 Fed. Cas. No. 13,168, 2 Cranch C. C. 318.

54. Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98, where it was so held upon the ground that no forcible taking was alleged, but the court said that even where there was force there were strong reasons for bringing trespass on the case.

55. Plummer *v.* Webb, 19 Fed. Cas. No. 11,233, 4 Mason 380; Steele *v.* Thacher, 22 Fed. Cas. No. 13,348, 1 Ware 85.

56. See, generally, PLEADING.

57. Butterfield *v.* Ashley, 6 Cush. (Mass.) 249 (holding that it must be alleged that defendant had such knowledge at the time of the enticement or hiring, or afterward had notice and continued to employ or harbor the child); Caughey *v.* Smith, 47 N. Y. 244 (holding further that defendant's knowledge of the minority of the child and of the fact that the father was living was sufficient to charge him with the legal inference that the father was entitled to the custody, labor, and services of the child).

58. Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985.

59. Stowe *v.* Heywood, 7 Allen (Mass.) 118.

60. See, generally, EVIDENCE.

61. Butterfield *v.* Ashley, 6 Cush. (Mass.) 249; Caughey *v.* Smith, 47 N. Y. 244; Somboy *v.* Loring, 22 Fed. Cas. No. 13,168, 2 Cranch C. C. 318, holding that in trespass *vi et armis* for taking away the plaintiff's son *per quod servitium amisit*, plaintiff must either prove actual force or knowledge on the part of defendant that the son was under age.

62. Caughey *v.* Smith, 47 N. Y. 244, holding that in an action for unlawfully harboring and concealing plaintiff's minor son, and inducing him to enlist in the service of the United States as a substitute for defendant, it was competent, for the purpose of showing that defendant believed that the son had left the father's service with the father's consent, to show that the son stated to defendant that his father was willing he should enter the military service of the government. But *compare* Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777, holding that defendant in an action of tort for the abduction of plaintiff's minor child could not show that he acted in ignorance of plaintiff's rights, or that the child had expressed a desire to be removed, where plaintiff disavowed any claim against defendant on the ground of malice.

63. Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

ciency of evidence[64] govern in an action by a parent for enticing away or harboring a child.[65]

I. Instructions.[66] The case must be submitted under instructions correctly stating the law as applicable to the facts shown and proper under the general rules relating to instructions.[67]

J. Elements of Recovery. The parent is entitled to recover for the loss of the child's services,[68] the injury to the parent's feelings,[69] his mental suffering caused by the wrong,[70] the loss of the companionship of the child,[71] and reasonable and proper expenditures incurred in seeking to regain possession of the child.[72]

K. Criminal Liability. Under some statutes knowingly decoying or enticing away a minor from his parents is made a criminal offense,[73] but such offense is not committed by merely hiring a minor with knowledge that he has a parent living.[74]

PARENTHESIS. An explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in course of a longer passage, without being grammatically connected with it;[1] a sentence so enclosed in another sentence as that it may be taken out without injuring the sense of that which encloses it.[2]

PARENTUM EST LIBEROS ALERE ETIAM NOTHOS. A maxim meaning "It is the duty of parents to support their children even when illegitimate."[3]

PARESIS. A term used to designate the wasting away of the brain tissue, without softening.[4] (See, generally, INSANE PERSONS.)

PARIA COPULANTUR CUM PARIBUS. A maxim meaning "Like things unite with like."[5]

64. See, generally, EVIDENCE.

65. See Soper *v.* Crutchfield, 96 S. W. 907, 29 Ky. L. Rep. 1080 (holding the evidence sufficient to sustain a verdict for defendants); Loomis *v.* Deets, (Md. 1894) 30 Atl. 612 (holding the evidence insufficient to show that defendant intended to deprive plaintiff of the control and services of his son by harboring him and refusing to allow plaintiff to get possession and control of him).

66. See, generally, TRIAL.

67. **Propriety of particular instructions** see Loomis *v.* Deets, (Md. 1894) 30 Atl. 612; Stowe *v.* Heywood, 7 Allen (Mass.) 118; Caughey *v.* Smith, 47 N. Y. 244.

68. Bundy *v.* Dodson, 28 Ind. 295 (holding that where defendant enticed away the minor son of plaintiff against his father's consent, and placed him in the United States army as a substitute, he was liable to plaintiff for the value of his son's services during the whole period of his absence as a soldier); Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

Period to which recovery may extend.— In an action to recover damages for loss of service by defendant's enticing away plaintiff's son or servant, as distinguished from the case of loss of service resulting from a personal injury of a permanent nature, plaintiff cannot recover damages for the whole of the term in which he was thus entitled to such service, but only up to the time of commencing his action, or perhaps up to the time of trial. Covert *v.* Gray, 34 How. Pr. (N. Y.) 450.

Vindictive damages are not intended to be given by N. H. Rev. St. c. 154, § 123, authorizing an action on the case by a parent against a shipmaster transporting an infant out of the state without the parent's consent; but in such an action the measure of damages is the value of the child's services up to the time of bringing suit, or if the child died previously, up to his death. Nickerson *v.* Harriman, 38 Me. 277.

69. Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

70. Stowe *v.* Heywood, 7 Allen (Mass.) 118; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

71. Washburn *v.* Abram, 90 S. W. 997, 28 Ky. L. Rep. 985; Soper *v.* Igo, 89 S. W. 538, 28 Ky. L. Rep. 519, 1 L. R. A. N. S. 362.

72. Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

73. See Cummins *v.* State, 36 Tex. Cr. 398, 37 S. W. 435.

74. Cummins *v.* State, 36 Tex. Cr. 398, 37 S. W. 435.

1. Century Dict. [*quoted* in *In re* Schilling, 53 Fed. 81, 83, 3 C. C. A. 440], where the court said: "It is used to limit, qualify, or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets."

2. Early *v.* Wilkinson, 9 Gratt. (Va.) 68, 72.

3. Bouvier L. Dict. [*citing* Lofft 222].

4. Lins *v.* Lenhardt, 127 Mo. 271, 282, 29 S. W. 1025.

5. Peloubet Leg. Max. [*citing* 15 Bac. 41].

PARIBUS SENTENTIIS REUS ABSOLVITUR. A maxim meaning "When opinions are equal the defendant is acquitted."[6]

PARI DELICTO. In a similar offence or crime; equal in guilt or in legal fault.[7] (Pari Delicto: Duress of Plaintiff Affecting Validity of Offense, see ACTIONS. Implied Contracts of Indemnity Between Parties In Pari Delicto, see INDEMNITY. Rights of — Parties to Illegal Contracts, in General, see CONTRACTS; Persons In Pari Delicto to Sue For Fraud, see FRAUD. See also IN PARI DELICTO.)

PARI DELICTO MELIOR EST CONDITIO POSSIDENTIS. See IN PARI DELICTO MELIOR EST CONDITIO POSSIDENTIS.[8]

PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS. See IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS.[9]

PARIES ONERI FERUNDO UTI NUNC EST ITA SIT. A maxim meaning "The party wall is to remain intact for both tenements forever."[10]

PARI MATERIA. See STATUTES.[11]

PAR IN PAREM IMPERIUM NON HABET. A maxim meaning "An equal has no power over an equal."[12]

PARIS GREEN. A pigment composed of the aceto-arsenite of copper.[13] (See, generally, POISONS.)

PARISH. In its primary sense, a subdivision of a state which is denominated in the books and known in the law and in the decisions as a quasi or involuntary corporation, possessing some corporate functions and attributes;[14] a district of certain limits which cannot be altered without legal enactment.[15] In English ecclesiastical law, the territory committed to the particular charge of a parson or priest;[16] one of the ecclesiastical subdivisions of the territory of England, and consists of that circuit of ground which is committed to the charge of one person or vicar, or other minister having cure of souls therein;[17] the territorial jurisdiction of a secular priest, or a precinct, the inhabitants of which belong to the same church, or they may reside promiscuously, among people belonging to any church, and be resident in several villages;[18] a corporation established solely for the purpose of maintaining public worship;[19] a competent number of Christians dwelling near together, and having one bishop, pastor, etc., or more set over them.[20] In France the ecclesiastical division of the territory — the spiritual, and in some particulars temporal, division; that is, the district in charge of a curate, and originally of the *curati*.[21] In Louisiana, a civil division corresponding to a county in other states.[22] (See COUNTIES; MUNICIPAL CORPORATIONS; RELIGIOUS SOCIETIES.)

6. Peloubet Leg. Max. [*citing* 4 Inst. 64].
7. Bouvier L. Dict.
8. Applied in Renfrew *v.* McDonald, 11 Hun (N. Y.) 254, 257.
9. **Applied in:** Wearse *v.* Peirce, 24 Pick. (Mass.) 141, 145; Clay *v.* Williams, 2 Munf. (Va.) 105, 117, 5 Am. Dec. 453; Harris *v.* Runnels, 12 How. (U. S.) 79, 86, 13 L. ed. 901; The Araminta, 1 Spinks 224, 230; Adamson *v.* McNab, 6 U. C. Q. B. 113, 128.
10. Morgan Leg. Max. [*citing* Tray 423].
11. See also United Soc. *v.* Eagle Bank, 7 Conn. 457, 469 [*quoted* in Northern Pac. R. Co. *v.* Barden, 46 Fed. 592, 618]; Kemble *v.* McGarry, 6 U. C. Q. B O. S. 570, 571.
12. Bouvier L. Dict. [*citing* Jenk. Cent. 174].
13. Century Dict.

As used in an indictment charging the offense of exposing a poisonous substance called "paris green," with intent that a certain animal belonging to another should take and eat the same see State *v.* Labounty, 63 Vt. 374, 375, 21 Atl. 730.

14. Fischer Land, etc., Co. *v.* Bordelon, 52 La. Ann. 429, 437, 28 So. 59.
15. Webster Dict. [*quoted* in Chicago, etc., R. Co *v.* Oconto, 50 Wis. 189, 195, 6 N. W. 607, 36 Am. Rep. 840].
16. Tuigg *v.* Treacy, 104 Pa. St. 493, 498, where the court said: "In Pennsylvania the term 'parish' has no special legal signification, it is used merely in its general sense. . . . In the absence of a state church here, however, the status of a parish is rendered comparatively unimportant; if used in ecclesiastical divisions, it has just such importance and particular signification as may be given it under ecclesiastical regulations."
17. 1 Blackstone Comm. 111, 114 [*quoted* in Wilson *v.* State, 34 Ohio St. 199, 201].
18. Hebert *v.* Lavalle, 27 Ill. 448, 454.
19. Milford *v.* Godfrey, 1 Pick. (Mass.) 91, 97.
20. Baker *v.* Fales, 16 Mass. 488, 499.
21. Sherman *v.* Vermillion Parish, 51 La. Ann. 880, 882, 25 So. 538.
22. Webster Dict. [*quoted* in Atty.-Gen. *v.* Detroit, 112 Mich. 145, 148, 70 N. W. 450,

PARISH CHURCH. A term which has various significations.[23] (See, generally, RELIGIOUS SOCIETIES.)

PARISH COURT. The name of a court established in each parish in Louisiana, and corresponding to the county courts or common pleas courts in the other states.[24] (See, generally, COURTS.)

PARISHIONER. A very large word, which takes in, not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, although they are not resident, nor do they contribute to the ornaments of the church.[25] (See PARISH; and, generally, RELIGIOUS SOCIETIES.)

PARIS MUTUAL. See FRENCH POOL.

PARIUM EADEM EST RATIO, IDEM JUS. A maxim meaning "Of things equal, the reason and the law is the same."[26]

PARK. In its original signification, a tract of enclosed land, stocked with wild beasts of the chase, enjoyed by the owner through royal grant or immemorial prescription;[27] an inclosure over one's grounds;[28] an inclosure upon a man's own land, in which beasts of park were kept;[29] an enclosed chase extending over a man's own grounds.[30] In its common and ordinary signification, an open or enclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located;[31] a piece of ground adapted and set aside for purposes of ornament, exercise, or amusement;[32] a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament;[33] a place for the resort of the public for recreation, air, and light;[34] a place for the resort of the public for recreation, air, and light, a place opened for everyone;[35] a place for the resort of the public for recreation and light;[36] a place for the resort of the public for recreation or enjoyment;[37] a place to be kept opened, and ornamented for public uses;[38] a pleasure ground in or near a city set apart for the recreation of the public;[39] a plot of ground in a city or town, set apart for ornament, a place which the residents of the municipality may frequent for pleasure and exercise, or amusement;[40] a public pleasure ground;[41] a tract of land in or near a city or

37 L. R. A. 211]. See also Sherman *v.* Vermillion, 51 La. Ann. 880, 882, 25 So. 538.

Sometimes "parish" may be construed to mean a borough, a chapelry, a CITY (*q.v.*), a HAMLET (*q.v.*), a precinct, a tithing, a town, a township, a village (Reg. *v.* Forncett St. Mary, 12 Q. B. 160, 166, 13 Jur. 729, 18 L. J. M. C. 125, 3 New Sess. Cas. 477, 64 E. C. L. 160), or vill (Reg. *v.* Forncett St. Mary, 12 Q. B. 160, 166, 13 Jur. 729, 18 L. J. M. C. 125, 3 New Sess. Cas. 477, 64 E. C. L. 160; Rex *v.* White, 1 Burr. 333, 337).

Distinguished from town or township in *In re* Election Sup'rs, 28 Fed. 840, 841.

As defined by statute, the word is said to mean, "every place having separate overseers of the poor, and separately maintaining its own poor." Hornby *v.* Toxteth Park Burial Bd., 31 Beav. 52, 66, 8 Jur. N. S. 531, 31 L. J. Ch. 643, 6 L. T. Rep. N. S. 146, 10 Wkly. Rep. 550, 54 Eng. Reprint 1056.

23. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 326, 3 L. ed. 735, applied sometimes to a select body of Christians, forming a local spiritual association; or to the building in which the public worship of the inhabitants of a parish is celebrated; but the true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial and the administration of the sacraments.

24. Black L. Dict.

25. Atty.-Gen. *v.* Parker, 3 Atk. 576, 577, 26 Eng. Reprint 1132, 1 Ves. 43, 27 Eng. Reprint 879.

26. Peloubet Leg. Max. [*citing* Whart. 738].

27. Com. *v.* Hazen, 20 Pa. Super. Ct. 487, 493.

28. Price *v.* Plainfield, 40 N. J. L. 608, 612.

29. Price *v.* Plainfield, 40 N. J. L. 608, 612.

30. Bouvier L. Dict. [*quoted* in Lake Wynola Assoc., 3 Pa. Co. Ct. 626].

31. Archer *v.* Salinas, 93 Cal. 43, 50, 28 Pac. 839, 16 L. R. A. 145.

32. Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042.

33. State *v.* Schweickardt, 109 Mo. 496, 510, 19 S. W. 47; Perrin *v.* New York Cent. R. Co., 36 N. Y. 120, 124.

34. Price *v.* Plainfield, 40 N. J. L. 608, 613.

35. State *v.* Schweickardt, 109 Mo. 496, 510, 19 S. W. 47.

36. Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 38, 37 N. E. 1071.

37. Steel *v.* Portland, 23 Oreg. 176, 184, 31 Pac. 479.

38. Rowzee *v.* Pierce, 75 Miss. 846, 860, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402.

39. State *v.* Schweickardt, 109 Mo. 496, 510, 19 S. W. 47.

40. McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237, 240.

41. Laird *v.* Pittsburg, 205 Pa. St. 1, 5, 54 Atl. 324, 61 L. R. A. 332.

town, and devoted to purposes of amusement, pleasure, or exercise;[42] a tract of land set apart and maintained for public use, and laid out, planted, and ornamented in such a way as to afford pleasure to the eye, as well as opportunity for open air recreation;[43] a tract of land set apart for ornament, or to afford the benefit of air, exercise, or amusement;[44] a piece of ground enclosed for public recreation or amusement;[45] any piece of public ground, generally in or near a large town, laid out and cultivated for the sole purpose of pleasure or recreation, without any regard to the size of the ground, or the style of the arrangement;[46] a piece of ground of any size, in or close to a town, and opened to the public for the purposes of recreation, pleasure, or exercise, subject to the regulation of the local authorities;[47] a piece of ground, usually of considerable extent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye, as well as opportunity for open air recreation;[48] a piece of ground within a city or town enclosed and kept for ornament and recreation.[49] (See, generally, MUNICIPAL CORPORATIONS.)

PARKING. A term applied to the act of beautifying those portions of a street not necessarily occupied by walks and roadways.[50] (See PARK; and, generally, MUNICIPAL CORPORATIONS.)

PARKWAY. A BOULEVARD,[51] *q. v.*; a street of special width, which is given a parklike appearance by planting its sides or center, or both, with grass, shade trees, and flowers, and is intended for recreation and for street purposes.[52] (See PARK; and, generally, MUNICIPAL CORPORATIONS.)

PARLIAMENT. The supreme court in the kingdom, not only for the making, but also for the execution of laws: by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.[53] Also the house of lords, the supreme court of judicature in the kingdom, for the hearing of appeals;[54] a body which acts on claims of peerage, in disputed elections of representative peers, and as a supreme court of appeal from the court of appeal in England, and the superior courts of Scotland and Ireland.[55]

42. Ehmen *v.* Gothenburg, 50 Nebr. 715, 718, 70 N. W. 237.

43. Kleopfert *v.* Minneapolis, 90 Minn. 158, 160, 95 N. W 908.

44. Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 38, 37 N. E. 1071.

45. Worcester Dict. [*quoted* in Goode *v.* St. Louis, 113 Mo. 257, 271, 20 S. W 1048; Laird *v* Pittsburg, 205 Pa St. 1, 5, 54 Atl. 324, 61 L. R. A. 332].

46. Imperial Dict. [*quoted* in Bennett *v.* Seibert, 10 Ind. App 369, 35 N. E. 35, 38, 37 N. E. 1071].

47. Encyclopedic Dict. [*quoted* in Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 38, 37 N. E. 1071].

48. Century Dict [*quoted* in Goode *v.* St. Louis, 113 Mo 257, 271, 20 S. W. 1048; Laird *v.* Pittsburg, 205 Pa. St. 1, 5, 54 Atl. 324, 61 L. R. A. 332].

49. Webster Dict. [*quoted* in Goode *v* St. Louis, 113 Mo. 257, 271, 20 S W. 1048; Withnell *v.* Petzold, 17 Mo. App 669, 674. Laird *v.* Pittsburg, 205 Pa. St. 1, 5, 54 Atl. 324, 61 L. R A. 332].

50. Downing *v.* Des Moines, 124 Iowa 289, 290. 99 N. W. 1066

51. Century Dict. [*quoted* in Kleopfert *v.* Minneapolis, 90 Minn. 158, 160, 95 N. W. 908].

52. Century Dict. [*cited* in Kleopfert *v.* Minneapolis, 90 Minn. 158, 160, 95 N. W. 908].

53. 4 Blackstone Comm. 259. See also 3 Blackstone Comm. 56; People *v.* Green, 5 Daly (N. Y.) 254, 271 [*citing* Jacob L. Dict.]; Burdett *v.* Abbot, 14 East 1, 159, 4 Taunt. 401, 12 Rev. Rep. 450.

54. 3 Blackstone Comm. 56.

55. Sweet L. Dict.

A court of appeal only.— The House of Lords has been for a considerable time — at least since the time of Henry the Fourth — the Court of the final appeal, having no original jurisdiction over causes, but only upon appeals and proceedings in error to rectify any injustice or mistake of the law, committed by the courts below. Wharton L. Lex. tit. "House of Lords" [*citing* 3 Hallam Const. Hist.].

Suspension and restoration of appellate jurisdiction.— By the Judicature Act, 1873, § 20, the jurisdiction of the House of Lords as the final Court of Appeal was taken away; but the operation of this section was suspended by the Judicature Act, 1875, § 2, until the 1st of November, 1876, and by the Appellate Jurisdiction Act, 1876, the appellate jurisdiction was restored. Wharton L. Lex. tit. "House of Lords."

PARLIAMENTARY LAW

By Ernest G. Chilton*

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* Author of "Livery-Stable Keepers," 25 Cyc. 1504; "Marshaling Assets and Securities," 26 Cyc. 927; and joint author of "Licenses," 25 Cyc. 593.

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CROSS-REFERENCES

For Matters Relating to:
Rules and Proceedings of:
Association, see ASSOCIATIONS; JOINT STOCK COMPANIES; LABOR UNIONS; MUTUAL BENEFIT INSURANCE.
Bank, see BANKS AND BANKING.
Beneficial Association, see MUTUAL BENEFIT INSURANCE.
Building and Loan Association, see BUILDING AND LOAN SOCIETIES.
City, see MUNICIPAL CORPORATIONS.
Club, see CLUBS.
Congress, see UNITED STATES.
Corporation, see CORPORATIONS.
County, see COUNTIES.
Election Board, see ELECTIONS.
Joint Stock Company, see JOINT STOCK COMPANIES.
Labor Union, see LABOR UNIONS.
Legislature, see STATES.
Municipality, see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS.
Official Board, see MUNICIPAL CORPORATIONS; OFFICERS.
Private Corporation, see CORPORATIONS.
Public Corporation, see MUNICIPAL CORPORATIONS.
School-Board, see SCHOOLS AND SCHOOL-DISTRICTS.
Town, see TOWNS.
Township, see TOWNS.
Trade Union, see LABOR UNIONS.

I. DEFINITION.

Parliamentary law may be defined as that body of recognized usages governing parliamentary and legislative assemblies which takes its name from the British parliament[1] and on the practice of which it is mainly founded, with such changes and modifications in American deliberative bodies as have been necessary to adapt it to the usages of this country.[2]

II. ORGANIZATION OF DELIBERATIVE BODIES.

A. In General. In all cases where part of a deliberative body remains, and is to be completed by the reception of new members, it remains an organized nucleus, and in its organized form receives new members and is not dissolved by the incoming elements.[3]

B. Adoption of Particular Rules — 1. IN GENERAL. The right of deliberative bodies to determine their own rules of procedure must be exercised in conformity with existing laws.[4]

1. **Parliament defined** see *ante*, p. 1685.
2. Bouvier L. Dict.
A rule of parliamentary law is one created and adopted by the legislative or deliberative body it is intended to govern. Landes *v.* State, 160 Ind. 479, 488, 489, 67 N. E. 189, Hadley, C. J., delivering opinion of the court.
3. Kerr *v.* Trego, 47 Pa. St. 292.
4. Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

2. TEMPORARILY. Where a body resolves that the rules of a prior body be adopted until a committee report rules, the prior rules cease to be in force on the report of the committee.[5]

III. MODE OF PROCEEDINGS.

A. As to Presiding Officer — 1. TAKING CHAIR. In carrying on the proceedings of a deliberative body the chair is not to be taken until a quorum for business is present, unless after due waiting such a quorum is despaired of, when the chair may be taken and the meeting adjourned.[6]

2. ELECTION OF OFFICER PRO TEMPORE. Where the officer whose legal right and duty it is to preside over the meetings of a deliberative body is necessarily or wilfully absent, the body *ex necessitate* has authority to elect a presiding officer *pro tempore*.[7]

B. Quorum or Number Necessary to Act — 1. IN GENERAL. Where a quorum is not fixed by the constitution or statute creating a deliberative body, consisting of a definite number, the general rule is that a quorum is a majority of all the members of the body.[8] In case, however, the number of members of the body is indefinite, the majority of those members present at a regular meeting constitutes a quorum for the transaction of business.[9]

2. DIMINUTION IN NUMBERS. Whenever the number required to constitute a quorum is fixed by statute or other rule, a diminution in the number of members of the body will not change the number necessary for a quorum.[10]

3. PRESUMPTION REGARDING. Where the roll call shows a quorum assembled for the transaction of business, but the roll call on a proposition discloses that less than a quorum voted, it will not be presumed that a quorum was present at the time the vote was taken.[11]

C. Right of Minority to Deliberate. The opportunity to deliberate, and, if possible, to convince their fellows, is the right of a minority of which they cannot be deprived by the arbitrary will of the majority.[12]

D. Voting — 1. MANNER OF. The original purpose of a division to ascertain the will of a body, the ayes occupying one part of the hall, and the noes another, and there remaining until the powers appointed counted them, is usually effected in modern deliberative bodies by a call of the house, a yea or nay vote when each member's name is called.[13]

5. Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364.

6. Kimball *v.* Marshall, 44 N. H. 465.

7. Billings *v.* Fielder, 44 N. J. L. 381.

8. *Maryland.*— Heiskell *v.* Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

New York.— *Ex p.* Willcocks, 7 Cow. 402, 17 Am. Dec. 525.

North Carolina.— State *v.* Ellington, 117 N. C. 158, 23 S. E. 250, 53 Am. St. Rep. 580, 30 L. R. A. 532; Cleveland Cotton-Mills *v.* Cleveland County, 108 N. C. 678, 13 S. E. 271.

Pennsylvania.— *In re* Doyle, 7 Pa. Dist. 635; Com. *v.* Read, 2 Ashm. 261.

South Carolina.— State *v.* Huggins, Harp. 139.

United States.— U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 26 L. ed. 321.

England.— Blacket *v.* Blizard, 9 B. & C. 851, 8 L. J. M. C. O. S. 103, 4 M. & R. 641, 17 E. C. L. 377.

See 27 Cent. Dig. tit. "Parliamentary Law," § 7.

No member disqualified by reason of interest can be counted for the purpose of making a quorum of a deliberative body consisting of a definite number of members. Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 659.

Under a statute providing that a majority shall be a quorum, a quorum of the members of a body is such a number as is competent to transact business in the absence of the other members. State *v.* Wilkesville Tp., 20 Ohio St. 288.

Members dead, disqualified, or refusing to qualify.— Where four out of eighteen members are either dead, disqualified, or refuse to qualify, eight constitute a quorum. State *v.* Huggins, Harp. (S. C.) 139.

9. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 5 Rob. (N. Y.) 649; Field *v.* Field, 9 Wend. (N. Y.) 394; *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

10. Fisher *v.* Harrisburg Gas Co., 1 Pearson (Pa.) 118.

11. State *v.* Ellington, 117 N. C. 158, 23 S. E. 250, 53 Am. St. Rep. 580, 30 L. R. A. 532.

12. Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

13. State *v.* Ellington, 117 N. C. 158, 23

2. Disqualification to Vote by Interest — a. In General. If a deliberative body adopts the rule that no member immediately interested in a proposition shall vote thereon, such rule will be binding on the members, so as to invalidate the election of a member who casts a ballot for himself.[14]

b. Pecuniary — (I) *General Rule.* The general rule at common law is that members of a deliberative body are disqualified to act on propositions in which they have a direct pecuniary interest.[15]

(II) *Exception.* An exception to this rule is recognized where the deliberative body itself is permitted to fix the compensation of its members.[16]

3. Number of Votes Required — a. In General. The general rule is that, in the absence of express provision to the contrary, a proposition is carried in a deliberative body by a majority of the legal votes cast.[17] However, where the statute requires a majority[18] or two thirds[19] of all the members, a vote of less than that number, although a majority of those present and voting, is not sufficient. So too where a statute requires all the members of a body to be present when a vote

S. E. 250, 53 Am. St. Rep. 580, 30 L. R. A. 532.

When polling not commenced.— At an annual town meeting the motion was made that the meeting should adjourn to a day certain. The moderator, being unable to determine which way the majority was by counting the hands, stated that fact to the meeting. A poll of the house was demanded, and tellers were appointed who reported that the majority were in favor of adjournment, and the vote was so declared by the moderator. It was then moved that the meeting should proceed to vote for town representative, and the moderator arranged the poll box and check list for that purpose. Before any polls were given in, the vote declared by the moderator on the question of adjournment was questioned by the proper number of voters. It was held that the business of polling for town representative was not "commenced," so as to render it too late to question the vote as declared by the moderator. Kimball *v.* Lamprey, 19 N. H. 215.

14. State *v.* Hoyt, 2 Oreg. 246.

15. Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 659; Oconto County *v.* Hall, 47 Wis. 208, 2 N. W. 291. See also Topeka *v.* Huntoon, 46 Kan. 634, 26 Pac. 488.

Where a rule adopted by a deliberative body forbids members to vote on questions in which they are directly interested, a member pecuniarily interested in a proposition is disqualified to vote thereon. Buffington Wheel Co. *v.* Burnham, 60 Iowa 493, 15 N. W. 282.

Indirect interest.— Members having no interest other than that which is common to every taxpayer are not disqualified to vote on a proposition affecting taxpayers. People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348.

16. Oconto County *v.* Hall, 47 Wis. 208, 2 N. W. 291, holding further that this exception goes upon the necessity of the case and the fact that all the members are equally interested.

17. *Connecticut.*— State *v.* Chapman, 44 Conn. 595.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Indiana.— State *v.* Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315; Hamilton *v.* State, 3 Ind. 452.

Louisiana.— Warnock *v.* Lafayette, 4 La. Ann. 419.

Massachusetts.— Sudbury First Parish *v.* Stearns, 21 Pick. 148.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576.

New Jersey.— State *v.* Parker, 32 N. J. L. 341.

New York.— Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 5 Rob. 649; Downing *v.* Rugar, 21 Wend. 178, 34 Am. Dec. 223; McFarland *v.* Crary, 6 Wend. 297.

North Carolina.— State *v.* Ellington, 117 N. C. 158, 23 S. E. 250, 53 Am. St. Rep. 580, 30 L. R. A. 532.

Ohio.— State *v.* Green, 37 Ohio St. 227; State *v.* Wilkesville Tp., 20 Ohio St. 288.

Pennsylvania.— Com. *v.* Wickersham, 66 Pa. St. 134; Com. *v.* Fleming, 23 Pa. Super. Ct. 404; *In re* Beck, 7 Pa. Dist. 629; Fisher *v.* Harrisburg Gas Co., 1 Pearson 118; Carpenter *v.* Burden, 2 Pars. Eq. Cas. 24; Com. *v.* Read, 2 Ashm. 261.

South Carolina.— State *v.* Deliesseline, 1 McCord 52.

Tennessee.— Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

Virginia.— Booker *v.* Young, 12 Gratt. 303.

United States.— U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 21 L. ed. 328.

England.—Oldknow *v.* Wainwright, 2 Burr. 1017, W. Bl. 229; Rex *v.* Monday, Cowp. 530.

See 37 Cent. Dig. tit. "Parliamentary Law," § 10.

18. Pimental *v.* San Francisco, 21 Cal. 351; McCracken *v.* San Francisco, 16 Cal. 591; San Francisco *v.* Hazen, 5 Cal. 169; State *v.* Fagan, 42 Conn. 32.

19. Logansport *v.* Legg, 20 Ind. 315; Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184; Stockdale *v.* Wayland School Dist. No. Two, 47 Mich. 226, 10 N. W. 349.

is to be taken on a proposition, a majority vote of all the members of the body is necessary.[20]

b. Members Present Declining to Vote. Where a quorum is present a proposition is carried by a majority of the votes cast, although some of the members present refuse to vote.[21]

c. Motion to Adjourn. The rule applicable to all deliberative bodies is that any number have power to adjourn, although they may not constitute a quorum for the transaction of business.[22]

d. Adoption of Rules. Although the rules of a prior deliberative body, temporarily adopted until a committee can report, provide that an amendment thereof cannot be made except by a two-thirds vote, the new rules adopted by the committee may be adopted by a majority vote.[23]

e. Suspension of Rules. If a body adopts the commonly accepted parliamentary rules for its governance, such rules cannot be suspended except by a unanimous vote of all the members present.[24]

f. Reconsideration. Where by statute a vote of two thirds is required to pass a resolution, and no rule has been adopted regulating practice on motions for reconsideration, a two thirds vote is necessary therefor.[25]

4. Casting Vote — a. Nature of. By the common law a casting vote sometimes signifies the single vote of a person who never votes, except in case of an equality, and sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote.[26]

b. Right to Cast. The presiding officer of a deliberative body, having a definite number of members, has the power in case of a tie to give the casting vote.[27]

20. Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223.

21. *Illinois.*— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Indiana.— State *v.* Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832.

Massachusetts.— Sudbury First Parish *v.* Stearns, 21 Pick. 148.

New Hampshire.— Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576; Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187.

New Jersey.— State *v.* Parker, 32 N. J. L. 341; Abels *v.* McKeen, 18 N. J. Eq. 462.

Ohio.— State *v.* Green, 37 Ohio St. 227.

Pennsylvania.— Com. *v.* Wickersham, 66 Pa. St. 134; *In re* Beck, 7 Pa. Dist. 629; Com. *v.* Read, 2 Ashm. 261.

United States.— U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321.

England.—Oldknow *v.* Wainwright, 2 Burr. 1017, W. Bl. 229.

See 37 Cent. Dig. tit. "Parliamentary Law," § 8.

22. Kimball *v.* Marshall, 44 N. H. 465; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

Where a constitution requires a two-thirds vote of all the members of a deliberative body to continue its business beyond a prescribed time and such vote is given, a majority is thereafter competent to adjourn from time to time as the necessities of the business may require. Speed *v.* Crawford, 3 Metc. (Ky.) 207.

23. Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364.

24. State *v.* Cleveland Bd. of Education, 2 Ohio Cir. Ct. 510, 1 Ohio Cir. Dec. 614.

Motion to table.— Where a rule can be suspended by a two-thirds vote, a loss by a two-thirds vote of a motion to table the matter presented in violation of a certain rule operates to suspend such rule. Kendall *v.* Grand Rapids Bd. of Education, 106 Mich. 681, 64 N. W. 745.

25. Whitney *v.* Hudson, 69 Mich. 189, 37 N. W. 184; Stockdale *v.* Wayland School Dist. No. Two, 47 Mich. 226, 10 N. W. 349.

26. People *v.* Church of Atonement, 48 Barb. (N. Y.) 603.

27. *Connecticut.*— State *v.* Chapman, 44 Conn. 595.

Illinois.— Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Kansas.— Carroll *v.* Wall, 35 Kan. 36, 10 Pac. 1.

Maine.— Small *v.* Orne, 79 Me. 78, 8 Atl. 152.

New York.— People *v.* Church of Atonement, 48 Barb. 603.

Tennessee.—Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

No equal division possible.— If there is an odd number of members present and participating in the action of the body, it is obvious that there can be no tie, so as to authorize the presiding officer to give the casting vote. State *v.* Chapman, 44 Conn. 595, holding that where twenty-two ballots are for one candidate and twenty-two for another, and a blank ballot is cast, there is no tie which will authorize the presiding officer to give a casting vote, as there cannot be an equal division of the members. See also Lawrence

c. Manner of Casting. The action of the presiding officer of a body consisting of a definite number of members in declaring that an officer is elected as the result of a ballot is not equivalent to giving a casting vote.[28]

5. Determination of Result of Vote — a. What May Be Shown For That Purpose. The circumstances leading up to the final determination of the result of a vote may always be shown for the purpose of showing the invalidity of the final adjudication.[29]

b. Authority of Tellers. In determining and announcing the result of a vote, the authority of tellers is not terminated by the resignation of the presiding officer who appointed them.[30]

E. Reconsideration — 1. By Whom Motion Therefor Made. Parliamentary law requires that the motion to reconsider must be made by one who voted with the majority on the motion proposed to be reconsidered.[31] A majority, however, can dispense with the rule requiring a reconsideration to be moved by one who voted with the majority, and if the majority treat the motion as regularly made it is to be considered as a tacit suspension of the rule.[32]

2. Conclusiveness of — a. As to Question Reconsidered. A reconsideration of a question by a deliberative body is final and there can be no further reconsideration of the matter.[33]

b. Upon Other Bodies. A motion to reconsider rests exclusively in the discretion of the body whose action it is proposed to reconsider, and no other body or tribunal has the right to treat a reconsideration as void.[34]

F. Motion to Adjourn. After one motion to adjourn has been disposed of, another motion to adjourn is not in order unless some intermediate question has been proposed.[35] However, if no objection is made to the renewal of a motion to adjourn without the interposition of some intermediate question, an objection to such successive motions to adjourn will be deemed waived.[36]

G. Adjourned Meetings — 1. Notice of. Members of deliberative bodies are bound to take notice of the time of adjournments, and to be present at the time and place of adjournment without special notice.[37]

2. What Business Considered at — a. Regular. Where a regular meeting is adjourned any business which would have been proper to consider at that meeting may be considered and acted on at the adjourned meeting.[38]

v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

28. Hornung *v.* State, 116 Ind. 458, 19 N. E. 151, 2 L. R. A. 510; Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308. *Compare* Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315; Small *v.* Orne, 79 Me. 78, 8 Atl. 152, holding that where by statute a presiding officer has the right to give a casting vote and, if two candidates have each one half of the votes cast, "determine and declare which of them is elected," it is not necessary to go through the formality of casting a ballot.

29. State *v.* Hutchins, 33 Nebr. 335, 50 N. W. 165, holding further that where at a special meeting the teller reported a vote in the affirmative of a proposition, and before the result was announced by the presiding officer objections were made that more votes had been cast than there were voters present, whereupon the presiding officer, by placing those in favor of and those opposed to the proposition in separate lines, found that there was a tie vote and thereupon voted "No," the final result of the balloting as declared by the presiding officer must be accepted as the decision of the body.

30. Atty.-Gen. *v.* Crocker, 138 Mass. 214.

31. People *v.* Rochester, 5 Lans. (N. Y.) 11, 14.

32. People *v.* Rochester, 5 Lans. (N. Y.) 11.

33. Ashton *v.* Rochester, 60 Hun (N. Y.) 372, 14 N. Y. Suppl. 855 [*affirmed* in 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619]; Sank *v.* Philadelphia, 4 Brewst. (Pa.) 133, 8 Phila. 117.

34. People *v.* Rochester, 5 Lans. (N. Y.) 11.

35. Hill *v.* Goodwin, 56 N. H. 441, holding, however, that at a meeting which twice voted down a proposition to adjourn, and a motion was immediately made to "adjourn to two o'clock in the afternoon," such motion was a different motion from the two previously voted down, and consequently not in violation of the parliamentary rule stated in the text.

36. Hill *v.* Goodwin, 56 N. H. 441.

37. Kimball *v.* Marshall, 44 N. H. 465.

38. *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

b. Special. Nothing can be considered at an adjourned meeting of a special or called meeting, unless it could have been considered and acted on at the special meeting.[39]

H. Third Person Objecting to Breach of Parliamentary Rules. A third person cannot object to a breach of parliamentary rules, the members of the deliberative body alone having that right.[40]

I. Rulings of Presiding Officer — 1. Effect of. The declaration by a presiding officer in announcing the result of a vote that a proposition is carried cannot have the effect of nullifying the act of a majority who have voted in favor of it.[41]

2. Remedy Against, When Obnoxious. The proper method of taking exception to an obnoxious ruling of a presiding officer is by an appeal therefrom to the meeting.[42]

IV. Operation and Effect of Proceedings.

A. Compliance With Statute. Where a deliberative body adopts rules of order for its parliamentary governance, the fact that it violates one of the rules so adopted does not invalidate a measure passed in compliance with statute.[43]

B. Approval of Given Proposition. The action of a deliberative body in reserving by resolution one parcel of realty for a given purpose is not tantamount to an approval of a sale of another parcel for the same purpose.[44]

V. Review of Proceedings.

The courts will not disturb the ruling on a parliamentary question made by a deliberative body having all the necessary authority to make rules for its governance and acting within the scope of its powers.[45]

PARLIAMENTARY TAX. A tax imposed directly by act of Parliament.[1]

PARLIAMENTARY WILL. A term used where the law steps in and disposes of property not distributed by will.[2]

PARLOR-CAR. See Carriers.

PAROCHIAL. Relating or belonging to a Parish,[3] *q. v.*

PAR OF EXCHANGE. The precise equivalent of the value of the gold coins of two nations — relative melting value of each;[4] the value of money of one country

Business proposed, but not concluded, at a regular meeting may be legally considered and determined by a deliberative body at an adjourned meeting. Granger *v.* Grubb, 7 Phila. (Pa.) 350.

39. *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

40. People *v.* Rochester, 5 Lans. (N. Y.) 11; Corre *v.* State, 8 Ohio Dec. (Reprint) 715, 9 Cinc. L. Bul. 242.

41. Chariton *v.* Holliday, 60 Iowa 391, 14 N. W. 775.

42. State *v.* Lashar, 71 Conn. 540, 42 Atl. 636, 44 L. R. A. 197 (holding further that where the presiding officer refuses to entertain a motion and a member puts the motion, and a ballot is taken by a rising vote, such action is in violation of parliamentary law); Proctor Coal Co. *v.* Finley, 98 Ky. 405, 33 S. W. 188, 17 Ky. L. Rep. 310 (holding further that where a by-law provides the manner in which the vote for chairman shall be taken, and in accordance therewith the person calling the meeting to order refuses to put an unauthorized motion naming a certain person for chairman, an objecting member has no right to put such motion to the meeting and proceed to the separate organization of the body).

43. McGraw *v.* Whitson, 69 Iowa 348, 28 N. W. 632; Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

44. Hess *v.* St. Louis Public Schools, 121 Mo. 43, 25 S. W. 767.

45. Davies *v.* Saginaw, 87 Mich. 439, 49 N. W. 667; Wells *v.* Bain, 75 Pa. St. 39, 15 Am. Rep. 563.

1. Palmer *v.* Earith, 14 L. J. Exch. 256, 257, 14 M. & W. 428.

2. Arthur *v.* Arthur, 10 Barb. (N. Y.) 9, 25 [*citing* Edwards *v.* Freeman, 2 P. Wms. 435, 443, 24 Eng. Reprint 803].

3. Black L. Dict. See also Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 328, 3 L. ed. 735 ("parochial churches"); Hart *v.* Beard, [1896] 1 Q. B. 54, 57, 60 J. P. 214, 65 L. J. Q. B. 157, 73 L. T. Rep. N. S. 535, Smith Reg. 40, 44 Wkly. Rep. 393 ("parochial electors' register"); Magarrill *v.* Whitehaven, 16 Q. B. D. 242, 243, Coltm. 448, 49 J. P. 743, 55 L. J. Q. B. 38, 53 L. T. Rep. N. S. 667, 34 Wkly. Rep. 275 ("parochial relief").

4. Murphy *v.* Kastner, 50 N. J. Eq. 214, 220, 24 Atl. 564.

in that of another;[5] the value of the pound sterling formerly fixed by law for purposes of revenue.[6] (See EXCHANGE; PAR.)

PAROL.[7] A word; speech; hence, oral or verbal; expressed or evidenced by speech only; not expressed by writing; not expressed by sealed instrument.[8] Also used to distinguish contracts which are made verbally, or in writing not under seal, from those which are under seal.[9] (Parol: Acceptance of Bills of Exchange, see COMMERCIAL PAPER. Acknowledgment or New Promise Affecting Statute of Limitations, see LIMITATIONS OF ACTIONS. Agreement in General, see CONTRACTS. Assignment, see ASSIGNMENTS. Contract in General, see CONTRACTS. Demurrer, see PLEADING. Effect and Requirements of Statute of Frauds, see FRAUDS, STATUTE OF. Evidence, see CRIMINAL LAW; EVIDENCE. Gift, see GIFTS. Lease and Tenancy, see LANDLORD AND TENANT. License, see LICENSES. Partition, see PARTITION. Ratification of Contract of Infants, see INFANTS Sale of — Chattels, see FRAUDS, STATUTE OF; SALES; Land, see FRAUDS, STATUTE OF; VENDOR AND PURCHASER. Separation Agreement, see HUSBAND AND WIFE. Trust, see TRUSTS.)

PAROL AGREEMENT. See PAROL, and Cross-References Thereunder.

PAROL CONTRACT. See PAROL, and Cross-References Thereunder.

PAROL DEMURRER. See PLEADING.

PAROLE. See PARDON.

PAROL EVIDENCE. See CRIMINAL LAW; EVIDENCE.

PAROL GIFT. See GIFTS.

PAROL TRUST. See TRUSTS.

PARRICIDE. The crime of killing one's father; also a person guilty of killing his father.[10] (See, generally, HOMICIDE.)

PARSON. A term which describes the functionary, whatever title he may bear, who for the time being has the cure of the parish as principal.[11] (See CLERGYMAN; CURATE; PARISH; and, generally, RELIGIOUS SOCIETIES.)

PARSONAGE.[12] A house in which a minister of the gospel resides;[13] the residence of the pastor, who conducts public worship in another building devoted exclusively to that object;[14] a certain portion of land, tythes and offerings, established by the laws of this kingdom, for the maintenance of the minister that hath the cure of souls within the parish where he is rector or patron;[15] a parish church

5. Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507, 510

6. Com. *v.* Haupt, 10 Allen (Mass.) 38, 44.

7. **Derived from a French word, which** means literally "word" or "speech." Bouvier L. Dict. [*quoted* in Yarborough *v.* West, 10 Ga. 471, 473].

8. Black L. Dict.

9. Bouvier L. Dict. [*quoted* in Yarborough *v.* West, 10 Ga. 471, 473].

"The pleadings in an action are also, in our old law French, denominated the parol, because they were formerly actual *viva voce* pleadings in Court, and not mere written allegations as at present." Brown L. Dict.

10. Black L. Dict.

11. Pinder *v.* Barr, 4 E. & B. 105, 115, 1 Jur. N. S. 205, 24 L. J. Q. B. 30, 2 Wkly. Rep 589, 28 Eng. L. & Eq. 235, 82 E. C. L. 105.

12 **Distinguished from "church."**— A parsonage house owned by a religious society stands upon a different footing than the church. There is no right of use in common in such parsonage house. It is not a sacred building, like a church edifice, but is, properly speaking, an endowment or source of pecuniary revenue to aid in support of the worship in the church proper. Its use is not spiritual, but temporal. Though it is ordinarily used as a residence for the pastor, there is nothing in its character or ownership to prevent its being used for other purposes, as circumstances may render it profitable or beneficial. Everett *v.* Asbury Park First Presb. Church, 53 N. J. Eq. 500, 503, 32 Atl. 747.

Not a place for religious worship, within Const. art. 7, § 2, declaring that the legislature may exempt "places of religious worship" from taxation. St. Mark's Church *v.* Brunswick, 78 Ga. 541, 542, 3 S. E. 561.

13. Reeves *v.* Reeves, 5 Lea (Tenn.) 644. 647.

14. People *v.* Collison, 6 N. Y. Suppl. 711, 712, 22 Abb. N. Cas. 52.

Equivalent to "manse" see Everett *v.* Asbury Park First Presb. Church, 53 N. J. Eq. 500, 503, 32 Atl. 747.

15. Degge Parson's Counselor [*quoted* in *In re* Alms Corn Charity, [1901] 2 Ch. 750, 758, 71 L. J. Ch. 76, 85 L. T. Rep. N. S. 533].

In its ecclesiastical sense the word was "glebe (or land) and house" belonging to a parish appropriated to the maintenance of the incumbent or settled pastor of a church;

endowed with a house, glebe, tithes, etc., or a certain portion of lands, tithes and offerings established by law for the maintenance of a minister who hath the cure of souls.[16] (See PARSON; and, generally, RELIGIOUS SOCIETIES.)

PARSONAGE LANDS. Lands of which a clergyman is seized in right of the town and by virtue of his office.[17] (See PARSONAGE.)

PART.[18] A CONSTITUENT, *q. v.*; a fragment; a member; a PIECE,[19] *q. v.*; a DIVISION, *q. v.*; a section;[20] a half portion or moiety;[21] a share;[22] one of the portions, equal or unequal, into which anything is divided or regarded as divided.[23] According to the connection,[24] the word is said to be broad enough to include everything in a given portion,[25] and may be used interchangeably in the same sense with the word ITEM,[26] *q. v.* Sometimes it may as appropriately be applied to an undivided as a divided portion.[27] In the plural, as applied to an appropriation of public money, it may mean the particulars, the details, the distinct and severable parts, of the appropriation.[28]

PARTAKER. One who has any part or interest in any action, matter or thing.[29]

but its modern general signification is in the sense of its being the residence of a parson, and it may be with land or without it. Wells *v.* Underhill Flats Cong. Church, 63 Vt. 116, 119, 21 Atl. 270.

16. Atty.-Gen. *v.* Grasett, 6 Grant Ch. (U. C.) 200, 234.

17. Howard *v.* Witham, 2 Me. 390, 393.

18. **Derived from Latin "*pars*."** Cairo *v.* Bross, 9 Ill. App. 406, 407.

Used in connection with other words.— "Her part aforesaid" see Doe *v.* Gell, 2 B. & C. 680, 681, 9 E. C. L. 296. "My half part" see Bebb *v.* Penoyre, 11 East 160, 163. "Part of a district" see Dorling *v.* Epsom Dist. Local Bd. of Health, 5 E. & B. 471, 486, 1 Jur. N. S. 956, 24 L. J. M. C. 152, 3 Wkly. Rep. 576, 85 E. C. L. 471. "Part of a stream" see Bullen *v.* Runnels, 2 N. H. 255, 259, 9 Am. Dec. 55. "Part of a street" see State *v.* Portage, 12 Wis. 562, 566. "Part of a town" see *In re* Taylor, 150 N. Y. 242, 248, 44 N. E. 790. "Part of goods sold" see Talver *v.* West, Holt N. P. 178, 179, 3 E. C. L. 77. "Part of the real estate" see Folsom *v.* Moore, 19 Me. 252, 254. "Parts of a day" see Gray *v.* Hall, 32 Misc. (N. Y.) 683, 685, 66 N. Y. Suppl. 500. "Parts of a dollar" see U. S. *v.* Gardner, 10 Pet. (U. S.) 618, 622, 9 L. ed. 556. "Parts" of a machine see Wheeler, etc., Mfg. Co. *v.* Lyon, 71 Fed. 374, 378. "Parts of the United Kingdom" see Rex *v.* Brownell, 1 A. & E. 598, 600, 3 L. J. M. C. 118, 28 E. C. L. 284.

19. Cairo *v.* Bross, 9 Ill. App. 406, 407.

20. Cairo *v.* Bross, 9 Ill. App. 406, 407; Hand *v.* Hoffman, 8 N. J. L. 71, 79.

21. Jones *v.* Portland, 57 Me. 42, 46 ("westerly part of . . . street"); Williams *v.* Lane, 4 N. C. 246, 247, 6 Am. Dec. 561; Lewis' Appeal, 89 Pa. St. 509, 513.

22. Hand *v.* Hoffman, 8 N. J. L. 71, 79; Fulford *v.* Hancock, 45 N. C. 55, 57; Lewis' Appeal, 108 Pa. St. 133, 136.

23. Cairo *v.* Bross, 9 Ill. App. 406, 407.

24. **The context** may govern the meaning and it may be of a comprehensive character. Thus, a building, whenever it is a permanent improvement, is "land," for the purpose of taxation, and the words "part thereof" may apply to the improvement, as well as to the lot on which it stands. Cincinnati College *v.* Yeatman, 30 Ohio St. 276, 280.

May not mean an excepted portion.— The term "part," in a deed conveying a tract of land, saving and excepting a small part of said tract, upon which rolling mill improvements now stand, has reference to quantity, as less than the whole, and, properly construed, is not to be taken as meaning necessarily that the part excepted is in one piece or parcel. This is the usual and ordinary signification of the word. As, when we say a part of Maryland is sandy, we are not to be understood that the sandy portion is to be found in one integral piece or parcel of the state's surface. Carroll *v.* Granite Mfg. Co., 11 Md. 399, 409.

Used in the saving clause of a statute.— The term "part," in a statute providing that all laws and parts of laws not inconsistent with certain other laws, shall be preserved, means a substantive member having such individual features that it can be treated as a distinct entity, and which might be imparted into the new law without marring its harmony or uniformity. Cairo *v.* Bross, 9 Ill. App. 406, 407.

25. Thus, as used in a will, it is said that a provision reciting that "his or her part" should be equally divided among the survivors, "part" is broad enough in its obvious signification to cover everything bestowed on each child by the will, and must be so understood. Zollicoffer *v.* Zollicoffer, 20 N. C. 574.

Used in a will it may include that portion of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child. Lewis' Appeal, 108 Pa. St. 133, 137, where it is said: "It is broad enough to include, and is intended to cover all the property or estate thus received."

26. Com. *v.* Barnett, 199 Pa. St. 161, 173, 48 Atl. 976, 55 L. R. A. 882; Com. *v.* Barnett, 11 Pa. Dist. 520, 524.

27. Vrooman *v.* Weed, 2 Barb. (N. Y.) 330, 333

28. Com. *v.* Barnett, 199 Pa. St. 161, 173, 48 Atl. 976, 55 L. R. A. 882.

29. Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438.

PARTEM ALIQUAM RECTE INTELLIGERE NEMO POTEST ANTEQUAM TOTUM ITERUM ATQUE ITERUM PERLEGERIT. A maxim meaning "No one can rightly understand any part until he has read the whole over and over again."[30]

PARTE QUACUNQUE INTEGRANTE SUBLATA, TOLLITUR TOTUM. A maxim meaning "An integral part being taken away, the whole is taken away."[31]

PARTIAL. As applied to persons, inclined either in favor of or against.[32] As pertains to things, of, pertaining to, or affecting, a part only; not general or universal; not total or entire.[33] (Partial: Assignment, see ASSIGNMENTS. Average, see MARINE INSURANCE. Insanity, see INSANE PERSONS. Loss, see FIRE INSURANCE; MARINE INSURANCE; and the Insurance Titles. Verdict, see CRIMINAL LAW.)

PARTIAL ASSIGNMENT.[34] See ASSIGNMENTS.

PARTIAL AVERAGE. See MARINE INSURANCE.[35]

PARTIAL INSANITY. See INSANE PERSONS.[36]

PARTIALITY. Inclination to favor one party or one side of a question more than the other; an undue bias of mind towards one party or side; unfairness.[37] (Partiality: Of Arbitrator, see ARBITRATION AND AWARD. Of Judge, see JUDGES. Of Juror, see JURIES. Of Referee, see REFERENCES. Of Witness, see WITNESSES. See PARTIAL.)

PARTIAL LOSS. See MARINE INSURANCE; and Particular Insurance Titles.

PARTIAL VERDICT. See CRIMINAL LAW.[38]

PARTICEPS CRIMINIS. One who assists another in any manner in carrying out a fraudulent purpose;[39] an accomplice.[40] (See, generally, CRIMINAL LAW.)

PARTICIPATE To take part, to share in common with others.[41]

Sometimes used in the sense of "taker" see Emans *v.* Emans, 3 N. J. L. 967, 971, 972.

30 Morgan Leg. Max. [*citing* Rigeway's Case, 3 Coke 52, 76 Eng. Reprint 753].

31. Peloubet Leg. Max. [*citing* Griesley's Case, 8 Coke 38*a*, 41, 77 Eng. Reprint 530].

32. Sam *v.* State, 13 Sm. & M. (Miss.) 189, 193.

33. Webster Dict.

"Partial or annual account."— This term has been applied to a judgment *de bene esse*, often rendered *ex parte* and only *prima facie* correct. Marshall *v.* Coleman, 187 Ill. 556, 569, 58 N. E 626. Also a term, which, when used in the orphans' court, implies *ipso facto* that nothing is settled by it, but those matters constituting the items in question in the statement itself. Leslie's Appeal, 63 Pa. St. 355, 363; Shriver *v.* Garrison, 30 W. Va. 456, 469, 4 S. E. 600.

"Partial defence" is a defense which only tends to mitigate a plaintiff's damages. Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 132, 67 N. Y. Suppl. 300.

"Partial evidence" is that which goes to establish a detached fact in a series tending to the fact in dispute. Cal. Code Civ. Proc. (1903) § 1834; Annot. Codes & St. Oreg. (1901) § 675.

"Partial evil" see State Bank *v.* Robinson, 13 Ark. 214, 216; Borden *v.* State, 11 Ark. 519, 534, 44 Am. Dec. 217.

"Partial law" is a law which embraces within its provisions only a portion of those persons who exist in the same state and are surrounded by like circumstances. Budd *v.* State, 3 Humphr. (Tenn.) 483, 491, 39 Am. Dec. 189 [*quoted* in Hatcher *v.* State, 12 Lea (Tenn.) 368, 371].

"Partial liquidations" are proceedings involving the surrender by a corporation of portions of its capital. Smith *v.* Dana, 77 Conn. 543, 557, 60 Atl. 117, 107 Am. St. Rep. 51, 69 L. R. A. 76.

"Partial restraint," in the law of contracts, is that which is restricted in its operation in respect to place. McCurry *v.* Gibson, 108 Ala. 451, 455, 18 So. 806, 54 Am. St. Rep. 177.

34. "Partial assignment" for the benefit of creditors is one which omits some substantial portion of a debtor's property, and cannot be made to rest upon a mere colorable omission. Mussey *v.* Noyes, 26 Vt. 462, 474. See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS.

35. See also Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463.

36. Particularly 22 Cyc. 1114 note 13.

37. Standard Dict.

38. See also U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

39. Alberger *v.* White, 117 Mo. 347, 364, 23 S. W. 92.

"Mere presence at the scene of the perpetration of a crime does not render a person a *particeps criminis*. To constitute him a party to the criminal act there must be not only presence upon the scene, but an actual participation — an aiding and abetting in the crime committed." State *v.* Fox, 70 N. J. L. 353, 355, 57 Atl. 270.

40. Blakely *v.* State, 24 Tex. App. 616, 925, 7 S. W. 233, 5 Am. St. Rep. 912.

41. Reardon *v.* State, 4 Tex. App. 602, 611, 612.

In the business of life insurance, and when used in connection with a premium or policy, it denotes a sharing of any and all profits accruing to the company or class to which the individual or policy belongs. Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch.

PARTICIPES PLURES SUNT QUASI UNUM CORPUS, IN EO QUOD UNUM JUS HABENT, ET OPORTET QUOD CORPUS SIT INTEGRUM, ET QUOD IN NULLA PARTE SIT DEFECTUS. A maxim meaning "Many parceners are as one body, inasmuch as they have but one right, and it is necessary that the body be perfect, and that there be a defect in no part."[42]

PARTICULAR. As an adjective,[43] sole, single, individual, specific; of or pertaining to a single person, class or thing, belonging to one only; not general, not common; hence personal, peculiar, singular.[44] As a noun,[45] a DETAIL,[46] *q. v.* In the plural as a noun, details;[47] the details of a claim, or the separate items of an account; sometimes called a bill of particulars.[48] (Particular: Agent, see PRINCIPAL AND AGENT.[49] Average, see MARINE INSURANCE. Custom, see CUSTOMS AND USAGES. Estate, see PARTICULAR ESTATES. Lien, see LIENS; and the Lien Titles. Malice, see PARTICULAR MALICE. Recital, see PARTICULAR RECITAL. Restraint of Trade, see CONTRACTS.)

PARTICULAR AVERAGE. See MARINE INSURANCE.

PARTICULAR CUSTOM. See CUSTOMS AND USAGES.

PARTICULAR ESTATE. An estate for life or for years.[50] (See, generally, ESTATES.)

PARTICULAR LIEN. See LIENS.

PARTICULAR MALICE. Ill will; grudge; a desire to be revenged on a particular person.[51] (See MALICE; and, generally, CRIMINAL LAW.)

PARTICULAR RECITAL. A recital which states some fact definitely.[52]

PARTICULARS, BILL OF. See CRIMINAL LAW; PLEADING.

PARTICULAR SERVICES. Peculiar services; limited services; not ordinary or general services of an individual.[53] (See PARTICULAR.)

App. 1896) 38 S. W. 116, 126. See also Robertson *v.* Fraser, L. R. 6 Ch. 696, 699, 40 L. J. Exch. 776, 19 Wkly. Rep. 989; Liddard *v.* Liddard, 28 Beav. 266, 268, 6 Jur. N. S. 439, 29 L. J. Ch. 619, 2 L. T. Rep. N. S. 200, 54 Eng. Reprint 368.

42. Morgan Leg. Max. [*citing* Coke Litt. 4].

43. **Distinguished from "concisely."**— The requirement of a statute that the statement "state 'concisely' the facts" out of which the indebtedness arose is not equivalent to requiring that "a 'particular' statement and 'specification' of the nature and consideration of the debt" be made. Curtis *v.* Corbitt, 25 How. Pr. (N. Y.) 58, 62.

Used in connection with other words.— "Keeping logs of particular lengths by themselves" see Maltby *v.* Plumer, 71 Mich. 578, 589, 40 N. W. 3. "Particular account of such loss or damage" see Bumstead *v.* Dividend Mut. Ins. Co., 12 N. Y. 81, 94. "Particular credit" see Bemis *v.* Kyle, 5 Abb. Pr. N. S. (N. Y.) 232, 233. "Particular kind and quantity of materials" see Grand Rapids *v.* Board of Public Works, 87 Mich. 113, 120, 49 N. W. 481. "Particular power" see Thompson *v.* Garwood, 3 Whart. (Pa.) 287, 306, 31 Am. Dec. 502. "Particular proposition" see Drennen *v.* Banks, 80 Md. 310, 318, 30 Atl. 655. "Particular questions of fact" see Salem-Bedford Stone Co. *v.* Hilt, 26 Ind. App. 543, 59 N. E. 97, 98; McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905, 906; Foster *v.* Turner, 31 Kan. 58, 62, 1 Pac. 145; Gale *v.* Priddy, 66 Ohio St. 400, 404, 64 N. E. 437. "Particular state" see U. S. *v.* Pirates, 5 Wheat. (U. S.) 184, 200, 5 L. ed. 64. "Particular statement" see Curtis *v.* Corbitt, 25 How. Pr. (N. Y.) 58, 59.

44. Webster Dict. [*quoted* in Henley *v.* State, 98 Tenn. 665, 731, 41 S. W. 352, 1104, 39 L. R. A. 126].

45. **"Execute his will in 'every particular'"** see McKenzie *v.* Roleson, 28 Ark. 102, 109.

46. Baltimore City Pass. R. Co. *v.* Knee, 83 Md. 77, 82, 34 Atl. 252. See also Curtis *v.* Corbitt, 25 How. Pr. (N. Y.) 58, 62, where it is said: "I have, therefore . . . looked into Webster, the great lexicographer of our age, and find that one of his definitions of the word 'particular' is as follows: 'A minute detail of things singly enumerated.'"

47. Baltimore City Pass. R. Co. *v.* Knee, 83 Md. 77, 82, 34 Atl. 252.

48. Black L. Dict. See also INDICTMENTS AND INFORMATIONS; PLEADING.

49. See also Ruby *v.* Talbott, 5 N. M. 251, 267, 21 Pac. 72, 3 L. R. A. 724.

50. Bunting *v.* Speek, 41 Kan. 424, 427, 21 Pac. 288, 3 L. R. A. 690, where it is said: "This is called the particular estate, for the reason that it is only a small part or particle of the inheritance."

51. State *v.* Long, 117 N. C. 791, 799, 23 S. E. 431; Brooks *v.* Jones, 33 N. C. 260, 261.

52. Kellogg *v.* Dennis, 38 Misc. (N. Y.) 82, 88, 77 N. Y. Suppl. 172, where it was said that a recital which states that a mortgage is a lien on the premises conveyed by the deed is what the law defines a "particular recital."

53. Henley *v.* State, 98 Tenn. 665, 684, 41 S. W. 352, 1104, 39 L. R. A. 126.

"Services of witnesses in criminal cases are not 'particular services.'" Dills *v.* State, 59 Ind. 15, 18; Buchman *v.* State, 59 Ind. 1, 12, 26 Am. Rep. 75; Daly *v.* Multnomah County, 14 Oreg. 20, 21, 12 Pac. 11.